

California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
Chapter 20 [Reserved]

9-20 California Legal Forms--Transaction Guide Chapter 20

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DIVISION II: REAL ESTATE TRANSACTIONS
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9-21 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter deals with agreements with real estate brokers and agents. The Legal Background discusses the regulation of brokers and salespersons and the nature of the agency relationship between brokers and sellers or buyers of real property. Further, it examines in detail the requirements governing listing agreements. The Legal Background also covers broker-salesperson and finder's agreements. The Transaction Guide includes lists of information and documents needed to draft listing and broker-salesperson agreements, important transactional and contractual determinations the attorney should make before drafting or approving these agreements, and procedures for drafting and executing the agreements and satisfying related reporting requirements. The Forms part contains several complete listing agreements prepared by the California Association of Realtors and additional provisions and related forms that may be incorporated into or used in conjunction with those complete agreements. Other forms included in this chapter include disclosures of agency relationships, a complete broker-salesperson contract, finder's agreements, and official forms that may be used to report changes affecting brokers and salespersons.

For discussion of employment contracts in general, see Ch. 85, *Employment Agreements* . For discussion of the legal status of employees and independent contractors, see Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Contracts* . For discussion of real estate brokers, see California Real Estate Law and Practice, chs. 60- 64 (Matthew Bender).

Related topics not discussed in detail in this chapter are options to purchase real property, agreements to sell real property, and exchanges of real property. These topics are discussed in Ch. 22, *Options to Purchase Real Property* , Ch. 23, *Real Property Sales Agreements* , and Ch. 24, *Exchanges of Real Property* .



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§ 21.01 California Sources

[1] Statutes

Real Estate Law. *Bus. & Prof. Code § 10000 et seq.*

General provisions and administration. *Bus. & Prof. Code §§ 10000-10103*.

Characterization of salesperson as employee or independent contractor. *Bus. & Prof. Code § 10032*.

Voluntary surrender of license by real estate licensee against whom investigation is pending or accusation has been filed. *Bus. & Prof. Code § 10100.2*.

Persons who assist brokers with regard to mortgage loan transactions are excluded from the definition of real estate broker. *Bus. & Prof. Code § 10133.1(c)*.

Notification of salesperson's employment or termination; alteration of license. *Bus. & Prof. Code § 10161.8*.

Real estate licensing regulations. *Bus. & Prof. Code §§ 10130-10249.93*.

Revenue. *Bus. & Prof. Code §§ 10450-10481*.

Real Estate Recovery Program. *Bus. & Prof. Code §§ 10470-10481*.

Mineral brokerage. *Bus. & Prof. Code §§ 10500-10580*.

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Agency listings for transfer of real property or mobilehome. *Civ. Code § 1086 et seq.*

Statute of Frauds. *Civ. Code § 1624.*

Modification of written agreement. *Civ. Code § 1698.*

Disclosure of law enforcement database of registered sex offenders' locations. *Civ. Code § 2079.10a*.

Agency--In General. *Civ. Code § 2295 et seq.*

Agency relationships in residential real party transactions. *Civ. Code §§ 2079.12-2079.24.*

Prohibition of discrimination based on race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation under California Fair Employment and Housing Act. *Gov. Code § 12900 et seq.*

Workers' compensation. *Lab. Code § 3200 et seq.*

Employee defined. *Lab. Code § 3351*.

Independent contractor defined. *Lab. Code § 3353*.

Probate listings. *Prob. Code § 10150.*

Agent's compensation in estate real property sales. *Prob. Code § 10160 et seq.*

Duties of Trustees. *Prob. Code § 16000 et seq.*

Unemployment compensation. *Unemp. Ins. Code § 100 et seq.*

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Withholding taxes on wages. *Unemp. Ins. Code § 13000 et seq.*

[2] Regulations

Regulations of the Real Estate Commissioner. *10 Cal. Code Reg. § 2700 et seq.*

Proof of legal presence required for broker's license. *10 Cal. Code Reg. § 2718.*

Broker as licensed salesperson. *10 Cal. Code Reg. § 2724.*

Delegation by broker of authority to supervise and control activities of certain nonlicensed persons. *10 Cal. Code Reg. § 2724.*

Delegation by broker of authority to review agreements. *10 Cal. Code Reg. § 2725(b).*

Broker-salesperson relationship agreements. *10 Cal. Code Reg. § 2726*.

Salesperson Change Application. *10 Cal. Code Reg. § 2752*.

Real estate licensing laws do not apply to certain persons advertising or disseminating information on internet. *10 Cal. Code Reg. § 2770*.

Characterization as employee or independent contractor. *10 Cal. Code Reg. § 4304-1*.



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§ 21.02 Federal Sources

[1] Statutes

Federal Insurance Contributions Act (FICA). *I.R.C. §§ 3101-3128.*

Characterization as employee or independent contractor. *I.R.C. § 3121*.

Federal Unemployment Tax Act (FUTA). *I.R.C. §§ 3301-3311*.

Employee defined. *I.R.C. § 3306*.

[2] Regulations

Characterization as employee or independent contractor. Treas. Reg. § 31.3401-1.



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§ 21.05 Law Reviews and Periodicals

Disclosure of Agency Relationships in Real Estate Brokered Transactions in California: Legal and Practical Considerations, 6 Cal. Real Prop. J. No. 3, 22 (1987).

The Practice of Dual Agency in California: Civil Code Sections 2373-2382 (Agency Relationships in Real Property Transactions), 21 U.S.F. L. Rev. 81 (1986).

Barash, *Negotiating Real Estate Brokerage Agreements*, 8 Real Estate L.J. 240 (1980).



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§ 21.06 Annotations

Annot., What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing, and Able Purchaser of Real Property, 87 A.L.R.4th 11 (1991) .



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§ 21.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender)

Ch. 22, *Options to Purchase Real Property*.

Ch. 23, *Real Property Sales Agreements*.

Ch. 24, *Exchanges of Real Property*.

Ch. 25, *Real Estate Loans*.

Ch. 26, *Real Property Escrows*.

Ch. 26A, *Title Insurance*.

Ch. 27, *Deeds and Recording*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 84, *Independent Contractors*.

Ch. 85, *Employment Contracts*.

California Forms of Pleading and Practice(Matthew Bender).

Ch. 103, *Brokers*.

Ch. 455, *Probate: Sale of Estate Property* .

California Points and Authorities, Ch. 31, *Brokers and Salespersons* (Matthew Bender).

California Real Estate Law and Practice(Matthew Bender).

Ch. 60, *Regulation of Real Estate Brokers*.

Ch. 61, *Employment and Authority of Brokers*.

Ch. 62, *Recovery of Broker's Commissions*.

Ch. 63, *Duties and Liabilities of Brokers*.

Ch. 64, *Licensing and Discipline of Brokers*.

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 21, *Sales and Exchanges* (Matthew Bender).

[2] Additional Text References

Am. Jur. Legal Forms 2d, Ch. 46, *Brokers.*

Miller & Starr, Current Law of California Real Estate, Ch. 1, *Contract Law Applicable to Real Estate Transactions*; Ch. 2, *The Specific Real Estate Contracts*; Ch. 3, *Agency*; Ch. 4, *Regulation of the Real Estate Agency* (West 2d ed.).

Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005).



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PART II. LEGAL BACKGROUND
A. Regulation and Activities of Brokers, Salespersons, and Finders

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§ 21.10 Real Estate Brokers

[1] Definition and Activities

A real estate broker is a person who, for compensation or in expectation of compensation (regardless of the form or time of payment), does (or negotiates to do) one or more of the following acts for another or others:

(1) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity [*Bus. & Prof. Code § 10131(a)*].

(2) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase, or exchange of leases on real property, or on a business opportunity [*Bus. & Prof. Code § 10131(b)*; *see Bus. & Prof. Code § 10167.2(a)* (broker may operate prepaid rental listing service); *see also* Ch. 34A, *Prelease Forms*].

(3) Collects rents from real property, or improvements on real property, or from business opportunities [*Bus. & Prof. Code § 10131(b)*].

(4) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering on, lands owned by the state or federal government [*Bus. & Prof. Code § 10131(c)*].

(5) Solicits borrowers or lenders for or negotiates loans, or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity [*Bus. & Prof. Code § 10131(d)*; *see Bus. & Prof. Code §§ 10240, 10241* ("mortgage broker" must give written disclosure statement to borrower); *see also* Ch. 25, *Real Estate Loans*].

(6) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange, a real property sales

contract or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof [*Bus. & Prof. Code § 10131(e)*; *see Bus. & Prof. Code §§ 10232-10232.2* (annual filing requirements of brokers who conduct transactions pursuant to *Bus. & Prof. Code §§ 10131(d), (e), 10131.1*); *see also* Ch. 25, *Real Estate Loans*].

Real estate brokers may also engage in other business activities that are beyond the scope of this chapter, such as selling or exchanging real property sales contracts or promissory notes [*Bus. & Prof. Code § 10131.1*]; receiving or collecting advance fees in connection with advance fee listings or contracts [*Bus. & Prof. Code § 10131.2*]; and issuing, or soliciting buyers or sellers for, noncorporate securities, such as interests in limited partnerships, joint ventures, and unincorporated associations [*Bus. & Prof. Code § 10131.3*; *see Corp. Code § 25206*]. They may also sell mobilehomes [*Bus. & Prof. Code § 10131.6(a)*; *see* Ch. 40, *Mobilehomes*].

A real estate broker employed as a broker must be licensed as such by the State of California [*Bus. & Prof. Code §§ 10130, 10136, 10137, 10151*; *see § 21.12*; *but see Bus. & Prof. Code § 10133.1* (persons or entities exempt from licensing requirements)].

[2] Business Entities as Real Estate Brokers

Certain business entities may act as brokers. A corporation may, for example, be licensed as a broker [*see Bus. & Prof. Code §§ 10158, 10211*]. A license issued to a corporation entitles one officer of the corporation to engage in the business of real estate broker on behalf of the corporation [*Bus. & Prof. Code § 10211*]. The designated officer is licensed to act as a broker, but only while employed by the corporation and only in his or her capacity as an officer of the corporation [*Bus. & Prof. Code § 10159*]. The authorized officer must be designated in the corporation's license application [*Bus. & Prof. Code § 10211*]. Additional fees are required if more than one officer is to engage in the real estate business on behalf of the corporation [*Bus. & Prof. Code § 10211*].

Partnerships may perform acts for which real estate broker's licenses are required, but every partner through whom the partnership performs such acts must be individually licensed [*Bus. & Prof. Code § 10137.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposePurposeBusiness & Corporate LawGeneral PartnershipsFormationGeneral OverviewReal Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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§ 21.11 Real Estate Salespersons

A real estate salesperson is a natural person who, for compensation (or in expectation of compensation), is employed by a licensed real estate broker to do one or more of the acts that real estate brokers are authorized to do [*Bus. & Prof. Code § 10132*; *see Bus. & Prof. Code § 10017* ("salesman" means "salesperson"); *see also Bus. & Prof. Code §§ 10131-10131.4, 10131.6* (real estate brokers' activities); § 21.10]. A salesperson is the broker's agent and cannot act independently of the broker [*Grand v. Griesinger (1958) 160 Cal. App. 2d 397, 406, 325 P.2d 475]* . Every broker who employs a salesperson has a duty to exercise reasonable supervision over the salesperson's activities; and, if the broker fails to exercise reasonable supervision, the broker's license may be suspended or revoked [*Bus. & Prof. Code § 10177(h)*]. A salesperson may not be employed by, or accept compensation from, any person other than the broker under whom the salesperson is at the time licensed [*Bus. & Prof. Code § 10137*].

As used in the Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*] and in the regulations of the Real Estate Commissioner, the word "salesman" means "salesperson" [*Bus. & Prof. Code § 10017*]. Any real estate licensee [*see § 21.12*] may choose to refer to his or her licensed status as "real estate salesman," "real estate saleswoman," or "real estate salesperson" [*Bus. & Prof. Code § 10017*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & Regulation



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§ 21.11A Persons Who Assist Brokers With Mortgage Loan Transactions

Certain individuals who assist brokers with regard to mortgage loan transactions are excluded from the definition of real estate broker. This includes persons who solicit borrowers or lenders, negotiate loans, collect payments, or perform services for borrowers or lenders [*Bus. & Prof. Code § 10133.1(c)(1)*]. Specifically, a real estate broker's employee who, on behalf of the broker, assists the broker in meeting the broker's obligations to customers in residential mortgage loan transactions, when the lender is an institutional lender [*see Fin. Code § 50003*], is not treated as a real estate broker, provided the employee does not participate in any negotiations occurring between the principals [*Bus. & Prof. Code § 10133.1(c)(1)*]. However, a broker must exercise reasonable supervision and control over the activities of the nonlicensed employees and must comply with the branch office licensing requirements for each location where the nonlicensed persons are employed [*Bus. & Prof. Code § 10133.1(c)(2)*; *see Bus. & Prof. Code § 10163*]. In any case, these provisions do not restrict the ability of the Real Estate Commissioner to discipline a broker or corporate broker licensee or its designated officer, or both the corporate broker licensee and its designated officer, for misconduct of a nonlicensed employee, or to adopt, amend, or repeal rules or regulations governing the employment or supervision of an employee who is a nonlicensed person [*Bus. & Prof. Code § 10133.1(c)*; *see Bus. & Prof. Code § 10080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 21 AGREEMENTS WITH REAL ESTATE BROKERS AND AGENTS
PART II. LEGAL BACKGROUND
A. Regulation and Activities of Brokers, Salespersons, and Finders

9-21 California Legal Forms--Transaction Guide § 21.12

§ 21.12 License Requirements and Penalties

[1] In General

Real estate brokers [*see Bus. & Prof. Code §§ 10012, 10015, 10131-10131.6*; *see also § 21.10*] and real estate salespersons [*see Bus. & Prof. Code §§ 10013, 10016, 10017, 10132*; *see also § 21.11*] must be licensed by the Department of Real Estate [*Bus. & Prof. Code §§ 10130, 10136, 10137, 10151*; *but see Bus. & Prof. Code § 10133.1* (persons or entities exempt from licensing requirements)]. Any person who acts as a real estate broker or salesperson (or who advertises using words indicating that he or she is a real estate broker) without a license is guilty of a public offense punishable by a fine and/or imprisonment in the county jail [*Bus. & Prof. Code § 10139*]. Similarly, any person who pays any other person for performing acts for which a real estate broker's or salesperson's license is required is guilty of a misdemeanor if the person paid is not known to be (or does not present evidence that he or she is) a regularly licensed real estate broker at the time the compensation is earned [*Bus. & Prof. Code § 10138*]. In addition, the commissioner may fine (up to $10,000) any real estate broker who, following a license disciplinary hearing, is found to have violated *Bus. & Prof. Code § 10137* by employing or compensating a person not licensed as a real estate broker or a real estate salesperson to solicit borrowers or lenders for or negotiate loans secured directly or collaterally by liens on real property [*Bus. & Prof. Code § 10139.5*].

No one engaged in the business or acting in the capacity of a real estate broker or salesperson in California may collect compensation for the performance of any acts for which a license is required without first alleging and proving that he or she was duly licensed at the time the cause of action arose [*Bus. & Prof. Code § 10136*]. The purpose of this rule is to protect the public from the perils of dealing with incompetent or untrustworthy persons [*Cline v. Yamaga (1979) 97 Cal. App. 3d 239, 246, 158 Cal. Rptr. 598]* . However, the rule will not be construed so literally as to permit the avoidance of a just obligation [*Estate of Baldwin (1973) 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189]* . A broker who was licensed when he or she performed the services for which compensation is claimed may, for example, recover even though the broker was not licensed when the claim to the compensation matured [*see Cline v. Yamaga (1979) 97 Cal. App. 3d 239, 245-246, 158 Cal. Rptr. 598]* . Similarly, recovery is allowed when a corporation conducting a real estate brokerage was not duly licensed, provided the corporate officer who actually performed the services was duly licensed [*see Estate of Baldwin (1973) 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189]* .

[2] Denial, Suspension, or Revocation of License

A real estate license may be denied, suspended, or revoked for any of the causes specified by statute [*see Bus. & Prof. Code §§ 480, 490, 10177*]. For example, these statutes authorize denial, suspension, or revocation if a licensee or applicant has done any of the following:

- Procured or attempted to procure or renew a license (for the applicant, the licensee, or for another person) by fraud, misrepresentation, deceit, or material misstatement of fact [*Bus. & Prof. Code § 10177(a)*].

- Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee [*Bus. & Prof. Code §§ 480(a), 490, 10177(b)*; *see 10 Cal. Code Reg. § 2910*(criteria of substantial relationship)].

- Done any act involving dishonesty, fraud, deceit, or dishonest dealing [*Bus. & Prof. Code §§ 480(a)(2), 10177(j)*].

- Willfully disregarded or violated any of specified provisions of the Business and Professions and Corporations Codes relating to real estate or the rules and regulations of the Real Estate Commissioner [*Bus. & Prof. Code § 10177(d), (m)*].

- Had a license issued by another agency of California, another state, or the federal government that was revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension was taken after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections [*Bus. & Prof. Code § 10177(f)*; *see Berg v. Davi (2005) 130 Cal. App. 4th 223, 29 Cal. Rptr. 3d 803* (Department of Real Estate properly rejected application for real estate salesperson's license based on applicant's disbarment as attorney)].

- Violated the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] or the regulations of the Commissioner of Corporations pertaining to that law [*Bus. & Prof. Code § 10177(n)*].

- Demonstrated negligence or incompetence in performing any act for which a license is required [*Bus. & Prof. Code § 10177(g)*].

- As a broker, failed to exercise reasonable supervision of the activities of his or her salespersons [*Bus. & Prof. Code § 10177(h)*].

- Violated provisions of *Bus. & Prof. Code § 10237 et seq.*, concerning the claim of exemption from securities qualification, and governing sale of or offer to sell a series of notes secured directly by an interest in the same real property, or the sale of undivided interests in a note secured directly by real property equivalent to a series transactions [*Bus. & Prof. Code § 10177(p)*].

- Violated, or failed to comply with, the provisions of *Civ. Code § 2920 et seq.*, related to mortgages [*Bus. & Prof. Code § 10177(q)*].

A license may be denied only if the act alleged to constitute grounds for denial is substantially related to the qualifications, functions, or duties of the real estate business or profession [*see Bus. & Prof. Code § 480(a)(3)(B)*]. For purposes of denial, suspension, or revocation, a "conviction" includes a plea of guilty or a conviction following a plea of nolo contendere [*Bus. & Prof. Code §§ 480(a)(1), 490, 10177(b)*]. However, if conviction of a crime is the alleged

ground for denial, suspension, or revocation, competent evidence must show that the present qualification of the applicant is in some manner rationally and substantially related to the earlier offense [*Pieri v. Fox (1979) 96 Cal. App. 3d 802, 807, 158 Cal. Rptr. 256* ; *see Arneson v. Fox (1980) 28 Cal. 3d 440, 451, 170 Cal. Rptr. 778, 621 P.2d 817* (evidence sufficient to show substantial relationship)]. Proof of commission of a crime, even a crime involving turpitude, is not enough, unless there is additional evidence establishing this rational and substantial relationship [*Pieri v. Fox (1979) 96 Cal. App. 3d 802, 807, 158 Cal. Rptr. 256]* .

In addition, the Real Estate Commissioner may suspend or revoke a real estate license held by, or may deny the issuance of a license to, a corporation if an officer, director, or person owning or controlling 10 percent or more of the stock of the corporation commits any of the acts prohibited by *Bus. & Prof. Code § 10177* [*Bus. & Prof. Code § 10177*].

Further, a real estate license may be suspended or revoked if the licensee, while acting as an agent for a buyer of real property, fails to disclose to the buyer the nature and extent of any direct or indirect ownership interest of the licensee in the real property. The licensee must also disclose the direct or indirect ownership of the property by (1) a person related to the licensee by blood or marriage, (2) an entity in which the licensee has an ownership interest, or (3) any other person with whom the licensee occupies a special relationship [*Bus. & Prof. Code § 10177(o)*; *see § 21.213*].

If a real estate broker that is a corporation has not done any act specified in *Bus. & Prof. Code § 10177*, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the Real Estate Commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, if any offending officer, director, or stockholder who has done the prohibited acts individually, and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation [*Bus. & Prof. Code § 10177*].

An investigation into the conduct of a real estate licensee may be initiated by the Department of Real Estate (DRE) on its own information or by any person alleging in a verified, written complaint that the licensee's actions constitute grounds for license suspension or revocation [*Bus. & Prof. Code § 10177.5*]. A contested case may be originally heard by the DRE or, at the discretion of the DRE, by an administrative law judge [*Gov. Code § 11517(a)*]. If a contested case is originally heard by the DRE, an administrative law judge must be present during the consideration of the case and, if requested, must assist and advise the DRE in the conduct of the hearing. In addition, no member of the DRE who did not hear the evidence may vote on the decision, and the DRE must issue its decision within 100 days of submission of the case [*Gov. Code § 11517(b)*]. If a contested case is originally heard by an administrative law judge alone, the judge must prepare a proposed decision within 30 days after the case is submitted to him or her, and must follow all other statutory requirements governing the timing and form of the decision [*Gov. Code § 11517(c)*; *see* § 64.90[1]].

A real estate licensee against whom an investigation is pending or an accusation has been filed pursuant to *Gov. Code § 11503* may petition the Commissioner to voluntarily surrender his or her license [*Bus. & Prof. Code § 10100.2*]. The surrender of a license becomes effective on acceptance by the Commissioner. The former licensee may be relicensed only by petitioning for reinstatement pursuant to *Gov. Code § 11522*. When deciding a petition for reinstatement, the Commissioner may consider all relevant evidence, including affidavits [*Bus. & Prof. Code § 10100.2*]. For additional discussion, see California Real Estate Law and Practice, Ch. 64, *Licensing and Discipline of Brokers* (Matthew Bender).

[3] Legal Presence

[a] Required of All Applicants

An applicant for an original real estate broker license (or other type of real estate license, including a real estate broker officer license, a real estate salesperson license, a prepaid rental listing service license, and a mineral, oil, and gas broker license), and a renewal of any of these licenses that has not been previously qualified pursuant to the regulatory

requirements discussed throughout this subsection [*see* [d], *below*], must provide the Department of Real Estate with proof of the applicant's legal presence in the United States [*10 Cal. Code Reg. § 2718*]. A similar requirement applies to applicants for payment from the Real Estate Recovery Account [*see § 21.13[6]*]. These requirements became operative on August 1, 1998, and were promulgated by the Department of Real Estate (DRE) pursuant to federal legislation that eliminated certain public benefits for illegal immigrants [*10 Cal. Code Reg. § 2718*; *see 8 U.S.C. § 1621*; *see also 8 U.S.C. § 1601 et seq.*].

[b] Required Documents

To satisfy the DRE requirements, the applicant must submit the "State Public Benefits Statement" (DRE Form 205) [*10 Cal. Code Reg. § 2718(f)(1)*], on which the applicant must declare himself or herself to be one of the following:

- A citizen of the United States;

- A qualified alien [*see 10 Cal. Code Reg. § 2718(d)* (definition of "qualified alien," which includes alien lawfully admitted for permanent residence or granted asylum under Immigration and Nationality Act, *8 U.S.C. § 1101 et seq.*)];

- A nonimmigrant alien [*see 10 Cal. Code Reg. § 2718(e)* (adopting definition of this term set forth in *8 U.S.C. § 1101(a)(15)*)]; or

- An alien paroled into the United States for less than one year under *8 U.S.C. § 1182(d)(5)* (*Section 212(d)(5) of the Immigration and Nationality Act*).

An alien not in one of these categories is not eligible for a real estate license [*10 Cal. Code Reg. § 2718(b)*].

In addition, the applicant must present documents that are acceptable to the U.S. Citizenship and Immigration Services (USCIS), formerly called the Immigration and Naturalization Service (INS), and are included in List A or List B of DRE Form 205 (List A sets forth acceptable documents to establish U.S. citizenship, such as a birth certificate; List B identifies documents that may be submitted by an alien lawfully admitted for permanent residence under the Immigration and Nationality Act, such as a "green card"). These documents will serve as reasonable evidence of the applicant's declared status [*10 Cal. Code Reg. § 2718(f)(2)*; *see 10 Cal. Code Reg. § 2718(g), (i)* (circumstances under which documents must be submitted to USCIS for verification through Systematic Alien Verification for Entitlements (SAVE) system or alternative verification-related procedures must be followed)]. The applicant may present the documents before applying for the license [*see 10 Cal. Code Reg. § 2718(h)*].

[c] Documents That Do Not Appear to Be Genuine or to Relate to Applicant; Denial of Application

When the documents presented appear on their face not to be genuine or not to relate to the individual presenting them, the government entity that originally issued the documents must be contacted for verification. With regard to naturalized citizens and derivative citizens presenting certificates of citizenship and aliens, the DRE will request verification from USCIS. If the applicant has lost the original documents, presents expired documents, or is unable to present any documents evidencing his or her immigration status, the applicant will be referred to the local USCIS office to obtain documentation [*10 Cal. Code Reg. § 2718(f)(3), (j)*; *see 10 Cal. Code Reg. § 2718(k)* (requiring acceptance of USCIS verification, and denial of benefits if USCIS cannot verify applicant's status)].

When an alien has completed and signed the State Public Benefits Statement under penalty of perjury and has presented documents issued by the USCIS that serve as reasonable evidence of the applicant's declared status, eligibility for a real estate license must not be delayed, denied, reduced, or terminated while the status of the alien is verified [*10 Cal. Code Reg. § 2718(l)*].

Any denial of a real estate license or license endorsement pursuant to the above provisions will be subject to the provisions of the Administrative Procedure Act [*Gov. Code § 11340 et seq.*] governing formal hearings [*10 Cal. Code Reg. § 2718(o)*; *see Bus. & Prof. Code § 10100*; *see also Gov. Code § 11500 et seq.* (hearing provisions)].

[d] Proof of Legal Presence for License Renewal or Extension

Any applicant for a license renewal who has not already satisfied the proof of legal presence requirements set forth in the Real Estate Commissioner's regulations must do so in order to obtain a renewal [*10 Cal. Code Reg. § 2718*; *see § 21.12[3][a]-[c]*]. A qualified alien without permanent status must provide this proof for each renewal of a license [*10 Cal. Code Reg. § 2718(c)*]. United States citizens and aliens with permanent status need to submit this proof only once [*see 10 Cal. Code Reg. § 2718*]. The applicant may present the required documents before applying for the renewal [*10 Cal. Code Reg. § 2718(h)*].

If an applicant for a timely renewal of a license has submitted, in good faith, evidence of eligibility pursuant to the regulatory requirements that the applicant has reason to believe would qualify him or her for renewal, but the Department finds that the evidence submitted may not qualify, the Department may extend the license for 90 days in order to allow the applicant to submit additional evidence of eligibility that satisfies the regulatory requirements [*10 Cal. Code Reg. § 2718(n)(1)*].

If an applicant has received an extension, the Department may grant an additional extension not to exceed 60 days in order to allow the applicant to submit additional evidence of eligibility, provided (1) the applicant submits a written request for such an extension, (2) the request establishes good cause, and (3) the applicant provides proof that he or she has complied with the statutory continuing education requirements [*10 Cal. Code Reg. § 2718(n)(2)*; *see Bus. & Prof. Code § 10170 et seq.*].

When the license is issued during or at the end of one of these extensions, it will expire four years from the date otherwise applicable as if no extension had been granted [*10 Cal. Code Reg. § 2718(n)(3)*].

[4] Real Estate Licensing Laws Not Applicable to Certain Persons Advertising or Disseminating Information on Internet

A Department of Real Estate regulation specifies when the real estate licensing laws do *not* apply to persons who advertise or disseminate information about "services" over the internet, the world wide web, or similar electronic common carrier systems [*see 10 Cal. Code Reg. § 2770*]. For these purposes, "services" means any activity for which a real estate license is required and that is offered or provided to a customer located in California [*10 Cal. Code Reg. § 2770(a)(2)*; *see 10 Cal. Code Reg. § 2770(a)(1)* ("customer" means person located in California on whose behalf service is provided or offered or to whom advertisement is directed)].

These persons will not be deemed to be engaged in the business of, acting in the capacity of, advertising as, or assuming to act as a real estate broker in California if any of the following apply [*10 Cal. Code Reg. § 2770(b)*]:

- The advertisement or information involves a service, but it (1) is not directed to any particular person or customer located in California, (2) is limited to general information about the services offered to customers or the public in general, and (3) includes the following legend: "The services referred to herein are not available to persons located within the State of California."

- The advertisement or information does not involve a service provided in connection with activity for which a real estate license is required.

- The advertisement or information is not being published, circulated, or transmitted on behalf of another or others.

- The person is engaged exclusively in advertising and performs no other acts requiring a real estate license; and (1) the person conducting the advertising does not compile or represent that he or she will compile information about specific parties in a real estate transaction; (2) the fee charged for the advertising is consistent with fees charged for similar advertising services; and (3) the advertisements provide for direct contact between prospective parties to a real estate transaction or contact through a licensed California real estate broker.

A person who advertises or disseminates information with respect to providing a service is not required to have a real estate broker license if any of the following apply [*10 Cal. Code Reg. § 2770(c)*]:

- The person publishing, circulating, or transmitting the advertisement or disseminating the information is acting within the exemptions from the definition of real estate broker contained in *Bus. & Prof. Code §§ 10133* and *10133.1*.

- The services provided do not include any of the acts within the meaning of *Bus. & Prof. Code §§ 10131, 10131.1, 10131.2, 10131.3, 10131.4, 10131.45,* and *10131.6* (that is, acts that require a license).

- Both of the following requirements are met:

  - Before any direct electronic communication or any response or contact with a specific customer, barriers or other implemented policies and procedures are in place, designed to ensure that before the response or contact, the person making it is appropriately licensed under the Real Estate law or qualifies for an exemption from real estate broker licensure.

  - There is a legend in all advertising and information disseminated about services offered, indicating whether the person making the advertising or disseminating the information is a licensed California real estate broker. If the person is not a licensed broker, the following additional legend must be included: "The services are not available to persons located within the State of California."

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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§ 21.13 Recovery Account of Real Estate Fund

[1] In General

The Recovery Account of the Real Estate Fund [*see Bus. & Prof. Code § 10470 et seq.*] was established under authority of the Real Estate Commissioner to provide indemnification for certain losses suffered by victims of fraud and other misconduct perpetrated by real estate brokers and salespersons [*see Froid v. Fox (1982) 132 Cal. App. 3d 832, 838, 183 Cal. Rptr. 461* ; *Circle Oaks Sales Co. v. Smith (1971) 16 Cal. App. 3d 682, 685, 94 Cal. Rptr. 232]* . It is funded from license fees [*Bus. & Prof. Code §§ 10450.6, 10470*] supplemented, when necessary, with transfers from the Real Estate Fund [*Bus. & Prof. Code § 10470.1*].

For a general consideration of recovery from the Real Estate Fund, refer to California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers* (Matthew Bender). For forms and procedure for recovery, refer to California Forms of Pleading and Practice, Ch. 103, *Brokers* (Matthew Bender)

[2] Applications for Payment

An application for payment from the Recovery Account may be made by an aggrieved person who has obtained a final judgment in a court of competent jurisdiction (including, but not limited to, a criminal restitution order issued pursuant to *Penal Code § 1202.4(f)* or *18 U.S.C. § 3663*) or an arbitration award against a licensed broker or salesperson based on the licensee's fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds arising directly out of a transaction that (1) did not violate *Bus. & Prof. Code § 10137* (prohibiting the employment by brokers of unlicensed persons for the performance of acts requiring a license and placing related restrictions on the employment and compensation of salespersons) or *Bus. & Prof. Code § 10138* (making it a misdemeanor for a person to pay for acts for which a real estate broker's or salesperson's license is required, if person paid is not known to be licensed as a real estate broker at the time the compensation is earned), and (2) involved the performance by the licensee of acts for which the license was required [*Bus. & Prof. Code § 10471(a)*; *see Bus. & Prof. Code §§ 10137, 10138*]. A "court of competent jurisdiction" includes the federal courts, but does not include the courts of another state [*Bus. & Prof. Code § 10471*]. For this purpose, misrepresentation includes both intentional and negligent misrepresentation [*Andrepont v. Meeker (1984) 158 Cal. App. 3d 878, 884-886, 204 Cal. Rptr. 887]* . Whether a broker's misrepresentation was

negligent is a question of fact based on the particular circumstances of the case. The determination must take into account the broker's statutory duty to conduct a reasonably competent and diligent inspection of the property for sale as well as the broker's duty to place a listing or give information that is accurate and based on the knowledge that the broker had or should have had at the time [*Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1077, 76 Cal. Rptr. 2d 911* ; *see Civ. Code §§ 1088, 2079(a)*].

The language "performed acts for which that license was required" in *Bus. & Prof. Code § 10471(a)* limits recovery to transactions that fall within the purview of the specific license held by the judgment debtor. In other words, a broker must perform acts for which a broker's license is required, and a salesperson much perform acts for which a salesperson's license is required. If the defendant's acts exceed the scope of his or her license, recovery is not permitted from the Recovery Account [*Davis v. Harris (1998) 61 Cal. App. 4th 507, 511-512, 71 Cal. Rptr. 2d 591* (judgment creditors not entitled to recovery because judgment debtor was salesperson and performed acts for which broker's license was required)].

Applications for payment from the Recovery Account may also be based on a stipulated judgment [*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897, 36 Cal. Rptr. 2d 193]* . This is so because relief will be granted under *Bus. & Prof. Code § 10471,* unless to do so is clearly forbidden by statute, and nothing in the Recovery Account statutes prohibits applications from being based on a stipulated judgment [*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897, 36 Cal. Rptr. 2d 193]* .

The application for payment must, among other things, set forth a detailed narrative statement of the facts upon which the judgment is based [*Bus. & Prof. Code § 10471(c)(4)*], a statement that the underlying complaint was prosecuted "conscientiously and in good faith" [*see Bus. & Prof. Code § 10471(c)(5)(A)*], and a statement that the applicant has complied with statutory requirements for recovery from the Fund [*Bus. & Prof. Code § 10471(c)(7)(B)*].

For the purpose of an application based on a criminal restitution order, the claimant must make all of the following statements [*Bus. & Prof. Code § 10471(c)(5)(B)*]:

- The claimant has not intentionally and without good cause failed to pursue any person potentially liable to the claimant in the underlying transaction, other than a defendant who is the subject of the criminal restitution order.

- The claimant has not intentionally and without good cause failed to pursue in a civil action for damages all persons potentially liable to the claimant in the underlying transaction who otherwise reasonably appeared capable of responding in damages, other than a defendant who is the subject of a criminal restitution order.

- The claimant employed no other procedural means contrary to the diligent prosecution of the complaint in order to seek to qualify for the Recovery Account.

The application must also contain a description of searches and inquiries conducted by or on behalf of the claimant with respect to the judgment debtor's assets liable to be sold or applied to satisfaction of the judgment, an itemized valuation of the assets discovered, and the results of actions by the claimant to have the assets applied to satisfaction of the judgment [*Bus. & Prof. Code § 10471(c)(7)(D)*]. It must contain a statement that the claimant has diligently pursued collection efforts against other judgment debtors and all other persons liable to the claimant in the transaction that is the basis for the underlying judgment [*Bus. & Prof. Code § 10471(c)(7)(E)*], a statement that the underlying judgment has not been discharged in bankruptcy or declared nondischargeable [*Bus. & Prof. Code § 10471(c)(7)(F)*; *see Bus. & Prof. Code § 10471(d)*], and a statement that the application was mailed or delivered to the Department of Real Estate no later than one year after the underlying judgment became final [*Bus. & Prof. Code § 10471(c)(7)(G)*]. An application for payment from the Recovery Account that is based on a criminal restitution order must comply with all requirements

specified above. For the purpose of an application based on a criminal restitution order, "judgment" means the criminal restitution order, "complaint" means the facts of the underlying transaction on which the criminal restitution order is based, and "judgment debtor" means any defendant who is the subject of the criminal restitution order [*Bus. & Prof. Code § 10471(e)*].

The application must be mailed or delivered to the Department of Real Estate no later than one year after the underlying judgment became final [*Bus. & Prof. Code § 10471(c)(7)(G)*].

[3] Amount of Recovery

Recovery from the fund is limited by statute according to the date on which the cause of action arose and the number of transactions and licensees for which claims are made. The statutory limitations apply regardless of the number of persons aggrieved, the number of parcels of real estate involved in a transaction, or the number of judgments against a particular licensee [*Bus. & Prof. Code § 10474*].

The liability of the Recovery Account will not exceed $50,000 for any one transaction and $250,000 for any one licensee, for causes of action occurring on or after January 1, 2009, or $20,000 for any one transaction and $100,000 for any one licensee, for causes of action occurring before that date [*Bus. & Prof. Code § 10474(a),(b)*]. Recovery is limited in every case to the amount unpaid on the judgment that represents an actual and direct loss to the claimant in the transaction [*Bus. & Prof. Code § 10471(a)*]. Accordingly, exemplary or punitive damages that were included in the underlying judgment may not be included in an award against the Fund [*Circle Oaks Sales Co. v. Smith (1971) 16 Cal. App. 3d 682, 685, 94 Cal. Rptr. 232]* . Similarly, if the claimants received tax benefits in the transaction, the tax benefits must be deducted from the claimed loss to determine the appropriate amount of recovery from the Fund [*Froid v. Fox (1982) 132 Cal. App. 3d 832, 838-839, 183 Cal. Rptr. 461]* .

When multiple licensed real estate personnel are involved in a transaction and the individual conduct of two or more of the licensees results in a judgment triggering the right to apply for payment from the Recovery Account of the Real Estate Fund [*see Bus. & Prof. Code § 10471(a)*; *see also § 21.13[2]*], the claimant may seek recovery from the Recovery Account based on the judgment against any of the licensed real estate personnel [*Bus. & Prof. Code § 10474(c)*]. This right is subject to (1) the monetary limitations based on the date the cause of action arose [*see Bus. & Prof. Code § 10474(a), (b)*], and (2) the requirement that the claimant diligently pursue, prior to the application for payment from the Account, collection efforts against other judgment debtors and all other persons liable to the claimant in the transaction that is the basis for the underlying judgment [*Bus. & Prof. Code § 10474(c)*; *see Bus. & Prof. Code § 10471(c)(7)(E)*].

[4] Parties Not Entitled to Recover

Because the purpose of the Recovery Account is to protect innocent members of the public from the misconduct of real estate licensees [*see Edmonds v. Augustyn (1987) 193 Cal. App. 3d 1056, 1062, 238 Cal. Rptr. 704]* , certain persons are barred from recovery. Neither the spouse of the judgment debtor nor a personal representative of the spouse may recover [*Bus. & Prof. Code § 10471(c)(7)(A)*]. Similarly, there may be no recovery from the Fund when both the claimant and the judgment debtor are real estate licensees, and the only basis for recovery is a dispute as to the division of fees [*Middelsteadt v. Karpe (1975) 52 Cal. App. 3d 297, 302-304, 124 Cal. Rptr. 840]* . There can be no recovery when the judgment debtor was acting as a principal rather than an agent at the time of the alleged misconduct [*Stout v. Edmonds (1986) 180 Cal. App. 3d 66, 69-70, 225 Cal. Rptr. 345* ; *Froid v. Fox (1982) 132 Cal. App. 3d 832, 840-842, 183 Cal. Rptr. 461]* .

Although the fact that the claimant is a real estate licensee will not of itself bar that claimant from recovery against another licensee who was acting as a licensee at the time of the alleged misconduct, the claimant's license and real estate experience will be germane to the issues of lack of knowledge and justifiable reliance [*Buccella v. Mayo (1980) 102*

Cal. App. 3d 315, 327 n.7, 162 Cal. Rptr. 369] .

[5] Effect of Recovery on License of Broker or Salesperson

Payment of any amount from the Recovery Account will automatically suspend the license of the broker or salesperson whose misconduct gave rise to the payment [*Bus. & Prof. Code § 10475*]. The license cannot be reinstated until the licensee has fully reimbursed the Fund for the amount of the payment plus interest at the prevailing legal rate applicable to a court judgment [*Bus. & Prof. Code § 10475*]. A discharge in bankruptcy will not relieve a person from the suspension [*Bus. & Prof. Code § 10475*].

[6] Proof of Legal Presence

In addition to satisfying the requirements *set forth in § 21.13[1]-[5]*, an applicant for a payment from the Real Estate Recovery Account must provide the Department of Real Estate (DRE) with proof of the applicant's legal presence in the United States [*10 Cal. Code Reg. § 2718*]. A similar requirement applies to applicants for a real estate license [*see § 21.12[3]*]. These requirements became operative August 1, 1998, and were promulgated by the DRE pursuant to federal legislation that eliminated certain public benefits for illegal immigrants [*10 Cal. Code Reg. § 2718*; *see 8 U.S.C. § 1621*; *see also 8 U.S.C. § 1601 et seq.*].

To satisfy the DRE requirements, an applicant for payment must submit the "State Public Benefits Statement" (DRE Form 205) [*10 Cal. Code Reg. § 2718(f)(1)*], on which the applicant must declare himself or herself to be one of the following:

- A citizen of the United States;
- A qualified alien [*see 10 Cal. Code Reg. § 2718(d)* (definition of "qualified alien," which includes alien lawfully admitted for permanent residence or granted asylum under Immigration and Nationality Act, *8 U.S.C. § 1101 et seq.*)];
- A nonimmigrant alien [*see 10 Cal. Code Reg. § 2718(e)* (adopting definition set forth in *8 U.S.C. § 1101(a)(15)*)]; or
- An alien paroled into the United States for less than one year under *8 U.S.C. § 1182(d)(5)* (*Section 212(d)(5) of the Immigration and Nationality Act*).

An alien not in one of these categories is not eligible to receive a payment from the Recovery Account [*10 Cal. Code Reg. § 2718(b)*].

In addition, the applicant must present documents that are acceptable to the U.S. Citizenship and Immigration Services (USCIS), formerly called the Immigration and Naturalization Services (INS), and are included in List A or List B of DRE Form 205 (List A sets forth acceptable documents to establish U.S. citizenship, such as a birth certificate; List B identifies documents that may be submitted by an alien lawfully admitted for permanent residence under the Immigration and Nationality Act, such as a "green card"). These documents will serve as reasonable evidence of the applicant's declared status [*10 Cal. Code Reg. § 2718(f)(2)*; *see 10 Cal. Code Reg. § 2718(g), (i)* (circumstances under which documents must be submitted to USCIS for verification through Systematic Alien Verification for Entitlements (SAVE) system or alternative verification-related procedures must be followed)].

When the documents presented appear on their face not to be genuine or not to relate to the individual presenting them, the government entity that originally issued the documents must be contacted for verification [*10 Cal. Code Reg. § 2718(f)(3), (j)*]. With regard to naturalized citizens and derivative citizens presenting certificates of citizenship and

aliens, the DRE will request verification from the USCIS. If the applicant has lost the original documents, presents expired documents, or is unable to present any documents evidencing his or her immigration status, the applicant will be referred to the local USCIS office to obtain documentation [*10 Cal. Code Reg. § 2718(f)(3), (j)*; *see 10 Cal. Code Reg. § 2718(k)* (requiring acceptance of USCIS verification, and denial of benefits if USCIS cannot verify applicant's status)]. The applicant may present documents that serve as reasonable evidence of the applicant's declared status before applying for payment from the Real Estate Recovery Account [*see 10 Cal. Code Reg. § 2718(h)*].

Any denial of a payment application pursuant to the above provisions will be subject to the provisions of the Administrative Procedure Act [*Gov. Code § 11340 et seq.*] governing formal hearings [*10 Cal. Code Reg. § 2718(o)*; *see Bus. & Prof. Code § 10100*; *see also Gov. Code § 11500 et seq.* (hearing provisions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudGeneral OverviewCriminal Law & ProcedureSentencingRestitutionReal Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide § 21.14

§ 21.14 Finders

"Finders" are persons who bring together others (including buyers, sellers, borrowers, and lenders) so that they may negotiate for and eventually enter into contracts [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65]* . A finder is not an agent; a finder is in business for himself or herself and owes no obligation to any principal [*Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793, 164 Cal. Rptr. 647]* . Thus, no fiduciary relationship is created between a finder and his or her employer, and the finder may well be employed as a finder by both buyer and seller [*McConnell v. Cowan (1955) 44 Cal. 2d 805, 811, 285 P.2d 261]* .

A finder's only duty and power under his or her contract of employment is to find and introduce a prospective purchaser or a prospective seller to his or her employer. A finder does not have the power to negotiate the terms on which his or her employer or employers will deal [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* .

A finder need not be licensed as a real estate broker [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8, 106 Cal. Rptr. 761, 507 P.2d 65]* . In California, the courts have long permitted finders to recover fees for their services in real estate transactions without first obtaining real estate licenses [*see Shaffer v. Beinhorn (1923) 190 Cal. 569, 573-574, 213 P. 960* ; *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Grant v. Marinell (1980) 112 Cal. App. 3d 617, 619, 169 Cal. Rptr. 414* ; *but see Civ. Code § 1624*; *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258 n.6, 241 Cal. Rptr. 22, 743 P.2d 1279* (fee agreement must be in writing, signed by party to be charged)]. To recover a finder's fee, however, an unlicensed person must limit his or her services to bringing other parties together, and must leave negotiation and completion of the transaction to others [*see Tyrone v. Kelley (1973) 9 Cal. 3d 1, 12, 106 Cal. Rptr. 761, 507 P.2d 65]* . The distinction between a finder (who need not be licensed) and a broker or salesperson (who must be licensed) frequently turns upon whether the finder has been given authority or has undertaken duties beyond merely bringing the parties together [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65* ; *see § 21.10* (real estate broker)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.15

§ 21.15 Discriminatory Practices Prohibited by California Fair Employment and Housing Act

Under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], it is unlawful to engage in specified discriminatory practices in housing accommodations or employment on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation [*see Gov. Code § 12955*]. Discrimination on these bases is against public policy [*Gov. Code § 12920*], and the opportunity to seek, obtain, and hold housing without discrimination is a civil right [*Gov. Code § 12921(b)*; *see Civ. Code § 51*]. The Department of Fair Employment and Housing is authorized to take remedial and preventive actions [*Gov. Code § 12901*], such as to use the services of all governmental departments and agencies, including conciliation councils with regard to housing discrimination, and to receive, investigate, and conciliate complaints alleging discriminatory practices [*Gov. Code § 12930(d), (f)*]. For example, with regard to real estate transactions, it is unlawful for any person, organization, or entity to do any of the following [*Gov. Code § 12955(i)-(k)*]:

- Discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, based on discrimination because of the specified characteristics;

- Deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service based on discrimination because of the specified characteristics; or

- Otherwise make unavailable or deny a dwelling based on discrimination because of the specified characteristics.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsDisability DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsEnforcementCivil Rights LawContractual Relations & HousingFair Housing RightsFamily Status DiscriminationCivil Rights LawContractual Relations & HousingFair

Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRacial DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsReligious Discrimination



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9-21 California Legal Forms--Transaction Guide §§ 21.16

§§ 21.16 Loan Modification Services

Any real estate licensee who negotiates or arranges, or attempts to negotiate or arrange, or otherwise offers to perform, a modification or any other form of lender forbearance respecting a loan secured by a mortgage or deed of trust on residential real property containing four or fewer dwelling units, for which a fee or other compensation is paid by the borrower, must provide the following statement to the borrower, as a separate document, in not less than 14-point bold type, before entering into any fee agreement with the borrower: "It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov" [*Bus. & Prof. Code § 10147.6(a), (d)*; *see Bus. & Prof. Code § 10147.6(c)* (violation of code section is offense); *see also Civ. Code § 2944.6* (same provisions as *Bus. & Prof. Code § 10147.6* but applicable to all persons)]. If the loan modification or other lender forbearance services are offered or negotiated in one of the languages set forth in *Bus. & Prof. Code § 1632*, a translated copy of the statement must be provided to the borrower in that language [*Bus. & Prof. Code § 10147.6(b)*].

Until January 1, 2013 [*Bus. & Prof. Code § 10085.6(d)*], notwithstanding any other provision of law, it is unlawful for any real estate licensee who negotiates or arranges, or attempts to negotiate or arrange, or otherwise offers to perform, a modification or any other form of lender forbearance respecting a loan secured by a mortgage or deed of trust on residential real property containing four or fewer dwelling units, for which a fee or other compensation is paid by the borrower, to do any of the following [*Bus. & Prof. Code § 10085.6(a), (c)*; *see Bus. & Prof. Code § 10085.6(b)* (violation of code section is offense); *see also Civ. Code § 2944.7* (same provisions as *Bus. & Prof. Code § 10085.6* but applicable to all persons)]:

- Claim, demand, charge, collect, or receive any compensation until after the licensee has fully performed each and every service that the licensee contracted to perform or represented would be performed;

- Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation; or

- Take any power of attorney from the borrower for any purpose.



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9-21 California Legal Forms--Transaction Guide §§ 21.17-21.19

[Reserved]

§§ 21.17[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.20

§ 21.20 Nature of Relationship

[1] Broker as Agent

The relationship between a broker and his or her client ordinarily is that of principal and agent, with the broker being a form of special agent [*Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 278, 210 P.2d 768* ; *see Civ. Code § 2297* ("special agent" is an agent for a particular act or transaction)]. A special agent has only the authority actually or ostensibly conferred upon him or her by the principal [*Civ. Code § 2315*; *see Civ. Code §§ 2316, 2317* (actual and ostensible authority)]. Other general principles of agency law are also applicable to real estate brokers [*see Civ. Code § 2295 et seq.*].

An agency relationship in a real estate context is a strict fiduciary relationship that requires the broker to act in the principal's best interest [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 733, 253 Cal. Rptr. 800* ; *see Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101]* . Further, a broker/agent in a residential real property transaction must comply with various statutory requirements [*see Civ. Code §§ 2079.12-2079.24*] that, among other things, specify permissible types of agency relationships [*see § 21.20[2]*] and impose disclosure obligations [*see § 21.20[3]*]. Under the applicable statutes, an "agent" is a person acting under the statutes in a real property transaction, and includes a person who is licensed as a real estate broker, and under whose license a listing is executed or an offer to purchase is obtained [*Civ. Code § 2079.13(a)*]. A "real property transaction" is a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase [*Civ. Code § 2079.13(k)*]. "Real property," as used in the foregoing statutes, means (1) an estate of inheritance or life estate in property containing one to four dwelling units, (2) any leasehold in this type of property exceeding one year's duration, and (3) mobilehomes that are offered for sale or sold through a real estate broker [*Civ. Code § 2079.13(j)*].

A real estate salesperson who acts for a principal owes the same fiduciary duties to that principal as a broker [*Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 64-65, 221 Cal. Rptr. 353]* .

The actual relationship between a broker/agent and the parties to a real estate transaction [*see Civ. Code § 2079.13(k)*

("real property transaction" defined)] is initially defined by the agreement between the broker and the parties [*see Civ. Code §§ 2299* (actual agency), *2300* (ostensible agency); *see also §§ 21.30-21.36*]. The payment of compensation (or the obligation to pay compensation) is not necessarily determinative of a particular agency relationship [*Civ. Code § 2079.19*].

[2] Permitted and Prohibited Relationships

A real estate agent may act in different capacities in different transactions and have different relationships with his or her principals. An agent in a residential real property transaction [*see* [1], *above*] may select a specific form of agency relationship as a condition of the agent's employment, provided the following apply: (1) the relationship is not specifically prohibited [*see* discussion, *below*]; and (2) the agent (i) furnishes the required "Disclosure Regarding Real Estate Agency Relationship" [*Civ. Code § 2079.16*; *see §§ 21.21, 21.220*], (ii) discloses the agent's actual relationship to the party, and (iii) furnishes the required confirmation of disclosure [*Civ. Code § 2079.20*; *see Civ. Code § 2079.17*; *see also §§ 21.21, 21.221*].

A "listing agent," that is, one who has obtained a listing of real property to act as an agent for compensation [*Civ. Code § 2079.13(f)*], may act in a particular transaction exclusively as the seller's agent or as a dual agent representing both the buyer and seller [*Civ. Code § 2079.17(b)*]. A "selling agent" may act in a particular transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller [*Civ. Code § 2079.17(a)*]. For these purposes, a selling agent is a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller [*Civ. Code § 2079.13(n)*]. A listing agent may also act as a selling agent, and the combination of both of these functions in one agent does not, of itself, make the agent a dual agent [*Civ. Code § 2079.22*]. However, a listing agent (whether or not that agent is also a selling agent) may not act as an agent for the buyer only [*Civ. Code §§ 2079.17(b), 2079.18*].

[3] Dual Representation

A "dual agent" is an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction [*Civ. Code § 2079.13(d)*]. A broker may not act for more than one party in a transaction without the knowledge or consent of all parties to the transaction [*Bus. & Prof. Code § 10176(d)*; *see Civ. Code § 2079.17* (requiring listing or selling agent to disclose whether agent is acting as a dual agent or exclusively as buyer's agent or seller's agent); *see also § 21.21*]. A broker who does not disclose the fact that he or she is acting as a dual agent is barred from recovering a commission [*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 305, 306 n.4, 1 Cal. Rptr. 2d 680* (commission barred under public policy that prohibits gain from contract that is conducive to bad faith and double-dealing); *McConnell v. Cowan (1955) 44 Cal. 2d 805, 810, 285 P.2d 261* (commission from either party barred unless both parties knew and approved of dual representation)]. In addition, a broker's or salespersons's failure to disclose a dual agency relationship may result in the buyer's or seller's recovery of damages caused by the nondisclosure [*Brown v. FSR Brokerage, Inc. (1998) 62 Cal. App. 4th 766, 778]* .

A broker who represents both parties to a real estate transaction has the same fiduciary duty of utmost care, integrity, honesty, and loyalty in dealing with both the buyer and the seller as does a broker who represents only one party to a transaction [*see Civ. Code § 2079.16*]. Further, a dual agent may not, without the express permission of the seller, disclose to the buyer that the seller will accept a price less than the listing price [*Civ. Code § 2079.16*; *see Brown v. FSR Brokerage, Inc. (1998) 62 Cal. App. 4th 766, 777]* . Similarly, a dual agent may not, without the express permission of the buyer, disclose to the seller that the buyer will pay a price greater than the price offered [*Civ. Code § 2079.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary Responsibilities



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§ 21.21 Required Disclosures

So that buyers and sellers will understand their relationships to their agents, listing and selling agents involved in residential real property transactions [*see § 21.20[1]*] must (1) provide the seller and buyer with a copy of the statutory disclosure form set forth in *Civ. Code § 2079.16* [*see § 21.220[2]* ("Disclosure Regarding Real Estate Agency Relationships")], and (2) obtain a signed acknowledgment of receipt from the seller and buyer [*Civ. Code § 2079.14*]. The statutory form describes the different types of agency relationships a seller or buyer may have with a real estate agent, and generally informs the recipient of the agent's affirmative obligations in the transaction.

In addition to providing the foregoing disclosure, the agent must also disclose whether he or she is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent, and must confirm the disclosure in writing [*Civ. Code § 2079.17*]. These disclosures must be made before the transaction has been consummated; that is, disclosure of a dual agency relationship after an offer has been made does not satisfy the disclosure requirement [*see Brown v. FSR Brokerage, Inc. (1998) 62 Cal. App. 4th 766, 778]* . A statutory form must be used for the written confirmation [*see Civ. Code § 2079.17(c)*; *see also § 21.221*].

For further coverage of these disclosure requirements and disclosure forms prepared by the California Association of Realtors, see *§§ 21.220* and *21.221*.

When an agent undertakes to arrange financing in connection with a sale, lease, or exchange of real property, or when a person or entity arranging financing in connection with the sale, lease, or exchange of real property undertakes to act as an agent with respect to that property, that agent, person, or entity must, within 24 hours, make a written disclosure of those roles to all parties to the sale, lease, or exchange, and any related loan transaction [*Bus. & Prof. Code § 10177.6*; *see Civ. Code § 2079.13(a)* (definition of agent in this context)].

Nothing in the statutory rules requiring disclosure of agency relationships diminishes the duty of disclosure that sellers and their agents owe to buyers, nor do the statutory rules relieve agents (or their associate licensees, subagents, or employees) from liability for their conduct otherwise imposed by law [*Civ. Code § 2079.24*]. For discussion of the duties of disclosure owed to buyers by sellers and their agents, refer to Ch. 23, *Real Property Sales Agreements.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDisclosureGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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§ 21.21A Disclosure of Law Enforcement Database of Registered Sex Offenders' Locations

In response to the passage of "Megan's Law" requiring law enforcement authorities to maintain a database of the locations of registered sex offenders and to provide that information to the public [*see Penal Code §§ 290*, *290.4*, *290.46*], certain written real estate contracts must contain a notice related to that database [*see Civ. Code § 2079.10a*]. Effective July 1, 1999, the notice requirement applies to every contract of sale for residential real property comprising one to four dwelling units, including installment land sales contracts [*Civ. Code § 2079.10a(a)*; *see Civ. Code § 2985* (definition of real property sales contract)].

The contract must contain the following notice, printed in at least eight-point type [*Civ. Code § 2079.10a(a)(3)* (applicable on and after April 1, 2006); *see Civ. Code § 2079.10a(a)(1), (2)* (this notice may be used in contracts before April 1, 2006, in lieu of notice that formerly was required; contract forms containing notice that formerly was required may be used until April 1, 2006)]:

> **Notice:**
> Pursuant to *Section 290.46 of the Penal Code*, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

The information in the notice is deemed adequate to inform the transferee about the existence of the statewide database and information from the database regarding the locations of registered sex offenders [*Civ. Code § 2079.10a(b)*]. On delivery of this notice, the seller is not required to provide any further information in addition to that contained in the notice regarding the proximity of registered sex offenders, and making those disclosures cannot give rise to any cause of action against the seller by a registered sex offender [*Civ. Code § 2079.10a(b)*]. However, providing the statutory notice regarding the existence of the database of registered sex offender locations does not alter any other existing duty that a seller has to make disclosures [*Civ. Code § 2079.10a(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-21 California Legal Forms--Transaction Guide § 21.22

§ 21.22 Broker as Principal

[1] Limitations

Although the right of real estate brokers to act in the dual capacity of principal and agent has been upheld in California [*see Estate of Baldwin (1973) 34 Cal. App. 3d 596, 605-606, 110 Cal. Rptr. 189]* , the right is subject to stringent limitations. At the minimum, a broker who undertakes to act both as agent and as principal must make a full disclosure of all material facts concerning the transaction that might affect the other principal's decision [*Rattray v. Scudder (1946) 28 Cal. 2d 214, 223, 169 P.2d 371* ; *Smith v. Zak (1971) 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242]* . However, if the listing is a net listing, the agent may properly buy the property at the net price without disclosing whether any other offers have been made for the property [*Pascal v. Cotton (1962) 205 Cal. App. 2d 597, 600-601, 23 Cal. Rptr. 357* ; *Allen v. Dailey (1928) 92 Cal. App. 308, 313-314, 268 P. 404* ; *see § 21.200*]. Nevertheless, when the agent has agreed to obtain the "highest possible" or "best" price for the property, the agent has a higher duty [*see Pascal v. Cotton (1962) 205 Cal. App. 2d 597, 600, 23 Cal. Rptr. 357]* . A broker who has obtained such a listing must disclose to the principal all offers to buy the property [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242* ; *Simone v. McKee (1956) 142 Cal. App. 2d 307, 312, 298 P.2d 667]* .

A broker cannot acquire indirectly a property that the broker could not acquire directly [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101]* . Thus, for example, a corporation in which the agent has a large concealed interest may not acquire property listed with the agent in the absence of full disclosure of the connection between the agent and the corporation [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675-676, 68 Cal. Rptr. 589, 441 P.2d 101]* . A listing agent may not use a third-party nominee to buy property for the broker's own account [*see Simone v. McKee (1956) 142 Cal. App. 2d 307, 310-313, 298 P.2d 667]* . A broker who conceals from a seller the fact that the seller's land has been sold to the state for taxes may not later make a profit by buying the land at a tax sale [*Skopp v. Weaver (1976) 16 Cal. 3d 432, 441, 128 Cal. Rptr. 19, 546 P.2d 307]* .

When an agent's acts have been questioned by the agent's principal, the agent has the burden of proving that he or she acted with the utmost good faith toward the principal [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242* ; *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359]* . Similarly, when a listing agent

buys the listed property for the agent's own account, the burden is upon the agent to show affirmatively that he or she acted in highest good faith and without concealment [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101* ; *see Civ. Code § 2079.13(f)* ("listing agent" defined)].

[2] Denial of Commission Based on Lack of Disclosure

As mentioned above [*see § 21.20 [3]*], a broker who does not disclose the fact that he or she is acting as a dual agent is barred from recovering a commission [*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 305, 306 n. 4, 1 Cal. Rptr. 2d 680* (commission barred under public policy that prohibits gain from contract that is conducive to bad faith and double-dealing)]. Since similar conflicts of interest may arise when brokers act in the dual capacity of principal and agent as arise when brokers act as dual agents, it appears likely that a broker acting as both principal and agent might also be denied a commission based on lack of disclosure [*see L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 305, 1 Cal. Rptr. 2d 680* (undisclosed dual agency puts real estate agent in position in which duty to one party conflicts with duty to other party and agent's own interests tempt him or her to be unfaithful to parties)]. However, this area has not been the subject of much litigation, and case law has yet to establish the extent to which a broker who does not disclose that he or she is acting as principal and agent is barred from recovering a commission. Caution should, nevertheless, be exercised to avoid any conflict of interest in transactions where brokers act as both principals and as agents.

[3] Statutory Requirements

The broker is required to obtain the written permission of the client approving in advance any profit the broker may receive from the transaction [*see Bus. & Prof. Code § 10176(g)*]. Whenever a broker has been given an option to purchase the subject property by his or her principal, prior to or coincident with the election to exercise that option, the broker must reveal, in writing, to the principal the full amount of the broker's profit and must obtain the principal's written consent approving the amount of such profit [*see Bus. & Prof. Code § 10176(h)*]. For a form of disclosure, see *§ 21.222[2]*.

With respect to a commitment to make a mortgage loan that is accepted by the applicant, when the broker represented to the applicant that the broker was the lender or was authorized to issue the commitment on behalf of the lender or lenders in the mortgage loan transaction, the broker must not fail to disburse funds in accordance with the commitment [*see Bus. & Prof. Code § 10176(k)*]. The broker must not intentionally delay the closing of a mortgage loan for the sole purpose of increasing interest, costs, fees, or charges payable by the borrower [*see Bus. & Prof. Code § 10176(l)*].

The license of a broker may be suspended or revoked if the broker has generated an inaccurate opinion of the value of residential real property, requested in connection with a debt forgiveness sale, in order to manipulate the lienholder to reject the proposed debt forgiveness sale or in order to acquire a financial or business advantage, including a listing agreement, that directly results from the inaccurate opinion of value, with regard to the property [*Bus. & Prof. Code § 10176(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalBusiness & Corporate LawAgency RelationshipsDisclosureUndisclosed PrincipalReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions



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B. Agency Relationship

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[Reserved]

§§ 21.23[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-21 California Legal Forms--Transaction Guide § 21.30

§ 21.30 Listing Agreements Defined

A listing is a written contract between an owner of property and an agent, authorizing the agent to sell the property or to find a buyer [*Civ. Code § 1086(f)*]. There are four types of listings: (1) an exclusive right to sell listing [*Civ. Code § 1086(f)(1)*]; (2) an exclusive agency listing [*Civ. Code § 1086(f)(2)*]; (3) an open listing [*Civ. Code § 1086(f)(3)*]; and (4) a probate listing [*Civ. Code § 1089.5*; *see Prob. Code § 10150*]. Each type is subject to specific statutory regulation, discussed in *Section 21.32*. A "listing agent" must be a real estate licensee [*see Civ. Code § 1086(g)*; *see also § 21.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsExclusive Agency AgreementsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide § 21.31

§ 21.31 Related Terms Defined

For purposes of the regulated listing provisions of the Civil Code [*Civ. Code §§ 1086 et seq.*],the following terms have the meanings set forth below [*Civ. Code § 1086*]:

- "Property" means real property or a mobilehome [*see Health & Safety Code § 18008* ("mobilehome" defined); *see also* Ch. 39, *Mobilehome Parks* ; Ch. 40, *Mobilehomes*].

- "Sell" and "sale" include lease and exchange.

- "Buyer" includes a tenant and a party with whom property is exchanged.

- An "agent" is one who is authorized by law to act in that capacity for that type of property, and who is either (1) licensed as a real estate broker [*see Bus. & Prof. Code §§ 10131-10131.6*; *see also § 21.10* (real estate broker)], or (2) a "licensee" under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see Health & Safety Code § 18006*; *see also* Ch. 40, *Mobilehomes*].

- A "listing agent" is one who has obtained a listing of property and who is authorized by law to act as an agent for compensation with regard to that kind of listing [*see Civ. Code § 1090* (listing agent may also be selling agent).]

- A "selling agent" is an agent participant in a multiple-listing service who acts in cooperation with a listing agent and who sells, or finds a buyer for, the property [*see Civ. Code § 1087* ("multiple listing service" defined); *see also § 21.34*].

- An "appraiser" is one licensed or certified under the Real Estate Appraisers' Licensing and Certification Law [*Bus. & Prof. Code § 11300 et seq.*].

- "Sold" includes "leased" and "exchanged." A property is sold when a legally binding commitment to

sell the property comes into existence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawProperty ValuationReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-21 California Legal Forms--Transaction Guide § 21.32

§ 21.32 Regulated Listings

[1] Exclusive Right to Sell

Under an "exclusive right to sell listing," the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find a buyer for the property [*Civ. Code § 1086(f)(1)*]. The agent is entitled to the agreed compensation if during that time the property is sold by anyone, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(1)*]. This type of listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination [*Civ. Code § 1086(f)(1)*].

[2] Exclusive Agency

Under an "exclusive agency listing," as under an exclusive right to sell listing, the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find a buyer for the property [*see Civ. Code § 1086(f)(1), (2)*]. The agent is entitled to the agreed compensation if during that time the property is sold by anyone, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*see Civ. Code § 1086(f)(1), (2)*]. However, unlike an exclusive right to sell listing, under an exclusive agency listing, the owner reserves the right to sell directly (but not through any other agent) and, in that event, without obligation to pay compensation to the agent [*Civ. Code § 1086(f)(2)*].

[3] Open Listing

An "open listing" does not grant the listing agent any exclusive rights or priorities. Rather, the agent receives a commission only if the agent procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, before the property is otherwise sold either through another agent or by the owner directly and before the listing expires by its terms or is revoked [*Civ. Code § 1086(f)(3)*]. An open listing may contain an agreement by the owner to pay the listing agent compensation in any amount, at any time, and for any services, other than for selling the property or finding a buyer [*Civ. Code § 1089*].

Open listings placed in multiple-listing services are subject to additional requirements [*see Civ. Code §§ 1087, 1088*; *see also § 21.34*].

[4] Probate Listing

A contract between a personal representative of a decedent and a licensed broker authorizing the broker to find a purchaser for property of the decedent's estate is governed by *Prob. Code § 10150* [*Civ. Code § 1089.5*]. The contract is also subject to the Civil Code provisions regulating listings [*see Civ. Code § 1086 et seq.*] if the subject property falls within the definition of "property" set forth in the Civil Code [*Civ. Code § 1089.5*; *see Civ. Code § 1086(a)* ("property" defined); *see also § 21.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsExclusive Agency AgreementsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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§ 21.33 Unregulated Listings

Certain types of listings are not subject to statutory regulation. For example, a "net listing" is a listing that provides that an agent may retain as compensation for the services rendered all sums received over and above a net price to the owner [*see Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 626-627, 66 Cal. Rptr. 747* , citing *Pascal v. Cotton (1962) 205 Cal. App. 2d 597, 600, 23 Cal. Rptr. 357]* . Employment of an agent by a prospective purchaser or lessee to locate property for purchase or lease may also be considered a listing [*see § 21.14* (finders); *see also § 21.35* ("finder's agreement" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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§ 21.34 Multiple-Listing Services

A "multiple listing service" is a facility of cooperation of agents and appraisers [*see Civ. Code § 1086(e)* ("appraiser" defined); *see also § 21.31*], operating through an intermediary that does not itself act as an agent or appraiser, through which agents establish express or implied legal relationships with respect to listed properties, or that may be used by agents and appraisers, pursuant to the rules of the service, to prepare market evaluations and appraisals of real property [*Civ. Code § 1087*]. Thus, in the case of member agents, the service enables them to pool their listings and permits any member to seek a buyer for the property listed with the service.

If an open listing is placed in a multiple-listing service, the total commission paid by the owner goes to the selling agent who obtains an enforceable offer from a ready, able, and willing buyer on terms accepted by the owner [*Civ. Code § 1087*]. An open listing may, but is not required to, specify the compensation to be paid to the selling agent; it may also state that the compensation is to be negotiated between the selling agent and the owner [*Civ. Code § 1087*].

No listing may be placed in a multiple-listing service unless authorized or directed by the owner in the listing [*Civ. Code § 1088*]. An agent or appraiser who places a listing or other information in such a service will be responsible for the truth of all representations and statements made by the agent or appraiser of which that agent or appraiser had knowledge or reasonably should have had knowledge, to anyone injured by their falseness or inaccuracy [*Civ. Code § 1088*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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§ 21.35 Finder's Agreements

A finder's agreement is a written contract to bring together persons so that they may negotiate for and eventually enter into contracts [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Batson v. Strehlow (1968) 68 Cal. 2d 662, 668, 68 Cal. Rptr. 589, 441 P.2d 101* ; *McConnell v. Cowan (1955) 44 Cal. 2d 805, 810, 285 P.2d 261]* . The parties who may be brought together by a finder in a real estate transaction include, among others, buyers, sellers, borrowers, and lenders [*see Shaffer v. Beinhorn (1923) 190 Cal. 569, 573-574, 213 P. 960* ; *Tyrone V. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Grant v. Marinell (1980) 112 Cal. App. 3d 617, 621, 169 Cal. Rptr. 414]* . A finder need not be a real estate licensee [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Batson v. Strehlow (1968) 68 Cal. 2d 662, 668, 68 Cal. Rptr. 589, 441 P.2d 101* ; *McConnell v. Cowan (1955) 44 Cal. 2d 805, 810, 285 P.2d 261* ; *see § 21.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersGeneral OverviewReal Property LawBrokersBrokerage AgreementsReal Property LawPurchase & SaleGeneral Overview



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§ 21.36 Statute of Frauds

[1] Writing Required

An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate or to procure, introduce, or find a purchaser or seller of real estate, supported by consideration, is an enforceable contract subject to the principles of contract law [*see Civ. Code § 1624(a)(4)*]. Thus, such an agreement comes within the statute of frauds and, accordingly, must be in writing, signed by the party to be charged [*Civ. Code § 1624*]. Finder's fee agreements, like broker's commission agreements, are also subject to the statute of frauds [*see Civ. Code § 1624*; *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258 n.6, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

A memorandum sufficient to satisfy the statute of frauds requirement need not be a formal document, but must "unequivocally show on its face the fact of employment of the broker" or agent seeking to receive the real estate commission [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *see Franklin v. Hansen (1963) 59 Cal. 2d 570, 573, 30 Cal. Rptr. 530, 381 P.2d 386 , disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770* ; *Babcock v. Houston (1973) 33 Cal. App. 3d 858, 864, 109 Cal. Rptr. 454]* . Thus, a broker's contract will not be declared void merely because of a defect, ambiguity, or uncertainty in the description of the property to be sold, when the defect can be cured by allegations and proof of extrinsic facts and circumstances [*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 864, 109 Cal. Rptr. 454]* .

It is a question of fact whether the writing constitutes an agreement or memorandum sufficient to comply with the statute of frauds [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279]* . A brief notation on the back of a business card covering the essential terms of the agreement and date and initialed by the seller has been held to suffice [*Seck v. Foulks (1972) 25 Cal. App. 3d 556, 568, 102 Cal. Rptr. 170]* . However, a writing setting forth the price, terms and description of the property offered for sale by the signor of the writing, delivered to real estate brokers but not expressly addressed to them, was held insufficient as not bearing written evidence of a contract of employment or authorization [*Kleinsorge & Heilbron v. Liness (1911) 17 Cal. App. 534, 539, 120 P. 444* ; *see Seck v. Foulks (1972) 25 Cal. App. 3d 556, 566, 102 Cal. Rptr. 170]* .

Thus, insofar as the statute of frauds is concerned, at a minimum, a listing agreement must contain evidence of a contract of employment or authorization [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *Seck v. Foulks (1972) 25 Cal. App. 3d 556, 566, 102 Cal. Rptr. 170]* . See *§§ 21.110* and *21.112* for other matters to consider including in a listing agreement.

Although a broker must have written authorization in order to recover a commission on the sale of real property [*see Civ. Code § 1624(a)(4)*], the statute of frauds is not a defense if the broker reasonably relies on the misrepresentations of the seller that a written authorization exists [*see Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1270, 241 Cal. Rptr. 22, 743 P.2d 1279]* . An affirmative misrepresentation as to the existence of a writing will support an action by the broker in equitable estoppel [*Owens v. Foundation for Ocean Research (1980) 107 Cal. App. 3d 179, 183, 165 Cal. Rptr. 571 , disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* .

[2] Modification of Agreement

A written listing agreement may be modified only by the following: (1) a written agreement; (2) an oral agreement that has been fully executed by both parties; or (3) unless the agreement otherwise provides, an oral agreement that satisfies the statute of frauds, supported by new consideration [*Civ. Code § 1698(a)-(c)*]. However, the statute does not preclude application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written agreement by an oral agreement, waiver of a provision of a written agreement, or oral independent collateral agreements, when appropriate [*Civ. Code § 1698(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsExceptionsSubsequent Oral AgreementsContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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[Reserved]

§§ 21.37[Reserved]



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§ 21.50 Duration of Listing

[1] Setting Expiration Date

The Real Estate Commissioner may temporarily suspend or permanently revoke a real estate license at any time if (1) the licensee claims, demands, or receives compensation or a commission under any exclusive agreement authorizing or employing the licensee to perform the acts of a licensed real estate broker for compensation or commission, and (2) the agreement does not contain a definite, specified date of final and complete termination [*Bus. & Prof. Code § 10176(f)*; *see Bus. & Prof. Code § 10131* (licensed real estate broker's acts defined)]. Although illegal contracts or contracts against public policy are generally not enforceable, there is a judicial exception in the case of an executed exclusive listing agreement that violates the statutory rule requiring a definite termination date. In this case, the courts permit the broker to collect his or her commission provided (1) the transaction has been completed, (2) the public cannot be protected by refusing enforcement of the agreement, (3) no moral turpitude was involved, and (4) the seller would be unjustly enriched if the agreement were not enforced [*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 863, 109 Cal. Rptr. 454]* .

[2] Time of the Essence

A party will normally be permitted to complete his or her performance within a "reasonable" time even though the performance is subsequent to the date specified in the contract [*see Civ. Code § 1492*; *Katemis v. Westerlind (1956) 142 Cal. App. 2d 799, 804-805, 299 P.2d 383]* .

However, if time is made of the essence, a party who fails to perform on time will not be permitted to complete his or her performance nor will he or she be entitled to restitution [*see Glock v. Howard & Wilson Colony Co. (1898) 123 Cal. 1, 13, 55 P. 713* ; *see also Amoruso v. Carley (1949) 93 Cal. App. 2d 422, 427, 209 P.2d 139]* , unless the provision making time of the essence has been waived [*Gonzalez v. Hirose (1948) 33 Cal. 2d 213, 216-217, 200 P.2d 793]* , or unless injustice would result [*Barkis v. Scott (1949) 34 Cal. 2d 116, 118-124, 208 P.2d 367* ; *Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 332-333, 263 P.2d 655]* .

[3] Termination of Listing Agreement

A real estate listing creates an agency between the broker and the owner [*see Bus. & Prof. Code § 10131*; *Civ. Code § 2295*]. Unless coupled with an interest, the agency may be terminated by revocation by the principal, by the principal's death, or by his or her incapacity to contract [*Civ. Code § 2356(a)*]. If the broker has an exclusive and "irrevocable" listing for a designated period and the principal exercises his or her power to revoke the listing prior to its expiration, the principal is liable to the broker for the amount of the expected commission, even though the property was sold by another broker, if the agreement provides for compensation to the original broker for any sale during the exclusive period [*Century 21 Butler Realty, Inc. v. Vasquez (1996) 41 Cal. App. 4th 888, 891* ; *see Baumgartner v. Meek (1954) 126 Cal. App. 2d 505, 509-511, 272 P.2d 552]* , but only if the broker has been diligent in seeking out a purchaser [*see Coleman v. Mora (1968) 263 Cal. App. 2d 137, 146-147, 69 Cal. Rptr. 166* ; *see also Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 601, 78 Cal. Rptr. 302]* . If the principal dies during the exclusive listing period, the exclusive right to sell terminates by operation of law, and the executor who subsequently sells the property during the listing period has no contractual liability under the agreement [*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614, 98 Cal. Rptr. 559]* . If the broker sells the property after the death of the principal but before learning of it, the broker apparently still is entitled to his or her commission [*see Civ. Code § 2356(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTerminationsExpiration of TimeReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.51

§ 21.51 Compensation

[1] Required Disclosure of Amount

The license of a real estate agent may be suspended or revoked if the agent fails to disclose to the principal the full amount of his or her compensation, prior to or coincident with the signing of the listing agreement or contract [*Bus. & Prof. Code § 10176(g)*.]

[2] When Compensation Is Due

Under an open listing, the agent will receive a commission only if the agent procures a person who is ready, able, and willing to acquire the owner's property on the same terms authorized by the listing (1) before the property is otherwise sold either through another agent or by the owner directly, and (2) before the listing expires by its terms or is revoked [*Civ. Code § 1086(f)(3)*].

Under an exclusive agency listing, the agent named in the listing is entitled to the agreed compensation or commission if the owner sells or exchanges the property through other brokers [*Civ. Code § 1086(f)(2)*]. However, if the owner sells or exchanges the property directly, and not through any other agent, the owner is not required to pay a commission to the agent holding the exclusive agency listing [*Civ. Code § 1086(f)(2)*].

Under the exclusive right to sell listing, the agent named in the listing will receive the agreed compensation if, during a specified time period, the property is sold to anyone, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(1)*].

Even when a listing agreement has expired, if a seller and a buyer have made a written agreement to pay the broker a commission, the seller would violate the implied covenant of good faith by entering into an agreement with the buyer on substantially the same terms as contemplated in the original agreement but without paying the originally agreed on commission to the broker [*Torelli v. J. P. Enterprises (1997) 52 Cal. App. 4th 1250, 1256, 61 Cal. Rptr. 2d 76]* .

The courts have held that the provisions giving a broker the unqualified right to be paid a commission when a person is procured who is ready, able, and willing to acquire the owner's property on the terms of the listing or on other unqualified terms acceptable to the owner will not be defeated by the failure of the parties to consummate the transaction and to have evidence of the transfer of title recorded [*Meyer v. Selggio (1947) 80 Cal. App. 2d 161, 164, 181 P.2d 690]* . The owner may not have to pay the broker a commission, however, if the right to a commission is expressly and unequivocally qualified by providing in the listing, or in a subsequent agreement containing other terms acceptable to the owner, that no commission will be earned until the transaction is consummated and the deed or other evidence of the transfer of title is recorded, and the parties fail to consummate the transaction through no fault of the owner [*Cotton v. Jewell Theatre Corp. (1956) 146 Cal. App. 2d 243, 247-248, 303 P.2d 593* ; *Dale v. Raines (1953) 115 Cal. App. 2d 309, 310-311, 252 P.2d 22]* .

[3] Amount of Compensation; Required Notice

The amount or rate of real estate commissions is not fixed by law; real estate commissions are set by each broker individually and may be negotiable between the seller and broker [*see Bus. & Prof. Code § 10147.5(a)*]. Further, any printed or form agreement that establishes, intends to establish, or alters the terms of any agreement that previously established a right to compensation to be paid to a real estate licensee for the sale of residential real property containing not more than four residential units, or for the sale of a mobilehome, must contain the following statement in not less than 10-point boldface type immediately preceding any provision relating to compensation: "Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker" [*Bus. & Prof. Code § 10147.5(a)*; *see Bus. & Prof. Code § 10147.5(d)* ("alters the terms of agreement previously establishing right to compensation" defined)]. Moreover, the amount or rate of compensation must not be printed in any such agreement [*Bus. & Prof. Code § 10147.5(b)*]. However, failure to comply with these requirements will not affect the validity of a transfer of title to real property [*Bus. & Prof. Code § 10147.5(c)*].

[4] Safety Clause

An exclusive right to sell listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination [*Civ. Code § 1086(f)(1)*]. "Negotiation" means that the efforts of the broker to interest a buyer must have proceeded to the point where the buyer would be considered a likely purchaser; whether negotiations have proceeded to that point is a question of fact [*Delbon v. Brazil (1955) 134 Cal. App. 2d 461, 464, 285 P.2d 710]* . If the listing requires that the owner pay the commission if the property is sold or conveyed to persons who had been "introduced" to the property by the broker during the listing period, "introduce" is commonly construed to mean that the broker must do something more than incidentally show the property, along with other properties, to a prospective buyer [*Korstad v. Hoffman (1963) 221 Cal. App. 2d Supp. 805, 809, 35 Cal. Rptr. 61* ; *see Torelli v. J. P. Enterprises (1997) 52 Cal. App. 4th 1250, 1256, 61 Cal. Rptr. 2d 76]* . Furthermore, there must be a causal connection between the broker's act and the sale [*Korstad v. Hoffman (1963) 221 Cal. App. 2d Supp. 805, 809-810, 35 Cal. Rptr. 61]* .

The statute governing the exclusive agency and open listings does not expressly authorize (or prohibit) the inclusion of a provision for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination [*see Civ. Code § 1086(f)*]. However, these listing agreements often include such a provision.

[5] Compensation for Other Services

An open listing may contain an agreement by the owner to pay the listing agent compensation in any amount, at any time, for specified services other than for selling the property or procuring or finding a buyer [*Civ. Code § 1089*]. It appears that the exclusive right to sell, exclusive agency, or probate listings may contain a similar clause, although there is no express statutory authorization for such a provision [*see Civ. Code § 1089*; *Korstad v. Hoffman (1963) 221 Cal.*

App. 2d Supp. 805, 808-810, 35 Cal. Rptr. 61] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.52

§ 21.52 Cooperation of Other Brokers in Multiple Listings

The listing broker may delegate his or her powers to another agent only under any of the following circumstances [*see Civ. Code § 2349*]:

- The act to be done is purely mechanical.
- The act is such that the listing broker cannot, but the cooperating broker can, lawfully perform it.
- It is the usage of the place to delegate the powers.
- The delegation is specifically authorized by the owner of the property.

If a cooperating broker is lawfully appointed to represent the owner of the property, that cooperating broker is the agent of the owner and represents the owner in the same manner as the listing broker [*see Civ. Code § 2351*]. If, however, the cooperating broker is not authorized to represent the owner of the property, no privity of contract and no fiduciary relationship is established between them, and the cooperating broker is considered solely and exclusively the agent of the listing broker [*see Civ. Code §§ 2022, 2350*; *Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939-941, 294 P.2d 192* ; *see Colbough v. Hartline (1994) 29 Cal. App. 4th 1516, 1523-1524, 35 Cal. Rptr. 2d 213* (seller's payment of full commission through escrow precluded cooperating broker's action against seller for cooperating broker's claimed share of commission when there was no written agreement between the brokers and listing broker was only authorized to cooperate with subagents, not to divide commission with cooperating brokers)]. Thus, if the listing broker seeks the cooperation of other brokers, the listing broker and the cooperating brokers should enter into a separate agreement regarding the division of the commission to be paid by the owner under the terms of the listing agreement [*see Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939-941, 294 P.2d 192]* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsAuthority to ActDelegation of AuthorityReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.53

§ 21.53 Sale or Exchange of Business With Real Property

In the sale or exchange of a business together with the real property, the Real Estate Commissioner is authorized to suspend or revoke a broker's license if the broker, without first having obtained a written authorization from the owner of the property to offer the property for sale or exchange, has a buyer sign an agreement providing that the buyer transact the purchase or exchange of the property through that broker or pay a compensation to the broker if the property is purchased or exchanged [*Bus. & Prof. Code § 10176(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-21 California Legal Forms--Transaction Guide § 21.54

§ 21.54 Deposit Money

A real estate broker is authorized to deposit trust funds into an interest-bearing account in a bank, savings and loan association, credit union, or industrial loan company whose accounts are insured by the Federal Deposit Insurance Corporation, if all of the following requirements are met [*Bus. & Prof. Code § 10145(d)*]:

- The deposit is requested by the owner of the trust funds or by the principals to a transaction from whom the broker has received trust funds.
- The account is in the broker's name as trustee for the specified beneficiary or principal.
- All of the deposited funds are covered by insurance provided by a federal governmental agency.
- The funds are kept separate, distinct, and apart from other funds.
- The broker discloses to the provider of funds and to any beneficiary whose identity is known to the broker at the time the account is established the nature of the account, how interest will be calculated and paid under various circumstances, whether service charges will be paid to the depository and by whom, and possible notice requirements or penalties for withdrawal of funds from the account.
- No interest earned on the funds inures directly or indirectly to the benefit of the broker or to any person licensed to the broker.
- In an executory sale, lease, or loan transaction in which the broker accepts funds in trust to be applied to the purchase, lease, or loan, the parties to the contract specify in the contract or by collateral written agreement the person to whom interest earned on the funds is to be paid or credited.

A broker may reject a request that funds be placed in an interest-bearing account [*Bus. & Prof. Code § 10145(e)*].

A real estate broker collecting payments or performing services for note owners or investors in connection with loans secured by a first lien on real property may deposit trust funds in an out-of-state depository institution insured by the Federal Deposit Insurance Corporation, if the note owner or investor is any one of a number of persons or institutions specified by statute [*see Bus. & Prof. Code § 10145(a)(2)*]. A real estate broker who deposits funds held in trust in such a manner must make available, in California, the books, records, and files pertaining to the trust accounts to the Commissioner or his or her representative, or pay the reasonable expenses for travel and lodging incurred by the Commissioner or his or her representative to conduct an examination at any out-of-state location [*Bus. & Prof. Code § 10145(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleEscrow



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9-21 California Legal Forms--Transaction Guide §§ 21.55-21.69

[Reserved]

§§ 21.55[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.70

§ 21.70 Requirements Governing Agreements

Every real estate broker must have a written agreement with each of his or her salespersons, whether the salesperson is licensed as a salesperson or as a broker under the broker-salesperson arrangement. The agreement must be dated and signed by the parties [*10 Cal. Code Reg. § 2726*]. Furthermore, the agreement must cover material aspects of the relationship between the parties, including supervision of licensed activities, duties, and compensation [*10 Cal. Code Reg. § 2726*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsReal Property LawBrokersBrokerage Agreements



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9-21 California Legal Forms--Transaction Guide § 21.71

§ 21.71 Characterization of Salesperson as Employee or Independent Contractor

[1] In General

A real estate broker and a real estate salesperson licensed under that broker may contract between themselves as independent contractors or as employer and employee, for purposes of their legal relationship with and obligations to each other [*Bus. & Prof. Code § 10032(b)*]. However, all obligations created under the Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*], all regulations issued by the Real Estate Commissioner relating to real estate salespersons, and all other obligations of brokers and real estate salespersons to members of the public will apply regardless of whether the real estate salesperson and the broker to whom the salesperson is licensed have characterized the salesperson as an employee or an independent contractor [*Bus. & Prof. Code § 10032(a)*]. Nevertheless, the correct characterization of a salesperson as an employee or as an independent contractor is important for purposes of tort liability, unemployment and workers' compensation insurance, and withholding and employment taxes [*see* [2]-[5], *below*].

In general, in determining whether an individual is an employee or an independent contractor, the most important factor is whether the employer has the right to control the manner and means of accomplishing the result desired [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 671, 39 Cal. Rptr. 849]* . Although this determination is a question of fact [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 672, 39 Cal. Rptr. 849]* , it may vary according to the legal context in which the decision is made [*see* [2]-[5], *below*]. Therefore, caution should be exercised in determining whether an individual is an employee or an independent contractor, and specialized counsel should be consulted, as needed.

[2] Tort Liability

In a broker-salesperson relationship, the broker is required by law to exercise reasonable supervision over the activities of his or her salespersons [*Bus. & Prof. Code § 10177(h)*]. This requirement, in the context of tort liability, led one court to decide that a salesperson, insofar as his or her relationship with the employing broker is concerned, cannot be classified as an independent contractor [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 207, 30 Cal. Rptr. 253]* . In *Gipson*, the court held that the determination that a salesperson does not qualify as an independent contractor for tort liability purposes is unaffected by the fact that, under California case law, a salesperson might qualify as an independent contractor for purposes of unemployment insurance [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d*

190, 207, 30 Cal. Rptr. 253 ; *see Cal. Emp. Stab. Com. v. Norins Realty Co. (1946) 29 Cal. 2d 419, 422, 175 P.2d 217* ; *California Emp. Stab. Com. v. Morris (1946) 28 Cal. 2d 812, 818-820, 172 P.2d 497]* . Moreover, in *Gipson*, the court stated that any contract that purports to change the broker-salesperson relationship to that of agent to independent contractor for purposes of tortious liability to third parties is invalid as being contrary to the provisions of the Real Estate Law [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 207, 30 Cal. Rptr. 253* ; *see* Stats. 1991, ch. 679, § 2 (*Bus. & Prof. Code § 10032* does not affect holding in *Gipson*)]. For further discussion of the characterization of an individual as an employee or an independent contractor in this context, see Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Agreements* .

[3] Unemployment Insurance and Workers' Compensation

Characterization of a real estate salesperson as an employee or an independent contractor for unemployment and Workers' Compensation insurance purposes is governed by the following statutes: *Unemp. Ins. Code §§ 650* (unemployment insurance), *13000-13054* (withholding taxes on wages); *Lab. Code §§ 3200-6149* (workers' compensation).

For purposes of unemployment insurance, a real estate salesperson is not considered an employee if (1) the salesperson is licensed under California law; (2) substantially all the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual; and (3) the services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes [*Unemp. Ins. Code § 650*].

The term "employee" under the Workers' Compensation Act includes every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed [*Lab. Code § 3351*], and every person rendering service for another is presumed to be an employee unless he qualifies as an independent contractor [*Lab. Code § 3357*]. The term "independent contractor," for workers' compensation purposes, is defined as any person who renders service for a specified recompense for a specified result, under the control of his or her principal as to the result of his or her work only and not as to the means by which the result is accomplished [*Lab. Code § 3353*]. Whether a particular salesperson is an employee or an independent contractor for purposes of workers' compensation coverage is a question of fact [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399* ; *Payne v. White House Properties, Inc. (1980) 112 Cal. App. 3d 465, 471, 169 Cal. Rptr. 373]* . For further discussion of the characterization of an individual as an employee or an independent contractor in this context, see Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Agreements* .

[4] Federal and State Withholding Taxes

For federal income tax withholding purposes, an individual is an employee if the individual is either a corporate officer or a common law employee [*I.R.C. § 3401(c)*; *Treas. Reg. § 31.3401(c)-1*]. An individual is a common law employee if the person for whom the services are performed has the right to control and direct the performance, not only as to the result to be accomplished, but also as to the details and means by which the result is accomplished [*Treas. Reg. § 31.3401(c)-1(b)*]. In doubtful cases, the facts will be examined to determine whether or not an employer-employee relationship exists [*Treas. Reg. § 31.3401(c)-1(d)*]; and if that relationship is found to exist, the designation of the employee as something else, such as an independent contractor, is immaterial [*Treas. Reg. § 31.3401(c)-1(e)*]. If the individual performing the services is not a common law employee, that individual is an independent contractor [*see* [1], *above*].

In distinguishing employees from independent contractors for state purposes, common law rules apply in determining

the existence of an employer-employee relationship [22 Cal. Code Reg. § 4304-1]. The right of the principal to control the manner and means of accomplishing a desired result is the most significant factor in making this determination [22 Cal. Code Reg. § 4304-1]. An employer-employee relationship exists if the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised [22 Cal. Code Reg. § 4304-1]. The principal's right to discharge at will is another strong indication that control exists [22 Cal. Code Reg. § 4304-1; *see* 22 Cal. Code Reg. § 4304-1 (other indications of right to control)]. For further discussion of the characterization of an individual as an employee or an independent contractor in this context, see Ch. 1E, *Taxation of Businesses* , Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Agreements* .

[5] Federal Employment Taxes

There are two types of federal unemployment taxes: Federal Insurance Contributions Act (FICA) [*I.R.C. §§ 3101-3128*], or social security and medicare taxes, and Federal Unemployment Tax Act (FUTA) [*I.R.C. §§ 3301-3311*], or federal employment taxes [*see I.R.C. §§ 3121(a)(1), (2), 3301, 3306(b)(1)*]. For both FICA and FUTA tax purposes, employees include corporate officers, common law employees, and statutory employees [*I.R.C. § 3121(d)*]. A common law employee is the same for FICA and FUTA tax purposes as for income tax withholding [*see I.R.C. § 3121(d)*; *see also* [4], *above*; *but see I.R.C. § 3121(d)(3)* (statutory employees)]. Thus, for purposes of the Federal Insurance Contributions Act [*I.R.C. §§ 3101-3128*] and the Federal Unemployment Tax Act [*I.R.C. §§ 3301-3311*], the distinction between an "employee" and an "independent contractor" depends on the right of control, and if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial [*see I.R.C. §§ 3121(d)(2), 3306(i)(1)*]. For further discussion of the characterization of an individual as an employee or an independent contractor in this context, see Ch. 1E, *Taxation of Businesses* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesEstimates & Withholding (IRC secs. 3101-3102, 3301-3310, 3401-3406, 6315, 6654-6655)DefinitionsTortsVicarious LiabilityAgentsGeneral OverviewTortsVicarious LiabilityIndependent ContractorsGeneral OverviewWorkers' Compensation & SSDICoverageEmployment RelationshipsContractors



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9-21 California Legal Forms--Transaction Guide §§ 21.72-21.99

[Reserved]

§§ 21.72[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.100

§ 21.100 Facts

NOTE:

Facts enumerated below relate exclusively to agreements with brokers and agents. For related listings of facts, see the practice guides in Ch. 22, ***Options to Purchase Real Property*** (option terms), Ch. 23, ***Real Property Sales Agreements*** (terms of sale of property), and Ch. 26, ***Real Property Escrows*** (escrow instructions for sale of the property).

[1] Listing and Finder's Agreements

1. Full names, addresses, and telephone numbers of:

    a. Broker.

    b. Salesperson.

    c. Finder.

    d. Grantor and grantee under deed.

    e. Spouse, if community property.

2. Agent's license status:

    a. Active.

    b. In good standing.

c. Type.

d. License identification number.

3. Agent's qualifications, experience, and specialties.

4. Names of parties with whom principal had prior agreement, if any.

NOTE:
If the principal had a prior agreement with another agent, counsel should obtain the names of parties with whom the former agent had negotiated so they may be specifically excluded from the present agency agreement.

5. Description of property to be purchased, sold, or exchanged.

a. Legal description of real property.

NOTE:
The legal description of the real property may be obtained from a deed or policy of title insurance.

b. Street address of real property.

c. Items of personal property to be retained by owner and removed prior to transfer.

d. Items of personal property to be included in the sale or exchange.

6. Description of business to be sold with real property:

a. Sole proprietorship.

b. Partnership.

c. Corporation.

d. Other type of business entity.

NOTE:
In the sale or exchange of a business together with the real property, the Real Estate Commissioner is authorized to suspend or revoke a broker's license if the broker, without first having obtained a written authorization from the owner of the property to offer the property for sale or exchange, has a buyer sign an agreement providing that the buyer transact the purchase or exchange of the property through that broker or pay a compensation to the broker if the property is purchased or exchanged [*Bus. & Prof. Code § 10176(j)*].

[2] Broker-Salesperson Agreements

1. Employing broker.

a. Full name.

b. Business address.

c. Telephone number.

d. Fictitious business name.

e. License identification number.

2. Salesperson (or broker acting in capacity of salesperson).

a. Full name.

b. Business address.

c. Telephone number.

d. License identification number.

3. Date when salesperson entered broker's employment or other effective date of change when appropriate.

4. Prior employment by other real estate brokers.

a. Broker under whom salesperson was last licensed.
(1) Full name.

(2) Business address.

(3) Telephone number.

(4) License identification number.

b. Date of termination of relationship.

5. Address where salesperson, or broker working as salesperson, will be employed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & Regulation



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§ 21.101 Documents

[1] Listing and Finder's Agreements

1. Deed of real property.

   NOTE:
   The deed may be used to obtain the legal description of the real property and to examine the seller's title to the property.

2. Any other recorded documents.

   NOTE:
   For example, other recorded documents might include a co-tenancy agreement that runs with the land.

3. Title reports.

4. Notes.

5. Appraisals.

6. Surveys.

7. Inspection reports.

8. Insurance policies.

9. Leases affecting real property.

10. If buyer or seller is corporation, certified copy of resolution of directors or shareholders approving sale or purchase of real property.

11. If buyer or seller is partnership, partnership agreement or partnership documents indicating authority or agreement to buy or sell real property.

12. Financial statements, tax returns, and other relevant documents of business being sold with real property, if any.

13. Broker's licenses.

[2] Broker-Salesperson Agreements

1. Agreements currently used by broker for salespersons working in similar capacity.

2. Commission schedule.

3. Office rules and regulations governing duties and responsibilities of salespersons.

4. Fictitious business name statement.

a. Broker.

b. Salesperson.

5. License certificate.

a. Broker.

b. Salesperson.

[3] Salesperson-Assistant Contracts

1. License Certificate.

a. Salesperson.

b. Assistant.

2. Office rules and regulations governing duties and responsibilities of salespersons.

3. Agreement between salesperson and broker.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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[Reserved]

§§ 21.102[Reserved]



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B. Preliminary Determinations

9-21 California Legal Forms--Transaction Guide § 21.110

§ 21.110 Transactional Determinations for Listing and Finder's Agreements

1. Determine necessity of retaining real estate agent.

NOTE:

Counsel should independently determine whether retaining an agent is consistent with the client's desires and intentions, taking into consideration the following: Whether the client owns the subject property or is a prospective purchaser of it; whether the client has the time, knowledge, and ability to complete each step of the transaction; and the complexity of the transaction.

a. Consider benefits of retaining agent:

(1) Expertise of professional, if sale or exchange is complex.

(2) Greater exposure of property or to properties, if sale, exchange, or purchase must be completed expeditiously.

NOTE:

Sales and exchanges can often be concluded much faster when the listing broker cooperates with those brokers in the area who are members of a multiple-listing service. See *§ 21.34* for discussion of multiple-listing services.

b. Determine whether conditions exist that may make it desirable for owner or purchaser to act as own agent, such as:

(1) Owner or purchaser knows of interest of prospective parties.

(2) Interested and prospective parties can be easily reached.

(3) Owner or purchaser has time, knowledge, and ability to complete each step of transaction.

(4) Property is desirable and subject to strong demand.

2. Determine type of agent best suited for client.

a. Finder.

NOTE:

"Finders" are persons who bring together others (including buyers, sellers, borrowers, and/or lenders) so that they may negotiate for and eventually enter into contracts [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65]* . A finder is not an agent; a finder is in business for himself or herself and owes no obligation to any principal [*Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 792, 164 Cal. Rptr. 647]* . Thus, no fiduciary relationship is created between a finder and his or her employer, and the finder may well be employed as a finder by both buyer and seller [*McConnell v. Cowan (1955) 44 Cal. 2d 805, 810-811, 285 P.2d 261]* .

A finder's only duty and power under the contract of employment is to find and introduce a prospective purchaser or a prospective seller to his or her employer. A finder does not have the power to negotiate the terms on which his or her employer or employers will deal [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* .

A finder need not be licensed as a real estate broker and is not required to have a real estate broker's license to enter into a finder's agreement with either a prospective purchaser or a prospective seller of property [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8, 106 Cal. Rptr. 761, 507 P.2d 65]* .

b. Broker.

NOTE:

In contrast to a finder, a broker employed as a broker does have authority to participate on behalf of his or her employer in negotiations for the purchase or sale by the employer of real property. A broker, in addition to performing the duties of a "middleman" (or finder), is employed to use discretionary authority for the benefit of his or her employer and to act for the employer's best interests [***see*** *Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* . Thus, a confidential or fiduciary relationship is created between a broker employed as a broker and his or her employer [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* . As a result, unlike a finder, a broker (employed as a broker) cannot represent both parties to a real estate transaction and still receive a commission from either party unless both parties knew of the dual representation and approved of it [*McConnell v. Cowan (1955) 44 Cal. 2d 805, 810, 285 P.2d 261]* . Finally, although a finder need not be licensed, a real estate broker employed as a broker must be licensed as such by the State of California [*Bus. & Prof. Code §§ 10130, 10136, 10137, 10151*; ***but see*** *Bus. & Prof. Code § 10133.1* (persons or entities exempt from licensing requirements); ***see*** *§§ 21.10, 21.12* (real estate brokers), *21.14* (finders)].

c. Salesperson.

NOTE:

A real estate salesperson is a natural person who, for compensation (or in expectation of compensation), is employed by a licensed real estate broker to do one or more of the acts that real estate brokers are authorized to do [*Bus. & Prof. Code § 10132*; ***see*** *Bus. & Prof. Code § 10017* ("salesman" means "salesperson"); ***see also*** *Bus. & Prof. Code §§ 10131-10131.4, 10131.6* (real estate broker's activities); § 21.10]. A salesperson is the broker's agent and cannot act independently of the broker [*Grand v. Griesinger (1958) 160 Cal. App. 2d 397, 406, 325 P.2d 475]* . Every broker who employs a salesperson has a duty to exercise reasonable supervision over the salesperson's activities; and, if the broker fails to exercise reasonable supervision, the broker's license may be revoked [*Bus. & Prof. Code § 10177(h)*]. A salesperson may not be employed by, or accept compensation from, any person other than the broker under whom the salesperson is at the time licensed [*Bus. & Prof. Code § 10137*].

3. Determine finder's, broker's, or salesperson's qualifications.

a. Experienced in various types of properties and areas.

b. Member of multiple-listing service, if applicable.

c. Active and good standing status of real estate license, if applicable.

(1) Individual broker.

(2) Corporation.

(3) Brokers in partnership.

4. Verify factual and legal capacity of parties to enter into listing or finder's agreement by determining the following:

a. Contractual capacity.

b. Marital status.

c. State of title of real property.

5. Determine if and how property should be bought, sold, exchanged, or otherwise disposed of, e.g.:

a. Conditional sale.

b. Sale and leaseback.

c. Lease with option to buy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate

LawAgency RelationshipsDisclosureGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawPurchase & SaleGeneral Overview



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9-21 California Legal Forms--Transaction Guide § 21.111

§ 21.111 Transactional Determinations for Broker-Salesperson Agreements

1. Determine whether salesperson to be covered by agreement is licensed as salesperson or as broker.

2. If licensed as broker, determine whether salesperson intends to operate under broker license or under salesperson license.

3. Determine nature of working relationship desired by parties.

a. Sharing of office space only.

b. Sharing of listings and office facilities.

c. Salesperson to work under prescribed routine, with regular hours devoted to employment.

d. Salesperson to have complete discretion in number of hours worked, and methods used in performing assignments.

e. Other working relationship, if applicable.

4. Determine method and amount of compensation to be paid to salesperson.

a. Straight percentage commission based on sales consummated by salesperson.

b. Commission of sales with drawing rights.

c. Commission with guaranteed minimum compensation.

d. Salary plus commission or bonus.

e. Other.

5. Determine whether any special duties or responsibilities will be required of salesperson, for example, in connection with employment of licensed or unlicensed assistant.

6. Determine parties' termination rights with respect to listings obtained during period of employment:

a. All rights of salesperson terminate with agreement.

b. Salesperson to receive share of commission on all sales made by him or her but not closed at time of termination, if subsequently closed.

c. Salesperson to receive share of commission of listings originated by him or her during employment.

7. Determine restrictions to be placed on salesperson's use, after termination of relationship, of confidential information regarding listings, loan commitments, and prospective customers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCompensationBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure AgreementsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.112

§ 21.112 Contractual Determinations for Listing and Finder's Agreements

[1] Real Property

1. Determine interest of owners.

2. Determine personal property to be included in sale of real property.

3. Determine personal property to be excluded in sale of real property.

4. Determine sales or exchange price, considering:

    a. Appraised value.

    b. Cost and expenses during escrow and other charges to clear title.

    c. Net desired by seller.

    d. If exchange, boot desired by owner.

5. Determine method of payment of price:

    a. Deposit.
    (1) How paid:
    (a) Cash.

    (b) Note.

(2) To whom paid:

(a) Agent.

(b) Owners.

(c) Escrow.

b. Balance.

(1) When paid.

(2) How paid:

(a) Cash.

(b) Note (owner to finance).

(c) Note (other than owner financing).

(d) Assumption of existing loan.

(3) To whom paid.

6. Determine manner of holding funds prior to close of escrow [*see Bus. & Prof. Code § 10145*; *10 Cal. Code Reg. §§ 2832*, *2832.1*]:

NOTE:
For discussion of the manner in which a real estate broker may hold the funds of others prior to the close of escrow [*Bus. & Prof. Code § 10145*], see *§ 21.54*.

a. In trust.

b. Delivered to owner.

c. Date and time funds must be in specified account.

7. Make following determinations relating to escrow [*see* Ch. 26, *Real Property Escrows*]:

a. Determine number of days from acceptance within which instructions are to be given to escrow agent.

b. Determine number of days from date instructions are delivered to escrow within which transaction must be closed.

8. Determine existence of liens and encumbrances to which person acquiring property must take subject.

9. Make following determinations relating to title insurance [*see* Ch. 26A, *Title Insurance*]:

a. Determine type of title insurance.

b. Determine who will pay premium.

10. Determine any liquidated damages in event of purchaser's default.

11. Determine prorations of:

a. Interest.

b. Insurance.

c. Taxes.

d. Assessments.

e. Rents.

f. Other.

12. Determine date property will be delivered to purchasers.

[2] Agency

1. Determine date agency is to commence and terminate.

2. Determine date agency agreement is to be signed.

3. Determine type of agency:

a. Exclusive right to sell listing [*see Civ. Code § 1086(f)(1)*; *see also §§ 21.32[1], 21.200*].

b. Exclusive agency listing [*see Civ. Code § 1086(f)(2)*; *see also §§ 21.32[2], 21.201*].

c. Open listing [*see Civ. Code § 1086(f)(3)*; *see also §§ 21.32[3], 21.202*].

d. Probate listing [*see Civ. Code § 1089.5*; *Prob. Code § 10150*; *see also § 21.32[4]*].

NOTE:
A contract between a personal representative of a decedent, or a conservator or guardian of an estate, and a licensed broker authorizing the broker to find a purchaser for property of the decedent's estate is governed by *Prob. Code § 10150* [*Civ. Code § 1089.5*]. The contract is also subject to the Civil Code provisions regulating listings [***see*** *Civ. Code §§ 1086-1090*] if the subject property falls within the definition of "property" set forth in the Civil Code [*Civ. Code § 1089.5*; ***see*** *Civ. Code § 1086(a)* ("property" defined); ***see also*** *§ 21.30* (definition of listing agreements)].

4. Determine amount of agent's compensation:

a. Percent of selling price.

b. Fixed sum.

c. Percent of certain amount of price and other percent on excess.

d. Everything above certain net amount to seller.

5. Determine method of payment of agent's compensation:

NOTE:
In some cases, the agent's compensation is regulated by statute [***see*** *Civ. Code §§ 1086, 1087, 1089*; ***see also*** *§ 21.51*].

a. When commission is earned and payable:

(1) On execution of sale or exchange agreement.

(2) On close of escrow.

(3) On procuring buyer, even if no agreement for sale or exchange is reached.

(4) If buyers default, percent of whatever damages are recovered by seller.

b. Set number of days from date agency agreement terminates within which agent is entitled to compensation.

c. How commission is to be paid.

d. Party to pay commission:

(1) Buyer.

(2) Owner.

6. Determine authority and duties of agent:

a. Whether agent may submit offers to principal or other party.

b. Whether agent may act [*see Civ. Code §§ 2079.13-2079.18*]:

(1) Exclusively as seller's agent.

(2) Exclusively as buyer's agent.

(3) As dual agent for seller and buyer [*see Civ. Code § 2079.13(d)* ("dual agent" defined)].

NOTE:
For discussion of rules relating to the disclosure of agency relationships, see *§§ 21.220[1]* and *21.221[1]*. For discussion of conflicts of interest between agent and principal, see *§ 21.20[3]*.

c. Whether agent is required to pursue any specific course of action with regard to procuring other interested parties.

d. Whether broker is required to submit listing to multiple-listing service, and, if so, determine:

(1) Time limit within which listing must be submitted.

(2) If, and extent to which, agent is authorized to delegate agent's powers to cooperating agent [*see Civ. Code §§ 2349-2351*].

e. Whether agent is to advertise and, if so, where, on what dates, or with what frequency.

7. Determine method of resolving disputes.

NOTE:
Arbitration is typically chosen. For discussion of arbitration and a sample arbitration provision that may be adapted for use in a listing agreement, see *§ 21.210*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyContracts LawTypes of ContractsExclusive Agency AgreementsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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9-21 California Legal Forms--Transaction Guide § 21.113

§ 21.113 Contractual Determinations for Broker-Salesperson and Salesperson-Assistant Agreements

1. Determine status of salesperson or assistant for purposes of California unemployment insurance coverage.

NOTE:

For purposes of unemployment insurance, a real estate salesperson is not considered an employee if (1) the salesperson is licensed under California law; (2) substantially all the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual; and (3) the services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed, and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes [*Unemp. Ins. Code § 650*; ***see*** *Bus. & Prof. Code § 10032(b)*].

2. Determine whether salesperson or assistant is covered by Workers' Compensation Act.

NOTE:

Characterization of a real estate salesperson as an employee or an independent contractor for purposes of workers' compensation is governed by the Workers' Compensation Act [*Lab. Code § 3200 et seq.*; ***see*** *Bus. & Prof. Code § 10032(b)*; ***see also*** *§ 21.71[3]*].

3. Determine status of salesperson or assistant for purposes of federal and state withholding and employment taxes [*see § 21.71[4]*].

4. Determine extent of potential tort liability for acts of salespersons within scope of employment [*see § 21.71[2]*].

NOTE:

A common area of tort liability involves salespersons' business use of automobiles. When a salesperson causes an automobile accident in which another person is injured, the employing broker may be liable for the salesperson's accident despite an attempt to create independent contractor status [***see*** *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 30 Cal. Rptr. 253]* .

5. Determine that relationship agreement complies with applicable federal and state maximum hour and minimum wage laws.

NOTE:

For a discussion of maximum hour and minimum wage laws, see Ch. 85, ***Employment Agreements*** .

6. Determine method of resolving disputes between parties.

NOTE:

Arbitration is typically chosen. For discussion of arbitration and sample arbitration provisions that may be adapted for use in a broker-salesperson agreement, see *§ 21.210*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawEmployment RelationshipsGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesEstimates & Withholding (IRC secs. 3101-3102, 3301-3310, 3401-3406, 6315, 6654-6655)General OverviewWorkers' Compensation & SSDICoverageEmployment RelationshipsContractorsWorkers' Compensation & SSDICoverageEmployment RelationshipsEmployees



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9-21 California Legal Forms--Transaction Guide §§ 21.114-21.119

[Reserved]

§§ 21.114[Reserved]



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C. Procedural Guide

9-21 California Legal Forms--Transaction Guide § 21.120

§ 21.120 Execution of Agreement

[1] Listing and Finder's Agreements

1. Have all parties execute agreement.

2. Deliver one fully executed copy of agreement to each party.

NOTE:
When a real estate licensee prepares or has prepared an agreement that employs the licensee to perform any acts for which the licensee is required to hold a license, or when a licensee secures the signature of any person to any contract pertaining to such services, the licensee must deliver a copy of the agreement to the person signing it at the time the signature is obtained [*Bus. & Prof. Code § 10142*].

3. Ascertain that all principals are fully informed regarding all compensation, commissions, and profits that real estate licensee will (or expects to) obtain as a result of transaction.

NOTE:
Any real estate licensee who takes or claims any secret or undisclosed compensation, commission, or profit is subject to investigation and discipline by the Department of Real Estate [*Bus. & Prof. Code § 10176(g)*]. Similarly, failure of a licensee to reveal to the licensee's employer the full amount of the licensee's compensation, commission, or profit prior to or coincident with the signing of an agreement is grounds for investigation and discipline [*Bus. & Prof. Code § 10176(g)*].

[2] Broker-Salesperson and Salesperson-Assistant Agreements

1. Have all parties execute agreement.

2. Deliver one fully executed copy of agreement to each party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawBrokersBrokerage Agreements



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9-21 California Legal Forms--Transaction Guide §§ 21.121-21.129

[Reserved]

§§ 21.121[Reserved]



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D. Drafting Guide

9-21 California Legal Forms--Transaction Guide § 21.130

§ 21.130 Drafting Considerations

[1] Listing and Finder's Agreements

NOTE:

The California Association of Realtors (CAR) prints and supplies its members with copyrighted standard listing forms. Many of the local real estate boards throughout California sell these forms to their members and to the public at a nominal charge. The members of multiple-listing services throughout California also have their own printed listing forms, and many real estate brokers have listing forms drafted for their own use. However, caution should be exercised in ascertaining that a printed form meets the specific needs of the parties.

1. Negotiate with client, as needed, form and content of listing or finder's agreement.

2. Review selected listing agreement [*see §§ 21.200-21.202*] or finder's agreement [*see §§ 21.240, 21.241*], and confirm that it:

a. Is consistent with desires and intentions of client.

b. Complies with following mandatory requirements [*see § 21.36*]:
(1) Is or will be signed by party to be charged [*Civ. Code § 1624*].

(2) Contains authorization or evidence of contract of employment [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *Seck v. Foulks (1972) 25 Cal. App. 3d 556, 566, 102 Cal. Rptr. 170* ; *see § 21.36[1]*].

(3) Is for definite term.

NOTE:

The Real Estate Commissioner may temporarily suspend or permanently revoke a real estate license if the licensee claims, demands, or receives compensation or a commission under any exclusive agreement authorizing or employing the licensee to perform the acts of a licensed real estate broker for compensation or commission if the agreement does not contain a definite, specified date of final and complete termination [*Bus. & Prof. Code § 10176(f)*; ***see*** *Bus. & Prof. Code § 10131* (licensed real estate broker's acts defined); ***see also*** *§ 21.10*].

[2] Broker-Salesperson and Salesperson-Assistant Agreements

1. Negotiate with client, as needed, form and content of agreement.

2. Review selected agreement [*see, e.g., § 21.230*], and confirm that it:

NOTE:

The California Association of Realtors (CAR) prints and supplies its members copyrighted standard agreement forms. Many of the local real estate boards throughout California sell such forms to their members and to the public at a nominal charge. The members of multiple-listing services throughout California also have their own printed listing forms, and many real estate brokers have forms drafted for their own use. However, caution should be exercised in ascertaining that a printed form meets the specific needs of the parties.

a. Properly characterizes working relationship desired by parties [*see § 21.71*]:

(1) Salesperson or assistant as employee [*see § 21.71*; *see also* Ch. 85, *Employment Agreements*].

(2) Salesperson or assistant as independent contractor [*see §§ 21.71, 21.230*; *see also* Ch. 84, *Independent Contractors*].

b. Is consistent with other desires and intentions of client.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawBrokersBrokerage Agreements



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9-21 California Legal Forms--Transaction Guide §§ 21.131-21.139

[Reserved]

§§ 21.131[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.140

§ 21.140 Completion of Sales or Purchase Transaction

1. Prepare or renew sales agreement [*see* Ch. 23, *Real Property Sales Agreements*] or exchange agreement [*see* Ch. 24, *Exchanges of Real Property*].

2. Prepare or renew financing and security instruments [*see* Ch. 25, *Real Estate Loans* ; Ch. 25A, *Security Instruments for Real Estate Financing*].

3. Procure escrow and title insurance [*see* Ch. 26, *Real Property Escrows* ; Ch. 26A, *Title Insurance*].

4. Prepare and record deed [*see* Ch. 27, *Deeds and Recording*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingGeneral OverviewReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleClosing & Settlement



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9-21 California Legal Forms--Transaction Guide § 21.141

§ 21.141 Broker's Duties

NOTE:

The agency disclosure requirements discussed below [***see*** *Civ. Code §§ 2079.12-2079.24*] apply only when the transaction involves (1) an estate of inheritance or life estate in property containing one to four dwelling units, (2) any leasehold in the foregoing type of property, or (3) a mobilehome [***see*** *Civ. Code § 2079.13(j)* ("real property" defined); ***see also*** *Civ. Code § 761(1), (2)* (estates in real property)].

1. Provide statutory "Disclosure Regarding Real Estate Relationship."

NOTE:

A "listing agent" [***see*** *Civ. Code § 2079.13(f)*] must provide the seller with this form [***see*** *Civ. Code § 2079.16*; ***see also*** *§ 21.220*] before entering into the listing agreement [*Civ. Code § 2079.14(a)*]. A "selling agent" must provide the same disclosure to the seller and/or buyer as soon as practicable before execution of an offer or a contract to purchase [*Civ. Code § 2079.14(b)*]. For detailed rules governing when, by whom, and to whom the statutory disclosure statement must be given, see *§ 21.220[1]*.

2. Provide statutory form confirming agency disclosure.

NOTE:

Real estate agents must actually disclose the relationship between them and their principals "as soon as practicable," and the disclosure must be confirmed in the sales agreement [***see*** Ch. 23, ***Real Property Sales Agreements***] or in a separate writing [***see*** *§ 21.221*] executed or acknowledged by the seller, the buyer, and the agent [*Civ. Code § 2079.14*]. For rules governing when and by whom the statutory confirmation of disclosure form must be executed or acknowledged, see *§ 21.221[1]*.

3. Have broker disclose to both buyer and seller all facts known to broker materially affecting value or desirability of the property that are not known to, or within diligent observation of, parties [Civ. Code § 2079.16; *see also § 21.22* (disclosure obligations of agent-principal)].

4. Make sure that deed of trust is recorded within one week after title to property is transferred [*Bus. & Prof. Code § 10141.5*].

5. Within one month after title is transferred, make sure all parties are informed in writing of selling price and amount of other consideration given for property [*Bus. & Prof. Code § 10141*].

6. Retain, for at least three years, copies of all documents executed or obtained by broker in connection with transaction [*Bus. & Prof. Code § 10148*].

7. As to any subdivided property, comply with subdivision laws with regard to furnishing purchasers with public reports and handling moneys paid on account of purchase price.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDisclosureGeneral OverviewReal Property LawBrokersGeneral OverviewReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleClosing & Settlement



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9-21 California Legal Forms--Transaction Guide § 21.142

§ 21.142 Changes Affecting Salespersons

1. If salesperson enters employ of broker:

a. Have broker notify Department of Real Estate of that fact, in writing, within five days [*see Bus. & Prof. Code § 10161.8(a)*; *10 Cal. Code Reg. § 2752*].

NOTE:
The notification must be given on the official Salesperson Change Application [***see*** *10 Cal. Code Reg. § 2752*; ***see also*** *§ 21.231*]. The form must be signed by the salesperson and the new and former brokers [***see*** *10 Cal. Code Reg. § 2752*].

b. Instruct salesperson to make following alterations to his or her license [*Bus. & Prof. Code § 10161.8(c), (d)*]:

(1) Mark out name of former broker and fomer business address on face of license;

(2) Type or write name of new employing broker and new main office address in ink on reverse side; and

(3) Date and initial foregoing alterations.

c. Have salesperson provide broker with salesperson's license certificate, and confirm that license will be retained at broker's main business office [*10 Cal. Code Reg. § 2753*].

2. If broker-salesperson relationship terminates, have terminating broker:

a. Immediately notify Department of Real Estate, in writing, of termination [*Bus. & Prof. Code §*

10161.8(b); *see 10 Cal. Code Reg. § 2752*; *see also § 21.231*]; and

NOTE:
The broker may use the official Salesperson Change Application [***see § 21.231***] to provide this notice, provided the notice is mailed to the Department of Real Estate not more than 10 days following the termination [*10 Cal. Code Reg. § 2752*].

b. Immediately return salesperson's license certificate to salesperson [*10 Cal. Code Reg. § 2753*].

3. Instruct salesperson to notify Department of Real Estate of any of following changes [*see § 21.231*]:

a. Change in mailing address.

b. Change in name.

c. Issuance of duplicate license.

d. Activation of license.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsTerminationsGeneral OverviewReal Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide § 21.143

§ 21.143 Changes Affecting Broker

NOTE:

The following discussion deals only with changes affecting the broker that must be reported by the broker on the Broker Change Application (for Broker Licensees) [***see** § 21.232*]. It does not include changes affecting salespersons that are reported to the Department of Real Estate on the Salesperson Change Application [***see** §§ 21.142, 21.231*].

1. Prepare official Broker Change Application (for Broker Licensees) to reflect any of following changes [*see § 21.232*]:

a. Change in main office address.

b. Change in mailing address.

c. Personal name change.

d. Addition or cancellation of fictitious business name.

e. Issuance of duplicate license.

2. Deliver application and fees, if appropriate, in person at any district office or mail to Department of Real Estate, P.O. Box 187004, Sacramento, CA 95818-7004 [*see § 21.232*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide §§ 21.144-21.199

[Reserved]

§§ 21.144[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 21 AGREEMENTS WITH REAL ESTATE BROKERS AND AGENTS
PART IV. FORMS

9- California Legal Forms--Transaction Guide

NOTE:

Use of standard form agreements has become increasingly popular, because having agreements drafted by an attorney can be time-consuming and costly. The California Association of Realtors (CAR) prints and supplies its members with copyrighted standard listing forms, and many of the local real estate boards in California sell these forms to their members and to the public for a nominal charge. The members of various multiple-listing services throughout California also have their own printed listing forms. Although brokers commonly use the foregoing agreements, some brokerage offices have listing forms drafted for their own use. The most commonly used standard form listing agreements are included in this Part [***see §§ 21.200-21.202***]. These forms are reproduced here for illustrative purposes with the permission of the California Association of Realtors. Endorsement is not implied. The printed forms should satisfy the requirements of all but the most complex transactions. Section 21.200[1] discusses alternative provisions that may be used, as needed.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 21 AGREEMENTS WITH REAL ESTATE BROKERS AND AGENTS
PART IV. FORMS
A. Listing Agreements
1. Complete (Standard) Agreements

9-21 California Legal Forms--Transaction Guide § 21.200

§ 21.200 Exclusive Authorization and Right to Sell [CAR Form RLA]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Residential Listing Agreement (Exclusive Authorization and Right to Sell) [CAR Form RLA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. Participation in a multiple-listing service may be required of the broker [*see* [2], P 6, *below*; *see also § 21.34*]. Under the exclusive listing agreement, the broker is entitled to a commission if, during the term of the agreement (1) the property is sold by anyone, or (2) the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(1)*]. However, if the owner of the property desires to retain the right to sell the property directly (but not through any other agent), without becoming obligated to pay his or her broker a commission, the owner should use an "exclusive agency" agreement rather than the CAR exclusive listing form [*see § 21.201*]. If the owner wants several brokers to attempt to sell the property, the "open listing" should be used, with the successful broker being the only one entitled to a commission [*see § 21.202*].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] "Right to Sell" Defined

A provision in a listing agreement that gives the broker the "right to sell" gives him or her the right to solicit offers and submit them to the owner for the owner's acceptance; it does not, per se, give the broker the right to bind the owner on

any contract of sale that could be specifically enforceable by the purchaser. If the owner intends to make a definite offer that need only be accepted by the purchaser, this intent must be clearly and definitely stated in the listing [*Lyne v. Bonner (1954) 129 Cal. App. 2d 743, 746, 277 P.2d 941* ; *Mason v. Mazel (1947) 82 Cal. App. 2d 769, 772-773, 187 P.2d 98]* . See *§ 21.211* for discussion of the agent's authority to solicit acceptance and the appropriate form.

[c] Writing Required

An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate or to procure, introduce, or find a purchaser or seller of real estate, for compensation, is invalid, unless the agreement, or some note or memorandum relating to the agreement, is in writing and signed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(4)*]. For discussion of the requirements necessary to satisfy the statute of frauds, see *§ 21.36[1]*.

[d] Modification of Agreement

A written listing agreement may be modified only by the following [*Civ. Code § 1698(a)-(c)*]: (1) a written agreement; (2) an oral agreement that has been fully executed by both parties; or (3) unless the agreement provides otherwise, an oral agreement that satisfies the statute of frauds, supported by new consideration. However, the statute does not preclude application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written agreement by an oral agreement, waiver of a provision of a written agreement, or oral independent collateral agreements, if appropriate [*Civ. Code § 1698(d)*].

[e] Termination of Agreement on Death of Principal

If the principal dies during the exclusive listing period, the exclusive right to sell terminates by operation of law and the executor who subsequently sells the property during the listing period will have no contractual liability under the agreement [*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614, 98 Cal. Rptr. 559]* . If the broker sells the property after the death of the principal but before learning of it, apparently the broker is still entitled to a commission [*see Civ. Code § 2356*]. For further discussion of the termination of a listing agreement, see *§ 21.50[3]*.

[f] Sale or Exchange of a Business Opportunity Property

In situations involving the sale or exchange of a business together with the real property, the Real Estate Commissioner is authorized to suspend or revoke a broker's license if the broker, without first having obtained from the owner of the property a written authorization to offer the property for sale or exchange, has a purchaser sign an agreement in which it is provided that the purchaser either transact the purchase or exchange of the property through the broker or pay a compensation to the broker if the property is purchased or exchanged [*Bus. & Prof. Code § 10176(j)*].

[g] Modification of Printed Forms

To the extent that specific terms of the agreement between the parties vary from the terms of the printed agreement (or that additional terms must be added to those set forth in the printed form), specific clauses or provisions can be drafted as riders to the printed form. However, riders should not be attached to the printed form if they are so numerous or so extensive as to make the resulting agreement ambiguous, unclear, contradictory, or cumbersome. If such a result appears likely, a new agreement should be drafted, using the form reproduced below as a reference for provisions that need not be varied.

[h] Specific Provisions

[i] Nature of Listing

Paragraph 1 of the following form sets forth the type of listing agreement as an "exclusive" right to sell [*see* [a], *above*].

[ii] Revocability of Agreement

Despite the fact that the listing agreement purports to be "irrevocable" [*see* [2], P 1, *below*], it is revocable at the will of the principal unless it is "coupled with an interest," that is, unless the agent has an interest in the property listed and not merely an expectation of a commission on the sale of the property [*Glazer v. Hanson (1929) 98 Cal. App. 53, 59, 276 P. 607]* .

Nonetheless, although the principal may have the power to revoke the listing agreement, this does not mean that he or she may exercise that power without incurring a liability to pay a commission or damages for breaching the agreement. The grant of an "irrevocable" right to sell the listed property for a specified period is commonly given in consideration for the broker's promise to use diligence in procuring a purchaser [*see* [2], P 8, *below*]. The agreement may further provide that the broker will receive a specified commission if the property is withdrawn from sale (that is, transferred, conveyed, leased, rented, or made unmarketable) by the seller before the expiration of the listing period [*see* [2], P 4(A)(3), *below*]. Thus, if the owner of the property exercises his or her power to revoke the listing agreement or to withdraw the property from sale prematurely, the broker is entitled to damages for a breach of the agreement or to the commission provided for in the agreement if he or she has been diligent in seeking a purchaser for the property, even though the property was sold by another broker, if the agreement provides for compensation to the original broker for any sale during the exclusive period [*Century 21 Butler Realty, Inc. v. Vasquez (1996) 41 Cal. App. 4th 888, 891* ; *see Baumgartner v. Meek (1954) 126 Cal. App. 2d 505, 509-511, 272 P.2d 552]* . If, on the other hand, the broker fails to use diligence to find a purchaser, there is a failure of consideration, which entitles the owner to revoke at will without liability to the broker despite the grant of an irrevocable agency [*Coleman v. Mora (1968) 263 Cal. App. 2d 137, 148-152, 69 Cal. Rptr. 166* ; *Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 601, 78 Cal. Rptr. 302]* . For further discussion of the broker's and seller's duties, see [x], *below*.

[iii] Expiration Date

An exclusive agreement authorizing a licensee to perform the acts of a real estate broker [*see Bus. & Prof. Code § 10131*] for compensation must contain a definite, specified date of termination [*Bus. & Prof. Code § 10176(f)*]. See [xv], *below*, for discussion of a provision making time of the essence and § 21.50 for further discussion of the duration of the listing.

Paragraph 1 of this form provides for the inclusion of the expiration date.

[iv] Description of Property

An exclusive listing agreement should contain a sufficient description to identify the property listed. Both a legal and common description are usually included. If the description of the property is defective because of a mistake, ambiguity, or uncertainty, the defect may be cured by resort to extrinsic facts and circumstances, and when the property can be sufficiently identified by that additional information, the agreement may be enforced [*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 864, 109 Cal. Rptr. 454]* .

In this form, the property description is to be set forth in Paragraph 1.

[v] Listing Price and Terms of Sale

Paragraph 3 of this form provides the listing price and the terms of sale. If the listing agreement gives the agent the authority to solicit offers, the terms of sale need not be as detailed as those appearing in other types of real estate agreements where offers are to be presented to others for their acceptance [*see* [b], *above*]. Even in agreements where the agent has the authority to solicit an acceptance, it is recommended that the terms of the sale be included in a separate

document (such as a sales agreement or escrow instructions) that is incorporated by reference into the body of the listing agreement, rather than in the body of the listing agreement itself. By physically dividing the terms of the transaction into two separate parts (the listing agreement and the sales agreement), the two sets of terms can be examined and considered independently to avoid confusion and the inadvertent omission of significant terms peculiar to either the listing or the sale. For a contract of sale or escrow instructions, see Ch. 23, *Real Property Sales Agreements* , or Ch. 26, *Real Property Escrows* .

[vi] Inclusion of Personal Property

This form includes provisions applicable to the specific items that are to be included in and excluded from the listing agreement [*see* [2], P 2, *below*]. Unless otherwise specified in the space provided, all fixtures and fittings that are attached to the property are included, and all personal property items are excluded, from the purchase price. A Property Checklist may be used if the list (or descriptions) of the items of property for either inclusion or exclusion is too extensive to fit in the allotted space. If a Checklist is used, it should be noted in the applicable space provided as an attached exhibit.

[vii] Multiple-Listing Service

Paragraph 6 of this form states that the listing will be provided to a specified multiple-listing service. See *§ 21.34* for discussion of multiple-listing services.

[viii] Required Disclosure of Amount of Compensation

The license of a real estate agent may be suspended or revoked if he or she fails to disclose to the principal, prior to or coincident with the signing of the agreement evidencing the meeting of the minds of the contracting parties, the full amount of the agent's compensation [*Bus. & Prof. Code § 10176(g)*].

Paragraph 4 of this form governs the broker's compensation. For further discussion of compensation, see *§ 21.51*.

[ix] Compensation Safety Clause

An exclusive right to sell listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination [*Civ. Code § 1086(f)(1)*]. This type of provision is commonly referred to as a safety clause and is contained in Paragraph 4(A)(2) of this form. For further discussion of safety clauses, see *§ 21.51[4]*.

[x] Broker's and Seller's Duties

Paragraph 8 of this form sets forth the obligation of the broker to exercise reasonable effort and due diligence to achieve the sale of the property. It also authorizes the broker to order reports and disclosures and advertise and market the property in any medium selected by the broker, including the Internet. In addition, Paragraph 8 sets forth the obligation of the seller to consider offers and to act in good faith to accomplish the sale of the property. Further, it sets forth in bold-faced letters the agreement of the seller to indemnify the broker from claims arising from incorrect information supplied by the seller or from any material facts the seller knows but fails to disclose.

[xi] Agency Relationships

Paragraph 10 of this form discusses further agency relationships, including provisions addressing an agent's possible dual agency with both the buyer and seller [*see* [2], P 10(A)-(E), *below*]. For discussion of these relationships and related duties of disclosure, see *§§ 21.220[1], 21.221[1]*. For a form disclosing that the agent is also acting as a principal in a particular real estate transaction, see *§ 21.222*.

[xii] Deposit Money

Paragraph 9 of this form contains the deposit money provision. See *§ 21.54* for rules relating to deposit money.

[xiii] Dispute Resolution

Paragraph 19 contains provisions for the mediation and arbitration of disputes and claims arising under the agreement and sets forth the matters specifically excluded from mediation and arbitration, such as unlawful detainer actions and the filing of a mechanics' lien. Paragraph 19(B) contains the statutory heading and notice that must accompany a provision for binding arbitration [*see Code Civ. Proc. § 1298*; *see also § 21.210*].

[xiv] Payment of Attorneys' Fees

Paragraph 15 of this form contains a provision entitling the prevailing party in any legal proceeding arising out of this agreement to reasonable attorneys' fees. In any action on a contract that contains a provision for attorneys' fees, the party prevailing on the contract will be entitled to reasonable attorneys' fees in addition to other costs, whether or not the provision specifically applies to that party [*Civ. Code § 1717(a)*]. With certain exceptions, the party prevailing on the contract will be the party who recovered a greater relief in the action on the contract, as determined by the court [*Civ. Code § 1717(b)(1)*; *see Civ. Code § 1717(b)(2)* (exceptions)]. For further discussion, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[xv] Time of the Essence

A party will normally be permitted to complete his or her performance within a "reasonable" time even though the performance is subsequent to the date specified in the contract [*Civ. Code § 1492*; *see Katemis v. Westerlind (1956) 142 Cal. App. 2d 799, 804-805, 299 P.2d 383]* . If time is made of the essence, however, a party who fails to perform on time will not be permitted to complete his or her performance and will not be entitled to restitution [*see Glock v. Howard & Wilson Colony Co. (1898) 123 Cal. 1, 13, 55 P. 713* ; *see also Amoruso v. Carley (1949) 93 Cal. App. 2d 422, 426-428, 209 P.2d 139]* , unless the provision making time of the essence has been waived [*see Gonzalez v. Hirose (1948) 33 Cal. 2d 213, 216-217, 200 P.2d 793]* , or unless injustice would result [*Barkis v. Scott (1949) 34 Cal. 2d 116, 118-124, 208 P.2d 367* ; *Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 332-333, 263 P.2d 655]* .

The form agreement reproduced below does not make time of the essence, although a time of the essence clause may be added to Paragraph 16 ("Additional Terms") of this form.

[2] FORM

Exclusive Authorization and Right to Sell [CAR Form RLA]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to CommissionsReal Property LawPurchase & SaleGeneral Overview



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9-21 California Legal Forms--Transaction Guide § 21.201

§ 21.201 Exclusive Agency Authorization and Right to Sell [CAR Form RLAA]

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Residential Listing Agreement (Agency Authorization and Right to Sell) [CAR Form RLAA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. Participation in a multiple-listing service may be required of the broker [*see* [2], P 6, *below*; *see also § 21.34*].

Under an "exclusive agency listing," as under an exclusive right to sell listing [*see § 21.200*], the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find a buyer for the property [*see Civ. Code § 1086(f)(1), (2)*]. The agent is entitled to the agreed compensation if during that time the property is sold by any other agent, or if the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*see Civ. Code § 1086(f)(1), (2)*]. However, unlike an exclusive right to sell listing, under an exclusive agency listing, the owner reserves the right to sell directly (but not through any other agent) and, in that event, without obligation to pay compensation to the agent [*Civ. Code § 1086(f)(2)*].

If the owner of the property does not desire to retain the right to sell the property without becoming obligated to pay his or her broker a commission, the owner should use an "exclusive right to sell listing agreement" rather than the CAR exclusive agency listing form [*see § 21.200[2]*]. If the owner wants several brokers to attempt to sell the property, the "open listing" should be used, with the successful broker being the only one entitled to a commission [*see § 21.202*].

For coverage of other clauses in this form, see *§ 21.200[1]*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in

packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORM

Exclusive Agency Authorization and Right to Sell [CAR Form RLAA]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyContracts LawTypes of ContractsExclusive Agency AgreementsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.202

§ 21.202 Non-Exclusive ("Open") Agency Authorization and Right to Sell [CAR Form RLAN]

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Residential Listing Agreement--"Open" (Non-Exclusive Authorization and Right to Sell) [CAR Form RLAN, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. Participation in a multiple-listing service may be required of the broker [*see* [2], P 6, *below*; *see also § 21.34*].

An "open listing" does not grant the listing agent any exclusive rights or priorities. Rather, the agent receives a commission only if the agent procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, before the property is otherwise sold either through another agent or by the owner directly and before the listing expires by its terms or is revoked [*Civ. Code § 1086(f)(3)*]. An open listing may also contain an agreement by the owner to pay the listing agent compensation in any amount, at any time, and for services other than for selling the property or finding a buyer [*Civ. Code § 1089*].

An open listing differs from the exclusive right to sell and the exclusive agency agreements in §§ 21.200 and 21.201, respectively. Under the exclusive listing agreement, the broker is entitled to a commission if the property is sold or withdrawn from the market during the term of the agreement, whether the sale results from the efforts of the broker personally, another broker, or the owner [*Civ. Code § 1086(f)(1)*]. If this type of agreement is desired, refer to § 21.200 for further discussion and the appropriate form. If the owner of the property desires to retain the right to sell the property directly (but not through any other agent), without becoming obligated to pay his or her broker a commission, the owner should use an "exclusive agency" agreement [*see § 21.201*].

For coverage of other provisions of this form, see *§ 21.200[1]*.

PRACTICE TIP:

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Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORM

Non-Exclusive ("Open") Agency Authorization and Right to Sell [CAR Form RLAN]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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9-21 California Legal Forms--Transaction Guide § 21.203

[Reserved]

§ 21.203[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.204

§ 21.204 Buyer Broker Agreement--Exclusive Right to Represent [CAR Form BBE]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Exclusive Buyer Broker Right to Represent Agreement [CAR Form BBE, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The representation agreement is irrevocable and exclusive [*see* [2], P 1, *below*]. CAR also publishes two other Buyer Broker Agreements: (1) a Non-Exclusive Right to Represent with compensation provisions for the broker [CAR Form BBNE; *see § 21.205*], and (2) a Non-Exclusive/Not for Compensation agreement [CAR Form BBNN; *see § 21.206*].

Under the exclusive authorization agreement, the broker is entitled to a commission if [*see* [2], P 3(B), *below*]:

- During the representation period, the buyer enters into an agreement to acquire any property as described in the agreement;

- Within a specified number of days after expiration of the representation period, the buyer enters into an agreement to acquire property that was introduced to the buyer by the broker or for which the broker acted on the buyer's behalf; or

- Within a specified number of days after expiration of the agreement, broker gives buyer a written notice of those properties that broker introduced to buyer, or for which broker acted on buyer's behalf.

If the buyer wants to retain the right to locate properties himself or herself or wants several brokers to attempt to locate property, the non-exclusive right to represent should be used, with the successful broker then being the only one entitled to a commission [*see § 21.205*].

PRACTICE TIP:

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[b] Purchase or Exchange of Business With Real Property

In situations involving the purchase or exchange of a business together with the real property, the Real Estate Commissioner is authorized to suspend or revoke a broker's license if the broker, without first having obtained a written authorization from the owner of the property concerned to offer the property for sale or exchange, has a purchaser sign an agreement in which it is provided that the purchaser will either transact the purchase or exchange of the property through the broker or will pay a compensation to the broker if the property is purchased or exchanged [*Bus. & Prof. Code § 10176(j)*].

[c] Disclosure of Broker's Interest in Property

A real estate license may be suspended or revoked if the licensee, while acting as an agent for a buyer of real property, fails to disclose to the buyer the nature and extent of any direct or indirect ownership interest of the licensee in the real property [*Bus. & Prof. Code § 10177(o)*]. The licensee must also disclose the direct or indirect ownership of the property by (1) a person related to the licensee by blood or marriage, (2) an entity in which the licensee has an ownership interest, or (3) any other person with whom the licensee occupies a special relationship [*Bus. & Prof. Code § 10177(o)*]. See *§ 21.213* for a form to be used to set forth any of the above disclosures.

[d] Broker's Duty to Inspect

The broker's fiduciary duty with regard to inspections may be much broader than the statutory duty to visually inspect the property imposed on brokers selling to a buyer with whom there is no contractual or fiduciary relationship [*Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 26* ; *see Civ. Code § 2079*]. For example, the broker's fiduciary duty may include the duty to inspect public records or permits. Paragraph 6 of the form defines the scope of the broker's duty with regard to inspections, and Paragraph 7(D) advises the buyer to read the buyer's Inspection Advisory attached to the agreement for a list of the items and other concerns that typically warrant inspections by the buyer or other professionals.

[e] Specific Provisions

[i] Nature of Agreement

Paragraph 1 of the form provides that the broker has the exclusive and irrevocable right to represent the buyer in acquiring real property. Despite the fact the agreement purports to be "irrevocable," it is revocable at the will of the principal unless it is "coupled with an interest" [*see Glazer v. Hanson (1929) 98 Cal. App. 53, 59, 276 P. 607]* . Nonetheless, although the buyer may have the power to revoke the authority of the broker, this does not mean that the buyer may exercise that power without incurring liability to pay a commission or damages for breaching the agreement [*see* [2], P 3, *below*].

[ii] Expiration Date

An exclusive agreement authorizing a licensee to perform the acts of a real estate broker [*see Bus. & Prof. Code § 10131*] for compensation must contain a definite, specified date of termination [*Bus. & Prof. Code § 10176(f)*]. Paragraph 1 of this form provides for the inclusion of the expiration date. See *§ 21.50* for further discussion of the

duration of the agreement.

[iii] Description of Property

Paragraph 4 of this form provides for a description of the type of acquisition, including the price range.

[iv] Broker Authorizations and Obligations

Paragraph 5(A) of this form states that the broker is authorized to locate and present properties to the buyer, present offers, and assist the buyer in negotiations for acceptance of those offers. The broker is also authorized to obtain a credit report on the buyer at the buyer's expense and to assist the buyer in other ways, including in the financing process and by providing the buyer with a list of professionals who perform inspection related services.

Paragraph 5(B) of this form sets forth the obligations of the broker with regard to the acquisition of a specific property, including an obligation to conduct a visual inspection of accessible areas for a residential property containing one-to-four dwelling units, an obligation to deliver or communicate disclosures, and an obligation to facilitate the escrow process. The scope of the broker's duties is described in Paragraph 6 of this form.

[v] Buyer Obligations

Paragraph 7 of this form sets forth the obligations of the buyer. The buyer must view or consider properties selected by the broker and act in good faith in the negotiation and completion of any contract entered into in furtherance of the agreement. Within five (or another number filled in by the parties) days from the date of execution, the buyer must provide the broker with personal and financial information to assure the broker of the buyer's ability to acquire the property. The buyer must notify the broker in writing of any material issue to the buyer, including buyer's requests for information on any particular interest of importance to the buyer. In addition, Paragraph 7(D) advises the buyer to read the buyer's Inspection Advisory attached to the agreement for a list of the items and other concerns that typically warrant inspections by the buyer or other professionals.

[vi] Agency Relationship

Under Paragraph 2(C)(1) of this form, if the buyer is shown property listed with the broker, the buyer consents to the broker becoming a dual agent for both the buyer and the seller with regard to those properties. If the broker is to act as the exclusive agent of the buyer, then the applicable box in Paragraph 2(C)(2) must be checked depending on whether the broker's firm lists or does not list properties for sale.

[vii] Disclosure of Compensation

The license of a real estate agent may be suspended or revoked if he or she fails to disclose to the principal, before or coincident with the signing of the agreement evidencing the meeting of the minds of the contracting parties, the full amount of the agent's compensation [*Bus. & Prof. Code § 10176(g)*]. Paragraph 3 of this form governs the broker's compensation and includes a "safety clause" [*see* [2], P 3(B)(2), *below*]. For further discussion of compensation, see *§ 21.51*.

[viii] Dispute Resolution

Paragraph 8 contains provisions for the mediation and arbitration of disputes and claims arising under the agreement. Paragraph 8(B) contains the statutory heading and notice that must accompany a provision for binding arbitration [*see Code Civ. Proc. § 1298*; *see also § 21.210*]. The matters specifically excluded from mediation and arbitration, such as unlawful detainer actions and the filing of a mechanics' lien, are set forth in Paragraph 8(B)(2).

[ix] Payment of Attorneys' Fees

Paragraph 11 of this form contains a provision entitling the prevailing party in any legal proceeding regarding the obligation to pay compensation under the agreement to reasonable attorneys' fees. However, if a party commences an action without first attempting to resolve the matter through mediation as provided in Paragraph 8(A), then the party is not entitled to recover attorneys' fees, even if they would otherwise be available to that party in the action. For further discussion of attorneys' fees, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM

Buyer Broker Agreement--Exclusive Right to Represent [CAR Form BBE]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Listing Agreements
1. Complete (Standard) Agreements

9-21 California Legal Forms--Transaction Guide § 21.205

§ 21.205 Buyer Broker Agreement--Non-Exclusive Right to Represent [CAR Form BBNE]

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Non-Exclusive Buyer Broker Right to Represent Agreement [CAR Form BBNE, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. CAR also publishes two other Buyer Broker Agreements: (1) an Exclusive Right to Represent with compensation provisions for the broker [CAR Form BBE; *see § 21.204*], and (2) a Non-Exclusive/Not for Compensation agreement [CAR Form BBNN; *see § 21.206*].

The non-exclusive authorization in this form does not grant the broker any exclusive rights or priorities. The broker receives a commission under this agreement only if [*see* [2], P 3(B), *below*]:

- A buyer enters into an agreement to acquire specified property on those terms or any other terms acceptable to the buyer during the term of the representation period if the property was introduced to the buyer by the broker or was one for which the broker acted on the buyer's behalf; or

- Within a specified number of days after expiration of the representation period, the buyer enters into an agreement to acquire the specified property that broker introduced to buyer, or for which broker acted on the buyer's behalf.

The non-exclusive authorization differs from the exclusive authorization under which the broker is entitled to a commission if the buyer acquires property during the term of the agreement, whether the acquisition results from the efforts of the broker personally, another broker, or the buyer. If this type of agreement is desired, see *§ 21.204*.

For coverage of other provisions of this form, see *§ 21.204[1][e]*.

PRACTICE TIP:
Getting in Touch With the California Association of Realtors. The California Association of

Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORM

Buyer Broker Agreement--Non-Exclusive Right to Represent [CAR Form BBNE]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions



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1. Complete (Standard) Agreements

9-21 California Legal Forms--Transaction Guide § 21.206

§ 21.206 Buyer Broker Representation Agreement [CAR Form BBNN]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard Non-Exclusive/Not for Compensation Buyer Broker Agreement [CAR Form BBNN, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The representation agreement is revocable and non-exclusive [*see* [2], P 1, *below*]. It contains neither a description of the property to be acquired nor a compensation component. It is intended to:

- Define the scope of the agency relationship [*see* [2], P 2, *below*];
- Clarify the broker's duty with regard to inspections [*see* [2], PP 3 and 4, *below*; *see also* [b], *below*]; and
- Add certainty about the time frame within which any legal action can be brought [*see* [2], P 6, *below*].

Unless the parties otherwise agree to a only single agency, under Paragraph 2(C)(1) of this form the buyer consents to the broker becoming a dual agent with regard to properties listed with the broker. Paragraph 6 provides that any legal action for breach of the agreement must be brought no more than two years from the expiration of the agreement or the date the cause of action arose, whichever occurs first. There is no provision for payment of attorneys' fees.

CAR also publishes two other Buyer Broker Agreements: (1) an Exclusive Right to Represent [CAR Form BBE; *see § 21.204*], and (2) a Non-Exclusive Right to Represent [CAR Form BBNE; *see § 21.205*]. Unlike the form in [2], *below*, both of these other agreements are irrevocable and include compensation provisions to the broker, dispute resolution provisions, and a provision providing for attorneys' fees.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Broker's Duty to Inspect

The broker's fiduciary duty with regard to inspections may be much broader than the statutory duty to visually inspect the property imposed on brokers selling to a buyer with whom there is no contractual or fiduciary relationship [*Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 26* ; *see Civ. Code § 2079*]. For example, the broker's fiduciary duty may include the duty to inspect public records or permits.

Paragraph 3(B) of this form sets forth the obligations of the broker with regard to the acquisition of a specific property, including an obligation to conduct a visual inspection of accessible areas for a residential property containing one-to-four dwelling units, an obligation to deliver or communicate disclosures, and an obligation to facilitate the escrow process. Paragraph 4 of the form defines the scope of the broker's duty with regard to inspections.

Paragraph 5(D) advises the buyer to read the buyer's Inspection Advisory attached to the agreement for a list of the items and other concerns that typically warrant inspections by the buyer or other professionals.

[2] FORM

Buyer Broker Representation Agreement [CAR Form BBNN]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary Responsibilities



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9-21 California Legal Forms--Transaction Guide §§ 21.207-21.209

[Reserved]

§§ 21.207[Reserved]



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9-21 California Legal Forms--Transaction Guide § 21.210

§ 21.210 Arbitration Provision and Related Statutory Notice

[1] Comment

[a] Use of Form

This form consists of (1) a binding arbitration provision and (2) a statutory heading and notice that must accompany such a provision. This arbitration provision and related statutory notice may be included in a listing, finder's, or employment agreement, as desired. Arbitration provisions are generally included in standard listing forms [*see, e.g., § 21.200[2]*, P 19]. This arbitration provision incorporates by reference the rules of the American Arbitration Association [*see Code Civ. Proc. § 1298 et seq.*]. For further discussion of arbitration and an alternative arbitration clause providing for use of the rules of the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*], see *§ 21.200[1][h][xiii], [2]*, and Ch. 23, *Real Property Sales Agreements* .

[b] Statutory Heading and Notice

If an agreement contains a provision for binding arbitration, the following requirements must be satisfied:

- The arbitration provision must be clearly titled "ARBITRATION OF DISPUTES" [*Code Civ. Proc. § 1298(b)*].

- The statutory arbitration notice must appear immediately following the arbitration provision and immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision [*Code Civ. Proc. § 1298(c)*; *see* [2], PP 2, 3, *below*].

- Both the statutory notice and the arbitration provision must be set out in capital letters if the contract is typed. If the contract is printed, the provision must be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and the notice must be set out in at least 10-point bold type or in contrasting red in at least 8-point bold type [*Code Civ. Proc. § 1298(b), (c)*].

For further discussion of these disclosure requirements, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Arbitration Provision and Related Statutory Notice

ARBITRATION OF DISPUTES

[*If contract is typed, set out following provision in capital letters. If contract is printed, set out following provision in (1) at least 8-point bold type, or (2) contrasting red in at least 8-point type (Code Civ. Proc. § 1298(b)).*]

Section _____. ANY CONTROVERSY OR CLAIM ARISING OUT OF THIS AGREEMENT OR A BREACH THEREOF SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION.

[*If contract is typed, set out following statutory notice in capital letters. If contract is printed, set out following notice in (1) at least 10-point bold type, or (2) contrasting red in at least 8-point bold type (Code Civ. Proc. § 1298(c)).*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

INITIALED BY [*title, e.g.,* OWNER]:_____
INITIALED BY [*title, e.g.,* AGENT]: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



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9-21 California Legal Forms--Transaction Guide § 21.211

§ 21.211 Authority of Broker to Solicit Buyer's Acceptance of Seller's Offer in Listing Agreement

[1] Comment

[a] Use of Form

This form is a clause authorizing a broker to accept, on the seller's behalf, an offer by a purchaser to buy the property that is the subject of the listing agreement. In other words, this clause should be used if the listing agreement is drafted so that (1) it constitutes an offer to sell, and (2) a purchaser's acceptance of the seller's offer would turn the listing agreement into the actual agreement of sale. Thus, this clause gives the broker the right to bind the owner on a contract of sale. Obviously, it should not be used unless the listing contains detailed provisions setting forth the terms and conditions of the sale. As a practial matter, it is rare for a broker to be given this type of authority to bind the owner on a contract of sale.

This form is intended to be incorporated by reference into the body of the listing agreement [*see §§ 21.200-21.202*]. If a standard form listing agreement is used, the provision incorporating the exhibit by reference can be set forth in the section of the agreement devoted to additional or miscellaneous terms [*see, e.g., § 21.200 [2]*, P 16]. Alternatively, this form may be modified to serve a clause that may be incorporated directly into the body of the listing agreement.

[b] Authority of Agent to Solicit Acceptance

A provision in a listing agreement that gives the broker the "right to sell" gives the broker the right to solicit offers and submit them to the owner for his or her acceptance; it does not, per se, give the broker the right to bind the owner on any contract of sale that could be specifically enforceable by the purchaser. If the owner intends to make a definite offer that need only be accepted by the purchaser, this intent must be clearly and definitely stated in the listing [*Lyne v. Bonner (1954) 129 Cal. App. 2d 743, 746, 277 P.2d 941* ; *Mason v. Mazel (1947) 82 Cal. App. 2d 769, 772-773, 187 P.2d 98]* .

[c] Buyer's Acceptance as Separate Agreement

If the listing agreement authorizes the agent to solicit the buyer's acceptance of the seller's offer, a form providing for that acceptance must be drafted [*see § 21.212*].

[2] FORM

Authority of Broker to Solicit Buyer's Acceptance of Seller's Offer in Listing Agreement

EXHIBIT _____

Broker's Authority to Solicit Acceptance From Buyer

The [*title of listing agreement*] ("Agreement") to which this Exhibit is attached, and which incorporates this Exhibit by reference, is more than a mere grant of authority to Broker to solicit offers from purchasers that are to be submitted to Seller for Seller's approval and acceptance. Instead, the Agreement constitutes an offer that may be accepted by any buyer without the need for the further approval of Seller or Broker. On such an acceptance by a buyer, Broker is expressly authorized and obligated to take the following steps:

(1) To bind Seller by contract according to the terms and conditions set forth in the Agreement;

(2) To record this Agreement;

(3) To prepare, execute, and deliver all necessary documents for the consummation of this sale [*or* exchange *or* sale or exchange] and the transfer of title, in the name of Seller; and

(4) To perform any other acts that may be required for the consummation of this sale [*or* exchange *or* sale or exchange], the transfer of title, and the recording of the deed or other evidence of the transfer of title.

Notwithstanding the above, unless a signed copy of the buyer's acceptance is delivered to Seller, either in person or by mail to the address of Seller set forth in the Agreement, within the period of the Agreement, or unless other terms are accepted by Seller and the buyers within the period of the Agreement, the Agreement and the offer to the buyers that it contains shall be canceled and of no further force and effect.

Executed on _____[*date*], at _____[*city*], [*county*], California.

SELLER
_____ [*signature*]
[*typed name and title*]

BROKER
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesFormation & NegotiationReal Property

LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleContracts of SaleFormalities



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9-21 California Legal Forms--Transaction Guide § 21.212

§ 21.212 Buyer's Acceptance of Seller's Offer in Listing Agreement

[1] Comment

[a] Use of Form

This form is a buyer's acceptance of a seller's offer (in a listing agreement) to sell real property. It may be used when (1) the listing agreement is intended to serve as a definite offer to sell, and (2) the acceptance by a purchaser of the seller's offer converts the listing agreement into the sales agreement. As a practial matter, it is rare for a broker to be given this type of authority to bind the owner on a contract of sale.

The buyer's acceptance may be incorporated into the body of the listing agreement [*see §§ 21.200-21.202*] or may be included in a separate document that is then incorporated by reference into the body of the listing agreement. This form uses the latter approach of placing the acceptance in a separate, attached exhibit. If a standard form listing agreement is used, the provision incorporating this form by reference can be set forth in the section of the agreement devoted to additional or miscellaneous terms [*see e.g., § 21.200[2]*, P 16].

Use of all capital letters will make the representations more prominent. If the agreement is to be printed, these provisions should be in larger type than the other provisions.

[b] Contract of Sale or Escrow Instructions as Separate Agreement

When a broker is authorized to solicit a buyer's acceptance of the seller's offer in the listing agreement, the parties must contemplate and draft the terms of the sale. The terms of sale may be incorporated into the body of the listing agreement or may be included in a separate document (such as a sales agreement or escrow instructions) that is then incorporated by reference into the body of the listing agreement. Because none of the listing agreements in this chapter [*see §§ 21.200-21.202*] include terms of sale, if this form is to be used, the attorney should incorporate the terms of sale in a separate, attached exhibit. When that approach is used, the terms of the entire transaction are physically divided into two important parts, the listing agreement and the sales agreement. The two sets of terms can be examined and

considered independently to avoid confusion and the inadvertent omission of significant terms peculiar to either the listing or the sale.

Since either a contract of sale or escrow instructions must be prepared when this form is used, refer to Ch. 23, *Real Property Sales Agreements*, or Ch. 26, *Real Property Escrows.*

[2] FORM

Buyer's Acceptance of Seller's Offer in Listing Agreement

EXHIBIT _____

ACCEPTANCE BY BUYER

I, THE UNDERSIGNED BUYER, AGREE TO PURCHASE THE PROPERTY DESCRIBED IN [*title of listing agreement*] ("AGREEMENT"), ON THE TERMS AND CONDITIONS SET FORTH IN EXHIBIT [*exhibit containing terms of sale*] TO THE AGREEMENT, FOR THE PURCHASE PRICE OF $_____.

BY SIGNING BELOW, I ACKNOWLEDGE THE FOLLOWING:

1. THAT I HAVE CAREFULLY READ THE FOREGOING AGREEMENT AND EXHIBIT _____ AND THAT I UNDERSTAND AND CONSENT TO ALL PROVISIONS OF BOTH THE AGREEMENT AND THAT EXHIBIT; AND

2. THAT I UNDERSTAND THAT A REAL ESTATE BROKER IS A PERSON QUALIFIED TO ADVISE ON REAL ESTATE AND THAT I HAVE THE RIGHT, AND HAVE BEEN GIVEN ALL OF THE OPPORTUNITY I NEEDED PRIOR TO SIGNING BELOW, TO OBTAIN INDEPENDENT ADVICE FROM ANY PERSON I WISHED WITH RESPECT TO ANY MATTERS CONCERNING THE ABOVE PROPERTY, ITS PURCHASE, AND THE AGREEMENT AND ITS EXHIBIT _____; AND

3. THAT I HAVE RECEIVED A COPY OF THE LISTING AGREEMENT AND ITS EXHIBIT _____.

Executed on _____[*date*], at _____[*city*], [*county*], California.

BUYER
_____ [*signature*]
[*typed name and title*]
[*street address*]
[*city, state, zip*]
[*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesFormation & NegotiationReal Property LawBrokersBrokerage AgreementsReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrow



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9-21 California Legal Forms--Transaction Guide § 21.213

§ 21.213 Disclosure to Buyer of Agent's Interest in Property

[1] Comment

[a] Use of Form

Disclosure to Buyer of Agent's Interest in Property

This form notifies a potential purchaser of real property that the purchaser's agent has an ownership interest in the property. It may be incorporated into the body of the exclusive buyer-broker agreement [*see § 21.204*] or may be included in a separate document that is then incorporated by reference into the body of such an agreement. This form uses the latter approach and consequently is intended to be a separate, attached exhibit to a buyer-broker agreement. If a standard form buyer-broker agreement is used, the provision incorporating this form by reference can be noted in the section of the agreement devoted to additional or miscellaneous terms or conditions [*see, e.g., § 21.204 [2]*, P 10].

[b] Disclosure of Agent's Interest in Property

A real estate license may be suspended or revoked if the licensee, while acting as an agent for a buyer of real property, fails to disclose to the buyer the nature and extent of any direct or indirect ownership interest of the licensee in the real property [*Bus. & Prof. Code § 10177(o)*]. The licensee must also disclose the direct or indirect ownership of the property by (1) a person related to the licensee by blood or marriage, (2) an entity in which the licensee has an ownership interest, or (3) any other person with whom the licensee occupies a special relationship [*Bus. & Prof. Code § 10177(o)*].

[2] FORM

Disclosure to Buyer of Agent's Interest in Property

DISCLOSURE OF AGENT'S INTEREST IN PROPERTY

This Disclosure is made _____[*date*] at _____[*city*], California, by _____[*name*], referred to in this Disclosure as "Agent," to _____[*name*] and _____[*name*], collectively referred to in this Disclosure as "Buyers." This Disclosure relates to that certain real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California ("the Property"), and more particularly described in Exhibit A, which is attached to this Disclosure and hereby incorporated by reference.

[*Choose one of the following paragraphs:*]

Agent hereby notifies Buyers that Agent has the following [direct *or* indirect] ownership interest in the Property: [*specify*].

[*OR*]

Agent hereby notifies Buyers of the following:

(1)

_____ [*Name of person or entity*] has the following

_____ [direct *or* indirect] ownership interest in the Property:

_____ [*specify*].

(2) Agent has the following

_____ [relationship with the above person:

_____ (*describe blood, marriage, or other special relationship between agent and above person*) *or* ownership interest in the above entity:

_____ (*specify*)].

[*Continue with the following:*]

By signing below, Buyers acknowledge receipt of a copy of this Disclosure.

Executed on _____[*date*], at _____[*city*], [*county*], California.

BUYERS
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

AGENT

_____ [*signature*]
[*typed name and title*]

EXHIBIT A

[*Attach legal description of the property.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDisclosureGeneral OverviewBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide §§ 21.214-21.219

[Reserved]

§§ 21.214[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Agency Relationship Disclosures

9-21 California Legal Forms--Transaction Guide § 21.220

§ 21.220 Disclosure Regarding Real Estate Agency Relationships [CAR Form AD]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard disclosure regarding real estate agency relationships [CAR Form AD, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The form sets forth the statutory disclosure regarding real estate agency relationships required by the Civil Code for every real estate transaction involving (1) an estate of inheritance or life estate in property containing one to four dwelling units, (2) any leasehold in the foregoing type of property, or (3) a mobilehome [*see Civ. Code § 2079.14*; *see also Civ. Code § 2079.13(j)* ("real property" defined); *Civ. Code § 761(1), (2)* (estates in real property defined)]. Real estate agents must give this form to buyers and sellers at the times and in the manner prescribed in *Civ. Code § 2079.14* (discussed *below*).

This form is complete as reproduced below; nothing need be filled in. It must be signed by the agent and the agent's associate licensee (if any), as well as by the buyer and/or seller, as appropriate [*Civ. Code § 2079.16*].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Purpose and Contents of Form

So that buyers and sellers of real estate will understand their relationships to their agents, this form (1) discloses the capacity in which the agent is acting in a particular transaction (exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller), and (2) enumerates the affirmative

obligations of the agent in each relationship [*see Civ. Code §§ 2079.14-2079.16*]. Further, *Civ. Code §§ 2079.13 through 2079.24*, excluding *Civ. Code § 2079.16* itself, must be and are printed on the back of this form, so that the actual statutes regarding agency disclosures are available to buyers and sellers at the time the form is provided [*see Civ. Code § 2079.16*].

[c] Timing

A "listing agent" [*see Civ. Code § 2079.13(f)*] must provide the form to the seller before the agent and the seller enter into a listing agreement [*Civ. Code § 2079.13(e)*; *see Civ. Code § 2079.14(e)* ("listing agreement" defined)]. A "selling agent" must provide the form to the seller "as soon as practicable" before presenting the seller with an offer to purchase, unless the selling agent is also the listing agent and has previously provided the seller with the disclosure form in his or her capacity as a listing agent [*Civ. Code § 2079.14(b)*]. If the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller (and acknowledgment of its receipt may be obtained from the seller) by the listing agent [*Civ. Code § 2079.14(c)*; *see* [e], *below* (acknowledgment of receipt)]. Alternatively, the selling agent may deliver the disclosure form to the seller by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required [*Civ. Code § 2079.14(c)*; *see* [e], *below* (acknowledgment of receipt)].

The selling agent must provide this form to the buyer "as soon as practicable" before execution of the buyer's offer to purchase [*Civ. Code § 2079.14(d)*]. However, if the offer to purchase is not prepared by the selling agent, it is sufficient if the selling agent presents the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer [*Civ. Code § 2079.14(d)*].

[d] Delegation of Duty to Associate Licensee

Listing agents, selling agents, and real estate brokers are responsible for providing the disclosure form to their clients [*Civ. Code § 2079.14*; *see Civ. Code § 2079.13(a)* ("agent" defined); *Bus. & Prof. Code § 10131* (real estate broker's acts defined); § 21.10; *see also Civ. Code §§ 2079.14, 2079.17* (disclosure duties of "selling" agents and "listing" agents)]. The statutes recognize, however, that a broker may delegate his or her duty to provide the form to an "associate licensee," who may be a real estate salesperson or another broker licensed under or working pursuant to a written contract with the broker [*see Civ. Code § 2079.13(b)* ("associate licensee" defined); *Bus. & Prof. Code §§ 10017* ("salesman" means "salesperson"), *10132* (real estate salesperson); *but see Civ. Code § 2079.13(o)* ("subagent" is not "associate licensee"); *see also § 21.11* (real estate salespersons)]. When the broker's duty has been delegated to an associate licensee, the broker still "bears responsibility" for his or her associate licensee; however, the associate licensee also has a duty to the client [*Civ. Code § 2079.13(b)*]. Thus, the statutes imposing the obligation to provide the statutory form provide that, when an associate licensee owes a duty to any principal (or to any buyer or seller who is not a principal) in a real property transaction, that duty is "equivalent" to the duty owed to that party by the broker for whom the associate licensee functions [*see Civ. Code § 2079.13(b)*].

[e] Acknowledgment of Receipt

The agents must obtain signed acknowledgments of receipt of the disclosure form from the seller or buyer, except (1) when the disclosure form is sent by certified mail to a seller by a selling agent who does not deal on a face-to-face basis with the seller [*see Civ. Code § 2079.14(c)*], or (2) when the seller or the buyer refuses to sign an acknowledgment of receipt of the disclosure form [*Civ. Code § 2079.14*; *see Civ. Code § 2079.15*]. If one of the parties refuses to acknowledge receipt of the form, the agent or associate licensee must set forth, sign, and date a written declaration of the facts of the refusal [*Civ. Code § 2079.15*].

[f] Other Disclosure Obligations

Nothing in the statutory rules requiring disclosure of agency relationships diminishes the duty of disclosure that sellers

and their agents owe to buyers, nor do the statutory rules relieve agents (or their associate licensees, subagents, or employees) from liability for their conduct otherwise imposed by law [*Civ. Code § 2079.24*]. For discussion of the duties of disclosure owed to buyers by sellers and their agents, see Ch. 23, *Real Property Sales Agreements* .

In *Huijers v. DeMarrais* [*Huijers v. DeMarrais (1992) 11 Cal. App. 4th 676, 685-686, 14 Cal. Rptr. 2d 232]* , the Court of Appeal held that a listing agreement was voidable by the sellers because the buyer's broker had failed to give them the statutory agency disclosure form set forth in *Civ. Code § 2079.16* before entering into the listing agreement with the sellers. Because *Civ. Code § 2079.24* provides that the statutes governing agency disclosures do not diminish the duty of disclosure owed by agents or relieve agents from liability, the statutes leave intact the common law remedies for failure to disclose [*Huijers v. DeMarrais (1992) 11 Cal. App. 4th 676, 685, 14 Cal. Rptr. 2d 232]* . Under the common law, if an agent breaches the duty to disclose dual representation, the remedy is that the seller is not liable for the commission, and may avoid the transaction [*Huijers v. DeMarrais (1992) 11 Cal. App. 4th 676, 685-686, 14 Cal. Rptr. 2d 232* (citing *McConnell v. Cowan (1955) 44 Cal. 2d 805, 809, 285 P.2d 261*)].

[g] Confirmation

The form must be followed by actual disclosure of the capacity in which the agent is acting in the particular transaction (that is, exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller) [*Civ. Code § 2079.17*]. Further, a confirmation of that relationship must be executed or acknowledged [*see Civ. Code § 2079.17*]. For such a confirmation form, see *§ 21.221*.

[2] FORM

Disclosure Regarding Real Estate Agency Relationships [CAR Form AD]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsAuthority to ActDelegation of AuthorityBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Agency Relationship Disclosures

9-21 California Legal Forms--Transaction Guide § 21.221

§ 21.221 Confirmation: Real Estate Agency Relationships [CAR Form AC-6]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard confirmation of a real estate agency relationship [CAR Form AC-6, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The form is prescribed by the Civil Code [*Civ. Code § 2079.17(c)*]. A confirmation form is required only when the transaction involves (1) an estate of inheritance or life estate in property containing one to four dwelling units, (2) any leasehold in the foregoing type of property, or (3) a mobilehome [*see Civ. Code § 2079.14*; *see also Civ. Code §§ 761(1), (2)* (estates in real property defined), *2079.13(j)*("real property" defined)].

For the statutory disclosure form regarding real estate agency relationships prescribed by *Civ. Code § 2079.16*, see *§ 21.220*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Required Disclosure and Confirmation

In addition to providing the required "Disclosure Regarding Real Estate Agency Relationships" [*Civ. Code § 2079.16*; *see § 21.220*], each agent has the further duty of disclosing whether he or she is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent representing both the buyer and the seller [*Civ. Code § 2079.17*; *see Civ. Code § 2079.13(d)* ("dual agent" defined)], and of confirming the disclosure in writing [*see Civ. Code § 2079.17*].

A "listing agent" [*see Civ. Code § 2079.13(f)*] may act in a particular transaction exclusively as the seller's agent or as a dual agent representing both the buyer and seller [*Civ. Code § 2079.17(b)*]. A "selling agent" [*see Civ. Code § 2079.13(n)*] may act in a particular transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller [*Civ. Code § 2079.17(a)*]. A listing agent may also act as a selling agent, and the combination of both of these functions in one agent does not, of itself, make the agent a dual agent [*Civ. Code § 2079.22*]. However, a listing agent (whether or not that agent is also a selling agent) may not act as an agent for the buyer only [*Civ. Code §§ 2079.17(b), 2079.18*].

The disclosure of the actual relationship between the agent and the seller or buyer may initially be made either orally or in writing, and must be made "as soon as practicable" [*Civ. Code § 2079.17(a), (b)*]. However, the disclosure must be followed by a written confirmation of the relationship (this form). Disclosure of the capacity in which the listing agent is acting must be confirmed either in a separate writing executed or acknowledged by the seller and the listing agent or in the sales agreement [*Civ. Code § 2079.17(b)*]. The capacity in which the selling agent is acting must be confirmed either in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent or in the sales agreement [*Civ. Code § 2079.17(a)*]. If the confirmation is in a writing separate from the contract, the separate writing must be executed or acknowledged before or coincident with the execution of the contract [*Civ. Code § 2079.17(a), (b)*].

[c] Duty to Provide Form

The duty to prepare and obtain signatures on this form falls on real estate brokers [*Civ. Code § 2079.14(a), (b)*; *see Civ. Code § 2079.13(a)* ("agent" defined); *Bus. & Prof. Code § 10131* (real estate broker); *see also Civ. Code §§ 2079.14, 2079.17* (disclosure duties of "selling" agents and "listing" agents)]. However, the statutes recognize that brokers may delegate their duties in this regard to "associate licensees" [*see Civ. Code § 2079.13(b)*]. For a discussion of the duties of brokers and associate licensees to provide the statutory forms, see *§ 21.220[1][d]*.

[2] FORM

Confirmation: Real Estate Agency Relationships [CAR Form AC-6]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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9-21 California Legal Forms--Transaction Guide § 21.222

§ 21.222 Disclosure to Principal That Broker Is Also a Principal

[1] Comment

[a] Use of Form

This form may be used by a real estate broker to advise his or her principal in a real estate transaction that the broker is also acting as a principal in the transaction and to reveal any compensation, commission, or profit that the broker will receive. The form will typically be used if a broker wishes to purchase for his or her own account property for which the broker has earlier obtained a listing, or if the broker wishes to obtain an option to purchase the listed property.

[b] Broker as Principal

Although the right of a real estate broker to act in the dual capacity of principal and agent has been upheld in California [*see Estate of Baldwin (1973) 34 Cal. App. 3d 596, 605-606, 110 Cal. Rptr. 189]* , the right is subject to stringent limitations.

A broker generally must conform to the same high standards of fidelity and loyalty to which trustees are held [*Civ. Code § 2322*; *Rattray v. Scudder (1946) 28 Cal. 2d 214, 222-223, 169 P.2d 371* ; *Smith v. Zak (1971) 20 Cal. App. 3d 785, 792, 98 Cal. Rptr. 242* ; *see Prob. Code § 16000 et seq.* (duties of trustees)]. A trustee has a broad duty not to take part in any transaction in which the trustee has an interest adverse to the beneficiary [*Prob. Code § 16004(a)*]. A transaction between a trustee and a beneficiary by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties [*Prob. Code § 16004(c)*].

At the minimum, a broker who undertakes to act both as agent and principal must make a full disclosure of all material facts concerning the transaction that might affect the other principal's decision [*Rattray v. Scudder (1946) 28 Cal. 2d 214, 223, 169 P.2d 371* ; *Smith v. Zak (1971) 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242]* . This duty of disclosure is in addition to the statutory duties of disclosure imposed by the Business and Professions Code [*see Bus. & Prof. Code § 10176(d), (g), (h)*; *see also § 21.22*]. Thus, a broker may not act for more than one party in a transaction without the knowledge or consent of all parties to the transaction [*Bus. & Prof. Code § 10176(d)*]. Similarly, a broker may not claim

or take any secret or undisclosed compensation, commission, or profit [*Bus. & Prof. Code § 10176(g)*]. Brokers must, before or coincident with the execution of the contracts between them and their principals, reveal to their principals the full amount of their compensation, commissions, and profits [*Bus. & Prof. Code § 10176(g)*]. A broker may not take an option to purchase except when the broker, before or coincident with the exercise of the option, reveals in writing to the principal the full amount of the broker's profit and obtains the written consent of the principal approving the amount of the profit [*Bus. & Prof. Code § 10176(h)*; *see* Ch. 22, *Options to Purchase Real Property*].

For further discussion of broker as principal, see *§ 21.22*.

[c] Date

The required disclosures of the broker to the principal should be made before the principal signs a contract obligating the principal to sell the property to the broker. Accordingly, the date on this form should be the same as, or earlier than, the date on the contract.

[d] Independent Counsel

A real estate agent who acts as a principal in a transaction in which he or she is employed as an agent should advise the principal that the principal has the right to obtain independent counsel regarding the propriety of the sale. The first alternative provision of Paragraph 6 of this form recites that the agent has advised the principal of that right, but that the principal has decided to proceed without independent counsel. The second alternative version of Paragraph 6 may be used to set forth the name of the advisor if the principal exercises the above right.

[e] Disclosure to Buyer of Agent's Interest in Property

A real estate license may be suspended or revoked if the licensee, while acting as an agent for a buyer of real property, fails to disclose to the buyer the nature and extent of any direct or indirect ownership interest of the licensee in the real property. The licensee must also disclose the direct or indirect ownership of the property by (1) a person related to the licensee by blood or marriage, (2) an entity in which the licensee has an ownership interest, or (3) any other person with whom the licensee occupies a special relationship [*Bus. & Prof. Code § 10177(o)*]. For further discussion and an illustrative disclosure, see *§ 21.213*.

[2] FORM

Disclosure to Principal That Broker Is Also a Principal

DISCLOSURE THAT AGENT IS PRINCIPAL

Listing Agreement

1. On _____[*date*], _____[*name of broker*], a licensed real estate broker ("Broker") and _____[*name of real property owner*] ("Owner") entered into [*title of listing agreement*]. A copy of that listing agreement, marked "Exhibit A," is attached to this Agreement and is hereby incorporated by reference. By the terms of Exhibit A, Owner employed Broker as Owner's agent to sell the real property described in Exhibit A ("the property").

Sales Agreement

2. _____[On _____ (*date other than date of this disclosure*) *or* After executing this

Disclosure], Broker and Owner will enter into a sales agreement. A copy of that sales agreement, marked "Exhibit B," is attached to this Disclosure and hereby incorporated by reference. By the terms of Exhibit B, Owner will agree to sell to Broker and Broker will agree to purchase from Owner the real property described in Exhibit B, which is the same real property described in Exhibit A.

Broker Acting as Principal

3. Broker has disclosed to Owner that Broker is acting as a principal in purchasing the property and is purchasing the property for Broker's own account and benefit.

Other Offers

[*If no other offers were received:*]

4. Broker, in Broker's capacity as agent for Owner, used _____[his *or* her] best efforts to obtain other offers to purchase the property, but obtained none.

[*OR, if other offers were received:*]

4. Broker, in Broker's capacity as agent for Owner, used _____[his *or* her] best efforts to obtain other offers to purchase the property. _____[The following offers, and no others, were received: _____ (*specify dates, names of parties, and essential terms of all offers*) *or* Copies of all of the other offers obtained by Broker are attached to this Disclosure as Exhibits _____-_____]. None of these offers was accepted by Owner.

[*CONTINUE*]

Compensation, Commissions, and Profits

5. Broker has disclosed to Owner that Broker expects to receive the following compensation, commissions, and other profits as a result of Broker's purchase of the property: [*specify exact amounts*]. Broker does not expect to receive any other compensation, commission, or other profits in connection with this transaction.

Independent Advice and Counsel

[*If owner has not obtained independent advice:*]

6. Broker has advised Owner that Owner has the right to obtain independent counsel concerning the sale of the property to Broker. Despite that advice, Owner has not sought independent counsel and has concluded that the sale and all material provisions of Exhibit B are fair and reasonable to Owner. Accordingly, Owner has decided to proceed with the sale of the real property to Broker without obtaining independent counsel.

[*OR, if owner has obtained independent advice:*]

6. Owner has received independent counsel regarding the sale of the property to Broker. Owner obtained that independent advice from [*name and title of independent adviser, e.g.:* Sally K. White, Attorney-at-Law]. Owner has carefully considered that independent counsel and satisfied [himself *or* herself] that the sale and all the material provisions of Exhibit B are fair and reasonable to Owner.

[*CONTINUE*]

Acknowledgment of Receipt

7. By signing below, Owner acknowledges receipt of a copy of this Disclosure.

Executed on _____[*date*], at _____[*city*], [*county*], California.

OWNER
_____ [*signature*]
[*typed name and title*]
BROKER
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-21 California Legal Forms--Transaction Guide §§ 21.223-21.229

[Reserved]

§§ 21.223[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
C. Salespersons and Assistants: Agreements and Reporting Forms

9-21 California Legal Forms--Transaction Guide § 21.230

§ 21.230 Independent Contractor Agreement (Between Broker and Associate-Licensee) [CAR Form ICA]

[1] Comment

[a] Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard independent contractor agreement between a broker and associate-licensee [CAR Form ICA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The form may be used when the salesperson is to be an independent contractor, not an employee. For discussion of the characterization of a real estate salesperson as an employee or independent contractor, see *§ 21.71*. For discussion of employees and independent contractors generally, see Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Agreements* .

If the salesperson is hired as an employee rather than an independent contractor, this form may serve as a checklist of the material aspects of the broker-salesperson relationship that should be covered by the employment agreement. For employment contracts generally, see Ch. 85, *Employment Agreements* .

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Contents and Execution

Every real estate broker must have a written agreement with each of his or her salespersons, whether licensed as a salesperson or as a broker. The agreement must be dated and signed by the parties and must cover the material aspects of the relationship between the parties, including supervision of licensed activities, duties, and compensation [*10 Cal. Code Reg. § 2726*].

[c] Salesperson's Assistant

Paragraph 12 of this form provides that the salesperson may make use of a personal assistant provided that the salesperson has a written agreement with the assistant that establishes the terms and responsibilities of the parties. Both the salesperson and the assistant must sign any agreement that the broker has established for these purposes. Unless otherwise agreed, a licensed assistant must supply a copy of his or her license to the broker. For a form of agreement between the salesperson and the assistant, see *§ 21.233*. For a three-party agreement between the broker, the salesperson, and the assistant, see *§ 21.234*.

[d] Modification of Commission Schedule

The clauses in Paragraph 8 of this form providing for sales commissions in accordance with a set schedule, which may not be varied except by written agreement of the parties, precludes oral modification of the commission arrangement. In *Beggerly v. Gbur* [*Beggerly v. Gbur (1980) 112 Cal. App. 3d 180, 169 Cal. Rptr. 166]* , the court held that such a clause expresses a clear intent to preclude oral modification within the meaning of *Civ. Code § 1698(c)*, and rejected the salesperson's allegation that a new oral agreement had been reached [*Beggerly v. Gbur (1980) 112 Cal. App. 3d 180, 187-190, 169 Cal. Rptr. 166* ; *see Civ. Code § 1698(c)* (written contract may be modified by oral agreement supported by new consideration unless written contract expressly provides otherwise)].

[2] FORM

Independent Contractor Agreement (Between Broker and Associate-Licensee) [CAR Form ICA]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCompensationReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions



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C. Salespersons and Assistants: Agreements and Reporting Forms

9-21 California Legal Forms--Transaction Guide § 21.231

§ 21.231 Salesperson Change Application [DRE Form 214]

[1] Comment

[a] Use of Form

This form is an official form prepared by the California Department of Real Estate for use by licensed real estate brokers and salespersons to notify the Real Estate Commissioner of certain changes affecting salespersons. These changes include changes in a salesperson's name, mailing address, or sponsoring broker.

Typically, licensed salespersons prepare and submit this form to the Department of Real Estate. However, real estate brokers also use the form to notify the Real Estate Commissioner of the commencement and termination of a salesperson's employment [*see Bus. & Prof. Code § 10161.8(a), (b)*; *10 Cal. Code Reg. § 2752*]. Whenever a real estate salesperson enters the employ of a real estate broker, the broker must notify the Real Estate Commissioner of that fact within five days [*10 Cal. Code Reg. § 2752*]. This notification must be given on this form and must be signed by the broker and the salesperson. The predecessor broker may use the form to give notice of termination of the broker-salesperson relationship if the form is mailed to the Real Estate Commissioner not more than 10 days following the termination [*10 Cal. Code Reg. § 2752*; *see Bus. & Prof. Code § 10161.8(b)* (notice of termination required)].

The Department of Real Estate maintains an informative website at www.dre.ca.gov. All DRE forms, including the form in [2], *below*, can be found at www.dre.ca.gov/frm_forms.html.

[b] Distinguished From Change Application (for Broker Licensees)

This form should be distinguished from the Department of Real Estate form entitled "Broker Change Application (for Broker Licensees)," to be used by a licensed real estate broker, including one working as a broker-salesperson, to notify the Real Estate Commissioner of certain changes affecting the broker. See *§ 21.232* for a copy of that form and related discussion.

[c] Changes on License of Salesperson

Whenever a salesperson licensee acquires a business address different from the address shown on his or her license, the licensee must (1) mark out the former address on the face of the license, (2) type or write in ink the new main office address on the reverse side, and (3) date and initial the changes [*Bus. & Prof. Code § 10161.8(c)*]. Whenever a real estate salesperson enters the employ of a new broker, the salesperson must (1) mark out the name of his or her former broker on the face of the license, (2) type or write the name of the new employing broker in ink on the reverse side, and (3) date and initial the changes [*Bus. & Prof. Code § 10161.8(d)*].

[2] FORM

Salesperson Change Application [DRE Form 214]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & Regulation

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9-21 California Legal Forms--Transaction Guide § 21.232

§ 21.232 Broker Change Application (for Broker Licensees) [DRE Form 204]

[1] Comment--Use of Form

This form is the California Department of Real Estate's official form to be used by a licensed real estate broker to notify the Real Estate Commissioner of any of the following:

- Change in main office address.
- Change in mailing address.
- Change in personal name.
- Addition or cancellation of fictitious business name.
- Issuance of a duplicate license.

As indicated on the form, this form is to be used by brokers only (including those working as broker-salespersons). Licensed salespersons, however, must use DRE Form 214 [*see § 21.231* for the official form and a discussion of changes involving salespersons]. Corporations and corporate officers must use DRE Form 204A.

The Department of Real Estate maintains an informative website at www.dre.ca.gov. All DRE forms, including the form in [2], *below*, can be found at www.dre.ca.gov/frm_forms.html.

[2] FORM

Broker Change Application (for Broker Licensees) [DRE Form 204]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-21 California Legal Forms--Transaction Guide § 21.233

§ 21.233 Personal Assistant Contract (Between Associate-Licensee and Licensed or Unlicensed Assistant) [CAR Form PAC]

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard personal assistant contract between an associate-licensee and a licensed or unlicensed assistant [CAR Form PAC, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The contract does all of the following:

- Specifies whether the assistant is an employee or independent contractor of the salesperson [*see* [2], P 3, *below*];
- Provides for compensation of the assistant [*see* [2], P 5, *below*]; and
- Specifies whether or not the assistant is covered by errors and omissions insurance obtained by the salesperson or broker [*see* [2], P 7, *below*].

Paragraph 4 allows the parties to specify the activities to be performed by the assistant.

This contract satisfies the requirement of the independent contractor agreement between the broker and salesperson that the salesperson may make use of a personal assistant only if the salesperson has a written agreement with the personal assistant that establishes the terms and responsibilities of the parties [*see § 21.230[2]*]. For a three-party agreement between the broker, salesperson, and assistant, see *§ 21.234*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORM

Personal Assistant Contract (Between Associate-Licensee and Licensed or Unlicensed Assistant) [CAR Form PAC]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActDelegation of AuthorityInsurance LawMalpractice InsuranceErrors & Omissions PoliciesReal Property LawBrokersDiscipline, Licensing & Regulation



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9-21 California Legal Forms--Transaction Guide § 21.234

§ 21.234 Broker/Associate-Licensee/Assistant Three-Party Agreement [CAR Form TPA]

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is a standard broker/associate-licensee/assistant three-party agreement [CAR Form TPA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. The agreement establishes the relationship between the parties. Paragraph 4 specifies that the assistant works for the salesperson under the terms of a separate written agreement between them, and that, except as specified, no other agreements exist between the broker and assistant for the performance of any acts specified in the agreement between the salesperson and the assistant. Paragraph 6 states that the salesperson is solely responsible for the assistant's compensation.

This agreement is designed to be used with the agreement between the salesperson and the assistant that establishes the terms and responsibilities of their relationship [*see § 21.233*] and the independent contractor agreement between the broker and salesperson [*see § 21.230*].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORM

Broker/Associate-Licensee/Assistant Three-Party Agreement [CAR Form TPA]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsReal Property LawBrokersDiscipline, Licensing & Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 21 AGREEMENTS WITH REAL ESTATE BROKERS AND AGENTS
PART IV. FORMS
C. Salespersons and Assistants: Agreements and Reporting Forms

9-21 California Legal Forms--Transaction Guide §§ 21.235-21.239

[Reserved]

§§ 21.235[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 21 AGREEMENTS WITH REAL ESTATE BROKERS AND AGENTS
PART IV. FORMS
D. Finder's Agreements

9-21 California Legal Forms--Transaction Guide § 21.240

§ 21.240 Finder-Buyer Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a "finder" and a person who wishes to purchase real estate. The finder's sole function under this agreement is to "find" and introduce prospective parties to a real estate transaction [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* .

Unlike a "listing agent" [*see Civ. Code § 2079.13(f)*], a "finder" need not be a real estate licensee [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8, 106 Cal. Rptr. 761, 507 P.2d 65]* . However, if a finder is to perform services other than merely finding and introducing the parties, the finder must be a real estate licensee, and an appropriate listing agreement should be executed by the finder (agent) and his or her principal [*see Tyrone v. Kelley (1973) 9 Cal. 3d 1, 12, 106 Cal. Rptr. 761, 507 P.2d 65]* .

For coverage of real estate listing agreements and standard agreement forms, see *§§ 21.200-21.206*. For a finder-seller agreement and related discussion, see *§ 21.241*.

[b] Finder's Authority

An unlicensed finder's authority under a finder's agreement must be very limited. The only power that can be given to, and the only duty that can be imposed on, an unlicensed finder is to find a potential buyer and introduce him or her to the seller [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* . Any power or duties given the finder beyond merely finding a buyer and introducing him or her to the seller will prevent the finder from being able to enforce the finder's agreement unless he or she is a licensed real estate broker [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 11-12, 106 Cal. Rptr. 761, 507 P.2d 65]* . The distinction between a finder and a broker is more fully discussed in *§ 21.14*.

[c] Writing Required

Finders' fee agreements, like brokers' commission agreements, are subject to the statute of frauds and, accordingly, must be in writing and signed by the party to be charged [*see Civ. Code § 1624*; *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

[d] Arbitration Provision

If a binding arbitration provision is desired, see *§ 21.210* for such a provision and its related statutory notice.

[2] FORM

Finder-Buyer Agreement

FINDER'S AGREEMENT

This Agreement is made on _____[*date*], at _____[*city*], California, by _____[*name of prospective buyer*] ("Buyer"), and _____[*name of finder*] ("Finder").

Recitals

A. Buyer desires to purchase [*specify type of real property*] in [*county*], California, for a purchase price not exceeding $_____; and

B. Finder desires to find and introduce to Buyer a person or persons from whom Buyer may purchase the above property.

THEREFORE, Buyer and Finder agree that Buyer shall pay Finder the fee specified in this Agreement if Finder, on or before _____[*date*], finds and introduces to Buyer a person or persons from whom Buyer purchases real property similar to that described in this Agreement and in accordance with the terms and conditions set forth in this Agreement; and the parties additionally agree as follows:

No Obligation to Purchase

1. Buyer shall be under no obligation to purchase property from any person or persons who may be introduced to Buyer by Finder during the term of this Agreement.

No Fee Unless Purchase

2. Buyer shall be under no obligation to pay any fee to Finder on account of this Agreement until and unless Buyer purchases real property similar to that described in this Agreement from a person or persons introduced to Buyer by Finder during the term of this Agreement.

Purchase Defined

3. The word "purchase" as used in this Agreement means the conveyance to Buyer of fee simple title to real property similar to that described in this Agreement. Further, there shall be no purchase of any property within the meaning of this Agreement until [*title company*] issues its California Land Title Association standard coverage title insurance

policy insuring that title to property purchased pursuant to this Agreement is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to the seller, subject only to those exceptions approved by Buyer in writing.

Finder's Fee

4. The fee to be paid by Buyer to Finder pursuant to this Agreement on the purchase by Buyer of property similar to that described in this Agreement from any person or persons introduced to Buyer during the term of this Agreement shall be a sum equal to _____ percent of the purchase price agreed to be paid by Buyer for the property.

The words "purchase price" and "price" as used in this Agreement mean the total principal amount agreed to be paid by Buyer to the seller of the property for the property and do not include any interest, taxes, insurance, escrow, title, loan, or inspection fees agreed to be paid by Buyer in connection with the purchase of the property.

Payment of Finder's Fee

5. The fee specified in Paragraph 4 of this Agreement shall be due and payable by Buyer to Finder at the time [*title company*] issues the California Land Title Association standard coverage title insurance policy described in Paragraph 3 of this Agreement.

Safety Clause

6. The fee specified in Paragraph 4 of this Agreement shall also be payable by Buyer to Finder in the event Buyer, within [*number*] days after expiration of the term of this Agreement, purchases any property similar to the property described in this Agreement from any person or persons introduced to Buyer by Finder during the term of this Agreement. The term of this Agreement shall expire at midnight Pacific Standard Time on _____[*date*].

Notices

7. (a) Unless otherwise provided in this Agreement, any notice, tender, or delivery to be given under this Agreement by either party to the other may be effected by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed communicated as of _____[mailing *or* actual receipt *or* _____ (*number*) hours from mailing]. Mailed notices shall be addressed as set forth below, but each party may change its address by written notice in accordance with this Paragraph.

(b) Notice to Buyer shall be addressed as follows: _____.

(c) Notice to Finder shall be addressed as follows: _____.

Entire Agreement

8. This Agreement constitutes the entire agreement between the parties relating to Finder's employment by Buyer. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the Buyer

and Finder.

Attorneys' Fees

9. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Executed on _____[*date*], at _____[*city*], [*county*], California.

BUYER
_____ [*signature*]
[*typed name and title*]
FINDER
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCompensationContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawBrokersDiscipline, Licensing & Regulation



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D. Finder's Agreements

9-21 California Legal Forms--Transaction Guide § 21.241

§ 21.241 Finder-Seller Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a finder and a prospective seller of real property. The finder's sole function under this agreement is to find and introduce prospective parties to a real estate transaction [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 669, 68 Cal. Rptr. 589, 441 P.2d 101]* .

Unlike a listing agent [*see Civ. Code § 2079.13(f)*], a finder need not be a real estate licensee [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8, 106 Cal. Rptr. 761, 507 P.2d 65]* . However, if a finder is to perform services other than merely finding and introducing the parties, the finder must be a real estate licensee, and an appropriate listing agreement should be executed by the finder (agent) and his or her principal [*see Tyrone v. Kelley (1973) 9 Cal. 3d 1, 12, 106 Cal. Rptr. 761, 507 P.2d 65]* .

For further discussion of the limitations on a finder's authority, see *§§ 21.14* and *21.240*. For a finder-buyer agreement, see *§ 21.240*. For real estate listing agreements, see *§§ 21.200-21.202*.

[b] Writing Required

Finder's fee agreements, like broker's commission agreements, are subject to the statute of frauds and, accordingly, must be in writing and signed by the party to be charged [*see Civ. Code § 1624*; *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1258, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

[c] Arbitration Provision

If a binding arbitration provision is desired, see *§ 21.210* for such a provision and its related statutory notice.

[2] FORM

Finder-Seller Agreement

FINDER'S AGREEMENT

This Agreement is made on _____[*date*], at _____[*city*], California, by [*owner*] ("Owner") and [*finder*] ("Finder").

Recitals

A. Owner is the owner in fee simple of certain real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California ("the property"), and more particularly described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference;

B. Owner desires to sell the property on the terms specified in this Agreement for a sales price of not less than $_____; and

C. Finder desires to find and introduce to Owner a person or persons ("buyer") who shall purchase the property from Owner on the terms specified in this Agreement, in exchange for the payment by Owner to Finder of a finder's fee as specified in this Agreement;

THEREFORE, the Owner and Finder agree as follows:

No Fee Unless Sale

1. Owner shall be under no obligation to pay any fee to Finder under this Agreement until the property is sold by Owner to a Buyer found and introduced to Owner during the term of this Agreement by Finder.

For purposes of this Agreement, no sale shall be complete until Owner has received all money and other things agreed to be given to Owner as consideration for the sale by Owner of the property. When part of the consideration agreed to be given to Owner for the sale by Owner of the property is a promissory note secured by a deed of trust on the property or the assumption by Buyer of an existing encumbrance on the property, this consideration shall be deemed received by Owner upon the recordation of the deed of trust or assumption agreement.

Term of Agreement

2. The term of this Agreement shall commence on the execution of this Agreement by Owner and Finder and shall end at midnight Pacific Standard Time on _____[*date*].

Finder's Fee

3. The fee to be paid by Owner to Finder pursuant to this Agreement on the sale by Owner of the property to a Buyer introduced to Owner during the term of this Agreement by Finder shall be a sum equal to _____ percent of the purchase price agreed to be paid by Buyer for the property.

The words "purchase price" and "price" as used in this Agreement mean the total principal amount agreed to be paid by Buyer for the property, excluding any interest, taxes, insurance, escrow, title, loan, or inspection fees or charges agreed

to be paid by Buyer in connection with the purchase of the property.

Payment of Finder's Fee

4. The fee specified in Paragraph 3 of this Agreement shall be due and payable by Owner to Finder as soon as Owner has received, or the escrow holder has mailed to Owner, all money and other things agreed to be given to Owner as consideration for the sale of the property to a Buyer introduced to Owner by Finder during the term of this Agreement.

Safety Clause

5. The fee specified in Paragraph 3 of this Agreement shall also be payable by Owner to Finder, in the manner prescribed by Paragraph 4 of this Agreement, should Owner, within [*number*] days after expiration of the term of this Agreement, sell the property to any Buyer introduced to Owner by Finder during the term of this Agreement.

No Agency

6. Finder is not, and shall not be deemed in any way, to be Owner's agent, and Owner shall not be bound by or liable for any representations concerning the property or the sale of the property made by Finder. However, Owner shall indemnify and hold Finder harmless from any claims, loss, demands, litigation, or judgments resulting from (1) any misinformation concerning the property supplied to Finder by Owner, or (2) the concealment of any material fact concerning the property by Owner.

Equal Housing Opportunity

7. The property is being offered for sale by Owner to any person willing to buy it for a sale price of not less than $_____, on terms acceptable to Owner, in compliance with federal, state, and local anti-discrimination laws.

Notices

8. (a) Unless otherwise provided in this Agreement, any notice, tender, or delivery to be given under this Agreement by either party to the other may be effected by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed communicated as of _____[mailing *or* actual receipt *or* _____ (*number*) hours from mailing]. Mailed notices shall be addressed as set forth below, but each party may change its address by written notice in accordance with this paragraph.

(b) Notice to Buyer shall be addressed as follows: _____.

(c) Notice to Finder shall be addressed as follows: _____.

Entire Agreement

9. This instrument constitutes the entire agreement between the parties relating to Finder's employment by Buyer. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and

effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Buyer and Finder.

Attorneys' Fees

10. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Executed on _____[*date*], at _____[*city*], [*county*], California.

OWNER
_____ [*signature*]
[*typed name and title*]
FINDER
_____ [*signature*]
[*typed name and title*]

EXHIBIT A

[*Attach legal description of property.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCompensationContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawBrokersDiscipline, Licensing & Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY

9-22 California Legal Forms--Transaction Guide 22.syn

§ 22.syn Synopsis to Chapter 22: OPTIONS TO PURCHASE REAL PROPERTY

§ 22.01 California Statutes

[1] Civil Code

[2] Government Code

[3] Probate Code

§ 22.02 Federal Sources

[1] Statutes

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§§ 22.03-22.04 [Reserved]

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[1] Matthew Bender Sources

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§§ 22.08-22.09 [Reserved]

§ 22.10 Definitions

§ 22.11 Distinguished From Sales Contract

§ 22.12 Distinguished From Preemptive Right

§ 22.13 Statute of Frauds

§§ 22.14-22.19 [Reserved]

§ 22.20 Practical Uses of Options for Both Optionee and Optionor

[1] Avoiding Necessity of Present Commitment

[2] Avoiding Conditions and Contingencies in the Sales Agreement

§ 22.21 Benefit of Option to Optionee

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[2] Land Development

[3] Prompting Optionor to Perform and Cooperate

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[1] Retaining Initial Payment

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[4] Avoiding Imputed Interest

§§ 22.23-22.29 [Reserved]

§ 22.30 Duration of Option

[1] Setting Expiration Date

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[3] Common Methods of Fixing Duration

[4] Rule Against Perpetuities

[5] Automatic Termination of Option and Execution of Releasing Documents

§ 22.31 Consideration

[1] Role of Consideration

[2] Sufficiency and Form of Consideration

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§ 22.32 Exercise of Option

[1] In General

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§ 22.33 Assignment of Option Agreement

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§ 22.40 Tax Consequences of Option Consideration

[1] To Optionor

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§ 22.41 Tax Considerations Relating to Successive Options

§ 22.42 Tax Consequences on Sale of Option

§ 22.43 Tax Consequences on Expiration of Option

§§ 22.44-22.49 [Reserved]

§ 22.50 Recordation and Acknowledgment

§ 22.51 Real Estate Transfer Disclosure Statement

§ 22.52 Remedies

[1] Specific Performance

[2] Damages for Breach

[3] Declaratory Relief

[4] Rescission

[5] Optionor's Remedies

§§ 22.53-22.99 [Reserved]

§ 22.100 Facts

Scope

§ 22.101 Documents

Scope

§§ 22.102-22.109 [Reserved]

§ 22.110 Transactional Determinations

Scope

§ 22.111 Contractual Determinations--Option Agreements Generally

Scope

§ 22.112 Contractual Determinations--Successive Options

Scope

§§ 22.113-22.119 [Reserved]

§ 22.120 Execution and Recordation

Scope

§§ 22.121-22.129 [Reserved]

§ 22.130 Drafting Considerations

Scope

§§ 22.131-22.139 [Reserved]

§ 22.140 Extension of Option Period

Scope

§ 22.141 Exercise of Option

Scope

§ 22.142 Assignment of Option

Scope

§ 22.143 Quitclaim of Option Rights

Scope

§§ 22.144-22.199 [Reserved]

§ 22.200 Option to Purchase

[1] Comment

[a] Use of Form

[b] Designation of Parties and Date of Execution

[c] Transactional Relationship of Parties

[d] Contract of Sale or Escrow Instructions as Exhibit to Option Agreement

[2] FORM

Option to Purchase

§ 22.201 Option to Repurchase

[1] Comment--Use of Form

[2] FORM

Option to Repurchase

§ 22.202 Successive Option Agreement

[1] Comment

[a] Use of Form

[b] Subdivision Regulation Considerations

[c] Specific Provisions

[i] Recital

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[iii] Setting Parcel Prices and Option Consideration

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[2] FORM

Successive Option Agreement

§ 22.203 Abstract of Option Agreement

[1] Comment--Use of Form

[2] FORM

Abstract of Option Agreement

§§ 22.204-22.209 [Reserved]

§ 22.210 Option Period--Right to Extend

[1] Comment

[a] Use of Form

[b] Purpose of Right to Extend

[c] Legal Role of Consideration

[2] FORM

Option Period--Right to Extend

§§ 22.211-22.219 [Reserved]

§ 22.220 Preliminary Title Report as Consideration

[1] Comment

[a] Use of Form

[b] Services as Consideration

[2] FORM

Preliminary Title Report as Consideration

§ 22.221 Analysis of Property as Consideration

[1] Comment--Use of Form

[2] FORM

Analysis of Property as Consideration

§§ 22.222-22.229 [Reserved]

§ 22.230 Applicability of Warranties

[1] Comment

[a] Use of Form

[b] Enforcement of Warranties, Covenants, and Representations

[2] FORM

Applicability of Warranties

§ 22.231 Rights of Parties In Event of Condemnation

[1] Comment

[a] Use of Form

[b] Optionee's Right to Compensation

[2] FORM

Rights of Parties In Event of Condemnation

§ 22.232 Protection of Optionor From Mechanics' Liens

[1] Comment

[a] Use of Form

[b] Notice of Nonresponsibility

[2] FORM

Protection of Optionor From Mechanics' Liens

§ 22.233 Status of Growing Crops on Exercise of Option

[1] Comment--Use of Form

[2] FORM

Status of Growing Crops on Exercise of Option

§ 22.234 Prohibition Against Recordation

[1] Comment

[a] Use of Form

[b] Risks to Optionee

[2] FORM

Prohibition Against Recordation

§ 22.235 Automatic Termination and Prior Execution of Quitclaim Deed

[1] Comment--Use of Form

[2] FORM

Automatic Termination and Prior Execution of Quitclaim Deed

§ 22.236 Risk of Loss

[1] Comment--Use of Form

[2] FORM

Risk of Loss

§§ 22.237-22.249 [Reserved]

§ 22.250 Notice of Exercise of Right to Extend Option Period

[1] Comment

[a] Use of Form

[b] Recording

[c] Tax Consequences of Extension

[2] FORM

Notice of Exercise of Right to Extend Option Period

§ 22.251 Extension of Option Agreement

[1] Comment

[a] Use of Form

[b] Procedure for Execution and Recordation

[2] FORM

Extension of Option Agreement

§ 22.252 Notice of Exercise of Option

[1] Comment--Use of Form

[2] FORM

Notice of Exercise of Option

§ 22.253 Assignment of Option

[1] Comment

[a] Use of Form

[b] Tax Considerations

[2] FORM

Assignment of Option

§ 22.254 Quitclaim of Option Rights

[1] Comment--Use of Form

[2] FORM

Quitclaim of Option Rights



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY

9-22 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter deals with options to purchase real property. It covers transactional, contractual, tax, and drafting considerations and includes discussions concerning the formal requirements for executing and recording options.

The chapter also discusses requirements for extending the option period, exercising and assigning the option, and quitclaiming option rights. A general form of option to purchase, an option to repurchase, a successive option, and an abstract of option constitute the option agreements contained in this chapter. Various option provisions applicable to specific transactions are also included. Related forms set forth in the chapter include a notice of exercise of the right to extend an option period, an extension of an option agreement, a notice of exercise of an option, an assignment of an option, and a quitclaim of option rights.

Related topics not discussed in detail in this chapter are agreements to sell real property and exchanges of real property. These topics are discussed in Chapters 23, *Real Property Sales Agreements* , and 24, *Real Property Exchanges* .



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A. Primary Sources

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§ 22.01 California Statutes

[1] Civil Code

Constructive notice period of recorded option agreement. *Civ. Code §§ 884.010, 884.020.*

Transferability of all property. *Civ. Code § 1044.*

Change of name of owner. *Civ. Code § 1096.*

Disclosures upon transfer of residential property. *Civ. Code §§ 1102-1102.15.*

Recording in county where property is located. *Civ. Code § 1169.*

Acknowledgment of execution. *Civ. Code §§ 1180-1193.*

Revocation of option through lapse of time. *Civ. Code § 1587(2).*

Statute of frauds. *Civ. Code § 1624.*

Uniform Vendor and Purchaser Risk Act. *Civ. Code § 1662.*

Damages for breach of contract. *Civ. Code § 3300.*

Damages for breach of contract to convey real property. *Civ. Code § 3306.*

Damages for breach of agreement to deliver quitclaim. *Civ. Code § 3306a.*

[2] Government Code

Recordability of instrument affecting title to or possession of real property. *Gov. Code § 27280*.

Requirement that instruments be acknowledged before recordation. *Gov. Code §§ 27287, 27288*.

Recording fees. *Gov. Code § 27361*.

Headings and margins of recorded instruments. *Gov. Code § 27361.6*.

[3] Probate Code

Uniform Statutory Rule Against Perpetuities. *Prob. Code §§ 21200-21231*.



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A. Primary Sources

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§ 22.02 Federal Sources

[1] Statutes

Tax treatment of property used in trade or business. *I.R.C. § 1231*.

Tax treatment of loss or gain attributable to sale or exchange of option, or loss attributable to failure to exercise option. *I.R.C. § 1234*.

[2] Regulations

Tax treatment of loss or gain attributable to sale or exchange of option, or loss attributable to failure to exercise option. *Treas. Reg. § 1.1234-1(a), (b)*.



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A. Primary Sources

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[Reserved]

§§ 22.03[Reserved]



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B. Secondary Sources

9-22 California Legal Forms--Transaction Guide § 22.05

§ 22.05 Law Reviews and Periodicals

Cozzillio, *The Option Contract: Irrevocable Not Irrejectable, 39 Catholic U.L.R. 491 (1990).*

Newman, *How to Draft Option Contracts (with Form) (Part 2),* 4 The Practical Real Estate Lawyer No. 6, p.29 (Nov. 1988).

Newman, *How to Draft Option Contracts (with Form) (Part 1),* 4 The Practical Real Estate Lawyer No. 5, p.35 (Sept. 1988).



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§ 22.06 Annotations

Annot., Option to Purchase Real Property as Affected by Optioner's Receipt of Offer for, or Sale of, Larger Tract Which Includes the Optioned Parcel, 34 A.L.R.4th 1217 (1984) .

Annot., Timeliness of Notice of Exercise of Option to Purchase Realty, 87 A.L.R.3d 805 (1978) .

Annot., Time in Which Option Created by Will to Purchase Real Estate Is to Be Exercised, 82 A.L.R.3d 790 (1978) .



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§ 22.07 Text References

[1] Matthew Bender Sources

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Ch. 569, *Vendor and Purchaser of Real Property* .

California Real Estate Law & Practice, Vol. 3, Ch. 70, *Options.*

Current Legal Forms

Vol. 8A, Ch. 21, *Sales and Exchanges.*

Vol.9, Ch. 22, *Development and Subdivision* (Matthew Bender).

[2] Additional Text References

California Real Property Sales Transactions (Cal. CEB 1981), Ch. 4, *Options.*

Friedlander, Tax Management Portfolio No. 475, Capital Gain or Loss Treatment Upon Disposition of Real Property.

Guerin, Taxation of Real Estate Transaction (Shepard's/McGraw-Hill 2 ed.), Vol. 1, Ch. 6, *Time of Sale, Leases, and Sale-Leasebacks.*

Miller & Starr, Current Law of California Real Estate (2d ed.), Vol. 1, Ch. 2, *The Specific Real Estate Contracts.*

Witkin, Summary of California Law, Vol. 1, *Contracts* (10th ed. 2005).

[3] Legal Encyclopedias

77 Am. Jur. 2d Vendor and Purchaser §§ 27-49.

54 Cal. Jur. 3d Real Estate Sales §§ 138-175.



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[Reserved]

§§ 22.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND
A. Nature of Option Agreement

9-22 California Legal Forms--Transaction Guide § 22.10

§ 22.10 Definitions

An option to purchase real property, when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase specified real property for a stipulated price within a specified time [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139* ; *see Spielberg v. Granz (1960) 185 Cal. App. 2d 283, 289, 8 Cal. Rptr. 190]* . It is a right acquired by contract to accept or reject a present offer to sell real property within a limited time in the future [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . The right to purchase created by an option is a substantial one: it is irrevocable by the owner of the property and may be exercised against the owner's successors following the owner's death [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . Typically, the owner of the real property is referred to as the "optionor" and the holder of the option is referred to as the "optionee."

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of Preemption



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§ 22.11 Distinguished From Sales Contract

An option to purchase real property must be distinguished from a sales contract to purchase property. An option gives the optionee the right to purchase specified property without imposing any duty to purchase, while a sales contract obligates the buyer to purchase the property according to the terms and conditions set forth in the contract [*Schmidt v. Beckelman (1960) 187 Cal. App. 2d 462, 469-470, 9 Cal. Rptr. 736]* .

The difference in the obligations imposed distinguishes the two types of agreements and is the primary factual and legal indicator used in determining whether an instrument, regardless of its title or form, is an option or a sales contract [*Scarbery v. Bill Patch Land & Water Co. (1960) 184 Cal. App. 2d 87, 100, 7 Cal. Rptr. 408]* . The test of whether an instrument is an option or a contract of sale is whether there is such an obligation on the part of the optionee/purchaser to buy that it can be enforced by specific performance [*Scarbery v. Bill Patch Land & Water Co. (1960) 184 Cal. App. 2d 87, 100, 7 Cal. Rptr. 408]* . The form and title of an instrument are not controlling, since the law looks through the form to substance and gives effect to the intention of the parties [*Welk v. Fainbarg (1967) 255 Cal. App. 2d 269, 272-273, 63 Cal. Rptr. 127]* . For example, it has been held that an instrument, although labeled an option, was in fact a contract of purchase and sale; the agreement provided for substantial, continued, and immediate payments on the purchase price before exercise of the option was permitted, and its practical effect amounted to a contract of purchase and sale with regular installment payments [*see Smith v. Morton (1972) 29 Cal. App. 3d 616, 618-620, 106 Cal. Rptr. 52]* . When the contract is ambiguous, the courts will look to extrinsic evidence to determine the true intent of the parties [*Welk v. Fainbarg (1967) 255 Cal. App. 2d 269, 273, 63 Cal. Rptr. 127]* .

On exercise of the option, it becomes a contract of sale binding on both parties; however, the mere exercise of the option does not mean that a new contract is in fact made by and at the time of the exercise. The contract of sale has already been made, as far as the optionor is concerned, but it is subject to conditions that are removed by the exercise. Moreover, the optionee is entitled to specific performance of the contract when the option is exercised, and this right relates back to the time of giving the option so as to cut off intervening rights acquired with knowledge of the existence of the option [*Seeburg v. El Royale Corp. (1942) 54 Cal. App. 2d 1, 4, 128 P.2d 362]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsOption ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of PreemptionReal Property LawPurchase & SaleRemediesSpecific Performance



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§ 22.12 Distinguished From Preemptive Right

An option should also be distinguished from a preemptive right. A preemptive right does not give the preemptioner the power to compel an unwilling owner to sell. It merely requires the owner, when and if the owner decides to sell, to offer to sell the property first to the person entitled to the preemptive right at a stipulated price [*Mercer v. Lemmens (1964) 230 Cal. App. 2d 167, 170, 40 Cal. Rptr. 803]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsRights of Preemption



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9-22 California Legal Forms--Transaction Guide § 22.13

§ 22.13 Statute of Frauds

Although an option to purchase real property is considered to be a property right, it does not constitute an interest in the land itself [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 691, 119 Cal. Rptr. 491, 532 P.2d 139]* . An option supported by consideration is an enforceable contract, subject to the principles of contract law [*see Caras v. Parker (1957) 149 Cal. App. 2d 621, 626-627, 309 P.2d 104]* . Thus, in the same manner that a contract to sell real property is subject to the statute of frauds, an option to purchase real property comes within the statute of frauds and, accordingly, must be in writing [*Pac. Etc. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 66, 301 P.2d 825* ; *Civ. Code § 1624(c)*]. The statute of frauds requires a writing, signed by the party to be charged [*see Civ. Code § 1624*]. A sufficient memorandum of a sale of an interest in real property must include the identity of the parties [*Malerbi & Associates v. Seivert (1961) 191 Cal. App. 2d 760, 762, 12 Cal. Rptr. 852]* , a description of the property so that it may be adequately identified [*Ganiats Construction, Inc. v. Hesse (1960) 180 Cal. App. 2d 377, 384, 4 Cal. Rptr. 706]* , and the terms of the sale [*Ontario Downs, Inc. v. Lauppe (1961) 192 Cal. App. 2d 697, 702, 13 Cal. Rptr. 782]* . Since an option agreement, when exercised, becomes the sales agreement [*Caras v. Parker (1957) 149 Cal. App. 2d 621, 625-627, 309 P.2d 104]* , it requires the same care and specificity in drafting as a contract of sale. At a minimum, an option should contain a description of the real property, the identity of the parties, the price for the sale of the real property, the time period during which the option may be exercised, a definite statement of the consideration of the optionee, and various other terms concerning the manner of exercising and giving notice of the exercise of te option. Refer to Sections 22.110 and 22.111 for various matters to consider for inclusion in the option agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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§§ 22.14[Reserved]



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§ 22.20 Practical Uses of Options for Both Optionee and Optionor

[1] Avoiding Necessity of Present Commitment

An option may suit a potential buyer or seller who does not desire to make a present commitment. A potential buyer might simply be hesitant and desire more time. A potential seller might currently need occupancy of the premises but be willing to sell for a price based on a higher market, or might want to postpone the sale to a more favorable tax period.

[2] Avoiding Conditions and Contingencies in the Sales Agreement

In many real estate transactions, the parties find themselves drafting conditions into the sales agreement or deposit receipt, which, if not satisfied, relieve a party from going forward with the contract. These conditions often raise problems as to whether they were satisfied or whether the party responsible has exercised good faith in attempting to satisfy the conditions.

For example, even the simple purchase of a single-family dwelling may involve the condition that the buyer obtain satisfactory financing. A complex transaction may have many conditions relating to soil conditions, zoning, surveys, and other matters. By using an option, the parties can avoid the insertion of certain (or any) conditions or contingencies into the final sales agreement. This is possible because the option provides a period during which the optionee can wait to see whether particular conditions and contingencies will be satisfied before deciding whether or not to exercise the option. The optionor also benefits from this arrangement: if the sale does not go through because the optionee chooses not to exercise the option, the optionor has the option consideration as compensation; if the option is exercised, the optionor benefits from a sales agreement with few (if any) tangential conditions and contingencies remaining to be fulfilled, which is an agreement the optionor can be more confident of enforcing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of Preemption



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§ 22.21 Benefit of Option to Optionee

[1] Speculation

One classic use of the option is for speculation on a rising real estate market. The advantage of the option is that it allows the optionee to speculate on property with a small investment in proportion to the cost of an outright purchase. If the market does rise, the optionee deducts the option price from profits. But if the market falls, the optionee's losses are cut to a minimum.

[2] Land Development

In the area of real estate development, there are numerous situations in which a considerable amount of work and investigation must be carried out before the potential purchaser can establish that he or she has a profitable use for the property. A developer may need to know the results of various tests and surveys, or whether certain zoning restrictions will give way. Just as important, the developer may need a lengthy option period to stimulate interest in the property and obtain commitments from lessees or others whose advance commitments would insure success. The use of an option allows the person who believes he or she can profit from the use of certain property to develop plans or obtain commitments, or both, without having to purchase the property outright.

Successive options may be particularly useful to a developer. This type of option agreement gives the developer periodic options on contiguous parcels in a tract. This allows the developer to see how successful the first projects are before making a larger commitment while reserving more land in case of success.

[3] Prompting Optionor to Perform and Cooperate

In many situations, a potential buyer is in need of or has bargained for various services from the seller. Examples of these services are title reports, surveys, and cooperation in obtaining utilities and changing zoning laws. An option with a fixed duration that commences only after the optionor performs specified services will stimulate the optionor's performance if he or she believes the option contract is favorable. Thus, if the optionor knows that a six-month option period will not begin to run until the optionor has provided the optionee with a subdivision map, the optionor will be

more apt to comply quickly.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.22

§ 22.22 Benefit of Option to Optionor

[1] Retaining Initial Payment

If the optionee fails to exercise the option within the option period, the optionor may retain the consideration given for the option [*Sheveland v. Reed (1958) 159 Cal. App. 2d 820, 822, 324 P.2d 633* ; *see also* California Real Estate Law & Practice, Ch. 70, *Options* (Matthew Bender)].

[2] Prompting Optionee to Perform and Cooperate

Just as an option can be used to avoid placing complicated conditions in the sales agreement, it can be used to stimulate the optionee to resolve these conditions during the option period. A buyer who signs an agreement to purchase, subject to obtaining satisfactory financing, can easily avoid the commitment on the grounds that any available financing was unsatisfactory. Even more sophisticated drafting leaves something to the efforts of the buyer. But if, through use of the option, the buyer/optionee pays money that will be lost if the option is not exercised, he or she will think twice before frivolously abandoning the contract. If the optionee does not exercise the option, the optionor has the option consideration as compensation.

[3] Instead of a Security Interest

From a security point of view, using successive options in the sale of many parcels of a tract may be more advantageous to the optionor than taking a purchase money mortgage in the outright sale of the whole tract. If the optionee does not exercise one of the options, or breaches a condition precedent to exercise, the optionee's rights terminate immediately [*see § 22.30[5]*]. There is no necessity for foreclosure proceedings. Even though this method leaves the optionor with the obligation to pay taxes and other expenses on the remaining parcels, adjustments in the consideration for the option should provide adequate compensation.

[4] Avoiding Imputed Interest

Prior to the Tax Reform Act of 1986 [Pub. L. No. 99-514], if a sale of a capital asset was being made, and the sales

price was being paid in installments, it was advantageous for the seller to attribute as much of the installment payments to principal as possible in order to secure capital gains treatment for these installments. Any interest paid by the purchaser for the privilege of spreading income payments out over time was taxable to the seller as ordinary income. Extensive "imputed interest" rules existed to prevent sellers from treating interest income as capital gains [*see I.R.C. §§ 483, 1272-1275*]. Because an option becomes a contract of sale only on exercise, use of successive options avoided imputation of interest, even though the payments were similarly spaced.

Corporate taxpayers generally are subject to the same rate of tax on both capital gains and ordinary income [*I.R.C. §§ 11, 1201*]. Individual taxpayers, however, are taxed on capital gains at a rate that is significantly lower than the maximum tax rate on ordinary income. The tax rate on capital gains is generally 15 percent [*see I.R.C. § 1(h)(1)(C)*, effective generally for tax years ending on or after 5/16/03 and before 2009; *see* Pub. Law No. 108-27, §§ 301, 303; *see also I.R.C. § 1(a)-(d), (i)*].

In contrast, the maximum tax rate on ordinary income for individuals is 35 percent after 2002 [*I.R.C. § 1(a)-(d), (i)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationUnearned IncomeGeneral Overview



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[Reserved]

§§ 22.23[Reserved]



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§ 22.30 Duration of Option

[1] Setting Expiration Date

Although not required to be stated, the option term is an extremely significant element of the option agreement. In the absence of the statement of a term, the option will be open for a reasonable time [*Auslen v. Johnson (1953) 118 Cal. App. 2d 319, 322, 257 P.2d 664]* . The interpretation of what constitutes a reasonable time under the circumstances of the particular case may vary considerably. To effect the intention of the parties and to provide a degree of certainty to the option agreement, it is therefore recommended that the option agreement contain a specific statement of the option period.

[2] Time of the Essence

The effect of setting an exact option period is to make time of the essence as to the exercise of the option [*Rosenaur v. Pacelli (1959) 174 Cal. App. 2d 673, 676, 345 P.2d 102]* . This means that the optionee loses all right to exercise the option if the optionee does not do so according to its terms and exactly within the allotted time period [*see Wilson v. Gentile (1992) 8 Cal. App. 4th 759, 762-768, 10 Cal. Rptr. 2d 713* (provision for exercise "within 30 days prior to expiration" permits exercise during 30-day period preceding expiration)]. However, time is of the essence only with respect to the exercise of the option. After the option has been exercised, this doctrine has no application, and a reasonable time to perform is allowed unless otherwise specifically provided [*see Murfee v. Porter (1950) 96 Cal. App. 2d 9, 18, 214 P.2d 543]* .

[3] Common Methods of Fixing Duration

There are three common methods of fixing the duration of the option period. In the most typical case, the option period commences on execution of the option agreement and runs through a fixed date. When the optionee is relying on and desires to stimulate certain performance by the optionor [*see § 22.21 [3]*], the commencement of the period may be fixed as dependent on the date of certain performance by the optionor. Another alternative utilizes a fixed period that begins and ends on dates certain in the future, that is, the option period is fixed by beginning and ending dates but does not commence on execution of the option agreement. This alternative is useful if the optionor either needs the property

temporarily, needs to postpone exercise of the option for tax reasons, or is otherwise unprepared to convey title until some future date.

[4] Rule Against Perpetuities

The Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code §§ 21200-21231*] codifies and supersedes the common law rule against perpetuities [*see Prob. Code §§ 21201, 21205(a)*]. While options were held subject to the common law rule against perpetuities [*see Alamo School Dist. v. Jones (1960) 182 Cal. App. 2d 180, 190-191, 6 Cal. Rptr. 272]* , the USRAP specifically excludes property interests arising out of "nondonative transfers" from its application [*see Prob. Code § 21225(a)*; *but see Prob. Code § 21225(a)(1)-(8)* (exceptions for certain "domestic" transfers)]. "Nondonative" transfers are commonly commercial transactions, such as options [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. Law Rev. *Comm. 2501*, 2595 (1990)]. The authors of the USRAP believed that subjecting commercial transactions to perpetuities limitations would tend to discourage the improvement of property, with undesirable social results, and that nondonative transfers were thus inappropriate subjects for perpetuities regulation [*see* Waggoner, *The Uniform Statutory Rule Against Perpetuities, 21 Real Prop., Prob. and Tr. J. 569, 600 (1986)*]. Whether a transfer is "donative" is generally, but not always, determined by whether the transfer is supported by consideration [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. Law Rev. *Comm. 2501*, 2595 (1990)]. A detailed discussion of the rule against perpetuities and its operation in California is beyond the scope of this chapter. For general coverage of the USRAP, refer to Chapter 67, *Future Interests and Perpetuities.*

[5] Automatic Termination of Option and Execution of Releasing Documents

With respect to the exercise of an option within the option period, time is deemed to be of the essence [*see Rosenaur v. Pacelli (1959) 174 Cal. App. 2d 673, 676, 345 P.2d 102]* . In other words, the optionee loses all rights to exercise the option if the option time period expires before an exercise is effected. Thus, the rights to exercise terminate automatically and it is good practice to insert in the option agreement a statement explaining this concept [*see § 22.200[2]*, P 7].

If a recorded instrument gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within (1) six months after the option expires according to its terms; or (2) if the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded [*Civ. Code § 884.010*]. This six-month period can create problems by clouding title to the underlying property for that period even though the underlying option period has expired. This problem can be remedied by requiring the subsequent execution of a quitclaim deed or other documents releasing the option when it expires. Other approaches include a prohibition against recording the option [*see § 22.234*; *see also § 22.50*] or a provision for automatic termination and prior execution of a quitclaim deed [*see § 22.235*].

Once an option to purchase real property expires of record, the recorded instrument that creates or gives constructive notice of the option ceases to be notice to any person or to put any person on inquiry with respect to the exercise or existence of the option or any contract, conveyance, or other instrument that may have been executed pursuant to the option [*Civ. Code § 884.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsContracts LawTypes of ContractsOption ContractsReal Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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§ 22.31 Consideration

[1] Role of Consideration

As mentioned above [see *§ 22.10*], an option is a unilateral offer by the owner to a prospective purchaser to sell to the purchaser within the time and under the conditions stated in the option. When supported by consideration, the offer is irrevocable according to its terms [*Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49]* . In the absence of consideration, the optionor can revoke the offer at any time prior to acceptance [*Kelley v. Rouse (1961) 188 Cal. App. 2d 92, 96-97, 10 Cal. Rptr. 235]* .

[2] Sufficiency and Form of Consideration

Any consideration will be deemed sufficient to create a binding offer, and its value need not reflect any proportional relationship to the value of the property [*Marsh v. Lott (1908) 8 Cal. App. 384, 388-390, 97 P. 163]* . In fact, the consideration for granting the option is not even relevant to establishing the element of "adequacy" in an action for specific performance: the "adequacy" required to obtain specific performance of an exercised option relates to the purchase price of the optioned property, not the option consideration [*Marsh v. Lott (1908) 8 Cal. App. 384, 389, 97 P. 163* ; *see Kowal v. Day (1971) 20 Cal. App. 3d 720, 725-728, 98 Cal. Rptr. 118* (presence of consideration turned illusory contract of sale into irrevocable option to purchase)].

A sum of money is the most typical form of consideration for an option. One basic factor that the parties may use to determine the amount of the consideration is the cost to the optionor of keeping the property off the market. This should take into account the following: the accruing expenses of ownership of the property, such as taxes and mortgage costs; what the optionor could realize on sale of the property; and what risk, if any, the optionor takes in delaying sale. If the parties decide to set as part of the consideration the actual amount of taxes accruing during the option period, the optionee will be responsible for all taxes payable during this period, not just those due [*Brady v. Fowler (1920) 45 Cal. App. 592, 594-595, 188 P. 320]* .

[3] Retention of Consideration

A provision setting forth the optionor's right to retain the option consideration in the event the option is not exercised is an important part of the option agreement. In many cases, the option consideration is an independent measure of the value of keeping the property off the market, and should not be refunded to the optionee. Even if this is not the case, the option consideration may serve as "earnest money" to be forfeited by the optionee in case the optionee does not proceed with the sale [*see § 22.22[1]*].

An option agreement may provide for the return of the option consideration under certain circumstances. This is appropriate only if the refund is conditioned on the failure of a representation made by the optionor; for example, the agreement may provide for a refund if the property cannot be rezoned as the optionor promised. Even then, before drafting such a provision, it should be taken into account that one of the reasons for using an option is to allow the potential buyer, for a relatively small sum in relation to the purchase price, to attempt to resolve all or many important contingencies before committing to the purchase [*see § 22.20[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawConsiderationSufficient ConsiderationReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of Preemption



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9-22 California Legal Forms--Transaction Guide § 22.32

§ 22.32 Exercise of Option

[1] In General

The exercise of an option is the communicated election of the optionee to accept the option; if not required by statute to be in writing, the acceptance may be oral [*Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49* (involving option for sale of real property); *see Civ. Code § 1582*], unless the option agreement provides otherwise. If the option prescribes any conditions concerning the communication of its acceptance, the optionor is not bound unless they are satisfied; in other cases, any reasonable and usual method may be adopted [*Civ. Code § 1582*]. An example of such a method is the deposit in the mail of written notice of acceptance. In that case, the acceptance is effective at the time that it is deposited in the mail [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097]* . An optionee that communicates a rejection of the option may lose the right to exercise it, even within the option period [*see Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 55, 276 Cal. Rptr. 240]* .

[2] Relation Back Doctrine

On exercise of the option, the priority rights of the optionee relate back to the date of the option agreement to take precedence over any party having actual or constructive knowledge of the option and whose claim of right arose subsequent to the option agreement [*Utley v. Smith (1955) 134 Cal. App. 2d 448, 450, 285 P.2d 986]* . Recordation of the option agreement ceases to serve as constructive notice six months from the date of the expiration of the option or, if there is no expiration date, six months from the recordation of the instrument giving notice [*Civ. Code § 884.010*]. For a discussion of the relation back doctrine in the context of option agreements, refer to California Real Estate Law & Practice, Chapter 70, *Options* (Matthew Bender).

If an option to purchase real property is granted and recorded before the federal government records a tax lien [*see I.R.C. §§ 6321-6323*] against the property, the subsequent exercise of the option causes the optionee's right to the property to relate back to the date on which it acquired the option and thus to achieve priority over the tax lien. California's relation back doctrine serves as the basis for this result because the nature and extent of a property interest competing with a federal tax lien for priority is determined by state law [*Claremont Terrace Homeowners' Assn. v.*

United States (1983) 146 Cal. App. 3d 398, 405-408, 194 Cal. Rptr. 216] .

Even an unrecorded option gains priority if the optionee was in possession of, and made monthly payments on, the property prior to the recordation of the tax lien, because California law provides that recordation only affects the priority of a property interest as against subsequent bona fide purchasers and charges the federal government with notice of the option under the foregoing circumstances [*Claremont Terrace Homeowners' Assn. v. United States (1983) 146 Cal. App. 3d 398, 405-408, 194 Cal. Rptr. 216]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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§ 22.33 Assignment of Option Agreement

Civil Code Section 1044 provides generally that all property may be transferred. An option is freely assignable unless its terms otherwise provide or unless the agreement depends on the personal trust and confidence of the optionor in the optionee [*Mott v. Cline (1927) 200 Cal. 434, 450, 253 P. 718]* . When the option agreement provides that its obligations will be binding on the parties' assignees and other successors in interest, an assignee assumes the assignor's obligations upon assignment, and no express assumption of the obligations is necessary [*Brady v. Fowler (1920) 45 Cal. App. 592, 595, 188 P. 320]* . For alternative provisions concerning assignment of an option, see *Section 22.200*, Paragraph 8.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentNonassignability ClausesContracts LawThird PartiesGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Provisions of Option Agreement

9-22 California Legal Forms--Transaction Guide §§ 22.34-22.39

[Reserved]

§§ 22.34[Reserved]



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9-22 California Legal Forms--Transaction Guide § 22.40

§ 22.40 Tax Consequences of Option Consideration

[1] To Optionor

The optionor must determine when the option consideration is to be reported for purposes of federal income taxes. The date of the taxable event depends on whether or not the consideration is applicable to the purchase price of the property.

To the extent the consideration for the option is not applicable to the purchase price, it is recognized as income during the year of its receipt [*Hull v. Commissioner of Int. Rev. (4th Cir. [T.C.] 1937) 87 F.2d 260, 261-262]* . To the extent the consideration is applicable to the purchase price on exercise of the option, there is no taxable event until the exercise or until the expiration of the option [*Virginia Iron Coal & C. Co. v. Commissioner of Int. Rev. (4th Cir. [T.C.] 1938) 99 F.2d 919, 921 , cert. denied, 307 U.S. 630 (1938)* ; *see C.V.L. Corporation (1951) 17 T.C. 812, 816]* . If the option is exercised, the consideration (1) becomes part of the purchase price and is entitled to the same tax treatment as the rest of the purchase price (very likely, capital gains), and (2) is reportable in the year of exercise of the option even if it was received in a prior year [*J.F. Westrom (1966) 25 T.C.M. 1019, 1023]* . If the option expires, the consideration is treated as ordinary income. This income is reportable in the year the option expires even if it was received in a prior year [*see Dill Co. (1959) 33 T.C. 196 , nonacq., 1961-2 C.B. 6 , aff'd, 294 F.2d 291* ; *Treas. Reg. § 1.1234-1(b)*]. In order to postpone the taxation of option consideration to a future time, the contract must be an option. Mere terminology is not enough. If the option payments are large and logically more akin to purchase payments and the optionee cannot rationally back out of the transaction without losing an unreasonable amount of money, then the contract is in danger of being considered an ordinary purchase agreement for the purposes of taxation [*see Watson v. Commissioner of Int. Rev. (9th Cir. [B.T.A.] 1932) 62 F.2d 35, 36]* .

[2] To Optionee

An option is an asset [*Helvering v. San Joaquin Fruit & Inv. Co. (1936) 297 U.S. 496, 498, 56 S. Ct. 569, 80 L. Ed. 824]* . Therefore, all consideration expended by the optionee to acquire and maintain the option in force enters into the computation of loss on expiration of the option pursuant to *Internal Revenue Code Section 1234*. Correspondingly, if the option is sold, the consideration becomes the basis in computing gain or loss. Finally, on acquisition of the property through exercise of the option, the consideration becomes a part of the optionee's tax basis for the property [*see C.H.*

Mead Coal Co. v. Commissioner of Internal Revenue (4th Cir. [B.T.A.] 1934) 72 F.2d 22, 25] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)OptionsTax LawFederal Income Tax ComputationSales & ExchangesSecurities & Other Instruments (IRC secs. 1058, 1081-1083, 1091-1092, 1233-1234A, 1236, 1256, 1259, 1271-1278, 1281-88)General Overview



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9-22 California Legal Forms--Transaction Guide § 22.41

§ 22.41 Tax Considerations Relating to Successive Options

The optionor will need to determine whether the proceeds from the sale of each parcel, as each option is exercised, fall within capital gains provisions or are considered ordinary income. Assuming the property was not purchased for sale to customers [*see I.R.C. § 1231(b)(1)(B)*], the sale of the property in successive parcels does not alone convert the seller into a dealer who must treat the gains as ordinary income. Capital gains result from a sale even though it is one of successive transfers of tracts to the same builder if the transaction is not one of separate sales but is part of a single sale that is fragmented to permit the builder to generate funds by building and selling to pay for successive portions of the total acreage [Winding River Ranch, Inc. (1966) 25 T.C.M. 1335, 1340]. However, real estate automatically becomes "dealer" property when subdivision activity is undertaken in order to effect a disposition [*1959-1 C.B. 15, Rev. Rul. 59-91*]. Therefore, the optionor should be cautious if asked to undertake any of the preliminary subdivision efforts before conveyance of the parcels.

The tax rate on capital gains depends first on whether the taxpayer is an individual or a corporation. For an individual, the tax rate on capital gains generally is 15 percent, although the actual tax rate depends on the time the capital asset was held and other specified factors [*see I.R.C. § 1(h)(1)(C)*, effective generally for tax years ending on or after 5/16/03 and before 2009; *see* Pub. Law No. 108-27, §§ 301, 303; *see also I.R.C. § 1(a)-(d), (i)*]. In contrast, corporate capital gains are taxed at the same rate as ordinary income [*see I.R.C. §§ 11(b), 1201*]. Therefore, a nonindividual optionor may not care about having short-term capital gain, or ordinary gain, as opposed to long-term capital gain. In fact, if any loss is involved for the optionor, the optionor may prefer an ordinary loss, or even a short-term capital loss, rather than a long-term capital loss [*see I.R.C. § 1211*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288,

1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of Gains



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9-22 California Legal Forms--Transaction Guide § 22.42

§ 22.42 Tax Consequences on Sale of Option

Under federal tax law, an option is an asset [*Helvering v. San Joaquin Fruit & Inv. Co. (1936) 297 U.S. 496, 498, 56 S. Ct. 569, 80 L. Ed. 824]* with a tax basis ordinarily equal to the amount the optionee paid for the option [*I.R.C. § 1012*]. The character of an option as a capital or noncapital asset is determined by the character that the underlying property would have in the hands of the optionee if the optionee had acquired it [*I.R.C. § 1234*]. In other words, the optionee is deemed to be dealing in the property underlying the option for purpose of taxation of any gain or loss [*see Treas. Reg. § 1.1234-1(a)*]. An option that is a capital asset or a Section 1231 asset because it would be used in the taxpayer's trade or business and that is held for the appropriate period is entitled to long-term capital gains treatment on sale [*I.R.C. §§ 1221, 1222(3), 1231*]. The holding period commences the day after the acquisition of the option and includes the date of its sale [*see H.M. Hooper (1932) 26 B.T.A. 758, 760* ; *Rev. Rul. 70-598, 1970-2 C.B. 168*].

The tax rate on capital gains depends first on whether the taxpayer is an individual or a corporation. For an individual, the tax rate on capital gains generally is 15 percent, although the actual tax rate depends on the time the capital asset was held and other specified factors [*see I.R.C. § 1(h)(1)(C)*, effective generally for tax years ending on or after 5/16/03 and before 2009; *see* Pub. Law No. 108-27, §§ 301, 303; *see also I.R.C. § 1(a)-(d), (i)(2)*]. In contrast, corporate capital gains are taxed at the same rate as ordinary income [*see I.R.C. §§ 11(b), 1201*]. Therefore, a nonindividual optionee may not care about having ordinary gain or short-term capital gain, as opposed to long- term capital gain. Indeed, if any loss is involved for the optionee, the optionee may prefer an ordinary loss, or even a short-term capital loss, rather than a long- term capital loss [*see I.R.C. § 1211*]. However, capital losses are still allowed only to the extent of capital gains (in the case of a corporation), or capital gains plus amounts limited by statute (in the case of individual taxpayers) [*see I.R.C. § 1211*]. Carryback and carryforward rules for unused capital losses still apply [*see I.R.C. § 1212(a), (b)*]. Section 1231 losses still may be allowed in full [*see I.R.C. § 1231(a)(4)*]. Therefore, the appropriate characterization of property, and of gains and losses from the exercise, lapse, or assignment of an option on that property, may still have considerable importance. For further discussion of the various tax considerations relating to options, see California Real Estate Law & Practice, Ch. 70, *Options* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of Gains



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9-22 California Legal Forms--Transaction Guide § 22.43

§ 22.43 Tax Consequences on Expiration of Option

If an optionee allows the option to expire, and a loss is attributable to the failure to exercise, the loss is recognized in the year in which the option expired [*see I.R.C. § 1234(a)(2)*]. The nature of the loss depends on the character that the land underlying the option would have in the optionee's hands, that is whether the land would be a capital asset, and how long the option is held [*I.R.C. § 1234(a)*; *Treas. Reg. § 1.1234-1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of LossesTax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Options



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9-22 California Legal Forms--Transaction Guide §§ 22.44-22.49

[Reserved]

§§ 22.44[Reserved]



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9-22 California Legal Forms--Transaction Guide § 22.50

§ 22.50 Recordation and Acknowledgment

The parties must decide whether or not to record the option. Recording protects the rights of the optionee but gives publicity to the option. Moreover, a recorded option can cloud the title of the optionor even after the option expires [*see § 22.30[5]*].

If the parties decide that the option is to be recorded, it must be executed and acknowledged by the parties whose real property is affected or alienated by the instrument [*Gov. Code §§ 27287*, *27288*]. Thus, the purported owners of the underlying real property, including the spouses of the owners if community interests are involved, must execute and acknowledge an option. The optionees are not required to acknowledge the option. See *§ 22.200[2]* for standard acknowledgments for an individual, a partnership, and a corporation.

If the parties decide not to record the option agreement, they may desire to prepare, execute, and record an abstract of the option agreement [*see § 22.203*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.51

§ 22.51 Real Estate Transfer Disclosure Statement

Unless a statutory exception applies [*see Civ. Code § 1102.2*], the transferor of any real property containing at least one but not more than four dwelling units must deliver to the prospective transferee a written statutory disclosure statement setting forth detailed information concerning the property [*Civ. Code § 1102(a)*; *see Civ. Code § 1102.6* (disclosure form)]. This requirement applies to a variety of types of transfers of real property, including transfers made in connection with an option to purchase [*see Civ. Code § 1102(a)*]. Further, any city or county may require that a second disclosure form be used in conjunction with the foregoing statutory disclosure statement [*see Civ. Code § 1102.6a*]. The transferor must make additional disclosures if the property (1) lies within certain designated "hazardous areas" that are susceptible to floods, fires, or earthquakes [*see Civ. Code § 1103*; *see also Civ. Code §§ 1103.1*, *1103.2* (transfers not covered; form)]; (2) has been the site of an illegal controlled substance release [*see Civ. Code § 1102.18*]; or (3) is subject to a Mello-Roos tax pursuant to the Mello-Roos Community Facilities Act [*Gov. Code 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [Sts. & Hy. Code § 8500et seq.], which concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*see* Civ. Code § 1l02.6b(a)(2); *see also* Civ. Code § 1l02.6c(b) (satisfaction of additional disclosure requirement concerning supplemental property tax bills)]. In the future, the Toxic Mold Protection Act of 2001 may also impose additional disclosure requirements [*see Health & Safety Code §§ 26100-26156*]. For further discussion and the statutory disclosure forms, see Ch. 23, *Real Property Sales Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesToxic MoldReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-22 California Legal Forms--Transaction Guide § 22.52

§ 22.52 Remedies

[1] Specific Performance

Since an option supported by consideration is an irrevocable offer [*Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49]* , the optionee can accept the offer at any time during the option period, even if the optionor has purported to revoke. In other words, the option is irrevocable until the time specifically fixed in the contract for termination regardless of an attempted revocation [*Jonas v. Leland (1947) 77 Cal. App. 2d 770, 776, 176 P.2d 764* , *disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 216, 32 Cal. Rptr. 415, 384 P.2d 7]* . When the option is exercised, it becomes a bilateral executory contract that can be enforced by specific performance if the optionor refuses to convey the subject real property [*see Torlai v. Lee (1969) 270 Cal. App. 2d 854, 858, 76 Cal. Rptr. 239]* . The statutory requirements for an action in specific performance are as follows [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173* ; *Civ. Code § 3384 et seq.*]: the legal remedy must be inadequate; the consideration must be adequate; the contract must be just and reasonable as to the party against whom it is being enforced; there must be mutuality of remedies; the contract terms must be sufficiently definite to be enforceable; and the performance ordered by the court must be substantially the same as that promised in the contract [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173* ; *Civ. Code § 3384 et seq.*]. For further discussion of the enforcement of a sales agreement by specific performance, see California Real Estate Law and Practice, Ch. 74, *Buyer's Remedies in Actions Involving Agreements of Sale* (Matthew Bender).

[2] Damages for Breach

The following damages are recoverable for breach of an agreement to convey an estate in real property [*Civ. Code § 3306*]:

- The price paid;
- The expenses properly incurred in examining the title and preparing the necessary papers;
- The difference between the agreed price and the value of the estate at the time of the breach;

- The expenses properly incurred in preparing to enter on the land;
- Consequential damages according to proof; and
- Interest.

[3] Declaratory Relief

An optionee can obtain a declaratory judgment that an option is still in effect if the optionor improperly repudiates the option during its term [*see, e.g., Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 74 Cal. Rptr. 722, 450 P.2d 42]* . For a complaint for declaratory relief in the option context, see California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property* (Matthew Bender).

[4] Rescission

An optionee can obtain rescission of an option agreement and return of the consideration, provided that the optionee establishes that he or she was induced to enter into the option by fraudulent misrepresentations [*Soderling v. Tomlin (1959) 170 Cal. App. 2d 169, 172, 338 P.2d 946]* .

[5] Optionor's Remedies

The optionor may also have remedies under an option agreement. When the optionee breaches a material condition of the option agreement, the optionor may terminate the option for breach of contract [*Briles v. Paulson (1915) 170 Cal. 408, 410, 149 P. 804]* . After the option has been exercised, the optionor has all the rights of any other seller under an executory agreement to sell real property. If the option expires and the optionee breaches the terms of the option by refusing to execute a quitclaim deed to clear the optionor's title, the optionor can bring a quiet title action and then recover damages for the breach of contract and the expenses in quieting title, including reasonable attorneys' fees [*Fabares v. Benjamin (1960) 180 Cal. App. 2d 264, 271-272, 4 Cal. Rptr. 359* ; *Civ. Code § 3306a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsExecutory ContractsReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesCompensatory DamagesReal Property LawPurchase & SaleRemediesDamagesConsequential DamagesReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawPurchase & SaleRemediesSpecific Performance



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[Reserved]

§§ 22.53[Reserved]



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9-22 California Legal Forms--Transaction Guide § 22.100

§ 22.100 Facts

NOTE:

Facts enumerated below relate exclusively to options [for related facts, ***see*** Ch. 23, ***Real Property Sales Agreements*** (terms of sale of property), and Ch. 26, ***Real Property Escrows*** (escrow instructions for sale of property)].

1. Parties.

a. Full names.

b. Addresses.

c. Telephone numbers.

d. Names of spouses.

e. Names and addresses of attorneys.

2. Description of real property.

a. Street address.

b. Legal description.

NOTE:

The legal description of the real property may be obtained from a deed or policy of title insurance.

3. Length of time optionor has held real property.

NOTE:
This information is relevant to tax treatment of gains or losses [***see*** *I.R.C. § 1222*].

4. Duration of option period.

5. Consideration for option.

a. Cash or other personal property.

b. Services or other performance.

6. Whether growing crops are present on real property [*see § 22.233*].

7. Rights of optionor regarding:

a. Real property improvements and personal property [*see § 22.202[2]*, art. VII].

b. Leases respecting real property [*see § 22.202[2]*, art. VIII].

8. Tax characterization of real property.

a. Capital asset.

b. Real property used in trade or business [*see I.R.C. § 1231*].

9. Exercise of option.

a. Manner.

b. Places to which notices may be sent.

c. Purchase price of real property.

(1) Total amount.

(2) Amount of down payment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsProperty DescriptionsReal Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Options



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9-22 California Legal Forms--Transaction Guide § 22.101

§ 22.101 Documents

1. Deed of real property.

NOTE:
A deed may be used to obtain a legal description of the real property and to examine the optionor's title to the property.

2. Policy of title insurance.

3. Leases affecting real property.

4. If optionor is corporation, certified copy of resolution of directors or shareholders approving execution of option agreement.

5. If optionor is partnership, copy of recorded statement of partnership [*see* Ch. 15, *General Partnerships*].

6. If optionor is unincorporated association, authorizing resolution or recorded statement of authority [*see Corp. Code §§ 18115, 18120*; *see also* Ch. 13A, *Nonprofit Unincorporated Associations*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide §§ 22.102-22.109

[Reserved]

§§ 22.102[Reserved]



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B. Preliminary Determinations

9-22 California Legal Forms--Transaction Guide § 22.110

§ 22.110 Transactional Determinations

1. Determine suitability of option.

NOTE:

Counsel should independently determine whether an option agreement is consistent with the client's desires and intentions, taking into consideration whether the client owns the subject property or is a prospective purchaser of it, whether the client desires merely an option to purchase or an outright purchase of the property, and whether counsel has been retained to draft the option or to advise the client concerning an extant option. An option may offer significant advantages in comparison to an outright purchase or sale; however, there may be disadvantages such as monetary detriment to the optionor resulting from the property being kept off the market for the option period.

a. Consider following practical advantages:

(1) Additional time to make decisions concerning sale of subject property.

(2) Postponement of sale to achieve favorable tax treatment.

(3) Present realization of consideration in form of cash or services.

(4) Removal of conditions and contingencies in sales agreement.

NOTE:

An option can be used to avoid the insertion of conditions or contingencies in the final bilateral sales agreement in that an option provides time for the prospective buyer to determine whether any conditions and contingencies are necessary. Therefore, the final

sales agreement, on exercise of the option, typically is less complex and more likely to be performed.

b. Consider following benefits:

(1) To buyer:

(a) Speculation.

(b) Land development, especially when successive option agreement [*see § 22.202*] is used.

(c) Encouragement to seller to perform and cooperate.

(d) Avoidance of publicity when option is not recorded.

(2) To seller:

(a) Earnest money considerations.

(b) Encouragement to buyer to perform and cooperate.

(c) Security considerations.

NOTE:
Successive options [***see*** *§ 22.202*] used in connection with the sale of multiple parcels of real property may be more advantageous to the seller/optionor from a security point of view than an outright sale of the entire tract. If the buyer/optionee does not exercise one of the options, or breaches a condition precedent to the exercise of one of them, his or her rights terminate immediately. There is no necessity for foreclosure. For further discussion of security considerations inherent in the use of options to purchase real property, refer to Section 22.22[3].

c. Ascertain business aspects relating to proposed transaction.

d. Resolve whether option is appropriate for transaction.

e. Determine type of option agreement to be drafted.

(1) General form of option agreement [*see § 22.200*].

(2) Option to repurchase [*see § 22.201*].

(3) Successive option [*see § 22.202*].

2. Verify factual and legal capacity of parties to enter into option agreement by determining following:

a. Contractual capacity.

b. Marital status.

c. State of title of real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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§ 22.111 Contractual Determinations--Option Agreements Generally

1. Determine amount of option consideration and whether applicable to purchase price [*see §§ 22.200[1], 22.201[1]*].

2. If applicable, resolve clouded title problem created by expired option by reading and selecting appropriate provisions [*see §§ 22.30[5], 22.200[2],* P 7, *22.234*, *22.235*].

3. Decide whether option should be assignable [*see § 22.33*; *see also §§ 22.200[2],* P 8].

4. Determine point in time that mailed notices are deemed communicated [*see § 22.32[1]*].

5. Determine whether sale warranties or representations should be made applicable to option period [*see § 22.230*].

6. Determine whether option consideration should consist partially of services, such as providing preliminary title report or analysis of property [*see §§ 22.220, 22.221*].

7. If optionee is to perform work on optioned property during option period, determine what types of protection are available from mechanics' liens [*see § 22.232*].

8. Determine desirability of providing for extensions of option period, and nature and amount of consideration for extensions [*see § 22.210*].

9. Determine disposition of growing crops, if any, on exercise of option [*see § 22.233*].

10. Determine rights of parties on condemnation or destruction of property [*see § 22.231*].

NOTE:

Counsel and the client should carefully consider the amount of the option consideration. If the consideration is nominal and the situation involves the optionor simply giving a potential buyer/optionee more time, perhaps the optionee should not be entitled to compensation without an exercise of the option in the case of condemnation. On the other hand, if the optionee has paid substantial consideration, in effect investing in an option, the optionee's interest deserves more protection.

11. Determine which performance, other than exercise of option, should be subject to time is of essence provision [*see § 22.30 [2]*].

12. Determine method of exercise to be required by option agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentNonassignability ClausesReal Property LawPurchase & SaleOption ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

9-22 California Legal Forms--Transaction Guide § 22.112

§ 22.112 Contractual Determinations--Successive Options

1. Determine scheme for division of property into parcels and order of parcels to be subject to option.

2. Determine whether flexibility is necessary in case one party desires to rearrange order or to exchange real property.

3. Determine schedule of how option periods are to be set up, and amount and manner of payment of consideration.

4. Determine whether, in addition to exercise of each successive option, optionee may exercise right to buy entire property and, if so, at what purchase price.

5. If optionor is participating in financing of property, or if optionor retains adjacent property, determine what types of control optionor should retain over development of optioned property.

6. Determine rights that optionor may retain over property while it is being developed, including permanent rights in form of easements.

7. Review and attempt to anticipate problems that may arise by virtue of long-term nature of successive options.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewReal Property LawAdjoining LandownersEasementsReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

9-22 California Legal Forms--Transaction Guide §§ 22.113-22.119

[Reserved]

§§ 22.113[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY
PART III. TRANSACTION GUIDE
C. Procedural Guide

9-22 California Legal Forms--Transaction Guide § 22.120

§ 22.120 Execution and Recordation

1. Have option agreement executed by:

a. Optionors.

b. Spouses of optionors.

c. Optionees.

2. If agreement is to be recorded [*see § 22.50*], have signatures of optionors and their spouses acknowledged [*see § 22.200[2]* (forms of acknowledgment)].

3. If parties do not desire terms of agreement to be of public record, prepare abstract of agreement [*see § 22.203*], and have it executed and acknowledged in same fashion as original agreement.

4. Accomplish recordation by mailing document to county recorder's office in county where property is located [*Civ. Code § 1169*], along with check for applicable fee [*see Gov. Code § 27361*; *see also Gov. Code § 27279(a)* (definition of "instrument")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationExecutionReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-22 California Legal Forms--Transaction Guide §§ 22.121-22.129

[Reserved]

§§ 22.121[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
D. Drafting Guide

9-22 California Legal Forms--Transaction Guide § 22.130

§ 22.130 Drafting Considerations

1. Review selected option agreement [*see §§ 22.200, 22.201, 22.202*], keeping in mind preliminary determinations *outlined in Sections 22.110through 22.112*.

2. Determine desirability of following option provisions:

a. Applicability of warranties and covenants to option period [*see § 22.230*].

b. Preliminary title report as consideration [*see § 22.220*].

c. Analysis of property as consideration [*see § 22.221*].

d. Protection of optionor from mechanic's liens [*see § 22.232*].

e. Right to extend option period [*see § 22.210*].

f. Consideration for extension [*see § 22.210*].

g. Status of growing crops on exercise of option [*see § 22.233*].

h. Rights of parties on condemnation [*see § 22.231*].

i. Risk of loss [*see § 22.236*].

j. Assignability of option [*see §§ 22.33, 22.200[2],* P 8].

k. Automatic termination [*see § 22.235*].

l. Prohibition against recordation [*see § 22.234*].

m. Commencement of option period on fixed date in future or on occurrence of event [*see § 22.200[2],* P 2].

n. Prohibition against assignment of option [*see §§ 22.33, 22.200[2],* P 8].

3. Negotiate with opposing attorney the form and contents of option agreement.

4. Draft option agreement [*see §§ 22.200-22.202*].

5. Review option agreement to confirm that it contains following mandatory elements:

a. Identity of parties [*Malerbi & Associates v. Seivert (1961) 191 Cal. App. 2d 760, 762, 12 Cal. Rptr. 852]* .

b. Description of real property so that it may be adequately identified [*Ganiats Construction, Inc. v. Hesse (1960) 180 Cal. App. 2d 377, 384, 4 Cal. Rptr. 706]* .

c. Terms of sale [*Ontario Downs, Inc. v. Lauppe (1961) 192 Cal. App. 2d 697, 702-703, 13 Cal. Rptr. 782]* .

NOTE:
Incorporation of the terms of the sale may be accomplished either by expressly incorporating desired terms in the option agreement or by incorporating by reference the terms of the sales agreement attached to the option agreement.

d. Definite term.

NOTE:
In the absence of a definite term, a reasonable term will be implied [*Auslen v. Johnson (1953) 118 Cal. App. 2d 319, 322, 257 P.2d 664* ; ***see*** *§ 22.30*].

e. Consideration.

NOTE:
This element is necessary only if the parties intend the option to be irrevocable [***see*** *Torlai v. Lee (1969) 270 Cal. App. 2d, 854, 858* ; ***see also*** *§ 22.31*].

6. If general form of option agreement [*see § 22.200*] or option to repurchase [*see § 22.201*] is desired, negotiate and draft agreement of sale of real property.

NOTE:
For forms of sales agreements and real property escrow instructions, refer to Chapter 23, ***Agreements to Sell Real Property,*** and Chapter 26, ***Real Property Escrows.***

7. If successive option agreement [*see § 22.202*] is desired, negotiate and draft terms of sale by use of sample provisions set forth in Article V of § 22.202[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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D. Drafting Guide

9-22 California Legal Forms--Transaction Guide §§ 22.131-22.139

[Reserved]

§§ 22.131[Reserved]



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E. Related and Subsequent Procedures

9-22 California Legal Forms--Transaction Guide § 22.140

§ 22.140 Extension of Option Period

1. If right to extend option period is granted in agreement between parties and optionee wishes to exercise this right:

a. Draft and have optionee sign notice of exercise after review of tax considerations [*see § 22.250[1][c]*].

NOTE:
The optionee's signature should also be acknowledged if recordation is intended in order to give constructive notice of the extension of the option. If the original agreement was not recorded, then this notice will also not be recorded.

b. Communicate notice and tender extension consideration to optionor, verifying by review of original agreement that extension provision, provision governing manner of giving notice, and other relevant provisions will be satisfied.

c. If recording is to be effected, mail acknowledged document to county recorder's office in county where property is located [*Civ. Code § 1169*], enclosing check for applicable fee [*see Gov. Code § 27361*; *see also Gov. Code § 27279(a)* (definition of "instrument")].

2. If right to extend option period is to be negotiated after original agreement:

a. Draft extension of option agreement after review of tax considerations [*see § 22.251*].

b. Have following parties execute extension agreement:

(1) Optionor.

(2) Spouse of optionor.

(3) Optionee.

NOTE:
The signatures of the optionors and spouses of optionors should also be acknowledged if recordation is intended in order to give constructive notice of the extension of the option. If the original agreement was not recorded, this notice will also not be recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.141

§ 22.141 Exercise of Option

1. Select appropriate method of exercise in conformance with method specified in option agreement.

NOTE:

Any timely exercise that does not exactly conform to the method specified in the option agreement will be ineffective [*Layton v. West (1969) 271 Cal. App. 2d 508, 511-512, 76 Cal. Rptr. 507* ; ***see*** *Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 498, 113 Cal. Rptr. 705, 521 P.2d 1097]* . If no method is specified in the option, any method that communicates acceptance to the optionor is sufficient [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* .

a. If general form of option [*see § 22.200*] is used, have optionee exercise option by executing sales agreement and delivering it to optionor.

b. When appropriate under terms of option agreement, prepare and have optionee execute notice of exercise of option, and provide optionor with this notice [*see § 22.252*].

2. Effect exercise of option within option term.

NOTE:

The date for exercising an irrevocable option is extended one day if the last day falls on a Sunday or legal holiday [*Civ. Code § 11*]. If the option is revocable, the date for exercising it may be revoked at any time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.142

§ 22.142 Assignment of Option

1. Determine whether option is assignable by reviewing option agreement terms and applicable law [*see § 22.33*].

2. Review tax consequences of assignment [*see § 22.253[1][b]*].

3. Have assignment [*see § 22.253*] executed by:

a. Assignor (original optionee).

b. Spouse of assignor.

c. Assignee.

4. If assignment is to be recorded, have execution acknowledged.

5. If recording is to be effected, mail acknowledged document to county recorder's office in county where property is located [*Civ. Code § 1169*], enclosing check for applicable fee [*see Gov. Code § 27361*; *see also Gov. Code § 27279(a)* (definition of "instrument")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.143

§ 22.143 Quitclaim of Option Rights

NOTE:
For a review of the quitclaiming of option rights, refer to §§ 22.30[5] and 22.254.

1. Have quitclaim deed [*see § 22.254*] executed and acknowledged by:

a. Optionee.

b. Spouse of optionee.

2. To record quitclaim deed, mail acknowledged deed to county recorder's office in county where property is located [*Civ. Code § 1169*], enclosing check for applicable fee [*see Gov. Code § 27361*; *see also Gov. Code § 27279(a)* (definition of "instrument")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesQuit Claim DeedsReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide §§ 22.144-22.199

[Reserved]

§§ 22.144[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY
PART IV. FORMS
A. Complete Option Agreements

9-22 California Legal Forms--Transaction Guide § 22.200

§ 22.200 Option to Purchase

[1] Comment

[a] Use of Form

This form is a general form of option agreement to purchase real property. It grants to named optionees the exclusive right to purchase described real property at an agreed price and under specified terms and conditions. The form also provides for both the giving of consideration in exchange for the grant and a fixed option period. Thus, if the option agreement is properly executed, the option is irrevocable for the term of the option [*see Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49]* .

This form contains basic option provisions. It may be adapted to the particular circumstances of the contemplated transaction by the use of various optional provisions, appropriately modified [*see §§ 22.210-22.236*].

[b] Designation of Parties and Date of Execution

The blanks in the preamble for the names of the optionors are to be filled in with the names of the legal owners of the property underlying the option. Caution should be exercised in ascertaining both the ownership and capacity to contract of an optionor and the state of the title. Even if investigation reveals sole ownership, when an alleged sole owner is or was married, the consent of spouse clause at the end of this form should be used to prevent subsequent claims. If the optionor's name is presently different from the one in which record title stands, the option agreement must include the name in which record title is vested in order to serve as constructive notice on recordation [*see Civ. Code § 1096*].

A title insurance company can help ascertain the record state of the title, along with exceptions, encumbrances, and the existence of prior options. However, even the small cost of a preliminary title report may not be justified when the option is really just a several-day extension of an offer to sell, with nominal consideration for the option. The degree of examination, whether through investigation or title company aid such as a preliminary report or a policy of title insurance, depends on whether the value of the option justifies the expense. A successive option agreement dealing with the development of a large tract of land will warrant more extensive examination [*see § 22.202*; *see also § 22.220*

(preliminary title report as consideration)].

[c] Transactional Relationship of Parties

There are cases when a court must decide whether an agreement is one of several types of instruments. For example, it may be a close question of whether the parties intended an option or a sales agreement [*see § 22.11*]. When parties intend an option agreement, and are using this type of agreement to their advantage, they should use option terminology in the agreement. In a close case, weight would be given to the manner in which the parties treated the instrument [*see Smith v. Blodget (1921) 187 Cal. 235, 241, 201 P. 584]* . However, the designation of the contract is not controlling [*see Smith v. Morton (1972) 29 Cal. App. 3d 616, 619-620, 106 Cal. Rptr. 52* (labels disregarded in finding instrument to be contract of sale rather than option agreement)]. This form, in the recitals and preamble, uses option terminology from the beginning of the agreement, designates the parties "optionors" and "optionees," not "buyers" and "sellers," and describes in the recitals the relationship into which the parties are entering. While this form describes the relationship of the parties as optionors and optionees, further details may be added to the recitals if the nature of the agreement as an option or other type of instrument is a close question.

[d] Contract of Sale or Escrow Instructions as Exhibit to Option Agreement

On exercise, an option agreement becomes the sales agreement [*Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49]* . Therefore, when the option is drafted, the parties must contemplate and draft the terms of the sale. The terms of sale may be incorporated into the body of the option agreement or included in a separate document (such as a sales agreement or escrow instructions) that is then incorporated by reference into the body of the option agreement.

This form uses the latter approach of incorporating the terms of sale in a separate, attached exhibit, and provides for execution of the exhibit as the method by which the option is exercised. Thus, the terms of the entire transaction are physically divided into two important parts, the option terms and the sales terms. The two sets of terms can be examined and considered independently to avoid confusion and the inadvertent omission of significant terms peculiar to either the option or the sale.

Since either a contract of sale or escrow instructions must be prepared when this form is used, refer to Chapter 23, *Agreements to Sell Real Property*, or Chapter 26, *Real Property Escrows.*

[2] FORM

Option to Purchase

[*If agreement is to be recorded, use:*]

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)
_____ [*street address*])
_____ [*city, state, zip*])
)

_____

_____

Space above this line for recorder's use

[*Continue with the following:*]

OPTION AGREEMENT

Preamble

This Option Agreement is made _____[*date*] at _____[*city*], California, by _____[*name*] and _____[*name*], collectively referred to in this Agreement as "Optionors," and _____[*name*] and _____[*name*], collectively referred to in this Agreement as "Optionees."

Recitals

WHEREAS, Optionors are the owners of certain real property situated in _____ County, referred to in this Agreement as "the Property," _____[commonly known as _____ (*street address*), *or, if property has no street address,* located in] _____[*city*], California, and more particularly described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference; and,

WHEREAS, Optionees desire to acquire the exclusive right to purchase, without becoming obligated to purchase, the Property at an agreed price and under specified terms and conditions;

NOW, THEREFORE, it is agreed as follows:

Grant of Option

1. Optionors hereby grant to Optionees the exclusive right to purchase the Property at a price and under the terms and conditions set forth in Exhibit A.

Option Period

[*Choose one of the following paragraphs:*]

[*If the option period begins on the date of the agreement, use:*]

2. This option will commence on the day and year first above written and will remain in effect until _____[*time of day*], _____[*date*].

[*OR*]

[*If the option period begins on a fixed future date, use:*]

2. This option will commence _____[*date*], and continue until _____[*time of day*], _____[*date*].

[*OR*]

[*If the option period begins on the occurrence of a stated event, use:*]

2. This option will continue for a period to and including _____[*time of day*], [*number*] [days *or* months *or* years] from [*specified event, e.g.,* Optionees' receipt from Optionors of a preliminary title report as described below]. This period must be computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

[*Continue with the following:*]

Consideration

3. This option is granted in consideration of Optionees' payment to Optionors of the sum of $ _____, payable [*specify the terms of payment, e.g.,* by a certified or cashier's check drawn to the order of Optionors, subject to collection, receipt of which is hereby acknowledged].

Application of Consideration to Purchase Price

[*Choose one of the following paragraphs:*]

[*If any extension consideration is treated same as original consideration, use:*]

4. If this option or any extension of it is exercised in accordance with its terms, [then the consideration paid Optionors by Optionees will _____ (apply *or* not apply) *or* then _____ percent of the consideration paid Optionors by Optionees will apply] to the purchase price.

[*OR*]

[*If extension consideration is treated differently, use:*]

4. If this option is exercised in accordance with its terms, [then the consideration paid Optionors by Optionees for the original option period will _____ (apply *or* not apply) *or* then _____ percent of the

consideration paid Optionors by Optionees for the original option period will apply] to the purchase price. If an extension of this option is exercised in accordance with the terms of this option, [then the consideration paid Optionors by Optionees for the extension will _____ (apply *or* not apply) *or* then _____ percent of the consideration paid Optionors by Optionees for the extension will apply] to the purchase price.

[*Continue with the following:*]

Retention of Consideration

5. In the event this option or any extension thereof is not exercised, all sums paid and services rendered to Optionors by Optionees will be retained by Optionors in consideration of the granting of this option.

Exercise of Option

6. If Optionees [are not in breach of this Agreement *or specify performance, e.g.*, have delivered or deliver concurrently with the exercise of the option a preliminary title report], they may exercise this option by execution and tender to Optionors of an instrument in the form of Exhibit A. Optionors must then immediately execute [*add if agreement is to be recorded:*, acknowledge,] and deliver to Optionees an executed copy of the instrument.

Automatic Termination

7. If Optionees fail to exercise this option in accordance with its terms and within the option period or any extension of it, then this option and the rights of Optionees will automatically and immediately terminate without notice. Thereafter, Optionees must properly execute, acknowledge, and deliver to Optionors within [*number*] days of a request therefor,

_____

[*Select the appropriate provision below:*]

[*If the quitclaim deed is attached as Exhibit B, use:*]

a quitclaim deed in the form of Exhibit B, which is attached to this Agreement and hereby incorporated by reference.

[*OR*]

[*If the quitclaim deed is not attached as an exhibit, use:*]

a release, quitclaim deed, or any other document required by Optionors or a title insurance company to verify the termination of this Agreement.

[*Continue with the following:*]

Assignability of Option

[*Choose one of the following paragraphs:*]

[*If there are no conditions on assignment but assignment is effective only on giving specified notice to the optionor, use:*]

8. Optionees may at any time during the option period assign this Agreement; provided, however, that an assignment will be effective only on the giving of [*number*] days' written notice of the assignment by Optionees to Optionors.

[*OR*]

[*If assignment is subject to condition(s), use:*]

8. Optionees may assign this Agreement on condition that [*specify condition, e.g.,* the written consent of Optionors is first obtained].

[*OR*]

[*If assignment is prohibited, use:*]

8. Optionees must not assign this Agreement. In the event an attempted assignment is made, in violation of this provision, then Optionees' rights under this Agreement will automatically terminate without notice.

[*Continue with the following:*]

Notices

9. (a) Unless otherwise provided in this Agreement, any notice, tender, or delivery to be given under this Agreement by either party to the other may be effected by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested, and will be deemed communicated as of _____[mailing *or* actual receipt *or* _____ (*number*) hours from mailing]. Mailed notices must be addressed as set forth below, but each party may change its address by written notice in accordance with this paragraph.

(b) Notice to Optionors must be addressed as follows: _____.

(c) Notice to Optionees must be addressed as follows: _____.

Entire Agreement

10. This instrument and the attached Exhibit A [*add if quitclaim deed attached:* and Exhibit B] constitute the entire agreement between the parties relating to the option. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement will be of no force and effect unless it is in writing and signed by the Optionors and Optionees.

Attorneys' Fees

11. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party will be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Binding Effect

12. This Agreement will be binding on and inure to the benefit of the parties to this Agreement and their heirs, personal representatives, successors, and assigns [*add if option is nonassignable or conditionally assignable:*, except as otherwise provided in this Agreement].

Executed on _____[*date*], at _____[*city*], [*county*], California.

OPTIONORS
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

OPTIONEES
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

[*If any Optionor is married, choose one of following paragraphs:*]

[*If one Optionor is married, use:*]

Statement of Optionor's Spouse

The undersigned, who is the spouse of _____[*name of optionor*], acknowledges that _____[he *or* she] has absolutely no interest, whether present or future, in the Property that is the subject of this Agreement. The undersigned has read this Agreement and consents to its execution and performance in all respects.
_____ Dated:

_____ [*signature of spouse*]
[*typed name*]

[*OR*]

[*If two or more Optionors are married, use:*]

Statement of Optionors' Spouses

The undersigned, who are the spouses of Optionors, acknowledge that they have absolutely no interest, whether present or future, in the Property that is the subject of this Agreement. The undersigned have read this Agreement and consent to its execution and performance in all respects.
_____ Dated:

_____ [*signature of spouse*]
[*typed name*]
_____ [Husband *or* Wife]
of _____ [*name of optionor*]

[*Repeat signature block for each additional spouse.*]

[*Continue with the following:*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____ [capacity *or* capacities], and that by _____[his *or* her *or* their] signature [s] on the instrument the person [s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[*Seal*]

EXHIBIT A

[*Attach escrow instructions or a sales agreement.*]

[*If quitclaim deed is attached as exhibit, add:*]

EXHIBIT B

[*Attach quitclaim deed.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of First RefusalReal Property LawPurchase & SaleOption ContractsRights of Preemption



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY
PART IV. FORMS
A. Complete Option Agreements

9-22 California Legal Forms--Transaction Guide § 22.201

§ 22.201 Option to Repurchase

[1] Comment--Use of Form

This form is a short form of an option agreement to repurchase specified real property. It is designed to give a seller-optionee of real property the exclusive right to reacquire the same real property sold to the buyer-optionor. The form may be adapted for use when the optionee desires the right to reacquire the specified property on the occurrence of some contingency. For example, an owner of several contiguous parcels may be interested in enhancing the value of some of the parcels by selling various remaining parcels to a developer who has promised to develop the latter within a certain time period and according to stated specifications. For protection from the failure of the developer to develop the land, the owner may retain an option to repurchase the land if construction is not started by a certain date; such an option agreement is valid and may be specifically enforced [*see, e.g., D-K Investment Corp. v. Sutter (1971) 19 Cal. App. 3d 537, 96 Cal. Rptr. 830]* . Refer to § 22.50 for discussion of recording and acknowledgment requirements and considerations.

[2] FORM

Option to Repurchase
[*If agreement is to be recorded, use:*]

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)
_____ [*street address*])
_____ [*city, state, zip*])
)

_____

_____

Space above this line for recorder's use

[*Continue with the following:*]

OPTION AGREEMENT

Preamble

This Option Agreement is made _____[*date*] at _____[*city*], California, by _____[*name*],

[*Add if more than one optionor:* and _____ (*name*), collectively] referred to in this Agreement as "Optionor," and _____ [*name*],

[*Add if more than one optionee:* and _____ (*name*), collectively]

referred to in this Agreement as "Optionee."

Recitals

WHEREAS, Optionor is the purchaser and owner of certain real property located at _____[*street address and city*], _____ County, California, referred to in this Agreement as "the Property," and more particularly described in and evidenced by that certain grant deed, by Optionor as grantee and Optionee as grantor, recorded as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, which deed is referred to and incorporated in this Agreement for a complete description of the Property; and,

WHEREAS, Optionee has examined the Property and, as the former owner of it, is acquainted with the Property and desires to acquire from Optionor the exclusive right to repurchase, without being obligated to repurchase, the Property at the price and on the terms and conditions provided for in this Agreement;

NOW, THEREFORE, it is agreed as follows:

Grant of Option

1. For and in consideration of the sum of $ _____ paid by Optionee to Optionor, receipt of which is

hereby acknowledged by Optionor, Optionor hereby grants to Optionee the exclusive right to repurchase the Property for a period of [*number*] [days *or* months *or* years], from and after the date of this Agreement and pursuant to the terms and conditions of that certain contract of sale (embodied in the form of Escrow Instructions) that is attached to this Agreement as Exhibit A and hereby incorporated by reference.

Exercise of Option

2. In the event that Optionee desires to exercise this option, Optionee must do so by delivering signed, written notice to Optionor on or before expiration of this option, of the election of Optionee to exercise this option. The notice must be accompanied by Escrow Instructions in the form of Exhibit A, executed by Optionee as Buyer. On exercise by Optionee in the manner set forth above, Optionor must promptly execute the Escrow Instructions and deposit them with the Escrow Holder.

Binding Effect

3. This Agreement will bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties to this Agreement.

Execution

IN WITNESS WHEREOF, the parties to this Agreement have executed this Option Agreement on the date above written.

OPTIONOR
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

OPTIONEE
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

[*For acknowledgment, see § 22.200 [2].*]

EXHIBIT A

[*Attach escrow instructions.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of Preemption



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 22 OPTIONS TO PURCHASE REAL PROPERTY
PART IV. FORMS
A. Complete Option Agreements

9-22 California Legal Forms--Transaction Guide § 22.202

§ 22.202 Successive Option Agreement

[1] Comment

[a] Use of Form

This form is a successive option agreement. It provides all the basic provisions that should go into any successive option agreement as well as specific provisions dealing with the types of problems that are typical in a transaction involving the development of a subdivision. To these provisions may be added appropriate optional provisions [*see §§ 22.210-22.236*]. For other examples of successive option agreements, refer to Current Legal Forms, Chapter 22, *Development and Subdivision* (Matthew Bender).

The various purposes served by successive options include advantages to both the prospective seller and the prospective buyer. A seller may find the granting of successive options to a developer advantageous as a substitute for a security device for the sale of the whole tract that allows continued controls upon the developer for as long as the seller has not been paid for the property in full. A buyer-developer may prefer successive options to experiment with the successful development of one parcel without committing as to the others, at the same time being assured of the right to purchase the remaining parcels if the venture is successful.

[b] Subdivision Regulation Considerations

The Subdivided Lands Act [*Bus. & Prof. Code §§ 11000-11200*] is designed to protect individual purchasers of lots or homes from subdividers and to assure that all purchasers will be given essential information concerning public utility facilities and other essential factors. The statutory requirements of the Act are inapplicable to an installment land sales contract by an owner to a subdivider who intends to subdivide the property and sell it to the public [*Westbrook v. Summerfield, Roberts Etc., Inc. (1957) 154 Cal. App. 2d 761, 766, 316 P.2d 691]* ; the rationale of this proposition should apply to successive option agreements as well. For detailed discussion of the Subdivided Lands Act and subdivision regulation in general, refer to Ch. 30, *Subdivision Regulation.*

[c] Specific Provisions

[i] Recital

The recital in this form states that the option is applicable to parcels of the described property rather than the whole. No reference is made to an exhibit supplying the terms of the proposed sale; the option agreement itself is designed to include all the terms of sale.

[ii] Grant of and Consideration for Successive Options

There are numerous ways in which the granting of successive options, along with a system for providing monetary consideration, may be set up. The first alternative in this form is mechanically closest to reflecting the concept of how a successive option agreement operates: it demonstrates graphically what it is that is being given in exchange for the option consideration (assuming the option consideration does not apply to the purchase price). The optionee pays option consideration on a certain date. This consideration entitles the optionee to exercise an option to purchase the entire property or just the parcel relating to the first option. The option consideration, therefore, is not just for the first parcel but includes all remaining parcels, for these, too, are remaining off the market. The foregoing arrangement may be varied so as to omit the optionee's option to purchase all the land at the same time.

[iii] Setting Parcel Prices and Option Consideration

Schemes for setting and interrelating the prices of the various parcels and the consideration for the option vary tremendously. One possibility is to try to estimate the exact worth of each parcel. For instance, taking the first "grant" clause utilized below, the parties should estimate the fair market value of each parcel during the period when the option relating to it might be exercised. Then the parties should set the option consideration for each period as the true measure of the value of the optionor's keeping the property off the market. To preserve the validity of this approach, the parties should avoid making the consideration applicable to the purchase price. If, on the other hand, the consideration is to apply to the purchase price, then the purchase price must be appropriately inflated. For the important tax consequences of the application or nonapplication of consideration to the purchase price, refer to Section 22.40.

If the period over which the agreement extends is not too long, or the market too volatile, one possible way of setting up all the relationships in a chart such as given in the first "grant" clause below is to compute uniform rates. Thus, once it is estimated that the land should be worth $15,000 per acre next year and $16,000 the year after, and the agreement runs one more year, the parties could set all the purchase prices on the basis of $16,000 per acre, providing, perhaps, for a somewhat lower alternative if the option to buy all parcels were immediately exercised. Similarly, after several option periods were estimated as to the amount of the option consideration, the parties could compute an average option consideration cost per acre per one-month period. This rate could be applied to all option periods and all parcels in the agreement.

The element of flexibility can be built into setting purchase prices by providing for fair market value as of the date the option is exercised, to be established by appraisal. An illustration of such an arrangement is provided as an alternative below. Flexibility may also be built into the option consideration by segregating certain components such as taxes and insurance and providing that the optionee must pay these costs.

[iv] Exercise of Successive Options

Each successive option is exercised in the same manner as a single option. The only difference is that the optionee must continue to exercise each successive option in order to keep future successive options available. Alternatives that must be considered and determined in this form are whether the optionee will have the right to exercise an option to buy all the parcels at once, in advance of when the optionee must purchase them or terminate the agreement, and, if the optionee has this right, what will be the purchase price of all the remaining parcels combined.

[v] Controls Maintained by Optionor-Seller

An extensive program of land development usually involves the seller's maintaining an interest in the project. This is because the large sums of money needed generally require the seller to participate in the financing, or the seller may be retaining adjacent land. These factors, particularly the financing, give the seller a strong interest in maintaining certain controls on the development of the land. This may be accomplished by setting conditions precedent to the exercise of the successive options relating to the paying off of obligations and the successful development of land acquired by the previous option. Successful development may also be accomplished by giving the seller a significant say in the method and plan of development. Many variations in accomplishing the foregoing are possible. Articles II and VI of this form set forth several possibilities.

[vi] Reservation of Rights by Optionor

When the development of the property will take a long time, the optionor may request, and the optionee may allow, a reservation of rights as to conducting activities on the optioned lands that may carry over even after they have been conveyed. These rights may serve as part of the option consideration. They may even involve permanent easements that benefit the optionor if the optionor is retaining adjacent land. Numerous such rights can be offered the optionor, depending on the situation and the uses of the land. Several possibilities are suggested below in Articles VII and VIII.

[vii] Exchange of Lands

When vast parcels of land are involved in a long-term plan of development, preserving flexibility as to changing land needs is advisable. The possibility always exists that the interests of the optionee or optionor might require that land other than that originally specified in the agreement be offered first, or even that land already conveyed be exchanged for land in a parcel to which the option has not yet been exercised. An example of an exchange arrangement is demonstrated below in Article IX.

[2] FORM

Successive Option Agreement

	)
Recording Requested by:	)
_____ [*name*]	)
After Recordation, Mail to:	)
_____ [*street address*]	)
_____ [*city, state, zip*]	)
	)

Space above this line for recorder's use

SUCCESSIVE OPTION AGREEMENT

Preamble

This Agreement is made on _____[*date*], at _____[*city*], California, by _____[*name*] and _____[*name*], collectively referred to in this Agreement as "Optionors," and _____[*name*] and _____[*name*], collectively referred to in this Agreement as "Optionees."

Recitals

WHEREAS, Optionors are the owners of certain real property located in _____ County, California, referred to in this Agreement as "the Property," consisting of separate parcels designated Parcels A through _____, respectively, which Property and parcels are more particularly described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference; and,

WHEREAS, Optionees desire to acquire the exclusive right to purchase, without becoming obligated to purchase, the parcels that comprise the Property at agreed prices and under specified terms and conditions;

NOW THEREFORE, it is agreed as follows:

ARTICLE I. GRANT OF SUCCESSIVE OPTIONS

Grant of Successive Options

[*Choose one of the following:*]

[*If consideration for successive options and parcel payments is set forth separately, use:*]

Section 1.01. In consideration of $ _____, receipt of which is hereby acknowledged, Optionors hereby grant to Optionees the exclusive right to purchase the parcels comprising the Property at the prices, for the consideration, and within the time limitations specified below.

Payment Schedule

Section 1.02. Consideration for the successive options and parcel purchases must be paid in the following amounts and by the following deadlines:

Performance Deadline	Payment	Pays For
_____	$ _____	Grant of Option on Parcels A Through _____
[*date*]	_____	
_____	$ _____	Purchase of Parcel A
[*date*]	_____	

_____	$ _____	Grant of Option on Parcels B Through _____
[*date*]		
_____	$ _____	Purchase of Parcel B
[*date*]		

[*OR*]

[*If provision is made for monthly option consideration, use:*]

Section 1.01. (a) Optionors hereby grant to Optionees the exclusive right to purchase the parcels comprising the Property at the following prices, on or before the following deadline dates.

Parcel	Exercise Deadline	Purchase Price
A	_____ [*date*]	$_____
B	_____ [*date*]	$_____

(b) These options are granted in consideration of the payment of $ _____, receipt of which is hereby acknowledged. In further consideration, Optionees must keep this Agreement in effect by monthly payments to Optionors as set forth below in Section 1.02.

Payment Schedule

Section 1.02. Consideration for the option must be paid monthly as follows:

(a) or the period _____[*date*] to _____[*date*], the amount of $ _____, payable by certified or cashier's check on the first of each month.

(b) For the period _____[*date*] to _____[*date*], the amount of $ _____, payable by certified or cashier's check on the first of each month.

[*OR*]

[*If purchase prices are to be set later at fair market value, use:*]

Section 1.01. In consideration of $ _____, Optionors hereby grant to Optionees the exclusive right to purchase the parcels comprising the Property on or before the dates specified below. The purchase price for each parcel must be equal to the fair market value of the parcel on the date the option relating to the parcel is exercised, this price not to be less than $ _____ per acre.

Parcel	Exercise Deadline

A _____ [*date*]

B _____ [*date*]

Appointment of Appraisers

Section 1.02. If the parties are unable to agree in writing on the fair market value within [*e.g.*, 30] days of the exercise of each option, that fair market value will be determined by a board of three appraisers as follows:

(a) Within [*e.g.*, 40] days of the exercise of each option, each of the parties must notify the other party in writing of the name and address of an appraiser selected by it. If either party fails to notify the other party of the appraiser selected by it within the time provided, the appraiser already selected will select a second appraiser. The two appraisers so selected will select a third appraiser, and in the event the two appraisers selected fail, within [*e.g.*, 10] days after their selection, to agree on the third, then the presiding judge of the Superior Court of _____ County will, on the request of either party, appoint, within [*e.g.*, 10] days after such a request, a third appraiser.

(b) The appraisers so selected or appointed must promptly proceed to determine the fair market value of the land included in the parcel as to which the option has been exercised; provided, however, that in no event will the fair market value be determined to be less that $ _____ per acre. Any valuation agreed on by a majority of the appraisers not less than $ _____ per acre will be accepted as final and conclusive between the parties to this Agreement and by any court of competent jurisdiction and will ipso facto become the purchase price for that parcel.

(c) The appraisers must make their report in writing, and the report must be signed in duplicate by any two of the appraisers. A copy of the signed report must be delivered to each of the parties to this Agreement and to the title company described in Article V within [*e.g.*, 15] days of the selection of the third appraiser. The expenses and cost of the appraisal will be divided equally between the parties.

[*OR*]

[*If purchase price is already determined, use:*]

Section 1.01. In consideration of $ _____, receipt of which is hereby acknowledged, Optionors hereby grant to Optionees the exclusive right to purchase the parcels comprising the Property for the following purchase prices within the period set forth below:

Parcel	Exercise Deadline	Purchase Price
A	_____ [*date*]	$_____
B	_____ [*date*]	$_____

[*Continue with the following:*]

ARTICLE II. EXERCISE OF SUCCESSIVE OPTIONS

Exercise of Successive Options

Section 2.01. Each of the options granted in this Agreement must be exercised by notice to Optionors on or before the applicable deadline; provided, however, that the exercise of each option is conditioned on the following: (1) timely payment of the applicable option consideration; (2) exercise of the preceding option (if any); and, (3) Optionees' performance without breach of all the terms of this Agreement. Optionees must exercise each successive option in order to continue this Agreement in full force and effect.

[*Add if Optionees have option to purchase all remaining parcels:*]

Notwithstanding the foregoing, Optionees may, at any time, exercise the option to purchase all of the remaining parcels, in which case the purchase price will be _____ (*specify, e.g.,* the sum of all unpaid purchase prices *or* the sum of all unpaid purchase prices plus the option consideration that would have been paid had Optionees waited until each deadline to exercise each option *or* the fair market value of those parcels, as defined in this Agreement)].

[*If successful development is prerequisite to subsequent exercise of options, add:*]

Additional Conditions Precedent to Exercise

Section 2.02. The exercise of each successive option is further conditioned on the following conditions precedent: _____[*specify, e.g.,* that Optionees have obtained partial releases from the deed of trust held by Optionors on _____ percent of the acres in the preceding parcel; that Optionees have developed the preceding parcel by _____ (*specify, e.g.,* selling or leasing for a term of not less than _____ [*number*] years _____ percent of the acres in the preceding parcel); and that Optionees have paid off _____ percent of the note given in connection with the purchase of the preceding parcel].

[*Continue with the following:*]

ARTICLE III. TREATMENT OF OPTION CONSIDERATION

[*Choose one of the following paragraphs:*]

[*If option consideration is not applied to purchase price, use:*]

Retention of Consideration

Section 3.01. If any or all of the successive options granted in this Agreement are not exercised, all sums paid and services rendered Optionors by Optionees will be retained by Optionors in consideration of the granting of these successive options. In no event will any sums paid as option consideration be applicable to the purchase prices of the parcels.

[*OR*]

[*If option consideration is applied to purchase price, use:*]

Application and Retention of Consideration

Section 3.01. On exercise of any of the successive options granted in this Agreement, the purchase price payable for the related parcel will be reduced by [_____ percent of the related option payment *or* the related monthly option payments paid in the period preceding the exercise of the option *or specify other amount*].

[*If appropriate, add:* These payments will apply to the cash down payment to be made on the purchase of the parcel.]

If any or all of the successive options granted in this Agreement are not exercised, all sums paid and services rendered Optionors by Optionees will be retained by Optionors in consideration of the granting of these successive options.

[*Continue with the following:*]

ARTICLE IV. TERMINATION

[*Choose one of the following:*]

[*If generally providing that any breach results in automatic termination, use:*]

Automatic Termination

Section 4.01. If Optionees fail to meet any deadline relating to option consideration or exercise of an option or terms of sale of each parcel, then this Agreement and the rights of Optionees will automatically and immediately terminate without notice. Thereafter, Optionees must properly execute, acknowledge, and deliver to Optionors within [*number*] days of request therefor, a release, quitclaim deed, or any other document required by Optionors or a title company to verify the termination of this Agreement.

[*OR*]

[*If specific events of default are to be listed, use:*]

Default

Section 4.01. Each of the following events will constitute an event of default under this Agreement:

(a) Optionees fail or omit to make, on or before the date on which it is due, any payment to be made to Optionors of principal or interest pursuant to the provisions of any note given pursuant to the provisions of this Agreement.

(b) Optionees fail to perform or observe any of the covenants or agreements of any deed of trust given pursuant to the provisions of this Agreement.

(c) Optionees develop or subdivide all or any portion of the parcels of land acquired from Optionors pursuant to this Agreement in a manner not in substantial accordance with a development plan previously approved in writing by Optionors.

(d) Optionees fail to perform any other acts to be performed pursuant to the provisions of this Agreement.

(e) A petition is filed against an Optionee in any court, whether or not pursuant to any statute of the United States or of any state, in any bankruptcy, [reorganization,] composition, extension, arrangement, or insolvency proceedings, and Optionee is thereafter adjudicated bankrupt, or the petition is approved by the court, or the court assumes jurisdiction of the subject matter, or the proceedings are not dismissed within [*e.g.*, 90] days after the institution of them, or any such petition is so filed by an Optionee.

(f) In any proceeding, a receiver or trustee is appointed for all or any portion of an Optionee's property, and the receivership or trusteeship is not vacated within [*e.g.*, 90] days after the appointment of the receiver or trustee.

(g) An Optionee makes an assignment for the benefit of its creditors.

[*If optionee is corporation, add:* (h) An Optionee is dissolved in accordance with the provisions of the Corporations Code of the State of California.]

Termination

Section 4.02. If an event of default occurs, Optionors will have the right, at their election, then or at any time thereafter while the event of default continues, to give Optionees notice that on the date specified in the notice, which date must be not less than [*e.g.*, 10] days after the giving of the notice, all of Optionees' rights under this Agreement will terminate. On the date specified in the notice, all of Optionee's rights under this Agreement will terminate and come to an end unless the default is curable and is in fact cured within the period specified in the notice, or unless the default (other than the failure to pay money) is curable but cannot reasonably be cured within [*e.g.*, 10] days after the giving of the notice and Optionees commence within that [*e.g.*, 10]-day period to cure the default and prosecute their efforts to conclusion with reasonable diligence.

Recordation

Section 4.03. [A memorandum of this Agreement in the form of Exhibit _____ attached to this Agreement *or* This Agreement] must be executed and acknowledged by the parties for the purpose of recording. If Optionees fail to exercise any of the options granted in this Agreement within the time provided, or if Optionees' rights under this Agreement are terminated as provided in Section 4.02, Optionees must promptly execute and deliver to Optionors a document relinquishing to Optionors Optionees' rights to acquire the portion of Parcels A through _____ not yet acquired by Optionees, which document must be in the form Optionors require.

[*Continue with the following illustrative terms of sale:*]

ARTICLE V. TERMS OF SALE

Terms of Sale

Section 5.01. On exercise of any of the successive options granted in this Agreement, the terms of sale will be as follows: Within [*specify, e.g.*, 30] days [of the exercise of each option *or* from the determination of the purchase price

for any of the Parcels by agreement or appraisal pursuant to Article I], Optionors must deposit in escrow with _____[a title company *or specify name of title company*] a grant deed to the parcel as to which an option has been exercised, the deed to be in the form attached as Exhibit _____. Within the same time period, Optionees must deposit in escrow with the title company both of the following: (1) a note which, if the options relating to Parcels [*specify*] are exercised, must be in the form attached as Exhibit _____, and which, if the options relating to Parcels [*specify*] are exercised, must be in the form attached as Exhibit _____, it being understood that at the time of execution of the note all blank spaces in the note must be appropriately completed, including the principal amount of the purchase price for the particular parcel; and (2) a deed of trust covering the parcel in the form of Exhibit _____.

Instructions to Escrow Company

Section 5.02. The parties must instruct the title company within the period specified in Section 5.01 to do the following:

(a) Close each such escrow if and when it is prepared to issue its standard coverage policy of title insurance with liability in the principal amount of the purchase price for the particular parcel, insuring the interests of both parties, as these interests may appear, subject only to the following:

(1) The exceptions applicable to the particular parcel as set forth in Exhibit _____.

(2) The exceptions contained in its customary printed form of standard coverage policy of title insurance.

(3) The reservations in the deed.

(4) The rights of any subsequent lessee or licensee of Optionors to the extent provided in Section 8.01.

(b) Record the deed in _____ County, California, and deliver it to Optionees.

(c) Date the note and deed of trust as of the closing of the escrow.

(d) Record the deed of trust in _____ County, California, and deliver the deed of trust and note to Optionors.

Closing

Section 5.03. (a) On the closing of each such escrow, Optionors must pay the recording fees, the cost of any documentary transfer taxes that may be due, the premium for the policy of title insurance, and one-half of the escrow fee.

(b) On the closing of each such escrow, Optionees must pay the other one-half of the escrow fee.

(c) Property taxes must be prorated as of the date of closing.

(d) Each party must pay to the title company its part of the foregoing charges on receipt of the title company's statement of the charges.

ARTICLE VI. DEVELOPMENT PLANS

Land Use Plan

Section 6.01. Optionees covenant and agree to develop and subdivide each of Parcels A through _____ that Optionees may acquire from Optionors pursuant to this Agreement substantially as provided in (1) the land use plan attached to this Agreement and marked Exhibit _____, and (2) development plans approved in writing by both parties. Optionees may from time to time submit to Optionors for approval amendments to the land use plan, and Optionors' approval must not be unreasonably withheld.

Parcel Development Plan

Section 6.02. Within [*e.g.*, 90] days after the recordation of a deed from Optionors to Optionees for each of Parcels A through _____, Optionees must prepare and submit to Optionors a development plan for the parcel described in that deed, which development plan will be subject to the written approval of Optionors. Optionor's approval must not be unreasonably withheld. At any time prior to the full development and subdivision of any of Parcels A through _____ pursuant to a development plan approved in writing by the parties, Optionees may submit to Optionors for approval an amendment to any development plan then in effect, and Optionor's approval must not be unreasonably withheld. The initial development plan for each parcel that Optionees are obligated to submit within [*e.g.*, 90] days after recordation of the deed (1) must satisfy the requirements of Section 6.03, (2) may be in narrative form, general or skeleton in nature, and (3) may be approved by Optionors subject to supplemental material being submitted and approved at a later date. The term "development plan" as used in this Agreement with respect to any of the Parcels means the development plan for the parcel originally approved by Optionors or as subsequently amended by any amendments approved by Optionors as provided in this Agreement.

Contents of Development Plan

Section 6.03. Before construction actually begins in any area, a development plan for the area must have been submitted and approved that sets forth among other things the following:

(a) The division of the Property into areas for single- family residences, multifamily residences, professional, administrative, commercial, and industrial uses, and also areas for schools, parks, golf courses, playgrounds, and other community purposes;

(b) The location of rights-of-way for all streets and highways, including both width of right-of-way and width of paved surface from curb to curb, and paving and sidewalk plans;

(c) The nature and capacity of sewage disposal, storm drainage, water, gas, electric, telephone, and street lighting facilities;

(d) The lots into which the Property is to be divided for subdivision purposes; and,

(e) The terms of building and use restrictions to be imposed in the various areas.

Submission of Plan for Government Approval

Section 6.04. It will be the responsibility of Optionees to present the development plan for each parcel for approval by the [*specify, e.g.*, County Planning Commission] or any other governmental authority, whether state, city, or county, as may be required by law to permit the subdivision and development of the parcel in accordance with the development

plan.

ARTICLE VII. REMOVAL OF IMPROVEMENTS AND PERSONAL PROPERTY

Right of Optionors to Remove

Section 7.01. Optionors reserve the right to remove from the Property the following improvements: [*specify, e.g.*, any buildings, fences, cattle watering facilities, pole lines, pipelines, tanks, pumps, irrigation facilities] and other improvements, whether similar or dissimilar to the foregoing, and any personal property belonging to Optionors on the Property. The right may be exercised at any time and from time to time either before or after the parcels on which the improvements or personal property are located are conveyed to Optionees; provided, however, that any improvements or personal property remaining on Property conveyed to Optionees after the expiration of [*e.g.*, 60] days from notice given by Optionees to Optionors requesting removal of improvements or personal property from that Property will be deemed abandoned and will become the property of Optionees.

Optionor's Limited Obligation of Restoration

Section 7.02. Optionors will have no obligation to remove any improvements or personal property, or any portion of the foregoing, that Optionors do not desire to remove, and will have no obligation to restore the surface on any Property from which improvements or personal property are removed, with the following exceptions: (1) Optionors must fill in any holes or trenches dug in the course of removal; and (2) in the case of water wells from which equipment is removed, the well must be properly capped and the casing in the well left intact.

ARTICLE VIII. ADDITIONAL RIGHTS OF PARTIES

Leasing of Optioned Parcels

Section 8.01. Optionors may from time to time lease or grant licenses to use portions of parcels the options to which have not yet been exercised. The rights of each lessee or licensee of Optionors will continue in effect, unless a shorter term is specified in the lease or license, for [*specify time period, e.g.*, one year] after the date of [exercise by Optionees of the option with respect to *or* conveyance to the Optionees of] the Property affected by the lease or license.

Reservation of Rights

Section 8.02. At the time of each conveyance under this Agreement, Optionors must reserve the rights listed in (a) through (d), below, which reservations must be expressed in each deed. The form of fee simple deed to be used by Optionors is attached to this Agreement as Exhibit _____, and the appropriate date, land description, and exceptions and reservations must be inserted into each deed. The following are the rights to be reserved:

(a) Ingress and egress easements for highway and travel purposes and for installation and maintenance of water, power, telephone, and other utilities over, along, and across all now existing and future roads and waterways on or through the land, public or private, for the benefit of any land of Optionors' that, at the time of the conveyance, has not been conveyed to Optionees, subject to the following provisions:

(1) Any reserved easement may be relocated by the Optionees if substantially similar access is given by the relocation.

(2) The relocation, including the relocation of utilities, must be at the sole expense of the Optionees.

(3) The relocation must occur only with Optionors' written consent to relocation, which consent must not be unreasonably withheld.

(b) Reasonable right-of-way reservations or provisions for the benefit of any land of Optionors' that, at the time of the conveyance, has not been conveyed to Optionees, provided the reservations or provisions assure Optionors of public road access from that land to _____[*specify, e.g., set forth name of street or highway*].

(c) For a period of [*number*] years after the date of each conveyance and free of rent or charge therefor, the exclusive possession for use, as the land subject to this Agreement is presently being used, of all of the land described in Exhibit _____ even if some, or all, of the land has been released or discharged from the lien of the deed or deeds of trust mentioned in this Agreement, including possession of and title to crops in the ground. This reservation will continue in like manner for [*number*] years after the date of each conveyance, but only as to land not then physically under development by Optionees.

(d) All stumps and dead and down timber on all of the land described in Exhibit _____, free of charge therefor, for a period of [*number*] years after the date of this Agreement, subject to the following provisions:

(1) If the foregoing are not removed from the land within that _____-year period, this reservation will cease.

(2) Optionors must not cut any growing timber after the date of this Agreement.

Entry on Optioned Lands

Section 8.03. Optionees will have the right at any time hereafter to survey, map, engineer, make and take soundings on any parcel subject to this Agreement, even during the period when Optionors have exclusive possession, provided those acts do not unreasonably interfere with Optionors' exclusive possession, and provided further that Optionees must indemnify and hold Optionors harmless from any and all damage and liability occasioned by entry pursuant to this section .

[*If exchange provisions are to be included, add:*]

ARTICLE IX. EXCHANGE OF LAND

Revision of Description Proposed by Optionors

Section 9.01. If at any time Optionors deem it advisable to revise or amend the description of any portion of Parcels A through _____ not yet acquired by Optionees pursuant to this Agreement, Optionors may, from time to time, submit to Optionees a written request that a revision take place. If Optionees consent to any requested revision it will be deemed to have been made at the time of consent. The consent of Optionees to a revision must not be unreasonably withheld, provided that Optionees will not be obligated to consider any requested revision unless it is on an acre-for-acre basis.

Exchange of Land Proposed by Optionors

Section 9.02. If at any time Optionors deem it advisable to exchange land owned by Optionors for land acquired by Optionees pursuant to this Agreement, Optionors may submit to Optionees a written request that an exchange take

place. If Optionees consent to any requested exchange the exchange must be made as provided in this Article. The consent of Optionees to an exchange must not be unreasonably withheld, provided that Optionees will not be obligated to consider any requested exchange unless it is on an acre-for- acre basis.

Exchange of Land Proposed by Optionees

Section 9.03. If at any time after Optionees have acquired one or more of Parcels A through _____, Optionees deem it advisable to exchange acreage in a parcel so acquired for acreage included in any portion of Parcels B through _____ not yet acquired by Optionees pursuant to this Agreement, Optionees may submit to Optionors a written request that such an exchange take place. If Optionors consent to the requested exchange, the exchange must be made as provided in this Article. The consent of Optionors to an exchange must not be unreasonably withheld, provided that Optionors will not be obligated to consider a requested exchange unless the following apply: (1) it is on an acre-for-acre basis; (2) it is for property of a like character (that is, residential for residential and commercial for commercial as designated on the land use plan marked Exhibit _____); and (3) after the exchange, the parcels as reconstituted would each be a contiguous unit.

Written Consent to Exchange

Section 9.04. If either party consents to a requested exchange pursuant to Sections 9.02 or 9.03, that party must notify the other party in writing.

Closing Title to Exchanged Property

Section 9.05. (a) Within [*e.g.,* 30] days after the date of the written notification, the parties are obligated to make the following deposits in escrow: (1) Optionors must deposit in escrow with the title company a grant deed to the acreage to be exchanged by it, which deed must be in the form attached as Exhibit _____. (2) Optionees must deposit in escrow with the title company a grant deed to the acreage to be exchanged by Optionees, which deed must be in the form attached as Exhibit _____. (3) The parties must each execute and deposit in escrow with the title company the documents and instruments that are necessary (1) to release the acreage to be exchanged and conveyed by Optionees from any and all deeds of trust given pursuant to this Agreement to secure the payment of a purchase money note, and (2) to include the acreage to be exchanged and conveyed by Optionors among the acreage subject to any and all such deeds of trust.

(b) Within [*e.g.,* 30] days after the date of the written notification, the parties must instruct the title company to close each such escrow if and when it is prepared to issue its standard coverage policies of title insurance with respect to the acreage exchanged by each party with liability equal in amount to the [purchase price of the acreage *or* fair market value of the acreage as agreed to by the parties], insuring the interests of both Optionors and Optionees as those interests may appear, subject only to the following: (1) The exceptions applicable to the acreage as set forth in Exhibit _____; (2) The exceptions contained in its customary printed form of standard coverage policy of title insurance; (3) The reservations in any deed from Optionors; and (4) The right of any subsequent lessee or licensee of Optionors to the extent provided in Section 8.01.

(c) Within [*e.g.,* 30] days after the date of the written notification, the parties must instruct the title company to record the deeds in _____ County, California, and deliver them to the respective grantees.

Payments to Title Company

Section 9.06. Following the closing of any escrow provided for in this Article, the party requesting the exchange must pay to the title company, upon the receipt of the title company's statement, the following: the recording fees, documentary transfer taxes, premiums for the policies of title insurance, and escrow fee.

Amendment of Descriptions

Section 9.07. On the recordation of the deeds referred to in Section 9.05, or on Optionees' consent to a revision of the description of any of Parcels A through _____ as provided in Section 9.01, the descriptions set forth in Exhibit _____ to this Agreement, and the description of Parcels A through _____ as that description may be fixed pursuant to this Agreement, will be deemed to be revised and amended to the extent necessary to reflect the changes made in the parcels as a result of the revision or exchange, and all references in this Agreement to Parcels A through _____ will be deemed to refer to the parcels as they may be reconstituted from time to time pursuant to this Agreement.

ARTICLE X. ASSESSMENTS PRIOR TO CONVEYANCE

Obligation of Optionees to Reimburse Optionors

Section 10.01. If any land not yet conveyed to Optionees pursuant to this Agreement is affected by any special assessment or assessments occasioned or caused by and attributable to improvements made by Optionees or others to or on the land previously conveyed by Optionors pursuant to this Agreement, Optionees must reimburse Optionors for the amount of the special assessment or above-described assessments paid by Optionors at the time of the conveyance of the affected land pursuant to this Agreement. A special assessment must not be deemed to be any ad valorem tax levied on the land or any increase in any ad valorem tax levied on the land.

ARTICLE XI. ASSIGNABILITY

Assignability

Section 11.01. No assignment of this Agreement or of any right accruing under this Agreement may be made, in whole or in part, by either party without the prior written consent of the other party; provided, however, that nothing in this section will impair Optionees' right to convey lands acquired from Optionors pursuant to this Agreement which have been released by Optionors from all existing deeds of trust given pursuant to this Agreement.

Execution

IN WITNESS WHEREOF, the parties to this Agreement have executed this Option Agreement the day and year first above written.

OPTIONORS
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

OPTIONEES
_____ [*signature*]

[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

[*For acknowledgment, see § 22.200[2].*]

[*Attach Exhibits.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawRestrictive CovenantsSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Complete Option Agreements

9-22 California Legal Forms--Transaction Guide § 22.203

§ 22.203 Abstract of Option Agreement

[1] Comment--Use of Form

The parties may be reluctant to record the entire option agreement because they desire to avoid making all of the terms of the agreement public or because of the expense of recording a lengthy agreement. If this is the case, they may prepare and record an abstract of the agreement. The only requirements for drafting this abstract are that it must affect title to real property [*Gov. Code § 27280*], be acknowledged or proved [*Gov. Code §§ 27287, 27288*], and contain the essentials of which parties to be put on constructive notice must be aware. Basically, this means that the instrument must describe the real property and the length of time the option will affect title to it. The following form, then, is a sample that may be used in a simple option transaction. However, if successive options, extensions, or other complex conditions affecting the length of the option are to be applicable, the abstract must contain these conditions if it is to give constructive notice.

[2] FORM

Abstract of Option Agreement

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)
_____ [*street address*])
_____ [*city, state, zip*])
)

_____

_____

Space above this line for recorder's use

ABSTRACT OF OPTION AGREEMENT

This Abstract of Option Agreement is executed [concurrently *or* in connection] with that certain Option Agreement, dated _____, between the undersigned Optionors and _____[*names of optionees*] relating to the following property: [*property description*]. Optionors hereby grant to Optionees, _____[*names of optionees*], the exclusive right to purchase the above-described property at a price, and under the terms and conditions, set forth in the Option Agreement. This option will expire on _____[*date*], and unless exercised prior to that date, Optionees will have no further interest in the property.

OPTIONORS
_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

[*For acknowledgment, see Section 22.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of First RefusalReal Property LawPurchase & SaleOption ContractsRights of Preemption



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-22 California Legal Forms--Transaction Guide §§ 22.204-22.209

[Reserved]

§§ 22.204[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Option Provisions
1. Right to Extend

9-22 California Legal Forms--Transaction Guide § 22.210

§ 22.210 Option Period--Right to Extend

[1] Comment

[a] Use of Form

This form sets forth three alternative provisions regarding the right to extend an original option period. The first alternative gives the optionee the right to extend the original option period to a fixed date in the future. The second alternative permits the optionee to extend the period to any date before and including a stated date and is appropriate for successive options. The third alternative gives the optionee the right to extend the option to any date within a stated limit; the amount of consideration is to vary in accordance with the selected length of the extension.

This form also contains two alternative provisions regarding the consideration for extension. The first alternative may be inserted in either a standard option agreement or a successive option agreement. The second alternative provides for consideration that varies with the length of the extension selected by the optionee and is, thus, appropriate for use with the third alternative right-to-extend provision. For a discussion concerning the tax considerations, refer to § 22.40.

[b] Purpose of Right to Extend

The right to extend the option period may be valuable to the optionee for several reasons. If the optionee's purpose in obtaining the option is speculative, then an extension clause allows the optionee the right to continue to speculate on a rising market without buying the property outright. If the purpose of the option is to allow time to resolve contingencies or to develop the property, an extension clause assures that the optionee will not lose the initial investment if the original time period proves inadequate.

[c] Legal Role of Consideration

Just as consideration is necessary to make an option agreement binding on the optionor for the period of the original option period [*see Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49]* , there must also be

consideration to support an extension. Therefore, if the parties desire an extension to be binding, they should expressly provide for the giving of additional consideration when the option agreement grants a right to extend to the optionee.

[2] FORM

Option Period--Right to Extend

Extension of Option Period

[*If the optionee is given the right to extend the original option period to a fixed future date, use:*]

#. Optionors further grant to Optionees the right to extend the original option period until _____[*time of day*], on _____[*date*]. This right may be exercised by Optionees only if they are not in breach of this Agreement and if they provide notice of the exercise, and tender the required consideration, to Optionors before the expiration of the original option period.

[*OR*]

[*If the optionee can extend the period for a fixed amount of time from the original expiration date, use:*]

#. Optionors further grant to Optionees the right to extend [the original *or* each] option period until _____[*time of day*], [*number*] [days *or* months *or* years] from its expiration. This period must be computed by excluding the expiration date and counting the last day, unless the last day is a holiday, and then it must also be excluded. This right may be exercised by Optionees only if they are not in breach of this Agreement and if the provide notice of the exercise, and the required consideration, to Optionors before the expiration of the original option period.

[*OR*]

[*If the optionee can extend the option to any date within a stated limit and the amount of consideration will vary with the selected length of the extension, use:*]

#. Optionors further grant to Optionees the right to extend the original period not beyond _____[*time of day*], _____[*date*]. This right may be exercised by Optionees only if they provide the following to Optionors before the expiration of the original option period: notice of the exercise and of the date and time of expiration of the extension; and the required consideration.

[*Continue with the following:*]

Consideration for Extension

[*If the period of the extension is fixed, use:*]

#. If Optionees exercise their right to extend [the original *or* any] option period, they must pay to Optionors the sum of $[*add if appropriate:* for each extension], payable [*specify manner of payment, e.g.*, by a cashier's or certified check drawn to the order of Optionors, subject to collection].

[*OR*]

[*If the optionee selects the length of the extension, use:*]

#. If Optionees exercise their right to extend the original option period, they must pay to Optionors that sum of money calculated by multiplying $ _____ times a fraction of which the numerator is the number of [days *or* months *or* years] of the exercised extension, and the denominator is the total number of [days *or* months *or* years] of the maximum extension permitted under this Agreement. This amount will be payable [*specify manner of payment, e.g.*, by a cashier's or certified check drawn to the order of Optionors, subject to collection].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawConsiderationPreexisting DutiesContracts LawConsiderationSufficient ConsiderationContracts LawContract ModificationsPreexisting DutiesReal Property LawPurchase & SaleOption ContractsGeneral Overview



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1. Right to Extend

9-22 California Legal Forms--Transaction Guide §§ 22.211-22.219

[Reserved]

§§ 22.211[Reserved]



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B. Option Provisions
2. Consideration

9-22 California Legal Forms--Transaction Guide § 22.220

§ 22.220 Preliminary Title Report as Consideration

[1] Comment

[a] Use of Form

This form contains an optional provision requiring the optionee to provide, as partial consideration for the granting of an option, a preliminary title report covering the underlying real property. Since optionors typically bargain for and receive monetary consideration for the granting of an option, this provision should be added to an option agreement that also provides for monetary consideration [*see § 22.31*]. This form may be adapted for use in successive option agreements [*see § 22.202*].

[b] Services as Consideration

In addition to cash, services may be required from the optionee as consideration for the option. A typical service is the obtaining of a preliminary title report on the underlying property. When dealing with a developer, the optionor may require services in the form of costly surveys or technical analyses of the property [*see § 22.221*]. The services have independent value to the optionor if the optionee fails to exercise the option to purchase. For example, extensive property analyses may enable the optionor to develop the land or supply the optionor with significant information relating to the prospective sale of the property.

[2] FORM

Preliminary Title Report as Consideration

Preliminary Title Report as Additional Consideration

#. In further consideration of the granting of _____[this option *or* these successive options], Optionees must obtain and deliver at their own expense to Optionors _____[before _____ (*date*)

or during the (first) option period], a preliminary title report issued by _____[*name of title company*] covering the property.

Optionees must then give notice before or concurrently with the exercise of [the *or* each] option of those exceptions in the preliminary title report and those matters in the report relating to condition of title, which Paragraph _____ of [Exhibit A *or* this Agreement *or specify other provision or document*] requires Optionors to remove or cure. Failure to give this notice as to any exception or condition will constitute a waiver by Optionees of the right to object to the exception or condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawConsiderationSufficient ConsiderationInsurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleOption ContractsGeneral Overview



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2. Consideration

9-22 California Legal Forms--Transaction Guide § 22.221

§ 22.221 Analysis of Property as Consideration

[1] Comment--Use of Form

This form contains an optional provision that requires the optionee to provide specified property analyses as partial consideration for the granting of an option. Since optionors typically bargain for and receive monetary consideration for the granting of an option, this provision should be added to an option agreement that also provides for monetary consideration [*see § 22.31*]. This form may be adapted for use in successive option agreements [*see § 22.202*].

[2] FORM

Analysis of Property as Consideration

Property Analyses as Additional Consideration

#. In further consideration of the granting of _____[this option *or* these successive options], Optionees must cause to be prepared and delivered at their own expense to Optionors _____[before _____ (*date*) *or* during the (first) option period], an analysis of the Property that includes [*specify, e.g.*, a soil test, engineering report, and boundary survey], prepared by _____[*specify, e.g.*, persons professionally qualified and licensed to practice in the State of California]. Optionors consent to Optionees or their agents entering on the Property for the purpose of preparing this analysis, but Optionees agree to indemnify Optionors from all liability resulting from this entry, and to recompense Optionors for any damage to the Property caused by this entry if this option is not exercised.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationSufficient ConsiderationReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide §§ 22.222-22.229

[Reserved]

§§ 22.222[Reserved]



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3. Rights of Parties

9-22 California Legal Forms--Transaction Guide § 22.230

§ 22.230 Applicability of Warranties

[1] Comment

[a] Use of Form

This form provides alternative provisions designed for use in option agreements in which the parties agree that specified covenants, warranties, and representations made by the optionor in favor of the optionee will apply to the transaction during the option period and before exercise of the option. The first alternative provision is designed for a standard option agreement [*see §§ 22.200, 22.201*]. The second alternative provision may be used in a successive option agreement [*see § 22.202*].

[b] Enforcement of Warranties, Covenants, and Representations

The right of an optionee to maintain a cause of action against an optionor who is not prepared to perform is conditioned on the optionee's exercise of the option [*see Auslen v. Johnson (1953) 118 Cal. App. 2d 319, 323, 257 P.2d 664* ; *Seeburg v. El Royale Corp. (1942) 54 Cal. App. 2d 1, 4-7, 128 P.2d 362]* . For this reason, the option agreement should contain a separate warranty provision applicable to the option period for those warranties, covenants, and representations that the optionee desires to be able to enforce during the option period. The following provisions accomplish this by (1) referring to the terms of sale, (2) making the desired warranties, covenants, and representations applicable to the option period, and (3) excluding those that are not intended to be in force until the time of sale.

[2] FORM

Applicability of Warranties

Warranties, Covenants, and Representations

[*If provision is to be included in a standard option agreement, use:*]

#. The covenants, warranties, and representations made by Optionors in favor of Optionees in Exhibit A, except for those contained in Paragraph _____ of Exhibit A, are also applicable during the option period and before exercise of the option. [*If appropriate, add:* Optionors agree that they will not further encumber the Property unless and until this option expires.]

[*OR*]

[*If provision is to be included in a successive option agreement, use:*]

#. The covenants, warranties, and representations made by Optionors in favor of Optionees in Paragraph _____ relating to the terms of closing for each parcel, will also apply during the successive option periods and before the exercise of any or all options [, except for _____ (*specify any exceptions*)].

[*If appropriate, add:* Optionors agree not to further encumber the Property unless and until this Agreement expires.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionBreach of WarrantyContracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawTypes of ContractsCovenantsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.231

§ 22.231 Rights of Parties In Event of Condemnation

[1] Comment

[a] Use of Form

This form contains four alternative provisions that set forth the respective rights of optionor and optionee in the event of condemnation of the underlying property before exercise of the option. The first alternative provides that the optionee is not entitled to compensation on condemnation. The second alternative permits the optionee to share the condemnation award to the same extent as permitted by law. The third and fourth alternatives illustrate examples of condemnation clauses appropriate for use in successive option agreements.

[b] Optionee's Right to Compensation

The right to compensation in the event of condemnation is conditioned on whether the condemnation has deprived the claimant of a valuable right rather than on whether the right can technically be called an estate or an interest in land [*see County of San Diego v. Miller (1975) 13 Cal. 3d 684, 691-693, 119 Cal. Rptr. 491, 532 P.2d 139]* . In the case of options to purchase real property, the owner of an unexercised option to purchase land possesses a valuable property right that, if taken by government, is compensable under *California Constitution, Article I, Section 19*. The measure of damages to the optionee is the excess, if any, of the total award above the optioned purchase price [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 693, 119 Cal. Rptr. 491, 532 P.2d 139]* . Therefore, the parties to an option agreement should provide in the agreement for their respective rights in case the property is condemned, either confirming California law or specifying other rights. The need to set forth such an understanding is particularly important when the option period extends for a considerable length of time.

[2] FORM

Rights of Parties In Event of Condemnation

Condemnation

[*If optionee not entitled to compensation, use:*]

#. In the event that all or any part of the Property is appropriated during the option period by the power of eminent domain, then Optionees will have no compensable interest and no right to share in the condemnation award.

[*OR*]

[*If optionee permitted to share condemnation award to extent permitted by law, use:*]

#. In the event that all or any part of the Property is appropriated during the option period by the exercise of the power of eminent domain, then Optionees will have a compensable interest and a right to share in the condemnation award to the extent that the excess, if any, of the total award is above the optioned purchase price.

[*OR*]

[*If successive option agreement provides that compensation will reduce sales price, use:*]

#. In the event of the condemnation or taking by eminent domain of any land subject to this Agreement prior to its conveyance by Optionors under this Agreement and while this Agreement is in full force and effect, Optionees will be made a party to those proceedings and, if Optionors and Optionees cannot agree as to the amount of any award to be accepted for the condemnation or taking, the amount of that award will be determined by trial in the proper court or courts. The amount of any award must be paid to Optionors, and the net amount so received by Optionors after payment of all expenses and fees incurred will reduce the sales price of the parcel or parcels that would have contained the land so condemned or taken by eminent domain. [*If method of application is to be specified, add:* This reduction must first be applied to the principal balance of the deed of trust on the subject parcel in inverse chronological order of the installment payments thereof. In no event may there be any return of, or other credit for, any option money payments, or other money, received or to be received by Optionors from Optionees pursuant to this Agreement.]

[*OR*]

[*If successive option agreement provides that parcel descriptions will be revised to exclude condemned property, use:*]

#. In the event any part of Parcels A through _____ is condemned or taken for a public or quasi-public use prior to the acquisition of those parcels by Optionees pursuant to this Agreement, the proceeds of any award or compensation arising from the condemnation will belong to and be the property of Optionors, and the description of the parcels as set forth in the attached Exhibit A will be deemed to be revised to exclude the portion so condemned or taken. If any action is filed in a court of competent jurisdiction for the condemnation or taking for a public or quasi-public use of any portion of Parcels A through _____ prior to the acquisition of those parcels by Optionees pursuant to this Agreement, Optionors will have the right to settle that action on the terms it deems reasonable, including the right to convey to the plaintiff in the action the property that is the subject of the action free and clear of any rights of Optionees under this Agreement. In that event, all of the proceeds of any such conveyance will

belong to and be the property of Optionors, and the description of the parcels in the attached Exhibit A will be deemed to be revised to exclude the portion so conveyed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawEminent Domain ProceedingsProcedureReal Property LawEminent Domain ProceedingsValuationReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.232

§ 22.232 Protection of Optionor From Mechanics' Liens

[1] Comment

[a] Use of Form

This form contains an optional provision designed to protect the optionor from mechanics' liens that might otherwise be attached to the underlying real property as a result of services performed by the optionee on the property [*see, e.g., § 22.221*]. The optionor is protected by the requirement that the optionee acquire a bond. When the services performed on the property involve a considerable cost for the contracting of labor and materials, the optionor should consider a provision limiting the risk of mechanics' liens.

[b] Notice of Nonresponsibility

The filing by the optionor of a notice of nonresponsibility pursuant to *Civil Code Section 3094* may not guaranty nonresponsibility [*see Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 597-601, 159 P.2d 663* (lessor not entitled to notice of nonresponsibility protection when lease required lessee to build improvements lessor would benefit from on return of property); *but see American Transit Mix Co. v. Weber (1951) 106 Cal. App. 2d 74, 79, 234 P.2d 732* (vendor under land sales contract is protected by notice of nonresponsibility)]. No case has ruled on the availability of Section 3094 in the option context. Therefore, the best assurance of protection from mechanics' liens available to the optionor appears to be the requirement that the optionee acquire a bond.

[2] FORM

Protection of Optionor From Mechanics' Liens

Mechanics' Liens

#. Before commencement of the work specified in Paragraph _____, namely [*description of work that*

might give rise to mechanics' lien], Optionees must deliver proof to Optionors of the procurance of a bond in favor of Optionors, guaranteeing the completion of the work free from mechanics', materialmen's, and related liens. The form of the bond, proof of its procurance, and the corporation issuing it will be subject to the approval of Optionors, which approval must not be unreasonably withheld.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.233

§ 22.233 Status of Growing Crops on Exercise of Option

[1] Comment--Use of Form

This form contains a provision that states that the optionor is entitled to retain the ownership of all designated crops growing on the underlying real property as of a specified date in the event the optionee exercises the option to purchase the property. Growing crops have the status of real property [*Wilson v. White (1911) 161 Cal. 453, 460-461, 119 P. 895]* . Without an agreement to the contrary, the optionor would be obligated to convey growing crops with the underlying property on exercise of the option. Therefore, if the optionor intends to grow crops on the underlying property during the option period, and to retain ownership of them after exercise of the option, the following provision should be included in the option agreement.

[2] FORM

Status of Growing Crops on Exercise of Option

Crops

#. Optionors will have the benefit and retain the ownership of all crops growing on the Property as of the date [the *or* each] option granted in this Agreement is exercised, provided that the crops be removed _____[by _____ (*date*) *or specify other limitation, e.g.,* within _____ (*time period*) from the date of exercise].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.234

§ 22.234 Prohibition Against Recordation

[1] Comment

[a] Use of Form

This form is an option provision prohibiting the recordation of the option agreement. The form and the procedure accompanying its use, or the alternatives *set forth in Sections 22.235* and 22.244, should be used if the optionor wants to be able to clear title immediately after the option expires according to its terms and before the expiration date provided by statute for an unexercised option of record [*see Civ. Code §§ 884.010-884.030; see also § 22.30 [5]*]. Pursuant to the provision, the optionees' violation of the prohibition against recordation will cause the agreement to automatically terminate without notice.

An optional clause in this form provides that the option agreement is to be held by a designated third party and that on expiration of the option period the third party will cancel the instrument. This arrangement assures that the optionee does not possess the agreement, and therefore cannot have the signature of the optionor proved and the agreement recorded.

[b] Risks to Optionee

Acceptance of an antirecordation clause involves a risk to the optionee because it enables the optionor to convey a superior claim to the property to third parties without notice of the optionee's rights. In evaluating whether to take this risk, the optionee should consider the reliability of the optionor and the optionor's ability to respond in damages. If still in doubt, the optionee may consider offering to execute a quitclaim deed in advance to be held by a third party [*see § 22.235*]; the optionor then has the assurance of being easily able to clear title in case of expiration of the option, and the optionee is able to record the agreement and gain the protection of constructive notice to third parties.

[2] FORM

Prohibition Against Recordation

Prohibition Against Recordation

#. [(a)] Optionees must not cause or allow this Agreement or a memorandum or assignment of it to become of record in any public office. In the event Optionees violate this provision, the option granted in this Agreement will automatically terminate without notice.

[*If option agreement is to be held by third party, add:*]

(b) In accordance with the policy of this provision, the parties agree to the following procedure: (1) All copies of this Agreement bearing the signatures of the Optionors must be delivered to _____[*name of third party*] to hold in accordance with the terms of this provision. (2) On termination of the Agreement, Optionors must deliver written notice of the termination to Optionees and to _____[*name of third party*]. If Optionees object to the termination, they must provide a written notice of objection to _____[*name of third party*] and Optionors within [*number*] days. This notice must set forth the grounds for their objections. If they fail to provide such a notice, then _____[*name of third party*] must cancel the instrument by stamping or marking the word "CANCELLED" on each page of the Agreement, and deliver one copy of the Agreement to the Optionees, and any additional copies to the Optionors. (3) If Optionees do object, and the parties do not reach an accord on the issues presented by the objection within [*number*] days, then the issue of whether the Agreement has been terminated will be submitted to arbitration under the rules of the American Arbitration Association. _____[*Name of third party*] will then either cancel and deliver, or retain, the Agreement in accordance with the arbitration decision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.235

§ 22.235 Automatic Termination and Prior Execution of Quitclaim Deed

[1] Comment--Use of Form

This form is a clause that provides both for the automatic termination of an option agreement in the event the option is not exercised and for a method of dealing with the problem of clouded title. This form and the procedure accompanying its use, or the alternatives *set forth in Sections 22.234* and *22.254*, should be used if the optionor wants to be able to clear title immediately after the option expires according to its terms and before the expiration date provided by statute for an unexercised option of record [*see Civ. Code §§ 884.010-884.030*; *see also § 22.30[5]*].

An optionee loses all rights to exercise an option if the option period expires [*Rosenaur v. Pacelli (1959) 174 Cal. App. 2d 673, 676, 345 P.2d 102]* . This proposition applies to an option transaction even though the parties have failed to provide for an automatic termination in their agreement. However, the purpose of a provision providing for the automatic termination of an option in the event that there is a failure to exercise timely the option is to inform the parties of this important legal concept.

This form also prescribes a method for avoiding the problem of a cloud on the title of the underlying property. The problem of clouded title affects an unexercised option until it expires of record pursuant to statute. As mentioned above, this form permits the optionor to clear title immediately after the option expires according to its terms, without waiting for the statutory expiration date. It accomplishes this by providing that a third party will be the holder of an already executed and acknowledged quitclaim deed, which is to be recorded on expiration of the option.

[2] FORM

Automatic Termination and Prior Execution of Quitclaim Deed

Automatic Termination

#. (a) If Optionees fail to exercise _____[this *or* any] option in accordance with its terms and within

the [applicable] option period or any extension of that period, then this Agreement and the rights of the Optionees will automatically terminate without notice.

(b) In accordance with the policy of this provision, the parties agree to the following procedure:

(1) Concurrently with the execution of this Agreement, Optionees agree to execute and acknowledge [a quitclaim deed *or* quitclaim deeds] quitclaiming their interest in [each parcel of] the Property, and to deliver the quitclaim deed[s] to _____[*name of third party*], who will hold the quitclaim deed [s] in accordance with this provision.

(2) On termination of the Agreement, Optionors must deliver written notice of the termination to Optionees and to _____[*name of third party*]. If Optionees object to the termination, they must provide a written notice of objection to _____[*name of third party*] and Optionors within [*number*] days. This notice must set forth the grounds for their objections. If they fail to provide such a notice, then _____[*name of third party*] will cause the quitclaim [deed *or* deeds to the parcels not conveyed] to be recorded in the office of the county recorder in the county where the Property is located.

(3) If Optionees do object, and the parties do not reach an accord on the issues presented by the objection within [*number*] days, then the issue of whether the Agreement has been terminated will be submitted to arbitration under the rules of the American Arbitration Association. _____[*Name of third party*] will then either record or retain the quitclaim deed [s] in accordance with the arbitration decision.

(4) Optionors will be responsible for all reasonable costs of _____[*name of third party*] for performance in accordance with this provision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawPerformanceDischarges & TerminationsReal Property LawDeedsTypesQuit Claim DeedsReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & Encroachments



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9-22 California Legal Forms--Transaction Guide § 22.236

§ 22.236 Risk of Loss

[1] Comment--Use of Form

This form sets forth alternative provisions allocating the risk of loss in the event of loss or damage to the underlying property before the exercise of the option. The first provision gives the optionees the right to terminate the agreement and obtain a prorated refund of moneys paid to the optionors following any material loss or damage to the property. This right must be exercised within a specified time period. The second version provides that the optionees are not entitled to such a refund. Both provisions contain language that may be used to specify whether or not the optionees, on exercise of the option, may offset against the purchase price any insurance proceeds or other amounts collected for any loss or damage to the underlying property.

The allocation of the risk of loss depends on such factors as the amount and type of consideration paid for the option. It is possible to draft a provision completely favoring the optionee so that the optionee is protected from every loss occurring during the option period or a provision favoring the optionor by providing that the risk of loss be taken by the optionee. This latter alternative is reasonable when the optionee has paid only nominal consideration for the option and has limited expectations with respect to the future use of the underlying property.

[2] FORM

Risk of Loss

Loss or Damage to Property

[*EITHER*]

#. In the event of material loss or damage to the Property, Optionees will be entitled to elect within [*e.g.,* five] days of notice or knowledge of the loss or damage the right to terminate this Agreement and obtain a refund of all moneys paid

to Optionors, prorated according to the duration of the option period before the occurrence of the material loss or damage. In the event of any loss or damage to the Property, Optionees [will *or* will not] be entitled on the exercise of this option to offset against the purchase price [*specify, e.g.,* the insurance proceeds collected for that loss or damage].

[*OR*]

#. In the event of any loss or damage to the Property, Optionees will not be entitled to any refund of moneys paid Optionors by virtue of the occurrence of loss or damage to the Property. [However, Optionees will *or* Further, Optionees will not] be entitled on exercise of this option to offset against the purchase price [*specify, e.g.,* the insurance proceeds collected for that loss or damage].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide §§ 22.237-22.249

[Reserved]

§§ 22.237[Reserved]



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9-22 California Legal Forms--Transaction Guide § 22.250

§ 22.250 Notice of Exercise of Right to Extend Option Period

[1] Comment

[a] Use of Form

This form is a notice to the optionor of the exercise of the right to extend the option period; its use assumes that the right to extend was specifically granted in the option agreement. For an example of an option provision granting the right to extend the option period, see *§ 22.210*. For an example of a subsequent agreement to extend a designated option period, see *§ 22.251*. For a discussion of the appropriate method of exercising an option, see *§ 22.32*.

This form should be executed by the optionee and the signature should be acknowledged if recording is to be effected [*see* [b], *below; § 22.50*]. If the original option agreement fails to specify the applicability of extension consideration to the purchase price, this must now be settled in writing. This notice should be communicated to the optionor along with a tender of consideration, both as called for by the agreement; the agreement should be reviewed to verify that the form of the notice is correct and that correct procedure is followed.

[b] Recording

This form also contains a recording heading although the validity of the form is not affected by the failure to have the form recorded. If the option agreement was recorded, then this notice should also be made of record by sending a duplicate original for recordation [*see § 22.120*]. To prevent the option from expiring of record, an extension of a recorded option must be recorded within six months after the option expires according to its terms, or, if the option provides no expiration date, within six months after the date the instrument that creates or gives constructive notice is recorded [*see Civ. Code § 884.010*].

[c] Tax Consequences of Extension

The Internal Revenue Service has contended, so far unsuccessfully in the courts, that an extension terminates the old option and begins a new one, thereby commencing a new holding period [*see, e.g., Chemetron Corporation v. C.I.R.*

(7th Cir. [T.C.] 1962) 299 F.2d 644, 645-650] . This position stems from the concern that the extension was obtained solely for tax advantage. This concern is arguably less applicable in two situations: (1) when the original option agreement provided for the right to extend; and (2) when a new extension is sought for business reasons other than solely for tax advantage. To this end, this form originates directly from rights granted in the original option agreement, and Section 22.241 includes specific recitals of the business reasons for which the extension was sought. For additional support, the extension period should not coincide exactly with the desired tax period but should exceed it and be in line with the stated business purpose (if any). Care should also be taken not to modify, or to modify as little as possible, the terms of the original option. Modifications add support to the position that a new option has been created, rather than an old one extended.

[2] FORM

Notice of Exercise of Right to Extend Option Period

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)
_____ [*street address*])
_____ [*city, state, zip*])
)

_____

_____

Space above this line for recorder's use

NOTICE TO EXTEND

To: _____[*names of optionors*]

You are hereby notified that the undersigned Optionees exercise their right to extend the current option period until _____[*date*], in accordance with that certain [Successive] Option Agreement, dated _____, between the undersigned Optionees and _____[*names of optionors*]. Also in accordance with the [Successive] Option Agreement, Optionees tender to Optionors the sum of $ [*specify amount called for by extension consideration clause*], in the form of [*specify means of payment, e.g.,* a cashier's check drawn to the order of Optionors].

_____ Dated:

_____ [*signature*]
[*typed name*], Optionee
_____ [*signature*]
[*typed name*], Optionee

[*For acknowledgment, see Section 22.200 [2]*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.251

§ 22.251 Extension of Option Agreement

[1] Comment

[a] Use of Form

This form is for use when the right to extend the option period has not been specifically granted in the option agreement but, rather, has been subsequently agreed to by the parties. This form embodies this subsequent agreement. For a discussion of tax considerations related to extending an option period, see *§ 22.250[1][c]*.

[b] Procedure for Execution and Recordation

This form must be executed by all parties to the original option agreement, including the optionor, the optionee, and, when appropriate due to community or other interests, the spouse of the optionor. If the form is to be recorded, which depends on whether or not the original option agreement was recorded, the signatures of the optionor and the spouse of the optionor must be acknowledged. To prevent an option from expiring of record, an extension of a recorded option must be recorded within six months after the option expires according to its terms, or, if the option provides no expiration date, within six months after the date of recordation of the instrument that creates or gives constructive notice [*see Civ. Code § 884.010*]. For a discussion of the process of extension, see *§ 22.120*.

[2] FORM

Extension of Option Agreement

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)
_____ [*street address*])

_____ [*city, state, zip*])
)
_____

_____

Space above this line for recorder's use

EXTENSION AGREEMENT

This Extension Agreement is made on _____[*date*], at _____[*city*], California, between _____[*names of optionors*], "Optionors" under that certain [Successive] Option Agreement dated _____, which is attached to this Extension Agreement as Exhibit A and hereby incorporated by reference, and _____[*names of optionees*], "Optionees" under that [Successive] Option Agreement.

WHEREAS, Optionees desire an extension of [the *or* the current option period under the] [Successive] Option Agreement in order to [*specify a business purpose, e.g.,* complete the analysis of the property *or* complete negotiations for the development of the property]; and,

WHEREAS, Optionors are willing to grant an extension under the terms and for the consideration specified below;

NOW, THEREFORE, it is agreed as follows:

1. Optionee's right to exercise the [current] option granted by the [Successive] Option Agreement is hereby extended until _____[*time of day*], on _____[*date*].

2. In consideration of the granting of this extension, Optionees must pay to Optionors on the execution of this Extension Agreement $ _____ in the form of [*specify, e.g.,* a cashier's check drawn to the order of Optionors]. [That sum will _____ (apply *or* not apply) *or* Of that amount, _____ percent will apply] to the purchase price of the [property *or* parcel for which the extension has been granted].

3. Other than the extension of time granted by this Extension Agreement, all terms and conditions of the original [Successive] Option Agreement, Exhibit A, are still in full force and effect, including the provision for automatic termination without notice of Optionees' rights on failure to exercise the option within the time limit established in this Extension Agreement.

IN WITNESS WHEREOF, the parties to this Extension Agreement have executed it on the date first above written.

OPTIONORS
_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]

OPTIONEES _____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]

[*For acknowledgment, see Section 22.200[2].*]

[*Attach Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.252

§ 22.252 Notice of Exercise of Option

[1] Comment--Use of Form

This form is a notice of the exercise of an option. It is to be used when the option agreement provides for exercise by written notice. Modifications to this form should be made, depending on the terms and conditions set forth in the particular option agreement. For example, if the option agreement requires a tender of consideration at the time of exercise, the notice should be modified to reflect the tender of consideration.

This form is not appropriate when the option agreement requires an exercise procedure by some means other than written notice [*see, e.g., § 22.200[2],* P 6 (exercise effected by executing and delivering sales agreement)].

[2] FORM

Notice of Exercise of Option

NOTICE OF EXERCISE OF OPTION

To: _____[*names of optionors*]

Notice is hereby given that the undersigned Optionees exercise their right to purchase the property described in that certain Option Agreement, dated _____, between the undersigned Optionees and _____[*names of optionors*], in accordance with the provisions of the Option Agreement.
_____ Dated:

_____ [*signature*]
[*typed name*], Optionee
_____ [*signature*]
[*typed name*], Optionee

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview



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9-22 California Legal Forms--Transaction Guide § 22.253

§ 22.253 Assignment of Option

[1] Comment

[a] Use of Form

This form is an assignment of an option to purchase real property. The form contains a statement concerning the consideration given for the assignment and incorporates by reference the assigned agreement, a copy of which must be attached to the assignment as an exhibit.

The assignor, spouse [*see § 22.200[1][b]*], and assignee should execute this form. If recordation is to be effected, their signatures must be acknowledged. Unless the option agreement specifies that it is not to be recorded, the assignment should be recorded [*see § 22.120*].

For option provisions governing the assignability of the option agreement, see *§ 22.200 [2]*, P 8.

[b] Tax Considerations

In purporting to sell the option, the optionee should be careful that he or she is not in effect exercising the option and selling the underlying property. If the optionee joins in conveying title to the underlying property, the Internal Revenue Service may take the position that the option was exercised and the property, not the option, was sold [*see Barber v. United States (8th Cir. [Minn.] 1954) 215 F.2d 663, 665*]. The facts of each case are determinative. If the position of the Internal Revenue Service is upheld, the gain on the sale will be short-term capital gain (ordinary income) to the optionee since the holding period in the property will commence from the date of the exercise of the option and will necessarily be less than one year [*see Chemetron Corporation v. C.I.R. (7th Cir. [T.C.] 1962) 299 F.2d 644, 645]* . To avoid this pitfall, the optionee should make it clear that the intention is to assign the option, not to sell the underlying property. After giving notice of the assignment to the optionor, the assignor should have nothing further to do with the transaction. The assignee must be the one to exercise the option and to deal with, and pay the purchase price to, the optionor.

[2] FORM

Assignment of Option

	)
Recording Requested by:	)
_____ [*name*]	)
After Recordation, Mail to:	)
_____ [*street address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

ASSIGNMENT OF OPTION

In consideration of $ _____, payable by certified or cashier's check, subject to collection, receipt of which is hereby acknowledged, the undersigned Assignors hereby assign to [*names of assignees*], the undersigned Assignees, all of the Assignors' rights under that certain Option Agreement dated _____, which was executed by the undersigned Assignors as Optionees and by _____[*names of optionors*] as Optionors. A true copy of the Option Agreement is attached to this Assignment of Option as Exhibit A and is hereby incorporated by reference. Assignees will undertake and perform the obligations of Optionees under the Option Agreement.

_____ Dated:

ASSIGNORS

_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

ASSIGNEES

_____ [*signature*]
[*typed name and title*]
_____ [*signature*]
[*typed name and title*]

[*For acknowledgment, see Section 22.200[2].*]

[*Attach Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesGeneral OverviewContracts LawThird PartiesDelegation of PerformanceReal Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Options



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9-22 California Legal Forms--Transaction Guide § 22.254

§ 22.254 Quitclaim of Option Rights

[1] Comment--Use of Form

This form is a quitclaim deed whereby an optionee under an option agreement quitclaims all interest, if any, arising out of the agreement and relating to the underlying real property. One purpose of a quitclaim deed is to quitclaim all of the interests of the optionee in the underlying property. Another significant purpose is to avoid the problem of a clouded title [*see § 22.30 [5]*]. If the option agreement contains a provision requiring the optionee to execute a quitclaim deed, the following form of quitclaim deed may be executed and recorded in the appropriate county recorder's office.

[2] FORM

Quitclaim of Option Rights

_____

	)
Recording Requested by:	)
_____ [*name*]	)
After Recordation, Mail to:	)
_____ [*name*]	)
_____ [*street address*]	)
_____ [*city, state, zip*]	)
	)

_____

_____

Space above this line for recorder's use
Documentary Transfer Tax:
_____ none

Mail tax statements to:
_____[*name of optionor*]
_____[*street address*]
_____[*city, state, zip*]

QUITCLAIM DEED

For valuable consideration, receipt of which is hereby acknowledged, _____[*names of optionees*], Optionees under that certain Option Agreement dated _____, and recorded in Book _____, Page _____, of the Official Records of _____ County, do hereby remise, release, and forever quitclaim to _____[*names of optionors*] all of their right, title, and interest in the real property located in _____[the City of _____, *or* an unincorporated area of] _____ County, California, described as follows: [*legal description of property*].

This deed is given to relinquish and release any right, title, and interest the grantors may have by virtue of the Option Agreement.

Assessor's Parcel No. _____

Executed on _____[*date*], at _____[*city and state*].

_____[*signature*]
[*typed name*], Optionee
_____ [*signature*]
[*typed name*], Optionee

[*For acknowledgment, see Section 22.200[2].*]

[*Insert as last line at bottom of first page of deed:*]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesQuit Claim DeedsReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & Encroachments



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS

9-23 California Legal Forms--Transaction Guide 23.syn

AUTHOR: William M. Hensley Editorial Consultant

§ 23.syn Synopsis to Chapter 23: REAL PROPERTY SALES AGREEMENTS

§ 23.01 California Sources

[1] Constitution

[2] Statutes

[a] Civil Rights

[b] Disclosures

[c] Sale Contracts

[d] Sale Transactions Generally

[e] Taxation Issues

[3] Regulations

§ 23.02 Federal Regulations

§§ 23.03-23.04 [Reserved]

§ 23.05 Law Reviews and Periodicals

§ 23.06 Annotations

§ 23.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 23.08-23.09 [Reserved]

§ 23.10 Terminology

[1] Real Property Sale Contracts

[2] Purchase Agreements; Deposit Receipts

§ 23.11 Overview of Applicable Laws

[1] Required Elements of Contract

[2] Statute of Frauds

[3] Home Equity Sale Contracts Statute

[4] Applicability of Unruh Civil Rights Act

[5] Applicability of California Fair Employment and Housing Act

[6] Inapplicability of Consumer Credit Statute (Unruh Act)

[7] Buyer's Choice Act

§ 23.12 Parties to Contract

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[2] Married Persons

[a] Separate Property

[b] Community Property

[3] Minors

[4] Persons of Unsound Mind

[5] Corporations

[6] General Partnerships

[7] Limited Partnerships

[8] Unincorporated Associations

§ 23.13 Mutual Assent

[1] Basic Requirement

[2] Acceptance and Counteroffers

[3] Revocation

[4] Certainty

§ 23.14 Description of Property

[1] Requirement of Specificity: Legal Description

[2] Effect of Inadequate Description

[3] Reference to Recorded Maps or Other Instruments

[4] Other Methods of Describing Land

§ 23.15 Purchase Price

[1] Sufficiency of Consideration

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§ 23.16 Contingencies (Conditions)

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§ 23.19 Risk of Loss

§ 23.20 Disclosure Requirements Applicable to Sellers

[1] Statutory Real Estate Transfer Disclosure Statement

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[4] Earthquake Safety Guides

[a] Residential and Noncommercial Property

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[5] Installation of Smoke Detector

[6] Water Heater Bracing

[7] Lead-Based Paint Disclosures

[8] Notice of Nearby Ordnance Locations

[9] Common-Interest Development Information

[10] Title Insurance

[11] Disclosure of Industrial Use Zoning

[12] Notice of Controlled Substance Release

[12A] Notice of Local Health Officer's Order Prohibiting Use or Occupancy

[13] Property Tax Disclosures

[a] Mello-Roos Tax and Street Improvement Lien Assessment Installment Disclosures

[b] Supplemental Property Tax Bill Disclosure

[14] Toxic Mold Protection Act of 2001--Future Disclosure Requirements

[15] Private Transfer-Fee Requirement

[16] Noncompliant Plumbing Fixtures (Pre-1994 Residential Property)

§ 23.20A Requirements Related to Actions for Defective Construction in New Residences Sold On or After January 1, 2003

[1] Overview and Applicability of Statutory Scheme

[2] Parties

[3] Standards for Determining When Construction Is Defective

[a] Issues With Which Standards Are Primarily Concerned

[b] Issues Related to Other Areas of Construction

[4] Builder's Express Warranty for Fit and Finish Items

[5] Optional Enhanced Protection Agreement

[6] Homeowner's Obligation to Follow Maintenance Obligations and Schedules

[7] Seller's Duty to Provide Copy of Title Seven

[8] Statute of Limitations

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Notice of Former Ordnance Location

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Statutory Notice Regarding Title Insurance [Civ. Code § 1057.6]

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License to Enter for Environmental Inspection and Testing

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Interim Occupancy Agreement [CAR Form IOA]

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FOOTNOTES:

(n1)Footnote *. William M. Hensley is an attorney with the Irvine law firm of Jackson, DeMarco & Peckenpaugh. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender).



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS

9-23 California Legal Forms--Transaction Guide Scope

AUTHOR: William M. Hensley Editorial Consultant

Scope

William M. Hensley
Editorial Consultantn* Scope

This chapter covers agreements for the purchase and sale of real property that provide for the immediate transfer of title to the buyer in exchange for the entire purchase price. Although this chapter focuses on drafting concerns, it also discusses related topics such as methods of financing, statutory disclosures, and tax considerations.

The Legal Background reviews the laws governing all contracts in California, examines the manner in which those laws are applied to real property sale contracts, and discusses laws applicable solely to these contracts. The Transaction Guide contains lists of information and documents needed to draft a contract for a real property sale transaction, important determinations that the attorney should make before drafting or approving a contract, and procedures for drafting and executing the contract and meeting related reporting requirements. The forms include complete contracts for the sale of residential, commercial, and undeveloped real property; alternative and additional contractual provisions; and related documents such as a real estate transfer disclosure statement, a preliminary change-of-ownership report, and a bill of sale.

This chapter should be used in conjunction with other chapters listed in the Research Guide.

FOOTNOTES:
(n2)Footnote *. William M. Hensley is an attorney with the Irvine law firm of Jackson, DeMarco & Peckenpaugh. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender).



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART I. RESEARCH GUIDE
A. Primary Sources

9-23 California Legal Forms--Transaction Guide § 23.01

AUTHOR: William M. Hensley Editorial Consultant

§ 23.01 California Sources

[1] Constitution

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[2] Statutes

[a] Civil Rights

Unruh Civil Rights Act. *Civ. Code § 51.*

Prohibition against housing discrimination based on age. *Civ. Code § 51.2.*

Senior citizen housing. *Civ. Code §§ 51.2-51.4*; *Civ. Code §§ 51.10-51.12* (special provisions applicable only to Riverside County).

Opportunity to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or other basis prohibited by *Civ. Code § 51. Gov. Code §§ 12920, 12921(b).*

[b] Disclosures

Consumer information booklet concerning common environmental hazards affecting real property. *Bus. & Prof. Code § 10084.1*; *Civ. Code § 2079.7*; *Health & Safety Code § 25417.*

Seller's disclosure regarding advisability of title insurance. *Civ. Code § 1057.6*.

Disclosures on transfer of residential property. *Civ. Code § 1102 et seq.*

Disclosure regarding noncompliant plumbing fixtures in building that was built and available for use before January 1, 1994. *Civ. Code §§ 1101.4(c), 1101.5(e)*.

Statutory real estate transfer disclosure statement. *Civ. Code § 1102.6*.

Second (local option) statutory real estate transfer disclosure statement. *Civ. Code § 1102.6a*.

Continuing lien securing levy of special taxes pursuant to Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to fixed lien assessment collected in installments to secure bonds issued under Improvement Bond Act of 1915 [Sts. & Hy. Code § 8500 et seq.] for street improvements or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24. Civ. Code § 1102.6b(a)(2)*.

Satisfaction of disclosure requirements in relation to Mello-Roos Community Facilities Act and Improvement Bond Act of 1915 by substantially equivalent disclosure notice obtained from another source, including nongovernmental source. *Civ. Code § 1102.6b(d)*.

Supplemental property tax bill disclosure statement. *Civ. Code § 1102.6c*.

Notice of former ordnance locations. *Civ. Code § 1102.15*.

Controlled substance release on property. *Civ. Code § 1102.18*.

Future disclosures under Toxic Mold Protection Act of 2001. *Health & Safety Code §§ 26100-26156*.

Statutory natural hazard disclosure statement. *Civ. Code § 1103 et seq.*

Broker's duty to inspect residential property and disclose material facts to prospective buyers. *Civ. Code § 2079 et seq.*

Disclosures regarding participation of "arrangers of credit" in seller financing. *Civ. Code § 2956 et seq.*

Disclosure of installation of smoke detector. *Health & Safety Code §§ 13113.7, 13113.8*.

Certification of compliance with water heater bracing requirement. *Health & Safety Code § 19211*.

Alquist-Priolo Earthquake Fault Zoning Act. *Pub. Res. Code § 2621 et seq.*

Required disclosure of potential applicability of Alquist-Priolo Act. *Pub. Res. Code § 2621.9*.

Seismic Hazards Mapping Act. *Pub. Res. Code § 2690 et seq.*

Required disclosure that property is located within seismic hazard zone. *Pub. Res. Code § 2694*.

[c] Sale Contracts

Expiration of unperformed contract for sale of real property. *Civ. Code § 886.010 et seq.*

Uniform Vendor and Purchaser Risk Act. *Civ. Code § 1662*.

Liquidated damages. *Civ. Code § 1675 et seq.*

Consent of spouse to sale of community property. *Fam. Code § 1102*.

[d] Sale Transactions Generally

Structural pest-control inspection and report. *Bus. & Prof. Code § 8516*.

Certification of absence or presence of wood-destroying pests or organisms. *Bus. & Prof. Code § 8519*.

Real Estate Appraisers' Licensing and Certification Law. *Bus. & Prof. Code § 11300 et seq.*

Construction defect disputes involving new residential units sold on or after January 1, 2003. *Civ. Code § 895 et seq.*

Definitions. *Civ. Code § 895*.

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Homeowner's requirement to follow reasonable maintenance obligations. *Civ. Code § 907*.

Mandatory nonadversarial pre-litigation settlement procedure. *Civ. Code §§ 910-938*.

Time limit for bringing action. *Civ. Code § 941*.

Damages. *Civ. Code § 944*.

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Required installation of water-use efficiency improvements (pre-1994 properties). *Civ. Code § 1101.1 et seq.*

Regulation of home equity sale contracts. *Civ. Code § 1695 et seq.*

Defined. *Civ. Code § 1695.1(e)*.

Requirements of contract. *Civ. Code §§ 1695.2, 1695.3*.

Notice of right to refrain from signing conveyance instruments. *Civ. Code § 1695.3(h)*.

Notices of right to cancel. *Civ. Code § 1695.5(a), (b)*.

Rescission of unconscionable transaction. *Civ. Code §§ 1695.13, 1695.14*.

Requirements relating to equity buyer's representative. *Civ. Code §§ 1695.15-1695.17.*

Inapplicability of Unruh Act [*Civ. Code § 1801 et seq.*] to contracts for sale of structure or parcel of real property. *Civ. Code § 1801.4.*

[e] Taxation Issues

Impact of change of ownership on property taxation. *Rev. & Tax. Code § 60 et seq.*

Change-of-ownership reporting requirements. *Rev. & Tax. Code § 480 et seq.*

Requirements governing preliminary change-of-ownership report. *Rev. & Tax. Code § 480.3.*

Request for written ruling from county assessor as to property tax consequences of transaction, or as to property tax liability of specified property. *Rev. & Tax. Code § 5909.*

[3] Regulations

Change-of-ownership rules. *18 Cal. Code Reg. § 462.001 et seq.*



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AUTHOR: William M. Hensley Editorial Consultant

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AUTHOR: William M. Hensley Editorial Consultant

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AUTHOR: William M. Hensley Editorial Consultant

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AUTHOR: William M. Hensley Editorial Consultant

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AUTHOR: William M. Hensley Editorial Consultant

§ 23.10 Terminology

[1] Real Property Sale Contracts

This chapter covers real property sale contracts that provide for the immediate transfer of title to the buyer in exchange for payment of the entire purchase price at once. These are not the same as the "real property sale contracts" defined in *Civ. Code § 2985*, which are actually installment-sale contracts (commonly called installment land sale contracts). Under the typical installment-sale contract, the buyer agrees to pay the purchase price in installments and is entitled to possession immediately on execution of the contract. No escrow is involved. The seller retains legal title to the property as security for the payments until all or most of them are made. Because they are security devices, these installment-sale contracts are covered in Ch. 25A, *Security Instruments for Real Estate Financing* .

The contracts in this chapter may be called "marketing contracts" [*see, e.g., Code Civ. Proc. § 1298(a)*], although in practice that term is rarely used. The common term "real property sale contracts" (or "agreements") has been used in this chapter.

[2] Purchase Agreements; Deposit Receipts

The purchase agreement, sometimes referred to as a "deposit receipt," is a type of sale contract frequently used in small real estate transactions. It is generally a printed form prepared by a real estate association or commercial publisher [*see, e.g., § 23.203* (California Association of Realtors, Residential Purchase Agreement and Joint Escrow Instructions)]. The purchase agreement serves two functions: (1) on completion by the buyer and delivery to the seller (along with the buyer's deposit), it constitutes the buyer's offer to purchase the property; and (2) on acceptance by the seller, it is a binding purchase and sale contract [*see § 23.203[1]*; *see also* California Real Estate Law and Practice, Ch. 71, *Real Property Purchase and Sale Agreements* , Pt. B (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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§ 23.11 Overview of Applicable Laws

[1] Required Elements of Contract

An agreement to do or not to do a certain thing is a contract if that agreement creates a legal duty enforceable by a civil action or proceeding [*Civ. Code § 1549*; *see Civ. Code §§ 1427, 1428*]. A contract for the purchase and sale of real property is subject to the laws that govern all types of contracts in California [*see Civ. Code § 1549 et seq.*]. The necessary elements of any contract are [*Civ. Code § 1550*]:

- Parties capable of contracting [*see Civ. Code §§ 1550, 1556, 1558* (incapacity; identifiable parties)];
- The consent of the parties [*see Civ. Code § 1565 et seq.*];
- A lawful object [*see Civ. Code §§ 1595 et seq., 1667 et seq.* (object of contract; unlawful contracts)]; and
- A sufficient cause or consideration [*see Civ. Code §§ 1614, 1605 et seq.* (written instrument is presumptive evidence of consideration; consideration)].

For further coverage of basic contract law, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Additional requirements apply specifically to real property sale contracts. Those requirements are discussed throughout this chapter.

[2] Statute of Frauds

Under California law, any contract for the sale of an interest in real property, or some note or memorandum of the contract, must be in writing and subscribed by the party to be charged or by the party's agent [*Civ. Code § 1624(a)(3)*]. An agent cannot sign the document unless the principal first authorizes that act in writing [*Civ. Code § 1624(a)(3)*; *see*

Civ. Code § 2309 (equal dignities rule: authority to enter into contract required by law to be in writing can only be given by instrument in writing)].

PRACTICE TIP:

Don't Forget the Equal Dignities Rule Defense. Practitioners frequently focus upon the operation of the statute of frauds, yet ignore the potential dispositive impact of the equal dignities rule. This rule holds that the authority of an agent to execute on behalf of a principal with respect to a contract governed by the statute of frauds also must be in writing. Because of the possible inequities arising from application of this rule, the courts have been liberal in recognizing ratification and estoppel theories to synchronize with the realities of a particular real estate deal. However, the equal dignities rule is still a potent defense. In one case, the court found a defendant was estopped from raising the statute of frauds, but nonetheless was *not* estopped from relying on the equal dignities rule as a defense [*see McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 252-254, 115 Cal. Rptr. 902] . By William M. Hensley*.

To meet these requirements, a contract for the sale of real property must be in a writing that identifies the parties to the contract, sets forth the purchase price and the terms and manner of payment, contains a description of the property, and is signed by the parties to be charged or their agents [*Finn v. Goldstein (1927) 201 Cal. 605, 607, 258 P. 85* ; *Dennis v. Overholtzer (1960) 178 Cal. App. 2d 766, 774, 3 Cal. Rptr. 193 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 221, 32 Cal. Rptr. 415, 384 P.2d 7]* .

An oral contract within the statute of frauds is voidable at the election of either party. Each party assumes the risk that the other party will withdraw [*Goldstein v. McNeil (1954) 122 Cal. App. 2d 608, 611, 265 P.2d 113* ; *see Civ. Code § 1624*]. However, a party who does not sign the contract can be estopped to assert the statute of frauds following the partial performance of the other party [*see Francis v. Colendich (1961) 193 Cal. App. 2d 128, 131, 14 Cal. Rptr. 56* (payment, survey, and fencing-in of parcel were sufficient for estoppel); *see also Oren Realty & Development Co. v. Superior Court (1979) 91 Cal. App. 3d 229, 235, 154 Cal. Rptr. 97]* . Full performance of an oral contract is not voidable for failure to satisfy the statute of frauds, because the statute is merely a defense to enforcement [*see Realty Corp. of America, Inc. v. Burton (1958) 162 Cal. App. 2d 44, 57, 327 P.2d 948]* .

For further discussion, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[3] Home Equity Sale Contracts Statute

Special statutory requirements [*see Civ. Code § 1695 et seq.*] apply to certain contracts for the sale of owner-occupied residential property, consisting of one-to-four residential units, that is in foreclosure [*Civ. Code § 1695.1(b)*]. Known as "home equity sale contracts," these include most contracts under which the property is sold in foreclosure but outside the normal foreclosure procedure [*see Civ. Code § 1695.1(a), (e)*; *see* Ch. 25D, *Foreclosure*]. The special statutory requirements that apply to these contracts are intended to protect homeowners from being induced, through misrepresentations or other unreasonable commercial practices, to sell their homes in foreclosure for a fraction of fair market value during the period between the commencement of foreclosure proceedings and the scheduled foreclosure sale date [*see Civ. Code § 1695*].

These statutes regulate a contract between any equity buyer and equity seller, that is, the buyer and seller of a residence in foreclosure [*Civ. Code § 1695.1(e)*; *see generally Segura v. McBride (1992) 5 Cal. App. 4th 1028, 7 Cal. Rptr. 2d 436* (law applies to all buyers of home equity subject to foreclosure, not just to persons in business of buying home equity)]. An equity buyer is any person who acquires title to any residence in foreclosure [*see Civ. Code § 1695(b)* (definition)] except as follows [*Civ. Code § 1695.1(a)*]:

- For the purpose of using the property as a residence;

- By a deed in lieu of foreclosure of any voluntary lien or encumbrance of record;

- By a deed from a trustee acting under a power of sale in a deed of trust or mortgage at a foreclosure sale conducted pursuant to *Civ. Code § 2920 et seq.*;

- At any sale of property authorized by statute;

- By order or judgment of any court; or

- From a spouse, blood relative, or blood relative of a spouse.

An equity seller has the right to cancel any contract with an equity buyer until the earlier of (1) the fifth business day following the day on which the equity seller signed a contract that complies with the provisions governing home equity sale contracts [*see Civ. Code § 1695.4*], or (2) the day scheduled for the sale of the property pursuant to a power of sale conferred in a deed of trust [*see Civ. Code § 1695.4*]. Until that time has elapsed, the equity buyer is restricted in the acts he or she may perform in connection with the sale transaction [*see Civ. Code § 1695.6(b)*]. Statutory notices regarding the right to cancel [*see Civ. Code § 1695.5(a)*] and the temporary restrictions on the actions of the equity buyer [*see Civ. Code § 1695.3(h)*] must be included in the sale contract [*see Civ. Code §§ 1695.2, 1695.3* (other required contents); *see also § 23.211*]. Further, a statutory notice of cancellation must be attached to the contract [*see Civ. Code § 1695.5*; *see § 23.307*]. Finally, if any person involved in a transaction involving residential real property in foreclosure takes "unconscionable advantage" of the property owner in foreclosure, the transaction is voidable and may be rescinded by the property owner within two years of the date of the recordation of the conveyance of the property [*see Civ. Code § 1695.14*; *see also § 23.324*].

The Home Equity Sales Contract Act excludes from its coverage a purchaser acquiring title "at any sale of property authorized by statute" [*Civ. Code § 1695.1(a)(4)*]. In *Spencer v. Marshall, (2008) 168 Cal. App. 4th 783, 795, 85 Cal. Rptr. 3d 752* , the court concluded that the Legislature purposefully started the phrase with the preposition "at," which is defined in the dictionary as denoting a location or position. Thus, to be excluded from the Act, the purchaser must have bid for or purchased the property at a sale authorized by statute. For example, a purchase of property at a government sale due to unpaid taxes would fall under this exception. In *Spencer*, the fact that an equity seller sold the property to the equity purchaser after receiving approval from a bankruptcy trustee did not bring the sale within the statutory exemptions from the definition of "equity purchaser" because the equity purchasers did not buy the property "at" any sale of property authorized by statute.

If a representative of an equity buyer participates in a home equity sale transaction, the representative must provide written proof and a written statement indicating that the representative has a valid current California real estate license and is bonded by an admitted surety insurer in an amount equal to twice the fair market value of the real property that is the subject of the contract [*Civ. Code § 1695.17(a)*; *see Civ. Code § 1695.15(b)* ("representative" defined); *see also § 23.308*]. The equity buyer is liable for all damages resulting from any statement made or act committed by the representative in connection with the equity buyer's acquisition of a residence in foreclosure, receipt of any consideration or property from or on behalf of the seller, or performance of any act prohibited by the laws governing home equity sale contracts [*Civ. Code § 1695.15(a)*; *see Civ. Code § 1695.16* (any contractual provision attempting to limit this liability is void)]. For further discussion, see *§ 23.308[1]*.

[4] Applicability of Unruh Civil Rights Act

The Unruh Civil Rights Act prohibits business establishments from discriminating in the sale of housing based on age, unless the discrimination is in favor of senior citizens and complies with numerous statutory requirements [*Civ. Code §§ 51.2-51.4*; *see Civ. Code §§ 51.10-51.12* (special provisions applicable only to Riverside County); Stats. 1996, ch. 1147, § 8 (legislative findings for special treatment of Riverside County); *see also* Ch. 34, *Condominiums* (coverage of senior

housing statutes)].

The Unruh Civil Rights Act declares that all persons within California are free and equal and, regardless of sex, race, color, religion, ancestry, or national origin, disabilities, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all "business establishments" of every kind whatsoever [*Civ. Code § 51(b)*; *see Civ. Code § 51(e)* (definitions)]. The act is not to be construed to require modification of new or existing structures [*Civ. Code § 51(d)*]. It has been interpreted to prohibit all arbitrary discrimination by business establishments [*In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992]* .

The term "business" as used in the Act embraces everything about which one can be employed, and "establishment" includes not only a fixed location but also a permanent "commercial force or organization" or a "permanent settled position (as in life or business)" [*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468 469, 20 Cal. Rptr. 609, 370 P.2d 313]* . "Business establishment" also covers owners of duplexes, non-owner-occupied single-family dwellings, and other housing accommodations *[56 Ops. Cal. Atty. Gen. 546 (1973)]* .

[5] Applicability of California Fair Employment and Housing Act

Under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], it is unlawful to engage in specified discriminatory practices in housing accommodations on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability [*see Gov. Code § 12955*]. Discrimination on these bases is against public policy [*Gov. Code § 12920*], and the opportunity to seek, obtain, and hold housing without discrimination is a civil right [*Gov. Code § 12921(b)*; *see Civ. Code § 51*]. The Department of Fair Employment and Housing is authorized to take remedial and preventive actions, such as to use the services of all governmental departments and agencies, including conciliation councils with regard to housing discrimination, and to receive, investigate, and conciliate complaints alleging discriminatory practices [*Gov. Code § 12930(d), (f)*]. For example, with regard to real estate transactions, it is unlawful for any person, organization, or entity to do any of the following [*Gov. Code § 12955(i)- (k)*]:

- Discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, based on discrimination because of the specified characteristics;

- Deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service based on discrimination because of the specified characteristics; or

- Otherwise make unavailable or deny a dwelling based on discrimination because of the specified characteristics.

[6] Inapplicability of Consumer Credit Statute (Unruh Act)

California's Unruh Act [*Civ. Code § 1801 et seq.*] (not to be confused with the Unruh Civil Rights Act discussed in *§ 23.11[4]*) strictly regulates the extension of consumer credit in connection with retail installment sales [*see* Ch. 45, *Consumer Installment Loans and Credit Sales*]. However, the Unruh Act is inapplicable to real property sale contracts. Specifically, the Act does not apply to any contract or series of contracts providing for the following [*Civ. Code § 1801.4*]:

- The construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in a parcel of real property; or

- The sale of a lot of real property, including any site preparation incidental to the sale.

These exceptions were specifically enacted to abrogate any contrary rule in *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 73 Cal. Rptr. 398, 447 P.2d 638* , which applied the provisions of the Unruh Act to a contract of sale for a house yet to be built [*see* Stats. 1969, ch. 554, § 2].

[7] Buyer's Choice Act

If the seller acquired the property at a foreclosure sale and was the mortgagee or trust deed beneficiary that foreclosed, then the provisions of *Civ. Code § 1103.20 et seq.*, titled the Buyer's Choice Act, could apply. Until January 1, 2015 [*Civ. Code § 1103.23*], no mortgagee or trust deed beneficiary (nor any trustee, agent, officer, or other employee, of a mortgagee or beneficiary), that acquired title to residential real property improved by four or fewer dwelling units at a foreclosure sale, may require, directly or indirectly, as a condition of selling the property, that title insurance covering the property, or escrow service provided in connection with the sale of the property, must be obtained by the purchaser from a particular title insurer or escrow agent [*Civ. Code § 1103.22(a), (b)(2)*; *see Civ. Code § 1103.22(b)(1), (3)* (escrow service and title insurance defined)]. However, the purchaser may agree to accept the services of a title insurer or an escrow agent recommended by the seller if the seller first gives the purchaser written notice of the right to make an independent selection of those services [*Civ. Code § 1103.22(a)*].

Civ. Code § 1103.22 applies regardless of whether the secondary sale ensues from a solicitation of purchasers or from acceptance of an unsolicited offer to purchase [*see Civ. Code § 1103.21(b)*].

A sale subject to *Civ. Code § 1103.22* cannot be invalidated solely because of the failure of any person to comply with any provision of *Civ. Code § 1103.20 et seq.* [*Civ. Code § 1103.22(d)*]. However, a violation of *Civ. Code § 1103.22* is a cause of action, and the purchaser may recover statutory damages equal to three times all of the charges made for the required title insurance or escrow services. A violation also is a ground for disciplinary action by a licensing agency, if the culpable mortgagee or beneficiary (or a culpable trustee, agent, officer, or other employee, of the mortgagee or beneficiary) is a state-licensed person [*Civ. Code § 1103.22(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsEconomic DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsFamily Status DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRacial DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsReligious DiscriminationReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleFormalities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide § 23.12

AUTHOR: William M. Hensley Editorial Consultant

§ 23.12 Parties to Contract

[1] Capacity

The parties to a valid contract must be capable of contracting [*Civ. Code § 1550*; *see Civ. Code § 1558* (identities of parties must be ascertainable)]. All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights [*see Civ. Code § 1556*].

[2] Married Persons

[a] Separate Property

Spouses may each own separate property, and together they may hold property in joint tenancy or tenancy in common or as community property or as community property with a right of survivorship [*Fam. Code § 750*]. The separate property of a married person includes, among other things (1) all property owned by that person before marriage, (2) all property acquired by that person during marriage by gift, will, or inheritance, and (3) the rents, issues, and profits of property in the first two categories [*Fam. Code § 770*; *see Fam. Code §§ 771, 781* (additional types of separate property)]. A married person may convey his or her separate property without the consent of the other spouse [*Fam. Code § 770*].

[b] Community Property

Except as otherwise provided by statute, all real property, wherever situated, acquired by a married person during the marriage while domiciled in California is community property or as community property with a right of survivorship [*Fam. Code § 760*]. One statutory variation, applicable to instruments created after June 2001, allows for community real property with right of survivorship. Any community property (except a multiple-party account [*see Prob. Code § 5100 et seq.*]), when expressly declared in the transfer document to be community property with right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, on the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the

instrument, subject to the same procedures as property held in joint tenancy [*Civ. Code § 682.1*]. For further discussion, see Ch. 27, *Deeds and Recording* .

Either spouse has the management and control of community real property, regardless of when it was acquired. However, both spouses (either personally or by duly authorized agent) must sign any instrument by which community real property is sold or conveyed [*Fam. Code § 1102(a)*; *see Fam. Code § 1100(c)*]. This joint-execution requirement does not apply to transfers between the spouses [*Fam. Code § 1102(b)*]. Further, the joint-execution requirement and the other provisions of *Fam. Code § 1102* do not preclude either spouse from encumbering his or her interest in community real property, pursuant to *Fam. Code § 2033*, to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation [*Fam. Code § 1102(e)*].

Several important presumptions affect the application of the community property laws. For example:

- If a husband and wife acquired property before 1975 by an instrument in which they are described as husband and wife, it is presumed that the property is community property unless a different intention is expressed in the instrument [*Fam. Code § 803(c)*; *see* Ch. 27, *Deeds and Recording*].

- If record title to real property is held in the name of one spouse, and that spouse signs a contract or instrument conveying the property or any interest in it to a good faith purchaser who has no knowledge of the marriage relation, the instrument is presumed valid [*see Fam. Code § 1102(c)*; *Fam. Code § 1102(d)* (one-year limitation period to avoid instrument)].

- In the case of property acquired during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, the property is presumed to be community property for the purpose of division of the property on dissolution of marriage or legal separation. This presumption may be rebutted either by a clear statement in the deed or other documentary evidence of title that the property is separate property and not community property or by proof that the parties have made a written agreement that the property is separate property [*Fam. Code § 2581*; *see* Ch. 27, *Deeds and Recording*].

[3] Minors

A person under 18 years of age [*see Fam. Code § 6500* (age of majority)] cannot make a contract relating to real property [*Civ. Code §§ 1556, 1557*; *Fam. Code § 6701(b)*; *Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 137, 225 P.2d 238* (contract is void)] unless he or she is an emancipated minor. An emancipated minor is any person under 18 years of age who either (1) has entered into a valid marriage (whether or not the marriage has been dissolved), (2) is on active duty with the U.S. armed forces, or (3) has received a declaration of emancipation pursuant to *Fam. Code § 7122* [*Fam. Code § 7002*]. An emancipated minor will be considered to be an adult for purposes of the minor's capacity to enter into a binding contract or to buy or sell any interest in real property [*Fam. Code § 7050(e)(2), (3)*]. For further discussion, see Ch. 100B, *Contracts and Employment of Minors* .

When a real property transaction involves an unemancipated minor as seller, a duly appointed guardian must be authorized by court order to sell the real property that is held in the minor's name [*Prob. Code § 2540*; *see* Ch. 27, *Deeds and Recording*]. For discussion, see California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* (Matthew Bender).

[4] Persons of Unsound Mind

A person of unsound mind who is entirely without understanding has no power to make a contract of any kind [*Civ.*

Code § 38]. After an adjudication of incapacity, a person of unsound mind cannot make any contract until restored to capacity [*Civ. Code § 40*]. For further discussion, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

If a person of unsound mind who is not entirely without understanding makes a contract before his or her incapacity has been judicially determined, the contract is subject to rescission [*Civ. Code §§ 39, 1689(b)(7)*]. For discussion, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender).

A conservator must be appointed to sell, pursuant to court authorization, real property that is held in the name of an incompetent [*Prob. Code § 2540*; *see Prob. Code § 3000 et seq.* (disposition of community property when spouse is incompetent)]. For discussion, see California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender).

[5] Corporations

Any contract or other instrument in writing by a corporation is not invalid for any lack of authority of the signing officers if the buyer did not have actual knowledge of that lack of authority. The appropriate officers are the chairman of the board, the president, or any vice president, and the secretary, assistant secretary, chief financial officer, or assistant treasurer of the corporation [*Corp. Code § 313*; *but see Corp. Code § 208(a)* (rule inapplicable to certain intracorporate disputes not affecting rights of third persons)]. To be valid and enforceable against the corporation, a contract to sell the corporation's real property must be signed a person who holds one of the three specified operational offices (chairman, president, vice president) and a person who holds one of the other specified offices (secretary, assistant secretary, chief financial officer, assistant treasurer). However, it is not necessary for two individuals to sign: if one person happens to hold both an operational office and also one of the other offices (such as president and chief financial officer), then that person alone can sign. In such a case, it is not necessary to disclose, or to indicate in connection with the signature, that the person holds both offices; it is necessary only that the person signing for the corporation must in fact hold both offices [*Snukal v. Flightways Mfg., Inc. (2000) 23 Cal. 4th 754, 786-787, 98 Cal. Rptr. 2d 1, 3 P.3d 286* (lease signed for corporation by one person, who signed only once and was designated as "president" of corporation, was enforceable against corporation under *Corp. Code § 313* because that person was in fact president, chief financial officer, and secretary of corporation)]. Nevertheless, prudence would dictate requiring two signatures on behalf of a corporation, even by one person signing as two officers, along with appropriate designation of the official capacity in which each signature is given.

PRACTICE TIP:

Get Two Corporate Signatures of Appropriate Officers. *Snukal* is must reading in the area about the number and identity of corporate officers who must sign on behalf of a corporation in order to create a binding contract. Before the California Supreme Court resolved the case, the decision created quite a stir by holding that *Corp. Code § 313* should be applied quite literally. Although the Supreme Court recognized that actual and ostensible authority doctrines frequently prevail in contractual contexts, the real-life lesson is that parties opposite a corporation should insist on *two* corporate representative signatures to be safe--one by the Board chairman, president, or any vice president *and* one by the secretary, assistant secretary, chief financial officer, or assistant treasurer. *By William M. Hensley*.

If the property to be sold represents all or substantially all of the assets of the corporation [*see Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 15-16, 206 P.2d 847]* , the principal terms of the disposition must be approved by the board [*Corp. Code § 1001(a)*; *see Corp. Code § 151* ("approved by the board" defined)]. In addition, unless the transaction is in the usual and regular course of the business of the corporation [*see Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 16, 206 P.2d 847]* , the principal terms of the sale must be approved by the outstanding shares [*see Corp. Code § 152* ("approved by the outstanding shares" defined)] either before or after the board's approval and before or after the transaction [*Corp. Code § 1001(a)*]. However, if the transaction constitutes a conversion to another

form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; *see Corp. Code § 1150 et seq.* (conversions)]. For further discussion, see Ballantine & Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* (Matthew Bender).

Civ. Code § 1190 offers an assurance regarding the capacity of a corporate participant in a sale transaction. That assurance is available if the corporation's deed (1) is signed by the president, vice president, secretary, or assistant secretary of the corporation, and (2) includes the statutory certificate of acknowledgment [*see Civ. Code § 1190*; *see also Civ. Code § 1189(a)* (statutory form)]. For further discussion, see Ch. 27, *Deeds and Recording* .

Any deed or instrument conveying or otherwise transferring corporate assets may have annexed to it any one of several certificates of the corporation's secretary or assistant secretary. If properly drafted, the attached certificate will be prima facie evidence of the existence of the facts authorizing the conveyance or other transfer of the assets and conclusive evidence in favor of any innocent buyer or encumbrancer for value. For discussion of the required contents of such a certificate [*see Corp. Code § 1002*], see *§ 23.121*.

[6] General Partnerships

A general partnership can acquire real property in the partnership name or in the name of one or more of the partners [*Corp. Code § 16204(a)*]. When title to real property is held in the partnership name, the property can be conveyed only in that name. In general, any partner can convey that title by an instrument signed in the partnership name [*Corp. Code §§ 16302(a)(1), 16303*].

The partnership may recover property conveyed by a partner pursuant to an instrument signed in the partnership name unless the partner's act binds the partnership or the property has been conveyed to a good faith purchaser for value without knowledge that the partner exceeded his or her authority by executing the conveyance [*Corp. Code § 16302(b)*; *see Corp. Code §§ 16301, 16303*].

If title to partnership property is held in the name of one or more of the partners, only the partners in whose name title stands can convey title [*see Corp. Code § 16302(a)(2), (3)*; *see also Corp. Code §§ 16204, 16303*].

For further discussion of general partnerships, see Ch. 15, *General Partnerships* . For deeds that may be used by a partnership to acquire and convey property, see Ch. 27, *Deeds and Recording* .

[7] Limited Partnerships

A general partner of a limited partnership has the rights and powers of a partner in a general partnership (for example, the right to convey partnership property) [*Corp. Code § 15904.02(a)* (ULPA '08), *Corp. Code § 15643* (CRLPA, repealed January 1, 2010); *see § 23.12[6]*]. The recordation of a certified copy of the certificate of limited partnership (or any amendment) in the county where partnership real property is located creates a conclusive presumption in favor of a good faith purchaser of the property that the general partners named in the certificate are all of the general partners of the partnership [*Corp. Code § 15902.01(e)* (ULPA '08), *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010)].

The consent of each partner is necessary to sell, lease, exchange, or otherwise dispose of all or substantially all of a limited partnership's property, with or without the goodwill, other than in the usual and regular course of the limited partnership's activities [*Corp. Code § 15904.06(a)* (ULPA '08)]. Under the CRLPA, unless the limited partnership agreement provides to the contrary, a transfer of all or a substantial part of the assets of the limited partnership or the incurring of any indebtedness that is not in the ordinary course of business must be authorized by the affirmative vote of a majority in interest of the limited partners [*Corp. Code § 15636(f)(1)(B), (C)* (CRLPA, repealed January 1, 2010)].

For further discussion of limited partnerships, see Ch. 16, *Formation of Limited Partnerships* .

[8] Unincorporated Associations

An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real or personal property [*Corp. Code §§ 18105, 18110*; *see Corp. Code § 21200* (capacity of unincorporated association that is organized as medical society)]. The acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers, (2) a person specifically designated by a resolution adopted by the association, or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property [*Corp. Code § 18120(a)*; *see* Ch. 27, *Deeds and Recording*]. Generally, it must be conclusively presumed in favor of a bona fide transferor, purchaser, or encumbrancer for value of the association's real property located in the county in which a statement of authority has been recorded, that a person designated in the statement is authorized to acquire, transfer, or encumber real property on the association's behalf [*Corp. Code § 18120(c)*]. However, the presumption does not apply if, before the acquisition, transfer, or encumbrance, either (1) the statement of authority is revoked by the unincorporated association, or (2) a person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized [*Corp. Code § 18120(d)*].

For further discussion of unincorporated associations, see Ch. 13A, *Nonprofit Unincorporated Associations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawPurchase & SaleContracts of SaleFormalities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide § 23.13

AUTHOR: William M. Hensley Editorial Consultant

§ 23.13 Mutual Assent

[1] Basic Requirement

The consent of the parties to a contract is essential to the existence of the contract and must be free, mutual, and communicated by each party to the other [*Civ. Code §§ 1550, 1565*]. Consent is not free if it is obtained through duress, menace, actual fraud, constructive fraud, undue influence, or a mistake of fact or law [*Civ. Code § 1567*; *see Civ. Code § 1565 et seq.*].

The existence of mutual assent is determined by an objective test [*Meyer v. Benko (1976) 55 Cal. App. 3d 937, 942, 127 Cal. Rptr. 846]* that looks to the reasonable meaning of the parties' words and acts [*see Brant v. California Dairies, Inc. (1935) 4 Cal. 2d 128, 133, 48 P.2d 13]* . Mutual assent is usually manifested by the signatures of both parties on the contract itself [*Sampson v. Draeger (1927) 88 Cal. App. 105, 108, 262 P. 781]* . The execution by both parties of a deposit receipt that contains all the material factors common to a sale of real property indicates the existence of mutual consent and therefore that the parties entered into an enforceable contract [*Meyer v. Benko (1976) 55 Cal. App. 3d 937, 942-944, 127 Cal. Rptr. 846* ; *see Yablon v. Burke (1955) 131 Cal. App. 2d 502, 505, 280 P.2d 809* (unsigned standard-form deposit receipt is not contract of sale)].

For further discussion of the existence of mutual consent in this context, see California Real Estate Law and Practice, Ch. 71, *Deposit Receipts and Other Agreements of Sale* (Matthew Bender). For an examination of the requirement of mutual consent as it relates to contracts in general, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] Acceptance and Counteroffers

An acceptance of an offer to make a contract must be absolute and unqualified. A qualified or conditional acceptance is considered a new proposal or counteroffer [*Civ. Code § 1585*; *Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 750-752, 101 Cal. Rptr. 335* ; *Apablasa v. Merritt & Co. (1959) 176 Cal. App. 2d 719, 726, 1 Cal. Rptr. 500]* . A counteroffer terminates the offeree's power to accept the original offer, unless the offeror, in the offer, or the offeree, in

the counteroffer, provides that the counteroffer will not terminate the offer [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335]* . For further discussion of counteroffers, see *§ 23.204[1]*.

PRACTICE TIP:

CAR Counteroffer Battle Shows Lack of Contract Formation. One frequently forgets how law school contract principles came to life given the widespread modern use of California Association of Realtors (CAR) forms. A case from the Third District Court of Appeal illustrates how counteroffer "unqualified" acceptance rules kept a contract from arising in a real estate context. Specifically, in *Roth v. Malson [(1998) 67 Cal. App. 4th 552, 79 Cal. Rptr. 2d 226]* , plaintiff-buyer wrote "COUNTER TO COUNTER OFFER" in a CAR form and then handwrote some fairly minor changes in a space marked "CHANGES/AMENDMENTS." The Third District, in a 2-1 opinion, found that the "counter-counteroffer" language had to be viewed objectively, requiring a further response from defendant-seller. Seller did not respond, with the result that no contract was formed and a summary judgment in favor of seller on buyer's specific performance action was affirmed. *By William M. Hensley*.

[3] Revocation

An offer may be revoked at any time before acceptance of the offer is communicated to the offeror [*Civ. Code § 1586*]. An offer may be revoked by (1) communication of notice of revocation from the offeror to the offeree, (2) lapse of time, (3) the offeree's failure to fulfill a condition precedent to acceptance, or (4) the offeror's death or insanity [*Civ. Code § 1587*]. For further discussion, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[4] Certainty

Mutual assent is not present if there is any evidence that a material element has been left to future agreement. For example, a deposit receipt containing all of the essential terms of sale is not a binding contract if the parties intend to withhold final agreement until all incidental terms and conditions are noted in a written agreement [*see Smissaert v. Chiodo (1958) 163 Cal. App. 2d 827, 831, 330 P.2d 98* (no contract when addendum to deposit receipt provided for final written agreement)]. Further, a deposit receipt is not a contract of sale when it does not adequately arrange for payment of the remainder of the purchase price [*see Kline v. Rogerson (1947) 80 Cal. App. 2d 158, 160, 181 P.2d 385* (no contract when deposit receipt provided that purchase price was to be paid on mutually satisfactory terms, and parties never agreed on such terms)]. However, a contradiction in the terms on the face of the contract will not invalidate the contract if the court (through the use of parol evidence or otherwise) can recognize and remedy the contradiction to effect the intentions of the parties at the time of execution [*Lipton v. Johansen (1951) 105 Cal. App. 2d 363, 367, 233 P.2d 648]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationCounteroffersContracts LawFormationMeeting of MindsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-23 California Legal Forms--Transaction Guide § 23.14

AUTHOR: William M. Hensley Editorial Consultant

§ 23.14 Description of Property

[1] Requirement of Specificity: Legal Description

To satisfy the statute of frauds [*see Civ. Code § 1624(c)*; *Code Civ. Proc. § 1971*; *see also § 23.11[2]*], a contract for the sale of real property must be in a writing that, among other things, contains a description of the property that sufficiently identifies it [*Finn v. Goldstein (1927) 201 Cal. 605, 607, 258 P. 85* ; *see Calvi v. Bittner (1961) 198 Cal. App. 2d 312, 321, 17 Cal. Rptr. 850]* . An adequate description is also a prerequisite to specific performance of the contract [*see Civ. Code § 3390* (contract cannot be specifically enforced if its terms are not sufficiently certain to make clearly ascertainable what precise act is to be done); *see also Ganiats Construction, Inc. v. Hesse (1960) 180 Cal. App. 2d 377, 384, 4 Cal. Rptr. 706]* .

The term "legal description" is commonly used to refer to a description of real property that is complete enough to permit the identification of a particular parcel of land.

The courts have applied a number of standards or tests in determining the adequacy of descriptions of real property. Under one common test, a description will be deemed sufficient if a competent surveyor could locate the land and establish its boundaries from the description [*see Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 207, 72 Cal. Rptr. 769]* . Another test has been applied to descriptions that are abstract and of a general nature. That test determines whether the description, with the assistance of external evidence that does not contradict or add to the description, can be connected with and applied to the appropriate property to the exclusion of all other property [*Vezaldenos v. Keller (1967) 254 Cal. App. 2d 816, 823, 62 Cal. Rptr. 808]* . In addition, the Supreme Court has held that a memorandum agreement satisfies the statute of frauds if it (1) identifies the subject of the parties' agreement, (2) shows that they made a contract, and (3) states the essential contract terms with reasonable certainty [*Sterling v. Taylor (2007) 40 Cal. 4th 757, 766, 55 Cal. Rptr. 3d 116, 152 P.3d 420]* .

Under any test used by the courts, parol evidence may be admitted for the purpose of applying the given description to the earth's surface, thereby identifying the property [*Beverage v. Canton Placer Mining Co. (1955) 43 Cal. 2d 769,*

774, 278 P.2d 694 ; *Calvi v. Bittner (1961) 198 Cal. App. 2d 312, 316, 17 Cal. Rptr. 850]* . However, parol evidence cannot be used to furnish the description [*Sterling v. Taylor (2007) 40 Cal. 4th 757, 766, 55 Cal. Rptr. 3d 116, 152 P.3d 420* (memorandum must include essential contractual terms, and therefore extrinsic evidence is not admissible to supply those required terms); *Roberts v. Lebrain (1952) 113 Cal. App. 2d 712, 715, 248 P.2d 810* ; *Vezaldenos v. Keller (1967) 254 Cal. App. 2d 816, 823, 62 Cal. Rptr. 808]* . For further discussion of the parol evidence rule, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] Effect of Inadequate Description

An inadequate description (one that fails to identify the land or to provide the means by which it may be identified) may (1) render the contract void or ineffective [*see Edwards v. City of Santa Paula (1956) 138 Cal. App. 2d 375, 380, 292 P.2d 31]* , (2) cause a party to incur additional expense to bring an action to reform the instrument [*see Hanlon v. Western Loan & Bldg. Co. (1941) 46 Cal. App. 2d 580, 598, 116 P.2d 465]* , and (3) preclude specific enforcement of the contract [*see Civ. Code § 3390*; *see also* [1], *above*].

[3] Reference to Recorded Maps or Other Instruments

Real property sale contracts frequently describe the subject property by reference to a lot and block number as indicated on a map that has been filed with the county recorder. Alternatively, the contract may refer to the description set forth in another document, such as the seller's deed or a preliminary title report (which usually includes a description of the property and a copy of a map of the property) or title insurance policy. When a description incorporates a map or other instrument by reference, the documents, when read together, must provide a description of the property sufficiently definite to locate the property [*Caldwell v. Center (1866) 30 Cal. 539, 542* ; *see Ames v. Irvine Co. (1966) 246 Cal. App. 2d 832, 836, 55 Cal. Rptr. 180* (all information contained on map is included in description by reference with same effect as though it were specifically set forth)].

Maps used to describe property can include subdivision maps prepared pursuant to the Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see* Ch. 30, *Subdivision Regulation*], "official maps" prepared by local jurisdictions [*see Gov. Code § 66499.52*], and assessors' parcel maps [*see Rev. & Tax. Code § 327*].

[4] Other Methods of Describing Land

In addition to recorded maps or other instruments, methods of describing land that are used in California include reference to United States Government survey, reference to the California Coordinate System, description by metes and bounds, bounds descriptions, and lot division descriptions. For further discussion, see California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions* (Matthew Bender).

PRACTICE TIP:

Include APN. In order to guard against invalidation based on an incorrect property description, always include the Assessor's Parcel Number (APN) as a fail-safe measure. *By William M. Hensley.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsProperty DescriptionsReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleRemediesRescission & Restitution



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9-23 California Legal Forms--Transaction Guide § 23.15

AUTHOR: William M. Hensley Editorial Consultant

§ 23.15 Purchase Price

[1] Sufficiency of Consideration

A real property sale contract must have a sufficient cause or consideration [*see Civ. Code § 1550(4)*]. This consideration must be "good consideration," that is, valuable consideration [*Horton v. Kyburz (1959) 53 Cal. 2d 59, 65, 346 P.2d 399]* . A benefit conferred or agreed to be conferred on the seller, to which the seller is not otherwise entitled, is good consideration. Similarly, a detriment suffered or agreed to be suffered by the buyer is good consideration if the buyer was not already legally bound to suffer this prejudice at the time of consent [*Civ. Code § 1605*]. Real property sale contracts almost invariably provide for the payment of a specified purchase price in exchange for the transfer of title.

Although a good and sufficient consideration must be a valuable consideration, it need not be an adequate consideration [*see Horton v. Kyburz (1959) 53 Cal. 2d 59, 66, 346 P.2d 399]* . However, unless the purchase price or other consideration is "adequate," the buyer will not be able to obtain specific performance of the contract [*Civ. Code § 3391(1)*; *see Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 255, 40 Cal. Rptr. 189]* . The determination of the adequacy of the consideration is made as of the time of the execution of the contract [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 474, 46 Cal. Rptr. 173]* .

PRACTICE TIP:

Rely on Presumptions, But Do Not Go Too Far. If someone challenges the nature or amount of legal consideration, do not forget to rely on the rule that a written instrument is *presumptive* evidence of a consideration [*Civ. Code § 1614*]. In line with this presumption, the burden of showing lack of consideration to support a written instrument rests with the party challenging the instrument [*Civ. Code § 1615*]. However. the presumption regarding consideration is rebuttable; *Evid. Code § 622* makes this clear by specifying that a *recital* of consideration--with recitals usually given conclusive effect--is an exception to the general rule of dispositive impact. Nonetheless, a recital of considerations does have a powerful evidentiary effect, requiring rebuttal by the other side in order to show that adequate consideration was not given for entry into a contract. *By William M. Hensley.*

[2] Terms of Payment

A real property sale contract will not satisfy the statute of frauds [*see Civ. Code § 1624*] unless it sets forth (among other things) the purchase price and the terms and manner of payment [*Finn v. Goldstein (1927) 201 Cal. 605, 607, 258 P. 85* ; *Dennis v. Overholtzer (1960) 178 Cal. App. 2d 766, 774, 3 Cal. Rptr. 193 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 221, 32 Cal. Rptr. 415, 384 P.2d 7]* . The terms of payment must be complete and must not leave any material element to future agreement [*see Kline v. Rogerson (1947) 80 Cal. App. 2d 158, 160, 181 P.2d 385* ; *Burgess v. Rodom (1953) 121 Cal. App. 2d 71, 74, 262 P.2d 335]* .

If the purchase price will not be payable entirely in cash at the closing, the contract must provide for the method of securing the balance of the purchase price [*see Mueller v. Chandler (1963) 217 Cal. App. 2d 521, 523, 31 Cal. Rptr. 646]* . The normal method is by the use of a deed of trust.

If the property is subject to an existing deed of trust or mortgage, the buyer may "assume" the encumbrance or accept the property "subject to" the encumbrance. If the buyer purchases the property "subject to" an existing encumbrance, he or she does not assume or agree to pay the debt secured by the mortgage or deed of trust [*Wolfert v. Guadagno (1933) 130 Cal. App. 661, 663, 20 P.2d 360]* and does not become personally liable for the payment of the debt [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531* ; *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 599, 125 Cal. Rptr. 557, 542 P.2d 981]* . A buyer who "assumes" the encumbrance agrees to pay and discharge the debt that the seller is liable for and that is secured by the mortgage or deed of trust, and therefore becomes liable for the debt to the mortgagee or beneficiary [*Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 P. 411]* . For further discussion, see *§ 23.221[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationAdequate ConsiderationContracts LawConsiderationSufficient ConsiderationEvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFailure of ConsiderationReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleFormalities



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.16 Contingencies (Conditions)

While every real estate contract places conditions on a party's performance, if a contract does not impose a definite obligation on one party to perform it, it lacks the fundamental element of mutuality of obligation and is not binding on the other party [*Shortell v. Evans-Ferguson Corp. (1929) 98 Cal. App. 650, 660, 277 P. 519]* . A contract that allows the buyer to withdraw if he or she wishes is illusory [*Mattei v. Hopper (1958) 51 Cal. 2d 119, 122, 330 P.2d 625]* . Conditions to performance are often referred to as "contingencies," and this chapter will follow that practice.

A contract conditioned on the satisfaction of either party or a third party is not illusory. If a contingency requires the personal satisfaction of either party (a subjective judgment), the party who must be satisfied has an implied duty of good faith [*Mattei v. Hopper (1958) 51 Cal. 2d 119, 124, 330 P.2d 625* ; *see Converse v. Fong (1984) 159 Cal. App. 3d 86, 90, 205 Cal. Rptr. 242* ; *Simmons v. Dryer (1963) 216 Cal. App. 2d 733, 743, 31 Cal. Rptr. 199]* . When the contingency must meet an objective standard such as commercial value or quality, operative fitness, or mechanical utility, the relevant standard is that of a reasonable person [*Mattei v. Hopper (1958) 51 Cal. 2d 119, 123, 330 P.2d 625]* . In the case of an inspection contingency (such as pest inspection or inspection of subsoil), the standard is the prevailing practice in that field of inspection at that time [*see Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 249, 73 Cal. Rptr. 127]* .

The validity of a real estate contract containing a contingency (condition) is protected somewhat by the statutory rule that all things considered in law or usage to be incidental to a contract, or necessary to carry it into effect, are implied in the contract [*Civ. Code § 1656*]. This rule has been interpreted to infer in every contract for the sale of real property a requirement of a good faith attempt by both parties to carry the contract into effect [*Landis v. Blomquist (1967) 257 Cal. App. 2d 533, 537, 64 Cal. Rptr. 865]* .

PRACTICE TIP:

Determining in Whose Favor Contingencies Run Is Important. Contingencies are a crucial aspect of real estate purchase/sale contracts. In determining the effect of contingencies, courts often consider in whose favor they run or to whom they were designed to benefit. The determination of benefit can be outcome

determinative in determining the legal effect of a particular contingency. Decisional law frequently will side with the view that certain contingencies are waivable by a certain party based upon which party the contingency was assigned to benefit [*see, e.g., WYDA Associates v. Merner (1996) 42 Cal. App. 4th 1702, 1714-1715, 50 Cal. Rptr. 2d 323* (financing contingency protected buyer, but the actual contingency period was for seller's benefit and seller did not have to keep the property off the market indefinitely while buyer sought financing)]. One cannot lose sight of the purpose of a contingency for purposes of judicial scrutiny of the circumstances under which the contingency will be found to have been waived or to be unenforceable. *By William M. Hensley.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationMutual ObligationContracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.17 Warranties

Some warranties arise by operation of law. In the case of real property sales, the only significant implied warranties are those applicable to newly constructed homes [*see Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88* (implied warranty that new construction was designed and constructed in reasonably workmanlike manner); *see also* California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies* (Matthew Bender)] and to personal property included in the sale [*see Com. Code §§ 2314, 2315*; *see also* Ch. 52, *Sales of Goods Under the Uniform Commercial Code*]. The scope, modification, and exclusion of these warranties are strictly regulated.

If a real property sale contract provides that the warranties set forth in the contract will survive delivery of the deed, this will prevent the contract (and its warranties) from being merged into and extinguished by the accepted deed, and therefore will permit the injured party to bring an action if a warranty is breached after delivery of the deed [*see Burnand v. Nowell (1948) 84 Cal. App. 2d 1, 5, 189 P.2d 796* ; *see also Code Civ. Proc. § 2076* (person to whom tender is made must, at time of tender, specify any objection to money, instrument, or property, or he or she will be deemed to have waived it)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral Overview



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.18 Liquidated Damages

[1] Real Property Sales Contracts in General

This discussion focuses on the seller's right to liquidated damages following a buyer's breach of a real property sale contract. A liquidated damages clause in a real property sale contract is enforceable if the following conditions are satisfied:

- It is separately signed or initialed by each party to the contract [*Civ. Code §§ 1676, 1677(a)*; *see Guthman v. Moss (1984) 150 Cal. App. 3d 501, 509-510, 198 Cal. Rptr. 54* (failure to sign or initial renders provision voidable)].

- In the case of a printed contract, the provision is set out either in at least 10-point boldface type or 8-point contrasting red boldface type [*Civ. Code §§ 1676, 1677(b)*].

- The buyer (or other person seeking to invalidate the provision) does not establish that the provision was unreasonable in view of the circumstances existing at the time the contract was made [*Civ. Code §§ 1671(b), 1676*].

Additional requirements apply to sale contracts for residential real property [*see* [2], *below*].

If the buyer defaults, and the contract does not contain a liquidated-damages provision, the seller may recover not only the excess of the contract price over the value of the property but also consequential damages according to proof and interest [*see Civ. Code § 3307*].

Liquidated damages provisions used in other contexts are subject to different requirements [*see Civ. Code § 1671*; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

[2] Residential Property

Liquidated-damages provisions are subject to additional requirements when (1) they apply to residential property consisting primarily of a dwelling of one-to-four units, and (2) the buyer intends (at the time the contract is made) to occupy the dwelling or one of its units as his or her residence. In that case, a liquidated-damages provision is valid only to the extent that the buyer actually pays the subject funds (that is, the deposit) in the form of cash or check, including a postdated check [*Civ. Code § 1675(b)*].

When the amount actually paid pursuant to the liquidated-damages provision does not exceed 3 percent of the purchase price, the provision is presumed valid to the extent of payments actually made, unless the buyer establishes that the amount is unreasonable as liquidated damages [*Civ. Code § 1675(c)*]. Conversely, when the amount actually paid pursuant to the liquidated-damages provision exceeds 3 percent of the purchase price, the provision is presumed invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages [*Civ. Code § 1675(d)*; *see* 13 Cal. L. Rev. Comm. Reports 1735 (1976)(buyer may choose to uphold provision when it appears that seller will be able to show higher actual damages in absence of valid liquidated-damages provision)].

The reasonableness of an amount actually paid as liquidated damages must be determined taking into account (1) the circumstances existing at the time the contract was made, and (2) the price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer's default [*Civ. Code § 1675(e)*; *see* 13 Cal. L. Rev. Comm. Reports 1735 (1976)(circumstances considered by court in making its determination regarding reasonableness include cost of insurance, interest, and taxes during period after original sale contract was made, and any additional broker fees that result from buyer's default)].

Different requirements apply for the initial sale of newly constructed attached residential condominium units located within a structure of 10 or more units [*Civ. Code § 1675(f)(1)*; *see Civ. Code § 783*]. If the amount actually paid to the seller pursuant to the liquidated-damages provision exceeds 3 percent of the purchase price of the residential unit in the transaction, both of the following must occur if the buyer defaults [*Civ. Code § 1675(f)(1)*]:

- The seller must perform an accounting of its costs and revenues related to and fairly allocable to the construction and sale of the residential unit within 60 calendar days after the final close of escrow of the sale of the unit within the structure; and

- The accounting must include any and all costs and revenues related to the construction and sale of the residential property and any delay caused by buyer's default.

The seller must make reasonable efforts to mitigate any damages arising from the default, and the seller must refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either 3 percent of the originally agreed-on purchase price of the residential property or the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting [*Civ. Code § 1675(f)(1)*; *see* Civ. Code § 1675(f)(2)(refund must be sent to buyer's last known address within 90 days after final close of escrow of sale or lease of all residential condominium units within structure)]. If the amount retained by the seller after the accounting does not exceed 3 percent of the purchase price, the amount is valid unless the buyer establishes that it is unreasonable as liquidated damages [*Civ. Code § 1675(f)(3)*; *see Civ. Code § 1675(e)* (determination of reasonableness of liquidated damages)]. If a new qualified buyer has entered into a contract to purchase the residential property in question, the seller must perform the accounting within 60 calendar days after a new qualified buyer has entered into a contract to purchase [*Civ. Code § 1675(f)(5)*; *see Civ. Code § 1675(f)(7)* ("new qualified buyer" defined)].

Until July 1, 2014, special provision is made also for enhanced liquidated damages to be allowed to sellers in cases involving pre-completion sales of units in a structure of 20 or more residential condominium units, standing over eight stories high, that is high-density infill development as defined in *Pub. Res. Code § 21159.24(a)(10)* and is located in a

city, county, or city and county with a population density of 1,900 residents per square mile or greater as evidenced by the 2000 federal census. When the sale price of a unit exceeds $1,000,000, and the buyer defaults, liquidated damages of 6 percent of the purchase price will be presumed valid [*Civ. Code § 1675(g),(h)*]. Except regarding the amount of liquidated damages and the conditions prescribed for this case, the rules in this case are essentially the same as in a case subject to *Civ. Code § 1675(f)*, described above.

When more than one payment made by the buyer is to constitute liquidated damages (for example, when the buyer makes a deposit at the time of the offer and then makes an additional deposit on execution of the contract), the amount of any payment after the first payment is valid as liquidated damages only if the total of all the payments meets the 3-percent and reasonableness requirements discussed above [*Civ. Code § 1678*]. Further, a separate liquidated-damages provision signed or initialed by each party must be inserted in the contract for each payment. If the contract is printed, each of these provisions must be set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type [*Civ. Code § 1678*; *see Civ. Code § 1677*].

[3] Miscellaneous Requirements

None of the foregoing statutory requirements affect the right of either party to the contract to seek, or preclude either party to the contract from seeking, specific performance of the contract [*Civ. Code §§ 1680, 3389*]. Further, those requirements do not apply to liquidated-damages provisions that specify the damages the seller will pay the buyer if the seller breaches the contract [*Civ. Code § 1679*]. Liquidated-damages provisions that come within these exemptions are subject to alternative requirements in *Civ. Code § 1671* [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesConsequential DamagesReal Property LawPurchase & SaleRemediesDamagesDuty to MitigateReal Property LawPurchase & SaleRemediesDamagesLiquidated Damages



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.19 Risk of Loss

Under the Uniform Vendor and Purchaser Risk Act, any real property sale contract made in California is to be interpreted to include the provisions of the Act unless the contract provides otherwise. The Act provides that the seller retains full responsibility for the property until the legal title or possession has been transferred to the buyer. Thus if the property is destroyed (through no fault of the buyer's) or is taken by condemnation before such a transfer, the buyer is entitled to a return of his or her money, and the seller cannot enforce the contract. If the loss occurs after a transfer of title or possession, the buyer must continue to pay [*see Civ. Code § 1662*]. For further discussion, see *§ 23.200[1][f]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRisk of Loss



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.20 Disclosure Requirements Applicable to Sellers

[1] Statutory Real Estate Transfer Disclosure Statement

Unless a statutory exception applies [*see Civ. Code § 1102.2*], the transferor of any real property containing up to four dwelling units must complete and deliver a statutory disclosure form to the transferee when the property is transferred by sale (or by certain other methods) [*see Civ. Code § 1102(a)*; *see also Civ. Code § 1102.6*; § 23.300[2] (statutory form)]. Any waiver of this requirement, or of any of the other disclosure requirements, is void as against public policy [*Civ. Code § 1102(c)*]. The seller's delivery of a transfer disclosure statement is a condition precedent to the buyer's duty to perform under the contract. Prior to transfer, the failure to provide a disclosure statement gives rise to a right to rescission in the buyer, and precludes an action for specific performance by the seller [*Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202, 1 Cal. Rptr. 3d 569]* .

The statutory form must indicate whether the property has certain items, whether any of those items are not in operating condition, whether the seller is aware of any significant defects or malfunctions in certain structural components of the property, and whether the seller is aware of various other restrictions or problems with the property [*see Civ. Code § 1102.6*]. In the case of a sale, the statement must be delivered as soon as practicable before transfer of title [*Civ. Code § 1102.3*]. The transferor must indicate compliance with these requirements on either the receipt for deposit, the real property sale contract, an addendum attached to those documents, or a separate document [*Civ. Code § 1102.3*].

A disclosure made in accordance with *Civ. Code § 1102.6* cannot be relied on by a buyer as part of the sale contract or as a separate contract containing contingencies on which the formation of the purchase and sale contract depends [*Brasier v. Sparks (1993) 17 Cal. App. 4th 1756, 1760, 22 Cal. Rptr. 2d 1]* .

Any broker representing the seller or obtaining the offer must complete a portion of the statutory inspection disclosure statement [*see Civ. Code § 1102.6*; *see also § 23.22[1], [2]*].

For further discussion and the statutory form, see *§ 23.300*.

[2] Local Option Disclosure Statement

If a transferor is required to complete a statutory real estate transfer disclosure statement [*see Civ. Code § 1102(a)*; [1], *above*], the city or county in which the property is located may require the transferor to provide additional disclosures regarding the property. The additional disclosures must be set forth on a statutory form (called the "Local Option Real Estate Transfer Disclosure Statement") or on an alternative form required by the applicable local ordinance [*Civ. Code § 1102.6a(a)*]. For further discussion and the statutory form, see *§ 23.301*.

[3] Natural Hazard Disclosures

A transferor of real property, or his or her agent, must notify prospective transferees when the real property lies within any of the following hazardous areas [*Civ. Code § 1103(a), (c)*; *see Civ. Code § 1103.2*]:

- A special flood hazard area [*see Gov. Code § 8589.3*];
- An area of potential flooding [*see Gov. Code § 8589.4*];
- A very high fire hazard severity zone [*see Gov. Code § 51183.5*];
- A wildland area that may contain substantial forest fire risks and hazards [*see Pub. Res. Code § 4136*];
- An earthquake fault zone [*see Pub. Res. Code § 2621.9*; *see also* [4], *below*]; or
- A seismic hazard zone [*see Pub. Res. Code § 2694*; *see also* [4], *below*].

These disclosures must be made on the sale (or exchange, installment land sale contract as defined in *Civ. Code § 2985*, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements) of any real property improved with or consisting of one-to-four dwelling units (or transfer of a residential stock cooperative) [*Civ. Code § 1103(a)*; *see Civ. Code § 1103.2*]. These requirements also apply to resale of a manufactured home or mobilehome that is classified as personal property intended for use as a residence if the transaction was entered into after 1999 [*Civ. Code § 1103(b)*; *see Health & Safety Code §§ 18007, 18008*].

If the transaction is subject to the statutory real estate transfer disclosure requirements [*see Civ. Code § 1102 et seq.*; *see also* [1], *above*], the disclosures must be made in (1) a statutory natural hazard disclosure statement [*Civ. Code § 1103.2*], or (2) the local option real estate transfer disclosure statement [*see* [2], *above*]. For further discussion and the statutory natural hazard disclosure statement form, see *§ 23.302*.

[4] Earthquake Safety Guides

[a] Residential and Noncommercial Property

The California Seismic Safety Commission is responsible for publishing and updating a booklet entitled Homeowner's Guide to Earthquake Safety [*Bus. & Prof. Code § 10149(a), (c)*]. Among other things, this guide must include maps and information on geologic and seismic hazard conditions for the entire state, and provide recommendations for mitigating the hazards of an earthquake [*see Bus. & Prof. Code § 10149(d)*]. The commission must distribute this guide to real estate licensees and, on request, to any member of the general public [*Bus. & Prof. Code § 10149(a)*; *see Bus. & Prof. Code § 10149(c)* (commission must charge fee for guide)].

A transferor of a residential dwelling of conventional light-frame construction built before 1960 and containing

one-to-four living units must, as soon as practicable before the transfer of title, deliver to the transferee (1) a copy of the Homeowner's Guide to Earthquake Safety, and (2) an earthquake hazards disclosure statement regarding the property [*Gov. Code § 8897.1(a), (b)*]. The earthquake hazards disclosure must clearly indicate whether the transferor has actual knowledge that the dwelling has any of the deficiencies listed in *Gov. Code § 8897.2* [*Gov. Code § 8897.1(a)*; *see Gov. Code § 8897.1(c)* (exemptions from disclosure requirements)]. This disclosure may be made in person or by mail to the transferee, any person authorized to act for the transferee in the transaction, or additional transferees who have requested delivery from the transferor in writing [*Gov. Code § 8897.1(b)*].

If the Homeowner's Guide to Earthquake Safety is delivered to a transferee in connection with a transfer of noncommercial real property, the information in the guide will be deemed to be adequate to inform the transferee to (1) geologic and seismic hazards in general (as described in the guide) that may affect real property, and (2) mitigating measures that the transferee or seller might consider. Further, the seller or broker will not be required to provide additional information concerning those hazards and mitigating measures [*Civ. Code § 2079.8(a)*]. These rules apply to all transfers of real property, including real property subject to *Civ. Code § 1102* [*see* [1], *above*] or the Alquist-Priolo Earthquake Fault Zoning Act (Alquist-Priolo Act) [*Civ. Code § 2079.8(a)*; *see also Pub. Res. Code § 2621 et seq.* (Alquist-Priolo Act)].

Notwithstanding the above, *Civ. Code § 2079.8* does not increase or decrease any duties of sellers or brokers, including the duties imposed by *Civ. Code § 1102* and the Alquist-Priolo Act or by *Civ. Code § 2079 et seq.* [*Civ. Code § 2079.8(b)*; *see § 23.22[1]*]. Further, *Civ. Code § 2079.8* does not alter the duty of a seller or broker to disclose the existence of known hazards on or affecting the real property [*Civ. Code § 2079.8(b)*].

[b] Commercial Property

Commercial real property is subject to an alternative set of earthquake-related disclosure laws that are very similar to the ones described in [a], *above* [*see Bus. & Prof. Code § 10147* (preparation of earthquake safety guide); *Civ. Code § 2079.9* (delivery of safety guide to transferee of real property); *Gov. Code §§ 8875.6, 8893.2* (transferor or transferor's agent must deliver guide to prospective buyer if property being transferred was built before 1975 and consists of precast concrete or reinforced masonry building or unreinforced masonry building with wood frame floors or roofs)]. The primary difference between the two sets of laws is that the Commercial Property Owner's Guide to Earthquake Safety [*see Bus. & Prof. Code § 10147*] includes explanations of what constitutes "adequate wall anchorage" [*see Bus. & Prof. Code § 10147(d)(3)*]. That term is defined to mean a connection between a wall and floor, or between a wall and roof construction, of a precast concrete or reinforced masonry building with wood frame floors or roof, that is capable of resisting specified horizontal forces [*Gov. Code § 8893.1*]. If a transferee of real property is given a Commercial Property Owner's Guide to Earthquake Safety and does not bring the structure into compliance with the requirements for adequate wall anchorage within three years of receiving the notice (five years in the case of a transfer of an unreinforced masonry building), the transferee/owner will not receive payment from any state assistance program for repairs resulting from damage during an earthquake until all other applicants have been paid [*Gov. Code §§ 8875.7, 8893.4*].

[5] Installation of Smoke Detector

Every single-family dwelling and factory-built housing unit [*see Health & Safety Code § 19971*] that is sold must have an operable smoke detector [*Health & Safety Code § 13113.8(a)*; *but see Health & Safety Code § 13113.8(d)* (exceptions to installation requirement)]. The detector must be approved and listed by the State Fire Marshal and installed in accordance with the fire marshal's regulations [*see 19 Cal. Code Reg. §§ 200 et seq., 740 et seq.*]. Unless prohibited by local rules, regulations, or ordinances, a battery-operated smoke detector will meet this requirement [*Health & Safety Code § 13113.8(a)*].

The transferor of any real property containing a single-family dwelling, whether the transfer is made by sale, exchange,

or real property sale contract [*see Civ. Code § 2985* (definition)], must deliver to the transferee a written statement indicating that the transferor has complied with this requirement. The statement must be included in the receipt for deposit, an attached addendum, or a separate document [*Health & Safety Code § 13113.8(b)*; *see Health & Safety Code § 13113.8(c)* (delivery requirements); *see also § 23.305*].

Similar requirements apply to mobilehomes and multiple-unit residential structures, whether or not the unit or structure is about to be transferred [*see Health & Safety Code § 13113.7*; *see also* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

[6] Water Heater Bracing

All existing residential water heaters must be braced, anchored, or strapped to resist falling or horizontal displacement due to earthquake motion. At a minimum, the water heater must be secured in accordance with the California plumbing code or any modifications made to that code by a city, county, or city and county [*Health & Safety Code § 19211(a)*; *see Health & Safety Code § 17958.5* (local modifications)]. (The plumbing code was formerly in the California Code of Regulations as part 5 of title 24. That title was removed, but the plumbing code is available from the International Code Council, which has a web site at www.iccsafe.org.) For these purposes, "water heater" means any standard water heater with a capacity of not more than 120 gallons for which a pre-engineered strapping kit is readily available [*Health & Safety Code § 19211(d)*].

The seller of any real property containing a water heater must certify in writing to the prospective buyer that the above requirement has been complied with. This certification must be in writing, and may be included in existing transactional documents, including (but not limited to) the sale contract [*see § 23.203[2]*], statutory real estate transfer disclosure statement, local option real estate transfer disclosure statement, or Homeowner's Guide to Earthquake Safety [*Health & Safety Code § 19211(b)*]. Any building or portion of a building, including any dwelling unit, guestroom, suite of rooms, or portions of these, or the premises on which it is located, is deemed to be a nuisance if it is in violation of this requirement, and the owner has to right to correct the violation [*Health & Safety Code § 19211(f)*; *see Health & Safety Code § 17980*]. However, an owner of a residential rental property may not evict any person on the basis that the eviction is required to comply with this section [*Health & Safety Code § 19211(c)*].

[7] Lead-Based Paint Disclosures

Federal regulations require sellers of most residential housing built before 1978 to disclose the presence of known lead-based paint or lead-based paint hazards in the housing [*see 24 C.F.R. § 35.86*; *40 C.F.R. § 745.103*; § 23.311]. Sale transactions involving housing for the elderly, zero-bedroom dwellings (such as studio apartments; other examples would be dormitory housing and military barracks), and housing sold at foreclosure are exempted from the disclosure requirements [*see 24 C.F.R. §§ 35.82(a), 35.86*; *40 C.F.R. §§ 745.101(a), 745.103*]. The seller must disclose to the buyer the presence of any known lead-based paint and lead-based paint hazards, provide available records and reports, and give the buyer a lead-hazard information pamphlet [*see 24 C.F.R. § 35.80*; *40 C.F.R. § 745.100*]. The seller must also disclose this information to each agent involved in the transaction [*24 C.F.R. § 35.88(a)(3)*; *40 C.F.R. § 745.107(a)(3)*]. Some of the required disclosures must be set forth in an attachment to the sale contract [*see 24 C.F.R. § 35.92(a)*; *40 C.F.R. § 745.113(a)*; § 23.311]. In addition, the seller must permit the buyer, for 10 days, to conduct a risk assessment or inspection [*see § 23.312*]. The parties may agree in writing to a different inspection period, or the buyer may waive the opportunity in writing [*24 C.F.R. § 35.90*; *40 C.F.R. § 745.110*].

Sellers and their agents who fail to comply with the requirements are subject to civil and criminal penalties and can be held jointly and severally liable to the buyer in an amount equal to three times the amount of damages incurred [*24 C.F.R. § 35.96*; *40 C.F.R. § 745.118*].

In March 2008, EPA issued new rules for contractors who renovate or repair housing, child-care facilities or schools

built before 1978 to further protect children from exposure to lead-based paint *[73 Fed. Reg. 21692 (April 22, 2008)* ; amending 40 C.F.R. Part 745]. The "Lead: Renovation, Repair and Painting Program" rule, which will take effect in April 2010, prohibits work practices creating lead hazards. Under the new rules, workers must follow lead-safe work practice standards to reduce potential exposure to dangerous levels of lead during renovation and repair activities. Requirements under the rule include implementing lead-safe work practices and certification and training for paid contractors and maintenance professionals working in pre-1978 housing, child-care facilities and schools.

The rule covers all rental housing and non-rental homes where children under six and pregnant mothers reside. The new requirements apply to renovation, repair or painting activities where more than six square feet of lead-based paint is disturbed in a room or where 20 square feet of lead-based paint is disturbed on the exterior. The affected contractors include builders, painters, plumbers and electricians. Trained contractors must post warning signs, restrict occupants from work areas, contain work areas to prevent dust and debris from spreading, conduct a thorough cleanup, and verify that cleanup was effective. For further information *see* http://www.epa.gov/lead/pubs/renovation.htm.

[8] Notice of Nearby Ordnance Locations

Any seller of residential real property who is required to provide the buyer with a real estate transfer disclosure statement [*see Civ. Code § 1102(a)*; [1], *above*] and who has actual knowledge of any former federal or state ordnance locations within the neighborhood area must give the buyer written notice of that knowledge as soon as practicable before transfer of title [*Civ. Code § 1102.15*]. For these purposes, "former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes that may contain potentially explosive munitions [*Civ. Code § 1102.15*]. For further discussion, see *§ 23.304[1]*.

[9] Common-Interest Development Information

The owner of a separate interest in a condominium project, community apartment project, planned development, or stock cooperative must furnish prospective buyers with specified documents relating to the common-interest development and the owner's separate interest [*see Bus. & Prof. Code § 11018.6*; *Civ. Code §§ 1133, 1134, 1368(a), (f)*]. For a list of these documents, and further discussion, see Ch. 34, *Condominiums* .

[10] Title Insurance

In an escrow transaction [*see § 23.23*] for the purchase of real property, when a policy of title insurance [*see § 23.24*] is not to be issued to the buyer, the buyer must be given a statutory notice (in a separate document) indicating that it may be advisable for the buyer to obtain such a policy. The buyer must sign and acknowledge the notice [*Civ. Code § 1057.6*; *see § 23.309*].

PRACTICE TIP:

Buyer Beware--Buy Title Insurance. If you are the buyer in a real estate transaction, do not be penny foolish. Make sure to purchase title insurance. In fact, many title insurers offer extra protection in the form of insurance that insures against view protection problems, homeowners' association CC&R violations, and extended easement concerns. Buyers are well advised to buy extended title insurance protection offered by reputable title insurers. *By William M. Hensley.*

[11] Disclosure of Industrial Use Zoning

The seller of residential real property who has actual knowledge that the property is adjacent to, or zoned to allow, an industrial use described in *Code Civ. Proc. § 731a*, or affected by a nuisance created by such a use, must give written notice of that knowledge to the buyer as soon as practicable before transfer of title [*Civ. Code § 1102.17*].

[12] Notice of Controlled Substance Release

A seller of residential real property who knows that any release of an illegal controlled substance has come to be located on or beneath the real property must give written notice advising of that condition to the buyer before sale of the property. Notice is given by checking "yes" on the appropriate question on the Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*; *see Civ. Code § 1940.7*.5 (similar disclosure requirements applicable to landlords)]. A seller's knowledge of the condition is established by receipt of a notice as specified, or by actual knowledge of the condition from a source independent of the notice [*Civ. Code § 1102.18(b)(2)*]. A seller's delivery of this disclosure information is legally adequate for purposes of informing the prospective buyer of the condition; the seller is not required to provide any additional disclosure of the information [*Civ. Code § 1102.18(b)(3)*].

"Illegal controlled substance" means a drug, substance, or immediate precursor listed in specified schedules [*see Health & Safety Code §§ 11054-11058*], or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture of an illegal controlled substance, which does not include marijuana [*Civ. Code § 1102.18(a)(1)*]. "Release" means any spilling, leaking, pumping, pouring , emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of an illegal controlled substance in a structure or into the environment [*Civ. Code § 1102.18(b)(1)*].

The owner's failure to provide written notice to the buyer when required by *Civ. Code § 1102.18(b)* will subject the owner to actual damages and any other remedies provided by law. In addition to any other damages provided by law, if the owner has actual knowledge of the presence of any release of an illegal controlled substance, and knowingly and willfully fails to provide written notice to the buyer as required, the owner is liable for a civil penalty not to exceed $5,000 for each separate violation [*Civ. Code § 1102.18(b)(4)*].

[12A] Notice of Local Health Officer's Order Prohibiting Use or Occupancy

A local health officer has power to issue and serve an order prohibiting the use or occupancy of particular property after determining that the property is polluted by a hazardous chemical related to methamphetamine-laboratory activities [*Health & Safety Code § 25400.22(a)*]. The property owner and any other person occupying the property must immediately vacate, and the owner must promptly engage a contractor to clean up the property [*Health & Safety Code § 25400.25*]. Thereafter, until the owner has received a notice from the local health officer that the property requires no further action, the owner must notify a prospective buyer in writing of the pending order, and provide the prospective buyer with a copy of the pending order, except as otherwise required in *Civ. Code § 1102.3* [*see § 23.20[1]*]. The prospective buyer must acknowledge, in writing, the receipt of a copy of the pending order [*Health & Safety Code § 25400.28(a)*]. The owner is subject to a civil penalty for failing to provide the required notice to a prospective buyer [*Health & Safety Code § 25400.45(a)*].

[13] Property Tax Disclosures

[a] Mello-Roos Tax and Street Improvement Lien Assessment Installment Disclosures

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* [*see § 23.20[1]*] must make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(a)(2)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the

assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*]. Special provisions require the legislative body collecting assessment installments under the Improvement Bond Act of 1915 to designate an office, department, or bureau in the local agency to handle annual assessment installment obligation information, reports, and dissemination, among other related activities [*Gov. Code § 53754(a)*]. For purposes of enabling sellers of real property to satisfy notice requirements concerning these assessments, the agency must furnish a Notice of Assessment on request within five working days, at a charge not to exceed $10 [*Gov. Code § 53754(b)*; *see Gov. Code § 53754(c)* (prescribed form for notice of assessment)].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, and the date until the tax may be levied against the property for the Mello-Roos and a contact telephone number, if available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

If these required disclosures have been delivered to the transferee, the seller or the seller's agent is not required to provide additional information concerning the special tax or assessment installments, and the disclosure information is deemed to satisfy the responsibility of the seller or the seller's agent to provide this information to the transferee. In any case, these disclosure requirements do not impose a duty to discover a special tax or assessment installments, or the existence of any levying district not actually known to the agents [*Civ. Code § 1102.6b(e)*].

[b] Supplemental Property Tax Bill Disclosure

It is the sole responsibility of the seller of any residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.* [*see § 23.300[1][b]*], or the seller's agent, to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills, in addition to any other disclosure required by *Civ. Code § 1102 et seq.* [*Civ. Code § 1102.6c(a)*]. For additional discussion and a form, see *§ 23.300A*.

[14] Toxic Mold Protection Act of 2001--Future Disclosure Requirements

The Toxic Mold Protection Act of 2001 [*Health & Safety Code §§ 26100-26156*] requires the Department of Health

Services to convene a task force of various experts and interested parties to advise the Department on the development of permissible exposure limits to molds, standards for assessment of molds in indoor environments, standards for identification of molds, and remediation of mold. The Act will eventually require any person who sells, transfers, or rents specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers, prospective tenants, renters, and landlords concerning mold problems in the real property [*see Health & Safety Code § 26140 et seq.*]. However, these disclosure duties and requirements would not apply until the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*see Health & Safety Code § 26154*]. Adding additional uncertainty concerning these requirements, the Act will be implemented only to the extent the Department determines that funds are available for its implementation [*Health & Safety Code § 26156*].

[15] Private Transfer-Fee Requirement

If property being transferred after 2007 is subject to a private transfer fee, the transferor must provide, at the time the transfer disclosure statement required pursuant to *Civ. Code § 1102.6* is provided, an additional disclosure statement containing all of the following [*Civ. Code § 1102.6e*]:

- Notice that payment of a transfer fee is required on transfer of the property;
- The amount of the fee required for the asking price of the real property, and a description of how the fee is calculated;
- Notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price;
- The entity to which funds from the fee will be paid;
- The purposes for which funds from the fee will be used; and
- The date or circumstances under which the obligation to pay the transfer fee expires, if it could expire.

A private transfer fee, for this purpose, is any fee-payment requirement imposed in a covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property, which requires a fee be paid on transfer of the real property [*Civ. Code § 1098*; *but see Civ. Code § 1098(a)-(i)* (exceptions)].

In addition, the recipient of any such fee imposed before 2008, or the person or entity imposing any such fee after 2007, must record a document, entitled "Payment of Transfer Fee Required," in which pertinent facts about the fee-payment requirement are disclosed [*Civ. Code § 1098.5*].

For forms of these disclosure statements, see *§ 23.314*.

[16] Noncompliant Plumbing Fixtures (Pre-1994 Residential Property)

On and after January 1, 2017 [*Civ. Code § 1102.155(b)*], the seller of residential real property subject to *Civ. Code § 1102 et seq.* [*see § 23.20[1]*] must disclose, in writing, that *Civ. Code § 1101.4* [*see* § 23.20B] requires that California single-family residences, if built and available for use before January 1, 1994 [*Civ. Code § 1101.2*], must be equipped with water-conserving plumbing fixtures on or before January 1, 2017; and the seller must further disclose whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1102.155(a)(1)*; *see Civ. Code § 1101.3(c),(e)* (what are noncompliant plumbing fixtures and water-conserving plumbing fixtures)]. The seller must affirm that this

representation is that of the seller and not a representation of any agent, and that this disclosure is not intended to be part of any contract between the buyer and the seller. The seller must further affirm that this disclosure is not a warranty of any kind by the seller or any agent representing any principal in the transaction and is not a substitute for any inspections or warranties that any principal may wish to obtain [*Civ. Code § 1102.155(a)(2)*]. For a disclosure form that can be used to meet this requirement, see *§ 23.315*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide § 23.20A

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§ 23.20A Requirements Related to Actions for Defective Construction in New Residences Sold On or After January 1, 2003

[1] Overview and Applicability of Statutory Scheme

In accordance with Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residence (excluding a condominium conversion) for which the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896, 938*]. The action is preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all in accordance with statutory time frames [*see Civ. Code § 910 et seq.*; *see also* [9] *below*].

The provisions, standards, rights, and obligations set forth in Title Seven are binding on all original purchasers and their successors-in-interest. Homeowners' associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code § 945*].

These provisions do not apply to any action by a claim to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of any other statute [*Civ. Code § 943(a)*]. In addition, for a claim involving a single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is generally limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law [*Civ. Code § 943(b)*].

To make a claim for violation of these statutory standards [*see Civ. Code § 896 et seq.*] a homeowner only needs to

demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in *Civ. Code § 945.5*. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard, provided that the violation arises out of, pertains to, or is related to, the original construction [*Civ. Code § 942*].

As discussed in [2] through [9], *below*, Title Seven is primarily concerned with handling defects in construction, a subject which, at first blush, would seem more appropriate for coverage in the materials dealing with construction and development. However, Title Seven imposes obligations and responsibilities on sellers of property subject to its provisions that must be satisfied in connection with the sales agreement and before close of escrow. Thus, it is at the contracting stage that the parties must understand their relative rights, responsibilities, and obligations under Title Seven. For sample language in a general form of contract for the sale of real property, see *§ 23.200[2]*. The California Association of Realtors (CAR) applicable form is set forth in *§ 23.205*.

[2] Parties

A "claimant" or "homeowner" who may bring an action under Title Seven includes individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association created for the purpose of managing the development [*Civ. Code § 895(f)*]. A "builder" against whom an action governed by Title Seven may be brought may be, but is not limited to, a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim [*Civ. Code § 911(a)*]. The term "builder" for these purposes does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliatedwith the builder. These nonaffiliated general contractors and nonaffiliated contractors are treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals [*Civ. Code § 911(b)*].

General contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals may also be liable for damages to the extent that they cause, in whole or in part, a violation of a particular statutory construction standard as the result of a negligent act or omission or a breach of contract. All actions by a claimant or builder to enforce an express contract, or any provision of an express contract, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional are preserved. Builders, general contractors, subcontractors, suppliers, manufacturers, or design professionals may be held joint and severally liable to the extent that they contribute to any specific violation of the statutory construction standards. This negligence standard, however, does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional to which strict liability applies [*Civ. Code § 936*].

[3] Standards for Determining When Construction Is Defective

[a] Issues With Which Standards Are Primarily Concerned

The statutory standards used to determine the existence of construction defects are concerned with the following issues [*see Civ. Code § 896(a)- (f)*]:

- Water issues related to the building's windows, doors, roofs, decks and balconies, foundations, hardscape (e.g., paths, patios, landscaping, drainage systems), exterior surfaces (e.g., stucco and siding), retaining walls, plumbing and sewer systems, shower and bath enclosures, and ceramic tile and countertops.

- Structural issues related to the foundations, load-bearing components, and slabs, including compliance with applicable established standards for earthquake and wind load resistance.

- Soil and retaining wall issues related to the structural integrity of the building and the suitability of the surrounding land for the purpose represented at the time of the original sale, or for the purpose for which the land is commonly used (e.g., as a garden).

- Fire protection issues related to applicable government regulations, fireplaces and chimneys, and electrical and mechanical systems.

- Issues related to the operation of the plumbing and sewer systems.

- Issues related to the operation of the electrical systems.

The standards set forth in the statute and summarized above and in [b], *below*, are intended to address every function or component of the building. To the extent that a function or component of a building is not addressed by these standards, it is actionable if it causes damage [*Civ. Code § 897*].

[b] Issues Related to Other Areas of Construction

Issues related to other areas of construction to which standards apply include [*see Civ. Code § 896(g)*]:

- Cracking in exterior pathways, driveways, landscape, sidewalks, patios, stucco, exterior siding, and other exterior wall finishes and fixtures.

- Installation of products that are completely manufactured offsite (e.g., doors, windows, fireplaces, and HVAC units).

- Installation of the heating system.

- Installation of untreated wood and steel fences.

- Compliance with government standards for inter-unit noise transmission.

- Operation of irrigation and drainage systems.

- Application of paint and stains.

- Installation of roofing materials.

- Installation of ceramic tile and tile backing.

- Installation of dryer ducts.

- General construction standards to avoid hazards to public health.

[4] Builder's Express Warranty for Fit and Finish Items

Issues related to the fit and finish of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim that do not rise to the level of construction defects under the statutory construction standards are nonetheless

subject to a minimum one-year express written warranty, which the builder must provide to the home buyer. The express warranty does not apply to damage to these items caused by defects in other components that are governed by the construction standards. If the builder fails to provide the express warranty, a statutory one-year warranty for these items will apply [*Civ. Code § 900*].

[5] Optional Enhanced Protection Agreement

A builder may, but is not required to, offer greater protection or protection for longer time periods than those provided by the statutory standards [*see Civ. Code § 896* (time periods); *see also* [3], *above* (statutory standards), and [8], *below* (statutory time limit for bringing action)], in its express contract with the homeowner. This constitutes an "enhanced protection agreement" [*Civ. Code § 901*]. If an enhanced protection agreement is in place, the statutory construction standards in *Civ. Code § 896* no longer apply other than to establish minimum provisions by which to judge the enforceability of the enhanced protection agreement's particular provisions [*Civ. Code § 902*]. However, employing an enhanced protection agreement does not affect the applicability of the mandatory pre-litigation procedure [*Civ. Code § 906*; *see Civ. Code §§ 910-938*; *see also* [9], *below*].

The builder's election to offer its own protection agreement must be made in writing no later than the close of escrow [*see Civ. Code § 895(c)* ("close of escrow" defined)]. In addition to the enhanced protection agreement, the builder must also provide the homeowner with a complete copy of the statutory construction standards and advise the homeowner that the builder has elected not to be subject to the statutory standards. If any provision of the builder's protection agreement is later found to be unenforceable, as not meeting the statutory standards, the builder may use the statutory standards in lieu of the provisions in its own protection agreement that are found to be unenforceable [*Civ. Code § 903*]. If a homeowner seeks to enforce a particular statutory standard in lieu of a provision in the builder's protection agreement, the homeowner must give the builder written notice of that intent at the time the homeowner files a notice of claim [*Civ. Code § 904*; *see Civ. Code § 910(a)*].

If, in a subsequent litigation or other legal action, a homeowner seeks to enforce the statutory construction standards in lieu of the enhanced protection agreement, the builder may have the matter bifurcated and have an immediately binding determination of his or her responsive pleading within 60 days after that pleading is filed, but in no event later than the commencement of discovery. If the builder fails to seek such a determination in the specified time frame, he or she waives the right to do so and the statutory construction standards will apply [*Civ. Code § 905*].

Any nonoriginal homeowner will be deemed to be in privity for purposes of the enhanced protection agreement only if the builder has recorded the agreement on title or provided actual notice of the agreement to the nonoriginal homeowner. If the builder's protection agreement is not recorded or no actual notice is provided, the statutory construction standards will apply to the nonoriginal homeowner's claims [*Civ. Code § 905*].

[6] Homeowner's Obligation to Follow Maintenance Obligations and Schedules

A homeowner is obligated to follow all reasonable maintenance obligations and schedules communicated in writing by the builder and product manufacturers, as well as commonly accepted maintenance practices. Failure of the homeowner to do so may subject him or her to the affirmative defenses afforded the builder in any subsequent action [*Civ. Code § 907*; *see Civ. Code § 945.5(c)*].

[7] Seller's Duty to Provide Copy of Title Seven

Civ. Code § 912(g) requires the seller to provide with the original sales documentation, a written copy of Title Seven, which must be initialed and acknowledged by the buyer and the seller's sales representative.

[8] Statute of Limitations

With certain limited exceptions listed below, any action brought under Title Seven must be filed within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code §§ 938, 941*]. The four-year statute of limitations specified for patent defects and the 10-year statute of limitations for latent defects, specified by *Code Civ. Proc. §§ 337.1* and *337.15*, respectively, do not apply to these actions [*Civ. Code § 941(d)*].

Exceptions to the 10-year limitation period include the following:

- Four years for actions alleging improper operation of electrical systems [*Civ. Code § 896(f)*].
- One year from original occupancy of adjacent unit for actions alleging noncompliance with governmental inter-unit noise transmission standards [*Civ. Code § 896(g)(6)*].
- Four years from close of escrow for actions alleging improper installation of untreated steel fences and adjacent components [*Civ. Code § 896(g)(9)*].
- Five years from close of escrow for actions alleging improper application of paint and stains [*Civ. Code § 896(g)(10)*].
- Two years from close of escrow for actions alleging improper installation of landscaping systems [*Civ. Code § 896(g)(12)*].
- Two years from close of escrow for actions alleging improper installation of dryer ducts [*Civ. Code § 896(g)(14)*].

"Close of escrow" means the date of the close of escrow between the builder and the original homeowner. If the claimant is an association, "close of escrow" means the date of substantial completion [*see Civ. Code § 1351(a)*], or the date the builder relinquishes control over the association's ability to decide whether to initiate a claim, whichever is later [*Civ. Code § 895(c)*].

The applicable statute of limitations may be tolled pending the outcome of the mandatory pre-litigation process [*see Civ. Code § 928*; *see also* [9], *below*].

The statute of limitations may not be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of the subject residential property, at the time any deficiency in the residence constitutes the proximate cause for which it is proposed to make a claim or bring an action [*Civ. Code § 941(c)*].

Existing statutory and decisional law governing the tolling of statutes of limitations applies to the time periods for filing an action or making a claim for violation of the statutory construction standards, except for the special tolling provisions related to the pre-litigation procedure [*Civ. Code § 941(c)*; *see Civ. Code § 927*].

The above-described time limitations "do not apply to any action by a claimant for a contract or express contractual provision" and these provisions also do not limit causes of action and damages to which they do not apply [*Civ. Code § 941(e)*]. Though it was probably not the Legislature's intent, if taken literally, this could be construed to exempt an action based on violation of a builder's enhanced protection agreement from the 10-year limitation period specified by *Civ. Code § 941(a)* in which case the shorter limitation period applicable to a contract action, or an action based on a patent defect [*see Code Civ. Proc. §§ 337(1), 337.1*, respectively], arguably could apply.

[9] Mandatory Pre-Litigation Procedure

[a] Overview

Before a homeowner can file an action seeking damages for alleged construction defects based on the construction standards described in [3], *above*, he or she must initiate a process the main component of which is the builder's right to attempt to repair any alleged defects before the homeowner can initiate litigation [*Civ. Code § 910*]. The goal of this pre-litigation process is to afford the parties the opportunity for quick and fair resolution of construction defect claims without having to resort to lengthy and expensive litigation [*see* 2002 Stats., ch. 722, § 1(c)].

The statutory pre-litigation process is mandatory unless a builder provides, by contract, for its own nonadversarial procedure. However, if the builder does so, and the contractual procedure either fails to resolve the construction defects or is subsequently found to be unenforceable, the builder may not then require adherence with the statutory procedure [*Civ. Code § 914(a)*].

When the sales agreement is executed, the builder must notify the homeowner which nonadversarial procedure--i.e., the statutory procedure, or the builder's alternative nonadversarial contractual provisions--will apply to resolve any construction defects. If the builder elects to use alternative nonadversarial contractual provisions, the election is binding regardless of whether those provisions successfully resolve the ultimate dispute or are ultimately deemed enforceable [*Civ. Code § 914(a)*].

If the builder fails to comply with the requirements of a nonadversarial procedure or elects not to go through with such a procedure, the homeowner is released from the obligation to participate in the procedure and may proceed to file an action to resolve the alleged construction defects [*Civ. Code § 915*].

When the claimant is an association representing a common interest development that includes 20 or more units and the parties comply with the statutory pre-litigation process, the parties will be excused from performing the substantially similar pre-litigation dispute resolution process required by *Civ. Code § 1375* [*Civ. Code § 935*].

[b] Notice of Claim

Before the claimant can file an action alleging violation of the construction standards, he or she must provide the builder with written notice of the claimant's claim that the construction of his or her residence violates any of the statutorily-prescribed standards. The notice must be delivered to the builder's registered agent via certified mail, overnight mail, or personal delivery. The notice has the same force and effect as a notice of commencement of a legal proceeding [*Civ. Code § 910(a)*].

The notice of claim must include all of the following [*Civ. Code § 910(a)*]:

- The claimant's name, address, and preferred method of contact.
- A statement that the claimant alleges a violation pursuant to *Civ. Code § 895 et seq.* against the builder.
- A description of the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation.

For a form of a notice of claim, see *California Forms of Pleading and Practice, Ch. 104, Building Contracts, § 104.261* (Matthew Bender).

If the claimant is a group of homeowners or an association, the notice must identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences [*Civ. Code § 910(a)*].

The builder must register the name and address of an agent for notice with the Secretary of State, or elect to use a third party for that purpose provided the builder has notified the homeowner in writing of the third party's name and address. The name and address of the registered agent or third party must be included with the original sales documentation and must be initialed and acknowledged by the purchaser and the builder's sales representative [*Civ. Code § 912(e)*].

The notice requirement does not preclude a homeowner from seeking redress through any applicable normal customer service procedure set forth in any contract, warranty, or other builder-generated document. However, if the homeowner requests this form of recourse through such a procedure, the request does not satisfy the statutory notice requirement [*Civ. Code § 910(b)*].

The builder must acknowledge receipt of the notice of claim in writing within 14 days [*Civ. Code § 913*].

[c] Builder's Obligation to Provide Copies of Requested Materials

Within 30 days of the claimant's written request, the builder must provide, at the claimant's expense, copies of the following [*Civ. Code § 912(a)- (d)*]:

- All relevant documents, such as plans, specifications and soil reports, public reports, and engineering calculations pertaining to the claimant's residence, or as part of a larger development tract.

- All maintenance and preventative maintenance recommendations.

- All manufactured products maintenance, preventive maintenance, and limited warranty information.

- All of the builder's limited contractual warranties in effect at the time the residence was originally sold.

If the builder fails to comply in a timely manner with the claimant's request for any of this information, the claimant is relieved from any obligation to continue with the pre-litigation process and may proceed to file suit [*Civ. Code § 912(i)*]. On filing suit, the burden is on the homeowner to show that he or she did not comply with the pre-litigation procedures due to the builder's noncompliance with *Civ. Code § 912* [*Standard Pacific Corp. v. Superior Court (2009) 176 Cal. App. 4th 828, 834, 98 Cal. Rptr. 3d 295]* .

[d] Inspection of Claimed Unmet Standards

The builder may elect to inspect the alleged violations of the statutory construction standards specified in the notice of claim. Any inspection and testing must be completed within 14 days after the builder acknowledges receipt of the notice of claim. The builder must bear the cost of the inspection and testing [*Civ. Code § 916(a)*]. If reasonably necessary, the builder may, within three days of the initial inspection or testing, conduct a second inspection or testing. The second inspection must be completed within 40 days of the initial inspection [*Civ. Code § 916(c)*].

If the builder intends to hold a third party, i.e., a subcontractor, design professional, individual product manufacturer, or material supplier (including an insurance carrier, warranty company, or service company) responsible for its contribution to the unmet standard, the builder must give notice to that third party sufficiently in advance to allow them to attend the initial or second inspection and to participate in any subsequent repair process. Failure to include a third party in the inspection process will not be construed to relieve the third party from liability in any subsequent action brought by the claimant [*Civ. Code § 916(e)*].

[e] Offer to Repair

Within 30 days of the initial or, if requested, second inspection or testing, the builder may offer in writing to repair any violation found. The offer must also compensate the claimant for damages recoverable within the time frame for the repair. It must be accompanied by a repair plan, including a detailed statement identifying the violation to be repaired and setting a reasonable completion date [*Civ. Code § 917*; *see Civ. Code § 944* (recoverable damages)]. The completion date, barring unforseen events, should be within 120 days of the claimant's acceptance of the offer [*see Civ. Code § 921(b)*].

If the builder elects to repair some, but not all, of the claimed unmet construction standards, he or she must also set forth in writing the reasons, and the support for those reasons, for not repairing all claimed unmet standards [*Civ. Code § 924*].

The offer of repair must be accompanied by an offer to mediate the dispute at the homeowner's option. If the builder makes an offer to repair and the mediation fails to resolve the dispute, the claimant must allow the repair to be performed [*Civ. Code § 919*].

The builder may not obtain a release or waiver of any kind in exchange for required repair work [*Civ. Code § 926*]. Note that this rule must be reconciled with the fact that if the builder has obtained a valid release as to a particular violation, the release operates as an affirmative defense to an action by the claimant [*see Civ. Code § 945.5(f)*].

When a repair has been made but not to the claimant's satisfaction, the claimant may proceed to file suit for violation of the applicable construction standard, for inadequate repair, or for both [*Civ. Code § 926*]. However, if there has been no previous mediation between the parties, the claimant must request mediation before filing suit [*Civ. Code § 928*].

If the builder fails to make an offer to repair, the claimant may proceed to file an action for violation of the statutory construction standards [*Civ. Code § 920*].

[f] Cash Offer in Lieu of Repair

The builder may make a cash offer instead of making the repair. The claimant may either accept the offer, or reject it and proceed to file an action based on violation of the statutory construction standards [*Civ. Code § 929(a)*]. In exchange for a cash payment, the builder is entitled to obtain a reasonable release, the terms and conditions of which are negotiable between the builder and the claimant [*Civ. Code § 929(b)*].

[g] Effect of Pre-Litigation Process on Statute of Limitations

If the applicable statute of limitations has otherwise run during the statutory pre-litigation process and the process resulted in an inadequate repair, the time period for filing an action is extended from the time of the claimant's original claim to 100 days after the inadequate repair is completed. The action is not limited to the inadequate repair; it may encompass any violation of the construction defect standards [*Civ. Code § 927*].

If the statute of limitations has otherwise run during the statutory pre-litigation process, it will be extended to 45 days after the time for responding to the notice of claim has expired if the builder does any of the following [*Civ. Code § 927*]:

- Fails to acknowledge the claim in a timely manner [*see Civ. Code § 913*].
- Elects not to go through the statutory pre-litigation process.
- Fails to request an inspection in a timely manner.

If the builder has elected to employ its own alternative nonadversarial procedure in lieu of the statutory procedure [*see § 23.20A[9][a]*], and the statute of limitations would otherwise run during that procedure, the time period for filing an action for violation of the statutory construction standards is extended from the time of the claimant's original claim to either 100 days after either the completion of the alternative procedure, or 100 days after the alternative procedure is deemed unenforceable, whichever is later [*Civ. Code § 927*].

[h] Dealing With Claims Discovered After Action Is Filed

Once an action has been filed, subsequently discovered claims of unmet statutory construction standards must be administered separately--that is, they are subject to the pre-litigation procedure. However, in the case of a detached single family residence, if the subsequently discovered claim is for a violation of the same construction standard as a standard that is the subject of a pending action brought by the same claimant, the claimant need not reinitiate the process as to that standard. The same is true in the case of an attached project, if the subsequently discovered claim is for a violation of the same construction standard for a connected component system in the same building as a standard that is the subject of a pending action brought by the same claimant [*Civ. Code § 932*].

§ 23.20B Installation of Water-Use Efficiency Improvements (Pre-1994 Properties)

[1] Requirements in General

State law requires generally that a residential or commercial property, if it was built and available for use on or before January 1, 1994 [*Civ. Code § 1101.2*], must be equipped with water-conserving plumbing fixtures [*Civ. Code § 1101.1 et seq.*]. While the law does not directly require that water-conserving plumbing fixtures must be installed before a property can be sold or transferred, that is the practical implication of a requirement (starting in 2017 for single-family properties and in 2019 for other properties) that a seller or transferor must disclose, before completion of the sale or transfer, both the law's requirements and also whether the property includes any noncompliant plumbing fixtures [*Civ. Code §§ 1101.4(c), 1101.5(e)*; *see* § 23.20B[6]; *see also Civ. Code § 1102.155* (related disclosure requirement, discussed in *§ 23.20[16]*)].

With respect to a particular property, requirements are applicable on and after various dates, starting January 1, 2014, and depending on the circumstances [*see* § 23.20B[3]-[5]]. This law does not apply, however, to [*Civ. Code § 1101.7*]:

- A registered historical site;
- Any property for which a licensed plumber certifies that, because of the age or configuration of the property or its plumbing, installation of water-conserving plumbing fixtures is not technically feasible; or
- A building for which water service is permanently disconnected.

Cities and counties may enact ordinances and establish policies, and retail water suppliers may establish policies, that promote compliance with this state law or that will result in a greater amount of water savings than those provided for in this state law [*Civ. Code § 1101.8*]. A city or county that adopted an ordinance requiring retrofit of noncompliant plumbing fixtures prior to July 1, 2009, is exempt from the requirements of this state law as long as the ordinance remains in effect [*Civ. Code § 1101.9*].

[2] Definitions

In this context, real property that is improved with, or consists of, a building that was built and available for use on or before January 1, 1994 [*Civ. Code § 1101.2*], is subject to *Civ. Code § 1101.1 et seq.* as either:

- A *single-family residential property* if the building contains not more than one unit intended for human habitation [*Civ. Code § 1101.3(d)*];

- A *multi-family residential property* if the building contains more than one unit intended for human habitation, or if the property has any mixed residential-commercial building or portion of such a building intended for human habitation--including a residential hotel but not including a hotel or motel other than a residential hotel [*Civ. Code § 1101.3(b)*]; or

- A *commercial property* if the building is intended for commercial use, including as a hotel or motel, and is not a single-family residential property or a multi-family residential property [*Civ. Code § 1101.3(a)*].

A water-conserving plumbing fixture is a fixture that is in compliance with current building standards applicable to a newly constructed property of the same type [*Civ. Code § 1101.3(e)*].

A noncompliant plumbing fixture is any of the following [*Civ. Code § 1101.3(c)*]:

- A toilet manufactured to use more than 1.6 gallons of water per flush;

- A urinal manufactured to use more than 1 gallon of water per flush;

- A showerhead manufactured to have a flow capacity of more than 2.5 gallons of water per minute; or

- An interior faucet that emits more than 2.2 gallons of water per minute.

[3] Requirements for Building Additions, Alterations, or Improvements

On and after January 1, 2014, for any building alteration or improvement to a single-family residential property, as a condition for issuance of a certificate of final completion and occupancy or final permit approval by the local building department, the permit applicant must replace all noncompliant plumbing fixtures with water-conserving plumbing fixtures [*Civ. Code § 1101.4(a)*].

On and after January 1, 2014, all noncompliant plumbing fixtures in a multi-family residential property or a commercial residential property must be replaced with water-conserving plumbing fixtures in the following circumstances [*Civ. Code § 1101.5(d)(1)*].

- For building additions in which the sum of concurrent building permits by the same permit applicant would increase the floor area of the space in a building by more than 10 percent, the building permit applicant must replace all noncompliant plumbing fixtures in the building [*Civ. Code § 1101.5(d)(1)(A)*].

- For building alterations or improvements in which the total construction cost estimated in the building permit is greater than $150,000, the building permit applicant must replace all noncompliant plumbing fixtures that service the specific area of the improvement [*Civ. Code § 1101.5(d)(1)(B)*].

- Notwithstanding the foregoing requirements, for any alterations or improvements to a room in a building that require a building permit, if that room contains any noncompliant plumbing fixtures, the building permit applicant must replace all noncompliant plumbing fixtures in that room [*Civ. Code § 1101.5(d)(1)(C)*].

- Replacement of all noncompliant plumbing fixtures with water-conserving plumbing fixtures must

be a condition for issuance of a certificate of final completion and occupancy or final permit approval by the local building department [*Civ. Code § 1101.5(d)(2)*].

[4] Building Subject to Demolition Permit

The duty of an owner or building permit applicant to comply with the requirements of *Civ. Code § 1101.1 et seq.* will be postponed for one year from the date of issuance of a demolition permit for the building. If the building is demolished within the one year postponement, those requirements will not apply. If the building is not demolished after the expiration of one-year, the provisions of *Civ. Code § 1101.1 et seq.* will apply, subject to appeal to the local building department, even though the demolition permit is still in effect or a new demolition permit has been issued [*Civ. Code § 1101.6*].

[5] Replacement Deadlines for All Properties

[a] Single-Family Property

On or before January 1, 2017, noncompliant plumbing fixtures in a single-family residential property must be replaced by the property owner with water-conserving plumbing fixtures [*Civ. Code § 1101.4(b)*].

[b] Multi-Family or Commercial Property

On or before January 1, 2019, all noncompliant plumbing fixtures in a multi-family residential property or a commercial property must be replaced with water-conserving plumbing fixtures [*Civ. Code § 1101.5(a)*].

On and after January 1, 2019, the water-conserving plumbing fixtures required by *Civ. Code § 1101.5* must be operating at the manufacturer's rated water consumption at the time the tenant takes possession. A tenant is responsible for notifying the owner or owner's agent if the tenant becomes aware that a water-conserving plumbing fixture within his or her unit is not operating at the manufacturer's rated water consumption. The owner or owner's agent must correct an inoperability in a water-conserving plumbing fixture on notice by the tenant or if detected by the owner or the owner's agent [*Civ. Code § 1101.5(c)*].

An owner or the owner's agent may enter the owner's property for the purpose of installing, repairing, testing, and maintaining water-conserving plumbing fixtures required by *Civ. Code § 1101.5*, consistent with notice requirements of *Civ. Code § 1954* [*Civ. Code § 1101.5(b)*].

[6] Disclosure by Seller or Transferor to Purchaser or Transferee

The applicable disclosure requirement, below, applies to a sale or transfer of the entire estate or fee interest in a property, not to a sale or transfer of a partial interest, including a leasehold [*Civ. Code § 1101.3(f)*].

On and after January 1, 2017, a seller or transferor of a single-family residential property must disclose in writing to the prospective purchaser or transferee the requirements of *Civ. Code § 1101.4(b)* [*see* § 23.20B[5][a]] and whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1101.4(c)*].

On and after January 1, 2019, a seller or transferor of a multi-family residential property or a commercial property must disclose to the prospective purchaser or transferee, in writing, the requirements of *Civ. Code § 1101.5(a)* [*see* § 23.20B[5][b]] and whether the property includes any noncompliant plumbing fixtures. This disclosure may be included in other transactional documents [*Civ. Code § 1101.5(e)*].

For a disclosure form that can be used to meet the applicable requirement, see *§ 23.315*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawConstruction LawDefectsReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawPurchase & SaleRemediesLiability of Developers & Vendors



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.21 Seller Financing and Arrangers of Credit

Special disclosure requirements apply to the sale of a one-to-four-unit dwelling when the transaction involves seller financing and the participation of an arranger of credit [*see Civ. Code § 2956 et seq.*]. An "arranger of credit" is a person, other than a party to the transaction, who develops or negotiates credit terms and completes the credit documents for compensation [*Civ. Code § 2957(a)(1)*]. Certain persons are excluded from this definition [*see Civ. Code § 2957(a)*], including an attorney who is representing one of the parties [*Civ. Code § 2957(a)(1)*; *but see Civ. Code § 2957(a)(2)* (attorney is arranger of credit if he or she is party to transaction and neither party is represented by real estate agent)]. The disclosures pertain primarily to the terms of the seller financing [*see Civ. Code § 2963*] and must be made before the execution of any note or security documents [*Civ. Code § 2959*]. The California Association of Realtors and other real estate organizations may offer printed standard forms designed to meet these disclosure requirements. For further discussion, see Ch. 25A, *Security Instruments for Real Estate Financing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.22 Statutory Responsibilities of Real Estate Brokers

[1] Inspection of Residential Property and Disclosure of Material Facts

Special inspection and disclosure requirements apply to any real estate broker licensed under California law who has a written contract with a seller to find or obtain a buyer for residential real property containing one-to-four dwelling units, including a manufactured home [*Civ. Code § 2079(a)*; *see Health & Safety Code § 18007* ("manufactured home" defined)]. The broker, or another broker acting in cooperation with the broker to find and obtain a buyer, must conduct a reasonably competent and diligent visual inspection of the property offered for sale, and must disclose to prospective buyers all facts revealed by the investigation that materially affect the value or desirability of the property [*Civ. Code § 2079(a)*]. The broker must comply with these requirements and any regulations imposing standards of professional conduct adopted under *Bus. & Prof. Code § 10080* with reference to *Bus. & Prof. Code §§ 10176* and *10177* (regarding disciplinary actions against licensees) [*Civ. Code § 2079(b)*]. The broker must exercise the degree of care that a reasonably prudent real estate licensee would exercise, measured by the degree of knowledge (through education, experience, and examination) required to obtain a real estate license [*Civ. Code § 2079.2*]. The inspection need not include or involve areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the property's title or use [*Civ. Code § 2079.3*]. In addition, the seller's agent is under no duty to independently verify or disclaim the accuracy of the seller's representations; rather, the agent must only act in good faith and must not convey the seller's representations without a reasonable basis for believing them to be true [*Robinson v. Grossman (1997) 57 Cal. App. 4th 634, 641-642, 67 Cal. Rptr. 2d 380]* .

The statutory duty to inspect and disclose goes only toward prospective buyers and not to persons who are not parties to the real estate transaction [*Coldwell Banker Residential Brokerage Co. Inc. v. Superior Court (2004) 117 Cal. App. 4th 158, 165, 11 Cal. Rptr. 3d 564* (broker owed no duty to homebuyer's minor child who allegedly suffered injuries as result of home's undisclosed microbial contamination)].

PRACTICE TIP:

Brokers Are Not Required to Have "Superman" Eyes. Brokers are not held to a supernatural standard of

care, even though buyers many times bring suit on theories that are predicated on near-supernatural theories. In fact, case law has confirmed that brokers do not have to undertake structural foundation analysis of a residence or, as one decision graphically described, have "x-ray eyes" [*Civ. Code § 2079*; *Wilson v. Century 21 Great Western Realty (1973) 15 Cal. App. 4th 298*]. Rather, the broker is held to a normal visual inspection standard to the geographical area under consideration [*but see Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 26* (indicating that broker's *fiduciary* duty to inspect may be broader than nonfiduciary duty imposed under *Civ. Code § 2079*)].

Brokerage practices do vary by geographical area in terms of inspection practices. For example, in the Fresno area, brokers *require* sellers to get a roofer certification that there are no significant roof problems coupled with a two-year warranty from the roof inspector--based on broker experience that roof leaks are a number one cause of disputes. (If there are problems from such a certification, they are addressed through negotiation during the escrow process.) Southern California brokers do not require such a roof certification, preferring to defer to the buyer's option of seeking an independent home inspection report. These regional variances in practice illustrate how standard-of-care issues are driven by geographical trade differences. *By William M. Hensley.*

If the property is a unit in a planned development, a condominium, or a stock cooperative, the broker need only inspect the unit offered for sale, as long as the seller or the broker provides the prospective buyer with certain subdivision documents as required by *Civ. Code § 1368* [*see Civ. Code § 2079.3*; *see also* Ch. 34, *Condominiums*]. There is no duty to go beyond these requirements to find additional matters (such as pending litigation concerning common areas of the property) that have not been revealed in the course of the required inquiries [*Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1282, 63 Cal. Rptr. 2d 373]* .

These requirements do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself. In discharging these duties, the buyer or prospective buyer must take into account those facts that are known to him or her or within his or her diligent attention and observation [*Civ. Code § 2079.5*].

If a seller or real estate broker provides a prospective buyer with the Homeowner's Guide to Earthquake Safety, the seller or broker will not to be required to provide the buyer with additional information concerning (1) the geologic and seismic hazards described in the guide, or (2) measures that the buyer or seller might consider to mitigate earthquake hazards [*Civ. Code § 2079.8(a)*]. However, the broker will still be obligated to comply with the other disclosure requirements of *Civ. Code § 2079 et seq.* [*Civ. Code § 2079.8(b)*]. Slightly different requirements apply when the property being transferred is commercial property [*see Bus. & Prof. Code § 10147*; *Civ. Code § 2079.9*; *see also § 23.20[4]*].

[2] Coordination With Transferor's Disclosure Statement

The brokers' inspection and disclosure requirements have been coordinated with the separate requirement that transferors of real property containing one-to-four dwelling units must complete and provide prospective transferees with a statutory real estate transfer disclosure statement [*see Civ. Code §§ 1102.3, 1102.6*; *see also § 23.20[1]*]. The statutes governing use of the transferor's disclosure statement impose some delivery and record-keeping duties on real estate brokers [*see Civ. Code § 1102.12*; *see also § 23.300[1][c][iv]*], but they do not expressly require brokers or agents to make disclosures. However, Paragraphs III and IV of the statutory transferor's disclosure form [*Civ. Code § 1102.6*; *see § 23.300[2]*] must be completed by any broker of the transferor and any other broker who obtains an offer. Alternatively, the form provides the brokers with the option of stating the disclosures on a separate form, provided they indicate this election in Paragraph I of the official form [*see Civ. Code § 1102.6*].

Related statutes require the seller or his or her agent to make natural-hazards disclosures under specified circumstances [*see Civ. Code § 1103 et seq.*; *see also §§ 23.20[3], 23.302[1]*.

[3] Disclosures Regarding Agency Relationship

Certain statutory disclosure requirements regarding an agency relationship apply when a transaction involves (1) a perpetual estate, an estate of inheritance, or life estate in property containing one-to-four dwelling units, (2) any leasehold in the foregoing type of property exceeding one years' duration, or (3) a mobilehome [*see Civ. Code § 2079.13(j)* (definition of "real property"); *see also Civ. Code § 761(1), (2)*]. A licensed real estate broker under whose license a listing contract is signed or an offer to purchase is obtained must provide the seller and buyer in any resulting sale transaction with two disclosures regarding the broker's agency relationship with the seller or buyer [*Civ. Code § 2079.13(a)*; *see Civ. Code §§ 2079.12-2079.24*; *see also Civ. Code § 2079.13(k)*]. First, the broker must provide a statutory form entitled "Disclosure Regarding Real Estate Relationship" [*see Civ. Code § 2079.16*; *see also* Ch. 21, *Agreements With Real Estate Brokers and Agents*]. Second, the broker must disclose whether he or she is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent representing both the buyer and the seller [*Civ. Code § 2079.17*] and must confirm this disclosure in writing. The written confirmation must appear either in the sale contract [*see § 23.210*] or in a separate writing.

For further discussion of these requirements, see Ch. 21, *Agreements With Real Estate Brokers and Agents* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleRemediesDuty to Disclose



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.23 Escrow

[1] Escrow Instructions

As a general rule, it is presumed that escrow instructions are merely a customary and convenient means of carrying out an underlying real property sale contract, and that they are not intended to supersede it [King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321 ; *Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 542, 261 P.2d 553]* . Thus the escrow instructions are considered evidence of the meaning and intent of the contract, and may be looked to in order to ascertain the contractual obligations of the parties when the contract is unclear or silent on a particular point [King v. Stanley (1948) 32 Cal. 2d 584, 588-589, 197 P.2d 321 ; *Leiter v. Handelsman (1954) 125 Cal. App. 2d 243, 250, 270 P.2d 563]* . Further, the omission of certain terms or contingencies from escrow instructions will not, in and or itself, operate to change the terms of the contract [*Keelan v. Belmont Co. (1946) 73 Cal. App. 2d 6, 7, 165 P.2d 930]* . Notwithstanding the general rule, however, terms contained in escrow instructions may supersede inconsistent terms of an underlying contract [*Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Hawes v. Lux (1931) 111 Cal. App. 21, 24, 294 P. 1080]* .

From the point of view of the escrow agent, written escrow instructions of the parties define and limit the agent's obligations [*see Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402]* . The escrow holder does not owe a duty to persons who are not parties to the escrow and thus cannot be held liable to strangers to the escrow for injuries allegedly caused by following its principals' instructions [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 713-714, 117 Cal. Rptr. 2d 541, 41 P.3d 548* (escrow holder who paid note as instructed by issuing check to assignor of the note rather than assignee, neither of whom were parties to the escrow, could not be held liable to assignor for breach of fiduciary duty or for negligence)].

[2] Termination of Escrow

Title to instruments and funds deposited in escrow passes by operation of law when the conditions of the escrow are performed. The escrow is terminated when (1) all of the conditions have been performed, (2) it is abandoned or canceled by mutual agreement of the parties, or (3) it is canceled by one party because of another party's failure to

perform a required term or condition. Termination ends the dual agency relationship between the escrow agent and the parties and shifts the right to possession and control of deposited instruments and funds to the parties respectively entitled to the delivery or return of the items [*see, e.g., Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrow



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§ 23.24 Marketable Title and Title Insurance

In any contract for the sale of real property, there is an implied requirement that the seller convey a "good" or "marketable" title to the buyer [King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321 ; *see Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 649-651, 234 P.2d 625* ("marketable title" and "good title" are analytically indistinguishable concepts; older cases refer to "good title")]. A real property sale contract cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt [*Civ. Code § 3394*].

"Marketable title" is a title that a reasonable buyer, well-informed of the facts and their legal consequences and willing and anxious to perform the contract, would, in the exercise of the prudence that business persons ordinarily bring to bear on such transactions, be willing to accept [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 649, 234 P.2d 625]* . It must be sufficiently free from defects to enable the holder (1) to retain the property, (2) to possess it in peace, and (3) when the time comes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value [*Mertens v. Berendsen (1931) 213 Cal. 111, 113, 1 P.2d 440]* . To qualify as "marketable," a title must embrace both the legal and equitable estates, must be free from unknown encumbrances, and must be defensible and salable [*Palos Verdes Corp. v. Housing Authority (1962) 202 Cal. App. 2d 827, 838, 21 Cal. Rptr. 225]* .

Title insurance is usually used to establish marketable title [*see Ins. Code § 12340.1* ("title insurance" defined)]. The California Land Title Association's standard coverage policy is probably the most commonly used form of title insurance policy in California. It is a "joint protection" policy designed to insure the interest of either an owner or a lender against title risks. The American Land Title Association's (ALTA) loan policy, which insures mortgages and deeds of trust, is commonly purchased by institutional lenders on real property. The ALTA owner's policy, which is designed for use by real property owners, is commonly purchased in connection with the acquisition of large commercial properties. For discussion of title insurance, see Ch. 26A, *Title Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsReal Property LawTitle QualityMarketable TitleRemediesReal Property LawTitle QualityMarketable TitleTests



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9-23 California Legal Forms--Transaction Guide § 23.25

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§ 23.25 Insurance

After the execution of a real property sale contract, the buyer has an insurable interest in the property [*see Long v. Keller (1980) 104 Cal. App. 3d 312, 317, 163 Cal. Rptr. 532]* . Unless it provides otherwise, a real property sale contract made in California must be interpreted as placing the risk of loss on the buyer on the transfer of either legal title or possession [*Civ. Code § 1662*; *see § 23.19*].

The buyer may assume the seller's insurance. However, because an insurance policy is a personal contract that indemnifies the insured against loss resulting from the destruction of or damage to the insured's interest in the property [*see Long v. Keller (1980) 104 Cal. App. 3d 312, 320, 163 Cal. Rptr. 532]* , the transfer of a policy usually requires the insurer's consent, whether or not that is stated in the policy [*Bergson v. Builders' Ins. Co. (1869) 38 Cal. 541, 544]* .

For further discussion, see California Insurance Law and Practice, Ch. 8, *The Insurance Contract* , Ch. 35, *Property Insurance in General* , and Ch. 36, *Homeowners and Related Policies* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRisk of Loss



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9-23 California Legal Forms--Transaction Guide § 23.26

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§ 23.26 Gain or Loss on Sale of Real Property

[1] Classification of Assets

Real property is a capital asset if not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business [*I.R.C. § 1221(a)(1)*] and not classified as Section 1231 property used in trade or business [*I.R.C. § 1221(a)(2)*]. Real property is Section 1231 property if held by the taxpayer for more than one year and used in the taxpayer's trade or business but not held primarily for sale to customers in the ordinary course of that trade or business [*I.R.C. § 1231(b)(1)*]. Any other real property, namely, real property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business, is classified as a noncapital asset [*see I.R.C. § 1221*; *see also Malat v. Riddell (1966) 383 U.S. 569, 570, 86 S. Ct. 1030, 16 L. Ed. 2d 102]* .

For an individual, the tax rate on capital gains is generally 15 percent, although the actual tax rate depends on the time the capital asset was held and other specified factors [*see I.R.C. § 1(h)(1)(C)*, effective generally for tax years ending on or after 5/16/03 and before 2009; *see* Pub. Law No. 108-27, §§ 301, 303; *see also I.R.C. § 1(a)- (d), (i)(2)*]. In contrast, corporate capital gains are taxed at the same rate as ordinary income [*see I.R.C. §§ 11(b), 1201*].

Capital losses are allowed only to the extent of capital gains (in the case of a corporation) or capital gains plus limited amounts of ordinary income (in the case of an individual taxpayer) [*see I.R.C. § 1211*]. However, there are carry-back and carry-forward rules for unused capital losses [*see I.R.C. § 1212(a), (b)*], and losses on Section 1231 property may be allowed in full [*see I.R.C. § 1231(a)(4)*].

[2] Sale of Capital Assets

[a] Federal Law

Any gain or loss realized by the seller on the sale of a capital asset is a capital gain or capital loss [*I.R.C. § 1222*]. If the capital asset has been held by the seller for not more than one year, the resulting gain or loss is a short-term capital gain or loss [*I.R.C. § 1222(1), (2)*]. If the capital asset was held by the seller for more than one year, the resulting gain or loss

on its sale is a long-term capital gain or loss [*I.R.C. § 1222(3), (4)*]. A taxpayer's short-term capital gains in a given year are reduced by short-term capital losses for the same year to determine net short-term capital gain or loss [*I.R.C. § 1222(5), (6)*]. The taxpayer's long-term capital gains during the year are reduced by long-term capital losses for the year to determine net long-term capital gain or loss [*I.R.C. § 1222(7), (8)*].

If net long-term capital gain exceeds net short-term capital loss, the difference is net capital gain [*I.R.C. § 1222(11)*]. Individual net capital gains are taxed at rates significantly lower than for ordinary income, based on the time the asset was held and other specified factors [*see I.R.C. § 1(h)*; *see also I.R.C. § 1(a)- (d)*]. A corporation is taxed on net capital gain (or, if less, taxable income) [*I.R.C. § 1201(a)*] at the same maximum rate that applies to ordinary corporate income [*see I.R.C. § 11(b)*].

Noncorporate taxpayers who show a net short-term or long-term capital loss as a result of these computations may offset that loss against any other capital gains; then any remaining loss may be deducted from ordinary income up to a maximum of $3,000 ($1,500 in the case of a married individual filing a separate return) [*I.R.C. § 1211(b)*]. Corporations showing a capital loss as a result of the computations outlined above may offset that loss only against capital gains [*see I.R.C. § 1211(a)*]. Within statutory limits, capital losses in excess of the allowed amount [*I.R.C. § 1222(10)* (net capital losses)] may be carried forward by noncorporate taxpayers [*see I.R.C. § 1212(b)*] or may be carried backward or forward by corporations [*see I.R.C. § 1212(a)*].

[b] California Law

For California state income tax purposes, capital gains and losses must be determined in accordance with the provisions of the Internal Revenue Code [*see Rev. & Tax. Code § 18151*; § 23.26[2][a]].

[3] Sale of Section 1231 Assets

Any gain realized on the sale of a Section 1231 asset [*see § 23.26[1]*] is treated as long-term capital gain, except that any gain realized on the sale must be treated as ordinary income to the extent of the losses from these transactions over the five preceding years [*I.R.C. § 1231(c)*; *Rev. & Tax. Code § 18151*]. However, any loss realized on the sale of a Section 1231 asset is treated as an ordinary loss fully deductible against other taxable income in the year of the sale [*I.R.C. § 1231(a)*; *Rev. & Tax. Code § 18151*].

[4] Sale of Noncapital Assets

Any gain realized on the sale of noncapital assets is treated as ordinary income. However, any loss on the sale of a noncapital asset is fully deductible against other income in the year the loss was recognized [*I.R.C. §§ 61, 64, 65, 165(c)*; *Rev. & Tax. Code § 17201*].

[5] Determining Gain or Loss

For income tax purposes, including under California law [*see Rev. & Tax. Code § 18031*], the amount of gain or loss on a sale of any property is computed as the amount realized minus the seller's adjusted tax basis for the property and the expenses of making the sale [*see* I.T. 2340, VI-1 C.B. 43 (1927) ; *see also Chapin v. Commissioner, 12 T.C. 235, 238 , aff'd, 180 F.2d 140 (8th Cir. 1950)]* . The amount realized includes the fair market value of any notes received or any mortgages or deeds of trust the buyer assumed [*I.R.C. § 1001*; *Rev. & Tax. Code §§ 18031, 24901(b)*]. The adjusted tax basis of the property is the seller's cost of acquiring the property (including any mortgages or deeds of trust the seller assumed or took the property subject to), plus the costs of any capital improvements made to the property by the seller, less any depreciation deductions allowed in previous years because of the property [*I.R.C. §§ 1011, 1012, 1016(a)*; *Rev. & Tax. Code §§ 18031, 18036*].

Land is not depreciable, but depreciation deductions can be taken for buildings and improvements placed on the land if

they are used in a trade or business for the production of income [*I.R.C. §§ 167, 168*; *Treas. Reg. § 1.167(a)-2*; *Rev. & Tax. Code §§ 17201, 17250, 24349-24356*]. Residential real property placed in service after 1986, must be depreciated for federal tax purposes over a 27.5-year period. Nonresidential real property placed in service after 1986, must be depreciated for federal tax purposes over a 39-year period [*I.R.C. § 168(c)*]. Alternatively, a taxpayer may elect a 40-year depreciation period for federal tax purposes [*see I.R.C. § 168(g)*]. Regardless of the period, real property depreciation must be computed for federal tax purposes on a straight-line basis [*see I.R.C. § 168(b), (g)*].

For California purposes, the amount of depreciation that will be taken into account in determining the taxpayer's adjusted basis of property for purposes of computing gain or loss will depend on whether the taxpayer is subject to the Personal Income Tax Law or the Corporation Tax Law. The Personal Income Tax Law generally allows depreciation deductions in the same manner as incorporated federal law [*see Rev. & Tax. Code §§ 17024.5, 17250*, 27201; *I.R.C. §§ 167, 168*; *see § 12C.252[1][b]* for a detailed discussion]. The Corporation Tax Law allows less generous depreciation deductions. Depreciation deductions under those provisions must generally be computed using one of several methods (straight-line, double declining balance, sum-of-years digits), taking into account useful life and salvage value [*Rev. & Tax. Code §§ 24349(a), (b), 24350, 24351, 24352, 24352.5, 24353, 24354, 24354.1, 24355, 24355.4*]. These rules generally follow pre-1981 federal law, and result in depreciation deductions that are likely to be less favorable than under federal law [*see Rev. & Tax. Code §§ 24349-24356*; *I.R.C. §§ 167, 168*].

[6] Sale of Residence

Special rules govern the determination of gain or loss from the sale of a residence. A personal residence is a capital asset. Therefore any gain required to be recognized from the sale of a personal residence is treated as capital gain [*I.R.C. § 1221*; *Rev. & Tax. Code § 18151*]. This gain must be recognized in the year the residence is sold unless the gain is wholly or partially excluded or deferred (see discussion below). Loss ordinarily is not deductible because there is usually no profit motive in the acquisition of a home [*see Treas. Reg. § 1.165-9(a)*].

A specified amount of gain from the sale or exchange of a principal residence is excluded from income if, during the five-year period ending on the date of the sale or exchange, the property had been owned and used by the taxpayer as a principal residence for periods that aggregate to two years or longer [*I.R.C. § 121(a)*; *see I.R.C. § 121(c)* (special treatment of certain sales and exchanges)]. However, for a sale or exchange after 2008, the exclusion does not reach any part of the gain that must be allocated to a period of nonqualified use, that is, with some exceptions, any period (other than the portion of any period preceding 2009) during which the property was not used as the principal residence of the taxpayer or the taxpayer's spouse or former spouse [*I.R.C. § 121(b)(4)*; *see I.R.C. § 121(b)(4)(C)(ii)* (exceptions to what is period of nonqualified use)]. The maximum amount of gain that may be excluded with regard to any sale or exchange is $250,000 for single taxpayers or $500,000 for married taxpayers filing joint returns and meeting additional statutory criteria [*I.R.C. § 121(b)(1), (2)*; *see I.R.C. § 121(d)(1)- (3)* (special rules concerning joint returns and treatment of property of former or deceased spouse)]. This exclusion applies to only one sale or exchange in a two-year period. The taxpayer may elect to have the exclusion not apply to a particular sale or exchange [*I.R.C. § 121(f)*].

Effective for estates of decedents dying after 2009, the exclusion for the sale of a principal residence is extended to estates and individuals who acquire a residence from the decedent [*I.R.C. § 121(d)(11)(A), (B)*]. If the decedent's estate or an individual heir sells the decedent's principal residence, $250,000 of gain can be excluded on the sale of the residence, provided the decedent used the property as a principal residence for two or more years during the five-year period prior to the sale [*I.R.C. § 121(b)(1)*]. The exclusion for the gain on the sale of a principal residence also applies to property sold by a trust that was a qualified revocable trust under *I.R.C. § 645* immediately prior to the decedent's death [*I.R.C. § 121(d)(11)(C)*].

In the case of property as to which the taxpayer rolled over gain from another residence [*see* former *I.R.C. § 1034*], the aggregate period for which the other residence (and each previous residence taken into account [*see I.R.C. § 1223(6)*]) had been used as a principal residence is taken into account in determining the period for which the taxpayer has owned

and used the current property as a principal residence [*I.R.C. § 121(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Real PropertyTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Capital AssetsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of GainsTax LawFederal Taxpayer GroupsIndividualsExclusions From Gross Income (IRC secs. 101-112, 115, 117-123, 125-139)General Overview



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9-23 California Legal Forms--Transaction Guide § 23.27

AUTHOR: William M. Hensley Editorial Consultant

§ 23.27 Interest Deductions

[1] Personal Interest

As a general rule, interest that is paid or accrued within the taxable year may be deducted [*see I.R.C. § 163(a)*; *see also Rev. & Tax. Code §§ 17201, 24344, 24345*]. However, for the noncorporate taxpayer, there are several important exceptions to the deductibility of interest.

No taxpayers other than corporations are allowed a deduction for "personal" interest [*I.R.C. § 163(h)(1)*]. Personal interest is a residual category including all interest that does not qualify under one of five specific categories of interest for which a deduction is allowed in whole or in part [*I.R.C. § 163(h)(2)*]:

- Interest paid or accrued on indebtedness properly allocable to a trade or business;
- Investment interest [*see I.R.C. § 163(d)*];
- Interest taken into account in computing passive income and losses [*see I.R.C. § 469*];
- Interest on a "qualified residence" of the taxpayer [*see I.R.C. § 163(h)(3), (4)*];
- Interest on underpayment of estate taxes while certain extensions are in effect [*see I.R.C. §§ 2001, 6163*];
- Any interest allowable as a deduction under *I.R.C. § 221* (relating to interest on educational loans).

Interest paid or accrued by the buyer in connection with the purchase of real property will be fully deductible only if the underlying indebtedness is properly allocable to a trade or business [*see* [2], *below*]. It will be deductible subject to limitations if it is qualified residence interest, interest taken into account in determining income or loss from a passive

activity, or investment interest [*see* [3]-[6], *below*]. Interest will be nondeductible personal interest in all other cases [*see I.R.C. § 163(h)(1), (2)*].

[2] Business Interest

Interest remains fully deductible if paid or accrued on indebtedness properly allocable to a trade or business other than the business of performing services as an employee [*I.R.C. § 163(a), (h)(2)(A)*].

It is not clear whether the use of the term "trade or business" in *I.R.C. § 163(h)* carries with it the body of case law interpreting the term as used in *I.R.C. § 162* (concerning deductions for business expenses). There is authority for the proposition that a trade or business under *I.R.C. § 162* requires holding one's self out to others as engaged in the selling of goods and services [*see Gajewski v. C.I.R. (2d Cir. 1983) 723 F.2d 1062, 1065-1067]* . Furthermore, costs incurred by real estate investors during construction or the start-up period are generally not allowed as deductions but are required to be capitalized and amortized, under the theory that during construction or the start-up period there is not yet a trade or business incurring ordinary and necessary expenses [*I.R.C. § 195*; *see Francis v. Commissioner (1977) T.C. Memo. 1977-170* ; *Goodwin v. Commissioner (1980) 75 T.C. 424 , aff'd, 691 F.2d 490 (3rd Cir. 1982)]* .

Whether this rule now applies to interest on real estate acquisition or construction loans or other preoperational indebtedness of a business is not resolved. The language of the two code sections regarding "trade or business" is different. The business expense deduction is allowed for "all ordinary and necessary expenses paid or incurred ... in carrying on any trade or business" [*I.R.C. § 162(a)*]. The interest deduction is allowed for "interest paid or accrued on indebtedness properly allocable to a trade or business" [*I.R.C. § 163(h)(2)(A)*].

[3] Qualified Residence Interest

Qualified residence interest is interest paid or accrued during the taxable year on acquisition indebtedness or home equity indebtedness with respect to any qualified residence of the taxpayer [*I.R.C. § 163(h)(3)(A)*]. "Acquisition indebtedness" means any indebtedness, up to $1 million ($500,000 in the case of a married individual filing a separate return), that is both (1) incurred in acquiring, constructing, or substantially improving any qualified residence of the taxpayer, and (2) secured by that residence [*I.R.C. § 163(h)(3)(B)*; *see I.R.C. § 163(h)(3)(C)*]. A "qualified residence" includes the taxpayer's principal residence [*I.R.C. § 163(h)(4)(A)(i)(I)*; *see I.R.C. § 121*] and one other residence of the taxpayer that is selected by the taxpayer for these purposes [*I.R.C. § 163(h)(4)(A)(i)(II), (iii)*]. However, if the designated second residence is rented for a majority of the taxable year, it will be considered a qualified residence only if the taxpayer uses the dwelling unit as a residence for the greater of 14 days or 10 percent of the number of days during the year for which the unit is rented at fair rental value [*I.R.C. § 163(h)(4)(A)(i)(II)*; *see I.R.C. § 280A(d)(1)*].

For these purposes, "home equity indebtedness" means any indebtedness (other than acquisition indebtedness) secured by a qualified residence to the extent that the aggregate amount of the indebtedness does not exceed the fair market value of the qualified residence reduced by the amount of acquisition indebtedness with respect to the residence [*I.R.C. § 163(h)(3)(C)*]. The aggregate amount treated as home equity indebtedness for any period cannot exceed $100,000 ($50,000 in the case of a separate return by a married individual) [*I.R.C. § 163(h)(3)(C)(ii)*].

[4] Passive Activity Interest

All rental activities [*see I.R.C. § 469(j)(8)*] and activities involving the conduct of a trade or business in which the taxpayer does not materially participate are "passive" activities for federal income tax purposes [*I.R.C. § 469(c)(1), (2)*]. Deductions arising from passive activities, including any deduction for interest incurred in connection with the activity, may be taken only against income attributable to the taxpayer's aggregate passive activities [*I.R.C. § 469(a)(1), (d)*]. Deductions that are disallowed under the rule in any taxable year may be carried forward to the next taxable year but not back to any previous taxable year [*I.R.C. § 469(b)*] and are allowed against all income if the taxpayer disposes of his or

her entire interest in the activity in a fully taxable transaction [*see I.R.C. § 469(g)*].

The rule applies to any taxpayer that is an individual, estate, trust, closely held corporation, or personal service corporation [*I.R.C. § 469(a)(2)*]. However, there is an exception that permits closely held corporations to use passive losses and credits against active income but not against investment income [*see I.R.C. § 469(e)(2)*].

A taxpayer is deemed to participate materially in an activity if the taxpayer is involved in the operations of the activity on a regular, continuous, and substantial basis [*I.R.C. § 469(h)(1)*]. Each case is to be determined independently on its facts and circumstances. Relevant considerations are whether the activity is the taxpayer's principal business, the taxpayer's physical presence on the premises of the activity, and the taxpayer's performance of management functions and services for the activity [*see* S. Rep. No. 99-313, Pub. L. No. 99-514 (1986), pp. 732-735]. A limited partner is conclusively presumed not to be a material participant. The IRS may, however, promulgate regulations permitting limited partners to be material participants [*I.R.C. § 469(h)(2)*].

There is a limited allowance of deductions against other income in rental real estate activities. A natural person may apply his or her passive activity losses and credits against up to $25,000 of nonpassive income, if the person "actively participates" (see definition, *below*) in the rental real estate activities [*I.R.C. § 469(i)(1), (2)*]. The $25,000 limit is reduced by 50 percent of the taxpayer's adjusted gross income over $100,000 [*I.R.C. § 469(i)(3)*; *see I.R.C. § 469(i)(5)* (all amounts halved for married taxpayers filing separately)].

Active participation in rental real estate is a less-stringent standard than material participation in other passive activities. Active participation requires only significant and good faith participation in management decisions, even if arrangements are made for others to provide services. At a minimum, however, the taxpayer must have an interest of at least 10 percent of all interests in the activity for the entire taxable year regardless of the personal time and effort invested in the activity [*I.R.C. § 469(i)(6)(A)*; *see* S. Rep. No. 99-313, Pub. L. No. 99-514 (1986), pp. 736-738]. The taxpayer must meet this active-participation standard in both the year in which the deduction or credit arises and the year in which it is taken [*I.R.C. § 469(i)(1)*]. As with the material-participation standard, limited partners will be conclusively considered not to be active participants in rental real estate activities unless the IRS promulgates regulations permitting them to be active participants [*I.R.C. § 469(i)(6)(C)*].

[5] Investment Interest

Investment interest deductions for a taxable year may not exceed net investment income for the same taxable year [*I.R.C. § 163(d)(1)*]. Any amount disallowed in one taxable year is carried forward to the next taxable year [*I.R.C. § 163(d)(2)*].

Investment interest is interest paid or accrued on indebtedness properly allocable to property held for investment [*I.R.C. § 163(d)(3)*]. Real property is not specifically mentioned in the definition of "property held for investment" [*see I.R.C. §§ 163(d)(5), 469(e)(1)*]. Investment interest specifically excludes interest taken into account in computing income or loss from a passive activity [*I.R.C. § 163(d)(3)(B)(ii)*; *see I.R.C. § 469*; *see* [4], *above*], but not interest properly allocable to a trade or business [*see* [2], *above*].

[6] Prepaid Interest and Points

Interest is deductible by a cash-basis taxpayer only when paid, and the giving of a note for interest is not considered to be payment [*I.R.C. § 163(a)*; *see England v. Commissioner (1960) 34 T.C. 617]* . Interest paid by a taxpayer on a mortgage on real estate of which he or she is the legal or equitable owner may be deducted as interest on the taxpayer's indebtedness, even though the taxpayer is not directly liable on the note [*Treas. Reg. § 1.163-1(b)*; *see Rev. Rul. 68-643, 1968-2 C.B. 76* (if interest is prepaid for period not exceeding 12 months beyond end of taxable year of payment, IRS will determine on case-by-case basis whether deduction of interest causes material distortion of income);

see also Rev. Rul. 69-582, 1969-2 C.B. 29 (current deduction for points constituting interest is generally allowable without need for proration if borrower did not obtain funds for points from lender and no material distortion of income results)].

Prepaid interest of a cash-basis taxpayer is deductible only with respect to the period for which it is allocable [*I.R.C. § 461(g)*]. This requirement applies to all taxpayers, including individuals, corporations, partnerships, estates, and trusts [S. Rep. No. 94-938, Pub. L. No. 94-455 (1976), p. 104]. The only exception is for points paid by a cash-basis taxpayer in connection with a debt incurred for the purchase or improvement of the taxpayer's principal residence and secured by that residence. The exception applies only if points are generally charged in the geographical area where the loan is made and only to the extent of the number of points generally charged in that area [*I.R.C. § 461(g)(2)*].

Under the tax-benefit rule, a cash-basis taxpayer must recapture interest that was prepaid and deducted on the sale of property [*see, e.g., Weyher v. Commissioner (1976) 66 T.C. 825* (taxpayer sold real property to corporation of which he was president and majority shareholder; he was reimbursed for interest that he had prepaid and deducted when he purchased; amount recovered on sale that represented prepaid interest had to be recaptured as ordinary income)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationDeductions for Business ExpensesInterest (IRC sec. 163)Tax LawFederal Income Tax ComputationDeductions for Business ExpensesResidential Property Used for Business (IRC sec. 280A)Tax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Taxpayer GroupsC CorporationsInsurance Companies (IRC secs. 801-848)DeductionsTax LawFederal Taxpayer GroupsIndividualsBusiness Deductions (IRC secs. 62, 63, 162)General OverviewTax LawFederal Taxpayer GroupsIndividualsBusiness Deductions (IRC secs. 62, 63, 162)Requirements for Deductibility



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AUTHOR: William M. Hensley Editorial Consultant

§ 23.28 Allocation of Purchase Price

[1] Improved Property

The purchase price of improved property must be allocated among each of the assets sold. For tax purposes the seller is treated as having sold each individual asset separately, and its gain is measured accordingly. The buyer is treated as having purchased each asset separately, and basis in each of the assets is determined accordingly [*see Treas. Reg. § 1.61-6(a)*; *see also Drybrough v. Comm'r (1966) 45 T.C. 424* (attempts to allocate portions of purchase price may be disregarded by IRS if they bear no reasonable relationship to value of assets to which they are allocated)].

The IRS has recognized that the component method of accounting for depreciation on used real property improvements may be used if the cost of acquisition is properly allocated to the various components based on their value, and useful lives are assigned to the component accounts based on the condition of those components at the time of acquisition [*Rev. Rul. 73-410, 1973-2 C.B. 53* ; *see Rev. Rul. 75-55, 1975-1 C.B. 74*].

[2] Unimproved Property

The purchase price may be allocated in a sale of unimproved property. For example, when part of a larger property is sold and the property is subdivided into lots, the basis of the entire property must be equitably apportioned among the individual parts. The sale of each part is treated as a separate transaction, and gain or loss is computed separately. The apportionment can allocate more of the purchase price to the more-valuable portions of the property. The allocation of additional price to certain portions will increase the buyer's tax basis in those assets and consequently decrease the taxable gain when those tracts are sold [*see Treas. Reg. § 1.61-6(a)*]. Allocation of total cost on the basis of the fair market value of each portion of a tract of land has been approved [*see Biscayne Bay Islands Co. v. Commissioner (1931) 23 B.T.A. 731* ; *see also Cleveland-Sandusky Brewing Corp. v. Commissioner (1958) 30 T.C. 539]* . Allocation of cost according to front footage, release prices, tentative sales prices, or assessed valuation has been approved under limited circumstances [*see Cullinan v. Commissioner (1927) 5 B.T.A. 996* ; *Cullinan v. Commissioner (1930) 19 B.T.A. 930* ; *see also Fairfield Plaza, Inc. v. Commissioner (1963) 39 T.C. 706]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Disposition of Depreciable PropertyTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Real Property Subdivided for Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide § 23.29

AUTHOR: William M. Hensley Editorial Consultant

§ 23.29 Foreign Sellers and Tax Withholding

If the seller of real property is a "foreign person" [*see I.R.C. § 1445(f)(3)* ("foreign person" means any person other than a "United States person")], the Foreign Investment in Real Property Tax Act (FIRPTA) [Pub. L. No. 96-499, §§ 1121-1125] requires the buyer to withhold from the seller's proceeds 10 percent of the gross sale price, unless an exemption applies [*see I.R.C. § 1445*]. The two most significant exemptions apply when (1) the seller furnishes the buyer an affidavit stating, under penalty of perjury, the seller's U.S. taxpayer identification number and that the seller is not a foreign person, and (2) the purchase price is $300,000 or less and the buyer plans to use the property as his or her residence [*see I.R.C. § 1445(b)(2), (5)*]. For discussion, see California Real Estate Law and Practice, Ch. 5, *Taxation of Real Estate Investments: An Overview* , Pt. B (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal RegulationsGeneral OverviewTax LawInternational TaxesForeign Persons' Activities in the United StatesGeneral OverviewTax LawInternational TaxesForeign Persons' Activities in the United StatesInvestment in U.S. Real Property (IRC secs. 861, 897)Tax LawInternational TaxesForeign Persons' Activities in the United StatesNonresident & Resident Aliens (IRC secs. 864, 871-880)General Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
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9-23 California Legal Forms--Transaction Guide § 23.30

AUTHOR: William M. Hensley Editorial Consultant

§ 23.30 Tax Withholding

[1] Overview

California income-tax withholding requirements apply to all dispositions of California real property interests [*see* Rev. & Tax. Code §§ 18662(e), 18668(d)], except in certain cases [*see § 23.30[2]*]. When withholding is required:

- The transferor (seller) may make an election as to the amount [Rev. & Tax. Code § 18662(e)(2)(B); *see § 23.30[3]*].

- The transferee (buyer) is required to withhold the elected amount or, in the absence of the transferor's election, 3.33 percent of the sale price [Rev. & Tax. Code § 18662(e)(2)(A); regarding what is sale price, see *§ 23.30[2][a]*].

- In the case of a qualified installment sale, the withholding requirements may or must be applied to each installment (instead of the sale price) [Rev. & Tax. Code § 18662(e)(2)(E); *see § 23.30[4]*].

- Any withheld amount must be reported and remitted to the Franchise Tax Board (FTB) [Rev. & Tax. Code § 18662(e)(4); *see § 23.30[5]*].

In this context, a "California real property interest" is an interest in real property located in California and defined in I.R.C. § 897(c)(1)(A)(i), that is "an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands" [Rev. & Tax. Code § 18662(e)(5)]. For the purpose of that definition, the term "interest in real property" includes (1) fee ownership and co ownership of land or improvements on land, (2) leaseholds of land or improvements on land, (3) options to acquire land or improvements on land, and (4) options to acquire leaseholds of land or improvements on land. Moreover, the term "real property" includes movable walls, furnishings, and other personal property associated with the use of the real property [I.R.C. § 897(c)(6)(A), (B)].

The FTB may prescribe, by forms, instructions, published notices, or regulations, any requirements necessary for the efficient administration of the withholding requirements, relating to the treatment of *de minimis* amounts that would otherwise required to be withheld and remitted [Rev. & Tax. Code § 18662(e)(9)].

[2] Exceptions to Withholding Requirements

[a] Sale Price Not More Than $100,000

No transferee is required to withhold any amount unless the sale price of the California real property conveyed exceeds $100,000 [Rev. & Tax. Code § 18662(e)(3)(A)].

For purposes of the withholding requirements, the "sale price" is the sum of all of the following [Rev. & Tax. Code § 18662(e)(8)]:

- The cash paid, or to be paid, but excluding for this purpose any stated or unstated interest or original issue discount, as determined under I.R.C. §§ 1271-1275.

- The fair market value of other property transferred, or to be transferred.

- The outstanding amount of any liability assumed by the transferee or to which the California real property interest is subject immediately before and after the transfer.

In the case of an installment sale, this minimum sale price is not to be applied to each installment [Rev. & Tax. Code § 18662(e)(2)(E)(ii)].

[b] Lack of Notification as to Requirements

No transferee, other than an intermediary or accommodation party in a deferred exchange, is required to withhold any amount unless the real estate escrow person provided written notification of the withholding requirements [Rev. & Tax. Code § 18662(e)(3)(B)]. A "real estate escrow person" is (1) the person, including any attorney, escrow company, or title company, responsible for closing the transaction or, if no such person is responsible for closing the transaction, then (2) any other person who receives and disburses the consideration or value for the interest or property conveyed [Rev. & Tax. Code § 18662(e)(6)].

An escrow person has a statutory duty to provide notification [Rev. & Tax. Code § 18668(e)(2); *see § 23.30[8]*].

[c] Foreclosure Sale

No transferee, trustee under a deed of trust, or mortgagee under a mortgage with a power of sale is required to withhold when the transferee has acquired California real property (1) at a sale pursuant to a power of sale under a mortgage or deed of trust, (2) at a sale pursuant to a decree of foreclosure, or (3) by a deed in lieu of foreclosure [Rev. & Tax. Code § 18662(e)(3)(C)(i)].

[d] Sale by Bank as Trustee

No transferee is required to withhold when the transferor is a bank acting as trustee other than a trustee of a deed of trust [Rev. & Tax. Code § 18662(e)(3)(C)(ii)].

[e] Sale of Principal Residence

No transferee, including for this purpose any intermediary or accommodation party in a deferred exchange, is required

to withhold any amount if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, that [Rev. & Tax. Code § 18662(e)(3)(D)(i); *see* Rev. & Tax. Code § 18668(e)(5) (transferor's liability for knowingly executing false certificate for purpose of avoiding withholding requirements)]:

- The California real property being conveyed is the seller's or decedent's principal residence, within the meaning of I.R.C. § 121 (exclusion of gain from sale of principal residence).

- The last use of the property being conveyed was use by the transferor as the transferor's principal residence within the meaning of I.R.C. § 121.

The transferor must submit a copy of the written certificate and supporting documentation, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

[f] Like-Kind Exchange Without Recognition of Gain

No transferee, including for this purpose any intermediary or accommodation party in a deferred exchange, is required to withhold any amount if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, that the California real property being conveyed is being exchanged, or will be exchanged, for property of like kind, within the meaning of I.R.C. § 1031. However, this exception applies only to the extent of the amount of the gain not required to be recognized for California income or franchise tax purposes under I.R.C. § 1031 [Rev. & Tax. Code § 18662(e)(3)(D)(ii)(I); *see* Rev. & Tax. Code § 18668(e)(5) (transferor's liability for knowingly executing false certificate for purpose of avoiding withholding requirements)]. The transferor must submit a copy of the written certificate and supporting documentation, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

This exception will not apply if the exchange does not qualify for nonrecognition treatment for California income or franchise tax purposes under I.R.C. § 1031, in whole or in part, because of the failure of the transaction to comply with the provisions of I.R.C. § 1031(a)(3) relating to the requirement that property be identified and that the exchange be completed not more than 180 days after the transfer of the exchanged property [Rev. & Tax. Code § 18662(e)(3)(D)(ii)(II)].

If this exception applies, the transferee must notify the FTB in writing within 10 days of the expiration of the statutory periods specified in I.R.C. § 1031(a)(3) and thereafter must remit the applicable withholding amount [Rev. & Tax. Code § 18662(e)(3)(D)(ii)(III)].

[g] Involuntary Conversion of Property

No transferee, including for this purpose any intermediary or accommodation party in a deferred exchange, is required to withhold any amount if (1) the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, that the California real property has been compulsorily or involuntarily converted, within the meaning of I.R.C. § 1033; and (2) the transferor intends to acquire property similar or related in service or use so as to be eligible for nonrecognition of gain for California income tax purposes under I.R.C. § 1033 [Rev. & Tax. Code § 18662(e)(3)(D)(iii); *see* Rev. & Tax. Code § 18668(e)(5) (transferor's liability for knowingly executing false certificate for purpose of avoiding withholding requirements)]. The transferor must submit a copy of the written certificate and supporting documentation, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

[h] Nonrecognition of Gain or Loss

No transferee, including for this purpose any intermediary or accommodation party in a deferred exchange, is required to withhold any amount if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, that the transaction will result in either a net loss or a net gain not required to be recognized for California income or franchise tax purposes [Rev. & Tax. Code § 18662(e)(3)(D)(iv); *see* Rev. & Tax. Code § 18668(e)(5) (transferor's liability for knowingly executing false certificate for purpose of avoiding withholding requirements)]. The transferor must submit a copy of the written certificate and supporting documentation, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

[i] Sale by California Corporation or Partnership

The requirements for withholding do not apply to a disposition of a California real property interest by either [Rev. & Tax. Code § 18662(e)(1)(A)]:

- A corporation, including an entity classified for tax purposes as a corporation under Rev. & Tax. Code § 23001 et seq.; or

- A partnership, as determined in accordance with I.R.C. § 701 et seq. (Subchapter K), including an entity classified as a partnership for tax purposes under Rev. & Tax. Code § 17001 et seq.

The intended references here are to California corporations and partnerships. The withholding requirements do apply to a disposition of a California real property interest by a corporation or, after 2008, a partnership if, immediately after the transfer of the title to the California real property, the corporation or partnership has no permanent place of business in California. A corporation or partnership has no permanent place of business in California if it is not organized and existing under the laws of California, does not qualify with the office of the Secretary of State to transact business in California, and does not maintain and staff a permanent office in California [*Rev. & Tax. Code § 18662(e)(1)(B)*].

[j] Sale by Corporation With California Place of Business

No transferee, including for this purpose any intermediary or accommodation party in a deferred exchange, is required to withhold any amount if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, that the transferor is a corporation with a permanent place of business in California [Rev. & Tax. Code § 18662(e)(3)(D)(v); *see* Rev. & Tax. Code § 18668(e)(5) (transferor's liability for knowingly executing false certificate for purpose of avoiding withholding requirements)]. The transferor must submit a copy of the written certificate and supporting documentation, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

[3] Transferor's Election of Withholding Amount

If the transferor makes an election, the transferee, including any intermediary or accommodation party in a deferred exchange, is required to withhold an amount equal to an amount certified by the transferor in writing under penalty of perjury. The amount certified must not be less than the gain required to be recognized under California law on the disposition of the California real property, multiplied by either (1) the franchise tax rate, for transferors that are corporations [*see* Rev. & Tax. Code §§ 23151, 23186], or (2) the highest rate specified in Rev. & Tax. Code § 17041, for transferors other than corporations. However, after 2008, for S corporations subject to the modified tax rate specified in *Rev. & Tax. Code § 23802*, the multiplier is the sum of the rate specified in *Rev. & Tax. Code § 23802(b)* and the highest rate specified in *Rev. & Tax. Code § 17041*. For purposes of applying this requirement, the highest rate specified in § 17041 is determined without regard to any other tax rate specified under the Personal Income Tax Law, regardless of whether the applicable statute provides that tax must be treated as if imposed under § 17041 [Rev. & Tax. Code §

18662(e)(2)(B)].

The written certification must be in a form as prescribed by the FTB. The form must state a warning as follows: "Title and escrow persons and exchange accommodators are not authorized to provide legal or accounting advice for purposes of determining withholding amounts. Transferors are strongly encouraged to consult with a competent tax professional for this purpose" [Rev. & Tax. Code § 18662(e)(2)(C)(I)].

The FTB must make this form available electronically on its web site in a format that allows a transferor to complete and print the form. The FTB also must provide electronic means to enable the transferor to estimate the amount of gain required to be recognized by the transferor in the transaction. Any form or worksheet, electronic or otherwise, developed for this purpose must provide the same warning [Rev. & Tax. Code § 18662(e)(2)(C)(ii)].

The transferor must submit a copy of the written certificate and supporting documentation for the elected withholding amount, executed by the transferor, to the FTB on request [Rev. & Tax. Code § 18662(e)(4)(B)].

[4] Withholding in Case of Installment Sale

In the case of an installment sale [*see I.R.C. § 453(b)* (definition)] occurring after 2008, the withholding requirements must be separately applied to each principal payment to be made under the terms of the installment sale agreement [*Rev. & Tax. Code § 18662(e)(2)(E)*]. For an installment sale occurring before 2009, application of the withholding requirements separately to each installment would depend on the transferee's making an irrevocable election for that treatment [*see* former *Rev. & Tax. Code § 18662(e)(2)(E)*].

[5] Transferee's Duty to Report and Remit

Amounts withheld and payments made in accordance with the withholding requirements must be reported and remitted to the FTB in the form and manner and at the time specified by the FTB. Notwithstanding this requirement, funds withheld on individual transactions by real estate escrow persons may, at the real estate escrow person's option, be remitted (1) by the 20th day of the month following the close of escrow for the individual transaction, or (2) on a monthly basis in combination with other transactions closed during that month [Rev. & Tax. Code § 18662(e)(4)(A)].

[6] Transferee's Liability

Whenever any transferee is required but fails to withhold any amount pursuant to Rev. & Tax. Code § 18662(e), unless it is shown that the failure to withhold is due to reasonable cause, the transferee is liable for $500 or 10 percent of the amount required to be withheld, whichever is greater, after the transferee is notified in writing of the withholding requirements [Rev. & Tax. Code § 18668(d)]. However, the transferee is not liable if the failure to withhold is the result of his or her reliance, based on good faith and on all the information of which he or she has knowledge, on a written certificate executed by the transferor in circumstances permitting it [Rev. & Tax. Code § 18668(e)(4); regarding transferor's execution of a certificate, see *§ 23.30[2][e]-[h], [j]*].

[7] Escrow Person's Fee for Assistance

It is unlawful for any real estate escrow person to charge any customer for complying with the withholding requirements, unless the escrow person provides assistance [Rev. & Tax. Code § 18662(e)(7)(A); regarding who is escrow person, see *§ 23.30[2][b]*]. "Assistance" includes, but is not limited to, helping the parties clarify with the FTB the issue of whether withholding is required or, on request of the parties, withholding an amount and remitting that amount to the FTB [Rev. & Tax. Code § 18662(e)(7)(B)]. "Assistance" does not include providing written notification of the withholding requirements [Rev. & Tax. Code § 18662(e)(7)(C); *see § 23.30[8]*]. When the escrow person provides assistance in complying with the withholding requirements, it is unlawful for the escrow person to charge any customer a fee that exceeds $45 [Rev. & Tax. Code § 18662(e)(7)(D)].

[8] Escrow Person's Notification Duty

A real estate escrow person must provide written notification to the transferee (other than a transferee that is an intermediary or accommodation party in a deferred exchange) in substantially the form prescribed by statute [Rev. & Tax. Code § 18668(e)(2); regarding who is escrow person, see *§ 23.30[2][b]*].

Unless it is shown that a failure to notify is due to reasonable cause, the escrow person is liable for the amount of the transferee's liability [*see § 23.30[6]*], when written notification of the withholding requirements is not provided to the transferee (other than a transferee that is an intermediary or accommodation party in a deferred exchange) in a case of the disposition of California real property disposition that is subject to the withholding requirements [Rev. & Tax. Code § 18668(e)(1)]. However, the escrow person is not liable if the tax due as a result of the disposition of California real property is paid by the original or extended due date of the transferor's return for the taxable year in which the disposition occurred [Rev. & Tax. Code § 18668(e)(3)]. Further, the escrow person is not liable if the failure to withhold is the result of his or her reliance, based on good faith and on all the information of which he or she has knowledge, on a written certificate executed by the transferor in circumstances permitting it [Rev. & Tax. Code § 18668(e)(4); regarding transferor's execution of certificate, see *§ 23.30[e]-[h], [j]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale ContractsReal Property LawPurchase & SaleEscrowTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsGeneral OverviewTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide § 23.31

AUTHOR: William M. Hensley Editorial Consultant

§ 23.31 Property Tax

[1] In General

All property in California is subject to property taxation at its full value, unless exempt under the laws of the United States or California [*Cal. Const., art. XIII, § 1*; *Rev. & Tax. Code §§ 201, 401*]. The maximum amount of any ad valorem tax on real property cannot exceed 1 percent of the "full cash value" of the property [*Cal. Const., art. XIIIA, § 1(a)*]. The full cash value of property is the valuation as shown on the 1975-1976 tax rolls unless the property was purchased, was newly constructed, or changed ownership after the 1975 assessment [*Cal. Const., art. XIIIA, § 2(a)*; *see § 23.31[2]*].

[2] Reappraisal on Sale

The full cash value of real property that is purchased or newly constructed or changes ownership after March 1, 1975, is equal to the fair market value of the property as of the date on which the purchase or change of ownership occurs or the new construction is completed (or, if it is uncompleted, on the lien date) [*Rev. & Tax. Code § 110.1(a)(2)*]. This amount (the full cash value) is also the "base year value" for the property, from which the taxable value will be computed [*Cal. Const., art. XIIIA, § 2(a)*; *Rev. & Tax. Code § 110.1(a), (b)*; *see 18 Cal. Code Reg. § 460(b)(2)(A)*; *see also Rev. & Tax. Code §§ 75.9, 75.10*]. To determine the taxable value of the property, adjustments may be made to the base year value to reflect (1) inflation at a rate not to exceed 2 percent per annum, (2) a reduction in value as shown in the consumer price index or comparable data for the area, or (3) a decline in value resulting from substantial damage, destruction, or other factors [*Cal. Const., art. XIIIA, § 2(b)*; *Rev. & Tax. Code § 51*]. The base year value does not include that portion of the previous base year value that was attributable to any portion of the property that has been destroyed or removed [*Rev. & Tax. Code § 51(b)*].

For purposes of determining "full cash value" or "fair market value" of real property (other than possessory interests) being appraised on a purchase, that value will be the purchase price, unless it is established by a preponderance of the evidence that the real property would not have been transferred for that price in an open market transaction [*Rev. & Tax. Code § 110(b)*; *see Rev. & Tax. Code § 110(a)*]. The purchase price will be rebuttably presumed to be the "full cash

value" or "fair market value" if the terms of the transaction were negotiated at arm's length between a knowledgeable transferor and transferee, neither of whom could take advantage of the exigencies of the other [*Rev. & Tax. Code § 110(b)*; *but see Rev. & Tax. Code § 110(c)* (presumption does not apply if taxpayer fails to provide related information in preliminary change-of-ownership report or change-in-ownership statement); *see also § 23.31[4]*]. For these purposes, "purchase price" means the total consideration provided by the buyer or on the buyer's behalf, valued in money, whether paid in money or otherwise. There is a rebuttable presumption that the value of improvements financed by the proceeds of an assessment resulting in a lien imposed on the property by a public entity is reflected in the total consideration, exclusive of that lien amount, involved in the transaction. This presumption may be overcome if the assessor establishes by a preponderance of the evidence that all or a portion of the value of those improvements is not reflected in that consideration. If a single transaction results in a change of ownership of more than one parcel of real property, the purchase price must be allocated among those parcels and any other assets transferred in the transaction, based on the relative fair market value of each [*Rev. & Tax. Code § 110(b)*].

The property will be reappraised at its full cash value as of the date on which the change of ownership occurs or the new construction is completed [*Rev. & Tax. Code § 75.10(a)*; *18 Cal. Code Reg. §§ 462.001, 463*; *but see Rev. & Tax. Code §§ 68, 75.10(b)* (exceptions)]. For a reappraisal triggered by a sale, the date of the ownership change is rebuttably presumed to be either the date of recordation, when the transfer is evidenced by the recordation of a deed or other document, or the date of the transfer document, when the transfer is accomplished by an unrecorded document [*18 Cal. Code Reg. § 462.260(a)*]. The presumption may be rebutted by evidence proving a different date to be either the date all parties' instructions have been met in escrow or the date the contract of the parties became specifically enforceable [*18 Cal. Code Reg. § 462.260(a)*].

A taxpayer who is over the age of 55 or who is severely and permanently disabled may transfer the base year value of his or her principal residence to any replacement dwelling of equal or lesser value within the same county [*but see Rev. & Tax. Code § 69.5(a)(2)* (authorizing transfer of base year value to replacement dwelling in other county, if permitted by local ordinance)], provided the following conditions are satisfied:

- The original residence was, and the replacement dwelling is, eligible for the homeowner's property tax exemption [*see Rev. & Tax. Code § 218*; *Cal. Const., art. XIII, § 3(k)*].

- The replacement dwelling is purchased or newly constructed by the taxpayer within two years after the sale of the original residence.

- The taxpayer files a claim with the county assessor within three years after the purchase of the replacement property or the completion of construction on that property [Rev. & Tax. Code § 69.5(a)(1), (f)(1)(F)]. A claim that is filed after the expiration of the three-year filing period must, nevertheless, be considered by the assessor, if specified conditions are satisfied [*see* Rev. & Tax. Code § 69.5(f)(2)].

Counties are required to prepare supplemental assessment rolls and collect supplemental taxes for real property that has been the subject of a transaction triggering reappraisal [*see Rev. & Tax. Code §§ 75, 75.80*]. The assessed value (that is, the property's new base year value) [*see Rev. & Tax. Code §§ 75.9, 75.10*] is entered on the supplemental roll, which reflects the difference between the property's taxable value on the current assessment roll (if any) and its new base year value. The buyer will be liable for a supplemental assessment prorated for the portion of the tax year remaining after the reappraisal [*see Rev. & Tax. Code §§ 75.41, 75.51*].

[3] Attachment of Lien

Local ad valorem real property taxes become a lien on the property [*Rev. & Tax. Code §§ 2187-2189*]. The lien date (effective date) is the first day of January preceding the fiscal year for which the taxes are levied [*Rev. & Tax. Code § 2192*]. On the lien date, the amount of the tax for the following fiscal year will not be known; therefore, when the tax

rate is subsequently established and the taxes are assessed and levied, they will relate back to the lien date [*see City of Long Beach v. Aistrup (1958) 164 Cal. App. 2d 41, 52, 330 P.2d 282]* . The tax lien continues until the taxes are paid or legally canceled or the property is sold to satisfy the tax lien [*Rev. & Tax. Code § 2194*].

[4] Report of Change of Ownership

Following any change of ownership of taxable real property, the transferee must report the transfer to officials of the county in which the property is located [*Rev. & Tax. Code § 480(a)*]. For these purposes, a change of ownership is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*]. The purchase of real property falls within that definition [*see Rev. & Tax. Code § 67* ("purchase" means a change of ownership for consideration)].

When, as in the case of a purchase, the change of ownership is effected by the recordation of a deed or other document, the transferee must file a completed preliminary change-of-ownership report with the county recorder at the time of recordation [*see Rev. & Tax. Code § 480.3*; *see also § 23.306*]. If that report is not filed, the transferee will be required to file a completed change-in-ownership statement [*Rev. & Tax. Code § 480(a)*] and pay an additional recording fee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuationTax LawState & Local TaxesReal Property TaxCollectionTax Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART II. LEGAL BACKGROUND

9-23 California Legal Forms--Transaction Guide §§ 23.32-23.99

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.32[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

9-23 California Legal Forms--Transaction Guide § 23.100

AUTHOR: William M. Hensley Editorial Consultant

§ 23.100 Facts

[1] Basic Facts

1. Basic information about buyer and seller (and title holder, if title holder is not seller):

a. Name.

b. Address.

c. Telephone number.

d. Legal status:
(1) Individual.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Joint venture.

(6) Unincorporated association.

(7) Other.

e. For any party that is an individual:

(1) Age (if party may be a minor or is selling a residence and may be over 55) [*see § 23.111*].

(2) Marital status.

(3) If married:
(a) Name and address of spouse.

(b) Date and place of marriage.

(4) Regarding any previous marriages:

(a) Date, place, and length of marriage.

(b) Name and address of former spouse.

(c) Circumstances of termination.

2. Additional information concerning any parties who are not individuals, such as:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind party.

3. Information concerning property:

a. Location [*see § 23.14*]:

(1) Street address, city, and county.

(2) General location (general area and vicinity).

b. Type of property, such as:

(1) Single-family residence.

(2) Apartment building or complex.

(3) Common-interest development or unit in one.

(4) Warehouse.

(5) Office building.

(6) Raw (vacant) land.

(7) Construction site.

(8) Farm.

(9) Industrial property.

(10) Shopping center.

(11) Mobilehome park.

(12) Senior citizen housing development.

c. Size of property:

(1) Number of units, if residential.

(2) Acreage, if vacant land.

(3) Square footage, if office or other commercial or industrial building.

d. Inventory or description of improvements, fixtures, and personal property, if any, to be sold with land.

e. Actual or anticipated date of completion of any significant construction.

f. Approximate value of property.

4. Steps already taken in connection with transaction.

a. Whether option agreement has been signed.

b. Whether contract has been signed.

c. If escrow agent has been retained:

(1) Whether escrow file has been opened.

(2) Escrow number, if any.

NOTE:
For detailed checklists of escrow procedures, see Ch. 26, ***Real Property Escrows*** .

d. Whether preliminary title report has been ordered and received.

e. Whether any inspections have been ordered or performed and reports have been received.

5. Steps attorney is retained to perform, such as:

a. Negotiate terms of proposed transaction.

b. Draft sale contract and related documents.

c. Review contract drafted by another.

d. Advise on rights under executory contract.

e. Coordinate complicated development or transfer transaction.

6. Extent of client's previous experience with this type of transaction and real estate transactions in general.

7. Names, addresses, titles, and telephone numbers of persons significantly connected with transaction, such as:

a. Attorney representing other party.

b. Real estate agent.

c. Contractor.

d. Architect.

e. Engineer.

f. Lender.

g. Escrow agent.

h. Title insurer.

i. Surveyor.

j. Accountant.

k. Market research analyst.

l. Appraiser.

m. Geologist.

n. Well-driller.

o. Hydrologist.

p. Common-interest development owners' association.

q. Mutual or private water company.

r. Persons under contract to provide maintenance or other services to subject property.

s. Structural pest-control operator or registered pest-control company.

t. Governmental officials or inspectors responsible for building and health code inspection and report.

[2] Additional Facts About Seller and Property

1. When and how seller acquired property.

2. Reasons for selling.

3. How seller holds title:

a. As corporation.

b. As partnership, and whether in partnership name or name of partner.

c. As individual.

d. With co-owner [*see Civ. Code § 682*]:
(1) In joint tenancy.

(2) In tenancy in common.

(3) With spouse [*see Fam. Code § 750*]:
(a) In joint tenancy.

(b) In tenancy in common.

(c) As community property.

(d) As community property with right of survivorship.

4. Other persons with potential equitable or community-property interest in property.

a. Facts and circumstances relevant to assessment of potential claim.

b. Nature and status of communications and dealings relating to potential interest.

5. Adverse claims against seller's title, if any.

a. Nature of claim.

b. Basis for claim and circumstances leading to claim.

c. Seller's contentions regarding claim.

d. Actions taken by claimant to assert or enforce claim, if any.

e. Nature and status of seller's dealings with claimant.

6. Pending litigation affecting property, if any.

7. Easements burdening or benefiting property.

8. Other encumbrances or liens against property.

a. Basis for lien and circumstances surrounding imposition.

b. Original amount of lien claim.

c. Payments made by seller on underlying obligation.

d. Nature and basis of seller's objections to amount or validity of lien, if any.

e. Actions taken by lien claimant to perfect or enforce lien, if any.

f. Nature and status of seller's dealings with lien claimant.

9. Other agreements affecting property, such as:

a. Party wall agreement.

b. Boundary agreement.

10. If property is currently leased or rented:

a. Number of rental units.

b. Number of units presently occupied.

c. Terms of leases or rental agreements in effect.

d. Amount of security deposits held by seller.

e. Whether any eviction proceedings are pending.

11. If seller is corporation:

a. Date and state of incorporation.

b. Date board of directors or shareholders have approved or will approve sale.

NOTE:

Authorization should appear in the bylaws [***see*** Ch. 4, ***Bylaws***] or a resolution of the board of directors [***see*** Ch. 5, ***Directors' Meetings, Actions, and Resolutions***].

12. If seller is partnership, names of partners authorized to sign conveyance of property.

NOTE:

Title companies usually require the signatures of all partners or satisfactory evidence that the partners who signed the instrument were authorized to do so. A provision in a recorded statement of partnership signed by all partners granting such authority is satisfactory evidence of that authority [***see*** Ch. 15, ***General Partnerships***].

13. Concerning purchase price:

a. Total asking price.

b. Price per acre or net acre for raw land.

c. Amount of total cash down payment.

d. Cash payable on close of escrow.

e. For payments to be made after close of escrow (such as on sale of lots in subdivision to be created on purchased land), how payment is to be secured, such as deed of trust [*see § 23.131*].

f. Whether price reflects anticipated assumption of existing loan or other encumbrances on land.

NOTE:

The attorney should promptly ascertain whether an existing loan is assumable (in other words, whether it contains a "due on sale" clause). If it is not assumable, the lender's consent to the assumption will have to be obtained. For discussion of due on sale clauses and the assumption of loans secured by real property in general, see Ch. 25, ***Real Estate Loans*** .

14. Concerning existing loan or loans:

a. Original lender.

b. Present holder or beneficiary, if different.

c. Approximate unpaid principal balance.

d. Rate of interest.

e. Concerning periodic payments:

(1) Amount of each payment.

(2) Frequency of payments.

(3) Due dates.

(4) Whether payments include interest, taxes, and insurance.

f. Regarding any balloon payment:

(1) Due date.

(2) Amount (estimate if unknown).

(3) Whether borrower has contractual right to refinance it.

g. Prepayment penalty, if any.

h. Additional amounts owed under note or deed of trust, if any.

i. Amount in impound account, if any (if known to seller).

j. Nature of any existing delinquencies or defaults.

k. Status of any delinquencies or defaults and action taken by lender in response.

15. Concerning escrow:

a. Name and location (or desired manner of selection) of escrow agent.

b. Time when escrow should close.

c. Items to be prorated in escrow:

(1) Real property taxes.

(2) Special assessments and liens.

(3) Insurance premiums.

(4) Rents.

(5) Deposits.

d. Expenses of escrow each party is to pay [*see § 23.114*].

16. Regarding any inspections already performed:

a. Date.

b. Name and title of inspector.

c. Inspector's employer.

d. Reason for inspection.

e. Whether report has been prepared and received.

f. Status of arrangements, if any, for necessary corrective work.

PRACTICE TIP:

Home Inspections Are Recommended. Home inspections by independent contractors should be utilized by most residential buyers. Even though they have significant carve-outs, these inspections are cheap and usually give notice of "yellow flags" or "red flags" that might lead a buyer to a pass on a purchase or to negotiate through the escrow process issues revealed by the inspection.

In hilly areas (especially areas built on fill), a buyer is well advised to obtain a geological inspection for such hazards as ancient landslides, subsidence-sensitive soil, and the like.

Home inspections also provide a source of comfort for other real estate professionals. One recent case allowed an equitable indemnity action to proceed against a home inspector by a real estate broker in a disgruntled buyer lawsuit [*see Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 103 Cal. Rptr. 2d 858] . By William M. Hensley.*

17. Concerning insurance coverage on property:

a. Type and limits of each policy.

b. Term and expiration date of policy.

c. Premium.

d. Transferability of policy.

18. Contingencies (conditions) seller wishes to include in contract [*see § 23.16*; *see also § 23.113* (list of common contingencies)], such as seller's ability to purchase replacement property.

[3] Additional Facts About Buyer

1. Purpose for acquiring property, such as:

a. Principal residence.

b. Speculation.

c. Subdivision.

d. Commercial development.

e. Lease back to seller.

f. Income.

g. Investment.

2. Proposed or actual source of financing:

a. Cash down payment.

b. Real estate loan [*see* Ch. 25, *Real Estate Loans*].
(1) Institutional lender.

(2) Private financing.

c. Anticipated seller financing.

d. Construction and take-out loans [*see* Ch. 30A, *Construction Financing*].

e. Assumption of existing loan on property.

3. Status of buyer's attempts to obtain financing:

a. Name and address of each lender to whom buyer has applied for financing.

b. Date completed loan package was submitted to lender.

c. Current status of application, if known.

d. Whether formal or informal loan commitment has been obtained.

4. If transaction will be contingent on sale of buyer's present residence:

a. Status of attempts to sell.

b. Net proceeds to be realized under terms of contract or pending offers.

c. If contract has been signed:

(1) Date escrow was opened.

(2) Date specified for close of escrow.

(3) Contingencies still to be met.

(4) Other potential problems.

5. Other contingencies desired by buyer.

NOTE:
For a checklist of contingencies that should be considered by buyers, see *§ 23.113*. For discussion of the

use of contingencies in real property sale contracts, see *§ 23.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

9-23 California Legal Forms--Transaction Guide § 23.101

AUTHOR: William M. Hensley Editorial Consultant

§ 23.101 Documents to Be Obtained

[1] Seller's Documents

1. Any correspondence between buyer and seller.

2. Deed to property.

3. Preliminary title report and title policy issued:

    a. In connection with present transaction, if available.

    b. Issued to seller at time of acquisition of property.

4. Copy of each document listed in preliminary title report.

5. Notes, mortgages, or other documents relating to existing security interests in property.

6. Most recent property tax bill.

7. Copies of any existing leases on property.

8. Copies of any fire, casualty, or other insurance policies insuring land and any improvements that are to be transferred to buyer.

9. If seller is corporation, certified copy of resolution of board of directors [*see* Ch. 5, *Directors'*

Meetings, Actions, and Resolutions] or shareholders approving sale.

10. If seller is partnership holding title in its name, certified copy of statement of partnership recorded in county where land is located [*see* Ch. 15, Part A, *Formation of General Partnerships* , Pt. A].

11. If transaction involves new construction, copies of:

a. Contract between owner and prime design professional (such as architect or engineer) [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*].

b. Construction contract documents [*see* Ch. 30D, *Construction Contracts and Subcontracts*]:

(1) Owner's contract with prime contractor.

(2) Drawings and specifications.

(3) General, supplementary, and other conditions.

(4) Addenda.

(5) Modifications.

c. Names and addresses of subcontractors.

d. Building permits.

e. Use permit.

12. Copy of any broker's listing contract [*see* Ch. 21, *Agreements With Real Estate Brokers and Agents*].

13. Pest-control reports, building or health code inspection reports, or other reports relating to condition of property.

14. Other agreements affecting property, such as:

a. Party wall agreement.

b. Boundary agreement.

c. Option agreement.

d. Instruments creating easements burdening or benefiting property.

15. Documents evidencing zoning relief, such as:

a. Conditional use permit.

b. Variance.

16. Most recent survey of property.

17. Service or maintenance contracts on property.

18. If transaction involves common-interest development, following project documents (as applicable):

a. Declaration ("CCRs").

b. Condominium plan.

c. Bylaws for owners' association.

d. Rules and regulations for project.

e. Articles of incorporation or association for owners' association.

f. Minutes of meetings of owners' association's board of directors.

NOTE:
Minutes of meetings of the owners' association's board of directors can disclose risks that the buyer normally would want to consider, such as litigation over construction defects in common areas.

19. Instruments or documents creating or asserting liens against property.

20. Pleadings, papers, and correspondence in any litigation affecting title to or use of property.

21. Membership certificate or other document evidencing membership in owners' association, if any.

22. Stock certificate or other document evidencing membership in or subscription to mutual or private water company, if any.

23. Bills of sale, purchase receipts, or other documents evidencing seller's ownership of personal property to be conveyed to buyer, if any.

24. Pest-control certification, if one has been secured.

25. Statements, invoices, and receipts showing real estate taxes and special assessments imposed on property and seller's payment of those taxes and assessments.

26. Statements, invoices, receipts, and other documents establishing seller's advance payment of fees and costs incidental to maintenance or use of property.

27. Seller's books and records showing:

a. Rental payments received.

b. Security deposits held by seller.

[2] Buyer's Documents

1. Correspondence between buyer and seller.

2. Contract between buyer and real estate broker, if any.

3. Appraisal obtained by buyer.

4. Loan applications and related materials obtained from prospective lenders.

5. Option agreement signed by buyer and pertaining to subject property.

6. Documents relating to sale of additional property by buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.102-23.109

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-23 California Legal Forms--Transaction Guide § 23.110

AUTHOR: William M. Hensley Editorial Consultant

§ 23.110 Capacity and Consent of Parties

1. If party is minor, is he or she emancipated and capable of entering into binding contract to buy or sell real property [*see Fam. Code §§ 7002, 7050*]?

2. If seller has been adjudicated incompetent, has a conservator been appointed to sell the property [*see Prob. Code § 2540*]?

3. If corporation is a party to sale contract:

a. Has board adopted resolution authorizing sale or purchase [*see* Ch. 5, *Directors' Meetings, Actions, and Resolutions*]?

b. If corporation is seller:
(1) Is sale in usual and regular course of corporation's business?

(2) Does property represent all or substantially all of corporation's assets?

NOTE:
Statutory approval requirements apply to the sale of all or substantially all of the assets of a corporation [***see*** *Corp. Code § 1001(a)*; ***see also*** *§ 23.121*]. If the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; ***see*** *Corp. Code § 1150 et seq.* (conversions)].

4. If seller is limited partnership:

a. Has certified copy of certificate of limited partnership been recorded in county where real property is located [*see Corp. Code § 15902.01(e)* (ULPA '08), *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010)]?

b. Does subject property constitute all or a substantial part of assets of partnership?

NOTE:

The consent of each partner is necessary to sell, lease, exchange, or otherwise dispose of all or substantially all of a limited partnership's property, with or without the goodwill, other than in the usual and regular course of the limited partnership's activities [*Corp. Code § 15904.06(a)* (ULPA '08)]. Under the CRLPA, unless the limited partnership agreement provides to the contrary, a transfer of all or a substantial part of the assets of the limited partnership must be authorized by the affirmative vote of a majority in interest of the limited partners [*Corp. Code § 15636(f)*].

5. If seller is general partnership, does recorded statement of partnership (signed by every partner) authorize specified partners to sign instruments on behalf of partnership?

6. If seller is unincorporated association [*see Corp. Code § 18120*]:

a. Has statement listing persons authorized to sign conveyances of association property been recorded in county where real property is located?

b. Has member of association recorded contradictory statement concerning that authority?

7. Is mutual assent to contract present [*see § 23.13*]?

a. Is consent of each party free and mutual?

b. Has consent been (or will it be) communicated by each party to the other?

c. Do parties agree on all material elements of transaction?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.111

AUTHOR: William M. Hensley Editorial Consultant

§ 23.111 Tax Considerations

1. For purposes of federal and California state income taxes, will real property be considered [*see § 23.26[1]*]:

a. Noncapital asset, that is, real property held primarily for sale to customers in ordinary course of taxpayer's trade or business [*I.R.C. § 1221*; *Rev. & Tax. Code § 18151*]?

b. Section 1231 asset, that is, real property that [*I.R.C. § 1231(b)*; *Rev. & Tax. Code § 18151*]:
(1) Has been held by taxpayer for more than one year?

(2) Has been used in taxpayer's trade or business?

(3) Has not been held primarily for sale to customers in ordinary course of taxpayer's trade or business?

c. Capital asset, that is, real property that is not noncapital asset or Section 1231 asset [*I.R.C. § 1221(a)(1), (2)*; *Rev. & Tax. Code § 18151*]?

2. If property is seller's personal residence [*see § 23.26[6]*]:

a. Is transaction subject to rules allowing specified amount of gain from sale or exchange of principal residence to be excluded from income [*see I.R.C. § 121*; *Rev. & Tax. Code § 17131*; *see also Rev. & Tax. Code § 17152* (how California law differs from *I.R.C. § 121*)?]

b. Does seller have option of applying rollover provisions of former *I.R.C. § 1034* because sale occurred before May 7, 1997 (or within two years after that date if there was binding contract in existence before that date)?

3. If at least one payment for property is to be received after close of taxable year in which disposition occurs [*see § 23.27*], does seller wish to use installment method of reporting income from sale [*see* Ch. 25A, *Security Instruments for Real Estate Financing*]?

4. For purposes of depreciation recapture, when was property placed in service [*see § 23.26[5]*]?

5. How will purchase price be allocated among assets being sold?

NOTE:

For tax purposes, the purchase price of improved property must be allocated among the assets transferred to the buyer. The amount of the seller's gain or loss will be computed on an asset-by-asset basis, and the buyer will be treated as having purchased each asset separately [***see*** *Treas. Reg. § 1.61-6(a)*]. The purchase price of unimproved property may also be allocated under certain circumstances, such as when subdivided lots are being sold. For further discussion, see *§ 23.28*.

Since the allocation of the purchase price causes different tax consequences to the buyer and to the seller, they may disagree about the allocation even though they are in agreement as to the total amount of the purchase price. Thus the allocation of the purchase price may require extensive negotiations. For instance, recapture on depreciation previously taken by the seller on certain assets will be ordinary income to the seller at the time of the sale [*I.R.C. §§ 1245*, *1250*], and the seller will attempt to allocate as small a portion of the sales price to those assets as possible. However, the buyer will want as much of the purchase price as possible allocated to the depreciable property, because the buyer's subsequent depreciation on these assets depends on his or her basis in these assets. (The Tax Reform Act of 1986 [Pub. L. No. 99-514] made this aspect of negotiation less critical, however. Because accelerated depreciation methods are no longer available, the importance to the buyer of allocating as much of the purchase price as possible to depreciable buildings, rather than to nondepreciable land, has been diminished [***see*** *§ 23.26[5]*].)

6. Will interest paid by buyer in connection with purchase be:

a. Paid or accrued on indebtedness properly allocable to taxpayer's trade or business (fully deductible [*see I.R.C. § 163(a), (h)(2)(A)*])?

b. Paid or accrued on indebtedness that is secured by "qualified residence" of taxpayer [*see I.R.C. § 163(h)(4)(A)* ("qualified residence" defined)]?

NOTE:

For discussion of the definition of "qualified residence interest," which determines the extent to which this interest is deductible [***see*** *I.R.C. § 163(h)(3)(A)*], see *§ 23.27[3]*.

c. Incurred in connection with "passive activities" [*see I.R.C. § 469(c)(1), (2)*]?

NOTE:

For these purposes, all rental activities and activities involving the conduct of a trade or business in which the taxpayer does not materially participate are passive activities [*I.R.C.*

§ 469(c)(1), (2)]. Deductions arising from these activities (including interest deductions) may only be taken against income attributable to the taxpayer's aggregate passive activities [*I.R.C. § 469(a)(1), (d)*; ***see*** *§ 23.27[4]*].

d. Paid or accrued on indebtedness incurred or continued to purchase or carry property held for investment?

NOTE:

Deductions for this investment interest may not exceed net investment income for the same taxable year [*I.R.C. § 163(d)(1), (3)*; ***see*** *§ 23.27[5]*].

7. If seller is "foreign person," is buyer required to withhold part of gross sale price [*see I.R.C. § 1445*; *see also § 23.29*]?

8. Is buyer required to withhold because transaction does not come under exemption [*see Rev. & Tax. Code § 18662(e)*; *see also § 23.30*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationDeductions for Business ExpensesInterest (IRC sec. 163)Tax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Capital AssetsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Disposition of Depreciable PropertyTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Installment MethodTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)



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9-23 California Legal Forms--Transaction Guide § 23.112

AUTHOR: William M. Hensley Editorial Consultant

§ 23.112 Title Insurance

1. What type of title insurance policy should buyer obtain [*see* Ch. 26A, *Title Insurance*]?

2. How much protection should be purchased [*see* Ch. 26A, *Title Insurance*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle Insurance



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9-23 California Legal Forms--Transaction Guide § 23.113

AUTHOR: William M. Hensley Editorial Consultant

§ 23.113 Contingencies (Conditions)

1. What contingencies should be included in contract [*see § 23.200[2]*, P 3.01 et seq.; *§ 23.201[2]*, P 3.01 et seq.; *§ 23.202[2]*, P 3.01 et seq.]?

a. Buyer's approval of preliminary title report.

NOTE:
The seller of real property must convey "good" or "marketable" title to the buyer [King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321 ; ***see*** *§ 23.24*]. The process of establishing the condition of title typically commences with the receipt of a preliminary title report by the buyer, who must approve or disapprove every exception listed in the report [***see*** *§ 23.200[1][d][ii]*].

b. Conveyance of marketable title to buyer.

c. Issuance of title insurance policy [*see § 23.200[1][d][ii]*].

d. Delivery of possession to buyer [*see § 23.200[1][d][iii]*]:

(1) On close of escrow.

(2) After close of escrow (with seller retaining possession for specified time) [*see § 23.326* (temporary lease agreement)].

(3) Before close of escrow [*see § 23.327* (interim occupancy agreement)].

NOTE:

Unless the sale contract provides otherwise, the risk of loss will shift from the seller to the buyer on the transfer of possession or legal title [***see*** *Civ. Code § 1662*; ***see also*** *§ 23.251[1]*].

e. Survey of property.

NOTE:

A survey is particularly important when the purchase price of unimproved property is determined by the size of the parcel [***see*** *§ 23.201[1][e][i]*].

f. Inspections or tests regarding physical condition of property, such as:

(1) Soil test, geological test, or other engineering test.

NOTE:

These tests are often used to help a developer determine whether the physical condition of the property is compatible with development plans [***see*** *§ 23.201[1][e][ii]*].

(2) Inspection by licensed contractor [*see § 23.202[1][c][vi]*].

(3) Roof inspection [*see § 23.202[1][c][vii]*].

(4) Structural pest-control (termite) inspection [*see § 23.133*].

NOTE:

Lenders often require a recent structural pest-control report ("termite report") and a certification of performance of any necessary corrective work, as a condition to the release of loan proceeds [***see*** *Bus. & Prof. Code § 8519*]. The buyer may wish to postpone performance of any corrective work until after the sale has closed, or may be willing to accept a reduction in the purchase price in lieu of the issuance before the close of escrow of a certification. If the parties agree to require a structural pest-control report and clearance, they should decide at the outset who will pay for any corrective work. For discussion, see *§ 23.320[1]*.

g. Issuance or granting of governmental approvals required by buyer, such as:

(1) Building permit [*see § 23.201[1][e][v]*].

(2) Variance [*see § 23.201[1][e][iii]*].

(3) Subdivision map approval [*see § 23.201[1][e][iv]*].

(4) Other permits, certificates, or licenses [*see § 23.202[1][c][v]*].

NOTE:

If the buyer's intended use requires a governmental approval, the buyer should make his or her obligation to perform contingent on the receipt of the necessary approval.

h. Suitability of property for buyer's intended use [*see § 23.234*].

i. Financing contingencies [*see § 23.131*].

j. If sale involves commercial structure containing multiple rental units:

(1) Buyer's approval of leases, maintenance or service contracts, and other agreements affecting property [*see § 23.202[1][c][i]*].

(2) Buyer's approval of seller's books and records [*see § 23.202[1][c][iv]*].

(3) Submission to buyer of tenant estoppel certificates [*see §§ 23.202[1][c][ii], 23.322*].

(4) Seller's assignment of leases or any other agreements to buyer [*see § 23.202[1][c][iii]*].

(5) Buyer's obtaining satisfactory leases from prospective tenants [*see § 23.235*].

k. Inventory of personal property to be included in sale [*see § 23.202[1][c][viii]*].

l. Bill of sale for personal property [*see § 23.202[1][c][viii]*].

m. Purchase or sale of other property by buyer [*see §§ 23.230-23.232*].

NOTE:
The buyer should insist on the inclusion of an appropriate contingency when the buyer's plans for the property require the purchase of multiple parcels that have different owners [***see** §§ 23.230, 23.231*] or when the buyer must sell other property to obtain the proceeds necessary to purchase the property covered by the sale contract [***see** § 23.232*].

n. Seller's purchase of other property [*see § 23.233*].

o. Seller's endorsement and transfer to buyer of:

(1) Membership in owners' association [*see § 23.238*].

(2) Shares in mutual water company [*see § 23.237*].

(3) Other documents evidencing transfer of membership or entitlement.

p. Execution of separate agreement pertaining to property, such as easement agreement or party wall agreement [*see § 23.239*].

q. Receipt of estimate of reasonable value by Department of Veterans Affairs [*see § 23.223*].

r. Receipt of appraisal by Federal Housing Administration [*see § 23.224*].

s. Other.

2. Regarding each contingency:

a. Who will benefit from contingency?

b. Who will determine whether contingency has been met [*see* Ch. 26, *Real Property Escrows* ; *see also § 23.16*]?

(1) Parties (outside escrow).

(2) Escrow agent.

c. What is deadline for meeting contingency?

(1) Close of escrow.

(2) Specified date.

(3) Other.

d. What steps, if any, must be taken by party to indicate that contingency has been met (such as written notice of satisfaction of escrow conditions [*see* Ch. 26, *Real Property Escrows* ; *see also § 23.200[1][c]*])?

e. What will be effect of failure of contingency?

(1) Automatic cancellation of contract.

(2) Cancellation on written notice.

(3) Waiver of contingency.

NOTE:
For an illustrative notice of waiver of a contingency, see Ch. 26, ***Real Property Escrows*** .

(4) Option or obligation of party to remedy failure to perform contingency.

(5) Option of party intended to benefit from contingency to select any of following:

(a) Termination of contract.

(b) Purchase property:
(i) With corresponding reduction in purchase price.

(ii) Without price reduction.

(c) Remove defect and purchase property with corresponding price reduction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable

TitleRemedies



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9-23 California Legal Forms--Transaction Guide § 23.114

AUTHOR: William M. Hensley Editorial Consultant

§ 23.114 Costs and Expenses

1. What costs or expenses of maintenance or use of property should be prorated [*see* Ch. 26, *Real Property Escrows*]?

a. Real property taxes.

b. Special assessments.

c. Maintenance fees.

d. Owners' association dues.

e. Premiums for insurance policies to be transferred to buyer.

f. Utility bills.

g. Other.

2. Who will be obligated to pay other costs and expenses of sale and escrow?

a. Broker's commission.

b. Cost of preliminary report and title insurance policy.

c. Initial pest-control report.

d. Cost of corrective pest-control work [*see § 23.133*].

e. Fees for building and health code inspection report and costs of corrective work.

f. Documentary transfer tax and local transfer tax [*see* Ch. 27, *Deeds and Recording* ; California Real Estate Law and Practice, Ch. 132, *Disposition* , Pt. F (Matthew Bender)].

NOTE:
The transfer tax must be declared on the face of the deed or in a separate document submitted to the recorder along with the deed. If a separate document is used, it will not be recorded [*Rev. & Tax. Code § 11932*]; thus, the price paid for the property (the "total consideration," on which the tax is based) will not be disclosed in the public record. Either or both of the parties might prefer to have a separate document used for declaring the tax, and in that case, it would be appropriate for the contract to provide that the seller's escrow instructions will require use of a separate document.

g. Fee for reconveyance of existing deed of trust.

h. Recording fees.

i. Fees and charges for services of escrow agent.

3. Should any of those costs or expenses be prorated or paid by parties directly (outside escrow) [*see* Ch. 26, *Real Property Escrows*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersRight to CommissionsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrowTax LawState & Local TaxesReal Property TaxGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.115

AUTHOR: William M. Hensley Editorial Consultant

§ 23.115 Miscellaneous

1. What instruments or documents must be obtained and recorded to convey clear title to buyer?

a. Quitclaim deed conveying interest of record owner, spouse, or other potential claimant to seller.

b. Reconveyance of deed of trust.

c. Instruments or documents discharging and removing liens:
(1) Acknowledgment of satisfaction of judgment.

(2) Release of mechanic's lien.

(3) Release of tax lien.

(4) Release of lis pendens or order expunging lis pendens.

2. Will account of either party be credited or debited for special items?

a. Difference between estimated balance and actual balance of loan to be assumed by buyer.

b. Money retained in impound account as result of buyer's assumption of loan made to seller.

c. Buyer's assumption of liability for security deposits held by seller.

d. Rents owing for rental periods ending before close of escrow.

3. Will sale or buyer's proposed use be subject to special state or federal laws?

a. Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; *see* Ch. 34, *Condominiums*].

b. Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see* Ch. 30, *Subdivision Regulation*].

c. Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see* Ch. 30, *Subdivision Regulation*].

d. Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1701 et seq.*; *see* Ch. 30, *Subdivision Regulation*].

e. National Environmental Protection Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

f. California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

NOTE:
If CEQA is applicable, the attorney should also determine the applicability of the California Department of Real Estate's environmental impact evaluation regulations [***see*** *10 Cal. Code Reg. § 2820 et seq.*; ***see also*** Ch. 34, ***Condominiums***].

g. California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

h. Regional environmental regulations [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

4. Do any local regulations and requirements apply to buyer's proposed use of property [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*]?

a. Zoning requirements.

b. Setback and parking requirements.

c. Local building codes and regulations.

5. Is property within any special hazardous areas?

a. Special flood hazard area designated by Federal Emergency Management Agency [*see Gov. Code § 8589.3*].

b. Area of potential flooding [*see Gov. Code § 8589.4*].

c. Very high fire hazard severity zone designated pursuant to *Gov. Code § 51175 et seq.* [*see Gov. Code § 51183.5*].

d. Wildland area that may contain substantial forest fire risks and hazards (that is, state responsibility area designated by State Board of Forestry pursuant to *Pub. Res. Code § 4125*) [*see Pub. Res. Code § 4136*].

e. Delineated earthquake fault zone [*see Pub. Res. Code § 2621.9*].

f. Seismic hazard zone as designated under *Pub. Res. Code § 2690 et seq.* [*see Pub. Res. Code § 2694*].

NOTE:

When the property is located within any such area, the transferor, or his or her agent, must disclose this to prospective transferees [***see, e.g.,*** *Civ. Code § 1103*]. For further discussion, see *§ 23.302[1]*.

6. Will proposed method of financing be subject to following federal consumer legislation?

a. Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*; *see* Ch. 25, *Real Estate Loans*].

b. Real Estate Settlement Procedures Act (RESPA) [*12 U.S.C. § 2601 et seq.*; *see* Ch. 25, *Real Estate Loans*].

7. Does proposed transaction involve residence in foreclosure (or "residential real property in foreclosure") [*see Civ. Code § 1695 et seq.*; § 23.11[3]]?

8. If seller is providing financing, will "arranger of credit" be used [*see § 23.21*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseBuilding & Housing Codes



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9-23 California Legal Forms--Transaction Guide §§ 23.116-23.119

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.116[Reserved]



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9-23 California Legal Forms--Transaction Guide

AUTHOR: William M. Hensley Editorial Consultant

NOTE:

This chapter focuses on the initial steps in a real property sale transaction: the negotiation, drafting, and execution of the real property sale contract. Thus this procedural guide covers only the steps leading up to execution of the sale contract, and certain related steps such as optional recordation [***see** § 23.124*] and statutory disclosures [***see** § 23.125*]. Also covered are other related and subsequent procedures, such as the performance of structural pest-control work [***see** § 23.150*].

Once the sale contract is signed, the parties normally open an escrow as soon as possible. The opening of an escrow, drafting of escrow instructions, and procedures up to and including the close of escrow are covered in Ch. 26, ***Real Property Escrows*** .



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9-23 California Legal Forms--Transaction Guide § 23.120

AUTHOR: William M. Hensley Editorial Consultant

§ 23.120 Representation

1. If requested to represent both parties to transaction:

    a. Recommend that one party obtain separate counsel.

    b. Determine whether conflict exists.

2. If parties do not withdraw request and do not appear to have conflicting or potentially conflicting interests, take following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

    a. Make full disclosure to each party of nature of representation of other party.

    b. Obtain written consent of both parties to arrangement before accepting employment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of Interest



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9-23 California Legal Forms--Transaction Guide § 23.121

AUTHOR: William M. Hensley Editorial Consultant

§ 23.121 Approval of Transaction

1. If seller is a corporation:

NOTE:
If the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; ***see*** *Corp. Code § 1150 et seq.* (conversions)].

a. If property represents all or substantially all of selling corporation's assets, have principal terms of sale [*Corp. Code § 1001(a)*; *see § 23.12[5]*]:
(1) Approved by board [*see Corp. Code § 151*].

(2) Approved by outstanding shares [*see Corp. Code § 152*], unless transaction is in usual and regular course of seller's business.

b. Attach to sale contract, as exhibit, certificate [*Corp. Code § 1002*] stating that:

(1) Sale has been validly approved by board.

(2) Whether property described in contract is or is not substantially all of corporate assets and sale is or is not in usual and regular course of business of corporation.

(3) If property constitutes all or substantially all the corporate assets and transfer is not in usual course of business of corporation, whether transfer has been approved by

outstanding shares of corporation pursuant to General Corporation Law, or approval is not required by General Corporation Law.

2. If property constitutes all or substantial part of assets of limited partnership, take following steps:

NOTE:
For discussion of ULPA '08 [*Corp. Code § 15900 et seq.*; *see Corp. Code §§ 15912.04, 15912.06* (operative date and limited application of former limited partnership acts prior to January 1, 2010), *see* Ch. 16, ***Formation of Limited Partnerships*** .

a. Under ULPA '08, obtain consent of each partner to sell, lease, exchange, or otherwise dispose of all or substantially all of limited partnership's property, with or without good will, other than in usual and regular course of limited partnership's activities [*Corp. Code § 15904.06(b)*].

b. Under CRLPA [*Corp. Code § 15636(f)(1)(b)* (repealed January 1, 2010):

(1) Submit sale to vote of limited partners.

(2) Proceed with sale only if majority in interest of limited partners vote for it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPurchase & SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.122

AUTHOR: William M. Hensley Editorial Consultant

§ 23.122 Offer and Acceptance

[1] Purchase Agreement; Deposit Receipt

NOTE:

The purchase agreement, sometimes referred to generally as a "deposit receipt," is a type of sale contract that is frequently used in smaller real estate transactions, such as the sale of a single-family residence. It is generally a printed form prepared by a real estate organization [***see, e.g.,*** *§ 23.203[2]* (California Association of Realtors (CAR) form of residential purchase agreement)] or commercial publisher. In [a]-[c], ***below***, are set forth procedures that may be followed by an attorney in a transaction involving the use of a purchase agreement. In most cases, however, most or all of the following steps will be performed by the parties with the assistance of their real estate agents.

[a] Buyer's Offer

1. Assist buyer in completing purchase agreement.

a. Complete applicable provisions.

b. Provide for attachment and incorporation by reference of agreements related to possession [*see § 23.203[1][c][iv]*], such as:

(1) Residential lease agreement [*see § 23.326*].

(2) Interim occupancy agreement [*see § 23.327*].

c. Have parties initial clauses when necessary, such as:

(1) Liquidated-damages provision [*see § 23.203[1][c][xiv]*].

(2) Optional terms and contingencies that are to apply to transaction [*see, e.g., § 23.203[2]*].

d. If desired, modify provisions of purchase agreement [*see § 23.203[1][b][iii]*]:

(1) List modifications in paragraph designated for this purpose.

(2) Use rider, addendum, or other document that is attached to deposit receipt and incorporated by reference.

e. Avoid making changes on face of purchase agreement [*see § 23.203[1][b][iii]*].

f. Give special consideration to whether certain provisions in printed form should be modified.

(1) Risk of loss [*see Civ. Code § 1662*; *see also § 23.203[1][f][i]*].

(2) Disclosure of agency relationship [*see Civ. Code § 2079.17*; *see also § 23.203[1][f][ii]*].

(3) Effect of failure to meet contingencies of sale [*see § 23.203[1][f][iii]*].

(4) Installation of smoke detector in single-family dwelling [*see Health & Safety Code § 13113.8*; *see also § 23.203[1][c][vii]*].

(5) Delivery of statutory real estate transfer disclosure statement to buyer of one-to-four-unit dwelling [*see Civ. Code §§ 1102, 1102.3*; *see also § 23.203[1][c][ix]*].

2. Obtain buyer's check for deposit, made payable to escrow agent.

3. Submit offer and deposit to seller.

4. Once parties agree to all terms, tender buyer's deposit and confirm that both parties have signed purchase agreement and all counteroffers [*see* [b], [c], *below*].

[b] Seller's Counteroffer

NOTE:
If the seller rejects the offer but wishes to make a counteroffer, the seller's attorney can assist in the following steps.

1. Complete counteroffer form [*see § 23.204[1][c]*].

a. Identify paragraphs of purchase agreement that are to be modified.

b. Set forth modifications.

c. Describe any additions desired by seller.

2. Sign form.

3. Insert reference to counteroffer form on purchase agreement and sign purchase agreement [*see § 23.204[1][c]*].

4. Specify deadline for buyer's acceptance of counteroffer.

NOTE:
The CAR counteroffer form [***see § 23.204[2]***] gives the seller the right to accept other offers unless and until the seller receives a copy of the counteroffer form containing the buyer's signature [***see § 23.204[1][c][iii]***].

5. Once parties agree to all terms, confirm that both parties have signed purchase agreement and counteroffer.

[c] Buyer's Counteroffer

NOTE:
It is theoretically possible for a transaction to involve several rounds of counteroffers. In practice, after the first counteroffer is submitted, the parties should have a good idea of what basic terms are acceptable to each party. If the basic terms are acceptable, any remaining details can be hammered out in informal negotiations before the terms are memorialized in a final counteroffer. This avoids the need for preparing numerous rounds of paperwork to resolve the fine points of a transaction.

1. Assist buyer in specifying proposed changes to counteroffer on counteroffer form.

2. Specify deadline for seller's acceptance of buyer's counteroffer.

3. Once parties agree to all terms, confirm that both parties have signed purchase agreement and all counteroffers.

[2] Custom-Drafted Form

1. If retained to draft contract, use complete contracts set forth in this chapter [*see §§ 23.200-23.202*] and drafting guide [*see § 23.130* et seq.].

NOTE:
The form in *§ 23.200[2]* may be used for a relatively simple transaction, such as the purchase of a single-family dwelling. The form in *§ 23.201[2]* covers the sale of unimproved land to a developer. The form in *§ 23.202[2]* is a contract for the sale of a structure containing multiple dwelling units.

2. If client is seller and receives contract prepared by another attorney, review contract to ensure that it is

consistent with client's goals, otherwise acceptable to client, and legally sufficient.

NOTE:

For checklists of provisions that must or should be included in sale contracts, see *§ 23.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCounteroffersReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.123

AUTHOR: William M. Hensley Editorial Consultant

§ 23.123 Execution

1. Instruct seller and buyer (and their spouses, if necessary) to sign contract.

NOTE:

Under the California statute of frauds, a contract for the sale of real property must be subscribed by the parties to be charged or their agents [*Civ. Code § 1624(a)*; ***see*** *§ 23.11[2]*; ***see also*** *Gov. Code § 27287* (execution is prerequisite to recordation)]. Both spouses (either personally or by duly authorized agent) must sign any instrument by which community real property is sold or otherwise conveyed [*Fam. Code § 1102(a)*; ***see*** *Fam. Code § 1100(c)*; ***see also*** *§ 23.12[2]*].

The parties may sign the contract at the same time, or the buyer may sign it and treat it as an offer that does not become a contract until it is signed by the seller [***see*** *§ 23.203[1][b]*].

2. If seller is married and claims that property is his or her separate property, have seller's spouse sign quitclaim deed [*see* Ch. 27, *Deeds and Recording*] or sign statement waiving right to sign sale contract [*see §§ 23.12[2][b]*, *23.254*].

3. If seller's agent has been authorized in writing by seller to sign as attorney-in-fact, have agent first subscribe seller's name, and then agent's own name as attorney-in-fact [*see* Ch. 27, *Deeds and Recording*].

NOTE:

Under the statute of frauds [***see*** *§ 23.11[2]*], an agent cannot sign a sale contract on behalf

of the seller without prior written authorization from the seller [***see*** *Civ. Code §§ 1091, 1624(a)*]. In many cases, the agent will be an attorney-in-fact [***see*** *People ex rel. Dept. of Public Works v. Malone (1965) 232 Cal. App. 2d 531, 536-537, 42 Cal. Rptr. 888* ("attorney-in-fact" defined); ***see also*** Ch. 98, ***Powers of Attorney***]. When executing an instrument that transfers an interest in real property, an attorney-in-fact must first subscribe the name of the principal, and then his or her own name as the attorney-in-fact [*Civ. Code § 1095*].

4. If seller is partnership, have sale contract executed by partners expressly authorized by statement of general partnership, if any, otherwise all partners.

NOTE:

This execution requirement is typically imposed on general partnerships by title insurers and is more stringent than those required by California law [***see*** *§ 23.12[6]*]. In the case of a limited partnership, all of the general partners should sign the contract [***see*** *§ 23.12[7]*].

5. If seller is unincorporated association, have sale contract executed by president (or other head) and secretary, recording secretary, or other comparable officer, or by persons specifically designated by resolution adopted pursuant to articles of association or bylaws [*Corp. Code § 18115*; *see § 23.12[8]*].

6. If seller is corporation, obtain signatures of [*Corp. Code § 313*; *see § 23.12[5]*]:

a. Chairman of board, president, or any vice-president.

b. Secretary, assistant secretary, chief financial officer, or assistant treasurer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.124

AUTHOR: William M. Hensley Editorial Consultant

§ 23.124 Optional Recordation

NOTE:

Recording the contract or a memorandum of it protects the interest in the property of a good faith purchaser or mortgagee for value from any previous unrecorded conveyances and from any subsequent conveyances or actions affecting title [***see*** *Civ. Code § 1214*].

1. If desired, prepare memorandum of contract for recording purposes [*see § 23.321*].

NOTE:

A recorded memorandum will provide constructive notice of the contents of the contract to subsequent buyers and mortgagees [***see*** *Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 529, 131 Cal. Rptr. 394, 551 P.2d 1226]* while protecting the confidentiality of many of the terms of the contract [***see*** *§ 23.321[1]*].

2. Have memorandum of sale contract executed in same manner as contract [*see § 23.123*].

3. Arrange for acknowledgment of contract or memorandum by executing parties and for certification of acknowledgments by authorized officer [*see Gov. Code § 27287*].

NOTE:

For discussion of the current laws governing acknowledgments, including coverage of an assurance offered by *Civ. Code § 1190* regarding the capacity of a corporate participant in a sale transaction, see Ch. 27, ***Deeds and Recording*** .

4. Have contract or memorandum recorded in county in which property is situated.

NOTE:

An instrument is deemed to be recorded when, after being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record [*Civ. Code § 1170*]. Instruments entitled to be recorded must be recorded by the county recorder of the county in which the subject real property is situated [*Civ. Code § 1169*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.125

AUTHOR: William M. Hensley Editorial Consultant

§ 23.125 Disclosures

[1] Seller's Disclosures

1. If real property contains single-family dwelling, have seller provide buyer with smoke detector installation statement [*see § 23.20[5]*].

a. Include statement in deposit receipt or separate document [*see Health & Safety Code § 13113.8(b)*; *see also § 23.135*].

b. Deliver statement as soon as practicable before transfer of title [*Health & Safety Code § 13113.8(c)*].

NOTE:
The statement must indicate that the seller has complied with his or her statutory duty to install an operable smoke detector [*Health & Safety Code § 13113.8(b)*].

Although the installation and notice requirements do not apply to other types of structures, a similar installation requirement applies to other structures containing "dwelling units intended for human occupancy," whether or not the structures are about to be transferred [*Health & Safety Code § 13113.7*]. Sellers are not required to provide a notice of compliance with that installation requirement [***see*** *Health & Safety Code § 13113.7*; ***see also*** Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits***].

"Deliver" means delivery in person or by mail to the buyer, or to any person authorized to act for him or her in the transaction, or to additional transferees who have requested

delivery from the seller in writing. Delivery to a transferee's spouse will be deemed delivery to the transferee, unless the contract states otherwise [*Health & Safety Code § 13113.8(c)*].

2. If real property contains water heater, have seller provide buyer with certification that water heater has been braced, anchored, or strapped to resist falling or horizontal displacement from earthquake motion [*Health & Safety Code § 19211*; *see § 23.20[6]*].

NOTE:

This certification must be in writing and may be included in existing transaction documents, including, but not limited to, the sale contract or deposit receipt [***see** § 23.203[1][c][vii]*], statutory real estate transfer disclosure statement, local option real estate transfer disclosure statement, or Homeowner's Guide to Earthquake Safety [*Health & Safety Code § 19211(b)*]. For these purposes, "water heater" means any standard water heater with a capacity of not more than 120 gallons for which a pre-engineered strapping kit is readily available [*Health & Safety Code § 19211(d)*].

3. Unless statutory exception applies [*see Civ. Code § 1102.2*; *see also § 23.300[1][b][ii]*], have seller of any real property containing not more than four dwelling units take following steps [*see Civ. Code § 1102(a)*; *see also § 23.300*]:

a. Complete real estate transfer disclosure statement [*see Civ. Code § 1102.6* (official form)].

b. Deliver form to buyer as soon as practicable before transfer of title [*Civ. Code § 1102.3*].

c. Indicate compliance with these requirements in deposit receipt or other document [*see Civ. Code § 1102.3*; § 23.135].

d. If required by local ordinance [*Civ. Code § 1102.6a*], complete and deliver additional local option real estate transfer disclosure statement [*see § 23.301*].

e. If seller has actual knowledge of any former federal or state ordnance locations within neighborhood area, give written notice of that knowledge to buyer as soon as practicable before transfer of title [*Civ. Code § 1102.15*; *see § 23.304*].

f. Deliver disclosure notice concerning supplemental property tax bills to prospective purchaser [*Civ. Code § 1102.6c(a)*; *see § 23.300A*].

4. If real property consists of separate interest in condominium project, community apartment project, planned development, or stock cooperative, have seller furnish buyer with specified documents [*see* Ch. 34, *Condominiums*] relating to development in general and particular separate interest [*see Bus. & Prof. Code §§ 11018.1, 11018.6*; *Civ. Code §§ 1133, 1134, 1368(a), (e)*].

5. If real property consists of lot or parcel in subdivision, have seller furnish buyers with required disclosures [*see Bus. & Prof. Code §§ 11018(b), 11018.1*; *10 Cal. Code Reg. §§ 2795, 2795.1; see also Ch. 30, Subdivision Regulation, § 30.100* et seq.].

NOTE:

These disclosures consist of a final public report covering the subdivision [***see** Bus. & Prof. Code § 11018*] and, if the seller wishes to take reservations before the receipt of the final public report, a preliminary public report [***see** 10 Cal. Code Reg. §§ 2795, 2795.1*]. The seller must obtain acknowledgment of receipt of these documents from the buyer [***see** Bus. & Prof. Code § 11018.1(a)*; *10*

Cal. Code Reg. §§ 2795, 2795.1]. When taking reservations, the seller must also enter into a reservation agreement and an escrow agreement with the buyer [***see*** *10 Cal. Code Reg. §§ 2795, 2795.1*].

6. Have seller disclose any other material facts [*see Civ. Code §§ 1572(3), 1710(3)*; *see also Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8]* , preferably in writing (such as sale contract) and before execution of sale contract.

7. If property is located within specified hazardous area [*see Civ. Code § 1103*; *see also § 23.125*] and is subject to *Civ. Code § 1102 et seq.*, have seller (or seller's agent) deliver required natural hazard disclosure to buyer [*Civ. Code § 1103.2(a), (e)*].

NOTE:

This disclosure must be made on the statutory natural hazard disclosure statement form; or it may be made on the local option real estate transfer disclosure statement if the local statement includes substantially the same information and substantially the same warning set forth in the statutory disclosure form [*Civ. Code § 1103.2(a), (e)*]. For further discussion and the statutory form, see *§ 23.302*.

8. If property is not subject to *Civ. Code § 1102 et seq.* and is located within very high fire hazard severity zone [*see Gov. Code § 51179*] or wildland area that may contain substantial forest fire risks and hazards (that is, state responsibility area) [*see Pub. Res. Code § 4136*], have seller disclose this to buyer [*Gov. Code § 51183.5(a)*; *Pub. Res. Code § 4136(a)*; *see §§ 23.125, 23.302[1]*].

9. If property is not subject to *Civ. Code § 1102 et seq.* and is located within designated special flood hazard area, area of potential flooding shown on inundation map, delineated earthquake fault zone, or designated seismic hazard zone, instruct seller to disclose this to buyer if seller is acting without agent [*Gov. Code §§ 8589.3(a), 8589.4(a)*; *Pub. Res. Code §§ 2621.9(a), 2694(a)*; *see §§ 23.125, 23.302[1]*].

10. If property consists of residential dwelling of conventional light-frame construction built before 1960 and containing one-to-four living units, have seller deliver copy of Homeowner's Guide to Earthquake Safety and earthquake hazards disclosure statement containing information required by statute [*see Gov. Code § 8897.2*] to buyer as soon as practicable before transfer of title [*Gov. Code § 8897.1(a)*; *see Gov. Code § 8897.1(b), (c)* (delivery requirements and exemptions)].

11. If transaction involves precast concrete or reinforced masonry building or unreinforced masonry building that was built before 1975, and building has wood frame floors or roofs, have seller (or seller's agent) deliver Commercial Property Owner's Guide to Earthquake Safety [*see Bus. & Prof. Code § 10147*] to buyer as soon as practicable before sale [*Gov. Code §§ 8875.6, 8893.2* (unreinforced masonry building; precast concrete or reinforced masonry building); *see Gov. Code §§ 8893.5, 8875.95* (violation of this requirement will not invalidate transfer); *see also § 23.20[4]*].

NOTE:

The seller could consider optionally providing the buyer with the Homeowner's Guide to Earthquake Safety or Commercial Property Owner's Guide to Earthquake Safety, as appropriate [***see*** *Civ. Code §§ 2079.8, 2079.9*].

12. If sale will be consummated through use of escrow, but arrangements have not been made for issuing title insurance policy to buyer, have seller or real estate agent provide buyer with statutory notice (in separate document) indicating that it may be advisable for buyer to obtain such policy [*Civ. Code § 1057.6*; *see § 23.309*], and have buyer sign to acknowledge receipt.

13. If property consists of residential housing built before 1978 [*see* 24 C.F.R. pt. 35; 40 C.F.R. pt. 745], except housing

for elderly, "0-bedroom dwellings," and housing sold at foreclosure [*see 24 C.F.R. §§ 35.82(a), 35.86*; *40 C.F.R. §§ 745.101(a), 745.103*]:

a. Have seller deliver to buyer federally required disclosures concerning lead-based paint and lead-based paint hazards [*see § 23.311*; *see also § 23.312* (sale contract contingency language describing buyer's related right to inspect property)].

b. Have seller, buyer, and any agents sign and acknowledge disclosures.

14. If seller of residential real property knows that any release of illegal controlled substance has come to be located on or beneath real property [*Civ. Code § 1102.18(b)(1)*; *see § 23.20[12]* (definitions of "release" and "illegal controlled substance")]:

a. Give written notice advising of condition to buyer before sale of property by checking "yes" on appropriate question on Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*].

b. Attach copy of any notice received from law enforcement or any other entity, such as Department of Toxic Substances Control, county health department, or local environmental health officer.

NOTE:

A seller's knowledge of the condition is established by receipt of a notice as specified, or by actual knowledge of the condition from a source independent of the notice [*Civ. Code § 1102.18(b)(2)*]. A seller's delivery of this disclosure information is legally adequate for purposes of informing the prospective buyer of the condition; the seller is not required to provide any additional disclosure of the information [*Civ. Code § 1102.18(b)(3)*].

15. If real property is subject to disclosure requirements of *Civ. Code § 1102 et seq.*, have seller make appropriate disclosures if property being transferred is subject to [*Civ. Code § 1102.6b(a)*]:

a. Continuing lien securing levy of special taxes pursuant to Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*].

b. Fixed lien assessment collected in installments to secure bonds issued pursuant to Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which concerns street improvements.

c. Disclosure requirement concerning contractual assessment as provided in *Sts. & Hy. Code § 5898.24*.

NOTE:

The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments, and the disclosure notice concerning the contractual assessment as provided in *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(b)*]. A seller may satisfy the disclosure notice obtained from a nongovernmental source that satisfies the requirements [*Civ. Code § 1102.6b(c), (d)(1)*; ***see*** *Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. See *§ 23.20[13]* for additional discussion of these requirements and related definitions.

16. If local health officer has served order prohibiting use or occupancy of property after determining that property is

polluted by hazardous chemical related to methamphetamine-laboratory activities [*see Health & Safety Code § 25400.22(a)*], have seller [*Health & Safety Code § 25400.28(a)*]:

a. Notify buyer in writing of pending order.

b. Provide buyer with copy of pending order.

c. Obtain buyer's acknowledgment, in writing, of receipt of copy of pending order.

NOTE:

Except as otherwise required in *Civ. Code § 1102.3*, the owner must take these steps unless the owner has received a notice from the local health officer that the property requires no further action [*Health & Safety Code § 25400.28(a)*]. The owner is subject to a civil penalty for noncompliance [*Health & Safety Code § 25400.45(a)*].

17. If property being transferred after 2007 is subject to private transfer fee, have transferor provide, at time transfer disclosure statement is provided pursuant to *Civ. Code § 1102.6*, additional disclosure statement concerning private transfer-fee requirement [*Civ. Code § 1102.6e*; *see § 23.20[15]*]:

[2] Real Estate Broker's Disclosures

1. If real estate broker licensed in California has written contract with seller to find or obtain buyer for residential real property containing one-to-four dwelling units, confirm that broker [*Civ. Code § 2079(a)*]:

a. Conducted reasonably competent and diligent visual inspection of property.

b. Disclosed to buyers all facts revealed by investigation and materially affecting value or desirability of property.

NOTE:

These requirements apply to California-licensed brokers and brokers who act in cooperation with them to find and obtain buyers [*Civ. Code § 2079(a)*]. It is the duty of a licensed real estate broker or salesperson to comply with these requirements and any regulations imposing standards of professional conduct adopted under *Bus. & Prof. Code § 10080* with reference to *Bus. & Prof. Code §§ 10176* and *10177* (relating to disciplinary action against real estate licensees) [*Civ. Code § 2079(b)*]. For further discussion, see *§ 23.22[1]*.

If the property is a unit in a planned development, condominium, or stock cooperative, the broker need only inspect the unit offered for sale, as long as the seller or broker provides the prospective buyer with certain subdivision documents as required by *Civ. Code § 1368* [***see*** *Civ. Code § 2079.3*; ***see also*** Ch. 34, ***Condominiums***].

These disclosures may be made on the statutory real estate transfer disclosure statement [***see*** *§ 23.300[2]*; ***see also*** *§ 23.22[1]*] or in a separate document.

2. Confirm that licensed real estate broker, under whose license listing contract was signed or offer to purchase was obtained, duly revealed agency relationship to party other than broker's client [*see* Ch. 21, *Agreements With Real Estate*

Brokers and Agents]:

a. Provided statutory "Disclosure Regarding Real Estate Relationship" form [*see Civ. Code §§ 2079.14, 2079.16*].

b. Disclosed nature of relationship as soon as practicable [*see Civ. Code § 2079.17(a), (b)*].

c. Provided statutory form for confirmation of agency disclosure in sale contract or separately [*see Civ. Code § 2079.14*; *see also § 23.135*].

3. If property is located within specified hazardous area [*see Civ. Code § 1103*; *see also § 23.115*] and is subject to *Civ. Code § 1102 et seq.* [*see § 23.125[1]*], have seller's broker (or seller) deliver required natural hazard disclosure to prospective buyers [*Civ. Code § 1103.2*].

NOTE:
This disclosure must be made on the statutory natural hazard disclosure statement form; or it may be made on the local option real estate transfer disclosure statement [***see** § 23.125[1]*] if the local statement includes substantially the same information and substantially the same warning set forth in the statutory disclosure form [*Civ. Code § 1103.2(a), (e)*]. For further discussion and the statutory form, see *§ 23.302*.

4. If property is not subject to *Civ. Code § 1102 et seq.* and is located within designated special flood hazard area, area of potential flooding shown on inundation map, delineated earthquake fault zone, or designated seismic hazard zone, instruct broker to disclose this to buyer [*Gov. Code §§ 8589.3(a), 8589.4(a)*; *Pub. Res. Code §§ 2621.9(a), 2694(a)*; *see § 23.115*; *see also § 23.302[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Real Property Sale Contracts

9-23 California Legal Forms--Transaction Guide §§ 23.126-23.129

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.126[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART III. TRANSACTION GUIDE
D. Drafting Guide to Real Property Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.130

AUTHOR: William M. Hensley Editorial Consultant

§ 23.130 Introductory Provisions

1. Begin contract with introductory paragraph or preamble setting forth [*see §§ 23.200[2], 23.202[2]*]:

a. Date of execution of contract.

b. Information concerning parties:
(1) Full names (spelled correctly, since deed will be prepared on basis of names in contract).

(2) Status and capacity, such as:
(a) California corporation.

(b) California limited partnership.

(c) Husband and wife.

(d) Single (or unmarried) man or woman.

c. Agreement of parties to sell and purchase real property.

NOTE:
A sale contract should not provide that the title is to be taken by the "buyer or the buyer's nominee" because the use of the term "nominee" can make the contract uncertain and therefore a nullity [***see*** *Rivadell, Inc. v. Razo (1963) 215 Cal. App. 2d 614, 625, 30 Cal. Rptr. 622]* or preclude the intended buyer (the nominee) from obtaining specific performance of the contract [***see*** *Cisco v. Van Lew (1943)*

60 Cal. App. 2d 575, 579-582, 141 P.2d 433] . Thus, if a transfer to a nominee is contemplated, the sale contract should permit the buyer to assign the contract to the nominee [***see*** *Civ. Code § 1458*; *Cisco v. Van Lew (1943) 60 Cal. App. 2d 575, 583-584, 141 P.2d 433]* .

2. Provide legal description of real property [*see §§ 23.200[2], 23.202[2]*]:

a. Attach, and incorporate by reference, exhibit containing legal description [*see § 23.14*], such as copy of:

(1) Deed creating seller's title.

(2) Preliminary title report.

(3) Title insurance policy.

b. Incorporate legal description into introductory paragraph.

c. Include street address, if any.

NOTE:

A street address should be included, when possible, in any legal description. Although a street address alone may be sufficient to describe the property [***see*** King v. Stanley (1948) 32 Cal. 2d 584, 586, 197 P.2d 321 ; ***see also*** *Estate of Wolf (1932) 128 Cal. App. 305, 310, 17 P.2d 1052]* , this practice should be avoided, particularly when the address does not cover the entire property to be conveyed [***see*** *Brudvig v. Renner (1959) 172 Cal. App. 2d 522, 524, 342 P.2d 276* ; ***see also*** *Finn v. Goldstein (1927) 201 Cal. 605, 608, 258 P. 85]* .

d. Omit any reference to acreage.

NOTE:

Descriptions containing a statement of acreage may present problems because an acre can be any shape. For example, a reference to "the next contiguous 30 acres" was inadequate, and the option in which it was contained was unenforceable because an acre can take any shape, and there was no reference to any other boundary [*Ganiats Construction, Inc. v. Hesse (1960) 180 Cal. App. 2d 377, 384, 4 Cal. Rptr. 706]* .

e. Avoid description that refers to unrecorded map or instrument.

NOTE:

Although a map or other document referred to in a description [***see*** *§ 23.14[4]*] need not be of record in order to create a legally valid description [***see*** *Donnelly v. Tregaskis (1908) 154 Cal. 261, 263-264, 97 P. 421]* , the description should not refer to unrecorded instruments because (1) if a title dispute develops, and it becomes necessary to prove in court the exact parcel described, the unrecorded instrument may be unavailable, and (2) reference to an unrecorded instrument will make the title uninsurable and may not provide constructive notice to subsequent buyers or encumbrancers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of

SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.131

AUTHOR: William M. Hensley Editorial Consultant

§ 23.131 Purchase Price and Terms of Financing

1. Include purchase price provision [*see § 23.15*] that either:

    a. States total purchase price [*see § 23.200[2]*, P 1.01; § 23.202[2], P 1.01; *see also § 23.200[1][b]*].

    b. Sets forth formula for determining purchase price [*see § 23.201[2]*, P 1.01; *see also § 23.201[1][b]*].

2. If desired, allocate total purchase price among [*see § 23.202[2]*, P 1.01; *see also § 23.28*]:

    a. Land.

    b. Improvements.

    c. Any personal property included in sale.

3. For each deposit, specify [*see § 23.200[2]*, P 1.01; § 23.201[2], P 1.02; § 23.202[2], P 1.02]:

    a. Amount.

    b. Time of payment.

    c. Method of payment, for example, certified or cashier's check.

NOTE:
Virtually every real property sale contract calls for the payment of a deposit on execution of the contract. The contract may also require the buyer to pay an additional deposit at a later date. If the deposit on residential property is to be made in two or more payments, a separate liquidated-damages provision should be inserted for each payment [*Civ. Code § 1678*; ***see*** *§ 23.18[2]*].

4. State amount payable on close of escrow, such as:

a. Balance payable in cash or by check [*see § 23.200[2]*, P 1.01; *see also § 23.200[1][b]*].

b. Specified amount (less than balance) payable in cash or by check [*see § 23.201[2]*, P 1.02].

5. In the case of seller financing:

a. Include following information regarding promissory note:

(1) What form it is to take (for example, attached exhibit).

(2) Principal amount.

(3) Amount of periodic payment and mode of payment (for example, monthly, quarterly, semiannually, or annually).

(4) Rate of interest.

(5) Whether interest will be:
(a) Included in periodic payment [*see § 23.201[2]*, P 1.02; *see also § 23.201[1][b]*]; or

(b) In addition to that payment [*see § 23.202[2]*, P 1.02; *see also § 23.202[1][b][ii]*].

NOTE:
If the note will call for "interest-only" payments with a balloon payment of principal at the end of a specified period (such as five or ten years), the terms should be specified in the sale contract.

(6) Amounts and due dates of any balloon payments.

(7) Whether sale is contingent on buyer's ability to obtain loan within designated period [*see § 23.222*].

(8) Date of commencement of payments.

b. Concerning deed of trust:

(1) Specify form it is to take (for example, attached exhibit).

(2) State whether it will be first deed of trust.

(3) If appropriate, add subordination provisions [*see § 23.201[1][c]*].

(4) If desired, include partial release provisions [*see § 23.201[1][d]*].

6. State any other method for payment of balance of purchase price, for example:

a. Buyer's use of straight note, under which entire principal, with or without interest, is paid in one lump sum [*see § 23.220*].

b. Buyer's assumption of existing encumbrance [*see § 23.221*].

c. Buyer's agreement to take subject to existing encumbrance [*see § 23.221*].

d. Issuance to buyer, on specified terms, of any of following loans:

(1) Purchase money loan [*see § 23.222*].

(2) Construction and permanent loans [*see § 23.201[2]*, P 3.02; *see also § 23.201[1][e][vi]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.132

AUTHOR: William M. Hensley Editorial Consultant

§ 23.132 Escrow and Related Matters

1. Provide for opening of escrow [*see § 23.200[2]*, P 2.01; § 23.202[2], P 2.01; *see also § 23.200[1][c]*].

2. Specify closing date [*see § 23.200[2]*, P 2.02; 23.202[2], P 2.02].

3. Provide for proration of expenses [*see § 23.200[2]*, P 2.03; § 23.202[2], P 2.03; *see also § 23.200[1][c][iii]*].

4. State total commission to be paid to any and all brokers and identify brokers entitled to it [*see § 23.200[2]*, P 2.04; § 23.202[2], P 2.04; *see also § 23.200[1][c][v]*].

5. Assign or allocate responsibility for payment of closing costs [*see § 23.200[2]*, P 2.05; § 23.202[2], P 2.05; *see also § 23.200[1][c][iv]*].

6. State how buyer is to take title or provide that buyer is to advise escrow agent [*see § 23.200[2]*, P 2.06; § 23.202[2], P 2.06]:

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersRight to CommissionsReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.133

AUTHOR: William M. Hensley Editorial Consultant

§ 23.133 Contingencies (Conditions)

1. Set forth contingencies [*see § 23.113*].

2. For each contingency, specify [*see § 23.200[1][d][i]*]:

a. Precise act required to meet contingency, such as:
(1) Issuance of permit by appropriate governmental agency.

(2) Approval by one party of instrument provided by other party during escrow.

b. Party for whose benefit contingency was inserted.

c. Time within which contingency must be met or waived.

d. Requirements governing benefited party's acceptance or rejection of performance meeting contingency [*see § 23.16*].

e. Party who will be responsible for any related costs.

3. Describe consequences if contingency is not met [*see §§ 23.113, 23.200[1][d][iv]*].

NOTE:
Real estate brokers and attorneys may draw a distinction between what they call passive contingency removal--meaning that failure to meet a contingency automatically cancels the contract--and active contingency removal. Since both parties, presumably, want the contract to be performed, contingencies

generally should require active removal. In other words, if a contingency is not met, the failure must be communicated to the other party (or objection is waived otherwise); then if the failure is curable within a reasonable time, the responsible party must have an opportunity to cure it; and the contract is not canceled unless the failure is uncurable within a reasonable time, or efforts to cure it are ineffectual.

PRACTICE TIP:

Make Contingency Removals Active or Self-Executing in Nature. This commentator cannot underscore enough what is just said in the foregoing NOTE. Real estate transactional attorneys should make sure most contingencies are removed actively, namely, communication to escrow that the transaction is being canceled affirmatively. The only exception that should apply is in the case of conditions like financing contingencies. If the buyer cannot get loan approval by close of escrow, the deal terminates automatically *assuming* the buyer in good faith could not get loan approval. With the exception of a few self-executing contingencies well known to real estate professionals, most other contingencies should require active communication of disapproval by buyer (plus a specified cure opportunity). *By William M. Hensley.*

4. If sale is contingent on receipt of structural pest-control certification (popularly known as "termite clearance") [*see § 23.202[2]*, P 3.03; § 23.320[1][b]]:

a. Provide for performance of pest-control work in sale contract [*see § 23.202[1][d]*] or separately.

b. Specify whether parties are to order new report or rely on existing report [*see Bus. & Prof. Code §§ 8641, 8516, 8516.5*; *Civ. Code § 1099(a)*].

c. Require buyer to approve report within specified period.

d. Authorize performance of corrective work necessary to obtain certification [*see Bus. & Prof. Code §§ 8516, 8519*].

NOTE:

When a registered pest-control company completes work under a contract, it must prepare a "notice of work completed and not completed" on a form prescribed by the Structural Pest Control Board. The notice must include a statement of the cost of the completed work and the estimated cost of work not completed. The company must furnish a copy of the notice to the owner of the property or the owner's agent within 10 working days after completing the work. The address of each property inspected on which work was completed must be reported on a form prescribed by the board and must be filed with the board no later than 10 working days after the work is completed. Every property on which work is completed must be assessed a filing fee pursuant to *Bus. & Prof. Code § 8674* [*Bus. & Prof. Code § 8518*]. The company must retain all original notices of work completed and work not completed, and activity forms, for three years. Notices of work completed and not completed must be made available for inspection and reproduction by the executive officer of the board or a duly authorized representative during business hours. Original notices of work completed or not completed, or copies of these, must be submitted to the board on request within two business days [*Bus. & Prof. Code § 8518*]. As soon as practicable before transfer of title, the seller must provide the buyer with any work completion notice or certification received by the seller before the transfer of title [*Civ. Code § 1099(b)*; ***see*** *Civ. Code § 1099(c)* (delivery requirements)].

e. State that cost of corrective work, up to amount specified in report, is to be [*see § 23.202[2]*, P 3.03]:

(1) Borne solely by one party.

(2) Split between parties.

(3) Borne by one party up to specified limit, with other party to pay balance.

(4) Apportioned in some other manner.

f. If report has not yet been obtained, consider limiting maximum potential liability for repair cost to certain sum [*see § 23.202[2]*, P 3.03].

g. Provide for handling of additional costs [*see § 23.202[2]*, P 3.03].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
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D. Drafting Guide to Real Property Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.134

AUTHOR: William M. Hensley Editorial Consultant

§ 23.134 Warranties

1. If desired, include warranties of parties [*see § 23.17*], such as warranties regarding [*see § 23.200[2]*, P 4.01 et seq.; § 23.201[2], P 4.01 et seq.; § 23.202[2], P 4.01 et seq.]:

a. Condition of seller's title [*see § 23.200[1][e][iii]*].

b. Pending litigation [*see § 23.200[1][e][iv]*].

c. Violations of applicable laws.

d. Condition of property [*see § 23.200[1][e][vi]*].

e. Defaults under existing contracts [*see § 23.202[1][d][v]*].

f. Status of existing leases [*see § 23.202[1][e][ii]*].

g. Insurance covering property [*see § 23.202[1][e][iii]*].

h. Status of service and related contracts affecting property.

i. Seller's legal relationships with employees.

j. Personal property included in sale.

k. Applicable zoning laws.

l. Authority of entity to enter into contract [*see § 23.255*].

NOTE:
Although buyer warranties are less common, they are sometimes used, particularly in connection with sales of multi-unit rental properties. For example, the buyer may warrant the assumption at the close of escrow of all duties arising out of existing leases and other contracts pertaining to the property.

2. State whether warranties are to survive delivery of deed.

NOTE:
Unless the sale contract provides that the warranties will survive delivery of the deed, the warranties will be extinguished when the buyer accepts the deed [***see*** *Burnand v. Nowell (1948) 84 Cal. App. 2d 1, 5, 189 P.2d 796]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.135

AUTHOR: William M. Hensley Editorial Consultant

§ 23.135 Disclosures

1. If seller of single-family dwelling has already met statutory obligation to install smoke detector [*see Health & Safety Code § 13113.8(b)*], provide notice of installation [*Health & Safety Code § 13113.8(b)*; *see § 23.125[1]*] in contract [*see § 23.203[1][c][vii]*] or addendum to it or separately [*see § 23.305*].

2. If seller has complied with obligation to have water heater braced, anchored, or strapped to resist falling or horizontal displacement due to earthquake motion, provide written certification of this compliance in contract [*see § 23.203[1][c][vii]*] or separately [*Health & Safety Code § 19211(b)*].

NOTE:

The written certification may be included in existing transactional documents, including (but not limited to) the sale contract or deposit receipt, statutory real estate transfer disclosure statement, local option real estate transfer disclosure statement, Homeowner's Guide to Earthquake Safety, or other document [*Health & Safety Code § 19211(b)*]. For these purposes, "water heater" means any standard water heater with a capacity of not more than 120 gallons for which a pre-engineered strapping kit is readily available [*Health & Safety Code § 19211(d)*].

3. If seller of property containing one to four dwelling units has already delivered statutory real estate transfer disclosure statement to buyer [*see Civ. Code § 1102.3*, *1102.6*; *see also § 23.125[1]*], provide notice of this delivery [*Civ. Code § 1102.3*] in contract [*see § 23.203[1][c][ix]*] or addendum to it or separately [*see § 23.303*].

NOTE:

Any city or county may require that a second disclosure form be used in conjunction with

the real estate transfer disclosure statement [***see*** *Civ. Code § 1102.6a*; ***see also*** *§ 23.301*]. If the sale contract or local ordinance requires the seller to provide this second statement within a specified number of days [***see*** *§ 23.236[1]*], compliance with that requirement should be mentioned in the notice of delivery [***see*** *§ 23.303[1]*].

Similarly, if the property is situated within a hazardous area [***see*** *§§ 23.115*, *23.125[1]*], the parties may wish to include a notice of the delivery of the required disclosure [***see*** *§ 23.303[1]*].

4. If broker is involved in transaction and has disclosed nature of agency relationship with seller or buyer, insert confirmation of that disclosure in sale contract unless confirmation is provided in separate writing [*Civ. Code § 2079.17(a), (b)*; *see § 23.125[2]*].

5. If sale involves residential real property in foreclosure that is subject to home equity sale contract law, add statutory notices [*see Civ. Code §§ 1695.3, 1695.5*; *see also § 23.137*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDisclosureGeneral OverviewBusiness & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.136

AUTHOR: William M. Hensley Editorial Consultant

§ 23.136 Miscellaneous Provisions

1. Describe any special agreement, such as one relating to:

a. Execution of necessary documents [*see § 23.201[2]*, P 4.03].

b. Continuation of operations during escrow [*see § 23.202[2]*, P 4.12].

c. Indemnification of other party [*see § 23.202[2]*, PP 4.14, 5.02; *see also § 23.202[1][f][ii]*].

d. Assumption of agreements and contracts [*see § 23.202[2]*, P 5.01; *see also § 23.202[1][f][i]*].

2. If desired, set forth miscellaneous provisions regarding subjects such as [*see § 23.200[2]*, P 5.01 et seq.; § 23.201[2], P 5.01 et seq.; § 23.202[2], P 6.01 et seq.]:

a. Allocation of risk of loss [*see also § 23.251*].

b. Liquidated damages [*see § 23.200[1][g]*].

c. Insurance [*see § 23.200[1][h]*].

d. Assignment of contract.

e. Time for performance (that is, "time of the essence" provision) [*see § 23.200[1][i]*].

f. Delivery of notices.

g. Status of contract and exhibits as entire agreement between the parties.

h. Attorney's fees [*see Civ. Code § 1717*].

i. Binding effect of contract.

j. Governing law.

k. Effect of headings.

l. Waiver of breach of provision [*see § 23.200[1][k]*].

m. Sale-leaseback of property [*see § 23.250*].

n. Purchase of property "as is" [*see § 23.252*].

o. Arbitration [*see § 23.253*].

3. If married seller is selling separate property, include statement by seller's spouse that he or she has no interest in subject property [*see § 23.254*; *see also § 23.123*].

4. If farmland is being sold, consider including provisions providing for:

a. Transfer of water rights and crop allotment to buyer [*see § 23.260*].

b. Retention and harvest of crops by seller [*see § 23.261*].

c. Retention of crops by seller and harvest and sale of crops by buyer [*see § 23.262*].

d. Seller's reservation of water rights [*see § 23.263*].

e. Seller's reservation of right to enter and remove merchantable timber [*see § 23.264*].

5. If sale involves residential real property in foreclosure and is subject to home equity sale contract law, add provisions required by statute [*see Civ. Code §§ 1695.3, 1695.5*; *see also § 23.137*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral Overview

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9-23 California Legal Forms--Transaction Guide § 23.137

AUTHOR: William M. Hensley Editorial Consultant

§ 23.137 Special Requirements for Home Equity Contracts

NOTE:

Special statutory requirements [***see*** *Civ. Code § 1695 et seq.*] apply to certain contracts for the sale of owner-occupied residential property consisting of one-to-four residential units that is in foreclosure [*Civ. Code § 1695.1(b)*]. Known as "home equity sale contracts," these essentially include most contracts under which the property is sold outside the normal foreclosure procedure [***see*** *Civ. Code § 1695.1(a), (e)*; ***see also*** *§§ 23.11[3]*].

Any provision of a home equity sale contract that attempts or purports to limit the liability of the equity buyer for damages resulting from the statements or acts of the equity buyer's representative will be void and will, at the option of the equity seller, render the contract void. Further, any provision of the contract that attempts or purports to require arbitration of any dispute arising under the laws governing home equity sale contracts will be void at the option of the equity seller, but only if grounds exist for the revocation of the contract [*Civ. Code § 1695.16(a)*]. For further discussion, see *§ 23.308[1]*.

1. Prepare contract in 10-point boldfaced type (or equivalent) using language principally used by equity buyer and equity seller to negotiate sale [*Civ. Code § 1695.2*].

2. Include following information regarding equity buyer [*Civ. Code § 1695.3(a)*]:

a. Name.

b. Business address.

c. Telephone number.

3. State address of residence in foreclosure [*Civ. Code § 1695.3(b)*].

4. State total consideration to be given by equity buyer in connection with or incident to sale [*Civ. Code § 1695.3(c)*].

5. Provide complete description of terms of payment or other consideration, including any services that equity buyer represents he or she will perform for equity seller before or after sale [*Civ. Code § 1695.3(d)*].

6. Specify time at which possession is to be transferred to equity buyer [*Civ. Code § 1695.3(e)*].

7. Include terms of any rental agreement [*Civ. Code § 1695.3(f)*].

8. Add statutory notices regarding equity seller's rights to [*see § 23.211*]:

a. Refrain from signing conveyance instruments [*see Civ. Code § 1695.3(h)*].

b. Cancel contract [*see Civ. Code §§ 1695.3(g), 1695.5(a)*].

9. Complete statutory notice of cancellation [*see Civ. Code § 1695.5(b)*; *see also § 23.307*] and attach two easily detachable copies of notice to contract [*Civ. Code § 1695.5(b)*].

10. Have equity seller and equity buyer sign and date contract [*Civ. Code § 1695.2*].

NOTE:

The contract must be fully completed, signed, and dated by the equity seller and equity buyer before the execution of any instrument of conveyance of the residence in foreclosure [*Civ. Code § 1695.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.138

AUTHOR: William M. Hensley Editorial Consultant

§ 23.138 Special Requirements for Newly Constructed Residences Sold On or After January 1, 2003

NOTE:

Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")] imposes obligations and responsibilities on a builder, developer, or original seller of new residential units sold on or after January 1, 2003. These obligations and responsibilities should be reflected in the sales agreement. For coverage of this legislation, see *§ 23.20A*. For sample form provisions, see *§§ 23.200[2]*, *23.205*.

1. Include minimum one-year express written limited warranty covering fit and finish of following building components [*see Civ. Code § 900*; *see also § 23.20A[4]*]:

a. Cabinets.

b. Mirrors.

c. Flooring.

d. Interior and exterior walls.

e. Countertops.

f. Paint finishes.

g. Trim.

2. If applicable, disclose that seller is electing to offer enhanced protection agreement in lieu of being bound by statutory construction standards, and incorporate seller's enhanced agreement into sales contract [*see Civ. Code §§ 901-906*; *see also § 23.20A[5]*].

NOTE:
If an enhanced protection agreement is in place, the statutory construction standards no longer apply other than to set forth minimum provisions by which to judge the enforceability of the particular provisions of the enhanced protection agreement [*Civ. Code § 902*].

3. Provide that buyer is obligated to follow all reasonable maintenance obligations and schedules communicated to him or her in writing by the seller and product manufacturers, as well as commonly accepted maintenance practices [*see Civ. Code § 907*; *see also § 23.20A[6]*].

NOTE:
The relevant maintenance standards and schedules should be included in the closing documents and incorporated by reference in the sales agreement itself.

4. Include provision indicating whether pre-litigation non-adversarial procedure parties must use in attempting to resolve construction defect disputes is either:

a. That prescribed by *Civ. Code § 895 et seq.* (Title Seven of Part Two of Division Two of the Civil Code) [*see Civ. Code §§ 910-938*; *see also § 23.20A[9]*]; or

b. Alternative nonadversarial contractual procedure developed by seller [*see Civ. Code § 914(a)*].

NOTE:
If the seller elects to use its own alternative nonadversarial procedure in lieu of the statutory procedure, the election is binding regardless of whether the builder's alternative procedure is successful in resolving the ultimate dispute or ultimately deemed unenforceable [*Civ. Code § 914(a)*].

5. If seller elects to use its own nonadversarial contract procedure to attempt pre-litigation resolution of construction defects, incorporate in sales agreement provisions setting forth that procedure.

6. Include instruction to original buyer to provide to any subsequent buyer any documents related to construction defects legislation that have been provided in conjunction with original sale [*see Civ. Code § 912(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress ConditionsGeneral OverviewContracts LawContract Conditions & ProvisionsImplied WarrantiesFitnessReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawPurchase & SaleRemediesLiability of Developers & Vendors



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9-23 California Legal Forms--Transaction Guide §§ 23.139-23.149

AUTHOR: William M. Hensley Editorial Consultant

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§§ 23.139[Reserved]



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9-23 California Legal Forms--Transaction Guide § 23.150

AUTHOR: William M. Hensley Editorial Consultant

§ 23.150 Arranging for Pest-Control Work

1. If appropriate, order certified copy of any structural pest-control inspection reports and work completion notices on property filed with Structural Pest Control Board during preceding two years [*see Bus. & Prof. Code §§ 8516, 8518*].

2. If there is no recent report on property, have responsible party (who will pay for work) order structural pest-control report.

NOTE:

If the latest report was made more than one year before execution of the sale contract, it is probably a good idea to order a new report in any case. Lenders may have even more stringent requirements. Some, for example, will require a new report if the last one is more than six months old.

With regard to work and reports concerning wood destroying pests or organisms [*Bus. & Prof. Code § 8516(a)*; ***see*** *Bus. & Prof. Code § 8519*], a written inspection report must be prepared on a form approved by the Structural Pest Control Board and delivered to the person requesting the inspection or an agent within 10 business days after the inspection. The report must be delivered before work is commenced on any property. Reports must be made available for inspection and reproduction to the executive officer of the board or a representative during business hours. Original inspection reports or copies of reports must be submitted to the board on request within two business days [*Bus. & Prof. Code § 8516(a)*; ***see*** *Bus. & Prof. Code § 8519*].

3. Have parties order and pay for corrective work in manner specified in sale contract or separate

structural pest-control certification agreement [*see § 23.133*].

4. If pest-control operator cannot perform necessary corrective work and prepare certification before date specified in sale contract for close of escrow, have parties extend escrow or authorize escrow agent to retain funds in impound account and pay operator after work is completed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.151

AUTHOR: William M. Hensley Editorial Consultant

§ 23.151 Actions Involving Home Equity Sales Contracts

NOTE:
For the definition of "home equity sale contract" and further discussion, see *§§ 23.11[3]*, *23.137*, and *23.211[1][b]*.

1. Notify client of equity seller's right to cancel contract until earlier of [*Civ. Code § 1695.4(a)*]:

a. Midnight of fifth business day following day on which seller signed contract that complies with requirements of provisions governing home equity sale contracts [*see Civ. Code § 1695 et seq.*].

b. Eight o'clock a.m. on day scheduled for sale of property pursuant to power of sale conferred in deed of trust.

2. Inform client of right to bring action for recovery of damages or other equitable relief within four years after equity buyer takes any of following actions in violation of home equity sale contract laws [*Civ. Code §§ 1695.6, 1695.7*; *see § 23.211[1][g]*]:

a. Accepting or inducing equity seller's execution of any instrument of conveyance of any interest in residence in foreclosure.

b. Recording any document signed by equity seller.

c. Actually or purporting to transfer or encumber any interest in residence in foreclosure

to any third party [*see Civ. Code § 1695.6(b)(3)*].

d. Paying equity seller any consideration.

e. Making untrue or misleading statements regarding transaction [*see Civ. Code § 1695.6(d)*].

f. Having encumbrances placed on, or granting interests in, property that is purportedly held by equity buyer and subject to option to repurchase held by equity seller.

3. To rescind, have seller provide notice of cancellation to equity buyer (at address specified in contract) by either personally delivering written notice of cancellation or sending telegram indicating cancellation [*Civ. Code § 1695.4(b)*].

NOTE:
Within 10 days following receipt of a notice of cancellation, the equity buyer must return without condition any original contract and any other documents signed by the equity seller [*Civ. Code § 1695.6(c)*; ***see*** *Civ. Code § 1695.7* (action for damages for violation of *Civ. Code § 1695.6*)].

4. If client is equity seller and any person has taken "unconscionable advantage" of client, notify client of right to:

a. Rescind contract by taking following actions within two years of date of recordation of conveyance of property [*Civ. Code § 1695.14*]:
(1) Give written notice [*see § 23.324*] to equity buyer and successor in interest, if successor in interest is not good faith purchaser or encumbrancer for value.

(2) Record notice with county recorder of county in which property is located.

(3) Restore everything of value received from equity buyer under contract, or offer to restore everything on condition that seller does likewise [*see Civ. Code §§ 1691, 1695.14(b)*; *see also § 23.324[1][c]*].

b. Bring action for recovery of damages or other equitable relief within four years after date of alleged violation [*Civ. Code § 1695.7*; *see § 23.211[1][g]*].

5. If equity buyer and successor in interest do not, within 20 days of delivery of notice of rescission, reconvey title to property free and clear of encumbrances created subsequent to rescinded transaction, notify seller of his or her right to bring action to enforce rescission and for cancellation of deed [*Civ. Code § 1695.14(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & Restitution



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9-23 California Legal Forms--Transaction Guide § 23.152

AUTHOR: William M. Hensley Editorial Consultant

§ 23.152 Obtaining Title Insurance

NOTE:

In any contract for the sale of real property, the law implies a requirement that the seller convey a "good" or "marketable" title to the buyer [King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321] . Marketable title is generally established through the use of title insurance. For discussion of title insurance, see Ch. 26A, ***Title Insurance*** .

1. Obtain and analyze preliminary report or commitment showing condition of title.

2. If desired, clear or make alternative arrangements for handling of title defects listed in preliminary report or commitment.

3. Order these:

a. Title insurance policy.

b. Any appropriate indorsements, such as:
(1) Easement indorsement.

(2) Single family homeowner's protection indorsement.

(3) Condominium owners protection indorsement.

c. If necessary, special-purpose policies and reports, such as:

(1) Litigation guarantee (may be used to disclose necessary defendants in action to remove a cloud on title).

(2) Subdivision guarantee (will show that all persons having any record title interest in real property that is being subdivided have signed and acknowledged consent certificate [*see Gov. Code § 66436*]).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleRemediesReal Property LawTitle QualityMarketable TitleTests



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9-23 California Legal Forms--Transaction Guide § 23.153

AUTHOR: William M. Hensley Editorial Consultant

§ 23.153 Reporting Change of Ownership

NOTE:

The following requirements apply after any change of ownership of real property (or of a manufactured home) that is subject to local property taxation [*Rev. & Tax. Code § 480(a)*]. A change of ownership in this context is a transfer of a present interest in the property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*; ***see*** *Rev. & Tax. Code §§ 61, 62, 67*]. Although owners of tax-exempt real property are exempt from these requirements [***see*** *Rev. & Tax. Code § 480(a)*], they must still report conveyances of the right to use the property, under certain circumstances [***see*** *Rev. & Tax. Code § 480.5*].

1. If transaction will be closed through escrow, determine whether and to what extent escrow agent will assist buyer in meeting change-of-ownership reporting requirements [*see § 23.306[1][a]*].

2. Complete preliminary change-of-ownership report (provided by county assessor or recorder) and file it with county recorder at time of recordation [*Rev. & Tax. Code § 480.3*; *see § 23.306*].

NOTE:

The preliminary change-of-ownership report must be signed by the transferee, certifying that the information provided on the form is, to the best of his or her knowledge and belief, true, correct, and complete. The form must not be signed by an agent acting for a transferee [*Rev. & Tax. Code § 480.3(a)*]. Failure to file the preliminary report with the county recorder may result in an additional recording fee [*Rev. & Tax. Code § 480.3(b)*]. A failure to tender the additional fee may delay or preclude the recordation of the document evidencing the change of ownership [***see*** *Rev. & Tax. Code § 480.3(c)*].

Certain persons and transactions are exempt from the preliminary change-of-ownership reporting requirement and from the payment of the additional recording fee [***see*** *Rev. & Tax. Code § 480.3(e), (f)*; ***see also*** *§ 23.306[1][b][ii]*].

PRACTICE TIP:

Expect a Reassessment Upon a New Property Purchase. Hate to say it, but practicalities often speak louder than all the treatises one could write. More often than not, a real estate property transfer between existing owners (even in a partition action) triggers a reassessment of property valuation by the county assessor's office. If such an event occurs, this commentator has found that it is worthwhile to appeal, especially in connection with residential property reassessments. As the appeal draws near to an administrative hearing, an official from the assessor's office usually will call and try to negotiate a compromise on the valuation issue. Generally, a settlement is reached informally at this pre-adjudication stage--and all over the telephone at a fairly economical price. *By William M. Hensley.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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9-23 California Legal Forms--Transaction Guide § 23.154

AUTHOR: William M. Hensley Editorial Consultant

§ 23.154 Extending Recorded Contract

1. If contract was recorded, consider recording extension of contract before five years after date for conveyance of title provided in contract or, if no such date is provided, five years after last date provided in contract for meeting contingencies in contract [*Civ. Code § 886.030(a)*].

NOTE:

An unperformed recorded contract for the sale of real property [***see*** *Civ. Code § 886.010(a), (b)*] will expire of record unless the expiration date is waived or extended by an instrument that is recorded before that date [*Civ. Code § 886.030*]. A contract that has expired of record has no effect and does not constitute an encumbrance or cloud on the title to the real property as against a person other than a party to the contract [*Civ. Code § 886.040*]. For discussion, see California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property*, § 569.10 et seq. (Matthew Bender).

2. Following recordation of extension, notify buyer that contract will expire of record unless buyer performs contract within five years after date for conveyance of title provided in extension or, if no such date is provided, five years after last date provided in extension for meeting contingencies in contract [*Civ. Code § 886.030(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.155-23.199

AUTHOR: William M. Hensley Editorial Consultant

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§§ 23.155[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.200

AUTHOR: William M. Hensley Editorial Consultant

§ 23.200 Contract of Sale of Real Property--General Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract for sale of real property and may be used in relatively simple real estate transactions, such as the sale of a single-family residential dwelling. It provides for the opening of an escrow, a deposit, and payment of the balance of the purchase price on close of escrow. The buyer is to receive a preliminary title report and a standard form title insurance policy. Contingencies set forth requirements governing the status of the seller's title and the delivery of possession. There is a series of seller warranties and a liquidated damages provision.

The form includes alternative provisions that are appropriate for compliance with Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")], which imposes obligations and responsibilities on a builder, developer, or original seller of new residential units sold on or after January 1, 2003 [*see* [*l*], *below*; *see also § 23.20A*].

For a standardized purchase agreement that is also suitable for basic transactions, see *§ 23.203*.

The form in *§ 23.201[2]* may be used for the sale of unimproved real property to a developer. The form in *§ 23.202[2]* may be used for the sale of multi-unit rental property.

[b] Payment of Purchase Price

In addition to establishing the purchase price, the contract must adequately describe the terms and manner of payment [*Finn v. Goldstein (1927) 201 Cal. 605, 607, 258 P. 85* ; *Dennis v. Overholtzer (1960) 178 Cal. App. 2d 766, 774, 3 Cal. Rptr. 193* , *disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 221, 32 Cal. Rptr. 415, 384 P.2d 7]* . For further discussion, see *§ 23.15*.

If the buyer plans to obtain some or all of the funds due at closing from a third-party lender, counsel should add the form in *§ 23.222[2]* (purchase money loan contingency) to the miscellaneous contingencies. For discussion of alternative payment and financing provisions, see *§ 23.201[1][b]*.

[c] Escrow

[i] Relationship Between Contract and Escrow Instructions

Most real property sale contracts provide for the use of an escrow. Escrow instructions [*see § 23.23[1]*] define the obligations of the escrow agent [*see Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 8-9, 151 Cal. Rptr. 570* ; *see also* Ch. 26, *Real Property Escrows*].

An escrow is a mechanism for effecting concurrent performance of the obligations of the parties to the underlying real property sale contract. This is accomplished by having the parties deposit the instructions, funds, documents, and other necessary items with a neutral third party, known as the escrow agent (or escrow holder), who serves as a mutual agent. The escrow agent oversees and monitors the performance of the applicable terms and contingencies and, if they are fully performed, takes the steps necessary to complete the transfer of title to the buyer and delivers the consideration to the seller. Ordinarily, the sale contract will specify the particular person or entity who is to serve as the escrow agent. However, the contract may provide for the subsequent selection of the agent by a specified party or a lender or another third party.

Because escrow instructions are drafted after the execution of the sale contract, the drafter of the instructions can avoid inconsistencies between the two documents by referring to the contract during the drafting process. Overlapping (and therefore potentially conflicting) provisions should be avoided. The form in [2], *below*, reflects the different functions of the two documents and avoids inconsistencies by containing general provisions that do not set forth the specific ways in which the escrow agent is to perform its functions.

[ii] Opening of Escrow

Ordinarily, the sale contract will specify the person or entity that is to serve as the escrow agent. However, the contract may provide for the subsequent selection of the holder by a particular party, lender, or other third party. The provision for opening of escrow also requires the deposit of escrow instructions (joint or separate) [*see § 23.23[1]*] and other necessary documents with the escrow agent.

[iii] Prorations

Real property sale contracts usually provide for the proration of property taxes, maintenance fees, and similar expenses relating to the property and paid or assumed by one of the parties for the period during which the ownership of the property changes hands. Proration is essentially a method of apportioning these expenses to each party. Prorations are usually computed on a daily basis (based on a 30-day month and 360-day year) and then divided between the parties as of the closing date. If the sale involves income-producing property, rents and other income are also prorated. Although the contract should authorize prorations, the specific procedures should be performed during escrow and described in the escrow instructions.

[iv] Costs and Expenses

When the sale contract obligates the seller to deliver good and marketable title subject to specified liens and encumbrances, the seller should pay the costs of removing all other liens and encumbrances. Responsibility for the payment of escrow fees and charges and other costs of completing the sale should be negotiated and then fixed in the sale contract. Since the escrow agent will usually make the actual payments, specific instructions should be inserted in

the escrow instructions.

[v] Brokers' Commissions

A sale contract should provide for the payment of any brokers' commissions due on the sale. In most cases, it will simply state the total commission and identify the brokers entitled to it. Additional terms, such as the circumstances under which the commission will be earned, due, and payable, should be set forth in the listing contract between the broker and the seller [*see Civ. Code § 1624(a)(4)* (written listing contract is required by statute of frauds)]. The commission provision in the sale contract must be consistent with the listing contract.

The seller usually pays the entire commission due to all brokers involved in the transaction, including any broker retained by the buyer. The total amount may be a flat sum but is commonly expressed as a percentage (typically 5-to-7 percent) of the purchase price [*see* Ch. 21, *Agreements With Real Estate Brokers and Agents* (different methods of compensation)].

If more than one broker will share the commission, the right of any broker who has not entered into a listing contract with the seller to receive a portion of the commission paid by the seller should be specified in the sale contract. This practice is advisable because agreements between brokers to split commissions are rarely in writing [*see Goossen v. Adair (1960) 185 Cal. App. 2d 810, 819, 8 Cal. Rptr. 855* (upholding enforceability of oral contract for division of commission between brokers); California Real Estate Law and Practice, Ch. 62, *Recovery of Brokers' Commissions* , Pt. F (Matthew Bender)], and buyers usually do not enter into written contracts with their brokers or usually wait until after the execution of the sale contract to do so.

[d] Contingencies (Conditions)

[i] Overview

Conditions, known in the real estate industry as contingencies, in a real property sale contract usually benefit the buyer [*see § 23.16*]. The contract may contain any contingencies appropriate for the transaction; for discussion of various contingencies, see [ii] and [iii], below, and §§ 23.201[1][e] and 23.202[1][c] and [d], as well as § 23.203[1][c] (provisions in the usual form of purchase agreement).

To reflect the intention of the parties fully and clearly, for each contingency the contract should specify the following:

- The precise act required to meet the contingency (for example, issuance of permits by the appropriate governmental agency, or approval by one party of an instrument, such as an existing lease, provided by the other party during escrow);
- The party for whose benefit the contingency was inserted;
- The time within which the contingency must be met or waived;
- Requirements governing the benefited party's acceptance or rejection of performance to meet the contingency [*see § 23.16*];
- The party who will be responsible for any related costs; and
- Any rights (including waiver) and obligations of the parties following failure to meet the contingency [*see* [iv], *below*].

[ii] Review of Preliminary Title Report and Conveyance of Marketable Title

The contract would normally provide that the buyer must have the opportunity to review a preliminary title report and to approve or disapprove of every exception listed in it. If the buyer disapproves of an exception, and the exception is not eliminated, the contract may be terminated.

The buyer's right to receive marketable title [*see § 23.24*] is usually embodied in a contingency, that evidence of marketable title shall be supplied by a standard form title insurance policy showing title vested in the buyer, subject to any specified title exceptions and any exceptions subsequently approved in writing by the buyer. A standard policy affords protection against title exceptions that appear from the public records, not against off-record exceptions that might be detected by inspecting the property or inquiring of those in possession [*see* Ch. 26A, *Title Insurance*]. The buyer's attorney should protect the buyer from any off-record exceptions. This can be accomplished in several ways. For example, the contract may call for the identification of any exceptions "known to Seller" and thus would extend to known off-record exceptions. Further, to protect against off-record exceptions not known to the seller, the buyer could obtain an extended coverage policy or commission a survey of the property and condition his or her obligation to perform on the approval of any exceptions revealed. Finally, the buyer may ask the seller to warrant the status of the seller's title [*see* [e][iii], *below*].

[iii] Delivery of Possession

It is common for a sale contract to provide that possession is to pass on close of escrow, free and clear of all uses and occupancies other than those approved in writing by the buyer. Alternatively, the parties may wish to provide for the transfer of possession before or after the close of escrow. Although the terms of any such arrangement may be specified in the sale contract, it is preferable to cover them in a separate agreement [*see §§ 23.326[2]* (temporary lease agreement), 23.327[2] (interim occupancy agreement)] and to make the execution of the separate agreement a contingency in the sale contract.

[iv] Contingency Not Met

The contract should specify the consequences in the event that a contingency is not met: for example, if a contingency is not met, the buyer may terminate the contract and receive a full refund without waiving any other rights the buyer may have against the seller for the breach (if any). The seller may be empowered to elect to remedy any failure to meet certain specified contingencies; and if the seller does not do so, the buyer may terminate the contract or buy the property with no reduction in price. For an alternative provision requiring the seller to attempt to remedy specified failures and providing the buyer with different options in the event the failure is not remedied, see *§ 23.201[2]*.

Before providing the seller with the option of remedying the failure to meet a specific contingency, counsel should confirm that the remedial measures specified do not conflict with the terms of the particular contingency as set forth in the contract. Although the failure provision may apply "notwithstanding any provision of this contract to the contrary," conflicting provisions may confuse the parties and result in inadvertent breaches.

Some of the contingencies contained in other forms in this chapter provide that they may be waived by the buyer [*see, e.g., § 23.201[2]*]. For discussion of waiver, see *§ 23.201[1][e][vii]*.

[e] Warranties

[i] Definition

The contract should contain some basic warranties, which are statements that specified facts pertaining to the property or the sale transaction do or will exist [*see § 23.17*]. For additional warranty provisions and discussion, see *§ 23.202*.

[ii] Survival of Delivery of Deed

A real property sale contract should provide that the warranties set forth in the contract will survive delivery of the deed. This will permit the injured party to bring an action if a warranty is breached after delivery of the deed [*see Burnand v. Nowell (1948) 84 Cal. App. 2d 1, 5, 189 P.2d 796]* .

[iii] Seller's Title

It is advisable, from the buyer's perspective, to have the seller warrant the status of the seller's title. Although a marketable-title contingency may provide for the disclosure of all title exceptions of record and any additional exceptions known to the seller, that would not cover off-record exceptions that are not known to the seller [*see* [d][ii], *above*]. If the buyer does not wish to obtain an extended-coverage policy or to commission a survey to reveal such off-record exceptions, he or she should attempt to obtain the seller's consent to the above warranty, which would cover unknown off-record exceptions. This warranty should be used in addition to, rather than in lieu of, a marketable-title contingency.

[iv] Pending Litigation

The buyer will want to know whether there is any pending litigation affecting the property. Although the preliminary title report will reveal the existence of any applicable lis pendens [*see* Ch. 26A, *Title Insurance*], the buyer should not rely solely on that source.

[v] Defaults

The buyer should have the seller warrant that the seller is not in default under any existing contracts pertaining to the property. Otherwise, the buyer risks facing the consequences of a possible default, such as the termination of a rental agreement by a disgruntled tenant.

[vi] Defects

The seller may warrant that the seller has no knowledge of any material defects, or that the seller has no knowledge of any material defects other than specified defects. Both warranties reflect the requirement that the seller disclose to the buyer any material fact of which the seller is aware, if the fact affects the value of the property and the seller knows that the fact would not be observed by the buyer on inspection [*see Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8* ; *Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 735-736, 737-738, 29 Cal. Rptr. 201]* . For a discussion of the remedies available to a buyer who has been defrauded by a seller, see California Real Estate Law and Practice, Ch. 74, *Buyer's Remedies in Actions Involving Agreements of Sale* , Pt. D (Matthew Bender).

If the property contains one to four dwelling units, the warranty regarding material defects need not be included, because the seller must provide the buyer with a detailed form regarding the condition of the property and will be liable for damages for a violation of any of the applicable disclosure requirements [*see Civ. Code § 1102; see also § 23.300[1]*].

[f] Risk of Loss

[i] Uniform Vendor and Purchaser Risk Act

Any contract made in California for the purchase and sale of real property will be interpreted as including an agreement that the parties will be bound by the Uniform Vendor and Purchaser Risk Act unless the contract provides otherwise. If all or a material part of the subject property is destroyed without fault of the buyer or is taken by eminent domain, the risk of loss will be borne as follows [*Civ. Code § 1662*]:

- The seller bears the loss if neither legal title nor possession of the property has been transferred to the buyer. The seller is not entitled to specific performance, and the buyer may recover any portion of the purchase price that he or she has paid.

- The buyer bears the loss when either legal title or possession has been transferred to the buyer. The buyer is not relieved of the obligation to pay the remainder of the purchase price and is not entitled to recover any amounts that he or she has paid.

[ii] Gaps in Coverage

Because the Uniform Vendor and Purchaser Risk Act automatically applies to any real property sale contract made in California unless the contract provides otherwise [*Civ. Code § 1662*], the sale contract need not include a risk-of-loss provision. However, under that act, the seller assumes the risk of loss only following the destruction or condemnation of "all or a material part" of the property. The act does not define "material part" and does not detail who is to bear the risk of any nonmaterial, pre-transfer loss. Similar concerns are not present once legal title or possession is transferred to the buyer because, from that point on, the buyer is obligated to perform following the destruction or condemnation of "all or any part" of the property.

[g] Liquidated Damages

[i] Basic Requirements

The contract may contain a liquidated-damages provision that governs the seller's remedies in the case of a default by the buyer. The provision must be separately signed or initialed by each party to the contract [*Civ. Code §§ 1676, 1677(a)*]. In a printed contract, it must be set out either in at least 10-point bold type or in contrasting red print in at least 8-point bold type [*Civ. Code §§ 1676, 1677(b)*].

If the buyer defaults, and the contract does not contain a liquidated-damages provision, the seller may recover the excess of the contract price over the value of the property, consequential damages according to proof, and interest [*see Civ. Code § 3307*; *see also § 23.18[1]*].

[ii] Residential Property

Additional requirements apply when the liquidated-damages provision appears in a contract for the sale of residential property consisting primarily of a one-to-four-unit dwelling, if the buyer intends (at the time the contract is made) to occupy at least one of the units as his or her residence. That provision will be valid only to the extent that the buyer actually pays the subject funds in cash or by check (including a postdated check) [*Civ. Code § 1675(b)*; *see § 23.18[2]*]. When the amount actually paid pursuant to the liquidated-damages provision does not exceed 3 percent of the purchase price, the provision is presumed valid to the extent of payments actually made, unless the buyer establishes that the amount is unreasonable as liquidated damages [*Civ. Code § 1675(c)*; *see Civ. Code § 1675(d)* (seller must establish that liquidated damages exceeding that amount are reasonable)]. For liquidated-damages provisions that do not reflect the foregoing residential-property requirements, see *§§ 23.201[2]* and *23.202[2]*.

Further, different requirements apply when the contract involves the initial sale of newly constructed attached residential condominium units located within a structure of 10 or more units and the buyer defaults [*see Civ. Code § 1675(f)*; *see also Civ. Code § 783*]. For a discussion of these requirements, see *§ 23.18[2]*.

If the deposit on residential property is made in two or more payments, a separate, initialed provision must be inserted for each payment [*see Civ. Code § 1678*].

[h] Insurance

The contract may provide that the seller will cancel his or her insurance policies as of the close of escrow, and the buyer is responsible for obtaining insurance as of that date. Alternatively, the buyer may either obtain his or her own insurance or assume the seller's policies by providing the seller with notice of this election a specified number of days before the close of escrow. Because an insurance policy is a personal contract between the insurer and the insured [*see Long v. Keller (1980) 104 Cal. App. 3d 312, 320, 163 Cal. Rptr. 532]* , the policy itself must be transferred. This will invariably require the insurer's consent [*see § 23.25*]. Counsel must therefore review the transfer provisions of the applicable policies before adopting the second alternative. If the second alternative is used, the notification period should be based on the number of days the agent will need to prepare the paperwork for an assumption.

For an alternative insurance provision that may be used to reflect insurance requirements imposed by sellers or lenders, see *§ 23.202[2]*.

[i] Time of the Essence

Most real property sale contracts provide that time is of the essence. This may permit a party to insist on performance by the date specified for the close of escrow. Following a failure to perform on time, and after timely tender by the non-defaulting party of performance and a notice of breach to the other party, the party unwilling to perform may, without incurring any liability, reject any further attempts at performance by the other party. Without such a provision, late performance may have to be tolerated if it is tendered within a reasonable time. For further discussion of the effect of a time-of-the-essence provision, see California Forms of Pleading and Practice, Ch. 140, *Contracts* , and Ch. 490, *Rescission and Restitution* (Matthew Bender).

[j] Arbitration and Mediation

If a real property sale contract contains a provision for binding arbitration, the provision must include a statutory heading and a statutory arbitration notice and must comply with certain format requirements [*see Code Civ. Proc. § 1298*]. For further discussion, see *§ 23.253[1]*.

The contract may contain a provision for the parties to undertake mediation when a dispute arises and then to submit to arbitration if mediation fails. No statutory requirements would govern the use of such a provision and whether such a provision would be enforceable is open to question since mediation is entirely a cooperative process. No statute supports compelled mediation, whereas the Code of Civil Procedure supports contractual arbitration [*see Code Civ. Proc. § 1280 et seq.*]. Either party could scuttle an on-going mediation by simply taking a stance that the other would regard as intolerable. If a mediation were successful, a settlement agreement would result and only when that agreement had been signed would the parties be bound by the mediation. For further discussion and some forms of contract provisions, see California Forms of Pleading and Practice, Ch. 31, *Mediation* (Matthew Bender).

[k] Waiver

The contract should provide that a waiver of a breach of any provision of the contract does not constitute a continuing waiver of the same provision or a waiver of any subsequent breach of the same or another provision of the contract [*see United Sav. & Loan Assn. v. Reeder Dev. Corp. (1976) 57 Cal. App. 3d 282, 292-293, 129 Cal. Rptr. 113* (upholding effectiveness of similar provision in real property sale contract); *see also Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67* (in continuing obligation contracts, waiver of breach up to certain time does not necessarily preclude promisee from asserting subsequent breach)]. For further discussion of the waiver of a breach of contract, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

[l] Compliance with Requirements for Newly Constructed Residences Sold On or After January 1, 2003

If the property that is the subject of the contract is a new residential unit sold on or after January 1, 2003, the sales

contract must reflect compliance with Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")]. This legislation primarily imposes obligations and responsibilities on, but is not limited to, a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim [*Civ. Code § 911(a)*; *see §§ 23.20A[1], [2], 23.205* (CAR Form)]. The term "builder" for these purposes does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. These nonaffiliated general contractors and nonaffiliated contractors are treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals [*Civ. Code § 911(b)*].

To effect compliance with Title Seven, this form includes optional provisions related to the following [*see § 23.138*]:

- A minimum one-year express limited warranty covering fit and finish of specified building components [*see Civ. Code § 900*].
- The applicability of either the statutory construction standards prescribed by Title Seven or an alternative enhanced protection agreement offered by the seller [*see Civ. Code §§ 901-906*].
- The buyer's duty to follow all reasonable maintenance obligations and schedules [*see Civ. Code § 907*].
- A pre-litigation nonadversarial procedure the parties must employ in attempting to resolve any construction defect disputes before instituting litigation [*see Civ. Code §§ 910-938*].
- The original buyer's duty to provide any subsequent buyer with any documents related to Title Seven that have been provided in conjunction with the original sale [*see Civ. Code § 912(h)*].

[2] FORM

Contract of Sale of Real Property--General Form

This contract is entered into_____[*date*] by and between_____[*name of seller*] ("Seller"), [*capacity of seller, e.g.,* a California corporation *or* husband and wife] and_____[*name of buyer*] ("Buyer"),_____[*capacity of buyer*].

Seller agrees to sell and convey, and Buyer agrees to purchase, the real property situated in_____[the City of _____, *or* an unincorporated area of] _____ County, California, and more particularly described [as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this contract and incorporated by reference] ("the Property"), on the following terms and conditions.

1. Purchase Price

1.01. Amount and Terms of Payment. The total purchase price of the Property is $_____, payable by Buyer to Seller as follows. The sum of $_____ shall be paid on execution of this contract, as a deposit to be applied to the purchase price at the close of escrow. This amount shall be payable_____[*specify, e.g.,* by certified or cashier's check drawn to the order of _____ (*name of escrow agent*)]. The balance of the purchase price shall be paid_____[at the close of escrow *or* into escrow during business hours at least _____

[*number*] days before the close of escrow]. This amount shall be payable [*specify, e.g.,* in cash or by certified or cashier's check drawn to the order of Seller].

1.02. Consequences of Buyer Default. If Buyer defaults in the performance of this contract, the deposit described in Paragraph 1.01 shall be forfeited by Buyer as provided in Paragraph 5.02. In the event this contract is terminated for any other reason, the deposit shall be refunded to Buyer pursuant to Paragraph 3.03.

2. Escrow

2.01. Opening of Escrow. An escrow shall be opened to consummate the sale of the Property according to the terms of this contract at the office of_____[*name and title of escrow agent*] (the "escrow agent") at_____[*address*], California. The escrow shall be opened within [*number*] days after the execution of this contract. Written escrow instructions in accordance with the terms of this contract shall be prepared [by each party or jointly], and the instructions shall be signed by the parties and delivered to the escrow agent within [*number*] days of the execution of this contract. Buyer and Seller shall also deposit with the escrow agent all instruments, documents, and other items identified in the escrow instructions or reasonably required by the escrow agent to close the sale on the closing date specified below.

2.02. Closing Date. The escrow shall be closed on the date the deed is recorded. [The escrow shall be considered to be in a condition to close when the escrow agent is authorized under the escrow instructions, and is able, to record the grant deed.] The escrow must be [in a condition to close *or* closed] no later than_____[*date*], unless the closing date is extended pursuant to the terms of this contract; provided, however, that this closing date shall not be extended beyond_____[*date*].

2.03. Prorations. The following shall be prorated between Seller and Buyer on the basis of a 30-day month as of the date escrow closes: [*specify, e.g.,* real property taxes, special assessments, and premiums on any insurance policies that are transferred to Buyer].

2.04. Broker's Commission. At the close of escrow, Seller shall pay_____[*specify, e.g.,* a sum equal to 6 percent of the selling price of the Property *or* the sum of $_____ *or specify other compensation*] as a real estate broker's commission._____[*If more than one broker is involved, provide for sharing of commission, e.g.,* This commission shall be divided equally between Seller's broker and Buyer's broker.] _____[*Add, in not less than 10-point boldface type, if contract is first document to establish broker's right to compensation for sale of residential real property containing up to four residential units or for sale of mobilehome, or if contract alters terms of any agreement that previously established such right to compensation:* **Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker.**]

2.05. Closing Costs. Seller shall pay [*specify, e.g.,* the real estate broker's commission described in Paragraph 2.04, any transfer taxes, the costs of the preliminary report and title insurance policy required by this contract, the reconveyance fees charged for the reconveyance of the deed of trust shown on the preliminary title report required by this contract, the recording fees for the reconveyance of that deed of trust, and the cost of preparing, executing, and acknowledging the grant deed and all other instruments necessary to convey title to Buyer]. [*Add, if appropriate:* Seller shall instruct the escrow agent to use a separate document for declaring any transfer tax, and not to declare any transfer tax on the face of the deed.] Buyer shall pay [*specify, e.g.,* the cost of recording the grant deed and any other instruments required to convey title to Buyer]. [*Specify any arrangement for splitting costs, e.g.,* The escrow fee, other than the cost of the above title insurance policy, shall be paid _____ percent by Buyer and _____ percent by Seller.]

[*EITHER*]

2.06. Vesting of Title. Buyer shall advise the escrow agent before the close of escrow of the manner in which title shall vest.

[*OR*]

2.06. Vesting of Title. On the close of escrow, title shall be vested in_____[*specify each buyer's name*] [*specify how title will be held by individual buyer(s), e.g.,* as community property with right of survivorship *or specify other buyer's capacity, e.g.,* a California corporation].

3. Additional Terms and Conditions

3.01. Preliminary Title Report. Within [*number*] days after the execution of this contract, [Buyer shall obtain *or* Seller shall furnish Buyer with] a preliminary [California *or* American] Land Title Association report of the title to the Property and each document shown as an exception or encumbrance in the report. This shall be done at the expense of [Buyer *or* Seller]. Within [*number*] days after the delivery of the report and related documents to Buyer, Buyer shall notify Seller in writing of any objection to any exception. If Buyer makes a timely objection to any exception and the exception is not eliminated within [*number*] days of the Seller's receipt of the objection, this contract shall be terminated pursuant to Paragraph 3.04. Buyer's failure to object in this manner to any exception shall be an approval by Buyer of that exception.

3.02. Miscellaneous Conditions. The close of escrow and Buyer's obligation to purchase the Property pursuant to this contract are subject to the satisfaction of the following conditions, which are solely for Buyer's benefit unless otherwise indicated.

(a) Marketable Title. The conveyance to Buyer of good and marketable title to the Property, as evidenced by a California Land Title Association standard coverage title insurance policy issued by _____ [*name of title company*] in the _____ [amount of $_____ *or* full amount of the purchase price], insuring that title to the Property is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Seller, subject only to those exceptions approved by Buyer in writing and the following: a lien for current real property taxes, any exceptions shown on the preliminary title report described in Paragraph 3.01 that are not disapproved by Buyer pursuant to that paragraph, and _____ [*specify additional exceptions*].

[*EITHER*]

(b) Delivery of Possession. The delivery of possession of the Property (with all keys to locks and all garage door openers) to Buyer _____ [immediately on the close of escrow *or specify other deadline*] free and clear of all uses and occupancies except those approved in writing by Buyer _____ [; provided, however, that if Seller is unable to deliver possession at that time, Seller shall pay Buyer $_____ per day from the close of escrow to the date Buyer obtains possession; and provided further that in no event shall delivery of possession occur later than _____ (*date*)].

[*OR*]

(b) Delivery of Possession. The execution by Seller and Buyer of _____ [*title of agreement providing for seller's retention of possession after close of escrow or buyer's occupancy before close of escrow*] attached to this contract as Exhibit _____.

[*Add other conditions as appropriate; see, e.g., § 23.201[2], P 3.02; § 23.202[2], P 3.02; see also §§ 23.220[2], 23.237[2].*]

3.03. Failure of Condition and Seller's Breach of Warranty. Except as provided in Paragraph 3.04, if any condition set forth in this contract is not satisfied, or if Buyer notifies Seller in writing before the close of escrow of Seller's breach of any of Seller's warranties set forth in this contract, then Buyer may cancel the escrow, terminate this contract, and recover the amounts paid by Buyer to the escrow agent toward the purchase price of the Property [*add, if Buyer is to pay escrow charges:* (less costs and expenses of escrow)]. Buyer shall exercise this power to terminate by complying with any applicable notice requirements specified in the relevant condition and, in all other cases, by providing written notice to Seller and the escrow agent within [*number*] days of the failure or breach. The exercise of this power shall not waive any other rights Buyer may have against Seller for breach of this contract. Seller shall instruct the escrow agent, in the escrow instructions, to refund to Buyer all money and instruments deposited in escrow by Buyer pursuant to this contract on failure of a condition or breach of a warranty and receipt of a termination notice. This instruction shall be irrevocable. [*Add, if Seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of escrow.]

3.04. Seller's Election to Remedy Defects. Notwithstanding any provision of this contract to the contrary, Seller shall have the right to remedy certain violations of this contract before the close of escrow. This right to remedy shall be subject to the following requirements and restrictions.

(a) Buyer shall immediately notify Seller in writing of Buyer's discovery, before the close of escrow, of a violation of any of the following provisions of this contract: _____ [*list paragraph numbers of any conditions or warranties that are to be subject to this provision*]. For these purposes, the foregoing violations shall be referred to as "defects."

(b) If Buyer fails to give notice, Buyer shall waive the defect, and the defect shall not be a violation of this contract. If Buyer gives notice, Seller may elect to remedy the defect by giving Buyer written notice of this election within _____ [*number*] days of receiving Buyer's notice. Seller's notice of election to remedy shall specify the number of days, up to a maximum of _____ [*number*] days, the close of escrow shall be postponed so that Seller may remedy the defect. If Seller fails to provide a timely notice of election or fails to remedy the defect before the close of escrow (including any extension of escrow), then Buyer may, at Buyer's election, either terminate this contract without any liability on the part of either party or purchase the Property without a reduction in the purchase price and without any liability for the unremedied defect or defects on the part of Seller. The failure by Buyer to make such an election shall be deemed an election of the _____ [first *or* second] option.

(c) Seller shall instruct the escrow agent, in the escrow instructions, to immediately refund to Buyer all money _____ [*add, if buyer is to pay escrow charges:* (less costs and expenses of escrow)] and instruments deposited in escrow by Buyer pursuant to this contract on termination of this contract and on receipt of notice of that termination from Buyer. _____ [*Add, if seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of the escrow.]

4. Rights, Duties, and Warranties

4.01. Rights and Duties of Buyer. Buyer has the following rights and duties.

(a) Buyer or Buyer's agents are granted the right, at any time and from time to time within _____ [*number*] days after the opening of the escrow, to enter the Property to conduct tests or investigations. The acts shall be conducted at the sole cost and expense of Buyer and must not unreasonably interfere with Seller's possession. Buyer shall indemnify and hold Seller harmless from any costs or liability resulting from the acts and, if the escrow is canceled

for a reason that is not the fault of Seller, for any damage to the Property resulting from the acts. Buyer shall give Seller written notice of the intention to enter _____ [*number*] days before the date of the planned entry.

[*If property is new residential unit sold on or after January 1, 2003, ADD (see Civ. Code §§ 907, 912(h)):*]

(b) Buyer has a duty to follow all reasonable maintenance obligations and schedules for building components communicated in writing to Buyer by Seller and product manufacturers, as well as commonly accepted maintenance practices.

(c) Buyer has a duty to provide any subsequent buyer with any documents related to Title Seven of Part Two of Division Two of the Civil Code (commencing with Section 895) that have been provided in conjunction with this transaction.

4.02. Warranties of Seller. Seller makes the following warranties.

(a) Seller owns the Property, free and clear of all liens, licenses, claims, encumbrances, easements, encroachments on the Property from adjacent properties, encroachments by improvements on the Property onto adjacent properties, and rights of way of any nature, not disclosed by the public record, other than: _____ [*specify exceptions, including any off-record items such as unrecorded leases*].

(b) Seller has no knowledge of any pending litigation involving the Property.

(c) Seller has no knowledge of any violations of, or notices concerning defects or noncompliance with, any applicable building code or other code, statute, regulation, ordinance, judicial order, or judicial holding pertaining to the Property.

(d) Seller is not in default under any contract, note, or encumbrance relating to the Property.

(e) Seller will maintain the Property in good repair and in the same condition, reasonable wear and tear excepted, as on _____ [*date*].

(f) _____ [*Add, if seller is not required to provide buyer with copy of statutory real estate transfer disclosure statement (see Civ. Code § 1102):* The Property and the improvements on the Property are in good condition, reasonable wear and tear excepted, and Seller has no knowledge of any material defects in the Property *or* Seller has no knowledge of any material defects in the Property and the improvements on the Property other than those listed in Schedule _____; and, except for those defects, the Property and improvements are in good condition, reasonable wear and tear excepted].

[*If property is new residential unit sold on or after January 1, 2003, ADD (see Civ. Code § 900):*]

(g) The fit and finish of all cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim are warranted against defects for a period of one-year. This warranty does not apply to damage to these components that is caused by defects in components that are governed by the construction standards prescribed by *Civil Code Section 896*.

[*If property is new residential unit sold on or after January 1, 2003, ADD EITHER (see Civ. Code §§ 896, 897):*]

(h) All building components described in Chapter 2 of Title Seven of Part Two of Division Two of the Civil Code

(commencing with Section 896), a copy of which is appended to this agreement as Appendix _____ and incorporated herein by reference, are in compliance with the construction standards prescribed by that chapter.

[*Attach copy of Civ. Code §§ 896-897* .]

[*OR (see Civ. Code § 901-903)*]

(h) All building components described in Chapter 2 of Title Seven of Part Two of Division Two of the Civil Code (commencing with Section 896), are warranted against construction defects as provided in the Seller's Enhanced Protection Agreement, a copy of which is appended to this agreement as Appendix _____ and incorporated herein by reference. Seller elects not to be subject to the provisions of Chapter 2 of Title Seven of Part Two of Division Two of the Civil Code.

[*Attach copies of Seller's Enhanced Protection Agreement and Civ. Code §§ 896-897.*]

4.03. Survival of Warranties. All warranties, covenants, and other obligations in this contract shall survive delivery of the deed.

5. Miscellaneous Provisions

5.01. Loss, Destruction, and Condemnation. The parties agree that the following provisions shall govern the risk of loss.

(a) If, before Seller transfers legal title or possession of the Property to Buyer, all or a material part of the Property is destroyed without fault of Buyer, or is taken by eminent domain by any person or entity, Buyer shall be entitled to recover any portion of the price that Buyer has paid, and Seller shall not have the right to enforce this contract. For these purposes, "material part of the Property" means _____ [*specify, e.g.,* an improvement or improvements on the Property that would cost $_____ or more to replace or to restore to the condition as of the date of execution of this contract].

(b) If after Seller transfers legal title or possession of the Property to Buyer, all or any part of the Property is destroyed without fault of Seller, or is taken by eminent domain by any person or entity, Buyer is not relieved from Buyer's obligation under this contract to pay the full price for the Property, nor is Buyer entitled to recover any portion of the price Buyer has paid.

(c) If damage, destruction, or condemnation occurs at any time before the close of escrow, and this loss is not covered by clauses (a) and (b) above, _____ [*describe allocation of risk, e.g.,* Buyer shall not have the right to terminate this contract, but shall be entitled to offset the cost of repair or replacement against the purchase price of the Property].

[*Set out following provision in at least 10-point boldface type, or 8-point contrasting red boldface type, if contract is printed (Civ. Code §§ 1676, 1677(b)).*]

5.02. Liquidated Damages. If Buyer defaults in the performance of this contract, the parties agree that Seller shall be released from any obligation to sell the Property to Buyer and may retain, as liquidated damages, the lesser of the deposit paid by Buyer on execution of this contract or 3 percent of the purchase price. Seller shall refund to Buyer any remainder of the deposit. The parties further agree that the amount of liquidated damages established by this provision is a reasonable estimate, under the circumstances existing on the date of execution of this contract, of what Seller's

damages would be in the event of a default by Buyer.

Initialed by Buyer: _____
Initialed by Seller: _____

[*EITHER*]

5.03. Insurance. Seller shall cancel all policies of insurance on the Property as of the close of escrow. Buyer shall be responsible for obtaining insurance on the Property as of the close of escrow.

[*OR*]

5.03. Insurance. Seller shall deliver to Buyer, within [*number*] days of the execution of this contract, copies of Seller's [*specify type(s) of insurance, e.g.,* fire and casualty] insurance policies on the Property. Those policies may be taken over by Buyer if Buyer so elects and if Buyer obtains the written consent of the insurers to the assumption. Buyer shall notify Seller and the escrow agent, in writing at least [*number*] days before the close of escrow, whether Buyer will or will not assume each policy. This notice shall be accompanied by a copy of any and all written consents to the assumption provided by the insurers. If Buyer fails to notify Seller in the required manner of Buyer's election concerning any insurance policy, the failure shall be deemed an election not to assume that policy. Buyer shall be responsible for having insurance on the Property as of the close of escrow.

[*CONTINUE*]

5.04. Assignment. Buyer may not assign this contract without Seller's prior written consent. The valid assignment of this contract [shall *or* shall not] relieve Buyer of liability under this contract.

5.05. Time of Essence. Time is of the essence in this contract.

5.06. Notices. Any notice, tender, delivery, or other communication pursuant to this contract shall be in writing and shall be deemed to be properly given if delivered, mailed, or sent by wire or other telegraphic communication as follows:

(a) If to Buyer:

_____[*name*]
_____[*street address*]
_____[*city, state, zip*]

(b) If to Seller:

_____[*name*]
_____[*street address*]
_____[*city, state, zip*]

Either party may change that party's address for these purposes by giving written notice of the change to the other party in the manner provided in this paragraph. If sent by mail, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* 48 hours] after it has been deposited in the U.S. mail, duly

registered or certified, with postage prepaid, and addressed as set forth above. If sent by wire or other form of telegraphic communication, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* eight hours] after it has been deposited with the carrier, prepaid and addressed as set forth above.

5.07. Entire Agreement. This contract and the attached exhibits constitute the entire agreement between the parties relating to the sale of the Property. Any prior agreements, promises, negotiations, or representations not expressly set forth in this contract are of no force and effect. Any amendment to this contract shall be of no force and effect unless it is in writing and signed by Buyer and Seller.

[*EITHER:*]

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 8-point boldface or contrasting red type, with heading in capital letters (Code Civ. Proc. § 1298(a)).*]

5.08. ARBITRATION OF DISPUTES. Any controversy or claim arising out of this contract or a breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction.

[*OR, if property is new residential unit sold on or after January 1, 2003 (see Civ. Code §§ 910-938)):*]

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 8-point boldface or contrasting red type, with heading in capital letters (Code Civ. Proc. § 1298(a)).*]

5.08. Settlement of Disputes.

(a) ARBITRATION OF DISPUTES. Except as provided in (b), below, any controversy or claim arising out of this contract or a breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction.

[*CONTINUE:*]

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 10-point boldface or 8-point contrasting red boldface type (Code Civ. Proc. § 1298(c)).*]

Notice:

By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the "ARBITRATION OF DISPUTES" provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless such rights are specifically included in the "ARBITRATION OF DISPUTES" provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary.

We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the "ARBITRATION OF DISPUTES" provision to neutral arbitration.

Initialed by Buyer: _____
Initialed by Seller: _____

[*If property is new residential unit sold on or after January 1, 2003, ADD EITHER (see Civ. Code §§ 910-938):*]

(b) Disputes involving violation of the construction standards prescribed by *Civil Code Sections 896* and *897* shall be governed by [*either* the pre-litigation nonadversarial procedure prescribed by Chapter 4 of Title Seven of Part Two of Division Two of the Civil Code (commencing with Section 910) *or* Seller's nonadversarial contractual procedure], a copy of which is included in this contract as Appendix _____.

[*OR, if Seller has Enhanced Protection Agreement:*]

(b) Disputes involving violation of Seller's Enhanced Protection Agreement shall be governed by [*either* the pre-litigation nonadversarial procedure prescribed by Chapter 4 of Title Seven of Part Two of Division Two of the Civil Code (commencing with Section 910) *or* Seller's nonadversarial contractual procedure], a copy of which is included in this contract as Appendix _____.

5.09. Attorney's Fees. If any action, proceeding, or arbitration arising out of or relating to this contract is commenced by either party to this contract or by the escrow agent, then as between Buyer and Seller, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorney's fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

5.10. Binding Effect. This contract shall be binding on and inure to the benefit of the parties to this contract and their heirs, personal representatives, successors, and assigns, except as otherwise provided in this contract.

5.11. Governing Law. This contract and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

5.12. Headings. The headings in this contract are inserted for convenience only. They do not constitute part of this contract and shall not be used in its construction.

5.13. Waiver. The waiver by any party to this contract of a breach of any provision of this contract shall not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other provision of this contract.

Date: _____
SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRisk of LossReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.201

AUTHOR: William M. Hensley Editorial Consultant

§ 23.201 Contract for Sale of Unimproved Land for Subdivision or Other Development

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract for the purchase and sale of unimproved property, which the buyer plans to develop by subdividing or constructing a building. It provides for seller financing, conditions the buyer's obligations on the issuance of commitments for construction loans and permanent loans from third parties, requires the subordination of the purchase money loan to those third-party loans, and authorizes partial releases of portions of the property from the lien of the purchase money deed of trust. Additional contingencies relate to the suitability of the land for the buyer's proposed use and the issuance of the approvals necessary for that development.

For discussion of warranties, see *§ 23.200[1][e]*. For discussion of miscellaneous provisions, see *§ 23.200[1]*.

[b] Purchase Price Provision

The purchase price for undeveloped real property may be determined by multiplying the number of acres times a specified price per acre. The exact number of acres may have to be determined by a survey. Land that is not suitable for development may or may not be included when determining the purchase price.

The contract should provide for a down payment, may provide for payment of a further sum (in cash or by check) on close of escrow, and may require payment of the balance of the purchase price in installments pursuant to the terms of a promissory note secured by a deed of trust in favor of the seller. The note may be an "interest included" note, under which each installment on the note will be applied first to interest on the remaining unpaid principal balance at a designated rate and then to reduction of the principal balance. Thus, the amount of each installment is the same, but the percentage of the installment payment that is applied to interest and principal will change as the unpaid balance of the note is reduced. For an "interest extra" provision, calling for equal principal payments and additional interest payments

that are based on the remaining unpaid principal balance of the note, see *§ 23.202[2]*.

The purchase price provision may also contain subordination and partial release requirements [*see* [c][i], [d], *below*]. In addition to specifying the more important terms to be included in the promissory note and deed of trust, the contract may provide for the attachment (as exhibits) of the form of note and deed of trust that must be used by the buyer. This practice makes it unnecessary to repeat all of the essential terms of the seller financing in the contract. Failure to include complete terms of payment in the contract and its exhibits may violate the statute of frauds [*see Civ. Code § 1624*] or render the contract unenforceable [*see § 23.15[2]*].

This chapter also contains alternatives to seller financing. For example, the form in *§ 23.200[2]* provides for the payment of a deposit and the balance at the close of escrow. If the buyer plans on obtaining some or all of those funds from a third-party lender, that provision may be used in conjunction with the form in *§ 23.222[2]*, which conditions the buyer's obligations under the sale contract on the receipt of a purchase money loan from a third party lender. For additional financing provisions, see *§ 23.220* (buyer to provide "straight" note) and § 23.221 (buyer to assume existing encumbrance).

[c] Subordination

[i] Overview

A developer of commercial or subdivision property typically relies heavily on borrowed money ("leveraging") to obtain the land and construct the improvements. In most cases, the seller of the land accepts a promissory note secured by a deed of trust on the land for a major portion of the purchase price. A commercial lending institution makes short-term construction loans, and another commercial lender makes permanent loans that are used to repay the proceeds of the construction loans [*see* Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. A]. Institutional lenders usually insist that a construction loan be secured by a first lien on the property. However, a deed of trust or mortgage given to secure payment of the purchase price of real property has, at the time of its conveyance, priority over all other liens on the property created by or against the buyer, subject to the operation of the recording laws [*Civ. Code § 2898*]. A purchase money deed of trust can be made subordinate to construction loan deeds of trust or mortgages by either an express subordination agreement, in which the land seller agrees to make the lien of the purchase money mortgage or deed of trust subject to the construction loan [*see* [ii], *below*]. The purchase money deed of trust is referred to as the "subordinated" lien, and the deed of trust securing the construction loan is the "subordinating" lien. Permanent loans may be handled in a similar manner [*see* Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. A].

An alternative to the use of subordination clauses and subordination agreements is a procedure that is commonly called "de facto subordination." This involves recording the construction loan mortgage or deed of trust before recording the purchase money mortgage or deed of trust, pursuant to an agreement of the parties usually contained in the land sale contract or escrow instructions. The same rules and limitations that apply to an attempted subordination pursuant to an automatic subordination or a "promise to subordinate" clause [*see* [ii], *below*] also apply to a de facto subordination [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338]* .

PRACTICE TIP:

Subordination Resulting From Optional Lienholder Advances. Subordination can occur as a matter of law even though no one agreed to a contractual subordination. For example, in *Lennar Northeast Partners v. Buice [(1996) 49 Cal. App. 4th 1576, 1589, 57 Cal. Rptr. 2d 435]* , the appellate court subordinated a senior lienholder's $140,000 subsequent advance below that of a junior lienholder's interest. The court went so far as to suggest that the senior lien in toto could have been subordinated had the junior lienholder also been a subordinating seller. Although post-*Lennar* decisions have held that "equitable subordination" must be narrowly circumscribed according to the circumstances at issue [*Friery v. Sutter Buttes Savings Bank (1997) 61 Cal. App. 4th 869, 876, 72 Cal. Rptr. 2d 32]* , *Lennar* is a

harbinger of potential danger for a lienholder making optional advances, counseling lawyers that advances normally should not be made without the express consent of the junior lienholder. *By William M. Hensley.*

[ii] Provision in Contract

When a subordination is made in connection with a sale of land that is to be developed by the buyer, the sale contract usually contains a provision requiring the seller to accept a purchase money deed of trust or mortgage containing one or more subordination clauses. Thus, by entering into the sale contract, the seller essentially makes a promise to subordinate. This promise may be specifically enforced on the buyer's behalf if the subordination provision contains terms that will define and minimize the risk that the subordinating lien will impair or destroy the seller's security [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* ; *see* Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. A]. For a list of terms meeting this standard, see [iii], below. A failure to include those terms may render the entire sale contract unenforceable [*Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 238, 39 Cal. Rptr. 284* ; *but see Reeder v. Longo (1982) 131 Cal. App. 3d 291, 295-297, 182 Cal. Rptr. 287* (buyer may unconditionally waive invalid subordination provision originally inserted solely for buyer's benefit and may obtain specific performance of remaining provisions of sale contract)]. For further discussion, see Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. A.

[iii] Required Contents

An enforceable subordination agreement or clause must specify at least the maximum principal, maximum interest rate, maximum term, and mode of repayment of the subordinating loan [*Cummins v. Gates (1965) 235 Cal. App. 2d 532, 540, 45 Cal. Rptr. 417]* . Further, it must be just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329]* . Although there is no magic number of terms that will ensure a just and reasonable subordination clause or agreement as a matter of law [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 521, 229 Cal. Rptr. 186]* , the courts have repeatedly stated that an enforceable subordination clause or agreement must contain terms that define and limit the seller's risk [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329]* and that leave no material element to the future agreement of the parties [*Krasley v. Superior Court (1980) 101 Cal. App. 3d 425, 431, 161 Cal. Rptr. 629]* .

Therefore, an enforceable subordination agreement or clause should, at the minimum, specify all of the following [*see Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 518, 229 Cal. Rptr. 186* ; *see also* Walters, *Subordination Agreement That Did Not Specify Maximum Amount of Loan or Terms Thereof Is Not Enforceable*, 1 Cal. Real Estate Reporter 164, 166]:

- The maximum principal amount of the subordinating loan;
- The maximum interest rate to be charged under the subordinating loan;
- The term (that is, maturity date) of the subordinating loan;
- Maximum loan fees and costs and whether they are to be paid from the principal amount of the subordinating loan;
- Repayment terms, including any provisions for balloon payments;
- Prepayment terms, such as maximum prepayment penalties;
- That the proceeds of the development loan may not be used for any purpose other than construction

or other development on the subject property, or other restrictions on the use of loan proceeds;

- Existence and terms of any commitment for "take-out" or permanent financing after completion of the construction or development; and

- That the new loan will be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender [*see Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1000, 92 Cal. Rptr. 583* (attorney was negligent when subordination clause did not require loan from institutional lender)].

For further discussion of these required terms, see Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. A.

[d] Partial Releases of Subdivided Land

[i] Use and Effect

A purchase money deed of trust or mortgage encumbering land that is to be subdivided almost always includes a "partial release" (also called a "partial reconveyance") clause. A partial release clause provides for the release of a portion of the property from the encumbrance, by a reconveyance signed by the trustee under the purchase money deed of trust, on the occurrence of a certain event, such as the payment of a designated portion of the purchase price.

The use of such a clause permits the buyer to develop the subdivision in stages. For example, under one common arrangement, as each home in the subdivision is completed and sold, the sale proceeds are disbursed through escrow to (1) pay off the construction loan that is secured by a deed of trust on the home's lot, and (2) obtain a release of the lot from the purchase money deed of trust. Alternatively, the developer may use the partial release clause to have acreage (instead of individual subdivision lots) released from the purchase money deed of trust. In that case, the developer has a portion of the property released and then subdivides and develops that portion. After it is developed and sold, the developer obtains the release of more land and proceeds to develop it. The release clause in the contract may give the buyer a choice of using either or both of those methods of development by providing for the release of raw undeveloped acreage before the subdivision map has been filed and for the release of individual lots as shown on a filed subdivision map.

Although a release clause will be included in the purchase money deed of trust, the real property sale contract should also include a release clause to ensure the enforceability of the clause [*see* Ch. 25C, *Release and Reconveyance*]. For further discussion, including a number of illustrative partial release provisions for deeds of trust that can be modified for use in the present context, see Ch. 25C, *Release and Reconveyance* .

[ii] Requirements of Subdivided Lands Act

The restrictions on partial releases imposed by the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] are triggered by the presence of a "blanket encumbrance," which is a deed of trust, mortgage, or any other lien or encumbrance securing the payment of money and affecting land to be subdivided or more than one lot or parcel of subdivided land [*Bus. & Prof. Code § 11013*]. A subdivider cannot sell or lease lots or parcels in a subdivision that is subject to the Subdivided Lands Act and to a blanket encumbrance unless either the encumbrance (or a supplemental agreement) contains an unconditional release clause or the subdivider complies with rather strenuous requirements specified in *Bus. & Prof. Code § 11013.2*.

An unconditional release clause allows the buyer or lessee to obtain legal title free and clear of the blanket encumbrance by complying with the terms and conditions of the purchase or lease [*Bus. & Prof. Code § 11013.1*]. Because institutional lenders (which ordinarily finance subdivision projects) and sellers are not likely to agree to the inclusion of

an unconditional clause, the contract should contain a conditional release provision: for instance, one applicable before recordation of the final subdivision map, or one governing post-recordation releases. Under such a conditional clause, the buyer-subdivider will not be able to sell the subdivided lots or parcels unless he or she complies with *Bus. & Prof. Code § 11013.2* by one of the following methods:

- Depositing the money paid or advanced by the buyers into escrow [*Bus. & Prof. Code § 11013.2(a)*];

- Transferring title to the individual lots or parcels to a trust until a proper release is obtained [*Bus. & Prof. Code § 11013.2(b)*];

- Furnishing a bond for the protection of the buyers [*Bus. & Prof. Code § 11013.2(c)*]; or

- Complying with any other condition or method acceptable to the Real Estate Commissioner that carries out the legislative intent to ensure that the buyer will obtain title to the lot or parcel free and clear of the blanket encumbrance [*Bus. & Prof. Code § 11013.2(d)*].

For further discussion of the requirements above, see Ch. 25C, *Release and Reconveyance* .

If a subdivision is subject to a blanket encumbrance but is exempt from compliance with *Bus. & Prof. Code § 11013.1*, the subdivider must have prospective buyers of lots, parcels, or units sign a statutory notice form [*see Civ. Code § 1133*]. For further discussion, see Ch. 30, *Subdivision Regulation* .

[iii] Contents of Release Clause

A partial release provision in a seller's deed of trust must be "just and reasonable" as to the seller to be specifically enforceable and should contain terms that define and minimize the risk that the seller's security will be impaired [*see Eldridge v. Burns (1978) 76 Cal. App. 3d 396, 428-431, 142 Cal. Rptr. 845* ; *Civ. Code § 3391(2)*]. The terms of the obligation must be sufficiently certain to make the precise act to be done clearly ascertainable [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885* ; *Hiller v. King (1951) 105 Cal. App. 2d 181, 190-191, 232 P.2d 905]* . If the provision is uncertain, it may render the entire sale contract unenforceable [*see White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465-467, 73 Cal. Rptr. 885* (contract containing uncertain release clause cannot be enforced by buyer); *but see Yackey v. Pacific Development Co. (1979) 99 Cal. App. 3d 776, 784, 160 Cal. Rptr. 430* (seller may bring action for damages for breach even though contract contains uncertain release clause); *see also* Ch. 25C, *Release and Reconveyance*].

Because it is rare for all acreage and all lots in a subdivision to be of the same value, the release clause should prevent the buyer-subdivider from taking only the best acreage or lots and leaving the deed of trust beneficiary with insufficient security to protect the purchase money promissory note [*see White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 467, 73 Cal. Rptr. 885]* . The release provision in the contract can protect the security and meet the specificity requirement discussed above in the following ways.

- The clauses dealing with the release of raw acreage before the recordation of a final subdivision map should include a schedule, which may be used to set different amounts or "release prices" that must be paid for lots in different parts of the proposed subdivision. The schedule also should specify the legal description and sizes of parcels that may be released and the order in which the parcels are to be released. This would be intended to prevent the buyer from having the more valuable parcels released first and leaving the deed of trust beneficiary with property of insufficient value to protect the deed of trust and the secured obligation. It also would prevent releases that would leave the remaining property without access to a public road or street.

- The clauses permitting the release of lots following the recordation of the final subdivision map also should use the release prices specified in the foregoing schedule. The "subdivided lots" release clauses need not specify the order of release or address access concerns because most local subdivision ordinances prevent subdividers from creating landlocked or completely valueless lots.

The amount of the "release price" for each lot or parcel will involve bargaining between the subdivider and the seller. In setting the price for each lot, the subdivider will argue for a release price that is roughly equivalent to or below the true resale value of the lot, while the seller will desire a price that exceeds the fair resale price of the lot so that the remaining lots will always be sufficient to protect the security.

For partial release provisions that are designed to be inserted into deeds of trust, see Ch. 25C, *Release and Reconveyance* . Those provisions may, with minor modifications, be used as alternatives to the release provisions included in the form in [2], below.

[iv] Subdivision Map Act Requirements

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] defines "subdivision" to include the division of a unit of land, as shown on a county assessment roll, for the purpose of sale, lease, or financing [*Gov. Code § 66424*]. This definition also encompasses a partial release from a blanket encumbrance [*see* 58 Ops. Atty. Gen. 408, 412 (1975)(placement of separate deeds of trust on different portions of unit of land is division for purpose of sale or financing)]. Partial release provisions recognize the applicability of the Subdivision Map Act by providing that a partial release cannot be granted unless the buyer-subdivider has met all requirements of that act. As a general rule, the act requires local approval of both a tentative map and a final map for any subdivision containing five or more parcels [*Gov. Code § 66426*]. Subdivisions that are not subject to that final-map requirement must have a parcel map approved by the local legislative body unless the local subdivision ordinance waives the statutory parcel-map requirement [*Gov. Code § 66428*]. For further discussion of the requirements of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

[e] Contingencies (Conditions)

[i] Survey

One of the contingencies in the contract may require the completion and deposit in escrow of a survey of the property. A survey is particularly important in the sale of undeveloped land because it will help the parties establish the exact acreage and therefore result in the computation of a fair purchase price when that amount is based on a price per acre or other unit [*see* [b], *above*].

[ii] Soil Tests and Other Engineering Tests

The buyer's performance should be conditioned on a determination by the buyer's experts that the physical condition of the property is compatible with the buyer's development plans. The types of tests that should be conducted will depend on the nature of those plans. For example, buyers of undeveloped land must determine whether the property is free from soil and geologic conditions that might preclude its use for the intended development without extra expense for precautionary, remedial, or corrective measures. The contract provision may include review by the buyer's expert of any reports previously prepared for the seller; however, the buyer should not rely solely on seller-commissioned reports and should obtain independent results that address the buyer's specific concerns.

The soil test contingency may require the buyer to notify the seller of the experts' determinations by a certain date, and provide that a failure to do so will constitute a waiver of the entire contingency. However, dicta in one case considering such a contingency suggested that a seller's actual or constructive knowledge that the property was unsuitable for the buyer's intended use would excuse the buyer from performance even when the buyer failed to give the required notice [*see United Sav. & Loan Assn. v. Reeder Dev. Corp. (1976) 57 Cal. App. 3d 282, 292, 129 Cal. Rptr. 113]* .

The contract may contain a related provision authorizing the buyer to enter the property after the opening of escrow to conduct necessary tests, and imposing seller-oriented limitations on the exercise of that right.

[iii] Zoning and Land Use Laws

The contract may contain a provision that conditions the buyer's performance on his or her ability to obtain the right under applicable zoning and land use laws to construct the desired development. This provision would protect the buyer when the zoning classification for the property does not permit the buyer's intended use and the buyer is unable to obtain a zoning change, variance, or conditional use permit for that use. For discussion of these forms of zoning relief, see Ch. 30B, *Zoning, Building, and Environmental Permits* . The provision also may grant the buyer the right to waive the contingency, so that the buyer will have the option of altering his or her development plans if necessary.

To protect the seller, the zoning provision should establish a deadline for the submission by the buyer of the necessary applications. Further, anticipating the possibility that a final determination regarding the buyer's application may not be made before the closing date, the provision may offer alternative methods of dealing with such an occurrence.

[iv] Approval of Subdivision Map

A buyer who intends to subdivide the property should condition the sale on approval by the proper governmental body of a tentative map to be submitted by the buyer. Under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], a tentative map must be prepared for most proposed subdivisions [*see Gov. Code § 66426*; *see also* Ch. 30, *Subdivision Regulation*]. It is essentially a rough draft showing the design and improvement of the proposed subdivision and the existing conditions in and around the subdivision [*see Gov. Code § 66424.5(a)*]. The local legislative body uses the tentative map to determine whether the proposed project should be approved and what changes (if any) must be made to the project. If it is approved, the map serves as the basis for the preparation of a final map (or, in some cases, a parcel map) for the project [*see Gov. Code §§ 66433*, *66434*, *66456*]. Because the tentative map is prepared much earlier than the final map and provides the developer with a clear idea of what requirements will be imposed on the final approval of the subdivision, it is sufficient and preferable to condition the buyer's performance on the approval of the tentative map (as opposed to the final or parcel map).

The map contingency should specify the date by which the seller must be notified of the final governmental action regarding the tentative map. This deadline will prevent the buyer from delaying in seeking the approval. If the map is rejected (or no final determination is made) by that date, the buyer may waive the contingency or terminate the contract. Alternatively, the attorney may wish to adapt the "final determination" contingency set forth in the zoning contingency [*see* [iii], *above*].

For further discussion of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

[v] Building Permit

If the buyer plans to construct a commercial building or subdivision, the contract should condition the buyer's performance on the issuance of the necessary building permits to the buyer or the buyer's contractor. The seller's attorney may wish to insist that the approval be obtained by a specified date, to ensure that the buyer will be diligent in seeking the building permits.

For an alternative contingency that should be used when the buyer will need to obtain additional permits, licenses, or certificates, see *§ 23.202[2]*.

[vi] Loan Commitments

A buyer who plans to construct a commercial building or subdivision requiring third-party financing should condition the closing of escrow and his or her further performance on the issuance to the buyer of commitments for a construction loan to finance the project, and possibly on the issuance of one or more commitments for permanent ("take-out") loans [*see* [c][i], *above*]. From the seller's perspective, the contingency (or another provision in the sale contract) should set forth the specific terms of the loan, to prevent the buyer from seeking construction financing at unobtainable terms. The financing contingency should cross-refer to the subordination provisions that describe the terms of the construction loan and take-out loan in detail [*see* [c][iii], *above*].

[vii] Failure of Contingencies

Some contingencies may be made waivable by the buyer [*see* [iii], *above*]. A party may unilaterally waive a condition precedent, but only if the contingency is solely for that party's benefit [*Johnson v. Lehtonen (1957) 151 Cal. App. 2d 579, 582, 312 P.2d 35* ; *Doryon v. Salant (1977) 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378]* . The party may waive the contingency either expressly or by his or her actions [*Noel v. DuMont Builders, Inc. (1960) 178 Cal. App. 2d 691, 696-697, 3 Cal. Rptr. 220]* . If a contingency benefits both parties, it may be waived only by their mutual agreement [*see Spangler v. Castello (1956) 147 Cal. App. 2d 49, 53, 304 P.2d 752* ; *Britschgi v. McCall (1953) 41 Cal. 2d 138, 143, 257 P.2d 977]* . For a form of notice of waiver of a contingency, see Ch. 26, *Real Property Escrows* .

The contract may provide that if any contingency fails to be met, the buyer may terminate the contract and receive a full refund without waiving any other rights that the buyer may have against the seller [*see § 23.200[1][d][iv]*]. Notwithstanding that right of disapproval, the seller may be obligated under the contract to attempt to remedy the failure of certain specified contingencies; and if the seller does not do so, the buyer may terminate the contract or purchase the property (with or without a corresponding reduction in the purchase price). Some contingencies may specify alternative consequences of a failure to be met, such as requiring the buyer to give notice of an expert's determination that the condition of the land precludes the buyer's intended use.

[2] FORMS

[a] Contract

Contract for Sale of Land for Subdivision or Other Development

CONTRACT OF SALE OF REAL PROPERTY

This contract is entered into_____[*date*] by and between_____[*name of seller*] ("Seller"), [*capacity of seller, e.g.*, a California corporation *or* husband and wife] and_____[*name of buyer*] ("Buyer"),_____[*capacity of buyer*].

Seller agrees to sell and convey, and Buyer agrees to purchase, the real property situated in_____[the City of _____, *or* an unincorporated area of] _____ County, California ("the Property"), and more particularly described [as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this contract and incorporated by reference], on the following terms and conditions.

1. Purchase Price

1.01. Formula for Determining Price. The total purchase price of the Property is_____[$_____ per acre *or specify other*] for each acre included in the Property. The exact number of acres included in the Property shall be determined by a survey. For these purposes, the number of acres [shall *or* shall not] include any portion of the Property disclosed by the survey to be unsuitable for development purposes because it is within the boundaries of [any presently recorded road, street, highway, right-of-way, or easement

or describe alternative exclusions].

1.02. Terms of Payment. The purchase price shall be payable by Buyer to Seller as follows.

(a) The sum of $_____ shall be paid on execution of this contract, as a deposit to be applied to the purchase price at the close of escrow. This amount shall be payable _____ [*specify, e.g.*, by certified or cashier's check drawn to the order of the escrow agent].

(b) The further sum of $_____, to be applied to the purchase price at the close of escrow, shall be payable _____ [*specify, e.g.*, in cash or by certified or cashier's check drawn to the order of the escrow agent] and shall be deposited into escrow during business hours at least _____ [*number*] days before the close of escrow.

(c) The balance shall be paid according to the terms of a promissory note in the form of Exhibit _____, which is attached to this contract and incorporated by reference. This note shall:

(1) Be payable to the order of Seller in _____ [monthly *or* annual *or other*] installments of $_____ [or more] each, commencing _____ [*number*] days after the close of escrow _____ [*specify additional terms, e.g.*, with the entire balance due on sale or _____ (*number*) years from the close of escrow]; and

(2) Provide that each installment payment when paid shall be applied first to the payment of interest at the rate of _____ percent per annum from the close of escrow on the then-remaining unpaid principal balance of the note, and then to reduction of the unpaid principal balance.

1.03. Security for Purchase Price. The promissory note described in Paragraph 1.02 shall be secured by a deed of trust ("the Purchase Money Deed of Trust") in the form of Exhibit _____, which is attached to this contract and incorporated by reference.

[*Insert additional provisions set forth in [b] or [c], below, as appropriate.*]

2. Escrow

2.01. Opening of Escrow. An escrow shall be opened to consummate the sale of the Property according to the terms of this contract at the office of_____[*name and title of escrow agent*] (the "escrow agent") at_____[*address*], California. The escrow shall be opened within [*number*] days after the execution of this contract. Written escrow instructions in accordance with the terms of this contract shall be prepared [by each party *or* jointly], and the instructions shall be signed by the parties and delivered to the escrow agent within [*number*] days of the execution of this contract. Buyer and Seller shall also deposit with the escrow agent all instruments, documents, and other items identified in the escrow instructions or reasonably required by the escrow agent to close the sale on the closing date specified below.

2.02. Closing Date. The escrow shall be closed on the date the deed is recorded. [The escrow shall be considered to be in a condition to close when the escrow agent is authorized under the escrow instructions, and is able, to record the grant deed.] The escrow must be [in a condition to close *or* closed] no later than_____[*date*], unless the closing date is extended pursuant to the terms of this contract; provided, however, that this closing date shall not be extended beyond_____[*date*].

2.03. Prorations. The following shall be prorated between Seller and Buyer on the basis of a 30-day month as of the date on which escrow closes: [*specify, e.g.*, real property taxes, special assessments, and premiums on the insurance

policies that are transferred to Buyer pursuant to this contract].

2.04. Broker's Commission. At the close of escrow, Seller shall pay_____[*specify, e.g.,* a sum equal to 6 percent of the selling price of the Property *or* the sum of $_____ *or specify other compensation*] as a real estate broker's commission._____[*Provide for sharing of commission, if more than one broker is involved, e.g.,* This commission shall be divided equally between Seller's broker and Buyer's broker.] _____[*Add, in not less than 10-point boldface type, if contract is first document to establish broker's right to compensation for sale of residential real property containing up to four residential units or for sale of mobilehome, or if contract alters terms of any agreement that previously established such right to compensation,* **Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker.**]

2.05. Closing Costs. Seller shall pay [*specify, e.g.,* the real estate broker's commission described in Paragraph 2.04, any transfer taxes, the costs of the preliminary report and title insurance policy required by this contract, the reconveyance fees charged for the reconveyance of the deed of trust shown on the preliminary title report required by this contract, the recording fees for the reconveyance of that deed of trust, and the cost of preparing, executing, and acknowledging the grant deed and all other instruments necessary to convey title to Buyer]. [*Add, if appropriate:* Seller shall instruct the escrow agent to use a separate document for declaring any transfer tax, and not to declare any transfer tax on the face of the deed.] Buyer shall pay [*specify, e.g.,* the cost of recording the grant deed and any other instruments required to convey title to the Buyer, the costs of preparing, executing, and acknowledging the promissory note and the deed of trust in the forms of Exhibits _____ and _____ to this contract, and the cost of recording that deed of trust]. [*Specify any arrangement for splitting costs, e.g.,* The escrow fee, other than the cost of the above title insurance policy, shall be paid _____ percent by Buyer and _____ percent by Seller.]

[*EITHER*]

2.06. Vesting of Title. Buyer shall advise the escrow agent before the close of escrow of the manner in which title shall vest.

[*OR*]

2.06. Vesting of Title. On the close of escrow, title shall be vested in_____[*specify each buyer's name*] [*specify how title will be held by individual buyer(s), e.g.,* as community property with right of survivorship *or specify other buyer's capacity, e.g.,* a California corporation].

3. Additional Terms and Conditions

3.01. Preliminary Title Report. Within [*number*] days after the execution of this contract, [Buyer shall obtain *or* Seller shall furnish Buyer with] a preliminary [California *or* American] Land Title Association report of the title to the Property and each document shown as an exception or encumbrance in the report. This shall be done at the expense of [Buyer *or* Seller]. Within [*number*] days after the delivery of the report and related documents to Buyer, Buyer shall notify Seller in writing of any objection to any exception. If Buyer makes a timely objection to any exception and the exception is not eliminated within [*number*] days of the Seller's receipt of the objection, this contract shall be terminated. Buyer's failure to object in this manner to any exception shall be an approval by Buyer of that exception.

3.02. Miscellaneous Conditions. The close of escrow and Buyer's obligation to purchase the Property pursuant to this contract are contingent on the satisfaction of the following conditions, which are solely for Buyer's benefit unless otherwise indicated.

(a) Marketable Title. The conveyance to Buyer of good and marketable title to the Property, as evidenced by a California Land Title Association standard coverage title insurance policy issued by _____ [*name of title company*] in the _____ [amount of $_____ *or* full amount of the purchase price] insuring that title to the Property is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Seller, subject only to those exceptions approved by Buyer in writing and the following: a lien for current real property taxes, any exceptions shown on the preliminary title report that are not disapproved by Buyer pursuant to that paragraph, the promissory note attached to this contract as Exhibit _____, the deed of trust attached to this contract as Exhibit _____, and _____ [*specify additional exceptions*].

(b) Delivery of Possession. The delivery of possession of the Property to Buyer _____ [immediately on the close of escrow *or specify other deadline*], free and clear of all uses and occupancies except those approved in writing by Buyer _____ [; provided, however, that if Seller is unable to deliver possession at that time, Seller shall pay Buyer $_____ per day from the close of escrow to the date buyer obtains possession; and provided further that in no event shall delivery of possession occur later than _____ (*date*)].

(c) Survey. The completion and deposit in escrow of a survey of the Property, which shall be prepared by a registered civil engineer or licensed land surveyor selected by Buyer and approved by Seller; provided that:

(1) Seller's approval shall not be unreasonably withheld.

(2) _____ [Buyer *or* Seller] shall pay for the survey.

(3) The survey shall be completed within _____ [*number*] days after the execution of this contract and deposited into escrow.

(4) Buyer shall have _____ [*number*] days following the deposit of that survey in escrow to notify Seller in writing of Buyer's disapproval of any matter stated in that survey; and if Buyer does so, this contract shall be terminated.

(d) Geological and Engineering Tests. The determination that all of the Property is free from filled ground or other geological or engineering conditions that would preclude the use and development of the Property as _____ [*specify planned use, e.g.*, a residential subdivision] in the usual and customary manner without extra expense for precautionary, corrective, or remedial measures; provided that:

(1) The determination shall be made by a person or persons selected by Buyer and professionally qualified and licensed to practice in California after a soil test or other civil engineering test has been conducted by that person or persons.

(2) Seller shall provide Buyer with copies of the following documents _____ [*specify time of delivery, e.g.*, at close of escrow], which shall be used by Buyer's expert or experts in making the foregoing determination: _____ [*describe tests, reports, etc. previously prepared on seller's behalf*].

(3) Buyer shall notify Seller of the determination in writing before _____ [*date*].

(4) Failure by Buyer to give that notice shall constitute a waiver of this condition.

(e) Zoning. The approval under the applicable zoning and land use laws and regulations of Buyer's proposal to _____ [construct *or* construct and operate] _____ [*planned use, e.g.*, a residential subdivision] on the Property; provided that:

(1) Buyer shall make the necessary applications, at Buyer's expense, within _____ [*number*] days after the execution of this contract, and shall proceed with diligence to secure the right to use the Property in the manner stated above.

(2) Buyer's failure to make those efforts shall constitute a waiver of this condition.

(3) Seller shall cooperate with Buyer in securing that right.

(4) If a final determination is obtained that does not permit the use of the Property as stated above, then Buyer may waive this condition or terminate the contract by giving Seller written notice of the election within _____ [*number*] days of the final determination.

(5) Buyer's failure to notify Seller in that manner shall constitute a waiver of this condition.

(6) A determination shall be deemed final when all nonjudicial appeals from an administrative determination have lapsed or been exhausted.

(7) If a final determination has not been obtained as of the close of escrow, then Buyer shall _____ [not have the right to extend the closing date *or* have the right to extend the closing date until _____ (*date*), by written notice to Seller of the election to extend given before the then-existing closing date].

(f) Building Permit. The issuance to Buyer, or Buyer's contractor, of a building permit for the construction of _____ [*describe improvements, e.g.,* 46 single-family dwellings] on the Property; provided that:

(1) Seller shall cooperate with Buyer in securing that permit.

(2) The permit shall be issued on or before _____ [*date*].

(3) If the permit is denied or is subject to conditions that Buyer reasonably determines to be unacceptable, Buyer may either waive this condition or terminate this contract by providing Seller with written notice of Buyer's election within _____ [*number*] days of the denial of the permit or issuance of an unacceptable permit.

(4) Buyer's failure to provide that notice shall constitute a waiver of this condition.

(g) Loan Commitments. The issuance to Buyer by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender, of written commitments for _____ [a construction loan *or* one or more construction loans] and _____ [a take-out loan *or* one or more take-out loans]; provided that:

(1) Each loan commitment described in this condition shall be for a loan that satisfies the conditions for subordination set forth in this contract.

(2) Within _____ [*number*] days after the date of execution of this contract, Buyer shall apply to at least _____ [*number*] lending institutions _____ [including _____ (*names of specific lenders*)] for each loan described above, and Buyer shall diligently supply each lending institution with the documents and information required by it in connection with Buyer's application for each loan.

(3) Buyer shall notify Seller in writing of Buyer's receipt of, or failure to obtain, the commitments above within _____ [*number*] days after the execution of this contract.

(4) If Buyer does not provide that notice, this condition shall be waived.

(5) If a timely notice informs Seller of a failure to obtain one or more of the necessary commitments, this contract shall be terminated.

[*Add other conditions; see, e.g., § 23.202[2], P 3.02; see also §§ 23.220[2], 23.237[2]).*]

[*Add following provision if property will be developed as subdivision:*]

(h) Subdivision Map. The approval of a tentative subdivision map for the subdivision of the Property; provided that:

(1) Buyer shall file the map for approval with the appropriate authorities within _____ [*number*] days of the execution of this contract.

(2) The map shall be approved on or before _____ [*date*].

(3) Buyer shall notify Seller in writing of the approval within _____ [*number*] days of the approval.

(4) If Buyer disapproves of any of the conditions attached to the approval of the map, Buyer must so notify Seller in writing within _____ [*number*] days of the date of the approval.

(5) Failure to give that notice shall constitute a waiver of this condition.

(6) If a timely notice informs Seller of Buyer's disapproval of any condition, this contract shall be terminated.

3.03. Failure of Condition and Seller's Breach of Warranty. Except as provided in Paragraph 3.04, if any condition set forth in this contract is not satisfied, or if Buyer notifies Seller in writing before the close of escrow of Seller's breach of any of Seller's warranties set forth in this contract, then Buyer may cancel the escrow, terminate this contract, and recover the amounts paid by Buyer to the escrow agent toward the purchase price of the Property [*add, if Buyer is to pay escrow charges:* (less costs and expenses of escrow)]. Buyer shall exercise this power to terminate by complying with any applicable notice requirements specified in the relevant condition and, in all other cases, by providing written notice to Seller and the escrow agent within [*number*] days of the failure or breach. The exercise of this power shall not waive any other rights Buyer may have against Seller for breach of this contract. Seller shall instruct the escrow agent, in the escrow instructions, to refund to Buyer all money and instruments deposited in escrow by Buyer pursuant to this contract on failure of a condition or breach of a warranty and receipt of a termination notice. This instruction shall be irrevocable. [*Add, if Seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of escrow.]

3.04. Seller's Obligation to Cure Defects. Notwithstanding any provision of this contract to the contrary, Buyer shall immediately notify Seller in writing of Buyer's discovery, before the close of escrow, of a violation of any of the following provisions of this contract:_____[*list paragraph numbers of any conditions or warranties that are to be subject to this provision*]. For these purposes, the foregoing matters shall be referred to as "defects." If Buyer fails to give notice, Buyer shall waive the defect and the defect shall not be a failure of a condition or breach of a warranty. If Buyer gives notice, the notice shall set forth the particular matter disapproved of or breached. On receipt of the notice, Seller shall immediately and diligently endeavor to remedy the defect at Seller's sole expense. If Seller does not remedy the defect within [*number*] days of the receipt of Buyer's notice, Buyer shall have the right to elect to do one of the following:

(a) Terminate the contract without any liability on the part of Buyer.

[*EITHER*]

(b) Purchase the Property at the purchase price less the reduction in market value due to the unremedied defect, provided that the reduction in market value shall be determined by arbitration if the parties are unable to agree on the amount of the reduction, the expense of the arbitration shall be borne by Seller, and the reduction in price shall be applied _____ [*specify, e.g.,* first to the down payment and next to the promissory note to Seller in the form of Exhibit _____].

[*OR*]

(b) Purchase the Property without a reduction in the purchase price and without any liability for the unremedied defect on the part of Seller, except that if the defect is a lien or encumbrance that can be remedied by the payment of money not to exceed a total of $_____, then Seller shall be required to pay that amount or instruct the escrow agent to pay that amount from escrow out of Seller's proceeds.

[*CONTINUE*]

(c) Remove the defect and purchase the Property for the purchase price less the reasonable cost to Buyer of removing the defect, provided that this cost does not exceed $_____.

Buyer shall notify Seller in writing, before the close of escrow, of Buyer's election of one of the foregoing options. A failure to elect shall be deemed an election of [*specify, e.g.,* the first option]. If Buyer elects the third option, Buyer shall be entitled to postpone the close of escrow up to a maximum of [*number*] days for the purpose of removing the defect. If Buyer is unable to remove the defect before the close of escrow, including any postponement period, Buyer may then elect the first or second option within that period of time. The failure of Buyer to make that election will be deemed an election of the [first *or* second] option. Seller shall instruct the escrow agent, in the escrow instructions, to immediately refund to Buyer all money [*add, if buyer is to pay escrow charges:* (less costs and expenses of escrow)] and instruments deposited in escrow by Buyer pursuant to this contract on termination of this contract pursuant to this paragraph, and on receipt of notice of that termination from Buyer. [*Add, if seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of the escrow.]

4. Rights and Warranties

4.01. Right of Buyer to Enter Property. Seller grants to Buyer, or Buyer's agents, the right, at any time and from time to time within [*number*] days after the opening of the escrow, to enter the Property to conduct tests or investigations. The acts shall be conducted at the sole cost and expense of Buyer and shall not unreasonably interfere with Seller's possession. Buyer shall indemnify and hold Seller harmless from any costs or liability resulting from the acts and, if the escrow is canceled for a reason that is not the fault of Seller, for any damage to the Property resulting from the acts. Buyer shall give Seller written notice of the intention to enter [*number*] days before the date of the planned entry.

4.02. Warranties of Seller. Seller makes the following warranties.

(a) Seller owns the Property, free and clear of all liens, licenses, claims, encumbrances, easements, encroachments on the Property from adjacent properties, encroachments by improvements on the Property onto adjacent properties, or

rights-of-way of any nature, not disclosed by the public record, other than: _____ [*describe exceptions, including any off-record items such as unrecorded leases*].

(b) There is no pending litigation involving the Property.

(c) Seller has no knowledge of any violations of, or notices concerning defects or noncompliance with, any applicable code, statute, regulation, ordinance, judicial order, or judicial holding pertaining to the Property.

(d) Seller is not in default under any contract, note, or encumbrance relating to the Property.

(e) Seller will maintain the Property in the same condition as on _____ [*date*].

4.03. Execution of Documents. Seller agrees to execute (sign with acknowledgment) any and all documents that may be required to gain the approval by any governmental body or agency of any plans or maps submitted by Buyer for approval pursuant to this contract. The cost or expense of any execution by Seller pursuant to this paragraph shall be borne solely by Buyer.

4.04. Survival of Warranties. All warranties, covenants, and other obligations in this contract shall survive delivery of the deed to the Property.

5. Miscellaneous Provisions

5.01. Loss, Destruction, and Condemnation. The parties agree that the Uniform Vendor and Purchaser Risk Act, set forth in *Civil Code Section 1662*, and its provisions governing the allocation of risk of loss, shall govern this transaction.

[*Set out following provision in at least 10-point boldface type, or 8-point contrasting red boldface type, if contract is printed (Civ. Code §§ 1676, 1677(b)).*]

5.02. Liquidated Damages. If Buyer defaults in the performance of this contract, the parties agree that Seller shall be released from any obligation to sell the Property to Buyer and may retain, as liquidated damages, the lesser of the deposit paid by Buyer on execution of this contract or 3 percent of the purchase price. Seller shall refund to Buyer any remainder of the deposit. The parties further agree that the amount of liquidated damages established by this provision is a reasonable estimate, under the circumstances existing on the date of execution of this contract, of what Seller's damages would be in the event of a default by Buyer.

Initialed by Buyer: _____
Initialed by Seller: _____

5.03. Insurance. Seller shall cancel all policies of insurance on the Property as of the close of escrow. Buyer shall be responsible for obtaining insurance on the Property as of the close of escrow._____[*Add any additional requirements imposed by lender or in connection with seller financing, e.g.,* This insurance shall include comprehensive casualty insurance in an amount sufficient to cover 100 percent of the replacement cost of the improvements to be erected by Buyer. Seller shall be named as an additional loss payee in the casualty policy and shall instruct the insurance carrier to deliver to Seller, before the close of escrow, evidence of this insurance and a certificate providing for 30 days' written notice of the cancellation of the casualty insurance.]

5.04. Assignment. Buyer may not assign this contract without Seller's prior written consent. The valid assignment of this contract [shall *or* shall not] relieve Buyer of liability under this contract.

5.05. Time of Essence. Time is of the essence in this contract.

5.06. Notices. Any notice, tender, delivery, or other communication pursuant to this contract shall be in writing and shall be deemed to be properly given if delivered, mailed, or sent by wire or other telegraphic communication as follows:

(a) If to Buyer:

_____[*name of addressee*]
_____[*street address*]
_____[*city, state, zip*]

(b) If to Seller:

_____[*name of addressee*]
_____[*street address*]
_____[*city, state, zip*]

Either party may change that party's address for these purposes by giving written notice of the change to the other party in the manner provided in this paragraph. If sent by mail, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* 48 hours] after it has been deposited in the U.S. mail, duly registered or certified, with postage prepaid, and addressed as set forth above. If sent by wire or other form of telegraphic communication, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* eight hours] after it has been deposited with the carrier, prepaid and addressed as set forth above.

5.07. Entire Agreement. This contract and the attached exhibits constitute the entire agreement between the parties relating to the sale of the Property. Any prior agreements, promises, negotiations, or representations not expressly set forth in this contract are of no force and effect. Any amendment to this contract shall be of no force and effect unless it is in writing and signed by Buyer and Seller.

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 8-point boldface or contrasting red type, with heading in capital letters (Code Civ. Proc. § 1298(a)).*]

5.08. ARBITRATION OF DISPUTES. Any controversy or claim arising out of this contract or a breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction.

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 10-point boldface or 8-point contrasting red boldface type (Code Civ. Proc. § 1298(c)).*]

Notice:

By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the "ARBITRATION OF DISPUTES" provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless such rights are specifically included in the "ARBITRATION OF DISPUTES" provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure.

Your agreement to this arbitration provision is voluntary.

We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the "ARBITRATION OF DISPUTES" provision to neutral arbitration.

Initialed by Buyer: _____
Initialed by Seller: _____

5.09. Attorney's Fees. If any action, proceeding, or arbitration arising out of or relating to this contract is commenced by either party to this contract or by the escrow agent, then as between Buyer and Seller, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorney's fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

5.10. Binding Effect. This contract shall be binding on and inure to the benefit of the parties to this contract and their heirs, personal representatives, successors, and assigns, except as otherwise provided in this contract.

5.11. Governing Law. This contract and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

5.12. Headings. The headings in this contract are inserted for convenience only. They do not constitute part of this contract and shall not be used in its construction.

5.13. Waiver. The waiver by any party to this contract of a breach of any provision of this contract shall not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other provision of this contract.

Date: _____
SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

[b] Price Provisions--Commercial Building Construction

Price Provisions--Commercial Building Construction

[*Insert following provisions into form in [a], above, if buyer will construct commercial building on property.*]

1.04. Subordination to Construction Loan. The Purchase Money Deed of Trust shall provide that it will be automatically subordinated to a deed of trust to be executed by Buyer or Buyer's successor in interest to secure a loan obtained for the purpose of constructing improvements on the Property (a "construction loan"); provided that:

(a) At the time of recordation of the deed of trust securing the construction loan, no unrescinded notice of default of the Purchase Money Deed of Trust shall appear of record, and Buyer shall not be in default in the payment of any taxes or assessments affecting the property then encumbered by the Purchase Money Deed of Trust.

(b) The total amount of the construction loan shall not exceed $_____.

(c) Any funds derived from the construction loan shall be used only for the construction on the Property of _____ [*describe type of facility, e.g.,* an apartment building containing at least 10 units] (the

"Building"), having a value, as determined by the institutional lender making the permanent or take-out loan on the Property, of at least $_____.

(d) The construction loan placed on any portion of the Property shall not exceed _____ percent of the anticipated value, as determined by the lending institution making the construction loan, of that portion of the Property after completion of the improvements that the loan was obtained to finance.

(e) No portion of the construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of the Building on the portion of the Property encumbered by the construction loan.

(f) The loan fees, interest, and other loan charges for the construction loan may be deducted from the principal amount of the loan, and shall not exceed the following maximum amounts:

Loan fees: $_____
Interest: $_____
Other loan charges: $_____

(g) The construction loan shall bear interest, exclusive of late charges, penalties, or default fees, not greater than _____ percent per annum.

(h) The provisions in the construction loan for late charges, penalties, or default fees shall be as follows: _____ [*specify*].

(i) The construction loan shall be payable _____ [in equal monthly installments *or specify other repayment schedule*] over a period of time of not less than _____ [*number*] months or more than _____ [*number*] years.

(j) Additional payments may be made, without penalty, on the principal and accrued interest of the construction loan at any time before maturity.

(k) The total payments due on the construction loan shall not exceed $_____ per month.

(l) The construction loan shall be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender.

(m) The proceeds of the construction loan shall be disbursed by the lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the Property and presentation of vouchers signed by Buyer or Buyer's successor in interest for the cost of work, labor, or materials actually performed or used in the construction of the Building.

(n) Buyer or the trustee named in the Purchase Money Deed of Trust shall deliver to Seller a binding written commitment from an institutional lender to make a permanent loan on the Property, further described below, upon completion of the Building.

(o) The remaining terms and provisions of any construction loan shall be as required by the lender.

1.05. Subordination to Permanent Loan. The Purchase Money Deed of Trust shall further provide that it will be automatically subordinated to a deed of trust to be executed by Buyer or Buyer's successor in interest on completion of the Building to secure a permanent loan (a "take-out loan") obtained to provide permanent financing for the improvements on the Property; provided that:

(a) At the time of recordation of the deed of trust securing the take-out loan, no unrescinded notice of default of the Purchase Money Deed of Trust shall appear of record, and Buyer shall not be in default in the payment of any taxes or assessments affecting the Property then encumbered by the Purchase Money Deed of Trust.

(b) The proceeds of the take-out loan shall be used first to pay in full any construction loans on the Property, and any mechanic's liens or other charges levied or leviable against the Property because of any improvements made on the Property by Buyer or Buyer's successor in interest.

(c) The total amount of the take-out loan shall not exceed $_____.

(d) The total amount of the take-out loan shall not exceed _____ percent of the value, as determined by the lender, of the Property as improved by Buyer or Buyer's successor in interest.

(e) The loan fees, interest, and other loan charges for the take-out loan may be deducted from the principal amount of the loan and shall not exceed the following maximum amounts:

Loan fees: $_____
Interest: $_____
Other loan charges: $_____

(f) The take-out loan shall bear interest, exclusive of late charges, penalties, or default fees, at a rate not greater than _____ percent per annum.

(g) The provisions in the take-out loan for late charges, penalties, and default fees shall be as follows: _____ [*specify*].

(h) The take-out loan shall be payable _____ [in equal monthly installments *or specify other repayment schedule*] over a period of time of not less than _____ [*number*] months or more than _____ [*number*] years.

(i) Additional payments may be made, without penalty, on the principal and accrued interest of the take-out loan at any time before maturity.

(j) The total payments due on the take-out loan shall not exceed $_____ per month.

(k) The take-out loan shall be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender.

(l) The proceeds of the take-out loan shall be disbursed by the lender either through its own offices or through a bonded disbursement control agency.

(m) The remaining terms and provisions of the take-out loan shall be as required by the lender.

[c] Price Provisions--Subdivision Development

Price Provisions--Subdivision Development

[*Insert following provisions into form in [a], above, if buyer will develop subdivision on property.*]

1.04. Subordination to Construction Loan. The Purchase Money Deed of Trust shall provide that, after the recordation of a subdivision map for the Property or any portion of it, the Purchase Money Deed of Trust will be automatically subordinated to one or more subsequent deeds of trust executed by Buyer to secure a loan or loans obtained for the purpose of constructing improvements on all or a portion of the Property covered by the subdivision map ("construction loans"); provided that:

(a) At the time of recordation of any deed of trust securing a construction loan, no unrescinded notice of default of the Purchase Money Deed of Trust shall appear of record, and Buyer shall not be in default in the payment of any taxes or assessments affecting the property then encumbered by the Purchase Money Deed of Trust.

(b) The total amount of all construction loans shall not exceed $_____.

(c) The amount of any new construction loan on a single lot shall not exceed $_____.

(d) Any funds derived from any construction loan shall be used only for the construction of improvements on the lot or lots that the construction loan encumbers.

(e) No construction loan placed on any lot or lots shall exceed _____ percent of the anticipated value, as determined by the lending institution making the construction loan, of the lot or lots after completion of the improvements that the loan was obtained to finance.

(f) No portion of any construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the lot or lots encumbered by the construction loan.

(g) The loan fees, interest, and other loan charges for any construction loan may be deducted from the principal amount of the loan, and shall not exceed the following amounts:

Loan fees: $_____
Interest: $_____
Other loan charges: $_____

(h) No construction loan shall bear interest, exclusive of late charges, penalties, or default fees, at a rate greater than _____ percent per annum.

(i) The provisions in any construction loan for late charges, penalties, or default fees shall be as follows: _____ [*specify*].

(j) Each construction loan shall be payable _____ [in equal monthly installments *or specify other repayment schedule*] over a period of time of not less than _____ [*number*] months or more than _____ [*number*] years.

(k) Additional payments may be made, without penalty, on the principal and accrued interest of any construction loan at any time before maturity.

(l) The total payments due on all construction loans shall not exceed $_____ per month.

(m) Each construction loan shall be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender.

(n) The proceeds of any construction loan shall be disbursed by the lender either through its own offices or through a

bonded disbursement control agency only after inspection of the work completed on the lot or lots and presentation of vouchers signed by Buyer or Buyer's successor in interest for the cost of work, labor, or materials actually performed or used in the construction of improvements on the lot or lots.

(o) The remaining terms and provisions of any construction loan shall be as required by the lender.

1.05. Subordination to Permanent Loan. The Purchase Money Deed of Trust shall further provide that it shall be subordinated to one or more subsequent deeds of trust to be executed by Buyer or Buyer's successor in interest on completion of the improvements on any lot of the Property to secure a permanent loan or loans obtained to provide permanent financing for the improvements constructed on the Property ("take-out loans"); provided that:

(a) At the time of recordation of any deed of trust securing a take-out loan, no unrescinded notice of default of the Purchase Money Deed of Trust shall appear of record, and Buyer shall not be in default in the payment of any taxes or assessments affecting the property then encumbered by the Purchase Money Deed of Trust.

(b) Each take-out loan shall be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender.

(c) The proceeds of any take-out loan shall be used first to pay in full any construction loans on the Property, and any mechanic's liens or other charges levied or leviable against the Property because of any improvements made on the Property by Buyer or Buyer's successor in interest.

(d) The total amount of all take-out loans shall not exceed $_____.

(e) The total amount of any take-out loan shall not exceed _____ percent of the value, as determined by the lender, of the property encumbered by the deed of trust securing that take-out loan as improved by Buyer or Buyer's successor in interest.

(f) The loan fees, interest, and other loan charges for any take-out loan may be deducted from the principal amount of the loan and shall not exceed the following maximum amounts:

Loan fees: $_____
Interest: $_____
Other loan charges: $_____

(g) No take-out loan shall provide for interest, exclusive of late charges, penalties, or default fees, at a rate greater than _____ percent per annum.

(h) The provisions in any take-out loan for late charges, penalties, or default fees shall be as follows: _____ [*specify*].

(i) Any take-out loan shall be payable _____ [in equal monthly installments *or specify other repayment schedule*] over a period of time of not less than _____ [*number*] months or more than _____ [*number*] years.

(j) Additional payments may be made, without penalty, on the principal and accrued interest of any take-out loan at any time before maturity.

(k) The total payments due on all take-out loans shall not exceed $_____ per month.

(l) The proceeds of any take-out loan shall be disbursed by the lender either through its own offices or through a bonded disbursement control agency.

(m) The remaining terms and provisions of any take-out loan shall be as required by the lender.

[*Add following provision if subdivider and seller agree to partial release of undeveloped parcels from encumbrance of purchase money deed of trust before approval of subdivision map:*]

1.06. Partial Releases Before Map Approval. The Purchase Money Deed of Trust shall also provide that the trustee under the Purchase Money Deed of Trust ("the Trustee") shall release any one or more of the parcels of the Property described in the Schedule set forth below ("the Schedule"), before the recordation of a final subdivision map for all or any portion of the Property, from the lien or charge of the Purchase Money Deed of Trust by the grant of partial reconveyances under the following terms and conditions:

(a) Buyer or Buyer's successor in interest shall submit a written request for the partial reconveyance to the Trustee.

(b) No partial reconveyance shall be granted at any time when an unrescinded notice of default appears of record.

(c) Buyer shall meet all requirements of the Subdivision Map Act, and local ordinances under it, arising in connection with the reconveyance at the sole cost and expense of Buyer.

(d) Buyer's request for reconveyance shall contain a certificate by a civil engineer licensed to practice in California specifying in acres and fractions of an acre the size of each parcel of the property requested to be reconveyed.

(e) No parcel shall be reconveyed if, by reason of the reconveyance, the portion of the Property remaining subject to the Purchase Money Deed of Trust would be left without frontage on a public street or road.

(f) No reconveyance shall be made of less than an entire parcel as described in the Schedule.

(g) Buyer shall pay to the Trustee a sum to be applied toward the payment of the principal of the promissory note secured by the Purchase Money Deed of Trust and equal to the amount per acre for each acre and fraction of an acre to be reconveyed for the parcel to be reconveyed as specified for that parcel in the Schedule.

(h) Buyer shall pay to the Trustee a sum to be applied to the interest accrued on the promissory note secured by the Purchase Money Deed of Trust. This sum shall be equal to the interest accrued on the promissory note to the date of the request for the reconveyance at the rate of _____ percent per annum on the unpaid principal balance of the promissory note.

(i) Buyer shall pay to the Trustee the costs of executing and recording the partial reconveyance.

(j) The following is the Schedule of parcels that may be reconveyed. The parcels may be released only in the order in which they appear on this Schedule: _____ [*construct schedule to show, for each parcel in property: legal description of parcel, number of acres in parcel, and release price per acre*].

[*Add following provision if subdivider and seller agree to partial release of individual lots following recordation of subdivision map:*]

1.07. Partial Releases Following Recordation of Map. The Purchase Money Deed of Trust shall further provide that

the Trustee shall, after the approval of a final subdivision map for all or a portion of the Property by _____ County, California, and the recording of that approved subdivision map in that county, release any one or more of the lots shown on that map from the lien or charge of the Purchase Money Deed of Trust by the grant of partial reconveyances under the following terms and conditions:

(a) Buyer or Buyer's successor in interest shall submit a written request for the partial reconveyance to the Trustee.

(b) No partial reconveyance shall be granted at any time when an unrescinded notice of default appears of record.

(c) Buyer shall pay to the Trustee a sum to be applied toward the payment of the principal of the promissory note secured by the Purchase Money Deed of Trust. This sum shall be equal to the amount that would have been required before approval of the map under the Schedule set forth in Paragraph 1.06 for the acreage contained in the lot to be reconveyed.

(d) Buyer shall pay to the Trustee a sum to be applied to the interest accrued on the promissory note secured by the Purchase Money Deed of Trust. This sum shall be equal to the interest accrued on the promissory note to the date of the request for the reconveyance at the rate of _____ percent per annum on the unpaid principal balance of the promissory note.

(e) Buyer shall pay to the Trustee the costs of executing and recording the partial reconveyance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.202

AUTHOR: William M. Hensley Editorial Consultant

§ 23.202 Contract of Sale of Property With Multiple Rental Units

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract for the sale of a commercial building containing multiple rental units. It provides for a deposit, seller financing, an escrow [*see § 23.200[1][c][i]*], and liquidated damages. It also sets forth contingencies relating to the delivery, approval, and assignment of existing leases, tenant estoppel certificates, the issuance of necessary governmental approvals, and a pest inspection and corrective pest-control work. Several seller warranties cover the condition of the property and the status of existing contracts affecting the property.

For discussion of provisions on marketable title and possession, see *§ 23.200[1][d][ii]* and *[iii]*. For discussion of miscellaneous provisions, see *§ 23.200[1]*.

[b] Purchase Price

[i] Allocation

The parties may specify the total purchase price of the improved property, and then allocate the total price among the land, improvements, and personal property included in the sale. For discussion of the tax consequences of such an allocation, see *§ 23.28[1]*.

[ii] Terms of Payment

The contract may provide for a down payment, payment of a further sum in cash or by check on close of escrow, and payment of the balance of the purchase price pursuant to the terms of a secured "interest extra" promissory note. Under an "interest extra" note, the buyer must make installment payments in a specified amount that does not change during

the term of the note. With each installment payment, the maker must also pay the interest then due on the remaining unpaid principal balance of the note. Thus the amount of the interest payment will decrease over the term of the note as the unpaid principal balance decreases. For an "interest included" provision, under which each installment payment is applied first to interest and then to principal, see *§ 23.201[2]*. For a list of other types of payment provisions, see *§ 23.131*.

[c] Contingencies (Conditions)

[i] Approval of Leases and Other Documents

The contract should condition the buyer's performance on his or her approval of the leases, insurance policies, service contracts, and employment contracts relating to the property. To protect the seller, the approval contingency may impose a deadline on this review process and provide that failure to meet that deadline constitutes an approval of the contracts.

Because the documents to be approved by the buyer will be numerous in the case of a large, multi-unit rental property, the contract may provide for the use and attachment of schedules that describe the documents in detail. These schedules may contain the following information:

- (Schedule 1) All leases encumbering the property as of the date of the contract, indicating for each lease whether any tenant is in default in the performance of that lease and setting forth the nature of any default;

- (Schedule 2) All insurance policies currently insuring the property, stating for each policy the policy number, insurer's name, term, expiration date, premiums, and nature and type of policy;

- (Schedule 3) All persons employed by the seller in connection with the property, stating for each the employee's name, social security number, position, salary, any collective bargaining or employment contract covering the employee, and the amount of any and all contributions accruing to pension, vacation, union welfare, or other funds for that employee; and

- (Schedule 4) All service and other contracts (such as contracts for equipment rental, maintenance, and guard service, but excluding employment, collective bargaining, or occupancy contracts), stating for each contract the names of the parties, the service rendered or to be rendered, the compensation payable by the seller, other important terms, and the expiration date.

The contract also may contain warranties that the schedules are accurate and that the seller is not in default under any of the contracts [*see* [e][ii], *below*].

[ii] Tenant Estoppel Certificates

If the tenants are obligated, under their leases, to provide estoppel certificates when the landlord requests them [*see generally* California Real Estate Law and Practice, Ch. 153, *Drafting Commercial Leases* (Matthew Bender)], the buyer should insist on receiving an estoppel certificate from each of the tenants as a condition to the closing of escrow. An estoppel certificate is a statement by a tenant that the seller has not breached the lease, that no security deposits are being held by the seller other than as shown on the seller's books, and that no rent has been paid in advance except as shown by those books [*see § 23.322*].

PRACTICE TIP:

Tenant Estoppel Certificates Get Conclusive Impact. Tenant estoppel certificates are indispensable elements of commercial sales of shopping centers and office buildings. The certificates routinely are

relied on by buyers in substantiating the cash flow from the property being purchased (and, on a subsidiary level, by appraisers hired by the parties to value the property under the income approach) [*see In re Aslan (9th Cir. 1990) 909 F.2d 367, 370]* .

One appellate decision has recognized that statements in a tenant estoppel certificate are tantamount to recitals that are accorded conclusive effect under *Evid. Code § 622* [*see Plaza Freeway Ltd. v. First Mountain Bank (2000) 81 Cal. App. 4th 616, 96 Cal. Rptr. 2d 865]* . Commentators agree that tenants may not contradict statements they have warranted as true in estoppel certificates [*see In re Aslan (9th Cir. 1990) 909 F.2d 367, 369 n.2* ; *California Real Estate Law & Practice, Ch. 90, Representing Clients in Sales Transactions, § 90.69[2]* (Matthew Bender)]. Given this impact afforded to these certificates, landlords and potential purchasers should insist on them. However, note that *Plaza Freeway* was subsequently distinguished in a 2004 case which held that the estoppel certificate was not conclusive evidence of the contract terms because it created an ambiguity: the certificate stated that the lease remained in effect but created an ambiguity as to the continued existence of an option in the lease [*Miner v. Tustin Avenue Investors (2004) 116 Cal. App. 4th 264, 272, 10 Cal. Rptr. 3d 178]* . *By William M. Hensley.*

[iii] Assignment of Leases

The contract should require the seller to furnish to the buyer a signed and acknowledged assignment of the seller's entire right, title, and interest in every lease encumbering the property. The contract should also provide for the buyer's approval of the proposed assignment contract and the buyer's assumption of the obligations under the leases.

[iv] Seller's Books and Records

The buyer should condition his or her performance on (1) the buyer's receipt and expressed approval of copies of all books and records relating to the management of the property, and (2) a showing of the current or delinquent status of each tenant. The seller should insist that the buyer's approval be in writing and deposited in escrow by a specific date.

[v] Licenses and Permits

The contract may condition the buyer's performance on issuance to the buyer of all permits, certificates, and licenses that the buyer will require to operate the property in the manner in which it has previously been operated by the seller. The contingency may further protect the buyer by providing that any conditions attached to the issuance of the approvals must be reasonably acceptable to the buyer. For discussion of the use of contingencies requiring the personal satisfaction of either party, see *§ 23.16*. To ensure the buyer's diligent performance in obtaining the necessary permits and licenses, the contingency may require the buyer to notify the seller within a specified number of days if any of the necessary approvals cannot be obtained.

[vi] Inspection by Contractor

The buyer may wish to retain a licensed contractor to inspect the physical condition of the property. This practice is particularly advisable when the subject property contains five or more dwelling units, because the seller of such a structure need not provide the prospective buyer with a copy of the statutory real estate transfer disclosure statement [*see Civ. Code § 1102(a)*; *see also § 23.20[1]*]. The contract may empower the buyer to order such an inspection, to negotiate with the seller concerning any defects disclosed in the inspection report, and to terminate the contract if the parties cannot agree on the correction of the defects.

[vii] Roof Inspection

If the property being sold is an older structure, the buyer should insist on the preparation of a roof inspection report by a

licensed general contractor or roofing contractor. The parties should be empowered to assume or allocate the responsibility for the payment of any recommended work, or the buyer should be empowered to terminate the contract if the seller is unwilling to pay for the work.

[viii] Inventory and Bill of Sale

If the sale includes personal property, that property can be described in the contract or in an exhibit. However, if several items are involved, the buyer's performance should be conditioned on the deposit in escrow of an inventory of the personal property taken jointly by the parties. In addition to the inventory, a bill of sale for the personal property [*see § 23.323*] should be deposited in escrow.

[d] Pest-Control Inspection and Work

A pest-control provision may be used when the buyer wants assurance that the structures are not infested with termites or other wood-destroying pests or organisms. It is important that this matter be covered because there are no implied warranties against building defects in a contract for the sale of real property [*Murphy v. Sheftel (1932) 121 Cal. App. 533, 539, 9 P.2d 568]* , such as defects caused by termites or dry rot. However, if the seller knows of termite damage and knows that the buyer is unaware of it, and the seller conceals it to induce the buyer to purchase the property, the seller may be liable, on a cause of action for fraud, for damages [*Orlando v. Berkeley (1963) 220 Cal. App. 2d 224, 228-229, 33 Cal. Rptr. 860* ; *Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 738, 29 Cal. Rptr. 201]* .

The pest-control provisions should reflect statutory requirements, procedural steps, and drafting considerations discussed in *§§ 23.133* and *23.150*. They should provide for the use of an existing structural pest-control report or the inspection of the property and the preparation of such a report by a registered company or licensed structural pest-control operator [*see Bus. & Prof. Code §§ 8506.1, 8516, 8556*], the performance of corrective work [*see Bus. & Prof. Code § 8516*] or termination of the contract if the recommended work exceeds a specified sum, the allocation of the costs of the work, and the deposit in escrow of a certification stating that the property is free of active infestation or infection in the visible and accessible areas [*see Bus. & Prof. Code § 8519*].

For further discussion, including an examination of problems relating to pest-control certifications, see *§ 23.320[1]*.

[e] Warranties

[i] Definition

A contract for the sale of a building containing multiple rental units typically contains a number of warranties. A warranty is a statement that specified facts pertaining to the property or the sale transaction exist or will exist [*see § 23.17*]. Warranties are particularly important when a multi-unit rental building is being sold because the buyer will be assuming existing rental agreements encumbering the property.

[ii] Status of Existing Contracts

To protect the buyer from the consequences of a default by the seller in the performance of the seller's obligations under existing contracts relating to the property [*see* [c][i], *above*], the contract may contain a warranty that the seller is not in default under those contracts.

[iii] Insurance

If the buyer will or may assume insurance policies currently covering the property, he or she should obtain the seller's warranty as to the validity of the pertinent information on each policy [*see § 23.200[1][h]*].

[f] Miscellaneous Agreements

[i] Buyer's Assumption of Contractual Obligations

The seller should obtain the buyer's agreement to assume and perform all of the terms and conditions of the leases and contracts that the seller has entered into. The buyer should insist that this assumption not take place until escrow has closed. This agreement supplements the seller's warranty regarding the assignment of leases.

[ii] Indemnification

In a sale of a multi-unit rental property, each party should be protected from any claim arising after the close of escrow and involving a breach of a lease or contract that allegedly occurred while the other party held title to the property. The seller should agree to indemnify the buyer against liability arising from any matter pertaining to the property that occurred or allegedly occurred before the close of escrow, and the buyer similarly should agree to indemnify the seller for matters occurring or allegedly occurring after the close of escrow.

[2] FORM

Contract of Sale of Property With Multiple Rental Units

This contract is entered into_____[*date*] by and between_____[*name of seller*] ("Seller"), [*capacity of seller, e.g.,* a California corporation *or* husband and wife] and_____[*name of buyer*] ("Buyer"),_____[*capacity of buyer*].

On the terms and conditions set forth in this contract, Seller agrees to sell and convey, and Buyer agrees to purchase, the following property (the "Property"):

(a) The real property situated in _____ [the City of _____ in *or* an unincorporated area of] _____ County, California, which is more particularly described _____ [as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this contract and incorporated by reference] (the "Real Property");

(b) All improvements constructed on the Real Property _____ [as described in Exhibit _____, which is attached to this contract and incorporated by reference] (the "Improvements"); and

(c) All items of personal property owned by Seller and located on or in, or used in connection with the operation of, the Real Property or the Improvements _____ [as described in Exhibit _____, which is attached to this contract and incorporated by reference] (the "Personal Property").

1. Purchase Price

1.01. Amount and Allocation. The total purchase price of the Property is $_____. The allocation of the purchase price is as follows:

$_____ for the Real Property.
$_____ for the Improvements.
$_____ for the Personal Property.

1.02. Terms of Payment. The purchase price shall be payable by Buyer as follows:

(a) The sum of $_____ shall be paid on execution of this contract. Seller hereby acknowledges receipt of this sum.

(b) The balance shall be paid according to the terms of a promissory note _____ [payable to Seller *or* in the form of Exhibit _____, which is attached to this contract and incorporated by reference]. This note shall provide for:

(1) Payment of the principal in _____ [*specify, e.g.,* monthly *or* annual] installments of $_____ or more each, commencing _____ [*number*] days after the close of escrow; and

(2) Interest from the close of escrow on the unpaid principal balance at the rate of _____ percent per annum, payable _____ [*specify, e.g.,* monthly *or* annually], commencing _____ [*number*] days after the close of escrow.

1.03. Security for Purchase Price. The promissory note described in Paragraph 1.02 shall be secured by a deed of trust in the form of Exhibit _____, which is attached to this contract and incorporated by reference. The deed of trust shall be a first lien on the Property.

2. Escrow

2.01. Opening of Escrow. An escrow shall be opened to consummate the sale of the Property according to the terms of this contract at the office of_____[*name, title, and address of escrow agent or* an escrow agent to be selected by _____ (Seller *or* Buyer *or identify third party who is to make selection*)] (the "escrow agent"). The escrow shall be opened within [*number*] days after the execution of this contract. Written escrow instructions in accordance with the terms of this contract shall be prepared [by each party *or* jointly], and the instructions shall be signed by the parties and delivered to the escrow agent within [*number*] days of the execution of this contract. Buyer and Seller shall also deposit with the escrow agent all instruments, documents, and other items identified in the escrow instructions or reasonably required by the escrow agent to close the sale on the closing date specified below.

2.02. Closing Date. The escrow shall be closed on the date the deed is recorded. [The escrow shall be considered to be in a condition to close when the escrow agent is authorized under the escrow instructions, and is able, to record the grant deed.] The escrow must be [in a condition to close *or* closed] no later than_____[*date*], unless the closing date is extended pursuant to the terms of this contract; provided, however, that this closing date shall not be extended beyond_____[*date*].

2.03. Prorations. The following shall be prorated between Seller and Buyer on the basis of a 30-day month as of the date escrow closes: [*specify, e.g.,* real property taxes, special assessments, premiums on the insurance policies that are transferred to Buyer pursuant to this contract, fees or charges for maintenance of the Property, and rents]. [Seller's account shall be credited with _____ (*specify, e.g.,* prepaid rents and security deposits held by Seller].

2.04. Broker's Commission. At the close of escrow, Seller shall pay_____[*specify, e.g.,* a sum equal to 6 percent of the selling price of the Property *or* the sum of $_____ *or specify other compensation*] as a real estate broker's commission._____[*Provide for sharing of commission, if more than one broker is involved, e.g.,* This commission shall be divided equally between Seller's broker and Buyer's broker.] _____[*Add, in not less than 10-point boldface type, if contract is first document to establish broker's right to compensation for sale of residential real property containing up to four residential units, or if contract alters terms of any agreement that previously established such right to compensation,* **Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between**

the seller and broker.]

2.05. Closing Costs. Seller shall pay [*specify, e.g.,* the real estate broker's commission described in Paragraph 2.04, any transfer taxes, the costs of the preliminary report and title insurance policy required by this contract, the reconveyance fees charged for the reconveyance of the deed of trust shown on the preliminary title report required by this contract, the recording fees for the reconveyance of that deed of trust, and the cost of preparing, executing, and acknowledging the grant deed and all other instruments necessary to convey title to Buyer]. [*Add, if appropriate:* Seller shall instruct the escrow agent to use a separate document for declaring any transfer tax, and not to declare any transfer tax on the face of the deed.] Buyer shall pay [*specify, e.g.,* the cost of recording the grant deed and any other instruments required to convey title to Buyer, the costs of preparing, executing, and acknowledging the promissory note and the deed of trust in the forms of Exhibits _____ and _____ to this contract, and the cost of recording that deed of trust]. [*Specify arrangement for splitting costs, e.g.,* The escrow fee, other than the cost of the above title insurance policy, shall be paid _____ percent by Buyer and _____ percent by Seller. The costs of structural pest-control work shall be paid as provided elsewhere in this contract.]

[*EITHER*]

2.06. Vesting of Title. Buyer shall advise the escrow agent before the close of escrow of the manner in which title shall vest.

[*OR*]

2.06. Vesting of Title. On the close of escrow, title shall be vested in_____[*specify each buyer's name*] [*specify how title will be held by individual buyer(s), e.g.,* as community property with right of survivorship *or specify other buyer's capacity, e.g.,* a California corporation].

3. Additional Terms and Conditions

3.01. Preliminary Title Report. Within [*number*] days after the execution of this contract, [Buyer shall obtain *or* Seller shall furnish Buyer with] a preliminary [California *or* American] Land Title Association report of the title to the Property and each document shown as an exception or encumbrance in the report. This shall be done at the expense of [Buyer *or* Seller]. Within [*number*] days after the delivery of the report and related documents to Buyer, Buyer shall notify Seller in writing of any objection to any exception. If Buyer makes a timely objection to any exception and the exception is not eliminated within [*number*] days of the Seller's receipt of the objection, this contract shall be terminated. Buyer's failure to object in this manner to any exception shall be an approval by Buyer of that exception.

3.02. Miscellaneous Conditions. The close of escrow and Buyer's obligation to purchase the Property pursuant to this contract are subject to the satisfaction of the following conditions, which are solely for Buyer's benefit unless otherwise indicated.

(a) Marketable Title. The conveyance to Buyer of good and marketable title to the Property, as evidenced by a California Land Title Association standard coverage title insurance policy issued by _____ [*name of title company*] in the _____ [amount of $_____ *or* full amount of the purchase price] insuring that title to the Property is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Seller, subject only to those exceptions approved by Buyer in writing and the following: a lien for current real property taxes, any exceptions shown on the preliminary title report that are not duly disapproved by Buyer, the promissory note attached to this contract as Exhibit _____, the deed of trust attached to this contract as Exhibit _____, and _____ [*specify*

additional exceptions].

(b) Related Agreements. Delivery to and approval by Buyer within _____ [*number*] days of the execution of this contract of the originals or true copies of the following items, schedules for which are attached to this contract and hereby incorporated by reference, relating to this contract and the Property:

(1) All leases listed in Schedule 1, together with a proposed contract for assignment of Seller's rights under those leases;

(2) All insurance policies listed in Schedule 2;

(3) All employment contracts, collective bargaining contracts, and records relating to any accrued funds, listed in Schedule 3; and

(4) All service or other contracts listed in Schedule 4;

provided that the failure of Buyer to object in writing to an item delivered pursuant to this condition within _____ [*number*] days of Buyer's receipt of the item shall be deemed an approval of that item.

(c) Tenants' Estoppel Certificates. Delivery to Buyer on close of escrow of an estoppel certificate completed and signed by each tenant of the Property, in the form of Exhibit _____.

(d) Seller's Books and Records. Delivery to Buyer within _____ [*number*] days after the execution of this contract of true copies of all books and records relating to the operation and management of the Property during the past _____ [*specify period*] and showing the current or delinquent status of each tenant during that period; provided that:

(1) Buyer shall notify Seller of Buyer's approval or disapproval of these books and records within _____ [*number*] days following their receipt by Buyer.

(2) A failure to provide that notification shall constitute a waiver of this right of approval.

(e) Assignment of Leases. Delivery to Buyer on the close of escrow of a written assignment, duly executed by Seller, assigning to Buyer all of Seller's rights, title, and interest in the leases encumbering the Property and listed in Schedule 1.

(f) Permits, Certificates, and Licenses. Issuance to Buyer before _____ [*date*] of all permits, certificates, and licenses required by Buyer to _____ [*specify, e.g.,* operate the Property in the manner in which it has been operated by Seller]; provided that:

(1) Those permits, certificates, and licenses shall be subject to only those conditions that Buyer reasonably determines to be acceptable.

(2) Buyer shall apply for those permits, certificates, and licenses at Buyer's sole expense.

(3) Buyer shall notify Seller on or before _____ [*date*] if Buyer is unable to obtain any of the foregoing approvals or if any of the approvals is subject to conditions that Buyer reasonably determines to be unacceptable.

(4) Buyer's failure to so notify Seller shall constitute a waiver of this condition.

(g) Delivery of Possession. The delivery of possession of the Property (with all keys to locks and all garage door openers) to Buyer immediately on the close of escrow, free and clear of all uses and occupancies except those approved in writing by Buyer _____ [; provided that if Seller is unable to deliver possession at that time, Seller shall pay Buyer $_____ per day from the close of escrow to the date buyer obtains possession; provided further that in no event shall delivery of possession occur later than _____ (*date*)].

(h) Inspection by Contractor. The preparation and deposit in escrow of a written report regarding the condition of the Property, and the approval by Buyer of the contents of the report; provided that:

(1) The report shall be prepared at Buyer's expense by a contractor selected by Buyer and professionally qualified and licensed to engage in the business and act in the capacity of a contractor in California, and shall be deposited in escrow within _____ [*number*] days of the execution of this contract.

(2) If Buyer disapproves of the results set forth in the report, Buyer shall notify Seller in writing of the specific conditions that are unacceptable to Buyer.

(3) If the parties are unable to reach agreement regarding the correction of these matters, Buyer may terminate this contract by providing Seller with written notice of that decision within _____ [*number*] days of the inspection.

(4) A failure by Buyer to provide that notice of termination shall constitute a waiver of this condition.

(i) Roof Inspection. The deposit in escrow within _____ [*number*] days of the execution of this contract of a written roof inspection report prepared by a licensed general contractor or roofing contractor selected by Buyer; provided that:

(1) If that report recommends the performance of any work, Seller shall notify Buyer, within _____ [*number*] days of the deposit of the report, that Seller either refuses to pay for the recommended work or will pay for some or all of it.

(2) If Seller refuses to pay for any or all of the work, Buyer may terminate this contract, order and pay for the work, or accept Seller's offer to pay for some of the work and assume responsibility for the payment of any remaining work that Buyer decides to have performed.

(3) Buyer shall provide Seller with written notice of that election within _____ [*number*] days of the receipt of Seller's notice.

(4) If Buyer fails to provide that notice, this condition shall be waived.

(5) The party or parties paying for the work shall have the right to select the contractor who will perform the work.

[*Add, if appropriate:*]

(j) Inventory. Deposit in escrow within _____ [*number*] days after the execution of this contract of a true and complete written inventory of all the Personal Property owned by Seller and located in or used in connection with the operation of the Real Property or the Improvements; provided that the inventory shall be prepared jointly by the parties.

[*Add, if appropriate:*]

(k) Bill of Sale. Delivery to Buyer on the close of escrow of a bill of sale duly signed by Seller conveying to Buyer title to all the Personal Property subject to this contract.

[*Add other conditions; see, e.g., § 23.201[2], P 3.02; see also §§ 23.220[2], 23.237[2]).*]

3.03. Pest-Control Certification and Corrective Work. The close of escrow is contingent on the deposit in escrow of a certification by a licensed structural pest-control operator, pursuant to *Business and Professions Code Section 8519,* that the Property is free of evidence of active infestation or infection in the visible and accessible areas. This condition is for the benefit of both Buyer and Seller and shall be satisfied as follows:

[*EITHER*]

(a) Seller shall deliver to Buyer, as soon as possible following execution of this contract, a copy of the structural pest-control report on the Property prepared by _____ [*name of structural pest-control operator*] and dated _____. Buyer shall have _____ [*e.g.,* five] days following receipt of that report to review and approve the report or terminate this contract.

[*OR*]

(a) Within _____ [*e.g.,* three] days after the date of execution of this contract, _____ [Seller *or* Buyer], at _____ [Seller's *or* Buyer's] expense, shall order a structural pest-control inspection and report by a licensed structural pest-control operator pursuant to *Business and Professions Code Section 8516.* Buyer shall have _____ [*e.g.,* five] days following receipt of that report to review and approve the report or terminate this contract.

[*CONTINUE*]

(b) Following approval of the structural pest-control report, _____ [Seller *or* Buyer] shall arrange for the performance of any corrective work necessary to obtain a certification. The cost of any corrective work, up to but not exceeding the sum specified in the report for performance of that work _____ [*add, if desired:* or $_____, whichever is less], together with any charges for reinspection or preparation of the certification, shall _____ [*specify, e.g.,* be the sole responsibility of _____ (Seller *or* Buyer) and shall be paid from funds held for _____ (Seller's *or* Buyer's) account at the close of escrow *or* be borne half by Seller and half by Buyer, and half of those fees and charges shall be paid from funds held for Seller's account at the close of escrow, and half of those fees and charges shall be paid from funds held for Buyer's account at the close of escrow *or* be paid by _____ (Seller *or* Buyer) up to a limit of $_____, and any charges in excess of that sum, up to but not exceeding the full price specified in the inspection report, shall be paid by _____ (*other party*)]. Payment shall be made from the respective funds held for the accounts of the parties at the close of escrow.

(c) If _____ [the cost specified in the report for performance of the necessary corrective work exceeds the full price specified in the inspection report, or if], during the course of the pest-control work, the operator discovers additional repairs that must be performed at a cost over and above the full price specified in the inspection report before the operator will issue a certification, the additional expense shall be _____ [*specify allocation, e.g.,* borne half by Seller and half by Buyer]; provided, however, that if those extra costs exceed $_____,

the parties shall negotiate the allocation of responsibility for costs in excess of that amount. If the parties cannot agree on the allocation, either party may terminate this contract by providing the other party with written notice of that election within _____ [*number*] days following notification by the structural pest-control operator of the additional expenses.

3.04. Failure of Condition and Seller's Breach of Warranty. Except as provided in Paragraph 3.05, if any condition set forth in this contract fails to occur, or if Buyer notifies Seller in writing before the close of escrow of Seller's breach of any of Seller's warranties set forth in this contract, then Buyer may cancel the escrow, terminate this contract, and recover the amounts paid by Buyer to the escrow agent toward the purchase price of the Property [*add, if Buyer is to pay escrow charges:* (less costs and expenses of escrow)]. Buyer shall exercise this power to terminate by complying with any applicable notice requirements specified in the relevant condition and, in all other cases, by providing written notice to Seller and the escrow agent within [*number*] days of the failure or breach. The exercise of this power shall not waive any other rights Buyer may have against Seller for breach of this contract. Seller shall instruct the escrow agent, in the escrow instructions, to refund to Buyer all money and instruments deposited in escrow by Buyer pursuant to this contract on failure of a condition or breach of a warranty and receipt of a termination notice. This instruction shall be irrevocable. [*Add, if seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of escrow.]

3.05. Seller's Obligation to Cure Defects. Notwithstanding any provision of this contract to the contrary, Buyer shall immediately notify Seller in writing of Buyer's discovery, before the close of escrow, of a violation of any of the following provisions of this contract:_____[*list paragraph numbers of any conditions or warranties that are to be subject to this provision*]. For these purposes, the foregoing matters shall be referred to as "defects." If Buyer fails to give that notice, Buyer shall waive the defect, and the defect shall not be a failure of a condition or breach of a warranty. If Buyer gives that notice, the notice shall set forth the particular matter disapproved of or breached. On receipt of the notice, Seller shall immediately and diligently endeavor to remedy the defect at the sole expense of Seller. If Seller does not remedy the defect within [*number*] days of the receipt of Buyer's notice, then Buyer shall have the right to elect to do one of the following:

(a) Terminate the contract without any liability on the part of Buyer.

[*EITHER*]

(b) Purchase the Property at the purchase price less the reduction in market value due to the unremedied defect, provided that the reduction in market value shall be determined by arbitration if the parties are unable to agree on it, the expense of the arbitration shall be borne by Seller, and the reduction in price shall be applied _____ [*specify, e.g.,* first to the down payment and next to the promissory note to Seller in the form of Exhibit _____].

[*OR*]

(b) Purchase the Property without a reduction in the purchase price and without any liability for the unremedied defect on the part of Seller, except that if the defect is a lien or encumbrance that can be remedied by the payment of money not to exceed a total of $_____, then Seller shall be required to pay that amount or instruct the escrow agent to pay that amount from escrow out of Seller's proceeds.

[*CONTINUE*]

(c) Remove the defect, and purchase the Property for the purchase price less the reasonable cost to Buyer of removing

the defect, provided that this cost does not exceed $_____.

Buyer shall notify Seller in writing, before the close of escrow, of Buyer's election of one of the foregoing options. A failure to elect shall be deemed an election of the first option. If Buyer elects the third option, Buyer shall be entitled to postpone the close of escrow up to a maximum of [*number*] days for the purpose of removing the defect. If Buyer is unable to remove the defect before the close of escrow, including any postponement period, Buyer may then elect the first or second option within that period of time. The failure of Buyer to make that election will be deemed an election of the [first *or* second] option. Seller shall instruct the escrow agent, in the escrow instructions, immediately to refund to Buyer all money [*add, if buyer is to pay escrow charges:* (less costs and expenses of escrow)] and instruments deposited in escrow by Buyer pursuant to this contract on termination of this contract pursuant to this paragraph, and on receipt of notice of that termination from Buyer. [*Add, if seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of the escrow.]

4. Warranties and Agreements of Seller

4.01. Warranty as to Status of Title. Seller warrants that Seller owns the Property, free and clear of all liens, licenses, claims, encumbrances, easements, encroachments on the Property from adjacent properties, encroachments by improvements or vegetation on the Property onto adjacent properties, and rights-of-way of any nature, not disclosed by the public record, other than [*specify off-record exceptions, such as unrecorded leases*].

4.02. Warranty as to Leases. Seller hereby warrants that:

(a) Schedule 1 contains a true and complete list of all leases encumbering the Property as of the date of this contract, accurately indicates for each lease whether any tenant is in default in the performance of that lease, and sets forth the nature of any default.

(b) No person or entity other than Seller has any title, interest, or right to possession of the Property or any part of it, as a tenant of Seller, or in any other capacity, except as listed in Schedule 1.

(c) All of the leases listed in Schedule 1 are currently in full force and effect.

(d) No tenant is entitled to any benefit except as set forth in the leases listed in Schedule 1.

(e) The rentals and other sums due or to become due under the leases listed in Schedule 1 have not been assigned or encumbered by Seller and will not be assigned or encumbered by Seller before the close of escrow as provided in this contract.

4.03. Warranty as to Insurance. Seller warrants that Schedule 2 contains a complete list of all of the insurance policies currently insuring the Property and correctly states for each policy the policy number, the name of the insurance company that issued the policy, the term and expiration date of the policy, the premiums, and the nature and type of the policy.

4.04. Warranty as to Employees. Seller warrants that Schedule 3 contains a true and complete list of all persons employed by Seller in connection with the Property and correctly states for each employee the employee's name, social security number, position, and salary, any collective bargaining or employment contract covering the employee, and the amount of any and all social security payments and contributions to pension, vacation, union welfare, or other funds accruing for the employee.

4.05. Warranty as to Service and Other Contracts. Seller warrants that Schedule 4 contains a true and complete list of all service and other contracts related to the property (except for employment or collective bargaining contracts and

leases) under which Seller is obligated, accurately showing for each contract the names of the parties, the service rendered or to be rendered, the compensation payable by Seller, and the expiration date.

4.06. Warranty as to Personal Property. Seller warrants that Exhibit _____ contains a true and complete list of the Personal Property subject to this contract.

4.07. Warranty Regarding Litigation. Seller warrants that there is no pending litigation involving the Property.

[*Add, if seller is not required to provide prospective buyers with real estate transfer disclosure statement (see Civ. Code § 1102):*]

[*EITHER*]

4.08. Warranty as to Defects. Seller warrants that the Real Property, Improvements, and Personal Property are in good condition, reasonable wear and tear excepted, and that Seller has no knowledge of any material defects in the foregoing Property.

[*OR*]

4.08. Warranty as to Defects. Seller warrants that Seller has no knowledge of any material defects in the Real Property, Improvements, and Personal Property other than those listed in Schedule _____, and that except for those defects the Property and improvements are in good condition, reasonable wear and tear excepted.

[*CONTINUE*]

4.09. Warranty as to Violations. Seller warrants that as of the date of the execution of this contract, Seller has no knowledge of any violations of any applicable building code or other code, statute, regulation, ordinance, judicial order, or judicial holding pertaining to the Property. Seller further warrants that Seller has not received any notices regarding defects under or noncompliance with any of the foregoing.

4.10. Warranty as to Defaults. Seller warrants that as of the date of the execution of this contract Seller has no knowledge of any default under any contract, agreement, lease, instrument, encumbrance, or transaction relating to the Property.

4.11. Warranty as to Zoning. Seller warrants that as of the date of the execution of this contract the property is zoned [*specify classification*] under the zoning laws of_____[*name of city or county*], and that Seller has no knowledge of proposed changes to this classification.

4.12. Continuation of Operations. Seller agrees to do the following until the close of escrow and the delivery of possession of the Property to Buyer pursuant to this contract:

(a) Perform all obligations arising under the agreements and other relationships listed in Schedules 1, 2, 3, and 4;

(b) Maintain the Property in good repair and in the same condition, reasonable wear and tear excepted, as on _____ [*date*]; and

(c) Continue to operate and manage the Property in a reasonable, diligent, and prudent manner;

provided that Seller shall not enter into any additional leases or other contracts related to the Property, or modify or extend any current lease or other contract, after the execution of this contract, without first obtaining Buyer's written consent.

4.13. Right of Buyer to Enter Property. Seller grants to Buyer, or Buyer's agents, the right, at any time and from time to time within [*number*] days after the opening of the escrow, to enter the Property to conduct tests or investigations. The acts shall be conducted at the sole cost and expense of Buyer and shall not unreasonably interfere with Seller's possession. Buyer shall indemnify and hold Seller harmless from any costs or liability resulting from the acts and, if the escrow is canceled for a reason that is not the fault of Seller, for any damage to the Property resulting from the acts. Buyer shall give Seller written notice of the intention to enter [*number*] days before the date of the planned entry.

4.14. Indemnification. Seller agrees to indemnify and hold Buyer harmless from any liability arising from the breach of any lease or contract, or from any other matter pertaining to the Property, that occurred or allegedly occurred before the close of escrow pursuant to this contract.

4.15. Survival of Warranties. All warranties, covenants, and other obligations in this contract shall survive delivery of the deed to the Property.

5. Agreements of Buyer

5.01. Assumption of Agreements and Contracts. On the close of escrow, Buyer agrees to assume the leases and the service and other contracts listed in the attached schedules. Buyer further agrees to keep and perform all of the terms and conditions of those agreements and contracts that were to be kept or performed by Seller.

5.02. Indemnification. After the close of escrow, Buyer agrees to indemnify and hold Seller harmless from any liability arising from the breach of a lease or other contract, or from any other matter pertaining to the Property, that occurred or allegedly occurred after the close of escrow pursuant to this contract.

6. Miscellaneous Provisions

6.01. Loss, Destruction, and Condemnation. The parties agree that the following provisions shall govern the risk of loss:

(a) If, before Seller transfers legal title or possession of the Property to Buyer, all or a material part of the Property is destroyed without fault of Buyer, or is taken by eminent domain by any person or entity, Buyer shall be entitled to recover any portion of the price Buyer has paid, and Seller shall not have the right to enforce this contract. _____ [For these purposes, "material part of the Property" means _____ (*specify, e.g.*, any portion of the Improvements that would cost $_____ or more to replace or to restore to the condition as of the date of execution of this contract).]

(b) If, after Seller transfers legal title or possession of the Property to Buyer, all or any part of the Property is destroyed without fault of Seller, or is taken by eminent domain by any person or entity, Buyer is not relieved from Buyer's obligation under this contract to pay the full price for the Property, nor is Buyer entitled to recover any portion of the price Buyer has paid.

(c) If damage, destruction, or condemnation occurs at any time before the close of escrow, and this loss is not covered by clauses (a) and (b) above, _____ [*describe allocation of risk, e.g.*, Buyer shall not have the right to terminate this contract but shall be entitled to offset the cost of repair or replacement against the purchase price of the Property].

[*Set out following provision in at least 10-point boldface type, or 8-point contrasting red boldface type, if contract is printed (Civ. Code §§ 1676, 1677(b)).*]

6.02. Liquidated Damages. If Buyer defaults in the performance of this contract, the parties agree that Seller shall be released from any obligation to sell the Property to Buyer and may retain, as liquidated damages, the lesser of the deposit paid by Buyer on execution of this contract or 3 percent of the purchase price. Seller shall refund to Buyer any remainder of the deposit. The parties further agree that the amount of liquidated damages established by this provision is a reasonable estimate, under the circumstances existing on the date of execution of this contract, of what Seller's damages would be in the event of a default by Buyer.

Initialed by Buyer: _____
Initialed by Seller: _____

6.03. Insurance. Seller shall deliver to Buyer within [*number*] days of the execution of this contract, copies of all of the insurance policies described in Schedule 2. Buyer shall notify Seller and the escrow agent at least [*number*] days before the close of escrow whether Buyer will or will not assume each policy. If Buyer fails to notify Seller in the required manner of Buyer's election concerning any insurance policy, the failure shall be deemed an election not to assume that policy. Buyer shall be responsible for having insurance on the Property as of the close of escrow._____[*Add any additional requirements imposed by lender or in connection with seller financing, e.g.,* This insurance shall include comprehensive casualty insurance in an amount sufficient to cover 100 percent of the replacement cost of the Improvements. Seller shall be named as an additional loss payee in the casualty policy and shall instruct the insurance carrier to deliver to Seller, before the close of escrow, evidence of this insurance and a certificate providing for 30 days' written notice of the cancellation of the casualty insurance.]

6.04. Assignment. Buyer may not assign this contract without Seller's prior written consent. The valid assignment of this contract [shall *or* shall not] relieve Buyer of liability under this contract.

6.05. Time of Essence. Time is of the essence in this contract.

6.06. Notices. Any notice, tender, delivery, or other communication pursuant to this contract shall be in writing and shall be deemed to be properly given if delivered, mailed, or sent by wire or other telegraphic communication as follows:

(a) If to Buyer:

_____[*name of addressee*]
_____[*street address*]
_____[*city, state, zip*]

(b) If to Seller:

_____[*name of addressee*]
_____[*street address*]
_____[*city, state, zip*]

Either party may change the party's address for these purposes by giving written notice of the change to the other party in the manner provided in this paragraph. If sent by mail, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* 48 hours] after it has been deposited in the U.S. mail, duly

registered or certified, with postage prepaid, and addressed as set forth above. If sent by wire or other form of telegraphic communication, any notice, delivery, or other communication shall be effective or deemed to have been given [*specify time period, e.g.,* eight hours] after it has been deposited with the carrier, prepaid and addressed as set forth above.

6.07. Entire Agreement. This contract and the attached exhibits and schedules constitute the entire agreement between the parties relating to the sale of the Property. Any prior agreements, promises, negotiations, or representations not expressly set forth in this contract are of no force and effect. Any amendment to this contract shall be of no force and effect unless it is in writing and signed by Buyer and Seller.

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 8-point boldface or contrasting red type, with heading in capital letters (Code Civ. Proc. § 1298(a)).*]

6.08. ARBITRATION OF DISPUTES. Any controversy or claim arising out of this contract or a breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction.

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 10-point boldface or 8-point contrasting red boldface type (Code Civ. Proc. § 1298(c)).*]

Notice:

By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the "ARBITRATION OF DISPUTES" provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless such rights are specifically included in the "ARBITRATION OF DISPUTES" provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary.

We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the "ARBITRATION OF DISPUTES" provision to neutral arbitration.

Initialed by Buyer: _____
Initialed by Seller: _____

6.09. Attorney's Fees. If any action, proceeding, or arbitration arising out of or relating to this contract is commenced by either party to this contract or by the escrow agent, then as between Buyer and Seller, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorney's fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

6.10. Binding Effect. This contract shall be binding on and inure to the benefit of the parties to this contract and their heirs, personal representatives, successors, and assigns, except as otherwise provided in this contract.

6.11. Governing Law. This contract and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

6.12. Headings. The headings in this contract are inserted for convenience only. They do not constitute part of this contract and shall not be used in its construction.

6.13. Waiver. The waiver by any party to this contract of a breach of any provision of this contract shall not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other provision of this contract.

Date: _____
SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantRental Property ManagementReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.203

AUTHOR: William M. Hensley Editorial Consultant

§ 23.203 Residential Purchase Agreement and Joint Escrow Instructions [CAR Form RPA-CA]

[1] Comment

[a] Use of Form

The form in [2], *below*, is the California Association of Realtors (CAR) long-form purchase agreement entitled "California Residential Purchase Agreement and Joint Escrow Instructions" (with financing clauses) [CAR Form RPA-CA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied].

This chapter contains provisions that may be incorporated into this form [*see §§ 23.210[2], 23.264[2]*]. For a guide to the use of those provisions, see *§ 23.130*.

For a CAR counteroffer form, see *§ 23.204*. For CAR forms of listing contracts and broker-salesperson contracts, see Ch. 21, *Agreements With Real Estate Brokers and Agents* .

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Residential Purchase Agreements, Generally

[i] Use by Parties

The CAR form, sometimes referred to as a "deposit receipt," is usually completed by the buyer and his or her broker. Everything preceding the seller's acceptance clause constitutes the buyer's offer to purchase the property. The buyer's broker then formally "presents" the offer to the seller and the seller's broker. If the seller accepts the offer, the buyer's broker tenders the deposit at that time. The seller may reject (or "conditionally accept") the offer and present a counteroffer adding additional terms or modifying terms in the buyer's offer [*see § 23.204*]. The transaction may involve the exchange of several counterproposals. A binding contract is not created until the seller signs the acceptance clause on the form, and both parties sign any counteroffer.

Parties should, of course, use care when proposing the use of standard forms. One court specifically commented on the use of CAR standard forms [*Behniwal v. Mix (2005) 133 Cal. App. 4th 1027, 1038 n.12, 35 Cal. Rptr. 3d 320]* :

> "California Realtor Association standard forms [for sale contracts] probably hasten real estate deals when everything goes right, i.e., when neither party wants to back out of a deal. When things go wrong, though, the nature of the forms can have the effect, as they clearly had in this case, of turning things into (in the trial court's word) a 'morass.' Instead of a clean exchange of forms the way attorneys would structure most deals (if they have the time), the forms and the labels tend to confuse the substance of what is going on. The advantage, of course, is that the need to do original thinking to explain precisely what is going on is minimized, which facilitates transactions en masse."

[ii] Role of Attorney

The attorney's role in a transaction involving the use of a purchase agreement ordinarily will be limited. The attorney may be asked to assist the buyer in completing the form, to review the completed form before either or both of the parties will sign it, or to interpret or determine the sufficiency of the completed form. Whenever the client is relying on a printed form, counsel should evaluate the legal sufficiency of the form. The remainder of this comment covers the more significant provisions of the CAR form.

[iii] Modifications

Certain recommended or optional modifications to the CAR form may be considered. Although modifications may be set forth in the form, they may be too lengthy or numerous to fit in the space provided. In that event, the revisions should be covered in exhibits, addenda, or riders, which should be attached to the purchase agreement and incorporated by reference. Each page of the attached document should be signed or initialed by both parties. For an illustrative addendum that may be easily modified for use in this context, see Ch. 30D, *Construction Contracts and Subcontracts* .

Changes should not be made on the face of the CAR form except when an entire provision is being deleted or modified. In that case, the provision should be lined out, and the change should be discussed on the attached document. Those marks and any other interlineations, deletions, or modifications appearing on the form itself should be initialed by both parties.

[c] Provisions of Form

[i] Purchase Price and Financing

Paragraph 1 of the CAR form identifies the buyer and the property, sets forth the offered purchase price, and the time for the closing of escrow. Paragraph 2 covers financing and provides that the buyer will tender a deposit at the time he or she signs the form. This deposit is to be held uncashed until the offer is accepted. The CAR form also contains a clause calling for the payment of an increased deposit at a later date [*see* [xiv], *below*]. In addition, the CAR form contains detailed alternative provisions regarding the financing of the balance of the purchase price, and states whether or not these financing provisions are conditions of sale [*see* [f][iii], *below*]. The financing options provide for the following:

- The issuance to the buyer by a third-party lender of a purchase-money or non-purchase-money loan [*see § 23.222*];

- Additional financing, such as seller financing [*see § 23.201[1][b]*] and the buyer's assumption of, or agreement to take "subject to," an existing encumbrance [*see § 23.221*]; and

- The balance of the purchase price to be deposited with the escrow agent.

The purchase may be made contingent on the property's being appraised at no less than the specified purchase price. If the buyer is making an all-cash offer, satisfactory written verification of sufficient funds to close the transaction must be provided to the seller within a specified number of days.

[ii] Sale of Buyer's Property

Unless otherwise provided, the transaction is not contingent on the sale of the buyer's property. If this sale is made contingent on the close of escrow of another property of the buyer, the seller has the right to continue to offer the property for sale, unless provided otherwise.

[iii] Escrow

The escrow provision provides for joint escrow instructions consisting of portions of the purchase agreement and any additional mutual instructions. The allocation of the escrow fee is provided for. More detailed escrow provisions are discussed in *§ 23.200[1][c]*. They provide, among other things, for the proration of expenses and the extension of the closing date. If the parties add a provision that contemplates the extension of the closing date [*see, e.g.,* [f][iii], *below*], they should add a clause similar to Paragraph 2.02 in § 23.200[2].

[iv] Possession

Possession is to be delivered to the buyer either on the close of escrow, on another specified date, or no later than a specified number of days after the close of escrow [*see § 23.200[1][d][iii]*]. The form provides for the attachment of supplements, which may include two other CAR forms that set forth alternative possession arrangements: a residential lease agreement [*see § 23.326*] and an interim occupancy agreement [*see § 23.327*].

Before completing the possession provision, the parties should review the laws governing risk of loss [*see Civ. Code § 1662*; *see also* [f][i], *below*].

[v] Buyer's Residence

The buyer must indicate whether the buyer intends to occupy the property as his or her primary residence. This information will determine the extent to which the liquidated-damages provision applies to the transaction [*see Civ. Code §§ 1675-1678*; *see also* [xiv], *below*].

[vi] Allocation of Costs

The CAR form allows for the allocation of a variety of costs between the buyer and seller, including the following, as applicable: city and county transfer or tax fees; title and escrow costs; costs relating to sewer, septic, and well systems, such as connection and inspection costs; homeowners' association costs; natural hazard zone disclosure report costs [*see* [ix], *below*]; pest-control inspection and report costs [*see* [viii], *below*]; and costs of smoke-detector installation and water-heater bracing [*see* [vii], *below*].

[vii] Smoke-Detector Installation and Water-Heater Bracing

As to smoke-detector installation and water-heater bracing, the CAR form states that seller will provide the buyer with a written statement of compliance, unless exempt, before the close of escrow. The seller is obligated to provide the buyer with written notice of the actual installation of smoke detectors [*see Health & Safety Code § 13113.8(b)*; *see also § 23.305*]. Similarly, the seller must certify to the buyer that the requirement that the water heater [*see Health & Safety Code § 19211(d)* ("water heater" defined as any standard water heater with a capacity of not more than 120 gallons for which a pre-engineered strapping kit is readily available)] has been braced, anchored, or strapped to resist falling or horizontal displacement due to earthquake motion has been complied with [*see Health & Safety Code § 19211*].

[viii] Pest-Control

Under the CAR form, the cost of having a pest-control report prepared by a registered structural pest-control company is allocated to the buyer or seller. The report (popularly known as a "termite report," although it also covers other matters) identifies any infested or infected areas and recommends corrective or preventive work [*see Bus. & Prof. Code § 8516(b)(6), (7), (10)*]. The costs of both corrective work and preventive work can also be allocated.

If such a report is prepared, the CAR form describes the property to be inspected and provides for the performance of necessary corrective work and the issuance of a pest-control certification stating that the property is free of active infestation or infection [*see Bus. & Prof. Code § 8519* (certification must state that property is free of active infestation or infection in visible and accessible areas)]. If inspection of inaccessible areas is recommended, the buyer may order further inspection, with the cost of any resulting corrective work paid as specified. If there is no damage, the buyer is responsible for the costs of entering and inspecting the formerly inaccessible areas unless otherwise agreed.

These arrangements reflect what is probably the most common way of dealing with pest-control inspection and certification. For an alternative pest-control provision, see *§ 23.202[2]* (alternative methods of allocating costs among parties). For a procedural guide to meeting the relevant statutory requirements, see *§ 23.150*. For additional discussion of the difficulties that can arise with regard to pest-control work, see *§ 23.320[1]*.

[ix] Disclosure Statements

Sellers of real property containing one-to-four dwelling units must deliver a statutory real estate transfer disclosure statement to prospective buyers [*see Civ. Code § 1102 et seq.*; *see also § 23.300*]. The seller must indicate compliance with this disclosure requirement on the purchase agreement, an addendum, or a separate document [*Civ. Code § 1102.3*; *see § 23.303* (separate document containing notice of compliance)]. A natural hazard disclosure statement is also required when the property is located within any special flood hazard area, potential flooding (inundation) area, very high fire hazard zone, state fire responsibility area, earthquake fault zone, or seismic hazard zone [*see Civ. Code § 1103*; *see also § 23.302*]. The CAR form provides for the delivery to the buyer of the required disclosure statements as well as any disclosure notice made available by a local agency levying a special tax on the property pursuant to the Mello-Roos Community Facilities Act [*see Gov. Code § 53311 et seq.*].

For transactions involving most residential property built before 1978, sellers must provide buyers with federal lead-based paint disclosures and pamphlet [*see 42 U.S.C. § 4852d*; *24 C.F.R. § 35.84 et seq.*; *40 C.F.R. § 745.100 et seq.*; *see also §§ 23.311[2]*, *23.312[2]*]. The CAR form provides for their delivery.

If the transaction involves a unit in a condominium, planned development, or other common interest subdivision, the CAR form provides that the seller will request from the homeowners' association and provide to the buyer copies of various governing and other documents [*see* Ch. 34, *Condominiums*].

As to all of these disclosures, the CAR form states that the seller will provide the disclosures within a specified number

of days of the seller's acceptance of the buyer's offer. The buyer then has a specified number of days to complete review and disapprove any unacceptable items.

If a seller of residential real property knows that any release of an illegal controlled substance has come to be located on or beneath the real property, the seller must give written notice advising of that condition to the buyer before sale of the property. Notice is given by checking "yes" on the appropriate question on the Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*; *see Civ. Code § 1940.7*.5 (similar disclosure requirements applicable to landlord)]. For additional discussion, including a definition of "illegal controlled substance," see *§ 23.20[12]*.

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* must also disclose if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(a)(2)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the assessment installment provided in *Gov. Code § 53754*, from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, and the date until the tax may be levied against the property for the Mello-Roos and a contact telephone number, if available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

For additional discussion of this disclosure requirement, see *§ 23.20[13]*.

[x] Seller Warranties

Optional provisions in the CAR form set forth seller warranties regarding the condition of the property at the time possession is made available to the buyer [*see § 23.200[1][e][vi]*]. Unless these provisions are modified to state that they will survive delivery of possession, the buyer may not bring an action for any breach of the warranties occurring after that time [*see Burnand v. Nowell (1948) 84 Cal. App. 2d 1, 5, 189 P.2d 796* ; *see also § 23.200[2]*, P 7.01].

[xi] Inspections and Condition of Property

A comprehensive clause in the CAR form authorizes the buyer, usually at the buyer's expense, to order inspections, tests, and investigations of the property and to terminate the agreement if those inspections reveal information or conditions unsatisfactory to the buyer.

Several alternative contingencies may be tailored to specific types of inspections. For example, the buyer may be empowered to accept or reject a survey of unimproved real property [*see § 23.201[2]*] and specifically to order the performance of geological inspections [*see § 23.201[2]*; *see also § 23.201[1][e][ii]*]. The buyer may be empowered to order and approve an inspection by a licensed contractor and/or a roof inspection [*see § 23.202[2]*]. The contract may require a pest-control inspection and the performance of related corrective work [*see § 23.202[2]*; *see also § 23.203[1][c][viii]*]. The purchase may be conditioned on a determination by the buyer (made after the execution of the sale contract) that the property is suitable for the buyer's intended purpose [*see § 23.234*].

The CAR form also provides that the buyer has the right to make a final inspection of the property within a specified number of days before the close of escrow, not as a contingency, but to verify that the seller has complied with his or her obligations under the agreement.

[xii] Proration

The CAR form provides for the proration of certain assessments, taxes, interest, rents, premiums on insurance assumed by the buyer, and other payments between the buyer and seller as of the close of escrow. Any exceptions must be agreed to in writing.

[xiii] Removal of Buyer's Contingencies

The CAR form provides that the seller may, after giving buyer a notice to perform, cancel the agreement if buyer does not remove an applicable contingency. Once all contingencies are removed, failure of either buyer or seller to close escrow on time may be a breach of the agreement.

[xiv] Liquidated Damages

California law regulates the scope and use of liquidated-damages provisions [*see Civ. Code §§ 1676, 1677*]. The CAR form incorporates the requirements that apply to a liquidated-damages provision in a contract for the sale of residential property primarily consisting of a one-to-four-unit dwelling, when the buyer intends to occupy at least one of the units as his or her residence [*see Civ. Code § 1675*; *see also § 23.203[1][c][v]*].

If the deposit on the property is to be made in two or more payments, a separate liquidated-damages provision must be inserted for each payment [*see Civ. Code § 1678*]. The liquidated-damages provision must be separately initialed by each party [*Civ. Code § 1677(a)*].

[xv] Dispute Resolution

The CAR form provides that the parties will first mediate disputes or claims, unless excepted, arising between them before resorting to arbitration or court action. The provision for binding arbitration of disputes meets the requirements of *Code Civ. Proc. § 1298* with regard to title, format, and the statutory notice [*see Code Civ. Proc. § 1298(a)- (c)*].

This provision must be separately initialed by the parties. For further discussion of these requirements, see *§ 23.253[1]*, which contains alternative arbitration provisions providing for the use of the rules of the American Arbitration Association or rules set forth in the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*].

[d] Offer and Deposit

The portion of the form preceding the buyer's signature constitutes an offer to purchase the described property and a receipt for the buyer's deposit. It does not become a binding contract unless and until the seller signs the "Acceptance of Offer" clause and delivers it to the buyer [*see § 23.203[1][b][i]*].

[e] Agreement Between Seller and Broker

[i] Amount of Commission

The CAR form provides that the seller agrees to pay compensation to the broker as specified in a separate written agreement between the seller and the broker. Brokers are not parties to the agreement. The form also includes provisions that may be used if the commission is to be split between the seller's broker ("listing broker") and another broker ("cooperating broker"). For discussion of splitting commissions, see *§ 23.200[1][c][v]*.

[ii] Statutory Commission Notice

If the CAR form will alter the terms of any previous contract providing for compensation, the form will be subject to *Bus. & Prof. Code § 10147.5*. Alteration of the terms of any contract that previously established a right to compensation means an increase in the rate of compensation, or the amount of compensation if initially established as a flat fee, provided in the contract that previously established a right to compensation [*see Bus. & Prof. Code § 10147.5*].

Note that the CAR form will not be the first document to establish the right of the seller's broker to a commission, because sellers and brokers enter into listing contracts at the time the property is put on the market [*see* Ch. 21, *Agreements with Real Estate Brokers and Agents* for CAR's standard listing agreements]. If, however, *Bus. & Prof. Code § 10147.5* does apply, the following statement must appear in at least 10-point boldface type immediately preceding any provision in the contract relating to a real estate licensee's compensation: "Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker." Because there is no room on the CAR form for the statutory notice, the compensation should not be specified and the form should instead refer to an attachment containing the statutory notice and the compensation figure.

For further discussion of the compensation for a real estate licensee, see Ch. 21, *Agreements With Real Estate Brokers and Agents* .

[f] Additional Provisions

[i] Risk of Loss

Before signing the CAR form, the parties should determine whether they wish to add provisions dealing with topics that are not covered by the form [*see § 23.203[2],* P 25 ("Other Terms and Conditions, including attached supplements")]. For instance, the form does not mention the transfer of the risk of loss. Any real property sale contract made in California for the purchase and sale of real property will be interpreted as including an agreement that the parties will be bound by the Uniform Vendor and Purchaser Risk Act [*Civ. Code § 1662*] unless the contract provides otherwise. Under the Act, the responsibility for the property shifts from the seller to the buyer on the transfer of legal title or possession [*Civ. Code § 1662*]. This can present problems, because there are gaps in the Act's allocation of risks. Specifically, under the Act, the seller assumes the risk of loss only following the destruction or condemnation of "all or a material part" of the property [*Civ. Code § 1662*]. The Act does not define "material part" and does not detail who is

to bear the risk of any nonmaterial, pre-transfer loss [*see Civ. Code § 1662*]. For a provision that fills these gaps, see *§§ 23.200[2]*, *23.201[2]*, and *23.202[2]*. For another provision that gives the drafter an opportunity to select a different method of allocation of risk, see *§ 23.251*.

[ii] Disclosure of Agency Relationship

A licensed real estate broker under whose license a listing contract is signed or an offer to purchase is obtained must disclose whether he or she is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent representing both the buyer and the seller [*Civ. Code § 2079.17*] and must confirm this disclosure in writing [*Civ. Code § 2079.17*; *see Civ. Code § 2079.16* (imposing related obligation to provide sellers and buyers with related statutory disclosure form)]. The written confirmation must appear either in the sale contract or in a separate writing [*Civ. Code § 2079.17*; *see* Ch. 21, *Agreements With Real Estate Brokers and Agents*]. The CAR form contains such a confirmation. For further discussion, see *§ 23.210*.

[iii] Contingency Not Met

The sale contract should specify the consequences of a failure to meet any contingency. The options are numerous, including automatic cancellation of the contract, cancellation at the option of the party intended to benefit from the contingency, an option or obligation on the part of the defaulting party to attempt to remedy the default, the benefiting party's option to attempt to remedy the default or to proceed with the transaction (with or without a corresponding reduction in the purchase price), and waiver of the contingency.

The CAR form provides that within the specified number of days after acceptance, the buyer must remove the loan contingency or cancel the agreement. Additional provisions for dealing with financing contingencies are set forth in *§§ 23.200[2]* and *23.201[2]*. For discussion of the options presented by those provisions, see *§§ 23.200[1][d][iv]* and *23.201[1][e][x]*.

[2] FORMn

Residential Purchase Agreement and Joint Escrow Instructions [CAR Form RPA-CA]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDisclosureIdentity of PrincipalReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

FOOTNOTES:
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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.204

AUTHOR: William M. Hensley Editorial Consultant

§ 23.204 Counteroffer [CAR Form CO]

[1] Comment

[a] Use of Form

The form in [2], *below*, is the California Association of Realtors (CAR) standardized counteroffer form [CAR Form CO, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied]. It may be used with CAR's residential purchase agreement [*see § 23.203[2]*].

A purchase agreement serves as an offer and does not become a binding contract unless and until it is signed by the seller [*see § 23.203[1][b][i]*]. However, because it would be unusual for a seller to agree to every term in the buyer's offer without any changes or additions whatsoever, in practice the usual procedure is for the seller to submit a counteroffer setting forth any modified or additional terms. Often the submission of a counteroffer is preceded by informal negotiations between the parties and their brokers over a term (such as price) that may be a point of contention, and the counteroffer will be used to memorialize the parties' informal agreement on such terms. For further discussion, see [c], below.

The CAR form may also be used by the buyer to make a subsequent counteroffer to the seller's counteroffer.

[b] Laws Governing Acceptances and Counteroffers

One of the elements of a contract is the consent of the parties [*Civ. Code § 1550*]. The consent must be free, mutual, and communicated by each party to the other [*Civ. Code § 1565*]. Further, it must be absolute and unqualified. A qualified acceptance is not an acceptance at all, but a new proposal [*Civ. Code § 1585*], and it has the effect of rejecting the original offer and making a counteroffer [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 750-752, 757, 101 Cal. Rptr. 335* ; *Apablasa v. Merritt & Co. (1959) 176 Cal. App. 2d 719, 726, 1 Cal. Rptr. 500]* . A conditional acceptance terminates the offeree's power to accept the original offer, unless the offeror in the offer or the offeree in the

counteroffer provides that the counteroffer will not terminate the offer [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335]* .

The CAR form provides that the terms and conditions of the offer to which the counteroffer relates are accepted subject to changes or amendments listed on the counteroffer form. It states that unless otherwise specified in writing, down payment and loan amounts will be adjusted in the same proportion as in the original offer. Under California law, this would be considered a conditional acceptance and a counteroffer [*see Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 750-752, 757, 101 Cal. Rptr. 335]* . Therefore, unless the purchase agreement or the counteroffer states that the counteroffer will not terminate the preceding offer, the use of the CAR form technically terminates the power to accept the original offer [*see Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335]* . Thereafter, the CAR counteroffer form serves as an offer by the party making it, which incorporates by reference many of the terms of the purchase agreement. Notwithstanding these principles of contract law, users of the form may routinely assume that they are making a conditional acceptance of the original offer and that the execution of the form constitutes a final acceptance of that offer.

[c] Counteroffer Procedure

[i] Completion of Form

The CAR form will be used to propose or memorialize both modifications of and additions to a purchase agreement. A modification of a particular term should begin by identifying that item. For example, the seller may state that "Paragraph 11 of the above purchase agreement is modified as follows: _____." The seller should then specify the manner in which the seller wishes to alter the original clause. After listing all modifications, terms may be added that do not conflict with the offer to which the counteroffer relates, by providing, for example, that "the above purchase agreement is further modified by the addition of the following terms:" and then listing them.

For discussion of the provisions of the CAR purchase agreement, including recommendations for additions or modifications, see *§ 23.203[1]*.

[ii] Notation on Purchase Agreement Regarding Seller's Counteroffer

In addition to completing the CAR form, the seller should insert a reference to it on the purchase agreement. This can be accomplished by checking the box preceding "SUBJECT TO ATTACHED COUNTER OFFER, DATED _____" in the seller's acceptance clause on the purchase agreement [*see § 23.203[2]*, P 33].

[iii] Submission to Buyer and Other Offers

The CAR form states that the seller may accept another offer any time before receipt by the seller (or the seller's designated agent) of a copy of the counteroffer, accepted and signed by the buyer. The form imposes a deadline on the buyer's acceptance. The counteroffer is revoked if that deadline passes or the seller accepts another offer.

The receiving party is given the opportunity to accept the counteroffer, or to accept the counteroffer conditionally, subject to an attached counteroffer. When additional negotiations are necessary, one of the parties should seriously consider drafting a new offer. This is preferable to preparing additional documents that refer to the deposit receipt and the first counteroffer, because the use of multiple documents can be very confusing and often results in inadvertent omissions, misstatements, and conflicting terms.

[2] FORMn

Counteroffer [CAR Form CO]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCounteroffersContracts LawFormationOffersGeneral OverviewContracts LawFormationOffersRevocable OffersReal Property LawPurchase & SaleContracts of SaleFormalities

FOOTNOTES:
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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Complete Sale Contracts

9-23 California Legal Forms--Transaction Guide § 23.205

AUTHOR: William M. Hensley Editorial Consultant

§ 23.205 Addendum to New Construction Residential Purchase Agreement [CAR Form NCAD]

[1] Comment--Use of Form

The form in [2], *below*, is the California Association of Realtors (CAR) New Construction Addendum to New Construction Purchase Agreement [CAR Form NCAD, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied]. It is for use to comply with the provisions of Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")]. The form should be used only in those situations when a residence is to be constructed by the close of escrow.

The construction defects legislation imposes obligations and responsibilities on, but is not limited to, a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim [*Civ. Code § 911(a)*; *see § 23.20A*]. In addition, these provisions are only applicable to new residential units when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003 [*Civ. Code § 938*]. The term "builder" for these purposes does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. These nonaffiliated general contractors and nonaffiliated contractors are treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals [*Civ. Code § 911(b)*].

For discussion, see *§ 23.20A*. For sample provisions addressing the construction defects legislation in a general form of contract for the sale of real property, see *§ 23.200[2]*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of

Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORMn

Addendum to New Construction Residential Purchase Agreement [CAR Form NCAD]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDefectsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesLiability of Developers & Vendors

FOOTNOTES:
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9-23 California Legal Forms--Transaction Guide §§ 23.206-23.209

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.206[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Alternative and Additional Contractual Provisions
1. Statutory Disclosures

9-23 California Legal Forms--Transaction Guide § 23.210

AUTHOR: William M. Hensley Editorial Consultant

§ 23.210 Disclosure of Exclusive or Dual Agency by Real Estate Agent

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory statement confirming that a licensed real estate broker, under whose license a listing contract is signed or an offer to purchase is obtained, has made a required disclosure regarding the nature of the broker's real estate agency relationship with a buyer or seller of real property [*Civ. Code § 2079.13(a)*]. The agency disclosure requirements [*see Civ. Code §§ 2079.13*, *2079.16*, *2079.17*] apply only when the transaction involves either (1) a perpetual estate, an estate of inheritance, or a life estate in property containing one-to-four dwelling units, (2) any leasehold in the foregoing type of property exceeding one year's duration, or (3) a mobilehome [*see Civ. Code § 2079.13(j)* (definition of "real property"); *see also Civ. Code § 761(1), (2)*]. This confirmation statement may be included in the miscellaneous provisions in any of the complete real property sale contracts set forth in *§§ 23.200[2]*, *23.201[2]*, and *23.202[2]*.

For discussion of additional requirements applicable to real estate brokers, see *§ 23.22*.

[b] Applicable Definitions

The disclosure requirements vary depending on whether the broker is a listing agent or a selling agent, and whether the broker is serving as a dual agent. The following definitions apply for these purposes:

- An "agent" is a person (including a licensed real estate broker) under whose license a listing contract is signed or an offer to purchase is obtained [*Civ. Code § 2079.13(a)*].

- A "listing agent" is a person who has obtained a listing of real property to act as an agent for

compensation [*Civ. Code § 2079.13(f)*; *see Civ. Code § 2079.13(a)*].

- A "selling agent" is a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for real property; or an agent who locates property for a buyer or finds a buyer for a property for which no listing exists, and presents an offer to purchase to the seller [*Civ. Code § 2079.13(n)*].

- A "dual agent" is an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in the sale transaction [*Civ. Code § 2079.13(d)*].

[c] Disclosure Requirement

As soon as practicable, a selling agent must disclose to the buyer and the seller whether the selling agent is acting in the sale transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both buyer and seller [*Civ. Code § 2079.17(a)*]. Similarly, as soon as practicable, a listing agent must disclose to the seller whether the listing agent is acting exclusively as the seller's agent, or as a dual agent representing both parties [*Civ. Code § 2079.17(b)*].

These disclosures may first be made either orally or in writing [*see Civ. Code § 2079.17(a), (b)*] but must then be confirmed in the sale contract or in a separate writing signed or acknowledged by the parties coincident with the making of the contract [*Civ. Code § 2079.17(a), (b)*; *see also* Ch. 21, *Agreements With Real Estate Brokers and Agents*]. The wording of the written confirmation is specified by statute [*see Civ. Code § 2079.17(c)*].

[2] FORM

Disclosure of Exclusive or Dual Agency by Real Estate Agent

[***number***]**. Disclosure of Real Estate Agency Relationship.** The parties hereby acknowledge that [each *or* the] agency relationship described below has been previously disclosed by the agent identified below and that this paragraph shall serve as confirmation of the agency relationship:

_____[*name of listing agent*] is the agent of (check one):

[ ] the seller exclusively; or

[ ] both the buyer and seller.

[*Add, if applicable:*]

_____[*name of selling agent if not same as listing agent*] is the agent of (check one):

[ ] the buyer exclusively; or

[ ] the seller exclusively; or

[ ] both the buyer and seller.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsDisclosureGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities



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9-23 California Legal Forms--Transaction Guide § 23.211

AUTHOR: William M. Hensley Editorial Consultant

§ 23.211 Home Equity Sale Contract Notices [Civ. Code §§ 1695.3(h), 1695.5(a)]

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of two statutory notices that must be included in home equity sale contracts. Those include most contracts for the sale of a residence in foreclosure when the sale is outside the normal foreclosure procedure [*see Civ. Code § 1695.1(a), (e)*; *see also* [b], *below*]. The disclosures and related statutory requirements [*see Civ. Code § 1695 et seq.*] are intended to protect homeowners from being induced, through misrepresentations or other unreasonable commercial practices, to sell their homes in foreclosure for a fraction of fair market value during the period between the commencement of foreclosure proceedings and the scheduled foreclosure sale date [*see Civ. Code § 1695* (legislative intent)]. Any waiver of these statutory provisions is contrary to public policy, void, and unenforceable [*Civ. Code § 1695.10*].

In addition to these notices, a separate form of notice of cancellation must be attached to the home equity sale contract [*see Civ. Code § 1695.5(b)*; § 23.307 (statutory form)]. Further, a representative of an equity buyer must make related disclosures before the transfer of any interest in the real property that is the subject of the home equity sale contract [*see Civ. Code § 1695.17*; § 23.308; *see also Civ. Code §§ 1695.15, 1695.16*].

For discussion of foreclosure, see Ch. 25D, *Foreclosure* .

[b] Definitions

The key term, "contract," means any offer or any contract, agreement, or arrangement, or any term of such a contract, between an equity buyer and equity seller incident to the sale of a residence in foreclosure [*Civ. Code § 1695.1(e)*]. Regarding whether the buyer qualifies as an equity buyer ("equity purchaser" is the statutory term) and whether the

seller is therefore an equity seller, see *§ 23.11[3]*.

The terms "residence in foreclosure" and "residential real property in foreclosure" mean residential real property consisting of one-to-four family dwelling units, one of which the owner occupies as his or her principal residence, and against which there is an outstanding notice of default recorded pursuant to *Civ. Code § 2920 et seq.* [*Civ. Code § 1695.1(b)*; *see* Ch. 25, *Real Estate Loans*].

"Property owner" means the record title owner of the residential real property in foreclosure at the time the notice of default was recorded [*Civ. Code § 1695.1(f)*].

[c] Contract Requirements

[i] Format, Language, and Signatures

Every home equity sale contract must be written in letters of a size equal to 10-point boldfaced type, in the same language (English, Spanish, and so forth) as that principally used by the equity buyer and equity seller to negotiate the sale of the residence in foreclosure. Further, the contract must be fully completed, signed, and dated by the equity seller and equity buyer before the execution of any instrument of conveyance of the residence in foreclosure [*Civ. Code § 1695.2*].

[ii] Contents

Every home equity sale contract must contain the entire agreement of the parties and must include the following terms [*Civ. Code § 1695.3*]:

- The equity buyer's name, business address, and telephone number;
- The address of the residence in foreclosure;
- The total consideration to be given by the equity buyer in connection with or incident to the sale;
- A complete description of the terms of payment or other consideration, including any services that the equity buyer represents he or she will perform for the equity seller before or after the sale;
- The time at which possession is to be transferred;
- The terms of any rental agreement;
- The statutory notice of the equity seller's right to cancel the contract [*see Civ. Code § 1695.5(b)*; *see also* [d][iii], *below*]; and
- The statutory notice regarding related rights of equity sellers (the form in [2], *below*) [*see Civ. Code § 1695.3(h)*; *see also* [d][ii], *below*].

With the exception of the disclosures set forth in the form in [2], *below*, the foregoing information will be present in any well-drafted real property sale contract. Consequently, the disclosures can be added to any of the illustrative real property sale contracts included in this chapter, in order to prepare a valid home equity sale contract.

[d] Cancellation of Contract

[i] Right to Cancel

In addition to any other right of rescission, an equity seller has the right to cancel any contract with an equity buyer until the earlier of (1) midnight of the fifth business day [*see Civ. Code § 1695.1(d)* ("business day" defined)] following the day on which the equity seller signs any contract or (2) 8:00 a.m. on the day scheduled for the sale of the property pursuant to a power of sale conferred in a deed of trust [*Civ. Code § 1695.4(a)*]. In addition, until the equity buyer has complied with the requirements concerning notification of cancellation rights, the equity seller may cancel the contract [*Civ. Code § 1695.5(d)*; *see Civ. Code § 1695.5(a)- (c)*]. Cancellation occurs when the equity seller personally delivers written notice of cancellation to the address specified in the contract [*see § 23.307*] or sends a telegram indicating cancellation to that address [*Civ. Code § 1695.4(b)*].

Until the time within which the equity seller may cancel the transaction has fully elapsed, the equity purchaser may not:

- Accept or induce the equity seller's execution of any instrument of conveyance of any interest in the residence in foreclosure [*Civ. Code § 1695.6(b)(1)*].

- Record with the county recorder any document, including any instrument of conveyance, signed by the equity seller [*Civ. Code § 1695.6(b)(2)*].

- Pay the equity seller any consideration [*Civ. Code § 1695.6(b)(4)*].

- Transfer or encumber (or purport to transfer or encumber) any interest in the residence in foreclosure to any third party.

However, a violation of this last prohibition will not defeat or affect a grant of an interest or encumbrance to a good faith purchaser or encumbrancer for value and without notice of the violation. For these purposes, knowledge on the part of the buyer or encumbrancer that the property was "residential real property in foreclosure" will not constitute notice of the violation. This protection for good faith purchasers or encumbrancers does not abrogate any duty of inquiry that exists as to rights or interests of persons in possession of the residential real property in foreclosure [*Civ. Code § 1695.6(b)(3)*].

For a discussion of the rescission of a home equity sale transaction in which the buyer, by the terms of the transaction, takes unconscionable advantage of the property owner in foreclosure [*see Civ. Code § 1695.13*], and a form for rescission, see *§ 23.324*.

[ii] Notice of Right to Refrain From Executing Instruments of Conveyance

Until the rescission period has elapsed, the equity buyer must not accept or induce the equity seller's execution of any instrument of conveyance of any interest in the residence in foreclosure [*Civ. Code § 1695.6(b)(1)*]. This prohibition is the subject of the first statutory notice set forth in the form in [2], *below*.

The statutory notice of the equity seller's right to refrain from executing instruments of conveyance must appear in at least 14-point boldface type if the contract is printed, or in capital letters if the contract is typed. The equity seller must add the name of the equity buyer to the notice. The notice must appear immediately above the statutory statement of the seller's right to cancel [*Civ. Code § 1695.3(h)*; *see* [iii], *below*].

[iii] Notice of Right to Cancel

The second paragraph of the form in [2], *below*, consists of the statutory notice of an equity seller's right to cancel a home equity sale contract [*see* [i], *above*]. This notice must appear immediately after the statutory notice regarding the seller's right to refrain from executing conveyance documents, and in immediate proximity to the space reserved for the

equity seller's signature. The notice must appear in at least 12-point boldface type if the contract is printed, or in capital letters if the contract is typed. The equity buyer must accurately enter the date and time of day on which the rescission right ends [*Civ. Code § 1695.5(a)*; *see* [i], *above*].

For a separate notice of the right to cancel, which must be provided in addition to this notice and must be attached to the home equity sale contract [*see Civ. Code § 1695.5(b)*], see *§ 23.307*.

[e] Additional Limitations on Equity Buyers

An equity buyer is subject to two additional limitations. First, the equity buyer must not make untrue or misleading statements regarding any aspect of the sale [*see Civ. Code § 1695.6(d)* (specific prohibitions against untrue or misleading statements)]. Second, if an equity seller conveys his or her residence in foreclosure to an equity buyer but reserves or obtains an option to repurchase, the equity buyer cannot have an encumbrance placed on the property or grant any interest in the property to any other person without the equity seller's written consent [*Civ. Code § 1695.6(e)*; *see Civ. Code § 1695.12*; *see also* [h], *below*]. However, this does not preclude the application of provisions concerning the rights of a good faith purchaser or encumbrancer for value [*Civ. Code § 1695.6(e)*; *see Civ. Code § 1695.6(b)(3)*].

[f] Criminal Penalties

Equity buyers who violate *Civ. Code § 1695.6* or engage in fraudulent or deceptive practices are subject to a fine, imprisonment, or both [*Civ. Code § 1695.8*].

[g] Actions by Equity Sellers

An equity seller can recover specified damages or obtain other equitable relief against an equity buyer who takes unconscionable advantage of the equity seller [*see Civ. Code § 1695.13*] or who violates any of the other restrictions applicable to equity buyers [*see Civ. Code § 1695.6* (restrictions)], provided the equity seller brings the action within four years after the date of the alleged violation [*see Civ. Code § 1695.7*]. In addition, a court may award exemplary damages or equitable relief, or both. Alternatively, the court may award a civil penalty of up to $2,500, but the court may not award both exemplary damages and a civil penalty [*Civ. Code § 1695.7*].

[h] Conveyance With Repurchase

If an equity seller purports to make an absolute conveyance of his or her residence in foreclosure to an equity buyer but reserves or obtains an option to repurchase, there is a presumption that the transaction does not involve an absolute conveyance but is instead a loan transaction. Specifically, it is presumed that the equity buyer has made a loan to the equity seller, and that the loan is secured by a mortgage. However, this presumption may be overcome by clear and convincing evidence that the transaction is indeed an absolute conveyance with an option to repurchase. The presumption will not apply to a good faith buyer or encumbrancer for value [*see Civ. Code § 1695.12*].

[i] Survival and Effect of Contract

A home equity sale contract will survive the delivery of any instrument of conveyance of the residence in foreclosure [*Civ. Code § 1695.3*]. Apparently this provision is intended to supplement other provisions prohibiting the equity buyer from accepting or inducing the seller's execution of an instrument of conveyance or recording an instrument of conveyance signed by the seller before the expiration of the seller's right to cancel [*see Civ. Code § 1695.6(b)(1), (2)*; *see also* [d][i], *above*].

A home equity sale contract will not have an effect on persons other than the parties to the contract [*Civ. Code § 1695.3(h)*].

[2] FORM

Home Equity Sale Contract Notices [Civ. Code §§ 1695.3(h), 1695.5(a)]

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 14-point boldface type (Civ. Code § 1695.3(h)).*]

NOTICE REQUIRED BY CALIFORNIA LAW: Until your right to cancel this contract has ended, _____ [*name of equity buyer*] or anyone working for _____ [*name of equity buyer*] CANNOT ask you to sign or have you sign any deed or any other document.

[*Set out following provision, immediately preceding space reserved for equity seller's signature, in capital letters if contract is typewritten, otherwise in at least 12-point boldface type (Civ. Code § 1695.5(a)).*]

You may cancel this contract for the sale of your house without any penalty or obligation at any time before _____ [*date and time rescission right ends*]. See the attached notice of cancellation form for an explanation of this right.

EQUITY SELLER
_____ [*signature of equity seller*]
_____ [*typed name*]
EQUITY PURCHASER
_____ [*signature of equity buyer*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingSecondary FinancingGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.212-23.219

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.212[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Purchase Price and Financing Provisions

9-23 California Legal Forms--Transaction Guide § 23.220

AUTHOR: William M. Hensley Editorial Consultant

§ 23.220 Buyer to Provide Straight Note

[1] Comment--Use of Form

The form in [2], *below*, is a payment provision for a real property sale contract. It provides for a down payment and states that the balance of the purchase price will be payable according to the terms of a "straight" (also referred to as a "noninstallment" or "flat") promissory note. It may be substituted for the payment provisions contained in §§ 23.200[2] and 23.202[2].

Under a straight note, the entire principal, with or without interest, is paid in one lump sum at a specified time, usually expressed as "on or before" a specified number of days, months, or years from a triggering event (such as the close of escrow). Interest may or may not be charged. The payment provision may conclude with a sentence that provides for a single payment of interest at the time the principal is paid.

[2] FORM

Buyer to Provide Straight Note

1.01. Amount and Terms of Payment. The total purchase price of the Property is $_____, payable by Buyer to Seller as follows:

(a) The sum of $_____ shall be paid on execution of this contract, as a deposit to be applied to the purchase price at the close of escrow. This amount shall be payable _____ [*specify, e.g.,* by certified or cashier's check drawn to the order of the escrow agent].

(b) The balance shall be paid according to the terms of a promissory note in the form of Exhibit _____, which is attached to this contract and incorporated by reference. The note shall be payable to the order of Seller and shall provide

that the entire principal amount shall be paid in one lump sum on or before _____ [*specify time period, e.g.*, the one-year anniversary date of the close of escrow. If that day is a Saturday, Sunday, or legal holiday, the due date shall be the next business day]. _____ [The note shall further provide for interest from the close of escrow on the principal amount at the rate of _____ percent per annum and shall provide for payment of the interest at the time the principal is paid.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.221

AUTHOR: William M. Hensley Editorial Consultant

§ 23.221 Buyer to Assume Existing Encumbrance

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative purchase price provisions that permit the buyer either to take subject to or to assume an existing encumbrance. It may be used in lieu of the payment provisions in §§ 23.200[2] and 23.202[2].

[b] Purchase of Property Subject to Existing Encumbrance

A buyer of real property who elects to purchase the property "subject to" an existing mortgage or deed of trust does not assume or agree to pay the debt secured by the mortgage or deed of trust [*Wolfert v. Guadagno (1933) 130 Cal. App. 661, 663, 20 P.2d 360]* and does not become personally liable for the debt [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531* ; *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 599, 125 Cal. Rptr. 557, 542 P.2d 981]* . The property remains the primary security for the obligation [*Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553]* . The seller (if he or she is the original trustor or mortgagor) remains personally liable for the payment of the debt, subject to the antideficiency provisions of *Code of Civ. Proc. §§ 580b* and *580d* [*see Ward v. DeOca (1898) 120 Cal. 102, 103, 52 P. 130* ; *see also* Ch. 25A, *Security Instruments for Real Estate Financing*]. If the original seller (as the original trustor or mortgagor) pays the sum due on the mortgage, the seller is subrogated to the mortgagee's right to foreclose against the property [*Vincent v. Garland (1936) 14 Cal. App. 2d 725, 727-728, 58 P.2d 1320* ; *see Civ. Code §§ 2848* (on payment of obligation, surety is entitled to enforce every remedy creditor has against principal), *2849* (surety is entitled to benefit of security held by creditor)].

[c] Assumption of Existing Encumbrance

A buyer of real property subject to a mortgage or deed of trust "assumes" the encumbrance (as part of the purchase price

of the property) by agreeing to pay and discharge the debt for which the seller is liable and that is secured by the mortgage or deed of trust. The assuming buyer becomes personally liable for the debt to the mortgagee or beneficiary [*Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 P. 411]* . This liability is established under the "equitable subrogation" theory [*see Ward v. De Oca (1898) 120 Cal. 102, 104-106, 52 P. 130* ; *see also* Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. B]. Although the assuming buyer becomes the principal debtor of the mortgagee or beneficiary, the seller remains liable, but only as a surety for the buyer [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531]* .

Under the statute of frauds, a contract by a buyer of real property to pay a debt secured by a mortgage or deed of trust on the property must be in writing and subscribed by the party to be charged (or that party's agent), unless the assumption is specifically provided for in the conveyance [*Civ. Code § 1624(a)(6)*]. For an illustrative assumption agreement and further discussion, see Ch. 25B, *Subordination, Assumption, and Assignment* , Pt. B.

[d] Owner's Statement and Beneficiary's Statement

The form in [2], *below*, contains optional provisions requiring the seller (or buyer) to submit a written request for an owner's statement or a beneficiary's statement regarding the existing encumbrance. An owner's statement is a written statement by the owner of the encumbered property concerning the terms, unpaid balance, validity, and enforcement of the promissory note and deed of trust. It is used to verify the seller's representations to the buyer of the nature and amount of the obligations secured by the existing deed of trust. For further discussion and illustrative forms, see Ch. 26, *Real Property Escrows* . A beneficiary's statement is a written statement by the holder of a deed of trust providing detailed information about the amount of the debt and other facts relating to the note. The beneficiary must provide the statement (along with a copy of the promissory note and deed of trust) on the written demand of the trustor, the trustor's successor in interest, or an escrow agent who is licensed under the escrow law or exempted from the licensing requirements [*Civ. Code § 2943*]. Such a request is usually made when the prospective buyer of real property is to take subject to or assume the existing encumbrance. For a request for a beneficiary's statement, see Ch. 26, *Real Property Escrows* . For further discussion and illustrative forms, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Buyer to Assume Existing Encumbrance

[***number***]**. Amount and Terms of Payment.** The total purchase price of the Property is $_____, payable by Buyer to Seller as follows:

(a) On execution of this contract, Buyer shall pay the sum of $_____ as a deposit to be applied to the purchase price at the close of escrow. This amount shall be payable _____ [*specify, e.g.,* by certified or cashier's check drawn to the order of the escrow agent].

(b) Buyer shall _____ [assume, with the lender's consent, *or* purchase subject to] the promissory note made by Seller and dated _____ [*date*], for $_____, which has an approximate balance of $_____, and is payable at approximately $_____ per month including interest at _____ percent per annum. A copy of that promissory note is attached to this contract as Exhibit _____. The payment of that note is secured by a deed of trust dated _____ [*date*], executed by Seller, in which _____ [*name*] is named as beneficiary and _____ [*name*] as trustee, recorded on _____ [*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California. A copy of that deed of trust is attached to this contract as Exhibit _____. _____ [Within _____ (*number*) days of the execution of this contract, _____ (Seller *or* Buyer) shall request, in writing, _____ (an owner's statement and/or a beneficiary's statement) on the above loan.

Within _____ (*number*) days of Buyer's receipt of the statement(s), Buyer shall notify Seller in writing of Buyer's approval or disapproval of the terms of the loan.] Buyer shall receive credit toward the purchase price in the amount of the balance of principal due the lender as of the date of the close of escrow.

(c) The balance of the purchase price shall be paid _____ [at the close of escrow *or* into escrow during business hours at least _____ (*number*) days before the close of escrow]. This amount shall be payable _____ [*specify, e.g.,* in cash or by certified or cashier's check drawn to the order of Seller].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.222

AUTHOR: William M. Hensley Editorial Consultant

§ 23.222 Buyer to Obtain Purchase Money Loan

[1] Comment

[a] Use of Form

The form in [2], *below*, empowers the buyer to obtain a commitment from an institutional lender for a purchase money loan. It may be inserted into any of the sale contracts in §§ 23.200[2], 23.201[2], and 23.202[2]. Because the buyer will use the proceeds of the third-party financing to pay some or all of the purchase price in cash on the close of escrow, the contract also should contain a clause providing for such a payment [*see § 23.200[1][b]*]. For further discussion of real estate financing, see Ch. 25, *Real Estate Loans* , and Ch. 30A, *Construction Financing* .

[b] Description of Loan

[i] Reasons for Specificity

A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity and may violate the statute of frauds [*see § 23.15[2]*]. This general rule has prevented the specific enforcement of real property sale contracts that required the buyer to obtain a loan when the terms of the loan were incompetently, indefinitely, or uncertainly described [*Mills v. Skaggs (1944) 64 Cal. App. 2d 656, 659, 149 P.2d 204]* .

Also, the buyer will want to limit the type of loan he or she will be required to accept. For example, a buyer who was obligated under a contract to obtain a "$20,000 loan at 5% for 20 years" could not thereafter reject a loan that included a prepayment penalty [*Fry v. George Elkins Co. (1958) 162 Cal. App. 2d 256, 260, 327 P.2d 905]* .

Moreover, to prevent the seller's property from being tied up for an unreasonable time, the seller should be certain that the buyer is seeking a loan with reasonable and realistic terms in view of current loan market conditions.

[ii] "Other Acceptable Terms"

Because institutional lending practices reflect the ever-changing state of the money market and a variety of other fluctuating factors, it is difficult, if not impossible, to anticipate the precise terms on which the buyer will be able to obtain financing. Consequently, the contract should provide the buyer with the flexibility to obtain a commitment for a loan on "other terms acceptable to the buyer." The seller should find this wording tolerable, because it increases the likelihood that the sale will be consummated.

[c] Contents of Form

The contract should specify the following terms of the loan and the loan commitment:

- The nature of the lender that may make the loan (that is, an institutional lender);
- The minimum amount of the loan;
- The term of the loan;
- The monthly payments to be made on the loan;
- The prepayment provisions to be contained in the loan instruments;
- The maximum interest the loan may bear;
- The loan fees (or "points") and costs, including late charges, penalties, and default fees, that the buyer may have to pay; and
- The deadline for obtaining the loan and the consequences of a failure to obtain it.

[d] Good Faith Efforts

The buyer's promise to make good faith efforts to obtain the loan is implied in any "new loan" contingency. Thus, a buyer was found not to have acted in good faith and to be liable for damages when he applied to two lenders but expressly refused to apply to the one lending institution that the buyer was advised would make the required loan [*Fry v. George Elkins Co. (1958) 162 Cal. App. 2d 256, 260, 327 P.2d 905]* . Consequently, the contract should provide that the buyer will apply to a specified number of lending institutions and will diligently furnish the institutions with all the documents and information they require to process the application. The contract also should empower the parties to name a specific lending institution.

[e] Deposit of Loan Instruments in Escrow

Anticipating that the buyer will obtain a satisfactory commitment, the contract should require the buyer and lending institution to deposit into escrow the documents required to enable the deed of trust securing the new loan to be recorded concurrently with the deed. This requirement should condition the close of escrow on the actual extension of the new loan to the buyer, and not merely on the issuance of a loan commitment by the lender.

[f] Alternatives to Formal Loan Commitments

The buyer may find that lenders are reluctant to issue formal loan commitments. The lender may only be willing to issue a letter that (1) states that the buyer qualifies for a loan, (2) contains a number of conditions to the making of the loan, and (3) expressly states that it is not a formal loan commitment and is not binding on the lender in any way. This

type of document is generally regarded as being sufficient to meet a loan-commitment contingency because it is often the only loan assurance available to the buyer.

[g] Buyer's Efforts

The contract should require the buyer to apply to a specified minimum number of lenders, including (if desired) a specific lender, and to supply each lender diligently with the required information and documents. This provision is recommended by a series of decisions holding that when a contract contains a financing contingency, there is an implied covenant obligating the buyer to use due diligence to obtain the financing [*Bewick v. Mecham (1945) 26 Cal. 2d 92, 99, 156 P.2d 757* ; *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 837, 83 Cal. Rptr. 855* ; *Fry v. George Elkins Co. (1958) 162 Cal. App. 2d 256, 261, 327 P.2d 905]* . This implied covenant was breached by a buyer who, after being informed that banks were unlikely to provide the necessary financing but that a specified mortgage company would probably make the loan, unsuccessfully applied to only two banks [*Fry v. George Elkins Co. (1958) 162 Cal. App. 2d 256, 260 261, 327 P.2d 905]* . The recognition of this implied covenant in the contract and the specification of the identities of likely lenders or a minimum number of lenders should make it less likely that the seller could lose the benefit of the bargain because of a failure to meet a financing contingency.

[2] FORM

Buyer to Obtain Purchase Money Loan

(_____) Loan Commitment. The issuance to Buyer of a written commitment for a purchase money loan; provided that:

(1) The loan shall be on substantially the following terms, or other terms acceptable to Buyer:

(i) Be made by a bank, life insurance company, building and loan association, savings and loan association, or other institutional lender;

(ii) Be in an amount not less than $_____;

(iii) Bear interest, exclusive of late charges, penalties, or default fees, at a rate not exceeding _____ percent per annum;

(iv) Be repayable in equal monthly installments not exceeding $_____ over a period of _____ [not less than] _____ [*number*] years;

(v) Require loan fees or other loan charges of not more than _____ [$_____ *or* _____ percent of the loan];

(vi) Contain a provision allowing prepayment of the loan _____ [without a penalty *or* with a penalty not to exceed _____ percent of the loan]; and

(vii) Contain the following provisions for late charges, penalties, or default fees: _____ [specify].

(2) Buyer shall apply for the loan to at least _____ [*number*] lending institutions _____ [including _____ (*name of specific lender*)], shall diligently supply each lending institution with the documents any information required by it in connection with Buyer's loan application, and shall obtain a written commitment for the loan by _____ [*date*] [or specify other deadline].

(3) Buyer shall notify Seller of the issuance of a loan commitment that satisfies this condition.

(4) If Buyer does not obtain a commitment by the above deadline, Buyer may terminate this contract or waive this condition by giving Seller written notice of the election within _____ [*number*] days of that deadline.

(5) If Buyer obtains a commitment, Buyer and the lending institution shall deposit in the escrow the documents that are required to enable the escrow agent to record the deed of trust securing the loan described in this condition concurrently with the conveyance from Seller to Buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.223

AUTHOR: William M. Hensley Editorial Consultant

§ 23.223 Purchase Price Not to Exceed VA-Determined Reasonable Value

[1] Comment--Use of Form

The form in [2], *below*, is a clause that provides that a buyer will not be obligated to purchase real property if the purchase price exceeds the reasonable value of the property established by the U.S. Department of Veterans Affairs (the former Veterans Administration, still known as the VA) [*see 38 U.S.C. § 101(1)*]. The VA guarantees real estate loans made by private lenders to qualified veterans or their spouses for the purchase of a home [*see 38 U.S.C. § 3710*]. Although there is no limitation on the purchase price of the home, the amount of the loan cannot exceed the reasonable value of the home as determined by the VA [*38 U.S.C. § 3710(b)(5)*; *see 38 U.S.C. § 3731*]. A loan that exceeds this reasonable value may not be guaranteed [*38 U.S.C. § 3710(b)(5)*; *but see* 38 U.S.C. § 3810(b)(7), (8) (limited exception for loans that are made to refinance certain other loans)], unless the veteran certifies to the VA that he or she has paid in cash from his or her own resources a sum equal to the difference between the purchase price or cost of the property and its reasonable value [*see 38 C.F.R. § 36.4336(a)(3)*]. The contract may authorize the buyer to terminate the transaction if the purchase price exceeds that reasonable value, but also should provide the buyer with the option of proceeding with the purchase. It may be inserted into §§ 23.200[2], 23.201[2], and 23.202[2].

For additional coverage of the VA home-loan application process, see Ch. 25, *Real Estate Loans* .

[2] FORM

Purchase Price Not to Exceed VA-Determined Reasonable Value

(_____) Valuation of Property. The establishment by the U.S. Department of Veterans Affairs of the reasonable value of the Property; provided that:

(1) The reasonable value shall not exceed the purchase price of the Property.

(2) Buyer shall obtain the determination within _____ [*number*] days of the execution of this contract.

(3) If that reasonable value exceeds the purchase price, or Buyer is unable to obtain a determination due to no fault of Buyer, Buyer may terminate this transaction by providing Seller with written notice of this election within _____ [*number*] days after the receipt by Buyer of the determination by the Department of Veterans Affairs of the reasonable value. If no determination had been obtained within _____ [*number*] days after execution of this contract, then Buyer may terminate this transaction by providing Seller with written notice of this election within _____ [*number*] days after that date.

(4) Buyer's failure to provide Seller with a timely notice of termination shall constitute a waiver of this condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawProperty ValuationReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.224

AUTHOR: William M. Hensley Editorial Consultant

§ 23.224 Seller to Obtain FHA Appraisal

[1] Comment--Use of Form

The form in [2], *below*, empowers the buyer to terminate the contract without penalty if the Federal Housing Administration (FHA) determines that the appraised value of the real property is below a specified amount. It may inserted into one of the contracts in §§ 23.200[2], 23.201[2], and 23.202[2].

The FHA insures loans by private lenders on several types of residential structures [*see 24 C.F.R. § 200.1 et seq.*]. Because the amount of an FHA-insured loan is based on an appraisal of the property [*see, e.g., 24 C.F.R. § 203.18(a)(2)- (4)* (loan-to-value ratio on loans for principal and secondary residences)], the buyer may need to terminate the transaction if the appraised amount is so low that the buyer cannot obtain a sufficient FHA-insured loan. The common practice is to require the seller to obtain the appraisal.

For a guide to FHA loan programs, see Ch. 25A, *Security Instruments for Real Estate Financing* . For further discussion of these loans, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[2] FORM

Seller to Obtain FHA Appraisal

(_____) FHA Appraisal. The delivery by Seller to Buyer of a written statement prepared by the Federal Housing Administration and specifying an appraised value for the Property of at least $_____; provided that:

(1) Seller shall obtain the determination as soon as possible but no later than _____ [*date*].

(2) Notwithstanding any other provision of this contract to the contrary, if Seller fails to provide such a statement, Buyer may terminate this transaction without forfeiting Buyer's deposit or incurring any other penalty, provided that Buyer notifies Seller in writing of this election by _____ [*date*].

(3) Buyer's failure to provide Seller with a timely notice of termination shall constitute a waiver of this condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawProperty ValuationReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.225-23.229

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.225[Reserved]



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9-23 California Legal Forms--Transaction Guide § 23.230

AUTHOR: William M. Hensley Editorial Consultant

§ 23.230 Buyer to Purchase Additional Parcels for Development

[1] Comment

[a] Use of Form

The form in [2], *below*, may be inserted into a contract for the sale of unimproved property [*see § 23.201[2]*] when (1) the buyer is a developer whose proposed project requires the purchase of more than one parcel, (2) the necessary parcels have different owners, and (3) the developer has not yet entered into a contract for the purchase of the other parcels. The buyer will not be required to perform his or her obligations under the underlying contract unless he or she is able to purchase the other necessary property.

[b] Purchase of Multiple Parcels

Developers of subdivisions, shopping centers, and other large projects frequently find that no single property owner can sell enough land for the proposed development. Faced with this situation, the developer could try to arrange a "package" deal under which all adjoining landowners sell their property as a unit under the same contract and in the same escrow, or the developer could enter into separate contracts with each of the landowners and make each of the contracts subject to the acquisition of the other necessary parcels. The second alternative probably occurs more frequently and is preferable because the developer can vary the terms of each contract to meet the demands of each seller.

[c] Terms of Purchase of Other Property

The contract may condition the purchase not only on the buyer's ability to purchase other property but also on the buyer's ability to purchase the other property on reasonable terms. Thus the buyer would not be not obligated to accept a loan on unfavorable terms. The specification of the maximum terms of the additional purchases also protects the seller who signs this contract. Were the close of escrow simply conditioned on the buyer's obtaining the other property, with

the maximum terms for the purchase not stated, the buyer could refuse to purchase the other property at a reasonable price and then attempt to use the contingency as an excuse for withdrawing from the contract. To prevent the buyer from tying up the seller's property for an unlimited time, the contract should provide that the escrow for any other parcel must close simultaneously with the escrow for the purchase of the property that is the subject of the sale contract in which this provision will be inserted.

[2] FORM

Buyer to Purchase Additional Parcels for Development

(_____) Purchase of Other Parcel by Buyer. The close, simultaneously with the close of escrow under this contract, of an escrow for the purchase by Buyer of the real property situated in _____ County, California, and [described as follows: _____ (*insert legal description*) *or* more particularly described in Exhibit _____, which is attached to this contract and incorporated by reference]; provided that:

(1) The purchase price of that property shall not exceed $_____.

(2) Not more than _____ [$_____ *or* _____ percent] of the purchase price shall be payable on close of escrow.

(3) The balance of the purchase price, with interest at the rate of not more than _____ percent per annum, shall be payable in equal _____ [*e.g.*, monthly] installments over a period of not less than _____ [*number*] years according to the terms of a promissory note secured by a deed of trust on the property.

(4) The promissory note and deed of trust shall be in the forms attached as Exhibits _____ and _____, respectively.

(5) The close of escrow for the purchase by Buyer of that property shall be subject to the simultaneous closing of escrow for the purchase by Buyer of the Property subject to this contract.

[*EITHER*]

(6) In all other respects the close of escrow for the purchase by Buyer of that property shall be subject to the same conditions as are imposed on the close of escrow for the purchase by Buyer of the Property subject to this contract.

[*OR*]

(6) The close of escrow for the purchase by Buyer of that property shall also be subject to the following additional conditions: _____ [*specify*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.231

AUTHOR: William M. Hensley Editorial Consultant

§ 23.231 Buyer to Acquire Additional Property Pursuant to Other Contracts

[1] Comment--Use of Form

The form in [2], *below*, may be inserted into § 23.201[2] (a complete contract for the sale of unimproved property) when the buyer must obtain additional parcels for an intended development, the buyer has already signed contracts to purchase those other parcels, and the buyer requires the simultaneous close of the escrows for all of the required parcels. If more than one other parcel is involved, a separate provision should be inserted for each parcel, so that the close of escrow is contingent on the simultaneous close of escrow for all affected parcels, and the buyer is protected against having to purchase some affected parcels even though the sale of another falls through. For a longer provision that may be used when contracts for the other parcels have not yet been signed, see *§ 23.230[2]*.

[2] FORM

Buyer to Acquire Additional Property Pursuant to Other Contracts

(_____) Buyer to Acquire Additional Property. The closing, simultaneously with the closing of escrow under this contract, of an escrow for the purchase by Buyer of certain additional property pursuant to the terms of a contract of sale signed by Buyer and_____[*name of other property owner*], dated_____[*date*], covering real property located in _____ County, California, and [described as follows: _____ (*insert legal description*) *or* more particularly described in Exhibit _____, which is attached to this contract and incorporated by reference].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of

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9-23 California Legal Forms--Transaction Guide § 23.232

AUTHOR: William M. Hensley Editorial Consultant

§ 23.232 Buyer to Sell Other Property

[1] Comment

[a] Use of Form

The form in [2], *below*, may be inserted into a contract for the sale of real property [*see §§ 23.200[2], 23.202[2]*] when the buyer wishes to finance the purchase with funds obtained from the sale of other real property, such as the buyer's former residence. It includes a release clause that permits the seller to accept another offer that is not contingent on the sale of other property unless the buyer waives this contingency [*see* [d], *below*].

[b] Timing of Other Sale

A buyer who wishes to sell real property and use the proceeds to fund the purchase of other property (as in the case of a sale of an existing residence and purchase of a new one) must decide whether to put the old property on the market before locating replacement property or to wait until after execution of the purchase contract for the replacement property. In most cases the seller of the replacement property will be more likely to agree on a contingent sale if a sale is already pending on the buyer's other property, because there is a greater likelihood that the other sale will be consummated within the specified time than if a buyer has not yet been found. This may be particularly important when the buyer is competing with other prospective buyers, inasmuch as an offer contingent on the sale of other property is usually at a disadvantage compared to an offer that contains no such contingency. Another advantage of finding a prospective buyer for the old property before agreeing to purchase the new property is that the seller of the old property will know how much he or she can expect to receive for the old property before negotiating the price and payment terms for the new property.

Conversely, a buyer who puts property on the market before finding suitable replacement property will be under pressure to find such property within a short time and may ultimately have to settle for property or terms that do not

meet all the buyer's expectations. The buyer and his or her broker must assess the state of the market and the buyer's needs before deciding what to do. One way to minimize time pressure is to provide for a long escrow for the other sale.

[c] Coordinating the Close of Escrows

Many contracts containing this type of contingency provide for the simultaneous close of escrows. This contingency requires the escrow for the sale of the other property to occur before or simultaneously with the close of escrow for this transaction. The timing is important because proceeds of the first sale will be needed in order for the second to close. When deciding on the closing date, the parties should provide for a long escrow if the buyer has not yet found a buyer for the other property. To minimize procedural difficulties, it may be advisable to have the same escrow agent handle both escrows.

[d] Relief Clause

The contract should contain a relief clause giving the seller the right to (1) tentatively accept another offer to purchase the property if that offer is not subject to the sale of other property and (2) terminate the sale contract if the buyer does not waive the contingency of sale within a specified period (such as three days). In other words, if the seller receives a backup offer that is not contingent on the sale of other property, he or she can force the first buyer either to waive that contingency or to terminate the sale. This clause is very advantageous to sellers because they are not forced to wait and see whether the first prospective buyer will actually be able to sell his or her property; if a second prospective buyer makes an offer that contains no such contingency, the seller can accept it. Conversely, such a relief clause can be extremely undesirable to a buyer because it forces the buyer, in effect, to gamble on being able to sell the old property or obtain other financing [*see* [e], *below*] before the time set for close of escrow on the replacement property. If the buyer fails to do either, the buyer will breach the sale contract, forfeit any deposit, and face potential liability for any other damages to which the seller is entitled.

The seller might not insist on including a relief clause. For example, if the seller is in no hurry to move and would be willing to extend the close of escrow, if necessary, to give the buyer additional time to sell the other property, a relief clause may be viewed as unnecessary. However, the seller should be aware that if no relief clause is included, the buyer is in effect being given the right to tie up the property for an extended period (especially if the sale contract provides for a long escrow) while seeking a suitable buyer for the other property.

[e] Interim Financing

If the buyer is unable to sell the other property in time to meet close of escrow on the replacement property, and the seller will not agree to an extension of the closing date, the buyer may be able to obtain interim short-term financing (a "swing loan") to pay any amounts due at the close of escrow for the replacement property. In this situation, the buyer will be in the difficult position of temporarily owning both properties. However, it may give sufficient time to find a buyer and close an escrow on the existing property.

[2] FORM

Buyer to Sell Other Property

(_____) Sale of Other Property by Buyer. The close, before or simultaneously with the close of escrow under this contract, of an escrow for the sale by Buyer of that certain real property owned by Buyer, located at_____[*complete street address*], in _____ County, California, and described as follows: [*insert legal description*] (the "other property"); provided that:

(1) The sale of the other property shall be _____ [on the terms and conditions specified in that contract of sale for the other property dated _____ (*date*) between _____ (*name*) as seller and

_____ (*name*) as buyer *or* for a price of at least $_____, and on terms and conditions acceptable to Buyer and sufficient to provide Buyer with at least $_____ in cash proceeds to be applied toward the purchase of the Property at the close of escrow under this contract].

(2) _____ [*Add, if no sale is pending:* Buyer agrees to make a concerted and good faith effort to find a purchaser for the other property and warrants that Buyer will not unreasonably reject any offer to purchase the other property meeting the basic requirements specified above.]

(3) Seller shall have the right to continue to offer the Property for sale to other purchasers.

(4) If Seller receives an offer that is not contingent on the sale of other property, Seller may accept that offer contingent on Buyer's failure to waive this condition.

(5) Seller shall provide Buyer with a written notice of that acceptance, personally delivered or sent by certified mail; if mailed, the notice will be deemed received by Buyer _____ [*e.g.*, two] days after the date of postmark.

(6) If Buyer does not waive this condition within _____ [*e.g.*, three] days of Buyer's receipt of that notice, this contract shall be terminated.

(7) Any such waiver by Buyer must be in writing and must comply with the delivery requirements applicable to Seller's notice of acceptance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.233

AUTHOR: William M. Hensley Editorial Consultant

§ 23.233 Seller to Buy Other Property

[1] Comment--Use of Form

The form in [2], *below*, may be used when a seller of real property is not willing to go ahead with the transaction unless he or she is able to purchase suitable replacement property. Typically, this type of provision will be used when a seller wishes to condition the sale of his or her primary dwelling on the purchase of another home. To provide the buyer with a little protection, this type of provision may be modified, if desired, by adding a relief clause, similar to that contained in § 23.232[2], giving the buyer the right to terminate the contract and purchase other property if the seller has not found suitable replacement property within a specified time. For further discussion of contingencies relating to the sale of other property, see *§ 23.232[1]*.

[2] FORM

Seller to Buy Other Property

[*EITHER*]

(_____) Purchase of Other Property by Seller. The close, before or simultaneously with the close of escrow under this contract, of an escrow for the purchase by Seller of certain real property [located at _____ (*complete street address*) *or* described as follows: _____ (*insert legal description*)], on the terms and conditions specified in the contract of sale for that property dated_____[*date*], between_____[*name*] as seller and_____[*name*] as buyer.

[*OR*]

(_____) Purchase of Other Property by Seller. The close, before or simultaneously with the close of escrow under this contract, of an escrow for the purchase by Seller of suitable replacement real property [for use as Seller's new principal residence], located in the City of _____, California, at a price of not less than $_____ nor more than $_____, and on terms and conditions otherwise acceptable to Seller; provided that Seller agrees to make a concerted and good faith effort to locate and purchase suitable replacement property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.234

AUTHOR: William M. Hensley Editorial Consultant

§ 23.234 Suitability of Property for Buyer's Intended Use

[1] Comment--Use of Form

The form in [2], *below*, may be inserted into a sale contract [*see §§ 23.200[2], 23.202[2]*] when the buyer wishes to condition his or her obligation to perform on a determination (made subsequent to the execution of the sale contract) that the property is suitable for the buyer's intended purpose. Other similar contingencies may concern a survey, soils tests, the approval of a subdivision map, and the issuance of a building permit [*see § 23.201[2]*] or the issuance of necessary permits, certificates, and licenses, performance of inspections of the property, and issuance of a certification that the property is free of infestation or infection caused by wood-destroying pests or organisms [*see § 23.202[2]*].

[2] FORM

Suitability of Property for Buyer's Intended Use

(_____) Suitability of Property for Buyer's Intended Use. The determination by Buyer, before_____[*date*], that the Property is suitable for [*specify desired use*]; provided that:

(1) _____ [*Specify method for making determination and applicable limitations, e.g.*, In order to make an informed decision, Buyer shall have the right, at Buyer's expense, to have one or more professionals inspect the Property; and Buyer shall indemnify and hold Seller harmless from all liability, claims, losses, damages, costs, and expenses, including attorney's fees, arising out of or resulting from the performance of any such inspection.]

(2) If Buyer determines that the Property is not suitable for the foregoing purpose, Buyer may terminate this contract at any time before the date specified above by providing Seller with written notice of the decision.

(3) The notice shall state the basis of the Buyer's determination _____ [and shall be accompanied by

any written inspection reports prepared pursuant to this condition].

(4) Buyer's failure to provide the Seller with the notice _____ [or those materials] before the date above shall be deemed a waiver of this condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.235

AUTHOR: William M. Hensley Editorial Consultant

§ 23.235 Buyer to Negotiate New Leases for Proposed Building

[1] Comment--Use of Form

The form in [2], *below*, may be inserted into a real property sale contract [*see §§ 23.200[2], 23.201[2]*] when the buyer intends to construct a commercial building on the property. It conditions the purchase on the buyer's ability to negotiate favorable leases with major tenants for the proposed development and specifies the minimum rental per square foot and the types of desired tenants. The buyer's proposed use should be specified in more detail in another provision of the contract.

[2] FORM

Buyer to Negotiate New Leases for Proposed Building

(_____) Negotiation of Leases. The negotiation by Buyer of leases for space in Buyer's proposed [*describe type of development, e.g.*, shopping center]; provided that:

(1) The leases shall be at rentals of not less than $_____ per square foot with _____ [*specify tenants and, if necessary, type of building or business, e.g.*, all of the following tenants: a reputable corporation operating department stores for a department store containing at least _____ square feet; a reputable supermarket chain for a supermarket containing at least _____ square feet; and a drug store operator for a drug store having at least _____ square feet].

(2) The other terms of the leases shall be acceptable to Buyer.

(3) The leases shall be signed before _____ [*date*], and Buyer shall notify Seller in writing by _____ [*date*] of Buyer's ability or inability to obtain the foregoing leases.

(4) A failure to so notify Seller shall constitute a waiver of this condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.236

AUTHOR: William M. Hensley Editorial Consultant

§ 23.236 Seller to Deliver Disclosure Form

[1] Comment

[a] Use of Form

The form in [2], *below*, requires the seller of real property containing one-to-four dwelling units to provide the buyer with (1) a statutory real estate transfer disclosure statement regarding the condition of the property [*see* [b], *below*], (2) an additional disclosure statement, if required by the city or county in which the real property is located [*see* [c], *below*], and (3) a statutory natural hazard disclose statement (when applicable) [*see* [d], *below*]. The form also empowers the buyer to cancel the transaction or to order one or more inspections of the property after reviewing the disclosure form or forms.

The disclosure requirements and related penalties for noncompliance [*see § 23.300[1][g]*] apply whether or not they are mentioned in the sale contract. Including this contingency in the contract permits the parties to impose an additional requirement, which is the delivery of the form or forms within a specified number of days, and to empower the buyer to terminate the contract after reviewing the disclosures.

Once the seller provides the buyer with the disclosures, the attorney for the seller should provide the buyer with the notice set forth in *§ 23.303[2]*.

[b] Standard Disclosure Statement

The seller of real property containing one-to-four dwelling units must complete and deliver a statutory real estate transfer disclosure form [*see Civ. Code § 1102.6*; *see also § 23.300*] to prospective buyers as soon as practicable before transfer of title [*Civ. Code § 1102*]. The seller must indicate compliance with this disclosure requirement on the deposit receipt or other sale contract, an addendum to the contract, or a separate document [*see Civ. Code § 1102.3*]. For a

notice of compliance and further discussion, see *§ 23.303*.

[c] Local Option Disclosure Statement

Any city or county may require a seller subject to the disclosure requirement discussed in [b], *above*, to provide the transferee with a second disclosure statement [*Civ. Code § 1102.6a*]. This second statement must be in the form specified by statute [*see Civ. Code § 1102.6a(b)*] or in an alternative form required by a local ordinance originally enacted before July 1990 [*Civ. Code § 1102.6a(a)*]. For further discussion and the statutory version of this statement, see *§ 23.301*. The form in [2], *below*, requires the delivery of the disclosure form within a specified number of days. Before adopting this requirement, which is not imposed by statute, counsel should confirm that it does not conflict with the local ordinance that imposes the disclosure requirement.

[d] Natural Hazard Disclosure Statement

When the seller must provide the transferee with a statutory real estate transfer disclosure statement pursuant to *Civ. Code § 1102.6*, the seller (or the seller's agent) also must give the transferee a statutory natural hazard disclosure statement if the real property lies within a specified hazardous area [*see Civ. Code § 1103(a), (c)*]. Alternatively, this disclosure may be set forth in the local option disclosure statement [*see* [c], *above*], provided this statement includes substantially the same information and substantially the same warning set forth in the statutory disclosure statement [*Civ. Code § 1103.2(e)*]. For further discussion and the statutory natural hazard disclosure statement form, see *§ 23.302*.

The form in [2], *below*, requires the delivery of the disclosure form within a specified number of days. This requirement is not imposed by statute. If the hazardous area disclosure will be set forth in the local option disclosure statement, counsel should confirm that this delivery requirement does not conflict with the local ordinance that requires the use of the local option form [*see* [c], *above*].

[2] FORM

Seller to Deliver Disclosure Form

(_____) Seller to Deliver Disclosures. The delivery by Seller to Buyer of a completed real estate transfer disclosure statement as required by *Civil Code Section 1102 et seq.* _____[*add, if applicable:* and a local option real estate transfer disclosure statement as required by Ordinance No. _____ of the _____ City Code] [*add, if applicable:* and a natural hazard disclosure statement as required by *Civil Code Section 1103*]; provided that:

(1) Delivery shall take place _____ [*specify applicable time period or deadline, e.g.*, within _____ [*number*] days of the execution of this contract].

(2) Following receipt of the disclosure form[s], Buyer shall have _____ [*number*] days within which to review the form[s] and to notify Seller in writing of Buyer's decision, based on the contents of the disclosure form[s], to cancel this transaction or to order one or more inspections.

(3) If Buyer orders any such inspections, they shall be performed within _____ [*number*] days of the delivery of that notice.

(4) Buyer shall also have the right to cancel this transaction after obtaining the results of any such inspection, provided Buyer gives Seller written notice of the decision and a copy of the inspection report (if any) within _____ [*number*] days after the performance of the inspection.

(5) Buyer's failure to provide Seller with a timely notice to cancel or a notice of Buyer's intention to order one or more

inspections shall constitute a waiver of this condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.237

AUTHOR: William M. Hensley Editorial Consultant

§ 23.237 Seller to Transfer Shares in Mutual Water Company

[1] Comment

[a] Use of Form

The form in [2], *below*, provides that the seller of real property will transfer to the buyer shares of stock in a mutual water company. It may be inserted into any of the complete sale contracts in §§ 23.200[2], 23.201[2], and 23.202[2].

[b] Mutual Water Company Shares

[i] Mutual Water Company

A mutual water company is a corporation that sells, distributes, supplies, or delivers water for domestic or irrigation use [*Corp. Code § 14300*]. This type of corporation is typically organized by water users in areas where there are supplies of privately owned water, for the purpose of having water supplied at a reasonable rate [*see generally Corp. Code § 14300 et seq.*; *see also Corp. Code § 14310 et seq.* (mutual water companies formed in connection with subdivided lands)]. The articles or bylaws of a mutual water company may (and usually will) provide that water can be sold or delivered only to owners of the corporation's shares and that each share will be appurtenant to land described in the share certificate [*Corp. Code § 14300*].

For further discussion of mutual water companies, see Ballantine & Sterling, California Corporation Laws, Ch. 20, *Corporations for Specific Purposes* (Matthew Bender).

[ii] Transfer of Shares

When an owner of real property to which water stock is attached or appurtenant wishes to transfer the land, the shares

cannot be transferred until the recorded deed is shown to the secretary of the water company. Thereafter, the secretary will issue the grantee a new certificate of stock for the number of shares attached or appurtenant to the land as shown on the company's books [*Corp. Code § 14302*].

Although the shares cannot be transferred free of the land to which they are appurtenant, the land may be transferred without the rights represented by the shares. A reservation of water rights in a deed, without mention of the appurtenant shares, will accomplish this [*Locke v. Yorba Irrigation Co. (1950) 35 Cal. 2d 205, 209, 217 P.2d 425]* .

[2] FORM

Seller to Transfer Shares in Mutual Water Company

(_____) Transfer of Shares in Mutual Water Company. The delivery to Buyer on the close of escrow of_____[*name of mutual water company*] Stock Certificate[s] [*identify certificate(s) by number(s) or otherwise*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesContracts for ServiceReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawWater RightsGeneral OverviewReal Property LawWater RightsRiparian Rights



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9-23 California Legal Forms--Transaction Guide § 23.238

AUTHOR: William M. Hensley Editorial Consultant

§ 23.238 Seller to Transfer Membership in Owners' Association

[1] Comment

[a] Use of Form

The form in [2], *below*, provides for the endorsement and transfer of a certificate or other document needed to transfer the seller's membership in a common-interest development owners' association to the buyer. It may be inserted into any contract in §§ 23.200[2], 23.201[2], and 23.202[2]. Normally, the document will be deposited in escrow for eventual delivery to the buyer.

[b] Owners' Associations

Every condominium project, planned development, stock cooperative, or community apartment project subject to the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; *see* Ch. 34, *Condominiums*] must be managed by an association, which may be incorporated or unincorporated [*Civ. Code § 1363(a)*; *see Civ. Code § 1351(a)*]. The members of the association are the owners of the condominiums (or other separate interests). These associations are usually referred to as owners' (or homeowners') associations. Whether or not it is incorporated, the association may (unless the governing documents provide otherwise) exercise the powers granted to a nonprofit mutual benefit corporation [*see Corp. Code § 7140*], except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with *Corp. Code § 7313* [*Civ. Code § 1363(c)*]. Most owners' associations are organized under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] and therefore may issue membership certificates [*see Corp. Code § 7313(b)* (required contents of certificates); *see also* Ch. 13, *Nonprofit Corporations*].

[2] FORM

Seller to Transfer Membership in Owners' Association

(_____) Transfer of Membership in Owners' Association. The delivery to Buyer on the close of escrow of_____[*name of owners' association*] Certificate No. [*or specify other document evidencing transfer of association membership*] duly endorsed by Seller for transfer to Buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawOwnership & TransferBusiness & Corporate Entities



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9-23 California Legal Forms--Transaction Guide § 23.239

AUTHOR: William M. Hensley Editorial Consultant

§ 23.239 Party to Make Separate Agreement Pertaining to Property

[1] Comment--Use of Form

The form in [2], *below*, requires one of the parties to a real property sale contract to make a separate agreement pertaining to the property. It may be inserted into any contract in §§ 23.200[2], 23.201[2], and 23.202[2] and may be used, for example, to require the buyer to convey some type of right or interest in the property, such as an easement [*see* Ch. 28A, *Easements and Licenses*], to the seller or to an owner of adjoining real property or to require the seller to sign a document benefiting the property to be conveyed to the buyer, such as a boundary agreement [*see* Ch. 28B, *Party Walls and Boundary Agreements*].

[2] FORM

Party to Make Separate Agreement Pertaining to Property

(_____) Execution of Separate Agreement. The execution and deposit in escrow by [Seller *or* Buyer] of _____ [*describe separate agreement or conveyance, e.g.,* a grant of an easement to _____ (*name*); provided that:

(1) The easement shall be appurtenant to a parcel of property owned by _____ (*name*) that adjoins the northern boundary of the Property and that is described in more detail in Exhibit _____ to this contract.

(2) The easement shall consist of a right-of-way for ingress and egress extending over that portion of the Property that is bordered by the northern, southern, and eastern boundaries of the Property and that extends westward 15 feet from the eastern boundary of the Property].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdjoining LandownersEasementsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.240-23.249

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.240[Reserved]



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9-23 California Legal Forms--Transaction Guide § 23.250

AUTHOR: William M. Hensley Editorial Consultant

§ 23.250 Sale-Leaseback Provisions

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sale-leaseback provision that may be inserted into any of the contracts in §§ 23.200[2], 23.201[2], and 23.202[2]. In a sale-leaseback, in its basic form, the buyer of real property simultaneously leases the property back to the seller. The transaction thus transfers the legal title to the real property (along with the financial benefits and burdens of ownership) without also transferring the right to occupy and use the property. The lease is usually for a long term and obligates the lessee (seller) to pay rent, real property taxes, insurance premiums, and operating costs associated with the property. The lessee may or may not have an option to repurchase the property on expiration of the lease or at some other future time.

Sale-leasebacks may involve either unimproved or improved land. A sale-leaseback of unimproved land typically contemplates its prompt development. Either the seller or the buyer may undertake the financial responsibility of developing the property. If the transaction involves improved property, the transaction may involve the sale-leaseback of both the land and the improvements, or of just the land or just the improvements (with the seller retaining ownership of the other) [*see, e.g., Frank Lyon Co. v. United States (1978) 435 U.S. 561, 98 S. Ct. 1291, 55 L. Ed. 2d 550* (sale-leaseback of improvements only)].

For further discussion, see California Real Estate Law and Practice, Ch. 76, *Sale-Leasebacks* , Pt. B (Matthew Bender).

[b] Coordinating Provisions of Contract and Lease

The contract used in a sale-leaseback transaction can take many forms but need not differ significantly from sale contracts that do not involve leasebacks. In addition to the provisions found in any real property sale contract, all that is

necessary is a requirement that the parties sign the related lease. If desired, the contract may also provide for the recordation of a memorandum of lease [*see* Ch. 34C, *Retail, Industrial, and Office Leases*]. The lease (rather than the sale contract) will govern the seller's continuing possession of the property, payment of rent, and other essential terms of the tenancy. The lease may be attached to the contract and incorporated by reference, or the contract may provide that the lease and the contract are to be signed simultaneously.

For discussion of the contents of leases used in these transactions, see California Real Estate Law and Practice, Ch. 76, *Sale-Leasebacks* (Matthew Bender). For illustrative leases, see Ch. 34C, *Retail, Industrial, and Office Leases* ; see also Rohan, Real Estate Financing-- Text, Forms, Tax Analysis, Ch. 6, *The Sale-Leaseback as a Financing Vehicle* (Matthew Bender), and Rohan, Current Leasing Law and Techniques: Forms, Ch. 12, *The Sale and Leaseback of Real Estate* (Matthew Bender).

[c] Income Tax Aspects

[i] Federal Depreciation Rules

A taxpayer who owns the land on which his or her business is located may claim a reasonable allowance as a depreciation deduction for the exhaustion and wear and tear of the improvements or physical developments located on the land [*I.R.C. § 167(a)(1)*] but not for the cost of the land itself. For purposes of federal income taxation, most depreciable real and personal property placed into service after 1980 must be depreciated using the accelerated cost recovery system (ACRS) [*see I.R.C. § 168*]; a modified depreciation system is used for most property placed in service after 1986 (MACRS) [*I.R.C. § 168*].

Under the MACRS, which governs depreciable property placed into service after 1986, the cost of the property is recovered over a specified number of years using a prescribed method of depreciation, depending on the classification of the property. This system more evenly matches class lives with the economic or useful lives of particular assets. After 1986 most real property is depreciated over 39 years (nonresidential property) or 27.5 years (residential rental property), using the straight line method [*I.R.C. § 168(c)*]. However, a taxpayer may elect (on a building-by-building basis) to use an alternative 40-year straight line depreciation recovery period [*see I.R.C. § 168(g)*]. Because the computation method is inflexible, and the depreciation periods are quite long, the amount of depreciation allowed in any one year may be small.

For further discussion, see Rabkin & Johnson, Federal Income, Gift, and Estate Taxation, Ch. 45, *Depreciation* (Matthew Bender).

[ii] California Depreciation Rules

The Personal Income Tax Law [*Rev. & Tax. Code § 17001 et seq.*] modifies *I.R.C. § 168* by stating that any reference to a "tax imposed by this chapter" in that section means "net tax," as defined in *Rev. & Tax. Code § 17039* [*Rev. & Tax. Code § 17250(a)(1)*]. Depreciation deductions under the Bank and Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*] are generally computed under separate statutory provisions rather than under incorporated federal provisions [*see Rev. & Tax. Code §§ 24349-24356*].

[iii] Ownership of Improvements

A taxpayer who sells the land on which his or her business is located to an investor and leases it back for use in the taxpayer's business cannot thereafter claim a depreciation deduction for any improvements belonging to the owner. However, the taxpayer can depreciate any leasehold improvements owned by the taxpayer. The deduction must be computed in the same manner as the deduction for the underlying property would be computed if that property had been placed in service at the same time as the improvement [*I.R.C. § 168(i)(6)*; *see Rev. & Tax. Code §§ 17201*, *24349(a)*]. Thus the period of depreciation is fixed by statute (for instance, 39 years for nonresidential real property placed into

service after 1986) and is not affected by the term of the lease [*I.R.C. § 168(i)(8)*; *see I.R.C. §§ 167(a), 168(c)*]. If the tenancy is terminated before the expiration of that period, and the taxpayer does not remove the improvements, he or she can take a loss with respect to the remaining basis in the improvements [*see § 23.26[5]*].

[iv] Deduction of Rent Paid

A taxpayer participating in a sale-leaseback transaction also can deduct on his or her federal and California state income tax returns the full amount of all rent, including rent applicable to the land itself, that the taxpayer must pay as a condition to his or her continued use or possession of the land, provided the taxpayer has not acquired and is not acquiring an equity interest in the property [*I.R.C. §§ 62, 162(a)(3)*; *Rev. & Tax. Code §§ 17072, 17201*].

[v] Taxable Gain or Loss to Seller

If, as is usually the case, the real property being sold under a sale and leaseback arrangement has been owned by the seller for more than six months and has been used in the seller's trade or business, it is classified as a "Section 1231" asset. Any gain realized by the seller on the sale of such an asset is treated as a long-term capital gain, with the exception that any gain realized on the sale must be treated as ordinary income to the extent of the losses from these transactions over the five preceding years [*I.R.C. § 1231(b)(1), (c)*; *Rev. & Tax. Code § 18151*]. Any loss realized by a seller on the sale of a Section 1231 asset is treated as ordinary loss fully deductible against other taxable income in the year of the sale [*I.R.C. § 1231(a)*; *Rev. & Tax. Code § 18151*].

[vi] Recharacterization of Transaction

The important tax and financial advantages of sale-leasebacks will be destroyed if the IRS successfully recharacterizes the transaction as a like-kind exchange, a disguised financing device, an option to buy, or a sale of a residual interest in the subject real property.

If a real property lease with a term of at least 30 years is exchanged for fee title to real property, the transaction will be deemed an exchange of "like-kind" properties for federal and state taxation purposes [*Treas Reg. § 1.1031(a)-1(c)(2)*; *see I.R.C. § 1031*; *Rev. & Tax. Code §§ 18031, 24941*; *see also* Rabkin & Johnson, Federal Income, Gift, and Estate Taxation, Ch. 43, *Disposition of Real Estate* (Matthew Bender)]. Any loss from the disposition of property in a like-kind exchange cannot be recognized [*see I.R.C. §§ 1031(a), (c), 1231*]. Recognition of gain is deferred until the property acquired in the exchange is sold. However, gain is recognized to the extent of the net amount of any money or other "unlike" property received in the exchange [*see I.R.C. § 1031(a), (b)*]. For further discussion of the characterization of the foregoing transaction as a like-kind exchange, see California Real Estate Law and Practice, Ch. 76, *Sale-Leasebacks* (Matthew Bender).

Tax benefits will also be lost if the sale-leaseback is recharacterized as a long-term loan or other financing device. The determination will depend on the facts of the case and will be based on the actual economic effect of the transaction on the parties, rather than on the wording of the relevant documents or the clearly expressed intentions of the parties [*Frank Lyon Co. v. United States (1978) 435 U.S. 561, 573, 98 S. Ct. 1291, 55 L. Ed. 2d 550]* . As a general rule, if there is a genuine multiple-party transaction with economic substance that is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the IRS should honor the parties' allocation of their respective rights and duties [*Frank Lyon Co. v. United States (1978) 435 U.S. 561, 583, 98 S. Ct. 1291, 55 L. Ed. 2d 550]* .

Although the principal challenges to sale-leasebacks involve financing devices and like-kind exchanges, recharacterization will also result if the transaction is found to be a grant of an option to buy the subject property [*see, e.g., Estate of Franklin v. C.I.R. (9th Cir. 1976) 544 F.2d 1045, 1049]* . It has also been suggested that a sale-leaseback is always a sale of a residual interest in the subject property, which is akin to a financing arrangement and therefore

should be treated as such [*see* Del Cotto, *Sale and Leaseback: A Hollow Sound When Tapped? 37 Tax Law Rev. 1 (1981)*].

[d] Property Tax--Change of Ownership

The California Supreme Court has held that a sale-leaseback of property is a change of ownership for property tax purposes [*see Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162, 2 Cal. Rptr. 2d 536, 820 P.2d 1046* ; *see also Rev. & Tax. Code §§ 60, 62(e), (g)*].

[2] FORM

Sale-Leaseback Provisions

[***number***]**. Sale-Leaseback.** Seller as lessee shall execute and deliver to Buyer as lessor a copy of the lease agreement attached to this contract as Exhibit _____ and incorporated by reference, leasing [the Property *or* the portion of the Property described in that lease] as of the close of escrow for the term, at the rent, and on the conditions specified in that lease. Seller shall also execute and deliver to Buyer a memorandum of lease in the form attached to this contract as Exhibit _____.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesSale-Leaseback TransactionsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Accelerated Cost Recovery SystemTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Taxpayer GroupsIndividualsBusiness Deductions (IRC secs. 62, 63, 162)General Overview



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9-23 California Legal Forms--Transaction Guide § 23.251

AUTHOR: William M. Hensley Editorial Consultant

§ 23.251 Risk of Loss

[1] Comment

[a] Use of Form

The form in [2], *below*, presents alternative contractual provisions allocating the risk of loss of real property before the close of escrow. Either alternative may replace the risk-of-loss provisions in the contracts in §§ 23.200[2], 23.201[2], and 23.202[2].

[b] Uniform Vendor and Purchaser Risk Act

Any contract made in California for the purchase and sale of real property will be interpreted as including an agreement that the parties will be bound by the Uniform Vendor and Purchaser Risk Act unless the contract provides otherwise. Under the act, the responsibility for the property shifts from the seller to the buyer on the transfer of legal title or possession [*Civ. Code § 1662*; *see § 23.19*].

There are gaps in the act's allocation of risks. Under the act, the seller assumes the risk of loss only following the destruction or condemnation of "all or a material part" of the property [*Civ. Code § 1662*]. The act does not define "material part" and does not detail who is to bear the risk of any nonmaterial, pre-transfer loss. For a provision that fills these gaps, see *§§ 23.200[2]*, *23.201[2]*, and *23.202[2]*.

[2] FORM

Risk of Loss

[*EITHER*]

[***number***]**. Risk of Loss, Destruction, or Condemnation.** The parties agree that the Uniform Vendor and Purchaser Risk Act, set forth in *Civil Code Section 1662*, and its provisions governing the allocation of risk of loss, shall govern this transaction.

[*OR*]

[***number***]**. Risk of Loss, Destruction, or Condemnation.** The parties agree that the Uniform and Vendor Purchaser Risk Act, set forth in *Civil Code Section 1662*, shall not apply to this transaction and that the following provisions shall govern the risk of loss._____[*Specify, e.g.*, If, before the close of escrow, all or any portion of the Property is taken by eminent domain by any person or entity, or destroyed or materially damaged before the close of escrow due to no fault of Buyer, Buyer may terminate this contract by providing Seller with written notice of this election within _____ (*number*) days after Buyer becomes aware of the taking, destruction, or damage.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRisk of Loss



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9-23 California Legal Forms--Transaction Guide § 23.252

AUTHOR: William M. Hensley Editorial Consultant

§ 23.252 "As Is" Clause

[1] Comment

[a] Use of Form

The form in [2], *below*, may be inserted into a real property sale contract by a seller who wishes to limit his or her potential liability for the condition of the property by expressly refusing to warrant or make representations concerning the condition of the property. A buyer-oriented option would permit the buyer to order an inspection of the property and to terminate the contract based on the results of the inspection.

Although some sellers insist on the inclusion of an "as is" clause, California law places significant limitations on the effectiveness and enforceability of these provisions [*see* [b], [c], *below*].

[b] Applicability to Visible Defects

An "as is" clause is void as against public policy, except to the extent that it is applied only to defective conditions visible to or observable by the buyer [*Orlando v. Berkeley (1963) 220 Cal. App. 2d 224, 229, 33 Cal. Rptr. 860* ; *see Civ. Code § 1668*]. A seller must disclose to the buyer any material fact (such as the existence of a material defect) of which the seller is aware, if the fact affects the value of the property and the seller knows that the buyer would not observe the fact on inspection [*see Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 735-738, 29 Cal. Rptr. 201* ; *Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8]* .

PRACTICE TIP

"As Is" Clauses Are Not Substantively Preclusive, But May Have Great Evidentiary Weight."As is" clauses are far from dispositive. They do not, for example, cover intentional non-disclosures by the seller. However, they do have great evidentiary impact in misrepresentation cases. Many judges in cases

this commentator has litigated give great weight to this clause in commercial real estate matters, reasoning that the buyer had an opportunity to inspect and that the clause undercut the reliance element of a misrepresentation claim. *By William M. Hensley.*

[c] Effect of Statutory Disclosure Requirements

[i] In General

Any waiver of the statutory requirements applicable to sellers of real property containing one-to-four dwelling units [*see Civ. Code § 1102* et seq.] is void as against public policy [*Civ. Code 1102(c)*]. Thus, the delivery of a real estate transfer disclosure statement [*see Civ. Code §§ 1102.3, 1102.6*; *see also § 23.300*] may not be waived in an "as is" sale [*Civ. Code § 1102.1(a)*; *Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 1195, 19 Cal. Rptr. 2d 161]* .

Unlike an "as is" clause, the statutory disclosure statement is not intended to be part of the sale contract [*see Civ. Code § 1102.6*]. Further, it is neither a warranty by the seller or any agent representing any principal in the transaction nor a substitute for any inspections or warranties that the principals may wish to obtain [*see Civ. Code § 1102.6*].

[ii] Buyer's Acknowledgment of Disclosure

An "as is" clause obligates the buyer to accept the property with any defects that were visible to or observable by the buyer at the time of the execution of the contract [*see Orlando v. Berkeley (1963) 220 Cal. App. 2d 224, 229, 33 Cal. Rptr. 860* ; *see also* [b], *above*]. A buyer who signs the disclosure statement before or simultaneously with the buyer's execution of the sale contract is, in effect, acknowledging his or her awareness of any defects described in the statement. If a dispute later arises regarding the applicability of the "as is" clause to particular defects, a court presumably can look to the buyer's acknowledgment of the statutory statement as evidence that the buyer was in fact aware of any defects described in it before executing the real property sale contract, and that those defects were therefore covered by an "as is" clause. There are no reported decisions on this point. A similar argument is possible in many cases even when the disclosure statement is delivered to the buyer after execution of the sale contract [*see Civ. Code § 1102.3* (statement must be provided as soon as practicable before transfer of title)], because sale contracts often contain a clause making the contract contingent on the buyer's approval of the disclosure statement [*see § 23.236*].

[2] FORM

"As Is" Clause

[***number***]**. Purchase of Property "As Is."** Buyer is to purchase the Property "as is," that is, in its present condition, and Seller makes no warranties or representations regarding the condition of the Property._____[However, Buyer shall have the right, at Buyer's expense, to have one or more professionals inspect the Property before _____ (*date*). Buyer shall indemnify and hold Seller harmless from all liability, claims, losses, damages, costs, and expenses, including attorney's fees, arising out of or resulting from the performance of any such inspection. Buyer may terminate this contract based on the results of any such inspection by providing Seller with written notice of termination before the above date. This notice shall state the basis of the Buyer's determination and shall be accompanied by any relevant written inspection reports. Buyer's failure to provide the notice in the required manner shall be deemed a waiver of this right to terminate.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.253

AUTHOR: William M. Hensley Editorial Consultant

§ 23.253 Arbitration

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of two alternative arbitration provisions for a real property sale contract, which may be inserted into §§ 23.200[2], 23.201[2], and 23.202[2]. Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by the agreement of the parties [*Stockwell v. Equitable Fire and Marine Ins. Co. (1933) 134 Cal. App. 534, 540, 25 P.2d 873]* .

The first provision incorporates by reference the rules of the American Arbitration Association, while the second provides for the use of the rules set forth in the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*]. For a detailed discussion of these arbitration schemes, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[b] Arbitration Disclosure Requirements Applicability

Statutory disclosure requirements apply to any contract to convey real property or a contract contemplated to convey real property in the future, if the contract contains a provision for binding arbitration [*Code Civ. Proc. § 1298(a)*; *see* [c], *below*]. The disclosure requirements also apply to contracts between principals and agents in real property sale transactions, including listing contracts [*Code Civ. Proc. § 1298(b)*; *see Civ. Code § 1086(f)*]. For further discussion, see Ch. 21, *Agreements With Real Estate Agents* .

[c] Binding Arbitration

Although the term "binding arbitration" is not defined by statute, it is generally understood to refer to a system of

arbitration under which the parties are bound by the arbitration award and are not entitled to judicial review of the award, except under extremely limited circumstances [*see Code Civ. Proc. § 1298(c)* (statutory notice describes binding nature of arbitration); *see, e.g., Bus. & Prof. Code § 6204(a)* (effect of contract by attorney and client to be bound by award of arbitrators)]. The rules of the American Arbitration Association and the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*] provide for binding arbitration. For further discussion, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender)].

[d] Heading, Notice, and Format

If the real property sale contract contains a binding arbitration provision, the following requirements must be met.

- The arbitration provision must be clearly titled "ARBITRATION OF DISPUTES" (in capital letters) [*Code Civ. Proc. § 1298(a)*].

- The statutory arbitration notice (set forth as the last two paragraphs of the form in [2], *below*,) must appear immediately following the arbitration provision and immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision [*Code Civ. Proc. § 1298(c)*].

- Both the statutory notice and the arbitration provision must be in capital letters if the contract is typed. If the contract is printed, the provision must be in at least 8-point boldface type or in contrasting red in at least 8-point type, and the notice must be in at least 10-point boldface type or in contrasting red in at least 8-point boldface type [*Code Civ. Proc. § 1298(a), (c)*].

PRACTICE TIP

Mediation Clauses. In many real estate purchase/sale contracts (including CAR forms), there is a provision providing that the parties must mediate any contractual dispute before pursing arbitration. This provision should not be ignored. As generally framed, the clause provides that a party who fails to submit to mediation first *may* forfeit the ability to recoup attorneys' fees under a contractual fee clause, at the discretion of the arbitrator or trial court. This commentator's experience is that arbitrators will enforce this provision *against* a party refusing to mediate in good faith. Out of three cases where an opposing party refused to mediate, the arbitrator during a subsequent arbitration refused to award attorneys' fees to the ultimate prevailing party. This penalty is a potent provision to use against uncooperative opposing parties in a real estate dispute. *By William M. Hensley.*

[e] Relationship to Other Laws

An arbitration provision subject to these disclosure requirements will not preclude or limit any right of action for bodily injury or wrongful death, or any right of action that is subject to *Code Civ. Proc. § 337.1* (four-year statute of limitations for actions based on patent deficiencies in the construction of improvements to real property) or *Code Civ. Proc. § 337.15* (ten-year statute of limitations for actions based on latent deficiencies in the construction of improvements to real property) [Code Civ. Proc. § 1298.7; *but see Basura v. U.S. Home Corp. (2002) 98 Cal. App. 4th 1205, 1212, 120 Cal. Rptr. 2d 328* (*Code Civ. Proc. § 1298.7* is preempted by section 2 of the Federal Arbitration Act [*9 U.S.C. § 2*], which prohibits courts from invalidating arbitration agreements under state laws applicable only to arbitration provisions); *see also* California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender)].

The statutory notice requirements do not diminish the authority of any court of competent jurisdiction with respect to real property transactions in areas involving court supervision or jurisdiction, including, but not limited to, probate, marital dissolution, foreclosure of liens, unlawful detainer, or eminent domain [*Code Civ. Proc. § 1298(d)*].

Any party to an action who proceeds to record a notice of pending action [*see Code Civ. Proc. § 405.20*] will not thereby waive any right of arbitration that that person may have pursuant to a written agreement to arbitrate, nor any right to petition the court to compel arbitration pursuant to *Code Civ. Proc. § 1281.2*, if, in filing an action to record that notice, the party at the same time presents to the court an application that the action be stayed pending the arbitration of any dispute that is claimed to be arbitrable and that is relevant to the action [*Code Civ. Proc. § 1298.5*].

[2] FORM

Arbitration

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 8-point boldface or contrasting red type, with heading in capital letters (Code Civ. Proc. § 1298(a)).*]

[*EITHER*]

[number]**. ARBITRATION OF DISPUTES. Any controversy or claim arising out of this contract or a breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction.**

[*OR*]

[number]**. ARBITRATION OF DISPUTES. A controversy that arises out of this contract or a breach of it shall be submitted to arbitration pursuant to this paragraph.**

(a) A party invoking this arbitration provision ("Initiating Party") shall notify the other party ("Responding Party") in writing of the request for arbitration. The notice shall state the name and address of the arbitrator selected by the Initiating Party and the basis of the party's claim. Within _____ [*number*] days after receiving this notice, the Responding Party shall give written notice to the Initiating Party of the name and address of the arbitrator selected by the Responding Party. If the Responding Party fails to give this notice within the period specified above, then within five days after the expiration of that period, the arbitrator selected by the Initiating Party shall select a second arbitrator, and the Responding Party shall be notified of that second arbitrator's name and address.

(b) Within _____ [*number*] days after the effective date of the last notice of selection of an arbitrator pursuant to clause (a) above, the two arbitrators selected shall select a third arbitrator and notify each party in writing of the name and address of the third arbitrator. If the two arbitrators fail to agree on the third within the time period specified in this clause, then _____ [***specify person who is to appoint third arbitrator, e.g.,*** the presiding judge of the _____ County Superior Court] shall, on the written request of either party, appoint a third arbitrator within _____ [***number***] days of the request. A copy of any request made pursuant to this clause shall be delivered or sent to the other party at the time the request is made. Any party receiving notice of an appointment pursuant to this clause shall give the other party written notice of that appointment.

(c) The arbitration shall be conducted in accordance with *Code of Civil Procedure Section 1280 et seq.* Arbitration hearings shall be held in _____ County, California. All notices shall be given pursuant to Paragraph _____ [*specify general notice provision*].

[*Set out following provision in capital letters if contract is typewritten, otherwise in at least 10-point boldface or*

8-point contrasting red boldface type (Code Civ. Proc. § 1298(c)).]

Notice:

By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the "ARBITRATION OF DISPUTES" provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless such rights are specifically included in the "ARBITRATION OF DISPUTES" provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary.

We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the "ARBITRATION OF DISPUTES" provision to neutral arbitration.

Initialed by Buyer: _____
Initialed by Seller: _____

PRACTICE TIP

Arbitration Before JAMS/Endispute, American Arbitration Association or Other Bodies; Discovery Rights. Many arbitration clauses go so far as to specify that the arbitration shall take place in front of an arbitrator appointed by private arbitration services--such as JAMS/Endispute or the American Arbitration Association--or by some other body. In deciding whether or not to agree to such a contractual clause, one needs to keep in mind that there are significant differences between competing arbitration services as far as procedures, arbitrator selection methods, arbitrator candidate pools, arbitrator expenses, and the like. It is best to consult regional local counsel who happens to be knowledgeable of these geographical peculiarities.

Pretrial discovery may or may not be available in contractual arbitration. Generally, unless the parties expressly agree in their contract otherwise, in real estate disputes arbitral discovery is almost non-existent as most practitioners know it [*see Code Civ. Proc. § 1283.1(b)*]. However, if the parties incorporate pre-trial discovery procedures (especially deposition procedure), discovery may proceed and be regulated by the arbitrator much as in ordinary civil litigation [*Code Civ. Proc. §§ 1283.1(b), 1283.05*]. *By William M. Hensley.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityContracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.254

AUTHOR: William M. Hensley Editorial Consultant

§ 23.254 Statement of Seller's Spouse

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement by the spouse of a seller of real property, to the effect that the spouse has no interest in the property being sold and will sign a quitclaim deed if necessary. It should be included immediately after the seller's signature block in the real property sale contract when the seller claims that the subject property is his or her separate property.

[b] Spouse's Right to Set Aside Conveyance

The use of the form in [2], *below*, is recommended because both spouses must sign any instrument conveying community real property, and a spouse who does not join in the execution of the instrument may bring an action to set aside the transfer within one year of the recording of the instrument of conveyance [*Fam. Code § 1102(a), (d)*]. A spouse who signs this statement will be estopped from setting aside the sale. The affirmative defense of estoppel may be asserted when the spouse had knowledge of the facts [*Rice v. McCarthy (1925) 73 Cal. App. 655, 662, 666, 239 P. 56]* and prejudiced or misled the grantee by his or her conduct [*Waldeck v. Hedden (1928) 89 Cal. App. 485, 491, 265 P. 340]* , so that the grantee did what the grantee would not have done otherwise [*Rice v. McCarthy (1925) 73 Cal. App. 655, 662, 239 P. 56* ; *see MacKay v. Darusmont (1941) 46 Cal. App. 2d 21, 26-27, 115 P.2d 221]* .

[2] FORM

Statement of Seller's Spouse

The undersigned, who is the spouse of_____[*name of seller*], acknowledges

that_____[he *or* she] has absolutely no interest, whether present or future, in the Property that is the subject of this contract. The undersigned has read this contract, consents to its execution and performance in all respects, and agrees to execute a quitclaim deed if required as a condition for Buyer to be able to obtain title insurance for the Property.

Dated: _____ [*date*]
_____ [*signature of spouse*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.255

AUTHOR: William M. Hensley Editorial Consultant

§ 23.255 Authority of Entity to Enter Into Contract

[1] Comment--Use of Form

The form in [2], *below*, consists of alternative provisions that may be used to establish the authority of (1) a corporation, partnership, or unincorporated association to enter into a real property purchase and sale transaction, and (2) officers or partners to sign the sale contract on behalf of the entity. For discussion of the capacity of these entities to contract, see *§ 23.12[5]-[8]*. One or more of these alternatives may be inserted into the miscellaneous provisions of any contract in §§ 23.200[2], 23.201[2], and 23.202[2].

[2] FORM

Authority of Entity to Enter Into Contract

[*EITHER*]

[***number***]**. Warranty of Authority.** [Seller *or* Buyer] warrants that:

(a) It is a duly organized, validly existing corporation in good standing under the laws of the State of _____.

(b) Its signatories to this contract are authorized to execute this contract on its behalf.

(c) _____ [*Add, if California corporation is selling all or substantially all of its assets and sale is not in usual and regular course of its business:* A majority of the outstanding shares have approved this transaction.]

(d) The certified copy of the resolution of its Board of Directors that is attached to this contract as Exhibit _____ and approves this transaction is currently (and at the time of the close of escrow will be) in full force and effect.

[*OR*]

[***number***]**. Warranty of Authority.** [Seller *or* Buyer] warrants that:

(a) It is a duly organized, validly existing _____ [general *or* limited] partnership in good standing under the laws of the State of _____.

(b) Its _____ [signatory *or* signatories] to this contract _____ [is *or* are] _____ [the general partner of the partnership *or* all of the general partners authorized to execute this contract].

(c) The _____ [statement of partnership *or* certificate of limited partnership] that is attached to this contract as Exhibit _____ is currently (and at the close of escrow will be) in full force and effect.

[*OR*]

[***number***]**. Warranty of Authority.** [Seller *or* Buyer] warrants that:

(a) It is a duly organized, validly existing unincorporated association in good standing under the laws of the State of _____.

(b) The resolution of the association that is attached to this contract as Exhibit _____ duly authorizes the association to enter into this contract and authorizes the association's signatories to this Contract to execute this contract.

(c) The foregoing resolution is currently (and at the close of escrow will be) in full force and effect.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide §§ 23.256-23.259

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.256[Reserved]



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9-23 California Legal Forms--Transaction Guide § 23.260

AUTHOR: William M. Hensley Editorial Consultant

§ 23.260 Seller to Transfer Water Rights and Crop Allotment

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of two provisions that may be inserted into a contract for the sale of agricultural land [*see § 23.200[2]*] when the buyer is to acquire the water rights or crop allotment relating to the land.

[b] Water Rights

Water rights are appurtenant to real property and part of the real property [*Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 154, 131 P. 119* ; *see* Ch. 36A, *Mining Claims, Timber Interests, and Water Rights*]. Therefore, unless expressly reserved, they pass as an incident to real property by a conveyance of the real property to which they are appurtenant without being mentioned in the deed or other instrument of conveyance of that real property [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 724, 93 P. 858]* . However, in order to avoid future disputes, the contract should expressly set forth a provision to the effect that the water rights are intended to be vested in the buyer on the consummation of the sale.

For a form for reservation of water rights, see *§ 23.263*.

[c] Crop Allotment

The Agricultural Adjustment Act of 1938 [*7 U.S.C. § 1281 et seq.*] provides for a system of acreage allotments for wheat, corn, cotton, and rice designed to maintain an orderly and balanced market flow of products [*7 U.S.C. § 1282*]. Basically, the acreage allotment is apportioned to farms in each county according to the amount of each crop raised on those farms in the year immediately preceding the year for which the allotment is determined [*7 U.S.C. § 1344(f)*]. Thus

the allotments are apportioned to the farm and not to the owner; nevertheless, official transfer forms must be submitted when a farm is sold. The act is administered by state and county committees of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture.

The second paragraph of the form in [2], *below*, contains a warranty by the seller as to the acreage allotment attributable to the property being sold for the year of the sale, and an agreement by the seller to submit a transfer form on consummation of the sale.

[2] FORM

Seller to Transfer Water Rights and Crop Allotment

[***Number***]**. Water Rights.** Seller agrees that on conveyance of the Property to Buyer pursuant to this contract, all water and water rights, however held or evidenced, owned by Seller and used on or in connection with the Property,_____[including _____ (*number*) shares of the capital stock of _____ (*name of water company*) held by Seller,] shall become vested in Buyer.

[***Number***]**. Crop Allotment.** Seller warrants and agrees that:

(a) Seller has not sold, leased, assigned, or otherwise transferred the _____ [*year and type of crop*] allotment covering the property.

(b) The allotment for the Property is _____ [*number*] acres.

(c) Seller will sell, assign, and transfer to Buyer as a material consideration for the purchase of the Property by Buyer a total _____ [*year and type of crop*] allotment of _____ [*number*] acres.

(d) At the close of escrow for this transaction, Seller shall have Seller's acreage allotments on property being farmed by Seller in _____ [*specify county where property being sold is located*] reconstituted by the _____ County office of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture and will, with Buyer and the local office of the Agricultural Stabilization and Conservation Service, execute the "transfer by sale" form necessary to transfer the allotment for the Property to Buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawWater RightsGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.261

AUTHOR: William M. Hensley Editorial Consultant

§ 23.261 Seller to Retain and Harvest Crops

[1] Comment--Use of Form

The form in [2], *below*, provides for the seller's reservation of crops growing on the property and of the right to harvest the crops by a specified date. As between the seller and buyer, a crop growing on the land being sold constitutes a part of the realty unless it has been constructively severed or the seller specifically reserves the crop [*Wilson v. White (1911) 161 Cal. 453, 460, 119 P. 895* ; *Silveira v. Ohm (1949) 33 Cal. 2d 272, 275, 201 P.2d 387]* . When a writing is essential to the transfer of the real property [*see § 23.11[2]*], a reservation of the crop by the seller cannot be established by parol evidence to impair the effect of the writing purporting to convey the land without reservation [*Wilson v. White (1911) 161 Cal. 453, 461, 119 P. 895]* .

For an alternative provision requiring the buyer to harvest the crops, market them through a specified agency, and divide the proceeds of their sale with the seller, see *§ 23.262*.

[2] FORM

Seller to Retain and Harvest Crops

[***number***]**. Harvest and Sale of Crops.** The crop of [*specify, e.g.,* oranges] produced on the Property during_____[calendar year _____ *or* the growing season ending _____ (*month and year*)] shall [remain the property of Seller and shall be harvested by Seller and removed from the Property *or* be equally divided between Buyer and Seller and harvested jointly by them] on or before_____[*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-23 California Legal Forms--Transaction Guide § 23.262

AUTHOR: William M. Hensley Editorial Consultant

§ 23.262 Retention of Crop by Seller and Harvest and Sale of Crop by Buyer

[1] Comment--Use of Form

The form in [2], *below*, is a contractual provision requiring the buyer of real property to harvest the crop growing on the land at the time of the sale, to market it through a designated marketing agency (such as an agricultural cooperative), and to divide the net proceeds from the sale of the crop with the seller. For further discussion, see *§ 23.261[1]*.

[2] FORM

Retention of Crop by Seller and Harvest and Sale of Crop by Buyer

[***number***]**. Harvest and Sale of Crops.** The crop of [*specify, e.g.*, oranges] produced on the Property during_____[calendar year _____ *or* the growing season ending _____ (*month and year*)] shall be harvested by Buyer and marketed by Buyer through_____[*name of marking agent*], and the net proceeds, after the charges of the marketing agent and the costs of harvesting and delivering the crop to the marketing agent have been deducted, shall be equally divided between Buyer and Seller.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.263

AUTHOR: William M. Hensley Editorial Consultant

§ 23.263 Seller's Reservation of Water Rights

[1] Comment--Use of Form

The form in [2], *below*, is a provision that may be inserted into a contract for the sale of agricultural land when the seller wishes to sever the water rights and to retain them for use on adjoining land owned by the seller. Although the right to take water for beneficial use on a particular parcel of land becomes an appurtenance to the land and passes with the land when it is conveyed [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 724, 93 P. 858]* , this right may be severed or "segregated" from the land by grant, condemnation, or prescription [*Gould v. Stafford (1891) 91 Cal. 146, 155, 27 P. 543]* . Therefore, the seller may reserve this right in the real property sale contract or the deed consummating the contract [*see Locke v. Yorba Irrigation Co. (1950) 35 Cal. 2d 205, 209, 217 P.2d 425* ; *see* Ch. 36A, *Mining Claims, Timber Interests, and Water Rights*].

The only apparent exception to the right to sever water rights applies when an irrigation company, such as a mutual water company, is being organized. Under those circumstances, the landowners organizing the company must show an intention that every portion of the land then owned by them will receive water and that the right of every portion of the land to receive water is perpetual and cannot be severed [*Locke v. Yorba Irrigation Co. (1950) 35 Cal. 2d 205, 209-210, 217 P.2d 425* ; *see § 23.236[1]*].

[2] FORM

Seller's Reservation of Water Rights

[***number***]**. Water Rights.** The right to use water from_____[*name of river or stream*], now owned by Seller, is not subject to this contract, and in any conveyance of the Property executed pursuant to this contract by Seller, those water rights shall be reserved to Seller for use on lands retained by Seller.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesContracts for ServiceReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawWater RightsBeneficial Use



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9-23 California Legal Forms--Transaction Guide § 23.264

AUTHOR: William M. Hensley Editorial Consultant

§ 23.264 Seller's Reservation of Right to Enter and Remove Merchantable Timber

[1] Comment

[a] Use of Form

The form in [2], *below*, is a clause by which the seller of real property reserves the right to enter and remove timber from the land. Unless modified or controlled by other expressions in a contract, "timber" means any trees that are fit to be used for lumber in building or similar construction [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852* ; *Crain v. Hoefling (1942) 56 Cal. App. 2d 396, 405, 132 P.2d 882]* .

Real property consists, among other things, of land and that which is affixed to land [*Civ. Code § 658*]. A thing is affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs [*Civ. Code § 660*]. Consequently, a conveyance of land will include trees growing on the land unless the contract provides otherwise [*see Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7* ; *see also Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 734, 50 Cal. Rptr. 852* (fee interest in standing timber is conveyable separately from title to underlying property)].

[b] Time for Removal

If the reservation fixes period during which the seller may exercise the right to enter and remove the timber, that provision will be enforced by the courts. If no period is specified, a reasonable period will ordinarily be implied. However, a contract that reserves the right to remove timber "at any time" in the future gives the seller a perpetual right to remove the timber [*Cochran v. Union Lumber Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632]* .

[c] Date Timber Will Be Deemed Merchantable

If the seller wishes to reserve the right to "all merchantable timber now standing," the date on which the timber is to be determined to be merchantable should be specified. If that is not done and more than one contract or a contract and subsequent deed both reserve the right to all merchantable timber now standing, the date of execution of the last document will be the date on which the timber will be deemed to be merchantable, on the theory that prior inconsistent terms have been merged into the terms of the final document [*Cochran v. Union Lumber Co. (1972) 26 Cal. App. 3d 423, 428-429, 102 Cal. Rptr. 632]* .

[2] FORM

Seller's Reservation of Right to Enter and Remove Merchantable Timber

[***number***]**. Right to Enter and Remove Merchantable Timber.** Seller excepts and reserves all merchantable timber now standing, growing, or being on any of the Property on the date of the execution of this contract, together with the right to remove that timber at any time on or before_____[*date*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsTimber EasementsReal Property LawLimited Use RightsProfits a PrendreReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide §§ 23.265-23.299

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.265[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Related Instruments
1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.300

AUTHOR: William M. Hensley Editorial Consultant

§ 23.300 Real Estate Transfer Disclosure Statement [Civ. Code § 1102]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory disclosure form that must be delivered to prospective transferees of real property containing one-to-four dwelling units when the property is transferred by sale or by certain other methods [*see Civ. Code § 1102(a)*]. The text of the form is set forth in *Civ. Code § 1102.6*. The disclosures pertain to the condition of the property. Except in certain circumstances [*see* [b][ii], *below*], this disclosure statement must be provided in addition to any other required disclosures [*see Civ. Code § 1102.8*; *see also § 23.135*].

Any city or county may require that a transferor provide additional disclosures regarding the property that is the subject of the statutory real estate transfer disclosure statement. The additional disclosures must be set forth on a statutory form (called the "Local Option Real Estate Transfer Disclosure Statement") or an alternative form required by the applicable local ordinance [*Civ. Code § 1102.6a(a)*]. For further discussion and the statutory form, see *§ 23.301*.

If the property is located in any of the natural hazard areas enumerated in *Civ. Code § 1103(c)*, and the matter involves the types of property and transfers described in *Civ. Code § 1103(a)* and *(b)*, the transferor must disclose this to the prospective transferees [*see* [j][ii], *below*].

[b] Applicability of Disclosure Requirement

[i] In General

With certain exceptions [*see* [ii], *below*], the disclosure requirement applies to transfers of real property, or residential stock cooperatives, containing one-to-four dwelling units, when the transfer is by any of the following [*Civ. Code §*

1102(a)]:

- Sale.
- Exchange [*see* Ch. 24, *Exchanges of Real Property*].
- Installment land sale contract [*see Civ. Code § 2985*; *see also* Ch. 25A, *Security Instruments for Real Estate Financing*].
- Lease with an option to purchase [*see* Ch. 34C, *Retail, Industrial, and Office Leases*].
- Any other option to purchase [*see* Ch. 22, *Options to Purchase Real Property*].
- Ground lease coupled with improvements [*see* Ch. 34D, *Ground Leases*].

Any waiver of the disclosure requirements is void as against public policy [*Civ. Code § 1102(c)*; *see* [h], *below*].

[ii] Exempt Transfers

The disclosure requirement does not apply to any of the following transfers [*Civ. Code § 1102.2*]:

- Transfer subject to the public reporting requirements of the Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.*; *Bus. & Prof. Code § 11018.1*; *see also* Ch. 30, *Subdivision Regulation*].
- Sale by a subdivider of a newly constructed residence located on subdivided land in a city, if the sale is exempt from the public reporting requirements because (a) the developer has complied with applicable purchase money handling requirements [*see Bus. & Prof. Code §§ 11013.1, 11013.2, 11013.4*] and (b) the subdivision is not a common-interest subdivision [*see Bus. & Prof. Code § 11004.5*] or undivided interest subdivision [*see Bus. & Prof. Code § 11010.4*].
- Transfer under court order, including:
  - Transfer ordered by a probate court in the administration of an estate;
  - Transfer under a writ of execution;
  - Transfer by any foreclosure sale;
  - Transfer by a trustee in bankruptcy;
  - Transfer by eminent domain; and
  - Transfer resulting from a decree for specific performance.
- The following transfers on default:
  - Transfer to a mortgagee by a mortgagor or successor in interest who is in default;
  - Transfer to a beneficiary of a deed of trust by a trustor or successor in interest who is in default;

- Transfer by any foreclosure sale after default;

- Transfer by any foreclosure sale after default in an obligation secured by a mortgage;

- Transfer by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale;

- Transfer by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted in accordance with a power of sale under a mortgage or deed of trust or a sale under a decree of foreclosure or who has acquired the real property by a deed in lieu of foreclosure;

- Transfer to the legal owner or lienholder of a manufactured home or mobilehome by a registered owner or successor in interest who is in default; and

- Transfer by reason of any foreclosure of a security interest in a manufactured home or mobilehome.

- Transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust, except that this exemption does not apply to a transfer if the trustee is a natural person who is sole trustee of a revocable trust and he or she is a former owner of the property or an occupant in possession of the property within the preceding year.

- Transfer from one co-owner to one or more other co-owners.

- Transfer to a spouse or to a person or persons related by consanguinity to any transferor.

- Transfer between spouses resulting from a judgment of dissolution of marriage or of legal separation or from a property settlement agreement incidental to such a judgment.

- Transfer by the State Controller in the course of administering the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*; *see also* Ch. 102C, *Lost and Unclaimed Property*].

- Transfer of tax-defaulted or tax-deeded property made by the state [*see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].

- Transfer or exchange to or from any governmental entity.

[c] Disclosure Procedure

[i] Basic Requirements

The transferor of real property subject to the disclosure requirement must complete and deliver the statutory statement to the prospective transferee. In the case of a sale, the delivery must occur as soon as practicable before transfer of title. In the case of a transfer by an installment land sale contract, or by a lease together with an option to purchase, or a ground lease coupled with improvements, it must be delivered as soon as practicable before the contract's execution. For these purposes, "execution" means the making or acceptance of an offer [*Civ. Code § 1102.3*]. The transferor must indicate compliance with the disclosure requirement on the deposit receipt or other sale contract, the lease, an addendum

attached to one of those documents, or a separate document [*Civ. Code § 1102.3*].

The transferor of a manufactured home or mobilehome must complete and deliver the disclosure as follows [*Civ. Code § 1102.3a(a)*]:

- In the case of a sale, or a lease with an option to purchase, involving an agent [*see Health & Safety Code § 18046*], as soon as practicable, but no later than the close of escrow for the purchase of the manufactured home or mobilehome; or

- In the case of a sale, or a lease with an option to purchase, not involving an agent [*see Health & Safety Code § 18046*], at the time of execution of any document by the prospective transferee and the transferor.

The transferor of a manufactured home or mobilehome must indicate compliance with these requirements either on the transfer disclosure statement (or any addendum to the disclosure statement) or on a separate document [*Civ. Code § 1102.3a(b)*]. For additional discussion of manufactured homes and mobilehomes, see Ch. 40, *Mobilehomes* .

Delivery must be made in person or by mail to the prospective transferee. Delivery to the spouse of a transferee will be deemed delivery to the transferee, unless the contract provides otherwise [*Civ. Code § 1102.10*].

[ii] Requirement of Good Faith

Each required disclosure and each act that may be performed in making the disclosure must be made in good faith. "Good faith" means honesty in fact in the conduct of the transaction [*Civ. Code § 1102.7*].

[iii] Approximations and Subsequent Inaccuracies

If, at the time the disclosures must be made, an item of required information is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information. The approximation must be clearly identified as such, must be reasonable, and must be based on the best information available to the transferor or his or her agent. It must not be used for the purpose of circumventing or evading the disclosure requirements [*Civ. Code § 1102.5*].

If any of the disclosed information subsequently becomes inaccurate as a result of any act, occurrence, or agreement after the delivery of the required disclosures, the resulting inaccuracy will not constitute a violation of the disclosure requirements [*Civ. Code § 1102.5*].

[iv] Responsibilities of Broker

If more than one licensed real estate broker is acting as an agent in the transfer transaction, the broker who has obtained the transferee's offer must deliver the disclosure to the transferee, unless the transferor has given other written instructions for delivery [*Civ. Code § 1102.12(a)*]. If a licensed real estate broker responsible for delivering the required disclosures cannot obtain the required disclosure document and does not have the transferee's written assurance that the disclosure has been received, the broker must advise the transferee in writing of his or her right to the disclosure [*Civ. Code § 1102.12(b)*].

A licensed real estate broker responsible for delivering the disclosures must maintain a record of the action taken and retain a copy of the record and the disclosure statement for three years from the date of the closing of the transfer transaction or from the date of the listing if the transaction is not consummated [*Civ. Code § 1102.12(b)*; *see Bus. & Prof. Code § 10148*].

[v] Transferee's Rights in Event of Late Delivery

If the form in [2], *below*, or any material amendment to the required disclosures [*see* [vi], *below*], is delivered after the execution of an offer to purchase, the transferee will have three days after delivery in person, or five days after delivery by deposit in the mail, to deliver a written notice terminating the offer to the transferor or the transferor's agent [*Civ. Code §§ 1102.3, 1102.3a(c)*].

[vi] Amendment of Disclosures

Any of the required disclosures may be amended in writing by the transferor or his or her agent. The written amendment must comply with the delivery requirements of *Civ. Code § 1102.3* or *1102.3a* [*Civ. Code § 1102.9*].

[d] Automatic Garage Door Openers

The seller must indicate whether the property has an automatic garage door opener. The form includes a warning that the garage door opener, if any, may not comply with statutory safety standards relating to automatic reversing devices. Those standards are set forth in *Health & Safety Code § 19890 et seq.* Among other things, they prohibit any person, corporation, or entity from manufacturing (for sale in California), installing, purchasing, or selling or offering for sale at retail or wholesale, a residential automatic garage door opener, unless the opener has an automatic reverse safety device that complies with the applicable standards set forth in the Underwriters Laboratories, Inc., Standard for Safety-ANSI/UL 325-30.1 and 325-30.2, Third Edition, as revised May 4, 1988 [*Health & Safety Code § 19890(a)*]. The opener also must contain a tactile garage door edge sensor, an optical sensor, or a similar device that is designed to cause a closing door to open and to prevent an open door from closing [*see Health & Safety Code § 19890(b)* (statute includes limited exception from this requirement for openers manufactured before 1993 and sold before July 1993)]. Further, the statutory standards prohibit the installation of a replacement residential garage door in a manner that connects the replacement door to an existing residential automatic garage door opener that does not meet the test standard set forth in *Health & Safety Code § 19890(e)* [*Health & Safety Code § 19890(h)*; *see Health & Safety Code § 19890(e)* (requiring person servicing or repairing the opener to determine whether it reverses on contact with a rigid two-inch high obstacle placed on the surface beneath the garage door, and to make specified disclosure if opener does not pass this test)]. Manufacturers, distributors, wholesalers, and retailers are subject to related disclosure requirements [*see Health & Safety Code § 19890(c), (d)*].

The foregoing statutory standards apply to all automatic garage door openers manufactured and sold for use in any residence [*Health & Safety Code § 19890(f)*; *see Health & Safety Code § 19890(g)(2)* ("residence" means building that contains one-to-four single-family dwelling units)]. Further, they apply to any automatic garage door opener that is (1) manufactured for commercial purposes, and (2) sold for, or installed in, a residence because the specific application requirements of the installation require the use of a commercial (rather than residential) opener. Residential applications of garage door openers manufactured for commercial purposes must comply with the manufacturer's installation instructions as well as the above statutory standards, with one exception: the applicable standard must be the Underwriters Laboratories, Inc., Standard for Safety-ANSI/UL 325-29 in lieu of the Underwriters Laboratories, Inc., Standard for Safety-ANSI/UL 325-30.1 and 325-30.2 [*Health & Safety Code § 19890(f)*].

In addition to any other remedies permitted by law, a seller who violates the notice requirements of *Civ. Code § 1102.6* relating to automatic garage door openers will be subject to a civil penalty [*Health & Safety Code § 19891(c)*]. Additional civil penalties apply to violations of *Health & Safety Code § 19890* [*see Health & Safety Code § 19891(a), (b)*]. Court proceedings relating to these violations may be initiated by the building department of the local agency with jurisdiction over the enforcement of building standards, by affected consumers, or by the district attorney. Assessed civil penalties are payable to the local agency initiating the court proceedings to offset resulting costs. If an affected consumer initiates the proceeding, the civil penalties will be payable to the consumer [*Health & Safety Code § 19891(d)*].

[e] Information Supplied by Others

[i] Nonliability of Transferor and Agents

A transferor will not be liable for any error, inaccuracy, or omission in the required disclosures if (1) it was not within the personal knowledge of the transferor or the listing or selling agent, (2) it was based on information timely provided by public agencies, or by certain experts under the circumstances described under [ii], *below*, and (3) ordinary care was exercised in obtaining and transmitting it [*Civ. Code § 1102.4(a)*].

This exemption from liability applies not only to transferors but also to listing and selling agents [*Civ. Code § 1102.4(a)*]. For these purposes, "listing agent" means one who has obtained a listing of property and who is authorized by law to act as an agent for compensation with regard to that property [*Civ. Code § 1102.14(a)*; *see Civ. Code § 1086(g)*]. "Selling agent" means an agent who acts in cooperation with a listing agent and who sells the property or finds and obtains a buyer [*Civ. Code § 1102.14(b)*; *see Civ. Code § 1086(h)*].

[ii] Information Supplied by Certain Licensed Experts

Under the exemption from liability discussed in [i], *above*, the transferor will not be liable for information furnished by a licensed engineer, land surveyor, geologist, structural pest-control operator, contractor, or other expert who, acting in response to a written or oral request, prepares and delivers to the transferee a report or opinion dealing with matters within the scope of the professional's license or expertise [*Civ. Code § 1102.4(c)*].

In responding to the request, the expert may indicate, in writing, an understanding that the information provided will be used in making the required disclosures. An expert who gives such an indication must also indicate the required disclosures (or portions of disclosures) to which the information being furnished is applicable. An expert furnishing such a statement will not be responsible for any items of information other than those expressly set forth in the statement [*Civ. Code § 1102.4(c)*].

[iii] Delivery of Information by Person Other Than Transferor or Agent

The delivery of any of the required information to a prospective transferee by a public agency or any person other than the transferor or a listing or selling agent will be deemed to comply with the statutory disclosure requirements and will relieve the transferor or agent of any further duty under the disclosure laws with regard to that item of information [*Civ. Code § 1102.4(b)*].

[f] Exemption for Escrow Agents

Any person or entity, other than a real estate licensee, acting as an escrow agent for the transfer of real property will not be deemed the agent of the transferor or transferee for purposes of the disclosure requirement, unless the person or entity is empowered to act as such by an express written agreement to that effect. The extent of this agency will be governed by the written agreement [*Civ. Code § 1102.11*].

[g] Effect of Noncompliance

No transfer subject to the disclosure requirement will be invalidated solely because of the failure of any person to comply with these disclosure requirements [*but see* [c][v], *above*]. However, any person who willfully or negligently violates or fails to perform any of the disclosure duties will be liable for any actual damages suffered by a transferee [*Civ. Code § 1102.13*]. However, this provision is applicable only when the buyer has gone through with the transaction despite the seller's failure to comply with the statutory disclosure requirements. If no transfer has taken place, *Civ. Code § 1102.13* does not apply. Prior to transfer, the failure to provide a disclosure statement gives rise to a right to rescission in the buyer [*Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202, 1 Cal. Rptr. 3d 569]* .

The Real Estate Commissioner may suspend or revoke the license of any real estate broker who repeatedly or willfully violates the disclosure requirements [*see Bus. & Prof. Code § 10176.5*].

[h] Effect of Waiver

Any waiver of the requirements of the disclosure provisions is void as against public policy [*Civ. Code § 1102(c)*; *see Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 201, 1 Cal. Rptr. 3d 569* (seller's delivery of real estate transfer disclosure statement is nonwaivable condition precedent to buyer's duty of performance under contract for sale and purchase of real property)]. *Civ. Code § 1102(c)*, enacted in 1994, appears to nullify the decision in *Loughrin v. Superior Court* [*Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 19 Cal. Rptr. 2d 161]* , in which a knowing and explicit waiver by a buyer of the benefits of the disclosure requirements of *Civ. Code § 1102 et seq.* was effective in a typical private real estate purchase and sale transaction. The court relied on *Civ. Code § 3513*, which provides that anyone may waive the advantage of a law intended solely for his or her benefit, but that a law established for a public reason cannot be contravened by a private agreement. Applying the factors used in *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98 100, 32 Cal. Rptr. 33* , the court in *Loughrin* found that none of the characteristics creating a "public interest" exist in the typical sale transaction. The court also found that its conclusion regarding waiver was supported by *Civ. Code § 1102.13* [*see* [g], *above*]. The language in *Civ. Code § 1102.13* contemplating a failure to comply with the disclosure statutes indicates that the purpose of *Civ. Code § 1102.13* is to facilitate private transactions rather than to impose regulations for the general public benefit [*Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 19 Cal. Rptr. 2d 161]* .

The court in *Loughrin* then examined the detailed "as is" clause used by the parties in the transaction, and concluded that it did not constitute a waiver of the buyer's rights under the disclosure statutes [*Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 1195, 19 Cal. Rptr. 2d 161]* . In addition, the Legislature specifically provided in 1994 that the delivery of a real estate transfer disclosure statement may not be waived in an "as is" sale, as was held by the court in *Loughrin* [1994 Stats., ch. 817, § 3]. For coverage of that aspect of the decision, see *§ 23.252[1]*.

[i] Effect of Disclosure Statement

[i] In General

The disclosure statement is not intended to be part of any contract between the seller and the buyer [*Brasier v. Sparks (1993) 17 Cal. App. 4th 1756, 1760, 22 Cal. Rptr. 2d 1* ; *see Civ. Code § 1102.6*]. It is not a warranty by the seller or any agent representing any principal in the transaction, or a substitute for any inspections or warranties the principals may wish to obtain [*see Civ. Code § 1102.6*].

If the statement is prepared after the contract's execution and reveals significant defects, the buyer may want to amend, renegotiate, or terminate the contract. For a provision that makes the sale contingent on the buyer's receipt and approval of the statement, see *§ 23.236[2]*.

[ii] Documentation of Seller's Duty to Disclose Material Facts

The disclosure statement may also be used to document the seller's compliance with his or her duty to disclose any material fact, such as the existence of a material defect, that the seller knows would not be observable to the buyer and that affects the value of the property [*see Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8* ; *Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 735-738, 29 Cal. Rptr. 201]* . By signing the statement, the buyer is, in effect, acknowledging receipt of all disclosures contained in it.

For discussion of the interaction between the disclosure statement and an "as is" clause, see *§ 23.252[1][c]*.

[j] Related Disclosure Requirements

[i] Notice of Nearby Ordnance Locations

Any seller of residential real property who is required to provide the buyer with a real estate transfer disclosure statement and who has actual knowledge of any former federal or state ordnance locations within the neighborhood area must give the buyer written notice of that knowledge as soon as practicable before transfer of title [*Civ. Code § 1102.15*]. For these purposes, "former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes that may contain potentially explosive munitions [*Civ. Code § 1102.15*]. For an illustrative disclosure form and additional discussion, see *§ 23.304*.

[ii] Natural Hazard Disclosures

A transferor, or his or her agent, must notify prospective transferees when the real property lies within any of the following hazard areas:

- A special flood hazard area [*see Gov. Code § 8589.3*];
- An area of potential flooding [*see Gov. Code § 8589.4*];
- A very high fire hazard severity zone [*see Gov. Code § 51183.5*];
- A wildland area that may contain substantial forest fire risks and hazards [*see Pub. Res. Code § 4136*];
- An earthquake fault zone [*see Pub. Res. Code § 2621.9*]; or
- A seismic hazard zone [*see Pub. Res. Code § 2694*].

When the transaction is subject to the statutory real estate transfer disclosure requirements [*see Civ. Code §§ 1102, 1102.6*; *see also* [b][i], *above*], the disclosures must be made in either a statutory natural hazard disclosure statement [*Civ. Code § 1103.2*] or the local option real estate transfer disclosure statement [*see § 23.301*], provided this statement includes substantially the same information and substantially the same warning that appears in the statutory natural hazard disclosure statement [*Civ. Code § 1103.2(e)*]. For further discussion and the statutory natural hazard disclosure statement form, see *§ 23.302*.

[iii] Geologic and Seismic Hazards

If a transferor or real estate broker provides a prospective buyer with a copy of the *Homeowner's Guide to Earthquake Safety* [*see Bus. & Prof. Code § 10149*] or the *Commercial Property Owner's Guide to Earthquake Safety* [*see Bus. & Prof. Code §§ 10147, 10149*], the seller or broker will not be required to provide the buyer with additional information concerning the geologic and seismic hazards described in the guide or measures that the buyer or seller might consider to mitigate earthquake hazards [*Civ. Code §§ 2079.8(a), 2079.9(a)*]. However, the seller or broker will still be obligated to make other required disclosures (including, in the case of noncommercial property, all other disclosures required by *Civ. Code § 1102* and the statutory real estate transfer disclosure statement) [*see Civ. Code §§ 2079.8(b), 2079.9(b)*]. For further discussion, see *§ 23.20[4]*.

[iv] Common Environmental Hazards

The Department of Real Estate (DRE) has published a booklet, entitled *Environmental Hazards: Guide for*

Homeowners and Buyers, which is designed to educate and inform consumers regarding common environmental hazards that are located on, and affect, real property [*see Bus. & Prof. Code § 10084.1(a)*; *Health & Safety Code § 25417*]. The DRE must distribute the booklet on request to the public (and may charge a fee for the booklet) [*Health & Safety Code § 25417*]. If the booklet is delivered to a transferee in connection with a transfer of real property, the seller or broker is not required to provide additional information concerning common hazards that can affect real property, and the information in the booklet will be deemed to be adequate to inform the transferee of those hazards [*Civ. Code § 2079.7(a)*]. However, the delivery of the booklet will not alter the duties of sellers or brokers, including their duties relating to the statutory real estate transfer disclosure statement and to disclose the existence of known environmental hazards on or affecting the real property [*Civ. Code § 2079.7(b)*].

[v] Notice of Controlled Substance Release

A seller of residential real property who knows that any release of an illegal controlled substance [*see § 23.20[12]* (definitions)] has come to be located on or beneath the real property must give written notice advising of that condition to the buyer before sale of the property. Notice is given by checking "yes" on the appropriate question on the Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*; *see Civ. Code § 1940.7*.5 (similar disclosure requirements applicable to landlords)]. A seller's knowledge of the condition is established by receipt of a notice as specified, or by actual knowledge of the condition from a source independent of the notice [*Civ. Code § 1102.18(b)(2)*]. A seller's delivery of this disclosure information is legally adequate for purposes of informing the prospective buyer of the condition; the seller is not required to provide any additional disclosure of the information [*Civ. Code § 1102.18(b)(3)*].

[vi] Mello-Roos Tax and Street Improvement Lien Assessment Installment Disclosures

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* must disclose if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(a)(2)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*; *see § 23.20[13]*].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, and the date until the tax may be levied against the property for the Mello-Roos and a contact telephone number, if

available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

[vii] Toxic Mold Protection Act of 2001--Future Disclosure Requirements

The Toxic Mold Protection Act of 2001 [*Health & Safety Code §§ 26100-26156*] requires the Department of Health Services to convene a task force of various experts and interested parties to advise the Department on the development of permissible exposure limits to molds, standards for assessment of molds in indoor environments, standards for identification of molds, and remediation of mold. The Act will eventually require any person who sells, transfers, or rents specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers, prospective tenants, renters, and landlords concerning mold problems in the real property [*see Health & Safety Code §§ 26140-26153*]. However, these disclosure duties and requirements would not apply until the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*see Health & Safety Code § 26154*]. Adding additional uncertainty concerning these requirements, the Act will be implemented only to the extent the Department determines that funds are available for its implementation [*Health & Safety Code § 26156*].

[2] FORM

Real Estate Transfer Disclosure Statement [Civ. Code § 1102]

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF_____[*date*]. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I
COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to *Section 1102 of the Civil Code*. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:

☐ Inspection reports completed pursuant to the contract of sale or receipt for deposit.

☐ Additional inspection reports or disclosures:

_____
_____
_____

II
SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller _____ is _____ is not occupying the property.

A. The subject property has the items checked below (read across):

_Range	_Oven	_Microwave
_Dishwasher	_Trash Compactor	_Garbage Disposal
_Washer/Dryer Hookups		_Rain Gutters
_Burglar Alarms	_Smoke Detector(s)	_Fire Alarm
_T.V. Antenna	_Satellite Dish	_Intercom
_Central Heating	_Central Air Cndtng.	_Evaporator Cooler(s)
_Wall/Window Air Cndtng.	_Sprinklers	_Public Sewer System
_Septic Tank	_Sump Pump	_Water Softener
_Patio/Decking	_Built-in Barbeque	_Gazebo
_Sauna		
_Hot Tub	_Pool	_Spa
_Locking Safety Cover*	_Child Resistant Barrier*	_Locking Safety Cover*
_Security Gate(s)	_Automatic Garage Door Opener(s)*	_Number Remote Controls
Garage:		
_Attached	_Not Attached	_Carport
Pool/Spa Heater:		
_Gas	_Solar	_Electric
Water Heater:		
_Gas	_Water Heater Anchored, Braced,	_Private Utility or

	or Strapped*	Other _____
Water Supply:		
_City	_Well	
Gas Supply:		
_Utility	_Bottled	
_Window Screens	_Window Security Bars _Quick Release Mechanism on Bedroom Windowsn*	

Exhaust Fan(s) in _____
220 Volt Wiring in _____
Fireplace(s) in _____
Gas Starter _____
Roof(s): Type: _____ Age: _____ (approx.)
Other: _____

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? _____ Yes _____ No. If yes, then describe.

(Attach additional sheets if necessary.): _____
_____
_____
_____

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? _____ Yes _____ No. If yes, check appropriate space(s) below.

_ Interior Walls _ Ceilings _ Floors _ Exterior Walls _ Insulation _ Roof(s) _ Windows _ Doors _ Foundation _ Slab(s) _ Driveways _ Sidewalks _ Walls/Fences _ Electrical Systems _ Plumbing/Sewers/Septics _ Other Structural Components
(Describe: _____
_____
_____)

If any of the above are checked, explain (attach additional sheets if necessary): _____
_____
_____
_____

C. Are you (Seller) aware of any of the following:

1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property	_ Yes	_ No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use	_ Yes	_ No

	or responsibility for maintenance may have an effect on the subject property		
3.	Any encroachments, easements, or similar matters that may affect your interest in the subject property	_ Yes	_ No
4.	Room additions, structural modifications, or other alterations or repairs made without necessary permits	_ Yes	_ No
5.	Room additions, structural modifications, or other alterations or repairs not in compliance with building codes	_ Yes	_ No
6.	Fill (compacted or otherwise) on the property or any portion thereof	_ Yes	_ No
7.	Any settling from any cause, or slippage, sliding, or other soil problems	_ Yes	_ No
8.	Flooding, drainage or grading problems	_ Yes	_ No
9.	Major damage to the property or any of the structures from fire, earthquake, floods, or landslides	_ Yes	_ No
10.	Any zoning violations, nonconforming uses, violations of "set-back" requirements	_ Yes	_ No
11.	Neighborhood noise problems or other nuisances	_ Yes	_ No
12.	CC&R's or other deed restrictions or obligations	_ Yes	_ No
13.	Homeowners' Association which has any authority over the subject property	_ Yes	_ No
14.	Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)	_ Yes	_ No
15.	Any notices of abatement or citations against the property	_ Yes	_ No
16.	Any lawsuits by or against the seller threatening to or affecting this real property, including any lawsuits alleging a defect or deficiency in this real property or "common areas" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)	_ Yes	_ No

If the answer to any of these is yes, explain (Attach additional sheets if necessary): _____

_____

_____

_____

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

III
AGENT'S INSPECTION DISCLOSURE

(To be completed only if the seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

☐ Agent notes no items for disclosure.

☐ Agent notes the following items:

_____
_____
_____

Agent (Broker Representing Seller) _____ By _____ Date _____

(Please Print) (Associate Licensee or Broker-Signature)

IV
AGENT'S INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

☐ Agent notes no items for disclosure.

☐ Agent notes the following items:

_____
_____
_____

Agent (Broker Obtaining the Offer) _____ By _____ Date _____

(Please Print) (Associate Licensee or Broker-Signature)

V

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER(S) AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller	Date	Buyer	Date
_____	_____	_____	_____
Seller	Date	Buyer	Date
_____	_____	_____	_____

Agent (Broker Representing Seller) _____ By _____ Date _____

(Associate Licensee or Broker-Signature)

Agent (Broker Obtaining the Offer) _____ By _____

Date

_____

(Associate Licensee or Broker-Signature)

SECTION 1102.3 OF THE CIVIL CODE PROVIDES A BUYER WITH THE RIGHT TO RESCIND A PURCHASE CONTRACT FOR AT LEAST THREE DAYS AFTER THE DELIVERY OF THIS DISCLOSURE IF DELIVERY OCCURS AFTER THE SIGNING OF AN OFFER TO PURCHASE. IF YOU WISH TO RESCIND THE CONTRACT, YOU MUST ACT WITHIN THE PRESCRIBED PERIOD.

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawPurchase & SaleRemediesDuty to Disclose

FOOTNOTES:

(n1)Footnote *. This garage door opener or child resistant pool barrier may not be in compliance with the safety standards relating to automatic reversing devices as set forth in Chapter 12.5 (commencing with § 19890) of Part 3 of Division 13 of, or with the pool safety standards of Article 2.5 (commencing with § 115920) of Chapter 5 of Part 10 of Division 104 of, the Health and Safety Code. The water heater may not be anchored, braced, or strapped in accordance with § 19211 of the Health & Safety Code. Window security bars may not have quick-release mechanisms in compliance with the 1995 Edition of the California Building Standards Code.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
C. Related Instruments
1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.300A

AUTHOR: William M. Hensley Editorial Consultant

§ 23.300A Supplemental Property Tax Bill Disclosure Statement

[1] Comment--Use of Form

The form in [2], *below,* may be used to provide disclosure regarding supplemental property tax bills. It is the sole responsibility of the seller of any residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.* [*see § 23.300[1][b]*], or the seller's agent, to deliver to the prospective purchaser a disclosure notice concerning supplemental property tax bills, in addition to any other disclosure required by *Civ. Code § 1102 et seq.* [*Civ. Code § 1102.6c(a)*]. The prescribed title of the notice must be in at least 14-point type or a contrasting color [*Civ. Code § 1102.6c(a)(2)*], and the prescribed text must be in at least 12-point type or a contrasting color [*Civ. Code § 1102.6c(a)(1)*].

This disclosure requirement may be satisfied by delivering a disclosure notice pursuant to *Civ. Code § 1102.6b* [*see § 23.20[13][a]*] that meets the requirements of *Civ. Code § 1102.6c(a)* [*Civ. Code § 1102.6c(b)*].

[2] FORM

Notice of Your "Supplemental" Property Tax Bill

Notice of Your "Supplemental" Property Tax Bill

California property tax law requires the Assessor to revalue real property at the time the ownership of the property changes. Because of this law, you may receive one or two supplemental tax bills, depending on when your loan closes.

The supplemental tax bills are not mailed to your lender. If you have arranged for your property tax payments to be paid through an impound account, the supplemental tax bills will not be paid by your lender. It is your responsibility to pay these supplemental bills directly to the Tax Collector.

If you have any question concerning this matter, please call your local Tax Collector's Office.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.301

AUTHOR: William M. Hensley Editorial Consultant

§ 23.301 Local Option Real Estate Transfer Disclosure Statement

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used in certain circumstances to provide additional information regarding real property that is the subject of a standard real estate transfer disclosure statement prepared pursuant to *Civ. Code § 1102.6* [*see § 23.300*]. Any city or county may require a transferor to provide disclosures regarding the subject property in addition to the ones required by *Civ. Code § 1102.6*. These additional disclosures must be made on this statutory form (the "Local Option Real Estate Transfer Disclosure Statement") or on an alternative form required by a local ordinance adopted before July 1990 [*Civ. Code § 1102.6a(a)*; *see* [b], *below*]. Addenda to the form may be used to facilitate the required disclosures [*Civ. Code § 1102.6a(c)*].

[b] Alternative Local Requirements

If the city or county, before July 1990, adopted an ordinance requiring the use of a local option disclosure statement other than the statutory form, the city council or county board of supervisors may amend the ordinance to revise its disclosure requirements [*Civ. Code § 1102.6a(a)*].

A city or county may use this statutory disclosure form for a purpose other than that specified in *Civ. Code § 1102.6a* [*Civ. Code § 1102.6a(c)*].

As of January 1, 2005, if a city or county adopts a different or additional disclosure form pursuant to *Civ. Code § 1102.6a* regarding the proximity or effects of an airport, the statement in that form must contain, at a minimum, the information in the "Notice of Airport in Vicinity" found in [*Civ. Code § 1102.6a(d)(1)*]:

- *Bus. & Prof. Code § 11010(b)(13)(A)*, relating to the contents of a filed notice of intention to offer subdivided land [*see* Ch. 30, *Subdivision Regulation*];

- *Civ. Code § 1103.4(c)*, relating to natural-hazards disclosures in an expert's report provided at the transferee's request [*see § 23.302*]; or

- *Civ. Code § 1353(a)(1)*, relating to the contents of the declaration that is recorded with regard to the creation of a common-interest development [*see* Ch. 33C, *Stock Cooperatives* , § 33C.201, Ch. 33D, *Planned Developments* , § 33D.200, and Ch. 34, *Condominiums* , § 34.202].

As of January 1, 2006, if a city or county does not adopt a different or additional disclosure form, the provision of an "airport influence area" disclosure pursuant to one of the statutes listed above [*Bus. & Prof. Code § 11010(b)(13)*; *Civ. Code §§ 1103.4(c), 1353(a)*] or, if there is not a current airport influence map, a written disclosure of an airport within two statute miles, will be deemed to satisfy any city or county requirements for the disclosure of airports in connection with transfers of real property [*Civ. Code § 1102.6a(d)(2)*].

[c] Natural Hazard Disclosures

A transferor, or his or her agent, must notify prospective transferees when the real property lies within any of the following hazard areas:

- A special flood hazard area [*see Gov. Code § 8589.3*];

- An area of potential flooding [*see Gov. Code § 8589.4*];

- A very high fire hazard severity zone [*see Gov. Code § 51183.5*];

- A wildland area that may contain substantial forest fire risks and hazards [*see Pub. Res. Code § 4136*];

- An earthquake fault zone [*see Pub. Res. Code § 2621.9*]; or

- A seismic hazard zone [*see Pub. Res. Code § 2694*].

When the transaction is subject to the statutory real estate transfer disclosure requirements [*see Civ. Code §§ 1102, 1102.6*; *see also § 23.300[1][b][i]*], the disclosures must be made in either a statutory natural hazard disclosure statement [*see Civ. Code § 1103 et seq.*] or the local option real estate transfer disclosure statement, provided this statement includes substantially the same information and substantially the same warning that appears in the statutory natural hazard disclosure statement [*Civ. Code § 1103.2(a)*]. For further discussion and the statutory natural hazard disclosure statement form, see *§ 23.302*.

[2] FORM

Local Option Real Estate Transfer Disclosure Statement

LOCAL OPTION REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS

_____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH ORDINANCE NO. _____ OF THE _____ CITY OR COUNTY CODE AS OF_____[*date*]. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I
SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AS REQUIRED BY THE CITY OR COUNTY OF _____, AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

1. _____
_____
_____
_____

2. _____
_____
_____
_____

(*Example: Adjacent land is zoned for timber production which may be subject to harvest.*)

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

II

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER(S) AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller Date Buyer Date

_____	_____	_____	_____
Seller	Date	Buyer	Date
_____	_____	_____	_____

Agent (Broker Representing Seller)	_____ By	_____	Date _____
		(Associate Licensee or Broker-Signature)	
	Agent (Broker Obtaining the Offer) _____ By		_____

Date
_____
(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.302

AUTHOR: William M. Hensley Editorial Consultant

§ 23.302 Natural Hazard Disclosure Statement

[1] Comment

[a] Use of Form

The form in [2], *below*, is the statutory natural hazard disclosure statement, which may be used to provide disclosures regarding real property that is the subject of a "standard" real estate transfer disclosure statement prepared pursuant to *Civ. Code § 1102.6* [*see § 23.300*] and lies within a hazard area. An alternative disclosure may be provided when an additional "local option" disclosure statement must be completed or the transaction is not subject to the disclosure requirements of *Civ. Code § 1102 et seq.* [*see* [b], *below*]. This disclosure is only a disclosure between the transferor, the transferor's agents, and the transferee, and may not be used by any other party, including, but not limited to, insurance companies, lenders, or governmental agencies, for any purpose [*Civ. Code § 1103.2(g)*].

[b] Hazard Areas and Covered Transfers

These disclosures must be made when the property lies within any of the following hazard areas [*Civ. Code § 1103(a)*]:

- Special flood hazard area designated by Federal Emergency Management Agency [*see Gov. Code § 8589.3*; *see also* [g][i], *below*];

- Area of potential flooding [*see Gov. Code § 8589.4*; *see also* [g][ii], *below*];

- Very high fire hazard severity zone designated pursuant to *Gov. Code § 51175 et seq.* [*see Gov. Code § 51183.5*; *see also* [g][iii], *below*];

- Wildland area that may contain substantial forest fire risks and hazards (that is, state responsibility

area designated by State Board of Forestry pursuant to *Pub. Res. Code § 4125*) [*see Pub. Res. Code § 4136*; *see also* [g][vi], *below*];

- Delineated earthquake fault zone [*see Pub. Res. Code § 2621.9*; *see also* [g][iv], *below*]; or

- Seismic hazard zone as designated under *Pub. Res. Code § 2690 et seq.* [*see Pub. Res. Code § 2694*; *see also* [g][v], *below*].

These disclosures must be made on the transfer of any real property or any residential stock cooperative improved with or consisting of one-to-four dwelling units, whether the transfer is by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements [*Civ. Code § 1103(a)*; *see Civ. Code § 1103.2*]. These requirements also apply to resale of a manufactured home or mobilehome that is classified as personal property intended for use as a residence if the transaction was entered into after 1999 [*Civ. Code § 1103(b)*; *see Health & Safety Code §§ 18007*, *18008*].

[c] Exempt Transfers

The disclosure requirements do not apply to the following transfers [*Civ. Code § 1103.1(a)*]:

- Transfer pursuant to court order, including, but not limited to:
  - Transfer ordered by a probate court in administration of an estate;
  - Transfer pursuant to a writ of execution;
  - Transfer by any foreclosure sale;
  - Transfer by a trustee in bankruptcy;
  - Transfer by eminent domain; and
  - Transfer resulting from a decree of specific performance.
- Transfers of the following kinds:
  - Transfer to a mortgagee by a mortgagor or successor in interest who is in default;
  - Transfer to a beneficiary of a deed of trust by a trustor or successor in interest who is in default;
  - Transfer by any foreclosure sale after default;
  - Transfer by any foreclosure sale after default in an obligation secured by a mortgage;
  - Transfer by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale; or
  - Transfer by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of

trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

- Transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

- Transfer from one co-owner to one or more other co-owners.

- Transfer to a spouse or to a person or persons in the line of consanguinity of one or more of the transferors.

- Transfer between spouses resulting from a judgment of dissolution of marriage or of legal separation of the parties or from a property settlement agreement incidental to that judgment.

- Transfer by the State Controller in the course of administering Chapter 7 of Title 10 of Part 3 of the Code of Civil Procedure [*Code Civ. Proc. § 1500 et seq.*].

- Transfer under Chapter 7 or Chapter 8 of Part 6 of Division 1 of the Revenue and Taxation Code [*Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].

- Transfer or exchange to or from any governmental entity.

[d] Disclosure Options

If a transaction is subject to the natural hazard disclosure requirements of *Civ. Code § 1103*, the required disclosures must be provided on either of the following forms [*Civ. Code § 1103.2(a), (e)*; *see Gov. Code §§ 8589.3(c), 8589.4(c), 51183.5(c)*; *Pub. Res. Code §§ 2621.9(c), 2694(c), 4136*]:

- The statutory natural hazard disclosure statement [*Civ. Code § 1103.2*]; or

- A local option real estate disclosure statement, provided this statement includes substantially the same information and warnings that are required by the natural hazard disclosure statement [*Civ. Code § 1103.2(a), (e)*; *see Civ. Code § 1102.6a*; *see also § 23.301*].

When the transaction is not subject to *Civ. Code § 1103*, the form of the disclosure is not specified by statute. However, language in the statutory disclosure statement may be modified for use in this context.

[e] Primary Disclosure Obligation

The transferor, or a transferor's agent, must deliver the natural hazard disclosure statement [*Civ. Code § 1103*]. The statement provides that the disclosures are made by the seller and his or her agents, and includes signature blanks for the seller and agents [*see Civ. Code § 1103.2(a)*]. Further, the required disclosures may be provided by the seller and seller's agent in the local option real estate disclosure statement [*Civ. Code § 1103.2(e)*]. Thus, if the transaction is subject to *Civ. Code § 1102 et seq.*, both the transferor and the transferor's agent share responsibility for making the required disclosures.

If the transaction is not subject to *Civ. Code § 1102 et seq.*, the statutory provision governing the specific type of disclosure required to be made will determine the party responsible for making the disclosure. Thus, the disclosure must be made by the following person or entity:

- The transferor, if the property is located within a very high fire hazard severity zone [*see Gov. Code § 51179*] or a wildland area that may contain substantial forest fire risks and hazards (that is, state responsibility area) [*Gov. Code § 51183.5(a)*; *Pub. Res. Code 4136(a)*; *see Pub. Res. Code § 4136*].

- The transferor's agent, or the transferor if he or she is acting without an agent, if the property is located within a designated special flood hazard area, area of potential flooding shown on inundation map, delineated earthquake fault zone, or designated seismic hazard zone [*Gov. Code §§ 8589.3, 8589.4(a)*; *Pub. Res. Code §§ 2621.9(a), 2694(a)*].

For further discussion of the statutory provisions governing each of the required natural hazard disclosures, see [g], below.

[f] Format of Disclosure and Relationship to Other Required Disclosures

[i] In General

The required disclosures may be made on a local option real estate disclosure statement [*Civ. Code § 1102.6a*; *see § 23.301[2]*] or must be made on the statutory form of natural hazard disclosure statement [*Civ. Code § 1103.2(a)*]. In a disclosure statement required by *Civ. Code § 1103.2*, an agent and third-party provider may cause his or her name to be preprinted in lieu of an original signature in the portions of the form reserved for signatures. The use of a preprinted name does not change the legal effect of the acknowledgment [*Civ. Code § 1103.2(f)(3)*].

The specification of items for disclosure [*see Civ. Code § 1103 et seq.*] does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction. These provisions were not intended to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical condition of the property and previously received reports of physical inspection noted on the disclosure form provided pursuant to *Civ. Code §§ 1102.6* and *1102.6a* [*Civ. Code § 1103.8(a)*]. Similarly, these provisions do not change the duty of a real estate broker or salesperson to inspect property pursuant to *Civ. Code § 2079* [*Civ. Code § 1103.8(a)*].

In any case, transfers not subject to the provisions of *Civ. Code § 1103 et seq.* may be subject to other disclosure requirements, including those under *Gov. Code §§ 8589.3, 8589.4*, and *51183.5* and *Pub. Res. Code §§ 2621.9, 2694*, and *4136*. In transfers not subject to the provisions of *Civ. Code § 1103 et seq.*, agents may make required disclosures in a separate writing [*Civ. Code § 1103.1(b)*].

[ii] Time and Manner of Delivery of Natural Hazard Disclosure Statement

The transferor of any real property subject to the disclosure requirements must deliver to the prospective transferee the required natural hazard disclosure statement as follows [*Civ. Code § 1103.3(a)*]:

- In the case of a sale: as soon as practicable before transfer of title; or

- In the case of transfer by an installment land sale contract, a lease together with an option to purchase, or a ground lease coupled with improvements: as soon as practicable before execution of the contract (meaning the making or acceptance of an offer).

The transferor must indicate compliance with these requirements on the deposit receipt or other real property sale contract, the lease, any addendum attached to one of those documents, or a separate document [*Civ. Code § 1103.3(b)*].

Delivery of the required disclosures must be by personal delivery to the transferee or by mail to the prospective transferee. Delivery to the spouse of a transferee is deemed delivery to the transferee, unless otherwise provided by contract [*Civ. Code § 1103.10*].

If any disclosure, or any material amendment of any disclosure, required to be made pursuant to the provisions of *Civ. Code § 1103 et seq.* is delivered after the execution of an offer to purchase, the transferee has three days after delivery in person, or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent [*Civ. Code § 1103.3(c)*].

[iii] Liability for Accuracy of Statement and Further Duties Under Act

The transferor or any listing or selling agent is not liable for any error, inaccuracy, or omission of any information in the natural hazard disclosure statement if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or the listing or selling agent, and was based on information timely provided by public agencies or by other persons providing information as specified by statute [*see Civ. Code § 1103.4(c)*], which is required to be disclosed, and ordinary care was exercised in obtaining and transmitting the information [*Civ. Code § 1103.4(a)*; *see Civ. Code § 1103.14(a), (b)* ("listing agent" and "selling agent" are defined in *Civ. Code § 1086(f), (g)*, exclusive of requirement that agent be participant in multiple listing service as defined in *Civ. Code § 1087*)]. The delivery of any information required to be disclosed to a prospective transferee by a public agency or other person providing information required to be disclosed is deemed to comply with these disclosure requirements and relieves the transferor or any listing or selling agent of any further duty with respect to that item of information [*Civ. Code § 1103.4(b)*].

The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery, dealing with matters within the scope of the professional's license or expertise, constitutes sufficient compliance for application of the exemption provided under *Civ. Code § 1103.4(a)*, if the information is provided to the prospective transferee pursuant to a written or oral request. In responding to the request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of *Civ. Code § 1103.2*. If the expert makes that statement, he or she must also indicate the required disclosures, or parts of required disclosures, to which the information being furnished is applicable. Then the expert will not be responsible for any items of information other than those expressly set forth in the statement [*Civ. Code § 1103.4(c)*].

Further, in responding to the transferee's request, the expert is required to make the following determinations and include the following statements, as appropriate, in the report [*Civ. Code § 1103.4(c)*]:

- If the property is determined to be within an "airport influence area" [*see Bus. & Prof. Code § 11010(b)(13)(B)* (definition)], the report must include this statement [*Civ. Code § 1103.4(c)(1)*]: "NOTICE OF AIRPORT IN VICINITY. This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you."

- If the property is determined to be within the jurisdiction of the San Francisco Bay Conservation and Development Commission [*see Gov. Code § 66620 et seq.*], the report must include this statement [*Civ. Code § 1103.4(c)(2)*]: "NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION. This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your

intended use of the property before you complete your transaction."

- If the property is determined to be within one mile of a parcel of real property designated as "Prime Farmland," "Farmland of Statewide Importance," "Unique Farmland," "Farmland of Local Importance," or "Grazing Land" on the most current "Important Farmland Map" issued by the California Department of Conservation, Division of Land Resource Protection, using solely the county-level GIS map data, if any, available on the Farmland Mapping and Monitoring Program web site, the report must include this statement [*Civ. Code § 1103.4(c)(3)*]: "NOTICE OF RIGHT TO FARM. This property is located within one mile of a farm or ranch land designated on the current county-level GIS 'Important Farmland Map,' issued by the California Department of Conservation, Division of Land Resource Protection. Accordingly, the property may be subject to inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character and a healthy agricultural sector. Customary agricultural practices in farm operations may include, but are not limited to, noise, odors, dust, light, insects, the operation of pumps and machinery, the storage and disposal of manure, bee pollination, and the ground or aerial application of fertilizers, pesticides, and herbicides. These agricultural practices may occur at any time during the 24-hour day. Individual sensitivities to those practices can vary from person to person. You may wish to consider the impacts of such agricultural practices before you complete your purchase. Please be advised that you may be barred from obtaining legal remedies against agricultural practices conducted in a manner consistent with proper and accepted customs and standards pursuant to *Section 3482.5 of the Civil Code* or any pertinent local ordinance."

The legal effect of a consultant's report delivered to satisfy the exemption provided by *Civ. Code § 1103.4* is not changed when it is accompanied by a Natural Hazard Disclosure Statement [*Civ. Code § 1103.2(f)(1)*]. A consultant's report must always be accompanied by a completed and signed Natural Hazard Disclosure Statement [*Civ. Code § 1103.2(f)(2)*].

After a transferor and his or her agent comply with *Civ. Code § 1103.2*, they are relieved of further duty with respect to those items of information. The transferor and his or her agent are not required to provide notice to the transferee if the information provided subsequently becomes inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence, unless the transferor or agent has actual knowledge that the information has become inaccurate [*Civ. Code § 1103.5(a)*]. If information disclosed in accordance with these provisions is subsequently rendered inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence subsequent to the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation [*Civ. Code § 1103.5(b)*].

Any disclosure made pursuant to the provisions of *Civ. Code § 1103 et seq.* may be amended in writing by the transferor or his or her agent, but the amendment is subject to the delivery requirements set forth in *Civ. Code § 1103.3* [*Civ. Code § 1103.9*].

[iv] Actions of Agents

Any person or entity, other than a real estate licensee licensed pursuant to *Bus. & Prof. Code § 10000 et seq.*, acting in the capacity of an escrow agent for the transfer of real property subject to these disclosure requirements will not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements, unless the person or entity is empowered to act by an express written agreement, which will govern the extent of that agency [*Civ. Code § 1103.11*].

If more than one licensed real estate broker is acting as an agent in a transaction subject to the provisions of *Civ. Code § 1103 et seq.*, the broker who has obtained the offer made by the transferee must, except as otherwise provided in *Civ.*

Code § 1103 et seq., deliver the required disclosure to the transferee, unless the transferor has given other written instructions for delivery [*Civ. Code § 1103.12(a)*]. If a licensed real estate broker responsible for delivering these disclosures cannot obtain the required disclosure document and does not have written assurance from the transferee that the disclosure has been received, the broker must advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering disclosures must maintain a record of the action taken to effect compliance, in accordance with *Bus. & Prof. Code § 10148* [*Civ. Code § 1103.12(b)*].

A transfer subject to these provisions will not be invalidated solely because of any person's failure to comply with any provision. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of *Civ. Code § 1103 et seq.* will be liable in the amount of actual damages suffered by a transferee [*Civ. Code § 1103.13*].

[g] Specific Disclosure Requirements

[i] Special Flood Hazard Area

An agent for a seller of real property that is located within a special flood hazard area designated by the Federal Emergency Management Agency, or the seller if he or she is acting without any agent, must disclose to any prospective buyer the fact that the property is located within a special flood hazard area [*Gov. Code § 8589.3(a)*; *see Gov. Code § 8589.3(g)* (required posting of public notices identifying location of special flood hazard area map and other specified information)]. The special flood hazard area disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Gov. Code § 8589.3(c)*].

The disclosure is required only when one of the following conditions exists [*Gov. Code § 8589.3(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a special flood hazard area.

- The local jurisdiction has compiled a list, by parcel, of properties that are within the special flood hazard area, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list.

For these purposes, persons specified in *Civ. Code § 1103.11* (that is, escrow agents) and persons acting under a power of sale regulated by *Civ. Code § 2924* will not be deemed agents of the seller [*Gov. Code § 8589.3(d)*].

The specification of items for disclosure does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 8589.3(f)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with the provisions. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*Gov. Code § 8589.3(e)*; *see Civ. Code § 1103.13*].

[ii] Area of Potential Flooding

An agent for a transferor of real property that is located within an area of potential flooding shown on an inundation map, or the transferor if he or she is acting without an agent, must disclose to any prospective buyer the fact that the property is located within an area of potential flooding [*Gov. Code § 8589.4(a)*]. The disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Gov. Code § 8589.4(c)*].

The disclosure is required only when one of the following conditions exists [*Gov. Code § 8589.4(b)*]:

- The transferor or the transferor's agent, has actual knowledge that the property is within an inundation area.

- The local jurisdiction has compiled a list, by parcel, of properties that are within the inundation area, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list.

For these purposes, persons specified in *Civ. Code § 1103.11* (that is, escrow agents) and persons acting under a power of sale regulated by *Civ. Code § 2924* will not be deemed agents of the transferor [*Gov. Code § 8589.4(d)*].

The specification of items for disclosure in *Gov. Code § 8589.4* does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 8589.4(f)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Gov. Code § 8589.4*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by the foregoing provisions will be liable in the amount of actual damages suffered by a transferee [*see Gov. Code § 8589.4(e)*; *see also Civ. Code § 1103.13*].

[iii] Very High Fire Hazard Severity Zone

A transferor of real property that is located within a very high fire hazard severity zone designated pursuant to *Gov. Code § 51175 et seq.* must disclose to any prospective transferee the fact that the property is located within a very high fire hazard severity zone, and is subject to the requirements of *Gov. Code § 51182* [*Gov. Code § 51183.5(a)*; *see Gov. Code § 51182* (imposing maintenance obligations on any person who owns, leases, controls, operates, or maintains occupied dwelling or occupied structure in, on, or adjoining any area or land that is covered with flammable materials and is within very high fire hazard severity zone designated by local agency pursuant to *Gov. Code § 51179*)]. The disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Gov. Code § 51183.5(b)*].

The disclosure is required only when one of the following conditions exists [*Gov. Code § 51183.5(b)*]:

- The transferor or the transferor's agent, has actual knowledge that the property is within a very high fire hazard severity zone.

- A map that includes the property has been provided to the local agency pursuant to *Gov. Code § 51178*, and a notice is posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the local agency.

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine whether the subject real property is included in a very high fire hazard zone, the seller normally must mark "Yes" on the natural hazard disclosure statement. The seller may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 23.300[1][e][ii]*] and verifying that the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Gov. Code § 51183.5(d)*].

The specification of items for disclosure in *Gov. Code § 51183.5* does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 51183.5(f)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Gov. Code § 51183.5*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Gov. Code § 51183.5(e)*; *see also Civ. Code § 1103.13*].

[iv] Delineated Earthquake Fault Zone

An agent for a transferor of real property that is located within a delineated earthquake fault zone, or the transferor if he or she is acting without any agent, must disclose to any prospective buyer the fact that the property is located within such a zone [*Pub. Res. Code § 2621.9(a)*]. The disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Pub. Res. Code § 2621.9(c)*].

The disclosure is required only when one of the following conditions exists [*Pub. Res. Code § 2621.9(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a delineated earthquake fault zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 2622*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

For these purposes, persons specified in *Civ. Code § 1103.11* (that is, escrow agents) and persons acting under a power of sale regulated by *Civ. Code § 2924* will not be deemed agents of the transferor [*Pub. Res. Code § 2621.9(e)*].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a delineated earthquake fault hazard zone, the agent or transferor normally must mark "Yes" on the natural hazard disclosure statement. The agent or transferor may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 23.300[1][e][ii]*] and verifying that the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or transferor's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 2621.9(d)*].

The specification of items for disclosure in *Pub. Res. Code § 2621.9* does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 2621.9(g)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 2621.9*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 2621.9(f)*; *see also Civ. Code § 1103.13*].

[v] Seismic Hazard Zone

An agent for a transferor of real property that is located within a seismic hazard zone as designated under *Pub. Res. Code § 2690 et seq.*, or the transferor if he or she is acting without any agent, must disclose to any prospective transferee the fact that the property is located within a seismic hazard zone [*Pub. Res. Code § 2694(a)*]. The disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or

must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Pub. Res. Code § 2694(c)*].

The disclosure is required only when one of the following conditions exists [*Pub. Res. Code § 2694(b)*]:

- The transferor or transferor's agent, has actual knowledge that the property is within a seismic hazard zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 2622*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

For these purposes, persons specified in *Civ. Code § 1103.11* (that is, escrow agents) and persons acting under a power of sale regulated by *Civ. Code § 2924* will not be deemed agents of the transferor [*Pub. Res. Code § 2694(e)*].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a seismic hazard zone, the agent or transferor normally must mark "Yes" on the natural hazard disclosure statement. The agent or transferor may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 23.300[1][e][ii]*] and verifying that the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 2694(d)*].

The specification of items for disclosure in *Pub. Res. Code § 2694* does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 2694(g)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 2694*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 2694(f)*; *see also Civ. Code § 1103.13*].

[vi] Wildland Fire Zone

A transferor of real property that is located within a state responsibility area designated by the State Board of Forestry pursuant to *Pub. Res. Code § 4125* must disclose to any prospective transferee the fact that the property is located within a wildland area that may contain substantial forest fire risks and hazards and is subject to the requirements of *Pub. Res. Code § 4291* [*Pub. Res. Code § 4136(a)*; *see Pub. Res. Code § 4291* (requiring any person that owns, leases, controls, operates, or maintains any building or structure in, on, or adjoining any mountainous area or forest-covered lands, brush-covered lands, or grass-covered lands, or any land that is covered with flammable material, to maintain firebreak and take other specified fire prevention steps)]. Except for property located within a county that has assumed responsibility for prevention and suppression of all fires pursuant to *Pub. Res. Code § 4129*, the transferor must also disclose to any prospective transferee that it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to *Pub. Res. Code § 4142* [*Pub. Res. Code § 4136(b)*]. The disclosure may be provided in the local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 23.301[2]] or must be provided in the natural hazard disclosure statement [*Civ. Code § 1103.2*; *Pub. Res. Code § 4136(d)*].

The disclosure is required only when one of the following conditions exists [*Pub. Res. Code § 4136(c)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a wildland fire zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 4125*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a wildland fire zone, the transferor ordinarily must mark "Yes" on the natural hazard disclosure statement. The transferor may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 23.300[1][e][ii]*] and verifying that the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the seller or the seller's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 4136(e)* (requiring agent to mark "Yes" or "No" on statement and implying, in context of remainder of section, that seller should make this mark)].

The specification of items for disclosure in *Pub. Res. Code § 4136* does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 4136(g)*]. No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 4136*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 4136(f)*; *see also Civ. Code § 1103.13*].

[vii] Providing Required Information

If an earthquake fault zone, seismic hazard zone, very high fire hazard severity zone, or wildland fire area map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine whether the subject real property is included in a natural hazard area, the transferor or the transfer's agent must mark "Yes" on the natural hazard disclosure statement. The transferor or the transferor's agent may mark "No" on the natural hazard disclosure statement if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 23.300[1][e][ii]*] and verifying that the property is not in the hazard zone. In any case, none of these provisions are intended to limit or abridge any existing duty of a transferor or the transferor's agents to exercise reasonable care in making a determination concerning the property [*Civ. Code § 1103.2(b)*].

If the Federal Emergency Management Agency (FEMA) has issued a letter of map revision confirming that a property is no longer within a special flood hazard area, then the transferor or transferor's agent may mark "No" on the natural hazard disclosure statement, even if the map has not been updated. The transferor or transferor's agent must attach a copy of the letter of map revision to the disclosure statement [*Civ. Code § 1103.2(c)*]. If FEMA has issued a letter of map revision confirming that a property is within a special flood hazard area and the location and the letter have been posted pursuant to *Gov. Code § 8589.3(g)*, then the transferor or the transferor's agent must mark "Yes" on the natural hazard disclosure statement, even if the map has not been updated. The transferor or transferor's agent must attach a copy of the letter of map revision to the disclosure statement [*Civ. Code § 1103.2(d)*].

[viii] Notice of Controlled Substance Release

A seller of residential real property who knows that any release of an illegal controlled substance [*see § 23.20[12]* (definitions)] has come to be located on or beneath the real property must give written notice advising of that condition to the buyer before sale of the property. Notice is given by checking "yes" on the appropriate question on the Real

Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*; *see Civ. Code § 1940.7*.5 (similar disclosure requirements applicable to landlords)]. A seller's knowledge of the condition is established by receipt of a notice as specified, or by actual knowledge of the condition from a source independent of the notice [*Civ. Code § 1102.18(b)(2)*]. A seller's delivery of this disclosure information is legally adequate for purposes of informing the prospective buyer of the condition; the seller is not required to provide any additional disclosure of the information [*Civ. Code § 1102.18(b)(3)*].

[2] FORM

Natural Hazard Disclosure Statement

NATURAL HAZARD DISCLOSURE STATEMENT

This statement applies to the following property: [*describe*].

The transferor and his or her agent(s) or a third-party consultant disclose the following information with the knowledge that even though this is not a warranty, prospective transferees may rely on this information in deciding whether and on what terms to purchase the subject property. Transferor hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

The following are representations made by the transferor and his or her agent(s) based on their knowledge and maps drawn by the state and federal governments. This information is a disclosure and is not intended to be part of any contract between the transferee and transferor.

THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S):

A SPECIAL FLOOD HAZARD AREA (Zone "A" or "V") designated by the Federal Emergency Management Agency.

Yes	No	Do not know and information not available from local jurisdiction
_____	_____	_____

AN AREA OF POTENTIAL FLOODING shown on a dam-failure inundation map.

Yes	No	Do not know and information not available from local jurisdiction
_____	_____	_____

A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to *Section 51178* or *51179 of the Government Code*. The owner of this property is subject to the maintenance requirement of *Section 51182 of the Government Code*.

Yes	No
_____	_____

A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant

to *Section 4125 of the Public Resources Code*. The owner of this property is subject to the maintenance requirements of *Section 4291 of the Public Resources Code*. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to *Section 4142 of the Public Resources Code*.

Yes _____ No _____

AN EARTHQUAKE FAULT ZONE pursuant to *Section 2622 of the Public Resources Code*.

Yes _____ No _____

A SEISMIC HAZARD ZONE pursuant to *Section 2696 of the Public Resources Code*.

Yes (Landslide Zone) _____ Yes (Liquefaction Zone) _____

No _____ Map not yet released by state _____

THESE HAZARDS MAY LIMIT YOUR ABILITY TO DEVELOP THE REAL PROPERTY, TO OBTAIN INSURANCE, OR TO RECEIVE ASSISTANCE AFTER A DISASTER.

THE MAPS ON WHICH THESE DISCLOSURES ARE BASED ESTIMATE WHERE NATURAL HAZARDS EXIST. THEY ARE NOT DEFINITIVE INDICATORS OF WHETHER OR NOT A PROPERTY WILL BE AFFECTED BY A NATURAL DISASTER. TRANSFEREE(S) AND TRANSFEROR(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE REGARDING THOSE HAZARDS AND OTHER HAZARDS THAT MAY AFFECT THE PROPERTY.

Signature of Transferor(s) _____ Date _____

Signature of Transferor(s) _____ Date _____

Agent(s) _____ Date _____

Agent(s) _____ Date _____

Check only one of the following:

_____ Transferor(s) and their agent(s) represent that the information herein is true and correct to the best of their knowledge as of the date signed by the transferor(s) and agent(s).

_____ Transferor(s) and their agent(s) acknowledge that they have exercised good faith in the selection of a third-party report provider as required in *Civil Code Section 1103.7*, and that the representations made in this Natural Hazard Disclosure Statement are based upon information provided by the independent third-party disclosure provider as a substituted disclosure pursuant to *Civil Code Section 1103.4*.

_____ Neither transferor(s) nor their agent(s)(1) has independently verified the information contained in this statement and report or (2) is personally aware of any errors or inaccuracies in the information contained on the statement. This statement was prepared by the provider below:

Third-Party Disclosure Provider(s) _____ Date _____

_____ Transferee represents that he or she has read and understands this document. Pursuant to *Civil Code Section 1103.8*, the representations made in this Natural Hazard Disclosure Statement do not constitute all of the transferor's or agent's disclosure obligations in this transaction.

Signature of Transferee(s) _____ Date _____

Signature of Transferee(s) _____ Date _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.303

AUTHOR: William M. Hensley Editorial Consultant

§ 23.303 Notice of Delivery of Real Estate Transfer Disclosure Statement

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice indicating that a seller of real property containing one-to-four dwelling units has provided the buyer with the statutory disclosure form describing the condition of the property [*see Civ. Code § 1102.6*; § 23.300[2] (statutory disclosure form); *see also* [c], [d], *below*]. The disclosure form must be delivered as soon as practicable before transfer of title [*Civ. Code § 1102.3(a)*]. Sellers subject to this disclosure requirement must indicate compliance with it on the deposit receipt or other real property sale contract, in an addendum attached to one of those documents, or a separate document [*Civ. Code § 1102.3*].

For a provision requiring the seller to furnish the statutory disclosure form and empowering the buyer to terminate the transaction after reviewing the statement, see *§ 23.236[2]*. For further discussion of the underlying disclosure requirement, see *§ 23.300[1]*.

[b] Failure to Deliver Disclosure Form

No sale or other transfer subject to the disclosure requirement [*see* [a], *above*] will be invalidated solely because of the failure of any person to comply with those requirements. However, any person who willfully or negligently violates or fails to perform any of the disclosure duties will be liable for any actual damages suffered by a transferee [*Civ. Code § 1102.13*; *see Bus. & Prof. Code § 10176.5* (Real Estate Commissioner may suspend or revoke license of any real estate broker who repeatedly or willfully violates these disclosure requirements)].

If the statutory disclosure form, or any material amendment to the required disclosures, is delivered after the execution of an offer to purchase, the transferee will have three days after delivery in person, or five days after delivery by deposit

in the mail, to deliver a written notice terminating the offer to the transferor or the transferor's agent [*Civ. Code § 1102.3*].

[c] Additional Local Disclosure Form

Any city or county may require a seller subject to the disclosure requirement [*see* [a], *above*] to provide the transferee with a second disclosure statement containing additional information regarding the subject property [*Civ. Code § 1102.6a*]. This second statement must be in a statutory form entitled "Local Option Real Estate Transfer Disclosure Statement" [*see Civ. Code § 1102.6a(b)*; § 23.301[2]] or in an alternative form required by an applicable local ordinance originally enacted before July 1990 [*Civ. Code § 1102.6a(a)*]. If the sale contract or local ordinance requires the seller to provide the local option disclosure statement within a specified number of days [*see § 23.236[1]*], compliance with that requirement should be mentioned in the notice of delivery.

[d] Natural Hazard Disclosure Statement

Certain natural hazard disclosures required by *Civ. Code § 1103* and related statutes may be provided by the seller or the seller's agent in either the statutory natural hazard disclosure statement [*see § 23.302[2]*] or the local option real estate transfer disclosure statement [*see* [c], *above*], provided the local option statement includes substantially the same information and warning that is required in the statutory statement. If the sale contract requires the seller to provide this statement within a specified number of days [*see § 23.236[1]*], compliance with that requirement should be mentioned in the notice of delivery.

[2] FORM

Notice of Delivery of Real Estate Transfer Disclosure Statement

_____[*Name of seller*] ("Seller") and_____[*name of buyer*] ("Buyer"), being parties to a contract dated _____ for the sale and purchase of certain real property in the_____[City of _____, *or* unincorporated area of] _____ County, California, located at_____[*address*] (the "Property"), acknowledge that:

(1) Seller has provided Buyer with a completed real estate transfer disclosure statement pursuant to *Civil Code Section 1102 et seq.*

(2) The delivery of that statement took place before the transfer of title to the Property.

[*Add, if applicable:*]

(3) Seller has also provided Buyer with a completed local option real estate transfer disclosure statement pursuant to *Civil Code Section 1102.6a* and Ordinance No. _____ of the _____ [*identify city of county*] Code.

[*Add, if applicable:*]

(4) Seller has also _____ [provided Buyer with a completed natural hazard disclosure statement pursuant to *or* included in the local option real estate transfer disclosure statement certain natural hazard disclosures required by] *Civil Code Section 1103 et seq.*

Date: _____

SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.304

AUTHOR: William M. Hensley Editorial Consultant

§ 23.304 Notice of Former Ordnance Location

[1] Comment--Use of Form

The form in [2], *below*, is a notice of the existence of a former military ordnance location. A seller of residential real property who is required to provide the buyer with a statutory real estate transfer disclosure statement [*see Civ. Code §§ 1102, 1102.6*; *see also § 23.300[2]*] and who has actual knowledge of any former federal or state ordnance locations within the neighborhood area must give written notice of that knowledge as soon as practicable before transfer of title [*Civ. Code § 1102.15*].

For these purposes, "former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes that may contain potentially explosive munitions. "Neighborhood area" means within one mile of the residential real property [*Civ. Code § 1102.15*].

This disclosure requirement does not limit or abridge any disclosure obligation created by any other law or that may exist in order to avoid fraud, misrepresentation, or deceit in a transfer transaction [*Civ. Code § 1102.15*].

[2] FORM

Notice of Former Ordnance Location

This notice relates to the real property in the_____[City of _____, *or* unincorporated area of] _____ County, California, located at_____[*address*] (the "Property"), which is the subject of a pending sale.

The seller has actual knowledge of the existence, within one mile of the Property, of a

former_____[federal *or* state] ordnance location. That former ordnance location is an area identified by [*identify governmental agency or instrumentality*] as an area once used for military training purposes that may contain potentially explosive munitions. It is located [*specify location of ordnance area*].

_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.305

AUTHOR: William M. Hensley Editorial Consultant

§ 23.305 Notice of Installation of Smoke Detector

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice that the seller of a single-family dwelling has installed an operable smoke detector in the property. It is a separate document rather than a provision of a real property sale contract. Written notice of compliance with the installation requirement must be included in the contract documents or in a separate document [*Health & Safety Code § 13113.8(b)*].

[b] Installation Requirement

Every single-family dwelling and factory-built housing unit [*see Health & Safety Code § 19971*] that is sold after 1985 must have an operable smoke detector. The detector must be approved and listed by the State Fire Marshal and installed in accordance with the Fire Marshal's regulations [*see 19 Cal. Code Reg. §§ 200 et seq., 740 et seq.*]. Unless prohibited by local rules, regulations, or ordinances, a battery-operated smoke detector will meet this requirement [*Health & Safety Code § 13113.8(a)*].

[c] Disclosure Requirement

The transferor of a single-family dwelling, whether the transfer is made by sale, exchange, or installment land sale contract, must deliver to the transferee a written statement indicating that the transferor has complied with the installation requirement. The statement must be included in the deposit receipt (or other sale contract), in an addendum attached to it, or in a separate document [*Health & Safety Code § 13113.8(b)*].

The transferor must deliver the installation statement as soon as practicable before the transfer of title in the case of a

sale or exchange, or before the execution of the contract when the transfer is by a installment land sale contract. For these purposes, "delivery" means delivery in person or by mail to the transferee, or to any person authorized to act for him or her in the transaction, or to additional transferees who have requested delivery from the transferor in writing. Delivery to the spouse of a transferee will be deemed delivery to a transferee, unless the contract states otherwise [*Health & Safety Code § 13113.8(c)*].

[d] Exceptions to Requirements

The installation and disclosure requirements do not apply to mobilehomes [*see Health & Safety Code § 18008*] or to duplexes, lodging houses, apartment complexes, hotels, motels, condominiums, stock cooperatives, time-share projects, and dwelling units in multiple-unit dwelling complexes. Owners of those dwelling units are subject to a similar installation requirement that applies whether or not the unit is about to be transferred [*see Health & Safety Code § 13113.7*; *see also* Ch. 30B, *Zoning, Building, and Environmental Permits*]. There is no requirement that a seller provide a notice of compliance with that installation requirement.

The following kinds of transfers are exempt from the installation and disclosure requirements [*Health & Safety Code § 13113.8(d)*]:

- Transfer that must be preceded by furnishing a prospective transferee with a copy of a public report pursuant to *Bus. & Prof. Code § 11018.1* [*see* Ch. 30, *Subdivision Regulation* ; Ch. 34, *Condominiums and Other Common-Interest Developments* , Pt. A].

- Transfer pursuant to court order, including:

    - Transfer ordered by a probate court in the administration of an estate;

    - Transfer pursuant to a writ of execution;

    - Transfer by a trustee in bankruptcy;

    - Transfer by eminent domain; and

    - Transfer resulting from a decree for specific performance.

- Transfers of the following kind:

    - Transfer to a mortgagee by a mortgagor in default;

    - Transfer to a beneficiary of a deed of trust by a trustor in default;

    - Transfer by any foreclosure sale after default;

    - Transfer by any foreclosure sale after default in an obligation secured by a mortgage; or

    - Transfer by a sale under a power of sale after a default in an obligation secured by an instrument containing a power of sale.

- Transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

- Transfer from one co-owner to one or more co-owners.

- Transfer to a spouse, or to a person or persons in the line of consanguinity of one or more of the transferors.

- Transfer between spouses resulting from a decree of dissolution of marriage, from a decree of legal separation, or from a property settlement agreement incidental to either type of decree.

- Transfer by the State Controller in the course of administering the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*].

- Transfer of tax-deeded property [*see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].

[e] Violation of Requirement

A failure to comply with these installation and disclosure requirements will not invalidate a sale. The exclusive remedy for such a failure is an award of actual damages of up to $100, exclusive of any court costs and attorney's fees [*Health & Safety Code § 13113.8(g)*].

[2] FORM

Notice of Installation of Smoke Detector

This notice relates to the real property in the_____[City of _____, *or* unincorporated area of] _____ County, California, located at_____[*address*] (the "Property"), which is the subject of a pending sale.

The seller has had an operable smoke detector installed in the dwelling on the Property in the manner required by California law.

To indicate your receipt of this notice, please sign the enclosed copy and return it_____[*specify how and to whom, e.g., seller's real estate agent*].

_____ [*signature*]
_____ [*typed name*]

I hereby acknowledge receipt of this notice.

Date: _____
_____ [*signature* of buyer]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawZoning & Land UseBuilding & Housing Codes



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9-23 California Legal Forms--Transaction Guide § 23.306

AUTHOR: William M. Hensley Editorial Consultant

§ 23.306 Preliminary Change-of-Ownership Report

[1] Comment

[a] Use of Form

The form in [2], *below*, is a preliminary change-of-ownership report that is prescribed by the State Board of Equalization and available from each county assessor or county recorder in California [*see Rev. & Tax. Code § 480.3(a)*]. This form, designated as BOE-502-A, is commonly known as the PCOR form. There are 58 versions of this form, one for each county; however, all versions are essentially the same, differing only with respect to the county name and perhaps the addition of some locally useful information (such an office address or telephone number) by the assessor or recorder. Any particular county version can be used in any other county; it is not necessary to use the version of the form provided by the assessor or recorder in the county where the form will be filed. This form can be downloaded from many assessor or recorder web sites (but not from the BOE web site).

Following any change of ownership of taxable real property [*see* [b][i], *below*], the transferee must report the transfer to the county assessor of the county in which the property is located. If a filed preliminary report is found to be inadequate by the county assessor, the transferee will be required to file a change-in-ownership statement on a form that the county assessor will send to the transferee [*see* [c][i], *below*].

If the change-of-ownership transaction will be closed through escrow, the attorney should determine at the outset whether the escrow agent will assist in meeting the change-of-ownership reporting requirement. For example, a title insurance company serving as an escrow agent frequently will provide the transferee with the preliminary change-of-ownership report and file the completed report with the county assessor when the agent records the deed.

The change-of-ownership reporting requirement is one of the laws that implement Cal. Const., art. XIIIA, which provides that the taxable value of real property may be increased only by an annual inflation factor of up to 2 percent [

see Rev. & Tax. Code § 51(a)(1)(D)] or to the fair market value when the property is purchased or newly constructed [*see Rev. & Tax. Code § 70* (definition of "newly constructed"); *see also Rev. & Tax. Code §§ 71, 75.12*; *18 Cal. Code Reg. § 463*] or when a change of ownership occurs [Cal. Const., art. XIIIA, § 2; *see* Cal. Const., art. XIII; *see also Rev. & Tax. Code § 50 et seq.*].

[b] What Constitutes Change of Ownership

[i] In General

A change of ownership is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*; *see Rev. & Tax. Code § 60 et seq.*; *18 Cal. Code Reg. § 462.001*; *see also* California Real Estate Law and Practice, Ch. 401, *Real Property Valuation and Assessment* (Matthew Bender)]. The transfer may be voluntary, involuntary, by operation of law, or by grant, gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement, or any other means [*18 Cal. Code Reg. § 462.001*]. The purchase of real property clearly falls within the above definition [*see Rev. & Tax. Code § 67* ("purchase" means a change of ownership for consideration)].

The general change-of-ownership rule and definitions are subject to a number of complex rules and exceptions established by statute and administrative regulation [*see Rev. & Tax. Code § 60 et seq.*; *18 Cal. Code Reg. § 462 et seq.*]. Most of these rules clarify whether particular transfers qualify as changes in ownership. These special rules do not affect the typical real property sale transaction between unrelated parties but do apply to a wide range of other transfers. Interspousal transfers (including transfers that take effect on the death of a spouse) do not constitute a change of ownership [*Rev. & Tax. Code § 63*; *18 Cal. Code Reg. § 462.220*]. Certain transactions do not constitute a change of ownership if they occur between parents and their children or between grandparents and their orphaned grandchildren [*see Rev. & Tax. Code § 63.1(a)*; *see also Rev. & Tax. Code § 63.1(c)(5)* (determination of full cash value of property transferred in grandparent-grandchild exchange)]. For discussion of the special rules, see California Real Estate Law and Practice, Ch. 401, *Real Property Valuation and Assessment* (Matthew Bender).

[ii] Assessor's Assistance

The primary responsibility for applying California's ad valorem property taxation laws rests with county tax assessors [*see Rev. & Tax. Code §§ 601, 602* (preparation of annual assessment roll)]. A taxpayer may submit a written request to the appropriate county assessor for a written ruling as to the property tax consequences of an actual or planned transaction, or as to the property tax liability of a specified property. Any ruling issued by the assessor will notify the taxpayer that the ruling represents the county's current interpretation of applicable law and does not bind the county, except as provided in *Rev. & Tax. Code § 5909(b)* [*Rev. & Tax. Code § 5909(a)*]. If a taxpayer's failure to timely report information or pay amounts of tax directly results from the taxpayer's reasonable reliance on the type of ruling described above, the taxpayer will be relieved of any penalties, or interest assessed or accrued, with regard to property taxes not timely paid as a direct result of this reasonable reliance. A taxpayer's failure to timely report property values or to make a timely payment of property taxes will be considered to directly result from the taxpayer's reasonable reliance on an assessor's written ruling only if (1) the taxpayer submitted a written request for a ruling, (2) the request fully described all relevant facts and circumstances pertaining to the subject transaction or property, and (3) the assessor responded in writing and specifically stated the property tax consequences of the transaction or the property tax liability of the property [*Rev. & Tax. Code § 5909(b)*].

[c] Filing Procedure

Since a change of ownership will be effected by the recordation of a deed at the close of the sale transaction, the transferee should obtain a preliminary change-of-ownership report form (available at the office of the county assessor or recorder; for many counties, the form also is available for downloading from the assessor's or recorder's web site) and submit the completed form to the county recorder at the time of recording the deed [*see Rev. & Tax. Code § 480.3(a)*].

The form must be signed by the transferee, certifying that the information provided on the form is, to the best of his or her knowledge and belief, true, correct, and complete. The form must not be signed by an agent acting for the transferee [*Rev. & Tax. Code § 480.3(a)*].

Although the filing of a preliminary change-of-ownership report is technically an optional procedure and is not a prerequisite to recording the transfer document [*see Rev. & Tax. Code § 480(e)*], a failure to file it will have consequences. The transferee will be required to submit, within 45 days, a change-in-ownership statement [*see Rev. & Tax. Code § 480(e)*] and the recorder will charge an additional recording fee [*Rev. & Tax. Code § 480.3(b)*]. Failure to pay the additional fee will delay the recording of the deed [*see Rev. & Tax. Code § 480.3(c)*].

A submitted preliminary change-of-ownership report will be forwarded to the county assessor. The assessor will accept the preliminary report unless he or she determines that the report is incomplete or inaccurate or that more information is needed. County assessors are not bound by any statutory or regulatory guidelines when making this determination and should be consulted for advice on local standards. If the preliminary report is inadequate, the assessor will provide the transferee with a form for a change-in-ownership statement, which must be completed and returned within 45 days [*see Rev. & Tax. Code § 482*].

The following persons are not required to submit a preliminary change-of-ownership report or pay an additional recording fee if the report is not submitted:

- Any trustee issuing a trustee's deed to the beneficiary of a trust deed or mortgagee, or his or her assignees, pursuant to the exercise of a power of sale contained in a deed of trust or mortgage [*see Civ. Code § 2920 et seq.*; *see also* Ch. 25D, *Foreclosure*]; or

- An intermediate transferee of property.

For these purposes, "intermediate transferee" means any transferee who is acting as both a transferee and the transferor of the same property as part of a series of simultaneous transfers affecting that property and who records the transfer documents and other recorded documents related to the transfer in consecutive order at one time [*Rev. & Tax. Code § 480.3(f)*].

[d] Confidentiality of Statement or Report

Preliminary change-of-ownership reports are not public documents and are not open to inspection [*Rev. & Tax. Code § 481*; but *see Rev. & Tax. Code § 408*]. All information contained in them must be kept secret by the county assessor, the State Board of Equalization, and all others authorized by law to receive or have access to that information [*Rev. & Tax. Code § 481*].

[2] FORM

Preliminary Change-of-Ownership Report

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrowTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & Timing



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9-23 California Legal Forms--Transaction Guide § 23.307

AUTHOR: William M. Hensley Editorial Consultant

§ 23.307 Statutory Notice of Cancellation of Home Equity Sale Contract [Civ. Code § 1695.5(b)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory notice of the right to cancel a home equity sale contract. A home equity contract essentially effects the sale of a residence in foreclosure [*see Civ. Code § 1695.1(e)*] and is subject to statutory requirements [*see Civ. Code § 1695 et seq.*; *see also § 23.211[1]*].

The equity buyer [*see Civ. Code § 1695.1(a)*] must attach to the contract two easily detachable copies of a completed cancellation notice and provide these documents to the equity seller [*Civ. Code § 1695.5(b), (c)*]. The equity seller may then use one of those attached copies as the notice of cancellation. For further discussion of the right to cancel, see *§ 23.211[1][d]*.

Until the equity buyer has complied with the requirements concerning notification of cancellation rights, the equity seller may cancel the contract [*Civ. Code § 1695.5(d)*; *see Civ. Code § 1695.5(a)- (c)*].

For a discussion of the rescission of a home equity sale transaction in which the buyer, by the terms of the transaction, takes unconscionable advantage of the property owner in foreclosure [*see Civ. Code § 1695.13*], and an illustrative rescission form, see *§ 23.324*.

[b] Required Format

The caption of the statutory form ("NOTICE OF CANCELLATION") must be in 12-point boldface type if the contract is printed, or in capital letters if the contract is typed. It must be followed by a space in which the equity buyer must enter the date the equity seller signs any contract. The form itself must be (1) in the same language (English, Spanish,

and so forth) as used in the contract and (2) in at least 10-point type if the contract is printed, or in capital letters if the contract is typed [*Civ. Code § 1695.5(b)*].

Although the equity seller may use this statutory notice as the notice of cancellation, the notice need not take the form in [2], below. The notice, however expressed, is effective if it indicates the equity seller's intention not to be bound by the contract [*Civ. Code § 1695.4(c)*].

[c] Return of Documents

Within 10 days following receipt of a notice of cancellation, the equity buyer must return without condition any original contract and any other documents signed by the equity seller [*Civ. Code § 1695.6(c)*].

[2] FORM

Statutory Notice of Cancellation of Home Equity Sale Contract [Civ. Code § 1695.5(b)]

[*Heading in capital letters if contract is typed, otherwise in at least 12-point boldface type:*]

Notice of Cancellation

[*date home equity sale contract was signed*]

[*Text in capital letters if contract is typed, otherwise in at least 10-point type:*]

You may cancel this contract for the sale of your house, without any penalty or obligation, at any time before_____[*date and time*].

To cancel this transaction, personally deliver a signed and dated copy of this cancellation notice, or send a telegram, to_____[*name of buyer*] at_____[*street address of buyer's place of business*] NOT LATER THAN_____[*date and time of day*].

I hereby cancel this transaction_____[*date*].

_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.308

AUTHOR: William M. Hensley Editorial Consultant

§ 23.308 Statement by Equity Buyer's Representative [Civ. Code § 1695.17(a)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement that an equity buyer's representative has a real estate license and is bonded. The representative must present this statement to all parties to a home equity sale transaction and must present related proof to the equity seller [*see Civ. Code § 1695.1(c)* ("equity seller" defined)].

For the primary discussion of home equity sale contracts, see *§ 23.211[1]*. See also *§ 23.307* regarding the statutory notice of the right to cancel a home equity sale contract, and § 23.324 concerning rescission of a home equity sale transaction.

[b] Definition of "Representative"

For these purposes, "representative" means a person who in any manner solicits, induces, or causes any property owner to transfer title to a residence in foreclosure to an equity buyer or solicits any member of the property owner's family or household to induce or cause the owner to make such a transfer [*Civ. Code § 1695.15(b)*].

[c] Disclosure Requirements

Any representative deemed to be the agent or employee, or agent and employee, of an equity buyer must provide both of the following [*Civ. Code § 1695.17(a)*]:

- Written proof to the equity seller that the representative has a valid current California real estate sales license and that the representative is bonded by an admitted surety insurer in an amount equal to

twice the fair market value of the real property that is the subject of the home equity sale contract; and

- A written statement, under penalty of perjury, that the representative has a valid current California Real Estate Sales License, is bonded by an admitted surety insurer in an amount equal to at least twice the value of the real property that is the subject of the contract, and has complied with the requirements regarding proof described above.

The representative must provide this statement to all parties to the home equity sale contract before the transfer of any interest in the real property that is the subject of the contract.

The failure to comply with the foregoing disclosure requirements will, at the option of the equity seller, render the sale contract void and will cause the equity buyer to be liable to the equity seller for all damages proximately caused by the failure to comply [*Civ. Code § 1695.17(b)*].

[d] Liability of Equity Buyer for Damages

An equity buyer is liable for all damages resulting from any statement made or act committed by the equity buyer's representative in connection with the equity buyer's acquisition of a residence in foreclosure, receipt of any consideration or property from or on behalf of the equity seller, or performance of any act prohibited by the law governing home equity sale contracts [*Civ. Code § 1695.15(a)*; *see Civ. Code § 1695 et seq.*]. Any contractual provision that attempts or purports to limit this liability will be void and will, at the equity seller's option, render the sale contract void. Further, the equity buyer will be liable to the equity seller for all damages proximately caused by that void provision. Any contractual provision that attempts or purports to require arbitration of any dispute arising under the law governing home equity sale contracts will be void at the option of the equity seller, but only if grounds exist for the revocation of the contract [*Civ. Code § 1695.16(a)*; *see Civ. Code § 1695.16(b)* (statute applies to contracts entered into after 1990)].

[2] FORM

Statement by Equity Buyer's Representative [Civ. Code § 1695.17(a)]

I am the [agent *or* employee *or* agent and employee] of_____[*name of equity buyer*] in connection with the proposed purchase by_____[*name of equity buyer*] of the residential real property commonly known as_____[*street address*], located in the City of _____, County of _____, State of California ("the Property"). As a party to the proposed home equity sale contract for that transaction, you are entitled to be notified that I have a valid current California real estate sales license, I am bonded by an admitted surety insurer in an amount equal to at least twice the value of the Property, and I have presented_____[*name of equity seller*] with written proof that I have the license described above and that I am bonded in the manner described above. This statement is provided pursuant to *California Civil Code Section 1695.17*.

Signed_____[*date*] at_____[*city*], California.

I declare under penalty of perjury that the foregoing is true and correct.

_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.309

AUTHOR: William M. Hensley Editorial Consultant

§ 23.309 Statutory Notice Regarding Title Insurance [Civ. Code § 1057.6]

[1] Comment--Use of Form

The form in [2], *below*, contains a statutory notice that must be provided, in a separate document, to a buyer of real property when the transaction is being consummated through the use of an escrow, if a policy of title insurance is not to be issued to the buyer [*Civ. Code § 1057.6*]. The buyer must sign and acknowledge the notice [*Civ. Code § 1057.6*].

Civ. Code § 1057.6 does not specify who must provide the notice to the buyer. The seller's broker may wish to provide the notice on the buyer's behalf. The form in [2], *below*, includes optional language (following the statutory notice) that may be used to identify the person who provides the form to the buyer and the underlying sale transaction.

The notice must be "signed and acknowledged" by the buyer [*Civ. Code § 1057.6*]. Acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [*see Civ. Code § 1189(a)* (statutory form of acknowledgment); *see also Favello v. Bank of America etc. Ass'n (1938) 24 Cal. App. 2d 342, 344, 74 P.2d 1057]* .

The notice must be provided to the buyer "[i]n an escrow transaction" [*Civ. Code § 1057.6*], that is, at any time after the escrow has been opened and before the close of escrow.

[2] FORM

Statutory Notice Regarding Title Insurance [Civ. Code § 1057.6]

This notice relates to the real property in the_____[City of _____, *or* unincorporated area of] _____ County, California, located at_____[*address*] (the "Property"), which is the subject of a pending sale.

IMPORTANT: IN A PURCHASE OR EXCHANGE OF REAL PROPERTY, IT MAY BE ADVISABLE TO OBTAIN TITLE INSURANCE IN CONNECTION WITH THE CLOSE OF ESCROW SINCE THERE MAY BE PRIOR RECORDED LIENS AND ENCUMBRANCES WHICH AFFECT YOUR INTEREST IN THE PROPERTY BEING ACQUIRED. A NEW POLICY OF TITLE INSURANCE SHOULD BE OBTAINED IN ORDER TO ENSURE YOUR INTEREST IN THE PROPERTY THAT YOU ARE ACQUIRING.

Buyer's Acknowledgment

I hereby acknowledge receipt of this notice_____[*date*].

_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.310

AUTHOR: William M. Hensley Editorial Consultant

§ 23.310 Earthquake Hazards Disclosure

[1] Comment

[a] Use of Form

The form in [2], *below*, is a disclosure of earthquake hazards. This earthquake hazards disclosure form, along with a copy of the *Homeowner's Guide to Earthquake Safety* [*see § 23.20[4]*], must be provided to a prospective buyer or other transferee by the transferor of any real property containing any residential dwelling that was built before 1960 if it contains one-to-four living units and is of "conventional light-frame construction, as defined in Chapter 25 of the 1991 Edition of the Uniform Building Code of the International Conference of Building Officials" [*Gov. Code § 8897.1(a)*].

For discussion of additional earthquake-related disclosures that must be made when the property is in a delineated earthquake fault zone or seismic hazard zone [*see* Civ. Code § 1003 et seq.; *Pub. Res. Code §§ 2621.9, 2694*], see *§ 23.302[1]*.

[b] Exemptions

The disclosure requirement does not apply to any of the following transfers [*Gov. Code § 8897.1(c)*]:

- Transfer required to be preceded by the furnishing to a prospective transferee of a copy of a public report [*see Bus. & Prof. Code § 11018.1*; *see also* Ch. 30, *Subdivision Regulation*].

- Transfer pursuant to court order, including:

    - Transfer ordered by a probate court in the administration of an estate;

- Transfer pursuant to a writ of execution;
- Transfer by a trustee in bankruptcy;
- Transfer by eminent domain; and
- Transfer resulting from a decree for specific performance.

- The following kinds of transfers:
  - Transfer to a mortgagee by a mortgagor in default;
  - Transfer to a beneficiary of a deed of trust by a trustor in default;
  - Transfer by any foreclosure sale after default (including defaults in obligations secured by a mortgage);
  - Transfer by a sale under a power of sale after a default in an obligation secured by a deed of trust or by any other instrument containing a power of sale; or
  - Any subsequent transfer by a mortgagor or beneficiary of a deed of trust who accepts a deed in lieu of foreclosure or purchases the property at a foreclosure sale.
- Transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
- Transfer from one co-owner to one or more co-owners.
- Transfer to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.
- Transfer between spouses resulting from a decree of dissolution of a marriage, from a decree of legal separation, or from a property settlement agreement incidental to either of those decrees.
- Transfer by the State Controller in the course of administering the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*; *see also* Ch. 102C, *Lost and Unclaimed Property*].
- Transfer of tax-defaulted or tax-deeded property made by the State [*see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].
- Transfer for which the transferee has agreed in writing that the dwelling will be demolished within one year of the date of transfer.

[c] Disclosure Procedure

The transferor must provide the earthquake hazards disclosure to the transferee as soon as practicable before the transfer of title in the case of a sale or exchange, or before the execution of the contract when the transfer is by a installment land sale contract [*Gov. Code § 8897.1(b)*; *see* Ch. 25A, *Security Instruments for Real Estate Financing*]. The disclosure may be made in person or by mail to the transferee or any person authorized to act for the transferee in the transaction, and additional transferees who have provided the transferor with a written request for the disclosure [*Gov.*

Code § 8897.1(b)].

[d] Required Disclosures

The transferor must disclose any of certain specified deficiencies if they are within the transferor's actual knowledge, are material to the transaction, and may increase the vulnerability of the dwelling to earthquake damage. The following deficiencies must be disclosed [*Gov. Code § 8897.2(a)*; *see Gov. Code § 8897.1(a)* (disclosure must clearly indicate whether transferor has actual knowledge that dwelling has any of these deficiencies)]:

- Absence of anchor bolts securing the sill plate to the foundation [*see Gov. Code § 8897.3* (requirements governing retrofit work for this deficiency)].
- Existence of any of the following conditions:
  - Perimeter cripple walls that are not braced with plywood, blocking, or diagonal metal or wood braces [*see Gov. Code § 8897.3* (requirements governing retrofit work for this deficiency)];
  - First-story wall or walls that are not braced with plywood or diagonal metal or wood braces;
  - Perimeter foundation composed of unreinforced masonry;
  - Unreinforced masonry dwelling walls;
  - Habitable room or rooms above a garage; or
  - Water heater that is not anchored, strapped, or braced.

In addition, the transferor must disclose any material information within the transferor's actual knowledge regarding any corrective measures or improvements taken to address the items listed above [*Gov. Code § 8897.2(b)*].

[e] Duties of Licensees

For the purposes of the laws governing the earthquake hazards disclosure, the duty of a real estate licensee will be limited to providing the transferor with a copy of the *Homeowner's Guide to Earthquake Safety* for delivery to the prospective transferee pursuant to *Civ. Code § 2079.8* [*Gov. Code § 8897.5*; *see § 23.20[4]*].

[2] FORM

Earthquake Hazards Disclosure

This notice relates to the real property in the_____[City of _____, *or* unincorporated area of] _____ County, California, located at_____[*address*] (the "Property"), which is the subject of a pending sale.

The seller has actual knowledge of the following [deficiencies *or* deficiency] material to the above sale transaction, which may increase the vulnerability of the dwelling on the Property to earthquake damage: [*specify*]._____[*Add material information within seller's actual knowledge regarding any corrective measures or improvements taken to address deficiencies identified above.*]

_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.311

AUTHOR: William M. Hensley Editorial Consultant

§ 23.311 Lead-Based Paint Disclosures Attachment for Sales Contract

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of an attachment setting forth certain required disclosures relating to the presence of lead-based in residential housing built before 1978. Sellers of most of that type of housing must include such an attachment with the sale contract [*see* [c], *below*]. The attachment was developed by EPA and HUD, but neither agency included a model form in the regulations governing lead-based paint disclosures, which appear in the Code of Federal Regulations in both the EPA title [*see 24 C.F.R. § 35.80 et seq.*] and the HUD title [*see 40 C.F.R. § 745.100 et seq.*]. A seller or broker or agent may use a different format that contains all of the required elements *[61 Fed. Reg. 9064, 9073 (1996)]* .

For a related disclosure that may be included in the sale contract and covers the required 10-day opportunity to inspect for the presence of lead-based paint before becoming obligated under a sale contract [*see 24 C.F.R. § 35.90*; *40 C.F.R. § 745.110*], see *§ 23.312*.

[b] Seller's Obligation to Disclose Presence of Lead-Based Paint

[i] In General

Federal regulations require sellers of most residential housing built before 1978 (referred to as "target housing") [*see 24 C.F.R. § 35.86*; *40 C.F.R. § 745.103* (definition)] to make disclosures regarding the presence of known lead-based paint or lead-based paint hazards in the housing [*see* [ii], *below*]. A sale transaction involving housing for the elderly, a zero-bedroom dwelling (such as a dormitory or barracks), or housing sold at foreclosure is exempt from the disclosure requirements [*see 24 C.F.R. § 35.82(a)*; *40 C.F.R. § 745.101(a)*].

Further, the seller must give the buyer a 10-day opportunity to conduct a risk assessment or inspection and must attach specific disclosure and warning language to the sale contract. The parties may agree in writing to a different time period, or the buyer may waive the opportunity in writing [*24 C.F.R. § 35.90*; *40 C.F.R. § 745.110*].

Sellers and their agents who fail to comply with the requirements are subject to civil and criminal penalties and can be jointly and severally liable to the buyer in an amount equal to three times the amount of actual damages [*24 C.F.R. § 35.96*; *40 C.F.R. § 745.118*]. However, failure to comply does not invalidate a sale contract [*42 U.S.C. § 4852d(c)*].

[ii] Required Disclosure Activities

Before a buyer becomes obligated under any contract to purchase target housing in a non-exempt transaction, the seller must do all of the following [*24 C.F.R. § 35.88*; *40 C.F.R. § 745.107*]:

- Provide the buyer with an EPA-approved lead-hazard information pamphlet, such as the EPA-approved *Protect Your Family From Lead in Your Home* (EPA 747-K-99-001), which can be obtained from the Government Printing Office or can be downloaded from www.hud.gov/offices/lead/healthyhomes/lead.cfm.

- Disclose to the buyer the presence of any known lead-based paint and lead-based paint hazards in the housing being sold, along with any additional information available concerning that paint or hazard, such as the basis for determining that the lead-based paint or hazard exists, its location, and the condition of the painted surfaces.

- Disclose to each agent involved in the transaction the presence of any known lead-based paint and lead-based paint hazards in the housing being sold and the existence of any available records or reports pertaining to that paint or hazards. The seller must also disclose any additional information available concerning the known lead-based paint or hazards, such as the basis for determining that the lead-based paint or hazard exists, its location, and the condition of the painted surfaces.

- Provide the buyer with any records or reports available to the seller pertaining to lead-based paint and lead-based paint hazards in the housing being sold. This includes records and reports regarding both common areas and other residential dwellings in multifamily target housing, provided the information is part of an evaluation or reduction of lead-based paint or hazards in the target housing as a whole.

If some, but not all, of these requirements have been fulfilled when the buyer has made an offer to purchase the housing, the seller must complete the remaining disclosure activities before accepting the offer and allow the buyer an opportunity to review the information and amend (or, presumably, withdraw) the offer [*24 C.F.R. § 35.88(b)*; *40 C.F.R. § 745.107(b)*]. The latest point at which disclosure must take place is just before the buyer becomes obligated under a sale contract [*see 61 Fed. Reg. 9064, 9071 (1996)* (EPA/HUD statutory interpretation)]. However, failure to conduct full disclosure before the sale does not affect the validity of a sale contract [*42 U.S.C. § 4852d(c)*].

[c] Attachment Required for Sales Contracts

Each sale contract involving target housing must include an attachment containing the elements listed below. The text of the lead warning statement must be in "large type" and on a "separate sheet of paper attached to the contract" [*42 U.S.C. § 4852d(a)(3)*], but there is no prescribed format *[61 Fed. Reg. 9073 (1996)]* (although a format was suggested by *EPA and HUD [61 Fed. Reg. 9074 (1996)]* , for drafters who want to use it as a guide). The attachment must be in the same language (that is, English, Spanish, and so forth) as the contract [*24 C.F.R. § 35.92(a)*; *40 C.F.R. § 745.113(a)*]. The required elements are as follows:

- A lead warning statement in prescribed language (implicitly required to be entitled "Lead Warning Statement");

- A statement by the seller that either discloses the presence of any known lead-based paint and lead-based paint hazards in the dwelling or indicates no knowledge of the presence of lead-based paint or hazards;

- A statement by the seller that provides any additional information available concerning the known lead-based paint or hazards (for example, the basis for determining that lead-based paint hazards exist in the housing, the location of lead-based paint or hazards, and the condition of the painted surfaces);

- A list of all records and reports pertaining to lead-based paint or hazards that are available to the seller and have been provided to the buyer (but if no records or reports are available to the seller, the seller must so indicate);

- A statement by the buyer affirming receipt of the above-described information and receipt of an EPA-approved lead hazard information pamphlet, such as *Protect Your Family From Lead in Your Home* [*see 15 U.S.C. § 2686*; *see also* [b][ii], *above*];

- A statement that the buyer either (1) has received a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint or hazards (unless the parties have mutually agreed to a different period of time) before becoming obligated under the contract or (2) has signed a written waiver of this opportunity;

- A statement by any agent involved in the transaction that he or she has informed the seller of the seller's disclosure obligations under *42 U.S.C. § 4852d* and that the agent is aware of his or her duty to ensure compliance with those requirements; and

- The signatures of all parties and agents certifying the accuracy of their statements on the attachment, along with the dates of signature.

Sellers and agents must retain copies of the completed attachment for at least three years from the sale's completion date [*24 C.F.R. § 35.92(c)*; *40 C.F.R. § 745.113(c)*].

[2] FORM

Lead-Based Paint Disclosures Attachment for Sales Contract

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built before 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended before purchase.

Seller's Disclosure
(Check statements that are true and provide information.)

☐ Known lead-based paint and/or lead-based paint hazards are present in the housing, namely: [*explain*].

☐ Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

☐ Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing, namely: [*list records and reports that were provided*].

☐ Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Buyer's Acknowledgment
(Initial statements that are true.)

_____ Buyer has received copies of all information listed above.

_____ Buyer has received the pamphlet *Protect Your Family From Lead in Your Home*.

_____ Buyer has received a 10-day opportunity (or mutually agreed-on period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

_____ Buyer has waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment
(Initial statement.)

_____ Agent has informed the seller of the seller's obligations under *42 U.S.C. § 4852d* and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

Seller:
_____ [*signature*] Date: _____
Buyer:
_____ [*signature*] Date: _____
Agent:
_____ [*signature*] Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.312

AUTHOR: William M. Hensley Editorial Consultant

§ 23.312 Lead-Based Paint Disclosures--Contingency Clause

[1] Comment

[a] Use of Form

The form in [2], *below*, is a clause describing the right of a purchaser of residential housing built before 1978 to inspect the property for the presence of lead-based paint. Federal regulations promulgated by the EPA and HUD require sellers of most such housing to disclose the presence of known lead-based paint and lead-based paint hazards in the housing, and to provide purchasers with a right of inspection [*see* [b], *below*; *§ 23.311[1]*]. This clause is based on an EPA/HUD-supplied example, but nothing in the federal disclosure regulations imposes a requirement on the parties to use any particular language *[61 Fed. Reg. 9064, 9077 (1996)]* .

[b] Inspection Right

Before a purchaser is obligated under a sale contract relating to housing subject to the federal disclosure regulations [*see § 23.311[1]*], the seller must permit the purchaser 10 days to conduct a risk assessment or inspection for the presence of lead-based paint and lead-based paint hazards. The parties may agree in writing to a different time period, or the buyer may waive the opportunity in writing [*24 C.F.R. § 35.90*; *40 C.F.R. § 745.110*].

[2] FORM

Lead-Based Paint Disclosures--Contingency Clause

[***number***]**. Lead-Based Paint Disclosures.** This contract is contingent on a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards at Buyer's expense until 9:00 p.m. on_____[*date 10 days after contract ratification, or other date mutually agreed on*]. This contingency

will terminate at that deadline unless Buyer (or Buyer's agent) delivers to Seller (or Seller's agent) a written contract addendum listing the specific existing deficiencies and corrections needed, together with a copy of the inspection and/or risk assessment report. Seller may, at Seller's option, within [*number*] days after delivery of the addendum, elect in writing to correct the deficiencies before settlement. If Seller will correct the deficiencies, Seller shall furnish Buyer with certification from a risk assessor or inspector demonstrating that the deficiencies have been remedied before the date of the settlement. If Seller does not elect to correct the deficiencies, or if Seller makes a counteroffer, Buyer shall have [*number*] days to respond to the counteroffer or remove this contingency and take the property in "as is" condition, otherwise this contract shall become void. Buyer may remove this contingency at any time without cause.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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9-23 California Legal Forms--Transaction Guide § 23.313

AUTHOR: William M. Hensley Editorial Consultant

§ 23.313 Disclosure of Law Enforcement Database of Registered Sex Offenders' Locations

[1] Comment--Use of Form

The form in [2], *below*, must be part of every contract of sale for residential real property comprising one-to-four dwelling units, including installment land sale contracts [*Civ. Code § 2079.10a(a)(3)* (applicable on and after April 1, 2006); *see Civ. Code § 2079.10a(a)(1), (2)* (this notice may be used in contracts before April 1, 2006, in lieu of notice that formerly was required; contract forms containing notice that formerly was required may be used until April 1, 2006); *see also Penal Code §§ 290*, *290.4*, *290.46* (California version of "Megan's Law" requiring law enforcement authorities to maintain database of locations of registered sex offenders and to provide that information to public)]. The contract must contain the notice in [2], *below*, printed in at least eight-point type [*Civ. Code § 2079.10a(a)(3)*].

The information in the notice is deemed adequate to inform the transferee about the existence of the statewide database and information from the database regarding the locations of registered sex offenders [*Civ. Code § 2079.10a(b)*]. On delivery of this notice, the seller is not required to provide any further information in addition to that contained in the notice regarding the proximity of registered sex offenders, and making those disclosures cannot give rise to any cause of action against the seller by a registered sex offender [*Civ. Code § 2079.10a(b)*]. However, providing the statutory notice regarding the existence of the database of registered sex offender locations does not alter any other existing duty that a seller has to make disclosures [*Civ. Code § 2079.10a(c)*].

[2] FORM

Disclosure of Law Enforcement Database of Registered Sex Offenders' Locations

Notice:

Pursuant to *Section 290.46 of the Penal Code*, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at

www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
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C. Related Instruments
1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.314

AUTHOR: William M. Hensley Editorial Consultant

§ 23.314 Disclosures Regarding Private Transfer-Fee Requirement

[1] Comment--Use of Form

The forms in [2], below, may be used to disclose a private transfer-fee requirement that will apply to a transfer of real property. A private transfer fee, for this purpose, is any payment required in a covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property, which requires a fee to be paid on transfer of the real property [*Civ. Code § 1098*; *but see Civ. Code § 1098(a)-(i)* (exceptions)].

If property being transferred after 2007 is subject to a private transfer-fee requirement, the transferor must provide, at the time of providing the transfer disclosure statement required pursuant to *Civ. Code § 1102.6,* an additional disclosure statement containing all of the following [*Civ. Code § 1102.6e*; *see* [2][a], *below*]:

- Notice that payment of a transfer fee is required on transfer of the property;
- The amount of the fee required for the asking price of the real property, and a description of how the fee is calculated;
- Notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price;
- The entity to which funds from the fee will be paid;
- The purposes for which funds from the fee will be used; and

- The date or circumstances under which the obligation to pay the transfer fee expires, if it could expire.

In addition, the person or entity imposing any such fee after 2007 must record a disclosure document, entitled "Payment of Transfer Fee Required," in which pertinent facts about the fee-payment requirement are disclosed [*see* [2][b], *below*]. The disclosure document must be recorded in the office of the county recorder for the county in which the real property is located, concurrently with the recording of the instrument creating the transfer-fee requirement [*Civ. Code § 1098.5(b)*]. The disclosure document must include all of the following information [*Civ. Code § 1098.5(b)(2)*]:

- The names of all current owners of the real property subject to the transfer fee, and the legal description and assessor's parcel number for the affected real property;

- The amount, if the fee is a flat amount, or the percentage of the sales price constituting the cost of the fee;

- If the real property is residential property: actual dollar-cost examples of the fee for a home priced at $250,000, a home priced at $500,000, and a home priced at $750,000;

- The date or circumstances under which the transfer fee payment requirement expires, if any;

- The purpose for which the funds from the fee will be used;

- The entity to which funds from the fee will be paid and specific contact information regarding where the funds are to be sent; and

- The signature of the authorized representative of the entity to which funds from the fee will be paid.

For transfer fees imposed before 2008, the recipient of the fee, as a condition of payment of the fee after 2008, must, before 2009, record the disclosure document against the real property in the office of the county recorder for the county in which the real property is located [*Civ. Code § 1098.5(a)*].

[2] FORMS

[a] Transferor's Disclosure

Transfer-Fee Payment Requirement

Payment of a transfer fee is required on transfer of the property. The amount of the fee required for the asking price is $_____, which is computed as follows: _____ [*describe how fee is computed*]. The final amount of the fee may be different if the fee is based on a percentage of the final sale price. The entity to which funds from the fee will be paid is _____ [*specify*]. The funds from the fee will be used _____ [*specify purpose for which funds from fee will be used*].The transfer-fee payment requirement _____ [will never expire or will expire _____ *(specify date when, or circumstances under which, requirement will expire)*].

[b] Fee Recipient's Disclosure

Recording requested by
_____[name]
When recorded mail to

_____ [name]
_____ [address]
_____ [city, state, zip]
Space above this line for recorder's use

Payment of Transfer Fee Required

A transfer fee will be imposed on any transfer of the real property described below, which occurs _____ [after the date of recording of this disclosure statement *or, for fee imposed before 2008,* after 2008].

The names of all current owners of the real property subject to the transfer fee, and the legal description and assessor's parcel number for the affected real property, are as follows: _____.

The fee will be _____ [*dollar amount if fee is flat amount, otherwise* _____ percent of the sale price]. _____ [*If property is residential property, add:* For example, the fee for a home priced at $250,000 would be $_____, or for a home priced at $500,000 would be $_____, or for a home priced at $750,000 would be $_____.]

The transfer-fee payment requirement _____ [will never expire or will expire _____ *(specify date when, or circumstances under which, requirement will expire)*].

The funds from the fee will be used _____ [*specify purpose for which funds from fee will be used*].

The funds from the fee will be paid to _____ [*specify entity to which funds from fee will be paid*]. Contact information regarding where the funds are to be sent is as follows: _____ [*specify*].

_____
[*name of entity*]
By:_____
[*signature*]

State of California
County of _____

On _____ [date], before me, _____ [*name and title of officer taking acknowledgment*], personally appeared _____ [*names of persons signing instrument*], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity on behalf of which any of the persons acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____
[*signature*]
_____

[*seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleReal Property LawPurchase & SaleRemediesDuty to Disclose



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1. Disclosure Forms

9-23 California Legal Forms--Transaction Guide § 23.315

AUTHOR: William M. Hensley Editorial Consultant

§ 23.315 Disclosures Regarding Noncompliant Plumbing Fixtures (Pre-1994 Properties)

[1] Comment--Use of Form

This form may be used to meet the applicable requirement (if any) for a seller or transferor of real property, if it was built and available for use before January 1, 1994, to make disclosures regarding whether the property has plumbing fixtures that are noncompliant with a legal standard. The legal standard is discussed in § 23.20B. There are three requirements.

(1) On and after January 1, 2017 [*Civ. Code § 1102.155(b)*], the seller of residential real property subject to *Civ. Code § 1102 et seq.* [*see § 23.20[1]*] must disclose, in writing, that *Civ. Code § 1101.4* (see the second requirement, below) requires that California single-family residences, if built and available for use before January 1, 1994 [*Civ. Code § 1101.2*], must be equipped with water-conserving plumbing fixtures on or before January 1, 2017; and the seller must further disclose whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1102.155(a)(1)*; *see Civ. Code § 1101.3(c),(e)* (what are noncompliant plumbing fixtures and water-conserving plumbing fixtures, discussed in § 23.20B[2])]. The seller must affirm that this representation is that of the seller and not a representation of any agent, and that this disclosure is not intended to be part of any contract between the buyer and the seller. The seller must further affirm that this disclosure is not a warranty of any kind by the seller or any agent representing any principal in the transaction and is not a substitute for any inspections or warranties that any principal may wish to obtain [*Civ. Code § 1102.155(a)(2)*]. (The statutory text states, apparently by clerical error: "any inspections that or warranties any principal may wish to obtain.")

(2) On and after January 1, 2017, a seller or transferor of a single-family residential property, if it was built and available for use before January 1, 1994 [*Civ. Code § 1101.2*; *see* § 23.20B[2]], must disclose in writing to the prospective purchaser or transferee the requirements of *Civ. Code § 1101.4(b)* [*see* § 23.20B[5][a]] and whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1101.4(c)*]. It is apparent that this disclosure

requirement can be met by making the disclosure required in *Civ. Code § 1102.155* (see the first requirement, above).

(3) On and after January 1, 2019, a seller or transferor of a multi-family residential property or a commercial property, if it was built and available for use before January 1, 1994 [*Civ. Code § 1101.2*; *see* § 23.20B[2]], must disclose to the prospective purchaser or transferee, in writing, the requirements of *Civ. Code § 1101.5(a)* [*see* § 23.20B[5][b]] and whether the property includes any noncompliant plumbing fixtures. This disclosure may be included in other transactional documents [*Civ. Code § 1101.5(e)*].

There is some disharmony between the first requirement and third requirement above. *Civ. Code § 1102.155* applies, on or after January 1, 2017, in cases that are subject to *Civ. Code § 1102 et seq.*; therefore *Civ. Code § 1102.155* can be applicable in a sale of a single-family residence or a sale of a duplex, a triplex, or a fourplex [*see Civ. Code § 1102(a)*]. *Civ. Code § 1101.5(e)* applies, or after January 1, 2019--that is, starting two years later--to a sale of a multi-family property, which would include a duplex, a triplex, or a fourplex. Thus, in the case of a sale of a residential duplex, triplex, or fourplex, it is not clear whether the disclosure requirement applies starting in 2017 or starting in 2019.

Since there is no requirement for a separate disclosure statement in any of these cases, this form could be included in a document containing other disclosures (but this form cannot be appended to the disclosure statement specified in *Civ. Code § 1102.6*).

[2] FORM

Disclosures Regarding Noncompliant Plumbing Fixtures

[*EITHER*]

Section 1101.4(b) of the Civil Code provides that on or before January 1, 2017, noncompliant plumbing fixtures in any single-family residential real property shall be replaced by the property owner with water-conserving plumbing fixtures.

[*OR*]

Section 1101.5(a) of the Civil Code provides that on or before January 1, 2019, all noncompliant plumbing fixtures in any multi-family residential real property and in any commercial real property shall be replaced with water-conserving plumbing fixtures.

[*CONTINUE*]

Section 1101.2 of the Civil Code provides that Section _____[1101.4(b) *or* 1101.5(a)] shall apply to residential and commercial real property built and available for use on or before January 1, 1994.

The property commonly known as _____[*specify address or other common description of property that is being sold or transferred*] _____[includes *or* does not include] noncompliant plumbing fixtures. _____[*If complying with Civ. Code § 1102.155, add:* This representation is that of the seller and not a representation of any agent, and this disclosure is not intended to be part of any contract between the buyer and the seller. This disclosure is not a warranty of any kind by the seller or any agent representing any principal in the transaction and is not a substitute for any inspections or warranties that any principal may wish to obtain.]

_____
[*signature*]

_____
[*typed name*]



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9-23 California Legal Forms--Transaction Guide §§ 23.316-23.319

AUTHOR: William M. Hensley Editorial Consultant

[Reserved]

§§ 23.316[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Other Documents

9-23 California Legal Forms--Transaction Guide § 23.320

AUTHOR: William M. Hensley Editorial Consultant

§ 23.320 Impound Account for Structural Pest-Control Work

[1] Comment

[a] Use of Form

This form is an auxiliary agreement between a buyer and seller of real property to impound funds for the cost of structural pest-control work. It is designed for use when a structural pest-control clearance must be obtained before close of escrow [*see § 23.320[1][b]*], and there is not enough time for the operator to perform the necessary corrective work and prepare the certification before the date specified in the sale contract for close of escrow [*see § 23.320[1][c]*]. For discussion and checklists covering the relevant statutory requirements governing the preparation of the report and the performance of corrective work necessary to obtain a pest-control certification, see *§§ 23.133* and *23.150*.

An impound account may be useful in other situations. If, for example, the seller has agreed to replace a roof, remove debris on the property, or perform other similar obligations, an impound account may ensure that the seller will perform those obligations and at the same time would avoid the possibility of a delay in the close of escrow.

[b] Structural Pest-Control Certification Process

Lenders typically require a recent structural pest-control report and a pest-control certification or clearance as a condition of making a loan. The certification or clearance requirement means, in effect, that all repair work must be performed and the property must be reinspected before close of escrow. Unless the contract provides for a long escrow period, the timing can be a problem. The process of ordering the inspection, arranging for performance of the corrective work, and obtaining a reinspection and certification can take weeks. One way to circumvent this problem is to arrange for an impound of funds after close of escrow to cover the cost of the structural work [*see § 23.320[1][c]*].

If the structural pest-control report indicates a substantial amount of damage, and the lender demands that a clearance be

obtained by close of escrow, the only real options are to perform the work, to extend the escrow period, to arrange for an impound of funds if that course is acceptable to the lender, or to terminate the escrow. Accordingly, the parties would be well advised to consider the policy of prospective lenders concerning termite clearances if it appears that there is a potential problem. Some lenders may negotiate a clearance requirement, while others will insist on a clearance regardless of the nature and cost of the work and the plans of the parties.

[c] Role and Operation of Impounds

In some cases, the process of ordering an inspection, preparing the inspection report, performing any corrective work, and preparing the certification may take weeks. If the escrow period is short, or if extensive corrective work must be performed in order to obtain a certification, it may not be possible to complete all these steps within the escrow period.

The most obvious way to solve this problem is to extend the time for close of escrow. There are numerous reasons, however, why an extension may be undesirable. The loan commitment issued by the buyer's lender, for example, may have a fixed expiration date, or a delayed close of escrow may jeopardize the sale of the buyer's existing residence or the purchase of the seller's new one. Accordingly, the parties may be reluctant or unwilling to extend the escrow date to await the pest-control clearance.

The impound arrangement offers the parties an alternative. It permits escrow to close on time regardless of whether a pest-control clearance has been obtained by that date. It authorizes the escrow agent to retain funds in an impound account and disburse those funds to the operator to cover the cost of the certification and corrective work.

[d] Funding of Impound Account

If the seller is responsible for the cost of the corrective work, the impound account will be funded out of amounts withheld from the proceeds of the sale received by the seller on close of escrow. If the buyer is responsible for the cost of corrective work, he or she is required to deposit additional funds with the escrow agent on or before the date of close of escrow. If the cost of corrective work is to be apportioned between buyer and seller, the agreement should be modified to provide for a combination of these two methods.

At first glance it might appear that creation of an impound account is superfluous if the buyer is the one responsible for the cost of corrective work, since the buyer, as new owner of the property, is the one who stands to benefit from performance of the work or to suffer if it is not performed. However, if the buyer is financing the purchase with a loan from an institutional lender, the lender may independently require a structural pest-control clearance as a condition of making the loan, in order to protect its security interest in the property. In this situation, if a clearance cannot be obtained before close of escrow, the lender may insist on an impound arrangement to ensure that the buyer will actually perform any necessary corrective work and obtain the required clearance.

[e] Amount of Impound

At a minimum, the amount of impounded funds should equal the structural pest-control operator's bid for performing the necessary corrective work, plus any other inspection and certification costs that are to be paid out of escrow. It is probably preferable to impound an amount exceeding those costs, such as 150 percent of the cost of the corrective work. The party responsible for the cost of repairs is thus given an incentive to have the repairs performed promptly, and the other party acquires a measure of protection (although not absolute protection) in the event that the repair costs exceed the amount specified in the operator's bid. Any funds remaining in the impound account after the operator has been paid will be refunded to the buyer or the seller, as appropriate.

[f] Failure to Perform Work

If the party responsible for the cost of the corrective work fails to arrange to have the work performed, the party for

whose benefit the impound is established (the buyer or the buyer's lender) should be empowered to arrange for performance of the work and payment of the operator out of the impounded funds. To facilitate exercise of this remedy, the party responsible for the cost of corrective work should be required to deposit into escrow a signed contract with the operator for performance of the corrective work. Ordinarily, this will consist of a copy of the report, with the operator's bid attached and signed by the buyer to indicate acceptance.

[2] FORM

Impound Account for Structural Pest-Control Work

This is an addendum to a contract between_____[*name*] as Seller and_____[*name*] as Buyer ("the Contract"), dated _____, for the sale and purchase of real property known as_____[*street address*] ("the Property"), and shall modify the terms of the Contract in the manner and to the extent specified in this addendum.

Under the Contract, the close of escrow is contingent on the deposit in escrow of a certification by a licensed structural pest-control operator (the "certification") that the Property is free of evidence of active infestation or infection in the visible and accessible areas. The cost of any corrective work that is required to obtain such a certification is to be borne by [Seller *or* Buyer *or, if costs are to be apportioned between seller and buyer, specify manner of apportionment*].

[Seller *or* Buyer] has obtained a structural pest-control inspection and report ("the report") on the Property dated _____, from_____[*name of structural pest-control operator*],_____[*address*] (the "operator"), a licensed structural pest-control operator. The report is attached to this addendum and is incorporated by reference. The report contains the operator's bid to perform the corrective work necessary to obtain a certification at a cost of $_____.

The operator has informed [Seller *or* Buyer] that it may not be possible to complete all corrective work specified in the report and prepare a certification before the date specified in the Contract for close of escrow, as required by the Contract.

_____[*Add, if appropriate:* To purchase the Property, Buyer is relying on the proceeds of a loan from _____ [*name of lender*] ("Lender"). Lender has informed Buyer that as a condition of making that loan, Lender will require the deposit in escrow of a certification or the creation of an impound account to cover the cost of corrective work.]

THEREFORE, Seller and Buyer agree to establish an impound account to cover payment of the cost of structural pest-control work on the Property, on the terms and conditions specified in this addendum.

1. Close of Escrow. Notwithstanding Paragraph [*number*] of the Contract, escrow on the Property shall close on the date specified in the Contract for close of escrow, regardless of whether a certification has been deposited with the escrow agent by that date, provided the parties have complied with all terms and conditions specified in this addendum.

2. Creation of Impound Account. If a certification has not been deposited with the escrow agent on or before the date specified in the Contract for close of escrow on the Property, the escrow agent shall establish an impound account containing funds in the amount of $_____, that sum being_____[*e.g.,* equal to *or* one and a half times the amount of] the operator's bid for performing the corrective work specified in the report [plus the operator's fee for inspection and certification]. These funds shall be [withheld by the escrow agent from the proceeds of sale disbursed to Seller following close of escrow on the Property *or* deposited with the escrow agent by Buyer, in addition to any other sums that Buyer is required to deposit with the escrow agent under the terms of the Contract, on or before the close of escrow on the Property *or specify apportionment of cost of corrective work between buyer and seller*

] and shall be held in a non-interest-bearing account and disbursed by the escrow operator in the manner specified in this addendum.

3. Payment of Corrective Work. On completion of all corrective work and issuance of a certification, [Seller *or* Buyer] shall deposit with the escrow agent a certification prepared by the operator, the operator's itemized statement for services rendered, and a statement signed by [Seller *or* Buyer *or* both Seller and Buyer] approving the completed work and authorizing release of the impounded funds. On receipt of the certification, statement, and authorization, the escrow agent shall promptly disburse to the operator, from the impound account, funds equal to the operator's charges appearing on its statement. After the operator has been paid in full for its services, the escrow agent shall promptly disburse any balance remaining in the impound account to [Seller *or* Buyer *or specify apportionment*].

4. Failure to Perform Corrective Work. If the operator's certification and statement for services rendered and an appropriate authorization to release the impounded funds have not been deposited with the escrow agent within [*number*] days following the close of escrow on the Property, the escrow agent shall immediately notify [*e.g.,* Buyer and Lender] of that fact. On receipt of that notice, [*e.g.,* Buyer or Lender] shall have the right to demand assurances that [Seller *or* Buyer] has arranged for performance of the corrective work and that satisfactory progress has been made toward completion of that work. If [Seller *or* Buyer] is unable to provide [*e.g.,* Buyer or Lender] with assurances satisfactory to [*e.g.,* Buyer or Lender], then [*e.g.,* Buyer or Lender], on notice to the escrow agent, may arrange with the operator for completion of any unperformed portion of the work and may unilaterally authorize the escrow agent to disburse funds from the impound account to cover the cost of the corrective work.

5. Deposit of Signed Contract. [Seller *or* Buyer] shall deposit with the escrow agent, concurrently with execution of this addendum, an original signed contract between [Seller *or* Buyer] and the operator, authorizing the operator to perform all corrective work listed in the report that is necessary to obtain a certification on the Property, at the price specified in the operator's bid.

6. Availability of Other Remedies. Nothing in this addendum shall be construed to abrogate, limit, or otherwise restrict any other legal or equitable remedy that would otherwise be available to [*e.g.,* Buyer or Lender], specifically including, but not limited to, the right of [*e.g.,* Buyer or Lender] to recover from [Seller *or* Buyer] any funds paid by [*e.g.,* Buyer or Lender] for any corrective work on the Property that is required in order to obtain a certification and the cost of which exceeds the funds held in the impound account.

_____ [*Add, if buyer's lender requires impound account:* **7. Lender as Third Party Beneficiary.** Lender shall be a third party beneficiary of this addendum and shall be entitled to enforce the terms of this addendum in the manner and to the extent specified in it.

Date: _____
SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

The undersigned, as escrow agent under the real property sale contract referred to in the foregoing addendum, accepts the terms of this addendum and agrees to establish and administer the impound account described in this addendum on the terms and conditions described in it.

Date: _____

_____ [name of escrow agent]
By _____ [*signature*]
_____ [*typed name and title*]

[*Add, if lender requires impound account:*]

Approved as to form and content.

Date: _____
_____ [*name of lender*]
By _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.321

AUTHOR: William M. Hensley Editorial Consultant

§ 23.321 Memorandum Contract of Sale of Real Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a memorandum of a real property sale contract that, when recorded, will provide constructive notice of the contents of the sale contract to would-be buyers and mortgagees [*see* [b], *below*]. Recording a memorandum is preferable to recording the sale contract, for the sake of protecting the confidentiality of many of the terms contained in the sale contract. Also, since the recording fee is based on the number of pages [*see Gov. Code § 27361*], a memorandum will almost invariably cost less to record.

Although no legal authority in California expressly authorizes the recordation of a memorandum contract of sale of real property, it is clear that a real property sale contract can be recorded [*see, e.g., Keese v. Beardsley (1923) 190 Cal. 465, 473, 213 P. 500* ; *High Fidelity Enterprises, Inc. v. Hull (1962) 210 Cal. App. 2d 279, 281, 26 Cal. Rptr. 654]* . A memorandum of a real property sale contract, while not expressly identified among the kinds of instruments that can be recorded [*see Gov. Code § 27279 et seq.*], is implicitly recordable if it contains all of the elements of a contract and is signed and acknowledged by the seller. The elements of a contract and the seller's signature would make the memorandum an "instrument" [*see Gov. Code § 27279(a)* ("a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty")]. Any instrument "affecting the title to or possession of real property may be recorded" [*Gov. Code § 27280(a)*]. The seller's acknowledgment is required because if "the instrument is an agreement for sale, ... deposit receipt, ... or affidavit which quotes or refers to an agreement for sale, ... [or] deposit receipt, ... and such instrument claims to, or affects any interest in real property, it shall be executed and acknowledged or proved ... by the party who appears by the instrument to be the party whose real property is affected or alienated thereby" [*Gov. Code § 27288*]. The recordability of such a memorandum is further implied by statutes clearly assuming that such a document could be recorded [*see, e.g., Civ. Code § 886.010 et seq.*].

However, some counties may not record a memorandum because of the lack of express authority. Consequently, before using the form in [2], *below*, the attorney should confirm that it will be accepted for recordation by the county in which the subject real property is situated (and by other counties, if appropriate) [*see* [g], *below*].

[b] Effect of Recordation

Every "conveyance" of real property (except a lease for a term not exceeding one year) is void as against any subsequent good faith purchaser or mortgagee for value whose conveyance is first duly recorded [*Civ. Code § 1214*; *see Civ. Code § 1217* (unrecorded instrument is valid as between parties and those who have notice); *see also Civ. Code § 1215* ("conveyance" defined); [e], *below*]. From the time it is filed with the recorder, a properly acknowledged or proved and certified instrument of conveyance will be constructive notice of its contents to subsequent buyers and mortgagees [*Civ. Code § 1213*; *see Civ. Code § 18* (constructive notice is that which is imputed by law)]. Recording also protects the interest in the property of a good faith purchaser or mortgagee for value from any previous unrecorded conveyances and from any subsequent conveyances or actions affecting title [*see Civ. Code § 1214*].

[c] Required Contents

Documents relating to real property must contain certain information in order to be recorded. A document effecting or evidencing a transfer or encumbrance of an interest in real property must contain the name or names in which the interest appears of record (with certain exceptions relating to notices of street and highway assessments) [*see Gov. Code § 27288.1(a)*]. A document that releases or terminates any interest, right, or encumbrance in real property must contain or have appended to it the names of all persons and entities owning the subject title or interest, or the names of those persons or entities appearing as the owners of the title or interest in the document that created the interest, right, or encumbrance [*Gov. Code § 27288.1(b)*]. The failure of a document to include the appropriate names will not affect the constructive notice that would otherwise be afforded by the recording of the document [*Gov. Code § 27288.1*].

If any person in whom the title of real estate is vested afterward changes his or her name, the memorandum (or other conveyance) must set forth the name in which he or she derived title to the property [*see Civ. Code § 1096*]. A document that does not include such a changed name will not impart constructive notice of its contents to subsequent buyers and encumbrancers, but will be valid as between the parties to the agreement and those who have notice of it [*Civ. Code § 1096*].

[d] Other Information and Format

To be recorded, a document must contain an address for delivery by the recorder [*see Gov. Code §§ 27321.5*, *27361.6*]. All printed forms primarily intended to be recorded must have a half-inch margin on the two vertical sides of each page, except in the top two and a half inches of the first page, which must be reserved for recording information. The left-hand three and a half inches of that reserved space is intended for use by the person requesting recordation, to show to whom the document should be returned. The recorder uses the right-hand side of that reserved space to show the time and place of recording. A failure to comply with the requirements will not affect the notice otherwise imparted by recording [*Gov. Code § 27361.6*].

All instruments presented for recordation should be on paper that will reproduce legibly by microphotographic or imaging processes [*Gov. Code § 27361.6*].

For further discussion, see Ch. 27, *Deeds and Recording* .

[e] Elements of Agreement

Every "conveyance" is constructive notice of its contents from the time it is filed with the recorder for record [*Civ. Code § 1213*]. For these purposes, "conveyance" includes every instrument in writing by which any estate or interest in real

property is created, alienated, mortgaged, or encumbered, or by which the title to any real property may be affected (except wills) [*Civ. Code § 1215*]. An executory land sale contract is such a "conveyance" because the effect of the contract is to convey or transfer the equitable title to land [*Keese v. Beardsley (1923) 190 Cal. 465, 473, 213 P. 500]* . However, a mere notice of such a land sale contract is not a "conveyance," because it neither creates, alienates, mortgages, encumbers, or affects the title to real property. Therefore, although the recording of an executory land sale contract will impart constructive notice of the contents of all instruments referred to in it, to persons subsequently dealing with the land described in it, the recording of a mere notice that a land sale contract has been signed and exists will not [*Hale v. Pendergrast (1919) 42 Cal. App. 104, 107, 183 P. 833]* . Consequently, the recorded memorandum must itself be drafted as an elemental contract for the sale of real property [*see § 23.11*] in order to be constructive notice of the contents of the actual sale contract.

[f] Acknowledgment

With certain exceptions not relevant to this discussion, before an instrument can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof must be certified [*Gov. Code § 27287*; *see Civ. Code §§ 1198, 1199*]. An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [*see, e.g., Civ. Code § 1189(a)*]. A certificate of acknowledgment is a formal declaration by an authorized officer [*see Civ. Code §§ 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*].

If the instrument affects or claims to affect an interest in real property and is an agreement for sale or lease, option agreement, deposit receipt, commission receipt, or affidavit that quotes or refers to any of the foregoing types of instruments, it must be signed and acknowledged or proved by the party who appears by the instrument to be the party whose real property is affected or alienated [*Gov. Code § 27288*; *see Gov. Code § 27287* (applicable methods of acknowledgment and proof)].

The certificate of acknowledgment must be in the form prescribed in the Civil Code [*see Civ. Code § 1189(a)*; *see also* Ch. 27, *Deeds and Recording*]. The certificate of acknowledgment of an instrument signed on behalf of an incorporated or unincorporated entity by a duly authorized person in the specified form is prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument and is conclusive evidence of that fact in favor of any good faith purchaser, lessee, or encumbrancer. "Duly authorized person," with respect to a domestic or foreign corporation, includes the president, vice president, secretary, and assistant secretary of the corporation [*Civ. Code § 1190*].

[g] Place of Recording

After being duly acknowledged or proved and certified, the instrument must be recorded in the county in which the subject real property is situated [*Civ. Code §§ 1169, 1170*]. A certified copy of the recorded instrument may be recorded in any other county, and, when so recorded, will have the same force and effect as if it were the original instrument [*Civ. Code § 1218*]. If the original is recorded in a county where the real property is not situated, then a certified copy may be recorded in the county where the real property is situated and will have the same force and effect as the original [*Civ. Code § 1213*].

[2] FORM

Memorandum Contract of Sale of Real Property

Recording requested by
_____[*name*]

When recorded mail to

_____[*name*]
_____[*address*]
_____[*city, state, zip*]

Space above this line for recorder's use

MEMORANDUM CONTRACT OF SALE

_____[*name and capacity*] ("Seller") agrees to sell, and_____[*name and capacity*] ("Buyer") agrees to purchase, the property located in the County of _____, State of California, and legally described as follows: [*insert legal description*]. The purchase price of the property shall be $_____, payable as follows: [*specify terms and manner of payment*]. The purchase and sale of the property shall be on the terms and conditions fully set forth in the contract of sale between the parties executed_____[*date*]. Those terms and conditions are made a part of this memorandum by this reference.

Signed_____[*date*] at_____[*city*], California.

SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

State of California
County of _____

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared [*names of persons signing instrument*], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity on behalf of which any of the persons acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
_____ [*signature*]
[*seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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9-23 California Legal Forms--Transaction Guide § 23.322

AUTHOR: William M. Hensley Editorial Consultant

§ 23.322 Tenant's Estoppel Certificate

[1] Comment

[a] Use of Form

The form in [2], *below*, is a certificate from a tenant of a building being sold, stating that the tenant has no offset or defense to rents accruing after the completion of the sale transaction. It is designed to be used in conjunction with a contract for the sale of a building containing multiple rental units that are subject to existing leases. If the tenants are obligated, under their leases, to provide estoppel certificates when the landlord requests them, the sale contract should contain a condition requiring the delivery to the buyer, on the close of escrow, of such a certificate from each tenant. For discussion of estoppel certificates, see California Real Estate Law and Practice, Ch. 153, *Drafting Commercial Leases* (Matthew Bender).

[b] Purpose of Certificate

A prospective buyer of rented property should confirm that the leases encumbering the property are enforceable. In addition to examining the leases, seller's books, and related correspondence, the buyer should also obtain confirmation from each tenant that the seller has not breached the lease, that no security deposits are being held by the seller other than as shown on the seller's books, and that no rent has been paid in advance except as shown by those books. The most effective and binding way to obtain this confirmation is to require the seller to deliver to the buyer before the close of escrow an estoppel certificate signed by each tenant stating these matters.

[c] Effect of Certificate

Whenever a party in litigation has, by his or her own statement or conduct, intentionally and deliberately led another to believe that a particular thing is true and to act on that belief, the party is not, in any litigation arising out of the

statement or conduct, permitted to contradict it [*Evid. Code § 623*]. The tenant's estoppel certificate should expressly certify that the tenant understands that the buyer will materially rely on the certificate in purchasing the leased property. In any future litigation arising under the lease, the tenant will be estopped to deny the truth of the statements contained in the certificate.

PRACTICE TIP

Tenant Estoppel Certificates Given Conclusive Effect Under *Evid. Code § 622*. Aside from *Evid. Code § 623*, one court has applied the conclusive presumption of *Evid. Code § 622* to tenant estoppel certificates [*see Plaza Freeway Ltd. Partnership v. First Mountain Bank (2000) 81 Cal. App. 4th 616, 96 Cal. Rptr. 2d 865]* . In doing so, the court found that an estoppel certificate was an "instrument" under § 622, eschewing a narrower definition adopted in a prior decision. *Plaza Freeway* may be an even better basis than § 623 for enforcing estoppel certificates, because reliance need not be demonstrated. Instead, *Evid. Code § 622* establishes a *conclusive* presumption, a presumption not subject to evidentiary contradiction as a matter of law [*Gayton v. Pacific Fruit Express Co. (1932) 127 Cal. App. 50, 61, 15 P.2d 217]* . However, note that *Plaza Freeway* was distinguished in a 2004 case which held that the estoppel certificate was not conclusive evidence of the contract terms because it created an ambiguity: the certificate stated that the lease remained in effect but created an ambiguity as to the continued existence of an option in the lease [*Miner v. Tustin Avenue Investors (2004) 116 Cal. App. 4th 264, 272, 10 Cal. Rptr. 3d 178]* . *By William M. Hensley.*

An estoppel can be applied only to representations relating to past or present facts, not to expressions of opinion concerning future events [*Berverdor, Inc. v. Salyer Farms (1950) 97 Cal. App. 2d 459, 464, 218 P.2d 138]* . The tenant is therefore only estopped to deny that the facts stated in the tenant's certificate were true at the date the certificate was made. Consequently, the buyer should insist that the certificates be prepared as close as possible to the closing date.

[2] FORM

Tenant's Estoppel Certificate

To:_____[*name of buyer*]
_____[*buyer's address*]

I hereby certify that:

1. I am the tenant in possession of_____[*describe leased premises by unit and address*] ("the premises").

2. I hold the premises under a written lease entered into between_____[me *or name*] as tenant and_____[*name*] as landlord dated _____, a copy of which is attached to this certificate._____[*Add, if appropriate:* The lease was duly assigned to me by _____ (*name of tenant*) by a written instrument dated _____, a copy of which is attached to this certificate.] There are no other agreements between me and the landlord.

3. My rent payments for the premises began to accrue on_____[*date*]. The present rent on the premises is $_____ per [month *or other period*]. The rent has been paid through_____[*date*]. I have also paid $_____ as a security deposit and $_____ as the last month's rent.

4. I have not assigned my lease or sublet the premises.

5._____[I do not have the option of extending the term of the lease *or* I have _____ (*number*) option(s) to extend the term of the lease for a period of _____ (*specify*)].

6. I do not have an option to purchase the premises or any other interest in the premises other than my lease_____[except as follows: _____ (*specify*)].

7. As of the date of this certificate, I am not in default in the performance of the lease and I have not committed any breach of it_____[except as follows: _____ (*specify*)].

8. To my knowledge the landlord is not in default in the performance of the lease and has not committed any breach of it_____[except as follows: _____ (*specify*)].

9. I have no claim against the landlord for any deposits except the above-mentioned security deposit.

10. As of the date of this certificate, I have no defenses or offsets I could allege in any action brought against me for rent accruing under the lease after_____[*date rent next becomes due*] _____[except as follows: _____ (*specify*)].

11. I make this certificate with the understanding that you are considering buying the leased premises and that if you do buy the premises, you will do so in material reliance on this certificate.

Signed_____[*date*] at_____[*city*], California.

[*Add, if tenant's obligation, under lease, is to provide sworn certificate:* I declare under penalty of perjury that the foregoing is true and correct.]

_____ [*signature of tenant*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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9-23 California Legal Forms--Transaction Guide § 23.323

AUTHOR: William M. Hensley Editorial Consultant

§ 23.323 Bill of Sale of Personal Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a bill of sale for the purchase of tangible or intangible personal property that is transferred in connection with the sale of real property. A bill of sale is a written agreement by which one person transfers his or her title to goods or chattels to another person [*Hull v. Ray (1926) 80 Cal. App. 284, 289, 251 P. 810* ; *see Civ. Code § 1053*; *see also Civ. Code § 1052 et seq.*]. When used in connection with a sale of real property, the bill of sale provides the buyer with written evidence of his or her ownership of the personal property included in the sale. The descriptions in the sale contract and bill of sale of the subject real property should be identical.

The bill of sale may include a warranty by the seller regarding the seller's title to the personal property and the condition of the property. For further discussion of bills of sale, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[b] Deposit in Escrow

The parties should agree that the seller is to deposit the bill of sale with the escrow agent for delivery to the buyer on the close of escrow. A bill of sale effectively vests the interest to be transferred only on its delivery [*see Civ. Code § 1054*]. The bill of sale cannot be delivered conditionally. Delivery to the buyer, or the buyer's agent as such, is necessarily absolute, and the bill of sale takes effect on delivery, discharged of any condition on which the delivery was made [*see Civ. Code § 1056*]. By depositing the bill of sale in escrow, the seller is assured that the delivery (and transfer of title) will not take place until and unless the escrow closes.

[2] FORM

Bill of Sale of Personal Property

BILL OF SALE OF PERSONAL PROPERTY

Pursuant to a contract of sale dated _____ ("the Contract") between_____[*name and capacity*] ("Seller") and_____[*name and capacity*] ("Buyer"), and for the consideration set forth in the Contract, the receipt of which is acknowledged, Seller sells, assigns, transfers, conveys, and delivers to Buyer [the personal property described in Exhibit A, which is attached to this bill of sale and incorporated by reference *or* the following personal property: _____ (*describe*)] ("the personal property").

[*Add, if appropriate:* Seller warrants that Seller is the lawful owner of the personal property; Seller has the right to transfer and convey the personal property; the personal property is free from all liens, claims, encumbrances, or security interests (except as set forth in the Contract); _____ (*add if desired:* the personal property is in good condition, reasonable wear and tear excepted;) and Seller will defend Buyer's title to the personal property against all persons.]

Date: _____
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormationGeneral OverviewContracts LawTypes of ContractsPersonal PropertyReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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9-23 California Legal Forms--Transaction Guide § 23.324

AUTHOR: William M. Hensley Editorial Consultant

§ 23.324 Notice of Rescission of Home Equity Sale Transaction [Civ. Code § 1695.14(b)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of rescission of a home equity sale transaction. It is designed to be used by a property owner to rescind such a transaction because of a violation of the prohibition against unconscionable home equity sale transactions [*see Civ. Code §§ 1695.13, 1695.14(b)*; *see also* [b], *below*]. For an overview of the law governing home equity sale transactions, see *§ 23.211[1]*.

For discussion of certain disclosures that a representative of an equity buyer must make before the transfer of any interest in the real property that is the subject of a home equity sale contract [*see Civ. Code § 1695.17*; *see also Civ. Code §§ 1695.15, 1695.16*], see *§ 23.308[1]*.

[b] Rescission of Unconscionable Transaction

It is unlawful for any person to initiate, enter into, negotiate, or consummate any transaction involving residential real property in foreclosure [*see Civ. Code § 1695.1(b)*; *see also § 23.211[1][b]*] if the person, by the terms of the transaction, takes unconscionable advantage of the property owner in foreclosure [*Civ. Code § 1695.13*; *see Civ. Code § 1695.1(f)* ("property owner" means record title owner of residential real property in foreclosure at time notice of default was recorded)]. Following a violation of this prohibition, the transaction is voidable and may be rescinded by the property owner within two years of the date of the recordation of the conveyance of the residential real property in foreclosure [*Civ. Code § 1695.14(a)*]. The equity seller may also bring an action for damages or other equitable relief against the equity buyer for such a violation [*see Civ. Code § 1695.7*; *see also § 23.211[1][g]*].

The rescission remedies are in addition to any other remedies provided by law [*Civ. Code § 1695.14(e)*].

[c] Procedure for Rescission

To rescind, the property owner must take the following steps within two years of the date of the recordation of the conveyance to the equity buyer [*Civ. Code § 1695.14(b)*]:

- Give written notice of the rescission as provided in *Civ. Code § 1691* [*see* [d], [e], *below*] to the equity buyer and his or her successor in interest, if the successor in interest is not a good faith purchaser or encumbrancer for value [*see* [f], *below*].

- Record the notice of rescission with the county recorder of the county in which the property is located.

- Restore or offer to restore to the other party everything of value received from that party [*see Civ. Code § 1691*; *see also* [e], *below*].

The equity buyer and his or her successor in interest have 20 days after the delivery of the notice in which to reconvey title to the property free and clear of encumbrances created subsequent to the rescinded transaction. On a failure to reconvey title within that time, the rescinding party may bring an action to force the rescission and cancel the deed [*Civ. Code § 1695.14(a), (b)*]. In any such action, the prevailing party is entitled to costs and reasonable attorney's fees [*Civ. Code § 1695.14(d)*].

[d] Required Contents of Notice

The notice of rescission must be in writing. It must contain the names of the property owner, the equity buyer, and any successor in interest holding record title to the real property. It must also particularly describe the real property [*Civ. Code § 1695.14(b)*; *see Civ. Code § 1691*].

[e] Restoration of Consideration

Rescission of an unconscionable home equity sale transaction is effected only on written notice as provided in *Civ. Code § 1691* [*Civ. Code § 1695.14(b)*]. To effect the rescission, the property owner must do the following promptly on discovering the facts that entitle him or her to rescind if he or she is free from duress, menace, undue influence, or disability, and is aware of the right to rescind [*Civ. Code § 1691*]:

- Give notice of rescission to the equity buyer.

- Restore to the equity buyer everything of value that he or she has received from the equity buyer under the contract, or offer to restore this consideration on the condition that the equity buyer does likewise, unless the equity buyer is unable or positively refuses to do so [*Civ. Code § 1691*].

[F] Good Faith Purchaser or Encumbrancer

The rescission will not affect the interest of a good faith purchaser or encumbrancer for value if the purchase or encumbrance occurred before the recordation of the notice of rescission, even if that buyer or encumbrancer was aware that the property was residential real property in foreclosure. However, this does not abrogate any duty of inquiry that exists as to rights or interests of persons in possession of the residential real property in foreclosure [*Civ. Code § 1695.14(c)*].

[g] Acknowledgment for Recordation

The notice of rescission is to be recorded [*Civ. Code § 1695.14(b)*]. Before an "instrument" can be recorded, its

execution must be acknowledged, unless the instrument is one of certain kinds that specifically need not be acknowledged [*Gov. Code § 27287*]. The notice of rescission is not described by any provision allowing for specified instruments to be recorded without acknowledgment. The notice of rescission would be an "instrument" in this context if "signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty" [*Gov. Code § 27287*]. It is not clear whether the notice of rescission would be an "instrument" and therefore would have to be acknowledged for recording. As a practical matter, acknowledging it will be necessary for having it recorded.

[2] FORM

Notice of Rescission of Home Equity Sale Transaction [Civ. Code § 1695.14(b)]

Recording requested by
_____[*name*]

When recorded mail to
_____[*name*]
_____[*street address*]
_____[*city, state, zip*]

Space above this line for recorder's use

NOTICE OF RESCISSION

TO:_____[*name of equity buyer or successor in interest*]

On_____[*date*], which is the date a notice of default respecting the following described real property was recorded, the undersigned was the record title owner of residential real property commonly known as_____[*street address*], located in the City of _____, County of _____, State of California, and more particularly described as follows: [*legal description*] ("the Property"). On [*date contract was signed*], the undersigned entered into a home equity sale contract with_____[*name of equity buyer*], who was the equity purchaser under that contract, incident to the sale of the Property in foreclosure. [*Add, if appropriate:* As of the date of this notice, _____ (*name*) is the successor in interest of _____ (*name of equity buyer*), holds record title to the Property, and is not a good faith purchaser or encumbrancer for value as described in *Civil Code Section 1695.14(c)*.] During the course of this sale transaction,_____[*name of equity buyer or other appropriate person*] took unconscionable advantage of the undersigned, within the meaning of and in violation of *Civil Code Section 1695.13*, by [*describe acts*]. Therefore, pursuant to *Civil Code Section 1695.14*, the undersigned hereby rescinds the above transaction and demands reconveyance of title to the Property free and clear of any encumbrances subsequent to that transaction, within 20 days after the delivery of this notice.

The undersigned offers to return all of the consideration the undersigned received under the above contract on condition that the title to the Property be reconveyed as demanded in this notice.

Date: _____
_____ [*signature*]
_____ [*typed name*]

State of California

County of _____

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared_____[*name*], who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that_____[he *or* she] executed the same in_____[his *or* her] authorized capacity, and that by_____[his *or* her] signature on the instrument the person executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
_____ [*signature*]
[*seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleRemediesRescission & Restitution



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9-23 California Legal Forms--Transaction Guide § 23.325

AUTHOR: William M. Hensley Editorial Consultant

§ 23.325 License to Enter for Environmental Inspection and Testing

[1] Comment--Use of Form

The form in [2], *below*, is an agreement giving the buyer a limited license to enter the property for the purpose of performing environmental tests, pursuant to a provision in the sale contract giving the buyer the right to inspect and test the property. If this form is to be used, an appropriate supporting provision should be inserted into the sale contract. The agreement entitles the buyer to bring any needed experts and laborers onto the property for that purpose and obligates the buyer to restore the property (and any affected contiguous property) to its condition before the agreement was signed. This form is based on a form of agreement furnished by William M. Hensley, Esq., of Jackson, DeMarco & Peckenpaugh, Irvine, California.

[2] FORM

License to Enter for Environmental Inspection and Testing

This agreement ("Agreement") is entered into_____[*date*] by and between_____[*name of seller*] ("Seller"), [*capacity of seller, e.g.,* a California corporation or husband and wife] and_____[*name of buyer*] ("Buyer"),_____[*capacity of buyer*].

By a separate contract (the "Sale Contract"), Seller has agreed to sell and Buyer has agree to purchase the real property situated in_____[the City of _____, *or* an unincorporated area of] _____ County, California, and more particularly described [as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this agreement and incorporated by reference] ("the Property"). Under the Sale Contract, Buyer has a contingency period of [*number*] days to inspect and accomplish environmental testing on the Property. Buyer has requested that Seller provide, and Seller is willing to provide, limited access to the Property for purposes of accomplishing the inspection and testing contemplated under the Sale Contract.

THEREFORE, in consideration of their mutual undertakings, Seller and Buyer agree as follows:

1. License and Limits of Seller' Responsibility. Seller hereby grant to Buyer and Buyer's representatives, agents, consultants, engineers, project managers or directors, contractors, and subcontractors (collectively the "Contractors") a nonexclusive license to enter on the Property solely in order to inspect it and to conduct all necessary environmental testing in connection with the contingency period provided for in the Sale Contract (the "Inspection Activities"). Seller shall have no responsibility or obligation to contribute any money or provide "in-kind" any labor, personnel or material in connection with the Inspection Activities.

2. License Term.

a. The license granted under this Agreement shall commence when this Agreement is signed by Seller and shall remain in effect until midnight on _____ [*date*] (the "Termination Date").

b. Upon termination of the license, Inspection Activities shall cease. All equipment and materials placed on the Property by Buyer or Contractors shall be removed before midnight on the Termination Date. Within _____ [*number*] days after the Termination Date, Buyer shall effect restoration of the Property substantially to its original condition and in a manner that is satisfactory to the Seller.

c. If Buyer or the Contractors should fail to perform any obligation under this Agreement, then Buyer authorizes Seller to take the following actions and all other actions that are reasonably necessary or that Seller deems convenient for the purpose of taking these actions: (i) cause the Inspection Activities to cease; (ii) have materials and equipment removed from the Property at Buyer's expense; and (iii) cause the Property to be restored to a condition satisfactory to Seller at Buyer's expense.

d. If Seller commences taking any of the actions identified in the preceding paragraph, then (i) neither Buyer nor the Contractors shall interfere with Seller's actions; (ii) Buyer and the Contractors shall waive any and all claims against Seller relating to Inspection Activities or removal of any material or equipment from the Property; (iii) Buyer and the Contractors shall pay or reimburse to Seller, within five days of a demand by the Seller, all of Seller's costs and expenses, including any attorney's fees, incurred in taking any such action.

e. Buyer shall have each of the Contractors sign an instrument acknowledging the terms of this Agreement and agreeing to the terms of this Agreement. Buyer shall promptly deliver each signed instrument to Seller.

3. Government Permits And Authorizations. Buyer shall obtain, at Buyer's expense, all governmental permits and authorizations required by any government agency for Buyer and the Contractors to perform the Inspection Activities or any related activities on the Property, including, without limitation, the restoration of the Property substantially to its original condition to the Seller's satisfaction.

4. Non-Interference With Contiguous Property. The Inspection Activities shall not interfere with or disrupt the normal daily activities on property contiguous to the Property or with any development on the contiguous property (including demolition activities) and shall not endanger the health, safety, or welfare of Seller or anyone else on the contiguous property while Inspection Activities are occurring (including, but not limited to, any placement, movement, or removal activities).

5. Removal of Equipment and Materials; Environmental Testing Obligations.

a. Buyer and the Contractors may maintain on the Property only such equipment, vehicles, materials, and personnel as are reasonably necessary for completion of the Inspection Activities. Such equipment, vehicles, and materials shall be

located and stored in such a manner as not to interfere with entering, leaving, and using the Property and the contiguous property. To the extent that any such equipment, vehicles, materials, and personnel have served their function and their presence is not reasonably necessary to perform the Inspection Activities, Buyer and the Contractors shall promptly remove such equipment, vehicles, material, and personnel from the Property. Buyer and the Contractors shall not maintain equipment, vehicles, materials, and personnel on contiguous property.

b. If any portion of the contiguous property suffers any damage by reason of the acts or omissions of Buyer or the Contractors, then Buyer or the Contractors shall be solely responsible for reasonably restoring the contiguous property to its condition existing immediately before the occurrence of such damage and to the satisfaction of the owners of the contiguous property.

c. Buyer and the Contractors shall be responsible for the legal disposition of any and all wastes, samples, extractions, injections, and by-products derived from the Inspection Activities. If any Hazardous Material (as defined in the next paragraph) is generated as a result of or in connection with the Inspection Activities, Buyer and the Contractors shall be deemed the generator and shall execute any required Hazardous Material manifest or hazardous waste manifest. Buyer shall be responsible for any contamination of the Property or contiguous property by Hazardous Materials that Buyer or the Contractors cause to be transported or deposited onto the Property or contiguous property in connection with the Inspection Activities or any other action by Buyer or the Contractors.

d. For purposes of this Agreement, "Hazardous Material" means any chemical, substance, material, controlled substance, object, waste, or combination thereof, that is or may be hazardous to human health or safety or the environment because of radioactivity, ignitability, corrosivity, reactivity, explosivity, toxicity, carcinogenicity, matugenicity, phytotoxicity, infectiousness, or other harmful or potentially harmful properties or effects, including, without limitation, petroleum hydrocarbons, petroleum products, fractional petroleum products, degraded petroleum products, and all chemicals, substances, materials, controlled substances, or objects defined or regulated under any state, federal or local law or regulation based on such properties or effects.

e. Buyer shall be responsible for any migration of Hazardous Material in groundwater under the Property or contiguous property that is caused or contributed to by the Inspection Activities.

6. Compliance With Law. Any activities conducted on the Property or contiguous property by Buyer or the Contractors pursuant to this Agreement shall be conducted in compliance with law.

7. Indemnification and Defense of Seller. Buyer shall defend Seller and the Property against, and indemnify and hold Seller and the Property harmless from, all liens, claims, losses, liabilities, and expenses asserted against or incurred by Seller or the Property and caused by Buyer's entry or activities on the Property. Seller shall not be responsible or liable for any harm, death, or disability caused to any employee, representative, agent, or contractor of Buyer or the Contractors while on the Property or contiguous property, or liable for any harm, claim, or any other event relating to the Inspection Activities and equipment placed on the Property.

8. Liens. Buyer and the Contractors shall keep the Property and contiguous property free and clear of all mechanic's, materialman's, and other liens resulting from any work or activity performed by Buyer or the Contractors.

9. Insurance. Buyer shall purchase, at Buyer's expense, and keep in force during the term of this Agreement, a public liability insurance policy covering Buyer and the Property with a combined single limit of at least $500,000 per occurrence, issued by a company and in a form and substance satisfactory to Seller, which approval by Seller shall not be unreasonably withheld, and naming Seller as additional insured. Buyer shall provide to Seller written proof of insurance prior to any entry on the Property for the purposes of the Inspection Activities and the work contemplated under this Agreement.

10. Venue. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be brought in the _____ County Superior Court.

11. Attorney's Fees. In the event that any party to this Agreement brings proceedings to enforce or construe the terms of this Agreement, the party not substantially prevailing in such proceedings shall pay to the substantially prevailing party all reasonable attorney's fees and all costs incurred by the substantially prevailing party, together with all costs of such proceeding.

12. References. References to a party include, bind, and inure to the benefit of, that party's officers, agents, employees, successors in interest and assignees.

13. Successors and Assigns. Buyer shall not assign any of Buyer's rights and shall not delegate any of Buyer's duties under this Agreement without the prior written consent of Seller, which consent may be withheld for any reason or for no reason. Subject to the foregoing, this Agreement shall be binding on and inure to the benefit of Seller and Buyer and their respective personal representatives, successors, and assigns; provided, however, that an assignment by Buyer of this Agreement shall not release Buyer from any obligation under this Agreement.

14. Authorized Signatories. Individuals executing this Agreement on behalf of a party represent and warrant that they are duly authorized to execute and deliver this Agreement on that party's behalf.

15. Changes. This Agreement may be changed only by the written agreement of both Seller and Buyer. All changes of this Agreement shall be binding on Seller and Buyer, without any additional legal consideration.

16. Headings. The headings contained in this Agreement are inserted for convenience only and shall not be considered in the construction or implementation of any provision.

17. Non-Waiver of Covenants and Conditions and Claims. The waiver by one party of the performance of any covenant or condition under this Agreement shall not invalidate this Agreement nor shall it be considered a waiver of any other covenant or condition under this Agreement. By entering into this Agreement, Seller does not waive any legal rights with respect to potential claims or causes of action that Seller has or may have in the future against Buyer, the Contractors, or any other person or entity not a party to this agreement. All such claims are expressly reserved _____ [except for those claims released by the settlement agreement dated _____ between Seller and Buyer].

18. Governing Law. The interpretation and enforcement of this Agreement shall be governed by the laws of the State of California. This Agreement shall be interpreted to give effect to its fair meaning and shall be construed as though it was prepared by both Seller and Buyer.

19. Severability. In the event that any provision of this Agreement is deemed not enforceable, the remaining provisions shall remain in full force and effect.

20. Test Results. If Buyer cancels the Sale Contract, Buyer shall provide Seller, at no cost to Seller, with a copy of all reports of tests of the Property prepared for Buyer. All information provided to or obtained by Buyer in connection with Buyer's investigation of the Property shall be kept in strict confidence by Seller, unless such disclosure is compelled by law or legal process.

21. Notice. All notices required or allowed in this Agreement shall be in writing and shall be sent to the addresses shown below. A party may change the party's address for notice by giving notice to the other party. Notice must be delivered by personal delivery, FAX transmission during normal business hours of the recipient, an overnight delivery service, or certified U.S. mail with return receipt requested. Notices are effective on the earliest of the date received, the

date of the delivery receipt, or the fifth day after postmark, as applicable.

To Seller: _____ [*address*]
To Buyer: _____ [*address*]
Date: _____
SELLER
_____ [*signature*]
_____ [*typed name*]
BUYER
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsLicensesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 23 REAL PROPERTY SALES AGREEMENTS
PART IV. FORMS
C. Related Instruments
2. Other Documents

9-23 California Legal Forms--Transaction Guide § 23.326

AUTHOR: William M. Hensley Editorial Consultant

§ 23.326 Temporary Lease Agreement Between Seller and Buyer [CAR Form RLAS]

[1] Comment--Use of Form

The form in [2], *below*, is the California Association of Realtors (CAR) Residential Lease After Sale [CAR Form RLAS, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied]. It is for use when the seller of a home needs additional time to move out after the close of escrow. In this situation it is often preferable to set out the rights and obligations of the parties in a separate agreement, rather than merely to specify in the sale contract that possession will be delivered to the buyer a stated number of days after the close of escrow. The primary advantage of a separate agreement is that it permits the parties to cover certain problem areas that could be confused with terms of the sale if inserted in the sale contract, such as a performance deposit and insurance coverage.

The parties should make delivery of possession pursuant to the interim occupancy agreement a condition in the underlying sale contract [*see § 23.200[1][d][iii]*].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORMn

Temporary Lease Agreement Between Seller and Buyer [CAR Form RLAS]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow

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PART IV. FORMS
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2. Other Documents

9-23 California Legal Forms--Transaction Guide § 23.327

AUTHOR: William M. Hensley Editorial Consultant

§ 23.327 Interim Occupancy Agreement [CAR Form IOA]

[1] Comment--Use of Form

The form in [2], *below*, is the California Association of Realtors (CAR) Interim Occupancy Agreement [CAR Form IOA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied]. It is designed for use when the buyer of real property will take possession of the property before the close of escrow. The agreement is structured as a lease arrangement. It provides that the buyer (i.e., tenant) must vacate the premises on termination of the agreement unless the parties have signed a new agreement or the landlord (i.e., seller) accepts rent from the tenant, in which case a month-to-month tenancy is created which either party may terminate in accordance with *Civ. Code § 1946.1* [*see* Ch. 35B, *Modification and Termination of Leases*]. The agreement specifies that the buyer's personal property is not insured by the seller and that the buyer is to carry renter's insurance to protect that property from loss [*see § 23.25*].

For discussion of the impact of the Uniform Vendor and Purchaser Risk Act [*Civ. Code § 1662*] on the allocation of risk of loss following the transfer of possession, see *§§ 23.19* and *23.251[1]*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[2] FORMn

Interim Occupancy Agreement [CAR Form IOA]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRight of PossessionReal Property LawPurchase & SaleEscrow

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY

9-24 California Legal Forms--Transaction Guide 24.syn

AUTHOR: by Patricia Hughes Mills

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§ 24.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 24.03-24.04 [Reserved]

§ 24.05 Law Reviews and Periodicals

§ 24.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§§ 24.07-24.09 [Reserved]

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§ 24.11 Definitions

§§ 24.12-24.19 [Reserved]

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§ 24.22 Three Party Exchanges

[1] "Alderson" Exchanges

[2] "Baird" Exchanges

§ 24.23 Three-Party-Three-Property Exchanges

§ 24.24 Four Party Exchanges

§ 24.25 Deferred Exchanges

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§ 24.40 Requirements for "Tax-Free" Exchange

[1] Qualified Property

[2] Nonqualified Property

[3] Like-Kind Property

[4] Restrictions on Nonsimultaneous Exchanges

[a] In General

[b] 1984 Amendments

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[i] Identification Generally

[ii] Identification of Multiple Replacement Properties

[iii] Revocation of Identification

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[e] Safe Harbors to Avoid Premature Actual or Constructive Receipt

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[ii] First Safe Harbor: Security or Guarantee Arrangements

[iii] Second Safe Harbor: Transferee's Obligation Secured by Cash or Cash Equivalent

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§ 24.42 Receipt of Money or Other Property ("Boot")

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[2] Recognition of Gain or Loss on Boot Received by Taxpayer

[3] Property Boot Given Offsets Any Form of Boot Received

[4] Mortgage Boot Received Is Offset by Mortgage Boot Given

[5] Property Boot Received Is Not Offset by Mortgage Boot Given

[6] Recognition of Gain or Loss on Property Boot Given by Taxpayer

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[1] Composite Basis and Allocation to Qualified Property

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§ 24.45 Recapture of Depreciation

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Scope

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§ 24.100 Facts

Scope

§ 24.101 Documents

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§§ 24.102-24.109 [Reserved]

§ 24.110 Determining Whether to Sell or Exchange

Scope

§ 24.111 Appropriate Form of Exchange

Scope

§ 24.112 Property to Be Exchanged

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§ 24.113 Planning Exchange in Accordance With Tax Goals

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§§ 24.114-24.119 [Reserved]

§ 24.120 Drafting Exchange Agreement

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§ 24.121 Drafting Escrow Instructions for Exchange

Scope

§ 24.122 Conducting Two Party Exchange

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§ 24.123 Conducting Three Party Exchange

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§ 24.131 Calculating Basis of Property Received in Trade

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§§ 24.132-24.199 [Reserved]

§ 24.200 Escrow Instructions--Short Form

[1] Comment

[a] Use of Form

[b] Purpose of Escrow and Escrow Instructions

[c] Use of Joint or Separate Instructions

[d] Identity of Parties

[e] Contents of Instructions

[i] In General

[ii] Title Insurance

[iii] Exceptions to Title

[iv] Proration

[v] Failure of Escrow to Close

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[2] Form

Escrow Instructions--Short Form

§ 24.201 Escrow Instructions--Long Form

[1] Comment--Use of Form

[2] Form

Escrow Instructions--Long Form

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§ 24.210 Exchange Agreement

[1] Comment

[a] Use of Form

[b] Contract Requirements

[c] Relationship to Escrow Instructions

[d] Contents of Agreement

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[ii] Exchange of Properties

[iii] Exceptions to Title

[iv] Valuation and Transfer of Boot

[v] Automatic Termination of Escrow

[vi] Concurrent Closing of Exchange and Sales Escrows

[vii] Title Insurance

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[2] Form

Exchange Agreement

§ 24.211 Three Party Exchange or Sale Agreement--With Escrow Instructions Included

[1] Comment

[a] Use of Form

[b] Provision for Escrow Instructions

[c] "Sale in Lieu" Provision

[d] Taxation of Transaction as Sale or Exchange

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[f] Exceptions to Title

[g] Right of Entry

[2] Form

Three Party Exchange or Sale Agreement--With Escrow Instructions Included

§ 24.212 Three Party Option to Exchange

[1] Comment

[a] Use of Form

[b] Options Generally

[c] Consideration

[i] Effect on Contract

[ii] Retention of Consideration

[d] Exercise of Option

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[f] Termination of Option

[i] Automatic Expiration

[ii] Title Problems After Recordation

[2] Form

Three Party Option to Exchange

§ 24.213 Nonsimultaneous (Deferred) Exchange Agreement

[1] Comment

[a] Use of Form

[b] Provision for Escrow Instructions

[c] "Sale in Lieu" Provision

[d] Requirements for Deferred Exchange

[i] Identification and Receipt

[ii] Safe Harbor: Security or Guarantee Arrangements

[e] Acquisition and Closing Costs

[2] Form

Nonsimultaneous (Deferred) Exchange Agreement

by Patricia Hughes Millsn*

FOOTNOTES:

(n4)Footnote *. Patricia Hughes Mills is a certified tax specialist practicing in Los Angeles, California. She is a graduate of Syracuse University College of Law and received her LL.M. in Taxation from the University of San Diego. Ms. Mills is a member of the California State Bar Taxation Section Executive Committee and teaches tax courses at Golden Gate University's Masters of Business Taxation program.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY

9-24 California Legal Forms--Transaction Guide Scope

AUTHOR: by Patricia Hughes Mills

Scope

by Patricia Hughes Millsn* Scope

This chapter covers the tax-deferred exchange of real property known as a "like-kind" exchange. The Legal Background discusses the various types of like-kind exchanges and their treatment under federal and state income tax law. Included is a discussion of the requirements imposed for nonsimultaneous (deferred) exchanges. The Transaction Guide sets forth the factors to be considered and the procedures to be followed to effect a tax-free exchange. The Forms section contains agreements for two party and three party exchanges designed to accomplish the transaction, as well as an agreement for a deferred exchange and escrow instructions for the exchange.

For a discussion of real property sales contracts, see Chapter 23, *Real Property Sales Agreements* . Escrow is discussed in Chapter 26, *Real Property Escrows*. Procedures and forms relating to the drafting of deeds are set forth in Chapter 27, *Deeds and Recording*.

FOOTNOTES:
(n5)Footnote *. Patricia Hughes Mills is a certified tax specialist practicing in Los Angeles, California. She is a graduate of Syracuse University College of Law and received her LL.M. in Taxation from the University of San Diego. Ms. Mills is a member of the California State Bar Taxation Section Executive Committee and teaches tax courses at Golden Gate University's Masters of Business Taxation program.



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A. Primary Sources

9-24 California Legal Forms--Transaction Guide § 24.01

AUTHOR: by Patricia Hughes Mills

§ 24.01 California Statutes

Disclosure of condition of real property containing one to four dwelling units before exchange. *Civ. Code §§ 1102-1102.14*.

Installation of smoke detector before exchange of single-family dwelling. *Health & Safety Code § 13113.8*.

Property acquired through exchanges included within the concept of "quasi-community property." *Prob. Code § 66*; *Rev. & Tax. Code § 15300(b)*.

Gain or loss on disposition of property determined in accordance with Internal Revenue Code. *Rev. & Tax. Code § 18031*.



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Primary Sources

9-24 California Legal Forms--Transaction Guide § 24.02

AUTHOR: by Patricia Hughes Mills

§ 24.02 Federal Sources

[1] Statutes

Exchange of property held for productive use or investment. *I.R.C. § 1031*.

[2] Regulations

Definition of "like-kind" property. *Treas. Reg. § 1.1031(a)-1(b), (c).*

Taxation of boot received in tax-free exchange. *Treas. Reg. § 1.1031(b)-1*.

Calculating basis of property acquired pursuant to tax-free exchange. *Treas. Reg. § 1.1031(d)-1*.

Treatment of assumption of liabilities. *Treas. Reg. § 1.1031(d)-2*.

Treatment of Deferred Exchanges. *Treas. Reg. § 1.1031(k)-1*.



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9-24 California Legal Forms--Transaction Guide §§ 24.03-24.04

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§§ 24.03[Reserved]



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B. Secondary Sources

9-24 California Legal Forms--Transaction Guide § 24.05

AUTHOR: by Patricia Hughes Mills

§ 24.05 Law Reviews and Periodicals

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Murrel & Panich, *Many Transaction Costs Can Reduce Boot in Like-Kind Exchanges, 74 J. Tax'n 320 (1991).*

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Levine and Glicklich, *Tax Free Real Estate Transactions: New Developments Involving Like-Kind Exchanges, 14 J. Real Est. Tax'n 172 (1987).*

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O'Dell, *Like-Kind Exchanges of Real Estate: Are They Still Viable? 62 Taxes 17 (1984).*

Solomon, *The Section 1031 Exchange of Real Estate--Has ACRS Decreased Its Attractiveness? 10 J. Real Est. Tax'n 346 (1983).*

Dallman, *Satisfying the "Exchange" Requirement in Simultaneous Multi-Party 1031 Deals, 56 J. Tax'n 74 (1982).*

Nad, *Effective Real Estate Tax Planning--Like-Kind Exchanges,* 40 NEW YORK UNIVERSITY INSTITUTE ON FEDERAL TAXATION 20-1 (1982) (Matthew Bender).

Faggen, *Tax Deferred Exchanges of Real Estate,* 39 NEW YORK UNIVERSITY INSTITUTE ON FEDERAL TAXATION 29-1 (1981) (Matthew Bender).

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Duhl, *Like-Kind Exchanges under Section 1031: Multi-Party Exchanges, Nonsimultaneous Exchanges, and Exchanges of Partnership Interests, 58 Taxes 949 (1980).*

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9-24 California Legal Forms--Transaction Guide § 24.06

AUTHOR: by Patricia Hughes Mills

§ 24.06 Text References

[1] Matthew Bender Sources

CALIFORNIA LEGAL FORMS (Matthew Bender)

Ch. 21, *Agreements With Brokers and Agents;* Ch. 22, *Options to Purchase Real Property;* Ch. 23, *Real Property Sales Agreements*; Ch. 26, *Real Property Escrows*

CALIFORNIA REAL ESTATE LAW & PRACTICE (Matthew Bender)

Ch. 72, *Tax-Deferred Exchanges*

Ch. 91, *Escrow*

Ch. 132, *Disposition* (recapture of depreciation).

J. Rabkin & M. Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Ch. 21, *Sales and Exchanges* (Matthew Bender).

Lasser, INCOME TAX TECHNIQUES, Ch. 38, *Tax-Free Exchanges of Real and Personal Property* (Matthew Bender).

RET: REAL ESTATE FINANCING, Ch. 8, *The Tax-Free Exchange of Real Estate* (Matthew Bender).

J. Rabkin & M. Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION, Ch. 43, *Disposition of Real Estate,* § 43.10 (Matthew Bender).

[2] Additional Text References

Am. Jur. Legal Forms 2d, ch. 103, *Exchange of Property*, § 103.24 (agreement to make exchange).

Mertens, Law of Federal Income Taxation, ch. 20, *Recognition of Gain or Loss on Sales.*

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[3] Legal Encyclopedias

30 Am. Jur. 2d Exchange of Property.

31 Cal. Jur. 3d Exchange of Property.

33 C.J.S. Exchange of Property.



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DIVISION II: REAL ESTATE TRANSACTIONS
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AUTHOR: by Patricia Hughes Mills

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§§ 24.07[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART II. LE GAL BACKGROUND
A. Introduction to Exchanges

9-24 California Legal Forms--Transaction Guide § 24.10

AUTHOR: by Patricia Hughes Mills

§ 24.10 Purpose of Exchange

Owners of real property held for business or investment purposes often wish to dispose of it and replace it with other property of similar character. There are many reasons for doing so: the property may have reached its maximum economic value; it may have been depreciated to such an extent that a substantial portion of the rental income is no longer sheltered from income taxes; or investment leverage may have decreased as the result of both the property's appreciation and the reduction of the principal balance of its mortgage encumbrances over the years [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)].

As a result of changes made by the Tax Reform Act of 1986 [Pub. L. No. 99-514], the importance of tax deduction-related reasons has been diminished, at least for many taxpayers. For example, rental real property is now subject to rules limiting allowable tax losses claimed before the disposition of the property to income accrued from the property (or other "passive" activities) [*see I.R.C. § 469*]. Nonbusiness interest deductions are severely limited compared to prior law. Allowable investment interest expense is limited to investment income in each taxable year [*see I.R.C. § 163(d)*]. With the exception of interest on mortgages for the taxpayer's residence and second home, most personal interest deductions have been eliminated [*see I.R.C. § 163(h)*]. In other words, exchanging property to obtain increased tax deductions is less likely to be profitable than it was prior to the Tax Reform Act of 1986.

The main reason a taxpayer will prefer to exchange rather than sell property is to take advantage of federal tax provisions that allow nonrecognition of gain when real property held for productive use in a trade or business or for investment is exchanged solely for property of a "like-kind" to be held for productive use in a trade or business or for investment. Gain is recognized only to the extent of the net amount of money or other "unlike" property received in the exchange [*I.R.C. § 1031*; *see § 24.42[2]*]. The legislative purpose behind this provision is to defer recognition of gain or loss on those transactions in which a taxpayer's money continues to be invested in the same kind of property, although in theory he or she may have recognized a gain or loss [*see Biggs v. Commissioner (1978) 69 T.C. 905, 913]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesInterest (IRC sec. 163)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & Losses



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Introduction to Exchanges

9-24 California Legal Forms--Transaction Guide § 24.11

AUTHOR: by Patricia Hughes Mills

§ 24.11 Definitions

Various terms are typically used to describe each of the parties and properties involved in an exchange, to aid in the discussion of often complex multiparty exchanges. The party who wishes to effect a tax-free exchange is known as the "taxpayer," since in many transactions that party will be the only one interested in the tax deferral aspects of the exchange [*see § 24.41*]. However, in a two party exchange [*see § 24.21*], the other party to the exchange will also be eligible for tax deferral. The property being transferred by the taxpayer is usually referred to as "Parcel A," and the property being acquired by the tax payer is usually referred to as "Parcel B" or the "target property."

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General Overview



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9-24 California Legal Forms--Transaction Guide §§ 24.12-24.19

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.12[Reserved]



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B. Types of Exchanges

9-24 California Legal Forms--Transaction Guide § 24.20

AUTHOR: by Patricia Hughes Mills

§ 24.20 Exchanges in General

There are three basic types of exchanges: (1) the two party exchange [*see § 24.21*], (2) the "Alderson" three party exchange [*see § 24.22 [1]*], and (3) the "Baird" three party exchange [*see § 24.22 [2]*]. In addition, there are also three-party--three-property exchanges [*see § 24.23*], four party exchanges [*see § 24.24*], and deferred exchanges [*see § 24.25*]. The more complicated varieties of exchanges are composed of one or more elements of the basic types.

The main goal in every multiple party exchange is to properly structure and document the exchange so that the taxpayer's transfer of property to the other party and the taxpayer's acquisition of the new like-kind property cannot be segregated and attacked as two separate and independent transactions that constitute a taxable sale and subsequent purchase rather than an exchange [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender); *see also § 24.123* (format guidelines for exchange)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawState & Local TaxesIncome TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview



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9-24 California Legal Forms--Transaction Guide § 24.21

AUTHOR: by Patricia Hughes Mills

§ 24.21 Two Party Exchanges

The two party exchange involves the exchange of real properties by two parties interested in acquiring each other's property and avoiding recognition of gain on the disposition. In general, if the properties exchanged are of like kind and are not acquired for purposes of resale, the transaction qualifies for nonrecognition of gain [*see* Bernard v. Commissioner, 26 T.C.M. 858 (1967) ; *see also § 24.40*]. Gain will only be recognized to the extent of any cash or boot received [*see I.R.C. § 1031(b)*; *see also § 24.42*].

The tax status of the individual parties in a two party exchange determines whether they qualify to defer recognition of gain, and each party's tax status is independent of the other. For example, in an exchange in which one party can defer gain, the other party will still be required to recognize gain if the latter party is acquiring the property for immediate resale [*see I.R.C. § 1031(a)(2)(A)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.22

AUTHOR: by Patricia Hughes Mills

§ 24.22 Three Party Exchanges

[1] "Alderson" Exchanges

A three party exchange is ordinarily used when a property owner does not want to sell the property unless similar property can be acquired and/or does not want to recognize gain upon disposition of the property. The type of three party exchange known as an "Alderson" exchange [*see Alderson v. C.I.R. (9th Cir. [T.C.] 1963) 317 F.2d 790]* involves three parties and two properties. It is used when a third party (such as a developer) desires to purchase the taxpayer's property ("Parcel A") for cash, but the taxpayer wants to exchange it for similar property, avoiding recognition of gain, and continuing business and investment enterprises on the new property. To solve this problem, the third party acquires for cash another property ("Parcel B") acceptable to the taxpayer. The third party then transfers Parcel B to the taxpayer in exchange for Parcel A. The taxpayer does not recognize gain and has no tax liability, since the exchange was for like-kind property and no boot was received [*see §§ 24.40 [3], 24.41*]. The third party, having purchased the property for cash, also has no tax liability; his or her basis in Parcel A is the carry-over basis from Parcel B by virtue of the exchange [*I.R.C. § 1031(d)*; *Alderson v. C.I.R. (9th Cir. [T.C.] 1963) 317 F.2d 790* ; *see § 24.43*]. The seller of Parcel B, having sold the property for cash, is the only party to the transaction who must recognize gain.

Each of the two steps described above is accomplished through separate escrows. The closing of the two escrows is normally simultaneous.

[2] "Baird" Exchanges

In the type of exchange known as a "Baird" exchange [*see J.H. Baird Publishing Co. (1962) 39 T.C. 608]* , the exchange step of the transaction occurs before the sale step and the intermediary who participates in both steps and both escrows is the owner of the other parcel of property, rather than a third party. The taxpayer first exchanges Parcel A for Parcel B, and then a third party purchases Parcel A for cash. Otherwise, the Baird exchange is similar to the Alderson exchange [*see* [1], *above*]. Both types of exchanges are made up of two distinct elements: a taxable purchase and sale and a straightforward two party exchange. Each of these elements is kept completely separate from the other by using

separate escrows in order for the exchange element of the transaction to have tax-deferred status.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.23

AUTHOR: by Patricia Hughes Mills

§ 24.23 Three-Party-Three-Property Exchanges

A three-party-three-property exchange involves the simultaneous circular transfer of three properties among three parties. Like the two party exchange, this type of exchange clearly qualifies for tax-deferred treatment, and gain is recognized only to the extent of cash or boot received [*see I.R.C. § 1031(a), (b)*; *see also Rev. Rul. 57-244, 1957-1 C.B. 247* ; §§ 24.40-24.42, 24.44].

The issue of whether the transaction would qualify for tax deferral if one of the parties transferred no realty but paid only cash is an open question [*see Halpern v. United States (N.D. Ga. 1968) 286 F. Supp. 255, 258]* . For example, if taxpayer 3 paid only cash to taxpayer 2, the Internal Revenue Service might claim that taxpayer 1 had constructive rights to and possession of the money and attack the transaction as being a taxable sale by taxpayer 1 to taxpayer 3 and a purchase of taxpayer 2's property. Consequently, unless all three taxpayers are exchanging properties, it is be preferable to structure the transaction along the lines of the Alderson or Baird types of three party exchanges discussed in *Section 24.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.24

AUTHOR: by Patricia Hughes Mills

§ 24.24 Four Party Exchanges

There are two varieties of four party exchanges. One is the four-party-four-property exchange in which each of the four parties is a principal acting on that party's own behalf. The other variety, which occurs more frequently, is actually a three-party exchange of either the Alderson, Baird, or three-party-three-property variety with a fourth party who acts as an agent for one of the parties, or is an additional purchaser or seller of all or part of the property involved. The addition of a purchase-sale transaction to a three-party-three-property exchange of three properties is also a four party exchange. If one of the three parties purchases property for purposes of making the exchange, the transaction is like a three party Alderson exchange and only the fourth party who sold property would have to recognize gain. On the other hand, if property was sold by one of the parties after the exchange took place, it would be similar to a Baird exchange and the seller would have to recognize gain from the sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.25

AUTHOR: by Patricia Hughes Mills

§ 24.25 Deferred Exchanges

A deferred exchange can involve two, three, or more parties. A taxpayer may desire a nonsimultaneous or deferred exchange if the taxpayer or the other party or parties is unwilling to wait until suitable exchange property can be located. In a deferred exchange, the taxpayer transfers his or her property before receiving the exchange property.

Nonrecognition treatment does not apply to a nonsimultaneous exchange of property unless (1) the property received by the taxpayer is identified within 45 days of the transfer of the property relinquished by the taxpayer [*I.R.C. § 1031(a)(3)(A)*]; or (2) the property is received by the taxpayer on or before the earlier of the day that is 180 days after the transfer of the relinquished property, or the due date (including extensions) of the taxpayer's tax return for the year in which the relinquished property is transferred [*I.R.C. § 1031(a)(3)(B)*]. These requirements were enacted to curb the practice of deferred exchanges, often referred to as "Starker" exchanges [*see Starker v. United States (9th Cir. 1979) 602 F.2d 1341, 1342-1343]* , in which a taxpayer would transfer property to a purchaser who would promise to purchase a currently unidentified property in the future, at the taxpayer's direction, for transfer to the taxpayer [*see § 24.40[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide §§ 24.26-24.39

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.26[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Taxation of Exchanges

9-24 California Legal Forms--Transaction Guide § 24.40

AUTHOR: by Patricia Hughes Mills

§ 24.40 Requirements for "Tax-Free" Exchange

[1] Qualified Property

To defer recognition of gain realized on the exchange of property, the property transferred by the taxpayer must have been held either (1) for productive use in a trade or business, or (2) for investment, and must be exchanged for property to be held for either of those same purposes [*I.R.C. § 1031(a)(1)*]. Property held by the taxpayer for productive use in a trade or business may be traded for either type of qualifying property. Similarly, property held for investment may be traded for either type of qualifying property [*Treas. Reg. § 1.1031(a)-1(a)*].

Neither the Internal Revenue Code nor the regulations define "property held for productive use in a trade or business" or "property held for investment." Similar language ("property used in the trade or business") is used for depreciation purposes [*see I.R.C. § 167*], and is defined for capital gains treatment as depreciable property used in the trade or business that is held for more than six months, is not includible in inventory, and is not held primarily for sale [*see I.R.C. § 1231(b)(1)* (applicable to property acquired between June 22, 1984, and Jan. 1, 1988); *see also* Pub. L. No. 98-369 § 1001(b)(15) note to *I.R.C. § 1231(b)*]. Although cases interpreting *I.R.C. §§ 167* and *1231* have held that the property need not be actively used to qualify as property used in a trade or business [*see, e.g., Sears Oil Co. v. Commissioner (2d Cir. 1966) 359 F.2d 191, 198]* , the addition of the word "productive" in *I.R.C. § 1031* seems to indicate that property must be actively used to qualify for like-kind exchange treatment.

The regulations provide some guidance as to the nature of property held "for investment." Unproductive real estate that is held by someone other than a dealer for future use or future appreciation in value qualifies as property held for investment [*Treas. Reg. § 1.1031(a)-1(b)*].

The personal residence of a taxpayer is not treated as held for productive use in trade or business or for investment. However, a specified amount of gain from the sale or exchange of a principal residence may be excluded from income if, during the five-year period ending on the date of the sale or exchange, the property was owned and used by the

taxpayer as a principal residence for periods aggregating at least two years [*I.R.C. § 121(a)*; *see I.R.C. § 121(c)* (special treatment of certain sales and exchanges)]. The maximum amount of gain that may be excluded with regard to any sale or exchange is $250,000 for a single taxpayer or $500,000 for married taxpayers filing joint returns and meeting statutory criteria [*I.R.C. § 121(b)(1),(2)*; *see I.R.C. § 121(d)(1)-(3)* (special rules concerning joint returns and treatment of property of former or deceased spouse)]. However, for a sale or exchange after 2008, the exclusion does not reach any part of the gain that must be allocated to a period of nonqualified use, that is, with some exceptions, any period (other than the portion of any period preceding 2009) during which the property was not used as the principal residence of the taxpayer or the taxpayer's spouse or former spouse [*I.R.C. § 121(b)(4)*; *see I.R.C. § 121(b)(4)(C)(ii)* (exceptions to what is period of nonqualified use)]. For additional discussion, see Ch. 23, *Real Property Sales Agreements* .

[2] Nonqualified Property

Not all property held for productive use in a trade or business or for investment qualifies for tax deferral. The following types of property are excepted [*I.R.C. § 1031(a)(2)*]:

- Stock in trade or other property held primarily for sale [*see Land Dynamics v. Commissioner (1978) 37 T.C.M. 1119, 1120]* .
- Stocks, bonds, or notes.
- Other securities or evidences of indebtedness or interest.
- Interests in a partnership (unless the partnership has elected not to be treated as a partnership for tax purposes) [*see I.R.C. §§ 761(a), 1031(a)(2)*].
- Certificates of trust or beneficial interests.
- Choses in action.

Property that is sold immediately after the exchange may be treated as property held primarily for sale, depending on the taxpayer's intent at the time of acquisition and sale of the property and the individual facts of each case [*see, e.g., Biedenharn Realty Co., Inc. v. United States (5th Cir. 1976) 526 F.2d 409, 416-420* ; *Maddux Construction Co. v. Commissioner (1970) 54 T.C. 1278, 1286* ; *United States v. Winthrop (5th Cir. 1969) 417 F.2d 905, 907-912]* . In the most obvious instance, a taxpayer who is a dealer in that property will be treated as holding property primarily for sale [*see Treas. Reg. § 1.1031(a)-1*]. However, persons other than business dealers may hold property primarily for sale. The actual use made of the property is evidence of the taxpayer's intent. When property received in an exchange is immediately sold, the sale is evidence that the property was held primarily for sale and the exchange may be treated as a taxable event [*see* Bernard v. Commissioner (1967) 26 T.C.M. 858] .

[3] Like-Kind Property

In addition to satisfying use (or holding) requirements [*see* [1], *above*], the property given up in an exchange must be of "like kind" with the property received in order to qualify for nonrecognition treatment [*I.R.C. § 1031(a)(1)*]. The words "like kind" refer to the nature or character of the property and not to its grade or quality, so that one kind or class of property may not be exchanged for property of a different class or kind [*Treas. Reg. § 1.1031(a)-1(b)*]. The statute is intended to apply the broad distinction between classes and characters of properties, such as between real and personal property, rather than between parcels of real property, however dissimilar they are [*Commissioner v. Crichton (5th Cir. 1941) 122 F.2d 181, 182]* . The character of property as real or personal is to be determined under state law [*Oregon Lumber Co. (1953) 20 T.C. 192, 197]* .

The courts and the Treasury have applied the term "like kind" broadly to real property exchanges. For example, a leasehold of a fee with 30 years or more to run is property of like kind with real estate. Real estate located in a city is considered to be of like kind with a ranch or farm. Improved real estate is of like kind with unimproved real estate [*Treas. Reg. § 1.1031(a)-1(c)*; *see Treas. Reg. § 1.1031(a)-1(b)*; *see also Koch v. Commissioner (1978) 71 T.C. 54, 65*]. The number of properties or interests involved in the transaction, or the exchange of a fractional interest for an entire interest, are factors of no importance in determining the "like-kind" nature of the properties [*Rev. Rul. 73-476*]. However, real property located within the United States is not considered of a like kind with real property located outside the United States [*I.R.C. § 1031(h)(1)*].

[4] Restrictions on Nonsimultaneous Exchanges

[a] In General

To qualify for deferred recognition of gain, the exchange of properties may be, but need not be, simultaneous. The most common way of effecting a simultaneous exchange is by making the transfer of each property contingent on the transfer of each other property. Reciprocal contingencies are included in both the exchange agreement and escrow instructions, in order to ensure that the purchase and exchange are seen by the IRS as one transaction. If the two escrows are not contingent upon each other, the transaction could be viewed as two separate transactions: a taxable sale of Parcel A and a taxable purchase of Parcel B [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)].

A taxpayer may desire a nonsimultaneous exchange if the taxpayer or the other party or parties is unwilling to wait until suitable exchange property can be located. Nonsimultaneous exchanges usually occur in a three party exchange [*see § 24.22*] when the taxpayer transfers the taxpayer's property to a third party, but does not receive any property in exchange until a later time when suitable property has been found.

[b] 1984 Amendments

I.R.C. § 1031 was amended in 1984 to provide that a nonsimultaneous exchange will not qualify for tax-deferred treatment unless the property to be received is identified and received within certain time periods. This amendment was enacted to eliminate the latitude and uncertainties from the *Starker* decision [*see Starker v. United States (9th Cir. 1979) 602 F.2d 1341, 1354]* , which held that a nonsimultaneous exchange could qualify for tax deferral even though the transferor could designate the property to be exchanged at any time up to five years after the transaction, and could have ultimately received cash rather than like-kind property. The legislative history to the 1984 amendments indicates that Congress felt that the kind of deferred exchange permitted in *Starker* more closely resembled a sale and later reinvestment than an actual exchange [*see* Pub. L. No. 98-369, § 77(b)(3)]. Also, because the value of the taxpayer's property must be determined at the time it is transferred, the taxpayer's gain can be measured with accuracy. Finally, Congress was concerned with the ability of taxpayers to defer taxation even if cash is ultimately received. Under the installment sale rules of *Internal Revenue Code Section 453*, the taxpayer must report gain from the sale of property as payments are actually received.

Therefore, in 1984, Congress amended *Internal Revenue Code Section 1031* to include limits on the time in which an exchange may be effected. Specifically, *Internal Revenue Code Section 1031(a)(3)* now provides that any property received by a taxpayer will not be treated as like-kind property for purposes of Section 1031 nonrecognition treatment under the following circumstances:

(1) The property to be received in the exchange is not so identified before the day that is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange; or

(2) The property to be received by the taxpayer is received after the earlier of:

(a) The day that is 180 days after the date on which the taxpayer transfers the property relinquished in the exchange; or

(b) The due date (determined with regard to extensions) for the transferor's income tax return for the taxable year in which the transfer of the relinquished property occurs.

These time limitations apply to transfers of property by the taxpayer after July 18, 1984. If property was transferred on or before that date, nonrecognition will not apply unless the property received in the exchange is received before January 1, 1987. If the taxpayer transferred property on or before July 18, 1984, and fails to receive exchange property by January 1, 1987, the period for assessing a deficiency with respect to the year of the transfer does not expire before January 1, 1988 [Pub. L. No. 98-369, § 77(b)(3)]. If the property to be received in the exchange is identified in a binding contract in effect on June 13, 1984, and at all times thereafter before the transfer, the property need not be received before January 1, 1989, and the limitations period for the assessment of a deficiency does not expire before January 1, 1990 [Pub. L. No. 98-369, § 77(b)(4)].

Note that the 1984 amendments appear to permit taxpayers to avoid unwanted nonrecognition treatment (such as when the taxpayer desires to recognize a loss) merely by delaying the receipt of property. This would, in effect, make nonrecognition treatment elective rather than mandatory.

Thus, the current rule contains separate limitations on the identification and transfer of the property to be received by the taxpayer. Final regulations have been issued on deferred exchanges, and are generally effective for transfers of property after June 9, 1991 [*see Treas. Reg. § 1.1031(k)-1*]. Transfers of property after May 15, 1990, but before June 10, 1991, are eligible for nonrecognition treatment if the provisions of either the final regulations or the initial proposed regulations are satisfied [*see Treas. Reg. § 1.1031(k)-1(o)*].

[c] Identification and Receipt of Replacement Property

[i] Identification Generally

Under the final regulations, to satisfy the identification requirements, the replacement property must be identified before midnight on the 45th day after the date on which the taxpayer gives up the relinquished property [*Treas. Reg. § 1.1031(k)-1(b)*]. Replacement property is treated as identified only if it is designated as replacement property in either (1) a written agreement covering the exchange that is signed by all parties before the end of the identification period, or (2) a written document signed by the taxpayer and hand delivered or mailed, telecopied, or otherwise sent before the end of the identification period to a person involved in the exchange (such as an intermediary, escrow agent, or title company) other than the taxpayer or a related party [*Treas. Reg. § 1.1031(k)-1(c)(2)*]. The replacement property must be unambiguously described; real property is generally unambiguously described if it is described by a legal description, street address, or distinguishable name [*Treas. Reg. § 1.1031(k)-1(c)(3)*]. Any replacement property that is received by the taxpayer before the end of the identification period is treated as identified before the end of the identification period [*Treas. Reg. § 1.1031(k)-1(c)(4)*].

Replacement property that will be produced or that is in production [*see I.R.C. § 263A(g)(1)*] must be described in as much detail as is practicable. For example, if the identified replacement property consists of improved real property on which the improvements are to be constructed, the description of the replacement property is adequate if a legal description is provided for the underlying land and as much detail is provided regarding construction of the improvements as is practicable as of the time that the identification is made [*Treas. Reg. § 1.1031(k)-1(e)(2)(i)*].

[ii] Identification of Multiple Replacement Properties

The taxpayer may identify more than one property as replacement property. However, the maximum number of replacement properties that the taxpayer may identify is (1) three properties of any fair market value, or (2) any number of properties so long as their aggregate fair market value does not exceed 200 percent of the aggregate fair market value of all the relinquished properties as of the date that the relinquished properties were transferred by the taxpayer. These rules apply regardless of the number of relinquished properties transferred as part of the same deferred exchange [*Treas. Reg. § 1.1031(k)-1(c)(4)(i)*; *see Treas. Reg. § 1.1031(k)-1(c)(4)(iii)*]. With certain exceptions, if a taxpayer identifies more properties than permitted, the taxpayer is treated as if no replacement property had been identified [*Treas. Reg. § 1.1031(k)-1(c)(4)(ii)*].

[iii] Revocation of Identification

An identification of property as replacement property may be revoked at any time before the end of the identification period. The revocation, as with the identification itself, must be in writing and sent before the end of the identification period to the person to whom the identification of the replacement property was sent [*Treas. Reg. § 1.1031(k)-1(c)(6)*].

[iv] Receipt

Under the regulations, property is timely received if it is received before the end of the exchange period and is substantially the same property as was identified [*Treas. Reg. § 1.1031(k)-1(d)*]. The exchange period ends at midnight on the earlier of 180 days after the date on which the taxpayer transfers the relinquished property or the due date (including extensions) for the taxpayer's return for the year in which the transfer occurs [*Treas. Reg. § 1.1031(k)-1(b)*]. In determining whether the replacement property received by the taxpayer is substantially the same property as identified when the identified replacement property is to be produced, variations due to usual or typical production changes are not taken into account. However, if substantial changes are made in the property to be produced, the replacement property received will not be considered to be substantially the same property as identified [*Treas. Reg. § 1.1031(k)-1(e)(3)(i)*]. The regulations further provide that if the identified property is real property to be produced and the production of the property is not completed on or before the date the taxpayer receives the property, the property received will be considered to be substantially the same property as identified only if the replacement property received constitutes real property under local law, and the replacement property received would have been considered to be substantially the same property as identified if production has been completed on or before the date the taxpayer received the property [*Treas. Reg. § 1.1031(k)-1(e)(3)(iii)*]. Further, any additional production occurring with respect to the replacement property after the property is received by the taxpayer will not be treated as the receipt of property of a like kind because the relinquished property will be considered to be transferred in exchange for services [*Treas. Reg. § 1.1031(k)-1(e)(4)*].

[d] Constructive Receipt

In the deferred exchange, the taxpayer cannot actually or constructively receive money or other property before the taxpayer actually receives the like-kind replacement property (without the recognition of gain). If the taxpayer receives money or other property, under general constructive receipt rules, before the taxpayer actually receives like-kind replacement property, the taxpayer may recognize gain or loss. If the taxpayer actually or constructively receives money or other property in the full amount of the consideration for the relinquished property before the taxpayer actually receives like-kind replacement property, the transaction constitutes a sale and not a deferred exchange (even though the taxpayer ultimately receives like-kind replacement property) [*Treas. Reg. § 1.1031(k)-1(f)(1)*].

The regulations provide that the taxpayer is in constructive receipt of money or other property at the time that the money or property is credited to the taxpayer's account, set apart for the taxpayer, or otherwise made available so that the taxpayer may draw upon it at any time or so that the taxpayer may draw upon it if notice of intention to draw is given. Although the taxpayer is not in constructive receipt of money or property in the taxpayer's control if its receipt is subject to substantial limitations or restrictions, the taxpayer is in constructive receipt of the money or property at the

time the limitations or restrictions lapse, expire, or are waived. Additionally, actual or constructive receipt of money or property by an agent of the taxpayer is actual or constructive receipt by the taxpayer [*Treas. Reg. § 1.1031(k)-1(f)(2)*].

[e] Safe Harbors to Avoid Premature Actual or Constructive Receipt

[i] In General

The use of various guarantee or security arrangements is common in deferred exchanges due to the unwillingness of taxpayers to rely on a transferee's unsecured promise to transfer the like kind replacement property. Intermediary arrangements may be used because the transferee may be unwilling or unable to acquire the replacement property. The use of such arrangements, however, raises issues concerning actual or constructive receipt. Therefore, the regulations provide four safe harbors to avoid being treated as in actual or constructive receipt of money or other property [*see Treas. Reg. § 1.1031(k)-1(g)*; *see also* [ii]-[v], *below*]. More than one safe harbor can be used in the same deferred exchange, but the terms of each safe harbor must be separately satisfied [*Treas. Reg. § 1.1031(k)-1(g)(1)*]. The explanation to the proposed regulations warned that it is expected that most deferred exchange transactions can be structured to come within the safe harbors, and that transactions not structured to come within the safe harbors will be carefully scrutinized.

Under all of the safe harbors, the taxpayer must have no rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property before the end of the exchange period [*Treas. Reg. § 1.1031(k)-1(g)(6)(i)*]. However, the agreements may provide that if a taxpayer has not identified replacement property by the end of the identification period, the taxpayer may have rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property at any time after the end of the identification period [*Treas. Reg. § 1.1031(k)-1(g)(6)(ii)*]. Furthermore, the agreements may provide that if a taxpayer has identified replacement property, the taxpayer may have rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property on or after the following [*Treas. Reg. § 1.1031(k)-1(g)(6)(iii)*]:

> (1) The receipt by the taxpayer of all the replacement property to which the taxpayer is entitled under the exchange agreement; or
>
> (2) The occurrence after the end of the identification period of a material and substantial contingency that (a) relates to the deferred exchange, (b) is provided for in writing, and (c) is beyond the control of the taxpayer and of any disqualified person, other than the person obligated to transfer the replacement property to the taxpayer.

Certain acquisition and closing costs may be paid out of the qualified escrow account or qualified trust, or by the qualified intermediary, without resulting in constructive receipt to the taxpayer of the remaining funds. These costs include items that relate to the disposition of the relinquished property or to the acquisition of the replacement property and are listed as the responsibility of a buyer or seller in the typical closing statement under local standards [*Treas. Reg. § 1.1031(k)-1(g)(7)(ii)*].

[ii] First Safe Harbor: Security or Guarantee Arrangements

The first safe harbor deals with security or guarantee arrangements. Under this rule, the transferee's obligation to transfer the replacement property to the taxpayer may be secured or guaranteed by one or more of the following [*Treas. Reg. § 1.1031(k)-1(g)(2)(i)*]:

> (1) A mortgage, deed or trust, or other security interest (other than cash or a cash equivalent);
>
> (2) A standby letter of credit that does not allow the taxpayer to draw on the letter of credit except upon a

default of the transferee's obligation to transfer like kind property; or

(3) A guarantee of a third party.

This safe harbor ceases to apply if at any time the taxpayer has an immediate ability or unrestricted right to receive money or other property pursuant to the security or guarantee arrangement [*Treas. Reg. § 1.1031(k)-1(g)(2)(ii)*].

[iii] Second Safe Harbor: Transferee's Obligation Secured by Cash or Cash Equivalent

Under the second safe harbor, the obligation of the transferee to transfer the replacement property is permitted to be secured by cash or a cash equivalent if the cash or cash equivalent is held in a qualified escrow account or a qualified trust [*Treas. Reg. § 1.1031(k)-1(g)(3)(i)*]. To be qualified, the escrow holder or trustee must not be the taxpayer or a "disqualified person" [*see* [iv], *below*] and the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of the money in the escrow account or trust are expressly limited to circumstances specified in the regulations [*Treas. Reg. § 1.1031(k)-1(g)(3)(ii), (iii)*; *see Treas. Reg. § 1.1031(k)-1(g)(6)*]. This safe harbor ceases to apply at the time the taxpayer has an immediate ability or unrestricted right to receive, pledge, borrow, or otherwise obtain the benefits of the cash held in the escrow or trust [*Treas. Reg. § 1.1031(k)-1(g)(3)(iv)*]. However, a taxpayer may receive money or other property directly from a party to the exchange, but not from a qualified escrow account or qualified trust, without affecting this safe harbor [*Treas. Reg. § 1.1031(k)-1(g)(3)(v)*].

[iv] Third Safe Harbor: Use of Qualified Intermediary

Under the third safe harbor, a taxpayer may use a qualified intermediary in a deferred exchange without being considered in constructive receipt of the proceeds. For these purposes, a qualified intermediary is not considered an agent of the taxpayer, and the taxpayer's transfer of relinquished property and subsequent receipt of like kind replacement property is treated as an exchange [*Treas. Reg. § 1.1031(k)-1(g)(4)(i)*]. However, the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of the money or property held by the qualified intermediary must be limited to the circumstances described in the regulations [*Treas. Reg. § 1.1031(k)-1(g)(4)(i)*; *see Treas. Reg. § 1.1031(k)-1(g)(6)*].

A "qualified intermediary" is a person who is not the taxpayer or a "disqualified person" and (1) who enters into a written exchange agreement with the taxpayer and (2) who, as required by the exchange agreement, acquires the relinquished property from the taxpayer, transfers the relinquished property, acquires the replacement property, and transfers the replacement property to the taxpayer [*Treas. Reg. § 1.1031(k)-1(g)(4)(iii)*; *see Treas. Reg. § 1.1031(k)-1(g)(4)(iv), (v)*].

A "disqualified person" is defined as an agent of the taxpayer's and certain related persons [*see Treas. Reg. § 1.1031(k)-1(k)*]. Of particular note is the fact that a disqualified person includes a person who has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within the two-year period ending on the date of the transfer of the first of the relinquished properties [*Treas. Reg. § 1.1031(k)-1(k)(2)*]. Thus, the taxpayer's attorney, accountant, or real estate broker can generally not act as the intermediary in the deferred exchange without the taxpayer being considered in constructive receipt of the proceeds of the relinquished property, resulting in a taxable sale rather than a tax-deferred exchange [*but see* Treas. Reg. 1.1031(k)-(1)(k)(2)(i), (ii)].

The qualified intermediary safe harbor provides considerable flexibility in structuring deferred exchanges. The regulations clearly contemplate the use of a qualified intermediary to structure a last-minute exchange [*Treas. Reg. § 1.1031(k)-1(g)(8)*, Ex. 4]. For example, a taxpayer who has entered into a contract to sell property to a third party purchaser may, immediately before closing under the contract, execute an exchange agreement for the same property with a qualified intermediary and assign to the intermediary the taxpayer's rights in the binding contract to sell the property to the third party. The intermediary can then direct the taxpayer to transfer title directly to the third party at the

closing [*see Rev. Rul. 90-34, 1990-1 C.B. 154*]. The intermediary will then use the funds received from the third party to purchase the replacement property identified by the taxpayer to complete a deferred exchange within the replacement period.

This safe harbor ceases to apply at the time the taxpayer has an immediate ability or unrestricted right to receive, pledge, borrow, or otherwise obtain the benefits of the money or other property held by the qualified intermediary. Rights conferred on the taxpayer under state law to terminate or dismiss the qualified intermediary are disregarded for this purpose [*Treas. Reg. § 1.1031(k)-1(g)(4)(vi)*]. Further, a taxpayer may receive money or other property directly from a party to the transaction, other than a qualified intermediary, without affecting this safe harbor [*Treas. Reg. § 1.1031(k)-1(g)(4)(vii)*].

[v] Fourth Safe Harbor: Entitlement to Growth Factor on Exchange Property

Under the fourth safe harbor in the regulations, the taxpayer is permitted to receive interest or a growth factor on the deferred exchange, without being considered in constructive receipt of the proceeds, provided that the taxpayer's rights to receive the growth factor are limited to certain specified circumstances [*Treas. Reg. § 1.1031(k)-1(g)(5), (6)*]. A taxpayer is treated as being entitled to receive interest or a growth factor with respect to a deferred exchange if the amount of money or property that the taxpayer is entitled to receive depends upon the length of time elapsed between the transfer of the relinquished property and the receipt of the replacement property [*Treas. Reg. § 1.1031(k)-1(g)(5), (h)*].

[5] Exchanges Between Related Persons

The nonrecognition provisions do not apply to like-kind exchanges between a taxpayer and a related person [*see I.R.C. § 1031(f)(3)* (definition); *see also I.R.C. §§ 267(b), 707(b)(1)*], if before two years after the date of the last transfer that was part of the exchange, either the taxpayer or the related person disposes of the property received in the exchange [*I.R.C. § 1031(f)(1)*; *see I.R.C. § 1031(f)(4)*; *but see I.R.C. § 1031(f)(2)* (exception for certain dispositions), *(g)* (suspension of running of two-year period under specified circumstances)]. In that case, the taxpayer takes the previously unrecognized gain or loss into account on the date of the subsequent disposition of the exchanged property [*I.R.C. § 1031(f)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Not Like-Kind PropertyTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART II. LE GAL BACKGROUND
C. Taxation of Exchanges

9-24 California Legal Forms--Transaction Guide § 24.41

AUTHOR: by Patricia Hughes Mills

§ 24.41 Nonrecognition of Gain or Loss on Like-Kind Property

I.R.C. § 1031 specifically defers recognition of the taxpayer's gain from the exchange of like-kind property until the property acquired in the exchange is sold [*see I.R.C. § 1031(a)(1)*]. It is an exception to the general rule that all gain realized on the sale or exchange of property must be recognized [*see I.R.C. § 1001(c)*]. "Realized" gain is the excess of the amount realized from a transaction over the adjusted basis of the property disposed of in the same transaction [*I.R.C. § 1001(a)*]. "Recognized" gain is that amount of gain that must be included in the gross income in the computation of the income tax [*see I.R.C. § 61(a)*; *see also I.R.C. § 1001(c)*]. The application of *I.R.C. § 1031* is mandatory; if all of the requirements for a tax-free exchange are satisfied [*see § 24.40*], the gain *must* be deferred [*see I.R.C. § 1031(a)*].

Losses from the disposition of property used in trade or business or for investment through a like-kind exchange cannot be recognized [*see I.R.C. §§ 1031(a), (c), 1231*]. If the taxpayer desires to recognize a tax loss, the disposition of the property should be structured as a taxable sale rather than as an exchange. This is particularly true of property that is used productively in the taxpayer's trade or business and qualifies for the recognition of ordinary losses on disposition [*see I.R.C. § 1231*; *see also* Ch. 23, *Real Property Sales Agreements*].

The tax effects of an exchange transaction must be analyzed independently as to each party involved in the exchange, and it is immaterial for purposes of the taxpayer's tax treatment whether or not the transaction qualifies as a tax-deferred exchange as to any of the other parties [*see I.R.C. § 1031(a)*; *Treas. Reg. § 1.1031(a)-1(a)*]. In a two party exchange, both parties are eligible to defer gain. In a three party exchange, the third party acquiring the taxpayer's property will not recognize gain since property is acquired rather than sold, and the owner of the other parcel will always recognize gain since property is being sold rather than exchanged [*see I.R.C. § 1001(a)*].

For purposes of state taxation, gain or loss on the disposition of property is determined in accordance with the applicable provisions of the Internal Revenue Code [*Rev. & Tax. Code § 18031*; *see Rev. & Tax. Code § 17024.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & Losses



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-24 California Legal Forms--Transaction Guide § 24.42

AUTHOR: by Patricia Hughes Mills

§ 24.42 Receipt of Money or Other Property ("Boot")

[1] In General

Inasmuch as the respective values of exchanged properties are rarely identical, the taxpayer may give or receive money or other "unlike" property, known as "boot," to equal out the exchange transaction [*see I.R.C. § 1031(b)*]. There are two basic forms of boot. Cash or unlike property received is referred to as "property boot." "Mortgage boot" is given when one party assumes a liability of the other party to the exchange. An assumption of liability is treated as money or other property received because it relieves a party from the burden of repaying that indebtedness [*see I.R.C. § 1031(d)*; *see also I.R.C. § 357(d)* (determination of amount of liability assumed); *Treas. Reg. § 1.1031(b)-1(c)*].

If properties of different values are exchanged without the use of boot to equalize the transaction, the exchange will still qualify as a tax-free exchange under *I.R.C. § 1031* [*Rev. Rul. 78-163, 1978-1 C.B. 257*]. The unequal nature of the exchange will not affect the nonrecognition of any gain or loss realized, or the determination of basis pursuant to *I.R.C. § 1031(d)* [*see § 24.43[2]*]. However, when such an exchange constitutes a charitable contribution for public purposes [*see I.R.C. § 170(c)*], the basis of the property received is determined under *I.R.C. § 1031(d)* as adjusted by applying the formula for bargain sales [*Rev. Rul. 78-163, 1978-1 C.B. 257, 258* ; *see I.R.C. § 1011(b)*].

[2] Recognition of Gain or Loss on Boot Received by Taxpayer

The taxpayer in a like-kind exchange defers recognition of any gain attributable to the receipt of like-kind property, but must recognize gain equal to the amount of money and the fair market value of the boot received in the exchange [*I.R.C. § 1031(b)*; *see Treas. Reg. § 1.1031(b)-1(a)(4)*]. However, no loss may be recognized on the receipt of either property boot or mortgage boot [*see I.R.C. § 1031(c)*; *see also Treas. Reg. § 1.1031(c)-1*]. When a taxpayer both gives and receives boot in one exchange transaction, any gain attributable to the boot received will be taxable only if it cannot be offset by the boot given to the other party to the exchange [*see Treas. Reg. §§ 1.1031(b)-1(c), 1.1031(d)-2*], in accordance with the rules discussed in [3]-[5], *below*.

[3] Property Boot Given Offsets Any Form of Boot Received

For the purpose of determining the amount of gain to be recognized on the receipt of boot in an exchange transaction, property boot received by the taxpayer may be offset by property boot given [*see Rev. Rul. 72-456, 1972-2 C.B. 468*]. Mortgage boot received by the taxpayer may also be offset by property boot given [*Treas. Reg. § 1.1031(d)-2,* ex. (2)(c)]. Brokerage commissions paid by the taxpayer in a like-kind exchange are treated as property boot given by the taxpayer. Consequently, mortgage or property boot received by the taxpayer may be offset by commissions paid by the taxpayer [*Rev. Rul. 72-456, 1972-2 C.B. 468*].

[4] Mortgage Boot Received Is Offset by Mortgage Boot Given

In an exchange transaction in which each party to the exchange either assumes a liability of the other party or acquires property subject to a liability, the mortgage boot received by the taxpayer is offset by the mortgage boot given to the other party when calculating the taxpayer's gain to be recognized [*see Treas. Reg. § 1.1031(d)-2*]. For example, if the taxpayer transfers property subject to a mortgage debt of $100,000, and receives property subject to a mortgage debt of $200,000, the taxpayer will have received no mortgage boot because the mortgage boot received is completely offset by the mortgage boot given. Accordingly, the taxpayer recognizes no gain on the exchange [*see Treas. Reg. § 1.1031(d)-2*].

[5] Property Boot Received Is Not Offset by Mortgage Boot Given

Although mortgage boot received is offset by property boot given, for purposes of calculating recognizable gain [*see* [4], *above*], property boot received is not offset by mortgage boot given [*Treas. Reg. § 1.1031(d)-2,* ex. (2)(c); *Rev. Rul. 79-44, 1979-1 C.B. 265*]. The taxpayer must treat as gain the value of the cash or property received, despite the fact that an equivalent amount of mortgage boot was given. For example, the taxpayer may transfer property with an exchange value of $100,000, and receive both property with an exchange value of $100,000 subject to a $50,000 mortgage, and $50,000 in cash. The taxpayer will have given $50,000 mortgage boot and received $50,000 property boot. The taxpayer cannot offset the mortgage boot given against the property boot received, and must recognize gain on the $50,000 received [*see Treas. Reg. § 1.1031(d)-2,* ex. 2].

[6] Recognition of Gain or Loss on Property Boot Given by Taxpayer

In addition to the recognition of gain on the receipt of boot by a taxpayer, the taxpayer may recognize gain on the transfer of property boot to the other party. Although the transfer of property boot along with qualifying property does not affect the nonrecognition treatment of the qualifying property, nonrecognition treatment does not apply to the boot transferred. The transfer of property boot is equivalent to a taxable sale of that property. Gain or loss is recognized on the property boot to the extent of the difference between its adjusted basis and its fair market value [*Treas. Reg. §§ 1.1031(a)-1(a), 1.1031(d)-1(e)*]. Therefore, a transaction in which a taxpayer transfers both qualified property and property boot in exchange for qualified property only actually consists of two parts: a taxable sale of property boot for a portion of the property received and a tax-free exchange of the taxpayer's qualified property for a portion of the property received.



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9-24 California Legal Forms--Transaction Guide § 24.43

AUTHOR: by Patricia Hughes Mills

§ 24.43 Determination of Basis

[1] Composite Basis and Allocation to Qualified Property

The composite basis of all property (other than money) received by the taxpayer in a like-kind exchange under *I.R.C. § 1031* is equal to the basis of the property given, decreased by the amount of any money received by the taxpayer, and either increased in the amount of any gain or decreased in the amount of any loss to the taxpayer that was recognized on the exchange [*I.R.C. § 1031(d)*]. The basis of the property received is also increased by the amount of brokerage commissions paid by the taxpayer [*Rev. Rul. 72-456, 1972-2 C.B. 468*].

If either the total basis or a portion of the total basis is to be allocated to more than one qualified property, the amount of that basis must be allocated to the qualified properties in the same proportion as the fair market values of the properties bear to each other on the date of the exchange [*see Rev. Rul. 68-36, 1968-1 C.B. 357* ; *see also* [4], *below*].

[2] When Only Qualified Property Is Received

If a like-kind exchange consists solely of qualified property, and no gain or loss is recognized under any provision of the Internal Revenue Code, the basis of the property acquired is the same as the adjusted basis of the property given by the taxpayer in the exchange. If additional consideration is given by the taxpayer in the exchange, the basis of the property acquired is the same as the adjusted basis of the property transferred, increased by the amount of the additional consideration given [*Treas. Reg. § 1.1031(d)-1(a)*]. If the taxpayer receives more than one qualifying property in the exchange, the substituted basis must be allocated between the properties received in proportion to their fair market values [*Rev. Rul. 68-36, 1968-1 C.B. 357*].

[3] When Qualified Property and Money Are Received

If gain is recognized to a taxpayer in a like-kind exchange on account of the receipt of money, the basis of the property acquired is the adjusted basis of the property given by the taxpayer, decreased by the amount of money received, and

increased by the amount of gain recognized on the exchange [*Treas. Reg. § 1.1031(d)-1(b)*; *see Rev. Rul. 68-36, 1968-1 C.B. 357* (multiple qualifying properties)]. This formula also applies when gain is recognized on account of mortgage boot received by the taxpayer, since for purposes of determining basis, net mortgage boot received is treated as money received [*I.R.C. § 1031(d)*].

[4] When Both Qualified and Unqualified Property Are Received

If gain is recognized to a taxpayer in a like-kind exchange and property boot other than cash is received, the total basis of all the properties received by the taxpayer in the transaction is equal to the adjusted basis of the property given by the taxpayer, decreased by the amount of any money received, and increased by the amount of gain recognized by the taxpayer. That total basis must be allocated to the properties received on the exchange. For the purpose of the allocation, an amount equal to the fair market value of the boot on the date of the exchange must be allocated to the boot. The remainder of the total basis must be allocated to the qualified properties [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(c)*].

[5] When Qualified Property and Boot Are Transferred

If gain or loss is recognizable by a taxpayer in a like-kind exchange and the taxpayer transfers boot in the transaction, the total basis of the properties received is equal to the total adjusted basis of the properties transferred by the taxpayer, either increased by the amount of gain recognized or decreased by the amount of loss recognized on the boot. For purposes of this rule, the taxpayer is deemed to have received an amount equal to the fair market value of the boot on the date of the exchange [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(e)*].

For purposes of computing the basis of property received in a like-kind exchange, brokerage commissions paid by a taxpayer are treated as boot transferred, so that the basis of property received in the exchange is increased by the amount of commissions paid by the taxpayer [*Rev. Rul. 72-456, 1972-2 C.B. 468*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.44

AUTHOR: by Patricia Hughes Mills

§ 24.44 Reporting Gain or Loss From Like-Kind Exchanges

[1] Character of Gain or Loss

The character of any gain or loss recognized in a like-kind exchange depends on the nature of the property giving rise to the gain or loss. Gain or loss from capital assets is treated as capital gain or loss [*see I.R.C. §§ 1201-1223*]. Gain or loss from "property used in the trade or business" is combined with other such gain or loss and certain gains from involuntary conversions sustained by the taxpayer in the same year. If the net result of the combination is a gain, it is taxed as long-term capital gain. If the combination results in a net loss, the loss is treated as an ordinary loss [*I.R.C. § 1231(a)*]. Gain or loss from property that is neither a capital asset nor property used in the trade or business is treated as ordinary gain or loss [*see I.R.C. § 1001*].

The difference between capital gains and losses, *I.R.C. § 1231* gains and losses, and ordinary gains and losses, may be more important for individual taxpayers than corporate taxpayers. Individual net capital gains are taxed at rates significantly lower than for ordinary income, based on the time the asset was held and other specified factors [*see I.R.C. § 1(h)*; *see also I.R.C. § 1(a)-(d), (i)(2)*]. However, a corporate taxpayer is taxed at a maximum rate of 35 percent on net capital gain (or, if less, taxable income) [*I.R.C. § 1201(a)*], the same maximum rate that applies to ordinary corporate income [*see I.R.C. § 11(b)*].

Capital losses are allowed only to the extent of capital gains (in the case of corporations) or capital gains plus amounts limited by statute (in the case of individual taxpayers) [*see I.R.C. § 1211*]. Carryback and carryforward rules for unused capital losses still apply [*see I.R.C. § 1212(a), (b)*]. *I.R.C. § 1231* losses still may be allowed in full [*see I.R.C. § 1231(a)(4)*]. Therefore, the appropriate characterization of property, and of gains and losses from that property, may still have considerable importance.

If a taxpayer transfers only qualified property in an exchange, but receives both qualified and nonqualified property, any gain must be gain from the disposition of a capital asset or from "property used in the trade or business," since those are

the only types of property that qualify under the like-kind nonrecognition provisions [*see I.R.C. §§ 1031(a)(1), 1221, 1231(b)*]. If a taxpayer transfers both qualified property and boot, the character of any gain or loss as capital or ordinary depends on the nature of the boot transferred.

[2] Installment Reporting

If, as part of the consideration in a like-kind exchange, a taxpayer is to receive installment payments in subsequent years, and if the transaction otherwise qualifies as an installment sale, any gain recognized is reported pursuant to the installment method unless the taxpayer elects out of that method [*see I.R.C. § 453(a), (d)*]. Even though the transaction is an installment sale, all depreciation recapture income [*see § 24.45*] must be recognized currently [*I.R.C. § 453(i)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of GainsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of LossesTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Recognition of Gains & Losses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART II. LE GAL BACKGROUND
C. Taxation of Exchanges

9-24 California Legal Forms--Transaction Guide § 24.45

AUTHOR: by Patricia Hughes Mills

§ 24.45 Recapture of Depreciation

[1] In General

When a taxpayer disposes of depreciated real property, the nonrecognition provisions of *I.R.C. § 1031* may be overridden to the extent that the depreciation recapture provisions apply. *I.R.C. §§ 1245* and *1250* provide for the recapture of certain depreciation on the disposition of depreciable property. Recapture of depreciation refers to the treatment of gain realized on the disposition of property as ordinary income, rather than capital gain, to the extent of the depreciation deductions taken on the property [*see I.R.C. §§ 1245, 1250*]. The proportion of the gain that is subject to "recapture" on the disposition of real property depends on the method of depreciation used, the date of acquisition or construction of the property, the type of property (for example, residential rental property), and the length of time that the property is held [*see I.R.C. §§ 1245, 1250*]. Individual net capital gains are taxed at rates significantly lower than for ordinary income, based on the time the asset was held and other specified factors [*see I.R.C. § 1(h)*; *see also I.R.C. § 1(a)-(d), (i)(2)*]. However, a corporate taxpayer is taxed at a maximum rate of 35 percent on net capital gain (or, if less, taxable income) [*I.R.C. § 1201(a)*], the same maximum rate that applies to ordinary corporate income [*see I.R.C. § 11(b)*].

For most depreciable real property placed in service after 1986, there will be no recapture. Residential rental property and nonresidential real property placed in service after that date will be restricted to straight-line depreciation methods [*see I.R.C. § 168*]. As a result of this mandatory depreciation method, there will be no "additional" depreciation as defined by *I.R.C. § 1250(b)*. Therefore, the recapture provisions simply will not apply [*see I.R.C. § 1250(a)(1)*].

Even for other kinds of property, and real property put in service before 1987 the recaptured depreciation is treated as ordinary income, as opposed to capital gains. This may be important, especially for individual taxpayers. Individual net capital gains are taxed at rates significantly lower than for ordinary income, based on the time the asset was held and other specified factors [*see I.R.C. § 1(h)*; *see also I.R.C. § 1(a)-(d), (i)(2)*]. However, a corporate taxpayer is taxed at a maximum rate of 35 percent on net capital gain (or, if less, taxable income) [*I.R.C. § 1201(a)*], the same maximum rate

that applies to ordinary corporate income [*see I.R.C. § 11(b)*]. On the other hand, treating recaptured depreciation as ordinary income may, in fact, increase the kinds of losses a taxpayer may use to offset that ordinary income [*see I.R.C. § 1211*].

The remaining importance of recapture is that it may force the recognition of gain in some cases when it would not otherwise be recognized, or to a greater extent than otherwise. The potential additional amount of gain to be recognized depends on (1) whether the property transferred was "Section 1245 property" or "Section 1250 property," and (2) whether the property received in exchange was "Section 1245 property" or "Section 1250 property" [*see I.R.C. §§ 1245(b)(4), 1250(d)(4)(A)(ii), (C)*]. The formula for calculating the amount that must be recognized is set forth in [2], *below*.

Most depreciable real property is "Section 1250 property." *I.R.C. § 1245* covers personal property and a few special categories of property "subject to the allowance for depreciation under Section 167" that will qualify as "Section 1245 property." These are properties that have had either a very specialized use or have had an adjusted basis reflecting amortization under other Internal Revenue Code sections [*see I.R.C. § 1245(a)(3)*]. All other real property "subject to the allowance for depreciation provided in Section 167" is "Section 1250 property" [*I.R.C. § 1250(c)*].

I.R.C. § 1245 applies to property that (1) is or has been subject to the allowance for depreciation under *I.R.C. § 167* or to the allowance of amortization provided in specified Internal Revenue Code sections; and (2) is either personal property, property that has a very specialized use [*see I.R.C. § 1245(a)(3)(B), (D)*-(F)], or property that has an adjusted basis reflecting amortization under certain Internal Revenue Code sections [*I.R.C. § 1245(a)(3)*; *see I.R.C. § 1245(a)(3)(C)*].

[2] Extent of Recapture in Exchange

If depreciable real property is disposed of in a like-kind exchange and gain (determined without regard to the recapture provisions) is not recognized in whole or in part under *I.R.C. § 1031*, the amount of gain recognized by the taxpayer under the recapture provisions is calculated by determining the amount of depreciation recapture that would have been applicable to the transaction had it been a taxable exchange, and then applying the special limitation on recognition of depreciation recapture in the case of like-kind exchanges [*see I.R.C. §§ 1245(a)(1), (b)(4), 1250(a), (d)(4)(A)*].

For Section 1245 property, the limitation is the sum of (1) the amount of gain recognized on the disposition under *I.R.C. § 1031*, determined without regard to *I.R.C. § 1245*, plus (2) the fair market value of property acquired that is not *I.R.C. § 1245* property and that is not taken into account in (1), *above* [*I.R.C. § 1245(b)(4)*; *see Treas. Reg. § 1.1245-4(d)*]. For *I.R.C. § 1250* property, the limitation is the greater of either (1) the amount of gain recognized on the disposition under *I.R.C. § 1031*, or (2) the excess of the amount of gain subject to recapture that would have been applicable to the transaction had it been a taxable exchange over the fair market value of the depreciable real property received in the exchange [*I.R.C. § 1250(d)(4)(A)(i), (C)*; *see Treas. Reg. § 1.1250-3(d)(1)(ii)(a), (iii)*].

For an extensive discussion of the recapture of depreciation, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 132, *Disposition* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Disposition of Depreciable PropertyTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

9-24 California Legal Forms--Transaction Guide

AUTHOR: by Patricia Hughes Mills

NOTE:

In this chapter, the client desiring tax deferral from the exchange of properties is called the "taxpayer." The taxpayer's real property is called Parcel A, and the real property the taxpayer will acquire through the exchange is called Parcel B [***see** § 24.11*]. "Nonqualified" or "other" property refers to any property given in an exchange that is not held for productive use in a trade or business or for investment [***see** I.R.C. § 1031(a)(1)*; ***see also*** CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)].



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-24 California Legal Forms--Transaction Guide §§ 24.46-24.99

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.46[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

9-24 California Legal Forms--Transaction Guide § 24.100

AUTHOR: by Patricia Hughes Mills

§ 24.100 Facts

1. Client's name, address, and phone number.

2. Client's legal status as individual, trust, partnership, corporation, or other entity.

3. Names of all parties and spouses.

NOTE:
If any community real property is transferred in the exchange, both spouses (either personally or by duly authorized agent) must execute the deed conveying the property [*Fam. Code § 1102(a)*].

4. Whether client has already located property to be acquired in exchange, or whether a deferred exchange will be necessary.

5. Following information for each parcel of real property to be exchanged:

a. Legal description.

b. Fair market value.

c. Encumbrances, including:

NOTE:
This information can be obtained by requesting a statement from the beneficiary of each

encumbrance pursuant to *Civ. Code § 2943* [***see** Ch. 25B, **Subordination, Assumption, and Assignment**, § 25B.220[2]*].

(1) Unpaid balance of principal;

(2) Interest rate;

(3) Method of payment of principal and interest;

(4) Date to which interest has been paid;

(5) Next payment date;

(6) Delinquencies, if any; and

(7) Name of lender.

d. Equity.

e. Zoning.

f. Whether any of following will be transferred with real property:

(1) Improvements.

(2) Leases.

(3) Crops.

6. Following additional information for property being exchanged:

a. Whether property has been held for either:

NOTE:
Only the following types of property will qualify for a like-kind exchange [*I.R.C. § 1031(a)(1)*]. For a discussion of the meaning of each of the following terms, see *Section 24.40*.

(1) Productive use in a trade or business; or

(2) Investment.

b. Basis or cost, adjusted to date.

c. Whether it is depreciated real property.

NOTE:
When a taxpayer disposes of depreciated real property, the nonrecognition provisions may

be overridden to the extent that the depreciation recapture provisions apply [***see*** *I.R.C. §§ 1245, 1250*; ***see also*** *§ 24.131*].

d. If taxpayer contemplates alternative sale in lieu of exchange:

(1) Sales price.

(2) Terms of purchase.

7. Client's intended use of property being acquired.

8. Whether client intends to dispose of property being acquired through exchange in near future.

NOTE:

If the client sells the property acquired immediately after the exchange, it is evidence that the property was held primarily for sale [***see*** *I.R.C. § 1031(a)(2)(A)*] and the exchange may be treated as a taxable event [***see*** Bernard v. Commissioner (1967) 26 T.C.M. 858] . Further, special rules apply regarding subsequent transfers when the exchange is between related persons [***see*** *I.R.C. § 1031(f)*; ***see also*** *§ 24.40 [5]*]. However, if property received in a like-kind exchange is immediately contributed to a limited partnership in which the client reserves a general partnership interest, the exchange will still qualify for nonrecognition treatment [*Magneson v. Commissioner (9th Cir. [T.C.] 1985) 753 F.2d 1490, 1497]* .

9. Manner in which client will take and hold title to property being acquired.

10. Personal property to be transferred or acquired in exchange, including:

NOTE:

Personal property will not qualify in a "tax-free exchange" except to the extent that it is being exchanged for other personal property of a like kind or class [*Treas. Reg. § 1.1031(a)-1(b)*]. If depreciable tangible personal property is exchanged, it is considered of a like class to other depreciable tangible personal property if the exchanged properties are either within the same General Asset Class or within the same Product Class [***see*** *Treas. Reg. § 1.1031(a)-2(b)*]. The goodwill or going concern value of a business is not of a like kind to the goodwill or going concern value of another business [***see*** *Treas. Reg. § 1.1031(a)-2(c)(2)*].

a. Nature of property (*e.g.*, cash, notes).

b. Value.

c. Encumbrances.

11. Names and addresses of the following:

a. Title companies to be used in exchange.

b. Brokers to be used in exchange.

c. Escrow company that will handle client's transaction.

d. Client's accountant.

12. Following facts regarding close of escrow, if available:

NOTE:
For a more complete list of facts regarding escrow, see Ch. 23, ***Real Property Sales Agreements*** .

a. Desired closing date.

b. Any conditions prerequisite to closing.

c. Items to be prorated in escrow.

d. Expenses of escrow each party will pay.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

9-24 California Legal Forms--Transaction Guide § 24.101

AUTHOR: by Patricia Hughes Mills

§ 24.101 Documents

NOTE:
The real property documents should be obtained for both the taxpayer's real property and the property the taxpayer will receive in the exchange, if possible.

1. Deeds for all property to be exchanged.

NOTE:
The legal description of each piece of property is necessary for drafting the exchange agreement and escrow instructions.

2. All other instruments of record on property to date.

3. Statements of beneficiaries or claims for payoff of parties to encumbrances.

4. Copies of leases or service contracts concerning property.

5. Copies of any insurance policies presently on property, including:

a. Property, fire, earthquake, and related coverages;

b. Liability coverage; or

c. Title coverage.

6. Copies of loan documents and mortgages.

7. Copies of powers of attorney affecting conveyancing.

8. Appraisals of property.

9. Accounting sheets, including:

a. Balance sheets;

b. Income statements; and

c. Pro forma sheets.

10. Preliminary title report or attorney's abstract examination opinion.

11. Surveys and maps.

12. Zoning and building permit information.

13. Other documents affecting property, such as:

a. Leases.

b. Liens.

c. Tax statements.

d. Maintenance contracts.

e. Utility contracts.

14. Client's most recent federal income tax return.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-24 California Legal Forms--Transaction Guide §§ 24.102-24.109

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

9-24 California Legal Forms--Transaction Guide § 24.110

AUTHOR: by Patricia Hughes Mills

§ 24.110 Determining Whether to Sell or Exchange

1. Ascertain whether taxpayer wants to recognize any loss from transfer of property used in trade or business or for investment.

NOTE:

Although a taxpayer may recognize loss from the sale of property used in trade or business or for investment, the taxpayer cannot recognize any loss when that property is exchanged solely for other like-kind property [*I.R.C. § 1031(a)*], or when other nonqualified property or money is also received in the exchange [*I.R.C. § 1031(c)*; *Treas. Reg. § 1.1031(c)-1*]. Therefore, if the taxpayer desires to recognize a loss, the transaction should be structured as a sale rather than an exchange. For a checklist of procedures required to structure a sale of real property, see Ch. 23, ***Real Property Sales Agreements*** .

2. Determine whether taxpayer desires to report any gains realized pursuant to the installment method [*see I.R.C. § 453*].

NOTE:

Installment reporting is available for gains realized in an exchange transaction as well as for sales transactions. For example, if a taxpayer receives installment payments of boot in subsequent years, the installment reporting rules will apply to the transaction unless the taxpayer opts out [***see*** *I.R.C. § 453(d)*; ***see also*** *§ 24.44[2]*].

3. Ascertain whether transferor would prefer to sell, pay tax, and purchase new property in order to get higher tax basis for depreciation purposes.

NOTE:

Smaller depreciation allowances permitted after the Tax Reform Act of 1986 [Pub. L. No. 99-514] reduce the importance of depreciation factors as a motivating factor for making exchanges [***see*** *§ 24.45*].

In an exchange, the tax basis of the new property received is the same as that of the old property given away, decreased in the amount of any money received and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized on the exchange [***see*** *I.R.C. § 1031(d)*; ***see also*** *§§ 24.43, 24.130*].

4. Decide if higher basis for depreciation purposes can be obtained by exchanging in any of following ways rather than by selling:

a. Exchanging for property that is heavily encumbered.

NOTE:

The parties should also consider other factors, such as mortgage boot [***see*** *§ 24.42*].

b. Exchanging for property that has higher equity than property to be exchanged.

NOTE:

This type of exchange would require the transferor to pay cash or give a promissory note for the difference in the equities [***see*** *§ 24.42*].

c. Exchanging for property with greater percentage of depreciable improvements than property to be exchanged.

d. Exchanging for property that can be more easily financed than property to be exchanged.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of GainsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of LossesTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Installment MethodTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Not Like-Kind Property



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
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B. Preliminary Determinations

9-24 California Legal Forms--Transaction Guide § 24.111

AUTHOR: by Patricia Hughes Mills

§ 24.111 Appropriate Form of Exchange

1. Ascertain which of following exchange forms is appropriate for transaction:

NOTE:
The following constitute the basic methods of arranging an exchange involving any number of parties so as to effectuate a tax-free exchange as to at least one party, the client-taxpayer. More complex transactions can be based on these methods [***see*** *§§ 24.23, 24.24*].

a. Simple exchange of property.

NOTE:
The simplest form of exchange is the two party exchange, which is simply a trade of property unaccompanied by any related sale [***see*** *§ 24.21*]. However, this type of exchange is not automatically limited to situations involving only two parties--it may be structured to encompass transactions involving any number of parties.

b. Exchange accompanied by sale or purchase, by one of following methods:

NOTE:
An exchange accompanied by a sale or purchase usually involves three parties, but the framework may be adapted for any transaction involving more than two parties. There must be an exchange of qualified properties between any two parties, and a separate transaction consisting of a related sale or purchase of property. A three party exchange is

necessary if the property that the taxpayer wants to receive in the exchange is not owned by the person who intends to acquire the taxpayer's property [***see*** *§ 24.20*].

(1) Exchange followed by sale.

NOTE:
In this transaction, also known as a "Baird" exchange [***see*** *§ 24.22 [2]*], the taxpayer (owner of "Parcel A") and the owner of another parcel of like-kind property ("Parcel B") exchange their properties. A third party (such as a developer) then purchases Parcel A.

(2) Sale followed by exchange.

NOTE:
In this transaction, also known as an "Alderson" exchange [***see*** *§ 24.22[1]*] the taxpayer (who owns "Parcel A") and another party wish to exchange properties. The other party purchases suitable property ("Parcel B") from a third party and then exchanges Parcel B for Parcel A. Variations of this type of transaction include an exchange agreement with a provision for sale in lieu of exchange [***see*** P 2 NOTE, ***below***; ***see also*** *§ 24.211[2]*], and an option to exchange or sell [***see*** *§ 24.212[2]*].

2. Determine whether transaction should require sale in lieu of exchange [*see, e.g., § 24.211*].

NOTE:
A "sale in lieu" provision usually requires the taxpayer to locate property ("Parcel B") that he or she would accept in the exchange, and notify the person interested in acquiring the taxpayer's own property ("Parcel A") that acceptable property has been located. The other party purchases Parcel B, and Parcel A and Parcel B are then exchanged. However, if the taxpayer fails to locate an acceptable Parcel B by a given date, the taxpayer must then sell Parcel A outright to the person interested in the taxpayer's property. Thus, this type of provision ensures that the interested party will acquire the taxpayer's property by some method by a given date, since that party usually would not have entered into the exchange agreement except for his or her desire to acquire the taxpayer's property [***see*** *§ 24.211[1][c]*]. If this provision is used, the purchase price and the method of payment should also be determined.

3. Determine whether a deferred exchange is necessary.

NOTE:
If the taxpayer must close on the transfer of property ("Parcel A") before locating suitable exchange property ("Parcel B"), a deferred exchange will be necessary. In that case, care must be taken to properly structure and execute the exchange, and to use a qualified intermediary if necessary [***see*** *§ 24.25*].

4. Determine whether transaction should be structured as option rather than outright sale or exchange, for any of following reasons:

NOTE:
For a complete discussion of the advantages of using an option to acquire real property, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Chapter 70, ***Options*** (Matthew Bender).

a. Taxpayer wishes to:

(1) Retain money in event that party acquiring taxpayer's property fails to complete transaction.

NOTE:
An optionor is entitled to keep the price paid for the option if it is not exercised, while a seller may not be entitled to keep the sales deposit as liquidated damages if the buyer breaches the sales contract [***see*** *§ 24.212[1][c][ii]*].

(2) Taxpayer wishes to continue using property for a limited period.

NOTE:
For example, the taxpayer may want to harvest crops before transferring the property.

b. Party acquiring taxpayer's property wishes to:

(1) Tie up property without making present commitment to acquire.

(2) Speculate on potential increase in property's value without risking more than option consideration price.

(3) Avoid publicity that could drive up the price of neighboring property that party desires to purchase.



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-24 California Legal Forms--Transaction Guide § 24.112

AUTHOR: by Patricia Hughes Mills

§ 24.112 Property to Be Exchanged

1. Determine whether real property to be transferred by taxpayer falls within either of following categories [*I.R.C. § 1031(a)*; *Treas. Reg. § 1.1031(a)-1(a)*]:

NOTE:

The property transferred may be either type set forth below, regardless of the type of property received [***see*** P 2, ***below***]. For example, property held for productive use in trade or business may be traded for either property used in trade or business, or for property held for investment. Property held for investment may be traded for either property held for investment, or for property used in trade or business [*Treas. Reg. § 1.1031(a)-1(a)*; ***see*** *§ 24.40[1]*].

If the transferor's residence is located on the property, it will not qualify under *I.R.C. § 1031* as either category of qualified property [***see*** *§ 24.40*]. However, a specified amount of gain from the sale or exchange of a principal residence may be excluded from income if, during the five-year period ending on the date of the sale or exchange, the property was owned and used by the taxpayer as a principal residence for periods aggregating at least two years [*I.R.C. § 121(a)*; ***see*** *I.R.C. § 121(c)* (special treatment of certain sales and exchanges)]. The maximum amount of gain that may be excluded with regard to any sale or exchange is $250,000 for a single taxpayer or $500,000 for married taxpayers filing joint returns and meeting statutory criteria [*I.R.C. § 121(b)(1),(2)*; ***see*** *I.R.C. § 121(d)(1)-(3)* (special rules concerning joint returns and treatment of property of former or deceased spouse)]. However, for a sale or exchange after 2008, the exclusion does not reach any part of the gain that must be allocated to a period of nonqualified use, that is, with some exceptions, any period (other than the portion of any period preceding 2009)

during which the property was not used as the principal residence of the taxpayer or the taxpayer's spouse or former spouse [*I.R.C. § 121(b)(4)*; ***see*** *I.R.C. § 121(b)(4)(C)(ii)* (exceptions to what is period of nonqualified use)]. For additional discussion, ***see*** Ch. 23, ***Real Property Sales Agreements*** .

a. Commercial property that is:
(1) Held for productive use.

(2) Used in trade or business.

(3) Not held primarily for sale.

b. Investment property.

2. Determine whether real property to be received by taxpayer is both of following [*I.R.C. § 1031(a)*; *Treas. Reg. § 1.1031(a)-1(a)*]:

a. Either:

(1) Commercial property that is:
(a) Held for productive use.

(b) Used in trade or business.

(2) Investment property.

b. Of "like-kind" with property transferred by taxpayer.

NOTE:

"Like-kind" refers to the nature and character of property, not to its grade or quality. For example, the fact that property is improved or unimproved refers to grade or quality only [*Treas. Reg. § 1.1031(a)-1(b)*]. The nature or character of property is reflected in the differences between real and personal property, rather than between parcels of real property, however dissimilar they are [***see*** *§ 24.40[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

9-24 California Legal Forms--Transaction Guide § 24.113

AUTHOR: by Patricia Hughes Mills

§ 24.113 Planning Exchange in Accordance With Tax Goals

NOTE:
The tax effects of the exchange must be analyzed separately as to each party. The effect of the exchange on the other parties is irrelevant as to each party's own tax consequences [***see*** *§ 24.41*].

1. Determine whether taxpayer wishes to avoid recognition of any gain on exchange of qualified property.

a. If complete nonrecognition is desired, property *received* by taxpayer must be limited to proper categories of qualified property only [*I.R.C. § 1031(a)(1)*; *Treas. Reg. § 1.1031(a)-1(a)*; *see § 24.112*].

b. Taxpayer must recognize gain to extent of [*I.R.C. § 1031(b)*]:
(1) Any money received.

(2) Fair market value of any nonqualified property received.

(3) Any liabilities of taxpayer (such as a mortgage) assumed by other exchanging party [*see Treas. Reg. § 1.1031(a)-1(a)*].

c. Property *transferred* by taxpayer must be limited to:

(1) Qualified property [*I.R.C. § 1031(a)(1)*].

(2) Cash [*see Treas. Reg. § 1.1031(a)-1(c)*].

(3) Nonqualified property that has a basis equal to its fair market value [*see Treas. Reg. § 1.1031(d)-1(e)*].

2. Determine whether taxpayer wishes to recognize gain or loss on nonqualified property given.

NOTE:

When recognition of gain or loss is desired, the transaction must be structured so that the taxpayer gives property boot with a basis higher or lower than fair market value. The transfer of nonqualified property is treated as a taxable sale that will result in the recognition of gain or loss to the extent of the difference between its fair market value on the date of the exchange and the taxpayer's basis [***see** Treas. Reg. § 1.1031(d)-1(e)*; ***see also** § 24.42[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

9-24 California Legal Forms--Transaction Guide §§ 24.114-24.119

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.114[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
C. Procedural Guide to Like-Kind Exchange

9-24 California Legal Forms--Transaction Guide § 24.120

AUTHOR: by Patricia Hughes Mills

§ 24.120 Drafting Exchange Agreement

NOTE:

This section contains a list of the basic provisions to be included in exchange agreements. For a discussion of agreements to transfer real property in general, see Ch. 23, ***Agreements to Sell Real Property*** . The use of particular forms or documents for a tax-deferred exchange is not required, and technically a mere exchange of deeds under an oral agreement to exchange is sufficient [***see*** *Rev. Rul. 61-119, 1961-1 C.B. 395*]. However, proper documentation clarifies the parties' rights, and also allows the taxpayer to show the IRS, if necessary, that all of the requirements of a tax-free exchange have been fulfilled. Additionally, if the exchange is a deferred exchange, a written agreement will generally be required in order to satisfy the regulations, especially if a qualified intermediary is used [***see*** *Treas. Reg. § 1.1031(k)-1*; ***see also*** *§ 24.25*].

1. For basic two party or three party agreement, include all of following:

a. Preamble, including:
(1) Names of parties to agreement.

(2) Designation of shorthand names used in contract.

NOTE:

For example, the taxpayer is usually referred to as the "First Party," and the other exchanging party is referred to as the "Second Party." The taxpayer's property may be designated as "Parcel A," and the property to be received by the taxpayer may be designated as "Parcel B" [***see, e.g.***, *§ 24.210[2]*].

b. Legal descriptions of properties to be exchanged.

NOTE:
The descriptions may either be inserted into the body of the agreement [***see, e.g.***, *§ 24.211[2]*, P 2.01], or attached as exhibits [***see, e.g.,*** *§ 24.210[2]*, P 1.01].

c. Provision indicating parties' agreement to exchange properties [*see, e.g., § 24.210[2]*, P 1.01].

d. Provision regarding exceptions to title for each parcel of property, either:

(1) If agreement assumes that preliminary title reports have been given to each party, list of all approved exceptions [*see, e.g., § 24.210[2]*, PP 2.01, 2.02]; or

(2) If agreement assumes that no preliminary title reports have been received, requirement that preliminary title reports are given and any exceptions approved [*see, e.g., § 24.211 [2]*, PP 3.01, 3.02].

e. Value of property [*see, e.g., § 24.210[2]*, P 3.01].

f. If respective equities of properties differ [*see, e.g., § 24.210[2]*, P 3.01]:

(1) Dollar value of difference; and

(2) Amount of cash or other property paid to even out exchange.

NOTE:
The parties are not required to use boot to even out the difference between properties of different market values to effect a like-kind exchange. The unequal nature of an exchange will not affect the nonrecognition of any gain or loss realized, or the determination of basis pursuant to *Internal Revenue Code Section 1031(d)* [***see*** *Rev. Rul. 78-163, 1978-1 C.B. 257* ; ***see also*** *§ 24.42*].

g. Provisions regarding escrow, including [*see, e.g., § 24.210[2]*, P 4.02]:

(1) Name of escrow holder;

(2) Date for opening escrow; and

(3) Statement regarding which document will control if agreement and escrow instructions are inconsistent [*see, e.g., § 24.210[2]*, P 4.02].

h. Conditions for close of escrow [*see § 24.210 [2]*, P 5.01];

NOTE:
When the agreement is used for a three party exchange, the closing of the exchange escrow is usually made to occur simultaneously with the closing of the sale escrow for the other half of the transaction [***see*** *§ 24.210 [1][d][vi]*].

i. Provisions regarding title insurance policies for each parcel of property [*see, e.g., § 24.210[2]*, P 6.01].

j. Required deposits by each party [*see, e.g., § 24.210[2]*, P 7.01].

k. Proration of expenses for each property [*see, e.g., § 24.210[2]*, PP 8.01, 8.02].

NOTE:

The interim charges involved in the transaction may include taxes, insurance, utilities, rent from tenants, or interest if a loan is being assumed [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 91, ***Escrow*** (Matthew Bender).

l. Costs to be borne by each party [*see, e.g., § 24.210[2]*, PP 9.01, 9.02].

NOTE:

Costs customarily borne by each party include half of the escrow fee, the cost of a title insurance policy, and the cost of recording the deed to the property [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 91, ***Escrow*** (Matthew Bender)].

m. Designation of each party's address for notice purposes [*see, e.g., § 24.210[2]*, P 11.02].

n. Miscellaneous standard contract provisions:

(1) Statement that time is of the essence [*see, e.g., § 24.210[2]*, P 11.01];

(2) Prohibition against assignment without consent of both parties [*see, e.g., § 24.210[2]*, P 11.03];

(3) Provision specifying governing law [*see, e.g., § 24.210[2]* P 11.04];

(4) Provision binding parties' successors in interest [*see, e.g., § 24.210[2]*, P 11.05];

(5) Provision for payment of attorneys' fees in event of litigation [*see, e.g., § 24.210[2]*, P 11.06]; and

(6) "Entire agreement" clause [*see, e.g., § 24.210[2]*, P 11.07].

2. If agreement requires "sale in lieu" of exchange or is a deferred exchange, add [*see, e.g., §§ 24.25, 24.211[2]*, P 4.01]:

a. Statement of taxpayer's desire to exchange rather than sell;

b. Requirement that taxpayer locate suitable property ("Parcel B") for other party or qualified intermediary to purchase and then exchange for taxpayer's property;

NOTE:

For a summary of the parties' obligations in a sale in lieu transaction, see *§ 24.111*, Paragraph 2 NOTE. For a discussion of the parties' obligations in a deferred exchange, see *§ 24.25*.

c. Date by which taxpayer must locate suitable property;

d. Following requirements if Parcel B is located by stated date:

(1) Taxpayer's obligation to give written notification of location of Parcel B to third party or intermediary acquiring Parcel A;

(2) Third party's or intermediary's obligation to acquire Parcel B;

(3) Taxpayer's obligation to sell Parcel A to third party or intermediary if Parcel B is not located by stated date; and

(4) Purchase price of Parcel A, including terms of any installments.

e. If it is a deferred exchange, the date by which Parcel B must be conveyed to the taxpayer.

3. If agreement will contain escrow instructions, add all basic escrow provisions.

NOTE:

For a list of escrow provisions, see *§ 24.121*, Paragraph 2. Escrow instructions may be incorporated into the exchange agreement to avoid having two documents that may contain conflicting provisions. A similar result can be obtained by drafting the escrow instructions to conform with the exchange contract, or attaching escrow instructions to the contract as an exhibit so that both documents can be agreed on at the same time [***see*** *§ 24.211[1][b]*; ***see also*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 91, ***Escrow*** (Matthew Bender)].

4. If agreement is structured as option, draft option contract containing all of following [*see § 24.212*]:

NOTE:

A separate exchange agreement [***see*** *§§ 24.210, 24.211*] should be drafted and attached as an exhibit to the option contract for use on exercise of the option. If exercise of the option may result in an alternative sale, a sales agreement [***see*** Ch. 23, ***Real Property Sales Agreements***] should also be attached.

a. Grant of option to acquire Parcel A;

b. Amount of consideration given for option;

c. Date on which unexercised option will terminate; and

d. Manner in which option may be exercised.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)RequirementsTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
C. Procedural Guide to Like-Kind Exchange

9-24 California Legal Forms--Transaction Guide § 24.121

AUTHOR: by Patricia Hughes Mills

§ 24.121 Drafting Escrow Instructions for Exchange

NOTE:

As an alternative to separate drafted instructions, escrow instructions may be provided by the escrow holder on printed forms, or may be contained in the exchange agreement itself [***see*** *§ 24.211[2]*, art. 1; ***see also*** *§ 24.120*, P 3]. For a complete discussion of escrows and escrow instructions, see Ch. 26, ***Real Property Escrows*** .

1. Select one of following types of instructions:

NOTE:

Escrow procedures differ by custom in northern and southern California. For a discussion of those differences, see *§ 24.200[1][c]*.

a. Joint instructions; or

NOTE:

Joint or "bilateral" instructions are used primarily in southern California. For a set of mutual instructions, see *§ 24.201*.

b. Separate instructions.

NOTE:

Separate or "unilateral" instructions are used primarily in northern California. For a set of separate instructions for each party to the exchange, see *§ 24.200*.

2. Include provisions regarding following:

NOTE:
This list contains the basic items to be included in the exchange escrow instructions. For a more complete list of items, see the Transaction Guide in Ch. 26, ***Real Property Escrows***.

a. Deposit by each party of [*see, e.g., § 24.200[2],* PP 1, 2]:

(1) Property deed; and

(2) Boot, when value of one property is greater than the other.

NOTE:
If boot will be paid in installments, a note and deed of trust will be deposited [***see, e.g.***, *§ 24.200[2],* art. I, P 1].

b. Title insurance on each piece of property [*see, e.g., § 24.201[2],* P 4];

c. Exceptions to title [*see, e.g., § 24.201[2],* P 4];

d. Prorations [*see, e.g., § 24.201[2],* PP 7, 8];

e. Expenses to be paid by each party [*see, e.g., § 24.201[2],* PP 10-12];

f. Payment of broker's commission [*see, e.g., § 24.201[2],* P 9];

g. Delivery of deeds [*see, e.g., § 24.201[2],* P 4];

h. Conditions to closing of escrow [*see, e.g., § 24.201[2],* P 5];

NOTE:
In a three party exchange, the closing of the exchange escrow should be made contingent on the closing of the purchase escrow, to ensure that the transaction is not treated as two separate transactions for tax purposes [***see*** *§ 24.210[1][d][vi]*]. If the exchange of properties will not be simultaneous, the identification and receipt of the target property must be accomplished within certain statutory deadlines [***see*** *§ 24.122,* P 6].

i. Termination of escrow on failure to close by given date [*see, e.g., § 24.201[2],* P 6]; and

j. General rights and duties of escrow holder [*see, e.g., § 24.201[2],* P 14].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide § 24.122

AUTHOR: by Patricia Hughes Mills

§ 24.122 Conducting Two Party Exchange

1. Open exchange escrow.

a. Select escrow holder.

NOTE:
For a discussion of the choice of an escrow agent, see Ch. 26, ***Real Property Escrows*** .

b. Set up escrow file.

c. Advise taxpayer to deposit following into exchange escrow:

NOTE:
For a discussion of sales escrow requirements, see Ch. 26, ***Real Property Escrows*** .

(1) Exchange escrow instructions, when separately drafted [*see § 24.121*].

(2) Deed to property being exchanged.

(3) Any cash (or note and deed of trust) or other boot given pursuant to exchange.

(4) Funds to be used for escrow fees, if required by escrow holder.

NOTE:

Most escrow transactions require a deposit of fees upon opening the escrow [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 91, ***Escrow*** (Matthew Bender)].

2. Advise taxpayer against doing any of following [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)]:

NOTE:

If the form or structure in which the exchange takes place is faulty, the courts may find a purchase-sale transaction rather than an exchange transaction [***see*** *Carlton v. United States (5th Cir. [Fla.] 1967) 385 F.2d 238* ; *W.D. Haden Co. v. Commissioner of Int. Rev. (5th Cir. [T.C.] 1948) 165 F.2d 588]* . The Internal Revenue Service regards the following actions as indicative of a sale rather than an exchange [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender); ***see also*** Borchard v. Commissioner (1965) 24 T.C.M. 1643 (compliance with all criteria required for exchange)]. For a thorough discussion of the various characteristics that courts have found significant in determining whether a given transaction is a tax-deferred exchange or a taxable sale, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender).

a. Giving cash or other property for receipt of qualified property but failing to simultaneously transfer any qualified property.

NOTE:

In this situation, the taxpayer would appear to have made a purchase of property.

b. Receiving cash or other nonqualified property for transfer of taxpayer's qualified property, but failing to simultaneously receive qualified property from other party.

NOTE:

In this situation, the taxpayer would appear to have made a sale of property. If the transaction will be a nonsimultaneous exchange, in addition to other restrictions [***see*** P 6, ***below***], the taxpayer should not receive any cash or nonqualified property until the qualified property is received.

c. Becoming bound to sell or convey property to other party either:

NOTE:

Standard "sale in lieu of exchange" provisions do not violate this requirement because they require a sale of property only if the arranged exchange of that property does not take place by a given date [***see § 24.211[2]***, P 4.01; ***see also § 24.212[2]***, P 2.03].

(1) Before arrangement of exchange; or

(2) Regardless of whether exchange takes effect.

d. Selling newly acquired property immediately after exchange.

NOTE:

If the property is immediately sold, the sale is evidence that the property was held

primarily for sale [***see*** Bernard v. Commissioner (1967) 26 T.C.M. 858] . Property held primarily for sale is specifically excluded from nonrecognition treatment [*I.R.C. § 1031(a)(2)(A)*; ***see*** *§ 24.40[2]*].

3. If property to be transferred contains one to four residential units, have transferor complete and deliver transfer disclosure statement(s) to prospective transferee [*see Civ. Code §§ 1102.6, 1102.6a*; *see also* Ch. 23, *Real Property Sales Agreements*].

NOTE:

The transferor of such property must always provide the prospective transferee with the statutory real estate transfer disclosure statement [*Civ. Code § 1102.6*; ***see*** Ch. 23, ***Real Property Sales Agreements***]. In addition, effective July 1, 1990, the appropriate city or county may require the transferor to provide a second disclosure form [*Civ. Code § 1102.6a*; ***see*** Ch. 23, ***Real Property Sales Agreements***].

4. If property to be transferred includes single-family dwelling or factory-built housing, serve transferee with written statement before transfer of title indicating that dwelling contains operable smoke detector [*Health & Safety Code § 13113.8(a)-(c)*].

NOTE:

For a complete discussion of the requirements for the written statement, see Ch. 23, ***Real Property Sales Agreements*** .

5. If property contains one to four residential units, was built prior to January 1, 1960, and is of conventional light-frame construction, havbe transferor deliver following documents to transferee as soon as practicable before transfer of title [*Gov. Code § 8897.1(a), (b)*]:

NOTE:

For these purposes, the applicable definition of "conventional light-frame construction" is set forth in Chapter 25 of the 1991 Edition of the Uniform Building Code of the International Conference of Building Officials [*Gov. Code § 8897.1(a)*].

a. Homeowner's Guide to Earthquake Safety.

b. Earthquake hazards disclosure statement [*see Gov. Code § 8897.2* (required contents)].

NOTE:

For an illustrative disclosure statement and coverage of the Homeowner's Guide to Earthquake Safety, see Ch. 23, ***Real Property Sales Agreeements*** .

6. Close escrow in following manner:

NOTE:

This discussion and the forms (except for Section 24.213[2]) in this chapter assume that a simultaneous exchange of property will occur. However, if the property to be received in the transaction has not been located at the time Parcel A is transferred, certain deadlines for the identification and receipt of Parcel B must be met before the exchange is completed [***see*** P 6, ***below***; ***see also*** *§ 24.213[2]*].

a. Advise taxpayer to take all actions required by exchange agreement as condition to close of escrow [*see, e.g., § 24.210[2]*, P 5.01].

NOTE:

Title to each party's property is retained until the satisfaction of all conditions [***see*** *Civ. Code § 1057*], and then passes automatically at the moment of satisfaction of those conditions [*Todd v. Vestermark (1956) 145 Cal. App. 2d. 374, 377, 302 P.2d 347]* .

b. Record property deeds.

NOTE:

The recordation of the documents serves to evidence the passing of title previously accomplished [*Holman v. Toten (1942) 54 Cal. App. 2d 309, 313-314, 128 P.2d 808]* . Recordation is usually handled by the escrow agent. For further discussion of recordation procedures, see Ch. 27, ***Deeds and Recording*** .

c. On closing, advise taxpayer to obtain from escrow holder all of following:

(1) Deed to property received in exchange.

(2) Any boot (including note and deed of trust) received in exchange.

(3) Title insurance policy for property received in exchange.

NOTE:

If, in an escrow transaction for the simultaneous exchange of real property, a policy of title insurance is not to be issued to a party to the exchange, the party must be given a statutory notice (in a separate document) indicating that it may be advisable for the party to obtain such a policy. The recipient must sign and acknowledge the notice [*Civ. Code § 1057.6*]. The forms in this chapter provide for the issuance of a title insurance policy for each parcel of property involved in the exchange [***see*** *§ 24.120*, P 1i]. For further discussion and an illustrative notice requirement, see Ch. 23, ***Real Property Sales Agreements*** .

(4) Itemized statement of costs charged to taxpayer's account.

7. If exchange transaction is nonsimultaneous:

NOTE:

A nonsimultaneous exchange may occur when the taxpayer transfers Parcel A to the party interested in acquiring it before Parcel B has been located [***see*** *§§ 24.40[4], 24.213*]. In that situation, if the following deadlines are not met, the transaction will not qualify for nonrecognition treatment as a like-kind exchange [*I.R.C. § 1031(a)(3)*].

a. Identify property to be received by taxpayer on or before 45th day after date on which taxpayer transfers property given to other party [*I.R.C. § 1031(a)(3)(A)*; *Treas. Reg. § 1.1031(k)-1(b)*]; and

b. Ensure that taxpayer receives property in exchange after the earlier of [*I.R.C. § 1031(a)(3)(B)*]:

(1) 180 days after date on which taxpayer transfers property given in exchange; or

(2) Due date for transferor's federal income tax return for taxable year in which transfer

of property given in exchange occurs.

NOTE:
Replacement property is treated as identified only if it is designated as replacement property in either a written agreement covering the exchange that is signed by all parties before the end of the identification period, or a written document signed by the taxpayer and hand-delivered or mailed, telecopied, or otherwise sent before the end of the identification period to a person involved in the exchange (such as an intermediary, escrow agent, or title company) other than the taxpayer or a related party [*Treas. Reg. § 1.1031(k)-1(c)(2)*; ***see*** *§ 24.40[4][c][i]*]. The replacement property must be unambiguously described. A legal description or street address is acceptable [*Treas. Reg. § 1.1031(k)-1(c)(3)*]. The regulations also provide special rules for identifying more than one property [***see*** *Treas. Reg. § 1.1031(k)-1(c)(4)*; § 24.40[4][c][ii]; ***see also*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
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9-24 California Legal Forms--Transaction Guide § 24.123

AUTHOR: by Patricia Hughes Mills

§ 24.123 Conducting Three Party Exchange

1. Arrange purchase and sale of property to be exchanged for taxpayer's property.

NOTE:

One element common to all three party exchanges is the purchase of one parcel of property by the third party to the exchange. In a "Baird" exchange, the taxpayer and the owner of Parcel B first exchange their properties; the third party then purchases Parcel A [***see*** *§ 24.22[2]*]. In an "Alderson" exchange, the third party first purchases Parcel B, and then exchanges it for Parcel A [***see*** *§ 24.22[1]*]. In most exchanges, Parcel B is already located and the exchange of the properties is simultaneous [***see, e.g.***, *§§ 24.210-24.212*]. However, if the transaction involves a delayed exchange, Parcel B may not yet be located and the purchase may take place at a later time. In that situation, the taxpayer must also meet certain deadlines for identification and receipt of Parcel B [***see*** *§ 24.122*, P 6]. Care must also be taken to select a qualified intermediary if one is to be used [***see*** *§ 24.40[4][e][iv]*].

a. Draft sales contract.

NOTE:

For sales agreements, see Ch. 23, ***Real Property Sales Agreements*** . Unless it is a deferred exchange, the contract should contain a provision that makes the closing of the sales escrow contingent upon closing of the exchange escrow. Although conceptually the purchase of Parcel B occurs before the exchange of Parcels A and B, the purchase and exchange escrows are made contingent on one another so that they occur simultaneously.

Furthermore, the third party will want the purchase to be made contingent in order to protect against acquiring unwanted property [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)]. For a reciprocal contingency provision used in an exchange agreement, see *§ 24.210[2]*, P 5.01.

b. Draft sales escrow instructions.

NOTE:

For escrow instructions for sales agreements, see Ch. 26, ***Real Property Escrows*** . Like the sales contract, the sales escrow instructions should provide that closing of the sales escrow is contingent upon the closing of the exchange escrow [***see*** P a NOTE, ***above***], unless it is a deferred exchange. For a reciprocal contingency provision used in an exchange escrow, see *§ 24.201[2]*, P 5.

2. Open exchange escrow.

NOTE:

For a discussion of the process of opening an exchange escrow, see *§ 24.122*, Paragraph 1.

3. Open sales escrow.

NOTE:

In a three party exchange, a separate escrow must be also set up for the sale transaction. The two escrows must be kept completely separate [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)]. For a general discussion of sales escrows, see Ch. 26, ***Real Property Escrows*** .

4. Advise taxpayer against taking any of the following actions regarded as indicative of a sale rather than an exchange in three party exchange transactions [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)]:

NOTE:

The following guidelines apply only to three party exchanges. For a list of actions to be avoided in both two party and three party exchanges, see *§ 24.122*, Paragraph 2.

a. Receiving any money other than cash boot transferred pursuant to exchange.

NOTE:

For example, in an Alderson exchange the taxpayer should not accept cash from the third party for Parcel A and then receive Parcel B directly from the owner. Since the essence of an exchange is the transfer of property for other property, and the essence of a sale is the payment of cash for property, the receipt of money by taxpayer may indicate a sale rather than an exchange [***see*** *Carlton v. United States (5th Cir. [Fla.] 1967) 385 F.2d 238, 242*]. If the parties are engaging in a deferred exchange, the safe harbors provided in the regulations should be followed in order to avoid constructive receipt of the cash [***see*** *Treas. Reg. § 1.1031(k)-1(g)*; ***see also*** *§ 24.40[4][e]*].

b. Signing any documents related to sale or purchase of property by third party.

NOTE:

The taxpayer should not be bound to take any action except that of exchanging property, to avoid the possibility of constructive receipt of money for the taxpayer's property [***see, e.g.***, *Alderson v. C.I.R. (9th Cir. [T.C.] 1963) 317 F.2d 790]* .

c. Making exchange after date specified in "sale in lieu" agreement.

NOTE:

In a "sale in lieu" agreement [***see § 24.211***], the taxpayer is required to locate an acceptable Parcel B, for the third party to purchase and then exchange for Parcel A, by a given date. If the taxpayer fails to notify the third party that the taxpayer has located suitable property by that date, the agreement obligates the taxpayer to sell Parcel A to the third party. If an exchange is completed after the date specified in the agreement, the third party is already required to pay cash for Parcel A, and the taxpayer is already entitled to receive money. Since the essence of a tax-deferred like-kind exchange is the transfer of one property in exchange for another [***see*** *I.R.C. § 1031(a)*], and after the specified date any transfer of Parcel A is in consideration for money rather than property, the transaction would not qualify for nonrecognition of gain [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)].

d. Violating identification and receipt requirements in deferred exchange.

NOTE:

If the requirements of *Internal Revenue Code Section 1031(a)(3)* are not satisfied in a deferred exchange, the transaction will be treated as a taxable sale [***see § 24.40[4]***].

5. If property to be transferred contains one to four residential units, have transferor complete and deliver transfer disclosure statement(s) to prospective transferee [*see Civ. Code §§ 1102.6, 1102.6a*; *see also Civ. Code §§ 1102-1102.18*; Ch. 23, *Real Property Sales Agreements*].

NOTE:

The transferor of such property must always provide the prospective transferee with the statutory real estate transfer disclosure statement [*Civ. Code § 1102.6*; ***see*** Ch. 23, ***Real Property Sales Agreements***]. In addition, the appropriate city or county may require the transferor to provide a second disclosure form [*Civ. Code § 1102.6a*; ***see*** Ch. 23, ***Real Property Sales Agreements***].

6. If property to be transferred includes single-family dwelling or factory-built housing, prepare written statement indicating that dwelling contains operable smoke detector.

NOTE:

For a discussion of the smoke detector statement, see *§ 24.122*, Paragraph 4.

7. Close escrows.

a. Advise taxpayer to take all actions required by exchange agreement for close of exchange escrow.

NOTE:

For a discussion of passage of title upon satisfaction of all conditions, see *§ 24.122*, Paragraph 5a NOTE.

b. Advise taxpayer to take all actions required by sales contract for close of the sales escrow.

NOTE:

Conditions for close of the sales escrow, as well as the exchange escrow, must be satisfied before title will pass, as the close of the exchange and sales escrows are made contingent upon each other [***see, e.g.***, *§ 24.210 [2]*, P 5.01]. For a general discussion of typical conditions required for close of a sales escrow, see Ch. 26, ***Real Property Escrows*** .

c. Record property deeds in correct order.

NOTE:

For a discussion of recordation, see *§ 24.122*, Paragraph 5b NOTE. In a three party exchange, the deeds must be recorded in the proper order in an exchange transaction to ensure that the chain of title is uninterrupted [***see*** CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 91, ***Escrow*** (Matthew Bender)]. For example, in an Alderson exchange the deed to Parcel B should be recorded pursuant to the sale to the third party before recordation of that deed pursuant to the exchange.

d. Obtain documents and any boot from escrow agent after closing.

NOTE:

For a list of documents to be obtained, see *§ 24.122*, Paragraph 5c.

8. If exchange transaction is nonsimultaneous, advise taxpayer to identify and receive property to be acquired within statutory deadlines [*see I.R.C. § 1031(a)(3)*].

NOTE:

For a discussion of the deadlines for identification and receipt of acquired property, see *§ 24.122*, Paragraph 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
C. Procedural Guide to Like-Kind Exchange

9-24 California Legal Forms--Transaction Guide §§ 24.124-24.129

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.124[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

9-24 California Legal Forms--Transaction Guide § 24.130

AUTHOR: by Patricia Hughes Mills

§ 24.130 Determining Amount of Depreciation Recapture

NOTE:

When a taxpayer disposes of depreciated real property, the like-kind nonrecognition provisions may be overridden to the extent that the depreciation recapture provisions apply. Recapture of depreciation refers to the treatment of gain realized on the disposition of property as ordinary income, rather than capital gain, to the extent of the depreciation deductions taken on the property [***see*** *I.R.C. §§ 1245, 1250*; ***see also*** *§ 24.45*]. The fact that recaptured depreciation is treated as ordinary income, as opposed to capital gains, may be important, especially for individual taxpayers. Individual net capital gains are taxed at rates significantly lower than for ordinary income, based on the time the asset was held and other specified factors [***see*** *I.R.C. § 1(h)*; ***see also*** *I.R.C. § 1(a)-(d), (i)*]. However, a corporate taxpayer is taxed at a maximum rate of 35 percent on net capital gain (or, if less, taxable income) [*I.R.C. § 1201(a)*], the same maximum rate that applies to ordinary corporate income [***see*** *I.R.C. § 11(b)*]. On the other hand, treating recaptured depreciation as ordinary income may increase the kinds of losses a taxpayer may use to offset that ordinary income [***see*** *I.R.C. § 1211*].

The remaining importance of recapture is that it may force the recognition of gain in some cases when it would not otherwise be recognized, or to a greater extent than otherwise, depending on the nature of the property transferred or received in the exchange [***see*** *I.R.C. §§ 1245(b)(4), 1250(d)(4)(A)(ii), (C)*; ***see also*** *§ 24.45*].

1. If taxpayer transfers Section 1250 property in like-kind exchange and gain is not recognized in whole or part, determine amount of recapture to be recognized in following manner:

NOTE:

"Section 1250 property" is all depreciable real property that is not "Section 1245

property" [***see*** *I.R.C. § 1250(c)*; ***see also*** *§ 24.131*, P 2]. For most depreciable real property placed in service after 1986 there will be no recapture [***see*** *I.R.C. § 1250(a)(1)*]: residential rental property and nonresidential real property placed in service after that date will be restricted to straight-line depreciation methods [***see*** *I.R.C. § 168*], and there is no "additional" depreciation as defined by *I.R.C. § 1250(b).*

a. Calculate amount of depreciation recapture that would apply to transaction if it were taxable [*I.R.C. § 1250(a)*]; and

b. Calculate limitation on amount of recapture by taking greater of either [*I.R.C. § 1250(d)(4)(A)(i), (C)*]:
(1) Amount of gain recognized on disposition under *I.R.C. § 1031* [*see § 24.113*].

(2) Excess of following:
(a) Amount of gain subject to recapture that would apply to transaction if it were taxable; over

(b) Fair market value of depreciable real property received in exchange.

2. If taxpayer transfers Section 1245 property in like-kind exchange and gain is not recognized in whole or part, determine amount of recapture as follows:

NOTE:
I.R.C. § 1245 applies to property that (1) is or has been subject to the allowance for depreciation under *I.R.C. § 167* or to the allowance of amortization provided in specified Internal Revenue Code Sections; and (2) is either personal property, property that has a very specialized use [***see*** *I.R.C. § 1245(a)(3)(B), (D)*-(F)], or property that has an adjusted basis reflecting amortization under certain Internal Revenue Code sections [*I.R.C. § 1245(a)(3)*; ***see*** *I.R.C. § 1245(a)(3)(C)*].

a. Calculate amount of depreciation recapture that would apply if transaction were taxable.

b. Calculate limitation on amount of recapture by taking sum of:

(1) Amount of gain recognized on exchange.

(2) Fair market value of property acquired in exchange that is not:
(a) Section 1245 property; and

(b) Taken into account in P (1), *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Disposition of Depreciable PropertyTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind

Exchanges (IRC sec. 1031)RequirementsTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)



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9-24 California Legal Forms--Transaction Guide § 24.131

AUTHOR: by Patricia Hughes Mills

§ 24.131 Calculating Basis of Property Received in Trade

1. Calculate basis of like-kind property received in exchange, as follows [*see § 24.43*]:

a. When no gain or loss is recognized, and:
(1) No boot is given or received, take adjusted basis of property transferred by taxpayer at time of the exchange [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(a)*].

(2) Boot is given [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(a)*]:
(a) Start with basis of property given in exchange.

(b) Make proper adjustments to basis; and

NOTE:
For example, expenditures for improvements would raise the cost basis. The rules on adjustment to basis are contained in *I.R.C. § 1016*.

(c) Increase by amount of any additional consideration in way of boot given for new property.

(3) Boot is received [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(d)*]:

(a) Take basis of property given in exchange.

(b) Decrease by amount of any money received.

(c) Allocate to nonqualified property amount equivalent to fair market value on date of exchange.

NOTE:
For a definition of "nonqualified property," see Part III(A) NOTE.

(d) Allocate remainder to qualified property.

NOTE:
"Qualified property" refers to property that is held for productive use in a trade or business or for investment, and qualifies for nonrecognition treatment upon exchange [***see*** *I.R.C. § 1031(a)(1)*; ***see also*** CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 72, ***Tax-Deferred Exchanges*** (Matthew Bender)].

b. When gain is recognized on account of taxpayer's receipt of:

(1) Money (or liabilities transferred by taxpayer) [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(b)*]:

NOTE:
For purposes of determining basis, if the other party to the exchange either (1) assumes a liability of the taxpayer, or (2) acquires property of the taxpayer that is subject to liability, the taxpayer is treated as having received money in the exchange [*I.R.C. § 1031(d)*].

(a) Take basis of property transferred by taxpayer, as adjusted to date.

(b) Decrease by amount of money received in exchange.

(c) Increase by amount of gain recognized on exchange.

(2) Nonqualified property [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(c)*]:

NOTE:
For a definition of "nonqualified property," see Part III(A) NOTE.

(a) Take total basis of property transferred by taxpayer, as adjusted to date.

(b) Decrease by amount of money received.

(c) Increase by amount of gain recognized on other nonqualified property.

(d) Allocate to nonqualified property amount equivalent to fair market value at date of exchange.

(e) Allocate remainder to qualified property.

c. When gain or loss is recognized on account of taxpayer's transfer of nonqualified property [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(e)*]:

NOTE:
Since there is no prohibition on trading nonqualified property along with qualified property for other qualified property, the gains or losses normally reportable outside of exchanges on this nonqualified

property are also separately recognized on the exchange transaction [***see*** *I.R.C. § 1001*].

(1) Take total basis of properties transferred by taxpayer.

(2) Increase by amount of gain recognized.

(3) Decrease by amount of loss recognized.

NOTE:
For purposes of this calculation, the taxpayer is deemed to have received in exchange for the nonqualified property an amount equal to its fair market value on the date of the exchange [Treas. Reg. § 1.1031(d)-(1)(e)].

d. When taxpayer has transferred Section 1250 property [*I.R.C. § 1250*; *see § 24.130*, P 1]:

(1) Apply basis rules of *Internal Revenue Code Section 1031* [*see* PP a-c, *above*] to qualified property acquired if [*Treas. Reg. § 1.1250-3(d)(4)*]:

(a) All Section 1250 gain is recognized [*see § 24.130*, P 1].

(b) Only non-Section 1250 property is received in exchange.

(c) Only one Section 1250 property is received in exchange.

(2) If more than one Section 1250 property is received, allocate basis to each property in proportion to relative fair market values of all Section 1250 property [*see Treas. Reg. § 1.1250-3(d)(2)(iv), (4)*].

(3) If both Section 1250 property and non-Section 1250 property are received, allocate basis in proportion to fair market value of properties [*Treas. Reg. § 1.1250-3(d)(2), (4)*].

2. Calculate basis of any nonqualified property received in exchange, as follows:

a. When no gain or loss is recognized but boot is received [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(d)*]:

(1) Take basis of property given in exchange;

(2) Decrease basis by amount of any money received; and

(3) Allocate amount of basis to nonqualified property that is equivalent to fair market value on date of exchange.

NOTE:
The remainder of the amount not allocated to nonqualified property is the basis of the qualified property [***see*** P 1a(3), ***above***].

b. When gain is recognized on account of taxpayer's receipt of nonqualified property [*I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1(c)*]:

(1) Take total basis of property transferred by taxpayer, as adjusted to date;

(2) Decrease basis by amount of money received;

(3) Increase basis by amount of gain recognized on other nonqualified property; and

(4) Allocate to nonqualified property amount equivalent to fair market value at date of exchange.

NOTE:
The remainder of the amount not allocated to nonqualified propertyis the basis of the qualified property [***see*** P 1b(2), ***above***].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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9-24 California Legal Forms--Transaction Guide §§ 24.132-24.199

AUTHOR: by Patricia Hughes Mills

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§§ 24.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
A. Escrow Instructions

9-24 California Legal Forms--Transaction Guide § 24.200

AUTHOR: by Patricia Hughes Mills

§ 24.200 Escrow Instructions--Short Form

[1] Comment

[a] Use of Form

This form is a short version of escrow instructions for the tax-deferred exchange of real property. It may be used for either a two or a three party exchange. This form contains separate instructions from each party that must be executed independently of each other. For a longer, mutual version of instructions, see *§ 24.201*. For additional sets of instructions, see *Ch. 26, Real Property Escrows, §§ 26.200-26.202*.

As an alternative to drafted escrow instructions, the parties to an exchange agreement may execute the printed escrow instructions supplied by the escrow or title company used to handle the exchange. As another alternative, the exchange agreement itself may contain the escrow instructions [*see § 24.211[2],* P 1.01].

[b] Purpose of Escrow and Escrow Instructions

Escrow is the method of closing a real estate transaction in which there is a concurrent exchange of money and documents resulting in the transfer of title to the property. A disinterested party is used to handle the details of the real estate transaction and to protect the interests of each party. In an exchange transaction, each party deposits a deed to the property given up in the exchange, along with any boot given, and receives a deed to the property received, together with any boot received. The purpose of the escrow instructions is to define the duties of the escrow holder that, when performed, will authorize the escrow holder to complete the transfer of the property. For a complete discussion of escrow and escrow instructions in general, see Ch. 26, *Real Property Escrows* .

[c] Use of Joint or Separate Instructions

The selection of joint or separate instructions may be determined by the area in California where the exchange takes

place. As a matter of custom, escrow procedures differ in northern and southern California. Joint or "bilateral" instructions are customarily used in southern California, at least in smaller transactions. Separate or "unilateral" instructions, separately executed by each party, are customarily used in northern California. When separate instructions are used, problems due to conflicting provisions from each party can be avoided if the attorneys for the parties consult with each other in drafting the instructions [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE,, Ch. 91, *Escrow* (Matthew Bender)]. This form contains separate instructions from each party. The second party incorporates by reference the first party's instructions [*see* [2], P 3.07, *below*].

The choice of escrow holder also differs in southern and northern California. In southern California, escrow transactions are usually handled by independent escrow companies or the escrow departments of banks or savings and loans, while in northern California they are usually handled by title insurance companies. For a discussion of these differences in escrow procedures, see *Ch. 26, Real Property Escrows, § 26.10* et seq.

[d] Identity of Parties

Whether these escrow instructions are used for a two party [*see § 24.210*] or three party exchange [*see §§ 24.210-24.212*], the taxpayer-client should be the "first party" designated in the instructions. If the exchange is an Alderson exchange [*see § 24.22 [1]*], the "second party" will be the person interested in acquiring the taxpayer's property. If the exchange is structured as a Baird exchange [*see § 24.22 [2]*], the "second party" will be the owner of the property the taxpayer wishes to acquire.

[e] Contents of Instructions

[i] In General

This form contains each party's agreement to deposit the deed to the property given up in the exchange. The party whose property has less equity will also deposit cash to be paid to the other party to make up the difference [*see* [2], *below*]. The instructions make the receipt of the other party's deed a condition of the delivery of each party's deed. For a list of basic provisions included in the escrow instructions, see *§ 24.121*, P 2.

[ii] Title Insurance

Title insurance for exchange escrows is handled in the same manner as ordinary sales escrows. Title insurance protects against the purchaser's loss due to liens or encumbrances on the property, or defects in the title to the property [*Ins. Code §§ 104, 12340.1*]. The California Land Title Association [CLTA], a professional organization of title companies, has devised the basic form of insurance policy for owners and lenders. For detailed discussion of the role of title insurance in the transfer of real property, and an illustration of the CLTA policy, see Ch. 26A, *Title Insurance* .

[iii] Exceptions to Title

This form assumes that the parties have received copies of the preliminary title reports on each property [*see, e.g., Ch. 26A, Title Insurance, §§ 26A.200*]. After the receipt of the title report, the contract may require each party to notify the other of any liens, encumbrances, or other rights of third parties ("exceptions") that the acquiring party approves [*see, e.g., § 24.211 [2]*, art. 3]. These instructions assume that the parties have already determined which of those exceptions they have approved [*see* [2], P 1.02, *below*].

[iv] Proration

These instructions contain a clause that requires the escrow holder to prorate whatever interim charges are involved in the transaction [*see* [2], PP 1.03- 1.05, *below*]. These charges may include taxes, insurance, utilities, rent from tenants, or interest if a loan is being assumed [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 91, *Escrow*

(Matthew Bender)].

[v] Failure of Escrow to Close

These instructions provide that if the escrow does not close on the agreed-upon date, the escrow terminates and the documents and funds deposited by each party will be returned [*see* [2], P 1.07, *below*]. Most escrow instructions contain this provision, or provide that any party who has fully complied with the requirements may demand the return of his or her money and property [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE,, ch. 91, *Escrow* (Matthew Bender)].

[vi] Concurrent Closing of Escrow

These instructions constitute only half of the escrow arrangements necessary in a three party like-kind exchange. A contract of sale [*see* ch. 23, *Real Property Sales Agreements*] and sales escrow instructions [*see* vol. 6, ch. 26, *Real Property Escrows*] are also necessary for the developer's purchase of Parcel A in an Alderson exchange or Parcel B in a Baird exchange. This form makes the closing of the exchange escrow contingent upon the closing of the sales escrow in the other half of the transaction [*see* [2], P 1.06, *below*], in order to create a simultaneous exchange of properties. Reciprocal contingencies should be included in both the exchange escrow instructions and agreement and the sales escrow instructions and agreement of an exchange in which both properties are transferred at the same time, in order to ensure that the Internal Revenue Service does not see the purchase and exchange as one transaction. If the two escrows are not contingent upon each other, the transaction could be viewed as a taxable sale of Parcel A and a taxable purchase of Parcel B [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE,, ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)]. For a discussion of requirements for exchanges in which one property is transferred at a later time, see [f], *below*.

[f] Nonsimultaneous Exchanges

To qualify for deferred recognition of gain, the exchange of properties may be, but need not be, simultaneous. Nonsimultaneous exchanges usually occur in a three party exchange when the taxpayer transfers the taxpayer's property to the third party but does not receive any property in exchange until a later time when suitable property has been located.

Internal Revenue Code Section 1031 was amended in 1984 to provide that a nonsimultaneous exchange will not qualify for tax-deferred treatment unless the property to be received is identified and received within certain time periods. First, the taxpayer must identify the property to be received in the exchange on or before the day that is 45 days after the transfer of the taxpayer's property to the other party to the exchange [*I.R.C. § 1031(a)(3)(A)*]. Second, the taxpayer must receive the property to be acquired in the exchange before the earlier of (1) 180 days after transfer of the taxpayer's property, or (2) the due date (determined with regard to extensions) of the taxpayer's federal income tax return for the taxable year in which the taxpayer's property was transferred [*I.R.C. § 1031(a)(3)(B)*; *see § 24.40[4]*]. Because these escrow instructions require an exchange of title as a condition to closing [*see* [2], PP 1.02, *3.05, below*], those deadlines do not apply to the exchange contemplated in this form [*see § 24.213[2]*].

[2] Form

Escrow Instructions--Short Form

ESCROW INSTRUCTIONS

_____ [*Name of title company*] Escrow No. _____

_____ [*Address*] Date _____

Attention: _____[*name of title officer handling escrow*]

The undersigned _____[*name of owner of Parcel A*] ("First Party") and _____[*name of person acquiring Parcel A*] ("Second Party"), hereby nominate you to be the Escrow Holder for the exchange in escrow of certain real property.

ARTICLE 1. INSTRUCTIONS OF FIRST PARTY

Deposit[s] by First Party

1.01. On or before _____[*date for close of escrow*], First Party will hand you a grant deed in favor of Second Party (or Second Party's nominee), executed and acknowledged by First Party, of that certain real property located in the [*add if applicable:* City of _____,] County of _____, State of _____ ("Parcel A"), and more particularly described as follows: _____[*set forth legal description of Parcel A*]. [*If Second Party's equity in Parcel B exceeds First Party's equity in Parcel A, add:* Also on or before _____ (*repeat date set forth above*), First Party will hand you _____ (the sum of $_____ *or, if payable in installments, describe note and trust deed to be deposited by First Party, e.g.,* a promissory note in the amount of $_____, secured by a deed of trust on Parcel A and payable to Second Party in monthly installments of $_____ or more commencing _____ days after the close of escrow, with interest at the rate of _____ percent per annum from the close of escrow on the unpaid principal balance of the note, and with the entire balance due and payable _____ years from the close of escrow)].

Delivery of Deed [and Other Documents];Title Insurance

1.02. You will deliver the grant deed [, promissory note, and trust deed] described in Paragraph 1.01, when you are able to satisfy the following requirements:

(1) You obtain [*or* issue] the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with liability not exceeding $

_____ [*value of Parcel A*], showing title vested in Second Party (or Second Party's nominee), subject to

_____ [*state all exceptions, including current real property taxes*].

(2) You obtain a grant deed executed and acknowledged [by Second Party] in favor of First Party to that certain real property located in the [*add if applicable:* City of

_____ ,] County of

_____ , State of

_____ ("Parcel B"), and more particularly described as follows:

_____ [*set forth legal description of Parcel B*].

(3) You obtain [*or* issue] the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with liability not exceeding $

_____ [*value of Parcel B*], showing title vested in First Party [*add, if applicable:* as joint tenants *or* as community property], subject only to

_____ [*set forth exceptions, e.g.,* current real property taxes and encumbrances]

[*If First Party's equity in Parcel A exceeds Second Party's equity in Parcel B, add:*]

(4) You hold for the account of First Party the sum of $

_____ (less those expenses and charges that are payable by First Party as provided in Paragraph 1.05 of this Agreement) [*and if the difference in equities is payable by a promissory note, add*:, and Second Party's promissory note and deed of trust as provided in Paragraph 2.01 of this Agreement].

[*Continue with the following:*]

Prorations as to Parcel A

1.03. You are instructed to prorate on Parcel A to the close of escrow all _____[*set forth matters to be prorated on Parcel A, e.g.,* interest, taxes, insurance, and rents].

Prorations as to Parcel B

1.04. You are instructed to prorate on Parcel B to the close of escrow all _____[*set forth matters to be prorated on Parcel B, e.g.,* interest, taxes, insurance, and rents].

Expenses of First Party

1.05. First Party agrees to pay _____[*specify, e.g.,* the cost of title insurance on Parcel B, _____ (his *or* her) proportionate share of the escrow charges, and the cost of recording the deed to Parcel B].

[*Add the following for a three party exchange:*]

Conditions

1.06. The closing of this escrow is contingent upon and must close concurrently with the close of Escrow No.

_____ with _____[Escrow Holder *or insert the name and address of other escrow company handling the sales escrow*].

[*Continue with the following:*]

Close of Escrow

1.07. Time is of the essence. If this escrow does not close on or before _____[*date for close of escrow*], this escrow will automatically terminate and the instruments, documents, and funds deposited by each party will be returned to the party depositing them. In the event of such a cancellation, each party must share equally all escrow cancellation fees and expenses.

ARTICLE 2. INSTRUCTIONS OF SECOND PARTY

Deposit[s] by Second Party

2.01. On or before _____[*date for close of escrow*], Second Party will hand you a grant deed to Parcel B executed and acknowledged [by Second Party] in favor of First Party. [*If First Party's equity in Parcel A exceeds Second Party's equity in Parcel B, add the following:* Also on or before _____ (*repeat date set forth above*), Second Party will hand you _____ (the sum of $_____ *or, if payable in installments, describe note and deed of trust to be deposited by Second Party, e.g.,* a promissory note in the amount of $_____, secured by a deed of trust on Parcel B and payable to First Party in monthly installments of $_____ or more commencing _____ days after the close of escrow, with interest at the rate of _____ percent per annum from the close of escrow on the unpaid principal balance of the note, and with the entire balance due and payable _____ years from the close of escrow)].

[*Continue with the following:*]

Delivery of Deed [and Other Documents];Title Insurance

2.02. You will deliver the deed [, promissory note, and trust deed] described in Paragraph 2.01 when you hold the properly executed and acknowledged grant deed to Parcel A, when you obtain the appropriate policy of title insurance on Parcel A [*if Second Party's equity in Parcel B exceeds First Party's equity in Parcel A, add:*, and when you hold for the account of Second Party the sum of $_____, less those expenses and charges that are payable by Second Party as provided in Paragraph 2.03 of this Agreement (*and if the difference in equities is payable by a promissory note, add:*, and First Party's promissory note and deed of trust as provided in Paragraph 1.01 of this Agreement)].

[*Continue with the following:*]

Expenses of Second Party

2.03. Second party agrees to pay _____[*set forth all items that second party will pay, e.g.,* the cost of title insurance on Parcel A and the cost of recording the deed to Parcel A].

ARTICLE 3. GENERAL INSTRUCTIONS

Disbursements

3.01. All disbursements must be made by check of Escrow Holder.

Adjustments

3.02. All adjustments must be made on the basis of a 30-day month.

Recordation of Instruments and Documents

3.03. Escrow Holder may record any instruments or documents deposited into this escrow that become necessary or proper to obtain the policies of title insurance on Parcel A and Parcel B as provided in these Instructions.

Payment of Encumbrances

3.04. Escrow Holder will pay all encumbrances of record necessary to place titles to Parcel A and Parcel B in the condition called for in these Instructions.

Delivery of Documents

3.05. Escrow Holder must instruct the appropriate county recorders to mail the grant deeds to Parcel A and Parcel B to the respective grantees, must deliver the policies of title insurance on those properties to the respective vestees, and must deliver _____[*set forth all other items to be delivered, e.g.,* trust deeds] to _____[*names and addresses of parties to whom delivered*].

Amendments

3.06. Any amendment or supplement to these Instructions must be in writing.

Incorporation by Reference of Other Provisions

3.07. Any general provision set forth in Escrow Holder's usual form of escrow instructions now in use with respect to exchanges of real property is hereby incorporated into these Instructions.

Executed on _____[*date*] at _____[*city and state*].

FIRST PARTY
_____ [*signature of First Party*]
[*typed name*]

SECOND PARTY
_____ [*signature of Second Party*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements

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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
A. Escrow Instructions

9-24 California Legal Forms--Transaction Guide § 24.201

AUTHOR: by Patricia Hughes Mills

§ 24.201 Escrow Instructions--Long Form

[1] Comment--Use of Form

This form is a long version of escrow instructions that may be used with a two party or three party exchange agreement that does not contain escrow instructions. It constitutes joint or "bilateral" instructions from the parties to the exchange. For a complete discussion of the use of escrow instructions in an exchange transaction, see *§ 24.200 [1]*. For a discussion of escrow in general, see Ch. 26, *Real Property Escrows* . For a set of joint escrow instructions to be used in a sale and purchase transaction, see *Ch. 26, Real Property Escrows, § 26.202[2]*.

[2] Form

Escrow Instructions--Long Form

ESCROW INSTRUCTIONS

_____ [*Name of title company*] Escrow No. _____

_____ [*Address*] Date _____

Attention: _____[*name of title officer handling the escrow*]

The undersigned, _____[*name of owner of Parcel A*] ("First Party") and _____[*name of person acquiring Parcel A*] ("Second Party"), hereby nominate you to be the Escrow Holder for the above escrow relating to the exchange of certain real property.

The parties hereby instruct you as follows:

Deposit by First Party

1. On or before _____[*date for close of escrow*], First Party will cause to be handed to you [*add if applicable:* the sum of $_____ and] a grant deed in favor of Second Party (or Second Party's nominee), executed and acknowledged by First Party, of that certain real property located in the [*add if applicable:* City of _____,] County of _____, State of _____ ("Parcel A"), and described in Exhibit A, which is attached to these Instructions and hereby incorporated by reference.

Deposit by Second Party

2. On or before _____[*date for close of escrow*], Second Party will cause to be handed to you [*add if applicable:* the sum of $_____ and] a grant deed in favor of First Party, executed and acknowledged by Second Party, of that certain real property located in the [*add if applicable:* City of _____,] County of _____, State of _____ ("Parcel B"), and described in Exhibit B, which is attached to these Instructions and hereby incorporated by reference.

Valuation

3. For purposes of this exchange, the following will apply:

(1) The value of Parcel A is deemed to be $

_____ , and the value of Parcel B is deemed to be $

_____ .

(2) The total amount of encumbrances against Parcel A is $

_____ , and the total amount of encumbrances against Parcel B is $

_____ .

(3) The difference in the values of the equities (value of each parcel less encumbrances) of Parcel A and Parcel B is deemed to be $

_____ . This difference will be compensated for by the payment of the sum of $

_____ by

_____ [First Party *or* Second Party] to

_____ [Second Party *or* First Party], through escrow at the close of escrow pursuant to these Instructions.

Delivery of Deeds; Title Insurance

4. Escrow Holder will close this escrow by delivering the grant deed to Parcel A to Second Party (or Second Party's nominee), and the grant deed to Parcel B to First Party, and by paying each party the amount in that party's respective account, when Escrow Holder can obtain both of the following:

(1) The usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with total liability of $

_____ [*value of Parcel A*], showing title to Parcel A vested in Second Party (or nominee), subject only to (a) nondelinquent general special taxes and assessments, if any [*or* all taxes for the fiscal year

_____ -

_____ , a lien but not yet payable]; and (b) all exceptions [*or* exception Nos.

_____] as shown on Preliminary Title Report No.

_____ , dated

_____ .

(2) The usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with total liability of $

_____ [*value of Parcel B*], showing title to Parcel B vested in First Party, or nominee, subject only to (a) nondelinquent general special taxes and assessments, if any [*or* all taxes for the fiscal year

_____ -

_____ , a lien but not yet payable]; and (b) all exceptions [*or* exception Nos.

_____] as shown on Preliminary Title Report No.

_____ , dated

_____ .

Conditions

5. The closing of this escrow is contingent upon the following: _____[*list any matters upon which closing is contingent, e.g.,* First Party obtaining a loan of not less than $_____ against Parcel B, payable in installments not exceeding $_____ per month with interest of not more than _____ percent per year]. [*If a three party exchange, add:* Closing of this escrow is also contingent upon the concurrent closing of Escrow No. _____ with _____ (Escrow Holder *or insert name and address of other escrow company handling sales escrow*)].

Close of Escrow

6. Time is of the essence. If this escrow does not close on or before _____[*date for close of escrow*], this escrow will automatically terminate and the instruments, documents, and funds deposited by each party must be returned to the party depositing them. In the event of termination, each party will share equally all escrow cancellation fees and expenses.

Prorations as to Parcel A

7. The following matters with respect to Parcel A will be prorated to the close of escrow:

(1) Real property taxes and assessments, if any;

(2) Rents and insurance, if any, upon the basis of statements handed to Escrow Holder, as approved by both parties; and

(3)

_____ [*List all other prorations, e.g.,* Interest on existing loans on Parcel A].

Prorations as to Parcel B

8. The following matters with respect to Parcel B will be prorated to the close of escrow:

(1) Real property taxes and assessments, if any;

(2) Rents and insurance, if any, upon the basis of statements handed to Escrow Holder, as approved by both parties; and

(3)

_____ [*List all other prorations, e.g.,* interest on existing loans on Parcel B].

Broker's Commission

9. If this escrow closes by title to Parcel A passing to Second Party (or Second Party's nominee), and title to Parcel B passing to First Party, First Party agrees to pay a broker's commission, for the conveyance of Parcel A to Second Party, of $_____ to _____[*name and address of broker*], payable through escrow at the close of escrow, and Second Party agrees to pay a broker's commission, for the conveyance of Parcel B to First Party, of $_____ to _____[*name and address of broker*], payable through escrow at the close of escrow.

Expenses of First Party

10. The charges and expenses incident to this escrow that will be borne by First Party are as follows:

(1)

_____ [The entire *or specify fraction, e.g.,* One half of the] fee of the Escrow Holder for escrow services.

(2)

_____ [The entire *or specify fraction, e.g.,* One half of the] cost of C.L.T.A. standard coverage policy of title insurance on Parcel A.

(3)

_____ [The entire *or specify fraction, e.g.,* One half of the] cost of drafting the deed to Parcel A and of recording the deed to Parcel B.

(4)

_____ [*List any other costs of First Party*].

Expenses of Second Party

11. The charges and expenses incident to this escrow that will be borne by Second Party are as follows:

(1)

_____ [The entire *or specify fraction, e.g.,* One half of the] fee of the Escrow Holder for escrow services.

(2)

_____ [The entire *or specify fraction, e.g.,* One half of the] cost of C.L.T.A. standard coverage policy of title insurance on Parcel B.

(3)

_____ [The entire *or specify fraction, e.g.,* One half of the] cost of drafting the deed to Parcel B and of recording the deed to Parcel A.

(4)

_____ [*List any other costs of Second Party*].

Other Expenses

12. All other costs and authorized expenses incurred by Escrow Holder pursuant to this escrow must be borne by the parties in accordance with the customary practices of the Escrow Holder.

Deposit of Funds

13. On or before the close of escrow, each party will deposit into this escrow that party's respective share of the costs and expenses called for under these Instructions.

General Instructions

14. The parties hereby further instruct Escrow Holder as follows:

(1) All disbursements must be made by check of Escrow Holder.

(2) All adjustments must be made on the basis of a 30-day month.

(3) Escrow Holder may record any instruments or documents deposited into this escrow that become necessary or proper to obtain the policies of title insurance on Parcel A and Parcel B, as provided in these Instructions.

(4) Escrow Holder must pay all encumbrances of record necessary to place titles to Parcel A and Parcel B in the condition called for in these Instructions.

(5) Escrow Holder must instruct the appropriate county recorders to mail the grant deeds to Parcel A and Parcel B to the appropriate grantees, must deliver the policies of title insurance on the properties to the appropriate recipients, and must deliver

_____ [*set forth any other items to be delivered*] to

_____ [*identify recipients*].

(6) Any amendment or supplement to these Instructions must be made, and consented to, by both parties in writing.

(7) Any general provision set forth in Escrow Holder's usual form of escrow instructions now in use with respect to exchanges of real property, is hereby incorporated herein.

Executed on _____[*date*] at _____[*city and state*].

FIRST PARTY
_____ [*signature of First Party*]
[*typed name*]

SECOND PARTY
_____ [*signature of Second Party*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal

Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
A. Escrow Instructions

9-24 California Legal Forms--Transaction Guide §§ 24.202-24.209

AUTHOR: by Patricia Hughes Mills

[Reserved]

§§ 24.202[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
B. Exchange Agreements

9-24 California Legal Forms--Transaction Guide § 24.210

AUTHOR: by Patricia Hughes Mills

§ 24.210 Exchange Agreement

[1] Comment

[a] Use of Form

This agreement is a contract for the exchange of like-kind real property. It may be used in a two party exchange, in a three party "Alderson" exchange between the taxpayer and developer, or in a "Baird" exchange between the taxpayer and seller. This agreement assumes that the property to be acquired by the taxpayer has already been located. For an agreement granting an option to exchange before the property to be acquired by the taxpayer is located, see *§ 24.212*. For a three party exchange or sale agreement that includes escrow instructions, see *§ 24.211*. For a deferred exchange, see *§ 24.213*. Printed exchange agreements, used primarily by real estate brokers, are also available from sources such as the California Association of Realtors (CAR).

[b] Contract Requirements

The rules of law applicable to contracts in general also apply to contracts for the exchange of property. For a complete discussion of those rules in the context of real property contracts, see Ch. 23, *Real Property Sales Agreements* .

[c] Relationship to Escrow Instructions

Most like-kind exchanges are transacted through a disinterested escrow holder in order to protect the interests of each party. Separate escrow instructions should be executed to accompany this exchange agreement. The instructions may be drafted [*see §§ 24.200, 24.201*], obtained in printed form from the escrow holder, or incorporated into the exchange agreement itself [*see § 24.211*]. For a discussion of the function of escrow instructions, see *§ 24.200[1][b]*.

The escrow instructions and the exchange agreement are to be read together unless the parties intend and understand that the escrow instructions modify or change the agreement [*see* CALIFORNIA REAL ESTATE LAW &

PRACTICE, Ch. 91, *Escrow* (Matthew Bender)]. To avoid conflicts between the agreement and the instructions, the instructions should be drafted in accordance with the agreement provisions. The agreement may contain a clause stating which document will control in the event of a conflict [*see, e.g.*, [2], P *4.02, below*]. Alternatively, the escrow instructions may be attached to the agreement as an exhibit so that both documents can be agreed upon at the same time, or the agreement can be drafted to include instructions so that there is only one document [*see, e.g., § 24.211*; *see also* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 91, *Escrow* (Matthew Bender)].

[d] Contents of Agreement

[i] In General

The terms of an exchange agreement are basically the same as the terms of a general contract for the sale of real estate [*see* Ch. 23, *Real Property Sales Agreements*]. The primary differences between the two are the provisions for reciprocal transfers [*see* [2], P 1.01, *below ; see also* [vi], *below*], the payment of the difference in the net value of the properties [*see* [2], P *3.01, below*], and an interest element in deferred exchanges [*see § 24.213*] contained in an exchange agreement.

The various parties and properties are usually given shorthand names in the contract. For either a two- or three party exchange, the taxpayer-client should be the First Party. If the form is used for a three party Alderson exchange [*see § 24.22[1]*], the taxpayer will be the First Party and the person interested in acquiring the taxpayer's property will be the Second Party. If the form is used for a three party Baird exchange [*see § 24.22[2]*], the owner of the property the taxpayer wishes to acquire will be the Second Party.

[ii] Exchange of Properties

This form sets forth the agreement of each of the parties to transfer his or her property in exchange for the property of the other. The legal description of each parcel should be attached as an exhibit to the agreement [*see* [2], P 1.01, *below*]. This form states the parties' intention that the conveyances qualify as a like-kind exchange under *Internal Revenue Code § 1031*. While the parties' intent does not govern the tax consequences of their actions, an intent to exchange rather than sell may determine the character of the transaction [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)].

[iii] Exceptions to Title

This form assumes that the parties have received copies of the preliminary title reports on each property [*see* Ch. 26A, *Title Insurance*], and that they have already determined which of those exceptions they have approved [*see* [2], Art. 2, *below*]. For an example of a provision requiring each party to provide a title report to the other, see *§ 24.211[2]*, Article 3.

[iv] Valuation and Transfer of Boot

This agreement sets forth the value of each parcel of property to be exchanged [*see* [2], P *3.01, below*]. In most cases, the various properties to be exchanged will not have identical values. For that reason, money or other property, known as "boot," is given by one party to even out the exchange [*see § 24.42*]. This form assumes that any inequities will be offset by the payment of a stated amount of cash [*see* [2], P *3.01, below*].

[v] Automatic Termination of Escrow

This agreement provides that if the escrow does not close on the agreed-upon date, the escrow terminates and the documents and funds deposited by each party will be returned [*see* [2], P *4.03, below*]. Most escrow instructions also contain this provision [*see, e.g., § 24.201[2]*, P 6], or provide that any party who has fully complied with the

requirements may demand the return of his or her money and property [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 91, *Escrow* (Matthew Bender)].

[vi] Concurrent Closing of Exchange and Sales Escrows

These instructions constitute only half of the escrow arrangements necessary in a three party like-kind exchange. A contract of sale [*see* ch. 23, *Real Property Sales Agreements*] and sales escrow instructions [*see* Ch. 26, *Real Property Escrows*] are also necessary for the developer's purchase of Parcel A in an Alderson exchange, or Parcel B in a Baird exchange. This agreement, as well as the escrow instructions to be used with the agreement, makes the closing of the exchange escrow contingent upon the closing of the sales escrow in the other half of the transaction [*see* [2], P *5.01, below*], in order to preserve the tax-free nature of the transaction as a simultaneous exchange [*see § 24.200[1][e][vi]*; *see also* CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)]. If Parcel B has not yet been located and the exchange will not be simultaneous, certain deadlines for identification and receipt of that property must be met in order for the entire transaction to qualify as a like-kind exchange [*see I.R.C. § 1031(a)(3)*; *see also § 24.40[4]*].

[vii] Title Insurance

This form provides that each party will receive a title insurance policy for the property received, showing title to be free and clear except for agreed-upon exceptions set forth in the exchange agreement [*see* [2], P *6.01, below*]. Title insurance protects against the purchaser's loss due to liens or encumbrances on the property, or defects in the title to the property [*Ins. Code §§ 104, 12340.1*]. The California Land Title Association [C.L.T.A.], a professional organization of title companies, has devised the basic form of insurance policy for owners and lenders. For a detailed discussion of the role of title insurance in the transfer of real property, and an illustration of the CLTA policy, see Chapter 26A, *Title Insurance* .

[e] Federal Income Taxation

For a discussion of the tax effects of an exchange transaction, see *§§ 24.41* and *24.42*. For a discussion of the recapture of depreciation on property transferred pursuant to a like-kind exchange, see *§ 24.45*.

[2] Form

Exchange Agreement

EXCHANGE AGREEMENT

This agreement is entered into by and between _____[*name of owner of Parcel A*] ("First Party") and _____[*name of person acquiring Parcel A*] ("Second Party").

First Party and Second Party agree as follows:

ARTICLE 1. EXCHANGE

Mutual Conveyances

1.01. First Party agrees to convey that certain real property located in the [*if applicable, add:* City of _____,] County of _____, State of _____ ("Parcel A") and described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference. Second Party agrees to convey to First Party that certain property located in the [*if applicable, add:* City of _____,] County

of _____, State of _____ ("Parcel B"), and described in Exhibit B, which is attached to this Agreement and hereby incorporated by reference. These conveyances will be for and in consideration of each other and on the terms and conditions set forth in this Agreement. It is the intention of the parties that these mutual conveyances will qualify as an "exchange" within the meaning of *Internal Revenue Code Section 1031*.

ARTICLE 2. EXCEPTIONS

Exceptions to Parcel A

2.01. First Party will convey title to Parcel A to Second Party free and clear of all covenants, conditions, restrictions, reservations, easements, and liens for taxes and assessments not yet payable, except as follows: _____[*list all exceptions*].

Exceptions to Parcel B

2.02. Second Party will convey title to Parcel B to First Party free and clear of all covenants, conditions, restrictions, reservations, easements, and liens for taxes and assessments not yet payable, except as follows: _____[*list all exceptions*].

ARTICLE 3. VALUE OF PROPERTY

Valuation [and Adjustment of Difference in Equities]

3.01. For purposes of the exchange, (1) Parcel A is deemed to have a fair market value of $_____, total encumbrances against it in the sum of $_____, and an equity of $_____[*value less encumbrances*], and (2) Parcel B is deemed to have a fair market value of $_____, total encumbrances against it in the sum of $_____, and an equity of $_____[*value less encumbrances*]. [*If difference exists between equities of Parcel A and Parcel B, add:* The differences in the respective equities of Parcel A and Parcel B is $_____, and will be offset by the payment in cash, through escrow at the close of escrow, of the sum of $_____ by _____[First Party *or* Second Party] to _____[Second Party *or* First Party]; provided, however, that the difference in the equities will be adjusted accordingly if the total encumbrances against either Parcel A or Parcel B are in an amount other than the respective amounts listed above for those properties.]

ARTICLE 4. ESCROW

Opening of Escrow

4.01. The exchange of Parcel A and Parcel B will be consummated by means of an escrow, which is to be opened with _____[*name and address of Escrow Holder*] ("Escrow Holder") within _____ (*number*) days following the execution of this Agreement.

[*Choose one of the following paragraphs:*]

[*If escrow instructions will not be attached to this form, use:*]

Escrow Instructions

4.02. The escrow instructions given to Escrow Holder must incorporate the terms of, and must be consistent with, this Agreement. Further, the escrow instructions must provide that if there is any inconsistency between the terms of this Agreement and the escrow instructions, the terms of this Agreement will control.

The escrow instructions must also provide that Escrow Holder will concurrently record First Party's grant deed to Parcel A to Second Party, and Second Party's grant deed to Parcel B to First Party, when the following apply:

(1) Escrow Holder can obtain the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with liability not exceeding $

_____ [*value of Parcel A*], showing title to Parcel A vested in Second Party (or Second Party's nominee), subject only to

_____ [*set forth exceptions to Parcel A*].

(2) Escrow Holder can obtain the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with liability not exceeding $

_____ [*value of Parcel B*], showing title to Parcel B vested in First Party, subject only to

_____ [*set forth exceptions to Parcel B*].

(3) Escrow Holder receives from

_____ [First Party *or* Second Party] cash or a cashier's [*or* certified] check in the sum of $

_____ [*sum equal to difference in equities, as provided in Article 3*].

[*OR*]

[*If escrow instructions will be attached to this form, use:*]

Escrow Instructions

4.02. The escrow instructions must be substantially in the form of the instructions attached to this Agreement as Exhibit C.

[*Continue with the following:*]

Close of Escrow

4.03. Unless extended in accordance with this Agreement, the escrow must close on or before _____[*date*] (the "close of escrow"). If the escrow cannot close by title to Parcel A passing to Second Party and title to Parcel B passing to First Party on or before that date, for any reason, the escrow will be automatically terminated and the Escrow Holder will upon demand of either party return all funds and documents deposited in the escrow to the party depositing them. The failure of the escrow to close and of the Escrow Holder to return to the depositing party all funds or documents deposited in the escrow will not affect any liability of either party to this Agreement to the other arising out of any breach of this Agreement [*or* will relieve both parties to this Agreement from their respective obligations under this Agreement].

ARTICLE 5. CONDITIONS TO CLOSING

Conditions

5.01. The enforceability of this Agreement and the closing of the escrow provided for in this Agreement are contingent upon the following:

(1) The performance by each party of all matters required to be performed by that party under this Agreement.

(2)

_____ [*List other conditions to the close of escrow, e.g.,* The rezoning of Parcel A for commercial use].

[*Choose one of the following paragraphs, if applicable:*]

[*For three party "Alderson" exchange, add:*]

(3) The concurrent closing of Escrow No.

_____ with

_____ [Escrow Holder *or state name and address of escrow company handling sale escrow*], by and between Second Party and

_____ [*name of owner of Parcel B*], for the purchase of Parcel B by Second Party from

_____ [*name of owner of Parcel B*] for purposes of this exchange.

[*OR*]

[*For three party "Baird" exchange, add:*]

(3) The concurrent closing of Escrow No.

_____ with

_____ [Escrow Holder *or state name and address of escrow company handling sale escrow*], by and between Second Party and

_____ [*name of party acquiring Parcel A from Second Party*], for the purchase of Parcel A by

_____ [*name of party acquiring Parcel A from Second Party*] from Second Party.

[*Continue with the following:*]

ARTICLE 6. TITLE INSURANCE

Policies

6.01. At the close of escrow, Second Party will be entitled to receive from _____[*name of title company*] its usual form C.L.T.A. standard coverage policy of the title insurance in the amount of $_____[*value of Parcel A*], showing title to Parcel A vested in Second Party free and clear of all matters except those matters stated in Paragraph 2.01 of this Agreement; and First Party will be entitled to receive from _____[*name of title company*] its usual form C.L.T.A. standard coverage policy of title insurance in the amount of $_____[*value of Parcel B*], showing title to Parcel B vested in First Party free and clear of all matters except those matters stated in Paragraph 2.02 of this Agreement.

ARTICLE 7. DEPOSITS

Required Deposits

7.01. Each party must deposit into the escrow provided for in this Agreement all funds and instruments required by this Agreement.

ARTICLE 8. PRORATIONS

Parcel A

8.01. The following matters will be prorated for Parcel A to the close of escrow:

(1) General and special real property taxes, and interests, and assessments for the current fiscal tax year [*or* all taxes for the fiscal year

_____ -

_____ , a lien but not yet payable]; and

(2)

_____ [*List all other matters required to be prorated, e.g.,* insurance, rents, and interest on Parcel A].

Parcel B

8.02. The following matters will be prorated for Parcel B to the close of escrow:

(1) General and special real property taxes, and interests, and assessments for the current fiscal tax year [*or* all taxes for the fiscal year

_____ -

_____ , a lien but not yet payable]; and

(2)

_____ [*List all other matters required to be prorated, e.g.,* insurance, rents, and interest on Parcel B].

ARTICLE 9. COSTS

First Party

9.01. The charges and expenses of the escrow to be borne by First Party are as follows:

(1)

_____ [The entire *or specify fraction, e.g.,* One half of the] fee of the Escrow Holder for escrow services.

(2) The cost of a standard policy of title insurance on Parcel B.

(3) The cost of drafting the deed to Parcel A and of recording the deed to Parcel B.

(4)

_____ [*List other specific expenses to be borne by First Party*].

(5) Any other costs and expenses that in the opinion of the Escrow Holder are customarily borne by the First Party.

Second Party

9.02. The charges and expenses of the escrow to be borne by Second Party are as follows:

(1)

_____ [The entire *or specify fraction, e.g.,* One half of the] fee of the Escrow Holder for escrow services.

(2) The cost of a standard policy of title insurance on Parcel A.

(3) The cost of drafting the deed to Parcel B and of recording the deed to Parcel A.

(4)

_____ [*List other specific expenses to be borne by Second Party*].

(5) Any other costs and expenses that in the opinion of the Escrow Holder are customarily borne by the Second Party.

ARTICLE 10. BROKER'S COMMISSION

Payment of Commissions

10.01. If the escrow provided for in this Agreement closes by title to Parcel A passing to Second Party and title to Parcel B passing to First Party, the following will apply:

(1) First Party will pay a broker's commission, for the conveyance of Parcel A to Second Party, of $

_____ to

_____ [*name and address of broker*], payable through escrow at the close of escrow.

(2) Second Party will pay a broker's commission, for the conveyance of Parcel B to First Party, of $

_____ to

_____ [*name and address of broker*], payable through escrow at the close of escrow.

ARTICLE 11. MISCELLANEOUS PROVISIONS

Time of Essence

11.01. Time is of the essence in this Agreement.

Notice

11.02. Any notice to be given or other document to be delivered to either party by the other under this Agreement may be delivered in person or may be deposited in the United States mail in the State of California, duly registered or

certified, with postage prepaid, and addressed as follows:

To First Party: _____[*name, address, and zip code*].

To Second Party: _____[*name, address, and zip code*].

Either party may, from time to time, by written notice to the other, designate a different address that will be substituted for the one specified above. If any notice or other document must be sent by certified mail as specified above, it will be deemed to have been effectively served or delivered at the expiration of 24 hours following the deposit of the notice in the United States mail in the manner set forth above.

Assignment

11.03. Neither this Agreement, nor any interest in this Agreement, will be assignable by either party without the prior written consent of the other.

Governing Law

11.04. All questions with respect to the construction of this Agreement, and the rights and liabilities of the parties to this Agreement, will be governed by the laws of the State of California.

Inurement

11.05. Subject to the restrictions against assignment contained in this Agreement, this Agreement will inure to the benefit of, and will be binding upon, the assigns, successors in interest, personal representatives, estates, heirs, and legatees of each of the parties.

Attorneys' Fees

11.06. In the event of any controversy, claim, or dispute between the parties, arising out of or relating to this Agreement or the breach of this Agreement, the prevailing party will be entitled to recover from the other party reasonable expenses, attorneys' fees, and costs.

Entire Agreement

11.07. This Agreement contains the entire agreement of the parties, and supersedes any prior written or oral agreements between them concerning the subject matter contained in this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties, relating to the subject matter contained in this Agreement, that are not fully expressed in this Agreement.

Executed on _____[*date*] at _____[*city and state*].

FIRST PARTY
_____ [*signature of First Party*]
[*typed name*]

SECOND PARTY

_____ [*signature of Seco nd Party*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Not Like-Kind PropertyTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
B. Exchange Agreements

9-24 California Legal Forms--Transaction Guide § 24.211

AUTHOR: by Patricia Hughes Mills

§ 24.211 Three Party Exchange or Sale Agreement--With Escrow Instructions Included

[1] Comment

[a] Use of Form

This form is a three party exchange agreement that provides for a sale in lieu of exchange if the taxpayer does not locate real property to receive in exchange by a given date. This arrangement is a type of "Alderson" exchange [*see § 24.22 [1]*]. For an exchange agreement in which the property to be transferred to the taxpayer in exchange has already been located, see *Section 24.210*. For an agreement granting the third party interested in acquiring the taxpayer's property an option to exchange property with the taxpayer, see *Section 24.212*. For a deferred exchange, see *Section 24.213*. This comment discusses only those provisions peculiar to this form. For a discussion of those provisions generally found in all exchange agreements, see *Section 24.210[1]*.

[b] Provision for Escrow Instructions

This form contains escrow instructions for the transfer of title to each of the parties [*see* [2], P 1.01, *below*]. It includes provisions for the deposit of money and documents into escrow [*see* [2], art. 12, *below*], prorations of expenses on the properties [*see* [2], art. 13, *below*], payment of costs and fees [*see* [2], arts. 14, 15, *below*], and the method of closing escrow [*see* [2], art. 6, *below*]. No separate instructions are necessary. By drafting the exchange agreement to include escrow instructions, the attorney avoids the potential problem of having two documents that may contain conflicting provisions. A similar result can be obtained by drafting the escrow instructions to conform with the exchange contract, or attaching escrow instructions to the contract as an exhibit so that both documents can be agreed on at the same time [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 91, *Escrow* (Matthew Bender)]. If separate escrow instructions are used, they should be read together with the exchange agreement unless the parties intend and understand that the escrow instructions modify or change the agreement [*Swanson v. Thurber (1955) 132 Cal. App. 2d 171, 180, 281 P.2d 642]* .

[c] "Sale in Lieu" Provision

This agreement requires the taxpayer to locate suitable property by a stated date, so that the third party interested in acquiring the taxpayer's property may purchase that designated property for purposes of an exchange. If the taxpayer fails to locate Parcel B, the third party will be entitled to purchase Parcel A outright from the taxpayer without having to perform any exchange transaction [*see* [2], PP *4.01, 4.03, below*]. The purpose of the sale provision is to ensure that the person interested in the taxpayer's property will acquire that property by either exchange or purchase by a given date, since that person usually would not have entered into the exchange agreement except for his or her interest in the taxpayer's property. The fact that the agreement provides for a taxable purchase and sale transaction as an alternative to an exchange does not preclude the taxpayer from obtaining nonrecognition of gain if the transaction is actually completed as an exchange by the specified date [*see Alderson v. Commissioner (9th Cir. [T.C.] 1963) 317 F.2d 790, 793]* . If the taxpayer does notify the third person of acceptable property by the stated date, that person becomes obligated to purchase Parcel B for the purpose of exchanging it for Parcel A [*see* [2], P *4.01, below*], and the exchange transaction then proceeds without further application of the sale in lieu provisions.

However, a problem arises if an exchange is completed after the date specified in the agreement. After that date, the agreement obligates the third person to pay cash for Parcel A, and entitles the taxpayer to receive money. Since the essence of a tax-deferred like-kind exchange is the transfer of one property in exchange for another [*see I.R.C. § 1031(a)*], and after the specified date any transfer of Parcel A is in consideration for money rather than property, the transaction would not qualify for nonrecognition of gain [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Tax-Deferred Exchanges* (Matthew Bender)]. Therefore, the attorney should advise the taxpayer using this form to select a realistic date as a deadline for locating Parcel B, and warn the taxpayer of the tax implications of failing to locate Parcel B before that date.

[d] Taxation of Transaction as Sale or Exchange

The use of this agreement for a sale of property will result in very different tax consequences for the taxpayer than its use for an exchange. If the transfer of property is ultimately consummated as a valid like-kind exchange, neither gain nor loss on the transfer of the like-kind property will be recognized by the taxpayer [*I.R.C. § 1031(a)*], and gain (but not loss) will be recognized on other money or other property received by the taxpayer pursuant to the exchange [*I.R.C. § 1031(b)*]. For a complete discussion of the tax implications of exchanges, see *Sections 24.41* and *24.42*.

If no acceptable property is located by the taxpayer to serve as Parcel B and the taxpayer's property is sold outright to the third person, the realized gain or loss will be recognized as a gain or loss in the year of sale [*I.R.C. § 1001(c)*]. For a complete discussion of the taxation of real property sales, see Ch. 23, *Real Property Sales Agreements* .

Installment sale reporting [*see I.R.C. § 453*] and recapture of depreciation [*see I.R.C. §§ 1245, 1250*] apply to both sales and exchanges.

[e] Deposit Upon Opening of Escrow

This form requires the person acquiring Parcel A to deposit a stated amount of money with the escrow holder upon the opening of escrow [*see* [2], P *5.02, below*]. If the transaction is closed as a sale, the deposit is applied toward the sales price [*see* [2], P 5.02(1), *below*]. This is a standard provision in real estate sales contracts [*see* Ch. 23, *Real Property Sales Agreements*].

If the transaction is closed as an exchange, it is important for tax purposes to specify the disposition of any funds deposited by the person acquiring Parcel A. To avoid classification as a taxable sale rather than exchange, the agreement should not grant the taxpayer any rights to receive money from the transaction except that which is paid out of the exchange escrow as cash boot [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 72, *Exchanges*

(Matthew Bender); *see also § 24.123*, P 2]. A taxpayer will be deemed to have constructively received money when the party acquiring the taxpayer's property deposits funds in escrow subject to the taxpayer's sole right to control their disposition [*Halpern v. United States (N.D. Ga. 1968) 286 F. Supp. 255, 258]* . This form requires the deposit to be used to pay the taxpayer any excess in value of Parcel A over Parcel B [*see* [2], PP 4.02, 5.02(2), *below*], and requires the escrow holder to return the remaining deposit to the party acquiring Parcel A [*see* [2], P 5.02(b), *below*].

If the party acquiring the taxpayer's property breaches the agreement, this form requires the deposit to be paid to the taxpayer as liquidated damages [*see* [2], P 5.02(3), *below*]. A provision in a contract for the sale of real property liquidating the damages to the seller upon the buyer's default is invalid unless the provision is separately signed or initialed by each party to the contract [*Civ. Code § 1677(a)*]. If the provision is included in a printed contract, it must be set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type [*Civ. Code § 1677*]. For a complete discussion of liquidated damages clauses in real property sales contracts, see Ch. 23, *Real Property Sales Agreements* .

If the escrow is canceled without a breach by the developer, this form requires the escrow holder to return the full amount of the deposit to the developer [*see* [2], P 5.02(4), *below*].

[f] Exceptions to Title

This form assumes that the party acquiring the taxpayer's property has not yet received a preliminary title report from the taxpayer and has not determined which exceptions to Parcel A are acceptable. It requires the taxpayer to provide the acquiring party with a preliminary title report within a specified period of time after execution of the agreement [*see* [2], P *3.02, below*]. The acquiring party must then approve any exceptions in writing or all will be deemed disapproved [*see* [2], P *3.02, below*]. If the transaction is completed as an exchange, the party acquiring Parcel A must provide a preliminary title report on Parcel B to the taxpayer, for written approval of any exceptions to title [*see* [2], P 4.01(5), *below*]. For a provision in which the preliminary title report has been received and exceptions to title approved, see *§ 24.210[2]*, P 2.01.

[g] Right of Entry

This agreement gives the party acquiring Parcel A the right to enter the taxpayer's property for the purpose of conducting soil, engineering, and land tests and surveys in order to determine the suitability of Parcel A for the proposed use of the property [*see* [2], P *10.01, below*]. This provision would be appropriate when property is transferred to a developer who plans to use it for a particular purpose [*see* Ch. 23, *Real Property Sales Agreements* (purchase for subdivision purposes)]. It also provides that the taxpayer will cooperate with the acquiring party in obtaining the appropriate zoning necessary for that party's intended use of the property [*see* [2], P *10.01, below*]. If certain conditions are necessary for the acquiring party's intended use, these provisions could be made express conditions to the closing of escrow under Article 7 [*see* Ch. 23, *Real Property Sales Agreements*].

[2] Form

Three Party Exchange or Sale Agreement--With Escrow Instructions Included

EXCHANGE OR SALE AGREEMENT

This agreement is entered into by and between _____[*name of owner of Parcel A*] ("First Party") and _____[*name of person acquiring Parcel A*] ("Second Party").

First Party and Second Party agree as follows:

ARTICLE 1. TRANSFER AGREEMENT

Agreement and Escrow Instructions

1.01. The terms and conditions set forth in this Agreement constitute both (1) an agreement between the parties for the transfer by First Party of Parcel A (as described in Paragraph 2.01 of this Agreement) to Second Party, and (2) escrow instructions for the related escrow to be opened by the parties with _____[*name and address of title company*] ("Escrow Holder") pursuant to Article 5 of this Agreement.

ARTICLE 2. LEGAL DESCRIPTION

Parcel A

2.01. First Party will transfer to Second Party and Second Party will acquire from First Party, on all of the terms and conditions contained in this Agreement, that certain real property located in the [*if applicable, add:* City of _____,] County of _____, State of _____ ("Parcel A") and described as follows: _____[*set forth legal description of Parcel A*].

ARTICLE 3. EXCEPTIONS

Title Requirements

3.01. In the event that this escrow closes by title to Parcel A passing to Second Party, title will be free and clear of all liens, encumbrances, covenants, conditions, restrictions, tenancies, rights of occupation or possession, easements, encroachments, and rights of any kind in third parties, except the following: (1) general and special real property taxes and assessments for the current fiscal tax year; and (2) any other exceptions that are approved by Second Party.

Preliminary Title Report

3.02. For purposes of determining approved exceptions, First Party will provide to Second Party, within _____[*number*] days after execution of this agreement, a preliminary title report on Parcel A. Within _____[*number*] days after receipt of the preliminary title report, Second Party will notify First Party and Escrow Holder in writing as to any exceptions that Second Party approves. All other exceptions will be deemed disapproved by Second Party. [*If applicable, add:* Any exception in the nature of a trust deed, mortgage, or other lien that is removable by the payment of money by Escrow Holder from closing funds in this escrow, must be so removed at the close of this escrow by the payment from those funds by Escrow Holder].

ARTICLE 4. EXCHANGE OR SALE

Exchange

4.01. First Party would prefer to exchange rather than to sell Parcel A for other real property of a similar nature. Therefore, First Party will have until _____[*date prior to date for close of escrow*] to locate and to notify Second Party in writing of other real property ("Parcel B") that would be acceptable to First Party in exchange for Parcel A. In the event of notification to Second Party on or before the foregoing date, Second Party will enter into a separate escrow with the owner of Parcel B ("Seller") for the acquisition of title to Parcel B. Second Party will close

escrow with Seller and will acquire title to Parcel B, provided all of the following conditions are satisfied:

(1) The purchase price of Parcel B is payable by Second Party to Seller entirely in cash [*or specify terms if payment is to be made by installment payments*].

(2) The amount of the purchase price of Parcel B is acceptable to First Party.

(3) The cost to Second Party of acquiring Parcel B, including all cash payments toward the purchase price and all other acquisition costs (including all escrow, title, and recording costs) incurred by Second Party, does not exceed $

_____ .

(4) The closing of the escrow between Second Party and Seller is made contingent upon the concurrent closing of this escrow.

(5) Second Party conveys title to Parcel B to First Party, through this escrow, free and clear of all liens, encumbrances, covenants, conditions, restrictions, tenancies, rights of occupation or possession, easements, encroachments, and rights of any kind in third parties, except the following: (a) general and special real property taxes and assessments for the current fiscal tax year; and (b) any other exceptions that are approved by First Party. For purposes of determining approved exceptions, Second Party will provide First Party with a preliminary title report on Parcel B, together with full copies of all exceptions set forth in that report. Within

_____ [*number*] days after receipt of the preliminary title report on Parcel B, First Party will notify Second Party and Escrow Holder in writing as to any exceptions that First Party approves. All other exceptions will be considered disapproved by First Party. [*If applicable, add:* Any exception in the nature of a trust deed, mortgage, or other lien that is removable by payment of money by Escrow Holder from closing funds in this escrow, will be so removed at the close of this escrow by the payment from those funds by Escrow Holder].

Payment on Exchange

4.02. In the event that this escrow is closed as an exchange, the exchange value of Parcel A, less encumbrances, is deemed to be $_____. Second Party will pay to First Party, through this escrow at the close of escrow, in cash or by a cashier's [*or* certified] check, an amount equal to the difference, if any, between the exchange value of Parcel A and the total cost to Second Party of acquiring Parcel B. For these purposes, "total cost" includes all payments in cash by Second Party to Seller toward the purchase price of Parcel B, and all other costs to Second Party of acquiring Parcel B, including all escrow, title, and recording costs.

Sale

4.03. In the event that this transaction is not consummated as an exchange as of the date set for the close of escrow as provided in this Agreement, First Party will immediately sell to Second Party, and Second Party will immediately purchase from First Party, Parcel A at the purchase price of $_____, payable as follows: _____[*set forth terms of purchase and, if applicable, security*].

ARTICLE 5. ESCROW

Opening

5.01. Within _____[*number*] days after the execution of this Agreement, an escrow will be opened by both parties with Escrow Holder.

Deposit

5.02. Upon the opening of the escrow provided for in this Agreement, and as a condition of this Agreement, Second Party will deposit in escrow cash or a cashier's [*or* certified] check payable to Escrow Holder in the amount of $_____. This deposit must be used as follows:

(1) If this escrow is closed as a sale rather than as an exchange, the deposit will be applied to the purchase price of Parcel A.

(2) If this escrow is closed as an exchange, the deposit will reduce the amount payable, if any, by Second Party to First Party as provided in Article 4 of this Agreement. If that deposit exceeds the amount payable by Second Party to First Party under Article 4 of this Agreement, the excess will be refunded to Second Party at the close of escrow.

(3) If this escrow is canceled without title to Parcel A passing to Second Party due to a breach of this Agreement by Second Party, both First and Second Parties agree by initialing this provision that the amount deposited by Second Party upon opening of escrow pursuant to this Agreement constitutes a reasonable estimate under the circumstances existing at the time this Agreement is made of the damages First Party would sustain because of such a breach, and agree that the deposit may be retained by First Party as liquidated damages in the event of any default. Initialed by First Party:

_____ [*initials of first party*] Initialed by Second Party:

_____ [*initials of second party*]

(4) If this escrow is canceled without a breach of this Agreement by Second Party, the deposit must be returned to Second Party.

ARTICLE 6. CLOSE OF ESCROW

Date

6.01. The escrow provided for in this Agreement will close on or before _____[*date*] (the "close of escrow"). In the event that this escrow does not close on or before that date, either party may, at that party's option, cancel this escrow; provided, however, that the cancellation or failure of this escrow to close, and Escrow Holder's return to the depositing party of the documents and funds so deposited, will not affect any liability of either party to the other resulting from a breach of this Agreement.

Method of Closing

6.02. The escrow provided for in this Agreement will close by Escrow Holder delivering a grant deed to Parcel A to

Second Party only if the following conditions are satisfied, to the extent applicable:

(1) If Escrow Holder can obtain the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with total liability of $

_____ [*value of Parcel A*], showing title to Parcel A vested in Second Party, subject only to those matters set forth in Article 3 of this Agreement.

(2) In the event that this escrow is closed as an exchange rather than a sale, if Escrow Holder can deliver a grant deed to Parcel B to First Party and can obtain the usual form C.L.T.A. standard coverage policy of title insurance issued by

_____ [*name of title company*] with total liability in an amount equal to the agreed value of Parcel B, showing title to Parcel B vested in First Party, subject only to those matters set forth in Paragraph 4.01 of this Agreement, and if Escrow Holder holds for the account of First Party an amount equal to the exchange value of Parcel A less the cost to Second Party of acquiring Parcel B, as provided in Article 5 of this Agreement.

(3) In the event that this escrow is closed as a sale rather than an exchange, if Escrow Holder holds for the account of First Party the sum of $

_____ [*set forth portion of purchase price and any notes or trust deeds required by P 4.03*].

(4) If

_____ [*list any other documents to be transferred through escrow*] are executed and deposited into escrow.

ARTICLE 7. CONDITIONS TO CLOSING

Conditions

7.01. This Agreement and the closing of this escrow are contingent upon the following:

(1) The performance by each party of all of the matters required to be performed by that party under this Agreement.

(2)

_____ [*List all other conditions to the close of escrow, e.g,* The rezoning of Parcel A as commercial property].

(3) In the event that the escrow is closed as an exchange rather than a sale, the concurrent closing of the sales escrow between Second Party and Seller for the purchase of Parcel B by Second Party.

ARTICLE 8. DELIVERY OF AGREEMENT

Delivery

8.01. A condition of this Agreement is the delivery by _____[Second Party *or* First Party] to _____[First Party *or* Second Party] of an original and two fully executed copies of this Agreement on or before _____[*date*]. This condition is solely for the benefit of _____[First Party *or* Second Party] and may be waived by _____[First Party *or* Second Party].

ARTICLE 9. POSSESSION

Transfer of Possession

9.01. Subject to the provisions of Article 10 of this Agreement, possession of Parcel A will be given to Second Party as of the date of close of escrow [*if applicable, add:*, except that Seller will have a limited right to retain possession until _____ (*date*), but only to the extent necessary to accomplish the _____ (*list reasons for retention of possession, e.g.*, harvesting of existing crops on the property)].

ARTICLE 10. RIGHT OF ENTRY

Grant of License

10.01. First Party hereby grants to Second Party a license, subject to all rights of the tenant now in possession, to enter upon Parcel A for the purpose of conducting soil tests and engineering and land surveys. Second Party will indemnify and hold First Party and Parcel A free and harmless from any and all liability, including mechanics' liens asserted against Parcel A as a result of the conduct of the operations or Second Party's presence on Parcel A, whether through agents, employees, contractors, or otherwise. First Party agrees to cooperate with Second Party in connection with the procurement, for the benefit of Second Party and solely at the expense of Second Party, of all required subdivision permits from the appropriate public authority or authorities having jurisdiction over Parcel A, and First Party agrees to execute any documents reasonably required in that connection. If this escrow is not closed by title to Parcel A passing to Second Party, Second Party will return Parcel A to First Party in the same condition and status as it was at the time this Agreement was executed, and will reimburse First Party for any and all damages to Parcel A or to First Party resulting from Second Party's presence on Parcel A.

ARTICLE 11. TITLE INSURANCE

Refusal to Issue Policy; No Representations or Warranties

11.01. Providing that each party complies with that party's obligations under this Agreement, the refusal of the title company to issue any policy of title insurance required under this Agreement will not be construed as a breach or default by either party. In the event of such a refusal, First Party will have no liability for damages under this Agreement insofar as the refusal affects Parcel A, and Second Party will have no liability for damages under this Agreement insofar as the refusal affects Parcel B. Each party is taking title on the basis of the policy of title insurance that that party is to receive and on that party's inspection of the real property, and not on the basis of any representation or warranty made by the other party. Each party hereby disclaims any representation or warranties of any description respecting the real property involved, the title to that property, or its area, corners, utility, or condition. Escrow Holder will have no liability or responsibility with respect to the provisions of this Article 11, which memorializes the agreement of First Party and Second Party with respect to matters set forth in this Agreement.

ARTICLE 12. DEPOSITS

First Party

12.01. The documents and funds to be deposited by First Party with Escrow Holder include the following:

(1) A grant deed conveying Parcel A to Second Party;

(2) All documents and statements of information required by Escrow Holder in order to close this escrow as an exchange or a sale; and

(3) All funds required by Escrow Holder to pay for all costs and prorations that are to be borne by First Party.

Second Party

12.02. The documents and funds to be deposited by Second Party with Escrow Holder include the following:

(1) In the event that this escrow is closed as an exchange, a grant deed conveying Parcel B to First Party, plus the funds required in Article 5 of this Agreement.

(2) In the event that this escrow is closed as a sale, that portion of the purchase price [and any notes and trust deeds] required under Article 4 of this Agreement.

(3) All documents and statements of information required by Escrow Holder in order to close this escrow as an exchange or a sale.

(4) All funds required by Escrow Holder to pay for those costs and prorations that are to be borne by Second Party.

ARTICLE 13. PRORATIONS

Parcel A

13.01. The following matters will be prorated on Parcel A to the close of escrow:

(1) General and special real property taxes and assessments for the current fiscal tax year; and

(2)

_____ [*List all other matters required to be prorated, e.g.*, Insurance, rent, and interest on Parcel A].

Parcel B

13.02. In the event that this escrow is closed as an exchange rather than a sale, the following matters will be prorated on Parcel B to the close of escrow:

(1) General and special real property taxes and assessments for the current fiscal tax year; and

(2)

_____ [*List all other matters required to be prorated, e.g.*, Insurance, rent, and interest on Parcel B].

ARTICLE 14. COSTS

Payment Obligations

14.01. First Party will pay for the following: the cost of the policy of title insurance on Parcel B, if this transaction is consummated as an exchange; one-half of the escrow fee; the cost of preparing the deed for Parcel A; and any other costs and expenses that in the opinion of Escrow Holder are customarily borne by First Party. Second Party will pay for the following: the cost of the policy of title insurance on Parcel A; one half of the escrow fee; the cost of recording the deed for Parcel A; [the cost of preparing the note and deed of trust described in Paragraph 4.03 of this Agreement; the cost of recording that deed of trust]; and any other costs and expenses that in the opinion of Escrow Holder are customarily borne by Second Party.

ARTICLE 15. BROKER'S FEES

Payment by First Party

15.01. If the escrow provided for in this Agreement closes by title to Parcel A passing to Second Party, First Party agrees to pay a broker's commission of $_____ to _____[*name and address of broker*], through escrow at the close of escrow, and Escrow Holder is authorized to deduct the commission from funds otherwise payable to First Party, if any, through escrow at close of escrow.

ARTICLE 16. MISCELLANEOUS PROVISIONS

Time of Essence

16.01. Time is of the essence in this Agreement.

Notices

16.02. Any notice to be given under this Agreement to either party or to Escrow Holder will be given either by personal delivery or by depositing the notice in the United States mail in the State of California, duly registered or certified, with postage prepaid, and addressed as follows:

To First Party: _____[*name, address, and zip code*]

To Second Party: _____[*name, address, and zip code*]

To Escrow Holder: _____[*name, address, and zip code*]

Either party may, from time to time, by written notice to the other and to Escrow Holder, designate a different address that will be substituted for the one specified above. If any notice or other document is sent by certified mail as stated above, it will be deemed to have been effectively served or delivered at the expiration of 24 hours following the deposit of the notice in the United States mail in the manner set forth above.

Assignment

16.03. Neither this Agreement, nor any interest in this Agreement, will be assignable by either party without the prior written consent of the other.

Governing Law

16.04. All questions with respect to the construction of this Agreement, and the rights and liabilities of the parties to this Agreement, will be governed by the laws of the State of California.

Inurement

16.05. Subject to the restrictions against assignment as contained in this Agreement, this Agreement will inure to the benefit of, and will be binding upon, the assigns, successors in interest, personal representatives, estates, heirs, and legatees of each of the parties.

Attorneys' Fees

16.06. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or the breach of it, the prevailing party will be entitled to recover from the other party reasonable expenses, attorneys' fees, and costs.

Entire Agreement

16.07. This Agreement contains the entire agreement of the parties, and supersedes any prior written or oral agreements between them concerning the subject matter contained in this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties, relating to the subject matter contained in this Agreement, that are not fully expressed in this Agreement.

Executed on _____[*date*], at _____[*city and state*].

FIRST PARTY
_____ [*signature of First Party*]
[*typed name*]

SECOND PARTY
_____ [*signature of Second Party*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
B. Exchange Agreements

9-24 California Legal Forms--Transaction Guide § 24.212

AUTHOR: by Patricia Hughes Mills

§ 24.212 Three Party Option to Exchange

[1] Comment

[a] Use of Form

This form is an option agreement for a three party exchange in which the taxpayer gives the person interested in acquiring the taxpayer's property an option to acquire that property. If the interested party exercises the option, the taxpayer is required either to locate suitable property for that party to purchase and then exchange for the taxpayer's property, or to sell the taxpayer's property outright to that party. This arrangement is a type of "Alderson" exchange [*see § 24.22[1]*].

This form is intended to be used in conjunction with an exchange agreement and a purchase and sale agreement. For a basic exchange agreement, see *§ 24.210*. For an exchange agreement providing in detail for the "sale in lieu" arrangement required by this option agreement, see *§ 24.211*. For a basic sales agreement, see Ch. 23, *Real Property Sales Agreements* .

This comment discusses only those provisions peculiar to this Form. For a discussion of exchange agreements in general, see *§ 24.210[1]*.

[b] Options Generally

An option to acquire real property is a contract between the owner of property and the potential purchaser, in which the owner grants the prospective purchaser the exclusive right for a specified period to acquire the property on the terms specified in the option contract [*San Diego County v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . Typically, the person giving the option is referred to as the "optionor," and the holder of the option is referred to as the "optionee." For the purposes of this agreement, the taxpayer is the optionor, and the person acquiring the taxpayer's property is the optionee. For a complete discussion of real property option contracts in general, see Ch. 22,

Options to Purchase Real Property .

[c] Consideration

[i] Effect on Contract

If an option is supported by consideration, it is subject to the principles of contract law [*Caras v. Parker (1957) 149 Cal. App. 2d 621, 626, 309 P.2d 104]* . It is therefore subject to the statute of frauds and must be in writing [*see Civ. Code § 1624(c)*]. It is also irrevocable by the optionor, and may be exercised against that person's successors after death [*San Diego County v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* .

This form requires the party acquiring the taxpayer's property to provide a stated amount of money as consideration for the grant of the option. None of that amount will be applicable to the acquisition of the property [*see* [2], P 1.02, *below*]. For a provision stating that the option consideration is to be applied toward the acquisition of the property, see Ch. 22, *Options to Purchase Real Property* .

Application of the option consideration to the purchase price has tax consequences for the optionor. Taxation of any consideration applied to the purchase price is deferred until the option is exercised. However, to the extent the consideration for the option is not applicable to the purchase price, it is recognized as income during the year of its receipt [*Hull v. Commissioner of Int. Rev. (4th Cir. [T.C.] 1937) 87 F.2d 260, 261* ; *see* Ch. 22, *Options to Purchase Real Property*].

[ii] Retention of Consideration

This form provides that the taxpayer may retain the option consideration in the event that the person acquiring the taxpayer's property does not exercise the option within the option period. Retention of option consideration is permissible in option contracts [*see Sheveland v. Reed (1958) 159 Cal. App. 2d. 820, 822, 324 P.2d 633* ; *see also* Ch. 22, *Options to Purchase Real Property*]. In contrast, the retention of deposits given pursuant to sales contracts as liquidated damages are restricted [*see § 24.211[1][e]*].

[d] Exercise of Option

This form provides that the person acquiring the taxpayer's property may exercise the option to acquire Parcel A by giving written notice to the taxpayer [*see* [2], P *2.01, below*]. When an option is properly exercised, the optionor must convey the property on the terms set forth in the option contract [*Schomaker v. Osborne (1967) 250 Cal. App. 2d. 887, 890, 58 Cal. Rptr. 827* ; *see* CALIFORNIA REAL ESTATE LAW & PRACTICE, ch. 70, *Options* (Matthew Bender)]. Therefore, at the time the option is drafted, the parties must contemplate and draft the terms of the sale or exchange. This may be accomplished by either incorporating the terms of sale or exchange into the option agreement, or by placing them in a separate sale or exchange agreement attached as an exhibit to the option agreement [*see* CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 70, *Options* (Matthew Bender); *see also Ch. 22, Options to Purchase Real Property, § 22.200[1][d]*]. This form requires the parties to attach both an exchange agreement and a sales agreement as exhibits to the option agreement, since the eventual transaction may be closed as either an exchange or a sale [*see* [2], PP 2.02, 2.03]. If the parties are unable to agree in advance on certain terms, such as interest rates, those terms may be left blank at the time the option agreement is executed and filled in when the sales or exchange agreement (as appropriate) is executed.

[e] Obligations After Exercise of Option

This agreement requires the taxpayer to locate Parcel B within a stated period of time after receiving notice that the party interested in acquiring Parcel A has exercised the option. If suitable property is found, the interested party must purchase that property for purposes of exchanging it for Parcel A if its cost does not exceed the cost of purchasing

Parcel A [*see* [2], P *2.02, below*]. The exchange is then transacted pursuant to the terms set forth in the attached exchange agreement.

If the taxpayer fails to locate other property by the stated date, the taxpayer must sell Parcel A for cash to the interested party pursuant to the terms set forth in the attached sales agreement [*see* [2], P 2.03, *below*]. The tax implications of a "sale in lieu" provision are discussed at *Section 24.211[1][c]*.

[f] Termination of Option

[i] Automatic Expiration

This agreement provides that failure to exercise the option by the date set forth in the contract will automatically terminate it [*see* [2], P 1.03, *below*]. The effect of setting an exact time period is to make time of the essence as to the exercise of the option [*Rosenaur v. Pacelli (1959) 174 Cal. App. 2d 673, 676, 345 P.2d 102]* . For alternative provisions relating to the duration of the option period, see *Chapter 22, Options to Purchase Real Property, § 22.210*.

[ii] Title Problems After Recordation

The optionee may decide to record the option to protect his or her rights [*see Ch. 22, Options to Purchase Real Property, § 22.50*]. If a recorded instrument creates or gives constructive notice of an unexercised option, the option will expire of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within (1) six months after the option expires according to its terms; or (2) if the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded [*Civ. Code § 884.010*]. Once an option expires, the recorded instrument that created or gave constructive notice of the option ceases to operate as notice or to put any person on inquiry with respect to the exercise or existence of the option or of any contract, conveyance, or other writing that may have been executed pursuant to the option [*Civ. Code § 884.020*]. To ensure that a clear title on the property subject to the option can be obtained after the option expires, this form requires the optionee to execute a quitclaim deed when requested to do so by the optionor or title insurance company [*see* [2], P 1.03, *below*].

[2] Form

Three Party Option to Exchange

OPTION TO PURCHASE OR EXCHANGE

This agreement is made by and between _____[*name of Optionor*] ("Optionor") and _____[*name of Optionee*] ("Optionee").

Optionor and Optionee agree as follows:

ARTICLE 1. OPTION TO PURCHASE

Grant of Option

1.01. For and in consideration of the sum of $_____ paid by Optionee to Optionor, Optionor grants to Optionee the right, option, and privilege to acquire, in the manner hereafter provided, that certain real property located in the [*if applicable, add:* City of _____,] County of _____, State of _____ ("Parcel A") and more particularly described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference.

Consideration

1.02. As consideration for the grant of the option, Optionee has concurrently with the execution of this Agreement delivered to Optionor _____[cash *or* a cashier's (*or* certified) check] in the sum of $_____. This sum is solely in consideration for the grant of this option to Optionee, and will in no event be applied toward the acquisition of Parcel A by Optionee.

Termination

1.03. In the event that Optionee has not exercised this option in the manner hereafter provided on or before _____[*hour*] _____[A.M. *or* P.M.] on _____[*date*], this option will automatically terminate at that time and on that date without notice to Optionee, and this Agreement will be of no further force or effect. Thereafter, Optionee will promptly execute, acknowledge, and deliver to Optionor a quitclaim deed or similar document requested by Optionor or a title insurance company for the purpose of verifying the termination of this option and the release of Optionee's rights in the property.

Retention of Consideration

1.04. In the event this option or any extension of it is not exercised, all sums paid and services rendered to Optionor by Optionee will be retained by Optionor in consideration of the granting of this option.

ARTICLE 2. EXERCISE OF OPTION

Manner of Exercise

2.01. Optionee may exercise this option only by delivering written notice of the exercise to Optionor on or before the time and date specified in Paragraph 1.03 of this Agreement for the termination of the option.

Intent to Exchange

2.02. It is Optionor's intention to exchange Parcel A for other similar property. Therefore, upon timely exercise of this option by Optionee, Optionor will have _____[*specify number not larger than 45*] days within which to locate and notify Optionee of suitable exchange property ("Parcel B") that Optionor would be willing to exchange for Parcel A. Optionor will give notice to Optionee by executing the Exchange Agreement attached to this Agreement as Exhibit B ("Exchange Agreement"), and by delivering the Exchange Agreement to Optionee within the period specified in this Agreement. In the event that Optionor delivers the Exchange Agreement to Optionee within that period, Optionee will immediately enter into an escrow for the acquisition of title to Parcel B for the purpose of exchanging it with Optionor for Parcel A pursuant to the terms and conditions set forth in the Exchange Agreement. However, Optionee will not be obligated to acquire Parcel B if the sum of the purchase price plus other costs of acquisition and exchange exceed the sum of the purchase price of Parcel A and other acquisition costs that would have been incurred by Optionee had this transaction been closed as a sale rather than an exchange.

Required Sale

2.03. In the event that Optionor does not deliver the Exchange Agreement to Optionee in the manner required by Paragraph 2.02 of this Agreement, or in the event that the escrow between Optionee and the owner of Parcel B does not close by title to Parcel B passing to Optionee as of the deadline set forth in Paragraph 2.02, Optionor will immediately sell Parcel A to Optionee at a price and under the conditions set forth in the Sales Agreement attached to this Agreement as Exhibit C.

ARTICLE 3. MISCELLANEOUS PROVISIONS

Notice

3.01. Any notice to be given or other document to be delivered by either party to the other under this Agreement must either be delivered in person to the other party or may be deposited in the United States mail in the State of California, duly certified or registered, with postage prepaid and addressed to the other party to whom intended as follows:

To Optionor: _____[*name, address, and zip code*]

To Optionee: _____[*name, address, and zip code*]

Either party to this Agreement may from time to time, by written notice to the other, designate a different address to be substituted for the one above. If any notice or other document is sent by certified or registered mail, as stated above, it will be deemed served or delivered 24 hours after mailing in the manner provided above.

Assignment

3.02. Optionee may not assign this option without the prior written consent of Optionor. Any attempt to assign this option in violation of this provision will terminate this option.

Inurement

3.03. Subject to the restrictions against assignment set forth in this Agreement, this Agreement will inure to the benefit of, and will be binding upon, the assigns, successors in interest, personal representatives, estates, heirs, and legatees of each of the parties to this Agreement.

Attorneys' Fees

3.04. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or the breach of this Agreement, the prevailing party will be entitled to recover from the losing party reasonable expenses, attorneys' fees, and costs.

Entire Agreement

3.05. This Agreement contains the entire agreement of the parties relating to the option granted in this Agreement, and supersedes any prior written or oral agreements between them concerning the subject matter contained in this Agreement.

Executed on _____[*date*], at _____[*city and state*].

OPTIONOR

_____ [*signature of optionor*]

[*typed name*]

OPTIONEE

_____ [*signature of optionee*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesReal Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 24 EXCHANGES OF REAL PROPERTY
PART IV. FORMS
B. Exchange Agreements

9-24 California Legal Forms--Transaction Guide § 24.213

AUTHOR: by Patricia Hughes Mills

§ 24.213 Nonsimultaneous (Deferred) Exchange Agreement

[1] Comment

[a] Use of Form

This form is an exchange agreement for a deferred exchange to be entered into between the taxpayer (seller of Parcel A) and the accommodator, who will purchase Parcel A from the taxpayer, sell it to the purchaser of Parcel A, then purchase the replacement property (Parcel B) for the taxpayer and transfer it to the taxpayer. While the accommodator could be the purchaser of Parcel A, it is more likely to be an independent third party who will act as accommodator for a fee. The taxpayer is engaging in a deferred exchange because the taxpayer's transfer of Parcel A and receipt of Parcel B are not simultaneous.

In drafting a deferred exchange agreement, careful consideration must be given to the rights and obligations imposed upon the accommodator. The taxpayer is transferring his or her property to the accommodator with only a contractual or a secured obligation of the accommodator to transfer another property or the proceeds back to the taxpayer. On the other hand, the accommodator is typically doing this for a fee, and will be unwilling to assume many liabilities or obligations. Therefore, the Exchange Agreement form provides that the taxpayer will indemnify the accommodator, and provides that the accommodator is not obligated to locate exchange property or assume any obligations with respect to the exchange property. The accommodator will be reimbursed for all acquisition costs, and the accommodator may purchase the replacement property directly in the taxpayer's name. The taxpayer, however, will want tight controls on the accommodator's ability to negotiate the terms of the purchase of the exchange property.

[b] Provision for Escrow Instructions

This form assumes that escrow instructions will be attached as an exhibit to the Exchange Agreement, and assumes that there will be two escrows: one for the sale of Parcel A and another for the acquisition of Parcel B. However, escrow instructions could be incorporated directly into this Agreement to avoid any potential problems that might result from

having two documents with conflicting provisions [*see § 24.211 [2]* (form of a three party exchange or sale agreement with escrow instructions included)]. If separate escrow instructions are used, they should be read together with the exchange agreement unless the parties intend and understand that the escrow instructions modify or change the agreement [*Swanson v. Thurber (1955) 132 Cal. App. 2d 171, 180, 281 P.2d 642]* .

[c] "Sale in Lieu" Provision

This form does not include a "sale in lieu" provision [*see § 24.211[1][c], [2]*], which is used when the purchaser of the taxpayer's property is acquiring the exchange property for the taxpayer. In this form, the accommodator is obligated to acquire the taxpayer's property and sell it to the purchaser of Parcel A. The taxpayer receives cash only if he or she does not designate replacement property for the accommodator to acquire on the taxpayer's behalf or the agreement is otherwise terminated by its terms.

[d] Requirements for Deferred Exchange

[i] Identification and Receipt

Nonrecognition treatment does not apply to a nonsimultaneous exchange of property if (1) the property to be received in the exchange is not identified before the day that is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange [*I.R.C. § 1031(a)(3)(A)*]; or (2) the property to be received by the taxpayer is received after the earlier of (a) the day that is 180 days after the date on which the taxpayer transfers the property relinquished in the exchange, or (b) the due date (determined with regard to extensions) for the transferor's income tax return for the taxable year in which the transfer of the relinquished property occurs [*I.R.C. § 1031(a)(3)(B)*]. Final regulations have been issued clarifying the identification and receipt requirements, and are generally effective for transfers of property after June 9, 1991 [*see Treas. Reg. § 1.1031(k)-1*; *see also §§ 24.25, 24.40[4][b], [c]*]. Replacement property is treated as identified only if it is designated as replacement property in either (1) a written agreement covering the exchange that is signed by all parties before the end of the identification period, or (2) a written document signed by the taxpayer and hand-delivered or mailed, telecopied, or otherwise sent before the end of the identification period to a person involved in the exchange (such as an intermediary, escrow agent, or title company) other than the taxpayer or a related party [*Treas. Reg. § 1.1031(k)-1(c)(2)*]. The replacement property must be unambiguously described, with a legal description or street address acceptable [*Treas. Reg. § 1.1031(k)-1(c)(3)*]. This form complies with these identification and receipt requirements.

In the deferred exchange, it is important that the taxpayer does not actually or constructively receive money or other property before the taxpayer receives the like kind replacement property (without the recognition of gain). If the taxpayer does receive money or its equivalent (under general constructive receipt rules), the transaction constitutes a sale and not a deferred exchange [*see Treas. Reg. § 1.1031(k)-1(f)*] For further discussion of constructive receipt in the exchange context, see *Section 24.40[4][d]*.

[ii] Safe Harbor: Security or Guarantee Arrangements

The use of various guarantee or security arrangements is common in deferred exchanges due to the unwillingness of taxpayers to rely on the accommodator's unsecured promise to transfer the like-kind replacement property. Intermediary arrangements may be used because the purchaser of the taxpayer's property may be unwilling or unable to acquire the replacement property. The use of such arrangements, however, raises issues concerning actual or constructive receipt. Therefore, the regulations provide four safe harbors that protect the taxpayer from being treated as if actual or constructive receipt of money or other property has taken place. [*see Treas. Reg. § 1.1031(k)-1(g)*; *see also § 24.40 [4][e]*].

This form provides that the accommodator's obligations will be secured by a letter of credit, which conforms with the first safe harbor in the regulations dealing with security or guarantee arrangements [*see Treas. Reg. § 1.1031(k)-1(g)(2)*;

see also § 24.40[4][e][ii]]. Under this rule, the transferee's obligation to transfer the replacement property to the taxpayer may be secured or guaranteed by one or more of the following: (1) a mortgage, deed of trust or other security interest (other than cash or a cash equivalent); (2) a standby letter of credit that does not allow the taxpayer to draw on the letter of credit except upon a default of the transferee's obligation to transfer like kind property; or (3) a guarantee of a third party [*Treas. Reg. § 1.1031(k)-1(g)(2)(i)*]. This safe harbor ceases to apply if at any time the taxpayer has an immediate ability or unrestricted right to receive money or other property pursuant to the security or guarantee arrangement [*Treas. Reg. § 1.1031(k)-1(g)(2)(i)*].

For a discussion of the other safe harbors [*see Treas. Reg. § 1.1031(k)-1(g)(3)*-(6)], including the use of a qualified intermediary, see *Section 24.40 [4][e][iii]-[v]*. Note that under all of the safe harbors, the taxpayer must have no rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property before the end of the exchange period [*Treas. Reg. § 1.1031(k)-1(g)(6)(i)*]. However, the agreement may provide that if a taxpayer has not identified replacement property by the end of the identification period, the taxpayer may have rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property at any time after the end of the identification period [*Treas. Reg. § 1.1031(k)-1(g)(6)(i)*].

[e] Acquisition and Closing Costs

Certain acquisition and closing costs may be paid by the qualified intermediary, without resulting in constructive receipt to the taxpayer of the remaining funds. These costs include items that relate to the disposition of the relinquished property or to the acquisition of the replacement property and are listed as the responsibility of a buyer or seller in the typical closing statement under local standards [*Treas. Reg. § 1.1031(k)-1(g)(7)(ii)*]. These types of costs are taken into account in determining the "Exchange Value" in this form.

[2] Form

Nonsimultaneous (Deferred) Exchange Agreement

EXCHANGE AGREEMENT

This agreement is entered into by and between [*name of owner of Parcel A*] ("First Party") and [*name of accommodator*] ("Second Party").

Recitals

A. First Party owns the property described in Paragraph 1.11 of this Agreement ("Parcel A") and desires to exchange this property for one or more Exchange Parcels of real estate of a like kind, within the meaning of *Internal Revenue Code Section 1031*, as amended.

B. First Party desires to engage in a nonsimultaneous exchange pursuant to the provisions of *Internal Revenue Code Section 1031(a)*.

C. Second Party desires to act as intermediary and acquire the Exchange Parcel(s) and sell Parcel A for the purposes of consummating the like kind exchange for First Party.

ARTICLE 1. DEFINITIONS

"Acquisition Costs"

1.01. "Acquisition Costs" means any actual direct costs and expenses incurred or expended by Second Party to third parties (net of amounts returned to Second Party) with respect to the proposed or actual acquisition by Second Party and transfer by Second Party to First Party of the Exchange Parcel(s), whether or not the acquisition and transfer is consummated. For these purposes, acquisition costs include attorneys' fees incurred in acquiring or seeking to acquire Exchange Parcel(s) or in reviewing Exchange Notices, payment of any cash portion of any purchase price, cash deposits placed in escrow, brokerage commissions, finder's fees, costs of inspections, escrow fees, transfer taxes, sales taxes, title insurance premiums, prorations resulting in a liability of Second Party, and other closing costs. Acquisition costs do not include any liabilities or obligations that are assumed or subsequently taken subject to by First Party and from which Second Party is completely and unconditionally released.

"Closing Date"

1.02. "Closing Date" means the date upon which the exchange is completed (or substantially completed) and all accounts between the parties with respect to the exchange are settled. These events must take place no later than the earlier of (1) the 180th day after the Conveyance Date for Parcel A, or (2) the due date (determined with regard to extensions) for First Party's tax return for the year in which First Party transfers Parcel A to Second Party.

"Conveyance Date"

1.03. "Conveyance Date" means, with respect to Parcel A, the date of recordation of the deed conveying Parcel A to Second Party. This recordation must occur not later than _____[*specify date*]. With respect to the Exchange Parcel(s), "conveyance date" means the date of recordation of the deed conveying the Exchange Parcel(s) to First Party. This recordation must occur not later than the earlier of (1) the 180th day after the Conveyance Date for parcel A, or (2) the due date (determined with regard to extensions) for First Party's tax return for the year in which First Party transfers Parcel A to Second Party.

"Escrow Holder"

1.04. "Escrow Holder" means the escrow holder for the escrow pursuant to which the exchange of Parcel A and the Exchange Parcel(s) will be consummated. This escrow holder will be _____[*name and address of escrow holder*].

"Exchange Escrow"

1.05. "Exchange Escrow" means that escrow pursuant to which the Second Party will acquire the Exchange Parcel(s).

"Exchange Escrow Holder"

1.06. "Exchange Escrow Holder" means the escrow holder for the escrow pursuant to which Second Party will acquire the Exchange Parcel(s). This escrow holder must be agreed upon by Second Party and the seller(s) of the Exchange Parcel(s).

"Exchange Notice"

1.07. "Exchange Notice" means the written notice given by First Party to Second Party, designating the Exchange Parcel(s) for acquisition by Second Party and conveyance to First Party, and complying with the requirements of Paragraph 2.02 of this Agreement.

"Exchange Parcel(s)"

1.08. "Exchange Parcel(s)" means any parcel or parcels of real estate (or an undivided interest in such a parcel or parcels), together with any appurtenances to or improvements on such a parcel or parcels, that is or are hereafter designated by First Party, provided the designation is made in the manner described in this Agreement.

"Exchange Purchase Agreement"

1.09. "Exchange Purchase Agreement" means that binding contract entered into by Second Party to acquire the Exchange Parcel(s) upon the terms and conditions specified in the Exchange Notice (or any amendments to the Exchange Notice), including appropriate escrow instructions used in connection with that transaction.

"Exchange Value"

1.10. "Exchange Value" means, with respect to Parcel A, the sum of $_____[*purchase price of Parcel A*], to be adjusted accordingly at the time of the Conveyance Date based upon the then-outstanding encumbrances, and reduced by any Acquisition Costs.

"Parcel A"

1.11. "Parcel A" means all of First Party's interest in and to the real property located in the [*if applicable, add:* City of _____,] County of _____, State of _____ and described in Exhibit A, which is attached to this Agreement and hereby incorporated by reference.

ARTICLE 2. EXCHANGE OF PROPERTY

Agreement to Exchange

2.01. The parties agree that, on or before the applicable conveyance dates specified in Paragraph 1.03 of this Agreement, (1) First Party will convey Parcel A to Second Party, and Second Party will convey to First Party the Exchange Parcel(s).

Acquisition of Exchange Parcel(s)

2.02.(a) First Party must designate to Second Party the property or properties to be acquired by the Second Party as the Exchange Parcel(s). First Party has the right to designate Exchange Parcels anywhere in the United States of America. First Party must make the designation of the Exchange Parcel(s) on or before midnight of the 45th day after the Conveyance Date of Parcel A. First Party must make the designation in writing, and must hand deliver, mail, or telecopy this notice (the Exchange Notice) to Second Party. Each such Exchange Notice from First Party must adequately identify the designated Exchange Parcel(s), specify the Exchange Value (exclusive of expenses and closing costs) that First Party will allow for the parcel, state the total purchase price that should be paid for the parcel, indicate

whether an option to purchase the parcel should be sought, specify any other terms and conditions of purchase that Second Party should attempt to obtain, and set forth any other information that will assist in the purchase of the parcel.

(b) First Party may designate more than one property as Exchange Parcels, subject to the following restrictions:

(1) First Party may designate a maximum of three properties of any fair market value; or

(2) First Party may designate any number of properties, so long as their aggregate fair market value does not exceed 200 percent of the aggregate fair market value of Parcel A.

(c) First Party may revoke or modify any designation of Exchange Parcel made under this Agreement, prior to midnight of the 45th day after the Conveyance Date of Parcel A. Any such revocation or modification must be in writing and made in the manner described above for designating Exchange Parcels.

(d) Upon receipt of an Exchange Notice, Second Party must take all necessary steps in order to be able to purchase the designated Exchange Parcel(s) within the time limitations specified in this Agreement, in accordance with the terms contained in the Exchange Notice. Second Party must keep First Party currently informed of the status of negotiations on all Exchange Parcels. Further, Second Party must not, without the prior written consent of First Party, exercise an option to purchase an Exchange Parcel or purchase an Exchange Parcel unless First Party has already approved the following: the title to the Exchange Parcel (as evidenced by a current preliminary title report on the property); the Exchange Value and the purchase price of the Exchange Parcel; the terms and conditions upon which the Exchange Parcel may be purchased; and any other documents, agreements, warranties, licenses, leases, or other matters applicable to the Exchange Parcel.

All options and agreements to purchase Exchange Parcels must be executed by Second Party in its name, and Second Party must enter into an Exchange Escrow (with an Exchange Escrow Holder) pursuant to which Second Party will acquire the Exchange Parcel(s). Second Party must submit all escrow instructions, amendments to escrow instructions, and agreements with the seller(s) of the Exchange Parcel(s) to First Party within three business days of receipt for approval by First Party prior to execution by Second Party.

Second Party must proceed to perform its obligations under the Exchange Purchase Agreement diligently and in good faith and to acquire the Exchange Parcel(s). Second Party will not be liable for any failure to close or to acquire the Exchange Parcel(s) for any reason other than Second Party's willful default in the performance of its obligations under the Exchange Purchase Agreement or under this Agreement.

Except as provided below, title to each Exchange Parcel must be recorded in the name of Second Party on or before the Conveyance Date of the parcel. Second Party must convey each Exchange Parcel to First Party subject only to any title defects or exceptions that were approved in writing by First Party prior to the acquisition of the parcel by Second Party. Notwithstanding the foregoing, title to the Exchange Parcel(s) may be recorded directly in the name of First Party to save the expense of additional transfer taxes, or when Second Party exercises its option to deed or cause the Exchange Parcel(s) to be deeded directly to First Party.

(e) Second Party acknowledges that all Exchange Parcels designated by First Party under this Agreement will be parcels that First Party desires to acquire for investment purposes or for use in its business. Therefore, Second Party agrees that it will not sell, transfer, assign, or convey any right, title, or interest in any Exchange Parcel to any party other than First Party without obtaining First Party's prior written consent.

(f) If Second Party expends any amount in accordance with this Paragraph 2.02 in attempting to purchase an Exchange Parcel (including any unrecoverable amount expended for an option to purchase such a parcel), and Second Party is

subsequently unable to purchase the parcel, or First Party subsequently (but prior to the execution by Second Party of a contract for its purchase) disapproves the parcel as an Exchange Parcel, the amount expended by Second Party will constitute a cost of the exchange to First Party if the cost would have been includable in computing the Exchange Value of the parcel. First Party shall promptly reimburse Second Party for all such costs as soon as they are incurred.

(g) Second Party will incur no liability to First Party under this Agreement and will not be deemed to be in default under this Agreement on account of Second Party being unable to acquire any Exchange Parcel on terms and conditions specified by First Party in the Exchange Notice or otherwise being unable to perform under the Exchange Purchase Agreement, unless (1) the failure to acquire the Exchange Parcel(s) or to perform is due to a willful default by Second Party under this Agreement or under the Exchange Purchase Agreement, and (2) the willful default has not been consented to or waived in writing by First Party. If Second Party attempts but fails to acquire the Exchange Parcel(s) after entering into an Exchange Purchase Agreement, Second Party must, at the option of First Party, assign to First Party (without recourse and without any warranty or representation in connection with the assignment) any rights, claims, causes of action, or other rights that Second Party may have under the Exchange Purchase Agreement or otherwise.

(h) In addition to the limitations on Second Party's obligations as set forth elsewhere in this Agreement, Second Party will have no obligation to do the following:

(1) To seek to locate potential Exchange Parcels for First Party.

(2) To make factual or legal investigations regarding any Exchange Parcel or potential Exchange Parcel.

(3) To perform any repairs, improvements, or maintenance of any nature to the assets of any Exchange Parcel, either prior or subsequent to the acquisition by Second Party.

(4) To agree to or to subject itself to any nonmonetary obligations to the former owner of an Exchange Parcel in connection with the acquisition of the Exchange Parcel.

Escrows

2.03. The exchange of Parcel A and the Exchange Parcel(s) must be consummated by means of an escrow, which is to be opened with Escrow Holder. The escrow instructions must be substantially in the form of the instructions attached to this Agreement as Exhibit B.

Indemnification

2.04. First Party hereby agrees to indemnify and to defend Second Party against, and to hold Second Party harmless from, all losses, damages, liability, costs, and expenses (including reasonable legal fees and disbursements) imposed or asserted against Second Party relating to any of the following:

(1) Second Party's good faith but unsuccessful attempt to acquire Exchange Parcels, unless (i) the failure resulted from Second Party's willful default under this Agreement or under the Exchange Purchase Agreement, and (ii) the default was not approved or waived in writing by First Party.

(2) Any act, condition, state of fact, occurrence, matter, or claim with respect to an Exchange Parcel that took place prior to or coincident with the former owner's conveyance of the Exchange Parcel under the

Exchange Purchase Agreement, unless (i) the act, condition, state of fact, occurrence, matter, or claim resulted from Second Party's willful default under this Agreement or under the Exchange Purchase Agreement, and (ii) the default was not approved or waived in writing by First Party.

(3) Any act, condition, state of fact, occurrence, matter, or claim with respect to an Exchange Parcel that took place subsequent to the transfer of the Exchange Parcel to First Party, unless (i) the act, condition, state of fact, occurrence, matter or claim resulted from Second Party's willful default under this Agreement or under the Exchange Purchase Agreement, and (ii) the default was not approved or waived in writing by First Party.

ARTICLE 3. VALUE OF PROPERTY AND EXCHANGE CREDIT

Value of Properties

3.01. For purposes of the exchange, Parcel A is deemed to have (1) a fair market value of $_____[*insert value*], (2) total encumbrances against it in the sum of approximately $_____[*insert value*], and (3) an equity of approximately $_____[*insert value*]. [*Insert similar information for the Exchange Parcel if it has already been identified.*]

Additional Payments

3.02. If there is a difference in the respective equities of Parcel A and the Exchange Parcel(s), this amount may be offset by a payment, in cash or notes, through escrow.

Exchange Account

3.03. If the exchange is not closed on the Conveyance Date of Parcel A, an Exchange Account will be maintained under this Agreement until the Closing Date. The Exchange Account must show all of the following, as of any given date:

(1) The Exchange Value of Parcel A, as a credit to the account;

(2) The Exchange Value of each Exchange Parcel acquired by Second Party and conveyed to First Party under this Agreement (as shown by the escrow closing or settlement, or as otherwise agreed to by the parties), as a debit or a charge against the Account; and

(3) The unrecovered balance of the Exchange Value of Parcel A (the "Exchange Credit").

Notwithstanding anything contained in this Paragraph to the contrary, Second Party will not be required to segregate any funds received on account of a disposition of Parcel A, and First Party will have no entitlement to those funds, or any interest in those funds, other than as provided in this Agreement.

Interest

3.04. Second Party must pay to First Party in arrears, monthly, on the last day of each month, all accrued interest on the Exchange Account at a rate equal to _____[*insert applicable rate*].

ARTICLE 4. CONVEYANCE OF EXCHANGE PARCELS

Consummation of Exchange

4.01.(a) On or before the Conveyance Date for Parcel A, the following must occur:

(1) First Party must deposit with the Escrow Holder or otherwise deliver to Second Party the deed conveying Parcel A to Second Party.

(2) Second Party must deposit with the Escrow Holder or otherwise deliver to First Party its written acknowledgment that it holds on its books and pursuant to this Agreement for the benefit of First Party an "Exchange Credit" equal to the amount of the Exchange Account for Parcel A.

(3) Both parties must deposit in the escrow or otherwise deliver to the other party, all funds, instructions, and documents that are required to close the escrow for Parcel A.

(b) Following the Conveyance Date for Parcel A, the exchange will continue until the Closing Date, and Second Party must continue to purchase the Exchange Parcel(s), in the manner specified in this Agreement. Notwithstanding the foregoing, each Exchange Parcel must be conveyed to First Party (through escrow or otherwise) as of the date that record title to the Exchange Parcel is vested in Second Party.

(c) When all Exchange Parcels have been conveyed to First Party on or before the Closing Date, the exchange will be completed. In all events, the exchange must be completed on or before the Closing Date. If the Exchange Value of the Exchange Parcel(s) conveyed to First Party under this Agreement exceeds the Exchange Value of Parcel A, First Party must pay an amount equal to the excess to Second Party in cash or notes on the Conveyance Date for the Exchange Parcel(s). If the Exchange Value of Parcel A exceeds the Exchange Value of the Exchange Parcel(s) conveyed to First Party under this Agreement, Second Party must pay an amount equal to the excess to First Party in cash, on the Conveyance Date for the Exchange Parcel(s). All other documents between the parties with respect to the exchange will be settled on the Closing Date or as soon thereafter as possible.

[*Choose one of the following paragraphs:*]

[*If obligations of Second Party are to be unsecured, use:*]

Security

4.02. The obligations of Second Party pursuant to this Agreement will be entirely unsecured.

[*OR*]

[*If Second Party's obligations are to be secured by a letter of credit, use:*]

Security

4.02. The obligations of Second Party under this Agreement must be secured by an irrevocable "stand-by" Letter of Credit issued by _____[*name of desired financial institution*]. The Letter of Credit must be dated as of the Conveyance Date of Parcel A, and must be in the amount of the Exchange Value. Further, the Letter of Credit must be non-negotiable and nontransferable (except together with the contractual rights of First Party under this Agreement). The term of the Letter of Credit must not expire prior to the 180th day following the Conveyance Date of Parcel A. The Letter of Credit must serve to underwrite and to secure the obligations of Second Party under this Agreement. Further, it must be payable to First Party only upon First Party providing issuer with a written statement that First Party is entitled to draw on the Letter of Credit on account of Second Party's default.

[*Continue with the following:*]

Termination by First Party

4.03. If Second Party fails to convey the Exchange Parcel(s) pursuant to Paragraph 2.01 of this Agreement prior to the Closing Date, then, in addition to its other remedies, First Party will have the right to terminate this Agreement by notice to Second Party. In the event of such a termination, the following must occur:

(1) Second Party must (i) immediately convey all of its right, title, or interest in and to Parcel A or all proceeds from the sale of Parcel A to First Party, and (ii) immediately transfer to First Party all right, title, and interest of Second Party in and to all Exchange Parcels.

(2) First Party must concurrently (i) pay to Second Party a sum equal to all costs incurred by Second Party in connection with the acquisition of the Exchange Parcel(s), to the extent the costs would have been includable in computing the Exchange Value of the parcel(s) had this Agreement been consummated, plus any amount due Second Party under Paragraph 4.01(c) of this Agreement, and (ii) assume, and indemnify Second Party against, all obligations of Second Party under all options, contracts, and other documents assigned to First Party under this Paragraph.

Upon the completion of such a termination, neither party will have any further right against or duty to the other under this Agreement, except as stated above.

ARTICLE 5. GENERAL MATTERS RELATING TO PARCEL A

Title to Parcel A

5.01.(a) Parcel A will be conveyed to Second Party by grant deed, subject only to (1) all matters ascertainable by a reasonable inspection and survey of Parcel A, and (2) the exceptions set forth in the preliminary title report describing Parcel A, which must be reviewed and approved by Second Party prior to the Conveyance Date for Parcel A.

(b) First Party must not cause or voluntarily permit any change to occur in the condition of title to Parcel A prior to its Conveyance Date. Second Party must have the right, at any time prior to the recordation of the deed to Parcel A, to terminate this Agreement, without liability of either party to the other, if Second Party will be unable to obtain, at standard premium rates, a CLTA standard form policy of title insurance, in the amount of the Exchange Value of Parcel A, showing title to Parcel A vested in Second Party free and clear of all matters except those described in the immediately preceding Subparagraph (a).

Termination by Second Party

5.02. In the event of any termination of this Agreement by Second Party by reason of the inability of First Party to satisfy its obligations under Paragraph 5.01 of this Agreement, First Party must indemnify, defend, and hold Second Party free and harmless from any loss, liability, claims, or demands arising out of actions taken by Second Party in furtherance of this Agreement in accordance with the terms of this Agreement.

ARTICLE 6. MISCELLANEOUS

Closing Costs and Taxes

6.01.(a) All closing costs incurred in connection with the conveyance of Parcel A to Second Party must be borne by Second Party and must reduce the Exchange Value as provided in Paragraph 1.10 of this Agreement. All closing costs incurred by Second Party in connection with the acquisition of the Exchange Parcel(s) or the conveyance of the Exchange Parcel(s) to First Party must be borne by Second Party and included in the Exchange Value of the Exchange Parcel(s). With respect to each such Exchange Parcel and Parcel A, closing costs will include the cost of real estate transfer taxes, recording fees, title insurance costs and premiums (if required), escrow fees, brokerage commissions, and all other costs incurred by the Escrow Holder or Exchange Escrow Holder in connection with the conveyance of each such parcel. Title insurance must be issued to each party upon that party's request, by an issuer designated by the party, covering any or all of the real estate conveyed to the party pursuant to this Agreement.

(b) Real property taxes on each Exchange Parcel must be prorated between Second Party and the owner of the Exchange Parcel. The resulting debit or credit will be taken into account in computing the Exchange Value of the Exchange Parcel. These taxes will not be prorated between Second Party and First Party.

Brokerage Commissions

6.02. Any real estate brokerage commissions payable as a result of these transactions must be paid and designated in the escrow instructions for the conveyance of each parcel and will reduce the Exchange Value of Parcel A or increase the Exchange Value of the or an Exchange Parcel, as the case may be.

Independent Obligations

6.03. The obligations of each of the parties to this transaction are conditioned upon the other party's performance of his, her, or its obligations under this Agreement and the close of escrow on all transactions covered by this Agreement. The conveyance of Parcel A to Second Party must occur prior to the conveyance of the Exchange Parcel(s).

Prohibition Against Assignment

6.04. This Agreement is not assignable by either of the parties to this Agreement.

Notices

6.05. All notices and other communications required or permitted to be given or delivered under this Agreement must be in writing and must be delivered personally or be sent by first-class mail, registered or certified, with postage prepaid, addressed to the party intended at the address set forth above, or at any other address that is designated by the party by notice given to the other party in the manner described in this Paragraph. All notices and other communications

delivered by mail, in the manner set forth above, must be deemed to have been delivered to and received by the addressee on the day following the date on which the notice or communication is deposited in the United States mail. All notices and other communications delivered personally to and received by a party are deemed received on the date of the personal delivery.

Time of Essence

6.06. Time is of the essence of this Agreement. Notwithstanding the above, if the date on which any action is required to be taken under this Agreement falls on any Saturday, Sunday, or legal holiday, the action must be taken on the next business day following that date.

Counterparts; Entire Agreement

6.07.(a) This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which will constitute one and the same instrument.

(b) This instrument constitutes the entire agreement of the parties, and supersedes any prior written or oral agreements between them concerning the subject matter contained in this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties, relating to the subject matter contained in this Agreement, that are not fully expressed in this Agreement.

Amendments

6.08. This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by both of the parties to this Agreement.

Attorneys' Fees

6.09. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or the breach of it, the prevailing party will be entitled to recover from the other party reasonable expenses, attorneys' fees, and costs.

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of First Party*]
[*typed name*]

_____ [*signature of Second Party*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains &

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DIVISION II: REAL ESTATE TRANSACTIONS
SPECIAL ALERT--Ch. 25 REAL ESTATE LOANS

10-SA California Legal Forms--Transaction Guide Scope

Scope

§ 25SA.01 Special Alert--Truth in Lending Act Disclosure Requirements

On and after July 27, 2009, a creditor will have to comply with some enhanced disclosure requirements [*see* Pub. L. 110-289, § 2502(a),(c)] under the Truth in Lending Act [*see* § 25.23] in the case of any extension of consumer credit that is secured by the dwelling of the consumer, if the transaction is subject to the Real Estate Settlement Procedures Act [*see* § 25.24]. A future release of this publication will incorporate the following changes at appropriate places in this chapter. (The requirements of 15 U.S.C. § 1638(b)(2)(B)-(E), listed below, will not apply to extensions of credit relating to timeshare plans described in 11 U.S.C. § 101(53D) [15 U.S.C. § 1638(b)(2)(G)], however.)

- The creditor will have to make good faith estimates of the disclosures required under 15 U.S.C. § 1638(a) and then mail or deliver them not later than three business days after receipt of the borrower's loan application, which will have to be at least seven business days before consummation of the transaction [15 U.S.C. § 1638(b)(2)(A)].

- To expedite consummation of a transaction, if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer will be permitted to waive or modify the timing requirements for disclosures under 15 U.S.C. § 1638(b)(2)(A). To effect a waiver or modification, the consumer will have to provide to the creditor a dated, written statement describing the emergency and specifically waiving or modifying those timing requirements, which statement bears the signature of all consumers entitled to receive the required disclosures; and the creditor will have to provide to the consumers, at or before the time of such waiver or modification, the final disclosures required by 15 U.S.C. § 1638(b)(1) [15 U.S.C. § 1638(b)(2)(F)].

- The required disclosures will have to include this statement in conspicuous type size and format [15 U.S.C. § 1638(b)(2)(B)(i)]: "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application."

- The required disclosures will have to be provided in the form of final disclosures at the time of consummation of the transaction [15 U.S.C. § 1638(b)(2)(B)(ii)].

- In any case in which the disclosure statement contains an annual percentage rate of interest that is no longer accurate, as determined under 15 U.S.C. § 1606(c), the creditor will have to furnish an additional, corrected statement to the borrower, not later than three business days before the date of consummation of the transaction [15 U.S.C. § 1638(b)(2)(D)].

- The consumer will have to receive the disclosures before paying any fee to the creditor or other person in connection with the consumer's application for the extension of credit. If the disclosures are mailed to the consumer, the consumer will be considered to have received them three business days after they are mailed. A creditor or other person will be permitted to impose a fee for obtaining the consumer's credit report before the consumer has received the disclosures, provided the fee is bona fide and reasonable in amount [15 U.S.C. § 1638(b)(2)(E)].

- On and after January 27, 2011, or an earlier compliance date established by a regulation of the Federal Reserve Board [*see* Pub. L. 110-289, § 2502(a),(c)(2)], if the annual rate of interest is variable, or the regular payments may otherwise be variable, then in addition to the other disclosures required by 15 U.S.C. § 1638(a), the disclosures provided under 15 U.S.C. § 1638(b) will have to label the payment schedule as "Payment Schedule: Payments Will Vary Based on Interest Rate Changes." Also, the disclosures will have to state, in conspicuous type size and format, examples of adjustments to the regular required payment on the extension of credit based on the change in the interest rates specified by the contract for such extension of credit. Among the examples to be provided is an example that reflects the maximum payment amount of the regular required payments on the extension of credit, based on the maximum interest rate allowed under the contract, in accordance with the rules of the Federal Reserve Board [15 U.S.C. § 1638(b)(2)(C)].



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS

10-25 California Legal Forms--Transaction Guide 25.syn

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Fair Lending Notice [21 Cal. Code Reg. § 7114]

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS

10-25 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers real estate loans made by conventional lenders; real estate loans made, insured, or guaranteed by governmental entities; and certain extensions of consumer credit secured by the borrower's residential property. This chapter discusses applicable statutory and regulatory requirements; includes the procedure and forms for obtaining certain kinds of loans; and examines various disclosures that must be made under state or federal law before the consummation of a loan or consumer credit transaction.

Security instruments that a borrower must execute to consummate a loan transaction are covered in Ch. 25A, *Security Instruments for Real Estate Financing* . The assumption of secured loans is covered in Ch. 25B, *Subordination, Assumption, and Assignment* . Full and partial releases and reconveyances of trust deeds, and the substitution of trustees under a trust deed, are covered in Ch. 25C, *Release and Reconveyance* . The procedure for foreclosing a trust deed or mortgage is covered in Ch. 25D, *Foreclosure* .

Loans that are used solely to finance improvements to real property are covered in Ch. 30A, *Construction Financing* .



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A. Primary Sources

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§ 25.01 California Sources

[1] Statutes

Transactions in trust deeds and real property sales contracts. *Bus. & Prof. Code § 10230 et seq.*

Claim of exemption and disclosure regarding series of notes or interests secured by same real property. *Bus. & Prof. Code § 10237 et seq.*

Real property loans.

Statements required of mortgage loan brokers. *Bus. & Prof. Code §§ 10232-10232.5, 10240, 10241, 10241.3, 10241.4.*

Maximum amount of expenses, charges, and interest. *Bus. & Prof. Code § 10242.*

Real Estate Appraiser's Licensing and Certification Law. *Bus. & Prof. Code § 11300 et seq.*

Notice of applicant's right to receive appraisal report. *Bus. & Prof. Code § 11423.*

Security interest in real property for goods other than for goods to be attached to real property, prohibition against contracts granting. *Civ. Code § 1804.3(b).*

Variable interest rate loans. *Civ. Code §§ 1916.5, 1916.6.*

Adjustable payment, adjustable rate loans. *Civ. Code § 1916.7.*

Renegotiable rate mortgage loans. *Civ. Code §§ 1916.8, 1916.9.*

Shared appreciation loans in general. *Civ. Code § 1917 et seq.*

Shared appreciation loans for seniors. *Civ. Code § 1917.320 et seq.*

Payoff demand statements and beneficiary statements. *Civ. Code § 2943*.

Impound accounts. *Civ. Code §§ 2954, 2954.1, 2954.2, 2954.8*.

Hazard insurance on real property securing a loan. *Civ. Code § 2955.5*.

Home Equity Loan Disclosure Act. *Civ. Code § 2970 et seq.*

Commercial banks, loan limits. *Fin. Code § 1220 et seq.*

Savings associations.

Investment in loans. *Fin. Code § 7450 et seq.*

Real estate loans. *Fin. Code § 7500 et seq.*

Usury exemption. *Fin. Code § 7675*.

Credit unions, loan restrictions. *Fin. Code § 14950 et seq.*

Industrial loan companies. *Fin. Code § 18000 et seq.*

California Residential Mortgage Lending Act. *Fin. Code § 50000 et seq.*

Licensing of residential mortgage lender. *Fin. Code § 50120 et seq.*

Licensing of residential mortgage loan service. *Fin. Code § 50130*.

Financial condition and transaction and bond requirements. *Fin. Code § 50200 et seq.*

Assessments. *Fin. Code § 50400 et seq.*

Prohibited practices and penalties. *Fin. Code § 50500 et seq.*

Brokerage services provided by licensees for borrowers. *Fin. Code § 50700 et seq.*

Cal-Vet loan program.

Veterans' Farm and Home Purchase Act of 1943. *Mil. & Vet. Code § 985 et seq.*

Veterans' Farm and Home Purchase Act of 1974. *Mil. & Vet. Code § 987.50 et seq.*

[2] Regulations

Regulations of Commissioner of Financial Institutions.

General provisions. *10 Cal. Code Reg. § 1.1 et seq.*

Administration. *10 Cal. Code Reg. § 5.1 et seq.*

Banking regulations. *10 Cal. Code Reg. § 10.1 et seq.*

Business and industrial development corporations regulations. *10 Cal. Code Reg. § 50.1 et seq.*

Savings and loan regulations.

Supplementary loan report and documentation requirements. *10 Cal. Code Reg. § 107.100 et seq.*

Wraparound loans. *10 Cal. Code Reg. § 107.300 et seq.*

Variable interest rate loan provisions. *10 Cal. Code Reg. § 107.500 et seq.*

Insurance in connection with sales, loans, and advances of credit. *10 Cal. Code Reg. § 107.600 et seq.*

Modification agreements. *10 Cal. Code Reg. § 107.700 et seq.*

Regulations of Commissioner of Corporations.

Loans by credit unions. *10 Cal. Code Reg. § 970 et seq.*

Industrial loan companies. *10 Cal. Code Reg. § 1101 et seq.*

Regulations of Real Estate Commissioner.

Brokers. *10 Cal. Code Reg. § 2720 et seq.*

Trust fund accounts. *10 Cal. Code Reg. § 2830 et seq.*

Mortgage loan brokerage. *10 Cal. Code Reg. § 2840 et seq.*

Real property securities dealers. *10 Cal. Code Reg. § 2975 et seq.*

Regulations of Department of Veterans Affairs for Cal-Vet farm and home purchases. *12 Cal. Code Reg. § 300 et seq.*

California's fair lending regulations. *21 Cal. Code Reg. § 7101 et seq.*

[3] Attorney General Opinions

Charge of interest by residential mortgage lender from date funds are paid into escrow. *82 Ops. Cal. Atty. Gen. 231 (1999)* .

Real estate licensee's acceptance of fee for referral of client to mortgage lender in violation of Real Estate Settlement Procedures Act of 1974. *81 Ops. Cal. Atty. Gen. 177 (1998)* .

Payment of commission by licensed real estate broker acting in capacity of mortgage loan broker to unlicensed person

for providing name, telephone number, and address of prospective borrower. *78 Ops. Cal. Atty. Gen. 71 (1995)* .

Applicability of original interest rate on Cal-Vet loan to assuming spouses. *60 Ops. Cal. Atty. Gen. 289.1 (1977)* .

Applicability of usury restriction in California Constitution to loans made by trust departments of commercial banks and by trust company acting as trustee. *59 Ops. Cal. Atty. Gen. 515 (1976)* .

Seller's points received by lender as constituting additional interest for purpose of usury; applicability of state usury laws to FHA insured and VA guaranteed mortgages. *59 Ops. Cal. Atty. Gen. 452 (1976)* .

Use restrictions and anticipated interest-reduction payments in regards to valuation of taxable low income housing projects constructed and operated pursuant to Section 236 of National Housing Act. 59 Cal. Op. Att'y Gen. 293 (1976) .

Applicability of maximum interest ceiling of 10 percent set in California Constitution to mortgage banking industrial loan companies, restricted industrial loan companies, and premium finance industrial loan companies. *58 Ops. Cal. Atty. Gen. 487 (1975)* .

Illegality of creditor's basing determination of creditworthiness on factors or criteria peculiar to women. *58 Ops. Cal. Atty. Gen. 232 (1975)* .



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§ 25.02 Federal Sources

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Federal Home Loan Mortgage Corporation. *12 U.S.C. § 1451 et seq.*

Federal savings associations. *12 U.S.C. § 1461 et seq.*

National Housing Act (Federal Housing Administration). *12 U.S.C. § 1701 et seq.*

Mortgage insurance. *12 U.S.C. § 1707 et seq.*

National mortgage insurance. *12 U.S.C. § 1716 et seq.*

National defense housing insurance. *12 U.S.C. § 1750 et seq.*

Real Estate Settlement Procedures Act of 1974. *12 U.S.C. § 2601 et seq.*

Homeowners Protection Act of 1998. *12 U.S.C. § 4901 et seq.*

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Purpose. *15 U.S.C. § 1601*.

Exempted transactions. *15 U.S.C. § 1603*.

Determination of finance charge. *15 U.S.C. § 1605*.

Determination of annual percentage rate. *15 U.S.C. § 1606*.

Disclosure requirement. *15 U.S.C. § 1631*.

Form of disclosure. *15 U.S.C. § 1632*.

Right of rescission. *15 U.S.C. § 1635*.

Disclosure requirements for home equity loans. *15 U.S.C. § 1637a*.

Disclosures in closed-end credit plans. *15 U.S.C. § 1638*.

Substantive limitations on home equity plans. *15 U.S.C. § 1647*.

Equal Credit Opportunity Act. *15 U.S.C. § 1691 et seq.*

Department of Veterans Affairs housing loans. *38 U.S.C. § 3701 et seq.*

[2] Regulations

Equal Credit Opportunity Act regulations (Regulation B). *12 C.F.R. § 202.1 et seq.*

Truth in Lending regulations (Regulation Z).

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Finance charge defined. *12 C.F.R. § 226.4*.

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Types of mortgage insurance available. *24 C.F.R. §§ 200.5-200.39*.

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Outlying area property loan insurance. *24 C.F.R. § 203.18(d)*.

Multifamily housing mortgage insurance. *24 C.F.R. § 207.1 et seq.*

Cooperative housing mortgage insurance. *24 C.F.R. § 213.1 et seq.*

Urban renewal mortgage insurance and insured improvement loans. *24 C.F.R. § 220.251 et seq.*

Low-cost and moderate-income housing mortgage insurance. *24 C.F.R. § 221.1 et seq.*

Condominium ownership mortgage insurance. *24 C.F.R. § 234.1 et seq.*

Mortgage insurance and assistance payments for home ownership for lower-income families and project rehabilitation. *24 C.F.R. § 235.1 et seq.*

Real Estate Settlement Procedures Act of 1974 (RESPA) regulations. *24 C.F.R. § 3500.1 et seq.*

Applicability of RESPA. *24 C.F.R. § 3500.5*.

Special information booklet required. *24 C.F.R. § 3500.6*.

Good faith estimate of settlement services. *24 C.F.R. § 3500.7*.

Uniform settlement statement form. *24 C.F.R. § 3500.8*.

Veterans programs.

Guaranty of loans to veterans to purchase manufactured homes and lots. *38 C.F.R. § 36.4201 et seq.*

Guaranty or insurance of loans to veterans to purchase residential property. *38 C.F.R. § 36.4300 et seq.*

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§§ 25.03[Reserved]



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§ 25.06 Annotations

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§ 25.07 Text References

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Ch. 25A, *Security Instruments for Real Estate Financing.*

Ch. 25B, *Subordination, Assumption, and Assignment.*

Ch. 25C, *Release and Reconveyance.*

Ch. 25D, *Foreclosure.*

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Ch. 3B, *Variable Rate Mortgages.*

Ch. 4, *Federal, State, and Local Financing Programs.*

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[Reserved]

§§ 25.08[Reserved]



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§ 25.10 Role of Attorney in Loan Transactions

An attorney is not likely to be actively involved in a client's real estate loan transaction unless the transaction is large or the client encounters problems during the transaction. Even in relatively small transactions, however, an attorney is expected to have sufficient background information and a working understanding of the lending industry to advise the client and to review documents. In large transactions, the attorney must review or draft some or all of the security instruments for the loan transaction [*see* Ch. 25A, *Security Instruments for Real Estate Financing*]. Whether drafting or reviewing documents or monitoring the overall progress of the loan funding, counsel needs to be familiar with the overall loan approval process.

In large real estate loan transactions, counsel for the lender may require as a condition of the loan that the borrower's counsel give his or her opinion on the enforceability of the loan documents against the borrower. This legal opinion will also give the parties the opportunity to allocate, before the consummation of the transaction, any risks identified by the attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsEffective RepresentationReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 25.11 Persons Who Assist Brokers With Mortgage Loan Transactions

Certain individuals who assist brokers with regard to mortgage loan transactions are excluded from the definition of real estate broker. This includes persons who solicit borrowers or lenders, negotiate loans, collect payments, or perform services for borrowers or lenders [*Bus. & Prof. Code § 10133.1(c)(1)*]. Specifically, a real estate broker's employee who, on behalf of the broker, assists the broker in meeting the broker's obligations to its customers in residential mortgage loan transactions, when the lender is an institutional lender [*see Fin. Code § 50003*], is not treated as a real estate broker, provided the employee does not participate in any negotiations occurring between the principals [*Bus. & Prof. Code § 10133.1(c)(1)*]. However, a broker must exercise reasonable supervision and control over the activities of the nonlicensed employees and must comply with the branch office licensing requirements for each location where the nonlicensed persons are employed [*Bus. & Prof. Code § 10133.1(c)(2)*; *see Bus. & Prof. Code § 10163*]. In any case, these provisions do not restrict the ability of the Real Estate Commissioner to discipline a broker or corporate broker licensee or its designated officer, or both the corporate broker licensee and its designated officer, for misconduct of a nonlicensed employee, or to adopt, amend, or repeal rules or regulations governing the employment or supervision of an employee who is a nonlicensed person [*Bus. & Prof. Code § 10133.1(c)*; *see Bus. & Prof. Code § 10080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 25.12 Sources of Real Estate Loans

[1] Types of Lenders

Sources for real estate loans include institutional lenders, such as commercial banks [*see § 25.12[2]*], savings associations [*see § 25.12[3]*], insurance companies, mortgage companies, pension funds, and real estate syndicates [*see* Ch. 29A, *Joint Ventures* , and Ch. 29B, *Nonpublic Real Estate Syndicates*]. Noninstitutional lenders (for example, sellers of property and other private lenders) constitute another source. Government sources of loans include the California Department of Veterans Affairs (Cal-Vet) [*see § 25.13[3]*] and the federal Small Business Administration. The Federal Housing Administration (FHA) and the federal Department of Veterans Affairs (VA) do not directly make loans but guarantee them or insure them [*see § 25.13[1], [2]*].

For an outline of the types of loans generally made by different lenders, see *§ 25.110*. For further discussion of available loan sources, see California Real Estate Law and Practice, Ch. 100, *Methods of Financing* , and Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[2] Commercial Banks

A commercial bank may be either a national or state bank. National banks are organized under federal law [*12 U.S.C. § 21 et seq.*] and regulated by the Comptroller of the Currency [12 C.F.R. pt. 1 et seq.]. National banks are also regulated by the Board of Governors of the Federal Reserve System [12 C.F.R. pt. 201 et seq.] because every national bank must be a member of the Federal Reserve System [*see 12 U.S.C. § 282*]. A national bank operating in California is also subject to the Banking Law [*Fin. Code § 99 et seq.*], except to the extent that the Banking Law is inconsistent with and infringes on paramount federal laws governing national banks [*Fin. Code § 100(b)*].

A California state bank is a corporation incorporated under the General Corporation Law [*see Corp. Code § 100 et seq.*] that is, with the approval of the Commissioner of Financial Institutions, incorporated for the purpose of engaging in, or that is authorized by the commissioner to engage in, the commercial or industrial banking business [*Fin. Code § 101(a)*]. State banks are subject to the Banking Law [*Fin. Code § 99 et seq.*] and are regulated by the Commissioner of Financial Institutions [*Fin. Code §§ 200(b), 210, 210.5(b)*; *see Fin. Code § 200 et seq.*; *10 Cal. Code Reg. § 1.1 et seq.*]. They are also governed by the General Corporation Law and all other state laws governing corporations generally, to

the extent that those laws are not inconsistent with the Banking Law [*Fin. Code § 101*].

State banks may elect to be members of the Federal Reserve System [*see 12 U.S.C. § 321*]. If this election is made, the member bank is subject both to state law and to all federal laws and regulations applicable to member banks of the Federal Reserve System [*see 12 U.S.C. §§ 324, 330*]. In response to a volatile lending environment and in order to maintain the quality of competition between federal and state lenders, the state legislature has authorized state banks to make loans on the same terms allowed to federally chartered banks by the Comptroller of the Currency [*see Civ. Code § 1916.12*].

For a summary of the loan policies of different lenders, including commercial banks, see *§ 25.110*. For an expanded discussion of loan policies of commercial banks, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[3] Savings Associations

Federally chartered savings associations are regulated under the Home Owners' Loan Act of 1933 [*12 U.S.C. § 1461 et seq.*] and are subject to regulations of the Office of Thrift Supervision [12 C.F.R. pt. 500 et seq.]. California-chartered savings associations are governed by the Savings Association Law [*Fin. Code § 5000 et seq.*] and are regulated by the Commissioner of Financial Institutions [*Fin. Code §§ 200(b), 210, 210.5(c)*; *see Fin. Code § 200 et seq.*; *10 Cal. Code Reg. § 1.1 et seq.*].

For a summary of the lending policies and restrictions of savings associations and other lenders, see *§ 25.110*. For further discussion, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[4] Industrial Loan Companies

An industrial loan company (also known as a thrift and loan company) is a premium finance agency, which is a company that, by the terms of its authority to engage in the industrial loan business, is permitted to issue or sell investment certificates and is subject to specified limitations on its business and other activities [*Fin. Code §§ 18003, 18560*; *see Fin. Code § 18596*; *see also Fin. Code § 18003* (these terms and related governing statutes do not apply to industrial banks, which are subject to and governed by *Fin. Code § 1400 et seq.*)]. These companies are governed by the Industrial Loan Law (also referred to as the Thrift and Loan Law) [*Fin. Code § 18000 et seq.*] and are regulated by the Commissioner of Financial Institutions [*Fin. Code §§ 200(b), 210, 210.5(d)*; *see Fin. Code § 200 et seq.*; *10 Cal. Code Reg. § 1.1 et seq.*].

Loans made by industrial loan companies are strictly regulated as to type, terms, and maximum charges [*see Fin. Code § 18190 et seq.*]. However, industrial loan companies are not limited by statute in the interest rate they may charge and are not subject to the usury provisions of the California Constitution [*see Cal. Const., art. XV, § 1*]. Most real estate loans made by industrial loan companies are so-called "hard-money seconds," under which the property owner borrows money secured by a second deed of trust for some purpose other than to acquire the property [*see § 25.14[1]*].

For further discussion, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[5] Residential Mortgage Lenders

The California Residential Mortgage Lending Act (RMLA) [*Fin. Code § 50000 et seq.*] governs persons engaged in the business of making or servicing residential mortgage loans in California. In general, persons engaged in these activities must obtain a license from the Commissioner of Corporations, unless the person or transaction is excepted from a

definition or exempt from licensure by a provision of the RMLA or a rule of the Commissioner [*Fin. Code § 50002(a)*; *see Fin. Code §§ 50120 et seq., 50130*]. Among the exempt persons under the RMLA are any bank, trust company, insurance company, or industrial loan company doing business under the authority or in accordance with a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States that is authorized to do business in California; a federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in California; and a savings and loan association, savings bank, or credit union organized under the laws of this or any other state that is authorized to transact business in California [*see Fin. Code § 50002(c)* (list of exempt persons)].

For persons who are subject to the RMLA, detailed provisions govern their financial condition and loan transactions [*Fin. Code § 50200 et seq.*]. Among the matters covered by the RMLA are:

- Required annual audits of a licensee's books by an independent certified accountant [*see Fin. Code § 50200*].
- A licensee's minimal tangible net worth [*see Fin. Code § 50201*].
- Procedures for handling escrow funds, trust accounts, and related financial matters [*see Fin. Code § 50202*].
- Limits on fees to be charged to borrowers and related matters [*see Fin. Code § 50203*].
- Prohibited activities [*see Fin. Code § 50204*].
- A licensee's maintenance of a surety bond [*see Fin. Code § 50205*].

The RMLA also authorizes licensees to provide brokerage services to a borrower, but strictly regulates the performance of these services by, among other things, (1) requiring the execution of a written loan brokerage agreement, and (2) imposing numerous restrictions and various reporting and disclosure requirements [*see Fin. Code § 50700 et seq.*].

For further discussion, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[6] Mortgage Loan Originators

[a] Regulatory Scheme

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 [*see 12 U.S.C. § 5101 et seq.*; *see also* Pub. L. No. 110-289, § 1501 et seq. (July 30, 2008)], also known as the S.A.F.E. Mortgage Licensing Act, requires all states to license and register mortgage loan originators through the Nationwide Mortgage Licensing System and Registry (NMLSR), developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. Provisions bringing California law into conformity with the federal law are found in the Real Estate Law [*see Bus. & Prof. Code § 10166.01 et seq.*], in the Finance Lenders Law [*see Fin. Code §§ 22012-22014, 22105.1-22105.4, 22109.1-22109.6*], and in the Residential Mortgage Lending Act [*see Fin. Code §§ 50002.5, 50003.5, 50003.6, 50140 et seq., 50150 et seq.*].

Mortgage loan originators are only individuals. Corporations, partnerships, and other entities that are not individuals, are not subject to the licensing requirements (and related requirements) imposed on mortgage loan originators; however, any such entity that employs or compensates a mortgage loan originator is, to some extent, subject to related regulation.

For regulatory purposes, a "mortgage loan originator" is an individual who, for compensation or gain, or in the expectation of compensation or gain, takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan [*Bus. & Prof. Code § 10166.01(b)(1)*; *Fin. Code §§ 22013(a), 50003.5(a)*; *see Bus. & Prof. Code § 10166.01(d)*; *Fin. Code §§ 22012(e), 50003(p)* (definition of residential mortgage loan)]. Generally, a license is required [*Bus. & Prof. Code § 10166.02(b)(2)*; *Fin. Code §§ 22109.6, 50002(d)*]. Exemptions from regulation are allowed for individuals who, although engaged in activities similar or related to mortgage loan origination (such as administrative and clerical tasks supporting loan origination, or renegotiation of existing loans by employees for the employer's own account), do not warrant individualized regulation [*see Bus. & Prof. Code § 10166.01(b)(2)*; *Fin. Code §§ 22013(b), 50003.5(b)*]. Loan processors and underwriters generally are not subject to licensing requirements if they work as employees, but those who work as independent contractors must comply with licensing requirements [*Bus. & Prof. Code § 10166.03*; *Fin. Code §§ 22014, 50002(f), 50003.6*]. An employee of a regulated financial institution, who engages in mortgage loan origination activities, can be exempt from licensing requirements if he or she is registered as a mortgage loan originator with the Nationwide Mortgage Licensing System and Registry [*Fin. Code § 50002(e)*; *see Fin. Code § 50003.5(c)* (definition of registered mortgage loan originator)].

In compliance with licensing requirements, every mortgage loan originator must register with, and maintain a valid unique identifier issued by, the Nationwide Mortgage Licensing System and Registry [*Bus. & Prof. Code § 10166.17*; *Fin. Code §§ 22100(e), 22109.6, 50002.5(d), 50146*]. The NMLSR identifier must be displayed and disclosed in connection with various mortgage loan origination activities [*see Bus. & Prof. Code §§ 10140.6(b), 10235.5, 10236.4*; *Fin. Code §§ 22347, 50209, 50701(c)*].

[b] Real Estate Licensees

An individual real estate licensee must obtain a license endorsement to act as a mortgage loan originator [*Bus. & Prof. Code § 10166.02(b)(2)*; *see* Stats. 2009, ch. 160, § 87 (license endorsement need not be obtained before December 1, 2010, and must be obtained by December 31, 2010)]. However, an individual who only performs real estate brokerage services [*see Bus. & Prof. Code § 10131(a), (b)* (definition)] need not have the license endorsement unless he or she is compensated by a lender, a mortgage loan originator, or an agent of a lender or mortgage loan originator [*Bus. & Prof. Code § 10166.01(b)(2)(B)*].

[c] Finance Lenders and Residential Mortgage Lenders

A mortgage loan originator, if not subject to licensing requirements under the Real Estate Law, must obtain a license under either the Finance Lenders Law or the Residential Mortgage Lending Act [*Fin. Code §§ 22109.6, 50002(d)*; *see* Stats. 2009, ch. 160, § 87 (license need not be obtained before July 1, 2010, and must be obtained by July 31, 2010)]. Generally, lenders and loan brokers and servicers subject to the Finance Lenders Law or the Residential Mortgage Lending Act:

- May not employ or compensate a mortgage loan originator who does not have a license (or does not have a license endorsement under the Real Estate Law) to act as a mortgage loan originator [*Fin. Code §§ 22100(b), 50002.5(a)*];

- Must maintain a net worth of $250,000 while employing any mortgage loan originator [*Fin. Code §§ 22104(b), 50201(a)*];

- May not make or broker a residential mortgage loan unless that loan is offered by, negotiated by, or applied for through, a licensed mortgage loan originator [*Fin. Code §§ 22100(d), 50002.5(c)*]; and

- Must register with, and maintain a valid unique identifier issued by, the Nationwide Mortgage Licensing System and Registry, if engaged in the business of making, brokering, and/or servicing

residential mortgage loans [*Fin. Code §§ 22100(e), 50002.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCommercial BanksBanking LawDepository InstitutionsCredit UnionsBanking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsBanking LawNational BanksGeneral OverviewReal Property LawFinancingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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§ 25.13 Loans Involving Government Participation

[1] FHA Insured Loans

The Federal Housing Administration (FHA, in the Department of Housing and Urban Development) does not make loans, but provides insurance for private lenders against losses on mortgages or trust deeds that finance homes, multifamily projects, land development projects, and group facilities projects. It also provides insurance against loss on loans for property improvements and insures yields on investments in rental housing projects [*see 24 C.F.R. § 200.5*]. In most cases the insurance premium may not exceed 1 percent per annum of the unpaid balance of principal [*see 24 C.F.R. § 203.281*].

For a summary of the procedure for obtaining an FHA insured loan, see *§ 25.130*.

[2] VA Guaranteed Loans

The Department of Veterans Affairs (VA) guarantees real estate loans made by private lenders to qualified veterans or their surviving spouses for the purchase or refinancing of homes, including condominium units [*38 U.S.C. § 3710*]. The VA guarantees only a part of the loan, with the maximum amount set by statute [*38 U.S.C. § 3703(a)(1)*; *see 38 C.F.R. § 36.4302(a)*]. To qualify for such a guaranty, the veteran must have served on active duty in the armed forces for a specified period of time [*see 38 U.S.C. §§ 3701(b), 3702*; *see also § 25.113*].

The VA also insures those types of loans [*38 U.S.C. § 3703(a)(2)*; *see 38 C.F.R. § 36.4370 et seq.*]. However, lenders seldom seek this insurance because the application procedure is more burdensome than that required for loan guaranties and the insurance is limited to 15 percent of the aggregate of the loans made or purchased by a lending institution [*38 U.S.C. § 3703(a)(2)(A)*].

For coverage of the procedure for obtaining a loan guaranteed by the VA, see *§ 25.131*. For VA loan guaranty documents, see *§ 25.210* et seq. For additional discussion of the insurance and loan guaranty programs of the VA, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[3] Cal-Vet Loans

[a] Overview

The California Department of Veterans Affairs (Cal-Vet), under authority of the Veterans' Farm and Home Purchase Act of 1974 [*see Mil. & Vet. Code § 987.50*], operates the Cal-Vet loan program to assist eligible veterans (and surviving spouses of eligible veterans) in the purchase of qualified farms and homes. Cal-Vet buys the property and sells it to the veteran or spouse under a real property sales (installment) contract. Cal-Vet makes a loan that is repayable at an interest rate usually below the market rate for conventional loans. In addition to a low interest rate, other benefits of the Cal-Vet loan program include low-cost fire and hazard insurance, and life and disability insurance at group premium rates. State bond issues provide the funds that finance the program, but at no cost to the taxpayers, since the veteran's monthly payments on the loan cover all bond and administrative expenses [*see Mil. & Vet. Code §§ 987.12, 987.83*].

For coverage of the procedure for obtaining a Cal-Vet loan, see *§ 25.132*. For Cal-Vet loan documents, see *§ 25.220* et seq. For the real property sales contract used by Cal-Vet, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[b] Definition of "Home"

A "home" for purposes of a Cal-Vet loan is a dwelling, condominium, or mobilehome suitably located and adequate to meet the housing needs of the veteran and minimum property standards [*see Mil. & Vet. Code § 987.53(b)*]. Each property must have a year-round access and water supply that is adequate and sufficient for its intended use as a farm or home [*12 Cal. Code Reg. § 322*].

[c] Eligibility for Home-Purchase Benefits

To be eligible to receive benefits from the Veterans' Farm and Home Purchase Act of 1974 [*see Mil. & Vet. Code § 987.50 et seq.*], the applicant must be a veteran or must otherwise qualify through an eligible veteran. For coverage of the relevant criteria [*see Mil. & Vet. Code §§ 980, 987.52*], see *§ 25.113*.

The surviving spouse of an eligible veteran may be allowed to succeed to the veteran's benefits under the Veterans' Farm and Home Purchase Act of 1974 [*Mil. & Vet. Code § 987.58(a)*]. A surviving spouse who has not remarried may also succeed to benefits if the deceased spouse was a member of the armed forces on active military duty, entered active duty while in California, lived in California for six months immediately preceding his or her entry into active duty, and was killed in the line of duty while on active duty or died after discharge from active duty from injuries incurred in the line of duty while on active duty. In making a determination of eligibility for these purposes, the Cal-Vet may base its determination on documentation furnished to the surviving spouse by the federal Department of Veterans Affairs specifying the cause of death [*Mil. & Vet. Code § 987.58(b)*]. Finally, the spouse of one who is considered a veteran for purposes of the Cal-Vet loan program because of being missing in action or a prisoner of war may file an application to receive farm and home-purchase benefits [*Mil. & Vet. Code § 987.58(c)*].

[d] Advantages of Loan Program

The advantages generally associated with Cal-Vet financing are low interest rates, low-cost fire and hazard insurance, and the assurance, through inspection and approval of the property, that the property is suitable for the veteran and his or her family. The term over which a purchase contract executed by Cal-Vet with a qualified veteran is made payable may not by statute exceed 40 years for farms or homes or 30 years for mobilehomes [*Mil. & Vet. Code § 987.71(b)*]. Cal-Vet provides that the maximum terms of these loans are as follows:

- Single family home loan or farm loan, 30 years.
- New mobilehome loan, 20 years.

- Used mobilehome loan, 10 or 15 years (depending on the age of mobilehome).

To allow the veteran to purchase the home selected without incurring excessive monthly payments, Cal-Vet, at the time of the initial purchase, may postpone the commencement of payment of the principal balance for a period not exceeding five years, provided the veteran's current income meets the standards for purchase on those terms, and Cal-Vet determines that the veteran's income can reasonably be expected to increase sufficiently within the five-year period to make the payments [*Mil. & Vet. Code § 987.71(d)*].

A deferred principal payment program permits a veteran to make interest-only payments on a Cal-Vet loan for up to five years if (1) the veteran has sufficient income and assets [*see 12 Cal. Code Reg. § 309.4* (definition)] to make these payments, and (2) the veteran's income can reasonably be expected to increase sufficiently within a five-year period to make the transition to payments of fully amortized principal and interest [*12 Cal. Code Reg. § 310(a), (c)*]. Several limitations and restrictions apply to these loans [*see 12 Cal. Code Reg. §§ 310.1, 310.2*].

[e] Qualification of Property

The maximum purchase price that Cal-Vet will pay for a home is set by statute [*see Mil. & Vet. Code § 987.64*]. Before any purchase of property, the applicant should file specific appraisals with Cal-Vet.

Unless expressly accepted in writing by Cal-Vet, all conditions, encumbrances, and liens (whether or not of record) on or affecting the property must be cleared before purchase by Cal-Vet [*12 Cal. Code Reg. § 322*]. Homes to be used primarily for rental or income purposes or as vacation or weekend homes, and properties located outside California, do not qualify for the Cal-Vet program [*12 Cal. Code Reg. § 320*].

[f] Preference for Benefits Under Loan Program

Whenever a shortage of funds exists in any of the funding sources available, Cal-Vet must use those funds according to specified preference categories [*Mil. & Vet. Code § 987.56(b)*]. (These preferences do not affect any eligibility requirement for benefits [*Mil. & Vet. Code § 987.56(c)*].)

- First preference must be given to veterans who are otherwise qualified because of service during a time of war and who were wounded or disabled as a result of their service. Cal-Vet must determine, in each case, whether the veteran was wounded or disabled as a result of service [*Mil. & Vet. Code § 987.56(b)(1)*].

- Second preference must be given to (1) unremarried spouses of individuals who were members of the armed forces on active military duty and were killed in the line of duty while on active duty, (2) members of the armed forces who were held as prisoners of war, and (3) unremarried spouses of members of the armed forces who have been designated by the armed forces as missing in action [*Mil. & Vet. Code § 987.56(b)(2)*].

- Third preference must be given to (1) veterans whose eligibility is derived from service that includes any date after August 1, 1990, and before a date set by law or by a Presidential proclamation ending the Gulf War and (2) veterans with wartime service discharged or released from active duty within 10 years of their application to Cal-Vet [*Mil. & Vet. Code § 987.56(b)(3)*].

- Fourth preference must be given to active members of the California National Guard or a reserve component of a branch of the United States armed forces who meet specified eligibility criteria [*Mil. & Vet. Code § 987.56(b)(4)*; *see Mil. & Vet. Code § 980(a)(3)*].

- Fifth preference must be given to veterans with wartime service discharged or released from active duty more than 10 years before their application to Cal-Vet [*Mil. & Vet. Code § 987.56(b)(5)*].

- Sixth preference must be given to veterans who are otherwise qualified and whose only military service was during a time of peace [*Mil. & Vet. Code § 987.56(b)(6)*].

- Seventh preference must be given to veterans eligible for a subsequent loan under *Mil. & Vet. Code § 987.86(a)* [*Mil. & Vet. Code § 987.56(b)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingFederal ProgramsU.S. Department of Housing & Urban Development ProgramsReal Property LawFinancingState Programs



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§ 25.14 Primary and Secondary Financing

[1] Definitions

In the context of real estate loans, the terms "primary" and "secondary" are used in two different senses. In one sense, they refer to the sequence in which lenders acquire first liens [*see* [2], *below*]. Used in a different sense, they refer to the priority of liens on the property. Primary financing thus refers to a loan that is secured by a first lien on real property. Secondary financing refers to an inferior lien (second, third, and so on) behind the first lien on the secured property. Some lenders engage exclusively or chiefly in primary financing while others concentrate on secondary financing. For example, sellers of property are a principal source of secondary financing but generally do not make first loans on property.

Another name given to secondary loans is "hard-money loans." The terms are often, but not always, interchanged. Hard-money loans derive that name from the practice of lenders who specialize in underwriting loans based on the value of the property more than the creditworthiness of the borrower. Generally, the terms of such loans are less favorable, involving high interest rates and more points than primary loans. The increased financing cost reflects the precarious nature of the loan (given that it is subordinated) and the typical borrower's lack of creditworthiness.

For additional coverage of secondary financing, see Rohan, Real Estate Financing--Text, Forms, Tax Analysis, Ch. 9A, *Secondary Financing, Subordination and Wrap-Around Mortgages* (Matthew Bender).

[2] Secondary Mortgage Market

The secondary mortgage market involves the sale of loans secured by first liens. For these purposes, "secondary" refers to the sequence in which lenders acquire the first lien. In a typical transaction, a conventional lender sells its loan secured by a first lien to a buyer in the secondary market, such as the Federal National Mortgage Association (FNMA, colloquially "Fannie Mae"). A lender who would not ordinarily make a certain type of loan may decide to do so if it can sell the loan at a profit on the secondary market. Fannie Mae and the Federal Home Loan Mortgage Corporation (FHLMC, colloquially "Freddie Mac") and other buyers in the secondary market have established parameters and requirements for the loans they will buy, including the loan documents and security instruments evidencing the loan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary Mortgage MarketGeneral OverviewReal Property LawFinancingSecondary Mortgage MarketFederal Home Loan Mortgage CorporationReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage Association



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10-25 California Legal Forms--Transaction Guide § 25.15

§ 25.15 Types of Loans

[1] Amortized Long-Term Loans

The most common device for financing the acquisition of real property in California is the fully amortized long-term loan. An amortized loan is one that is paid off through substantially equal regular installments of principal and interest. Although these loans traditionally have 30-year terms, shorter terms are becoming increasingly common. Banks and savings associations are the major sources of long-term real estate loans.

An amortized loan may be fully or partially amortized. A fully amortized loan is completely paid off (principal and interest) over the term of a loan by a series of regular periodic payments that are equal or roughly equal. The repayment schedule of a partially amortized loan does not provide for full repayment of principal in regular installments over the entire term. Instead, it typically requires the borrower to make regular payments of principal and interest over the entire term, but under a schedule that leaves part of the principal unpaid at the end of the term. That part is then payable in one sum, called a balloon payment [*see* [9], *below*].

For further discussion of long-term loans, see California Real Estate Law and Practice, Ch. 100, *Methods of Financing* (Matthew Bender).

[2] Short-Term Loans

Short-term loans are generally used to finance construction and for second and lower-priority mortgages. The term of these loans is usually five or fewer years but may be, in the case of secondary financing, up to 15 years. These loans are usually not fully amortized except in the case of the longer short-term loans, for example, a second mortgage taken back by the seller. The interest on a short-term loan is generally higher than on a long-term loan; otherwise, there are virtually no differences between a long-term loan and a short-term loan.

For full coverage of construction loans and financing, see Ch. 30A, *Construction Financing* .

[3] Insured Loans

A common type of loan is the insured loan, which includes FHA-insured and VA guaranteed loans [*see § 25.13[1], [2]*]. Some private companies insure lenders (usually institutional lenders) against loss on real estate loans. The availability of insurance means that a lender can safely make a loan that it would not otherwise consider making. The practical effect of insurance is to allow loans to be made at high loan-to-value ratios.

[4] Seller Financing

A seller may finance the sale by accepting an installment land sale contract [*see* Ch. 25A, *Security Instruments for Real Estate Financing*] or by taking the buyer's note and trust deed for all or a portion of the purchase price of the property. Seller financing may be a feasible alternative when the seller does not want to receive all cash for the price, when the buyer is unable to qualify for conventional financing because of a shortage of cash or low income, or when the property is one that conventional lenders will not finance.

Seller financing is subject to statutory disclosure requirements when it involves the sale of a dwelling for not more than four families and an arranger of credit [*see Civ. Code § 2956 et seq.*]. For discussion of these requirements, see *§ 25.25[1]*.

PRACTICE TIP:

Arranger of Credit. One area that is fraught with difficulty for the unwary real estate agent involves seller financing (also called carry-back financing). Unwittingly, the real estate agent may become an arranger of credit if the agent structures the transaction to allow for the seller to carry back part of the purchase price. If considered to be an arranger of credit, the agent may have certain responsibilities, such as completing the seller's disclosure statement. The failure to complete and transmit that statement to the buyer may provide the buyer with an opportunity to rescind the transaction. The agent may then be found responsible for the cost of the ensuing litigation. *Commentary by Timothy F. O'Leary*

[5] Fixed-Rate, Fixed-Payment Loans

A fixed-rate, fixed-payment loan typically is fully amortized, that is, repayable in substantially equal regular installments of principal and interest sufficient to repay the principal over the term of the loan. Installments are payable on a periodic basis, usually monthly. Although the installments are generally equal, the first and last installments may be slightly greater or smaller than the others.

[6] Graduated-Payment Loans

Under a graduated-payment loan, installment payments are at a relatively low level for a short period at the beginning of the loan term but gradually increase to a higher level at which they stabilize for the duration of the loan term. This plan allows borrowing by persons whose current incomes cannot service a loan on an equal-installment plan [*see* [5], *above*]. These loans are generally fully amortized.

[7] Adjustable-Rate Loans

Loans that do not use a fixed interest rate are commonly referred to as variable-rate or adjustable-rate loans. Within this category are several specific types of loans. The feature common to all of these loans is that the interest rate may be changed periodically. The most common effect of the changed interest rate is an increase or a decrease in the amount of each installment, either at the time of the rate change or at some other time. However, under some loans, the effect of the change is to extend the term of the loan rather than to increase the regular payment.

There are generally rate ceilings (called caps) that limit the amount of rate increases during a specific period and over the life of the loan. The frequency with which the interest rate may be changed is also usually limited. An agreed-on index or standard is used to adjust the interest rate. Commonly used standards include a bank prime rate, the six-month

Treasury bill index, and the three-year Treasury securities index.

The payments on this type of loan may be fully adjusted at the time of each rate change in order to maintain a fully amortized loan. Alternatively, the payments may be adjusted at a different rate from the changes in the interest rate. When the payment changes do not fully incorporate rate increases, the unpaid interest usually is added to the principal balance of the loan, creating negative amortization [*see* Comment, *Adjustable Rate Mortgages: A Proposed Statutory Reform, 26 Santa Clara L. Rev. 253 (1986)*; *see also* Rohan, Real Estate Financing--Text, Forms, Tax Analysis, Ch. 3B, *Variable Rate Mortgages* (Matthew Bender)].

Adjustable-rate mortgages (ARMs) are one type of adjustable-rate loan. Changes in the interest rate of these loans are linked to changes in the index specified in the loan documents and must comply with the rules specified in the loan documents, including rules governing the frequency of rate changes and the implementation of rate changes. Variable-rate loans [*see Civ. Code §§ 1916.5, 1916.6*], adjustable-payment, adjustable-rate loans [*see Civ. Code § 1916.7*], and renegotiable-rate loans [*see Civ. Code § 1916.8*] also are within this class of loans and are regulated by California statutes. Variable-rate loans and adjustable-payment, adjustable-rate loans are different from ARMs in that the increase in interest rate can lengthen the term of the loan.

A lender making any of those state-regulated loans must make certain disclosures to the borrower. However, those loans appear to have been rendered largely superfluous by ARMs, which allow more and higher rate changes per year [*see* California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender)].

[8] Convertible Loans

A convertible loan is a hybrid of an adjustable-rate loan and a fixed-rate loan. At the beginning of the loan term, the interest rate is adjustable, but the borrower may convert to a fixed rate at a later time during the loan term. Generally, the conversion must occur within a stated time period, for example, sometime between the second and fifth years of the loan term.

[9] Balloon-Payment Loans

A balloon-payment loan is essentially a loan with a final installment payment that (1) is significantly larger than the other installments and (2) pays the loan in full. For purposes of California notice and disclosure requirements, a balloon-payment note or loan is one that provides for a final payment that, as originally scheduled, is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision [*Civ. Code §§ 2924i(d)(1), 2957(b)*]. A call provision empowers the holder of the loan to declare the loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*]. For purposes of the statutes, an unexercised call provision does not cause a loan to be a balloon-payment loan [*Civ. Code §§ 2924i(d)(1), 2957(b)*].

Notice of the due date of an approaching balloon payment must be given to the borrower for certain loans secured by owner-occupied residential property [*see Civ. Code § 2924i(a)*] and for certain loans involving an arranger of credit and seller financing [*see Civ. Code § 2966*; *see also § 25.25[1]*]. For the required form for notice, see Ch. 25A, *Security Instruments for Real Estate Financing* . In the case of a balloon-payment loan involving an arranger of credit and seller financing, the promissory note must contain a required statement regarding the existence of the balloon payment [*see Civ. Code § 2966(d)*]. For the statutory statement, see Ch. 25A, *Security Instruments for Real Estate Financing* .

PRACTICE TIP:

Balloon Payments and Notice. A financing method that confounds sellers involves the carry-back loan with a short term of two or three years. The note typically is interest-only, with the principal due at the end of the term. This financing method is attractive to sellers and buyers alike. They both anticipate that

the buyer will be able to refinance the property and pay off the carry-back loan after establishing two or three years of good credit. However, the balloon-payment obligation can be mishandled by the seller, who can fail to provide the required advance notice of when the balloon payment is due. Unfortunately, the mistake often is not discovered until after the payment has long been due, and the seller is in the process of commencing foreclosure proceedings. Sellers should be cautioned to provide the balloon-payment notice well in advance of the due date, so that this error is avoided before the foreclosure rights are exercised. *Commentary by Timothy F. O'Leary*

[10] Straight Loans

A straight loan is unamortized. The entire principal plus accrued interest must be paid, in one payment, at the end of the loan term. If such a loan were to be made, it would typically be on a low loan-to-value ratio for a relatively short term, if the lender is an institutional lender. A private lender might be willing to make a straight loan for a longer term. For a form for a straight promissory note, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[11] Demand Loans

A demand loan is similar to a straight loan, except that it has no fixed term or has a nominal term of one year. Normally, the borrower must make interest-only regular payments on the loan until the lender demands the entire principal amount. Although these loans are usually more expensive to the borrower, they do provide the borrower with lower payments and improved cash flow. The advantage to the lender is a higher yield without a loss of control. For a form for a demand promissory note, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[12] Wraparound Loans

A wraparound loan is a real estate loan secured by a junior (almost always second) mortgage or deed of trust, the principal amount of which equals the sum of the outstanding balance on the existing loan secured by the first mortgage or trust deed plus the amount being advanced by the wrap-around lender. Although the payments on the first loan are commonly made through the wraparound lender, the wraparound borrower may be required to make those payments. If the borrower fails to make the payments, either to the wraparound lender or to the holder of the first lien, the wraparound lender may (but is not obligated to) make payments on, or pay off, the first loan [*see Armsey v. Channel Associates, Inc. (1986) 184 Cal. App. 3d 833, 836, 229 Cal. Rptr. 509*].

Wraparound trust deeds may be referred to as all-inclusive trust deeds. Forms for a promissory note secured by an all-inclusive trust deed and for an all-inclusive trust deed are set forth in Ch. 25A, *Security Instruments for Real Estate Financing* .

[13] Standard Shared Appreciation Loans

A shared appreciation loan is any loan secured by real property (other than owner-occupied residential property containing up to four units) that, among other things, obligates the borrower to pay the lender contingent deferred interest [*see Civ. Code § 1917(b)*]. The contingent deferred interest is a specified share of (1) the appreciation in the value of the property, (2) rents and profits attributable to the property, or (3) both of the foregoing [*Civ. Code § 1917(a)*]. The payment of contingent deferred interest is normally in exchange for an interest rate below the prevailing rate. The relationship of the borrower and the lender in the loan transaction is that of debtor and creditor [*Civ. Code § 1917.001*].

The lien of a deed of trust securing a shared appreciation loan includes and secures the principal amount of the loan and all interest, whether accrued or to be accrued, including all contingent deferred interest [*Civ. Code § 1917.003*]. The lien attaches from the time of the recordation of the trust deed [*Civ. Code § 1917.004(a)*]. A trust deed that acts as security for a shared appreciation loan must indicate this fact [*Civ. Code § 1917.004(b)*].

These loans are exempt from all provisions of the Civil Code or Financial Code that limit the interest rate or change of interest rate of variable-rate, adjustable-rate, or renegotiable-rate instruments, or that require particular language or provisions in security instruments securing variable-rate, adjustable-rate, or renegotiable-rate obligations or in evidences of such debts, except for those specifically imposed by the Civil Code provisions governing (1) shared appreciation loans by ERISA pension funds [*see* former *Civ. Code §§ 1917.010-1917.075*], or (2) shared appreciation loans for senior citizens [*Civ. Code § 1917.002*; *see* [14], *below*]. Lenders making these loans are exempt from the usury laws with regard to the loans [*Civ. Code § 1917.005*].

The statutory exemption for shared appreciation loans did not exempt from the usury law a loan for a housing development that contained provisions for payments of "additional interest" based on sales of units because the loan schedule ensured payments of additional interest even in the absence of appreciation in the value of the secured property [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 538-539, 65 Cal. Rptr. 3d 205]* . In WRI, the court rejected the lender's argument that the statutory definition of a shared appreciation loan encompasses any loan secured by real property -- including a loan that guarantees the lender an otherwise usurious rate of interest -- as long as the loan also contains a provision entitling the lender to a share of appreciation arising from the property. This interpretation would effectively abrogate the usury law with respect to loans secured by real property by sanctioning usurious rates of interest that were guaranteed, even in the absence of appreciation or risk [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 539, 65 Cal. Rptr. 3d 205]* . Thus, the statutory definition of a shared appreciation loan must be understood to permit a lender to obtain guaranteed interest payments up to the maximum rate permitted under the usury law, and, additionally, payments of contingent deferred interest that are subject to risk [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 540, 65 Cal. Rptr. 3d 205]* .

[14] Shared Appreciation Loans for Seniors

Special statutory requirements govern shared appreciation loans for senior citizens [*see Civ. Code § 1917.320 et seq.*]. A lender making such a loan refinances the existing debt on the borrower's residence and uses the existing equity to provide the borrower with monthly annuity payments. Then, on a maturity event [*see Civ. Code § 1917.320(j)*], the lender is paid the accrued principal and interest, and a share of the post-refinancing appreciation. The loan must be repaid at the earliest of the following times [*Civ. Code § 1917.331(a)(1)*; *see Civ. Code § 1917.320(j)*]:

- The borrower's death;
- Sale of the residence;
- Subsequent refinancing of the loan;
- The borrower's cessation of occupancy; or
- The borrower's failure to meet the terms of the trust deed.

However, in the case of the borrower's death or cessation of occupancy, the loan term will be extended until the earlier of the sale or refinancing of the property, or 12 months after the death or cessation of occupancy [*Civ. Code § 1917.331(a)(1)*].

The property securing the loan must contain one to four dwelling units, at least one of which is owner-occupied. Eligible improvements specifically include single family dwellings, single family mobilehome units, residential condominium units, and dwelling units in a planned unit development. A dwelling unit is conclusively deemed to be owner-occupied if the borrower certifies in writing to the lender that he or she will occupy the property [*Civ. Code § 1917.330*].

In addition, a lender may make a shared appreciation loan based solely on the value of the real property on which the borrower's dwelling is situated, and the loan may be secured only by that real property and not by the improvements on it [*Civ. Code § 1917.330*].

Comprehensive requirements govern the terms and conditions of the loans [*see Civ. Code § 1917.330 et seq.*] and the determination of the fair market value of the property for purposes of the loans [*see Civ. Code §§ 1917.410 et seq., 1917.510 et seq.*]. Further, there are numerous mandatory notice and disclosure requirements [*see Civ. Code § 1917.710 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsAdjustable Rate MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsConventional LoansReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingSecondary FinancingGeneral Overview



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§ 25.16 Loan Fees and Charges

The fees and charges for a real estate loan vary among lenders and in view of market conditions. Borrowers should expect to pay the lender some or all of the following:

- Application fee (sometimes referred to as an origination or processing fee).
- Charge for making the loan (expressed as "points": one point is 1 percent of the loan).
- Credit investigation fee.
- Appraisal fee.
- Title investigation fee.
- Title insurance premium for the lender's policy.
- Survey fee.
- Mortgage insurance premium.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral Overview



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§ 25.17 Regulation of Certain Loans Up to $250,000

[1] Loans and Real Property Covered

A consumer loan that is secured by real property and has an original balance not exceeding $250,000 may be subject to special regulations and prohibitions [*see Fin. Code § 4970 et seq.*].

- The real property securing the loan must be (1) used or intended to be used as the principal dwelling by the consumer, (2) located in California, and (3) improved by a one-to-four-unit dwelling [*Fin. Code § 4970(d)*].

- The annual percentage rate [*see Fin. Code § 4970(a)*] at consummation of the transaction will exceed by more than 8 percentage points the yield on Treasury securities having a comparable period of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor [*Fin. Code § 4970(b)(1)(A)*].

- The total points and fees payable by the consumer at or before the closing will exceed 6 percent of the total loan amount [*Fin. Code § 4970(b)(1)(B)*; *see Fin. Code § 4970(c)* (items included in points and fees)].

For these purposes, a consumer loan does not include a reverse mortgage, an open line of credit as defined by Regulation Z, or a bridge loan with a maturity of less than one year if the purpose of the loan is a bridge loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling [*Fin. Code § 4970(d)*].

[2] Limitations on Prepayment Fees or Penalties

For the first 36 months, a covered loan may include a prepayment fee or penalty if the originator of the loan offered the consumer a choice of another product without a prepayment fee or penalty [*Fin. Code § 4973(a)(2)(A)*]. The originator also must have disclosed in writing to the consumer, at least three business days before loan consummation, the terms of the prepayment fee or penalty for accepting a covered loan with the prepayment penalty, and the rates, points, and fees

that would be available to the consumer for accepting a covered loan without a prepayment penalty [*Fin. Code § 4973(a)(2)(B)*]. The amount of the prepayment fee or penalty must be limited to an amount not to exceed the payment of six months advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount [*Fin. Code § 4973(a)(2)(C)*].

A covered loan may not include a prepayment fee or penalty after the first 36 months following the date of consummation of the loan [*Fin. Code § 4973(a)(1)*].

A covered loan may not impose the prepayment fee or penalty if the loan is accelerated as a result of default, and the originator of the covered loan may not finance a prepayment penalty through a new loan that is originated by the same person [*Fin. Code § 4973(a)(2)(D), (E)*].

[3] Permissible Payment Schedules

A covered loan with a term of five years or less may not provide at origination for a payment schedule with regular periodic payments that when aggregated do not fully amortize the principal balance as of the maturity date of the loan. If a payment schedule is adjusted for the consumer's seasonal or irregular income, the total installments in a year may not exceed the amount of one year's worth of payments on the loan [*Fin. Code § 4973(b)*; *see Fin. Code § 4973(b)(2)* (not applicable to specified bridge loans)].

[4] Prohibited Terms and Provisions

A covered loan may not contain any of the following terms or provisions:

- A provision for negative amortization such that the payment schedule for regular monthly payments causes the principal balance to increase, unless the loan is a first mortgage and the licensed person discloses to the consumer that the loan contains a negative amortization provision that may add principal to the loan balance [*Fin. Code § 4973(c)*].

- Terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds [*Fin. Code § 4973(d)*].

- A provision that increases the interest rate as a result of a default, unless the change is a result of a variable rate loan that is consistent with the provisions of the loan documents, and the change in interest rate is not triggered by default or the acceleration of indebtedness [*Fin. Code § 4973(e)*].

- A provision that permits the lender, in its sole discretion, to accelerate the indebtedness, other than an acceleration in accordance with the terms of the loan documents as a result of the consumer's default, pursuant to a due-on-sale provision, or due to fraud or material misrepresentation by a consumer in connection with the loan or the value of security for the loan [*Fin. Code § 4973(i)*].

[5] Lender's Reasonable Belief in Recipient's Ability to Repay Loan

A person who originates a covered loan may not make or arrange the loan unless, at the time the loan is consummated, the person reasonably believes the consumer or consumers will be able to make the scheduled payments to repay the obligation. The lender's belief must be based on a consideration of the consumer's current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation must be based on the fully indexed rate of the loan computed at the time of application [*Fin. Code §*

4973(f)(1)].

In addition, a licensed person may not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation, or cash out that does not result in an identifiable benefit to the consumer, considering the consumer's stated purpose for seeking the loan, as well as fees, interest rates, finance charges, and points [*Fin. Code § 4973(j)*].

A consumer is presumed to be able to make the scheduled payments if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan on behalf of the consumer, or any other reasonable means [*Fin. Code § 4973(f)(1)*; *see Fin. Code § 4973(f)(3)* (loans based on stated income must not be to evade these provisions)]. In any case, no presumption of inability to make the scheduled payments to repay the loan may arise solely from the fact that the consumer's total monthly debts, including the loan amounts owed, exceed 55 percent of the consumer's monthly gross income [*Fin. Code § 4973(f)(1)*].

[6] Other Limitations on Lender and Loans

In general, a person who originates a covered loan may not act in any manner that constitutes fraud, whether specifically prohibited by statute or of a different character [*Fin. Code § 4973(n)*]. Specific prohibitions applicable to covered loans include the following:

- A person who originates a covered loan may not pay a contractor under a home-improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with the terms and conditions in a written escrow agreement signed by the consumer, lender, and contractor [*see Fin. Code § 4973(g)*].

- A person who originates a covered loan may not recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt [*Fin. Code § 4973(h)*].

- A person who originates a covered loan may not steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade less favorable than the risk grade that the consumer would qualify for based on the lender's current underwriting guidelines [*see Fin. Code § 4973(l)(1)*].

- If a broker originates a covered loan, the broker may not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which the consumer could qualify based on loan products offered by persons with whom the broker regularly does business [*Fin. Code § 4973(l)(2)*].

- A person who originates a covered loan may not avoid or attempt to avoid the applications of these provisions by structuring the loan transaction as an open-end credit plan for purposes of evading these provisions if the loan would have been a covered loan if structured as a closed-end loan, or by dividing any loan transaction into separate parts for the purpose of evading these provisions [*Fin. Code § 4973(m)*].

[7] Required Disclosure Statement

A covered loan may not be made unless a statutory disclosure statement has been provided to the consumer no later than

three business days before the loan documents are signed. The statement, which must be entitled CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE, must be written in 12-point or larger font [*see Fin. Code § 4973(k)(1)* (text of statutory notice)]. It is a rebuttable presumption that a licensed person has met its obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the notice [*Fin. Code § 4973(k)(2)*].

[8] Violations of Law

Any failure to comply with the law that was not willful or intentional and resulted from a bona fide error (which does not include an error in legal judgment), that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid those errors, must be corrected within 45 days after receipt of a complaint or discovery of the error. If corrected in this manner, a person who originates a covered loan will not be administratively, civilly, or criminally liable for the error [*Fin. Code § 4974(a)*]. In addition, any licensed person who violated provisions of the law is deemed to have violated that person's licensing law and is subject to suspension or loss of the license as well as administrative and civil penalties [*Fin. Code § 4975*; *see Fin. Code § 4977*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingState Regulation



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§ 25.17A Restrictions on Higher-Priced Mortgage Loans

[1] Overview

State-licensed lenders (see below) could be subject to certain restrictions on higher-priced mortgage loans imposed by *Fin. Code § 4995 et seq.* A "higher-priced mortgage loan" is a consumer credit transaction, secured by the consumer's principal dwelling, with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as of the date the interest rate is set, by (1) at least 1.5 percentage points, for a loan secured by a first lien on the dwelling, or (2) at least 3.5 percentage points, for a loan secured by a subordinate lien on the dwelling [*Fin. Code § 4995(a)* (incorporating definition in *12 C.F.R. § 226.35(a)*)].

The provisions of *Fin. Code § 4995 et seq.* apply only with respect to a higher-priced mortgage loan that originates on or after July 1, 2010 [*Fin. Code § 4995.4*].

The state-licensed lenders that could be subject to the restrictions of *Fin. Code § 4995 et seq.* are real estate brokers, finance lenders and brokers licensed under the Finance Lenders Law, residential mortgage lenders, commercial banks, industrial banks, savings associations, and credit unions [*Fin. Code § 4995(b)*].

There is no private right of action against a lender for a violation of *Fin. Code § 4995 et seq.*, which can be enforced only by the Attorney General or by the culpable lender's licensing agency [*Fin. Code § 4995.3(e)*]. However, in the event of a violation of *Fin. Code § 4995 et seq.*, a provision for a prepayment penalty or yield spread premium, with respect to the tainted higher-priced mortgage loan, is unenforceable [*Fin. Code § 4995.3(f)*].

[2] Lenders Making Higher-Priced Loans

Notwithstanding any other provision of law, in making higher-priced mortgage loans, state-licensed lenders are subject to the following restrictions.

The maximum amount of a prepayment penalty that may be imposed by the lender in connection with the higher-priced mortgage loan must not exceed 2 percent of the principal balance prepaid, for prepayment of the loan during the first 12 months following loan consummation, or 1 percent of the principal balance prepaid, for prepayment of the loan during

the second 12 months following loan consummation [*Fin. Code § 4995.1*].

The lender must not [*but see Fin. Code § 4995.2(h)* (safe-harbor protection for good faith noncompliance)]:

- Make, or cause to be made, any false, deceptive, or misleading statement or representation in connection with the higher-priced mortgage loan [*Fin. Code § 4995.2(b)*];

- Recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of the higher-priced mortgage loan, it if refinances all or any portion of the existing loan or debt [*Fin. Code § 4995.2(f)*];

- Make the higher-priced mortgage loan with a provision for negative amortization [*Fin. Code § 4995.2(g)*].

After the higher-priced mortgage loan is made, the lender may enter into a subsequent agreement with the borrower to capitalize payments as a means of permitting the borrower to cure or prevent a delinquency; and that would not violate the proscription against negative amortization [*Fin. Code § 4995.2(g)*].

[3] Lenders Acting as Mortgage Brokers

A state-licensed lender is a "mortgage broker" for purposes of *Fin. Code § 4995 et seq.* when the lender arranges or attempts to arrange a higher-priced mortgage loan, which originates on or after July 1, 2010, and which is to be made by an unaffiliated third person, if the state-licensed lender acts, in the transaction, as exclusive agent for the borrower or as dual agent for the borrower and the higher-priced lender, for compensation or in expectation of compensation, whether paid directly or indirectly. In that situation, the lender-broker is engaging in "mortgage brokerage services" [*Fin. Code § 4995(c), (d)*].

A mortgage broker that arranges only higher-priced mortgage loans must disclose that fact to a borrower, both orally and in writing, at the time of initially engaging in mortgage brokerage services with that borrower [*Fin. Code § 4995.2(c)*].

A mortgage broker that provides mortgage brokerage services must not steer, counsel, or direct a borrower to accept a loan at a higher cost than that for which the borrower could qualify based on the loans offered by the persons with whom the broker regularly does business [*Fin. Code § 4995.2(d)*].

A mortgage broker that provides mortgage brokerage services for a borrower must not receive compensation, including a yield spread premium, fee, commission, or any other compensation, for arranging a higher-priced mortgage loan with a prepayment penalty that exceeds the compensation that the mortgage broker would otherwise receive for arranging that higher-priced mortgage loan without a prepayment penalty [*Fin. Code § 4995.2(e)(1)*].

When providing mortgage brokerage services for a borrower, a mortgage broker must receive the same compensation for providing those services whether paid by the lender, by the borrower, or by a third party [*Fin. Code § 4995.2(e)(2)*].



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§ 25.17B Mortgage Brokers as Fiduciaries

State-licensed lenders (see below) can have specific fiduciary duties under *Civ. Code § 2923.1* when acting as mortgage brokers for residential mortgage loans; however, this will not limit or narrow any other fiduciary duty of a mortgage broker [*Civ. Code § 2923.1(c)*].

A "residential mortgage loan" in this context is a consumer credit transaction that is secured by residential real property that is improved by four or fewer residential units [*Civ. Code § 2923.1(b)(4)*].

The state-licensed lenders that could be subject to *Civ. Code § 2923.1* are real estate brokers, finance lenders, and brokers licensed under the Finance Lenders Law, residential mortgage lenders, commercial banks, industrial banks, savings associations, and credit unions [*Civ. Code § 2923.1(b)(1)*].

A state-licensed lender is a "mortgage broker" for purposes of *Civ. Code § 2923.1* when the lender arranges or attempts to arrange a residential mortgage loan which is to be made by an unaffiliated third person, if the state-licensed lender acts, in the transaction, as exclusive agent for the borrower or as dual agent for the borrower and the residential lender, for compensation or in expectation of compensation, whether paid directly or indirectly. In that situation, the lender-broker is engaging in "mortgage brokerage services" [*Civ. Code § 2923.1(b)(2), (3)*].

A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower, and any violation of the broker's fiduciary duties is a violation of the mortgage broker's license law. This fiduciary duty includes a requirement that the mortgage broker place the economic interest of the borrower ahead of the mortgage broker's own economic interest. A mortgage broker that provides mortgage brokerage services to the borrower owes this fiduciary duty to the borrower regardless of whether the mortgage broker is acting as an agent for any other party in connection with the residential mortgage loan transaction [*Civ. Code § 2923.1(a)*].



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§ 25.18 Impound Accounts

[1] When Permitted

An impound or other similar account for the payment of taxes on the property, insurance premiums, or other purposes relating to the property is not permitted as a condition of a sale contract or loan secured by a mortgage or deed of trust on a single-family, owner-occupied dwelling, except in the following situations [*Civ. Code § 2954(a)*]:

- An impound account is required by a state or federal regulatory authority.
- A loan is made, guaranteed, or insured by a state or federal governmental lending or insuring agency.
- The purchaser or borrower has failed to pay two consecutive tax installments on the property before the delinquency date for such payments.
- The original principal amount of the loan is 90 percent or more of the sale price, if the property involved is being sold, or of the appraised value of the property securing the loan.
- The combined principal amount of all loans secured by the real property exceeds 80 percent of the appraised value of the property securing the loans.
- A loan is made in compliance with the requirements for higher-priced mortgage loans established in Regulation Z [*see 12 C.F.R. § 226.35* (prohibited acts or practices in connection with higher-priced mortgage loans)], whether or not the loan is a higher-priced mortgage loan.
- A loan is refinanced or modified in connection with a lender's home-ownership preservation program or a lender's participation in such a program sponsored by a federal, state, or local government authority or a nonprofit organization.

The parties may mutually agree on an impound account if the seller or lender furnishes the purchaser or borrower with a

written statement indicating (1) that the impound account is not required as a condition of the sale or loan, and (2) whether interest will be paid on the impounded funds [*Civ. Code § 2954(a)(1)*]. For an impound provision that may be included in a trust deed or promissory note, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] Payment of Interest

Every financial institution that either makes loans secured by real property containing only a one to four-family residence located in California, or purchases obligations secured by such property, and that receives money in advance for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, must pay interest on the funds to the borrower [*Civ. Code § 2954.8(a)*]. The interest paid must be at the rate of at least 2 percent simple interest per annum and must be credited to the borrower's account annually or on termination of the account, whichever is earlier [*Civ. Code § 2954.8(a)*]. The financial institution may not impose any fee or charge in connection with the maintenance or disbursement of the money received in advance if the fee or charge will result in an interest rate of less than 2 percent per annum paid on that money [*Civ. Code § 2954.8(b)*].

For these purposes, a financial institution is any bank, savings and loan association, or credit union chartered under the laws of California or the United States, or any other person or organization making loans secured by real property containing only a one to four-family residence [*see Civ. Code § 2954.8(c)*]. The requirements do not apply to loans executed before 1977 or to funds deposited by a financial institution other than a bank, pursuant to a requirement of a state or federal regulatory authority, in a non interest-bearing demand trust fund account of a bank [*Civ. Code § 2954.8(d)*].

[3] Amount, Use, and Maintenance of Impounded Funds

A lender (or other person who purchases obligations secured by real property) who maintains an impound or similar account for the payment of taxes and assessments, for insurance premiums, or for other purposes relating to the property, must comply with all of the following limitations and restrictions:

- The lender cannot require the borrower to deposit in the account in any month an amount in excess of that which would be permitted in connection with a federally related mortgage loan pursuant to the Real Estate Settlement Procedures Act of 1974 (RESPA) [*Civ. Code § 2954.1(a); see 12 U.S.C. § 2601 et seq.* (RESPA); *see also 12 U.S.C. § 2609* (limitations on requirement of advance deposits in escrow accounts in connection with federally related mortgage loans)].

- The lender cannot require the sums maintained in the account to exceed at any time the amount or amounts reasonably necessary to pay the obligations as they become due, and must refund any excess within 30 days unless the parties agree otherwise [*Civ. Code § 2954.1(b)*].

- The lender may not make payments from the account so as to cause any insurance policy to be canceled or property taxes or other similar payments to become delinquent [*Civ. Code § 2954.1(c)*].

These requirements do not prohibit a lender from requiring additional amounts to be paid into an impound account to recover any deficiency that may exist in the account [*Civ. Code § 2954.1*].

Money held by a mortgagee or a beneficiary of a deed of trust on real property in California, or held by a vendor on a contract of sale of real property in California, in the type of impound account described above, must be retained in California and, if invested, must be invested only with California residents (in the case of individuals) or with entities or other persons engaged in business in California [*Civ. Code § 2955(a)*]. The lender must give the borrower a written disclosure of these provisions as soon as practicable and in any case before execution of any note or security documents [*Civ. Code § 2955.5(b)*]. Notwithstanding the above, a mortgagee or beneficiary of a trust deed secured by a first lien on

real property may deposit money held for the payment of taxes and assessments or insurance premiums or other purposes in an impound account in an out-of-state depository institution insured by the Federal Deposit Insurance Corporation if the mortgagee or beneficiary is any one of certain specified entities or persons [*see Civ. Code § 2955(c), (d)*; *see also* Ch. 25A, *Security Instruments for Real Estate Financing*]. The attorney general may bring an action to enjoin a violation of the above requirements [*Civ. Code § 2955(d)*].

For an illustrative statement of account that a lender may be required to give to a borrower in connection with an impound account, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[4] Legal Relationship Between Lender and Borrower

The legal relationship that exists between the lender and the borrower under *Civ. Code § 2954.8* is not defined by statute or judicial decision. However, in two cases involving loans made before 1977 (the effective date of *Civ. Code § 2954.8*), the borrowers claimed that an impound account constituted a trust for which the lender as trustee had a duty to invest the deposited money and from which the borrowers were entitled to the earnings realized by the investment. In one case, a trust was created, but the lender did not have a duty to pay the borrower any interest because the trust deed provided that the money would be deposited without interest [*Marsh v. Home Fed. Sav. & Loan Assn. (1977) 66 Cal. App. 3d 674, 684-685, 136 Cal. Rptr. 180*]. In the other case, a simple debtor-creditor relationship, rather than a trusteeship, was all that was created between the lender and borrower [*Petherbridge v. Prudential Sav. & Loan Assn. (1978) 79 Cal. App. 3d 509, 518-523, 145 Cal. Rptr. 87*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingState Regulation



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§ 25.19 Hazard Insurance as Requirement of Loan

A lender may not require a borrower, as a condition of receiving or maintaining a loan secured by real property, to provide hazard insurance coverage against risks to the improvements on the real property in an amount exceeding the replacement value of the improvements [*Civ. Code § 2955.5(a)*]. The lender must give the borrower a written disclosure of this provision as soon as practicable and in any case before execution of any note or security documents [*Civ. Code § 2955.5(b)*]. For these purposes, hazard insurance coverage means (1) insurance against losses caused by perils that are commonly covered in policies described as, among other things, a homeowner's policy or a general property form, or (2) comparable insurance coverage protecting the real property against loss or damage from fire and other perils covered within the scope of a standard extended coverage endorsement [*Civ. Code § 2955.5(e)(1)*]. A violation of these requirements does not affect the validity of the loan, secured note, or security instrument [*see Civ. Code § 2955.5(d)*]. However, any person harmed by such a violation will be entitled to obtain injunctive relief and may recover damages, reasonable attorneys' fees, and costs [*Civ. Code § 2955.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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§ 25.20 Equal Credit Opportunity Act

The Equal Credit Opportunity Act [*15 U.S.C. § 1691 et seq.*] forbids any creditor to discriminate against a credit applicant on the basis of the applicant's race, color, religion, national origin, sex, marital status, or age, or because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the federal consumer protection laws [*15 U.S.C. § 1691(a)*]. If a lender refuses to extend credit, the applicant is entitled to a statement of reasons for the refusal [*15 U.S.C. § 1691(d)*; *see § 25.239[1]*. A creditor who fails to comply is liable to the aggrieved applicant for actual and possibly for punitive damages [*see 15 U.S.C. § 1691e(a), (b)*].

For further discussion, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionEqual Credit OpportunityDiscriminatory ActsBanking LawConsumer ProtectionEqual Credit OpportunityLiability



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§ 25.21 Holden Act

The Holden Act [*Health & Safety Code § 35800 et seq.*], also called the Housing Financial Discrimination Act of 1977, prohibits (1) discrimination against borrowers based on sex, race, marital status, and other factors, and (2) the discriminatory practice known as redlining. The Holden Act applies to any bank, savings and loan association, or other institution in California, including a public agency, that regularly makes, arranges, or purchases loans for the construction, rehabilitation, improvement, or refinancing of housing accommodations [*Health & Safety Code § 35805(c)*]. Financial institutions must give loan applicants a notice summarizing the Holden Act's antidiscrimination policies and complaint procedures [*see 21 Cal. Code Reg. § 7114*; *see also § 25.201* (fair lending notice)]. For a detailed discussion of further prohibitions of the Holden Act and of the procedure for filing complaints, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsProhibited ActsReal Property LawFinancingRedlining



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§ 25.22 California Fair Employment and Housing Act

Under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], it is unlawful to engage in specified discriminatory practices in housing accommodations on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, source of income, or sexual orientation [*see Gov. Code § 12955*]. Discrimination on these bases is against public policy [*Gov. Code § 12920*], and the opportunity to seek, obtain, and hold housing without discrimination is a civil right [*Gov. Code § 12921(b)*; *see Civ. Code § 51*].

The Department of Fair Employment and Housing is authorized to take remedial and preventive actions [*Gov. Code § 12901*], such as to use the services of all governmental departments and agencies, including conciliation councils with regard to housing discrimination, and to receive, investigate, and conciliate complaints alleging discriminatory practices [*Gov. Code § 12930(d), (f)*].

It is unlawful for any person, bank, mortgage company, or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons, because of the characteristics set forth above, in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance. [*Gov. Code § 12955(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsCredit & Mortgage LawsCivil Rights LawContractual Relations & HousingFair Housing RightsProhibited ActsCivil Rights LawContractual Relations & HousingFair Housing RightsRemediesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 25.23 Truth in Lending Act (TILA)

[1] Purpose and Coverage of Act

A primary purpose of the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*] and Regulation Z [12 C.F.R. pt. 226] is to promote the informed use of consumer credit by requiring disclosures about its terms and cost [*see 15 U.S.C. § 1601(a)*; *see also 12 C.F.R. § 226.1(b)*]. In general, TILA applies to all creditors, that is, those who regularly offer or extend credit to consumers, when the credit (1) is subject to a finance charge or is payable pursuant to a written agreement in more than four installments and (2) is primarily for personal, family, or household purposes [*see 15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.1(c)(1)*; *see also § 25.111*; *but see 15 U.S.C. § 1602(f)* (special rules apply when credit is involved); *12 C.F.R. § 226.1(c)(2)*]. TILA specifically applies to credit extended in connection with loans and sales of property [*15 U.S.C. § 1602(f)*].

TILA does not apply to a credit transaction that involves an extension of credit of more than $25,000 unless it is a private education loan subject to *15 U.S.C. § 1650* or requires the acquisition or retention of a security interest in real property, or in personal property used or to be used as the borrower's principal dwelling [*see 15 U.S.C. § 1603(3)*; *12 C.F.R. § 226.3(b)*]. Also excluded from the purview of TILA are extensions of credit primarily for business, commercial, or agricultural purposes [*15 U.S.C. § 1603(1)*; *12 C.F.R. § 226.3(a)(1)*].

A loan that is secured by a deed of trust on a residence and obtained to invest in a limited partnership (formed to purchase real property) may be subject to TILA. Whether such an investment loan is for a personal purpose (and therefore covered by TILA) [*see 15 U.S.C. § 1602(f), (h)*], as opposed to a business or commercial purpose [*see 15 U.S.C. § 1603(1)* (exemptions from coverage)], must be determined on a case by case analysis. This analysis should consider the following factors [*Thorns v. Sundance Properties (9th Cir. 1984) 726 F.2d 1417, 1418-1419*], which are applied to the analogous Regulation Z exemption for business or commercial transactions [*see 12 C.F.R. § 226.3(a)(1), (2)*]:

- The relationship of the borrower's primary occupation to the acquisition.
- The degree to which the borrower will personally manage the acquisition.

- The ratio of income from the acquisition to the borrower's total income.
- The size of the transaction.
- The borrower's statement of purpose for the loan.

[2] Disclosures in Real Estate Transactions

In a nonexempt real estate transaction, the creditor must furnish the borrower with a disclosure statement setting forth specific credit information required by TILA. The basic information that must be given includes all of the following:

- The identity of the creditor.
- A statement of the amount financed.
- The finance charge (identified as such) and the dollar amount of that charge [*see § 25.23[3]*].
- The annual percentage rate [*see § 25.23[4]*].
- Details of any variable rate [*see § 25.23[6]*].
- The payment schedule.
- The total of payments.
- The fact that there is a demand feature, if there is one.
- The total sale price.
- The fact that there is a prepayment penalty or credit, if any applies.
- Late payment charges that may be imposed.
- The fact that the creditor has or will acquire a security interest in the property purchased.
- Certain information relating to insurance obligations and security interest charges.
- The lender's assumption policy (that is, whether a subsequent purchaser of the dwelling will be permitted to assume the remaining obligation on its original terms).
- Deposit requirements.
- Disclosure that interest on any portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for federal income tax purposes.

The disclosures must also refer to the contract for information about nonpayment, default, the right to accelerate the loan, prepayment rebates and penalties, and, at the lender's option, for further information about security interests and the lender's policy regarding assumption of the obligation [*15 U.S.C. § 1638*; *12 C.F.R. § 226.18*]. For a form for a model disclosure statement, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

Normally, the lender must make the TILA disclosures before the consummation of the transaction [*see 15 U.S.C. §§ 1632, 1638(b)(1)*; *12 C.F.R. § 226.17(b)*]. However, in a transaction subject to the Real Estate Settlement Procedures Act [*see 12 U.S.C. § 2601 et seq.*; *see also § 25.24*], in the case of any extension of credit that is secured by the dwelling of a consumer, the creditor must make good faith estimates of the disclosures required under *15 U.S.C. § 1638(a)* and then mail or deliver them not later than three business days after receipt of the borrower's loan application, which must be at least seven business days before consummation of the transaction [*15 U.S.C. § 1638(b)(2)(A)*]. In addition, the creditor must comply with the following requirements.

- To expedite consummation of a transaction, if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may waive or modify the timing requirements for disclosures under *15 U.S.C. § 1638(b)(2)(A)*. To effect a waiver or modification, the consumer must provide to the creditor a dated, written statement describing the emergency and specifically waiving or modifying those timing requirements, which statement must bear the signature of all consumers entitled to receive the required disclosures; and the creditor must provide to the consumers, at or before the time of such waiver or modification, the final disclosures required by *15 U.S.C. § 1638(b)(1)* [*15 U.S.C. § 1638(b)(2)(F)*].

- The required disclosures must include this statement in conspicuous type size and format [*15 U.S.C. § 1638(b)(2)(B)(i)*]: "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application."

- The required disclosures must be provided in the form of final disclosures at the time of consummation of the transaction [*15 U.S.C. § 1638(b)(2)(B)(ii)*].

- In any case in which the disclosure statement contains an annual percentage rate of interest that is no longer accurate, as determined under *15 U.S.C. § 1606(c)*, the creditor must furnish an additional, corrected statement to the borrower, not later than three business days before the date of consummation of the transaction [*15 U.S.C. § 1638(b)(2)(D)*].

- The consumer must receive the disclosures before paying any fee to the creditor or other person in connection with the consumer's application for the extension of credit. If the disclosures are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed. A creditor or other person may impose a fee for obtaining the consumer's credit report before the consumer has received the disclosures, provided the fee is bona fide and reasonable in amount [*15 U.S.C. § 1638(b)(2)(E)*].

- If the annual rate of interest is variable, or the regular payments may otherwise be variable, then in addition to the other disclosures required by *15 U.S.C. § 1638(a)*, the disclosures provided under *15 U.S.C. § 1638(b)* must label the payment schedule as "Payment Schedule: Payments Will Vary Based on Interest Rate Changes." Also, the disclosures must state, in conspicuous type size and format, examples of adjustments to the regular required payment on the extension of credit based on the change in the interest rates specified by the contract for such extension of credit. Among the examples required to be provided is an example that reflects the maximum payment amount of the regular required payments on the extension of credit, based on the maximum interest rate allowed under the contract, in accordance with the rules of the Federal Reserve Board [*15 U.S.C. § 1638(b)(2)(C)*].

The requirements of *15 U.S.C. § 1638(b)(2)(B)-(E)*, above, do not apply to extensions of credit relating to timeshare plans described in *11 U.S.C. § 101(53D)* [*15 U.S.C. § 1638(b)(2)(G)*].

In a consumer credit transaction secured by the consumer's principal dwelling, in which the extension of credit may exceed the dwelling's fair market value, the disclosure that interest on the portion of the credit extension that is greater than the dwelling's fair market value will not be tax deductible for federal income tax purposes [*see 15 U.S.C. § 1638(a)(15)*] must be made at the time the consumer applies for the credit extension [*15 U.S.C. § 1638(b)(3)*].

A creditor (and certain third parties) must provide detailed information to a consumer regarding any home equity loan (which is an open-end consumer credit plan that provides for an extension of credit secured by the consumer's dwelling) [*15 U.S.C. § 1637a(a)*; *12 C.F.R. § 226.5b(a)*]. Further, the creditor must comply with substantive limitations imposed by law on these loans [*15 U.S.C. § 1647(a)*; *12 C.F.R. § 226.5b(f)*]. For further discussion and a model disclosure statement, see *§ 25.237*.

A lender must make subsequent disclosures under certain circumstances. For example, subsequent disclosures are required on refinancing [*see 12 C.F.R. § 226.20(a)*]. For a list of these disclosures, see *§ 25.140*.

[3] Computing Finance Charge to Be Disclosed

Although there are certain exceptions with regard to real estate transactions, the amount of the finance charge in a consumer credit transaction generally is the sum of all charges payable directly or indirectly by the consumer, and imposed directly or indirectly by the creditor as an incident to the extension of credit [*see 15 U.S.C. § 1605*]. These include all of the following [*15 U.S.C. § 1605(a)-(c)*; *12 C.F.R. § 226.4(b)*]:

- Interest, time-price differential, and any amount payable under a point, discount, or other system of additional charges.
- Service or carrying charge, loan fee, finder's fee, or similar charge.
- Fee for an investigation or credit report.
- Premium or other charge for any guaranty or insurance protecting the creditor, and, subject to exceptions, premiums for credit life, accident, health, and property damage and liability insurance.

The following charges are *not* finance charges [*see 12 C.F.R. § 226.4(c)(1)-(6)*]:

- Credit application fees.
- Late payment charges.
- Some charges imposed for overdrawn accounts.
- Fees for participation in a credit plan.
- Seller's points.
- Certain interest forfeitures.

The following types of fees, if bona fide and reasonable in amount, are also excluded from the finance charge [*12 C.F.R. § 226.4(c)(7)*]:

- Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

- Fees for preparing deeds, mortgages, reconveyance, settlement, and similar documents.

- Notary, appraisal, and credit report fees.

- Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

Premiums for credit-related life, accident, health, or loss-of-income insurance and for property-damage and liability insurance may be excluded from the finance charge under certain conditions [*see 12 C.F.R. § 226.4(d)*]. If itemized and disclosed, taxes and fees prescribed by law and paid to public officials with respect to a security interest or a premium for insurance in lieu of perfecting a security interest may also be excluded from the finance charge [*see 12 C.F.R. § 226.4(e)*]. Income to be received by the consumer from deposits or investments may not be deducted in computing the finance charge [*12 C.F.R. § 226.4(f)*].

For further discussion of computing the finance charge, see California Real Estate Law and Practice, Ch. 105, *Truth in Lending* , Pt. D (Matthew Bender).

Some charges in real estate transactions that are excluded in computing the finance charge are included in the closing costs, and are therefore subject to the disclosure requirements of the Real Estate Settlement Procedures Act of 1974 [*see 12 U.S.C. § 2601 et seq.*]; *see also § 25.238*.

[4] Determining Annual Percentage Rate

The annual percentage rate is the cost of credit expressed as a yearly rate. It relates the amount and timing of value received by the consumer to the amount and timing of payments made. In closed-end credit transactions [*see* [5][a], *below*], the creditor may use either the actuarial method or the United States Rule method of computing the annual percentage rate [*12 C.F.R. § 226.22(a)(1)*]. The rate disclosed must be accurate to the nearest eighth of 1 percent [*12 C.F.R. § 226.22(a)(2)*]. For further discussion of the annual percentage rate, see Ch. 45, *Consumer Installment Loans and Credit Sales ;* see also California Real Estate Law and Practice, Ch. 105, *Truth in Lending* , Pt. E (Matthew Bender).

[5] Right of Rescission

[a] Overview

Generally, a consumer may rescind a credit transaction in which a security interest (including one that arises by operation of law) is or will be retained or acquired in the consumer's principal dwelling [*15 U.S.C. § 1635(a)*; *12 C.F.R. §§ 226.15(a), 226.23(a)*]. The types of credit extensions that may be rescinded differ depending on whether the transaction involves open-end or closed-end credit.

Closed-end credit is consumer credit other than open-end credit [*12 C.F.R. § 226.2(a)(10)*].

Open-end credit means consumer credit extended by a creditor under a plan in which (1) the creditor reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (3) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid [*12 C.F.R. § 226.2(a)(20)*].

[b] Affected Transactions

In closed-end credit transactions, each consumer whose ownership interest is or will be subject to the security interest

has the right to rescind, unless the right to rescind does not apply to the transaction [*12 C.F.R. § 226.23(a)(1)*; *see 15 U.S.C. § 1635(e)*; *12 C.F.R. § 226.23(f)* (transactions exempt from right to rescind)]. The principal type of closed-end credit transaction that is exempt from the right to rescind is a residential mortgage transaction [*15 U.S.C. § 1635(e)(1)*; *12 C.F.R. § 226.23(f)(1)*].

In open-end credit transactions, the consumer has the right to rescind all of the following [*12 C.F.R. § 226.15(a)(1)(i)*]:

- Each credit extension made under the credit plan.
- The plan when it is opened.
- A security interest when added or increased to secure an existing plan.
- The increase when a credit limit on the plan is increased.

The statutory right of rescission applies not only to transactions in which a security interest is created by the action of the homeowner (for example, the execution of a mortgage or deed of trust), but also when the security interest or lien arises by operation of law [*15 U.S.C. § 1635(a)*] (for example, mechanics' liens and other statutory liens) [*see N.C. Freed Co., Inc. v. Board of Governors of Fed. Res. Sys. (2d Cir. 1973) 473 F.2d 1210, 1213*]. Therefore, the disclosure requirements and rescission rights of TILA apply to home improvement contracts when the consumer executes an unsecured promissory note for the contract price, since the contractor will subsequently obtain a statutory lien on the consumer's property, thereby bringing the transaction within the purposes of TILA [*N.C. Freed Co., Inc. v. Board of Governors of Fed. Res. Sys. (2d Cir. 1973) 473 F.2d 1210, 1213*].

[c] Exceptions

The right to rescind in a closed-end credit transaction does not apply to the following [*12 C.F.R. § 226.23(f)*; *see 15 U.S.C. § 1635(e)*]:

- A residential mortgage transaction, that is, a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance its acquisition or initial construction [*15 U.S.C. § 1602(w)*; *12 C.F.R. § 226.2(a)(24)*].
- A transaction in which a state agency is a creditor.
- An advance (other than an initial advance) in a series of advances or series of single-payment obligations treated as single transactions [*see 12 C.F.R. § 226.17(c)(6)*], if a notice of the right to rescind and all material disclosures have been given to the consumer.
- A renewal of optional insurance premiums that is not considered a refinancing under the regulations.

The right to rescind in a closed-end credit transaction does not apply to a refinancing or consolidation by the same creditor of a credit extension already secured by the consumer's principal dwelling. However, the right of rescission does apply to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributable solely to the costs of the refinancing or consolidation [*12 C.F.R. § 226.23(f)*; *see 15 U.S.C. § 1635(e)*; *see also § 25.231*].

There is no right to rescind each credit extension made under an open-end plan if the extension is made in accordance with a previously established credit limit [*12 C.F.R. § 226.15(a)(1)(ii)*]. Only two types of transactions are exempt from

the right of rescission: (1) a residential mortgage transaction, as defined above, and (2) a credit plan in which a state agency is a creditor [*12 C.F.R. § 226.15(f)*].

[d] Exercise of Right

The right of rescission may be exercised until midnight of the third business day following consummation of the transaction, delivery of the required notice of the right to rescind [*see* §§ 25.230-25.236], or delivery of all material disclosures, whichever occurs last [*see 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3)*]. Material disclosures in closed-end credit transactions encompass the annual percentage rate, the finance charge, the payment schedule, and certain disclosures and limitations in cases involving high-cost mortgage loans and higher-priced mortgage loans [*12 C.F.R. § 226.23(a)(3)* n.48; *see 12 C.F.R. §§ 226.32(c),(d)* (high-cost mortgage loans), 226.35(b)(2) (higher-priced mortgage loans)]. In open-end credit transactions, material disclosures cover the method of determining the finance charge and the balance on which it will be imposed, the annual percentage rate, and the amount or method of determining the amount of any membership or participation fee that may be imposed [*see 12 C.F.R. § 226.15(a)(3)*n.36]. In addition, in a home equity open-end credit transaction, material disclosures must include the length of the draw period and of any repayment period [*see 12 C.F.R. § 226.5b(d)(5)(i)*] as well as an explanation of how the minimum periodic payment will be determined and the timing of the payments [*see 12 C.F.R. § 226.5b(d)(5)(ii)*]. For further discussion of disclosures regarding home equity plans, see *§ 25.237*. If the lender does not deliver the required notice or material disclosures, the right to rescind expires three years after consummation, on the transfer of the consumer's interest in the property, or on the sale of the property, whichever occurs first [*see 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3)*].

[e] Effect of Rescission

When a consumer exercises his or her right to rescind, the security interest that gave rise to the right to rescind becomes void and the consumer is not liable for any amount, including any finance charge [*12 C.F.R. §§ 226.15(d)(1), 226.23(d)(1)*]. Within 20 calendar days after receipt of a notice of rescission, the creditor must return any money or property given to anyone in connection with the transaction and take any action necessary or appropriate to reflect termination of the security interest [*15 U.S.C. § 1635(b)*; *12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2)*].

If the creditor has delivered any money or property, the consumer may retain possession until the creditor has returned any money or property given to anyone in connection with the transaction and taken the action necessary or appropriate to reflect termination of the security interest. After the creditor has fulfilled these obligations, the consumer must tender the money or property to the creditor. If tender of money or property would be impracticable or inequitable, the consumer must tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money, however, must be made at the creditor's place of business as designated in the notice of the right of rescission. If the creditor does not take possession of the tendered money or property within 20 calendar days after tender, the customer may keep it without further obligation [*12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3)*].

The procedures governing return of money or property by the creditor and tender and return of money or property by the consumer are subject to modification by court order [*12 C.F.R. §§ 226.15(d)(4), 226.23(d)(4)*]. Because the right of rescission is an equitable doctrine and subject to equitable considerations, a court may condition the granting of rescission on repayment of the principal amount of the underlying loan to the creditor [*Brown v. Nat. Permanent Fed. Sav. & Loan Ass'n (D.C. Cir. 1982) 683 F.2d 444, 446-447*].

Attorneys have a legal right to a fee award in a successful action for rescission under TILA [*see 15 U.S.C. § 1640(a)(3)*]. Attorneys may seek those fees in actions initiated after settlement of the clients' claims [*James v. Home Constr. Co. (11th Cir. 1982) 689 F.2d 1357, 1359*].

[f] Waiver or Modification of Right of Rescission

The right of rescission may not be modified or waived by a customer except in extraordinary circumstances, when the customer determines that the extension of credit is needed to meet a bona fide personal financial emergency, and each customer involved furnishes the creditor with a dated, written, and signed statement describing the emergency and modifying or waiving the right of rescission [*see 15 U.S.C. § 1635(d)*; *12 C.F.R. §§ 226.15(e), 226.23(e)*]. Printed forms may not be used for such a modification or waiver [*12 C.F.R. §§ 226.15(e), 226.23(e)*].

[6] Disclosures in Adjustable-Rate Mortgage Loans

The interest rate, time-price differential, and any other amount payable under a point, discount, or other system of additional charges must be disclosed [*see 15 U.S.C. § 1605(a)*]. Under regulations applicable to federal savings associations, the interest rate, payment, loan balance, and loan term of a home loan may be adjusted if the term of the loan does not exceed 40 years, provided several other requirements are met [*12 C.F.R. § 560.30*]. Within three business days following receipt of an application for a home loan, a federal savings association must disclose to the loan applicant the terms of the types of loans offered to the applicant. An adjustment notice containing specified information [*see 12 C.F.R. § 226.20(c)*] must be delivered or mailed at least once in each year in which a rate adjustment is implemented without an accompanying payment change, and at least 25, but not more than 120, days before a payment at the new level is due [*12 C.F.R. § 560.210*]. These federal regulatory requirements preempt state laws purporting to govern the right of a federally chartered savings association to make adjustable-rate mortgage loans [*12 C.F.R. § 560.2(a)*; *see 12 C.F.R. § 560.110*].

A creditor must include in any consumer credit contract secured by a dwelling and subject to TILA and Regulation Z the maximum interest rate that may be imposed during the term of the obligation if (1) in the case of closed-end credit [*see 12 C.F.R. § 226.2(a)(10)*; *see also* [5][a], *above*], the annual percentage rate may increase after consummation, or (2) in the case of open-end credit [*see 12 C.F.R. § 226.2(a)(20)*; *see also* [5][a], *above*], the annual percentage rate may increase during the plan [*12 C.F.R. § 226.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingLiabilityReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 25.24 Real Estate Settlement Procedures Act (RESPA)

[1] Purpose

The Real Estate Settlement Procedures Act of 1974 (RESPA) [*12 U.S.C. § 2601 et seq.*; *see* 24 C.F.R. pt. 3500] was enacted primarily to ensure that consumers are provided with timely information regarding the nature and costs of the settlement process and are protected from unnecessarily high settlement charges resulting from abusive lending practices [*see 12 U.S.C. § 2601(a)*]. Specifically, the purposes of RESPA include all of the following [*12 U.S.C. § 2601(b)*]:

- To make effective advance disclosure to home buyers and sellers of settlement costs.
- To eliminate kickbacks or referral fees that tend to increase the costs of certain settlement services unnecessarily.
- To reduce the amounts home buyers are required to place in escrow accounts established to ensure the payment of real estate taxes and insurance.
- To reform and modernize local record-keeping of land title information.

RESPA does not set the prices for settlement services but does require a lender to provide the buyer and seller in a real estate transaction with timely information on the nature and costs of the settlement process. The requirements of RESPA apply to any federally related mortgage loan [*see 24 C.F.R. § 3500.5(b)* (definition); *see also § 25.112*].

A form for the lender's good faith estimate of the settlement charges likely to be incurred by a borrower in a covered transaction is set forth in *§ 25.238*.

[2] Prohibitions Against Kickback and Referral Fees

It is unlawful for any person to give or receive a fee, kickback, or anything of value for referring business incident to or as part of a settlement subject to RESPA to any particular person [*12 U.S.C. § 2607(a)*]. Giving or receiving any part of

a fee charged for rendering a settlement service in connection with a transaction subject to RESPA, without the recipient actually performing services for the fee, is also unlawful [*12 U.S.C. § 2607(b)*]. Violators are subject to criminal and civil penalties [*see 12 U.S.C. § 2607(d)(1), (2)*].

RESPA does not prohibit the payment of a fee (1) to an attorney for services actually rendered, (2) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance, or (3) by a lender to its duly appointed agent for services actually rendered in the making of a loan [*12 U.S.C. § 2607(c)*; *24 C.F.R. § 3500.14(f)(1)*]. The payment to any person of a bona fide salary, compensation, or other payment for goods or facilities actually furnished or services actually performed, and payment pursuant to a cooperative brokerage and referral arrangement or agreement between real estate agents and brokers are also exempt from the statutory prohibition [*12 U.S.C. § 2607(c)*; *24 C.F.R. § 3500.14(f)(2), (3)*]. Another exception applies to normal promotional and educational activities not directly conditioned on the referral of business and not involving the defrayal of expenses that otherwise would be incurred by persons in a position to refer settlement business, such as title company receptions, free seminars on title matters to professionals, and the furnishing of certain property information without charge to professionals [*24 C.F.R. § 3500.14(f)(4)*]. The waiver by a lender of a requirement that a borrower pay a prepayment penalty provided in mortgage documents, whether or not the waiver is conditioned on the lender's receipt of a loan application from, or the making of a loan to, the borrower or person purchasing property from the borrower is also not unlawful under RESPA [*24 C.F.R. § 3500.14(f)(5)*].

HUD has developed a test for determining whether yield spread premiums ("YSPs"), which are fees paid by mortgage lenders to mortgage brokers based on the difference between the interest rate at which the broker originates the loan and the par, or market rate, offered by the lender, are prohibited under RESPA. Under this test, a payment from a lender to a mortgage broker is not prohibited when (1) goods and facilities are actually furnished or services are actually performed for the compensation paid, and (2) the discount is reasonably related to the value of the goods or facilities actually furnished or the services actually performed [RESPA Statement of Policy 2001-1, *66 Fed. Reg. 53052, 53054 (Oct. 18, 2001)* ; *see Schuetz v. Banc One Mortgage Corp. (9th Cir. 2002) 292 F.3d 1004, 1014* (HUD test entitled to substantial deference; YSP did not violate RESPA because there was substantial evidence that mortgage broker provided borrower compensable goods, facilities, and services); *Bjustrom v. Trust One Mortgage Corp. (9th Cir. 2003) 322 F.3d 1201* (following *Schuetz* and holding that YSP did not violate RESPA); *Geraci v. Homestreet Bank (9th Cir. 2003) 347 F.3d 749, 751-752* (judgment granted for defendant as matter of law when plaintiffs failed to allege that YSPs were not reasonably related to value of goods or facilities that were actually furnished or services that were actually performed); *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal. App. 4th 1134, 1144-1145, 135 Cal. Rptr. 2d 796* (payment of YSPs when borrower has paid 1 percent loan origination fee does not violate HUD regulations; YSP stated as lump sum rather than itemized list of services and fees was proper); *see also Lane v. Residential Funding Corp. (9th Cir. 2003) 323 F.3d 739, 744* (applying HUD YSP test to hold that lender's arrangement with title company for discounts on title insurance and escrow fees did not violate RESPA)].

A seller of property in a transaction subject to RESPA may not directly or indirectly require, as a condition of the sale, that the buyer purchaser title insurance on the property from any particular title company [*12 U.S.C. § 2608(a)*]. In the event of a violation, the seller is liable to the buyer in an amount equal to three times all charges made for the title insurance [*12 U.S.C. § 2608(b)*].

Certain controlled business arrangements do not constitute payments prohibited by law. A controlled business arrangement is an arrangement in which (1) a person who is in a position to refer business incident to or part of a real estate settlement service involving a federally related mortgage loan, or an associate of such a person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than one percent in a provider of settlement services, and (2) either of those persons directly or indirectly refers the business to that provider or affirmatively influences the selection of that provider [*12 U.S.C. § 2602(7)*]. A controlled business arrangement is not unlawful if all of the following conditions are satisfied [*12 U.S.C. § 2607(c)*]:

- At or before the time of referral, full disclosure of the arrangement is made to the person being referred, and that person is provided with an accurate written estimate of the charge or range of charges.

- The person is not required to use any particular provider of settlement services.

- The only thing of value that is received from the arrangement (other than payments authorized by statute) is a return on ownership interest or franchise relationship.

[3] Restrictions on Advance Deposits in Escrow or Reserve Accounts

A lender in a transaction subject to RESPA is limited as to the amount it may require a borrower or prospective borrower to deposit in any escrow or trust account established for the payment of taxes, insurance premiums, or other charges on the mortgaged property. The lender may not require the deposit of any amount in excess of the maximum specified by statute either before or on the date of settlement, or in any month after the first full installment payment under the mortgage becomes due [*12 U.S.C. § 2609(a)(1), (2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureBanking LawConsumer ProtectionReal Estate Settlement ProceduresKickbacks & Prohibited FeesBanking LawConsumer ProtectionReal Estate Settlement ProceduresLoan ServicingReal Property LawPurchase & SaleClosing & Settlement



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10-25 California Legal Forms--Transaction Guide § 25.25

§ 25.25 California Disclosure Requirements

[1] Arrangers of Credit and Seller Financing

Certain disclosures are required for any transaction involving the purchase of a dwelling for not more than four families if the purchase includes an extension of credit by the vendor and there is an arranger of credit [*Civ. Code § 2956*; *see Civ. Code § 2957(d)* (credit must involve finance charge or be payable in more than four installments)]. An arranger of credit is a person, other than a party to the credit transaction, who (1) is involved in developing or negotiating credit terms and in completing the credit documents, and (2) directly or indirectly receives compensation for these services or from any transaction or transfer of real property that is facilitated by these services. Excluded from this definition are (1) attorneys who represent one of the parties, (2) persons acting as escrow holders in the transaction, and (3) escrow holders who do not act as arrangers of credit [*see Civ. Code § 2957(a)*]. If a real estate licensee or a licensed attorney is a party, that person is considered an arranger of credit unless neither party to the transaction is represented by a real estate licensee [*Civ. Code § 2957(a)(2)*].

The disclosures must be made before execution of any note or security documents [*Civ. Code § 2959*], and must be made to the purchaser by the arranger of credit and the vendor, and to the vendor by the arranger of credit and the purchaser [*Civ. Code §§ 2956, 2959, 2963*]. Specified information must be disclosed [*see Civ. Code § 2963*]. The California Association of Realtors has prepared a standard form containing this information [*see § 25.255*].

These disclosures need not be made to a purchaser or seller entitled to receive alternative disclosures pursuant to the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*; *see § 25.23*], the Real Estate Settlement Procedures Act [*12 U.S.C. § 2601 et seq.*; *see § 25.24*], selected sections of the Business and Professions Code pertaining to mortgage loan transactions [*see Bus. & Prof. Code §§ 10232.4, 10232.5, 10240*; *see also §§ 25.250, 25.260*], or the qualification or exemption requirements of *Corp. Code § 25110* [*Civ. Code § 2958*; *see* Ch. *6, Securities Regulation Issues*].

[2] Adjustable-Payment, Adjustable-Rate Residential Loans

Any lender offering adjustable rate residential mortgage loans must give prospective borrowers a copy of the most recent available publication of the Federal Reserve Board that is designed to provide the public with descriptive information concerning adjustable-rate mortgages. The lender must provide this publication either at the prospective

borrower's request or at the same time the lender first provides written information, other than direct mail advertising, concerning any adjustable rate residential mortgage loan or credit sale to the prospective borrower, whichever is earlier [*Civ. Code § 1921(b)*; *see Civ. Code § 1921(c)* (alternative distribution method available to lenders subject to specified federal lending and disclosure requirements)]. Any lender who fails to comply with this disclosure requirement may be enjoined by any court of competent jurisdiction and will be liable for actual damages, the costs of the action, and reasonable attorneys' fees as determined by the court. The court may make any orders necessary to prevent future violations [*Civ. Code § 1921(b)*].

An adjustable rate residential mortgage loan is any loan or credit sale that is primarily for personal, family, or household purposes, that bears interest at a rate subject to change during the term of the loan (whether predetermined or otherwise), and that is made on the security of real property containing one to four dwelling units [*Civ. Code § 1921(a)(1)*]. A lender subject to the disclosure requirement is any person, association, corporation, partnership, limited partnership, or other business entity making more than 10 loans or credit sales, in any 12-month period, on the security of residential real property containing one to four dwelling units [*Civ. Code § 1921(a)(2)*].

[3] Home Equity Loans

The Home Equity Loan Disclosure Act [*Civ. Code § 2970 et seq.*] applies to any open-end consumer credit plan in which a consensual security interest is created or retained against the consumer's dwelling (called a home equity loan) [*Civ. Code § 2970*]. A creditor must provide an applicant for a home equity loan with a disclosure in either of two specified forms, unless similar disclosure requirements are imposed by a federal statute or regulation, and the creditor has complied with those requirements [*Civ. Code § 2971(a)(1), (2), (c)*; *see § 25.202*]. The disclosure explains that the loan will be secured by the prospective borrower's home, and that a default could result in the loss of the home. It must be made by (1) a separate and specific document attached to or accompanying the application, or (2) a clear and conspicuous statement on the application [*Civ. Code § 2971(b)*].

[4] Notice of Right to Receive Appraisal

A lender in a loan transaction secured by real property must provide a notice to a loan applicant of the applicant's right, on request, to receive a copy of the appraisal, provided the applicant has paid for the appraisal [*Bus. & Prof. Code § 11423(b)*; *see Bus. & Prof. Code § 11302(b)* (appraisal defined)]. If the loan is to be secured by residential real property [*see Bus. & Prof. Code § 11423(a)(3)* (real property in California containing only a one- to four- family residence)], the notice must be set forth in at least 10 point boldface type in a separate document that the applicant may retain. Further, the notice must contain specified information, including an address to which the request should be sent [*see Bus. & Prof. Code § 11423(d)*], and must be given no later than 15 days after the lender receives the written loan application [*Bus. & Prof. Code § 11423(d)*].

If the loan is to be secured by nonresidential real property, the notice must be given within 15 days of the lender's receipt of the appraisal. The notice must state, among other things, that the applicant is only entitled to receive the appraisal or appraisals obtained by the lender for the purpose of evaluating the applicant's pending request for an extension of credit [*Bus. & Prof. Code § 11423(e)*].

An applicant's written request for a copy of an appraisal must be received by the lender no later than 90 days after (1) the lender has provided notice of the action taken on the application or a notice of incompleteness, or (2) the application has been withdrawn [*Bus. & Prof. Code § 11423(b)*; *see Bus. & Prof. Code § 11423(d)*]. The lender must mail or deliver a copy of the appraisal within 15 days after receiving the applicant's request, or within 15 days after receiving the appraisal, whichever occurs later [*Bus. & Prof. Code § 11423(c)*]. Release of the appraisal to the applicant may be conditioned upon payment of (1) the cost of the appraisal, and (2) in the case of a loan secured by nonresidential real property, the cost of duplicating the appraisal [*Bus. & Prof. Code § 11423(d), (e)*].

The above requirements are in addition to any right of access to appraisals that exists under any other provision of state or federal law [*Bus. & Prof. Code § 11423(i)*]. They are not intended to effect a change in current law in any manner with respect to reliance on an appraisal by anyone other than the lender who released the appraisal [*Bus. & Prof. Code § 11423(f)*].

These requirements do not apply to appraisals obtained by a lender on property owned by the lender, or to appraisals obtained by the lender in anticipation of modifying any existing loan agreement if the lender has not charged for the appraisal [*Bus. & Prof. Code § 11423(g)*]. In the case of loans secured by residential real property, compliance with Regulation B [*see 12 C.F.R. § 202.1 et seq.*] is deemed to be compliance with *Bus. & Prof. Code § 11423* [*Bus. & Prof. Code § 11423(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawProperty Valuation



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10-25 California Legal Forms--Transaction Guide § 25.26

§ 25.26 Application of Statute of Frauds

A contract, promise, undertaking, or commitment to lend money or to grant or extend credit, in an amount greater than $100,000, is invalid unless the contract, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by the party's agent, if both of the following apply [*Civ. Code § 1624(a)(7)*]:

- It is made by a person engaged in the business of lending or arranging for the lending of money or extending credit; and

- It is not primarily for personal, family, or household purposes.

A contract, promise, undertaking, or commitment to lend money secured solely by residential property consisting of one to four dwelling units is deemed to be for personal, family, or household purposes [*Civ. Code § 1624(a)(7)*] and, therefore, is not subject to the statute of frauds.

For further discussion, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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10-25 California Legal Forms--Transaction Guide §§ 25.27-25.99

[Reserved]

§§ 25.27[Reserved]



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10-25 California Legal Forms--Transaction Guide § 25.100

§ 25.100 Facts

1. Name, address, and telephone number of each party:

    a. Borrower.

    b. Contact person at office of lender, if known.

    c. Loan broker, real estate broker, or other agent or representative of borrower.

2. Additional identifying information for borrower other than individual:

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

    d. Name, address and title of person authorized to bind entity.

3. If borrower is corporation:

    a. Date and state of incorporation.

    b. Date on which board of directors or shareholders approved or will approve loan.

4. If borrower is partnership and loan is for acquisition of real property:

    a. Whether partnership will acquire title to property to be encumbered [*see Corp. Code §*

16204(a)]:

(1) In partnership name; or

(2) In names of individual partners.

b. Whether statement of partnership has been recorded in county where property to be encumbered is located [*see* Ch. 15, *General Partnerships*].

c. Names of partners authorized to execute loan documents.

d. Whether all partners have approved or will approve of loan obligation.

5. If borrower is individual, personal and financial information:

a. Age.

b. Years of school.

c. Marital status.

d. If borrower is married:

(1) Name of spouse.

(2) Whether spouse will approve and sign loan documents.

e. Military service, if any.

f. Number of dependents.

g. Occupation and employment data:

(1) Employer.

(2) Position.

(3) Length of time with present employer.

(4) Previous employment.

h. Gross earned income, including base earnings, overtime, bonuses, and commissions.

i. Other income, including income from stock, bonds, rental income, and interest.

j. Previous and proposed housing costs, including:

(1) Primary financing.

(2) Secondary financing.

(3) Hazard insurance.

(4) Private deed of trust loan insurance.

(5) Real estate taxes.

(6) Homeowners' association fees.

k. Liquid assets available to close loan transaction.

6. Source of loan, if known.

a. Conventional lender, such as:

(1) Commercial bank.

(2) Savings and loan association.

(3) Finance company.

(4) Insurance company.

b. Federal Housing Administration (for insurance).

c. Federal Department of Veterans Affairs (for guaranty).

d. California Department of Veterans Affairs (for Cal-Vet loan).

e. Other.

7. Amount of proposed loan.

8. Purpose of loan:

a. Purchase.

b. Construction.

c. Refinance.

d. Improvement.

e. Other.

9. Information concerning real property that will secure loan:

a. Type.

b. Street address, city, and county.

c. Size and general characteristics.

d. Legal description.

e. Purchase price and down payment (if purpose of loan is acquisition of property).

f. Existing encumbrances on property, if any.

10. If senior trust deed or mortgage exists against property:

a. Name of trustor or mortgagor.

b. Name of beneficiary or mortgagee.

c. Name of trustee.

d. Date of execution.

e. Date of recordation.

f. County, book, and page where recorded.

g. Name and address where notice of default of senior encumbrance should be mailed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.101

§ 25.101 Documents

1. List of credit references.

2. Schedule of assets and liabilities of borrower.

3. Copies of tax returns for preceding year.

4. If borrower is self-employed, financial statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral Overview



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10-25 California Legal Forms--Transaction Guide §§ 25.102-25.109

[Reserved]

§§ 25.102[Reserved]



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B. Preliminary Determinations

10-25 California Legal Forms--Transaction Guide § 25.110

§ 25.110 Evaluating Available Sources of Loans

1. Consider general type of loan usually made by specific class of lender.

a. For commercial banks: commercial, FHA insured, and VA guaranteed loans on all types of real property in locale of bank, generally for short term and for bank customers [*see § 25.12[2]*].

b. For savings associations: conventional, FHA insured, VA guaranteed, and amortized first-lien loans on all types of real property (but mostly single-family dwellings) in locale of association [*see § 25.12[3]*].

c. For insurance companies: large conventional, FHA insured, and VA guaranteed loans on all types of property made:
(1) Through mortgage companies acting as loan correspondents; or

(2) Directly if local real estate loan office can make appraisals and process loan.

d. For pension, profit-sharing, and welfare funds: real estate loans, usually obtained through mortgage companies or mortgage brokers.

e. For mortgage companies: conventional loans from their own funds and FHA-insured and VA guaranteed loans if company has amount of capitalization and approval required.

NOTE:

A mortgage company cannot negotiate a loan for, or sell a loan to, a person or entity without obtaining a real estate broker's license [*Bus. & Prof. Code §§ 10130, 10131(d), (e)*] and complying with regulations concerning the closing of the transactions [*Bus. & Prof. Code § 10230 et seq.*] and maximum fees and commissions [*Bus. & Prof. Code § 10240 et seq.*; ***see*** *10 Cal. Code Reg. § 2840 et seq.*]. When a

mortgage company lends its own funds the usury law [Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1; *Cal. Const., art. XV, § 1*] applies, but otherwise regulation is minimal.

f. For FHA insured loan [*see § 25.13[1]*], whether loan is:

(1) For single-family residences and industrial, commercial, and other types of construction.

(2) Made by supervised financial institutions, including banks, savings associations, any institution whose deposits are insured by Federal Deposit Insurance Corporation, and approved mortgage companies or pension funds.

NOTE:
FHA insured loans are regulated as to purpose of loan, type of structure, loan-to-value ratio, interest rate, amount insurable, term of loan, service charge, and application fee. For a guide to obtaining an FHA insured loan, see *§ 25.130*.

g. For VA guaranteed loan, whether borrower is veteran qualified for guaranty to purchase or improve home or farm [*see § 25.13[2]*; *see also § 25.110*].

h. For Cal-Vet loan, whether borrower is veteran qualified for guaranty to purchase or improve home or farm [*see § 25.13[3]*; *see also § 25.110*].

2. Compare maximum loan terms of specific lenders:

a. Commercial banks (state and national): for improved property, 30 years on fully amortized loans [*Fin. Code § 1227(b)*; *see 12 U.S.C. §§ 371, 1828(o)*; *see also 12 C.F.R. §§ 34.1, 34.2*].

b. California savings associations: for home loans, 40 years [*see Fin. Code § 7504(b)*].

NOTE:
Home loans are loans made on the security of one-to-four-unit residential dwellings (including condominiums and cooperatives), combinations of those dwellings and business property (if no more than 20 percent of the total appraised value of the real estate is attributable to the business use), farm residences, and combinations of farm residences and commercial farm real property [*Fin. Code § 7504(a)(2)*].

c. Federal savings associations: up to 40 years, depending on type of property [12 C.F.R. § 545.33].

d. Insurance companies [*Ins. Code § 1192.2*]:

(1) 30 years if loan secured by unencumbered lease.

(2) No statutory maximum on other loans.

e. FHA [*12 U.S.C. § 1709(b)(3)*]:

(1) 30-year limitation if deed of trust not approved for insurance before construction.

(2) 35 years in all other cases.

f. VA: normally 25 years and 32 days, but may approve term of up to 30 years and 32 days, at time of origination [*38 C.F.R. § 36.4505(a)*; *see 38 U.S.C. § 3703(d)(1)*].

NOTE:

The use of the longer term may be approved if (1) the income and expenses of the veteran applicant, under customary credit standards, would prevent him or her from making the required payments for a loan with a term of 25 years and 32 days, and (2) the veteran would be able to make the payments for a longer term [*38 C.F.R. § 36.4505(a)*]. In no event may the maturity date of a loan exceed the estimated economic life of the property securing the loan [*38 C.F.R. § 36.4505(b)*].

g. Cal-Vet: maximum of 40 years for farms or homes, 30 years for mobilehomes located in a mobilehome park [*Mil. & Vet. Code § 987.71(b)*].

3. Compare lenders' requirements governing ratio of loan to appraised value:

a. California commercial banks [*Fin. Code § 1227*]:

(1) 60 percent of sound market value of real property (as determined by proper appraisal) for term not in excess of 10 years.

(2) 90 percent for 30 years when repayable in substantially equal installments not less often than monthly, unless security is guaranteed or insured by private insurer, licensed by Insurance Commissioner, in which case ratio may exceed 90 percent.

(3) 90 percent of appraised value of productive agricultural lands, including farms, for 30 years when repayable in substantially equal installments not less often than annually.

(4) 85 percent for short-term loans (not exceeding six months).

(5) 85 percent for building or refinancing loans when term does not exceed 60 months.

b. Commercial banks (national): varies, depending on type of property [*see 12 U.S.C. §§ 371(a), 1828(o)*; *see also 12 C.F.R. §§ 34.1, 34.2*].

c. California savings associations: for home loans [*see § 25.110*], maximum permitted by *Fin. Code § 7509*, as determined by association's board of directors (but not exceeding 100 percent) [*Fin. Code § 7504(b)(4)(A)*].

NOTE:

At the time of origination, a real estate loan by a California savings association may not exceed 100 percent of the market value of the security property. The board of directors of the association must establish maximum loan-to-value ratios for loans secured by real estate [*Fin. Code § 7509(a)*]. A home loan may exceed the adopted ratio if it is secured by real estate and a savings account, and if the amount that exceeds the adopted ratio is secured by the savings account [*Fin. Code § 7509(a)*]. Additional statutory requirements and restrictions apply to loans in excess of 90 percent of the appraised value of the security property [***see** Fin. Code § 7509(a)-(c)*]. The association may not make a loan secured by unimproved real property if the loan-to-value ratio would exceed 80 percent of the appraised value of the unimproved real property [*Fin. Code § 7509(d)*].

d. Federal savings associations: generally up to 90 percent for improved real property, but may be increased to 100 percent if certain requirements are met [*see* 12 C.F.R. §§ 545.32(d), 545.33(b)].

e. Insurance companies: 80 percent [*see Ins. Code § 1194.81*].

f. FHA: principal obligation not exceeding appraised value of property and not exceeding smallest of following [*12 U.S.C. § 1709(b)(2)*]:

(1) In case of single-family residence, 115 percent of median single-family house price in area;

(2) In case of duplex, triplex, or four-family residence, percentage of such median price that bears same ratio to such median price as dollar limitation in *12 U.S.C. § 1454(a)(2)*, stated below, bears to $93,750 (which is dollar limitation in such section for single-family residence), namely:

(a) $120,000 for duplex residence;

(b) $145,000 for triplex residence; and

(c) $180,000 for four-family residence; or

(3) In any case, 150 percent of dollar limitation stated in P (2), above, for residence of applicable size.

NOTE:

The dollar limitation in effect for a residence of any size in any area may not be less than the greater of (1) the dollar limitation in effect under *12 U.S.C. § 1709* for the area on October 21, 1998, and (2) 65 percent of the dollar limitation stated in P (2), *above*, for a residence of the applicable size [*12 U.S.C. § 1709(b)(2)(A)*].

g. VA: varies with lender [*see 38 U.S.C. § 3703*].

h. Cal-Vet: 98 percent [*Mil. & Vet. Code § 987.71*].

NOTE:

Cal-Vet may waive the initial payment in any case when the appraised value of the property equals the amount to be paid by Cal-Vet plus at least 5 percent. The purchaser may be required to pay a loan origination fee, not to exceed 1 percent of the loan amount, which may be added to the loan amount. In the case of a purchase requiring a VA guaranty, the department may waive the initial payment and the purchaser must pay the loan guaranty fee, which may be added to the loan amount [*Mil. & Vet. Code § 987.71(a)*].

When a purchaser makes an initial payment of less than 20 percent of the selling price of the property, Cal-Vet must take prudent measures to minimize losses from loan defaults and loan delinquencies and must ensure the continued financial solvency of the loan program by charging fees to cover the costs of any loan guaranty, primary mortgage insurance, or other similar arrangement. Fees charged may be included in the amount of the loan, collected in advance, or collected as part of the monthly payment [*Mil. & Vet. Code § 987.71(g)*]. The department may provide initial payment assistance to lower income first-time purchasers by providing a deferred-payment second loan, on which simple interest must be charged at a rate established by the department [*Mil. & Vet. Code § 987.71(h)(1)*]. This deferred-payment second loan is subject to all of the following conditions: (1) the loan may not exceed 3 percent of the selling price of the farm or home; (2) the loan must be secured by a deed of trust; and (3) the loan must be due and payable on payment in full of the contract or on the sale or transfer of the farm or home [*Mil.*

& Vet. Code § 987.71(h)(2)].

The maximum amount that Cal-Vet may pay for a home, condominium, mobilehome, or farm, or for the construction of a dwelling and other improvements, is regulated by statute [***see*** *Mil. & Vet. Code § 987.65*]. The amount may be increased for the acquisition or construction of a home equipped with solar energy heating devices. However, the increase is not permitted for swimming pools, hot tubs, saunas, or spas except in the case of wounded or disabled veterans who provide satisfactory medical evidence that the pool, tub, sauna, or spa is therapeutically necessary [***see*** *Mil. & Vet. Code § 987.92*].

4. Consider types of real property preferred by specific lender for real property loans:

a. Commercial banks (national and state): homes, small multiple residences, farms, and commercial properties.

b. Savings associations (federal and state): homes and multiple dwellings of all sizes.

c. Insurance companies: homes, large multiple residences, farms, and commercial properties.

d. FHA: all types of residential properties [*12 U.S.C. §§ 1709, 1713, 1715*].

e. VA: homes, condominiums, farms, or manufactured homes [*38 U.S.C. § 3710(a)*].

f. Cal-Vet: homes (including condominiums and mobilehomes) and farms [*see Mil. & Vet. Code §§ 987.51, 987.53(b)*].

5. Compare characteristics of specific types of loan and needs of client borrower.

a. Generally, fixed interest rates offered by various lenders may be ranked in following order from lowest to highest:

(1) Cal-Vet.

(2) VA.

(3) FHA.

(4) Insurance companies.

(5) Commercial banks.

(6) Savings associations.

NOTE:
The initial rate for adjustable-rate loans offered by conventional lenders may be much lower than for Cal-Vet, VA, or FHA loans.

b. Government-assisted loans and loans by savings associations typically have:

(1) Longest terms.

(2) Greatest loan-to-appraised-value percentage.

c. FHA is strict about borrower's financial profile.

d. Savings associations may be more concerned with security than borrower's financial capabilities.

e. Commercial banks:

(1) Are conservative in appraisals and lending practices.

(2) Prefer to deal with previous customers.

(3) Are less aggressive than savings associations in lending maximum permitted amounts.

f. Secondary financing is generally prohibited in government-assisted loans but is permitted by most institutional lenders.

g. Generally, compared with other institutional lenders:

(1) For banks:

(a) Interest rates are medium.

(b) Length of loan is shortest.

(c) Down payment is highest.

(2) For savings associations:

(a) Interest rate is highest.

(b) Length of loan is medium.

(c) Down payment is lowest.

(3) For insurance companies:

(a) Interest rate is medium.

(b) Term is longest.

(c) Down payment is medium.

(d) Total amount loaned is highest.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCommercial BanksBanking LawDepository InstitutionsCredit UnionsBanking

LawNational BanksReal Estate LoansReal Property LawFinancingGeneral OverviewReal Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingFederal ProgramsFederal Housing Administration



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

10-25 California Legal Forms--Transaction Guide § 25.111

§ 25.111 Applicability of Truth in Lending Act (TILA)

NOTE:
For further discussion of the Truth in Lending Act as it applies to real estate transactions, see *§ 25.23*.

1. Determine whether all of following conditions exist [*12 C.F.R. § 226.1(c)(1)*]:

a. Lender is creditor, namely person [*12 C.F.R. § 226.2(a)(17)(i)*]:
(1) Who regularly extends consumer credit that is:
(a) Subject to finance charge; or

(b) Payable by written agreement in more than four installments (not including a down payment); and

(2) To whom obligation is initially payable, either:

(a) On face of note or contract; or

(b) By agreement when there is no note or contract.

NOTE:
Credit is the right to defer payment of debt or to incur debt and defer its payment [*12 C.F.R. § 226.2(a)(14)*]. Consumer credit is credit offered or extended to a consumer primarily for personal, family, or household purposes [*12 C.F.R. § 226.2(a)(12)*]. A consumer is a natural person to whom credit is offered for personal, family, or household purposes. For purposes of the right of rescission [***see*** *§ 25.141*], that term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest [*12 C.F.R. § 226.2(a)(11), (12)*]. A person regularly extends consumer

credit only if that person extended it more than 25 times (or more than five times for transactions secured by a dwelling) in the preceding calendar year or will satisfy these numerical standards in the current calendar year [*12 C.F.R. § 226.2(a)(17)(i)* n.3].

b. Credit is primarily for personal, family, or household purposes.

NOTE:

The extension of credit primarily for business, commercial, or agricultural purposes, or to governmental entities, is specifically exempted from coverage by the Truth in Lending Act [*15 U.S.C. § 1603(1)*; *12 C.F.R. § 226.3(a)*]. A loan that is secured by a deed of trust on a residence and obtained in order to invest in a limited partnership (formed to purchase real property) may be considered to have a business or commercial purpose under certain circumstances [***see*** *Thorns v. Sundance Properties (9th Cir. 1984) 726 F.2d 1417, 1418-1419* ; ***see also*** *§ 25.23[1]*].

2. Determine whether transaction is exempt from TILA because it [*15 U.S.C. § 1603(3)*; *12 C.F.R. § 226.3(b)*]:

a. Involves extension of credit of more than $25,000; and

b. Does not require acquisition or retention or security interest in:

(1) Real property; or

(2) Personal property to be used as consumer's principal dwelling.

3. If transaction is subject to TILA and involves security interest (including security interests arising by law) that will be retained or acquired in consumer's principal dwelling [*see 15 U.S.C. § 1635(a)*], determine whether transaction is:

a. Open-end transaction, that is, any transaction involving consumer credit extended by creditor under plan in which [*12 C.F.R. § 226.2(a)(20)*]:

(1) Creditor reasonably contemplates repeated transactions;

(2) Creditor may impose finance charge from time to time on unpaid balance; and

(3) Amount of credit that may be extended to consumer during term of plan (up to any limit set by creditor) is generally made available to extent that any outstanding balance is repaid.

b. Closed-end transaction, that is, any transaction involving consumer credit other than open-end credit [*12 C.F.R. § 226.2(a)(10)*].

NOTE:

If the underlying credit transaction is a contract for goods that requires the consumer to grant the creditor a security interest in real property, counsel should review the contract to confirm that the primary goods involved are to be attached to the real property in which the security interest is granted. Any contract for goods that provides for a security interest in real property violates California law if the primary goods sold are not to be attached to the real property [*Civ. Code § 1804.3(b)*].

4. In case of open-end or closed-end transaction described above, determine whether consumer does not have right to

rescind because:

a. In case of open-end transaction, transaction involves:

(1) Credit extension made under open-end credit plan, if extension is made in accordance with previously established credit limit for plan [*15 U.S.C. § 1635(e)(4)*; *12 C.F.R. § 226.15(a)(1)(ii)*];

(2) Credit plan in which creditor is state agency [*15 U.S.C. § 1635(e)(3)*; *12 C.F.R. § 226.15(f)(2)*]; or

(3) Residential mortgage transaction [*15 U.S.C. § 1635(e)(1)*; *12 C.F.R. § 226.15(f)(1)*].

NOTE:
A residential mortgage transaction is a transaction in which a mortgage, trust deed, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance its acquisition or initial construction [*15 U.S.C. § 1602(w)*; *12 C.F.R. § 226.2(a)(24)*].

b. In case of closed-end transaction, transaction involves any of following:

(1) Residential mortgage transaction [*15 U.S.C. § 1635(e)(1)*; *12 C.F.R. § 226.23(f)(1)*].

(2) Refinancing or consolidation by same creditor of credit extension already secured by consumer's principal dwelling [*15 U.S.C. § 1635(e)(2)*; *12 C.F.R. § 226.23(f)(2)*; *see § 25.231*].

(3) Transaction in which creditor is state agency [*15 U.S.C. § 1635(e)(3)*; *12 C.F.R. § 226.23(f)(3)*].

(4) Advance, other than initial advance, in series of advances or in series of single-payment obligations that is treated as single transaction [*see 12 C.F.R. § 226.17(c)(6)*], if following have been given to consumer [*12 C.F.R. § 226.23(f)(4)*; *see 15 U.S.C. § 1635(e)(4)*]:

(a) Notice of right to rescind [*see 12 C.F.R. § 226.23(b)*]; and

(b) All material disclosures.

(5) Renewal of optional insurance premiums that is not considered refinancing [*12 C.F.R. § 226.23(f)(5)*; *see 12 C.F.R. § 226.20(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingLiabilityReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.112

§ 25.112 Applicability of Real Estate Settlement Procedures Act (RESPA)

NOTE:
A loan that meets all of the specified requirements and is not made to finance an exempt transaction will be considered a federally related mortgage loan subject to RESPA [*12 U.S.C. § 2602(1)* (definition); *see 24 C.F.R. §§ 3500.2, 3500.5* (definitions of terms; coverage of RESPA].

1. Determine whether loan meets or will meet following requirements:

a. Loan will not be temporary financing, such as construction loan [*12 U.S.C. § 2602(1)*].

b. Loan will be secured by first or subordinate lien (including refinancing of any secured loan) on residential real property, which is located in United States [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (2))], and either:
(1) At least one structure designed principally for occupancy by one-to-four families (including individual units of condominiums or cooperatives) is located on property or, following settlement, will be constructed on property using proceeds of loan [*12 U.S.C. § 2602(1)(A)*]; or

(2) Manufactured home is located on property or, following settlement, will be placed on property using proceeds of loan [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(i)(B))].

c. Loan will satisfy one of following requirements:

(1) Made in whole or in part by any lender that is regulated by, or whose deposits or accounts are insured by, any agency of United States [*12 U.S.C. § 2602(1)(B)(i)*]; or

(2) Made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way [*12 U.S.C. § 2602(1)(B)(ii)*]:

(a) By Secretary of Housing and Urban Development or any other officer or agency of United States; or

(b) Under or in connection with housing or urban development program administered by Secretary of Housing and Urban Development or housing or related program administered by any other officer or agency of United States; or

(3) Intended to be sold by originating lender to either [*12 U.S.C. § 2602(1)(B)(iii)*]:

(a) Federal National Mortgage Association (Fannie Mae);

(b) Government National Mortgage Association (Ginnie Mae);

(c) Federal Home Loan Mortgage Corporation (Freddie Mac); or

(d) Financial institution from which it is to be purchased by Freddie Mac; or

(4) Made in whole or in part by creditor [*see 15 U.S.C § 1602(f)* (definition)] that makes or invests in residential real estate loans aggregating more than $1,000,000 per year [*12 U.S.C. § 2602(1)(B)(iv)*]; or

NOTE:

For these purposes, a state agency or state instrumentality is not a creditor, and a residential real estate loan is any loan secured by residential property, including single-family and multifamily residential property [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(D))].

(5) Originated by dealer or, if obligation is to be assigned to any maker of mortgage loans listed in (1)-(4) above, originated by mortgage broker [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(E))]; or

(6) Secured by home equity conversion mortgage (also called reverse mortgage) issued by any maker of mortgage loans listed in (1)-(4) above [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(F))].

2. Determine whether loan or transaction falls within one of following categories, which are exempt from RESPA:

a. Loan on property constituting 25 or more acres, regardless of [*24 C.F.R. § 3500.5(b)(1)*]:

(1) Whether land is vacant;

(2) Whether land contains residential structure; or

(3) Purpose of loan.

b. Extension of credit primarily for business, commercial, or agricultural purpose [*24 C.F.R. § 3500.5(b)(2)*].

NOTE:

The definition of such an extension of credit for these purposes generally parallels Regulation Z [***see** 12*

C.F.R. § 226.3(a)(1)], and persons may rely on Regulation Z in determining whether the exemption applies. However, the exemption for business purpose loans does not include any loan to one or more persons acting in an individual capacity (natural persons) to acquire, refinance, improve, or maintain one- to four-family residential property used, or to be used, to rent to other persons. An individual who voluntarily chooses to act as a sole proprietorship is not considered to be acting in an individual capacity for these purposes [*24 C.F.R. § 3500.5(b)(2)*].

c. Temporary financing, such as construction loan [*24 C.F.R. § 3500.5(b)(3)*].

NOTE:

This exemption does not apply to a loan made to finance construction of one- to four-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by RESPA. Any construction loan for new or rehabilitated one- to four-family residential property, other than a loan to a bona fide builder (that is, a person who regularly constructs one- to four-family residential structures for sale or lease), is subject to RESPA if its term is for two years or more. A bridge loan or swing loan in which a lender takes a security interest in otherwise covered one- to four-family residential property is not covered by RESPA [*24 C.F.R. § 3500.5(b)(3)*].

d. Loan secured by vacant or unimproved property, unless within two years from date of loan settlement, any structure or manufactured home will be constructed or placed on that property using loan proceeds [*24 C.F.R. § 3500.5(b)(4)*].

NOTE:

If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by RESPA [*24 C.F.R. § 3500.5(b)(4)*].

e. Any assumption in which lender does not have right expressly to approve subsequent person as borrower on existing federally related mortgage loan [*24 C.F.R. § 3500.5(b)(5)*].

NOTE:

Any assumption in which the lender's permission is both required and obtained is covered by RESPA, whether or not the lender charges a fee for the assumption [*24 C.F.R. § 3500.5(b)(5)*].

f. Any conversion of federally related mortgage loan to different terms that are consistent with provisions of original mortgage instrument, as long as new note is not required, even if lender charges additional fee for conversion [*24 C.F.R. § 3500.5(b)(6)*].

g. Bona fide transfer of loan obligation in secondary market, except as otherwise provided in RESPA and Regulation X [*24 C.F.R. § 3500.5*; *see 24 C.F.R. § 3500.21*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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10-25 California Legal Forms--Transaction Guide § 25.113

§ 25.113 Miscellaneous

1. In case of new loan [*see § 25.120*], determine person who will negotiate with lender on buyer's behalf:

a. Buyer.

b. Attorney for buyer.

NOTE:
Counsel may negotiate a loan for a client without being deemed a mortgage loan broker [***see*** *Bus. & Prof. Code §§ 10131(d), 10230 et seq., 10240 et seq.*; *10 Cal. Code Reg. § 2840 et seq.*] because an attorney is expressly excluded from the definition of broker for purposes of licensing requirements [*Bus. & Prof. Code § 10133(a)(3)*; ***see*** *Bus. & Prof. Code § 10133.1(a)(5)*].

c. Buyer's real estate broker.

NOTE:
The broker should have current information on the terms and availability of specific loans. The client may also wish to have the broker recommend a lender, obtain an informal commitment for the loan on the property, or prepare or assist in the preparation of material to be submitted by the buyer. For further discussion of real estate brokers, see Ch. 21, ***Agreements With Real Estate Brokers and Agents*** **.**

d. Loan broker.

NOTE:
Loan brokers are usually either loan correspondents of institutional lenders (for example, mortgage companies) representing the lenders in the placement of loans, or brokers who are employed by borrowers and are aware of the needs and policies of institutional and private lenders.

2. If client wishes to obtain VA guaranteed loan [*see § 25.131*], determine whether client is qualified borrower, that is, whether client [*38 U.S.C. § 3702(a)*]:

NOTE:

If a veteran served on active duty during two or more of the periods below, entitlement derived from service during the most recent period (1) will cancel any unused entitlement derived from service during any earlier period and (2) will be reduced by the amount by which entitlement from service during any earlier period has been used to obtain certain direct, guaranteed, or insured housing loans [***see*** *38 U.S.C. § 3702(a)(1)*].

a. Was on active duty at least 90 days at any time during World War II, Korean Conflict, or Vietnam Era.

b. After September 15, 1940, was discharged or released from active duty for service-connected disability.

c. Satisfies either of following criteria:

(1) Served more than 180 days after July 25, 1947, and was discharged or released under conditions other than dishonorable; or

(2) Has served more than 180 days in active duty status and continues on active duty without break in service.

d. Served on active duty at least 90 days at any time during Persian Gulf War, other than veteran ineligible for benefits by reason of *38 U.S.C. § 5303A(b)* (imposing certain minimum active-duty service requirements).

3. If client wishes to obtain Cal-Vet loan [*see § 25.132*], determine whether client:

NOTE:

The veteran must satisfy all of the following criteria to be eligible for a Cal-Vet loan [***see*** *Mil. & Vet. Code §§ 980, 987.52*]. The surviving spouses of eligible California veterans may also be eligible for benefits under certain circumstances. A veteran who served during more than one qualifying war period, as specified in *Mil. & Vet. Code § 980*, and who repaid in full a Cal-Vet loan, will be granted a subsequent opportunity to purchase a property under the Cal-Vet loan program if, among other things, the qualifying war periods were served during different periods of enlistment, even if there was no distinct break during enlistments [*12 Cal. Code Reg. § 305.1(b), (d)*; ***see*** *12 Cal. Code Reg. § 305.1(a)* (overnight reenlistment qualifies as separate period of service); ***see also*** *12 Cal. Code Reg. §§ 305.1(c), 305.2*].

a. Satisfies any of following service requirements:

NOTE:

Active duty is full-time duty in the active military service of the United States, and active service is service on active duty or full-time National Guard duty [*Mil. & Vet. Code § 980(c)*; ***see*** *10 U.S.C. § 101(d)*].

(1) Is currently on active duty in military or naval service of United States [*Mil. & Vet. Code § 987.52(b)*; *see 12 Cal. Code Reg. § 300.6*].

(2) Served in active military, naval, or air service of United States after April 5, 1917, and before November 12, 1918 [*Mil. & Vet. Code § 980*].

(3) Served at least 90 consecutive days of active duty in military, naval, or air service of United States, or was honorably discharged for service-connected disability during such 90-day period, any portion of which was performed [*Mil. & Vet. Code § 980*]:

(a) After December 6, 1941, and before January 1, 1947.

(b) After June 26, 1950, and before February 1, 1955.

(c) After February 27, 1961, and before August 5, 1964, in case of a veteran who served in Republic of Vietnam during that period.

(d) After August 4, 1964, and before May 8, 1975.

(e) After August 1, 1990, to and including date on which territories in and around Arabian Peninsula ceased to be designated as place where United States armed forces were engaged in combat, as described in Executive Order 12744.

(f) At any time in campaign or expedition for service in which United States government authorized medal, regardless of number of days served on active duty [*see 12 Cal. Code Reg. § 300.1*].

(g) At any time in Somalia, or in direct support of troops in Somalia, during Operation Restore Hope, regardless of number of days served.

(4) As member of reserves or National Guard, satisfied all of following service requirements:

(a) Was called to, and released from, active duty, regardless of number of days served.

(b) Was called while presidential executive order specified that United States was engaged in combat or homeland defense.

(c) Received honorable discharge or was released from active duty under honorable conditions.

(5) Served in Merchant Marine Service of United States, and has been granted veteran status by Secretary of Defense under Title IV of GI Improvement Act of 1977 [*see* Pub. L. No. 95-202].

(6) Qualifies under federal laws for revenue bond or unrestricted funds [*see I.R.C. § 143*] and did following:

(a) Served in active military, naval, or air service of United States for not less than 90 consecutive days.

(b) Received honorable discharge or was released from active duty under honorable

conditions.

(7) Qualifies for funds made available from qualified mortgage revenue bond issued pursuant to *26 U.S.C. § 143* and who, at time of application for Cal-Vet benefits:

(a) Is member of California National Guard or reserve component of any branch of United States armed forces.

(b) Has enlisted or has been commissioned in that service for period of not less than six years and has completed minimum of one year of satisfactory service.

b. Was honorably discharged or released under honorable conditions (unless is currently on active duty) [*Mil. & Vet. Code § 980*].

c. Was discharged from service, or released from active duty, within 25 years from anticipated date of filing of application, unless applicant [*Mil. & Vet. Code § 986.01*]:

(1) Was wounded or is disabled as result of wartime service; or

(2) Was previously declared prisoner of war.

d. If client's service is or was after January 1, 1977, or client was discharged from military service longer than 30 years from receipt or postmark of client's loan application [*see 12 Cal. Code Reg. § 300.2(b), (d)*]:

NOTE:

If the client meets either of those criteria, the client must qualify for revenue bond funding [*12 Cal. Code Reg. § 300.2(b)*]. To qualify for a loan funded by revenue bonds, the client must satisfy the additional criteria set forth below [*12 Cal. Code Reg. § 300.2(d)*]. If an applicant served on active duty before 1977 and was released from active military service less than 30 years from the receipt or postmark of the application, the applicant will be eligible for consideration for a loan funded by general obligation bonds [*12 Cal. Code Reg. § 300.2(a)*]. If an applicant qualifies for both general obligation and revenue bond funding, the applicant must accept revenue bond funding [*12 Cal. Code Reg. § 300.2(c)*].

(1) Client is first-time home buyer as defined in *I.R.C. § 143(d)*, or is purchasing residence in targeted area as defined in *I.R.C. § 143(j)*.

(2) Property has purchase price that is within average area purchase-price safe harbor as defined in *I.R.C. § 143(e)(2)*.

(3) Client has income that satisfies federal income limitation for revenue bond funding as defined in *I.R.C. § 143(f)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsEffective RepresentationReal Property LawBrokersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingState Programs



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10-25 California Legal Forms--Transaction Guide §§ 25.114-25.119

[Reserved]

§§ 25.114[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide for Conventional Financing

10-25 California Legal Forms--Transaction Guide § 25.120

§ 25.120 Obtaining New Loan

1. If client as borrower is represented by loan broker, advise client of maximum amount of charges permitted by statute:

NOTE:
Included charges are the brokerage or commissions contracted for or to be received by any person negotiating, procuring, or arranging or making the loan, and the origination fees, points, bonuses, and other charges to be received by a broker if he or she elects to act as a lender rather than an agent in the transaction [*Bus. & Prof. Code § 10241(b)*].

a. For first deeds of trust [*Bus. & Prof. Code § 10242(b)(1)*]:
(1) 5 percent of principal amount for term of less than three years.

(2) 10 percent of principal amount for term of three years or more.

b. For second deed of trust [*Bus. & Prof. Code § 10242(b)(2)*]:

(1) 5 percent of principal amount for term of less than two years.

(2) 10 percent of principal amount for term of two but less than three years.

(3) 15 percent for term of three years or more.

2. Summarize for client customary steps involved in lender's evaluation and approval process.

a. Evaluation of loan application, including investigation and verification of information contained in application.

b. Inquiry of borrower concerning accuracy of information contained in application.

c. Review and approval of credit status and evaluation of personality and character of borrower in relation to his or her creditworthiness.

d. Disclosure and discussion of costs of loan, including closing costs.

e. Negotiation with applicant regarding amount of loan, taking into consideration applicant's ability to repay and value of security.

f. Approval (or denial) of loan by loan committee and notification of borrower.

3. Explain to borrower customary obligations of lender and borrower under loan.

a. Lender is not bound by acceptance of application, and loan proceeds will not be made available to borrower until trust deed is recorded and all other requirements met.

b. Borrower purchasing property must furnish title insurance policy at borrower's expense.

c. Borrower must pay notarial fees, recording costs, tax service, and usual bank charges for loan, and give lender right to advance funds for these purposes and to charge them against loan.

d. Borrower must permit lender to retain title papers during existence of loan.

e. Borrower must execute loan papers in satisfactory form.

f. Borrower must have property insured in manner required by or acceptable to lender.

g. Borrower must not permit work to be done or materials to be placed on property until after recordation of trust deed securing loan.

4. Advise client that lender will not approve or fund loan until lender has received appraisal by qualified appraiser.

NOTE:

A lender must provide notice to the loan applicant of the applicant's right, on request, to receive a copy of the appraisal [***see*** *Bus. & Prof. Code § 11423*; ***see also*** *§ 25.25[4]*. For additional coverage of appraisals, see California Real Estate Law and Practice, Ch. 101, ***Conventional Financing (Loans)*** (Matthew Bender).

5. Arrange for or confirm submission of following to lender:

a. Recent structural pest control report on property.

b. Certification that corrective work itemized in report has been completed.

6. Explain to client various forms of standard title insurance coverage [*see* Ch. 26A, *Title Insurance*]:

a. ALTA standard loan insurance policy.

b. CLTA standard coverage California title insurance policy.

c. Various guaranties.

d. CLTA endorsements:

(1) Covenants, conditions, and restrictions.

(2) Foundations.

(3) Mechanics' liens.

(4) Single-family homeowner's.

7. Review preliminary title report to verify report contains only exceptions to title commonly permitted by first lender, such as:

a. Liens for current taxes.

b. Current nondelinquent assessments.

c. Outstanding or reserved oil, gas, or mineral rights.

d. Existing rights-of-way.

e. Use or occupancy restrictions that do not provide for forfeiture of title in event of violation.

8. Cause preliminary title report for property to be submitted to lender.

9. Explain to client common requirements of lender for hazard insurance and fire insurance [*see § 25.19*]:

a. Coverage in amount equal to replacement value of improvements on property.

b. Delivery of policy to lender, either directly from borrower or through escrow.

NOTE:
A lender may not require a borrower under a loan secured by real property to provide hazard insurance in an amount exceeding the replacement value of the improvements on the property as established by the property insurer selected by the borrower [*Civ. Code § 2955.5(a)*]. The lender must give the borrower a written disclosure of this provision as soon as practicable and in any case before execution of any note or security documents [*Civ. Code § 2955.5(b)*]. For residential property, standard homeowner's package policies are usually acceptable.

10. Explain to client that lender may require use of tax agency service that will check and report payment and delinquencies of income and property taxes, and public improvement assessments and bonds that might be prior lien on property.

11. Explain general requirements of impound or trust fund accounts for payment of taxes and insurance premiums [*see § 25.18*].

12. Inform client of possible loan charges and closing costs, which may include:

a. Loan fee (setup or origination charge or points).

b. Credit report.

c. Appraisal report.

d. Drafting loan papers (note and trust deed or mortgage).

e. Notary fee for acknowledgment of trust deed.

f. Title insurance policy.

g. Escrow fees.

h. Recording fee for trust deed.

i. Tax service.

NOTE:
The amount of loan expenses will vary depending on the type of loan and the lender. When a loan is negotiated by a loan broker subject to regulation by the Real Estate Commissioner, the total loan costs, expenses, and interest [***see*** *Bus. & Prof. Code § 10241(a)*] are limited by statute [***see*** *Bus. & Prof. Code §§ 10242(a)*, *10245*].

13. Prepare for closing and funding of loan.

a. Have borrower execute escrow instructions [*see* Ch. 26, *Real Property Escrows*] providing, among other things, for:

(1) Close of escrow to be contingent on obtaining loan of specified amount from particular lender.

(2) Payment of loan proceeds to seller.

(3) Payment of loan proceeds or other funds of borrower for all loan and transaction costs previously authorized by borrower.

b. Draft note and trust deed (or mortgage) [*see* Ch. 25A, *Security Instruments for Real Estate Financing*] or review them if drafted by escrow holder.

c. Have parties execute and acknowledge note and trust deed and arrange for certification of acknowledgments by authorized officer (for example, notary public) [*see Gov. Code § 27287*; *Civ. Code § 1189*].

NOTE:
This execution generally occurs at the offices of the escrow holder. However, in the case of larger transactions, it may take place at the offices of the lender or the attorney for the buyer or seller.

Generally, a lender will not charge interest on funds until they are disbursed, even if the note is signed before closing of escrow. Some lenders, when drafting the note, will leave the date for the commencement of interest blank, and then fill in the date of recordation of the trust deed. Others will agree to waive interest until closing. However, when there is some delay in paying out the funds, the lender may require that after a certain number of days from the date of the note, interest will be charged on the full amount of the note regardless of whether all of the loan proceeds have been disbursed.

For loans secured by a mortgage or trust deed on real property improved with one to four residential dwelling units, interest may not be charged for a period in excess of one day before recording of the mortgage or trust deed if the loan proceeds are paid into escrow, or if there is no escrow, the date on which the loan proceeds have been made available for withdrawal as a matter of right [*Civ. Code § 2948.5(a)*; ***see*** *Ins. Code § 12413.1(d)* (withdrawal as matter of right)]. Interest may commence to accrue on the business day immediately preceding the day of recording if (1) the borrower affirmatively requests, and the lender agrees, that the recording will occur on Monday, or on a day immediately following a bank holiday, and (2) the borrower receives disclosure information concerning the amount of additional per diem interest charged to facilitate recording on Monday or the day following a holiday, as the case may be, and stating that it may be possible to avoid the additional per diem interest charge by recording the deed of trust on a day immediately following a business day, and the borrower acknowledges receipt of this information by signing a copy of the disclosure document before placing funds in escrow [*Civ. Code § 2948.5(b)*].

In any case, these provisions do not apply to loans made or negotiated by real estate brokers that are subject to *Bus. & Prof. Code § 10242(c)*, which prohibits charging interest until the date the proceeds of the loan are made available to the lender or are deposited in escrow [*Civ. Code § 2948.5(c)*]. For further discussion, see Ch. 25A, ***Security Instruments for Real Estate Financing*** **.**

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsInsurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.121

§ 25.121 Payoff of Seller's Lender When Buyer Is Obtaining New Loan

1. Confirm that seller deposits escrow instructions by seller [*see* Ch. 26, *Real Property Escrows*] providing for payment of balance of seller's existing loan from funds deposited by buyer, and instructing escrow agent to obtain following items from lender:

a. Payoff demand from seller's lender showing balance due on loan [*see §§ 25.253, 25.254*; Ch. 25B, *Subordination, Assumption, and Assignment*].

b. Lender's request to trustee for reconveyance of trust deed [*see* Ch. 25C, *Release and Reconveyance*].

c. Note, trust deed, and insurance policies.

2. Verify deposit of escrow instructions by seller's lender that [*see* Ch. 26, *Real Property Escrows*]:

a. Provide for deposit by lender into escrow of documents described above.

b. Request escrow agent to do following when it is authorized and prepared to disburse balance due on loan and all other amounts due under note or trust deed:
(1) Record reconveyance (executed and acknowledged by trustee); and

(2) Return to seller note, trust deed, and any insurance policies in force.

3. Confirm that escrow holder, lender, and trustee perform their duties [*see* Ch. 25C, *Release and Reconveyance*].

4. Verify escrow agent's receipt of deed of full reconveyance from trustee [*see* Ch. 25C, *Release and Reconveyance*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPurchase & SaleEscrow



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10-25 California Legal Forms--Transaction Guide § 25.122

§ 25.122 Assumption of Seller's Obligation

NOTE:

A buyer of real property may assume (that is, agree to pay and discharge) an existing loan secured by the property as part of the purchase price. Although the assuming buyer becomes personally and primarily liable for the debt [*Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 P. 411*], the seller remains liable as a surety for the buyer [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531*] unless the lender agrees to a novation [***see*** *Civ. Code § 1530 et seq.*] or agrees to release the seller from liability [***see*** *Civ. Code § 1541 et seq.*]. In the event of a default when the seller has not been released from liability, the lender may sue either the seller or the assuming buyer; but the lender must generally first foreclose against the property [***see*** *Code Civ. Proc. § 726*; ***see also*** Ch. 25D, ***Foreclosure***].

The advantages of assumption are that the loan fee will generally be less than for a new loan, and the amount the buyer will have to pay for the lender's title insurance will be less. The interest on the loan may be less than current market rates but may be increased to the market rate as a condition of the assumption. If the seller has a large amount of equity in the property, a disadvantage of an assumption is that the borrower will be required to have a large down payment to cover the seller's equity.

Many lenders include a due-on-sale provision in their deeds of trust, under which they may declare the balance of the loan immediately due and payable on transfer of the property unless their consent is obtained. For a discussion of due-on-sale clauses, see Ch. 25A, ***Security Instruments for Real Estate Financing*** **.**

1. Draft or review assumption agreement and escrow instructions [*see* Ch. 25B, *Subordination, Assumption, and Assignment ;* Ch. 26, *Real Property Escrows*].

2. Confirm that seller obtains statement from lender showing terms of loan and balance due [*Civ. Code § 2943*; *see* Ch. 25B, *Subordination, Assumption, and Assignment*].

NOTE:

Although the statement is primarily for the buyer's benefit, the seller must make the request. The lender may charge a limited fee for the statement [***see*** *Civ. Code § 2943(e)(6)*].

Provisions in the assumption agreement concerning the balance of the note to be assumed usually specify an approximate balance. If the lender's statement shows a balance that is more or less than the amount specified in the agreement, the cash portion of the purchase price will usually have to be adjusted to compensate.

3. Advise client that lender may require any or all of following as conditions of assumption:

a. Credit report on buyer.

b. Buyer's financial statement.

c. Agreement by buyer to become client (for example, bank depositor) of lender.

d. Increase of interest rate to market rate, if necessary.

e. Execution of assignment and assumption agreement.

f. Seller's agreement to remain personally liable on loan.

g. Endorsement of insurance policies to buyer.

h. New title insurance policy or endorsement naming new owner.

i. Assignment of seller's impound account for tax and insurance payments to buyer.

4. Confirm that lender has consented to assumption.

5. Have parties execute assumption agreement [*see* Ch. 25B, *Subordination, Assumption, and Assignment*].

NOTE:

The assumption agreements provided by most institutional lenders include (1) the buyer's agreement to assume; (2) the seller's agreement to remain personally liable on the loan; (3) the lender's formal consent to the assumption; and (4) an assignment of the impound account from the seller to the buyer [***see*** Ch. 25B, ***Subordination, Assumption, and Assignment*** **,** Pt. B].

6. Confirm that seller assigns his or her interest in fire insurance policies to buyer.

NOTE:

The process of assumption may be completed before escrow opens, but more commonly it is handled entirely by the escrow agent. For example, the escrow agent will obtain the beneficiary's statement, a copy of the assumption agreement, and the fire insurance policies from the lender, and will return them to the lender after having the agreement signed by the parties and the policies assigned from the seller to the buyer [***see*** Ch. 26,

Real Property Escrows].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptions



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10-25 California Legal Forms--Transaction Guide §§ 25.123-25.129

[Reserved]

§§ 25.123[Reserved]



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10-25 California Legal Forms--Transaction Guide § 25.130

§ 25.130 FHA Insured Loan

1. Review with client types of available FHA insured loans based on property to be purchased:

NOTE:
The following outlines only some of the more common types of FHA insured loans. Several others, such as home loans for lower income families [***see*** *12 U.S.C. § 1715z*; *24 C.F.R. § 235.1 et seq.*], cooperative housing mortgage insurance [***see*** *12 U.S.C. § 1715e*; *24 C.F.R. §§ 200.30, 213.1 et seq.*], and urban renewal projects [***see*** *12 U.S.C. § 1715k*; *24 C.F.R. §§ 200.32,* 220.1 et seq.], are also available.

a. Home mortgage insurance [*see 12 U.S.C. § 1709*; *24 C.F.R. § 203.1 et seq.*].
(1) Amount insurable for occupant mortgagor of principal or secondary residence is lesser of [*24 C.F.R. §§ 200.10, 203.18*; *see 24 C.F.R. § 203.18(f)(1), (2)* (principal residence and secondary residence defined)]:

NOTE:
If the client believes that the mortgage limit for an area does not accurately reflect the extent to which middle income and moderate income persons have limited housing opportunities because of high prevailing housing sales prices, the client may submit documentation in support of an alternative mortgage limit [*24 C.F.R. § 203.18b(a)(1)(i)*].

(a) Dollar limitation specified by regulations (which varies depending on whether residence is for one, two, three, or four families) [*see 24 C.F.R. § 203.18(a)(1)*].

(b) Amount computed under statutory formula based on ratio loan bears to appraised value of property [*see 24 C.F.R. § 203.18(a)(2)-(4)*; *see also 24 C.F.R. § 203.18(f)(4)* (appraised value defined)].

NOTE:
The formula varies depending on whether the residence is or will be the mortgagor's principal or secondary residence and whether, in the case of a principal residence, the residence was approved for insurance before the beginning of construction [***see*** *24 C.F.R. § 203.18(a)(2)-(4)*]. In no event may the mortgage involve a principal obligation in excess of 98.75 percent of the appraised value of the property (97.75 percent in the case of a mortgage with an appraised value in excess of $50,000), plus the amount of the mortgage insurance premium paid at the time the mortgage is insured [*24 C.F.R. § 203.18(g)*].

(2) Amount insurable for eligible nonoccupant mortgagors [*see 24 C.F.R. § 203.18(f)(3)* (definition)] is same as amount insurable for occupant mortgagors, except when lesser amount is expressly provided for in regulations [*24 C.F.R. § 203.18(c)*].

(3) Charges, fees, or discounts collected by lender cannot exceed statutory maximum [*see 24 C.F.R. § 203.27*].

b. Home mortgage insurance for condominium unit [*see 12 U.S.C. § 1715y*; 24 C.F.R. §§ 200.26, *234.1 et seq.*]:

NOTE:
The purpose of this assistance is to finance the acquisition of individual units in condominium projects containing four or more family units [***see*** *24 C.F.R. § 234.1(k)*].

(1) Maximum amount insurable for occupant mortgagors is lesser of [24 C.F.R. § 234.27(a)]:

(a) 95 percent of median one-family house price in area, as determined by VA, or 75 percent of dollar amount limitation determined under § 305(a)(2) of Federal Home Loan Mortgage Corporation Act [*see* 24 C.F.R. § 234.27(a)(1)].

NOTE:
If the FHA finds that middle-income and moderate-income persons have limited housing opportunities in any geographic area because of high prevailing housing sales prices, the FHA may increase the applicable dollar limitation [***see*** 24 C.F.R. § 234.27(b)].

(b) Amount computed under formula that is based on ratio loan bears to appraised value of property.

NOTE:
The formula varies depending on whether the dwelling is a principal or secondary residence and whether it was approved for insurance before the commencement of construction [***see*** 24 C.F.R. § 234.27(a)(2)-(4)].

(2) Maximum amount insurable for nonoccupant mortgagors is [24 C.F.R. § 234.27(d)]:

(a) Full amount for occupant mortgagors if nonoccupant mortgagor fulfills certain requirements [*see* 24 C.F.R. § 234.27(d)(2)].

(b) Lesser of amount computed for occupant mortgagors or 85 percent of appraised value of unit.

(3) Charges, fees, or discounts collected from mortgagor by mortgagee cannot exceed regulatory maximums [24 C.F.R. § 234.48].

2. Summarize for client procedure for obtaining conditional commitment from FHA setting appraised valuation and maximum insurable loan terms.

NOTE:

This first step in the processing of an FHA loan is taken by the seller and lender, not the buyer, to qualify the property, and may be taken before the buyer is known. If the buyer is known, the application of the seller and lender may be accompanied by the buyer's application. The commitment (appraisal) fee that the lender must pay the FHA is usually collected from the seller in advance.

a. Lender and seller must prepare and sign application for property appraisal and preliminary commitment and then submit it to FHA.

b. If application is acceptable for processing, FHA:

(1) Provides lender with notice of acceptance of application and assigned case number.

(2) Issues conditional commitment to lender.

(3) Sends statement of appraised value to lender for delivery to buyer before sale of property.

NOTE:

In signing the form, the seller (or the builder) agrees to deliver the statement of appraised value to the purchaser. The FHA must deliver the statement before the lender submits the application for credit approval and firm commitment to the FHA. The purchaser must certify on the application that he or she has received the statement of appraised value. The statement of appraised value includes the following items: (1) the appraised value or replacement cost of the property; (2) an estimate of the buyer's closing costs (such as fees for drawing instruments, recording, tax service, title insurance, documentary transfer taxes, and origination fees); and (3) estimates of fire insurance, taxes, maintenance, repairs, heat, and utilities.

3. Draft sales agreement to include (or review agreement to confirm existence of) following provisions:

a. Provision(s) making buyer's obligation contingent on:

(1) Seller delivering to buyer statement from FHA setting forth appraised value for property that equals or exceeds specified amount.

(2) Buyer obtaining loan and FHA approval.

b. Provision for payment by seller of discount to lender.

NOTE:

When the lender makes an FHA loan with the intention of selling the loan, the lender usually will condition the making of the loan on an agreement by the seller to pay a discount (points), since the buyer cannot be required to pay more than the rate and expenses specified by the FHA. Conditions in the secondary market dictate the amount of the discount.

4. Confirm that lender finds buyer acceptable as borrower.

5. Have borrower complete and sign application for credit approval and firm commitment and submit it to lender for transmittal to FHA.

NOTE:

The application is a detailed financial questionnaire and request for a loan of specific terms or for the maximum insurable amount. It provides information necessary to determine the probable ability of the prospective borrower to make the payments on the mortgage for which he is applying and to maintain the property. The application for firm commitment must be filed before the expiration of the preliminary commitment. If the application for the preliminary commitment has not been filed, it should accompany the application for a firm commitment.

6. Obtain or assist lender in obtaining following documents, which must accompany application:

a. Credit report on buyer.

b. Verification of employment.

c. Verification of deposits (used to verify borrower's cash assets).

d. Copy of executed sales or construction contract.

e. For refinancing loan, separate statement signed by borrower:

(1) Itemizing those debts to be paid from loan proceeds; and

(2) Identifying those debts secured by liens of record.

f. Other documents required by FHA.

7. Obtain firm commitment from FHA.

8. Draft or review, as appropriate, note and trust deed in accordance with terms of commitment.

9. Review lender's escrow instructions [*see* Ch. 26, *Real Property Escrows*], which may cover following items in addition to normal items covered by lender's instructions:

a. Conditions required by conditional and firm commitments.

b. Request for ALTA standard loan policy with CLTA covenants, conditions, and restrictions endorsement or other CLTA endorsements.

c. Collection from buyer of FHA insurance fee.

d. Collection for trust fund impound accounts, if any, for taxes and insurance.

e. Collection of seller's agreed-on discount (points), if any.

f. Collection of interest [*see 24 C.F.R. § 203.27(a)(5)*]:

(1) From later of:
(a) Date of closing.

(b) Date mortgage proceeds are disbursed by mortgagee to account of mortgagor or mortgagor's creditors.

(2) To date of beginning of amortization.

10. Assist client in closing transaction in same manner as conventional loan [*see § 25.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsInsuranceReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional MortgagesReal Property LawProperty Valuation



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10-25 California Legal Forms--Transaction Guide § 25.131

§ 25.131 VA Guaranteed Loan

1. Confirm veteran status of potential borrower [*see § 25.113*].

2. Have borrower complete and sign request for certificate of eligibility [*see § 25.210*] and send it to VA regional office serving area of residence together with proof of service.

3. Simultaneously or subsequently submit request for determination of reasonable value [*see § 25.211*] to local VA office.

NOTE:
A loan that exceeds the VA-determined reasonable value of the property will not be guaranteed [*38 U.S.C. § 3710(b)(5)*] unless the veteran certifies that he or she has paid in cash from his or her own resources a sum equal to the difference between the purchase price or cost of the property and its reasonable value [***see** 38 C.F.R. § 36.4336(a)(3)*].

4. Have borrower complete and sign application for home loan guaranty [*see § 25.212*] and cooperate with lender in obtaining following items for transmittal with application to VA regional office:

a. Credit report on veteran.

b. Verification of employment of veteran (and spouse, if applicable), showing regular income from employment.

c. Verification of deposit (used to verify cash assets from any source).

d. Copy of executed sales or construction contract.

e. Certificate of reasonable value.

f. Certificate of eligibility.

g. Any additional documents required by local VA office.

5. Advise client that VA will send certificate of commitment to lender if application is approved.

6. Have borrower sign certificate of loan disbursement required by VA at closing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansReal Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawProperty Valuation



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10-25 California Legal Forms--Transaction Guide § 25.132

§ 25.132 Cal-Vet Loan

1. Confirm veteran status of prospective borrower [*see § 25.113*].

2. Have borrower complete and sign Cal-Vet loan application [*see § 25.220*].

3. Designate preference, if any, on loan application [*see § 25.13[3][f]*].

NOTE:
An applicant who qualifies for a preference should indicate the reasons for the asserted preference on the loan application and should enclose documentary evidence, if available, in support of the claim for priority.

4. Submit application to Cal-Vet office [*12 Cal. Code Reg. § 302*], together with following:

a. If veteran was wounded or disabled in military service, documentary evidence of wound or disability [*12 Cal. Code Reg. § 304*].

b. Originals or certified copies of all pertinent military service or separation documents [*12 Cal. Code Reg. § 303(a)*].

NOTE:
The military service or separation documents must show inclusive dates of service and honorable discharge or release from active duty under honorable conditions [*12 Cal. Code Reg. § 303(a)*].

5. If Cal-Vet notifies client of adverse credit report, and client disagrees with information contained in credit report, assist client in pursuing disagreement with credit reporting agency [*see 12 Cal. Code Reg. § 309.2*].

NOTE:

The following factors, information, and procedures will be used to evaluate the applicant's financial status: (1) a credit report [***see*** 12 Cal. Code Reg. §§ 301.1, *309.2*]; (2) if the applicant has previously been adjudged bankrupt, an examination of the sufficiency of the applicant's income and assets [***see*** *12 Cal. Code Reg. § 309.4*]; (3) specified financial information submitted by the applicant [***see*** *12 Cal. Code Reg. § 309.5*]; and (4) certain information verifying the income or employment status of the applicant [***see*** 12 Cal. Code Reg. § 305.6]. If Cal-Vet refers the applicant to a credit reporting agency to resolve a dispute regarding an adverse credit report, the loan application will be held open for 30 days from the date of the referral, to give the applicant the opportunity to pursue the disagreement with the agency [*12 Cal. Code Reg. § 309.2*].

6. If application is denied, review Cal-Vet's statement of reasons for rejection [*see 12 Cal. Code Reg. § 309.3*].

NOTE:

Cal-Vet must give the applicant a statement of specific reasons for the denial and must confirm the statement in writing within 30 days from the receipt of the complete loan application package from the applicant. If the denial is based on information in the credit report, Cal-Vet must consider a new loan application after the applicant has established a credit history for at least six months following the date of original submission of the denied application [*12 Cal. Code Reg. § 309.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesMilitary & Veterans LawVeteransBenefitsLoansReal Property LawFinancingState Programs



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10-25 California Legal Forms--Transaction Guide §§ 25.133-25.139

[Reserved]

§§ 25.133[Reserved]



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E. Procedural Guide to Compliance With Regulations

10-25 California Legal Forms--Transaction Guide § 25.140

§ 25.140 TILA Disclosures and Related Requirements

NOTE:
For determinations regarding the applicability of the Truth in Lending Act (TILA) [***see*** *15 U.S.C. § 1601 et seq.*] and Regulation Z [***see*** 12 C.F.R. Pt. 226], see *§ 25.111*.

1. Confirm that lender provides borrower with statement containing required TILA disclosures as follows:

NOTE:
For a summary of the contents of the disclosure statement and coverage of some of the more important disclosures, see *§ 25.23*. For a detailed listing of the required contents of the disclosure statement, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** **.** This guide uses "creditor" and "consumer" rather than "lender" and "borrower" because the former terms are used in TILA.

a. In transaction subject to Real Estate Settlement Procedures Act [*see 12 U.S.C. § 2601 et seq.*; *see also § 25.24*], in case of any extension of credit that is secured by dwelling of consumer, instruct creditor to [*15 U.S.C. § 1638(b)(2)(A)*]:
(1) Make good faith estimates of the disclosures required under *15 U.S.C. § 1638(a)*.

(2) Mail or deliver them not later than three business days after receipt of borrower's loan application, which must be at least seven business days before consummation of transaction.

b. In all other cases, before consummation of transaction [*see 15 U.S.C. §§ 1632, 1638*; *12 C.F.R. §§ 226.17, 226.18*].

2. If dealing with open-end consumer credit plan [*see 12 C.F.R. § 226.2(a)(20)*; *see also § 25.111*] that involves extension of credit secured by consumer's dwelling (home equity loan), have creditor:

NOTE:

Although the following requirements apply when the home equity loan is secured by the consumer's principal dwelling [*15 U.S.C. § 1637a(a)*], that includes any second or vacation home of a consumer [*15 U.S.C. § 1637a(d)*].

a. Provide consumer with loan application and following materials [*15 U.S.C. § 1637a(b)(1)(A)*]:

NOTE:

In the case of telephone applications, applications contained in magazines or other publications, and applications provided by a third party, the following materials must be delivered or placed in the mail not later than three business days following the creditor's receipt of the consumer's completed application [*15 U.S.C. § 1637a(b)(1)(B)*; *12 C.F.R. § 226.5b(b)*n.10a].

(1) Detailed disclosures regarding creditor's home equity plan [*see 15 U.S.C. § 1637a(a)*; *12 C.F.R. § 226.5b(d)*; *see also § 25.237*]; and

(2) Brochure prepared by Board of Governors of Federal Reserve System, or suitable substitute [*15 U.S.C. § 1637a(e)*; *12 C.F.R. § 226.5b(e)*].

b. Provide consumer with additional set of disclosures before opening home equity plan [*15 U.S.C. § 1637(a)(8)*; *12 C.F.R. § 226.6(e)*; *see § 25.237[1][e]*].

c. Comply with substantive limitations imposed on these loans [*15 U.S.C. § 1647(a)*; *12 C.F.R. § 226.5b(f)*; *see § 25.237[1][f]*].

3. Confirm that creditor makes new disclosures (redisclosures) under any of following circumstances:

a. If annual percentage rate in consummated transaction varies from that previously disclosed by more than 0.125 percent in regular transaction or 0.25 percent in irregular transaction [*12 C.F.R. § 226.19(a)(2)(ii)*; *see 12 C.F.R. § 226.22(a)*].

NOTE:

In this case, the consumer must receive the corrected disclosures no later than three business days before consummation. If the corrected disclosures are mailed to the consumer or delivered to the consumer by means other than delivery in person, the consumer is deemed to have received the corrected disclosures three business days after they are mailed or delivered [*12 C.F.R. § 226.19(a)(2)(ii)*].

b. If obligation is refinanced [*12 C.F.R. § 226.20(a)*].

NOTE:

A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation, undertaken by the same consumer. A refinancing is a new transaction; therefore, the creditor must make new disclosures to the consumer. Refinancing does not include renewal of a single-payment obligation with no change in original terms,

reduction in the annual percentage rate, an agreement involving a court proceeding, a change in the payment schedule as a result of the consumer's default or delinquency (unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of certain kinds of insurance), or renewal of optional insurance [*12 C.F.R. § 226.20(a)*].

c. If transaction involves assumption of existing residential mortgage transaction [*see 12 C.F.R. § 226.20(b)*].

NOTE:
In this case, the creditor must make new disclosures to the subsequent consumer based on the remaining obligation [***see** 12 C.F.R. § 226.20(b)*].

4. If consumer has right to rescind transaction [*see § 25.23[5]*], confirm that creditor delivers two copies of notice of right to rescind to consumer [*15 U.S.C. § 1635*; *12 C.F.R. §§ 226.15, 226.23*] as follows:

a. In case of closed-end transaction [*see 12 C.F.R. § 226.2(a)(10)*], on or following:

NOTE:
Although TILA does not specify a deadline for the delivery of the notice of the right to rescind, the creditor should give the notice on consummation of the transaction triggering the right, because a later delivery will extend the period during which the consumer may exercise the right [***see** 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3)*].

(1) Consummation of transaction [*see 15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.23(a)(1)*; *see also § 25.230*].

(2) Any refinancing of original debt that is subject to security interest in consumer's principal dwelling, when [*see 12 C.F.R. § 226.23(a)(1)* n.47, (f)(2); *see also § 25.231*]:
(a) Security interest will be retained.

(b) New amount financed exceeds specified amount [*see 12 C.F.R. § 226.23(a)(1)* n.47, *(f)(2)*; *see also § 25.231[1][b]*].

b. In case of open-end transaction [*see 12 C.F.R. §§ 226.2(a)(20), 226.15(a)(1)(i)*]:

(1) When credit plan is opened [*see § 25.232*].

(2) When each credit extension is made under plan [*see § 25.233*].

(3) When credit limit is increased [*see § 25.234*].

(4) When security interest is added to secure existing plan [*see § 25.235*].

(5) When security interest is increased under existing plan [*see § 25.236*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
PART III. TRANSACTION GUIDE
E. Procedural Guide to Compliance With Regulations

10-25 California Legal Forms--Transaction Guide § 25.141

§ 25.141 Exercising or Waiving Right to Rescind

1. Advise client that consumer may modify or waive right to rescind [*12 C.F.R. §§ 226.15(e), 226.23(e)*]:

a. If consumer determines that credit is needed to meet bona fide personal financial emergency.

b. By giving creditor dated, written statement that:
(1) Describes emergency.

(2) Specifically modifies or waives right to rescind.

(3) Bears signatures of consumers entitled to rescind.

NOTE:
Printed forms may not be used for modifying or waiving the right to rescind. Notice is considered given when mailed, when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business [*12 C.F.R. §§ 226.15(a)(2), 226.23(a)(2)*].

2. If client wishes to exercise right to rescind, instruct client to do so:

NOTE:
The right-to-rescind notices in this chapter [***see*** §§ 25.230-25.236] may be used to inform the creditor of the consumer's election to rescind [***see*** *§ 25.230[1][c]*]. When more than one consumer in a transaction has the right to rescind, the exercise of the right by one is effective as to all [*12 C.F.R. §§ 226.15(a)(4), 226.23(a)(4)*].

a. By mail, telegram, or other means of written communication [*12 C.F.R. §§ 226.15(a)(2), 226.23(a)(2)*].

b. Before midnight of third business day following later of [*12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3)*]:

(1) Consummation of transaction.

(2) Delivery of notice of right to rescind.

(3) Delivery of all material disclosures.

NOTE:
If the creditor does not deliver the notice of the right to rescind and the material disclosures, the right to rescind expires three years after consummation, on transfer of all of the consumer's interest in the property, or on sale of the property, whichever occurs first [*12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3)*].

3. If client exercises right to rescind:

a. Confirm that creditor takes following steps within 20 calendar days after receipt of notice of rescission [*15 U.S.C. § 1635(b)*; *12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2)*]:

(1) Returns any money or property given to anyone in connection with transaction.

(2) Takes any action necessary or appropriate to reflect termination of security interest.

b. If creditor has given client any money or property, instruct client to do following after creditor satisfies obligations described above [*12 C.F.R. §§ 226.23(d)(3), 226.15(d)(3)*]:

(1) Tender money or property to creditor.

(2) If tender of money or property to creditor would be impracticable or inequitable, tender its reasonable value.

NOTE:
At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's place of business as designated in the notice of the right of rescission. If the creditor does not take possession of the tendered money or property within 20 calendar days after tender, the consumer may keep it without further obligation [*12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Procedural Guide to Compliance With Regulations

10-25 California Legal Forms--Transaction Guide § 25.142

§ 25.142 RESPA Special Informational Booklet

NOTE:
For determinations regarding the applicability of the Real Estate Settlement Procedures Act (RESPA) [***see*** *12 U.S.C. § 2601 et seq.*], see *§ 25.112*.

1. Confirm that lender provided loan applicant with current version of "Special Information Booklet" by delivering it or placing it in mail to applicant not later than three business days after application was received or prepared [*12 U.S.C. § 2604(a), (d)*; *24 C.F.R. § 3500.6(a)*].

NOTE:
The lender must supply a "Special Information Booklet" to every person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real property [*12 U.S.C. § 2604(d)*; *24 C.F.R. § 3500.6(a)*]. The lender need not provide a booklet to the borrower if the lender denies the borrower's application for credit before the end of the three business day period [*12 U.S.C. § 2604(d)*; *24 C.F.R. § 3500.6(a)(1)*]. If the borrower uses a mortgage broker, the mortgage broker must distribute the booklet and the lender need not do so [*24 C.F.R. § 3500.6(a)(1)*]. The booklet is deemed mailed when it is placed in the mail, addressed to the loan applicant at the address stated in the loan application or in other information submitted to or obtained by the lender at the time of the loan application [*24 C.F.R. § 3500.11*]. When more than one individual applies for a loan, the lender need supply a booklet to only one of the applicants [*24 C.F.R. § 3500.6(a)*].

2. Confirm that booklet meets following technical requirements:

a. If printed or reproduced by lender, it is not part of larger document for purposes of distribution under RESPA [*24 C.F.R. § 3500.6(c)*].

b. It has not been altered, with following exceptions [*24 C.F.R. § 3500.6(d)*]:
(1) Cover of booklet:
(a) May be in any form and may contain any drawings, pictures, or artwork, provided words "settlement costs" appear in title.

(b) May contain names, addresses, and telephone numbers of lender or others, and similar information.

(c) May not contain discussion of matters covered in booklet.

(2) Booklet may be translated into other languages.

NOTE:
HUD must approve any other changes in writing [*24 C.F.R. § 3500.6(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosure



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide § 25.143

§ 25.143 Good Faith Estimate of Settlement Costs

1. If client is entitled to receive copy of "Special Information Booklet" [*see § 25.142*], confirm that lender also delivers or mails good faith estimate of settlement charges not later than three business days after lender receives or prepares application [*12 U.S.C. § 2604(c), (d)*; *24 C.F.R. §§ 3500.6(a), 3500.7(a)*; *see § 25.238*].

NOTE:

The estimate should be included with the booklet [***see*** *12 U.S.C. § 2604(c)*; *24 C.F.R. § 3500.6(a)*]. The estimate is deemed mailed when placed in the mail, addressed to the loan applicant at the address stated in the loan application or in other information submitted to or obtained by the lender at the time of the loan application [*24 C.F.R. § 3500.11*].

If a mortgage broker has provided a good faith estimate, the lender is not required to provide an additional good faith estimate. If there is a mortgage broker, and the lender has not provided a good faith estimate, the mortgage broker must provide a good faith estimate not later than three business days after the mortgage broker receives either an application or information sufficient to complete an application. The lender is responsible for ascertaining whether the good faith estimate has been provided [*24 C.F.R. § 3500.7(b)(1)*]. However, the mortgage broker is not required to provide the applicant with a good faith estimate if, before the end of the three-business-days period, either the mortgage broker or lender denies the application, or the applicant withdraws the application [*24 C.F.R. § 3500.7(b)(3)*]. The mortgage broker is not permitted to require, as a condition for providing a good faith estimate, that the applicant submit supplemental documentation to verify the information provided on the application [*24 C.F.R. § 3500.7(b)(5)*].

If the loan involves an open-end line of credit (home equity plan) covered under the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and Regulation Z [12 C.F.R. pt. 226], a lender

or mortgage broker that provides the borrower with disclosures required by Regulation Z at the time the borrower applies for the loan will be deemed to satisfy the good faith estimate requirements of Regulation X [*24 C.F.R. § 3500.7(h)*].

2. Verify that good faith estimate conforms to requirements exemplified in form shown in Appendix C of Regulation X [*see § 25.238*], in accordance with instructions given in Appendix C.

NOTE:

The good faith estimate form is set out in Appendix C of Regulation X. The loan originator must prepare the good faith estimate in accordance with the requirements of *24 C.F.R. § 3500.7* and the instructions in Appendix C, which allow for flexibility in the preparation and distribution of the good faith estimate in hard copy and electronic format [*24 C.F.R. § 3500.7(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.144

§ 25.144 HUD Settlement Statement

1. Confirm that person conducting settlement (whether or not lender) satisfies following requirements governing distribution of HUD settlement statement:

NOTE:

A HUD-prescribed statement form must be used for settlement charges in connection with the purchase or refinancing (or other subordinate-lien transaction) of a one-to-four-family residential property [*see 12 U.S.C. § 2603(a)*; § 25.112 (applicability of Real Estate Settlement Procedures Act)]. The settlement agent must use the HUD-1 form in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. If there is a borrower but no seller (such as in the case of a refinancing loan or a subordinate-lien loan), the HUD-1 form may be used by completing the borrower's side of the statement, or the HUD-1A form may be used. One form or the other, as appropriate, must be used for every RESPA-covered transaction, unless its use is specifically exempted. The use of either form is exempted for open-end lines of credit (home equity plans) covered by TILA and Regulation Z [*24 C.F.R. § 3500.8(a)*].

a. Permits borrower to inspect HUD settlement statement, completed to set forth those items that are known to settlement agent at time of inspection, during business day immediately preceding settlement (but items related only to seller's transaction may be omitted) [*12 U.S.C. § 2603(b)*; *24 C.F.R. § 3500.10(a)*].

NOTE:

This requirement does not apply if the borrower or the borrower's agent does not attend the settlement, or when the settlement agent does not conduct a meeting of the parties for that purpose [*24 C.F.R. § 3500.10(d)*].

b. Provides parties with completed HUD settlement statement, as follows:

(1) If borrower waives right to delivery of completed settlement statement no later than at settlement by executing written waiver at or before settlement, settlement agent mails or delivers completed statement to borrower, seller, and lender (if lender is not settlement agent) as soon as practicable after settlement [*24 C.F.R. § 3500.10(c)*; *see 12 U.S.C. § 2603(b)*].

(2) If borrower or borrower's agent does not attend settlement, or if settlement agent does not conduct meeting of the parties for that purpose, settlement agent mails or delivers completed settlement statement as soon as practicable after settlement [*24 C.F.R. § 3500.10(d)*].

(3) In all other cases, settlement agent provides completed settlement statement to borrower, seller, lender (if lender is not settlement agent), and/or their agents at or before settlement [*24 C.F.R. § 3500.10(b)*; *see 12 U.S.C. § 2603(b)*].

2. Confirm that settlement agent has completed HUD settlement statement in accordance with instructions [*see 24 C.F.R. § 3500.8(b)*] and that any changes or insertions comply with requirements [*see 24 C.F.R. § 3500.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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10-25 California Legal Forms--Transaction Guide §§ 25.145-25.199

[Reserved]

§§ 25.145[Reserved]

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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Conventional Financing

10-25 California Legal Forms--Transaction Guide § 25.200

§ 25.200 Application for Real Estate Loan

[1] Comment--Use of Form

The form in [2], *below*, is a typical real estate loan application used by banks, savings associations, and other lenders [*see § 25.120*]. It is sanctioned jointly by the Federal National Mortgage Association (as Fannie Mae Form 1003) and the Federal Home Loan Mortgage Corporation (as Freddie Mac Form 65).

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of this form that can be printed out and filled in for use can be obtained at the web site of the Federal National Mortgage Association, located at http://www.efanniemae.com/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.200. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

For an outline of real estate loan sources, see *§ 25.110*. For a general discussion of conventional financing, see California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender).

[2] FORM

Application for Real Estate Loan

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security

InstrumentsGeneral OverviewReal Property LawFinancingSecondary Mortgage MarketFederal Home Loan Mortgage CorporationReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage Association



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide § 25.201

§ 25.201 Fair Lending Notice [21 Cal. Code Reg. § 7114]

[1] Comment--Use of Form

The form in [2], *below,* is the Department of Real Estate version of the fair lending notice that is required by the Holden Act [*Health & Safety Code § 35800 et seq.*] (sometimes called the Housing Financial Discrimination Act of 1977). Every regulated financial institution must give a copy of the notice to every loan applicant on the submission of the written loan application [*21 Cal. Code Reg. § 7114(a)*; *see* California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* (Matthew Bender)].

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of this form that can be printed out for use can be obtained at the web site of the Department of Real Estate, located at http://www.dre.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.201. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

Regulated financial institutions include any bank, savings and loan association, or other institution in California, including a public agency, that regularly makes, arranges, or purchases loans for the purpose of construction, rehabilitation, improvement, or refinancing of housing accommodations [*Health & Safety Code § 35805(c)*]. A housing accommodation is any improved or unimproved real property that (1) is used or intended for use as a residence, (2) is or will be occupied by the owner, and (3) contains not more than four dwelling units. That term also refers to any residential dwelling containing not more than four units when the owner, whether or not he or she occupies the property, applies or has applied for a secured home improvement loan from a financial institution, the proceeds of which are used to improve the secured property [*Health & Safety Code § 35805(d)*].

The content and format of the notice are prescribed by regulations [*see 21 Cal. Code Reg. § 7114(c)*]. The notice must contain the name and address of the state agency (specified in the regulations) that will accept complaints and answer

questions regarding loans made by the type of lender involved in the transaction [*see 21 Cal. Code Reg. § 7114(a)*]. The notice must be printed in not less than 10-point boldface type [*21 Cal. Code Reg. § 7114(d)*].

[2] FORM

Fair Lending Notice [21 Cal. Code Reg. § 7114]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawRegulatory AgenciesGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Conventional Financing

10-25 California Legal Forms--Transaction Guide § 25.202

§ 25.202 Home Equity Loan Disclosure

[1] Comment--Use of Form

The form in [2], *below*, is one of two alternative notices that must be provided to applicants for home equity loans under the Home Equity Loan Disclosure Act unless comparable federal requirements apply [*Civ. Code §§ 2970, 2971*]. A home equity loan is any open-end consumer credit plan in which a consensual security interest is created or retained against the consumer's dwelling [*Civ. Code § 2970*]. Open-end credit transactions involve the extension of credit under an agreement that permits the debtor to use an open line of credit at any time on the condition that he or she make periodic partial payments on the account. For discussion of open-end credit transactions, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

A creditor must provide an applicant for a home equity loan with a disclosure in either of two specified forms [*see Civ. Code § 2971(a)(1), (2)*]. One form consists of the statutory notice in [2], *below* [*see Civ. Code § 2971(a)(1)*]. The other form must contain the creditor's statement to the effect that the home equity loan is secured by a lien against the borrower's home and that, in the event of any default, the borrower risks the loss of the home [*Civ. Code § 2971(a)(2)*]. Either disclosure must be made by (1) a separate and specific document attached to or accompanying the application or (2) a clear and conspicuous statement on the application [*Civ. Code § 2971(b)*]. If it is made by a separate document, the creditor may wish to add an acknowledgment of receipt.

If the borrower applies for the loan by mail or telephone, the creditor must provide the disclosure within three business days. If the borrower makes the initial application in person, the creditor must provide the disclosure at that time [*Civ. Code § 2971(a)*].

If a creditor is required by federal statute or regulation to make a substantially similar disclosure, and the creditor complies with that federal requirement, the creditor will be deemed to have complied with the California disclosure requirement [*Civ. Code § 2971(c)*]. For discussion of disclosure requirements under the federal Truth in Lending Act, see *§ 25.23*.

[2] FORM

Home Equity Loan Disclosure

Home Equity Loan Disclosure

This home equity loan that you are applying for will be secured by your home and your failure to repay the loan for any reason could cause you to lose your home!

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Conventional Financing

10-25 California Legal Forms--Transaction Guide §§ 25.203-25.209

[Reserved]

§§ 25.203[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. VA Financing

10-25 California Legal Forms--Transaction Guide § 25.210

§ 25.210 Request for Certificate of Eligibility

[1] Comment--Use of Form

The form in [2], *below*, is prescribed by the federal Department of Veterans Affairs (VA) for use by a veteran as the first step in obtaining a VA guaranteed loan. It is designated as VA Form 26-1880.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of VA Form 26-1880 that can be printed out and filled in for use can be obtained at the web site of the Veterans Benefits Administration (in the Department of Veterans Affairs), located at http://www.vba.va.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.210. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

Instructions for completing and submitting the form are printed on the back of the form, which is not reproduced here. Proof of the veteran's military service [*see § 25.113*] must be filed concurrently with the form.

For the procedure involved in obtaining a VA guaranteed loan, see *§ 25.131*. This form may be filed simultaneously with a request for a determination of reasonable value [*see § 25.211*]. Thereafter, the veteran should file an application for a home-loan guaranty [*see § 25.212*].

[2] FORM

Request for Certificate of Eligibility

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansMilitary & Veterans LawVeteransVeterans AffairsReal Property LawFinancingFederal ProgramsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. VA Financing

10-25 California Legal Forms--Transaction Guide § 25.211

§ 25.211 Request for Determination of Reasonable Value

[1] Comment--Use of Form

The form in [2], *below*, is prescribed by the federal Department of Veterans Affairs (VA) to be submitted with or after the filing of a request for a certificate of eligibility [*see § 25.210*]. It is designated as VA Form 26-1805 and is a request for determination of reasonable value. After a certificate of reasonable value has been issued, the borrower must submit an application for a home loan guaranty [*see § 25.212*].

The form is included in a document package (available from lenders making VA guaranteed loans) that contains instructions along with multiple copies of the form. Only the form is reproduced here. It may be used for existing homes or for homes under construction. Various supporting documents must be submitted with the form. The required documents are listed on the instructions and depend on whether the application relates to proposed or existing construction. If a certificate of reasonable value has previously been issued, it may be submitted in lieu of many of the required documents.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of the document package containing a version of VA Form 26-1805 that can be printed out and filled in for use can be obtained at the web site of the Veterans Benefits Administration (in the Department of Veterans Affairs), located at http://www.vba.va.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.211. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

For a procedural guide to obtaining a VA guaranteed loan, see *§ 25.131*. For a general discussion of such loans, see *§ 25.13[2]*.

[2] FORM

Request for Determination of Reasonable Value

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Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansMilitary & Veterans LawVeteransVeterans AffairsReal Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawProperty Valuation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
PART IV. FORMS
B. VA Financing

10-25 California Legal Forms--Transaction Guide § 25.212

§ 25.212 Application for Home Loan Guaranty

[1] Comment--Use of Form

The form in [2], *below*, is an application by a borrower for a VA home loan guaranty. It is designated as VA Form 26-1802a. (The form is designed for use in obtaining either a VA guaranteed loan or an FHA insured loan.) The borrower should submit this application after submitting a request for a certificate of eligibility [*see § 25.210*] and a request for determination of reasonable value [*see § 25.211*]. Lenders will use this application for obtaining the prior approval of a VA guaranteed loan for the following:

- The purchase, construction, or simultaneous purchase and improvement, of a home or farm residence [*see 38 U.S.C. § 3710(a)(1)-(3)*];

- The purchase of a one-family unit in a condominium project or development [*see 38 U.S.C. § 3710(a)(6)*];

- The refinancing of an existing loan [*see 38 U.S.C. § 3710(a)(5)*]; or

- The repair, alteration, or improvement of the applicant's home (specifically including improvements designed to conserve energy) [*see 38 U.S.C. § 3710(a)(4), (7)*].

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of VA Form 26-1802a that can be printed out and filled in for use can be obtained at the web site of the Veterans Benefits Administration (in the Department of Veterans Affairs), located at http://www.vba.va.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.212. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

The applicant must submit all of the following items in conjunction with this application:

- A credit report.
- Verification of deposits (to verify the deposit of cash assets from any source).
- Verification of employment of the borrower, and spouse or coborrower, if applicable.
- A copy of an executed sales or construction contract.
- If the application is for a VA guaranteed loan for new construction, a VA Master Certificate of Reasonable Value.
- A VA Certificate of Eligibility [*see § 25.210*].

For a procedural guide to obtaining a VA guaranteed loan, see *§ 25.131*. For a general discussion of such loans, see *§ 25.13[2]*.

[2] FORM

Application for Home Loan Guaranty

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansMilitary & Veterans LawVeteransVeterans AffairsReal Property LawFinancingFederal ProgramsGeneral OverviewReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsInsurance



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide §§ 25.213-25.219

[Reserved]

§§ 25.213[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
PART IV. FORMS
C. Cal-Vet Financing

10-25 California Legal Forms--Transaction Guide § 25.220

§ 25.220 Cal-Vet Loan Application--Instructions

[1] Comment--Use of Form

The form in [2], *below*, is an instruction sheet for use in completing a loan application to the California Department of Veterans Affairs (Cal-Vet). The Cal-Vet loan application form is the same as the form that is sanctioned by the Federal National Mortgage Association and designated as Fannie Mae Form 1003 [*see § 25.200*].

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of a document package containing this form and a document package containing a loan application, which can be printed out and filled in for use, can be obtained at the web site of the California Department of Veterans Affairs, located at http://www.cdva.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.220. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

To apply for a loan, the veteran should obtain the necessary information, forms, and assistance in completing the forms from a Cal-Vet office or resident agent location convenient to the applicant. For a procedural guide to the loan application process, see *§ 25.132*. An applicant who qualifies for a preference [*see § 25.13[3][f]*] should indicate the reasons for the asserted preference on the loan application and should enclose any available documentary evidence that supports the claim for priority. The veteran must file the loan application within the time limits required under applicable federal law and regulations, and must qualify under federal laws and regulations governing the permitted uses of tax-exempt bond funds [*Mil. & Vet. Code § 987.57*].

The application must be accompanied by or must include any other documents or evidence required by Cal-Vet, including originals or certified copies of all pertinent military service or separation documents [*12 Cal. Code Reg. § 303(a)*; *see 12 Cal. Code Reg. § 304* (documentary evidence relating to any wound or disability)]. One example of the required supporting documentation is the purchaser's affidavit illustrated in *§ 25.221[2]*.

If Cal-Vet approves the application, the veteran selects the home or farm that he or she wishes to purchase and submits the selection to Cal-Vet for approval. Cal-Vet purchases an approved property in its own name [*Mil. & Vet. Code § 987.60*] and sells it to the veteran under an installment real property sales contract [*Mil. & Vet. Code § 987.69*]. For the form for a contract used by Cal-Vet, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Cal-Vet Loan Application--Instructions

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansReal Property LawFinancingSecondary Mortgage MarketFederal Home Loan Mortgage CorporationReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage AssociationReal Property LawFinancingState Programs



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Cal-Vet Financing

10-25 California Legal Forms--Transaction Guide § 25.221

§ 25.221 Purchaser's Affidavit for Cal-Vet Loan

[1] Comment--Use of Form

The form in [2], *below*, is an affidavit that must be executed by a prospective purchaser in order to obtain a Cal-Vet loan. The form requires the purchaser to affirm the veracity of several facts that are prerequisites for obtaining the loan (for example, that the home being purchased will not be an investment, recreational, or weekend home) [*see 12 Cal. Code Reg. § 320*]. The form must be signed by the purchaser, whose signature must be notarized.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of a document package containing this form, which can be printed out and filled in for use, can be obtained at the web site of the California Department of Veterans Affairs, located at http://www.cdva.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.221. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[2] FORM

Purchaser's Affidavit for Cal-Vet Loan

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansReal Property LawFinancingState Programs



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10-25 California Legal Forms--Transaction Guide §§ 25.222-25.229

[Reserved]

§§ 25.222[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
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D. Federal Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.230

§ 25.230 Notice of Right to Rescind (and Notice Rescinding) Closed-End Credit Transaction Involving Security Interest in Consumer's Principal Dwelling

[1] Comment

[a] Use of Form

This form is a notice to a consumer of his or her right to rescind a closed-end real estate credit transaction subject to the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*; *see § 25.23[5][b]*]. It is designed for use when the credit transaction involves a security interest (1) that is or will be retained by a creditor in a consumer's principal dwelling, and (2) that is not or will not be created or retained to finance the acquisition or initial construction of the dwelling. It includes a blank form for a notice that the borrower may execute to inform the lender of the consumer's election to exercise the right to rescind.

For a guide to the procedural aspects of TILA disclosures in real estate transactions, see *§ 25.140*. For further coverage of TILA and the right of rescission, see *§ 25.23*; for a guide covering the right to rescind, see *§ 25.141*; and for additional coverage of the right of rescission, see California Real Estate Law and Practice, Ch. 105, *Truth in Lending* (Matthew Bender).

[b] Form and Content of Notice

In a closed-end credit transaction subject to rescission, the creditor must give two copies of the notice of the right to rescind to each consumer entitled to rescind [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.23(b)*]. The notice must be made on a separate document that identifies the transaction. It must clearly and conspicuously disclose the retention or acquisition of a security interest in the consumer's principal dwelling and the consumer's right to rescind the transaction. It must also describe how to exercise the right to rescind, include a form for that purpose, and designate the address of the creditor's place of business. Finally, the notice must disclose the effects of rescission, and the date the rescission period will expire [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.23(b)*].

Regulation Z does not specify language for the notice or require that it be in any particular style or size of type. This

form is a model form recommended by the Board of Governors of the Federal Reserve System for general use in closed-end credit transactions [*see* 12 C.F.R. pt. 226, app. H-8] and satisfies the foregoing requirements for the notice.

[c] Exercise of Right of Rescission

In a closed-end credit transaction, the consumer may exercise the right of rescission until the later of midnight of the third business day following consummation of the transaction, delivery of the notice of right of rescission, or delivery of all material disclosures (that is, the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and certain disclosures and limitations in cases involving high-cost mortgage loans and higher-priced mortgage loans [*12 C.F.R. § 226.23(a)(3)* n.48; *see 12 C.F.R. §§ 226.32(c),(d)* (high-cost mortgage loans), 226.35(b)(2) (higher-priced mortgage loans)]. For discussion of the extension of this deadline, see *§ 25.230[1][d]*.

To exercise the right, the consumer must notify the creditor of the rescission by mail, telegram, or other writing. Notification by mail is considered given at the time of mailing; notification by telegram is given at the time of filing for transmission; and notification by other writing is given at the time delivery to the creditor's designated place of business [*12 C.F.R. § 226.23(a)(2)*; *see 15 U.S.C. § 1635(c)* (written acknowledgment of receipt of notice of right of rescission creates rebuttable presumption of delivery)]. When more than one consumer has the right to rescind, the exercise of the right by one of them is effective as to all of them [*12 C.F.R. § 226.23(a)(4)*].

[d] Violations of Notice Requirements

If notice of the right to rescind and the material disclosures are not delivered, the right to rescind expires three years after consummation of the transaction giving rise to the right, on transfer of all of the consumer's interest in the property involved, or on sale of the property, whichever occurs first [*12 C.F.R. § 226.23(a)(3)*]. On the issue of delivery, written acknowledgment of receipt of the notice of the right of rescission does no more than create a rebuttable presumption of delivery, notwithstanding any rule of evidence [*15 U.S.C. § 1635(c)*].

When the consumer is entitled to rescind under TILA, and the creditor fails to give notice of the right to rescind or take the action required on receipt of a notice of rescission, the consumer may collect, in addition to actual damages, the statutory penalty of twice the amount of the finance charge imposed in connection with the transaction [*15 U.S.C. § 1640(a)(2)(A)(i)*] or, since the transaction was not under an open-end credit plan and was secured by the consumer's principal dwelling, not less than $400 or more than $4,000 [*15 U.S.C. § 1640(a)(2)(A)(iv)*]. The consumer also may recover the costs of the action, together with a reasonable attorney's fee as determined by the court [*15 U.S.C. § 1640(a)(3)*].

[e] Delay of Performance by Creditor

Except when a consumer has waived or modified his or her right to rescind a transaction [*see 12 C.F.R. § 226.23(e)*; *see also § 25.23[5][f]*], in any transaction subject to TILA, no money may be disbursed other than in escrow, no services may be performed, and no materials may be delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded [*12 C.F.R. § 226.23(c)*].

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Closed-End Credit Transaction Involving Security Interest in Consumer's Principal Dwelling

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage on *or* lien on *or* security interest in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) The date of the transaction, which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage *or* lien *or* security interest] is also canceled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage on *or* lien on *or* security interest in] your home has been canceled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingLiabilityReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Federal Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.231

§ 25.231 Notice of Right to Rescind (and Notice Rescinding) Closed-End Refinance Transaction Involving Security Interest in Consumer's Principal Dwelling

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to a consumer of his or her right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to rescind a closed-end credit transaction in which (1) an original debt that was subject to a security interest in the consumer's principal dwelling is being refinanced, (2) the security interest will be retained, and (3) the new amount financed exceeds a specified amount [*see 12 C.F.R. § 226.23(a)(1)* n.47, *(f)(2)*; *see also* [b], *below*]. The creditor must give two copies of the notice to rescind to any consumer involved in the credit transaction [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.23(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

For the definition of a closed-end credit transaction and discussion of TILA and the right to rescind closed-end transactions, see *§ 25.23*.

[b] Amount Financed

As a general rule, the right to rescind does not apply to a refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling [*see § 25.23[5][b], [c]*]. However, the right does apply to the extent that the new amount financed exceeds the unpaid principal balance, plus any earned unpaid finance charge on the existing debt, plus amounts attributable solely to the costs of the refinancing or consolidation [*12 C.F.R. § 226.23(f)(2)*].

[c] Format

Regulation Z does not specify language for the notice or require that it be in any particular style or size of type. The form in [2], *below*, is a model form recommended by the Board of Governors of the Federal Reserve System for use in

closed-end refinance credit transactions [*see* 12 C.F.R. pt. 226, app. H-9].

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Closed-End Refinance Transaction Involving Security Interest in Consumer's Principal Dwelling

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a new transaction to increase the amount of credit previously provided to you. Your home is the security for this new transaction. You have a legal right under federal law to cancel this new transaction, without cost, within three business days from whichever of the following events occurs last:

(1) The date of the new transaction, which is _____; or

(2) The date you received your new Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel.

If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount. Within 20 calendar days after we receive your notice of cancellation of this new transaction, we must take the steps necessary to reflect the fact that your home does not secure the increase of credit. We must also return any money you have given to us or anyone else in connection with this new transaction.

You may keep any money we have given you in the new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below. If we do not take possession of the money within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the new transaction, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above).

If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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10-25 California Legal Forms--Transaction Guide § 25.232

§ 25.232 Notice of Right to Rescind (and Notice Rescinding) Open-End Credit Account Granting Security Interest in Consumer's Principal Dwelling

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to a consumer of his or her right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to rescind the establishment of an open-end credit account [*see § 25.23[5][a]*] in which the consumer has agreed to give the creditor a security interest in the consumer's principal dwelling. The creditor must give two copies of such a notice to any consumer involved in the credit transaction [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.15(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

For discussion of the applicability of TILA to consumer credit transactions, see *§ 25.23*.

[b] Form and Content of Notice

The notice of right of rescission in open-end credit transactions must identify the transaction or occurrence subject to rescission and clearly and conspicuously disclose the retention or acquisition of a security interest in the consumer's principal dwelling. It must also describe how to exercise the right to rescind, include a form for that purpose, and designate the address of the creditor's place of business. Finally, the notice must disclose the effects of rescission, and the date on which the rescission period expires [*12 C.F.R. § 226.15(b)*; *see 15 U.S.C. § 1635(a)*].

Regulation Z does not specify language for the notice or require that it be in any particular style or size of type. The form in [2], *below*, is a model form recommended by the Board of Governors of the Federal Reserve System for use in open-end credit transactions in which the creditor is granted a security interest in the consumer's principal dwelling [*see* 12 C.F.R. pt. 226, app. G-5] and satisfies the regulatory requirements for the notice.

[c] Exercise of Right of Rescission

A consumer may exercise the right of rescission until the later of midnight of the third business day following consummation of any of the transactions giving rise to that right, delivery of notice of the right, or delivery of all material disclosures [*12 C.F.R. § 226.15(a)(3); see also § 25.23[5]*]. For discussion of the extension of this deadline, see [d], *below.*

When more than one consumer has the right to rescind, the exercise of the right by one of them is effective as to all of them [*12 C.F.R. § 226.15(a)(4)*]. Notice of the exercise of the right may be given by mail, telegram, or other writing. Notification by mail is considered given at the time of mailing; notification by telegram is given at the time of filing for transmission; notification by other writing is given at the time of delivery to the creditor's designated place of business [*12 C.F.R. § 226.15(a)(2)*].

[d] Violations of Notice Requirements

If notice of the right to rescind and the material disclosures are not delivered, the right to rescind expires three years after consummation of the transaction giving rise to the right, on transfer of all of the consumer's interest in the property involved, or on sale of the property, whichever occurs first [*12 C.F.R. § 226.15(a)(3)*]. On the issue of delivery, written acknowledgment of receipt of the notice of the right of rescission does no more than create a rebuttable presumption of delivery, notwithstanding any rule of evidence [*15 U.S.C. § 1635(c)*].

When the consumer is entitled to rescind under TILA and the creditor fails to give notice of the right to rescind or to take the action required on receipt of a notice of rescission, the consumer may collect, in addition to actual damages, the statutory penalty of twice the amount of the finance charge imposed in connection with the transaction [*15 U.S.C. § 1640(a)(2)(A)(i)*]. The consumer also may recover the costs of the action, together with a reasonable attorney's fee as determined by the court [*15 U.S.C. § 1640(a)(3)*].

[e] Delay of Performance by Creditor

Except when a consumer has waived or modified his or her right to rescind a transaction [*12 C.F.R. § 226.15(e); see also § 25.23[5][f]*], in any transaction subject to TILA, no money may be disbursed other than in escrow, no services may be performed, and no materials may be delivered until the rescission period has expired and the creditor is reasonably satisfied that the customer has not rescinded [*12 C.F.R. § 226.15(c)*].

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Open-End Credit Account Granting Security Interest in Consumer's Principal Dwelling

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

We have agreed to establish an open-end credit account for you, and you have agreed to give us a [mortgage on *or* lien on *or* security interest in] your home as security for the account. You have a legal right under federal law to cancel the account, without cost, within three business days after the latest of the following events:

(1) The opening date of your account, which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel the account.

If you cancel the account, the [mortgage on *or* lien on *or* security interest in] your home is also canceled. Within 20 days of receiving your notice, we must take the necessary steps to reflect the fact that the [mortgage on *or* lien on *or* security interest in] your home has been canceled. We must also return to you any money or property you have given to us or anyone else in connection with the account.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the account, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingLiabilityReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide § 25.233

§ 25.233 Notice of Right to Rescind (and Notice Rescinding) Extension of Additional Credit on Existing Open-End Credit Account Involving Security Interest in Consumer's Principal Dwelling

[1] Comment--Use of Form

The form in [2], *below*, is a notice to a consumer of his or her right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to rescind the extension of additional credit under an existing open-end credit account agreement in which the creditor already has a security interest in the consumer's principal dwelling [*see 12 C.F.R. § 226.15(a)(1)(i)*]. The creditor must give the consumer two copies of such a notice of the right to rescind [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.15(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

This form is a model form recommended by the Board of Governors of the Federal Reserve System for use in open-end credit transactions in which additional extensions of credit are made [*see* 12 C.F.R. pt. 226, app. G-6] and satisfies the regulatory requirements for the notice [*see 12 C.F.R. § 226.15(a)(1)(i)*]. For discussion of those requirements, see *§ 25.232[1][c]*.

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Extension of Additional Credit on Existing Open-End Credit Account Involving Security Interest in Consumer's Principal Dwelling

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

We have extended credit to you under your open-end credit account. This extension of credit will increase the amount you owe on your account. We already have a [mortgage on *or* lien on *or* security interest in] your home as security for your account. You have a legal right under federal law to cancel the extension of credit, without cost, within three business days after the latest of the following events:

(1) The date of the additional extension of credit, which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel the additional extension of credit.

If you cancel the additional extension of credit, your cancellation will apply only to the additional amount and to any increase in the [mortgage *or* lien *or* security interest] that resulted because of the additional amount. It will not affect the amount you presently owe, and it will not affect the [mortgage on *or* lien on *or* security interest in] your home that we already have. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect the fact that any increase in the [mortgage on *or* lien on *or* security interest in] your home has been canceled. We must also return to you any money or property you have given to us or to anyone else in connection with this extension of credit.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the additional extension of credit, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide § 25.234

§ 25.234 Notice of Right to Rescind (and Notice Rescinding) Increase of Credit Limit on Existing Open-End Credit Account Involving Security Interest in Consumer's Principal Dwelling

[1] Comment--Use of Form

The form in [2], *below*, is a notice to a consumer of his or her right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to cancel an increase granted by the creditor in the consumer's credit limit on an existing open-end credit account involving a security interest in the consumer's principal dwelling [*see 12 C.F.R. § 226.15(a)(1)(i)*]. The creditor must give the consumer two copies of such a notice of the right to rescind [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.15(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

This form is a model form recommended by the Board of Governors of the Federal Reserve System for use in open-end credit transactions in which additional extensions of credit are made [*see* 12 C.F.R. pt. 226, app. G-7] and satisfies the regulatory requirements for the notice [*see 12 C.F.R. § 226.15(a)(1)(i)*]. For discussion of those requirements, see *§ 25.232[1][c]*.

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Increase of Credit Limit on Existing Open-End Credit Account Involving Security Interest in Consumer's Principal Dwelling

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

We have agreed to increase the credit limit on your open-end credit account. We have a [mortgage on *or* lien on *or* security interest in] your home as security for your account. Increasing the credit limit will increase the amount of the [mortgage on *or* lien on *or* security interest in] your home. You have a legal right under federal law to cancel the increase in your credit limit, without cost, within three business days after the latest of the following events:

(1) The date of the increase in your credit limit, which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel the increase in your credit limit.

If you cancel, your cancellation will apply only to the increase in your credit limit and to the [mortgage *or* lien *or* security interest] that resulted from the increase in your credit limit. It will not affect the amount you owe at present, and it will not affect the [mortgage on *or* lien on *or* security interest in] your home that we already have. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect the fact that any increase in the [mortgage on *or* lien on *or* security interest in] your home has been canceled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the increase in your credit limit, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us, because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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10-25 California Legal Forms--Transaction Guide § 25.235

§ 25.235 Notice of Right to Rescind (and Notice Rescinding) Grant of Security Interest in Consumer's Principal Dwelling Under Existing Open-End Credit Account

[1] Comment--Use of Form

The form in [2], *below*, is a notice to a consumer of his or her right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to rescind the addition of a security interest in the consumer's principal dwelling to the agreement underlying an existing open-end account [*see 12 C.F.R. § 226.15(a)(1)(i)*]. The creditor must provide two copies of such a notice of the right to rescind to any consumer whose ownership interest is subject to the security interest [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.15(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

This form is a model form recommended by the Board of Governors of the Federal Reserve System for use in open-end credit transactions in which additional extensions of credit are made [*see* 12 C.F.R. pt. 226, app. G-8] and satisfies the regulatory requirements for the notice [*see 12 C.F.R. § 226.15(a)(1)(i)*]. For discussion of those requirements, see *§ 25.232[1][c]*.

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Grant of Security Interest in Consumer's Principal Dwelling Under Existing Open-End Credit Account

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You have agreed to give us a [mortgage on *or* lien on *or* security interest in] your home as security for your existing open-end credit account. You have a legal right under federal law to cancel the [mortgage *or* lien *or* security interest], without cost, within three business days after the latest of the following events:

(1) The date of the [mortgage *or* lien *or* security interest], which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel the [mortgage *or* lien *or* security interest].

If you cancel the [mortgage *or* lien *or* security interest], your cancellation will apply only to the [mortgage *or* lien *or* security interest]. It will not affect the amount you owe on your account. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect that any [mortgage on *or* lien on *or* security interest in] your home has been canceled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may make the offer at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the [mortgage *or* lien *or* security interest], you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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§ 25.236 Notice of Right to Rescind (and Notice Rescinding) Increase in Amount of Security Interest in Consumer's Principal Dwelling Under Existing Open-End Credit Account

[1] Comment--Use of Form

The form in [2], *below*, is a notice to a consumer of the consumer's right, under the Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*], to rescind an increase in the amount of a security interest in his or her principal dwelling previously given to a creditor under an existing open-end credit account. The creditor must provide two copies of such a notice to any consumer whose ownership interest is subject to the security interest [*15 U.S.C. § 1635(a)*; *12 C.F.R. § 226.15(b)*]. This form also includes a blank form for a notice that the consumer may use to exercise the right to rescind.

This form is a model form recommended by the Board of Governors of the Federal Reserve System for use in open-end credit transactions in which additional extensions of credit are made [*see* 12 C.F.R. pt. 226, app. G-9] and satisfies the regulatory requirements for the notice [*see 12 C.F.R. § 226.15(a)(1)(i)*]. For discussion of those requirements, see *§ 25.232[1][c]*.

[2] FORM

Notice of Right to Rescind (and Notice Rescinding) Increase in Amount of Security Interest in Consumer's Principal Dwelling Under Existing Open-End Credit Account

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You have agreed to increase the amount of the [mortgage on *or* lien on *or* security interest in] your home that we hold as security for your open-end credit account. You have a legal right under federal law to cancel the increase, without cost, within three business days after the latest of the following events:

(1) The date of the increase in the security, which is _____; or

(2) The date you received your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel the increase in the security.

If you cancel the increase in the security, your cancellation will apply only to the increase in the amount of the [mortgage *or* lien *or* security interest]. It will not affect the amount you presently owe on your account, and it will not affect the [mortgage on *or* lien on *or* security interest in] your home that we already have. Within 20 calendar days after we receive your notice of cancellation we must take the necessary steps to reflect that any increase in the [mortgage on *or* lien on *or* security interest in] your home has been canceled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel the increase in security, you may do so by notifying us in writing, at _____[*creditor's name and business address*].

You may use any written statement that is signed and dated by you and states your intention to cancel; you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of _____[*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL
_____ [*signature*]
Consumer's Signature
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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§ 25.237 Home Equity Loan Plan Disclosures

[1] Comment

[a] Use of Form

This form is a model disclosure form containing information regarding a home equity loan plan, which is any open-end consumer credit plan [*see § 25.23[5][a]*] (also referred to as a credit line) that provides for an extension of credit secured by the consumer's dwelling [*15 U.S.C. § 1637a(a)*; *12 C.F.R. § 226.5b(a)*]. Creditors (and certain third parties) must (1) provide detailed information regarding the home equity plan and (2) observe stringent substantive limitations on the way in which the plan is structured [*15 U.S.C. § 1647*; *12 C.F.R. § 226.5b(f)*].

This form is recommended by the Board of Governors of the Federal Reserve System [*see* 12 C.F.R. pt. 226, app. G-14A] and satisfies the disclosure requirements. For the purpose of illustration, it describes a plan offering a 10-year draw period, which is followed by a five-year repayment period. Payments are based on a fraction of the outstanding balance.

[b] Dwelling Defined

The disclosure requirement applies when an open-end consumer credit plan provides for an extension of credit that is secured by the consumer's dwelling [*15 U.S.C. § 1637a(a)*; *12 C.F.R. § 226.5b(a)*], which includes not only a principal dwelling but also any second or vacation home [*15 U.S.C. § 1637a(d)*].

[c] Creditors and Third Parties

The disclosure requirements apply to creditors [*see 12 C.F.R. § 226.5b*; *see also 12 C.F.R. § 226.2(a)(17)(i)* (creditor defined); § 25.111]. A third person who provides applications to consumers for home equity plans also must provide the consumer with a required home equity brochure [*see* § 25.137[1][d]] along with the application [*12 CF.R. § 226.5b(c)*]. Further, if the creditor has provided the third person with home equity disclosures for its home equity plan [*see* § 25.137[1][d]], that person must provide those disclosures to the consumer along with the application and the brochure [

12 C.F.R. § 226.5b(c)].

[d] Disclosures to Be Provided With Application

The creditor normally must provide the consumer with both of the following documents at the time of providing the consumer with an application for a home equity plan [*15 U.S.C. § 1637a(b)(1)(A)*]:

- Detailed disclosures regarding the creditor's home equity plan [*see 15 U.S.C. § 1637a(a)*; *12 C.F.R. § 226.5b(d)* (required disclosures)]; and

- A brochure describing home equity plans, which has been prepared by the Board of Governors of the Federal Reserve System, or a suitable substitute that provides substantially similar information to the information set forth in that brochure [*see 15 U.S.C. § 1637a(e)*; *12 C.F.R. § 226.5b(e)*].

However, in the case of telephone applications, applications contained in magazines or other publications, or applications provided by a third person, the required disclosures must be delivered or placed in the mail not later than three business days following the creditor's receipt of the consumer's completed application [*15 U.S.C. § 1637a(b)(1)(B)*; *12 C.F.R. § 226.5b(b)*n.10a].

The required disclosures describe the payment terms, including the method of computation of the minimum payment, the frequency of payments, the length of the draw period, and any repayment period [*12 C.F.R. § 226.5b(d)(5)*; *see 15 U.S.C. § 1637a(a)(8)-(11)*]. They also provide information regarding fees imposed by the creditor [*15 U.S.C. § 1637a(a)(3)*; *12 C.F.R. § 226.5b(d)(7)*], variable rates [*15 U.S.C. § 1637a(a)(2)*; *12 C.F.R. § 226.5b(d)(12)*], and balloon payments [*15 U.S.C. § 1637a(a)(10)*; *12 C.F.R. § 226.5b(d)(5)(ii)*]. The required information must be provided only to the extent applicable [*12 C.F.R. § 226.5b(d)*].

The disclosures regarding the creditor's home equity plan must be provided on the application or on a separate form [*15 U.S.C. § 1637a(b)(2)(A)*; *12 C.F.R. § 226.5b(a)(1)*; *see 12 C.F.R. § 226.5(a)(1)* n.8 (disclosures need not be in a form that the consumer can keep)]. They must be made clearly and conspicuously and must be grouped together and segregated from all unrelated information [*15 U.S.C. § 1637a(b)(2)(B)*; *12 C.F.R. § 226.5b(a)(1)*]. Certain items must precede the other required disclosures [*see 15 U.S.C. § 1637a(b)(2)(C)*; *12 C.F.R. § 226.5b(a)(2)*].

[e] Additional Information Provided Before First Transaction

The creditor must provide the consumer with an additional set of disclosures before the home equity plan is opened. These additional disclosures repeat some of the information set forth in the creditor's first disclosure statement (for example, payment information), and must be provided along with the initial disclosures that must be furnished to a consumer when any open-end credit account subject to TILA is opened [*15 U.S.C. § 1637(a)(8)*; *12 C.F.R. § 226.6(e)*]. For a model initial disclosure statement and further discussion, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

[f] Substantive Limitations on Home Equity Plans

The creditor may not change, by contract or otherwise, the annual percentage rate after the plan is opened unless the change is based on an index that is not under the creditor's control and the index value is available to the general public [*15 U.S.C. § 1647(a)*; *12 C.F.R. § 226.5b(f)(1)*].

The creditor may not, by contract or otherwise, terminate an account and demand repayment of the entire outstanding balance in advance of the original term, unless one of the following has occurred [*15 U.S.C. § 1647(b)*; *12 C.F.R. § 226.5b(f)(2)*]:

- There has been fraud or material misrepresentation by the consumer in connection with the plan.

- The consumer has failed to meet the repayment terms of the agreement.

- The consumer acts or fails to act in a way that adversely affects the creditor's security for the plan, or any right of the creditor in the security.

The creditor may not change, by contract or otherwise, any term of the plan, except that the creditor may do the following [*12 C.F.R. § 226.5b(f)(3)*]:

- Provide in the initial agreement that it may prohibit additional extensions of credit or reduce the credit limit during any period in which the maximum annual percentage rate is reached.

- Provide in the initial agreement that specified changes will occur if a specified event takes place.

- Change the index and margin used under the plan if the original index is no longer available, historical fluctuations in the two indices were substantially similar, and the new index and margin will produce an annual percentage rate substantially similar to the rate in effect at the time the original index became available [*see 15 U.S.C. § 1647(c)(2)(A)*].

- Make a specified change if the consumer specifically agrees in writing to the change at that time.

- Make a change that will unequivocally benefit the consumer throughout the remainder of the agreement [*see 15 U.S.C. § 1647(c)(2)(F), (4)*].

- Make an insignificant change to terms [*see 15 U.S.C. § 1647(c)(1)*].

- Temporarily prohibit additional extensions of credit or reduce the credit limit in six specified circumstances [*see 15 U.S.C. § 1647(c)(2)(B)-(E)*].

[2] FORM

Home Equity Loan Plan Disclosures

IMPORTANT TERMS OF OUR HOME EQUITY LINE OF CREDIT

This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: To obtain the terms described below, you must submit your application before _____[*date*].

If these terms change (other than the annual percentage rate) and you decide, as a result, not to enter into an agreement with us, you are entitled to a refund of any fees that you have paid to us or anyone else in connection with your application.

Security Interest: We will take a mortgage on your home. You could lose your home if you do not meet the obligations in your agreement with us.

Possible Actions: Under certain circumstances, we can (1) terminate your line, require you to pay us the entire outstanding balance in one payment, and charge you certain fees; (2) refuse to make additional extensions of credit; and (3) reduce your credit limit.

If you ask, we will give you more specific information concerning when we can take these actions.

Minimum Payment Requirements: You can obtain advances of credit for 10 years (the "draw period"). During the draw period, payments will be due monthly. Your minimum monthly payment will equal the greater of $100 or 1/360th of the outstanding balance plus the finance charges that have accrued on the outstanding balance.

After the draw period ends, you will no longer be able to obtain credit advances and must pay the outstanding balance over five years (the "repayment period"). During the repayment period, payments will be due monthly. Your minimum monthly payment will equal 1/60th of the balance that was outstanding at the end of the draw period plus the finance charges that have accrued on the remaining balance.

Minimum Payment Example: If you made only the minimum monthly payments and took no other credit advances, it would take 15 years to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of 12 percent. During that period, you would make 120 monthly payments varying between $127.78 and $100.00 followed by 60 monthly payments varying between $187.06 and $118.08.

Fees and Charges: To open and maintain a line of credit, you must pay the following fees to us:

Application fee: $150 (due at application)
Points: 1 percent of credit limit (due when account opened)
Annual maintenance fee: $75 (due each year)

You also must pay certain fees to third parties to open a line. These fees generally total between $500 and $900. If you ask, we will give you an itemization of the fees you will have to pay to third parties.

Minimum Draw and Balance Requirements: The minimum credit advance you can receive is $500. You must maintain an outstanding balance of at least $100.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges for the line.

Variable-Rate Information: The line has a variable-rate feature, and the annual percentage rate (corresponding to the periodic rate) and the minimum payment can change as a result.

The annual percentage rate includes only interest and not other costs.

The annual percentage rate is based on the value of an index. The index is the monthly average prime rate charged by banks and is published in the *Federal Reserve Bulletin.* To determine the annual percentage rate that will apply to your line, we add a margin to the value of the index.

Ask us for the current index value, margin, and annual percentage rate. After you open a credit line, rate information will be provided on periodic statements that we will send you.

Rate Changes: The annual percentage rate can change each month. The maximum ANNUAL PERCENTAGE RATE that can apply is 18 percent. Except for this 18 percent "cap," there is no limit on the amount by which the rate can change during any one-year period.

Maximum Rate and Payment Examples: If you had an outstanding balance of $10,000 during the draw period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18 percent would be $177.78. This annual percentage rate could be reached during the first month of the draw period.

If you had an outstanding balance of $10,000 at the beginning of the repayment period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18 percent would be $316.67. This annual percentage rate could be reached during the first month of the repayment period.

Historical example: The following table shows how the annual percentage rate and the minimum monthly payments for a single $10,000 credit advance would have changed based on changes in the index over the past 15 years. The index values are from [*month*] of each year. While only one payment amount per year is shown, payments would have varied during each year.

The table assumes that no additional credit advances were taken, that only the minimum payments were made each month, and that the rate remained constant during each year. It does not necessarily indicate how the index or your payments will change in the future.

[*Create table with five columns headed "Year," "Index (%)," "Margin (%)," "ANNUAL PERCENTAGE RATE (%)," and "Minimum Monthly Payment (]"; insert rows of computed data, one row for each of past 15 years (in ascending order, with last row representing current year). Draw horizontal line between two rows, separating (with these labels) "Draw Period" data above line and "Repayment Period" data below line.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingSecondary FinancingHome Equity Credit Lines



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§ 25.238 RESPA Good Faith Estimate of Settlement Charges

[1] Comment

[a] Use of Form

This form is a good faith estimate of settlement charges that a borrower is likely to incur in a transaction subject to the Real Estate Settlement Procedures Act (RESPA) [*12 U.S.C. § 2601 et seq.*]. The lender in most transactions involving federally related mortgage loans [*see § 25.238[1][b]*] must provide the borrower with such an estimate [*12 U.S.C. § 2604(c)*; *see § 25.238[1][f]*]. This version of the good faith estimate is the form in Appendix C of Regulation X [*see* 24 C.F.R. pt. 3500]. For further discussion of RESPA, see *§ 25.24*.

[b] RESPA Application to Federally Related Mortgage Loan

RESPA applies to all transactions involving a federally related mortgage loan [*12 U.S.C. § 2602(1)*; *24 C.F.R. § 3500.5(b)*], which is any loan (other than temporary financing, such as a construction loan) that meets the requirements discussed below [*12 U.S.C § 2602(1)*].

First, the loan must be secured by a first lien or subordinate lien on residential real property (including a refinancing of a secured loan) on which there is located any structure designed principally for occupancy by one-to-four families (including individual units of condominiums and cooperatives) or a manufactured home. Alternatively, this requirement regarding the improvement on the real property may be satisfied by using the loan proceeds, following settlement, to construct the structure or place the manufactured home on the property [*12 U.S.C. § 2602(1)(A)*; *24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(i)(B))].

Second, the loan must be either:

- Made by a lender that is regulated by, or whose deposits or accounts are insured by, any agency of the United States [*12 U.S.C. § 2602(1)(B)(i)*]; or

- Made, insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the United States or under or in connection with a housing or urban development program administered by HUD or a housing or related program administered by any other officer or agency of the United States [*12 U.S.C. § 2602(1)(B)(ii)*]; or

- Intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation [*12 U.S.C. § 2602(1)(B)(iii)*]; or

- Made by a creditor [*see 15 U.S.C § 1602(f)* (definition)] that makes or invests in residential real estate loans aggregating more than $1,000,000 per year [*12 U.S.C. § 2602(1)(B)(iv)*; *see 24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(D)--state agency or state instrumentality is not creditor, and residential real estate loan is any loan secured by residential property, including single-family and multifamily residential property)]; or

- Originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified above, by a mortgage broker [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(E))]; or

- Subject to a home-equity conversion mortgage (also commonly called a reverse mortgage) issued by any maker of mortgage loans specified above [*24 C.F.R. § 3500.2* (definition of federally related mortgage loan: see par. (1)(ii)(F))].

[c] Settlement Services

Settlement, in the present context, is the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called closing or escrow in different jurisdictions [*24 C.F.R. § 3500.2* (definition of settlement)]. For comprehensive coverage of escrows, see Ch. 26, *Real Property Escrows* .

Settlement services include any service provided in connection with a real estate settlement, such as the origination of a federally related mortgage loan, including the taking of a loan application, loan processing, and the underwriting and funding of the loan [*12 U.S.C. § 2602(3)*].

[d] Exemptions

RESPA does not apply to any of the following transactions [*24 C.F.R. § 3500.5(b)*; *see § 25.112*]:

- A loan on property constituting 25 or more acres.

- An extension of credit primarily for a business, commercial, or agricultural purpose.

- Temporary financing, such as a construction loan.

- Any loan secured by vacant or unimproved land, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds.

- Any assumption in which the lender does not have the right expressly to approve a subsequent

person as the borrower on an existing federally related mortgage loan.

- Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, provided a new note is not required, even if the lender charges an additional fee for the conversion.

- A bona fide transfer of a loan obligation in the secondary market, except as otherwise set forth in RESPA and Regulation X.

[e] Lender's Duties

A lender, when making a loan, must (1) provide a "Special Information Booklet," prepared by HUD, to each person applying for a loan covered by RESPA [*12 U.S.C. § 2604(d)*; *see § 25.142*] and (2) provide a good faith estimate of probable settlement charges to each person [*12 U.S.C. § 2604(c)*; *see § 25.238[1][f]*].

The lender, or a settlement agent, also must provide a standard HUD-1 or HUD-1A settlement statement, unless the transaction is exempt from this requirement [*see 12 U.S.C. § 2603*; *24 C.F.R. § 3500.10*; *see also § 25.144*].

[f] Disclosure Requirement

The lender normally must provide the borrower with a good faith estimate of the amount of or range of charges for the specific settlement services that the borrower is likely to incur in the transaction [*12 U.S.C. § 2604(c)*; *24 C.F.R. § 3500.7(a)*]. The lender must provide this estimate, either by delivering it or by placing it in the mail to the loan applicant, not later than three business days after the application is received or prepared [*24 C.F.R. § 3500.7(a)(1), (2)*]. If the lender denies the application, or the applicant withdraws the application, before the end of the three-day period, however, the lender need not provide a good faith estimate [*24 C.F.R. § 3500.7(a)(3)*].

If a mortgage broker has provided a good faith estimate, the lender is not required to provide an additional good faith estimate. If there is a mortgage broker, and the lender has not provided a good faith estimate, the mortgage broker must provide a good faith estimate not later than three business days after the mortgage broker receives either an application or information sufficient to complete an application. The lender is responsible for ascertaining whether the good faith estimate has been provided [*24 C.F.R. § 3500.7(b)(1)*]. However, the mortgage broker is not required to provide the applicant with a good faith estimate if, before the end of the three-business-days period, either the mortgage broker or lender denies the application, or the applicant withdraws the application [*24 C.F.R. § 3500.7(b)(3)*]. The mortgage broker is not permitted to require, as a condition for providing a good faith estimate, that the applicant submit supplemental documentation to verify the information provided on the application [*24 C.F.R. § 3500.7(b)(5)*].

For a mortgage loan disclosure statement that satisfies California laws governing mortgage loan transactions and also includes a good faith estimate, see *§ 25.251*.

[g] Format and Contents

This form is a copy of the good faith estimate form that is set out in Appendix C of Regulation X. The loan originator must prepare the good faith estimate in accordance with the requirements of *24 C.F.R. § 3500.7* and the instructions in Appendix C, which allow for flexibility in the preparation and distribution of the good faith estimate in hard copy and electronic format [*24 C.F.R. § 3500.7(d)*].

[2] FORM

RESPA Good Faith Estimate of Settlement Charges

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Federal Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.239

§ 25.239 Equal Credit Opportunity Act Notice [12 C.F.R. § 202.9(a)(2), (b)]

[1] Comment--Use of Form

This form is a notice that should be included in a notice of adverse action given by a lender to a borrower in connection with a real estate loan application [*see 12 C.F.R. § 202.9(a)(2), (b)*]. A creditor may not unlawfully discriminate against any applicant for credit [*see 15 U.S.C. § 1691(a)*; *see also § 25.20*], must notify the applicant of action on the application within 30 days of the receipt of the application, and must, if applicable, provide the applicant with a statement of reasons for denying the application [*15 U.S.C. § 1691(d)*].

Any notification given to an applicant against whom adverse action is taken must be in writing and must contain the following [*12 C.F.R. § 202.9(a)(2)*]:

- A statement of the action taken.
- The name and address of the creditor.
- The name and address of the federal agency that administers creditor compliance with this requirement.
- Either a statement of specific reasons for the action taken or a disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the creditor of a request made within 60 days of the notification (with the disclosure to include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained).
- A statement of the provisions of *15 U.S.C. § 1601(a)*.

This form consists of regulatory language that satisfies this particular disclosure requirement [*12 C.F.R. § 202.9(b)(1)*].

[2] FORM

Equal Credit Opportunity Act Notice [12 C.F.R. § 202.9(a)(2), (b)]

EQUAL CREDIT OPPORTUNITY ACT NOTICE

The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to enter into a binding contract); or because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is [*name and address of appropriate agency; see Appendix A to 12 C.F.R. pt. 202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewBanking LawConsumer ProtectionEqual Credit OpportunityDiscriminatory ActsCivil Rights LawContractual Relations & HousingFair Housing RightsCredit & Mortgage LawsReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide §§ 25.240-25.249

[Reserved]

§§ 25.240[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. California Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.250

§ 25.250 Mortgage Loan Disclosure Statement [Bus. & Prof. Code § 10241; 10 Cal. Code Reg. § 2840]

[1] Comment

[a] Use of Form

This form is one of two disclosure statements approved by the Department of Real Estate (DRE) for use in meeting the requirements of *Bus. & Prof. Code § 10241* [*see 10 Cal. Code Reg. § 2840(a)*; *see also § 25.251*]. It is designated as Form RE 882. A mortgage loan broker must present a mortgage loan disclosure statement to a prospective borrower whenever the broker negotiates a loan that is to be secured by a lien on real property [*see § 25.250[1][b]*]. A real estate broker must obtain DRE approval for the use of a form that differs from an approved version [*10 Cal. Code Reg. § 2840(c)*].

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of Form RE 882, which can be printed out and filled in for use, can be obtained at the web site of the Department of Real Estate, located at http://www.dre.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.250. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[b] Mortgage Broker Disclosure Requirements

For purposes of the disclosure requirement, a mortgage loan broker is any real estate broker who solicits borrowers, or causes borrowers to be solicited, through express or implied representations that the broker will act as an agent in arranging a loan, but who in fact makes the loan from his or her own funds [*Bus. & Prof. Code § 10240(b)*; *see Bus. & Prof. Code § 10131(d)*]. If a loan negotiated by such a broker is to be secured directly or indirectly by a lien on real property, then the broker must deliver a disclosure statement to the borrower within three business days after receipt of a completed loan application, or before the borrower becomes obligated on the note, whichever is earlier [*Bus. & Prof.*

Code §§ 10240(a), 10241; *see Bus. & Prof. Code § 10245*; *see also 10 Cal. Code Reg. § 2842.5*]. For these purposes, a loan application will be considered complete when (1) the broker receives or has prepared a written application on any form normally used by the lender for a federally related mortgage loan or (2) in the case of a non-federally related mortgage loan, when the broker receives or has prepared a written application on any form normally used by a lender or the broker [*10 Cal. Code Reg. § 2842.5*].

In a federally regulated residential mortgage loan transaction in which the principal loan amount exceeds the principal loan levels set forth in *Bus. & Prof. Code § 10245*, a real estate broker meets the disclosure requirements of *Bus. & Prof. Code § 10240* if the borrower receives all of the following [*Bus. & Prof. Code § 10240(c)*]:

- A good faith estimate of settlement charges that meets the requirements of the Real Estate Settlement Procedures Act of 1974 [*12 U.S.C. § 2601 et seq.*] and sets forth the broker's real estate license number and a clear and conspicuous statement on the face of the document stating that the good faith estimate does not constitute a loan commitment.[*see § 25.251*]

- All applicable disclosures required by the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*].

- If the loan contains a balloon payment provision, the disclosure described in *Bus. & Prof. Code § 10241(h)*, the balloon disclosure required for that loan by Fannie Mae or Freddie Mac, or an alternative disclosure determined by the Department of Real Estate to satisfy the requirements of the Truth in Lending Act.

In addition, before becoming obligated on the loan, the borrower must acknowledge, in writing, receipt of the good faith estimate of settlement charges and all applicable disclosures required by the Truth in Lending Act. The real estate broker must retain on file for three years true and correct copies of the signed acknowledgment, the good faith estimate, and all applicable disclosures required by the Truth in Lending Act, as acknowledged by the borrower [*Bus. & Prof. Code § 10240*].

[c] Required Contents

The mortgage loan disclosure statement must set forth separately all of the items specified in *Bus. & Prof. Code § 10241*.

If the broker elects to make a loan that consists wholly or in part of broker-controlled funds, the broker must advise the borrower of that fact not later than the next business day after making the election, but in any event before the close of escrow of the loan transaction [*Bus. & Prof. Code § 10241.2*].

Additional disclosure requirements require a seller of residential real property who knows that any release of an illegal controlled substance has come to be located on or beneath that real property to give written notice advising of that condition to the buyer before sale of the property [*Civ. Code § 1102.18(b)*]. An illegal controlled substance is a drug, substance, or immediate precursor listed in specified schedules [*see Health & Safety Code § 11053 et seq.*], or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture of an illegal controlled substance, which does not include marijuana [*Civ. Code § 1102.18(a)(1)*]. A release of such a substance is any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of the illegal controlled substance in a structure or into the environment [*Civ. Code § 1102.18(b)(1)*].

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* must also make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which

concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(a)(2)*].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6d(d)(1)*; *see Civ. Code § 1102.6d(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6d(d)(2)*].

- The notice may describe a special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. The notice must include the name of the district levying taxes against the property, the annual Mello-Roos tax due for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum Mello-Roos tax may increase per year, the date until which the Mello-Roos tax may be levied against the property, and a contact telephone number, if available, for further information about the Mello-Roos tax.

- The notice may describe special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy the special assessments and bonds against the property. The notice must include the name of the special assessments and bonds, the current annual tax on the property for the special assessments and bonds, and a contact telephone number, if available, for further information about the special assessments and bonds.

For additional discussion of these requirements, see Ch. 23, *Real Property Sales Agreements* .

The Toxic Mold Protection Act of 2001 [*Health & Safety Code § 26100 et seq.*] will eventually require any person who sells specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers concerning mold problems in the real property [*see Health & Safety Code § 26140 et seq.*].

[d] Execution and Delivery

The statement must be signed by the borrower and either the loan broker negotiating the loan or a real estate licensee acting for the broker in negotiating the loan [*Bus. & Prof. Code § 10240*; *see 10 Cal. Code Reg. § 2842.5*]. An exact copy of the executed statement must be delivered to the borrower at the time of its execution. The broker negotiating the loan must retain on file for three years a true and correct copy of the statement as signed by the borrower and a signed acknowledgment that the buyer has received a true and correct copy of the good faith estimate and all applicable disclosures required by the Truth in Lending Act [*Bus. & Prof. Code § 10240*].

[e] Other Statutory Requirements

If the mortgage loan is to be secured by a dwelling, the additional requirements noted in this subsection apply [*Bus. & Prof. Code § 10240.1*]. For these purposes, a dwelling is either of the following units owned by a signatory to the mortgage or deed of trust secured by the dwelling unit at the time of execution of the mortgage or trust deed: a single dwelling unit in a condominium or cooperative; or any parcel containing only residential buildings if the total number of units on the parcel is four or fewer [*Bus. & Prof. Code § 10240.2*].

Credit life insurance or credit disability insurance may not be required as a condition to making the loan [*Bus. & Prof.*

Code § 10241.1(a)]. The borrower may consent to credit life or credit disability insurance, provided the insurance does not exceed an amount reasonably necessary to discharge the loan and is for a term not exceeding of the term of the loan [*Bus. & Prof. Code § 10241.1*].

The maximum amount of charges and expenses to be paid by the borrower in connection with the making of the loan [*see Bus. & Prof. Code § 10242(a), (b)*], and the maximum amount of late charges [*Bus. & Prof. Code § 10242.5(a)*] are set by statute.

In any loan transaction in which a fee is charged to a borrower for an appraisal of the real property that will serve as security for the loan, a copy of the appraisal report must be given by or on behalf of the broker to both the borrower and the lender at or before the closing of the loan transaction [*Bus. & Prof. Code § 10241.3*].

Interest on the loan may not be charged for any period before the date that the proceeds of the loan are made available to the borrower or are deposited in escrow [*Bus. & Prof. Code § 10242(c)*].

Balloon payments are not allowed for installment loans with a term shorter than three years, or with a term shorter than six years when the loan is secured by an owner-occupied dwelling of fewer than three units. The installment payments must be substantially equal, with no installment (including the final one) being greater than twice the amount of the smallest installment [*Bus. & Prof. Code §§ 10244, 10244.1*]. Notes given to the seller as part of the purchase price are exempt from the statutory prohibitions on balloon payments [*see Bus. & Prof. Code §§ 10244, 10244.1*]. Certain loans for financing the development of residential, commercial, or industrial buildings on the property are also exempt from the statutory restrictions on balloon payments and charges on renewed or refinanced loans [*see Bus. & Prof. Code § 10244*].

If the loan provides for a balloon payment and an agreement has been reached regarding an extension of the loan term or a refinancing of the loan, a written disclosure regarding the balloon payment and the agreement must be made before the borrower becomes obligated on the loan, unless the agreement is set forth in the promissory note or in a rider to the note [*see Bus. & Prof. Code § 10241.4*; *see also § 25.252[2]*].

When a loan with a maturity of less than three years is renewed or refinanced, the total charges to be paid on both the original and renewal loans may not exceed those prescribed by *Bus. & Prof. Code § 10242* [*Bus. & Prof. Code § 10244*]. If the renewal or refinancing is through the same person who negotiated the original loan, the total costs and expenses on both loans may not exceed the aggregate costs and expenses set forth in *Bus. & Prof. Code § 10242(a)* [*Bus. & Prof. Code § 10244*].

Prepayment penalties on loans secured by real property consisting of a single-family, owner-occupied dwelling are prohibited except for prepayments made within seven years of the execution of the loan. Within the seven year period, an amount not exceeding 20 percent of the unpaid balance may be prepaid in any 12 month period, and a prepayment charge may be imposed on any amount prepaid in any 12 month period in excess of 20 percent of the unpaid balance. The charge may not exceed an amount equal to the payment of six months advance interest on the amount prepaid in excess of 20 percent of the unpaid balance [*Bus. & Prof. Code § 10242.6(a)*]. However, a prepayment penalty may not be charged to a borrower pursuant to *Bus. & Prof. Code § 10242.6* if (1) the dwelling securing the loan cannot be occupied due to damage caused by a natural disaster, (2) the governor has declared a state of emergency in connection with the disaster [*see Gov. Code § 8550 et seq.*], and (3) the prepayment is causally related to the disaster [*Bus. & Prof. Code § 10242.6(b)*].

[f] Statutory Remedies

For any violation by the broker, the borrower may recover three times the amount charged in excess of the amount permitted by statute or the amount charged and prohibited by statute, plus costs and reasonable attorneys' fees, except in

the case of bona fide error, in which case only the excess or prohibited amount may be recovered [*Bus. & Prof. Code § 10246*]. In the alternative, if the loan is negotiated in violation of any provision of the law, the borrower may demand that the broker return any bonus, brokerage, or commission paid or payable for the negotiation of the loan [*Bus. & Prof. Code § 10248.2(b)*]. Since each of these remedies is mutually exclusive, the borrower may elect one or the other for a single breach but not both [*Bus. & Prof. Code § 10248.2(b)*]. In the case of the first remedy, there is a two year limitation period that begins to run from the date that the prohibited or excess charge was received [*Bus. & Prof. Code § 10246(c)*]. The second remedy is subject to a two year limitation period that begins to run when the loan matures [*Bus. & Prof. Code § 10248.2(d)*].

If the loan is not consummated because the borrower fails to disclose the outstanding liens of record or the correct current vested title that is material to the loan on real property, the borrower is liable for the costs and expenses of making the loan that have been paid or incurred, and is liable for the payment of half of the total of the bonuses, brokerage fees, or commissions for negotiating, procuring, or arranging or making the loan [*Bus. & Prof. Code § 10243*].

[2] FORM

Mortgage Loan Disclosure Statement [Bus. & Prof. Code § 10241; 10 Cal. Code Reg. § 2840]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.251

§ 25.251 Mortgage Loan Disclosure Statement and Good Faith Estimate [Bus. & Prof. Code § 10241]

[1] Comment--Use of Form

This form may be presented to a prospective borrower by a mortgage loan broker when the requirements of *Bus. & Prof. Code § 10241* apply [*see § 25.250[1]*], if the loan transaction is subject to the Real Estate Settlement Procedures Act (RESPA) [*see Bus. & Prof. Code § 10240(c)*; *10* Cal. Code Reg. § 2840(a); *see also 12 U.S.C. § 2601 et seq.* (RESPA)]. For discussion of RESPA, including the disclosure requirements imposed on mortgage brokers [*see 24 C.F.R. § 3500.7(a), (b)*], see *§ 25.238[1]*.

This form is designated as Form RE 883 by the Department of Real Estate. A different form must be used when the transaction is not subject to RESPA [*see § 25.250[2]*]. For discussion of the statutory and regulatory requirements that apply to both forms, including execution and delivery requirements, see *§ 25.250[1]*.

ELECTRONIC FORMS NOTE: Electronic copies of Form RE 883, which can be printed out and filled in for use, can be obtained at the web site of the Department of Real Estate, located at http://www.dre.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 3405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.251. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[2] FORM

Mortgage Loan Disclosure Statement and Good Faith Estimate [Bus. & Prof. Code § 10241; 10 Cal. Code Reg. § 2840.1]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.252

§ 25.252 Mortgage Loan Disclosures--Balloon Payment and Agreement Regarding Extension, Refinancing, or Renegotiation [Bus. & Prof. Code § 10241.4]

[1] Comment--Use of Form

This form must be provided to a borrower if all of the following conditions are satisfied:

- The loan is secured by a dwelling, provides for a balloon payment, and is otherwise subject to *Bus. & Prof. Code § 10240* [*see § 25.250[1]*].

- An agreement has been reached that includes a promise, representation, or similar undertaking to extend or seek the extension of the loan term or refinancing of the loan.

- The undertaking is not set forth in the promissory note evidencing the loan or in a rider to that note.

Under these circumstances, the undertaking must be in writing, and this notice must be provided to the borrower before he or she becomes obligated on the loan [*Bus. & Prof. Code § 10241.4(a)*].

The notice must include a statement regarding the balloon payment, which must be in at least 10-point boldface capital letters [*Bus. & Prof. Code § 10241.4(b)*]. The notice must also contain, in at least 10-point boldface capital letters, a statement describing the extension, refinancing, or renegotiation agreement. The latter statement is to the effect that either (1) the lender or note holder has agreed to an extension, refinancing, or renegotiation or (2) the broker has agreed to use his or her best efforts to obtain a future extension, refinancing, or renegotiation--whichever better describes the nature of the undertaking [*Bus. & Prof. Code § 10241.4(c)*].

[2] FORM

Mortgage Loan Disclosures--Balloon Payment and Agreement Regarding Extension, Refinancing, or Renegotiation [Bus. & Prof. Code § 10241.4]

DISCLOSURES REGARDING BALLOON PAYMENT
AND _____ [EXTENSION *or* REFINANCING *or* RENEGOTIATION]

AS THIS LOAN PROVIDES FOR A BALLOON PAYMENT, SEE THE MORTGAGE LOAN DISCLOSURE STATEMENT AND GOOD FAITH ESTIMATE FOR IMPORTANT INFORMATION ON BALLOON PAYMENTS. ALSO, REFER TO THE LOAN DOCUMENTS AND THIS EXTENSION AGREEMENT FOR YOUR SPECIFIC RIGHTS AND OBLIGATIONS.

[*EITHER*]

THE LENDER OR NOTEHOLDER HAS AGREED TO AN EXTENSION, REFINANCING, OR RENEGOTIATION OF THE TERMS OF THIS LOAN, AND THE LENDER'S OR NOTEHOLDER'S SIGNED AGREEMENT_____ [IS ATTACHED *or describe other method used to furnish that signed document* **]. TRANSMISSION BY A BROKER OF A LENDER'S OR NOTEHOLDER'S UNDERTAKING OR THE BROKER'S REPRESENTATION OF THAT UNDERTAKING, PURSUANT TO SECTION 10241.4 OF THE BUSINESS AND PROFESSIONS CODE, DOES NOT OF ITSELF, CREATE OR ALTER ANY AGENCY OR SIMILAR RELATIONSHIP BETWEEN THE LENDER OR NOTEHOLDER AND THE BORROWER, OR THE LENDER OR NOTEHOLDER AND THE BROKER.**

[*OR*]

THE BROKER, _____[*name of broker making or arranging loan*], **HAS AGREED TO USE HIS OR HER BEST EFFORTS TO OBTAIN A FUTURE EXTENSION, REFINANCING, OR RENEGOTIATION OF THE LOAN BY THE LENDER OR NOTE OWNER. THERE CAN BE NO ASSURANCE OR GUARANTEE THAT THE LENDER OR NOTE OWNER WILL AGREE.**

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral Overview



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10-25 California Legal Forms--Transaction Guide § 25.253

§ 25.253 Request for Payoff Demand Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

This form is a request for a payoff demand statement, which is a written statement, prepared by the beneficiary of a trust deed or a mortgagee in response to a written request by the grantor of the deed of trust or mortgage, setting forth the amounts required, as of the date of preparation, to fully satisfy all obligations secured by the deed of trust or mortgage that is the subject of the statement [*Civ. Code § 2943(a)(5)*]. This type of statement is used when the secured obligation is to be paid in full--for example, when the seller of real property needs to make arrangements to pay off an existing loan and obtain a reconveyance under the deed of trust. For an illustrative payoff demand statement, see *§ 25.254*.

A request can be made by a person acting as agent (for example, escrow agent) for or successor in interest to the grantor [*see Civ. Code § 2943(a)(4)*]. An assignee can exercise the rights and perform the duties of the beneficiary of the deed of trust or mortgagee [*see Civ. Code § 2943(a)(1)*].

Civ. Code § 2943 includes provisions that, until January 1, 2014 [*Civ. Code § 2943(g)*; *see* 2009 Stats., ch. 43, § 5 (eff. Jan. 1, 2010)], allow escrow agents to obtain valid payoff statements in short-sale transactions. In a case subject to those provisions, there is a "short-pay agreement" in effect, which is a written agreement by the beneficiary (or mortgagee) to release its lien on a property in return for payment of an amount less than the secured obligation [*Civ. Code § 2943(a)(6)*]. In a short-sale transaction, the person in possession of the short-pay agreement, or an escrow agent on that person's behalf, would submit a "short-pay request" asking the beneficiary to provide a "short-pay demand statement" [*Civ. Code § 2943(a)(7),(8)*]. The *form in § 25.253[2]* may be used for making a short-pay request, provided the form is modified to show specifically that it requests a "short-pay demand statement." If this form is used without specifying a short-pay demand statement in lieu of a payoff demand statement, then the beneficiary must treat it as a request for a normal payoff demand statement [*Civ. Code § 2943(e)(1)*]. The short-pay demand statement will be similar to a normal payoff demand statement but will set forth the amount that the beneficiary has agreed to accept in lieu of the whole outstanding debt, together with any terms and conditions under which the beneficiary will execute and deliver a reconveyance of the deed of trust securing the note that is the subject of the short-pay demand statement [*Civ. Code §*

2943(a)(7)]. For further discussion, see California Real Estate Law and Pracrice, Ch. 555, *Trust Deeds and Real Property Mortgages*, § 555.53[4] (Matthew Bender), or California Real Estate Law and Pracrice, Ch. 123, *Nonjudicial Foreclosure*, § 123.13[7] (Matthew Bender).

[b] Beneficiary Statement

If an existing obligation is to be assumed rather than paid in full, a so-called beneficiary statement should be requested instead of a payoff demand statement [*see Civ. Code § 2943(a)(2)*; *see also* Ch. 25B, *Subordination, Assumption, and Assignment*]. If a request for a statement does not specify a beneficiary statement, the beneficiary of the deed of trust or the mortgagee must treat the request as a request for a payoff demand statement [*Civ. Code § 2943(e)(1)*].

[c] Procedural Requirements

If beneficiary of the deed of trust or the mortgagee has more than one branch, office, or other place of business, the request must be made to the branch or office address set forth in the payment billing notice or payment book. In that case, the statement, unless it specifies otherwise, will be deemed to apply only to the unpaid balance of the single obligation named in the request and secured by the deed of trust or mortgage that is payable at the branch or office specified in the billing notice or payment book [*Civ. Code § 2943(e)(5)*].

Within 21 days after receiving the written request for the payoff demand statement, the beneficiary or mortgagee must prepare and deliver the statement [*Civ. Code § 2943(c)*] by either mailing it or faxing it [*see Civ. Code § 2943(a)(3)*]. However, if the deed of trust or mortgage is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary or mortgagee need not prepare and deliver the statement unless the written request is received before the first publication of a notice of sale or the notice of the first date of sale established by a court [*Civ. Code § 2943(c)*].

[d] Copy of Deed of Trust or Mortgage

This form includes a request for a copy of the deed of trust or mortgage. That request must be honored at no additional charge [*Civ. Code § 2943(e)(2)*].

[2] FORM

Request for Payoff Demand Statement [Civ. Code § 2943]

REQUEST FOR PAYOFF DEMAND STATEMENT

TO: _____[*name of beneficiary or mortgagee*]
_____[*address*]
_____[*city, state, zip*]

The undersigned is the grantor of the _____[deed of trust in which _____ (*name*) is named as beneficiary and _____ (*name*) is named as trustee *or* the mortgage in which _____ (*name*) is named as mortgagee], which was recorded _____[*date*], as instrument [*number*] in book _____, page _____, of the official records of _____ County, California.

The undersigned requests that you deliver a written payoff demand statement prepared pursuant to *Civil Code Section 2943* within 21 days after your receipt of this request. The payoff demand statement must set forth the amounts required, as of the date of preparation of the statement, to fully satisfy all obligations secured by the [deed of trust *or* mortgage]. The statement must also include information reasonably necessary to compute the payoff amount on a per diem basis for the period of time, up to 30 days, during which the per diem amount is not changed by the terms of the

promissory note executed _____[*date*], by _____[*name*] and payable to _____[*name*] in the principal sum of $_____, and secured by the [deed of trust *or* mortgage]. The undersigned further requests that you deliver to the undersigned, along with the payoff demand statement, a copy of the [deed of trust *or* mortgage]. To satisfy the delivery requirements, you should send those documents to the undersigned at _____[*address*] [or by fax to _____ (*fax number*)]. Dated: _____.

_____ [*signature*]
_____ [*typed name of grantor*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. California Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.254

§ 25.254 Payoff Demand Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

This form is a payoff demand statement, to be delivered in response to the request exemplified in *§ 25.253[2]*.

A charge up to $30 may be collected for furnishing the statement, unless the secured loan is FHA-insured or VA guaranteed [*Civ. Code § 2943(e)(6)*].

[b] Demand for Proof of Entitlement

Before delivering the statement, the beneficiary of the deed of trust or the mortgagee may require reasonable proof that the person making the request is entitled to make it. After demanding proof, the beneficiary or mortgagee will have 21 days after receipt of the proof to deliver the statement [*Civ. Code § 2943(e)(3)*].

A written statement appointing an authorized agent will constitute reasonable proof of the identity of an agent if it is signed by an entitled person and delivered personally to the beneficiary or mortgagee or delivered by registered return-receipt mail. Similar delivery of a policy of title insurance, preliminary report issued by a title company, original or photographic copy of a grant deed, or certified copy of letters testamentary, letters of guardianship, or letters of conservatorship will constitute reasonable proof of the identity of a successor in interest, provided the person requesting the statement is named as successor in interest in the document [*Civ. Code § 2943(e)(3)*].

[c] Required Contents

A payoff demand statement must set forth the amounts required (as of the date of preparation of the statement) to fully satisfy all obligations secured by the deed of trust or mortgage that is the subject of the payoff demand. It must include information reasonably necessary to compute the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note [*Civ. Code § 2943(a)(5)*; *see*

California National Bank v. Havis (2004) 120 Cal. App. 4th 1122, 16 Cal. Rptr. 3d 245 (letter acknowledging receipt of "payoff funds" but failing to state amount required to pay off loan or per diem interest rate was not a payoff demand statement)].

The payoff demand statement must also include a demand for the fee for the trustee, beneficiary, or mortgagee; otherwise, the fee may not be charged [*Civ. Code § 2941(e)(3)*]. The trustee, beneficiary, or mortgagee may charge a reasonable fee to the trustor or mortgagor, or the owner of the land, as the case may be, for all services involved in the preparation, execution, and recordation of the full reconveyance. Fees may be charged for, but are not limited to, document preparation and forwarding services rendered to effect the full reconveyance, as well as official fees. The fee may be made payable no earlier than the opening of a bona fide escrow, or no more than 60 days before the full satisfaction of the obligation secured by the deed of trust or mortgage [*Civ. Code § 2941(e)(1)*]. If the fee charged does not exceed $45, it is conclusively presumed to be reasonable [*Civ. Code § 2941(e)(2)*].

[d] Copy of Deed of Trust or Mortgage

If the request for the payoff demand statement includes a request for a copy of the deed of trust or mortgage, that request must be honored at no additional charge [*Civ. Code § 2943(e)(2)*].

[e] Reliance on Statement and Amendments

A payoff demand statement may be relied on in accordance with its terms. It may also be relied on for the purpose of establishing the amount necessary to pay the obligation in full. If the beneficiary or mortgage subsequently delivers notice of any amendment to the statement, then the amended statement may be relied on in accordance with its terms [*Civ. Code § 2943(d)(1)*]. If notice of an amendment is not given in writing, the beneficiary or mortgagee must deliver a written amendment to the statement no later than the next business day after that notice [*Civ. Code § 2943(d)(2)*].

[f] Continuing Unsecured Obligations

On the dates specified below, any sums that were due and for any reason not included in the statement or an amendment will continue to be recoverable by the beneficiary or mortgagee as an unsecured obligation of the obligor pursuant to the terms of the note and existing provisions of law [*Civ. Code § 2943(d)(3)*; *see Cathay Bank v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595]* :

- If the transaction is voluntary, the obligor or an agent of the obligor may rely on the statement or an amendment on the earlier of (1) the close of escrow; (2) transfer of title; or (3) recordation of a lien.

- If the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the obligor or an agent of the obligor may rely on the statement or an amendment on the acceptance of the last and highest bid at a trustee's sale or a court-supervised sale.

[g] Violations by Beneficiary or Mortgagee

The beneficiary of the deed of trust or the mortgagee, on willful failure to prepare and deliver a payoff demand statement within 21 days after receiving a valid request (or within 21 days after receiving proof of entitlement [*see Civ. Code § 2943(e)(3)*; [b], *above*]), is liable for all damages that the entitled person may sustain by reason of the refusal and must forfeit $300 to the entitled person, whether or not actual damages are sustained. Each failure to prepare and deliver the statement creates a separate cause of action, but a judgment awarding the entitled person a forfeiture, or damages and forfeiture, for any failure to prepare and deliver a statement bars recovery of damages and forfeiture for any other failure to prepare and deliver a statement, with respect to the same obligation, in compliance with a request made within six months before or after the request that resulted in the award. A willful failure is an intentional failure to comply with the requirements of *Civ. Code § 2943* without just cause or excuse [*Civ. Code § 2943(e)(4)*].

[2] FORM

Payoff Demand Statement [Civ. Code § 2943]

PAYOFF DEMAND STATEMENT

TO: _____[*name of obligor or other entitled person making request*]
_____[*address*]
_____[*city, state, zip*]

I, _____[*name of beneficiary or mortgagee*], hereby state that:

1. This statement is provided in response to your request, dated _____, for a written payoff demand statement setting forth the amounts required as of the date of the preparation of the statement to fully satisfy all obligations secured by the [deed of trust *or* mortgage] recorded _____[*date*], as instrument [*number*] in book _____, page _____, of the official records of _____ County, California. [A copy of the _____ (deed of trust *or* mortgage) is attached to this statement.]

2. The amount of the unpaid balance of the promissory note evidencing the principal obligation secured by the [deed of trust *or* mortgage] is $_____.

3. The amount due for accrued interest on the unpaid balance is $_____.

4. From and after the date of this statement, interest on the unpaid balance will accrue at _____ percent per annum.

5. The amount of daily interest that will accrue on the unpaid balance for each day from and after the date of this statement up to and including _____[*date not more than 30 days after date of statement*] is $_____. Until that date, the per diem amount will not be changed by the terms of the note.

6. The amounts and due dates for the required periodic payments of principal and interest on the note are as follows: [*specify*].

7. The aggregate amount of overdue installments of principal and interest is _____[zero *or state amount*].

8. The date to which real estate taxes and special assessments have been paid is _____[unknown *or specify date*].

9. The amount of hazard insurance now in effect on the property subject to the [deed of trust *or* mortgage] is _____[unknown *or state amount and add:* The term of that insurance is _____ (*number*) years, and the premiums are $_____ per year].

10. The amount held in an impound account maintained for the accumulation of funds with which to pay taxes and insurance on the property subject to the [deed of trust *or* mortgage] is _____[zero *or state amount*].

11. The amount of the prepayment penalty that will be payable under the terms of the note and [deed of trust *or* mortgage] if the note is paid in full before its original due date of _____ is _____[zero *or state amount*].

12. Additional charges, costs, and expenses paid or incurred by the [beneficiary *or* mortgagee] that have become a lien

on the subject property are [nonexistent *or specify nature and amounts*].

13. Aggregate fees due to the [trustee and beneficiary *or* mortgagee] for all services involved in the preparation, execution, and recordation of the full reconveyance are as follows: [*specify fees*]. This amount is payable on _____[*specify date no earlier than opening of bona fide escrow, and no more than 60 days before full satisfaction of obligation secured by deed of trust or mortgage*].
Dated: _____.

_____ [*signature*]
_____ [*typed name of beneficiary or mortgagee*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
PART IV. FORMS
E. California Disclosure Requirements

10-25 California Legal Forms--Transaction Guide § 25.255

§ 25.255 Seller Financing Addendum and Disclosure

[1] Comment

[a] Use of Form

The form in [2], *below,* is the California Association of Realtors form entitled "Seller Financing Addendum and Disclosure" (which is reprinted with permission of the California Association of Realtors, no endorsement implied). It satisfies the disclosure requirements that apply to any transaction involving the purchase of a dwelling for not more than four families when the purchase includes seller financing and there is an arranger of credit [*Civ. Code § 2956*; *see Civ. Code § 2957(d)* (arranged credit must involve finance charge or be payable in more than four installments)]. The disclosures pertain primarily to the terms of the seller financing [*see* [d], *below*].

[b] Arranger of Credit

An arranger of credit is a person, not a party to the credit transaction, who is involved in developing or negotiating credit terms and in completing the credit documents, and who directly or indirectly receives compensation for these services or from any transaction or transfer of real property that is facilitated by these services. Excluded from this definition are attorneys who represent the parties, persons acting as escrow holders in the transaction, and escrow holders who do not act as arrangers of credit [*see Civ. Code § 2957(a)*]. If a real estate licensee or a licensed attorney is a party, that person is considered an arranger of credit unless neither party to the transaction is represented by a real estate licensee [*Civ. Code § 2957(a)(2)*].

[c] Exceptions

The disclosures need not be made to a purchaser or seller entitled to receive alternative disclosures pursuant to the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*], the Real Estate Settlement Procedures Act [*12 U.S.C. § 2601 et seq.*], selected sections of the Business and Professions Code pertaining to mortgage loan transactions [*see Bus. & Prof. Code §§ 10232.4, 10232.5, 10240*; *see also §§ 25.250[1], 25.260[1]*], or the qualification or exemption requirements of *Corp. Code § 25110* [*Civ. Code § 2958*]. For discussion of the qualification and exemption requirements of the

corporate securities law, see Ch. 6, *Securities Regulation Issues* .

[d] Disclosures

Before the execution of any note or security documents [*see Civ. Code § 2959*], the disclosures must be made to the purchaser by the arranger of credit and the seller, and to the seller by the arranger of credit and the purchaser [*Civ. Code §§ 2956, 2959, 2963*].

The disclosure statement must set forth all of the following:

- An identification of the note or other credit documents or security documents and of the property that is the security for the transaction [*Civ. Code § 2963(a)*].
- A description or copy of the terms of the promissory note or other credit documents [*Civ. Code § 2963(b)*].
- The principal terms and conditions of each recorded encumbrance that constitutes a lien that is or will be senior to the financing being arranged, including, as available [*Civ. Code § 2963(c)*]:
  - The original balance.
  - The current balance.
  - The periodic payment.
  - Any balloon payment.
  - The interest rate (and any provisions governing variations in the interest rate).
  - The maturity date.
  - Whether or not there is any current default in payment on that encumbrance.
- If refinancing would be required as a result of lack of full amortization under the terms of any existing or proposed loans: a warning that the refinancing might be difficult or impossible in the conventional mortgage marketplace [*Civ. Code § 2963(d)*].
- If negative amortization may result from any variable-rate or adjustable-rate financing being arranged, clear disclosure of this fact and an explanation of its potential effect [*Civ. Code § 2963(e)*].
- If the financing involves an all-inclusive deed of trust, a statement indicating [*Civ. Code § 2963(f)*]:
  - Whether the credit or security documents specify who is liable for payment or responsible for defense in the case of an attempted acceleration by a lender or other obligee under a prior encumbrance.
  - Whether the credit or security documents specify the responsibilities and rights of the parties in the event of a loan prepayment on a prior encumbrance that may result in a requirement for refinancing, a prepayment penalty, or a prepayment discount.

- If the credit or security documents contain such specifications of rights and responsibilities, a recital of the provisions that apply.

- If the financing being arranged, or any financing represented by a prior encumbrance, could result in a balloon payment, or in an acceleration of the principal balance: a disclosure of the date and amount of the balloon payment or the amount that would be due on the exercise of the right to accelerate, and a statement that there is no assurance that new financing or a loan extension will be available at the time of the balloon payment or acceleration [*Civ. Code § 2963(g)*].

- If the financing being arranged involves an all-inclusive deed of trust or real property sales contract [*Civ. Code § 2963(h)*]:

    - A disclosure of the party to whom payments must be made and who will be responsible for remitting these funds to payees under prior encumbrances and vendors under this transaction.

    - A warning that if that person is not a neutral third party, the parties may wish to agree to have a neutral third party designated for these purposes.

- A disclosure of the identity, occupation, employment, and income of the prospective purchaser, and credit data regarding that purchaser, as represented to the arranger by the prospective purchaser, or a disclosure that the arranger makes no representation about the creditworthiness of the specific prospective purchaser [*Civ. Code § 2963(i)*].

- A warning that *Code Civ. Proc. § 580b* may limit any recovery by the vendor to the net proceeds of the sale of the security property in the event of foreclosure [*Civ. Code § 2963(i)*].

- A statement that either [*Civ. Code § 2963(j)*]:

    - Loss-payee clauses have been added to property insurance protecting the vendor; or

    - Instructions have been or will be sent to the escrow holder (if any) or the appropriate insurance carriers for the addition of loss-payee clauses; or

    - The vendor should consider protecting himself or herself by having loss-payee clauses added.

- A statement that a request for notice of default under *Civ. Code § 2924b* has been recorded or, if a request has not been recorded, a statement that the vendor should consider recording such a request [*Civ. Code § 2963(k)*].

- A statement that either (1) a policy of title insurance has been obtained or will be obtained and furnished to the vendor and purchaser, insuring their respective interests, or (2) the vendor and purchaser individually should consider obtaining a policy of title insurance [*Civ. Code § 2963*(*l*)].

- A statement that either (1) the vendor should make alternative arrangements to determine whether property taxes have been paid or (2) a tax service has been arranged to report to the vendor whether property taxes have been paid on the property, identifying the person who will be responsible for the continued retention and compensation of the tax service [*Civ. Code § 2963(m)*].

- A disclosure of whether the security documents on the financing being arranged have been or will be recorded pursuant to *Gov. Code § 27280*, or a statement that the vendor's security may be subject to intervening liens or judgments that may occur after the note is executed and before any resort to security occurs if the security documents are not recorded [*Civ. Code § 2963(n)*].

- A statement, if applicable, that the purchaser is to receive cash from the proceeds of the transaction, specifying the amount, the source of the funds, and the purpose of the disbursement as represented by the purchaser [*Civ. Code § 2963(o)*].

- A statement that a request for notice of delinquency under *Civ. Code § 2924e* has been made, or, if such a request has not been made, a statement that the vendor should consider making such a request [*Civ. Code § 2963(p)*].

[e] Notice of Balloon Payment

When a balloon payment note with a repayment term of greater than one year is given in the type of transaction that is subject to the disclosure requirement, the holder of the note must give prior notice to the payor of the pending balloon payment [*Civ. Code § 2966*]. For a form for a notice, see Ch. 25A, *Security Instruments for Real Estate Financing* .

Every balloon payment note that is subject to the provisions of *Civ. Code § 2966* must include a statement reciting that the holder of the note is required by statute to give notice of the balloon payment within a prescribed period [*see Civ. Code § 2966(d)*]. The required statutory language for the statement is set forth in Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Seller Financing Addendum and Disclosure

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionBanking LawConsumer ProtectionState LawRemediesBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25 California Legal Forms--Transaction Guide §§ 25.256-25.259

[Reserved]

§§ 25.256[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
F. Mortgage Loan Broker's Disclosures and Reports

10-25 California Legal Forms--Transaction Guide § 25.260

§ 25.260 Disclosure Statement to Lender or Note Purchaser [Bus. & Prof. Code § 10232.5; 10 Cal. Code Reg. § 2846]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a disclosure statement prescribed by the Department of Real Estate, and designated as Form RE 851A, for use by a real estate broker in soliciting a lender to originate a real estate loan.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of Form RE 851A, which can be printed out and filled in for use, can be obtained at the web site of the Department of Real Estate, located at http://www.dre.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.260. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[b] Basic Disclosure Requirement

In making a solicitation to a particular person and in negotiating with that person to make a loan secured by real property or to purchase a real property sales contract or a note secured by a trust deed, a real estate broker must deliver to the person solicited a completed disclosure statement [*Bus. & Prof. Code § 10232.4(a)*]. The contents of the statement will vary depending on the type of transaction involved [*see* [d]-[h], *below*]. The disclosure statement should be given as early as practicable before the person becomes obligated to make the loan or purchase; and, except as provided in *Bus. & Prof. Code § 10232.4(c)*, it must be given before the receipt by or on behalf of the broker of any funds from the person [*Bus. & Prof. Code § 10232.4(a)*].

[c] Exceptions to Disclosure Requirement

A disclosure statement need not be provided when the prospective lender is any of the following persons [*Bus. & Prof. Code § 10232.4(b)*]:

- Any bank (or subsidiary), bank holding company (or subsidiary), savings bank or savings association holding company (or subsidiary), trust company, savings bank or savings and loan association (or subsidiary), credit union, industrial bank or industrial loan company, personal property broker, commercial finance lender, consumer finance lender, or insurance company doing business under the authority of, and in accordance with, the laws of California, any other state, or the United States, relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, commercial finance lenders, or insurance companies, as evidenced by a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States.

- The United States or any state, district, territory, or commonwealth of the United States; any city, county, city and county, public district, public authority, public corporation, public entity, or political subdivision of a state, district, territory, or commonwealth of the United States; or any agency or corporation or other instrumentality of any one or more of the foregoing, including the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Department of Veterans Affairs.

- Trustees of a pension, profit sharing, or welfare fund, if the fund has a net worth of not less than $15,000,000.

- Any corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 [*see 15 U.S.C. § 78a et seq.*] or any wholly owned subsidiary of that corporation.

- A licensed residential mortgage lender or servicer when acting under the authority of that license.

A disclosure statement need not be provided to the prospective purchaser of a security offered under authority of a permit issued pursuant to applicable provisions of the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] for the offering, if one of the conditions of the exemption is that each prospective purchaser of the security be given a disclosure statement prescribed by the regulation before the prospective purchaser becomes obligated to purchase the security [*Bus. & Prof. Code § 10232.4(b)*].

[d] Use of Alternative Form

The form in [2], *below*, was published by the Department of Real Estate in order to aid real estate licensees in providing information of significance to prospective lenders and purchasers of promissory notes secured by real property and real property sales contracts in a uniform and effective manner [*10 Cal. Code Reg. § 2846(b)*; *see 10 Cal. Code Reg. § 2846(a)*]. Alternative disclosure statement forms can be approved, but only if the broker seeking approval establishes that the request for approval is made on behalf of 25 or more real estate brokers who are subject to the requirements of *Bus. & Prof. Code § 10232(d)* (relating to brokers who are not under common management, direction, or control) [*10 Cal. Code Reg. § 2846(b)*].

[e] Transaction Involving New Loan

The form in [2], *below*, should be used for a loan origination or new loan transaction. For these purposes, a broker is involved in a new loan transaction if he or she performs acts described in *Bus. & Prof. Code § 10131(d)* (that is, soliciting borrowers or lenders, collecting payments, or performing services for borrowers, lenders, or note owners) in

negotiating a loan to be secured by a lien on real property [*see Bus. & Prof. Code § 10232.5(a)*; *see also Bus. & Prof. Code § 10131(d)*]. The disclosure statement for such a transaction must include the following information [*Bus. & Prof. Code § 10232.5(a)*]:

- Address or other means of identification of the real property that is to be the security for the borrower's obligation.

- Age, size, type of construction, and description of improvements to the property, if contained in the appraisal or as represented to the broker by the prospective borrower.

- Identity, occupation, employment, income, and credit data about the prospective borrower as represented to the broker by the prospective borrower.

- Terms of the promissory note to be given to the lender.

- Pertinent information concerning all encumbrances that constitute liens against the property.

- Provisions for servicing of the loan, if any, including disposition of the late-payment charge and prepayment penalty paid by the borrower; and

- Detailed information concerning any proposed arrangement under which the prospective lender, along with persons not otherwise associated with the lender, will be joint beneficiaries or obligees.

The disclosure statement also must include the estimated fair market value of the property as determined by an appraisal, a copy of which must be provided to the lender. However, a lender may waive the requirement of an independent appraisal in writing, on a case-by-case basis; and in that case, the real estate broker must provide the broker's written estimated fair market value of the property, which must include the objective data on which the broker's estimate is based [*Bus. & Prof. Code § 10232.5(a)(2)*].

The disclosure statement also must include pertinent information about other loans that the borrower expects or anticipates will result in a lien being recorded against the property, to the extent that the broker has actual knowledge of the other loans. For these purposes, actual knowledge is knowledge gained by the broker through arranging another loan or receipt of written notification of another loan. In this regard, the broker must also provide to the prospective lender the option to apply to purchase a title insurance policy or an endorsement to an existing title insurance policy covering the property, and a copy of a written loan application, and a credit report [*Bus. & Prof. Code § 10232.5(a)(6)*].

If the solicitation is subject to *Bus. & Prof. Code § 10231.2* [*see* [f], *below*], the disclosure statement also must include a detailed statement of the intended use and disposition of the funds being solicited, including an explanation of the nature and extent of the benefits to be directly or indirectly derived by the broker [*Bus. & Prof. Code § 10232.5(a)(9)*].

[f] Transaction Involving Sale of Real Property Sales Contract or Secured Promissory Note

Special requirements govern the contents of a disclosure statement prepared by a real estate broker who is performing acts described in *Bus. & Prof. Code § 10131(e)* or *Bus. & Prof. Code § 10131.1* in negotiating the sale of a real property sales contract or a promissory note secured directly or collaterally by a lien on real property [*see Bus. & Prof. Code § 10232.5(b)*]. The relevant acts described in *Bus. & Prof. Code § 10131(e)* consist of selling, buying, or offering to sell or buy a real property sales contract or secured promissory note [*see Bus. & Prof. Code § 10131(e)*]. The relevant *Bus. & Prof. Code § 10131.1* acts consist of engaging as a principal in the business of buying these contracts or notes from, or selling them to, the public or making loans secured by real property to the public[*see Bus. & Prof. Code § 10131.1(a)*]. A disclosure statement subject to the foregoing requirements must include the following information [*Bus.*

& Prof. Code § 10232.5(b); *see* DRE Form 851B (disclosure statement for sale of existing note), available at http://www.dre.ca.gov/frm_forms.html]:

- Address or other means of identification of the real property that is the security for the trustor's or vendee's obligation.

- Age, size, type of construction, and a description of improvements to the real property, if known by the broker.

- Information available to the broker relating to the ability of the trustor or vendee to meet the contractual obligations under the note or contract, including the trustor's or vendee's payment history under the note or contract.

- Terms of the contract or note, including the principal balance owing.

- Provisions for servicing of the note or contract, if any, including disposition of late charge, prepayment penalty, or other fees or charges paid by the trustor or vendee.

- A statement regarding whether the dealer is acting as a principal or an agent in the transaction with the prospective purchaser.

- Estimated fair market value of the securing property as determined by an appraisal, a copy of which must be provided to the lender.

However, a lender may waive the requirement of an independent appraisal in writing, on a case by case basis; and in that case, the real estate broker must provide the broker's written estimated fair market value of the securing property, which must include the objective data on which the broker's estimate is based [*Bus. & Prof. Code § 10232.5(b)*].

The disclosure statement also must include detailed information concerning any proposed arrangement under which the prospective purchaser, along with persons not otherwise associated with the prospective purchaser, will be joint beneficiaries or obligees. In this regard, the broker must also provide to the prospective purchaser the option to apply to purchase a title insurance policy or an endorsement to an existing title insurance policy covering the real property and, if available from the seller of the note or contract or from the original lender, a copy of a written loan application, and a credit report [*Bus. & Prof. Code § 10232.5(b)*].

[g] Additional Information When Solicited Funds Are for Broker's Use

A special disclosure requirement applies to any real estate broker who acts as a principal while engaging in certain loan or sales transactions and who intends to directly or indirectly obtain the use or benefit of funds solicited in the transaction [*Bus. & Prof. Code § 10231.2*]. The requirement applies to any real estate broker who, through the use of specified representations, proposes to solicit and accept funds, or to cause the solicitation and acceptance of funds, to be applied to a purchase or loan transaction in which the broker will directly or indirectly obtain the use or benefit of the funds other than for commissions, fees, and costs and expenses provided by law for the broker's services as an agent. The proposal must be made through express or implied representations that the broker or salesperson acting on the broker's behalf is engaging in the real estate brokerage activities described in *Bus. & Prof. Code § 10131(d)* and *(e)* [*Bus. & Prof. Code § 10231.2(a)*; *see* [e], *above*].

Any broker subject to this requirement, before the making of any representation, solicitation, or presentation of a lender/purchaser disclosure statement, must submit to the Department of Real Estate a true copy of the appropriate disclosure statement [*see* [a], *above*], complete except for the signature of the prospective lender or purchaser, and a

statement that the submittal is being made pursuant to *Bus. & Prof. Code § 10231.2* [*Bus. & Prof. Code § 10231.2(a)*]. Thereafter, the broker, when making a solicitation, must make certain that the completed disclosure statement is delivered to the person solicited not less than 24 hours before the earlier of (1) the acceptance of any funds from that person by or on behalf of the broker and (2) the execution of any instrument obligating the person to make the loan or purchase. The statement must be signed by the prospective lender or purchaser and by the real estate broker or, on the broker's behalf, by a real estate salesperson licensed to the broker. An exact copy of the executed statement must be given to the prospective lender or purchaser, and the broker must retain a true copy of the executed statement for four years [*Bus. & Prof. Code § 10231.2(b)*].

The special disclosure requirement is not applicable under the following circumstances: First, if the type of solicitation discussed above is made by a corporate real estate broker, the broker is exempt from this disclosure requirement unless the funds solicited are intended for the direct or indirect use or benefit of an officer or director of the corporation or a person with at least a 10-percent ownership interest in the corporation [*Bus. & Prof. Code § 10231.2(d)*]. Second, the disclosures are not required in the case of an offering of a security authorized pursuant to the provisions of the Real Estate Law relating to a claim of exemption from securities qualification for a series of notes or interests secured by the same real property [*see Bus. & Prof. Code § 10237 et seq.*; *see also* [h], *below*] or the applicable provisions of the Corporate Securities Law of 1968 [*Bus. & Prof. Code § 10231.2(c)*; *see Corp. Code § 25000 et seq.*; *see also* Ch. 6, *Securities Regulation Issues ;* Ch. 6H, *Qualification of Securities*].

[h] Disclosure Regarding Series of Notes or Interests Secured by Same Real Property

Any transaction involving a sale of or an offer to sell a series of notes secured directly by an interest in the same California real property, or a sale of undivided interests in a note secured directly by California real property equivalent to a series transaction, must comply with specified requirements [*Bus. & Prof. Code § 10237*; *see Bus. & Prof. Code § 10238 et seq.*]. The terms "sale" and "offer to sell" have the same meaning as in *Corp. Code § 25017* and include the acts of negotiating and arranging the transaction [*Bus. & Prof. Code § 10239.2(d)*]. Qualifying transactions are subject solely to regulation by the Department of Real Estate and are exempted from supervision by the Department of Corporations under *Corp. Code § 25110* [*Corp. Code § 25102.5*]. A broker or person who becomes the servicing agent for notes or interests sold under these provisions, on which payments due during any period of three consecutive months in the aggregate exceed $125,000 or the number of persons entitled to payments exceeds 120, must file the required notice within 30 days after becoming the servicing agent [*Bus. & Prof. Code § 10238(b)*; *see Bus. & Prof. Code § 10238(a)*].

For discussion of the transactions and property subject to these requirements, as well as required notices, restrictions on advertising and promotional claims, restrictions on the terms of the notes, restrictions on the number of sales, and requirements and specifications of individuals who may purchase these notes, see California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender).

[i] Signature and Delivery Requirements

The disclosure statement must be signed by the prospective lender or purchaser and by the real estate broker or, on the broker's behalf, by a real estate salesperson licensed to the broker. The statement must be delivered as early as practicable before the lender or purchaser becomes obligated to make the loan or purchase and, except as provided in *Bus. & Prof. Code § 10232.4(c)* [*see* [j], *below*], before the receipt by or on behalf of the broker of any funds from that person. An exact copy of the executed statement must be given to the lender or purchaser. The broker must retain a true copy of the executed statement for four years [*Bus. & Prof. Code § 10232.4(a)*].

[j] Disbursements From Escrow Depository or Trust Fund Account

Special signature and delivery requirements apply when the broker has custody of funds of a prospective lender or

purchaser that were received and are being maintained with the express permission of the owner and in accordance with law, and the broker retains the funds in an escrow depository or a trust fund account pending receipt of the owner's express written instructions to disburse the funds for a loan or purchase. Under those circumstances, the broker must deliver the disclosure statement to the owner and obtain the owner's written consent to a proposed disbursement before making any disbursement. The broker must transmit to the owner, not later than 25 days after receipt, all funds then in the broker's custody for which the owner has not given written instructions authorizing disbursement, unless the broker and owner have entered into a written agreement that authorizes the broker to retain the funds for a longer period [*Bus. & Prof. Code § 10232.4(c)*; *see Bus. & Prof. Code § 10231.1* (governing written agreements authorizing broker to retain funds for longer than 25 days)].

[2] FORM

Disclosure Statement to Lender or Note Purchaser [Bus. & Prof. Code § 10232.5; 10 Cal. Code Reg. § 2846]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25 REAL ESTATE LOANS
PART IV. FORMS
F. Mortgage Loan Broker's Disclosures and Reports

10-25 California Legal Forms--Transaction Guide § 25.261

§ 25.261 Annual Report of Mortgage Loan and Trust Deed Transactions [Bus. & Prof. Code § 10232.2(c); 10 Cal. Code Reg. § 2849.01]

[1] Comment

[a] Use of Form

The form in [2], *below*, is an annual report, designated as Form RE 881, that must be filed with the Department of Real Estate by real estate brokers who engage in certain transactions involving the negotiation or sale of secured obligations, such as mortgage loan brokerage transactions [*Bus. & Prof. Code §§ 10131(d), 10232.2(c)*; *10 Cal. Code Reg. § 2849.01*; *see Bus. & Prof. Code §§ 10131(e), 10131.1*].

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Electronic copies of Form RE 881, which can be printed out and filled in for use, can be obtained at the web site of the Department of Real Estate, located at http://www.dre.ca.gov/. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or e-mailing us at cal.custquest@bender.com and requesting an electronic copy of CLF Form 25.261. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will need Adobe Acrobat Reader version 3.0 or higher.

[b] Brokers Required to Report

The annual reporting requirement applies to a real estate broker who intends or reasonably expects in any successive 12 months to engage in any of three categories of activities [*see Bus. & Prof. Code § 10232.2*; *see also Bus. & Prof. Code § 10232(a), (b)*]. Persons under common management, direction, or control in conducting any of the activities described above are considered as one person for the purpose of applying these criteria [*Bus. & Prof. Code § 10232(a)*].

One category involves the collection of at least $250,000 in payments on behalf of (either or both) owners of promissory notes secured directly or collaterally by liens on real property and owners of real property sales contracts [

Bus. & Prof. Code § 10232(a)(2)]. These activities are typically performed by mortgage loan brokers [*see § 25.250[1][b]*].

A second category involves the collection of at least $250,000 in payments on behalf of (either or both) obligors of promissory notes secured directly or collaterally by liens on real property and lenders of real property sales contracts [*Bus. & Prof. Code § 10232(a)(3)*].

The third category involves the negotiation of any combination of 10 or more of the following transactions pursuant to certain provisions of the Real Estate Law [*see Bus. & Prof. Code §§ 10131(d), (e), 10131.1*] in an aggregate amount of more than $1,000,000 [*Bus. & Prof. Code § 10232(a)(1)*]:

- Loans secured directly or collaterally by liens on real property or on business opportunities as agent for another or others [*see Bus. & Prof. Code § 10131(d)*].

- Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property or on business opportunities as agent for another or others [*see Bus. & Prof. Code § 10131(e)*].

- Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property as the owner of those notes or contracts [*see Bus. & Prof. Code § 10131.1*].

The second and third categories apply to certain trust deed and real property sales contract transactions performed for compensation or in expectation of compensation [*Bus. & Prof. Code § 10131*] by real estate brokers who may, but do not necessarily, engage in mortgage loan brokerage transactions as well.

There is a rebuttable presumption that a broker intends to conduct the volume of business specified in *Bus. & Prof. Code § 10232(a)* if the broker negotiates either (1) any combination of two or more new loans and sales or exchanges of existing promissory notes and real property sales contracts having an aggregate amount of more than $250,000 in any three successive months or (2) any combination of five or more new loans and sales or exchanges of existing promissory notes and real property sales contracts having an aggregate amount of more than $500,000 in any successive six months [*see Bus. & Prof. Code § 10232(b)*]. The presumption is based on the fact that these levels of business would satisfy the criteria of *Bus. & Prof. Code § 10232(a)(1)* if maintained for a year.

[c] Application of Criteria

In determining whether a broker satisfies the criteria of *Bus. & Prof. Code § 10232(a)* and *(b)* [*see* [b], *above*], the following factors should be taken into account:

First, if two or more real estate brokers who are not under common management, direction, or control, cooperate in the negotiation of a loan or the sale or exchange of a promissory note or real property sales contract and share in the compensation for their services, the dollar amount of the transaction must be allocated according to the ratio that the compensation received by each broker bears to the total compensation received by all brokers for their services in negotiating the loan, sale, or exchange [*Bus. & Prof. Code § 10232(d)*].

Second, for purposes of the annual reporting requirement and certain related requirements [*see Bus. & Prof. Code §§ 10232.2, 10232.25*; *see also § 25.261[1][f]*], loans and sales negotiated by a broker, or for which a broker collects payments or provides other servicing for the owner of the note or contract, are not counted in making that determination in any of the following cases [*Bus. & Prof. Code § 10232(c)*]:

- The loan or sale is negotiated, or the loan or contract is being serviced for the owner, under authority of a permit issued pursuant to the provisions concerning a claim of exemption from securities qualification for series of notes or interests secured by same real property [*see Bus. & Prof. Code § 10237 et seq.*; *see also § 25.260[1][h]*] or applicable provisions of the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*].

- The transaction is subject to the disclosure requirements of *Civ. Code § 2956 et seq.*

- The lender or purchaser is any of the following:

    - The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, or the federal Department of Veterans Affairs.

    - A bank, savings association, credit union, or similar entity [*see Bus. & Prof. Code § 10232(c)(1)(B)*].

    - The trustees of a pension, profit-sharing, or welfare fund, if the fund has a net worth of at least $15,000,000.

    - Any corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 [*see* 15 U.S.C. § 78 *l*], or any wholly owned subsidiary of such a corporation.

    - Any syndication or other combination of any of the foregoing entities that is organized to purchase the promissory note.

    - The California Housing Finance Agency or any local housing finance agency organized under the Health and Safety Code.

    - A licensed residential mortgage lender or servicer acting under the authority of that license.

    - An institutional investor that issues mortgage-backed securities, as specified in *Fin. Code § 50003(j)(11)*.

    - A licensed real estate broker selling all or part of the loan, the note, or the contract to any of the lenders or purchasers listed above.

The reporting requirement also does not apply to the following [*Bus. & Prof. Code § 10230(a)*]:

- The negotiation of a loan by or on behalf of a real estate broker in connection with a qualifying sale or exchange of real property in which the broker acted as the agent of one or more of the parties to the sale or exchange.

- The sale or exchange, by or on behalf of the broker, of a promissory note created for the purpose of financing a qualifying real property sale or exchange transaction in which the broker acted as the agent of one or more of the parties to the qualifying real property sale or exchange, regardless of the time of the sale or exchange of the promissory note.

A qualifying sale or exchange of real property is one that is subject to the requirements of the statutory provisions governing disclosures on purchase money liens on residential property [*Bus. & Prof. Code § 10230(a)*; *see Civ. Code § 2956 et seq.*].

These exemptions for brokers acting as agents for parties to the sale or exchange of real property do not apply to the negotiation of loans or to sales or exchanges of promissory notes in connection with the financing of a real property sale or exchange transaction in which the broker had a direct or indirect monetary interest as a party [*Bus. & Prof. Code § 10230(b)*].

[d] Required Contents of Report

The annual report must contain specified information relating to the business conducted by the broker while engaging in any of the activities described in *Bus. & Prof. Code §§ 10131(b)* and *(d)* and *10131.1* [*see § 25.261[1][b]*]. The report must set forth the following [*Bus. & Prof. Code § 10232.2(c)*; *see 10 Cal. Code Reg. § 2849.01*]:

- Number and aggregate dollar amount of loan, trust deed sales, and real property sales contract transactions negotiated.

- Number and aggregate dollar amount of promissory notes and contracts serviced by the broker or an affiliate of the broker.

- Number and aggregate dollar amount of late payment charges, prepayment penalties, and other fees or charges collected and retained by the broker under servicing agreements with beneficiaries and obligees.

- Default and foreclosure experience in connection with promissory notes and contracts subject to servicing agreements between the broker and beneficiaries or obligees.

- Commissions received by the broker for services performed as agent in negotiating loans and sales of promissory notes and real property sales contracts.

- Aggregate costs and expenses as referred to in *Bus. & Prof. Code § 10241* and paid by borrowers to the broker.

[e] Time for Filing and Failure to File

The annual report must be completed and submitted within 90 days after the end of the broker's fiscal year or within whatever additional time the Department of Real Estate may allow for good cause [*Bus. & Prof. Code § 10232.2*]. If the broker fails to file within that time period, the Real Estate Commissioner may have an examination and report prepared, and then charge the broker 150 percent of the cost of the examination and report [*Bus. & Prof. Code § 10232.2(e)*]. In determining the hourly cost incurred for conducting an examination and preparing the report, the Commissioner may use the estimated average hourly cost for all department audit staff performing audits of real estate brokers. If a broker fails to pay the amount within 60 days following the mailing of a notice of billing, the Commissioner may suspend the broker's license or delay renewal of the broker's license. The suspension or delay must remain in effect until the amount due is paid or the broker's right to renew a license has expired. The Commissioner may maintain an action for the recovery of the amount in any court of competent jurisdiction [*Bus. & Prof. Code § 10232.2(e)*].

[f] Newly Qualifying Broker's Report

A broker who meets, for the first time, any of the criteria of *Bus. & Prof. Code § 10232(a)* and *(b)* [*see § 25.261[1][b]*]

must notify the Department of Real Estate in writing of that fact within 30 days [*Bus. & Prof. Code § 10232(e)*]. A broker who violates this requirement can be fined, and may have his or her license suspended or revoked for failure to pay the fine [*see Bus. & Prof. Code § 10236.2*].

[g] Section 10232(a) Broker's Reports

Brokers meeting the criteria of *Bus. & Prof. Code § 10232(a)* ("Section 10232(a) brokers") [*see § 25.261[1][b]*] must also submit one of the following documents [*Bus. & Prof. Code § 10232.2*; *but see Bus. & Prof. Code § 10232(c)(1)* (for purposes of this requirement, certain loans or sales are not counted in determining whether brokers meet foregoing criteria)]:

- An annual report, prepared by a licensed California independent public accountant, that reviews the broker's trust fund financial statements, which must generally be filed within 90 days after the end of the broker's fiscal year or within whatever additional time the Department of Real Estate may allow for good cause [*see Bus. & Prof. Code § 10232.2(a)*; *see also 10 Cal. Code Reg. §§ 2846.5, 2846.7*]; or

- A notarized, sworn statement attesting to the fact that the broker did not receive for the benefit of a person to whom the broker is a trustee, any trust funds in cash or in a form convertible to cash during the fiscal year. This statement must be filed within 30 days after the end of the broker's fiscal year or within whatever additional time the Department of Real Estate may allow for good cause [*Bus. & Prof. Code § 10232.2(b)*].

A Section 10232(a) broker is also required to file a trust funds status report within 30 days after the end of each of the first three fiscal quarters of the broker's fiscal year, or within whatever additional time the Department of Real Estate may allow for good cause [*Bus. & Prof. Code § 10232.25(a)*; *but see Bus. & Prof. Code § 10232(c)(1)* (for purposes of this requirement, certain loans or sales are not counted in determining whether brokers meet foregoing criteria)]. Specified information must be included in the report [*see Bus. & Prof. Code § 10232.25(a), (b)*], and the report should be prepared by the broker's accountant. If a broker fails to file the report on time, the Real Estate Commissioner may order an examination and report and then charge the broker 150 percent of the cost of making the examination and report [*Bus. & Prof. Code § 10232.25(c)*].

The report need not be submitted by a broker who, in carrying out the activities described in *Bus. & Prof. Code § 10131(d)* and *(e)* [*see § 25.261[1][b]*], did not during a fiscal quarter accept for the benefit of a person to whom the broker is a trustee, any payment or remittance in a form convertible to cash by the broker [*Bus. & Prof. Code § 10232.25(d)*]. Instead, the broker must submit a statement under penalty of perjury on an official form attesting to the fact that the broker meets the criteria of the exemption [*Bus. & Prof. Code § 10232.25(d)*].

A broker meeting the criteria of *Bus. & Prof. Code § 10232(a)* who undertakes to service a promissory note secured directly or collaterally by a lien on real property or a real property sales contract must comply with the following requirements [*Bus. & Prof. Code § 10233*]:

- The broker must have a written authorization from the borrower, the lender, or the owner of the note or contract, that is included in the terms of a written servicing agreement that satisfies the requirements of *Bus. & Prof. Code § 10238(k)*.

- The broker must provide the lender or the owner of the note or contract with at least an accounting of the unpaid principal balance at the end of each year and an accounting of collections and disbursements received and made during each year. Each accounting must identify the person who holds the original note or contract and the deed of trust evidencing and securing the debt or obligation for which the accounting has been provided.

- The broker must provide to the lender or the owner of the note or contract written notification within 15 days of the occurrence of any of the following events:

    - Recording of a notice of default.

    - Recording of a notice of trustee's sale.

    - Receipt of any payment constituting an amount greater than or equal to five monthly payments, together with a request for partial or total reconveyance of the real property, in which case the notice must also indicate any further transfer or delivery instructions.

    - Delinquency of any installment or other obligation under the note or contract for over 30 days.

[h] Trust Funds Reports

A special trust fund reporting requirement applies to any broker who engages in any of the activities specified in *Bus. & Prof. Code § 10131(d)* and (e) [*see § 25.261[1][b]*], but who is not a Section 10232(a) broker [*see § 25.261[1][g]*] because the annual dollar volume of those activities does not exceed the threshold prescribed by *Bus. & Prof. Code § 10232(a)* [*see § 25.261[1][b]*]. Although the broker is not required to file trust fund status reports [*see Bus. & Prof. Code § 10232.5(a)*], he or she is required to prepare those reports in accordance with either the requirements of *Bus. & Prof. Code § 10232.25(a)* and *(b)* or the requirements established by the lender or note owner, if the lender or note owner (1) requires monthly reconciliations of trust account balances, (2) requires annual, CPA-audited financial statements, and (3) maintains a contractual right to audit the trust accounts held by the broker on behalf of the lender or note owner. The broker must keep those reports on file at the broker's office, where they must be subject to inspection by the Department of Real Estate on 24 hours' notice [*Bus. & Prof. Code § 10232.25(e)*].

[i] Disclosures

In making a solicitation to a particular person and in negotiating with that person to make a loan secured by real property or to purchase a real property sales contract or a note secured by a deed of trust, any real estate broker subject to *Bus. & Prof. Code § 10230 et seq.* must provide prospective purchasers and lenders with a disclosure statement containing specified information [*see Bus. & Prof. Code §§ 10232.4, 10232.5*; *see also § 25.260[2]*].

No broker subject to *Bus. & Prof. Code § 10230 et seq.* may place an advertisement disseminated primarily in California for a loan unless the broker's license number, as well as the unique identifier assigned to that broker by the Nationwide Mortgage Licensing System and Registry (if the broker's license has a mortgage loan originator endorsement), under which the loan would be made or arranged, are disclosed (1) within the printed text of the advertisement, or (2) in the case of a radio or television advertisement, in the oral text of the advertisement [*Bus. & Prof. Code § 10235.5*; *see 10 Cal. Code Reg. § 2847.3* (statements satisfying this requirement)]. The broker may submit a copy of proposed advertising for approval [*Bus. & Prof. Code § 10232.1(a)*; *see § 25.261[1][k]*]. In addition, every licensed real estate broker must do the following [*Bus. & Prof. Code § 10236.4*]:

- In compliance with *Bus. & Prof. Code § 10235.5*, display his or her license number, along with the unique identifier assigned to that broker by the Nationwide Mortgage Licensing System and Registry (if the broker's license has a mortgage loan originator endorsement), in all advertisements in connection with a solicitation of borrowers or potential investors; and

- Disclose both the broker's license number and the department's license information telephone

number, along with the mortgage loan originator's unique identifier, if any, whenever a borrower or investor signs any documents related to a loan negotiated by the broker.

[j] Required Notification That Broker No Longer Services or Arranges Loans

A real estate broker must notify the Department of Real Estate when he or she is no longer servicing or arranging loans subject to the reporting requirements of *Bus. & Prof. Code § 10232*. If the broker has already made required reports in the year, he or she must continue making reports for that year but must notify the department before the expiration of that year that he or she will no longer be servicing or arranging loans for which reports are required. The department's records, including those that may be disclosed by calling the department's license information telephone number, may then be appropriately updated [*Bus. & Prof. Code § 10236.5*].

[k] Proposed Advertising

A real estate broker, before using any proposed advertisement in connection with the conduct of activities described in *Bus. & Prof. Code §§ 10131(d)* and *(e)* and *10131.1* [*see § 25.261[1][b]*], may submit a true copy of the advertisement to the Department of Real Estate for approval. The submission must be accompanied by a fee [*Bus. & Prof. Code § 10232.1(a)*].

For purposes of this approval requirement, an advertisement includes dissemination in any newspaper, circular, form letter, brochure, or similar publication, display, sign, radio broadcast, or telecast, that concerns (1) the use, terms, rates, conditions, or the amount of any loan or sale involved in a *Bus. & Prof. Code § 10232* activity or (2) the security, solvency, or stability of any person carrying on such an activity [*Bus. & Prof. Code § 10232.1(a)*]. Advertisements do not include a letter or brochure that is either of the following [*Bus. & Prof. Code § 10232.1(b)*]:

- Restricted in distribution to other real estate brokers and to persons for whom the broker has previously acted as agent in arranging a loan secured by real property or in the purchase, sale, or exchange of a deed of trust or real property sales contract; or

- Restricted in content to the identification and a description of the terms of loans, mortgages, deeds of trust, and real property sales contracts offered for funding or purchase through the broker as agent.

The submittal and approval requirements do not apply to advertising that is used exclusively in connection with an offering authorized by permit issued pursuant to provisions of the Real Estate Law relating to real property securities dealers [*see Bus. & Prof. Code § 10237 et seq.*] or applicable provisions of the Corporate Securities Law of 1968 [*Bus. & Prof. Code § 10232.1(c)*; *see Corp. Code § 25000 et seq.*; *see also* Ch. 6H, *Qualification of Securities*].

In administering *Bus. & Prof. Code § 10232.1*, the Real Estate Commissioner will take any action that is appropriate to prevent or halt the publication of advertising that is false, misleading, or deceptive in itself or through the omission of information necessary to make a presentation not misleading in the context in which it is used. To this end, the Commissioner may disapprove or require verification of representations in advertising submitted pursuant to *Bus. & Prof. Code § 10231.1*. In determining whether an advertisement is likely to create a false impression, the Commissioner will consider not only the actual text but also such factors as format, pictorial display, and emphasis [*10 Cal. Code Reg. § 2848*].

If disapproval of a proposed advertisement is not communicated to the broker within 15 calendar days after receipt of the copy of the proposed advertisement, the proposed advertisement will be deemed approved. The Commissioner, however, will not be estopped from disapproving a later publication or other use of the same or similar advertising [*Bus. & Prof. Code § 10232.1(a)*].

[2] FORM

Annual Report of Mortgage Loan and Trust Deed Transactions [Bus. & Prof. Code § 10232.2(c); 10 Cal. Code Reg. § 2849.01]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING

10-25A California Legal Forms--Transaction Guide 25A.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING

10-25A California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter covers the principal security instruments used in real estate transactions. Its focus is on promissory notes, deeds of trust (including all-inclusive trust deeds and notes), mortgages, and installment real property sales contracts. The forms section includes complete security instruments, alternative and additional provisions for those instruments, and related notices, requests, and other documents that may be executed concurrently with or subsequent to a security instrument.

This chapter does not consider the following related subjects: sale-leasebacks [*see* Ch. 23, *Real Property Sales Agreements* (sale-leaseback provisions for sales agreement); *see also* Rabkin & Johnson, Current Legal Forms, Ch. 21, *Sales and Exchanges* (Matthew Bender)]; letters of credit [*see* Rabkin & Johnson, Current Legal Forms, Ch. 5C, *Letters of Credit and Commercial Paper* (Matthew Bender)]; or guaranties [*see* California Real Estate Law and Practice, Ch. 112, *Guaranty and Suretyship* (Matthew Bender)].

For detailed coverage of real estate loans, see Ch. 25, *Real Estate Loans* . That chapter describes the various types of loans and sets forth the procedure for obtaining a loan. It also discusses federal and state law applicable to real estate loans, including required lender disclosures under the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the federal Real Estate Settlement Procedures Act of 1974 [*12 U.S.C. § 2601 et seq.*]. In addition, Chapter 25 examines state requirements governing mortgage loan transactions and real property securities dealers.

Ch. 25B, *Subordination, Assumption, and Assignment* , covers the subordination of one trust deed to another, the assumption of loans, and the assignment of notes and trust deeds. Full and partial releases and reconveyances of deeds of trust and the substitution of trustees under trust deeds are covered in Ch. 25C, *Release and Reconveyance* . For a detailed discussion of the foreclosure procedure applicable to security instruments, see Ch. 25D, *Foreclosure* .

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AUTHOR: Timothy F. O'Leary Practice Consultant

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Ch. 555, *Trust Deeds and Real Property Mortgages* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Security Transactions in Real Property*, §§ 1-96 (10th ed. 2005).

California Real Estate Finance Practice (Cal. CEB 2000).

California Mortgage and Deed of Trust Practice, Ch. 1, Part II, *The Obligation*; Part III, *The Security Instrument* (3d ed. Cal. CEB 2000).

Miller & Starr, California Real Estate, vol. 4, Ch. 10, *Deeds of Trust* (3d ed. West Group 2000).



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART I. RESEARCH GUIDE
B. Secondary Sources

10-25A California Legal Forms--Transaction Guide §§ 25A.08-25A.09

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25A.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART II. LEGAL BACKGROUND

10-25A California Legal Forms--Transaction Guide § 25A.10

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.10 Overview of Security Instruments

[1] Deed of Trust

The deed of trust is the most widely used real property security device in California. Under a trust deed, the debtor (trustor) conveys title to real property to a trustee as security for a debt owed to the creditor (beneficiary) [*see Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 611, 39 Cal. Rptr. 647*]. However, title is conveyed for security purposes only [*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 654, 20 P.2d 940*]. Thus, the trustor retains all incidents of ownership, including the right to possession [*see Sacramento Bank v. Alcorn (1898) 121 Cal. 379, 383, 53 P. 813*], to further encumber the property, and to transfer the property subject to the trust deed [*see Davidow v. Corporation of America (1936) 16 Cal. App. 2d 6, 10-11, 60 P.2d 132*]. The trustee is essentially a common agent of the trustor and beneficiary [*Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 747, 111 Cal. Rptr. 112*], and ordinary principles of agency determine the trustee's obligations and liabilities [*Kerivan v. Title Ins. & Trust Co. (1983) 147 Cal. App. 3d 225, 229, 195 Cal. Rptr. 53* ; for coverage of agency principles, see California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)].

Deeds of trust typically grant the trustee the power of sale on default of the trustor, and can be foreclosed either judicially by court action [*Code Civ. Proc. § 725a*] or nonjudicially by exercise of the power of sale in the manner prescribed by statute [*Civ. Code § 2924*; *see § 25A.210[1][c]*].

The trust deed is usually evidenced by a separate promissory note [*see § 25A.17*]. A trust deed is a contract that is to be interpreted together with the note and any other document that is part of the same transaction (e.g., a sales agreement) [*Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 481, 160 Cal. Rptr. 177*].

[2] Mortgage

A mortgage is a contract by which the mortgagor (debtor) as owner hypothecates or pledges specific property, including an estate for years in real property, for the performance of an act, without the necessity of a change of possession of the property [*Civ. Code § 2920(a)*; *see § 25A.11[2]*]. "Mortgage" also means any instrument other than a trust deed,

including a real property sales contract, that has a power of sale affecting real property [*Civ. Code § 2920(b)*; *see Civ. Code §§ 2924-2924h*; *§ 25A.18*]. It is similar to a trust deed except that (1) there are only two parties (the mortgagor/debtor and the mortgagee/creditor), (2) the mortgagee has only a lien against the property as security for the payment of the debt [*Civ. Code § 2926*], and (3) the mortgagor retains title to the property [*see Civ. Code § 2888*]. The lien of a mortgage is "special," unless the parties expressly agree that it is "general" [*Civ. Code § 2923*]. A special lien may be enforced only for the performance of the particular act or obligation specified in the mortgage contract [*Civ. Code § 2875*; *see Civ. Code § 2874* (general lien may be enforced as security for all obligations of the owner)].

After a default by the mortgagor, the mortgagee must first attempt to satisfy the obligation by enforcing the lien, either by suit for foreclosure [*see Code Civ. Proc. §§ 725a-730.5*] or, if the instrument contains a power of sale, by nonjudicial foreclosure [*see Civ. Code §§ 2924-2924h, 2932*; *see also § 25A.214[2]*]. For further discussion of foreclosure, see Ch. 25D, *Foreclosure* .

[3] Reverse Mortgage

A "reverse mortgage" as defined and governed by statute is a nonrecourse loan secured by real property that meets all of the following criteria [*Civ. Code § 1923*; *see Civ. Code § 1923.10* (applicable to reverse mortgage loans executed after 1997)]:

- The loan provides cash advances to a borrower based on the borrower's equity in, or on the value of, the borrower's owner-occupied principal residence [*see Civ. Code § 1923.4* (property may be held in trust of which occupant is beneficiary)].

- The loan requires no payment of principal or interest until the entire loan becomes due and payable.

- The loan is made by a lender licensed or chartered pursuant to the laws of California or the United States.

A reverse mortgage constitutes a lien against the subject property to the extent of all advances made pursuant to the borrower and all interest accrued on the advances, and that lien has priority over any lien filed or recorded after recordation of the reverse mortgage [*Civ. Code § 1923.3*]. For purposes of determining eligibility and benefits under means-tested programs, reverse mortgage loan payments made to a borrower are treated as proceeds from a loan and not as income, and undisbursed reverse mortgage funds are treated as equity in the borrower's home and not as proceeds from a loan, resources, or assets [*see Civ. Code § 1923.9*].

Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of several specified kinds of contracts, including reverse mortgages, must deliver to the other party to the contract or agreement, before the execution of it, a translation of the contract or agreement in the language in which it was negotiated, which includes a translation of every term and condition in that contract or agreement [Civ. Code § 1632(b)(5)]. A lender may not make a reverse mortgage loan without first complying with, or in the case of brokered loans ensuring compliance with, the requirements of Civ. Code § 1632, if applicable [Civ. Code § 1923.2(*l*)].

The lender and the loan must comply with requirements concerning the terms of the loan [*see Civ. Code § 1923.2(a)-(d)*] and disclosures to be made in the loan documents [*see Civ. Code §§ 1923.2(h), 1923.5, 1923.6*]. If a lender fails to make loan advances as required in the loan documents, and fails to cure an actual default after notice as specified in the loan documents, the lender must forfeit to the borrower three times the amount wrongfully withheld plus interest at the legal rate [*Civ. Code § 1923.2(e)*]. However, no arrangement, transfer, or lien may be invalidated solely because of the lender's failure to comply with these requirements, although other civil penalties may apply [*Civ. Code § 1923.7*].

A reverse mortgage loan may become due and payable on the occurrence of any of these events [*Civ. Code § 1923.2(f)*; *see Civ. Code § 1923.2(g)* (additional conditions governing repayment)]:

- The home securing the loan is sold or title to the home is otherwise transferred [*see Civ. Code § 1923.4*].
- All borrowers cease occupying the home as a principal residence [*see Civ. Code § 1923.2(g)(1)* (excluding temporary absences)].
- Any fixed maturity date agreed to by the lender and the borrower occurs.
- An event occurs that is specified in the loan documents and jeopardizes the lender's security.

A lender may not require an applicant for a reverse mortgage to purchase an annuity as a condition of obtaining a reverse mortgage loan. A reverse mortgage lender or a broker arranging a reverse mortgage loan may not [Civ. Code § 1923.2(i)]:

- Offer an annuity to the borrower before the closing of the reverse mortgage or before the expiration of the right of the borrower to rescind the reverse mortgage agreement; or
- Refer the borrower to anyone for the purchase of an annuity before the closing of the reverse mortgage or before the expiration of the right of the borrower to rescind the reverse mortgage agreement.

Before accepting a final and complete application for a reverse mortgage loan or assessing any fees, a lender must refer the prospective borrower to a housing counseling agency approved by the U.S. Department of Housing and Urban Development (HUD) for counseling. The counseling must meet the standards and requirements established by HUD for reverse mortgage counseling. The lender must provide the borrower with a list of at least five housing counseling agencies approved by HUD, including at least two agencies that can provide counseling by telephone [Civ. Code § 1923.2(j)].

A lender may not accept a final and complete application for a reverse mortgage loan from a prospective applicant or assess any fees on a prospective applicant without first receiving a certification from the applicant or the applicant's authorized representative that the applicant has received counseling from a HUD-approved agency. The certification must be signed by the borrower and the agency counselor, and must include the date of the counseling and the name, address, and telephone number of both the counselor and the borrower. (An electronic facsimile copy of the housing counseling certification can meet this requirement.) The lender must maintain the certification in an accurate, reproducible, and accessible format for the term of the reverse mortgage [Civ. Code § 1923.2(k)].

PRACTICE TIP:

Federal Rules Regarding Reverse Mortgages. In addition to the usual good faith disclosures governing loan transactions, *15 U.S.C. § 1648* imposes additional disclosure requirements on lenders who offer reverse mortgages. Those requirements include projections using three appreciation rates and which take into consideration the borrower's life expectancy. Lenders should be careful to comply with these statutory requirements as courts have been willing to scrutinize the offering of reverse mortgages, particularly to elderly borrowers, as constituting predatory practices. Some communities, such as the City of Oakland, have considered legislation to protect against the misuse of these loan products. *Commentary by Timothy F. O'Leary*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.11

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.11 Deeds of Trust and Mortgages

[1] Comparison

The technical differences between a mortgage and deed of trust are now primarily a matter of historical rather than functional significance. The same rules that are generally applied to deeds of trust are applied to mortgages since there is now virtually no legal difference between the two [*Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529* ; *see § 25A.11[3]-[6]*]. Case law has emphasized the practical and theoretical similarities between trust deeds and mortgages and largely ignored the theoretical differences. For example, although a trust deed (unlike a mortgage) results in a conveyance of legal title to the trustee, the trustor is regarded as the legal owner except as to the trustee, and title passes to the trustee only to the degree necessary to secure the property and to permit the trustee to convey the property to a purchaser following the trustor's default [*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655-656, 20 P.2d 940*]. Thus, the California Supreme Court has referred to the deed of trust as practically and substantially only a mortgage with a power of sale [*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 654, 20 P.2d 940* ; *see § 25A.214*; for further discussion, see California Real Estate Law & Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender)].

One of the few remaining differences between a mortgage with a power of sale and a deed of trust is that the lapse of the statute of limitations on the secured obligation will extinguish a mortgage but will not affect the power of sale in a trust deed [*Carson Redevelopment Agency v. Adam (1982) 136 Cal. App. 3d 608, 610-612, 186 Cal. Rptr. 615* (trust deed); *Faxon v. All Persons (1913) 166 Cal. 707, 715-717, 137 P. 919* (mortgage)]. Other differences exist in the method of clearing title free of the lien when the obligation is satisfied [*see* Ch. 25C, *Release and Reconveyance*], and in the applicability of *Civ. Code § 3289* (interest on obligation after breach) to a note secured by a mortgage, but not one secured by a trust deed [*Civ. Code § 3289*].

In the past, trust deeds were used to avoid certain protections available to mortgagors. Although this historical reason no longer applies [*see Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 657-658, 20 P.2d 940*], the trust deed is still used in the vast majority of California real estate transactions.

[2] Property Interest Encumbered

Any interest in real property that is capable of being transferred may be mortgaged or may provide the security for a trust deed [*Civ. Code § 2947*; *see, e.g., Tripler v. MacDonald Lumber Co. (1916) 173 Cal. 144, 147, 159 P. 591*]. Because the trust deed requires a transfer of title, the property interest provided as security is normally some form of present ownership interest [*see, e.g., Caito v. United California Bank (1978) 20 Cal. 3d 694, 701, 144 Cal. Rptr. 751, 576 P.2d 466*]. However, the parties may expressly agree in the security instrument to create a lien on real property not yet acquired or not yet in existence. In that case, the lien attaches when the property is acquired [*Civ. Code § 2883(a)*; *see Hosford v. Henry (1951) 107 Cal. App. 2d 765, 774, 238 P.2d 91* ; *but see Civ. Code § 2883(b)* (agreement by beneficiary of estate subject to administration to create lien on undistributed property in estate creates no lien until property is distributed to that beneficiary)].

Several code sections pertaining to the creation and enforcement of real property trust deeds and mortgages specifically authorize the hypothecation of estates for years in real property by trust deeds or mortgages [*see Civ. Code §§ 2920(a)* (definition of "mortgage"), 2924b (copies of notices of sale and default), 2924c (reinstatement after default)]. These provisions were enacted to abrogate the holding in *Taylor v. Bouissiere* [*Taylor v. Bouissiere (1987) 195 Cal. App. 3d 1197, 241 Cal. Rptr. 253*] that the enforcement rights in leasehold mortgages are governed by the rules regarding personal property [Stats. 1989, ch. 698, § 15; *see Taylor v. Bouissiere (1987) 195 Cal. App. 3d 1197, 1200, 241 Cal. Rptr. 253*]. The Legislature found that the holding of *Taylor* (1) was inconsistent with the legislative history and provisions of several statutes governing trust deeds and mortgages, and (2) would have resulted in a gap in the method of enforcement of those security instruments, because the rules regarding enforcement of personal property interests specifically do not apply to leasehold mortgages [Stats. 1989, ch. 698, § 15].

Any fixtures on the encumbered real property are subject to the lien of the security instrument [*see Civ. Code §§ 658-660*; *Trask v. Moore (1944) 24 Cal. 2d 365, 368-372, 149 P.2d 854* ; *Harper v. Buckles (1937) 19 Cal. App. 2d 481, 484-485, 65 P.2d 947*]. The security instrument may also create a security interest in personal property that does not constitute a fixture, if the instrument satisfies certain requirements of the Commercial Code [*see Com. Code § 9502*]. However, it is advisable to use a separate security instrument for personal property pursuant to the requirements of the Commercial Code, because a mortgage or trust deed will not comply with the procedures for creating and perfecting liens on personal property and therefore will not be effective against third persons who purchase or encumber the personal property without notice [*Margolis v. Superior Court (1959) 151 Cal. App. 2d 333, 336, 313 P.2d 29* (decided under prior law); *see Com. Code § 9401 et seq.*]. For discussion of the Commercial Code requirements governing the creation of security interests in personal property and fixtures, see Ch. 42, *Secured Transactions* ; *see also* California Forms of Pleading and Practice, Ch. 503, *Sales: Secured Transactions* (Matthew Bender).

Title acquired by the mortgagor or trustor after the execution of the security instrument inures to the beneficiary or mortgagee as security as if it had been acquired before the execution [*Civ. Code § 2930*; *Barberi v. Rothchild (1936) 7 Cal. 2d 537, 538-540, 61 P.2d 760* ; *California Bank v. Bell (1940) 38 Cal. App. 2d 533, 537-538, 101 P.2d 724*]. This rule also applies when the trustor reacquires fee title after a foreclosure sale [*Barberi v. Rothchild (1936) 7 Cal. 2d 537, 538-540, 61 P.2d 760* (trust deed); *Jensen v. Duke (1925) 71 Cal. App. 210, 211-212, 234 P. 876* (mortgage)].

[3] Required Form

Both a deed of trust and a mortgage must be in writing, must describe the secured property [*see § 25A.11[4]*], and must be signed by the party to be charged (that is, the trustor or mortgagor) [*Civ. Code §§ 2922, 1091-1092*; *Code Civ. Proc. § 1971*]. Further, the security instrument must contain sufficient information regarding the secured obligation to ascertain the extent of the encumbrance [*D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736* ; *see § 25A.11[5]*].

In the case of a mortgage, a simple statutory form may be used [*Civ. Code § 2948*; *see § 25A.213*] but is not required. There is no statutory form of trust deed, but standard "short" and "long" versions of trust deeds prepared by title

companies are widely used. Further, institutional lenders generally use their own standard documents [for discussion of the use of fictitious security instruments by title companies and institutional lenders, see *§ 25A.12*]. When loans by institutional lenders will be sold in the secondary loan market, the lender must use the uniform security instruments prepared by the Federal National Mortgage Association (FNMA, or "Fannie Mae") or the Federal Home Loan Mortgage Corporation (FHLMC, or "Freddie Mac"). For larger and more complicated transactions, security instruments are usually custom-drafted based on negotiations between the parties.

[4] Description of Property

To be effective, a deed of trust or mortgage must contain a description of the property to be encumbered that is sufficient to identify the property [*Sepulveda v. Apablasa (1938) 25 Cal. App. 2d 381, 387, 77 P.2d 526* (trust deed); *Scott v. Woodworth (1917) 34 Cal. App. 400, 408-410, 167 P. 543* (mortgage)]. Absent the express written statement of the grantor contained in the instrument or document, the consolidation of separate and distinct legal descriptions of real property contained in one or more deeds, trust deeds, mortgages, or other instruments of conveyance or security documents into a subsequent single deed, trust deed, mortgage, or other instrument of conveyance or security document (by use of an individual listing of legal descriptions in the subsequent single instrument, or by means of a consolidated legal description composed of more than one previously separate and distinct legal description) does not affect or alter the separate and distinct nature of the described real property [*Civ. Code § 1093*].

[5] Necessity and Description of Obligation

The validity of the trust deed or mortgage depends on the existence of an enforceable underlying obligation [*Turner v. Gosden (1932) 121 Cal. App. 20, 22, 8 P.2d 505*] since the lien of the security is merely an incident to and is measured by the performance of the obligation [*Coon v. Shry (1930) 209 Cal. 612, 615, 289 P. 815* ; *see Civ. Code § 2909*]. The obligation is usually the payment of money evidenced by a promissory note, but all that is required is that the instrument secure the performance of an act [*see Civ. Code § 2872*].

A valid deed of trust or mortgage must contain sufficient information to determine the extent of the obligation [*D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736*]. However, a statement that the trust deed is given to secure a note of a certain date from one party to another, according to the terms of the note, is sufficient to identify the obligation [*Security Loan etc. Co. v. Mattern (1901) 131 Cal. 326, 331, 63 P. 482*]. It is common practice to also refer to the amount of the promissory note. A minor variance between a secured note and its description contained in a trust deed or mortgage does not invalidate the security [*Rogers v. Evans (1934) 137 Cal. App. 538, 545, 31 P.2d 233* (note payable to husband alone was described in security instrument as payable to husband and wife)].

[6] Delivery and Recording

A mortgage or deed of trust must be delivered to the mortgagee or beneficiary to be effective [*see Stirton v. Pastor (1960) 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135* ; *Hahn v. Hahn (1954) 123 Cal. App. 2d 97, 101, 266 P.2d 519* ; *see also Burns v. Peters (1936) 5 Cal. 2d 619, 623, 55 P.2d 1182* (delivery to trustee is not required)]. The delivery must comply with the requirements governing the delivery of deeds in general [*see Hahn v. Hahn (1954) 123 Cal. App. 2d 97, 101, 266 P.2d 519* ; *see also Stirton v. Pastor (1960) 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135* (delivery must be unconditional)]. For discussion of these requirements, see Ch. 27, *Deeds and Recording* ; *see also* California Real Estate Law & Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender).

As between its parties and as to a subsequent grantee or lienor with actual notice, a trust deed or mortgage does not have to be acknowledged or recorded in order to be valid [*see Civ. Code § 1217*]. However, both should be acknowledged and recorded, since acknowledgment is a prerequisite to recording [*Gov. Code § 27287*] and recording is necessary to protect the priority of the security instrument from later bona fide purchasers for value [*see Civ. Code § 1214*].

As a general rule, mortgages and trust deeds may be acknowledged and recorded in the same manner as grants of property [*Civ. Code § 2952*; *see* Ch. 27, *Deeds and Recording*]. An additional recordation requirement applicable solely to security instruments with a power of sale provides that they must contain the address of the trustor or mortgagor and a request for notice of default under *Civ. Code § 2924b* [*Gov. Code § 27321.5(b)*]. For discussion of the recordation of fictitious security instruments, see *§ 25A.12*.

All acknowledgments of deeds, quitclaim deeds, or deeds of trust affecting real property (other than a trustee's deed resulting from a decree of foreclosure or a nonjudicial foreclosure pursuant to *Civ. Code § 2924*, or a deed of reconveyance) require the right thumbprint of the party signing the document [*see Gov. Code § 8206(a)(2)(G)*; *see Gov.Code § 8214.23* (notary public is subject to civil penalty for failure to obtain thumbprint)].

PRACTICE TIP:

Electronic Deeds of Trust. For similar reasons of convenience and security, mortgage lenders who fund numerous loans occasionally employ "electronic" deeds of trust for the protection of their credit facilities, or more commonly, their investors. Such instruments are signed and stored electronically by the mortgage broker to provide an unrecorded, junior security interest in the property that is the subject of the loan. The mortgage broker's intent is to "warehouse" and then package the loan for sale and assignment to a credit facility. If the broker petitions for bankruptcy relief, the security instrument is then recorded and provides the broker's investors with priority against other unsecured debtors. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsConventional LoansReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure



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10-25A California Legal Forms--Transaction Guide § 25A.12

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.12 Fictitious Mortgage or Deed of Trust

Fictitious mortgages or trust deeds may be recorded in any county [*see Civ. Code § 2952*]. These "fictitious instruments" are generally recorded by title insurance companies or institutional lenders and contain all standard provisions utilized by the title company or lender. If a subsequent mortgage or trust deed recorded in the same county incorporates by reference any provisions of the fictitious instrument, the parties are bound by the referenced provisions just as though the provisions were fully set forth in the mortgage or trust deed. For the benefit of the parties, the provisions of the fictitious instrument are typically included in the subsequent mortgage or trust deed, but are preceded by instructions to the county recorder to not record the portion of the security instrument containing the referenced provisions [*see § 25A.211[1][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide § 25A.13

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.13 Liens Created by Mortgage or Deed of Trust

[1] As Incident of Debt

The lien created by a mortgage [*see § 25A.10[2]*] or trust deed [*see § 25A.10[1]*] is accessory to the act for the performance of which it is security [*Civ. Code § 2909*]. Stated differently, the lien is an incident of the debt. If the note itself is unenforceable, the mortgage does not give it validity [*Coon v. Shry (1930) 209 C. 612, 615, 289 P. 815*].

[2] Priority

The lien of a trust deed or mortgage has priority according to the date of its creation, all other things being equal [*Civ. Code § 2897*], subject to the operation of the recording laws [*Civ. Code § 1214*]. An exception is provided by statute for purchase money mortgages, which have priority over all other liens created against the purchaser, subject to operation of the recording laws [*Civ. Code § 2898(a)*]. The priority of the lien of a mortgage or trust deed on an estate for years in real property is determined in the same manner used for determining the priority of a lien of a mortgage or trust deed on real property [*Civ. Code § 2898(b)*].

Priority is generally given under the recording laws to the person who first records his or her instrument, provided that person is a bona fide purchaser or encumbrancer without notice of prior interests [*Civ. Code §§ 1213-1215*]. For a discussion of the priority status of additional advances made by a senior creditor after recordation of a junior lien, see *§ 25A.224[1]*. For further discussion of the priority of liens, see California Real Estate Law & Practice, Ch. 121, *Priorities of Liens* (Matthew Bender).

[3] Expiration of Lien

The expiration date for the lien of a mortgage, deed of trust, or other real property security instrument is fixed by statute [*see Civ. Code § 882.020(a)*; *see also Civ. Code § 2911*]. However, the expiration date may be postponed by recording a notice of intent to preserve the security interest [*Civ. Code § 880.310*; *see* Ch. 27, *Deeds and Recording*]. Once the lien has expired, it is unenforceable by any means; expiration of the lien is equivalent for all purposes to a certificate of

satisfaction, reconveyance, release, or other discharge of the security interest. However, the execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge is not necessary to terminate or evidence the termination of the security interest [*Civ. Code § 882.030*]. The reference to expiration of a "lien" in *Civ. Code § 882.030* includes only the security interest enforceable through judicial foreclosure pursuant to *Code Civ. Proc. § 725a*, which is subject to the four-year statute of limitations in *Civ. Code § 2911*, and does not extinguish the power of sale in a deed of trust [*Ung v. Koehler (2005) 135 Cal. App. 4th 186, 196, 37 Cal. Rptr. 3d 311*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide § 25A.14

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§ 25A.14 Defeasible Deeds

A security may be created by the execution of a deed coupled with an agreement that the deed is to only constitute security for the payment of the indebtedness of the grantor to the grantee rather than an absolute conveyance [*Civ. Code §§ 2924(a), 2925*; *Banta v. Wise (1901) 135 Cal. 277, 279, 67 P. 129*]. Pursuant to the agreement, the creditor must reconvey the property to the debtor when the debt is paid in full. An oral agreement that the deed is merely security for the debt is effective between the debtor and creditor, but is not binding on third parties unless they have actual or constructive notice of the agreement [*see Civ. Code § 2925*]. To give effective notice, an instrument reciting that the deed is defeasible must be recorded in the county where the property is located [*Civ. Code § 2950*; *see §§ 25A.216* (condition of defeasance contained in deed), *25A.215* (separate instrument)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide § 25A.15

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.15 Right of Junior Lienholder to Notice of Delinquencies and Default

A junior lienholder who has recorded a proper and timely request is entitled to receive a copy of any notice of default and sale recorded by a senior lienholder [*see Civ. Code § 2924b*; *see also* Ch. 25D, *Foreclosure* (request for notice of default and sale)]. This enables the junior lienholder to take steps to protect its interest in the property prior to the sale of the property through nonjudicial foreclosure.

The right of a junior lienholder to request and obtain a notice of delinquencies in payments on an obligation securing the senior lien is governed by *Civ. Code § 2924e*. Specifically, the beneficiary or mortgagee of any trust deed or mortgage may, with the written consent of the trustor or mortgagor, submit a written request to the beneficiary or mortgagee of any lien that is senior to the lien of the requesting party, requesting written notice of delinquencies of four months or more in payments of principal or interest on any obligation secured by the senior lien. The request must contain specified information [*see Civ. Code § 2924e(b)*] and may be made notwithstanding the fact that the loan secured by the lien of the requesting party is not then in default as to payments of principal or interest [*Civ. Code § 2924e(a)*]. Statutory provisions govern the period of effectiveness (including renewals) of the request and the procedure for responding to it [*see Civ. Code § 2924e(b), (c)*]. A lienholder who has made such a request must notify the senior lienholder in writing if the obligation secured by the junior lien is subsequently satisfied [*Civ. Code § 2924e(g)*]. For further discussion of these requirements and an illustrative request for notice, see *§ 25A.242[1]*.

PRACTICE TIP:

Subordinated Interests. Practitioners representing subordinated interests, such as lessees or the dominant tenement of an easement, occasionally recommend recording a request that their clients receive a written notice of default. The receipt of a notice of a default provides the recipient with an opportunity to intervene in the event of foreclosure to protect the subordinated interest. However, one could equally argue that the recording of such a request only calls attention to the subordinated interest, and in the process, may jeopardize it. If the senior lender forecloses without providing notice to the holder of the dominant tenement, the easement may survive the foreclosure sale even if the easement was recorded after the trust deed that the lender foreclosed upon. If the holder of the subordinated interest does not

realistically entertain notions of saving the property if a default is recorded, recording a written request for receipt of a notice of default may be unnecessary because the holder of the subordinated interest will receive notice of the default by the senior lender anyway; and if the holder does not receive a copy of the notice of default, the holder has an argument that its subordinated interest survives the foreclosure sale. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingSecondary FinancingLien Priorities



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10-25A California Legal Forms--Transaction Guide § 25A.16

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.16 Beneficiaries' Agreement to Be Governed by Majority Interest Holders

[1] Nature of Agreement

Civ. Code § 2941.9 establishes a process through which all of the beneficiaries under a trust deed may agree to be governed by beneficiaries holding more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or any affiliate of that licensed real estate broker [*Civ. Code § 2941.9(a)*; *see Civ. Code § 2941.9(e)* ("affiliate of the licensed real estate broker" includes any person defined in *Corp. Code § 25013* who is controlled by, or is under common control with, or who controls, a licensed real estate broker; "control" means the direct or indirect possession of the power to direct or cause the direction of management and policies)]. This publication uses the term "majority interest holders" to refer to the beneficiaries granted this authority. Under *Civ. Code § 2941.9*, all holders of notes secured by the same real property or series of undivided interests in notes secured by real property equivalent to a series transaction must agree in writing to be governed by the above majority interest holders, with respect to actions to be taken on behalf of all holders in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure [*Civ. Code § 2941.9(b)*; *see § 25A.247*]. A description of this agreement must be disclosed pursuant to *Bus. & Prof. Code § 10232.5* (governing the contents of disclosure statements given to prospective lenders or purchasers in certain transactions involving the negotiation and/or sale of secured obligations) [*see* Ch. 25, *Real Estate Loans* , § 25.260], and must be included in a recorded document, such as the deed of trust or the assignment of interests [*Civ. Code § 2941.9(c)*].

For coverage of a related procedure that permits the substitution of a trustee by majority interest holders [*see Civ. Code § 2934a*], see Ch. 25C, *Release and Reconveyance* .

[2] Majority Action Affidavit

Actions taken pursuant to the authority granted in *Civ. Code § 2941.9* are not effective unless all of the parties agreeing to the action sign, under penalty of perjury, a separate written document entitled "Majority Action Affidavit." A majority action affidavit must state the following [*Civ. Code § 2941.9(d)*; *see § 25A.248*]:

- The action has been authorized pursuant to *Civ. Code § 2941.9*.

- None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the deed of trust.

- The undersigned together hold more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction.

- Notice of the action was sent by certified mail, postage prepaid, with return receipt requested, to each holder of an interest in the obligation secured by the deed of trust who has not joined in the execution of the document.

The document must be recorded in the office of the county recorder of each county in which the real property described in the deed of trust is located. Once the document is recorded, it constitutes conclusive evidence of compliance with the requirements of *Civ. Code § 2941.9(d)* in favor of trustees acting pursuant to *Civ. Code § 2941.9*, substituted trustees acting pursuant to *Civ. Code § 2934a* [*see* Ch. 25C, *Release and Reconveyance*], subsequent assignees of the obligation secured by the deed of trust, and subsequent bona fide purchasers or encumbrancers for value of the real property described in the document [*Civ. Code § 2941.9(d)*].

PRACTICE TIP:

Broker as Substitute Trustee. Though the "Majority Action Affidavit" precludes the counting of the broker's stock (or affiliates) toward the majority, nothing in the statute precludes the broker from serving as the trustee on the appointment of the majority of the remaining members. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.17

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§ 25A.17 Promissory Notes

[1] Requirements

A promissory note is the instrument generally used to evidence the indebtedness that is secured by a deed of trust or mortgage on real property. Notes are subject to the requirements of both contract and negotiable instrument law; these basic requirements are briefly discussed [*see § 25A.17[2]-[6]*]. However, the emphasis in this chapter is on the special requirements applicable to a promissory note used in a secured real property transaction.

[2] Negotiability

A negotiable note allows a buyer to take the note free of many personal claims and defenses the maker might have against the original creditor. A "negotiable instrument" is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, provided all of the following apply [*Com. Code § 3104(a)*]:

- It is payable to bearer or to order at the time it is first issued or first comes into possession of a holder.

- It is payable on demand or at a definite time.

- It does not state any other undertaking or instrument by the person promising or ordering payment to do any act in addition to the payment of money. However, the promise or order may contain (1) an undertaking or power to give, maintain, or protect collateral to secure payment; (2) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or (3) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

For further discussion of these requirements, see Ch. 55, *Negotiable Instruments* , and California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender).

[3] Secured by Residential Property

Federal and state requirements for loans secured by residential property are generally more restrictive and more protective of the borrower than the parallel requirements for commercial property. Special areas of regulation include prepayment penalties [*see § 25A.222[1]*], prohibitions against lender acceleration of the loan on the buyer's sale or encumbrancing of the property [*see § 25A.221[1]*], impound accounts [*see § 25A.228[1]*], and the commencement of interest on a note [*see Civ. Code § 2948.5*]. For purposes of most governmental regulation in this area, "residential property" includes property containing one to four dwelling units [*see, e.g., Civ. Code § 2948.5* (prohibiting commencement of interest for more than one day before recording of mortgage or trust deed or funds are available for withdrawal)]. In some instances, the term means a single-family, owner-occupied dwelling [*see, e.g., Civ. Code § 2949* (prohibiting acceleration due to further encumbrance)].

[4] Interest and Amortization

The interest rate for a promissory note may remain constant or vary during the term of the loan. With either type of interest rate, there are several variations based on how and when the principal and interest will be paid over the term of the loan [*see* §§ 25A.200-25A.205]. Under a third type of interest arrangement, the rate at the beginning of the loan term is variable, but the borrower may "convert" the rate to a fixed term at specified times during the loan term.

Long term promissory notes with fixed interest rates and fixed payments were traditionally the principal type of note used in a secured real property transaction. This type of loan, with its fixed equal periodic payments of principal and interest, fully amortizes over the loan term [*see § 25A.201*].

By contrast, nonamortized [*see Fin. Code § 7504(a)(3)*] or partially amortized notes [*see Fin. Code § 7504(a)(5)*] have a due date prior to a full amortization term and require the payment of a lump sum or "balloon payment" on the earlier due date [*see §§ 25A.200* (straight note), *25A.202* (note with increasing periodic payments and balloon payment), *25A.203* (note with interest only payments and interest tied to prime rate)]. For a discussion of the special statutory notice requirements applicable to a balloon payment note [*Civ. Code § 2924i*], see *§§ 25A.225[1]* and *25A.240[1]*.

The various types of real estate loans, including variable interest rate loans [*see Civ. Code §§ 1916.5, 1916.6*], adjustable payment, adjustable rate loans [*see Civ. Code § 1916.7*], adjustable rate loans [*see 12 C.F.R. §§ 34.20, 34.21*], and shared appreciation loans [*see Civ. Code § 1917 et seq.*] are described and discussed in the Legal Background to Ch. 25, *Real Estate Loans* .

[5] Commencement of Interest

For loans secured by a mortgage or trust deed on real property improved with one to four residential dwelling units, interest may not be charged for a period in excess of one day before recording of the mortgage or trust deed, if the loan proceeds are paid into escrow, or if there is no escrow, the date on which the loan proceeds have been made available for withdrawal as a matter of right [*Civ. Code § 2948.5(a)*]. For these purposes, an electronically transmitted document that specifies that final settlement has occurred constitutes written notice as to an individual item [*Ins. Code § 12413.1(d)*]. Interest may commence to accrue on the business day immediately preceding the day of recording if both of the following occur [*Civ. Code § 2948.5(b)*]:

- The borrower affirmatively requests, and the lender agrees, that the recording will occur on Monday, or on a day immediately following a bank holiday.

- The borrower receives disclosure information concerning the amount of additional per diem interest charged to facilitate recording on Monday or the day following a holiday, as the case may be, and stating that it may be possible to avoid the additional per diem interest charge by recording the deed of trust on a

day immediately following a business day, and the borrower acknowledges receipt of this information by signing a copy of the disclosure document before placing funds in escrow.

In any case, these provisions do not apply to loans made or negotiated by real estate brokers that are subject to *Bus. & Prof. Code § 10242(c)*, which prohibits charging interest until the date the proceeds of the loan are made available to the lender or are deposited in escrow [*Civ. Code § 2948.5(c)*].

[6] Series of Notes or Interests Secured by Same Real Property

Any transaction involving a sale of or an offer to sell a series of notes secured directly by an interest in the same California real property, or a sale of undivided interests in a note secured directly by California real property equivalent to a series transaction, must comply with specified requirements [*Bus. & Prof. Code § 10237*; *see Bus. & Prof. Code § 10238 et seq.*]. The terms "sale" and "offer to sell" have the same meaning as in *Corp. Code § 25017* and include the acts of negotiating and arranging the transaction [*Bus. & Prof. Code § 10239.2(d)*]. Qualifying transactions are subject solely to regulation by the Department of Real Estate and are exempted from supervision by the Department of Corporations under *Corp. Code § 25110* [*Corp. Code § 25102.5*]. A broker or person who becomes the servicing agent for notes or interests sold under these provisions, on which payments due during any period of three consecutive months in the aggregate exceed $125,000 or the number of persons entitled to payments exceeds 120, must file the required notice within 30 days after becoming the servicing agent [*Bus. & Prof. Code § 10238(b)*; *see Bus. & Prof. Code § 10238(a)*].

For discussion of transactions and property subject to these requirements, as well as required notices, restrictions on advertising and promotional claims, restrictions on the terms of the notes, restrictions on the number of sales, and requirements and specifications of individuals who may purchase these notes, see California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsNegotiationGeneral OverviewContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingState Regulation



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§ 25A.18 Real Property Sales Contracts

A "real property sales contract" is an agreement under which one party agrees to convey title to real property to another party on the satisfaction of specified conditions set forth in the contract, and that does not require conveyance of title within one year from the date of formation of the contract [*Civ. Code § 2985(a)*]. This statutory definition encompasses what is commonly referred to as an installment land sale contract, under which the buyer pays the purchase price in installments over a period of time and the seller retains title to the property as security for the payments until all or a portion of the payments are made. The contract not only contains the basic buy-sell agreement, but also acts as the security device guaranteeing payment of the purchase price by permitting the seller to retain legal title until the buyer has made the required payments. A form of real property sales contract is set forth in *§ 25A.230[2]*. The requirements applicable to the contract are fully discussed in *§ 25A.230[1]*.

Because developers could have difficulty financing large-scale residential condominium developments that comprise attached units, if Civil Code provisions governing installment land sale contracts [Civ. Code § 2985 et seq.] were applied to a pre-sale agreement for a unit in such a project, those provisions do not apply to such an agreement that was made in consequence of a conditional public report for the condominium project issued by the Department of Real Estate pursuant to Bus. & Prof. Code § 11018.12 [Civ. Code § 2985(b); *see generally* Assem. Comm. on Judiciary, Analysis of Sen. Bill No. 504 (2005-2006 Reg. Sess.) as amended Jan. 19, 2006; *see also California Real Estate Law and Practice, Ch. 424, Regulation of Subdivided Land Sales, § 424.80* (Matthew Bender)(issuance of conditional public report)].

A sale of real property is considered to be an installment sale for income tax purposes if at least one payment is to be received after the close of the taxable year in which the sale occurs [*I.R.C. § 453(b)(1)*; *see Rev. & Tax. Code § 24667*]. Income from an installment sale must be reported under the installment method unless the seller elects to report the income from the sale in full in the year of sale [*I.R.C. § 453(a)*; *see I.R.C. § 453(d)*]. The seller might make this election if he or she anticipates a large loss in the year of the sale that would otherwise be unused, or significant increases in income in future years when payments are to be received. In general, the installment method permits the seller to recognize income when payments are actually received, rather than when the buyer incurs the contractual duty to pay.

When a seller reports gain from a sale of real property on the installment method, the amount of income recognized in any taxable year is the proportion of the payment received in that year that the gross profit bears to the total contract price [*I.R.C. § 453(c); see Rev. & Tax. Code § 17551*].

If an installment sale of depreciable property is made to a person or entity related to the seller [*see I.R.C. § 453(f)(1)* ("related person" defined)], the sale generally will not qualify for installment-method reporting [*see I.R.C. § 453(g)*]. Further, with certain exceptions, if a seller makes an installment sale to a related person or entity who then sells the property within two years after the original sale and before paying the original seller in full, the amount realized from the second sale is treated as having been received by the original seller at the time of the second sale [*see I.R.C. § 453(e)*].

Real property sales contracts should not be confused with "marketing contracts," which provide for the immediate transfer of title to the buyer in exchange for payment of the purchase price. For detailed coverage of these agreements, see Ch. 23, *Real Property Sales Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingInstallment Land Sale ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Future PaymentsTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Installment Method



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10-25A California Legal Forms--Transaction Guide § 25A.19

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.19 Vendor's Lien

To the extent a seller of real property does not have a consensual lien, a vendor's lien exists in favor of the seller for the unpaid balance of the purchase price [*Civ. Code §§ 3046-3048*; *see Dingley v. Bank of Ventura (1881) 57 Cal. 467]* . A vendor's lien offers little security to the seller because it is unwritten and unrecorded and not binding on subsequent bona fide purchasers and encumbrancers for value [*Civ. Code § 3048*]. Subsequent purchasers or encumbrancers with actual or constructive knowledge that the balance of the original purchase price remains unpaid have sufficient notice to be subject to the lien [*Edwards-Town, Inc. v. Dimin (1970) 9 Cal. App. 3d 87, 87 Cal. Rptr. 726*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingBona Fide Purchasers



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.20 Rent Skimming

"Rent skimming" means using revenue received from the rental of a parcel of residential real property at any time during the first-year period after the acquisition of that property without first applying the revenue or an equivalent amount to the payments due on all mortgages and trust deeds encumbering that property [*Civ. Code § 890(a)*]. Certain persons with a security interest in the real property and tenants of the property may bring a civil action against any person who engages in rent skimming with respect to that property [*see Civ. Code § 891*]. Multiple acts of rent skimming may result in criminal prosecution [*see Civ. Code § 892*]. Certain statutory affirmative defenses exist for both the civil and criminal actions, including payment by a defendant of the rental revenue received to a health care provider for necessary medical treatment for the defendant or his or her family [*see Civ. Code § 893*]. For further coverage, including forms for use in proceedings based on rent skimming, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

PRACTICE TIP:

Rent Skimming. Unlike a common-law claim for waste, an action for rent skimming is not barred by the "one-action" rule [*Civ. Code § 891(g)*]. The statute thus provides a powerful remedy that is not extinguished by a foreclosure sale. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.21

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.21 Inspection of Real Property Security

[1] Right of Entry

A secured lender [*see Civ. Code § 2929.5(e)(5)* (definition)], subject to statutory limitations, may enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security [*Civ. Code § 2929.5(a)*; *see Civ. Code § 2929.5(e)(2), (4)* (definitions of "hazardous substance" and "release")]. The lender may exercise this right under either of the following circumstances [*Civ. Code § 2929.5(a)*]:

- On reasonable belief of the existence of a past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security not previously disclosed in writing to the secured lender in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower.

- After the commencement of nonjudicial or judicial foreclosure proceedings against the real property security.

The lender must not abuse the right of entry and inspection or use it to harass the borrower or tenant of the property. Further, the lender must give the borrower or tenant reasonable notice of the lender's intent to enter, and may enter only during the borrower's or tenant's normal business hours, except (1) in case of an emergency, (2) when the borrower or tenant has abandoned the premises, or (3) if it is impracticable to give that notice or enter during those hours. Twenty-four hours notice is presumed to be reasonable notice in the absence of evidence to the contrary [*Civ. Code § 2929.5(b)*]. Finally, the lender must reimburse the borrower for the cost of repair of any physical injury to the real property security caused by the entry and inspection [*Civ. Code § 2929.5(c)*].

[2] Court Order

If the lender is refused the right of entry and inspection by the borrower or tenant of the property, or is otherwise unable

to enter and inspect the property without a breach of the peace, the lender may, on petition, obtain an order from a court of competent jurisdiction to exercise the lender's rights under *Civ. Code § 2929.5(a)*. That action will not constitute an action within the meaning of *Code Civ. Proc. § 726(a)* (the "one form of action" rule) [*Civ. Code § 2929.5(d)*; *see* Ch. 25D, *Foreclosure* ; *see also Code Civ. Proc. § 564(c)- (e)* (receiver may be appointed in such an action)].

[3] Related Remedies

A secured lender may bring an action against the borrower for breach of any environmental provision made by the borrower, for the recovery of damages, and for the enforcement of the environmental provision [*see Code Civ. Proc. § 736*]. Further, when the real property security is environmentally impaired and the borrower is in default, the lender may (1) waive its lien against the impaired security and exercise the rights and remedies of an unsecured creditor, or (2) exercise the rights and remedies of a secured creditor [*see Code Civ. Proc. § 726.5*]. For further discussion of these remedies, see Ch. 25D, *Foreclosure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.22 Homeowners Protection Act of 1998

The Homeowners Protection Act of 1998 [*12 U.S.C. § 4901 et seq.*; *see* Pub. L. No. 105-216, § 13 (effective July 29, 1999)] prescribes guidelines for mandatory termination of private mortgage insurance (PMI) for a residential mortgage when the principal balance is first scheduled to reach or actually reaches 80 percent of the original value of the property securing the mortgage loan. The Act's guidelines address the following [*see 12 U.S.C. § 4902*]:

- Situations in which the mortgagor's written request to the mortgage servicer for cancellation of PMI must be given effect.
- Situations in which PMI must be automatically terminated.
- The requirement that in all cases PMI must be terminated at the midpoint of the amortization period if the mortgagor is then current on the mortgage payments.
- The date as of which no further PMI payments can be required.
- The return of unearned PMI premiums to the mortgagor.

High-risk loans, as defined by statute, are exempted from these provisions [*see 12 U.S.C. § 4902(g)*].

The Act further prescribes disclosure requirements for PMI amortization schedules, including schedules for the following [*12 U.S.C. § 4903*]:

- New mortgages at the time of the transaction.
- High-risk mortgages.

- Mortgage transactions entered into before enactment of the Act.
- Annual written updates.
- PMI cancellation or termination.
- Mortgage insurance paid for by the lender.

No fees may be charged for these disclosures [*12 U.S.C. § 4906*]. In addition, any mortgage servicer, mortgagee, or mortgage insurer who violates the Act's provisions is subject to civil liability for damages incurred by each mortgagor to whom the violation relates [*12 U.S.C. § 4907*].

The Act preempts state law governing PMI, unless the state law requires PMI termination at an earlier date or when a lower mortgage loan principal balance is achieved. The Act also preempts servicing agreements entered into by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or any private investor or note holder [*12 U.S.C. § 4908*].

The Act further prescribes enforcement guidelines for federal banking agencies [*12 U.S.C. § 4909*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsInsuranceReal Property LawFinancingMortgages & Other Security InstrumentsPrivate Mortgage InsuranceReal Property LawFinancingSecondary Mortgage MarketFederal Home Loan Mortgage CorporationReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage Association



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10-25A California Legal Forms--Transaction Guide § 25A.23

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.23 Regulation of Certain Secured Consumer Loans

A consumer loan that is secured by real property may be subject to additional regulation [*see Fin. Code § 4970 et seq.*]. For the loan to be covered by the governing provisions, the real property securing the loan must be (1) used or intended to be used as the principal dwelling by the consumer, (2) located in California, and (3) improved by a one-to-four unit residential building [*Fin. Code § 4970(d)*]. In addition, one of the following conditions must be met [*Fin. Code § 4970(b)*]:

- The annual percentage rate at consummation of the transaction will exceed by more than 8 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

- The total points and fees payable by the consumer at or before closing will exceed 6 percent of the total loan amount [*see Fin. Code § 4970(c)* (items included in "points and fees"); *Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500* (transaction was not covered loan when total points and fees exceeded 6 percent only if yield-spread premium was included)].

For these purposes, a consumer loan does not include (1) a reverse mortgage, (2) an open line of credit as defined by Regulation Z [*see 12 C.F.R. § 226.1 et seq.*], (3) a consumer credit transaction that is secured by rental property or second homes, or (4) a bridge loan, that is, any temporary loan, having a maturity of one year or less, for the purpose of acquisition or construction of a dwelling intended to become the consumer's principal dwelling [*Fin. Code § 4970(d)*].

Loans that are subject to these regulations and prohibitions must satisfy detailed requirements with regard to limitations on prepayment fees or penalties [*Fin. Code § 4973(a)*], permissible payment schedules [*Fin. Code § 4973(b)*], and prohibited terms and provisions [*Fin. Code § 4973(c)- (e)*], among other requirements. In addition, before giving the loan the lender must satisfy conditions concerning the lender's reasonable belief in the loan recipient's ability to repay the loan [*Fin. Code § 4973(f)*]. The lender must also provide the borrower with required disclosures, and is subject to

enforcement and penalties for violations of the law [*Fin. Code § 4973(j)*]. For additional discussion of this law and its application, see Ch. 25, *Real Estate Loans* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingResidential Secondary MortgagesReal Property LawFinancingState Regulation



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CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART II. LEGAL BACKGROUND

10-25A California Legal Forms--Transaction Guide §§ 25A.24-25A.99

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25A.24[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25A California Legal Forms--Transaction Guide § 25A.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.100 Facts for Promissory Notes

1. Name, address and telephone number of:

    a. Payor.

    b. Payee.

2. Additional information for parties who are not individuals:

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

    d. Name, address, and title of person authorized to bind entity.

3. Information concerning debt:

    a. Principal amount.

    b. Rate of interest and schedule of when payable.

    c. Amount of periodic payment and mode of payment (*e.g.*, monthly, quarterly,

semiannually, or annually).

d. Amount and due dates of any balloon payments.

e. Date of commencement of payments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsDischarge & PaymentPaymentMethods & PlacesContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory Notes



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A. Client Interview--Facts and Documents

10-25A California Legal Forms--Transaction Guide § 25A.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.101 Facts for Deed of Trust or Mortgage

1. Name, address, and telephone number of parties:

    a. Trustor, trustee, and beneficiary when debt is secured by trust deed.

    b. Mortgagor and mortgagee if debt is secured by mortgage.

2. Additional information for parties who are not individuals:

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

    d. Name, address, and title of person authorized to bind entity.

3. If trustor or mortgagor is a corporation:

    a. Date and state of its incorporation.

    b. Date on which its board of directors or shareholders approved or will approve execution and delivery of trust deed [*see Corp. Code § 313*].

4. If trustor or mortgagor is partnership:

a. Whether partnership will acquire title to real property to be encumbered in partnership name or in names of individual partners.

b. Whether statement of partnership (for a general partnership) [*see Corp. Code § 16303(e)*; *see also* Ch. 15, Part A, *Formation of General Partnerships*] or certificate of limited partnerships (for a limited partnership) [*see Corp. Code § 15902.01(e)* (ULPA '08); *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010); *see also* Ch. 16, *Formation of Limited Partnerships*] has been recorded in office of county recorder where property to be encumbered is located.

c. Which partners are authorized to sign deed of trust or mortgage [*see Corp. Code §§ 16302(a), 16303(a)(1)(D)*].

d. Whether all partners have or will approve of execution of trust deed or mortgage and its terms.

5. If trustor or mortgagor is married person purportedly dealing with his or her separate property:

a. Name of his or her spouse.

b. Whether spouse will approve and sign trust deed or mortgage [*see Fam. Code § 1102*; *see also* Ch. 23, *Real Property Sales Agreements*].

6. Legal description of property that trust deed or mortgage is to encumber.

7. Size, location, and general characteristics of property that trust deed or mortgage is to encumber.

8. Priority status of trust deed or mortgage, e.g., first, second, or lower.

9. If senior trust deed or mortgage exists against property:

a. Name of trustor or mortgagor.

b. Name of beneficiary or mortgagee.

c. Name of trustee (if trust deed).

d. Date of execution.

e. Date of recordation.

f. County and book and page number where recorded.

g. Address where notice of default of senior encumbrance should be mailed, and name of recipient.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



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A. Client Interview--Facts and Documents

10-25A California Legal Forms--Transaction Guide § 25A.102

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.102 Facts for Installment Real Property Sales Contract

1. Name, address and telephone number of:

    a. Buyer.

    b. Seller.

2. Additional information for parties who are not individuals:

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

    d. Name, address, and title of person authorized to bind entity.

3. Legal description of property to be encumbered.

4. County, and city or unincorporated area where property is located.

5. Purchase price and method of payment.

6. Existing encumbrances, if any, against property.

7. Responsible party for payment of real property taxes, assessments, and insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale Contracts



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10-25A California Legal Forms--Transaction Guide § 25A.103

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.103 Documents

1. Copy of grant deed, preliminary title report, or other document containing legal description of property to be encumbered.

2. Copy of any superior trust deeds or mortgages recorded against property.

3. If dealing with installment real property sales contract and subject property located in subdivision, copy of Real Estate Commissioner's final subdivision public report for subdivision [*see* Ch. 30, *Subdivision Regulation*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalities



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

10-25A California Legal Forms--Transaction Guide §§ 25A.104-25A.109

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25A.104[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
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B. Preliminary Determinations

10-25A California Legal Forms--Transaction Guide § 25A.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.110 Type of Loan

1. Determine source of loan secured by trust deed or mortgage.

    a. Seller.

    b. Federal or state savings and loan association.

    c. National or state bank.

    d. Other.

    NOTE:
    Applicable restrictions on provisions such as late charges and prepayment penalties depend on the regulatory authority for a specific lender. For a detailed listing of loan sources, see Ch. 25, ***Real Estate Loans*** .

2. Ascertain whether lender requires use of its own documents [*see § 25A.111*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalities



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10-25A California Legal Forms--Transaction Guide § 25A.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.111 Type of Security Instrument

1. Ascertain whether security document will be a:

a. Deed of trust, as is usually the case [*see § 25A.11[1]*];

b. Mortgage [*see § 25A.11[2]*]; or

NOTE:
Although there are very few differences between a trust deed and a mortgage with a power of sale, the trust deed is the preferred type of security device in California [***see*** *§ 25A.11[1]*].

c. Real property sales contract [*see § 25A.18*].

2. In the case of a trust deed, determine type of form parties will use:

a. Standardized document prepared by title company or lender [*see § 25A.12[3]*].

b. Custom-drafted document.

c. Short or long form [*see § 25A.12[3]*; *see also §§ 25A.210* (long form), *25A.211* (short form)].

d. All-inclusive trust deed [*see § 25A.212*].

3. In the case of a mortgage, determine whether parties will use:

a. Statutory mortgage [*see Civ. Code § 2948*; *see also § 25A.213*].

NOTE:
This form is rarely used because it contains few provisions regarding the rights and liabilities of the parties [***see** § 25A.213[1]*].

b. Standardized document prepared by title company or lender [*see § 25A.12[3]*].

c. Custom-drafted document.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.112

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.112 Status of Property and Borrower

1. If real property to be encumbered is residential, determine whether it is subject to:

a. Restrictions on when interest may begin to accrue [*see Civ. Code § 2948.5*; *see also § 25A.17[5]*].

b. Other governmental restrictions, e.g., limitations on [*see § 25A.17[3]*]:
(1) Prepayment penalties [*see § 25A.221[1]*].

(2) Lender acceleration of loan following buyer's sale or further encumbrancing of the property [*see § 25A.221[1]*].

(3) Impound accounts [*see § 25A.228*].

2. Determine whether borrower occupies or is to occupy real property to be encumbered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale ClausesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.113

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.113 Federal and State Disclosure Requirements

1. Determine applicability of following federal disclosure statutes to transaction:

a. Federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*].

NOTE:
For a discussion of the applicability of the Truth in Lending Act, see "Disclosures Required Under Federal Truth in Lending Act" and subsequent headings in the Legal Background to Ch. 25, ***Real Estate Loans*** . The factors in determining applicability of the Act are outlined in Part II(B) of the Transaction Guide to Ch. 25, ***Real Estate Loans*** .

b. Federal Real Estate Settlement Procedures Act [*12 U.S.C. §§ 2601-2617*].

NOTE:
For coverage of the Real Estate Settlement Procedures Act, see "Real Estate Settlement Procedures Act (RESPA)--In General" and succeeding headings in the Legal Background to Ch. 25, ***Real Estate Loans.*** The factors in determining applicability of the Act are outlined in Part II(C) of the Transaction Guide to Ch. 25, ***Real Estate Loans*** .

2. Determine applicability of following state statutory disclosure requirements:

a. Disclosures required when transaction involves [*see* Ch. 25, *Real Estate Loans*]:

(1) Dwelling containing up to four units;

(2) Seller financing; and

(3) Participation of "arranger of credit."

b. Disclosures required for adjustable payment, adjustable rate loans [*see Civ. Code § 1916.7*; *see also* "Disclosures for Adjustable Payment, Adjustable Rate Residential Loans" in Ch. 25, *Real Estate Loans*].

c. Disclosures required for transactions involving mortgage loan brokers [*see Bus. & Prof. Code §§ 10240*, *10232.4*, *10232.5*; *see also* "Mortgage Loan Brokers--In General" and subsequent headings in Legal Background to Ch. 25, *Real Estate Loans*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureBanking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingState Regulation



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10-25A California Legal Forms--Transaction Guide §§ 25A.114-25A.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25A.114[Reserved]



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10-25A California Legal Forms--Transaction Guide § 25A.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.120 Promissory Note and Security Instrument

NOTE:

If the promissory note and trust deed or mortgage must be drafted, Part D of this Transaction Guide should be used in conjunction with the following procedural guide. Also, if the note and security instrument are executed in connection with the purchase of real property, which is usually the case, counsel should consult Ch. 23, ***Real Property Sales Agreements*** , and Ch. 26, ***Real Property Escrows*** .

1. Review note and security instrument to confirm that they do not provide for waiver of following nonwaivable rights of debtor:

a. Rights under *Civ. Code § 2924*, which include right to require recordation of notice of default and publication of notice of sale [*see Civ. Code § 2953*; *see also §§ 25D.202[1]* (notice of default), *25D.206[1]* (notice of sale)].

b. Rights under *Civ. Code § 2924b*, which include right to receive copy of notices of default and sale [*see Civ. Code § 2953*; *see also § 25A.15*].

c. Rights under *Civ. Code § 2924c*, which include rights to [*see Civ. Code § 2953*; *see also § 25D.202[1]*]:

(1) Reinstate trust deed or mortgage prior to foreclosure; and

(2) Have notice of rescission of declaration of default recorded.

d. "One form of action" protection under *Code Civ. Proc. § 726* [*see Civ. Code § 2953*; *see also §*

25D.13[1]].

e. Antideficiency protection of purchase money obligations under *Code Civ. Proc. § 580b* [*Freedland v. Greco (1955) 45 Cal. 2d 462, 289 P.2d 463*].

f. Antideficiency protection after nonjudicial foreclosure under *Code Civ. Proc. § 580d* [*Freedland v. Greco (1955) 45 Cal. 2d 462, 289 P.2d 463*].

g. Right of redemption from a lien [*Civ. Code § 2889*].

2. Confirm provisions of note and security instrument are:

a. Consistent with terms of purchase agreement or other applicable agreement for real property; and

b. Are otherwise acceptable to client.

3. If secured note will be junior lien on property, determine unpaid balance on senior lien by obtaining statement of unpaid balance from holder of senior lien [*see Civ. Code § 2943*; *see also Ch. 25B, Subordination, Assumption and Assignment, §§ 25B.220, 25B.221*].

4. Before consummation of transaction, confirm that lender has given debtor disclosure statements required by following federal statutes (as applicable):

a. Truth in Lending Act [*15 U.S.C. § 1601 et seq.*; *see § 25A.113(1)(a)*; *see also* Ch. 25, *Real Estate Loans*]:

(1) General disclosure statement regarding loan [*12 C.F.R. §§ 226.17-226.19*; *see* Ch. 45, *Consumer Installment Loans and Credit Sales*].

(2) Notice to debtor of right to rescind credit transaction, together with a blank notice of rescission for debtor's use [*12 C.F.R. §§ 226.15, 226.23*; *see* Ch. 25, *Real Estate Loans*].

b. Real Estate Settlement Procedures Act: [*12 U.S.C. § 2601 et seq.*; *see § 25A.113(1)(b).*]

(1) Federal booklet describing nature and costs of settlement services [*12 U.S.C. § 2604(d)*].

(2) Good-faith estimate of settlement charges [*12 U.S.C. § 2604(c)*].

(3) Uniform settlement statement as part of a closing in escrow [*see 12 U.S.C. § 2603(a)*].

5. Confirm that lender has given debtor disclosure statements required under state law (as applicable):

a. If transaction involves "arranger of credit," seller financing, and residential property of four or fewer units [*see Civ. Code §§ 2956-2967*; *see also § 25A.113(2)(a)*]:

(1) General disclosure statement [*Civ. Code § 2963*].

NOTE:

The California Association of Realtors and other real estate boards offer standardized forms designed to satisfy these disclosure requirements [***see*** Ch. 25, ***Real Estate Loans***].

(2) Disclosure regarding balloon payment [*Civ. Code § 2966*; *see § 25A.225*].

b. Disclosures regarding adjustable payment, adjustable rate loans [*see Civ. Code § 1916.7*; *see also* Ch. 25, *Real Estate Loans*].

c. Disclosures involving mortgage loan brokers [*see Bus. & Prof. Code §§ 10240, 10232.4,* and *10232.5*; *see also* Ch. 25, *Real Estate Loans*].

6. Have client execute promissory note [*see* §§ 25A.200-25A.205] and trust deed or mortgage [*see* §§ 25A.210-25A.214].

NOTE:

The name of the trustor on the trust deed or the mortgagor on the mortgage should be the same as it will appear on the grant deed conveying title to the property. If the real property secured by the trust deed or mortgage is community property, both spouses must execute any instrument that encumbers the property [*Fam. Code § 1102(a)*; ***see*** *Fam. Code § 1102(e)* (statute does not preclude spouse from encumbering his or her interest in community real property, as provided in *Fam. Code § 2033*, to pay reasonable attorneys' fees to retain or maintain legal counsel in proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of parties)]. For discussion of additional requirements governing execution of an instrument affecting real property by a partnership, corporation or unincorporated association, see Ch. 23, ***Real Property Sales Agreements*** .

7. If lien being created is junior to another, have holder of junior lien:

a. Mail actual notice of junior lien [*see § 25A.241*] to holder of senior security.

NOTE:

Unless the junior lienor delivers actual notice of his or her junior security to the holder of the senior security, any advances made by the senior to the trustor subsequent to the execution of the junior security will be prior to the lien of the junior security. Actual notice does not include the constructive notice afforded by recording the junior security [***see*** *§ 25A.241[1]*].

b. Execute and record separate request for notices of default and sale [*see § 25D.200[2]*; *see also Civ. Code § 2924b*] if request is not inserted in junior trust deed.

c. Execute and record request for notice of delinquencies under senior lien [*Civ. Code § 2924e*; *see § 25A.242*].

8. Record trust deed [*Civ. Code § 2952*] in every county where any portion of real property is located [*Civ. Code § 1169*; *see § 25A.12[6]*].

NOTE:

Although a trust deed is effective as between the trustor and beneficiary as of the date of execution, the beneficiary can only protect his or her priority as against subsequent encumbrancers and transferees of the trustor by recording the trust deed [*Civ. Code §§ 1214, 1215*; ***see*** *§ 25A.13[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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10-25A California Legal Forms--Transaction Guide § 25A.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.121 Real Property Sales Contracts

NOTE:
When the real property sales contract must be drafted rather than merely reviewed, *§ 25A.132* should be used in conjunction with this section.

1. Order preliminary title report or commitment from title company to verify [*see* Ch. 26A, *Title Insurance*]:

a. Existing liens and encumbrances against property.

b. Record owner of property.

2. If contract is subject to existing liens on property, determine unpaid balance on each lien by obtaining following from holder of lien [*see Civ. Code § 2943*]:

a. Payoff demand statement, if existing lien is to be paid in full with funds provided by purchaser [*see* Ch. 25, *Real Estate Loans*].

b. Beneficiary statement, if purchaser is to assume existing lien [*see* Ch. 25B, *Subordination, Assumption, and Assignments*].

3. Confirm provisions of contract are:

a. Consistent with agreement negotiated by or on behalf of client; and

b. Otherwise acceptable to client.

4. Confirm contract contains statement of [*Civ. Code § 2985.5*]:

a. Number of years required to complete payment in accordance with terms of contract.

b. Basis on which tax estimate is made.

5. If contract is to contain arbitration provision [*Code Civ. Proc. § 1298(a), (c)*; *see § 25A.233*]:

NOTE:
Disclosure requirements apply only when the real property sales contract contains a provision for binding arbitration [*Code Civ. Proc. § 1298(a)*]. For further discussion, see Ch. 23, ***Real Property Sales Agreements*** .

a. Use following heading for provision: "ARBITRATION OF DISPUTES."

b. Insert statutory arbitration notice:
(1) Immediately before line or space provided for parties to indicate their assent or nonassent to arbitration provision; and

(2) Immediately following arbitration provision.

c. Observe following format requirements:

(1) If contract is typed, set out provision and statutory notice in capital letters.

(2) If contract is printed:
(a) Set out arbitration provision in at least 8-point bold type or in contrasting red in at least 8-point type; and

(b) Set out statutory notice in at least 10-point bold type or in contrasting red in at least 8-point bold type.

6. If contract is for sale of unimproved, previously divided property [*see Civ. Code § 2985.51(e), (f)*], confirm contract contains statement of compliance with or nonapplicability of Subdivision Map Act [*Civ. Code § 2985.51*; *see Gov. Code § 66410 et seq.* (Subdivision Map Act); *see also* §§ 25A.133(14), *25A.232*].

7. If contract is for sale of residential lot in a subdivision, verify contract does not prohibit prepayment by buyer except during 12-month period following sale [*Civ. Code § 2985.6(a)*].

8. When contract is for sale of land in subdivision, include any provisions required by Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations [*see 10 Cal. Code Reg. § 2791.9*; *see also § 25A.230[1][l][ii]*].

9. Have buyer deliver cashier's check for down payment to escrow holder (or seller's attorney if no escrow holder) to hold in trust pending recordation of contract and issuance of title policies.

NOTE:

The contract by its terms usually acknowledges receipt of this sum by the seller [***see*** *§ 25A.230[2]*].

10. Have parties execute contract.

11. Record entire contract or memorandum of contract [*see* Ch. 23, *Real Property Sales Agreements*] in every county in which any portion of real property is located [*Civ. Code § 1169*].

NOTE:

A memorandum of the contract rather than the contract itself should be recorded only if this is acceptable to the title company insuring the seller's and buyer's interest in the contract.

12. Concurrently with recordation of contract, obtain policy of title insurance insuring client's (whether buyer or seller) interest in contract [*see* Ch. 26A, *Title Insurance*].

13. If contract is subject to existing liens, execute and record separate request for notices of default and sale [*see* Ch. 25D, *Foreclosure* ; *see also Civ. Code § 2924b*] for each lien, if request is not inserted in contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawSubdivisionsGeneral Overview



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10-25A California Legal Forms--Transaction Guide §§ 25A.122-25A.129

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25A.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
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D. Drafting Guide to Security Instruments

10-25A California Legal Forms--Transaction Guide § 25A.130

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.130 Promissory Notes

NOTE:
The following provisions are included in all of the illustrative promissory notes set forth in this chapter [***see*** §§ 25A.200-25A.205], unless otherwise indicated.

1. Begin promissory note with provision setting forth:

a. Full names of payor and payee.

b. Payee's promise to pay obligation.

c. In the case of an all-inclusive note, description of "first" or "underlying" note and security instrument [*see § 25A.205*].

2. Include provision describing terms of obligation:

a. Original principal amount.

b. Interest rate.

c. Whether interest rate is fixed or will change during term of loan.

d. Term of loan.

3. Specify method of repayment:

NOTE:

If the note is secured by a trust deed or mortgage on real property improved with one to four residential dwelling units, there are statutory restrictions governing the commencement of interest on the note [***see § 25A.17[5]***].

a. Payment of entire principal (with accrued interest) on certain date [*see § 25A.200*].

b. Payment of interest only in regular installments during term of loan and payment of principal in one or more lump sums [*see § 25A.203*].

c. Payments of principal and interest in equal monthly or other periodic installments [*see § 25A.201*].

d. Payment on demand [*see § 25A.204*].

4. Specify amount and due date of each payment during term of loan.

5. Include provision for payment by debtor of attorneys' fees in event of debtor's default under note.

6. Add statutory notice regarding balloon payment [*see § 25A.225*] if [*Civ. Code § 2966*]:

a. Note has repayment term longer than one year;

b. Note is given to seller of residential dwelling for not more than four families; and

c. An "arranger of credit" participates in transaction [*see Civ. Code § 2957(a)(1)* ("arranger of credit" defined)].

7. Consider including provision under which creditor waives personal liability of debtor for obligation [*see § 25A.220*].

NOTE:

The creditor may agree to such a provision when antideficiency legislation restricts the creditor to proceeding only against the secured real property and prohibits personal judgments against the debtor. For discussion of deficiency judgments, see Ch. 25D, ***Foreclosure*** ; ***see also*** California Real Estate Law & Practice, Ch. 122, ***Antideficiency Legislation*** (Matthew Bender).

8. If desired, insert "due-on-sale" and/or "due-on-encumbrance" provision [*see § 25A.221*].

NOTE:

A "due-on-sale" provision gives the lender the option to accelerate the entire balance of the note if the debtor sells or otherwise transfers the underlying real property. A "due-on-encumbrance" provision gives the lender the same option in the event the debtor further encumbers the secured property.

9. If debtor will have (pursuant to law or agreement of parties) right to prepay all or any portion of debt, add provision [*see § 25A.222*]:

a. Stating this fact; and

b. If appropriate, describing prepayment penalty.

10. If desired, include late charge provision [*see § 25A.223*].

11. If drafting an all-inclusive note:

a. Provide for payment of underlying obligation, e.g. [*see § 25A.205[1][d]*]:
(1) Require holder of all-inclusive documents to make payments on underlying instrument, to extent payor under all-inclusive documents provides holder with necessary funds [*see § 25A.205*]; or

(2) Have escrow holder accept payments from payor and make above payments.

b. Confirm that all-inclusive documents are consistent with underlying documents [*see § 25A.205[1][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25A California Legal Forms--Transaction Guide § 25A.131

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.131 Trust Deeds

NOTE:
This section refers solely to deeds of trust, since they are used much more frequently in California than mortgages. However, all requirements for a deed of trust discussed below, unless otherwise noted, are equally applicable to a mortgage.

1. Begin with introductory paragraph setting forth:

a. Name and legal status of trustor, trustee, and beneficiary.

b. Name of trustor's spouse, if married.

NOTE:
The trustor's spouse must execute the trust deed if the secured property is community property [*Fam. Code § 1102(a)*; ***see*** *Fam. Code § 1102(e)* (statute does not preclude spouse from encumbering his or her interest in community real property, as provided in *Fam. Code § 2033* (regarding "family law attorney's real property lien"), to pay reasonable attorneys' fees to retain or maintain legal counsel in proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of parties)].

c. Trustor's address.

NOTE:
The trust deed will not be accepted for recording unless it contains this information [*Civ. Code § 2924b*;

Gov. Code § 27321.5(b); ***see*** *§ 25A.210[1][b]*].

2. Include clause granting power of sale to trustee [*see § 25A.210[2],* 2nd P; *see also § 25A.210[1][c]*].

3. Describe property to be secured by setting forth [*see § 25A.210[1][d]*]:

a. Legal description, either:

(1) In body of text of trust deed; or

(2) As exhibit to be attached to trust deed.

b. County, and city or unincorporated area where property is located.

NOTE:

For discussion of the hypothecation of estates for years in real property by trust deeds or mortgages [***see, e.g.,*** *Civ. Code § 2920(a)*], see *§ 25A.11[2]*.

4. Specify obligations that trust deed is to secure [*see § 25A.210[1][d]*:

a. Date and amount of obligation being incurred contemporaneously with execution of trust deed [*see § 25A.210[2],* 3d P].

b. Preexisting obligations, if any.

c. Any future advances made by beneficiary to trustor [*see § 25A.224[1]*].

5. Include provisions setting forth affirmative obligations of trustor under trust deed:

a. To keep property in good condition and repair and to not commit waste [*see § 25A.210[2],* P (A)(1); *see also § 25A.210[1][e]*].

b. To procure and maintain fire insurance on property [*see § 25A.210[2],* P (A)(2); *see also § 25A.210[1][f]*].

c. To appear in and defend any action affecting security of trust deed [*see § 25A.210[2],* P (A)(3); *see also § 25A.210[1][g]*].

d. To pay taxes, assessments, and prior liens before delinquency [*see § 25A.210[2],* P (A)(4); *see also § 25A.210[1][g]*].

e. To reimburse beneficiary or trustee for any sums expended under trust deed [*see § 25A.210[2],* P (A)(5)].

6. Add clause providing for assignment of proceeds of any condemnation award to beneficiary [*see § 25A.210[2],* P (B)(1); *see also 25A.210[1][h]*].

7. Consider including following provisions relating to late payments by trustor:

a. Acceptance by beneficiary of late payment as not waiving right to declare default for late payment [

see § 25A.210[2], P (B)(2)].

b. Imposition of late charge for late payment [*see § 25A.223[1]*.

8. Add provision requiring trustee to execute full reconveyance to trustor on request of beneficiary and full payment by trustor [*Civ. Code § 2941*; *see § 25A.210[2]*, P (B)(4); *see also § 25A.210[1][k]*].

9. Include provision under which trustor assigns rents and profits to beneficiary [*see Civ. Code § 2938*; *see also § 25A.210[1]*[*l*]].

10. Add provision outlining [*see § 25A.210[2],* P (B)(6)]:

a. Remedies of beneficiary on default by trustor; and

b. Procedure for nonjudicial foreclosure.

11. Insert following provisions relating to trustee:

a. Acceptance by trustee of duties under trust deed [*see § 25A.210[2],* P (B)(8)]; and

b. Procedure for substituting one trustee for another [*see § 25A.210[2]*, P (B)(9); *see also § 25A.210[1][m]*].

NOTE:
For the procedure for substituting a trustee in a deed of trust, see §§ 25C.140-25C.143.

12. If trust deed is to be subordinated to another deed of trust, insert provisions [*see § 25A.210[1][j]*]:

NOTE:
An agreement to subordinate often occurs in a purchase/sale situation when the seller agrees to accept a trust deed from the purchaser as part of the purchase price and to subordinate that trust deed to a deed of trust securing a construction loan to be obtained by the purchaser to develop the property. For coverage of subordination, see Ch. 25B, ***Subordination, Assumption, and Assignment*** **.**

a. Providing for:

(1) "Automatic subordination" of trust deed to subsequent trust deed securing future loan [*see §§ 25B.200*, 25B.202-25B.206]; or

(2) Subordination to trust deed being recorded concurrently [*see § 25B.205[2]*]; and

b. Complying with statutory notice and other requirements, if applicable [*see Civ. Code § 2953.2*; *see also §§ 25B.201[2], 25B.202[2]*].

NOTE:
When a trust deed is to be subordinated to an existing loan, it may be necessary to execute a separate subordination agreement [***see*** *§ 25B.207[2]*]. A subordination agreement may be subject to statutory notice and other requirements [***see*** *Civ. Code § 2953.3*; ***see also*** §§ 25B.208-25B.211].

13. If parties have agreed that portions of property are to be released from trust deed on payment of designated portions of purchase price, insert partial release provision [*see § 25A.210[1][j]*; *see also* §§ 25C.220-25C.224].

14. If promissory note secured by trust deed is a purchase money encumbrance, insert provision stating that fact [*see § 25A.210[2]*, P (B)(14)].

15. If trustor will not be personally liable under note secured by trust deed, include provision stating that fact [*see § 25A.220*].

16. Consider including due-on-sale clause [*see § 25A.221*].

17. If there is senior lien of record, either:

a. Add request for copies of notice of default and sale for senior lien [*see § 25A.210[2]*, P (B)(15)]; or

b. Execute separate request for notice [*see § 25D.200[2]*].

18. Include signature blocks for parties, with appropriate form of acknowledgment for each party [*see § 25A.210* for individual, corporate, and partnership forms of acknowledgment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingSecondary FinancingLien Priorities



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10-25A California Legal Forms--Transaction Guide § 25A.132

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.132 Real Property Sales Contracts

1. Begin contract with introductory paragraph or preamble setting forth [*see § 25A.230[2]* (preamble of form)]:

a. Execution date of contract.

b. Information concerning parties:
(1) Full names (spelled correctly).

NOTE:
If the seller acquired title in one name but has since changed his or her name, that fact should be recited in the preamble of the contract in the same manner as it should be recited in a deed by seller conveying the title [*Civ. Code § 1096*; ***see*** Ch. 27, ***Deeds and Recording***].

(2) Status and capacity, e.g.:

(a) California corporation.

(b) A California limited partnership.

(c) Husband and wife.

(d) A single man or woman.

(e) Other.

c. Agreement of parties to purchase and sell real property.

2. Describe property being sold by:

a. Providing legal description, either:

(1) In introductory paragraph; or

(2) In exhibit that is attached to contract and incorporated by reference; and

b. Designating county and city or unincorporated area in which property being sold is located.

3. Include purchase price provision [*see § 25A.230[2],* § 1] that:

a. States total purchase price.

b. Describes method by which purchase price is to be paid:

(1) Amount of payment, if any, to be made on execution of contract.

(2) Amount of each installment to be made under contract by buyer.

(3) Whether buyer may prepay without penalty any installments due under contract.

NOTE:
This will dictate whether the words "or more" should be included in the contract following specification of the amount of each installment or whether a separate prepayment penalty clause should be included in the contract [***see** § 25A.222*].

If the property being sold consists of a lot in a residential subdivision and the lot contains a dwelling for not more than four families, the buyer has a statutory right of prepayment that cannot be waived [*Civ. Code § 2985.6*]. However, notwithstanding this right, the seller, by an agreement in writing with the buyer, may prohibit prepayment for up to a 12-month period following the sale [*Civ. Code § 2985.6*].

(4) Frequency with which and date on which each installment is to be paid.

(5) Rate of interest to be charged on unpaid principal balance of purchase price.

(6) Whether interest is included in each installment or is to be paid in addition to each installment.

NOTE:
When interest is included in each installment, the contract should provide that each installment will be credited first to the payment of interest and then to the reduction of the unpaid principal balance of the purchase price.

(7) Place or places where each installment is to be paid.

(8) Number of years that will be required for buyer to complete payment of purchase price under contract, disregarding any prepayment privileges or provisions [*Civ. Code § 2985.5(a)*; *see § 25A.230[2]*, § 1(b)].

4. Include provision setting forth buyer's responsibilities for payment of real property taxes:

a. Date when taxes will be prorated between buyer and seller [*see § 25A.230[2]*, § 5].

b. Method by which buyer will pay taxes [*see § 25A.230[2]*, § 5].

c. Whether impound fund is to be established for payment of taxes and insurance [*see § 25A.231[2]*].

NOTE:
If the property being sold is subject to a trust deed that requires an impound for taxes, the contract must provide for an impound fund [***see** § 25A.231*].

d. Basis on which tax estimate is made [*Civ. Code § 2985.5(b)*].

e. Interest rate to be charged on amounts paid by seller for taxes, insurance, etc., following buyer's failure to satisfy its obligation to pay these amounts prior to delinquency [*see § 25A.230[2]*, § 7].

5. Include provisions setting forth other affirmative obligations of buyer under contract, e.g.:

a. To keep property in good condition and repair and to not commit waste [*see § 25A.230[2]*, § 11].

b. To procure and maintain fire insurance on property [*see § 25A.230[2]*, § 6].

6. Add clause assigning proceeds of any condemnation award to seller [*see § 25A.230[2]*, § 8; *see also § 25A.210[1][h]*].

7. Consider including provisions relating to late payments by buyer:

a. Acceptance by seller of late payment as not waiving right to declare default for late payment [*see § 25A.210[2]*, P (B)(2)].

b. Imposition of late charge for late payment [*see § 25A.223[1]*].

8. Include provision under which buyer assigns rents to beneficiary [*see Civ. Code § 2938*; *see also § 25A.210[1]*[*l*]].

9. Consider inserting clause in which trustee is granted power of sale [*see § 25A.210[1][c]*].

10. When power of sale is included, add provisions for:

a. Powers of trustee [*see § 25A.230[2]*, § 2].

b. Remedies of seller on default by buyer and procedure for sale by nonjudicial foreclosure [*see § 25A.230[2]*, § 17].

c. Acceptance by trustee of duties under trust deed [*see § 25A.230[2]*, § 18].

d. Procedure for substituting one trustee for another [*see § 25A.230[2]*, § 19].

NOTE:
For the procedure for substituting a trustee in a trust deed, see §§ 25C.140-25C.143.

11. If agreed on by parties, include provision setting forth conditions under which seller will convey legal title to property to buyer and accept promissory note secured by trust deed on property being sold in substitution of installment contract [*see § 25A.230[2]*, § 22].

12. State which party is to procure and pay for title insurance policy [*see § 25A.230[2]*, § 21].

13. Identify each existing encumbrance against property and party responsible for payment of encumbrance [*see § 25A.230[2]*, § 3].

NOTE:
Every installment sales contract relating to the sale by a subdivider of real property in a subdivision must clearly set forth any encumbrances outstanding at the date of the contract [*Bus. & Prof. Code § 11200*]. When any property being sold under an installment sales contract is subject to an existing trust deed or mortgage, the buyer should record a request for notice of default and sale [***see** § 25D.200[2]*].

14. If real property that is subject of contract is unimproved [*see Civ. Code § 2985.51(e)*] and resulted from division of real property, add appropriate statutory statement regarding compliance with or nonapplicability of Subdivision Map Act [*Civ. Code § 2985.51*; *see § 25A.232*; *see also Gov. Code §§ 66410-66499.37* (Subdivision Map Act)], depending on when division occurred:

a. If division occurred on or after January 1, 1978, statement that division creating parcel or parcels to be conveyed was [*Civ. Code § 2985.51(a)*]:

(1) Made in compliance with Subdivision Map Act [*Gov. Code § 66410 et seq.*] and local ordinances adopted pursuant thereto.

(2) Not subject to Subdivision Map Act and local ordinances.

(3) Exempt from the Subdivision Map Act and regulations.

(4) Subject of waiver of requirements of Subdivision Map Act and local ordinances.

NOTE:
Each of the above statements must include specific additional information [***see** Civ. Code § 2985.51(a)*; ***see also** § 25A.232[2]*].

b. If division occurred before January 1, 1978, contract must: [*Civ. Code § 2985.51(b)(1), (2)*]

(1) Contain or be attached to, signed statement by vendor that relevant parcel or parcels:

(a) Have been created in compliance with Subdivision Map Act and any local ordinances adopted thereto, or any applicable prior law regulating division of land;

(b) Are covered by waiver of foregoing laws; or

(c) Were exempt from or not otherwise subject to any such law at time of their creation, or

(2) Include description of real property being conveyed as entire lot or parcel by referencing recorded final or parcel map creating parcel or parcels being conveyed.

NOTE:

If the parcel or parcels that are the subject of the real property sales contract were not created in compliance with the Subdivision Map Act and local ordinances adopted pursuant thereto, or any other prior law regulating the division of land, and were not exempt from, or were otherwise subject to any such law at the time of their creation, the real property sales contract must contain a statement signed by the vendor and vendee acknowledging that fact [*Civ. Code § 2985.51(b)(3)*]. In addition, the vendor must attach to the real property sales contract a conditional certificate of compliance issued pursuant to *Gov. Code § 66499.35* [*Civ. Code § 2985.51(b)(3)*]. These requirements are fully discussed in *§ 25A.232[1]*; illustrative forms for the required statements are included in *§ 25A.232[2]*.

15. When contract is for sale of land in subdivision, include any provisions required by Subdivided Lands Act [Bus. & Prof. Code § 11000 et seq.] and its implementing regulations [*see 10 Cal. Code Reg. § 2791.9*; *see also § 25A.230[1]*[*l*][ii]].

16. Include signature blocks and appropriate forms of acknowledgment for each signatory [*see § 25A.210* for individual, corporate, and partnership forms of acknowledgment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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10-25A California Legal Forms--Transaction Guide §§ 25A.133-25A.139

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[Reserved]

§§ 25A.133[Reserved]



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10-25A California Legal Forms--Transaction Guide § 25A.140

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.140 Statement of Account for Impound or Trust Account Funds

NOTE:

The requirements outlined in this section apply to trust deeds, mortgages, and real property sales contracts [*Civ. Code § 2954(b)*]. The term "creditor," as used below, includes a beneficiary under a deed of trust, a mortgagee under a mortgage, and the seller under a real property sales contract. The term "debtor," as used below, includes a trustor, mortgagor, and a buyer under a real property sales contract.

1. On receipt of written request from debtor, have creditor, within 60 days after end of calendar year, furnish statement for calendar year containing itemized accounting of [*Civ. Code § 2954(b)*; *see § 25A.245*]:

a. Moneys received for interest and principal repayment; and

b. Moneys received and held in or disbursed from an impound or trust account, if any, for payment of property taxes, insurance premiums, or other purposes relating to the property.

NOTE:

Transmission by the creditor to a debtor of a monthly statement or passbook showing moneys received for interest and principal repayment and received and held in and disbursed from an impound or trust account, if any, constitutes compliance with this disclosure requirement [*Civ. Code § 2954(b)*].

If the creditor willfully or repeatedly violates this requirement, he or she will be subject to a civil fine [***see*** *Civ. Code § 2954(b)*].

2. On receipt of written request and of advance payment required by statute [*see Civ. Code § 2954(b)*], have creditor furnish statement for period other than calendar year [*Civ. Code § 2954(b)*].

NOTE:

The debtor is entitled to only one free statement per calendar year [*Civ. Code § 2954(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsReal Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingState RegulationReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.141

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.141 Annual Statement of Creditor

NOTE:

The requirements outlined below apply to purchase money deeds of trust, mortgages, and real property sales contracts for real property containing only a one-to-four-family residence, and to the refinancing of the foregoing security instruments [***see*** *Civ. Code §§ 2954.2(a), 2954.2(b)(1)*]. Therefore, the term "creditor," as used below, includes a beneficiary under a trust deed, a mortgagee under a mortgage, and the seller under a real property sales contract. The term "debtor," as used below, includes a trustor, mortgagor, and a buyer under a real property sales contract.

1. Unless creditor selects option discussed in (2), below, have creditor furnish to debtor, within 60 days after end of calendar year, written statement that [*Civ. Code § 2954.2(a)*; *see § 25A.246[2]*]:

a. Shows amount of moneys received for interest and principal repayment and late charges;

b. Shows amount of moneys received and held in or disbursed from an impound account, if any, for payment of property taxes, insurance premiums, bond assessments, or other purposes relating to property, and interest credited to account; and

c. Contains notice in 10-point type that debtor may request additional accountings pursuant to *Civ. Code § 2954* [*see § 25A.140*].

NOTE:

The debtor is entitled to receive one statement for each calendar year without charge and

without request [*Civ. Code § 2954.2(a)*].

2. Advise client that creditor may, in lieu of furnishing above statement, transmit to debtor cumulative statements or receipts that, for each calendar year, provide in one of the statements or receipts the information required by statute [*Civ. Code § 2954.2(a)*].

NOTE:

If this alternative method of complying with the statute is used, the 10-point notice advising the debtor that additional accountings can be requested under *Civ. Code § 2954* [***see*** P (1)(c), ***above***], should be added to the cumulative statements or receipts [*Civ. Code § 2954.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingState RegulationReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.142

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.142 Request for Notice of Delinquencies

NOTE:

A beneficiary or mortgagee of any deed of trust or mortgage on real property may request a notice of delinquency on a senior trust deed or mortgage if (1) the subject real property contains one to four residential units, or (2) the trust deed or mortgage was given to secure an original obligation of up to $300,000 [*Civ. Code § 2924e(a)*]. Although all references below are to a trust deed and the trustor and beneficiary, all requirements are equally applicable to a mortgage, mortgagor, and mortgagee.

1. Draft instrument requesting notice of any or all delinquencies of four months or more on senior lien and containing [*Civ. Code § 2924e(b)*; *see § 25A.242[2]*]:

a. Identification of ownership or security interest of requester.

b. Date on which requester's interest will terminate as evidenced by maturity date of note of trustor in favor of requester.

c. Name of trustor.

d. Name of current owner of security property if different from trustor.

e. Street address or other description of security property.

f. Loan number (if available to requester) of loan secured by senior lien.

g. Name and address to which notice is to be sent.

2. Obtain trustor's written consent for beneficiary to receive notice of delinquencies through either [*Civ. Code § 2924e(a)*]:

a. Signed and dated agreement, separate and apart from other loan and security documents; or

b. Disclosure made to trustor in at least 10-point type in loan or other security document signed by trustor.

3. Send following by certified mail [*see Civ. Code § 2924e(a)*] to beneficiary or its agent designated to receive loan payments at address specified for receipt of payments, if known, or if not known, at address shown on recorded trust deed [*Civ. Code § 2924e(a), (b)*]:

a. Request for notice of delinquencies [*see § 25A.242[2]*].

b. Signed written consent of trustor.

c. Required statutory fee.

4. Record request for notice of delinquencies [*§ 25A.242[2]*] in office of county recorder of county in which security real property is located [*Civ. Code § 2924e(b)*].

NOTE:

A request remains valid until withdrawn in writing and is applicable to all delinquencies of four months or more that occur before the date on which the requester's interest terminates as specified in the request or the expiration date of the request, as appropriate. A request for notice is effective for five years from whichever date is later; that of the mailing or that of the recording of the request, and may be renewed [*Civ. Code § 2924e(b)*; ***see*** P (5), ***below***].

5. If necessary to renew request for notice, take following steps within six months before expiration date of original request [*Civ. Code § 2924e(b)*]:

a. Send following to beneficiary (or its agent) at address to which original requests for notice are to be sent:

(1) Signed statement that request is renewed [*see § 25A.243[2]*];

(2) Copy of original request; and

(3) Statutory renewal fee; and

b. Record renewal request in office of county recorder of county in which property is located.

NOTE:

Timely submittal of a renewal request for notice continues the effectiveness of the original request for five years from the time when it would otherwise have lapsed. Succeeding renewal requests may be submitted in the same manner as described above [*Civ. Code § 2924e(b)*].

6. On satisfaction of obligation secured by junior lien, have "junior" beneficiary notify "senior" beneficiary in writing [

Civ. Code § 2924e(g)]:

a. Of satisfaction of junior lien; and

b. That senior beneficiary is no longer required to provide notice of delinquencies pursuant to above request for notice of delinquencies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

10-25A California Legal Forms--Transaction Guide § 25A.143

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.143 Notice of Balloon Payment

NOTE:

This section outlines the procedure for giving notice of a balloon payment under *Civ. Code § 2924i*. Almost identical notice is required under *Civ. Code § 2966* in transactions that involve an "arranger of credit" [***see*** *Civ. Code § 2957(a)(1)*] and seller financing [***see*** *§ 25A.240[1]*]. The only unique provision in *Civ. Code § 2966* requires the inclusion in the promissory note of an additional notice of the balloon payment [*Civ. Code § 2966(d)*; ***see*** *§ 25A.225*; ***see also*** *§ 25A.120(5)(a)(2)*].

The following requirements are equally applicable to a mortgage, the mortgagee, and the mortgagor [***see*** *Civ. Code § 2924i(a)*].

1. Advise holder of note of duty to give notice of final (balloon) payment [*see § 25A.240[2]*] to trustor or trustor's successor in interest if [*Civ. Code § 2924i*; *see § 25A.240*]:

a. Trust deed is on real property that contains one to four residential units, at least one of which (at time loan is made) is or is to be occupied by borrower;

b. Loan is for period in excess of one year; and

c. Loan is a balloon payment loan, i.e.:

(1) Loan provides for final payment as originally scheduled that is more than twice amount of any of immediately preceding six regularly scheduled payments; or

(2) Loan contains a call provision that is exercised by holder of loan.

NOTE:

A "call provision" is a loan contract term that provides the holder of the loan with the right to call the loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*].

The obligation under *Civ. Code § 2924i* to give notice of a balloon payment does not extend to open end credit transactions as defined in Regulation Z, whether or not the transaction is otherwise subject to Regulation Z [***see** Civ. Code § 2924i(d)(3)* for definition of "Regulation Z"], transactions subject to *Civ. Code § 2956* ("arrangers of credit"), and loans made for the principal purpose of financing the construction of one or more residential units [*Civ. Code § 2924i(b)*].

2. Draft notice of balloon payment [*see § 25A.240[2]*] that contains [*Civ. Code § 2924i(c)*]:

a. Name and address of person to whom final payment must be paid.

b. Date on or before which final payment must be paid.

NOTE:

If the due date of the final loan payment is extended before the time notice is otherwise required, the notice requirement applies only to the due date as extended (or as subsequently extended) [*Civ. Code § 2924i(c)*].

c. Amount of final payment, or if exact amount is unknown, good faith estimate of amount, including unpaid principal, interest, and any other charges.

NOTE:

This amount must be determined assuming timely payment in full of all scheduled installments coming due between the date the notice is prepared and the date when the final payment is due [*Civ. Code § 2924i(c)(3)*].

d. If borrower has contractual right to refinance final payment, statement to that effect.

3. At least 90 days but not more than 150 days before due date of final payment, deliver or mail by first-class mail, notice of balloon payment [*see § 25A.240[2]*] to trustor or successor in interest at last known address [*Civ. Code § 2924i(c)*].

NOTE:

If the notice is mailed, a certificate of mailing must be obtained from the United States Postal Service [*Civ. Code § 2924i(c)*]. For a discussion of the effect on the security instrument of a beneficiary's failure to give notice of the balloon payment and the statutory remedies against the beneficiary, see *§ 25A.240[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.144

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.144 Inspection of Property to Determine Existence of Release of Hazardous Waste

1. Notify secured lender of its right to enter and inspect real property security ("property") for purpose of determining existence, location, nature, and magnitude of any past or present release or threatened release of hazardous substance into, onto, beneath, or from property, provided this right is exercised [*Civ. Code § 2929.5(a)*]:

NOTE:

For these purposes, "secured lender" means the beneficiary under a trust deed against the real property security, or the mortgagee under a mortgage against that security, and any successor in interest of the beneficiary or mortgagee [*Civ. Code § 2929.5(e)(5)*]. "Real property security" means any real property and improvements, other than a separate interest and any related interest in the common area of a residential common interest development [***see*** *Civ. Code § 1351* (applicable definitions of "separate interest," "common area," and "common interest development")], or real property consisting of one acre or less that contains up to 15 dwelling units [*Civ. Code § 2929.5(e)(3)*]. "Hazardous substance" means (1) any "hazardous substance" as defined in *Health & Safety Code § 25281(h), (2)* any "waste" as defined in *Water Code § 13050(d)*, or *(3)* petroleum, including crude oil, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture of the foregoing [*Civ. Code § 2929.5(e)(2)*]. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including continuing migration, of hazardous substances into, onto, or through soil, surface water, or groundwater [*Civ. Code § 2929.5(e)(4)*].

a. On reasonable belief of existence of past or present release or threatened release of any hazardous substance into, onto, beneath, or from property not previously disclosed in writing to lender in conjunction with the making, renewal, or modification of loan, extension of credit, guaranty, or other obligation involving borrower.

b. After commencement of nonjudicial or judicial foreclosure proceedings against property [*see* Ch. 25D, *Foreclosure*].

2. If lender elects to exercise this right, give borrower or tenant of property reasonable notice of lender's intent to enter, except under following circumstances [*Civ. Code § 2929.5(b)*]:

NOTE:
Twenty-four hours notice will be presumed to be reasonable notice in the absence of evidence to the contrary [*Civ. Code § 2929.5(b)*].

a. In an emergency;

b. If borrower or tenant has abandoned premises; or

c. If it is impracticable to do so.

3. Instruct lender to enter only during borrower's or tenant's normal business hours, except under circumstances described in (2), *above* [*Civ. Code § 2929.5(b)*].

4. Instruct lender not to abuse right of entry and inspection or use it to harass borrower or tenant [*see Civ. Code § 2929.5(b)*].

5. Instruct lender to reimburse borrower for cost of repair of any physical injury to property caused by entry and inspection [*Civ. Code § 2929.5(c)*].

6. If lender is refused right of entry and inspection by borrower or tenant, or is otherwise unable to enter and inspect property without breach of the peace, bring action to enforce lender's rights [*see Civ. Code § 2929.5(d)*; *Code Civ. Proc. § 564(c)- (e)* (appointment of receiver in such an action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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10-25A California Legal Forms--Transaction Guide § 25A.145

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.145 Beneficiaries' Agreement to Be Governed by Majority Interest Holders

1. If all beneficiaries wish to be governed by "majority interest holders" [*see* NOTE, *below*], take following steps:

NOTE:

Civ. Code § 2941.9 establishes a process through which all of the beneficiaries under a trust deed may agree to be governed by beneficiaries holding more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or any affiliate of that licensed real estate broker [*Civ. Code § 2941.9(a)*; ***see*** *§ 25A.16*]. This publication uses the term "majority interest holders" to refer to the beneficiaries granted this authority under *§ 2941.9*.

a. Prepare beneficiaries' agreement to be governed by majority interest holders, and have it executed by all holders of notes secured by same real property or series of undivided interests in notes secured by real property equivalent to series transaction [*Civ. Code § 2941.9(b)*; *see § 25A.247[2]*].

NOTE:

All of these holders must agree to be governed by majority interest holders with respect to actions to be taken on behalf of all holders in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance,

or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure [*Civ. Code § 2941.9(b)*].

b. Disclose existence of this agreement pursuant to *Bus. & Prof. Code § 10232.5* (governing contents of disclosure statements given to prospective lenders or purchasers in certain transactions involving the negotiation and/or sale of secured obligations) [*Civ. Code § 2941.9(c)*; *see Ch. 25, Real Estate Loans, § 25.260*].

c. Include description of agreement in a recorded document, such as deed of trust or assignment of interests [*Civ. Code § 2941.9(c)*].

2. When majority interest holders wish to take action pursuant to *Civ. Code § 2941.9*, take following steps [*Civ. Code § 2941.9(d)*]:

a. Have them sign, under penalty of perjury, a separate "Majority Action Affidavit" containing statements required by statute [*see § 25A.248[2]*].

b. Have Majority Action Affidavit recorded in office of county recorder of each county in which real property described in deed of trust is located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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10-25A California Legal Forms--Transaction Guide §§ 25A.146-25A.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25A.146[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
A. Promissory Notes

10-25A California Legal Forms--Transaction Guide § 25A.200

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.200 Straight Promissory Note

[1] Comment

[a] Use of Form

The form in [2], *below*, is a promissory note that provides that the entire principal amount and accrued interest are due on a certain date. No interim or periodic payments of principal or interest are required before that date. This type of note is generally referred to as a "straight" or "flat" note.

For a promissory note that requires the payment of interest only during its term, see *§ 25A.203*. For a fully amortized note with equal periodic payments of principal and interest, see *§ 25A.201*. Other forms of promissory notes are set forth in *§§ 25A.202* (increasing periodic payments and a balloon payment), *25A.204* (demand note), and *25A.205* (note secured by all-inclusive trust deed).

For additional provisions that may be included in a promissory note and a trust deed or mortgage securing the note, see §§ 25A.220-25A.228. Forms for trust deeds and mortgages are set forth in §§ 25A.210-25A.216.

[b] Prepayment

If the payor is to have the right to prepay the indebtedness without penalty, the term "on or before" should appear immediately before the payment date. If not prohibited by statute, a prepayment penalty provision may be added to the note [*see § 25A.222*].

[c] Other Applicable Laws

For discussion of restrictions on when interest may commence on a promissory note given as part of the purchase price of property improved with one to four residential dwelling units [*see Civ. Code § 2948.5*], see *§ 25A.17[5]*. For an

overview of other statutory limits on loans secured by residential property, see *§ 25A.17[3]*.

For a summary of the credit transactions subject to the disclosure requirements of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*], see the discussion under "Disclosures Required under Federal Truth in Lending Act" and subsequent headings in the Legal Background to Ch. 25, *Real Estate Loans* ; *see also* Ch. 45, *Consumer Installment Loans and Credit Sales* , for a detailed discussion of the Truth in Lending Act.

[2] FORM

Straight Promissory Note

PROMISSORY NOTE [SECURED BY DEED OF TRUST]

$_____ _____ [*city*], California

_____ [*date*]

On [*add if note may be prepaid without penalty: or before*] _____[*date*], for value received, the undersigned (the "Borrower") promises to pay to _____[*name of lender*] (the "Holder"), or order, at [*place for payment*], or any other place designated in a writing submitted by Holder to Borrower, the principal sum of $_____, with interest on the unpaid principal balance from _____[*date*], until paid, at the rate of _____ percent per annum, all payable on the date specified in this Note for the payment of the principal sum.

Principal and interest under this Note shall be paid in lawful money of the United States.

Whether or not suit is filed, Borrower agrees to pay all reasonable attorneys' fees, costs of collection, costs, and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it.

[*Add following clause if note is secured by trust deed:*]

This note is secured by a [*add if purchase money obligation: purchase money*] Deed of Trust, dated _____, to _____[*name of trustee*] as Trustee, executed by Borrower in favor of Holder [*add if purchase money obligation:* and is given as part of the purchase price for the real property described in that Deed of Trust].

_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & Interpretation



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10-25A California Legal Forms--Transaction Guide § 25A.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.201 Fully Amortized Promissory Note

[1] Comment

[a] Use of Form

The form in [2], *below*, is an installment promissory note for use when a loan is to fully amortize over the loan term in equal installments. The periodic installment payments include both principal and interest, and the amount of the periodic payments is the same throughout the term of the note.

An interest-only note is set forth in *§ 25A.203*. For a description of other illustrative notes set forth in this chapter, see *§ 25A.200[1][a]*.

If the note is to be secured by a trust deed, see *§§ 25A.210* (long form trust deed), *25A.211* (short form), and *25A.212* (all-inclusive). For mortgages that may be used to secure a promissory note, see *§§ 25A.213* and *25A.214*.

Other provisions that may be included in a promissory note or trust deed are set forth in §§ 25A.220-25A.228.

[b] Prepayment

If the borrower is permitted to prepay all or a portion of the loan without a prepayment penalty, the words "or more" should be inserted immediately after the dollar amount of the regular periodic payment. Without an "or more" clause, the creditor is not required to accept early payment [*see Record Mach. & Tool Co. v. Pageman Holding Corp. (1954) 42 Cal. 2d 227, 232, 266 P.2d 1*]. For further discussion, see *§ 25A.222[1]*.

[2] FORM

Fully Amortized Promissory Note

PROMISSORY NOTE [SECURED BY DEED OF TRUST]

$_____ _____ [*city*], California

_____ [*date*]

In the installments described below, for value received, the undersigned (the "Borrower") promises to pay to _____[*name of lender*] (the "Holder"), or order, at [*place of payment*], or any other place designated in a writing submitted by Holder to Borrower, the sum of $_____, with interest from _____[*date*], on unpaid principal at the rate of _____ percent per annum. Principal and interest shall be payable in monthly installments of $[*add if borrower may prepay without penalty:* or more] on the _____ day of each month, beginning on the _____ day of [*month*], [*year*], and continuing each consecutive month thereafter until all principal and accrued but unpaid interest have been paid in full, with any unpaid principal and all accrued but unpaid interest due and payable on the _____ day of [*month*], [*year*].

Each payment shall be credited first on interest then due and the remainder on principal. Immediately thereafter, interest shall cease on the principal so credited.

Principal and interest are payable in lawful money of the United States.

Should default be made in payment of any installment when due, [*add when note is secured by trust deed:* or in the performance of any of the agreements contained in the deed of trust securing this Note], the whole sum of principal and interest shall become immediately due and payable at Holder's option. Failure by Holder to exercise this option shall not constitute a waiver of the right to exercise it in the event of any subsequent default.

Whether or not suit is filed, Borrower agrees to pay all reasonable attorneys' fees, costs of collection, costs, and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it.

[*Add following clause if note is secured by trust deed:*]

This note is secured by a [*add if purchase money obligation: purchase money*] Deed of Trust, dated _____, _____, to _____[*name of trustee*] as Trustee, executed by Borrower in favor of Holder [*add if purchase money obligation:* and is given as part of the purchase price for the real property described in that Deed of Trust].

_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Promissory Notes

10-25A California Legal Forms--Transaction Guide § 25A.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.202 Promissory Note With Increasing Periodic Payments and Balloon Payment

[1] Comment

[a] Use of Form

The form in [2], *below*, is a promissory note that requires "interest only" payments during the early part of the loan term, equal periodic payments of principal and interest for the duration of the loan term, and a final "balloon payment." For a fully amortized note with equal periodic payments of principal and interest throughout the loan term, see *§ 25A.201*. An "interest only" note with interest tied to the prime rate is set forth in *§ 25A.203*. For a demand note and a note secured by an all-inclusive trust deed, see *§§ 25A.204* and *25A.205*. Additional provisions for promissory notes and trust deeds, such as a due-on-sale provision [*see § 25A.221[2]*] and late charge provision [*see § 25A.223[2]*] are set forth in §§ 25A.220-25A.228.

[b] Notice Requirements for Balloon Payment Loans

[i] Definitions

For purposes of the disclosure requirements discussed below, a "balloon payment loan" or "balloon payment note" is a loan or note that (1) provides for a final payment as originally scheduled that is more than twice the amount of any of the immediately preceding six regularly scheduled payments or (2) that contains a call provision [*Civ. Code §§ 2924i, 2957(b)*]. However, if a call provision is not exercised by the holder of the loan, the existence of the unexercised call provision does not cause the loan to be deemed a balloon payment loan or note [*Civ. Code §§ 2924i(d)(1), 2957(b)*]. "Call provision" means a loan or note contract term that provides the holder of the loan with the right to call the loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*].

[ii] Arranger of Credit

When an "arranger of credit" [*see Civ. Code § 2957(a)*] is involved in a loan transaction for the purchase of a dwelling for not more than four families and the seller accepts a balloon payment note with a repayment period in excess of one year, the holder of the note must give notice to the borrower within a specified period of time before thematurity date of the note that the balloon payment under the note is due [*Civ. Code §§ 2966, 2956(a)*; *see § 25A.240[2]* (form of notice)]. Under these circumstances, the note itself must also contain a statutory statement advising the borrower of the right to notice of the balloon payment under *Civ. Code § 2966* [*Civ. Code § 2966(d)*; *see § 25A.225[1]*]. This form contains the statutory statement.

[iii] Borrower-Occupied Residential Property

Notice of a balloon payment before a note's maturity date is also required for any balloon payment loan with a term longer than one year that is secured by a trust deed or mortgage on real property containing one to four residential units, at least one of which, at the time the loan is made, is or is to be occupied by the borrower [*Civ. Code § 2924i*; *see § 25A.240*]. The following are exempt from this notice requirement: (1) open credit transactions as defined in Regulation Z, whether or not the transaction is otherwise subject to Regulation Z [*see Civ. Code 2924i(d)(3)* for definition of Regulation Z]; (2) transactions subject to *Civ. Code § 2956* [*see* discussion under "--Arrangers of Credit and Seller Financing" in the Legal Background to Ch. 25, *Real Estate Loans*]; and (3) loans made for the principal purpose of financing the construction of one or more residential units [*Civ. Code § 2924i(b)*].

[iv] Procedure

For a step-by-step guide to the procedure for giving notice of a balloon payment before the note's maturity date, see *§ 25A.143*.

[2] FORM

Promissory Note With Increasing Periodic Payments and Balloon Payment

PROMISSORY NOTE [SECURED BY DEED OF TRUST]

$_____ _____ [*city*], California

_____ [*date*]

On [*add if note may be prepaid without penalty:* or before] _____[*date*], for value received, the undersigned (the "Borrower") promises to pay to _____[*name of lender*] (the "Holder"), or order, at [*place of payment*], or any other place designated in a writing submitted by Holder to Borrower, the principal sum of $_____, plus interest on the unpaid principal balance according to the terms contained in this Note.

Interest on the unpaid principal balance of this Note shall be computed at the rate of _____ percent per annum, from _____[*date*], until the principal balance of this Note and all accrued interest on the Note are paid in full.

Commencing on _____[*date*], and continuing each consecutive month thereafter until _____[*date*], Borrower shall pay interest only on the unpaid principal balance of this Note on the _____ day of each calendar month, beginning on the _____ day of _____[*date*], and continuing until the _____ day of _____, _____[*insert date one month before date on which periodic payments of principal and interest will begin*]. Commencing on _____[*date*], and continuing each consecutive month thereafter until _____[*insert date one month before maturity date of note*], Borrower shall pay principal and interest in

monthly installments of $[*add if borrower may prepay without penalty:* or more] on the _____ day of each month. On _____[*insert maturity date of note*], Borrower shall pay a final payment of principal equal to $[*insert dollar amount of final balloon payment*], and shall also pay any unpaid principal and all accrued but unpaid interest on the same date.

Each payment shall be credited first on interest then due and the remainder on principal. Immediately thereafter, interest shall cease on the principal so credited.

Principal and interest are payable in lawful money of the United States.

Should default be made in payment of any installment of interest or of principal and interest when due, [*add when note is secured by trust deed:* or in the performance of any of the agreements contained in the deed of trust securing this Note,] the whole sum of principal and interest shall become immediately due and payable at Holder's option. Failure by Holder to exercise this option shall not constitute a waiver of the right to exercise it in the event of any subsequent default.

Whether or not suit is filed, Borrower agrees to pay all reasonable attorneys' fees, costs of collection, costs, and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it.

[*Add following clause if note is secured by trust deed:*]

This note is secured by a [*add if purchase money obligation:* purchase money] Deed of Trust, dated _____, to _____[*name of trustee*] as Trustee, executed by Borrower in favor of Holder [*add if purchase money obligation:* and is given as part of the purchase price for the real property described in that Deed of Trust].

[*Add following statement if note is subject to Civ. Code § 2966 (see § 25A.225[1]):*]

This Note is subject to *Civil Code Section 2966*, which provides that the holder of this Note shall give written notice to the trustor, or the trustor's successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due.

_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Promissory Notes

10-25A California Legal Forms--Transaction Guide § 25A.203

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.203 Promissory Note With Interest Only Payments and Interest Tied to Prime Rate

[1] Comment

[a] Use of Form

The form in [2], *below*, is a promissory note that requires the borrower to make periodic payments of "interest only" during the term of the note. On the maturity date of the note, the entire principal sum is due.

The interest in this note is tied to the prime rate; this arrangement is most often used for construction loans. The use of a variable rate provision that changes by reference to an external index may impair the negotiability of the note. Because it is necessary to look outside the scope of the instrument to determine the applicable interest rate, the note may not be considered an unconditional promise to pay a fixed amount of money, as required for negotiability [*see Com. Code § 3104(a)*]. For further discussion, see *§ 25A.17[2]*.

For a promissory note that requires "interest only" payments during the early part of the loan term, equal periodic payments of principal and interest for the duration of the loan term, and a final "balloon payment," see *§ 25A.202*. For other complete promissory notes, see *§§ 25A.200*, *25A.201*, and *25A.204*. Additional provisions that may be included in a promissory note or trust deed are set forth in §§ 25A.220-25A.228.

[b] Statutory Notice Required for Balloon Payment Notes

A "balloon payment loan" or "balloon payment note" is a loan or note with a term in excess of one year that provides for a final payment as originally scheduled that is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision [*Civ. Code §§ 2924i, 2957(b)*]. The holder of a balloon payment note secured by residential property must give notice to the borrower within a specified period of time before the maturity date of the note that the balloon payment under the note is due [*Civ. Code §§ 2924i, 2966*]. Under certain circumstances, the note itself must contain a notice advising the borrower of the statutory right to receive notice of the

due date of the balloon payment [*see § 25A.225*]. For further discussion of these requirements, see *§ 25A.202[1][b]*.

[2] FORM

Promissory Note With Interest Only Payments and Interest Tied to Prime Rate

PROMISSORY NOTE [SECURED BY DEED OF TRUST]

$_____ _____ [*city*], California

_____ [*date*]

On or before _____[*date*], for value received, the undersigned ("Borrower") promises to pay to _____[*name of lender*] ("Holder"), or order, at [*place of payment*], or any other place designated in a writing submitted by Holder to Borrower, the principal sum of $_____, or so much thereof as may be advanced, plus interest on the unpaid principal balance according to the terms contained in this Note.

Interest on the principal sum of this Note from time to time outstanding will be computed on the basis of a 365-day year and actual days elapsed from date of disbursement until paid, at the per annum rate of _____ percent in excess of the Prime Rate of _____[*name and location of financial institution*] from time to time in effect. Interest only for the monthly period ending on the last day of the preceding month shall be calculated on a daily basis and shall be payable monthly on the _____ day of each calendar month, beginning on the _____ day of [*month*], [*year*], and continuing until the _____ day of [*month*], _____[*year; insert same maturity date set forth above*], at which time the then unpaid balance of principal and interest shall all be due and payable. Increases or decreases in the rate of interest shall be effective on the effective day of each change in the Prime Rate announced by _____[*name and location of financial institution*].

"Prime Rate" means that rate that from time to time is announced by [*name and location of financial institution*] as its prime rate and is not necessarily the lowest lending rate of that [*type of financial institution, e.g.*, bank]. Should [*name and location of financial institution*] cease to exist or fail to announce a Prime Rate, the Prime Rate shall be the rate announced by [*name and location of alternate financial institution*] as its prime rate.

Should Borrower fail to pay any interest as provided for in this Note, that interest shall thereafter bear like interest as the principal. Interest shall, at the option of Holder, be payable on demand on any principal balance from and after its maturity date. Should Borrower default in the payment of any installment of interest when due, then the whole sum of principal and interest shall, at the option of Holder, become immediately due. Principal and interest are payable in lawful money of the United States.

Borrower expressly agrees that this Note, or any payment under this Note, may be extended from time to time and consents to the acceptance and/or release of further security for this Note, all without in any way affecting the liability of the Borrower. Borrower waives the rights of presentment and notice of dishonor. "Presentment" means the right to require the Holder to demand payment of amounts due. "Notice of dishonor" means the right to require Holder to give notice to other persons that amounts due have not been paid.

This Note may be prepaid at any time, in whole or in part, without any prepayment penalty.

Whether or not suit is filed, Borrower agrees to pay all reasonable attorneys' fees, costs of collection, costs, and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it.

[*Add following clause if note is secured by trust deed:*]

This note is secured by a [*add if purchase money obligation: purchase money*] Deed of Trust, dated _____, to _____[*name of trustee*] as Trustee, executed by Borrower in favor of Holder [*add if purchase money obligation:* and is given as part of the purchase price for the real property described in that Deed of Trust].

[*Add following statement if note is subject to Civ. Code § 2966 (see § 25A.225[1]):*]

This note is subject to *Civil Code § 2966*, which requires Holder to give written notice to the trustor, or the trustor's successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due.

_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
A. Promissory Notes

10-25A California Legal Forms--Transaction Guide § 25A.204

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.204 Demand Note

[1] Comment

[a] Use of Form

The form in [2], *below*, is a demand note that is payable on demand by the holder of the note, or on a specified date if no demand is made. For other forms of promissory notes, see §§ 25A.200-25A.203. Additional and alternative provisions for promissory notes and trust deeds are set forth in §§ 25A.220-25A.228.

[b] Statutory Notice Required for Balloon Payment Notes

A "balloon payment loan" or "balloon payment note" is a loan or note with a term in excess of one year that provides for a final payment as originally scheduled that is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision [*Civ. Code §§ 2924i, 2957(b)*]. "Call provision" means a note or loan contract term that provides the holder of the note or loan with the right to call the note or loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*]. However, a note or loan with a call provision is not deemed a balloon payment for these purposes if the call provision is not exercised by the holder of the note or loan [*Civ. Code §§ 2924i(d)(1), 2957(b)*].

The holder of a balloon payment note secured by residential property must give notice to the borrower within a specified period of time before the maturity date of the note that the balloon payment under the note is due [*Civ. Code §§ 2924i, 2966*; *see § 25A.240*]. Under certain circumstances, the note itself must contain a notice advising the borrower of the statutory right to receive notice of the due date of the balloon payment [*see § 25A.225*]. For further discussion of these requirements, see *§ 25A.202[1][b]*.

[2] FORM

Demand Note

DEMAND NOTE

$_____ _____ [*city*], California

_____ [*date*]

On demand, or, if no demand is made, then on _____[*date*], for value received, the undersigned ("Borrower") promises to pay in lawful money of the United States of America, to the order of _____[*name of lender*] ("Holder") at [*place of payment*], or at any other place designated in a writing by Holder to Borrower, the sum of $_____ with interest in like lawful money from _____[*date*], at the rate of _____ percent per year, computed on the basis of a 360-day year and actual days elapsed, until paid.

Whether or not suit is filed, Borrower agrees to pay all reasonable attorneys' fees, costs of collection, costs, and expenses incurred by Holder in connection with the enforcement or collection of this Note. Borrower further agrees to pay all costs of suit and the sum adjudged as attorneys' fees in any action to enforce payment of this Note or any part of it.

This Note binds each of the undersigned, if more than one, jointly and severally, and shall be binding on them and their successors and assigns.

[*Add following statement if note is subject to Civ. Code § 2966 (see § 25A.225[1]):*]

This note is subject to *Civil Code Section 2966*, which requires Holder to give written notice to the trustor, or the trustor's successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due.

_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
A. Promissory Notes

10-25A California Legal Forms--Transaction Guide § 25A.205

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.205 Promissory Note Secured by All-Inclusive Deed of Trust

[1] Comment

[a] Use of Form

The form in [2], *below*, is a promissory note that is to be secured by an "all-inclusive" deed of trust. For a compatible all-inclusive deed of trust, see *§ 25A.212*. For other forms of promissory notes, see §§ 25A.200-25A.203. Additional and alternative provisions for promissory notes and deeds of trust are set forth in §§ 25A.220-25A.228.

[b] All-Inclusive Trust Deeds

An "all-inclusive" deed of trust, also known as an "overlapping" or "overriding" trust deed or a "wraparound" mortgage, is a financing device primarily used during periods of high interest rates when it is advantageous to borrowers to retain existing loans on the property that are at lower rates than prevailing market interest rates. The "all-inclusive" trust deed secures a promissory note in a face amount equal to the loan balance of an existing obligation (for example, a trust deed) on the same real property, plus the amount of funds actually advanced or promised to be advanced by the wraparound lender [*see* California Real Estate Law & Practice, Ch. 100, *Methods of Financing* (Matthew Bender)].

All-inclusive notes and trust deeds are most often used in purchase/sale situations, as illustrated by the following example. The buyer purchases property from the seller for a total purchase price of $600,000. The property is subject to an existing first trust deed (on which the seller is trustor) of $300,000. The buyer pays the $600,000 purchase price with a $100,000 cash down payment and an all-inclusive note and trust deed for $500,000 in favor of the seller. The $500,000 all-inclusive note includes the balance of the $300,000 obligation secured by the existing first trust deed. The seller continues to make payments under the existing first trust deed but receives the funds to make the payments from the buyer under the all-inclusive note. The difference between $500,000 and $300,000 is referred to as the seller's equity, i.e., the amount loaned by the seller to the buyer.

Both the following form and the companion trust deed set forth in *§ 25A.212* assume that there is only one obligation secured by a trust deed senior to the all-inclusive deed of trust and that the one obligation is evidenced by one promissory note. An all-inclusive deed of trust is probably most often a second trust deed on the property, subject to the outstanding included ("underlying") first trust deed. However, if there is more than one outstanding prior trust deed, the all-inclusive may be a third, fourth, or even lower order of trust deed.

[c] Consistency Between Underlying Documents and All-Inclusive Documents

In drafting an all-inclusive note and trust deed, the attorney should confirm that the all-inclusive documents are consistent with the underlying trust deed and note. It is particularly important that the documents contain consistent provisions regarding the method of repayment of the underlying obligation and related financial obligations of the parties [*see §§ 25A.130(3)- (9), 25A.131(4)- (7)*]. For example, if the underlying note requires a penalty for prepayment, the all-inclusive note should also require the same penalty [*but see* discussion of an alternative arrangement in [d], *below*].

Once the all-inclusive note and trust deed are drafted, they should be reviewed and approved by the institutional trustee and the title company that may be used to insure title following foreclosure. For a discussion of the importance of foreclosure provisions on a title company's willingness to insure title, see *§ 25A.212[1]*.

[d] Provisions for Payments on Notes

This form requires the lender (i.e., the holder of the all-inclusive note and trust deed) to make the payments on the underlying first trust deed, but only to the extent that the borrower (i.e., the payor under the all-inclusive trust deed) provides the holder with the necessary funds. If the lender fails to make the required payments on the first trust deed, the borrower is permitted to make the payments directly to the holder of the first trust deed. Some all-inclusive notes and trust deeds require the borrower to make all payments to a neutral escrow and further instruct the escrow holder, rather than the lender, to make all payments on the underlying prior deed of trust.

A borrower who makes payments directly to the lender has no assurance that the lender is making the required payments on the first trust deed. Therefore, the borrower should execute and record a request for notice of default and sale on the first deed of trust [*see Civ. Code § 2924b*; *see also § 25D.200[2]* (request for notice)]. *Section 25A.212* (all-inclusive deed of trust) includes such a request.

When computing the amortization schedule for the all-inclusive note, the parties should confirm that the balance of that note will always exceed the balance of the underlying note. Otherwise, the balance of the underlying note could eventually exceed the balance on the all-inclusive note [*see* Rohan, Real Estate Financing, Ch. 10, *The Wrap-Around Mortgage* (Matthew Bender)].

As discussed in [c], *above*, if the underlying senior obligation contains restrictions regarding prepayment of the underlying obligation, the all-inclusive note and trust deed should include the same restrictions. In the alternative, the all-inclusive instruments may permit prepayment to the extent of the holder's equity above the amount of the senior included debt and then provide that the borrower is subject to the prepayment restrictions of the underlying senior obligation. Whether or not the borrower has the right to prepay the all-inclusive note, a provision should be included specifying that the borrower is entitled to a reconveyance of the all-inclusive deed of trust when the unpaid balance of the all-inclusive note is equal to the balance due on the senior underlying note [for discussion of reconveyances, see Ch. 25C, *Release and Reconveyance*].

[e] Usury

If the interest rate on a wraparound note exceeds the interest rate on the underlying senior obligation or obligations, the

wraparound lender gets additional interest from the "spread" in rates. When additional interest is computed on the wraparound lender's equity, the result may be to increase the yield to a usurious interest rate. When the wraparound secures a purchase money loan, the argument against usury is stronger; there may be no loan under the time-sale doctrine or it may be easier for the court to find that the seller has advanced the full amount of the note by giving title and use of the property to a buyer who has invested only a down payment [*see* Comment, *The Wrap-Around Mortgage: A Critical Inquiry, 21 UCLA. L. Rev. 1529, 1537*-1539 (1974)]. There is also the argument that a sale of property is not a "loan or forbearance of money" under the usury laws and that an all-inclusive note given to a seller as part of the purchase price of the property is not subject to the limitations of the usury law [*see* Comment, *The Wrap-Around Mortgage: A Critical Inquiry, 21 UCLA L. Rev. 1529, 1535*-1539 (1974)].

For more detailed coverage of usury, see California Real Estate Law & Practice, Ch. 104, *Usury* (Matthew Bender).

[2] FORM

PROMISSORY NOTE SECURED BY ALL-INCLUSIVE DEED OF TRUST

PROMISSORY NOTE SECURED BY ALL-INCLUSIVE
DEED OF TRUST

DO NOT DESTROY THE ORIGINAL OF THIS NOTE: When paid, the Original Note, together with the Deed of Trust securing it, must be surrendered to the Trustee for cancellation and retention before reconveyance will be made.

$_____ _____ [*city*], California

_____ [*date*]

This Note is secured by a deed of trust ("All-Inclusive Deed of Trust") that is junior and subordinate to a deed of trust recorded on _____[*date*], in Book _____, Page _____, Official Records of _____ County, California ("First Deed of Trust") securing a certain promissory note dated _____, given by _____[*name of payor*] in favor of _____[*name of payee*], in the original principal amount of $_____ ("First Note"). Copies of the First Deed of Trust and First Note are attached to this Note as Exhibits A and B, respectively.

The original principal amount of this Note includes the unpaid principal balance of the First Note as of the date the All-Inclusive Deed of Trust securing this Note is recorded and the sum amount of all payments (other than principal payments) of any type due to the holder of the First Note before _____[*insert date or description, e.g.*, the first day of the calendar month immediately following the date the All-Inclusive Deed of Trust is recorded].

In installments as described in this Note, the undersigned ("Borrower") promises to pay to _____[*name of payee*] ("Holder") at [*place for payment*], or at any other place designated in a writing submitted to Borrower by Holder, the principal sum of $_____, with interest from _____[*date*], as hereafter provided, payable as follows: _____[*describe method for payment of principal and interest, incorporating terms of First Note, e.g.*, interest only in installments of $_____ or more on the first day of each calendar month, commencing on _____ [*date*], and continuing until _____[*date*]; thereafter, principal and interest payable in installments of $_____ or more on the first day of each calendar month, commencing on _____[*date*], and continuing until _____[*date*], on which date the unpaid principal balance of this Note together with all interest accrued on that balance shall be fully due and payable]. Interest on the unpaid principal balance of the Note shall be payable at the rate of _____ percent per annum. If the First Note, or any successor or substitute note secured by a first deed of trust on the real property ("Real Property") described in the All-Inclusive Deed of Trust securing this

Note, shall provide for a different date for the payment of the entire principal balance of the note, then the entire principal balance payable under this Note shall be payable on the same date, rather than on _____[*date*], as provided above, but in no event shall that other date be earlier than _____.

All payments of principal and interest under this Note shall be payable in lawful money of the United States. Any payment made shall be credited first on interest then due and the remainder on principal; and interest shall immediately cease on the principal so credited.

The Holder shall pay when due the principal and interest of the First Note and all taxes, assessments [*add if appropriate:*, and insurance premiums] payable under the terms of the First Note or First Deed of Trust, provided all payments under this Note are paid promptly by Borrower when due. The foregoing obligation of the Holder of this Note shall cease when there is no sum secured by the All-Inclusive Deed of Trust other than sums that may be or become due to the holder of the First Note and First Deed of Trust.

[*Add the following if the First Note provides for a balloon payment:*]

Borrower shall pay to the Holder of this Note, at least 10 days before its due date, the balloon payment required by the First Note and First Deed of Trust to be paid on _____[*due date of balloon payment*]. The sum so paid by Borrower shall then be paid by the Holder of this note to the holder of the First Note. The principal due under this Note shall be reduced by the amount of the balloon payment paid by the Borrower, but the balloon payment shall not satisfy or reduce the payment of any periodic installment payment due under this Note.

If the Holder of this Note fails to make any payments under the First Note and First Deed of Trust as required by this Note, the Borrower shall have the right to pay directly to the holder of the First Note any payments that the Holder of this Note fails to make. Any payments so made by the Borrower shall be credited to the installments of principal and interest next accruing under this Note. The right of the Borrower to make payments on the First Note directly to the holder of the First Note pursuant to this paragraph is in addition to any other rights or remedies the Borrower may have for failure by the Holder of this Note to make payments on the First Note as required by this Note. For so long as the Borrower is not in default with respect to any payments required to be made under this Note, the Holder of this Note shall indemnify, hold harmless, and defend Borrower of and from any and all loss, cost, damage, liability, and expense, including attorneys' fees, arising out of any actual or alleged default by the Holder of this Note in the payment of the First Note.

Should Borrower default in the payment of any installment when due or in the performance of any other obligation called for in this Note or in the All-Inclusive Deed of Trust securing this Note, the whole sum of principal and interest under this Note shall, at the option of Holder, become immediately due and payable.

If any action is instituted to enforce payment of this Note, or if any proceeding is commenced to foreclose the All-Inclusive Deed of Trust securing the Note through exercise of the power of sale, judicial foreclosure, or otherwise, Borrower promises to pay all costs incurred in the action or proceeding, including without limitation all attorneys' fees. Furthermore, if Holder is required to pay, or becomes obligated to pay, any penalties, late charges, or interest under the terms of the First Note by reason of Borrower's failure to make timely payments under this Note, Borrower promises to pay the amount of the penalties, late charges, or interest to Holder on demand.

This Note is secured by an All-Inclusive Deed of Trust executed on this date and given to _____[*name of trustee*], as Trustee.

_____ [*signature of borrower*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryContracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsDischarge & PaymentPaymentMethods & PlacesContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingSecondary FinancingWraparound MortgagesReal Property LawFinancingUsury



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
A. Promissory Notes

10-25A California Legal Forms--Transaction Guide §§ 25A.206-25A.209

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25A.206[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
B. Trust Deeds and Mortgages

10-25A California Legal Forms--Transaction Guide § 25A.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.210 Deed of Trust--Long Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed of trust with a power of sale clause and an assignment of rents clause. It is referred to as a "long form" deed of trust because it contains the full text of several "standard" provisions commonly used in trust deeds. These standard provisions are recorded along with the remainder of the trust deed. For a short form of deed of trust that incorporates by reference several "standard" provisions set forth in a previously-recorded fictitious trust deed, see *§ 25A.211*.

Standard printed versions of both the long and short forms of trust deeds are available from title companies. Institutional lenders generally insist on use of their own forms; however, in larger loan transactions, the lender and debtor typically negotiate modifications of specific provisions.

Additional and alternative provisions for trust deeds, such as due-on-sale and late charge clauses, are set forth in §§ 25A.220-25A.228. Subordination clauses for trust deeds and related notices are contained in Ch. 25B, *Subordination, Assumption, and Assignment*. For partial release provisions that may be included in a trust deed, see Ch. 25C, *Release and Reconveyance* . For illustrative mortgages, see *§§ 25A.213[2]* and *25A.214[2]*.

[b] Execution and Recording

The trust deed should be executed by the trustor in the same manner as his or her name appears of record as the owner of the property. The spouse of the trustor must also execute the trust deed if the property is community property, whether or not the spouse's name appears of record [*Fam. Code § 1102(a)*; *see Fam. Code § 1102(e)* (statute does not preclude spouse from encumbering his or her interest in community real property, as provided in *Fam. Code § 2033*, to pay reasonable attorneys' fees to retain or maintain legal counsel in proceeding for dissolution of marriage, for nullity of

marriage, or for legal separation of the parties); *see* Ch. 23, *Real Property Sales Agreements*].

The trust deed should also be acknowledged and then recorded in every county in which any portion of the property is located [*Civ. Code §§ 1169, 2952*]. A deed of trust will not be accepted for recordation unless it contains the address of the trustor and a request for notice of default under *Civ. Code § 2924b* [*Gov. Code § 27321.5(b)*; *see* [n], *below*].

All acknowledgments of deeds, quitclaim deeds, or deed of trust affecting real property (other than a trustee's deed resulting from a decree of foreclosure or a nonjudicial foreclosure pursuant to *Civ. Code § 2924,* or a deed of reconveyance) require the right thumbprint of the party signing the document [*see Gov. Code § 8206(a)(2)(G)*].

[c] Power of Sale Clause

In the second introductory paragraph of this form, the trustor irrevocably grants and assigns the secured real property, with the power of sale, to the trustee in trust. The power of sale is the power of the trustee to sell the property pledged as security if the trustor defaults under the deed of trust. The option of foreclosing through the statutory nonjudicial foreclosure method [*Civ. Code §§ 2924-2924h*] in lieu of through the judicial foreclosure process [*see Code Civ. Proc. §§ 725a, 726*] is available to a trustee only if the mortgage or deed of trust contains a power of sale [*see Civ. Code § 2924(a)*]. All deeds of trust contain or should contain a power of sale clause.

Paragraph B(6) of this form summarizes the powers and duties of the trustee with respect to a foreclosure. For a detailed discussion of the foreclosure process, see Ch. 25D, *Foreclosure* .

[d] Description of Parties, Property, and Debt

The first two introductory paragraphs of this form require insertion of the name, address, and legal status of the trustor [*see* [b], *above*], the beneficiary, and the trustee; the complete legal description of the real property to be encumbered; and the amount of the debt to be secured. A valid trust deed must contain a sufficient description of the property and of the underlying obligation [*see § 25A.12[4], [5]*].

The third introductory paragraph of this form states that the deed of trust secures not only the original debt but also any extensions or renewals of it, any additional amounts loaned by the beneficiary to the trustee in the future (provided these amounts are evidenced by notes reciting that they are so secured), and the performance of all covenants made by the trustor in the trust deed. For a discussion of the effect and use of a future advances clause under which the original trust deed secures future amounts advanced by the lender, see *§ 25A.224[1]*.

[e] Maintenance of Property and Waste

Under this form, the trustor covenants to keep the secured property in good condition, to comply with all laws and regulations affecting the property, and to not commit waste on the property [*see* P A(1) of Form]. Any person whose interest is subject to the lien of a mortgage may not do any act that will substantially impair the mortgagee's security [*Civ. Code § 2929*].

The beneficiary may enjoin the trustor from committing waste that impairs the security [*Hill v. Taylor (1863) 22 Cal. 191, 193* (receiver appointed); *see Code Civ. Proc. §§ 564, 745*; *Osuna v. Albertson (1982) 134 Cal. App. 3d 71, 75-78, 184 Cal. Rptr. 338* (in addition to its traditional definition, waste may include failure to pay property taxes)]. The remedies of a beneficiary for waste depend on whether the trustor or a third party has committed the waste and whether the beneficiary's security interest in the real property is impaired [*see* California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender)].

[f] Insurance

This form obligates the trustor to procure and maintain fire insurance on the property and to name the beneficiary as loss payee [*see* P A(2) of Form]. It includes language permitting the beneficiary the choice of either applying the proceeds to any debt the trust deed secures in any order he or she may determine, or releasing part or all of the proceeds to the trustor. When this provision is used, the covenant of good faith and fair dealing implied in every contract allows the beneficiary to retain the insurance proceeds only to the extent that the security was impaired; to the extent the security is not impaired, the beneficiary has no right to the proceeds [*Schoolcraft v. Ross (1978) 81 Cal. App. 3d 75, 77, 146 Cal. Rptr. 57]* .

A lender may not require a borrower, as a condition of receiving or maintaining a loan secured by real property, to provide hazard insurance coverage against risks to the improvements on the real property in an amount exceeding the replacement value of the improvements on the property [*Civ. Code § 2955.5(a)*]. The lender must give the borrower a written disclosure of this provision as soon as practicable and in any case before execution of any note or security documents [*Civ. Code § 2955.5(b)*]. For these purposes, "hazard insurance coverage" means (1) insurance against losses caused by perils that are commonly covered in policies described as, among other things, a "Homeowner's Policy" or a "General Property Form," or (2) comparable insurance coverage protecting the real property against loss or damage from fire and other perils covered by a standard extended coverage endorsement [*Civ. Code § 2955.5(e)(1)*; *see Civ. Code § 2955.5(e)(2)* ("improvements" defined)]. This statutory restriction on lenders was imposed in response to the common lender practice of requiring borrowers to procure and maintain hazard insurance in an amount equal to the lender's loan. A person harmed by a lender's violation of the statutory requirement may obtain injunctive relief and recover damages and reasonable attorneys' fees and costs [*Civ. Code § 2955.5(c)*]. However, violations do not affect the validity of the loan or the security instrument [*Civ. Code § 2955.5(d)*].

Paragraph B(6) of this form permits the beneficiary to accelerate the indebtedness and foreclose following the trustor's failure to perform any act under the deed of trust. Many security instruments in common use contain such a provision. In a case involving a similar provision, it was held that (1) a trustee or beneficiary may not foreclose under an acceleration provision in a trust deed when the trustor fails to provide fire insurance for the security property, unless the failure to provide the insurance impairs the security of the trust deed; and (2) it is a question of fact whether the lack of fire insurance impairs the security of the trust deed [*Freeman v. Lind (1986) 181 Cal. App. 3d 791, 806, 226 Cal. Rptr. 515]* . However, the Legislature has effectively abrogated that holding, at least for institutional lenders. Statutes now provide that state or nationally chartered banks and savings and loan associations may accelerate the maturity date of a loan due to the nonpayment of insurance, taxes, rent, or assessments, even if no impairment of the security results [*Fin. Code §§ 1227.2*, *1227.3*, *7461*, *7462*].

The provisions of any trust deed or mortgage on real property that authorize any beneficiary, trustee, mortgagee, or agent or successor in interest of the foregoing to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the property will be enforceable whether or not the event that caused the insurance proceeds to become payable impaired the security interest in the property [*Civ. Code § 2924.7(b)*]. This code provision further abrogates the holding in *Freeman v. Lind* to the extent that the holding and similar cases [*see, e.g., Kreshek v. Sperling (1984) 157 Cal. App. 3d 279, 204 Cal. Rptr. 30]* in any way restrict the right of a beneficiary or mortgagee under a trust deed or mortgage on real property to enforce the express provisions of the security instrument [*see Civ. Code § 2924.7*]. For discussion of related provisions, see [g], *below*.

[g] Payment of Defense Costs, Taxes, Liens, and Other Costs

This form requires the trustor to appear in and defend any action affecting the security of the deed of trust [*see* P A(3) of Form]; to pay related costs and attorneys' fees [*see* P A(3) of Form]; to promptly pay all taxes, assessments, and other liens on the property [*see* P A(4) of Form]; and to reimburse the beneficiary or trustee for all sums expended by either in exercising rights specified in the trust deed [*see* P A(5) of Form]. A related provision requires the trustor to pay attorneys' fees in the event of a foreclosure [*see* P B(12) of Form].

If a contract contains a provision specifically providing that attorneys' fees and costs shall be awarded to either of the parties, then the party prevailing on the contract is entitled to reasonable attorneys' fees and other costs [*Civ. Code § 1717(a)*]. An attorneys' fee provision contained in a contract is construed as applying to the entire contract unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract [*Civ. Code § 1717(a)*]. Consequently, a trustor is entitled to attorneys' fees after prevailing in an action to enjoin a nonjudicial foreclosure because the trustee could have recovered attorneys' fees if the trustee had successfully foreclosed [*Valley Bible Center v. Western Title Ins. Co. (1983) 138 Cal. App. 3d 931, 932-933, 188 Cal. Rptr. 335]* .

Paragraph A(4) of this form requires the trustor to pay, before delinquency, all taxes and assessments on the property and all superior encumbrances, charges, and liens on the property. Under that provision, if the trustor fails to make the required payments, the trustee and beneficiary may make the necessary payments, and the amount of any such payments will be added to the amount of the secured debt [*Civ. Code § 2876*; *Savings & L. Soc. v. Burnett (1895) 106 Cal. 514, 536, 39 P. 922* (taxes); *Windt v. Covert (1907) 152 Cal. 350, 353-354, 93 P.67* (senior liens)]. For a discussion of the right of institutional lenders to accelerate the maturity date of a loan due to the nonpayment of insurance, taxes, rent, or assessments, see [f], *above*.

The provisions of any trust deed or mortgage on real property that authorize any beneficiary, trustee, mortgagee, or agent or successor in interest of the foregoing to accelerate the maturity date of the principal and interest on any loan secured by the security instrument or to exercise any power of sale or other remedycontained in that instrument on the trustor's or mortgagor's failure to pay or reimburse, at the times provided for under the terms of the trust deed or mortgage, any (1) taxes, rents, assessments, or insurance premiums with respect to the property or the loan [*see* P A(4) of Form], or (2) advances made by the beneficiary, mortgagee, or his or her agent or successor in interest [*see* P A(5) of Form], will be enforceable whether or not the trustor's or mortgagor's failure to pay the taxes, rents, assessments, insurance premiums, or advances impaired the security interest in the property [*Civ. Code § 2924.7(a)*].

[h] Condemnation

The condemnation provision in this form [*see* P B(1) of Form] is typical of that contained in many standard deeds of trust and provides that the proceeds of any condemnation award to the trustor are assigned to the beneficiary as security for the obligations secured by the trust deed. However, the assignment is subject to the trustor's ownership rights. The enforceability of this provision and the effect of condemnation of the secured property is governed by statute [*see Code Civ. Proc. §§ 1265.210-1265.250*].

[i] Late Payments

Under this form, the beneficiary does not waive any right to prompt payment of amounts due by accepting any payment after its due date [*see* P B(2) of Form]. For a trust deed provision that assesses the trustor a late charge for late payments, see *§ 25A.223[2]*.

[j] Partial Release and Subordination

This form grants the trustee, among other powers, the power to execute a deed of partial reconveyance on a portion of the secured property and the power to join in the execution of an instrument subordinating the lien created by the trust deed to another lien [*see* P B(3) of Form]. However, the trustee may not exercise these powers unless it receives (1) the beneficiary's written request and instructions for the exercise of these powers, and (2) the trust deed and promissory note for proper endorsement by the trustee.

The foregoing provision is found in most standardized, preprinted trust deeds. Although it may be sufficient to govern the respective rights and duties of the beneficiary and the trustee for a partial release and subordination, it does not

address the more significant rights and duties between the beneficiary and the trustor for a partial release or subordination. If the beneficiary and trustor agree to subordination of the trust deed or if they agree to partial releases from under the trust deed, the provisions relating to either must be clearly and carefully drafted and comply with judicially-crafted standards of clarity and fairness. In the case of subordination, certain notices and language may be required by statute [*see Civ. Code §§ 2953.1-2953.5*]. For detailed coverage of subordination, including illustrative subordination clauses that may be inserted into trust deeds, see Ch. 25B, *Subordination, Assumption, and Assignment* . For discussion of requirements relating to partial releases (and partial release clauses for trust deeds), see Ch. 25C, *Release and Reconveyance* .

[k] Full Reconveyance

This form obligates the trustee to reconvey the secured property to the trustor when the trustee receives a reconveyance request from the beneficiary stating thatall sums under the trust deed have been paid [*see* P B(4) of Form]. When the obligation has been paid in full, the beneficiary must deliver the request for reconveyance and the original note and trust deed to the trustee [*Civ. Code § 2941(b)*]. The trustee must then, subject to certain exceptions, execute and record a deed of full reconveyance [*Civ. Code § 2941(b)*]. For a deed of full reconveyance and further discussion, see *§ 25C.201*.

[l] Right to Rents and Profits

[i] Assignment of Rents

The trustor under a trust deed is entitled to possession of the secured property and to the rents accruing from the property [*Code Civ. Proc. § 774*; *Civ. Code § 2927*; *Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450]* unless there is a foreclosure and sale of the property under the deed of trust [*Belcher v. Aaron (1937) 8 Cal. 2d 180, 182, 64 P.2d 402]* . However, the possessory rights of the trustor, including the right to rents and profits from the property, may be changed by the parties in the security agreement or by a separate agreement [*Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450]* .

Most trust deeds (including this form) contain some type of assignment of rents clause that provides that the beneficiary, his or her agent, or a court-appointed receiver has the right on default to take possession of the premises and to sue for or collect the rents, issues, and profits from the property [*see* P B(5) of Form]. If the security or separate agreement does not give the beneficiary the right to take possession and collect or sue for the rents and profits, he or she may not do so [*Locke v. Klunker (1898) 123 Cal. 231, 235, 55 P. 993]* .

Written assignments of rents and profits entered into after 1996 are subject to *Civ. Code § 2938* [*Civ. Code § 2938(i)*; *see* [ii]-[iv], *below*]. Former *Civ. Code §§ 2938* and *2938.1* continue to govern contracts entered into prior to 1997 [*Civ. Code § 2938(i)*; *see* [v], *below*].

The following subsections summarize the applicable statutory requirements. For more extensive coverage of these requirements, see California Real Estate Law & Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender).

[ii] Written Assignment Creates Present Security Interest

A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property, irrespective of whether the assignment is denoted as absolute, absolute conditioned on default, additional security for an obligation, or otherwise, is, on execution and delivery by the assignor, effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. For these purposes, the term "leases, rents, issues, and profits of real property" includes the cash proceeds of the foregoing. The term "cash proceeds" means cash, checks, deposit accounts, and the like [*Civ. Code § 2938(a)*].

Civ. Code § 2938 applies to contracts entered into after 1996. Former *Civ. Code §§ 2938* and *2938.1*, as those sections

were in effect before 1997, govern contracts entered into, and actions and proceedings initiated on the basis of those contracts, before 1997 [*Civ. Code § 2938(i)*; *see* [v], *below*].

[iii] Recordation and Perfection of Assignment

An assignment of an interest in leases, rents, issues, or profits of real property may be recorded in the records of the county recorder in which the underlying real property is located in the same manner as any other conveyance of an interest in real property, whether the assignment is in a separate document or part of a deed of trust or mortgage [*Civ. Code § 2938(b)*]. When the assignment is duly recorded in accordance with the methods, procedures, and requirements for recordation of conveyances of other interests in real property, (1) the assignment will be deemed to give constructive notice of the content of the assignment with the same force and effect as any other duly recorded conveyance of an interest in real property, and (2) the interest granted by the assignment will be deemed fully perfected as of the time of recordation with the same force and effect as any other duly recorded conveyance of an interest in real property, notwithstanding any provision of the assignment or any provisions of law that would otherwise preclude or defer enforcement of the rights granted the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, the possession of the property by the assignee, or the appointment of a receiver [*Civ. Code § 2938(b)*].

[iv] Assignee's Enforcement of Assignment on Assignor's Default

On default of the assignor under the obligation secured by the assignment of leases, rents, issues, and profits, the assignee is entitled to enforce the assignment in accordance with *Civ. Code § 2938*, which permits enforcement by one or more of several steps, including the appointment of a receiver [*see Civ. Code § 2938(c)*]. On and after the date the assignee takes one or more of these enforcement steps, the assignee is entitled to collect and receive all rents, issues, and profits that have accrued but remain unpaid and uncollected by the assignor or its agents or for the assignor's benefit on that date, and all rents, issues, and profits that accrue on or after that date [*Civ. Code § 2938(c)*]. As a general rule, monies receive by the assignee pursuant to these enforcement procedures must be applied by the assignee to the debt or otherwise in accordance with the assignment or the promissory note, deed of trust, or other instrument evidencing the obligation [*see Civ. Code § 2938(c)*].

The application of rents, issues, or profits to the secured obligation satisfies the secured obligation to the extent of those rents, issues, or profits, and, notwithstanding any provisions of the assignment or other loan documents to the contrary, must be credited against any amounts necessary to cure any monetary default for purposes of reinstatement under *Civ. Code § 2924c* [*Civ. Code § 2938(e)*].

[v] Prior Law

Former *Civ. Code §§ 2938* and *2938.1*, as those sections were in effect before 1997, continue to govern contracts entered into, and actions and proceedings initiated on the basis of those contracts, before 1997 [*Civ. Code § 2938(i)*]. Under former *Civ. Code § 2938.1*, an assignment of the rents, issues, and profits of real property that was executed after 1992 and that stated that it was given as additional security, was perfected by recording, in the county in which the real property was located, an instrument granting the assignment. Recordation perfected the assignment without requiring the beneficiary to obtain possession of the property, and without appointing a receiver, or taking any other action [former *Civ. Code § 2938.1(a)*]. The assignment could be contained in a mortgage, trust deed, or other recorded instrument [former *Civ. Code § 2938.1(c)*]. The beneficiary could not exercise any rights under this type of assignment until and unless the trustor was in default of its obligation to the beneficiary [former *Civ. Code § 2938.1(b)*].

The above provisions did not invalidate assignments as additional security that were perfected by other means before 1993, and they did not apply to absolute assignments of rents, issues, and profits [former *Civ. Code § 2938.1(d)*]. An assignment of rents, issues, and profits made in connection with a loan secured by real property that was expressly

absolute, was deemed to constitute a present transfer of the assignor's interest in existing and future rents, issues, and profits of that real property effective when the assignment was executed and delivered by the assignor [former *Civ. Code § 2938(a)*]. Such an assignment could be recorded in the county in which the real property was located in the same manner as any other conveyance of an interest in real property, whether the assignment was in a separate document or part of a mortgage or deed of trust. When recorded, the assignment constituted constructive notice of the content and effect of the assignment with the same force and effect as any other recorded interest in real property. The interest granted by the assignment was deemed perfected as of the date it was recorded, notwithstanding any provision of the assignment or of any other provision of law that would otherwise preclude or defer enforcement of the rights granted the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor [former *Civ. Code § 2938(b)*].

[m] Substitution of Trustee

This form contains a clause providing for the substitution of the trustee under the trust deed [*see* P B(9) of Form]. The clause sets forth a procedure that is similar to one of the two alternative statutory procedures for substitution of a trustee. Under that statutory method, the trustee may be substituted by recording in the county in which the property is located a substitution document executed and acknowledged by all of the beneficiaries under the trust deed, or their successors in interest. That substitution is effective notwithstanding any contrary provision in any trust deed executed after 1967 [*Civ. Code § 2934a(a)(1)(A)*]. For a substitution of trustee form that complies with the statutory requirements and further discussion, see Ch. 25C, *Release and Reconveyance* .

[n] Request for Notice of Default

If there is a senior encumbrance on the property, the trust deed should contain a request for notices of default and sale under the senior encumbrance. This form contains such a request, in accordance with the requirements of *Civ. Code § 2924b(a)*. The request may also be recorded as a separate instrument [*see § 25D.200*].

[2] FORM

Deed of Trust--Long Form

Deed of Trust--Long Form

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

DEED OF TRUST

THIS DEED OF TRUST is made _____[*date*], between _____[*name of trustor*] (the "Trustor"), whose address is _____[*street address, city, state, zip*], and _____[*name of beneficiary*] (the "Beneficiary"), whose address is _____[*street address, city, state, zip*], and

_____[*name of trustee*], [a California corporation] (the "Trustee") [*add if trustee is an individual:*, whose address is _____ (*street address, city, state, zip*)];

TRUSTOR HEREBY irrevocably grants, transfers, and assigns to Trustee, in trust, with power of sale, all that property in the [*add if applicable:* City of _____,] County of _____, State of _____, described as: [*set forth legal description of property in the center of the page*], (the "Property"), together with rents, issues, and profits of the Property, subject, however, to the right, power, and authority given to and conferred on Beneficiary to collect and apply these rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

(1) Payment of the indebtedness evidenced by a promissory note executed by Trustor on _____[*this date or specify other date*], in the principal sum of $_____, and any renewal, extension, or modification of the promissory note (the "Note");

(2) Any additional sums and interest that may hereafter be loaned to the then record owner of the Property by Beneficiary, when evidenced by another note or notes reciting that it or they are so secured; and

(3) The performance of each agreement contained in this Deed of Trust.

A. TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:

Maintenance and Repair

(1) To keep the Property in good condition and repair; not to remove or demolish any buildings on the Property; to complete or restore promptly and in good and workmanlike manner any building that may be constructed, damaged, or destroyed on the Property; to pay when due all claims for labor performed and materials furnished for the Property; to comply with all laws affecting the Property or requiring any alterations or improvements to be made on the Property; not to commit or permit waste of the Property; not to commit, suffer, or permit any act on the Property in violation of law; and to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts that from the character or use of the Property may be reasonably necessary.

Fire Insurance

(2) To provide, maintain, and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary on any indebtedness secured by this Deed of Trust and in any order determined by Beneficiary, or at the option of Beneficiary the entire amount so collected or any part of that amount may be released to Trustor. This application or release shall not cure or waive any default or notice of default under this Deed of Trust or invalidate any act done pursuant to such a notice.

Defense of Security

(3) To appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust or the rights or powers of Beneficiary, or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

Payment of Liens and Taxes

(4) To pay, at least [*e.g.*, 10] days before delinquency, all taxes and assessments affecting the Property, including assessments on appurtenant water stock; all encumbrances, charges, and liens, with interest, on the Property or any part of the Property, which appear to be prior or superior to this Deed of Trust; and all costs, fees, and expenses of this Trust.

If Trustor fails to make any payment or to do any act as provided in this Deed of Trust, then Beneficiary or Trustee may (but is not obligated to) make the payment or do the act in the required manner and to the extent deemed necessary by Beneficiary or Trustee to protect the security of this Deed of Trust. The performance by Beneficiary or Trustee of such an act shall not require notice to or demand on Trustor and shall not release Trustor from any obligation under this Deed of Trust. Beneficiary or Trustee shall also have the following related rights and powers: to enter on the Property for the foregoing purposes; to appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust or the rights or powers of Beneficiary or Trustee; to pay, purchase, contest, or compromise any encumbrance, charge, or lien that in the judgment of either appears to be prior or superior to this Deed of Trust; to employ counsel; and to pay necessary expenses and costs, including attorneys' fees.

Reimbursement of Costs

(5) To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to this Deed of Trust, with interest from date of expenditure at the amount allowed by law in effect at the date of this Deed of Trust, and to pay any amount demanded by Beneficiary (up to the maximum allowed by law at the time of the demand) for any statement regarding the obligation secured by this Deed of Trust.

B. THE PARTIES AGREE THAT:

Condemnation Award

(1) Any award of damages in connection with any taking or condemnation, or for injury to the Property by reason of public use, or for damages for private trespass or injury to the Property, is hereby assigned and shall be paid to Beneficiary as further security for all obligations secured by this Deed of Trust. On receipt of any such proceeds, Beneficiary may hold the proceeds as further security, or apply or release them in the same manner and with the same effect as provided in this Deed of Trust for the disposition of proceeds of fire or other insurance.

Waiver of Late Payments

(2) By accepting payment of any sum secured by this Deed of Trust after its due date, Beneficiary does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure to pay any indebtedness secured by this Deed of Trust.

Trustee's Powers

(3) On written request of Beneficiary and presentation of this Deed of Trust and the Note for endorsement, Trustee may (a) reconvey all or any part of the Property; (b) consent to the making and recording, or either, of any map or plat of all or any part of the Property; (c) join in granting any easement on the Property; or (d) join in or consent to any extension agreement or any agreement subordinating the lien, encumbrance, or charge of this Deed of Trust. Trustee need not

provide Trustor with notice before taking any of the foregoing actions, and shall not be liable for the proper performance of the act. The exercise by Trustee of any of the foregoing powers shall not affect the personal liability of any person for payment of the indebtedness secured by this Deed of Trust, or the lien of this Deed of Trust on the remaining property as security for the repayment of the full amount secured by this Deed of Trust.

Full Reconveyance

(4) On written request of Beneficiary stating that all sums secured by this Deed of Trust have been paid, surrender of this Deed of Trust, the Note, and any other notes secured by this Deed of Trust to the Trustee for cancellation and retention, and payment of Trustee's fees and charges, Trustee shall reconvey, without warranty, the Property then subject to this Deed of Trust. The recitals in the reconveyance shall be conclusive proof of the truthfulness of the recitals. The grantee in the reconveyance may be described as "the person or persons legally entitled thereto." Five years after issuance of the full reconveyance, Trustee may destroy the Note and this Deed, unless directed in the request to retain them.

Assignment of Rents

(5) As additional security, Trustor hereby gives to and confers on Beneficiary the right, power, and authority during the continuance of these Trusts, to collect the rents, issues, and profits of the Property, but reserves the right, prior to any default by Trustor in payment of any indebtedness secured by this Deed of Trust or in the performance of any agreement under this Deed of Trust, to collect and retain these rents, issues, and profits as they become due and payable. On any such default, Beneficiary may pursue any of the enforcement mechanisms specified in *Civil Code Section 2938(c)*. The exercise of these enforcement rights by Beneficiary shall not cure or waive any default or notice of default under this Deed of Trust or invalidate any act done pursuant to such a notice.

Default in Foreclosure

(6) On default by Trustor in the payment of any indebtedness secured by this Deed of Trust or in the performance of any obligation under this Deed of Trust, Beneficiary may declare all sums secured by this Deed of Trust immediately due and payable by delivering to Trustee a written declaration of default and demand for sale and a written notice of default and election to sell the Property. Trustee shall cause the notice of default and election to sell to be recorded. Beneficiary also shall deposit with Trustee this Deed of Trust, the Note, and all documents evidencing any additional expenditures secured by this Deed of Trust.

After the required time period has lapsed following the recordation of the notice of default, and after notice of sale has been given as required by law, Trustee, without demand on Trustor, shall sell the Property at the time and place specified in the notice of sale, either as a whole or in separate parcels, and in any order determined by Trustee, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at the time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser at the auction its deed conveying the Property sold, but without any covenant or warranty, express or implied. The recital in the deed of any matter or fact shall be conclusive proof of the truthfulness of the recital. Any person, including Trustor, Trustee, or Beneficiary, may purchase at the sale.

After deducting all costs, fees, and expenses of Trustee and Beneficiary under this paragraph, including costs of procuring evidence of title incurred in connection with sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under the terms of this Deed of Trust, not then repaid, with accrued interest at the amount allowed by

law in effect at the date of this Deed of Trust; all other sums then secured by this Deed of Trust; and the remainder, if any, to the person or persons legally entitled to the remaining proceeds.

General Provisions

(7) This Deed applies to, inures to the benefit of, and binds all parties to this Deed of Trust and their heirs, legatees, devisees, administrators, executors, successors, and assigns. The term "Beneficiary" shall mean the holder and owner, including pledgee, of the Note secured by this Deed of Trust, whether or not named as a beneficiary in this Deed of Trust, and the heirs, legatees, devisees, administrators, executors, successors, and assigns of any such person. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Acceptance by Trustee

(8) Trustee accepts this Trust when this Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party to this Deed of Trust of pending sale under any other deed of trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party unless brought by Trustee.

Substitution of Trustees

(9) Beneficiary, or any successor in ownership of any indebtedness secured by this Deed of Trust, may from time to time, by written instrument, substitute a successor or successors to any Trustee named in or acting under this Deed of Trust. The substitution instrument shall set forth the following: the date of recordation of this Deed of Trust; the name of the Trustor; the book and page where this Deed of Trust is recorded; and the name of the new Trustee. When executed by Beneficiary and duly acknowledged and recorded in the office of the recorder of the county or counties where the Property is situated, the substitution instrument shall be conclusive proof of proper substitution of the successor Trustee or Trustees. Any successor Trustee or Trustees shall, without conveyance from the Trustee predecessor, succeed to all its title, estate, rights, powers, and duties.

Cumulative Powers and Remedies

(10) The powers and remedies conferred in this Deed of Trust are concurrent and cumulative to all other rights and remedies provided in this Deed of Trust or given by law. These powers and remedies may be exercised singly, successively, or together, and as often as deemed necessary.

Conclusiveness of Recitals

(11) The recitals contained in any reconveyance, trustee's deed, or any other instrument executed by the Trustee from time to time under the authority of this Deed of Trust or in the exercise of its powers or the performance of its duties under this Deed of Trust, shall be conclusive evidence of their truth, whether stated as specific and particular facts, or in general statements or conclusions. Further, the recitals shall be binding and conclusive on the Trustor, the Trustor's heirs, executors, administrators, successors, and assigns, and all other persons.

Attorney's Fees

(12) If any action is brought for the foreclosure of this Deed of Trust or for the enforcement of any provision of this Deed of Trust (whether or not suit is filed), Trustor agrees to pay all costs and expenses of Beneficiary and Trustee, including reasonable attorney's fees; and these sums shall be secured by this Deed of Trust.

Cotrustees

(13) If two or more persons are designated as Trustee in this Deed of Trust, any, or all, power granted in this Deed of Trust to Trustee may be exercised by any of those persons, if the other person or persons are unable, for any reason, to act. Any recital of this inability in any instrument executed by any of those persons shall be conclusive against Trustor and Trustor's heirs and assigns.

[*Add following clause if trust deed is purchase money encumbrance:*]

Purchase Money Encumbrance

(14) The promissory note secured by this Deed of Trust is given as a part of the purchase price of the Property.

[*Add following clause if there is senior trust deed or mortgage recorded against property:*]

Request for Notices of Default and Sale

(15) In accordance with *Civil Code Section 2924b*, request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor [*or* Mortgagor], and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add if security instrument is deed of trust:* and _____ (*name*) as Trustee,] be mailed to:

_____[*name*]
_____[*address*]
_____[*city, state, zip*]

NOTICE:
A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale under this Deed of Trust be mailed to Trustor at the address of Trustor set forth above.

TRUSTOR
_____ [*signature of trustor*]
[*typed name*]

Acknowledgment

)

State of California) ss
County of _____)
_____

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)
_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by Mortgagors



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
B. Trust Deeds and Mortgages

10-25A California Legal Forms--Transaction Guide § 25A.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.211 Deed of Trust--Short Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a short form deed of trust that incorporates by reference provisions of a fictitious deed of trust that has been previously recorded in the office of the county recorder where the short form deed of trust is to be recorded [*see Civ. Code § 2952*]. Fictitious deeds of trust are recorded by institutional lenders, title companies, and escrow companies and contain several "standard" provisions that commonly appear in trust deeds. Thereafter, the entity may use a short form trust deed that incorporates by reference the standard clauses of the fictitious trust deed into the short form deed without the necessity of recording the full text of the provisions [*see* [b], *below*]. However, for the convenience of the parties, the text of the provisions is generally set forth on the back of standardized, preprinted short forms.

The short form deed of trust, like any deed of trust, should be executed and acknowledged by the trustor and recorded in the office of the county recorder where the real property is located [*Civ. Code §§ 1169, 2952*; *see § 25A.210[1][b]*].

For a long form trust deed containing many standard clauses, see *§ 25A.210*. All of the significant provisions in this form (other than the identifying information regarding the fictitious trust deed) also appear in *§ 25A.210*, and are discussed in the comment to that form. For additional provisions that may be included in a trust deed, see §§ 25A.220-25A.228.

[b] Reference to Fictitious Trust Deed

When a short form trust deed or mortgage incorporates by reference any provisions of a fictitious trust deed or mortgage, the reference must contain a statement of the date the fictitious instrument was recorded; the county recorder's office and the book or volume and the page where it is recorded, and a statement (by paragraph numbers or

similar method) that will definitely identify the specific provisions of the fictitious instrument that are being adopted [*Civ. Code § 2952*]. The form in [2], *below*, provides for the inclusion of the above information [*see* P (1) under "TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:"].

[2] FORM

Deed of Trust--Short Form
Deed of Trust--Short Form

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

DEED OF TRUST

THIS DEED OF TRUST made this _____ day of _____, [*month and year*], between _____[*name of trustor*] (the "Trustor"), whose address is _____[*street address, city, state, zip*], and _____[*name of beneficiary*] (the "Beneficiary"), whose address is _____[*street address, city, state, zip*], and _____[*name of trustee*], [a California corporation] (the "Trustee") [*add if trustee is an individual:* , whose address is _____ (*street address, city, state, zip*)];

TRUSTOR HEREBY irrevocably grants, transfers, and assigns to Trustee, in trust, with power of sale, all that property in the [*add if applicable:* City of _____,] County of _____, State of _____, described as: [*set forth legal description of property in the center of the page*], (the "Property"), together with the rents, issues, and profits of the Property, subject, however, to the right, power, and authority given to and conferred on Beneficiary by Paragraph [*specify applicable paragraph number in recorded fictitious trust deed*] of the provisions incorporated in this Deed of Trust by reference to collect and apply those rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

(1) Performance of each agreement of Trustor incorporated by reference or contained in this Deed of Trust;

(2) Payment of the indebtedness evidenced by one promissory note, and any extension or renewal of that note, in the principal sum of $_____, executed by Trustor _____[on this date *or* on _____ (*date*)] in favor of Beneficiary or order; and

(3) Payment of any further sums that the then record owner of the Property hereafter may borrow from Beneficiary, when evidenced by another note or notes reciting it is so secured.

TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:

(1) By the execution and delivery of this Deed of Trust and the note secured by this Deed of Trust, that provisions _____ to [*beginning and ending numbers of provisions in fictitious trust deed described below*], inclusive, of the fictitious Deed of Trust recorded on _____[*date*], in Book _____ at Page _____, of the Official Records of _____ County [*county in which trust deed is to be recorded*], California, hereby are adopted and incorporated by reference;

(2) That [he/she] acknowledges receipt of a full copy of the provisions numbered _____ to _____, inclusive, referred to above, and understands them;

(3) That [he/she] will observe and perform those provisions; and

(4) That the references to property, obligations, and parties in those provisions shall be construed to refer to the Property, obligations, and parties set forth in this Deed of Trust.

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale under this Deed of Trust be mailed to [him/her] at the address of the Trustor set forth above.

[*Add following clause if transfer by trustor will accelerate entire indebtedness (see § 25A.221[2] for alternative provision):*]

In the event that all or any part of the Property, or any interest in the Property, is sold, agreed to be sold, conveyed, transferred, disposed of, further encumbered, or alienated by Trustor, or by the operation of law or otherwise, without the prior written consent of Beneficiary, all sums secured by this Deed of Trust shall, at the option of Beneficiary, immediately become due and payable. Consent to one such transaction shall not be deemed to be a waiver of the right to require consent to future or successive transactions.

[*Add following clause if trust deed is purchase money encumbrance:*]

The promissory note secured by this Deed of Trust is given as a part of the purchase price of the Property.

[*Add following if there is senior trust deed or mortgage recorded against property:*]

In accordance with *Civil Code Section 2924b*, request is hereby made by the undersigned Trustor that a copy of any Notice of Default and a copy of any Notice of Sale under the Deed of Trust [*or* Mortgage] recorded _____[*date of recordation*], in Book _____, Page _____, Official Records of _____ County, California, executed by _____[*name*] as Trustor [*or* Mortgagor] in which _____[*name of beneficiary or mortgagee*] is named as Beneficiary [*or* Mortgagee], and _____[*name of trustee; omit if mortgage*] as Trustee, be mailed to _____[*name of person to whom notice is to be mailed, normally beneficiary of this junior trust deed*], whose address is _____[*street, city, state, zip*].

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

TRUSTOR

_____ [*signature of trustor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
B. Trust Deeds and Mortgages

10-25A California Legal Forms--Transaction Guide § 25A.212

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.212 All-Inclusive Deed of Trust

[1] Comment

[a] Use of Form

The form in [2], *below*, is an "all-inclusive" deed of trust that is compatible for use with the all-inclusive promissory note set forth in *§ 25A.205*. The discussion in the comment to that form defines an all-inclusive deed of trust and fully explains its use, and is therefore equally applicable to use of this form. For a discussion of the standard provisions for a general deed of trust, see *§ 25A.210[1]*.

This form assumes, as does the form in *§ 25A.205* (all-inclusive note), that there is only one obligation secured by a deed of trust senior to the all-inclusive deed of trust and that the one obligation is evidenced by one promissory note [*see § 25A.205[1][b]*].

[b] Drafting Considerations

The provisions of the all-inclusive note and deed of trust must be consistent with the underlying trust deed and note. For discussion of several areas for which this is especially important, see *§ 25A.205[1][c]*.

A title company will frequently require that an all-inclusive deed of trust contain special foreclosure provisions before the title company will act as trustee or insure title of the purchaser at a trustee's sale. One concern to title companies is the amount of credit bid the holder of the all-inclusive trust deed needs to make at a trustee's sale, that is, whether it should include the amount of the underlying obligation (this form provides that this amount need not be included) [*see* P C(6) of Form]. A second concern is whether a sale under the all-inclusive trust deed will be subject to the underlying first lienor and whether the senior lien will be paid out of the sale proceeds (under this form, the sale is subject to the underlying lien) [*see* P C(6) of Form]. A third concern is whether the title company should reconvey the property from the all-inclusive trust deed when the unpaid balance due on the all-inclusive note is equal to the unpaid balance of the

underlying senior lien (this form provides for such a reconveyance) [*see* P C(4) of Form]. The terms of the all-inclusive deed of trust should specifically address and clarify these issues [*see Armsey v. Channel Associates, Inc. (1986) 184 Cal. App. 3d 833, 838, 229 Cal. Rptr. 509]* . The terms of the trust should also be reviewed in advance by the title company to be named as trustee.

In a case involving an all-inclusive deed of trust that did not contain specific foreclosure provisions, the beneficiary bid the amount of his equity in the all-inclusive trust deed (which was an amount less than the face amount of the all-inclusive deed of trust). There had been a fire on the property, and the issue in the case was who was entitled to the insurance proceeds. The court held that the debt owed to the beneficiary was the full face amount of the all-inclusive note, and that if a beneficiary bids less than the full amount of the obligation owing to him or her, a deficiency balance of the debt remains to which the beneficiary may seek entitlement from insurance proceeds. It further stated that *Code Civ. Proc. § 580b* did not prevent the beneficiary from realizing on the insurance policy, which was additional security for the loan, up to the amount of the indebtedness remaining after the foreclosure sale [*see Armsey v. Channel Associates, Inc. (1986) 184 Cal. App. 3d 833, 837-839, 229 Cal. Rptr. 509]* .

[c] Request for Notice of Default and Sale

Since a borrower who makes payments directly to the holder of the all-inclusive note has no assurance that the holder is making the required payment on the underlying senior obligation, the borrower should execute and record a request for notice of default and sale on the underlying senior obligation. This form includes a request for these notices. Alternatively, the request may be recorded as a separate instrument [*see § 25D.200*].

[2] FORM

All-Inclusive Deed of Trust
All-Inclusive Deed of Trust

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

ALL-INCLUSIVE DEED OF TRUST AND ASSIGNMENT OF RENTS

THIS ALL-INCLUSIVE DEED OF TRUST AND ASSIGNMENT OF RENTS is made this _____ day of [*month*], [*year*], by and between _____[*name of trustor*] (the "Trustor"); _____[*name of beneficiary*] (the "Beneficiary"); and _____[*name of trustee*] (the "Trustee");

TRUSTOR HEREBY irrevocably grants, transfers, and assigns to Trustee, in trust, with power of sale, all that property in the [*add if applicable:* City of _____,] County of _____, State of _____, described as: [*set forth legal description of property in the center of the page*], (the "Property"),

together with rents, issues, and profits of the Property, subject, however, to the right, power, and authority given to and conferred on Beneficiary to collect and apply these rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

(1) Payment of the indebtedness evidenced by a promissory note executed by Trustor on _____[this date *or* _____ (*date*)], in the principal sum of $_____, and any renewal, extension, or modification of the promissory note (the "All-Inclusive Note");

(2) Any additional sums and interest that may hereafter be loaned to the then record owner of the Property by Beneficiary, when evidenced by another note or notes reciting that it or they are secured by this All-Inclusive Deed of Trust; and

(3) The performance of each agreement contained in this All-Inclusive Deed of Trust and of each agreement contained in the All-Inclusive Note, the provisions of which are hereby incorporated by reference.

A. TRUSTOR AND BENEFICIARY HEREBY AGREE that this is an All-Inclusive Deed of Trust and is subject and subordinate to the deed of trust now of record and referred to as the First Deed of Trust in the All-Inclusive Note and that the First Deed of Trust secures that certain promissory note referred to in the All-Inclusive Note as the First Note. Pursuant to the terms of the All-Inclusive Note, Beneficiary has agreed to pay the principal and interest of the First Note and all taxes, assessments [*add if appropriate:* and insurance premiums] payable under the terms of the First Note or First Deed of Trust, provided Trustor makes all payments under the All-Inclusive Note when due. If Beneficiary defaults in the payment or performance of any obligation called for under the First Deed of Trust, Trustor may make the payments (including any late charges, penalties, advances, and impounds) direct to Beneficiary or the obligee or holder, as appropriate, and the payments shall be credited against the payments next due under the All-Inclusive Note secured by this All-Inclusive Deed of Trust.

B. TO PROTECT THE SECURITY OF THIS ALL-INCLUSIVE DEED OF TRUST:

Maintenance and Repair

(1) Trustor shall:

(a) Keep the Property in good condition and repair;

(b) Not remove or demolish any buildings on the Property;

(c) Complete or restore promptly and in good and workmanlike manner any building that may be constructed, damaged, or destroyed on the Property;

(d) Pay when due all claims for labor performed and materials furnished for the Property;

(e) Comply with all laws affecting the Property or requiring any alterations or improvements to be made on the Property;

(f) Not commit or permit waste of the Property;

(g) Not commit, suffer, or permit any act on the Property in violation of law; and

(h) Cultivate, irrigate, fertilize, fumigate, prune, and do all other acts that from the character or use of the Property may be reasonably necessary.

Fire Insurance

(2) Trustor shall provide, maintain, and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary on any indebtedness secured by this All-Inclusive Deed of Trust and in any order determined by Beneficiary, or at the option of Beneficiary the entire amount so collected or any part of that amount may be released to Trustor. This application or release shall not cure or waive any default or notice of default under this All-Inclusive Deed of Trust or invalidate any act done pursuant to such a notice.

Defense of Security

(3) Trustor shall appear in and defend any action or proceeding purporting to affect the security of this All-Inclusive Deed of Trust or the rights or powers of Beneficiary, or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this All-Inclusive Deed of Trust.

Payment of Liens and Taxes

(4) Trustor shall pay to Beneficiary, at least [*e.g.*, 20] days before delinquency, as required under the First Note or the First Deed of Trust, all taxes and assessments affecting the Property, including assessments on appurtenant water stock; all encumbrances, charges, and liens, with interest, on all or any part of the Property, which appear to be prior or superior to this All-Inclusive Deed of Trust; and all costs, fees and expenses of this Trust.

Beneficiary shall pay when due all taxes, assessments, and other liens on the Property as required under the First Deed of Trust or First Note, provided Trustor makes all of the payments described in the preceding paragraph when due. If Trustor fails to make any payment or to do any act as provided in this All-Inclusive Deed of Trust, then Beneficiary or Trustee may (but is not obligated to) make the payment or do the act in the required manner and to the extent deemed necessary by Beneficiary or Trustee to protect the security of this All-Inclusive Deed of Trust. The performance by Beneficiary or Trustee of such an act shall not require notice to or demand on Trustor and shall not release Trustor from any obligation under this All-Inclusive Deed of Trust. Beneficiary or Trustee shall also have the following related rights and powers: to enter on the Property for the foregoing purposes; to appear in and defend any action or proceeding purporting to affect the security of this All-Inclusive Deed of Trust or the rights or powers of Beneficiary or Trustee; to pay, purchase, contest, or compromise any encumbrance, charge, or lien that in the judgment of either appears to be prior or superior to this All-Inclusive Deed of Trust; to employ counsel; and to pay necessary expenses and costs, including attorneys' fees.

Reimbursement of Costs

(5) Trustor shall pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to this All-Inclusive Deed of Trust, with interest from date of expenditure at the amount allowed by law in effect at the date of this All-Inclusive Deed of Trust, and shall pay any amount demanded by Beneficiary (up to the maximum allowed by law at the time of the demand) for any statement regarding the obligation secured by this All-Inclusive Deed of Trust. Trustor further agrees to pay Beneficiary the cost of any penalty or other charge imposed by the holder of the First Note

and First Deed of Trust for Beneficiary's default under either, when the default was caused by Trustor's failure to promptly pay any sum required under this All-Inclusive Deed of Trust.

C. IT IS MUTUALLY AGREED THAT:

Condemnation Award

(1) Any award of damages in connection with any taking or condemnation, or for injury to the Property by reason of public use, or for damages for private trespass or injury to the Property, is hereby assigned and shall be paid to Beneficiary as further security for all obligations secured by this All-Inclusive Deed of Trust. On receipt of any such proceeds, Beneficiary may hold the proceeds as further security, or apply or release them in the same manner and with the same effect as provided in this All-Inclusive Deed of Trust for the disposition of proceeds of fire or other insurance.

Waiver of Late Payments

(2) By accepting payment of any sum secured by this All-Inclusive Deed of Trust after its due date, Beneficiary does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure to pay any indebtedness secured by this All-Inclusive Deed of Trust.

Trustee's Powers

(3) On written request of Beneficiary and presentation of this All-Inclusive Deed of Trust and the Note for endorsement, Trustee may (a) reconvey all or any part of the Property; (b) consent to the making and recording, or either, of any map or plat of all or any part of the Property; (c) join in granting any easement on the Property; or (d) join in or consent to any extension agreement or any agreement subordinating the lien, encumbrance, or charge of this All-Inclusive Deed of Trust. Trustee need not provide Trustor with notice before taking any of the foregoing actions, and shall not be liable for the proper performance of the act. The exercise by Trustee of any of the foregoing powers shall not affect the personal liability of any person for payment of the indebtedness secured by this All-Inclusive Deed of Trust, or the lien of this All-Inclusive Deed of Trust on the remaining property as security for the repayment of the full amount secured by this All-Inclusive Deed of Trust.

Full Reconveyance

(4) At any time when the unpaid principal balance of the All-Inclusive Note secured by this All-Inclusive Deed of Trust and accrued interest on that note is equal to or less than the unpaid principal balance of the First Note and accrued interest on the First Note, Beneficiary shall, on demand by Trustor or its successors, surrender this All-Inclusive Deed of Trust and the All-Inclusive Note to Trustee and shall cause Trustee to execute and record a full reconveyance without warranty of the Property. The recitals in the reconveyance shall be conclusive proof of the truthfulness of the recitals. The grantee in the reconveyance may be described as "the person or persons legally entitled thereto." Five years after issuance of the full reconveyance, Trustee may destroy the All-Inclusive Note and this All-Inclusive Deed of Trust, unless directed in the request to retain them.

Assignment of Rents

(5) As additional security, Trustor hereby gives to and confers on Beneficiary the right, power, and authority during the continuance of these Trusts, to collect the rents, issues, and profits of the Property, but reserves the right, prior to any default by Trustor in payment of any indebtedness secured by this All-Inclusive Deed of Trust or in the performance of any agreement under this All-Inclusive Deed of Trust, to collect and retain these rents, issues, and profits as they become due and payable. On any such default, Beneficiary may, without notice and without regard to the adequacy of the security for the indebtedness secured by this All-Inclusive Deed of Trust, either personally or by agent or court-appointed receiver, do the following: enter on and take possession of the Property or any part of the Property; sue for or otherwise collect all rents, issues, and profits, including those past due and unpaid; and apply these rents, issues, and profits, less costs and expenses of operation and collection (including reasonable attorneys' fees), on any indebtedness secured by this All-Inclusive Deed of Trust, in any order determined by Beneficiary. The exercise of the foregoing rights by Beneficiary shall not cure or waive any default or notice of default under this All-Inclusive Deed of Trust or invalidate any act done pursuant to such a notice.

Default in Foreclosure

(6) On default by Trustor in the payment of any indebtedness secured by this All-Inclusive Deed of Trust or in the performance of any obligation under this All-Inclusive Deed of Trust, Beneficiary may declare all sums secured by this All-Inclusive Deed of Trust immediately due and payable by delivering to Trustee a written declaration of default and demand for sale and a written notice of default and election to sell the Property. Default in the payment of any indebtedness secured by this All-Inclusive Deed of Trust or in the performance of any agreement under this All-Inclusive Deed of Trust constitutes a default only under this All-Inclusive Deed of Trust and the All-Inclusive Note and does not constitute a default under the First Note or First Deed of Trust. Trustee shall cause the notice of default to be recorded. Beneficiary also shall deposit with Trustee this All-Inclusive Deed of Trust, the All-Inclusive Note, and all documents evidencing any additional expenditures secured by this All-Inclusive Deed of Trust.

After the required time period has lapsed following the recordation of the notice of default, and after notice of sale has been given as required by law, Trustee, without demand on Trustor, shall sell the Property at the time and place specified in the notice of sale, either as a whole or in separate parcels, and in any order determined by Trustee, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at the time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser at the auction its deed conveying the Property sold. That deed and the purchaser's ownership interest in the Property shall be subject to the First Note and First Deed of Trust. Further, the deed shall be without any covenant or warranty, express or implied. The recital in the deed of any matter or fact shall be conclusive proof of the truthfulness of the recital. Any person, including Trustor, Trustee, or Beneficiary, may purchase at the sale.

After deducting all costs, fees, and expenses of Trustee and Beneficiary under this Paragraph, including costs of procuring evidence of title incurred in connection with sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under the terms of this All-Inclusive Deed of Trust, not then repaid, with accrued interest at the amount allowed by law in effect at the date of this All-Inclusive Deed of Trust; all other sums then secured by this All-Inclusive Deed of Trust; and the remainder, if any, to the person or persons legally entitled to the remaining proceeds.

Notwithstanding any other provision of this All-Inclusive Deed of Trust or the All-Inclusive Note, any demand for sale delivered to the Trustee for the foreclosure of this All-Inclusive Deed of Trust shall be reduced by the unpaid balance, if any, at the time of the Trustee's sale, of the principal and interest due on the First Note and of any other sums payable under the terms of the First Note or First Deed of Trust. Satisfactory evidence of the unpaid balance (which may consist

of the written statement of the holder of the First Note) must be submitted to the Trustee prior to sale.

Beneficiary agrees that, in the event of foreclosure of this All-Inclusive Deed of Trust, Beneficiary shall, at any Trustee's sale, bid an amount not in excess of the amount then due on the obligation secured by this All-Inclusive Deed of Trust, including late charges, penalties, and/or advances, minus the balance then due on the First Note, including late charges, interest penalties, advances, and/or impounds.

General Provisions

(7) This All-Inclusive Deed of Trust applies to, inures to the benefit of, and binds all parties to this All-Inclusive Deed of Trust and their heirs, legatees, devisees, administrators, executors, successors, and assigns. The term "Beneficiary" shall mean the holder and owner, including pledgee, of the All-Inclusive Note, whether or not named as a beneficiary in this All-Inclusive Deed of Trust, and the heirs, legatees, devisees, administrators, executors, successors, and assigns of any such person. In this All-Inclusive Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Acceptance by Trustee

(8) Trustee accepts this Trust when this All-Inclusive Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party to this All-Inclusive Deed of Trust of pending sale under any other deed of trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party unless brought by Trustee.

Substitution of Trustees

(9) Beneficiary, or any successor in ownership of any indebtedness secured by this All-Inclusive Deed of Trust, may from time to time, by written instrument, substitute a successor or successors to any Trustee named in or acting under this All-Inclusive Deed of Trust. The substitution instrument shall contain the name of the original Trustor, Trustee, and Beneficiary under this All-Inclusive Deed of Trust, the book and page where this Deed is recorded, and the name and address of the new Trustee. When executed by Beneficiary and duly acknowledged and recorded in the office of the recorder of the county or counties where the Property is situated, the substitution instrument shall be conclusive proof of proper substitution of the successor Trustee or Trustees. Any successor Trustee or Trustees shall, without conveyance from the Trustee predecessor, succeed to all its title, estate, rights, powers, and duties.

Cumulative Powers and Remedies

(10) The powers and remedies conferred in this All-Inclusive Deed of Trust are concurrent and cumulative to all other rights and remedies provided in this Deed of Trust or given by law. These powers and remedies may be exercised singly, successively, or together, and as often as deemed necessary.

Conclusiveness of Recitals

(11) The recitals contained in any reconveyance, trustee's deed, or any other instrument executed by the Trustee from time to time under the authority of this All-Inclusive Deed of Trust or in the exercise of its powers or the performance of its duties under this All-Inclusive Deed of Trust, shall be conclusive evidence of their truth, whether stated as

specified and particular facts, or in general statements or conclusions. Further, the recitals shall be binding and conclusive on the Trustor, the Trustor's heirs, executors, administrators, successors, and assigns, and all other persons.

Attorney's Fees

(12) If any action is brought for the foreclosure of this All-Inclusive Deed of Trust or for the enforcement of any provision of this All-Inclusive Deed of Trust (whether or not suit is filed), Trustor agrees to pay all costs and expenses of Beneficiary and Trustee, including reasonable attorney's fees; and these sums shall be secured by this All-Inclusive Deed of Trust.

Cotrustees

(13) If two or more persons are designated as Trustee in this All-Inclusive Deed of Trust, any, or all, power granted by this All-Inclusive Deed of Trust to the Trustee may be exercised by any of those persons, if the other person or persons are unable, for any reason, to act. Any recital of this inability in any instrument executed by any of those persons shall be conclusive against Trustor and the Trustor's assigns.

[*Add following clause if trust deed is purchase money encumbrance:*]

Purchase Money Encumbrance

(14) The promissory note secured by this All-Inclusive Deed of Trust is given as a part of the purchase price of the Property.

[*Add following clause if there is senior trust deed or mortgage recorded against property:*]

Request for Notices of Default and Sale

(15) In accordance with *Section 2924b of the California Civil Code*, request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor [*or* Mortgagor], and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add if security instrument is a deed of trust:* and _____ (*name*) as Trustee,] be mailed to:

_____[*name*]
_____[*address*]
_____[*city, state, zip*]

NOTICE:
A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale under this All-Inclusive

Deed of Trust be mailed to Trustor at the address of Trustor set forth above.

TRUSTOR
_____ [*signature of trustor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
B. Trust Deeds and Mortgages

10-25A California Legal Forms--Transaction Guide § 25A.213

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.213 Statutory Mortgage [Civ. Code § 2948]

[1] Comment--Use of Form

The form in [2], *below*, is the statutory form of mortgage prescribed by *Civ. Code § 2948*. Since this form contains very few provisions concerning the rights and liabilities of the parties, it is seldom used except in situations involving small sums of money. For a more comprehensive mortgage, see *§ 25A.214*.

A mortgage should be executed and acknowledged by the mortgagor and recorded in the office of the county recorder where all or a portion of the real property is located [*Civ. Code §§ 1214*, *1215*; *see § 25A.214[1][c]*].

[2] FORM

Statutory Mortgage
Statutory Mortgage [*Civ. Code § 2948*]

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

MORTGAGE

THIS MORTGAGE, made the _____ day of _____, in the year _____, by _____[*name of mortgagor*] of _____[*address of mortgagor*], Mortgagor, to _____[*name of mortgagee*] of _____[*address of mortgagee*], Mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee all that property located in the [*add if applicable:* City of _____,] County of _____, California, described as: [*set forth legal description in center of page*], as security for the payment to Mortgagor of $_____, on [*or* before] the _____ day of [*month*], in the year _____, with interest thereon [or as security for the payment of an obligation evidenced by _____ (*insert description, e.g.,* a promissory note dated _____, executed by Mortgagor in favor of Mortgagee)].

_____ [*signature of mortgagor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPriorities & RecordingRecording Acts



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
B. Trust Deeds and Mortgages

10-25A California Legal Forms--Transaction Guide § 25A.214

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.214 Mortgage With Power of Sale

[1] Comment

[a] Use of Form

The form in [2], *below*, is a mortgage with a power of sale provision. The option of foreclosing by the statutory nonjudicial method [*see Civ. Code §§ 2924-2924h*] rather than by court action [*see Code Civ. Proc. §§ 725a*, *726*] is available to a mortgagee only if the mortgage contains a power of sale [*see Civ. Code § 2924(a)*]. A mortgage may confer a power of sale on the mortgagee or any other person. The power permits the person to sell the property pledged as security after a breach of the secured obligation [*Civ. Code § 2932*].

Many of the provisions of this form are substantially similar to those in the long form deed of trust set forth in *§ 25A.210[2]*. Therefore, the discussion in the comment to that form regarding specific provisions is equally applicable to this form.

For the statutory form for a mortgage, see *§ 25A.213[2]*.

[b] Required Contents

A mortgage must be created in writing [*Civ. Code § 2922*]. The mortgage should contain a complete and precise legal description of the real property [*see Scott v. Woodworth (1917) 34 Cal. App. 400, 408-410, 167 P. 543* ; *see also § 25A.11[4]*] and sufficient information to determine the extent of the underlying obligation [*D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736* ; *see § 25A.11[5]*; *see also* [c], *below*].

[c] Execution and Recordation

The mortgage should be executed and acknowledged by the mortgagor and recorded in the county where all or part of

the real property is located [*Civ. Code §§ 1214, 1215*]. To be accepted for recordation, a mortgage with a power of sale must contain the mortgagor's address and a request for notice of default under *Civ. Code § 2924b* [*Gov. Code § 27321.5(b)*; *see § 25A.11[6]*].

[d] Deed of Trust Distinguished

A mortgage with a power of sale is quite similar to a deed of trust. For discussion of the few differences between these two types of security instruments, see *§ 25A.11[1]*.

[2] FORM

Mortgage With Power of Sale

Mortgage With Power of Sale

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____

Space above this line for recorder's use

MORTGAGE

THIS MORTGAGE, made this _____ day of _____ [*month*], _____ [*year*] between _____[*name of mortgagor*], (the "Mortgagor"), whose address is _____[*street address, city, state, zip*], and _____[*name of mortgagee*], (the "Mortgagee");

MORTGAGOR HEREBY mortgages to Mortgagee [*add if power of sale:* with power of sale], all that property located in the [*if applicable:* City of _____,] County of _____, California, described as: _____[*set forth legal description of property in center of page*], (the "Property"), together with rents, issues, and profits of the Property, subject, however, to the right, power, and authority given to and conferred on Mortgagee to collect and apply these rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

(1) The payment of the indebtedness evidenced by a promissory note of this date, executed by Mortgagor in favor of Mortgagee in the original principal amount of $_____ (the "Note");

(2) The payment of any additional sums and interest that may hereafter be loaned to Mortgagor or the Mortgagor's successors or assigns by Mortgagee, when evidenced by another note or notes reciting that it or they are secured by this Mortgage; and

(3) The performance of each agreement contained in this Mortgage.

TO PROTECT THE SECURITY OF THIS MORTGAGE, MORTGAGOR AGREES:

Maintenance and Repair

(1) To keep the Property in good condition and repair; not to remove or demolish any buildings on the Property; to complete or restore promptly and in good and workmanlike manner any building that may be constructed, damaged, or destroyed on the Property; to pay when due all claims for labor performed and materials furnished for the Property; to comply with all laws affecting the Property or requiring any alterations or improvements to be made on the Property; not to commit or permit waste of the Property; not to commit, suffer, or permit any act on the Property in violation of law; and to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts that from the character or use of the Property may be reasonably necessary.

Fire Insurance

(2) To provide, maintain, and deliver to Mortgagee fire insurance satisfactory to and with loss payable to Mortgagee. The amount collected under any fire or other insurance policy may be applied by Mortgagee on any indebtedness secured by this Mortgage and in any order determined by Mortgagee, or at the option of Mortgagee the entire amount so collected or any part of that amount may be released to Mortgagor. This application or release shall not cure or waive any default or notice of default under this Mortgage or invalidate any act done pursuant to such a notice.

Defense of Security

(3) To appear in and defend any action or proceeding purporting to affect the security of this Mortgage or the rights or powers of Mortgagee, and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Mortgagee may appear, and in any suit brought by Mortgagee to foreclose this Mortgage.

Payment of Liens and Taxes

(4) To pay, at least _____ [*e.g.*, 10] days before delinquency, all taxes and assessments affecting the Property, including assessments on appurtenant water stock; all encumbrances, charges, and liens, with interest, on the Property or any part of the Property, which appear to be prior or superior to this Mortgage; and all costs, fees, and expenses of this Mortgage.

If Mortgagor fails to make any payment or to do any act as provided in this Mortgage, then Mortgagee may (but is not obligated to) make the payment or do the act in the required manner and to the extent deemed necessary by Mortgagee to protect the security of this Mortgage. The performance by Mortgagee of such an act shall not require notice to or demand on Mortgagor and shall not release Mortgagor from any obligation under this Mortgage. Mortgagee shall also have the following related rights and powers: to enter on the Property for the foregoing purposes; to appear in and defend any action or proceeding purporting to affect the security of this Mortgage or the rights or powers of Mortgagee; to pay, purchase,contest, or compromise any encumbrance, charge, or lien that in the judgment of either appears to be prior or superior to this Mortgage; to employ counsel; and to pay necessary expenses and costs, including attorneys' fees.

Reimbursement of Costs

(5) To pay immediately and without demand all sums so expended by Mortgagee, with interest from date of expenditure at the amount allowed by law in effect at the date of this Mortgage, and to pay any amount demanded by Mortgagee (up to the maximum allowed by law at the time of the demand) for any statement regarding the obligation secured by this Mortgage.

Condemnation Award

(6) Any award of damages in connection with any taking or condemnation, or for injury to the Property by reason of public use, or for damages for private trespass or injury to the Property, is hereby assigned and shall be paid to Mortgagee as further security for all obligations secured by this Mortgage. On receipt of any such proceeds, Mortgagee may hold the proceeds as further security, or apply or release them in the same manner and with the same effect as provided in this Mortgage for the disposition of proceeds of fire or other insurance.

Waiver of Late Payments

(7) By accepting payment of any sum secured by this Mortgage after its due date, Mortgagee does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure to pay any indebtedness secured by this Mortgage.

Mortgagee's Powers

(8) At any time and from time to time, Mortgagee may (a) release any part of the Property from this Mortgage; (b) consent to the making of any map or plat of the Property; (c) join in granting any easement on the Property; or (d) join in any extension agreement or any agreement subordinating the lien or charge of this Mortgage. Mortgagee need not provide Mortgagor with notice before taking any of the foregoing actions, and shall not be liable for the proper performance of the act. The exercise by Mortgagee of any of the foregoing powers shall not affect the personal liability of any person for payment of the indebtedness secured by this Mortgage, or the lien of this Mortgage on the remaining property as security for the repayment of the full amount secured by this Mortgage.

Certificate of Discharge

(9) When all sums secured by this Mortgage have been paid in full, the lien created by this Mortgage shall cease and become void, and Mortgagee shall cause a certificate of discharge to be entered of record stating that all sums secured by this Mortgage have been fully paid, satisfied, and discharged, and that the Property has been released from the lien of this Mortgage. At that time, Mortgagee shall also cancel the note secured by this Mortgage and shall return this Mortgage and the note to Mortgagor.

Assignment of Rents

(10) As additional security, Mortgagor hereby gives to and confers on Mortgagee the right, power, and authority during the continuance of this Mortgage, to collect the rents, issues, and profits of the Property, but reserves the right, prior to any default by Mortgagor in payment of any indebtedness secured by this Mortgage or in the performance of any

agreement under this Mortgage, to collect and retain these rents, issues, and profits as they become due and payable. On any such default, Mortgagee, without notice and without regard to the adequacy of the security for the indebtedness secured by this Mortgage, either personally or by agent or court-appointed receiver, may do the following: enter on and take possession of the Property or any part of the Property; sue for or otherwise collect all rents, issues, and profits, including those past due and unpaid; and apply these rents, issues, and profits, less costs and expenses of operation and collection (including reasonable attorneys' fees), on any indebtedness secured by this Mortgage, in any order determined by Mortgagee. The exercise of the foregoing rights by Mortgagee shall not cure or waive any default or notice of default under this Mortgage or invalidate any act done pursuant to such a notice.

Default and Foreclosure

(11) On default by Mortgagor in payment of any indebtedness secured by this Mortgage or in the performance of any obligation under this Mortgage, Mortgagee may declare all sums secured by this Mortgage immediately due and payable by instituting legal proceedings for judicial foreclosure of this Mortgage, in which case the net proceeds from the sale under the direction and decree of a court of competent jurisdiction shall be applied to the indebtedness secured by this Mortgage.

[*Include following if mortgage is to contain power of sale:*]

As an alternative to court foreclosure, on such a default, Mortgagee may declare all sums secured by this Mortgage immediately due and payable by recording a written notice of default. After the required time period has lapsed following the recordation of the notice of default, and after notice of sale has been given as required by law, Mortgagee, without demand on Mortgagor, shall sell the Property at the time and place specified in the notice of sale, either as a whole or in separate parcels, and in any order determined by Mortgagee, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Mortgagee may postpone sale of all or any portion of the Property by public announcement at the time and place of sale, and from time to timethereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Mortgagee shall deliver to the purchaser at the auction its deed conveying the Property sold, but without any covenant or warranty, express or implied. The recital in the deed of any matter or fact shall be conclusive proof of the truthfulness of the recital. Any person, including Mortgagor or Mortgagee, may purchase at the sale.

After deducting all costs, fees, and expenses of Mortgagee under this paragraph, including costs of procuring evidence of title incurred in connection with the sale, Mortgagee shall apply the proceeds of sale to payment of: all sums expended under the terms of this Mortgage, not then repaid, with accrued interest at the amount allowed by law in effect at the date of this Mortgage; all other sums then secured by this Mortgage; and the remainder, if any, to the person or persons legally entitled to the remaining proceeds.

General Provisions

(12) This Mortgage applies to, inures to the benefit of, and binds all parties to this Mortgage and their heirs, legatees, devisees, administrators, executors, successors, and assigns. In this Mortgage, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

The undersigned Mortgagor requests that a copy of any notice of default and of any notice of sale under this Mortgage be mailed to Mortgagor at the Mortgagor's address set forth above.

[*Add following clause if mortgage is purchase money mortgage:*]

The promissory note secured by this Mortgage is given as a part of the purchase price of the Property.

[*Insert following paragraph if mortgage is junior encumbrance on property:*]

Request for Notices of Default and Sale

(13) In accordance with *California Civil Code Section 2924b*, request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor [*or* Mortgagor], and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add if security instrument is deed of trust:* and _____ (*name*) as Trustee,] be mailed to:

_____[*name*]
_____[*address*]
_____[*city, state, zip*]

NOTICE: A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

MORTGAGOR
_____ [*signature of mortgagor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25A California Legal Forms--Transaction Guide § 25A.215

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.215 Agreement for and Notice of Deed Intended as Mortgage

[1] Comment--Use of Form

The form in [2], *below*, is an agreement and notice that a deed absolute on its face has been given only for security purposes and is intended as a mortgage. A security may be created by the execution of a deed with an agreement that the deed is to only constitute security for the payment of the grantor's indebtedness to the grantee [*Civ. Code §§ 2924(a), 2925*; *Banta v. Wise (1901) 135 Cal. 277, 279, 67 P. 129]* . When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, the grant is not defeated or affected as against any person other than the grantee or his or her heirs or devisees, or persons having actual notice, unless an instrument of defeasance (this form), duly executed and acknowledged, has been recorded in the office of the county recorder of the county where the property is situated [*Civ. Code § 2950*]. The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing the transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument [*Civ. Code § 2925*].

This form is a separate agreement of defeasance which should be recorded when the grant deed is recorded. An alternative method of creating and recording a defeasance is to insert a defeasance provision in the deed itself stating that the deed will be void on payment of the debt [*see § 25A.216*].

[2] FORM

Agreement for and Notice of Deed Intended as Mortgage
Agreement for and Notice of Deed Intended as Mortgage

)
Recording requested by)
_____ [*name*])
When recorded mail to)

_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

AGREEMENT FOR AND NOTICE OF GRANT DEED INTENDED AS MORTGAGE

In consideration of and as security for the making of a loan by _____[*name of lender*], (the "Grantee"), to _____[*name of borrower*], (the "Grantor"), in the amount of $_____, and evidenced by a promissory note dated _____, in the same amount, Grantor shall, concurrently with or subsequent to the execution of this agreement, execute and record a grant deed in the office of the County Recorder of _____ County, California, to Grantee conveying the real property located in the [*add if applicable:* City of _____,] County of _____, California, described as follows: [*set forth legal description in center of page*].

On payment in full of the above promissory note, Grantee shall execute and record in the office of the County Recorder of _____ County, California, a deed reconveying title to the real property to Grantor.
Dated: _____.

GRANTEE
_____ [*signature of grantee*]
[*typed name*]
GRANTOR
_____ [*signature of grantor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional MortgagesReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide § 25A.216

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.216 Grant Deed Provision Providing for Defeasance of Deed

[1] Comment--Use of Form

The form in [2], *below*, is a provision that may be inserted in a grant deed when the deed is executed solely for the purpose of securing payment of an indebtedness owing by the grantor to the grantee. When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions (such as full payment of a debt), the grant is not defeated or affected as against any person other than the grantee or his or her heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, is recorded in the office of the county recorder of the county where the property is located [*Civ. Code § 2950*]. One way to accomplish this is to insert a defeasance provision (this form) in the deed itself stating that the deed will be void on payment of the debt. An alternative method is to record a separate agreement of defeasance [*see § 25A.215*].

For discussion of deeds in general, see Ch. 27, *Deeds and Recording* .

[2] FORM

Grant Deed Provision Providing for Defeasance of Deed

Grant Deed Provision Providing for Defeasance of Deed

CONDITION OF DEFEASANCE PROVISION FOR GRANT DEED

This grant deed is executed and delivered on the condition that it shall be null and void on the payment in full by _____[*name of grantor*] to _____[*name of grantee*] of the indebtedness in the amount of $_____, as evidenced by a promissory note dated _____. On the payment in full of that indebtedness, Grantee shall immediately execute and record in the office of the County Recorder of

_____ County, California, a deed reconveying title to the real property to Grantor, in a form satisfactory to Grantor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional MortgagesReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide §§ 25A.217-25A.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25A.217[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
C. Note and Trust Deed Provisions

10-25A California Legal Forms--Transaction Guide § 25A.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.220 Note Provision for Waiver of Personal Liability

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision that may be inserted in a promissory note if the lender agrees to waive personal liability of the debtor on the note. If the funds from a loan are used toward the purchase of the secured property, the trust deed may be a "purchase money" security for purposes of antideficiency legislation and thereby protect the debtor from personal liability on the debt [*see Code Civ. Proc. §§ 580b, 726*; *see also* [b], *below*], whether or not a promissory note waives personal liability of the debtor. Conversely, even if the trust deed states that it is a "purchase price" or "purchase money" deed of trust, a court could determine that the funds were not in fact applied to the purchase price of the property [*see Davis v. Myre (1964) 228 Cal. App. 2d 616, 39 Cal. Rptr. 682]* .

[b] "Purchase Money" Security Defined

In the general sense, a purchase money security is a mortgage or trust deed given for the price of real property at the time of its conveyance [*see, e.g., Civ. Code § 2898*]. For purposes of the antideficiency statute, a "purchase money" security is a mortgage or deed of trust that is security for a debt incurred by the buyer for the purchase of real property when (1) the debt is owed to the seller by the buyer; or (2) the debt is owed to a third-party lender and the real property purchased is a dwelling for not more than four families that is occupied entirely or in part by the buyer [*Code Civ. Proc. § 580b*]. It is also an installment land sales contract under which the seller retains title until the buyer pays all or a large portion of the purchase price, since such a contract serves essentially the same function as a mortgage or trust deed [*Venable v. Harmon (1965) 233 Cal. App. 2d 297, 300, 43 Cal. Rptr. 490* ; *see Code Civ. Proc. § 580b*].

For a detailed discussion of the antideficiency statutes, see Ch. 25D, *Foreclosure* , and California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* (Matthew Bender).

[2] FORM

Note Provision for Waiver of Personal Liability

Note Provision for Waiver of Personal Liability

The Borrower under this Note assumes no personal liability for the payment of this Note, for any other default under the Deed of Trust securing this Note, or for the payment of any deficiency established after judicial foreclosure or after a Trustee's sale under the Deed of Trust. The Holder of this Note, by accepting this Note and the Deed of Trust securing it, waives any personal liability of Borrower and agrees to look solely to the security of the Deed of Trust for payment of this Note. In the event of any default by Borrower under the terms of this Note or the Deed of Trust, the sole recourse of Holder for any and all such defaults shall be by judicial foreclosure or by the exercise of Trustee's power of sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Note and Trust Deed Provisions

10-25A California Legal Forms--Transaction Guide § 25A.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.221 Due-on-Sale Clause

[1] Comment

[a] Use of Form

The form in [2], *below*, is an acceleration clause that may be included in a promissory note that is secured by a deed of trust (or mortgage) on real property. The clause permits the holder of the promissory note, at its option, to declare the entire unpaid balance of the note immediately due and payable should the maker of the note sell, transfer, convey, or further encumber the real property that is subject to the trust deed or mortgage securing the note. This type of clause is commonly referred to as a "due-on-sale" clause [*see Tucker v. Lassen Sav. & Loan Assn (1974) 12 Cal. 3d 629, 631 n.1, 116 Cal. Rptr. 633, 526 P.2d 1169]* , but is technically also a "due-on-encumbrance" clause since it permits acceleration on further encumbrancing of the property [*see* [e], *below*].

An acceleration clause applicable to residential property must be included both in the promissory note and in the trust deed or mortgage [*Civ. Code § 2924.5*; *see* [f][i], *below*]. With minor modifications, this form may be inserted in a trust deed or mortgage.

For discussion of statutory changes permitting a lender to accelerate a loan following a trustor's or mortgagor's failure to pay taxes, rents, assessments, or insurance premiums [*see Civ. Code § 2924.7*], see *§ 25A.210[1][g]*.

[b] Purpose

The intended purpose of a due-on-sale clause is to prevent the maker of the note from selling the real property securing the note to irresponsible parties who might either (1) destroy or commit waste on the property, or (2) be in such a precarious financial position as to make foreclosure practically inevitable [*see La Sala v. American Sav. & Loan Assn (1971) 5 Cal. 3d 864, 879-880, 97 Cal. Rptr. 849, 489 P.2d 1113]* . The purpose of making the entire unpaid balance of the note due and payable on further encumbrancing of the property is to prevent the maker of the note from becoming

"over-indebted" and unable to make payments on the note as they mature [*see* California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender)]. A due-on-sale clause also enables a lender in a period of rising interest rates to maintain its real estate loan portfolio at the current market rate of interest by requiring real estate loans to be refinanced at higher market rates of interest as the original borrowers sell or convey the mortgaged properties [*see La Sala v. American Sav. & Loan Assn (1971) 5 Cal. 3d 864, 880 n.17, 97 Cal. Rptr. 849, 489 P.2d 1113]* . For all of these reasons, a seller or lender may insist on inclusion of a due-on-sale and/or due-on-encumbrance clause in the security instruments to be executed by the buyer or borrower.

[c] Effect on Prepayment Penalty

If a lender elects to enforce a due-on-sale clause, it may not also impose a prepayment penalty [*12 C.F.R. § 591.5(b)(2)*]. For a discussion of the circumstances under which a prepayment penalty can and cannot be charged in connection with the enforcement of a due-on-sale clause, see *§ 25A.222[1][e]*.

[d] Validity of Due-on-Sale Clause under 1982 Garn Act

[i] Preemption of State Law

Under Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 [*12 U.S.C. § 1701j-3*] ("Garn Act") and implementing regulations of the Federal Home Loan Bank Board ("FHLBB") [*12 C.F.R. §§ 591.1-591.6*], all lenders may enforce a due-on-sale clause in any contract involving a real property loan that was made on or after October 15, 1982, with certain exceptions [*12 U.S.C. § 1701j-3*; *see 12 C.F.R. § 591.5*; *see also 12 C.F.R. § 591.2(b)* (definition of "due-on-sale clause")]. Although these federal laws permanently preempt conflicting state laws [*12 U.S.C. § 1701j-3(b)(1)*; *12 C.F.R. § 591.1(b)*], certain loans made before the above date (i.e., during a "window period") were, for a limited time, subject to state prohibitions on the exercise of due-on-sale clauses.

Under the Garn Act, the exercise of the option under a due-on-sale clause is exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower are fixed and governed by the contract [*12 U.S.C. § 1701j-3(b)(2)*; *12 C.F.R. §§ 591.3(b), 591.4(b)*]. The FHLBB's regulations exclusively govern the due-on-sale practices of all lenders without regard to limitations imposed by state law, including prohibitions against restraints on alienation, penalties and forfeitures, equitable restrictions, and state law dealing with equitable transfers [*12 C.F.R. § 591.5(a)*].

[ii] Prohibitions on Enforcement

The preemptive FHLBB regulations prohibit enforcement of a due-on-sale clause in any real property loan (including a window-period loan) secured by a lien on residential real property containing less than five dwelling units and occupied or to be occupied by the borrower under any of the following circumstances [*12 U.S.C. § 1701j-3(d)*; *12 C.F.R. § 591.5*]:

- The creation of an encumbrance that is junior to the lender's security (if no transfer of occupancy rights is involved).
- The creation of a purchase-money security interest for household appliances.
- A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety.
- The granting of a leasehold interest of three years or less not containing an option to purchase.
- A transfer in which the transferee occupies or will occupy the property and (1) the transfer is to a

relative resulting from the death of the borrower; (2) the spouse or children become an owner of the property; or (3) the transfer results from a decree of dissolution of marriage, legal separation agreement, or an incidental property settlement agreement by which the spouse becomes an owner of the property.

- A transfer into an inter vivos trust in which the borrower is and remains the beneficiary and occupant, unless, as a condition precedent, the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.

If one of the above exceptions applies, but a subsequent event disqualifies the transfer from the previously applicable exception, then the lender will no longer be prevented from enforcing a due-on-sale clause [*12 C.F.R. § 591.5(b)(5)*].

[iii] Waiver and Release

A lender waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the lender and the existing borrower's prospective successor in interest agree in writing that (1) the successor in interest will be obligated under the terms of the loan; and (2) interest on sums secured by the lender's security interest will be payable at a rate the lender will request. Thereafter, the lender must release the existing borrower from all obligations under the loan instruments, and the lender is deemed to have made a new loan to the existing borrower's successor in interest [*12 C.F.R. § 591.5(b)(4)*]. These waiver and release rules apply to all loans secured by homes occupied by borrowers made by a federal association after July 31, 1976, and to all loans secured by homes occupied by borrowers made by other lenders after May 13, 1983 [*12 C.F.R. § 591.5(b)(4)*].

[e] Due-on-Encumbrance Clauses

A due-on-encumbrance clause differs from a due-on-sale clause in that it grants the creditor the option of accelerating the loan if the debtor encumbers the property without the creditor's consent. The Garn Act preempts state law with respect to the enforceability of due-on-encumbrance clauses since its definition of a due-on-sale clause is broad enough to encompass encumbrances [*see* Witkin, Summary of California Law, vol. 4, *Security Transactions in Real Property*, § 91 (10th ed. 2005)].

As mentioned above, the Garn Act prohibits acceleration on the creation of a junior encumbrance, but only when the loan is secured by a lien on residential real property containing less than five dwelling units and occupied or to be occupied by the borrower [*12 U.S.C. § 1701j-3(d)*; *12 C.F.R. § 591.5*; *see* [d][ii], *above*]. State law applies to the creation of a junior encumbrance when the loan is secured by commercial or industrial property or residential property containing five or more units. Although California statutes do not limit encumbrance-based accelerations of loans secured by these types of properties, the general rule imposed by the California courts for these properties is that a due-on-encumbrance clause can be enforced by a lender only if it is reasonably necessary to protect the lender's security [*La Sala v. American Sav. & Loan Assn (1971) 5 Cal. 3d 864, 877-882, 97 Cal. Rptr. 849, 489 P.2d 1113]* .

California statutes do regulate loans secured by single-family, owner-occupied dwellings or residential property containing four or fewer units, in a manner that does not appear to be inconsistent with the above Garn Act requirements [*see* [f]-[g], *below*].

[f] California Requirements

[i] Inclusion of Acceleration Clause in Both Trust Deed and Note

To be valid, an acceleration clause in a security transaction encumbering real property containing four or fewer residential units, or encumbering real property on which four or fewer residential units are to be constructed, must be set forth in full in both the deed of trust or mortgage encumbering the property and the promissory note or other document

evidencing the secured obligation [*Civ. Code § 2924.5*]. *Civ. Code § 2924.5* applies only to trust deeds and mortgages executed on or after July 1, 1972, and specifically to clauses that accelerate the secured obligation on the sale, conveyance, alienation, lease, succession, assignment, or other transfer of the property subject to the trust deed or mortgage [*Civ. Code § 2924.5*]. The purpose of *Civ. Code § 2924.5* is to provide notice to the borrower of a due-on-sale clause.

In cases not covered by the statute, it is not essential to include the acceleration clause in both the promissory note and the security instrument [*but see* the discussion of recordation in the next paragraph]. A promissory note and the mortgage or trust deed securing it are to be construed together as one contract [*First-Trust Joint S.L. Bk. of Chicago v. Meredith (1936) 5 Cal. 2d 214, 218, 53 P.2d 958* ; *San Gabriel Val. Bk. v. Lake View etc. Co. (1906) 4 Cal. App. 630, 632, 89 P. 360]* . Therefore, in cases not subject to the statute, an acceleration clause contained only in a mortgage or trust deed is sufficient to accelerate the unpaid balance due on the promissory note secured by the mortgage or trust deed [*First-Trust Joint S.L. Bk. of Chicago v. Meredith (1936) 5 Cal. 2d 214, 218, 53 P.2d 958]* . Similarly, in cases not covered by the statute, an acceleration clause contained only in a promissory note is sufficient to enable the mortgage or trust deed securing the note to be foreclosed at the time the holder of the note accelerates payment of the note under the acceleration clause [*San Gabriel Val. Bk. v. Lake View etc. Co. (1906) 4 Cal. App. 630, 632, 89 P. 360]* .

Notwithstanding the above decisions, many practitioners consider it good practice to include the acceleration clause in both the security instrument and the note because of the laws governing recordation and constructive notice. Specifically, inclusion of an acceleration clause in a promissory note but not in the security instrument presents problems because (1) a promissory note is not an instrument affecting the title to or possession of real property and therefore cannot be recorded [*Gov. Code § 27280*] and (2) there appears to be some question as to the extent reference to the note in the recorded trust deed or mortgage imparts constructive notice of the contents of the promissory note and especially any acceleration clauses that may be contained in the note. If, however, the acceleration clause is set forth in the trust deed or mortgage as well as in the promissory note, it may be recorded as part of the security instrument. Recording of the acceleration clause as part of the trust deed or mortgage will give constructive notice of it to all prospective purchasers or encumbrancers of the real property subject to the trust deed or mortgage [*see Civ. Code § 2952*; *see also § 25A.11[6]*].

[ii] Limitations on Acceleration

A mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling may not be declared in default, nor may the maturity date of the indebtedness secured by the mortgage or deed of trust be accelerated, solely because the owner has further encumbered all or any part of the real property with a junior mortgage or junior deed of trust [*Civ. Code § 2949(a)*]. For these purposes, a single-family, owner-occupied dwelling is a dwelling that will be owned and occupied by a signatory to the mortgage or trust deed encumbering the dwelling within 90 days of the execution of the security instrument [*Civ. Code § 2949(b)*]. The statute applies only to mortgages and deeds of trust executed after March 7, 1973, and cannot be waived [Stats. 1972, ch. 698, § 2].

Under a later-enacted statute, an obligee may not accelerate the maturity date of the principal and accrued interest on a loan secured by a mortgage or trust deed on residential real property (i.e., property containing four or fewer housing units) solely by reason of certain specified transfers in title to the real property [*Civ. Code § 2924.6(a)*]. These transfers include all of the following [*Civ. Code § 2924.6(a)*]:

- A transfer resulting from the death of an obligor to the obligor's spouse who is also an obligor;
- A transfer by an obligor when the spouse becomes a co-owner of the property;
- A transfer resulting from a decree of dissolution of the marriage or legal separation, or from a

property settlement agreement incidental to such a decree that requires the obligor to continue to make the loan payments by which a spouse who is an obligor becomes the sole owner of the property;

- A transfer by an obligor or obligors into an inter vivos trust in which the obligor or obligors are beneficiaries; and

- Making the real property or any portion of the property subject to a junior encumbrance or lien.

The statute applies only to loans executed or refinanced on or after January 1, 1976 [*Civ. Code § 2924.6(d)*], and its provisions may not be waived [*Civ. Code § 2924.6(b)*].

Comparison of *Civ. Code § 2949* and *Civ. Code § 2924.6* reveals some ambiguity as to which statute governs loans made after January 1, 1976, on single-family residences. *Civ. Code § 2949* requires the borrower to reside on the property within 90 days of the loan's execution, while *Civ. Code § 2924.6* has no such requirement. In view of its later enactment and less restrictive language, *Civ. Code § 2924.6* probably controls as to loans made on single-family residences after January 1, 1976.

If inconsistent with the Garn Act, the state statutes discussed above would be preempted by the Act. However, in view of their apparent compatibility with the provisions of the Garn Act [*see* [d] and [e], *above*], the statutes are probably not preempted.

[g] Summary of Prior California Law

Although California law regarding due-on-sale clauses has been superseded by federal law [*see* [d][i], *above*], the attorney will probably come across numerous references to prior state law when researching acceleration clauses. Consequently, the attorney may find the following summary of prior law useful.

In 1978, the California Supreme Court held that a due-on-sale clause contained in a promissory note or trust deed could not be enforced by an institutional lender on the occurrence of an outright sale unless the lender could demonstrate that enforcement was reasonably necessary to protect against impairment to its security or the risk of default [*Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953-954, 148 Cal. Rptr. 379, 582 P.2d 970]* . In 1982, the California Supreme Court held that the *Wellenkamp* rule against automatic enforcement of due-on-sale clauses applied to private lenders, not just institutional lenders, and to loans to purchase investment property, not just residential property. The Court held that the reasons for the *Wellenkamp* rule applied in these situations and that there was no basis for distinguishing *Wellenkamp* [*Dawn Investment Co. v. Superior Court (1982) 30 Cal. 3d 695, 700-703, 180 Cal. Rptr. 332, 639 P.2d 974]* . Using the same rationale, another court held that the *Wellenkamp* rule applied to an individual homeowner who sold his or her home and took back a promissory note and deed of trust [*West v. Buffo (1983) 139 Cal. App. 3d 93, 96, 188 Cal. Rptr. 535]* .

[2] FORM

Due-on-Sale Clause

Due-on-Sale Clause

Should the undersigned agree to or actually sell, convey, transfer, [or] dispose of [*add if encumbrancing of property may accelerate loan:,* or further encumber] the real property described in the deed of trust securing this Note, or any part of it, or any interest in it, without first obtaining the written consent of the Holder of the Note, then all obligations secured by this Note may be declared due and payable, at the option of Holder. Consent to one transaction of this type will not constitute a waiver of the right to require consent to future or successive transactions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsGarn-St. Germain Depository Institutions ActReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale ClausesReal Property LawFinancingState Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
C. Note and Trust Deed Provisions

10-25A California Legal Forms--Transaction Guide § 25A.222

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§ 25A.222 Prepayment Penalty Provision

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative versions of a provision commonly referred to as a "prepayment penalty clause." A lender should insert such a clause in a promissory note and trust deed (or mortgage) if a borrower is to be charged for payment of the loan before its original maturity date. Although the provisions of this form are designed to be inserted into a promissory note, they may be easily modified for use in a trust deed or mortgage.

In general, there is no right to prepay a loan unless prepayment is authorized by statute or by the parties to the promissory note [*see Civ. Code § 1490*; *see also Williams v. Fassler (1980) 110 Cal. App. 3d 7, 10, 167 Cal. Rptr. 545]* . Prepayment fees also may be established by statute or by the provisions of the promissory note. This comment examines the California statutes authorizing and regulating prepayments, and also considers federal restrictions and court-imposed limitations on prepayment penalties that are not regulated by statute. The California requirements have been incorporated into the first two alternative provisions set forth in this form. The remaining provisions may be used when the loan is not subject to these specific statutory requirements [*see* [c][iii], *below*].

One purpose of a prepayment penalty clause is to discourage refinancing of loans by borrowers when interest rates drop. Another purpose is to provide the lender with additional compensation to cover costs associated with reinvestment of funds generated from early payment of loan funds.

[b] Federal Statutes

Regulations of the Office of Thrift Supervision, which preempt state law and apply to loans by federal savings and loan associations, permit imposition of a prepayment penalty as provided in the loan contract [12 C.F.R. § 545.34(c)].

Under Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 [*12 U.S.C. § 1701j-3*] (the "Garn Act") and its implementing regulations [*12 C.F.R. §§ 591.1-591.6*; *see § 25A.221[1]*], applicable to all lenders, a lender who declares by written notice that a loan is due pursuant to a due-on-sale clause or seeks payment in full as a result of invoking such a clause, cannot also impose a prepayment penalty or equivalent fee [*12 C.F.R. § 591.5(b)(2)*]. A lender also may not impose a prepayment penalty or equivalent fee when (1) the lender (or the party acting on the lender's behalf) fails to approve within 30 days the completed credit application of a "qualified transferee" of the secured property to assume the loan in accordance with the terms of the loan, and (2) thereafter the borrower transfers the secured property to that transferee and prepays the loan in full within 120 days after receipt by the lender of the completed credit application. A "qualified transferee" is a person who qualifies for the loan under the lender's applicable underwriting standards and who occupies or will occupy the secured property [*12 C.F.R. § 591.5(b)(3)*].

[c] California Statutory Requirements

[i] Transactions Involving Single-Family, Owner-Occupied Dwelling and Mortgage Loan Broker (First Alternative)

For a loan that is secured by real property consisting of a single-family, owner-occupied dwelling and that is negotiated by a mortgage loan broker for compensation [*see Bus. & Prof. Code §§ 10248.3, 10131(d), 10240(b)*], a borrower has the right to prepay in whole or in part at any time the principal and accrued interest on the loan. However, the lender has a limited right to charge a prepayment penalty for any prepayment made within seven years of the date of execution of the mortgage or trust deed. During that period, an amount not exceeding 20 percent of the unpaid balance may be prepaid in any 12-month period without penalty, but a prepayment charge may be imposed on any amount exceeding this 20-percent/12-month limitation. The charge may not exceed an amount equal to the payment of six months' advance interest on the amount subject to the prepayment penalty [*Bus. & Prof. Code § 10242.6(a)*; *see* 1st alternative P in [2], *below*]. Notwithstanding the foregoing, the prepayment penalty described above may not be charged to a borrower if the dwelling securing the loan cannot be occupied due to damage caused by a natural disaster; the Governor has declared a state of emergency in connection with the disaster [*see Gov. Code §§ 8550-8668*]; and the prepayment is causally related to the disaster [*Bus. & Prof. Code § 10242.6(b)*].

For these purposes, "owner-occupied dwelling" means a dwelling that will be owned and occupied by a signatory to the mortgage or trust deed secured by the dwelling within 90 days of the execution of the mortgage or trust deed [*Bus. & Prof. Code § 10242.6(c)*].

[ii] Owner-Occupied Residential Property Containing Four or Fewer Units (Second Alternative)

Except as provided in *Bus. & Prof. Code § 10242.6* [*see* [i], *above*], prepayment of the principal and accrued interest on a loan secured by a mortgage or trust deed on owner-occupied residential real property containing four or fewer units may be made in whole or in part at any time, but only prepayments made within five years of the date of execution of the mortgage or trust deed are potentially subject to a penalty. Within that five-year period, a prepayment charge may be imposed on any amount prepaid in any 12-month period that exceeds 20 percent of the original principal amount of the loan. This charge must not exceed an amount equal to the payment of six months' advance interest on the amount subject to the penalty. An amount not exceeding 20 percent of the original principal amount may be prepaid in any 12-month period without penalty [*Civ. Code § 2954.9(b)*; *see* 2nd alternative P in [2], *below*].

Notwithstanding the above, a prepayment penalty may not be charged to a borrower if (1) the residential structure securing the loan cannot be occupied due to damage caused by a natural disaster; (2) the Governor has declared a state of emergency in connection with the disaster [*see Gov. Code §§ 8550-8668*]; and (3) the prepayment is causally related to the disaster [*Civ. Code § 2954.9(c)*].

[iii] Other Residential Property of Four or Fewer Units (Third Through Fifth Alternatives)

Except as otherwise provided by statute [*see* [i] and [ii], *above*], when the original obligation is a loan for residential property of four or fewer units, the borrower under any note or evidence of indebtedness secured by a trust deed, mortgage, or any other lien on real property may repay at any time the whole or any part of the balance due, together with accrued interest [*Civ. Code § 2954.9(a)(1)*]. However, a borrower may obligate himself or herself, by a written agreement, to pay a prepayment charge [*Civ. Code § 2954.9(a)(2)*]; *see* 3rd to 5th alternative PP of form in [2], *below*]. In addition, the right to prepay does not apply during any calendar year to a bona fide loan secured by a trust deed or mortgage given back during that calendar year to the seller by the purchaser on account of the purchase price if the seller does not take back four or more trust deeds or mortgages during that same calendar year [*Civ. Code § 2954.9(a)(3)*]. Stated differently, the seller's protection from prepayment during the year of the loan does not apply if the seller takes back four or more trust deeds or mortgages during the calendar year. The statute specifically provides that it must not be construed to prohibit a borrower from obligating himself or herself to pay a prepayment charge by an agreement in writing with the lender [*Civ. Code § 2954.9(a)(3)*]. Notwithstanding the above, the prepayment penalty may not be charged to a borrower if (1) the residential structure securing the loan cannot be occupied due to damage caused by a natural disaster; (2) the Governor has declared a state of emergency in connection with the disaster [*see Gov. Code §§ 8550-8668*]; and (3) the prepayment is causally related to the disaster [*Civ. Code § 2954.9(c)*].

When the borrower agrees in writing to pay a prepayment charge pursuant to the above requirements, there are no additional statutory requirements governing the prepayment obligation. However, the parties should confirm that any negotiated arrangement does not violate court-imposed limitations [*see* [d], *below*]. The third, fourth, and fifth alternative provisions in this form offer alternative prepayment arrangements that comply with the judicial restrictions.

[iv] Variable Interest and Adjustable-Rate Loans

If a lender other than a supervised financial organization [*see Civ. Code § 1916.5(d)(1)* (definition); *see also § 25A.226[1][b]*] makes a variable interest rate loan that secures the purchase or construction of four or fewer residential units, the security instrument and note evidencing the loan must grant the borrower the right to prepay the loan in whole or in part without a prepayment charge within 90 days after the borrower receives notice of an increase in the interest rates [*see Civ. Code § 1916.5(a)(5), (b)(1)*]. Borrowers under adjustable-payment, adjustable-rate loans [*see Civ. Code § 1916.7*] secured by borrower-occupied residential property containing four or fewer units may prepay the loan in whole or in part without a prepayment charge at any time [*Civ. Code § 1916.7(b)(8)*].

The variable interest rate loans and adjustable-payment, adjustable-rate loans referred to above are created by state statute and must be distinguished from the federal adjustable rate mortgages (ARMs). State regulation of non-fixed interest rate loans is more restrictive than comparable federal legislation. Because the ARMs allow higher interest rate changes per year and are generally more favorable to a lender, the above state-regulated loans have been rendered largely superfluous [*see* California Real Estate Law & Practice, Ch. 101, *Conventional Financing Loans* (Matthew Bender)]. For discussion of other requirements applicable to variable interest rate loans and adjustable-payment, adjustable-rate loans, see *§ 25A.226[1]*.

[v] Cal-Vet Loans

Real estate loans made under the California Veterans' Farm and Home Purchase Act (Cal-Vet loans) may be prepaid without penalty [*see Mil. & Vet. Code §§ 987, 987.71*]. For a description of Cal-Vet Loans, see "--Cal-Vet Loans" in the Legal Background to Ch. 25, *Real Estate Loans* .

[vi] Real Property Sales Contracts

A real property sales contract [*see Civ. Code § 2985*] for land that has been subdivided into a residential lot or lots that contain a dwelling for not more than four families may be prepaid in whole or in part at any time without penalty, except that the contract may prohibit prepayment during the first 12-month period after the sale. Any other waiver of the

statutory right by the buyer is void [*Civ. Code § 2985.6*]. For illustrative real property sales contracts, see *§§ 25A.230[2]* and *25A.234[2]*.

[vii] Interaction With Due-on-Sale Clauses

For discussion of statutory limitations on the imposition of a prepayment fee following the exercise of an acceleration clause [*see Civ. Code § 2954.10*], see [e], *below*.

[d] Judicial Enforcement of Prepayment Penalties

In the absence of applicable statutory restrictions, borrowers and lenders have a relatively free hand in setting the amount of any prepayment penalty. Although dicta in several cases suggest that unconscionable prepayment penalties will not be upheld [*see* Hellbaum v. Lytton Sav. & Loan Ass'n (1969) 274 Cal. App. 2d 456, 459, 79 Cal. Rptr. 9 (*disapproved on other grounds in Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*)], parties clearly have the right to establish penalties that are reasonable at the time of formation. For example, an agreement between private parties specifying a 50 percent prepayment penalty was upheld when the penalty was reasonably related to the obligee's anticipated risk of incurring increased tax liability on prepayment [*Williams v. Fassler (1980) 110 Cal. App. 3d 7, 13, 167 Cal. Rptr. 545]* .

The imposition of prepayment penalties in connection with the refinancing of promissory notes is not an unreasonable restraint on alienation because it is reasonably related to certain legitimate interests of lenders. Specifically, lenders need to cover their costs due to potential lag time and administrative processing before making new loans [*Sacramento Sav. & Loan Assn v. Superior Court (1982) 137 Cal. App. 3d 142, 146-147, 186 Cal. Rptr. 823]* . The California court that reached these conclusions was examining a prepayment penalty that was assessed against commercial borrowers. That penalty was computed using the statutory formula applicable to the prepayment of loans on owner-occupied residential dwellings [*see Bus. & Prof. Code § 10242.6*; *see also* [c][i], [ii], *above*]. Because the Legislature considered that prepayment formula reasonable when applied to the purchaser of a home, the court concluded that it was also reasonable when applied to commercial borrowers [*Sacramento Sav. & Loan Assn. v. Superior Court (1982) 137 Cal. App. 3d 142, 146-147, 186 Cal. Rptr. 823]* .

[e] Effect of Exercise of Due-on-Sale Clauses

The exercise of due-on-sale clauses contained in loans originated on or after October 15, 1982, is governed by Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 [*12 U.S.C. § 1701j-3*] and its implementing regulations [*12 C.F.R. §§ 591.1-591.6*; *see § 25A.221[1]*]. As discussed in [b], *above*, a lender may not impose a prepayment penalty when it elects to exercise a due-on-sale clause in a loan [*12 C.F.R. § 591.5(b)(2)*].

Under certain circumstances, California law prohibits an obligee who exercises a contractual right to accelerate the maturity date of the principal and accrued interest on any loan secured by a mortgage or trust deed on real property from claiming, exacting, or collecting any charge, fee, or penalty for any prepayment resulting from that acceleration [*Civ. Code § 2954.10*]. This statutory prohibition does not apply to loans (other than those secured by residential real property containing four or fewer units) in which the obligor has (1) expressly waived, in writing, the right to repay in whole or in part without penalty or (2) expressly agreed in writing to pay a prepayment penalty on acceleration. Any such waiver or agreement must be separately signed or initialed by the obligor, and its enforcement must be "supported by evidence of a course of conduct by the obligee of individual weight to the consideration in that transaction for the waiver or agreement" [*Civ. Code § 2954.10*]. The California prohibition also does not apply in cases governed by preemptive federal regulations [*see* [b], *above*].

[f] VA and FHA Loans

Federal regulations for prepayment penalties apply to Department of Veterans Affairs (VA) loans [*see 38 C.F.R. §*

36.4310] and Federal Housing Administration (FHA) loans [*see 24 C.F.R. § 207.253*]. For detailed coverage of these loans, see Ch. 25, *Real Estate Loans* .

[2] FORM

Prepayment Penalty Provision

Prepayment Penalty Provision

[*First Alternative (see Bus. & Prof. Code § 10242.6*):]

Borrower reserves the right to make additional payments on the principal and accrued interest of this indebtedness at any time prior to maturity; provided, however, that if these additional payments exceed, during any 12-month period within seven years of the date of execution of the deed of trust securing this Note, 20 percent of the unpaid balance of this Note, Borrower must first pay to the Holder of this Note a sum equal to six months' advance interest on the excess amount prepaid.

[*Second Alternative (see Civ. Code § 2954.9(b)):*]

Borrower reserves the right to make additional payments on the principal and accrued interest of this indebtedness at any time prior to maturity; provided, however, that if these additional payments exceed, during any 12-month period within five years of the date of execution of the deed of trust securing this Note, 20 percent of the original principal amount of this Note, Borrower must first pay to the Holder of this Note a sum equal to six months' advance interest on the amount prepaid in excess of 20 percent of the original principal amount.

[*Third Alternative (charging for prepayments above specified percentage):*]

Borrower shall have the right to make additional payments on the principal and accrued interest of this indebtedness at any time prior to maturity; provided, however, that if these additional payments during [*specify period, e.g.*, any 12-month period] should aggregate more than _____ percent of the unpaid balance, Borrower must first pay to the Holder of this Note a sum equal to _____ percent of the amount of all prepayments in excess of this _____ percent.

[*Fourth Alternative (charging unearned interest):*]

Borrower may pay this Note in full at any time by paying principal, accrued interest, plus unearned interest equal to _____ days' interest on this Note as consideration for the right to make the prepayment.

[*Fifth Alternative (imposing charge and providing for decreasing fee):*]

Borrower may prepay this Note in whole or in part after _____ years from the date of this Note, provided Borrower pays to the Holder of this Note a prepayment fee equal to _____ percent of the amount of the principal prepaid. [*Add if desired:* For each year after _____ years from the date of this Note, the amount of the fee for prepayment shall decrease by _____ percent, except the fee shall never be less than _____ percent.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsFederal Savings AssociationsBanking LawFederal ActsGarn-St. Germain Depository Institutions ActBanking LawRegulatory AgenciesU.S. Office of Thrift SupervisionContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.223

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.223 Late Charge Provision

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision for a late charge that may be included in a promissory note. Notes used in real estate transactions commonly contain a clause providing for the imposition of a late charge when a payment is not made when due or is not made within a specified number of days of its due date.

Late charges are designed to serve a dual purpose [*see Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 739-740, 108 Cal. Rptr. 845, 511 P.2d 1197*]:

- To compensate the lender for its administrative expenses and the cost of the money wrongfully withheld.

- To encourage the borrower to make timely future payments.

[b] Late Charges as Liquidated Damages

Since a late charge provision imposes an additional charge on the borrower on default, it is subject to the requirements of *Civ. Code § 1671* [*Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 738, 108 Cal. Rptr. 845, 511 P.2d 1197*]. Under § 1671, a liquidated damages provision in a contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(b)*; for a more detailed discussion of liquidated damage provisions in general, see *Ch. 75, Formation of Contracts and Standard Contract Provisions, § 75.251*].

[c] State Statutory Restrictions

[i] Amount of Late Charge

A late charge imposed under a loan secured by a mortgage or trust deed on property containing only a single-family, owner-occupied dwelling may not exceed the greater of $5 or the equivalent of 6 percent of the installment due that is applicable to payment of principal and interest on the loan [*Civ. Code § 2954.4(a)*]. A payment may not be treated as a "late payment" until at least 10 days following the due date of the installment, and a late charge may not be imposed more than once for the late payment of the same installment [*Civ. Code § 2954.4(a)*]. These restrictions on the amounts of late charges do not apply to loans made by credit unions, industrial loan companies, consumer finance lenders, or commercial finance lenders, or to loans made or negotiated by a real estate broker subject to specific provisions of the Business and Professions Code [*Civ. Code § 2954.4(e)*].

[ii] Required Notice to Borrower

Before a lender may impose the first late charge on a delinquent payment of a loan secured by real property, the borrower must either (1) be notified in writing and given at least 10 days from the mailing of the notice in which to cure the delinquency or (2) be informed, by a billing or notice sent for each payment due on the loan, of the date after which such a charge will be assessed [*Civ. Code § 2954.5(a)*]. The notice sent to the borrower must contain the amount of the late charge or the method by which it is calculated [*Civ. Code § 2954.5(a)*]. If a subsequent payment becomes delinquent, the borrower must be notified in writing that the charge will be imposed if payment is not received, or the borrower must be notified at least semiannually of the total amount of late charges imposed during the period covered by the notice [*Civ. Code § 2954.5(b)*].

The notice of the late charge must be sent to the address specified by the borrower, or, if no address is specified, to the borrower's address as shown in the lender's records [*Civ. Code § 2954.5(c)*]. When there are multiple borrowers, notice mailed to one of them is deemed to comply with the statutory requirements [*Civ. Code § 2954.5(d)*]. Failure of the lender to give the required notice does not excuse or defer the borrower from complying with obligations under the loan, other than the obligation to pay a late payment charge [*Civ. Code § 2954.5(e)*].

[d] Loans by Federal Savings Associations

The state statutory restrictions discussed above do not apply to loans made by federal savings and loan associations, since federal law is preemptive in this area. For loans by a federal savings and loan association on the security of a home to be occupied by the borrower, no late charge may be collected unless the monthly billing, coupon, or notice regarding the payments due discloses the date after which the charge may be assessed. A late charge cannot be assessed for any payment received within 15 days of the due date of the payment [*12 C.F.R. § 560.33*].

[2] FORM

Late Charge Provision

Late Charge Provision

Borrower agrees to pay a late charge to the Holder of this Note for any amount of principal or interest due under this Note and not received by Holder on or before the [*number, e.g.,* 15th] day of each month. This date is _____ calendar days after the date the installment is due. The amount of the late charge is $[*or* _____ percent of the overdue amount]. This late charge is a reasonable sum that takes into consideration all of the circumstances existing on the date of this Note and is a fair and reasonable estimate of the costs and expenses that will be incurred by Holder due to Borrower's failure to make timely payments. The parties to this Note agree that it would be impracticable or extremely difficult to fix the actual damages resulting to Holder from Borrower's failure to make timely payments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsEnforcementOverdue InstrumentsContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.224

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.224 Provision for Future Advances

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision that may be included in a trust deed to specify the obligations (including future advances) that are to be secured by the trust deed. Specifically, it recites that, in addition to the principal obligation being created contemporaneously with the borrower's execution of the trust deed, the deed of trust also secures additional amounts that may be advanced to the borrower in the future. The portion of the provision referring to the advance of additional future amounts is commonly referred to as a "future advance" clause. Although this type of provision may be referred to as a "dragnet" clause, the classic dragnet clause differs from this form in that it covers not only present and future obligations between the borrower and lender, but also past, preexisting obligations [*see* [b], *below*].

With minor modifications, the following provision may be inserted into a mortgage rather than a trust deed.

[b] Future Advance Clauses

[i] Validity

A future advance clause secures other debts owed by the trustor to the beneficiary arising after the execution of the trust deed [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 292, 128 Cal. Rptr. 338]* . These clauses have long been held valid in California [*see Civ. Code § 2884*; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 398, 126 Cal. Rptr. 549]* . To be valid, the clause must state that it secures future advances, but need not specify the amount or number of future advances [*Imhoff v. Title Ins. & Trust Co. (1952) 113 Cal. App. 2d 139, 144, 247 P.2d 851* ; *Oaks v. Weingartner (1951) 105 Cal. App. 2d 598, 601-602, 234 P.2d 194]* . The most common form of future advance clause provides, as does this form, that it only secures later loans that specifically refer to the deed of trust.

The clause will be valid even if (1) there was no specified loan made at the time the trust deed was executed [*see Moss v. Odell (1901) 134 Cal. 464, 466, 66 P. 581]* , or (2) the future advances are to be made only at the beneficiary's discretion [*Langerman v. Puritan Dining Room Co. (1913) 21 Cal. App. 637, 647, 132 P. 617]* . However, if the clause specifies a limitation, a future advance that does not comply with the express limitation is not secured [*see Keese v. Beardsley (1923) 190 Cal. 465, 470, 213 P. 500]* .

[ii] Priority

A subsequent loan covered by a future advance clause has the same priority as the trust deed itself if the subsequent loan was obligatory rather than optional on the part of the beneficiary. However, if the subsequent loan was not obligatory, it is subordinate to an intervening junior trust deed or other interest, if at the time the beneficiary made the subsequent loan, he or she had been given actual notice of the existence of the junior trust deed [*Pike v. Tuttle (1971) 18 Cal. App. 3d 746, 751, 96 Cal. Rptr. 403]* .

Advances that are not obligatory but are made for the actual improvement of the property have priority over mechanics' liens that attached before the advances were made [*Civ. Code § 3136*]. This priority for nonobligatory future advances that improve the property has also been extended by case law to the situation in which the junior lienor who would have priority is the holder of a second deed of trust rather than the beneficiary of a mechanics' lien [*Turner v. Lytton Sav. & Loan Asso. (1966) 242 Cal. App. 2d 457, 459, 51 Cal. Rptr. 552* (decided under former Code Civ. Proc. § 1188.1, which had identical language to *Civ. Code § 3136*)].

[c] Dragnet Clauses

A dragnet clause essentially makes the trust deed security for all other debts owed by the trustor to the beneficiary, regardless of when they arose or arise [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 292, 128 Cal. Rptr. 338]* . Thus, it secures preexisting, present, and future obligations between the borrower and lender. If the borrower has several loans with the same lender, each containing a dragnet clause, the effect is to make each deed of trust security for all of the loans and conversely to secure each loan with all of the trust deeds. In addition, any unsecured loans become secured by each trust deed containing a dragnet clause [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 292, 128 Cal. Rptr. 338]* .

When presented with the question of which multiple obligations of a debtor are secured by a dragnet clause, the courts normally attempt to uphold the intentions of the parties rather than enforce the literal wording of the provision, and place on the proponent the burden of showing that both parties intended an unspecified loan to be included by the dragnet clause [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 294, 128 Cal. Rptr. 338]* . In the absence of expressed intent, the courts commonly attempt to determine (1) whether the unspecified loan bears a relationship to the principal or specified loan; and (2) whether the unspecified loan was made in reliance on the security [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 295-296, 128 Cal. Rptr. 338]* . Under the first test, if the loans are similar in nature or have some close connection (*e.g.*, two home improvement loans), the requisite intent may be inferred to exist [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 295-296, 128 Cal. Rptr. 338* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404, 126 Cal. Rptr. 549]* . Under the second test, if the unspecified loan is expressly secured by a different security, there is an inference that the parties did not intend that the unspecified loan be secured by the security provided for the specified loan [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 296, 128 Cal. Rptr. 338* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404-405, 126 Cal. Rptr. 549]* .

Because it is easy to include specific existing obligations in the dragnet clause if the parties so intend, failure to do so constitutes strong grounds for inferring that no such intent existed, or that if it did, it was a secret intent harbored by the creditor and not shared with the debtor [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286,*

293-294, 128 Cal. Rptr. 338 ; *Gates v. Crocker-Anglo Nat. Bk. (1968) 257 Cal. App. 2d 857, 858, 860-861, 65 Cal. Rptr. 536* ; *see also* California Real Estate Law & Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender)].

[2] FORM

Provision for Future Advances

Provision for Future Advances

THIS DEED OF TRUST IS FOR THE PURPOSE OF SECURING:

(1) Payment of the sum of $_____ with interest on that sum according to the terms of a promissory note or notes executed by Trustor on _____[this date *or* _____ (*date*)], payable to the order of Beneficiary, and extensions, renewals, or modifications of the Note or Notes;

(2) Payment of any additional amounts, with interest on those amounts, that may be hereafter loaned by Beneficiary to the then record owner of the Property, which additional loans are evidenced by a promissory note or notes containing a recitation that this Deed of Trust secures the payment of the note or notes;

(3) Performance of each agreement of Trustor contained in this Deed of Trust; and

(4) Payment of all sums to be made by Trustor pursuant to the terms of this Deed of Trust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsAfter-Acquired PropertyReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingSecondary FinancingLien Priorities



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10-25A California Legal Forms--Transaction Guide § 25A.225

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.225 Statutory Statement for Balloon Payment Note [Civ. Code § 2966]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice that must be included in a balloon payment promissory note when the note has a repayment term longer than one year and is given to a seller of a residential dwelling for not more than four families as part of a transaction involving an "arranger of credit" [*see Civ. Code §§ 2956, 2966(a), (d)*; *see also* [b], *below*]. Before the due date of any balloon payment, the holder of the note must also give a notice to the borrower containing information on the balloon payment [*Civ. Code § 2966(a)*; *see § 25A.240*].

Failure to include this notice in a balloon payment promissory note does not invalidate the note [*Civ. Code § 2966(d)*].

[b] Statutory Definitions

An "arranger of credit" is a person, other than a party to the credit transaction, who is involved in developing or negotiating credit terms, participates in the completion of the credit documents, and directly or indirectly receives compensation (1) for arrangement of the credit, or (2) from any transaction or transfer of the real property that is facilitated by the extension of credit [*Civ. Code § 2957(a)(1)*]. The term does not include either an attorney representing one of the parties to the credit transaction [*Civ. Code § 2957(a)(1)*] or an escrow holder in the transaction [*Civ. Code § 2957(a)(3)*]. However, "arranger of credit" does include a party to the transaction who is either a licensed attorney or a real estate licensee, if neither party is represented by a licensed broker [*see Civ. Code § 2957(a)(2), (4)*].

In most situations, the only persons who will meet the definition of "arranger of credit" are the real estate licensees involved in the negotiations, since they will participate in the negotiations and receive compensation in the form of their commission. As a general rule, the requirements of *Civ. Code § 2966* therefore apply when a real estate licensee is involved in the sales transaction and the seller participates in the financing by taking a balloon payment note [*see*

California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender)].

A "balloon payment note" is a loan that provides for a final payment that, as originally scheduled, is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision [*Civ. Code §§ 2924i(d)(1), 2957(b)*]. A "call provision" is a loan contract term that provides the holder of the loan with the right to call the loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*]. However, if the call provision is not exercised by the holder of the loan, the existence of the unexercised call provision will not cause the loan to be deemed a balloon payment loan [*Civ. Code §§ 2924i(d)(1), 2957(b)*].

[2] FORM

Statutory Statement for Balloon Payment Note

Statutory Statement for Balloon Payment Note [Civ. Code § 2966]

This Note is subject to *California Civil Code Section 2966*, which provides that the Holder of this Note shall give written notice to Trustor, or Trustor's successor in interest, of prescribed information at least 90 and not more than 150 days before any balloon payment is due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.226

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.226 Variable Interest Rate Provisions

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of variable interest rate provisions that may be inserted in a note secured by a trust deed or mortgage on real property. *Civ. Code § 1916.5* sets forth specific requirements for variable interest rate provisions contained in a mortgage contract, deed of trust, real estate sales contract, or any note or negotiable instrument issued in connection with any of the foregoing, when (1) the lender is not a supervised financial organization [*see Civ. Code § 1916.5(d)(1)* ("supervised financial organization" defined); *see also* [b], *below*]; and (2) the purpose of the document containing the variable interest rate provision is to finance the purchase or construction of real property containing four or fewer residential units or on which four or fewer residential units are to be constructed [*see Civ. Code § 1916.5(a), (b)(1)*]. The specific statutory requirements for the variable interest rate provisions include restrictions on when and by how much the interest may change and grant the borrower the right to prepay the loan in whole or in part within 90 days of notification of any increase in the rate of interest [*see Civ. Code § 1916.5(a)*]. These requirements are incorporated into this form.

Variable interest rate provisions subject to *Civ. Code § 1916.5* must be included in both the evidence of debt (*e.g.*, the note) and the security document (*e.g.*, the trust deed) in order to be valid [*Civ. Code § 1916.5(a)*]. Both the evidence of debt and the security document must also contain an appropriate notice to the borrower [*Civ. Code § 1916.5(a)(6)*; *see § 25A.227*].

[b] Exemptions

As mentioned in [a], *above*, *Civ. Code § 1916.5* does not apply to a lender that is a supervised financial organization [*Civ. Code § 1916.5(a)*]. For these purposes, "supervised financial organization" means a state-regulated or federally regulated bank, savings association, savings bank, or credit union; a state-regulated industrial loan company, personal

property broker, consumer finance lender, or holding company, affiliate, or subsidiary of the foregoing; or an institution of the Farm Credit System [*Civ. Code § 1916.5(d)(1)*; *see 12 U.S.C. § 2002(a)* (composition of the Farm Credit System)].

The following are also exempt from the provisions of *Civ. Code § 1916.5*:

- Unamortized construction loans with an original term of two years or less [*Civ. Code § 1916.5(b)(2)*].

- Loans made for the purchase or construction of improvements to existing residential dwellings [*Civ. Code § 1916.5(b)(2)*].

- Nonprofit public corporations [*Civ. Code § 1916.5(f)*].

- A loan with an interest rate that is less than the then current market rate for a similar loan, when (1) the loan is made in order to accommodate the borrower because of a special relationship (such as an employment or business relationship) between the borrower and the lender or the borrower and a customer of the lender, and (2) the rate of interest will increase only on the termination of the special relationship [*Civ. Code § 1916.5(g)*].

[c] Further Regulations

Certain classes of lenders may be subject to further regulations concerning variable interest rate provisions [*see, e.g., 10 Cal. Code Reg. §§ 107.500-107.505* for regulations applicable to California savings and loan associations]. The Commissioner of Financial Institutions and the Insurance Commissioner are authorized by statute to adopt regulations setting forth the prescribed standards on which variations in the interest rate will be based [*see Civ. Code § 1916.5(c)* (version operative July 1, 1997; before that date, earlier version of statute granted this authority to Savings and Loan Commissioner instead of Commissioner of Financial Institutions)].

[2] FORM

Variable Interest Rate Provisions

Variable Interest Rate Provisions

It is agreed that the interest rate provided in this Note is variable and that after six months from the date of this Note the Holder of the Note may decrease or increase, from time to time, the interest rate specified in this Note by _____[*specify amount of change and standard to which the change in interest rate is keyed, e.g.,* 1/10 of 1 percent per annum for each 1/10 of 1 percent per annum cumulative decrease or increase in the weighted average cost of savings, borrowings, and Federal Home Loan Bank advances to California members of the Federal Home Loan Bank of San Francisco as computed from statistics tabulated by the Federal Home Loan Bank of San Francisco as of the last day of the semiannual calendar period immediately preceding the date of this Note. If Federal Home Loan Bank statistics are not available for any semiannual calendar period, the weighted average cost of the Holder's savings, borrowings, and Federal Home Loan Bank advances shall be substituted for Federal Home Loan Bank statistics in the computation]. Any decrease or increase shall go into effect as of the payment date during the second calendar month following availability of the statistics. If a change in interest rate becomes effective, the Holder may decrease or increase the monthly payment payable under this Note so that the loan evidenced by this Note will be paid in full in regular monthly installments by the end of the amortization period in effect at the time of the change; provided, however, that the borrower may extend the term of the loan for any additional period that may be required to amortize the loan without increasing the existing monthly payment, up to a maximum loan term of 40 years. Any increase or decrease in the interest rate shall not exceed 1/4 of 1 percent per annum in any semiannual period, nor shall any such

increase or decrease be less than 1/10 of 1 percent per annum except for increases or decreases not previously invoked in full by reason of the 1/4 of 1 percent per annum maximum limitation. Any change in the interest rate shall not result in a rate more than 2.5 percentage points greater than the rate for the first loan payment due after the closing of the loan evidenced by this Note. There shall be only one change in the interest rate in any one semiannual period, and at least six months shall elapse between each such change. The fact that the Holder may not have invoked a permissible increase, in whole or in part, shall not be deemed a waiver of the Holder's right to invoke an increase at any time thereafter within the limits provided in this Note.

Notwithstanding anything to the contrary set forth in this Note, the balance owing under this Note may be paid in full without prepayment charge during the 90-day period following notice of any increase in interest rate payable under this Note. Any notice described in this Note shall be deemed given to Borrower when it is deposited in the United States mail, postage prepaid, addressed to the owner of the property described in the Deed of Trust [*or other security document*] securing this Note as the owner's name and address appear on Holder's records at the time the notice is given.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.227

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.227 Notice to Borrower of Provision for Variable Interest Rate [Civ. Code § 1916.5]

[1] Comment--Use of Form

The form in [2], *below*, consists of a prescribed statement that must be attached to security documents and evidences of debt that (1) are used by lenders other than supervised financial organizations [*see Civ. Code § 1916.5(a), (d)(1)*], (2) contain variable interest provisions, and (3) involve the financing of residential real property of four or fewer units [*Civ. Code § 1916.5(a)(6), (b)*]. For these purposes, "security document" means a mortgage contract, deed of trust, or real estate sales contract [*Civ. Code § 1916.5(d)(4)*]. "Evidence of debt" means a note or negotiable instrument [*Civ. Code § 1916.5(d)(5)*]. For further discussion of the applicability of this disclosure requirement and related restrictions on variable interest rate loans, see *§ 25A.226[1]*.

The statement must be printed or written in a size equal to at least 10-point bold type [*Civ. Code § 1916.5(a)(6)*]. If the following statement and the other specific statutory provisions regarding the frequency and amount of the change in interest rate [*Civ. Code § 1916.5(a)*; *see § 25A.226*] are not included in the security document and evidence of debt, any increase in interest provided for in the variable interest clause is not valid [*Civ. Code § 1916.5(a)*]. However, any decrease will apparently be valid and enforceable by the borrower.

[2] FORM

Notice to Borrower of Provision for Variable Interest Rate

Notice to Borrower of Provision for Variable Interest Rate [Civ. Code § 1916.5]

NOTICE TO BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR A VARIABLE INTEREST RATE.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsAdjustable Rate Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.228

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.228 Impound Provision

[1] Comment

[a] Use of Form

The form in [2], *below*, is an impound provision for use in a deed of trust (or mortgage). It provides the lender with a reserve account from which to make required payments for taxes and insurance. In a typical impound situation, the lender will periodically make an estimate of the funds that will be required for these purposes during a given year and adjust the borrower's monthly payment on the trust deed by an amount necessary to provide these funds.

Although this form assumes that the security instrument is a trust deed, it may be easily modified for insertion in a mortgage.

[b] Capacity of Lender

A question has arisen in a number of cases as to whether a lender that requires borrowers to maintain impound accounts acts in the capacity of a trustee and must segregate the impound funds and pay interest on them or account for profits made from the investment of the impound funds. The issue of whether or not the lender holds the impound funds as a trustee depends on the intentions of the parties [*see Marsh v. Home Fed. Sav. & Loan Assn. (1977) 66 Cal. App. 3d 674, 680, 136 Cal. Rptr. 180]* . Under the typical impound provision in a deed of trust, such as the one set forth in this form, the courts will normally find that a trust relationship rather than a debtor-creditor relationship exists with respect to the impound funds, unless there is some evidence of a contrary intention of the parties [*see Marsh v. Home Fed. Sav. & Loan Assn. (1977) 66 Cal. App. 3d 674, 682, 136 Cal. Rptr. 180]* . Further, if the impound provision empowers the lender-trustee to commingle the funds with its general funds and if it provides that no interest will be paid on the funds, then these provisions will be upheld by the courts (when the account is of the type not subject to interest payment requirements) [*see* [c][ii], *below*; *see also Marsh v. Home Fed. Sav. & L. Assn. (1977) 66 Cal. App. 3d 674, 684-687, 136 Cal. Rptr. 180]* .

[c] Statutory Requirements

[i] When Impound May Be Required

Several statutes govern the use of impound accounts and the reporting of impound balances held by beneficiaries under trust deeds. *Civ. Code § 2954* prohibits lenders and sellers from requiring impound, trust, or other types of accounts for the payment of taxes on the property, insurance premiums, or other purposes relating to the property as a condition of a real property sales contract or a loan secured by a trust deed or mortgage on real property containing only a single-family, owner-occupied dwelling. Notwithstanding this general prohibition, impound accounts are permitted under *Civ. Code § 2954* under the following circumstances [*Civ. Code § 2954(a)*]:

- An impound account is required by a state or federal regulatory authority.
- A loan is made, guaranteed, or insured by a state or federal governmental lending or insuring agency.
- The purchaser or borrower has failed to pay two consecutive tax installments on the property before the delinquency date for such payments.
- The original principal amount of the loan is 90 percent or more of the sale price, if the property involved is being sold, or of the appraised value of the property securing the loan.
- The combined principal amount of all loans secured by the real property exceeds 80 percent of the appraised value of the property securing the loans.
- A loan is made in compliance with the requirements for higher-priced mortgage loans established in Regulation Z [*see 12 C.F.R. § 226.35* (prohibited acts or practices in connection with higher-priced mortgage loans)], whether or not the loan is a higher-priced mortgage loan.
- A loan is refinanced or modified in connection with a lender's home-ownership preservation program or a lender's participation in such a program sponsored by a federal, state, or local government authority or a nonprofit organization.

The parties may establish an impound account on mutually agreeable terms if, prior to the execution of the loan or sales agreement, the seller or lender furnishes to the purchaser or borrower a written statement (set forth in the loan application or in a separate document) that states (1) that the establishment of the account is not required as a condition to the execution of the loan or sales agreement, and (2) whether or not interest will be paid on the funds in the account [*Civ. Code § 2954(a)(1)*].

[ii] Required Interest Payments on Impounded Funds

For loans secured by real property containing only a one-to-four family residence located in California, a lender who receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, must pay interest to the borrower on the amount so held [*Civ. Code § 2954.8*]. The interest on this amount must be at the rate of at least 2 percent simple interest per annum and must be credited to the borrower's account annually or on termination of the account, whichever is earlier [*Civ. Code § 2954.8(a)*]. Any fee charged by the lender in connection with the maintenance or disbursement of money received in connection with the impound account may not reduce the interest rate obligation to less than 2 percent [*Civ. Code § 2954.8(b)*]. The obligation to pay interest on impound funds does not apply to moneys that are required by a state or federal regulatory authority to be placed by a lender other than a bank in a non-interest-bearing demand trust fund account of a bank [*Civ. Code § 2954.8(d)(2)*].

[iii] Restrictions on Amount and Use of Funds

Civ. Code § 2954.1 prohibits a lender (or person who purchases obligations secured by real property) who maintains an impound account from requiring the borrower to deposit in the account in any month an amount in excess of that which would be permitted in connection with a federally-related mortgage loan pursuant to Section 10 of the Real Estate Settlement Procedures Act of 1974 (RESPA) [*see 12 U.S.C. § 2609*; *see also 12 U.S.C. § 2601 et seq.* (RESPA)]. *Section 2954.1* also prohibits the same person from: (1) requiring the sums maintained in the account to exceed at any time the amount or amounts reasonably necessary to pay obligations as they become due; or (2) making payments from the account in a manner that would cause the cancellation of any insurance policy or cause property taxes or other similar payments to become delinquent [*Civ. Code § 2954.1*].

[iv] Limitations Regarding Deposits

Money held by a mortgagee or a beneficiary of a deed of trust on real property in California, or held by a vendor on a contract of sale of real property in California, in an impound account for the payment of taxes and assessments, insurance premiums, or other purposes on or relating to the property, must be retained in California. Further, if that money is invested, it must be invested only with (1) residents of California, in the case of individuals, or (2) partnerships, corporations, or other persons (or the branches or subsidiaries of these entities or persons) that are engaged in business within California [*Civ. Code § 2955(a)*].

Notwithstanding the above, a mortgagee or beneficiary of a trust deed secured by a first lien on real property may deposit money held for the payment of taxes and assessments, insurance premiums, or other purposes in an impound account in an out-of-state depository institution insured by the Federal Deposit Insurance Corporation if the mortgagee or beneficiary is any one of the following [*Civ. Code § 2955(b)*]:

- The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, or the Department of Veterans Affairs.

- A bank (or subsidiary of a bank), bank holding company (or subsidiary), trust company, savings bank or savings and loan association (or subsidiary), savings bank or savings association holding company (or subsidiary), credit union, industrial bank or industrial loan company, commercial finance lender, personal property broker, consumer finance lender, or insurer doing business under the authority of, and in accordance with, the laws of California, any other state, or of the United States relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, commercial finance lenders, personal property brokers, consumer finance lenders, or insurers, as evidenced by a license, certificate, or charter issued by the United States or a state, district, territory, or commonwealth of the United States.

- Trustees of a pension, profit-sharing, or welfare fund, if the fund has a net worth of at least $15,000,000.

- A corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 [*15 U.S.C. § 78a et seq.* (Act); *see 15 U.S.C. § 78l* (§ 12 of Act)], or any wholly owned subsidiary of the corporation.

- A syndication or other combination of any of the entities described in the four items listed above, that is organized to purchase the promissory note.

- The California Housing Finance Agency or a local housing finance agency organized under the

Health and Safety Code.

- A licensed real estate broker selling all or part of the loan, note, or contract to any of the lenders or purchasers described in the items listed above.

- A licensed residential mortgage lender or servicer when acting under the authority of that license.

- A mortgagee or beneficiary of a trust deed who deposits funds held in trust in an out-of-state depository institution in accordance with the requirements discussed above must make available, in California, the books, records, and files pertaining to those trust accounts to the appropriate state regulatory department or agency, or pay the reasonable expenses for travel and lodging incurred by the regulatory department or agency in order to conduct an examination at an out-of-state location [*Civ. Code § 1955(c)*].

The Attorney General may bring an action to enjoin a violation of *Civ. Code § 2955(a)* or *(b)* [*Civ. Code § 2955(d)*].

[2] FORM

Impound Provision

Impound Provision

General Impound Requirements

(_____) Trustor agrees to pay to Beneficiary monthly advance installments of taxes, assessments, and insurance premiums for the purpose of accumulating a fund (commonly known as a reserve or impound account) to insure payment when due or before delinquency, of any or all of the taxes, assessments, and insurance premiums mentioned in Paragraph [*specify*] of this Deed of Trust. The parties agree, however, that this impound requirement shall not require Trustor to pay Beneficiary in any month an amount in excess of that which would be permitted in connection with a federally-related mortgage loan pursuant to Section 10 of the Real Estate Settlement Procedures Act of 1974 or require the sums maintained in the account to exceed at any time the amount(s) reasonably necessary to pay the above obligations as they become due. Further, Beneficiary shall not make payments from the account in a manner that would cause the cancellation of any insurance policy or that would cause property taxes or other similar payments to become delinquent.

If the amounts paid to Beneficiary are insufficient to discharge Trustor's obligation to pay the premiums, taxes, and assessments as they become due, Trustor shall pay to Beneficiary on its demand any additional sums it may require to discharge Trustor's obligation to pay premiums, taxes, and assessments. Should Trustor fail to pay to Beneficiary these additional sums, Beneficiary may, at its sole option, pay them and add amounts so paid to the principal indebtedness secured by this Deed of Trust. These amounts added to the principal indebtedness shall bear interest at the rate provided for in the Note. Beneficiary is not responsible for shortages in this reserve account, nor is Beneficiary responsible for any representations by builders, real estate agents, or their representatives as to the amount of the reserve payment.

At the option of Beneficiary, all moneys paid to Beneficiary under the terms of this Paragraph may be held by Beneficiary in trust in the general funds without interest, to pay the premiums, taxes, and assessments before they become delinquent, and on payment by Beneficiary of taxes, assessments, and insurance premiums, the amount so paid shall be charged to the principal due on the Note.

Beneficiary may increase the above monthly advance installment payment at any time in order to insure payment of

insurance, taxes, and assessments; provided, however, that any increase in the monthly installments shall not cause (1) the amount paid to be in excess of that permitted under this paragraph; (2) the sums maintained in the account to exceed at any time the amount(s) reasonably necessary to pay the above obligations as they become due; (3) the cancellation of any insurance policy; or (4) property taxes or other similar payments to become delinquent. Any sum held in excess of the reasonable amount shall be refunded within 30 days [or specify other agreement of the parties regarding the refund of any excess amounts]. At the option of Beneficiary, refunds of prepaid or other interest or return premiums from insurance may be added to the above fund and used for any purpose allowed under this Deed of Trust or under Paragraph _____ [*specify paragraph relating to disposition of impound funds on default*]. If Trustor fails to pay the installment provided for in this Paragraph, the failure shall constitute a default under this Deed of Trust.

Disposition of Impound on Default

(_____) In the event of default in the payment of any of the moneys to be paid under the terms of the Note or this Deed of Trust or in the performance of any of the covenants and obligations of this Deed of Trust, then any funds in the possession of Beneficiary under the provisions of Paragraph _____ [*insert number of paragraph relating to the impound requirement*], may, at the option of Beneficiary, be applied to the payment of principal and/or interest or any other amount due on the obligation secured by this Deed of Trust in lieu of being applied to any of the purposes for which the fund established under Paragraph _____ [*identify impound provision*] is established.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresLoan ServicingReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
C. Note and Trust Deed Provisions

10-25A California Legal Forms--Transaction Guide § 25A.229

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§ 25A.229[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
D. Installment Real Property Sales Contracts

10-25A California Legal Forms--Transaction Guide § 25A.230

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.230 Installment Real Property Sales Contract--With Power of Sale Clause

[1] Comment

[a] Use of Form

This form is a real property sales contract [*see § 25A.230[1][b]*] under which the buyer agrees to pay the purchase price to the seller in installments over a period of time, the buyer obtains possession immediately on execution of the contract, and the seller retains title to the property as security until the purchase price is paid in full.

For an installment sales contract used by the California Department of Veterans Affairs, see *§ 25A.234*. For alternative and additional provisions for a real property sales contract, see *§§ 25A.231* (provision for impound of taxes and insurance) and *25A.232* (notice required for sale of unimproved real property that has been previously divided).

[b] Real Property Sales Contracts

A "real property sales contract" (also referred to as an installment land sales contract or installment real property sales contract) is an agreement that provides for the conveyance of title to real property on the satisfaction of conditions set forth in the contract and that does not require conveyance of title within one year from the date of execution of the contract [*see Civ. Code § 2985(a)*]. Most real property sales contracts (including this form) condition the transfer of title on the payment in full of monthly or other periodic installments of the purchase price, permit the seller to retain title to the property as security for the payments until all or a portion of them are made, and do not provide for an escrow. Thus, in addition to serving as the basic purchase-sale agreement, the contract acts as the security device guaranteeing payment.

Because developers could have difficulty financing large-scale residential condominium developments that comprise attached units, if Civil Code provisions governing installment land sale contracts [Civ. Code § 2985 et seq.] were applied to a pre-sale agreement for a unit in such a project, those provisions do not apply to such an agreement that was

made in consequence of a conditional public report for the condominium project issued by the Department of Real Estate pursuant to Bus. & Prof. Code § 11018.12 [Civ. Code § 2985(b); *see generally* Assem. Comm. on Judiciary, Analysis of Sen. Bill No. 504 (2005-2006 Reg. Sess.) as amended Jan. 19, 2006; *see also California Real Estate Law and Practice, Ch. 424, Regulation of Subdivided Land Sales, § 424.80* (Matthew Bender)(issuance of conditional public report)].

[c] Real Property Sales Agreements

Real property sales agreements are used more frequently than real property sales contracts in California. A real property sales agreement, also known as a marketing contract, provides for the immediate transfer of title to the buyer in exchange for payment of the purchase price. For detailed coverage of these agreements, see Ch. 23, *Real Property Sales Agreements* .

[d] Power of Sale

This form is similar to a deed of trust in that it contains provisions appointing a trustee and granting the trustee the power to sell the real property subject to the contract in a nonjudicial foreclosure sale in the event of the buyer's default under the contract [for a trust deed containing a power of sale clause, *see § 25A.210*]. A real property sales contract containing a power of sale is a "mortgage" subject to the statutory provisions governing the exercise of a power of sale in a nonjudicial foreclosure [*Civ. Code § 2920(b)*; see *Civ. Code §§ 2924-2924h*; *see also § 25A.230[2],* sec. 17]. For a detailed discussion of the nonjudicial foreclosure process, see Ch. 25D, *Foreclosure* .

The statute providing that real property sales contracts with a power of sale are "mortgages" subject to the statutory nonjudicial foreclosure provisions [*Civ. Code § 2920(b)*] became effective January 1, 1987, and was enacted in response to a California Supreme Court decision holding that even a willfully defaulting buyer had the unconditional right to redeem the property by paying the seller the entire amount due on the sales contract plus interest and damages [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 114, 219 Cal. Rptr. 170, 707 P.2d 232]* . The holding was superseded by a statute granting the buyer the right to reinstate the land sales contract by paying the amount then due, plus interest and costs [*see Civ. Code § 2924c*; *see also § 25D.204*].

[e] Recording the Contract

The purchaser under a real property sales contract should have the contract recorded. Recordation provides constructive notice of the contents of the contract to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Civ. Code §§ 1214, 1215, 1217*; *see also § 23.224[1]*]. Another important reason for recordation is the fact that the purchaser will not be able to obtain title insurance on his or her equitable ownership interest in the property unless the contract is recorded [*see* Ch. 26A, *Title Insurance*]. This form requires the trustee to have the contract recorded [*see § 25A.230[2],* sec. 20].

A real estate broker who negotiates, sells, or exchanges a "real property sales contract" [*see Bus. & Prof. Code § 10029* (definition)] must either record the contract or recommend to the principal that the contract be recorded [*Bus. & Prof. Code § 10234*]. In addition, in the placing of any loan, a broker must deliver or cause to be delivered conformed copies of any deed of trust to both the investor or lender and the borrower within a reasonable amount of time from the date of recording [*Bus. & Prof. Code § 10234.5*].

If the contract is not recorded, the seller is limited as to the amount of encumbrances he or she may place on the property without the purchaser's consent [*Civ. Code § 2985.2*; *see also § 25A.230[1][g]*].

[f] Limitations on Transfers and Assignments

[i] By Seller

The fee owner of the real property may not transfer a real property sales contract without also transferring the real property that is the subject of the contract, and the real property may not be transferred unless accompanied by an assignment of the contract [*Civ. Code § 2985.1*]. The California Supreme Court has construed this provision to mean that the linkage between the seller's title and buyer's contractual interest must continue until the contractual interest has been terminated by conveyance of title to the buyer, by a foreclosure sale, or by strict foreclosure [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 116, 219 Cal. Rptr. 170, 707 P.2d 232]* . Thus, the seller cannot unilaterally declare the contract breached and terminate the buyer's right to redeem. For a detailed discussion of the buyer's remedies under an installment land sales contract, see California Real Estate Law & Practice, Ch. 113, *Installment Land Sale Contracts* (Matthew Bender).

Notwithstanding the above statutory prohibition, the seller may assign or pledge the real property sales contract to the holder of the first lien on the property as security or for collection [*Civ. Code § 2985.1*], and may transfer the fee title to the property in trust without concurrently assigning the installment contract [*10 Cal. Code Reg. § 2791.9* (applicable to subdivision interests)].

[ii] By Buyer

Many installment real property sales contracts provide that the buyer may not assign the contract without the seller's consent. This restriction has been attacked as an invalid restraint on the buyer's equitable title to the land covered by the contract. No California court appears to have ruled directly on the validity of such a provision, although it has been held that this type of provision is for the benefit of the seller only and does not affect the validity of an assignment without consent as between the buyer and his or her assignee [*Johnston v. Landucci (1942) 21 Cal. 2d 63, 68, 130 P.2d 405]* . The courts have strictly construed these provisions against the seller. Thus, unless the provision specifically provides otherwise, it does not prohibit the buyer from leasing the premises [*see Stevinson v. Joy (1912) 164 Cal. 279, 128 P. 751]* or from selling his or her equitable interest to a third party under a sales contract [*see Covington v. Clark (1959) 175 Cal. App. 2d 449, 346 P.2d 229]* .

If a buyer transfers or sells under a Department of Veterans Affairs installment contract [*see § 25A.234*], the Department can accelerate and either demand payment of the balance of the contact or terminate the contract. The Department need not show harm or impairment of the security resulting from the transfer [*Mil. & Vet. Code §§ 987.72, 987.73(a), 987.77*; *Department of Veterans Affairs v. Duerksen (1982) 138 Cal. App. 3d 149, 155-156, 187 Cal. Rptr. 832]* . For a discussion of due-on-sale clauses in general, see *§ 25A.221[1]*.

[g] Penalty for Encumbering Land Subject to Unrecorded Installment Contract Without Purchaser's Consent

Any person who sells land under an unrecorded installment land sales contract and thereafter, without the purchaser's written consent, encumbers the land, is subject to both civil and criminal penalties if (1) the total amount of the new encumbrance and any preexisting encumbrances on the land exceeds the amount then due under the contract; or (2) the aggregate amount of any periodic payments on the new encumbrance and any preexisting encumbrances exceeds the periodic payments due on the contract, excluding any pro rata amount for insurance and taxes [*Civ. Code § 2985.2*].

[h] Seller's Duties Regarding Contract Payments

A seller under an installment real property sales contract (or his or her assignee) who receives an installment payment on the contract and fails to apply it to any payment then due on any obligation secured by an encumbrance on the property subject to the contract, is subject to civil and criminal penalties [*Civ. Code § 2985.3*; *see Pen. Code § 506b*]. A seller under an installment contract who receives pro rata payments for insurance and taxes must hold the amounts in trust for the designated purpose and may not disburse them for any other purpose without the consent of the buyer and any person or corporation holding an encumbrance on the property [*Civ. Code § 2985.4*]. The foregoing requirement

regarding taxes and insurance does not apply to a state- or federally-supervised assignee of a seller who, as agent for the seller, receives and disburses payments [*Civ. Code § 2985.4*]. For a provision for the impound of taxes and insurance, see *§ 25A.231*.

[i] Taxes

This form provides that the buyer will pay all taxes and assessments on the property [*see § 25A.230[2],* sec. 5]. If the required payments are not made within 10 days of their due date, the seller may make the payments and add the amount paid to the balance owed by the buyer [*see § 25A.230[2],* sec. 7]. Real estate taxes are the seller's responsibility under an installment land sales contract unless the parties agree otherwise in the contract [*Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157, 168, 272 P.2d 16]* . If the buyer has contractually agreed to pay the taxes, he or she has the legal duty to do so [*see Estate of Backesto (1923) 63 Cal. App. 265, 269-270, 218 P. 597]* .

For discussion of statutory changes authorizing the enforcement of provisions in a trust deed or mortgage that permit a lender to accelerate a loan following a trustor's or mortgagor's failure to pay taxes, rents, assessments, or insurance premiums [*see Civ. Code § 2924.7*], see *§ 25A.210[1][g]*.

[j] Insurance

This form requires the buyer to obtain and maintain fire insurance for the property [*see § 25A.230[2],* sec. 6]. A lender may not require a borrower under a loan secured by real property to provide hazard insurance coverage on that property in an amount exceeding the replacement value of the improvements on the property as established by the property insurer selected by the borrower [*Civ. Code § 2955.5(a)*]. The lender must give the borrower a written disclosure of this provision as soon as practicable and in any case before execution of any note or security documents [*Civ. Code § 2955.5(b)*].

In the absence of a contractual provision to the contrary, a seller who pays the insurance premiums on his or her insurable interest in the property is entitled to any proceeds, and the proceeds are not an offset against the purchase price payable by the buyer under the contract [*White v. Gilman (1903) 138 Cal. 375, 377, 71 P. 436]* .

For discussion of the circumstances under which lenders may require borrowers to obtain or maintain hazard insurance [*see Civ. Code § 2955.5*], see *§ 25A.210[1][f]*. For discussion of statutory changes permitting the enforcement of provisions in a trust deed or mortgage on real property that authorize any beneficiary, trustee, mortgagee, or agent or successor in interest of the foregoing to receive and control the disbursement of the proceeds of any policy of fire, flood, or other hazard insurance respecting the property [*see Civ. Code § 2924.7(b)*], see *§ 25A.210[1][f]*. For discussion of related changes permitting a lender to accelerate a loan following a trustor's or mortgagor's failure to pay taxes, rents, assessments, or insurance premiums [*see Civ. Code § 2924.7*], see *§ 25A.210[1][g]*.

[k] Years to Complete Payment and Basis of Tax Estimate

An installment real property sales contract must contain a statement of the number of years required to complete payment in accordance with the terms of the contract [*see § 25A.230[2],* sec. l(b)] and the basis on which the tax estimate is made [*Civ. Code § 2985.5*; *see § 25A.230[2],* sec. 5].

[l] Special Requirements for Subdivision Interests

[i] Subdivision Map Act

If unimproved property that resulted from a division of property is the subject of a real property sales contract, the contract must contain a statement indicating that the division (1) complied with the Subdivision Map Act ("Act") [*Gov. Code § 66410 et seq.*], (2) was not subject to the Act, (3) was exempt from the Act, or (4) was the subject of a waiver of

the Act's requirements [*Civ. Code § 2985.51*]. Willful violation of this requirement subjects the seller to civil and criminal penalties [*Civ. Code § 2985.51(d)*]. For the required statements and further discussion, see *§ 25A.232*.

[ii] Subdivided Lands Act

Under the Subdivided Lands Act ("Act") [*Bus. & Prof. Code § 11000 et seq.*], every installment land sales contract dealing with the purchase and sale of real property in a subdivision must clearly set forth the legal description of the property, the encumbrances outstanding at the date of the contract, and the terms of the contract [*Bus. & Prof. Code § 11200*]. The Act and its implementing regulations also set forth requirements intended to insure that the subdivider will be able to deliver clear title to the buyer of a subdivision interest once the buyer has fulfilled the contractual obligations. These requirements apply to all subdivisions, not only those being sold under installment land sales contracts. However, they only apply to a subdivider selling an original subdivision interest in a new subdivision, and do not apply to subsequent individual resales of the subdivision interests by the original purchasers.

The applicability of specific statutory provisions intended to secure the safety of purchase money paid by buyers and to insure the subdivider's ability to deliver clear title to the property depend on whether the property is encumbered by a "blanket encumbrance" [*see Bus. & Prof. Code § 11013* (definition)] or is not so encumbered [*see Bus. & Prof. Code § 11013.4*; *see also* Ch. 30, *Subdivision Regulation* ; California Real Estate Law & Practice, Ch. 113, *Installment Land Sale Contracts* (Matthew Bender)]. Regulations supplement these statutory requirements [*see 10 Cal. Code Reg. §§ 2791-2791.8*; *see also 10 Cal. Code Reg. § 2791.9* (applicable solely to real property sales contracts)].

Under these statutes and regulations, the subdivider may be required to maintain all purchase money received from purchasers in a neutral escrow, transfer title to the property in trust pending conveyance of title to the purchaser, post a bond, or comply with other acceptable alternatives [*see Bus. & Prof. Code §§ 11013.2, 11013.4*; *10 Cal. Code Reg. § 2791.9*; *see also* Ch. 30, *Subdivision Regulation*].

[iii] Buyer's Statutory Right to Prepay

The buyer under a real property sales contract for the purchase of a subdivision residential lot or lots containing a dwelling for not more than four families may prepay all or any part of the balance due on the contract. However, the seller may prohibit prepayment for up to a 12-month period following the sale if the buyer agrees in writing to this limitation [*Civ. Code § 2985.6(a)*]. Although any waiver by the buyer of these statutory protective provisions is against public policy and void, such a waiver does not in any way affect the validity of the remainder of the contract [*Civ. Code § 2985.6(b)*].

The above statutory limitations are the only ones specifically applicable solely to installment real property sales contracts. For discussion of prepayment restrictions that apply to contracts in general, see *§ 25A.222[1]*.

[m] Truth in Lending Disclosures

Under the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*], creditors must disclose the terms and cost of credit to any person to whom credit is extended. For these purposes, a creditor is a person who regularly offers or extends credit to consumers when the credit (1) is subject to a finance charge or is payable pursuant to a written agreement in more than four installments, and (2) is primarily for personal, family, or household purposes [*see 15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.1(c)(1)*; *see also 12 C.F.R. § 226.2(a)(17)(i)*, n.3]. TILA specifically applies to credit extended in connection with loans and sales of property [*15 U.S.C. § 1602(f)*]. For additional coverage of TILA, see Ch. 25, *Real Estate Loans* .

[n] Seller's Transfer Disclosure Statements

The transferor of any real property containing at least one but not more than four dwelling units must deliver to the

prospective transferee a statutory disclosure statement setting forth detailed information concerning the property [*Civ. Code §§ 1102, 1102.3*; *see Civ. Code § 1102.6* (statutory form)]. When the transfer is effected by an installment real property sales contract, the statement must be delivered as soon as practicable before execution of the contract [*Civ. Code § 1102.3*; *see Civ. Code § 1102*].

If a transfer transaction is subject to the foregoing disclosure requirement, the city or county in which the property is located may require the transferor to provide additional disclosures regarding the property on a statutory form (called the "Local Option Real Estate Transfer Disclosure Statement") or on an alternative form required by the applicable local ordinance [*Civ. Code § 1102.6a(a)*].

Certain disclosures of natural hazards must be made on the transfer of any real property or any residential stock cooperative improved with or consisting of one to four dwelling units. This applies to transfers by sale, exchange, installment land sale contract as defined in *Civ. Code § 2985*, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements [*Civ. Code § 1103(a)*; *see Civ. Code §§ 1103.1, 1103.2* (transfers not covered; form)]. These requirements also apply to resale of a manufactured home or mobilehome that is classified as personal property intended for use as a residence if the transaction was entered into after 1999 [*Civ. Code § 1103(b)*; *see Health & Safety Code §§ 18007, 18008*].

Additional disclosure requirements require a seller of residential real property who knows that any release of an illegal controlled substance has come to be located on or beneath that real property to give written notice advising of that condition to the buyer before sale of the property [*Civ. Code § 1102.18(b)*]. "Illegal controlled substance" means a drug, substance, or immediate precursor listed in specified schedules [*see Health & Safety Code §§ 11054-11058*], or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture of an illegal controlled substance, which does not include marijuana [*Civ. Code § 1102.18(a)(1)*]. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of an illegal controlled substance in a structure or into the environment [*Civ. Code § 1102.18(a)(2)*].

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* must also make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53311 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*], which concerns street improvements, or to a contractual assessment program authorized pursuant to *Sts. & Hy. Code § 5898.24* [*Civ. Code § 1102.6b(a)(2)*]. A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures pursuant to *Civ. Code § 1102.4*)].

It is the sole responsibility of the seller of any residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.* [*see § 23.300[1][b]*], or the seller's agent, to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills, in addition to any other disclosure required by *Civ. Code § 1102 et seq.* [*Civ. Code § 1102.6c(a)*]. For further discussion and a form, see *Ch. 23, Real Property Sales Agreements, § 23.300A*.

Further, the Toxic Mold Protection Act of 2001 [*Health & Safety Code § 26100 et seq.*] will eventually require any person who sells, transfers, or rents specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers, prospective tenants, renters, and landlords concerning mold problems in the real property [*see Health & Safety Code § 26140 et seq.*].

For statutory disclosure statements and further discussion, see *§§ 23.200, 23.201*.

[o] Installation of Smoke Detector Prior to Sale

Every single-family dwelling and all factory-built housing [*see Health & Safety Code § 19971*] that is transferred under a real property sales contract must have an operable smoke detector. The seller must provide the transferee with a written statement indicating compliance with this requirement [*Health & Safety Code § 13113.8(a), (b)*]. For further discussion and an illustrative notice, see *§ 23.202*.

[p] Earthquake Hazards Disclosures

A copy of the official Homeowner's Guide to Earthquake Safety [*see Bus. & Prof. Code § 10149*] and an earthquake hazards disclosure form must be provided to a prospective purchaser or other transferee by the transferor of any real property containing any residential dwelling that (1) was built before January 1, 1960, (2) contains one to four living units, and (3) is of conventional light-frame construction, as defined in Chapter 25 of the 1991 Edition of the Uniform Building Code of the International Conference of Building Officials [*Gov. Code § 8897.1(a)*; *but see Gov. Code § 8897.1(c)* (exceptions)]. The transferor must provide the earthquake hazards disclosure statement as soon as practicable before execution of the real property sales contract [*Gov. Code § 8897.1(b)*; *see Gov. Code § 8897.2* (required contents)]. For additional coverage and a model disclosure form, see § 23.208.

[q] Broker's Duty to Inspect Property

Licensed real estate brokers who deal with real property sales contracts [*see Civ. Code § 2079.1*] for residential real property consisting of one to four dwelling units have certain statutory inspection and disclosure duties [*see Civ. Code §§ 2079-2079.10*]. For a detailed discussion of these duties, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Installment Real Property Sales Contract

Installment Real Property Sales Contract--With Power of Sale Clause

CONTRACT OF SALE

CONTRACT OF SALE entered into _____[*date*], by and between _____[*name(s)*], [*status, e.g.*, a California corporation *or* husband and wife], of _____ County, California, (the "Seller") _____[*name(s)*], [*status, e.g.*, a single woman], of _____ County, California, (the "Buyer") and _____[*name(s)*], [*status, e.g.*, a California corporation], ("Trustee").

Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the real property situated in the City of [*or* an unincorporated area of], _____ County, California (the "Property"), described as follows: [*insert legal description of property*] on the following terms and conditions:

Purchase Price

Section 1. The total purchase price for the Property is $_____, payable as follows:

(a) The sum of $_____ on execution of this Contract. Seller hereby acknowledges receipt of this sum.

(b) The balance of $_____ shall be paid in installments of $_____ (or more) per month, payable on or before the _____ day of every month commencing _____[*date*], and continuing until the full amount of the purchase price together with interest from the date of this Contract on the remaining unpaid principal balance of the purchase price at the rate of

_____ percent per annum has been paid, not exceeding [*number*] years. Each installment shall be payable to Seller at _____[*address*], California, or any other place or places designated by Seller from time to time by written notice. When received by Seller, each installment shall be credited by Seller first to the payment of the interest on the then remaining unpaid principal balance of the purchase price due to the date of receipt of the installment, then to the reduction of the unpaid principal balance of the purchase price. Interest on the amount credited to the payment on the principal balance of the purchase price shall thereafter cease. This Contract shall require _____ years and _____ months to complete in accordance with its terms.

Appointment and Powers of Trustee

Section 2. On recordation of this contract, Buyer and Seller irrevocably grant, transfer, and assign their respective right, title, and interest in the Property to Trustee for the purpose of securing Buyer's and Seller's obligations under this Contract and hereby confer on Trustee the following powers:

(a) Power to convey to Buyer legal title to the Property on full satisfaction of Buyer's obligations to Seller, on written instructions from Seller or its successor in interest; and

(b) Power to foreclose under power of sale pursuant to Section 17 of this Contract, and to issue a deed on foreclosure and sale. The deed shall convey the property without covenant or warranty, expressed or implied, and any recitals contained in the deed of any matters or facts shall be conclusive proof of the truthfulness of the recitals.

Outstanding Encumbrances

[*EITHER*]

Section 3. The Property is not subject to any encumbrances that are outstanding at the date of this Contract.

[*OR*]

Section 3. The Property is subject to the following encumbrance[s] that [is *or* are] outstanding at the date of this Contract and will be paid by Seller according to [its *or* their] terms: _____[*list encumbrances, e.g.,* A Deed of Trust recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, securing a promissory note dated _____, in the principal amount of $_____, which has an approximate unpaid principal balance of approximately $_____, and which is payable, together with interest on the remaining unpaid principal balance, at the rate of _____ percent per annum, to _____ (*name of payee of note*) in installments of $_____ (or more) on the _____ day of each month.]

[*CONTINUE*]

Encumbrances by Seller

Section 4. Seller, after the date of this Contract, shall not in any manner [*add if there are existing encumbrances:* further] encumber the Property without the written consent of Buyer.

Taxes and Assessments

Section 5. The tax estimate on which this Contract is based is the tax bill for the fiscal year. Except as otherwise provided in this Contract, Buyer shall pay, at least 10 days before their due date, all general and special taxes, liens, and charges, including all assessments of every nature, levied, assessed, or accruing on the Property after the execution of this Contract. For these purposes, all taxes, assessments, and insurance premiums pertaining to the Property shall be prorated on the basis of a 30-day month as of the date of this Contract.

Insurance

Section 6. Buyer, during the continuance of this Contract, shall insure and keep insured, at Buyer's own cost and expense, for their full replacement value, all buildings and improvements located on the Property against loss by fire or the elements, with an insurance company acceptable to Seller and for Seller's benefit as Seller's interest may appear.

Payments by Seller

Section 7. If Buyer fails to satisfy _____[his *or* her] obligation under this Contract to pay any amount for taxes, assessments, or insurance before the amount becomes delinquent, Seller may, at _____[his *or* her] option, declare Buyer in default under this Contract or pay the amount. If Seller pays the amount, Seller may add the amount to the balance due Seller under the terms of this Contract. Any amount paid by Seller pursuant to this Section shall bear interest from the date of payment by Seller to the date of reimbursement or repayment by Buyer at the rate of _____ percent per annum.

Destruction or Condemnation of Property

Section 8. Destruction of, or damage to, any building or other improvement now or hereafter placed on the Property, or of any personal property described in this Contract, whether from fire or any other cause, including the taking of the Property, or any part of the Property, for public use, shall not release Buyer from any of _____[his *or* her] obligations under this Contract. It is expressly understood that Buyer bears all risk of loss of, or damage to, the Property. If any part of the Property is taken for public use, the portion of the condemnation award remaining after payment of reasonable expenses of procuring the award, shall be paid to Seller and applied as payment on the purchase price under this Contract [*add if applicable:* or by payment to the beneficiary of the prior encumbrance listed in Section 3 of this Contract as required by the terms of that encumbrance], unless Seller [*add if appropriate:* and the beneficiary] elect [s] to allow Buyer to apply all or a portion of the condemnation award to the rebuilding or restoration of any improvements damaged by the taking. In case of damage or destruction from a peril insured against, the proceeds of the insurance remaining after payment of the reasonable expenses of procuring the insurance and the proceeds shall be devoted to the restoration or rebuilding of the improvements within a reasonable time unless Buyer elects that the proceeds shall be paid to Seller [*add if applicable:* or beneficiary of the prior encumbrance listed in Section 3 of this Contract].

Good Condition and Repair

Section 9. Buyer agrees that the Property and the buildings and improvements on the Property are, at the date of this Contract, in good condition, reasonable wear and tear excepted, and that Buyer shall, at Buyer's own cost and expense, maintain the Property and the buildings and improvements on the Property in the same condition that they are in on the

date of this Contract.

Right of Inspection

Section 10. Seller shall have the right to enter on and inspect the Property and the buildings and improvements onthe Property at least once each calendar month. All repairs required on the Property or the foregoing buildings and improvements noted by Seller shall be made by Buyer, at Buyer's own cost and expense, within 10 days after Buyer receives written notice from Seller.

Waste and Removal of Buildings

Section 11. Buyer shall not remove or permit the removal from the Property of any building or other improvement located on the Property without Seller's prior written consent, nor shall Buyer commit or permit to be committed any waste of the Property or of any building or improvement on the Property.

Alterations Prohibited

Section 12. Buyer will not renovate, remodel, or alter any building or improvement now or hereafter situated on the Property, or construct any additional building or improvement on the Property without first providing Seller with written notice and plans for the work and getting Seller's written approval of the plans.

Mechanics' Liens

Section 13. Buyer shall indemnify and hold Seller and the property of Seller, including Seller's interest in the Property, free and harmless from liability for any and all mechanics' liens or other expenses or damages resulting from any renovations, alterations, buildings, repairs, or other work placed on the Property by Buyer.

Personal Injuries

Section 14. Buyer shall indemnify and hold Seller free and harmless from any and all demands, loss, or liability resulting from the injury to or death of any person or persons because of the negligence of Buyer or the condition of the Property at any time after the date possession of the Property is delivered to Buyer.

Possession and Legal Title

Section 15. Buyer shall be entitled to enter into possession of the Property on the date this Contract is recorded [*or* on _____ (*date*)] and to continue in possession of the Property so long as Buyer is not in default in the performance of this Contract. Seller shall retain legal title as a security interest in the Property until Buyer has paid the balance of the purchase price as required by this Contract.

Assignment of Rents

Section 16. As additional security, Buyer hereby gives to and confers on Seller the right, power, and authority during

the continuance of the Trust created by this Contract, to collect the rents, issues, and profits of the Property, but reserves the right, prior to any default by Buyer in the payment of any indebtedness secured by this Contract or in the performance of any agreement under this Contract, to collect and retain the rents, issues, and profits as they become due and payable. On any such default, Seller may, without notice and without regard to the adequacy of the security for the indebtedness secured by this Contract, either personally or by agent or court-appointed receiver, do the following: enter on and take possession of the Property or any part of the Property; sue for or otherwise collect the rents, issues, and profits, including those past due and unpaid; and apply the rents, issues, and profits, less costs and expenses of operation and collection (including reasonable attorneys' fees), on any indebtedness secured by this Contract, in any order determined by Seller. The exercise of the foregoing rights by Seller shall not cure or waive any default or notice of default under this Contract or invalidate any act done pursuant to such a notice.

Default in Foreclosure

Section 17. On default by Buyer in the payment of any indebtedness secured by this Contract or in the performance of any agreement under this Contract, Seller may declare all sums secured by this Contract immediately due and payable by delivering to Trustee a written declaration of default and demand for sale and a written notice of default and election to sell the Property. Trustee shall cause the notice of default and election to sell to be recorded. Seller also shall deposit with Trustee this Contract and all documents evidencing expenditures secured by this Contract.

After the lapse of the time then required by law following the recordation of the notice of default, and after notice of sale has been given as then required by law, Trustee, without demand on Buyer, shall sell the Property at the time and place fixed by it in the notice of sale, either as a whole or in separate parcels, and in any order determined by Trustee, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at the original time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser at the auction its deed conveying the Property sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness of the recitals. Any person, including Buyer, Trustee, or Seller, may purchase at the sale.

After deducting all costs, fees, and expenses of Trustee and of this Trust, including costs of procuring evidence of title incurred in connection with the sale, Trustee shall apply the proceeds of sale to payment of all sums expended under the terms of this Contract not then repaid, with accrued interest at the rate allowed by law in effect at the date of this Contract, all other sums then secured by this Contract, and the remainder, if any, to the person or persons legally entitled to the proceeds.

Acceptance by Trustee

Section 18. Trustee accepts this Trust when this Contract, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party to this Contract of pending sale under any other contract or of any action or proceeding in which Buyer, Seller, or Trustee shall be a party unless brought by Trustee.

Substitution of Trustee

Section 19. Seller, or any successor in ownership of any indebtedness secured by this Contract, may from time to time, by written instrument, substitute a successor or successors to any Trustee named in or acting under this Contract. The substitution instrument must contain the name of the original Buyer, Trustee, and Seller under this contract, the book and page where this Contract is recorded, and the name and address of the new Trustee. When executed by Seller and

duly acknowledged and recorded in the office of the recorder of the county or counties where the Property is situated, the substitution instrument shall be conclusive proof of proper substitution of the successor Trustee or Trustees. Any successor Trustee or Trustees shall, without conveyance from the Trustee predecessor, succeed to all its title, estate, rights, powers, and duties.

Recordation and Title Insurance

Section 20. On the execution of this Contract by the parties, Trustee shall cause it to be recorded in the Office of The County Recorder of _____ County, California. On recordation, Seller and Buyer shall obtain title insurance policies issued by _____[*name of title company*] insuring their interests in this Contract. This shall be done at the expense of [Buyer *or* Seller].

Conveyance on Full Performance

Section 21. When the purchase price and all other amounts to be paid by Buyer pursuant to this Contract are fully paid as provided in this Contract, Seller will execute and deliver to Buyer a good and sufficient deed conveying to Buyer good and marketable title to the Property as evidenced by a California Land Title Association standard coverage [*or specify other form of policy*] title insurance policy in the full amount of the purchase price. The title policy shall be paid for by Seller [*or* Buyer].

Deed of Trust in Lieu of Contract

Section 22. When the full sum of $_____, including the amount paid by Buyer on execution of this Contract, has been paid by Buyer on the principal amount of the purchase price specified in this Contract, Seller will, on request of Buyer, execute and deliver to Buyer a good and sufficient deed conveying to Buyer good and marketable title to the Property as evidenced by a California Land Title Association standard coverage [*or specify other form of policy*] title insurance policy in the full amount of the purchase price procured and paid for by Seller [*or* Buyer], and will accept in substitution of this Contract a promissory note in the amount of the then unpaid principal balance of the purchase price containing terms for interest and payment similar to those contained in this Contract and secured by a first Deed of Trust on the Property. The promissory note and Deed of Trust shall be in the usual form now being supplied by the _____ Title Company for use in _____ County, California.

Entire Agreement

Section 23. Both Buyer and Seller agree that this Contract constitutes the sole and only agreement between them respecting the Property and correctly sets forth their obligations to each other as of its date.

Attorneys' Fees

Section 24. If any action arising out of or relating to this Contract is commenced by either party to this Contract, then as between Buyer and Seller, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action.

Notices

Section 25. Any and all notices or other communications required or permitted by this Contract or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom it is directed, or in lieu of personal service when mailed by first-class mail, postage prepaid, addressed to Buyer at the address of the Property or to Seller at _____, California. Either party may change that party's address for these purposes by giving written notice of the change to the other party in the manner provided in this Section.

Binding on Heirs and Successors

Section 26. This Contract shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties to this Contract; provided, however, that nothing contained in this Section shall be construed as a consent by Seller to any assignment of this Contract or of any interest in this Contract by Buyer except as provided in Section 23 of this Contract.

Assignments Prohibited

Section 27. Buyer shall not transfer, sell, or assign Buyer's interest in the Property unless the transfer, sale, or assignment may be consummated without acceleration of any senior encumbrance on the Property. In the event of an acceleration of any senior encumbrance by reason of a transfer, sale, or assignment by Buyer, the total amount of unpaid principal and interest due under this Contract shall be immediately due and payable to Seller in order to protect Seller against the loss of Seller's security interest in this Contract.

Time of Essence

Section 28. Time is expressly declared to be of the essence.

Waiver

Section 29. The waiver of any breach of this Contract by either party shall not constitute a continuing waiver or a waiver of any subsequent breach either of the same or another provision of this Contract.

Prepayment Penalty

Section 30. Buyer may pay to Seller the full remaining unpaid principal balance of the purchase price specified in this Contract at any time before it becomes due by paying in addition to that principal amount the interest that has accrued on that amount to the date of the payment and an additional sum equal to _____ percent of the unpaid principal balance.

[*Add the following if there is a senior trust deed or mortgage recorded against the property that the buyer will assume as part of the purchase price:*]

In accordance with *California Civil Code Section 2924b*, request is hereby made by the undersigned that a copy of any Notice of Default and a copy of any Notice of Sale under the Deed of Trust [*or* Mortgage] recorded

_____[*date of recordation*], in Book _____, Page _____[*or* as Instrument No. _____], Official Records of _____ County, California, executed by _____ as Trustor [*or* Mortgagor] in which _____[*name of beneficiary or mortgagee*] is named as Beneficiary [*or* Mortgagee], [*add if describing a trust deed:* and _____ (*name of trustee*) as Trustee,] be mailed to [*name of person to whom notice is to be mailed, normally the seller under this contract*], whose address is _____[*street, city, state, zip*].

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

Executed on _____[*date*], at _____ County, California.

SELLER
_____ [*signature of seller*]
[*typed name*]
BUYER
_____ [*signature of buyer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsReal Property LawFinancingConstruction LoansReal Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPriorities & RecordingRecording Acts



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
D. Installment Real Property Sales Contracts

10-25A California Legal Forms--Transaction Guide § 25A.231

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.231 Purchase Price Provision Requiring Impound for Taxes and Insurance

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision that may be inserted in an installment real property sales contract [*see § 25A.230*] if the buyer agrees to deposit amounts in an impound account maintained by the seller for the payment of taxes and insurance on the property. It allocates the total purchase price to be paid under the contract among amounts for taxes, insurance, interest, and principal.

Every seller of improved or unimproved real property under a real property sales contract who receives pro rata payments for insurance and taxes must hold these amounts in trust for the purpose designated. These amounts may not be disbursed for any other purpose without the consent of the payor and any person or corporation holding an encumbrance on the property [*Civ. Code § 2985.4*]. The above restrictions do not apply to a state or federally supervised assignee of a seller who, as agent for the seller, receives and disburses payments [*Civ. Code § 2985.4*]. On request of the purchaser under a real property sales contract, the seller must furnish a statement containing an itemized account of moneys received by the seller during a calendar year for principal, interest, taxes, and insurance [*Civ. Code § 2954(b)*; *see § 25A.245[2]*].

[b] Statutory Requirements

[i] When Impound Account May Be Required

Numerous statutes govern the use of impound accounts and the reporting of impound balances held by beneficiaries under trust deeds and sellers under real property sales contracts. Impound accounts may be required by a seller of a single-family, owner-occupied dwelling only under certain circumstances. In the absence of one of these circumstances, an impound account is permitted only if the buyer consents to it [*see Civ. Code § 2954*]. For a detailed discussion of

these requirements, see *§ 25A.228[1][c][i]*.

[ii] Required Interest Payments on Impounded Funds

With certain exceptions, a lender who requires advance payments for taxes and insurance under a loan secured by real property containing only a one-to-four family residence, must pay interest on the impounded amounts [*see Civ. Code § 2954.8*]. For coverage of these requirements, see *§ 25A.228[1][c][ii]*.

[iii] Amount, Use, and Maintenance of Impounded Funds

Statutory restrictions govern the amount that may be impounded and the ways in which the lender may use the impounded funds [*see Civ. Code §§ 2954.1, 2955*]. For discussion of these limitations, see *§ 25A.228[1][c][iii]*.

[2] FORM

Purchase Price Provision Requiring Impound for Taxes and Insurance

Purchase Price Provision Requiring Impound for Taxes and Insurance

Total Purchase Price

Section _____. The total purchase price for the Property is $_____, payable as follows: $_____ on execution of this Contract, receipt of which is hereby acknowledged by Seller, and the balance in installments of $[*add if balance may be prepaid without penalty:* or more] per month payable to Seller, at any place designated in writing by Seller, on the _____ day of each month commencing _____[*date*], and continuing for a period not exceeding _____ years from that date until the full purchase price together with interest as provided in this Contract has been paid. Each monthly installment shall be credited by Seller as follows:

Taxes

(a) First, to a trust fund for the payment of taxes and assessments that are levied or assessed or that accrue against the Property during the continuance of this Contract. The amount of each installment to be credited to the trust fund is to be determined by dividing the latest tax bill for the Property then available by 12. Should any taxes or assessments be increased at any time during the continuance of this Contract, the monthly installments to be paid by Buyer shall thereafter be increased by the amount that is necessary to pay the tax or assessment increase.

Insurance

(b) Second, to a trust fund for the payment of premiums on insurance policies issued by insurance companies selected by Seller insuring all buildings and improvements on the Property for their full replacement value against loss by fire, with loss payable to Seller. All moneys collected by Seller from any such insurance policy shall be applied by Seller to the payment of the then unpaid principal balance of this Contract and interest on that amount in any order selected by Seller.

Interest

(c) Third, to interest at the rate of _____ percent per annum from the date of this Contract on the then remaining unpaid principal balance of the purchase price recited in this Contract.

Principal

(d) Fourth, to reduction of the then remaining unpaid principal balance of the purchase price recited in this Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
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D. Installment Real Property Sales Contracts

10-25A California Legal Forms--Transaction Guide § 25A.232

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.232 Statement Regarding Subdivision Map Act

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative statements, one of which must be included in any real property sales contract entered into on or after January 1, 1978, when the real property that is the subject of the contract resulted from a division of real property [*see Civ. Code § 2985.51*; *see also* [b], *below*]. The statements indicate whether the divided property complied with, was not subject to, was exempt from, or was the subject of a waiver of the requirements of, the Subdivision Map Act [*Gov. Code §§ 66410-66499.37*] or applicable prior law. As discussed below, the precise statement required by statute depends on whether the division occurred on or after, or prior to, January 1, 1978 [*see Civ. Code § 2985.51*].

[b] Disclosure Requirement

[i] Definitions

For purposes of this disclosure requirement, a "real property sales contract" is an agreement under which one party agrees to convey title to unimproved real property to another party on the satisfaction of conditions set forth in the contract and that does not require the conveyance of title within one year from the date of the formation of the contract. "Unimproved real property" means real property that does not contain any permanent structures intended for human occupancy or commercial use [*Civ. Code § 2985.51(e)*].

[ii] Exemption

A real property sales contract is exempt from this disclosure requirement if it (1) requires either a good faith down payment and a single payment of the balance of the purchase price or a single payment of the purchase price on

completion of the contract, and (2) does not require periodic payments of principal or interest [*Civ. Code § 2985.51(f)*].

[c] Statements for Divisions of Property on or After January 1, 1978

[i] Compliance With Act

If the division complied with the Subdivision Map Act [for a detailed discussion of the Act's requirements, see Ch. 30, *Subdivision Regulation*], the statement in the contract must expressly refer to the location, in the records of the county recorder for the county in which the real property is located, of a previously recorded certificate of compliance or conditional certificate of compliance issued pursuant to the Act. Alternatively, the statement may describe the real property to be conveyed as an entire lot or parcel by referencing the recorded final or parcel map creating the parcel or parcels to be conveyed. When the statement refers to a recorded parcel map and the approval of the map was conditioned on the construction of specified offsite and onsite improvements, the statement must expressly set forth all the required offsite and onsite improvements if these improvements have not been completed prior to the date the real property sales contract is executed [*Civ. Code § 2985.51(a)(1)*; *see* 1st alternative P of form in [2], *below*].

[ii] Other Statements

If the division was not subject to the Subdivision Map Act [*see § 30.20[1]*; *see also § 30.110[1]*], the statement must set forth the basis for the nonapplicability [*Civ. Code § 2985.51(a)(4)*; *see* 2nd alternative P of form in [2], *below*]. If the division was exempt from the Act [*see § 30.20[3]*; *see also § 30.110[1]*], the statement must set forth the basis for the exemption [*Civ. Code § 2985.51(a)(2)*; *see* 3rd alternative P of form in [2], *below*].

If the Act's requirements were waived by the appropriate local agency for the real property division, a copy of the document issued by the local agency and granting the waiver must be attached to the contract. The statement must also specify all offsite and onsite improvements that have not been completed before the execution of the real property sales contract but were required as a precondition of the waiver [*Civ. Code § 2985.51(a)(3)*; *see* 4th alternative P of form in [2], *below*].

[d] Statements for Divisions of Property Prior to January 1, 1978

If the real property that is the subject of the real property sales contact is unimproved and resulted from a division of property that occurred before January 1, 1978, statements similar to those required for post-January 1, 1978, divisions must be included in or attached to the contract [*see Civ. Code § 2985.51(b)*; for coverage of these requirements, see *§ 25A.132(14)(b)*]. The alternative statements set forth in the form below may be adapted for use for these earlier divisions.

[e] Civil and Criminal Sanctions

If a buyer under a real property sales contract reasonably relies on a statement by the seller that the subject property was divided in compliance with or was exempt from the Subdivision Map Act, and it is subsequently determined that neither statement was accurate, the buyer may recover from the seller the costs of complying with the Act or may void the contract and sue for damages. A civil penalty may also be imposed against the seller [*Civ. Code § 2985.51(c)*]. A seller who willfully provides a buyer with a false statement regarding applicability of the Act is guilty of a misdemeanor [*Civ. Code § 2985.51(d)*].

[2] FORM

Statement Regarding Subdivision Map Act

Statement Regarding Subdivision Map Act

[*First alternative (for division that complied with Act):*]

Section _____. The Property described in this Contract was created by a division of real property that complied with the Subdivision Map Act and the local ordinance[s] of _____ County adopted pursuant to that act. [*Select the appropriate provision below:*]

[*EITHER*]

A Certificate of Compliance [*or* A Conditional Certificate of Compliance] was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

[*OR*]

The Property is parcel number _____, as designated on a final [or parcel] map recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California. [*Add if appropriate:* The approval of that map was conditioned on the construction of the following offsite and onsite improvements, which have not been completed as of this date: _____ (*describe all improvements*)].

[*Second alternative (for division that was not subject to Act):*]

Section _____. The Property described in this Contract was created by a division of real property that was not subject to the provisions of the Subdivision Map Act and the local ordinance[s] of _____ County adopted pursuant to that act because [*describe basis for nonapplicability of the Act*].

[*Third alternative (for division that was exempt from Act):*]

Section _____. The Property described in this Contract was created by a division of real property that was exempt from compliance with the Subdivision Map Act and the local ordinance[s] of _____ County adopted pursuant to that act because [*describe basis of exemption*].

[*Fourth alternative (for division that was granted waiver from Act):*]

Section _____. The Property described in this Contract was created by a division of real property for which the requirements of the Subdivision Map Act and the local ordinance[s] of _____ County adopted pursuant to that act were waived. A copy of the document granting the waiver and issued by _____[*name of local agency granting the waiver*] is attached to this Contract. [*Add if appropriate:* The granting of the waiver was conditioned on the construction of the following offsite and onsite improvements, which have not been completed as of the execution date of this Contract: _____ (*describe all improvements*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
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D. Installment Real Property Sales Contracts

10-25A California Legal Forms--Transaction Guide § 25A.233

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.233 Arbitration Provision and Related Statutory Notice

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of (1) a binding arbitration provision that may be included in a real property sales contract [*see § 25A.230*] and (2) a statutory heading and notice that must accompany such a provision [*see* [b], *below*]. The arbitration provision incorporates by reference the rules of the American Arbitration Association. For further discussion of arbitration and an alternative arbitration clause that provides for the use of rules set forth in the California Arbitration Act [*Code Civ. Proc. §§ 1280-1294.2*], see Ch. 23, *Real Property Sales Agreements* .

[b] Statutory Heading and Notice

If a contract to convey real property or contemplated to convey real property in the future, including a real property sales contract, contains a provision for binding arbitration, the following requirements must be satisfied [*Code Civ. Proc. § 1298(a)*; *see Civ. Code § 2985* ("real property sales contract" defined); Ch. 23, *Real Property Sales Agreements* ; *see also Code Civ. Proc. § 1298.8* (these requirements apply only to contracts or agreements entered into on or after July 1, 1989)]:

- The arbitration provision must be clearly titled "ARBITRATION OF DISPUTES" [*Code Civ. Proc. § 1298(a)*].

- The statutory arbitration notice (set forth as the indented paragraphs of this form) must appear immediately following the arbitration provision and immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision [*Code Civ. Proc. § 1298(c)*].

- Both the statutory notice and the arbitration provision must be set out in capital letters if the contract

is typed. If the contract is printed, the provision must be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and the notice must be set out in at least 10-point bold type or in contrasting red in at least 8-point bold type [*Code Civ. Proc. § 1298(a), (c)*].

For further discussion of these requirements, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Arbitration Provision and Statutory Notice

Arbitration Provision and Related Statutory Notice

ARBITRATION OF DISPUTES

[*If contract is typed, set out following provision in capital letters. If contract is printed, set out following provision in (1) at least 8-point bold type, or (2) contrasting red in at least 8-point type (Code Civ. Proc. § 1298(a)).*]

Section _____. ANY CONTROVERSY OR CLAIM ARISING OUT OF THIS CONTRACT OR A BREACH THEREOF SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION.

[*If contract is typed, set out following statutory notice in capital letters. If contract is printed, set out following notice in (1) at least 10-point bold type, or (2) contrasting red in at least 8-point bold type (Code Civ. Proc. § 1298(c)).*]

NOTICE:

BY INITIALLING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALLING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

INITIALLED BY BUYER: _____
INITIALLED BY SELLER: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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10-25A California Legal Forms--Transaction Guide § 25A.234

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.234 Installment Real Property Sales Contract--California Department of Veterans Affairs

[1] Comment

[a] Use of Form

The form in [2], *below*, is the real property sales contract used by the California Department of Veterans Affairs for its Cal-Vet loan program. It is reproduced here for illustrative purposes. Cal-Vet loan forms are available on the Internet at http://www.cdva.ca.gov/calvetloans.

For a detailed discussion of the procedures involved in obtaining a Cal-Vet loan, including forms that must be submitted to the Department of Veterans Affairs to obtain approval of the loan, see Ch. 25, *Real Estate Loans* .

[b] Cal-Vet Loan Procedure

Under the Veterans' Farm and Home Purchase Act of 1974 [*Mil. & Vet. Code § 987.50 et seq.*], the California Department of Veterans Affairs operates a purchase program commonly known as "Cal-Vet loans" to assist California veterans in acquiring farms or homes. Unlike financing programs of the Federal Housing Administration or the United States Veterans Administration, the California Department of Veterans' Affairs does not merely guarantee loans made to veterans by a lender but actually advances the funds, obtained from the issuance and sale of bonds under various veterans bond acts [*see Mil. & Vet. Code § 996.971 et seq.*], for the purchase of homes and farms by veterans.

After a qualified veteran has been approved by the Department for a Cal-Vet loan, the veteran selects the home or farm he or she wishes to purchase and submits the selection to the Department for approval, as the Department prescribes. The Department has the sole responsibility for underwriting and approving all farm or home loans [*Mil. & Vet. Code § 987.59(a)*]. The Department is directed by statute to achieve efficient processing and approval of loans and to ensure the optimal participation of qualified mortgage brokers and other qualified financial institutions [*see Mil. & Vet. Code § 987.59(b)*]. The Department, if it approves the selection, then purchases the property in its own name [*Mil. & Vet. Code*

§ 987.60] and sells it to the veteran under an installment real property sales contract [*Mil. & Vet. Code § 987.69*].

[c] Advantages of Cal-Vet Financing

The advantages generally associated with Cal-Vet financing are low interest rates, low-cost fire and hazard insurance, and the assurance, through inspection and approval of the property by the Department of Veterans Affairs, that the property is suitable for the veteran and his or her family. The term over which a purchase contract executed by the Department with a qualified veteran is made payable may not by statute exceed 40 years for farms or homes or 30 years for mobilehomes [*Mil. & Vet. Code § 987.71(b)*], although the Department provides that the length of these loans is as follows:

- Single Family Home--Thirty-year term loan.
- Farm Loan--Thirty-year term loan.
- New Mobilehome--Twenty-year term loan (maximum).
- Used Mobilehome--Ten to 15-year term loan (maximum depends on age of mobilehome).

[d] Assignment of Cal-Vet Contracts

A Cal-Vet purchase contract may not be assigned, voluntarily or involuntarily, by operation of law or otherwise, without the written consent of the Department of Veterans Affairs [*Mil. & Vet. Code § 987.73*; *see* [2], *below,* P 18]. The Department will consent to an assignment only for the following types of assignments [*12 Cal. Code Reg. § 342*; *see Mil. & Vet. Code § 987.73*]:

- To another qualified veteran.
- To the veteran and spouse, and no other party or parties, in joint tenancy, tenancy in common, or as community property.
- To a non-veteran spouse when the entire beneficial interest in the Cal-Vet property is awarded in a dissolution of marriage, legal separation, or nullity proceeding; however, the interest rate will be raised for spouses not eligible for the veterans' rate.
- To eligible heirs, devisees, or personal representatives.
- To a non-veteran spouse if the veteran purchaser qualifies as a person in long-term care as defined in *Welf. & Inst. Code § 14050.3* and the Department is satisfied that the interest of the veteran is adequately protected [*see Mil. & Vet. Code § 987.73(c)*].

When the Department consents to an assignment, the rate of interest chargeable to veteran purchasers may not be made applicable to a non-veteran assignee. Instead, the Department must fix a new rate for the non-veteran assignee [*Mil. & Vet. Code § 987.72*].

[e] Default of Buyer

On default of the veteran buyer, the Department of Veterans Affairs may cancel the contract. On cancellation of the contract, the purchaser forfeits all right to the property, and all payments previously made are deemed rental paid for occupancy [*Mil. & Vet. Code § 987.77*; *see* [2], *below,* P 15]. Paragraph 16 of this form requires the Department to give

the purchaser at least 30 days' written notice of its intention to cancel the contract.

[2] FORM

Installment Real Property Sales Contract--California Department of Veterans Affairs

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawVeteransBenefitsLoansReal Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingState Programs



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10-25A California Legal Forms--Transaction Guide §§ 25A.235-25A.239

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25A.235[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Related Notices, Requests, and Instruments

10-25A California Legal Forms--Transaction Guide § 25A.240

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.240 Notice of Balloon Payment

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of the due date of a balloon payment under a promissory note. This type of notice must be provided for certain loans secured by owner-occupied residential property [*see Civ. Code § 2924i(a)*; *see also* [d], *below*] and for certain loans involving an "arranger of credit" and seller financing [*see Civ. Code § 2966*; *see also* [c], *below*]. Requirements under both of the applicable statutes for notice of a balloon payment are essentially the same. The one notable exception is that a promissory note subject to *Civ. Code § 2966* must additionally include a statutory statement reciting the fact that the note is subject to the statute [*see* [f], *below*].

This form assumes that the security instrument is a trust deed. However, it may be easily modified for use in conjunction with a mortgage.

[b] Statutory Definitions

A "balloon payment note" is a loan that provides for a final payment that, as originally scheduled, is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision [*Civ. Code §§ 2924i(d)(1), 2957(b)*]. A "call provision" is a loan contract term that provides the holder of the loan with the right to call the loan due and payable either after a specified period has elapsed following closing or after a specified date [*Civ. Code §§ 2924i(d)(2), 2957(c)*]. However, if the holder of the loan does not exercise the call provision, the existence of the unexercised call provision will not cause the loan to be deemed a balloon payment loan [*Civ. Code §§ 2924i(d)(1), 2957(b)*].

[c] Applicability of Section 2966 Requirements

The notice requirement of *Civ. Code § 2966* applies to transactions for the purchase of a dwelling for not more than four families when (1) there is an "arranger of credit," and (2) the seller extends credit by accepting a balloon payment note with a repayment term of greater than one year [*see Civ. Code §§ 2956, 2966*]. An "arranger of credit" is a person, other than a party to the credit transaction, who develops or negotiates credit terms, participates in the completion of the credit documents, and directly or indirectly receives compensation for arrangement of the credit or from any transaction or transfer of the real property that is facilitated by the extension of credit [*Civ. Code § 2957(a)(1)*]. The term does not include either an attorney representing one of the parties to the credit transaction [*Civ. Code § 2957(a)(1)*] or an escrow holder in the transaction [*Civ. Code § 2957(a)(3)*]. However, a party to the transaction who is either a licensed attorney or a real estate licensee is an arranger of credit if the party is represented by a licensed broker [*see Civ. Code § 2957(a)(2), (4)*].

In most situations, the only persons who will meet the definition of "arranger of credit" are the real estate licensees involved in the negotiations since they will participate in the negotiations and receive compensation in the form of their commission. Therefore, as a general rule, the requirements of *Civ. Code § 2966* apply when a real estate licensee is involved and the seller participates in the financing by taking a balloon payment note [*see* California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender)].

[d] Applicability of Section 2924i Requirements

Civ. Code § 2924i applies to loans secured by a trust deed or mortgage on real property containing one to four residential units, at least one of which at the time the loan is made is or is to be occupied by the borrower, if the loan is for a period in excess of one year and is a balloon payment loan [*Civ. Code § 2924i(a)*]. However, *Civ. Code § 2924i* does not apply to [*Civ. Code § 2924i(b)*]:

- Transactions subject to the "arranger of credit" disclosure requirements of *Civ. Code § 2956* [*see* Ch. 25, *Real Estate Loans* , Legal Background, "--Arrangers of Credit and Sales of Dwellings"].

- Loans made for the principal purpose of financing the construction of one or more residential units.

- Open-end credit as defined in Regulation Z, whether or not the transaction is otherwise subject to Regulation Z. "Regulation Z" means any rule, regulation, or interpretation promulgated by the Board of Governors of the Federal Reserve System under the Federal Truth in Lending Act [*15 U.S.C. §§ 1601-1667e*] and any interpretation or approval issued by an authorized official or employee of the Federal Reserve System [*Civ. Code § 2924i(d)(3)*; *see* Ch. 25, *Real Estate Loans* , Legal Background, "Disclosures Required Under Federal Truth in Lending Act--Purpose and Coverage of Act" and succeeding headings; *see also* Ch. 46, *Credit Card and Other Open-End Credit Transactions*].

[e] Contents and Delivery of Notice

The holder of a balloon payment loan must provide the trustor or his or her successor in interest with a notice regarding the balloon payment. The notice must include all of the following [*Civ. Code §§ 2924i(c), 2966(a)*]:

- A statement of the name and address of the person to whom the final payment must be paid.

- The date on or before which the final payment must be paid.

- The amount of the final payment, or if the exact amount is unknown, a good faith estimate of the amount, including unpaid principal, interest, and any other charges. These amounts must be determined assuming timely payment in full of all scheduled installments coming due between the date the notice is prepared and the date when the final payment is due.

- If the borrower has a contractual right to refinance the final payment, a statement to that effect, including, for *Civ. Code § 2966* notes [*see* [c], *above*], a summary of the actual terms of the refinancing or an estimate or approximation of those terms, to the extent known.

The holder must deliver or mail the notice by first-class mail, with a certificate of mailing obtained from the United States Postal Service, to the trustor or successor at his or her last known address. This must take place at least 90 days but not more than 150 days prior to the due date of the final payment on the loan. However, if the due date of the final payment is extended before notice is otherwise required, then the notice requirement applies only to the due date as extended (or as subsequently extended) [*Civ. Code §§ 2924i(c), 2966(a)*].

[f] Statement Required for Section 2966 Notes

Every note that is subject to the provisions of *Civ. Code § 2966* [*see* [c], *above*] must include a statement reciting that the holder of the note is required by statute to give notice of the balloon payment within a prescribed period [*see Civ. Code § 2966(d)*]. The required statutory language for the statement is set forth in *§ 25A.225*. Failure to include the notice does not invalidate the note [*Civ. Code § 2966(d)*].

[g] Violation of Notice Requirements

Failure to provide notice of a balloon payment in the manner required by statute does not extinguish any obligation of payment by the borrower, but does extend the due date for any balloon payment to the later of (1) the date specified in the balloon payment note; (2) 90 days from the date of delivery or mailing of the required notice; or (3) the due date specified in the required notice. If the failure to give timely notice acts to extend the term of any note, interest continues to accrue for the extended term at the contract rate, payments continue to be due at any periodic interval and on any payment schedule specified in the notice, and the payments must be credited to principal or interest under the terms of the note. Default in any extended periodic payment is considered a default under terms of the note or security instrument [*Civ. Code §§ 2924i(e), 2966(b)*]. For *Civ. Code § 2966* notes, a failure to give notice does not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice [*Civ. Code § 2966(c)*].

Any credit or security document subject to the statutory balloon payment notice requirements is not invalidated solely because any person fails to comply with these requirements. However, any person who willfully violates any of the requirements is liable for actual damages suffered by the debtor as the proximate result of the violation, and, if the debtor prevails in any suit under *Civ. Code § 2924i* to recover that amount, for reasonable attorneys' fees [*Civ. Code §§ 2924i(f)(1), 2965*]. No person may be held liable in any action under the statutory provisions if it is shown by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such an error [*Civ. Code §§ 2924i(f)(2), 2965*].

[2] FORM

Notice of Balloon Payment

Notice of Balloon Payment

_____[*name of borrower*]
_____[*address*]
_____[*city, state, zip*]
LOAN NUMBER: _____

NOTICE OF FINAL (BALLOON) PAYMENT

THIS NOTICE IS GIVEN pursuant to California Civil Code Section _____ [2924i *or* 2966], and relates to the promissory note dated _____, for $_____ (the "Note"). The payment of that Note is secured by the Deed of Trust dated _____, executed by _____[*name*], as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

You are hereby notified of the following facts concerning the Note:

1. The final payment on the Note is due on _____[*date*].

2. The amount of the final payment, including unpaid principal, interest, and any other applicable charges, is [*add if exact amount is unknown:* approximately] $_____. This amount assumes timely payment in full of all scheduled installments coming due between the date of this notice and the date when the final payment is due.

3. The final payment must be paid to _____[*name*] at _____[*address, city, state, zip*].

[*Add if applicable:*]

4. As provided in the above Deed of Trust, you have a contractual right to refinance this final payment. [*To extent known, add following for Civ. Code § 2966 notes:* The terms of the refinancing are as follows _____ (*describe terms*)].
Dated: _____.

_____ [*name of lender*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentMethods & PlacesContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsNonconventional Mortgages



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10-25A California Legal Forms--Transaction Guide § 25A.241

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.241 Notice to Senior Lender of Junior Lien

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of the existence of a junior lien. This notice should be given by a junior lienholder to the holder of the senior lien when the junior lienholder wants to confirm priority of its lien against nonobligatory advances made to a borrower under a senior trust deed after creation of the junior lien.

Because the trust deed is the most widely used real property security device in California, this form assumes that the relevant security instruments are trust deeds. If either or both instruments are mortgages, minor modifications in the description of the instrument and the parties must be made to this form.

[b] Priority of Junior Lien

When a senior trust deed (or mortgage) contains a future advance clause, a junior lien will have priority over future advances made after recordation of the junior lien if (1) the junior lienor gives actual, not constructive, notice to the senior lienholder of the junior lien, and (2) the future advances after the junior lien are not obligatory on the senior lienor [*Pike v. Tuttle (1971) 18 Cal. App. 3d 746, 751, 96 Cal. Rptr. 403]* . Advances that are not obligatory but are made for the actual improvement of the property have priority over mechanics' liens that attached before the advances were made [*Civ. Code § 3136*]. This priority for nonobligatory future advances that improve the property has also been extended by case law to the situation in which the junior lienor who would have priority is the holder of a second deed of trust rather than the beneficiary of a mechanics' lien [*Turner v. Lytton Sav. & Loan Ass'n (1966) 242 Cal. App. 2d 457, 459, 51 Cal. Rptr. 552* (decided under former Code Civ. Proc. § 1188.1, which had identical language to *Civ. Code § 3136*)].

[2] FORM

Notice to Senior Lender of Junior Lien

Notice to Senior Lender of Junior Lien

NOTICE OF EXISTENCE OF JUNIOR LIEN

_____[*name of borrower*]
_____[*address*]
_____[*city, state, zip*]

You are hereby notified that the undersigned is the legal owner and holder of the promissory note and all other indebtedness secured by that Deed of Trust (the "Junior Deed of Trust") dated _____, executed by _____[*name*] as Trustor, in which the undersigned [*or* _____ (*name*)] is named as Beneficiary and _____[*name*] is named as Trustee, and recorded as Instrument No. _____ in Book _____ at Page _____ of the Official Records of the County Recorder of the County of _____, California. [*Add if applicable:* The undersigned is the successor in interest of the Beneficiary of the Junior Deed of Trust.]

The lien of this Junior Deed of Trust is secured by the real property (the "Property") described in Exhibit "A," which is attached to this Notice and hereby incorporated by reference. The Junior Deed of Trust is subordinate to a Deed of Trust (the "Senior Deed of Trust") secured by the Property and dated _____, executed by _____[*name*] as Trustor, in which you are [*or* _____ (*name*) is] named as the Beneficiary and _____[*name*] is named as Trustee, and recorded as Instrument No. _____ in Book _____ at Page _____ of the Official Records of the County Recorder of the County of _____, California.

[*Add if appropriate:*]

Request is hereby made that you notify the undersigned whether the Senior Deed of Trust secures future advances that you may make to Trustor, and if so, whether or not you are obligated and bound to make any such future advances.

_____ [*signature of junior lienholder*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsAfter-Acquired PropertyReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



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10-25A California Legal Forms--Transaction Guide § 25A.242

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.242 Request for Notice of Delinquencies

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by a junior lienholder for notice of delinquencies in payments on an obligation securing the senior lien. This form of request satisfies the requirements of *Civ. Code § 2924e*, which grants the right of notice to certain junior lienholders on residential property [*see* [b], *below*]. The receipt of notice of delinquencies on a senior lien enables a junior lienor to take steps to protect his or her position before a notice of default on the senior lien is recorded.

This form assumes that the relevant security instruments are trust deeds, as is almost invariably the case. However, it may be easily modified for use in conjunction with mortgages.

[b] Overview of Statutory Provisions

Under *Civ. Code § 2924e*, the beneficiary or mortgagee of any trust deed or mortgage either (1) on real property containing one to four residential units, or (2) given to secure an original obligation of up to $300,000 may, with the written consent of the trustor or mortgagor, submit a written request to the beneficiary or mortgagee of any lien that is senior to the lien of the requesting party, requesting written notice of delinquencies of four months or more in payments of principal or interest on any obligation secured by the senior lien. The request may be made notwithstanding the fact that the loan secured by the lien of the requesting party is not then in default as to payments of principal or interest [*Civ. Code § 2924e(a)*].

The rights and obligations set forth in *Civ. Code § 2924e* inure to the benefit of, or pass to, successors in interest of the parties specified in that statute [*Civ. Code § 2924e(b)*; *see* [i], *below*].

[c] Contents of Request

The request for notice must identify [*Civ. Code § 2924e(b)*]:

- The requester's ownership or security interest.
- The date on which the requester's interest will terminate as evidenced by the maturity date of the note of the trustor or mortgagor in favor of the requester.
- The name of the trustor or mortgagor and the name of the current owner of the security property if different from the trustor or mortgagor.
- The street address or other description of the security property.
- The loan number (if available to the requester) of the loan secured by the senior lien.
- The name and address to which notice is to be sent.

[d] Procedure for Making Request

The request for notice must be sent by certified mail to the "senior" beneficiary or mortgagee, or any agent designated by the beneficiary or mortgagee for the purpose of receiving loan payments. The request must be sent to the address specified for the receipt of the loan payments. However, if that address is not known, it must be sent to the address shown on the recorded trust deed or mortgage [*Civ. Code § 2924e(a)*]. If any beneficiary or mortgagee (or designated agent) has been succeeded in interest by any other person, any request for notice must be transmitted promptly to that person [*Civ. Code § 2924e(e)*].

The request for notice must include the signed written consent of the trustor or mortgagor and be accompanied by the $40 statutory fee [*Civ. Code § 2924e(b)*; *see* [e], *below*]. Further, it must be recorded in the office of the county recorder of the county in which the security real property is located [*Civ. Code § 2924e(b)*].

[e] Consent of Trustor or Mortgagor

The required written consent of the trustor or mortgagor [*see* [c], *above*] must be either (1) effected through a signed and dated agreement that is separate from other loan and security documents, or (2) disclosed to the trustor or mortgagor in at least 10-point type [*Civ. Code § 2924e(a)*]. To be useful, this consent should be obtained as a part of the original loan transaction because the debtor does not have any incentive for signing such a consent at a later date [*see* California Real Estate Law & Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender)].

[f] Period of Effectiveness and Renewals

Unless withdrawn in writing, a request for notice of delinquencies is effective for five years from the date the request is mailed or the date it is recorded, whichever is later. However, it may be renewed within six months prior to its expiration date by sending the beneficiary or mortgagee (or agent) a copy of the earlier request for notice together with a signed statement that the request is renewed [*see § 25A.243*].

A request for notice is applicable to all delinquencies that occur prior to the termination date of the requester's interest (as specified in the request) or the statutory expiration date for the request, as appropriate [*Civ. Code § 2924e(b)*].

[g] Notice of Satisfaction of Obligation

If an obligation secured by a junior lien is satisfied after the junior lienholder has submitted a written request to the senior lienholder for notice of delinquencies, the requester must notify the senior lienholder in writing of the foregoing satisfaction. The notification must also state that the senior lienholder is no longer required to provide the junior lienholder with a notice of delinquencies pursuant to the prior request for such a notice [*Civ. Code § 2924e(g)*].

[h] Notice of Delinquencies

[i] Procedural Requirements

A senior beneficiary or mortgagee must give the requester written notice of any uncured delinquency that exists or occurs on or after 10 days from the date the request is mailed or the date on which it is recorded, whichever is later. The notice must also state the amount of the delinquency. It must be given within 15 days following the end of four months from any delinquency in payments of principal or interest, by personal service or first-class mail (postage prepaid). After a notice of default [*see § 25D.202[2]*] has been recorded pursuant to *Civ. Code § 2924(a)(1)* with respect to a delinquency, no notice or further notice is required [*Civ. Code § 2924e(c)*].

If the senior beneficiary or mortgagee of an obligation secured by nonresidential property [*see* [b], *above*] has sent five or more notices before the expiration of the effective period of the request, he or she may charge a fee of up to $15 for each subsequent notice [*Civ. Code § 2924e(b)*].

[ii] Failure to Give Notice

If the beneficiary or mortgagee of any senior lien fails to give the requester the required notice of deficiencies [*see* [i], *above*], and a subsequent foreclosure or trustee's sale of the security property occurs, the beneficiary or mortgagee is liable to the requester for damages consisting of a statutory penalty plus any monetary damage that the requester has sustained (as a result of the failure to provide timely notice) from the date on which notice should have been given to the earlier of (1) the date on which the notice is given, or (2) the date of the recording of the notice of default [*see Civ. Code § 2924(a)(1)*]. A showing by the beneficiary or mortgagee, by a preponderance of the evidence, that the failure to provide timely notice resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such an error, is a defense to any liability for that failure [*Civ. Code § 2924e(d)*].

Any failure to give proper notice of delinquencies does not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice [*Civ. Code § 2924e(f)*].

[i] Successors in Interest

The rights and obligations created by *Civ. Code § 2924e* inure to the benefit of, or pass to, as the case may be, successors in interest of parties specified in that statute. Any successor in interest of a party entitled to notice of delinquencies under *Civ. Code § 2924e* must file a request for that notice with any beneficiary or mortgagee of the senior lien and must pay a processing fee prescribed by statute. Under these circumstances, the trustor or mortgagor need not submit a new written consent from the trustor or mortgagor [*Civ. Code § 2924e(b)*; *see* [c], *above*].

[2] FORM

Request for Notice of Delinquencies
Request for Notice of Delinquencies

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])

_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

REQUEST FOR WRITTEN NOTICE OF DELINQUENCIES

TO: _____[*name of beneficiary or agent*]
_____[*address*]
_____[*city, state, zip*]

THIS REQUEST CONCERNS that certain Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which you are [*or* _____ (*name*) is] named as the Beneficiary and _____[*name*] is named as Trustee, and recorded as Instrument No. _____ in Book _____ at Page _____ of the Official Records of the County Recorder of the County of _____, California (the "Senior Deed of Trust"). [*Add if available to requester:* The number of the loan evidenced by that promissory note is _____.]

YOU ARE HEREBY REQUESTED [*add if applicable:*, as the _____ (successor in interest *or* designated agent) of the above Beneficiary,] to provide the undersigned with written notice of any delinquencies of four months or more in payments of principal or interest on the promissory note [*or specify other obligation*] and all other indebtedness secured by the Senior Deed of Trust.

THIS REQUEST IS MADE by the undersigned, as the legal owner and holder of the promissory note and all other indebtedness secured by that certain Deed of Trust (the "Junior Deed of Trust"), dated _____, executed by _____[*name*] as Trustor, in which the undersigned [*or* _____ (*name*)] is named as Beneficiary and _____[*name*] is named as Trustee, and recorded as Instrument No. _____ in Book _____ at Page _____ of the Official Records of the County Recorder of the County of _____, California. [*Add if applicable:* The undersigned is the successor in interest of the Beneficiary of the Junior Deed of Trust.] The lien of this Junior Deed of Trust is subordinate to the Senior Deed of Trust. The date on which the foregoing interest of the undersigned will terminate as evidenced by the maturity date of the above promissory note of the Trustor is _____.

The street address of the real property secured by the Senior and Junior Deeds of Trust is [*or provide other description of security property*]. [*Add if current owner of security property is different from trustor:* The current owner of that security property is _____].

The notice should be delivered to the undersigned by personal service or first-class mail (postage prepaid) at _____[*address, city, state, zip*].

This request is made pursuant to *California Civil Code Section 2924e*. The undersigned is entitled to make this request because [the real property subject to the Junior Deed of Trust contains _____ (*number not exceeding four*) residential units *or* the principal sum of the promissory note secured by the Junior Deed of Trust is $_____ (*amount not exceeding $300,000*)].
Dated: _____.

_____ [*signature of requester*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

[*If above request is not separate from other loan and security documents, set forth following consent clause in at least 10-point type (see Civ. Code § 2924e(a)):*]

Consent of Trustor

As the Trustor of the above Junior Deed of Trust, I hereby consent to the making of this request for notice.
Dated: _____.

_____ [*signature of trustor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for PaymentReal Property LawFinancingMortgages & Other Security InstrumentsAfter-Acquired PropertyReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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10-25A California Legal Forms--Transaction Guide § 25A.243

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.243 Renewal of Request for Notice of Delinquencies

[1] Comment

[a] Use of Form

The form in [2], *below*, is a renewal of a previously-recorded request for notice of delinquencies under a senior lien. A beneficiary or mortgagee of a deed of trust or mortgage on real property may request a notice of delinquency if (1) the subject real property contains one to four residential units, or (2) the trust deed or mortgage was given to secure an original obligation of up to $300,000 [*Civ. Code § 2924e(a)*]. These lienholders may then take steps to protect their junior position before a notice of default is recorded for the senior lien. For further discussion and a form for a request for notice of delinquencies, see *§ 25A.242*.

[b] Procedure for Renewal

The original request for notice is effective for five years from the mailing of the request or the recording of that request, whichever occurs later. It may be renewed within six months before its expiration date by sending the following (in the manner described below) to the beneficiary or mortgagee or any agent that the beneficiary/mortgagee has designated to receive loan payments [*see Civ. Code § 2924e(b)*]:

- A copy of the earlier request for notice;
- A signed statement that the request is renewed; and
- A $15 renewal fee.

The requester must send the renewal of the request by certified mail to the beneficiary, mortgagee, or agent at the address specified for the receipt of these payments, if known. If that address is not known, the renewal must be sent to

the address shown on the recorded trust deed or mortgage [*Civ. Code § 2924e(a)*]. The renewal must be recorded in the county recorder's office for the county in which the secured real property is located [*Civ. Code § 2924e(b)*].

When a renewal request for notice is timely submitted, the effectiveness of the original request is continued for five years from the time when it would otherwise have lapsed. Succeeding renewal requests may be submitted in the same manner [*Civ. Code § 2924e(b)*].

If an obligation secured by a junior lien is satisfied after the junior lienholder has submitted a written request to the senior lienholder for notice of delinquencies, the requester must notify the senior lienholder in writing of the foregoing satisfaction. The notification must also state that the senior lienholder is no longer required to provide the junior lienholder with a notice of delinquencies pursuant to the prior request for such a notice [*Civ. Code § 2924e(g)*].

[2] FORM

Renewal of Request for Notice of Delinquencies

Renewal of Request for Notice of Delinquencies

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

Renewal of Request for Notice of Delinquencies

TO: _____[*name of beneficiary or agent*]
_____[*address*]
_____[*city, state, zip*]

The REQUEST FOR WRITTEN NOTICE OF DELINQUENCIES (the "Request") dated _____[*date*], and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of the County Recorder of the County of _____, California IS HEREBY RENEWED. A copy of the Request is attached to this document and concerns that certain Deed of Trust dated _____[*date*], executed by _____[*name*] as Trustor, in which you are [*or* _____ (*name*) is] named as the Beneficiary and _____[*name*] is named as Trustee, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of the County Recorder of the County of _____, California.
Dated: _____.

_____ [*signature of requester*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25A California Legal Forms--Transaction Guide § 25A.244

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.244 Agreement for Modification of Existing Loan

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement for use by a borrower and lender to modify the terms of an existing loan. The modification agreement should specifically describe the existing promissory note and the trust deed (or mortgage) securing it, and should set forth the terms of modification. Institutional lenders are restricted as to the type of loans that may be modified and the purposes for which modification may be made [*see, e.g., 10 Cal. Code Reg. §§ 107.700-107.702* (state savings and loan associations)].

This form assumes that the relevant security instrument is a trust deed. However, it may be easily modified for use in conjunction with a mortgage.

[b] Effect on Junior Lien

This modification agreement is conditioned on the fact that no liens or encumbrances exist against the secured property except the lien created by the loan being modified. The modification agreement therefore has no effect on junior liens since there are none.

If there are junior liens and the modification agreement provides for the advance of additional funds on the loan that are to be secured by the original trust deed, the advances may or may not be superior to the junior liens. If future advances are obligatory on the lender, the lien of the original trust deed or mortgage is superior to liens of other encumbrancers that attach subsequent to execution of the trust deed or mortgage but prior to the making of the future advances [*Fickling v. Jackman (1928) 203 Cal. 657, 662, 265 P. 810]* . Conversely, if the future advances are merely optional with the lender, the lien of the trust deed or mortgage as to such future advances is inferior to liens or encumbrances that have attached subsequent to the execution of the trust deed or mortgage but prior to the making of the future advances,

provided the lender has notice of the existence of the junior liens [*Lumber & Builders Supply Co. v. Ritz (1933) 134 Cal. App. 607, 610-611, 25 P.2d 1002]* .

[2] Form

Agreement for Modification of Existing Loan

Agreement for Modification of Existing Loan

MODIFICATION AGREEMENT

Loan No. _____

THIS AGREEMENT is made this _____ day of _____, [*month*], [*year*], by and between _____[*name of lender*] (the "Lender") and _____[*name of borrower*] (the "Borrower").

RECITALS

A. Lender has loaned to Borrower certain moneys evidenced by a promissory note (the "Note") dated _____, for $_____, which is secured by a Deed of Trust (the "Deed of Trust") to _____[*name*] as Trustee, recorded as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California; and

B. Borrower desires to modify the terms of the Note and to remedy defaults, if any, in the Note.

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, Lender and Borrower agree as follows:

1. Borrower hereby acknowledges that the unpaid principal balance of the Note is $_____ and that the interest on that sum is payable at the rate of _____ percent per annum from _____[*date*], and hereby (a) waives (if and to the fullest extent such a waiver is permitted by law) the benefit of the statutes of limitations as now existing or hereafter amended in relation to the Note or any payments, extensions, or renewals of the Note; and (b) agrees and guarantees that any extensions, renewals, or forbearance of any portion of the obligation evidenced by the Note shall in no way affect Borrower's liability under the Note; and (c) agrees to pay all principal and interest of the Note in the time and manner set forth in Paragraph 2, below.

2. The terms for payment of the unpaid balance owing on the Note and interest on that amount are modified as follows: _____[*set forth terms of modification, e.g.,* The principal of the Note and all accrued interest shall be due and payable on or before _____ [*date*], unless extended as provided in this paragraph. Provided no default exists under the Note or the Deed of Trust, the date for payment of principal may be extended to _____[*date*] on the payment of an extension fee of $_____]. In any event, the entire amount of unpaid principal and interest on the Note shall be due and payable on _____[*date*].

3. Borrower expressly represents that the Property described in the Deed of Trust is subject to no encumbrances subsequent to the Deed of Trust except taxes for the present fiscal year if not delinquent and that no one other than Borrower has any interest in the Property except as follows: [*set forth exceptions, if any*]. This agreement is executed by Lender and is to be effective only on the foregoing conditions.

4. Lender hereby agrees to the amendment of the terms of the Note to the extent specifically set forth in this Agreement, but only on the conditions stated in Paragraph 2, above and on the further condition that the amendment shall not prejudice any present or future rights, remedies, benefits, or powers belonging or accruing to Lender under the terms of the Note as hereby amended or of the Deed of Trust.

5. Except as otherwise provided in this Agreement, the Note and Deed of Trust shall remain unaffected, unchanged, and unimpaired by reason of the foregoing extension and amendment.

6. In this agreement, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

LENDER
_____ [*signature of lender*]
[*typed name*]
BORROWER
_____ [*signature of borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25A California Legal Forms--Transaction Guide § 25A.245

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.245 Statement of Account for Impound or Trust Account Funds

[1] Comment--Use of Form

The form in [2], *below*, is a statement of account regarding funds received from a borrower during a calendar year and disbursed from an impound or trust account for the payment of taxes and insurance on property subject to a mortgage, trust deed, or real property sales contract [*see Civ. Code § 2954(b)*]. Every mortgagee, beneficiary, or seller under a real property sales contract, must, on request of the mortgagor, trustor, or buyer, furnish the requester with an itemized accounting of moneys (1) received for interest and principal repayment and (2) received and held in or disbursed from an impound or trust account, if any, for payment of taxes on the property, insurance premiums, or other purposes relating to the subject property. The statement must be furnished with 60 days after the end of the calendar year for which it is given [*Civ. Code § 2954(b)*].

The recipient of the statement may request a statement for a period covering a period other than a calendar year but must pay for such a special statement. Only one account statement for each calendar year must be provided free of charge [*Civ. Code § 2954(b)*].

In lieu of furnishing the above statement, the mortgagee, beneficiary, or seller may furnish a monthly statement or passbook showing moneys (1) received for interest and principal repayment and (2) received and held in and disbursed from an impound or trust account, if any [*Civ. Code § 2954(b)*].

An increase in the monthly rate of payment of a mortgagor, trustor, or buyer on a real property sales contract for impound or trust accounts is not effective until after the mortgagee, beneficiary, or seller has furnished the borrower with an itemized accounting of the moneys presently held by it in the accounts, a statement of the new monthly rate of payment, and an explanation of the factors necessitating the increase [*Civ. Code § 2954(b)*].

A person who willfully or repeatedly violates the statute requiring the statement of account is subject to a fine [*Civ.*

Code § 2954(b)].

For other requirements applicable to impound accounts, see *§ 25A.228[1]*.

[2] FORM

Statement of Account for Impound [or Trust] Account Funds

STATEMENT OF ACCOUNT FOR IMPOUND [*or* TRUST]
ACCOUNT FUNDS

_____[*date*]

TO: _____[*name of mortgagor, trustor, or seller*]

Pursuant to your request dated _____, the undersigned hereby provides you with the following information regarding your obligation to the undersigned created by a promissory note dated _____, in the original principal amount of $_____ and secured by a deed of trust [*or* mortgage] recorded on _____[*date*], in the Office of the County Recorder of _____ County as Instrument No. _____ in Book _____, Page [*or* under a real property sales contract dated _____, between you and the undersigned]:

1. For the calendar year _____, you have paid the undersigned a total of $_____, which has been credited against the principal amount owed to the undersigned. The total unpaid principal is now $_____.

2. For the calendar year _____, you have paid the undersigned a total of $_____ as interest on the principal obligation owed to the undersigned.

3. For the calendar year _____, you have paid the undersigned a total of $_____ for deposit in an impound [*or* trust] account maintained by the undersigned. During the calendar year, the undersigned disbursed $_____ from the account for the payment of taxes and $_____ for the payment of insurance premiums. The balance in the account as of the date of this statement is $_____.

_____ [*signature of mortgagee, beneficiary, or buyer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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10-25A California Legal Forms--Transaction Guide § 25A.246

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.246 Annual Statement of Creditor for Purchase-Money Obligations Secured by Residential Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement of account that must be given to borrowers by creditors of purchase-money obligations secured by residential real property. Specifically, the statement must be given to a mortgagor by every mortgagee when the mortgage is given as part of the purchase price for property containing only a one- to four-family residence (or to refinance such a mortgage) [*Civ. Code § 2954.2(a)*]. For these purposes, "mortgagee" includes a beneficiary under a trust deed, a seller under a real property sales contract, and an organization that services a mortgage or trust deed by receiving and disbursing payments for the mortgagee or beneficiary [*Civ. Code § 2954.2(b)(1)*]. "Mortgage" includes a first or second mortgage, a first or second trust deed, and a real property sales contract [*Civ. Code § 2954.2(b)(2)*].

[b] Contents of Notice

Within 60 days after the end of each calendar year, the mortgagee must give the mortgagor a written statement showing the amount of (1) moneys received for interest and principal repayment and late charges, (2) moneys received and held in or disbursed from an impound account, if any, for the payment of taxes on the property, insurance premiums, bond assessments, or other purposes relating to the property, and (3) any interest credited to such an impound account. Transmittal by the mortgagee to the mortgagor of cumulative statements or receipts that, for each calendar year, provide in one of the statements or receipts the information required by the statute, satisfies these disclosure requirements [*Civ. Code § 2954.2(a)*].

The statement must also include a notification in 10-point type that the mortgagor may request additional accountings pursuant to *Civ. Code § 2954* [*see § 25A.245*]. The mortgagor is entitled to receive one statement for each calendar year without charge and without request [*Civ. Code § 2954.2(a)*].

[2] Form

Annual Statement of Account

ANNUAL STATEMENT OF ACCOUNT

_____[*date*]

TO: _____[*name of mortgagor, trustor, or buyer*]

The following is information for the calendar year of _____, on your obligation to the undersigned created by a promissory note dated _____, in the original principal amount of $_____ and secured by a deed of trust [*or* mortgage] recorded on _____[*date*], in the Office of the County Recorder of _____ County as Instrument No. [or under a real property sales contract dated _____, between you and the undersigned]:

1. For the calendar year _____, you have paid the undersigned a total of $_____, which has been credited against the principal amount owed to the undersigned. The total unpaid principal balance is now $_____.

2. For the calendar year _____, you have paid the undersigned a total of $_____ as interest on the principal obligation owed to the undersigned.

3. For the calendar year _____, you have paid the undersigned a total of $_____ in late charges.

4. For the calendar year _____, you have paid the undersigned a total of $_____ for deposit in an impound [*or* trust] account maintained by the undersigned. During the calendar year, the undersigned disbursed $_____ from the account for the payment of taxes, $_____ for the payment of insurance premiums, [and] $_____ for the payment of bond assessments [*if applicable, list any additional amounts paid for other purposes.*]

A total of $_____ in interest has been credited to the impound account during the calendar year [*or* No interest has been credited to the impound account during the calendar year]. The balance in the account as of the date of this statement is $_____.

_____ [*signature of mortgagor, trustor, or buyer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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10-25A California Legal Forms--Transaction Guide § 25A.247

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.247 Beneficiaries' Agreement to Be Governed by Majority Interest Holders [Civ. Code § 2941.9(b)]

[1] Comment--Use of Form

The form in [2], *below*, is an agreement under which all of the beneficiaries under a trust deed agree to be governed by beneficiaries holding more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or any affiliate of that licensed real estate broker [*Civ. Code § 2941.9(a)*; *see Civ. Code § 2941.9(e)* ("affiliate of the licensed real estate broker" defined)]. This publication uses the term "majority interest holders" to refer to the beneficiaries granted this authority. Under *Civ. Code § 2941.9*, which establishes this process, all holders of notes secured by the same real property or series of undivided interests in notes secured by real property equivalent to a series transaction must agree in writing (this form) to be governed by the foregoing majority interest holders with respect to actions to be taken on behalf of all holders in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure [*Civ. Code § 2941.9(b)*].

A description of this agreement must be disclosed pursuant to *Bus. & Prof. Code § 10232.5* (governing the contents of disclosure statements given to prospective lenders or purchasers in certain transactions involving the negotiation and/or sale of secured obligations) [*see* Ch. 25, *Real Estate Loans*, § 25.560], and must be included in a recorded document, such as the deed of trust or the assignment of interests [*Civ. Code § 2941.9(c)*].

Actions taken pursuant to the authority granted in *Civ. Code § 2941.9* are not effective unless all of the parties agreeing to the action sign, under penalty of perjury, a separate written document entitled "Majority Action Affidavit" [*see Civ. Code § 2941.9(d)*]. For such a document, see *§ 25A.248*.

[2] Form

Beneficiaries' Agreement to Be Governed by Majority Interest Holders

BENEFICIARIES' AGREEMENT TO BE GOVERNED BY MAJORITY INTEREST HOLDERS

The undersigned hereby state and agree as follows:

1. This agreement has been prepared pursuant to *Civil Code Section 2941.9*.

2. The undersigned are _____[*describe their status as all holders of notes secured by same real property or series of undivided interests in notes secured by real property equivalent to series transaction, e.g.,* all of the holders of several notes that are in favor of different payees but that are secured by a single Deed of Trust dated _____, executed by _____ (*name*) as Trustor, in which the undersigned (*or specify others*) are named as Beneficiaries and _____ (*name*) as Trustee, and recorded _____ (*date*), as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California] .

3. The undersigned hereby agree to be governed by beneficiaries holding more than 50 percent of the record beneficial interest of [*refer to notes or interests described above, e.g.,* the above notes], exclusive of any notes [*or* interests] of a licensed real estate broker that is the issuer or servicer of the notes [*or* interests] of any affiliate of the licensed real estate broker, with respect to actions to be taken on behalf of all holders in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on the holders' behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure.
Dated: _____.

_____ [*signature of holder*]
[*typed name*]
[*include additional signature blocks as necessary*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25A SECURITY INSTRUMENTS FOR REAL ESTATE FINANCING
PART IV. FORMS
E. Related Notices, Requests, and Instruments

10-25A California Legal Forms--Transaction Guide § 25A.248

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25A.248 Majority Action Affidavit [Civ. Code § 2941.9(d)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a "Majority Action Affidavit" reflecting the requirements of *Civ. Code § 2941.9* [for coverage of these requirements, see *§ 25A.247[1]*]. Actions taken pursuant to the authority granted in *Civ. Code § 2941.9* are not effective unless all the parties agreeing to the action sign, under penalty, a separate written document (this form) entitled "Majority Action Affidavit" stating the following [*Civ. Code § 2941.9(d)*]:

- The action has been authorized pursuant to *Civ. Code § 2941.9*.
- None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the deed of trust.
- The undersigned together hold more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction.
- Notice of the action was sent by certified mail, postage prepaid, with return receipt requested, to each holder of an interest in the obligation secured by the deed of trust who has not joined in the execution of the document.

[b] Recordation and Effect

The Majority Action Affidavit must be recorded in the office of the county recorder of each county in which the real property described in the deed of trust is located. Once it is recorded, it constitutes conclusive evidence of compliance

with the requirements of *Civ. Code § 2941.9(d)* in favor of trustees acting pursuant to *Civ. Code § 2941.9*, substituted trustees acting pursuant to *Civ. Code § 2934a* [*see* Ch. 25C, *Release and Reconveyance*], subsequent assignees of the obligation secured by the deed of trust, and subsequent bona fide purchasers or encumbrancers for value of the real property described in the document [*Civ. Code § 2941.9(d)*].

[2] FORM

Majority Action Affidavit

Majority Action Affidavit

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

MAJORITY ACTION AFFIDAVIT

The undersigned hereby state the following:

1. The undersigned have been authorized, pursuant to *Civil Code Section 2941.9* and an Agreement to Be Governed by Majority Interest Holders [*or specify other title of agreement*] dated _____, to act on behalf of _____[*specify, e.g.*, all of the holders of several notes that are in favor of different payees but that are secured by a single Deed of Trust dated _____, executed by _____ (*name*) as Trustor, in which _____ (*specify*) are named as Beneficiaries and _____ (*name*) as Trustee, and recorded _____ (*date*), as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California].

2. The following action [has been *or* will be] taken by the undersigned pursuant to the authority granted in *Civil Code Section 2941.9*: [*specify*].

3. None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the above Deed of Trust.

4. The undersigned together hold more than 50 percent of the record beneficial interest of [*specify, e.g.*, the notes described in Paragraph 1, above].

5. Notice of the action described in Paragraph 2, above, was sent by certified mail, postage prepaid, with return receipt requested, to each holderof an interest in the obligation secured by the above Deed of Trust who has not joined in the execution of this document.

The undersigned declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature of holder*]
[*typed name*]
_____ [*signature of holder*]
[*typed name*]
[*include additional signature blocks as necessary*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her] authorized _____[capacity *or* capacities], and that by _____[his *or* her] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT

10-25B California Legal Forms--Transaction Guide 25B.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.syn Synopsis to Chapter 25B: SUBORDINATION, ASSUMPTION, AND ASSIGNMENT

§ 25B.01 California Sources

[1] Statutes

[2] California Attorney General Opinions

§ 25B.02 Federal Statutes

§§ 25B.03-25B.04 [Reserved]

§ 25B.05 Law Reviews

§ 25B.06 Annotations

§ 25B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 25B.08-25B.09 [Reserved]

§ 25B.10 Subordination Defined

§ 25B.11 Priority of Mortgages and Trust Deeds

[1] "First in Time, First in Priority" Rule

[2] Purchase Money Security Instruments

§ 25B.12 Use of Subordination Clauses and Agreements

§ 25B.13 Statutory Restrictions on Subordination Clauses and Agreements

§ 25B.14 Subordination Clauses in Trust Deeds

[1] Types of Subordination Clauses

[2] Automatic Subordination Clauses

[3] Executory Subordination Clauses

§ 25B.15 De Facto Subordination

§ 25B.16 Effectiveness of "Automatic Subordination" Clauses

[1] Enforceability

[2] Noncomplying Loan

[3] Misapplication of Construction Loan Funds

[4] Separate Subsequent Subordination Agreements

§ 25B.17 Effectiveness of "Executory" or "Promise to Subordinate" Clauses

§ 25B.18 Required Contents of Subordination Clauses and Agreements

§ 25B.19 Effectiveness of Recording Subordinating Construction Loan First

§ 25B.20 Liability of Attorney or Escrow Agent for Wrongful Subordination

§ 25B.21 Deficiency Judgment for Subordinated Seller

§§ 25B.22-25B.29 [Reserved]

§ 25B.30 Scope of Part

§ 25B.31 Assumption

[1] Effect on Original Debtor and Assuming Grantee

[2] Written Agreement

[3] Practical and Other Considerations

[4] Usurious Obligations

[5] Taking Property "Subject to" Encumbrance

§ 25B.32 Overview of Assignments

§ 25B.33 Absolute Assignment of Security Instruments and Notes

[1] Method of Assignment

[2] Effect of Recordation

[3] Effect of Usury Law

§ 25B.34 Reassignments by Financial Institutions

§ 25B.35 Assignments for Security Purposes

§§ 25B.36-25B.99 [Reserved]

§ 25B.100 Facts Required for Deed of Trust to Be Subordinated

Scope

§ 25B.101 Additional Facts Required for Previously Recorded Subordinated Deed of Trust

Scope

§ 25B.102 Facts Required for Subordinating Loan

Scope

§ 25B.103 Basic Facts for Assumption or Assignment

Scope

§ 25B.104 Documents--Subordination

Scope

§ 25B.105 Documents--Assumption and Assignment

Scope

§§ 25B.106-25B.109 [Reserved]

§ 25B.110 Determinations for Deed of Trust Subordination Clause

Scope

§ 25B.111 Determinations Regarding Subordination Agreement

Scope

§ 25B.112 Assumption

Scope

§ 25B.113 Assignment

Scope

§§ 25B.114-25B.119 [Reserved]

§ 25B.120 Deed of Trust Subordination Clause

Scope

§ 25B.121 Subordination Agreement

Scope

§ 25B.122 De Facto Subordination

Scope

§ 25B.123 Assumption of Note and Deed of Trust

Scope

§ 25B.124 Absolute Assignment of Note and Security Instrument

Scope

§§ 25B.125-25B.129 [Reserved]

§ 25B.130 Voiding Subordination Clause or Agreement

Scope

§ 25B.131 Waiving Noncompliance With Statutory Notice Requirements

Scope

§§ 25B.132-25B.199 [Reserved]

§ 25B.200 Short Form Deed of Trust Containing Automatic Subordination Clause

[1] Comment

[a] Use of Form

[b] Short Form of Deed of Trust

[c] Required Subordination Provisions

[i] Minimum Terms

[ii] Principal and Interest of Subordinating Loan

[iii] Term of Subordinating Loan

[iv] Fees, Costs, and Interest Paid From Subordinating Loan

[v] Restrictions on Use of Loan Proceeds

[vi] Payment Charges

[vii] Commitment for "Take-Out" Financing

[viii] Disbursement Provisions

[d] Required Statutory Notices

[2] Form

Short Form Deed of Trust Containing Automatic Subordination Clause

§ 25B.201 Statutory Notice That Real Property Security Instrument Contains Subordination Clause [Civ. Code § 2953.2(a), (b)]

[1] Comment

[a] Use of Form

[b] Subordination Clause Defined

[c] Notice and Related Disclosures

[d] Effect of Violation

[e] Waiver of Requirements

[2] Form

Statutory Notice That Real Property Security Instrument Contains Subordination Clause

§ 25B.202 Notice in Security Instrument That Lien May Be Subordinated for Purposes Other Than Improvement of Land [Civ. Code § 2953.2(c)]

[1] Comment

[a] Use of Form

[b] Required Placement and Format

[c] Exemptions From Statute

[2] Form

Notice in Security Instrument That Lien May be Subordinated for Purposes Other Than Improvement of Land

§ 25B.203 Alternative Subordination Provision for Deed of Trust--Subordination on Recordation of Subdivision Map for Encumbered Property

[1] Comment

[a] Use of Form

[b] Required Subordination Provisions

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination on Recordation of Subdivision Map for Encumbered Property

§ 25B.204 Alternative Subordination Provision for Deed of Trust--Subordination to Both a Construction and a "Take-Out" Loan

[1] Comment

[a] Use of Form

[b] Required Subordination Provisions

[c] Provisions Regarding "Take-Out Loan"

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination to Both a Construction and a "Take-Out" Loan

§ 25B.205 Alternative Subordination Provision for Deed of Trust--Subordination to Deed of Trust Being Concurrently Recorded

[1] Comment

[a] Use of Form

[b] Purpose of Form

[c] Loss of Priority by Misapplication of Construction Loan

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination to Deed of Trust Being Concurrently Recorded

§ 25B.206 Alternative Subordination Provision for Deed of Trust--Provision Requiring Subordinating Loan to Be Used for Improvements on Property

[1] Comment

[a] Use of Form

[b] Off-Site Improvements

[c] Statutory Requirements for Subordination

[2] Form

Alternative Subordination Provision for Deed of Trust--Provision Requiring Subordinating Loan to Be Used for Improvements on Property

§ 25B.207 Subordination Agreement Subordinating Recorded Deed of Trust to Deed of Trust for Specific New Loan

[1] Comment

[a] Use of Form

[b] Required Subordination Provisions

[c] Statutory Requirements for Notices

[d] New Consideration Required for Agreement When Terms Vary From Original Subordination Clause

[2] Form

Subordination Agreement Subordinating Recorded Deed of Trust to Deed of Trust for Specific New Loan

§ 25B.208 Statutory Notice Following Title of Subordination Agreement [Civ. Code § 2953.3(a), (b)]

[1] Comment

[a] Use of Form

[b] Subordination Agreement Defined

[c] Requirements for Notice

[d] Form of Title of Subordination Agreement

[e] Failure to Comply With Requirements

[f] Waiver

[2] Form

Statutory Notice Following Title of Subordination Agreement

§ 25B.209 Statutory Notice Required Above Signature Line of Subordination Agreement [Civ. Code § 2953.3(c)]

[1] Comment--Use of Form

[2] Form

Statutory Notice Required Above Signature Line of Subordination Agreement

§ 25B.210 Notice of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

[1] Comment--Use of Form

[2] Form

Notice of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

§ 25B.211 Waiver by Beneficiary of Subordinated Deed of Trust of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

[1] Comment--Use of Form

[2] Form

Waiver by Beneficiary of Subordinated Deed of Trust of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

§§ 25B.212-25B.219 [Reserved]

§ 25B.220 Request for Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

[b] Payoff Demand Statement

[c] Owner's Statement

[d] Request Procedure

[e] Definitions

[2] Form

Request for Beneficiary Statement

§ 25B.221 Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

[b] Owner's Statement

[c] Delivery of Statement and Related Documents

[d] Proof of "Entitled Person" Status

[e] Required Contents

[f] Reliance on Statement and Amendments

[g] Continuing Unsecured Obligations

[h] Violations by Beneficiary

[2] Form

Beneficiary Statement

§ 25B.222 Assumption Agreement for Execution by Seller, Purchaser, and Lender

[1] Comment

[a] Use of Form

[b] Grantee's Liability

[c] Continuing Liability of Original Debtor

[d] Assumption Agreement in Writing

[2] Form

Assumption and Assignment Agreement

§ 25B.223 Alternative Provision for Assumption Agreement--Release of Original Debtor From Liability

[1] Comment--Use of Form

[2] Form

Alternative Provision for Assumption Agreement--Release of Original Debtor From Liability

§§ 25B.224-25B.229 [Reserved]

§ 25B.230 Assignment of Note and Deed of Trust

[1] Comment

[a] Use of Form

[b] Assignment of Security Instrument

[c] Assignment of Promissory Note

[i] Effect and Methods

[ii] Delivery and Negotiation

[iii] Endorsement

[d] Notice of Default and Notice of Sale

[e] Recording Assignment

[2] Form

Assignment of Note and Deed of Trust

§ 25B.231 Assignment of Note and Mortgage

[1] Comment--Use of Form

[2] Form

Assignment of Note and Mortgage

§ 25B.232 Notice to Debtor of Assignment

[1] Comment--Use of Form

[2] Form

Notice to Debtor of Assignment

§ 25B.233 Notice to Debtor of Transfer of Servicing of Loan

[1] Comment

[a] Use of Form

[b] Contents and Delivery

[c] Liability for Payments

[d] Defaults

[2] Form

Notice of Transfer of Servicing of Indebtedness

Timothy F. O'Learyn*
Practice Consultant

FOOTNOTES:

(n10)Footnote *. Timothy F. O'Leary is a partner in the San Francisco law firm of O'Leary & Lecky, LLP, where his practice emphasizes real estate and professional liability litigation. He graduated from Stanford University and Boalt Hall School of Law. He has written numerous articles on real estate and litigation for the California Real Estate Reporter (Matthew Bender) and other state-wide publications. He regularly lectures on real estate and related topics for the California Association of Realtors and California Society of CPAs.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT

10-25B California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter covers the subordination, assumption, and assignment of trust deeds and mortgages. It includes the forms and procedure for effecting a subordination both through a clause in a deed of trust and through a separate subordination agreement. Statutory notices required for certain subordination clauses and agreements are also discussed.

This chapter also covers the assumption of obligations secured by real property and the assignment of the rights and interests in promissory notes and the mortgages or trust deeds securing the notes.

For detailed coverage of deeds of trust in general and other security instruments used in real property financing, see Ch. 25A, *Security Instruments for Real Estate Financing* . Partial release provisions, which are often included in a deed of trust containing a subordination clause, are covered in Ch. 25C, *Release and Reconveyance* .

FOOTNOTES:
(n11)Footnote *. Timothy F. O'Leary is a partner in the San Francisco law firm of O'Leary & Lecky, LLP, where his practice emphasizes real estate and professional liability litigation. He graduated from Stanford University and Boalt Hall School of Law. He has written numerous articles on real estate and litigation for the California Real Estate Reporter (Matthew Bender) and other state-wide publications. He regularly lectures on real estate and related topics for the California Association of Realtors and California Society of CPAs.



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART I. RESEARCH GUIDE
A. Primary Sources

10-25B California Legal Forms--Transaction Guide § 25B.01

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.01 California Sources

[1] Statutes

Priority of recorded conveyances. *Civ. Code § 1214.*

Novation. *Civ. Code §§ 1530-1533.*

Release of debtor from liability. *Civ. Code §§ 1541-1543.*

Assumption agreement, statute of frauds. *Civ. Code § 1624(a)(6).*

Priority of liens on same property. *Civ. Code § 2897.*

Priority of purchase money liens. *Civ. Code § 2898.*

Recorded assignments of mortgages and deeds of trust, constructive notice. *Civ. Code § 2934.*

Effect of recorded assignment on debtor. *Civ. Code § 2935.*

Notice of transfer of servicing of indebtedness on secured note. *Civ. Code § 2937.*

Subordination clauses and agreements

Defined. *Civ. Code § 2953.1.*

Notice required. *Civ. Code § 2953.2.*

Contents. *Civ. Code § 2953.3*.

Voidability of nonconforming subordination. *Civ. Code § 2953.4*.

Exemption for loans exceeding $25,000. *Civ. Code § 2953.5*.

Assignments of real property sales contracts. *Civ. Code § 2985.1*.

Vendor's lien. *Civ. Code §§ 3046-3048*.

Purchaser's lien. *Civ. Code § 3050*.

Assignments of interests in real property, requirement of writing. *Code Civ. Proc. § 1971*.

Negotiation, transfer, and endorsement of instruments. *Com. Code § 3102 et seq.*

Enforcement of instruments. *Com. Code § 3301 et seq.*

Commercial banks, loans secured by first liens. *Fin. Code § 1227*.

[2] California Attorney General Opinions

Subordination clauses--discussion of applicability and waiver of 1963 statutory requirements in reference to particular circumstances, transactions, and clauses. *43 Ops. Cal. Atty. Gen. 19 (1964)* .

Assignment of land sale contract, not required of trustor-seller when placing deed of trust on property. *40 Ops. Cal. Atty. Gen. 159 (1962)* .



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART I. RESEARCH GUIDE
A. Primary Sources

10-25B California Legal Forms--Transaction Guide § 25B.02

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.02 Federal Statutes

Security requirements for real property loans

National bank. *12 U.S.C. § 371*.

Savings and loan association. *12 U.S.C. § 1464*.

Garn-St. Germain Depository Institutions Act of 1982. *12 U.S.C. § 1701j-3*.



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PART I. RESEARCH GUIDE
A. Primary Sources

10-25B California Legal Forms--Transaction Guide §§ 25B.03-25B.04

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25B.03[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART I. RESEARCH GUIDE
B. Secondary Sources

10-25B California Legal Forms--Transaction Guide § 25B.05

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.05 Law Reviews

Comment, *Subrogation of Mortgages in California: A Comparison With the Restatement and Proposals for Change, 48 UCLA L. Rev. 1633 (2001).*



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B. Secondary Sources

10-25B California Legal Forms--Transaction Guide § 25B.06

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.06 Annotations

Annot., Construction mortgagee-lender's duty to protect interest of subordinated purchase-money mortgagee,13 A.L.R. 5th 684 (1993).

Annot., Mortgages: effect on subordinate lien of redemption by owner or assignee from sale under prior lien, 56 A.L.R. 4th 703 (1987) .

Annot., Construction and application of statutes expressly protecting borrowers in second mortgage transactions, 43 A.L.R. 4th 675 (1986) .

Annot., What transfers justify acceleration under "due-on-sale" clause of real-estate mortgage, 22 A.L.R. 4th 1266 (1983) .



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CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART I. RESEARCH GUIDE
B. Secondary Sources

10-25B California Legal Forms--Transaction Guide § 25B.07

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 23, *Real Property Sales Agreements* .

Ch. 25A, *Security Instruments for Real Estate Financing* .

Ch. 25C, *Release and Reconveyance* .

Ch. 26, *Real Property Escrows* .

Ch. 30A, *Construction Financing* .

Ch. 35A, *Assignment and Sublease of Leasehold Interests.*

Ch. 42, *Secured Transactions* .

Ch. 55, *Negotiable Instruments* .

California Real Estate Law and Practice (Matthew Bender).

Ch. 82, *Recording of Instruments* .

Ch. 110, *Notes* .

Ch. 111, *Deeds of Trust and Mortgages*, §§ 111.70-111.82 (assumption and assignment).

Ch. 114, *Subordination* .

Ch. 121, *Priorities of Liens* .

California Forms of Pleading and Practice (Matthew Bender).

Ch. 385, *Negotiable Instruments* .

Ch. 555, *Trust Deeds and Real Property Mortgages* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Security Transactions in Real Property* (10th ed. 2005).

California Mortgage & Deed of Trust Practice, Ch. 1, Part III, *Secured Transactions* (3d ed. Cal. CEB 2000).

California Real Property Sales Transactions (3d ed. Cal. CEB 1998), Ch. 8, *Seller Financing*, §§ 8.46-8.50 (assumptions), §§ 8.62-8.91 (subordination).

Secured Real Property Transactions, Program Material, § 4.1 (subordination)(Cal. CEB 1985).

Miller & Starr, California Real Estate, Vol. 5, Ch. 11, *Recording and Priorities* (3d ed. West Group 2000).



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B. Secondary Sources

10-25B California Legal Forms--Transaction Guide §§ 25B.08-25B.09

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25B.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART II. LEGAL BACKGROUND
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.10

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.10 Subordination Defined

"Subordination" refers to the establishment of priority between different existing encumbrances on the same parcel of property by some means other than the basic priority principles ordinarily applicable to competing liens [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338*]. When the owner of an interest in real property agrees to subordinate that interest to another interest in the same property, the owner is agreeing to place his or her interest in a lesser position or status in relation to the other interest, making his or her interest subject or subservient to the other interest. In effect, the agreement to subordinate one encumbrance to another allows the second encumbrance to usurp the priority of the encumbrance that is to be subordinated [*Connell v. Zaid (1969) 268 Cal. App. 2d 788, 792, 74 Cal. Rptr. 371*]. The importance of priority is illustrated by the fact that the foreclosure of a lien on real property having priority over other liens on the same property may extinguish the other liens [*see Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578*]. For discussion of rights and remedies of junior lienholders faced with foreclosure of the senior lien, see California Real Estate Law & Practice, Ch. 120, *Representing a Client After Default* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
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10-25B California Legal Forms--Transaction Guide § 25B.11

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.11 Priority of Mortgages and Trust Deeds

[1] "First in Time, First in Priority" Rule

A mortgage on real property creates a lien, vested in the mortgagee, on the encumbered real property [*see Bank of Italy etc. Ass'n v. Bentley (1933) 217 Cal. 644, 654, 20 P.2d 940*]. A deed of trust on real property given for security purposes conveys to the trustee a peculiar type of legal title to the property much like the lien created by a mortgage [*see Bank of Italy etc. Ass'n v. Bentley (1933) 217 Cal. 644, 654-658, 20 P.2d 940*]. For purposes of subordination and priority, the title obtained by a trustee under a trust deed given for security purposes is treated the same as the lien created by a mortgage [*see Fickling v. Jackman (1928) 203 Cal. 657, 661, 265 P. 810*].

Other things being equal, different liens on the same property have priority according to the time of their creation, except in cases of bottomry and respondentia [*Civ. Code § 2897*; *see Harb. & Nav. Code §§ 450, 470* (cases of bottomry and respondentia arise only in relation to ships and their cargoes)]. Therefore, the first mortgage or trust deed creating a lien on real property has priority over all other mortgages, trust deeds, or liens on the same property, "other things being equal." The limited situations in which "other things" are not considered "equal" are if the subsequently created lien is for unpaid taxes [*see Rev. & Tax. Code § 2192.1*] or is entitled to priority because of the recording laws. Under the recording laws, a subsequently created lien is entitled to priority only if it was recorded before the earlier mortgage or trust deed and was acquired for a valuable consideration in good faith without notice of the existence of the unrecorded mortgage or trust deed [*see Civ. Code § 1214*].

The time when a lien created by a real property mortgage or trust deed comes into existence and attaches to the encumbered real property is the later of (1) the performance of the last act required to make the obligation secured by the mortgage or trust deed binding on the lender, or (2) the recordation and delivery of the mortgage or trust deed to the mortgagee or beneficiary [*see Western Loan & Bldg. Co. v. Scheib (1933) 218 Cal. 386, 389-390, 23 P.2d 745* ; *Fickling v. Jackman (1928) 203 Cal. 657, 662, 265 P. 810* . For example, if a mortgage or trust deed to secure future advances is recorded before the advances are loaned to the trus]tor, and the making of the advances is obligatory on the

part of the mortgagee or beneficiary, the lien of the security instrument attaches to the encumbered real property as of the date the instrument was recorded or delivered. However, if the making of the advances is optional with the mortgagee or beneficiary, the lien of the mortgage or trust deed does not attach to the encumbered property until the date or dates the advances are actually made [*Fickling v. Jackman (1928) 203 Cal. 657, 662, 265 P. 810*].

[2] Purchase Money Security Instruments

An exception to the "first in time, first in priority" rule applicable to liens and encumbrances is the special statutory priority given to a real property purchase money mortgage or trust deed. A mortgage or trust deed given for the price of real property at the time of the conveyance of the property to the purchaser has priority over all other liens created against the purchaser, subject to the operation of the recording laws [*Civ. Code § 2898*; *see Tolman v. Smith (1890) 85 Cal. 280, 285-286, 24 P. 743*].

The purpose of this exception is to prevent a trust deed or mortgage given by the purchaser and recorded before delivery of the deed conveying the property to him or her from gaining priority over the purchaser's contemporaneous mortgage or trust deed to the vendor securing the unpaid purchase price [*see Walley v. P.M.C. Inv. Co. (1968) 262 Cal. App. 2d 218, 220, 68 Cal. Rptr. 711*]. For purposes of establishing priority, the deed to the purchaser and his or her purchase money mortgage or trust deed back to the seller are considered contemporaneous acts, and no lien or charge against the purchaser can be prior to the rights of the vendor under his or her mortgage or trust deed [*Walley v. P.M.C. Inv. Co. (1968) 262 Cal. App. 2d 218, 220, 68 Cal. Rptr. 711*]. Thus, a deed or mortgage given by the purchaser and recorded before delivery of the deed to him or her is subject and subordinate to the mortgage or deed of trust given by the purchaser, contemporaneously with conveyance of title to him or her, to the property seller as security for the unpaid purchase price of the property [*Ludy v. Zumwalt (1927) 85 Cal. App. 119, 125, 259 P. 52*]. In like manner, an abstract of judgment against the purchaser recorded before delivery of the grant deed to the purchaser creates a lien on all property owned by the purchaser, but does not gain priority over a purchase money deed of trust executed and delivered by the purchaser at the time title to the purchased property was conveyed to him or her [*Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 359, 15 Cal. Rptr. 710*].

The statute giving a purchase money mortgage or deed of trust priority over all other liens is subject to operation of the recording laws [*see Civ. Code § 2898*]. Therefore, a purchase money mortgage or trust deed does not have priority over a subsequently created lien in favor of a person who parted with value in good faith for the lien, that was recorded before the purchase money mortgage or trust deed [*see Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338*].

For further discussion, see California Real Estate Law & Practice, Ch. 121, *Priorities of Liens* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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10-25B California Legal Forms--Transaction Guide § 25B.12

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§ 25B.12 Use of Subordination Clauses and Agreements

Any person owning an interest in real property can agree to subordinate that interest to some other interest in that property owned by another person. Most commonly, however, it is the interest of the holder of a mortgage, trust deed, or other lien that is subordinated to a later mortgage, trust deed, or lien on the subject property [Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298 n.1 (1966)*].

The subordination of one mortgage or trust deed to another may be useful in a number of situations. For example, the owner of real property may seek to have the holder of a junior trust deed on the property subordinate that security instrument to a new "first" deed of trust so that the property owner can use the new first loan proceeds to pay off the existing first (and any other superior) trust deeds on the property and reduce the owner's monthly payments [*see Connell v. Zaid (1969) 268 Cal. App. 2d 788, 791-792, 74 Cal. Rptr. 371*]. However, the usual situation involving a subordination clause or agreement occurs when real property is sold for commercial development or subdivision purposes [*see Connell v. Zaid (1969) 268 Cal. App. 2d 788, 792, 74 Cal. Rptr. 371*].

Until a development or subdivision is complete, a developer is usually unable to borrow enough money from a commercial lending institution on the security of the land and proposed development to pay for both the purchase price of the land and the costs of constructing improvements on the land. Therefore, the seller of the land intended for development typically agrees to accept a promissory note secured by a trust deed or mortgage on the land for a portion of its purchase price, and the developer obtains from a commercial lending institution a construction loan or loans to finance construction of the proposed development or subdivision [*see* Ch. 30A, *Construction Financing*].

Construction loans made by commercial lenders are generally conditioned on the construction loan being granted first priority lien status. Therefore, if the borrower/developer has already given a purchase money deed of trust (or mortgage) to the seller of the property, the developer generally cannot finance the development of the property without finding a way to make the purchase money trust deed subordinate, subject to, and subservient to the construction loan trust deeds required by the construction lenders [*see* Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A.*

L. Rev. 1298 (1966)].

The two common methods of arranging for the construction lender to hold the first lien on the property to be developed are (1) executing an express subordination agreement in which the land seller agrees to make the lien of his or her purchase money encumbrance subject to the construction loan, and (2) recording the construction loan encumbrance before recording the purchase money encumbrance [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338*]. It appears that the same rules on enforcement and recognition of subordination agreements apply to both methods of subordinating a purchase money mortgage or trust deed to a construction loan mortgage or trust deed [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338*].

To summarize, in the normal subordination situation, the vendor provides the land, the purchaser provides the expertise, and the purchaser's lender provides the capital, all for the mutually beneficial purpose of developing the land and disposing of it (usually by sale, but occasionally by rental). This arrangement produces a fund out of which the vendor is paid for the land, the lender is repaid its loan with interest, and the purchaser receives compensation for his or her efforts and skill [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 662-663, 56 Cal. Rptr. 844*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-25B California Legal Forms--Transaction Guide § 25B.13

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.13 Statutory Restrictions on Subordination Clauses and Agreements

Subject to certain exceptions, every real property security instrument that contains or has attached to it a subordination clause, and every subordination agreement, must contain prescribed notices and descriptive captions [*see Civ. Code §§ 2953.1-2953.3*]. A subordination clause or subordination agreement subject to these statutes that does not comply with their requirements is voidable by the person whose security interest is to be subordinated [*Civ. Code § 2953.4*]. For the statutory requirements for the notices and captions, see *§§ 25B.201*, *25B.202*, *25B.208*, and *25B.209*. For a form that may be used to give notice of noncompliance with the statutory requirements, see *§ 25B.210*.

Exempt from these statutory requirements are subordination clauses or agreements that expressly state that the subordinating loan will exceed $25,000 [*Civ. Code § 2953.5(a)*] or that are executed in connection with a loan that exceeds $25,000 [*Civ. Code § 2953.5(b)*]. Although the statutory requirements therefore have little or no effect on most real estate subdivision and commercial development projects in California [Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1300 n.6 (1966)*], they are nevertheless commonly complied with by large institutional lenders.

For these purposes, a "subordination clause" is a clause in a real property mortgage, trust deed, or installment sales contract in which the mortgagee, beneficiary, or installment seller agrees either that (1) on the happening of specified conditions, his or her security interest in the land will become subordinated to the lien of another mortgage, trust deed, or land contract encumbering the land, or (2) on the happening of specified conditions, he or she will execute an agreement subordinating the security interest to the lien of another mortgage, trust deed, or land contract encumbering the land [*Civ. Code § 2953.1(b)*]. A "subordination agreement" is defined as a separate agreement or instrument by which the holder of a security interest under a real property mortgage, deed of trust, or installment sales contract agrees either that (1) the existing security interest is subordinate to the lien of another mortgage or deed of trust encumbering the same land, or (2) on the occurrence of specified conditions the security interest will become subordinated to the lien of another mortgage or deed of trust, or (3) on the occurrence of specified conditions he or she will execute an agreement subordinating the interest to the lien of another mortgage or deed of trust [*Civ. Code § 2953.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-25B California Legal Forms--Transaction Guide § 25B.14

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.14 Subordination Clauses in Trust Deeds

[1] Types of Subordination Clauses

The types of subordination clauses commonly used in California real property mortgages and deeds of trust have been described and labeled differently by different authorities [*see Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338* ; *see also* Lascher, *Subordination Clauses in Court: Is California Unfair to Unfairness?, 1 U. San Fernando Valley L. Rev. 1 (1967)*]. Basically, however, there are two types of subordination clauses commonly used in California real property mortgages and trust deeds. The first type is generally referred to as an "automatic subordination" clause [*see Woodworth v. Redwood Empire Sav. & Loan Assn. (1971) 22 Cal. App. 3d 347, 351, 99 Cal. Rptr. 373*]. The second type has been called an "executory subordination" or "promise to subordinate" clause [Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1300 (1966)*].

[2] Automatic Subordination Clauses

An automatic subordination clause provides that the mortgage or deed of trust in which it is contained will automatically be subordinated to the lien of a subsequently executed and recorded mortgage or trust deed containing certain specified terms or securing a loan not exceeding a specified amount repayable on specified terms. An automatic subordination clause is specifically enforceable only if it specifies the terms of the loan to which the trust deed will be subordinated [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* ; *see § 25B.16[1]*]. For a complete list of those required terms, see *§ 25B.18*.

A purchaser who intends to develop the land commercially or for subdivision purposes usually bargains for inclusion of this type of subordination clause in the purchase money trust deed, to avoid having to return to the seller after a construction loan is obtained and negotiate the seller's subordination of the purchase money trust deed. Notwithstanding the inclusion of such a clause, lending institutions and title companies, as a condition to making and insuring the loan secured by the subsequently executed mortgage or deed of trust, invariably require the holder of the mortgage or trust

deed containing an automatic subordination clause to execute a separate subordination instrument, just as if the subordination clause were executory [*see § 25B.16[4]*].

[3] Executory Subordination Clauses

An "executory subordination" or "promise to subordinate" clause is a clause by which the mortgagee or beneficiary of the mortgage or trust deed in which the clause is contained promises to execute a separate instrument subordinating the mortgage or trust deed to a subsequent mortgage or trust deed at the time the subsequent security instrument is to be recorded [*see* Miller, Starr, & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1300 (1966)*]. To be specifically enforceable and not merely an agreement to agree in the future, the executory subordination or "promise to subordinate" clause must include details of the permissible terms, conditions, and purposes of the loan to which the mortgage or trust deed containing the "promise to subordinate" clause is to be subordinated [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* ; *see § 25B.17*]. For a complete list of those required terms, see *§ 25B.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.15 De Facto Subordination

"De facto" subordination is a common way to subordinate purchase money real property mortgages and trust deeds without using either an automatic or executory subordination clause in the trust deed. Under this method, the parties agree (usually in the land sale contract or in escrow instructions) to record the construction loan mortgage or deed of trust before the purchase money mortgage or trust deed, giving priority to the earlier-recorded instrument. The same rules and limitations applicable to subordination achieved through an automatic subordination or "promise to subordinate" clause also apply to a de facto subordination [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338* ; *see § 25B.16*].

A variation of the de facto subordination method is the insertion in a deed of trust or mortgage of a clause expressly stating that it is subject and subordinate to another specifically described trust deed or mortgage [*see § 25B.205*]. Such a provision cannot be used, of course, unless the mortgage to have priority is in existence at the time the subordinated mortgage or trust deed is drafted.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-25B California Legal Forms--Transaction Guide § 25B.16

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.16 Effectiveness of "Automatic Subordination" Clauses

[1] Enforceability

Two primary issues have arisen in California courts concerning the enforceability and effectiveness of automatic subordination clauses in contracts for the sale of real property.

The first issue is the enforceability by specific performance of the seller's obligation to accept a mortgage or trust deed containing an automatic subordination clause as security for payment of the purchase price. A contract of sale is not specifically enforceable against the seller unless it specifies in detail the terms of the loan to which the mortgage or deed of trust will be subordinated [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* (specific terms of subordinating loan required in executory subordination clause); *Woodworth v. Redwood Empire Sav. & Loan Assn. (1971) 22 Cal. App. 3d 347, 361, 99 Cal. Rptr. 373* (*Handy* principles of fair dealing for executory subordination agreements applicable to automatic subordination agreements); *see § 25B.17*]. For a complete list of terms that must be described, see *§ 25B.18*. A buyer may be able to waive an invalid subordination provision unconditionally and obtain specific performance of the remainder of the sales contract [*see Reeder v. Longo (1982) 131 Cal. App. 3d 291, 295-297, 182 Cal. Rptr. 287* ; *see also § 25B.17*].

The second issue concerns the effectiveness of an automatic subordination clause contained in an executed and recorded security instrument to give priority to a subsequent mortgage or trust deed. Under an automatic subordination clause, a subsequently executed mortgage or deed of trust gains priority over the mortgage or trust deed containing the clause without further action by the original mortgagee or trust deed beneficiary, provided that the subsequently executed instrument complies with the terms specified in the automatic subordination clause [*Carpenson v. Najarian (1967) 254 Cal. App. 2d 856, 864-865, 62 Cal. Rptr. 687*]. This is true despite the fact that the automatic subordination clause may be too indefinite to allow a contract of sale requiring the seller to accept a trust deed containing the clause to be specifically enforced against the seller. Once the mortgage or trust deed containing the clause has been executed, delivered, accepted, and recorded the question is not one of prospective enforcement but compliance by a subsequent

mortgage or trust deed with the subordination conditions, however scanty, contained in the clause [*Jones v. Sacramento Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 522, 527 n.4, 56 Cal. Rptr. 741*].

PRACTICE TIP:

Advances. Lenders should identify in the trust deed what additional advances necessary to protect the senior lender's security interest are considered obligatory, and thus would have priority over junior lienholders. Payments of delinquent property taxes, insurance premiums, and prior encumbrances are obvious examples of obligatory advances that would maintain the senior lender's priority. Senior lenders should expand this list to include the payment of mechanic's lienholders with claims of priority, receivership fees and expenses, and necessary building repairs. While not necessarily determinative of what constitutes an obligatory payment, the clause places junior lenders on notice and should help protect the advance's priority. *Commentary by Timothy F. O'Leary*

[2] Noncomplying Loan

Rights of priority under an agreement of subordination extend to and are limited strictly by the express terms and conditions of the subordination agreement [*Irvine v. California Cotton Credit Corp. (1937) 18 Cal. App. 2d 761, 763, 64 P.2d 782*]. A subsequently executed mortgage or trust deed that does not comply with the terms specified in an automatic subordination clause does not gain priority over the mortgage or trust deed containing the clause [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 663, 56 Cal. Rptr. 844* ; *Jones v. Sacramento Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 522, 526, 56 Cal. Rptr. 741* ; *Collins v. Home Savings & Loan Ass'n (1962) 205 Cal. App. 2d 86, 95, 22 Cal. Rptr. 817*].

[3] Misapplication of Construction Loan Funds

If the automatic subordination clause provides for subordination only to a trust deed or mortgage that secures a construction loan, a construction lender who allows proceeds of the construction loan to be misapplied to other purposes may lose the priority otherwise afforded the mortgage or trust deed by the automatic subordination clause [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 664, 56 Cal. Rptr. 844*]. However, the construction lender may be given an equitable lien having priority over the trust deed or mortgage containing the automatic subordination clause for the portion of the construction loan funds actually used in the construction of improvements on the encumbered property [*Jones v. Sacramento Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 522, 529-530, 56 Cal. Rptr. 741*], or the loan may be held to have lost priority only as to the amounts misapplied to purposes other than construction of improvements on the encumbered property [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 665, 56 Cal. Rptr. 844*].

A construction lender's claim that its construction loan trust deed or mortgage is entitled to priority over the purchase money mortgage or trust deed containing a subordination clause is based on principles of the law of contract, not the law of negligence. The lender's claim to priority flows from the subordination provisions of the mortgage or trust deed contract between the land seller and buyer. It is only as a result of the seller's waiver in that instrument of the statutory right to a first lien that the construction lender is entitled to claim priority. Thus, to the extent the construction lender does not comply with the conditions of the seller's waiver as set forth in the subordination clause, the construction lender's mortgage or trust deed is not entitled to priority over that of the seller. One condition of the seller's waiver is the proper use of the construction loan funds secured by the construction lender's mortgage or trust deed, and consequently the priority of the construction loan mortgage or trust deed does not vest until those funds are applied to the construction purpose [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1033, 96 Cal. Rptr. 338*].

Strong public policy reasons exist to protect the holder of a subordinated purchase money mortgage or trust deed. As between the land seller and the construction lender, the construction lender, usually a financial institution constantly

engaged in professional construction lending, is in a better position by far to control use of the construction loan proceeds. The lender, unlike the seller, can require documented evidence before making any disbursements of the construction loan funds that expenses have been incurred, and can corroborate that evidence by on-site inspections [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1036-1037, 96 Cal. Rptr. 338*]. Therefore, the construction lender's trust deed should not be advanced or preferred over the seller's interest in the land if an implied agreement can and, in equity, should be spelled out, and the construction lender has no reason to believe its trust deed conferred any lien to which the seller's interest was subordinate other than to the extent of money spent for construction purposes [*Middlebrook-Anderson Co.v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1037, 96 Cal. Rptr. 338*]. The *Middlebrook-Anderson* case has been interpreted as imposing on a construction lender an implied agreement that its mortgage or trust deed has priority over the subordinated purchase money mortgage or trust deed only to the extent construction loan amounts are properly expended for construction purposes [*Gluskin v. Atlantic Savings & Loan Assn. (1973) 32 Cal. App. 3d 307, 314, 108 Cal. Rptr. 318*].

Any limitation on the use of loan proceeds must be expressly described in the subordination clause or agreement [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 521, 229 Cal. Rptr. 186* ; *see § 25B.18*]. If the subordination agreement authorizes application of a part of the loan proceeds to purposes other than construction or development, the part so applied retains its priority [*Schneider v. Ampliflo Corp. (1983) 148 Cal. App. 3d 637, 639-640, 196 Cal. Rptr. 172*]. Similarly, the construction lender does not lose priority over a purchase money mortgage or deed of trust if the holder of the otherwise subordinated purchase money security instrument actively participates in borrowing and misapplying the construction loan funds [*Woodworth v. Redwood Empire Sav. & Loan Assn. (1971) 22 Cal. App. 3d 347, 364-365, 99 Cal. Rptr. 373*].

The same public policy reasons that impose a duty on a construction lender to see that construction loan funds are not misapplied also preclude the construction lender from making a material modification in the construction loan without the consent of the holder of a purchase money mortgage or trust deed that has been subordinated to the construction loan, if the modification will affect the rights of the holder [*Gluskin v. Atlantic Savings & Loan Assn. (1973) 32 Cal. App. 3d 307, 314, 108 Cal. Rptr. 318*]. Such a modification, made without the consent of the holder of the purchase money security instrument, destroys the priority that the construction loan mortgage or trust deed would otherwise have over the subordinated purchase money security instrument [*Gluskin v. Atlantic Savings & Loan Assn. (1973) 32 Cal. App. 3d 307, 314, 108 Cal. Rptr. 318* ; *see Lennar Northeast Partners v. Buice Irrevocable Trust (1996) 49 Cal. App. 4th 1576, 1588, 57 Cal. Rptr. 2d 435* (material modification resulted in loss of priority only for modification, when the liens were held by hard-money lenders; court distinguished Gluskin on ground that it involved subordinating seller)].

[4] Separate Subsequent Subordination Agreements

In dealing with a purchase money mortgage or deed of trust that contains an automatic subordination clause, a construction lender and its title company almost universally require the holder of the purchase money security instrument to execute a separate agreement at the time a construction loan is actually made on the encumbered property, specifically subordinating the purchase money mortgage or trust deed to the specifically described construction loan mortgage or trust deed [*see* Miller et al., *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1300 (1966)*]. Without this separate agreement, the title company will not insure the priority of the lender's lien, and without insurance, the lender will not make the loan.

If there is a variation between the seller's original agreement to subordinate and the subsequent agreement required by the title company and lender, the new agreement must be intended as a novation and supported by new consideration in order to be enforceable. Otherwise, the two agreements will be interpreted together as two parts of a single transaction, as if the new agreement were intended to make the original clause specific or to implement it [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 661, 56 Cal. Rptr. 844*]. For an example and discussion of a subordination agreement intended to supersede an automatic subordination clause in a deed of trust, see *§ 25B.207*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.17 Effectiveness of "Executory" or "Promise to Subordinate" Clauses

Under an executory or "promise to subordinate" clause, the mortgagee or beneficiary of the purchase money mortgage or trust deed promises to execute a subsequent instrument subordinating the security instrument to a subsequently executed mortgage or trust deed. It appears that if the "promise to subordinate" clause is a promise to subordinate to a construction loan, and the purchase money mortgagee or beneficiary fulfills the promise and executes an instrument specifically subordinating the purchase money mortgage or trust deed to a construction loan mortgage or trust deed, the construction lender has the same duty as it has under an automatic subordination clause--to see that the construction loan funds are not misapplied [*see § 25B.16[3]*; *see also Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1036-1037, 96 Cal. Rptr. 338*]. Thus, the construction lender loses priority over the subordinated purchase money mortgage or trust deed as to any portion of the construction loan fund not used for construction purposes [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1037, 96 Cal. Rptr. 338*]. The lender also loses priority over the purchase money mortgage or trust deed if, without the consent of the holder of the purchase money security instrument, the construction lender consents to a major modification in the construction loan and the modification materially affects rights under the subordinated purchase money mortgage or trust deed [*Gluskin v. Atlantic Savings & Loan Assn. (1973) 32 Cal. App. 3d 307, 314, 108 Cal. Rptr. 318* ; *see Lennar Northeast Partners v. Buice Irrevocable Trust (1996) 49 Cal. App. 4th 1576, 1588, 57 Cal. Rptr. 2d 435*].

Similarly, it appears that if the holder of a purchase money mortgage or trust deed refuses to fulfill a "promise to subordinate" clause contained in the instrument, the same rules applicable to a contract for the sale of real property that requires the seller to accept a purchase money mortgage or trust deed containing a subordination clause should apply to specific performance of the clause. A contract of sale containing a clause subordinating a seller's trust deed to other trust deeds securing loans for construction and permanent financing must be just and reasonable to be specifically enforceable [*see Civ. Code § 3391(2)*]. The subordination clause must contain terms that will define and minimize the risk that the subordinating liens will impair or destroy the seller's security [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*]. Those terms may include (1) limits on the use to which the proceeds of the

subordinating loans may be put to insure that their use will improve the value of the land, (2) maximum amounts so that the loans will not exceed the contemplated value of the improvements they finance, (3) requirements that the loans not exceed some specified percentage of the construction cost or value of the property as improved, and (4) specified amounts per square foot of construction, or other limits designed to protect the purchase money security [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*]. Subsequent cases have followed the *Handy* rationale, further determining what loan terms must be included in a "just and reasonable" subordination clause [*see § 25B.18*].

However, in *Thomas v. Fox* [*Thomas v. Fox (1982) 128 Cal. App. 3d 361, 368, 180 Cal. Rptr. 253*], a case not involving a construction loan, the court specifically enforced a contract containing a subordination clause that did not set forth the terms of the subordinating loan. The buyer had agreed to purchase a trailer park for $450,000. Because the seller wished to negotiate a tax-free exchange under *I.R.C. § 1031*, the buyer agreed to pay $400,000 in cash and to give the seller a note and trust deed for $50,000. If the seller could find a party willing to exchange other property for the $50,000 trust deed, the trust deed would be subordinated to a new loan not to exceed 60 percent of the purchase price of $400,000 and assigned to the exchanging party. Otherwise, the buyer would pay the seller an additional $50,000 in cash. The subordination clause did not expose the seller to any risks, since the subordinated trust deed would either be transferred to the exchanging party in escrow or the seller would receive all cash for the property. Therefore, the contract was held to be fair and reasonable to the seller even in the absence of detailed loan provisions [*Thomas v. Fox (1982) 128 Cal. App. 3d 361, 367, 180 Cal. Rptr. 253*]. However, this holding was limited to a unique fact situation in which the seller had little or no risk of loss. Generally, the same issue of the seller's risk of loss applies to non-construction, as well as construction, subordinating loans [*see* Miller & Starr, California Real Estate (3d ed. West Group 2000), Ch. 11, *Recording and Priorities*, § 11:191].

A subsidiary question not present in the case of a wholly executory contract of sale requiring the seller to accept a purchase money mortgage or trust deed containing an indefinite subordination clause, exists in the case of an indefinite "promise to subordinate" clause contained in an already executed purchase money mortgage or trust deed. The courts have held that if a contract of sale requires the seller to accept a purchase money deed of trust or mortgage containing a subordination clause, and the subordination clause as described in the contract is too indefinite and uncertain, and therefore not just and reasonable to the seller [*see* *Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*], the entire contract is unenforceable [*Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 238, 39 Cal. Rptr. 284*]. Furthermore, the contract cannot be made specifically enforceable by the buyer's conditional waiver of the invalid subordination provisions [*Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 242, 243, 39 Cal. Rptr. 284*]. In *Magna Development Co. v. Reed [(1964) 228 Cal. App. 2d 230, 242, 39 Cal. Rptr. 284*], the court held that the buyer's agreement to waive the subordination provision only if the court found that the provision, as a matter of law, made the sales contract uncertain was merely a conditional waiver made on the eve of a summary judgment procedure. However, a buyer may waive an invalid subordination provision and obtain specific performance of the remaining provisions of a real estate sales contract if (1) the subordination provision was inserted solely for the buyer's benefit, and (2) the waiver is complete and unconditional [*Reeder v. Longo (1982) 131 Cal. App. 3d 291, 295-297, 182 Cal. Rptr. 287*]. In *Reeder*, a large down payment and small purchase money note indicated that the subordination provision was inserted solely for the buyer's benefit. Moreover, a complete and unconditional waiver was indicated by the fact that the subordination clause was drafted by the seller's attorney, and that the buyer agreed to the identical agreement minus the subordination clause [*Reeder v. Longo (1982) 131 Cal. App. 3d 291, 295-297, 182 Cal. Rptr. 287]* .

In a completed real estate transaction, when the seller has already conveyed title to the buyer and accepted back a mortgage or trust deed as security for payment of the purchase price, the question arises whether or not the transaction is void in its entirety if the purchase money mortgage or trust deed contains a "promise to subordinate" clause that is too indefinite and uncertain to be specifically enforced. The California courts have apparently not, as yet, had to answer this subordination question. However, in a related situation, the courts have held that if a partial release clause contained in a purchase money mortgage or trust deed is too indefinite to be specifically enforced, a sale that is already otherwise

complete will not be invalidated [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 763-764, 75 Cal. Rptr. 533*], even though such a clause would invalidate an executory contract of sale [*see White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 469, 73 Cal. Rptr. 885*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART II. LEGAL BACKGROUND
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.18

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.18 Required Contents of Subordination Clauses and Agreements

The volume and complexity of reported cases indicate the difficulty that real estate developers and their attorneys have encountered in drafting satisfactory subordination agreements and clauses. This difficulty is attributable to a conflict between the legitimate needs and goals of real estate developers and the equally legitimate needs of sellers. To develop a parcel or tract successfully, a developer must obtain financing [*see § 25B.12*]. Since the terms under which lending institutions are willing to extend financing vary greatly, it is difficult for a developer to know at the time the sale contract is executed how much money will actually be lent, what the interest rate will be, and what "points" the lender will charge. A seller, on the other hand, must be able to determine with some degree of certainty what the terms and conditions of the subordinating loan will be, to be able to decide whether the sale transaction, with the defined terms of the subordination agreement or clause, represents an acceptable risk. In the ongoing struggle between developers and sellers, the courts have extended special protections to the sellers, citing "strong public policy reasons" [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1036, 96 Cal. Rptr. 338*]. Without those protections, the seller is forced to rely entirely on the buyer's good faith and ability as a developer to ensure that the seller will not lose both the land and the purchase price [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*].

An enforceable subordination agreement or clause must at least specify the maximum principal, maximum interest rate, maximum term, and mode of repayment of the subordinating loan [*Cummins v. Gates (1965) 235 Cal. App. 2d 532, 540, 45 Cal. Rptr. 417* ; *see* Miller & Starr, California Real Estate (3d ed. West Group 2000), Ch. 11, *Recording and Priorities*, § 11:191]. However, it must also be just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*]. Although there is no "magic number" of terms that will insure a just and reasonable subordination clause or agreement as a matter of law [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 521, 229 Cal. Rptr. 186*], the courts have repeatedly stated that an enforceable subordination clause or agreement must contain terms that define and limit the seller's risk [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* ; *see § 25B.17*] and that leave no material element to the future agreement of the parties [*Krasley v. Superior Court (1980) 101 Cal. App. 3d 425, 431,*

161 Cal. Rptr. 629]. Therefore, an enforceable subordination agreement or clause should, at the minimum, specify all of the following [*see Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 518, 229 Cal. Rptr. 186*]:

- The maximum principal amount of the subordinating loan;
- The maximum interest rate to be charged under the subordinating loan;
- The term (that is, the maturity date) of the subordinating loan;
- Maximum loan fees and costs and whether they are to be paid from the principal amount of the subordinating loan;
- Repayment terms, including any provisions for balloon payments;
- Prepayment terms, such as maximum prepayment penalties;
- That the proceeds of the development loan may not be used for any purpose other than construction on or development of the subject property, or other restrictions on use of loan proceeds;
- Existence and terms of any commitment for "take-out" or permanent financing after completion of the construction or development; and
- That the new loan will be made by a bank, life insurance company or correspondent thereof, building and loan association, savings and loan association, or other institutional lender [*see Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1000, 92 Cal. Rptr. 583* (attorney found negligent when subordination clause did not require loan from institutional lender)].

For further discussion of these required terms, see *§ 25B.200[1][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.19

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.19 Effectiveness of Recording Subordinating Construction Loan First

One method used to avoid the problems incidental to automatic subordination and "promise to subordinate" clauses in purchase money mortgages and trust deeds is to hold escrow for the sale of property open until construction financing has been arranged by the buyer and then, pursuant to an agreement with the seller, record the construction loan mortgage or trust deed before recording the purchase money mortgage or trust deed [*see Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338* ; *see also § 25B.15*]. Whether or not this procedure constitutes "subordination" is the subject of some dispute.

According to one view, no subordination in fact has taken place since the seller of the property never had a first lien to "subordinate" to the construction loan. Proponents of this view cite in its support a 1963 case [*see Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 681, 30 Cal. Rptr. 658*]. In *Spaziani*, the court held that a lender's first recorded trust deed did not lose priority over a subsequently recorded purchase money trust deed because the lender's loan was not for construction purposes. However, the only subordination agreement involved in that case was a recital in a purchase contract that the seller's trust deed would be subordinate to a deed of trust securing a loan for a specified sum, with no reference to construction purposes. The seller's only remedy was a suit for breach of contract against the buyer; he or she had no remedy against the construction lender [*see* Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1301, 1309-1312 (1966)*].

Another view is that recording the construction loan mortgage or trust deed before recording the purchase money mortgage or trust deed constitutes a subordination of the purchase money mortgage or trust deed, and the provision in the sales contract or escrow instructions authorizing such a procedure is a subordination clause. Therefore, if an institutional lender making a construction loan on real property knows that payment to the land's seller of a portion of the purchase price of the property has been deferred, the construction lender should incur the same liabilities for misapplication of the construction loan funds whether the lender's construction loan mortgage or trust deed was recorded ahead of the purchase money mortgage or trust deed or the purchase money mortgage or trust deed was recorded first and subordinated under an automatic subordination clause in it to the lender's construction loan mortgage

or trust deed [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338*]. The *Middlebrook* court held that there is no justification, legal or otherwise, that would call for a different result when the seller in a joint transaction records his or her mortgage or trust deed first and agrees it will be subordinated to a construction loan, and when the seller agrees the construction lender may achieve priority by recording its construction loan mortgage or trust deed before his or her purchase money security instrument is recorded [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338*]. In either case, the court held, a subordination agreement exists and the lender has a duty to protect the seller's security interest by seeing to the fair application of the construction loan funds [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1037-1038, 96 Cal. Rptr. 338*]. Since this decision was rendered by the same court that rendered the decision in *Spaziani v. Millar*, the court itself attempted to distinguish the *Spaziani* case, primarily on the grounds that in *Spaziani* there was no subordination agreement between the seller and lender and the loan was a purchase assistance loan rather than a construction loan [*see Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1035, 96 Cal. Rptr. 338*].

PRACTICE TIP:

Insuring Priority. Sellers and their counsel will avoid the potential risk of a loss of priority by purchasing an appropriate title policy insuring the priority of the purchase money mortgage. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.20

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.20 Liability of Attorney or Escrow Agent for Wrongful Subordination

An attorney or an escrow agent can be held liable to a land seller for the loss resulting to the seller from the wrongful or negligent subordination of his or her purchase money mortgage or trust deed to another loan that has since been foreclosed.

In a case affirming a malpractice judgment against an attorney, the appellate court criticized the subordination clause contained in escrow instructions drafted by the attorney for his client, the seller of the land in question. The court stated that no attorney with knowledge of the most elementary rules of law governing real estate sales transactions and subordination would have failed to insist on adequate provisions to insure that all of the proceeds of the loan to which the client's purchase money trust deed was to be subordinated would be used to improve the encumbered property. The attorney's negligence was emphasized by the fact that there was no requirement in the subordination clause that the construction loan to which his client's purchase money trust deed was to be subordinated was to be obtained from an institutional lender that could be relied on to see that the proceeds of the loan were properly used to improve the real property [*Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1000, 92 Cal. Rptr. 583*]. A concurring justice opined that the subordination clause in the case was so one-sided and unfair as to be only slightly less fraudulent than the land buyers who took advantage of it. According to that justice, an attorney who has been employed to represent the interests of the seller must provide advice and counsel that will enable the client to protect himself or herself against the foregoing dangers, and if the attorney does not adequately do this he or she may become liable for losses suffered by the client as a result of the attorney's negligence [*Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1003, 92 Cal. Rptr. 583*].

An escrow holder is the agent to both parties in a real estate transaction, occupies a fiduciary relationship to both parties, and must follow the escrow instructions explicitly. If a contract of sale and escrow instructions state that the land seller will accept a purchase money trust deed containing an automatic subordination clause for its subordination to a construction loan, the escrow holder violates his or her duty to the seller by recording a construction loan trust deed before recording the purchase money trust deed, knowing that not all the construction loan funds are to be used for construction purposes [*Ruth v. Lytton Sav. & Loan Ass'n (1968) 266 Cal. App. 2d 831, 842-843, 72 Cal. Rptr. 521* ,

modified, 272 Cal. App. 2d 24]. In that case, had the trust deed for the improper construction loan not been recorded before the purchase money trust deed, it would not, under the automatic subordination clause, have gained priority over the purchase money trust deed and the seller would not have suffered loss on foreclosure of the construction loan trust deed [*see Ruth v. Lytton Sav. & Loan Ass'n (1968) 266 Cal. App. 2d 831, 843, 72 Cal. Rptr. 521 , modified, 272 Cal. App. 2d 24*].

An escrow agent may also be held liable to a seller for negligence when it acts on incomplete and ambiguous instructions in allowing a purchase money mortgage or trust deed to be subordinated to another security instrument at the close of escrow. In closing the escrow on incomplete and ambiguous instructions, the escrow agent is exercising authority without first determining the conditions under which the authority might be exercised or, in other words, is disposing of the seller's property without instructions to do so because the incomplete and ambiguous instructions were meaningless [*Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 683, 30 Cal. Rptr. 658*].

For further discussion of escrows, including the fiduciary duties and responsibilities of escrow agents, see Ch. 26, *Real Property Escrows* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPurchase & SaleEscrowTortsMalpractice & Professional LiabilityAttorneysTortsMalpractice & Professional LiabilityProfessional Services



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10-25B California Legal Forms--Transaction Guide § 25B.21

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.21 Deficiency Judgment for Subordinated Seller

A deficiency judgment against a defaulting borrower is prohibited after the foreclosure, either by sale under a nonjudicial power of sale clause or by sale under a judicial foreclosure action of a purchase money mortgage or trust deed [*see Code Civ. Proc. §§ 580b, 580d*].

A purpose of this antideficiency legislation is to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened also with personal liability in the form of a deficiency judgment for the balance of the purchase price of the land not realized on the foreclosure sale [*Bargioni v. Hill (1963) 59 Cal. 2d 121, 123, 28 Cal. Rptr. 321, 378 P.2d 593*]. Thus, the legislation places the risk of inadequate security for the purchase price on the purchase money mortgagee, usually the land vendor. This discourages a vendor from overvaluing the security. It also discourages precarious land promotion schemes, because the security value of the land gives purchasers a clue to its true market value [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 42, 27 Cal. Rptr. 873, 378 P.2d 97*].

A personal judgment is also precluded against a land purchaser for the loss suffered by the holder of a purchase money "second" mortgage or trust deed that has become valueless because of the foreclosure of the "first" mortgage or trust deed to which it was subordinate [*Brown v. Jensen (1953) 41 Cal. 2d 193, 198, 259 P.2d 425*]. In the standard purchase money mortgage transaction involving a purchase money "second" mortgage or trust deed, the borrower has been unable to give the vendor a normal cash down payment and obtain the balance of the purchase price required by the vendor from a third party lender. The reason the purchaser has been unable to obtain the balance from a lender is because it exceeds the security value of the property. Thus, the purchaser normally will obtain a third party loan equal to the security value of the property secured by a first trust deed on the property and finance the balance of the purchase price demanded by the vendor by giving the vendor a promissory note secured by a second trust deed on the property for the difference between the full amount of the purchase price less any down payment made and the amount obtained from the third party lender [*see Spangler v. Memel (1972) 7 Cal. 3d 603, 612, 102 Cal. Rptr. 807, 498 P.2d 1055*]. In

this situation, the purchaser's inability to obtain the purchase price from a third party lender using the land as security should warn the seller that he or she is perhaps overvaluing the land. If the seller insists on receiving a premium price by means of a second trust deed, the seller does so at his or her peril [*see Spangler v. Memel (1972) 7 Cal. 3d 603, 612, 102 Cal. Rptr. 807, 498 P.2d 1055*].

In one case, a waiver of *Code Civ. Proc. § 580b* protection was found when a vendor subordinated its deed of trust to a construction loan, and after the purchaser subsequently sold the property a week before foreclosure, the vendor provided the purchaser with a deed of reconveyance so that escrow could close. The court held that the purchaser could not extinguish the security interest by inducing the vendor to execute a deed of reconveyance, and then invoke *Code Civ. Proc. § 580b* to shift the loss to the vendor. The court also held that the *Code Civ. Proc. § 580b* protection was waived when the vendor agreed to subordinate its lien to the purchaser's construction loan, because the subordination agreement contemplated a change of use of the property [*Jack Erickson & Associates v. Hesselgesser (1996) 50 Cal. App. 4th 182, 188-189, 57 Cal. Rptr. 2d 591*].

Different issues exist when the seller agrees to accept a purchase money mortgage or trust deed containing a subordination clause subordinating it to a construction loan. Typically, the seller is selling the property for commercial development, and the true market value of the land depends on the likelihood of the success of the commercial development. In this factual context, the security value of the property at the time of the sale gives no clue to the true market value of the land. That depends, in large part at least, on the competence, diligence, and good faith of the developing purchaser. Effective prevention of overvaluation in a sale of property for commercial development using a subordination clause lies in forcing the purchaser-developer to make realistic assessments of the likelihood of the project's success and in inducing the purchaser-developer to exert his or her highest efforts in carrying it out. This can be accomplished by placing the risk of failure on the purchaser-developer and permitting the holder of the subordinated purchase money mortgage or trust deed to recover a deficiency judgment against the purchaser-developer on the promissory note secured by the purchase money security instrument after the development has failed and the construction lender has caused the property to be foreclosed and sold [*see Spangler v. Memel (1972) 7 Cal. 3d 603, 613, 102 Cal. Rptr. 807, 498 P.2d 1055*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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[Reserved]

§§ 25B.22[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND
B. Assumption and Assignment

10-25B California Legal Forms--Transaction Guide § 25B.30

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.30 Scope of Part

This Part covers the assumption of obligations secured by real property and the assignment of the rights and interests in promissory notes and the mortgages or trust deeds securing the notes. Although assignments made exclusively for security purposes are briefly considered in this Part, more detailed coverage of such assignments is set forth in other chapters [*see § 25B.35*].

For full coverage of trust deeds and other security instruments used in real property financing, see Ch. 25A, *Security Instruments for Real Estate Financing* . The release and reconveyance of trust deeds and the procedure for substituting a trustee under a deed of trust are covered in Ch. 25C, *Release and Reconveyance* . For coverage of the subordination of security instruments, see §§ 25B.10-25B.21.



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B. Assumption and Assignment

10-25B California Legal Forms--Transaction Guide § 25B.31

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.31 Assumption

[1] Effect on Original Debtor and Assuming Grantee

A trustor or mortgagor may convey or otherwise transfer the real property that is subject to the trust deed or mortgage [*Moss v. Minor Properties, Inc. (1968) 262 Cal. App. 2d 847, 855, 69 Cal. Rptr. 341*]. Following such a conveyance, the property remains subject to the debt and the transferor/original debtor continues to be personally liable for the debt, unless the creditor agrees to a novation [*see Civ. Code §§ 1530-1533*] or to release the transferor from liability [*see Civ. Code §§ 1541-1543*; *Ward v. De Oca (1898) 120 Cal. 102, 105, 52 P. 130* ; *see also § 25B.223[1]*]. As discussed below, the grantee is not personally liable for the debt unless (1) he or she assumes the debt and (2) there has been no break in the chain of assumption.

A grantee of real property "assumes" an existing encumbrance against real property by agreeing to pay and discharge the debt that the original debtor is liable for and that is secured by the mortgage or trust deed [*Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 P. 411*]. The most common assumption arrangement involves an agreement by the purchaser of real property subject to a trust deed or mortgage to assume the encumbrance as part of the purchase price [*see Ch. 23, Real Property Sales Agreements, § 23.221*; *see also* [3], *below*].

Under the "equitable subrogation" theory, the assuming grantee becomes personally liable for the debt to the mortgagee or beneficiary, but only if the original debtor and any intervening grantees also assumed the encumbrance [*see Ward v. De Oca (1898) 120 Cal. 102, 104-106, 52 P. 130* ; *Case v. Egan (1922) 57 Cal. App. 453, 454, 207 P. 388]* . Thus, unless there was a break in the chain of assumption, the assuming grantee becomes the principal debtor and the original mortgagor or trustor becomes a surety on the debt. A creditor may thereafter treat both the original debtor and the assuming grantee as debtors, but must recognize the suretyship relationship in subsequent dealings with either [*Everts v. Matteson (1942) 21 Cal. 2d 437, 447-448, 132 P.2d 476* ; *see Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 47-50, 40 P.2d 553* ; *Civ. Code §§ 2787-2855* (suretyship)].

Under suretyship law, a surety faced with a foreclosure action may require the mortgagee or beneficiary to proceed first against the assuming grantee [*Civ. Code § 2845*; *Hamburger v. Ellingson (1934) 139 Cal. App. 311, 313-315, 33 P.2d 850]* . For further discussion of suretyship principles, see Ch. 79, *Suretyship, Guaranty, and Indemnity ; see also California Forms of Pleading & Practice, Ch. 538, Suretyship, Bonds, and Undertakings, § 538.10 et seq.* (Matthew Bender).

Other results of the equitable subrogation theory are that the assuming grantee has the following protections just as if he or she were the original debtor: (1) the right to force the creditor to foreclose against the property before suing on the indebtedness [*Code Civ. Proc. § 726*; *Security-First Nat. Bank v. Chapman (1939) 31 Cal. App. 2d 182, 188-189, 87 P.2d 724*]; (2) the immunity from a deficiency judgment in a judicial foreclosure if the encumbrance is a "purchase money" obligation incurred by the original debtor at the time the debtor acquired the property [*Code Civ. Proc. § 580b*; *see Weaver v. Bay (1963) 216 Cal. App. 2d 559, 561, 31 Cal. Rptr. 211*]; and (3) the immunity from a deficiency judgment in a nonjudicial foreclosure under a power of sale [*Code Civ. Proc. § 580d*]. For coverage of foreclosures of mortgages and trust deeds and deficiency judgments, see Ch. 25D, *Foreclosure* .

If the original debtor pays the sum due on the note following the assumption, the note is discharged and the original debtor is subrogated to (that is, he or she acquires) all of the rights of the mortgagee or beneficiary [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 45, 71 Cal. Rptr. 64*].

[2] Written Agreement

Under the Statute of Frauds, an assumption agreement must be in writing and executed by the assuming grantee. A separate written instrument is not required if the assumption is expressly set forth in the conveyance instrument [*Civ. Code § 1624(a)(6)*; *see § 25B.222*; *see also Ch. 23, Real Property Sales Agreements, § 23.221*].

[3] Practical and Other Considerations

A buyer's ability to assume an existing loan may be restricted by the presence of a due-on-sale clause in the promissory note and security instrument. Such a clause allows the lender to accelerate the loan in the event of a sale or other transfer of the property. The enforceability of due-on-sale clauses is regulated under the Garn-St. Germain Depository Institutions Act of 1982 [*12 U.S.C § 1701j-3*] and implementing regulations of the Federal Home Loan Bank Board [*see 12 C.F.R. §§ 591.1-591.6*]. For coverage of these laws, see *§ 25A.221[1]*.

Whether the purchaser should assume an existing loan or obtain a new loan for the purchase depends, among other factors, on refinancing costs, the potential assessment of a prepayment penalty, and the difference between the prevailing market interest rate and the interest rate of the existing loan. For a detailed discussion of the factors to be considered before assuming a loan, see *California Real Estate Law & Practice, Ch. 1, Analysis of Real Estate Investments, § 1.75* (Matthew Bender).

[4] Usurious Obligations

A purchaser of real property who assumes an existing encumbrance on the property as part of the purchase price is estopped from asserting that the obligation secured by the encumbrance is usurious [*Barnes v. Hartman (1966) 246 Cal. App. 2d 215, 223, 54 Cal. Rptr. 514*]. The one apparent exception to this rule is when the assuming party is a corporation in which the original obligor is a shareholder. The corporation is allowed to assert a claim of usury based on the original obligor's retained interest as a shareholder in the obligation [*see Roesch v. De Mota (1944) 24 Cal. 2d 563, 572-574, 150 P.2d 422*].

[5] Taking Property "Subject to" Encumbrance

If a transferee of real property takes the property "subject to" an existing encumbrance, he or she does not assume or

agree to pay the debt secured by the mortgage or deed of trust [*Wolfert v. Guadagno (1933) 130 Cal. App. 661, 663, 20 P.2d 360*] and does not become personally liable for the payment of the debt [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531* ; *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 599, 125 Cal. Rptr. 557, 542 P.2d 981*]. Instead, the property becomes the primary security for the obligation [*Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553*], and the transferor (if he or she is the original trustor or mortgagor) remains personally liable as a surety for the property itself [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531*]. Thereafter, the transferor can force the creditor to foreclose against the property before suing on the underlying indebtedness [*Code Civ. Proc. § 726*; *see Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531*]. If the encumbrance was created at the time of the original purchase by the transferor, he or she will not be subject to a deficiency judgment on judicial foreclosure [*Code Civ. Proc. § 580b*], or on nonjudicial foreclosure by exercise of the power of sale [*Code Civ. Proc. § 580d*; *Weaver v. Bay (1963) 216 Cal. App. 2d 559, 561, 31 Cal. Rptr. 211*].

If the transferor (as the original trustor or mortgagor) pays the sum due on the mortgage or trust deed, the transferor is subrogated to the mortgagee's or beneficiary's right to foreclose against the property [*Vincent v. Garland (1936) 14 Cal. App. 2d 725, 727-728, 58 P.2d 1320* ; *see Civ. Code §§ 2848* (on payment of obligation, surety entitled to enforce every remedy creditor has against principal), *2849* (surety entitled to benefit of security held by creditor)].

A recitation in a deed that the property is "subject to" a trust deed or mortgage does not constitute an assumption of the debt secured by the trust deed or mortgage [*Snidow v. Hill (1948) 87 Cal. App. 2d 803, 807, 197 P.2d 801* (trust deed); *Andrews v. Robertson (1918) 177 Cal. 434, 439, 170 P. 1129* (mortgage)]. If, however, a deed containing such a recitation also contains an express covenant by the grantee to pay the debt, there is an assumption by the grantee [*Everts v. Matteson (1942) 21 Cal. 2d 437, 448, 132 P.2d 476*] unless the covenant is placed in the deed without the grantee's knowledge or consent [*Fishback v. J.C. Forkner Fig Gardens (1934) 137 Cal. App. 211, 215-219, 30 P.2d 586*].

PRACTICE TIP:

"Subject to" Sales. "Subject to" transactions are inherently risky and expose the participants to liability. Purchasers acquire property "subject to" the existing loan generally because they have poor credit which disqualifies them from obtaining a loan in their name. When the buyer defaults or becomes delinquent in the payment of monthly obligations, the sellers, who are still identified as the obligors by the lender and other creditors, receive the dunning letters, and at a minimum, their credit rating suffers. If the buyers petition for bankruptcy relief, the sellers do not receive the benefit of the automatic stay. The sellers must continue to discharge the obligations without any of the benefits because they are no longer occupying the property.

A promissory note secured by a "wrap around" deed of trust (in which a default in the senior encumbrance triggers a default in the junior note) may be the best solution. However, the "wrap around" trust deed is still junior to, and may violate the terms of, the senior financing which the buyers took "subject to." *Commentary by Timothy F. O'Leary.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingSecondary FinancingWraparound MortgagesReal Property LawFinancingUsuryReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds



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10-25B California Legal Forms--Transaction Guide § 25B.32

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.32 Overview of Assignments

An assignment transfers the assignor's title or ownership, or some right or interest in either, to the assignee [*see Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 614,116 P.2d 599*]. Thereafter, the assignor may not maintain an action on the claim, his or her right to demand performance is extinguished, and the assignee acquires that right [*McCown v. Spencer (1970) 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213*]. An assignment may be an outright and absolute assignment or an assignment for security purposes only. This Part focuses on the outright assignments of mortgages and of the beneficial interests under trust deeds [*see § 25B.33*]. Although assignments for security purposes are covered in detail in other chapters of this publication, this Part presents a brief discussion of such assignments [*see § 25B.33*].

For coverage of assignments in general, see Ch. 76, *Assignments of Rights and Obligations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by Mortgagors



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10-25B California Legal Forms--Transaction Guide § 25B.33

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.33 Absolute Assignment of Security Instruments and Notes

[1] Method of Assignment

Both a mortgage and the beneficial interest under a trust deed may be assigned and recorded [for discussion of the rights and obligations of assignors and assignees, see *§ 25B.230[1][c][i]*]. However, the effective assignment of a security instrument is dependent on the assignment of the secured debt for two reasons. First, neither a mortgage nor a trust deed may be assigned apart from the debt it secures [*Kelley v. Upshaw (1952) 39 Cal. 2d 179, 192, 246 P.2d 23*]. Second, an assignment of the debt effectively assigns the security [*Civ. Code § 2936* (assignment of debt secured by mortgage carries with it the security); *Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560* (assignment of note secured by trust deed transfers trust deed to assignee without further assignment); *see also § 25B.222[1]*]. Consequently, although it is essential that the promissory note be assigned (as discussed below), a formal assignment of the security instrument is not required [*Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560*].

The assignment of a promissory note may be made in the note itself, in a separate instrument, or by delivery [*Hays v. Plummer (1899) 126 Cal. 107, 110, 58 P. 447*]. The fact that possession of the note is not transferred does not render the assignment ineffective [*Kent v. Kent (1935) 6 Cal. App. 2d 488, 490, 44 P.2d 445*]. However, a failure to deliver and endorse the note may prevent the transfer from being considered a "negotiation" and therefore deprive the assignee of the rights available to a "holder in due course" [*see Com. Code §§ 1201(b)(15), (27), 3201, 3203, 3301, 3302*]. Consequently, the most effective and widely used method of assignment is for the assignor to endorse and deliver the note to the assignee and to execute a separate written instrument assigning the note and the security instrument [*see § 25B.222*].

[2] Effect of Recordation

A recorded assignment of a mortgage or beneficial interest in a trust deed imparts constructive notice to all persons from the time of recordation [*Civ. Code § 2934*]. However, mere recordation of the assignment of the note and security does not constitute notice of the assignment to the debtor or his or her heirs or personal representatives so as to

invalidate subsequent payments made by any of them to a person holding the note [*Civ. Code § 2935*; *see § 25B.232* (notice to debtor of assignment)]. It does, however, constitute sufficient notice to the debtor to invalidate payments made by him or her to an assignor who no longer holds (that is, retains physical possession of) the note [*Rodgers v. Peckham (1898) 120 Cal. 238, 241-242, 52 P. 483*]. The protection of a debtor without notice of the assignment therefore only extends if he or she pays the person who actually holds the note.

Any person transferring the servicing of the indebtedness on a note, bond, or other instrument secured by a mortgage or trust deed on residential real property containing up to four units to a different servicing agent, and any person assuming from another person the responsibility for servicing the instrument evidencing the indebtedness, must give written notice of the transfer to the borrower or subsequent obligor before the borrower or subsequent obligor becomes obligated to make payments to the new servicing agent [*Civ. Code § 2937(a), (b)*; *see § 25B.233*]. This disclosure requirement reduces the risk that a debtor will pay a person who no longer holds the note.

The recordation of an assignment does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument [*Com. Code § 3302(b)*; *see Com. Code § 3302(a)* ("holder in due course") means the holder of an instrument who, among other things, took the instrument without the type of notice described above); *see also* Ch. 55, *Negotiable Instruments*].

[3] Effect of Usury Law

Both the lender and the assignee of an usurious obligation may be sued [*see Burr v. Capital Reserve Corp. (1969) 71 Cal. 2d 983, 992-993, 80 Cal. Rptr. 345, 458 P.2d 185*]. However, if a usurious note is transferred to a holder in due course to whom the maker is compelled to make payment, the original payee is the proper defendant and the holder in due course takes free of any claim of usury by the debtor [*Liebelt v. Carney (1931) 213 Cal. 250, 254, 2 P.2d 144*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsTransfersReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingUsury



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10-25B California Legal Forms--Transaction Guide § 25B.34

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.34 Reassignments by Financial Institutions

A financial institution may not enter into a contract that provides for reassignment [*Bus. & Prof. Code § 17350*]. For these purposes, "reassignment" is the right of a financial institution that is the assignee of a contract secured by real property to return the contract to the person assigning it to the financial institution, or to assign it to any other person, on the default of one or more of the parties to the contract [*Bus. & Prof. Code § 17351(b)*]. The following financial institutions are subject to this prohibition: banks, savings and loan associations, credit unions chartered under the laws of California or the United States, and any other person or organization making loans on the security of real property [*Bus. & Prof. Code § 17351(a)*]. The purpose of this legislation is to discourage financial institutions from making loans to consumers who are credit risks [*see Review of Selected 1979 California Legislation*, 11 Pacific L.J. 392-393 (1980)].

PRACTICE TIP:

Reassignments. Most mortgage brokers have a clause in their agreement with the credit facility obligating the broker to "repurchase" the loan if the borrower defaults shortly after the loan is funded. The purpose of the provision is to penalize brokers for procuring borrowers who clearly lack the resources to discharge the indebtedness. Most brokers accept their responsibility to repurchase such loans, even if they did not participate in the underwriting decision. The brokers fear that if they refuse to repurchase loans issued to borrowers who default in the first 60 or so days, the credit facility will terminate the broker's lending agreement, even though such repurchases appear to violate the cited section prohibiting reassignment. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by Mortgagees



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10-25B California Legal Forms--Transaction Guide § 25B.35

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.35 Assignments for Security Purposes

When an assignment is made solely for the express purpose of securing performance of an obligation, the assignment grants the assignee present rights in specified property but permits the assignor to continue to enjoy the benefits of the property until and unless the assignor defaults in its obligations to the assignee. For example, an assignment of rents clause in a trust deed that assigns the rents from encumbered property to the assignee/beneficiary but allows the assignor/trustor to collect and retain the rents unless and until the trustor defaults in his or her obligations to the beneficiary under the trust deed is customarily included in standard forms of trust deeds [*see § 25A.210*]. For related forms, see *Ch. 35A, Assignment and Sublease of Leasehold Interests, §§ 35A.203* (assignment to lender of lessor's interest in lease as security for loan obligation),*35A.221* (notice to lessee of assignment of lease as security for loan).

As a condition to making a construction loan, the lender may require that the trustor assign to it for security purposes all of the trustor's right, title, and interest in the trustor's construction contract, in the trustor's agreement with the architect for the project, and in the plans and specifications for the construction project. For a combined form of deed of trust, assignment of rents, and security agreement for a construction loan, see *Ch. 30A, Construction Financing, § 30A.204*.

A promissory note and deed of trust may be assigned by the payee/beneficiary for security purposes, but the security interest given is not "perfected" and protected against general creditors of the payee simply by recordation of the assignment in the county where the trust deed is recorded. The security interest in the note and trust deed is a security interest in "instruments" under the California Commercial Code, and a security interest in instruments can be perfected only by the taking of possession of the instruments by the secured party [*see Matter of Staff Mortgage & Inv. Corp. (9th Cir. 1977) 550 F.2d 1228, 1230*]. For further discussion of security instruments in notes and trust deeds, see *Ch. 42, Secured Transactions, §§ 42.200* (security agreement creating nonpossessory security interest in promissory note or other indebtedness), *42.203* (security agreement creating possessory security interest in collateral consisting of promissory notes secured by trust deeds or land sale contracts).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security Leases



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[Reserved]

§§ 25B.36[Reserved]



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10-25B California Legal Forms--Transaction Guide § 25B.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.100 Facts Required for Deed of Trust to Be Subordinated

NOTE:

When the seller of property accepts a purchase money promissory note from the buyer as part of the purchase price for the property and agrees to subordinate the promissory note to a subsequent new loan to be obtained by buyer, provisions reflecting that agreement generally are included in the purchase/sale contract itself [***see*** Ch. 23, ***Real Property Sales Agreements***]. Similar and conforming provisions are then inserted in the trust deed given to the seller at the close of escrow or inserted in a separate subordination agreement.

1. Information concerning promissory note to be secured by subordinated deed of trust:

    a. Names of payees.

    b. Legal status of payees, *e.g.*, husband and wife, a corporation, etc.

    c. Total amount of principal payable.

    d. Interest payable.

    e. Due dates and amounts of periodic payments of principal and interest.

    f. Any other terms of note.

2. Name and status of trustor.

a. If a corporation:

(1) Date and state of its incorporation.

(2) Date on which its board of directors or shareholders have approved or will approve execution and delivery of trust deed.

b. If a partnership:

(1) Whether partnership is or has acquired title to real property to be encumbered in partnership name or in names of individual partners.

(2) Whether statement of partnership (for a general partnership) [*see Corp. Code § 16303(e)*; *see also* Ch. 15, Part A, *Formation of General Partnerships* , Part A] or certificate of limited partnership (for a limited partnership) [*see Corp. Code § 15902.01(e)* (ULPA '08); *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010); *see also* Ch. 16, *Formation of Limited Partnerships*] has been recorded in office of county recorder where property to be encumbered is located.

(3) Which partners are authorized to sign deed of trust [*see Corp. Code §§ 16302(a), 16303(a)(1)(D)*] on partnership property or if signature of each partner is needed on trust deed.

(4) Whether all partners have approved or will approve of execution of trust deed and its terms.

c. If husband and wife, determine whether both will approve and sign trust deed.

d. If married person purportedly dealing with his or her separate property:

(1) Name of his or her spouse.

(2) Whether his or her spouse will approve and sign trust deed.

3. Legal description of property that trust deed is to encumber.

4. Size, location, and general characteristics of property that trust deed is to encumber.

5. Purpose of subordination:

a. Construction of improvements on encumbered property, *e.g.*:

(1) Subdivision homes.

(2) Single family residence.

(3) Shopping center.

(4) Apartment complex or building.

(5) Residential duplex or triplex.

(6) Office or multipurpose commercial building.

(7) Single purpose commercial building.

(8) Industrial park.

(9) Mobilehome park.

b. Other purposes.

6. Reputation and ability of trustor as developer.

a. Experience in developing property.

b. Financial ability and worth.

c. Prior developments.

d. Reputation among lenders, builders, and developers.

7. Anticipated fair market value that encumbered real property will have after completion of project to be financed by loan to which trust deed is to be subordinated.

8. Person or corporation that will serve as trustee under trust deed.

9. Any special provisions, such as partial release clauses, that parties wish incorporated in trust deed [*see* Ch. 25C, *Release and Reconveyance*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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10-25B California Legal Forms--Transaction Guide § 25B.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.101 Additional Facts Required for Previously Recorded Subordinated Deed of Trust

NOTE:

Notwithstanding that a trust deed containing provisions for its subordination to another subsequent deed of trust may be of record, lending institutions and title companies generally require at the time of making the new loan secured by the subordinating trust deed that the holder of the subordinated security instrument execute a separate agreement specifically subordinating to the new loan, as a condition to making and insuring the subordinating loan [***see*** Miller, Starr & Regalia, ***Subordination Agreements in California***, *13 UCLA L. Rev. 1298, 1300 (1966)*; ***see also*** *§§ 25B.16[4], 25B.207*].

1. Name and status of beneficiary or beneficiaries on recorded subordinated trust deed.

2. Name and status of trustor on recorded subordinated deed of trust.

3. Recording information for subordinated deed of trust:

    a. Date recorded.

    b. Instrument or Book and Page Number.

    c. County.

4. Date and amount of promissory note that is secured by subordinated deed of trust.

5. Content of subordination provisions contained in recorded subordinated deed of trust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPriorities & RecordingGeneral Overview



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10-25B California Legal Forms--Transaction Guide § 25B.102

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.102 Facts Required for Subordinating Loan

NOTE:

To be enforceable, a subordination clause or agreement must set forth the terms of the subordinating loan [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329* ; ***see*** *§ 25B.18*]. The extent to which this information is available depends on whether a final commitment for the subordinating loan has been obtained as of the time a subordination agreement is included in a trust deed or a subordination agreement is drafted. When the particular terms of the loan are not known at that time, the instrument containing the subordination provisions must nevertheless contain specific guidelines for the subordinating loan [***see*** *§ 25B.121* (1)].

1. Terms of subordinating loan.

a. Name and status of lender.

b. Purpose of loan.

c. Amount of principal.

d. Interest rate.

e. Term (i.e., maturity date) of loan.

f. Repayment terms, including any provisions for balloon payments.

g. Prepayment terms, such as maximum prepayment penalties, if any.

h. Loan fees and other loan charges.

i. Whether loan fees and charges will be paid from principal.

j. Loan disbursement provisions.

k. Ratio of loan to anticipated fair market value of improved property.

l. Restrictions on use of proceeds.

m. Any commitment for "take-out" or permanent financing after completion of construction.

n. Any other specific restrictions or terms of subordinating loan.

2. Name and legal status of trustor under trust deed securing subordinating loan.

3. Name and legal status of beneficiary under trust deed securing subordinating loan.

4. Legal description of property to be encumbered by subordinating loan, if different from property encumbered by subordinated loan.

NOTE:

In some circumstances, only a portion of the property encumbered by the subordinated loan is encumbered by the subordinating loan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.103

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.103 Basic Facts for Assumption or Assignment

1. Name, address, and telephone number of following:

a. If property is secured by trust deed:
(1) Original trustor;

(2) Original trustee;

(3) Original beneficiary; and

(4) Substituted trustee, if any.

b. If property is secured by mortgage:

(1) Original mortgagor, and

(2) Original mortgagee.

c. Either:

(1) Proposed assignee of beneficiary or mortgagee; or

(2) Person who will assume debt from trustor or mortgagor.

d. Current owner of property securing debt if different from any of above.

e. Person in possession of property if different from any of above.

f. Guarantor, if any, of debt.

2. Additional information for parties who are not individuals:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Name, address, and title of person authorized to bind entity.

3. Information concerning debt:

a. Date incurred.

b. Original principal amount.

c. Approximate amount of unpaid balance.

d. Whether debt is current and in good standing.

4. Legal description of secured property.

5. Information concerning security instrument:

a. Type:

(1) Deed of trust.

(2) Mortgage.

b. Date executed.

c. Recording information:

(1) Date recorded.

(2) Instrument or Book and Page number.

(3) County.

6. Additional information about any previous assumption:

a. Name, address, and telephone number of assuming debtor.

b. Date of execution of assumption agreement [*see Civ. Code § 1624(a)(6)*].

7. Additional information about any previous assignment:

a. Name, address, and telephone number of assignee.

b. Date of execution of assignment instrument (if any) [*see § 25B.230[1]*].

c. Date of delivery and endorsement of promissory note (if applicable) [*see § 25B.230[1]*].

d. Date and place of recordation of assignment instrument (if applicable) [*see § 25B.230[1][e]*].

e. Date of execution of any notice to debtor of assignment [*see § 25B.232[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by Mortgagees



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25B California Legal Forms--Transaction Guide § 25B.104

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.104 Documents--Subordination

1. Copy of any purchase/sale agreement entered into by parties who have agreed to subordination of one trust deed to another.

2. Recorded copy of any subordinated trust deed.

3. Copy of promissory note secured by subordinated trust deed.

4. Copy of loan commitment, if available, for subordinating loan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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10-25B California Legal Forms--Transaction Guide § 25B.105

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.105 Documents--Assumption and Assignment

1. Promissory note or other instrument evidencing indebtedness.

2. Deed of trust or mortgage.

3. Previous assignment of trust deed or mortgage, if any.

4. Document(s) under which person other than original trustor or mortgagor assumed debt and obligations under trust deed or mortgage, if any.

5. Recorded substitution of trustee, if any.

6. Recorded partial reconveyance(s)(if any) for property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by Mortgagees



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A. Client Interview--Facts and Documents

10-25B California Legal Forms--Transaction Guide §§ 25B.106-25B.109

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25B.106[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

10-25B California Legal Forms--Transaction Guide § 25B.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.110 Determinations for Deed of Trust Subordination Clause

NOTE:

This portion of the Transaction Guide relates only to the preliminary determinations required for drafting the subordination clause of a trust deed. For the preliminary determinations required for drafting other portions of the trust deed, see *§ 25A.110* et seq. If the subordination clause that is to be inserted into a trust deed is being drafted as part of a contract between the seller and buyer for the sale of the property that is to be encumbered by the trust deed, *§ 25B.110* should be used in conjunction with Part B., Transaction Guide, for Ch. 23, ***Real Property Sales Agreements*** .

1. Determine whether loan to be subordinated does, or subordinating loan will, exceed $25,000.

NOTE:

Certain statutory notices must be included in a subordinated trust deed unless the trust deed either (1) expressly states that the loan to which it may be subordinated will exceed $25,000 or (2) secures a loan exceeding $25,000 [*Civ. Code § 2953.5*; ***see*** *§ 25B.13*].

2. Determine purpose of subordinating loan.

a. Construct improvements on encumbered property.

b. Permit trustor under subordinated and subordinating trust deed to make payments on existing liens on property, including subordinated loan or others.

c. Other.

3. Ascertain which type of subordination clause should be included in trust deed [*see § 25B.14[1]*].

a. "Automatic subordination" clause [*see § 25B.14[2]*].

b. "Executory" or "promise to subordinate" clause [*see § 25B.14[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.111 Determinations Regarding Subordination Agreement

NOTE:

This section assumes that a commitment for a subordinating loan has already been made, and that the lending institution requires a subordination agreement specifically to subordinate an existing recorded trust deed to the new deed of trust securing the subordinating loan [***see*** *§ 25B.16[4]*].

1. Determine whether loan to be subordinated does, or subordinating loan will, exceed $25,000.

NOTE:

Certain statutory notices must be included in a subordination agreement unless the agreement either (1) expressly states that the subordinating loan will exceed $25,000 or (2) is executed in connection with a loan exceeding $25,000 [*Civ. Code § 2953.5*; ***see*** *§ 25B.13*].

2. Determine whether recorded trust deed to be subordinated under agreement contains subordination clause and, if so, specific terms and conditions of clause.

3. Determine whether terms of subordinating loan, to be listed in subordination agreement, differ from those required by subordination clause in subordinated deed of trust.

NOTE:

If there is a variation between the new and original subordination agreements, the new agreement will be unenforceable unless it is supported by new consideration [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 661, 56 Cal. Rptr. 844* ; ***see*** *§*

25B.207[1][d]].

4. Determine whether subordination agreement is intended as novation of prior subordination clause or agreement.

NOTE:

A new subordination agreement must be intended as a novation, and supported by new consideration [***see*** (3), ***above***], in order to be enforceable. Otherwise, the two agreements will be interpreted together as two parts of a single transaction, as if the new agreement were intended to make the original clause specific or to implement it [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 655, 661, 56 Cal. Rptr. 844*]. The determination of a novation is based on intent [***see*** *§ 25B.207[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementDefensesFailure of ConsiderationContracts LawPerformanceNovationReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.112

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.112 Assumption

1. Determine whether existing debtor is personally liable on secured obligation.

NOTE:
The assuming grantee will not be personally liable on the encumbrance unless the original debtor and any intervening grantees between the assuming grantee and that debtor had each assumed the encumbrance [***see*** *Case v. Egan (1922) 57 Cal. App. 453, 454, 207 P. 388* ; *Ward v. De Oca (1898) 120 Cal. 102, 104-106, 52 P. 130* ; ***see also*** *§ 25B.222[1][c]*].

2. If existing debtor is personally liable on obligation, determine whether creditor is willing to release him or her from personal liability [*see § 25B.31[1]*; *see also § 25B.223*].

3. Determine whether promissory note and security instrument contain due-on-sale clause potentially restricting buyer's ability to assume existing loan [*see § 25B.31[3]*; *see also § 25B.222[1][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptions



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25B California Legal Forms--Transaction Guide § 25B.113

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.113 Assignment

1. Determine whether proposed assignment is:

    a. Assignment made solely for security purposes [*see § 25B.35*]; or

    b. Absolute or outright assignment of mortgage or beneficial interests under trust deed [*see § 25B.33*].

2. Determine whether assignment of promissory note will be made [*see § 25B.230[1][c]*]:

    a. In note itself;

    b. In separate instrument; or

    c. By delivery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by Mortgagees



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10-25B California Legal Forms--Transaction Guide §§ 25B.114-25B.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25B.114[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25B California Legal Forms--Transaction Guide § 25B.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.120 Deed of Trust Subordination Clause

1. Include following terms of subordinating loan, as agreed on by parties, in subordination clause in deed of trust:

NOTE:
To be enforceable, a subordination clause or agreement must set forth the terms of the subordinating loan [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329* ; ***see*** *§ 25B.18*]. If a loan commitment has already been made, the terms of the subordinating loan can be specified with particularity. However, when no loan commitment has yet been received, the parties must agree on the terms or specify maximums for dollar amounts and parameters for other terms of the loan [***see*** *§ 25B.200*].

a. Maximum principal amount of subordinating loan.

b. Maximum ratio of loan to anticipated fair market value of improved property.

c. Maximum interest rate to be charged under subordinating loan.

d. Term (*i.e.*, maturity date) of subordinating loan.

e. Maximum loan fees and costs and whether they are to be paid from principal amount of subordinating loan.

f. Repayment terms, including any provisions for balloon payments.

g. Prepayment terms, such as maximum penalties, if any.

h. Restrictions on use of loan proceeds.

NOTE:
If the loan is for construction purposes only, the subordination clause should state that the proceeds must be used only for the construction of improvements on the property [***see § 25B.200[1]***[[c][v]].

i. Terms of any commitment for "take-out" or permanent financing after completion of construction or development.

j. Loan disbursement provisions.

k. That new loan will be made by bank, life insurance company or correspondent thereof, building and loan association, savings and loan association, or other institutional lender [*see Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1000, 92 Cal. Rptr. 583* (attorney found negligent when subordination clause did not require loan from institutional lender)].

2. If required [*see § 25B.110* (1)], insert statutory notices regarding existence of subordination clause in trust deed [*see Civ. Code § 2953.2*].

NOTE:
Each required notice must be set forth in a particular location in the deed [*Civ. Code § 2953.2*; ***see §§ 25B.201[2], 25B.202[2]*** for these notices].

3. Have deed of trust executed and notarized and record it in county where encumbered property is located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingGeneral Overview



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10-25B California Legal Forms--Transaction Guide § 25B.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.121 Subordination Agreement

1. Include all of following in agreement:

a. Recitals regarding purpose of agreement [*see § 25B.207[2]*].

b. Terms of subordinating loan:

NOTE:
To be enforceable, a subordination clause or agreement must set forth the terms of the subordinating loan [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329* ; ***see*** *§ 25B.18*]. Because the developer usually has received a loan commitment by the time a subordination agreement is executed, the specific terms of the loan for which a commitment has been received are ascertainable and must be specified with particularity [***see*** *California Real Estate Law & Practice, Ch. 114,* ***Subordination****, § 114.51* (Matthew Bender); ***see also*** *§ 25B.207[2]*].

(1) Name and status of lender.

(2) Purpose of loan.

(3) Amount of principal.

(4) Interest rate.

(5) Term (*i.e.*, maturity date) of loan.

(6) Repayment terms, including any provisions for balloon payments.

(7) Prepayment terms, such as maximum penalties, if any.

(8) Loan fees and other loan charges.

(9) Whether loan fees and charges will be paid from principal.

(10) Ratio of loan to anticipated fair market value of improved property.

(11) Any commitment for "take-out" or permanent financing after completion of construction.

(12) Any restrictions on use of proceeds.

(13) Loan disbursement provisions.

c. Recital of new consideration, if agreement is intended to supersede subordination clause in recorded deed of trust [*see § 25B.207[2]*, P 4].

d. Statement of novation, if agreement is intended to supersede subordination clause in recorded deed of trust [*see § 25B.207[2]*, P 4].

e. Statutory notices regarding subordination provisions, if required [*see § 25B.110* (1)].

NOTE:

Any required statutory notices must be set forth in particular locations in the agreement [***see*** *Civ. Code § 2953.3*; ***see also*** *§§ 25B.208[2], 25B.209[2]* for examples of those notices].

2. Have beneficiary and trustor execute subordination agreement in presence of notary and have signatures acknowledged.

3. Prepare escrow instructions that require simultaneous recording of subordination agreement and subordinating deed of trust.

NOTE:

For a guide to drafting escrow instructions, see Ch. 26, ***Real Property Escrows*** .

4. Deliver executed originals of agreement and escrow instructions to escrow agency handling escrow for construction loan.

5. Deliver copies of agreement and escrow instructions to the following parties:

a. Beneficiary of subordinated deed of trust, and/or beneficiary's attorney.

b. Trustor, and/or trustor's attorney.

c. Lending institution.

d. Title company.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPurchase & SaleEscrow



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10-25B California Legal Forms--Transaction Guide § 25B.122

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.122 De Facto Subordination

NOTE:

"De facto" subordination occurs when the subordinating deed of trust (usually for a construction loan) is recorded before the trust deed to be subordinated (typically a purchase money trust deed to the seller) pursuant to agreement between the parties (normally contained in the sales contract, escrow instructions, or deposit receipt) [***see*** *§§ 25B.16, 25B.19*].

1. Consider including following in purchase money trust deed to be subordinated:

NOTE:

Although these statements are not required, they provide notice of subordination and use of loan proceeds in a recorded instrument, in addition to the agreement regarding recording order set forth in the sales contract or escrow instructions [***see*** *§ 25B.205[1]*].

a. Statement that trust deed is subordinate to lender's trust deed [*see § 25B.205[2]*].

b. Statement that all funds from lender's loan must be used for specified purposes only [*see § 25B.206[2]*].

2. Have lender's trust deed recorded before purchase money trust deed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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10-25B California Legal Forms--Transaction Guide § 25B.123

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.123 Assumption of Note and Deed of Trust

NOTE:

This section refers solely to deeds of trust since they are used much more frequently in California than mortgages. However, all requirements for a trust deed discussed below, unless otherwise noted, are equally applicable to a mortgage.

Any references to a beneficiary should be deemed to refer to a mortgagee as well [***see*** *Civ. Code § 2943*; ***see also*** *§ 25B.220[1][e]*].

1. Request following documents from beneficiary of trust deed to be assumed [*see Civ. Code § 2943*; *see also § 25B.220[2]* for form of request]:

a. Beneficiary statement [*see Civ. Code § 2943(a)(2)* (definition)] of unpaid balance on secured note; and

NOTE:

A beneficiary statement is essentially a statement of the unpaid balance of an obligation secured by a mortgage or deed of trust [***see*** *Civ. Code § 2943(a)(2)*]. Only an "entitled person" may request a beneficiary statement from the beneficiary [*Civ. Code § 2943(a)(4)*; ***see*** *§ 25B.220[1][e]*]. The request may be made (1) at any time before, or within two months after, the recording of a notice of default under the mortgage or trust deed; or (2) more than 30 days before the entry of a decree of foreclosure [*Civ. Code § 2943(b)(2)*]. The beneficiary may require reasonable proof that the person making the request is an entitled person [*Civ. Code § 2943(e)(3)*; ***see*** *§ 25B.221[1][d]*.

If the obligation secured by the mortgage or deed of trust is to be paid in full rather than assumed, a payoff demand statement should be used instead of a beneficiary statement [***see*** *Civ. Code § 2943(a)(5), (c)*; ***see also*** *Ch. 25,* ***Real Estate Loans****, §§ 25.253, 25.254*]. If an entitled person requests a statement pursuant to *Civ. Code § 2943* and does not specify whether he or she is seeking a beneficiary statement or a payoff demand statement, the beneficiary must treat the request as a request for a payoff demand statement [*Civ. Code § 2943(e)(1)*].

b. If desired, copy of trust deed.

NOTE:

When the request for a beneficiary statement includes a specific request for a copy of the trust deed (or mortgage), the beneficiary must furnish the copy along with the beneficiary statement at no additional charge [*Civ. Code § 2943(e)(2)*].

2. Confirm receipt of following within 21 days after beneficiary's receipt of request for beneficiary statement [*Civ. Code § 2943(b)(1)*]:

a. Beneficiary statement indicating [*Civ. Code § 2943(a)(2)*; *see § 25B.221*]:

NOTE:

If the beneficiary requires reasonable proof that the person making the request is an entitled person, the beneficiary must provide the beneficiary statement within 21 days of his or her receipt of the proof [*Civ. Code § 2943(e)(3)*; ***see*** *§ 25B.221[1][d]*]. If the beneficiary fails to provide the statement within the applicable 21-day period, he or she is liable to the person making the request for damages and the sum of $300 [*Civ. Code § 2943(e)(4)*; ***see*** *§ 25B.221[1][h]*].

(1) Amount of unpaid principal and interest.

(2) Interest rate.

(3) Amount of overdue payments of principal and interest, if any.

(4) Amounts of periodic payments of principal and interest, if any.

(5) Date on which obligation is due in whole or part.

(6) Date to which real property taxes and special assessments have been paid (to extent known by beneficiary).

(7) Amount, term, and premiums of hazard insurance (to extent known by beneficiary).

(8) Amount in account, if any, maintained by beneficiary for accumulation of funds with which to pay taxes and insurance premiums.

(9) Nature and, if known, amount of any additional charges, costs, or expenses paid or incurred by beneficiary that have become a lien on real property.

(10) Whether or not obligation secured by trust deed can or may be transferred to new borrower.

b. Copy of promissory note, including any modification.

c. Copy of trust deed (if requested).

3. Have parties execute appropriate instrument of assumption [*see § 25B.222[2]*; *see also § 25B.223[2]*], which, in case of institutional lenders, is generally provided by lender.

NOTE:

An assumption by the transferee without a novation [***see*** *Civ. Code §§ 1530-1533*] or release [*Civ. Code §§ 1541-1543*] by the creditor will not remove the transferor from any liability on the encumbrance that he or she might have had prior to the assumption since the transferor is still liable on the debt as a surety [*Ward v. De Oca (1898) 120 Cal. 102, 105, 52 P. 130* ; *Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553*]. If the creditor is an institutional lender, it may consent to remove the transferor from liability on the encumbrance [***see*** *§ 25B.223*], but the more general method is to cancel the original note, record a full reconveyance to the transferor, and have the transferee execute a new note and security.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptions



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10-25B California Legal Forms--Transaction Guide § 25B.124

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.124 Absolute Assignment of Note and Security Instrument

1. Obtain from debtor/owner of property, "owner's statement" [*see § 25B.221[1][b]*; *see also Ch. 26, Real Property Escrows, § 26.243*] that:

a. Verifies status of note and security instrument;

b. Affirms terms, validity, and enforceability of note and security instrument; and

c. Sets forth amounts of unpaid principal balance and other outstanding obligations.

2. Have search performed at Recorder's Office in County where property is located to determine existence of any previous assignments of record.

3. Execute escrow instructions [*see* Ch. 26, *Real Property Escrows*] requiring deposit of following into escrow:

a. Properly endorsed promissory note.

NOTE:
For a discussion of the endorsement of promissory notes, see *§ 25B.230[1]*.

b. Duly executed and acknowledged assignment instrument [*see §§ 25B.230* (assignment of note and trust deed), 25B.231 (assignment of note and mortgage)].

c. Assignee's consideration, if any.

4. Instruct escrow to record assignment instrument in county where encumbered property is located.

5. Notify debtor of assignment [*see § 25B.232*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingGeneral Overview



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10-25B California Legal Forms--Transaction Guide §§ 25B.125-25B.129

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25B.125[Reserved]



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10-25B California Legal Forms--Transaction Guide § 25B.130

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.130 Voiding Subordination Clause or Agreement

NOTE:

A subordination clause or agreement not exempt from statutory notice requirements is voidable by the person whose security interest was to be subordinated, or his or her successor in interest, if it does not contain statutory notices regarding subordination [*Civ. Code § 2953.4(a)*; ***see*** *§§ 25B.110(1),25B.111(1)*]. However, no person may void the clause or agreement if he or she had actual knowledge of the existence and terms of that subordination clause or agreement [*Civ. Code § 2953.4(a)*].

1. Prepare notice stating all of following [*Civ. Code § 2953.4(b)*; *see § 25B.210[2]*]:

a. That provisions required by *Civ. Code §§ 2953.2* (subordination clause) or *2953.3* (subordination agreement) have not been complied with;

b. That person signing notice is holder of security instrument to be subordinated, or his or her successor in interest; and

c. That he or she elects to void effect of subordination clause or agreement.

2. Have notice executed and acknowledged.

3. Record notice within two years of date on which subordinating instrument was executed [*Civ. Code § 2953.4(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.131

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.131 Waiving Noncompliance With Statutory Notice Requirements

NOTE:

The holder of a security interest to be subordinated may waive his or her right to void the subordination clause or agreement on the basis of noncompliance with required statutory notices [*Civ. Code § 2953.4(c)*; ***see*** *§ 25B.130*].

1. Prepare waiver stating all of following [*Civ. Code § 2953.4(c)*; *see § 25B.211[2]*]:

a. That holder of subordinated security interest knows of existence and terms of subordinating clause or agreement; and

b. That he or she waives right to void subordination clause or agreement on basis of noncompliance with statutory notices [*see Civ. Code §§ 2953.1-2953.4*].

2. Have waiver executed and acknowledged.

3. Record waiver [*Civ. Code § 2953.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

10-25B California Legal Forms--Transaction Guide §§ 25B.132-25B.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25B.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.200

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.200 Short Form Deed of Trust Containing Automatic Subordination Clause

[1] Comment

[a] Use of Form

The form in [2], *below*, is a short form deed of trust containing an "automatic subordination" clause. It is intended for use when, as is often the case, the purchaser of undeveloped property gives the seller a purchase money deed of trust for a portion of the purchase price, and the seller agrees to subordinate its trust deed to a construction loan to be obtained by the purchaser for developing the property.

The subordination clause in this form provides that the trust deed containing it be automatically subordinated, without further action by its beneficiary, to a subsequent trust deed placed on the encumbered real property by the trustor to secure a "construction loan" complying with the terms specified in the subordination clause. A subsequently executed deed of trust securing a "construction loan" or other loan that does not comply with the terms specified in the foregoing subordination clause will not gain priority over the trust deed containing the subordination clause [*see § 25B.16[2]*]. For a definition of the term "automatic subordination clause" and descriptions of other types of subordination clauses that may be included in a trust deed or used in real estate transactions, see *§ 25B.14*.

[b] Short Form of Deed of Trust

This form includes the provisions of a standard short form of deed of trust used by title companies. A short form trust deed incorporates by reference certain provisions of fictitious trust deeds recorded in each county in California. A standard short form trust deed used by a title company generally contains the text of those provisions on the back side of the printed form [*see § 25A.211*]. This form recites that a copy of the provisions is attached to and made a part of the trust deed.

This form also includes subordination provisions. As an alternative, counsel may elect to use a standard printed short

form trust deed supplied by a title company, containing a statement on the front side that subordination provisions are attached to and made a part of the trust deed. However, if this method is used, all statutory captions and notices required for nonexempt subordination provisions must be set forth on the face of the trust deed in the required manner [*see* [d], *below*].

[c] Required Subordination Provisions

[i] Minimum Terms

A seller, by agreeing to subordinate his or her security to that of a lender, takes the risk that the subordinating lien will impair or destroy the seller's security [*see Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329*]. As a result, courts have developed certain guidelines for the minimum terms of a subordinating loan that is to take priority over the seller's lien [*see § 25B.18*]. To be enforceable, a subordination clause or agreement must at least specify the maximum principal, maximum interest rate, maximum term, and the mode of repayment of the subordinating loan [*Cummins v. Gates (1965) 235 Cal. App. 2d 532, 540, 45 Cal. Rptr. 417*]. Even when these terms are clearly specified, the agreement may not be enforceable if it is not just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 582, 55 Cal. Rptr. 769, 422 P.2d 329*].

Although there is no "magic number" of terms that will insure a just and reasonable subordination clause as a matter of law, an enforceable subordination agreement should, at a minimum, specify each of the terms set forth below [*see Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 522, 229 Cal. Rptr. 186*]. The need for certainty regarding the basic terms of the subordinating loan applies to permanent loans as well as construction loans [*see* Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1305 (1966)*; *see also § 25B.204[1]*]. If, at the time the subordination agreement or clause is executed, the buyer has received a loan commitment, those terms should be specified with particularity [*see, e.g., § 25B.207*]. However, when no loan commitment has yet been received, the drafter must approximate the following terms, or at least specify maximums:

- The maximum principal amount of the subordinating loan [*see* P 2 of subordination provisions of form; *see also* [c][ii], *below*].

- The maximum interest rate to be charged under the subordinating loan [*see* P 6 of subordination provisions of form; *see also* [c][ii], *below*].

- The term (*i.e.*, maturity date) of the subordinating loan [*see* P 8 of subordination provisions of form; *see also* [c][iii], *below*].

- Maximum loan fees and costs and whether they are to be paid from the principal amount of the subordinating loan [*see* PP 6, 7 of subordination provisions of form; *see also* [c][iv], *below*].

- Repayment terms, including any provisions for balloon payments [*see* P 8 of subordination provisions of form; *see also* [c][vi], *below*].

- Prepayment terms, such as maximum penalties, if any [*see* P 9 of subordination provisions of form; *see also* [c][vi], *below*].

- Restrictions on use of proceeds, such as requiring proceeds of the development loan to be used only for construction on or development of the subject property [*see* P 3 of subordination provisions of form; *see also* [c][v], *below*].

- Existence and terms of any commitment for "take-out" or permanent financing after completion of the construction or development [*see, e.g., § 25B.204*; *see also* [c][vii], *below*].

- That the new loan must be made by a bank, life insurance company or correspondent thereof, building and loan association, savings and loan association, or other institutional lender [*see* P 11 of subordination provisions of form; *see also Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1000, 92 Cal. Rptr. 583* (attorney found negligent when subordination clause did not require loan from institutional lender)].

[ii] Principal and Interest of Subordinating Loan

The amount of the subordinating loan's principal and interest must be specified, since the court will not resort to custom or usage to determine a maximum amount [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 521, 229 Cal. Rptr. 186*]. The drafter may have some leeway in specifying the maximum principal amount and the maximum interest rate of the subordinating loan. In case of doubt about the amount a lender may be willing to lend, the drafter may specify a higher rather than a lower maximum. It is not sufficient, however, to specify the amount in terms of a maximum amount per lot, as the number of lots may not be determinable with precision at the time the agreement is signed [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329*]. The maximum principal amount may be set at a percentage of appraised value of the improved property, and the interest rate may be specified in terms of a certain percentage above prime, or at the prevailing rate in the business community at the time of construction or development [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 522, 229 Cal. Rptr. 186*].

[iii] Term of Subordinating Loan

The term (or maturity date) of the loan should not be stated as a maximum, because the seller's risk under a subordination agreement (and therefore the fairness of the agreement to the seller) will depend on the cumulative effect of the term and the interest rate. A loan with a relatively short term could endanger the seller's security, either because it provides for a balloon payment at the end of the short term, or because the payments called for are unusually large. A loan with a long term, if coupled with a high interest rate, could also be detrimental to the seller's security, as it would prolong the time during which the seller's security interest would be subordinated and increase the total amount of interest payable. If the term of the construction loan is to be stated as a maximum, a minimum term should also be specified, so the actual term will lie somewhere between the stated maximum and minimum [*see California Real Estate Law & Practice, Ch. 114, Subordination, § 114.51* (Matthew Bender)].

[iv] Fees, Costs, and Interest Paid From Subordinating Loan

If the buyer is allowed to pay the costs of financing and interest accruing during the construction period from the proceeds of the loan, that fact should be specifically stated. A limitation on the interest rate is not sufficient protection to the seller unless the loan fees are also limited, since the lender may compensate for a lower interest rate by charging a higher loan fee [*see Collins v. Home Savings & Loan Ass'n (1962) 205 Cal. App. 2d 86, 91, 22 Cal. Rptr. 817* (seller unaware of 13.5 percent loan fee)]. The net effect would be an interest rate that exceeds the maximum rate specified in the agreement [Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1304 (1966)*].

[v] Restrictions on Use of Loan Proceeds

Because the proceeds of the subordinating loan are typically used to promote the mutual interests of the buyer and seller in developing the property and increasing its value [*see § 25B.12*], the subordination agreement should contain terms that limit use of the proceeds of the subordinating loan to development of the property [*see Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329*]. If for some reason a seller agrees to subordinate his or her

purchase money trust deed to a loan that may be used for purposes apart from development of the property, that agreement must be spelled out with particularity [*Miller v. Citizens Savings & Loan Ass'n (1967) 248 Cal. App. 2d 655, 663, 56 Cal. Rptr. 844*]. The agreement should also specify any amounts that are to be used for off-site improvements, such as streets, sidewalks, and utilities [*California Real Estate Law & Practice, Ch. 114, Subordination, § 114.42[1]* (Matthew Bender); *see § 30.200[1]*]. Likewise, if any of the proceeds may be used as an advance to pay part of the land's purchase price, that amount should be specified [*Ruth v. Lytton Savings & Loan Ass'n (1968) 266 Cal. App. 2d 831, 841, 72 Cal. Rptr. 521 , op. corrected, 272 Cal. App. 2d 24, 76 Cal. Rptr. 926*].

[vi] Payment Charges

Prepayment terms, charges, and late penalties should be specified if possible. However, the seller will receive some additional protection regarding these terms if the source of the new loan funds is limited to an insurance company, or a federal or state bank or savings and loan. Those lenders are subject to government regulation, and tend to use standardized loan documents [*see* Ch. 25, *Real Estate Loans* ; *see also* Ch. 30A, *Construction Financing*].

[vii] Commitment for "Take-Out" Financing

A subordinating loan intended to pay for construction costs will generally be limited to a short term for completion of construction, and permanent financing will be necessary to pay off the construction loan. The seller, who may want assurance that the buyer has a commitment for permanent financing, also known as "take-out" financing, often benefits from a lender requirement that permanent financing be arranged before the construction loan is made [Miller, Starr & Regalia, *Subordination Agreements in California, 13 U.C.L.A. L. Rev. 1298, 1305 (1966)*]. For an example and discussion of subordination to both a construction loan and a take-out loan, see *§ 25B.204*.

[viii] Disbursement Provisions

Although a provision regarding disbursement of the loan proceeds is not a required term for a valid subordination agreement, such a provision is often included. The voucher system required by this form [*see* P 11 of form] is frequently adopted by lenders. Alternatives to that system include requiring that the buyer furnish a surety bond of which the seller is an obligee, or using an independent third party to disburse the construction proceeds [*see* Ch. 30A, *Construction Financing*].

[d] Required Statutory Notices

The statutory notices required in California to be set forth at the beginning and end of certain trust deeds containing subordinating provisions are included as part of the deed of trust set forth in this form. These statutory notices may be excluded from the deed of trust when either the loan secured by the trust deed containing the subordination clause or the loan to which the trust deed is to be subordinated exceeds $25,000 [*see § 25B.13*]. For further discussion of those notices, see *§§ 25B.201, 25B.202*.

[2] Form

Short Form Deed of Trust Containing Automatic Subordination Clause

Short Form Deed of Trust Containing Automatic Subordination Clause

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

)

_____
Space above this line for recorder's use

[*Add following heading, in underlined capital letters if typewritten or in at least 10-point boldface type if printed, unless (1) subordination clause expressly states that subordinating loan will exceed $25,000, or (2) deed of trust is being executed for loan that exceeds $25,000 (see Civ. Code §§ 2953.2(a), 2953.5):*]

SUBORDINATED DEED OF TRUST

[*Add following notice, in capital letters if typewritten or in at least 8-point boldface type if printed, unless (1) subordination clause expressly states that subordinating loan will exceed $25,000, or (2) deed of trust is being executed for loan that exceeds $25,000 (see Civ. Code §§ 2953.2(b), 2953.5):*]

NOTICE:
THIS SUBORDINATED DEED OF TRUST CONTAINS A SUBORDINATION CLAUSE WHICH MAY RESULT IN YOUR SECURITY INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

THIS SUBORDINATED DEED OF TRUST, made this _____ day of _____[*month*], _____[*year*], between _____[*name of trustor*], hereafter called "Trustor," whose address is _____[*street, city, state, zip*], and _____[*name of beneficiary*], hereafter called "Beneficiary," whose address is _____[*street, city, state, zip*], and _____[*name of trustee*], [a California corporation,] hereafter called "Trustee" [*add if trustee is an individual:*, whose address is _____ (*street, city, state, zip*)];

WITNESSETH: That Trustor irrevocably grants, transfers, and assigns to Trustee, in trust, with power of sale, all that property in the [*add if applicable:* City of _____,] County of _____, State of _____, described as: _____[*set forth legal description of the property in the center of the page*], together with the rents, issues, and profits thereof, subject, however, to the right, power, and authority given to and conferred on Beneficiary by Paragraph _____[*specify applicable paragraph number in recorded fictitious trust deed*] of the provisions incorporated herein by reference to collect and apply those rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

(1) Performance of each agreement of Trustor incorporated by reference or contained herein;

(2) Payment of the indebtedness evidenced by a promissory note dated _____, and any extension or renewal of that note, in the principal sum of $_____, executed by Trustor in favor of Beneficiary or order and given as a part of the purchase price of the property described above; and

(3) Payment of any further sums that the then record owner of the property hereafter may borrow from Beneficiary, when evidenced by another note or notes reciting that it is so secured.

TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:

(1) By the execution and delivery of this Deed of Trust and the note secured hereby, that Provisions _____ through _____[*beginning and ending numbers of provisions in fictitious trust deed described below*], inclusive, of the fictitious deed of trust recorded on _____[*date*], in Book _____ at Page _____, of the Official Records of _____ County [*county in which trust deed is to be recorded*], California, are hereby adopted and incorporated by reference;

(2) That Trustor acknowledges receipt of a full copy of the Provisions numbered _____ through _____, inclusive, referred to above and attached to this Deed of Trust as Exhibit "A," and understands them;

(3) That Trustor will observe and perform those provisions; and

(4) That the references to property, obligations, and parties in those provisions shall be construed to refer to the property, obligations, and parties set forth in this Deed of Trust.

[*Set forth subordination provisions, expressly subordinating the deed of trust to a designated security instrument (see § 25B.205) or using an automatic subordination clause, such as the following:*]

TRUSTOR AND BENEFICIARY AGREE AS FOLLOWS:

This Subordinated Deed of Trust shall be automatically subordinate to a deed of trust, to be executed by Trustor or Trustor's successor in interest and recorded in _____[*county where property is located*] County, California, to secure a loan (hereafter referred to as a "construction loan") obtained for the purpose of the construction of improvements on the property, provided that the conditions listed below are satisfied. For purposes of this Deed of Trust, "construction loan" shall include any advance of funds to Trustor by the Lender for the purpose of the construction of improvements on the property and secured by a lien on the property, whether in the form of a mortgage, deed of trust, or other security instrument in favor of Lender. The following are the conditions to this subordination:

(1) At the time of recordation of the deed of trust securing the construction loan, no unrescinded Notice of Default of this Deed of Trust appears of record.

(2) The total amount of the construction loan shall not exceed $_____.

(3) Any funds derived from the construction loan secured by the property shall be used only for the construction of improvements on the property and, to the extent permitted in this Deed of Trust, for the payment of loan fees, interest, or charges directly connected with the construction of improvements on the property. "Construction of improvements" as used in this Deed of Trust shall mean _____[*define in detail, e.g.*, for a commercial building: the actual costs of labor and materials to construct a three-story commercial building with the usual appurtenances, including parking facilities, driveway, and fencing; aggregate costs of general improvements, including engineering fees, architectural fees, drafting fees, and permit and inspection fees; and costs of utility hookup and assessment charges (exclusive of monthly charges) in respect to the use of these facilities].

(4) The total amount of the construction loan shall not exceed _____ percent of the anticipated value of the property after completion of the construction of improvements financed by the construction loan, as determined by the Lender.

(5) No portion of the construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the property.

(6) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of the construction loan are as follows:

(a) Loan fees: _____ percent of the principal amount of the construction loan.

(b) Interest: _____ percent per annum.

(c) Other loan charges: A sum not to exceed _____ percent of the principal amount of the construction loan [*or* $_____].

(7) The construction loan shall not bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than _____ percent per annum.

(8) The construction loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the construction loan, with the total unpaid balance all due and payable at the end of that period.

(9) Additional payments may be made, without penalty, on the principal and accrued interest of the construction loan at any time prior to maturity [*or specify maximum prepayment penalty or other prepayment terms*].

(10) The total payments of principal and interest due on the construction loan shall not exceed $_____ per month.

(11) The construction loan shall be made by a federal or state bank, life insurance company or correspondent thereof, federal or state savings and loan association, or other institutional lender regulated by federal or state authority (referred to throughout this Deed of Trust as "Lender").

(12) The proceeds of the construction loan shall be disbursed by the Lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the property and presentation of vouchers signed by the Trustor or his or her successors in interest for the cost of work, labor, or materials actually performed or used in the construction of improvements on the property.

(13) The remaining terms and provisions of the construction loan shall be as required by the Lender.

Beneficiary, within 10 days after receipt of a written request therefor from Trustor, shall execute a separate agreement of subordination, in recordable form, in favor of the construction loan to which this Deed of Trust is hereby subordinated, and deliver the subordination agreement to the Lender or Lender's title company designated by Trustor. The terms of any such subordination agreement shall prevail over the subordination provisions provided for in this subordinated deed of trust.

THE FOLLOWING ARE ADDITIONAL PROVISIONS OF THIS DEED OF TRUST:

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale under this Deed of Trust or under any Deed(s) of Trust to which this Deed of Trust shall become subordinate pursuant to the terms of this Deed of Trust, be mailed to the undersigned Trustor at the address of the Trustor set forth above.

[*Add following if there is existing senior trust deed or mortgage recorded against property:*]

In accordance with *California Civil Code Section 2924b*, request is hereby made by the undersigned Trustor that a copy

of any Notice of Default and a copy of any Notice of Sale under the Deed of Trust [*or* Mortgage] recorded _____[*date*], in Book _____, Page _____, Official Records of _____ County, California, as affecting the property described above, executed by _____[*name*], as Trustor [*or* Mortgagor] in which _____[*name of beneficiary or mortgagee*] is named as Beneficiary [*or* Mortgagee], and _____[*name of trustee; omit if mortgage*] as Trustee, be mailed to _____[*name of person to whom notice is to be mailed, normally the beneficiary of this junior trust deed*], whose address is _____[*street, city, state, zip*].

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

[*Add following clause if transfer by trustor will accelerate entire indebtedness:*]

In the event that all or any of the property described in this Deed of Trust, or any interest in that property, is sold, agreed to be sold, conveyed, or alienated by Trustor, or by the operation of law or otherwise, without the prior written consent of Beneficiary, all sums secured by this Deed of Trust shall, at the option of Beneficiary, immediately become due and payable. Consent to one such transaction shall not be deemed to be a waiver of the right to require consent to future or successive transactions.

[*If subordination clause allows funds from subordinating loan to be used for any purpose other than defraying costs of improvement of the real property security, add following notice in capital letters if typewritten or in at least eight-point boldface type if printed, unless (1) subordination clause expressly states that subordinating loan will exceed $25,000, or (2) deed of trust is being executed for loan that exceeds $25,000 (see Civ. Code §§ 2953.2(c), 2953.5):*]

NOTICE:

THIS SUBORDINATED DEED OF TRUST CONTAINS A SUBORDINATION CLAUSE THAT ALLOWS THE PERSON OBLIGATED ON YOUR REAL PROPERTY SECURITY INSTRUMENT TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LAND.

Signature of Beneficiary	Signature of Trustor
_____ [*signature*]	_____ [*signature*
[*typed name*]	*as name appears of record as owner of property (see Fam. Code § 1102)*]
	[*typed name*]

[*If property is community property, add signature of trustor's spouse, whether or not spouse's name appears of record as owner of property (see Fam. Code § 1102):*]

_____ [*signature of trustor's spouse*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California)
)

County of _____)
_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.201 Statutory Notice That Real Property Security Instrument Contains Subordination Clause [Civ. Code § 2953.2(a), (b)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory notice that must be included in any real property security instrument that contains a subordination clause or has such a clause attached to it [*see Civ. Code § 2953.2(b)*]. However, this notice requirement and related statutory requirements do not apply to any subordination clause or subordination agreement that expressly states that the subordinating loan will exceed $25,000 or that is executed in connection with a loan that exceeds $25,000 [*Civ. Code § 2953.5*].

[b] Subordination Clause Defined

For these purposes, "subordination clause" means a clause in a real property security instrument whereby the holder of the security interest under the instrument agrees that on the occurrence of specified conditions or circumstances his or her security interest will become subordinate to, or he or she will execute an agreement subordinating his or her interest to, the lien of another real property security instrument that would otherwise be of lower priority than his or her lien or security interest [*Civ. Code § 2953.1(b)*]. A "real property security instrument" includes any mortgage, trust deed, or land contract in or on real property [*Civ. Code § 2953.1(a)*]. For the statutory definition of a subordination agreement [*see Civ. Code § 2953.1(c)*], see *§ 25B.208[1][b]*.

[c] Notice and Related Disclosures

The notice and related disclosures must appear on the instrument as follows:

- At the top of the instrument, the word "subordinated" must appear in at least 10-point boldface type

unless it is typewritten. If the instrument is typewritten, the term must appear in capital letters and must be underlined [*Civ. Code § 2953.2(a)*].

- Immediately following the term "subordinated," the type of security instrument being used must be described [*Civ. Code § 2953.2(a)*].

- Immediately below the above information, the statutory notice (this form) must appear in capital letters if typewritten and in at least 8-point boldface type otherwise [*Civ. Code § 2953.2(b)*].

If a subordination clause contained or attached to a security instrument allows the trustor to use the funds from a subsequent loan for any purpose other than defraying the costs of improvement of the property, the security instrument must contain a notice to that effect [*Civ. Code § 2953.2(c)*; *see § 25B.202*].

[d] Effect of Violation

Any subordination clause or subordination agreement that violates the above statutory requirements is voidable by the person whose security interest is to be subordinated, or by that person's successor in interest [*see Civ. Code § 2953.4*]. For a discussion of the precise circumstances under which the election to void a subordination clause or agreement may be made and the procedure for exercising the election, see *§ 25B.210[1]*.

[e] Waiver of Requirements

The holder of the security interest that is or may become subordinated may waive the statutory requirements discussed in this Comment by recording a statement prescribed by statute [*see Civ. Code § 2953.4(c)*]. For further discussion of these waiver requirements, see *§ 25B.211[1]*.

[2] Form

Statutory Notice That Real Property Security Instrument Contains Subordination Clause

SUBORDINATED _____ [***type of security instrument, e.g.,*** DEED OF TRUST]

NOTICE:
THIS _____ [*title of instrument, e.g.,* DEED OF TRUST] CONTAINS A SUBORDINATION CLAUSE WHICH MAY RESULT IN YOUR SECURITY INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.202 Notice in Security Instrument That Lien May Be Subordinated for Purposes Other Than Improvement of Land [Civ. Code § 2953.2(c)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice that a lien may be subordinated for purposes other than improvement of land. With certain exceptions, discussed in [c], *below*, every real property security instrument that contains or has attached to it a subordination clause allowing the trustor to use the funds from a subsequent loan for any purpose other than defraying the costs of improvement of the real property security must contain a notice of that fact [*Civ. Code § 2953.2(c)*; *see Civ. Code § 2953.1(a)* (definition of "real property security instrument"), *Civ. Code § 2953.1(b)* (definition of "subordination clause")]. This form contains the notice expressly prescribed by statute.

An additional statutory notice required at the beginning of every security instrument containing a subordination clause is set forth as *§ 25B.201*. For a discussion of related statutory requirements for subordination clauses, see *§§ 25B.13*, *25B.201[1]*.

[b] Required Placement and Format

The following notice must appear directly above the signature of the person (beneficiary) whose lien is to be subordinated. Furthermore, if the security instrument is in printed form, the notice must be in at least eight-point boldface type. If the instrument is typed, the notice must be entirely in capital letters [*Civ. Code § 2953.2(c)*].

[c] Exemptions From Statute

If the subordination clause expressly states that the subordinating loan will exceed $25,000 or if the loan secured by the instrument containing the subordination clause actually exceeds that amount, the notice requirements do not apply [*Civ.*

Code § 2953.5]. Although a large number of real estate transactions fall within this exempt category, many institutional lenders and title insurance companies as a matter of course include the notice provisions in all subordination documents.

[2] Form

Notice in Security Instrument That Lien May be Subordinated for Purposes Other Than Improvement of Land

Notice in Security Instrument That Lien May Be Subordinated for Purposes Other Than Improvement of Land

NOTICE:

THIS _____ [*title of instrument, e.g.,* DEED OF TRUST] CONTAINS A SUBORDINATION CLAUSE WHICH ALLOWS THE PERSON OBLIGATED ON YOUR REAL PROPERTY SECURITY INSTRUMENT TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LAND.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.203

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.203 Alternative Subordination Provision for Deed of Trust--Subordination on Recordation of Subdivision Map for Encumbered Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a subordination provision specifying that the deed of trust in which it is contained will be subordinated to a construction loan deed of trust on the date of recordation of a final subdivision map for the encumbered property. It may be used as an alternative to the "automatic" subordination provision set forth in *§ 25B.200*.

For a general discussion of the purpose of subordination clauses, see *§ 25B.12*. For a discussion of subdivisions and the Subdivision Map Act [*Gov. Code §§ 66410-66499.37*], see Ch. 30, *Subdivision Regulation* . For a provision providing for the partial release of individual lots in a subdivision from a deed of trust, see *§ 25C.221[2]*.

[b] Required Subordination Provisions

To be enforceable, a subordination clause or agreement must specify enough terms of the subordinating loan to be just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 582, 55 Cal. Rptr. 769, 422 P.2d 329*]. For a discussion of those terms, see *§ 25B.200[1][c]*. One of the terms that must be specified is the amount of principal and interest for the subordinating loan [*Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 521, 229 Cal. Rptr. 186*]. It is not sufficient to specify the amount in terms of a maximum amount per lot, as the number of lots may not be determinable with precision at the time a subordination agreement or deed of trust with a subordination clause is executed [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329*]. Therefore, when a final subdivision map showing the exact number of lots has not been recorded before executing the subordinated deed of trust, the maximum number of lots permitted should be specified if reference is made to a loan amount for each lot.

All security instruments containing a subordination clause and all subordination agreements, unless exempt by statute, must contain prescribed captions and notices [*see Civ. Code §§ 2953.1-2953.5*]. For a discussion of those requirements and for the forms of notice, see *§§ 25B.201*, *25B.202* (trust deed subordination provisions),25B.208-25B.211 (subordination agreements and related notices).

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination on Recordation of Subdivision Map for Encumbered Property

Alternative Subordination Provision for Deed of Trust--Subordination on Recordation of Subdivision Map for Encumbered Property

On the date that a final subdivision map is recorded for the property described in this Deed of Trust in the Office of the County Recorder of _____[*name of county where property is located*], County, California, provided that an unrescinded Notice of Default under the terms of this Deed of Trust does not appear of record, this Deed of Trust, hereafter called "Purchase Money Deed of Trust," shall automatically be subordinated to one or more deeds of trust hereafter executed by the Trustor covering any lot or group or groups of lots into which the property then has been subdivided as shown on a subdivision map filed for record in _____ County, the total number of lots not to exceed _____[*specify maximum number of lots*], to secure loans, hereafter called "construction loans," to finance the construction of improvements on lots shown on that subdivision map, provided:

(1) The total amount of all construction loans shall not exceed $_____. The maximum amount of any loan on a single lot shall be $_____.

(2) Any funds derived from any construction loans shall be used only for the construction of improvements on the lot or lots that the construction loan encumbers and to the extent permitted under this Deed of Trust, for the payment of loan fees, interest, or charges directly connected with the construction of improvements. "Construction of improvements" as used in this Deed of Trust shall mean _____[*define in detail, e.g.,* for a commercial building: the actual costs of labor and materials to construct a three-story commercial building with the usual appurtenances, including parking facilities, driveway, and fencing; aggregate costs of general improvements, including engineering fees, architectural fees, drafting fees, permit and inspection fees, and costs of utility hookup and assessment charges (exclusive of monthly charges) with respect to the use of these facilities)].

(3) No construction loan placed on any lot or lots shall exceed _____ percent of the anticipated value, as determined by the lending institution making the construction loan, of the lot or lots after completion of the construction of improvements for which the loan was obtained.

(4) No portion of any construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the lot or lots encumbered by the construction loan.

(5) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of any construction loan are as follows:

(a) Loan fees: _____ percent of the principal amount of the construction loan.

(b) Interest: _____ percent per annum.

(c) Other loan charges: A sum not to exceed _____ percent of the principal amount of the construction loan [*or* $_____ (*dollar amount*)].

(6) No construction loan shall bear interest, exclusive of late charges, penalties, or fees payable in case of default,

greater than _____ percent per annum.

(7) Each construction loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the construction loan, with the total unpaid balance all due and payable at the end of that period.

(8) Additional payments may be made, without penalty, on the principal and accrued interest of any construction loan at any time prior to maturity [*or specify maximum prepayment penalty or other prepayment terms*].

(9) The total payments of principal and interest due on all construction loans shall not exceed $_____ per month.

(10) Each construction loan shall be made by a federal or state bank, life insurance company or correspondent thereof, federal or state savings and loan association, or other institutional lender regulated by federal or state authority (referred to throughout this Deed of Trust as a "Lender").

(11) The proceeds of any construction loan shall be disbursed by the Lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the property and presentation of vouchers signed by the Trustor or his or her successors in interest for the cost of work, labor, or materials actually performed or used in the construction improvements on the property.

(12) The remaining terms and provisions of any construction loan shall be as required by the Lender.

Within 10 days after receipt of a written request therefor from Trustor, Beneficiary shall execute a separate agreement of subordination, in recordable form, in favor of the construction loan to which this Deed of Trust is hereby subordinated, and deliver the subordination agreement to the Lender or Lender's title company designated by Trustor. The terms of any such subordination agreement shall prevail over the subordination provisions provided for in this subordinated deed of trust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.204

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.204 Alternative Subordination Provision for Deed of Trust--Subordination to Both a Construction and a "Take-Out" Loan

[1] Comment

[a] Use of Form

The form in [2], *below*, is a subordination clause for insertion in a deed of trust that is to be subordinated to deeds of trust securing both construction and permanent, or "take-out," loans. It may be used as an alternative to the subordination clause in *§ 25B.200*.

For a general discussion of the function of subordination clauses, see *§ 25B.12*.

[b] Required Subordination Provisions

To be enforceable, a subordination clause or agreement must specify enough terms of the subordinating loan to be just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 582, 55 Cal. Rptr. 769, 422 P.2d 329*]. For a discussion of those terms, see *§ 25B.200[1][c]*.

All security instruments containing a subordination clause and all subordination agreements, unless exempt by statute, must contain prescribed captions and notices [*see Civ. Code §§ 2953.1-2953.5*]. For a discussion of those requirements and for the forms of notice, see *§§ 25B.201, 25B.202* (trust deed subordination provisions),25B.208-25B.211 (subordination agreements and related notices).

[c] Provisions Regarding "Take-Out Loan"

This form contains provisions for subordination of the purchase money deed of trust to both a construction loan and a permanent loan, called a take-out loan. A construction loan is generally a short-term or interim loan that is repaid with

the proceeds from permanent loans [*see* discussion under "Construction Loans Generally" in the Legal Background to Ch. 30A, *Construction Financing*]. A permanent or take-out loan is a long-term loan, payable in installments over a period of years, which is used to pay off, or "take out," an interim construction loan [*see Jones v. Sacramento Sav. & Loan Ass'n (1967) 248 Cal. App. 2d 522, 527, 56 Cal. Rptr. 741*]. Although the take-out loan is made when construction is completed, a lender may make a written commitment to make the loan before the construction lender proceeds with a construction loan. However, permanent commitments are quite difficult to obtain before the commencement of construction [*see* discussion under "Long-Term Financing--Permanent or Take-Out Loans" in the Legal Background to Ch. 30A, *Construction Financing*]. The two loans may be made by the same lender, or, more commonly, by different lenders, with the construction lender receiving the security of the permanent loan commitment [*see* discussion under "Relationship Between Construction and Permanent Loans" in the Legal Background to Ch. 30A, *Construction Financing*]. The need for certainty regarding the basic terms of the subordinating loan [*see* [b], *above*] applies to permanent loans as well as construction loans [*see* Miller, Starr & Regalia, "Subordination Agreements in California," *13 UCLA L. Rev. 1298, 1305 (1966)*].

For further discussion of permanent financing, see Ch. 30A, *Construction Financing* .

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination to Both a Construction and a "Take-Out" Loan

SUBORDINATION

Subject to the following provisions and provided no unrescinded notice of default under the terms of this Subordinated Deed of Trust then appears of record, this Subordinated Deed of Trust shall, with no further action of the Beneficiary, be subordinate to the following:

(1) A deed of trust, to be hereafter executed by Trustor, or his or her successor in interest, covering the property, and to be recorded in the Office of the County Recorder of _____[*name of county where property is located*], to secure a loan (hereafter called "construction loan") from a state or federal bank, life insurance company or correspondent thereof, federal or state savings and loan association, or other institutional lender regulated by federal or state authority (hereafter called "Lender") for the purpose of constructing improvements on the property, provided:

(a) The total amount of the construction loan shall not exceed $_____;

(b) Any funds derived from the construction loan shall be used only for the construction on the property of _____ [*describe type of facility, e.g.*, an apartment building containing at least 10 units], having a value, as determined by the institutional lender making the permanent or take-out loan on the property, of at least $_____, and to the extent permitted in this Deed of Trust, for the loan fees, interest, or other charges directly connected with the construction of the _____ [*type of facility*];

(c) The construction loan securing the property shall not exceed _____ percent of the anticipated value of the property after completion of the improvements for which the loan was obtained, as determined by the lender making the permanent loan on the property;

(d) No portion of the construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of _____ [*describe type of facility*] on the portion of the property encumbered by the construction loan;

(e) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of the construction loan are as follows:

(i) Loan fees: _____ percent of the principal amount of the construction loan.

(ii) Interest: _____ percent per annum.

(iii) Other loan charges: A sum not to exceed _____ percent of the principal amount of the construction loan.

(f) The construction loan shall not bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than _____ percent per annum.

(g) The construction loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the construction loan, with the total unpaid balance all due and payable at the end of that period.

(h) Additional payments may be made, without penalty, on the principal and accrued interest of the construction loan at any time before maturity [*or specify maximum prepayment penalty or other prepayment terms*].

(i) The total payments of principal and interest due on the construction loan shall not exceed $_____ per month.

(j) The proceeds of the construction loan shall be disbursed by the Lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the property and presentation of vouchers signed by the Trustor or his or her successors in interest for the cost of work, labor, or materials actually performed or used in the construction of improvements on the property.

(k) Trustor has delivered to the Trustee or Beneficiary a binding written commitment from an institutional lender to make a permanent loan on the property, further described below, on completion of _____ [*describe type of improvements*].

(l) The remaining terms and provisions of the construction loan shall be as required by the Lender.

Within 10 days after receipt of a written request therefor from Trustor, Beneficiary shall execute a separate agreement of subordination, in recordable form, in favor of the construction loan to which this Deed of Trust is hereby subordinated, and deliver the subordination agreement to the Lender or Lender's title company designated by Trustor. The terms of any such subordination agreement shall prevail over the subordination provisions provided for in this Deed of Trust.

(2) A deed of trust, to be hereafter executed by Trustor (or his or her successor in interest) on completion of _____[*describe type of facility*], covering the property as improved, and to be recorded in the Office of the County Recorder of _____[*name of county where property is located*], to secure a permanent loan (hereafter called "permanent loan") from a state or federal bank, life insurance company or correspondent thereof, federal or state savings and loan association, or other institutional lender regulated by federal or state authority (hereafter called "Lender"), provided:

(a) The proceeds of the permanent loan shall be used first to pay in full any construction loans on the property, and any mechanics' liens or other charges levied or leviable against the property because of any improvements made on the property by Trustor, or his or her successors in interest, and the property shall be reconveyed from any construction loan deed of trust to which this Deed of Trust is subject;

(b) The total amount of the permanent loan shall not exceed $_____;

(c) The total amount of the permanent loan shall not exceed _____ percent of the value, as determined by the Lender making the permanent loan, of the property as improved by Trustor or his or her successor in interest;

(d) The maximum loan fees, interest, or other loancharges that may be deducted from the principal amount of the permanent loan are as follows:

(i) Loan fees: _____ percent of the principal amount of the loan.

(ii) Interest: _____ percent per annum.

(iii) Other loan charges: A sum not to exceed _____ percent of the principal amount of the loan.

(e) The permanent loan shall not bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than _____ percent per annum;

(f) The permanent loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the permanent loan, with the total unpaid balance all due and payable at the end of that period.

(g) Additional payments of principal and accrued interest on the permanent loan may be made, without penalty, at any time prior to maturity [*or specify maximum prepayment penalty or other prepayment terms*].

(h) The total payments of principal and interest due on the permanent loan shall not exceed $_____ per month.

(i) The proceeds of the permanent loan shall be disbursed by the Lender either through its own offices or through a bonded disbursement control agency; and

(j) The remaining terms and provisions of the permanent loan shall be as required by the Lender.

Within 10 days after receipt of a written request therefor from Trustor, Beneficiary shall execute a separate agreement of subordination, in recordable form, in favor of the permanent loan to which this Deed of Trust is hereby subordinated, and deliver the subordination agreement to the Lender or Lender's title company designated by Trustor. The terms of any such subordination agreement shall prevail over the subordination provisions provided for in this Deed of Trust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
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A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.205

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.205 Alternative Subordination Provision for Deed of Trust--Subordination to Deed of Trust Being Concurrently Recorded

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision stating that the deed of trust or mortgage in which it is contained is subordinate in priority to another mortgage or deed of trust being recorded concurrently. This type of provision may be used when, at the close of escrow for the sale of property, a purchase money mortgage or trust deed given to the seller by the buyer is to be recorded immediately after the recording of a construction loan mortgage or trust deed on the same property given by the buyer and in favor of a construction lender.

To protect the seller from misapplication of the construction loan funds [*see §§ 25B.16[3], 25B.19*], a provision requiring those proceeds to be used exclusively for construction purposes should be used in conjunction with this form [*see § 25B.206*]. The issue of misapplication applies to "de facto" subordination discussed below as well as to any other form of subordination [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1034, 96 Cal. Rptr. 338* ; *see § 25B.19*].

[b] Purpose of Form

A mortgage or deed of trust containing an automatic subordination clause is not subordinated to a subsequently recorded deed of trust securing a later loan on the same property unless the second loan strictly complies with the terms and restrictions specified in the automatic subordination clause [*see § 25B.16[2]*]. An "executory" or "promise to subordinate" clause contained in a mortgage or deed of trust may be deemed by a court too indefinite or unfair to be specifically enforced when the holder of the mortgage or deed of trust refuses to fulfill his or her promise to execute an instrument subordinating his or her security interest to the deed of trust securing a later loan [*see § 25B.17*].

One method sometimes used to avoid these problems is for the purchaser and seller to agree to subordinate the purchase money mortgage or deed of trust to the deed of trust securing a construction loan for development of the property by recording the construction loan deed of trust immediately before recording the purchase money deed of trust [*see § 25B.12*]. To carry out this method of "de facto" subordination, the developer-purchaser of the property must arrange for a construction loan to be made on the property prior to the close of escrow for the purchase of the property. Joint escrow instructions from the purchaser, seller, and construction lender are then executed instructing the escrow holder first to record the deed conveying the property to the purchaser, then to record the deed of trust securing the construction loan, and then immediately to record the purchase money deed of trust encumbering the property.

A problem potentially present under the above method of subordination is that a mortgage or trust deed given for the price of real property at the time of its conveyance to the buyer has priority over all other liens against the purchaser, subject to operation of the recording laws [*Civ. Code § 2898*; *see § 25B.11[1]*]. The recording laws only prevent a purchase money mortgage or deed of trust from having priority over a subsequent mortgage or trust deed recorded before the purchase money mortgage or trust deed when the subsequent mortgagee or trust deed beneficiary parted with value in good faith for the mortgage or deed of trust security interest [*Civ. Code § 1214*]. It is doubtful whether a construction lender could, when its deed of trust is recorded as part of the same escrow before recordation of the purchase money deed of trust, claim priority over the purchase money deed of trust simply by operation of the recording laws. It would appear the construction lender's claim to priority must depend on the land seller's agreement, contained in the sales contract or escrow instructions, to allow the construction loan deed of trust to be recorded before recordation of the purchase money deed of trust [*see Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1033, 96 Cal. Rptr. 338*].

To effectuate fully the land seller's agreement to allow the construction loan to have priority and to make the agreement a matter of public record, a statement or memorandum of the agreement should be included in a recorded instrument relating to the transaction. By including a provision such as the one set forth below in the subordinated purchase money deed of trust, that objective is achieved. The inclusion of such a provision in the deed of trust gives constructive notice that the normal priorities between a construction loan and purchase money deed of trust have been altered by agreement of the parties and that the purchase money deed of trust, containing the provision set forth in this form, is inferior to and subject to the specifically described construction loan deed of trust recorded almost concurrently.

[c] Loss of Priority by Misapplication of Construction Loan

There is a split in scholarly authority in California over the effect of a subsequent misapplication of construction loan funds on a subordination achieved by recording a purchase money deed of trust immediately after recording the construction loan deed of trust on the same property. Some legal experts argue that the priority of the construction loan deed of trust cannot be affected by subsequent misapplication of the construction loan funds. Other experts argue the contrary [*see § 25B.19*].

[2] Form

Alternative Subordination Provision for Deed of Trust--Subordination to Deed of Trust Being Concurrently Recorded

Alternative Subordination Provision for Deed of Trust--Subordination to Deed of Trust Being Concurrently Recorded

This Deed of Trust [*or* Mortgage] is subject and subordinate to another Deed of Trust [*or* Mortgage] dated _____, executed by _____[*name of other trustor or mortgagor*] in which _____[*name of other beneficiary or mortgagee*] is named as Beneficiary [*or* Mortgagee] [*add for deed of trust:* and _____ (*name of other trustee*) as Trustee], which is being recorded concurrently with, but immediately prior to, this instrument in the Official Records of _____[*name of county where property*

is located] County, California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25B California Legal Forms--Transaction Guide § 25B.206

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.206 Alternative Subordination Provision for Deed of Trust--Provision Requiring Subordinating Loan to Be Used for Improvements on Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision requiring the proceeds of the subordinating loan to be used exclusively for improvements on encumbered property intended to be developed as a subdivision. This type of provision is intended for insertion in a purchase money mortgage or deed of trust containing a provision such as that set forth in *§ 25B.205*, providing that the purchase money deed of trust is subordinate to a construction loan deed of trust on the same property being recorded immediately prior to the purchase money deed of trust.

When subordination is accomplished through this method, known as "de facto" subordination, there is some question about whether the subsequent misapplication of construction loan funds does or does not destroy the priority of the construction loan deed of trust over the purchase money deed of trust. The knowing disbursement by the construction lender of construction loan funds for purposes other than the making of improvements in violation of a provision to the contrary in the subordinated deed of trust apparently does cause the construction loan deed of trust to lost its priority over the purchase money mortgage or deed of trust containing the provision [*see § 25B.19*].

[b] Off-Site Improvements

If the developer is permitted to use the loan proceeds for off-site improvements such as streets, sidewalks and utilities, the agreement should also specify the amounts that are to be used for those improvements [*see § 25B.200[1][c][v]*; *see also Ch. 30, Subdivision Regulation, § 30.220[1][f][viii]* (discussion of subdivision off-site improvements)]. This form contains an alternative provision authorizing the use of loan proceeds for off-site improvements.

[c] Statutory Requirements for Subordination

When neither the subordinating construction loan nor the subordinated purchase money loan exceeds $25,000, certain notices prescribed by statute must appear in boldface type or all capital letters in the subordinated security interest instrument [*see § 25B.13*]. One of the notices is required by statute when the security interest created by the instrument may, by terms of the subordination clause in the instrument, be subordinated to a loan for purposes other than making improvements on the encumbered property [*Civ. Code § 2953.3(c)*]. A form for that notice is set forth in *§§ 25B.202* and *25B.209*.

[2] Form

Alternative Subordination Provision for Deed of Trust--Provision Requiring Subordinating Loan to Be Used for Improvements on Property

Alternative Subordination Provision for Deed of Trust--Provision Requiring Subordinating Loan to Be Used for Improvements on Property

Any and all funds derived from the loan secured by the subordinating deed of trust [*or* mortgage] shall be used only for the construction of improvements on the real property that it encumbers; and no portion of that loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the encumbered real property. "Construction of improvements" shall mean the construction of residential structures on each of the lots designated in the final subdivision map for the property recorded on _____[*date*], in _____ County, California, with the usual appurtenances, including parking facilities, driveway, and fencing, and the construction of all common area facilities; shall encompass all costs of labor and materials for the foregoing, all aggregate costs of general improvements, including engineering fees, architectural fees, drafting fees, permit and inspection fees, and all costs of utility hookup and assessment charges (exclusive of monthly charges) with respect to the use of these facilities; and shall specifically exclude all off-site subdivision improvements [*or* shall specifically include off-site physical subdivision improvements required by the city (*or* county) of _____, California, including, but not limited to, roads, storm drains, sidewalks, curbs, gutters, underground utilities, water systems, sewage systems, drainage and erosion control facilities, and fencing, provided that not more than $_____ (*specify maximum*) of the loan proceeds may be used for these off-site improvements].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawSubdivisionsState Regulation



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10-25B California Legal Forms--Transaction Guide § 25B.207

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.207 Subordination Agreement Subordinating Recorded Deed of Trust to Deed of Trust for Specific New Loan

[1] Comment

[a] Use of Form

The form in [2], *below*, is a subordination agreement in which the seller agrees to subordinate its recorded deed of trust to a new deed of trust that will be recorded contemporaneously with the subordination agreement. Even when the seller's deed of trust contains an automatic subordination clause [*see § 25B.14[2]*], title companies and institutional lenders almost universally require the seller to execute at the time the new subordinating lien is to be recorded a separate subordination agreement that specifically subordinates the seller's lien to the pending new lien [Miller, Starr & Regalia, *Subordination Agreements in California, 13 UCLA L. Rev. 1298, 1300 (1966)*; *see § 25B.16[4]*]. Many title companies and institutional lenders require that their own standard form be used for this purpose.

[b] Required Subordination Provisions

To be enforceable, a subordination clause or agreement must specify enough terms of the subordinating loan to be just and reasonable to the seller [*Handy v. Gordon (1967) 65 Cal. 2d 578, 582, 55 Cal. Rptr. 769, 422 P.2d 329*]. For a discussion of those terms, see *§ 25B.200[1][c]*.

[c] Statutory Requirements for Notices

This form contains various statutory notices designed to protect the holder of the subordinated deed of trust and is required to be included in every nonexempt subordination agreement [*see Civ. Code §§ 2953.3, 2953.5*]. For a discussion of those notices, see *§§ 25B.208[1]* (notice following title),*25B.209[1]* (notice above signature).

[d] New Consideration Required for Agreement When Terms Vary From Original Subordination Clause

A real property deed of trust containing an automatic subordination clause will not be subordinated to a subsequently executed deed of trust and the loan it secures unless the subsequent loan strictly complies with the terms, conditions, and restrictions set forth in the automatic subordination clause [*Miller v. Citizens Savings & Loan Ass'n (1967) 248 Cal. App. 2d 655, 663, 56 Cal. Rptr. 844* ; *see § 25B.16[2]*]. Therefore, a new subordination agreement between the trustor and beneficiary may be used to ensure the priority of the new deed of trust when the loan secured by the lender's deed of trust does not strictly comply with the terms specified in the automatic subordination clause. However, if there is a variation between the seller's original agreement to subordinate and the subsequent agreement between the trustor and beneficiary (whether required by the title company or institutional lender or otherwise), the new agreement must be intended as a novation and supported by new consideration to be enforceable. Otherwise, the two agreements are interpreted together as two parts of a single transaction, as if the new agreement were intended to make the original clause specific or to implement it [*Miller v. Citizens Savings & Loan Ass'n (1967) 248 Cal. App. 2d 655, 661, 56 Cal. Rptr. 844*]. The question whether a novation [*see Civ. Code §§ 1530-1533*] has taken place is one of intention [*Collins v. Home Savings & Loan Ass'n (1962) 205 Cal. App. 2d 86, 100, 22 Cal. Rptr. 817*]. The provisions of this form expressly state that intention and provide for new consideration [*see* P 4 of Form].

[2] Form

Subordination Agreement Subordinating Recorded Deed of Trust to Deed of Trust for Specific New Loan
Subordination Agreement Subordinating Recorded Deed of Trust to Deed of Trust for Specific New Loan

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

[*Add following heading, in underlined capital letters if typewritten or in at least 10-point boldface type if printed, unless (1) subordination agreement expressly states that subordinating loan will exceed $25,000, or (2) agreement is being executed in connection with a loan that exceeds $25,000 (see Civ. Code §§ 2953.3(a), 2953.5):*]

SUBORDINATION AGREEMENT

[*Add following notice, in capital letters if typewritten or in at least 8-point boldface type if printed, unless (1) subordination agreement expressly states that subordinating loan will exceed $25,000, or (2) agreement is being executed in connection with a loan that exceeds $25,000 (see Civ. Code §§ 2953.3(b), 2953.5):*]

NOTICE:
THIS SUBORDINATION AGREEMENT RESULTS IN YOUR SECURITY INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER INSTRUMENT.

THIS SUBORDINATION AGREEMENT is made between _____[*name of trustor*], hereafter called "Trustor," and _____[*name of beneficiary*], hereafter called "Beneficiary."

WHEREAS, Trustor executed a Deed of Trust, dated _____, in favor of Beneficiary, which was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereafter called the "Subordinate Deed of Trust";

WHEREAS, the Subordinate Deed of Trust was security for a promissory note in the amount of $_____ executed on _____[*date*] by Trustor in favor of Beneficiary;

WHEREAS, Trustor is the owner of the real property subject to the Subordinate Deed of Trust, hereafter called "Real Property," which is located in the [*if applicable,* City of _____,] County of _____, California, and is more particularly described as follows: _____[*set forth legal description in the center of the page*];

WHEREAS, Trustor desires to obtain a loan, hereafter referred to as the "Construction Loan," in the amount of $_____ from _____[*name of lender*], hereafter referred to as "Lender," and has executed or shall execute concurrently with this Subordinate Deed of Trust a note for the amount of the Construction Loan and a deed of trust in favor of Lender, hereafter referred to as the "Superior Deed of Trust," securing and evidencing the Construction Loan; and

WHEREAS, Lender is willing to make the Construction Loan provided the deed of trust securing it (the Superior Deed of Trust) is a lien or charge on the Real Property prior and superior to the lien or charge of the Subordinate Deed of Trust, and provided further that Beneficiary specifically and unconditionally subordinates the lien or charge of the Subordinate Deed of Trust to the Superior Deed of Trust; and

WHEREAS, it is mutually beneficial to Beneficiary and Trustor that Lender make the Construction Loan to Trustor and Beneficiary is willing to subordinate the lien of the Subordinate Deed of Trust, insofar as it encumbers the Real Property, to the Superior Deed of Trust in order that Trustor may obtain the Construction Loan from Lender;

NOW, THEREFORE, the parties to this instrument agree as follows:

Terms of Subordinating Loan

1. The terms of the Construction Loan from Lender to Trustor are as follows:

(a) The total amount of the construction loan is $_____, which is _____ percent of the anticipated value of the property after completion of the improvements for which the loan is being obtained, as determined by Lender.

(b) Any funds derived from the construction loan shall be used only for the construction of improvements on the property that it encumbers. Construction of improvements shall mean: _____ [*describe in detail* (*see, e.g.,* P 1 of subordination provisions in § 25B.200)].

(c) No portion of the construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the property encumbered by the construction loan.

(d) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of the construction loan are as follows:

(i) Loan fees: $_____, which is _____ percent of the principal amount of the construction loan.

(ii) Interest: _____ percent per annum.

(iii) Other loan charges: $_____, which shall be paid for _____ [*specify breakdown of charges, e.g., recording costs and processing fees*].

(e) The construction loan bears interest, exclusive of late charges, penalties, or fees payable in case of default, at the rate of _____ percent per annum [*or specify applicable interest provision*].

(f) The construction loan is payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the construction loan, with the total unpaid balance all due and payable at the end of that period.

(g) Additional payments may be made, without penalty, on the principal and accrued interest of the construction loan at any time before maturity [*or specify maximum prepayment penalty or other prepayment terms*].

(h) The total payment of principal and interest due on the construction loans is $_____ per month.

(i) The proceeds of the construction loan must be disbursed by the Lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the property and presentation of vouchers signed by the Trustor or his or her successors in interest for the cost of work, labor, or materials actually performed or used in the construction of the improvements on the property.

(j) _____ [*Set forth any remaining terms and provisions required by the lender*].

Beneficiary hereby approves all the terms of the loan.

Subordination

2. Beneficiary hereby subordinates the Subordinate Deed of Trust to the Superior Deed of Trust, which shall be recorded concurrently with this instrument in the Office of the County Recorder of _____ County, California. Beneficiary further declares that the lien of the Superior Deed of Trust shall be and is in all respects prior and superior to the lien of the Subordinate Deed of Trust and that the Superior Deed of Trust and any renewals or extensions of the Superior Deed of Trust and the note secured by it shall be and remain at all times a lien or charge on the Real Property, prior and superior to the lien or charge of the Subordinate Deed of Trust.

Acknowledgment of Subordination

3. Beneficiary acknowledges that _____[he *or* she] hereby intentionally waives, relinquishes, and subordinates the priority and superiority of the lien or charge of the Subordinate Deed of Trust in favor of the lien or charge of the Superior Deed of Trust, and that _____[he *or* she] understands that in reliance on and in consideration of this waiver, relinquishment, and subordination specific loans and advances are being and will be made, and that specific monetary and other obligations are being and will be entered into by third parties, that would not be made or entered into but for that reliance on the waiver, relinquishment, and subordination. Beneficiary further acknowledges that an endorsement has been placed on the note secured by the Subordinate Deed of Trust and that the Subordinate Deed of Trust has by this instrument been subordinated to the lien or charge of the Superior Deed of Trust.

Conflict With Deed of Trust

4. [*Add if terms of subordinating loan vary from those specified in subordination clause of Subordinate Deed of Trust:* In consideration of _____ (*specify new consideration*),] Beneficiary and Trustor hereby further agree that this Subordination Agreement shall supersede and operate as a novation of all of those provisions of the Subordinate Deed of Trust, if any, that provide for the automatic subordination of the lien of the Subordinate Deed of Trust to the lien or liens of a mortgage or deed of trust, or mortgages or deeds of trust, affecting all or a portion of the Real Property.

Entire Agreement

5. This agreement contains the whole agreement between the parties relating to the deed of trust loans, and the priority of those loans. There are no agreements, written or oral, outside or separate from this agreement, and all prior negotiations, if any, are merged into this agreement.

Binding Effect

6. This Subordination Agreement shall inure to the benefit of Lender, its legal representatives, successors, and assigns, and shall be binding on Beneficiary and Trustor, their respective heirs, legal representatives, successors, and assigns.

Dated: _____.

[*If subordination clause allows funds from subordinating loan to be used for any purpose other than defraying costs of improvement of real property security, add following notice in capital letters if typewritten or in at least eight-point boldface type if printed, unless (1) subordination agreement expressly states that subordinating loan will exceed $25,000, or (2) agreement is being executed in connection with loan that exceeds $25,000 (see Civ. Code §§ 2953.3(c), 2953.5):*]

NOTICE:
THIS SUBORDINATION AGREEMENT CONTAINS A PROVISION WHICH ALLOWS THE PERSON OBLIGATED ON YOUR REAL PROPERTY SECURITY TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LAND.

BENEFICIARY
_____ [*signature of beneficiary*]
[*typed name*]
TRUSTOR
_____ [*signature of trustor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceNovationReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.208

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.208 Statutory Notice Following Title of Subordination Agreement [Civ. Code § 2953.3(a), (b)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory notice provision that must follow the title of a subordination agreement, unless the loan to be subordinated exceeds $25,000 [*Civ. Code § 2953.5(b)*] or the subordination agreement expressly provides that the subordinating loan must exceed $25,000 [*Civ. Code § 2953.5(a)*]. It must be inserted immediately below the title of every nonexempt subordination agreement [*Civ. Code § 2953.3(b)*].

Some subordination agreements subject to this notice requirement must contain an additional statutory notice above the signature line. For discussion of that notice, see *§ 25B.209[1]*.

[b] Subordination Agreement Defined

For these purposes, a "subordination agreement" is a separate agreement or instrument whereby the holder of a security interest under a real property mortgage, deed of trust, or installment sales contract agrees that (1) his or her existing security interest is subordinate to the lien of another mortgage or trust deed encumbering the same land, (2) on the occurrence of specified conditions his or her security interest will become subordinated to the lien of another mortgage or trust deed, or (3) on the occurrence of specified conditions he or she will execute an agreement subordinating his or her interest to the lien of another mortgage or trust deed [*Civ. Code § 2953.1(c)*].

[c] Requirements for Notice

If the subordination agreement is typed, the notice provision must be entirely in capital letters; but if the subordination agreement is a printed form, the notice provision must be in at least 8-point boldface type [*Civ. Code § 2953.3(b)*].

[d] Form of Title of Subordination Agreement

The title of the subordination agreement must be the words "Subordination Agreement" [*Civ. Code § 2953.3(a)*]. If the subordination agreement is typed, the title must be entirely in capital letters and underlined; if the subordination agreement is printed, the title must be at least 10-point boldface type [*Civ. Code § 2953.3(a)*].

[e] Failure to Comply With Requirements

If the subordination agreement fails to meet the statutory notice requirements, the beneficiary of the subordinated deed of trust may record a notice of failure of compliance within two years from the date of execution of the instrument to which his or her interest is subordinated. This procedure allows the beneficiary of the subordinated trust deed to void the violating subordination agreement but only if he or she is without actual knowledge of the existence and terms of the subordination agreement [*Civ. Code § 2953.4(a), (b)*]. For a notice of noncompliance with subordination notice requirements, see *§ 25B.210*.

[f] Waiver

The beneficiary of the subordinated lien may waive the statutory notice requirements by the subsequent execution and recordation of a waiver [*Civ. Code § 2953.4(c)*]. For a waiver of noncompliance with the prescribed notice requirements, see *§ 25B.211*.

[2] Form

Statutory Notice Following Title of Subordination Agreement

Statutory Notice Following Title of Subordination Agreement

NOTICE:
THIS SUBORDINATION AGREEMENT MAY RESULT [*or* RESULTS] IN YOUR SECURITY INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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PART IV. FORMS
A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.209

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.209 Statutory Notice Required Above Signature Line of Subordination Agreement [Civ. Code § 2953.3(c)]

[1] Comment--Use of Form

Unless the loan to be subordinated exceeds $25,000 [*Civ. Code § 2953.5(b)*] or the subordination agreement expressly provides that the subsequent subordinating loan must exceed $25,000 [*Civ. Code § 2953.5(a)*], and if the subordination agreement permits the trustor to use the proceeds of the loan for any purpose other than defraying the actual contract costs for improvement of the secured real property, the notice in this form must appear directly above the signature of the person (beneficiary) whose security is being, or will be, subordinated [*Civ. Code § 2953.3(c)*]. If the subordination agreement is typed, the notice provisions must be entirely in capital letters; but if the subordination agreement is a printed form, the notice provision must be in at least eight-point boldface type [*Civ. Code § 2953.3(b)*].

The notice provision in *§ 25B.208[2]* and the title requirement discussed in *§ 25B.208[1]* must also appear in any nonexempt subordination agreement. For a discussion of the remedy available for failure to comply with the notice requirements and of the requirements and procedure for waiving those requirements, see *§§ 25B.210[1], 25B.211[1]*.

[2] Form

Statutory Notice Required Above Signature Line of Subordination Agreement

Statutory Notice Required Above Signature Line of Subordination Agreement

NOTICE:

THIS SUBORDINATION AGREEMENT CONTAINS A PROVISION WHICH ALLOWS [*or* MAY ALLOW] THE PERSON OBLIGATED ON YOUR REAL PROPERTY SECURITY TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LAND.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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A. Subordination

10-25B California Legal Forms--Transaction Guide § 25B.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.210 Notice of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

[1] Comment--Use of Form

The form in [2], *below*, is a notice that certain statutory requirements for a subordination clause or agreement have not been satisfied. Statutes in California place certain restrictions on mortgages or trust deeds containing subordination clauses and on subordination agreements when neither the loan whose security interest is to be subordinated nor the loan to which it is to be subordinated exceeds $25,000 [*see § 25B.13*].

Noncompliance with the statutory requirements by a mortgage, trust deed, or subordination agreement subject to the statutes enables the person whose security interest was to be subordinated to void the subordination clause or agreement within two years after execution of the security instrument to which his or her interest was to be subordinated [*Civ. Code § 2953.4(a)*]. However, he or she cannot void the subordination clause or agreement if, in spite of the noncompliance with the statutory requirements, he or she had actual knowledge of the existence and terms of the subordination clause or agreement [*Civ. Code § 2953.4(a)*]. To exercise the election to invalidate the subordination clause or agreement, the person whose security interest was to be subordinated must record a notice that the provisions of the statute have not been complied with, that he or she is the holder of the security interest that is or was to be subordinated, and that he or she elects to void the effect of the subordination clause or subordination agreement [*Civ. Code § 2953.4(b)*].

For other notices required by related statutes, see *§§ 25B.201*, *25B.202*, *25B.208*, *25B.209*, and *25B.211*.

[2] Form

Notice of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

Notice of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

NOTICE OF NONCOMPLIANCE

NOTICE IS HEREBY GIVEN, in accordance with *Civil Code Section 2953.4*, that the provisions of Civil Code Section _____ [*2953.2* (*for subordinated security instruments*) *or 2953.3* (*for subordination agreements*)] have not been complied with in connection with the subordinated Deed of Trust [*or* Subordination Agreement] dated _____, by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded on _____[*date*], in Book _____, Page _____, Official Records of the County Recorder of _____ County, California.

The undersigned is the holder of [*or* successor-in-interest to] the beneficial interest of the security instrument that is or was to become subordinated, and _____[he *or* she *or* it] hereby elects to void the effect of the subordination clause in the Deed of Trust [*or* void the effect of the Subordination Agreement].
Dated: _____.

_____ [*signature*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

State of California	)
County of _____	)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true

and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState RegulationReal Property LawNonmortgage LiensLien Priorities



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10-25B California Legal Forms--Transaction Guide § 25B.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.211 Waiver by Beneficiary of Subordinated Deed of Trust of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

[1] Comment--Use of Form

The form in [2], *below*, is a statement that may be used by the beneficiary under a subordinated deed of trust to waive compliance with certain statutory notice requirements for subordination. Statutes in California place certain restrictions on mortgages or trust deeds containing subordination clauses and on subordination agreements when neither the loan to be subordinated nor the loan to which it is to be subordinated exceeds $25,000 [*see § 25B.13*].

The statutory requirements may, however, be waived by the person whose mortgage or deed of trust is, under the noncomplying subordination clause or subordination agreement, to be subordinated [*Civ. Code § 2953.4(c)*]. To waive the statutory requirements, the holder of the mortgage or trust deed that is to be subordinated must, after execution and recordation of the noncomplying mortgage, trust deed, or subordination agreement execute and record a statement that he or she knows of the existence of the subordination clause or agreement, knows of its terms, and waives the statutory provisions and requirements [*Civ. Code § 2953.4(c)*].

Other notices required by the statutes are set forth in *§§ 25B.201*, *25B.202*, *25B.208*, and *25B.209*. A notice of noncompliance with the statutory requirements, by which the person whose security interest was to be subordinated voids the subordination clause or agreement, is set forth in *§ 25B.210*.

[2] Form

Waiver by Beneficiary of Subordinated Deed of Trust of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements
Waiver by Beneficiary of Subordinated Deed of Trust of Noncompliance by Deed of Trust or Subordination Agreement With Statutory Notice Requirements

)

Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

WAIVER OF NONCOMPLIANCE

NOTICE IS HEREBY GIVEN, in accordance with *California Civil Code Section 2953.4(c)*, that the undersigned is the holder of the beneficial interest in the Deed of Trust dated _____, by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded on _____[*date*], in Book _____, Page _____, Official Records of the County Recorder of _____ County, California; that the undersigned knows of the existence of _____[a subordination clause contained in that Deed of Trust or a subordination agreement dated _____, between _____ (*name*) and _____ (*name*) in connection with that Deed of Trust] and of its terms, and that the undersigned hereby waives the provisions of *Civil Code Section 2953.4* and the requirements of *Civil Code Sections 2953.1*, *2953.2*, and *2953.3*.
Dated: _____.

_____ [*signature of beneficiary*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState Regulation



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10-25B California Legal Forms--Transaction Guide §§ 25B.212-25B.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25B.212[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Assumption

10-25B California Legal Forms--Transaction Guide § 25B.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.220 Request for Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request for a beneficiary statement. A beneficiary statement is essentially a statement of the unpaid balance of an obligation secured by a mortgage or deed of trust [*see Civ. Code § 2943(a)(2)*; for an illustrative beneficiary statement, see *§ 25B.221*]. The statement is used when the trust deed or mortgage is to be assumed and the parties wish to determine the precise amount of the debt [*see § 25B.221[1][a]*].

This form assumes that the "entitled person" requesting the statement is the trustor or mortgagor of the mortgaged or trust property, or the successor in interest of the trustor or mortgagor [*see* [e], *below*]. However, if the assumption occurs in connection with the purchase of the property securing the obligation, it is quite possible that the escrow holder will, as another "entitled person," prepare and submit the request. For a request that is made by an escrow agent, see Ch. 26, *Real Property Escrows* .

[b] Payoff Demand Statement

Civ. Code § 2943, which governs beneficiary statements, also sets forth requirements for a related disclosure document referred to as a "payoff demand statement." A payoff demand statement is used when the obligation secured by a mortgage or deed of trust is to be paid in full [*see Civ. Code § 2943(a)(5), (c)*; *see also* Ch. 25, *Real Estate Loans*]. If an entitled person requests a statement pursuant to *Civ. Code § 2943* and does not specify whether he or she is seeking a beneficiary statement or a payoff demand statement, the beneficiary must treat the request as a request for a payoff demand statement [*Civ. Code § 2943(e)(1)*].

[c] Owner's Statement

The disclosure requirements of *Civ. Code § 2943* apply only to beneficiaries, mortgagees, and their assignees [*see Civ. Code § 2943(a)(1)*]. For discussion of a nonstatutory request for confirmation of a debt that may be submitted to a trustor or mortgagor by a proposed assignee of the beneficiary or mortgagee, see *§ 25B.221[1][b]*.

[d] Request Procedure

Any entitled person or his or her authorized agent may prepare and deliver to the beneficiary [for the definitions of "entitled person," "beneficiary," and "delivery," *see* [e], *below*] or the beneficiary's authorized agent a written request or demand for a beneficiary statement. The request may be made (1) at any time before, or within two months after, the recording of a notice of default under the mortgage or trust deed; or (2) more than 30 days prior to the entry of a decree of foreclosure [*Civ. Code § 2943(b)(2)*].

If the beneficiary has more than one branch, office, or other place of business, then the request must be made to the branch or office address set forth in the payment billing notice or payment book. In that case, the statement, unless it specifies otherwise, will be deemed to apply only to the unpaid balance of the single obligation named in the request and secured by the mortgage or trust deed that is payable at the branch or office whose address appears on the above billing notice or payment book [*Civ. Code § 2943(e)(5)*].

The beneficiary may charge up to $30 for furnishing the statement, unless the mortgage or trust deed is insured by the Federal Housing Administrator or guaranteed by the Administrator of Veterans Affairs [*Civ. Code § 2943(e)(6)*].

This form includes an optional request for a copy of the trust deed or mortgage. When such a request is included, the beneficiary must furnish the copy of the security instrument along with the beneficiary statement at no additional charge [*Civ. Code § 2943(e)(2)*].

[e] Definitions

Under *Civ. Code § 2943*, "beneficiary" means a mortgagee or beneficiary of a mortgage or trust deed, or his or her assignees [*Civ. Code § 2943(a)(1)*]. "Entitled person" means any of the following [*Civ. Code § 2943(a)(4)*; *see* Ch. 26, *Real Property Escrows*]:

- The trustor or mortgagor of the mortgaged or trust property, or that person's successor in interest;
- Any beneficiary under a trust deed;
- Any person having a subordinate lien or encumbrance of record;
- Any escrow holder licensed as an agent; or
- Any person who is acting as an escrow holder and is exempt from the licensing requirements of the Escrow Law [*see Fin. Code § 17000 et seq.* (Escrow Law); *Fin. Code § 17006* (exemptions)].

The "date of sale" established under *Civ. Code § 2924g* (governing sales under a power of sale) is not changed as a result of the preparation and delivery of a beneficiary statement or a payoff demand statement [*Civ. Code § 2943(f)*].

"Delivery" means (1) depositing or causing to be deposited in the United States mail an envelope with postage prepaid, containing a copy of the document to be delivered, addressed to the person whose name and address are set forth in the request for the document, or (2) faxing the document to that person [*Civ. Code § 2943(a)(3)*].

[2] Form

Request for Beneficiary Statement

REQUEST FOR BENEFICIARY STATEMENT

TO: _____[*name of beneficiary or mortgagee*]
_____[*address*]
_____[*city, state, zip*]

The undersigned is the Trustor [*or* Mortgagor *or* the Successor in Interest of the Trustor (*or* Mortgagor)] of the Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary [*or* Mortgagee] and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California [*or describe other status as entitled person (see Civ. Code § 2943(b))*].

Pursuant to *California Civil Code Section 2943*, the undersigned hereby requests that you deliver to the undersigned, within 21 days after receipt of this demand, the following documents: (1) a true, correct, and complete copy of the promissory note [*or specify other evidence of indebtedness*] executed on _____[*date*], by _____[*name*] and payable to _____[*name*] in the principal sum of $_____, and secured by the above Deed of Trust [*or* Mortgage]; [*and*] (2) a written beneficiary statement setting forth all those matters required by *Section 2943 of the California Civil Code* concerning the above promissory note [*if desired, add:*; and (3) a copy of the above Deed of Trust (*or* Mortgage)]. To satisfy applicable delivery requirements, you should mail those documents to the following address: _____[*address, city, state, zip*]. [*Alternatively, you may fax the documents to the undersigned (fax number _____).*]
Dated: _____.

_____ [*signature of trustor or mortgagor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
B. Assumption

10-25B California Legal Forms--Transaction Guide § 25B.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.221 Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a beneficiary statement. If requested to do so by an "entitled person" [*see § 25B.220[1][e]* (definition)], the beneficiary or mortgagee under a trust deed or mortgage must deliver to the requesting party a beneficiary statement setting forth the unpaid balance of the obligation secured by the mortgage or trust deed and certain other information [*Civ. Code § 2943(b)(1)*; *see* [e], *below*]. The statement is generally obtained when a person proposes to purchase property encumbered by the lien of the beneficiary or mortgagee, and the prospective purchaser intends to assume the existing obligation as part of the purchase price [*see § 25B.31*]. The purpose of the statement is to establish for the benefit of the proposed purchaser/grantee the amount of the outstanding debt and all other pertinent information concerning the note or other evidence of indebtedness.

If the proposed purchaser/grantee or another party wishes to pay off the existing obligation, he or she should request a "payoff demand statement" instead of a beneficiary statement [*see § 25B.220*; *see also* Ch. 25, *Real Estate Loans*].

[b] Owner's Statement

For an "owner's statement" that contains information similar to the one below, but that is completed by the debtor/owner of the property, see Ch, 26, *Real Property Escrows* . An owner's statement is generally requested by a proposed assignee of the beneficiary or mortgagee in order to confirm the status of the debt and to determine whether the debtor is claiming any offsets against the beneficiary or mortgagee. However, there is no statutory authority requiring a debtor to furnish such a statement; *Civ. Code § 2943* only applies to requests directed to beneficiaries and mortgagees [*see Civ. Code § 2943(a)(1), (b)(1)*].

[c] Delivery of Statement and Related Documents

In response to a valid written request [*see § 25B.220*], the beneficiary or the beneficiary's authorized agent must, within 21 days of the receipt of the request, deliver to the requesting party a beneficiary statement and a true, correct, and complete copy of (1) the promissory note or other evidence of indebtedness, and (2) any modification to that note or other document [*Civ. Code § 2943(b)(1)*]. Further, if the written request includes a request for a copy of the trust deed or mortgage, the beneficiary must furnish that document with the beneficiary statement at no additional charge [*Civ. Code § 2943(e)(2)*].

For these purposes, "delivery" means (1) depositing or causing to be deposited in the United States mail an envelope with postage prepaid, containing a copy of the document to be delivered, addressed to the person whose name and address are set forth in the request for the document, or (2) faxing the document to that person [*Civ. Code § 2943(a)(3)*].

The beneficiary may charge up to $30 for furnishing each required statement, unless the mortgage or trust deed is insured by the Federal Housing Administrator or guaranteed by the Administrator of Veterans Affairs [*Civ. Code § 2943(e)(6)*].

[d] Proof of "Entitled Person" Status

Only "entitled persons" or their authorized agents have the right to request a beneficiary statement [*Civ. Code § 2943(b)*; *see § 25B.220[1][e]* (definition)]. Before delivering a beneficiary statement, the beneficiary may require reasonable proof that the person making the request is, in fact, an entitled person or an authorized agent of an entitled person. If the beneficiary does so, he or she will have 21 days after receipt of the foregoing proof to deliver the beneficiary statement [*Civ. Code § 2943(e)(3)*].

A written statement appointing an authorized agent will constitute reasonable proof of the identity of an agent if it is signed by the entitled person and delivered personally to the beneficiary or delivered by registered return receipt mail. Similar delivery of a policy of title insurance, preliminary report issued by a title company, original or photographic copy of a grant deed, or certified copy of letters testamentary, of guardianship, or of conservatorship will constitute reasonable proof of the identity of a successor in interest, provided the person requesting the statement is named as successor in interest in the document [*Civ. Code § 2943(e)(3)*].

[e] Required Contents

A beneficiary statement must be in writing and must indicate all of the following [*Civ. Code § 2943(a)(2)*]:

- The amount of the unpaid balance of the obligation secured by the mortgage or trust deed and the interest rate, together with the total amounts, if any, of all overdue installments of principal or interest, or both.
- The amounts of periodic payments, if any.
- The date on which the obligation is due in whole or in part.
- The date to which real estate taxes and special assessments have been paid, to the extent the information is known to the beneficiary.
- The amount of hazard insurance in effect and the term and premium of that insurance, to the extent the information is known to the beneficiary.
- The amount in an account, if any, maintained for the accumulation of funds with which to pay taxes

and insurance premiums.

- The nature and, if known, the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary that have become a lien on the real property involved.

- Whether or not the obligation secured by the mortgage or trust deed can or may be transferred to a new borrower [for a detailed discussion of due-on-sale clauses, see Ch. 25A, *Security Instruments for Real Estate Financing*].

[f] Reliance on Statement and Amendments

A beneficiary statement may be relied on by the entitled person or that person's authorized agent in accordance with its terms. Similarly, if the beneficiary notifies the entitled person or his or her authorized agent of any amendment to the statement, then the amended statement may be relied on by the entitled person or his or her authorized agent in accordance with its terms [*Civ. Code § 2943(d)(1)*].

If the notification of an amendment is not given in writing (for example, verbally), then the beneficiary must deliver a written amendment to the statement to the entitled person or his or her authorized agent no later than the next business day after the initial notification [*Civ. Code § 2943(d)(2)*].

[g] Continuing Unsecured Obligations

On the dates specified below, any sums that were due and for any reason not included in the statement or amended statement will continue to be recoverable by the beneficiary as an unsecured obligation of the obligor pursuant to the terms of the note and existing provisions of law [*Civ. Code § 2943(d)(3)*; *see Cathay Bank v. Fidelity Nat'l Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595*]. However, the remaining debt is no longer secured according to the terms of the original note in any circumstance [*Cathay Bank v. Fidelity Nat'l Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595*]:

- If the transaction is voluntary, the entitled party or his or her authorized agent may rely on the statement or amended statement on the earlier of (1) the close of escrow, (2) transfer of title, or (3) recordation of a lien.

- If the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the entitled party or his or her authorized agent may rely on the statement or amended statement on the acceptance of the last and highest bid at a trustee's sale or a court supervised sale.

[h] Violations by Beneficiary

If a beneficiary willfully fails to prepare and deliver a statement within 21 days of the receipt of a proper request, or, if applicable, within 21 days of receipt of proof of the requesting party's entitled person status [*Civ. Code § 2943(e)(3)*; *see* [d], *above*], he or she (1) is liable to the entitled person for all damages that the entitled person may sustain by reason of the refusal, and (2) must forfeit $300 to the entitled person, whether or not actual damages are sustained. Each failure to prepare and deliver the statement creates a separate cause of action, but a judgment awarding an entitled person a forfeiture, or damages and forfeiture, for any failure to prepare and deliver a statement bars recovery of damages and forfeiture for any other failure to prepare and deliver a statement, with respect to the same obligation, in compliance with a request therefor made within six months before or after the request that resulted in the award. For these purposes, "willfully" means an intentional failure to comply with the requirements of *Civ. Code § 2943* without just cause or excuse [*Civ. Code § 2943(e)(4)*].

[2] Form

Beneficiary Statement

BENEFICIARY STATEMENT

This statement is provided in response to your request, dated _____, for a written beneficiary statement setting forth all those matters required by *California Civil Code Section 2943* concerning the promissory note [*or describe other evidence of indebtedness*] executed on _____[*date*], by _____[*name*], in the principal sum of $_____, secured by the Deed of Trust [*or* Mortgage] (hereafter referred to as the "Deed of Trust" [*or* "Mortgage"]) referred to in the request. A true, correct, and complete copy of the note [and all subsequent modifications to it] [*add if request for beneficiary statement also requested following document:*, and a copy of the Deed of Trust (*or* Mortgage),] is [*or* are] attached to this statement.

Concerning the above promissory note, you are hereby informed as follows:

1. The amount of the unpaid balance of the promissory note is $_____.

2. The rate of interest on the note is _____ percent per annum.

3. _____[No installments of principal and interest are overdue *or* The amount of overdue installments of principal and interest is $_____].

[*Add if applicable:*]

4. The amounts and the dates for the periodic payments of principal and interest are as follows: _____[*specify*].

[*Continue with the following:*]

5. The note is due and payable on or before _____[*date*].

6. Real estate taxes and special assessments have been paid to _____[*date*] [*or, if this information is unknown to beneficiary,* The date to which the real estate taxes and special assessments have been paid is unknown to the undersigned].

7. The amount of the hazard insurance is $_____, the term of that insurance is _____[*number*] years, and the premiums are $_____ per year [*or, if this information is unknown to beneficiary,* The amount of hazard insurance in effect and the term and premium of that insurance are unknown to the undersigned].

[*Add if applicable:*]

8. The amount in an account maintained for the accumulation of funds with which to pay taxes and insurance is $_____.

[*Add if applicable:*]

9. The nature and the amount of additional charges, costs, and expenses paid or incurred by the Beneficiary [or Mortgagee] that have become a lien on the real property involved are as follows: _____.

[*Choose one of the following paragraphs:*]

10. The obligations secured by the note may be transferred by the Trustor [*or* Mortgagor] under the Deed of Trust [

or Mortgage] to another person [*specify any restrictions on transfer, e.g.*, provided that the Trustor (*or* Mortgagor) obtains the prior written consent of the Beneficiary (*or* Mortgagee), as required by the terms of the note].

[*OR*]

10. Under the terms of the note [*add if applicable:* and the Deed of Trust (*or* Mortgage)], the obligations secured by the note cannot be transferred by the Trustor [*or* Mortgagor] under the Deed of Trust [*or* Mortgage] to another person.
Dated: _____.

_____ [*signature of beneficiary or authorized agent*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
B. Assumption

10-25B California Legal Forms--Transaction Guide § 25B.222

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.222 Assumption Agreement for Execution by Seller, Purchaser, and Lender

[1] Comment

[a] Use of Form

The form in [2], *below*, is a three-party assumption agreement for use by the beneficiary of an existing deed of trust on real property being sold and by the seller and the purchaser of the property. It provides that the purchaser will assume the promissory note secured by the trust deed and that the beneficiary will not exercise its right under either the trust deed or promissory note to accelerate the unpaid balance of the secured indebtedness [*see § 25B.31[3]*].

This form assumes that the security instrument will be a deed of trust because trust deeds are used much more frequently in California than mortgages. However, this form may be easily modified for use in conjunction with the assumption of a note secured by a mortgage.

[b] Grantee's Liability

A grantee of real property subject to an existing deed of trust or mortgage who "assumes" the encumbrance agrees to pay and discharge the secured debt that the original debtor (grantor) is liable for [*Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 P. 411*]. The grantee's liability on the mortgage is established under the "equitable subrogation" theory [*see Ward v. De Oca (1898) 120 Cal. 102, 104-106, 52 P. 130*]. Under this theory, the assuming grantee is personally and primarily liable for the encumbrance, but only if all intervening grantees between the assuming grantee and the original debtor had each assumed the encumbrance [*see Ward v. De Oca (1898) 120 Cal. 102, 104-106, 52 P. 130* ; *Case v. Egan (1922) 57 Cal. App. 453, 454, 207 P. 388* ; *see also § 25B.31[1]*].

[c] Continuing Liability of Original Debtor

Under the form in [2], *below*, the seller is not released from liability on the promissory note being assumed by the

buyer. The original debtor on an assumed encumbrance may be released from liability only if the creditor agrees to a novation [*see Civ. Code §§ 1530-1533*] or to release the original debtor from liability [*see Civ. Code §§ 1541-1543*; *see also Ward v. De Oca (1898) 120 Cal. 102, 52 P. 130*]. For a provision that may be inserted into this form when a creditor agrees to release the original obligor from liability, see *§ 25B.223*. Without such a release, the original debtor becomes a surety on the debt [*Everts v. Matteson (1942) 21 Cal. 2d 437, 447-448, 132 P.2d 476* ; *see § 25B.31[1]*].

[d] Assumption Agreement in Writing

To be valid and enforceable, an assumption agreement must be in writing and subscribed by the party to be charged (or his or her agent) [*Civ. Code § 1624(a)(6)*; *see Katz v. Haskell (1961) 196 Cal. App. 2d 144, 157, 16 Cal. Rptr. 453*]. A separate written instrument is not required if the assumption is specifically provided for in the conveyance instrument [*Civ. Code § 1624(a)(6)*].

[2] Form

Assumption and Assignment Agreement

ASSUMPTION AND ASSIGNMENT AGREEMENT

This Agreement is made among _____[*name and legal status of seller*], hereafter called "Seller,"
_____[*name and legal status of purchaser*], hereafter called "Purchaser," and
_____[*name and legal status of beneficiary*], hereafter called "Lender."

RECITALS

A. WHEREAS, Seller is presently the owner of the property (hereafter called the "Property") described in a Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California (hereafter called the "Deed of Trust"), which Deed of Trust is security for a promissory note dated _____, executed by _____[*name*] as Maker, payable to _____[*name*], in the principal sum of $_____ (hereafter called the "Promissory Note");

B. WHEREAS, Seller and Purchaser have entered into a real property sales agreement under which Purchaser has agreed to purchase the Property and to assume the Promissory Note and Deed of Trust as part of the purchase price for the Property to be paid by Purchaser to Seller [*add if assumption is contingent on lender's waiver of due-on-sale clause (see Recital C and Paragraph 3, below) and/or lender's agreement to release seller from liability (see § 25B.223):*, subject to the conditions stated in this Agreement]. [*Add the following if the promissory note or trust deed contains a "due-on-sale" provision:*]

C. WHEREAS, Buyer's obligation to assume the Promissory Note is conditioned on Lender's agreement not to exercise its option under the terms of the Promissory Note and Deed of Trust to accelerate the unpaid balance of the Promissory Note as a result of the above transfer.

[*Continue with the following:*]

THE PARTIES HEREBY AGREE AS FOLLOWS:

Unpaid Balance of Note

1. The total unpaid principal balance on the Promissory Note is $_____. A beneficiary statement prepared by Lender pursuant to *Civil Code Section 2943* is attached to this Agreement as Exhibit A.

Assumption of Liability

2. Buyer hereby assumes and agrees to pay the obligation represented by the Promissory Note; acknowledges that the Real Property described in the Deed of Trust shall remain subject to the Deed of Trust; acknowledges that nothing in this Agreement shall affect the priority of the lienof the Deed of Trust over other liens and encumbrances against the Real Property; and agrees to be bound by all of the conditions and covenants contained in the Promissory Note and Deed of Trust. Buyer also agrees that the Deed of Trust shall secure all other sums that Buyer may borrow in the future from Lender when such sums are evidenced by another note or notes stating that they are so secured.

[*Add if a due-on-sale provision appears in the promissory note or deed of trust:*]

Consent to Transfer

3. Lender hereby consents to the transfer of the Real Property described in the Deed of Trust [*add if applicable:* and the Promissory Note] and waives its right to accelerate the entire unpaid balance of the Promissory Note by reason of the transfer; provided, however, that this consent shall not be deemed a waiver of the right to require consent to future transactions.

[*Continue with the following:*]

Seller's Continued Liability

4. In consideration of the execution and acceptance of this Agreement, Seller hereby agrees that the liability of Seller on the Promissory Note shall not be affected by this Agreement. Seller waives presentation, demand of payment protest, and notice of nonpayment of the above indebtedness, and expressly consents to and waives the right to notice of the following: a delay or change in the performance of any of the provisions of the Deed of Trust, or in the time of payment of all or any installment of the principal; a change in the amount of one or more installments; [*add if trust deed contains partial release provision:* partial releases of the property authorized by the Deed of Trust;] the acceptance of additional security for the Promissory Note; a reduction or increase of the interest rate or principal of the Promissory Note; and subsequent assumption agreements.

[*Add if funds have been impounded by the lender to pay insurance, taxes, and other matters:*]

Assignment by Seller

5. Seller hereby transfers and assigns to Purchaser all of its right, title, and interest in and to any and all refunds and credits that may at any time accrue under the Deed of Trust [*add if appropriate:* or under the contract of insurance on the Deed of Trust by the Federal Housing Administration].

[*Continue with the following:*]

Governing Law

6. All questions about the construction of this Agreement, and the right and liabilities of the parties to this Agreement, shall be governed by the laws of the State of California.

Binding on Successors

7. This Agreement shall inure to the benefit of, and shall be binding on, the assigns, successors in interest, personal representatives, estates, heirs, and legatees of each of the parties.

Entire Agreement

8. This Agreement contains the entire agreement of the parties, and supersedes any prior written or oral agreements between them concerning the subject matter of this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, among the parties, relating to the subject matter of this Agreement, that are not fully expressed in this Agreement.

Executed on _____[*date*], at _____[*city and state*].

SELLER
_____ [*signature of seller*]
[*typed name*]
BUYER
_____ [*signature of buyer*]
[*typed name*]
LENDER
_____ [*signature of lender*]
[*typed name*]

EXHIBIT A

[*Attach beneficiary statement (see § 25B.221).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
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B. Assumption

10-25B California Legal Forms--Transaction Guide § 25B.223

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.223 Alternative Provision for Assumption Agreement--Release of Original Debtor From Liability

[1] Comment--Use of Form

The form in [2], *below*, consists of provisions that may be inserted into the assumption agreement set forth in *§ 25B.222[2]* (in the manner described below) when (1) the original debtor under a promissory note secured by a trust deed is selling the secured property to a buyer who is assuming liability on the note and trust deed, and (2) the lender agrees to release the original debtor (seller) from liability under the secured note. Absent such a release by the lender [*see Civ. Code §§ 1541-1543*] or a novation [*see Civ. Code §§ 1530-1533*], the original debtor is not relieved from this liability [*see Ward v. De Oca (1898) 120 Cal. 102, 52 P. 130* ; *see also § 25B.31[1]*].

The provisions in this form may be included in *§ 25B.222[2]* by including the Recital paragraph as Recital D and by substituting the release provision for Paragraph 4 of that form.

[2] Form

Alternative Provision for Assumption Agreement--Release of Original Debtor From Liability

Alternative Provision for Assumption Agreement--Release of Original Debtor From Liability

[*Add to § 25B.222[2] as final recital:*]

D. WHEREAS, Seller's agreement to sell the Real Property is conditioned on Lender's agreement to release Seller from all liability on the Promissory Note and Deed of Trust;

[*Substitute the following for P 4 of § 25B.222[2]:*]

Release From Liability

4. Provided record title to the Real Property is transferred to Purchaser and provided Purchaser executes this Agreement, Lender hereby releases Seller from any and all liability on or under the Promissory Note and Deed of Trust. The release of Seller shall be effective on the latter of (1) the date record title to the Real Property is transferred to Purchaser, or (2) the date Purchaser executes this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceNovationReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptions



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25B California Legal Forms--Transaction Guide §§ 25B.224-25B.229

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25B.224[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
C. Assignment

10-25B California Legal Forms--Transaction Guide § 25B.230

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.230 Assignment of Note and Deed of Trust

[1] Comment

[a] Use of Form

The form in [2], *below*, is an assignment of a promissory note and the beneficial interest under a trust deed. It is designed to be used in conjunction with the relevant note [*see* [b], *below*] and a notice of assignment [*see* [e], *below*].

For an assignment of a mortgage and promissory note, see *§ 25B.231*.

[b] Assignment of Security Instrument

An assignment of any interest in real property must be in writing and subscribed by the assignor or the assignor's lawful agent [*see Code Civ. Proc. § 1971*; *see also* *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 291, 267 P.2d 16* (assignment must manifest intention to presently transfer assignor's interest without further action)]. Because an assignment of a trust deed or mortgage is not effective without assignment of the note [*Kelley v. Upshaw (1952) 39 Cal. 2d 179, 192, 246 P.2d 23*], this form assigns both the security instrument and the note. As a practical matter, only the note need be assigned [*see* [c], *below*], because the assignment of a debt secured by a mortgage or trust deed effectively assigns the security [*Civ. Code § 2936* (mortgage); *Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560* (trust deed); *see § 25B.33*]. A formal assignment of the security instrument is not required [*Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560* ; *Pitman v. Walker (1922) 187 Cal. 667, 671, 203 P. 739*]. However, it is good practice to (1) endorse and deliver the note [*see* [c][ii], [iii], *below*], (2) prepare an assignment instrument that refers to the security and the note (this form), and (3) have the assignor acknowledge the assignment instrument in order that the assignee can record the assignment to protect the priority of the security over subsequent encumbrancers or transferees of the assignor [*see Civ. Code § 2934*; *see also* [e], *below*]. An assigned instrument must be used in this context to protect priority because a promissory note is not an instrument affecting the title to or possession of real property and therefore cannot be recorded [*see Gov. Code § 27288*].

[c] Assignment of Promissory Note

[i] Effect and Methods

The assignment of a promissory note transfers title to the instrument to the assignee, gives the assignee all of the rights of the assignor, and subjects the assignee to all the defenses available against the assignor [*see Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 614, 116 P.2d 599*]. The assignor loses the right to maintain an action on the claim or to demand performance [*McCown v. Spencer (1970) 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213*].

The assignment of a promissory note may be made in the note itself [*see* [iii], *below*], in a separate instrument (this form), or by delivery [*Hays v. Plummer (1899) 126 Cal. 107, 110, 58 P. 447* ; *see* [ii], *below*]. Although only one of these options need be selected, the most effective and widely used method is to endorse and deliver the note to the assignee and to execute a separate assignment instrument [*see* [b], *above*].

[ii] Delivery and Negotiation

An assignment of a note is fully effective without transfer of possession of the note itself [*Kent v. Kent (1935) 6 Cal. App. 2d 488, 490, 44 P.2d 445*]. However, a promissory note payable "to order" will not be negotiated unless it is delivered and endorsed [*see* [iii], *below*], and a note payable "to bearer" must be delivered in order to be negotiable [*Com. Code § 3203(a)*]. For these purposes, "delivery" means the voluntary transfer of possession to the assignee [*Com. Code § 1201(b)(15)*].

Negotiation is a special form of transfer by which an instrument that is negotiable in form passes to the transferee. The transferee becomes a holder [*see Com. Code §§ 1201(b)(21), 3203(a)*] and may enjoy the status of a holder in due course [*see Com. Code § 3302*] if certain additional conditions are met. Holders and holders in due course, unlike ordinary transferees, take the note and security instrument free from personal defenses, such as lack of consideration [*see Security Pacific Nat'l Bank v. Chess (1976) 58 Cal. App. 3d 555, 562, 129 Cal. Rptr. 852*]. For a detailed discussion of the rights of holders and holders in due course and the requirements for negotiation, see Ch. 55, *Negotiable Instruments* , and California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender).

[iii] Endorsement

An endorsement must be written (1) by or on behalf of the holder and (2) on the instrument or on a paper so firmly affixed to the instrument as to become a part of it. An endorsement on an affixed paper is valid and effective even if there is sufficient space on the instrument to write the endorsement [*Com. Code § 3204(a)*]. Words of assignment, condition, waiver, guaranty, limitation, or disclaimer of liability accompanying an endorsement do not affect its character as an endorsement [*Com. Code § 3204(a)*].

There are three types of endorsement: (1) special [*see Com. Code § 3205(a)*]; (2) in blank [*see Com. Code § 3205(b)*]; and (3) restrictive [*see Com. Code § 3206*]. A special endorsement specifies by name the person to whom or to whose order it makes the instrument payable [*Com. Code § 3205(a)*]. If there is a special endorsement, the instrument becomes payable to the order of the special endorsee and may be further negotiated only by the endorsement of that endorsee [*Com. Code § 3205(a)*].

An endorsement in blank, on the other hand, does not specify a particular endorsee and may consist of a mere signature. An instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed [*Com. Code § 3205(b)*].

The final type of endorsement is the restrictive endorsement. An endorsement is restrictive if it has any of the following characteristics [*Com. Code § 3206*]:

- It is conditional.
- It purports to prohibit further transfer of the instrument.
- It includes the words "for collection," "for deposit," "pay any bank," or similar terms signifying a purpose of deposit or collection.
- It otherwise states that it is for the benefit or use of the endorser or of another person.

Unless otherwise agreed, any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified endorsement of the transferor [*Com. Code § 3203(c)*].

For a detailed discussion of endorsements, see Ch. 55, *Negotiable Instruments* , and California Real Estate Law & Practice, Ch. 110, *Notes* (Matthew Bender).

[d] Notice of Default and Notice of Sale

This form includes a provision requesting that copies of any recorded notice of default or notice of sale of a senior lien be given to the assignee [*see Civ. Code § 2924b*]. This provision should be used if the trust deed is a junior lien against the property, so that the assignee will receive any such notice recorded by the senior lienor [*see § 25D.200*].

[e] Recording Assignment

Although execution of an assignment makes the assignment effective between the assignor and the assignee, the assignment does not affect the rights of third parties who may subsequently acquire an interest in the assignor's beneficial interest in the note unless and until the assignment is recorded. Therefore, the assignment should be acknowledged and recorded in order to impart constructive notice to third parties [*see Civ. Code §§ 2934, 2952*; *see § 25B.33[2]*]. However, recording the assignment does not constitute actual notice to the debtor so as to invalidate future payments made by the debtor to the person actually holding the note [*Civ. Code § 2935*]. Therefore, the assignee should give separate notice to the debtor of the assignment [*see § 25B.232*].

[2] Form

Assignment of Note and Deed of Trust

Assignment of Note and Deed of Trust

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____

Space above this line for recorder's use

ASSIGNMENT OF DEED OF TRUST

For value received, the undersigned hereby grants, assigns, and transfers to _____[*name of assignee*] all beneficial interest [*or* the undersigned's right, title, and interest] in and to the Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, together with the note or notes described or referred to in that Deed of Trust, the money due and to become due on the Deed of Trust with interest, and all rights accrued or to accrue under the Deed of Trust. [*Add if desired:* The real property subject to the Deed of Trust is located in _____ (the City of _____, *or* an unincorporated area of) _____ County, California, and is more particularly described as follows: _____ (*set forth legal description*).]

[*Add if there is a senior trust deed or mortgage recorded against the property:*]

In accordance with *California Civil Code Section 2924b,* the undersigned Assignor hereby requests that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, as affecting the above-described property, executed by _____[*name*] as Trustor [*or* Mortgagor] in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add only if senior encumbrance is a deed of trust:* and _____ (*name*) as Trustee,] be mailed to _____[*name of beneficiary under this junior trust deed*], whose address is _____[*street address, city, state, zip*].

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

Dated: _____.

_____ [*signature of assignor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
C. Assignment

10-25B California Legal Forms--Transaction Guide § 25B.231

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.231 Assignment of Note and Mortgage

[1] Comment--Use of Form

The form in [2], *below*, is an assignment of all rights under a mortgage and the note or notes secured by the mortgage. It may be recorded in the county where the secured property is located [*see Civ. Code § 2934*]. Separate notice of the assignment should be given to the debtor [*see § 25B.232[2]*] since recordation of the assignment does not constitute notice so as to invalidate payments made on the note by the debtor to the person holding the note [*Civ. Code § 2935*; *see also § 25B.232[1]*].

For a discussion of the importance of delivering and endorsing a promissory note to the assignee and of preparing a separate assignment instrument, see *§ 25B.230[1]*. For discussion of other requirements for and effects of assignments, see *§ 25B.33*.

[2] Form

Assignment of Note and Mortgage
Assignment of Note and Mortgage

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

ASSIGNMENT OF MORTGAGE

For value received, the undersigned hereby transfers and assigns to _____[*name of assignee*] that certain mortgage dated _____, executed by _____[*name*], as Mortgagor, to _____[*name*], as Mortgagee, and recorded as Instrument No. _____ on _____[*date*], in Book _____, Page _____, Official Records of _____ County, California, together with the note or notes secured by and described or referred to in that Mortgage, the money due or to become due on the Mortgage, with interest, and all rights accrued or to accrue under the Mortgage. [*Add if desired:* The real property subject to the Mortgage is located in _____ (the City of _____, *or* an unincorporated area of) _____ County, California, and is more particularly described as follows: _____ (*set forth legal description*).]

[*Add if there is a senior trust deed or mortgage recorded against the property:*]

In accordance with *California Civil Code Section 2924b*, the undersigned Assignor hereby requests that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, as affecting the above-described property, executed by _____[*name*] as Trustor [*or* Mortgagor] in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add only if senior encumbrance is a deed of trust:* and _____ as Trustee,] be mailed to _____[*name of mortgagee under this junior mortgage*], whose address is _____[*street address, city, state, zip*].

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

Dated: _____.

_____ [*signature of assignor*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*],who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in

_____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
C. Assignment

10-25B California Legal Forms--Transaction Guide § 25B.232

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.232 Notice to Debtor of Assignment

[1] Comment--Use of Form

The form in [2], *below*, is a notice that the beneficial interest under a trust deed and the promissory note secured by the trust deed have been assigned. If the relevant security instrument is a mortgage, counsel should make appropriate changes to the description of the security [for an illustrative reference to a mortgage, see *§ 25B.231[2]*].

This separate form of notice is customarily given to a debtor since the mere recordation of the assignment of a trust deed is not, in itself, sufficient notice to the debtor to invalidate any payments made thereafter by him or her to the person holding the note [*Civ. Code § 2935*]. If the promissory note secured by the assigned trust deed is to remain in the assignor's possession, it is especially important to the assignee that notice of the assignment be given directly to the debtor/trustor since payments made by a debtor without notice to the assignor in possession of the note must be credited against the balance owing on the note, even though the assignee has received nothing from the debtor [*see Civ. Code § 2935*].

Any person transferring the servicing of the indebtedness on a note, bond, or other instrument secured by a mortgage or trust deed on residential real property containing up to four units to a different servicing agent, and any person assuming from another person the responsibility for servicing the instrument evidencing indebtedness, must give written notice of the transfer to the borrower or subsequent obligor before the borrower or subsequent obligor becomes obligated to make payments to the new servicing agent [*Civ. Code § 2937(a), (b)*; *see § 25B.33[2]*]. This disclosure requirement reduces the risk that a debtor will pay a person who no longer holds the note. In addition, any person transferring the servicing of indebtedness of this nature to a different servicing agent must provide the new servicing agent with all existing insurance policy information that the person is responsible for maintaining, including, but not limited to, flood and hazard insurance policy information [*Civ. Code § 2937(d)*].

The statutory protection given a debtor without notice of an assignment applies only if the debtor pays the person who

holds the note. If a debtor does not have knowledge of the assignment and pays a person who no longer holds the note, the payment does not discharge the note [*Rodgers v. Peckham (1898) 120 Cal. 238, 241-242, 52 P. 483* ; *Title Ins. etc. Co. v. Kuchenbeiser (1912) 20 Cal. App. 11, 12, 127 P. 1039*]. Although a payment to the assignor without possession of the note may not reduce the principal amount owing on the note, it also is an amount that is not received by the assignee. It follows from the above that it is in the best interest of the assignee to give the debtor notice of the assignment whenever the assignee is to receive payments under the note, whether the assignor does or does not retain possession of the note.

[2] Form

Notice to Debtor of Assignment

NOTICE TO DEBTOR OF ASSIGNMENT

TO: _____[*name*]
_____[*address*]
_____[*city, state, zip*]

NOTICE IS HEREBY GIVEN that all of the beneficial interest under that promissory note dated _____[*date*], to the order of _____[*name of payee*], in the amount of $_____, executed by you [*or name of original maker*], and the Deed of Trust dated _____[*date*], executed by you [*or name of original trustor*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, securing the above promissory note, has been assigned to the undersigned, the assignment being recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

You are hereby directed to make all further payments under the above promissory note and Deed of Trust to the undersigned at the following address: _____[*street address, city, state, zip*].
Dated: _____.

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawFinancingState RegulationReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25B SUBORDINATION, ASSUMPTION, AND ASSIGNMENT
PART IV. FORMS
C. Assignment

10-25B California Legal Forms--Transaction Guide § 25B.233

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25B.233 Notice to Debtor of Transfer of Servicing of Loan

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of the transfer of the servicing of the indebtedness on a note secured by a mortgage or deed of trust on real property containing one to four residential units located in California. Any person transferring the servicing of such an indebtedness to a different servicing agent, and any person assuming from another person the responsibility for servicing the instrument evidencing indebtedness, must give written notice of the transfer (this form) to the borrower or subsequent obligor before the borrower or subsequent obligor becomes obligated to make payments to the new servicing agent [*Civ. Code § 2937(a), (b)*]. If a notice of default has been recorded or a judicial foreclosure proceeding has been commenced, additional requirements apply [*Civ. Code § 2937(c)*; *see* [d], *below*]. In addition, any person transferring the servicing of indebtedness of this nature to a different servicing agent must provide the new servicing agent with all existing insurance policy information that the person is responsible for maintaining, including, but not limited to, flood and hazard insurance policy information [*Civ. Code § 2937(d)*].

The term "servicing" is not defined in *Civ. Code § 2937* or elsewhere in the California codes. However, it is generally used to refer to the supervision and administration of a loan after it has been made. This supervision and administration typically includes the performance of some or all of the following tasks: the collection of payments, the maintenance of accounting records, the computation of interest and principal, and the foreclosure of defaulted loans [*see* California Department of Real Estate Reference Book, Glossary at http://www.dre.ca.gov/pdf_docs/ref29.pdf].

For a notice that the beneficial interest under a trust deed and the related promissory note have been assigned, see *§ 25B.232*. For discussion of promissory notes and security instruments, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[b] Contents and Delivery

The notice must contain all of the following information [*Civ. Code § 2937(e)*]:

- The name and address of the new servicing agent.
- The date the transfer was or will be completed.
- The address where all payments pursuant to the transfer are to be made.
- The due date of the next payment (this item must be included only when the notice is given by the new servicing agent) [*Civ. Code § 2937(f)*].

The notice must be sent by first-class mail, postage prepaid, to the borrower's or subsequent obligor's address designated for loan payment billings or, if escrow is pending, as provided in escrow [*Civ. Code § 2937(e)*].

[c] Liability for Payments

The borrower or subsequent obligor will not be liable to the holder of the note, bond, or other instrument or to any servicing agent for payments made to the previous servicing agent or for late charges if (1) these payments were made before the borrower's or subsequent obligor's receipt of written notice of the transfer, and (2) the payments were otherwise on time [*Civ. Code § 2937(g)*]. This statutory protection of a debtor who pays a previous servicing agent is significant because, under the laws governing assignments of beneficial interests under trust deeds and related promissory notes, a debtor without notice of an assignment who pays the assignor/original creditor is protected only if the assignor still holds the note [*Rodgers v. Peckham (1898) 120 Cal. 238, 241-242, 52 P. 483* ; *Title Ins. etc. Co. v. Kuchenbeiser (1912) 20 Cal. App. 11, 12, 127 P. 1039* ; *see § 25B.232[1]*].

[d] Defaults

If a notice of default has been recorded or a judicial foreclosure proceeding has been commenced, the person transferring the servicing of the indebtedness and the new servicing agent must given written notice to the trustee or attorney named in the notice of default or judicial foreclosure of the transfer. A notice of default, notice of sale, or judicial foreclosure will not be invalidated solely because the servicing agent is changed during the foreclosure process [*Civ. Code § 2937(c)*].

For purposes of *Civ. Code § 2937*, the term "servicing agent" does not include a trustee exercising a power of sale pursuant to a deed of trust [*Civ. Code § 2937(h)*].

[2] Form

Notice of Transfer of Servicing of Indebtedness

NOTICE OF TRANSFER OF SERVICING OF INDEBTEDNESS

TO: _____[*name*]
_____[*address*]
_____[*city, state, zip*]

This notice pertains to that promissory note dated _____, to the order of _____[*name of payee*], in the amount of $_____, executed by you [*or name of original maker*], and secured by the

Deed of Trust dated _____, executed by you [*or name of original trustor*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

You are hereby notified that, effective _____[*date*], the servicing of indebtedness on the above note has been transferred to _____[*name*], whose address is _____. Further, you are hereby directed to make all further payments under the above note and Deed of Trust to that new servicing agent. [*Add if notice is being given by new servicing agent:* The due date of the next payment is _____.]
Dated: _____.

_____ [*signature of transferor*]
[*typed name*]
_____ [*signature of transferee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE

10-25C California Legal Forms--Transaction Guide 25C.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.syn Synopsis to Chapter 25C: RELEASE AND RECONVEYANCE

§ 25C.01 California Sources

[1] Statutes

[2] Regulations

[3] California Attorney General Opinions

§§ 25C.02-25C.04 [Reserved]

§ 25C.05 Annotations

§ 25C.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 25C.07-25C.09 [Reserved]

§ 25C.10 Termination of Security Instrument and Clearing of Record Title

§ 25C.11 Full Reconveyance and Discharge

§ 25C.12 Bond Procedure for Absent or Uncooperative Creditors

§ 25C.13 Effect of Unauthorized or Forged Reconveyance

§ 25C.14 Trustee's Liability for Improper Reconveyance

§ 25C.15 Partial Releases

[1] Definition

[2] Role in Subdivision Process

[3] Requirement of Certainty and Fairness

[4] Type of Certainty Required for Specific Performance

[5] Examples of Unenforceable Clauses

[6] Enforcement Before and After Execution of Security Instrument

[7] Effect of Uncertainty or Unfairness on Contract

[8] Right to Release After Default

§ 25C.16 Requirements of Subdivided Lands Act

[1] Definitions

[2] Unconditional Release Clauses

[3] Statutory Alternatives to Unconditional Clauses

§ 25C.17 Requirements of Subdivision Map Act

§ 25C.18 Substitution of Trustees

[1] Functions of Trustee

[2] Alternative Statutory Methods

[3] Nonstatutory Methods

[4] After Commencement of Nonjudicial Foreclosure

§§ 25C.19-25C.99 [Reserved]

§ 25C.100 Basic Facts for Reconveyance, Discharge, or Substitution

Scope

§ 25C.101 Additional Facts for Partial Reconveyance

Scope

§ 25C.102 Additional Facts for Substitution of Trustee

Scope

§ 25C.103 Documents for Reconveyance or Discharge

Scope

§§ 25C.104-25C.109 [Reserved]

§ 25C.110 Reconveyance or Discharge

Scope

§ 25C.111 Partial Release

Scope

§ 25C.112 Substitution of Trustee

Scope

§§ 25C.113-25C.119 [Reserved]

§ 25C.120 Trust Deeds

Scope

§ 25C.121 Mortgages

Scope

§ 25C.122 Special Procedure for Absent or Uncooperative Mortgagee or Beneficiary

Scope

§§ 25C.123-25C.129 [Reserved]

Scope

§ 25C.130 Purchase Money Handling Requirements

Scope

§ 25C.131 Request by Beneficiary

Scope

§ 25C.132 Execution and Recording

Scope

§§ 25C.133-25C.139 [Reserved]

Scope

§ 25C.140 Alternative Statutory Methods

Scope

§ 25C.141 Nonstatutory Method Pursuant to Trust Deed Provision

Scope

§ 25C.142 Nonstatutory Substitution by Mutual Agreement

Scope

§§ 25C.143-25C.199 [Reserved]

§ 25C.200 Request by Beneficiary for Full Reconveyance

[1] Comment

[a] Use of Form

[b] Contents of Request

[c] Fees for Full Reconveyance

[d] Optically Imaged Reproductions

[e] Civil and Criminal Penalties

[f] Deed of Full Reconveyance

[2] Form

Request by Beneficiary for Full Reconveyance

§ 25C.201 Deed of Full Reconveyance

[1] Comment

[a] Use of Form

[b] Recording

[c] Fees for Recordation of Full Reconveyance

[2] Form

DEED OF RECONVEYANCE

§ 25C.202 Trustor's Request for Delivery of Promissory Note and Deed of Trust

[1] Comment

[a] Use of Form

[b] Optically Imaged Reproductions

[c] Civil and Criminal Penalties

[2] Form

Request for Delivery of Promissory Note and Deed of Trust

§ 25C.203 Certificate of Discharge of Mortgage

[1] Comment

[a] Use of Form

[b] Recording

[c] Authorized Fees

[d] Civil and Criminal Penalties

[2] Form

CERTIFICATE OF DISCHARGE OF MORTGAGE

§ 25C.204 Mortgagor's Request for Delivery of Promissory Note and Mortgage

[1] Comment

[a] Use of Form

[b] Optically Imaged Reproduction

[2] Form

Request for Delivery of Promissory Note and Mortgage

§§ 25C.205-25C.209 [Reserved]

§ 25C.210 Declaration for Release of Lien [Civ. Code § 2941.7]

[1] Comment

[a] Use of Form

[b] Nonexclusive Statutory Procedure

[c] Required Contents of Declaration

[d] Corporate Bond

[e] Substitution of Absent Trustee of Record

[i] Requirements for Substitution

[ii] Effect of Recording Bond and Declaration

[2] Form

Declaration for Release of Lien

§ 25C.211 Notice of Recording Bond and Declaration Pursuant to Civ. Code § 2941.7

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Mailing of Notice

[2] Form

Notice of Recording Bond and Declaration Pursuant to Civil Code Section 2941.7

§ 25C.212 Objection to Satisfaction of Record of Mortgage

[1] Comment

[a] Use of Form

[b] Recordation

[c] Objection to Reconveyance

[2] Form

Objection to Satisfaction of Record of Mortgage

§ 25C.213 Demand by Trustor for Reconveyance

[1] Comment--Use of Form

[2] Form

Demand by Trustor for Reconveyance

§§ 25C.214-25C.219 [Reserved]

§ 25C.220 Partial Release Provision--Parcels of Acreage

[1] Comment

[a] Use of Form

[b] Trust Deed Terminology

[c] Purpose of Partial Release Provisions

[d] Requirements of Fairness and Certainty

[e] Release Price and Order

[f] Requirements of Subdivision Map Act

[g] Description of Parcels Before Subdivision

[2] Form

PARTIAL RELEASE OF PARCELS

§ 25C.221 Partial Release Provision--Individual Lots on Subdivision Map

[1] Comment

[a] Use of Form

[b] Release Price and Order of Release

[c] Subdivision Requirements

[2] Form

PARTIAL RELEASE FOR LOTS

§ 25C.222 Partial Release Provision--Down Payment as Credit Against Release Price

[1] Comment

[a] Use of Form

[b] Alternative Release on Close of Escrow

[c] Requirements of Certainty and Fairness

[d] Subdivision Requirements

[2] Form

Partial Release Provision--Down Payment as Credit Against Release of Parcel

§ 25C.223 Request for Partial Reconveyance

[1] Comment

[a] Use of Form

[b] Contents

[2] Form

Request for Partial Reconveyance

§ 25C.224 Deed of Partial Reconveyance

[1] Comment

[a] Use of Form

[b] Recording

[2] Form

Deed of Partial Reconveyance

§§ 25C.225-25C.229 [Reserved]

§ 25C.230 Statutory Substitution of Trustee: Substitution Instrument [Civ. Code § 2934a]

[1] Comment

[a] Use of Form

[b] Statutory Methods

[i] Alternatives

[ii] Substitution by Sole Beneficiary or All Beneficiaries

[iii] Substitution by Majority Interest Holders

[iv] Contents of Substitution Instrument; New Trustee's Powers

[c] Notice of Substitution

[d] Substitution After Giving of Notice of Sale

[e] Multiple Deeds of Trust

[f] Substitution by Court

[2] Form

Substitution of Trustee

§ 25C.231 Statutory Substitution of Trustee: Additional Document Regarding Compliance With Statutory Requirements by Majority Interest Holders [Civ. Code § 2934a(a)(2)]

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Attachment, Recordation, and Effect

[2] Form

Statement Regarding Compliance With Statutory Method of Substitution of Trustee

§ 25C.232 Declaration of Mailing

[1] Comment

[a] Use of Form

[b] Use of Declarations

[2] Form

Declaration Mailing

§ 25C.233 Unilateral Substitution of Trustee Pursuant to Deed of Trust Provision

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Effect of Substitution on Nonjudicial Foreclosure Proceeding

[2] Form

Unilateral Substitution of Trustee Pursuant to Deed of Trust Provision

§ 25C.234 Substitution of Trustee by Joint Agreement

[1] Comment

[a] Use of Form

[b] Execution and Recording

[c] Effect of Substitution on Nonjudicial Foreclosure Proceeding

[2] Form

Substitution of Trustee by Joint Agreement

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FOOTNOTES:

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE

10-25C California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter covers the reconveyance of trust deeds and the discharge or satisfaction of mortgages. In addition to considering full reconveyances and discharges, which clear the title of record following the full payment and satisfaction of the underlying obligation, this chapter also examines arrangements for the partial release of a portion of the encumbered property from the lien of the security instrument. Finally, the chapter discusses the substitution of a trustee under a trust deed, which may be necessary in conjunction with either a full or partial reconveyance.

For a detailed discussion of trust deeds, mortgages, and other security instruments, see Ch. 25A, *Security Instruments for Real Estate Financing* . For materials that are relevant to the large numbers of reconveyances that occur in sales situations, see Ch. 23, *Real Property Sales Agreements* and Ch. 26, *Real Property Escrows* . The procedure for foreclosing a trust deed or mortgage, which may require the substitution of the trustee before or during the proceedings, is covered in Ch. 25D, *Foreclosure* . Finally, since most trust deeds with partial release provisions also contain subordination clauses, the reader may wish to refer to Ch. 25B, *Subordination, Assumption, and Assignment.*

FOOTNOTES:
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A. Primary Sources

10-25C California Legal Forms--Transaction Guide § 25C.01

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.01 California Sources

[1] Statutes

"Blanket encumbrance" defined. *Bus. & Prof. Code § 11013*.

Release clause for sale of subdivision lots. *Bus. & Prof. Code §§ 11013.1-11013.4*.

Novation. *Civ. Code §§ 1530-1533*.

Release of obligations. *Civ. Code §§ 1541-1543*.

Effect of partial performance on extinguishment of lien. *Civ. Code § 2912*.

Substitution of trustee. *Civ. Code § 2934a*.

Full reconveyance and discharge, mortgages and deeds of trust. *Civ. Code §§ 2939-2941.7*.

Vendor's lien. *Civ. Code §§ 3046-3048*.

Purchaser's lien. *Civ. Code § 3050*.

[2] Regulations

Impound alternative to statutory partial release. *10 Cal. Code Reg. §§ 2791, 2791.1, 2791.4*.

Bond to secure advance payments on subdivision lots. *10 Cal. Code Reg. § 2791.2.*

Trustee for subdivision purchase money. *10 Cal. Code Reg. § 2791.6.*

[3] California Attorney General Opinions

Creation of several deeds of trust on portions of land constitutes "division" under Subdivision Map Act. 58 Ops. Cal. Atty. Gen. 408 (1975) .

Impound alternative to statutory partial release under Subdivided Lands Act. 39 Ops. Cal. Atty. Gen. 16 (1962) .

Blanket improvement lien when materials delivered or work begins affecting more than one lot of subdivision. *37 Ops. Cal. Atty. Gen. 180 (1961)* .

Authority of Commissioner to require compliance with release provision for blanket encumbrance when subdivider in default. *19 Ops. Cal. Atty. Gen. 65 (1952)* .



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.05 Annotations

Annot., Conveyance or surrender of property as an accord and satisfaction of contract obligation, 59 A.L.R. 5th 665 (1998).

Annot., Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 43 A.L.R. 5th 519 (1996).

Annot., Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R. 4th 853 (1981).



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.06 Text References

[1] Matthew Bender Sources

CALIFORNIA LEGAL FORMS (Matthew Bender).

Ch. 23, *Real Property Sales Agreements* .

Ch. 25A, *Security Instruments for Real Estate Financing* .

Ch. 25B, *Subordination, Assumption, and Assignment* .

Ch. 25D, *Foreclosure* .

Ch. 26, *Real Property Escrows* .

Ch. 30, *Subdivision Regulation* .

CALIFORNIA REAL ESTATE LAW & PRACTICE (Matthew Bender).

Ch. 115, *Release and Reconveyance* .

Ch. 113, Installment Land Sale Contracts, § 113.32 (blanket encumbrances).

CALIFORNIA FORMS OF PLEADING & PRACTICE (Matthew Bender).

Ch. 555, Trust Deeds and Real Property Mortgages, § 555.136 (statutory form of substitution of trustee).

Rabkin & Johnson, Current Legal Forms, Ch. 22, *Development and Subdivision* , Forms 22.01-22.14 (purchase and option agreements with partial release provisions).

[2] Additional Text References

Witkin, Summary of California Law, Vol. 4, *Security Transactions in Real Property*, §§ 8 (substitution of trustee), 116-117 (discharge, payment and satisfaction) (10 ed. 2005).

Miller & Starr, California Real Estate (3d ed. West Group 2000), Vol. 4, Ch. 10, *Deeds of Trust*, §§ 10:111 (reconveyance), 10:119 (partial release).

California Real Property Sales Transactions (3d ed. Cal. CEB 1998), Ch. 8, "Seller Financing."

California Mortgage and Deed of Trust Practice (3d ed. Cal. CEB 2000), Ch. 8, *Payment and Related Disputes*, §§ 8.84-8.89 (reconveyances).



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.10 Termination of Security Instrument and Clearing of Record Title

A trust deed terminates and title automatically revests in the trustor on the satisfaction of the underlying obligation [*see Snider v. Basinger (1976) 61 Cal. App. 3d 819, 823, 132 Cal. Rptr. 637* ; *Tyler v. Currier (1905) 147 Cal. 31, 36, 81 P. 319* ; *Prob. Code § 15407*; *see also Windt v. Covert (1907) 152 Cal. 350, 354, 93 P. 67* ("satisfaction" means payment or discharge)]. The legal effect of a subsequent reconveyance of the trust deed and title [*see Civ. Code § 2941*; *see also § 25C.11*] is merely to clear the title of record [*see Snider v. Basinger (1976) 61 Cal. App. 3d 819, 823, 132 Cal. Rptr. 637*]. Similarly, a mortgage is extinguished by the satisfaction of the obligation secured by the mortgage, and the legal effect of a certificate of discharge [*see Civ. Code § 2939*; *see also § 25C.11*]] is simply the clearing of record title [*see Civ. Code § 2909*; *McMillan v. Richards (1858) 9 Cal. 365*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.11 Full Reconveyance and Discharge

After the trustor pays in full the obligation secured by a deed of trust, the beneficiary and trustee must follow a process to reconvey the trust deed and title to the trustor. First, within 30 calendar days after the obligation has been satisfied, the beneficiary or the beneficiary's assignee must execute and deliver to the trustee the original note and trust deed and a request for a full reconveyance [*Civ. Code § 2941(b)*; *see § 25C.200[2]*; *see also Civ. Code § 2941(f)* ("original" may include optically imaged reproduction under certain circumstances)]. There is no requirement that the trustor submit a request for the performance of this obligation. The procedures to "cause" the full reconveyance or certificate of discharge to be recorded include, but are not limited to, sending the material by certified mail with the U.S. Postal Service, or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient. The full reconveyance or certificate of discharge must be sent in recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded. The county recorder must stamp and record the full reconveyance or certificate of discharge within two business days of receipt [*Civ. Code § 2941(c)*; *see Evid. Code § 641* (properly addressed and mailed letter is presumed to be received)]. *Civ. Code § 2941* creates a hierarchical system for issuing reconveyances. Thus, title insurers may record a release of obligation only if both the lender/beneficiary and the trustee, after proper request, have failed or refused to comply with their statutory duties within the specified periods [*Trustors Sec. Serv. v. Title Recon Tracking Serv. (1996) 49 Cal. App. 4th 592, 607, 56 Cal. Rptr. 2d 793*].

When a mortgage is satisfied, the mortgagee must record a certificate of discharge [*see § 25C.203*] stating that the mortgage has been paid [*Civ. Code §§ 2939-2941*].

The final payoff of the obligation secured by a trust deed or mortgage and giving rise to the full reconveyance or discharge may occur at the end of the original term of the obligation or before the end of the original term, such as when the obligation is paid in full with the proceeds from the sale of the real property securing the obligation.

A mortgagee, beneficiary, or trustee who fails to record a full reconveyance or certificate of discharge is subject to both civil [*Civ. Code § 2941(d)*] and criminal liability [*Civ. Code § 2941.5*]. The violation makes the violator liable to the

person affected for all damages that person may sustain by reason of the violation, and requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.12 Bond Procedure for Absent or Uncooperative Creditors

An alternative procedure governs releases whenever (1) the obligation secured by a mortgage or trust deed has been fully satisfied and the present mortgagee or beneficiary of record cannot be located after diligent search, or refuses to execute and deliver a proper certificate of discharge or request for reconveyance, or (2) a specified balance, including principal and interest, remains due and the mortgagor or trustor (or successor in interest of either) cannot, after diligent search, locate the then mortgagee or beneficiary of record. In those cases, the lien of the security instrument must be released when the mortgagor or trustor (or successor in interest of either) records a corporate bond accompanied by a declaration and, in the case of a trust deed, a reconveyance [*Civ. Code § 2941.7*]. For a step-by-step guide to the relevant procedure, see §§ 25C.120-25C.122. *See also* §§ 25C.210-25C.213 (forms).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.13 Effect of Unauthorized or Forged Reconveyance

If a reconveyance is unauthorized, it does not affect the title of a subsequent bona fide purchaser [*Firato v. Tuttle (1957) 48 Cal. 2d 136, 139-140, 308 P.2d 333*]. However, an unauthorized reconveyance to a purchaser with notice may be set aside by a court of equity [*Firato v. Tuttle (1957) 48 Cal. 2d 136, 139, 308 P.2d 333* ; *see Phelps v. American Mortg. Co. (1936) 6 Cal. 2d 604, 608, 59 P.2d 95*]. A forged reconveyance is void and of no effect and the lien of the trust deed remains as a prior lien against a subsequent bona fide purchaser or encumbrancer [*Firato v. Tuttle (1957) 48 Cal. 2d 136, 139, 308 P.2d 333* ; *Wutzke v. Bill Reid Painting Service, Inc. (1984) 151 Cal. App. 3d 36, 43, 198 Cal. Rptr. 418*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingBona Fide Purchasers



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.14 Trustee's Liability for Improper Reconveyance

If a trustee negligently reconveys a trust deed to a trustor not entitled to the reconveyance, the trustee is liable to the beneficiary for the beneficiary's damages [*Jeanese, Inc. v. Surety Title & Gty. Co. (1959) 176 Cal. App. 2d 449, 454, 1 Cal. Rptr. 752*]. The same rule applies when the trustee reconveys the trust deed in reliance on a forged request for reconveyance [*see Stephans v. Herman (1964) 225 Cal. App. 2d 671, 673, 37 Cal. Rptr. 746*].

A beneficiary must deliver to the trustee the original promissory note and trust deed concurrently with a request for reconveyance [*see Civ. Code § 2941(b)*; *see also Civ. Code § 2941(g)* ("original" may include optically imaged reproduction under certain circumstances)]. If the original note has been lost or destroyed, the trustee should and is entitled to obtain adequate indemnity before executing the reconveyance to protect the trustee from liability for a potentially improper reconveyance [*see Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 479, 160 Cal. Rptr. 177*]. An affidavit by the beneficiary or its assignee that the note has been lost and not negotiated or assigned to any other person may be acceptable to some trustees, but a trustee may insist on an indemnity bond by a corporate surety [*see Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 480, 160 Cal. Rptr. 177*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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10-25C California Legal Forms--Transaction Guide § 25C.15

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.15 Partial Releases

[1] Definition

A partial release clause is a provision in a trust deed or mortgage permitting the trustor or mortgagor to have a portion of the encumbered property released from the lien of the security instrument on the payment of a specified sum to the beneficiary or mortgagee. A partial reconveyance of a lot or parcel releases that lot or parcel from the lien while leaving the remaining parcels or lots encumbered for the duration of the secured obligation [*see* California Real Estate Law & Practice, Ch. 115, *Release and Reconveyance* (Matthew Bender)].

Unless a trust deed or mortgage contains a partial release clause, the borrower is not entitled to have any portion of the encumbered property released from the lien of the security instrument until he or she has paid the entire debt [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 115, 92 Cal. Rptr. 851* ; *Bradbury v. Thomas (1933) 135 Cal. App. 435, 442, 27 P.2d 402* ; *see Civ. Code § 2912* (partial performance does not extinguish lien)]. Although partial releases and reconveyances are neither authorized nor prohibited by statute, they are recognized as valid if they comply with stringent judicially crafted standards of certainty and fairness. These requirements are discussed below.

[2] Role in Subdivision Process

Partial release clauses are most often found in mortgages or trust deeds given by a developer to a seller to secure the purchase of land intended for development as a subdivision. The developer may use the partial release provisions to obtain the release and reconveyance of a portion of the property before paying the entire obligation secured by the whole of the property. In so doing, the developer can obtain free and clear a portion of the property and then resell or develop it, which in either case enables the developer to finance development of the remainder of the property or to reduce the obligation on the remaining encumbered property. Partial release clauses also permit a subdivider to have individual lots in the property released after it is subdivided in order to convey free and clear title to the lot purchasers.

Partial releases and reconveyances affecting subdivided lands normally must also satisfy the requirements of the Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see § 25C.17*] and the Subdivided Lands Act [*Bus. & Prof. Code §*

11000 et seq.; *see § 25C.16*].

When a developer purchasing land for development as a residential subdivision finances the purchase by giving the seller a promissory note secured by a trust deed on the land for a portion of the land's purchase price, the trust deed, in most cases, will contain a subordination clause as well as a partial release clause. The subordination clause will require the seller/lender to subordinate its trust deed to the construction loan for the subdivision to be obtained by the developer. The construction loan will generally be secured by deeds of trust on the individual lots in the subdivision and will provide for release of the individual lots on their sale to third parties and the payment to the construction lender of the appropriate amount of sales proceeds. For further discussion of subordination, see Ch. 25B, *Subordination, Assumption, and Assignment* .

[3] Requirement of Certainty and Fairness

For a court of equity to decree that an obligation is specifically enforceable, the terms of the obligation must be complete and certain in all particulars essential to its enforcement [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 761, 75 Cal. Rptr. 533*]. The terms of the obligation must be sufficiently certain to make the precise act to be done clearly ascertainable [*Civ. Code § 3390*; *White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885* ; *Hiller v. King (1951) 105 Cal. App. 2d 181, 190-191, 232 P.2d 905*]. Further, specific performance cannot be enforced against a party to a contract if the contract is not just and reasonable as to that party [*Civ. Code § 3391(2)*].

[4] Type of Certainty Required for Specific Performance

The basic reason that partial release clauses drafted for mortgages and trust deeds are often uncertain and unenforceable is the difficulty involved in describing the various parcels of land that may be released from the lien of the mortgage or trust deed and the order in which the parcels may be released [*see Hiller v. King (1951) 105 Cal. App. 2d 181, 193, 232 P.2d 905*]. As a practical matter, different parcels of the property encumbered by a purchase money mortgage or deed of trust are seldom of equal value. Differences in terrain or roadway access, for example, may render one acre of the encumbered property more valuable than another [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 467, 73 Cal. Rptr. 885*].

PRACTICE TIP:

Certainty of Description. Describing the released parcel with certainty is particularly difficult during the development phase when the precise boundaries of each parcel are still being mapped. The development process may require increasing or decreasing the number of units per acre, thus forcing the developer to redraw the parcel descriptions. Drafting a release clause which entitles the borrower to release each parcel as it is developed and sold is nearly impossible at the early development stages. Typically developers will obtain a second round of financing that "takes out" the pre-development financing once the parcels have been drawn and approved. When accurate legal descriptions become available, the developer can draft clauses that enable the borrower to release individual parcels from the security instrument. *Commentary by Timothy F. O'Leary*

To satisfy the requirements governing certainty and fairness [*see* [3], *above*], a partial release clause should protect the seller by allowing releases only in return for the reasonable value of the land [*see §§ 25C.220[1][e], 25C.221[1][b]*]. Further, the clause should specify the order of release of designated parcels or place other limitations on the buyer's authority to select parcels for release; otherwise, the buyer could obtain releases in a manner that would leave the remainder of the security worth less than the amount secured [*see § 25C.220[1][e]*]. The clause should also clearly specify the terms relating to the consideration to be paid for the release. For example, the clause should specify whether the payments made for a release are to be applied to interest or principal [*see Chapman College v. Wagener (1955) 45 Cal. 2d 796, 801-802, 291 P.2d 445*] and whether any cash down payment or regular payments on the note made by the buyer/trustor will or will not apply to the release price [*see San Diego Construction Co. v. Mannix (1917) 175 Cal.*

548, 554-558, 166 P. 325 ; *see also § 25C.222*].

[5] Examples of Unenforceable Clauses

The courts have found a number of broadly worded partial release clauses to be unenforceable as uncertain or unfair. For example, a clause providing for releases at a specified sum per acre without describing the parcels that may be released or the order of release was held to be uncertain and unfair to the beneficiary and therefore unenforceable. The court noted that the clause would permit the purchaser to secure the release of only the choicest parcels and could leave the seller with security on only relatively valueless and undesirable parcels [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465-468, 73 Cal. Rptr. 885*]. A clause permitting the release of parcels of a specified size provided they were contiguous with previously released parcels was also found to be unenforceable because the contiguity requirement would not prevent the purchaser from obtaining the release of only the valuable parcels [*see Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 760-763, 75 Cal. Rptr. 533* ; *see also Eldridge v. Burns (1978) 76 Cal. App. 3d 396, 428-430, 142 Cal. Rptr. 845*].

[6] Enforcement Before and After Execution of Security Instrument

The question of the enforceability of a partial release clause by specific performance may arise either before or after execution of the trust deed or mortgage in which it is to be contained. For example, a specific performance action will lie, in a proper case, to enforce a seller's obligation under a land sales contract to convey title to the land to the purchaser and accept a trust deed containing a partial release clause as security for payment of the purchase price of the land [*see White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885*]. It may also be necessary to bring a specific performance action after execution of a purchase money trust deed containing a partial release clause to compel the trust deed's beneficiary to request and the trust deed's trustee to execute a partial reconveyance from the lien of the trust deed as required by the partial release clause [*see Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 761, 75 Cal. Rptr. 533*]. The question whether a partial release clause is sufficiently certain to be specifically enforced may therefore arise either before or after execution of the security instrument in which it is contained and is more or less the same in both instances [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 763, 75 Cal. Rptr. 533*].

[7] Effect of Uncertainty or Unfairness on Contract

If an executory land sales contract provides that the seller will accept a trust deed containing either partial release or subordination provisions as security for payment of the purchase price, those provisions, as described in the contract, are material parts of the contract [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 467-468, 73 Cal. Rptr. 885* ; *Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 238, 39 Cal. Rptr. 284*]. Consequently, if either the partial release clause or the subordination provision as described in the contract is too uncertain or unfair to be specifically enforced, the entire land sales contract is unenforceable in equity. Waiver by the purchaser of the subordination or partial release provision will not cure the defect and make the contract enforceable against the seller [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 468-469, 73 Cal. Rptr. 885* ; *Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 242-243, 39 Cal. Rptr. 284*].

Under different circumstances, an uncertain or unfair release clause will not necessarily render the entire contract unenforceable. The seller may thus bring an action for breach of contract, and the buyer cannot defend on the basis of the unenforceability of the clause or the unfairness to the seller because the clause is for the buyer's benefit [*see Yackey v. Pacific Development Co. (1979) 99 Cal. App. 3d 776, 783, 160 Cal. Rptr. 430*]. On the other hand, a seller who has already conveyed title to the purchaser and accepted a trust deed containing an uncertain release clause cannot use the clause as a basis for rescission when there is no evidence that the seller would be prejudiced by enforcement of the remainder of the contract and the buyers are willing to waive the release clause [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 766, 75 Cal. Rptr. 533*].

[8] Right to Release After Default

Partial release provisions commonly provide that the trustor or mortgagor may have portions of the encumbered property released from the lien of the trust deed or mortgage only when the trustor or mortgagor is not in default of the security instrument [*see Bradbury v. Thomas (1933) 135 Cal. App. 435, 443, 27 P.2d 402*]. Such a provision notwithstanding, if the trustor makes the required payment for a partial release and then defaults, the subsequent default does not destroy the trustor's right to the partial release. The right to the partial reconveyance in such a situation accrues at the time the trustor makes the payment, not when he or she requests the partial release [*Conley v. Poway Land & Inv. Co. (1965) 232 Cal. App. 2d 22, 27, 42 Cal. Rptr. 636*].

If the partial release clause does not prohibit partial releases following a default by the trustor or mortgagor, he or she is entitled to a partial release on payment of the required consideration for the release, whether or not he or she is in default [*see Sacramento S.F.L. Co. v. Whaley (1920) 50 Cal. App. 125, 194 P. 1054*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART II. LEGAL BACKGROUND

10-25C California Legal Forms--Transaction Guide § 25C.16

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.16 Requirements of Subdivided Lands Act

[1] Definitions

Under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], to lawfully sell or lease lots or parcels in a "subdivision" that is subject to a "blanket encumbrance", either (1) the blanket encumbrance or some supplemental agreement must unconditionally provide that the purchaser or lessee of the lot or parcel may obtain the legal title or other applicable interest free and clear of the blanket encumbrance [*see* [2], *below*], or (2) the developer must comply with one of several stringent statutory requirements [*see Bus. & Prof. Code § 11013.2*; *see also* [3], *below*].

For these purposes, "subdivision" means improved or unimproved land situated within California that is divided or proposed to be divided into five or more lots orparcels for the purpose of immediate or future sale, lease, or financing [*Bus. & Prof. Code § 11000(a)*; *see* Ch. 30, *Subdivision Regulation*]. "Blanket encumbrance" means a trust deed, mortgage, or any other lien or encumbrance securing or evidencing the payment of money and affecting either land that is to be subdivided or more than one lot or parcel of already subdivided land [*Bus. & Prof. Code § 11013*]. That term also includes any agreement affecting more than one lot or parcel of subdivided land by which the owner or subdivider holds the subdivision under an option, contract to sell, or trust agreement [*Bus. & Prof. Code § 11013*].

[2] Unconditional Release Clauses

An unconditional release clause must unconditionally provide that the purchaser or lessee of a lot or parcel may obtain legal title (or other interest) free and clear of the blanket encumbrance, on compliance with the terms and conditions of the purchase or lease [*see Bus. & Prof. Code § 11013.1*]. A release clause that permits lots in a subdivision to be released from the lien of a blanket encumbrance only if the subdivider is not in default on the blanket encumbrance does not give the lot purchaser such an "unconditional" right *[19 Ops. Cal. Atty. Gen. 65, 66 (1952)]* .

As a practical matter, it would be rare to encounter a blanket encumbrance containing a release clause deemed "unconditional" by the above statutory standard. Instead, subdividers and lenders commonly elect to comply with one of the alternative statutory methods for assuring delivery of free and clear title to the purchaser [*see* [3], *below*].

[3] Statutory Alternatives to Unconditional Clauses

When neither the blanket encumbrance nor a supplemental agreement contains an unconditional partial release clause, the subdivider must do one of the following [*Bus. & Prof. Code § 11013.2*]:

- Deposit into escrow the entire amount of money paid or advanced by the lot purchaser in an escrow depository until a proper release from the blanket encumbrance is obtained or the money can be returned to the purchaser [*see 10 Cal. Code Reg. §§ 2791*, *2791.1*, *2791.4*].

- Transfer title to the individual lots or parcels to an authorized trust until a proper release from the blanket encumbrance is obtained [*see 10 Cal. Code Reg. § 2791.6*].

- Post a bond with the California Real Estate Commissioner payable to the State of California for the return of the purchaser's money in the event a release from the blanket encumbrance cannot be eventually obtained [*see 10 Cal. Code Reg. § 2791.2*].

- Comply with any other condition or method acceptable to the Real Estate Commissioner that carries out the intent and provisions of the statute, which is to ensure that the buyer will obtain title to the lot or parcel free and clear of the blanket encumbrance.

According to the Department of Real Estate, the first of the alternatives above is the one most often used, and posting a bond is the second most preferred method. Under the first method, all funds deposited by purchasers must be maintained in escrow until escrow is in a position to issue title free and clear of all liens except the buyer's new first loan to be placed on the property through and at the close of escrow. The Department of Real Estate must review and approve the escrow instructions during the subdivision approval process [*see 10 Cal. Code Reg. § 2791*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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10-25C California Legal Forms--Transaction Guide § 25C.17

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.17 Requirements of Subdivision Map Act

Under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], the definition of "subdivision" includes the division of a unit of land, as shown on a county assessment roll, for the purpose of sale, lease, or financing [*Gov. Code § 66424*]. This definition is broad enough to include a partial release from a blanket encumbrance [*see 58 Ops. Cal. Atty. Gen. 408, 412 (1975)* (placement of separate trust deeds on different portions of unit of land is division for purpose of sale or financing)]. Therefore, partial releases covering previously undivided property will trigger the applicability of the Subdivision Map Act. The Act generally requires local approval of both a tentative map and a final map for any subdivision containing five or more parcels [*Gov. Code § 66426*]. Subdivisions that are not subject to the final map requirement must have a parcel map approved by the local legislative body unless the local subdivision ordinance waives the statutory parcel map requirement [*Gov. Code § 66428*]. For detailed coverage of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25C California Legal Forms--Transaction Guide § 25C.18

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.18 Substitution of Trustees

[1] Functions of Trustee

The functions of a trustee under a deed of trust are generally passive in nature, with two major exceptions. Pursuant to the terms of a typical trust deed, the trustee is empowered to sell the real property securing the trust deed in a nonjudicial foreclosure proceeding, and to execute a reconveyance for the real property on full payment of the obligation secured by the trust deed. Either power may generally be exercised by the trustee only following authorization from the beneficiary.

It may be necessary to replace a trustee in conjunction with and before either the commencement of a nonjudicial foreclosure proceeding [*see* Ch. 25D, *Foreclosure*] or the full or partial reconveyance of a trust deed. This need may arise for a number of reasons, including the death of an individual trustee, the uncooperativeness of an institutional trustee, or the reluctance of a trustee to commence foreclosure proceedings or to execute a reconveyance as requested by a beneficiary.

[2] Alternative Statutory Methods

There are two statutory methods for substituting a trustee who is acting under a trust deed on real property or an estate for years in real property that was given to secure an obligation to pay money and that confers no other duties on the trustee other than those that are incidental to the exercise of power of sale conferred [*Civ. Code § 2934a(a)(1)*]. Under the first method, the trustee may be substituted by recording in the county in which the property is located a substitution document executed and acknowledged by all of the beneficiaries under the trust deed, or their successors in interest. Such a substitution will be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 [*Civ. Code § 2934a(a)(1)(A)*; *see § 25C.230[2]*].

Under the second statutory method, the trustee may be substituted by recording in the county in which the property is located a substitution document executed and acknowledged by the holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by

real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or of any affiliate of that licensed real estate broker ("majority interest holders") [*Civ. Code § 2934a(a)(1)(B)*; *see Civ. Code § 2934a(a)(3)* ("affiliate of the licensed real estate broker" defined)]. A substitution by this method is not effective unless all the parties signing the substitution document also sign, under penalty of perjury, a separate written document containing specified information regarding compliance with the pertinent statutory requirements [*see Civ. Code § 2934a(a)(2)*; *see also § 25C.231[2]*]. For coverage of a related procedure established by *Civ. Code § 2941.9* that may be used by all beneficiaries under a trust deed to agree to be governed by majority interest holders, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[3] Nonstatutory Methods

A substitution of the trustee pursuant to the terms of a substitution clause included in a trust deed is valid even if it does not conform to the requirements of the statutory method [*U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 83-85, 116 Cal. Rptr. 44*]. However, the procedure required by such a substitution clause is frequently similar to the first statutory method described under [2], *above* [*see § 25C.233[2]*]. In most cases it is possible to replace a trustee and simultaneously comply with both the statutory requirements and the trust deed provisions, given the similarity and the simple requirements of both methods of substitution.

Another nonstatutory method of substitution is the joint execution, acknowledgment, and recordation of an instrument of substitution by the trustor and beneficiary [*see § 25C.234[2]*]. This method also is valid without regard to the requirements of the statutory method [*Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*].

[4] After Commencement of Nonjudicial Foreclosure

If a substitution document is executed, but not recorded, before or concurrently with the recording of the notice of default, the beneficiary or beneficiaries or their authorized agents must cause notice of the substitution to be mailed, before or concurrently with the recording of the substitution document, to all persons to whom a copy of the notice of default would be required to be mailed [*Civ. Code § 2934a(b)*]. If the substitution is effected after a notice of default has been recorded but before the recording of the notice of sale, the beneficiary or beneficiaries or their authorized agents must cause a copy of the substitution document to be mailed, before or concurrently with the recording of that document, to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed [*Civ. Code § 2934a(c)*]. An affidavit must be attached to the substitution document, stating that notice has been given to the persons and in the manner required [*Civ. Code § 2934a(b), (c)*; *see Civ. Code § 2924b* (requirements for mailing); *§ 25C.232[2]* (form of declaration in lieu of affidavit)].

A trustee named in a recorded substitution document must be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution document is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing in *Civ. Code § 2934a* requires that a trustee under a recorded substitution document accept the substitution. Once recorded, the substitution document constitutes conclusive evidence of the authority of the substituted trustee or his or her agents to act [*Civ. Code § 2934a(d)*].

Unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given pursuant to *Civ. Code § 2924f* after execution of the substitution document, any sale conducted by the substituted trustee will be void [*Civ. Code § 2934a(e)*].

For further discussion of nonjudicial foreclosures, see Ch. 25D, *Foreclosure* . For an illustrative notice of sale, see *§ 25D.206[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25C California Legal Forms--Transaction Guide §§ 25C.19-25C.99

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25C.19[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25C California Legal Forms--Transaction Guide § 25C.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.100 Basic Facts for Reconveyance, Discharge, or Substitution

1. Name, address, and telephone number of parties:

    a. Trustor, trustee, and beneficiary if debt is secured by trust deed.

    b. Mortgagor and mortgagee if debt is secured by mortgage.

    c. Assignee of beneficiary or mortgagee if original trust deed or mortgage has been assigned.

    d. Current trustee of record if different from trustee named in original trust deed.

    e. Person, if any, who assumed debt from original trustor or mortgagor.

    f. Current owner of property securing debt if different from any of above.

2. Additional information about parties who are not individuals:

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

d. Name, address, and title of person authorized to bind entity.

3. Information concerning debt:

NOTE:
The following assumes the debt is evidenced by a promissory note.

a. Date incurred.

b. Original principal amount.

c. Unpaid balance of principal amount and interest, if any.

d. If obligation has been paid in full, date of final payment.

4. Information concerning real property:

a. Location:
(1) Street address.

(2) City or unincorporated area.

(3) County.

b. Type:

(1) Improved.

(2) Unimproved.

c. Legal description of property.

d. Legal description of portion of property previously reconveyed under partial reconveyance, if any.

5. Information concerning security instrument:

a. Type:

(1) Deed of trust.

(2) Mortgage.

b. Date executed.

c. Recording information:

(1) Date recorded.

(2) Instrument or book and page number.

(3) County.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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10-25C California Legal Forms--Transaction Guide § 25C.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.101 Additional Facts for Partial Reconveyance

1. Legal description of portion of real property to be reconveyed.

2. Amount required by trust deed to be paid before reconveyance.

3. All conditions required by trust deed to be satisfied before reconveyance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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A. Client Interview--Facts and Documents

10-25C California Legal Forms--Transaction Guide § 25C.102

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.102 Additional Facts for Substitution of Trustee

1. Name, address, and telephone number of proposed new trustee.

2. Whether trustor is in default or in good standing under trust deed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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A. Client Interview--Facts and Documents

10-25C California Legal Forms--Transaction Guide § 25C.103

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.103 Documents for Reconveyance or Discharge

1. Promissory note or other instrument evidencing indebtedness.

2. Trust deed or mortgage.

3. Assignment of trust deed or mortgage, if any.

4. Document(s) under which person other than original trustor or mortgagor assumed debt and obligations under trust deed or mortgage, if any.

5. Recorded substitution of trustee, if any.

6. Any recorded partial reconveyance(s) for property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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A. Client Interview--Facts and Documents

10-25C California Legal Forms--Transaction Guide §§ 25C.104-25C.109

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25C.104[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

10-25C California Legal Forms--Transaction Guide § 25C.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.110 Reconveyance or Discharge

1. Determine whether underlying obligation has been fully paid and satisfied.

2. If representing trustor or mortgagor, ascertain whether special statutory release procedure must be followed because beneficiary or mortgagee [*see §§ 25C.120-25C.122*]:

a. Has refused to record requested reconveyance or certificate of discharge; or

b. Cannot be located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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10-25C California Legal Forms--Transaction Guide § 25C.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.111 Partial Release

1. If dealing with existing security instrument, review its requirements governing partial reconveyances.

2. If drafting security instrument, determine type of partial release clause desired by client:

NOTE:
A security instrument may contain any or all of the following types of partial release clauses. For further discussion of security instruments in general, see Ch. 25A, ***Security Instruments for Real Estate Financing*** .

a. Clause for release of acreage before its development or subdivision [*see § 25C.220[2]*].

b. Clause for release of lots designated on final subdivision map [*see § 25C.221[2]*].

c. Clause providing that down payment will be credited toward [*see § 25C.222[2]*]:
(1) Amount required for release of a specific portion of property; and

(2) Principal amount owning on secured promissory note.

d. "Unconditional" clause for conveyance of title to purchaser free and clear of encumbrance on purchaser's fulfillment of contractual obligations.

NOTE:

Lenders rarely agree to the use of such a clause because it may be exercised when the subdivider is in default [***see*** *19 Ops. Cal. Atty. Gen. 65, 66 (1952)* ; ***see also*** *§ 25C.16*].

3. If drafting partial release clause, determine order in which parcels of land should be released from lien and price of each parcel so that [*see § 25C.15[4]*]:

a. Security of trust deed or mortgage will not be unduly impaired;

b. Remaining encumbered property will not be without access to public roads or streets and other utilities; and

c. Proposed development may proceed in reasonable and profitable manner.

4. Determine whether or not transaction is subject to Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see § 25C.16*; *see also* Ch. 30, *Subdivision Regulation*].

5. If Subdivided Lands Act applies and release clause is not "unconditional," determine which statutory procedure will be followed for handling of purchase monies and/or title [*see Bus. & Prof. Code § 11013.2*; *see also § 25C.16[3]*].

6. Ascertain whether mortgagor or beneficiary of record can be located [*see Civ. Code § 2941.7*; *see also § 25C.122*(1), (2)].

7. Determine whether trustor or mortgagor is in default of security instrument [*see § 25C.15[8]*].

8. Ascertain whether security instrument contains or is to contain subordination clause [*see § 25C.15[2]*].

9. Determine whether Subdivision Map Act [*Gov. Code § 66410 et seq.*] and applicable local subdivision ordinance require final map or parcel map.

NOTE:

The definition of "subdivision" set forth in the Act includes a partial release from a blanket encumbrance [***see*** *58 Ops. Cal. Atty. Gen. 408, 412 (1975)* ; ***see also*** *§ 25C.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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B. Preliminary Determinations

10-25C California Legal Forms--Transaction Guide § 25C.112

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.112 Substitution of Trustee

1. Determine whether substitution will be effected:

a. Pursuant to either of the following statutory methods:
(1) Recordation of substitution instrument executed and acknowledged by all beneficiaries under trust deed [*see Civ. Code § 2934a(a)(1)(A)*; *see also § 25C.230[2]*].

(2) Recordation of the following [*see Civ. Code § 2934a(a)(1)(B)*]:
(a) Substitution instrument [*see § 25C.230[2]*] executed and acknowledged by holders of more than 50 percent of record beneficial interest of series of notes secured by same real property or of undivided interests in note secured by real property equivalent ot a series transaction ("majority interest holders"); and

(b) Separate document containing specified information regarding compliance with relevant statutory requirements and executed, under penalty of perjury, by all parties signing substitution instrument [*see § 25C.231*].

b. Pursuant to express provisions of trust deed [*see § 25C.233[2]*].

NOTE:
A substitution of trustee pursuant to the terms of a deed of trust is valid whether or not the substitution procedure conforms to the statutory methods [***see*** *Bennett v. Ukiah Fair Asso. (1936) 7 Cal. 2d 43, 44-45, 59 P.2d 805*]. However, substitution clauses commonly require essentially the same information and procedures as the statutory method described in (a)(1), above.

c. By mutual agreement between trustor and beneficiary [*see § 25C.234[2]*].

NOTE:

If the beneficiary and trustor mutually agree to a substitution of the trustee, they may effect the substitution without the trustee's consent and without regard to the requirements of the statutory methods [*Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*].

2. Determine whether either notice of default or notice of sale has been recorded against trust deed in which trustee will be replaced.

NOTE:

Special notice requirements apply when a substitution of trustee is effected before a notice of default has been recorded in a nonjudicial foreclosure proceeding or before the giving of the notice of sale [***see*** *Civ. Code § 2934a(b), (c)*; ***see also*** *§ 25C.230[1][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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10-25C California Legal Forms--Transaction Guide §§ 25C.113-25C.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25C.113[Reserved]



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C. Procedural Guide to Full Reconveyance or Discharge

10-25C California Legal Forms--Transaction Guide § 25C.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.120 Trust Deeds

1. Within 30 days after full payment of debt, have beneficiary or beneficiary's assignee deliver following to trustee, or to title company conducting escrow substituted for trustee of record [*Civ. Code § 2941(b)(1)*]:

NOTE:
A beneficiary, in accordance with the requirements and procedures of *Civ. Code § 2934a*, may substitute the title company conducting the escrow through which the obligation is satisfied for the trustee of record, in which case the title company assumes the obligation of trustee, and may collect the authorized fee [*Civ. Code § 2941(b)(7)*; ***see*** P 3, ***below***].

Additionally, in lieu of delivering the original note and deed of trust to the trustee within 30 days of loan satisfaction, a beneficiary who executes and delivers to the trustee a request for full reconveyance within 30 days of loan satisfaction may, within 120 days of loan satisfaction, deliver the original note and deed of trust either to the trustee or trustor. In that case, on satisfaction of the note and deed of trust, the note and deed of trust must be altered to indicate that the obligation is paid in full [*Civ. Code § 2941(b)(8)*].

a. Duly executed request for full reconveyance of trust deed [*see § 25C.200[2]*], specifying in reconveyance instrument one of following options for delivery of instrument [*Civ. Code § 2941(b)(1)(B)*]:

NOTE:
The recorder has no duty to validate the addresses specified in either of these options [

Civ. Code § 2941(b)(1)(B)].

(1) That recorder should deliver recorded instrument to trustor's or successor in interest's address, pursuant to *Gov. Code § 27321*, together with information on that person's last known address.

(2) That the recorder should deliver recorded instrument to trustee's address. If trustee's address is specified for delivery, trustee must mail recorded instrument to trustor or successor in interest to last known address for that party.

b. Original promissory note.

NOTE:
For these purposes, "original" may include an optically imaged reproduction when (1) the trustee is an affiliate or subsidiary of the beneficiary or the beneficiary's assignee, (2) the optical image storage media used to store the document is "nonerasable write once, read many (WORM)" optical image media that does not allow changes to the stored document, (3) the optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management, and (4) written authentication identifying the reproduction as an unaltered copy of the note or trust deed is stamped or printed on the reproduction [*Civ. Code § 2941(f)*].

c. Original trust deed [*see* P b, NOTE, *above*].

d. Any other documents that are necessary to reconvey trust deed or cause it to be reconveyed.

2. If request for reconveyance is to be delivered to trustee other than trustee named in original trust deed, confirm that instrument substituting new trustee for original trustee has been recorded in county in which property is located [*see Civ. Code § 2934a(a)*; *see also §§ 25C.140*-25C.143].

NOTE:
From the time the substitution is filed for record, the new trustee succeeds to all the powers, duties, authority, and title granted and delegated to the trustee named in the trust deed [*Civ. Code § 2934a(a)(4)*].

3. Advise trustee and beneficiary that either may do the following [*Civ. Code § 2941(e)(1)*]:

a. Charge fee to trustor (or owner of land) for all services rendered in connection with preparation, execution, or recordation of full reconveyance, including, but not limited to, document preparation and forwarding services rendered to effect full reconveyance.

b. Include demand for fee in payoff demand statement [*Civ. Code § 2941(e)(3)*; *see Civ. Code § 2943*; *see also* Ch. 25, *Real Estate Loans*].

NOTE:
This fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the trust deed [*Civ. Code § 2941(e)(1)*]. If the fee does not exceed $45, it is conclusively presumed to be

reasonable [*Civ. Code § 2941(e)(2)*].

c. Collect official fees.

4. Instruct trustee to take following steps on receipt of documents described in P 1, *above*, and of fee described in P 3, *above* (if any) [*Civ. Code § 2941(b)(1)*]:

a. Execute and acknowledge deed of full reconveyance [*see § 25C.201[2]*].

b. Record or cause to be recorded full reconveyance in office of county recorder in which deed of trust is recorded within 21 calendar days after trustee's receipt of original note, deed of trust, request for full reconveyance, fee that may be charged [*see* P 3, *above*], recorder's fees, and other items and documents necessary to reconvey deed of trust.

NOTE:

The procedures to "cause" the full reconveyance or certificate of discharge to be recorded include, but are not limited to, sending the material by certified mail with the U.S. Postal Service, or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient. The full reconveyance or certificate of discharge must be sent in recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded. The county recorder must stamp and record the full reconveyance or certificate of discharge within two business days of receipt [*Civ. Code § 2941(c)*; ***see*** *Evid. Code § 641* (properly addressed and mailed letter is presumed to be received)].

5. Instruct trustee to deliver or cause to be delivered, on written request of trustor or trustor's heirs, successors, or assignees [*see § 25C.202[2]*], original note and deed of trust [*Civ. Code § 2941(b)(1)(C)*].

NOTE:

Violation by a beneficiary or trustee (or the assignee of either) of the requirements of *Civ. Code § 2941* (discussed throughout this section) results in both civil [***see*** *Civ. Code § 2941(d)*] and criminal [***see*** *Civ. Code § 2941.5*] penalties. With regard to civil penalties, violation of these provisions makes the violator liable to the person affected by the violation for all damages that the person may sustain by reason of the violation, and also requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*]. Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded, or if a release of obligation is earlier and timely recorded, the beneficiary must refund to the trustee the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation [*Civ. Code § 2941(j)*; ***see*** *Civ. Code § 2941(b)(3)* (release of obligation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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10-25C California Legal Forms--Transaction Guide § 25C.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.121 Mortgages

1. On full payment of debt, instruct mortgagee (or assignee) to execute and acknowledge certificate of discharge [*see § 25C.203[2]*] containing [*see Civ. Code §§ 2939, 2941(a)*]:

a. Statement that mortgage has been paid, satisfied, or discharged.

b. Reference to book and page where mortgage is recorded [*see* (3), *below*].

2. Advise mortgagee of right to do the following [*see Civ. Code § 2941(e)(1)*]:

a. Charge fee to mortgagor (or owner of land) for all services rendered in connection with preparation, execution, or recordation of certificate of discharge of mortgage, including, but not limited to, document preparation and forwarding services rendered to effect discharge, and include demand for fee in payoff demand statement [*Civ. Code § 2941(e)(3)*; *see Civ. Code § 2943* (payoff demand statement); *see also* Ch. 25, *Real Estate Loans*].

NOTE:
This fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the mortgage [*Civ. Code § 2941(e)(1)*]. If the fee does not exceed $45, it is conclusively presumed to be reasonable [*Civ. Code § 2941(e)(2)*].

b. Collect official fees.

3. Have certificate of discharge recorded in office of county recorder in which mortgage is recorded [*Civ. Code §§ 2940, 2941(a)*].

4. When mortgagee named in original mortgage has foreign executor, administrator, or guardian, instruct personal representative to produce and record in office of county recorder of county in which mortgage is recorded, duly certified and authenticated copy of its letters testamentary, or of administration or of guardianship, stating that letters have not been revoked [*Civ. Code § 2939.5*].

NOTE:

For these purposes, "guardian" includes a foreign conservator, committee, or comparable fiduciary [*Civ. Code § 2939.5*].

5. Instruct mortgagee to deliver, on written request of mortgagor (or mortgagor's heirs, successors, or assignees) [*see § 25C.204[2]*], original note and mortgage to person making request [*Civ. Code § 2941(a)*].

NOTE:

For these purposes, "original" may include an optically imaged reproduction when (1) the optical image storage media used to store the document is "nonerasable write once, read many (WORM)" optical image media that does not allow changes to the stored document, (2) the optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management, and (3) written authentication identifying the reproduction as an unaltered copy of the note or mortgage is stamped or printed on the reproduction [*Civ. Code § 2941(f)*]. A violation by a mortgagee or assignee of the requirements of *Civ. Code § 2941* (discussed throughout this section) results in both civil [***see** Civ. Code § 2941(d)*] and criminal [***see** Civ. Code § 2941.5*] penalties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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10-25C California Legal Forms--Transaction Guide § 25C.122

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.122 Special Procedure for Absent or Uncooperative Mortgagee or Beneficiary

1. Notify client of necessity of filing bond and declaration to obtain reconveyance or discharge if [*Civ. Code § 2941.7*]:

a. Obligation secured by mortgage or trust deed has been fully satisfied and present mortgagee or beneficiary of record:
(1) Cannot be located after diligent search [*see* P 2, *below*]; or

(2) Refuses to execute and deliver proper certificate of discharge or request for reconveyance.

b. Specified balance, including principal and interest, remains due and mortgagor or trustor (or successor in interest of either) cannot, after diligent search [*see* P 2, *below*], locate the then mortgagee or beneficiary of record.

2. If mortgagee or beneficiary is absent, conduct "diligent search" as follows [*Civ. Code § 2941.7(d)*]:

a. Check telephone directory for city where mortgagee or beneficiary maintained last known address or place of business.

b. If mortgagee or beneficiary (or successor in interest of either) is corporation, check records of:

(1) California Secretary of State; and

(2) Secretary of state in state of incorporation if other than California.

c. If mortgagee or beneficiary is state or national bank or state or federal savings and loan association, contact regulatory authority for financial institution.

d. Give notice of recordation of declaration and bond [*see* P 5, *below*].

3. Obtain bond that [*Civ. Code § 2941.7(a)*]:

NOTE:

There is no specific statutory requirement as to how long the bond must be enforceable [***but see*** P 8(c), ***below***, for coverage of the minimum term of the bond when the present trustee of record cannot be located and is being substituted], but the Court of Appeal has held that a 60-day bond is insufficient as a matter of law to satisfy the statutory requirement that the bond protect the beneficiary's interest [*Carter v. Continental Land Title Co. (1991) 233 Cal. App. 3d 1597, 1599, 285 Cal. Rptr. 413*].

a. Is acceptable to trustee.

b. Is issued by corporation lawfully authorized to issue surety bonds in California.

c. Is in sum equal to greater of either:

(1) Two times amount of original obligation secured by mortgage or trust deed and any additional principal amounts, including advances, shown in any recorded amendment thereto; or

(2) One half of total amount computed pursuant to (1), *above*, and any accrued interest on that amount.

d. Is conditioned for payment of any sum that mortgagee or beneficiary may recover in action on secured obligation, with costs of suit and reasonable attorneys' fees.

e. Names as obligees:

(1) Mortgagee (or successor in interest); or

(2) Trustee who will execute reconveyance [*see* PP 7, 8, *below*] and beneficiary (or successor in interest).

f. Contains following information regarding trust deed or mortgage:

(1) Recording date and instrument number or book and page number.

(2) Names of original mortgagor and mortgagee or trustor and beneficiary.

(3) Amount shown as original principal sum.

(4) Recording information and new principal amount shown in any recorded amendment to instrument.

4. Prepare and have mortgagor or trustor execute (under penalty of perjury) declaration [*see § 25C.210[2]*] that states [*Civ. Code § 2941.7(b)*]:

a. That it is recorded pursuant to *Civ. Code § 2941.7*.

b. Name of original mortgagor or trustor and mortgagee or beneficiary.

c. Declarant's name and address.

d. Either:

NOTE:
If the trustee will be substituted for purposes of recording the execution of the reconveyance [***see*** *Civ. Code § 2941.7(f)*; ***see also*** P 8, ***below***], the declaration must contain a statement regarding the satisfaction of the obligation and the absence of the trustee and mortgagee or beneficiary, in lieu of the alternative statements described in this subparagraph (d) [*Civ. Code § 2941.7(f)(2)*].

(1) That obligation secured by mortgage or trust deed has been fully satisfied and that present mortgagee or beneficiary of record:
(a) Cannot be located after diligent search; or

(b) Refuses to execute and deliver proper certificate of discharge or request for reconveyance as required under *Civ. Code § 2941*; or

(2) That specified balance, including principal and interest, remains due and that mortgagor or trustor (or successor in interest of either), after diligent search, cannot locate the then mortgagee or beneficiary.

e. That declarant has mailed to persons, by method described in P 5, *below*, notice of recording declaration and bond [*see § 25C.211[2]*], which informs recipient of [*Civ. Code § 2941.7(b)(5)*]:

(1) Name and address of mortgagor or trustee, if any.

(2) Right to:

(a) Record written objection with respect to release of lien of mortgage [*see § 25C.212[2]*]; or

(b) Notify trustee in writing of any objection to reconveyance of trust deed.

f. Date any notices were mailed pursuant to (e), *above*, and names and addresses of all persons to whom mailed.

5. Prepare and mail notice described in P 4(e), *above*, by certified mail, return receipt requested, to [*Civ. Code § 2941.7(b)(5), (d)(1)*]:

a. Last address of person to whom payments under mortgage or trust deed were made.

b. Last mortgagee or beneficiary of record at address shown on instrument creating, assigning, or

conveying interest.

c. Any other address that declarant has used to correspond with or contact mortgagee or beneficiary.

6. Cause bond and declaration to be recorded in office of county recorder of county in which encumbered property is located [*Civ. Code § 2941.7*].

7. For a trust deed, instruct trustee to execute and record deed of reconveyance [*§ 25C.201[2]*] if [*Civ. Code § 2941.7(c)*; *see* P 8, *below*, for the procedure for the substitution of an absent trustee]:

a. At least 30 days have elapsed since recordation of corporate bond and declaration [*see* P 6, *above*];

b. Trustee has not received, during that 30-day period, written objection to reconveyance from beneficiary of record;

c. Trustee has been paid any usual reconveyance fees plus costs; and

d. Trustee has received demand for reconveyance [*see § 25C.213[2]*].

NOTE:

It is unclear from the language of *Civ. Code § 2941.7(c)* whether a separate demand for reconveyance is required or whether the recording of the required bond and declaration constitutes sufficient demand for the reconveyance. An attorney representing a mortgagor or trustor may elect to send a separate demand rather than making the potentially erroneous assumption that the unclear statutory language does not require such a separate demand.

The trustee has no liability to any person by reason of its execution of a reconveyance in reliance on a trustor's (or successor in interest's) substantial compliance with the applicable statute. The sole remedy of any person damaged by reason of the reconveyance is against the trustor, the affiant, or the bond [*Civ. Code § 2941.7(c)*].

8. If present trustee of record and present mortgagee or beneficiary of record cannot be located after diligent search, take following steps to substitute trustee solely for purposes of executing the reconveyance pursuant to § 2941.7 [*Civ. Code § 2941.7(f)*].

NOTE:

The substitution will not confer any duties on the substitute trustee other than those that are incidental to the execution of the reconveyance [*Civ. Code § 2941.7(f)*].

a. Add the following to the declaration to be executed by trustor [*see* P 4, *above*]:

(1) Statement that declaration is filed pursuant to *Civ. Code § 2941.7(f)*.

(2) In lieu of either statement specified in *Civ. Code § 2941.7(b)(4)* [*see* P 4(d), *above*], statement that obligation secured by trust deed has been fully satisfied and present trustee of record and present beneficiary of record cannot be located after diligent search.

b. Obtain consent of title insurance company to serve as substitute trustee.

NOTE:

The substitute trustee must be a title insurance company that agrees to accept the substitution. *Civ. Code § 2941.7(f)* does not impose a duty on a title insurance company to accept such a substitution [*Civ. Code § 2941.7(f)(3)*].

c. Obtain bond that, in addition to satisfying requirements set forth in P 3, *above*, is for a period of at least five years.

9. For mortgage, advise mortgagee that mortgage is satisfied of record when 30 days have expired following recordation of corporate bond and accompanying declaration, provided mortgagee does not record an objection to satisfaction of mortgage [*see § 25C.212[2]*] within that period [*Civ. Code § 2941.7(c)*].

NOTE:

A bona fide purchaser or encumbrancer for value takes the interest conveyed free of the mortgage, provided the bond and declaration have been properly recorded [***see*** *Civ. Code § 2941.7(a), (b)*] and the deed to the purchaser recites that no objections by the mortgagee have been recorded [*Civ. Code § 2941.7(c)*]. The attorney for a grantee under such a deed should always verify with the title company that the grantee's insured ownership interest will be free and clear of such a mortgage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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10-25C California Legal Forms--Transaction Guide §§ 25C.123-25C.129

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25C.123[Reserved]



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AUTHOR: Timothy F. O'Leary Practice Consultant

NOTE:

Unlike a full reconveyance, which is required by statute when the obligation secured by a trust deed is paid in full [*Civ. Code § 2941(b)*; ***see*** §§ 25C.120-25C.122], a partial reconveyance is neither required nor prohibited by statute. Unless a trust deed (or mortgage) contains a partial release provision, the borrower is not entitled to have any portion of the encumbered property released from the lien of the trust deed or mortgage until he or she has paid in full the obligation secured by the trust deed (or mortgage) [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 115, 92 Cal. Rptr. 851* ; *Bradbury v. Thomas (1933) 135 Cal. App. 435, 442, 27 P.2d 402* ; ***see*** *Civ. Code § 2912* (partial performance as not extinguishing lien)].

This Part D focuses exclusively on the procedure for the reconveyance of a portion of the real property subject to a trust deed and does not consider partial releases under mortgages, because (1) trust deeds are much more common than mortgages in California, and (2) there are no unique requirements governing partial releases under mortgages.



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10-25C California Legal Forms--Transaction Guide § 25C.130

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.130 Purchase Money Handling Requirements

NOTE:
The following requirements apply when a subdivision subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.* (Act); ***see*** *Bus. & Prof. Code § 11000* ("subdivision" defined)] is also subject to a blanket encumbrance [***see*** *Bus. & Prof. Code § 11013*; ***see also*** *§ 25C.111*, P 4].

1. Have lender and subdivider:

a. Enter into agreement for unconditional release of individual subdivided lots; or

NOTE:
The agreement (set forth in the "blanket encumbrance" or a supplemental agreement) must unconditionally provide that the purchaser or lessee of the lot or parcel can obtain the legal title or other applicable interest free and clear of the blanket encumbrance, on compliance with the terms and conditions of the purchase or lease [*Bus. & Prof. Code § 11013.1*]. As a practical matter, it is unlikely that the parties would reach such an agreement [***see*** *§ 25C.16[2]*].

b. Select statutory method for handling purchase monies and/or title [*see § 25C.16[3]*].

2. If statutory method is selected [*see* 1(b), *above*], monitor compliance with applicable requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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10-25C California Legal Forms--Transaction Guide § 25C.131

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.131 Request by Beneficiary

1. Confirm that trustor has:

a. Paid sum required under trust deed for partial reconveyance; and

b. Satisfied all other conditions precedent to partial reconveyance specified in trust deed.

NOTE:
A standard condition precedent to a partial reconveyance is that the trustor not be in default [***see*** *§ 25C.15[8]*]. Other conditions may include the performance of a survey for the property to be released [***see*** *§ 25C.220[2]*].

2. Have beneficiary deliver following to trustee:

a. Duly executed request for partial reconveyance [*see § 25C.223[2]*] containing:

(1) Legal description of specific property to be reconveyed.

(2) Request that trustee endorse partial reconveyance on back of original trust deed and original promissory note and return both to beneficiary.

b. Original promissory note that is secured by trust deed.

c. Original recorded copy of trust deed.

d. Other documents, if any, required by trustee for execution of deed of partial reconveyance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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10-25C California Legal Forms--Transaction Guide § 25C.132

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.132 Execution and Recording

1. Instruct trustee to execute and acknowledge deed of partial reconveyance for portion of property to be reconveyed [*see § 25C.224[2]*].

2. Pursuant to instructions contained in request for partial reconveyance [*see § 25C.223[2]*], have trustee either [*see Civ. Code § 2941*]:

a. Record deed of partial reconveyance in same county where deed of trust is recorded; or

b. Deliver deed to trustor for recordation.

3. Instruct trustee to endorse partial reconveyance on original promissory note and trust deed and to return them to beneficiary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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10-25C California Legal Forms--Transaction Guide §§ 25C.133-25C.139

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25C.133[Reserved]



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AUTHOR: Timothy F. O'Leary Practice Consultant

NOTE:

For preliminary determinations to be made before replacing a trustee under a deed of trust, see *§ 25C.112*.



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E. Procedural Guide to Substitution of Trustee

10-25C California Legal Forms--Transaction Guide § 25C.140

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.140 Alternative Statutory Methods

1. If every beneficiary (or successor in interest) agrees to substitution, take following steps:

a. Have them execute and acknowledge substitution instrument [*see § 25C.230[2]*] containing the following [*Civ. Code § 2934a(a)(1), (4)*]:

NOTE:
Such a substitution will be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 [*Civ. Code § 2934a(a)(1)(A)*].

(1) Date of recordation of trust deed.

(2) Trustor's name.

(3) Book and page or instrument number where trust deed is recorded.

(4) Name of new trustee.

b. Record substitution instrument in county in which property is located [*Civ. Code § 2934a(a)(1)(A)*].

NOTE:
With respect to multiple deeds of trust that are recorded in the same county in which the substitution is being recorded and that all have the same trustee and beneficiary or beneficiaries, a substitution may be accomplished by recording a single document complying with the requirements of *Civ. Code § 2934a*

substituting trustees for all those deeds of trust [*Civ. Code § 2934a(a)(4)*].

2. As alternative to procedure described in P 1, *above*, take following steps (if appropriate):

a. Prepare substitution instrument containing information described in P 1(a), *above*, and have it executed and acknowledged by holders of more than 50 percent of record beneficiary interest of series of notes secured by same real property or of undivided interests in note secured by real property equivalent to a series transaction ("majority interest holders") [*Civ. Code § 2934a(a)(1)(B), (4)*].

NOTE:

The notes and interests referred to above do not include any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or of any affiliate of that licensed real estate broker [*Civ. Code § 2934a(a)(1)(B)*; ***see*** *Civ. Code § 2934a(a)(3)* ("affiliate of licensed real estate broker" defined)].

b. Have parties signing substitution instrument also sign, under penalty of perjury, separate written document stating the following [*Civ. Code § 2934a(a)(2)*]:

(1) Substitution has been signed pursuant to *Civ. Code § 2934a(a)(1)(B)*.

(2) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of obligation secured by trust deed.

(3) Undersigned together hold more than 50 percent of record beneficial interest of series of notes secured by same real property or of undivided interests in note secured by real property equivalent to series transaction.

(4) Notice of substitution was sent by certified mail, postage prepaid, with return receipt requested to each holder of an interest in obligation secured by trust deed who has not joined in execution of substitution or separate document.

c. Attach separate document described in P 2(b), *above*, to substitution instrument, and record these documents in office of country recorder of each county in which real property described in trust deed is located [*Civ. Code § 2934a(a)(1)(B), (2)*].

NOTE:

Once the "separate" document is recorded, it constitutes conclusive evidence of compliance with the requirements of *Civ. Code § 2934a(a)(2)* in favor of (1) substituted trustees acting pursuant to *Civ. Code § 2934a, (2)* subsequent assignees of the obligation secured by the deed of trust and (3) subsequent bona fide purchasers or encumbrancers for value of the described real property [*Civ. Code § 2934a(a)(2)*].

A substitution may be accomplished, with respect to multiple deeds of trust that are recorded in the same county in which the substitution is being recorded and that all have the same trustee and beneficiary or beneficiaries, by recording a single substitution instrument, complying with the requirements of *Civ. Code § 2934a*, substituting trustees for all those deeds of trust [*Civ. Code § 2934a(a)(4)*].

3. Regardless of statutory method, if substitution instrument is executed, but not recorded, before or concurrently with recording of notice of default, take following steps before or concurrently with recording of substitution instrument [

Civ. Code § 2934a(b)]:

a. Have beneficiary or beneficiaries or their authorized agents mail notice of substitution by registered or certified mail, postage prepaid [*see Civ. Code § 2924b*], to all persons entitled under *Civ. Code § 2924b* to receive notice of default [*see § 25D.202[2]* (notice of default)].

NOTE:
No particular form of notice of substitution is required. Sending a copy of the substitution instrument would be effective.

b. Attach to substitution instrument, affidavit or declaration that notice has been mailed to persons and in manner required by statute [*see § 25C.232[2]*].

4. Regardless of statutory method used, if notice of default for trust deed has been recorded in nonjudicial foreclosure proceeding but notice of sale has yet to be recorded, take following steps before recordation of substitution instrument [*Civ. Code § 2934a(c)*; *see* P 5, *below*]:

a. Have beneficiary or beneficiaries or their authorized agents mail copy of substitution instrument by registered or certified mail, postage prepaid [*see Civ. Code § 2924b*], to current trustee and to all persons entitled under *Civ. Code § 2924b* to receive notice of default [*see § 25D.202[2]* (notice of default)].

b. Attach to substitution instrument, affidavit or declaration that copy has been mailed to persons and in manner required by statute [*see § 25C.232[2]*].

5. Regardless of statutory method used, if substitution is recorded after notice of sale has been given in nonjudicial foreclosure proceeding, give new notice of sale pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*; *see § 25D.206[2]* (notice of sale)].

NOTE:
If a new notice of sale is not given, any sale conducted by the new trustee will be void [*Civ. Code § 2934a(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART III. TRANSACTION GUIDE
E. Procedural Guide to Substitution of Trustee

10-25C California Legal Forms--Transaction Guide § 25C.141

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.141 Nonstatutory Method Pursuant to Trust Deed Provision

NOTE:
A substitution of trustee pursuant to a substitution clause contained in a trust deed is valid whether or not it conforms to the requirements of the statutory methods [*U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 83-85, 116 Cal. Rptr. 44*].

1. Review trust deed for requirements for substitution of trustee.

2. Have party required by trust deed (usually beneficiary) execute and acknowledge substitution instrument containing information required by trust deed [*see § 25C.233[2]*; *see also U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 83-85, 116 Cal. Rptr. 44*], specifically:

NOTE:
Standard deeds of trust typically require the inclusion of the following information in substitution instruments.

a. Names of original trustor, trustee, and beneficiary.

b. Name and address of new trustee.

c. County (and book and page) where deed of trust is recorded.

3. If notice of default for trust deed has been recorded in nonjudicial foreclosure proceeding but notice of sale has yet to be recorded, consider providing notice of substitution in manner required by statute [*see*

Civ. Code § 2934a(c); *see also § 25C.140*, P 4] before recording the following:

NOTE:
Although the notice requirements of *Civ. Code § 2934a(c)* apply only to the statutory methods of substitution, it is recommended that they be followed for a nonstatutory substitution as well.

a. Notice of sale; and

b. Substitution instrument.

4. Record substitution in location specified by trust deed, which is generally every county in which any portion of real property is located.

5. If substitution is recorded after notice of sale has been given in nonjudicial foreclosure proceeding, give new notice of sale pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*; *see § 25D.206[2]* (notice of sale)].

NOTE:
If a new notice of sale is not given under these circumstances, any sale conducted by the new trustee will be void [*Civ. Code § 2934a(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording Acts



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E. Procedural Guide to Substitution of Trustee

10-25C California Legal Forms--Transaction Guide § 25C.142

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.142 Nonstatutory Substitution by Mutual Agreement

NOTE:
The joint execution, acknowledgment, and recordation of an instrument of substitution by the trustor and beneficiary is valid without regard to the requirements of the statutory methods of substitution described in *§ 25C.140* [***see*** *Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*].

1. Have trustor and beneficiary jointly execute and acknowledge substitution agreement [*see § 25C.234[2]*] containing [*see Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*]:

a. Names of original trustor, trustee, and beneficiary.

b. Name and address of new trustee.

c. County (and book and page) where trust deed is recorded.

d. Other provisions agreed on by trustor and beneficiary, if any.

2. If notice of default for trust deed has been recorded in nonjudicial foreclosure proceeding but notice of sale has yet to be recorded, consider providing notice of substitution in manner required by statute [*see Civ. Code § 2934a(c)*; *see also § 25C.140*, P 4] before recording following:

NOTE:
Although the notice requirements of *Civ. Code § 2934a(b)* apply only to the statutory methods of

substitution, it is recommended that they be followed for a nonstatutory substitution as well.

a. Notice of sale; and

b. Substitution instrument.

3. Record substitution [*see § 25C.234[2]*] in every county in which any portion of real property is located.

4. If substitution is recorded after notice of sale has been given in nonjudicial foreclosure proceeding, give new notice of sale pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*]; *see § 25D.206[2]* (notice of sale)].

NOTE:

If a new notice of sale is not given under the circumstances named above, any sale conducted by the new trustee will be void [*Civ. Code § 2934a(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Procedural Guide to Substitution of Trustee

10-25C California Legal Forms--Transaction Guide §§ 25C.143-25C.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25C.143[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide § 25C.200

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.200 Request by Beneficiary for Full Reconveyance

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by a beneficiary under a deed of trust that the trustee execute a full reconveyance of title to the property subject to the trust deed. Within 30 days following satisfaction of the obligation secured by a trust deed, the beneficiary or the beneficiary's assignee must execute and deliver to the trustee a request for reconveyance (this form), the original promissory note, and the original trust deed [*see Civ. Code § 2941(b)(1)*; *see also* [d], *below* (such a reproduction may be used in lieu of the original note or trust deed under certain circumstances)]. The beneficiary or assignee should also deliver to the trustee any other evidences of the debt secured by the trust deed and any other documents that are necessary to reconvey, or cause to be reconveyed, the deed of trust [*Civ. Code § 2941(b)(1)*].

The legal effect of a reconveyance is to clear the title of record; the trust deed itself terminates and title automatically revests in the trustor when the underlying obligation is satisfied [*Snider v. Basinger (1976) 61 Cal. App. 3d 819, 823, 132 Cal. Rptr. 637* ; *see § 25C.10*]. However, the request for reconveyance and the other reconveyance documents typically do not mention record title or the vesting of title. Instead, they simply provide for the reconveyance of the estate held by the trustee under the trust deed.

[b] Contents of Request

The request for reconveyance should authorize the trustee to reconvey without warranty to the trustor the estate held by the trustee under the trust deed and to either record the deed of full reconveyance [*see § 25C.201*] or deliver it to a designated escrow for recording [*see Civ. Code § 2941(b), (c)*; *see also § 25C.201[1][b]*].

After the trustee has recorded the deed of full reconveyance or delivered it to the appropriate escrow, the trustee must deliver, or cause to be delivered, on the written request of the trustor or the trustor's heirs, successors, or assignees, the original note and trust deed to the person making the request [*Civ. Code § 2941(b)(1)(C)*; *see § 25C.202[2]*; *see also* [d], *below*]. Although a technical reading of this requirement indicates that a separate request for delivery is necessary, the delivery request is often included (as in this form) in the beneficiary's request to the trustee for full reconveyance.

The request for reconveyance should also include any language or statements specified in the trust deed as prerequisite to a reconveyance of the trust deed by the trustee.

[c] Fees for Full Reconveyance

The trustee or beneficiary may charge a reasonable fee to the trustor (or the owner of the land) for all services rendered in connection with the preparation, execution, or recordation of a request for full reconveyance, including, but not limited to, document preparation and forwarding services rendered to effect the full reconveyance, and, in addition, may collect official fees [*Civ. Code § 2941(e)(1)*]. The trustee or beneficiary's fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the trust deed [*Civ. Code § 2941(e)(1)*]. If the fee does not exceed $45, it is conclusively presumed to be reasonable [*Civ. Code § 2941(e)(2)*]. The fee may not be charged unless demand for the fee was included in the payoff demand statement [*Civ. Code § 2941(e)(3)*; *see Civ. Code § 2943* (payoff demand statement); *see also* Ch. 25, *Real Estate Loans*].

[d] Optically Imaged Reproductions

As mentioned above, *Civ. Code § 2941* imposes requirements governing the handling and return of the original note and trust deed. For these purposes, "original" may include an optically imaged reproduction when (1) the trustee is an affiliate or subsidiary of the beneficiary or the beneficiary's assignee, (2) the optical image storage media used to store the document is "nonerasable write once, read many (WORM)" optical image media that does not allow changes to the stored document, (3) the optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management, and (4) written authentication identifying the reproduction as an unaltered copy of the note or trust deed is stamped or printed on the reproduction [*Civ. Code § 2941(f)*].

[e] Civil and Criminal Penalties

A beneficiary or the assignee of a beneficiary who fails to execute and deliver to the trustee the original note, trust deed, and request for a full reconveyance when the obligation secured by the trust deed has been satisfied is subject to both civil [*see Civ. Code § 2941(d)*] and criminal [*see Civ. Code § 2941.5*] penalties. With regard to civil penalties, violation of these provisions makes the violator liable to the person affected by the violation for all damages that the person may sustain by reason of the violation, and also requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*]. Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded, or if a release of obligation is earlier and timely recorded, the beneficiary must refund to the trustee the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation [*Civ. Code § 2941(j)*; *see Civ. Code § 2941(b)(3)* (release of obligation)].

[f] Deed of Full Reconveyance

For discussion of a trustee's obligation to record a deed of full reconveyance on receipt from the beneficiary of a request for reconveyance, see *§ 25C.201[1]*.

[2] Form

Request by Beneficiary for Full Reconveyance

REQUEST FOR RECONVEYANCE

TO: _____[*name of trustee*]
_____[*address*]
_____[*city, state, zip*]

The undersigned, as holder and legal owner of a promissory note in the amount of $_____, secured by a Deed of Trust (hereafter referred to as "the Deed of Trust") dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereby states that all sums secured by the Deed of Trust have been paid in full [*or* shall be paid in full through an escrow to be consummated through _____ (*name of escrow company*)], and requests and authorizes you to do the following:

(1) On payment to you of any sums owing to you under the terms of the Deed of Trust, to cancel the Deed of Trust, the promissory note secured by the Deed of Trust, and any and all other evidences of indebtedness secured by the Deed of Trust, all of which are delivered to you along with this Request for Reconveyance;

(2) To reconvey, without warranty, to the person or persons legally entitled thereto, the estate now held by you thereunder in the property described in the Deed of Trust and to record the reconveyance in the Official Records of _____ County, California [*or* and to deliver the reconveyance to _____[(*name of escrow company*)] at _____[(*address*)], _____[(*city, state, zip*)] for recording]; and

(3) To deliver the above promissory note and Deed of Trust, and other evidences of indebtedness secured by the Deed of Trust, to _____[*name of trustor or of escrow company*] at _____[*street address, city, state, zip*].
Dated: _____.

_____ [*signature of beneficiary*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide § 25C.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.201 Deed of Full Reconveyance

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed of reconveyance that may be used by a trustee under a deed of trust to reconvey the trust deed and title to the trustor. A trustee must execute a deed of reconveyance following the trustee's receipt of a request for full reconveyance from the beneficiary or assignee of the beneficiary [*Civ. Code § 2941(b)(1)*; *see § 25C.200*] or after the trustor has, because of the beneficiary's absence or lack of cooperation, satisfied the reconveyance requirements of *Civ. Code § 2941.7* [*see § 25C.200[1]*].

The trustee must deliver a copy of the reconveyance to the beneficiary, its successor in interest, or its servicing agent, if known [*Civ. Code § 2941(b)(1)(B)*]. The reconveyance instrument must specify one of the following options for delivery of the instrument; the recorder has no duty to validate the addresses given with either option [*Civ. Code § 2941(b)(1)(B)*]:

- That the recorder should deliver the recorded instrument pursuant to *Gov. Code § 27321* to the trustor or successor in interest, at that person's last known address as stated.

- That the recorder should deliver the recorded instrument to the trustee's address, in which case the trustee must mail the recorded instrument to the trustor or the successor in interest to the last known address for that party.

[b] Recording

After execution of a full reconveyance by a trustee under a trust deed, the trustee must record or cause to be recorded

the full reconveyance in the office of the county recorder in which the trust deed is recorded within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for full reconveyance, the fee that may be charged, recorder's fees, and other documents necessary to reconvey the deed of trust [*Civ. Code § 2941(b)(1)(A)*]. The procedures to "cause" the full reconveyance or certificate of discharge to be recorded include, but are not limited to, sending the material by certified mail with the U.S. Postal Service, or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient. The full reconveyance or certificate of discharge must be sent in recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded. The county recorder must stamp and record the full reconveyance or certificate of discharge within two business days of receipt [*Civ. Code § 2941(c)*; *see Evid. Code § 641* (properly addressed and mailed letter is presumed to be received)]. Failure to record the full reconveyance properly subjects the trustee to both civil [*see Civ. Code § 2941(d)*] and criminal [*see Civ. Code § 2941.5*] penalties. With regard to civil penalties, violation of these provisions makes the violator liable to the person affected by the violation for all damages that the person may sustain by reason of the violation, and also requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*]. Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded, or if a release of obligation is earlier and timely recorded, the beneficiary must refund to the trustee the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation [*Civ. Code § 2941(j)*; *see Civ. Code § 2941(b)(3)* (release of obligation)].

[c] Fees for Recordation of Full Reconveyance

The trustee may charge a fee to the trustor for all services rendered in connection with the preparation, execution, or recordation of a full reconveyance, including, but not limited to, document preparation and forwarding services rendered to effect the full reconveyance [*Civ. Code § 2941(e)(1)*]. This fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the trust deed [*Civ. Code § 2941(e)(1)*]. If the fee does not exceed $45, it is conclusively presumed to be reasonable [*Civ. Code § 2941(e)(2)*]. The fee may not be charged unless demand for the fee was included in the payoff demand statement [*Civ. Code § 2941(e)(3)*; *see Civ. Code § 2943* (payoff demand statement); *see also* Ch. 25, *Real Estate Loans*].

[2] Form

DEED OF RECONVEYANCE

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

DEED OF RECONVEYANCE

Pursuant to the written request of the Beneficiary of that Deed of Trust dated _____, executed by

_____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, the undersigned, as the present Trustee of Record of that Deed of Trust does hereby grant and reconvey to the person or persons legally entitled thereto, without warranty, all of the estate and interest derived to the Trustee in and to the following property described in the Deed of Trust:

[*Insert legal description*]

The Trustor is the person to whom the Recorder of _____ County, California, shall deliver the recorded instrument pursuant to the requirements of *Government Code Section 27231*.
Dated: _____.

_____ [*signature of trustee*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide § 25C.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.202 Trustor's Request for Delivery of Promissory Note and Deed of Trust

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by the trustor under a deed of trust that the trustee deliver the original promissory note and trust deed to the trustor. After receiving the original note and trust deed and a request for reconveyance from the beneficiary or beneficiary's assignee [*see § 25C.200[1][a]*] and recording a deed of reconveyance [*see § 25C.201[2]*], the trustee must then deliver, or cause to be delivered, on the written request of the trustor or the trustor's heirs, successors, or assignees, the original note and trust deed to the person making the request [*Civ. Code § 2941(b)(1)(C)*].

As a practical matter, a separate request by the trustor for delivery of the promissory note and trust deed may not be necessary if, as is common practice, the beneficiary's request to the trustee for reconveyance [*see § 25C.200[2]*] instructs the trustee to directly (or through escrow) deliver the note and trust deed to the trustor (or escrow acting on behalf of the trustor).

[b] Optically Imaged Reproductions

The trustee is required to deliver to the trustor the original promissory note and trust deed. For these purposes, "original" may include an optically imaged reproduction when (1) the trustee is an affiliate or subsidiary of the beneficiary or the beneficiary's assignee, (2) the optical image storage media used to store the document is "nonerasable write once, read many (WORM)" optical image media that does not allow changes to the stored document, (3) the optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management, and (4) written authentication identifying the reproduction as an unaltered copy of the note or trust deed is stamped or printed on the reproduction [*Civ. Code §*

2941(f)].

[c] Civil and Criminal Penalties

Violation by a trustee of any of the requirements of *Civ. Code § 2941*, including failure to comply with this type of written request for delivery of the original note and trust deed, subjects the trustee to both civil [*see Civ. Code § 2941(d)*] and criminal [*see Civ. Code § 2941.5*] penalties. With regard to civil penalties, violation of these provisions makes the violator liable to the person affected by the violation for all damages that the person may sustain by reason of the violation, and also requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*]. Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded, or if a release of obligation is earlier and timely recorded, the beneficiary must refund to the trustee the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation [*Civ. Code § 2941(j)*; *see Civ. Code § 2941(b)(3)* (release of obligation)].

[2] Form

Request for Delivery of Promissory Note and Deed of Trust

REQUEST FOR DELIVERY OF PROMISSORY NOTE AND DEED OF TRUST

TO: _____[*name of trustee*]
_____[*address*]
_____[*city, state, zip*]

Pursuant to *California Civil Code Section 2941(b)*, the undersigned hereby requests that you deliver to _____[him *or* her] at the address indicated below, the following:

(1) That Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California, which has been fully satisfied and for which you are required by law to execute and record or cause to be recorded a deed of full reconveyance.

(2) The promissory note secured by the above Deed of Trust, dated _____, in the principal amount of $_____[*dollar amount*].

[*Add if applicable:*]

(3) _____[*List all other evidences of indebtedness secured by trust deed and any other documents to be delivered to trustor*].

[*Continue with following:*]

Dated: _____.

_____ [*signature of trustor*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide § 25C.203

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.203 Certificate of Discharge of Mortgage

[1] Comment

[a] Use of Form

The form in [2], *below*, is a certificate of discharge of a mortgage. A mortgagee or mortgagee's assignee must execute, acknowledge, and record such a certificate following the satisfaction of the mortgage [*Civ. Code §§ 2939, 2941(a)*]. The certificate must state that the mortgage has been paid, satisfied, or discharged, and must refer to the book and page where the mortgage is recorded. Further, the certificate must be signed by the mortgagee or the mortgagee's personal representatives or assigns, and acknowledged or proved and certified [*Civ. Code § 2939*]. This form provides for the inclusion of an acknowledgment [*see Civ. Code § 1180 et seq.*; for coverage of acknowledgments, see Ch. 27, *Deeds and Recording*].

[b] Recording

An executed certificate of discharge must be recorded in the office of the recorder for the county in which the mortgage is recorded [*Civ. Code §§ 2940, 2941(a)*]. The procedures to "cause" the full reconveyance or certificate of discharge to be recorded include, but are not limited to, sending the material by certified mail with the U.S. Postal Service, or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient. The full reconveyance or certificate of discharge must be sent in recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded. The county recorder must stamp and record the full reconveyance or certificate of discharge within two business days of receipt [*Civ. Code § 2941(c)*; *see Evid. Code § 641* (properly addressed and mailed letter is presumed to be received)].

[c] Authorized Fees

The mortgagee may charge a fee to the mortgagor for all services rendered in connection with the recordation of the certificate of discharge, including, but not limited to, document preparation and forwarding services rendered to effect the discharge, and, in addition, may collect official fees [*see Civ. Code § 2941(e)(1)*]. The fee may not be charged unless demand for the fee was included in the payoff demand statement [*Civ. Code § 2941(e)(3)*; *see Civ. Code § 2943* (payoff demand statement); *see also* Ch. 25, *Real Estate Loans*]. The mortgagee's fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the mortgage [*Civ. Code § 2941(e)(1)*]. If this fee does not exceed $45, it is conclusively presumed to be reasonable [*Civ. Code § 2941(e)(2)*].

[d] Civil and Criminal Penalties

Failure by the mortgagee or his or her assignee to properly execute and record a certificate of discharge after the mortgage has been satisfied subjects the mortgagee (or assignee) to both civil [*see Civ. Code § 2941(d)*] and criminal [*see Civ. Code § 2941.5*] penalties. With regard to civil penalties, violation of these provisions makes the violator liable to the person affected by the violation for all damages that the person may sustain by reason of the violation, and also requires that the violator forfeit $500 to the affected person [*Civ. Code § 2941(d)*]. Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded, or if a release of obligation is earlier and timely recorded, the beneficiary must refund to the trustee the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation [*Civ. Code § 2941(j)*; *see Civ. Code § 2941(b)(3)* (release of obligation)].

[2] Form

CERTIFICATE OF DISCHARGE OF MORTGAGE

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

CERTIFICATE OF DISCHARGE OF MORTGAGE

The undersigned hereby certifies that the mortgage dated _____, executed by _____[*name of mortgagor*] as Mortgagor to _____[*name of mortgagee*] as Mortgagee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, has been fully paid, satisfied, and discharged, and that the _____

[*Select the appropriate provision below*]

[*If document is to include property description:*] following property described in and secured by the mortgage has been released from the lien created by the mortgage: _____[*insert legal description*].

[*Or, if property is to be described in an exhibit:*] property that is secured by the mortgage and described in Exhibit A, which is attached to this certificate of discharge and hereby incorporated by reference, has been released from the lien created by the mortgage.
Dated: _____.

_____ [*signature of mortgagee*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide § 25C.204

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.204 Mortgagor's Request for Delivery of Promissory Note and Mortgage

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by a mortgagor (or successor in interest) that the mortgagee deliver the original promissory note and mortgage instrument to the requester following the discharge of the mortgage [*see Civ. Code § 2941(a)*]. A recorded mortgage is discharged by the recordation of a certificate of discharge stating that the mortgage has been paid, satisfied, or discharged [*Civ. Code §§ 2939, 2940, 2941*; *see § 25C.203[2]*]. After the recordation of the certificate of discharge, the mortgagee, on the written request of the mortgagor or the mortgagor's heirs, successors, or assignees, as the case may be, must then deliver the original note and mortgage to the person making the request [*see Civ. Code § 2941(a)*; *see also* [b], *below*].

For further discussion of the requirements relating to a certificate of discharge, see *§ 25C.203[1]*.

[b] Optically Imaged Reproduction

Civ. Code § 2941 requires (in part) that the mortgagee deliver the original note and mortgage to the mortgagor or other requestor. For these purposes, "original" may include an optically imaged reproduction when (1) the optical image storage media used to store the document is "nonerasable write once, read many (WORM)" optical image media that does not allow changes to the stored document, (2) the optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management, and (3) written authentication identifying the reproduction as an unaltered copy of the note or trust deed is stamped or printed on the reproduction [*Civ. Code § 2941(f)*].

[2] Form

Request for Delivery of Promissory Note and Mortgage

REQUEST FOR DELIVERY OF PROMISSORY NOTE AND MORTGAGE

TO: _____[*name of mortgagee*]
_____[*address*]
_____[*city, state, zip*]

Pursuant to *California Civil Code Section 2941(a)*, the undersigned hereby requests that you deliver to _____[him *or* her] at the address indicated below, the following:

(1) The mortgage dated _____, executed by _____[*name*] as Mortgagor to _____[*name*] as Mortgagee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California, which has been fully paid and satisfied and for which you are required by law to execute, acknowledge, and record or cause to be recorded a certificate of discharge stating that the mortgage has been paid, satisfied, or discharged.

(2) The promissory note secured by the above mortgage, dated _____, in the principal amount of $_____.

(3) _____[*list all other evidences of indebtedness secured by mortgage and any other documents to be delivered to mortgagor*].
Dated: _____.

_____ [*signature of mortgagor*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
1. Standard Procedure

10-25C California Legal Forms--Transaction Guide §§ 25C.205-25C.209

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25C.205[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
2. Statutory Bond and Declaration Procedure

10-25C California Legal Forms--Transaction Guide § 25C.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.210 Declaration for Release of Lien [Civ. Code § 2941.7]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration that may be used by a trustor or mortgagor, in conjunction with a bond required by statute, to effect a reconveyance of a trust deed or a discharge of a mortgage when the beneficiary or mortgagee cannot be located or is uncooperative. Specifically, this type of declaration must be used when:

- The obligation secured by a mortgage or trust deed has been fully satisfied and the present mortgagee or beneficiary of record cannot be located after diligent search [*see Civ. Code § 2941.7(d)* ("diligent search" defined); *see also § 25C.122*, P 2];

- The secured obligation has been fully satisfied and the present mortgagee or beneficiary of record refuses to execute and deliver a proper certificate of discharge or request for reconveyance; or

- A specified balance, including principal and interest, remains due and the mortgagor or trustor (or the mortgagor's or trustor's successor in interest) cannot, after diligent search, locate the then mortgagee or beneficiary of record.

Under these circumstances, the lien of the mortgage or trust deed is released when the mortgagor or trustor (or successor in interest of either) records or causes to be recorded, in the office of the county recorder of the county in which the encumbered property is located, a corporate bond accompanied by a declaration (this form) [*see Civ. Code § 2941.7(b)*], and with respect to a trust deed, a reconveyance [*Civ. Code § 2941.7*]. The mortgagor or trustor must sign the declaration under penalty of perjury [*Civ. Code § 2941.7(b)*].

For a step-by-step guide to the above procedure, see *§ 25C.122*.

[b] Nonexclusive Statutory Procedure

The special statutory procedure outlined in *Civ. Code § 2941.7* and discussed in this comment is not an exclusive procedure for the issuance of reconveyances and the issuance of bonds and declarations to release the lien of a mortgage and does not affect any other procedures, statutory or otherwise, for the issuance of reconveyances and the issuance of bonds and declarations to release the lien of a mortgage [*Civ. Code § 2941.7(e)*].

[c] Required Contents of Declaration

The declaration accompanying the corporate bond recorded by the mortgagor or trustor (or successor in interest of either) must state [*Civ. Code § 2941.7(b)*]:

- That it is recorded pursuant to *Civ. Code § 2941.7*.
- The name of the original mortgagor or trustor and mortgagee or beneficiary.
- The name and address of the person making the declaration.
- Unless the declaration contains the statement described in the next item below, that the obligation secured by the mortgage or trust deed has been fully satisfied and the current mortgagee or beneficiary of record cannot be located after diligent search, or refuses to execute and deliver a proper certificate of discharge or request for reconveyance as required under *Civ. Code § 2941*.
- Unless the declaration contains the statement described in the item above, that a specified balance, including principal and interest, remains due and the mortgagor or trustor (or successor in interest of either) cannot, after diligent search, locate the then mortgagee or beneficiary.
- That the declarant has mailed a notice of recording of the declaration and bond [*see § 25C.211*] to the last address of the person to whom payments under the mortgage or trust deed were made and to the last mortgagee or beneficiary of record at the address for the mortgagee or beneficiary shown on the instrument creating, assigning, or conveying the interest, and at any other address that the declarant has used to correspond with or contact the mortgagee or beneficiary [*see Civ. Code § 2941.7(d)(1)*], the date of mailing, and the name and address of each person to whom the notice was mailed.

For additional and alternative contents that must be included in the declaration when the present trustee of record cannot be located and is being substituted, see [e], *below*.

[d] Corporate Bond

The bond must be acceptable to the trustee and must comply with statutory requirements [*see Civ. Code § 2941.7(b)*]. For a discussion of these requirements, which prescribe, among other things, the minimum amount of the bond, see *§ 25C.122*, P 3.

[e] Substitution of Absent Trustee of Record

[i] Requirements for Substitution

If the present trustee of record and the present mortgagee or the beneficiary of record cannot be located after diligent search [*see Civ. Code § 2941.7(d)*], the trustor or the trustor's successor-in-interest may substitute the trustee without

conferring any duties on the substitute trustee other than those that are incidental to the execution of a reconveyance pursuant to *Civ. Code § 2941.7*. The substitute trustee must be a title insurance company that agrees to accept the substitution; a title insurance company has no duty to accept the substitution. Further, both of the following additional requirements must be met [*Civ. Code § 2941.7(f)*]:

- The declaration must state that it is filed pursuant to *Civ. Code § 2941.7(f)* and contain, in lieu of one of the alternative statements described in *Civ. Code § 2941.7(b)(4)* [*see* the fourth and fifth items under [c], *above*], a statement indicating that the obligation secured by the trust deed has been fully satisfied and the present trustee of record and present beneficiary of record cannot be located after diligent search.

- The corporate bond must be for a period of five or more years.

[ii] Effect of Recording Bond and Declaration

After the expiration of 30 days following the recording of the corporate bond and accompanying declaration, delivery to the trustee of the usual reconveyance fees plus costs, and a demand for reconveyance [*see § 25C.213[2]*], the trustee must execute and record, or otherwise deliver as provided in *Civ. Code § 2941* [*see § 25C.202[1]*], a reconveyance in the same form as if the beneficiary had delivered to the trustee a proper request for reconveyance, provided that the trustee has not received a written objection to the reconveyance from the beneficiary of record. A trustee is not liable to any person by reason of its execution of are conveyance in reliance on a trustor's (or successor in interest's) substantial compliance with *Civ. Code § 2941.7*. The sole remedy of any person damaged by reason of the conveyance is against the trustor, the affiant, or the bond [*Civ. Code § 2941.7(c)*].

A mortgage is satisfied of record when 30 days have expired following recordation of the corporate bond and the accompanying declaration, provided the mortgagee has not recorded an objection to satisfaction [*see § 25C.212[2]*] within that period. A bona fide purchaser or encumbrancer for value takes the interest conveyed free of the mortgage, provided (1) the requirements of *Civ. Code § 2941.7* (discussed throughout this comment) have been satisfied and (2) the deed to the purchaser recites that no objections by the mortgagee have been recorded [*Civ. Code § 2941.7(c)*].

[2] Form

Declaration for Release of Lien

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

DECLARATION FOR RELEASE OF LIEN

I, _____[*name*], the [successor in interest of the] Trustor [*or* Mortgagor] of that Deed of Trust [*or* Mortgage] dated _____, executed by _____[name *or* me] as Trustor [*or* Mortgagor],

in which _____[*name*] is named as Beneficiary [*or* Mortgagee] [*add if security instrument is a trust deed:* and_____ (*name*) as Trustee], and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereby declare:

1. This declaration is recorded pursuant to *California Civil Code Section 2941.7*.

2. My address is _____[*street address, city, state, zip*].

[*EITHER*]

3. The obligation of the above Deed of Trust [*or* Mortgage] has been fully satisfied, and the present Beneficiary [*or* Mortgagee] of record _____[cannot be located after diligent search *or* refuses to execute and deliver a proper request for reconveyance (*or* certificate of discharge) as required under *Civil Code Section 2941*].

[*OR*]

3. The sum of $_____, which is the balance, including principal and interest, under the above Deed of Trust [*or* Mortgage], remains due, and I cannot, after diligent search, locate the Beneficiary [*or* Mortgagee].

[*OR*]

3. This declaration is being filed pursuant to *Civ. Code § 2941.7(f)* because (1) the obligation of the above Deed of Trust has been fully satisfied, and (2) the present Trustee of record and present Beneficiary of record cannot be located after a diligent search.

[*Continue with following:*]

4. On _____[*date*], I mailed by certified mail, return receipt requested, a notice of recording this declaration and the required bond under *California Civil Code Section 2941.7* and informing the recipients of the name and address of the Trustee [*or* Mortgagor], and of the right to notify the Trustee in writing of any objection to the reconveyance of the above Deed of Trust [*or* to record a written objection with respect to the release of the lien of the above Mortgage], to the following persons and addresses:

(a) _____ [*name*], who is the person to whom payments under the above Deed of Trust [*or* Mortgage] were made, at _____ [*street address, city, state, zip*], which is the last known address of that person.

(b) _____ [*name*], who is the last Beneficiary [*or* Mortgagee] of record, at _____ [*street address, city, state, zip*], which is the address of the Beneficiary [*or* Mortgagee] shown on _____ [*detailed description of instrument creating, assigning, or conveying interest*] [*add if applicable* (*see Civ. Code § 2941.7(b)(5), (d)(1)*, and at _____ (*street address, city, state, zip*), which is an address I have previously used to correspond with or contact the foregoing Beneficiary (*or* Mortgagee)].

I declare under penalty of perjury under the laws of the State of California that the foregoing Declaration is true and correct.

Executed on _____[*date*], at _____[*city*], California.

_____ [*signature of declarant*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
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A. Full Reconveyance and Discharge
2. Statutory Bond and Declaration Procedure

10-25C California Legal Forms--Transaction Guide § 25C.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.211 Notice of Recording Bond and Declaration Pursuant to Civ. Code § 2941.7

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of the recordation of a bond and declaration which may be used in connection with the execution of a reconveyance of a trust deed or the discharge of a mortgage when the beneficiary or mortgagee is absent or uncooperative [*see Civ. Code § 2941.7*]. The mailing of such a notice is one of the steps that must be taken by the trustor or mortgagor (or successor in interest of either) under those circumstances [*see Civ. Code § 2941.7(b)(5), (d)(1)*]. For a detailed discussion of the relevant procedure, see *§ 25C.210[1]*.

[b] Required Contents

The notice of recordation must inform the recipient of the name and address of the mortgagor or trustee, if any, and of either (1) the right (in the case of a mortgage) to record a written objection with respect to the release of the lien of the mortgage [*see § 25C.212[2]*], or (2) the right (in the case of a trust deed) to notify the trustee in writing of any objection to the reconveyance of the trust deed [*Civ. Code § 2941.7(b)(5)*].

[c] Mailing of Notice

The notice must be mailed by certified mail, return receipt requested to [*Civ. Code § 2941.7(b)(5), (d)(1)*]:

- The last address of the person to whom payments under the mortgage or trust deed were made.

- The last mortgagee or beneficiary of record at the address for the mortgagee or beneficiary shown on the instrument creating, assigning, or conveying the interest.

- Any other address that the declarant has used to correspond with or contact the mortgagee or beneficiary.

The related declaration [*see § 25C.210[2]*] must state the date the notices were mailed and the names and addresses of all persons to whom mailed [*Civ. Code § 2941.7(b)(5)*].

[2] Form

Notice of Recording Bond and Declaration Pursuant to Civil Code Section 2941.7

NOTICE OF RECORDING BOND AND DECLARATION PURSUANT TO CIVIL CODE SECTION 2941.7

TO: _____[*name of beneficiary or mortgagee or person to whom payments were mailed*]
_____[*street address*]
_____[*city, state, zip*]

This notice pertains to that Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor [*or* Mortgagor], in which _____[*name*] is named as Beneficiary [*or* Mortgagee] [*add if security instrument is trust deed:* and _____ (*name*) as Trustee], and recorded _____[*date*] as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

You are hereby notified by the undersigned, the [successor in interest of the] Trustor [*or* Mortgagor] of the above Deed of Trust [*or* Mortgage], that a bond and declaration shall be recorded by the undersigned in the Official Records of _____ County, California, in order to release the lien of the above Deed of Trust [*or* Mortgage] pursuant to *California Civil Code Section 2941.7*.

[*EITHER*]

You have the right to record a written objection with respect to the release of the lien of the Mortgage.

[*OR*]

You have the right to notify the Trustee in writing of any objection to the reconveyance of the Deed of Trust. The name and address of the Trustee are: _____.

[*Continue with following:*]

The address of the undersigned is: _____.
Dated: _____.

_____ [*signature of mortgagor, trustor, or successor in interest*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Statutory Bond and Declaration Procedure

10-25C California Legal Forms--Transaction Guide § 25C.212

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.212 Objection to Satisfaction of Record of Mortgage

[1] Comment

[a] Use of Form

The form in [2], *below*, is an objection by a mortgagee to the satisfaction of record of a mortgage sought by a mortgagor under *Civ. Code § 2941.7*. That statute permits a mortgagor to have a mortgage satisfied of record when the mortgagee is absent or uncooperative. For discussion of this procedure, see *§ 25C.210[1]*.

This form may be modified for use as an objection by a trustee to the reconveyance of a trust deed under *Civ. Code § 2941.7* [*see* [c], *below*].

[b] Recordation

The mortgagee's objection must be recorded in the office of the county recorder of the county in which the encumbered property is located [*see Civ. Code § 2941.7*] within 30 days of the date the mortgagor records a bond and declaration pursuant to *Civ. Code § 2941.7* [*Civ. Code § 2941.7(c)*; *see § 25C.210[2]* (declaration)]. If the mortgagee does not record an objection within that period, the mortgage is satisfied of record when 30 days have expired following the mortgagor's recordation of the required bond and accompanying declaration [*Civ. Code § 2941.7(c)*].

[c] Objection to Reconveyance

A trustee, within the 30-day period following the recordation of a corporate bond and accompanying declaration pursuant to *Civ. Code § 2941.7*, may notify the trustee in writing of any objection to the reconveyance of the trust deed [*Civ. Code § 2941.7(c)*; *see Civ. Code § 2941.7(b)(5)*; *see also § 25C.210[1]*]. Unlike an objection to the release of the lien of a mortgage, an objection to reconveyance need not be recorded. Thus, counsel may adapt this form for use by a

trustee by deleting the recording information at the beginning of the form, making appropriate changes in terminology, and omitting the acknowledgment.

[2] Form

Objection to Satisfaction of Record of Mortgage

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

OBJECTION TO SATISFACTION OF RECORD OF MORTGAGE

The undersigned Mortgagee hereby objects to the satisfaction of record of that Mortgage dated _____, executed by _____[*name*] as Mortgagor to the undersigned [or _____ (*name*)] as Mortgagee and recorded _____[*date*], _____, as Instrument No. _____ in Book _____, Page _____ of the Official Records of _____ County, California. The foregoing Mortgagor requested the satisfaction of record of that Mortgage in a declaration recorded _____[*date*] as Instrument No. _____ in Book _____, Page _____ of the Official Records of _____ County, California, and in a corporate bond recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California.
Dated: _____

_____ [*signature of mortgagee*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in

_____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25C California Legal Forms--Transaction Guide § 25C.213

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.213 Demand by Trustor for Reconveyance

[1] Comment--Use of Form

The form in [2], *below*, is a demand by a trustor under a trust deed that the trustee execute a reconveyance of the trust deed pursuant to *Civ. Code § 2941.7* [*see § 25C.11*]. That statute permits a trustor to secure a reconveyance when the beneficiary cannot be located or is uncooperative [for a detailed discussion of this reconveyance procedure, see *§ 25C.210[1]*]. Among other things, *Civ. Code § 2941.7* requires the trustor to record a bond and declaration [*see § 25C.210*] and to make a demand for reconveyance [*Civ. Code § 2941.7(c)*]. Because it is not clear from the statutory language whether the bond and declaration in themselves constitute a demand on the trustee for the reconveyance or whether a separate demand, such as this form, is required, a cautious trustor should provide the trustee with a separate demand.

In addition to the above steps, the trustor must provide the trustee with the usual reconveyance fees plus costs [*Civ. Code § 2941.7(c)*]. For discussion of these fees [*see Civ. Code § 2941(e)*], see *§ 25C.200[1][c]*.

After the expiration of 30 days following the recording of the bond and declaration and the trustee's receipt of the reconveyance demand and reconveyance fees, the trustee must execute, record, and deliver a reconveyance [*see § 25C.201[2]*] in the same form as if the beneficiary had delivered to the trustee a proper request for reconveyance [*see § 25C.200[2]*], provided that the trustee has not received a written objection to the reconveyance from the beneficiary of record [*Civ. Code § 2941.7(c)*].

[2] Form

Demand by Trustor for Reconveyance

DEMAND BY TRUSTOR FOR RECONVEYANCE

TO: _____[*name of trustee*]
_____[*street address*]
_____[*city, state, zip*]

The undersigned, as obligor under a promissory note in the amount of $_____, secured by a Deed of Trust dated _____, executed by the undersigned [*or* _____ (*name*)] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereby states that all sums secured by that Deed of Trust have been paid in full and that, pursuant to *California Civil Code Section 2941.7*, a bond and declaration were recorded by the undersigned on _____[*date*], as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California.

THE UNDERSIGNED HEREBY DEMANDS that you do the following:

(1) Cancel the above Deed of Trust, promissory note, and any and all other evidences of indebtedness secured by the Deed of Trust that have been delivered to you;

(2) Reconvey, without warranty, to the person or persons legally entitled thereto, the estate now held by you under the Deed of Trust;

(3) Deliver the promissory note and Deed of Trust, and any and all other evidences of indebtedness secured by the Deed of Trust, to _____[*name of trustor*] at _____[*street address, city, state, zip*];

(4) Execute and cause to be recorded in the Official Records of _____ County, California, a deed of reconveyance; and

(5) Cause the original recorded deed of reconveyance to be delivered to _____[*name of trustor*] at _____[*street address, city, state, zip*].
Dated: _____.

_____ [*signature of trustor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
A. Full Reconveyance and Discharge
2. Statutory Bond and Declaration Procedure

10-25C California Legal Forms--Transaction Guide §§ 25C.214-25C.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25C.214[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
B. Partial Reconveyance

10-25C California Legal Forms--Transaction Guide § 25C.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.220 Partial Release Provision--Parcels of Acreage

[1] Comment

[a] Use of Form

The form in [2], *below*, is a partial release provision that may be included in a purchase money deed of trust covering property that is planned to be developed as a subdivision. It is designed for use when, as is often the case, a subdivision map has not been recorded for the property before the time the partial release provision is included in the trust deed given to the seller of the property. Thus, this form provides for the release of parcels of acreage. However, it also provides that no such release may occur until a parcel or final subdivision map has been recorded for the property [*see* [f], *below*].

For a clause that provides for the release of individual lots designated on a final subdivision map, see *§ 25C.221[2]*. The parties may agree to include both types of partial release provisions in the trust deed [*see § 25C.221[1][b]*]. Both forms are compatible for use with a contract for sale of undeveloped land for subdivision or other development and its partial release provisions [*see* Ch. 23, *Real Property Sales Agreements*].

For a partial release provision that credits a buyer/trustor's cash down payment against the consideration required for the release of a portion of the property from a purchase money deed of trust, see *§ 25C.222[2]*.

[b] Trust Deed Terminology

This comment uses trust deed terminology in reference to both trust deeds and mortgages because the legal principles discussed throughout this comment apply to both types of security instruments and trust deeds are much more common than mortgages in California.

[c] Purpose of Partial Release Provisions

By obtaining the release of a portion of the undeveloped property, a developer has the flexibility to sell the released portion to another developer or to develop and sell or begin selling lots or units in the released portion of the property. This generally enables the developer to help service the debt on the remainder of the property and help capitalize future development of the still-encumbered portion of the property [*see § 25C.15*].

[d] Requirements of Fairness and Certainty

A partial release provision in a seller's trust deed must be "just and reasonable" as to the seller to be specifically enforceable, and should contain terms that define and minimize the risk that the seller's security will be impaired [*see Elridge v. Burns (1978) 76 Cal. App. 3d 396, 428-431, 142 Cal. Rptr. 845* ; *Civ. Code § 3391(2)*]. Because all acreage or lots in a subdivision are generally not of the same value, the provision must prevent the subdivider from taking only the best acreage or lots and leaving the trust deed beneficiary with insufficient security to protect his or her purchase money promissory note [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 467, 73 Cal. Rptr. 885*].

The terms of the obligation under a partial release provision must be sufficiently certain to make the precise act to be done clearly ascertainable [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885* ; *Hiller v. King (1951) 105 Cal. App. 2d 181, 190-191, 232 P.2d 905*]. If the provision is uncertain, it may render the entire sales agreement unenforceable [*see White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465-467, 73 Cal. Rptr. 885* (contract containing uncertain release clause cannot be enforced by buyer); *but see Yackey v. Pacific Development Co. (1979) 99 Cal. App. 3d 776, 784, 160 Cal. Rptr. 430* (seller may bring action for damages for breach even though contract contains uncertain release clause)]. For a detailed discussion of these requirements, see *§ 25C.15[3]-[7]*.

[e] Release Price and Order

This form includes a schedule that may be used to fix different "release prices" that must be paid for specific parcels. The price differential for separate parcels is appropriate for use when the parcels differ in value due to location or other factors. The schedule also requires specification of the legal description and sizes of parcels that may be released; however, these items are subject to adjustment based on a recorded subdivision map to be obtained by the buyer/trustor [*see* discussion under [f] and [g], *below*]. To prevent the buyer-subdivider from having the more valuable parcels released first and leaving the beneficiary with parcels inadequate to protect the secured obligation, subsection (h) of this form requires that the parcels be released in a specified order. This type of provision may be necessary to maximize the value of the still-encumbered property by maintaining it as a contiguous "block" (rather than in noncontiguous parcels) or by insuring that it does not become landlocked or isolated from necessary or essential services.

[f] Requirements of Subdivision Map Act

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] defines "subdivision" to include the division of a unit of land, as shown on a county assessment roll, for the purposes of sale, lease, or financing [*Gov. Code § 66424*]. This definition encompasses a partial release from a blanket encumbrance [*see 58 Ops. Cal. Atty. Gen. 408, 412 (1975)* (placement of separate trust deeds on different portions of unit of land is division for purpose of sale or financing)]. The Act generally requires local approval of both a tentative map and a final map for any subdivision containing five or more parcels [*Gov. Code § 66426*]. Subdivisions not subject to the final map requirement must have a parcel map approved by the local legislative body unless the local subdivision ordinance waives the statutory parcel map requirement [*Gov. Code § 66428*]. For detailed coverage of subdivisions, see Ch. 30, *Subdivision Regulation* .

[g] Description of Parcels Before Subdivision

If a purchase money trust deed containing a partial release provision is being drafted before the subdivision of the property, the drafters are presented with the problem of describing with certainty the parcels to be reconveyed. This

form offers the following solutions to this drafting problem.

Subsection (h) of this form provides for the inclusion of a legal description for each parcel to be released. The "release parcels" referred to in that provision are not the parcels or lots that will ultimately be shown on a recorded subdivision map but are parcels of acreage on the property, as so designated by agreement of the seller/beneficiary and buyer/trustor.

Subsection (d) of this form provides that notwithstanding the foregoing legal description of each "release parcel," any reconveyance may consist only of one or more whole legal lots or parcels as shown on a recorded parcel or final map. It further provides that in order for the buyer/trustor to satisfy this condition, it may request reconveyance of only so much of the "release parcel" as contains whole, legally divided lots or parcels. This may result in the reconveyance of less than an entire "release parcel" because, for example, the boundary line of the release parcel may split one or more legally separate lots or parcels. Nevertheless, this form requires the buyer/trustor to pay the entire release price for the release parcel designated in the partial release provision. However, any amount paid for acreage not reconveyed will be credited against the principal amount owing to the beneficiary and toward the payment of the release price for the parcel containing the unreleased acreage.

[2] Form

PARTIAL RELEASE OF PARCELS

PARTIAL RELEASE OF PARCELS

Section _____. At any time when an unrescinded Notice of Default of this Purchase Money Deed of Trust (hereafter referred to as the "Deed of Trust") is not of record, on written request of the Trustor, partial reconveyances from the lien or charge of the Deed of Trust shall be granted by the Beneficiary (through the Trustee), subject to the following:

(a) Trustor's request for reconveyance shall contain a certificate (hereafter referred to as the "Certificate") by a civil engineer licensed to practice in California specifying in acres and fractions of acres the size of each parcel of the property requested to be reconveyed (hereafter referred to as the "Parcel" or "Parcels"); this Certificate shall be conclusive as to the precise number of acres and fractions of acres in computing the amount to paid pursuant to Subsection (e) of this Section.

(b) Trustor shall, at Trustor's sole expense, satisfy all requirements of the Subdivision Map Act of the State of California, and local ordinances under it, arising in connection with the reconveyance.

(c) No Parcel shall be reconveyed if, by reason of the reconveyance, the portion of the Property remaining subject to this Deed of Trust would be left without legal access to a public street or road.

(d) No reconveyance shall be of less than an entire Parcel as described in the schedule set forth in Subsection (h) of this Section (hereafter referred to as the "Schedule"), except that any reconveyance under this Section shall be only of one or more whole lots or parcels as set forth in a recorded parcel or final subdivision map. The Trustor shall have the right to request that the Beneficiary (through the Trustee) release and reconvey only those whole lots or parcels set forth in a recorded parcel or final subdivision map and that are contained within a Parcel described in the Schedule below, notwithstanding that the Trustor would otherwise have the right to have the entire Parcel released and reconveyed. If less than a Parcel described in the Schedule is released and reconveyed pursuant to this Subsection (d), Trustor shall pay the full release price for the applicable Parcel designated in the Schedule below, but the amount attributable to acreage in the Parcel not released pursuant to this Subsection (d) shall be credited and applied toward the payment of (1) the principal of the promissory note secured by this Deed of Trust and (2) the Release Price required to obtain the release of a subsequent Parcel designated in the Schedule and containing the unreleased acreage.

(e) Trustor shall pay the Beneficiary (through the Trustee) a sum to be applied toward the payment of the principal of the promissory note secured by this Deed of Trust and equal to the amount per acre for each acre or fraction of an acre to be reconveyed for the Parcel to be reconveyed as specified for that Parcel in the Schedule.

(f) Trustor shall pay to the Beneficiary (through the Trustee) a sum to be applied to the interest accrued on the promissory note secured by this Deed of Trust. This sum shall be equal to the interest accrued on the promissory note to the date of the request for the reconveyance at the rate of _____ percent per year on the unpaid principal balance of the promissory note.

(g) Trustor shall pay to the Trustee the costs of executing and recording the partial reconveyance.

(h) The following is the Schedule of Parcels that may be reconveyed pursuant to this Section _____. The Parcels may be released only in the order in which they appear on this Schedule.

Parcel	Number of Acres	Release Price Per Acre
_____ [*legal description*]	_____	$_____
_____ [*legal description*]	_____	$_____

[*Repeat information above for each parcel*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
B. Partial Reconveyance

10-25C California Legal Forms--Transaction Guide § 25C.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.221 Partial Release Provision--Individual Lots on Subdivision Map

[1] Comment

[a] Use of Form

The form in [2], *below*, is a partial release provision that may be included in a purchase money deed of trust securing property intended to be developed as a subdivision. It provides for the release of individual lots designated on a final subdivision map.

For a clause that provides for the release of parcels of acreage, see *§ 25C.220[2]*. The parties may agree to include both types of partial release provisions in the trust deed [*see* [b], *below*].

This form and the form in *§ 25C.220[2]* are compatible for use with *§ 23.201* (contract for sale of undeveloped land for subdivision or other development) and its partial release provisions [*see § 23.201[2]* PP 1.06, 1.07] in Ch. 23, *Real Property Sales Agreements* .

For a partial release provision that credits the buyer/trustor's cash down payment against the "release price" required for a partial release of property, see *§ 25C.222[2]*.

[b] Release Price and Order of Release

Subsection (a) of this form contains alternative provisions for the amount required to be paid to obtain the release of a lot. The first alternative, intended for use when a final subdivision map for the property has not yet been recorded and in conjunction with the provision set forth in *§ 25C.220[2]*, bases the release price on the per acre equivalent of the schedule set forth in *subsection (h) of § 25C.220[2]*. The second alternative in subsection (a) may be used when a final subdivision map for the property has been recorded and sets a specific release price for each lot. Both alternatives reflect the fact that the lots in a subdivision are seldom of the same exact value due to location or other factors and that

the subdivider should be required to pay a higher release price for the more valuable lots.

This form does not require that the lots be released in any specific order. Because all the lots to be released are designated on a recorded final subdivision map, it is highly unlikely that there will be any lots in the approved subdivision without access to public roads or utilities. Thus, the seller/trustee need not be concerned that unreleased parcels will be landlocked or isolated. Any difference in value among the lots due to other factors should be taken into account when setting the different release prices to be paid for individual lots pursuant to this form. If the subdivision is a multi-phase project, the seller/beneficiary may insist that all or a majority of the lots in the first phase be released before the any lots in the second or subsequent phases.

For a discussion of the important considerations applicable to the release price and order of release that may affect the enforceability of a partial release clause, see *§§ 25C.15[3], [4], 25C.220[1][d]*.

[c] Subdivision Requirements

For so long as property being developed as a subdivision is subject to a blanket encumbrance, a subdivider cannot sell or lease lots or parcels in the subdivision unless the blanket encumbrance contains an unconditional release clause (which virtually none do) or unless the subdivider complies with one of the alternative requirements of the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] to assure that the purchaser obtains title to the lot or parcel free and clear of the blanket encumbrance. A blanket encumbrance is a trust deed, mortgage, or any other lien or encumbrance securing the payment of money and affecting land to be subdivided or more than one lot or parcel of subdivided land [*Bus. & Prof. Code § 11013*]. For a discussion of these requirements, see *§ 25C.16*. For a discussion of the applicability of the Subdivision Map Act [*Gov. Code § 66410 et seq.*] to partial releases from a deed of trust, see *§ 25C.220[1][f]*. For coverage of all aspects of subdivision regulation, see Ch. 30, *Subdivision Regulation* .

[2] Form

PARTIAL RELEASE FOR LOTS

PARTIAL RELEASE FOR LOTS

Section _____. At any time when an unrescinded Notice of Default of this Purchase Money Deed of Trust (hereafter referred to as the "Deed of Trust") is not of record, on written request of the Trustor, partial reconveyances from the lien or charge of the Deed of Trust shall be granted by the Beneficiary (through the Trustee) for individual lots shown on a final subdivision map to be recorded in _____[*name of county where property is located*] County, California [*or* recorded as Map No. _____, Instrument No. _____, on _____[*date*], in the Office of the County Recorder of _____ County, California], subject to the following:

[*Use if final subdivision map has not yet been recorded and provision set forth in § 25C.220 is also to be included in trust deed:*]

(a) Trustor shall pay to the Beneficiary (through the Trustee) a sum to be applied toward the payment of the principal of the promissory note secured by this Deed of Trust. This sum shall be equal to the amount required under the Schedule set forth in Subsection (h) of Section _____, for the acreage contained in the lot to be reconveyed.

[*Or use if final subdivision map has been recorded:*]

(a) For each lot to be conveyed, Trustor shall pay to the Beneficiary (through the Trustee) a sum to be applied toward the payment of the principal of the promissory note secured by this Deed of Trust and equal to the amount per

lot as follows:

Lot Number	Amount
_____	$_____
_____	$_____

[*Repeat the information above for each lot*]

[*Continue with the following:*]

(b) Trustor shall pay to the Beneficiary (through the Trustee) a sum to be applied to the interest accrued on the promissory note secured by this Deed of Trust. This sum shall be equal to the interest accrued on the promissory note to the date of the request for the reconveyance at the rate of _____ percent per year on the unpaid principal balance of the promissory note.

(c) Trustor shall pay to the Trustee the costs of executing and recording the partial reconveyance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
B. Partial Reconveyance

10-25C California Legal Forms--Transaction Guide § 25C.222

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.222 Partial Release Provision--Down Payment as Credit Against Release Price

[1] Comment

[a] Use of Form

The form in [2], *below*, is a partial release provision for inclusion in a purchase money deed of trust encumbering land being purchased for subdivision purposes. It provides that on payment by the trustor to the beneficiary of a specified sum, the beneficiary will reconvey to the trustor a specific portion of the property designated on an existing recorded final or parcel subdivision map. It also provides that the cash down payment made by the buyer/trustor for the purchase of the property securing the trust deed is to be credited toward the amount the trustor must pay for the partial reconveyance, and that the difference between the full release price and the cash down payment is to be applied toward the principal amount owing on the promissory note secured by the trust deed.

This form describes the portion of the property to be released by reference to a recorded final or parcel subdivision map for the property. For a form of partial release that may be used when a subdivision map has not been recorded prior to the time the partial release clause is drafted, see *§ 25C.220*. For a partial release clause that provides for the release of individual lots described in a recorded final subdivision map, see *§ 25C.221*.

[b] Alternative Release on Close of Escrow

In lieu of inserting this form into a trust deed, the buyer and seller could agree that a portion of the property being sold be conveyed free and clear to buyer at the closing of escrow, that is, never included under the trust deed in favor of seller, in consideration of buyer's cash down payment. Such an arrangement is possible when a buyer/trustor and seller/beneficiary are able to agree before the close of escrow on the release of a specified portion of the property. This method would avoid any enforcement problems arising from an uncooperative beneficiary in fulfilling its future obligation to reconvey [*see* [c], *below*]. However, when the buyer/subdivider is unable to deliver the required amount of cash to the seller/beneficiary before the close of escrow, a provision in the trust deed such as the following may be a

practical alternative.

[c] Requirements of Certainty and Fairness

The problem of enforcing a partial release clause may arise if the clause is too unclear or uncertain to permit specific enforcement, for example, if it is unclear which parcel a beneficiary is required to reconvey. Enforcement problems may also arise if the reconveyance results in unfairness to the beneficiary, because the property, remaining encumbered after a partial reconveyance, constitutes insufficient security to the beneficiary for payment of the obligation owed by the trustor. For a discussion of the important considerations applicable to the certainty and fairness requirements for a partial release, which affect the enforceability of a partial release clause, see *§§ 25C.15[3], [4], 25C.220[1][d]*.

[d] Subdivision Requirements

When a partial reconveyance is made under a trust deed covering property being developed as a subdivision, the Subdivision Map Act [*Gov. Code § 66410 et seq.*] and the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] generally apply. For discussion of these Acts, see *§§ 25C.16*, *25C.17*. For detailed coverage of subdivisions, see Ch. 30, *Subdivision Regulation* .

[2] Form

Partial Release Provision--Down Payment as Credit Against Release of Parcel

PARTIAL RELEASE OF PARCEL

Section _____. At any time when an unrescinded notice of default of this Purchase Money Deed of Trust (hereafter referred to as the "Deed of Trust") is not of record, on written request of the Trustor, a partial reconveyance of one parcel of the Property from the lien or charge of this Deed of Trust shall be granted by Beneficiary, subject to the following:

(a) The following is a description of the Parcel that may be released pursuant to this Section (hereafter referred to as "the Parcel"): _____[*insert legal description referring to recorded parcel or final map, e.g.,* Parcel 1 of Parcel Map No. 123, recorded on January 1, 1988, as Instrument No. 88-456789 of Official Records of San Diego County, California].

(b) Trustor, at Trustor's sole expense, shall satisfy all requirements of the Subdivision Map Act of the State of California, and local ordinances under it, arising in connection with the reconveyance.

(c) No reconveyance shall be of less than the entire Parcel.

(d) The Parcel shall not be reconveyed if, by reason of the reconveyance, the portion of the Property remaining subject to this Deed of Trust would be left without legal access to a public street or road.

(e) Trustor shall pay to the Beneficiary (through the Trustee) a sum equal to $_____ (hereafter referred to as the "Total Release Price"), less the amount of $_____, which shall have been paid in cash by the Trustor to the Beneficiary prior to or concurrently with recordation of this Deed of Trust (hereafter the "Cash Down Payment"). The amount equal to the difference between the Total Release Price and the Cash Down Payment shall be applied toward the payment of the principal of the promissory note secured by this Deed of Trust.

(f) Trustor shall pay to the Beneficiary (through the Trustee) a sum to be applied to the interest accrued on the promissory note secured by this Deed of Trust. This sum shall be equal to the interest accrued on the promissory note to the date of the request for the reconveyance at the rate of _____ percent per year on the unpaid principal balance of the promissory note.

(g) Trustor shall pay to the Trustee the costs of executing and recording the partial reconveyance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Partial Reconveyance

10-25C California Legal Forms--Transaction Guide § 25C.223

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.223 Request for Partial Reconveyance

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by the beneficiary under a trust deed that the trustee execute a deed of reconveyance for a specified portion of the property encumbered by the trust deed. Unless there is an enforceable agreement between the beneficiary and the trustor providing for partial releases, the beneficiary has no obligation to release any part of the encumbered property from the lien of the trust deed until the trustor has paid in full the secured obligation [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 92 Cal. Rptr. 851* ; *see Civ. Code § 2912* (partial performance does not extinguish lien)]. The agreement between the beneficiary and trustor for a partial release is generally contained in the trust deed itself but may be in a separate duly acknowledged and recorded document [*Woodward v. Brown (1897) 119 Cal. 283, 298, 51 P. 542*].

For further discussion of partial releases, see *§ 25C.15*.

[b] Contents

The request for a partial release should identify the deed of trust and include the legal description of the property to be reconveyed. Further, it is customary to include a request that the trustee (1) endorse the reconveyance on the back side of the original promissory note and trust deed (provided by the beneficiary), and (2) return the note and trust deed to the beneficiary.

[2] Form

Request for Partial Reconveyance

REQUEST FOR PARTIAL RECONVEYANCE

TO: _____[*name of trustee*]
_____[*street address*]
_____[*city, state, zip*]

The undersigned, as legal owner and holder of the promissory note and all other indebtedness secured by that certain Deed of Trust (hereafter referred to as the "Deed of Trust") dated _____, executed by _____[*name*] as Trustor, in which the undersigned [*or* _____ (*name*)] is named as Beneficiary and _____[*name*] is named as Trustee, and recorded as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California;

HEREBY DELIVERS TO YOU the original of the promissory note secured by the Deed of Trust and the original recorded copy of the Deed of Trust, and

REQUESTS THAT YOU, in accordance with the terms of the Deed of Trust, do the following:

(1) Reconvey, without warranty, to the person or persons legally entitled thereto, the estate now held by you under the Deed of Trust in and to the following portion of the real property in the County of _____, State of California subject to the Deed of Trust: _____[*set forth legal description of parcel to be released*].

(2) Endorse on the promissory note secured by the Deed of Trust and on the Deed of Trust the making of the partial reconveyance described in this request.

(3) After making the above endorsement, return the promissory note and Deed of Trust to the undersigned at _____[*address, city, state, zip*].

[*EITHER*]

(4) Record the executed deed of partial reconveyance in the Official Records of _____ County, California.

[*OR*]

(4) Deliver the executed deed of partial reconveyance, in recordable form, to _____[*name of escrow agent for trustor*] at _____[*address, city, state, zip*].

[*Continue with the following:*]

Dated: _____.

_____ [*signature of beneficiary*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawPriorities &

RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25C California Legal Forms--Transaction Guide § 25C.224

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.224 Deed of Partial Reconveyance

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed of partial reconveyance for execution by a trustee after the trustee has received the following documents from the beneficiary: a request for a partial reconveyance, the original promissory note and deed of trust, and all other documents specifically required under the trust deed for a partial reconveyance. A deed of partial reconveyance is identical to a deed of full reconveyance [*see § 25C.201[2]*] except that a partial reconveyance conveys only a specified portion of the real property subject to a trust deed whereas a full reconveyance conveys all of the property subject to the trust deed. Therefore, counsel should carefully and specifically describe the portion of the real property to be reconveyed.

For a procedural guide to the granting of a partial reconveyance, see §§ 25C.130-25C.132.

[b] Recording

After executing and acknowledging the deed of partial reconveyance, the trustee should follow the instructions for recording contained in the beneficiary's request for partial reconveyance [*see § 25C.223[2]*]. These may require the trustee to record the deed in the county where the deed of trust is recorded or to deliver the deed to an escrow company designated by the beneficiary or to the beneficiary for recording.

[2] Form

Deed of Partial Reconveyance

)
Recording requested by)

_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

DEED OF PARTIAL RECONVEYANCE

Pursuant to a written request made by the Beneficiary identified below, the undersigned, as Trustee under that Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and the undersigned [*or* _____ (*name*)] as Trustee, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, does hereby grant and convey to the person or persons legally entitled thereto, without warranty, the estate held by the undersigned under the Deed of Trust in the following property described in the Deed of Trust: _____[*set forth legal description*].
Dated: _____

_____ [*signature of trustee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
B. Partial Reconveyance

10-25C California Legal Forms--Transaction Guide §§ 25C.225-25C.229

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25C.225[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
C. Substitution of Trustees

10-25C California Legal Forms--Transaction Guide § 25C.230

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.230 Statutory Substitution of Trustee: Substitution Instrument [Civ. Code § 2934a]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a substitution of a trustee in a deed of trust. It is designed for use when the parties are utilizing one of the two alternative statutory methods for substituting trustees [*see Civ. Code § 2934a*]. Specifically, this form may be used for the first statutory method, which requires the consent and participation of all of the beneficiaries (or the sole beneficiary, when appropriate) [*see* [b][ii], *below*]. Alternatively, this form may be easily modified to satisfy the requirements governing the second statutory method, which permits substitution by holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction [*see* [b][iii], *below*]. Most of the statutory requirements governing the contents, execution, and recordation of the substitution instrument (discussed below) apply to both statutory methods.

In addition to these statutory methods, there are two other methods of substituting trustees in a trust deed: (1) by mutual agreement between the beneficiary and trustor [*see § 25C.234[2]*], and (2) pursuant to the terms of the trust deed itself [*see § 25C.233[2]*].

[b] Statutory Methods

[i] Alternatives

As mentioned in [a], *above*, there are two statutory methods for substituting a trustee who is acting under a trust deed on real property or an estate for years in real property that was given to secure an obligation to pay money and that confers no other duties on the trustee other than those that are incidental to the exercise of power of sale conferred [*Civ. Code § 2934a(a)(1)*]. These methods are described below.

[ii] Substitution by Sole Beneficiary or All Beneficiaries

The trustee may be substituted by recording in the county in which the property is located a substitution executed and acknowledged by all of the beneficiaries under the trust deed, or their successors in interest. Such a substitution will be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 [*Civ. Code § 2934a(a)(1)(A)*]. For the required contents of the substitution instrument, see [iv], *below*.

[iii] Substitution by Majority Interest Holders

Alternatively, the trustee may be substituted by recording in the county in which the property is located a substitution executed and acknowledged by the holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or of any affiliate of that licensed real estate broker ("majority interest holders") [*Civ. Code § 2934a(a)(1)(B)*; *see Civ. Code § 2934a(a)(3)* ("affiliate of the licensed real estate broker" includes any person defined in *Corp. Code § 25013* that is controlled by, or under common control with, or who controls, a licensed real estate broker; "control" means direct or indirect possession of the power to direct or cause the direction of management and policies)]. For the required contents of the substitution instrument, see [iv], *below*.

A substitution executed under this method is not effective unless all the parties signing the substitution also sign, under penalty of perjury, a separate written document containing specified information regarding their compliance with the relevant statutory requirements [*see Civ. Code § 2934a(a)(2)*; *see also § 25C.231[2]*]. The separate document must be attached to and recorded with this substitution instrument [*Civ. Code § 2934a(a)(2)*].

For coverage of a related procedure established by *Civ. Code § 2941.9* that may be used by all beneficiaries under a trust deed to agree to be governed by majority interest holders, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[iv] Contents of Substitution Instrument; New Trustee's Powers

Regardless of the statutory method used, the substitution instrument must include the date of recordation of the trust deed, the name of the trustor, the book and page or instrument number where the trust deed is recorded, and the name of the new trustee [*Civ. Code § 2934a(a)(4)*].

From the time the substitution is filed for record, the new trustee succeeds to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust [*Civ. Code § 2934a(a)(4)*].

[c] Notice of Substitution

If a substitution instrument is executed, but not recorded, before or concurrently with the recording of the notice of default, the beneficiary or beneficiaries or their authorized agents must cause notice of the substitution to be mailed, before or concurrently with the recording of the substitution instrument, to all persons to whom a copy of the notice of default would be required to be mailed [*Civ. Code § 2934a(b)*].

If the substitution is effected after a notice of default has been recorded but before the recording of the notice of sale, the beneficiary or beneficiaries or their authorized agents must cause a copy of the substitution instrument to be mailed, before or concurrently with the recording of that document, to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed [*Civ. Code § 2934a(c)*].

An affidavit must be attached to the substitution document, stating that notice has been given to the persons and in the

manner required [*Civ. Code § 2934a(b), (c)*; *see § 25C.232[2]* (form of declaration in lieu of affidavit)]. These persons include, among others, all persons recording a separate request for notice of default and the trustor [*see Civ. Code § 2924b*]. The mailing must comply with *Civ. Code § 2924b* [*Civ. Code § 2934a(b), (c)*]. For coverage of these mailing requirements and the persons entitled to receive notice, see *§ 25D.202[1]*.

[d] Substitution After Giving of Notice of Sale

When a notice of sale is given and there is a subsequent replacement of the trustee named in the notice, any sale conducted by the substitute trustee is void unless a new notice of sale containing the name, street address, and telephone number of the substitute trustee is given pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*]. For a notice of sale, see *§ 25D.206[2]*.

[e] Multiple Deeds of Trust

A substitution for multiple deeds of trust may be made if the deeds are recorded in the same county in which the substitution is being recorded and if they all have the same trustee and beneficiary or beneficiaries [*Civ. Code § 2934a(a)(4)*]. A single substitution document, substituting trustees for all the trust deeds and containing all of the information required by statute [*see* [b][iv], *above*] may be recorded under these circumstances [*Civ. Code § 2934a(a)(4)*].

[f] Substitution by Court

Application for substitution of trustees may also be made to the court under the statutes governing private trusts, when the trustee vacates his or her position or refuses to act [*Prob. C. § 15660*; *see Mutual B. & L. Ass'n v. Wiborg (1943) 59 Cal. App. 2d 325, 330, 139 P.2d 73]* . For further discussion and forms relating to the procedure for court appointment of substitute trustees to a private trust, see California Forms of Pleading & Practice, Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* (Matthew Bender).

[2] Form

Substitution of Trustee

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

SUBSTITUTION OF TRUSTEE

The undersigned, as the present Beneficiary of record under that Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which the undersigned [*or* _____ (*name*)] is named as Beneficiary and _____[*name*] as Trustee, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of

_____ County, California, hereby substitutes _____[*name*] at _____[street address, city, state, zip], as Trustee in the place of _____[*name*], the Trustee presently of record.
Dated: _____.

_____ [*signature of beneficiary*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)
_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
C. Substitution of Trustees

10-25C California Legal Forms--Transaction Guide § 25C.231

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.231 Statutory Substitution of Trustee: Additional Document Regarding Compliance With Statutory Requirements by Majority Interest Holders [Civ. Code § 2934a(a)(2)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a document that must accompany a substitution instrument when the substitution is being performed by majority interest holders. For discussion of this statutory method of substitution, see *§ 25C.230[1]*.

[b] Required Contents

A substitution performed pursuant to the statutory procedure described above is not effective unless all the parties signing the substitution also sign, under penalty of perjury, a separate written document (this form) stating the following [*Civ. Code § 2934a(a)(2)*]:

- The substitution has been signed pursuant to *Civ. Code § 2934a(a)(1)(B)*.
- None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the trust deed.
- The undersigned together hold more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction.
- Notice of the substitution was sent by certified mail, postage prepaid, with return receipt requested to each holder of an interest in the obligation secured by the trust deed who has not joined in the execution of the substitution or the separate document.

[c] Attachment, Recordation, and Effect

This separate document must be attached to the substitution instrument and must be recorded in the office of the county recorder of each county in which the real property described in the deed of trust is located. Once this document is recorded, it constitutes conclusive evidence of compliance with the requirements of *Civ. Code § 2934a(a)(2)* in favor of (1) substituted trustees acting pursuant to *Civ. Code § 2934a, (2)* subsequent assignees of the obligation secured by the deed of trust, and (3) subsequent bona fide purchasers or encumbrancers for value of the described real property [*Civ. Code § 2934a(a)(2)*].

[2] Form

Statement Regarding Compliance With Statutory Method of Substitution of Trustee

Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

STATEMENT REGARDING COMPLIANCE WITH STATUTORY METHOD OF SUBSTITUTION OF TRUSTEE

The undersigned hereby state the following:

(1) The Substitution of Trustee [*or other title of substitution instrument*] to which this statement is attached has been signed pursuant to *Civil Code Section 2934a(a)(1)(B).*

(2) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the Deed of Trust described in the attached Substitution of Trustee.

(3) The undersigned together hold more than 50 percent of the record beneficial interest of _____[a series of notes secured by the same real property *or* undivided interests in a note secured by real property equivalent to a series transaction].

(4) Notice of the substitution was sent by certified mail, postage prepaid, with return receipt requested to each holder of an interest in the obligation secured by the above Deed of Trust who has not joined in the execution of the Substitution of Trustee or this Statement.

The undersigned declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature of holder*]
[*typed name*]
_____ [*signature of holder*]

[*typed name*]

[*Include additional signature blocks as necessary*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
PART IV. FORMS
C. Substitution of Trustees

10-25C California Legal Forms--Transaction Guide § 25C.232

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.232 Declaration of Mailing

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration that should be attached to and recorded with the substitution of trustee instrument [*see § 25C.230[2]*] when the beneficiary uses one of the statutory substitution methods and either (1) the substitution instrument is executed, but not recorded, before or concurrently with the recording of the notice of default [*see Civ. Code § 2934a(b)*], or (2) the substitution takes place after a notice of default has been recorded in a nonjudicial foreclosure proceeding [*see Civ. Code § 2934a(c)*]. Under these circumstances, the beneficiary or beneficiaries or their authorized agents must give due notice of the substitution [*see § 25C.230[1]*] and attach an affidavit (or declaration pursuant to *Code Civ. Proc. § 2015.5*) [*see* [b], *below*] to the substitution instrument. The affidavit/declaration (this form) must state that notice has been given to the persons and in the manner required by statute [*Civ. Code § 2934a(b), (c)*].

[b] Use of Declarations

Code Civ. Proc. § 2015.5 permits the use of a declaration in lieu of any affidavit required by law. This form utilizes the declaration option because a declaration, unlike an affidavit, need not be made before an authorized officer [*see Code Civ. Proc. §§ 2003* ("affidavit" is a written declaration under oath), 2012 (affidavit may be taken before any officer authorized to administer oaths)]. For discussion of the requirements governing declarations, see *§ 25D.207[1]*.

[2] Form

Declaration Mailing

DECLARATION OF MAILING

I, _____[*name*], declare:

I am, and at all times mentioned in this Declaration was, a citizen of the United States, over the age of 18 years, and a resident of _____ County, California.

I caused _____[notice *or* copies] of the foregoing Substitution of Trustee to be mailed in accordance with *California Civil Code Section 2934a* to the persons and in the manner specified below.

On _____[*date*], I deposited in the United States mail envelopes containing _____[notice *or* copies] of the foregoing Substitution of Trustee. These envelopes were sent by _____[registered *or* certified] mail, postage prepaid, to the following persons and addresses: _____[*list names and addresses of all persons to whom notice of default must be sent pursuant to Civ. Code § 2924b; also list name and address of current trustee if copies are sent pursuant to Civ. Code § 2934a(c)*].

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____[*city*], California, on _____[*date*].

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
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C. Substitution of Trustees

10-25C California Legal Forms--Transaction Guide § 25C.233

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.233 Unilateral Substitution of Trustee Pursuant to Deed of Trust Provision

[1] Comment

[a] Use of Form

The form in [2], *below,* is an instrument that replaces a trustee under a deed of trust through the beneficiary's unilateral action. This method of substitution is one commonly provided for in many standard deeds of trust. Substitution of a trustee pursuant to the terms of a trust deed is valid whether or not it conforms to the requirements of the statutory methods [*see Bennett v. Ukiah Fair Ass'n (1936) 7 Cal. 2d 43, 44-45, 59 P.2d 805* ; *see also U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 83-85, 116 Cal. Rptr. 44*].

There are three additional methods of replacing trustees in a deed of trust. The first two are alternative statutory methods of substitution. They permit substitution either (1) by all of the beneficiaries (or the sole beneficiary, when appropriate), or (2) by holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction [*Civ. Code § 2934a*; *see § 25C.230*]. Under the third (nonstatutory) method, if the beneficiary and trustor mutually agree to a substitution of the trustee, they may effect the substitution without the consent of the trustee and without regard to the substitution procedure set forth in the trust deed [*Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*]. For a substitution instrument that reflects the statutory methods, see *§ 25C.230[2]*; for a form for substitution to be jointly executed by the beneficiary and trustor, see *§ 25C.234[2]*.

[b] Required Contents

Standard substitution clauses found in many trust deeds generally require that the substitution instrument contain the names of the original trustor, trustee, and beneficiary, the name and address of the new trustee, and the book and page where the trust deed is recorded. These standard clauses also generally require that the instrument be acknowledged by every beneficiary under the trust deed and recorded in every county in which the trust deed is recorded. A particular

trust deed should be carefully reviewed by counsel for any additional substitution requirements.

As a practical matter, standard substitution clauses in many trust deeds require essentially the same information and procedure as the statutory methods [*see Civ. Code § 2934a(a)(1)(A)*]. For example, most trust deeds permit substitution by the beneficiaries without the consent of the trustor, as does the statutory method. Therefore, it is possible in most cases to replace a trustee and simultaneously comply with the statutory requirements and the specific provisions of the trust deed.

[c] Effect of Substitution on Nonjudicial Foreclosure Proceeding

If one of the statutory methods of substitution is used [*see Civ. Code § 2934a*; *see also § 25C.230[1]*] after a notice of default has been recorded in a nonjudicial foreclosure proceeding, a copy of the substitution must be mailed by the beneficiary or beneficiaries or their authorized agents to the current trustee and to all persons entitled to receive the notice of default [*see Civ. Code § 2934a(c)*; for further discussion of this requirement, *see § 25C.230[1]*]. While this distribution requirement applies specifically to the statutory methods of substitution, it is recommended that notice be given in the same manner in the case of a nonstatutory substitution.

Notwithstanding any provision in any trust deed, when a notice of sale is given and there is a subsequent substitution of the trustee named in the notice, any sale conducted by the substituted trustee is void unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*]. For further discussion of nonjudicial foreclosures, see Ch. 25D, *Foreclosure* .

[2] Form

Unilateral Substitution of Trustee Pursuant to Deed of Trust Provision

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

SUBSTITUTION OF TRUSTEE

WHEREAS, _____[*name of original trustor*] was the original Trustor, _____[*name of original trustee*] was the original Trustee, and _____[*name of original beneficiary*] was the original Beneficiary under that Deed of Trust (hereafter referred to as the "Deed of Trust") dated _____, and recorded as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, and

WHEREAS, the undersigned is the present Beneficiary under the Deed of Trust, and

WHEREAS, the undersigned desires to substitute a new Trustee under the Deed of Trust in the place and stead of the

original Trustee, in the manner provided for in the Deed of Trust,

NOW, THEREFORE, the undersigned hereby substitutes _____[*name of trustee to be substituted*], _____[*legal status, e.g.*, a California corporation or an individual], whose address is _____[*address*], as Trustee under the Deed of Trust.
Dated: _____.

_____ [*signature of beneficiary*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25C RELEASE AND RECONVEYANCE
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C. Substitution of Trustees

10-25C California Legal Forms--Transaction Guide § 25C.234

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25C.234 Substitution of Trustee by Joint Agreement

[1] Comment

[a] Use of Form

The form in [2], *below*, is a substitution of trustee designed for use when both the beneficiary and trustor under the trust deed wish to effect the substitution without the consent of the trustee and without regard to the requirements of the statutory methods of substitution [*see Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*].

There are three additional methods of replacing trustees in a deed of trust. The first two are alternative statutory methods of substitution. They permit substitution either (1) by all of the beneficiaries (or the sole beneficiary, when appropriate), or (2) by holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction [*Civ. Code § 2934a*; *see § 25C.230*]. Under the third (nonstatutory) method, a trustee may be replaced pursuant to the terms of the applicable trust deed [*see Bennett v. Ukiah Fair Ass'n (1936) 7 Cal. 2d 43, 44-45, 59 P.2d 805* (this method need not comply with foregoing statutory requirements)]. For example, many trust deeds permit the beneficiary to unilaterally substitute a trustee without the trustor's consent [*see § 25C.233*].

[b] Execution and Recording

Both the trustor and beneficiary should execute and acknowledge this type of substitution instrument. Thereafter, the instrument should be recorded in each county where the real property is located and the trust deed is recorded [*see Pacific S. & L. Co. v. N. American Etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355*].

[c] Effect of Substitution on Nonjudicial Foreclosure Proceeding

If a substitution of the trustee is effected pursuant to one of the statutory methods [*see Civ. Code § 2934a*; *see also § 25C.230[1]*] after a notice of default has been recorded in a nonjudicial foreclosure proceeding, the beneficiary or beneficiaries or their authorized agents must mail a copy of the substitution to the current trustee and to all persons entitled to receive the notice of default [*see Civ. Code § 2934a(c)*; *see also § 25C.230[1]*]. While the above requirement applies specifically to the statutory methods of substitution, it is recommended that in the case of a nonstatutory substitution, the beneficiary give notice to the concerned parties in the same manner as is required for statutory substitutions.

Notwithstanding any provision in any trust deed, when a notice of sale is given and there is a subsequent substitution of the trustee named in the notice, any sale conducted by the substituted trustee is void unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee has been given pursuant to *Civ. Code § 2924f* [*Civ. Code § 2934a(e)*]. For further discussion of nonjudicial foreclosures, see Ch. 25D, *Foreclosure* .

[2] Form

Substitution of Trustee by Joint Agreement

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

SUBSTITUTION OF TRUSTEE

The undersigned, _____[*name of undersigned beneficiary*], as the present Beneficiary of record, and _____[*name of undersigned trustor or present record owner*], as the Trustor [*or* present record owner of the property described] under the Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereby jointly substitute _____[*name*], at _____[*street address, city, state, zip*], as Trustee in the place of _____[*name*], the Trustee presently of record.
Dated: _____.

BENEFICIARY
_____ [*signature of beneficiary*]
[*typed name*]
TRUSTOR [*or* PRESENT RECORD OWNER]
_____ [*signature of trustor or present record owner*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
SPECIAL ALERT--Ch. 25D FORECLOSURE

10-SA California Legal Forms--Transaction Guide Scope

Scope

§ 25DSA.01 Special Alert--Mortgage Foreclosure Consultants

On and after July 1, 2009, the business of mortgage foreclosure consultants [*see* § 25D.29] in California will be more strictly regulated [*see* 2008 Stats., ch. 278]. A future release of this publication will incorporate the following changes at appropriate places in this chapter.

- Foreclosure consultants will be required to be registered with the California Department of Justice and to be bonded by a corporate surety [Civ. Code § 2945.45(a)(1),(2)].

- A foreclosure-consulting contract will have to be written in another language as well as in English, if the parties negotiated in another language [Civ. Code § 2945.3(c)].

- The owner's notice of cancellation of the contract will be effective if given by fax or e-mail, in lieu of regular mail [Civ. Code § 2945.2(b),(c)].

- A foreclosure consultant will no longer be permitted to enter into an agreement to assist the owner in arranging, or to arrange for the owner, the release of surplus funds after the trustee's sale is conducted [Civ. Code § 2945.4(h)].



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE

10-25D California Legal Forms--Transaction Guide 25D.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.syn Synopsis to Chapter 25D: FORECLOSURE

§ 25D.01 California Statutes

§§ 25D.02-25D.04 [Reserved]

§ 25D.05 Law Reviews

§ 25D.06 Annotations

§ 25D.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

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[1] Applicability

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§ 25D.14 Multiple Notes and Multiple Securities

§ 25D.15 Enforcement of Mixed Collateral Debts

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§ 25D.16 Right of Reinstatement

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[1] Definition

[2] Following Judicial Foreclosure Sale

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§ 25D.18 Possession During Default

§ 25D.19 Effect of Trustor's Bankruptcy

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§ 25D.21 Limits on Amount of Deficiency Judgment

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§ 25D.23 Amounts Mistakenly Omitted From Payoff Demand

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§ 25D.30 Protections for Active Duty Service Members Under State and Federal Law

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§ 25D.110 Status of Property, Debt, and Debtor

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[a] Use of Form

[b] Special Considerations

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[2] FORM

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[c] Known Defaults

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[i] Statutory Statement

[ii] Types of Curable Defaults

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[v] Spanish Language Requirements

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[a] Use of Form

[b] Reinstatement Period

[c] Amount Required to Reinstate

[i] Secured and Recurring Obligations

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[b] Heading and Typeface

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[a] Use of Form

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Notice of Rescission of Sale for Failure of Consideration

§ 25D.209 Trustee's Deed

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[a] Use of Form

[b] Effect of Trustee's Deed

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[2] FORM

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§ 25D.210 Notice of Potential Entitlement to Proceeds of Sale Subject to Conflicting Claims

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[b] Entitled Persons and Method of Distribution

[c] Required Contents

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Notice of Potential Entitlement to Proceeds of Trustee's Sale

§ 25D.211 Notice to Residents of Property in Foreclosure

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[2] FORM

Notice to Residents of Property in Foreclosure

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§ 25D.220 Statutory Notice and Statement Required in Contract With Foreclosure Consultant [Civ. Code § 2945.3]

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[2] FORM

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[b] Required Contents and Format

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[a] Use of Form

[b] Definition of "Representative"

[c] Disclosure Requirements

[d] Liability of Foreclosure Consultant for Damages Resulting From Representative's Acts or Statements

[2] FORM

Statement by Representative of Foreclosure Consultant

Timothy F. O'Learyn*
Practice Consultant

FOOTNOTES:

(n16)Footnote *. Timothy F. O'Leary is a partner in the San Francisco law firm of O'Leary & Lecky, LLP, where his practice emphasizes real estate and professional liability litigation. He graduated from Stanford University and Boalt Hall School of Law. He has written numerous articles on real estate and litigation for the California Real Estate Reporter(Matthew Bender) and other state-wide publications. He regularly lectures on real estate and related topics for the California Association of Realtors and California Society of CPAs.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE

10-25D California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter covers foreclosures arising from defaults under deeds of trust and mortgages secured by real property. The primary emphasis is on nonjudicial foreclosures and the procedure and forms required to effect them. The chapter also discusses judicial foreclosures as a remedy available to a creditor; however, a detailed discussion of that topic is beyond the scope of this chapter. For complete coverage of judicial foreclosures, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

FOOTNOTES:
(n17)Footnote *. Timothy F. O'Leary is a partner in the San Francisco law firm of O'Leary & Lecky, LLP, where his practice emphasizes real estate and professional liability litigation. He graduated from Stanford University and Boalt Hall School of Law. He has written numerous articles on real estate and litigation for the California Real Estate Reporter(Matthew Bender) and other state-wide publications. He regularly lectures on real estate and related topics for the California Association of Realtors and California Society of CPAs.



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A. Primary Sources

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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.01 California Statutes

Civil and criminal penalties for rent skimming. *Civ. Code § 890 et seq.*

Nonjudicial foreclosure. *Civ. Code § 2924 et seq.*

Notice required for final payment on balloon payment loan. *Civ. Code § 2924i*.

Inspection of property by secured lender to determine existence of hazardous waste release. *Civ. Code § 2929.5*.

Foreclosure parties and bids. *Civ. Code § 2931 et seq.*

Power of sale. *Civ. Code § 2932*.

Power of sale under assigned mortgage. *Civ. Code § 2932.5*.

Foreclosure consultants. *Civ. Code § 2945 et seq.*

Attachment is not action for recovery of debt under *Code Civ. Proc. § 726(a). Code Civ. Proc. § 483.012*.

Deficiency judgments. *Code Civ. Proc. § 580a et seq.*

Enforceability of letter of credit supporting obligation that is secured by mortgage or trust deed. *Code Civ. Proc. §§ 580.5, 580.7*.

Execution of writ of sale. *Code Civ. Proc. § 716.020*.

Judicial foreclosure. *Code Civ. Proc. § 725a et seq.*

Remedies of secured lender following borrower's default when security is environmentally impaired. *Code Civ. Proc. § 726.5*.

Redemption after judicial foreclosure. *Code Civ. Proc. § 729.010 et seq.*

Action for breach of contract following borrower's breach of environmental provision. *Code Civ. Proc. § 736*.

Enforcement of mixed collateral debts. *Com. Code § 9604*.

Protections from civil actions for active duty military service members. *Mil. & Vet. Code § 400 et seq.*

Protection from rescinding contract for purchase of real or personal property. *Mil. & Vet. Code § 407*.

Protection from foreclosure on mortgages and deeds of trust. *Mil. & Vet. Code § 408*.



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AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25D.02[Reserved]



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B. Secondary Sources

10-25D California Legal Forms--Transaction Guide § 25D.05

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.05 Law Reviews

Freeman & Gurev, *An Overview of Defenses Available to Guarantors of Real Property Secured Transactions Under California Law, 38 Santa Clara L. Rev. 329 (1998).*

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Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout, 43 UCLA L. Rev. 1117 (1996).*

Knox, *Procedures to Delay Real Property Foreclosures, 23 W. St. U.L. Rev. 303 (1996).*

Perlmutter, *Navigating a Proposed "New Value" Plan Through the Cross-Currents of the Confirmation Process: An Arduous Journey for the Debtor of a Single-Asset Real Estate Case, 17 Whittier L. Rev. 427 (1996).*

Comment, *Will Refinancing Your Home Mortgage Risk Your Life Savings?: Refinancing and California Code of Civil Procedure Section 580b , 43 UCLA L. Rev. 2077 (1996).*

Note, *Equating California Foreclosure Sales With Ordinary Residential Sales, 68 S. Cal. L. Rev. 947 (1995).*

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Comment, *The Sanction for Violation of California's One-Action Rule, 79 Cal. L. Rev. 1601 (1991).*

Comment, *Veterans' Liabilities After Foreclosure--Indemnification and the Scope of the Guarantor's Remedy, 18 W. St. U.L. Rev. 805 (1991)*.

Katz, *Bankruptcy Code Obstacles to Non-Judicial Foreclosures*, 24 Beverly Hills L.J. 190 (1990).



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.06 Annotations

Annot., Propriety of setting minimum or upset price for sale of property at judicial foreclosure, 4 A.L.R. 5th 693 (1993).

Annot., Mortgage foreclosure forbearance statutes--modern status, 83 A.L.R. 4th 243 (1991).

Annot., Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased, 37 A.L.R. 4th 286 (1985).

Annot., Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third party lienor, in absence of express trust provision, 30 A.L.R. 4th 732 (1984).

Annot., Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased, 37 A.L.R.4th 286 (1985).



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.07 Text References

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Ch. 25, *Real Estate Loans* .
Ch. 25A, *Security Instruments for Real Estate Financing* .

California Real Estate Law & Practice (Matthew Bender).
Ch. 120, *Representing a Client After Default* .
Ch. 121, *Priorities of Liens* .
Ch. 122, *Antideficiency Legislation* .
Ch. 123, *Nonjudicial Foreclosure* .

California Forms of Pleading and Practice (Matthew Bender).
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[2] Additional Text References

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AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25D.08[Reserved]



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10-25D California Legal Forms--Transaction Guide § 25D.10

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.10 Types of Foreclosure

"Foreclosure" commonly refers to the enforcement of a deed of trust or mortgage in any manner provided by law. Following a default under the terms of a trust deed or mortgage and the underlying obligation, the method of enforcement is the sale of the encumbered real property.

In many cases, a creditor may elect to proceed with either nonjudicial foreclosure or judicial foreclosure. Nonjudicial foreclosure, which culminates in the private sale of the real property, is available only if the trust deed or mortgage securing the obligation contains a clause or provision granting a power of sale [*see Civ. Code § 2924(a)*]. As a matter of practice, most security instruments used in California do contain a power of sale. Judicial foreclosure must be initiated by filing a complaint for foreclosure [*see Code Civ. Proc. §§ 725a, 726*] in the county in which the property is located [*see Code Civ. Proc. § 392(a)(2)*]. For an illustrative complaint that may be used to commence a judicial foreclosure, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

Several code sections pertaining to the creation and enforcement of real property trust deeds and mortgages specifically authorize the hypothecation of estates for years in real property by trust deeds or mortgages. The statutes include several discussed throughout this chapter, including those governing the following:

- Reinstatement [*see Civ. Code § 2924c*; *see also § 25D.16*].
- Copies of notices of sale and default [*see Civ. Code § 2924b*; *§ 25D.200*; *see also Civ. Code § 2924.3*; *§ 25D.121*, P 10].
- Deficiency judgments [*see Code Civ. Proc. §§ 580b, 580d*; *see also § 25D.20*].
- The "one form of action" rule [*see Code Civ. Proc. § 726*; *see also § 25D.13*].

A member of the State Bar of California must not directly or indirectly purchase property at a foreclosure sale if the

member or any other member of the State Bar affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm (1) is an attorney for a party, or (2) is acting as trustee or in a similar capacity [*Cal. Rules Prof. Conduct, Rule 4-300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsConflicts of InterestReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.11 Effect of Foreclosure

A properly executed nonjudicial foreclosure extinguishes all junior liens. The buyer at the sale takes title free and clear of all liens on the property junior to the lien foreclosed [*Hohn v. Riverside County Flood Control and Water Conservation Dist. (1964) 228 Cal. App. 2d 605, 613, 39 Cal. Rptr. 647*]. A decree of judicial foreclosure also extinguishes all junior liens [*Code Civ. Proc. §§ 701.630, 729.080(e)*]. However, after a judicial foreclosure, the judgment debtor and any successor in interest may have a right of redemption [*see § 25D.17[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.12 Nonjudicial and Judicial Foreclosures Compared

Because judicial foreclosure requires court proceedings, it is generally more expensive and time consuming than nonjudicial foreclosure. It is possible to comply with the statutory notice and other requirements and to sell property in a nonjudicial foreclosure in approximately 120 days.

Another disadvantage to a judicial foreclosure is that the debtor may have the right to redeem the property for a specified period of time following the sale [*see § 25D.17*]. There is no right of redemption after property is sold in a nonjudicial foreclosure proceeding.

The only advantage generally associated with judicial foreclosure is that it may be possible to obtain a deficiency judgment against the debtor if the proceeds from the sale of the property are insufficient to satisfy the debt [*see § 25D.20[3]*], whereas nonjudicial foreclosure precludes obtaining a deficiency judgment [*see Code Civ. Proc. § 580d*].

PRACTICE TIP:

Judicial Foreclosure. Selecting judicial foreclosure instead of the less-expensive and time-consuming remedy of non-judicial foreclosure involves the consideration of a number of factors:

- Will there be a substantial deficiency judgment justifying a judicial foreclosure?
- Even if a deficiency judgment is available, will the debtor have sufficient assets to satisfy the judgment?
- How much is the client willing to spend in appraisal fees and the like to proceed with judicial foreclosure?
- Is the client willing to accept the right of the debtor to redeem the property after the

judicially-supervised sale concludes?

The law firm advising the client should ask at a minimum these questions to ensure that the client is weighing the relative advantages of the two options. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's RightReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption



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10-25D California Legal Forms--Transaction Guide § 25D.13

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.13 "One Form of Action" Rule

[1] Applicability

Code Civ. Proc. § 726(a) extends the applicability of the "one form of action" rule to an action for the recovery of a debt or the enforcement of a right secured by a mortgage on an estate for years in real property [for discussion of types of foreclosure, see *§ 25D.10*]. The same rule applies if the security instrument is a deed of trust on real property [*see Code Civ. Proc. § 725a*; *see also Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley (1933) 217 Cal. 644, 657-658, 20 P.2d 940*]. The rule was enacted to protect mortgagors from harassment in repeated litigation [*Salter v. Ulrich (1943) 22 Cal. 2d 263, 266, 138 P.2d 7*]. It effectively prevents a creditor from bringing a lawsuit on the promissory note secured by a trust deed or mortgage rather than judicially foreclosing on the security instrument. If the creditor attempts to ignore the security and sue directly on the underlying obligation, the debtor may plead *Code Civ. Proc. § 726(a)* as an affirmative defense and thereby force the creditor to exhaust the security before seeking a personal judgment against the debtor for a deficiency [*Walker v. Community Bank (1974) 10 Cal. 3d 729, 734, 111 Cal. Rptr. 897, 518 P.2d 329* ; *Hartman v. Smith (1963) 219 Cal. App. 2d 415, 416-417, 33 Cal. Rptr. 147*].

Some types of proceedings short of a lawsuit may be considered an "action" for purposes of *Code Civ. Proc. § 726(a)* [*see Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 771, 199 Cal. Rptr. 557* ("set-off" by bank treated as equivalent of action)].

[2] Exception for Certain Fraud Cases

Notwithstanding *Code Civ. Proc. § 726* or any other provision of law to the contrary, any person authorized to make or arrange loans secured by real property who originates, acquires, or purchases any such loan may bring an action for damages against a borrower based on fraud that induced the original lender to make the loan. The damages may include exemplary damages of up to 50 percent of the actual damages [*Code Civ. Proc. § 726(f)*]. Such an action does not constitute a money judgment for deficiency, or a deficiency judgment within the meaning of *Code Civ. Proc. §§ 580a, 580b*, and *580d* [*Code Civ. Proc. § 726(h)*]. This right of action does not apply if (1) the loan is secured by single-family, owner-occupied residential real property, (2) the property is actually occupied by the borrower as

represented to the lender, and (3) the loan is for less than $150,000 as adjusted annually [*Code Civ. Proc. § 726(g)*].

[3] Later Worthless Security Exception

When the security for a mortgage or deed of trust is destroyed after being granted, the creditor can sue directly on the obligation without foreclosing first [*see Cohen v. Marshall (1925) 197 Cal. 117, 123, 239 P. 1050]* . There is also no requirement that a creditor proceed first with foreclosure if the creditor becomes unsecured by a senior lienor's foreclosure of the security [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39, 27 Cal. Rptr. 873, 378 P.2d 97*].

A junior lienholder was not barred from suing directly on the underlying obligation when its security was extinguished by the foreclosure of a senior lien, even though the junior lienholder had commenced foreclosure proceedings before the senior lienholder's foreclosure and had postponed its foreclosure sale to allow the senior lienholder to complete its foreclosure sale first [*Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 610, 59 Cal. Rptr. 2d 288*]. The junior lienholder's failure to complete its own foreclosure proceedings was not an affirmative act leading to the loss of the security, and the mere commencement of the foreclosure proceedings was not an election of remedies that precluded a suit on the deficiency [*Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 614-615, 59 Cal. Rptr. 2d 288*].

The fact that the security was insufficient when taken or becomes insufficient because of a decline in its value does not preclude application of *Code Civ. Proc. § 726*; the debt is still secured even though the security is not adequate [*Barbieri v. Ramelli (1890) 84 Cal. 154, 156, 23 P. 1086* ; *Giandeini v. Ramirez (1936) 11 Cal. App. 2d 469, 471, 54 P.2d 91*].

[4] Enforceability of Letters of Credit

If an obligation is secured by a mortgage or trust deed on real property (or on an estate for years in real property) and is also supported by a letter of credit, the following acts will not constitute an action within the meaning of *Code Civ. Proc. § 726(a)* or a failure to comply with any other statutory or judicial requirement to proceed first against security [*Code Civ. Proc. § 580.5(b)*; *see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 252, 62 Cal. Rptr. 2d 243, 933 P.2d 507* (*Code Civ. Proc. § 580.5* merely clarifies existing law and therefore applies to letters of credit issued before its effective date of September 16, 1994)]:

- The presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit.

- The honor or payment of, or the demand for reimbursement, receipt of reimbursement, or enforcement of any contractual, statutory, or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit.

This exemption from the one form of action rule applies whether the above acts occur before or after the judicial or nonjudicial foreclosure of the mortgage or trust deed, or a conveyance in lieu of foreclosure [*Code Civ. Proc. § 580.5(b)*]. However, notwithstanding this exemption, a letter of credit will not be enforceable by any party to the letter of credit in a loan transaction in which all of the following circumstances exist [*Code Civ. Proc. § 580.7(b)*]:

- The loan is secured by a purchase money trust deed or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the loan was made to be occupied, by the customer.

- The customer is a natural person.

- The letter of credit is issued to the beneficiary to avoid a default of the existing loan.

- The letter of credit is issued after January 1, 1995 (the operative date of *Code Civ. Proc. § 580.7*).

Code Civ. Proc. § 580.5 also exempts letter of credit transactions from the antideficiency statutes [*see § 25D.22*].

For further discussion of this exemption, see California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* (Matthew Bender). For coverage of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers* .

[5] Waiver of Defense and Sanctions

The benefits of the single form of action rule cannot be waived by the mortgagor in connection with making or renewing the loan [*Civ. Code § 2953*; *see Winklemen v. Sides (1939) 31 Cal. App. 2d 387, 404, 88 P.2d 147*]. However, the rule is an affirmative defense that must be asserted in a demurrer or raised in the answer. If a debtor fails to plead the existence of a mortgage in a timely manner, the defense is lost [*Salter v. Ulrich (1943) 22 Cal. 2d 263, 268, 138 P.2d 7* ; *Spector v. National Pictures Corp. (1962) 201 Cal. App. 2d 217, 226, 20 Cal. Rptr. 307*]. Once the defense is waived, the creditor may receive a valid personal judgment against the debtor on the obligation sued on. The so-called sanction aspect of *Code Civ. Proc. § 726(a)* prevents the creditor from then foreclosing on the security [*see Salter v. Ulrich (1943) 22 Cal. 2d 263, 268, 138 P.2d 7*].

[6] Attachment Allowable as Remedy

In an action to foreclose a mortgage or deed of trust on real property or an estate for years in real property, and subject to the restrictions of *Code Civ. Proc. §§ 580b* and *580d*, pursuit of a remedy relating to attachment [*see Code Civ. Proc. § 481.010 et seq.*] does not constitute an action for the recovery of a debt secured by a mortgage or deed of trust under *Code Civ. Proc. § 726(a)* or a failure to comply with other statutory or judicial requirements to proceed first against the security [*Code Civ. Proc. § 483.012*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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10-25D California Legal Forms--Transaction Guide § 25D.14

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.14 Multiple Notes and Multiple Securities

If multiple securities exist for a single debt, a creditor bringing a foreclosure action should judicially foreclose on all the securities, because the creditor may not later foreclose on any remaining security [*see Stockton Sav. & Loan Soc'y v. Harrold (1900) 127 Cal. 612, 616, 60 P. 165*]. In contrast, a nonjudicial foreclosure on only part of the security does not prevent the creditor from foreclosing, either judicially or nonjudicially, on the remaining security. However, the creditor is not entitled to obtain a deficiency judgment on the subsequent foreclosure, even if none of the security was purchase money security, because nonjudicial foreclosure on any portion of the security prevents a deficiency judgment on the remaining security under *Code Civ. Proc. § 580d* [*Hatch v. Security-First Nat'l Bank (1942) 19 Cal. 2d 254, 260-262, 120 P.2d 869*].

If there are multiple notes, each representing a separate debt, the applicability of the antideficiency legislation to each note must be considered separately. For a discussion of the factors involved in determining whether debts are separate, see California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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10-25D California Legal Forms--Transaction Guide § 25D.15

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.15 Enforcement of Mixed Collateral Debts

[1] Separate Foreclosures

If an obligation is secured by a security interest in personal property or fixtures [*see Com. Code § 9334*] and also by an interest or estate in real property, the secured party may elect to foreclose separately on the real property and on the personal property or fixtures, or to foreclose on the real property and the personal property or fixtures in a unified action [*see Com. Code § 9604(a)(1)(A), (B)*]. Alternatively, the secured party may foreclose on some personal property separately and on other personal property in a unified action with the real property [*Com. Code § 9604(a)(1)(C)*].

[2] Applicability of Various Laws

Except as otherwise provided in the Commercial Code, provisions and limitations of any law respecting real property and obligations secured by an interest or estate in real property do not apply to (1) the obligation, or (2) any personal property or fixtures, other than personal property or fixtures subject to a unified action. The real property provisions and limitations mentioned above specifically include the following [*Com. Code § 9604(a)(2)(A)*]:

- The "one form of action" rule [*Code Civ. Proc. § 726*; *see § 25D.13[1]*; *see also Com. Code § 9604(a)(5), (8)*].
- Provisions regarding acceleration or reinstatement of obligations secured by an interest or estate in real property.
- Prohibitions against deficiency judgments.
- Limitations on deficiency judgments based on the value of the collateral.
- Limitations on the right to proceed as to collateral and requirements that a creditor resort either first or at all to its security.

However, if an obligation secured by personal property or fixtures would otherwise become unenforceable by reason of *Code Civ. Proc. § 726* or any requirement that a creditor resort first to its security, then, notwithstanding that statute or requirement, the obligation will nevertheless remain enforceable to the full extent necessary to permit a secured party to proceed against personal property or fixtures securing the obligation in accordance with the secured party's rights and remedies as permitted under the Commercial Code [*Com. Code § 9604(a)(2)(B)*].

The requirements of *Com. Code § 9604(a)(2)* do not limit the application or deprive the debtor of the protection of certain antideficiency laws [*see Com. Code § 9604(a)(3)*; *see also Code Civ. Proc. §§ 580a, 580b, 580d*; *Com. Code § 9604(a)(8)*]. Furthermore, the requirements of *Com. Code § 9604(a)(2)* do not excuse compliance with the reinstatement provisions of *Civ. Code § 2924c* [*see Com. Code § 9604(a)(3)(C)*; *§ 25D.16*] or affect any law respecting real property or obligations secured by real property with respect to a loan or a credit sale made to any individual primarily for personal, family, or household purposes [*Com. Code § 9604(a)(3)(E)*].

If the secured party commences an action [*see Code Civ. Proc. § 22* ("action" defined)] that seeks a monetary judgment on the debt [*see Com. Code § 9604(a)(6)* ("monetary judgment on the debt" defined)], *Com. Code § 9604(a)(2)* does not prevent the debtor's assertion of any right to require the inclusion in the action of any interest or estate in real property securing the debt. If a monetary judgment on the debt is entered in the action, *Com. Code § 9604(a)(2)* does not prevent the debtor's assertion of the subsequent unenforceability of the encumbrance on any interest or estate in real property securing the debt and not included in the action [*Com. Code § 9604(a)(3)(B)*].

If the secured party violates any statute or rule of law that requires a creditor who holds an obligation secured by an interest or estate in real property to resort first to its security before resorting to any property of the debtor that does not secure the obligation, *Com. Code § 9604(a)(2)* does not prevent (1) the debtor's assertion of any right to require correction of the violation, (2) any right of the secured party to correct the violation, (3) the debtor's assertion of the subsequent unenforceability of the encumbrance on any interest or estate in real property securing the obligation, or (4) the debtor's assertion of the subsequent unenforceability of the obligation except to the extent that the obligation is preserved by *Com. Code § 9604(a)(2)(B)* [*Com. Code § 9604(a)(3)(G)*]. Under *Com. Code § 9604(a)(2)(B)*, if an obligation secured by personal property or fixtures would otherwise become unenforceable by reason of *Code Civ. Proc. § 726* or any requirement that a creditor resort first to its security, then, notwithstanding that section or any similar requirement, the obligation will nevertheless remain enforceable to the full extent necessary to permit a creditor to proceed against personal property or fixtures securing the obligation in accordance with the creditor's rights and remedies as permitted under the Commercial Code [*Com. Code § 9604(a)(2)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFixtures & ImprovementsSecurity Interests



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.16 Right of Reinstatement

"Reinstatement" refers to the right of a debtor or a junior beneficiary or lienholder to cure a default by paying the amounts in default under the trust deed or mortgage, all amounts in default on recurring obligations, permitted costs and expenses, and trustee's or attorneys' fees. Once the default is cured, the secured obligation and the security instrument are reinstated in full force and effect, as if no acceleration had occurred, and any pending foreclosure proceedings must be dismissed or discontinued. However, when the beneficiary or mortgagee has made no advances on defaults that would constitute recurring obligations, the beneficiary or mortgagee may require the trustor or mortgagor to provide reliable written evidence that the required amounts have been paid prior to reinstatement [*Civ. Code § 2924c(a)(1)*; *see §§ 25D.204[2], 25D.205[2]*].

In a nonjudicial foreclosure, the debtor may exercise the right to reinstate at any time from the date of recordation of the notice of default until five business days before the date of sale set forth in the initial recorded notice of sale [*Civ. Code § 2924c(e)*; *but see Bank of America N.A. v. La Jolla Group II (2005) 129 Cal. App. 4th 706, 712, 28 Cal. Rptr. 3d 825* (fact that agreement to cure default did not take place within time statutorily granted to cure default as a matter of right was irrelevant because homeowner and lender mutually agreed to cure and reinstatement of loan)]. In a judicial foreclosure proceeding, reinstatement may be made at any time before entry of the decree of foreclosure [*Civ. Code § 2924c(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingGeneral Overview



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.17 Right of Redemption

[1] Definition

The right of redemption generally refers to the statutory right of a debtor to redeem the property sold at a judicial foreclosure sale after the sale. This right is usually considered a significant disadvantage to creditors electing judicial foreclosure. In contrast, debtors are granted no right of redemption following a sale in a nonjudicial foreclosure proceeding.

[2] Following Judicial Foreclosure Sale

If the decree of foreclosure of a mortgage or trust deed on real property determines that a deficiency judgment may be ordered against the defendant, the real property mustbe sold subject to a right of redemption, unless the property is a leasehold estate with an unexpired term of less than two years at the time of levy [*Code Civ. Proc. § 729.010(a)*]. Property sold subject to the right of redemption may be redeemed by only the judgment debtor or the judgment debtor's successor in interest; the purchaser of the property at the foreclosure sale is not a successor in interest [*Code Civ. Proc. § 729.020*]. The redemption period ends three months after the date of sale if the sale proceeds are sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, or one year after the date of sale if the proceeds do not satisfy the secured indebtedness with interest and costs of action and of sale [*Code Civ. Proc. § 729.030*]. For further discussion of the right of redemption and the amount necessary to redeem property after a judicial sale, see California Real Estate Law & Practice, Ch. 124, *Judicial Foreclosure* (Matthew Bender).

[3] Before Nonjudicial Foreclosure Sale

Although a debtor does not have a right to redeem property after it is sold at a nonjudicial foreclosure sale, he or she does have a right of redemption beginning on expiration of the reinstatement period provided by *Civ. Code § 2924c* [*see § 25D.16*] and ending just before the actual sale of the property [*see Civ. Code § 2903*]. The debtor may exercise this right by paying or offering to pay the entire amount due, plus creditor's expenses [*see Civ. Code § 2905*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's RightReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.18 Possession During Default

During the existence of a trust deed, the trustor, in the absence of a contrary agreement, retains all ownership rights in the encumbered property, including the right to possession and any rents and profits of the property [*Civ. Code § 2927*; *Code Civ. Proc. § 744*; *Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450*]. However, most trust deeds and mortgages provide that in the event of a default by the debtor, the creditor may take possession and collect the rents and profits to reduce the debt. Creditors generally enforce this right by having a receiver appointed either before foreclosure [*Code Civ. Proc. § 564(b)(9)*] or pursuant to a foreclosure action [*Code Civ. Proc. § 564(b)(2)*]. For detailed coverage of the appointment of receivers, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceiverships ReceiversAppointments Civil ProcedureRemediesReceiverships ReceiversPowers Real Property LawFinancingMortgages & Other Security InstrumentsForeclosures General Overview Real Property LawOwnership & TransferAgents & Fiduciaries



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.19 Effect of Trustor's Bankruptcy

When bankruptcy proceedings are in effect against the debtor/owner of real property, there is an automatic stay against the beneficiary and trustee that prohibits the commencement or continuation of all foreclosure proceedings [*see 11 U.S.C. § 362(a)(4)*]. In an action filed in the bankruptcy court to remove an automatic stay, the beneficiary generally has the burden of proving (1) "cause" for the removal (including the lack of adequate protection of the beneficiary's interest in the property); (2) that the trustor does not have an equity in the property and the property is not necessary to an effective reorganization; or (3) that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either transfer of all or part ownership of, or other interest in, the real property without the secured creditor's consent or court approval, or multiple bankruptcy filings affecting the property [*see 11 U.S.C. § 362(d)*; *see also 11 U.S.C. § 326(g)*]. A court may grant relief from an automatic stay when a debtor files Chapter 11 proceedings for the sole purpose of obtaining the automatic stay preventing foreclosure, at least if there is no equity in the real property over and above obligations owed the beneficiary [*see In re Zed, Inc. (U.S. Bank. Ct. [N.D. Cal.] 1982) 20 B.R. 462, 464*]. For detailed coverage of the effect of bankruptcy on a foreclosure proceeding, including the procedure and forms required to obtain relief from an automatic stay, see Collier Bankruptcy Practice Guide, Ch. 38, *Automatic Stay/Relief From Stay* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageLiensBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysCauseBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysProceduresReal Property LawBankruptcyAutomatic StaysReal Property LawBankruptcySecured Claims



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.20 Deficiency Judgments

[1] Definition

A deficiency judgment is a judgment rendered against a borrower in an amount equal to the balance owed on the loan after a foreclosure sale has been conducted and the sale proceeds have been applied to the outstanding loan balance. California's antideficiency laws [*see Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*] severely limit the availability of deficiency judgments.

[2] Nonjudicial Foreclosure

If a mortgagee or trustee sells real property under a power of sale contained in the mortgage or deed of trust, a deficiency judgment may not be obtained on a note secured by the mortgage or trust deed [*Code Civ. Proc. § 580d*]. The Legislature's use of the limited term "note" in *Code Civ. Proc. § 580d* indicates a clear intention that the section not apply to obligations other than promissory notes [*Willys of Marin Co. v. Pierce (1956) 140 Cal. App. 2d 826, 831, 296 P.2d 25* (deed of trust given as security for performance of lease)]. The prohibition against deficiency judgments for nonjudicial foreclosures also does not extend to a trust deed, mortgage, or other lien given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or made by a public utility subject to the provisions of the Public Utilities Act [*see Code Civ. Proc. § 580d*; *see also Pub. Util. Code § 201 et seq.* (Public Utilities Act)].

For further discussion, see California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* , Part E (Matthew Bender), and California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

[3] Judicial Foreclosure

A deficiency judgment may be obtained after most judicial foreclosures unless the relevant deed of trust or mortgage is a "purchase money" security, that is, security given to (1) the seller to secure payment of the balance of the purchase

price of real property, or (2) a third party lender to secure repayment of a loan used to pay all or part of the purchase price of a dwelling containing up to four units and occupied in whole or in part by the buyer [*see Code Civ. Proc. § 580b*].

If a deficiency judgment is allowed in a particular judicial foreclosure action, the recovery is subject to the procedural requirements and monetary limitations set forth in *Code Civ. Proc. § 726(b)* [*see § 25D.21*].

For further discussion, see California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* , Part D (Matthew Bender), and California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

[4] Installment Land Sale Contracts

A deficiency judgment may not be obtained following the failure of a purchaser of real property to complete a contract of sale [*Code Civ. Proc. § 580b*]. For purposes of this rule, a contract of sale is an installment land sales contract under which the seller retains title until the buyer pays all or a large portion of the purchase price. This prohibition exists because these contracts serve essentially the same function as a mortgage or deed of trust [*Venable v. Harmon (1965) 233 Cal. App. 2d 297, 300, 43 Cal. Rptr. 490*]. For further discussion, see California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.21 Limits on Amount of Deficiency Judgment

The amount of the deficiency judgment available against a defendant found personally liable in a judicial foreclosure will be the amount by which the indebtedness (including interest, costs of levy and sale, and costs of the action) exceeds the fair value of the property or interest sold as of the date of sale. However, the judgment (excluding interest from the date of sale and costs) must not exceed the difference between the price paid for the property and the entire outstanding secured indebtedness [*Code Civ. Proc. § 726(b)*].

For these purposes, "fair value" means the intrinsic value of the property, taking into consideration all of the circumstances affecting the underlying worth of the property at the time of the sale (including the market value of the property), but without consideration of the impact of foreclosure proceedings on this fair value [*Rainer Mortgage v. Silverwood, Ltd. (1985) 163 Cal. App. 3d 359, 367, 209 Cal. Rptr. 294*].

Both the plaintiff and defendant may present evidence of the fair value of the property or property interest sold as of the date of sale. The court is required on motion of any party, and may on its own motion, appoint a probate referee to appraise the property or property interest sold as of the time of sale. This appraisal is admissible in evidence [*Code Civ. Proc. § 726(b)*].

Code Civ. Proc. § 580a, pertaining to nonjudicial foreclosures, contains language similar to *Code Civ. Proc. § 726* regarding the effect of value on the amount of a deficiency judgment, referring to "fair market value" rather than to "fair value." However, because subsequently enacted *Code Civ. Proc. § 580d* precludes (subject to very limited exceptions) any deficiency judgment on a note secured by a deed of trust or obligation after a nonjudicial foreclosure, *Code Civ. Proc. § 580a* may only be applicable to actions for a deficiency on non-note obligations, such as a lease, and to the situations specifically excepted from the purview of *Code Civ. Proc. § 580d* [*see § 25D.20[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawProperty Valuation

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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.22 Exemption From Antideficiency Statutes for Letter of Credit Transactions

If an obligation is secured by a mortgage or trust deed on real property (or on an estate for years in real property) and is also supported by a letter of credit, the following acts will not constitute a deficiency judgment within the meaning of the antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*] or a violation of those statutes [*Code Civ. Proc. § 580.5(b)*; *see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 252, 62 Cal. Rptr. 2d 243, 933 P.2d 507* (*Code Civ. Proc. § 580.5* merely clarifies existing law and therefore applies to letters of credit issued before its effective date of September 16, 1994); *see also* Stats. 1994, ch. 611, § 5 (legislative intent)]:

- The presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit.

- The honor or payment of, or the demand for reimbursement, receipt of reimbursement, or enforcement of any contractual, statutory, or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit.

This exemption from the antideficiency statutes applies whether the above acts occur before or after (1) the judicial or nonjudicial foreclosure of the mortgage or trust deed or (2) a conveyance in lieu of foreclosure [*Code Civ. Proc. § 580.5(b)*]. However, notwithstanding this exemption, a letter of credit will not be enforceable in a loan transaction when the loan is secured by a purchase money trust deed or mortgage on owner-occupied, one-to-four unit residential property and certain other circumstances exist [*see Code Civ. Proc. § 580.7(b)*; *see also § 25D.13[4]*].

Code Civ. Proc. § 580.5 also exempts the above letter of credit transactions from the "one form of action" rule [*see Code Civ. Proc. § 726(a)*; *see also § 25D.13[4]*].

For coverage of letters of credit, see Ch. 56, *Letters of Credit and Electronic Fund Transfers* . For further discussion of this exemption, see California Real Estate Law & Practice, Ch. 122, *Antideficiency Legislation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBonds, Guarantees & Letters of CreditLetters of CreditCommercial Law (UCC)Letters of Credit (Article 5)RemediesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments



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10-25D California Legal Forms--Transaction Guide § 25D.23

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.23 Amounts Mistakenly Omitted From Payoff Demand

Code Civ. Proc. § 580b does not operate as an absolute bar to the recovery of amounts mistakenly omitted from a payoff demand on a note secured by a deed of trust on real property [*Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 52, 57 Cal. Rptr. 2d 687, 924 P.2d 996*]. After payoff and reconveyance, any omitted amount is no longer a secured obligation, and *Code Civ. Proc. § 580b* does not apply. In this situation, recovery may be based on unjust enrichment [*Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 50, 57 Cal. Rptr. 2d 687, 924 P.2d 996*]. The relevant inquiry is whether the creditor's mistake was one of fact and whether the person benefitting knew or should have known about the mistake [*Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 52, 57 Cal. Rptr. 2d 687, 924 P.2d 996*]. Allowing recovery for unjust enrichment does not contradict the policy of requiring the creditor to rely on the property to secure the debt, because any unjust-enrichment recovery may not exceed the value of the property [*Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 53, 57 Cal. Rptr. 2d 687, 924 P.2d 996* ; *First Nationwide Savings v. Perry (1992) 11 Cal. App. 4th 1657, 1664-1665, 15 Cal. Rptr. 2d 173*].

The principles of unjust enrichment, mistake, and estoppel have been incorporated into *Civ. Code § 2943*, which governs payoff demands [*see Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 51, 57 Cal. Rptr. 2d 687, 924 P.2d 996* ; *Freedom Financial Thrift & Loan v. Golden Pacific Bank (1993) 20 Cal. App. 4th 1305, 1315, 25 Cal. Rptr. 2d 235*]. *Civ. Code § 2943* provides that any amounts that were due and for any reason not included in the statement or amended statement must continue to be recoverable by the beneficiary as an unsecured obligation of the obligor pursuant to the terms of the note andexisting provisions of law [*Civ. Code § 2943(d)(3)*]. As with the common law cause of action, *Code Civ. Proc. § 580b* does not bar recovery under *Civ. Code § 2943* for mistakes of fact in payoff demands with respect to purchase money obligations [*Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 53 n.5, 57 Cal. Rptr. 2d 687, 924 P.2d 996*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefGeneral OverviewReal Property LawFinancingMortgages & Other Security

InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments



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10-25D California Legal Forms--Transaction Guide § 25D.24

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.24 Environmentally Impaired Security

[1] Additional and Alternative Remedies

Several unique remedies and related rights are available to a secured lender when the real property security has become environmentally impaired. As a general rule, these remedies are not subject to the "one form of action" rule [*see Code Civ. Proc. § 726(a)*; *§ 25D.13[1]*]. Because many of the remedies include judicial proceedings, a detailed discussion of them is beyond the scope of this publication. However, the following subsections present an overview of the various remedies.

[2] Inspection of Secured Property

A secured lender may, subject to statutory limitations, enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance [*see Civ. Code § 2929.5(e)(2), (4)* (definitions of "hazardous substance" and "release")] into, onto, beneath, or from the real property security. The lender may exercise this right under either of the following circumstances [*Civ. Code § 2929.5(a)*]:

- On reasonable belief of the existence of a past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security not previously disclosed in writing to the secured lender in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower; or

- After the commencement of nonjudicial or judicial foreclosure proceedings against the real property security.

The lender must comply with notice and reimbursement requirements when exercising the right to enter and inspect [*see Civ. Code § 2929.5(b), (c)*]. If the lender is refused the right of entry and inspection, it may, on petition, obtain a court order to exercise these rights. That action will not constitute an action within the meaning of the "one form of action"

rule [*Civ. Code § 2929.5(d)*; *see Code Civ. Proc. § 564(c), (d)* (appointment of receiver in such an action)].

For further discussion, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[3] Alternative Remedies on Borrower's Default

Notwithstanding the "one form of action" rule or any other provision of law, a secured lender may elect to do either of the following when the real property security is environmentally impaired and the borrower is in default:

- Waive its lien against any parcel of real property security that is environmentally impaired or is an affected parcel [*see Code Civ. Proc. § 726.5(e)(1)* (affected parcel essentially means a parcel that is contiguous to, within 2000 feet of, or a part of a subdivision that contains an environmentally impaired parcel)], and against all or any portion of the fixtures and personal property attached to the parcels, and exercise the rights and remedies of an unsecured creditor (including reduction of its claim against the borrower to judgment) and any other rights and remedies permitted by law [*Code Civ. Proc. § 726.5(a)(1)*]; or

- Exercise the rights and remedies of a creditor secured by a trust deed or mortgage and, if applicable, a lien against fixtures or personal property attached to the real property security, and any other rights and remedies permitted by law [*Code Civ. Proc. § 726.5(a)(2)*].

"Environmentally impaired" means that the estimated costs to clean up and remediate a past or present release or threatened release of any hazardous substance [*see Code Civ. Proc. § 726.5(e)(3)* (definition)] into, onto, beneath, or from the real property security, not disclosed in writing to, or otherwise actually known by, the secured lender prior to the making of the loan or extension of credit secured by the real property security, exceeds 25 percent of the higher of the aggregate fair market value of all security for the loan or extension of credit (1) at the time of the making of the loan or extension of credit, or (2) at the time of the lender's discovery of the release or threatened release. For purposes of this definition, the estimated costs to clean up and remediate the contamination caused by the release or threatened release must include only those costs that would be incurred reasonably and in good faith. Further, the fair market value of the security must be determined without giving consideration to the release or threatened release, and must be exclusive of the amount of all liens and encumbrances against the security that are senior in priority to the lender's lien. Notwithstanding the above, credit secured by a single parcel of real property that is included in the National Priorities List pursuant to *42 U.S.C. § 9605* or in any list published by the Department of Toxic Substances Control pursuant to *Health & Safety Code § 25356* will be deemed to be environmentally impaired [*Code Civ. Proc. § 726.5(e)(3)*].

Before the lender may waive its lien against any parcel of real property security on the basis of environmental impairment, the lender must provide written notice of the default to the borrower. Further, the value of the subject real property security must be established and its environmentally impaired status must be confirmed by an order of a court of competent jurisdiction in an action brought by the lender against the borrower. The complaint for a valuation and confirmation action may include causes of action for a money judgment for all or part of the secured obligation, in which case the above waiver of the lender's liens will result only if and when the lender obtains a final money judgment against the borrower [*Code Civ. Proc. § 726.5(b)*].

If a secured lender elects the rights and remedies of an unsecured creditor [*Code Civ. Proc. § 726.5(a)(1)*], and the borrower's obligations are also secured by other real property security, fixtures, or personal property, the lender must first foreclose against the additional collateral to the extent required by applicable law. In that case, the amount of the judgment obtained by the lender will be limited to the extent *Code Civ. Proc. §§ 580a*, *580d*, and *726(b)* apply to the foreclosures of additional real property security. The borrower may waive or modify these foreclosure requirements provided that the waiver or modification is in writing and signed by the borrower after default [*Code Civ. Proc. § 726.5(c)*].

Code Civ. Proc. § 726.5 will not be applicable if both of the following are true [*Code Civ. Proc. § 726.5(d)*]:

- The release or threatened release [*see Code Civ. Proc. § 726.5(e)(7)* ("release" defined)] was not knowingly or negligently caused or contributed to, or knowingly or willfully permitted or acquiesced to, by any of the following: the borrower or any related party; or any affiliate or agent of the borrower or any related party.

- In conjunction with the making, renewal, or modification of the loan, extension of credit, guaranty, or other secured obligation, neither the borrower, any related party, nor any affiliate or agent of either of the foregoing had actual knowledge or notice of the release or threatened release, or if such a person had knowledge or notice of the release or threatened release, the borrower made written disclosure of the release to the lender after the lender's written request for information concerning the environmental condition of the real property security, or the lender otherwise obtained actual knowledge of the release, prior to the making, renewal, or modification of the obligation.

Code Civ. Proc. § 726.5 must not be construed to invalidate or otherwise affect in any manner any rights or obligations arising under contract in connection with a loan or extension of credit, including provisions limiting recourse [*Code Civ. Proc. § 726.5(f)*]. *Code Civ. Proc. § 726.5* applies only to loans, extensions of credit, guaranties, or other obligations secured by real property security made, renewed, or modified after 1991 [*Code Civ. Proc. § 726.5(g)*].

[4] Action for Breach of Contract

Notwithstanding any other provision of law, a secured lender may bring a breach of contract action against a borrower for breach of any environmental provision made by the borrower relating to the real property security. The action may also seek the recovery of damages and the enforcement of the environmental provision [*Code Civ. Proc. § 736(a)*]. For these purposes, "environmental provision" means any written representation, warranty, indemnity, promise, or covenant (hereafter collectively referred to as a "representation") by a borrower relating to (1) the existence, location, nature, use, generation, manufacture, storage, disposal, handling, or past, present, or future release or threatened release [*see Code Civ. Proc. § 736(f)(5)* ("release" defined)], of any hazardous substance [*see Code Civ. Proc. § 736(f)(3)* ("hazardous substance" defined)] into, onto, beneath, or from the real property security, or (2) past, present, or future compliance with any law relating to the foregoing. The representation must have been made by the borrower in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower. *Code Civ. Proc. § 736* applies to such a representation whether or not it is or was contained in or secured by the trust deed or mortgage, and whether or not the trust deed or mortgage has been discharged, reconveyed, or foreclosed upon [*Code Civ. Proc. § 736(f)(2)*].

This type of action will not constitute an action within the meaning of *Code Civ. Proc. § 726(a)*, or constitute a money judgment for a deficiency or a deficiency judgment within the meaning of *Code Civ. Proc. §§ 580a*, *580b*, *580d*, and *726(b)*. No injunction for the enforcement of an environmental provision may be issued after (1) the obligation secured by the real property security has been fully satisfied, or (2) all of the borrower's rights, title, and interest in and to the real property security have been transferred in a bona fide transaction to an unaffiliated third party for fair value [*Code Civ. Proc. § 736(a)*].

The damages a lender may recover in such an action are limited to reimbursement for cleanup, remediation, or other response action costs [*see Code Civ. Proc. § 736(b)(1), (2)*], attorneys' fees and costs [*Code Civ. Proc. § 736(b)(4)*], and indemnification against liabilities of the lender to third parties relating to the breach [*see Code Civ. Proc. § 736(b)(3)*].

Code Civ. Proc. § 736 is not intended to establish, abrogate, modify, limit, or otherwise affect any other cause of action that a secured lender may have against a borrower under an environmental provision [*Code Civ. Proc. § 736(d)*]. *Code*

Civ. Proc. § 736 applies only to environmental provisions contracted in conjunction with loans, extensions of credit, guaranties, or other obligations made, renewed, or modified after 1991 [*Code Civ. Proc. § 736(e)*]. Notwithstanding the foregoing, *Code Civ. Proc. § 736* may not be construed to validate, invalidate, or otherwise affect in any manner the rights and obligations of the parties to, or the enforcement of, environmental provisions contracted before 1992 [*Code Civ. Proc. § 736(e)*].

PRACTICE TIP:

Environmentally Impaired Property. The reason that lenders favor the alternative remedies referred to in this section is the fear that if the lender acquires environmentally impaired property through foreclosure, the lender will become exposed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*] to remediate the environmental hazards. These additional remedies help the lender obtain relief without exposing it to liability to federal, state, and local regulators. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensEnvironmental Liens



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10-25D California Legal Forms--Transaction Guide § 25D.25

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§ 25D.25 Additional Remedies for Rent Skimming

It is unlawful to engage in rent skimming in California [*see Civ. Code §§ 890-894*]. "Rent skimming" means using revenue received from the rental of a parcel of residential real property at any time during the first year after the acquisition of that property without first applying the revenue or an equivalent amount to the payments due on all mortgages and deeds of trust encumbering that property [*Civ. Code § 890(a)*]. Civil remedies are available to certain persons affected by rent skimming, including [*Civ. Code § 891(a)-(d)*]:

- The seller of an interest in the residential real property who either receives an evidence of indebtedness secured by a lien on the property or reacquires the property interest from the rent skimmer;

- A mortgagee or beneficiary under a deed of trust encumbering residential real property affected by rent skimming; and

- The tenant of residential real property affected by rent skimming.

Criminal charges may also be brought for multiple acts of rent skimming [*see Civ. Code § 892*].

PRACTICE TIP:
Rent Skimming. Actions for rent skimming are not barred by the "one-form of action rule" [*Civ. Code § 891(g)*]. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral Overview



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.26 Deed in Lieu of Foreclosure

A "deed in lieu of foreclosure" is a deed executed by a trustor to a beneficiary in order to avoid having the beneficiary foreclose on a deed of trust. Although such a deed may appear to a creditor to be less costly and more expedient than foreclosure, the creditor, among other risks, may face claims from junior lienholders that the deed was not effective to extinguish their claims and claims that the deed is invalid because a debtor-creditor relationship still exists. In addition, a title company insuring title of the creditor/owner under the deed will require either special recitals in the deed or an estoppel affidavit from the debtor before it will insure the deed. For a discussion of considerations applicable to accepting a deed in lieu of foreclosure, see California Real Estate Law & Practice, Ch. 120, *Representing a Client After Default* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.27 Notice of Nonacceptance of Deed

A holder of a security interest may execute and record a notice of nonacceptance of a recorded deed. The notice must identify the security interest and the parties to the deed, and must set forth a legal description of the property, the date of recordation of the deed, the county in which the project is located, and the county assessor's parcel number of the real property referenced in the deed. The notice must be recorded with the recorder of the county in which the real property is located [*Civ. Code § 1058.5(a)*]. A creditor may wish to record a notice of nonacceptance if, for example, the debtor recorded a deed in lieu of foreclosure without the creditor's consent to escape liability for a deficiency judgment resulting from a judicial foreclosure. Although such a deed would not be valid and effective because of the grantee's failure to accept it [*see Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131* ; *see also* Ch. 27, *Deeds and Recording*], its recordation could present title problems. The subsequent recordation of a notice of nonacceptance should help resolve those problems.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.28 Home Equity Sales Contracts

Home equity sales contracts between a purchaser and the owner of a residence in foreclosure are strictly regulated by statute, with civil actions and criminal penalties authorized for violations [*see Civ. Code § 1695 et seq.*]. For a discussion of the requirements applicable to these contracts, see Ch. 23, *Real Property Sales Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.29 Foreclosure Consultants

"Foreclosure consultants" are persons who, for compensation, offer to perform services relating to a foreclosure proceeding for an owner of residential real property in foreclosure [*see Civ. Code § 2945.1*]. Several persons and entities are excluded from this definition, including various categories of persons licensed by the state or acting under authority of a branch of the federal government, certain financial institutions, and escrow companies [*Civ. Code § 2945.1(b)*].

In response to harsh practices in the past by foreclosure consultants, who often secured payment of high fees with a deed of trust on the defaulting homeowner's residence and in return performed no service (or a service that was essentially worthless), the Legislature has required a foreclosure consultant to be registered with the California Department of Justice and to be bonded by a corporate surety [*Civ. Code § 2945.45(a)(1), (2)*]. In addition, the Legislature has strictly regulated the conduct of foreclosure consultants [*see Civ. Code § 2945 et seq.*]. This regulation extends to matters such as contract requirements [*see Civ. Code § 2945.3*; *see also §§ 25D.220[2]*, 25D.221[2]], allowable compensation [*see Civ. Code § 2945.4*], cancellation rights of an owner [*see Civ. Code § 2945.2*], liability of a foreclosure consultant [*see Civ. Code §§ 2945.9, 2945.10*], and disclosures by a representative of a foreclosure consultant [*see Civ. Code § 2945.11*; *see also § 25D.222[2]*]. Civil actions and criminal penalties are authorized for violations [*see Civ. Code §§ 2945.6, 2945.7*]. The statutes regulating foreclosure consultants only apply after foreclosure proceedings have commenced; if no notice of default is recorded, the restrictions are not applicable [*Tomlin v. Cole (1984) 152 Cal. App. 3d 556, 559, 199 Cal. Rptr. 632*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.30 Protections for Active Duty Service Members Under State and Federal Law

[1] Purpose and Application of Protections

In 2002, the California Legislature enacted special protections for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. This legislation establishes special protection from foreclosure and other civil liabilities for active service members and reservists who are found by a court to need assistance because of the demands of their military service [*Mil. & Vet. Code § 408*]. The legislation includes many provisions that are similar to those included in the federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*; *see 50 U.S.C. App. §§ 502, 511*], which is discussed in [4], *below*. However, the SCRA has many more provisions than the California law covering a greater variety of topics.

The California provisions apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 420*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 414*].

[2] Actions to Foreclose on Mortgage or Deed of Trust

The protections apply to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage on real or personal property owned by a service member at the commencement of the period of the military service and still owned by the service member [*Mil. & Vet. Code § 408(a)*]. In any proceeding commenced in any court during the period of military service to enforce that obligation, arising out of nonpayment of any sum due or out of any other breach of the terms of the mortgage, trust deed, or other security occurring before or during the period of service, the court may, after hearing and in its discretion on its own motion, and must, on application by the service member or some person on the defendant's behalf (1) stay the proceedings for any period as the court deems just, and (2) make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 408(b)*]. The

court may deny the stay if it finds that the ability of the defendant to comply with the terms of the obligation is not materially affected by the military service [*Mil. & Vet. Code § 408(b)*].

No sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation described above will be valid if made during the period of military service or within three months thereafter, except pursuant to an agreement between the parties or on an order previously granted by the court and a return thereto made and approved by the court [*Mil. & Vet. Code § 408(c)*]. Any person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property in violation of these provisions is guilty of a misdemeanor [*Mil. & Vet. Code § 408(d)*].

[3] Actions to Rescind or Terminate Contract for Purchase

A seller or other person who holds the contract may not exercise any right or option to rescind or terminate a contract for the purchase of real or personal property, if the person or the person's assignor has received a deposit or purchase price installment from a person who has entered military service after the date of payment of the deposit or installment. Additionally, the person who holds the contract may not exercise any right or option under that contract to resume possession of the property for nonpayment of any installment due. This prohibition is applicable to any breach of the contract's terms occurring before or during the period of that military service. The only exercise may be an action in a court of competent jurisdiction [*Mil. & Vet. Code § 407(a)*]. Violation of these provisions subjects the violator to a fine and potential imprisonment [*Mil. & Vet. Code § 407(c)*].

A court, on the hearing of the action, may order the repayment of prior installments or deposits or any part of these, as a condition of terminating the contract and resuming possession of the property. The court must take this action on application to it by the service member or some person on the service member's behalf. Otherwise, the court may take this action on its own motion and discretion [*Mil. & Vet. Code § 407(b)*]. Alternatively, the court may order a stay of proceedings as the court deems just, unless in the court's opinion, the defendant's ability to comply with the terms of the contract is not materially affected by reason of the service; or it may make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 407(b)*].

[4] Federal Provisions

The federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*; *see 50 U.S.C. App. §§ 502, 511* (applicable to current military personnel)] provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights and liabilities of servicemembers during their military service, so that they can devote their entire energy to national defense [*50 U.S.C. App. § 502*]. Among the Act's protections are many similar to those afforded by the 2002 California legislation discussed in [1]-[3], *above*.

With regard to mortgages and similar instruments, both the SCRA and California's Military and Veterans Code give a court authority to allow an eligible service member to postpone making payments on mortgages that were entered before the member began active duty, on property that was owned before that time, and that is still owned by the member, if the member's ability to pay the mortgage is affected by his or her service [*see 50 U.S.C. App. §§ 532, 533, 591*; *Mil. & Vet. Code §§ 407, 408*]. Similarly, under both the federal and state Acts:

- Active service members are allowed to apply to a court for a stay of proceedings to collect real property taxes or assessments [*see 50 U.S.C. App. §§ 561, 591*; *Mil. & Vet. Code § 409.2*]; and

- A court can cap interest rates at 6 percent on all obligations of active service members (including mortgages) incurred before active duty [*see 50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*].

The SCRA allows for the stay of many civil legal proceedings if the service member demonstrates that his or her military service has materially affected the member's ability to appear for the court proceedings, including proceedings

concerning mortgage foreclosures [*see 50 U.S.C. App. § 522*]. Of course, the length of the stay is at the court's discretion based on the service member's showing. The SCRA also offers protections against eviction from residential property rented by a service member, as well as lawful termination of leases for members entering active duty [*see 50 U.S.C. App. §§ 531, 535*].

Relevant forms for relief under the provisions of the federal and state Acts are provided in California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* . These forms include a petition for relief from a mortgage or installment contract for the purchase of real property, an application for a stay of proceedings to collect real property taxes or assessments, and a stay of action on an obligation secured by a mortgage, trust deed, or similar instrument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART II. LEGAL BACKGROUND

10-25D California Legal Forms--Transaction Guide § 25D.31

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.31 Foreclosure Protection

[1] Foreclosure Assistance

In July 2008, the Governor of California signed into law SB 1137, intended to ameliorate the deleterious effects on the state economy and local economies and the California housing market resulting from the foreclosures of residential properties in unprecedented numbers resulting from subprime lending practices [2008 Stats., Ch. 69, sec. 1(d)]. In SB 1137, the Legislature found and declared that residential property foreclosures increased sevenfold from 2006 to 2007; that more than 84,375 properties were lost to foreclosure in California in 2007; and that 254,824 loans went into default, the first step in the foreclosure process [2008 Stats., Ch. 69, sec. 1(a)]. SB 1137 modified the foreclosure process to require mortgagees, beneficiaries, or authorized agents to provide notice to certain borrowers and explore options that could avoid foreclosure.

[2] Contacting Borrowers

Effective September 6, 2008 [2008 Stats., Ch. 69, sec. 10], a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to *Civ. Code § 2924* [*see § 25D.202* (form)] until 30 days after the mortgagee, beneficiary, or authorized agent initially contacted the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure [*Civ. Code § 2923.5(a)(1), (2)*]. The borrower must be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. However, a notice of default may be filed when a mortgagee, beneficiary, or authorized agent failed to contact the borrower as required despite the due diligence of the mortgagee, beneficiary, or authorized agent [*Civ. Code § 2923.5(g)*; *see* Civ. Code § 2329.5(g)(1)-(5) (actions required for due diligence)].

A notice of default must include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower, or has tried with due diligence to contact the borrower as required by *Civ. Code § 2923.5(g)*, or that no contact was required pursuant to *Civ. Code § 2923.5(h)* [*Civ. Code § 2923.5(b)*].

These requirements apply to a loan that is secured by a mortgage or deed of trust recorded from January 1, 2003, to December 31, 2007, inclusive, on real property that is the principal residence of the borrower (as indicated to the lender in loan documents) containing no more than four dwelling units [*Civ. Code § 2923.5(i)*]. However, these requirements do not apply in any of the following cases [*Civ. Code § 2923.5(h)*]:

- The borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.

- The borrower has contracted with an organization, person, or entity, whose primary business is advising people who have decided to leave their homes and who need advice on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.

- The borrower has filed a case under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, and the bankruptcy court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure.

Civ. Code § 2923.5 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2923.5(j)*].

[3] Loan Modifications

Under specified circumstances, mortgage lenders and servicers are authorized under their pooling and servicing agreements to modify mortgage loans when the modification is in the best interest of investors. Generally, that modification may be deemed to be in the best interest of investors when the net present value of the income stream of the modified loan is greater than the amount that would be recovered through the disposition of the real property security through a foreclosure sale [Stats. 2008, Ch. 69, sec. 1(c); *see* California Real Estate Law and Practice, Ch. 93, *Real Estate Settlement Procedures Act* (Matthew Bender)]. In SB 1137, the Legislature found and declared that any duty that servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan as to which both of the following apply: (1) The loan is in payment default, or payment default is reasonably foreseeable; and (2) anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis [*Civ. Code § 2923.6(a)*]/ The Legislature declared its intent that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority [*Civ. Code § 2923.6(b)*]. Section 2923.6 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2923.6(c)*].

[4] Notice of Foreclosure to Residents

Effective September 6, 2008 [2008 Stats., Ch. 69, sec. 10], on posting a notice of sale pursuant to *Civ. Code § 2924f*, a trustee or authorized agent must also post, in the manner required for posting the notice of sale on the property to be sold [*see § 25D.206*], a specified notice in English and the languages described in *Civ. Code § 1632* [*Civ. Code § 2924.8(a)*; *see § 25D.211* (notice)]. Concurrently with the mailing of the notice of sale pursuant to *Civ. Code § 2924b*, the mortgagee, trustee, beneficiary, or authorized agent must send, by first-class mail, a copy of that posted notice in an envelope addressed to the "resident of property subject to foreclosure sale" [*Civ. Code § 2924.8(a)*]. It is an infraction to tear down the notice within 72 hours of posting. Violators are subject to a fine of $100 [*Civ. Code § 2924.8(b)*].

These notice requirements apply only to loans secured by residential real property, and if the billing address for the

mortgage note is different than the property address [*Civ. Code § 2924.8(d)*]. Section 2923.8 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [Civ. Code § 2923.8(e)].

[5] Maintenance of Vacated Property

A legal owner is required to maintain vacant residential property [*see Civ. Code § 2929.3(g)*] purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust [*Civ. Code § 2929.3(a)(1)*]/ A governmental entity may impose a civil fine of up to $1,000 per day for a violation [*see Civ. Code § 2929.3(a)(1)* (entity must give notice of alleged violation and intent to assess fine)]. The governmental entity must provide a period of not less than 30 days for the legal owner to remedy the violation prior to imposing a civil fine and must allow for a hearing and opportunity to contest any fine imposed. In determining the amount of the fine, the governmental entity shall take into consideration any timely and good faith efforts by the legal owner to remedy the violation. The maximum civil fine is $1,000 for each day that the owner fails to maintain the property, commencing on the day following the expiration of the period to remedy the violation established by the governmental entity [*Civ. Code § 2929.3(a)(2)*; *see Civ. Code § 2929.3(b)* ("failure to maintain" defined)]. A governmental entity may establish different compliance periods for different conditions on the same property in the notice of alleged violation mailed to the legal owner [*Civ. Code § 2929.3(a)(3)*].

A governmental entity may provide less than 30 days' notice to remedy a condition before imposing a civil fine if it determines that a specific condition of the property threatens public health or safety and provided that notice of that determination and time for compliance is given [*Civ. Code § 2929.3(c)*]. Fines may not be imposed under both section 2929.3 and a local ordinance, and these provisions do not preempt any local ordinances [*Civ. Code § 2929.3(e), (f)*]. The rights and remedies provided in section 2929.3 are cumulative and in addition to any other rights and remedies provided by law [*Civ. Code § 2929.3(h)*]. Section 2929.3 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2929.3(i)*].

[6] Notice to Quit

Notwithstanding the unlawful detainer provisions of Civ. Code § *Code Civ. Proc. § 1161* [*see* Ch. 35B, *Modification and Termination of Leases*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit in the manner set forth in *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section1161b is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, sec. 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. In addition, the Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. A lease or tenancy is considered bona fide if (1) the

mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [P.L. 111-22, sec. 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [P.L. 111-22, sec. 704, 123 Stats. 1662]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett].



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART II. LEGAL BACKGROUND

10-25D California Legal Forms--Transaction Guide §§ 25D.31-25D.99

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25D.31[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25D California Legal Forms--Transaction Guide § 25D.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.100 Facts

1. Name, address, and telephone number of parties.

    a. Trustor, trustee, and beneficiary if debt is secured by deed of trust.

    b. Mortgagor and mortgagee if debt is secured by mortgage.

    c. Assignee of beneficiary or mortgagee if original trust deed or mortgage has been assigned.

    d. Substituted trustee, if any, since execution of original deed of trust.

    e. Person, if any, who assumed debt from original trustor or mortgagor.

    f. Current owner of property securing debt if different from any of above.

    g. Person in possession of property if different from any of above.

    h. Guarantor, if any, of debt.

2. Additional information for parties who are not individuals.

    a. Type of entity.

    b. Full legal name.

c. Address of main office or principal place of business.

d. Name, address, and title of person authorized to bind entity.

3. Information concerning debt.

NOTE:
The following assumes the debt is evidenced by a promissory note.

a. Date incurred.

b. Original principal amount.

c. Unpaid balance of principal amount.

d. Interest rate.

e. Amount and due date of each payment.

f. Date and amount of last payment made by trustor or mortgagor.

g. Amount of late charges, if any, specified in promissory note evidencing debt.

h. Type of security given for debt:
(1) Only real property; or

(2) Both real property and personal property.

i. Whether debt was incurred to purchase real property given as security.

j. Whether debt when originally incurred was in favor of:

(1) Seller of real property; or

(2) Third party lender.

k. Whether debt is guaranteed by guarantor.

l. Whether letter of credit supports secured obligation.

4. Information concerning real property.

a. Location:

(1) Street address.

(2) Nearest crossroads, frontage road, or access road.

(3) City or unincorporated area.

(4) County.

b. Type:

(1) Residential.

(2) Other.

c. Size:

(1) If residential, number of units.

(2) If raw land, acreage.

(3) Square footage, if office or other commercial or industrial building.

d. Estimated market value.

e. Legal description of property.

f. Legal description of portion of property previously reconveyed under partial reconveyance, if any.

5. Information concerning security instrument.

a. Type:

(1) Deed of trust.

(2) Mortgage.

b. Date executed.

c. Recording information:

(1) Date recorded.

(2) Instrument or book and page number.

(3) County.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25D California Legal Forms--Transaction Guide § 25D.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.101 Documents

1. Promissory note or other instrument evidencing indebtedness.

2. Deed of trust or mortgage.

3. Assignment of deed of trust or mortgage, if any.

4. Document(s) under which person other than original trustor or mortgagor assumed debt and obligations under deed of trust or mortgage, if any.

5. Recorded substitution of trustee, if any.

6. Recorded partial reconveyance(s) (if any) for property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawPriorities & RecordingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

10-25D California Legal Forms--Transaction Guide §§ 25D.102-25D.109

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25D.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

10-25D California Legal Forms--Transaction Guide § 25D.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.110 Status of Property, Debt, and Debtor

1. Determine condition of title of property by obtaining following from title insurance company:

a. Trustee's sale guarantee (for nonjudicial or judicial foreclosure) [*see § 26A.235*]; or

b. Litigation guarantee (for judicial foreclosure) [*see § 26A.230*].

NOTE:
Trustee's sale guarantees and litigation guarantees list all matters of record affecting the property, such as liens (including federal and state tax liens), abstracts of judgment, and tax delinquencies. Also included are a legal description of the property and the identity of the record owner of the property. A trustee or beneficiary may purchase a trustee's sale guarantee at a rate meeting the standards contained in *Ins. Code §§ 12401.1* and *12401.3*. The cost of either guarantee is recoverable from the debtor in a foreclosure proceeding [***see** Civ. Code § 2924c(c)*].

2. Determine whether debtor is currently in military service or was in service within preceding three months.

NOTE:
The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] precludes foreclosure of property for nonpayment of any amount due and secured by a mortgage or deed of trust while the debtor is in military service or within 90 days thereafter except on court order. However, this provision applies only if the obligation was incurred before the debtor entered military service [*50 U.S.C. App. § 533*].

3. Determine whether loan is insured or guaranteed by federal government under Federal Housing Administration (FHA) or Department of Veterans Affairs (VA) program.

NOTE:

Because federal procedures and regulations prevail to the extent inconsistent with California laws relating to foreclosure procedures and antideficiency protection [***see*** *United States v. Shimer (1961) 367 U.S. 374, 381, 81 S. Ct. 1554, 6 L. Ed. 2d 908*], counsel should contact the appropriate federal agency before the commencement of foreclosure procedures and follow federal procedures as necessary [***see*** *12 U.S.C. § 1707 et seq.* (FHA); *38 U.S.C. § 3701 et seq.* (VA); 24 C.F.R. pt. 200 et seq. (FHA); 28 C.F.R. pt. 36 (VA)].

4. Determine whether notice regarding balloon payment has been or must be delivered to debtor/borrower; that is, whether loan [*see Civ. Code § 2924i*; *see also* Ch. 25A, *Security Instruments for Real Estate Financing*]:

a. Is secured by trust deed or mortgage on real property containing up to four residential units, at least one of which at time loan was made was (or was to be) occupied by borrower;

b. Is for period in excess of one year; and

c. Is a "balloon payment loan."

NOTE:

A "balloon payment loan" is a loan that provides for a final payment as originally scheduled that is more than twice the amount of any of the immediately preceding six regularly scheduled payments or that contains a call provision. However, if the holder of a loan with a call provision does not exercise the provision, the existence of the unexercised provision will not cause the loan to be deemed to be a balloon payment loan [*Civ. Code § 2924i(d)(1)*].

5. Determine whether debt is guaranteed by guarantor.

NOTE:

For a discussion of the effect of foreclosure proceedings, including antideficiency legislation, on a guarantor, surety, endorser, or similar party, see California Real Estate Law & Practice, Ch. 122, ***Antideficiency Legislation*** (Matthew Bender).

6. If secured obligation is also supported by letter of credit:

a. Determine whether draws on letter will be exempt from one form of action rule and antideficiency statutes [*see Code Civ. Proc. §§ 580.5, 580.7*; *see also §§ 25D.13[4], 25D.22*].

b. Determine whether loan is insured or guaranteed by federal government under Federal Housing Administration (FHA) or Department of Veterans Affairs (VA) program.

7. Determine whether loan is secured by mortgage or deed of trust recorded from January 1, 2003, to December 31, 2007, inclusive, on real property that is principal residence of borrower (as indicated to lender in loan documents) containing no more than four dwelling units [*Civ. Code § 2923.5(i)*].

a. If yes, call or meet with borrower at least 30 days prior to filing notice of default to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure [*Civ. Code § 2923.5(a)*].

NOTE:

A notice of default may be filed when a mortgagee, beneficiary, or authorized agent has failed to contact the borrower as required despite due diligence [*Civ. Code § 2923.5(g)*; *see* Civ. Code § 2329.5(g)(1)-(5) (actions required for due diligence)].

b. File notice of default at least 30 days after initially contacting borrower, and include declaration from mortgagee, beneficiary, or authorized agent that it has contacted borrower, or has tried with due diligence to contact borrower as required by *Civ. Code § 2923.5(g)*, or that no contact was required pursuant to *Civ. Code § 2923.5(h)* [*Civ. Code § 2923.5(b)*; *see § 25D.202* (notice of default form)].

c. If billing address for the mortgage note is different than the property address [*Civ. Code § 2924.8(d)*], post specified notice on property subject to the foreclosure sale [*Civ. Code § 2924.8(a)*; *see § 25D.211[2]* (form of notice)].

Note:

Concurrently with the mailing of the notice of sale pursuant to *Civ. Code § 2924b*, the mortgagee, trustee, beneficiary, or authorized agent must send, by first-class mail, a copy of that posted notice, in an envelope addressed to the "resident of property subject to foreclosure sale" [*Civ. Code § 2924.8(a)*].

d. Provide at least 60 days' notice to quit before commencing unlawful detainer proceedings.

Note:

Notwithstanding the unlawful detainer provisions of Civ. Code § *Code Civ. Proc. § 1161* [*see* Ch. 35B, *Modification and Termination of Leases*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given at least 60 days' written notice to quit pursuant in the manner set forth in *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*].

Note:

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, sec. 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett]. The federal provisions are repealed on December 31, 2012 [P.L. 111-22, sec. 704, 123 Stats. 1662].

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersGeneral OverviewMilitary & Veterans LawVeteransBenefitsLoansReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security

InstrumentsNonconventional Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

10-25D California Legal Forms--Transaction Guide § 25D.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.111 Electing Nonjudicial or Judicial Foreclosure

1. Review deed of trust or mortgage to determine whether it contains power of sale clause.

NOTE:
The option of nonjudicial foreclosure is available only if the security instrument contains such a clause [***see*** *Civ. Code § 2924(a)*].

2. If debt in default is secured by mortgage, confirm that statute of limitations has not run on underlying debt.

NOTE:
If the obligation on which the debtor has defaulted is secured by a mortgage, the lien created by the mortgage is extinguished by the running of the statute of limitations on the underlying debt [***see*** *Civ. Code § 2911*]. Therefore, even if the mortgage contains a power of sale, the debtor may enjoin the threatened sale [*Faxon v. All Persons (1913) 166 Cal. 707, 715, 137 P. 919*]. If the obligation in default is secured by a deed of trust and the statute of limitations has run on the underlying obligation, the statute operates as a defense to any action brought by the creditor to enforce his security interest [*Flack v. Boland (1938) 11 Cal. 2d 103, 106, 77 P.2d 1090*], but it does not affect the trustee's right to exercise the power of sale in the security instrument [Hohn v. Riverside County Flood Control etc. *(1964) 228 Cal. App. 2d 605, 614, 39 Cal. Rptr. 647*].

3. If proceeds from sale may be insufficient to satisfy entire debt, determine whether any of the following conditions will exist and therefore preclude deficiency judgment:

a. Sale of property is to be effected through nonjudicial foreclosure of promissory note and trust deed or mortgage [*Code Civ. Proc. § 580d*].

b. Sale of property is to be effected through judicial foreclosure and [*Code Civ. Proc. § 580b*; *see § 25D.20[3]*]:
(1) Debtor/purchaser failed to complete contract of sale; or

(2) Trust deed or mortgage was given:
(a) To seller to secure payment of balance of purchase price of property; or

(b) To lender to secure repayment of loan that was used to pay all or part of purchase price of one- to four-unit dwelling occupied, entirely or in part, by debtor/purchaser.

4. If deficiency judgment is permitted, before tentatively deciding to proceed with judicial foreclosure, consider and balance benefit of deficiency judgment against following disadvantages normally associated with judicial foreclosure:

a. More time-consuming because of required court proceedings.

b. More expensive.

NOTE:
If the amount of the underlying debt is very large, the amount of trustee's or attorneys' fees permitted by statute after a nonjudicial foreclosure sale [***see*** *Civ. Code § 2924d(a), (b)*] may approach the litigation costs of a judicial foreclosure.

c. Debtor has right to redeem property for, depending on circumstances, three months or one year after date of sale [*Code Civ. Proc. § 729.030*; *see § 25D.17[2]*].

NOTE:
For detailed coverage of the procedures governing judicial foreclosures, which are beyond the scope of this chapter because they require the commencement of a court action, see California Forms of Pleading and Practice, Ch. 555, ***Trust Deeds and Real Property Mortgages*** (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of Limitations



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B. Preliminary Determinations

10-25D California Legal Forms--Transaction Guide §§ 25D.112-25D.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 25D.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
C. Procedural Guide to Nonjudicial Foreclosure

10-C California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

NOTE: This Part sets forth the procedure for the nonjudicial foreclosure of a deed of trust rather than a mortgage. The same procedure should be followed for the foreclosure of a mortgage containing a power of sale, with two variations: (1) the mortgagee or other authorized person must perform all functions of a trustee; and (2) the mortgagee need not give notices or directions to a nonexistent trustee.

Although this Procedural Guide is directed primarily to an attorney representing a beneficiary rather than a trustor, it should prove useful to a trustor's attorney in monitoring the required proceedings for a nonjudicial foreclosure. For coverage that specifically considers the perspective of the attorney for the trustor/debtor, see California Real Estate Law & Practice, Ch. 120, ***Representing a Client After Default*** (Matthew Bender).



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART III. TRANSACTION GUIDE
C. Procedural Guide to Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.120 Request for Sale

1. Prepare and have beneficiary execute request to trustee to institute proceedings for nonjudicial foreclosure (request for sale) [*§ 25D.201[2]*], which should [*see Civ. Code § 2924(a)(1)*]:

a. Declare that breach of secured obligation has occurred.

b. Describe each breach actually known to beneficiary [*see § 25D.121*, P 3b].

c. State beneficiary's election to sell property to satisfy foregoing obligation and any other obligation secured by deed of trust.

d. Request that trustee sell property in a nonjudicial foreclosure.

2. Submit request for sale to trustee, together with:

a. Promissory note(s).

b. Deed(s) of trust.

c. Any other evidences of indebtedness secured by deed of trust.

d. Affidavit of nonmilitary status [*see* NOTE in *§ 25D.110*, P 2; *see also* California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender), for a form of affidavit].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
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C. Procedural Guide to Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.121 Notice of Default

1. Have trustee order and obtain trustee's sale guarantee from a title company [*see* NOTE in *§ 25D.110*, P 1b].

2. If original trustee named in deed of trust is to be replaced, have beneficiary execute substitution of trustee [*see* §§ 25C.230-25C.234 (forms)].

NOTE:
Although most deeds of trust permit a substitution of trustee to be executed by the beneficiary alone, some require the beneficiary and original trustee to execute the substitution of trustee jointly.

3. Prepare notice of default [*see § 25D.202[2]*] containing [*Civ. Code § 2924(a)(1)*]:

a. The following information concerning deed of trust:
(1) Name(s) of trustor(s); and

(2) Either of the following:
(a) Book and page where deed of trust is recorded; or

(b) Description of trust property.

b. Statement that breach of secured obligation has occurred.

c. Description of nature of each breach actually known to beneficiary.

NOTE:

There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust subject to the notice of default. However, the failure to include an actually known default will not (1) invalidate the notice of sale, or (2) preclude the beneficiary from asserting a claim to the omitted default or defaults in a separate notice of default [*Civ. Code § 2924(e)*]. In any case, in performing the required acts, the trustee will not incur liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and amount of the default under the secured obligation, deed of trust, or mortgage [*Civ. Code § 2924(b)*]. Additionally, the trustee is not subject to the provisions governing fair debt collections practices [***see*** *Civ. Code § 1788 et seq.*] when performing the required acts [*Civ. Code § 2924(b)*].

d. Declaration of beneficiary's election to sell property (or cause it to be sold) to satisfy:

(1) Obligation that has been breached; and

(2) Any other obligation secured by same trust deed.

e. If default is curable under reinstatement provision of *Civ. Code § 2924c* [*see § 25D.122*], statutory statement regarding right of reinstatement required by *Civ. Code § 2924c(b)(1)* [*see § 25D.202[2]*].

4. Have beneficiary, trustee, or authorized agent of beneficiary or trustee execute and acknowledge notice of default [*see Civ. Code § 2924(a)(1)*].

5. Record notice of default in office of recorder of each county in which all or any part of property is situated [*Civ. Code § 2924(a)(1)*; *see § 25D.202[1]*].

6. Record substitution of trustee, if appropriate [*see* P 2, *above*], concurrently with notice of default.

7. Instruct trustee, beneficiary, or authorized agent of foregoing to send copies of notice of default (showing recording date) as follows:

a. Within 10 business days following recordation of notice, by registered or certified mail, postage prepaid, to:

(1) Each person who has recorded a separate request for notice of default [*see Civ. Code § 2924b(a)*; *see also § 25D.200[2]*], directed to address designated in request [*Civ. Code § 2924b(b)(1), (g)*].

NOTE:
Each recorded request for a notice of default will be listed in the trustee's sale guarantee obtained from the title company [***see*** P 1, ***above***].

(2) Each person who is entitled to notice under terms of trust deed, directed to address designated in trust deed [*Civ. Code § 2924b(d)*].

(3) Each trustor, at address specified in trust deed or at his or her last known address, if different than address specified in trust deed [*Civ. Code § 2924b(e)*].

NOTE:
The trustee, beneficiary, or agent must simultaneously send an additional copy by first-class mail

(postage prepaid) to each trustor at the address described above, and then execute and retain an affidavit or declaration of mailing [*§ 25D.207[2]*] for the additional copy [*Civ. Code § 2924b(e)*].

b. Within one month following recordation, by registered or certified mail, postage prepaid, to following persons with recorded interest in property [*Civ. Code § 2924b(c)(1), (2)*]:

NOTE:
The copies must be sent to the return addresses set forth in the recorded instruments evidencing the interests [*Civ. Code § 2924b(c)(1)*].

(1) Successor in interest (in whole or part) of trustor.

(2) Beneficiary or mortgagee (and assignee of either) of any recorded junior trust deeds or mortgages.

(3) Vendee of any contract of sale, or lessee of any lease, junior to trust deed being foreclosed, and their successors in interest, if any.

(4) Sacramento Office of the Controller if, as of recording date of notice, a notice of lien for postponed property taxes has been recorded against real property to which notice of default applies.

8. If trust deed does not contain mailing address of trustor or mortgagor named in it and if trustor has not recorded separate request for notice, instruct trustee to [*Civ. Code § 2924b(d)*]:

a. Have notice of default published once a week for at least four weeks in newspaper of general circulation in county in which property is situated, commencing within 10 days after filing of notice.

b. In lieu of publication, either:

(1) Personally deliver copy of notice of default to trustor:
(a) Within 10 days after filing of notice; or

(b) At any time before publication is completed.

(2) Post notice of default in conspicuous place on the property and mail notice to trustor's last known address.

9. Have trustee mail to trustor, at his or her last known address, statutory default statement required by *Civ. Code § 2924f(c)* [*see § 25D.203[2]*] if:

a. Trust deed is secured by single-family, owner-occupied residence;

b. Obligation secured by trust deed is contained in contract for goods or services subject to Unruh Act; and

c. Default is not cured within 30 days after recordation of notice of default.

10. Instruct any agent who collects obligor's payments under promissory note secured directly or collaterally by trust

deed for beneficiary to mail following notices, postage prepaid, to beneficiary [*Civ. Code § 2924.3(a)*]:

NOTE:

These disclosure requirements apply to an agent of a beneficiary, mortgagee, or owner of a promissory note secured directly or collaterally by a mortgage or trust deed on real property or an estate for years in real property, who has undertaken to make collections of payments from an obligor under the note [*Civ. Code § 2924.3(a)*].

The agent need not mail the following notices if he or she knows or reasonably believes that the default has already been cured by or on behalf of the obligor [*Civ. Code § 2924.3(c)*] or if the following apply: (1) the beneficiary is entitled to receive notice pursuant to *Civ. Code § 2924b(c)* [***see*** P 7b, ***above***] or has had a request for notice recorded for him or her pursuant to *Civ. Code § 2924b(b)* [***see*** P 7a(1), ***above***]; and (2) the agent reasonably believes that the beneficiary's last known address [***see*** *Civ. Code § 2924b(b)(3)* (definition of "last known address")] is the current business or residence address of that person [*Civ. Code § 2924.3(b)*].

Failure to comply with these reporting requirements will not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice [*Civ. Code § 2924.3(d)*].

a. A copy of notice of default, within 15 days after it is recorded [*see* P 5, *above*]; and

b. Notice that a notice of default of superior lien has been recorded, within 15 days after it is recorded or within three business days after agent receives the information, whichever is later.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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10-25D California Legal Forms--Transaction Guide § 25D.122

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.122 Curing the Default

1. If trustor wishes to cure default and reinstate debt, instruct trustor to pay all of following to beneficiary (or beneficiary's successor in interest) before date of sale set forth in initial recorded notice of sale [*Civ. Code § 2924c(a)(1), (e)*; *see § 25D.204*]:

a. All amounts of principal, interest, taxes, assessments, insurance premiums, or advances in default under terms of trust deed.

b. All amounts in default on recurring obligations [*see Civ. Code § 2924c(a)(1)*].

c. Permitted costs and expenses [*see Civ. Code § 2924c(c)*].

d. Trustee's or attorneys' fees [*see Civ. Code § 2924c(d)*; *see also § 25D.204[1]* (discussion of permissible fees)].

2. If default is cured, confirm that beneficiary, within 21 days following reinstatement, executes and delivers to trustee notice of rescission that rescinds notice of default [*Civ. Code § 2924c(a)(2)*; *see § 25D.205[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.123

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.123 Notice of Sale

1. If at least three months have elapsed since recordation of notice of default, and default has not been cured, prepare notice of sale containing [*Civ. Code §§ 2924(a)(2), (3), 2924f(b)*; *see § 25D.206[2]*]:

NOTE:

Starting June 15, 2009, until January 1, 2011, in some cases in which the delinquent loan is secured by residential real property, the normal three-month delay between recording the notice of default and giving notice of the sale is extended an additional 90 days, in order to allow the parties to pursue a loan modification so as to prevent the impending foreclosure [*Civ. Code § 2923.52(a)*; *see Civ. Code § 2923.52(d), (e)* (operative date and sunset date)]. For discussion, see *§ 25D.206[1][c][vii]*.

In addition to satisfying the requirements discussed below, the notice of sale must conform to the minimum typeface and heading requirements set forth in *Gov. Code § 6043* [*Civ. Code § 2924f(b)(1)*]. For further discussion, see *§ 25D.206[1]*.

a. Description of property, which must include:
(1) Street address or other common designation, if any, and county assessor's parcel number.

(2) If property has no street address or other common designation:
(a) Legal description of property.

(b) Name and address of beneficiary at whose request sale is to be conducted.

(c) Statement that directions may be obtained on written request submitted to beneficiary within 10 days from first publication of notice.

NOTE:
Directions are deemed reasonably sufficient to locate the property if its location is given with reference to the direction and approximate distance from the nearest crossroads, frontage road, or access road. If the notice contains a legal description or a county assessor's parcel number and either a street address or another common designation of the property, the validity of the notice and the validity of the sale will not be affected by the fact that the street address, other common designation, name and address of the beneficiary, or the directions are erroneous or omitted [*Civ. Code § 2924f(b)(1)*].

b. Name, street address in California (which may reflect agent of trustee), and either toll-free telephone number or telephone number in California of trustee.

c. Name of original trustor.

d. Time of sale.

NOTE:
The sale must be held between 9 A.M. and 5 P.M. on any business day, Monday through Friday [*Civ. Code § 2924g(a)*; ***see*** *Civ. Code § 9* ("business day" defined)]. Although the minimum advance notice required by *Civ. Code § 2924f* is 20 days, the date for the sale should be set at least 31 days in advance (from expiration of the three-month period following recording of notice of default), because federal tax liens filed more than 30 days before the date of the trustee's sale are not extinguished by the sale unless appropriate notice is given to the Internal Revenue Service at least 25 days before the date of sale [***see*** *I.R.C. § 7425(b), (c)*; ***see also*** P 3a, ***below***].

e. Street address and specific place at that address where sale will be held.

f. Statement of:

(1) Total amount of unpaid balance of obligations secured by the property; and

(2) Reasonably estimated costs, expenses, and advances at time of initial publication of notice of sale.

g. Description of personal property or fixtures to be sold, if sale is to be a unified sale of real property and personal property [*see Civ. Code § 2924f(b)(2)*; *Com. Code § 9604(a)(1)(B)*; *see also § 25D.15*].

h. Statutory statement regarding default [*see Civ. Code § 2924f(c)(3)*; *see also § 25D.203[2]*].

2. Order a "date down" from title company that issued trustee's sale guarantee [*see § 25D.121*, P 1], confirming that record is to be searched as of 31 days before sale to determine whether any federal tax liens were filed more than 30 days from date of sale [*see* the NOTE to P 1d, *above*].

3. Instruct trustee to send copies of notice of sale in following manner:

a. At least 25 days before date of sale, send notice to Internal Revenue Service, by registered or certified mail or by personal service, if there is a federal tax lien on property [*I.R.C. § 7425(c)*].

NOTE:
If notice is not given, the Internal Revenue Service has the right to redeem the property within 120 days from the date of sale [*I.R.C. § 7425(d)*].

b. At least 20 days before date of sale, send notice by registered or certified mail, with postage prepaid, to [*Civ. Code § 2924b(b)(2), (c)(3), (d), (e)*]:

(1) Each person who has recorded a separate request for notice of default [*see § 25D.200[2]*], directed to address designated in request;

(2) Each person who is entitled to notice under terms of deed of trust, directed to address designated in trust deed;

(3) Each trustor, at address specified in trust deed or at trustor's last known address, if different;

(4) Sacramento office of any state taxing agency that has recorded notice of tax lien before recording date of notice of default against real property to which notice of default applies; and

(5) Each person to whom a copy of notice of default was mailed pursuant to *Civ. Code § 2924b(c)(1), (2)* [*see § 25D.121*, P 7b].

NOTE:
Until January 1, 2013 [*Civ. Code § 2924.8(e)*], when the notice of sale is mailed pursuant to *Civ. Code § 2924b*, the mortgagee, trustee, beneficiary, or authorized agent must concurrently send, by first class mail, a copy of a different notice [*see § 25D.211*], in an envelope addressed to "Resident of property subject to foreclosure sale" [*Civ, Code § 2924.8(a)*].

c. Simultaneously with mailing described in P 3b, *above* [*Civ. Code § 2924b(c)(3)*]:

(1) Send trustor an additional copy of notice by first-class mail, at same address to which notice is sent by registered or certified mail [*see* P 3b(3), *above*]; and

(2) Execute and retain affidavit of mailing containing specified information [*see § 25D.207[2]*].

4. Post notice at least 20 days before date of sale in following locations [*Civ. Code § 2924f(b)(1)*]:

a. In one public place in city (or judicial district if no city) in which property is to be sold.

b. In conspicuous place on property to be sold.

NOTE:
If the property to be sold is a single-family residence, the notice must be posted on a door of the residence, unless this action is not possible or is restricted, in which case the notice must be posted in a conspicuous place on the property. However, if access to the property is denied because a common entrance to the property is restricted by a guard gate or similar impediment, the notice may be posted at that place [*Civ. Code § 2924f(b)(1)*].

NOTE:

Effective September 6, 2008 [Stats. 2008, ch. 69, § 10], on posting a notice of sale pursuant to *Civ. Code § 2924f*, a trustee or authorized agent must also post, in the manner required for posting the notice of sale on the property to be sold, a specified notice in English and the languages described in *Civ. Code § 1632* [*Civ. Code § 2924.8(a)* (in effect until January 1, 2013); *see § 25D.211* (notice)].

5. Publish notice once a week for three consecutive calendar weeks, with first publication occurring at least 20 days before date of sale, in newspaper of general circulation published [*Civ. Code § 2924f(b)(1)*]:

a. In city, judicial district, or county in which property is situated, if there is such a newspaper; or

b. If property is not within a city, in newspaper for appropriate judicial district [*Civ. Code § 2924f(b)(1)*]; or

c. If newspaper of general circulation does not exist in above locations, in newspaper of general circulation published in California county that:

(1) Is contiguous to county in which all or part of property is situated; and

(2) Has highest population of all similarly contiguous counties.

NOTE:

The determination of the populations of the contiguous counties must be based on the total county populations as determined by the most recent federal decennial census published by the Bureau of the Census [*Civ. Code § 2924f(b)(1)*].

6. Record notice with county recorder of county in which property or some part thereof is situated at least 20 days before date of sale [*Civ. Code § 2924f(b)(1)*].

7. After mailing, posting, publishing, and recording notice of sale, have trustee execute or obtain appropriate declarations regarding mailing and posting of notice of sale [*see § 25D.207[1]*] and obtain an affidavit or declaration of publication from newspaper in which notice was published.

8. Provide copy of notice of sale to Internal Revenue Service if "Notice of Federal Tax Lien under Internal Revenue Laws" has been recorded, after deed of trust or mortgage being foreclosed, against subject real property [*Civ. Code § 2924b(c)(4)*].

NOTE:

The mortgagee, trustee, or other person authorized to record the notice of default must provide a copy of the notice of sale to the Internal Revenue Service, in accordance with *I.R.C. § 7425* and any applicable federal regulations, if a "Notice of Federal Tax Lien under Internal Revenue Laws" has been recorded, after the deed of trust or mortgage being foreclosed, against the real property to which the notice of sale applies. The failure to provide the Internal Revenue Service with a copy of the notice of sale is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the beneficiary's consent. Any option to rescind the trustee's sale under this provision must be exercised before any transfer of the property by the successful bidder to a bona fide purchaser for value. The rescission of the trustee's sale may be recorded in a notice of rescission pursuant to *Civ. Code § 1058.5* [*Civ. Code § 2924b(c)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawNonmortgage LiensTax Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.124

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.124 Postponements of Sale

1. Notify trustee that trustee is authorized to postpone sale in accordance with any of following [*Civ. Code § 2924g(c)(1)*]:

a. On order of any court of competent jurisdiction.

b. If stayed by operation of law.

c. By mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee.

d. At trustee's discretion.

2. Instruct trustee that sale proceedings may be postponed, including postponement on instruction by beneficiary to trustee that sale proceedings be postponed, at any time before completion of sale for any period of time not to exceed total of 365 days from date set forth in notice of sale [*Civ. Code § 2924g(c)(1)*].

NOTE:
In the event that the sale proceedings are postponed for a period or periods totaling more than 365 days, the scheduling of any further sale proceedings must be preceded by giving a new notice of sale in the manner prescribed in *Civ. Code § 2924f*. New fees incurred for the new notice of sale must not exceed the amounts specified in *Civ. Code §§ 2924c* and *2924d* and must not exceed reasonable costs that are necessary to comply with these requirements [*Civ. Code § 2924g(c)(2)*].

3. If sale is postponed, instruct trustee to [*Civ. Code § 2924g(d)*; *see Civ. Code § 2924g(e)* (postponement of sale until

expiration of bankruptcy stay)]:

a. Make public announcement at time and place specified in notice of sale of postponement, reason for it, and date, time, and place of rescheduled sale.

NOTE:
The place of sale must remain unchanged. No other notice of the postponement is required. If the postponement was caused by an injunction, restraining order, or stay, the sale must be conducted no sooner than the seventh day after the earlier of (1) dismissal of the action, or (2) expiration or termination of the injunction, restraining order, or stay (which required postponement of the sale), whether by entry of a court order, operation of law, or otherwise, unless the injunction, restraining order, or subsequent order expressly requires the sale to be held within that seven-day period. The seven-day period does not include the day the action is dismissed or the day the injunction, restraining order, or stay expires or is terminated. If the sale had been scheduled to occur during the above seven-day period and the foregoing rules prohibit it from being conducted during that period, a new notice of postponement must be given [*Civ. Code § 2924g(d)*]. Notwithstanding these time periods, if postponement of a sale is based on a stay granted under the Bankruptcy Code, the sale may be conducted no sooner than the expiration of that stay, and the seven-day provision of *Civ. Code § 2924g(d)* does not apply [*Civ. Code § 2924g(e)*].

b. Maintain record of postponement and reason for it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.125

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.125 Conducting Sale

NOTE:

When the deed of trust confers the power of sale on the trustee, the trustee's attorney or any duly authorized agent may conduct the sale and act in the sale as the auctioneer for the trustee [*Civ. Code § 2924a*].

A trustee or any other person may state that property subject to a recorded notice of default or subject to a nonjudicial foreclosure sale is being sold in an "as-is" condition [*Civ. Code § 2924h(g)*].

1. Hold sale at time and location specified in notice of sale (or in public announcement made following postponement of earlier sale) [*Civ. Code § 2924g(a)*].

NOTE:

The sale must be held between the hours of 9:00 A.M. and 5:00 P.M. on any business day, in the county in which some or all of the property is situated [*Civ. Code § 2924g(a)*]. If the property is in two or more counties, the public sale of all of the property may be held in any one of the counties [*Civ. Code § 2924g(b)*].

2. If property consists of more than one lot or parcel, sell each separately unless [*Civ. Code § 2924g(b)*]:

a. Deed of trust or mortgage provides otherwise; or

b. Third person claims a portion of the property and requires it to be sold separately.

NOTE:

If the property consists of several known lots or parcels that may be sold to advantage

separately, and the trustor is present at the sale, he or she may (unless the deed of trust or mortgage provides otherwise) specify the order in which the property must be sold, and the trustee must comply. After sufficient property has been sold to satisfy the indebtedness, no more can be sold [*Civ. Code § 2924g(b)*].

3. If trustee scheduled sale of more than one parcel for same time and location [*Civ. Code § 2924g(a)*]:

a. Announce any postponement of any sales at time published in notice of sale.

b. Commence first sale at time published in notice of sale or immediately after announcement of any postponement.

c. Conduct each subsequent sale as soon as possible after completion of preceding sale.

4. Notify trustee of right to enforce one of the following bidding procedures for sale:

NOTE:
Each bid made at a trustee's sale constitutes an irrevocable offer by the bidder to purchase the property for the amount of the bid, but a second or subsequent bid by the same bidder or any other bidder for a higher amount cancels the prior bid [*Civ. Code § 2924h(a)*]. Any postponement or discontinuance of the sale proceedings cancels the last bid [*Civ. Code § 2924h(e)*].

a. Conditionally accept and hold (for duration of sale) evidence of each bidder's ability to deposit with trustee full amount of his or her final bid, with payment of bid to be made after completion of sale and on demand by trustee [*Civ. Code § 2924h(b), (d)*; *see* P 8, *below*].

b. Require last and highest bidder to deposit, if not deposited previously, full amount of bidder's final bid immediately before completion of sale [*Civ. Code § 2924h(b)*].

5. Require payment of bids by one of following methods [*Civ. Code § 2924h(b), (d)*]:

a. Cash.

b. Cashier's check drawn on a state or national bank.

c. Check drawn by a state or federal credit union, state or federal savings and loan association, savings association, or savings bank [*see Fin. Code § 5102* (definition)] authorized to do business in California.

d. Cash equivalent that has been designated in notice of sale as acceptable to trustee before and as a condition to recognition of the bid.

6. Accept any "credit" bid only from present beneficiary of deed of trust in foreclosure and only in amount not exceeding total amount due beneficiary (including trustee's fees and expenses) [*see Civ. Code § 2924h(b)*].

7. Sell property to highest bidder [*Civ. Code § 2924g(a)*] and complete sale by announcement, fall of hammer, or in another customary manner [*Civ. Code § 2924h(b)*].

8. If not deposited before completion of sale, demand delivery of full amount of final bid [*Civ. Code § 2924h(d)*].

NOTE:

This amount must be in one of the forms described in P 5, ***above***. If the last and highest bidder fails to deliver the final bid when demanded, that bidder is liable to the trustee for all damages that the trustee may sustain as a result of the failure, including any court costs and reasonable attorneys' fees. Further, if the failure is willful, or if the last and highest bidder cancels an instrument submitted to the trustee as a cash equivalent, the bidder is guilty of a misdemeanor punishable by a fine of not more than $2,500 [*Civ. Code § 2924h(d)*].

9. If successful bidder deposited a cash equivalent or check drawn by credit union or savings and loan association, have trustee:

a. Withhold issuance of trustee's deed to successful bidder until funds become available to payee or endorsee as matter of right [*Civ. Code § 2924h(c)*].

NOTE:

For these purposes, the sale will be deemed final on the acceptance of the last and highest bid, and will be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days of the sale [*Civ. Code § 2924h(c)*]. However, as discussed in P 9b, ***below***, the sale will be subject to an automatic rescission under certain circumstances.

b. If funds are not "available for withdrawal" [*Civ. Code § 2924h(c)*; *see Ins. Code § 12413.1*]:

NOTE:

The sale is subject to an automatic rescission for a failure of consideration if the funds are not "available for withdrawal" as defined in *Ins. Code § 12413.1* [*Civ. Code § 2924h(c)*; ***see*** *Ins. Code § 12413.1(e)* (when a draft has been submitted for collection, "available for withdrawal" means when the draft has been submitted for collection and payment received), (g) (incorporating by reference definition set forth in *12 C.F.R. § 229.2(d)*, as that regulation existed on January 1, 1990)].

If the last and highest bidder cancels an instrument submitted to the trustee as a cash equivalent, the bidder will be guilty of a misdemeanor punishable by a fine of not more than $2,500 [*Civ. Code § 2924h(d)*].

(1) Send notice of rescission for failure of consideration to last and highest bidder.

NOTE:

The trustee must send the notice to the last and highest bidder who submitted the check or alternative instrument, if the trustee knows the bidder's address. Following the automatic rescission, the interest of any lienholder must be reinstated in the same priority as if the previous sale had not occurred [*Civ. Code § 2924h(c)*].

(2) Prepare new notice of sale [*Civ. Code § 2924f(b)*; *see § 25D.206[2]*].

NOTE:

If the notice is being given following the cancellation by the last and highest bidder of an instrument submitted to the trustee as a cash equivalent, the trustee will be entitled to recover the costs of the new notice of sale as provided in *Civ. Code § 2924c* [*Civ. Code § 2924h(d)*; ***see*** *§ 25D.206[1][l]*].

(3) Conduct new sale.

10. Unless sale is rescinded [*see* P 9, *above*], have trustee execute and deliver trustee's deed to purchaser [*see § 25D.209*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.126

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.126 Distributing Proceeds and Handling Conflicting Claims

1. If a dispute exists regarding proceeds of sale, ask trustee to decide whether to:

a. File interpleader action [*Civ. Code § 2924j(e)*].

NOTE:
If the trustee decides to file an interpleader action in order to resolve the dispute, the requirements of *Civ. Code § 2924j* [***see*** PP 2-6, ***below***] will not apply [*Civ. Code § 2924j(e)*]. For comprehensive coverage of interpleader, see California Forms of Pleading and Practice, Ch. 314, ***Interpleader*** (Matthew Bender).

b. Comply with requirements of *Civ. Code §§ 2924j* and *2924k* [*see* PP 2-8, *below*].

NOTE:
The remainder of § 25D.126 applies only if the trustee elects to comply with *Civ. Code §§ 2924j* and *2924k.*

2. Determine whether or not there will be proceeds remaining after trustee pays [*see Civ. Code §§ 2924j(a), 2924k(a)(1), (2)*]:

NOTE:
To the extent required by the Unclaimed Property Law, a trustee in possession of surplus proceeds that are not required to be deposited with the court pursuant to *Civ. Code § 2924j(b)* must comply with the Unclaimed Property Law [*Civ. Code § 2924j(g)*; ***see*** *Code Civ. Proc. § 1500 et seq.*].

a. Costs and expenses of sale [*see* P 7a, *below*].

b. Obligations secured by trust deed that was subject of sale [*see* P 7b, *below*].

3. If there will be proceeds remaining after payment of amounts described in P 2a and b, *above*, prepare notice informing each "entitled person" [*see* P 4, *below*] that [*Civ. Code § 2924j(a)*; *see § 25D.210[2]*]:

a. There has been a trustee's sale of described real property.

b. Person may have claim to all or portion of sale proceeds remaining after payment of amounts described in P 2a and b, *above*.

c. Person may contact trustee at address provided in notice to pursue any potential claim.

d. Before the trustee can act, the noticed person may be required to present proof that the person holds the beneficial interest in the obligation and the security interest for the obligation; and the noticed person must also submit a written claim to the trustee, executed under penalty of perjury, containing [*Civ. Code § 2924j(a)*]:

NOTE:

In the case of a promissory note secured by a deed of trust, proof that the person holds the beneficial interest may include the original promissory note and assignment of beneficial interests related to the note [*Civ. Code § 2924j(a)*].

(1) Statement of amount of claim to date of trustee's sale.

(2) Itemized statement of principal, interest, and other charges.

(3) Statement that claims must be received by trustee at address stated in notice no later than 30 days after date trustee sent notice.

4. Send notice described in P 3, *above*, by first-class mail, postage prepaid, to following persons, if they possessed recorded interests in subject real property as of date immediately prior to trustee's sale ("entitled persons") [*Civ. Code § 2924j(a)*; *see Civ. Code § 2924b(b), (c)*]:

NOTE:

The notices must be sent to the return addresses set forth in the recorded instruments evidencing the interests of the following persons [*Civ. Code § 2924j(a)*; ***see*** *Civ. Code § 2924b(c)(1)*]. In addition, the mortgagee, trustee, or other person authorized to record the notice of default must provide a copy of the notice of sale to the Internal Revenue Service, in accordance with *I.R.C. § 7425* and any applicable federal regulation, if a "Notice of Federal Tax Lien under Internal Revenue Laws" has been recorded, after the deed of trust or mortgage being foreclosed, against the real property to which the notice of sale applies. The failure to provide the Internal Revenue Service with a copy of the notice of sale is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the beneficiary's consent. Any option to rescind the trustee's sale under this provision must be exercised before any transfer of the property by the successful bidder to a bona fide purchaser for value. The rescission of the trustee's sale may be recorded in a notice of rescission pursuant to *Civ. Code § 1058.5* [*Civ. Code § 2924b(c)(4)*].

a. Each person who has recorded separate request for notice of default [*see Civ. Code § 2924b(a), (b)(1)*; *see also § 25D.121*, P 7a(1)].

b. Each trustor [*see Civ. Code § 2924b(b)(1)*].

c. Successor in interest (in whole or part) of trustor [*see Civ. Code § 2924b(c)(2)(A)*].

d. Beneficiary or mortgagee (and assignee of either) of any recorded junior trust deeds or mortgages [*see Civ. Code § 2924b(c)(2)(B), (C)*].

e. Vendee of any contract of sale, or lessee of any lease, junior to trust deed being foreclosed, and their successors in interest, if any [*see Civ. Code § 2924b(c)(2)(D), (E)*].

f. Sacramento Office of Controller if, as of recording date of notice, a notice of lien for postponed property taxes has been recorded against real property to which notice applies [*see Civ. Code § 2924b(c)(2)(F)*].

5. Instruct trustee to use due diligence [*see Civ. Code § 2924j(f)*; *see also* P 6, NOTE, *below*] to determine priority of written claims received in response to foregoing notice [*Civ. Code § 2924j(b)*; *see Civ. Code § 2924k*; *see also* P 7, *below* (statutory order of distribution of proceeds)].

6. If, after due diligence, trustee cannot determine priority of above written claims or trustee determines that there is a conflict between potential claimants:

NOTE:

For these purposes, "due diligence" means that the trustee (1) researched the written claims submitted or other evidence of conflicts and (2) determined that a conflict of priorities exists between two or more claimants that the trustee is unable to resolve [*Civ. Code § 2924j(f)*].

a. Send (by first-class mail, postage prepaid) notice to all entitled persons [*see* P 4, *above*] that [*Civ. Code § 2924j(d)*]:

(1) States that trustee intends to deposit funds with clerk of superior court.

(2) Provides that claim for funds must be filed with court within 30 days from date of notice.

(3) Sets forth address of court in which funds were deposited.

(4) Includes phone number for obtaining further information.

b. Prepare proof of service of above notice of right to file claim on all entitled persons [*Civ. Code § 2924j(c)*].

c. Prepare declaration of unresolved claims that contains [*Civ. Code § 2924j(c)*]:

(1) Date of trustee's sale.

(2) Description of property.

(3) Names and addresses of all entitled persons who were sent notice of potential claim [*see* P 4, *above*].

(4) Statement that trustee exercised due diligence in attempting to determine priority of written claims [*see* P 5, *above*].

(5) Statement that trustee provided written notices regarding:
(a) Potential claims [*see Civ. Code § 2924j(a)*; *see also* P 3, *above*].

(b) Right to file claim [*see Civ. Code § 2924j(d)*; *see also* a, *above*].

(6) Amount of sales proceeds trustee deposited with superior court [*see* d(3), *below*].

NOTE:
The trustee will deposit the proceeds at the same time he or she files this declaration with the superior court [***see*** P d(3), ***below***].

d. Have trustee file or deposit following with clerk of superior court of county in which sale occurred:

(1) Proof of service of notice of right to file claim [*Civ. Code § 2924j(c)*; *see* b, *above*].

(2) Declaration of unresolved claims [*Civ. Code § 2924j(c)*; *see* c, *above*].

(3) Portion of sales proceeds that trustee cannot distribute, less any fees charged by clerk for performance of activities relating to deposited funds [*Civ. Code § 2924j(c)*].

NOTE:
The trustee may deposit (1) the total proceeds of the trustee's sale, less any fees charged by the clerk, if a conflict or conflicts exist with respect to the total proceeds, or (2) that portion that cannot be distributed after due diligence, less any fees charged by the clerk [***see*** *Civ. Code § 2924j(f)* ("due diligence" defined); ***see also*** P 6, NOTE, ***above***]. The deposit of these funds with the superior court discharges the trustee of further responsibility for the disbursement of the deposited funds. Thereafter, the clerk will deposit the funds with the county treasurer or in a bank trust account [*see Gov. Code § 77009(a)(2)*] subject to the order of the superior court on the application of any interested party. The clerk may charge a reasonable fee for the performance of activities relating to these deposited funds equal to the fee for filing an interpleader action [*Civ. Code § 2924j(c)*; ***see*** *Gov. Code § 70611* (filing fee)].

The court will schedule a hearing on the deposited funds. The clerk will serve written notice of the hearing by first-class mail on all claimants identified in the trustee's declaration at the addresses specified in that declaration. The court will consider all claims filed at least 15 days before the date of the hearing. This review must take place within 90 days after the deposit of the funds. Finally, the court will distribute the funds to the entitled claimants [*Civ. Code § 2924j(d)*].

(4) Copy of trustee's sale guarantee and any information relevant to identity, location, and priority of potential claimants [*Civ. Code § 2924j(c)*].

NOTE:
A trustee's sale guarantee is a special report prepared and issued by a title insurer to supply and guarantee the accuracy of title information relating to property that is subject to foreclosure. For an illustrative trustee's sale guarantee and further discussion, see *§ 26A.235*.

7. Have trustee distribute any sales proceeds not deposited with court in following order of priority [*Civ. Code § 2924k(a)*]:

NOTE:
This order of priority also applies to any distribution of sales proceeds by a superior court clerk pursuant to a court order [*Civ. Code § 2924k(a)*; ***see*** P 6(d)(3), NOTE, ***above***].

a. To costs and expenses of exercising power of sale and of sale, including trustee's fees and attorneys' fees [*see Civ. Code §§ 2924d(b), 2924k(b); see also* P 8, *below*].

b. To payment of obligations secured by trust deed that is subject of sale.

c. To satisfy outstanding balance of obligations secured by any junior liens or encumbrances in order of their priority.

d. To trustor or trustor's successor in interest.

NOTE:
If the property has been sold or transferred to another, this distribution should be to the vested owner of record at the time of the sale [*Civ. Code § 2924k(a)(4)*].

8. Notify trustee of right to charge [*Civ. Code § 2924k(b)*]:

a. Costs and expenses for such items as mailing.

b. Reasonable fee for services rendered in connection with distribution of proceeds, including:

NOTE:
If the fee charged for services rendered does not exceed $100 or $125 if there are obligations secured by any junior liens or encumbrances [***see*** *Civ. Code § 2924k(a)(3)*], it will be conclusively presumed to be reasonable [*Civ. Code § 2924k(b)*].

(1) Investigation of priority and validity of claims.

(2) Distribution of funds.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary

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10-25D California Legal Forms--Transaction Guide §§ 25D.127-25D.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25D.127[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.200

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.200 Request for Notices of Default and Sale [Civ. Code § 2924b]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory request for a copy of any notice of default [*see § 25D.202[2]*] and of any notice of sale [*see § 25D.206[2]*] required by *Civ. Code § 2924* to be given in a nonjudicial foreclosure. The request may be made by any person at any time subsequent to recordation of a deed of trust or mortgage containing the power of sale and before recordation of a notice of default [*Civ. Code § 2924b(a)* (applicable to default under trust deed or mortgage on real property on or an estate for years in real property)]. Each person whose name and address are set forth in a duly recorded request must be provided with a copy of any notice of default or notice of sale within specified periods of time prior to the sale [*see Civ. Code § 2924b(b)(1), (2), (c)(3)*; *see also §§ 25D.121*, P 7a(1), *25D.123*, P 3b(1)].

[b] Special Considerations

Many standard deeds of trusts and mortgages used by title companies and financial institutions contain a provision requesting that copies of any notice of default and notice of sale be sent to the trustor or mortgagor at the address specified in the security instrument. In that case, the trustor or mortgagor need not execute and record this separate form of request since the inclusion of a request in the security instrument triggers the same obligation to provide notice that applies following the filing of a separate request [*Civ. Code § 2924b(d)*].

If there is an address change for the trustor or mortgagor from that specified in the deed of trust or mortgage, the trustor or mortgagor should file and record the separate form of request set forth below, since the person authorized and required to mail the notices of default and sale is required to send them only to the trustor's or mortgagor's last known address if different from the address specified in the deed of trust or mortgage [*see Civ. Code § 2924b(b)*]. "Last known address" of each trustor or mortgagor means the last business or residence physical address actually known by the mortgagee, beneficiary, trustee, or other person authorized to record the notice of default. A physical address does not

include an e-mail address or any form of electronic address for a trustor or mortgagor. An address is "actually known" if it is contained in the original deed of trust or mortgage, or in any subsequent written notification of a change of physical address from the trustor or mortgagor pursuant to the deed of trust or mortgage [*Civ. Code § 2924b(b)(3)*]. Similarly, if a person records a request for notices and then changes his or her address, that person must file a new request, since the notices will be sent only to the address contained in the previously recorded request [*Civ. Code § 2924b(a)*].

[c] Contents of Request

The request must be in substantially the form set forth in *Civ. Code § 2924b(a)*. Further, the request must specify the name and address of the person to whom the notice is to be mailed, and must identify the deed of trust or mortgage by stating (1) the names of the parties to it; (2) the date of recordation of the security instrument; and (3) the book and page where the deed of trust or mortgage is recorded or the recorder's number. Finally, the person making the request must sign and acknowledge it [*Civ. Code § 2924b(a)*].

[d] Recording of Request

The request must be recorded in any county in which any part or parcel of the real property is located [*Civ. Code § 2924b(a)*]. The recording of the request does not affect the title of the property, and does not give notice that the person recording the request has any right, title, or interest in or lien or charge on the property [*Civ. Code § 2924b(f)*].

[2] FORM

Request for Notice and Sale

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

REQUEST FOR NOTICE OF DEFAULT AND SALE

In accordance with *California Civil Code Section 2924b*, request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale under that Deed of Trust [*or* Mortgage] executed by _____[*name*] as Trustor [*or* Mortgagor], and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, in which _____[*name*] is named as Beneficiary [*or* Mortgagee], [*add if security instrument is a deed of trust:* and _____ (*name*) as Trustee,] be mailed to:

_____[*name*]
_____[*address*]
_____[*city, state, zip*]

NOTICE:

A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

Dated: _____.

_____ [*signature*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.200A

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.200A Request by Homeowners' Association to Receive Copy of Trustee's Deed [Civ. Code § 2924b(f)]

[1] Comment--Use of Form

The form in [2], *below*, may be used by a homeowners' association [*see Civ. Code § 1351(a)* (definition)] to request a copy of any trustee's deed in the event of a sale concerning any separate interest governed by the association. With respect to separate interests governed by a homeowners' association, the association may cause to be filed in the office of the recorder, in the county in which the separate interests are situated, a request that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of those separate interests, mail to the association a copy of any trustee's deed on a sale concerning a separate interest. Subsequent requests by an association will supersede prior requests [*Civ. Code § 2924b(f)*].

The request must include a legal description or the assessor's parcel number of the separate interests and must include the name and address of the association and a statement that it is a homeowners' association [*Civ. Code § 2924b(f)*].

To be effective, the request must be recorded before the filing of a notice of default. The mortgagee, trustee, or other authorized person must mail the requested information to the association within 15 business days following the date the trustee's deed is recorded. Failure to mail the request, however, will not affect the title to real property [*Civ. Code § 2924b(f)*].

The document must meet format requirements prescribed for recordable documents (for instance, a half-inch margin on each vertical side and the top 2 inches of the first page left blank for recording information) [*see Gov. Code § 27361.6*]. For discussion, see Ch. 27, *Deeds and Recording* .

[2] FORM

[*Recording information. See § 25D.200[2].*]

_____ [*Name*], which is a homeowners' association, requests that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of the separate interests referred to below, mail to the association a copy of any trustee's deed on a sale concerning a separate interest, as provided in *Section 2924b(f) of the Civil Code*.

The separate interests in question are identified by _____ [*either* Assessor's Parcel Number *or* the following legal description:] _____ [*specify*].

The association's name and address are: _____ [*specify*].
Dated: _____

_____ [*signature*]
[*typed name and title*]

[*Acknowledgment. See § 25D.200[2].*]



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.201 Declaration of Default and Request for Sale

[1] Comment

[a] Use of Form

The form in [2], *below*, is (1) a declaration by a beneficiary under a deed of trust that a default has occurred under the trust deed, and (2) a request that the trustee sell the property in order to satisfy the indebtedness. The purpose of the form is to provide the trustee with the authorization and necessary information to prepare a notice of default [*see § 25D.202*].

[b] Required Contents of Related Notice of Default

This form sets forth the following items of information, which must appear in the notice of default [*see Civ. Code § 2924(a)(1)*; *see also § 25D.202[1][b]*]:

- A statement that a breach of the secured obligation has occurred.
- A description of the nature of each breach actually known to the beneficiary.
- A declaration of the beneficiary's election to sell the property to satisfy the foregoing obligation and any other obligation secured by the trust deed.
- Identifying information regarding the deed of trust.

If the deed of trust being foreclosed requires additional statements, recitals, or information from the beneficiary as a condition to the sale, those should be added to this form.

Concurrently with delivery of the request for sale, the beneficiary should deliver to the trustee the original deed of trust, the promissory note(s), and any other evidences of indebtedness secured by the trust deed. The trustee may also require the beneficiary to deposit in advance some or all of the trustee's anticipated costs and expenses of sale.

[2] FORM

Declaration of Default and Request for Sale

DECLARATION OF DEFAULT AND REQUEST FOR SALE

TO: _____[*name of trustee*]
_____[*street address*]
_____[*city, state, zip*]

The undersigned, as legal owner and holder of a promissory note in the amount of $_____, secured by a Deed of Trust (hereafter referred to as "the Deed of Trust") dated _____, executed by _____[*name*], as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, hereby states that the undersigned has actual knowledge that a breach [*or* breaches] of the obligation for which the Deed of Trust is security has [*or* have] occurred and that the nature of the breach is [*or* breaches are] as follows: _____[*describe all breaches actually known to beneficiary*]. Because of the breach [*or* breaches], the undersigned hereby declares that all sums secured by the Deed of Trust are immediately due and payable and that the undersigned elects to sell, or cause to be sold, the trust property to satisfy the foregoing obligation [*add if applicable:* and any other obligation secured by the Deed of Trust].

As Trustee under the Deed of Trust, you are hereby requested and authorized to begin foreclosure on the Deed of Trust, to file for record a Notice of Default as provided in *California Civil Code Sections 2924* and *2924c* if you have not already done so, and to proceed with the sale of the property pursuant to the terms of the Deed of Trust.

A statement of all amounts currently due on the indebtedness secured by the Deed of Trust is attached to this document.
Dated: _____.

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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10-25D California Legal Forms--Transaction Guide § 25D.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.202 Notice of Default [Civ. Code §§ 2924(a)(1), 2924c]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of default, which must be recorded at least three months before the recordation of a notice of sale [*see § 25D.206*] to sell property through the nonjudicial foreclosure of a deed of trust or mortgage [*Civ. Code § 2924(a)(2), (3)*]. The notice must be executed either by the trustee, beneficiary, or mortgagee, or the authorized agent of any of the above, and must be recorded in every county in which any portion of the real property is located [*Civ. Code § 2924(a)(1)*].

[b] Required Contents

The notice of default must identify the mortgage or deed of trust by stating the name of each mortgagor or trustor and giving (1) the book and page where the mortgage or deed of trust is recorded, or (2) a description of the mortgaged or trust property. It must also state that a breach of the obligation for which the mortgage or transfer in trust is security has occurred, and must set forth the nature of each breach actually known to the beneficiary [*see* [c], *below*] and the mortgagee's or beneficiary's election to sell the security or to cause it to be sold to satisfy the foregoing obligation and any other obligation secured by the mortgage or trust deed that is in default [*Civ. Code § 2924(a)(1)*]. The last paragraph of the following form contains the above information.

If the default can be cured by the payment of money, the notice of default must also contain a statutory statement regarding the debtor's right to pay the amount in default and to reinstate the obligation and deed of trust or mortgage [*Civ. Code § 2924c(a)(1)*; *see* [d], *below*]. Although this requirement does not apply to other types of defaults, it is common to include the statutory reinstatement provision in all notices of default [*see* [d][ii], *below*].

[c] Known Defaults

As mentioned in [b], *above*, the notice of default must set forth, among other things, the nature of each breach actually known to the mortgagee or beneficiary. There is a rebuttable presumption that the mortgagee or beneficiary actually knew of all unpaid loan payments on the obligation owed to the mortgagee or beneficiary and secured by the mortgage or trust deed subject to the notice of default. However, the failure to include an actually known default will not invalidate the notice of sale or preclude the mortgagee or beneficiary from asserting a claim to this omitted default or defaults in a separate notice of default [*Civ. Code § 2924(e)*]. In any case, in performing the required acts, the trustee will not incur liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and amount of the default under the secured obligation, deed of trust, or mortgage [*Civ. Code § 2924(b)*]. Additionally, the trustee is not subject to the provisions governing fair debt collections practices [*see Civ. Code § 1788 et seq.*] when performing the required acts [*Civ. Code § 2924(b)*].

[d] Notice of Right to Reinstate

[i] Statutory Statement

If the default is curable under the reinstatement provisions of *Civ. Code § 2924c* [*see* [ii], *below*], the notice of default must begin with the reinstatement notice set forth in that statute [*see Civ. Code § 2924c(b)(1)*]. This statutory statement notifies the debtor of the right of reinstatement (discussed below) and of other legal rights. The form in [2], *below*, with the exception of the last paragraph, is the required statement.

[ii] Types of Curable Defaults

Following a default under the terms of a trust deed or mortgage on real property or on an estate for years in real property, *Civ. Code § 2924c* permits the debtor to reinstate the obligation and the trust deed or mortgage, provided the default can be cured by the payment of money. Specifically, the right to reinstate is triggered on the election of the beneficiary to accelerate the outstanding indebtedness as a result of a monetary default, that is, a failure to pay any of the following pursuant to the terms of the obligation or the relevant security instrument: interest, any installment of principal, taxes, assessments, insurance premiums, or advances made by the beneficiary or mortgagee. The debtor may reinstate the secured obligation and trust deed or mortgage following such a default by paying the entire amount due, at the time payment is tendered, with respect to [*Civ. Code § 2924c(a)(1)*]:

- All amounts of principal, interest, taxes, assessments, insurance premiums, or advances shown in the notice of default and actually known by the beneficiary to be, and that are, in default under the terms of the trust deed or mortgage and the secured obligation. The trustor or mortgagor need not pay, as a condition of reinstatement, any portion of the principal that, but for the acceleration on default, would not then be due.

- All amounts in default on recurring obligations not shown in the notice of default. For these purposes, "recurring obligations" means: all amounts of principal and interest on the loan, or rents, subject to the trust deed or mortgage in default due after the notice of default is recorded; all amounts of principal and interest or rents advanced on senior liens or leaseholds that are advanced after the recordation of the notice of default; and payments of taxes, assessments, and hazard insurance advanced after recordation of the notice of default.

- All reasonable costs and expenses that are actually incurred in enforcing the terms of the underlying obligation or the trust deed or mortgage, subject to *Civ. Code § 2924c(c)* [*see § 25D.204[1][c][ii]*].

- Trustee's or attorney's fees, subject to *Civ. Code § 2924c(d)* [*see § 25D.204[1][c][iii]*].

[iii] Other Defaults

A literal reading of *Civ. Code § 2924c* indicates that the statutory reinstatement notice must be included in a notice of default only for defaults that can be cured by the payment of money. However, given the fact that the statutory statement itself directs the recipient to contact the beneficiary or mortgagee "to find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason" [*Civ. Code § 2924c(b)(1)*], prudent practice is to include the required statutory statement in a notice of default for any type of default, including a nonmonetary default.

[iv] Type and Print Requirements

The statutory reinstatement notice must, if printed, appear in at least 12-point boldface type, with the following exception: the language set forth in the form below in all capital letters must appear in 14-point boldface type if printed, or in capital letters if typed [*Civ. Code § 2924c(b)(1)*].

[v] Spanish Language Requirements

The reinstatement notice must be in Spanish under either of the following circumstances. First, it must be in Spanish if the trustor or mortgagor "received" a Spanish translation of the secured agreement under *Civ. Code § 1632(b)(1)* or *(4)* [*Civ. Code § 2924c(b)(1)*; *see Ch. 45, Consumer Installment Loans, § 45.64*]. The term "received" is set out in quotation marks above because *Civ. Code § 2924c* uses the word "requested" instead, and consequentially does not reflect the provisions of *Civ. Code § 1632*. Section 1632 has been amended to delete the requirement that the trustor or mortgagor (or other eligible recipient) must request a Spanish translation of the secured agreement (or other document subject to *Civ. Code § 1632*). Although *Civ. Code § 2924c* has not been revised to reflect that change, counsel should assume that the reinstatement notice must be in Spanish if the trustor or mortgagor received (as opposed to requested) a Spanish translation of the secured agreement under *Civ. Code § 1632(b)(1)* or *(4)*. This follows, since under § 1632, the translation is required to include a translation of every term and condition in that contract or agreement, with specified exceptions [*Civ. Code § 1632(a)*]. In addition, effective July 1, 2004, the scope of *Civ. Code § 1632* now applies to any person who negotiates primarily in Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into specified types of contracts or agreements [*Civ. Code § 1632(b)*; *see* 2003 Stats., ch. 330, § 2; *see also* 2003 Stats., ch. 589, § 2].

Second, the reinstatement notice must be in Spanish if the secured contract was principally negotiated in Spanish and is a home improvement contract subject to the Unruh Act [*Civ. Code § 2924c(b)(1)*; *see Civ. Code § 1801 et seq.* (Unruh Act); *Bus. & Prof. Code § 7151.2* ("home improvement contract" defined); *see also* Ch. 89, *Home Improvement and Specialty Contracts*]. The assignee of any covered home improvement contract and the person authorized to record the notice of default do not incur any obligation or liability for failing to mail a notice in Spanish unless Spanish is specified in the contract or the assignee or person has actual knowledge that the secured obligation was principally negotiated in Spanish [*Civ. Code § 2924c(b)(1)*].

[vi] Violations

Failure to comply with the notice provisions of *Civ. Code § 2924c(b)* does not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice [*Civ. Code § 2924c(b)(2)*].

[e] Mailing of Notice

[i] To Trustors and Persons Requesting Notice

The mortgagee, trustee, or other person authorized to record the notice of default must, within 10 business days [*see Civ. Code § 9* (definition of "business day")] after recordation of the notice, send by registered or certified mail, postage prepaid, copies of the notice (containing the recording date) to (1) each person whose name and address are set forth in

a duly recorded request therefor, directed to the address designated in that request; and (2) each trustor or mortgagor at the address specified in the trust deed or mortgage [*Civ. Code § 2924b(d)*] or at his or her last known address if different from the address specified in the trust deed or mortgage [*Civ. Code § 2924b(b)(1), (3)*].

"Last known address" of each trustor or mortgagor means the last business or residence physical address actually known by the mortgagee, beneficiary, trustee, or other person authorized to record the notice of default. A physical address does not include an e-mail address or any form of electronic address for a trustor or mortgagor. An address is "actually known" if it is contained in the original deed of trust or mortgage, or in any subsequent written notification of a change of physical address from the trustor or mortgagor pursuant to the deed of trust or mortgage [*Civ. Code § 2924b(b)(3)*]. The beneficiary must inform the trustee of the trustor's last address actually known by the beneficiary. However, the trustee incurs no liability for failing to send any notice to the last address unless the trustee has actual knowledge of it [*Civ. Code § 2924b(b)(3)*].

Simultaneously with the mailing of a copy of the notice of default by registered or certified mail to the trustor or mortgagor, the mortgagee, trustee, or other person authorized to record the notice of default, must send an additional copy of the notice of default by first-class mail (postage prepaid) to each trustor or mortgagor at the same address, and then execute and retain an affidavit or declaration [*see § 25D.207[2]*] indicating compliance with this requirement [*Civ. Code § 2924b(e)*].

[ii] To Other Specified Persons

Copies of the notice of default containing the recording date must also be mailed by registered or certified mail, postage prepaid, to certain persons with a recorded interest in the property, within one month after recordation of the notice of default [*Civ. Code § 2924b(c)(1)*]. Specifically, copies must be sent to [*Civ. Code § 2924b(c)(2)*]:

- The successor in interest, as of the recording date of the notice of default, of all or any part of the estate or interest of the trustor or mortgagor of the trust deed or mortgage being foreclosed.

- The beneficiary or mortgagee of any trust deed or mortgage recorded subsequent to the trust deed or mortgage being foreclosed or recorded prior to or concurrently with the trust deed or mortgage being foreclosed but subject to a recorded agreement or a recorded statement of subordination to the trust deed or mortgage being foreclosed.

- The assignee of any interest of the junior beneficiary or junior mortgagee described above, as of the recording date of the notice of default.

- The vendee of any contract of sale or the lessee of any lease of the estate or interest being foreclosed that is recorded subsequent to the trust deed or mortgage being foreclosed, or that is recorded before or concurrently with the trust deed or mortgage being foreclosed but is subject to a recorded agreement or statement of subordination to the trust deed or mortgage being foreclosed.

- The successor in interest to the vendee or lessee described above, as of the recording date of the notice of default.

- The Office of the Controller in Sacramento if, as of the recording date of the notice of default, a "Notice of Lien for Postponed Property Taxes" has been recorded against the encumbered real property.

The address to which a copy of the notice of default must be mailed for each of the above persons is the address indicated in the recorded instrument evidencing the person's recorded interest and to which the county recorder is instructed to return the instrument after recording [*Civ. Code § 2924b(c)(1)*].

If there is a successor in interest of the trustor or mortgagor described in the first bulleted item, *above*, an additional copy of the notice of default must be mailed by first-class mail, postage prepaid, to the successor in interest of record, and an affidavit or declaration of mailing [*see § 25D.207*] must be executed [*see Civ. Code § 2924b(e)*].

[f] Publication or Personal Delivery of Notice

A copy of the notice of default must be published if (1) the deed of trust or mortgage does not contain a mailing address of the trustor or mortgagor named in it; and (2) the trustor or mortgagor has not recorded a request for notice under *Civ. Code § 2924b(a)* [*see § 25D.200*]. The copy of the notice must be published once a week for at least four weeks in a newspaper of general circulation in the county in which the property is located. The publication must commence within 10 days after the filing of the notice of default [*Civ. Code § 2924b(d)*]. In lieu of publication, either of the following may be done: (1) a copy of the notice of default may be delivered personally to the trustor or mortgagor within 10 days after the filing of the notice or at any time before publication is completed; or (2) a copy of the notice of default may be posted in a conspicuous place on the property and another copy may be mailed to the trustor's or mortgagor's last known address [*Civ. Code § 2924b(d)*].

[g] Privileged Communications

The mailing, publication, and delivery of the notice of default, and the performance of related statutory procedures, constitute privileged communications within the meaning of *Civ. Code § 47* [*Civ. Code § 2924(d)*].

[h] Notices Required by Collection Agents

An agent who collects payments under a secured promissory note for a mortgagee, beneficiary, or owner of the note must send a copy of the notice of default and other notices to the mortgagee, beneficiary, or owner under certain circumstances [*see Civ. Code § 2924.3* (applicable to default under trust deed or mortgage on real property or on an estate for years in real property); *see also § 25D.121*, P 10].

[i] Notices Addressed to Attorneys, Agents, or Employees

The statutory procedure for mailing of the notice of default does not impose on any licensed attorney, agent, or employee of any person entitled to receive the notice of default any duty to communicate that notice to the person entitled to receive it by virtue of the fact that the mailing address used by the county recorder is the address of the attorney, agent, or employee [*Civ. Code § 2924b(c)(5)*].

[j] Declaration in Compliance With Temporary Foreclosure-Relief Provisions for Residential Properties

A mortgagee, trustee, beneficiary, or authorized agent, is required to comply with several temporary provisions in the Civil Code for the relief of homeowners facing foreclosure of their mortgage loans. Those relief provisions are discussed in *California Forms of Pleading and Practice, Ch. 555, Trust Deeds and Real Property Mortgages, § 555.51A* (Matthew Bender), and in *California Real Estate Law and Practice, Ch. 123, Nonjudicial Foreclosure, § 123.08* (Matthew Bender).

One of those provisions applies to a loan that is secured by a mortgage or deed of trust recorded from January 1, 2003, to December 31, 2007, inclusive, on real property that is the principal residence of the borrower (as indicated to the lender in loan documents) containing no more than four dwelling units [*Civ. Code § 2923.5(i)*]. In such a case, a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default until 30 days after initial contact was made with the borrower, in person or by telephone, in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure, or until 30 days after satisfying due-diligence requirements as described in *Civ. Code § 2923.5(g)* [*Civ. Code § 2923.5(a)*]. A notice of default must include a declaration that the mortgagee,

beneficiary, or authorized agent has contacted the borrower, or has tried with due diligence to contact the borrower as required by *Civ. Code § 2923.5(g)*, or that no contact was required pursuant to *Civ. Code § 2923.5(h)* [*Civ. Code § 2923.5(b)*]. Regarding the provisions of *Civ. Code § 2923.5(g)* and *(h)*, see *§ 25D.31[2]*.

This provision will remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2923.5(j)*].

[2] FORM

Notice of Default

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

NOTICE OF DEFAULT

[*If default is curable pursuant to Civ. Code § 2924c, insert following typed or printed statement (if printed, use at least 12-point type unless otherwise indicated). Capitalized boldface material immediately below must be set in 14-point boldface type if printed, or in capital letters if typed.*]

IMPORTANT NOTICE

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice). This amount is _____ as of _____[*date*], and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you

must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing before the time the notice of sale is posted (which may not be earlier than the end of the three-month period stated above) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

_____ [*name of beneficiary or mortgagee*]
_____ [*mailing address*]
_____ [*telephone*]

If you have any questions, you should contact a lawyer or the government agency that may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

[*Capitalized boldface material immediately below must be set in 14-point boldface type if printed, or in capital letters if typed.*]

Remember, **YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.**

[*If default is not curable pursuant to Civ. Code § 2924c, omit preceding material and begin notice with following. If notice is curable, continue with following:*]

Notice is hereby given by the undersigned, as [agent for the] _____[beneficiary/trustee/mortgagee] under that certain Deed of Trust [*or* Mortgage] dated _____, executed by _____[*name*] as Trustor [*or* Mortgagor], in which _____[*name*] is named as Beneficiary [*or* Mortgagee] and _____[*name of trustee*] as Trustee [*delete if mortgage*], and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, that a breach [*or* breaches] of the obligation for which the Deed of Trust [*or* Mortgage] is security has [*or* have] occurred. The following is a description of the breach [*or* breaches]: _____[*describe all breaches actually known to the beneficiary or mortgagee*]. Because of the breach [*or* breaches], the [undersigned hereby declares that all sums secured by the Deed of Trust (*or* Mortgage) are immediately due and payable and elects [*or, if notice is prepared by trustee or agent:* Beneficiary (*or* Mortgagee) has declared that all sums secured by the Deed of Trust (*or* Mortgage) are immediately due and payable and has elected] to sell, or cause to be sold, the trust property to satisfy the foregoing obligation [*add if applicable:* and any other obligation secured by the Deed of Trust (*or* Mortgage)].

[*If loan is secured by mortgage or deed of trust recorded from January 1, 2003, to December 31, 2007, inclusive, on real property that is principal residence of borrower (as indicated to lender in loan documents) containing no more than four dwelling units:*] Beneficiary (*or* Mortgagee) declares that _____[it has duly contacted the

borrower to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure as required by *Civil Code Section 2923.5(a)(2) or* it has tried with due diligence to contact the borrower as required by *Civil Code Section 2923.5(g) or* no contact with the borrower was required pursuant to *Civil Code Section 2923.5(h)*].
Dated: _____.

_____ [*signature of beneficiary, trustee, mortgagee, or agent*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.203

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.203 Statement of Default Under Unruh Act Contract [Civ. Code § 2924f(c)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement, prescribed by statute, describing the consequences of a default under an obligation arising out of a contract for goods or services subject to the Unruh Act [*Civ. Code § 1801 et seq.*]. The statement must be used in addition to a notice of default when (1) the obligation is contained in the type of contract described above; (2) the obligation is secured by a deed of trust or mortgage on real property containing a single-family, owner-occupied residence; and (3) the default has not been cured within 30 days of the recordation date of the notice of default. The trustee or mortgagee must mail a copy of the statutory statement (this form) to the trustor or mortgagor at his or her last known address [*Civ. Code § 2924f(c)*].

This statement must also be included in the trustee's notice of sale [*Civ. Code § 2924f(b)*; *see § 25D.206*].

The exercise of a power of sale in a trust deed or mortgage described above must, as a general rule, comply with the requirements for nonjudicial foreclosures discussed throughout this chapter [*see Civ. Code § 2924f(c)(1), (2)*]. However, the sale must also comply with the special statutory requirements and procedures discussed in [b], *below*.

[b] Special Statutory Sale Requirements

The sale of real property pursuant to a power of sale in any deed of trust or mortgage described in *Civ. Code § 2924f(c)* [*see* [a], *above*] must be held in the county where the residence is located and must be made to the person making the highest offer. The trustee may receive offers during the 10-day period immediately before the date of sale. If any offer is accepted in writing by both the trustor or mortgagor and the beneficiary or mortgagee before the time set for sale, the sale must be postponed to a specified date. Prior to that date, the trustor may convey the property to the offeror according to the terms of the offer. The offer is revocable until accepted. The acceptance of the offer and conveyance of

the property to the offeror terminate any further proceedings under the notice of sale, and the notice is deemed revoked [*Civ. Code § 2924f(c)(4)*].

In addition to the regular trustee fee authorized by statute [*see § 25D.204[1]*], the trustee or mortgagee may charge an additional fee of $50 [*Civ. Code § 2924f(c)(5)*].

[2] FORM

Statement of Default Under Unruh Act Contract

Statement of Default Under Unruh Act Contract
[Civ. Code § 2924f(c)]

TO: _____[*name of trustor or mortgagor*]
_____[*address*]
_____[*city, state, zip*]

YOU ARE IN DEFAULT UNDER A DEED OF TRUST [*or* MORTGAGE], DATED _____. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.
DATED: _____.

_____ [*name of trustee or mortgagee*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.204

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.204 Tender of Sum in Default

[1] Comment

[a] Use of Form

The form in [2], *below*, is a written tender that may be used to reinstate a debt pursuant to *Civ. Code § 2924c*. The reinstatement provisions of § 2924c apply when there has been (1) a default in the payment of principal, interest, or certain other sums required under a trust deed or mortgage on real property or on an estate for years in real property, and (2) a resulting acceleration of the outstanding indebtedness. In that case, the mortgagor or trustor (or successor in interest of either) or a junior beneficiary or lienholder may cure the default by paying to the beneficiary or mortgagee (or successor in interest of either) the amounts in default under the trust deed or mortgage, all amounts in default on recurring obligations, permitted costs and expenses, and trustee's or attorneys' fees [*see* [c], *below*].

Once the default is cured, the secured obligation and the security instrument are reinstated in full force and effect, as if no acceleration had occurred, and any pending foreclosure proceedings must be dismissed or discontinued. However, if the beneficiary or mortgagee has made no advances on defaults that would constitute recurring obligations [*see* [c][i], *below*], the beneficiary or mortgagee may require the trustor or mortgagor to provide reliable written evidence that the required amounts have been paid prior to reinstatement [*Civ. Code § 2924c(a)(1)*].

This form assumes that the underlying security instrument is a deed of trust. It may be easily modified for use in a transaction involving a mortgage.

[b] Reinstatement Period

In the case of a nonjudicial foreclosure, reinstatement may be made at any time within the period commencing with the date of recordation of the notice of default [*§ 25D.202[2]*] until five business days before the date of sale set forth in the initial recorded notice of sale [*Civ. Code § 2924c(e)*]. For judicial foreclosures, reinstatement may be made at any time

prior to entry of the decree of foreclosure [*Civ. Code § 2924c(a)(1)*].

If the sale does not occur on the date set forth in the initial recorded notice of sale [*see § 25D.206[2]*], or if a subsequent recorded notice of sale must be given, the right of reinstatement is revived as of the date of recordation of the subsequent notice of sale, and continues from that date until five business days before the date of sale set forth in the subsequently recorded notice of sale [*Civ. Code § 2924c(e)*].

If the sale is postponed on the date of sale set forth in either an initial or any subsequent notice of sale, or is postponed on the date declared for sale at an immediately preceding postponement of sale, and the postponement is for more than five business days from the date set forth in the notice of sale or declared at the time of postponement, the right of reinstatement is revived as of the date of postponement and continues from that date until five business days before the date of sale declared at the time of the postponement [*Civ. Code § 2924c(e)*].

There is no right of reinstatement during the period of five business days prior to the date of sale, whether the date of sale is noticed in a notice of sale or declared at a postponement of sale. Consequently, no beneficiary, trustee, mortgagee, or agent or successor of the foregoing, or any beneficiary under a subordinate deed of trust or mortgage or any other person having a subordinate lien or encumbrance of record, is liable to a trustor, mortgagor, or his or her agent or successor for failing to allow a reinstatement during that five-day period [*Civ. Code § 2924c(e)*].

[c] Amount Required to Reinstate

[i] Secured and Recurring Obligations

To reinstate the obligation and trust deed or mortgage declared in default, the trustor or mortgagor (or successor in interest of either) or the holder of a junior lien interest must pay the following [*Civ. Code § 2924c(a)(1)*]:

- All amounts of principal, interest, taxes, assessments, insurance premiums, or advances shown in the notice of default and actually known by the beneficiary to be, and that are, in default under the terms of the trust deed or mortgage and the secured obligation. The trustor or mortgagor need not pay, as a condition of reinstatement, any portion of the principal that, but for the acceleration on default, would not then be due.

- All amounts in default on recurring obligations not shown in the notice of default. For these purposes, "recurring obligations" means all amounts of principal and interest on the loan, or rents, subject to the trust deed or mortgage in default due after the notice of default is recorded; all amounts of principal and interest or rents advanced on senior liens or leaseholds that are advanced after the recordation of the notice of default; and payments of taxes, assessments, and hazard insurance advanced after recordation of the notice of default.

- All reasonable costs and expenses that are actually incurred in enforcing the terms of the underlying obligation or the trust deed or mortgage, subject to *Civ. Code § 2924c(c)* [*see* [ii], *below*].

- Trustee's or attorneys' fees, subject to *Civ. Code § 2924c(d)* [*see* [iii], *below*].

[ii] Costs and Expenses

Costs and expenses that may be charged pursuant to *Civ. Code § 2924 et seq.* are limited to the costs incurred for recording, mailing, publishing, and posting notices pursuant to the statutory requirements [*see Civ. Code §§ 2924-2924i*], and for any request for postponement made pursuant to *Civ. Code § 2924g*. The fee recoverable for each such postponement cannot exceed $50. A fee for a trustee's sale guarantee or, in the event of judicial foreclosure, a

litigation guarantee, may also be charged to the debtor. A trustee or beneficiary may purchase a trustee's sale guarantee at a rate meeting the standards contained in *Ins. Code §§ 12401.1* and *12401.3* [*Civ. Code § 2924c(c)*].

[iii] Trustee's or Attorneys' Fees

The trustee's or attorneys' fees that may be charged as a condition for reinstatement in a nonjudicial foreclosure proceeding differ depending on whether reinstatement occurs before or after the notice of sale [*see § 25D.206[2]*] is mailed. Before the mailing of the notice of sale, the limitations on trustee's or attorneys' fees cannot exceed the following limits: $300 if the unpaid principal sum secured is $150,000 or less, or $250 if the unpaid principal sum secured exceeds $150,000, plus one half of one percent of this sum exceeding $50,000 up to and including $150,000, plus one quarter of one percent of any portion of this sum exceeding $150,000 up to and including $500,000, plus one eighth of one percent of any portion of this sum exceeding $500,000. Any charge for trustee's or attorneys' fees is conclusively presumed to be lawful and valid if the charge does not exceed the amounts specified above. The unpaid principal sum secured must be determined as of the date the notice of default is recorded [*Civ. Code § 2924c(d)*].

The following table summarizes these fee limitations:

Authorized Fee	Unpaid Principal
$300 base amount	Up to $150,000
$250 base amount	Over $150,000

Plus the following added to base amount:

1/2 of 1%	$50,001-$150,000
1/4 of 1%	$150,001-$500,000
1/8 of 1%	$500,001 and up

The limitations above also apply to any trustee's or attorneys' fees that are charged, as a condition to reinstatement, at any time before the entry of a foreclosure decree in a judicial foreclosure proceeding [*Civ. Code § 2924c(d)*].

For discussion of the amount of trustee's or attorneys' fees that may be charged after the mailing of a notice of sale or after the sale of the property pursuant to a power of sale, see *§ 25D.206[1]*.

[d] Notice of Rescission

If the trustor, mortgagor, or other authorized person cures the default, the beneficiary or mortgagee must, within 21 days following the reinstatement, execute and deliver to the "trustee" [*see* discussion, *below*] a notice of rescission that rescinds the declaration of default and demand for sale and advises the trustee of the date of reinstatement. The trustee must cause the notice of rescission to be recorded within 30 days of receipt of the notice of rescission and of all allowable fees and costs [*Civ. Code § 2924c(a)(2)*; *see § 25D.205[2]*].

As mentioned above, *Civ. Code § 2924c(a)(2)* requires the beneficiary or mortgagee to deliver the notice of rescission to the "trustee," and provides that the trustee must cause that notice to be recorded. Of course, if the underlying security instrument is a mortgage, there will be no trustee. *Civ. Code § 2924c(a)(2)* has not yet been amended to clarify the procedure that should be followed when the transaction involves a mortgage.

[e] Right to Beneficiary's Statement or Payoff Demand Statement

Certain entitled persons have the right to demand and obtain a beneficiary statement or a payoff demand statement from a mortgagee or a beneficiary under a trust deed [*Civ. Code § 2943(b)* (beneficiary statement), (c) (payoff demand statement)]. For these purposes, "entitled persons" means the trustor or mortgagor (or successor in interest of either), subordinate lienholders, and certain escrow holders [*see Civ. Code § 2943(a)(4)* (definition)]. A beneficiary statement is requested when an existing obligation is to be assumed rather than paid in full [*see Civ. Code § 2943(a)(2)* (definition and required contents); *see also* Ch. 25B, *Subordination, Assumption, and Assignment*]. A payoff demand statement sets forth the amounts required (as of the date of the preparation of the statement) to satisfy fully all obligations secured by the loan that is the subject of the payoff demand statement [*Civ. Code § 2943(a)(5)*; *see* Ch. 25, *Real Estate Loans*], and is requested when the obligation will be paid off through the sale of the property.

[2] FORM

Tender of Sum in Default

Tender of Sum in Default

TO: _____[*name of beneficiary*]
_____[*address*]
_____[*city, state, zip*]

This tender and request relate to a Notice of Default dated _____, executed by _____[*name of trustee or other person executing notice*], and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California. That Notice of Default described a breach [*or* breaches] of an obligation on a promissory note in the face amount of $_____, secured by a Deed of Trust dated _____, executed by _____[*name*] as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

The undersigned hereby tenders the sum of $_____, in the form of the enclosed _____[*e.g.*, cashier's check], as the entire amount necessary to reinstate the above promissory note and Deed of Trust pursuant to *Civil Code Section 2924c*. You are hereby requested (1) to reinstate immediately that promissory note and Deed of Trust in force and effect as though no default had occurred, and (2) to execute and deliver to _____[*name of trustee*] a notice of rescission that rescinds the above Notice of Default and election to sell, and specifies the date of reinstatement.
Dated: _____.

_____ [*signature of trustor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.205

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.205 Notice of Rescission of Notice of Default

[1] Comment--Use of Form

The form in [2], *below*, is a notice of rescission that may be used by a beneficiary or mortgagee to rescind a notice of default and demand for sale [*see § 25D.202*] recorded in a nonjudicial foreclosure proceeding. If the trustor, mortagor, or other authorized person cures the default [*see § 25D.204*], the beneficiary or mortgagee must, within 21 days following the reinstatement, execute and deliver to the "trustee" a notice of rescission (this form) that (1) rescinds the declaration of default and demand for sale, and (2) advises the trustee of the date of reinstatement. Thereafter, the trustee must cause the notice of rescission to be recorded within 30 days of receipt of the notice of rescission and of all allowable fees and costs. The trustor or mortgagor may not be charged (except for the recording fee) for the execution and recordation of the notice of rescission [*Civ. Code § 2924c(a)(2)*].

As mentioned above, *Civ. Code § 2924c(a)(2)* requires the beneficiary or mortgagee to deliver the notice of rescission to the "trustee," and provides that the trustee must cause that notice to be recorded. Of course, if the underlying security instrument is a mortgage, there will be no trustee. *Civ. Code § 2924c(a)(2)* has not yet been amended to clarify the procedure that should be followed when the transaction involves a mortgage.

[2] FORM

Notice of Rescission of Notice of Default

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

)

_____
Space above this line for recorder's use

NOTICE OF RESCISSION OF NOTICE OF DEFAULT

The undersigned, as Beneficiary [*or* Mortgagee] under that certain Deed of Trust [*or* Mortgage] dated _____, executed by _____[*name*] as Trustor [*or* Mortgagor] in which _____[*name*] is named as Beneficiary [*or* Mortgagee] and _____[*name*] as Trustee [*delete if mortgage*] and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, rescinds the Notice of Default and election to sell the trust property that was recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.
Dated: _____.

_____ [*signature of beneficiary or mortgagee*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)
)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale

ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.206

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.206 Notice of Trustee's Sale [Civ. Code § 2924f]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of a sale of property to be made under a power of sale contained in a deed of trust. It may be adapted for use to give notice of a sale under a power of sale contained in a mortgage. The notice must be mailed, posted, published, and recorded in accordance with the statutory requirements discussed throughout this comment before the sale may take place or before any resale resulting from a rescission of a previously held sale [*see Civ. Code §§ 2924f, 2924h*].

A notice of sale may not be given until three months have elapsed from the date of recordation of a notice of default [*see Civ. Code § 2924(a)(2), (3)*; *see also § 25D.202[2]* (notice of default)].

For the procedures for conducting a sale, see *§ 25D.125*.

[b] Heading and Typeface

The notice of sale must conform to the minimum requirements of *Gov. Code § 6043* [*Civ. Code § 2924f(b)(1)*]. Thus, it must be set in type that is not smaller than nonpareil. Further, it must be preceded with words (that is, a heading) that (1) are printed in black-face type that is not smaller than nonpareil, and (2) describe or express in general terms the purport or character of the notice intended to be given [*Gov. Code § 6043*].

[c] Contents of Notice

[i] Time and Place of Sale

The notice of sale must state the time of sale and the street address and specific place at that address where the sale will be held [*Civ. Code § 2924f(b)(1)*]. The sale may be held anywhere in the county where the property (or a portion of it) is located. The time of sale must be between the hours of 9:00 A.M. and 5:00 P.M. on any business day, Monday through Friday [*Civ. Code § 2924g(a)*].

[ii] Information Relating to Trustor and Person Conducting Sale

The notice of sale must contain the trustee's name, street address in California (which may reflect an agent of the trustee), and telephone number in California (or a toll-free telephone number). The notice of sale must also contain the name of the original trustor and the notice of default set forth in *Civ. Code § 2924f(c)(3)* [*Civ. Code § 2924f(b)(1)*].

[iii] Property Description and Designation

In addition to any other description of the property that may be set forth in the notice of sale, the notice must describe the property by giving (1) its street address, if any, or other common designation, if any, and (2) a county assessor's parcel number [*Civ. Code § 2924f(b)(1)*]. If the property has no street address or other common designation, the notice must contain a legal description of the property, the name and address of the beneficiary at whose request the sale is to be conducted, and a statement that directions may be obtained pursuant to a written request submitted to the beneficiary within 10 days from the first publication of the notice. Directions are deemed reasonably sufficient to locate the property if information about the location of the property is given by reference to the direction and approximate distance from the nearest crossroads, frontage road, or access road [*Civ. Code § 2924f(b)(1)*]. However, if the notice contains a legal description or a county assessor's parcel number and either a street address or another common designation of the property, the validity of the notice is not affected by the fact that the street address, other common designation, name and address of the beneficiary, or the directions obtained from the beneficiary are erroneous or omitted [*Civ. Code § 2924f(b)(1)*].

A trustee or any other person may state that a property subject to a recorded notice of default or subject to a nonjudicial foreclosure sale is being sold in an "as-is" condition [*Civ. Code § 2924h(g)*].

[iv] Statement of Unpaid Balance of Obligation and Expenses

The notice of sale must contain a statement of the total amount of the unpaid balance of the secured obligation and reasonably estimated costs, expenses, and advances at the time of the initial publication of the notice of sale [*see § 25D.206[1]*[*l*]]. If the notice of sale is being republished pursuant to a cancellation of the cash equivalent bid by the highest bidder at a previous sale [*see § 25D.206[1][p]*], the notice must also contain a reference to that fact [*Civ. Code § 2924f(b)(1)*] and include the costs of giving the new notice [*see Civ. Code § 2924h(d)*]. The trustee, however, does not incur any liability for any good faith error in stating the proper amount, including any amount provided in good faith by or on behalf of the beneficiary. Furthermore, an inaccurate statement of the amount will not affect the validity of any sale to a bona fide purchaser for value [*Civ. Code § 2924f(b)(1)*].

[v] Description of Personal Property or Fixtures

If the sale is to be a unified sale of real property and personal property [*see Com. Code § 9604(a)(1)(B)*], the notice of sale must also contain a description of the personal property or fixtures to be sold. If all of the personal property or fixtures are to be sold, the description of the personal property or fixtures will be sufficient if it is the same as the description of the personal property or fixtures contained in the agreement creating the security interest in or encumbrance on the personal property or fixtures or the filed financing statement relating to the personal property or fixtures. In all other cases, the description will be sufficient if it would be a sufficient description of the personal property or fixtures under *Com. Code § 9108* [*Civ. Code § 2924f(b)(2)*]. A description of personal property is sufficient, whether or not it is specific, if it reasonably identifies what is described. Personal property may be referred to by general kind or class if the property can be reasonably identified as falling within the general kind or class, or if it can be so

identified when it is acquired by the debtor [*Com. Code § 9108(a)*]. There are a variety of ways in which a description may reasonably identify personal property. A description reasonably identifies the property if it describes it by [*Com. Code § 9108(b)*]:

- Specific listing.
- Category.
- A type of collateral defined in the Commercial Code [*see Com. Code § 9108(e)* (exception)].
- Quantity.
- Computational or allocational formula or procedure.
- Any other method, if the identity of the property is objectively determinable [*see Com. Code § 9108(c)* (exception)].

Inclusion in the notice of a reference to or a description of personal property or fixtures will not constitute an election by the secured party to conduct a unified sale pursuant to *Com. Code § 9604(a)(1)(B)*, will not obligate the secured party to conduct a unified sale pursuant to that statute, and will not render defective or noncomplying either that notice or a sale pursuant to that notice by reason of the fact that the sale includes none or less than all of the personal property or fixtures referred to or described in the notice [*Civ. Code § 2924f(b)(2)*].

This form assumes that the sale will involve only real property. For additional coverage of unified sales, see *§ 25D.15*.

[vi] Statement of Default

The notice of sale must contain the statement required by *Civ. Code § 2924f(c)(3)* [*see § 25D.203*], which warns the property owner that he or she is in default, states that the property may be sold, and suggests that the owner consult an attorney [*Civ. Code § 2924f(b)(1)*]. Although the statute does not require the statement to be printed in large or boldface type, it is set forth in all capital letters in the following form since that is how it appears in the statute [*see Civ. Code § 2924f(c)(3)*].

[vii] Statement Regarding Extraordinary Extension of Time

Normally a notice of sale cannot be given until after the passage of three months from the date of filing of the notice of default [*Civ. Code § 2924(a)(2),(3)*; *see § 25D.206[1][a]*]. However, starting June 15, 2009, until January 1, 2011, in some cases in which the delinquent loan is secured by residential real property, that mandatory delay is extended an additional 90 days, in order to allow the parties to pursue a loan modification so as to prevent the impending foreclosure [*Civ. Code § 2923.52(a)*; *see Civ. Code § 2923.52(d),(e)* (operative date and sunset date)]. The notice of sale may nevertheless be given after the passage of three months from the date of filing of the notice of default, if (among other conditions that could be satisfied for the exception to apply) the delinquent loan is serviced by a mortgage loan servicer that has obtained a temporary or final order of exemption from the appropriate regulatory agency, and that order is current and valid at the time the notice of sale is given [*Civ. Code §§ 2923.52(b), 2923.53*]. A notice of sale filed pursuant to *Civ. Code § 2924f* must include a declaration from the trustee, mortgagee, or other mortgage loan servicer, stating (1) whether or not a final or temporary order of exemption was obtained pursuant to *Civ. Code § 2923.53* and is current and valid on the date the notice of sale is filed and (2) whether the 90-day extension for giving notice of sale, specified in *Civ. Code § 2923.52(a)*, applies or does not apply [*Civ. Code § 2923.54(a)*].

For further discussion of the extraordinary provisions of *Civ. Code §§ 2923.52-2923.55*, see *California Forms of*

Pleading and Practice, Ch. 555, Trust Deeds and Real Property Mortgages, § 555.54[1][f] (Matthew Bender).

[d] Posting of Notice

The notice of sale must be posted at least 20 days before the date of sale in the following locations: (1) in one public place in the city (or judicial district if the sale will not take place in a city) where the property is to be sold; and (2) in some conspicuous place on the property to be sold, if this is possible and not restricted for any reason. If the property to be sold is a single-family residence, the posting must be on a door of the residence, unless this action is not possible or is restricted, in which case the notice must be posted in a conspicuous place on the property. However, if access to the property is denied because a common entrance to the property is restricted by a guard gate or similar impediment, the notice may be posted at that place [*Civ. Code § 2924f(b)(1)*].

[e] Publication of Notice

The notice of sale must be published once a week for three consecutive calendar weeks, with the first publication occurring at least 20 days preceding the date of sale. Publication must be in a newspaper of general circulation published in the city in which the property is situated (or judicial district if the property is not located in a city), if there is such a newspaper. If there is no such newspaper, the notice must appear in a newspaper of general circulation published in the county in which some or all of the property is located. If no newspaper of general circulation is published in the city, judicial district, or county, publication must be in a newspaper of general circulation published in the California county that is contiguous to the county in which all or part of the property is situated and that has the highest population of all similarly contiguous counties. The determination of the populations of the contiguous counties must be based on the total county populations as determined by the most recent federal decennial census published by the Bureau of the Census [*Civ. Code § 2924f(b)(1)*].

[f] Recordation of Notice

At least 20 days before the date of sale of the property, the notice of sale must be recorded with the county recorder of the county in which the property (or a part of the property) is located [*Civ. Code § 2924f(b)(1)*].

[g] Mailing of Notice

The mortgagee, trustee, or other person authorized to record the notice of default must, at least 20 days before the date of sale, send copies of the notice by registered or certified mail with postage prepaid to each of the following:

- Each person whose name and address are set forth in a duly recorded request for notice, directed to the address designated in the request;

- Each trustor or mortgagor, directed to the address designated in the deed of trust or mortgage [*Civ. Code § 2924b(d)*] or to his or her last known address if different from the address specified in the security instrument [*Civ. Code § 2924b(b)(2)*; *see Civ. Code § 2924b(b)(3)* ("last known address" defined)];

- The Sacramento office of any state taxing agency that has recorded a notice of tax lien before the recording date of the notice of default against the real property to which the notice of default applies; and

- Certain other persons who have a recorded interest in the property [*Civ. Code § 2924b(c)(2), (3)*]. For discussion of the persons entitled to a copy of the notice of sale by virtue of a recorded interest in the property, see *§ 25D.202[1]*.

Simultaneously with the mailing by registered or certified mail, the mortgagee, trustee, or other person must send an

additional copy of the notice of sale by first-class mail (postage prepaid) to each trustor or mortgagor at the same address, and then execute and retain an affidavit or declaration [*see § 25D.207[2]*] indicating compliance with this requirement [*Civ. Code § 2924b(e)*].

[h] Notice of Sale to Internal Revenue Service

The mortgagee, trustee, or other person authorized to record the notice of default must provide a copy of the notice of sale to the Internal Revenue Service, in accordance with *I.R.C. § 7425* and any applicable federal regulation, if a "Notice of Federal Tax Lien under Internal Revenue Laws" has been recorded, after the deed of trust or mortgage being foreclosed, against the real property to which the notice of sale applies. The failure to provide the Internal Revenue Service with a copy of the notice of sale is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the beneficiary's consent. Any option to rescind the trustee's sale under this provision must be exercised before any transfer of the property by the successful bidder to a bona fide purchaser for value. The rescission of the trustee's sale may be recorded in a notice of rescission pursuant to *Civ. Code § 1058.5* [*Civ. Code § 2924b(c)(4)*].

[i] Privileged Communications

The mailing, publication, and delivery of the notice of sale, and the performance of related statutory procedures, constitute privileged communications within the meaning of *Civ. Code § 47* [*Civ. Code § 2924(d)*].

[j] Special Requirements for Collection Agents

An agent who collects payments under a secured promissory note for a mortgagee, beneficiary, or owner of the note must send notice of the time and place scheduled for the trustee's sale to the mortgagee, beneficiary, or owner under certain circumstances [*see Civ. Code § 2924.3(a)*; *see also § 25D.121*, P 10].

[k] Notice to Federal Government

If the federal government has a tax lien on the property, the Internal Revenue Service must be given notice of the sale at least 25 days before the date of sale [*I.R.C. § 7425(c)*]. If that is not done, the federal tax lien will not be disturbed by the sale and the Internal Revenue Service will have the right to redeem the property within 120 days from the date of sale [*I.R.C. § 7425(b), (d)*; *see § 25D.123*, P 3a].

[l] Costs, Expenses, and Fees

[i] After Mailing of Notice but Before Sale

Commencing with the date that the notice of sale is mailed, and until the property is sold pursuant to the power of sale, the beneficiary, trustee, mortgagee, or his or her agent or successor in interest may demand and receive certain costs, expenses, trustee's fees, and attorneys' fees. Those charges may be demanded of the trustor or mortgagor, his or her agent or successor in interest, any beneficiary under a subordinate deed of trust, or any other person having a subordinate lien or encumbrance of record [*Civ. Code § 2924d(a)*].

Costs and expenses that may be charged pursuant to *Civ. Code § 2924 et seq.* are limited to the costs incurred (1) for recording, mailing, publishing, and posting notices pursuant to the statutory requirements [*see Civ. Code §§ 2924-2924i*], (2) for any request for postponement made pursuant to *Civ. Code § 2924g* (provided the charge does not exceed $50 per postponement), and (3) for a trustee's sale guarantee [*Civ. Code § 2924c(c)*].

The maximum trustee's or attorneys' fees that can be demanded are as follows [*Civ. Code § 2924d(a)*]:

- $425 base amount, if the unpaid principal sum secured is $150,000 or less, or $360 base amount if the unpaid principal sum secured is more that $150,000, plus the sum of the bulleted items below.

- One percent of any portion of the sum exceeding $50,000 up to and including $150,000.

- One half of one percent of any portion of the sum exceeding $150,000 up to and including $500,000.

- One quarter of one percent of any portion of the sum above $500,000.

The unpaid principal sum secured must be determined as of the date the notice of default is recorded [*Civ. Code § 2924d(a)*].

Trustee's or attorneys' fees that do not exceed the statutory maximum are conclusively presumed to be lawful and valid. The maximum fees are in lieu of and not in addition to those authorized to be charged for reinstatement after a notice of default has been filed but prior to the mailing of a notice of sale [*Civ. Code § 2924d(a)*; *see § 25D.206[1]*]. They are also in lieu of the charges that may be collected after a sale pursuant to a power of sale [*Civ. Code § 2924d(b)*; *see § 25D.206[1]*[*l*][ii]].

[ii] After Foreclosure Sale

If property is sold pursuant to a power of sale, the trustee or his or her agent or successor in interest may demand and receive from the beneficiary, or the beneficiary's successor in interest, or may deduct from the sale proceeds certain costs, expenses, and trustee's or attorneys' fees. Specifically, the trustee may recover reasonable costs and expenses if they are actually incurred in enforcing the terms of the obligation and are for recording, mailing, publishing, and posting required notices or for a trustee's sale guarantee [*Civ. Code § 2924d(b)*; *see Civ. Code § 2924c(c)*]. The trustee may also recover a fee no greater than $50 for any postponement of sale requested by the trustor [*Civ. Code § 2924d(b)*; *see Civ. Code § 2924c(c)*]. Trustee's or attorneys' fees may be recovered provided they do not exceed $425 or one percent of the unpaid principal sum secured, whichever is greater [*Civ. Code § 2924d(a)*]. Any charge for trustee's or attorneys' fees that falls within the statutory maximum is conclusively presumed to be lawful and valid. The unpaid principal sum secured must be determined as of the date the notice of default is recorded. These trustee's or attorneys' fees are in lieu of and not in addition to those charges authorized for reinstatement prior to the mailing of the notice of sale [*Civ. Code § 2924c(d)*; *see § 25D.206[1]*] and those charges authorized after the notice of sale has been mailed and before the property is sold [*Civ. Code § 2924d(a), (b)*; *see § 25D.206[1]*[*l*][i]].

[m] Prohibition Against Referral Rebates and Kickbacks

No person may pay, offer to pay, or collect any rebate or kickback for the referral of business involving the performance of any act required by the statutes regulating foreclosures of trust deeds and mortgages secured by real property. A violator is liable to the trustor for three times the amount of any rebate or kickback, plus reasonable attorneys' fees and costs, in addition to any other remedies provided by law. A violation does not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value without notice [*Civ. Code § 2924d(c)*].

[n] Payments by Trustee to Trustee's Agents

A trustee may pay or offer to pay a fee to an agent or subagent for work performed by the agent or subagent in discharging the trustee's obligations under the terms of the deed of trust. Any such payment is conclusively presumed to be lawful and valid if the fee, when combined with other fees of the trustee, does not exceed in the aggregate the trustee's fee authorized by statute [*Civ. Code § 2924d(d)*; *see § 25D.206[1]*[*l*][i]].

[o] New Notice of Sale Required After Postponements Exceeding 365 Days

The trustee has authority to postpone sale proceedings [*see Civ. Code § 2924g(c)(1)*], as described in *§ 25D.124*. In the event that the sale proceedings are postponed for a period or periods totaling more than 365 days, the scheduling of any further sale proceedings must be preceded by giving a new notice of sale in the manner prescribed in *Civ. Code § 2924f*. New fees incurred for the new notice of sale must not exceed the amounts specified in *Civ. Code §§ 2924c* and *2924d* and must not exceed reasonable costs that are necessary to comply with these requirements [*Civ. Code § 2924g(c)(2)*].

[p] Notice of Sale Required for Resales

A notice of sale must be given prior to any resale resulting from (1) a rescission of a previous sale due to a failure of consideration [*Civ. Code §§ 2924f(b), 2924h(c)*; *see § 25D.208*]; or (2) the cancellation of an instrument submitted to the trustee as a cash equivalent by the last and highest bidder at a sale [*Civ. Code § 2924h(d)*; *see Civ. Code § 2924h(c)*; *see also § 25D.125*, P 9].

[q] New Notice of Sale Required for Substituted Trustee

Notwithstanding any provision in a trust deed, if the trustee in a trust deed is substituted after a notice of sale has been given, a new notice of sale containing the name, street address, and telephone number of the substituted trustee must be given pursuant to *Civ. Code § 2924f*. If this notice is not given, any sale conducted by the substituted trustee will be void [*Civ. Code § 2934a(e)*]. If the substitution of trustee occurs after a notice of default [*§ 25D.202[2]*] has been recorded but before the recording of the notice of sale, a copy of the substitution instrument must be mailed to the current trustee and to all persons entitled to receive the notice of default [*Civ. Code § 2934a(c)*]. For further discussion, see Ch. 25C, *Release and Reconveyance* .

[2] FORM

NOTICE OF TRUSTEE'S SALE

NOTICE OF TRUSTEE'S SALE

YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED _____. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

Notice is hereby given that on _____[*business day, e.g.*, Monday], _____[*date*], at _____[*hour between 9 A.M. and 5 P.M.*] at _____[*street address, building, room number, or other specific place at that street address where sale will be held*], in the [*if applicable:* City of _____,] County of _____, State of California, _____[*name of trustee or other person conducting sale*], Trustee [*or title of other person conducting sale*], whose street address is _____, and whose telephone number is _____, will sell at public auction to the highest bidder for cash, in lawful money of the United States, all payable at the time of sale, the real property described below.

[*If property has street address or other common designation:*]

The real property is located in [the City of _____,] County of _____, State of California. It is commonly described as _____[*street address or other common designation*]. The county assessor's parcel number for the property is _____. [*If desired, add:* The following is the legal description of the property: _____.]

[*Or, if there is no street address or other common designation:*]

The real property is located in [the City of _____,] County of _____, State of California. The following is the legal description of the property: _____. You may obtain directions to the property by submitting a written request to the beneficiary requesting this sale within 10 days after _____[*date of first publication of notice*]. The name of the beneficiary is _____ and _____[his *or* her] address is _____.

[*Continue with following:*]

The sale will be made without covenant or warranty regarding title, possession, or encumbrances to satisfy the obligations secured by and pursuant to the power of sale conferred in that certain deed of trust dated _____, executed by _____[*name of trustor*], _____[*status, e.g.,* a single man], as Trustor to _____[*name of trustee*], _____[*status, e.g.,* a corporation], as Trustee for _____[*name of beneficiary*], as Beneficiary, recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____County, California.

A Notice of Default containing an election to sell the described real property under the above Deed of Trust was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

The following amounts represent the total amount of the unpaid balance of the obligation secured by the above-described property to be sold and the estimate of costs, expenses, and advances as of the time of the initial publication of this notice of sale:

Unpaid balance of obligation	$_____
Costs	$_____
Expenses	$_____
Advances	$_____
TOTAL AMOUNT	$_____

[*Add if notice is of resale:*]

This Notice is hereby republished as the result of the cancellation of a cash equivalent bid by the highest bidder at a previous sale. The above amounts include additional costs authorized by statute for giving this new Notice.

[*Add if appropriate:*]

On the date this notice of sale is filed, a final or temporary order of exemption obtained pursuant to *Civil Code Section 2923.53* _____[is *or* is not] current and valid. The 90-day extension for giving notice of sale, specified in *Civil Code Section 2923.52(a)*, _____[applies *or* does not apply].

[*Add if present holder of note was not original beneficiary of deed of trust:*]

The Deed of Trust described above was assigned to _____[*name of assignee*], _____[*status, e.g.,* a corporation], by an assignment dated _____, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

[*Add if trustee is not original trustee:*]

The undersigned was appointed and substituted as Trustee under the above Deed of Trust by a substitution dated _____, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

[*Continue with following:*]

This Notice is given in compliance with a written request made to the Trustee by the Beneficiary.
Dated: _____.

_____ [*name of trustee*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property

LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.207

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.207 Declaration of Mailing Notices

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration stating that a notice of default or a notice of sale has been sent by first-class mail to a trustor or mortgagor. Any person required to send a copy of a notice of default or notice of sale by registered or certified mail to a trustor or mortgagor pursuant to *Civ. Code § 2924b(b)* or *(c)* [*see §§ 25D.202[1][e]*, *25D.206[1][g]*] must simultaneously mail an additional copy of the required notice by first-class mail (postage prepaid) to the trustor or mortgagor at the same address. That person must also execute and retain an affidavit (or declaration pursuant to *Code Civ. Proc. § 2015.5*) [*see* [b], *below*] identifying the notice mailed and showing the following [*Civ. Code § 2924b(e)*]:

- The name and residence or business address of that person.
- That he or she is over 18 years old.
- The date of deposit in the mail.
- The name and address of the trustor or mortgagor to whom sent.
- That the envelope was sealed and deposited in the mail with postage fully prepaid.

In the absence of fraud, this affidavit/declaration establishes a conclusive presumption of mailing [*Civ. Code § 2924b(e)*].

[b] Effect of Declarations

Although *Civ. Code § 2924b(e)* requires the use of an affidavit of mailing, *Code Civ. Proc. § 2015.5* permits the use of a declaration in lieu of any affidavit required by law. This form uses the declaration option because a declaration, unlike an affidavit, need not be made before an authorized officer [*see Code Civ. Proc. §§ 2003* ("affidavit" is a written declaration under oath), 2012 (affidavit may be taken before any officer authorized to administer oaths)].

A declaration must be in writing and must be signed by the declarant. Further, the declaration must recite that the information contained in the declaration is true under penalty of perjury. The declaration must also (1) state the date and place of execution, if it is executed within California, or (2) state the date of execution and that it is a declaration under the laws of the State of California, if it is executed within or outside California [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(a), (b)* (model declarations)].

[c] Declaration for Other Mailings, Posting, and Publishing

Although there is no statutory requirement that the mailings of a notice of default or notice of sale by registered or certified mail or the posting or publishing of a notice required by statute in a nonjudicial foreclosure proceeding be documented by an affidavit or declaration, many practitioners elect to so document those facts [*see § 25D.123,* P 7] since the affidavits or declarations might be admissible as evidence that the requirements were satisfied [*see Evid. Code §§ 1237, 1271*]. This form may be modified to document the fact that those other requirements have been satisfied.

[2] FORM

Declaration of Mailing Notice of Default or Sale

DECLARATION OF MAILING NOTICE OF _____ [DEFAULT *or* SALE]

I, _____[*name of declarant*], declare:

1. I am, and at all times herein mentioned was, a citizen of the United States and over the age of 18 years.

2. My current _____[residence *or* business] address is _____.

3. On _____[*date*], I deposited in the United States mail, first-class, postage fully prepaid, a copy of a _____[Notice of Sale, dated _____, *or* Notice of Default, recorded _____ [*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____County, California] [*add if applicable:*, a copy of which is attached to this Declaration]. The copy was placed in a separate, sealed envelope, addressed as follows:

_____[*name of trustor or mortgagor*]
_____[*address*]
_____[*city, state, zip*]

[*If declaration is executed within California:*]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____[*date*], at _____, California.

[*Or, if executed within or outside California:*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

[*Continue with the following:*]

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.208

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.208 Notice of Rescission of Sale

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice that a previously conducted sale of property is rescinded. It reflects the requirements of *Civ. Code § 2924h(c)*. That statute applies only if the last and highest bidder at a trustee's sale submits a cash equivalent designated in the notice of sale or a check drawn on a credit union or a savings and loan association. In that case, the trustee's sale will be deemed final on the acceptance of the last and highest bid, and will be deemed perfected as of 8 A.M. on the actual date of sale if the trustee's deed is recorded within 15 calendar days of the sale. However, the sale is subject to an automatic rescission for a failure of consideration if the funds are not "available for withdrawal" as defined in *Ins. Code § 12413.1* [*see* [b], *below*]. Following an automatic rescission, the trustee must send a notice of the rescission to the last and highest bidder submitting the check or alternative instrument, if the trustee knows the address of the bidder [*Civ. Code § 2924h(c)*].

If a sale results in an automatic right of rescission for the failure of consideration, the interest of any lienholder must be reinstated in the same priority as if the previous sale had not occurred [*Civ. Code § 2924h(c)*].

[b] Availability of Funds

As mentioned in [a], *above*, automatic rescission results when the funds are not "available for withdrawal" as defined in *Ins. Code § 12413.1* [*Civ. Code § 2924h(c)*]. Under *§ 12413.1*, when a draft (other than a share draft) has been submitted for collection, "available for withdrawal" means when the draft has been submitted for collection and payment received [*Ins. Code § 12413.1(e)*]. Further, *§ 12413.1* adopts by reference the definition of "available for withdrawal" set forth in *12 C.F.R. § 229.2(d)*, as that regulation existed on January 1, 1990 [*Ins. Code § 12413.1(g)*]. The version of *§ 229.2(d)* in effect on that date has not been revised. It defines the foregoing term to mean "available for all uses generally permitted to the customer for actually and finally collected funds under the bank's account agreement

or policies, such as for payment of checks drawn on the account, certification of checks drawn on the account, electronic payments, withdrawals by cash, and transfers between accounts" [*12 C.F.R. § 229.2(d)*].

[2] FORM

Notice of Rescission of Sale for Failure of Consideration

NOTICE OF RESCISSION OF SALE FOR FAILURE OF CONSIDERATION

TO: _____[*name of bidder*]
_____[*address*]
_____[*city, state, zip*]

You are hereby notified that the sale to you of the real property located at _____[*street address and city*], California, a legal description of which is attached to this Notice as Exhibit "A," at the sale held on _____[*date*], at _____[*street address and city*], California, and conducted by the undersigned [*or name of other person conducting sale*] pursuant to a Notice of Sale recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, is hereby RESCINDED.

This rescission is authorized by California law for a failure of consideration. Specifically, _____[*describe failure of consideration, e.g.*, the undersigned has been advised that funds are not available for withdrawal for payment on your check in the amount of $_____, drawn by _____ (*name of financial institution*), a _____ (*description of financial institution, e.g.*, state savings and loan association), submitted to the undersigned for the purchase of the property].

The interest of any lienholder on the property existing before the above sale, including the beneficiary's lien under that certain Deed of Trust dated _____, recorded on _____, as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, is hereby reinstated and shall have the same priority as if the above-referenced rescinded sale had not occurred.
Dated: _____.

_____ [*signature of trustee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
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10-25D California Legal Forms--Transaction Guide § 25D.209

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.209 Trustee's Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a trustee's deed, which should be executed by a trustee in favor of the purchaser of property sold at a nonjudicial foreclosure sale. If the trustee accepts a check drawn by a credit union or a savings and loan association or a cash equivalent designated as acceptable by the trustee in the notice of sale, the trustee is authorized to and absolutely should withhold issuance of the trustee's deed to the successful bidder until funds become "available for withdrawal" as defined in *Ins. Code § 12413.1* [*see Civ. Code § 2924h(c)*; *see also § 25D.208[1][b]*].

For purposes of the documentary transfer tax, a separate declaration containing the amount of consideration paid and the amount of the unpaid debt must accompany a trustee's deed if that information is not set forth in the deed itself [*Rev. & Tax. Code § 11926*]. For a separate declaration, see Ch. 27, *Deeds and Recording* .

[b] Effect of Trustee's Deed

A trustee's deed is generally "without warranty" since the trustee has no duty to guarantee the title to the property [*Brown v. Busch (1957) 152 Cal. App. 2d 200, 204, 313 P.2d 19*]. Title passed by a trustee's deed is title held by the trustor as of the date of execution of the deed of trust plus any after-acquired title, rather than title held by the trustor as of the date of the foreclosure sale [*Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 612, 39 Cal. Rptr. 647*]. For a discussion of the effect of a foreclosure sale on existing liens, see *§ 25D.11*.

A recital in the trustee's deed of compliance with certain legal requirements (identified below) constitutes prima facie evidence of compliance with those requirements and conclusive evidence of that compliance in favor of bona fide purchasers and encumbrancers for value and without notice. This requirement applies to recitals of compliance with all requirements of law regarding any of the following [*Civ. Code § 2924(c)*]:

- The mailing of copies of notices.
- The publication of a copy of the notice of default.
- The personal delivery of the copy of the notice of default.
- The posting of copies of the notice of sale.
- The publication of a copy of the notice of sale.

The ultimate validity and effect of the above provision in *Civ. Code § 2924* regarding recitals in trustee's deeds have been expressly left open to question by the California Supreme Court [*Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 279 n.16, 146 Cal. Rptr. 208, 578 P.2d 925* ; *see Tomczak v. Ortega (1966) 240 Cal. App. 2d 902, 907, 50 Cal. Rptr. 20* (trust deed provision that recital is conclusive held to be invalid as violating *Civ. Code § 2953*); *but see Pierson v. Fischer (1955) 131 Cal. App. 2d 208, 216-217, 280 P.2d 491* (trust deed provision that recital is conclusive held not to violate *Civ. Code § 2953*)].

For further discussion of the execution of a trustee's deed and the rights of a purchaser of nonjudicially foreclosed property after the sale, see California Real Estate Law & Practice, Ch. 123, *Nonjudicial Foreclosure* (Matthew Bender).

[c] Notice of Rescission of Trustee's Deed

When a trustee's deed is invalidated by a pending bankruptcy or otherwise, recordation of a notice of rescission of the trustee's deed will restore the condition of record title to the real property described in the trustee's deed and the existence and priority of all lienholders to the status quo before the recordation of the trustee's deed on sale. Only the trustee or beneficiary causing the trustee's deed to be recorded, or his or her successor in interest, may record a notice of rescission [*Civ. Code § 1058.5(b)*]. The notice must do all of the following [*Civ. Code § 1058.5(b)*]:

- Identify the deed of trust;
- Include the identification numbers used by the recorder or the books and pages at which the trustee's deed and deed of trust are recorded;
- Contain the names of all trustors and beneficiaries;
- Identify the location of the property subject to the deed of trust; and
- Specify the reason for rescission.

Further discussion of the invalidity of a trustee's deed is beyond the scope of this publication. For coverage of void nonjudicial foreclosure sales and actions to set aside completed foreclosure sales, see California Forms of Pleading & Practice, Ch. 555, *Trust Deeds and Real Property Mortgages* (Matthew Bender).

[2] FORM

Trustee's Deed

)
Recording requested by)

_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

TRUSTEE'S DEED

_____[*Name of trustee*], _____[*capacity of trustee, e.g.,* a California corporation], as Trustee under the Deed of Trust described below, grants without warranty to _____[*name*] all that real property situated in the [*if applicable,* City of _____,] County of _____, California, described as follows: _____[*insert legal description*].

This conveyance is made pursuant to the powers conferred on grantor by the Deed of Trust dated _____, recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____County, California, executed by _____[*name*] as Trustor in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee;

[*Add if deed of trust has been assigned:*]

and assigned to _____[*name*] by an assignment dated _____, _____[as Instrument No. _____ *or* in Book _____, Page _____], Official Records of _____ County, California;

[*Add if original trustee has been substituted:*]

and by the appointment and substitution of the trustee under the above Deed of Trust by an instrument dated _____, and recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, and executed by _____[*name*];

[*Continue with the following:*]

and after fulfillment of the conditions specified in the Deed of Trust authorizing this conveyance, as follows:

1. A default occurred in the obligations for which the above Deed of Trust was given as security, and a Notice of Default was recorded in the office of the county recorder for each county in which the property described in that Deed of Trust is situated. The default, which still existed at the time of sale, consisted of _____[*describe*].

2. The Beneficiary made due demand on the Trustee to sell the property pursuant to the terms of the Deed of Trust.

3. Not less than three months elapsed between the recordation of the Notice of Default and the posting, first publication, and recordation of the Notice of Sale of the property.

4. The Trustee gave notice of the time and place of sale of the property in accordance with law and the terms of the Deed of Trust.

5. Copies of the Notice of Default and of the Notice of Sale were mailed in accordance with all requirements of law.

6. Grantor, as Trustee, sold the property at public auction on _____[*date*], in _____ County, California, the county in which the property [*or* a part of the property] is situated, in full accordance with law and the terms of the Deed of Trust. The grantee described above, being the highest bidder at the sale, became the purchaser, and paid to Trustee the amount bid ($_____) in lawful money of the United States.
Dated: _____.

_____ [*signature of trustee*]
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide § 25D.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.210 Notice of Potential Entitlement to Proceeds of Sale Subject to Conflicting Claims

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice from a trustee informing the intended recipients that they may have a claim to the proceeds of a trustee's sale. The trustee involved in the sale must prepare and distribute this notice if there will be sales proceeds remaining after the trustee pays (1) the costs and expenses of the sale, and (2) any obligations that are secured by the trust deed that was the subject of the sale [*Civ. Code § 2924j(a)*; *see Civ. Code § 2924k(a)(1), (2)*; *see also* [b], *below*]. The trustee need not give this notice or comply with the other requirements of *Civ. Code § 2924j*, however, if the trustee files an interpleader action in order to resolve a dispute regarding the proceeds of the sale [*Civ. Code § 2924j(a), (e)*].

Although this form assumes that the trustee's sale was made under a power of sale contained in a deed of trust, it may be easily adapted for use in a transaction involving a mortgage instead of a trust deed.

[b] Entitled Persons and Method of Distribution

The trustee must give this notice to every "entitled person." An entitled person is a person who had a recorded interest in the subject real property as of the date immediately prior to the trustee's sale and who is any of the following [*see Civ. Code § 2924j(a)* (requiring notice to be sent to each person possessing a recorded interest who would be entitled to notice under *Civ. Code § 2924b(b)* or *(c)*)]:

- A person who has recorded a separate request for notice of default [*see Civ. Code § 2924b(a), (b)(1)*; *see also § 25D.121*, P 7a(1)].

- A trustor under the trust deed being foreclosed [*see Civ. Code § 2924b(b)(1)*].

- A successor in interest (in whole or part) of such a trustor [*see Civ. Code § 2924b(c)(2)(A)*].

- A beneficiary or mortgagee (and assignee of either) of any recorded junior trust deeds or mortgages [*see Civ. Code § 2924b(c)(2)(B), (C)*].

- A vendee of any contract of sale, or lessee of any lease, junior to the trust deed being foreclosed, and their successors in interest, if any [*see Civ. Code § 2924b(c)(2)(D), (E)*].

- The Sacramento Office of the Controller if, as of the recording date of the notice, a notice of lien for postponed property taxes has been recorded against the real property to which the notice applies [*see Civ. Code § 2924b(c)(2)(F)*].

The trustee must send the notice by first-class mail, postage prepaid, to each entitled person at the return address set forth in the recorded instrument evidencing the entitled person's recorded interest [*Civ. Code § 2924j(a)* (requiring notice to be sent by first-class mail in the manner provided in *Civ. Code § 2924b(c)(1)*)].

In addition, the mortgagee, trustee, or other person authorized to record the notice of default must provide a copy of the notice of sale to the Internal Revenue Service, in accordance with *I.R.C. § 7425* and any applicable federal regulation, if a "Notice of Federal Tax Lien under Internal Revenue Laws" has been recorded, after the deed of trust or mortgage being foreclosed, against the real property to which the notice of sale applies. The failure to provide the Internal Revenue Service with a copy of the notice of sale is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the beneficiary's consent. Any option to rescind the trustee's sale under this provision must be exercised before any transfer of the property by the successful bidder to a bona fide purchaser for value. The rescission of the trustee's sale may be recorded in a notice of rescission pursuant to *Civ. Code § 1058.5* [*Civ. Code § 2924b(c)(4)*].

To the extent required by the Unclaimed Property Law, a trustee in possession of surplus proceeds that are not required to be deposited with the court pursuant to *Civ. Code § 2924j(b)* must comply with the Unclaimed Property Law [*Civ. Code § 2924j(g)*; *see Code Civ. Proc. § 1500 et seq.*].

[c] Required Contents

The notice must inform each entitled person of the following [*Civ. Code § 2924j(a)*]:

- There has been a trustee's sale of the described real property.

- The entitled person may have a claim to all or a portion of the sale proceeds remaining after payment of (1) costs and expenses of the sale, including the trustee's fees and attorneys' fees [*see Civ. Code § 2924k(a)(1)*], and (2) obligations secured by the trust deed that was the subject of sale [*Civ. Code § 2924k(a)(2)*].

- The entitled person may contact the trustee at the address provided in the notice to pursue any potential claim.

- Before the trustee can act, the noticed person may be required to present proof that the person holds the beneficial interest in the obligation and the security interest for the obligation (which, in the case of a promissory note secured by a deed of trust, may be proved by the original promissory note and assignment of beneficial interests related to the note), and the noticed person must also submit a written claim to the trustee, executed under penalty of perjury, containing (1) a statement of the amount of the

claim to the date of the trustee's sale; (2) an itemized statement of principal, interest, and other charges; and (3) a statement that claims must be received by the trustee at the address stated in the notice no later than 30 days after the date the trustee sent the notice to the potential claimant.

[2] FORM

Notice of Potential Entitlement to Proceeds of Trustee's Sale

NOTICE OF POTENTIAL ENTITLEMENT TO PROCEEDS OF TRUSTEE'S SALE

TO: _____[*name of entitled person*]
_____[*address*]
_____[*city, state, zip*]

This notice pertains to a sale of certain property located at _____[*street address and city*], California, a legal description of which is attached to this Notice as Exhibit "A." The sale was held on _____[*date*] at _____[*street address and city*], California, and conducted by the undersigned [*or name of other person conducting sale*] pursuant to a Notice of Sale recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California. As mentioned in that notice, the sale was made pursuant to the power of sale conferred in that certain deed of trust dated _____, executed by _____[*name*], as Trustor, in which _____[*name*] is named as Beneficiary and _____[*name*] as Trustee, and recorded _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

You are hereby notified that you may have a claim to all or a portion of the proceeds of the above sale remaining after the payment of the costs and expenses of the sale (including the undersigned's fees and attorneys' fees) and the payment of obligations secured by the above deed of trust. To pursue any potential claim, you may contact the undersigned, who was the trustee involved in the foregoing sale, at the following address: _____[*specify*]. Further, before the undersigned can act, you must submit a written claim to the undersigned, executed under penalty of perjury, containing the following:

(1) A statement of the amount of the claim to the date of the above sale.

(2) An itemized statement of the principal, interest, and other charges.

(3) A statement that claims must be received by the undersigned at the address set forth above no later than 30 days after the date the undersigned sent this Notice.
Dated: _____.

_____ [*signature of trustee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingSecondary

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10-25D California Legal Forms--Transaction Guide § 25D.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.211 Notice to Residents of Property in Foreclosure

[1] Comment -- Use of Form

This form is a notice to the residents of certain property that the property is in foreclosure. Effective September 6, 2008 [Stats. 2008, ch. 69, § 10], on posting a notice of sale pursuant to *Civ. Code § 2924f*, a trustee or authorized agent must also post, in the manner required for posting the notice of sale on the property to be sold [*see* 25D.206[1][d] (posting of notice of sale)], the notice *set forth in § 25D.211[2]*, in English and the languages described in *Civ. Code § 1632* [*Civ. Code § 2924.8(a)*]. Concurrently with the mailing of the notice of sale pursuant to *Civ. Code § 2924b*, the mortgagee, trustee, beneficiary, or authorized agent must send, by first-class mail, a copy of the notice in § 25D.211[2], in an envelope addressed to the "resident of property subject to foreclosure sale" [*Civ. Code § 2924.8(a)*]. It is an infraction to tear down the notice within 72 hours of posting. Violators are subject to a fine of $100 [*Civ. Code § 2924.8(b)*].

These notice requirements apply only to loans secured by residential real property, and if the billing address for the mortgage note is different than the property address [*Civ. Code § 2924.8(d)*]. These requirements are in effect until January 1, 2013, and as of that date are repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [Civ. Code § 2923.8(e)].

[2] FORM

Notice to Residents of Property in Foreclosure

Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
A. Nonjudicial Foreclosure

10-25D California Legal Forms--Transaction Guide §§ 25D.212-25D.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 25D.212[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
B. Foreclosure Consultants

10-25D California Legal Forms--Transaction Guide § 25D.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.220 Statutory Notice and Statement Required in Contract With Foreclosure Consultant [Civ. Code § 2945.3]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice and statement required by statute [*Civ. Code § 2945.3*] to be in every contract with a foreclosure consultant [*see Civ. Code § 2945 et seq.*]. Foreclosure consultants are persons who, for compensation, perform foreclosure-related services for owners of residential real property in foreclosure [*see Civ. Code § 2945.1*]. Contracts between owners and foreclosure consultants and the activities of those consultants are subject to a number of statutory requirements [*see Civ. Code § 2945 et seq.*; *see also § 25D.29*].

For discussion of certain disclosures that a representative of a foreclosure consultant must make before the transfer of any interest in real property that is the subject of a contract between a foreclosure consultant and the owner of residential real property in foreclosure [*see Civ. Code § 2945.11(a)*; *see also Civ. Code §§ 2945.9, 2945.10*], see *§ 25D.222[1]*.

[b] Contract Requirements

Every contract between a foreclosure consultant and the record title owner of the residential real property in foreclosure at the time the notice of default was recorded [*Civ. Code § 1695.1*; *see Civ. Code § 2945.1(g)*] must be in writing and fully disclose the exact nature of the foreclosure consultant's services and the total amount and terms of compensation [*Civ. Code § 2945.3(a)*]. In addition to other requirements [*see Civ. Code § 2945.3*], the contract must contain the notice set forth below, which must be printed in at least 14-point boldface type and printed immediately above the statutory statement (also set forth below) advising the owner of his or her cancellation rights [*Civ. Code § 2945.3(b)*]. The statutory statement regarding cancellation must be set forth in immediate proximity to the space reserved for the owner's signature and must be in a size equal to at least 10-point boldface type [*Civ. Code § 2945.3(d)*]. Until the foreclosure

consultant has complied with these requirements, the owner may cancel the contract [*Civ. Code § 2945.3(h)*].

The contract must be written in the same language as principally used by the foreclosure consultant to describe his or her services or to negotiate the contract. In addition, the foreclosure consultant must provide the owner, before the owner signs the contract, with a copy of a completed contract written in any other language used in any communication between the foreclosure consultant and the owner and in any language described in *Civ. Code § 1632(b)* and requested by the owner. (Those languages are Spanish, Chinese, Tagalog, Vietnamese, and Korean.) If English is the language principally used by the foreclosure consultant to describe the foreclosure consultant's services or to negotiate the contract, the foreclosure consultant must notify the owner orally and in writing before the owner signs the contract that the owner has the right to ask for a completed copy of the contract in one of those other languages [*Civ. Code § 2945.3(c)*].

For a separate notice of cancellation that must accompany every contract between a foreclosure consultant and an owner, see *§ 25D.221[2]*.

[2] FORM

Statutory Notice and Statement Required in Contract With Foreclosure Consultant [Civ. Code § 2945.3]

NOTICE REQUIRED BY CALIFORNIA LAW _____ [*name of foreclosure consultant*] or anyone working for him or her CANNOT:

(1) Take any money from you or ask you for money until _____[***name of foreclosure consultant***] **has completely finished doing everything he or she said he or she would do; and**

(2) Ask you to sign or have you sign any lien, deed of trust or deed.

[*Immediately thereafter and in immediate proximity to space reserved for owner's signature, insert following, in at least 10-point boldface type:*]

You, the owner, may cancel this transaction at any time prior to midnight of the fifth business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
B. Foreclosure Consultants

10-25D California Legal Forms--Transaction Guide § 25D.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.221 Notice of Cancellation of Contract With Foreclosure Consultant [Civ. Code § 2945.3(f)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory notice of cancellation that must accompany every contract between a foreclosure consultant and a residential property owner [*Civ. Code § 2945.3(f)*]. For additional discussion of these contracts and a statutory notice and statement that must be included in them, see *§ 25D.220*.

For discussion of certain disclosures that a representative of a foreclosure consultant must make before the transfer of any interest in real property that is the subject of a contract between a foreclosure consultant and the owner of residential real property in foreclosure [*see Civ. Code § 2945.11(a)*; *see also Civ. Code §§ 2945.9, 2945.10*], see *§ 25D.222[1]*.

[b] Required Contents and Format

The statutory notice of cancellation must be attached in duplicate to the contract and must be easily detachable. Further, the statement must be written in the same language as used in the contract and set forth in at least 10-point type [*Civ. Code § 2945.3(f)*]. Finally, the foreclosure consultant must provide the owner with a copy of the contract and the attached notice of cancellation [*Civ. Code § 2945.3(g)*]. Until the foreclosure consultant has complied with these requirements, the owner may cancel the contract [*Civ. Code § 2945.3(h)*].

Cancellation occurs when the owner gives written notice of cancellation to the foreclosure consultant by mail at the address specified in the contract; and notice of cancellation given by mail is effective when deposited in the mail properly addressed with postage prepaid. Cancellation occurs also when the owner gives written notice of cancellation to the foreclosure consultant by fax or e-mail at the number or address identified in the contract; and if given by fax or e-mail, notice of cancellation is effective when successfully transmitted [*Civ. Code § 2945.2(b),(c)*]. Notice of

cancellation given by the owner need not take the particular form that is provided with the contract and, however expressed, is effective if it indicates the intention of the owner not to be bound by the contract [*Civ. Code § 2945.2(d)*].

[2] FORM

Notice of Cancellation

NOTICE OF CANCELLATION

_____[*Enter date of transaction*]

You may cancel this transaction, without any penalty or obligation, within five business days from the above date.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____[*name of foreclosure consultant*] at _____[*address of foreclosure consultant's place of business*]. You may also cancel by sending a facsimile (fax) of a signed and dated copy of this cancellation notice, or any other written notice, to the following fax number: _____ [*fax telephone number of foreclosure consultant's place of business*]. You may also cancel by sending an e-mail canceling this transaction to the following e-mail address: _____ [*e-mail address of foreclosure consultant's business*].

I hereby cancel this transaction, _____[*date*].

_____ [*owner's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 25D FORECLOSURE
PART IV. FORMS
B. Foreclosure Consultants

10-25D California Legal Forms--Transaction Guide § 25D.222

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 25D.222 Statement by Representative of Foreclosure Consultant [Civ. Code § 2945.11(a)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement by a foreclosure consultant's representative, indicating that the representative has a real estate license and is bonded. As discussed in more detail below, if a foreclosure consultant and a record title owner of residential real property in foreclosure have entered into a contract, any representative of the consultant must present this statement to the consultant and the property owner, and must present related proof to the owner [*Civ. Code § 2945.11(a)(2)*; *see Civ. Code § 2945.1(a)* ("foreclosure consultant" defined)].

For discussion of the laws regulating foreclosure consultants, see *§ 25D.220[1]*.

[b] Definition of "Representative"

For these purposes, "representative" means a person who in any manner solicits, induces, or causes [*Civ. Code § 2945.9(b)*]:

- Any owner to contract with a foreclosure consultant;
- Any owner to pay any consideration or transfer title to the residence in foreclosure to the foreclosure consultant; or
- Any member of the owner's family or household to induce or cause any owner to pay any consideration or transfer title to the residence in foreclosure to the foreclosure consultant.

[c] Disclosure Requirements

Any representative deemed to be the agent, employee, or agent and employee of a foreclosure consultant must provide both of the following [*Civ. Code § 2945.11(a)*]:

- Written proof to the owner that the representative has a valid current California real estate sales license and that the representative is bonded by an admitted surety insurer in an amount equal to at least twice the fair market value of the real property that is the subject of the contract.

- A written statement (this form), under penalty of perjury, that the representative has a valid current California real estate sales license, is bonded by an admitted surety insurer in an amount equal to at least twice the value of the real property that is the subject of the contract, and has complied with the requirements regarding proof described in the item above. The representative must provide this statement to all parties to the contract prior to the transfer of any interest in the real property that is the subject of the contract.

The failure to comply with these disclosure requirements will (1) at the option of the owner, render the contract void, and (2) cause the foreclosure consultant to be liable to the owner for all damages proximately caused by the failure to comply [*Civ. Code § 2945.11(b)*].

[d] Liability of Foreclosure Consultant for Damages Resulting From Representative's Acts or Statements

A foreclosure consultant is liable for all damages resulting from any statement made or act committed by the foreclosure consultant's representative in connection with the foreclosure consultant's (1) performance, offer to perform, or contract to perform any of the foreclosure-related services regulated by statute [*see Civ. Code § 2945.1(a)*], (2) receipt of any consideration or property from or on behalf of an owner, or (3) performance of any act prohibited by the laws regulating foreclosure consultants [*Civ. Code § 2945.9(a)*; *see Civ. Code § 2945 et seq.*]. Any contractual provision that attempts or purports to limit this liability will be void and, at the option of the owner, will render the contract void. Further, the foreclosure consultant will be liable to the owner for all damages proximately caused by that void provision. Finally, any contractual provision that attempts or purports to require arbitration of any dispute arising under the laws regulating foreclosure consultants will be void at the option of the owner, but only if grounds exist for the revocation of the contract [*Civ. Code § 2945.10(a)*; *see Civ. Code § 2945.10(b)*].

[2] FORM

Statement by Representative of Foreclosure Consultant

STATEMENT BY REPRESENTATIVE OF FORECLOSURE CONSULTANT

The undersigned is serving as the representative _____[and agent *or* and employee *or*, agent and employee] of _____[*name of foreclosure consultant*] in connection with the services covered by the contract dated _____ between _____[*repeat name of foreclosure consultant*], and _____[*name of owner of real property in foreclosure*]. As a party to the above contract, you are hereby notified that:

(1) The undersigned has a valid current California real estate sales license.

(2) The undersigned is bonded by an admitted surety insurer in an amount equal to at least twice the value of the Property.

(3) The undersigned has presented _____[*name of property owner*] with written proof that the undersigned has the license described above and that the undersigned is bonded in the manner described above.

This statement is provided pursuant to *California Civil Code Section 2945.11*.

Executed on _____[*date*], at _____ County, California.

I declare under penalty of perjury that the foregoing is true and correct.

_____ [*signature of representative*]
[*typed name*]
_____ [*signature of representative*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS

11-26 California Legal Forms--Transaction Guide 26.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.syn Synopsis to Chapter 26: REAL PROPERTY ESCROWS

§ 26.01 California Sources

[1] Statutes

[2] Regulations

[3] California Attorney General Opinions

§ 26.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 26.03-26.04 [Reserved]

§ 26.05 Law Reviews

§ 26.06 Annotations

§ 26.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 26.08-26.09 [Reserved]

§ 26.10 Nature of Escrow

§ 26.11 Terms and Definitions

[1] "Escrow"

[2] "Escrow Holder" and "Escrow Agent"

[3] "Business Location" and "Business Office Location"

[4] "Customer Contact Center"

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§ 26.13 Creation of Escrow

§ 26.14 Essential Elements of Escrow

[1] Binding and Enforceable Contract

[2] Agreement on Conditions of Escrow

[3] Deposit With and Acceptance by Third Party

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§ 26.15 Termination of Escrow

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[2] Performance of Conditions of Escrow

[3] Cancellation by Mutual Agreement

[4] Cancellation for Nonperformance or Nonfulfillment of Condition

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[1] Qualifications

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[3] Obligations to Parties

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§ 26.18 Regulation Under the Escrow Law

[1] Regulation of Escrow Agents

[2] Regulation of Internet Escrow Agents, Electronic Records, and Electronic Transfers

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[b] Internet Escrow Agent Special Accounts

[c] Escrow Instructions Transmitted Over Internet and Electronic Signatures

[d] Customer Contact Centers Notice

[e] Electronic Transmission of Escrow Receipts and Statements

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§ 26.20 Escrow Instructions

[1] Nature and Function

[2] Common Forms

[3] Relationship Between Underlying Agreement and Subsequent Escrow Instructions

[4] Validity

[5] Interpretation

[6] Modification

§ 26.21 Performance of Conditions of Escrow

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§ 26.100 Basic Facts for All Parties

Scope

§ 26.101 Additional Facts for Representation of Seller

Scope

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Scope

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Scope

§ 26.104 Additional Documents to Be Obtained From Seller

Scope

§ 26.105 Additional Documents to Be Obtained From Buyer

Scope

§§ 26.106-26.109 [Reserved]

§ 26.110 Basic Determinations for All Parties

Scope

§ 26.111 Additional Determinations to Be Made by Attorney for Seller

Scope

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Scope

§§ 26.113-26.119 [Reserved]

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Scope

§ 26.121 Additional Procedures for Attorney Representing Seller

Scope

§ 26.122 Additional Procedures for Attorney Representing Buyer

Scope

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§ 26.200 Seller's Escrow Instructions

[1] Comment

[a] Use of Form

[b] Separate Instructions

[c] Drafting and Contents

[i] Implementation of Contract Provisions

[ii] Legal Requirements

[iii] Drafting Considerations

[d] Deposit Clause

[e] Arrangements With Existing Lenders and Lien Claimants

[f] Termite or Pest Control Clearance

[g] Treatment of Buyer's Deposit

[h] Conditions Precedent to Delivery of Deed

[i] Prorations and Adjustments

[j] Costs and Expenses to Be Paid by Seller

[k] Cancellation of Escrow

[i] Grounds and Manner of Cancellation

[ii] For Failure to Perform Terms and Conditions Within Specified Time

[iii] Manner of Effecting Cancellation

[l] Amendments and Supplemental Instructions

[m] Waiver

[n] Provisions Limiting Obligations of Escrow Holder

[o] Approval by Buyer

[p] Acceptance by Escrow Holder

[2] Form

Seller's Escrow Instructions

§ 26.201 Buyer's Escrow Instructions

[1] Comment

[a] Use of Form

[b] Construction and Operation of Separate Instructions

[c] Deposit Clauses

[d] Processing of Escrow

[i] Arrangements With New Lender

[ii] Arrangements With Existing Lender

[iii] Contingencies

[e] Conditions Precedent to Close of Escrow and Disbursement of Funds

[i] Terms and Conditions

[ii] Separate Conveyances and Agreements Benefitting Property

[iii] Termite or Pest Control Clearance

[iv] Other Contingencies

[v] Owner's Association Membership

[vi] Deposit of Leases and Rent Statements

[f] Standard Provisions

[2] Form

Buyer's Escrow Instructions

§ 26.202 Joint Escrow Instructions of Seller and Buyer

[1] Comment

[a] Use of Form

[b] Advantages and Disadvantages of Joint Instructions

[c] Contents of Joint Instructions

[2] Form

Joint Escrow Instructions of Seller and Buyer

§§ 26.203-26.209 [Reserved]

§ 26.210 Sale of Note and Deed of Trust--Seller's Instructions

[1] Comment

[a] Use of Form

[b] Deposit Clause

[c] Owner's Statement

[d] Beneficiary's Statement

[e] Conditions Precedent to Delivery of Note and Recording of Deed of Trust

[f] Standard Provisions

[2] Form

Sale of Note and Deed of Trust--Seller's Instructions

§ 26.211 Sale of Note and Deed of Trust--Buyer's Instructions

[1] Comment

[a] Use of Form

[b] Deposit Clauses

[c] Conditions Precedent to Payment of Purchase Price

[i] Commonly Required Conditions

[ii] Proper Endorsement and Delivery of Note and Assignment of Deed of Trust

[iii] Title Insurance and Fire Insurance

[iv] Owner's Statement

[v] Beneficiary's Statement

[d] Standard Provisions

[2] Form

Sale of Note and Deed of Trust--Buyer's Instructions

§ 26.212 Sale of Note and Deed of Trust--Joint Instructions

[1] Comment--Use of Form

[2] Form

Sale of Note and Deed of Trust--Joint Instructions

§§ 26.213-26.219 [Reserved]

§ 26.220 New Lender's Instructions

[1] Comment

[a] Use of Form

[b] Conditions Precedent to Request for Funds

[c] Deduction of Loan Fees and Charges

[d] Cancellation for Redrawing of Instructions and Documents

[2] Form

New Lender's Instructions

§ 26.221 Existing Lender's Instructions (Payoff of Existing Loan)

[1] Comment

[a] Use of Form

[b] Statutory Requirements for Payoff Demand Statements

[c] Payoff Demand

[2] Form

Existing Lender's Instructions (Payoff of Existing Loan)

§§ 26.222-26.229 [Reserved]

§ 26.230 Lien Claimant's Instructions (Payoff of Claim)

[1] Comment--Use of Form

[2] Form

Lien Claimant's Instructions (Payoff of Claim)

§§ 26.231-26.239 [Reserved]

§ 26.240 Request for Lender's Payoff Demand Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

[b] Beneficiary Statement

[c] Owner's Statement

[d] Definitions

[e] Procedural Requirements

[f] Payoff Demand Statement

[2] Form

Request for Lender's Payoff Demand Statement [Civ. Code § 2943]

§ 26.241 Request for Lien Claimant's Payoff Demand

[1] Comment--Use of Form

[2] Form

Request for Lien Claimant's Payoff Demand

§ 26.242 Request for Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

[b] Payoff Demand Statement

[c] Owner's Statement

[d] Request Procedure

[e] Definitions

[2] Form

Request for Beneficiary Statement [Civ. Code § 2943]

§ 26.243 Request for Owner's Statement, With Owner's Statement Attached

[1] Comment--Use of Form

[2] Form

Request for Owner's Statement, With Owner's Statement Attached

§§ 26.244-26.249 [Reserved]

§ 26.250 Amendment to Escrow Instructions

[1] Comment

[a] Use of Form

[b] Amendment of Escrow Instructions

[i] Written Amendment

[ii] Statement of Purpose

[iii] Timing of Amendment; Consent of Other Party

[2] Form

Amendment to Escrow Instructions

§ 26.251 Supplemental Escrow Instructions

[1] Comment--Use of Form

[2] Form

Supplemental Escrow Instructions

§ 26.252 Revocation of Escrow Instructions

[1] Comment

[a] Use of Form

[b] Notice Requirements

[2] Form

Revocation of Escrow Instructions

§§ 26.253-26.259 [Reserved]

§ 26.260 Notice of Satisfaction of Escrow Condition

[1] Comment--Use of Form

[2] Form

Notice of Satisfaction of Escrow Condition

§ 26.261 Notice of Waiver of Escrow Condition

[1] Comment

[a] Use of Form

[b] Attempted Waiver of Condition Benefitting Another Party

[2] Form

Notice of Waiver of Escrow Condition

§§ 26.262-26.269 [Reserved]

§ 26.270 Notice of Cancellation of Escrow for Default or Failure of Condition

[1] Comment

[a] Use of Form

[b] Observance of Cancellation Requirements Specified in Escrow Instructions

[2] Form

Notice of Cancellation of Escrow for Default or Failure of Condition

§ 26.271 Notice of Cancellation of Escrow by Mutual Agreement

[1] Comment

[a] Use of Form

[b] Observance of Cancellation Requirements Specified in Escrow Instructions

[2] Form

Notice of Cancellation of Escrow by Mutual Agreement

§ 26.272 Demand for Return of Funds Deposited in Escrow [Civ. Code § 1057.3]

[1] Comment

[a] Use of Form

[b] Duty to Return Funds

[c] Right to Damages

[i] Written Demand

[ii] Good Faith Disputes

[d] Escrow Holder

[e] Underlying Contract

[2] Form

Demand for Return of Funds Deposited In Escrow [Civ. Code § 1057.3]

Timothy F. O'Learyn*
Practice Consultant

FOOTNOTES:

(n19)Footnote *. Timothy F. O'Leary is a partner in the San Francisco law firm of O'Leary & Lecky, LLP, where his practice emphasizes real estate and professional liability litigation. He graduated from Stanford University and Boalt Hall School of Law. He has written numerous articles on real estate and litigation for the California Real Estate Reporter (Matthew Bender) and other state-wide publications. He regularly lectures on real estate and related topics for the California Association of Realtors and California Society of CPAs.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS

11-26 California Legal Forms--Transaction Guide Scope

AUTHOR: Timothy F. O'Leary Practice Consultant

Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter deals with the practical and legal aspects of escrows, with particular emphasis on those that are pertinent to the drafting, interpretation, and execution of escrow instructions. It covers the use of escrows to consummate agreements for the sale or transfer of interests in real property, but does not include specific coverage of the use of escrows in real property exchange transactions or in transactions involving the sale or transfer of businesses, securities, or other types of personal property.

Real property exchange transactions are covered in Ch. 24, *Exchanges of Real Property* . Real property sales agreements are discussed in detail in Ch. 23, *Real Property Sales Agreements* . Joint control agreements are addressed in Ch. 30E, *Joint (Builders') Control Agreements*.

FOOTNOTES:
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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART I. RESEARCH GUIDE
A. Primary Sources

11-26 California Legal Forms--Transaction Guide § 26.01

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.01 California Sources

[1] Statutes

Statement of selling price. *Bus. & Prof. Code § 10141*.

Broker's handling of funds. *Bus. & Prof. Code § 10145*.

Statement to borrower. *Bus. & Prof. Code § 10240*.

Liquor license escrows. *Bus. & Prof. Code §§ 24074-24075*.

Delivery of grants. *Civ. Code §§ 1053-1059*.

Requirement of delivery. *Civ. Code § 1054*.

Effect of delivery to grantee. *Civ. Code § 1056*.

Conditional deposit with third person. *Civ. Code § 1057*.

Effect of delivery of grant. *Civ. Code § 749*.

"Escrow" defined. *Civ. Code § 1057*.

Use of developer controlled escrow entity. *Civ. Code § 2995*.

Regulation of escrow agents by Commissioner of Corporations. *Fin. Code § 17000 et seq.*

Applicability of statutes and regulations. *Fin. Code §§ 17000-17010*.

Licensing and bonding requirements. *Fin. Code §§ 17200-17215*.

Adoption of administrative regulations. *Fin. Code § 17400*.

Requirements relating to instructions. *Fin. Code §§ 17403.2-17403.4*.

Record keeping requirements. *Fin. Code §§ 17404-17408*.

Limitations on disbursements. *Fin. Code §§ 17421-17422*.

Revocation of license. *Fin. Code §§ 17600-17614*.

Conservatorship proceedings. *Fin. Code §§ 17630-17634*.

Liquidation proceedings. *Fin. Code §§ 17635-17654*.

Recording of documents. *Gov. Code § 27280 et seq.*

Instruments and documents for which acknowledgment is not required. *Gov. Code §§ 27282-27285*.

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Information required. *Gov. Code § 27288.1*.

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Recording fees. *Gov. Code §§ 27361-27361.4*.

"Underwritten title company" defined. *Ins. Code § 12340.5*.

"Controlled escrow company" defined. *Ins. Code § 12340.6*.

Underwritten title company as escrow agent. *Ins. Code § 12389*.

Restrictions on commissions, rebates, and advances. *Ins. Code §§ 12404-12407*.

Disbursements from escrow. *Ins. Code § 12413.1*.

Deposit of escrow funds. *Ins. Code § 12413.5*.

[2] Regulations

Broker's handling of funds. *10 Cal. Code Reg. § 2830.1 et seq.*

Regulation of escrow agents by Commissioner of Corporations. *10 Cal. Code Reg. § 1709 et seq.*

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Delivery of documents. *10 Cal. Code Reg. § 1738.2*.

Printed instructions. *10 Cal. Code Reg. § 1738.5*.

Handling of escrow funds. *10 Cal. Code Reg. §§ 1740.4-1741.6*.

[3] California Attorney General Opinions

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A. Primary Sources

11-26 California Legal Forms--Transaction Guide § 26.02

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.02 Federal Sources

[1] Statutes

Real Estate Settlement Procedures Act. *12 U.S.C. § 2601 et seq.*

[2] Regulations

Regulations under Real Estate Settlement Procedures Act. *24 C.F.R. § 3500.1 et seq.*



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11-26 California Legal Forms--Transaction Guide § 26.05

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.05 Law Reviews

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11-26 California Legal Forms--Transaction Guide § 26.06

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.06 Annotations

Annot., Attorney and client: conflict of interest in real estate closing situations, 68 A.L.R.3d 967 (1976) .

Annot., Rights as between vendor and vendee under land contract in respect of interest as affected by deposit in escrow, 25 A.L.R.2d 951 (1952) .

Annot., Who must bear loss resulting from defaults or peculations of escrow holder, *15 A.L.R.2d 870 (1951)* .



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11-26 California Legal Forms--Transaction Guide § 26.07

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.07 Text References

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Ch. 23, *Agreements to Sell Real Property* .

Ch. 24, *Exchanges of Real Property* .

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California Points and Authorities(Matthew Bender), Ch. 101, *Escrows* .

California Real Estate Law and Practice(Matthew Bender), Ch. 91, *Escrow* .

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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.10 Nature of Escrow

An escrow is essentially a procedural device that provides a mechanism for effecting concurrent performance of the obligations assumed by the parties to an agreement or transaction involving the sale or transfer of an interest in property. It allows the parties to make performance of their respective obligations conditional on performance by the other party or parties. In a transaction that utilizes an escrow, the parties deposit the instruments, documents, funds, and other items necessary to effect full performance of their respective obligations with a neutral third party who serves as a mutual agent. They authorize and direct the agent to perform their respective obligations when the agent is fully authorized and able to effect full performance of the other parties' obligations. When all of the necessary items and authorizations have been received, the agent proceeds to consummate the agreement by taking the steps necessary to complete the transfer of title to the buyer or transferee, deliver the consideration to the seller or transferor, and perform the other terms and conditions of the agreement.

The essential legal characteristic of an escrow is that the neutral third party serving as a depository acquires, in its capacity as the mutual agent of the parties, dominion and control over instruments, funds and other items that they have deposited. Once a valid escrow has been created, a party may not unilaterally revoke a deposit [*Wittenbrock v. Cass (1895) 110 Cal. 1, 6-7, 42 P. 300* ; *Cannon v. Handley (1887) 72 Cal. 133, 140-141, 13 P. 315]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.11 Terms and Definitions

[1] "Escrow"

Adopting the technical common law meaning, the Civil Code defines an escrow as a grant that has been placed by the grantor in the possession of a third person and that is to take effect on the performance of a condition [*Civ. Code § 1057*]. However, the term is more commonly used and understood to refer to the overall transaction in which instruments, funds, and other items are deposited with a neutral third party for delivery on the occurrence of specified conditions [*Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162, 70 Cal. Rptr. 378]* . This broader meaning is used in the Escrow Law [*Fin. Code § 17000 et seq.*; *see § 26.18*], which defines an escrow as any transaction in which one person, for the purpose of effecting the sale, transfer, encumbrance, or leasing of real or personal property to another person, delivers a written instrument, evidence of title, money, or other thing of value to a third person to be held by the third person until the happening of a specified event or the performance of a prescribed condition, when it is to be delivered to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or the agent or employee of one of those parties [*Fin. Code § 17003(a)*]. With regard to Internet escrow companies, "escrow" also includes any transaction in which one person, for the purpose of effecting the sale or transfer of personal property or services to another person, delivers money (or its Internet-authorized equivalent) to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of those persons [*Fin. Code § 17003(b)*].

The term "escrow" is also used in a loose, nontechnical sense to refer to the totality of the functions performed by the neutral third party serving as the depository. Thus the retention of the neutral third party and the taking of other steps preparatory to the actual deposit of instruments and funds is frequently referred to as "opening an escrow," even though, as a technical matter, these steps are not sufficient to create an escrow. Similarly, the recording, disbursement, and delivery of instruments and funds that have been deposited and the performance of other ministerial and clerical functions necessary to complete the underlying transaction is often referred to as "closing the escrow," even though, technically, an escrow terminates on the performance or fulfillment of all of the specified conditions.

[2] "Escrow Holder" and "Escrow Agent"

The neutral third party with whom the parties to an escrow transaction deposit the instruments and funds necessary to complete a sale or transfer of property is usually called the "escrow holder" or "escrow agent." In the Escrow Law [*Fin. Code § 17000 et seq.*], the term "escrow agent" is used in a technical sense to denote a person or entity who performs escrow services for compensation [*Fin. Code § 17004*].

[3] "Business Location" and "Business Office Location"

"Business location" and "business office location" mean a facility or other place of business where a person engages in the business of receiving an escrow for deposit or delivery. These terms do not include a customer contact center [*Fin. Code § 17005.2*].

[4] "Customer Contact Center"

"Customer contact center" means a facility operated by an Internet escrow agent that exists solely for the purpose of responding to customer electronic messages and telephone inquiries, but where no receipt or disbursements relating to an escrow are made from the facility. In addition, any documentation or other material generated, transmitted, or otherwise sent from the facility must be able to be reviewed at any time from the business location of the Internet escrow agent [*Fin. Code § 17005.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsComputer & Internet LawInternet BusinessGeneral OverviewReal Property LawPurchase & SaleEscrow



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.12 Usefulness of Escrow

A party who performs unilaterally under an agreement for the sale or transfer of property takes a substantial risk: if the other party fails to perform, return of the property or consideration that has been transferred can only be compelled by means of a lawsuit, an expensive, time consuming, and frequently ineffective remedy. By providing a mechanism for effecting concurrent performance and giving a neutral third party the power to control performance of the parties' respective obligations, the use of an escrow largely eliminates this risk.

The use of an escrow also provides a convenient solution to another practical problem: frequently, the parties to an agreement for the sale or transfer of property cannot perform their obligations until the other parties have performed. In a typical real property sales transaction, for example, the seller needs to use the funds to be paid by the buyer to remove encumbrances and liens and convey clear title, while the buyer needs to receive clear title in order to provide the security required by a lender and obtain the funds to make the purchase. By making concurrent performance possible, an escrow enables the parties to use the fruits of the other parties' performance to perform their own obligations.

When an escrow is handled by a professional escrow agent, as almost all escrows are, the agent usually oversees and monitors the performance of the conditions of the agreement, handles communications with the parties and other interested persons, keeps appropriate records, and takes responsibility for the actual recording, delivery, and disbursement of instruments, documents and funds. The use of an escrow thus provides the parties with a convenient method of securing the performance of all of the various administrative and clerical tasks necessary to implement an agreement for the sale or transfer of property.

Because of the important functions they perform, escrows have become an almost universal feature of real property transactions in California. A prudent attorney or real estate broker handling a California real property transaction will invariably employ some form of escrow.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.13 Creation of Escrow

As a technical and legal matter, an escrow is created, and the subject instruments and funds are irrevocably placed under the control of a third party serving as the mutual agent of the parties, only when all of the elements of an escrow are present. The mere designation of a transaction as an escrow will not make it one if an essential element is missing [*Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* . Unless a valid escrow has been created, a neutral third party with whom instruments or funds have been deposited serves only as the agent for the depositor, and the depositor may therefore revoke a deposit at any time [*Fitch v. Bunch (1866) 30 Cal. 208, 213-214* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.14 Essential Elements of Escrow

[1] Binding and Enforceable Contract

For a valid escrow to exist, there must first be a binding and enforceable contract between the parties to the escrow [*Fitch v. Bunch (1866) 30 Cal. 208, 212* ; *Elliott v. Title Ins. & Trust Co. (1923) 64 Cal. App. 508, 511, 222 P. 175]* . A set of escrow instructions may be sufficient to satisfy this requirement if it contains all of the elements of a valid and enforceable contract [*Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327* ; *Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 314, 54 Cal. Rptr. 703]* . An irrevocable option may also be sufficient [*Caras v. Parker (1957) 149 Cal. App. 2d 621, 626, 309 P.2d 104]* .

[2] Agreement on Conditions of Escrow

An agreement by the parties to the escrow that the subject instruments and funds will be deposited with a neutral third party for delivery upon the occurrence of certain specified conditions is a second indispensable element of a valid escrow [*Fitch v. Bunch (1866) 30 Cal. 208, 213* ; *Sousa v. First California Co. (1950) 101 Cal. App. 2d 533, 538-539, 225 P.2d 955]* . If the parties are not in agreement on all of the terms and conditions of the contract or instructions governing the retention and delivery of the instruments and funds to be deposited in escrow, a deposit will not create an escrow [*Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167* ; *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366]* .

[3] Deposit With and Acceptance by Third Party

The actual deposit of instruments or funds with a third party and the third party's acceptance of that deposit in accordance with the agreement of the parties to the escrow is a third prerequisite to the creation of a valid escrow [*Sousa v. First California Co. (1950) 101 Cal. App. 2d 533, 538-539, 225 P.2d 955* ; *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366]* . The depository must be a neutral third party, that is, he or she must not be a party to the underlying transaction [Civ. Code § 1507; *Fin. Code § 17003*; *Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 373, 295 P.2d 515]* . Even when a conditional delivery is intended, the delivery of a grant to the grantee

will not establish an escrow and will ordinarily operate to vest the grantee with absolute title [*Mowry v. Heney (1890) 86 Cal. 471, 475-476, 25 P. 17]* .

[4] Intent to Transfer Dominion and Control Irrevocably

The final element of a valid escrow is an intent on the part of the party depositing an instrument or funds to transfer dominion and control irrevocably to the neutral third party depository. If the depositor retains the right to revoke unilaterally the deposit, no escrow is created [*Keyes v. Meyers (1905) 147 Cal. 702, 704-706, 82 P. 304* ; *Ragan v. Ragan (1915) 29 Cal. App. 63, 65, 154 P. 479]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.15 Termination of Escrow

[1] Manner and Effect of Termination

An escrow terminates when all of the conditions of the escrow have been performed or fulfilled, when it is abandoned or canceled by mutual agreement of the parties, or when it is canceled by one party due to another party's failure to perform a term or condition of the escrow agreement. When an escrow is terminated, the dual agency relationship between the escrow holder and the parties ceases and the right to possession and control of instruments and funds that have been deposited shifts to the parties respectively entitled to the delivery or return of the instruments or funds [*see, e.g., Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* ; *Vineland Homes, Inc. v. Barish (1956) 138 Cal. App. 2d 747, 750, 292 P.2d 941]* .

[2] Performance of Conditions of Escrow

When the conditions of an escrow have been fully performed or fulfilled, the escrow is terminated. At that point, regardless of whether there have been any steps taken to record, deliver, or disburse instruments and funds deposited, title to the subject property passes to the buyer or transferee, the seller or transferor becomes entitled to any funds or consideration deposited, and the escrow holder holds any instrument or consideration that has been deposited solely as the agent of the party entitled thereto [*Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 P. 448* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347]* . Once the escrow has been completed by the performance or fulfillment of all conditions, the parties have no power to rescind or cancel it [*Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 120, 326 P.2d 521]* .

[3] Cancellation by Mutual Agreement

Ordinarily, the parties to an escrow can abandon or cancel it by mutual agreement at any time before the conditions of the escrow have been performed [*Whitney v. Sherman (1918) 178 Cal. 435, 437-438, 173 P. 931* ; *Wilshire Realty Co. v. Kry Corp. (1967) 250 Cal. App. 2d 269, 276-277, 58 Cal. Rptr. 469]* . Even when an escrow agreement is made expressly for the benefit of a third party, the parties may rescind the agreement and cancel the escrow at any time before

the agreement is enforced by the third party beneficiary [*Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 487, 110 P.2d 396* ; *Wilshire Realty Co. v. Kry Corp. (1967) 250 Cal. App. 2d 269, 276-277, 58 Cal. Rptr. 469]* . However, when there has been an irrevocable change of position by the third party as a result of the escrow and the other elements are present, the doctrine of equitable estoppel may be applied to preclude a party or the escrow holder from relying on the cancellation [*Feinberg v. Intrastate Escrow Corp. (1963) 216 Cal. App. 2d 80, 85, 30 Cal. Rptr. 781]* .

[4] Cancellation for Nonperformance or Nonfulfillment of Condition

Most escrow agreements or instructions contain express provisions permitting cancellation of an escrow if the conditions of the escrow are not performed or fulfilled, and such provisions are generally given effect [*see, e.g., Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81* ; *Petre v. Roegner (1963) 219 Cal. App. 2d 288, 291-292, 33 Cal. Rptr. 82]* . Even in the absence of an express provision for cancellation, a nondefaulting party is ordinarily entitled to cancel when the conditions of the escrow are not performed or fulfilled within the time specified by the escrow agreement or instructions [*Moss v. Minor Properties, Inc. (1968) 262 Cal. App. 2d 847, 853-854, 69 Cal. Rptr. 341* ; *Edmunds v. Hysong (1931) 110 Cal. App. 746, 749-750* ; *294 P. 1078]* or, if no time is specified, within a reasonable time [*First Nat. Bank v. Caldwell (1927) 84 Cal. App. 438, 446, 258 P. 411]* . However, a party who has defaulted cannot rely on the failure of conditions he or she has failed to perform to cancel against a nondefaulting party [*Wales v. Greene (1954) 125 Cal. App. 2d 387, 390, 270 P.2d 534]* . If both parties are in default or if one party has defaulted before another's performance is due, a party must ordinarily perform or tender performance in order to be entitled to cancel [*Diamond v. Huenergardt (1959) 175 Cal. App. 2d 214, 220-221, 346 P.2d 37]* .

Provisions of an escrow agreement or instructions that specify the manner of effecting a cancellation of the escrow are generally controlling. Thus, if an escrow agreement provides for cancellation by written notice to the escrow holder, a party entitled to cancel need not give notice to the other parties in order to make the cancellation effective [*Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81]* . Similarly, if an escrow agreement provides that an escrow cannot be canceled for nonperformance of conditions until the parties have been given notice and an opportunity to perform the conditions, an attempt to cancel without affording a defaulting party the requisite notice and opportunity to cure is ineffective [*Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 796, 36 Cal. Rptr. 188]* .

PRACTICE TIP:

Interpleader Action. Even if the escrow instructions allow the escrow company to terminate the escrow and return the funds due to lack of performance, generally escrow companies are loath to cancel the escrow without mutual consent. If the time for closing escrow has passed and the parties have communicated their intent to the escrow company that they will not be closing escrow, generally one of the parties will institute an action against the other. Most real estate contracts in California provide for the arbitration of real estate disputes. The escrow is simply put on hold while the matter is litigated.

In a rare instance, the parties will abandon the escrow, leaving the escrow company with an open escrow indefinitely. In that situation, the escrow company should commence an action in interpleader under *Code Civ. Proc. § 386(b)*. The escrow company would appear as plaintiff and name as defendants the parties to the transaction. The amount that was deposited with the escrow company would be deposited with the clerk of the court. The escrow holder would request a dismissal of the action against it [*Code Civ. Proc. § 386.5*]. The parties to the transaction would remain to litigate any lingering issues. The escrow company could request attorney's fees at the time it seeks dismissal pursuant to *Code Civ. Proc. § 386.6. By Timothy F. O'Leary.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.16 The Escrow Holder

[1] Qualifications

For a valid escrow to exist, the person or entity undertaking to serve as the escrow holder must be a stranger to the underlying transaction [*Civ. Code § 1057*; *Fin. Code § 17003(a)*; *Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 373, 295 P.2d 515]* . Except for this requirement, the statutory and case law has not expressly made the validity of the escrow dependent on the escrow holder having any particular qualifications [*see Civ. Code § 1057*].

As discussed below [*see § 26.18*], professional escrow agents, persons or entities that perform escrow services for compensation, must be licensed, have specified qualifications, and comply with the applicable regulations [*see, e.g., Fin. Code § 17000 et seq.*; *Escrow Institute of Cal. v. Pierno (1972) 24 Cal. App. 3d 361, 365-369, 100 Cal. Rptr. 880]* . The Escrow Law expressly provides that the revocation, suspension, surrender, or expiration of an escrow agent's license does not impair or affect preexisting escrows lawfully contracted; but no provision of the Escrow Law authorizes the acceptance of further funds or documents into escrow subsequent to the revocation, surrender, or expiration of the license or during any period of suspension of the license [*Fin. Code § 17609*]. A recognition that violations of the Escrow Law may give an injured party a right to rescind under some circumstances seems implicit in this provision.

[2] Nature of Relationship to Parties

Until a valid escrow has been created, the escrow holder receives and retains instruments or funds that are deposited only in a capacity as the agent for the party making the deposit [*see Fitch v. Bunch (1866) 30 Cal. 208, 213-214* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* . Once an escrow is created, the escrow holder becomes the mutual agent of the parties and retains control over instruments and funds that have been deposited in that capacity until the conditions of the escrow are performed or the escrow is otherwise validly terminated [*Shreeves v. Pearson (1924) 194 Cal. 699, 708, 230 P. 448* ; *Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 315, 54 Cal. Rptr. 703]* . When the conditions of an escrow have been performed or when the escrow is terminated, the escrow holder holds any instrument or consideration that has been deposited solely as the agent of the party entitled to its

delivery or return [*Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 P. 448* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347]* .

[3] Obligations to Parties

The escrow holder is an agent of the parties to the escrow and thus owes them obligations determined by the application of general rules of agency [*Rianda v. San Benito Title Guar. Co. (1950) 35 Cal. 2d 170, 173, 217 P.2d 25* ; *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 682, 30 Cal. Rptr. 658]* . As an agent, the escrow holder has a fiduciary relationship with the parties [*Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1030, 115 Cal. Rptr. 653* ; *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 682, 30 Cal. Rptr. 658]* . However, the agency is a special agency and the agency relationship and the escrow holder's obligations as an agent are defined and limited by the joint instructions of the parties [*Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84* (escrow agent not liable for failure to report liens against property if not required to do that by escrow instructions); *Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 654-655, 37 P.2d 153]* .

By accepting, preparing, or offering to perform escrow instructions, the escrow holder is also contracting with the parties to perform the instructions and, consequently, has contractual obligations to them as well [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33]* .

In general, the escrow holder is obligated to comply strictly with the express and implied terms of the parties' instructions and to exercise reasonable skill and ordinary diligence in performing his or her undertaking [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 531-532, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Gordon v. D & G Escrow Corp. (1975) 48 Cal. App. 3d 616, 621-623, 122 Cal. Rptr. 150* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 829, 86 Cal. Rptr. 182]* . The escrow holder, however, has no obligation to do things that are not required by the terms of the instructions [*Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84* ; *Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77-78, 163 Cal. Rptr. 402* ; *Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 9, 151 Cal. Rptr. 570]* . If there is a dispute between the parties concerning the meaning or effect of the instructions, the escrow holder is not required to resolve the dispute and proceed to execute the instructions, but may institute an interpleader action to determine his or her obligations [*Security Trust Etc. Bank v. Carlsen (1928) 205 Cal. 309, 314, 467 P.2d 547]* .

[4] Duty to Disclose Material Facts

An escrow holder that, in the course of the agency relationship with the parties, acquires information that may affect their decisions relating to the escrow, has an obligation to communicate that information to the parties [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 534, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 547, 115 Cal. Rptr. 257]* . However, this obligation is limited in two important ways. First, the escrow holder is only obligated to disclose information received or acquired in a capacity as the escrow holder for the parties [*Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 654-655, 37 P.2d 153]* . Second, the escrow holder is only obligated to disclose information that relates to the state of the escrow or to the performance or fulfillment of the conditions of the escrow [*Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402* ; *Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 9, 151 Cal. Rptr. 570]* .

[5] Liability for Breach of Duties

An escrow holder that breaches its obligation to follow the instructions of the parties, or that breaches or negligently performs its duties as an agent, will be liable to the parties for any damages proximately caused by the breach [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Zang v. Northwestern Title Co.*

(1982) 135 Cal. App. 3d 159, 166, 185 Cal. Rptr. 176] . The damages that may be recovered by the parties include attorneys' fees and litigation costs incurred in connection with legal actions they were required to bring or defend as a result of the breach [*Prentice v. North Amer. Title Guar. Corp. (1963) 59 Cal. 2d 618, 620-621, 30 Cal. Rptr. 821, 381 P.2d 645* ; *Ruth v. Lytton Sav. & Loan Asso. (1968) 266 Cal. App. 2d 831, 845, 72 Cal. Rptr. 521]* .

Under some circumstances, an escrow holder may be held liable to a third party for failing to observe the agreement or instructions of a party to the escrow. Thus, an escrow holder that has knowledge that escrowed funds have been assigned to a third party will be liable to the third party if it disburses or uses the assigned funds in a manner that is contrary to the terms of the assignment. Liability in these circumstances rests on the theory that an agent's obligation to disburse proceeds held by the agent for its principal is coextensive with the principal's obligation to disburse those proceeds to the assignee [*Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 73, 22 Cal. Rptr. 712* ; *see Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 714, 117 Cal. Rptr. 2d 541, 41 P.3d 548]* . However, an escrow holder does not owe a fiduciary duty to persons who are not parties to the escrow [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal.4th 705, 712-714, 117 Cal. Rptr. 2d 541, 41 P.3d 548* (disapproving of *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* to the extent *Kirby* held otherwise)].

An attorneys' fee clause in escrow instructions giving the escrow agent the right to recover fees if a party failed to pay escrow costs supported an award of attorneys' fees to the purchaser [*Kangarlou v. Progressive Title Co. (2005) 128 Cal. App. 4th 1174, 1179, 27 Cal. Rptr. 3d 754]* . The purchaser sued the escrow agent and holder for breach of fiduciary duty based on allegations that the purchaser's real estate agent, real estate broker, and loan broker were not properly licensed and the defendants violated *Bus. & Prof. Code § 10137* by transacting business through unlicensed persons or entities and by paying them commissions. In holding that the purchaser could recover fees under the contract pursuant to *Civ. Code § 1717*, the court concluded that the defendants' fiduciary duties arose out of and were not outside the contract [*Kangarlou v. Progressive Title Co. (2005) 128 Cal. App. 4th 1174, 1179, 27 Cal. Rptr. 3d 754* ; *see Fairchild v. Park (2001) 90 Cal. App. 4th 919, 925-926, 109 Cal. Rptr. 2d 442* (breach of fiduciary duty may be both a breach of contract and a tort)]. The duty of an escrow holder to obtain evidence that a real estate broker is regularly licensed before delivering compensation arises from *Bus. & Prof. Code § 10138*, and the defendants assumed that duty only by entering the contract to execute the escrow for plaintiff purchaser and the seller. Furthermore, the defendants' duty to communicate facts learned about the broker's licenses arose only because of the duty to obtain such evidence. Since the duty to obtain such evidence was not outside the contract, the duty to communicate those findings also was not outside the contract. Finally, the defendants' obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions, were within the duties undertaken in the contract [*Kangarlou v. Progressive Title Co. (2005) 128 Cal. App. 4th 1174, 1179, 27 Cal. Rptr. 3d 754]* .

Contractual provisions exculpating professional escrow agents from liability for negligence have been held to be contrary to public policy and thus invalid when they are contained in standardized printed escrow instructions prepared bythe agents [*Akin v. Business Title Corp. (1968) 264 Cal. App. 2d 153, 156-159, 70 Cal. Rptr. 287]* .

PRACTICE TIP:

Exculpatory Clauses. While escrow companies cannot enforce exculpatory clauses because they violate public policy, escrow companies can delineate the extent of their responsibilities. Limiting the scope of the obligations that the escrow company has assumed for the parties does not constitute an exculpatory provision. A provision which reads that the escrow company is not liable even if it breaches one of its obligations is void as against public policy, however. *By Timothy F. O'Leary.*

[6] Imputation of Knowledge to Parties

As a consequence of the agency relationship and the duty of disclosure, knowledge acquired by the escrow holder in the course of the agency may be imputed to the parties [*In re Marriage of Cloney (2001) 91 Cal. App. 4th 429, 440, 110*

Cal. Rptr. 2d 615 ; *Bonaccorso v. Kaplan (1963) 218 Cal. App. 2d 63, 69, 32 Cal. Rptr. 69* ; *Boswell v. Reid (1962) 199 Cal. App. 2d 705, 712, 19 Cal. Rptr. 29]* . However, the scope of the knowledge that will be imputed to the parties is limited by the scope of the escrow holder's duty of disclosure; knowledge possessed by the escrow holder is not imputed to a party unless the escrow holder is obligated to disclose it to the party [*Vigli v. Davis (1947) 79 Cal. App. 2d 237, 257, 179 P.2d 586* ; *see Menzel v. Salka (1960) 179 Cal. App. 2d 612, 4 Cal. Rptr. 78]* .

PRACTICE TIP:

Lender Contractual Liability. In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 713-714, 117 Cal. Rptr. 2d 541, 41 P.3d 548* , the California Supreme Court held that an escrow company owed no responsibility to a lender to whom a note and deed of trust had been signed. The parties to the escrow had instructed the escrow company to use the proceeds to satisfy the loan. The escrow company was aware that the loan had been assigned to the plaintiff. However, consistent with the instructions, the escrow company paid over the proceeds to the former lender. The assignee of the loan sued the escrow company, but its suit was dismissed. The California Supreme Court held that the escrow company owed no duties of due care to the assignee-lender and correctly followed the instructions given to it by the parties.

Subsequently, the court of appeal in *Money Store Investment Corp. v. Southern Cal. Bank (2002) 98 Cal. App. 4th 722, 730-733, 120 Cal. Rptr. 2d 58* ruled on a case where the lender provided instructions to the defendant escrow holder to pay over the loan proceeds to an attorney for one of the parties. The transaction involved the purchase of a business. The instructions from the lender required the bank to provide an estimated closing statement to the lender. The court of appeal held that a triable issue of material fact existed as to whether the bank breached itscontractual obligations to the lender when it distributed the loan proceeds in a manner that was inconsistent with the lender's instructions and failed to provide the bank with an estimated closing statement to the lender. The court of appeal distinguished *Summit Financial* because it found that the Bank had assumed a contractual obligation to the lender which became binding when the lender had performed by depositing the loan proceeds with the Bank. The court of appeal dismissed the lender's independent claims for negligence and promissory estoppel. *By Timothy F. O'Leary.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Fiduciary DutyGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyReal Property LawPurchase & SaleEscrow



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART II. LEGAL BACKGROUND

11-26 California Legal Forms--Transaction Guide § 26.17

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.17 Regulation of Professional Escrow Holders

[1] Escrow Agents

The principal sources of regulation of professional escrow holders are California's Escrow Law [*Fin. Code § 17000 et seq.*] and its implementing regulations [*10 Cal. Code Reg. § 1709 et seq.*]. All persons and entities who are engaged in the business of receiving escrows for deposit or delivery for compensation are classified by the Escrow Law as "escrow agents" [*Fin. Code §§ 17003, 17004*] and, unless they fall within one of the classes specifically exempted, are subject to its restrictions and requirements [*Fin. Code § 17005.4*]. Escrow agents include joint control agents and Internet escrow agents [*Fin. Code § 17005.6*; *see Fin. Code § 17004* (exemptions)]. An "Internet escrow agent" is any person engaged in the business of receiving escrows for deposit or delivery over the Internet [*Fin. Code § 17004.5*]. Internet escrow agents are subject to the Escrow Law [*Fin. Code § 17005.4*; *see § 26.18[2]*].

It is unlawful for any person or entity other than a corporation licensed under the Escrow Law to act as an escrow agent in California [*Fin. Code § 17200*]. Acting as an escrow agent "in California" in this context means doing any act related to receiving an escrow for deposit or delivery that either [*Fin. Code § 17005.5*]:

- Is directed to persons in California or originates from California (and is directed to persons outside the state); or

- Leads to the formation of a contract, and the offer or acceptance of the offer is directed to a person in California, whether from inside or outside the state and whether the offer was made inside or outside the state.

[2] Exemptions from Application of Escrow Law

Only four classes of professional escrow holders are exempted from the application of the Escrow Law [*Fin. Code § 17006(a)*]:

- Persons and entities doing business under California or federal laws relating to banks, trust companies, building and loan or savings and loan associations, or insurance companies.

- Persons who are licensed to practice law in California, who have a bona fide client relationship with a principal in a real estate or personal property transaction, and who are not actively conducting an escrow agency.

- Persons and entities whose principal business is preparing abstracts or conducting title searches to be used as the basis for the issuance of title insurance policies by a title insurance company doing business under California laws relating to insurance companies.

- Licensed real estate brokers or agents who are performing acts in the course of or incidental to their real estate business.

The exemptions described in the second and fourth items are subject to two limitations. First, they are personal to the persons listed, and those persons must not delegate any duties other than duties performed under their direct supervision. Second, they are not available for any arrangement entered into for the purpose of performing escrows for more than one business [*Fin. Code § 17006(b)*].

Each of the exempt classes described above is subject to a separate regulatory scheme that, like the Escrow Law, is designed to maintain minimum standards of competency, security, and financial stability [*Escrow Institute of Cal. v. Pierno (1972) 24 Cal. App. 3d 361, 365-369, 100 Cal. Rptr. 880]* .

PRACTICE TIP:

Purchase Deposits. Though real estate agents are exempt from the Escrow Law, agents are well advised to properly use deposits towards purchases of property. Generally, buyers hand to their agent the initial deposit to be placed into escrow. Occasionally agents are dilatory in depositing these funds with the appropriate escrow company. The delay may cause the agent to violate the applicable law or assume duties to the seller which the agent would not want to assume. Agents should instruct the buyer to make out the check to the escrow company, immediately deposit the funds with that escrow company, and obtain a receipt from the escrow company confirming the deposit and identifying the escrow number. *By Timothy F. O'Leary.*

[3] Notification of Enforcement Action Against Escrow Holder

Whenever the Commissioner of Real Estate takes any enforcement or disciplinary action against a licensed escrow holder that is related to escrow services provided pursuant to *Fin. Code § 17006(a)(4)*, the Commissioner must notify the Insurance Commissioner and the Commissioner of Corporations concerning the action taken when the action is final. The purpose of this notification is to alert the departments that enforcement or disciplinary action has been taken, if the licensee seeks or obtains employment with entities regulated by the other departments [*Bus. & Prof. Code § 10176.1(a)(1)*]. In turn, the Commissioners of the Department of Corporations and the Department of Insurance are required to provide information to the Department of Real Estate and the other departments concerning persons who have been subject to enforcement or disciplinary action for malfeasance or misconduct related to the escrow industry [*see Fin. Code § 17423.1*; *Ins. Code § 12414.31*].

In addition to the notification, the Commissioner must also provide the other Commissioners with a copy of the written accusation, a statement of issues, or the order issued or filed in the matter, as well as additional requested materials concerning the relevant facts of the enforcement or disciplinary action [*Bus. & Prof. Code § 10176.1(a)(2)*]. This information is available on a website established and maintained by the Department of Real Estate, with hyperlinks to websites established by the Department of Corporations and the Department of Insurance

[www.dre.ca.gov/cons_escrow.html; *see Bus. & Prof. Code § 10176.1(c)* (no liability for release of false information unless done with knowledge and malice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFiduciary ResponsibilitiesLegal EthicsPractice QualificationsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART II. LEGAL BACKGROUND

11-26 California Legal Forms--Transaction Guide § 26.18

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§ 26.18 Regulation Under the Escrow Law

[1] Regulation of Escrow Agents

Under the Escrow Law, a corporation applying for a license as an escrow agent must demonstrate that it has been organized lawfully and for the purpose of providing legitimate escrow agent services; that it is solvent and financially stable; that its directors, officers, and managers have sufficient experience and are generally fit to engage in the escrow agent business; and that issuance of the license will be in the public interest [*Fin. Code §§ 17209, 17209.3*]. Once it receives a license, it must continue to meet the criteria for issuance of a license [*Fin. Code § 17608(b)*], must maintain a specified minimum net worth and minimum tangible assets [*Fin. Code § 17400*], and must maintain and make available for inspection books and records that are sufficiently clear and detailed to show whether it is complying with the applicable regulations [*Fin. Code §§ 17404-17409*].

As discussed in [5], *below*, the Escrow Law places a number of restrictions on the preparation and use of escrow instructions and the handling of documents and funds deposited in escrow. Other important regulatory provisions of the Escrow Law prohibit false or misleading advertising or statements [*Fin. Code §§ 17210.2, 17402-17403.1*], require disclosure of potential conflicts [*10 Cal. Code Reg. § 1740.1*], and prohibit payment of referral fees or similar fees [*Fin. Code § 17420*].

The Commissioner of Corporations is charged with the responsibility of reviewing and determining applications for escrow agent licenses [*Fin. Code §§ 17200-17209.3*] and enforcing, by appropriate disciplinary or legal action, the regulatory provisions of the Escrow Law [*see, e.g., Fin. Code §§ 17415, 17416, 17601-17609.2*]. When issuing a license or order under the Escrow Law, the Commissioner may impose conditions that are necessary and appropriate to carry out the provisions and purposes of the Escrow Law and, with respect to Internet escrow agents, are also consistent with the intent of the legislature to protect consumers and resolve issues presented by laws and regulations that may hamper the development of electronic commerce [*Fin. Code § 17215*; *see* Stats. 1999, ch. 876, § 1(b)]. Pursuant to authority conferred by the Escrow Law [*Fin. Code § 17400*], the Commissioner has adopted an extensive set of administrative regulations that supplement its provisions [*10 Cal. Code Reg. § 1709 et seq.*].

An escrow agent's license is effective until it is surrendered, revoked, or suspended [*Fin. Code § 17600(a)*]. A license is not transferable or assignable and may not be acquired, either in whole or in part, directly or indirectly, through stock purchase, foreclosure pursuant to a pledge or hypothecation, or other devices without the consent of the Commissioner. Before the transfer of 10 percent or more of the shares of an escrow agent, the escrow agent must file a new application for a license as required by *Fin. Code § 17201*. However, a new application for a license is not required to be filed by the escrow agent if the transfer of 10 percent or more of the shares of the escrow agent will be made by an existing shareholder to another existing shareholder who also owns 10 percent or more of the shares of the escrow agent before the transfer [*Fin. Code § 17213*].

[2] Regulation of Internet Escrow Agents, Electronic Records, and Electronic Transfers

[a] Electronic Records and Transfers

"Internet escrow agents," defined as persons engaged in the business of receiving escrows for deposit or delivery over the Internet [*Fin. Code § 17004.5*], are subject to the Escrow Law and implementing regulations [*Fin. Code § 17005.4*; *10 Cal. Code Reg. § 1710*]. In enacting laws governing Internet escrow agents, the Legislature intended that the state government recognize the unique and rapid technological advances changing electronic commerce (commonly called e-commerce) and facilitate the development of Internet-related commerce. While maintaining consumer protection as its highest priority, the Legislature is working to resolve issues presented by laws and regulations that may hamper the development of e-commerce [Stats. 1999, ch. 441, § 1(b); *see Fin. Code § 17215*].

All records required by the Escrow Law may be retained by an Internet escrow agent and provided to the Commissioner in electronic format [*Fin. Code § 17403.5(a)*]. All transfers by an Internet escrow agent between trust accounts and interest-bearing accounts, and between escrow accounts, may be made electronically [*Fin. Code § 17403.5(b)*]. A statement of account may be delivered by an Internet escrow agent to a customer by electronic mail or otherwise by the Internet, unless the customer requests otherwise [*Fin. Code § 17403.5(c)*]. With regard to Internet escrow companies, transfers to trust accounts by commercial banks and from operating accounts to cover losses may be made through wire transfer, and receipts for those transactions may be maintained in electronic form [*Fin. Code § 17409.1(a)*].

An escrow agent must comply with, at a minimum, the following procedures for wire transfers, which are also known as "electronic fund transfers" [*10 Cal. Code Reg. § 1738(b)*]:

- The instructions of the principals authorizing the wire transfer must contain, at a minimum (1) the amount of the funds to be wire transferred, (2) the name of the financial institution, (3) the account number, and (4) the account name receiving the funds.

- The escrow agent must retain confirmation of the wire transfer from the financial institution that contains, at a minimum (1) the amount of the funds wire transferred and (2) the account number and name of the account to which the funds were wire transferred.

- If necessary, the escrow books must be properly adjusted to reflect the wire transfer of funds from the escrow account.

- The escrow agent must maintain (1) a property audit trail and (2) adequate controls and safeguards for funds disbursed by wire transfer.

[b] Internet Escrow Agent Special Accounts

All money received by an Internet escrow agent from a credit card or Automated Clearing House (ACH) transfer as part

of an escrow transaction must be deposited on receipt in a bank, savings bank, or savings and loan association in a separate account that is designated "trust" or "escrow" account [*10 Cal. Code Reg. § 1737.1(a)*]. No funds other than those received from a credit card or ACH transfer as part of an escrow transaction may be deposited in the account or otherwise commingled with any other escrow money [*10 Cal. Code Reg. § 1737.1(a)*]. An Internet escrow agent may not withdraw, pay out, or transfer monies from a particular escrow for deposits received by credit card or ACH transfer before the deposit of the funds into the trust or escrow bank account [*10 Cal. Code Reg. § 1737.1(b)*].

An Internet escrow agent is required to establish a reserve made up of general account funds for the purpose of covering losses that result from the acceptance of credit cards and ACH deposits, including, but not limited to, charge backs, disputed charges, fraudulent transactions, and other debits [*10 Cal. Code Reg. § 1737.1(c)*]. The reserve must be at least equal to 10 percent of the average monthly credit card and ACH receipts. If actual losses exceed 10 percent of the average monthly credit card and ACH receipts, the Internet escrow agent must immediately increase the reserve to a least equal to the percentage of actual losses to the average monthly credit card and ACH receipts. An Internet escrow agent may request the Commissioner's approval to reduce the required reserves, and the Commissioner may approve the request if, in his or her opinion, the Internet escrow agent has submitted sufficient evidence to demonstrate that the lower reserve will be sufficient to cover anticipated losses [*10 Cal. Code Reg. § 1737.1(c)*; *see Fin. Code § 17210* (tangible net worth and liquid assets also required)]. The Internet escrow agent must deposit funds from the required reserves into the escrow trust account to cover any losses that result from credit cards or ACH deposits on or before the close of the next full working day after receiving notification of the debit. This does not apply if the debit is against funds received from a credit card or ACH deposit that remains in the escrow account [*10 Cal. Code Reg. § 1737.1(d)*].

[c] Escrow Instructions Transmitted Over Internet and Electronic Signatures

Internet escrow agents may accept escrow instructions that are created, generated, sent, communicated, received, or stored by electronic means provided that the principals to the transaction agree to conduct the transaction electronically [*10 Cal. Code Reg. § 1738.6(a)*]. The Internet escrow agent must require that the principals to the transaction acknowledge that they are able to electronically receive, download, and print the escrow instructions [*10 Cal. Code Reg. § 1738.6(b)*]. If a principal to the transaction is not able to electronically receive, download, and print the escrow instructions, the Internet escrow agent must mail a true and correct copy of the instructions to the person within 24 hours of executing the document. The Internet escrow agent must maintain a record of the principal's acknowledgment, and a record of each mailing [*10 Cal. Code Reg. § 1738.6(b)*].

The principals to the transaction may execute the escrow instructions and other escrow documents with an electronic signature that complies with the federal Electronic Signatures in Global and National Commerce Act (E-Sign Act) [*10 Cal. Code Reg. § 1738.6(c)*; *see 15 U.S.C. § 7001 et seq.*].

[d] Customer Contact Centers Notice

An Internet escrow agent must give the Commissioner a written notice that specifies the business address of a customer contact center at least 10 days before commencing business at that location. Similarly, at least 10 days before an intended change in the location of any customer contact center, an Internet escrow agent must give written notification to the Commissioner of the new business address [*10 Cal. Code Reg. § 1709.1*; *see § 26.11[4]*].

[e] Electronic Transmission of Escrow Receipts and Statements

An Internet escrow agent must issue consecutively numbered receipts for all escrow money or checks deposited with or mailed to the Internet escrow agent [*10 Cal. Code Reg. § 1741.1(b)*]. An Internet escrow agent may deliver the receipts electronically over the Internet to the person depositing the funds into escrow. If a person is not able to electronically receive the receipt, the Internet escrow agent must mail a true and correct copy of the receipt within 24 hours of execution, and may retain the receipt electronically [*10 Cal. Code Reg. § 1741.1(b)*; *see 10 Cal. Code Reg. § 1737.3*

(electronic receipts)].

[3] Experienced Persons Required in Escrow Offices

Within the organization of each escrow agent corporation, there must be one or more persons possessing a minimum of five years of responsible escrow or joint control experience stationed at the corporation's main office, and one or more persons possessing a minimum of four years of responsible escrow or joint control experience at each branch. The qualified person may be an owner, officer, or employee [*Fin. Code § 17200.8(a)*]. At least one of the required qualified persons must be stationed on duty at each licensed business location during the time the location is open for business [*Fin. Code § 17200.8(a)*]. A person who has satisfied educational requirements established by the Commissioner may substitute education for up to one year of experience [*Fin. Code § 17200.8(a)*]. Different rules apply to an Internet escrow agent with regard to escrows involving personal property [*see Fin. Code § 17200.8(b)*].

[4] Separate Escrow Accounts for Each Licensed Location

Separate escrow trust accounts must be maintained for each location licensed under the Escrow Law. Transfers between accounts are prohibited except by the actual writing of a check from one escrow to the other, and by depositing the check for the account of the escrow to which the funds are being transferred and writing a receipt for that deposit. Each transfer must be properly supported and documented in escrow files by inclusion of escrow instructions executed by the principals authorizing the transfer [*Fin. Code § 17409.1(a)*]. With regard to Internet escrow companies, transfers to trust accounts by commercial banks and from operating accounts to cover losses may be made through wire transfer, and receipts for all of these transactions may be maintained in electronic form [*Fin. Code § 17409.1(b)*].

[5] Preparation and Use of Escrow Instructions

The Escrow Law imposes a number of restrictions on the preparation and use of escrow instructions. Escrow instructions must be dated [*10 Cal. Code Reg. § 1738.3*]. All written escrow instructions and all escrow instructions transmitted electronically over the Internet executed by a buyer or seller, whether or not the agent is subject to the requirements of the Escrow Law, must contain a statement in at least 10-point type that includes the license name and department issuing the license, or the authority under which the person is operating [*Fin. Code § 17403.4*; *Civ. Code § 1057.7* (requirement inapplicable to supplemental escrow instructions or modifications to escrow instructions)]. Escrow instructions may not contain any blank to be filled in after they are executed [*Fin. Code § 17403.2(a)*]. Once they are executed, they may not be altered unless the alteration is signed or initialed by all persons who initially executed them [*Fin. Code § 17403.2(a)*]. An Internet escrow agent may not solicit or accept electronically over the Internet an escrow instruction or amended or supplemental escrow instruction containing any blank to be filled in after executing that escrow instruction or amended or supplemental escrow instruction [*Fin. Code § 17403.2(b)*; *see* [2][e], *above*]. Similarly, an Internet escrow agent may not permit any person to electronically, over the Internet, make any addition to, deletion from, or alteration of an escrow instruction or amended or supplemental escrow instruct unless it is executed by all persons who had executed the escrow instruction before the addition, deletion, or alteration [*Fin. Code § 17403.2(b)*].

Copies of escrow instructions, and of any amended or supplemental instructions, must be delivered to each person executing them at the time of execution [*Fin. Code § 17403.3(a)*]. Internet escrow agents must deliver electronically over the Internet a copy of each executed escrow instruction or amended or supplemental escrow instruction to all persons executing the instruction [*Fin. Code § 17403.3(b)*; *see* [2][e], *above*]. If a person is not able to electronically receive the instructions, the Internet escrow agent must mail a true and correct copy of the instructions to the person within 24 hours of execution [*Fin. Code § 17403.3(b)*].

The following must be on the face or first page of the escrow instructions, or attached as a separate amendment to the escrow instructions, if the escrow agent proposes to act according to these instructions [*10 Cal. Code Reg. § 1738.5*]:

- An authorization or direction to disburse any money except to an authorized subagent before recordation of instruments in escrows relating to real property or before consummation of sale in escrows relating to bulk sales of personal property.

- An authorization or direction to deliver, except to a duly authorized subagent, or record instruments affecting ownership or interest in real or personal property, before deposit with the escrow agent or an authorized subagent of the full sum of money required to be deposited in escrow under escrow instructions.

- An instruction authorizing disbursements in payment of services, or other items of expense, not including commissions payable to brokers or agents.

- An instruction (which must be in not less that 8-point bold type) that states: "The principals to the transaction agree that if no additional instructions are received from one or both of the principals to the transaction within 120 days from the date escrow is to close, the escrow holder shall consider the escrow canceled and is authorized to take a cancellation fee in the amount specified in the instruction and disburse any remaining deposits to the parties specified in the instruction."

For the instruction to be valid, it must be initialed or electronically executed by the principals to the transaction. The principals to the transaction are the buyer and seller or the borrower and lender [*10 Cal. Code Reg. § 1738.5*].

Except as otherwise indicated above, the restrictions imposed by the Escrow Law on the preparation and use of escrow instructions do not apply to attorneys, real estate brokers and other classes of professional escrow agents exempted from the Escrow Law by *Fin. Code § 17006* [*see § 26.17[2]*].

[6] Handling of Documents and Funds Deposited in Escrow

The basic requirement imposed by the Escrow Law is that an escrow agent may only use documents and property deposited in escrow as directed by the written escrow instructions of the parties, as directed by court order, or, with respect to those matters not covered by written instructions or court order, in accordance with sound escrow practice [*10 Cal. Code Reg. § 1738.2*].

Funds that are received in escrow must be deposited before the close of the next full working day in a bank, savings association or savings and loan account that is specifically designated as a trust or escrow account. They may not be commingled with any non-escrow funds [*Fin. Code § 17411*; *10 Cal. Code Reg. § 1737(a)*]. Funds deposited in a trust or escrow account cannot be withdrawn except in accordance with the written instructions of the parties or pursuant to court order [*10 Cal. Code Reg. § 1738*]. Prior to the actual closing and completion of an escrow, escrowed funds cannot be disbursed to pay for contingent fees or commissions [*Fin. Code § 17420*], but may be used for other purposes if the written instructions of all parties to the transaction so provide [*Fin. Code § 17421*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsComputer & Internet LawInternet BusinessGeneral OverviewComputer & Internet LawInternet BusinessContractsElectronic ContractsGovernmentsFiduciary ResponsibilitiesReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26 California Legal Forms--Transaction Guide § 26.19

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.19 Selection of Escrow Holder

Ordinarily, a contract for the sale or transfer of a real property interest will specify the particular person or entity who is to serve as escrow holder. Occasionally, though, a contract may provide that the escrow holder is to be selected by a particular party or even by a lender or other third party.

In California, almost all real estate escrows are established with professional escrow agents. In Northern California, most escrows are handled by escrow departments of title companies, while in Southern California most are handled by independent escrow companies. A significant number of escrows, particularly in refinancing transactions, are handled by escrow departments or subsidiaries of banks or other financial institutions.

In selecting a entity to serve as an escrow agent, the most important considerations are usually the financial strength and stability of the entity; the knowledge, experience, and competence of its escrow officers; and the likelihood that its handling of the escrow will be impartial and will not be affected by any dealings or ongoing business relationship that the entity may have with a party or a party's agent. In choosing between entities that are comparable in terms of these factors, location and accessibility may be important considerations. Ordinarily, there is not a substantial difference in the fees that various escrow agents charge. Consequently, cost is seldom a significant factor in the selection of an escrow agent, except possibly in large transactions in which fees are more likely to be subject to negotiation.

California has enacted two statutory measures designed to discourage the selection of escrow holders on the basis of commissions, rebates, or other direct financial benefits that may be received by a party or agent who may be in a position to control the selection because of superior knowledge or a superior bargaining position. First, an escrow agent regulated under the Escrow Law is prohibited from paying any kind of commission, rebate, or similar fee to a person referring escrow business [*Fin. Code § 17420*]. Second, a real estate developer is prohibited from requiring a buyer of residential real property to use an escrow entity in which the developer has a financial interest [*Civ. Code § 2995*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFiduciary ResponsibilitiesReal Property LawFinancingState RegulationReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.20

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.20 Escrow Instructions

[1] Nature and Function

Escrow instructions authorize and direct the escrow holder to act as the agent of the parties to an agreement and to take the specific steps that must be taken to carry out the agreement. They define and limit the authority and the obligations of the escrow holder [*Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 8-9, 151 Cal. Rptr. 570* ; *Mefford v. Security Title Ins. Co. (1962) 199 Cal. App. 2d 578, 585, 18 Cal. Rptr. 877* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 655, 37 P.2d 153]* .

[2] Common Forms

In most of the simpler California real estate transactions, the escrow agent prepares the escrow instructions by inserting information about the specific details of particular transactions on preprinted forms it has developed. Frequently, these preprinted form instructions are supplemented by riders or addenda drafted by escrow agents or attorneys to cover atypical conditions or circumstances. Escrow instructions prepared wholly by attorneys tend to be used more in those transactions that are particularly complex, that involve large sums of money, or that implement settlements of potential legal claims or pending litigation.

In Northern California transactions, the prevailing practice is to prepare separate escrow instructions for the buyer and the seller. In Southern California transactions, the prevailing practice is to prepare one set of joint escrow instructions for execution by both the buyer and the seller.

In Northern California, a set of escrow instructions usually takes the form of a document that is separate and distinct from the underlying agreement. As a general rule, the underlying agreement is not incorporated into the escrow instructions or otherwise deposited with the escrow holder. In Southern California, escrow instructions are frequently drafted concurrently with the underlying agreement and incorporated into the agreement, so that the agreement itself also serves as the instructions for the escrow that will be opened to implement the agreement.

[3] Relationship Between Underlying Agreement and Subsequent Escrow Instructions

In general, it is presumed that escrow instructions are merely a customary and convenient means of carrying out an underlying agreement and that they are not intended to supersede it [*King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321* ; *Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 542, 261 P.2d 553]* . This rule has two important implications. First, the escrow instructions are considered as evidence of the meaning and intent of the agreement and thus may be looked to in order to ascertain the contractual obligations of the parties when the agreement is unclear or silent on a particular point [*King v. Stanley (1948) 32 Cal. 2d 584, 588-589, 197 P.2d 321* ; *Leiter v. Handelsman (1954) 125 Cal. App. 2d 243, 250, 270 P.2d 563]* . Second, the omission of certain terms or conditions from escrow instructions will not, in and of itself, operate to change the terms of the agreement [*King v. Stanley (1948) 32 Cal. 2d 584, 591, 197 P.2d 321* ; *Keelan v. Belmont Co. (1946) 73 Cal. App. 2d 6, 12, 165 P.2d 930]* . However, notwithstanding the general rule, terms contained in escrow instructions may supersede inconsistent terms of an underlying agreement if it appears that the parties intended to modify the agreement [*Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Hawes v. Lux (1931) 111 Cal. App. 21, 24, 294 P. 1080]* .

Even though the contractual obligations of the parties are ordinarily determined by the underlying agreement, the obligations of the escrow holder are defined by the escrow instructions that have been conveyed by the parties [*Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 8-9, 151 Cal. Rptr. 570* ; *Mefford v. Security Title Ins. Co. (1962) 199 Cal. App. 2d 578, 585, 18 Cal. Rptr. 877* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 655, 37 P.2d 153]* . Therefore, unless the underlying agreement is incorporated or included in the escrow instructions in some manner, the escrow holder is not usually obligated to ascertain or perform terms and conditions of the agreement that are not set forth in the escrow instructions [*see Bailey v. Security Trust Co. (1919) 179 Cal. 540, 549, 177 P. 444* ; *Contemporary Investments, Inc. v. Safeco Title Ins. Co. (1983) 145 Cal. App. 3d 999, 1003-1005, 193 Cal. Rptr. 822]* . However, an escrow holder who has notice of a party's claim that the terms of the escrow instructions do not conform to the terms of the agreement due to an error in the preparation of the instructions has an obligation to permit the parties to correct the error or resolve any dispute before proceeding to close the escrow [*Diaz v. United California Bank (1977) 71 Cal. App. 3d 161, 171, 139 Cal. Rptr. 314* ; *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 681-682, 30 Cal. Rptr. 658]* .

[4] Validity

Escrow instructions deposited or conveyed by one party are not binding until all parties have either communicated their acceptance of the instructions to the escrow holder or have deposited or conveyed their own instructions [*see Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167* ; *Altadena Escrow Corp. v. Beebe (1960) 181 Cal. App. 2d 743, 745, 5 Cal. Rptr. 530]* . Even when all parties have deposited or conveyed escrow instructions, they will not be effective if they contain conflicting provisions concerning a material term or condition of the escrow [*Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167* ; *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366]* .

Ordinarily, escrow instructions are not required to be in writing, and oral instructions are therefore valid [*Cannon v. Handley (1887) 72 Cal. 133, 144-145, 13 P. 315* ; *Zang v. Northwestern Title Co. (1982) 135 Cal. App. 3d 159, 168, 185 Cal. Rptr. 176]* . However, an oral modification of written escrow instructions may be ineffective if the written instructions require that any modification be in writing [*Davis v. Stulman (1945) 72 Cal. App. 2d 255, 268, 164 P.2d 787]* .

[5] Interpretation

In general, an escrow holder is entitled to have its obligations determined by a fair and liberal construction of the escrow instructions and other documents placed in escrow [*Bailey v. Security Trust Co. (1919) 179 Cal. 540, 549, 177 P. 444]* . Separate escrow instructions are to be read and construed together [*Neher v. Kauffman (1925) 197 Cal. 674,*

683, 242 P. 713 ; *Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327]* . When printed instruction forms are used, provisions that are subsequently typed or written in will control over inconsistent printed provisions [*Welk v. Fainbarg (1968) 255 Cal. App. 2d 269, 275, 63 Cal. Rptr. 127]* . In the absence of express provisions, the escrow holder's obligations with respect to the furnishing of deeds, title insurance policies, prorating of taxes and other incidental matters are determined by custom [*Domino v. Mobley (1956) 144 Cal. App. 2d 24, 29, 300 P.2d 324]* .

[6] Modification

As a general rule, escrow instructions can be modified or withdrawn at any time with the consent of all of the parties to the escrow [*King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321* ; *Zlozower v. Lindenbaum (1929) 100 Cal. App. 766, 773, 281 P. 102]* . However, once valid instructions have initially been deposited with the escrow holder, a party may not modify or withdraw his or her instructions without the consent of all other parties, and an attempted unilateral modification will be ineffective [*Diaz v. United California Bank (1977) 71 Cal. App. 3d 161, 166, 139 Cal. Rptr. 314* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828, 86 Cal. Rptr. 182]* . If the instructions initially deposited require that modifications be approved in writing by all parties, a modification that has been made or approved verbally will also be ineffective [*Davis v. Stulman (1945) 72 Cal. App. 2d 255, 268, 164 P.2d 787* ; *Anderson v. Southern Title & Trust Co. (1947) 81 Cal. App. 2d 700, 702, 184 P.2d 949]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsContracts LawContract ModificationsGeneral OverviewReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.21

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.21 Performance of Conditions of Escrow

[1] Sufficiency of Performance

Title to the property or funds that are the subject of an escrow will not pass unless the terms and conditions of the escrow have been fully and strictly performed or fulfilled [*Shreeves v. Pearson (1924) 194 Cal. 699, 711, 230 P. 448* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347]* . The doctrine of substantial performance does not apply [*Love v. White (1961) 56 Cal. 2d 192, 194, 14 Cal. Rptr. 442, 363 P.2d 482* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347]* . The requirement of strict performance will not be satisfied by a showing that a party had the ability to perform [*Spangler v. Castello (1956) 147 Cal. App. 2d 49, 53, 304 P.2d 752* ; *Watts v. Mohr (1948) 86 Cal. App. 2d 256, 262, 194 P.2d 758]* .

[2] Timeliness of Performance

When instructions that require performance within a specified period or by a specified date declare that time is of the essence, the conditions of the escrow must be performed or fulfilled within the specified time [*Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 795, 36 Cal. Rptr. 188* ; *Pothast v. Kind (1933) 218 Cal. 192, 195, 24 P.2d 771]* . However, when the last day specified for performance falls on a Sunday or another holiday, the time for performance is extended up to and including the next day that is not a holiday [*Civ. Code §§ 7-12*; *Code Civ. Proc. §§ 10-13*; *Law v. Title Guarantee & Trust Co. (1928) 91 Cal. App. 621, 625-626, 267 P. 565* ; *Kells v. Pearson (1922) 56 Cal. App. 502, 505, 205 P. 888]* .

Ordinarily, time is not of the essence in the performance of escrow instructions unless the instructions contain a clear and express declaration to that effect; a provision that merely requires performance within a specified period does not render time of the essence [*Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 543, 261 P.2d 553* ; *Leiter v. Handelsman (1959) 125 Cal. App. 2d 243, 251, 270 P.2d 563]* . When time is not of the essence, performance within a reasonable time after the date or period specified in the instructions is timely [*Leiter v. Handelsman (1954) 125 Cal. App. 2d 243, 251, 270 P.2d 563* ; *see also Fowler v. Ross (1983) 142 Cal. App. 3d 472, 479, 191 Cal. Rptr. 183]* .

When the escrow instructions do not specify the time for performance of terms and conditions of the escrow, a reasonable period of time will be allowed [*Civ. Code § 1657*; *Rockefeller v. Smith (1930) 104 Cal. App. 544, 549, 286 P. 487]* . What will be considered a reasonable period of time depends on the nature of the terms and conditions to be performed and the surrounding circumstances [*First Nat. Bank v. Caldwell (1927) 84 Cal. App. 438, 444, 258 P. 411]* .

[3] Waiver

A party to an escrow may waive the right to performance of conditions of the escrow and performance of a condition is not required when it has been waived by the party or parties it was intended to benefit [*Wolf v. Price (1966) 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889* ; *Jolin v. Spira (1949) 94 Cal. App. 2d 356, 360, 210 P.2d 704]* . However, a party may not waive a condition that is intended, in whole or part, to benefit another party [*see Spangler v. Castello (1956) 147 Cal. App. 2d 49, 52, 304 P.2d 752]* .

A waiver may be express or may be implied from acts or circumstances indicating a intent to waive [*Wolf v. Price (1966) 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889* ; *Jolin v. Spira (1949) 94 Cal. App. 2d 356, 360, 210 P.2d 704]* . When the required elements are present, the doctrine of equitable estoppel may be applied to preclude a party who has led another party to believe a condition has been waived from asserting a right to performance of the condition [*Boshes v. Miller (1953) 119 Cal. App. 2d 332, 334-335, 259 P.2d 447* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 714, 48 P.2d 167]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.22

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.22 Passage of Title

The deposit of instruments or funds into escrow does not pass title to the funds or the subject property. Although the escrow holder acquires possession and control of items deposited into escrow, title remains vested in the depositor unless and until the conditions of the escrow are performed or fulfilled [*Love v. White (1961) 56 Cal. 2d 192, 194, 14 Cal. Rptr. 442, 363 P.2d 482* ; *Promis v. Duke (1929) 208 Cal. 420, 425, 281 P. 613]* . If the conditions of the escrow have not been performed or fulfilled, delivery or recordation of instruments or funds by the escrow holder is a nullity and does not pass title [*Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* ; *Montgomery v. Bank of America (1948) 85 Cal. App. 2d 559, 563, 193 P.2d 475]* . In the absence of a contrary agreement, the depositor retains the incidents of ownership and the risk of loss pending the performance or fulfillment of the escrow conditions [*see, e.g., Hildebrand v. Beck (1925) 196 Cal. 141, 145, 236 P. 301* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* ; *Turney v. Collins (1941) 48 Cal. App. 2d 381, 390, 119 P.2d 954]* .

Title to instruments and funds deposited in escrow passes by operation of law when the conditions of the escrow are performed or fulfilled, not when the instruments or funds are subsequently delivered or recorded [*Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* ; *Holman v. Toten (1942) 54 Cal. App. 2d 309, 313-314, 128 P.2d 808]* . In some cases, the "relation back" doctrine may be invoked to avoid injustice or hardship to a party and title will be deemed to have passed when instruments or funds were deposited in escrow [*see, e.g., Borgonovo v. Henderson (1960) 182 Cal. App. 2d 220, 229-230, 6 Cal. Rptr. 236* ; *Miller & Lux, Inc., v. Sparkman (1932) 128 Cal. App. 449, 454-455, 17 P.2d 772]* . However, the relation back doctrine will not be applied to defeat the rights of a bona fide purchaser [*Hibberd v. Smith (1885) 67 Cal. 547, 561-562, 4 P. 473* ; *see also Borgonovo v. Henderson (1960) 182 Cal. App. 2d 220, 229-230, 6 Cal. Rptr. 236]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsDeliveryReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.23[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26 California Legal Forms--Transaction Guide § 26.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.100 Basic Facts for All Parties

1. Names, addresses, and telephone numbers of client and other involved parties.

    a. Seller.

    b. Buyer.

    c. Attorney representing other party, if any.

    d. Seller's real estate broker, if any.

    e. Buyer's real estate broker, if any.

    f. Escrow holder, if designated or retained.

    g. Existing lenders, if any.

    h. Homeowner's association, if any.

    i. Mutual or private water company, if any.

    j. Parties under contract to provide maintenance or other services to property, if any.

    k. Buyer's prospective lender, if known.

l. Title insurer, if designated or retained.

m. Structural pest control operator, if designated or retained.

n. Contractors, engineers, or others designated or retained to make inspections or reports, if any.

o. Government officials or inspectors responsible for building and/or health code inspection and report.

2. Additional information concerning any parties who are not individuals.

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

3. Information concerning property to be conveyed.

a. Address of property.

b. Description of improvements located on property.

c. Nature and present use of property.

d. Names and relationship to seller of present occupants.

e. If property is leased or rented:
(1) Number of rental units.

(2) Number of units presently occupied.

(3) Terms of leases or rental agreements in effect.

(4) Security deposits held by seller.

(5) Whether any eviction proceedings are pending.

f. Record owners of property.

g. Other persons possibly having equitable or community property interest in property.

h. Adverse claims against seller's title, if any.

i. Pending litigation affecting property, if any.

j. Easements burdening or benefitting property.

k. Covenants, conditions, or restrictions affecting property.

l. Encumbrances or liens against property.

m. Other agreements affecting property.

(1) Party wall agreements.

(2) Boundary agreements.

(3) Other.

(4) Essential terms of contract.
(a) Parties to contract and date of contract.

(b) Real property and real property interests to be conveyed.

(c) Personal property to be conveyed.

(d) Purchase price.

(e) Loans to be obtained or assumed by buyer.

(f) Nature of contingencies.
1. Pest control clearance.

2. Building and/or health code inspection and clearance by local governmental agency.

3. Loan commitment.

4. Approval of additional items on preliminary title report.

5. Approval of reports of contractors, engineers, or others.

6. Issuance or granting of building permit, variance, or other governmental approval required by buyer.

7. Approval of terms of loan to be assumed.

8. Approval of leases or other agreements affecting property.

9. Purchase or sale of other residence.

10. Other contingencies.

(g) Deposit(s) to be made by buyer.

(h) Escrow holder or method of selecting escrow holder.

(i) Date or time specified for close of escrow.

4. Present status of transaction.

a. Whether escrow holder has been retained.

b. Whether escrow file has been opened.

c. Escrow number assigned, if any.

d. Whether preliminary title report has been:

(1) Ordered; and/or

(2) Received.

e. Whether any inspections have been:

(1) Ordered;

(2) Performed; and

(3) If performed, whether reports have been received.

f. Whether any contingencies have been satisfied.

g. Whether buyer has made any deposits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.101 Additional Facts for Representation of Seller

1. Names and addresses of additional parties with whom seller may have to deal.

    a. Persons or entities with potential equitable or community property interests in property.

    b. Lienholders.

    c. Others asserting claims against property.

    d. Tenants of property.

    e. Seller's insurers and insurance brokers.

    f. Attorneys representing above persons and entities.

2. Additional information concerning any parties who are not individuals.

    a. Type of entity.

    b. Full legal name.

    c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

3. Additional information concerning persons with potential equitable or community property interests.

a. Facts and circumstances relevant to assessment of potential claim.

b. Nature and status of communications and dealings relating to potential interest.

4. Additional information concerning encumbrances, liens, and adverse claims.

a. Existing loans:
(1) Original lender.

(2) Present holder or beneficiary, if different.

(3) Approximate unpaid principal balance.

(4) Prepayment penalty, if any.

(5) Additional amounts owed under note or deed of trust, if any.

(6) Amount in impound account, if any.

(7) Balloon payments due in near future, if any.

(8) Nature of any existing delinquencies or defaults.

(9) Status of and action taken by lender in response to delinquencies or defaults.

b. Liens:

(1) Basis for claim or lien and circumstances surrounding imposition.

(2) Original amount of lien claim.

(3) Payments made by seller on underlying obligation.

(4) Nature and basis of seller's objections to amount or validity of claim, if any.

(5) Actions taken by lien claimant to perfect or enforce lien, if any.

(6) Nature and status of seller's dealings with lien claimant.

c. Other adverse claims:

(1) Nature of claim.

(2) Basis for claim and circumstances leading to claim.

(3) Nature and basis of seller's contentions regarding claim.

(4) Actions taken by claimant to assert or enforce claim, if any.

(5) Nature and status of seller's dealings with claimant.

5. Additional information concerning tenants:

a. Monthly or other periodic rent due under terms of lease or rental agreement.

b. Current status of rental payments.

c. Due dates of future rental payments.

d. Other amounts owing under terms of lease or rental agreement.

e. Amount of security deposit held by seller under lease or rental agreement.

f. Current status of tenancy.

6. Additional information concerning insurance coverage on property:

a. Type and limits of fire and other physical damage insurance in effect.

b. Term and expiration date of policy.

c. Premium.

d. Transferability of policy.

7. Additional information concerning building and/or health code inspections:

a. Date inspection requested.

b. If inspection has occurred, date of inspection.

c. If report has been issued, findings made.

d. Status of arrangements, if any, for corrective work necessary to bring property into compliance.

e. Status of arrangements, if any, for reinspection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal

Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.102

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.102 Additional Facts for Representation of Buyer

1. Names and addresses of additional parties with whom buyer may have to deal:

a. Lenders to whom buyer has applied for financing.

b. Buyer's insurers and insurance brokers.

c. If transaction is contingent or dependent on sale of buyer's present residence, buyers, real estate brokers, and escrow holder involved with sale of present residence.

2. Additional facts concerning each loan application:

a. Date of application.

b. Amount applied for.

c. Terms quoted or offered by lender.

d. Conditions required by lender:
(1) Fire and physical damage insurance.

(2) Title insurance.

(3) Impound account.

(4) Other conditions.

e. Loan fees and charges, if known.

f. Status of application.

3. If transaction is contingent or dependent on sale of buyer's present residence:

a. Status of attempts to sell.

b. Net proceeds to be realized by buyer under terms of contract or pending offers.

c. If contract has been signed:

(1) Date escrow opened.

(2) Date specified for close of escrow.

(3) Contingencies still to be removed.

(4) Other potential problems.

4. If transaction is contingent or dependent on issuance or granting of building permit, variance, or other governmental approval:

a. Date of application, if any.

b. Documents and information furnished in support of application.

c. Date or dates of meetings or hearings scheduled.

d. Staff reports or recommendations issued or made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26 California Legal Forms--Transaction Guide § 26.103

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.103 Basic Documents

1. Contract of purchase and sale.

2. Any addenda or amendments to contract of purchase and sale.

3. Any supplemental agreements between seller and buyer.

4. Preliminary title report on property, if issued [*see § 26A.200*].

5. Any pest control reports, building or health code inspection reports, or other reports relating to condition of property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26 California Legal Forms--Transaction Guide § 26.104

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.104 Additional Documents to Be Obtained From Seller

1. Grant deed conveying property to seller.

2. Instruments creating easements burdening or benefitting property.

3. Instruments containing covenants, conditions, or restrictions affecting property.

4. Deeds of trust or mortgages encumbering property, and notes secured thereby.

5. Instruments or documents creating or asserting liens against property.

6. Other agreements affecting property, such as:

    a. Party wall agreements.

    b. Boundary agreements.

7. Copies of all pleadings, papers, and correspondence in any litigation affecting title to or use of property.

8. Preliminary title report and title policy issued to seller at time of seller's purchase of property.

9. Leases or rental agreements in effect with tenants of property, if any.

10. Membership certificate or other document evidencing membership in homeowner's association, if any.

11. Stock certificate or other document evidencing membership in or subscription to mutual or private water company, if any.

12. Bills of sale, purchase receipts, or other documents evidencing seller's ownership of personal property to be conveyed to buyer, if any.

13. Insurance policies providing coverage for property.

14. Contracts for maintenance services or other services for property or for personal property to be conveyed.

15. Pest control certification, if one has been secured.

16. Statements, invoices, and receipts showing real estate taxes and special assessments imposed on property and seller's payment of those taxes and assessments.

17. Statements, invoices, receipts, and other documents establishing seller's advance payment of fees and costs incidental to maintenance or use of property.

18. Seller's books and records showing:

a. Rental payments made and owed by tenants of property.

b. Security deposits held by seller.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26 California Legal Forms--Transaction Guide § 26.105

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.105 Additional Documents to Be Obtained From Buyer

1. Loan applications filed with prospective lenders.

2. Statements, notices, pamphlets, and other information about terms and conditions of loan furnished by prospective lenders.

3. Blank copies of forms used by prospective lenders for:

    a. Promissory note.

    b. Deed of trust.

    c. Other loan documents and statements, if available.

4. If transaction is contingent on issuance of building permit, variance, or other governmental approval:

    a. Copies of any applications or supplemental applications submitted.

    b. Copies of all documents and materials submitted in support of application.

    c. Copies of any correspondence with or notices from governmental agency.

    d. Copies of any staff reports or recommendations.

e. Copies, official notice, or minutes establishing issuance or granting of permit, variance, or approval.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26 California Legal Forms--Transaction Guide §§ 26.106-26.109

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.106[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

11-26 California Legal Forms--Transaction Guide § 26.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.110 Basic Determinations for All Parties

1. Select escrow holder, if one is not specified by contract.

a. Determine type of entity desired:
(1) Escrow department of title insurance company.

(2) Independent escrow company.

NOTE:
In most Northern California transactions, escrows are handled by escrow departments of title insurance companies, while in most Southern California transactions they are handled by independent escrow companies.

(3) Escrow department or subsidiary of financial institution.

NOTE:
In some cases, financial institutions financing a transaction will require that the escrow be handled by their escrow departments or subsidiaries. In others, particularly if the financing arrangements and contingencies are unusually complex or timing is critical, use of a lender's escrow department or subsidiary may be advantageous because it will facilitate the funding of the loan.

(4) Real estate broker.

NOTE:

Real estate brokers usually lack the specialized expertise, and sometimes the objectivity and impartiality, that an escrow holder should possess and use of a real estate broker is not recommended.

(5) Attorney.

NOTE:

Attorneys for the parties may also lack the objectivity and impartiality that an escrow holder should possess, and it may cost considerably more to have an escrow processed by an attorney than by a professional escrow agent.

b. Evaluate potential escrow holders in terms of:

(1) Financial strength and stability.

(2) Experience and expertise of escrow officers.

NOTE:

Usually the two most important considerations are the financial strength and stability of the prospective escrow holders and the experience and expertise of their escrow officers.

(3) Reputation.

(4) Impartiality.

NOTE:

Escrow holders who may be influenced by a long-standing or lucrative relationship with the real estate brokers or attorneys for the other party should be avoided.

(5) Accessibility to parties and attorneys.

(6) Cost.

NOTE:

Although the charges that will be imposed by prospective escrow holders should always be ascertained before a selection is made, the difference in cost will rarely be significant.

2. Determine whether to submit joint or separate escrow instructions by evaluating and weighing:

a. Prevailing customs and practices in locality.

NOTE:

Separate escrow instructions are used in most Northern California transactions. Joint escrow instructions are used in the majority of Southern California transactions.

b. Preference of escrow holder.

c. Other party's willingness to submit joint instructions.

d. Probable length and complexity of instructions.

NOTE:

Separate escrow instructions are generally less complex and easier to prepare than joint escrow instructions. However, any savings in initial drafting time must be weighed against the additional time that may be required to review separate instructions and eliminate any material inconsistencies between the seller's and buyer's instructions [*see* g. and h., ***below*].**

e. Ability to work smoothly and efficiently with other party or that party's attorney.

f. Additional time and expense likely to be entailed by drafting of joint instructions.

g. Likelihood of material conflicts if separate instructions are used.

h. Importance of avoiding material conflicts in initial instructions.

3. Determine obligations that must be performed by seller under terms of contract before buyer is obligated to pay purchase price.

a. State of title to be conveyed to buyer.

b. Type and amount of title insurance, and exceptions permitted [*see* Ch. 26A, *Title Insurance*].

c. Conveyances of interests in adjoining real property to buyer:

(1) Easement.

(2) Party wall agreement.

(3) Boundary agreement.

(4) Other agreements.

d. Conveyances of personal property to buyer.

e. Assignment or transfer of membership in homeowner's association to buyer.

f. Assignment or transfer of stock or subscription in mutual or private water company to buyer.

g. Type of pest control clearance or corrective work to be obtained or done by seller.

h. Type of building and/or health code inspection and clearance or corrective work to be obtained by seller.

i. Insurance policies to be transferred to buyer.

j. Maintenance agreements or other service contracts to be assigned to buyer.

k. Assignment and delivery of leases or rental agreements to buyer.

l. Delivery of rent statement or schedule to buyer.

m. Delivery of statement or schedule of security deposits to buyer.

n. Other conditions to be performed by seller.

4. Determine obligations that must be performed by buyer under terms of contract before seller is obligated to convey property.

a. Deposit(s) to be made by buyer.

b. Amount of cash payment to be made to seller.

c. Execution of secured promissory note to seller.

(1) Amount, due date, and other terms and conditions of note.

(2) Terms and conditions of deed of trust securing note.

(3) Priority of deed of trust securing note.

(4) Type and amount of title insurance and exceptions permitted.

(5) Type and amount of insurance coverage to be placed on property for benefit of seller.

d. Separate conveyances or agreements to be executed in favor of seller or third party by buyer:

(1) Easement.

(2) Party wall agreement.

(3) Boundary agreement.

(4) Other agreements.

e. Other conditions to be performed by buyer.

5. Determine date or time specified in contract for close of escrow.

6. Determine whether contract requires any obligations imposed on seller or buyer to be performed before close of escrow.

7. Determine whether any other provisions of contract make contract or a party's obligation to perform contingent on occurrence or nonoccurrence of the following (or other) events or conditions:

a. Buyer obtaining loan commitment on specified terms.

b. Buyer obtaining building permit, variance, or other approval from governmental agency for proposed addition to or use of property.

c. Buyer's approval of terms of loan to be assumed.

d. Buyer's approval of additional items on preliminary title report.

e. Buyer's approval of reports of contractors, engineers, or others.

f. Buyer's approval of leases or other agreements affecting property.

g. Buyer's sale of present residence or other property.

h. Seller's purchase of other residence.

8. If contract is made contingent on any of above conditions (or others), determine:

a. Effect of failure of condition:

(1) Contract will be automatically canceled unless condition occurs; or

(2) Contract will remain effective unless a party affirmatively asserts right to cancel.

b. Method, if any, prescribed for:

(1) Establishing occurrence or nonoccurrence of condition; and/or

(2) Asserting right to cancel.

c. Date by which or time within which condition must be satisfied or fulfilled.

9. Based on factors listed below, determine for each condition precedent or contingency provision whether escrow holder should be instructed as to contingency, or whether parties should determine satisfaction or fulfillment of contingency outside of escrow.

a. Nature of condition or contingency.

b. Likelihood of determining satisfaction or failure before escrow instructions are deposited.

c. Likelihood of determining satisfaction or failure before funds, instruments, or documents are deposited.

d. Potential for dispute over satisfaction or failure of condition or contingency.

e. Potential consequences of any such dispute.

f. Mechanism provided by contract for establishing satisfaction or failure.

g. Desirability and feasibility of having escrow holder determine satisfaction or failure.

NOTE:

Assuming that an appropriate mechanism can be found for making the determination, having the escrow holder determine the satisfaction or failure of a contingency can often avoid disputes that can tie up funds or important documents in an escrow that should be canceled or delay the processing of an escrow that should proceed. However, escrow holders generally should not, and as a matter of policy usually will not, make determinations that involve the exercise of judgment or the use of discretion. Thus, it is usually feasible to have the escrow holder determine the satisfaction or failure of the contingency only if the parties can agree on some procedure for making a determination that is consistent with the provisions of the underlying contract and that only requires the escrow holder to determine the existence or nonexistence of specified facts from a specified source.

h. Effect of dealing with condition or contingency in escrow on lenders and other interested third parties authorized to receive copies of escrow instructions and documents.

10. Determine whether contract requires proration of following (or other) costs or expenses of maintaining or using property:

a. Real property taxes.

b. Special assessments.

c. Maintenance fees.

d. Homeowner's dues.

e. Premiums for insurance policies to be transferred to buyer.

f. Utility bills.

11. Determine whether contract requires proration of following (and any other) items of income attributable to use of property:

a. Rents paid in advance for rental period or periods in which escrow closes.

b. Rents owing for rental period or periods in which escrow closes.

12. Based on factors listed below, determine whether any costs, expenses, or items of income required to be prorated should be prorated by parties outside of escrow:

a. Nature and probable amount of cost or item.

NOTE:

Proration through escrow is less important if the amount that is likely to be credited or debited is nominal or small in relation to other amounts involved in the transaction. In such a case, a party may prefer to take the risk of a dispute outside of escrow rather than complicate and possibly delay the processing of the escrow.

b. Prevailing custom or practice in locality.

c. Feasibility of having creditor prorate and separately bill costs and expenses.

d. Nature of information required for proration.

NOTE:

The feasibility of having the escrow holder prorate a particular item must be determined in light of the nature of the information that it must obtain in order to make the necessary determinations and calculations. If the necessary information will be difficult for the escrow holder to secure or analyze, or if it may be unavailable prior to the time escrow is to close, it may not be feasible to have the escrow holder prorate a particular item.

e. Availability of information required for proration prior to date set for close of escrow.

f. Feasibility of having escrow holder prorate cost of item.

NOTE:

The feasibility of having the escrow holder prorate a particular item essentially depends on whether having a particular item prorated through escrow is likely to unnecessarily complicate or delay the escrow, either as a result of dispute between the parties over how the item should be prorated or as a result of problems the escrow holder may have in obtaining the necessary information or making the necessary calculations or determinations.

g. Likelihood of potential problems in reaching agreement or obtaining payment from other party.

13. Determine whether contract requires any other credits or debits for following (or other) items:

a. Difference between estimated balance and actual balance of loan to be assumed by buyer.

b. Monies retained in impound account as result of buyer's assumption of a loan made to seller.

c. Buyer's assumption of liability for security deposits held by seller.

d. Rents owing for rental periods ending before close of escrow.

14. Determine who is obligated, under terms of contract, to pay following (and other) costs and expenses of sale and escrow:

a. Real estate commission.

b. Cost of preliminary report and title insurance policy.

c. Initial pest control report.

d. Corrective pest control work, if any.

e. Fees for building and/or health code inspection and report and cost of necessary corrective work.

f. Documentary transfer tax and any local transfer tax.

g. Fee for reconveyance of existing deed of trust.

h. Recording fees.

i. Fees and charges for services of escrow holder.

15. Based on factors listed below, determine whether any of above costs and expenses should be paid by parties outside of escrow:

a. Nature and probable amount of cost or expense.

NOTE:

Some necessary costs or expenses may have to be paid outside of escrow because the creditor requires payment for the particular services or items involved before the time escrow is to close. Some costs and expenses may be so small that the effort required to provide for their payment out of escrow simply is not justified.

b. Prevailing custom or practice in locality.

c. Feasibility of having creditor bill party directly.

d. Creditor's willingness to bill party directly.

e. Assignment of or lien against escrowed funds.

NOTE:

If a party has assigned escrowed funds to a creditor or granted a creditor a lien against escrowed funds and the escrow holder has knowledge of the assignment or the lien, the escrow holder will be liable to the third party if it disburses the assigned funds in a manner that is contrary to the terms of the assignment or fails to pay the lien [*Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co. (1962) 205 Cal. App. 2d 68, 73, 22 Cal. Rptr. 712]* . Consequently, in the absence of a written release from the assignee or lien claimant, an escrow holder with knowledge of an assignment or lien will usually insist that payment be made to the creditor out of escrow or, in the event that a party disputes the creditor's claim or asserts that payment has been made, that funds equal to the amount of the assignment or lien be retained in escrow.

f. Likelihood of dispute concerning validity or amount or costs or expenses.

g. Effect of providing for payment out of escrow in event of dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsGovernmentsFiduciary ResponsibilitiesReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

11-26 California Legal Forms--Transaction Guide § 26.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.111 Additional Determinations to Be Made by Attorney for Seller

1. Determine what instruments or documents need to be obtained and recorded to convey clear title to buyer:

a. Quitclaim deed conveying interest of record owner, spouse, or other potential claimant to seller.

b. Reconveyance of deed of trust.

c. Instruments or documents discharging and removing liens.
(1) Acknowledgment of satisfaction of judgment.

(2) Release of mechanic's lien.

(3) Release of tax lien.

(4) Release of lis pendens or order expunging lis pendens.

2. Determine what additional instruments and documents need to be obtained and deposited in escrow to secure issuance of required title insurance policy:

a. Statement of identity.

b. Copy of court decree or order authorizing sale.

c. Certified copy of statement of partnership.

d. Certified copy of corporate resolution.

3. Determine what additional instruments, agreements, documents, and items need to be obtained and deposited in escrow to perform other obligations imposed on seller, such as:

a. Conveyances of interests in adjoining real property to buyer:

(1) Grant of easement.

(2) Party wall agreement.

(3) Boundary agreement.

(4) Other agreements.

b. Bill of sale conveying personal property to buyer.

c. Assignment of homeowner's association membership or endorsed membership certificate.

d. Assignment or transfer of stock or subscription in mutual or private water company to buyer.

e. Pest control certification.

f. Report or certification of governmental agency establishing building and/or health code clearance.

g. Insurance policies to be transferred to buyer.

h. Maintenance agreements or other service contracts and assignment thereof.

i. Leases and rental agreements in effect, and assignment of those agreements.

j. Rent statement or schedule.

k. Statement or schedule of security deposits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

11-26 California Legal Forms--Transaction Guide § 26.112

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.112 Additional Determinations to Be Made by Attorney for Buyer

1. Determine approximate amount of cash buyer will be required to deposit in escrow.

2. Determine what instruments and agreements need to be prepared and deposited in escrow by buyer to comply with other obligations imposed on buyer, such as:

a. Grant of easement.

b. Party wall agreement.

c. Boundary agreement.

d. Other agreements.

3. Determine, if possible, what instruments, agreements, documents, and items buyer will need to obtain and deposit in escrow to comply with requirements of new lender.

a. Policy of fire and physical damage insurance.

b. Lender's title insurance policy [*see § 26A.250*].

4. Determine what steps need to be taken to obtain any required building permit, variance, or governmental approval, such as:

a. Filing of application or supplemental application.

b. Provision of materials and information in support of application.

c. Compliance with additional conditions.

d. Meetings or hearings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

11-26 California Legal Forms--Transaction Guide §§ 26.113-26.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 26.113[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Representation of Party to Real Estate Sale Escrow

11-26 California Legal Forms--Transaction Guide § 26.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.120 Initial Steps for All Parties

NOTE:

This transaction guide assumes that the seller and buyer are represented by attorneys. [Escrows for transactions in which the parties are represented only by real estate brokers or in which they are representing themselves are usually processed in a much different manner.] In such transactions, the escrow is typically "opened" either without instructions or with the purchase contract serving as a set of interim instructions. Requesting the parties to the escrow to provide information or deposit documents or funds as needed, the escrow holder proceeds to prepare or obtain the instruments and documents needed to complete the sale, using standard preprinted forms. It handles the dealings with lenders, lien claimants, and other involved third parties. Contingencies are handled by the parties outside of escrow. When the necessary arrangements have been made with third parties and the escrow is ready to close, the escrow holder will meet with the parties and have them review and sign the escrow instructions and all of the instruments and documents necessary to complete the sale. Usually, the deed and the other instruments will be recorded and escrow will close within one or two days after this meeting.

1. Contact escrow agent and:

a. Open escrow file.

b. Secure assignment of escrow number as reference for all future communications and dealings.

2. Obtain and review preliminary title report [*see § 26A.200*].

NOTE:

The preliminary title report shows the outstanding liens, encumbrances, restrictions, and other title defects that have been disclosed by the title insurer's investigation and that would be excepted from any policy of title insurance issued. This information is ordinarily needed by the seller because the seller is obligated to secure title insurance that excepts only those items the buyer has agreed to accept and therefore must secure the removal of any other liens, encumbrances, restrictions, or defects. It is ordinarily needed by the buyer because the buyer has agreed to take title subject to certain liens and restrictions and the buyer's escrow instructions must describe those items precisely in specifying the terms of the title insurance required as a condition to the close of escrow.

3. Prepare draft of escrow instructions [*see §§ 26.200* (seller's instructions), 26.201 (buyer's instructions), or 26.202 (joint instructions)].

4. Exchange drafts with attorney for other party (if separate instructions are used) and request escrow holder to review draft.

5. Make any revisions necessary to reconcile inconsistencies or meet concerns of other party or escrow holder.

6. Have instructions executed by client and approved by other party.

7. Deposit instructions with escrow holder.

8. Have escrow holder acknowledge receipt of and agreement to instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
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C. Procedural Guide to Representation of Party to Real Estate Sale Escrow

11-26 California Legal Forms--Transaction Guide § 26.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.121 Additional Procedures for Attorney Representing Seller

NOTE:
This guide is intended for use in escrows in which the parties are represented by attorneys [*see* note to § 26.120].

1. Order title insurance policy required by contract [*see §§ 26A.120-26A.123*].

NOTE:
In an escrow transaction for the purchase or simultaneous exchange of real property, if a policy of title insurance is not to be issued to the buyer or to the parties to the exchange, the buyer or parties must be given a statutory notice (in a separate document) indicating that it may be advisable to obtain a policy of title insurance. The recipients must sign and acknowledge the notice [*Civ. Code § 1057.6*; *see* Ch. 23, ***Real Property Sales Agreements***].

2. If required, take (or direct seller to take) steps necessary to obtain structural pest control certification:

NOTE:
Real property sales contracts usually require that a structural pest control report be ordered and that a certification ("termite clearance") be obtained. The contract may provide that the cost of any repair work will be paid by one of the parties or prorated between the parties in a specified manner.

Even if the parties themselves do not require a report or a certification, lenders commonly require that one be obtained and deposited into escrow as a condition of

lending funds for the purchase of the property.

a. Order pest control report, if not previously ordered.

b. Arrange for corrective work necessary to secure required certification.

c. If necessary, arrange for reinspection following completion of work.

d. Deposit certification in escrow when obtained.

3. If required, take (or direct seller to take) steps necessary to obtain city or county building and/or health code clearance:

a. Arrange for initial inspection, if not done previously.

b. Arrange for any corrective work necessary to bring property into compliance.

c. If necessary, arrange for reinspection.

d. Deposit report or certificate establishing clearance into escrow when obtained.

4. Make arrangements for transfer of fire and physical damage insurance policies to buyer.

5. Prepare and deposit in escrow notices of satisfaction or waiver of conditions as required by instructions [*see §§ 26.260* (notice of satisfaction) or 26.261 (notice of waiver)].

NOTE:
For a general discussion of contingencies, see *§ 26.201[1].*

6. Prepare following conveyances and agreements (as appropriate) to be executed by seller; have seller execute them and deposit them in escrow:

a. Grant deed [*see* Ch. 27, *Deeds and Recording*].

b. Grant of easement over adjoining real property [*see §§ 28A.200-28A.202*].

c. Party wall agreement [*see §§ 28B.200-28B.203*].

d. Boundary agreement [*see §§ 28B.210-28B.211*].

e. Bill of sale for personal property to be conveyed to buyer [*see § 23.323*].

f. Assignment of maintenance agreements or other service contracts relating to property [*see § 76.200*].

g. Assignment of homeowner's association membership [*see § 76.200*].

h. Assignment of stock or subscription in mutual or private water company [*see § 76.200*].

i. Assignment of rights under leases or rental agreements [*see §§ 35A.201, 35A.203*].

j. Assignment of security deposits [*see § 76.200*; *see also § 35A.223[1]*].

7. If seller is financing portion of purchase price, prepare promissory note and deed of trust and deposit them in escrow for execution by buyer [*see §§ 25A.200-25A.205, 25A.210-25A.212, 25A.240-25A.247*].

8. Obtain necessary instruments and agreements from third parties and deposit them in escrow:

a. Quitclaim deed conveying interest of record owner, spouse, or other potential claimant to seller [*see § 27.203*].

b. Instruments or documents discharging and removing liens that will not be paid off and removed through escrow [*see §§ 25B.220-25B.223*; *see also §§ 31.250-31.258* (mechanic's liens)].

9. Obtain additional instruments and documents required by title insurer and deposit them in escrow.

a. Statement of identity.

b. Power of attorney [*see § 27.272*].

c. Copy of court decree or order authorizing sale.

d. Certified copy of statement of partnership [*see § 15.285*].

e. Certified copy of corporate resolution [*see §§ 5.241, 5.249*].

10. Have seller prepare schedules of rents and security deposits and deposit them in escrow.

11. Deposit statements, invoices, receipts, and other documents furnished by seller to establish amount and payment of costs and expenses to be prorated in escrow.

12. Contact escrow holder to confirm close of escrow.

13. Contact seller to confirm disbursement of balance of purchase price.

14. Review closing statement and instruments, agreements, documents, and statements delivered by escrow holder or returned following close of escrow to verify that instructions have been carried out.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Representation of Party to Real Estate Sale Escrow

11-26 California Legal Forms--Transaction Guide § 26.122

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.122 Additional Procedures for Attorney Representing Buyer

NOTE:
This guide is intended for use in escrows in which the parties are represented by attorneys [*see* note to § 26.120].

1. Order any additional inspections or reports provided for by contract.

2. Instruct buyer to make deposits required by contract and instructions.

3. Prepare conveyances and agreements to be executed by buyer; have buyer execute them and deposit them in escrow.

b. Grant of easement over adjoining real property [*see §§ 28A.200-28A.202*].

c. Party wall agreement [*see §§ 28B.200-28B.203*].

d. Boundary agreement [*see §§ 28B.210-28B.211*].

4. If buyer is obtaining loan or if seller is financing portion of purchase price:

a. Review instruments and loan documents deposited in escrow for execution by buyer; if acceptable, have buyer execute them.

b. Order title insurance required by lender or seller [*see §§ 26A.120-26A.123*].

c. Make arrangements for issuance of fire and physical damage insurance required by lender or seller.

5. File preliminary change of ownership report [*see § 23.306*].

6. Have buyer deposit additional amounts of cash sufficient to pay balance of purchase price and escrow fees and costs that buyer is obligated to pay.

7. If transaction is contingent on obtaining building permit, variance, or other approval required for proposed addition or use, take (or direct buyer to take) steps necessary to complete application and secure determination:

a. File application or supplemental application.

b. Provide required materials and information in support of application.

c. Comply with additional conditions.

d. Attend meetings or hearing on application.

8. Contact escrow holder and verify close of escrow.

9. Review closing statement and instruments, agreements, documents, and statements delivered by escrow holder or returned following close of escrow to verify that instructions have been carried out.

10. Give tenants notice of assignment of leases and transfer of security deposits [*see §§ 35A.201, 35A.203*].

11. If maintenance, service, or other contracts have been assigned, give notice of assignment to obligor [*see § 76.200*].

12. File change in ownership statement if required [*see § 23.306[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Representation of Party to Real Estate Sale Escrow

11-26 California Legal Forms--Transaction Guide §§ 26.123-26.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.123[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
1. Sale of Real Property

11-26 California Legal Forms--Transaction Guide § 26.200

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.200 Seller's Escrow Instructions

[1] Comment

[a] Use of Form

This form is a set of escrow instructions that may be used by the seller in a transaction in which the seller and buyer submit separate instructions to the escrow holder pursuant to a contract for the sale of residential or commercial property. For separate buyer's instructions, see *§ 26.201*.

This form and the other escrow instruction forms in this chapter are designed for escrows in which, due to the complexity of the transaction, the amounts involved, or other considerations, the instructions are to be prepared by the attorneys representing the parties. Title companies and other professional escrow agents generally offer to prepare escrow instructions on behalf of the parties using printed form instructions they have developed. In some simple transactions, these printed forms may be adequate.

[b] Separate Instructions

Separate escrow instructions are used in most Northern California transactions. They are generally less complex and easier to prepare than joint escrow instructions, which are used in the majority of Southern California transactions. For joint seller's and buyer's instructions, see *§ 26.202*.

When the seller and buyer submit separate escrow instructions, they will be read and construed together to ascertain the terms and conditions of the escrow [*Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327]* . If the respective instructions of the parties are not in agreement as to the essential terms and conditions of the escrow, they will not operate to create a valid escrow [*House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* . However,

in the absence of express provisions, the escrow holder's obligations with respect to the furnishing of deeds and title insurance policies, the prorating of taxes and expenses, and other incidental matters, are determined by custom [*Domino v. Mobley (1956) 144 Cal. App. 2d 24, 29, 300 P.2d 324]* .

[c] Drafting and Contents

[i] Implementation of Contract Provisions

Ordinarily, the purpose of escrow instructions is to carry out the terms and conditions of an existing contract [*King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321* ; *Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 542, 261 P.2d 553]* . In a given transaction, therefore, the content of the escrow instructions must usually be dictated in large part by the terms of the underlying contract. This form contains instructions that can be used to implement provisions that are commonly found in contracts for the sale of residential and commercial real property [for discussion of real property sales contracts, *see* Ch. 23, *Real Property Sale Agreements*]. Whether these instructions are applicable to a particular transaction will depend on the terms of the sales contract.

[ii] Legal Requirements

When escrow instructions are drafted by the attorneys for the parties, the law does not require, as a general rule, the inclusion of any particular terms or conditions or the use of any particular form or language. However, all written escrow instructions (other than supplemental escrow instructions or modifications to escrow instructions) and all escrow instructions transmitted electronically over the Internet that are executed by a buyer or seller, whether prepared by an attorney or other person exempt from the Escrow Law [*Fin. Code § 17000 et seq.*; *see Fin. Code § 17006* (exemptions), § 26.17[2] (discussion)] or by a professional escrow agent licensed under the Escrow Law, must contain a statement in not less than 10-point type setting forth the name of the license or other authority under which the agent or preparer is operating and, if applicable, the name of the department issuing the license [*Fin. Code § 17403.4*; *Civ. Code § 1057.7*].

Further, professional escrow agents licensed under the Escrow Law are prohibited from accepting or using instructions that are not dated [*10 Cal. Code Reg. § 1738.3*], that contain blanks to be filled in after they are executed [*Fin. Code § 17403.2(a)*], or that contain alterations that have not been initialed by all persons executing them [*Fin. Code § 17403.2(a)*]. In addition, an Internet escrow agent may not solicit or accept electronically over the Internet an escrow instruction or amended or supplemental escrow instruction containing any blank to be filled in after executing that escrow instruction or amended or supplemental escrow instruction [*Fin. Code § 17403.2(b)*]. Similarly, an Internet escrow agent may not permit any person to electronically, over the Internet, make any addition to, deletion from, or alteration of an escrow instruction or amended or supplemental escrow instruct unless it is executed by all persons who had executed the escrow instruction before the addition, deletion, or alteration [*Fin. Code § 17403.2(b)*].

If the escrow agent proposes to act according to any of the following instructions, the instruction must be contained on the face or first page of the escrow instructions, or attached as a separate amendment [*10 Cal. Code Reg. § 1738.5*]:

- An authorization or direction to disburse any money except to an authorized subescrow agent before recordation of instruments in escrows relating to real property or before consummation of sale in escrows relating to bulk sales of personal property.

- An authorization or direction to deliver, except to a duly authorized subescrow agent, or record instruments affecting ownership or interest in real or personal property, before deposit with the escrow agent or an authorized subescrow agent of the full sum of money required to be deposited in escrow under escrow instructions.

- An instruction authorizing disbursements in payment of services, or other items of expense, not

including commissions payable to brokers or agents.

- An instruction in not less than 8 point bold type stating: "The principals to the transaction agree that if no additional instructions are received from one or both of the principals to the transaction within 120 days from the date escrow is to close, the escrow holder shall consider the escrow canceled and is authorized to take a cancellation fee in the amount specified in the instruction and disburse any remaining deposits to the parties specified in the instruction."

[iii] Drafting Considerations

In drafting a set of escrow instructions, the primary concerns of the attorney should be that they accurately reflect the terms and conditions of the underlying contract, that they are sufficiently complete to enable the escrow holder to carry out the contract, and that they preserve the rights and remedies of the client. The instructions should also define and limit the obligations of the escrow holder in such a way that they will be acceptable to the escrow agent who will be handling the escrow. Finally, the instructions should be clear and unambiguous, so that the escrow agent can ascertain its obligations without having to request additional instructions from the parties and so that disputes over their meaning will be minimized.

[d] Deposit Clause

Paragraph 3 of this form contains the deposit clause. The primary purpose of this clause is to identify the instruments, documents, and other items that the seller is depositing or will deposit in escrow in order to enable the escrow holder to comply with the conditions that must be performed or fulfilled by the seller before the buyer will authorize payment of the purchase price or other consideration. Conditions typically required by the buyer are discussed in *§ 26.201[1]*.

In addition to the instruments and documents required by the buyer, the seller must also deposit any additional instruments and documents that may be required by the title insurer that is to insure buyer's title or by the buyer's lender [*see § 26.220*]. If the buyer is to give the seller a promissory note and deed of trust for a portion of the purchase price or to execute some other type of agreement or conveyance in seller's favor, the seller will usually prepare the pertinent instruments or agreements and deposit them in escrow for execution by buyer.

Once instruments, documents, and other items are deposited into escrow, the escrow agent acquires dominion and control over them and the depositor may not unilaterally revoke the deposit and obtain the return of the items deposited [*Wittenbrock v. Cass (1895) 110 Cal. 1, 6-7, 42 P. 300* ; *Cannon v. Handley (1887) 72 Cal. 133, 140-141, 13 P. 315]* . If a dispute arises as to whether the escrow of the underlying contract has been terminated or canceled, a party who has deposited items in escrow will usually have to institute a lawsuit and obtain a court order to secure the return of those items. Consequently, to minimize the risk of having them tied up indefinitely in an escrow, funds and important instruments, agreements, certificates, and documents usually are not deposited in escrow until shortly before the deadline imposed by the underlying contract.

[e] Arrangements With Existing Lenders and Lien Claimants

If the property is encumbered by a deed of trust that secures a purchase money or other loan made to the seller, the seller will usually instruct the escrow holder to contact the lender and make the arrangements that are necessary to complete the sale. Paragraph 4 of this form contains a provision for use in a transaction in which the seller needs to obtain a reconveyance of a deed of trust securing an existing loan, and an alternative provision for use in a transaction in which the buyer will assume the existing loan.

If the seller needs to obtain a reconveyance of the deed of trust in order to convey clear title, the escrow holder will be instructed to secure a payoff demand and request the lender to deposit the reconveyance into the escrow, together with

instructions authorizing the escrow holder to record the reconveyance when it is prepared to disburse the balance demanded by the lender. For an escrow holder's request for a payoff demand, see *§ 26.240[2]*. For instructions to be submitted by the lender with the payoff demand and the reconveyance, see *§ 26.221[1]*.

If the buyer is going to assume the deed of trust or take the property subject to the deed of trust, the escrow holder will be instructed to secure a beneficiary's statement setting forth and itemizing the obligations secured by the deed of trust and to credit the balance owing against the purchase price or to adjust the purchase price accordingly. For a request for a beneficiary's statement, see *§ 26.242[2]*.

If there are other liens against the property that must be cleared, the seller will usually instruct the escrow holder to contact the lien holder in order to secure a payoff demand and to arrange for the lien holder to deposit the instruments or documents necessary to discharge and clear the lien into escrow along with instructions authorizing the escrow holder to record and deliver them when it is prepared to disburse the amount demanded by the lienholder. Paragraph 5 of this form instructs the escrow holder to make the arrangements necessary to clear an existing lien. For an escrow holder's request for a lien claimant's payoff demand, see *§ 26.241[2]*. For instructions to be submitted by the lien claimant with the payoff demand, see *§ 26.230[2]*.

[f] Termite or Pest Control Clearance

A structural pest control clearance usually will be required by the buyer, the buyer's lender, or both. In order to obtain such a clearance, it may be necessary to have corrective work performed during the escrow period and paid out of escrow. Paragraphs 6, 7, and 8 of this form govern the treatment of the structural pest control inspection, corrective work, and certification. These paragraphs correspond to those in § 26.201, the buyer's separate instructions. For discussion of these provisions, and the underlying assumptions on which they are based, see *§ 26.201[1][e][ii]*.

[g] Treatment of Buyer's Deposit

Real property sales agreements usually require the buyer to make an initial deposit toward the purchase price. They may also require the buyer to make an additional deposit toward the payment of the purchase price prior to the close of escrow. The deposit requirement may be an important test of the buyer's good faith or financial ability to complete the transaction. For that reason, a seller's escrow instructions should generally make compliance with the deposit requirement a condition of the escrow and should clearly spell out the seller's right to cancel the escrow if the buyer fails to comply. Paragraph 9 of this form instructs the escrow holder concerning the deposit requirement of an underlying contract, and provides that if the buyer fails to make a required deposit, the seller has the option of terminating the agreement and canceling the escrow by giving notice within a designated period.

If the underlying contract contains a liquidated damages clause, the seller will become entitled to all or part of the deposit if the contract is terminated due to the buyer's default. It is unlikely that an escrow holder will be willing to determine who is entitled to the deposit if there is a dispute as to whether the buyer has defaulted. However, if instructed to do so, an escrow holder will retain the deposit in escrow until entitlement is determined in a legal action or by agreement of the parties. Suing to establish entitlement to a deposit held in escrow is a much better remedy for the seller than the pursuit of a damage claim against the buyer, since it will avoid collection problems. Accordingly, the seller's escrow instructions should contain provisions that instruct the escrow holder, in the event of cancellation of the escrow, to hold the deposit in escrow until entitlement to the deposit is determined by court order or agreement of the parties.

[h] Conditions Precedent to Delivery of Deed

Paragraph 10 of this form specifies the conditions precedent to the recording and delivery of the deed. The seller's instructions should specify clearly the terms and conditions of the underlying contract that must be performed or

fulfilled before the escrow holder is authorized to take the steps necessary to convey the seller's property to the buyer. The most important condition, of course, is that the escrow holder must have received funds sufficient to pay the purchase price in escrow and must be authorized and able to disburse the purchase price to the seller on the close of escrow.

Occasionally, a real property sales contract will require the buyer to execute a separate instrument or agreement conveying some type of right or interest in the property to seller or another owner or adjoining real property. The most common examples of such conditions are requirements that the buyer convey an easement across the property for ingress and egress purposes or execute a party wall or boundary agreement for the benefit of an adjoining property. If the contract contains such a provision, the seller's escrow instructions should require that the buyer must have executed and deposited in escrow the necessary instruments and agreements and that the escrow holder must be authorized and prepared to record and deliver them upon the close of escrow.

If the underlying contract provides that the buyer is to give the seller a note secured by a deed of trust on the property for a portion of the purchase price, the seller's instructions should require that the buyer have executed the note and deed of trust in escrow and that the escrow holder be authorized and prepared to record and deliver them to seller on the close of escrow. The seller's escrow instructions should also require that a title insurer be obligated and prepared to issue any title insurance required by the underlying contract and that the escrow holder have received and be prepared to deliver the insurance policy providing any physical damage insurance required by the contract.

If the underlying contract is contingent on the occurrence or nonoccurrence of a specified condition or event for the seller's protection, the seller's escrow instructions should require that the seller have deposited in escrow a written notice or statement verifying the occurrence or nonoccurrence of the condition or event at issue.

[i] Prorations and Adjustments

Paragraph 11 of this form instructs the escrow holder to prorate certain specified expenses or items and credit or debit the accounts of the parties accordingly. Most real property sales contracts provide for the proration of property taxes, assessments, maintenance fees, and similar fees and charges paid or assumed by one party or another for a period during which ownership of the property changes. Most contracts for the sale of income-producing property similarly provide for the proration of rents and other income. Usually the escrow holder is instructed to make the necessary prorations and credit and debit the respective accounts of the parties accordingly. In such cases, the escrow instructions should specify clearly the particular fees, charges, costs and expenses that are to be prorated, the date as of which they are to be prorated, and the nature of any documentation or evidence required to establish the amount or payment of a particular item.

Paragraphs 13, 14, and 15 of this form instruct the escrow holder concerning other credits to be given in escrow. When an underlying contract provides that one party or another is entitled to a credit as a result of the assumption of a liability or the incidental transfer of an asset, the credit will usually be made through the escrow. If the precise amount of the credit cannot be ascertained initially, the escrow holder can either be instructed to determine the amount of the credit or to await supplemental instructions specifying the amount.

[j] Costs and Expenses to Be Paid by Seller

Paragraphs 16 and 17 of this form respectively authorize the escrow holder to pay the amounts necessary to obtain a reconveyance of a deed of trust encumbering the property and to remove a lien against the property. Under most real property sales contracts, the seller is obligated to deliver clear title, and thus must pay any cost of removing outstanding liens and encumbrances. If the property is encumbered by a deed of trust or an outstanding lien, the seller's instructions should specifically provide for payment of the balance of the secured loan or the amount necessary to discharge the lien. Authorization to make the payments should be conditioned on the deposit in escrow of the instruments and documents

necessary to remove the lien or encumbrance and discharge the underlying obligation.

Paragraph 18 of this form authorizes the escrow holder to pay, on the seller's behalf, the escrow fees and charges and other costs of sale that the seller is required to pay. Responsibility for the payment of escrow fees and other costs, charges, and fees of processing the escrow and completing the sale is ordinarily dependent on the agreement of the parties and is usually fixed by the underlying sales contract. The seller's instructions should identify and authorize payment of those items that are the responsibility of the seller. Unless the escrow holder requires that the seller make an initial deposit to cover the cost of the items that are to be paid by the seller, the seller's instructions should provide that the escrow holder may deduct the charges for these items from the funds to be disbursed to the seller for the purchase price.

[k] Cancellation of Escrow

[i] Grounds and Manner of Cancellation

In order to avoid uncertainty and potential litigation over the status of an escrow, escrow instructions should clearly define the grounds for cancellation of an escrow and the manner in which a cancellation may be effected. Paragraph 24 of this form contains general provisions permitting cancellation by mutual agreement of the parties, permitting a nondefaulting party to cancel the escrow if the terms and conditions of the escrow are not performed or fulfilled before a specified date, and prescribing the specific steps that must be taken to effect a cancellation. If the underlying agreement grants a party the right to cancel the escrow prior to the date set for close of escrow due to the occurrence or nonoccurrence of a specified event or condition, this right and the way in which it is to be exercised should be set forth separately in special provisions. For an example of this kind of special cancellation provision, see P 9 of this form, which grants the seller the right to cancel the escrow for the buyer's failure to make a required deposit.

[ii] For Failure to Perform Terms and Conditions Within Specified Time

If escrow instructions do not require performance within a specified period or by a specified date, performance of the terms and conditions of an escrow will be considered timely as long as it is rendered within a reasonable time [*Civ. Code § 1657*; *Rockefeller v. Smith (1930) 104 Cal. App. 544, 549, 286 P. 487]* . Even when the time for performance is specified, performance within a reasonable period of time after the specified deadline will be considered timely unless the escrow instructions expressly provide that time is of the essence [*Leiter v. Handelsman (1954) 125 Cal. App. 2d 243, 251, 270 P.2d 563* ; *see also Fowler v. Ross (1983) 142 Cal. App. 3d 472, 479, 191 Cal. Rptr. 183]* . What constitutes a reasonable period of time for performance depends on the nature of the terms and conditions to be performed and the surrounding circumstances [*First Nat. Bank v. Caldwell (1927) 84 Cal. App. 438, 444, 258 P. 411]* . Thus, when a reasonable period of time is allowed for performance, the parties and the escrow holder cannot, as a practical matter, determine when performance is due or when cancellation is proper.

On the other hand, when instructions require performance within a specified period or by a specified date and declare that time is of the essence, the conditions of the escrow must be performed or fulfilled within the specified time [*Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 795, 36 Cal. Rptr. 188* ; *Pothast v. Kind (1933) 218 Cal. 192, 195, 24 P.2d 771]* . Accordingly, this form contains provisions expressly declaring time to be of the essence [*see* P 25 of form], fixing a specific date by which the terms and conditions of the escrow must be performed or fulfilled [*see* P 23 of form], and permitting a nondefaulting party to cancel the escrow if they are not performed or fulfilled on or before that date [*see* P 24 of form]. Such provisions are usually given effect by the courts [*see, e.g., Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81* ; *Petre v. Roegner (1963) 219 Cal. App. 2d 288, 291-292, 33 Cal. Rptr. 82]* .

[iii] Manner of Effecting Cancellation

When cancellation of an escrow is permitted, provisions of escrow instructions prescribing the manner in which the cancellation must be effected are usually controlling and an attempt to effect a cancellation in some other way ordinarily

will be ineffective [*see, e.g., Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81* ; *Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 796, 36 Cal. Rptr. 188]* . Paragraph 24 of this form contains alternative provisions that represent the three most common approaches to the effecting of a cancellation for lack of timely performance of the terms and conditions of escrow: (1) automatic cancellation; (2) permitting a nondefaulting party to cancel the escrow by giving the prescribed notice of cancellation, absent such notice, the escrow will proceed; or (3) permitting a nondefaulting party to give the other party notice that escrow will be canceled if the other party fails to secure the performance or fulfillment of the terms and conditions at issue within a specified period, otherwise escrow will proceed. For a notice of cancellation of an escrow for a default or failure of a condition, see *§ 26.270*.

This form also authorizes cancellation by mutual agreement of the parties, but requires that it be effected by giving a prescribed notice. For a notice of cancellation of an escrow by mutual agreement, see *§ 26.271*. Even in the absence of a specific provision, the parties ordinarily would have the right to cancel an escrow by mutual agreement [*Whitney v. Sherman (1918) 178 Cal. 435, 437-438, 173 P. 931* ; *Wilshire Realty Co. v. Kry Corp. (1967) 250 Cal. App. 2d 269, 276-277, 58 Cal. Rptr. 469]* .

[l] Amendments and Supplemental Instructions

In the absence of a provision requiring written instructions, oral instructions are generally valid [*Cannon v. Handley (1887) 72 Cal. 133, 144-145, 13 P. 315* ; *Zang v. Northwestern Title Co. (1982) 135 Cal. App. 3d 159, 168, 185 Cal. Rptr. 176]* . However, when written escrow instructions require any amendments or modifications to be in writing, an attempt to amend or supplement them orally is ineffective [*see, e.g., Davis v. Stulman (1945) 72 Cal. App. 2d 255, 268, 164 P.2d 787* ; *Anderson v. Southern Title & Trust Co. (1947) 81 Cal. App. 2d 700, 702, 184 P.2d 949]* . Escrow instructions should generally require any amendments to be in writing so that the parties and the escrow holder can ascertain the terms of the instructions with certainty and so that the risk of disputes resulting from oral amendments or purported oral amendments can be avoided. Paragraph 37 of this form contains provisions requiring all amendments and supplemental instructions to be in writing.

Once the parties to an escrow have deposited their initial instructions and a valid escrow has been created, a party may not unilaterally amend his or her escrow instructions [*Diaz v. United California Bank (1977) 71 Cal. App. 3d 161, 166, 139 Cal. Rptr. 314* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828, 86 Cal. Rptr. 182]* . Accordingly, P 37 of this form provides that an amendment or supplemental instruction is not valid unless all parties either sign it or approve it in a signed writing deposited in escrow. For an amendment to escrow instructions, *see § 26.250[2]*. For supplemental escrow instructions, *see § 26.251*.

[m] Waiver

A party to an escrow may waive the right to performance of conditions of the escrow, and performance of a condition is not required when it has been waived by the party or parties it was intended to benefit [*Wolf v. Price (1966) 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889* ; *Jolin v. Spira (1949) 94 Cal. App. 2d 356, 360, 210 P.2d 704]* . However, a party may not waive a condition that is intended, in whole or part, to benefit another party [*see Spangler v. Castello (1956) 147 Cal. App. 2d 49, 52, 304 P.2d 752]* . In the absence of provisions to the contrary, a waiver may be implied from acts or circumstances indicating a intent to waive [*Wolf v. Price (1966) 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889* ; *Jolin v. Spira (1949) 94 Cal. App. 2d 356, 360, 210 P.2d 704]* . So that the parties can determine with certainty whether a particular term or condition of an escrow has been waived, and to eliminate disputes over whether a waiver can be implied from particular conduct, this form provides that any purported waiver of a term or condition of escrow is ineffective unless it is in writing and is signed or approved in a signed writing by each party that the term or condition was intended to benefit [*see* P 38 of Form]. For a notice of an express waiver, *see § 26.261[2]*.

[n] Provisions Limiting Obligations of Escrow Holder

This form provides that the escrow holder (1) is entitled to act upon instruments and documents received in the course of processing the escrow without making an independent determination as to whether they are genuine [*see* P 27 of form]; and (2) is not obligated to resolve conflicting claims or demands concerning the validity or interpretation of the escrow instruction or the sufficiency of a party's performance [*see* PP 33, 34 of form]. Provisions similar to these are contained in virtually all of the printed instructions prepared by professional escrow agents. Most professional escrow agents will not agree to serve under escrow instructions that do not contain these limitations on the obligations of the escrow holder.

[o] Approval by Buyer

Below the seller's signature block, this form provides a space for the buyer to acknowledge his or her approval of the seller's instructions. There is no legal requirement that the buyer approve the seller's escrow instructions. However, having the buyer review and approve the seller's instructions before they are submitted will enable the parties to identify and resolve any substantial conflicts at the outset and may validate provisions of the seller's instructions that would otherwise be ineffective due to the lack of parallel provisions in buyer's instructions.

[p] Acceptance by Escrow Holder

To create a valid escrow, the escrow holder must agree to accept and dispose of deposits made into escrow in accordance with the terms and conditions of the escrow instructions [*Sousa v. First California Co. (1950) 101 Cal. App. 2d 533, 538-539, 225 P.2d 955* ; *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366]* . Moreover, an escrow holder who accepts and agrees to escrow instructions has a contractual obligation to perform them as well as the legal obligations imposed by reason of the agency relationship [*Amen v. Merced County Title Co. (1978) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33]* . Accordingly, a party submitting escrow instructions should request the escrow holder to acknowledge its acceptance of the instructions and its agreement to perform them. Paragraph 39 of this form requests the escrow holder to acknowledge its acceptance of the instructions and its agreement to perform them. The final paragraph of this form sets forth the acknowledgment and acceptance to be executed by the escrow holder.

[2] Form

Seller's Escrow Instructions

SELLER'S ESCROW INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

Preliminary Recitals

1. _____[*name of seller*] (hereinafter sometimes referred to as "Seller") [*if applicable, describe status, e.g.,* a California corporation *or* a limited partnership,] has entered into a contract to sell to _____[*name of buyer*] (hereinafter sometimes referred to as "Buyer") [*if applicable, describe status, e.g.,* a California corporation *or* a limited partnership,] certain _____[residential *or* commercial] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." Subject to the terms and conditions set forth below, Seller hereby authorizes and instructs you to open an escrow for the purpose of completing the sale of the Subject Real Property to Buyer and to complete the sale in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow*:]

Disregard of Contract

2. Your obligations as escrow holder are to be determined solely by these instructions, the written instructions initially deposited by Buyer, and any subsequent amendments or supplemental instructions jointly submitted by Seller and Buyer. You are not responsible for knowing or interpreting any provisions of the contract on which these instructions are based, and shall not rely on any knowledge or understanding you may have of any such contractual provisions in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract between Buyer and Seller for the purchase and sale of the Subject Real Property or any contract purporting to be a contract on which your escrow instructions are based.

Deposit Clause

3. _____[Seller hereby deposits into escrow *or* On or before _____ (*date*) Seller will deposit or cause to be deposited into escrow] the following:

(a) A grant deed, executed by Seller [*or* by _____ as attorney in fact for Seller *or* by _____ as Executor of the Estate of _____ *or specify other capacity of person executing grant deed*] and in recordable form, conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

[*If grant deed will be executed by attorney in fact:*]

(b) A _____[special *or* general] power of attorney, executed by Seller and duly notarized, appointing _____[*name of person executing grant deed as attorney in fact for seller*] as Seller's attorney in fact and authorizing _____[*name of attorney in fact*] to execute the grant deed on behalf of Seller;

[*If property will be conveyed by executor or other legal representative:*]

(c) A certified copy of the order entered in _____[*describe proceeding, e.g.*, Alameda County Superior Court Action No. 1234, Estate of John Doe], authorizing _____[*name*] to convey the Subject Real Property to Buyer;

[*If seller is a partnership:*]

(d) A certified copy of the statement of partnership filed and recorded by Seller in _____[*county where property is located*];

[*If seller is a corporation:*]

(e) A duly certified copy of a resolution of Seller's Board of Directors _____[*specify nature of resolution, e.g.*, approving the sale of the Subject Real Property to Buyer and authorizing Jane Smith to execute all required agreements, instructions, and instruments on Seller's behalf];

[*If conveyances to seller must be made or recorded to vest clear title in seller:*]

(f) A quitclaim deed, executed by _____[*name of grantor*] and in recordable form, quitclaiming all of _____[*name of grantor*]'s right, title, and interest in the Subject Real Property to Seller [or

specify other conveyance necessary to vest clear title in seller];

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(g) A _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Seller and in recordable form, _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(h) A bill of sale, executed by Seller, conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract or other contract relating to property:*]

(i) The original of _____[*describe contract, e.g.*, the elevator service contract, dated March 18, 2003, between Seller and ABC Corporation,] and a duly executed assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(j) The originals of all leases now in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(k) A schedule showing the security deposits now held by Seller under leases now in effect between Seller and the present tenants of the Subject Real Property, and a duly executed assignment of those security deposits to Buyer, receipt of which is to be acknowledged by Buyer;

[*If property is part of condominium or planned unit development:*]

(l) _____[*name of condominium or planned unit development owner's association*] Certificate No. _____, duly endorsed for transfer to Buyer [*or specify other document evidencing transfer of association membership*];

[*If property is served by mutual or private water company:*]

(m) _____[*name of mutual or private water company*] stock certificate No. _____, duly endorsed for transfer to Buyer [*or specify other documents evidencing assignment or transfer*];

[*If seller is financing portion of purchase price, include (n) and (o), below:*]

(n) A promissory note evidencing a principal obligation of $_____ and certain other obligations to be executed in favor of Seller by Buyer;

(o) A _____[first *or* second *or specify other priority*] deed of trust on the Subject Real Property to be executed by Buyer for the benefit of Seller to secure payment and performance of the obligations evidenced by the above-mentioned promissory note;

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(p) A _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], executed by Seller and in recordable form, _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If underlying contract to be deposited in escrow (see Paragraph 2 above for alternative provision):*]

(q) A copy of the contract between Seller and Buyer for the sale and purchase of the Subject Real Property that is the basis for these instructions;

[*If pest control certification or necessary corrective work to be secured through escrow:*]

(r) A structural pest control report on the Subject Real Property, dated _____, prepared by _____[*name of structural pest control operator*] pursuant to the requirements of *Business and Professions Code Sections 8516* and *8519*;

[*If property taxes are to be prorated:*]

(s) The _____ County Assessor's property tax bill for the Subject Real Property for the tax fiscal year _____-_____, together with an official receipt evidencing payment of that bill;

[*If adjustments or prorations are to be made for rents that are delinquent or paid in advance in connection with sale of income-producing property:*]

(t) A rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property; and

(u) [*List any additional items to be deposited by seller*.]

[*Choose one of the following paragraphs:*]

[*If existing loan is to be paid off, use:*]

Lender's Payoff Demand Statement

4. As soon as possible after opening escrow, contact _____[*name and address of existing lender or holder*] and request that it place in escrow the following: a payoff demand statement prepared pursuant to *Civil Code Section 2943* and setting forth the amounts required to satisfy fully all obligations relating to the loan that is secured by the deed of trust shown as _____[exception or item or other designation] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A; the original promissory note evidencing the loan; a reconveyance of the deed of trust, duly executed and in recordable form; and escrow instructions authorizing you to cancel the note and record and deliver the reconveyance when you are prepared to disburse the amount of the balance due. Mail Seller copies of the statement and the escrow instructions as soon as they are received in escrow.

[*OR*]

[*If buyer is to assume existing loan, use:*]

Lender's Statement of Balance

4. As soon as possible after opening escrow, contact _____[*name and address of existing lender or holder*] and request that it place in escrow a beneficiary statement setting forth the information required by *Civil Code Section 2943,* including the unpaid principal balance of the loan secured by the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A. Mail Seller a copy of the statement as soon as it is received in escrow.

[*Continue with the following:*]

Other Claimants' Demands

5. As soon as possible after opening escrow, contact _____[*name and address of other lien claimant*] and request that _____[he/she/it] place in escrow the following: a statement and demand for payment of the amount required to _____[satisfy *or* discharge *or other appropriate characterization*] the _____[judgment *or* tax lien *or other description of lien*] shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A; a duly executed _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment] in recordable form; and escrow instructions authorizing you to _____[*action required to clear lien, e.g.,* file and record the acknowledgment of satisfaction of judgment] when you are prepared to disburse the amount demanded. Mail Seller copies of the statement and demand and the escrow instructions as soon as they are received in escrow.

[*If close of escrow is conditioned on performance of corrective structural pest control work and deposit of structural pest control certification, add:*]

Structural Pest Control Certification

6. The close of this escrow is conditioned on the deposit in escrow of a certification by a licensed structural pest control operator, pursuant to the requirements of *Business and Professions Code Section 8519*, that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas. The parties have retained _____[*name of structural pest control operator*] to conduct an inspection of the Subject Real Property and prepare a report in accordance with the requirements of *Business and Professions Code Section 8516.* A copy of that report _____[is being *or* will be *or* has been] deposited into escrow pursuant to Paragraph 3. The parties _____[have authorized *or* will authorize] _____[*name of structural pest control operator*] to perform _____[*all corrective work listed in that report as a condition of obtaining a certification that the property is free from active infestation or infection in the visible and accessible areas or describe work by referring to specific items in report, e.g.,* the corrective work described in Items _____ (*list by number*) of the report], at the price stated in the report. When the corrective work has been completed, _____[Buyer *or* Seller *or* the parties] will obtain a certification that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas, and will deposit with you a true and complete copy of the certification.

[*If cost of corrective work and/or pest control certification is to be paid out of escrow, add:*]

Disbursement of Payment for [Inspections and] Corrective Work

7. You are authorized to disburse to _____[name of structural pest control operator], in accordance with Paragraph 8, the sums necessary to pay the fees and charges for the corrective work described in Paragraph 6 [, and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification,] if, and only if, all of the following apply:

(a) You have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) _____[Buyer *or* Seller] has [*or* The parties have] deposited into escrow the certification of _____[*name of structural pest control operator*] pursuant to *Business and Professions Code Section 8519* that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas;

(c) _____[*name of structural pest control operator*] has deposited in escrow _____[his *or* her *or* its] invoice or statement setting forth the fees and charges for the corrective work described in Paragraph 6 [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification]; and

(d) The total of the fees and charges made by _____[*name of structural pest control operator*] for the corrective work [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification] does not exceed the price for those repairs as stated in the inspection report [, plus any standard inspection, reinspection, and certification fees, as applicable].

[*If cost of corrective work or pest control certification is to be paid out of escrow, add:*]

Responsibility for Expense of [Certification and] Corrective Work

8. Fees and charges for the corrective work listed in Paragraph 6, up to but not exceeding the price specified in the inspection report for performance of that work [, as well as any fees for (the inspection and) any reinspection of the Subject Real Property and the preparation and delivery of the required certification], subject to the conditions specified in Paragraph 7, will _____[*select the appropriate alternative below*]

[*If cost is to be borne solely by one party, use:*]

be the sole responsibility of _____[Seller *or* Buyer] and shall be paid from funds held for _____[Seller's *or* Buyer's] account at the close of escrow.

[*OR*]

[*If cost is to be split between the parties, use:*]

be borne one half by Seller and one half by Buyer, and will be paid from the respective funds held for the accounts of the parties at the close of escrow.

[*OR*]

[*If one party is to pay cost up to a specified limit and other party is to pay balance, use:*]

be paid as follows: _____[Seller *or* Buyer] will pay the fees and charges, up to a limit of $_____; and _____[*other party*] shall pay any charges in excess of $_____[*repeat amount specified above*], up to but not exceeding the full price specified in the inspection report for performance of the corrective work described in Paragraph 6. Payment shall be made from the respective funds held for the accounts of the parties at the close of escrow.

[*Continue with the following:*]

Buyer's Deposit

9. Buyer must pay into escrow, on or before _____[*date*], the sum of $_____ to be held by you as an initial deposit toward the payment of the purchase price for the Subject Real Property. [*If buyer is required to increase deposit prior to close of escrow, add*: Buyer must also pay into escrow, on or before _____ (*date*), the sum of $_____ to be held by you as an additional deposit toward the payment of the purchase price.] If Buyer fails to make the initial deposit described above on or before _____[*date*], [*add, if applicable*: or if Buyer fails to make the additional deposit described above on or before _____ (*date*),] you must notify Seller immediately and Seller will have the right to cancel this escrow by notifying you in writing, within _____ days after you have given _____[him *or* her *or* it] notice of Buyer's failure to make the required deposit, that _____[he *or* she *or* it] is exercising the right to cancel. [*If the underlying contract contains a liquidated damage clause, add*: Notwithstanding any other provisions of your escrow instructions, if this escrow is canceled due to a default by Buyer, you are authorized and directed to hold any funds that Buyer has paid into escrow as or for an initial (*add, if applicable*: or additional) deposit, up to a limit of $_____ (*specify amount of liquidated damages fixed by underlying contract*), until you receive joint instructions from Buyer and Seller or a final order or judgment of a court of competent jurisdiction directing or determining the manner in which the funds are to be disbursed.]

Conditions Precedent to Delivery of Deed and Other Instruments Effecting Conveyance

10. You are authorized to close escrow and to record and deliver the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer [*if applicable, describe other instruments to be recorded to vest clear title in buyer or effect the conveyance to buyer, e.g.,* and the grant of easement granting Buyer an easement across adjoining real property owned by Seller for purposes of ingress and egress] when, and only when, all of the following apply:

(a) You hold for Seller's account in available funds, and are authorized and prepared to disburse to or on behalf of Seller, the sum of $_____[*amount to be deposited into escrow by buyer for purchase price; if instructions require credits or debits to seller's account (as opposed to disbursements to be made on seller's behalf), add*:, plus any other sums that you are required to credit to the account of Seller under the escrow instructions you receive, minus any sums for which you are required to debit the account of Seller under the escrow instructions you receive];

[*If buyer is to make conveyance or agreement benefitting property retained by seller:*]

(b) The _____[*describe conveyance or agreement, e.g.*, grant of easement *or* party wall agreement] deposited in escrow by Seller has been executed and returned to you by Buyer in recordable form and without modification or deletion and you are authorized and prepared to record it and deliver it to Seller;

[*If seller is financing portion of purchase price, add (c) through (f), below, as appropriate:*]

(c) The promissory note deposited in escrow by Seller for execution by Buyer has been executed and returned to you by Buyer without modification or deletion and you are authorized and prepared to deliver it to Seller;

(d) The deed of trust deposited in escrow by Seller for execution by Buyer has been executed by Buyer and returned to you in recordable form without modification or deletion and you are authorized and prepared to record it and deliver it to Seller;

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue, when the deed of trust is recorded, a California Land Title Association joint protection policy [*or* American Land Title Association lender's policy] insuring that title to the Subject Real Property is vested in Buyer and that the deed of trust that Buyer has executed for the benefit and security of Seller is an encumbrance against the Subject Real Property that is subject and subordinate only to _____[*describe all superior liens and encumbrances contemplated by contract and escrow instructions*];

(f) You have received in escrow, and are authorized and prepared to deliver to Seller, an original policy of insurance providing _____[*describe required coverage and type of policy*] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable, e.g.,* ISO Form 438BFU NS] lender's loss payable endorsement naming Seller as the _____[first *or* second *or other priority*] loss payee;

[*If seller's obligation to sell is contingent on a condition other than buyer's performance:*]

(g) Seller has deposited in escrow a written statement, executed by Seller, either verifying that _____[*specify facts or events establishing satisfaction of condition, e.g.,* Seller has completed the purchase of another residence] or stating Seller's election to waive the right _____[*specify, e.g.,* to cancel the contract of purchase and sale and this escrow if _____ (he *or* she) did not complete the purchase of another residence by _____ (*date*)] and proceed to close escrow [*or describe other method selected by parties to establish satisfaction or waiver of condition*].

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) Buyer has acknowledged receipt of the security deposits transferred by Seller by executing one copy of the assignment deposited in escrow by Seller.

Proration of Certain Expenses

11. Prorate on the basis of a 30-day month, as of the date on which escrow closes [*or specify other agreed-upon date*], the following costs, charges, expenses, and items of income; credit or debit the respective accounts of Seller and Buyer accordingly. Prorate the following costs, charges and expenses on the basis of bills, statements, canceled checks, receipts, and other satisfactory types of documentary evidence of their existence, amount, and payment that is deposited in escrow by Seller or Buyer:

[*If property taxes are to be prorated:*]

(a) Real property taxes on the Subject Real Property for the tax fiscal year _____-_____;

[*If special assessments that have been paid or are due are to be prorated:*]

(b) _____[*Describe assessment*] on the Subject Real Property for _____[*specify period for which assessment is made*];

[*If maintenance fees are to be prorated:*]

(c) Fees or charges of _____[*name of person or entity providing service*] for maintenance of the Subject Real Property for the period _____[*specify period for which fees or charges have been or will be incurred*];

[*If homeowner's association dues are to be prorated:*]

(d) _____[*name of association*] dues for _____[*specify period for which dues will be paid or due*];

[*If premium for insurance to be assigned or transferred to buyer is to be prorated:*]

(e) The premium for _____[*name of insurer*] _____[*type of insurance, e.g., fire and extended special coverage*] Policy No. _____, for the policy period from _____ to _____[*dates*];

[*If rents are to be prorated in connection with a sale of income-producing or rental property, add (f) and (g), below:*]

(f) Rents paid in advance for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Buyer and debit the account of Seller with the portion of the rent attributable to the portion of the rental period after the close of escrow; and

(g) Rents owing for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Seller, and debit the account of Buyer with the portion of the rent attributable to the portion of the rental period before the close of escrow.

Proration Outside of Escrow

12. _____[*Describe specific items to be prorated out of escrow, e.g.,* Utility bills, telephone bills] and other costs, charges, expenses, and items of income arising from or attributable to the use or maintenance of the Subject Real Property that you have not been expressly instructed to prorate shall, if proration is required, be prorated by Seller and Buyer outside of this escrow.

[*Add the following provision if buyer is to assume existing loan:*]

Adjustments Based on Existing Loan

13. (a) The contract between Seller and Buyer provides that Buyer is to pay a total purchase price of $_____ and that the balance of the existing loan from _____[*name of existing lender*] that Buyer will assume is to be credited against that total purchase price. In preparing their instructions, the parties have estimated that the balance of the existing loan will be $_____ as of the close of escrow

and that Buyer will therefore be required to deposit the sum of $_____ into escrow for payment of the purchase price. You are to determine the precise amount that Buyer will be required to deposit into escrow for the purchase price, however, by crediting the actual balance of the existing loan as of the date of the close of escrow against the total purchase price of $_____. If the actual balance of the existing loan as of the close of escrow is greater than $_____[*parties' estimate of balance*], you will credit the difference against the amount that these instructions require Buyer to deposit for the purchase price and debit the account of Seller accordingly; if it is less than $_____[*parties' estimate of balance*], you will debit the difference against the amount that these instructions require Buyer to deposit for the purchase price and credit the account of Seller accordingly.

[*Choose one of the following paragraphs:*]

[*If parties contemplate that lender will return funds in impound account to seller:*]

(b) These instructions assume that _____[*name of existing lender*] will return to Seller the funds it is presently holding in the tax and insurance impound account established for the existing loan when the existing loan is assumed by Buyer and that Buyer will make a separate payment to _____[*name of existing lender*] of the funds required for the maintenance of the impound account. If _____[*name of existing lender*] retains the funds it is presently holding in the impound account and applies them for the benefit of Buyer, any funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

[*Or, if parties contemplate that lender will retain funds in impound account and that seller will receive a credit in the amount of the funds retained:*]

(b) The funds presently held by _____[*name of existing lender*] in the tax and insurance impound account established for the existing loan will be retained in that impound account by _____[*name of existing lender*] and applied to the maintenance of the account for the benefit of Buyer. The funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

Credits to Seller's Account

14. Credit the account of Seller and debit the account of Buyer with the following items:

[*If seller is to receive credit for past due rents in connection with sale of income-producing or rented property:*]

(a) An amount equal to the total of all rents owing from tenants of the Subject Real Property for rental periods ending before the date on which this escrow closes;

[*If monies held in impound account are to be retained by lender because of buyer's assumption of loan:*]

(b) An amount equal to the amount of the funds retained by _____[*name of lender*] in the tax and insurance impound account established for the loan secured by the first [*or* second *or* other priority] deed of trust on the Subject Real Property shown as _____[exception/item/*or other designation*] on the Preliminary title report attached to these instructions as Exhibit A; and

(c) [*List any other sums or items to be credited to seller.*]

Credits to Buyer's Account

15. Credit the account of Buyer and debit the account of Seller with the following items:

[*If buyer is to receive credit for prepaid rents and security deposits for which liability is assumed in connection with sale of income-producing or rented property, use (a) and (b), below:*]

(a) An amount equal to the total of all rents prepaid by tenants of the Subject Real Property for rental periods commencing after the date on which this escrow closes;

(b) An amount equal to the total of all security deposits held for tenants of the Subject Real Property for which Buyer is to assume responsibility, in accordance with the schedule deposited in escrow by Seller; and

(c) [*List any other sums or items to be credited to buyer*.]

Payoff of Existing Lender

16. You are authorized to disburse to _____[*name of lender or holde*r] on behalf of Seller, from the funds held for Seller's account, an amount equal to the balance due on the loan secured by the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A, as shown on the payoff demand statement that _____[*name of lender or holder*] has placed in escrow [*or, if the payoff figure has been determined*: an amount equal to the unpaid principal balance of $_____, plus interest thereon at a rate of $_____ per day from _____ to _____ (*date*s), plus a prepayment penalty of $_____, minus the impound account balance of $_____], when, and only when:

(a) You are otherwise authorized, under Seller's escrow instructions, to record and deliver the grant deed deposited by Seller and close escrow;

(b) You have received in escrow, and are authorized and prepared to cancel and deliver to Seller, the original promissory note evidencing the loan;

(c) You have received in escrow, and are authorized and prepared to deliver to Seller, the original of the deed of trust securing the loan; and

(d) You have recorded and delivered to Seller a duly executed reconveyance of the deed of trust securing the loan.

Payoff of Other Lien Claimant

17. You are authorized to disburse to _____[*name and address of other lien claimant*] on behalf of Seller, from the funds held for Seller's account, _____[the amount necessary to _____ (satisfy *or* discharge *or other appropriate characterization*); *or, if amount has been determined*: the sum of $_____, in full satisfaction of] the _____[*description of lien or underlying obligation, e.g.*, judgment *or* tax lien *or* mechanic's lien] shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A, as set forth in the itemized statement and demand for payoff that _____[*name of lien claimant*] has placed in escrow, when, and only when:

(a) You are otherwise authorized, under Seller's escrow instructions, to record and deliver the grant deed deposited by Seller and close escrow;

(b) You have _____[*action required to clear lien, e.g,* filed and recorded, recorded] a duly executed _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment,

release of mechanic's lien] and are authorized and prepared to deliver it to Seller; and

(c) [*Specify other conditions, such as receipt in escrow of duly executed release.*]

Disbursements From Funds Held for Seller

18. When you have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer, you are authorized to disburse on behalf of Seller, from the funds held for Seller's account at the close of escrow, the sums necessary to pay the following costs, charges, expenses, and items:

[*Select appropriate provisions from those below:*]

(a) The real estate broker's commission of $_____ owing to _____[*name and address of real estate broker; if commission is to be split, add*: and the real estate broker's commission of $_____ owing to _____ (*name and address of real estate broker*)];

(b) The documentary transfer tax and [*if local taxes are to be split: one half of*] any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

(c) The reconveyance fees charged by _____[*name of trustee*] for the reconveyance of the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

(d) The recording fees charged for the recording of the _____[*specify instruments for which seller is to pay recording fees, e.g.*, reconveyance of the deed of trust];

(e) The notary fees for any notary services performed for Seller;

(f) [*If title insurance costs are to be split: One half of*] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

(g) [*If escrow fees are to be split: One-half of*] Your fees and charges for the escrow services you have performed in connection with this escrow;

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification,] that you are authorized to pay on Seller's behalf under the provisions of Paragraphs 6, 7, and 8; and

(i) [*List any other costs, charges, or expenses to be paid out of escrow by seller*.]

Disbursement of Balance to Seller

19. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses, and items that you have been authorized to pay on Seller's behalf under the provisions of these instructions, you shall disburse the remaining balance of the funds held for the account of Seller to Seller in the following manner: _____[*select the appropriate provision below or specify other method of disbursement:*]

[*If seller will pick up check:*]

Notify Seller by [telephone *or* telegram *or specify other means of communication*] that you are prepared to disburse

those funds, draw a check to Seller on your escrow account for the balance of the funds held for Seller's account, and hold that check for Seller at your office at _____[*specify address*]. The check will be picked up at your office by Seller [*or specify name of designated officer, employee, or agent who will pick up check for seller*].

[*Or, if check will be mailed to seller:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; mail that check to Seller _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] at _____[*address to which check is to be mailed*].

[*Or, if check will be deposited in seller's bank account:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; deposit that check in _____[*name of bank or financial institution*] account no. _____, a _____[*type of account*] maintained in the name of Seller, at the _____[*name of branch*] of _____[*name of bank or financial institution*], which is located at _____[*address of branch at which account is maintained*]. Mail written confirmation of the deposit, and a copy of the deposit slip evidencing the deposit, to Seller as soon as the deposit is made.

Instruments to Be Recorded for Seller

20. When you have closed escrow and recorded the grant deed conveying the Subject Real Property to Buyer [*if pertinent, specify other instruments, e.g.,* and the first deed of trust executed for the security and benefit of _____ (*name of lender*),] record, in the order set forth below, the following instruments and documents:

[*If seller is financing a portion of the purchase price, use (a), (b), and (c), below:*]

(a) The _____[first *or* second *or specify other priority*] deed of trust executed by Buyer for the security and benefit of Seller;

(b) Seller's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)];

(c) Seller's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)].

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(d) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Buyer that _____[*specify purpose of agreement, e.g.,* provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller]; and

(e) [*List and describe other instruments and documents that should be recorded to protect seller's interests.*]

Delivery of Instruments and Documents to Seller

21. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Seller, or cause to be delivered to Seller, the following instruments and documents:

[*If seller is financing portion of purchase price, include (a) through (f), below:*]

(a) The request for a copy of any notice of default or any notice of sale under the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)];

(b) The request for written notice of any and all delinquencies on the obligation secured by the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)];

(c) The promissory note executed in favor of Seller by Buyer;

(d) The _____[first *or* second *or specify other priority*] deed of trust executed by Buyer for the benefit of Seller to secure payment and performance of the obligations evidenced by the promissory note;

(e) The title insurance policy insuring Seller's beneficial interest in the _____[first *or* second *or specify other priority*] deed of trust that Buyer has executed for the benefit and security of Seller;

(f) The policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property and naming Seller as the _____[first *or* second *or other priority*] loss payee.

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(g) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Buyer that _____[*specify purpose of agreement, e.g.,* provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is paying off existing loan, add (h) through (j), below:*]

(h) The original promissory note evidencing the loan made to Seller by _____[*name of lender*];

(i) The deed of trust securing the loan made to Seller by _____[*name of lender*];

(j) The reconveyance of the deed of trust securing the loan made to Seller by _____[*name of lender*];

[*If seller is paying off other lien claimants, add (k) and (l), below:*]

(k) The _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment or release of mechanic's lien] executed by _____[*name of lien claimant*];

(l) _____[*other documents to be deposited in escrow to evidence satisfaction or release of underlying obligation, e.g.,* The general release executed by _____ (*name of lien claimant*)];

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(m) The copy of the assignment that Buyer has executed to acknowledge the assignment and receipt of security

deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property;

[*If fees or charges for corrective pest control work or pest control certification are to be paid out of escrow:*]

(n) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the corrective structural pest control work and final certification ordered pursuant to these instructions;

[*If seller is to pay all or part of cost of title insurance policy:*]

(o) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If seller is to pay escrow fees or other costs:*]

(p) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Seller for _____[*specify applicable items, e.g.,* transfer taxes, reconveyance fees, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Close of Escrow

22. For the purposes of these instructions, this escrow shall be deemed to have closed when the grant deed conveying the Subject Real Property to Buyer has been recorded and the date on which the grant deed is recorded shall be deemed to be the date of the close of escrow. This escrow shall be considered to be in a condition to close when you are authorized under Seller's and Buyer's instructions, and when you are otherwise able, to record the grant deed.

Time for Close of Escrow

23. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

24. (a) By mutual agreement of Seller and Buyer, this escrow may be canceled at any time before the close of escrow either by means of supplementary escrow instructions directing you to cancel the escrow or by means of a written notice of cancellation.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], _____[*select the appropriate provision below:*]

[*If escrow is to be automatically canceled:*]

it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation.

[*Or, if affirmative action by party is necessary to effect cancellation:*]

you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance

with these instructions.

[*If affirmative action is necessary to effect cancellation, include one of the following paragraphs:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also include the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices. Any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instruments, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow by giving notice to the parties that you are exercising your right to cancel.

(f) Upon cancellation of the escrow, you shall return to Seller all funds, instruments, documents, and other items that Seller has deposited into escrow.

[*If time is to be made of the essence:*]

25. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Cooperation of Parties

26. Seller and Buyer shall cooperate with you in carrying out the instructions they deposit with you and completing this escrow. Seller and Buyer shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

27. You are authorized and entitled to assume that instruments, documents, and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

28. You are authorized to record any instrument, agreement, or document the recording of which is necessary or appropriate to secure the issuance of any policy of title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Furnishing of Copies

29. You are authorized to furnish copies of Seller's instructions, and of any instruments, documents, or writings deposited in escrow, to _____[*identify by name and capacity persons who you want be able to obtain copies of any instructions or documents on request, e.g.*, the prospective title insurer, buyer, buyer's lender, and the attorneys and real estate brokers for the parties]. You are authorized to furnish copies of Seller's instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure the issuance of any policy of title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Deposit of Funds in Escrow

30. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.*, a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at _____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you; funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement. Provided, however, that the deposit into escrow of a written commitment to deliver a check or funds into this escrow that is made to you or to a party to the escrow by a bank, savings and loan association, insurance company, or other lender may, in your sole discretion, be deemed to be the equivalent of a deposit into escrow of the funds that the lender has committed to deposit.

Disbursement of Funds Held in Escrow

31. You shall not make any disbursements from funds held in escrow unless they are authorized by the instructions you have received from Seller and Buyer. Unless a prior disbursement is specifically authorized by the instructions you have received from Seller and Buyer, you shall not make any disbursements from funds held in escrow until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

32. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in writing, must be signed by the party giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*], to each party to whom notice is to be given at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered or, if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Seller are to be personally delivered or mailed to _____[*seller or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Buyer are to be personally delivered or mailed to Buyer [*or name of authorized agent to whom notice is to be delivered; or, if buyer is to designate an agent, add*: or to an agent authorized under Buyer's written instructions to receive notice on Buyer's behalf], at _____[*specify address or state*: at the address designated in Buyer's written instructions].

Conflicting Instructions

33. If there is a material conflict between the instructions that you receive from Seller and the instructions that you receive from Buyer, you shall notify Seller and Buyer forthwith of the precise nature of the conflict by telephone and by mail and you shall take no further action to carry out the particular instructions that are the subject of the conflict until the conflict has been resolved or eliminated by a valid amendment to the conflicting instructions or by a final order or judgment of a court of competent jurisdiction.

Conflicting Demands or Claims

34. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow or conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received or conflicting demands or claims concerning your obligations as escrow holder. Until any such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties, and to retain in escrow any funds, instruments, documents, or items, that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict.

Revocability of Instructions Until Deposit of Buyer's Instructions

35. Until Buyer has deposited with you signed written instructions that are sufficient to enable you to complete the sale of the Subject Real Property on the conditions set forth in these instructions, Seller shall have the right to revoke these instructions and shall have the right to the return of any instruments, documents, items or funds deposited with you.

Sole Instructions

36. Unless and until they are subsequently amended or canceled in the manner provided in these instructions, these instructions and the written instructions initially deposited with you by Buyer shall constitute the complete escrow instructions, and the only escrow instructions, of Seller and Buyer, and shall revoke and supersede any prior oral instructions you may have received.

Amendments

37. Once these instructions and Buyer's initial written instructions have been deposited with you, the respective instructions of Seller and Buyer may only be amended, supplemented, or modified by means of a written amendment that has either been signed or approved in writing by both Seller and Buyer. No written amendment, supplement, or modification of Seller's instructions or Buyer's instructions shall be effective or valid unless and until it has been deposited with you and unless and until Seller and Buyer have either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of the Seller's or Buyer's written instructions shall be ineffective and invalid.

Waiver

38. Any term or condition of this escrow or the instructions deposited by Seller and Buyer may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or the instructions deposited by Seller and Buyer can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit. No written waiver shall be effective or valid unless and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

39. These escrow instructions were prepared by _____[*name of attorney*], attorney for Seller and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

40. Please acknowledge your receipt and acceptance of these escrow instructions [*if other items will be deposited with instructions, add*: and the items deposited with them] and your agreement to serve as escrow holder by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller.
_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

Acceptance by Buyer

I have read the foregoing escrow instructions of Seller and I approve and accept them.
_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions [*if other items will be deposited with instructions, add*: and the items listed in Paragraph _____ of those instructions].
_____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale [*or* transfer] of the Subject Real Property from _____[*name of seller*] to _____[*name of buyer*] and to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, the instructions submitted by _____[*name of buyer*], and any additional instructions or amendments submitted by the parties.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
1. Sale of Real Property

11-26 California Legal Forms--Transaction Guide § 26.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.201 Buyer's Escrow Instructions

[1] Comment

[a] Use of Form

This form is a set of escrow instructions that may be used by the buyer in a transaction in which the seller and buyer submit separate instructions to the escrow holder pursuant to a contract for the sale of residential or commercial property. For a corresponding set of separate seller's instructions, see *§ 26.200[2]*. For a discussion of separate instructions and the general considerations relevant to the use and adaption of this form, see *§ 26.200[1]*.

This form, like the other escrow instructions in this chapter, is designed for an escrow in which the instructions will be drafted by the attorneys for the parties. Most escrow agents prepare and make available their own preprinted escrow instructions. The Escrow Law [*Fin. Code § 17000 et seq.*] imposes certain legal requirements and restrictions on instructions that will be prepared or used by escrow agents subject to its provisions. For a discussion of these restrictions, see *§ 26.200[1]*.

[b] Construction and Operation of Separate Instructions

When the seller and buyer submit separate escrow instructions, they will be read and construed together to ascertain the terms and conditions of the escrow [*Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327]* . If the respective instructions of the parties are not in agreement as to the essential terms and conditions of the escrow, they will not operate to create a valid escrow [*Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167* ; *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366]* . The buyer's instructions contained in this form are drafted and organized to correspond with the separate seller's instructions *set out in § 26.200[2]*.

[c] Deposit Clauses

The buyer's deposit clauses [*see* Paragraphs 3, 4, and 5 of form] specify the funds and identify the instruments, documents, and other items that the buyer is depositing or will deposit into escrow in order to enable the escrow holder to comply with the conditions that must be performed or fulfilled by the buyer before the seller will authorize the recording and delivery of the deed.

The seller will require that funds sufficient to pay the purchase price be deposited into escrow. Accordingly, the buyer will have to deposit funds sufficient to pay that portion of the purchase price that is not being paid from the proceeds of a loan or being financed by the seller, and to cover the escrow fees and costs that the buyer is obligated to pay. For a discussion of other conditions that might be imposed by the seller, see *§ 26.200[1]*.

If the purchase price is being financed by a third party lender or by the seller, the buyer ordinarily will be required to execute and deposit in escrow a note and deed of trust, an insurance policy or policy memorandum, and other agreements or statements required by the seller or the lender. Usually, these instruments and documents will be prepared by the third party lender or the seller and deposited in escrow for execution by the buyer.

To minimize the risk of having funds tied up indefinitely in an escrow in the event of a dispute, funds generally are not deposited into escrow until shortly before the deadline imposed by the underlying contract. For a general discussion of deposits in escrow, see *§ 26.200[1]*.

[d] Processing of Escrow

[i] Arrangements With New Lender

If a portion of the purchase price will be paid from the proceeds of a new loan that is to be obtained by the buyer, the buyer will usually instruct the escrow holder to contact the lender and request that it place in escrow the instruments, agreements and documents that it will require the buyer to execute, together with the loan proceeds and instructions authorizing disbursement of the loan proceeds when the buyer has complied with the conditions imposed by the lender. Paragraph 6 of this Form instructs the escrow holder to contact the buyer's lender and arrange for the completion of the loan transaction. For a set of new lender's instructions, see *§ 26.220[2]*.

[ii] Arrangements With Existing Lender

A buyer who is to assume an existing loan will usually instruct the escrow holder to obtain a beneficiary's statement setting forth and itemizing the obligations secured by the existing deed of trust and to credit the balance owing against the purchase price or adjust the purchase price accordingly. Frequently, particularly if the sale is made contingent upon the lender permitting an assumption, the buyer will instruct the escrow holder to request the lender to place in escrow an assumption agreement and a statement of any assumption fee or other charges to be paid by buyer. Paragraph 7 of this Form instructs the escrow holder to secure a beneficiary's statement and arrange for buyer's assumption of an existing loan. Paragraph 15 of this Form instructs the escrow holder to adjust the purchase price to reflect the difference between the estimated loan balance used by the parties and the actual loan balance shown by the beneficiary's statement. For a request for a beneficiary's statement, see *§ 26.242[2]*.

[iii] Contingencies

Real property sales contracts usually contain provisions making the buyer's obligation to purchase the property contingent on the occurrence or nonoccurrence of specified events or conditions other than the seller's performance. For example, a contingency provision may make the buyer's obligation contingent on the buyer's obtaining a written commitment for a loan, on the sale of the buyer's present residence, or on the buyer's approval of a soils report or a structural engineer's report. For discussion of the contingency provisions most commonly found in real property sales

contracts, see Ch. 23, *Real Property Sales Agreements* .

In many cases, some (or even all) of the conditions imposed by contingency provisions will be satisfied or waived before the escrow instructions are drafted and need not be dealt with in the instructions. However, if the sale is still contingent when the buyer's instructions are drafted, they should instruct the escrow holder that the underlying contract and the escrow are contingent on the occurrence or nonoccurrence of the specified condition. This is particularly important if the buyer may be required to deposit funds into escrow before the occurrence or nonoccurrence of the condition can be determined.

The buyer's instructions should also provide a clear procedure, consistent with that provided in the underlying contract, for canceling the escrow pursuant to the contingency provision. Paragraph 11 of this form contains alternative provisions embodying the two most common approaches found in contingency provisions: (1) a provision instructing the escrow holder that the escrow is to be canceled if the buyer gives written notice of the occurrence or nonoccurrence of the specified condition and the buyer's intent to exercise the right to cancel; and (2) a provision instructing the escrow holder that the escrow is to be canceled automatically unless the buyer gives written notice, within a specified period, that the contingency has been satisfied or waived.

[e] Conditions Precedent to Close of Escrow and Disbursement of Funds

[i] Terms and Conditions

Paragraph 12 of this form sets forth the conditions precedent to the transfer and disbursement of the funds deposited in escrow by or on behalf of the buyer. The buyer's instructions should clearly specify the terms and conditions that must be performed or fulfilled before the escrow holder is authorized to disburse the funds deposited by or on behalf of the buyer. From the buyer's point of view, the two most important conditions are usually that: (1) the escrow holder must have recorded the grant deed or other instrument conveying the property to buyer and must be authorized and prepared to deliver it to buyer; and (2) a title insurer must be obligated and prepared to issue in buyer's favor a policy of title insurance providing the coverage required by the underlying contract. The disbursement of the funds should also be conditioned on the performance of the other material obligations assumed by seller under the terms of the contract and the satisfaction or fulfillment of conditions and contingencies that are designed to protect the buyer's interest.

[ii] Separate Conveyances and Agreements Benefitting Property

If the contract calls for the seller to execute a separate grant of easement, party wall or boundary agreement, or some other separate instrument or agreement benefitting the property to be conveyed to the buyer, the instructions should require that the seller have executed the agreement; that, if recordable, it have been recorded; and that the escrow holder be authorized and prepared to deliver it to the buyer. If the contract provides for the conveyance of personal property or the assignment of a maintenance or service contract affecting the property, authority to disburse should also be conditioned on the seller's execution of a bill of sale or assignment and its deposit in escrow for delivery to the buyer.

[iii] Termite or Pest Control Clearance

Most real property sales transactions are contingent on obtaining some form of termite or structural pest control clearance; usually a certificate complying with *Bus. & Prof. Code § 8519*. Ordinarily the buyer will require such a clearance as an assurance that the property is free from termite damage, dryrot, and similar defects. Furthermore, most lenders will independently require that a structural pest control clearance be deposited into escrow as a condition of making the loan, regardless of whether the buyer requires such a clearance.

If the initial inspection reveals damage that must be fixed before the structural pest control operator will issue a clearance, it may be necessary to pay the cost of the corrective work out of escrow. If the seller is required to pay for the work, he or she may not have sufficient cash on hand and may have to rely on the proceeds from the sale. On the other

hand, if the buyer is required to pay for all or any part of the work, he or she will want to be sure that escrow will close and the sale will actually be consummated before his or her funds are disbursed for that purpose.

Paragraphs 8, 9, and 10 of this form govern structural pest control clearances. These provisions assume that the parties have already ordered and received an initial inspection report that specifies a price for any necessary corrective work, and that they have agreed on how responsibility for payment of that cost will be allocated between buyer and seller. Paragraph 8 instructs the escrow holder concerning the existence of a pest control certification contingency and the procedure to be followed to complete necessary corrective work and secure the certification. Paragraph 9 authorizes the disbursement of funds from escrow to pay for the corrective work and certification, but only after (1) close of escrow and recordation of the deed, (2) deposit of the clearance, and (3) receipt of the operator's fee statement. In addition, disbursement is authorized only if the operator's charges do not exceed the amount of its original estimate. This last condition is designed to protect the parties in the event that during the course of performing the corrective work the structural pest control operator discovers additional damage that was not visible during the initial inspection and that will cause the repair costs to significantly exceed the original figure. If this should occur, the parties may have to reconsider whether to go forward with the sale on the original terms, and how the additional costs should be apportioned. The effect is to require the parties to submit supplemental escrow instructions dealing with the extra cost if this situation should occur; this is fairer to both parties than initially requiring one or the other to pay unanticipated and possibly substantial additional costs. Paragraph 10 instructs the escrow holder as to how the cost for the corrective work and certification is to be apportioned.

If the sale is contingent on the seller obtaining a particular type or clearance or performing particular corrective work, the escrow holder should receive separate instructions concerning the buyer's right to cancel the contract. The contingency provisions set forth in Paragraph 11 of this form should be used for this purpose.

[iv] Other Contingencies

If the buyer's obligation to purchase the property is still subject to other contingencies when the escrow instructions are deposited, the disbursement of the funds should be expressly conditioned on buyer's deposit of a written notice that the contingencies have been satisfied or waived. For a notice of satisfaction of a contingency, see *§ 26.260[2]*. For a notice of waiver of a contingency, see *§ 26.261[2]*.

[v] Owner's Association Membership

If the property is a condominium or townhouse, the buyer's instructions should require that the seller must have properly endorsed and deposited in escrow for delivery to the buyer any membership certificates, assignment, or other documents needed to transfer the seller's membership in the condominium or townhouse owner's association to the buyer.

[vi] Deposit of Leases and Rent Statements

If the property is rental property or other income-producing property, the contract will usually require the seller to deliver all of the leases or rental agreements that are in effect and schedules or statements showing the status of all rents, all security deposits held, and other obligations owed under the leases or rental agreements. In such cases, the disbursement of the buyer's funds should be conditioned on the seller's deposit of the leases, rental agreements, schedules, and statements into escrow for delivery to the buyer.

[f] Standard Provisions

This form contains standard provisions, appropriate for use by either party, concerning prorations and adjustments [*see* Paragraphs 13-17 of form], payment of escrow fees and costs [*see* Paragraph 18 of form], cancellation of escrow [*see* Paragraph 24 of form], amendments and supplemental instructions [*see* Paragraph 37 of form], waiver [*see* Paragraph 38 of form], limitations on the escrow holder's obligations [*see* Paragraphs 27, 33, and 34 of form], approval of

instructions by the other party [*see* paragraph following buyer's signature block], and acceptance by escrow holder [*see* Paragraph 39 and final paragraph of form]. For a general discussion of these standard provisions, see *§ 26.200[1]*.

[2] Form

Buyer's Escrow Instructions

BUYER'S ESCROW INSTRUCTIONS

TO: _____[*name of escrow holder*]

_____[*address*]

Preliminary Recitals

1. _____[*name of buyer*] (hereinafter sometimes referred to as "Buyer") [*if applicable, describe status, e.g.,* a California corporation or, a limited partnership], has entered into a contract to purchase from _____[*name of seller*] (hereinafter sometimes referred to as "Seller") [*if applicable, describe status, e.g.,* a California corporation *or* a limited partnership,] certain _____[residential *or* commercial] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." Subject to the terms and conditions set forth below, Buyer hereby authorizes and instructs you to open an escrow for the purpose of completing Buyer's purchase of the Subject Real Property to complete the purchase in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow:*]

Disregard of Contract

2. Your obligations as escrow holder are to be determined solely by these instructions, the written instructions initially deposited by Seller, and any subsequent amendments or supplemental instructions jointly submitted by Buyer and Seller. You are not responsible for knowing or interpreting any provisions of the contract on which these instructions are based and shall not rely on any knowledge or understanding you may have of any such contractual provisions in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract between Buyer and Seller for the purchase and sale of the Subject Real Property or any contract purporting to be a contract on which your escrow instructions are based.

Funds to Be Deposited by Buyer Toward Payment of Purchase Price

3. _____[Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit or cause to be deposited into escrow] [*if applicable, specify form of deposit, e.g.,* in cash *or* by certified check], funds totaling $_____, to be applied toward payment of the purchase price for the Subject Real Property, which funds will consist of the following:

[*If deposit is required:*]

(a) Buyer's initial deposit toward payment of the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow *or* will be deposited into escrow on or before

_____ (*date*)];

[*If deposit is to be increased:*]

(b) Buyer's additional deposit toward payment of the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow or will be deposited into escrow on or before _____ (*date*)];

[*If purchase price is to be paid in cash, use (c), below:*]

(c) [The balance of] the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow or will be deposited into escrow on or before _____ (*date*)].

[*Or, if purchase price is to be paid by downpayment plus proceeds of a purchase money loan, use (c) and (d), below:*]

(c) [The balance of] Buyer's downpayment on the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow *or* will be deposited into escrow on or before _____ (*date*)]; and

(d) The proceeds of a purchase money loan that Buyer will obtain from _____[*name of lender; or, if Buyer has not determined who lender will be*: a third party lender to be selected by Buyer] (hereinafter sometimes referred to as "Buyer's lender"), in the sum of $_____.

Additional Funds to Be Deposited by Buyer

4. In order to complete the purchase of the Subject Real Property and to comply with the terms and conditions of this escrow, Buyer will deposit into escrow on or before _____[*date*], provided that Buyer is notified thereof, any additional funds that are needed to pay the following costs, charges, expenses and items. You are to notify Buyer of the amounts necessary to pay the following expenses at least _____ days before _____[*date of close of escrow*] or, in the case of costs, charges, expenses, and items that cannot be determined by that date, as soon as they become known.

[*If buyer is to assume existing loan:*]

(a) Any fees or charges assessed by _____[*name of lender or holder*] in connection with Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[Exception *or* Item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to obtain new loan, and loan fees and costs are to be paid directly by buyer:*]

(b) The _____[*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, tax service contract charge,] and other costs, charges, fees, and expenses payment of which is required by Buyer's lender as a condition of making the loan that Buyer is to obtain from it to finance the purchase price of the Subject Real Property;

[*If buyer is to pay all or part of transfer taxes:*]

(c) [*If documentary transfer tax is to be split*: One half of] The documentary transfer tax and [*if local taxes are to be split*: one half of] any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

[*Continue with the following:*]

(d) The recording fees charged for the recording of _____[*specify instruments for which buyer is to pay recording fees, e.g.,* the grant deed conveying the Subject Real Property to Buyer];

(e) The notary fees for any notary services performed for Buyer;

[*If buyer is to pay all or part of title insurance costs:*]

(f) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay all or part of escrow fees:*]

(g) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*If buyer is to pay for all or part of any corrective pest control work or cost of obtaining pest control clearance:*]

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification,] that you are authorized to pay on Buyer's behalf under Paragraphs 8, 9, and 10;

[*List any other individual items, then continue with the following:*]

(i) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(j) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Instruments and Documents to Be Deposited by Buyer

5. _____[Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit into escrow] the following instruments, documents, and items:

[*If purchase is to be financed by a third party lender, include (a) through (d), below:*]

(a) The promissory note, duly executed, furnished by Buyer's lender and evidencing a principal obligation of $_____ and certain other obligations in favor of Buyer's lender;

(b) The _____[first *or* second *or specify other priority*] deed of trust, duly executed and in recordable form, furnished by Buyer's lender and securing payment and performance of the obligations evidenced by the above-mentioned promissory note;

(c) An original policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable*] lender's loss payable endorsement naming Buyer's lender as the _____[first *or* second *or other priority*] loss payee;

(d) Any other documents, instruments, or items the deposit of which is made a condition to the disbursement of the

loan proceeds to be deposited by Buyer's lender under any instructions deposited by Buyer's lender;

[*If seller is financing a portion of purchase price, include (e) through (g), below:*]

(e) The duly executed original of the promissory note evidencing a principal obligation of $_____ that Seller has deposited into escrow for execution by Buyer;

(f) The original, duly executed and in recordable form, of the _____[first *or* second *or specify other priority*] deed of trust securing the above-mentioned note that Seller has deposited into escrow for execution by Buyer;

(g) An original policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable*] lender's loss payable endorsement naming Seller as the _____[first *or* second *or other priority*] loss payee;

[*If buyer is to assume existing loan:*]

(h) The agreement, duly executed, furnished by _____[*name of existing lender or holder*] for Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(i) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], duly executed and in recordable form, furnished by Seller and providing for _____[*specify object of agreement, e.g.,* the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If underlying contract is to be deposited in escrow (see Paragraph 2 above for alternative provision*):]

(j) A copy of the contract between Seller and Buyer for the sale and purchase of the Subject Real Property that is the basis for these instructions; and

(k) _____[*List any additional items to be deposited by buyer.*]

[*Include the following provision if purchase is to be financed by third party lender:*]

Request for New Lender's Documents and Instructions

6. The purchase price for the Subject Real Property is to be financed in part by a loan that Buyer will obtain from _____[*name and address of lender; or, if buyer has not determined who lender will be: a third party lender to be selected and designated in writing by Buyer if lender has not previously been designated by shorthand reference, add*: (hereinafter sometimes referred to as "Buyer's lender")]. As soon as possible after opening this escrow [*or, if Buyer has not determined who lender will be*: after Buyer's lender is designated by Buyer], contact Buyer's lender and advise it that you have opened this escrow for the purpose of completing the sale of the Subject Real Property to Buyer. Request that it deposit in escrow as soon as possible escrow instructions setting forth the conditions under which it will authorize disbursement of the loan proceeds and the note, deed of trust, and other documents that it will require

Buyer to execute.

[*Add the following provision if buyer is to assume or take the real property subject to an existing loan:*]

Lender's Statement of Balance

7. As soon as possible after opening escrow, contact _____[*name and address of existing lender or holder*] and request that it place in escrow a _____[*if buyer is to assume loan*: beneficiary statement *or, if existing loan is to be paid in full*: payoff demand statement] setting forth the unpaid principal balance and the other information required by *Civil Code Section 2943* regarding the loan secured by the deed of trust shown as _____[Exception *or* Item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A. [*If buyer is to assume existing loan add*: In addition, request that _____ (*name of existing lender*) place in escrow an agreement for Buyer's assumption of the loan and a statement and demand for payment of any assumption fee and any other fees and charges to be assessed for Buyer's assumption of the loan.] Mail Buyer a copy of the above statement as soon as it is received in escrow.

[*If close of escrow is conditioned on performance of corrective structural pest control work and deposit of structural pest control certification, add:*]

Structural Pest Control Certification

8. The close of this escrow is conditioned on the deposit in escrow of a certification by a licensed structural pest control operator, pursuant to the requirements of *Business and Professions Code Section 8519*, that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas. The parties have retained _____[*name of structural pest control operator*] to conduct an inspection of the Subject Real Property and prepare a report in accordance with the requirements of *Business and Professions Code Section 8516*. A copy of that report _____[is being *or* will be *or* has been] deposited into escrow pursuant to Paragraph 5. The parties _____[have authorized *or* will authorize] _____[*name of structural pest control operator*] to perform _____[all corrective work listed in that report as a condition of obtaining a certification that the property is free from active infestation or infection in the visible and accessible areas *or describe work by referring to specific items in report, e.g.,* the corrective work described in Items _____ (*list by number*) of the report], at the price stated in the report. When the corrective work has been completed, _____[Buyer *or* Seller *or* the parties] will obtain a certification that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas, and will deposit with you a true and complete copy of the certification.

[*If cost of corrective work and/or pest control certification is to be paid out of escrow, add:*]

Disbursement of Payment for [Inspections and] Corrective Work

9. You are authorized to disburse to _____[*name of structural pest control operator*], in accordance with Paragraph 10, the sums necessary to pay the fees and charges for the corrective work described in Paragraph 8 [, and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification,] if, and only if, all of the following apply:

(a) You have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) _____[Buyer *or* Seller *or* The parties] has [*or* have] deposited into escrow the certification of _____[*name of structural pest control operator*] pursuant to *Business and Professions Code Section 8519* that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas;

(c) _____[*Name of structural pest control operator*] has deposited in escrow _____[his *or* her *or* its] invoice or statement setting forth the fees and charges for the corrective work described in Paragraph 8 [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification]; and

(d) The total of the fees and charges made by _____[*name of structural pest control operator*] for the corrective work [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification] does not exceed the price for those repairs as stated in the inspection report [, plus any standard inspection, reinspection, and certification fees, as applicable].

[*If cost of corrective work and/or pest control certification is to be paid out of escrow, add:*]

Responsibility for Expense of [Certification and] Corrective Work

10. Fees and charges for the corrective work listed in Paragraph 8, up to but not exceeding the price specified in the inspection report for performance of that work [, as well as any fees for (the inspection and) any reinspection of the Subject Real Property and the preparation and delivery of the required certification], subject to the conditions specified in Paragraph 9, will _____[*select the appropriate alternative below*]

[*if cost is to be borne solely by one party, use:*] be the sole responsibility of _____[Seller *or* Buyer] and shall be paid from funds held for _____[Seller's *or* Buyer's] account at the close of escrow.

[*OR*]

[*if cost is to be split between the parties, use:*] be borne one half by Seller and one half by Buyer, and will be paid from the respective funds held for the accounts of the parties at the close of escrow.

[*OR*]

[*if one party is to pay cost up to a specified limit and other party is to pay balance, use:*] be paid as follows: _____[Seller *or* Buyer] will pay the fees and charges, up to a limit of $_____; and _____[*other party*] shall pay any charges in excess of $_____[*repeat amount specified above*], up to but not exceeding the full price specified in the inspection report for performance of the corrective work described in Paragraph 8. Payment shall be made from the respective funds held for the accounts of the parties at the close of escrow.

[*If any contingencies specified in the contract of sale remain to be satisfied or fulfilled, include a separate provision such as the one below for each such contingency:*]

_____ **[** *Nature of contingency, e.g.,* **Loan] Contingency**

11. The agreement for the purchase and sale of the Subject Real Property and this escrow are conditioned on

_____[*characterize contingency, e.g.,* Buyer obtaining a written commitment for a fixed rate loan of $150,000, payable in equal monthly installments over a 30 year term, at an interest rate not to exceed 12 percent per annum and with loan fees not to exceed $3,000]. [*Select the appropriate provision below:*]

[*If escrow is to proceed unless buyer affirmatively notifies escrow holder of failure of condition, use:*]

If Buyer notifies you in writing _____[on or before _____ (*date*), *or* before the close of escrow] that _____[*specify facts establishing failure of condition, e.g.,* the required loan commitment has not been obtained] and that _____[he *or* she *or* it] is exercising the right to cancel the escrow, this escrow will be immediately and automatically canceled and no further instructions from or notice to any party will be required to make the cancellation effective.

[*OR*]

[*If escrow is to be canceled unless buyer affirmatively establishes satisfaction of condition, use:*]

This escrow will be immediately and automatically canceled on _____[*date*], without any further instructions from or notice to any party, unless, before that date, Buyer _____[*describe method of establishing satisfaction of condition, e.g.,* notifies you in writing that the required loan commitment has been obtained] [*if desired, add*: or notifies you in writing that _____ (he *or* she) is waiving the right to condition the sale and the escrow on _____ (*describe contingency*)].

[*Continue with the following:*]

If the escrow is canceled, you must return to Buyer all funds, instruments, and other items that Buyer has deposited into escrow.

Conditions Precedent to Close of Escrow and Disbursement of Buyer's Funds

12. You are authorized to disburse to Seller, from the funds held for Buyer's account at the close of escrow, the sum of $_____[*amount to be deposited into escrow for purchase price*], plus or minus any other sums that you are required to credit or debit to Seller's account under the escrow instructions you receive, when, and only when, all of the following apply:

(a) You have recorded a grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) _____[You are *or* _____ (*Name of title insurer*) is] prepared and obligated to issue _____[your *or* its] California Land Title Association standard coverage [*or specify other form of policy*] title insurance policy in the amount of $_____ insuring that title to the Subject Real Property is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and adverse interests except the following: _____[*list, describing with specificity, any exceptions or items shown in preliminary title report that buyer has agreed to accept, any deeds of trust or mortgages that will be recorded to secure obligations buyer has incurred to finance the purchase, and any easements, covenants, or other interests that buyer is to convey or assume under the terms of the escrow*];

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(c) You have recorded _____[a party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], executed by Seller, _____[*specify purpose of agreement, e.g.,* providing for the construction and maintenance of a wall between the Subject Real Property and the adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(d) Seller has executed and deposited into escrow, and you are authorized and prepared to deliver to Buyer, a bill of sale conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract, or other contract relating to property:*]

(e) Seller has executed and deposited in escrow, and you are authorized and prepared to deliver to Buyer, the original of the _____[*describe contract, e.g.,* the elevator service contract, dated March 18, 1987, between Seller and ABC Corporation] and a duly executed assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(f) Seller has deposited in escrow, and you are authorized and prepared to deliver to Buyer, the originals of all leases now in effect between Seller and the present tenants of the Subject Real Property [*or, if entire property leased under one lease*: the original of the lease between Seller and _____ (*name or names of lessees*), the present tenant[s] of the Subject Real Property];

[*If adjustments or prorations are to be made for rents that are delinquent or paid in advance in connection with sale of income-producing property:*]

(g) Seller has deposited a rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property in escrow [*if buyer must approve rent schedule, add*: and the rent schedule has been examined and approved in writing by Buyer];

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) Seller has deposited in escrow, and you are authorized and prepared to deliver to Buyer, a schedule showing the security deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property and a duly executed assignment of those security deposits to Buyer;

[*If property is part of a condominium or planned unit development:*]

(i) Seller has properly endorsed for transfer to Buyer and deposited into escrow, and you are authorized and prepared to deliver to Buyer, _____[*name of condominium or planned unit development owner's association*] Certificate No. _____[*or specify other document evidencing transfer of association membership*];

[*If property is served by a mutual or private water company:*]

(j) Seller has properly endorsed for transfer to Buyer and deposited in escrow _____[*name of mutual or private water company*] stock certificate No. _____[*or specify other documents evidencing assignment or transfer*];

[*If purchase is to be financed by a third party loan:*]

(k) Buyer's lender has deposited into escrow, and you have credited to Buyer's account, loan proceeds in the sum of $_____[*if loan fees and charges are to be deducted by lender before loan proceeds are deposited, add:*, less the deductions made by Buyer's lender for the _____ (*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, and tax service contract charge,) and other costs, charges, fees, and expenses that Buyer is required to pay to Buyer's lender in connection with the loan];

[*If pest control certification is to be deposited in escrow:*]

(l) You have received in escrow, in accordance with Paragraph 8 of these instructions, the written certification of _____[*name of structural pest control operator or the licensed structural pest control operator retained by the parties*], pursuant to *Business and Professions Code Section 8519*, that the _____[*describe improvements, e.g.,* house, garage, toolshed,] and other improvements located on the Subject Real Property are free of evidence of active infestation or infection in the visible and accessible areas; and

[*If buyer's obligation to purchase is contingent on condition other than seller's performance:*]

(m) Buyer has executed and deposited in escrow a written notice either verifying that _____[*specify facts or events establishing satisfaction of condition, e.g.,* the escrow established to complete the sale of Buyer's present residence has closed] or stating Buyer's election to (i) waive the right _____[*specify, e.g.,* to cancel the contract of purchase and sale and this escrow if the escrow established to complete the sale of Buyer's present residence did not close by _____ (*date*)], and (ii) proceed to close escrow [*or describe other method selected by parties to establish satisfaction or waiver of condition*].

Proration of Certain Expenses

13. Prorate on the basis of a 30-day month, as of the date on which escrow closes [*or specify other agreed-upon date*], the costs, charges, expenses, and items of income described below, and credit or debit the respective accounts of Seller and Buyer accordingly. Prorate the following costs, charges and expenses on the basis of bills, statements, canceled checks, receipts, and other satisfactory types of documentary evidence of their existence, amount and payment that is deposited in escrow by Seller or Buyer:

[*If property taxes are to be prorated:*]

(a) Real property taxes on the Subject Real Property for the tax fiscal year _____-_____;

[*If special assessments that have been paid or are due are to be prorated:*]

(b) _____[*Describe assessment*] on the Subject Real Property for _____[*specify period for which assessment is made*];

[*If maintenance fees are to be prorated:*]

(c) Fees or charges of _____[*name of person or entity providing service*] for maintenance of the Subject Real Property for the period _____[*specify period for which fees or charges have been or will be incurred*];

[*If homeowner's association dues are to be prorated:*]

(d) _____[*name of association*] dues for _____[*specify period for which dues paid or due*];

[*If premium for insurance to be assigned or transferred to buyer is to be prorated:*]

(e) The premium for _____[*name of insurer*] _____[*type of insurance, e.g., fire and extended special coverage*] Policy No. _____, for the policy period from _____ to _____[*dates*];

[*If rents are to be prorated in connection with a sale of income-producing or rental property, include (f) and (g), below:*]

(f) Rents paid in advance for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Buyer and debit the account of Seller with the portion of the rent attributable to the portion of the rental period after the close of escrow; and

(g) Rents owing for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Seller, and debit the account of Buyer with the portion of the rent attributable to the portion of the rental period before the close of escrow.

Proration Outside of Escrow

14. _____[*Describe specific items to be prorated out of escrow, e.g.,* Utility bills, telephone bills] and other costs, charges, expenses and items of income arising from or attributable to the use or maintenance of the Subject Real Property that you have not been expressly instructed to prorate shall, if proration is required, be prorated by Seller and Buyer outside of this escrow.

[*Add the following Paragraph 15 if buyer is to assume existing loan:*]

Adjustments Based on Existing Loan

15. (a) The contract between Buyer and Seller provides that Buyer is to pay a total purchase price of $_____ and that the balance of the existing loan from _____[*name of existing lender*] that Buyer will assume is to be credited against that total purchase price. In preparing these instructions, the parties have estimated that the balance of the existing loan will be $_____ as of the close of escrow and that Buyer will therefore be required to deposit the sum of $_____ into escrow for payment of the purchase price. You are to determine the precise amount that Buyer will be required to deposit into escrow for the purchase price, however, by crediting the actual balance of the existing loan as of the date of the close of escrow against the total purchase price of $_____. If the actual balance of the existing loan as of the close of escrow is greater than $_____[*parties' estimate of balance*], you will credit the difference against the amount that these instructions require Buyer to deposit for the purchase price and debit the account of Seller accordingly; if it is less than $_____[*parties' estimate of balance*], you will debit the difference against the amount that these instructions require Buyer to deposit for the purchase price and credit the account of Seller accordingly.

[*Choose one of the following paragraphs:*]

[*If parties contemplate that lender will return funds in impound account to Seller:*]

(b) These instructions assume that _____[*name of existing lender*] will return to Seller the funds it

is presently holding in the tax and insurance impound account established for the existing loan when the existing loan is assumed by Buyer, and that Buyer will make a separate payment to _____[*name of existing lender*] of the funds required for the maintenance of the impound account. If _____[*name of existing lender*] retains the funds it is presently holding in the impound account and applies them for the benefit of Buyer, any funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

[*Or, if parties contemplate that lender will retain funds in impound account and that seller will receive a credit in amount of funds retained:*]

(b) The funds presently held by _____[*name of existing lender*] in the tax and insurance impound account established for the existing loan will be retained in that impound account by _____[*name of existing lender*] and applied to the maintenance of the account for the benefit of Buyer. The funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

Credits to Seller's Account

16. Credit the account of Seller and debit the account of Buyer with the following items:

[*If seller is to receive credit for past due rents in connection with sale of income-producing or rented property:*]

(a) An amount equal to the total of all rents owing from tenants of the Subject Real Property for rental periods ending prior to the date on which this escrow closes;

[*If monies held in impound account are to be retained by lender due to buyer's assumption of loan:*]

(b) An amount equal to the amount of the funds retained by _____[*name of lender*] in the tax and insurance impound account established for the loan secured by the first [*or* second *or other priority*] deed of trust on the Subject Real Property shown as _____[exception *or* item *or other designation*] on the Preliminary Title Report attached as Exhibit A; and

(c) [*List any other sums or items to be credited to seller*.]

Credits to Buyer's Account

17. Credit the account of Buyer and debit the account of Seller with the following items:

[*If buyer is to receive credit for prepaid rents and security deposits for which liability is assumed in connection with sale of income-producing or rented property, include (a) and (b), below:*]

(a) An amount equal to the total of all rents prepaid by tenants of the Subject Real Property for rental periods commencing after the date on which this escrow closes;

(b) An amount equal to the total of all security deposits held for tenants of the Subject Real Property for which Buyer is to assume responsibility, in accordance with the schedule deposited in escrow by Seller; and

(c) [*List any other sums or items to be credited to buyer*.]

Other Disbursements From Funds Held for Buyer

18. When you have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in

the Subject Real Property to Buyer, and when you are otherwise authorized and prepared to disburse the funds that are to be credited to Seller's account as and for the purchase price, you are authorized to disburse, on behalf of Buyer, from the funds held for Buyer's account, the sums necessary to pay the following costs, charges, expenses, and items:

[*If buyer is to assume existing loan:*]

(a) Any fees or charges assessed by _____[*name of lender or holder*] in connection with Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to obtain new loan, and loan fees and costs are to be paid directly by buyer:*]

(b) The _____[*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, tax service contract charge,] and other costs, charges, fees, and expenses payment of which is required by _____[*name of buyer's lender*] as a condition of making the loan that Buyer is to obtain from it to finance the purchase price of the Subject Real Property;

[*If buyer is to pay all or part of transfer taxes:*]

(c) [*If documentary transfer tax will be split*: One half of] The documentary transfer tax and [if local taxes are to be split: one-half of] any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

(d) The recording fees charged for the recording of _____[*specify instruments for which buyer is to pay recording fees, e.g.,* the grant deed conveying the Subject Real Property to Buyer];

(e) The notary fees for any notary services performed for Buyer;

[*If buyer is to pay all or part of title insurance costs:*]

(f) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay all or part of escrow fees:*]

(g) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*If buyer is to pay all or part of cost of pest control corrective work or certification:*]

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification] that you are authorized to pay on Buyer's behalf under Paragraphs 8, 9, and 10;

[*List any other individual items, then continue with the following:*]

(i) Any costs, charges, expenses, or items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(j) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Disbursement of Balance to Buyer

19. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses, and items that you have been authorized to pay on Buyer's behalf under the provisions of these instructions, you shall disburse any remaining balance of the funds held for the account of Buyer by drawing a check to Buyer on your escrow account for the balance of the funds held for Buyer's account and mailing that check to Buyer _____[*specify type of mail to be used, e.g.*, by certified mail, return receipt requested] at _____[*address*] [*or specify other method of disbursement or delivery*].

Instruments to Be Recorded

20. When you are prepared to close escrow, you are authorized and instructed to record the following instruments and documents in the order set forth below provided that, if the issuance of a policy of title insurance or the making of a loan that is to be used to finance the purchase is conditioned upon their being recorded in some other order, you shall notify all parties immediately and refrain from proceeding until you have received further instructions resolving or eliminating the conflict:

[*If conveyances to seller must be made or recorded to vest clear title in seller:*]

(a) The quitclaim deed quitclaiming all of _____[*name of grantor*]'s right, title, and interest in the Subject Real Property to Seller [*or specify other conveyance necessary to vest clear title in seller*];

[*If seller is paying off existing loan:*]

(b) The reconveyance of the deed of trust securing the loan made to Seller by _____[*name of lender*];

[*If seller is paying off other lien claimants:*]

(c) The _____[*instrument required to clear lien, e.g.*, acknowledgment of satisfaction of judgment *or* release of mechanic's lien] executed by _____[*name of lien claimant*];

(d) The grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(e) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed in favor of Buyer by Seller and _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(f) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Buyer that _____[*specify purpose of agreement, e.g.*, provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If purchase is to be financed by third party lender:*]

(g) The first [*or specify other priority*] deed of trust executed by Buyer to secure the repayment of the purchase money loan to be made by _____[*name of lender*]; and

[*If seller is financing part of purchase price:*]

(h) The _____[first *or* second *or specify other priority*] deed of trust executed by Buyer to secure the payment of the portion of the purchase price to be financed by Seller.

Delivery of Instruments and Documents to Buyer

21. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Buyer, or cause to be delivered to Buyer, the following instruments and documents:

(a) The grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) The original California Land Title Association standard coverage [or specify other form of policy] title insurance policy] that _____[you have *or* _____ (*name of title insurer*) has] issued in accordance with the requirements of these instructions insuring that title to the Subject Real Property is vested in Buyer;

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(c) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed in favor of Buyer by Seller and _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(d) The bill of sale conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract, or other contract relating to property:*]

(e) The _____[*describe contract, e.g.*, elevator service contract, dated March 18, 1987, between Seller and ABC Corporation] and the assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(f) The leases in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is required to furnish a rent schedule:*]

(g) The rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) The schedule showing the security deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property and the assignment of those security deposits to Buyer;

[*If property is part of a condominium or planned unit development:*]

(i) _____[*name of condominium or planned unit development owner's association*] Certificate No. _____[*or specify other document evidencing transfer of association membership*];

[*If property is served by a mutual or private water company:*]

(j) _____[*Name of mutual or private water company*] Stock Certificate No. _____[*or specify other documents evidencing assignment or transfer*];

[*If pest control certification is to be deposited in escrow:*]

(k) The written certification of _____[*name of structural pest control operator or the licensed structural pest control operator retained by the parties*] pursuant to *Business and Professions Code Section 8519* that the _____[*describe improvements, e.g.*, house, garage, and toolshed,] and other improvements located on the Subject Real Property are free of evidence of active infestation or infection in the visible and accessible areas.

[*If property taxes are to be prorated:*]

(l) Copies of all bills, invoices, statements, and receipts evidencing the real property taxes assessed on the Subject Real Property for the tax fiscal year _____-_____ and any payment of those taxes;

[*If special assessments that have been paid or are due are to be prorated:*]

(m) Copies of all bills, invoices, statements, and receipts evidencing the _____[*describe assessment*] on the Subject Real Property for _____[*specify period for which assessment is made*] and any payment of that assessment;

[*If maintenance fees are to be prorated:*]

(n) Copies of all bills, invoices, statements, and receipts evidencing the fees or charges of _____[*name of person or entity providing service*] for maintenance of the Subject Real Property for the period _____[*specify period for which fees or charges have been or will be incurred*] and any payment of those fees and charges;

[*If owners' association dues are to be prorated:*]

(o) Copies of all bills, invoices, statements, and receipts evidencing _____[*name of association*] dues for _____[*specify period for which dues paid or due*] and any payment of those dues;

[*If premium for insurance to be assigned or transferred to buyer is to be prorated:*]

(p) Copies of all bills, invoices, statements, and receipts evidencing the premium for _____[*name of insurer*] _____[*type of insurance, e.g.*, fire and extended special coverage] Policy No. _____, for the policy period from _____[*date*], to _____[*date*], and any payment of that premium;

[*If buyer is to pay for all or part of cost of initial pest control report out of escrow:*]

(q) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the initial structural pest control report ordered by the parties;

[*If buyer is to pay for all or part of cost of corrective pest control work out of escrow:*]

(r) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the corrective structural pest control work and final certification ordered by the parties;

[*If buyer is to pay all or part of cost of title insurance policy:*]

(s) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you o*r set forth name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay escrow fees or other costs:*]

(t) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Buyer for _____[*specify applicable items, e.g.,* transfer taxes, reconveyance fees, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Close of Escrow

22. For the purposes of these instructions, this escrow shall be deemed to have closed when the grant deed conveying the Subject Real Property to Buyer has been recorded, and the date on which the grant deed is recorded shall be deemed to be the date of the close of escrow. This escrow shall be considered to be in a condition to close when you are authorized under Seller's and Buyer's instructions, and when you are otherwise able, to record the grant deed.

Time for Close of Escrow

23. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

24. (a) This escrow may, by mutual agreement of Seller and Buyer, be canceled at any time before the close of escrow by means of supplementary escrow instructions directing you to cancel the escrow or by means of a written notice of cancellation signed by both Seller and Buyer.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], _____[*if escrow is to be automatically canceled*: it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation *or, if affirmative action by party is necessary to effect cancellation*: you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance with these instructions].

[*If affirmative action is necessary to effect cancellation, add one of the following:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before

_____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also include the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices. Any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instrument, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow by giving notice to the parties that you are exercising your right to cancel.

(f) Upon cancellation of the escrow, you shall return to Buyer all funds, instruments, documents, and other items that Buyer has deposited into escrow.

[*If time is to be made of the essence:*]

Time of Essence

25. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Cooperation of Parties

26. Seller and Buyer shall cooperate with you in carrying out the instructions they deposit with you and completing this escrow. Seller and Buyer shall deposit into escrow, on request, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

27. You are authorized and entitled to assume that instruments, documents, and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

28. You are authorized to record any instrument, agreement, or document, the recording of which is necessary or

appropriate to secure the issuance of any policy of title insurance required by Buyer's or Seller's instructions or to comply with any other term or condition of Buyer's or Seller's instructions.

Furnishing of Copies

29. You are authorized to furnish copies of Buyer's instructions, and of any instruments, documents, or writings deposited in escrow, to _____[*identify by name and capacity persons who you want be able to obtain copies of any instructions or documents upon request, e.g.,* the prospective title insurer, buyer's lender, seller, the attorneys and real estate brokers for the parties]. You are authorized to furnish copies of Buyer's instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure the issuance of any policy of title insurance required by Buyer's or Seller's instructions or to comply with any other term or condition of Buyer's or Seller's instructions.

Deposit of Funds in Escrow

30. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.,* a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at _____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you; funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement. Provided, however, that the deposit into escrow of a written commitment to deliver a check or funds into this escrow that is made to you or to a party to the escrow by a bank, savings and loan association, insurance company, or other lender may, in your sole discretion, be deemed to be the equivalent of a deposit into escrow of the funds that the lender has committed to deposit.

Disbursement of Funds Held in Escrow

31. You shall not make any disbursements from funds held in escrow for Buyer's account unless they are authorized by the instructions you have received from Buyer. Unless a prior disbursement is specifically authorized by the instructions you have received from Buyer, you shall not make any disbursements from funds held in escrow for Buyer's account until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

32. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in writing, must be signed by the party giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [or specify other manner of giving notice], to each party to whom notice is to be given at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered or, if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Buyer are to be personally delivered or mailed to _____[buyer *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Seller are to be personally delivered or mailed to Seller [*or name of authorized agent to whom notice is to be delivered; or, if seller is to designate an agent, add*: or to an agent authorized under Seller's written instructions to receive notice on Seller's behalf], at _____[*specify address or state*: at the address designated in Seller's written instructions].

Conflicting Instructions

33. If there is a material conflict between the instructions that you receive from Buyer and the instructions that you receive from Seller, you shall notify Buyer and Seller forthwith of the precise nature of the conflict by telephone and by mail and you shall take no further action to carry out the particular instructions that are the subject of the conflict until the conflict has been resolved or eliminated by a valid amendment or supplement to the conflicting instructions or by a final order or judgment of a court of competent jurisdiction.

Conflicting Demands or Claims

34. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow or conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received or conflicting demands or claims concerning your obligations as escrow holder. Until such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties, and to retain in escrow any funds, instruments, documents, or items that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict.

Revocability of Instructions Until Deposit of Seller's Instructions

35. Until Seller has deposited with you signed written instructions that are sufficient to enable you to complete the sale of the Subject Real Property on the conditions set forth in these instructions, Buyer shall have the right to revoke these instructions and shall have the right to the return of any instruments, documents, items, or funds deposited with you.

Sole Instructions

36. Unless and until they are subsequently amended or canceled in the manner provided herein, these instructions and the written instructions initially deposited with you by Seller shall constitute the complete escrow instructions, and the only escrow instructions, of Buyer and Seller and shall revoke and supersede any prior oral instructions you may have received.

Amendments

37. Once these instructions and Seller's initial written instructions have been deposited with you, the respective instructions of Buyer and Seller may only be amended, supplemented, or modified by means of a written amendment that has either been signed or approved in writing by both Buyer and Seller. No written amendment, supplement, or modification of Buyer's instructions or Seller's instructions shall be effective or valid unless and until it has been deposited with you and unless and until Buyer and Seller have either signed it or approved it in a signed writing that has

been deposited with you. Any purported oral amendment, supplement, or modification of Buyer's or Seller's written instructions shall be ineffective and invalid.

Waiver

38. Any term or condition of this escrow or the instructions deposited by Buyer and Seller may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or the instructions deposited by Buyer and Seller can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit; no written waiver shall be effective or valid unless and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

39. These escrow instructions were prepared by _____[*name of attorney*], attorney for Buyer and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

40. Please acknowledge your receipt and acceptance of these escrow instructions [*if items are to be deposited with instructions, add*:, the items deposited with them,] and your agreement to serve as escrow holder, by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Buyer.
_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

Acceptance by Seller

I have read the foregoing escrow instructions of Buyer and I approve and accept them.
_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions [*if items are to be deposited with instructions, add*: and the items listed in paragraph _____ of those instructions]. _____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale [*or* transfer] of the Subject Real Property from _____[*name of seller*] to

_____[*name of buyer*] and to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, the instructions submitted by _____[*name of seller*], and any additional instructions or amendments submitted by the parties.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrow



41 of 120 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
1. Sale of Real Property

11-26 California Legal Forms--Transaction Guide § 26.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.202 Joint Escrow Instructions of Seller and Buyer

[1] Comment

[a] Use of Form

This form is a set of escrow instructions that may be used by the seller and the buyer in a transaction in which they submit joint escrow instructions to the escrow holder pursuant to a contract for the sale of residential or commercial property. Joint escrow instructions are used in most Southern California transactions, while separate escrow instructions are generally used in Northern California transactions. For separate seller's instructions, see *§ 26.200*. For separate buyer's instructions, see *§ 26.201*.

[b] Advantages and Disadvantages of Joint Instructions

The main advantage of joint instructions is that the process of drafting and submitting them usually requires the attorneys for the parties to confront and resolve inconsistencies and other potential problems at the outset; the processing of the escrow may be considerably facilitated if the escrow holder is guided by a single set of instructions and actual and potential conflicts are eliminated. On the other hand, because it may require the resolution of conflicts that prove to be immaterial and potential problems that never materialize, the process of drafting joint instructions can be a lengthy, time-consuming process that produces a set of instructions that is unnecessarily complex.

[c] Contents of Joint Instructions

From the point of view of the attorney preparing or reviewing them on behalf of a client, joint instructions should include virtually all of the provisions that normally would be included in separate instructions prepared for the client. Accordingly, this form essentially merges and consolidates the provisions of the seller's and buyer's instructions set out, respectively, in §§ 26.200[2] and 26.201[2]. For a discussion of those provisions, see *§§ 26.200[1]* (seller's instructions)

and 26.201[1] (buyer's instructions).

[2] Form

Joint Escrow Instructions of Seller and Buyer

JOINT ESCROW INSTRUCTIONS OF SELLER AND BUYER

TO: _____[*name of escrow holder*]
_____[*address*]

_____[*name of seller*] (hereinafter sometimes referred to as "Seller") [*if applicable, describe status, e.g.,* a California corporation or a limited partnership,] and _____[*name of buyer*] (hereinafter sometimes referred to as "Buyer") [*if applicable, describe status, e.g.,* a California corporation or a limited partnership,] deposit with you the following joint escrow instructions:

ARTICLE 1. INTRODUCTORY PROVISIONS

Preliminary Recitals

Section 1.01. Seller has entered into a contract to sell to Buyer certain _____[residential *or* commercial] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." Subject to the terms and conditions set forth below, Seller and Buyer hereby authorize and instruct you to open an escrow for the purpose of completing the sale of the Subject Real Property to Buyer and to complete the sale in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow:*]

Disregard of Contract

Section 1.02. Your obligations as escrow holder are to be determined solely by these instructions and any subsequent amendments or supplemental instructions jointly submitted by Seller and Buyer. You are not responsible for knowing or interpreting any provisions of the contract on which these instructions are based, and shall not rely on any knowledge or understanding you may have of any such contractual provisions in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract between Seller and Buyer for the purchase and sale of the Subject Real Property or any contract purporting to be a contract on which your escrow instructions are based.

ARTICLE 2. DEPOSITS INTO ESCROW

Seller's Deposits in Escrow

Section 2.01. _____[Seller hereby deposits into escrow *or* On or before _____ (*date*), Seller will deposit or cause to be deposited into escrow] the following:

(a) A grant deed, executed by Seller [*or* _____ as attorney in fact for Seller *or* _____ as Executor of the Estate of _____ *or specify other capacity of person executing grant deed*] and in recordable form, conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

[*If grant deed will be executed by attorney in fact:*]

(b) A _____[special *or* general] power of attorney, executed by Seller and duly notarized, appointing _____[*name of person executing grant deed as attorney in fact for seller*] as Seller's attorney in fact and authorizing _____[*name of attorney in fact*] to execute the grant deed on behalf of Seller;

[*If property will be conveyed by executor or other legal representative:*]

(c) A certified copy of the order entered in _____[*describe proceeding, e.g.,* Alameda County Superior Court Action No. 1234, Estate of John Doe], authorizing _____[*name*] to convey the Subject Real Property to Buyer;

[*If seller is a partnership:*]

(d) A certified copy of the statement of partnership filed and recorded by Seller in _____[*county where property is located*];

[*If seller is a corporation:*]

(e) A duly certified copy of a resolution of Seller's Board of Directors _____[*specify nature of resolution, e.g.,* approving the sale of the Subject Real Property to Buyer and authorizing Jane Smith to execute all required agreements, instructions, and instruments on Seller's behalf];

[*If conveyances to seller must be made or recorded to vest clear title in seller:*]

(f) A quitclaim deed, executed by _____[name of grantor] and in recordable form, quitclaiming all of _____[name of grantor]'s right, title, and interest in the Subject Real Property to Seller [or specify other conveyance necessary to vest clear title in seller];

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(g) A _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Seller and in recordable form, _____[*specify purpose of agreement, e.g.,* providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(h) A bill of sale, executed by Seller, conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract or other contract relating to property:*]

(i) The original of _____[*describe contract, e.g.,* the elevator service contract, dated March 18,

1987, between Seller and ABC Corporation,] and a duly executed assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(j) The originals of all leases now in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(k) A schedule showing the security deposits now held by Seller under leases now in effect between Seller and the present tenants of the Subject Real Property, and a duly executed assignment of those security deposits to Buyer, receipt of which is to be acknowledged by Buyer;

[*If property is part of condominium or planned unit development:*]

(l) _____[*name of condominium or planned unit development owner's association*] Certificate No. _____, duly endorsed for transfer to Buyer [*or specify other document evidencing transfer of association membership*];

[*If property is served by mutual or private water compan*y:]

(m) _____[*name of mutual or private water company*] stock certificate No. _____, duly endorsed for transfer to Buyer [*or specify other documents evidencing assignment or transfer*];

[*If seller is financing portion of purchase price, include (n) and (o), below:*]

(n) A promissory note evidencing a principal obligation of $_____ and certain other obligations to be executed in favor of Seller by Buyer;

(o) A _____[first *or* second *or specify other priority*] deed of trust on the Subject Real Property to be executed by Buyer for the benefit of Seller to secure payment and performance of the obligations evidenced by the above-mentioned promissory note;

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(p) A _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], executed by Seller and in recordable form, _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If underlying contract to be deposited in escrow (see Paragraph 2 above for alternative provision):*]

(q) A copy of the contract between Seller and Buyer for the sale and purchase of the Subject Real Property that is the basis for these instructions;

[*If pest control certification or necessary corrective work to be secured through escrow:*]

(r) A structural pest control report on the Subject Real Property, dated _____, prepared by _____[*name of structural pest control operator*] pursuant to the requirements of *Business and Professions Code Sections 8516* and *8519*;

[*If property taxes are to be prorated:*]

(s) The _____ County Assessor's property tax bill for the Subject Real Property for the tax fiscal year _____-_____, together with an official receipt evidencing payment of that bill;

[*If adjustments or prorations are to be made for rents that are delinquent or paid in advance in connection with sale of income-producing property:*]

(t) A rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property; and

(u) [*List any additional items to be deposited by seller*.]

Funds to Be Deposited by Buyer Toward Payment of Purchase Price

Section 2.02. [Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit or cause to be deposited into escrow *if applicable, specify form of deposit, e.g.*, in cash or by certified check], funds totaling $_____ to be applied toward payment of the purchase price for the Subject Real Property, which funds will consist of the following:

[*If deposit is required:*]

(a) Buyer's initial deposit toward payment of the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow *or* will be deposited into escrow on or before _____ (*date*)];

[*If deposit is to be increased:*]

(b) Buyer's additional deposit toward payment of the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow *or* will be deposited into escrow on or before _____ (*date*)];

[*If purchase price is to be paid in cash, use (c), below:*]

(c) [The balance of] the purchase price, in the sum of $_____, which _____[is hereby deposited into escrow *or* will be deposited into escrow on or before _____ (*date*)].

[*Or, if purchase price is to be paid by downpayment plus proceeds of a purchase money loan, use (c) and (d), below:*]

(c) [The balance of] Buyer's downpayment on the purchase price, in the sum of $_____, which [is hereby deposited into escrow *or* will be deposited into escrow on or before _____ (*date*)]; and

(d) The proceeds of a purchase money loan that Buyer will obtain from _____[*name of lender or, if Buyer has not determined who lender will be*: a third party lender to be selected by Buyer] (hereinafter sometimes referred to as "Buyer's lender"), in the sum of $_____.

[*Continue with the following:*]

Additional Funds to Be Deposited by Buyer

Section 2.03. In order to complete the purchase of the Subject Real Property and to comply with the terms and conditions of this escrow, Buyer will deposit into escrow on or before _____[*date*], provided that Buyer is notified thereof, any additional funds that are needed to pay the following costs, charges, expenses and items. You are to notify Buyer of the amounts necessary to pay the following expenses at least _____ days before _____[*date of close of escrow*] or, in the case of costs, charges, expenses, and items that cannot be determined by that date, as soon as they become known.

[*If buyer is to assume existing loan:*]

(a) Any fees or charges assessed by _____[*name of lender or holder*] in connection with Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[Exception *or* Item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to obtain new loan, and loan fees and costs are to be paid directly by buyer:*]

(b) The _____[*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, tax service contract charge,] and other costs, charges, fees, and expenses payment of which is required by Buyer's lender as a condition of making the loan that Buyer is to obtain from it to finance the purchase price of the Subject Real Property;

[*If buyer is to pay all or part of transfer taxes:*]

(c) [*If documentary transfer tax is to be split*: One half of] The documentary transfer tax and [if local taxes are to be split: one half of] any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

[*Continue with the following:*]

(d) The recording fees charged for the recording of _____[*specify instruments for which buyer is to pay recording fees, e.g.,* the grant deed conveying the Subject Real Property to Buyer];

(e) The notary fees for any notary services performed for Buyer;

[*If buyer is to pay all or part of title insurance costs:*]

(f) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay all or part of escrow fees:*]

(g) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*If buyer is to pay for all or part of any corrective pest control work or cost of obtaining pest control clearance:*]

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification,] that you are authorized to pay on Buyer's behalf under Sections 3.04, 3.05, and 3.06;

[*List any other individual items, then continue with the following:*]

(i) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(j) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Instruments and Documents to Be Deposited by Buyer

Section 2.04. _____[Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit into escrow] the following instruments, documents, and items:

[*If purchase is to be financed by a third party lender, include (a) through (d), below:*]

(a) The promissory note, duly executed, furnished by Buyer's lender and evidencing a principal obligation of $_____ and certain other obligations in favor of Buyer's lender;

(b) The _____[first *or* second *or specify other priority*] deed of trust, duly executed and in recordable form, furnished by Buyer's lender and securing payment and performance of the obligations evidenced by the above-mentioned promissory note;

(c) An original policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable*] lender's loss payable endorsement naming Buyer's lender as the _____[first *or* second *or other priority*] loss payee;

(d) Any other documents, instruments, or items the deposit of which is made a condition to the disbursement of the loan proceeds to be deposited by Buyer's lender under any instructions deposited by Buyer's lender;

[*If seller is financing a portion of purchase price, include (e) through (g), below:*]

(e) The duly executed original of the promissory note evidencing a principal obligation of $_____ that Seller has deposited into escrow for execution by Buyer;

(f) The original, duly executed and in recordable form, of the _____[first *or* second *or specify other priority*] deed of trust securing the above-mentioned note that Seller has deposited into escrow for execution by Buyer;

(g) An original policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable*] lender's loss payable endorsement naming Seller as the _____[first or second or other priority] loss payee;

[*If buyer is to assume existing loan:*]

(h) The agreement, duly executed, furnished by _____[*name of existing lender or holder*] for Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(i) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], duly executed and in recordable form, furnished by Seller and providing for _____[*specify object of agreement, e.g.,* the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If underlying contract is to be deposited in escrow (see Section 1.02, above, for alternative provision*):]

(j) A copy of the contract between Seller and Buyer for the sale and purchase of the Subject Real Property that is the basis for these instructions; and

(k) _____[*List any additional items to be deposited by buyer*.]

Additional Deposits Into Escrow

Section 2.05. Seller and Buyer shall deposit into escrow, on receiving notification from you, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

ARTICLE 3. PROCESSING OF ESCROW

[*If purchase is to be financed by third party lender, include the following provision:*]

Request for New Lender's Documents and Instructions

Section 3.01. The purchase price for the Subject Real Property is to be financed in part by a loan that Buyer will obtain from _____[*name and address of lender; or, if buyer has not determined who lender will be*: a third party lender to be selected and designated in writing by Buyer *if lender has not previously been designated by shorthand reference, add*: (hereafter referred to as "Buyer's lender")]. As soon as possible after opening this escrow [*or, if Buyer has not determined who lender will be*: after Buyer's lender is designated by Buyer], contact Buyer's lender and advise it that you have opened this escrow for the purpose of completing the sale of the Subject Real Property to Buyer. Request that it deposit in escrow as soon as possible escrow instructions setting forth the conditions under which it will authorize disbursement of the loan proceeds and the note, deed of trust, and other documents that it will require Buyer to execute.

[*Choose one of the following alternative sections:*]

[*If existing loan is to be paid off:*]

Lender's Payoff Demand Statement

Section 3.02. As soon as possible after opening escrow, contact _____[*name and address of existing lender or holder*] and request that it place in escrow a payoff demand statement prepared pursuant to *Section 2943 of the*

California Civil Code and setting forth the amounts required to fully satisfy all obligations relating to the loan that is secured by the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A, the original promissory note evidencing the loan, a reconveyance of the deed of trust, duly executed and in recordable form, and escrow instructions authorizing you to cancel the note and record and deliver the reconveyance when you are prepared to disburse the amount of the balance due. Mail Seller copies of the statement and the escrow instructions as soon as they are received in escrow.

[*OR*]

[*If buyer is to assume existing loan:*]

Lender's Statement of Balance

Section 3.02. As soon as possible after opening escrow, contact _____[*name and address of existing lender or holder*] and request that it place in escrow a beneficiary statement setting forth the information required by *California Civil Code Section 2943*, including the unpaid principal balance of the loan secured by the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A. Mail Seller and Buyer copies of the statement as soon as it is received in escrow.

[*Continue with the following:*]

Other Claimants' Demands

Section 3.03. As soon as possible after opening escrow, contact _____[*name and address of other lien claimant*] and request that _____[he *or* she *or* it] place in escrow the following: a statement and demand for payment of the amount required to _____[satisfy *or* discharge *or other appropriate characterization*] the _____[judgment *or* tax lien *or other description of lien*] shown as _____[Exception *or* Item *or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A; a duly executed _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment] in recordable form; and escrow instructions authorizing you to _____[*action required to clear lien, e.g.,* file and record the acknowledgment of satisfaction of judgment] when you are prepared to disburse the amount demanded. Mail Seller copies of the statement and demand and the escrow instructions as soon as they are received in escrow.

[*Add the following provision if close of escrow is conditioned on performance of corrective structural pest control work and deposit of structural pest control certification:*]

Structural Pest Control Certification

Section 3.04. The close of this escrow is conditioned on the deposit in escrow of a certification by a licensed structural pest control operator, pursuant to the requirements of *Business and Professions Code Section 8519*, that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas. The parties have

retained _____[*name of structural pest control operator*] to conduct an inspection of the Subject Real Property and prepare a report in accordance with the requirements of *Business and Professions Code Section 8516*. A copy of that report _____[is being *or* will be *or* has been] deposited into escrow pursuant to Section 2.01. The parties _____[have authorized *or* will authorize] _____[*name of structural pest control operator*] to perform _____[all corrective work listed in that report as a condition of obtaining a certification that the property is free from active infestation or infection in the visible and accessible areas *or describe work by referring to specific items in report, e.g.,* the corrective work described in Items _____ (*list by number*) of the report], at the price stated in the report. When the corrective work has been completed, _____[Buyer *or* Seller *or* the parties] will obtain a certification that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas, and will deposit with you a true and complete copy of the certification.

[*If cost of corrective work and/or pest control certification is to be paid out of escrow, add:*]

Disbursement of Payment for [Inspections and] Corrective Work

Section 3.05. You are authorized to disburse to _____[*name of structural pest control operator*], in accordance with Section 3.06, the sums necessary to pay the fees and charges for the corrective work described in Section 3.04 [, and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification,] if, and only if, all of the following apply:

(a) You have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) _____[Buyer *or* Seller *or* The parties] has [*or* have] deposited into escrow the certification of _____[*name of structural pest control operator*] pursuant to *Business and Professions Code Section 8519* that the Subject Real Property is free of evidence of active infestation or infection in the visible and accessible areas;

(c) _____[*Name of structural pest control operator*] has deposited in escrow _____[his *or* her *or* its] invoice or statement setting forth the fees and charges for the corrective work described in Section 3.04 [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification]; and

(d) The total of the fees and charges made by _____[*name of structural pest control operator*] for the corrective work [and for the reinspection of the Subject Real Property and the preparation and delivery of the required certification] does not exceed the price for those repairs as stated in the inspection report [, plus any standard inspection, reinspection, and certification fees, as applicable].

[*If cost of corrective work and/or pest control certification is to be paid out of escrow, add:*]

Responsibility for Expense of [Certification and] Corrective Work

Section 3.06. Fees and charges for the corrective work listed in Section 3.04, up to but not exceeding the price specified in the inspection report for performance of that work [, as well as any fees for (the inspection and) any reinspection of the Subject Real Property and the preparation and delivery of the required certification], subject to the conditions specified in Section 3.05, will _____[*select the appropriate alternative below*]

[*if cost is to be borne solely by one party, use:*] be the sole responsibility of _____[Seller *or* Buyer] and shall be paid from funds held for _____[Seller's *or* Buyer's] account at the close of escrow.

[*OR*]

[*if cost is to be split between the parties, use:*] be borne one half by Seller and one half by Buyer, and will be paid from the respective funds held for the accounts of the parties at the close of escrow.

[*OR*]

[*if one party is to pay cost up to a specified limit and other party is to pay balance, use:*] be paid as follows: _____[Seller *or* Buyer] will pay the fees and charges, up to a limit of $_____; and _____[*other party*] shall pay any charges in excess of $_____[*repeat amount specified above*], up to but not exceeding the full price specified in the inspection report for performance of the corrective work described in Section 3.04. Payment shall be made from the respective funds held for the accounts of the parties at the close of escrow.

[*Continue with the following:*]

Buyer's Deposit

Section 3.07. Buyer must pay into escrow, on or before _____[*date*], the sum of $_____ to be held by you as an initial deposit toward the payment of the purchase price for the Subject Real Property. [*If buyer is required to increase deposit prior to close of escrow, add*: Buyer must also pay into escrow, on or before _____ (*date*), the sum of $_____ to be held by you as an additional deposit toward the payment of the purchase price.] If Buyer fails to make the initial deposit described above on or before _____[*date*], [*add, if applicable*:, or if Buyer fails to make the additional deposit described above on or before _____ (*date*),] you must notify Seller immediately and Seller will have the right to cancel this escrow by notifying you in writing, within _____ days after you have given _____[him *or* her *or* it] notice of Buyer's failure to make the required deposit, that _____[he *or* she *or* it] is exercising the right to cancel. [*If the underlying contract contains a liquidated damage clause, add*: Notwithstanding any other provisions of your escrow instructions, if this escrow is canceled due to a default by Buyer, you are authorized and directed to hold any funds that Buyer has paid into escrow as or for an initial (*add, if applicable*: or additional) deposit, up to a limit of $_____ (*specify amount of liquidated damages fixed by underlying contract*), until you receive joint instructions from Buyer and Seller or a final order or judgment of a court of competent jurisdiction directing or determining the manner in which the funds are to be disbursed.]

[*If any contingencies specified in the contract of sale remain to be satisfied or fulfilled, include a separate provision such as the one below for each such contingency:*]

_____ **[** *Nature of contingency, e.g.,* **Loan] Contingency**

Section 3.08. The agreement for the purchase and sale of the Subject Real Property and this escrow are conditioned on

_____[*characterize contingency, e.g.,* Buyer obtaining a written commitment for a fixed rate loan of $150,000, payable in equal monthly installments over a 30 year term, at an interest rate not to exceed 12 percent per annum and with loan fees not to exceed $3,000].

[*Select one of the following alternatives:*]

[*If escrow is to proceed unless party affirmatively notifies escrow holder of failure of condition:*]

If _____[Seller *or* Buyer] notifies you in writing _____[on or before _____ [*date*], *or* before the close of escrow] that _____[*specify facts establishing failure of condition, e.g.,* the required loan commitment has not been obtained] and that _____[he *or* she *or* it] is exercising the right to cancel the escrow, this escrow shall be immediately and automatically canceled, and no further instructions from or notice to any party shall be required to make the cancellation effective.

[*Or, if escrow is to be canceled unless party affirmatively establishes satisfaction of condition:*]

This escrow shall be immediately and automatically canceled on _____[*date*], without any further instructions from or notice to any party, unless, before that date, _____[Seller *or* Buyer] _____[*describe method of establishing satisfaction of condition, e.g.,* notifies you in writing that the required loan commitment has been obtained for conditions other than party's agreement or approval, add: or notifies you in writing that _____ (he *or* she) is waiving the right to condition the sale and the escrow on _____ (*describe contingency*)].

[*Continue with the following:*]

If the escrow is canceled, you shall return to Seller and Buyer all funds, instruments, and other items that they have deposited into escrow.

ARTICLE 4. CONDITIONS PRECEDENT TO CLOSE OF ESCROW

Conditions Precedent to Recording and Delivery of Deed

Section 4.01. You are authorized to close escrow and to record and deliver the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer [if applicable, describe other instruments to be recorded to vest clear title in buyer or effect the conveyance to buyer, e.g., and the grant of easement granting Buyer an easement across adjoining real property owned by Seller for purposes of ingress and egress] when, and only when:

(a) You hold for Seller's account in available funds, and are authorized and prepared to disburse to or on behalf of Seller, the sum of $_____[*amount to be deposited into escrow by buyer for purchase price; if instructions require credits or debits to seller's account (as opposed to disbursements to be made on seller's behalf), add*:, plus any other sums that you are required to credit to the account of Seller under the escrow instructions you receive, minus any sums for which you are required to debit the account of Seller under the escrow instructions you receive];

[*If buyer is to make conveyance or agreement benefitting property retained by seller:*]

(b) The _____[*describe conveyance or agreement, e.g.*, grant of easement *or* party wall agreement] deposited in escrow by Seller has been executed and returned to you by Buyer in recordable form and without modification or deletion and you are authorized and prepared to record it and deliver it to Seller;

[*If seller is financing portion of purchase price, add (c) through (f), below, as appropriate:*]

(c) The promissory note deposited in escrow by Seller for execution by Buyer has been executed and returned to you by Buyer without modification or deletion and you are authorized and prepared to deliver it to Seller;

(d) The deed of trust deposited in escrow by Seller for execution by Buyer has been executed by Buyer and returned to you in recordable form without modification or deletion and you are authorized and prepared to record it and deliver it to Seller;

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue, when the deed of trust is recorded, a California Land Title Association joint protection policy [*or* American Land Title Association lender's policy] insuring that title to the Subject Real Property is vested in Buyer and that the deed of trust that Buyer has executed for the benefit and security of Seller is an encumbrance against the Subject Real Property that is subject and subordinate only to _____[*describe all superior liens and encumbrances contemplated by contract and escrow instructions*];

(f) You have received in escrow, and are authorized and prepared to deliver to Seller, an original policy of insurance providing _____[*describe required coverage and type of policy*] coverage for the Subject Real Property in an amount that is not less than $_____, [*specify term if applicable, e.g.,* for a term of not less than three years] with a _____[*specify particular type or form if applicable, e.g.,* ISO Form 438BFU NS] lender's loss payable endorsement naming Seller as the _____[first *or* second *or other priority*] loss payee.

[*If seller's obligation to sell is contingent on a condition other than buyer's performance:*]

(g) Seller has deposited in escrow a written statement, executed by Seller, either verifying that _____[*specify facts or events establishing satisfaction of condition, e.g.,* Seller has completed the purchase of another residence] or stating Seller's election to waive the right _____[*specify, e.g.,* to cancel the contract of purchase and sale and this escrow if _____ (he *or* she) did not complete the purchase of another residence by _____ (*date*)] and proceed to close escrow [*or describe other method selected by parties to establish satisfaction or waiver of condition*].

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) Buyer has acknowledged receipt of the security deposits transferred by Seller by executing one copy of the assignment deposited in escrow by Seller;

Conditions Precedent to Disbursement of Purchase Price

Section 4.02. You are authorized to credit to Seller's account and disburse to Seller, from the funds held for Buyer's account at the close of escrow, the sum of $_____[*amount to be deposited into escrow for purchase price*], plus any other sums that you are required to credit to the account of Seller under these instructions, minus any sums for which you are required to debit the account of Seller under these instructions when, and only when:

(a) You have recorded a grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue _____[your *or* its] California Land Title Association standard coverage [*or specify other form of policy*] title insurance policy in the amount of $_____ insuring that title to the Subject Real Property is vested in Buyer free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions and adverse interests except: _____[*list, describing with specificity, any exceptions or items shown in preliminary title report that buyer has agreed to accept, any deeds of trust or mortgages that will be recorded to secure obligations buyer has incurred to finance the purchase, and any easements, covenants, or other interests that buyer is to convey or assume under the terms of the escrow*];

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(c) You have recorded _____[a party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*], executed by Seller, _____[*specify purpose of agreement, e.g.*, providing for the construction and maintenance of a wall between the Subject Real Property and the adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(d) Seller has executed and deposited into escrow, and you are authorized and prepared to deliver to Buyer, a bill of sale conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract or other contract relating to property:*]

(e) Seller has executed and deposited in escrow, and you are authorized and prepared to deliver to Buyer, the original of the _____[*describe contract, e.g.*, the elevator service contract, dated March 18, 2003, between Seller and ABC Corporation] and a duly executed assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(f) Seller has deposited in escrow, and you are authorized and prepared to deliver to Buyer, the originals of all leases now in effect between Seller and the present tenants of the Subject Real Property [*or, if entire property leased under one lease*: the original of the lease between Seller and _____ (*name or names of lessees*), the present _____ (tenant *or* tenants) of the Subject Real Property];

[*If adjustments or prorations are to be made for rents that are delinquent or paid in advance in connection with sale of income-producing property:*]

(g) Seller has deposited a rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property in escrow [*if buyer must approve rent schedule, add*: and the rent schedule has been examined and approved in writing by Buyer];

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) Seller has deposited in escrow, and you are authorized and prepared to deliver to Buyer, a schedule showing the security deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property and a duly executed assignment of those security deposits to Buyer;

[*If property is part of a condominium or planned unit development:*]

(i) Seller has properly endorsed for transfer to Buyer and deposited into escrow, and you are authorized and prepared to deliver to Buyer, _____[*name of condominium or planned unit development owners' association*] Certificate No. _____[*or specify other document evidencing transfer of association membership*];

[*If property is served by a mutual or private water company:*]

(j) Seller has properly endorsed for transfer to Buyer and deposited in escrow _____[*name of mutual or private water company*] stock certificate No. _____[*or specify other documents evidencing assignment or transfer*];

[*If purchase is to be financed by a third party loan:*]

(k) Buyer's lender has deposited into escrow, and you have credited to Buyer's account, loan proceeds in the sum of $_____[*if loan fees and charges are to be deducted by lender before loan proceeds are deposited, add*:, less the deductions made by Buyer's lender for the _____ (*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, and tax service contract charge,) and other costs, charges, fees, and expenses that Buyer is required to pay to Buyer's lender in connection with the loan];

[*If pest control certification is to be deposited in escrow:*]

(l) You have received in escrow, in accordance with Section 3.04 of these instructions, the written certification of _____[*name of structural pest control operator or the licensed structural pest control operator retained by the parties*], pursuant to *Business and Professions Code Section 8519*, that the _____[*describe improvements, e.g.,* house, garage, toolshed,] and other improvements located on the Subject Real Property are free of evidence of active infestation or infection in the visible and accessible areas; and

[*If buyer's obligation to purchase is contingent on condition other than seller's performance:*]

(m) Buyer has executed and deposited in escrow a written notice either verifying that _____[*specify facts or events establishing satisfaction of condition, e.g.,* the escrow established to complete the sale of Buyer's present residence has closed] or stating Buyer's election to (i) waive the right _____[*specify, e.g.,* to cancel the contract of purchase and sale and this escrow if the escrow established to complete the sale of Buyer's present residence did not close by _____ (*date*)], and (ii) proceed to close escrow [*or describe other method selected by parties to establish satisfaction or waiver of condition*].

ARTICLE 5. PRORATIONS AND ADJUSTMENTS

Proration of Certain Expenses

Section 5.01. Prorate on the basis of a 30 day month, as of the date on which escrow closes [*or specify other agreed-on date*], the costs, charges, and expenses described below, and credit or debit the respective accounts of Seller and Buyer accordingly. Prorate the following costs, charges, and expenses on the basis of bills, statements, canceled checks, receipts, and other satisfactory types of documentary evidence of their existence, amount, and payment that is deposited in escrow by Seller or Buyer:

[*If property taxes are to be prorated:*]

(a) Real property taxes on the Subject Real Property for the tax fiscal year _____-_____;

[*If special assessments that have been paid or are due are to be prorated:*]

(b) _____[*Describe assessment*] on the Subject Real Property for _____[*specify period for which assessment is made*];

[*If maintenance fees are to be prorated:*]

(c) Fees or charges of _____[*name of person or entity providing service*] for maintenance of the Subject Real Property for the period _____[*specify period for which fees or charges have been or will be incurred:*]

[*If homeowner's association dues are to be prorated:*]

(d) _____[*name of association*] dues for _____[*specify period for which dues paid or due*];

[*If premium for insurance to be assigned or transferred to buyer is to be prorated:*]

(e) The premium for _____[*name of insurer*] _____[*type of insurance, e.g.,* fire and extended special coverage] Policy No. _____, for the policy period from _____ to _____[*dates*];

[*If rents are to be prorated in connection with a sale of income-producing or rental property, include (f) and (g), below:*]

(f) Rents paid in advance for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Buyer and debit the account of Seller with the portion of the rent attributable to the portion of the rental period after the close of escrow; and

(g) Rents owing for the rental period[s] in which this escrow closes, in accordance with the rent schedule deposited in escrow by Seller; credit the account of Seller, and debit the account of Buyer with the portion of the rent attributable to the portion of the rental period before the close of escrow.

Proration Out of Escrow

Section 5.02. _____[*Describe specific items to be prorated out of escrow, e.g.,* Utility bills, telephone bills] and any other costs, charges, expenses, and items of income arising from or attributable to the use or maintenance of the Subject Real Property, other than those costs, charges, expenses, and items of income that you have been expressly instructed to prorate, shall, if proration is required, be prorated by Seller and Buyer outside of this escrow.

[*Add the following Section 5.03 if buyer is to assume existing loan:*]

Adjustments Based on Existing Loan

Section 5.03(a) The contract between Buyer and Seller provides that Buyer is to pay a total purchase price of $_____ and that the balance of the existing loan from _____[*name of existing lender*] that Buyer will assume is to be credited against that total purchase price. In preparing these instructions, the parties have estimated that the balance of the existing loan will be $_____ as of the close of escrow

and that Buyer will therefore be required to deposit the sum of $_____ into escrow for payment of the purchase price. You are to determine the precise amount that Buyer will be required to deposit into escrow for the purchase price, however, by crediting the actual balance of the existing loan as of the date of the close of escrow against the total purchase price of $_____. If the actual balance of the existing loan as of the close of escrow is greater than $_____[*parties' estimate of balance*], you will credit the difference against the amount that these instructions require Buyer to deposit for the purchase price and debit the account of Seller accordingly; if it is less than $_____[*parties' estimate of balance*], you will debit the difference against the amount that these instructions require Buyer to deposit for the purchase price and credit the account of Seller accordingly.

[*Choose one of the following paragraphs:*]

[*If parties contemplate that lender will return funds in impound account to seller:*]

(b) These instructions assume that _____[*name of existing lender*] will return to Seller the funds it is presently holding in the tax and insurance impound account established for the existing loan when the existing loan is assumed by Buyer, and that Buyer will make a separate payment to _____[*name of existing lender*] of the funds required for the maintenance of the impound account. If _____[*name of existing lender*] retains the funds it is presently holding in the impound account and applies them for the benefit of Buyer, any funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

[*Or, if parties contemplate that lender will retain funds in impound account and that seller will receive a credit in amount of funds retained:*]

(b) The funds presently held by _____[*name of existing lender*] in the tax and insurance impound account established for the existing loan will be retained in that impound account by _____[*name of existing lender*] and applied to the maintenance of the account for the benefit of Buyer. The funds so retained and applied by _____[*name of existing lender*] shall be debited against the amount that these instructions require Buyer to deposit for the purchase price and the account of Seller shall be credited accordingly.

Credits to Seller's Account

Section 5.04. Credit the account of Seller and debit the account of Buyer with the following items:

[*If seller is to receive credit for past due rents in connection with sale of income-producing or rented property:*]

(a) An amount equal to the total of all rents owing from tenants of the Subject Real Property for rental periods ending prior to the date on which this escrow closes;

[*If monies held in impound account are to be retained by lender due to buyer's assumption of loan:*]

(b) An amount equal to the amount of the funds retained by _____[*name of lender*] in the tax and insurance impound account established for the loan secured by the first [*or* second *or other priority*] deed of trust on the Subject Real Property shown as _____[exception *or* item *or other designation*] on the Preliminary Title Report attached as Exhibit A; and

(c) [*List any other sums or items to be credited to seller*.]

Credits to Buyer's Account

Section 5.05. Credit the account of Buyer and debit the account of Seller with the following items:

[*If buyer is to receive credit for prepaid rents and security deposits for which liability is assumed in connection with sale of income-producing or rented property, include (a) and (b), below:*]

(a) An amount equal to the total of all rents prepaid by tenants of the Subject Real Property for rental periods commencing after the date on which this escrow closes;

(b) An amount equal to the total of all security deposits held for tenants of the Subject Real Property for which Buyer is to assume responsibility, in accordance with the schedule deposited in escrow by Seller; and

(c) [*List any other sums or items to be credited to buyer*.]

ARTICLE 6. RECORDING AND DELIVERY OF DOCUMENTS

Instruments to Be Recorded

Section 6.01. When you are prepared to close escrow, you are authorized and instructed to record the following instruments and documents in the order set forth below; provided that if the issuance of a policy of title insurance or the making of a loan that is to be used to finance the purchase is conditioned upon their being recorded in some other order, you shall notify all parties immediately and refrain from proceeding until you have received further instructions resolving or eliminating the conflict:

[*If conveyances to seller must be made or recorded to vest clear title in seller:*]

(a) The quitclaim deed quitclaiming all of _____[*name of grantor*]'s right, title, and interest in the Subject Real Property to Seller [*or specify other conveyance necessary to vest clear title in seller*];

[*If seller is paying off existing loan:*]

(b) The reconveyance of the deed of trust securing the loan made to Seller by _____[*name of lender*];

[*If seller is paying off other lien claimants:*]

(c) The _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment or release of mechanic's lien] executed by _____[*name of lien claimant*];

[*Continue with the following:*]

(d) The grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(e) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed in favor of Buyer by Seller that _____[*specify purpose of agreement, e.g.,* provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(f) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Buyer that _____[*specify purpose of agreement, e.g.,* provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If purchase is to be financed by a third party lender:*]

(g) The first [or specify other priority] deed of trust executed by Buyer to secure the repayment of the purchase money loan to be made by _____[*name of lender*];

[*If seller is financing part of purchase price:*]

(h) The _____[first *or* second *or specify other priority*] deed of trust executed by Buyer to secure the payment of the portion of the purchase price to be financed by Seller;

[*If seller's deed of trust is subordinate to another deed of trust, use (i) and (j), below:*]

(i) Seller's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)]; and

(j) Seller's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)].

Delivery of Instruments and Documents to Buyer

Section 6.02. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Buyer, or cause to be delivered to Buyer, the following instruments and documents:

(a) The grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer;

(b) The original California Land Title Association standard coverage [*or specify other form of policy*] title insurance policy that _____[you have *or* _____ (*name of title insurer*) has] issued in accordance with the requirements of these instructions insuring that title to the Subject Real Property is vested in Buyer;

[*If seller is to execute a separate instrument or agreement conveying some additional property interest:*]

(c) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed in favor of Buyer by Seller and _____[*specify purpose of agreement, e.g.,* providing for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is to convey personal property to buyer:*]

(d) The bill of sale conveying to Buyer _____[*describe personal property to be conveyed or incorporate attached exhibit describing personal property by reference*];

[*If seller is to transfer or assign rights under conditional sales contract, service contract, or other contract relating to property:*]

(e) The _____[*describe contract, e.g.,* elevator service contract, dated March 18, 1987, between Seller and ABC Corporation] and the assignment transferring and assigning to Buyer all of Seller's interest in and rights under that contract;

[*If property is income-producing property or is otherwise leased or rented:*]

(f) The leases in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is required to furnish a rent schedule:*]

(g) The rent schedule showing the status of rental payments under the leases in effect between Seller and the present tenants of the Subject Real Property;

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(h) The schedule showing the security deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property and the assignment of those security deposits to Buyer;

[*If property is part of a condominium or planned unit development:*]

(i) _____[*Name of condominium or planned unit development owners' association*] Certificate No. _____[*or specify other document evidencing transfer of association membership*];

[*If property is served by a mutual or private water company:*]

(j) _____[*Name of mutual or private water company*] Stock Certificate No. _____[*or specify other documents evidencing assignment or transfer*];

[*If pest control certification is to be deposited in escrow:*]

(k) The written certification of _____[*name of structural pest control operator or the licensed structural pest control operator retained by the parties*] pursuant to *Business and Professions Code Section 8519* that the _____[*describe improvements, e.g.,* house, garage, and toolshed,] and other improvements located on the Subject Real Property are free of evidence of active infestation or infection in the visible and accessible areas.

[*If property taxes are to be prorated:*]

(l) Copies of all bills, invoices, statements, and receipts evidencing the real property taxes assessed on the Subject Real Property for the tax fiscal year _____-_____ and any payment of those taxes;

[*If special assessments that have been paid or are due are to be prorated:*]

(m) Copies of all bills, invoices, statements, and receipts evidencing the _____[*describe assessment*] on the Subject Real Property for _____[*specify period for which assessment is made*] and any payment of that assessment;

[*If maintenance fees are to be prorated:*]

(n) Copies of all bills, invoices, statements, and receipts evidencing the fees or charges of _____[*name of person or entity providing service*] for maintenance of the Subject Real Property for the period _____[*specify period for which fees or charges have been or will be incurred*] and any payment of those fees and charges;

[*If owners' association dues are to be prorated:*]

(o) Copies of all bills, invoices, statements, and receipts evidencing _____[*name of association*] dues for _____[*specify period for which dues paid or due*] and any payment of those dues;

[*If premium for insurance to be assigned or transferred to buyer is to be prorated:*]

(p) Copies of all bills, invoices, statements, and receipts evidencing the premium for _____[*name of insurer*] _____[*type of insurance, e.g.,* fire and extended special coverage] Policy No. _____, for the policy period from _____[*date*], to _____[*date*], and any payment of that premium;

[*If buyer is to pay for all or part of cost of initial pest control report out of escrow:*]

(q) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the initial structural pest control report ordered by the parties;

[*If buyer is to pay for all or part of cost of corrective pest control work out of escrow:*]

(r) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the corrective structural pest control work and final certification ordered by the parties;

[*If buyer is to pay all or part of cost of title insurance policy:*]

(s) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay escrow fees or other costs:*]

(t) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Buyer for _____[*specify applicable items, e.g.,* transfer taxes, reconveyance fees, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Delivery of Instruments and Documents to Seller

Section 6.03. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Seller, or cause to be delivered to Seller, the following instruments and documents:

[*If seller is financing portion of purchase price, include (a) through (f), below:*]

(a) The request for a copy of any notice of default or any notice of sale under the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)];

(b) The request for written notice of any and all delinquencies on the obligation secured by the _____[*describe prior deed of trust, e.g.,* first deed of trust executed by Buyer for the security and benefit of _____ (*name of lender*)];

(c) The promissory note executed in favor of Seller by Buyer;

(d) The _____[first *or* second *or specify other priority*] deed of trust executed by Buyer for the benefit of Seller to secure payment and performance of the obligations evidenced by the promissory note;

(e) The title insurance policy insuring Seller's beneficial interest in the _____[first *or* second *or specify other priority*] deed of trust that Buyer has executed for the benefit and security of Seller;

(f) The policy of insurance providing _____[*describe required coverage and type of policy, e.g.,* fire and extended physical damage] coverage for the Subject Real Property and naming Seller as the _____[first *or* second *or other priority*] loss payee.

[*If buyer is to execute instrument or agreement benefitting adjoining property retained by seller:*]

(g) The _____[party wall agreement *or* boundary agreement *or* grant of easement *or specify other instrument or agreement relating to adjoining real property retained by seller*] executed by Buyer that _____[*specify purpose of agreement, e.g.,* provides for the construction and maintenance of a wall between the Subject Real Property and certain adjoining real property owned by Seller];

[*If seller is paying off existing loan, add (h) through (j), below:*]

(h) The original promissory note evidencing the loan made to Seller by _____[*name of lender*];

(i) The deed of trust securing the loan made to Seller by _____[*name of lender*];

(j) The reconveyance of the deed of trust securing the loan made to Seller by _____[*name of lender*];

[*If seller is paying off other lien claimants, add (k) and (l), below:*]

(k) The _____[*instrument required to clear lien, e.g.,* acknowledgment of satisfaction of judgment or release of mechanic's lien] executed by _____[*name of lien claimant*];

(l) _____[*other documents to be deposited in escrow to evidence satisfaction or release of underlying obligation, e.g.,* The general release executed by _____ (*name of lien claimant*)];

[*If seller is to transfer security deposits in connection with sale of income-producing or rented property:*]

(m) The copy of the assignment that Buyer has executed to acknowledge the assignment and receipt of security deposits now held by Seller under leases in effect between Seller and the present tenants of the Subject Real Property;

[*If fees or charges for corrective pest control work or pest control certification are to be paid out of escrow:*]

(n) Copies of all bills, invoices, statements, and receipts evidencing the fees and charges for the corrective structural pest control work and final certification ordered pursuant to these instructions;

[*If seller is to pay all or part of cost of title insurance policy:*]

(o) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If seller is to pay escrow fees or other costs:*]

(p) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Seller for _____[*specify applicable items, e.g.*, transfer taxes, reconveyance fees, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

ARTICLE 7. DISBURSEMENT OF FUNDS

Payoff of Existing Lender

Section 7.01. You are authorized to disburse to _____[*name of lender or holder*] on behalf of Seller, from the funds held for Seller's account, an amount equal to the balance due on the loan secured by the deed of trust shown as _____[*Exception or Item or other designation*] No. _____ on the Preliminary Title Report attached to these instructions as Exhibit A, as shown on the payoff demand statement that _____[*name of lender or holder*] has placed in escrow [*or, if the payoff figure has been determined*: an amount equal to the unpaid principal balance of $_____, plus interest thereon at a rate of $_____ per day from _____[*date*] to _____[*date*], plus a prepayment penalty of $_____, minus the impound account balance of $_____], when, and only when:

(a) You are otherwise authorized under these instructions to record and deliver the grant deed deposited by Seller and close escrow;

(b) You have received in escrow, and are authorized and prepared to cancel and deliver to Seller, the original promissory note evidencing the loan;

(c) You have received in escrow, and are authorized and prepared to deliver to Seller, the original of the deed of trust securing the loan; and

(d) You have recorded and delivered to Seller a duly executed reconveyance of the deed of trust securing the loan.

Payoff of Other Lien Claimant

Section 7.02. You are authorized to disburse to _____[*name and address of other lien claimant*] on behalf of Seller, from the funds held for Seller's account, the amount necessary to _____[satisfy *or* discharge *or other appropriate characterization*; *or, if amount has been determined*: the sum of $_____, in full satisfaction of] the _____[*description of lien or underlying obligation, e.g.*, judgment *or* tax lien *or* mechanic's lien] shown as _____[Exception *or* Item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A, as set forth in the itemized statement and demand for payoff that _____[*name of lien claimant*] has placed in escrow, when, and only when:

(a) You are otherwise authorized under these instructions to record and deliver the grant deed deposited by Seller and close escrow;

(b) You have _____[*action required to clear lien, e.g.*, filed and recorded, or recorded] a duly executed _____[*instrument required to clear lien, e.g.*, acknowledgment of satisfaction of judgment *or* release of mechanic's lien] and are authorized and prepared to deliver it to Seller; and

(c) [*Specify any other conditions, such as receipt in escrow of duly executed release*.]

Other Disbursements From Funds Held for Seller

Section 7.03. When you have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer you are authorized to disburse on behalf of Seller, from the funds held for Seller's account at the close of escrow, the sums necessary to pay the following costs, charges, expenses, and items:

[*Select appropriate provisions from those below:*]

(a) The real estate broker's commission of $_____ owing to _____[*name and address of real estate broker; if commission is to be split, add*: and the real estate broker's commission of $_____ owing to _____ (*name and address of real estate broker*)];

(b) The documentary transfer tax and [*if local taxes are to be split*: One half of] Any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

(c) The reconveyance fees charged by _____[*name of trustee*] for the reconveyance of the deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

(d) The recording fees charged for the recording of the _____[*specify instruments for which seller is to pay recording fees, e.g.*, reconveyance of the deed of trust];

(e) The notary fees for any notary services performed for Seller;

(f) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

(g) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification,] that you are authorized to pay on Seller's behalf under the provisions of Sections 3.04, 3.05, and 3.06; and

(i) [*List any other costs, charges or expenses to be paid out of escrow by seller*.]

Disbursement of Balance to Seller

Section 7.04. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses, and items that you have been authorized to pay on Seller's behalf under the provisions of these instructions, you shall disburse the remaining balance of the funds held for the account of Seller to Seller in the following manner: _____[*select the appropriate provision below or specify other method of disbursement:*]

[*If seller will pick up check:*]

Notify Seller by [telephone *or* telegram *or specify other means of communication*] that you are prepared to disburse the

funds, draw a check to Seller on your escrow account for the balance of the funds held for Seller's account, and hold that check for Seller at your office at _____[*specify address*]. The check will be picked up at your office by Seller [*or specify name of designated officer, employee, or agent who will pick up check for seller*].

[*Or, if check is to be mailed to seller:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; mail that check to Seller _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] at _____[*address to which check is to be mailed*].

[*Or, if check is to be deposited in seller's bank account:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; deposit that check in _____[*name of bank or financial institution*] Account No. _____, a _____[*type of account*] maintained in the name of Seller, at the _____[*name of branch*] of _____[*name of bank or financial institution*], which is located at _____[*address of branch at which account is maintained*]. Mail written confirmation of the deposit, and a copy of the deposit slip evidencing the deposit, to Seller as soon as the deposit is made.

Disbursements From Funds Held for Buyer

Section 7.05. When you have closed escrow and recorded the grant deed conveying all of Seller's right, title, and interest in the Subject Real Property to Buyer, and when you are otherwise authorized and prepared to credit and disburse the funds to be paid to Seller as and for the purchase price, you are authorized to disburse, on behalf of Buyer, from the funds held for Buyer's account, the sums necessary to pay the following costs, charges, expenses, and items:

[*If buyer is to assume existing loan:*]

(a) Any fees or charges assessed by _____[*name of lender or holder*] in connection with Buyer's assumption of the loan secured by the existing _____[*specify priority, e.g.,* first *or* second *or other priority*] deed of trust shown as _____[exception *or* item *or other designation*] No. _____ on the Preliminary Title Report attached as Exhibit A;

[*If buyer is to obtain new loan, and loan fees and costs are to be paid directly by buyer:*]

(b) The _____[*describe known individual charges, e.g.,* tax and insurance impound account payment, loan fee, credit report fee, tax service contract charge,] and other costs, charges, fees, and expenses, payment of which is required by _____[*name of buyer's lender*] as a condition of making the loan that Buyer is to obtain from it to finance the purchase price of the Subject Real Property;

[*If buyer is to pay all or part of transfer taxes:*]

(c) [*If documentary transfer tax will be split*: One half of] The documentary transfer tax and [if local taxes are to be split: one half of] any local transfer tax imposed as a result of the conveyance of the Subject Real Property to Buyer;

(d) The recording fees charged for the recording of _____[*specify instruments for which buyer is to pay recording fees, e.g.,* the grant deed conveying the Subject Real Property to Buyer];

(e) The notary fees for any notary services performed for Buyer;

[*If buyer is to pay all or part of title insurance costs:*]

(f) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance policy insuring Buyer's title to the Subject Real Property;

[*If buyer is to pay all or part of escrow fees:*]

(g) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*If buyer is to pay all or part of cost of pest control corrective work or certification:*]

(h) Fees and charges for corrective pest control work [*add, if applicable*:, the inspection and reinspection of the Subject Real Property, and the preparation and delivery of the required pest control certification] that you are authorized to pay on Buyer's behalf under Sections 3.04, 3.05, and 3.06;

[*List any other individual items, then continue with the following:*]

(i) Any costs, charges, expenses and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(j) Any other costs, charges, expenses or items that Buyer is required to pay under the terms of these instructions.

Disbursement of Balance to Buyer

Section 7.06. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses and items that you have been authorized to pay on Buyer's behalf under the provisions of these instructions, you shall disburse any remaining balance of the funds held for the account of Buyer by drawing a check to Buyer on your escrow account for the balance of the funds held for Buyer's account and mailing that check to Buyer _____[*specify type of mail to be used, e.g.*, by certified mail, return receipt requested] at _____[*address to which check is to be mailed*] [*or specify other method of disbursement or delivery*].

ARTICLE 8. GENERAL PROVISIONS

Close of Escrow

Section 8.01. For the purposes of these instructions, this escrow shall be deemed to have closed when the grant deed conveying the Subject Real Property to Buyer has been recorded and the date on which the grant deed is recorded shall be deemed to be the date of the close of escrow. This escrow shall be considered to be in a condition to close when you are authorized under these instructions, and when you are otherwise able, to record the grant deed.

Time for Close of Escrow

Section 8.02. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

Section 8.03. (a) This escrow may, by mutual agreement of Seller and Buyer, be canceled at any time before the close of escrow by means of the deposit in escrow of supplementary escrow instructions directing you to cancel the escrow or a written notice of cancellation.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], _____[*if escrow is to be automatically canceled*: it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation *or, if affirmative action by party is necessary to effect cancellation*: you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance with these instructions].

[*If affirmative action is necessary to effect cancellation, add one of the following:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also include the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices; any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instruments, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow by giving notice to the parties that you are exercising your right to cancel.

(f) If this escrow is canceled, you shall return to Seller and Buyer all of the funds, instruments, documents, and other items that they have deposited into escrow [*if applicable, add*:, except for any deposits that Buyer has made in accordance with Section 2.02, which you shall retain in accordance with the provisions of Section 3.07].

[*If time is to be made of the essence:*]

Time of Essence

Section 8.04. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Cooperation of Parties

Section 8.05. Seller and Buyer shall cooperate with you in carrying out their instructions and completing this escrow. Seller and Buyer shall furnish you, upon request, with any information, documents, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

Section 8.06. You are authorized and entitled to assume that instruments, documents, and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

Section 8.07. You are authorized to record any instrument, agreement, or document, the recording of which is necessary or appropriate to secure the issuance of any policy of title insurance required by these instructions or to comply with any other term or condition of these instructions.

Furnishing of Copies

Section 8.08. You are authorized to furnish copies of these instructions, and of any instruments, documents or writings deposited in escrow, to _____[*identify by name and capacity persons who you want be able to obtain copies of any instructions or documents on request, e.g.,* the prospective title insurer, buyer's lender, the attorneys and real estate brokers for the parties]. You are authorized to furnish copies of these instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure the issuance of any policy of title insurance required by these instructions or to comply with any other term or condition of these instructions.

Deposit of Funds in Escrow

Section 8.09. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.,* a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or

trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at _____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you; funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement. Provided, however, that the deposit into escrow of a written commitment to deliver a check or funds into this escrow that is made to you or to a party to the escrow by a bank, savings and loan association, insurance company, or other institutional lender may, in your sole discretion, be deemed to be the equivalent of a deposit into escrow of the funds that the lender has committed to deposit.

Disbursement of Funds Held in Escrow

Section 8.10. You shall not make any disbursements from funds held in escrow for the account of either Seller or Buyer unless they are authorized by the instructions you have received from Seller and Buyer. Unless a prior disbursement is specifically authorized by the instructions you have received from Seller and Buyer, you shall not make any disbursements from funds held in escrow for the account of either Seller or Buyer until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

Section 8.11. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in writing, must be signed by the party giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [or specify other manner of giving notice], to each party to whom notice is to be given at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered, or if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Buyer are to be personally delivered or mailed to _____[buyer *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Seller are to be personally delivered or mailed to _____[seller *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

Conflicting Instructions

Section 8.12. If there is a material conflict between these instructions and the instructions that you receive from any other party in the course of carrying out these instructions, you shall notify Seller and Buyer forthwith of the precise nature of the conflict by telephone and by mail, and shall take no further action to carry out the particular instructions that are the subject of the conflict until the conflict has been resolved or eliminated by a valid amendment or supplement to the conflicting instructions or by a final order or judgment of a court of competent jurisdiction.

Conflicting Demands or Claims

Section 8.13. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow, conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received, or conflicting demands or claims concerning your obligations as escrow holder. Until any such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict, and you are authorized to retain in escrow any funds, instruments, documents, or items that are the subject of the conflict or that may be affected by the resolution of the conflict.

Sole Instructions

Section 8.14. Unless and until they are subsequently amended or canceled in the manner provided in these instructions, these instructions shall constitute the complete escrow instructions, and the only escrow instructions, of Seller and Buyer, and shall revoke and supersede any prior oral or written instructions you may have received.

Amendments

Section 8.15. Once these instructions have been deposited with you, they may be amended, supplemented, or modified only by means of a written amendment or supplement that has either been signed or approved in writing by both Buyer and Seller. No written amendment, supplement, or modification of these instructions shall be effective or valid unless and until it has been deposited with you and unless and until Buyer and Seller have either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of these instructions or of any other written instructions deposited with you by Buyer and Seller shall be ineffective and invalid.

Waiver

Section 8.16. Any term or condition of this escrow or these instructions may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or these instructions can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit. No written waiver shall be effective or valid unless and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

Section 8.17. These escrow instructions were prepared by _____[*name of attorney*], attorney for Seller and an active member of the State Bar of California (State Bar Number _____), and by _____[*name of attorney*], attorney for Buyer and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

Section 8.18. Please acknowledge your receipt and acceptance of these escrow instructions [if other items deposited with instructions, add: and the items deposited therewith] and your agreement to serve as escrow holder by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller and one signed copy to Buyer.

_____ Dated:

SELLER

_____ [*signature of seller*]

[*typed name*]

_____ Dated:

BUYER

_____ [*signature of buyer*]

[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions [*if other items are to be deposited with instructions, add*: and the items listed in Sections 2.01 and 2.04 of those instructions].

_____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale [*or* transfer] of the Subject Real Property from _____[*name of seller*] to _____[*name of buyer*] and to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, and any additional instructions or amendments submitted by the parties.

_____ Dated:

ESCROW HOLDER

_____ [*name of escrow holder*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
1. Sale of Real Property

11-26 California Legal Forms--Transaction Guide §§ 26.203-26.209

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.203[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
2. Sale of Note and Deed of Trust

11-26 California Legal Forms--Transaction Guide § 26.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.210 Sale of Note and Deed of Trust--Seller's Instructions

[1] Comment

[a] Use of Form

This form is a set of escrow instructions that may be used by the seller in a transaction in which the seller and buyer submit separate instructions to the escrow holder to complete the sale of a promissory note and deed of trust. For separate buyer's instructions, see *§ 26.201*. For joint instructions to be used in this type of transaction, see *§ 26.202*. For a discussion of separate instructions and the general considerations relevant to the use and adaptation of this form, see the comment to § 26.200.

[b] Deposit Clause

Paragraph 3 of this form contains the deposit clause. The purpose of this clause is to identify the instruments, documents, and other items that the seller is depositing or will deposit in escrow in order to enable the escrow holder to comply with the conditions that must be performed or fulfilled by the seller before the buyer will authorize payment of the purchase price. Conditions typically required by the buyer are discussed in *§ 26.211[1]*.

[c] Owner's Statement

Frequently, the buyer's obligation to purchase a note and deed of trust will be contingent upon verification of their status by means of an owner's statement, a written statement by the owner of the encumbered property that affirms the terms, validity, and enforceability of the note and deed of trust, and sets forth the amounts of the unpaid principal balance and other outstanding obligations. If an owner's statement is required by the underlying contract, the seller will ordinarily instruct the escrow holder to contact the owner of the property encumbered by the deed of trust and request the owner's statement. For a request for an owner's statement, an owner's statement, and a general discussion of owner's statements,

see *§ 26.243*.

[d] Beneficiary's Statement

If the deed of trust is subordinate to a prior deed of trust, the buyer's obligation to purchase a note and deed of trust may also be contingent upon verification of the status of the prior deed of trust by means of a beneficiary's statement, a written statement by the current beneficiary of the prior deed of trust that sets forth the terms of the note and the amount of the unpaid principal balance and other outstanding obligations. If a beneficiary's statement is required, the seller will ordinarily instruct the escrow holder to contact the beneficiary of the prior deed of trust and request a beneficiary's statement. For a request for a beneficiary's statement and a general discussion of beneficiary's statements, see *§ 26.242*.

[e] Conditions Precedent to Delivery of Note and Recording of Deed of Trust

Paragraph 6 of this form sets forth the conditions precedent to the delivery of the promissory note and the recording of the assignment of the deed of trust. Ordinarily, the only condition that the seller will require to be fulfilled before the escrow holder is authorized to deliver the note and record an assignment of the deed of trust is that the escrow holder must have received funds sufficient to pay the purchase price in escrow and must be authorized and able to disburse the purchase price to seller upon the close of escrow.

[f] Standard Provisions

This form contains standard provisions, appropriate for use by either party, concerning payment of escrow fees and costs [*see* Paragraph 8 of form], cancellation of escrow [*see* Paragraph 13 of form], amendments and supplemental instructions [*see* Paragraph 26 of form], waiver [*see* Paragraph 27 of form], limitations on the escrow holder's obligations [*see* Paragraphs 16, 23 of form], approval by other party [*see* paragraph following seller's signature block], and acceptance by escrow holder [*see* Paragraph 28 and final paragraph of form]. For a general discussion of these standard provisions, see *§ 26.200[1]*.

[2] Form

Sale of Note and Deed of Trust--Seller's Instructions

SELLER'S INSTRUCTIONS FOR SALE OF NOTE AND DEED OF TRUST

TO: _____[*name of escrow holder*]
_____[*address*]

Preliminary Recitals

1. _____[*Name of seller*] (hereinafter sometimes referred to as "Seller") has _____[entered into a contract *or, if instructions constitute contract* agreed] to sell to _____[*name of buyer*] (hereinafter sometimes referred to as "Buyer") a promissory note, dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____ (hereinafter sometimes referred to as the "Subject Promissory Note"). Seller has also _____[contracted *or* agreed] to assign to Buyer the deed of trust (hereinafter sometimes referred to as the "Subject Deed of Trust") securing the performance of the terms of the Subject Promissory Note, which encumbers certain _____[residential *or* commercial *or* unimproved] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at [*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the

"Subject Real Property." The Subject Deed of Trust has been recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495].

Subject to the terms and conditions set forth below, Seller hereby authorizes and instructs you to open an escrow for the purpose of completing the sale of the Subject Promissory Note and the assignment of the Subject Deed of Trust to Buyer and to complete the sale and assignment in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow, or if instructions are to serve as contract:*]

Disregard of Underlying Agreement

2. Your obligations as escrow holder are to be determined solely by these instructions, the written instructions initially deposited by Buyer, and any subsequent amendments or supplemental instructions jointly submitted by Seller and Buyer. You are not responsible for knowing or interpreting any provisions of any contract or agreement on which these instructions may be based, and shall not rely on any knowledge or understanding you may have of any such contract or agreement in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract or agreement between Buyer and Seller for the purchase and sale of the Subject Promissory Note or any writing purporting to be a contract or agreement on which your escrow instructions are based.

Deposit Clause

3. _____[Seller hereby deposits into escrow *or* On or before _____ (*date*), Seller will deposit or cause to be deposited into escrow] the following:

(a) The original of the Subject Promissory note, endorsed in favor of Buyer in accordance with the directions of Buyer;

(b) The original of the Subject Deed of Trust;

(c) An Assignment of Deed of Trust, duly executed and in recordable form, transferring and assigning the Subject Deed of Trust to Buyer;

[*If existing title policy is to be transferred to buyer:*]

(d) _____[*Describe form of policy, e.g.,* an American Land Title Association standard form lender's policy; a California Land Title Association standard form joint protection policy] with _____[*identify required endorsements, e.g.,* CLTA form endorsement 100] issued by _____[*name of title insurer*] as Policy No. _____ in the sum of $_____;

[*If existing fire insurance policy is to be transferred to buye*r:]

(e) An original policy of insurance issued by _____[*name of insurer*] as Policy No. _____ and providing _____[*describe coverage or type of policy, e.g.,* fire and extended special coverage insurance] on the Subject Real Property in the amount of $_____; and

(f) [*List any other items to be deposited by seller*.]

[*Add the following provision if the deed of trust is subject to a senior deed of trust:*]

Request for Beneficiary Statement on Prior Deed of Trust

4. As soon as possible after opening escrow, contact _____[*name of beneficiary under prior deed of trust*], the beneficiary under the _____[first *or* second *or other priority*] on the Subject Real Property. Request that, pursuant to *Civil Code Section 2943*, _____[he *or* she *or* it] deliver to you a true, correct, and complete copy of the note [*or specify other evidence of indebtedness*] secured by _____[his *or* her *or* its] deed of trust and a written beneficiary statement concerning the status of the obligations secured by the deed of trust and, in particular, indicating the following:

(a) The unpaid balance of the principal obligation secured by the deed of trust;

(b) The amount due for accrued interest on the unpaid balance of the principal obligation as of the date of the statement and the rate at which interest will accrue from and after the date of the statement;

(c) The amounts and due dates of any required periodic payments on the principal obligation;

(d) The amounts and due dates of any balloon payments or similar payments on the principal obligation;

(e) The date on which the balance of the principal obligation is due and payable in full;

(f) The total amount of all overdue installments of either principal or interest, or both;

(g) The date to which real estate taxes and special assessments on the Subject Real Property have been paid, to the extent that this information is known to the beneficiary;

(h) The amount of fire, physical damage, or other hazard insurance on the Subject Real Property now in effect, the term for which it is in effect, and the premium for that insurance, to the extent that this information is known to the beneficiary;

(i) The amount held in any impound account maintained for the purpose of paying taxes or the premiums for insurance on the Subject Real Property;

(j) The nature and amount of any prepayment penalty or similar obligation, the payment of which is secured by the deed of trust;

(k) The nature, and to the extent known, the amount of any additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the deed of trust; and

(l) Whether or not the obligation secured by the deed of trust can or may be transferred to a new borrower and, if a transfer is permissible, the nature of any relevant requirements.

Request for Property Owner's Offset Statement

5. As soon as possible after opening escrow, contact _____[*name of owner*], the owner of the Subject Real Property, and request that _____[he *or* she *or* it] complete, execute, and return to you an owner's offset statement:

[*Select one or more of the following provisions, as appropriate:*]

(a) Certifying that _____[he *or* she *or* it] is the owner of the Subject Real Property, that the

Subject Real Property is encumbered by the Subject Deed of Trust, and that the Subject Deed of Trust secures the performance of the terms of the Subject Promissory Note;

(b) Certifying that the Subject Promissory Note provides for the payment of interest on the unpaid principal balance at a rate of _____ percent per annum and provides for the repayment of a principal amount of $_____[*original principal amount*] and interest in equal monthly installment payments of $_____, due on the _____ day of each month beginning in _____[*month*] of _____[*year*] and continuing up to and including _____[*month*] of _____[*year*];

(c) Certifying that there have been no changes in the original terms of the Subject Promissory Note or the Subject Deed of Trust;

(d) Certifying that, other than the principal amount set forth in the Subject Promissory Note, there have been no advances that are subject to the terms of the Subject Promissory Note or the Subject Deed of Trust;

(e) Stating the amount of the unpaid principal balance of the Subject Promissory Note and the date to which the interest on the unpaid principal balance has been paid;

(f) Stating the due date and amount of each delinquent installment payment or stating that there are no delinquent installment payments;

(g) Certifying that the makers of the Subject Promissory Note received full and valid consideration therefor and that the Subject Promissory Note and the Subject Deed of Trust are valid and enforceable;

(h) Certifying that, except to the extent specified in the statement, _____[he *or* she *or* it] has no offsets, claims, or defenses that could be asserted in or to an action or proceeding instituted to collect or enforce obligations that are owed under the terms of the Subject Promissory Note or the Subject Deed of Trust; and

(i) Certifying _____[his *or* her *or* its] understanding that the statement is being made for the benefit of, and will be relied upon by, all of the parties to the transaction involving the sale of the Subject Promissory Note, including Buyer and the title insurer insuring the Subject Deed of Trust.

Conditions Precedent to Delivery of Note and Deed of Trust

6. You are authorized to deliver the Subject Promissory Note and the Subject Deed of Trust to Buyer and to record and deliver the Assignment of Deed of Trust deposited in escrow by Seller when, and only when:

(a) You hold for Seller's account in available funds, and are authorized and prepared to disburse to or on behalf of Seller, as and for the purchase price, the sum of $_____[*if applicable add*: plus interest at the rate of $_____ per day for each and every day from and after _____, (*date to which interest has been paid*) up to and including the date on which this escrow closes]; and

(b) [*Specify any other conditions required by seller*.]

[*Add the following provision if title insurance or fire insurance policies are to be transferred to buyer:*]

Transfer of Insurance Policies

7. When you have closed escrow, delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer, and recorded the Assignment of Deed of Trust deposited in escrow by Seller, you are authorized to deliver to Buyer

_____[*specify policies to be transferred; e.g.*, the title insurance policy and the fire insurance policy] that Seller has deposited in escrow, and to take whatever actions are necessary to transfer Seller's interest in _____[that policy *or* those policies] to Buyer.

Disbursements From Funds Held for Seller

8. When you have closed escrow, delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer, and recorded the Assignment of Deed of Trust deposited in escrow by Seller, you are authorized to disburse, on behalf of Seller, from the funds held for Seller's account at the close of escrow, the sums necessary to pay the following costs, charges, expenses, and items:

[**Select one or more of the following provisions, as appropriate**:]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split, add*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which seller is to pay recording fees, e.g.*, Assignment of Deed of Trust];

(d) The notary fees for any notary services performed for Seller;

(e) [*If title insurance costs are to be split*: One half of] [T]he premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and _____[*either* the title insurance policy *or* the endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow; and

(g) [*List any other costs, charges, or expenses to be paid out of escrow by seller*.]

Disbursement of Balance to Seller

9. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses and items that you have been authorized to pay on Seller's behalf under the provisions of these instructions, you shall disburse the remaining balance of the funds held for the account of Seller to Seller in the following manner: _____[*select the appropriate provision below or specify other method of disbursement:*]

[*If seller will pick up check:*]

Notify Seller by [telephone *or* telegram *or specify other means of communication*] that you are prepared to disburse said funds, draw a check to Seller on your escrow account for the balance of the funds held for Seller's account, and hold that check for Seller at your office at _____[*specify address*]. The check will be picked up at your office by Seller [*or specify name of designated officer, employee, or agent who will pick up check for seller*].

[*Or, if check is to be mailed to seller:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; mail that check to Seller [*specify type of mail to be used, e.g.*, by certified mail, return receipt requested] at _____[*address to which check is to be mailed*].

[*Or, if check is to be deposited in seller's bank account:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; deposit that check in _____[*name of bank or financial institution*] account no. _____, a _____[type of account] maintained in the name of Seller, at the _____[*name of branch*] of _____[*name of bank or financial institution*], located at _____[*address of branch at which account is maintained*]. Mail written confirmation of the deposit and a copy of the deposit slip evidencing the deposit to Seller as soon as the deposit is made.

Delivery of Instruments and Documents to Seller

10. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Seller, or cause to be delivered to Seller, the following instruments or documents:

[*If seller is to pay all or part of cost of title insurance:*]

(a) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance _____[policy *or* endorsement] insuring the Subject Deed of Trust; and

[*If seller is to pay escrow fees or other escrow costs:*]

(b) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Seller for _____[*specify applicable items, e.g.*, beneficiary's statements, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Close of Escrow

11. For the purposes of these instructions, this escrow shall be deemed to have closed on the date on which the Subject Promissory Note and the Subject Deed of Trust are delivered to Buyer. This escrow shall be considered to be in a condition to close when you are authorized under Seller's and Buyer's instructions, and when you are otherwise able, to deliver the Subject Note and Deed of Trust to Buyer, record and deliver the Assignment of Deed of Trust deposited by Seller, and disburse the purchase price to Seller.

Time for Close of Escrow

12. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

13. (a) This escrow may, by mutual agreement of Seller and Buyer, be canceled at any time before the close of escrow by means of the deposit in escrow of supplementary escrow instructions directing you to cancel the escrow or a written notice of cancellation.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], _____[*if escrow is to be automatically canceled*: it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation *or*, *if affirmative action is necessary to effect cancellation*: you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance with these instructions].

[*If affirmative action is necessary to effect cancellation, choose one of the following paragraphs:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or has not been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also add the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices. Any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instruments, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow by giving notice to the parties that you are exercising your right to cancel.

(f) On cancellation of the escrow, you shall return to Seller all funds, instruments, documents, and other items that Seller has deposited into escrow.

[*If time is to be made of the essence:*]

Time of the Essence

14. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Cooperation of Parties

15. Seller and Buyer shall cooperate with you in carrying out the instructions they deposit with you and in completing this escrow. Seller and Buyer shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure required title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

16. You are authorized and entitled to assume that instruments, documents, and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

17. You are authorized to record any instrument, agreement, or document the recording of which is necessary or appropriate to secure any title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Furnishing of Copies

18. You are authorized to furnish copies of Seller's instructions, and of any instruments, documents, or writings deposited in escrow, to _____[*identify by name and capacity persons who you want be able to obtain copies of any instructions or documents upon request, e.g.,* the prospective title insurer, the buyer, the attorneys, and the real estate brokers for the parties]. You are authorized to furnish copies of Seller's instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure any title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Deposit of Funds in Escrow

19. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.,* a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at_____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you; funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement. Provided, however, that the deposit into escrow of a written commitment to deliver a check or funds into this escrow that is made to you or to a party to the escrow by a bank, savings and loan association, insurance company, or other lender may, in your sole discretion, be deemed to be the equivalent of a deposit into escrow of the funds that the lender has committed to deposit.

Disbursement of Funds Held in Escrow

20. You shall not make any disbursements from funds held in escrow unless they are authorized by the instructions

you have received from Seller and Buyer. Unless a prior disbursement is specifically authorized by the instructions you have received from Seller and Buyer, you shall not make any disbursements from funds held in escrow until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

21. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in writing, must be signed by the party or parties giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*], to each party to whom notice is to be given, at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered or, if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Seller are to be personally delivered or mailed to _____[seller *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Buyer are to be personally delivered or mailed to Buyer [*or name of authorized agent to whom notice is to be delivered; or, if buyer is to designate an agent, add*: or to an agent authorized under Buyer's written instructions to receive notice on Buyer's behalf], at _____[*specify address or state*: at the address designated in Buyer's written instructions].

Conflicting Instructions

22. If there is a material conflict between the instructions that you receive from Seller and the instructions that you receive from Buyer, you shall notify Seller and Buyer forthwith of the precise nature of the conflict by telephone and by mail, and you shall take no further action to carry out the particular instructions that are the subject of the conflict until the conflict has been resolved or eliminated by a valid amendment to the conflicting instructions or by a final order or judgment of a court of competent jurisdiction.

Conflicting Demands or Claims

23. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow or conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received or conflicting demands or claims concerning your obligations as escrow holder. Until any such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties, and to retain in escrow any funds, instruments, documents, or items that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict.

Revocability of Instructions Until Deposit of Buyer's Instructions

24. Until Buyer has deposited with you signed written instructions that are sufficient to enable you to complete the sale of the Subject Promissory Note on the conditions set forth in these instructions, Seller shall have the right to revoke these instructions and shall have the right to the return of any instruments, documents, items, or funds deposited with you.

Sole Instructions

25. Unless and until they are subsequently amended or canceled in the manner provided in these instructions, these instructions and the written instructions initially deposited with you by Buyer shall constitute the complete escrow instructions, and the only escrow instructions, of Seller and Buyer and shall revoke and supersede any prior oral instructions you may have received.

Amendments

26. Once these instructions and Buyer's initial written instructions have been deposited with you, the respective instructions of Seller and Buyer may only be amended, supplemented, or modified by means of a written amendment that has either been signed or approved in writing by both Seller and Buyer. No written amendment, supplement, or modification of Seller's instructions or Buyer's instructions shall be effective or valid unless and until it has been deposited with you and unless and until Seller and Buyer have either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of the Seller's or Buyer's written instructions shall be ineffective and invalid.

Waiver

27. Any term or condition of this escrow or the instructions deposited by Seller and Buyer may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or the instructions deposited by Seller and Buyer can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit; no written waiver shall be effective or valid unless and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

28. These escrow instructions were prepared by _____[*name of attorney*], attorney for Seller and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

29. Please acknowledge your receipt and acceptance of these escrow instructions [*if items are to be deposited with instructions, add*:, the items deposited with them,] and your agreement to serve as escrow holder by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller.
_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

Acceptance by Buyer

I have read the foregoing escrow instructions of Seller and I approve and accept them.
_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions [*if items are to be deposited with instructions, add*: and the items listed in Paragraph 3 of those instructions].
_____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale of the Subject Promissory Note and the assignment of the Subject Deed of Trust from _____[*name of seller*] to _____[*name of buyer*]. _____[*Name of escrow holder*] further agrees to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, the instructions submitted by _____[*name of buyer*], and any additional instructions or amendments that may be submitted by the parties.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
2. Sale of Note and Deed of Trust

11-26 California Legal Forms--Transaction Guide § 26.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.211 Sale of Note and Deed of Trust--Buyer's Instructions

[1] Comment

[a] Use of Form

This form is a set of escrow instructions that may be used by the buyer in a transaction in which the seller and buyer submit separate instructions to the escrow holder to complete the sale of a promissory note and deed of trust. For separate seller's instructions, see *§ 26.210*. For joint instructions to be used in this type of transaction, see *§ 26.212*. For a discussion of separate instructions and the general considerations relevant to the use and adaption of escrow instructions, see *§ 26.200[1]*.

[b] Deposit Clauses

Paragraphs 3 and 4 of this form contain deposit clauses providing, respectively, for the deposit of the purchase price and the funds needed to pay the escrow fees and costs to be paid by the buyer. The purpose of the buyer's deposit clauses is to identify the funds or other items that the buyer is depositing or will deposit in escrow to enable the escrow holder to comply with the conditions that must be performed or fulfilled by the buyer before the seller will authorize the delivery of the promissory note. To comply with the conditions imposed by the seller, the buyer ordinarily will only be required to deposit funds that are sufficient to pay the purchase price and to pay the escrow fees and costs that the buyer is obligated to pay.

[c] Conditions Precedent to Payment of Purchase Price

[i] Commonly Required Conditions

The buyer's instructions should specify clearly the terms and conditions that must be performed or fulfilled before the

escrow holder is authorized to disburse the funds deposited by or on behalf of the buyer. Paragraph 6 of this form, which contains the conditions precedent to the payment of the purchase price, sets forth those conditions that are most commonly required by the buyer of a note and deed of trust.

[ii] Proper Endorsement and Delivery of Note and Assignment of Deed of Trust

The buyer's instructions will require, initially, that the seller properly endorse the promissory note and deposit it in escrow for delivery to buyer. The wording of the endorsement may have significant legal consequences and, accordingly, the buyer's instructions should specify the exact language that must be used by the seller in endorsing the note.

The buyer's instructions will also require that the escrow holder be authorized and prepared to record an assignment of the deed of trust that the seller has deposited into escrow.

[iii] Title Insurance and Fire Insurance

Another essential condition that will be required by the buyer's instructions is that a title insurer be obligated and prepared to issue a policy of title insurance, or an endorsement to an existing policy of title insurance deposited in escrow by seller, insuring the buyer's beneficial interest in the deed of trust. In addition, the buyer's instructions will usually require that the escrow holder be authorized and prepared to deliver an insurance policy or a memorandum of an insurance policy providing the buyer with the fire and physical damage insurance required by provisions of the deed of trust.

[iv] Owner's Statement

Frequently, the underlying contract will make the buyer's obligations contingent on the seller verifying the status of the note and deed of trust by means of an owner's statement, a written statement by the owner of the property encumbered that affirms the terms, validity, and enforceability of the note and deed of trust and sets forth the amounts of the unpaid principal balance and other outstanding obligations. If this contingency has not been removed before the escrow instructions are deposited, the buyer's instructions should require that an owner's statement meeting specified requirements be deposited in escrow.

For a request for owner's statement, an owner's statement, and a general discussion of owner's statements, see *§ 26.243*.

[v] Beneficiary's Statement

If the deed of trust is subordinate to a prior deed of trust, the underlying contract will usually make the buyer's obligations contingent on the seller's verifying the status of the prior deed by means of a beneficiary's statement, a written statement by the current beneficiary of the prior deed of trust that sets forth the terms of the note and the amount of the unpaid principal balance and other outstanding obligations. If this contingency has not been removed when the buyer's instructions are deposited, they will ordinarily require that a beneficiary's statement meeting specified requirements be deposited in escrow. For a request for a beneficiary's statement and a general discussion of beneficiary's statements, see *§ 26.242*.

[d] Standard Provisions

This form contains standard provisions, appropriate for use by either party, concerning payment of escrow fees and costs [*see* Paragraph 8 of form], cancellation of escrow [*see* Paragraph 14 of form], amendments and supplemental instructions [*see* Paragraph 27 of form], waiver [*see* Paragraph 28 of form], limitations on the escrow holder's obligations [*see* Paragraphs 17, 24 of form], approval by other party [*see* paragraph following buyer's signature block], and acceptance by escrow holder [*see* Paragraph 29 and final paragraph of form]. For a general discussion of these

standard provisions, see *§ 26.200[1]*.

[2] Form

Sale of Note and Deed of Trust--Buyer's Instructions

BUYER'S INSTRUCTIONS FOR SALE OF NOTE AND DEED OF TRUST

TO: _____[*name of escrow holder*]
_____[*address*]

Preliminary Recitals

1. _____[*Name of buyer*] (hereinafter sometimes referred to as "Buyer") has _____[entered into a contract *or, if instructions constitute contrac*t: agreed] to purchase from _____[*name of seller*] (hereinafter sometimes referred to as "Seller") a promissory note, dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____ (hereinafter sometimes referred to as the "Subject Promissory Note"). Under this _____[contract *or* agreement], Seller is to assign to Buyer the deed of trust (hereinafter sometimes referred to as the "Subject Deed of Trust") securing the performance of the terms of the Subject Promissory Note, which encumbers certain _____[residential *or* commercial *or* unimproved] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." The Subject Deed of Trust has been recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495].

Subject to the terms and conditions set forth below, Buyer hereby authorizes and instructs you to open an escrow for the purpose of Buyer's purchase of the Subject Promissory Note and the assignment of the Subject Deed of Trust to Buyer and to complete the purchase and assignment in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow, or if instructions are to serve as contract:*]

Disregard of Underlying Agreement

2. Your obligations as escrow holder are to be determined solely by these instructions, the written instructions initially deposited by Seller, and any subsequent amendments or supplemental instructions jointly submitted by Buyer and Seller. You are not responsible for knowing or interpreting any provisions of any contract or agreement on which these instructions may be based, and shall not rely on any knowledge or understanding you may have of any such contract or agreement in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract or agreement between Buyer and Seller for the purchase and sale of the Subject Promissory Note or any writing purporting to be a contract or agreement on which your escrow instructions are based.

Deposit Clause

3. _____[Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit or cause to be deposited into escrow] the following:

(a) _____[Cash *or* A certified check *or* A cashier's check] in the sum of $_____, to be applied toward payment of the purchase price for the Subject Promissory Note and the Subject Deed of Trust [*If buyer is to pay all or part of escrow costs, add*: and toward payment of any costs, charges, or expenses that Buyer is required to pay under the terms of these instructions]; and

(b) _____[*List other items to be deposited by buyer*.]

Additional Funds to Be Deposited by Buyer

4. In order to complete the purchase of the Subject Promissory Note and the Subject Deed of Trust and to comply with the terms and conditions of this escrow, Buyer will deposit into escrow on or before _____[*date*], provided that Buyer is notified thereof, any additional funds that are needed to pay the following costs, charges, expenses, and items. You are to notify Buyer of the amounts necessary to pay those costs, charges, expenses, and items at least _____ days before _____[*date*], or, in the case of those costs, charges, expenses, and items that cannot be determined by _____[*date*], as soon as they are known.

[*Select one or more of the following provisions, as appropriate:*]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split, add*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which buyer is to pay recording fees, e.g.,* Assignment of Deed of Trust; request for copies of notices of sale and default];

(d) The notary fees for any notary services performed for Buyer;

(e) [*If title insurance costs are to be split*: One-half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and the _____[title insurance policy *or* endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One-half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*List any other individual items, then continue with the following:*]

(g) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(h) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

[*Add the following provision if escrow is conditioned on verification of the status of the obligations secured by a senior deed of trust, by means of a beneficiary's statement:*]

Beneficiary's Statement Contingency

5. The Subject Deed of Trust is subject and subordinate to a [first *or* second *or other priority*] deed of trust, dated

_____, executed by _____[*name of trustor*], trustor, in favor of _____[*name of beneficiary*] to secure a certain promissory note in the principal sum of $_____ and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495]. This escrow and Buyer's agreement to purchase the Subject Promissory Note and the Subject Deed of Trust are conditioned on Seller obtaining from the beneficiary under that deed of trust and depositing in escrow a beneficiary's statement showing:

[*Select one or more of the following provisions, as appropriate:*]

(a) That the unpaid balance of the principal obligation secured by the deed of trust does not exceed $_____;

(b) That the rate of interest on the unpaid balance of the principal obligation does not exceed _____ percent per annum;

(c) That the principal obligation and interest thereon are payable in equal monthly installment payments that do not exceed $_____;

(d) That no balloon payments or similar payments in excess of $_____ are due under the terms of the promissory note secured by the deed of trust or the deed of trust [*if applicable, add*: before _____ (*date*)];

(e) That the balance of the principal obligation is not due and payable in full before _____[*date*];

(f) That _____[the total amount of all overdue installments of principal and interest does not exceed $_____ *or* there are no overdue installments of principal or interest]; and

(g) That the total amount of all additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the deed of trust, does not exceed $_____.

[*Add the following provision if escrow is conditioned on verification of the status of the obligations evidenced and secured by the promissory note and deed of trust by means of an owner's offset statement:*]

Owner's Offset Statement Contingency

6. This escrow and Buyer's agreement to purchase the Subject Promissory Note and the Subject Deed of Trust are conditioned on Seller obtaining and depositing in escrow an owner's offset statement from _____[*name of owner or* the record owner of the Subject Real Property]:

[*Select one or more of the following provisions, as appropriate:*]

(a) Certifying that _____[he *or* she *or* it] is the owner of the Subject Real Property, that the Subject Real Property is encumbered by the Subject Deed of Trust, and that the Subject Deed of Trust secures the performance of the terms of the Subject Promissory Note;

(b) Certifying that the Subject Promissory Note provides for the payment of interest on the unpaid principal balance at a rate of _____ percent per annum and provides for the repayment of a principal amount of $_____ and interest in equal monthly installment payments of $_____, due on the _____ day of each month beginning in _____[*month*] of _____[*year*] and continuing up to and including _____[*month*] of

_____[*year*];

(c) Certifying that there have been no changes in the original terms of the Subject Promissory Note or the Subject Deed of Trust;

(d) Certifying that, other than the principal amount set forth in the Subject Promissory Note, there have been no advances that are subject to the terms of the Subject Promissory Note or the Subject Deed of Trust;

(e) Certifying that the amount of the unpaid principal balance of the Subject Promissory Note is $_____ and that interest has been paid to _____[*date*];

(f) Certifying that the makers of the Subject Promissory Note received full and valid consideration therefor and that the Subject Promissory Note and the Subject Deed of Trust are valid and enforceable;

(g) Certifying that, except to the extent that the statement reflects payment of the obligations evidenced and secured by the Subject Promissory Note and the Subject Deed of Trust, _____[he *or* she *or* it] has no offsets, claims, or defenses that could be asserted in or to an action or proceeding instituted to collect or enforce obligations that are owed under the terms of the Subject Promissory Note or the Subject Deed of Trust; and

(h) Certifying _____[his *or* her *or* its] understanding that the statement is being made for the benefit of, and will be relied upon by, all of the parties to the transaction involving the sale of the Subject Promissory Note, including Buyer and the title insurer insuring the Subject Deed of Trust.

Conditions Precedent to Payment of Purchase Price

7. The purchase price for the Subject Promissory Note and the Subject Deed of Trust is to be the sum of $_____[*if applicable add*: plus interest at the rate of $_____ per day for each and every day from and after _____ (*date to which interest has been paid*), up to and including the date on which this escrow closes]. You are authorized to close this escrow, to charge the amount of the purchase price against the funds deposited into escrow by Buyer, to credit the amount of the purchase price to Seller's account, and to disburse that amount to or on behalf of Seller, when, and only when:

(a) Seller has endorsed the original of the Subject Promissory Note as follows: "_____" [*set forth endorsement exactly as it should appear on the note*];

(b) Seller has deposited the original of the Subject Promissory Note, endorsed as required in Paragraph 6(a), into escrow and you are authorized and prepared to deliver it to Buyer;

(c) Seller has deposited into escrow, and you are authorized and prepared to deliver to Buyer, the original of the Subject Deed of Trust;

(d) Seller has executed and deposited into escrow, and you are authorized and prepared to record and deliver to Buyer, an assignment of deed of trust, in recordable form, assigning all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*Choose one of the following paragraphs:*]

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue to Buyer, as the beneficiary of the Subject Deed of Trust, _____[*describe type of policy, e.g.,* an American Land Title Association standard form lender's policy with _____ (*identify any required endorsements*)] in the sum of $_____, insuring that the lien of the Subject Deed of Trust is superior and prior to all liens, encumbrances, conditions, covenants, restrictions, and adverse interests except those for those

specifically described below; that there are no matters shown by the public records that affect the validity or priority of the Subject Deed of Trust other than those specifically described below; and that there are no federal tax liens or bankruptcy proceedings affecting the title of the Subject Real Property: _____[*list, describing with specificity, any exceptions or items that buyer has agreed to accept, using exact language of preliminary title report whenever possible*];

[*OR*]

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue in favor of Buyer as the beneficiary of the Subject Deed of Trust, in the sum of $_____, _____[*describe endorsement, e.g.,* a CLTA 104A form endorsement] to _____[your *or* _____ (*name of title insurer's*)] _____[*type of policy, e.g.,* CLTA standard form joint protection policy] No. _____, insuring that the lien of the Subject Deed of Trust is superior and prior to all liens, encumbrances, conditions, covenants, restrictions, and adverse interests except for those specifically described below; that there are no matters shown by the public records that affect the validity or priority of the Subject Deed of Trust other than those specifically described below; and that there are no federal tax liens or bankruptcy proceedings affecting the title of the Subject Real Property: _____[*list, describing with specificity, any exceptions or items that buyer has agreed to accept, using exact language of preliminary title report whenever possible*];

[*If fire insurance policy or policy memorandum is to be deposited in escrow, choose one of the following paragraphs:*]

(f) You have received in escrow, and are authorized and prepared to deliver to Buyer, [*if memorandum of existing policy is to be furnished, add*: a memorandum of] _____[*name of insurer*] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, insuring the Subject Real Property in the sum of $_____ and containing a _____[*specify type or form number*] lender's loss payable endorsement naming Buyer as the _____[first *or* second *or other priority*] loss payee;

[*OR*]

(f) Seller has deposited in escrow, and effectively assigned and transferred to Buyer, _____[*name of insurer*] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, insuring the Subject Real Property in the sum of $_____ and containing a _____[*specify type or form number*] lender's loss payable endorsement naming Seller as the _____[first *or* second *or other priority*] loss payee;

[*If escrow is conditioned on verification of the status of the obligations secured by a senior deed of trust, by means of a beneficiary's statement, add the following provision:*]

(g) Seller has obtained and deposited in escrow a beneficiary's statement that meets the requirements set forth in Paragraph 5;

[*If escrow is conditioned on verification of the status of the obligations evidenced and secured by the promissory note and the deed of trust by means of an owner's offset statement, add the following provision:*]

(h) Seller has obtained and deposited in escrow an owner's offset statement that meets the requirements set forth in Paragraph 6; and

(i) [*Specify any other conditions required by buyer*.]

Other Disbursements From Funds Held for Buyer

8. When you have delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer and closed this escrow, and when you are otherwise authorized and prepared to disburse the funds to be disbursed to Seller as and for the purchase price, you are authorized to disburse, on behalf of Buyer, from the funds held for Buyer's account, the sums necessary to pay the following costs, charges, expenses, and items:

[*Select one or more of the following provisions, as appropriate:*]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split, add*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which buyer is to pay recording fees, e.g.*, Assignment of Deed of Trust; request for copies of notices of sale and default];

(d) The notary fees for any notary services performed for Buyer;

(e) [*If title insurance costs are to be split*: One-half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and the _____[title insurance policy *or* endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One-half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*List any other individual items, then continue with the following:*]

(g) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(h) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Disbursement of Balance to Buyer

9. When you have closed escrow and disbursed the sums necessary to pay the purchase price and the costs, charges, expenses, and items that you have been authorized to pay on Buyer's behalf under the provisions of these instructions, you shall disburse any remaining balance of the funds held for the account of Buyer by drawing a check to Buyer on your escrow account for the balance of the funds held for Buyer's account and mailing that check to Buyer _____[*specify type of mail to be used, e.g.*, by certified mail, return receipt requested] at _____[*address to which check is to be mailed*] [*or specify other method of disbursement or delivery*].

Instruments to Be Recorded

10. When you have delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer and are prepared to close escrow, you are authorized and instructed to record the following instruments and documents in the order set forth below; provided that if the issuance of a title insurance policy or endorsement is conditioned upon their being recorded in some other order, you shall notify all parties immediately and refrain from proceeding until you have received further instructions resolving or eliminating the conflict:

(a) The assignment of deed of trust assigning and transferring all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*If the deed of trust is subordinate to another deed of trust, add (b) and (c), below:*]

(b) Buyer's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the first [or second or other priority] deed of trust, dated _____, executed by _____[*name of trustor*], trustor, in favor of _____[*name of beneficiary*], beneficiary, and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.*, in Book 731, page 249 *or* at Reel 327, Image 495]; and

(c) Buyer's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the first [or second or other priority] deed of trust, dated _____, executed by _____[*name of trustor*], trustor, in favor of _____[*name of beneficiary*], beneficiary, and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.*, in Book 731, page 249 *or* at Reel 327, Image 495].

Delivery of Instruments and Documents to Buyer

11. When you are prepared to close escrow, you are to deliver, or cause to be delivered to Buyer, after first recording them if they are to be recorded, the following instruments and documents:

(a) The Subject Promissory Note;

(b) The Subject Deed of Trust;

(c) The assignment of deed of trust assigning and transferring all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*Choose one of the following paragraphs:*]

(d) The _____[*describe type of policy, e.g.*, American Land Title Association standard form lender's policy] insuring Buyer's beneficial interest in the Subject Deed of Trust that _____[you have issued *or* you have obtained from _____ (*name of title insurer*)] pursuant to these instructions;

[*OR*]

(d) _____[Your *or* _____ (*name of title insurer*)'s] _____[*describe type of policy, e.g.*, CLTA standard form joint protection policy] No. _____[*policy number of existing policy*] and the _____[*describe type of endorsement, e.g.*, CLTA 104A form endorsement] to that policy insuring Buyer's beneficial interest in the Subject Deed of Trust;

[*If the subject deed of trust is subordinate to another deed of trust, add (e) and (f), below:*]

(e) Buyer's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the first [or second or other priority] deed of trust;

(f) Buyer's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the [first *or* second *or other priority*] deed of trust;

[*If fire insurance policy or policy memorandum is to be deposited in escrow:*]

(g) The [*if memorandum of existing policy is to be furnished add*: memorandum of] _____[*name of insurer*] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, with lender's loss payable endorsement that is to be deposited into escrow [*if seller is to assign existing policy, add*: and copies of the documents effecting the assignment of that policy to Buyer];

[*If escrow is conditioned on verification of the status of the obligations secured by a senior deed of trust by means of a beneficiary's statement:*]

(h) The beneficiary's statement that Seller has obtained and deposited into escrow in accordance with the requirements set forth in Paragraph 5;

[*If escrow is conditioned on verification of the status of the obligations evidenced and secured by the subject promissory note and the subject deed of trust by means of an owner's offset statement:*]

(i) The owner's offset statement that Seller has obtained and deposited in escrow in accordance with the requirements set forth in Paragraph 6;

[*If buyer is to pay all or part of cost of title insurance policy or endorsement:*]

(j) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance _____[policy *or* policy endorsement] Buyer's beneficial interest in the Subject Deed of Trust; and

[*If buyer is to pay escrow fees or other costs:*]

(k) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Buyer for _____[*specify applicable items, e.g.,* recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Close of Escrow

12. For the purposes of these instructions, this escrow shall be deemed to have closed on the date on which the Subject Promissory Note and the Subject Deed of Trust are delivered to Buyer. This escrow shall be considered to be in a condition to close when you are authorized under Seller's and Buyer's instructions, and when you are otherwise able, to deliver the Subject Note and Deed of Trust to Buyer, record and deliver the Assignment of Deed of Trust deposited by Seller, and disburse the purchase price to Seller.

Time for Close of Escrow

13. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

14. (a) This escrow may, by mutual agreement of Seller and Buyer, be canceled at any time before the close of escrow by means of the deposit in escrow of supplementary escrow instructions directing you to cancel the escrow or a written notice of cancellation.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before

_____[*date*], _____[*if escrow is to be automatically canceled*: it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation or, if affirmative action is necessary to effect cancellation: you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance with these instructions].

[*If affirmative action is necessary to effect cancellation, choose one of the following paragraphs:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or has not been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also add the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices; any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instruments, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow by giving notice to the parties that you are exercising your right to cancel.

(f) On cancellation of the escrow, you shall return to Buyer all funds, instruments, documents, and other items that Buyer has deposited into escrow.

[*Add the following paragraph if time is to be made of the essence:*]

Time of the Essence

15. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Cooperation of Parties

16. Seller and Buyer shall cooperate with you in carrying out the instructions they deposit with you and completing

this escrow. Seller and Buyer shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure required title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

17. You are authorized and entitled to assume that instruments, documents, and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

18. You are authorized to record any instrument, agreement, or document the recording of which is necessary or appropriate to secure any title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Furnishing of Copies

19. You are authorized to furnish copies of Buyer's instructions, and of any instruments, documents, or writings deposited in escrow, to _____[*identify by name and capacity persons authorized to obtain copies of any instructions or documents upon request, e.g.,* the prospective title insurer, seller, the attorneys, and the real estate brokers for the parties]. You are authorized to furnish copies of Buyer's instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure any title insurance required by Seller's or Buyer's instructions or to comply with any other term or condition of Seller's or Buyer's instructions.

Deposit of Funds in Escrow

20. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.,* a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at _____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you; funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement.

Disbursement of Funds Held in Escrow

21. You shall not make any disbursements from funds held in escrow unless those disbursements are authorized by the instructions you have received from Seller and Buyer. Unless a prior disbursement is specifically authorized by the instructions you have received from Seller and Buyer, you shall not make any disbursements from funds held in escrow until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

22. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in writing, must be signed by the party or parties giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*], to each party to whom notice is to be given at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered or, if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Buyer are to be personally delivered or mailed to _____[buyer *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Seller are to be personally delivered or mailed to Seller [*or name of authorized agent to whom notice is to be delivered; or, if seller is to designate an agent, add*: or to an agent authorized under Seller's written instructions to receive notice on Seller's behalf], at _____[*specify address or state*: at the address designated in Seller's written instructions].

Conflicting Instructions

23. If there is a material conflict between the instructions that you receive from Seller and the instructions that you receive from Buyer, you shall notify Seller and Buyer forthwith of the precise nature of the conflict by telephone and by mail and you shall take no further action to carry out the particular instructions that are the subject of the conflict until the conflict has been resolved or eliminated by a valid amendment to the conflicting instructions or by a final order or judgment of a court of competent jurisdiction.

Conflicting Demands or Claims

24. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow or conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received or conflicting demands or claims concerning your obligations as escrow holder. Until any such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties, and to retain in escrow any funds, instruments, documents, or items, that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict.

Revocability of Instructions Until Deposit of Seller's Instructions

25. Until Seller has deposited with you signed written instructions that are sufficient to enable you to complete the sale of the Subject Promissory Note on the conditions set forth in these instructions, Buyer shall have the right to revoke these instructions and shall have the right to the return of any instruments, documents, items, or funds deposited with you.

Sole Instructions

26. Unless and until they are subsequently amended or canceled in the manner provided in these instructions, these

instructions and the written instructions initially deposited with you by Seller shall constitute the complete escrow instructions, and the only escrow instructions, of Seller and Buyer, and shall revoke and supersede any prior oral instructions you may have received.

Amendments

27. Once these instructions and Seller's initial written instructions have been deposited with you, the respective instructions of Seller and Buyer may only be amended, supplemented, or modified by means of a written amendment that has either been signed or approved in writing by both Seller and Buyer. No written amendment, supplement, or modification of Seller's instructions or Buyer's instructions shall be effective or valid unless and until it has been deposited with you and unless and until Seller and Buyer have either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of Seller's or Buyer's written instructions shall be ineffective and invalid.

Waiver

28. Any term or condition of this escrow or the instructions deposited by Seller and Buyer may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or the instructions deposited by Seller and Buyer can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit. No written waiver shall be effective or valid unless and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

29. These escrow instructions were prepared by _____[*name of attorney*], attorney for Buyer and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

30. Please acknowledge your receipt and acceptance of these escrow instructions [if funds and items are to be deposited with instructions, add: and the funds and items deposited with them] and your agreement to serve as escrow holder by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Buyer.

_____ Dated:

BUYER

_____ [*signature of buyer*]

[*typed name*]

Acceptance by Seller

I have read the foregoing escrow instructions of Buyer and I approve and accept them.

_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions, of the sum of $_____ in _____[*specify form of deposit, e.g.*, cash *or* in the form of a cashier's check] [*if items are to be deposited with instructions, add*: and of the items listed in Paragraph _____ of those instructions]. _____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale of the Subject Promissory Note and the assignment of the Subject Deed of Trust from _____[*name of seller*] to _____[*name of buyer*] _____[*name of escrow holder*] further agrees to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, the instructions submitted by _____[*name of seller*], and any additional instructions or amendments submitted by the parties.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
2. Sale of Note and Deed of Trust

11-26 California Legal Forms--Transaction Guide § 26.212

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.212 Sale of Note and Deed of Trust--Joint Instructions

[1] Comment--Use of Form

This form is a set of escrow instructions that may be used by the seller and the buyer in a transaction in which they submit joint escrow instructions to the escrow holder to complete the sale of a promissory note and deed of trust. It may also serve as a contract for the sale of the note and deed of trust. For a general discussion of joint instructions, see *§ 26.202[1]*.

Joint instructions ordinarily should include virtually all the provisions that normally would be included in separate instructions prepared for the seller and the buyer. Accordingly, this form essentially merges and consolidates the seller's and buyer's instructions set out, respectively, in §§ 26.210[2] and 26.211[2]. For a discussion of provisions common to escrow instructions generally, see *§ 26.200[1]* (seller's instructions) and 26.201[1] (buyer's instructions).

[2] Form

Sale of Note and Deed of Trust--Joint Instructions

JOINT ESCROW INSTRUCTIONS OF SELLER AND BUYER

TO: _____[*name of escrow holder*]
_____[*address*]

_____[*Name of seller*] (hereafter sometimes referred to as "Seller") and _____[*name of buyer*] (hereafter sometimes referred to as "Buyer") deposit with you the following joint escrow instructions:

ARTICLE 1. INTRODUCTORY PROVISIONS

Preliminary Recitals

[*Choose one of the following paragraphs:*]

[*If the parties have already entered into a contract, use the following provision:*]

Section 1.01. Seller and Buyer have entered into a contract under the terms of which Seller is to sell to Buyer a secured promissory note, dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____ (hereinafter sometimes referred to as the "Subject Promissory Note"). Under the terms of this contract, Seller is also to assign to Buyer the deed of trust (hereinafter sometimes referred to as the "Subject Deed of Trust") securing the performance of the terms of the Subject Promissory Note, which encumbers certain _____[residential *or* commercial *or* unimproved] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." The Subject Deed of Trust has been recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495].

[*OR*]

[*If the escrow instructions are to constitute the contract, use the following provision:*]

Section 1.01. Seller hereby agrees to sell, and Buyer hereby agrees to purchase, on the terms and conditions set forth below, a secured promissory note, dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____ (hereinafter sometimes referred to as the "Subject Promissory Note"). Seller further agrees, on the terms and conditions set forth below, to transfer and assign to Buyer the deed of trust (hereinafter sometimes referred to as the "Subject Deed of Trust") securing the performance of the terms of the Subject Promissory Note, which encumbers certain _____[residential *or* commercial *or* unimproved] real property situated in the _____[*describe geographical location, e.g.,* City of Oakland, County of Alameda, State of California], commonly known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described in the Preliminary Title Report dated _____, attached as Exhibit "A" and by this reference incorporated herein, which real property is hereinafter sometimes referred to as the "Subject Real Property." The Subject Deed of Trust has been recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495]. Seller and Buyer intend that this agreement shall constitute both a legally binding contract for the purchase and sale of the Subject Promissory Note and the Subject Deed of Trust and their joint escrow instructions submitted pursuant to that contract to complete the purchase and sale of the Subject Promissory Note and the Subject Deed of Trust.

[*Continue with the following:*]

Subject to the terms and conditions set forth below, Seller and Buyer hereby authorize and instruct you to open an escrow for the purpose of completing the sale of the Subject Promissory Note and the assignment of the Subject Deed of Trust to Buyer and to complete the sale and assignment in accordance with the following directions.

[*Add the following provision if underlying contract is not to be deposited in escrow:*]

Disregard of Underlying Agreement

Section 1.02. Your obligations as escrow holder are to be determined solely by these instructions and any subsequent amendments or supplemental instructions jointly submitted by Seller and Buyer. You are not responsible for knowing or interpreting any provisions of any _____[contract *or* agreement] on which these instructions may be based, and shall not rely on any knowledge or understanding you may have of any such _____[contract *or* agreement] in ascertaining or performing your duties as escrow holder. You are not to accept in escrow any separate contract or agreement between Buyer and Seller for the purchase and sale of the Subject Promissory Note or any writing [*if instructions constitute contract, add*: other than these instructions] that purports to be a contract or agreement on which your escrow instructions are based.

ARTICLE 2. DEPOSITS INTO ESCROW

Seller's Deposits in Escrow

Section 2.01. _____[Seller hereby deposits into escrow*or* On or before _____ (*date*), Seller will deposit or cause to be deposited into escrow] the following:

(a) The original of the Subject Promissory Note, endorsed in favor of Buyer in accordance with the directions of Buyer;

(b) The original of the Subject Deed of Trust;

(c) An Assignment of Deed of Trust, duly executed and in recordable form, transferring and assigning the Subject Deed of Trust to Buyer;

[*If existing title policy is to be transferred to buyer:*]

(d) _____[*Describe form of policy, e.g.,* an American Land Title Association standard form lender's policy *or* a California Land Title Association standard form joint protection policy] with _____[*identify required endorsements, e.g.,* CLTA form endorsement 100] issued by _____[*name of title insurer*] as Policy No. _____ in the sum of $_____;

[*If existing fire insurance policy is to be transferred to buyer with addition of an endorsement to the existing policy:*]

(e) _____[An original *or* A memorandum of a] policy of insurance issued by _____[*name of insurer*] as Policy No. _____ and providing _____[*describe coverage or type of policy, e.g.,* fire and extended special coverage insurance] on the Subject Real Property in the amount of $_____; and

(f) [*List other items to be deposited by seller*.]

Buyer's Deposits in Escrow

Section 2.02. _____[Buyer hereby deposits into escrow *or* On or before _____ (*date*), Buyer will deposit or cause to be deposited into escrow] the following:

(a) _____[Cash *or* A certified check *or* A cashier's check] in the sum of $_____, to be applied toward payment of the purchase price for the Subject Promissory Note and the Subject Deed of Trust [*if buyer is to pay all or part of escrow costs, add*: and toward payment of any costs, charges, or expenses that Buyer is required to pay under the terms of these instructions]; and

(b) [*List other items to be deposited by buyer*.]

Additional Funds to Be Deposited by Buyer

Section 2.03. To complete the purchase of the Subject Promissory Note and the Subject Deed of Trust and to comply with the terms and conditions of this escrow, Buyer will deposit into escrow on or before _____[*date*], provided that _____[he *or* she *or* it] is notified thereof, any additional funds that are needed to pay the following costs, charges, expenses and items. You are to notify Buyer of the amounts necessary to pay those costs, charges, expenses, and items at least _____ days before _____[*date*] or, in the case of those costs, charges, expenses, and items that cannot be determined by _____[*date*], as soon as they are known.

[*Select one or more of the following provisions, as appropriate:*]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which buyer is to pay recording fees, e.g.,* Assignment of Deed of Trust *or* request for copies of notices of sale and default];

(d) The notary fees for any notary services performed for Buyer;

(e) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and the _____[title insurance policy *or* endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*List any other individual items, then continue with the following:*]

(g) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(h) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Additional Deposits Into Escrow

Section 2.04. Seller and Buyer shall deposit into escrow, on receiving notification from you, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure title insurance policies or endorsements, or to otherwise carry out the terms of their instructions and close this escrow.

[*If the subject deed of trust is subordinate to another deed of trust, add the following Article 3:*]

ARTICLE 3. BENEFICIARY STATEMENT

[*If escrow is conditioned on verification of the status of the obligations secured by the senior deed of trust, by means of a beneficiary's statement, add the following Section 3.01:*]

Beneficiary Statement Contingency

Section 3.01. The Subject Deed of Trust is subject and subordinate to a [first *or* second *or other priority*] deed of trust, dated _____, executed by _____[*name of trustor*] in favor of _____[*name of beneficiary*] to secure a certain promissory note in the principal sum of $_____ and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495]. This escrow and Buyer's agreement to purchase the Subject Promissory Note and the Subject Deed of Trust are conditioned on Seller obtaining from the beneficiary under that deed of trust and depositing in escrow a beneficiary statement showing:

[*Select one or more of the following provisions, as appropriate:*]

(a) That the unpaid balance of the principal obligation secured by the deed of trust does not exceed $_____;

(b) That the rate of interest on the unpaid balance of the principal obligation does not exceed _____ percent per annum;

(c) That the principal obligation and interest thereon are payable in equal monthly installment payments that do not exceed $_____;

(d) That no balloon payments or similar payments in excess of $_____ are due under the terms of the promissory note secured by the deed of trust or the deed of trust [*if applicable, add*: before _____ (*date*)];

(e) That the balance of the principal obligation is not due and payable in full before _____[*date*];

(f) That _____[the total amount of all overdue installments of principal and interest does not exceed $_____ *or* there are no overdue installments of principal or interest]; and

(g) That the total amount of all additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the deed of trust, does not exceed $_____.

Request for Beneficiary Statement on Prior Deed of Trust

Section 3.02. As soon as possible after opening escrow, contact _____[*name of beneficiary under prior deed of trust*], the beneficiary under the _____[first *or* second *or other priority*] deed of trust on the Subject Real Property. Request that, pursuant to *Civil Code Section 2943*, _____[he *or* she *or* it] deliver to you a true, correct, and complete copy of the note [or specify other evidence of indebtedness] secured by _____[his *or* her *or* its] deed of trust and a written beneficiary statement concerning the status of the obligations secured by the deed of trust and, in particular, indicating the following:

(a) The unpaid balance of the principal obligation secured by the deed of trust;

(b) The amount due for accrued interest on the unpaid balance of the principal obligation as of the date of the statement, and the rate at which interest will accrue from and after the date of the statement;

(c) The amounts and due dates of any required periodic payments on the principal obligation;

(d) The amounts and due dates of any balloon payments or similar payments on the principal obligation;

(e) The date on which the balance of the principal obligation is due and payable in full;

(f) The total amount of all overdue installments of either principal or interest, or both;

(g) The date to which real estate taxes and special assessments on the Subject Real Property have been paid, to the extent that this information is known to the beneficiary;

(h) The amount of fire, physical damage, or other hazard insurance on the Subject Real Property now in effect, the term for which it is in effect, and the premium for that insurance, to the extent that this information is known to the beneficiary;

(i) The amount held in any impound account maintained for the purpose of paying taxes or the premiums for insurance on the Subject Real Property;

(j) The nature and amount of any prepayment penalty or similar obligation the payment of which is secured by the deed of trust;

(k) The nature and, to the extent known, the amount of any additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the deed of trust; and

(l) Whether or not the obligation secured by the deed of trust can or may be transferred to a new borrower and, if a transfer is permissible, the nature of any relevant requirements.

ARTICLE 4. PROPERTY OWNER'S OFFSET STATEMENT

[*If escrow is conditioned on verification of the status of the obligations evidenced and secured by the subject promissory note and the subject deed of trust, by means of an owner's offset statement, add the following Section 4.01:*]

Owner's Offset Statement Contingency

Section 4.01. This escrow and Buyer's agreement to purchase the Subject Promissory Note and the Subject Deed of Trust are conditioned on Seller obtaining and depositing in escrow an owner's offset statement from _____[*name of owner or* the record owner of the Subject Real Property]:

[*Select one or more of the following provisions, as appropriate:*]

(a) Certifying that _____[he *or* she *or* it] is the owner of the Subject Real Property, that the Subject Real Property is encumbered by the Subject Deed of Trust, and that the Subject Deed of Trust secures the performance of the terms of the Subject Promissory Note;

(b) Certifying that the Subject Promissory Note provides for the payment of interest on the unpaid principal balance at a rate of _____ percent per annum and provides for the repayment of a principal amount of $_____ and interest in equal monthly installment payments of $_____, due on the_____ day of each month beginning in _____[*month*] of _____[*year*] and continuing up to and including _____[*month*] of _____[*year*];

(c) Certifying that there have been no changes in the original terms of the Subject Promissory Note or the Subject Deed of Trust;

(d) Certifying that, other than the principal amount set forth in the Subject Promissory Note, there have been no advances that are subject to the terms of the Subject Promissory Note or the Subject Deed of Trust;

(e) Certifying that the amount of the unpaid principal balance of the Subject Promissory Note is $_____ and that interest has been paid to _____[*date*];

(f) Certifying that the makers of the Subject Promissory Note received full and valid consideration therefor and that the Subject Promissory Note and the Subject Deed of Trust are valid and enforceable;

(g) Certifying that, except to the extent that the statement reflects payment of the obligations evidenced and secured by the Subject Promissory Note and the Subject Deed of Trust, _____[he *or* she *or* it] has no offsets, claims, or defenses that could be asserted in or to an action or proceeding instituted to collect or enforce obligations that are owed under the terms of the Subject Promissory Note or the Subject Deed of Trust; and

(h) Certifying _____[his *or* her *or* its] understanding that the statement is being made for the benefit of, and will be relied on by, all of the parties to the transaction involving the sale of the Subject Promissory Note, including Buyer and the title insurer insuring the Subject Deed of Trust.

Request for Property Owner's Offset Statement

Section 4.02. As soon as possible after opening escrow, contact _____[*name of owner or*: the record owner of the Subject Real Property], and request that _____[he *or* she *or* it] complete, execute, and return to you an owner's offset statement:

[*Select one or more of the following provisions, as appropriate:*]

(a) Certifying that _____[he *or* she *or* it] is the owner of the Subject Real Property, that the Subject Real Property is encumbered by the Subject Deed of Trust, and that the Subject Deed of Trust secures the performance of the terms of the Subject Promissory Note;

(b) Certifying that the Subject Promissory Note provides for the payment of interest on the unpaid principal balance at a rate of _____ percent per annum and provides for the repayment of a principal amount of $_____[*original principal amount*] and interest in equal monthly installment payments of $_____, due on the _____ day of each month beginning in _____[

month] of _____[*year*] and continuing up to and including _____[*month*] of _____[*year*];

(c) Certifying that there have been no changes in the original terms of the Subject Promissory Note or the Subject Deed of Trust;

(d) Certifying that, other than the principal amount set forth in the Subject Promissory Note, there have been no advances that are subject to the terms of the Subject Promissory Note or the Subject Deed of Trust;

(e) Stating the amount of the unpaid principal balance of the Subject Promissory Note and the date to which the interest on the unpaid principal balance has been paid;

(f) Stating the due date and amount of each delinquent installment payment or stating that there are no delinquent installment payments;

(g) Certifying that the makers of the Subject Promissory Note received full and valid consideration therefor and that the Subject Promissory Note and the Subject Deed of Trust are valid and enforceable;

(h) Certifying that, except to the extent specified in the statement, _____[he *or* she *or* it] has no offsets, claims, or defenses that could be asserted in or to an action or proceeding instituted to collect or enforce obligations that are owed under the terms of the Subject Promissory Note or the Subject Deed of Trust; and

(i) Certifying _____[his *or* her *or* its] understanding that the statement is being made for the benefit of, and will be relied upon by, all of the parties to the transaction involving the sale of the Subject Promissory Note, including Buyer and the title insurer insuring the Subject Deed of Trust.

ARTICLE 5. CONDITIONS PRECEDENT TO CLOSE OF ESCROW

Conditions Precedent to Delivery of Note and Deed of Trust

Section 5.01. You are authorized to deliver the Subject Promissory Note and the Subject Deed of Trust to Buyer and to record and deliver the Assignment of Deed of Trust deposited in escrow by Seller when, and only when:

(a) You hold for Seller's account in available funds, and are authorized and prepared to disburse to or on behalf of Seller, as and for the purchase price, the sum of $_____[*if applicable add*:, plus interest at the rate of $_____ per day for each and every day from and after _____, (*date to which interest has been paid*) up to and including the date on which this escrow closes]; and

(b) [*Specify any other conditions required by seller*.]

Conditions Precedent to Payment of Purchase Price

Section 5.02. The purchase price for the Subject Promissory Note and the Subject Deed of Trust is to be the sum of $_____[*if applicable add*: plus interest at the rate of $_____ per day for each and every day from and after _____, (*date to which interest has been paid*) up to and including the date on which this escrow closes]. You are authorized close this escrow, to charge the amount of the purchase price against the funds deposited into escrow by Buyer, to credit the amount of the purchase price to Seller's account, and to disburse that amount to or on behalf of Seller, when, and only when:

(a) Seller has endorsed the original of the Subject Promissory Note as follows: "_____" [*set forth*

endorsement exactly as it should appear on the note];

(b) Seller has deposited the original of the Subject Promissory Note, endorsed as required in Section 5.02(a), into escrow and you are authorized and prepared to deliver it to Buyer;

(c) Seller has deposited into escrow, and you are authorized and prepared to deliver to Buyer, the original of the Subject Deed of Trust;

(d) Seller has executed and deposited into escrow, and you are authorized and prepared to record and deliver to Buyer, an assignment of deed of trust, in recordable form, assigning all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*Choose one of the following paragraphs:*]

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue to Buyer, as the beneficiary of the Subject Deed of Trust, _____[*describe type of policy, e.g.,* an American Land Title Association standard form lender's policy with _____ (*identify any required endorsements*)] in the sum of $_____, insuring that the lien of the Subject Deed of Trust is superior and prior to all liens, encumbrances, conditions, covenants, restrictions and adverse interests except those for those specifically described below; that there are no matters shown by the public records that affect the validity or priority of the Subject Deed of Trust other than those specifically described below; and that there are no federal tax liens or bankruptcy proceedings affecting the title of the Subject Real Property: _____[*list, describing with specificity, any exceptions or items that buyer has agreed to accept, using exact language of preliminary title report whenever possible*].

[*OR*]

(e) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue in favor of Buyer as the beneficiary of the Subject Deed of Trust, in the sum of $_____, _____[*describe endorsement, e.g.,* a CLTA 104A form endorsement] to _____[your *or* _____ (*name of title insurer*)'s] _____[*describe type of policy, e.g.,* CLTA standard form joint protection policy] No. _____[*policy number of existing policy to which endorsement is to be added*], insuring that the lien of the Subject Deed of Trust is superior and prior to all liens, encumbrances, conditions, covenant, restrictions, and adverse interests except those for those specifically described below; that there are no matters shown by the public records that affect the validity or priority of the Subject Deed of Trust other than those specifically described below; and that there are no federal tax liens or bankruptcy proceedings affecting the title of the Subject Real Property: _____[*list, describing with specificity, any exceptions or items that buyer has agreed to accept, using exact language of preliminary title report whenever possible*].

[*Continue with the following:*]

[*If fire insurance policy or policy memorandum is to be deposited in escrow, choose one of the following paragraphs:*]

(f) You have received in escrow, and are authorized and prepared to deliver to Buyer, [*if memorandum of existing policy is to be furnished add*: a memorandum of] _____[*name of insurer*] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, insuring the Subject Real Property in the sum of $_____ and containing a _____[*specify type or form number*] lender's loss payable endorsement naming Buyer as the _____[first *or* second *or other priority*] loss payee;

[*OR*]

(f) Seller has deposited in escrow, and effectively assigned and transferred to Buyer, _____[*name of insurer*] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, insuring the Subject Real Property in the sum of $_____ and containing a _____[*specify type or form number*] lender's loss payable endorsement naming Seller as the _____[first *or* second *or other priority*] loss payee;

[*Continue with the following:*]

[*If escrow is conditioned on verification of the status of the obligations secured by a senior deed of trust, by means of a beneficiary's statement, add the following provision:*]

(g) Seller has obtained and deposited in escrow a beneficiary's statement that meets the requirements *set forth in Section 3.01*;

[*If escrow is conditioned on verification of the status of the obligations evidenced and secured by the subject promissory note and the subject deed of trust, by means of an owner's offset statement, add the following provision:*]

(h) Seller has obtained and deposited in escrow an owner's offset statement that meets the requirements *set forth in Section 4.01*; and

(i) [*Specify any other conditions required by buyer*.]

ARTICLE 6. RECORDING AND DELIVERY OF DOCUMENTS

Instruments to Be Recorded

Section 6.01. When you have delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer and are prepared to close escrow, you are authorized and instructed to record the following instruments and documents in the order set forth below; provided that if the issuance of a title insurance policy or endorsement is conditioned upon their being recorded in some other order, you shall notify all parties immediately and refrain from proceeding until you have received further instructions resolving or eliminating the conflict:

(a) The assignment of deed of trust assigning and transferring all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*If the subject deed of trust is subordinate to another deed of trust, add (b) and (c), below:*]

(b) Buyer's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the [first *or* second *or other priority*] deed of trust, dated _____, executed by _____[*name of trustor*], trustor, in favor of _____[*name of beneficiary*], beneficiary, and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495]; and

(c) Buyer's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the [first *or* second *or other priority*] deed of trust, dated _____, executed by _____[*name of trustor*], trustor, in favor of _____[*name of beneficiary*], beneficiary, and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book

731, page 249 *or* at Reel 327, Image 495].

[*Add the following provision if title insurance or fire insurance policies are to be transferred to buyer:*]

Transfer of Insurance Policies to Buyer

Section 6.02. When you have closed escrow, delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer, and recorded the Assignment of Deed of Trust deposited in escrow by Seller, you are authorized to execute whatever documents and to take whatever actions are necessary to transfer Seller's interest in _____[*as applicable*: the title insurance policy and the fire insurance policy] that Seller has deposited in escrow.

Delivery of Instruments and Documents to Buyer

Section 6.03. When you are prepared to close escrow, you are to deliver, or cause to be delivered to Buyer, after first recording them if they are to be recorded, the following instruments and documents:

(a) The Subject Promissory Note;

(b) The Subject Deed of Trust;

(c) The assignment of deed of trust assigning and transferring all of Seller's beneficial interest in the Subject Deed of Trust to Buyer;

[*Choose one of the following paragraphs:*]

(d) The _____[*describe type of policy, e.g.,* American Land Title Association standard form lender's policy] insuring Buyer's beneficial interest in the Subject Deed of Trust that you have _____[issued *or* obtained from _____ (*name of title insurer*)] pursuant to these instructions;

[*OR*]

(d) _____[Your *or* _____ (*name of title insurer*)] _____[*describe type of policy, e.g.,* CLTA standard form joint protection policy] No. _____[*policy number of existing policy*] and the _____[*describe type of endorsement, e.g.,* CLTA 104A form endorsement] to that policy insuring Buyer's beneficial interest in the Subject Deed of Trust;

[*If the subject deed of trust is subordinate to another deed of trust, add (e) and (f), below:*]

(e) Buyer's request pursuant to *Civil Code Section 2924b* for a copy of any notice of default or any notice of sale under the _____[first *or* second *or* other priority] deed of trust;

(f) Buyer's request pursuant to *Civil Code Section 2924e* for written notice of any and all delinquencies in payment of principal or interest on the obligation secured by the _____[first *or* second *or other priority*] deed of trust;

[*If fire insurance policy or policy memorandum is to be deposited in escrow:*]

(g) The [*if memorandum of existing policy is to be furnished, add*: memorandum of] _____[*name*

of insurer] _____[*describe type of policy, e.g.,* fire and extended special coverage] insurance policy No. _____, with lender's loss payable endorsement that is to be deposited into escrow [*if seller is to assign existing policy, add*: and copies of the documents effecting the assignment of that policy to Buyer];

[*If escrow is conditioned on verification of the status of the obligations secured by a senior deed of trust, by means of a beneficiary's statement:*]

(h) The beneficiary's statement that Seller has obtained and deposited into escrow in accordance with the requirements *set forth in Section 3.01*;

[*If escrow is conditioned on verification of the status of the obligations evidenced and secured by the subject promissory note and the subject deed of trust, by means of an owner's offset statement:*]

(i) The owner's offset statement that Seller has obtained and deposited in escrow in accordance with the requirements *set forth in Section 4.01*;

[*If buyer is to pay all or part of cost of title insurance policy or endorsement:*]

(j) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance _____[policy *or* policy endorsement] insuring Buyer's beneficial interest in the Subject Deed of Trust; and

[*If buyer is to pay escrow fees or other costs:*]

(k) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Buyer for _____[*specify applicable items, e.g.*, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

Delivery of Instruments and Documents to Seller

Section 6.04. When you have closed escrow and recorded all instruments and documents that are to be recorded, you are to deliver to Seller, or cause to be delivered to Seller, the following instruments or documents:

[*If seller is to pay all or part of cost of title insurance:*]

(a) Copies of all bills, invoices, statements, and receipts evidencing the premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and title insurance _____[policy *or* endorsement] insuring the Subject Deed of Trust; and

[*If seller is to pay escrow fees or other escrow costs:*]

(b) Your itemized statement showing your fees and charges for the escrow services you have performed in connection with this escrow and the sums that you have paid on behalf of Seller for _____[*specify applicable items, e.g.*, beneficiary's statements, recording fees, notary fees,] and other costs, fees, charges, and expenses incurred in completing this escrow or complying with these instructions.

ARTICLE 7. DISBURSEMENT OF FUNDS

Disbursements From Funds Held for Seller

Section 7.01. When you have closed escrow, delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer, and recorded the Assignment of Deed of Trust deposited in escrow by Seller, you are authorized to disburse, on behalf of Seller, from the funds held for Seller's account, the sums necessary to pay the following costs, charges, expenses, and items:

[*Select one or more of the following provisions, as appropriate:*]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which seller is to pay recording fees, e.g.*, Assignment of Deed of Trust];

(d) The notary fees for any notary services performed for Seller;

(e) [*If title insurance costs are to be split*: One half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and the _____[title insurance policy *or* endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One half of] Your fees and charges for the escrow services you have performed in connection with this escrow; and

(g) [*List any other costs, charges or expenses to be paid out of escrow by seller*.]

Disbursement of Balance to Seller

Section 7.02. When you have closed escrow and disbursed the sums necessary to pay the costs, charges, expenses, and items that you have been authorized to pay on Seller's behalf under these instructions, you shall disburse the remaining balance of the funds held for the account of Seller to Seller in the following manner: _____[*select the appropriate provision below or specify other method of disbursement:*]

[*If seller will pick up check:*]

Notify Seller by telephone [or telegram or specify other means of communication] that you are prepared to disburse those funds, draw a check to Seller on your escrow account for the balance of the funds held for Seller's account, and hold that check for Seller at your office at _____[*address*]. The check will be picked up at your office by Seller [*or specify name of designated officer, employee, or agent who will pick up check for seller*].

[*Or, if check is to be mailed to seller:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; mail that check to

Seller _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] at _____[*address to which check is to be mailed*].

[*Or, if check is to be deposited in seller's bank account:*]

Draw a check to Seller on your escrow account for the balance of the funds held for Seller's account; deposit that check in _____[*name of bank or financial institution*] Account No. _____, a _____[*type of account*] maintained in the name of Seller, at the _____[*name of branch*] of _____[*name of bank or financial institution*], which is located at _____[*address of branch at which account is maintained*]. Mail written confirmation of the deposit, and a copy of the deposit slip evidencing the deposit, to Seller as soon as the deposit is made.

Other Disbursements From Funds Held for Buyer

Section 7.03. When you have delivered the Subject Promissory Note and the Subject Deed of Trust to Buyer and closed this escrow, and when you are otherwise authorized and prepared to disburse the funds to be disbursed to Seller as and for the purchase price, you are authorized to disburse, on behalf of Buyer, from the funds held for Buyer's account, the sums necessary to pay the following costs, charges, expenses, and items:

[*Select one or more of the following provisions, as appropriate:*]

(a) The loan broker's commission of $_____ owing to _____[*name and address of loan broker; if commission is to be split*: and the loan broker's commission of $_____ owing to _____ (*name and address of loan broker*)];

(b) The fee charged by _____[*name of beneficiary under prior deed of trust*] for providing the beneficiary's statement requested pursuant to these instructions;

(c) The recording fees charged for the recording of the _____[*specify instruments for which buyer is to pay recording fees, e.g.,* Assignment of Deed of Trust; request for copies of notices of sale and default];

(d) The notary fees for any notary services performed for Buyer;

(e) [*If title insurance costs are to be split*: One-half of] The premium and any other fees and costs charged by _____[you *or name of title insurer*] for the issuance of the preliminary report and the _____[title insurance policy *or* endorsement to the existing title insurance policy] insuring the Subject Deed of Trust;

(f) [*If escrow fees are to be split*: One-half of] Your fees and charges for the escrow services you have performed in connection with this escrow;

[*List any other individual items, then continue with the following:*]

(g) Any costs, charges, expenses, and items that Buyer is to pay as a result of any proration or adjustment required by these instructions; and

(h) Any other costs, charges, expenses, or items that Buyer is required to pay under the terms of these instructions.

Disbursement of Balance to Buyer

Section 7.04. When you have closed escrow and disbursed the sums necessary to pay the purchase price and the costs, charges, expenses, and items that you have been authorized to pay on Buyer's behalf under the provisions of these instructions, you shall disburse any remaining balance of the funds held for the account of Buyer by drawing a check to Buyer on your escrow account for the balance of the funds held for Buyer's account and mailing that check to Buyer _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] at _____[*address to which check is to be mailed; or specify other method of disbursement or delivery*].

ARTICLE 8. GENERAL PROVISIONS

Close of Escrow

Section 8.01. For the purposes of these instructions, this escrow shall be deemed to have closed on the date on which the Subject Promissory Note and the Subject Deed of Trust are delivered to Buyer. This escrow shall be considered to be in a condition to close when you are authorized under these instructions, and when you are otherwise able, to deliver the Subject Note and Deed of Trust to Buyer, record and deliver the Assignment of Deed of Trust deposited by Seller, and disburse the purchase price to Seller.

Time for Close of Escrow

Section 8.02. As soon as this escrow is in a condition to close, you are to proceed forthwith to close it. This escrow must be _____[in a condition to close *or* closed] no later than _____[*date*].

Cancellation of Escrow

Section 8.03.(a) This escrow may, by mutual agreement of Seller and Buyer, be canceled at any time before the close of escrow by means of the deposit in escrow of supplementary escrow instructions directing you to cancel the escrow or a written notice of cancellation.

(b) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], _____[*if escrow is to be automatically canceled*: it shall be immediately and automatically canceled; no instructions from or notice to any party shall be required in order to effect the cancellation*or, if affirmative action is necessary to effect cancellation*: you shall proceed with the escrow and close the escrow as soon as possible unless the escrow is canceled in accordance with these instructions].

[*If affirmative action is necessary to effect cancellation, choose one of the following paragraphs:*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions or because, without any fault on the part of a party, a condition of the escrow has not occurred or has not been fulfilled, a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*OR*]

(c) If this escrow is not _____[in a condition to close *or* closed] on or before _____[*date*], because a party has defaulted in the performance of a term or condition of the escrow or of these instructions, or because a condition of the escrow has not occurred or been fulfilled, you shall give the parties

notice stating that escrow _____[was not in a condition to close *or* could not be closed] on that date and specifying the particular terms or conditions of the escrow or of these instructions that had not been performed or that had not occurred or been fulfilled. Unless the terms and conditions specified in the notice are performed or have occurred or been fulfilled within _____[*specify period, e.g.,* five days], a party who is not in default may cancel this escrow by giving you written notice that he or she is exercising the right to cancel the escrow.

[*If affirmative action is necessary to effect cancellation, also add the following paragraph:*]

(d) A cancellation of this escrow can only be effected by means of supplementary escrow instructions or a written notice complying with the respective provisions of these instructions relating to amendment of instructions and notices; any purported oral cancellation of this escrow shall be ineffective and invalid.

[*Continue with the following:*]

(e) If this escrow is not closed on or before _____[*date*], and if the parties do not deposit any additional funds, instruments, documents, instructions, or other items in escrow or take any other steps to place the escrow in a condition to close for a period of six months thereafter, you may, at your option, cancel this escrow, by giving notice to the parties that you are exercising your right to cancel.

(f) Upon cancellation of the escrow, you shall return to Buyer all funds, instruments, documents, and other items that Buyer has deposited into escrow.

[*Add the following provision if time is to be made of the essence:*]

Time of the Essence

Section 8.04. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

[*Continue with the following:*]

Cooperation of Parties

Section 8.05. Seller and Buyer shall cooperate with you in carrying out these instructions and completing this escrow. Seller and Buyer shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are reasonably necessary to enable you to comply with demands made on the escrow by third parties, to secure required title insurance, or to otherwise carry out the terms of their instructions and close this escrow.

Genuineness of Documents

Section 8.06. You are authorized and entitled to assume that instruments, documents and other writings that are deposited in escrow or that you receive in the course of carrying out your instructions are genuine and are in fact signed by the person or persons purporting to execute them, and you are authorized and entitled to act upon or use such instruments, documents, and writings, unless and until you have actual knowledge of facts or circumstances that would

cause a reasonably prudent person to suspect that they are not genuine.

Recording of Documents

Section 8.07. You are authorized to record any instrument, agreement, or document the recording of which is necessary or appropriate to secure any title insurance required by these instructions or to comply with any other term or condition of these instructions.

Furnishing of Copies

Section 8.08. You are authorized to furnish copies of Buyer's instructions, and of any instruments, documents, or writings deposited in escrow, to _____[*identify by name and capacity persons who are authorized to obtain copies of any instructions or documents upon request, such as the prospective title insurer, the attorneys and real brokers for the parties*]. You are authorized to furnish copies of these instructions, and of any instruments, documents, or writings deposited in escrow, to other persons or entities if and to the extent that you determine, in the good faith exercise of your judgment, that it is necessary or appropriate in order to secure any title insurance required by these instructions or to comply with any other term or condition of these instructions.

Deposit of Funds in Escrow

Section 8.09. (a) You are authorized and instructed to deposit all funds you receive in escrow in a general escrow [*if appropriate, add*: or trust] account that is maintained in your name at _____[*identify types of financial institutions in which funds may be deposited, e.g.*, a State or National Bank insured by an agency of the United States Government] and to retain those funds in such an account until they are disbursed pursuant to the instructions of the parties. However, you are authorized to transfer escrowed funds held in one general escrow [*if appropriate, add*: or trust] account to any other general escrow [*if appropriate, add*: or trust] account maintained in your name at _____[*identify types of financial institutions in which funds may be deposited*].

(b) For the purposes of these instructions, funds deposited into escrow in the form of cash or its equivalent are deemed deposited when they are delivered to you. Funds deposited into escrow in the form of a check, draft, or similar instrument are deemed deposited when the collectibility of the funds has been confirmed and they are available for disbursement.

Disbursement of Funds Held in Escrow

Section 8.10. You shall not make any disbursements from funds held in escrow unless they are authorized by these instructions or by amendments or supplemental instructions jointly submitted by Seller and Buyer. Unless a prior disbursement is specifically authorized by these instructions or by amendments or supplemental instructions jointly submitted by Seller and Buyer, you shall not make any disbursements from funds held in escrow until you have closed escrow. Any disbursement made from funds held in escrow shall be made in the form of a check drawn on the general escrow [*if appropriate, add*: or trust] account in which the escrowed funds are held.

Notices

Section 8.11. (a) Unless another form of notice or another manner of giving notice is required or expressly authorized by other provisions of these instructions, any notice that is required or permitted under these instructions must be in

writing, must be signed by the party or parties giving the notice, and must be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*], to each party to whom notice is to be given at the addresses set forth below. An attempted or purported notice that does not comply with these requirements shall be invalid and ineffective. Notice shall be deemed to have been given at the time it is personally delivered or, if given by mail, at the time it is deposited in the United States Mail.

(b) Notices that are to be given to you are to be personally delivered or mailed to _____[you *or specify particular person to whom notice is to be delivered or mailed*] at _____[*address*].

(c) Notices that are to be given to Buyer are to be personally delivered or mailed to _____[Buyer *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

(d) Notices that are to be given to Seller are to be personally delivered or mailed to _____[Seller *or name of authorized agent to whom notice is to be delivered*] at _____[*address*].

Conflicting Demands or Claims

Section 8.12. You are not obligated to determine or resolve conflicting demands or claims to funds, instruments, documents, or items deposited in escrow or conflicting demands or claims concerning the validity, interpretation, or performance of the escrow instructions you have received or conflicting demands or claims concerning your obligations as escrow holder. Until such conflicting demands or claims have been determined, resolved, or eliminated by written agreement of the parties, a valid amendment or supplement to your escrow instructions, or a final order or judgment of a court of competent jurisdiction, you are authorized to refrain from carrying out any instructions or performing any duties, and to retain in escrow any funds, instruments, documents, or items that are the subject of the conflict or that may be dependent upon or affected by the resolution of the conflict.

Sole Instructions

Section 8.13. Unless and until they are subsequently amended or canceled in the manner provided herein, these instructions shall constitute the complete escrow instructions, and the only escrow instructions, of Seller and Buyer and shall revoke and supersede any prior oral or written instructions you may have received.

Amendments

Section 8.14. Once these instructions have been deposited with you, they may only be amended, supplemented, or modified by means of a written amendment that has either been signed or approved in writing by both Seller and Buyer. No written amendment, supplement, or modification of these instructions shall be effective or valid unless and until it has been deposited with you and unless and until Seller and Buyer have either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of these instructions shall be ineffective and invalid.

Waiver

Section 8.15. Any term or condition of this escrow or these instructions may be waived, but only with the agreement of each party the term or condition was intended to benefit. A term or condition of this escrow or the instructions deposited by Seller and Buyer can only be waived by means of a written waiver that has either been signed or approved in writing by the party or parties the term or condition was intended to benefit. No written waiver shall be effective or valid unless

and until it has been deposited with you and unless and until each party it was intended to benefit has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral waiver shall be ineffective and invalid.

Preparation of Instructions

[*Set forth following provision in at least 10-point type:*]

Section 8.16. These escrow instructions were prepared by _____[*name of attorney*], attorney for Seller and an active member of the State Bar of California (State Bar Number _____), and by _____[*name of attorney*], attorney for Buyer and an active member of the State Bar of California (State Bar Number _____).

Request for Acknowledgment of Acceptance

Section 8.17. Please acknowledge your receipt and acceptance of these escrow instructions [if funds and items will be deposited with instructions, add:, and the funds and items deposited with them,] and your agreement to serve as escrow holder by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller and one signed copy to Buyer.
_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing escrow instructions [*if funds will be deposited with instructions, add*:, of the sum of $_____ deposited by _____ (Buyer *or* Seller) _____ (*specify form of deposit, e.g.*, in cash *or* in the form of a cashier's check); *if items will be deposited with instructions, add*:, and of the items listed in Sections 2.01 and 2.02 of those instructions]. _____[*Name of escrow holder*] agrees to establish an escrow for the purpose of completing the sale of the Subject Promissory Note and the assignment of the Subject Deed of Trust from _____[*name of seller*] to _____[*name of buyer*] and further agrees to serve as escrow holder for that escrow in accordance with the terms and conditions of the foregoing instructions, and any additional instructions or amendments submitted by the parties.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleEscrow



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
2. Sale of Note and Deed of Trust

11-26 California Legal Forms--Transaction Guide §§ 26.213-26.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.213[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
3. Lender's Instructions

11-26 California Legal Forms--Transaction Guide § 26.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.220 New Lender's Instructions

[1] Comment

[a] Use of Form

This form is a set of instructions that may be used by a lender that is making a loan to the buyer to finance a portion of the purchase price for real property when the documentation and funding of the loan are to be accomplished through the escrow established to complete the sale of the property. Although this form is written for use in connection with a purchase of real property, it may also be adapted for use in refinancing or other secured loan transactions.

These instructions are typical of the instructions used by institutional lenders. They do not create a true escrow, because the lender expressly reserves the right to revoke them unilaterally and obtain the return of items deposited. Essentially, they constitute a revocable offer to deposit the loan proceeds on performance of the specified conditions [*see, e.g., Keyes v. Meyers (1905) 147 Cal. 702, 704-706, 82 P. 304* ; *Ragan v. Ragan (1915) 29 Cal. App. 63, 65, 154 P. 479]* .

Ordinarily, these instructions would be delivered to the escrow holder along with the note and deed of trust that the buyer is to execute to evidence and secure the loan, and the other loan documents to be executed by or delivered to the buyer.

[b] Conditions Precedent to Request for Funds

Usually a lender will not deposit loan proceeds into escrow until all of the conditions of making the loan (other than the actual recording of the deed of trust and issuance of a policy of title insurance) have been satisfied and the escrow holder is fully authorized and prepared to close escrow promptly on receipt of the loan proceeds. Thus, these instructions provide that before the escrow holder may request the loan proceeds, the following must occur:

- The deed of trust must be executed by the buyer and the escrow holder must be authorized and prepared to record it, the promissory note, and the other agreements, statements and documents to be executed by the buyer must be properly executed and returned to the lender;

- Statements and documents to be delivered to the buyer must be delivered and an acknowledgment or certification of delivery returned to the lender;

- The title insurer must have delivered its written commitment to issue the title insurance required by the lender;

- The escrow holder must be authorized and prepared to deliver a fire and physical damage insurance policy complying with the lender's requirements;

- The escrow holder must have delivered copies of the preliminary title report and the escrow instructions submitted by the parties to the lender;

- The buyer must have deposited the required cash downpayment and funds sufficient to pay any escrow costs or charges into escrow; and

- The escrow holder must be authorized and prepared to record the deed of trust, to secure the issuance and delivery of the title insurance policy required by the lender and to deliver the required fire and physical damage insurance policy to the lender. When these additional conditions have been complied with, the escrow holder is authorized to disburse the loan proceeds.

[c] Deduction of Loan Fees and Charges

These instructions assume that, in accordance with the usual practice, the lender will deduct its loan fees and charges from the loan proceeds before depositing them in escrow. If loan fees and charges are to be paid out of escrow, the right to request and disburse the loan proceeds should be conditioned on the escrow holder having been authorized and instructed by the Buyer to pay the loan fees and charges.

[d] Cancellation for Redrawing of Instructions and Documents

The lender's loan documents and escrow instructions are ordinarily predicated on the assumption that escrow will close before the first payment comes due under the terms of the note deposited for the Buyer's execution. Accordingly, if the escrow does not close before this date, the instructions and loan documents will have to be revoked and withdrawn. These instructions contain a provision for automatic cancellation of the instructions in that event.

[2] Form

New Lender's Instructions

NEW LENDER'S INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

Preliminary Recitals

1. _____[*Name of buyer*] (hereinafter sometimes referred to as "Buyer" [*or* "Borrower" *or other appropriate designation*]) has applied to _____[*name of lender*] (hereinafter sometimes referred to as "Lender") for a loan of $_____ to finance the purchase of [*or, if loan is not a purchase money loan*: to be secured by] certain real property known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California], which property is hereinafter sometimes referred to as the "Subject Real Property." Lender has been advised that Buyer has opened the above-referenced escrow with you for the purpose of completing the purchase of the Subject Real Property [*or, if loan is not a purchase money loan*: obtaining the loan]. In order to secure performance or fulfillment of the terms and conditions of the loan for which Buyer has applied, and to facilitate the making of the loan if appropriate, Lender, reserving the right to amend or revoke these instructions, unilaterally and without prior notice, at any time, hereby authorizes and instructs you as follows:

Deposit Clause

2. Lender has enclosed herewith the following:

(a) A promissory note providing for the repayment of a principal amount of $_____ plus interest on the unpaid balance thereof at the rate of _____ percent per annum in equal monthly installments of $_____ beginning _____[*date*], over a _____ year term, to be executed by Buyer in favor of Lender;

(b) A deed of trust conveying the Subject Real Property to _____[*name of trustee*] in trust for the purpose of securing performance of the obligations evidenced by the above-described promissory note and certain other obligations, to be executed by Buyer for the benefit of Lender;

[*If an impound account is to be established:*]

(c) An agreement and authorization for the establishment and maintenance of a tax and insurance impound account, to be executed by Buyer in favor of Lender;

[*If buyer is required to secure a tax service contract:*]

(d) An application for a tax service contract, to be executed by Buyer;

[*If loan is subject to Truth in Lending Act (15 U.S.C. § 1601 et seq.; 12 C.F.R. § 226.1 et seq.), add (e) through (g), below:*]

(e) Two copies of the Regulation Z Disclosure Statement required by the Truth in Lending Act, one of which is to be delivered to Buyer and one of which is to be executed by Buyer to acknowledge receipt;

(f) Three copies of the notice of consumer's right to rescind required by the Truth in Lending Act, two of which are to be delivered to Buyer and one of which is to be returned to us;

(g) A certification form verifying the delivery of the notices of right to rescind, which is to be completed by you and returned to us;

[*If buyer must acknowledge insurance requirements:*]

(h) Two copies of a notice and acknowledgment of understanding of the insurance coverage that will be required by Lender pursuant to the enclosed deed of trust, one of which is to be delivered to Buyer and one of which is to be executed by Buyer to acknowledge receipt;

[*If buyer must sign statement regarding oral representations:*]

(i) Two copies of a statement and acknowledgment of understanding concerning the effect of oral representations and agreements, one of which is to be delivered to Buyer and one of which is to be executed by Buyer to acknowledge receipt;

[*If loan fees and charges are to be deducted from loan:*]

(j) An agreement and authorization for deduction of loan charges and fees from the gross loan proceeds, to be executed by Buyer;

[*If buyer must execute or re-execute loan application:*]

(k) A [*if applicable*: corrected or other appropriate characterization] loan application, to be [executed *or* re-executed] by Buyer; and

(l) [*List any other forms or statements that must be completed or executed by buyer*.]

Execution of Loan Instruments and Documents

3. When you have received these instructions, please have Buyer execute immediately all loan instruments and documents that have been deposited with you for execution by Buyer. All of the loan instruments and documents that have been deposited with you for execution by Buyer are to be executed by Buyer on the same date. Buyer must execute all loan instruments and documents that _____[he *or* she] is required to execute by signing _____[his *or* her] name exactly as it appears or will appear on the grant deed that will vest title in Buyer and on the enclosed deed of trust.

Insurance Requirements

4. We require, as a condition of making the loan, that you hold for delivery to us an original policy of insurance, duly issued and in effect, providing _____[*describe coverage or type of policy, e.g.,* fire and extended special coverage insurance] on the Subject Real Property in an amount not less than $_____ and complying with the following requirements:

(a) The policy shall be issued by an insurer that is admitted to transact insurance business in California and that has at least a _____[*specify minimum rating*] in the most recent edition of Best's Insurance Guide [*or specify other required qualifications*];

(b) The policy shall either be a continuous policy or a policy with an unexpired term of at least _____[*specify minimum term*], and the premium for the initial _____[*specify period or term*] following the making of the loan must have been paid;

(c) The policy shall name Buyer as an insured and shall contain a _____[*specify type or form number*] lender's loss payable endorsement naming Lender as the [first *or* second *or other priority*] loss payee;

(d) The policy shall not have a deductible that exceeds $_____; and

(e) [*List any other requirements*.]

[*Add the following provision if a minimum downpayment is required:*]

Requirement of Cash Downpayment

5. We require, as a condition of making the loan, that _____[$_____ *or* _____ percent] of the purchase price of the Subject Real Property be paid by Buyer, in cash or its equivalent, from Buyer's own funds. [*If applicable, add*: We also require, as a condition of making the loan, that there be no secondary financing of the purchase of the Subject Real Property by any commercial or private lender, by _____ (*name of seller*), or by any other person.]

[*If the loan is subject to the Truth in Lending Act, add the following provisions:*]

Compliance With Truth In Lending Requirements

6. We require, as a condition of making the loan, that prior to the disbursement of any loan proceeds you effect compliance with the disclosure and notice requirements imposed by the federal Truth in Lending Act and allow the three-day rescission period required by the Truth in Lending Act to expire. You shall not request or disburse any loan proceeds unless and until you have complied with each of the following conditions:

(a) You shall deliver one copy of the enclosed Regulation Z Disclosure Statement to Buyer at the time Buyer executes the enclosed promissory note and deed of trust and the other enclosed loan documents.

(b) At the time a copy of the Regulation Z Disclosure Statement is delivered to Buyer, you shall have Buyer sign another copy of the Regulation Z Disclosure Statement, in the space provided for that purpose, to acknowledge receipt of the statement.

(c) At the time that Buyer executes the loan instruments and documents and acknowledges receipt of the Regulation Z Disclosure Statement, you shall deliver to Buyer two copies of the enclosed notice of consumer's right to rescind. Before delivering these two copies of the notice to Buyer, you shall insert the date on which the notice is to be delivered on all three copies of the notice in the space provided for that purpose _____[*describe place where date is to be inserted, e.g.*, on the first line of the notice, opposite the phrase "date of delivery"] and you shall insert the date of the third full business day following the date on which the notice is to be delivered on all three copies of the notice in the space provided for that purpose _____[*describe place where date is to be inserted*].

(d) As soon as Buyer has executed the enclosed loan instruments and documents and you have delivered the copies of the disclosure statement and notice of right to rescind and had Buyer acknowledge receipt of the statement, you shall deliver to us the copy of the disclosure statement that Buyer has signed to acknowledge receipt and the copy of the notice of right of rescission that you have retained, together with a completed certification form certifying that you have delivered two copies of the notice to Buyer; and

(e) You shall not request or disburse the loan proceeds, or any part of them, until the fourth business day after the date on which the disclosure statement is delivered to Buyer or the fourth business day after the date on which the notices of right to rescind are delivered to Buyer, whichever is later.

Conditions Precedent to Request for Loan Funds

7. You may request us to deposit the proceeds of the loan with you when, and only when:

(a) Buyer has properly executed the enclosed promissory note without modification or deletion and you have delivered the original of the executed promissory note to us;

(b) Buyer has properly executed the enclosed deed of trust without modification or deletion and it is in recordable form;

(c) You have delivered a true and complete copy of the executed deed of trust to us and are authorized and prepared

to record the original deed of trust when you receive and are authorized and prepared to disburse the loan proceeds;

(d) You have delivered to us true and complete copies of all of the escrow instructions that you have received from Buyer and the other parties to the above escrow, including any amendments or supplemental instructions, and any assignments or demands that have been deposited with or delivered to you in connection with the escrow;

(e) You have delivered to us a copy of the _____[*title reports to be provided, e.g.,* preliminary title report or ALTA report] obtained for this transaction;

(f) _____[You are *or* _____ (*name of title insurer*) is] prepared and obligated to issue in our favor, on the recordation of the enclosed deed of trust, a standard form American Land Title Association lender's policy with _____[*identify required endorsements, e.g.,* CLTA form endorsement 100] in the amount of $_____, insuring that title to the Subject Real Property is vested in Buyer and that the enclosed deed of trust is an encumbrance against the Subject Real Property that is subject and subordinate only to _____[*describe all interests, liens, and encumbrances to which deed of trust is to be subordinate*];

(g) You have delivered to us a written confirmation [*or other appropriate characterization*] verifying _____[your commitment *or* the commitment of _____ (*name of title insurer*)] to issue the policy of title insurance required by these instructions on the recordation of the enclosed deed of trust;

(h) You have received in escrow, and are authorized and prepared to deliver to us on recordation of the enclosed deed of trust, an original policy of _____[*describe coverage or type of policy, e.g.,* fire and extended special coverage] insurance complying with the requirements set forth in Paragraph 4;

[*If minimum downpayment is required:*]

(i) Buyer has deposited in escrow, to be applied toward payment of the purchase price for the Subject Real Property, the sum of $_____, and has otherwise complied with the downpayment requirements set forth in Paragraph 5;

[*If pest control certification is required:*]

(j) You have delivered to us a true and complete copy of a written certification from a licensed structural pest control operator pursuant to *Business and Professions Code Section 8519* that the residence [*or other type of structure*] and other improvements located on the Subject Real Property are free from evidence of active infestation or infection in the visible and accessible areas;

[*If impound account is to be established:*]

(k) Buyer has properly executed the enclosed agreement and authorization for the establishment and maintenance of a tax and insurance impound account, and you have delivered the original of the executed agreement and authorization to us;

[*If buyer is required to secure a tax service contract:*]

(l) Buyer has completed and properly executed the enclosed application for a tax service contract, and you have delivered it to _____[*name of entity providing tax service*] with the required fee;

[*If loan is subject to Truth in Lending Act (15 U.S.C. § 1601 et seq.), add (m) through (o), below:*]

(m) You have delivered to Buyer, in accordance with the requirements set forth in Paragraph 6, one copy of the enclosed Regulation Z Disclosure Statement and two copies of the enclosed notice of consumer's right to rescind;

(n) You have delivered to us the copy of enclosed Regulation Z Disclosure Statement that Buyer has executed to acknowledge receipt of the statement, and have delivered to us a true and complete copy of the enclosed notice of consumer's right to rescind together with your certification verifying delivery of two copies of the notice to Buyer;

(o) More than three full business days have elapsed since the date on which the disclosure statement was delivered to Buyer, and more than three full business days have elapsed since the date on which the notices of right to rescind were delivered to Buyer;

[*If buyer must acknowledge insurance requirements:*]

(p) You have delivered a copy of the enclosed notice and acknowledgment of insurance requirements to Buyer and delivered to us the copy that Buyer has executed to acknowledge receipt of the notice;

[*If buyer must sign statement regarding oral representations:*]

(q) You have delivered a copy of the enclosed statement and acknowledgment concerning oral representations and agreements to Buyer and delivered to us the copy that Buyer has executed to acknowledge receipt of the statement;

[*If loan fees and charges are to be deducted from the loan:*]

(r) Buyer has properly executed the enclosed agreement and authorization for deduction of loan charges and fees and you have delivered to us the original of the executed agreement;

[*If buyer must execute or re-execute the loan application:*]

(s) Buyer has properly _____[executed *or* re-executed] the enclosed [*if applicable*: corrected *or other appropriate characterization*] loan application and you have delivered the original of the executed application to us; and

[*List any other conditions, then continue with the following:*]

(t) You are otherwise authorized and prepared, under the instructions you have received from all parties, to close the above-referenced escrow within 24 hours after the loan proceeds are deposited with you.

[*Add the following provision if loan fees and charges are to be deducted from gross loan proceeds:*]

Deduction of Loan Fees and Charges

8. Before depositing the loan proceeds with you, we will deduct from the gross loan proceeds of $_____[*principal amount of loan*], pursuant to Buyer's agreement and authorization, the sums necessary to pay the following loan fees and charges:

[*Select one or more of the following provisions, as appropriate:*]

(a) Our loan fee of $_____;

(b) The credit report fee of $_____;

(c) The initial tax impound account payment of $ _____;

(d) Initial insurance impound account payment of $ _____;

(e) Appraisal fee of $_____;

(f) Our processing fee of $_____;

(g) Interest from and after the date of disbursement to _____[*date*], _____ at the rate of $_____[*amount of daily interest on principal amount of loan*] per day; and

(h) [*List any other loan fees or charges to be deducted from gross loan proceeds*].

Recording of Deed of Trust

9. When all of the conditions precedent to requesting the deposit of the loan proceeds, as set forth in Paragraph 7, have been performed or fulfilled and the loan proceeds have been deposited with you pursuant to your request, you are authorized and instructed to record forthwith the grant deed conveying the Subject Real Property to Buyer and our enclosed deed of trust and to close the above-referenced escrow. You are instructed to record our enclosed deed of trust immediately after you record the grant deed conveying the Subject Real Property to Buyer.

Issuance of Title Insurance Policy

10. As soon as you have recorded our enclosed deed of trust, you are instructed to _____[issue *or* cause _____ (*name of title insurer*) to issue] and to deliver to us a standard form American Land Title Association lender's title insurance policy with _____[*identify required endorsements, e.g.,* CLTA form endorsement 100] in the amount of $_____, insuring that title to the Subject Real Property is vested in Buyer and that the enclosed deed of trust is an encumbrance against the Subject Real Property that is subject and subordinate only to _____[*describe all interests, liens, and encumbrances to which deed of trust is to be subordinate*].

Conditions Precedent to Disbursement of Loan Proceeds

11. You are authorized to disburse the loan proceeds that we deposit with you when, and only when:

(a) All of the conditions precedent to requesting the deposit of the loan proceeds, as set forth in Paragraph 7, have been performed or fulfilled;

(b) You have recorded the grant deed conveying the Subject Real Property to Buyer and the enclosed deed of trust; and

(c) You have _____[issued and delivered to us *or* caused _____ (*name of title insurer*) to issue and deliver] a standard form American Land Title Association lender's title insurance policy that complies with the title insurance requirements set forth in Paragraph 7(f).

Requests and Notices

12. The request for the loan proceeds and all other requests and notices directed to Lender shall be in writing and shall be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*] to _____[*name of entity or authorized agent*] at _____[*name of office or branch*] at _____[*address*]. Requests shall be deemed to have been made and notices shall be deemed to have been given only when they have been received by _____[Lender *or* _____ (*name of authorized agent*)].

Delivery of Instruments and Documents

13. All instruments and documents that are to be delivered to Lender shall be personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested [*or specify other manner of giving notice*] to _____[*name of entity or authorized agent*] at _____[*name of office or branch*] at _____[*address*]. Instruments and documents shall be deemed to have been delivered only when they have been received by _____[Lender *or* _____ (*name of authorized agent*)].

Nonresponsibility for Escrow Fees and Charges

14. Lender shall have no responsibility or liability for any of your escrow fees or charges or for any fees, charges, costs or expenses incurred by you or any other party to the above-referenced escrow in complying with these instructions, obtaining the loan for which Buyer has applied, or otherwise processing or closing the above-referenced escrow.

Sole Instructions

15. These instructions constitute the complete escrow instructions, and the only escrow instructions, of Lender and shall revoke and supersede any prior oral or written instructions you may have received from Lender.

Waiver and Deviations From Instructions

16. Lender may waive, or may permit deviations from, any term or condition of these instructions. However, a term or condition of these instructions can only be waived by means of a written waiver signed by an authorized officer, agent, or employee of Lender. Deviation from these instructions will only be permitted if it is specifically authorized in writing by an authorized officer, agent, or employee of Lender. Any purported oral waiver, and any purported oral authorization to deviate from the terms of these instructions, shall be ineffective and invalid.

Amendments and Supplemental Instructions

17. Lender shall have the right to amend or supplement these instructions at any time without prior notice and without the agreement or consent of any other party or parties. However, these instructions may only be amended, supplemented, or modified by means of a written amendment or supplement that has either been signed or approved in writing by an authorized officer, agent, or employee of Lender. No written amendment, supplement, or modification of these instructions shall be effective or valid unless and until it has been deposited with you and unless and until an authorized officer, agent, or employee of Lender has either signed it or approved it in a signed writing that has been deposited with you. Any purported oral amendment, supplement, or modification of these instructions shall be ineffective and invalid.

Revocation and Cancellation of Instructions

18. (a) Lender shall have the right to revoke and cancel these instructions at any time without prior notice and without the agreement or consent of any other party or parties. If Lender exercises its right to revoke and cancel these instructions, you shall return to Lender forthwith, upon demand, any and all funds, instruments, documents, and other items that Lender has deposited with you.

(b) If all terms and conditions precedent to the disbursement of the loan proceeds have not been performed or fulfilled on or before _____[*date*], these instructions shall be immediately and automatically canceled and revoked without the need for any instruction or notice from Lender. In the event of such a cancellation, you shall return these instructions and the enclosed loan instruments and documents to Lender to be redrawn, and you shall return to Lender forthwith any funds or other instruments, documents, and items that Lender has deposited with you.

(c) If the above-referenced escrow is canceled by any other party or parties, you shall return to Lender forthwith

any and all funds, instruments, documents, and other items that Lender has deposited with you.

Time Is of the Essence

19. Time is of the essence with respect to each and every provision of these instructions and in the performance, occurrence, fulfillment, or satisfaction of each and every term and condition of this escrow and these instructions.

Request for Acknowledgment of Acceptance

20. Please acknowledge your receipt and acceptance of these instructions [*if items are to be deposited with instructions, add*: and the items deposited therewith], and your agreement to hold and dispose of any funds, instruments, documents, or items that Lender deposits with you in accordance with the terms and conditions of these instructions, by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Lender.

_____ Dated:

LENDER
_____ [*name of lender*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing instructions [*if items are to be deposited with instructions, add*: and the items listed in Paragraph 2 of those instructions.]
_____[*Name of escrow holder*] agrees that any funds, instruments, documents, or other items deposited by _____[*name of lender*] shall be held and disposed of in accordance with the terms and conditions of the foregoing instructions and such amendments or additional instructions as may be submitted by the _____[*name of lender*].

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
A. Complete Escrow Instructions
3. Lender's Instructions

11-26 California Legal Forms--Transaction Guide § 26.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.221 Existing Lender's Instructions (Payoff of Existing Loan)

[1] Comment

[a] Use of Form

This form is a set of instructions that may be used by an existing lender (beneficiary) [*see Civ. Code § 2943(a)(1)*] whose loan is to be paid off by the seller. These instructions are typical of the instructions forwarded by institutional lenders in response to a request for a payoff demand statement [*see Civ. Code § 2943*; *see also § 26.240*]. Essentially, they authorize the escrow holder to record the reconveyance and return to the seller the note, deed of trust (or mortgage), and any insurance policies in force when the escrow holder is authorized and prepared to disburse the balance due on the loan and any other amounts due under the note or trust deed. Ordinarily, these instructions will be delivered to the escrow holder along with a payoff demand statement, the originals of the note and trust deed, and an executed reconveyance of the trust deed.

Like most payoff instructions used by institutional lenders, these instructions do not create a true escrow with respect to the loan documents that may be delivered to the escrow holder, because the lender expressly reserves the right unilaterally to revoke them and obtain the return of the items deposited. Instead, these instructions constitute an offer that may be revoked at any time before the seller accepts by rendering the requested performance [*see, e.g., Keyes v. Meyers (1905) 147 Cal. 702, 704-706, 82 P. 304* ; *Ragan v. Ragan (1915) 29 Cal. App. 63, 65, 154 P. 479]* .

This form assumes that the security instrument will be a deed of trust because trust deeds are used much more frequently in California than mortgages. However, this form may be easily modified for use in conjunction with the assumption of a note secured by a mortgage.

[b] Statutory Requirements for Payoff Demand Statements

A "payoff demand statement" is a written statement, prepared by a beneficiary in response to a written request made by an "entitled person" or authorized agent [*see Civ. Code § 2943(a)(4)*], setting forth the amounts required, as of the date of preparation, to satisfy all obligations secured by the loan that is the subject of the payoff demand statement in full [*Civ. Code § 2943(a)(5)*]. Within 21 days of the receipt by a beneficiary or a beneficiary's authorized agent of a written request for a payoff demand statement, the beneficiary or his or her agent must prepare and deliver the statement to the person requesting it [*Civ. Code § 2943(c)*]. For further discussion of the detailed statutory requirements governing payoff demand statements, see *§ 26.240[1]*.

[c] Payoff Demand

The lender's payoff demand usually is expressed as a specified sum or sums plus interest on the unpaid principal loan balance. Under *Civ. Code § 2943*, the demand must include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note [*Civ. Code § 2943(a)(5)*]. If the loan is not paid in full before the per diem amount is changed by the terms of the note or before another installment payment is made, the demand will be incorrect and will have to be adjusted. Accordingly, most lenders' instructions will either provide for revocation of the instructions or amendment of the demand if the escrow is not closed before the payoff amount is changed.

Any amount that was due but for any reason was not included in the payoff demand statement or an amended statement will continue to be recoverable by the beneficiary as an unsecured obligation, pursuant to the terms of the note and provisions of law [*Civ. Code § 2943(d)(3); Cathay Bank v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595]* .

[2] Form

Existing Lender's Instructions (Payoff of Existing Loan)

EXISTING LENDER'S INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]
_____[*city, state, zip*]

RE: Your Escrow No. _____

Our Loan No. _____

Preliminary Recitals

1. _____[*Name of lender or holder*] (hereafter referred to as "Beneficiary") is the beneficiary under a deed of trust executed by _____[*name of seller or other trustor*] for the purpose of securing the repayment of a loan in the principal amount of $_____ and the payment of certain other obligations, and subsequently recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495] (hereafter referred to as the "Deed of Trust")]. In response to your _____[*title or description of request for payoff demand, e.g.,* Request for Payoff Demand Statement] dated _____, Beneficiary, reserving the right to amend or revoke these instructions, unilaterally and without prior notice, at any time, hereby authorizes and instructs you as follows:

Deposit Clause

2. _____[Beneficiary hereby deposits with you *or* On or before _____ (*date*), Beneficiary will deposit with you] the following:

(a) A written payoff demand statement showing the amounts required to pay off and discharge the obligations secured by the Deed of Trust and setting forth the other information required by *Section 2943 of the California Civil Code*, as requested in your _____[*title or description of request for payoff demand statement, e.g.*, Request for Payoff Demand Statement] dated _____.

(b) The original of the promissory note dated _____, executed in favor of _____[*name of lender or other payee*] by _____[*name of person or persons executing note*] in the amount of $_____, and evidencing the principal obligation secured by the Deed of Trust (hereafter referred to as the "Promissory Note").

(c) The original of the Deed of Trust.

(d) A full reconveyance of the Deed of Trust, duly executed by _____[*name of trustee*] and in recordable form (hereafter referred to as the "Reconveyance").

(e) The original of _____[*name of insurer*] _____[*type of policy, e.g.,* fire and extended special coverage] policy No. _____, insuring _____[*names and capacities, e.g.,* Seller as named insured and Beneficiary as additional insured] and providing _____[*describe coverage and type of policy*] for the real property encumbered by the Deed of Trust in the amount of $_____ for the period from _____[*date*] to _____[*date*].

(f) The statement of _____[*name of trustee*] setting forth its charges for reconveying the Deed of Trust.

Conditions Precedent to Recording and Delivery of Reconveyance

3. You are authorized to cancel the Promissory Note and the Deed of Trust, to record the Reconveyance, and to deliver to the parties the Promissory Note, Deed of Trust, Reconveyance, and other documents that Beneficiary has deposited with you when, and only when, you hold for the account of Beneficiary in available funds, and are authorized and prepared to disburse to Beneficiary, the amount necessary to pay off and discharge all of the following outstanding obligations:

(a) The unpaid balance of $_____ on the principal obligation evidenced by the Promissory Note and secured by the Deed of Trust;

(b) Interest on the unpaid balance of the principal obligation at the rate of _____ percent per annum from and after _____[*date*], up to and including the date of disbursement;

[*If late charges are owed:*]

(c) Late charges totaling $_____ assessed as a result of _____'s [*name of seller or other payor*] failure to make timely payment of installments due on _____[*date or dates of delinquent installments*];

[*If there is a prepayment penalty:*]

(d) A prepayment charge of $_____;

[*If lender is charging a processing or forwarding fee:*]

(e) Beneficiary's _____[processing *or* forwarding] fee of $_____;

[*If reconveyance is secured by lender:*]

(f) _____'s [*name of trustee*] reconveyance fee of $_____; and

[*Continue with the following:*]

(g) Any other obligations, fees, or charges set forth in any amendment to these instructions or in any amended or supplemental demand subsequently deposited with you by Beneficiary.

Adjustment of Beneficiary's Demand

4. Beneficiary shall have the right to adjust, amend, or supplement the demand set forth in Paragraph 3, unilaterally and without notice, at any time by amending these instructions or by depositing with you an amended or supplemental demand.

Disbursements

5. As soon as you have recorded the Reconveyance, you shall disburse to Beneficiary the full amount demanded in Paragraph 3. This disbursement and any other disbursement made to Beneficiary shall be made in the form of your check drawn on a general escrow [*if applicable*: or trust] account maintained in your name [*or specify other type of payment required*] and shall be made by mailing the check _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] to Beneficiary [or specify individual to whom check is to be mailed] at _____[*address to which check is to be mailed*].

Installment Payments and Other Continuing Obligations

6. Until you have recorded the Reconveyance and disbursed the full amount demanded by Beneficiary, _____[*name of seller and/or other payors or obligors*] must make all installment payments that are or become due, and must perform all other obligations imposed, under the terms of the Promissory Note and the Deed of Trust. Neither the pendency of the above-referenced escrow nor Beneficiary's submission of instructions or a demand for payment shall operate to excuse the performance of any obligation imposed or waive any right granted under the terms of the Promissory Note and the Deed of Trust. If Beneficiary receives full or partial payment on any of the obligations comprising its demand, it will adjust and amend its demand to take account of that payment.

Cancellation of Insurance

7. When you have recorded the Reconveyance and disbursed the full amount demanded by Beneficiary, you are authorized to cancel, as to any interest of Beneficiary, the _____[*type of policy*] that Beneficiary has deposited with you [*or, if lender or holder is not holding policy*: any insurance policy providing coverage for the real property encumbered by the Deed of Trust].

Nonresponsibility for Escrow Fees and Charges

8. Beneficiary shall have no responsibility or liability for any of your escrow fees or charges or for any fees, charges, costs, or expenses incurred by you or any other party to the above-referenced escrow in complying with Beneficiary's instructions or demand, securing the reconveyance of the Deed of Trust, or otherwise processing or closing the above-referenced escrow.

Amendment or Revocation of Instructions

9. Beneficiary shall have the right to amend these instructions at any time without prior notice and without the agreement or consent of any other party or parties. Beneficiary shall have the right to revoke and cancel these instructions at any time without prior notice and without the agreement or consent of any other party or parties. If Beneficiary exercises its right to revoke and cancel these instructions, or if the above-referenced escrow is canceled for any reason, you shall return to Beneficiary forthwith, upon demand, any and all instruments, documents, and other items that Beneficiary has deposited with you.

Request for Acknowledgment of Acceptance

10. Please acknowledge your receipt and acceptance of these instructions [*if items are to be deposited with instructions, add*: and the items deposited with them], and your agreement to hold and dispose of any instruments, documents, or items that Beneficiary deposits with you in accordance with the terms and conditions of these instructions, by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Beneficiary.
_____ Dated:

BENEFICIARY
_____ [*name of lender or holder*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing instructions [*if other items are to be deposited with instructions, add*: and the items listed in Paragraph 2 of those instructions].
_____[*Name of escrow holde*r] agrees that any instruments, documents, or other items deposited by _____[*name of lender or holder*] shall be held and disposed of in accordance with the terms and conditions of the foregoing instructions and any amendments or additional instructions that may be submitted by _____[*name of lender or holder*].

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide §§ 26.222-26.229

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.222[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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4. Instructions by Other Parties

11-26 California Legal Forms--Transaction Guide § 26.230

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.230 Lien Claimant's Instructions (Payoff of Claim)

[1] Comment--Use of Form

This form is a set of instructions that may be used by a lien claimant whose claim is to be paid off by a seller to secure removal of the lien prior to sale of the property. These instructions normally would be deposited in escrow in response to a request from the escrow holder or one of the parties for a payoff demand from the lien claimant [*see § 26.241*]. An itemized statement of the obligations secured by the lien, documentation of these obligations, if requested, and the instruments and documents required to discharge and remove the lien, would also be deposited in escrow along with these instructions. Essentially, these instructions authorize the escrow holder to take the actions necessary to discharge and remove the lien when it is authorized and prepared to disburse the amount owed on the underlying obligation.

As drafted, these instructions do not create a true escrow, because the lien claimant expressly reserves the right to revoke them unilaterally and obtain the return of items deposited. Rather, they constitute a revocable offer to discharge and remove the lien [*see, e.g., Keyes v. Meyers (1905) 147 Cal. 702, 704-706, 82 P. 304* ; *Ragan v. Ragan (1915) 29 Cal. App. 63, 65, 154 P. 479]* .

There is no statutory requirement that a lien claimant deposit the instruments or documents necessary to discharge or remove a lien into an escrow before the underlying obligation is paid. However, most lien claimants will agree to permit the payoff and removal of the lien to be handled through an escrow because it is the quickest and easiest way (and sometimes the only way) to obtain payment.

These instructions are designed for use by the lien claimant's attorney. Frequently, the escrow holder will provide the lien claimant with printed instructions. Instructions prepared by the escrow holder usually will not contain the provisions that grant the lien claimant the right to unilaterally revoke the instructions, demand the return of the instruments deposited, or unilaterally amend the initial demand.

[2] Form

Lien Claimant's Instructions (Payoff of Claim)

LIEN CLAIMANT'S INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

_____[*describe lien or obligation*]

Preliminary Recitals

1. _____[*Name of claimant*] (hereinafter sometimes referred to as "Claimant") is the _____[*appropriate characterization, e.g.*, judgment creditor *or* claimant] under the _____[*describe instrument creating or preserving lien, e.g.*, abstract of judgment *or* Claim of Mechanic's Lien] recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.*, in Book 731, page 249 *or* at Reel 327, Image 495]. In response to your _____[*title or description of request for payoff demand, e.g.*, Request for Payoff Demand] dated _____, Claimant, reserving the right to amend or revoke these instructions, unilaterally and without prior notice, at any time, hereby authorizes and instructs you as follows:

Deposit Clause

2. _____[Claimant hereby deposits with you *or* On or before _____ [*date*], Claimant will deposit with you] the following:

(a) A[n] [*if appropriate, add*: itemized] written statement and demand setting forth the amount required to pay off _____[*characterize underlying obligation or claim, e.g.*, the judgment in Alameda County Superior Court Action No. 1234 *or* the charges for labor and materials that are the basis for the above-described Claim of Mechanic's Lien] [*if obligation is drawing interest, add*: and the amount of daily interest that will accrue on _____ (*characterize principal obligation, e.g.*, the unpaid principal balance of the judgment) from the date of the statement until the date of payment];

[*If verification of claim has been requested:*]

(b) Copies of all bills, invoices, statements, _____[*describe other types of writings deposited*] and other documents substantiating and supporting _____[*characterize underlying obligation or claim, e.g.*, the charges for labor and materials that are the basis for the above-described Claim of Mechanic's Lien];

[*Continue with the following:*]

(c) _____[*Describe instrument required to discharge or release lien, e.g.*, An acknowledgment of satisfaction of judgment *or* A release of mechanic's lien], signed by Claimant and properly notarized, _____[*effect of instrument: e.g.*, acknowledging satisfaction of the above-described judgment *or* releasing the lien resulting from the above-described Claim of Lien].

Conditions Precedent to Recording of Instrument Discharging or Releasing Lien

3. You are authorized to _____[*specify action required to discharge or release lien, e.g.,* file and record the acknowledgment of satisfaction of judgment deposited by Claimant or record the Release of Mechanic's Lien deposited by Claimant] when, and only when, you hold for the account of Claimant in available funds, and are authorized and prepared to disburse to Claimant, the sum of $_____[*total amount owed on underlying obligation as of date of instructions*] plus interest in the amount of $_____ per day for each day from and after _____[*date of instructions*] up to and including the date on which the disbursement is made to Claimant.

Adjustment of Claimant's Demand

4. Claimant shall have the right to adjust, amend, or supplement the demand set forth in Paragraph 3, unilaterally and without notice, at any time, by amending these instructions or by depositing with you an amended or supplemental demand.

Disbursements

5. As soon as you have _____[*specify action required to discharge or release lien, e.g.,* filed and recorded the acknowledgment of satisfaction of judgment deposited by Claimant or recorded the Release of Mechanic's Lien deposited by Claimant], you shall disburse to Claimant, without making any deduction therefrom, the sum of $_____[*total amount owed on underlying obligation as of date of instructions*] plus interest in the amount of $_____ per day for each day from and after _____[*date of instructions*] up to and including the date on which the disbursement is made to Claimant. This disbursement and any other disbursement made to Claimant shall be made in the form of your check drawn on a general escrow [*if applicable*: or trust] account maintained in your name [*or specify other type of payment required*] and shall be made by mailing the check _____[*specify type of mail to be used, e.g.,* by certified mail, return receipt requested] to Claimant [*or specify individual to whom check is to be mailed*] at _____[*address to which check is to be mailed*].

Nonresponsibility for Escrow Fees and Charges

6. Claimant shall have no responsibility or liability for any of your escrow fees or charges or for any fees, charges, costs, or expenses incurred by you or any other party to the above-referenced escrow in complying with Claimant's instructions or demand, securing the discharge or release of the above-described lien, or otherwise processing or closing the above-referenced escrow.

Amendment or Revocation of Instructions

7. Claimant shall have the right to amend these instructions at any time without prior notice and without the agreement or consent of any other party or parties. Claimant shall have the right to revoke and cancel these instructions at any time without prior notice and without the agreement or consent of any other party or parties. If Claimant exercises Claimant's right to revoke and cancel these instructions, or if the above-referenced escrow is canceled for any reason, you shall return to Claimant forthwith, on demand, any and all instruments, documents, and other items that Claimant has deposited with you.

Request for Acknowledgment of Acceptance

8. Please acknowledge your receipt and acceptance of these instructions [*if items are to be deposited with instructions, add*: and the items deposited with them], and your agreement to hold and dispose of any instruments, documents, or items that Claimant deposits with you in accordance with the terms and conditions of these instructions, by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Claimant.

_____ Dated:

CLAIMANT
_____ [*name of claimant*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing instructions [*if other items are to be deposited with instructions, add*: and the items listed in Paragraph 2 of those instructions].
_____[*Name of escrow holder*] agrees that any instruments, documents, or other items deposited by _____[*name of claimant*] shall be held and disposed of in accordance with the terms and conditions of the foregoing instructions and any amendments or additional instructions that may be submitted by _____[*name of claimant*].

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide §§ 26.231-26.239

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.231[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
B. Other Escrow Forms
1. Requests to Third Parties

11-26 California Legal Forms--Transaction Guide § 26.240

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.240 Request for Lender's Payoff Demand Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

This form is a request for a lender's (beneficiary's) payoff demand statement. A "payoff demand statement" is a written statement, prepared by a beneficiary in response to a written request made by an "entitled person" or authorized agent, setting forth the amounts required, as of the date of preparation, to satisfy all obligations secured by the loan that is the subject of the statement in full [*Civ. Code § 2943(a)(5)*]. For definitions of "beneficiary" and "entitled person," see *§ 26.240[1][d][d]*. For an illustrative payoff demand statement, see *§ 25.254*.

This request may be used when a seller of real property needs to arrange to pay off an existing loan and obtain a reconveyance of the deed of trust (or mortgage) securing the loan. In accordance with customary procedure, it requests the lender to provide a payoff demand statement, and to place the reconveyance and the loan instruments in escrow together with instructions authorizing recording or delivery when the escrow holder is prepared to disburse the balance. For instructions to be submitted by an existing lender in response to a request for a payoff demand statement, see *§ 26.221*.

Ordinarily, the escrow holder will make the arrangements for the payoff of the loan and the reconveyance of the trust deed. Consequently, this form has been drafted for use by an escrow holder. For a request made by a seller (i.e., a trustor or mortgagor), see *§ 25.253*.

This form assumes that the security instrument will be a deed of trust because trust deeds are used much more frequently in California than mortgages. However, this form may be easily modified for use in conjunction with the assumption of a note secured by a mortgage.

Civ. Code § 2943 includes provisions that, until January 1, 2014 [*Civ. Code § 2943(g)*; *see* 2009 Stats., ch. 43, § 5 (eff. Jan. 1, 2010)], allow escrow agents to obtain valid payoff statements in short-sale transactions. In a case subject to those provisions, there is a "short-pay agreement" in effect, which is a written agreement by the beneficiary (or mortgagee) to release its lien on a property in return for payment of an amount less than the secured obligation [*Civ. Code § 2943(a)(6)*]. In a short-sale transaction, the person in possession of the short-pay agreement, or an escrow agent on that person's behalf, would submit a "short-pay request" asking the beneficiary to provide a "short-pay demand statement" [*Civ. Code § 2943(a)(7), (8)*]. The *form in § 25.253[2]* may be used for making a short-pay request, provided the form is modified to show specifically that it requests a "short-pay demand statement." If this form is used without specifying a short-pay demand statement in lieu of a payoff demand statement, then the beneficiary must treat it as a request for a normal payoff demand statement [*Civ. Code § 2943(e)(1)*]. The short-pay demand statement will be similar to a normal payoff demand statement but will set forth the amount that the beneficiary has agreed to accept in lieu of the whole outstanding debt, together with any terms and conditions under which the beneficiary will execute and deliver a reconveyance of the deed of trust securing the note that is the subject of the short-pay demand statement [*Civ. Code § 2943(a)(7)*]. For further discussion, see *CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 555, Trust Deeds and Real Property Mortgages, § 555.53[4]* (Matthew Bender), or *CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 123, Nonjudicial Foreclosure, § 123.13[7]* (Matthew Bender).

[b] Beneficiary Statement

If an existing obligation is to be assumed rather than paid in full, a beneficiary statement should be requested instead of a payoff demand statement [*see Civ. Code § 2943(a)(2), (b)*; *see also* Ch. 25B, *Subordination, Assumption, and Assignment*]. Both types of statements are governed by *Civ. Code § 2943*. If an entitled person or his or her authorized agent requests a statement pursuant to *Civ. Code § 2943* and does not specify whether he or she is seeking a beneficiary statement or a payoff demand statement, the beneficiary must treat the request as a request for a payoff demand statement [*Civ. Code § 2943(e)(1)*].

[c] Owner's Statement

The disclosure requirements of *Civ. Code § 2943* apply only to beneficiaries, mortgagees, and their assignees [*see Civ. Code § 2943(a)(1)*]. For a nonstatutory request for confirmation of the debt that may be submitted to a trustor or mortgagor by a proposed assignee of the beneficiary or mortgagee, see *§ 26.243*.

[d] Definitions

Under *Civ. Code § 2943*, "beneficiary" means a mortgagee or beneficiary of a mortgage or trust deed, or his or her assignees [*Civ. Code § 2943(a)(1)*]. "Entitled person" means (1) the trustor or mortgagor of the mortgaged or trust property, or that person's successor in interest; (2) any beneficiary under a trust deed; (3) any person having a subordinate lien or encumbrance of record; (4) any escrow holder licensed as an agent; or (5) any person who is acting as an escrow holder and is exempt from the licensing requirements of the Escrow Law [*Civ. Code § 2943(a)(4)*; *see Fin. Code § 17000 et seq.* (Escrow Law); *Fin. Code § 17006* (exemptions); *see also § 26.18*]. Finally, "delivery" means depositing or causing to be deposited in the United States mail an envelope with postage prepaid, containing a copy of the document to be delivered, addressed to the person whose name and address is set forth in the request for the document [*Civ. Code § 2943(a)(3)*]. This document may also be faxed to the person whose name and address are set forth in the demand for the document [*Civ. Code § 2943(a)*].

[e] Procedural Requirements

Within 21 days of the receipt by the beneficiary or the beneficiary's authorized agent of the written request for a payoff demand statement, the beneficiary or his or her agent must prepare and deliver the statement to the person requesting it [*Civ. Code § 2943(c)*]. For the definition of "delivery," see *§ 26.240[1][d]*. However, if the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary will have no obligation to

prepare and deliver the statement unless the written request is received prior to the first publication of a notice of sale or the notice of the first date of sale established by a court [*Civ. Code § 2943(c)*].

If the beneficiary has more than one branch, office, or other place of business, then the request must be made to the branch or office address set forth in the payment billing notice or payment book. In that case, the statement, unless it specifies otherwise, will be deemed to apply only to the unpaid balance of the single obligation named in the request and secured by the mortgage or trust deed that is payable at the branch or office whose address appears on the foregoing billing notice or payment book [*Civ. Code § 2943(e)(5)*].

[f] Payoff Demand Statement

As mentioned above, an illustrative payoff demand statement is *set forth in § 25.254*. The comment to that form discusses, among other things, the required contents of the statement [*Civ. Code § 2943(a)(5)*], the right of the beneficiary to demand proof of the "entitled person" status of the requesting party [*see Civ. Code § 2943(e)(3)*], and the consequences of the failure of a beneficiary to comply with the statutory disclosure requirements [*see Civ. Code § 2943(e)(4)*].

Any amount that was due but for any reason was not included in the payoff demand statement or an amended statement will continue to be recoverable by the beneficiary as an unsecured obligation, pursuant to the terms of the note and provisions of law [*Civ. Code § 2943(d)(3)*; *Cathay Bank v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595]* .

[2] Form

Request for Lender's Payoff Demand Statement [Civ. Code § 2943]

REQUEST FOR LENDER'S PAYOFF DEMAND STATEMENT

_____[*name of lender or holder*]
_____[*address*]
_____[*city, state, zip*]

Re: Your Loan No. _____

Our Escrow No. _____

_____[*Name of seller*] has established an escrow with us for the purpose of completing a sale of certain real property known as and located at _____[*street address*] and more particularly described as follows:

[*Set forth legal description:*]

We are informed that you are the beneficiary under a deed of trust (hereafter referred to as the "Deed of Trust") executed by _____[*name of seller or other trustor*] and conveying the above property in trust to _____[*name of trustee*] for the purpose of securing a loan in the principal amount of $_____. According to the preliminary title report we have obtained, the Deed of Trust was recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495], and represents an outstanding lien against the property.

In connection with this escrow, _____[*name of seller*] has instructed us to pay off and discharge all obligations secured by the Deed of Trust and obtain a full reconveyance thereof. Accordingly, please deposit with us the following:

1. Your written payoff demand statement prepared pursuant to *Civil Code Section 2943* and setting forth the amounts required to fully satisfy all obligations secured by the Deed of Trust, as of the date of preparation of the statement, including:

(a) The unpaid balance of the principal obligation secured by the Deed of Trust;

(b) The amount due for accrued interest on the unpaid balance of the principal obligation and the rate at which interest will accrue from and after the date of the statement;

(c) Information reasonably necessary to calculate the payoff amount on a per diem basis for a period of time, not exceeding 30 days, during which the per diem amount is not changed by the terms of the principal obligation;

(d) The amounts and due dates of any required periodic payments on the principal obligation;

(e) The total amount of all overdue installments of either principal or interest, or both;

(f) The date, if known, to which real estate taxes and special assessments on the above property have been paid;

(g) The amount of fire, physical damage, or other hazard insurance on the above property now in effect, the term for which it is in effect, and the premium for that insurance;

(h) The amount held in any impound account maintained for the purpose of paying taxes or the premiums for insurance on the above property;

(i) The nature and amount of any prepayment penalty or similar obligation, the payment of which is secured by the Deed of Trust; and

(j) The nature and, to the extent known, the amount of any additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the Deed of Trust.

2. The original of the Deed of Trust.

3. The original of the promissory note evidencing the principal obligation secured by the Deed of Trust.

4. A full reconveyance of the Deed of Trust, duly executed by _____[*name of trustee*] and in recordable form.

5. The originals of any insurance policies insuring against fire, hazard, or other physical damage to the above property.

6. Your escrow instructions authorizing us to cancel the promissory note, record the reconveyance, and deliver the instruments and documents that you have deposited when we hold for your account, and are authorized and prepared to disburse to you, the amount you have advised us is required to pay off and discharge the obligations secured by the Deed of Trust.

7. A statement of any fees or charges for the reconveyance of the Deed of Trust or the furnishing of the above payoff demand statement.

We will hold these items in escrow and will proceed to record or deliver them when, and only when, we hold for your

account, and are authorized and prepared to disburse, the amount you have demanded. Please advise us how you want the disbursement to be made. If you have any questions, contact _____[*name of escrow officer or other person to whom inquiries should be directed*] by mail at _____[*mailing address*] or by telephone at _____[*telephone number*].

Thank you for your cooperation in this matter.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
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B. Other Escrow Forms
1. Requests to Third Parties

11-26 California Legal Forms--Transaction Guide § 26.241

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.241 Request for Lien Claimant's Payoff Demand

[1] Comment--Use of Form

This form may be used when a seller needs to make arrangements to pay off a lien claimant and discharge and remove a lien against the property to be conveyed. It requests the lien claimant to furnish an itemized statement and demand for payment of the obligation or obligations secured by the lien and to deposit the instruments necessary to discharge and remove the lien into escrow together with instructions authorizing the removal of the lien when the escrow holder is prepared to disburse the amount owed on the underlying obligation. For instructions to be submitted by a lien claimant in response to a request for a payoff demand, see *§ 26.230*.

There is no statutory requirement that a lien claimant deposit the instruments or documents necessary to discharge or remove a lien into an escrow before the underlying obligation is paid. However, most lien claimants will agree to permit the payoff and removal of the lien to be handled through an escrow because it is the quickest and easiest way (and sometimes the only way) to obtain payment.

Ordinarily, arrangements for payment of the underlying obligation and removal of the lien will be made by the escrow holder, and this form therefore has been drafted for use by an escrow holder. However, the arrangements may be made by the seller or the seller's attorney and, in such a case, the form may be modified for their use.

For a general discussion of mechanics' liens, see Ch. 31, *Mechanics' Liens* .

[2] Form

Request for Lien Claimant's Payoff Demand

REQUEST FOR CLAIMANT'S PAYOFF DEMAND

_____[*name of claimant*]
_____[*address*]

Re: _____[*describe lien or obligation*]

Our Escrow No. _____

_____[*name of seller*] has established an escrow with us for the purpose of completing a sale of certain real property known as and located at _____[*street address, e.g.*, 2101 Webster Street, Oakland, California] and more particularly described as follows:

[*Set forth legal description:*]

We are informed that you _____[have *or* claim] a lien [*or other appropriate characterization*] against the above-described property by virtue of _____[*describe instrument creating lien, e.g.*, an abstract of the judgment entered in Alameda County Superior Court action No. 1234 *or* a Claim of Mechanic's Lien, dated July 14, 2002, in the amount of $2,756.82]. According to the preliminary title report we have obtained, this _____[*describe instrument, e.g.*, abstract of judgment *or* Claim of Mechanic's Lien] was recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.*, in Book 731, page 249 *or* at Reel 327, Image 495], and represents an outstanding lien against the property.

In connection with that escrow, _____[*name of seller*] has instructed us to pay _____[*characterize underlying obligation or claim, e.g.*, the judgment or your claim for labor and materials] in full and obtain _____[*describe instrument required to discharge or release lien, e.g.*, an acknowledgment of satisfaction of judgment *or* a release of mechanic's lien] from you. In order to pay off _____[*characterize underlying obligation or claim, e.g.*, the judgment or your claim for labor and materials], we need you to deposit with us the following:

1. Your [*if appropriate, add*: itemized] written statement and demand setting forth the amount required to pay off _____[*characterize underlying obligation or claim, e.g.*, the judgment or your claim for labor and materials] in full. [*If obligation is drawing interest, add*: In this statement, please be sure to state the amount of daily interest that will accrue on _____ (*characterize principal obligation, e.g.*, the unpaid principal balance of the judgment) from the date of the statement until the date on which you are paid.]

[*Add the following provision if verification of claim is required:*]

2. Copies of all bills, invoices, statements, _____[*describe other types of writings that might tend to verify claim*] and other documents that substantiate or support your claim.

[*Continue with the following:*]

3. _____[*Describe instrument required to discharge or release lien, e.g.*, An acknowledgment of satisfaction of judgment *or* A release of mechanic's lien], signed by you and properly notarized, _____[*effect of instrument: e.g.*, acknowledging satisfaction of the above-described judgment *or* releasing the lien resulting from the above-described Claim of Lien].

4. Your escrow instructions authorizing us to _____[*specify action required to discharge or release lien, e.g.*, file and record the acknowledgment of satisfaction of judgment] that you have executed and deposited

with us when we hold for your account, and are authorized and prepared to disburse to you, the amount you have advised us is required to pay off _____[*characterize underlying obligation or claim, e.g.*, the judgment or your claim for labor and materials].

We will hold these items in escrow and will proceed to _____[*specify action required to discharge or release lien, e.g.*, file and record the acknowledgment of satisfaction of judgment] when, and only when, we hold for your account, and are authorized and prepared to disburse, the amount you have demanded. Please advise us how you want the disbursement to be made. If you have any questions, contact _____[*name of escrow officer or other person to whom inquiries should be directed*] by mail at _____[*mailing address*] or by telephone at _____[*telephone number*].

Thank you for your cooperation in this matter.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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CHAPTER 26 REAL PROPERTY ESCROWS
PART IV. FORMS
B. Other Escrow Forms
1. Requests to Third Parties

11-26 California Legal Forms--Transaction Guide § 26.242

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.242 Request for Beneficiary Statement [Civ. Code § 2943]

[1] Comment

[a] Use of Form

This form is a request to the beneficiary of a deed of trust encumbering real property for a beneficiary statement and a copy of the note. A "beneficiary statement" is an itemized statement of the outstanding obligations secured by the trust deed [*see Civ. Code § 2943(a)(2)*; *see also* [e], *below*]. This type of request is usually necessary in connection with a sale of real property when a buyer is to assume the trust deed, or take subject to the trust deed, and receive a credit equal to the amount of the unpaid obligations it secures. For a detailed discussion of assumption, see Ch. 25B, *Subordination, Assumption, and Assignment* .

Under this form, the person making the request is an escrow holder. A licensed escrow holder is one of the "entitled persons" who may request a beneficiary statement [*see Civ. Code § 2943(a)(4)*; *see also* [e], *below*]. For a request made by the trustor or mortgagor of the mortgaged or trust property, see *§ 25B.220*.

This form assumes that the security instrument will be a deed of trust because trust deeds are used much more frequently in California than mortgages. However, this form may be easily modified for use in conjunction with the assumption of a note secured by a mortgage.

For an illustrative beneficiary statement, see *§ 25B.221*.

[b] Payoff Demand Statement

Civ. Code § 2943, which governs beneficiary statements, also sets forth requirements for a related disclosure document referred to as a "payoff demand statement." A payoff demand statement is used when the obligation secured by a

mortgage or deed of trust is to be paid in full [*see Civ. Code § 2943(a)(5), (c); see also § 26.240*]. If an entitled person requests a statement pursuant to *Civ. Code § 2943* and does not specify whether he or she is seeking a beneficiary statement or a payoff demand statement, the beneficiary must treat the request as a request for a payoff demand statement [*Civ. Code § 2943(e)(1)*].

Any amount that was due but for any reason was not included in the payoff demand statement or an amended statement will continue to be recoverable by the beneficiary as an unsecured obligation, pursuant to the terms of the note and provisions of law [*Civ. Code § 2943(d)(3); Cathay Bank v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270, 53 Cal. Rptr. 2d 595]* .

[c] Owner's Statement

For an "owner's statement" that contains information similar to that provided in this form, but that is completed by the debtor and/or owner of the property, see *§ 26.243*. An owner's statement is generally requested by a proposed assignee of the beneficiary or mortgagee to confirm the status of the debt and to determine whether the debtor is claiming any offsets against the beneficiary or mortgagee. However, there is no statutory authority requiring a debtor to furnish such a statement; *Civ. Code § 2943* applies only to requests directed to beneficiaries and mortgagees [*see Civ. Code § 2943(b)(1), (c)*].

[d] Request Procedure

Any entitled person or his or her authorized agent may prepare and deliver to the beneficiary [for the definitions of "entitled person," "beneficiary," and "delivery," *see* [e], *below*] or the beneficiary's authorized agent a written request or demand for a beneficiary statement. The request may be made (1) at any time before, or within two months after, the recording of a notice of default under the mortgage or trust deed, or (2) more than 30 days before the entry of a decree of foreclosure [*Civ. Code § 2943(b)(2)*].

If the beneficiary has more than one branch, office, or other place of business, then the request must be made to the branch or office address set forth in the payment billing notice or payment book. In that case, the statement, unless it specifies otherwise, will be deemed to apply only to the unpaid balance of the single obligation named in the request and secured by the mortgage or trust deed that is payable at the branch or office whose address appears on the foregoing billing notice or payment book [*Civ. Code § 2943(e)(5)*].

This form specifies the information that the beneficiary must include in the beneficiary statement [*see Civ. Code § 2943(a)(2)* (required contents)]. However, there is no statutory requirement that the request set forth these items, and the request may simply ask the beneficiary to provide a beneficiary statement setting forth the information required by statute [*see* Ch. 25B, *Subordination, Assumption, and Assignment*].

This form includes an optional request for a copy of the trust deed. When such a request is made, the beneficiary must furnish the copy of the trust deed along with the beneficiary statement at no additional charge [*Civ. Code § 2943(e)(2)*].

[e] Definitions

Under *Civ. Code § 2943*, "beneficiary" means a mortgagee or beneficiary of a mortgage or trust deed, or his or her assignees [*Civ. Code § 2943(a)(1)*]. "Entitled person" means (1) the trustor or mortgagor of the mortgaged or trust property, or that person's successor in interest [*see § 25B.220*]; (2) any beneficiary under a trust deed; (3) any person having a subordinate lien or encumbrance of record; (4) any escrow holder licensed as an agent; or (5) any person who is acting as an escrow holder and is exempt from the licensing requirements of the Escrow Law [*Civ. Code § 2943(a)(4)*; *see Fin. Code § 17000 et seq.* (Escrow Law); *Fin. Code § 17006* (exemptions); *see also § 26.18*]. Finally, "delivery" means depositing or causing to be deposited in the United States mail an envelope with postage prepaid,

containing a copy of the document to be delivered, addressed to the person whose name and address is set forth in the request for the document [*Civ. Code § 2943(a)(3)*]. This document may also be faxed to the person whose name and address are set forth in the demand for the document [*Civ. Code § 2943(a)*].

[2] Form

Request for Beneficiary Statement [Civ. Code § 2943]

REQUEST FOR BENEFICIARY STATEMENT

TO: _____[*name of lender or holder*]
_____[*address*]
_____[*city, state, zip*]

Re: Your Loan No. _____

Our Escrow No. _____

_____[*Name of seller*] has established an escrow with us for the purpose of completing a sale of certain real property known as and located at _____[*street address*] and more particularly described as follows:

[*Set forth legal description:*]

We are informed that you are the beneficiary under a deed of trust (hereafter referred to as the "Deed of Trust") executed by _____[*name of seller or other trustor*] and conveying the above property in trust to _____[*name of trustee*] for the purpose of securing a loan in the principal amount of $_____. According to the preliminary title report we have obtained, the Deed of Trust was recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495]. We are requesting that you deliver to us a true, correct, and complete copy of the note [*or specify other evidence of indebtedness*] evidencing the loan secured by the Deed of Trust, and a written beneficiary statement concerning the obligations secured by the Deed of Trust that contains the information specified in *Civil Code Section 2943*, and, in particular, indicates the following:

(1) The unpaid balance of the principal obligation secured by the Deed of Trust;

(2) The amount due for accrued interest on the unpaid balance of the principal obligation and the rate at which interest will accrue from and after the date of the statement;

(3) Information reasonably necessary to calculate the payoff amount on a per diem basis for a period of time, not exceeding 30 days, during which the per diem amount is not changed by the terms of the principal obligation;

(4) The amounts and due dates of any required periodic payments on the principal obligation;

(5) The amounts and due dates of any balloon payments or similar payments on the principal obligation;

(6) The date on which the balance of the principal obligation is due and payable in full;

(7) The total amount of all overdue installments of either principal or interest, or both;

(8) The date, if known, to which real estate taxes and special assessments on the above property have been paid;

(9) The amount of fire, physical damage, or other hazard insurance on the above property now in effect, the term for which it is in effect, and the premium for that insurance;

(10) The amount held in any impound account maintained for the purpose of paying taxes or the premiums for insurance on the above property;

(11) The nature and amount of any prepayment penalty or similar obligation, the payment of which is secured by the Deed of Trust;

(12) The nature and, to the extent known, the amount of any additional costs, charges, expenses, and other obligations incurred to date, the payment of which is secured by the Deed of Trust; and

(13) Whether or not the obligation secured by the Deed of Trust can or may be transferred to a new borrower and, if a transfer is permissible, the nature of any relevant requirements.

If there is any charge for providing us with this information, please advise us of the amount and basis for the charge. We will remit promptly any charges that are due. If you have any questions, contact _____[*name of escrow officer or other person to whom inquiries should be directed*] by mail at _____[*mailing address*] or by telephone at _____[*telephone number*].

Thank you for your cooperation in this matter.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDefinitions & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26 REAL PROPERTY ESCROWS
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1. Requests to Third Parties

11-26 California Legal Forms--Transaction Guide § 26.243

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.243 Request for Owner's Statement, With Owner's Statement Attached

[1] Comment--Use of Form

This form is a request to the owner of real property for a statement concerning the status of the loan and other obligations secured by a deed of trust on the property, together with an owner's statement to be signed and returned by the owner in response to the request.

An owner's statement will usually be requested in connection with the sale of a note and deed of trust. It serves to verify representations that the seller of the note has made to the buyer of the note concerning the nature and amount of the obligations secured by the deed of trust. If the elements of equitable estoppel are present, it may also operate to estop the owner from asserting facts or contentions contrary to those set forth in the statement in any action or proceeding the buyer may have to institute to enforce the note and deed of trust [*see Evid. Code § 623*; *see also City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489-490, 91 Cal. Rptr. 23, 476 P.2d 423* (elements of equitable estoppel)].

The request for an owner's statement ordinarily will be made by the escrow holder, and this form therefore has been drafted for use by an escrow holder. However, the request may also be made by the seller, the buyer, or their attorneys, and, in such a case, the form may be modified for their use.

The escrow holder usually provides the property owner with an owner's statement to be executed and returned. The escrow holder, using information supplied by the seller, normally will insert the specific information relating to the terms of the note, the unpaid balance, and the nature and amount of outstanding obligations and request that the owner verify it. This form assumes that this practice will be followed. Occasionally, however, the owner will be requested to provide this specific information on blanks inserted in the statement for that purpose.

The owner of the property has no legal obligation to provide an owner's statement. However, he or she may be willing

to do so to avoid the possibility that the buyer may institute enforcement proceedings on the basis of erroneous information furnished by the seller or in recognition of the fact that it may be necessary to request forbearance or some other accommodation from the buyer in the future.

[2] Form

Request for Owner's Statement, With Owner's Statement Attached

REQUEST FOR OWNER'S STATEMENT

TO: _____[*name of property owner*]
_____[*address*]

RE: Our Escrow No. _____

_____[*Holder of promissory note*] has established an escrow with us for the purpose of completing a sale of a promissory note, dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____. This promissory note is secured by a _____[first *or* second *or other priority*] deed of trust on certain real property known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described as follows:

[*Set forth legal description:*]

According to the preliminary title report we have obtained, the deed of trust that secures the above-described promissory note was recorded in the official records of _____ County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495], and presently represents a valid encumbrance against the above-described property. We are informed that you are the owner of the above-described property and are therefore requesting that you verify the current status of the promissory note and the deed of trust by reviewing the Owner's Statement set forth below, making the necessary corrections on any items of information you believe to be incorrect, signing the statement, and returning the signed statement to us as soon as possible in the stamped envelope we have enclosed for that purpose.

If you have any questions, contact _____[*name of escrow officer or other person to whom inquiries should be directed*] by mail at _____[*mailing address*] or by telephone at _____[*telephone number*].

Thank you for your cooperation.
_____ Dated:

_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

OWNER'S STATEMENT

I, _____[*name of owner*], hereby state and certify that:

1. I am the owner of that certain real property known as and located at _____[*street address, e.g.,* 2101 Webster Street, Oakland, California] and more particularly described as follows:

[*Set forth legal description:*]

2. The above-described property is encumbered by a deed of trust (hereinafter "the deed of trust"), dated _____, executed by _____[*name of trustor*] and conveying the above-described property in trust to _____[*name of trustee*] for the security and benefit of _____[*name of beneficiary*], that was recorded in the official records of _____[*name of county*] County on _____[*date*], _____[*recording data, e.g.,* in Book 731, page 249 *or* at Reel 327, Image 495].

3. The deed of trust secures the performance of the terms of a promissory note (hereinafter "the promissory note"), dated _____, executed in favor of _____[*name of payee*] by _____[*name of payor*] in the principal amount of $_____[*original principal amount*].

4. The promissory note provides for the payment of interest on the unpaid principal balance at a rate of _____ percent per annum. It further provides for the repayment of the principal amount of $_____[*original principal amount*] and interest in equal monthly installment payments of $_____, due on the _____ day of each month beginning in _____[*month*] of _____[*year*] and continuing up to and including _____[*month*] of _____[*year*].

5. There have been no changes in the original terms of the promissory note or the deed of trust. Other than the principal amount set forth in the promissory note, there have been no advances that are subject to the terms of the note or the deed of trust.

6. As of the date of this statement, the unpaid balance of the principal amount of the promissory note is $_____ and the interest on the unpaid principal balance has been paid to _____[*date*].

7. As of the date of this statement, the following monthly installment payments are due under the terms of the promissory note and are unpaid in whole or part: _____[*state due date and unpaid amount of each delinquent installment payment; if none, state*: None].

8. The makers of the promissory note received full and valid consideration therefor and the promissory note and the deed of trust are valid and enforceable. Except as stated herein, I have no offsets, claims, or defenses that could be asserted in or to an action or proceeding instituted to collect or enforce obligations that are owed under the terms of the promissory note or the deed of trust.

9. I understand that this statement has been requested for the purposes of a transaction in which the promissory note is to be sold and I make it for the benefit of all parties involved in that transaction, including the buyer of the promissory note and the title insurer insuring the deed of trust, and with the understanding that it will be relied on by all parties involved in that transaction.

_____ Dated:

OWNER

_____ [*signature of property owner*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26 California Legal Forms--Transaction Guide §§ 26.244-26.249

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.244[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Other Escrow Forms
2. Modification or Revocation of Escrow Instructions

11-26 California Legal Forms--Transaction Guide § 26.250

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.250 Amendment to Escrow Instructions

[1] Comment

[a] Use of Form

This form is a written amendment to a set of escrow instructions. It is a general form that can be used by either the buyer or the seller to modify either separate or joint escrow instructions. The style and format generally conform to that of the complete escrow forms in this chapter [*see §§ 26.200-26.230*].

This form should be used when the parties intend to change the terms of instructions that have already been submitted. When the parties intend to instruct the escrow holder on matters not covered by previous instructions, supplemental instructions should be used. For a form for supplemental instructions, and discussion of the distinction between amendments and supplemental instructions, see *§ 26.251*.

[b] Amendment of Escrow Instructions

[i] Written Amendment

If existing escrow instructions require a written amendment, an attempt to amend them in some other way will be ineffective [*see, e.g., Anderson v. Southern Trust & Title Co. (1947) 81 Cal. App. 2d 700, 702, 184 P.2d 949* ; *Davis v. Stulman (1945) 72 Cal. App. 2d 255, 268, 164 P.2d 787]* . Even when oral amendments are permissible [*see, e.g., Zang v. Northwestern Title Co. (1982) 135 Cal. App. 3d 159, 168, 185 Cal. Rptr. 176* ; *Cannon v. Handley (1887) 72 Cal. 133, 144-145, 13 P. 315]* , written amendments should be used to avoid potential disputes about the terms or effect of an amendment.

[ii] Statement of Purpose

There is no legal requirement that a written amendment specify the purpose of the amendment. However, this form includes a statement of the purpose of the amendment to assist the escrow holder in determining the effect of the amendment.

[iii] Timing of Amendment; Consent of Other Party

Escrow instructions may be amended by the parties at any time [*King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321* ; *Zlozower v. Lindenbaum (1929) 100 Cal. App. 766, 773, 281 P. 102]* . However, once both parties have deposited their initial instructions, a party may not amend his or her escrow instructions without the consent of the other party [*Diaz v. United California Bank (1977) 71 Cal. App. 3d 161, 166, 139 Cal. Rptr. 314* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828, 86 Cal. Rptr. 182]* . Accordingly, this form should be signed by both parties even when it only amends the escrow instructions of one party.

[2] Form

Amendment to Escrow Instructions

AMENDMENT TO ESCROW INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

The _____[*title of escrow instructions being amended, e.g.,* Seller's Escrow Instructions *or* Joint Escrow Instructions of Seller and Buyer] dated _____, previously deposited in the above-referenced escrow are hereby amended by _____[*name or names of party or parties submitting amendment*] in the following respects:

[*If one or more provisions are to be deleted:*]

1. By deleting from those instructions _____[*describe provisions to be deleted, e.g.,* Section 6.02 *or* the second sentence of Paragraph 20; *if provision to be deleted is brief, add*:, which now reads as follows: "_____"];

[*If one or more provisions are to be added:*]

2. By adding to those instructions, _____[*specify where provisions are to be added, e.g.,* immediately preceding Section 4.03 *or* immediately following the phrase "the sum of" in the third sentence of Paragraph 12], the following: _____[*set forth in full provisions to be added*].

[*If one provision is to be substituted for another:*]

3. By deleting from those instructions _____[*describe provisions to be deleted, e.g.,* Section 6.02 *or* the second sentence of Paragraph 20; *if provision to be deleted is brief, add*:, which now reads as follows: "_____"], and substituting in its place the following: _____[*set forth in full provision to be added*].

[*Continue with the following:*]

This amendment is made for the purpose of _____[*specify purpose, e.g.,* resolving a conflict in the instructions initially submitted by Seller and Buyer *or* correcting a clerical error]. It shall supersede and control over any contrary provisions of the _____[*title of escrow instructions being amended, e.g.,* Seller's Escrow Instructions *or* Joint Escrow Instructions of Seller and Buyer] previously deposited in the above-referenced escrow.

Please acknowledge your receipt and acceptance of this amendment by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller and one signed copy to Buyer.

[*Select the appropriate signature block below; either:*]

_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

[*OR*]

_____ Dated:

_____ [*signature of party submitting amendment*]
[*typed name*]

Acceptance by _____ [Seller *or* Buyer]

I have read the foregoing amendment to the escrow instructions of _____[Seller *or* Buyer] and I approve and accept it.

_____ [*signature of party approving amendment*]
[*typed name*]

[*Continue with the following:*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of, and accepts, the foregoing amendment to the _____[*title of escrow instructions being amended, e.g.,* Seller's Escrow Instructions *or* Joint Escrow Instructions of Seller and Buyer] dated _____, previously deposited in the above-referenced escrow.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.251

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.251 Supplemental Escrow Instructions

[1] Comment--Use of Form

This form may be used by any party to an escrow to give the escrow holder supplemental escrow instructions. Supplemental escrow instructions are essentially a type of amendment and are subject to the rules that govern amendments, which are discussed in *§ 26.250[1]*. The different characterizations are used mainly to clarify the nature of a change or addition. An amendment is usually understood to change the meaning or effect of existing provisions, while a supplement is usually understood to add matters not previously covered.

[2] Form

Supplemental Escrow Instructions

SUPPLEMENTAL ESCROW INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

_____[*Name(s) of party or parties submitting instruction*] hereby deposit[s] the following instructions to supplement the _____[*title of escrow instructions being supplemented, e.g.,* Seller's Escrow Instructions or Joint Escrow Instructions of Seller and Buyer] dated _____, previously deposited in the above-referenced escrow. You are authorized and instructed to complete the sale and purchase of the real property described in the _____[*title of escrow instructions being supplemented, e.g.,* Seller's Escrow Instructions or Joint Escrow Instructions of Seller and Buyer] previously deposited in the above-referenced escrow in

accordance with the following additional directions:

[*Insert text of supplemental instructions*]

These supplemental escrow instructions are deposited with you pursuant to _____[*identify provision of prior instructions authorizing or contemplating supplement, if any, and describe purpose, e.g.,* Section 5.01 of the Joint Escrow Instructions of Seller and Buyer for the purpose of instructing you on the specific amounts to be credited or debited to the parties as a result of the proration of certain expenses of maintaining the Subject Real Property].

Please acknowledge your receipt and acceptance of these supplemental instructions by signing the acknowledgment and acceptance set forth below on the enclosed copies and returning one signed copy to Seller and one signed copy to Buyer.

[*Select the appropriate signature block below; either:*]

_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

[*OR*]

_____ Dated:

_____ [*signature of party submitting amendment*]
[*typed name*]

Acceptance by _____ [Seller *or* Buyer]

I have read the foregoing amendment to the escrow instructions of _____[Seller *or* Buyer] and I approve and accept it.

_____ [*signature of party approving amendment*]
[*typed name*]

[*Continue with the following:*]

Acknowledgment and Acceptance by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of, and accepts, the foregoing supplemental escrow instructions.
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.252

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.252 Revocation of Escrow Instructions

[1] Comment

[a] Use of Form

This form may be used to exercise a right to revoke escrow instructions unilaterally and demand the return of items deposited with the escrow holder under those instructions.

The deposit of escrow instructions and items with an escrow holder is not always irrevocable. When a valid escrow has not been created, the escrow holder serves only as the agent of the party making the deposit, and that party therefore may revoke the instructions and demand the return of the items deposited at any time [*Fitch v. Bunch (1866) 30 Cal. 208, 213-214* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* . Accordingly, a party who has deposited instructions with an escrow holder has a right to revoke them at any time before all of the elements necessary to constitute a valid escrow are present. Most commonly, a party is entitled to exercise this right of revocation because the other party has not agreed to or accepted the conditions of the deposit [*House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366* ; *Security-First Nat. Bk. v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* , because there is not a valid contract between the parties [*Fitch v. Bunch (1866) 30 Cal. 208, 212* ; *Elliott v. Title Ins. & Trust Co. (1923) 64 Cal. App. 508, 511, 222 P. 175]* , or because the right to revoke the deposit has expressly been reserved [*Keyes v. Meyers (1905) 147 Cal. 702, 704-706, 82 P. 304* ; *Ragan v. Ragan (1915) 29 Cal. App. 63, 65, 154 P. 479]* .

[b] Notice Requirements

Under the law of agency, notice to the escrow holder is all that is required to revoke the escrow and terminate the escrow holder's control over instruments or items deposited [*Fitch v. Bunch (1866) 30 Cal. 208, 213-214]* . Under some circumstances, however, the deposit of escrow instructions may also constitute an offer to the other party to enter

into a contract. In such cases, the contractual rules governing offer and acceptance may require that the revocation be communicated to the other party to preclude the formation of a binding contract [*see Civ. Code §§ 1586* (offer may not be revoked after acceptance), 1587(1) (offer may be revoked by communicating revocation to offeree)]. Consequently, it is generally advisable to give notice of the revocation to the other party as well as the escrow holder.

[2] Form

Revocation of Escrow Instructions

REVOCATION OF ESCROW INSTRUCTIONS

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

_____[*name of party revoking instructions*] ("_____" [Seller *or* Buyer]) hereby revokes and cancels the _____[*title of escrow instructions being revoked, e.g.,* Seller's Escrow Instructions] dated _____, previously deposited with you, and revokes and cancels any authority granted to you under those instructions. This revocation is made [pursuant to Paragraph _____ of those instructions] for the reason that _____[*indicate why revocation is appropriate, e.g.,* no escrow instructions have been deposited by Buyer to date].

You are directed to refrain from taking any further action to complete the sale of the Subject Real Property and to refrain from taking any further action to carry out the _____[*title of escrow instructions being revoked, e.g.,* Seller's Escrow Instructions] deposited by _____[*name of party revoking instructions*]. You are further instructed to cancel any escrow you may have established pursuant to those instructions and to return to _____[*name of party revoking instructions*] forthwith any and all funds, instruments, documents, and other items _____[he *or* she *or* it] has deposited with you.

Please acknowledge your receipt of this notice of revocation of instructions, and the date of receipt, by signing the acknowledgment set forth below on the enclosed copies, entering the date of receipt thereon, and returning a signed copy to _____[*name of party revoking instructions*].
_____ Dated:

_____ [*signature of revoking party*]
[*typed name*]

Acknowledgment by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing notice of revocation of escrow instructions on _____[*date*].
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide §§ 26.253-26.259

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.253[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26 California Legal Forms--Transaction Guide § 26.260

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.260 Notice of Satisfaction of Escrow Condition

[1] Comment--Use of Form

This form may be used by either party to an escrow to give written notice to the escrow holder and the other party that a condition of the escrow or to a party's obligation to perform has been satisfied. This form should be used when a contingency provision provides for the automatic cancellation of the escrow or the underlying contract unless a specified party gives notice of the satisfaction of the condition at issue. For a general discussion of contingency provisions, see *§ 26.201[1]*. This form should also be used when the satisfaction of the condition is made a condition precedent to the close of escrow by the instructions of one or both of the parties. For a notice of waiver of a condition, see *§ 26.261*. For a notice of cancellation of escrow due to the failure of a condition, see *§ 26.270*.

Frequently, escrow instructions provide that the satisfaction of a condition can only be established by written notice. Even in the absence of such provisions, however, it is a good practice to give written notice, particularly when the failure of the condition requires cancellation of the escrow or precludes a close of escrow.

[2] Form

Notice of Satisfaction of Escrow Condition

NOTICE OF SATISFACTION OF CONDITION

TO: _____[*name of escrow holder*]
_____[*address*]
_____[*name of other party*]
_____[*address*]

RE: Escrow No. _____

[*If applicable, refer to escrow instructions requiring notice of satisfaction of condition, e.g.*, Pursuant to Section 3.07 of the joint escrow instructions previously deposited in the above-referenced escrow,] you are hereby notified that _____[*describe facts or circumstances constituting satisfaction of condition, e.g.*, Buyer agrees to take title to the Subject Real Property subject to the easement shown as Exception No. 4 on the Preliminary Title Report dated _____ *or* the escrow established to complete the sale of Buyer's present residence has closed] and that the condition set forth in _____[*e.g.*, Paragraph 11(i)] of the instructions previously deposited in the above-referenced escrow by Buyer has therefore been satisfied and fulfilled.

Please acknowledge your receipt of this notice, and the date of receipt, by signing the acknowledgment set forth below on the enclosed copies, entering the date of receipt thereon, and returning a signed copy to _____[*party submitting notice*].
_____ Dated:

_____ [*signature of party submitting notice*]
[*typed name*]

Acknowledgment by Escrow Holder

_____[*name of escrow holder*] acknowledges receipt of the foregoing notice of satisfaction of condition on _____[*date to be filled in by escrow holder*].
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.261

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.261 Notice of Waiver of Escrow Condition

[1] Comment

[a] Use of Form

This form may be used by either party to an escrow to give written notice to the escrow holder and the other party that a condition of the escrow or to a party's obligation to perform has been waived. A party to an escrow may waive the right to performance of conditions of the escrow, and performance of a condition is not required when it has been waived by the party or parties it was intended to benefit [*Wolf v. Price (1966) 244 Cal. App. 2d 165, 173, 52 Cal. Rptr. 889* ; *Jolin v. Spira (1949) 94 Cal. App. 2d 356, 360, 210 P.2d 704]* .

This form should be used when a contingency provision provides for automatic cancellation of the escrow or the underlying contract unless a specified party gives notice that the condition has been satisfied or waived. It should also be used by a party who desires to waive a condition that is a condition precedent to the close of escrow under his or her own instructions. For a notice that a condition has been satisfied, see *§ 26.260*. For a notice of cancellation of an escrow due to the failure of a condition, see *§ 26.270*. For a general discussion of contingency provisions, see *§ 26.201[1]*.

Frequently, escrow instructions provide that the waiver of a condition can only be established by written notice. Even in the absence of such provisions, it is a good practice to give written notice of a waiver, particularly if the failure of the condition requires cancellation of the escrow or precludes a close of escrow.

[b] Attempted Waiver of Condition Benefitting Another Party

A party's unilateral attempt to waive a condition that was intended in whole or part to benefit another party will be ineffective [*see Spangler v. Castello (1956) 147 Cal. App. 2d 49, 52, 304 P.2d 752]* . Consequently, if there is any question about whether the waiver was intended in part to benefit some other party, the party making the waiver should

attempt to have the other party sign the notice of waiver or otherwise approve the waiver in writing.

[2] Form

Notice of Waiver of Escrow Condition

NOTICE OF WAIVER OF CONDITION

TO: _____[*name of escrow holder*]
_____[*address*]
_____[*name of other party*]
_____[*address*]

RE: Escrow No. _____

[*If applicable, refer to escrow instructions providing for waiver of condition, e.g.,* Pursuant to Section 8.17 of the joint escrow instructions previously deposited in the above-referenced escrow,] you are hereby notified that _____[*name of party or parties waiving condition*] waive[s] _____[*describe condition or right waived, e.g.,* the condition requiring escrow to close on or before _____ (*date*) *or* the right to cancel this escrow and the contract of purchase and sale of the Subject Real Property if the escrow established to complete the sale of Buyer's present residence did not close before _____ (*date*)]. If the other terms and conditions of this escrow are performed or fulfilled, you are authorized and instructed to proceed to close the escrow notwithstanding _____[*describe facts or circumstances constituting failure of condition, e.g.,* the failure of the parties to close escrow prior to_____ (*date*) or the fact that the escrow established to complete the sale of Buyer's present residence did not close on or before _____ (*date*)].

Please acknowledge your receipt of this notice, and the date of receipt, by signing the acknowledgment set forth below on the enclosed copies, entering the date of receipt thereon, and returning a signed copy to _____[*party submitting notice*].
_____ Dated:

_____ [*signature of party waiving condition*]
[*typed name*]

Acknowledgment by Escrow Holder

_____[*name of escrow holder*] acknowledges receipt of the foregoing notice of waiver of condition on _____[*date to be filled in by escrow holder*].
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawPurchase & SaleClosing

& SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide §§ 26.262-26.269

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 26.262[Reserved]



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11-26 California Legal Forms--Transaction Guide § 26.270

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.270 Notice of Cancellation of Escrow for Default or Failure of Condition

[1] Comment

[a] Use of Form

This form may be used to exercise a party's right to cancel an escrow (1) pursuant to provisions of escrow instructions or an underlying contract making the party's obligation to complete the escrow or the underlying transaction contingent on the occurrence or nonoccurrence of specified conditions; (2) pursuant to provisions of escrow instructions or an underlying contract expressly giving the party the right of cancellation in the event of the occurrence or nonoccurrence of specified conditions; or (3) when the escrow is not closed within the time specified in the instructions and the party exercising the right to cancel is not in default. For a general discussion of unilateral cancellation of escrows, see *§ 26.200[1]*. For a general discussion of contingency provisions, see *§ 26.201[1]*.

[b] Observance of Cancellation Requirements Specified in Escrow Instructions

Provisions in escrow instructions that specify or limit the manner in which a right of cancellation may be exercised are generally given effect [*see, e.g., Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 796, 36 Cal. Rptr. 188* ; *Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81]* . Consequently, a party attempting to cancel an escrow should be careful to observe any requirements contained in the escrow instructions strictly.

[2] Form

Notice of Cancellation of Escrow for Default or Failure of Condition

NOTICE OF CANCELLATION OF ESCROW

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

[*If applicable, refer to escrow instructions requiring notice of cancellation, e.g.,* Pursuant to Section 8.03(c) of the joint escrow instructions previously deposited in the above-referenced escrow,] You are hereby notified that [*if party is required to provide notice of failure of condition, describe facts or circumstances constituting failure, e.g.,* the escrow established to complete Seller's purchase of another residence did not close on or before _____ (*date*) *or* Buyer does not approve the soils report furnished by Seller *add*: and, accordingly, that]
_____[*name of party*] ("_____" [Seller *or* Buyer]) is hereby exercising _____[his *or* her *or* its] right to cancel the above-referenced escrow, and to revoke and cancel any escrow instructions _____[he *or* she *or* it] may have previously submitted, _____[*describe ground, e.g.,* in the event that the escrow established to complete the sale of Seller's residence did not close on or before _____ (*date*) *or* if _____ (he *or* she *or* it) did not approve the soils report].

You are instructed to refrain from taking any further action to complete the sale of the Subject Real Property, to cancel the above-referenced escrow forthwith, and to return to _____[*party submitting notice*] forthwith any and all funds, instruments, documents, and other items _____[he *or* she *or* it] has deposited with you.

Please acknowledge your receipt of this notice of cancellation of escrow, and the date of receipt, by signing the acknowledgment set forth below on the enclosed copies, entering the date of receipt thereon, and returning a signed copy to _____[*party submitting notice*].
_____ Dated:

_____ [*signature of canceling party*]
[*typed name*]

Acknowledgment by Escrow Holder

_____[*name of escrow holder*] acknowledges receipt of the foregoing notice of cancellation of escrow on _____[*date to be filled in by escrow holder*].
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.271

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.271 Notice of Cancellation of Escrow by Mutual Agreement

[1] Comment

[a] Use of Form

This form may be used to effect a cancellation of an escrow pursuant to the mutual agreement of the parties. For a unilateral notice of cancellation of escrow due to a default or the failure of a condition, see *§ 26.270*. For a unilateral notice of revocation of escrow instructions, see *§ 26.252*.

The parties to an escrow may cancel the escrow by mutual agreement at any time before it is closed [*Whitney v. Sherman (1918) 178 Cal. 435, 437-438, 173 P. 931* ; *Wilshire Realty Co. v. Kry Corp. (1967) 250 Cal. App. 2d 269 276-277, 58 Cal. Rptr. 469]* . The parties are ordinarily entitled to cancel the escrow even if provisions of the instructions were intended to benefit third parties [*Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 487, 110 P.2d 396* ; *Wilshire Realty Co. v. Kry Corp. (1967) 250 Cal. App. 2d 269, 276-277, 58 Cal. Rptr. 469]* . However, if there has been an irrevocable change of position by the third party as a result of the escrow, the doctrine of equitable estoppel may preclude a party or the escrow holder from relying on the cancellation [*Feinberg v. Intrastate Escrow Corp. (1963) 216 Cal. App. 2d 80, 85, 30 Cal. Rptr. 781]* .

[b] Observance of Cancellation Requirements Specified in Escrow Instructions

Provisions of escrow instructions that specify or limit the manner in which a right of cancellation may be exercised are generally given effect [*see, e.g., Weisberg v. Ashcraft (1963) 223 Cal. App. 2d 793, 796, 36 Cal. Rptr. 188* ; *Weaver v. Casad (1948) 86 Cal. App. 2d 593, 595, 195 P.2d 81]* . Consequently, even when both parties to an escrow agree to cancel it, they should be careful to strictly observe any requirements contained in the escrow instructions.

[2] Form

Notice of Cancellation of Escrow by Mutual Agreement

NOTICE OF CANCELLATION OF ESCROW

TO: _____[*name of escrow holder*]
_____[*address*]

RE: Your Escrow No. _____

[*If applicable, refer to escrow instructions requiring notice of cancellation and authorizing cancellation by mutual agreement, e.g.,* Pursuant to Sections 8.03(a) and 8.03(c) of the joint escrow instructions previously deposited in the above-referenced escrow,] You are hereby notified that _____[*name of seller*] ("Seller") and _____[*name of buyer*] ("Buyer"), by mutual agreement, are hereby canceling the above-referenced escrow and revoking and canceling any escrow instructions they may previously have submitted.

You are instructed to refrain from taking any further action to complete the sale of the Subject Real Property, to cancel the above-referenced escrow forthwith, and to return to Seller and Buyer forthwith any and all funds, instruments, documents, and other items they have deposited with you.

Please acknowledge your receipt of this notice of cancellation of escrow, and the date of receipt, by signing the acknowledgment set forth below on the enclosed copies, entering the date of receipt thereon, and returning one signed copy to Seller and one signed copy to Buyer.
_____ Dated:

SELLER
_____ [*signature of seller*]
[*typed name*]

_____ Dated:

BUYER
_____ [*signature of buyer*]
[*typed name*]

Acknowledgment by Escrow Holder

_____[*Name of escrow holder*] acknowledges receipt of the foregoing notice of cancellation of escrow on _____[*date to be filled in by escrow holder*].
_____ Dated:

ESCROW HOLDER
_____ [*name of escrow holder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelGeneral OverviewReal Property LawPurchase & SaleContracts of

SaleGeneral OverviewReal Property LawPurchase & SaleEscrow



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11-26 California Legal Forms--Transaction Guide § 26.272

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 26.272 Demand for Return of Funds Deposited in Escrow [Civ. Code § 1057.3]

[1] Comment

[a] Use of Form

This form is a demand for the return of funds deposited in an escrow for the purchase and sale of real property containing one to four residential units. As discussed in more detail below, the buyer or seller who deposited the funds may submit this request to the other party if the escrow does not close on time, and will be entitled to damages if the recipient of this form fails to execute any document required by the escrow holder to release the deposited funds [*see Civ. Code § 1057.3*].

[b] Duty to Return Funds

If a buyer and seller have entered into a contract to purchase and sell real property, it is their obligation to ensure that all funds deposited into an escrow account are returned to the person who deposited them or who is otherwise entitled to the funds under the contract, if the purchase is not completed by the date set forth in the contract for the close of escrow (or any duly executed extension of that date) [*Civ. Code § 1057.3(a)*].

For these purposes, "property" means real property containing one to four residential units, at least one of which at the time the escrow is created is to be occupied by the buyer. The buyer's statement as to his or her intention to occupy one of the units is conclusive for these purposes [*Civ. Code § 1057.3(f)(3)*]. "Close of escrow" means the date, specified event, or performance of prescribed condition on which the escrow agent is to deliver the subject of the escrow to the person specified in the buyer's instructions to the escrow agent [*Civ. Code § 1057.3(f)(1)*].

[c] Right to Damages

[i] Written Demand

If the buyer or seller has not fulfilled his or her obligation under *Civ. Code § 1057.3(a)* to return funds deposited in escrow by the other party [*see* [b], *above*], a written demand (this form) may be made for the return of the funds [*see Civ. Code § 1057.3(b)*]. Apparently, the demand may be made by the party who deposited the funds in escrow or by the escrow agent. Within 30 days following the written demand, the recipient must execute any document required by the escrow holder to release the deposited funds. The statute does not specify whether this 30-day period commences on the mailing or the receipt of the demand. This form contains optional language providing that it commences on receipt of the demand. If the recipient fails to execute any such document, he or she will be liable to the person making the deposit for all of the following [*Civ. Code § 1057.3(b)*]:

- The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute [*see* [c][ii], *below*].

- Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute. These damages must not be less than $100 or more than $1,000.

- Reasonable attorneys' fees incurred in any action to enforce *Civ. Code § 1057.3*.

[ii] Good Faith Disputes

Notwithstanding *Civ. Code § 1057.3(b)* [*see* [c][i], *above*], if escrow funds are withheld to resolve a good faith dispute between the buyer and the seller, there will be no cause of action or liability imposed under Section 1057.3 for the failure to return the funds. A party who is denied the return of deposited funds is entitled to damages under Section 1057.3 only on proving that there was no good faith dispute as to the right to the deposited funds [*Civ. Code § 1057.3(c)*]. For these purposes, "good faith dispute" means a dispute in which the trier of fact finds that the party refusing to return the deposited funds had a reasonable belief as to his or her legal entitlement to withhold the deposited funds. The existence of a good faith dispute must be determined by the trier of fact [*Civ. Code § 1057.3(f)(2)*].

[d] Escrow Holder

On the filing of a cause of action pursuant to *Civ. Code § 1057.3*, the escrow holder must deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed. The filing discharges the escrow holder of further responsibility for the funds [*Civ. Code § 1057.3(d)*].

Nothing in Section 1057.3 restricts the ability of an escrow holder to file an interpleader action in the event of a dispute as to the proper distribution of funds deposited in an escrow account [*Civ. Code § 1057.3(g)*]. For detailed coverage of interpleader actions brought by escrow holders, see California Forms of Pleading and Practice, Ch. 253, *Escrows* (Matthew Bender).

[e] Underlying Contract

Neither of the following, when performed by any principal to an escrow transaction, will be deemed a cancellation or termination of the underlying contract to purchase and sell real property, unless the contract provides to the contrary: (1) the execution of a document required by the escrow holder to release funds deposited in the escrow account; or (2) the acceptance of funds released from escrow. If the escrow instructions constitute the only contract between the buyer and seller, no document required by the escrow holder to release funds deposited in an escrow account will abrogate a cause of action for breach of a contractual obligation to purchase or sell real property, unless the contract provides otherwise [*Civ. Code § 1057.3(e)*].

[2] Form

Demand for Return of Funds Deposited In Escrow [Civ. Code § 1057.3]

DEMAND FOR RETURN OF FUNDS DEPOSITED IN ESCROW

TO: _____[*name of party*]
_____[*address*]
_____[*city, state, zip*]

RE: Escrow No. _____

As you are aware, the proposed purchase of property that led to the establishment of the above escrow was not completed by the date set forth in _____[*specify paragraph number*] of the _____[*identify escrow instructions, e.g.*, joint escrow instructions previously deposited in the above escrow *or describe any duly executed extension of those instructions*] for the close of escrow. Consequently, the undersigned hereby requests that you return to the undersigned [*or identify other person who is entitled to the funds*] the following funds deposited into the above escrow by the undersigned: _____[*describe*]. You are also requested to execute any document required by the escrow holder for the above escrow to release funds on deposit in the escrow account. If you fail to release those funds or to execute any such document within 30 days of [your receipt of] this notice, you will be liable to the undersigned for damages.

This request is made pursuant to *Civil Code Section 1057.3*.
_____ Dated:

_____ [*signature of buyer or seller*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewContracts LawTypes of ContractsReleasesReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDamagesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE

11-26A California Legal Forms--Transaction Guide 26A.syn

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§ 26A.252 ALTA Owner's Policy (10-17-92)

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11-26A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter deals with title insurance policies and related reports, including preliminary reports, commitments, binders, guarantees, and indorsements. It explains the function of title insurance, analyzes the most important legal rules governing the rights of title insurance policyholders, and describes the reports and policies most commonly encountered by real estate owners and lenders. All forms set forth in this chapter are reproduced (with permission) from the *Policy & Indorsement Forms Book* of the California Land Title Association.

Related subjects covered elsewhere in this publication are escrow [*see* Ch. 26, *Real Property Escrows*], deeds [*see* Ch. 27, *Deeds, Conveyancing, Dedication, and Homesteads*] easements and covenants [*see* Ch. 28, *Easements, Covenants, and Adjoining Owners*], zoning [*see* Ch. 30B, *Zoning, Building, and Environmental Permits*], and leases [*see* Ch. 35, *Real Property Leases and Lease Provisions*, and Ch. 35B, *Modification and Termination of Leases*].



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A. Primary Sources

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§ 26A.01 California Sources

[1] Statutes

Duty of county recorder to record instruments entitled to be recorded. *Civ. Code § 1169*.

When instrument is deemed recorded. *Civ. Code § 1170*.

Recordation constitutes constructive notice to subsequent purchasers and mortgagees. *Civ. Code § 1213*.

Conveyances void as against subsequent purchasers or mortgages in good faith and for valuable consideration whose conveyances are first recorded. *Civ. Code § 1214*.

"Conveyance" defined for purposes of recording statutes. *Civ. Code § 1215*.

Unrecorded instrument valid as between parties and those who have notice. *Civ. Code § 1217*.

Seller who cannot give title free from reasonable doubt not entitled to specific performance. *Civ. Code § 3394*.

"Insurance" defined. *Ins. Code § 22*.

"Title insurance" defined. *Ins. Code §§ 104, 12340.1*.

"Title policy" defined. *Ins. Code § 12340.2*.

Activities comprising business of title insurance. *Ins. Code § 12340.3*.

Title insurers, domestic title insurers, and foreign title insurers. *Ins. Code § 12340.4*.

Underwritten title companies. *Ins. Code § 12340.5*.

Controlled escrow companies. *Ins. Code § 12340.6*.

Advisory organizations. *Ins. Code § 12340.8*.

Abstracts of title. *Ins. Code § 12340.10*.

Preliminary reports, commitments, and binders. *Ins. Code § 12340.11*.

Authority of underwritten title companies. *Ins. Code § 12389*.

Additional powers of domestic title insurers. *Ins. Code §§ 12390, 12391*.

Regulatory authority of Insurance Commissioner. *Ins. Code § 12394*.

Rate schedules and all regularly issued title forms must be filed with Insurance Commissioner. *Ins. Code § 12401.1*.

Basic classifications of coverage and services must be established as basis for determining rates. *Ins. Code § 12401.2*.

Standards that must be applied in making and use of rates. *Ins. Code § 12401.3*.

[2] Regulations

Title companies must maintain records of policy forms, underwriting rules, rates, charges, fees, rating plans, and rating systems. *10 Cal. Code Reg. § 2556*.

Title companies must file rates, rating plans, and rating systems with Insurance Commissioner. *10 Cal. Code Reg. § 2556.1(a)*.

Title insurers must file all regularly issued forms of title policies and modifications with Insurance Commissioner. *10 Cal. Code Reg. § 2556.1(b)*.

Underwritten title company may use forms filed by title insurer. *10 Cal. Code Reg. § 2556.1(c)*.

Member of qualified advisory organization may authorize organization to file forms on its behalf. *10 Cal. Code Reg. § 2556.1(e)*.

No charges may be made except in accordance with effective rate filings. *10 Cal. Code Reg. § 2556.1(g)*.



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[Reserved]

§§ 26A.02[Reserved]



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B. Secondary Sources

11-26A California Legal Forms--Transaction Guide § 26A.05

§ 26A.05 Law Reviews and Periodicals

Hosack & O'Connor, "Handling Bad Faith Claims Against Title Insurers," 5 Calif. Lawyer (June 1985) p. 31.

Beasley, "Title Policy Endorsements Relating to Alternative Mortgage Forms," *17 Real Prop., Prob. & Tr. J. 375 (1982).*

Comment, "Title Insurance and Railroad Rights of Way: *Caveat Emptor*!" *12 Pacific L.J. 1099 (1980).*

Kuklin, "Commercial Title Insurance and the Lawyer's Responsibility," *15 Real Prop., Prob. & Tr. J. 557 (1980).*

Taub, "Rights and Remedies Under a Title Policy," *15 Real Prop., Prob. & Tr. J. 422 (1980).*

Rooney, "Title Insurance: A Primer for Attorneys," *14 Real Prop., Prob. & Tr. J. 608 (1979).*

Ring, "Title Insurance for the Owner Or What You See Is Not Necessarily What You Get!" *52 L.A. Bar J. 20 (1976) .*

McKnight, "Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions," 47 Calif. State B.J. 408 (1972).

Audrain, "The Role of Title Insurance in Land Commerce," *6 Santa Clara Lawyer 10 (1965).*

Eagan, "Title Insurance for Condominiums," *14 Hastings L.J. 210 (1963).*

Comment, "Title Insurance in California," *39 Calif. L. Rev. 235 (1951).*



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§ 26A.06 Annotations

"Defect in, or condition of, adjacent land or way as within coverage of title insurance policy," *8 A.L.R.4th 1246 (1981)* .

"Construction of clause in title insurance policy excepting defects resulting from the rights of parties in possession," *94 A.L.R.3d 1188 (1979)* .

"What constitutes a charge, encumbrance, or lien within contemplation of title insurance policy," *87 A.L.R.3d 764 (1978)* .

"Title insurance: exclusion of liability for defects, liens, or encumbrances created, suffered, assumed, or agreed to by the insured," *87 A.L.R.3d 515 (1978)* .

"Duty of applicant or his agent to disclose facts arising or discovered after application for title insurance," *75 A.L.R.3d 600 (1977)* .

"Liability of one preparing abstract of title, for deficiencies therein, to one other than person directly contracting for abstract," *34 A.L.R.3d 1122 (1970)* .

"Insured's cooperation with claimant in establishing valid claim against insurer as breach of cooperation clause," *8 A.L.R.3d 1345 (1966)* .

"Title examination activities by lending institution, insurance company, or title and abstract company, as illegal practice of law," *85 A.L.R.2d 184 (1962)* .

"Measure, extent, or amount of recovery on policy of title insurance," *60 A.L.R.2d 972 (1958)* .



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11-26A California Legal Forms--Transaction Guide § 26A.07

§ 26A.07 Text References

[1] Matthew Bender References

CALIFORNIA REAL ESTATE LAW & PRACTICE,Ch. 92, *Title Insurance* (Matthew Bender).

CALIFORNIA INSURANCE LAW PRACTICE, Ch. 8, *The Insurance Contract* ; Ch. 9, *Issuance of Insurance Policies* ; Ch. 13, *Claims Practices and the Duty of Good Faith* ; Ch. 39, *Title Insurance* (Matthew Bender).

CALIFORNIA FORMS OF PLEADING PRACTICE, Ch. 548, *Title Insurance* (Matthew Bender).

POWELL ON REAL PROPERTY, Ch. 92, *Title Insurance* (Matthew Bender).

Shernoff, Gage & Levine, INSURANCE BAD FAITH LITIGATION, Ch. 5, *Duties Under First-Party Insurance Policies* (Matthew Bender).

[2] Additional Text References

California Land Title Association, *Policy & Indorsement Forms Book* (CLTA, Revised 1971).

Witkin, *Summary of California Law*, vol. 12, *Real Property*, §§ 352-367 (10th ed. 2005).

Bowman, *Ogden's Revised California Real Property Law* (Cal. C.E.B. 1974, 1975)

Appendix, *What Is Title Insurance?*; Ch. 30, *Nature of Title Insurance*; Ch. 31, *Types of Title Insurance Policies*; Ch. 32, *Special Title Insurance Indorsements in Common Use*.

Hosack, *California Title Insurance Practice* (Cal. C.E.B. 1980).

Miller & Starr, *Current Law of California Real Estate* (Rev. ed., 1972), Ch. 12, *Title Insurance and Escrows*.



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[Reserved]

§§ 26A.08[Reserved]



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§ 26A.10 Nature of Title Insurance

[1] Definition

"Insurance" is defined by statute as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code § 22*]. "Title insurance" is defined as the insurance, guarantee, or indemnification of owners of real or personal property, holders of liens or encumbrances on real property, or other persons interested in real property, against loss or damage suffered by reason of [*Ins. Code § 12340.1*; *see Ins. Code § 104*]:

- Liens or encumbrances on, or defects in, the title to real property;
- Invalidity or unenforceability of any liens or encumbrances on real property; or
- Incorrectness of searches relating to the title to real or personal property.

In addition, title insurance policies may insure such matters as the identity, due execution, and validity of notes or bonds secured by mortgages or deeds of trust [*Ins. Code § 12390(a)*]; the identity, due execution, validity, and recording of any mortgage or deed of trust [*Ins. Code § 12390(b)*]; and the identity, due execution, and validity of evidences of indebtedness issued by the State of California, its political subdivisions or districts, or public corporations [*Ins. Code § 12390(c)*].

[2] Importance in Real Estate Industry

Title insurance is an indispensable part of virtually every commercial real estate transaction in California. It is as important in credit transactions as in sales and leases. Title insurance (and the title insurance industry) perform the vital functions of providing (1) essential information as to the condition of real estate titles throughout the state, and (2) assurance, in the form of policies, reports, commitments, binders, guarantees, and indorsements, that the information provided is complete and accurate.

[3] Title Insurers and Underwritten Title Companies

A "title insurer" is defined as any company issuing title policies as insurer, guarantor, or indemnitor [*Ins. Code § 12340.4*; *see Ins. Code § 12340.3* ("business of title insurance" defined)]. An "underwritten title company" is any corporation engaged in the business of preparing title searches, title examinations, title reports, certificates, or abstracts of title on the basis of which a title insurer writes title policies [*Ins. Code § 12340.5*].

Because underwritten title companies are not title insurers, they may not issue their own policies of title insurance, although they may be empowered by qualified title insurers to do this by countersigning the title insurer's policies, much in the way that an insurance broker or agent sells the policies of an insurance company. Title insurers may, however, perform the functions of both types of companies. They may and frequently do prepare title searches, examinations, reports, certificates, and abstracts, and issue title insurance policies based on those services. For further discussion of title insurers and underwritten title companies, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsOwnershipGeneral OverviewInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview



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§ 26A.11 Marketable Title

[1] Definition

"Marketable title" is that title which a reasonable buyer, well informed as to the facts and their legal consequences and willing and anxious to perform the contract, would, in the exercise of the prudence that business persons ordinarily bring to bear on such transactions, be willing to accept [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 649, 234 P.2d 625]* . To be "marketable," a title must be sufficiently free from defects to enable the holder to retain the property, to possess it in peace, and, when the time comes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value [*Mertens v. Berendsen (1931) 213 Cal. 111, 113, 1 P.2d 440]* . To qualify as "marketable," a title must embrace both the legal and equitable estates, be free from unknown encumbrances, and be defensible and salable [*Palos Verdes Corp. v. Housing Authority (1962) 202 Cal. App. 2d 827, 838, 21 Cal. Rptr. 225]* .

[2] Seller's Obligation To Convey

In any agreement for the sale of real property, the law implies a condition that the seller convey a "good" or "marketable" title to the buyer [*King v. Stanley (1948) 32 Cal. 2d 584, 589, 197 P.2d 321]* . In fact, an agreement for the sale of real property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt [*Civ. Code § 3394*]. While the older cases often refer to "good" title [*see Smiddy v. Grafton (1912) 163 Cal. 16, 18, 124 P. 433]* and the newer cases generally use the words "marketable title" [*see* Nishiyama v. Safeco Title Ins. Co. (1978) 85 Cal. App. Supp. 3d 1, 6, *149 Cal. Rptr. 355]* , the two concepts are the same [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 649 651, 234 P.2d 625]* .

[3] Contrasted With Market Value

The concept of "marketable title" differs from "market value." Although some cases refer to "merchantable title" as the equivalent of "marketable title" [*King v. Stanley (1948) 32 Cal. 2d 584, 590, 197 P.2d 321]* , thereby implying that a title is "marketable" if a buyer may be found for the property (and "not marketable" if a buyer cannot be found), a parcel may have a "marketable title" and still have little or no market value. "Marketable title" is a concept that refers exclusively to the condition of the title to a parcel of property; the condition of the title does not depend on the seller's ability to find a buyer for the property, nor does it necessarily indicate that the property is valuable. A person can hold

perfect title to land that is valueless, and have "marketable" title to land that is unmarketable [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 651, 234 P.2d 625]* .

[4] Effect of Recording Laws

The marketability of a title is vitally affected by the recorded chain of title. The recorded chain of title, in turn, is affected by the California recording laws.

California has adopted the "race-notice" system of recording [*see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 82, *Recording of Instruments*]. Under this system, priorities in land are established by the order in which instruments affecting land are recorded, provided that the transferee of any interest who seeks the protection of the recording laws must not have notice (actual or constructive) of preexisting interests in the same land [*Civ. Code § 1107* (grants), *Civ. Code § 1214* (conveyances); *see Civ. Code § 1215* ("conveyance" defined)]. This system makes it essential for persons dealing with real property to be fully advised as to all interests that may be revealed by the recorded chain of title.

Under California law, every duly acknowledged conveyance of real property provides constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Civ. Code §§ 1169, 1170* (recording of instruments); *but see Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 169, 95 Cal. Rptr. 682* (no constructive notice unless statute declares recording of document constructive notice)]. Although an unrecorded instrument is valid as between the parties to the instrument and those who have actual notice of it [*Civ. Code § 1217*], every conveyance of real property (other than a lease for a term not exceeding one year) is void as against any subsequent purchaser or mortgagee of the same property, in good faith and for a valuable consideration, whose conveyance is first duly recorded [*Civ. Code § 1214*]. Similarly, a conveyance is void as against any judgment affecting the title unless the conveyance is recorded before notice of the pendency of the action is recorded [*Civ. Code § 1214*]. As used in the recording statutes, the term "conveyance" includes every instrument (except a will) by which any interest or estate in real property is created, transferred, mortgaged, or encumbered, or by which the title to any real property may be affected [*Civ. Code § 1215*].

Any person who has notice, actual or constructive, of a prior interest in a parcel of real property cannot qualify as a bona fide purchaser or encumbrancer of the property [*James v. James (1926) 80 Cal. App. 185, 193, 251 P. 666]* . Constructive notice may be inferred from actual notice of circumstances sufficient to put a prudent person on inquiry as to a particular fact [*Beab, Inc. v. First Western Bank & Tr. Co. (1962) 204 Cal. App. 2d 680, 688, 22 Cal. Rptr. 583]* , or may be the legal consequence of the proper recording of a valid instrument [*Civ. Code § 1213*]. For a general discussion of the California recording laws and the legal rights of bona fide purchasers, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 82, *Recording of Instruments* (Matthew Bender).

[5] Effect of Title Insurance

Title insurance is generally used throughout the United States to establish marketable title. Iowa is the only state in which title insurance is not available, and its absence there is due solely to a prohibitory statute [*see* Cook, "Iowa's Prohibition of Title Insurance-- Leadership or Folly?" 33 Drake Univ. L. Rev. 683 (1983-1984)].

Title insurance has become so universal that few buyers or lenders will accept a title or make a loan on the security of real property without appropriate title insurance coverage. Title insurance "plants," in which records relating to real property are continuously updated, are maintained in most counties in California. Lending institutions typically require a specific type of title policy from a particular source before they will lend money on the security of real property, and buyers customarily require standard-form title insurance policies as a part of any transaction involving a transfer of title to real property. The superior facilities of title companies for collecting records relating to real estate titles, and the special experience, knowledge, and expertise of most title insurance officers and personnel, have persuaded most

landowners, lenders, real estate brokers, and public officers to rely on title insurance companies as arbiters of the condition of real estate titles. It has been said that the "real" real property law of California tends to be made more by title companies than by courts [Comment, "Title Insurance in California," *39 Calif. L. Rev. 235, 244 (1951)*].

The refusal of a title insurer to insure the title to a parcel, however, does not establish its "unmarketability" [*Wilson v. Pacific Coast Title Ins. Co. (1951) 106 Cal. App. 2d 599, 602, 235 P.2d 431]* . Title insurers, like other insurers, are free to accept or refuse a given risk [*see Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 665, 172 Cal. Rptr. 248]* . The underwriting decisions of title insurers are business decisions that reflect their operating policies rather than the condition of any title or titles.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.12

§ 26A.12 Title Search and Issuance of Title Insurance

[1] Title Search

The words "title search" traditionally have been used to describe the process by which public records of title documents are searched, assembled, analyzed, and reported [*see Lattin v. Gillette (1892) 95 Cal. 317, 318, 320, 30 P. 545]* . In the modern title insurance industry, however, much of the work of a title search is completed before any request for title information is received. This is done through the regular and continuing maintenance of the title company's "plant," in which records of real property are preserved, posted, and indexed on a continuous basis [for a discussion of the facilities and functions of title insurance plants, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance* (Matthew Bender)].

[2] Assessment of Condition of Title

After a title search is completed, the title company's title examiner analyzes all documents affecting the condition of the title, noting any items that may constitute defects in the title. All of these items are then assembled and presented to the company's underwriter, who decides whether the company is willing to insure the title and, if it is, what items will be listed as "exceptions" to the coverage.

[3] Issuance of Policy

A title insurer is entitled, in the exercise of its own judgment, to fix the terms on which it will issue a policy [*Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 543, 115 Cal. Rptr. 257]* . Since a "perfect" title is virtually unknown, all large title insurance companies encounter risks affecting real property titles on a daily basis. Some title risks are remote or slight, and insurers may be willing to assume them rather than determine beyond the possibility of any doubt that the risks do not exist or that they could never affect the subject title.

If a title insurance company is willing to issue an insurance policy, it will typically prepare a "preliminary report," in which all of the defects it has found are listed as exceptions [*see § 26A.200*]. On receipt of an application for insurance coverage, the company typically will issue a policy that lists the same "exceptions," unless those objections have first been removed or "cleared" [*see* discussion in *§ 26A.200[1][g]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstractsReal Property LawTitle QualityMarketable TitleDefects & Encroachments



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11-26A California Legal Forms--Transaction Guide § 26A.13

§ 26A.13 Preliminary Reports

[1] Nature

A preliminary report is a document that is prepared and issued by a title company for the purpose of showing the condition of a particular title as a preliminary to the issuance of a title insurance policy. It is a statement of the terms and conditions under which the insurer would, on the date of the report, be willing to issue a policy of title insurance [*Ins. Code § 12340.11*]. A preliminary report is not an abstract of title. That is, it does not purport to list all recorded conveyances, instruments, or documents that impart constructive notice with respect to the chain of title [*Ins. Code § 12340.11*; *see Ins. Code § 12340.10* (abstracts of title)], nor does it constitute a representation as to the condition of a particular title [Ins. Code § 12340.11]. Preliminary title reports issued after January 1, 1995, are required to contain a statutory notice to that effect [*see Ins. Code § 12414.30(a)*; *see also § 26A.200[1][h]*].

[2] Use and Purpose

Although a preliminary report cannot be relied on as a complete and accurate statement of all liens, encumbrances, or other defects that may affect the marketability of a title, it serves an important purpose in the title insurance process. A preliminary report is typically issued during the course of an escrow and before title to a parcel is transferred or encumbered. Since it lists all of the items that would be excepted from coverage if a title policy were issued on the date of the report, it gives a prospective purchaser or lender an opportunity to remove, or "cure," unacceptable exceptions before the policy itself is issued. For this reason, preliminary reports are vital preliminaries to the closing of escrow and the issuance of title insurance policies.

Insurance Code Section 12414.30(b) states that upon request, a title insurance company may provide coverage against loss or damage under the terms, conditions, and stipulations of the title insurance policy for any monetary liens set forth in the preliminary report. For further discussion of preliminary reports, see *§ 26A.200 [1]*. For a general discussion of the legal rules relating to preliminary reports and abstracts of title, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstractsReal Property LawTitle QualityMarketable TitleDefects & Encroachments



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11-26A California Legal Forms--Transaction Guide § 26A.14

§ 26A.14 Commitments

A commitment is an agreement by a title insurer to issue a title insurance policy to a proposed insured upon the acquisition by the proposed insured of the land referred to in the commitment. Like a preliminary report [*see § 26A.13*] and a binder [*see § 26A.15*], a commitment constitutes an offer to issue a title policy on specified terms and conditions. A commitment is not an abstract of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of abstracts of title applicable to the issuance of a commitment [*Ins. Code § 12340.11*; *see Ins. Code § 12340.10* (abstracts of title); *see also* discussion in *§ 26A.13*]. A commitment differs from a preliminary report in that it obligates the issuer for the period specified in the commitment to issue a title insurance policy, upon payment of the premiums and charges, and subject to all of the conditions and stipulations contained in it [CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.33[1] (Matthew Bender)]. For further discussion of commitments, see *§ 26A.210[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationOffer & AcceptanceInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstracts



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§ 26A.15 Binders

A binder is a contract that provides present insurance coverage, although only for a short time [*Spott Electrical Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710]* . To qualify as a binder, a contract must obligate the insurer to provide present, and not merely future, coverage [*Parlier Fruit Co. v. Fireman's etc. Ins. Co. (1957) 151 Cal. App. 2d 6, 20, 311 P.2d 62]* . A title insurance binder is typically purchased by the owner of a parcel of real property to provide temporary coverage until the property is sold and to assure prospective purchasers that a full policy of title insurance will be issued upon transfer of title. Title insurance binders ordinarily are not issued for more than one year [CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.34[1] (Matthew Bender)].

Like preliminary reports and commitments, binders are defined by statute as offers to issue title policies and are removed from the statutory definition of abstracts of title [*Ins. Code § 12340.11*; *see Ins. Code § 12340.10* (abstracts of title); *see also* discussion in *§ 26A.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsBindersInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstracts



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§ 26A.16 Guarantees

[1] Nature

A title guarantee is a special report that is prepared and issued by a title insurer for the purpose of supplying and guaranteeing the accuracy of specific title information [CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.35[1] (Matthew Bender)]. Modern guarantees must be distinguished from the historic title guarantees commonly used before development of the modern title insurance policy [*see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.02[6] (Matthew Bender)]. While the historic guarantees were used to report generally on the marketability of titles, modern guarantees serve more specialized functions and are typically ordered by persons or entities with specific needs.

[2] Types of Guarantees

Title guarantees are available to do, among other things, the following:

- Report and guarantee information relevant to anticipated legal action that will or may affect title to or possession of real property [*see § 26A.230[1]*.

- List all deeds and other instruments recorded in the chain of title to a particular parcel [*see § 26A.231[1]*.

- Grant assurances as to the condition of the title to a particular parcel of property as revealed in the title company's own records or "lot books" [*see § 26A.232[1]*.

- Locate property owned by a named party or parties in a particular county [*see § 26A.233[1]*.

- Assure public officials that the persons who sign the certificate of consent filed with a subdivision map are all of the persons required to do so under the Subdivision Map Act [*Gov. Code §§ 66410-66499.37*; *see § 26A.234[1]*.

- Provide information relating to property that is subject to foreclosure, either through exercise of a power of sale contained in a deed of trust or by judicial proceedings [*see § 26A.235[1]*].

For a general review of other types and purposes of title guarantees, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Volume 4, Chapter 92, *Title Insurance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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§ 26A.17 Title Insurance Policies

[1] Definition

A "title policy" is defined by statute as any written instrument or contract by means of which title insurance liability is assumed [*Ins. Code § 12340.2*; for title insurance liability, *see* discussion in *§ 26A.10 [1]*]. Since the coverage of all title insurance policies is significantly limited by conditions and exclusions set forth in the policies, it is important to note and understand the conditions and exclusions of the different standard-form policies. For discussions of those conditions and exclusions and how they affect policy coverage, see the comments to the complete policy forms in this chapter [§ 26A.250 et seq.].

[2] Standardization

[a] In General

Title insurance policies are highly standardized. Policy standardization has been promoted in large part by state laws requiring insurers to file all regularly issued forms of title policies with the Insurance Commissioner [*Ins. Code § 12401.1*] and to establish basic classifications of coverage and services to be used as the basis for determining rates [*see Ins. Code § 12401.2*]. Standardization has also been facilitated by the existence of advisory organizations [*see Ins. Code § 12340.8*] that operate on a statewide and national basis to perform functions such as drafting and recommending standard title insurance forms.

[b] American Land Title Association (ALTA)

The American Land Title Association (ALTA) is the largest and most influential title insurance advisory organization in the United States. With a membership comprising more than 2,000 title insurance and abstract companies, ALTA functions primarily to formulate and suggest forms for title insurance policies demanded by large institutional lenders, such as banks and life insurance companies, whose multi-state financial activities require mortgages, deeds of trust, and other security devices in many different jurisdictions. Most title insurance policies in the United States are based in whole or in part on forms developed by ALTA [Rooney, "Title Insurance: A Primer for Attorneys," *14 Real Prop., Prob., & Tr. J. 608 (1979)*].

[c] California Land Title Association (CLTA)

The California Land Title Association (CLTA) is the California counterpart of ALTA. With headquarters in Sacramento, CLTA has more than 100 members (including more than 15 title insurers and more than 90 underwritten title companies) in all counties of the state. In addition to recommending forms and practices for its members, the association monitors and advocates legislation and regulations affecting the title industry, monitors judicial decisions affecting title to real property in California, and files briefs in cases of statewide significance. CLTA publishes a valuable loose-leaf compendium of all CLTA-recommended title insurance reports, guarantees, policies, and indorsements [California Land Title Association, *Policy & Indorsement Forms Book* (Revised 1971)]. This compendium corresponds to the master file of ALTA and CLTA standard forms on file with the California Insurance Commissioner, and is updated on a regular basis.

[d] Available Forms

The *CLTA Policy & Indorsement Forms Book* [California Land Title Association, *Policy & Indorsement Forms Book* (Revised 1971)] includes 11 different title insurance policy forms. These forms are designed for use under different circumstances and by different insureds. Three of the most frequently used and useful of these policy forms are set forth verbatim in this chapter [*see §§ 26A.250-26A.252*].

The CLTA Standard Coverage Policy (1990) [*see § 26A.250*] is probably the most commonly used form of title insurance policy in California. It is a "joint protection" policy designed to insure the interest of either an owner or a lender against title risks. The ALTA Loan Policy (10-17-92) [*see § 26A.251*], which insures mortgages and deeds of trust, is commonly purchased by institutional lenders on real property. The ALTA Owner's Policy (10-17-92) [*see § 26A.252*], which is designed for use by real property owners, is commonly purchased in connection with the acquisition of large commercial properties.

In addition to these commonly used forms, the CLTA forms book includes the following specialized title policy forms:

- CLTA Oil Leasehold Policy
- ALTA U.S. Policy
- ALTA Leasehold Loan Policy
- ALTA Leasehold Owner's Policy
- ALTA Construction Loan Policy
- ALTA Residential Title Insurance Policy
- ALTA Master Residential Loan Policy
- ALTA Short Form Residential Loan Policy

Exemplars of these additional forms may be obtained by referring to the *CLTA Policy & Indorsement Forms Book* or by requesting copies from local title companies.

[3] Application of General Insurance Law Principles; Characterization as Adhesion Contracts

A title insurance policy is an insurance contract, and as such is governed by general principles of insurance law [

Lagomarsino v. San Jose etc. Title Ins. Co. (1960) 178 Cal. App. 2d 455, 464, 3 Cal. Rptr. 80] .

Because the insurer typically prepares the policy and submits it to the insured, who must either accept or reject it in the form submitted, insurance policies have been termed "adhesion" contracts [*Neal v. State Farm Ins. Cos. (1961) 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781]* . An "adhesion" contract is a standardized contract offered to consumers on an essentially "take it or leave it" basis, without offering a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing in the offered contract [*Steven v. Fidelity & Casualty Co. (1962) 58 Cal. 2d 862, 882, 27 Cal. Rptr. 172, 377 P.2d 284* ; *Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775]* .

Pointing out that title insurance policies are framed by insurers and that policyholders have little or no opportunity to vary their terms, the courts have applied the same rules to title insurance policies that are traditionally applied to other insurance policies [*see Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 122, 253 P.2d 116* ; *Lagomarsino v. San Jose etc. Title Ins. Co. (1960) 178 Cal. App. 2d 455, 464, 3 Cal. Rptr. 80* ; *J.H. Trisdale, Inc. v. Shasta etc. Title Co. (1956) 146 Cal. App. 2d 831, 835, 304 P.2d 832]* . At least one court, however, has drawn a distinction between a typical adhesion contract and a title insurance policy that clearly does not insure against a particular risk. If, in the view of this court, a risk or defect claimed to have caused loss or damage to an insured could have been insured against by purchase of a commonly available policy indorsement [*see § 26A.18*], the policyholder's failure to purchase the indorsement will take the policy outside the realm of adhesion contracts and relieve the insurer of the burdens otherwise imposed on the issuers of adhesion contracts [*Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 170, 95 Cal. Rptr. 682* ; *see* discussion in [4], *below*].

[4] Construction and Interpretation

An insurance policy must be construed in accordance with the common understanding of the words used [*Civ. Code § 1644*; *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253* ; *see also Civ. Code § 1645* (technical words interpreted in technical sense)]. If possible, it must be construed so as to fairly achieve its object, which is to indemnify the insured for covered losses [*Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal. 3d 112, 115, 95 Cal. Rptr. 513, 485 P.2d 1129]* . Insurers may not avoid liability by relying on technicalities in the policy or by urging a literal interpretation of an isolated clause that is not supported by the plain meaning of the contract as a whole [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 122, 253 P.2d 116]* .

If provisions of a policy may be read in different ways, all doubts about its meaning must be resolved against the insurer [*Paramount Properties Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 569, 83 Cal. Rptr. 394, 463 P.2d 746]* . Provisions of the policy as a whole and all exceptions to liability must be construed, if possible, so as to give the insured the protection that he or she had a reasonable right to expect [*Mutual B.-L. Assn. v. Security T.I. & G. Co. (1936) 14 Cal. App. 2d 225, 229, 57 P.2d 1392]* . When a loss is claimed, only the clearest policy provisions may be relied on to deny the claim. When the very contingency that was insured against occurs, only clear and compelling reasons will justify denying the insured full reimbursement for all losses sustained by reason of the occurrence [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 122, 253 P.2d 116]* .

For a more detailed discussion of the general rules applicable to the construction of insurance policies and the resolution of ambiguities, see CALIFORNIA INSURANCE LAW PRACTICE, Ch. 8, *The Insurance Contract*, § 8.02 (Matthew Bender).

[5] Insurer's Right To Condition or Limit Coverage

While ambiguities in title insurance policies will be strictly construed against the insurers [*see* [3], *above*], there must be some ambiguity before the rule of strict construction will be applied [*see Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 270, 209 Cal. Rptr. 266* ; *Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d*

162, 170, 95 Cal. Rptr. 682] . An insurer has the right to limit the coverage of a policy issued by it and, when it has done so in plain language, the limitation must be respected [*Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 270, 209 Cal. Rptr. 266* ; *Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 170, 95 Cal. Rptr. 682]* . Just as the insured is powerless to dictate the terms of the policy [*see* discussion under [3], *above*], the insured is in no position to complain if the policy does not contain something that the insurer, in the exercise of its business judgment, saw fit to omit [*Sala v. Security Title Ins. & Guar. Co. (1938) 27 Cal. App. 2d 693, 702, 81 P.2d 578]* . If the language of the policy is clear, that language is binding on the courts, and no rule of interpretation will have the effect of altering or amending it [*see Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 270, 209 Cal. Rptr. 266* ; *Wetzler v. State Farm Mut. Auto Ins. Co. (1966) 246 Cal. App. 2d 472, 476, 54 Cal. Rptr. 756]* .

[6] Contractual Basis for Insurer's Liability

Because a title insurance policy is a contract, the insurer's liability to the insured, if any, sounds in contract and not in tort [*see* POWELL ON REAL PROPERTY, vol. 7, P 1048 (Matthew Bender)]. Thus, a title insurer, *as insurer*, may not be held liable for omitting some matter affecting a title from a title report or policy, unless the omission also constitutes a breach of contract. Although an insurer, *as abstractor*, may be liable on the theory of negligence for preparing and issuing an inaccurate or incomplete abstract of title [*see Ins. Code § 12340.10* ("abstract of title" defined); *see also § 26A.200 [1]*], the liability of an insurer, *as insurer*, is framed and limited by the policies it issues [*see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.110[3] (Matthew Bender)]. Since title insurers in California rarely issue abstracts of title [*see Ins. Code § 12340.10*; *see also* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*], the circumstances under which a title insurer may be held liable for negligence are rare.

Accordingly, an attorney advising a client regarding the client's rights (or liabilities) under a title insurance policy or report must analyze the terms and conditions of the policy or report and determine if a breach of contract has occurred. Such an analysis must be made, in the first instance, according to traditional rules of contract law. The failure of the insurer to pay any of the benefits provided for in the policy, for example, or to provide a defense to the insured on the terms and at the times required by the policy, may constitute a breach. Similarly, the failure of the insured to comply with the terms of the policy as to notice of claim or proof of loss, or to cooperate with the insurer, may constitute a breach by the insured. The insurer's failure to accurately and completely report all matters relating to a particular title (even if that failure may be characterized as negligence) will *not*, in and of itself, establish a breach of the policy, unless the failure (i.e., the alleged negligence) also violates some term or condition of the policy. For a general discussion of title insurance liability, *see* CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 548, *Title Insurance* (Matthew Bender).

[7] Loss or Damage

The insuring clauses of the standard title insurance policies obligate the insurer to indemnify the insured for "loss or damage." In the ALTA Loan Policy(10-17-92) [*see § 26A.251*, Conditions and Stipulations, P 7] and the ALTA Owner's Policy (10-17-92) [*see § 26A.252*, Conditions and Stipulations, P 7], the obligation of the insurer to indemnify the insured is limited to "actual loss or damage" not exceeding the amount of insurance stated in the policy. The purpose of these provisions is to limit the insurer's obligation to indemnify the insured to actual losses, and to relieve the insurer of any obligation to indemnify the insured for speculative losses or "windfalls." The courts have held that in the absence of actual loss or damage the insured is not entitled to recover on the policy [*Cale v. Transamerica Title Insurance (1990) 225 Cal. App. 3d 422, 425-426, 275 Cal. Rptr. 107* ; *Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 122 123, 331 P.2d 742]* . Loss or damage must be both alleged and proved at the trial. An allegation and proof that the market value of the insured property was diminished as a consequence of the defects insured against will satisfy this requirement [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 124 , 253 P.2d 116]* , but a complaint that does not allege diminution in market value is subject to general demurrer [*Hawkins v.*

Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 122, 331 P.2d 742] .

For a general discussion of loss and damage under title insurance policies, and rules and forms for actions against title insurers, *see* CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 548, *Title Insurance* (Matthew Bender).

[8] Coinsurance

Some title insurance policies contain coinsurance clauses. For example, the ALTA Owner's Policy (10-17-92) [*see § 26A.252*, Conditions and Stipulations, P 7(b)] requires an allocation of loss between the insurer and the insured when the amount of insurance purchased is less than a specified amount of either the value of the insured land or the consideration paid for the land, whichever is less. This clause makes the insurer and the insured coinsurers of any loss that falls within its provisions.

"Coinsurance" means a relative division of the risk between the insurer and the insured [*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 385, 106 Cal. Rptr. 307]* . It requires that the risk of loss be divided according to the relative amount of the insurance and the actual value of the insured property [*Hilton v. Federal Ins. Co. (1931) 118 Cal. App. 495, 502, 5 P.2d 648* ; Home Ins. Co., New York v. Eisenson (5th Cir. [Fla.] 1950) *181 F.2d 416, 418]* . A coinsurance clause requires the insured to maintain full insurance (or a specified percentage of full insurance) or, upon failure to do so, to bear a proportionate part of the loss [Home Ins. Co., New York v. Eisenson (5th Cir. [Fla.] 1950) *181 F.2d 416, 418]* . A coinsurance clause ordinarily has the effect of inducing the insured to carry enough insurance to cover the value of the insured property [*Home Ins. Co., New York v. Eisenson (5th Cir. [Fla.] 1950) 181 F.2d 416, 418-419*]. Though coinsurance clauses have been prohibited by statute in some jurisdictions, they are enforceable in California [*see Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 385 386, 106 Cal. Rptr. 307* ; *Hilton v. Federal Ins. Co. (1931) 118 Cal. App. 495, 502, 5 P.2d 648]* .

Coinsurance clauses only take effect when the actual loss is partial and less than the amount of the insurance [*see* discussion under "Coinsurance" in the comment to § 26A.252].

[9] Liability for Bad Faith

Every insurance contract contains an implied covenant (commonly called the covenant of good faith and fair dealing) that neither party will do anything that impairs the right of the other to receive the benefits of the agreement [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 574, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *see* INSURANCE BAD FAI TH LITIGATION, § 2.01 (Matthew Bender)]. The covenant is applicable to all insurance contracts, including policies of title insurance [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470]* .

Liability under the implied covenant of good faith and fair dealing extends to varied fact situations. For example, an insurer who unreasonably and in bad faith fails or refuses to settle the insured's claim may be held liable in an action for breach of the covenant [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032]* . Similarly, the insurer may be held liable for improper investigation of claims [*see* INSURANCE BAD FAITH LITIGATION, §§ 5.10-5.12 (Matthew Bender)], for unreasonably refusing to defend the insured under terms of the policy [*see* INSURANCE BAD FAITH LITIGATION, §§ 3.20-3.26 (Matthew Bender)], for unreasonably failing or refusing to settle third party claims against the insured [*see* INSURANCE BAD FAITH LITIGATION, §§ 3.02-3.07 (Matthew Bender)], or for unreasonably withholding benefits that should be paid to the insured [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796]* .

For a general discussion of the implied covenant of good faith and fair dealing as it applies to title insurance policies, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender); see also CALIFORNIA INSURANCE LAW PRACTICE, Ch. 13, *Claims Handling and the Duty of Good Faith* (Matthew

Bender).

[10] Insured Parties

Title insurance policies are typically contracts entered into by two parties, referred to as the insurer and the insured. No rights inure to third parties under a title insurance contract unless the third parties are also named as insureds in the policy [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 33-34, 147 Cal. Rptr. 655* ; *Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 127 128, 331 P.2d 742]* . Thus, a seller of real property may not claim benefits under a policy issued only to a lender [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 33 34, 147 Cal. Rptr. 655]* , nor may a subsequent purchaser of real property claim benefits under a policy issued to a previous owner of the same property [*Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 127 128, 331 P.2d 742]* .

Although actions for breach of the covenant of good faith and fair dealing [*see* [9], *above*] are said to sound in tort and to arise independently of the contractual rights and obligations of the parties [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796]* , the covenant is an incident of the contract, and the right to recover under it is available only to parties to the contract [*see* INSURANCE BAD FAITH LITIGATION, § 2.02(Matthew Bender); see also CALIFORNIA INSURANCE LAW PRACTICE, Ch. 13, *Claims Handling and the Duty of Good Faith* (Matthew Bender)].

[11] Arbitration

Some title insurance policies contain arbitration clauses. Arbitration is a procedure whereby disputes are submitted for determination to private, unofficial persons selected by agreement of the parties or, in the absence of agreement, as provided by law [*Stockwell v. Equitable F. & M. Ins. Co. (1933) 134 Cal. App. 534, 540, 25 P.2d 873]* . In California, written agreements to submit existing controversies (or controversies arising after the agreements are made) to arbitration are valid, enforceable, and, unless there are grounds that would justify revocation of a contract, irrevocable [*Code Civ. Proc. § 1281*].

Both the ALTA Loan Policy (10-17-92) and the ALTA Owner's Policy (10-17-92) provide for arbitration of certain controversies or claims arising out of or relating to the policies. Under the policies, arbitration is compulsory when the amount of insurance is $1,000,000 or less and either the insured or the insurer demands arbitration. When the amount of insurance is over $1,000,000, arbitration is required only when both the insurer and the insured agree to arbitrate the claim [*see § 26A.251*, Conditions and Stipulations, P 13; § 26A.252, Conditions and Stipulations, P 14]. Arbitration must be conducted according to the Title Insurance Arbitration Rules of the American Arbitration Association. The law of the situs of the land applies in the proceedings, and judgment on the arbitrator's award may be entered in any court having jurisdiction [*see § 26A.251*, Conditions and Stipulations, P 13; *see also § 26A.252*, Conditions and Stipulations, P 14].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsAdhesion ContractsInsurance LawClaims & ContractsPolicy InterpretationStandardized AgreementsInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART II. LEGAL BACKGROUND

11-26A California Legal Forms--Transaction Guide § 26A.18

§ 26A.18 Indorsements

[1] Definition

An indorsement to an insurance policy adds to or amends the coverage of the policy by limiting, altering, or expanding the policyholder's rights or the insurer's liability [*McFarland v. New Zealand Ins. Co. (1959) 176 Cal. App. 2d 422, 424, 1 Cal. Rptr. 482* ; *Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 431 432, 296 P.2d 801]* . An indorsement to an insurance policy is sometimes referred to as a "rider."

[2] Effect

Properly used, an indorsement will eliminate the need to redraft or rewrite an entire contract to reflect a change in or addition to its provisions. An effective insurance indorsement becomes a part of the policy and cannot be separated from it [*Jew Fun Him v. Occidental Life Ins. Co. (1948) 88 Cal. App. 2d 246, 249, 198 P.2d 711]* . If an indorsement or rider has been attached to an insurance policy, the original policy and the indorsement must be read together and construed as a whole [*Narver v. California State Life. Ins. Co. (1930) 211 Cal. 176, 181, 294 P. 393]* .

[3] Use

Indorsements are commonly attached to standard policies to increase or otherwise modify their coverage. Additional premiums are usually charged for indorsements, although some are made available without charge. Most indorsements, like most policies, are standardized, but some insurers may draft new indorsement forms or modify older forms to meet the specific requirements of prospective policyholders. Indorsements do not usually insure against risks or defects occurring after the original policy date, although some may be used to "down-date" a policy to the date of indorsement.

[4] Available Endorsements to Standard Title Insurance Policies

The California Land Title Association *Policy & Indorsement Forms Book* (Revised 1971) contains more than 100 title insurance indorsements recommended for use by title insurers in California. This chapter reprints and explains seven of the most widely used indorsements. These are:

- CLTA Covenants, Conditions, and Restrictions Indorsement [*see § 26A.260*]
- CLTA Mechanics' Liens Indorsement [*see § 26A.261*]
- CLTA Foundation Indorsement [*see § 26A.262*]
- CLTA Easement Indorsement [*see § 26A.263*]
- CLTA Assignment of Trust Deed Indorsement [*see § 26A.264*]
- CLTA Single Family Homeowner's Protection Indorsement [*see § 26A.265*]
- CLTA Condominium Owner's Protection Indorsement [*see § 26A.266*]

For a detailed discussion of legal rules relating to the use of title insurance indorsements, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26A California Legal Forms--Transaction Guide §§ 26A.19-26A.99

[Reserved]

§§ 26A.19[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-26A California Legal Forms--Transaction Guide § 26A.100

§ 26A.100 Facts

1. Name, address, and telephone number of client;

2. Description and character of subject property, including:

a. Address and location;

b. Approximate size;

c. Approximate value;

d. Whether improved or unimproved;

e. If subject to encumbrance(s):
(1) Number of encumbrances;

(2) Name and address of encumbrancer(s) (e.g., mortgage lender, judgment creditor, seller under installment sale contract);

(3) Approximate balance due on encumbrance(s);

(4) Terms of repayment, e.g.:
(a) Maturity date;

(b) Amount of periodic payments, if any;

(c) When periodic payments, if any, are due (e.g., monthly, quarterly, annually);

(d) Interest rate;

(e) Whether interest rate is fixed or variable;

(f) Terms of balloon payment, if any.

f. Name(s) and address(es) of title holder(s) (if not client).

3. Legal status of client, e.g.:

a. Owner;

b. Seller;

c. Buyer;

d. Lender;

e. Borrower;

f. Lessor;

g. Lessee;

h. Heir, devisee, or legatee;

i. Litigant, e.g.:

(1) Plaintiff;

(2) Defendant;

(3) Judgment creditor;

(4) Judgment debtor.

j. Broker;

k. Other.

4. If client has already ordered or purchased title report or policy:

a. Type of report or policy.

NOTE:
Title insurance reports and policies are broadly classified as "preliminary reports," "commitments," "binders," "guarantees," and "policies." In addition, "indorsements" may be attached to "policies." For discussion of these classifications, see the Legal

Background.

b. Title company:

(1) Full name;

(2) Address

(3) Whether company is "underwritten title company" or "title insurer."

NOTE:
Not all "title companies" are "title insurers." An "underwritten title company" is a corporation that engages in the business of preparing title searches, title examinations, title reports, certificates of title, or abstracts of title on the basis of which a "title insurer" writes title policies [*Ins. Code § 12340.5*; ***see*** *Ins. Code § 12389(a)* (underwritten title company authorized to prepare title searches, reports, examinations, certificates, and abstracts)]. A "title insurer" is any company issuing title policies as insurer, guarantor, or indemnitor [*Ins. Code § 12340.4*]. Although "underwritten title companies" cannot perform the functions of title insurers, title insurers may perform the functions of both types of companies. For a general discussion of the organization of the title insurance industry, with a delineation of the powers and duties of underwritten title companies and title insurers, ***see*** *§ 26A.10 [3]*; ***see also*** CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, ***Title Insurance*** (Matthew Bender).

c. Amount of insurance.

NOTE:
The "amount of insurance" may be shown on the face of the policy or report (or in one of the schedules) opposite an identifying designation such as "Amount" or "Liability"; or it may be stated in the body of the policy or report as the amount by which the company's liability is limited. The amount is determined by the type of policy issued and the value of the property insured. Thus, the amount of an owner's policy will generally be determined by the market value of the property, which in turn is determined by the selling price. Similarly, the amount of a lender's policy will be determined by the amount of the loan. The premiums or fees charged by the title company are based on this amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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A. Client Interview--Facts and Documents

11-26A California Legal Forms--Transaction Guide § 26A.101

§ 26A.101 Documents

1. Title documents to subject property, e.g.:

    a. Deed;

    b. Deed of trust;

    c. Installment sale contract;

    d. Lease.

2. Title reports and/or policies relating to subject property, if any, e.g.:

    a. Preliminary report [*see § 26A.13*; *see also § 26A.200[1]*];

    b. Commitment [*see § 26A.14*; *see also § 26A.210[1]*];

    c. Binder [*see § 26A.15*; *see also § 26A.220[1]*];

    d. Guarantee [*see § 26A.16*; *see also §§ 26A.230[1]* 26A.235[1]];

    e. Title insurance policy [*see § 26A.17*; *see also §§ 26A.250[1]* 26A.252[1]];

    f. Indorsement [*see § 26A.18*; *see also §§ 26A.260[1]* 26A.266[1]].

3. If client is heir, devisee or legatee, documents relating to probate administration, including:

a. Will;

b. Petition for probate of will and/or for letters testamentary, of administration, or other;

c. Decree of distribution, if any.

4. If client is a litigant, documents relating to litigation, including:

a. Pleadings;

b. Judgment, if any;

c. Post-judgment documents (e.g., writ of execution, abstract of judgment, assignment of judgment, claim of exemption, sheriff's deed, etc.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityGeneral Overview



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[Reserved]

§§ 26A.102[Reserved]



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B. Preliminary Determinations

11-26A California Legal Forms--Transaction Guide § 26A.110

§ 26A.110 Necessity or Advisability of Title Insurance

1. Is client purchasing property?

a. Title insurance should be purchased whenever real property is purchased.

NOTE:
It is never advisable to rely on title insurance policies issued to other parties interested in a parcel or tract (e.g., former owners or lenders). A purchaser of property may not recover on a policy issued to a former owner or lender. Further, the condition of the title may have changed materially since the other policy was issued. Finally, title policies suitable for sellers are not usually suitable for owners.

b. Title insurance should be acquired contemporaneously with title.

NOTE:
Most title insurance is based on the condition of a title as revealed by the public records and is related to priorities appearing of record as of a particular date and hour. The title insurance protection may be lost if the insurance is not acquired at the same time as title is acquired.

2. Is client lending on real property?

a. Lender on real property may not rely on title insurance issued to an owner.

NOTE:
No person may rely on or claim the benefits of title insurance unless that person is an "insured" under the policy [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 33 34, 147 Cal. Rptr. 655* ; *Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 127*

128, 331 P.2d 742] . Thus, a seller of real property may not claim benefits under a policy issued only to a lender [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 33 34, 147 Cal. Rptr. 655]* , nor may a subsequent purchaser of real property claim benefits under a policy issued to a previous owner of the same property [*Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 127 128, 331 P.2d 742]* .

b. Lender may require different title insurance policy form than buyer or owner.

NOTE:

The two principal ALTA title insurance policies, the ALTA Loan Policy (10-17-92) [***see*** *§ 26A.251*] and the ALTA Owner's Policy (10-17-92) [***see*** *§ 26A.252*] are designed for use by lenders and owners, respectively. An ALTA Loan Policy will provide no protection to an owner or buyer; nor will an ALTA Owner's Policy provide protection to a lender.

c. If loan is made after property is purchased, title policy updated to date of loan is necessary.

NOTE:

It is never wise to rely on an old title report or policy. Significant changes in the condition of a title can take place at any time. A client who contemplates making a loan secured by real estate should ascertain the status of the title at the time of the loan and purchase adequate title insurance protection as of that date.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawTitle QualityGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26A California Legal Forms--Transaction Guide § 26A.111

§ 26A.111 Type of Title Insurance Policy

NOTE:

The forms in this chapter include three complete title insurance policy forms reprinted verbatim from the CLTA Policy & Indorsement Forms Book (Revised 1971) with permission of CLTA. These are the CLTA Standard Coverage Policy (1990) [***see*** *§ 26A.250*], the ALTA Loan Policy (10-17-92) [***see*** *§ 26A.251*], and the ALTA Owner's Policy (10-17-92) [***see*** *§ 26A.252*]. These forms are the most commonly used title insurance forms in California. The CLTA book also includes the CLTA Oil Leasehold Policy, the ALTA U.S. Policy, the ALTA Leasehold Loan Policy, the ALTA Leasehold Owner's Policy, the ALTA Construction Loan Policy, the ALTA Residential Title Insurance Policy, the ALTA Master Residential Loan Policy, and the ALTA Short Form Residential Loan Policy. The ALTA Residential Policy is the so-called "plain English" policy. Copies of these additional forms may be obtained from the CLTA Policy & Indorsement Forms Book or from local title companies.

1. If client is purchaser of residential or small commercial property, consider use of CLTA Standard Coverage Policy (1990).

NOTE:

The CLTA Standard Coverage Policy (1990) [***see*** *§ 26A.250*] is the most commonly used title insurance policy in California. It is a "joint protection policy" that may be used to insure the title interests of, among others, lessees, sublessees, secured creditors, and owners of easements or rights of way. For a general discussion of the use of the CLTA Standard Coverage Policy (1990), see *§ 26A.250*.

2. If client is purchaser of large commercial property, consider use of ALTA Owner's Policy (10-17-92).

NOTE:

The ALTA Owner's Policy (10-17-92) [***see*** *§ 26A.252*] is an "extended coverage" policy

that provides protection against many off-record as well as on-record title risks. Because it offers protection against some risks that could only be ascertained by inspecting or surveying the property, or by making an inquiry of the persons in possession, it provides valuable coverage for large commercial property owners and for owners who are out of the state or so far distant from the property that they cannot conveniently inspect it. There are, however, important matters that are excluded from the CLTA Standard Coverage Policy but not from the ALTA Loan Policy. It provides protection against matters excluded from coverage under the CLTA Standard Coverage Policy (1990) [***see*** *§ 26A.250*], such as taxes or assessments not shown as existing liens by the public records; facts, rights, interests, or claims not shown by the public records but which could be ascertained by inspecting the land or making an inquiry of the persons in possession; easements, liens, or encumbrances not shown by the public records; discrepancies, conflicts in boundary lines, shortages in area, encroachments, or any other facts that a correct survey would disclose and that are not shown by the public records; and mining claims and water rights [***see*** *§ 26A.250*, Schedule B, Part I]. For a general discussion of the use of the ALTA Owner's Policy (10-17-92), see the comment to § 26A.252.

3. If client is non-institutional (but not out-of-state) lender on real property, consider use of CLTA Standard Coverage Policy (1973).

NOTE:

The CLTA Standard Coverage Policy (1990) [***see*** *§ 26A.250*] is a "joint protection" policy designed to provide title insurance protection for both owners and non-institutional lenders on real property. While it provides protection for lenders, it does not provide the extensive coverage against off-record risks provided by the ALTA Loan Policy (10-17-92), which is generally preferred by out-of-state lenders. For a general discussion of the use of the CLTA Standard Coverage Policy (1990), see *§ 26A.250[1]*.

4. If client is institutional (or out-of-state) lender on real property, consider use of ALTA Loan Policy (10-17-92).

NOTE:

The ALTA Loan Policy (10-17-92) [***see*** *§ 26A.251*], like the ALTA Owner's Policy (10-17-92) [***see*** *§ 26A.252*], affords protection for many off-record risks excluded from coverage under the CLTA Standard Coverage Policy (1990) [***see*** *§ 26A.250*]. Since the insurer under the ALTA Loan Policy (10-17-92) assumes the responsibility of inspecting (and in some cases surveying) the insured property, the policy provides valuable coverage for lenders who make loans on the security of real estate located outside of their home states. Many institutional lenders insist that borrowers obtain ALTA Loan Policies naming the borrowers as insureds before they will agree to make real estate loans. For a general discussion of the use of the policy, see *§ 26A.251[1]*.

5. Should any indorsements be ordered to augment basic policy coverage?

NOTE:

More than 100 indorsement forms are included in the CLTA Policy & Indorsement Forms Book (Revised 1971). For discussion of the circumstances under which some of the more important and commonly used indorsements should be ordered, see *§§ 26A.121--26A.123*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's InterestsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawTitle QualityGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.112

§ 26A.112 Amount of Insurance

1. How much protection should be purchased?

a. Title insurance protection is limited by amount of insurance stated in policy.

NOTE:
Unless there are grounds for recovery "off the policy," such as negligence or bad faith [***see*** CALIFORNIA REAL ESTATE LAW PRACTICE, §§ 92.130-92.131 (Matthew Bender)], the obligation of the insurer to indemnify the insured is always limited by the amount of insurance stated in the policy. Regardless of the amount of the loss or damage sustained by the insured, recovery for loss or damage under the policy cannot exceed the stated amount of insurance [***see*** *§§ 26A.250 [2],* Insuring Clause, ***also*** Schedule A; 26A.251 [2], Insuring Clause, ***also*** Schedule A; 26A.252 [2], Insuring Clause, Schedule A]. Recovery for attorneys' fees or other costs of litigation may, however, be in addition to (and sometimes in excess of) the stated amount of insurance.

b. Amount of insurance is ordinarily set at price paid for or lent on security of land.

2. Should amount of insurance be increased?

a. If value of land increases after title insurance policy is issued, or if improvements are added to insured land, amount of insurance should be increased.

NOTE:
This can be particularly important when real estate values are inflating. Increased protection is generally available through endorsement.

b. If amount of insurance is less than a specified percentage of actual value of land (or land as improved), insured may be a "coinsurer" of loss or damage.

NOTE:

Some title insurance policies (e.g., the ALTA Owner's Policy (10-17-92) [***see*** *§ 26A.252*]) contain "coinsurance" clauses. Under a "coinsurance" clause, the risk of a partial loss is divided between the insurer and the insured according to the relative amount of the insurance and the actual value of the insured property [*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 385 386, 106 Cal. Rptr. 307* ; Home Ins. Co., New York v. Eisenson (5th Cir. [Fla.] 1950) *181 F.2d 416, 418]* . If, for example, the value of the property at original purchase is $200,000 but the amount of insurance is only $100,000, the risk of partial loss is divided between the insurer and the insured on a 50-50 basis. If there is a $100,000 loss, the insurer is obligated only to pay 50 percent of the loss, or $50,000. For further discussion of coinsurance, see *§§ 26A.17[8], 26A.252[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCoinsuranceGeneral OverviewInsurance LawProperty InsuranceGeneral OverviewInsurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceTitle Insurance



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

11-26A California Legal Forms--Transaction Guide §§ 26A.113-26A.119

[Reserved]

§§ 26A.113[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART III. TRANSACTION GUIDE
C. Procedural Guide to Selection of Title Policies and Reports

11-26A California Legal Forms--Transaction Guide § 26A.120

§ 26A.120 Steps Preliminary to Ordering Title Insurance Policy

1. Apply for preliminary report or commitment.

NOTE:

Preliminary reports [***see*** *§ 26A.200*] are designed to show the condition of title as a preliminary to the issuance of title insurance policies [for discussion, ***see*** *§ 26A.13*; ***see also*** *Ins. Code § 12340.11*]. Application may be made directly to a title company, although many applications are customarily made through real estate brokers who are handling transactions for the client. Alternatively, a commitment [***see*** *§ 26A.210*] may be ordered. A commitment generally serves the same purpose as a preliminary report [***see*** *§ 26A.210 [1]*; ***see also*** *§ 26A.14*].

2. Examine and analyze preliminary report or commitment.

NOTE:

The preliminary report will list as exceptions any liens, encumbrances, or defects that would be listed as exceptions if the policy were issued on the date of the report. It will also reveal if title to the property is vested in the person who purports to have the right to sell or encumber it. The attorney must analyze the condition of the title as revealed by the report.

Many liens, encumbrances, or defects such as recorded covenants, conditions and restrictions, tax liens, easements or rights-of-way for utilities, reservations of mineral rights, and similar matters may have no effect on the "marketability" of the title [for general discussion of marketable title issues affecting title insurance, ***see*** *§ 26A.11*] and be perfectly acceptable to the client. Other liens or defects, however, may be unacceptable. Unacceptable liens or defects might include easements that interfere with the use of the

property, notices of lis pendens, judgment liens, and similar matters. If any unacceptable liens, encumbrances, or defects are listed in the preliminary report, it may be possible to remove or "cure" them before the policy is issued [***see*** (3)(a), ***below***].

3. Handle title defects in one of following ways:

a. If possible, clear (or demand that another party to transaction clear) liens, defects, or encumbrances before issuance of title insurance policy.

NOTE:
Some defects revealed by the preliminary report may be easily "cured," e.g., by obtaining (or demanding that the other party to the real estate transaction obtain) a release of lien, a reconveyance, a quitclaim deed, a satisfaction of judgment, or another document necessary to "cure" the defect. Other defects may be cured only by judicial action, e.g., by commencing an action for quiet title. A litigation guarantee [***see*** *§ 26A.230*] may be useful in obtaining information preliminary to any such action [for ordering litigation guarantees, ***see*** *§ 26A.123*(1),(2)].

b. Obtain indemnification agreement with other party under which other party agrees to indemnify client for costs of clearing title or "curing" defect after close of escrow.

NOTE:
A prospective purchaser or lender may demand that the seller or borrower agree in writing to indemnify the purchaser or lender for the cost of clearing title or for any loss occasioned by the title defect. It is customary to require security for the performance of an indemnification agreement in an amount sufficient to cover the probable cost of removing the defect.

c. Cause escrow holder to impound part of proceeds of escrow to cover estimated cost of removing defect.

NOTE:
Escrow holders will frequently impound sufficient funds to cover the estimated cost of removing an exception. If, for example, there is a judgment lien against the property, the escrow holder will impound sufficient funds to pay the lien if it is valid. In the meantime, the parties can seek to settle the question of validity.

d. Obtain title insurance indorsement for additional title insurance protection against defect [for guidance in ordering the appropriate indorsements, *see § 26A.122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsReal Property LawTitle QualityMarketable TitleRemedies



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide to Selection of Title Policies and Reports

11-26A California Legal Forms--Transaction Guide § 26A.121

§ 26A.121 Ordering Title Insurance Policy

1. Select form of policy.

NOTE:
Since title insurance policies are highly standardized [***see*** *§ 26A.17 [2]*], the policy chosen will ordinarily be one of the standard-form policies recommended for use by the California Land Title Association. For considerations relating to the different policies and their uses, see *§ 26A.111*; see also *§§ 26A.250*; *26A.252*.

2. Make order directly to title company or through real estate broker.

NOTE:
Title insurance policies are commonly ordered at the time that a contract for the sale of real property is entered into. The policy to be issued is identified in the contract. The policy is issued at the same time as the deeds are executed, delivered and recorded, and the premium for the policy is paid out of escrow. In some circumstances, the attorney can order the policy directly; or, if the attorney is drafting the contract, deeds, or other documents, the policy to be issued may be selected and identified at that time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationStandardized AgreementsInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.122

§ 26A.122 Ordering Indorsements

NOTE:
An indorsement adds to or amends the coverage of an insurance policy. When effective, it becomes a part of the policy and must be considered with it. CLTA recommends the use of more than 100 indorsement forms, which are included in its CLTA Policy & Indorsement Forms Book (Revised 1971). For a general discussion of indorsements, see *§§ 26A.18*, *26A.260[1]*.

1. If client is an institutional lender who is lending on property affected by covenants, conditions, and restrictions, order covenants, conditions, and restrictions indorsement.

NOTE:
The title to a parcel of real property is sometimes restricted or encumbered by one or more recorded instruments setting forth "covenants, conditions, and restrictions" (CC and R's) on its use [for a general discussion of CC and R's, ***see*** CALIFORNIA REAL ESTATE LAW PRACTICE, vol. 13, ch. 470, ***"Subdivisions*** (Matthew Bender)]. The CLTA Covenants, Conditions, and Restrictions Indorsement [***see*** *§ 26A.260*] is designed to provide title insurance protection against any loss sustained by an insured lender as a result of CC and R's. It is designed to be issued in connection with the ALTA Loan Policy [***see*** *§ 26A.251*], which is frequently purchased by institutional lenders [***see*** *§ 26A.111[4]*]. Protection against loss or damage sustained by reason of a violation of CC and R's may be necessary to the protection of the lien of the insured lender.

2. If client is lender who cannot inspect property and who has reason to believe that mechanic's lien may attain priority over lien of secured loan, order mechanics' liens indorsement.

NOTE:
CLTA's Mechanics' Liens Indorsement [***see*** *§ 26A.261*] should be added to ALTA Loan

Policy [***see*** § 2 26A.51] if the lien of an insured loan may be imperiled by mechanics' liens. A mechanic's lien is entitled to priority over the lien of a deed of trust if the work of improvement began before the deed of trust was recorded and if the mechanic's lien claimant had no notice of the deed of trust at the time the work began [*Civ. Code §§ 3134, 3137*; for legal and practical aspects of the mechanics' lien laws, ***see*** Ch. 31, ***Mechanics' Liens***]. To protect themselves against the loss of priority to unrecorded mechanics' liens, lenders frequently inspect the property on which they propose to make a loan to determine if work has commenced or materials have been supplied. Because out-of-state lenders frequently find it impossible to inspect the property on which they make loans, they often require that their borrowers provide appropriate title insurance protection against mechanics' liens before any loan is made.

3. If client is construction lender who cannot inspect property and has reason to believe that foundations may not be properly located within boundaries of construction site, order foundation indorsement.

NOTE:

CLTA's Foundation Indorsement [***see*** *§ 26A.262*] should be added to ALTA Loan Policy [***see*** *§ 26A.251*] if a lender wishes title insurance protection against possible loss due to improper location of the foundations on a construction project. The risk that foundations are not properly located within the boundaries of the insured property may be minimized by inspecting the property or, if the lender is an out-of-state lender (or for any other reason cannot inspect the property), by purchasing a foundation indorsement. The indorsement will be issued by the insurer after the insurer has inspected the property. For a general discussion of foundation indorsements, see *§ 26A.262[1]*.

4. If client is purchasing or lending on property subject to easement in favor of another parcel (or whose use depends on enforceability of easement over adjoining property), order easement indorsement.

NOTE:

CLTA's Easement Indorsement [***see*** *§ 26A.263*] is designed to be added to the CLTA Standard Coverage Policy [***see*** *§ 26A.250*], the ALTA Loan Policy [***see*** *§ 26A.251*], or the ALTA Owner's Policy [***see*** *§ 26A.252*] to provide title insurance protection against loss resulting from the use (or lack of use) of an easement [***see*** *§ 26A.263[1]*].

5. If client is purchasing deed of trust, order assignment of trust deed indorsement.

NOTE:

CLTA's Assignment of Trust Deed Indorsement [***see*** *§ 26A.264*] is designed to be added to the ALTA Loan Policy [***see*** *§ 26A.251*] to provide title insurance protection for the purchaser of the beneficial interest under a deed of trust. Although the CLTA Standard Coverage Policy [***see*** *§ 26A.250*] and the ALTA Loan Policy [***see*** *§ 26A.251*] protect successors in ownership of an insured mortgage or deed of trust, the new owner of the indebtedness will require assurance that the lien of the insured mortgage or deed of trust is valid and enforceable. The Assignment of Trust Deed Indorsement will provide that assurance. In addition, it will assure the assignee of the deed of trust that the deed of trust has been transferred by a valid assignment, that there are no subsisting tax or assessment liens which have priority (except as noted in the indorsement), that there are no matters affecting the validity or priority of the mortgage or deed of trust (except as noted), and that there are no federal tax liens or bankruptcy proceedings which affect the insured estate or interest (except as noted).

6. If client is (or is to become) single-family homeowner and wishes to have additional homeowner's title protection, order single-family homeowner's protection indorsement.

NOTE:

CLTA's Single Family Homeowner's Protection Indorsement [***see*** *§ 26A.265*] may be added to the CLTA Standard Coverage Policy [***see*** *§ 26A.250*] to provide title insurance protection of particular value to a homeowner. It insures the owner of a single-family, owner-occupied residential structure against loss or damage sustained by reason of lack of a right of access from the insured land to a public street; any statutory lien for labor or material arising out of any work of improvement in progress or completed on the date of the policy (except liens for which the insured has agreed to be responsible); removal of the residential structure or interference with its use for ordinary residential purposes as the result of a final court order or judgment based on such matters as encroachments onto adjoining lands, violations of covenants, conditions, or restrictions, or violations of applicable zoning ordinances; and damage to the residential structure resulting from the exercise of any right to use the surface of the land for mineral extraction or development. For a general consideration of homeowner's title insurance protection (and other available forms of homeowner's indorsements), see *§ 26A.265[1]*.

7. If client is (or is to become) condominium homeowner and wishes additional condominium owner's title protection, order condominium owner's protection indorsement.

NOTE:

CLTA's Condominium Owner's Protection Indorsement [***see*** *§ 26A.266*] may be added to the CLTA Standard Coverage Policy [***see*** *§ 26A.250*]. It offers condominium homeowners substantially identical protection to that offered single-family homeowners in the Single Family Homeowner's Protection Indorsement [***see*** (6), ***above***]. It assures the condominium homeowner that the estate or interest described in the policy is a condominium as defined in *Civil Code Section 783*; that there is no lack of access from the described unit to a public street; that no statutory lien for labor or materials has attached to the insured interest (except a lien for work for which the insured has agreed to be responsible); that the residence will not be removed and that there will be no interference with its use as a residence by reason of a final court order or judgment based on the existence of any encroachment of the residence onto adjoining lands or onto an easement, any violation of enforceable covenants, conditions or restrictions, or any of certain specified zoning violations; and that there are no mineral rights that would damage the structure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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C. Procedural Guide to Selection of Title Policies and Reports

11-26A California Legal Forms--Transaction Guide § 26A.123

§ 26A.123 Ordering Special-Purpose Policies and Reports

1. If legal action affecting title to or possession of property is contemplated, order litigation guarantee.

NOTE:

The necessity for legal action will often appear after a preliminary title report [***see*** *§ 26A.200*] has been received showing some lien, restriction, encumbrance, or other defect that "clouds" a title. A litigation guarantee [***see*** *§ 26A.230*] will disclose the necessary parties defendant in a particular kind of action (which the attorney may specify when requesting the guarantee). Litigation guarantees are useful in many kinds of actions, including suits for condemnation, partition, foreclosure, and quiet title. The issuing title company will be liable for damages suffered as a result of the inaccuracy or incompleteness of the guarantee [*Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 738 739, 41 Cal. Rptr. 345]* . For further discussion of the characteristics and use of litigation guarantees, see § 26A.30[1].

2. If it is necessary to determine exact nature of particular person's interest in parcel or tract, order litigation guarantee.

NOTE:

A litigation guarantee [***see*** *§ 26A.230*] or a lot book guarantee [***see*** *§ 26A.232*] may be useful to identify property owned by a particular person and the nature or extent of that person's interest in it. If, for example, a property search guarantee [***see*** (5), ***above***] reveals that certain property stands in the name of a particular judgment debtor, the attorney may order a litigation guarantee or a lot book guarantee to identify the debtor's interest in the property.

3. If it is necessary to determine priorities of various recorded instruments, order chain of title guarantee.

NOTE:

A chain of title guarantee [***see*** *§ 26A.231*] will disclose the priorities of various recorded instruments. It lists all deeds and other recorded instruments in the chain of title, disclosing the recording date and the names of all parties to each instrument. The guarantee will cover any period of time specified in the guarantee. Since charges for chain of title guarantees are based on the number of documents reported, it is common to request that the title company issue a guarantee for a relatively short span of years.

4. If it is necessary to determine if particular instrument is in chain of title, order chain of title guarantee.

NOTE:

A chain of title guarantee [***see*** *§ 26A.231*] will disclose whether a particular instrument is in the chain of title [***see*** *§ 26A.231[1]*].

5. If it is necessary to find real property standing in name of judgment debtor, order property search guarantee.

NOTE:

A property search guarantee (often called a "name run search") [***see*** *§ 26A.233*] will reveal all real property standing of record in a particular name. The guarantee may also include a list of existing mortgages and deeds of trust that stand in the name of a particular person. An attorney representing a judgment creditor or prospective plaintiff may use the property search guarantee to discover property owned by the judgment debtor or prospective defendant [***see*** *§ 26A.233[1]*].

6. If it is necessary to locate and identify real property owned by a decedent or conservatee, order property search guarantee.

NOTE:

A property search guarantee [***see*** *§ 26A.233*] may also be used to locate and identify property owned by a decedent or conservatee. If the guarantee reveals that property stands of record in the name of the decedent or the conservatee, other reports or guarantees may be ordered to ascertain the nature or extent of the decedent's or conservatee's interest in it.

7. If client is preparing to submit subdivision map for approval by local officials, order subdivision guarantee.

NOTE:

All parties having any record title interest in real property that is being subdivided must sign and acknowledge a certificate by which they consent to the preparation and recordation of the subdivision map [*Gov. Code § 66436*]. County and city officials customarily withhold approval of final subdivision maps until guarantees have been issued showing that all of the persons having any record interest in the property being subdivided have signed the certificate. A subdivision guarantee [***see*** *§ 26A.234*] is customarily ordered by subdividers for this purpose.

8. If foreclosure is contemplated, order trustee's sale guarantee.

NOTE:

A trustee's sale guarantee [***see*** *§ 26A.235*] will provide useful title information relating to property that is subject to foreclosure (either through exercise of a power of sale or by

judicial proceedings). The guarantee, which will help to prevent irregularities in the foreclosure sale, should be ordered before any foreclosure sale is held [***see*** *§ 26A.235[1]*].

9. If client is contemplating resale of property soon after its purchase, order binder.

NOTE:

Binders are typically issued to provide temporary title insurance coverage while the purchaser of real property attempts to find another purchaser. The binder has the advantage of providing present coverage and of assuring prospective repurchasers that permanent coverage will be available in the future. In California, title insurance binders are not ordinarily issued for more than one year. For a general discussion of binders, see *§ 26A.15*; see also *§ 26A.200[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsBindersInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsReal Property LawTitle QualityMarketable TitleRemedies



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11-26A California Legal Forms--Transaction Guide §§ 26A.124-26A.199

[Reserved]

§§ 26A.124[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
A. Preliminary Reports

11-26A California Legal Forms--Transaction Guide § 26A.200

§ 26A.200 CLTA Preliminary Report Form

[1] Comment

[a] Use of Form

This form is the preliminary report form approved for use by the California Land Title Association (CLTA) and revised as of January 1, 1995. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission.

[b] Preliminary Reports In General

An owner, lender, or prospective purchaser of real property contemplating the purchase of a title insurance policy will typically request that a title company prepare and issue a preliminary report. This request is frequently made through a real estate broker who represents one of the parties. The report is sought for the purpose of discovering the condition of title and as a preliminary to negotiating the terms of a sales or loan contract. Preliminary reports are often ordered when the escrow for a sale or loan transaction is opened [for a general discussion of escrow procedures and practices, *see* the Legal Background to Ch. 26, *Real Property Escrows*].

[c] Contrasted with Abstracts of Title

It is important to understand the distinctions between preliminary reports on one hand, and abstracts of title and title insurance policies on the other.

First, a preliminary report is not an abstract of title [*Ins. Code § 12340.11*; *see Ins. Code § 12340.10*; *see also* discussion in *§ 26A.13*]. An abstract of title is defined by statute as a written representation, provided pursuant to a contract (whether written or oral), intended to be relied upon by the person who has contracted for the representation, listing all recorded conveyances, instruments or documents which, under the laws of California, impart constructive notice with respect to the chain of title [*Ins. Code § 12340.10*].

Before January 1, 1982, when *Insurance Code Section 12340.11* became effective, preliminary reports were deemed, under case law, to be analytically identical to abstracts of title, and title companies were held liable for negligence in the preparation of inaccurate or incomplete preliminary reports [*see Hardy v. Admiral Oil Co. (1961) 56 Cal. 2d 836, 841, 16 Cal. Rptr. 894, 366 P.2d 310* ; *J.H. Trisdale, Inc. v. Shasta etc. Title Co. (1956) 146 Cal. App. 2d 831, 837, 304 P.2d 832* ; *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 939, 122 Cal. Rptr. 470]* . The decisions that imposed negligence liability for the preparation of preliminary reports were widely criticized [*see* Hosack, *California Title Insurance Practice* (Cal. C.E.B. 1980), § 3.19; Miller & Starr, *Current Law of California Real Estate* (Rev. ed., 1972), §§ 12.79, 12.80]. This liability was effectively abolished by the enactment of *Insurance Code Section 12340.11*, which explicitly excepts preliminary reports from the statutory definition of abstracts of title and declares that a preliminary report cannot be construed as a representation as to the condition of a title [*see Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 209 Cal. Rptr. 266* (*Ins. Code § 12340.11* (not applicable to preliminary reports issued before Jan. 1, 1982); for discussion of decisions predating *Ins. Code § 12340.11*, holding preliminary reports to be identical to abstracts of title, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.131 (Matthew Bender)].

[d] Contrasted with Title Policies

Second, a preliminary report is not a title policy. A title policy is defined by statute as a written instrument or contract by means of which title insurance liability is assumed [*Ins. Code § 12340.2*]. No insurance liability is assumed under a preliminary report. A preliminary report constitutes an offer to issue a title policy subject to the stated exceptions and conditions set forth in the report [*Ins. Code § 12340.11*; for a discussion of exceptions, *see* [f], *below*]. The CLTA Preliminary Report Form explicitly provides that the report is issued for the purpose of facilitating the issuance of a policy of title insurance, and for that purpose only, and that no liability is assumed by the report [*see* CLTA Preliminary Report Form, third (unnumbered) P]. The form further states that if it is desired that liability be assumed before a title policy is issued, a binder [*see § 26A.220*] or a commitment [*see § 26A.210*] should be requested.

Insurance Code Section 12414.30(b) states that upon request, a title insurance company may provide coverage against loss or damage under the terms, conditions, and stipulations of the title insurance policy for any monetary liens set forth in the preliminary report.

[e] Exhibit A

Exhibit A attached to this form sets forth exclusions that will be listed in various standard form title insurance policies if and when they are issued. For example, it includes a verbatim statement of the exclusions that will be listed in Schedule B of the CLTA Standard Coverage Policy [*see § 26A.250*] if that policy is issued to the prospective policy holder. It also includes the statement of exclusions from the ALTA Residential Title Insurance Policy (6-1-87), the ALTA Loan Policy (10-17-92) [*see § 26A.251*], the ALTA Leasehold Loan Policy (10-17-92), the ALTA Owner's Policy (10-17-92 [*see § 26A.252*], and the ALTA Leasehold Owner's Policy (10-17-92). These exclusions are set forth in this preliminary report for the purpose of clearly advising the prospective policy holder of matters that will be excluded if and when the title insurance policy is issued.

[f] Exceptions

The preliminary report will reveal any liens, encumbrances, or defects that would be listed on the policy if the policy were issued on the date and at the time shown on the report. These are set forth as exceptions to coverage and are usually presented in a list, with each exception assigned a number. Exceptions listed in preliminary reports include matters such as real property taxes (currently due or delinquent), covenants, conditions, and restrictions affecting the property [for a general discussion of covenants, conditions, and restrictions, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 470, *Subdivisions* (Matthew Bender)], deeds of trust, easements or rights-of-way for utility use, and reservations of mineral rights.

Many of these exceptions will have no effect on the "marketability" of the title [for general discussion of marketable title issues relating to title insurance, *see § 26A.11*] and will be entirely acceptable to the client. For example, many reservations of mineral rights, recorded covenants, conditions and restrictions, easements or rights-of-way for utilities, and similar matters may have no effect on the marketability of the title. Other listed exceptions will automatically be removed upon close of escrow and before the title insurance policy is issued. For example, real property taxes due or delinquent will be paid, and trust deeds for existing loans will be reconveyed.

Other exceptions, however, may be unacceptable. Unacceptable matters might include easements that interfere with the use of the property, notices of lis pendens, judgment liens, and similar matters.

[g] Clearing Exceptions

If any unacceptable liens, encumbrances, or defects are listed in the preliminary report, it may be possible to remove ("cure") them before the policy is issued. Some defects may be cleared easily, simply by obtaining (or demanding that another party to the real estate transaction obtain) a release of lien, a reconveyance, a quitclaim deed, a satisfaction of judgment, or a similar document. Other defects may be cured only by judicial action, such as commencing an action for quiet title.

If the defect cannot be removed before close of escrow, the parties may enter into an indemnification agreement, by which the seller (or borrower) agrees to indemnify the buyer (or lender) against lost occasioned by the defect. Alternatively, the escrow holder may impound sufficient funds to cover any loss occasioned by the defect. For procedural steps in handling title defects revealed by a preliminary report, see *§ 26A.120*.

[h] Statutory Warning

Under the Insurance Code, every preliminary report that constitutes an offer to issue an owner's policy of title insurance must include a statement warning the prospective policy holder that the report is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land [*Ins. Code § 12414.30(a)* (operative Jan. 1, 1995)]. The statement must also advise the prospective policy holder that the exceptions and exclusions shown in the report are meant to provide notice of matters that are not covered under the terms of the title insurance policy and that the prospective policy holder should carefully read and consider all of those exceptions and exclusions [*Ins. Code § 12414.30(a)* (operative Jan. 1, 1995)]. The third paragraph of this form contains the language required by the Insurance Code.

[2] FORM

CLTA Preliminary Report Form

(BLANK TITLE COMPANY)
PRELIMINARY REPORT

YOUR NO. _____
OUR NO. _____

TO:

In response to the above referenced application for a policy of title insurance, Blank Title Company hereby reports that it is prepared to issue, or cause to be issued, as of the date hereof, a Policy or Policies of Title Insurance describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of

any defect, lien or encumbrance not shown or referred to as an Exception below or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations of said Policy forms.

The printed Exceptions and Exclusions from the coverage of said Policy or Policies are set forth in Exhibit A attached. Copies of the Policy forms should be read. They are available from the office which issued this report.

Please read the exceptions shown or referred to below and the exceptions and exclusions set forth in Exhibit A of this report carefully. The exceptions and exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.

It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.

This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby. If it is desired that liability be assumed prior to the issuance of a policy of title insurance, a Binder or Commitment should be requested.

Dated as of _____, 19 _____, at 7:30 A.M.

_____
Title Officer

The form of policy of title insurance contemplated by this report is: _____.

The estate or interest in the land hereinafter described or referred to covered by this Report is:

_____ .

Title to said estate or interest at the date hereof is vested in:

_____ .

The land referred to in this Report is situated in the State of California, County of _____, and is described as follows:

_____ .

At the date hereof exceptions to coverage in addition to the printed Exceptions and Exclusions in said policy form would be as follows:

_____ .

Exhibit A (Rev. 12-04-92)

CALIFORNIA LAND TITLE ASSOCIATION STANDARD COVERAGE POLICY--1990 EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay any loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with

the applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any claim, which arises out of the transaction vesting in the insured the estate of interest insured by this policy or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws.

EXCEPTIONS FROM COVERAGE--SCHEDULE B, PART I

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.

AMERICAN LAND TITLE
ASSOCIATION
RESIDENTIAL TITLE INSURANCE POLICY (6-1-87)
EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys', fees and expenses resulting from:

[1]--Governmental police power, and the existence or violation of any law or governmental regulation. This includes building and zoning ordinances and also laws and regulations concerning:

- land use
- improvements on the land

- land division
- environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.

This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.

[2]--The right to take the land by condemning it, unless:

- a notice of exercising the right appears in the public records on the Policy Date
- the taking happened prior to the Policy Date and is binding on you if you bought the land without knowing of the taking

[3]--Title Risks:

- that are created, allowed, or agreed to by you
- that are known to you, but not to us, on the Policy Date unless they appeared in the public records
- that result in no loss to you
- that first affect your title after the Policy Date this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks

[4]--Failure to pay value for your title.

[5]--Lack of a right:

- to any land outside the area specifically described and referred to in Item 3 of Schedule A

or

- in streets, alleys, or waterways that touch your land

This exclusion does not limit the access coverage in Item 5 of Covered Title Risks.

AMERICAN LAND TITLE
ASSOCIATION LOAN POLICY (10-17-92)
WITH ALTA ENDORSEMENT--FORM 1 COVERAGE
and
AMERICAN LAND TITLE ASSOCIATION LEASEHOLD LOAN POLICY
(10-17-92)
WITH ALTA ENDORSEMENT--FORM 1 COVERAGE
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material or to the extent insurance is afforded herein as to assessments for street improvements under construction or completed at Date of Policy); or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

7. Any claim, which arises out of the transaction creating the interest of the mortgage insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or

(ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or

(iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
(a) to timely record the instrument of transfer; or

(b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

The above policy forms may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following General Exceptions:

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5.

(a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.

AMERICAN LAND TITLE
ASSOCIATION OWNER'S POLICY (10-17-92)
and
AMERICAN LAND TITLE ASSOCIATION LEASEHOLD OWNER'S
POLICY(10-17-92)

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured

claimant had paid value for the estate or interest insured by this policy.

4. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(i) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(ii) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:
(a) to timely record the instrument of transfer; or

(b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

The above policy forms may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following General Exceptions:

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5.

(a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



98 of 120 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
A. Preliminary Reports

11-26A California Legal Forms--Transaction Guide §§ 26A.201-26A.209

[Reserved]

§§ 26A.201[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
B. Commitments

11-26A California Legal Forms--Transaction Guide § 26A.210

§ 26A.210 ALTA Commitment (1982)

[1] Comment

[a] Use of Form

This form is the ALTA Commitment (1982) form approved for use by the California Land Title Association. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

[b] Commitments In General

A commitment is a contract under which a title insurer obligates itself to issue a title insurance policy upon stated terms and conditions. By statute, a "commitment" is an offer to issue a title policy subject to stated exceptions and conditions [*Ins. Code § 12340.11*]. Like preliminary reports [*see § 26A.200*] and binders [*see § 26A.220*], commitments are not abstracts of title, and none of the rights, duties, or responsibilities applicable to the preparation and issuance of abstracts of title are applicable to the issuance of commitments [*Ins. Code § 12340.11*; *see §§ 26A.200[1][c],[d]*].

[c] Contrasted with Preliminary Reports and Binders

Commitments differ significantly from preliminary reports [*see § 26A.200*] and binders [*see § 26A.220*]. A preliminary report does not provide present insurance coverage, nor is it an enforceable agreement to provide coverage in the future. A preliminary report is an offer to issue a title policy. If and when the offer is accepted, the insurer's liability will be framed by the terms of a title policy [*see § 26A.200[1][b]*]. A binder provides present coverage, but only for a temporary period [*see § 26A.220 [1]*]. A commitment does not provide present coverage, but it does obligate the insurer to provide future coverage, subject to stated exceptions and conditions. Title insurers in some areas of California routinely issue commitments instead of preliminary reports. For discussion of commitments, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance*, § 92.33 (Matthew Bender).

[d] Contents of Form

This commitment identifies the form of title policy that the insurer agrees to furnish to the insured [Schedule A]. It also sets forth the face amount of the policy [Schedule A], the name of the proposed insured [Schedule A], and the time during which the insurer's obligation will be enforceable [second (unnumbered) P]. The commitment also sets forth the exceptions that will be listed in the policy if and when a policy is issued [Schedule B § II]. For a general discussion of exceptions to title insurance coverage, see *§ 26.200[f],[g]*.

The commitment does not cover any defects, liens, or encumbrances that are created or attach between the date of the commitment and the date on which the proposed insured meets the requirements [*see* Schedule B § I] set forth in the commitment [Conditions, P 2].

Under this form, the insurer's contractual obligation is limited to issuing the policy referred to in the commitment [*see* Conditions, P 4]. If there is an error in the commitment (e.g., if there is a title defect or lien that is not listed as an exception), the insurer's liability will be limited to actual loss caused by good faith reliance on the commitment to comply with the requirements set forth in the commitment or to eliminate any exceptions shown in the commitment [*see* Conditions, P 4]. The insurer's liability under the form is limited to the policy amount shown in the commitment [Conditions, P 4; *see* Schedule A, P 2].

[2] FORM

ALTA Commitment (1982)

ALTA COMMITMENT (1982)
INFORMATION

The Title Insurance Commitment is a legal contract between you and the Company. It is issued to show the basis on which we will issue a Title Insurance Policy to you. The Policy will insure you against certain risks to the land title, subject to the limitations shown in the Policy.

The Company will give you a sample of the Policy form, if you ask.

The Commitment is based on the land title as of the Commitment Date. Any changes in the land title or the transaction may affect the Commitment and the Policy.

The Commitment is subject to its Requirements, Exceptions and Conditions.

THIS INFORMATION IS NOT PART OF THE TITLE INSURANCE COMMITMENT. YOU SHOULD READ THE COMMITMENT VERY CAREFULLY.

If you have any questions about the Commitment, contact _____.

TABLE OF CONTENTS

AGREEMENT TO ISSUE POLICY

SCHEDULE A

1. Commitment Date

2. Policies to be Issued, Amounts and Proposed Insureds

3. Interest in the Land and Owner

4. Description of the Land

SCHEDULE B-I REQUIREMENTS

SCHEDULE B-II EXCEPTIONS

CONDITIONS

TITLE INSURANCE COMMITMENT
BY
BLANK TITLE INSURANCE COMPANY
AGREEMENT TO ISSUE POLICY

We agree to issue a policy to you according to the terms of this Commitment. When we show the policy amount and your name as the proposed insured in Schedule A, this Commitment becomes effective as of the Commitment Date shown in Schedule A.

If the requirements shown in this Commitment have not been met within _____[*Instructions to ALTA members: this period is optional with the Company*] after the Commitment Date, our obligation under this Commitment will end. Also, our obligation under this Commitment will end when the Policy is issued and then our obligation to you will be under the Policy.

Our obligation under this Commitment is limited by the following:

The provisions in Schedule A.

The Requirements in Schedule B-I.

The Exceptions in Schedule B-II.

The Conditions on Page _____.

This Commitment is not valid without SCHEDULE A and Sections I and II of SCHEDULE B.

[*Instructions to ALTA Members: The countersignature clause is optional with each Company.*]

SCHEDULE A

1. Commitment Date:

2. Policy (or policies) to be issued:

[*Instructions to ALTA Members: The Company should identify forms of policies below*]

(a) Owner's Policy: Policy Amount $

_____

Proposed Insured:

(b) Loan Policy: Policy Amount $

_____

Proposed Insured:

(c) Policy Amount $

_____

Proposed Insured:

3.

_____ interest in the land described in this Commitment is owned, at the Commitment Date, by

_____ .

4. The land referred to in this Commitment is described as follows: [*Instructions to ALTA Members: At the option of the Company, Item 4 may read:* The land referred to in this Commitment is described in Schedule C.]

SCHEDULE B SECTION I
REQUIREMENTS

The following requirements must be met:

(a) Pay the agreed amounts for the interest in the land and/or the mortgage to be insured.

(b) Pay us the premiums, fees and charges for the policy.

(c) Documents satisfactory to us creating the interest in the land and/or the mortgage to be insured must be signed, delivered and recorded.

[*Instructions to ALTA Members: A period may be added to the above or a colon may be added and specific documents typed in.*]

(d) You must tell us in writing the name of anyone not referred to in this Commitment who will get an interest in the land or who will make a loan on the land. We may then make additional requirements or exceptions.

[*Instructions to ALTA Members: Additional requirements may be listed here.*]

SCHEDULE B SECTION II EXCEPTIONS

Any policy we issue will have the following exceptions unless they are taken care of to our satisfaction:

CONDITIONS

1. DEFINITIONS

(a) "Mortgage" means mortgage, deed of trust or other security instrument. (b) "Public Records" means title records that give constructive notice of matters affecting your title according to the state law where your land is located.

2. LATER DEFECTS

The Exceptions in Schedule B Section II may be amended to show any defects, liens or encumbrances that appear for the first time in the public records or are created or attach between the Commitment Date and the date on which all of the Requirements (a) and (c) of Schedule B Section I are met. We shall have no liability to you because of this amendment.

3. EXISTING DEFECTS

If any defects, liens or encumbrances existing at Commitment Date are not shown in Schedule B, we may amend Schedule B to show them. If we do amend Schedule B to show these defects, liens or encumbrances, we shall be liable to you according to Paragraph 4 below unless you knew of this information and did not tell us about it in writing.

4. LIMITATION OF OUR LIABILITY

Our only obligation is to issue to you the Policy referred to in this Commitment, when you have met its Requirements. If we have any liability to you for any loss you incur because of an error in this Commitment, our liability will be limited to your actual loss caused by your relying on this Commitment when you acted in good faith to:

Comply with the Requirements shown in Schedule B Section I

or

Eliminate with our written consent any Exceptions shown in Schedule B Section II.

We shall not be liable for more than the Policy Amount shown in Schedule A of this Commitment and our liability is subject to the terms of the Policy form to be issued to you.

5. CLAIMS MUST BE BASED ON THIS COMMITMENT

Any claim, whether or not based on negligence, which you may have against us concerning the title to the land must be based on this Commitment and is subject to its terms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationOffer & AcceptanceInsurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstracts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
B. Commitments

11-26A California Legal Forms--Transaction Guide §§ 26A.211-26A.219

[Reserved]

§§ 26A.211[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
C. Binders

11-26A California Legal Forms--Transaction Guide § 26A.220

§ 26A.220 Interim Binder Form A

[1] Comment

[a] Use of Form

This form is the interim binder form approved for use by the California Land Title Association and revised as of February 19, 1981. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

A binder is a temporary insurance contract [*Spott Electrical Co. v. Industrial Indem Co. (1990) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710]* . To qualify as a binder, a contract must obligate the insurer to provide present, and not merely future, coverage [*Parlier Fruit Co. v. Fireman's etc. Ins. Co. (1957) 151 Cal. App. 2d 6, 20, 311 P.2d 62]* . Like preliminary reports [*see § 26A.200*] and commitments [*see § 26A.210*], binders are defined by statute as offers to issue title policies [*Ins. Code § 12340.11*]; also like preliminary reports and commitments, they are removed from the statutory definition of abstracts of title [*Ins. Code § 12340.11*; *see Ins. Code § 12340.10* (abstracts of title); *see also § 26A.200[1][c],[d]*].

Title insurance binders are typically issued to provide temporary coverage while the owner of real property attempts to find a purchaser. The binder has the advantage of providing present coverage and of assuring prospective purchasers that permanent coverage will be available in the future. In California, title insurance binders are not ordinarily issued for more than one year [*see* discussion in *§ 26A.15*].

[b] Contents of Form

Interim Binder Form A obligates the insurer to provide a title insurance policy on the binder date or, in the alternative, on the date a valid and sufficient instrument creating an insurable estate, interest, or lien in favor of the insured is executed, delivered, and recorded [*see* first (unnumbered) P of insuring clause]. Although the form does not include an express insuring clause, the insuring function of binders is well recognized [*see Spott Electrical Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710* ; *Parlier Fruit Co. v. Fireman's etc. Ins. Co. (1957)*

151 Cal. App. 2d 6, 19 20, 311 P.2d 62] . Even if express language is not employed, a binder will be construed as being subject to the terms and conditions of the policy referred to in the binder, or of the policy ordinarily used by the company if a specific policy is not referred to [*Parlier Fruit Co. v. Fireman's etc. Ins. Co. (1957) 151 Cal. App. 2d 6, 20, 311 P.2d 62]* . It has long been understood that a binder is a present contract of insurance [*Black v. Industrial Acci. Com. (1932) 215 Cal. 639, 651, 12 P.2d 640]* .

The form states the limit of the insurer's liability, describes the title or estate that will be vested in the insured, and lists the liens, encumbrances, defects, or other matters that are excepted from coverage. The form also sets a time limit on its coverage. An instructional note appended to the form states that the period of time for which the binder is to run should not exceed the "hold-open period" that the insurer adopts in its posted rate schedules [*see 10 Cal. Code Reg. § 2556.1(a)* (rates must be filed with Insurance Commissioner)]. After expiration of the time stated, or when the policy referred to in the binder is issued, whichever occurs first, coverage under the binder is null and void [*see* second (unnumbered) insuring P].

[2] FORM

Interim Binder Form A

INTERIM BINDER FORM A

To: _____ Fee: $ _____

Date of Binder: _____ No.: _____

BLANK TITLE INSURANCE COMPANY, a corporation, hereby agrees that it will issue, as of the date shown above, its policy of title insurance [*add, if required*: with CLTA Indorsement No. _____ attached] with a liability not exceeding $ _____, insuring title to the estate or interest described to be vested in the vestee named herein subject only to the exceptions shown herein and to all of the provisions of the policy; or in the alternative, if a valid and sufficient instrument creating an insurable estate, interest or lien in favor of _____ is executed, delivered and recorded within _____ days from the date shown above, the policy will be issued as of the date of recording the instrument, insuring the estate, interest or lien subject only to the aforesaid exceptions and provisions of the policy and to liens, encumbrances and any other matters affecting title which shall have intervened, or occurred, or become for the first time disclosed of record between the date shown above and the date of recording the instrument, including those matters affecting title which may attach as a result of the recording.

This Binder is null and void _____ days from the date shown above or when the policy is issued, whichever shall first happen.

BLANK TITLE INSURANCE COMPANY
By _____
President
By _____
Secretary

[*NOTE: The period of time for which the Binder is to run should not exceed the "hold-open" period the companies adopt in their posted rate schedule.*]

SCHEDULE A

1. The estate or interest in the land described or referred to herein is:

2. Title to the estate or interest covered hereby at the date hereof is vested in:

3. The land referred to herein is described as follows:

4. Exceptions:

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsBindersInsurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
C. Binders

11-26A California Legal Forms--Transaction Guide §§ 26A.221-26A.229

[Reserved]

§§ 26A.221[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
D. Guarantees

11-26A California Legal Forms--Transaction Guide § 26A.230

§ 26A.230 Litigation Guarantee

[1] Comment

[a] Use of Form

This form is the litigation guarantee form (CLTA Guarantee Form No. 1) approved for use by the California Land Title Association (CLTA) and revised as of December 16, 1992 (with subsequent revisions to the schedule of exclusions as of December 1995). The form is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

[b] Guarantees In General

A title guarantee (also sometimes referred to as a "guaranty") is a special report prepared and issued by a title insurer to supply and guarantee the accuracy of specific title information. Unlike historic title guarantees which, before the development of the modern title insurance policy, were used to report generally on the condition of titles [*see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 92, *Title Insurance*, § 92.02[6] (Matthew Bender)], modern guarantees serve specialized functions. They provide title insurance coverage, subject to stated limits and for specific situations. For a general discussion of title guarantees in California, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance*, § 92.35[1] (Matthew Bender)].

[c] Litigation Guarantees

Litigation guarantees are typically ordered by attorneys before commencing legal actions affecting title to or possession of real property. The necessity for legal action will often appear after a preliminary title report [*see § 26A.200*] has been received showing some lien, restriction, encumbrance, or other defect that "clouds" a title. The litigation guarantee will disclose the necessary parties defendant in a particular kind of action, which may be specified by the attorney requesting the guarantee.

If, for example, an attorney wishes to commence an action for quiet title, it will be necessary to determine the names of

all persons who have claims adverse to the plaintiff's title in the subject property so that they may be named as defendants [*see Code Civ. Proc. § 762.010*]. A litigation guarantee will provide the attorney with the names of those persons. Litigation guarantees are useful in many kinds of actions, including suits for condemnation, partition, and foreclosure, as well as quiet title. They may be admitted in evidence as summaries of the business records of the title companies [*see Evid. Code § 1271* (business records)] and, when admitted, are prima facie evidence of the truth of their contents [*Talbot v. Wake (1977) 74 Cal. App. 3d 428, 443, 141 Cal. Rptr. 463]* .

If a litigation guarantee is inaccurate or incomplete, the title company will be liable for damages suffered as a result of the inaccuracy or incompleteness [*Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 738 739, 41 Cal. Rptr. 345]* .

[d] "Date-Down" Indorsement

A "date-down" indorsement is available to show any changes in the title to the subject property after the date of the guarantee [*see* CLTA Guarantee Form No. 2, CLTA Policy & Indorsements Forms Book (Revised 1971)]. The attorney may find this form useful to discover changes in the title that have occurred after the date of the litigation guarantee and up to the time of trial.

[e] Contents of Form

The CLTA-approved litigation guarantee sets forth the name of the assured, the date of the guarantee, the land covered by the guarantee, the name of a person or persons holding an estate or interest in that land, and the estate or interest that is held. It guarantees the named insured against loss not exceeding the stated liability amount that the insured may sustain by reason of any correctness in the described assurances.

The guarantee includes a standard Schedule of Exclusions and Guarantee Conditions and Stipulations. These materials are standardized groups of provisions designed to be included with many types of guarantees. They are included in this form for purposes of illustration, but have been omitted from the subsequent guarantee forms illustrated in this chapter to avoid redundancy. In practice, however, they are included with the majority of guaranty forms.

The Schedule of Exclusions states certain standard exclusions that are intended to be generally applicable to the guarantee to which they are attached, except to the extent specifically excepted in Schedule A of the particular guarantee. The Guarantee Conditions and Stipulations is another standardized block of provisions that defines words and phrases that are used in the guarantee and specifies terms and conditions that limit the effectiveness of the guarantee. The Conditions and Stipulations are similar (but not identical) to the Conditions and Stipulations attached to standard title insurance policies [*see §§ 26A.250-26A.252*].

[2] FORM

Litigation Guarantee

LITIGATION GUARANTEE

SUBJECT TO THE LIMITATIONS CONTAINED HEREIN, THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE,

BLANK TITLE INSURANCE COMPANY a corporation, herein called the Company,

GUARANTEES

the Assured named in Schedule A against loss not exceeding the liability amount stated in Schedule A which the Assured shall sustain by reason of any incorrectness in the assurance which the Company hereby gives that, according to the public records, as of Date of Guarantee shown in Schedule A:

1. The title to the herein described estate or interest is vested in the vestee named in Schedule A.

2. Except for the matters shown in Schedule B, there are no defects, liens, encumbrances or other matters affecting title to the estate or interest in the land shown in Schedule A, which matters are not necessarily shown in the order of their priority.

3.

(a) The current interest holders claiming some right, title or interest by reason of the matters shown in Part II of Schedule B are as shown therein. The vestee named in Schedule A and parties claiming to have some right, title or interest by reason of the matters shown in Part II of Schedule B may be necessary parties defendant in an action, the nature of which is referred to in Schedule A.

(b) The current interest holders claiming some right, title or interest by reason of the matters shown in Part I of Schedule B may also be necessary parties defendant in an action, the nature of which is referred to in Schedule A. However, no assurance is given hereby as to those current interest holders.

4. The return address for mailing after recording, if any, as shown on each and every document referred to in Part II of Schedule B by specific recording information, and as shown on the document(s) vesting title as shown in Schedule A are as shown in Schedule C.

THIS LITIGATION GUARANTEE IS FURNISHED SOLELY FOR THE PURPOSE OF FACILITATING THE FILING OF THE ACTION REFERRED TO IN SCHEDULE A. IT SHALL NOT BE USED OR RELIED UPON FOR ANY OTHER PURPOSE.

Schedule A

Order No.	Liability	Fee $
_____	_____	_____

_

[Guarantee/Order No. _____]

1. Name of Assured:

2. Date of Guarantee:

3. This Litigation Guarantee is furnished solely for the purpose of facilitating the filing of an action to _____.

4. The estate or interest in the Land which is covered by this Guarantee is:

5. Title to the estate or interest in the Land is vested in:

6. The Land referred to in this Guarantee is described as follows:

Schedule B

Defects, liens, encumbrances or other matters affecting title:

Part I

1.

2.

3.

Part II

4.

5.

6.

7.

Schedule C

Addresses

Paragraph No.	Recording Information	Mailing Address
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

SCHEDULE OF EXCLUSIONS FROM COVERAGE OF THIS GUARANTEE

Except to the extent that specific assurances are provided in Schedule A of this Guarantee, the Company assumes no liability for loss or damage by reason of the following:

(a) Defects, liens, encumbrances, adverse claims or other matters against the title, whether or not shown by the public records.

(b)(l) Taxes or assessments of any taxing authority that levies taxes or assessments on real property; or, (2) Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not the matters excluded under (1) or (2) are shown by the records of the taxing authority or by the public records.

(c)(1) Unpatented mining claims; (2) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (3) water rights, claims or title to water, whether or not the matters excluded under (1), (2) or (3) are shown by the public records.

2. Notwithstanding any specific assurances which are provided in Schedule A of this Guarantee, the Company assumes no liability for loss or damage by reason of the following:

(a) Defects, liens, encumbrances, adverse claims or other matters affecting the title to any property beyond the lines of the land expressly described in the description set forth in Schedule (A), (c) or in Part 2 of this Guarantee, or title to streets, roads, avenues, lanes, ways or waterways to which such land abuts, or the right to maintain therein vaults, tunnels, ramps or any structure or improvements; or any rights or easements therein, unless such property, rights or easements are expressly and specifically set forth in said description.

(b) Defects, liens, encumbrances, adverse claims or other matters, whether or not shown by the public records; (1) which are created, suffered, assumed or agreed to by one or more of the Assureds; (2) which result in no loss to the Assured; or (3) which do not result in the invalidity or potential invalidity of any judicial or non-judicial proceeding which is within the scope and purpose of the assurances provided.

(c) The identity of any party shown or referred to in Schedule A.

(d) The validity, legal effect or priority of any matter shown or referred to in this Guarantee.

GUARANTEE CONDITIONS AND STIPULATIONS

1. Definition of Terms.

The following terms when used in the Guarantee mean:

(a) the "Assured": the party or parties named as the Assured in this Guarantee, or on a Supplemental writing executed by the Company.

(b) "land": the land described or referred to in Schedule (A)(C) or in Part 2, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A)(C) or in Part 2, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways.

(c) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(d) "public records": records established under State statutes at Date of Guarantee for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.

(e) "date": the effective date.

2. Notice of Claim to be Given by Assured Claimant.

An Assured shall notify the Company promptly in writing in case knowledge shall come to an Assured hereunder of any

claim of title or interest which is adverse to the title to the estate or interest, as stated herein, and which might cause loss or damage for which the Company may be liable by virtue of this Guarantee. If prompt notice shall not be given to the Company, then all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any Assured under this Guarantee unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

3. No Duty to Defend or Prosecute.

The Company shall have no duty to defend or prosecute any action or proceeding to which the Assured is a party, notwithstanding the nature of any allegation in such action or proceeding.

4. Company's Option to Defend or Prosecute Actions; Duty of Assured Claimant to Cooperate.

Even though the Company has no duty to defend or prosecute as set forth in Paragraph 3 above:

(a) The Company shall have the right, at its sole option and cost, to institute and prosecute any action or proceeding, interpose a defense, as limited in (b), or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as stated herein, or to establish the lien rights of the Assured, or to prevent or reduce loss or damage to the Assured. The Company may take any appropriate action under the terms of this Guarantee, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this Guarantee. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(b) If the Company elects to exercise its options as stated in Paragraph 4(a) the Company shall have the right to select counsel of its choice (subject to the right of such Assured to object for reasonable cause) to represent the Assured and shall not be liable for and will not pay the fees of any other counsel, nor will the Company pay any fees, costs or expenses incurred by an Assured in the defense of those causes of action which allege matters not covered by this Guarantee.

(c) Whenever the Company shall have brought an action or interposed a defense as permitted by the provisions of this Guarantee, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from an adverse judgment or order.

(d) In all cases where this Guarantee permits the Company to prosecute or provide for the defense of any action or proceeding, an Assured shall secure to the Company the right to so prosecute or provide for the defense of any action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such Assured for this purpose. Whenever requested by the Company, an Assured, at the Company's expense, shall give the Company all reasonable aid in any action or proceeding, Securing evidence, obtaining witnesses, prosecuting or defending the action or lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as stated herein, or to establish the lien rights of the Assured. If the Company is prejudiced by the failure of the Assured to furnish the required cooperation, the Company's obligations to the Assured under the Guarantee shall terminate.

5. Proof of Loss or Damage.

In addition to and after the notices required under Section 2 of these Conditions and Stipulations have been provided to the Company, a proof of loss or damage signed and sworn to by the Assured shall be furnished to the Company within ninety (90) days after the Assured shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the matters covered by this Guarantee which constitute the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the Assured to provide the required proof of loss or damage, the Company's obligation to such assured under the Guarantee shall terminate. In addition, the Assured may reasonably be required to submit to examination under oath by

any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Guarantee, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Assured shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the Assured provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Assured to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this Guarantee to the Assured for that claim.

6. Options to Pay or Otherwise Settle Claims: Termination of Liability.

In case of a claim under this Guarantee, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Liability or to Purchase the Indebtedness.

The Company shall have the option to pay or settle or compromise for or in the name of the Assured any claim which could result in loss to the Assured within the coverage of this Guarantee, or to pay the full amount of this Guarantee or, if this Guarantee is issued for the benefit of a holder of a mortgage or a lienholder, the Company shall have the option to purchase the indebtedness secured by said mortgage or said lien for the amount owing thereon, together with any costs, reasonable attorneys' fees and expenses incurred by the Assured claimant which were authorized by the Company up to the time of purchase.

Such purchase, payment or tender of payment of the full amount of the Guarantee shall terminate all liability of the Company hereunder. In the event after notice of claim has been given to the Company by the Assured the Company offers to purchase said indebtedness, the owner of such indebtedness shall transfer and assign said indebtedness, together with any collateral security, to the Company upon payment of the purchase price.

Upon the exercise by the Company of the option provided for in Paragraph (a) the Company's obligation to the Assured under this Guarantee for the claimed loss or damage, other than to make the payment required in that paragraph, shall terminate, including any obligation to continue the defense or prosecution of any litigation for which the Company has exercised its options under Paragraph 4, and the Guarantee shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other Than the Assured or With the Assured Claimant.

To pay or otherwise settle with other parties for or in the name of an Assured claimant any claim assured against under this Guarantee, together with any costs, attorneys' fees and expenses incurred by the Assured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of the option provided for in Paragraph (b) the Company's obligation to the Assured under this Guarantee for the claimed loss or damage, other than to make the payment required in that paragraph, shall terminate, including any obligation to continue the defense or prosecuion of any litigation for which the Company has exercised its options under Paragraph 4.

7. Determination and Extent of Liability.

This Guarantee is a contract of Indemnity against actual monetary loss or damage sustained or incurred by the Assured claimant who has suffered loss or damage by reason of reliance upon the assurances set forth in this Guarantee and only

to the extent herein described, and subject to the Exclusions From Coverage of This Guarantee.

The liability of the Company under this Guarantee to the Assured shall not exceed the least of:

(a) the amount of liability stated in Schedule A or in Part 2;

(b) the amount of the unpaid principal indebtedness secured by the mortgage of an Assured mortgagee, as limited or provided under Section 6 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage assured against by this Guarantee occurs, together with interest thereon; or

(c) the difference between the value of the estate or interest covered hereby as stated herein and the value of the estate or interest subject to any defect, lien or encumbrance assured against by this Guarantee.

8. Limitation of Liability.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures any other matter assured against by this Guarantee in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as stated herein.

(c) The Company shall not be liable for loss or damage to any Assured for liability voluntarily assumed by the Assured in settling any claim or suit without the prior written consent of the Company.

9. Reduction of Liability or Termination of Liability.

All payments under this Guarantee, except payments made for costs, attorneys' fees and expenses pursuant to Paragraph 4 shall reduce the amount of liability pro tanto.

10. Payment of Loss.

(a) No payment shall be made without producing this Guarantee for endorsement of the payment unless the Guarantee has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within thirty (30) days thereafter.

11. Subrogation Upon Payment or Settlement.

Whenever the Company shall have settled and paid a claim under this Guarantee, all right of subrogation shall vest in the Company unaffected by any act of the Assured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the Assured would have had against any person or property in respect to the claim had this Guarantee not been issued. If requested by the Company, the Assured shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The Assured shall permit the Company to sue, compromise or settle in the name of the Assured and to use the name of the Assured in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the Assured the Company shall be subrogated to all rights and remedies of the Assured after the Assured shall have recovered its principal, interest, and'costs of collection.

12. Arbitration.

Unless prohibited by applicable law, either the Company or the Assured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Assured arising out of or relating to this Guarantee, any service of the Company in connection with its issuance or the breach of a Guarantee provision or other obligation. All arbitrable matters when the Amount of Liability is $1,000,000 or less shall be arbitrated at the option of either the Company or the Assured. All arbitrable matters when the amount of liability is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the Assured. The Rules in effect at Date of Guarantee shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permits a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

13. Liability Limited to This Guarantee; Guarantee Entire Contract.

(a) This Guarantee together with all endorsements, if any, attached hereto by the Company is the entire Guarantee and contract between the Assured and the Company. In interpreting any provision of this Guarantee, this Guarantee shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, or any action asserting such claim, shall be restricted to this Guarantee.

(c) No amendment of or endorsement to this Guarantee can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

14. Notices, Where Sent.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this Guarantee and shall be addressed to the Company at _____.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityMarketable TitleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
D. Guarantees

11-26A California Legal Forms--Transaction Guide § 26A.231

§ 26A.231 Chain of Title Guarantee

[1] Comment

[a] Use of Form

This form is the chain of title guarantee form (CLTA Guarantee Form No. 6) approved for use by the California Land Title Association (CLTA) and revised as of June 6, 1992. The form is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are copied from that publication.

A chain of title guarantee may be purchased by any person who wishes to determine the priorities of various recorded instruments. It lists all deeds and other recorded instruments in the chain of title, disclosing the recording date and the names of all parties to each instrument. The guarantee will cover any period of time specified in the guarantee. It may begin with an original Spanish or Mexican land grant or a state or federal patent and continue up to the present date. Alternatively, it may commence with some other date stated in the request. Since charges for chain of title guarantees are based on the number of documents reported, it is common to request that the title company issue a guarantee for a relatively short span of years.

In addition to determining the priority of various instruments, the chain of title guarantee may be useful in disclosing whether a particular instrument is in the chain of title, whether there has been a merger of title, and the nature and type of the interest held by a particular party.

For a general discussion of the characteristics and uses of title guarantees, see *§§ 26A.16, 26A.230[1][b]*.

[b] Contents of Form

The CLTA-recommended chain of title guarantee guarantees the named assured against actual monetary loss or damage, not exceeding the liability amount stated in the guarantee, that the assured may sustain by reason of any incorrectness in the assurances set forth in the guarantee. The assurances are based on the public records which, under the recording laws, impart constructive notice [*see § 26A.11 [4]*]. However, they relate only to an interest in the

specified land which was acquired or reserved by a named person pursuant to a specified instrument (such as a deed). The assurances are that the only matters appearing in those records subsequent to a specified date are those listed in the guarantee.

By its terms, the guarantee does not cover taxes, assessments, and related matters, or instruments, proceedings, or other matters that do not specifically describe the land.

[2] FORM

Chain of Title Guarantee

CHAIN OF TITLE GUARANTEE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE, AND SUBJECT TO THE FURTHER EXCLUSION AND LIMITATION THAT NO GUARANTEE IS GIVEN NOR LIABILITY ASSUMED WITH RESPECT TO THE IDENTITY OF ANY PARTY NAMED OR REFERRED TO IN SCHEDULE A OR WITH RESPECT TO THE VALIDITY, LEGAL EFFECT OR PRIORITY OF ANY MATTER SHOWN THEREIN,

BLANK TITLE INSURANCE COMPANY,
a corporation, herein called the Company

GUARANTEES

the Assured named in Schedule A against actual monetary loss or damage not exceeding the liability amount stated in Schedule A which the Assured shall sustain by reason of any incorrectness in the assurances set forth in Schedule A.

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signature

SCHEDULE A
Chain of Title Guarantee

Order No. _____ Liability _____Fee $ _____[Guarantee No. _____]

1. Name of Assured:

2. Date of Guarantee:

The assurances referred to on the face page are:

That according to those public records which, under the recording laws, impart constructive notice of matters relating to

the interest, if any, which was _____[acquired *or* reserved] by

pursuant to a _____ [*identify instrument*] in and to the land described as follows:

Only the following matters appears in such records subsequent to _____:

This Guarantee does not cover:

1. Taxes, assessments, and matters related thereto.

[*Delete following if G.I. run is made:*]

2. Instruments, proceedings, or other matters which do not specifically describe said land.

[*Here add full text of Guarantee Conditions and Stipulations as shown in § 26A.230[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & Encroachments



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
D. Guarantees

11-26A California Legal Forms--Transaction Guide § 26A.232

§ 26A.232 Lot Book Guarantee

[1] Comment

[a] Use of Form

This form is the lot book guarantee (CLTA Guarantee Form No. 12) approved for use by the California Land Title Association (CLTA) and revised as of June 6, 1992. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

[b] Lot Book Guarantees In General

A lot book guarantee is used to supply and guarantee the accuracy of information relating to the condition of a title as revealed by the title company's "lot books." The "lot books" are title records maintained by the title company in its own "plant" and indexed according to lot or parcel, not according to name. This method of preserving title records contrasts sharply with the grantor and grantee indexes maintained by county recorders, in which instruments are indexed only according to the names of the parties [for a general discussion of lot books and their use in the modern title insurance industry, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, C. 92, *Title Insurance* (Matthew Bender)].

The lot book guarantee specifically provides that it is prepared according to the issuing company's property records maintained for the particular lot or parcel and without examination of the company's records maintained and indexed by name. For this reason, it is offered at a lower premium than guarantees prepared from the public records.

For a general discussion of the characteristics and uses of title insurance guarantees, see *§§ 26A.16, 26A.230[1][b]*.

[c] Not Based on Examination of Public Records

A lot book guarantee may not be relied on as a representation that the subject property is free and clear of liens and encumbrances. In one case, the purchaser of property at an execution sale examined a lot book guarantee issued to the attorney for the executing creditor. Relying on the lot book guarantee, the purchaser acquired the property. Later, the

purchaser discovered that a deed of trust appearing of record against the subject property was not disclosed in the guarantee. Pointing out that the guarantee explicitly stated that it was based on the title company's lot book records, that the county recorder's grantor-grantee indexes had not been examined, and that the title insurer made no representation as to the state of the official public records, the Court of Appeal held that the purchaser was not entitled to rely on the guarantee as a representation that the property was unclouded and free of encumbrances [*Harrison v. Commonwealth Land Title Ins. Co. (1979) 97 Cal. App. 3d 973, 975, 159 Cal. Rptr. 209]* .

[2] FORM

Lot Book Guarantee

LOT BOOK GUARANTEE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE, AND SUBJECT TO THE FURTHER EXCLUSION AND LIMITATION THAT NO GUARANTEE IS GIVEN NOR LIABILITY ASSUMED WITH RESPECT TO THE IDENTITY OF ANY PARTY NAMED OR REFERRED TO IN SCHEDULE A OR WITH RESPECT TO THE VALIDITY, LEGAL EFFECT OR PRIORITY OF ANY MATTER SHOWN THEREIN,

BLANK TITLE INSURANCE COMPANY,
a corporation, herein called the Company

GUARANTEES

the Assured named in Schedule A against actual monetary loss or damage not exceeding the liability amount stated in Schedule A which the Assured shall sustain by reason of any incorrectness in the assurances set forth in Schedule A.

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signature

SCHEDULE A
Lot Book Guarantee

Order No. _____ Liability _____Fee $ _____[Guarantee No. _____]

1. Name of Assured:

2. Date of Guarantee:

The assurances referred to on the face page hereof are:

That according to the Company's property records relative to the following described land (but without examination of

those Company records maintained and indexed by name):

A. The last recorded instrument purporting to transfer title to said land is:

B. There are no mortgages or deeds of trust which purport to affect title to said land, other than those shown below under Exceptions.

[*Insert C, below, upon request:*]

C. There are no [*detail matters to be covered, e.g.:* homesteads, agreements to convey, attachments, notices of non-responsibility, notices of completion, tax deeds] which purport to affect title to said land other than shown below under Exceptions.

No guarantee is made regarding (a) matters affecting the beneficial interest of any mortgage or deed of trust which may be shown herein as an exception, or (b) other matters which may affect any such mortgage or deed of trust.

No guarantee is made regarding any liens, claims of liens, defects or encumbrances other than those specifically provided for above, and, if information was requested by reference to a street address, no guarantee is made that said land is the same as said address.

Exceptions:

[*Here add full text of Guarantee Conditions and Stipulations as shown in § 26A.230[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
D. Guarantees

11-26A California Legal Forms--Transaction Guide § 26A.233

§ 26A.233 Property Search Guarantee

[1] Comment

[a] Use of Form

This form is the property search guarantee form (CLTA Guarantee Form No. 13) approved for use by the California Land Title Association (CLTA) as of June 6, 1992. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

A property search guarantee (sometimes referred to as a "name run search") begins with the name of a particular person (rather than with a property description or location) and reveals real property owned by that person in a particular county. The guarantee may also include a list of existing mortgages and deeds of trust that stand in the name of a particular person.

For a general discussion of the characteristics and uses of title guarantees, see *§§ 26A.16, 26A.230[1][b]*.

An attorney may find the property search guarantee to be a useful tool in various situations. An attorney representing a judgment creditor or prospective plaintiff may use the property search guarantee to discover property owned by the judgment debtor or prospective defendant. The guarantee may also be used by an attorney representing a decedent's estate or a conservatorship to locate property owned by the decedent or conservatee.

[b] Use In Conjunction With Other Guarantees

If the property search guarantee reveals that property in the county stands in the name of the particular judgment debtor or debtors, the attorney may find it useful to order another more specific or comprehensive guarantee, such as a litigation guarantee [*see § 26A.230*] or a lot book guarantee [*see § 26A.232*], to specifically identify the property owned and the nature or extent of the debtor's interest in it.

[2] FORM

Property Search Guarantee

PROPERTY SEARCH GUARANTEE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE, AND SUBJECT TO THE FURTHER EXCLUSION AND LIMITATION THAT NO GUARANTEE IS GIVEN NOR LIABILITY ASSUMED WITH RESPECT TO THE IDENTITY OF ANY PARTY NAMED OR REFERRED TO IN SCHEDULE A OR WITH RESPECT TO THE VALIDITY, LEGAL EFFECT OR PRIORITY OF ANY MATTER SHOWN THEREIN,

BLANK TITLE INSURANCE COMPANY,
a corporation, herein called the Company

GUARANTEES

the Assured named in Schedule A against actual monetary loss or damage not exceeding the liability amount stated in Schedule A which the Assured shall sustain by reason of any incorrectness in the assurances set forth in Schedule A.

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signature

SCHEDULE A
Property Search Guarantee

Order No. _____ Liability _____Fee $ _____[Guarantee No. _____]

1. Name of Assured:

2. Date of Guarantee:

The assurances referred to on the face page hereof are:

That according to the official name index to the latest equalized assessment roll of _____ County, California, and the indices of the County Recorder of said County subsequent to _____, with respect to the name(s) of

The following described land was assessed or acquired in the above name(s) and has not thereafter been transferred:

[*Insert following upon request, indicating commencement date of search:*]

And that, according to the indices of the County Recorder of said County subsequent to _____, with

respect to said name, the following described mortgages and deeds of trust were acquired in the above name(s) and have not thereafter been assigned nor fully released or reconveyed:

[*Here add full text of Guarantee Conditions and Stipulations as shown in § 26A.230[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.234

§ 26A.234 Subdivision Guarantee

[1] Comment

[a] Use of Form

This form is the form of subdivision guarantee (CLTA Guarantee Form No. 14) approved for use by the California Land Title Association (CLTA) and revised as of April 10, 1975. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission.

[b] Purpose of Subdivision Guarantees

Under the Subdivision Map Act [*Gov. Code §§ 66410-66499.37*], all parties having any record title interest in real property that is to be subdivided must sign and acknowledge a certificate by which they consent to the preparation and recordation of the subdivision map [*Gov. Code § 66436*]. The certificate must be filed with the map [*Gov. Code § 66436*]. To assure themselves that all of the necessary signatures are on the certificate, public officials customarily withhold approval of final subdivision maps until appropriate subdivision guarantees have been issued [for a general discussion of the Subdivision Map Act, *see* the Legal Background to C. 30, *Subdivision Regulation*].

The CLTA-approved subdivision guarantee is issued in favor of a named county and any city within which the subdivision is located. It provides assurance that, according to the public records which impart constructive notice of matters affecting the title to the subdivision land [for a discussion of constructive notice and title insurance, *see § 26A.11[4], [5]*], the only parties having any record title interest whose signatures are necessary under the Subdivision Map act are as specified in the guarantee.

For a general discussion of the characteristics and uses of title guarantees, see *§§ 26A.16, 26A.230[1][b]*.

[2] FORM

Subdivision Guarantee

SUBDIVISION GUARANTEE

Fee: $_____
No.: _____
Subdivision: _____

BLANK TITLE INSURANCE COMPANY
a corporation

GUARANTEES

The County of _____ and any City within which said subdivision is located in a sum not exceeding $1,000.00

That, according to those public records which, under the recording laws, impart constructive notice of matters affecting the title to the land included within the exterior boundary shown on the map of the above referenced subdivision, the only parties having any record title interest in said land whose signatures are necessary, under the requirements of the Subdivision Map Act, on the certificates consenting to the recordation of said map and offering for dedication any streets, roads, avenues and other easements offered for dedication by said map are: _____
_____

The map hereinbefore referred to is a subdivision of:
_____
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____
Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationReal Property LawTitle QualityGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.235

§ 26A.235 Trustee's Sale Guarantee

[1] Comment

[a] Use of Form

This form is the trustee's sale guarantee form (CLTA Guarantee Form No. 22) approved for use by the California Land Title Association (CLTA) and revised as of August 9, 1994. It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

The trustee's sale guarantee provides important title information relating to property that is subject to foreclosure, either through exercise of a power of sale contained in a deed of trust or by judicial proceedings [for a general discussion of foreclosure, *see* the Legal Background to Ch. 25D, "Foreclosure"]. Because this information will help to protect the beneficiary against irregularities in the foreclosure sale, it should be known before the foreclosure is initiated.

For a general discussion of the characteristics and uses of title guarantees, see *§§ 26A.16, 26A.230[1][b]*.

[b] Content of Form

Among other information, the CLTA-recommended trustee's sale guarantee includes the names and addresses of persons who have recorded requests for and who are entitled to receive copies of notice of default and sale. The form also discloses the city in which the property is located (or, if the property is not in a city, the judicial district). Finally, it contains a reminder that the sale may be inhibited if the trustor is entitled to the benefits of the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] and that the Federal Tax Lien Act of 1966 [*I.R.C. § 6323* et seq.] requires that certain notices be given to the Secretary of the Treasury if a federal tax lien is to be discharged.

[2] FORM

Trustee's Sale Guarantee

TRUSTEE'S SALE GUARANTEE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE LIMITS OF LIABILITY AND THE OTHER PROVISIONS OF THE CONDITIONS AND STIPULATIONS HERETO ANNEXED AND MADE A PART OF THIS GUARANTEE,

BLANK TITLE INSURANCE COMPANY
a corporation, herein called the Company

GUARANTEES
the Assured named in Part 2 of this Guarantee

against loss not exceeding the liability amount stated in Part 2 which the assured shall sustain by reason of any incorrectness in the assurance which the Company hereby gives that, according to the public records, as of the Date of Guarantee shown in Part 2:

1. The title to the herein described estate or interest was vested in the vestee named, subject to the matters shown as Exceptions herein, which Exceptions are not necessarily shown in the order of their priority;

2. The names and addresses of persons who have recorded requests, as provided by Section 2924b(a) and (d) of the Civil Code, for a copy of notice of default and for a copy of notice of sale are as shown herein;

3. The names and addresses of additional persons who, as provided by Section 2924b(c)(1) and (2) of the Civil Code, are entitled to receive a copy of notice of default and a copy of notice of sale are as shown herein;

4. The names and addresses of state taxing agencies which, as provided by *Section 2924b(c)(3) of the Civil Code*, are entitled to receive a copy of notice of sale, are as shown herein; and

5. The herein described land is located in the city of judicial district stated herein and, if designated, the newspaper or newspapers listed herein qualify for publication of notice pursuant to *Section 2924f of the Civil Code*.

BLANK TITLE INSURANCE COMPANY
By: _____

Dated: _____

Guarantee No. _____ .....Liability $ _____

Date of Guarantee: _____ .....Fee $ _____

1. Name of Assured:

2. The estate or interest in the land hereinafter described or referred to covered by this Guarantee is:

3. Title to said estate or interest at the date hereof is vested in:

4. The land referred to in this Guarantee is situated in the State of California, County of

_____ , and is described as follows:

5. EXCEPTIONS:

INFORMATION FOR TRUSTEE

Guarantee No. _____

Relative to the Deed of Trust shown as Exception _____ in Part 2.

1. City in which said land is located:

If not in the city, judicial district in which said land is located:

2. Legal publication:

3. The names and addresses of persons who have recorded requests, as provided by Section 2924b(a) and (d) of the Civil Code, for a copy of Notice of Default and for a copy of Notice of Sale are:

4. The names and addresses who, as provided by Section 2924b(c)(1) and (2) of the Civil Code, are entitled to receive a copy of Notice of Default and a copy of Notice of Sale are:

5. The names and addresses of state taxing agencies which, as provided by *Section 2924b(c)(3) of the Civil Code*, are entitled to receive a copy of Notice of Sale are:

6. Attention is called to the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*], the provisions of *Military and Veterans Code Sections 400 to 409.11*, and the Military Reservist Relief Act of 1991 (*Sections 800 to 810, Military and Veterans Code*),n1 which contain inhibitions against the sale of land under a deed of trust if the owner is entitled to the benefits of said Acts.

7. Attention is called to the Federal Tax Lien Act of 1966 (Public Law 89-719) which, among other things, provides for the giving of written Notice of Sale in a specified manner to the Secretary of the Treasury or his or her delegate as a requirement for the discharge or divestment of a Federal Tax Lien in a nonjudicial sale, and establishes with respect to such lien a right in the United States to redeem the property within a period of 120 days from the date of any such sale.

[*The arrangement and language of the matters shown in this Part 3 is to be in accordance with the practices of the issuing member company.*]

[*Here add full text of Guarantee Conditions and Stipulations as shown in § 26A.230[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawTitle QualityGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Discharges of Property & Release of Liens

FOOTNOTES:

(n1)Footnote 1. *Now see Mil. & Vet. Code § 800 et seq.*, entitled the California Military Families Financial Relief Act, as added by Stats. 2005, ch. 291.



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11-26A California Legal Forms--Transaction Guide §§ 26A.236-26A.249

[Reserved]

§§ 26A.236[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Policies

11-26A California Legal Forms--Transaction Guide § 26A.250

§ 26A.250 CLTA Standard Coverage Policy (1990)

[1] Comment

[a] Use of Form

This form is the CLTA Standard Coverage Policy (1990). It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are copied verbatim from that publication.

The CLTA Standard Coverage Policy (1990) is the most commonly used title insurance policy in California. It is a "joint protection" policy designed to provide title insurance protection for both owners and non-institutional lenders. Unlike the ALTA Loan Policy [*see § 26A.251*] and the ALTA Owner's Policy [*see § 26A.252*], the CLTA Standard Coverage Policy affords protection against title defects, liens, and encumbrances that appear from the public records, but not against defects or other matters that might be determined by inspecting the property or inquiring of those in possession. The ALTA Loan Policy (which is designed to afford title protection to lenders) and the ALTA Owner's Policy (which is designed to afford title protection to landowners) are "extended coverage" policies that afford protection against many off-record as well as on-record risks.

The CLTA Standard Coverage Policy may be used to cover any insurable estate or interest in land. Among others, the interests of lessees, sublessees, secured creditors, and owners of easements or rights of way may be insured under the policy.

For the ALTA Loan Policy, see *§ 26A.251[2]*. For the ALTA Owner's Policy, see *§ 26A.252[2]*.

[b] Parties Covered

The general rule is that title insurance protection extends only to those persons and entities who are identified in the policies as the "insured." Accordingly, third parties may not recover on the policy unless they are named in it [*see* discussion in *§ 26A.17[10]*]. The CLTA Standard Coverage Policy (1990) names the "insured" (who may be the purchaser of the property, a lender on the property, or both the purchaser and the lender), but broadens the definition of

"insured" to include those who succeed to the interest of the insured by operation of law (as distinguished from purchase), including heirs, distributees, devisees, survivors, personal representatives, and corporate or fiduciary successors [Conditions and Stipulations, P 1(a)]. The protected persons and entities also include [Conditions and Stipulations, PP 1(a), 2(a), 12(c)]:

- The owner of an indebtedness insured by the secured mortgage or deed of trust and each successor in ownership of that indebtedness (except any successor who acquires the indebtedness as the result of an indemnity contract, a guarantee, a bond, or some other policy of insurance).

- Lenders who acquire an estate or interest in the property through foreclosure, trustee's sale, or conveyance in lieu of foreclosure.

- Any parent or wholly-owned subsidiary of an insured corporation.

- The corporate successors of an insured corporation, providing they have succeeded to the interests of the insured corporation by operation of law and not by purchase.

- Any governmental agency that insures or guarantees the indebtedness secured by an insured mortgage or that acquires all or part of the interest or interest pursuant to a contract of insurance or guaranty.

The policy does not protect any person or entity who purchases the insured property or indebtedness from the insured [Conditions and Stipulations, P 2(b)].

[c] Coverage Period

Coverage is provided as of the date of the policy, and liens created or defects arising after the date of the policy are not covered [Exclusions from Coverage, P 3(c)]. Thus, there is no protection against tax liens arising after the policy date, even though those liens may have priority over previously created deeds of trust. Similarly, the policy does not cover taxes or assessments that are not shown as existing liens by the records of any taxing authority, although the taxes or assessments may later become liens [Schedule B, Exceptions from Coverage, Part I, P 1].

Coverage as of the policy date will continue in force as long as the insured retains an estate or interest in the land or owns an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or for as long as the insured has liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the insured's estate or interest in the insured property [Conditions and Stipulations, P 2(b)].

[d] Property Covered

The policy covers a specified interest or estate (e.g., a fee, a leasehold, or a remainder interest) in a particularly described tract or parcel of land. As used in the policy, "land" includes the real property described in the policy and any improvements affixed to the property that, by law, constitute real property [Conditions and Stipulations, P 1(f)]. If, however, improvements that the insured believes to be on the insured property are in fact on adjoining property, coverage does not extend to those improvements [Conditions and Stipulations, P 1(f); *Walters v. Marler (1978) 83 Cal. App. 3d 1, 15, 17, 147 Cal. Rptr. 655]* .

Specifically excluded from coverage are rights, titles, interests, estates, or easements in land beyond the boundaries of the described property or in abutting streets, roads, avenues, alleys, lanes, ways, or waterways [Conditions and Stipulations, P 1(f)]. Similarly, the policy affords no protection against discrepancies, conflicts in boundary lines, shortages in area, encroachments, or any other facts which a correct survey would disclose and which are not shown by

the public records [Schedule B, Exceptions from Coverage, Part I, P 4].

Policy coverage does not extend to adjoining property. Thus, the insurer is not liable for coverage of a tract larger than that described in the policy [*Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 543, 115 Cal. Rptr. 257]* , nor for adjoining land created by abandonment of a street [*Murray v. Title Ins. & Trust Co. (1967) 250 Cal. App. 2d 248, 256, 58 Cal. Rptr. 273]* . However, coverage may be extended if the property description in the policy is ambiguous. Since ambiguities in insurance policies are generally construed against the insurers [*see § 26A.17 [4]*], if the policy description can be read in two ways, one of which extends the benefits of the policy to approximately twice as much land as the other, the court will adopt the description that is most favorable to the insured [*Lagomarsino v. San Jose etc. Title Ins. Co. (1960) 178 Cal. App. 2d 455, 464 465, 3 Cal. Rptr. 80]* .

[e] Protection Against Record Risks

[i] In General

The policy insures against loss or damage (not exceeding the amount of the insurance set forth in Schedule A) that the insured may sustain by reason of various risks revealed by those public records that impart constructive notice of their contents [*see* discussion in *§ 26A.11[4]*].

[ii] Vesting

The first "record" risk insured against is loss or damage that the insured may sustain by reason of title being vested other than as stated in Schedule A of the policy [Insuring Clause, P 1]. The vesting clause is critical, since vesting of title in some form other than that shown in the policy may result in a total loss to the insured [*see Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 Cal. App. 2d 421, 429, 342 P.2d 362* ; *Yeoman v. Sawyer (1950) 99 Cal. App. 2d 43, 221 P.2d 225* (titles not vested in joint tenancy as shown in policy)].

[iii] Defects, Liens, or Encumbrances

The policy also insures against defects in, or liens or encumbrances on, the insured's title [Insuring Clause, P 2]. Such matters as recorded mortgages [*see Macfarlane v. Faulkner (1934) 1 Cal. App. 2d 722, 723 724, 37 P.2d 161]* , abstracts of judgment [*Lang v. Klinger (1973) 34 Cal. App. 3d 987, 993, 110 Cal. Rptr. 532]* , tax liens [*National H. Co. v. Title I. & T. Co. (1941) 45 Cal. App. 2d 215, 220 222, 113 P.2d 906]* , and declarations of homestead [*Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 739, 41 Cal. Rptr. 345]* are covered under this clause. However, a recorded notice of default on a senior trust deed listed as an exception in the policy is not a defect in or lien on the title of a junior lienholder and is not covered (*Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 269 270, 209 Cal. Rptr. 266]* . Although the insurer is required to report the existence of the senior trust deed, it need not report on the status of the senior trust deed. Whether payments on a senior trust deed are current or in default is not usually a matter of record and is customarily ascertained by demanding a beneficiary statement from the senior lienholder [*Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 269 270, 209 Cal. Rptr. 266* ; *see Civ. Code § 2943* (demand for statement of unpaid balance)]. For a discussion of unrecorded easements, liens, or encumbrances, which are excluded from the coverage of the policy, see [p][iv], below.

[f] Unmarketability

The policy also insures against loss or damage sustained by reason of unmarketability of the insured's title [Insuring Clause, P 3]. For a general discussion of the concept of marketability, see *§ 26A.11*. A claim of unmarketability may not be based on matters specifically excluded from coverage, such as liens, encumbrances, or defects created, suffered, assumed, or agreed to by the insured [Exclusions from Coverage, P 3(a)]; matters not known to the insurer and not recorded in the public records at the date of policy but known to the insured and not disclosed in writing to the insurer before the issuance of the policy [Exclusions from Coverage, P 3(b)]; or matters attaching or created after the date of the

policy [Exclusions from Coverage, P 3(d); *Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 664, 172 Cal. Rptr. 248]* .

[g] Access

The policy also insures against loss or damage resulting from lack of a right of access to and from the land [Insuring Clause, P 4]. This protection, however, does not extend to "landlocked" lots or other parcels that do not abut on physically open streets or highways, or to a right to cross over abutting property to obtain access to a street [*Lincoln Sav. & Loan Assn. v. Title Ins. & Trust Co. (1975) 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219* ; *see Lincoln Sav. & Loan Assn. v. Riviera Estates Assn. (1970) 7 Cal. App. 3d 449, 87 Cal. Rptr. 150]* . Only the "ordinary rights" of an abutting owner to convenient use of the street and to direct and reasonable ingress to and egress from the abutting land to the street are covered [*Lincoln Sav. & Loan Assn. v. Title Ins. & Trust Co. (1975) 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219]* .

[h] Invalidity of or Priority over Insured Lien

If the insured is the holder of a mortgage or deed of trust that is insured under the policy, the policy will also cover loss or damage resulting from the invalidity or enforceability of the lien of the insured mortgage or deed of trust, and the priority of any other lien over the lien of the insured mortgage or deed of trust [Insuring Clause, PP 5, 6]. However, if the mortgage or deed of trust is invalid or unenforceable because of the insured's failure at the date of the policy to comply with applicable doing business laws, or because of any violation of usury, consumer credit, or truth-in-lending laws, the policy provides no coverage [Exclusions from Coverage, PP 4, 5].

[i] Invalidity or Unenforceability of Assignment

If the insured is the assignee of a mortgage or deed of trust that is insured under the policy, and if the assignment is shown in Schedule B, the policy will also cover loss or damage resulting from any invalidity or enforceability of the assignment, or any failure of the assignment to vest title to the insured mortgage or deed of trust in the name of the insured free and clear of all liens [Insuring Clause, P 7].

[j] Protection Against Off-Record Risks In General

In addition to protection against risks that are revealed by public records that impart constructive notice, the policy affords important coverage against certain risks that are not revealed in the public records. Because the off-record risks covered by the policy have the potential for defeating or substantially impairing the insured's title, protection against them is one of the most valuable benefits of the policy.

[k] Forgery

An insurer who insures that title will be "vested" as shown in the policy is liable if, because of forgeries in the insured's chain of title, the title is not so vested [*Hopkins v. Fresno County A. Co. (1918) 36 Cal. App. 699, 702, 173 P. 106]* . Similarly, a policy that insures against any "defect or invalidity" in an insured title covers loss occasioned by the forgery of a document essential to the insured title [*California Pac. T. & T. Co. v. MacArthur (1934) 1 Cal. App. 2d 323, 327, 36 P.2d 413]* . By insuring that the title is vested as shown in the policy [Insuring Clause, P 1] and that there are no defects in or liens or encumbrances on the title [Insuring Clause, P 2], the CLTA Standard Coverage Policy affords protection against forgery.

While the risk of forgery is remote, a loss from forgery is potentially devastating. If a signature to one of the instruments in the insured's chain of title is forged, the insured title may be entirely defeated [*Wutzke v. Bill Reid Painting Service, Inc. (1984) 151 Cal. App. 3d 36, 43, 198 Cal. Rptr. 418]* . A forged document is a nullity and cannot be made the basis for any claim of title; not even a bona fide purchaser for value and without notice may rely on a

forged document, as the title of a bona fide purchaser also depends on a good title [*Firato v. Tuttle (1957) 48 Cal. 2d 136, 139, 308 P.2d 333]* . If a deed is void, it follows that any claim of title flowing from that deed is similarly void [*Wutzke v. Bill Reid Painting Service, Inc. (1984) 151 Cal. App. 3d 36, 44, 198 Cal. Rptr. 418]* .

[l] Lack of Capacity or Status

Various factors, including age, mental competency, and marital status may impair the capacity or status of one of the grantors in the insured's chain of title and thereby render a conveyance void. A void conveyance cannot be the foundation of a good title, even under the rules of bona fide purchase [*Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 276 277, 251 P.2d 1003]* . Thus, if a conveyance is void, the title may be defective or wholly invalid.

For example, a minor has no power to make a contract relating to real property [*Fam. Code § 6701*] or to convey real property by deed [*Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 137, 225 P.2d 238]* . A conveyance by a person who is incompetent in fact, although not judicially adjudged as such, may be rescinded [*Civ. Code §§ 38, 39*; *see Prob. Code §§ 810-812* (evidentiary requirements for showing of incapacity)], while the conveyance of a person duly adjudged to be incompetent is void and passes no title whatever [*Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 276, 251 P.2d 1003]* . The general rule is that a married person lacks the capacity to sell or encumber community real property unless his or her spouse joins in the transaction [*Fam. Code § 1102(a)*]. If real property stands in the name of one spouse alone, however, a lease, contract, mortgage, or deed executed by that spouse to a lessee, purchaser, or encumbrancer, in good faith and without knowledge of the marital relation, is presumed to be valid [*Fam. Code § 1102(c)(2)*]. The joint execution requirement and other provisions of *Family Code Section 1102* do not preclude either spouse from encumbering his or her interest in community real property, as provided in *Family Code Section 1102(e)*, to pay reasonable attorneys' fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation [*Fam. Code § 1102(e)*].

By insuring that the title is vested as shown in the policy [Insuring Clause, P 1] and that there are no defects in or liens or encumbrances on the title [Insuring Clause, P 2], the CLTA Standard Coverage Policy affords protection against lack of capacity or status.

[m] Lack of Delivery

The policy also affords protection against lack of delivery of one of the deeds in the chain of title. Since a grant of real property takes effect only on its delivery by the grantor [*Civ. Code § 1054*], if one of the instruments in the insured's chain of title was not delivered as required by law, the insured's title may be wholly defective [*Hudemann v. Dodson (1932) 215 Cal. 3, 6, 7 P.2d 997* ; *Promis v. Duke (1929) 208 Cal. 420, 427, 281 P. 613]* . Protection against lack of delivery is guaranteed under the policy's vesting [Insuring Clause, P 1] and defects, liens, and encumbrances [Insuring Clause, P 2] clauses.

[n] Altered or Fraudulently Obtained Deeds

If an insured sustains a loss by reason of an altered or fraudulently obtained deed, the title insurer will be liable [*Mutual B.-L. Assn. v. Security T.I. & G. Co. (1936) 14 Cal. App. 2d 225, 230 232, 57 P.2d 1392* ; *California Pac. T. & T. Co. v. MacArthur (1934) 1 Cal. App. 2d 323, 325 327, 36 P.2d 413* ; *Montgomery v. Bank of America (1948) 85 Cal. App. 2d 559, 563, 193 P.2d 475]* . Like a forged document, an altered deed [*see Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1021, 84 Cal. Rptr. 538]* or a deed obtained by fraud [*see Trout v. Taylor (1934) 220 Cal. 652, 656, 32 P.2d 968]* is ineffective to convey any title.

[o] Exclusions

[i] In General

The policy includes a schedule of six types of risks which are excluded from coverage under the policy [*see* Exclusions from Coverage]. These exclusions are generally for matters that may affect the insured land but that are not shown by the public records [for an explanation of the distinction between "exclusions" and "exceptions," *see* [p][i], *below*].

[ii] Laws, Ordinances, and Governmental Regulations

The policy excludes coverage for four classes of laws, ordinances, and regulations. These are laws, ordinances, and regulations that do the following [Exclusions from Coverage, P 1(a)]:

- Restrict, regulate, prohibit, or relate to the occupancy, use, or enjoyment of the land;
- Restrict, regulate, prohibit, or relate to the character, dimensions, or location of any improvement on the land at the time the policy is issued, or thereafter erected on it;
- Restrict, regulate, prohibit, or relate to a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; and
- Relate to environmental protection.

Coverage is also excluded for the effect of any violation of these laws, ordinances, or governmental regulations, except to the extent that a notice of the enforcement of any such law or regulation or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at the date of the policy [Exclusions from Coverage, P 1(a)].

[iii] Governmental Police Power

The policy excludes coverage for any governmental police power not embraced within the exclusion for laws, ordinances, or governmental regulations [*see* Exclusions from Coverage, P 1(a) and discussion under [ii], *above*], except to the extent that a notice of the exercise of the power or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at the date of the policy [Exclusions from Coverage, P 1(b)].

[iv] Rights of Eminent Domain

Coverage for rights of eminent domain is excluded unless notice of the exercise of the rights has been recorded in the public records at the date of the policy. However, this exclusion does not apply to any taking that has occurred before the date of the policy and that would be binding on the rights of a purchaser for value without knowledge [Exclusions from Coverage, P 2].

[v] Defects Created or Known by the Insured

The policy excludes coverage for defects, liens, encumbrances, and other matters created, suffered, assumed, or agreed to by the insured. This exclusion applies regardless of whether the matter complained of was in the public records at the date of the policy [Exclusions from Coverage P 3(a)]. A defect is not "created" by the insured, however, unless it was intentionally created and the insurer had no reasonable opportunity to discover it [*Hansen v. Western Title Ins. Co. (1963) 220 Cal. App. 2d 531, 535-536, 33 Cal. Rptr. 668]* .

The policy also excludes coverage for defects, liens, encumbrances, and other matters that were not known to the company and not recorded in the public records at the date of the policy, but that were known to the insured and not disclosed to the company prior to the date the insured became an insured under the policy [Exclusions from Coverage, P 3(b)]. To fall within the scope of this exclusion, the insured's knowledge of a defect, lien, encumbrance, or other matter

must be actual knowledge. Constructive knowledge or notice which may be imputed to an insured by reason of the public records, or any other records that impart constructive notice of matters affecting the land, is not sufficient [Conditions and Stipulations, P 1(e)].

[vi] Defects Resulting in No Loss or Damage

The policy excludes coverage for any defect, lien, encumbrance, adverse claim or other matter that results in no loss or damage to the insured [Exclusions from Coverage, P 3(c)]. This exclusion is consistent with the well-established principle that a title insurance policy is a contract of indemnity and that the insurer's duty to indemnify the insured arises only after the insured has suffered loss or damage covered by the policy [*Cale v. Transamerica Title Insurance (1990) 225 Cal. App. 3d 422, 425-426, 275 Cal. Rptr. 107* ; *see* Conditions and Stipulations, P 7]. If no loss or damage has been suffered, the insurer has no duty to indemnify the insured [*Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 122-123, 331 P. 2d 742]* . For further discussion, see *§ 26A.17[7]*.

[vii] Defects Arising After Issuance of Policy

The policy provides no coverage for defects, liens, encumbrances, adverse claims or other matters attaching or created after the date of the policy [Exclusions from Coverage, P 3(d)]. This recognizes the fact that a title insurance policy provides coverage only as of the date of the policy [*see* [c], *above*].

[viii] Loss Caused Because Insured Did Not Pay Value

The policy excludes coverage for defects, liens, encumbrances, adverse claims, or other matters resulting in loss or damage which would not have been sustained if the insured had paid value for the insured mortgage or deed of trust, or for the estate or interest insured by the policy [Exclusions from Coverage, P 1(e)]. This exclusion has the effect of limiting the policy's protection to those who are entitled to the protection of the recording laws [*see* Rooney, *Title Insurance: A Primer for Attorneys, 14 Real Prop., Prob. & Tr. J. 608, 615 (1979)*]. California recording laws protect only purchasers or encumbrances in good faith and for valuable consideration [Civ. Code P 1214]. For further discussion, see *§ 26A.11[4]*.

[ix] Noncompliance with Doing Business and Creditor Protection Laws

The policy excludes coverage for certain matters that apply only to an insured mortgage or deed of trust and that arise out of the failure of the insured to comply with laws relating to lending and the business of lending. No coverage is provided for the unenforceability of the lien of an insured mortgage or deed of trust if the unenforceability is due to the insured's failure or inability at the date of the policy to comply with applicable doing business laws of the state in which the land is situated [Exclusions from Coverage, P 4]. Coverage is also excluded if a subsequent owner of the indebtedness is unable or fails to comply with those laws [Exclusions from Coverage, P 4].

The policy also excludes coverage for any invalidity or unenforceability of the lien of the insured mortgage or deed of trust that arises out of the transaction evidenced by the insured mortgage and that is based upon usury or any consumer credit protection or truth in lending law [Exclusions from Coverage, P 5].

[x] Bankruptcy, Insolvency, or Creditors' Rights Laws

The policy excludes coverage for any claim that arises out of the transaction vesting in the insured the estate or interest insured by the policy, or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws [Exclusions from Coverage, P 6].

[p] Exceptions

[i] In General

The policy provides no coverage for matters that are described in the policy as "exceptions from coverage." These are listed in Schedule B. Schedule B is divided into two parts. Part I consists of a list of five types of matters that are always excepted from coverage. Part I provides space for listing additional matters that the insurer elects to except from the coverage of a particular policy. While Part I is a part of the printed policy and does not vary, Part II is tailored to the particular transaction.

Both exclusions and exceptions limit the coverage of a title insurance policy, and the distinction between them is not always clear. An exclusion usually describes a general classification of matters for which the policy provides no coverage, while an exception describes a particular defect, lien, encumbrance, or other claim affecting the insured property that is outside the coverage of the policy. For example, a defect, lien, encumbrance, or adverse claim that results in no loss or damage to the insured claimant is classified as an exclusion, while an unpaid tax lien against the insured property would be classified as an exception [Exclusions from Coverage, P 3(c); Schedule B, Exceptions from Coverage, Part II].

[ii] Taxes or Assessments

Part I of Schedule B excepts taxes or assessments that are not shown as existing liens by the public records or by the records of any taxing authority that levies taxes or assessments on real property [Schedule B, Exceptions from Coverage, Part I, P 1]. It also excepts proceedings by a public agency that may result in taxes or assessments, and any notices of such proceedings, whether or not they are shown by the public records or by the records of any such agency [Schedule B, Exceptions from Coverage, Part I, P 1].

The effect of this exception is to prohibit coverage for taxes and assessments that may be assessed against the insured land in the future but, at the time the policy is issued, have not yet become liens against that land. This exception does not affect taxes or assessments that have attached to the land and that are shown on the public records or on the records of the taxing agency at the date of the policy. Taxes and assessments of this kind must be reported on the policy, and failure to do so will subject the insurer to liability under the general terms of the insuring clause [Insuring Clause, P 2].

[iii] Unrecorded Facts That Could Be Learned by Inspecting Land

Part I of Schedule B excepts from coverage any facts, rights, interests, or claims that are not shown by the public records but that could be ascertained by an inspection of the land, or that may be asserted by persons in possession of the land [Schedule B, Exceptions from Coverage, Part I, P 2]. This exception includes rights that have been obtained by adverse possession or other prescriptive rights [*Bothin v. The California Title Ins. Co. (1908) 153 Cal. 718, 722-724, 96 P. 500]* .

[iv] Unrecorded Easements, Liens, and Encumbrances

Part I of Schedule B excepts from coverage any easements, liens, or encumbrances, or claims thereof, that are not shown by the public records [Schedule B, Exceptions from Coverage, Part I, P 3].

[v] Conflicts in Boundary Lines and Shortages in Area

Part I of Schedule B excepts from coverage any discrepancies, conflicts in boundary lines, shortage in area, or encroachments, or any other facts that a correct survey would disclose and that are not shown by the public records [Schedule B, Exceptions from Coverage, Part I, P 4].

[vi] Unpatented Mining Claims

Part I of Schedule B excepts from coverage unpatented mining claims, reservations or exceptions in patents or in acts authorizing the issuance of patents, and water rights, water claims, or title to water. The policy provides no coverage for these matters, whether or not they fall within the terms of some other exception of the policy and whether or not they are shown by the public records [Schedule B, Exceptions from Coverage, Part I, P 5].

[q] Notices and Claims

The policy prescribes certain notices that the insured must give to the insurer whenever any litigation is commenced alleging a title defect, lien, encumbrance, or other insured matter, or whenever any claim adverse to the insured estate, interest, or lien is asserted [Conditions and Stipulations, PP 3,4]. It also requires that a sworn proof of loss or damage be furnished within 90 days after the insured learns of facts giving rise to a claim under the policy [Conditions and Stipulations, P 5].

[r] Settlements

The insurer has the option to pay or otherwise settle any claim against the insured, or to terminate all liability by paying or tendering payment of the amount of the insurance provided for in the policy, together with costs, attorneys' fees, and expenses incurred up to the time of the payment or tender [Conditions and Stipulations, P 6(a)(i)].

The insurer is required to defend any litigation against the insured arising out of an insured defect, lien, or encumbrance [Conditions and Stipulations P 4(a)] and, upon payment of a claim, is subrogated to the rights of the insured [Conditions and Stipulations, P 12].

For a general discussion of title insurance liability and claims, see CALIFORNIA REAL ESTATE LAW PRACTICE, Volume 4, Chapter 92, *Title Insurance* (Matthew Bender). For discussion of actions against title insurers, and forms for complaints, cross-complaints, and answers suitable for use in actions against title insurers, *see* CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 548, *Title Insurance* (Matthew Bender).

[s] Indorsements

The CLTA Standard Coverage policy provides only basic coverage. Indorsements providing additional coverage for particular situations are available. Since indorsements are frequently attached to standard policies, the attorney should examine both the policy and indorsement to determine the extent of the protection afforded the assured. For available CLTA-approved indorsements, see *§§ 26A.260*; *26A.266.*

[2] FORM

CLTA Standard Coverage Policy (1990)

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on such title;

3. Unmarketability of the title; or

4. Lack of a right of access to and from the land;
and in addition, as to an insured lender only:

5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6. The priority of any lien or encumbrance over the lien of the insured mortgage, said mortgage being shown in Schedule B in the order of its priority;

7. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule B, or the failure of the assignment shown in Schedule B to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

[*Witness clause optional*]

BLANK TITLE INSURANCE COMPANY
By: _____
President
By: _____
Secretary

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with the applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws.

SCHEDULE A

(File No. _____) Policy No. _____

Amount of insurance $ _____ Premium $ _____

Date of Policy _____ (at a.m./p.m.)

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[*Add Paragraph 4, as shown below, or a separate Schedule C, captioned the same as Paragraph 4:*]

[4. The land referred to in this policy is described as follows:]

SCHEDULE B

(File No. _____) Policy No. _____

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

PART I

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5.

(a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.

PART II

[*The specific exceptions applicable to the estate or interest covered by the policy should be typed here*]

CONDITIONS AND STIPULATIONS

1. *Definition of Terms.*

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors. The term "insured" also includes

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage.

(c) "insured lender": the owner of an insured mortgage.

(d) "insured mortgage": a mortgage shown in Schedule B, the owner of which is named as an insured in Schedule A.

(e) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(f) "land": the land described or referred to in Schedule [A] [C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A] [C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(g) "mortgage: mortgage, deed of trust, trust deed, or other security instrument.

(h) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge.

(i) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excerpted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. *Continuation of Insurance.*

(a) *After Acquisition of Title by Insured Lender.* If this policy insures the owner of the indebtedness secured by the insured mortgage, the coverage of this policy shall continue in force as of Date of Policy in favor of (i) such insured lender who acquires all of any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) *After Conveyance of Title by an Insured.* The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land; or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from an insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to an insured.

(c) *Amount of Insurance.* The amount of insurance after the acquisition or after the conveyance by an insured lender shall in neither event exceed the least of:

(i) The amount of insurance stated in Schedule A;

(ii) The amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) The amount paid by any governmental agency or governmental instrumentality, if the agency or the instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. *Notice of Claim To Be Given by Insured Claimant.*

An insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to that insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. *Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.*

(a) Upon written request by an insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of such insured to object for reasonable cause) to represent the insured as to

those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by an insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to an insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, an insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for this purpose. Whenever requested by the Company, an insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or other proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of an insured to furnish the required cooperation, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. *Proof of Loss or Damage.*

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by each insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of an insured claimant to provide the required proof of loss or damage, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation with regard to the matter or matters requiring such proof of loss or damage.

In addition, an insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by an insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it

is necessary in the administration of the claim. Failure of an insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that insured for that claim.

6. *Options to Pay or Otherwise Settle Claims; Termination of Liability.*

In case of a claim under this policy, the Company shall have the following additional options:

(a) *To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.*

(i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) in case loss or damage is claimed under this policy by the owner of the indebtedness secured by the insured mortgage, to purchase the indebtedness secured by the insured mortgage for the amount owning thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of the option provided for in paragraph a(i), all liability and obligations to the insured under this policy, other than to make the payment required in that paragraph, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

Upon the exercise by the Company of the option provided for in paragraph a(ii) the Company's obligation to an insured lender under this policy for the claimed loss or damage, other than the payment required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

(b) *To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.*

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay: or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraph b(i) or b(ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. *Determination and Extent of Liability.*

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured

claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The Liability of the Company under this policy to an insured lender shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured lender has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The liability of the Company under this policy to an insured owner of the estate or interest in the land described in Schedule A shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(d) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. *Limitation of Liability.*

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, or, if applicable, to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable to an insured lender for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured

mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. *Reduction of Insurance; Reduction or Termination of Liability.*

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of insurance pro tanto. However, as to an insured lender, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy as to any such insured, except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company to an insured lender except as provided in Section 2(a) of these Conditions and Stipulations.

10. *Liability Noncumulative.*

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

The provisions of this Section shall not apply to an insured lender, unless such insured acquires title to said estate or interest in satisfaction of the indebtedness secured by an insured mortgage.

11. *Payment of Loss.*

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. *Subrogation Upon Payment or Settlement.*

(a) *The Company's Right of Subrogation.*

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving

these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated (i) as to an insured owner, to all rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss; and (ii) as to an insured lender, to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) *The Insured's Rights and Limitations.*

Notwithstanding the foregoing, the owner of the indebtedness secured by an insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of an insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) *The Company's Rights Against Non-insured Obligors.*

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of an insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. *Arbitration.*

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. *Liability Limited to This Policy; Policy Entire Contract.*

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. *Severability.*

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. *Notices, Where Sent.*

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at [*fill in*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
E. Policies

11-26A California Legal Forms--Transaction Guide § 26A.251

§ 26A.251 ALTA Loan Policy (10-17-92)

[1] Comment

[a] Use of Form

This form is the ALTA Loan Policy (10-17-92). It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are copied verbatim from that publication.

The ALTA Loan Policy (10-17-92) is one of two widely used "extended coverage" policies designed by the American Land Title Association (ALTA) and recommended for use by the CLTA. The other is the ALTA Owner's Policy (10-17-92) [*see § 26A.252*]. The loan policy (this form) is designed for the protection of lenders, while the owner's policy affords similar protection to landowners.

The ALTA Loan Policy, when issued without certain optional exceptions [*see* discussion in [g], *below*], affords title insurance protection against many off-record risks that are excluded from coverage under the CLTA Standard Coverage Policy (1990) [*see § 26A.250*]. When the ALTA policy is issued in this form, the insurer is in effect assuming responsibility for inspecting and in some cases surveying the insured property. Because the ALTA Loan Policy, when so issued, is based on inspection of the land as well as on examination of the public records, it provides valuable coverage for lenders who make loans on the security of real estate located outside of their home states. Therefore, prospective lenders who cannot conveniently visit the land may find the ALTA Loan Policy useful or even essential. Because the ALTA policy can be issued to provide valuable off-record protection not afforded by the CLTA Standard Coverage Policy, many institutional lenders insist that borrowers obtain an ALTA Loan Policy naming the borrowers as insured before agreeing to make a real estate loan. Because coverage under the ALTA Loan Policy can be broader than that afforded by the CLTA Standard Coverage Policy (1990), the premiums charged for it are higher and the duties undertaken by the insurer more extensive.

[b] Parties Covered

The ALTA Loan Policy is commonly procured by an institutional lender, who is named in Schedule A as the "insured."

However, the policy definition of "insured" is broad enough to extend coverage to other persons and entities as well. For example, successors to ownership of the insured mortgage (except successors who are "noninsured obligors" [*see* Conditions and Stipulations, P 12(c)]) are covered [Conditions and Stipulations, P 1(a)(i)], as are governmental agencies or instrumentalities that insure or guarantee the payment of the insured mortgage [Conditions and Stipulations, P 1(a)(ii)]. If there is a foreclosure on the insured mortgage (or if the lender acquires the land by conveyance in lieu of foreclosure), coverage continues in favor of the insured lender even after the foreclosure or conveyance [Conditions and Stipulations, PP 1(a)(iii), 2(a)].

A title insurance policy is a contract between an insurer and an insured, and third parties have no rights under the contract unless they come within the policy definition of "insured" [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 33 34, 147 Cal. Rptr. 655* ; *see* discussion in *§ 26A.17[10]*].

[c] Time of Coverage

The policy provides coverage as of the date of the policy, which is set forth in Schedule A [Insuring Clause]. Coverage will continue as of the date of the policy as long as the insured retains an estate or interest in the land, holds a purchase money mortgage or deed of trust given by a purchaser from the insured, or has liability by reason of covenants of warranty made by the insured in any transaction or conveyance of the insured estate or interest [Conditions and Stipulations, P 2(b)].

Coverage will not continue in favor of anyone who purchases from the insured (a) an estate or interest in the land or (b) an indebtedness secured by a purchase money mortgage given to the insured [Conditions and Stipulations, P 2(b)].

[d] Property Insured

Like the CLTA Standard Coverage Policy [*see § 26A.250*], the ALTA Loan policy insures a specified interest or estate in a specifically described tract or parcel of land. The policy definition of "land" includes the land described in the policy and any improvements affixed to the land that by law constitute real property [Conditions and Stipulations, P 1(d); *see Civ. Code § 660* ("fixture" defined)]. The definition does not include any property beyond the lines of the property described in the policy or any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways [Conditions and Stipulations, P 1(d)].

[e] Risks Insured Against

The policy insures against loss or damage (not exceeding the amount of the insurance specified in Schedule A) that the insured may sustain or incur by reason of any of various specified risks. These include such risks as:

- Title being vested other than as stated in Schedule A [Insuring Clause, P 1].
- Defects in or liens or encumbrances on the insured title [Insuring Clause, P 2].
- Unmarketability of the insured title [Insuring Clause, P 3].
- Lack of a right of access to and from the land [Insuring Clause, P 4].
- Invalidity or unenforceability of the lien of the insured mortgage or deed of trust [Insuring Clause, P 5], except if the invalidity or unenforceability is based on usury or any consumer credit protection or truth in lending law [Exclusions from Coverage, P 5].
- The priority of any lien or encumbrance over the lien of the insured mortgage or deed of trust

[Insuring Clause, P 6].

- Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor, or material arising from improvements or works contracted for or commenced before the date of the policy, or commenced or contracted for after the date of the policy if the insured advanced funds (or was obligated to advance funds) for the work or improvement before the date of the policy [Insuring Clause, P 7].

- Any assessments for street improvements under construction or completed as of the date of the policy that have priority over the insured mortgage or deed of trust [Insuring Clause, P 8].

[f] Exclusions

[i] In General

Some of the exclusions listed in the ALTA Loan Policy (10-17-92) are identical to exclusions listed in the CLTA Standard Coverage Policy (1990). These are:

- The exclusions for laws, ordinances, and governmental regulations [Exclusions from Coverage, P 1(a)].

- Governmental police power [Exclusions from Coverage, P 1(b).

- Rights of eminent domain [Exclusions from Coverage, P 2].

- Defects created or known by the insured [Exclusions from Coverage, P 3(a)].

- Defects known to the insured but not to the insurer [Exclusions from Coverage, P 3(b)].

- Defects resulting in no loss or damage [Exclusions from Coverage, P 3(c)].

- Defects arising after the issuance of the policy [Exclusions from Coverage, P 3(d)].

- Loss suffered because the insured did not pay value [Exclusions from Coverage, P 3(e)].

- Noncompliance with doing business and creditor protection laws [Exclusions from Coverage, P 4].

- Violations of usury or truth-in-lending laws [Exclusions from Coverage, P 5].

[ii] Bankruptcy, Insolvency, or Creditors' Rights Laws

Like the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92) excludes coverage for any claim arising out of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, but only if (1) the claim is based on the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer, (2) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination, or (3) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer, except when the preferential transfer results from the failure to timely record the instrument of transfer or the failure of the recordation to impart notice to a purchaser for value or a judgment or lien creditor [Exclusions from Coverage, P 7].

[iii] Mechanics' Liens

The ALTA Loan Policy (10-17-92) contains one exclusion that is not found in the CLTA Standard Coverage Policy (1990). This is for certain mechanics' liens for work contracted for and commenced after the policy is issued and not financed by proceeds of the insured mortgage or deed of trust that the insured has advanced or is obligated to advance at the date of policy [Exclusions from Coverage, P 6].

[g] Exceptions

[i] In General

One of the most important differences between the ALTA Loan Policy and the CLTA Standard Coverage Policy is the way in which the two policies treat exceptions [for discussion of the distinction between exclusions and exceptions, *see § 26A.250[o][i]*]. The CLTA Standard Coverage Policy lists five standard exceptions [for discussion of these exceptions, *see § 26A.250[o][ii]*]. These exceptions, which are listed in Part I of Schedule B of the CLTA Standard Coverage Policy, are matters that do not appear in the public records and that can be ascertained only by inspecting or surveying the property or by making inquiries of persons in possession.

The ALTA Loan Policy does not routinely list these standard exceptions, although it gives the insurer the option of listing them [*see* Schedule B, Exceptions from Coverage, Part I]. When the policy is issued without these exceptions, it provides valuable coverage that is not available under the CLTA Standard Coverage Policy. When the insurer elects to list the exceptions, however, the policy affords little more protection than the CLTA Standard Coverage Policy.

[ii] Particular Exceptions

Like the CLTA Standard Coverage Policy, the ALTA Loan Policy provides space for listing particular exceptions [Schedule B, Exceptions from Coverage, Part II]. These exceptions will vary from policy to policy, depending on what defects, encumbrances, liens, and other matters are discovered in the course of searching the title.

[h] Notice, Proof of Loss, and Examination

The policy requires the insured to give the insurer prompt written notice whenever litigation is commenced involving a claim adverse to the insured title or lien, and whenever the insured obtains knowledge of any claim that might cause loss or damage for which the insurer would be liable [Conditions and Stipulations, P 3]. Written notice must also be given whenever the insured title or lien is rejected as unmarketable [for a general discussion of marketable title in the context of title insurance, *see § 26A.11*]. If the insured fails to give the required notice, and if the insurer is prejudiced by the failure, then all liability of the insurer for matters as to which the notice is required will terminate [Conditions and Stipulations, P 3].

In addition to the written notice, the insured is required to furnish written and sworn proof of loss within 90 days after ascertaining the facts giving rise to the loss or damage [Conditions and Stipulations, P 5]. The proof of loss or damage must describe the defect, lien, or encumbrance and the basis of calculating the amount of the loss or damage. The insurer's liability under the policy will terminate if proof of loss is not given as required and if the failure to give proof of loss prejudices the insurer [Conditions and Stipulations, P 5].

The insurer also may require the insurer to submit to an examination under oath [Conditions and Stipulations, P 5], but the request for an examination must be reasonable [Conditions and Stipulations, P 5]. Further, the insurer may demand that the insured authorize third parties to show records, books, ledgers, checks, correspondence, and memoranda that are in the custody or control of the third parties and that reasonably pertain to the claimed loss or damage. However, the insured need not give the required permission if it would be prohibited by law or governmental regulation; and, upon demand by the insured, the insurer is bound to protect the confidentiality of any materials in the custody or control of third parties [Conditions and Stipulations, P 5].

[i] Litigation

[i] Insurer's Duty to Defend

The insurer is obligated to pay costs, attorneys' fees, and expenses incurred in defense of the insured title or lien, as insured [Insuring Clause], and, upon written request, to defend the insured in any litigation in which any third party asserts a claim adverse to the title or interest as insured [Conditions and Stipulations, P 4(a)]. The duty to provide a defense extends only to matters for which the insurer is also required to indemnify the insured against loss or damage [Insuring Clause; Conditions and Stipulations, P 4(a)]. Thus, there is no duty to provide a defense for any claim or action that does not allege some defect, lien, encumbrance, or other matter insured against by the policy [Conditions and Stipulations, P 4(a)]. The insurer has the right to select counsel to represent the insured and is not liable for the fees of any other counsel [Conditions and Stipulations, P 4(a)]. However, the insured has the right to object to a particular attorney for "reasonable cause" [Conditions and Stipulations, P 4(a)].

[ii] Insurer's Right to Commence Litigation

At its option, the insurer may institute and prosecute any action or proceeding that it deems necessary or desirable to establish the title to the insured estate, interest, or lien [Conditions and Stipulations, P 4(b)]. By taking any such action, however, the insurer does not concede liability or waive any provision of the policy [Conditions and Stipulations, P 4(b)].

[iii] Insured's Duty of Cooperation

The insured has a broad obligation of cooperation in all matters related to litigation. The insured must permit the insurer to use its name in litigation [Conditions and Stipulations, P 4(d)]. When requested, the insured must help to secure evidence, obtain witnesses, effect settlements, and do any other lawful acts that the insurer deems necessary or desirable [Conditions and Stipulations, P 4(d)]. The failure of the insured to cooperate will terminate the insurer's obligation with regard to any matter if the failure prejudices the insurer [Conditions and Stipulations, P 4(d)].

[iv] Settlement

Further, the insurer has the option to pay or otherwise settle any claim against the insured, or to pay or tender the amount of the insurance provided for in the policy together with costs, attorneys' fees, and expenses incurred up to the time of the payment or tender [Conditions and Stipulations, P 6].

[j] Arbitration

This policy contains an arbitration clause [Conditions and Stipulations, P 13]. The clause provides for arbitration of claims or controversies between the insurer and the insured arising out of or relating to the policy or any service of the insurer in connection with the issuance of the policy, the breach of a policy provision, or any obligation under the policy [Conditions and Stipulations, P 13]. Arbitration is mandatory for any claim when the amount of insurance is $1,000,000 or less and either party demands arbitration. Arbitration is mandatory when the amount of insurance is over $1,000,000 only when both the insurer and the insured agree to arbitration. Arbitration is conducted according to the Title Insurance Arbitration Rules of the American Arbitration Association, and judgment may be entered on the arbitrator's award [Conditions and Stipulations, P 13].

For further discussion of arbitration under title insurance policies, see *§ 26A.17[11]*.

For a general discussion of title insurance liability and claims, see CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender). For discussion of actions against title insurers, together with forms of complaint, cross-complaints, and answers suitable for use in actions against title insurers, *see* CALIFORNIA FORMS

OF PLEADING AND PRACTICE, Chapter 548, *Title Insurance* (Matthew Bender).

[2] FORM

ALTA Loan Policy (10-17-92)

POLICY OF TITLE INSURANCE
Issued by
BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land;

5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6. The priority of any lien or encumbrance over the lien of the insured mortgage;

7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8. Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the lien of the insured mortgage;

9. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

[*Witness clause optional*]

BLANK TITLE INSURANCE COMPANY

By _____
PRESIDENT
By _____
SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material or to the extent insurance is afforded herein as to assessments for street improvements under construction or completed at Date of Policy); or

(e) resulting in loss or damage which would not have been sustained if the insured

claimant had paid value for the insured mortgage.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or

(ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or

(iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
(a) to timely record the instrument of transfer; or

(b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

SCHEDULE A

(File No. _____) Policy No. _____

Amount of insurance $ _____ Premium $ _____

Date of Policy _____ (at a.m./p.m.)

1. Name of Insured:

2. The estate or interest in the land which is encumbered by the insured mortgage is:

3. Title to the estate or interest in the land is vested in:

4. The insured mortgage and assignments thereof, if any, are described as follows:

[*Add Paragraph 5, as shown below, or a separate Schedule C, captioned the same as Paragraph 5:*]

[5. The land referred to in this policy is described as follows:]

SCHEDULE B

(File No. _____) Policy No. _____

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

PART I

[*POLICY MAY INCLUDE THE FOLLOWING GENERAL EXCEPTIONS IF SO DESIRED BY ISSUING COMPANY*]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.]

[*VARIABLE EXCEPTIONS SUCH AS TAXES, EASEMENTS, CC & Rs, ETC.*]

Note:
If there are matters which affect the title to the estate or interest in the land described in Schedule [A] [C], but which are subordinate to the lien of the insured mortgage, Part II of Schedule B must be added, or Part I of Schedule B must contain the following statement:

"Matters which affect the title to the estate or interest, but which are subordinate to the lien of the insured mortgage"

PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule [A] [C] is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) 'insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule [A] [C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A] [C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

(a) *After Acquisition of Title.* The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) *After Conveyance of Title.* The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) *Amount of Insurance.* The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company

shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under this policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from

third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) *To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.*

(i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of either of the options provided for in paragraphs a(i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) *To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.*

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

l2. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) *The Company's Right of Subrogation.*

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

(b) *The Insured's Rights and Limitations.*

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) *The Company's Rights Against Non-insured Obligors.*

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the company at: _____.

NOTE: Bracketed [] material optional.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
E. Policies

11-26A California Legal Forms--Transaction Guide § 26A.252

§ 26A.252 ALTA Owner's Policy (10-17-92)

[1] Comment

[a] Use of Form

This form is the ALTA Owner's Policy (10-17-92). It is reprinted from the CLTA Policy & Indorsement Forms Book (Revised 1971), with permission. The instructions in the form are reproduced verbatim from that publication.

The ALTA Owner's Policy is one of two widely used "extended coverage" policies designed by the American Land Title Association (ALTA) and recommended for use by the CLTA. The other is the ALTA Loan Policy [*see § 26A.251*]. The owner's policy provides landowners with protection comparable to that provided to lenders under the loan policy. The principal difference between this policy and the CLTA Standard Coverage Policy [*see § 26A.250*] is that the CLTA Standard Coverage Policy protects the insured against title defects, liens, and encumbrances that appear from the public records, while this policy may be issued to afford protection against many "off-record," as well as "on-record," title risks [*see* [b], *below*; *see also § 26A.251[1]*].

[b] Covered Risks

The insuring clause of the ALTA Owner's Policy provides coverage against four broad classes of risks:

- Improper vesting of the insured title [Insuring Clause, P 1].
- Defects in or liens or encumbrances on the insured title [Insuring Clause, P 2].
- Unmarketability of the insured title [Insuring Clause, P 3].
- Lack of access to and from the insured land [Insuring Clause, P 4].

[c] Exclusions

[i] In General

The ALTA Owner's Policy lists some of the same exclusions that are found in the CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92). Exclusions that are found in all three of these policies are the exclusions for:

- Laws, ordinances, and governmental regulations [Exclusions from Coverage, P 1(a)].
- Governmental police power [Exclusions from Coverage, P 1(b)].
- Rights of eminent domain [Exclusions from Coverage, P 2].
- Defects created or known by the insured [Exclusions from Coverage, P 3(a)].
- Defects known to the insured but not to the insurer [Exclusions from Coverage, P 3(b)].
- Defects resulting in no loss or damage [Exclusions from Coverage, P 3(c)].
- Defects arising after the issuance of the policy [Exclusions from Coverage, P 3(d)].
- Loss suffered because the insured did not pay value [Exclusions from Coverage, P 3(e)].

The ALTA Owner's Policy does *not* include two exclusions that are found in the ALTA Loan Policy (10-17-92) and that are suitable only for policies insuring lenders. These are:

- The exclusion for noncompliance with doing business and creditor protection laws [Exclusions from Coverage, P 4].
- The exclusion for violations of usury or truth-in-lending laws [Exclusions from Coverage, P 5].

[ii] Bankruptcy, Insolvency, or Creditors' Rights Laws

Like the CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92), the ALTA Owner's Policy excludes coverage for any claim arising out of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws. However, the exclusion is applicable only if the claim is based on (1) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or (2) the transaction creating the insured estate or interest being deemed a preferential transfer, except where the preferential transfer results from the failure to timely record the instrument of transfer or the failure of the recordation to impart notice to a purchaser for value or a judgment or lien creditor [Exclusions from Coverage, P 7].

[d] Exceptions

[i] In General

One of the most important differences between the ALTA Owner's Policy (10-17-92) and the CLTA Standard Coverage Policy (1990) is the way in which the two policies treat exceptions [for distinction between exclusions and exceptions, *see § 26A.250 [p][i]*]. Like the ALTA Loan Policy (10-17-92), the ALTA Owner's Policy (10-17-92) gives the insurer the option of listing the standard exceptions that are always included in the CLTA Standard Coverage Policy (1990) [for discussion of these exceptions, *see § 26A.250[1][o][ii]*]. These exceptions, which are listed in Part I of Schedule B of the CLTA Standard Coverage Policy, are matters that do not appear in the public records and that can be ascertained

only by inspecting or surveying the property or by making inquiries of persons in possession. When the ALTA Owner's Policy (10-17-92) is issued without these standard exceptions, it provides valuable coverage that is not available under the CLTA Standard Coverage Policy. When the insurer elects to list the exceptions, however, the policy affords little more protection than the CLTA Standard Coverage Policy.

[ii] Particular Exceptions

Like the CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92), the ALTA Loan Policy provides space for listing particular exceptions [Schedule B, Exceptions from Coverage, Part II]. These exceptions will vary from policy to policy, depending on what defects, encumbrances, liens, and other matters are discovered in the course of searching the title.

[e] Coinsurance

This policy contains a coinsurance clause [*see* Conditions and Stipulations, P 7(b)]. A coinsurance clause requires that the risk of loss be divided between the insurer and the insured according to the relative amount of the insurance and the actual value of the insured property [*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 385 386, 106 Cal. Rptr. 307* ; Home Ins. Co., New York v. Eisenson (5th Cir. [Fla.] 1950) *181 F.2d 416, 418* ; *see* discussion in *§ 26.17[8]*].

Under the coinsurance clause in this policy, the risk of loss must be divided in either of two circumstances: (1) the amount of insurance at the date the policy is issued is less than 80 percent of the value of the land or the full consideration paid for the land, whichever is less; or (2) after the policy is issued, an improvement is erected on the land that increases the value of the land by at least 20 percent over the amount of the insurance shown in the policy [*see* Conditions and Stipulations, P 7(b)]. When no subsequent improvement has been made, the coinsurance clause limits the insurer's obligation to indemnify the insured to the loss pro rata in the proportion that the amount of insurance bears to the total value of the land at the date of the policy [*see* Conditions and Stipulations, P 7(b)(i)]. When the property has been improved after the policy was issued, the coinsurance clause limits the insurer's indemnity obligation for a partial loss to the loss pro rata in the proportion that 120 percent of the amount of insurance bears to the sum of the amount of insurance and the amount expended for the improvement [*see* Conditions and Stipulations, P 7(b)(ii)].

The coinsurance clause takes effect only when the actual loss is partial [*see* Conditions and Stipulations, P 7(b)(i), (ii)]. When the actual loss exceeds the amount of the insurance, there is no contribution by the insurer beyond the terms of the policy [*Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 386, 106 Cal. Rptr. 307]* .

[f] Notices, Claims, and Settlements

Like the ALTA Loan Policy [*see § 26A.251*], this policy requires the insured to give notice of claims [Conditions and Stipulations, P 3], to furnish proof of loss [Conditions and Stipulations, P 5], to cooperate with the insurer in the prosecution or defense of any litigation [Conditions and Stipulations, P 4(d)], and, on reasonable demand of the insurer, to submit to examination under oath respecting alleged defects, liens, encumbrances, or other matters for which the insurer might be liable [Conditions and Stipulations, P 5]. For a general discussion of those requirements, see *§ 26A.251[1][h]*.

This form, like the ALTA Loan Policy, also gives the insurer the option to make certain settlements and thereby terminate its liability under the policy [Conditions and Stipulations, P 6]. For a discussion of the settlement options of the insurer and the effect on the insurer's liability of exercise of those rights, see *§ 26A.251[i]*.

[g] Arbitration

This policy contains an arbitration clause identical in terms to the arbitration clause set forth in the ALTA Loan Policy [

see § 26A.251]. The clause requires that certain claims and controversies between the insured and the insurer be submitted to arbitration under the Title Insurance Arbitration Rules of the American Arbitration Association [Conditions and Stipulations, P 14]. For the rights and duties of the parties under the arbitration clause, see *§ 26A.251[1][j]*.

For a general discussion of title insurance liability and claims, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Chapter 92, *Title Insurance* (Matthew Bender). For a discussion of actions against title insurers, together with forms for complaints, cross-complaints, and answers suitable for use in actions against title insurers, *see* CALIFORNIA FORMS OF PLEADING AND PRACTICE, Chapter 548, *Title Insurance* (Matthew Bender).

[2] FORM

ALTA Owner's Policy (10-17-92)

POLICY OF TITLE INSURANCE Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

[*Witness clause optional*]

BLANK TITLE INSURANCE COMPANY
By _____
PRESIDENT

_____ Dated:

By _____
SECRETARY

Dated:

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

4. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:

(i) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

(ii) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:

(a) to timely record the instrument of transfer; or

(b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

SCHEDULE A

(File No. _____) Policy No. _____

Amount of Insurance $ _____) Premium $ _____

Date of Policy _____
(at a.m./p.m.)

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[*Add Paragraph 4, as shown below, or a separate Schedule C, captioned the same as Paragraph 4:*]

[4. The land referred to in this policy is described as follows:]

SCHEDULE B

(File No. _____) Policy No. _____

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

[*POLICY MAY INCLUDE THE FOLLOWING GENERAL EXCEPTIONS IF SO DESIRED BY ISSUING COMPANY:*

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an

inspection of the land or by making inquiry of persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.]

[*VARIABLE EXCEPTIONS SUCH AS TAXES, EASEMENTS, CC & Rs, ETC.*]

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule [A] [C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A] [C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under this policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) *To Pay or Tender Payment of the Amount of Insurance.*

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) *To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.*

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's

obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or

(ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule [A] [C] consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) *The Company's Right of Subrogation.*

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) *The Company's Rights Against Non-insured Obligors.*

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the company at: _____.

NOTE:
Bracketed [] material optional.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawPurchase & SaleGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
E. Policies

11-26A California Legal Forms--Transaction Guide §§ 26A.253-26A.259

[Reserved]

§§ 26A.253[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
F. Indorsements

11-26A California Legal Forms--Transaction Guide § 26A.260

§ 26A.260 CLTA Covenants, Conditions, and Restrictions Indorsement

[1] Comment

[a] Use of Form

This form is the Covenants, Conditions, and Restrictions Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 9, 1994. It is Form 100 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to the ALTA Loan Policy [*see § 26A.251*].

[b] Nature and Use of Indorsements

[i] In General

An indorsement adds to or amends the coverage of an insurance policy by limiting, altering, or expanding the parties' rights or obligations [*McFarland v. New Zealand Ins. Co. (1959) 176 Cal. App. 2d 422, 424, 1 Cal. Rptr. 482 ; Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 431 432, 296 P.2d 801]* . When effective, an indorsement becomes a part of the policy and cannot be separated from it [*Jew Fun Him v. Occidental Life Ins. Co. (1948) 88 Cal. App. 2d 246, 249, 198 P.2d 711]* . The original policy and the indorsement, if consistent, must be read together and construed as a whole [*Narver v. California State Life. Ins. Co. (1930) 211 Cal. 176, 181, 294 P. 393]* . If there is an inconsistency between the original policy and the indorsement, the indorsement will prevail, if it is free from ambiguity [*Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 431, 296 P.2d 801]* .

Indorsements are commonly attached to standard policies to increase or otherwise modify their coverage. Additional premiums are usually charged for indorsements, although some are made available without charge.

[ii] Spelling

The words "indorsement" and "endorsement" are used interchangeably in the legal literature and in title insurance

forms. Older CLTA forms use "indorsement," but as those forms are replaced with new versions "endorsement" is being substituted. To achieve consistency with other Matthew Bender publications, this publication continues to use "indorsement," except when "endorsement" is used in the text of standard forms which are reproduced verbatim. No legal distinction is intended to be indicated by the different spellings.

[iii] CLTA Forms

The CLTA recommends more than 100 indorsement forms for the use of its members. All of the recommended forms are included in the CLTA Policy & Indorsement Forms Book (Revised 1971). Many non-member insurers have prepared similar forms for their own use. Special indorsements are sometimes available to cover unusual risks or to meet the specific requirements of a prospective policyholder. For a general discussion of title insurance indorsements, see CALIFORNIA REAL ESTATE LAW PRACTICE, Volume 4, Chapter 92, *Title Insurance* (Matthew Bender).

[c] Covenants, Conditions, and Restrictions Indorsement

The title to a parcel of real property is sometimes restricted or encumbered by one or more instruments setting forth "covenants," "conditions," or "restrictions" on its use. These instruments (commonly known as CC and R's) are recorded by residential subdividers for the purpose of establishing design and construction standards and providing protection against commercial and industrial encroachment into the subdivisions [for a general discussion of CC and R's, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Ch. 470, *Subdivisions* (Matthew Bender)]. Protection against loss or damage sustained by reason of a violation of CC and R's may be valuable and, in appropriate circumstances, necessary to the effective economic use of the property.

CLTA's Covenants, Conditions and Restrictions Indorsement is customarily added to the ALTA Loan Policy [*see § 26A.251*] whenever the insured land is affected by CC and Rs. Unless modified by an exception in the attached schedules, the indorsement will insure against loss sustained by reason of: (1) covenants, conditions, or restrictions under which the lien of the insured mortgage can be cut off, subordinated, or otherwise impaired [P 1(a)]; (2) violations on the insured land of any enforceable covenants, conditions, or restrictions [P 1(b)]; encroachments of buildings or improvements located on the insured land onto adjoining lands, or encroachments of buildings or improvements located on adjoining lands onto the insured land [P 1(c)]; (4) unmarketability of the insured title by reason of any violations on the insured land [P 2(b); for a general discussion of "marketability" of title, *see § 26A.11*]; and (5) damage to existing improvements that might result from the use of an easement or the exercise of mineral rights on the insured land [P 3].

[2] FORM

CLTA Covenants, Conditions, and Restrictions Indorsement

ENDORSEMENT

Attached to Policy No. _____

Issued By
BLANK TITLE INSURANCE COMPANY

The Company hereby insures against loss which the Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:

(a) That there are no covenants, conditions, or restrictions under which the lien of the

mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;

(b) That there are no present violations on the land o f any enforceable covenants, conditions, or restrictions;

(c) That, except as shown in Schedule B, there are no encroachments of buildings, structures, or improvements located on the land onto adjoining lands, nor any encroachments onto the land of buildings, structures, or improvements located on adjoining lands.

2.

(a) Any future violations on the land of any covenants, conditions, or restrictions occurring prior to acquisition of title to the estate or interest referred to in Schedule A by the insured, provided such violations result in impairment or loss of the lien of the mortgage referred to in Schedule A, or result in impairment or loss of title to the estate or interest if the insured shall acquire such title in satisfaction of the indebtedness secured by the mortgage;

(b) Unmarketability of the title to the estate or interest referred to in Schedule A by reason of any violations on the land, occurring prior to acquisition of title to the estate or interest referred to in Schedule A by the insured, of any covenants, conditions or restrictions.

3. Damage to existing improvements, including lawns, shrubbery or trees

(a) Which are located or encroach upon that portion of the land subject to any easement shown in Schedule B, which damage results from the exercise of the right to use or maintain such easement for the purposes for which the same was granted or reserved;

(b) Resulting from the exercise of any right to use the surface of the land for the extraction or development of the minerals excepted from the description of the land or shown as a reservation in Schedule B.

4. Any final court order or judgment requiring removal from any land adjoining the land of any encroachment shown in Schedule B.

Wherever in this indorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms covenants and conditions contained in any lease.

For purposes of this endorsement, the words "covenants," "conditions" or "restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy and is not excepted in Schedule B.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____
Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 26A TITLE INSURANCE
PART IV. FORMS
F. Indorsements

11-26A California Legal Forms--Transaction Guide § 26A.261

§ 26A.261 CLTA Mechanics' Liens Indorsement

[1] Comment

[a] Use of Form

This form is the Mechanics' Liens Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 10, 1993. It is form 101 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to a CLTA Standard Coverage Policy [*see § 26A.250*] issued to an insured lender.

Like other title insurance indorsements, the Mechanics' Liens Indorsement is designed to add to the coverage of another policy [for a general discussion of indorsements, *see §§ 26A.18, 26A.260[1][b]*]. In particular, this indorsement is designed to insure against any loss that an insured lender might suffer by reason of a mechanics' lien that acquires priority over the lien of the insured mortgage or deed of trust.

[b] Need For Protection Against Mechanics' Liens

The priorities of liens on real property are usually determined by the order in which the liens are recorded [*see Civ. Code § 2897*]. In contrast, mechanics' liens [*see Civ. Code § 3110*] are preferred to any lien, mortgage, deed of trust, or other encumbrance that attaches after the commencement of a work of improvement or of which the mechanics' lien claimant had no notice and which was unrecorded at the time of commencement of the work [*Civ. Code §§ 3110, 3137*]. For this reason, lenders frequently inspect property on which they propose to make a loan to determine if work has been commenced or materials supplied. In the absence of inspection, special title insurance protection against mechanics' liens may be purchased. Since out-of-state lenders frequently are unable to inspect the property, they often require that their borrowers provide appropriate title insurance protection against mechanics' liens before any loan is made.

[c] Related CLTA Indorsements

Other indorsements are available to provide protection against mechanics' liens. For example, CLTA Form 101.1 may

be added to either the ALTA Owner's Policy [*see § 26A.252*] or to an owner's CLTA Standard Coverage Policy [*see § 26A.250*]. CLTA Forms 101.2 or 101.3 may be added either to the ALTA Loan Policy [*see § 26A.251*] or to the CLTA Standard Coverage Policy [*see § 26A.250*]. CLTA Form 101.2 may be used to insure a lender against mechanic's liens after completion of a work of improvement. CLTA Form 101.3 may be used to insure a lender against mechanic's liens for work under construction or completed on the date of the indorsement. CLTA Indorsement Form 101.4, which may be added to a CLTA Standard Coverage Policy issued in favor of a lender, insures against mechanic's liens arising out of any work of improvement under construction or completed on the date of the indorsement. CLTA Form 101.8, which may be attached to a CLTA Standard Coverage Policy issued to a lender, insures against the priority of any mechanics' liens resulting from off-site improvements. CLTA Indorsement Form 126 may be used to assure the owner of a single-family residence against loss sustained by reason of mechanics' liens in progress or completed as of the date of the policy.

[2] FORM

CLTA Mechanics' Liens Indorsement

ENDORSEMENT

Attached to Policy No. _____

Issued by

BLANK TITLE INSURANCE COMPANY

The Company hereby insures the owner of the indebtedness secured by the mortgage referred to in paragraph _____ of Part II of Schedule B against loss which the insured shall sustain by reason of the establishment of priority over the lien of the insured mortgage upon the estate or interest referred to in Schedule A of any statutory lien for labor or material attaching to the estate or interest referred to in Schedule A, said priority being based upon the claim that building materials had been delivered to or upon the land, or building operations had commenced thereon, prior to the recordation of the insured mortgage.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawNonmortgage LiensMechanics' LiensReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-26A California Legal Forms--Transaction Guide § 26A.262

§ 26A.262 CLTA Foundation Indorsement

[1] Comment

[a] Use of Form

This form is the Foundation Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 10, 1993. It is form 102.4 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to an ALTA Loan Policy [*see § 26A.251*] or to a CLTA Standard Coverage Policy [*see § 26A.250*] issued in favor of a lender.

For a general discussion of indorsements, see *§§ 26A.18, 26A.260[1][b]*.

[b] Purpose of Foundation Indorsement

The Foundation Indorsement is designed to add to the coverage of another policy by insuring against loss that an insured lender might suffer if foundations erected on property that secures the lender's loan are not properly located. If foundations are not properly located within the boundaries of the insured property, the lender may suffer a loss. The risk of such a loss may be minimized by inspecting the property or, if the lender is an out-of-state lender or for any other reason cannot inspect the property, by purchasing a Foundation Indorsement. This form may be issued by an insurer after the insurer has inspected the property to assure the insured that the foundations of a structure under construction are within the boundaries of the insured land and do not violate any of the covenants, conditions, or restrictions described in the policy.

[c] Related CLTA Forms

CLTA Forms 102.5, 102.6, and 102.7 offer lenders protection similar to that offered by this form. Form 102.6 provides protection against loss arising from improperly located foundations and from any violations of covenants, conditions, or restrictions. Forms 102.5 and 102.7 provide identical coverage, with the addition of coverage against loss from foundations that might encroach on easements.

[2] FORM

CLTA Foundation Indorsement

Fee $ _____

ENDORSEMENT
Attached to Policy No. _____
Issued by
BLANK TITLE INSURANCE COMPANY

The Company assures the owner of the indebtedness secured by the mortgage referred to in paragraph _____ of Schedule _____

(1) That the foundations of the structure under construction on the land at this date are within the boundary lines of the land;

(2) That the location of said foundations does not violate the covenants, conditions, or restrictions referred to in Schedule B.

The Company hereby insures the insured against loss which the insured shall sustain in the event that the assurance herein shall prove to be incorrect.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the fact amount thereof.
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.263

§ 26A.263 CLTA Easement Indorsement

[1] Comment

[a] Use of Form

This form is the Easement Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 10, 1993. It is form 103.1 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to a standard coverage policy issued in favor of an owner or lender, such as the CLTA Standard Coverage Policy [*see § 26A.250*], the ALTA Loan Policy [*see § 26A.251*], or the ALTA Owner's Policy [*see § 26A.252*].

[b] Purpose of Easement Indorsement

The Easement Indorsement is designed to add to the coverage of another policy by insuring against loss resulting from the exercise of any easement rights referred to in the policy. If the insured property is subject to an easement in favor of another parcel, the owner or insured lender may require assurance that no loss will result from the exercise of that easement. Similarly, if the continued use of the insured property depends on the enforceability of an easement over adjoining property, the owner or lender may require assurance that the easement will be enforceable and that there will be no interference with its use. The form set forth below may be used by an insurer to insure a lender against loss resulting from any exercise of the right of use or maintenance of an easement over or through the insured land.

For further discussion of easement indorsements, see CALIFORNIA REAL ESTATE LAW PRACTICE, § 92.101[4] (Matthew Bender).

[c] Related CLTA Indorsements

Other easement indorsement forms may be used when appropriate or needed. CLTA Form 103.3, for example, may be used to insure a lender against loss sustained if the owner of any easement described in the policy compels the removal of improvements that encroach on the easement. CLTA Form 103.4 may be used to assure an owner or lender that any

easement described in the policy provides the owner with ingress to and egress from a given public street. CLTA Forms 103.5 and 103.8 may be used to insure against damage to existing improvements, including lawns, shrubbery, or trees, resulting from the exercise of any right to use an easement over the surface of the insured land. CLTA Form 103.6 may be used to insure a lender that none of the improvements located on the insured land encroach on an easement described in the policy.

[2] FORM

CLTA Easement Indorsement

ENDORSEMENT
Attached to Policy No. _____
Issued by
BLANK TITLE INSURANCE COMPANY

The Company hereby insures the owner of the indebtedness secured by the mortgage referred to in paragraph _____ of Schedule _____ against loss which the insured shall sustain as a result of any exercise of the right of use or maintenance of the easement referred to in paragraph _____ of Schedule B over or through the land.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the fact amount thereof.
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersEncroachmentsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.264

§ 26A.264 CLTA Assignment of Trust Deed Indorsement

[1] COMMENT

[a] Use of Form

This form is the Assignment of Trust Deed Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 10, 1993. It is form 104 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to an ALTA Loan Policy [*see § 26A.251*].

[b] Purpose of Assignment of Trust Deed Endorsement

The CLTA Standard Coverage Policy [*see* Form 26A.50] and the ALTA Loan Policy [*see § 26A.251*] protect successors in ownership of an insured mortgage or deed of trust, although the insurer reserves as against any successor who acquires the indebtedness by operation of law (as distinguished from purchase) all rights and defenses that it would have had against the original insured. The new owner of the indebtedness, however, may require assurance that the lien of the insured mortgage or deed of trust is valid and enforceable. The Assignment of Trust Deed Indorsement may be used to assure the assignee that the mortgage or deed of trust has been transferred by a valid assignment, that there are no subsisting tax or assessment liens that have priority (except as noted in the indorsement), that there are no matters affecting the validity or priority of the mortgage or deed of trust (except as noted), and that there are no federal tax liens or bankruptcy proceedings that affect the insured estate or interest (except as noted).

[c] Related CLTA Indorsements

Other indorsement forms with similar assurances may be used to extend the protection of other policies. CLTA Form 104A, for example, makes assurances identical to those of this form and is designed to be attached to a CLTA Standard Coverage Policy [*see § 26A.250*] issued in favor of a lender. CLTA Form 104.1, which is designed for use with either a CLTA Standard Coverage Policy [*see § 26A.250*] or an ALTA Loan Policy [*see § 26A.251*], assures that the insured mortgage or deed of trust has been transferred by a valid assignment and that no reconveyance or modification or

subordination of the insured mortgage or deed of trust appears of record. CLTA Form 104.6, which is designed for use with an ALTA Loan Policy [*see § 26A.251*], and CLTA Form 104.7, which is designed for use with either a CLTA Standard Coverage Policy [*see § 26A.250*] or an ALTA Loan Policy [*see § 26A.251*], provides assurance that no assignment of rents prior to the insured assignment appears in the public records (other than as noted in the indorsement). This protection may be valuable to the assignee if the property is producing rents and if the assignment of the mortgage or deed of trust includes an assignment of rents.

[2] FORM

CLTA Assignment of Trust Deed Indorsement

ENDORSEMENT
Attached to Policy No. _____
Issued by
BLANK TITLE INSURANCE COMPANY

The Company assures _____ "the Assured":

(a) That by a valid assignment or assignments the beneficial interest under the mortgage referred to in paragraph

_____ of Schedule

_____ has been transferred to the Assured;

(b) That there are no subsisting tax or assessment liens which are prior to the insured mortgage, except:

(c) That there are no matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy, except:

(d) That there are no United States tax liens or bankruptcy proceedings affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in said policy, except:

The Company hereby insures the Assured against loss which the Assured shall sustain in the event that the assurances herein shall prove to be incorrect.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the fact amount thereof.
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security

InstrumentsTransfersTransfers by MortgageesReal Property LawFinancingSecondary FinancingAssignees & PriorityReal Property LawFinancingSecondary FinancingLien Priorities



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11-26A California Legal Forms--Transaction Guide § 26A.265

§ 26A.265 CLTA Single Family Homeowner's Protection Indorsement

[1] Comment

[a] Use of Form

This form is the Single Family Homeowner's Protection Indorsement form approved for use by the California Land Title Association (CLTA) and issued as of September 10, 1993. It is form 126 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to the CLTA Standard Coverage Policy [*see § 26A.250*].

[b] Purpose of Homeowner's Protection Indorsement

Indorsements providing title insurance protection of particular value to homeowners are available in various forms. This form may be used to insure the owner of a single-family, owner-occupied residential structure against loss or damage arising from various title defects, including:

- Any statutory lien for labor or material arising out of any work of improvement in progress or completed on the date of the policy (except liens for which the insured has agreed to be responsible);

- Removal of the residential structure or interference with its use for ordinary residential purposes as the result of a final court order or judgment based on such matters as encroachments onto adjoining lands, violations of covenants, conditions, or restrictions, or violations of applicable zoning ordinances; and

- Damage to the residential structure resulting from the exercise of any right to use the surface of the land for mineral extraction or development.

For further discussion of indorsements providing homeowner's protection, *see* CALIFORNIA REAL ESTATE LAW PRACTICE, Volume 4, § 92.101[15] (Matthew Bender).

[c] Related CLTA Indorsements

CLTA Form 126A.1 provides identical coverage for property on which there is a one-to-four family residential structure in which the insured owner resides or intends to reside. CLTA Form 126A.2 [*see § 26A.266*] provides identical coverage for condominium property. CLTA Form 126A.3 is identical to Form 126, except that the insured owner does not have to intend to reside in the residential structure; the requirements of the indorsement are met if there is a residential structure on the insured land at the date of the policy.

[2] FORM

CLTA Single Family Homeowner's Protection Indorsement

ENDORSEMENT
Attached to Policy No. _____
Issued by
BLANK TITLE INSURANCE COMPANY

1. This endorsement shall be effective only if at Date of Policy there is located on the land described in said Policy a single family residential structure, in which the insured owner resides or intends to reside. For the purpose of this indorsement the term "residential structure" is defined as the principal dwelling structure located on the land together with all improvements thereon related to residential use of the property except plantings of any nature, perimeter fences and perimeter walls, and the term "insured owner" is defined as any insured named in Schedule A and, subject to any rights or defenses the Company may have had under the policy and all indorsements, such insured owner's heirs, distributees, devisees, survivors, personal representatives or next of kin.

2. The Company hereby insures the insured owner of the estate or interest described in Schedule A against loss or damage which the insured owner shall sustain by reason of:

a. the existence at Date of Policy of any statutory lien for labor or materials attaching to the estate or interest referred to in Schedule A arising out of any work of improvement on the land, in progress or completed at Date of Policy, except those liens arising out of a work of improvement for which the insured owner has agreed to be responsible.

b. the removal of the residential structure or the interference with the use thereof for ordinary residential purposes as the result of a final court order or judgment, based upon the existence at Date of Policy of:

(1) any encroachment of said residential structure or any part thereof onto adjoining lands, or onto any easement shown as an exception in Part II of Schedule B of the policy, or onto any unrecorded subsurface easement;

(2) any violation on the land of enforceable covenants, conditions or restrictions, provided that this coverage shall not refer to or include the terms, covenants and conditions contained in any lease, sub-lease, or contract of sale referred to in the policy;

(3) any violation of applicable zoning ordinances to the extent that such ordinances regulate (a) area, width or depth of the land as a building site for the residential structure; (b) floor space area of the residential structure; (c) set back of the residential structure from the property lines of the land; or (d) height of the residential structure.

c. damage to the residential structure resulting from the exercise of any right to use the surface of the land for the extraction or development of the minerals excepted from the description of the land or shown as a reservation in Schedule B.

For purposes of this endorsement, the words "covenants," "conditions" or "restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy and is not excepted in Schedule B.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the fact amount thereof.
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawAdjoining LandownersEncroachmentsReal Property LawMiningGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-26A California Legal Forms--Transaction Guide § 26A.266

§ 26A.266 CLTA Condominium Owner's Protection Indorsement

[1] Comment

[a] Use of Form

This form is the Condominium Owner's Protection Indorsement form approved for use by the California Land Title Association (CLTA) and revised as of September 10, 1993. It is form 126.2 in the CLTA Policy & Indorsement Forms Book (Revised 1971), from which it is reprinted with permission. The form is designed to be attached to the CLTA Standard Coverage Policy [*see § 26A.250*].

[b] Purpose of Condominium Owner's Protection Indorsement

This form insures the owner of a condominium used as a single-family residence that:

- The estate or interest described in the policy is a condominium as defined in *Civil Code Section 783*;
- No statutory lien for labor or materials has attached to the insured interest (except a lien for work for which the insured has agreed to be responsible);
- The residence will not be removed and there will be no interference with its use as a residence by reason of a final court order or judgment based on the existence of any encroachment of the residence onto adjoining lands or onto an easement, any violation of enforceable covenants, conditions, or restrictions, or any of certain specified zoning violations; and
- There are no mineral rights that would damage the structure.

Substantially identical protection for the owner of a single-family residence is available in CLTA Form 126 [*see § 26A.265*].

[2] FORM

CLTA Condominium Owner's Protection Indorsement

ENDORSEMENT
Attached to Policy No. _____
Issued by
BLANK TITLE INSURANCE COMPANY

1. This endorsement shall be effective only if at Date of Policy the condominium described in the Policy is used as a single family residential structure, in which the insured owner resides or intends to reside. For the purpose of this indorsement the term "residential structure" is defined as the particular condominium unit described in the Policy, together with all improvements located within the common areas appurtenant thereto and related to residential use thereof except plantings of any nature, perimeter fences and perimeter walls surrounding the project of which said condominium is a part, and the term "insured owner" is defined as any insured named in Schedule A and, subject to any rights or defenses the Company may have had under the Policy and all the endorsements, such insured owner's heirs, distributees, devisees, survivors, personal representatives or next of kin.

2. The Company hereby insures the insured owner of the estate or interest described in Schedule A against loss or damage which the insured owner shall sustain by reason of:

a. any incorrectness in the assurance which the Company hereby gives that the estate or interest referred to in Schedule A is a condominium as defined in *Section 783 of the California Civil Code*, in fee and as such is entitled to be assessed and taxed as a separate parcel.

b. the existence at Date of Policy of any statutory lien for labor or materials attaching to the estate or interest referred to in Schedule A arising out of any work of improvement on the land, in progress or completed at Date of Policy, except those liens arising out of a work of improvement for which the insured owner has agreed to be responsible.

c. the removal of the residential structure or the interference with the use thereof for ordinary residential purposes as the result of a final court order or judgment, based upon the existence at Date of Policy of:
(1) any encroachment of said residential structure or any part thereof onto adjoining lands, or onto any easement shown as an exception in Part II of Schedule B of the policy, or onto any unrecorded subsurface easement;

(2) any violation on the land of enforceable covenants, conditions or restrictions, provided that this coverage shall not refer to or include the terms, covenants and conditions contained in any lease, sub-lease, or contract of sale referred to in the policy;

(3) any violation of applicable zoning ordinances to the extent that such ordinances regulate (a) area, width or depth of the land as a building site for the residential structure; (b) floor space area of the residential structure; (c) set back of the residential structure from the property lines of the land; or (d) height of the residential structure.

d. damage to the residential structure resulting from the exercise of any right to use the surface of the land for the extraction or development of the minerals excepted from the description of the land or

shown as a reservation in Schedule B.

For purposes of this endorsement, the words "covenants," "conditions" or "restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy and is not excepted in Schedule B.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the fact amount thereof.
_____ Dated:

BLANK TITLE INSURANCE COMPANY
By _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawNonmortgage LiensMechanics' LiensReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING

11-27 California Legal Forms--Transaction Guide 27.syn

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.syn Synopsis to Chapter 27: DEEDS AND RECORDING

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Certificate of Secretary or Assistant Secretary of Corporation Regarding Execution of Corporation Grant Deed

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[iii] Action to Establish Abandonment

[iv] Notice of Intent

[2] FORM

Notice of Intent to Preserve Interest

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FOOTNOTES:

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING

11-27 California Legal Forms--Transaction Guide Scope

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Scope

Timothy F. O'Leary,n*
Practice Consultant Scope

This chapter covers the drafting, recording, and delivery of deeds. The Legal Background examines the principal types of deeds, the requirements for a valid deed, and the method and effect of recording and delivering a deed. The Transaction Guide contains lists of information and documents needed to draft a deed and important determinations that counsel should make before drafting the deed. Among other things, those determinations assist the attorney in defining the precise estate to be transferred and the form in which title should be taken. The Transaction Guide also sets forth procedures for drafting, executing, recording, and delivering the deed and performing related tasks. The forms include numerous complete deeds, including basic grant and quitclaim deeds, joint ownership deeds, and deeds with business grantors; alternative and additional deed provisions; and related documents, such as a notice of intent to preserve a power of termination and a corporate resolution to convey real property.

This chapter does not consider the transactions underlying the conveyance of title to real property. For comprehensive coverage of the purchase and sale of real property, see Ch. 23, *Real Property Sales Agreements* . Options to purchase real property and related transactions are covered in Ch. 22, *Options to Purchase Real Property* . Tax-deferred or "like-kind" exchanges are discussed in Ch. 24, *Exchanges of Real Property* .

The creation and conveyance of certain types of interests or estates in real property are covered elsewhere in this publication. For discussion of easements and profits *a prendre*, and illustrative deeds and other instruments creating those interests, see Ch. 28A, *Easements and Licenses* . Ch. 28C, *Covenants, Conditions and Restrictions*, examines conditions, covenants, and equitable servitudes that restrict the uses to which the land of another may be put, and includes a deed that incorporates prior recorded restrictions into the conveyance. For coverage of the deeds that are executed by trustees in favor of the purchasers of property sold at nonjudicial foreclosure sales, see Ch. 25D, *Foreclosure* . For discussion of contamination issues in real property transactions, see Ch. 33, *Contamination Considerations in Real Property Transactions* .

FOOTNOTES:
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Marketable record title. *Civ. Code § 880.020 et seq.*

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Transfer of property in general. *Civ. Code § 1039 et seq.*

Interpretation of grants. *Civ. Code § 1066 et seq.*

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Statutory form of grant deed. *Civ. Code § 1092*.

Recording transfers of real property. *Civ. Code § 1169 et seq.*

Reformation of deed. *Civ. Code § 3399*.

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Adjudication of identity of grantor. *Code Civ. Proc. § 770.010 et seq.*

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AUTHOR: Timothy F. O'Leary, Practice Consultant

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PART II. LEGAL BACKGROUND

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§ 27.10 Definitions and Overview of Deeds

A deed is a written instrument that transfers or conveys title to real property [*Brusseau v. Hill (1927) 201 Cal. 225, 228, 256 P. 419* ; *see Civ. Code § 1039* (a "transfer" is an act of the parties, or of the law, by which title to real property is conveyed from one person to another)]. A transfer in writing of title to real property is called a grant or conveyance [*see Civ. Code § 1053*]. As used in the laws governing modes of transfer, "grant" refers to all written conveyances transferring title to real property [*see Civ. Code § 1053*], including grant deeds and quitclaim deeds [*MacFarland v. Walker (1919) 40 Cal. App. 508, 512, 181 P. 248* ; *but see § 27.11[1], below*, for the special meaning of "grant" when that term is included in a grant deed].

The principal types of deeds used in California are grant deeds, quitclaim deeds, and deeds given at judicial sales. A fourth type, warranty deeds, is occasionally used in this state. These deeds are discussed in more detail below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsTypesSheriff's DeedsReal Property LawDeedsTypesWarranty



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§ 27.11 Principal Types of Deeds

[1] Grant Deeds

The grant deed is the most frequently used deed in California. In a grant deed, the term "grant" is the essential element or operative word of transfer [*see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . Thus, a grant deed states that one person grants an interest in real property to another [*see Civ. Code § 1092* (statutory form of grant deed); *see also §§ 27.200[2], 27.201[2]*]. Although a grant deed may convey any type of estate in real property [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* , it is presumed to transfer a fee simple title unless it appears from the deed that a lesser estate was intended [*Civ. Code § 1105*; *see American Enterprise, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935* (grant deed is presumed to convey grantor's entire interest in the property); *see also § 27.20[2]*]. A grant deed that passes a fee simple title also transfers any interest in the property acquired by the grantor after the date of the deed [*Civ. Code § 1106*; *Schwenn v. Kaye (1984) 155 Cal. App. 3d 949, 952, 202 Cal. Rptr. 374* ; *see § 27.20[7]*].

If a grant deed conveys an estate of inheritance or fee simple, the deed carries with it the following implied covenants unless it provides otherwise [*Civ. Code § 1113*]:

- That the grantor has not previously conveyed the same estate, or any right, title, or interest in it, to any person other than the grantee; and

- That as of the time of the execution of the conveyance, the property is free from any encumbrance made by the grantor or any person claiming under the grantor.

These implied covenants against prior conveyances and against encumbrances impose personal obligations on the grantor and the grantor's heirs [*see Civ. Code § 1113*] and are personal to the grantee [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188-189* ; *Babb v. Weemer (1964) 225 Cal. App. 2d 546, 550, 551, 37 Cal. Rptr. 533]* . For additional coverage, see *§ 27.200[1][c]*.

[2] Quitclaim Deeds

A quitclaim deed conveys whatever present right or interest the grantor has in the property at the time of the deed, including legal, equitable, and inchoate rights [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Soares v. Steidtmann (1955) 130 Cal. App. 2d 401, 404, 278 P.2d 953]* . As a general rule, it does not transfer after-acquired title [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . However, if the grantor has an equitable interest at the time of the conveyance and later acquires a legal title, the legal title is deemed to be transferred to the grantee [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112]* .

No covenants are implied when a quitclaim deed is used, even if the word "grant" appears in the deed [*Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147* ; for discussion of the implied warranties in grant deeds, *see § 27.200[1]*]. In addition, quitclaim deeds, unlike grant deeds, normally are not subject to the presumption that a fee simple title is intended to pass [*Winchell v. Lambert (1956) 146 Cal. App. 2d 575, 579, 304 P.2d 149* ; *but see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112* ; *Estate of Wilson (1940) 40 Cal. App. 2d 229, 232-233, 104 P.2d 716* ; *see also § 27.20[1]*].

[3] Deeds Given in Judicial Sales

A deed given at an execution sale [*see Code Civ. Proc. §§ 701.660, 701.670*], or any other deed executed by a court-appointed or public official, essentially has the same effect as a quitclaim deed [*see, e.g., National Bk. of Bakersfield v. Williams (1916) 31 Cal. App. 705, 708, 161 P. 504* ; *see also § 27.11[2]*]. For example, a deed executed by a levying officer who has sold property at an execution sale conveys any interest of the judgment debtor in the subject property (1) that is held on the effective date of the lien under which the property was sold or (2) that is acquired between the effective date and the date of sale [*Code Civ. Proc. § 701.640*].

Although execution sales are beyond the scope of this publication, they are discussed in detail in California Forms of Pleading and Practice, Ch. 254, *Executions and Enforcement of Judgments* (Matthew Bender).

[4] Warranty Deeds

A warranty deed contains express covenants, such as a covenant of warranty. A covenant of warranty is an undertaking by the grantor-covenantor to compensate the grantee if an outstanding superior title held by a third party results in a total or partial failure of the grantee's title [*Tropico Land & Improvement Co. v. Lambourn (1915) 170 Cal. 33, 38, 148 P. 206]* . Other express covenants typically set forth in warranty deeds include a covenant for quiet possession or enjoyment, a covenant of seisin, a covenant of right to convey, a covenant against encumbrances, and a covenant for further assurance. These deeds, however, are seldom used in California because buyers rely on title insurance for protection against loss resulting from title problems For detailed coverage of title insurance, *see* Ch. 26A, *Title Insurance* . For further discussion of warranty deeds, see California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsTypesSheriff's DeedsReal Property LawDeedsTypesSpecial WarrantyReal Property LawDeedsTypesWarranty



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11-27 California Legal Forms--Transaction Guide § 27.12

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.12 Deed Intended as Mortgage (Defeasible Deed)

A creditor and debtor may enter into an agreement providing that a deed absolute on its face has been given only for security purposes and is intended as a mortgage. The execution of a deed pursuant to such an agreement creates a security [*Civ. Code §§ 2924(a), 2925*; *Banta v. Wise (1901) 135 Cal. 277, 279, 67 P. 129]* . Pursuant to the agreement, the creditor must reconvey the property to the debtor when the debt is paid in full. An oral agreement that the deed is merely security for the debt is effective between the debtor and creditor but is not binding on third parties unless they have actual or constructive notice of the agreement [*see Civ. Code § 2925*]. To give effective notice, an instrument reciting that the deed is defeasible (that is, capable of being defeated or terminated) [*see* Restatement of Property, §§ 16, 24, 25] must be recorded in the county where the property is located [*Civ. Code § 2950*]. This recording may be accomplished by a separate agreement of defeasance [*see § 25A.215[2]*] or by inserting a defeasance provision in the deed itself and then recording the deed [*see § 25A.216[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.13

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§ 27.13 Deed in Lieu of Foreclosure

[1] Alternative to Foreclosure

A creditor holding a deed of trust or mortgage may, following a default by the debtor, accept a deed to the property instead of filing a notice of default and instituting foreclosure proceedings [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 82, 338 P.2d 387* ; *Baldwin v. American Trading Co. (1925) 76 Cal. App. 80, 88, 243 P. 710]* . This alternative permits the creditor to avoid the time and expense of foreclosure. Obviously, this alternative is advisable only when the value of the secured property is equal to or greater than the amount of the indebtedness.

[2] Requirements for Validity

At the time of the execution of the security agreement, a creditor cannot secure a debtor's agreement to forfeit the debtor's interest in the secured property in the event of default [*Civ. Code § 2889*]. Such an agreement is void [*Civ. Code § 2889*]. However, a creditor and debtor may enter into an agreement, after a default by the debtor, that provides for the conveyance of the subject property to the mortgagee or beneficiary in consideration for a cancellation of the obligation [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387]* . To be valid, the conveyance must be (1) fair, (2) free from undue influence, oppression, or fraud, and (3) for adequate consideration [*Phelan v. De Martin (1890) 85 Cal. 365, 367, 24 P. 725]* . The transfer may be made by grant or quitclaim deed [*see §§ 27.200[2]* (grant deed), 27.203[2] (quitclaim deed), and comments] and may be done at any time after the default and prior to a foreclosure sale [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387]* . A title company may require an estoppel affidavit from the debtor, in lieu of or in addition to a statement in the deed, stating that (1) the transfer is an absolute conveyance, (2) the debtor acted freely and without coercion or duress, and (3) the amount of the debt coupled with any additional consideration given is equal to the fair market value of the subject property [*see California Real Estate Law and Practice, Ch. 120, Representing a Client After Default, § 120.25[4]* (Matthew Bender)].

[3] Effect

A deed in lieu of foreclosure causes the creditor's lien to merge with the legal title acquired on execution of the deed and

extinguishes the creditor's lien, provided there are no intervening junior liens [*Anglo-Californian Bank v. Field (1908) 154 Cal. 513, 514-515, 98 P. 267]* . If there is an intervening lien, merger will not occur. Instead, the legal title and senior lien will be considered as separate interests in order to protect the rights of the senior creditor [*Hines v. Ward (1898) 121 Cal. 115, 118-119, 53 P. 427]* .

PRACTICE TIP:

Extinguishing Junior Lien Holders. A deed in lieu of foreclosure is less costly and more convenient than pursuing the foreclosure process through to conclusion. The lender will be able to obtain immediate possession and ownership of the property and avoid the necessity of a lengthy foreclosure process, the appointment of a receiver during that process, and the necessary legal costs and expenses. The disadvantage of obtaining a deed in lieu of foreclosure generally is that it does not extinguish the other lien holders. Thus, the grantee will acquire the property subject to either junior or senior lien holders. For that reason, except in the case where a senior lender is the only lien holder and has obtained a litigation guarantee that no other lien holders exist, most lenders will incur the expense of the foreclosure process to extinguish junor lien holders. *Commentary by Timothy F. O'Leary.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien Priorities



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.14 Overview of Requirements for Valid Deed

To be valid and effective, a deed must comply with the following requirements:

- The deed must be in writing and must be executed by the grantor or the grantor's authorized agent [*Civ. Code § 1091*; *see §§ 27.15, 27.25*].

- The deed must be delivered to and accepted by the grantee [*Civ. Code § 1054* (delivery); *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131* (acceptance); *see Code Civ. Proc. § 1933*; *see also § 27.31*].

- The deed must contain the names or other sufficient description of the grantor and grantee [*Cordano v. Wright (1911) 159 Cal. 610, 617, 115 P. 227* (grantor); *Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447-448, 290 P.2d 590* (grantee); *see §§ 27.16[3]* (grantor), 27.17[2]].

- At the time the deed is executed, the grantor must be in existence [*see Civ. Code § 1039*] and have the capacity to contract [*Clark v. Abrams (1942) 49 Cal. App. 2d 497, 499, 121 P.2d 750* ; *see § 27.16[1]*].

- At the time of the transfer, the grantee must be in existence [*see Civ. Code § 1039*] and must be capable of taking and holding title to real property [*Rixford v. Zeigler (1907) 150 Cal. 435, 437-438, 88 P. 1092* ; *see § 27.17[1]*].

- The deed must contain a description of the property that is sufficient to identify and locate it [*see Leider v. Evans (1962) 209 Cal. App. 2d 696, 703, 26 Cal. Rptr. 123* ; *see also § 27.19*].

- The instrument must set forth words indicating an intent to convey [*Cordano v. Wright (1911) 159 Cal. 610, 618, 115 P. 227* ; *see § 27.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty Descriptions



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.15 Statute of Frauds

An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by a written instrument [*Civ. Code § 1091*; *see Code Civ. Proc. § 1971*]. A discussion of transfers by operation of law is beyond the scope of this chapter, but for more information, see *California Real Estate Law and Practice, Ch. 80, Deeds and Transfer of Title, § 80.02* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsStatutes of FraudsReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.16 Grantor

[1] Requirement of Capacity to Convey

The grantor of real property must have the capacity to convey title to the grantee at the time the grantor executes and delivers the deed [*Hughes v. Grandy (1947) 78 Cal. App. 2d 555, 564, 177 P.2d 939]* . Whether the grantor had this capacity is a question of fact [*Allen v. Samuels (1962) 204 Cal. App. 2d 710, 715, 22 Cal. Rptr. 528* ; *see Clark v. Abrams (1942) 49 Cal. App. 2d 497, 499, 121 P.2d 750* (party alleging lack of capacity has burden of proof)]. As a general rule, the determination regarding capacity is subject to the same rules governing testamentary capacity [*Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341* ; *Tuttle v. Bessey (1955) 137 Cal. App. 2d 725, 727, 290 P.2d 884* ; *see § 61.11*; *but see O'Neil v. Spillane (1975) 119 Cal. Rptr. 245* (proof of existence of undue influence required to cancel deed of gift or conveyance inter vivos differs from that which is required to set aside a will)].

A grantor has the capacity to convey real property if he or she can comprehend the nature of the act of conveyance, the character of the subject property, and the grantor's relationship to the natural objects of his or her act [*Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341* ; *see Hughes v. Grandy (1947) 78 Cal. App. 2d 555, 565-566, 177 P.2d 939]* . Although it is the grantor's mental condition at the moment of execution and delivery of the deed that is relevant, the grantor's condition before and after the execution and delivery may be considered [*Hughes v. Grandy (1947) 78 Cal. App. 2d 555, 564, 177 P.2d 939]* . Evidence of the grantor's appearance, conduct, acts, habits, and conversation is relevant, provided the evidence has a reasonable tendency to indicate the grantor's mental condition at the time of the execution and delivery [*Hughes v. Grandy (1947) 78 Cal. App. 2d 555, 565, 177 P.2d 939]* .

Several entities have the capacity to convey real property. They include corporations [*see Corp. Code § 207*; *see also § 27.220[1]*], unincorporated associations [*see Corp. Code § 18105*; *see also § 27.223[1]*], and partnerships [*see Corp. Code §§ 15010, 16302(a)*; *see also § 27.221[1]*].

[2] Lack of Capacity to Convey

The capacity to convey title is lacking if the person attempting the transfer is a minor or is mentally incapacitated [*Mattos v. Kirby (1955) 133 Cal. App. 2d 649, 653, 285 P.2d 56]* . A minor (that is, anyone under the age of 18) [*Fam. Code § 6500*] cannot make a contract relating to real property or any interest in real property [*Fam. Code § 6701(b)*]. Consequently, if the grantor under a deed is a minor, the conveyance is void [*see Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 137, 225 P.2d 238]* .

The following rules govern mental incapacity:

- A person entirely without understanding has no power to make a contract [*Civ. Code § 38*], and a deed made by such a person is void [*Mattos v. Kirby (1955) 133 Cal. App. 2d 649, 653, 285 P.2d 56]* .

- If a person has been judicially declared incompetent, any deed made by that person after the adjudication is void [*Civ. Code § 40*; *Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 276, 251 P.2d 1003]* .

- If a person of unsound mind who is not entirely without understanding makes a conveyance before his or her incapacity has been judicially determined, the deed is subject to rescission [*Civ. Code § 39(a)*] and cancellation [*see Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 720-721, 23 Cal. Rptr. 349* ; *see also Civ. Code §§ 1692, 3412*]. A rebuttable presumption affecting the burden of proof that a person is of unsound mind exists for these purposes if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence [*Civ. Code § 39(b)*].

- If a person was intoxicated (voluntarily or otherwise) at the time of execution of a deed, the deed may be set aside [*Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 503, 41 P.2d 932* (intoxicated person is as unable to consent to the terms of a contract as person of unsound mind)].

[3] Identification in Deed

A valid deed must properly identify the grantor [*Cordano v. Wright (1911) 159 Cal. 610, 617, 115 P. 227]* . The body of the deed need not set forth the grantor's name if his or her identity is ascertainable with certainty from a consideration of the entire instrument, such as when the grantor signs and acknowledges the deed as the owner of the interest to be conveyed [*Childs v. Newfield (1934) 136 Cal. App. 217, 222, 28 P.2d 924* ; *see Strong v. Strong (1943) 22 Cal. 2d 540, 543-544, 140 P.2d 386* (suggesting in dictum that signature alone may be enough to convey signatory's interest)].

A person may assume any name in which to receive title to property, and a subsequent conveyance by that person under the assumed name will pass a good title [*Knaugh v. Baender (1927) 84 Cal. App. 142, 148, 257 P. 606]* . A grantor who takes title in one name and then wishes to transfer the title in another name must set forth in the deed the name under which he or she received title [*Civ. Code § 1096*]. If the deed does not comply with this requirement, it will be valid between the parties and those with notice, but the recordation of the instrument will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*; *see Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* (grantor's use of substantially different name in conveyance instrument breaks recorded chain of title and renders title unmarketable); *but see* discussion of *Code Civ. Proc. § 770.010 et seq.* in [4], *below*].

[4] Adjudication of Identity

A statutory procedure exists for the establishment of the identity of a grantor of real property when a discrepancy exists between the name in which the grantor acquired his or her interest in the property and the name in which the grantor transferred the property. Under this procedure, if property is acquired or stands of record in the name of a person who thereafter transfers the property under a different name, any subsequent owner of the property may commence a

proceeding to adjudicate and determine the identity of the person in whose name the property was acquired or stands of record and the person who transferred the property [*Code Civ. Proc. §§ 770.020, 770.040(a)*; *see Code Civ. Proc. § 770.010* (definitions of "acquired," "property," "subsequent owner," and "transfer")]. Because the use by the grantor of a name other than the name under which he or she received title breaks the recorded chain of title and renders the title unmarketable [*see Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* ; *see also § 27.16[3], above*], this adjudication of identity may be the only way to establish marketable title to the subject property [*see* California Forms of Pleading and Practice, Ch. 299, *Identity, Establishment of* (Matthew Bender)].

To obtain this adjudication of identity, the subsequent owner must file a verified petition in the superior court of the county in which all or a portion of the property is located [*Code Civ. Proc. §§ 770.030, 770.040(a)*; *see Code Civ. Proc. § 770.050* (form and contents of petition)]. The clerk will set the petition for hearing by the court [*Code Civ. Proc. § 770.060(a)*]. Thereafter, the petitioner must post notices of the time and place of the hearing at the courthouse where the proceeding is pending and in a conspicuous place on the subject property at least 10 days before the hearing [*Code Civ. Proc. § 770.060(b), (c)*]. Any person interested in the property may file an answer to the petition at any time before the date fixed for the hearing [*Code Civ. Proc. § 770.040(b)*].

At the hearing, the court will hear proof offered by the petitioner and by any persons answering the petition. It will then make and enter a decree determining the identity of the person or persons named in the petition [*Code Civ. Proc. § 770.070(a)*]. Any aggrieved party may appeal the decree [*Code Civ. Proc. § 770.070(b)*]. After the decree becomes final, it constitutes prima facie evidence of the matters determined, and the identity of every person described in the decree is presumed to be that stated in the decree [*Code Civ. Proc. § 770.080(a)*]. Finally, a certified copy of the decree must be recorded in the office of the county recorder of every county in which any part of the property is located [*Code Civ. Proc. § 770.080(b)*].

For further discussion, an illustrative petition, and related forms, see California Forms of Pleading and Practice, Ch. 299, *Identity, Establishment of* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.17 Grantee

[1] Capacity to Take and Hold Title

The grantee under a deed may be a natural person [*see Civ. Code § 671*; *see also Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 162, 131 P. 119* (contract purporting to transfer property to a fictitious person is void)] or any of the following entities: a corporation [*Corp. Code § 207*; *Cavin Memorial Corp. v. Requa (1970) 5 Cal. App. 3d 345, 354, 85 Cal. Rptr. 107]* ; a partnership [*Corp. Code §§ 15008(3), 16204*]; or an unincorporated association [*Corp. Code §§ 18105, 18110*; *see Corp. Code § 21200* (capacity of unincorporated association that is organized as medical society)].

At the time of the conveyance, a grantee who is an individual must be living [*Civ. Code § 1039*] and must be capable of taking and holding title to real property [*Rixford v. Zeigler (1907) 150 Cal. 435, 437, 88 P. 1092]* . A child conceived, but not yet born, is deemed an existing person for these purposes [*Civ. Code § 43.1*; *Scott v. McPheeters (1939) 33 Cal. App.2d 629, 631, 92 P.2d 678]* . Although a minor cannot convey title to real property [*see § 27.16[2]*], he or she has capacity to receive and hold title to real property [*In re Guardianship of Yano (1922) 188 Cal. 645, 649, 206 P. 995]* . Aliens also have this capacity [*Civ. Code § 671*]. Convicts may inherit, own, sell, or convey real property, but the Department of Corrections may restrict or prohibit sales or conveyances that are made for business purposes [*Penal Code § 2601(a)*].

[2] Identification and Status

A deed must identify the grantee by name or by a designation or description that is sufficient to identify the grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447-448, 290 P.2d 590* ; *see Green v. MacAdam (1959) 175 Cal. App. 2d 481, 485, 346 P.2d 474]* . The deed may refer to the grantee by a fictitious or assumed name [*Emery v. Kipp (1908) 154 Cal. 83, 86, 97 P. 17* ; *see Knaugh v. Baender (1927) 84 Cal. App. 142, 148, 257 P. 606]* .

A deed that conveys property to a group or a class of persons, such as the heirs or devisees of a decedent, will be valid if there is a method of determining the identities of the class members [*California Trust Co. v. Kerckhoff-Cuzner Mill*

Etc. Co. (1936) 5 Cal. 2d 628, 630, 55 P.2d 865 ; *Schade v. Stewart (1928) 205 Cal. 658, 664-665, 272 P. 567* ; *see Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 448, 290 P.2d 590* (grant to "the owners of Lot 3 and their successors" was valid)]. However, a grant to a large group whose members' identities cannot be ascertained (for example, the inhabitants of a town) will not convey title to them [*Winter v. Stock (1866) 29 Cal. 407, 411]* .

Title companies may require the deed to identify the status of the grantee or grantees. This information is particularly important in the case of married grantees because of the presumptions regarding community property [*see Fam. Code §§ 803, 2581*; *see also § 27.254[1]*].

[3] Unnamed Grantee

Special problems exist when the deed does not set forth the grantee's name. As a general rule, such a deed is void [*Bryce v. O'Brien (1936) 5 Cal. 2d 615, 616, 55 P.2d 488]* . The deed becomes valid, however, if the name is subsequently filled in by the grantor or the grantor's authorized agent. An agent cannot validly insert the grantee's name (or the name of the grantor or a description of the property) unless the agent (1) has been authorized to do so by the grantor in writing [*Green v. MacAdam (1959) 175 Cal. App. 2d 481, 486, 346 P.2d 474* ; *see Code Civ. Proc. § 1971*; *Civ. Code § 1091*], or (2) fills in the blank at the grantor's directions and in the grantor's presence [*Alton v. Haywood (1934) 136 Cal. App. 191, 193, 28 P.2d 385]* . However, if a third party fills in the blanks without the proper authorization, the grantor can make the deed valid by ratifying it in writing [*see Jones v. Coulter (1925) 75 Cal. App. 540, 551-552, 243 P. 487* ; *see also Civ. Code § 2310*; California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender)].

The above rules regarding blank deeds do not apply to a deed delivered to an escrow holder with written instructions giving the escrow agent authority to insert the grantee's name [*Tumansky v. Woodruff (1936) 14 Cal. App. 2d 279, 283, 57 P.2d 1372]* . If a grantee accepts such a deed and fulfills the escrow conditions, he or she may at any time instruct the escrow holder to insert his or her name [*Tumansky v. Woodruff (1936) 14 Cal. App. 2d 279, 283, 57 P.2d 1372]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.18 Property Subject to Transfer

Property of any kind may be transferred [*Civ. Code § 1044*; *but see Civ. Code § 1045* (mere possibility, such as the expectancy of an heir, that is not coupled with an interest cannot be transferred)]. Real (or "immovable") property consists of land [*see Civ. Code § 659* ("land" defined)], that which is affixed to land [*see Civ. Code § 660* (describing when a thing is deemed to be affixed to land)], that which is incidental or appurtenant to land, and certain items that are considered immovable by law [*Civ. Code § 658*]. It is essential that the deed accurately describe the real property being conveyed [*see § 27.19[1]*] and the interest that the grantee is to receive in that property [*see § 27.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty DescriptionsReal Property LawOwnership & TransferGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
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11-27 California Legal Forms--Transaction Guide § 27.19

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.19 Description of Property

[1] Identification of Property

A valid deed must contain a description of the subject property that either identifies the land or affords a means for its identification [*Podd v. Anderson (1963) 215 Cal. App. 2d 660, 665, 30 Cal. Rptr. 345* ; *see Civ. Code § 1092*]. No special form of description is required, and a general description is sufficient [*Vezaldenos v. Keller (1967) 254 Cal. App. 2d 816, 823, 62 Cal. Rptr. 808* ; *see, e.g., Brusseau v. Hill (1927) 201 Cal. 225, 231, 256 P. 419* ("all the estate of the grantor" and "all my land" are sufficient); *Civ. Code § 1092* (authorizing use of descriptive name, for example, "The Norris Ranch")]. A deed containing a vague and uncertain description is void [*Du Bois v. Larke (1959) 175 Cal. App. 2d 737, 748-749, 346 P.2d 830]* .

[2] Parol Evidence

When a deed contains an ambiguous description of the property, parol evidence is admissible to aid in interpreting the description [*Edwards v. City of Santa Paula (1956) 138 Cal. App. 2d 375, 380, 292 P.2d 31]* , that is, to determine the intention of the parties [*Hixson v. Jones (1967) 253 Cal. App. 2d 860, 864, 61 Cal. Rptr. 883]* . For example, parol evidence may be used to explain the description, or to show that the land described by some name or designation is generally known by that name [*Corona Unified School Dist. v. Vejar (1958) 165 Cal. App. 2d 561, 564, 332 P.2d 294]* .

[3] Incorporation by Reference

If a deed describes property by referring to another document, such as a map, with sufficient certainty to identify it, the other document is regarded as incorporated into the deed [*Calvi v. Bittner (1961) 198 Cal. App. 2d 312, 316, 17 Cal. Rptr. 850]* . If the reference to the other document is insufficient to identify it, the document will be incorporated into the deed only if it is shown that there is only one document which could correspond to the incomplete reference [*Edwards v. City of Santa Paula (1956) 138 Cal. App. 2d 375, 381-382, 292 P.2d 31]* .

[4] Consolidation of Legal Descriptions

The consolidation of separate and distinct legal descriptions of real property contained in one or more deeds or other instruments of conveyance into a subsequent single deed or other instrument of conveyance does not, absent the express written statement of the grantor, result in a merger of the separate and distinct parcels [*Civ. Code § 1093*]. This rule applies whether the consolidation is done by use of an individual listing of the legal descriptions in a subsequent single instrument or by means of a consolidated legal description composed of more than one previously separate and distinct legal description [*Civ. Code § 1093*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty Descriptions



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11-27 California Legal Forms--Transaction Guide § 27.20

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.20 Interest or Estate Being Conveyed

[1] Overview of Classifications

An interest in real property is referred to as an "estate" [*Civ. Code § 701*]. The term "estate" signifies the degree, quantity, nature, and extent of the interest [*Estate of Brunet (1949) 34 Cal. 2d 105, 107, 207 P.2d 567]* . These interests or estates are classified by the Civil Code in several ways [*Civ. Code § 701*; *see Civ. Code §§ 761-783.1*], as discussed below. The classifications are not mutually exclusive.

[2] Period of Enjoyment

One way in which estates or interests in real property are classified is according to their time or period of enjoyment. Thus, every interest in property is either present or future, and either perpetual or limited [*Civ. Code § 688(1), (2)*].

A present interest entitles the owner to the immediate possession of the property [*Civ. Code § 689*]. The four basic types of present estates or interests in real property are (1) estates of inheritance or perpetual estates (fees) [*see Civ. Code § 762* (every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or an absolute fee); *see also Civ. Code § 1105* (grant deed is presumed to transfer fee simple title unless it appears from the deed that a lesser estate was intended)], (2) life estates, (3) estates for years, and (4) estates at will [*Civ. Code § 761*]. For further discussion of these estates, *see § 27.103*.

A future interest entitles the owner to the possession of the property only at a future time [*Civ. Code § 690*; *see Civ. Code § 699* (future interests may be transferred)]. There are three basic categories of common-law future interests: reversionary interests (including powers of termination), remainders, and executory interests [*see* Restatement of Property, §§ 25(1), 154(1), 156; for further discussion of these future interests, *see § 27.103*]. A future interest is often drafted to take effect on the occurrence of a contingency. This contingency or condition precedent fixes the beginning of the grantee's right in the property [*see Civ. Code § 708*]. For a discussion of conditions precedent and subsequent, see *§ 27.20[3]*.

A perpetual interest has a duration equal to that of the property [*Civ. Code § 691*]. A limited interest has a duration less than that of the property [*Civ. Code § 692*].

[3] Conditions Precedent or Subsequent

If the time when the enjoyment of property is to begin or end depends on events, the enjoyment is said to be on condition [*Civ. Code § 707*]. A condition is a provision contained in an instrument of conveyance that modifies or rescinds the conveyance if the grantee or the grantee's successors fail to comply with the provision [*Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926]* .

Conditions are either precedent or subsequent. A condition precedent fixes the beginning of the right, and a condition subsequent fixes the ending of the right [*Civ. Code § 708*]. A fee simple subject to a condition subsequent is an estate that may be terminated by the grantor or the grantor's successors if a stated event occurs [Restatement of Property § 45; *People ex. rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504-505, 26 Cal. Rptr. 853]* . Following a breach of a condition subsequent, the grantor (or successors) must take positive action to regain possession of the property [*People ex. rel. Dept of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504-505, 26 Cal. Rptr. 853* ; *City of Santa Monica v. Jones (1951) 104 Cal. App. 2d 463, 470, 232 P.2d 55* ; *see Civ. Code § 885.050*; *see also Code Civ. Proc. § 336(b)*]. The future interest of the grantor or successor that accompanies such a defeasible fee is a power of termination [*Civ. Code § 885.010(a)(1)*]. There are statutory limitations on the duration of a power of termination [*see § 27.202[1][e]*].

Due to the risk of forfeiture, conditions subsequent are disfavored by the courts and will be interpreted as covenants whenever possible [*MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367* ; *see Hawley v. Kafitz (1905) 148 Cal. 393, 394, 83 P. 248* ; *see also § 27.21*]. Further, any condition involving a forfeiture will be strictly interpreted against the party for whose benefit it is created [*Civ. Code § 1442*].

Although grantors have a great deal of freedom to impose conditions on transfers of property, there are several categories of impermissible conditions. For example, any condition in a deed of real property that purports to restrict the right of any person to sell, lease, rent, use, or occupy the property on the basis of invidious discrimination [*see § 27.112*, P 3] is void [Civ. Code § 782(a)].

For further discussion of conditions, see Ch. 28C, *Covenants, Conditions, and Restrictions* .

[4] Absolute or Qualified Ownership

Estates are also classified as to the quality of the interest that is held. The ownership of property is either absolute or qualified [*Civ. Code § 678*]. It is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his or her pleasure, subject only to general laws [*Civ. Code § 679*]. Ownership is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited, or when the use is restricted [*Civ. Code § 680*].

[5] Number of Owners

Estates are further classified based on the number of persons holding interests in the subject property. The ownership of property by a single person is designated as a sole or several ownership [*Civ. Code § 681*]. Ownership by several persons must be in one of the following forms: joint tenancy, tenancy in partnership, tenancy in common, community property [*Civ. Code § 682*], or, effective July 1, 2002, community property with right of survivorship [*Civ. Code § 682.1*]. These forms are mutually exclusive [*see Jacquemart v. Jacquemart (1956) 142 Cal. App. 2d 794, 796, 299 P.2d 281]* .

When a deed names several grantees but does not set forth their respective interests, there is a rebuttable presumption that each grantee takes an equal interest [*Anderson v. Broadwell (1931) 119 Cal. App. 150, 153]* . Of course, joint tenants hold property in equal shares [*Civ. Code § 683*], and the respective interests of a husband and wife in community property are equal during the continuance of the marriage [*Fam. Code § 751*]. When the grantor wishes multiple grantees to hold property in unequal shares, the grantor should select a form of joint ownership that permits this (that is, tenancy in common or partnership interests) and specify the respective interests in the deed.

PRACTICE TIP:

Equity Shares. A common practice during the 1980s was for buyers to acquire property as tenants in common. The vehicle allowed a struggling young couple to use the creditworthiness (and down payment) of their parents to afford an expensive new home. The parents would reap the tax benefits, while the couple would build equity and share that equity with their parents. While changes to the tax law and home values have made this practice less attractive, it still exists and practitioners should be aware of the vehicle as a means of sharing equity between younger and older generations. Consultations with a tax adviser are necessary to insure that allocating tax benefits to one party to the detriment of the other is still appropriate. *Commentary by Timothy F. O'Leary.*

[6] Rule Against Perpetuities

Under the Uniform Statutory Rule Against Perpetuities (USRAP) [*see Prob. Code § 21200 et seq.*], a nonvested property interest is invalid unless one of the following conditions is satisfied:

- When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

- The interest either vests or terminates within 90 years after its creation [*Prob. Code § 21205*].

However, the USRAP specifically excludes property interests arising out of "nondonative transfers" from its application [*see Prob. Code § 21225(a)*; *but see Prob. Code § 21225(a)(1)- (8)* for exceptions for certain "domestic" transfers)]. "Nondonative" transfers are generally transfers that are supported by consideration [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)]. However, this is not always the case. If a transfer is essentially gratuitous in nature, it is to be regarded as donative even if it is supported by consideration [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)].

A detailed discussion of the rule against perpetuities and its operation in California is beyond the scope of this chapter. For detailed coverage of the USRAP, *see* Ch. 67, *Future Interests and Perpetuities* .

[7] After-Acquired Title

If a grantor attempts to convey a greater interest in real property than he or she owns, the deed will be valid only to the extent of the grantor's interest in the land [*Goldman v. Goldman (1953) 116 Cal. App. 2d 227, 242, 253 P.2d 474]* . However, pursuant to the doctrine of after-acquired title, if the grantor does not acquire an interest in the conveyed property until after the execution of the conveyance, that interest will, in some cases, also pass under the deed, whether or not the grantor had any title to the conveyed property at the time he or she executed the deed [*Maxwell v. Carlon (1939) 30 Cal. App. 2d 356, 361, 86 P.2d 666* ; *see Schwenn v. Kaye (1984) 155 Cal. App. 3d 949, 952-954, 202 Cal. Rptr. 374]* .

The bases for the doctrine of after-acquired title are estoppel and statute. Under the common law, if the grantor states on the face of the instrument, in any way, that he or she is seized or possessed of a particular estate, and the deed purports

to convey that estate, the grantor and all persons in privity with the grantor will be estopped from denying that the grantor owned that estate at the time the deed was executed [*Clark v. Baker (1860) 14 Cal. 612, 629* ; *see also Barberi v. Rothchild (1936) 7 Cal. 2d 537, 540-541, 61 P.2d 760]* .

Under the statutory rule governing after-acquired title, if a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title (or claim of title) to the property, the title or claim of title passes by operation of law to the grantee or the grantee's successors [*Civ. Code § 1106*]. Thus, a grant deed that transfers a fee simple title transfers after-acquired title [*Schwenn v. Kaye (1984) 155 Cal. App. 3d 949, 952, 202 Cal. Rptr. 374* ; *Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112* ; *see Civ. Code § 1105*; § 27.11[1]].

Because a quitclaim deed transfers whatever present interest or estate the grantor has in the property [*see § 27.11[2]*], the doctrine of after-acquired title normally does not apply [*see Civ. Code § 1106*; *Taylor v. Coachella Valley Water Dist. (1952) 108 Cal. App. 2d 743, 745, 239 P.2d 454]* . However, if the quitclaim deed conveys an equitable estate and legal title later vests in the grantor, that title is deemed to be transferred to the grantee [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112]* . Further, if a quitclaim deed contains language indicating an intention not to limit the interest conveyed to the grantor's present interest, or expressly or impliedly affirms the existence of a particular estate and an intention by the parties to have the deed convey that estate, the grantor may be estopped from asserting an after-acquired title or interest in contradiction to the terms or implications of the quitclaim deed [*Estate of Wilson (1940) 40 Cal. App. 2d 229, 232-233, 104 P.2d 716]* .

The doctrine applies only as long as the grantee has some estate, interest, or claim in the conveyed property [*Garabaldi v. Shattuck (1886) 70 Cal. 511, 513, 11 P. 778]* . If the grantee no longer has any estate in the property, the grantor's new title does not pass to the grantee [*Garabaldi v. Shattuck (1886) 70 Cal. 511, 513, 11 P. 778]* . For example, if the grantor, following the initial conveyance, acquires the grantee's property at an execution or judicial sale or through adverse possession, the grantee no longer has any interest in the property, and the grantor's acquisition will not pass to the grantee as after-acquired property [*McCune v. McCune (1937) 23 Cal. App. 2d 295, 297, 72 P.2d 883* (execution sale); *Garabaldi v. Shattuck (1886) 70 Cal. 511, 512, 11 P. 778* (adverse possession)].

[8] Exceptions and Reservations

Although the terms "reservation" and "exception" are frequently used interchangeably to refer to a clause in a deed that detracts from what the grantee would otherwise receive under the deed, there are material differences between the two terms [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677, 41 Cal. Rptr. 223]* . A reservation in a deed allows the grantor's entire interest in the subject property to pass to the grantee, but revests a newly created interest in the grantor or a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739* ; *see Caffroy v. Fremlin (1961) 198 Cal. App. 2d 176, 182, 17 Cal. Rptr. 668* (reservation may be through an instrument collateral to the deed); *see also Holmes v. Nay (1921) 186 Cal. 231, 237, 199 P. 325* (reservation may be implied)]. An exception prevents part of the grantor's interest from passing to the grantee [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476 n.1, 102 Cal. Rptr. 739]* . Consequently, the excepted interest remains in the grantor, and the exception does not vest an interest in a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476 n.1, 102 Cal. Rptr. 739]* .

The question of whether a particular provision in a deed is an exception or a reservation is not conclusively determined by the use of the term "reservation" or "exception" alone. Instead, the resolution of this issue depends on the real intention of the parties as ascertained from the whole conveyance [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677-678, 41 Cal. Rptr. 223* ; *see Coon v. Sonoma Magnesite Co. (1920) 182 Cal. 597, 601-602, 189 P. 271* (when a clause in a conveyance excepted "a strip of land... for a road to be built at some future time," the phrase "for a road" modified the entire clause and indicated that the parties intended to reserve a right-of-way for a road)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsRemediesAfter-Acquired PropertyReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesFuture InterestsGeneral OverviewReal Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawOwnership & TransferTransfer Not By DeedAcquisition by After-Acquired Title



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11-27 California Legal Forms--Transaction Guide § 27.21

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.21 Restrictions on Use of Property

A grantor may wish to restrict the grantee's use and enjoyment of the conveyed property. One common method of accomplishing this purpose is the insertion in the deed of a condition subsequent [*see § 27.20[3]*]. Another option is the restrictive covenant. A restrictive covenant is a promise to refrain from doing certain things in regard to the use of land [*Sackett v. Los Angeles City School Dist. (1931) 118 Cal. App. 254, 257, 5 P.2d 23* ; *see Civ. Code §§ 1460-1470* (prerequisites for binding restrictive covenants affecting real property)]. The covenant may be created in a deed or in a separate agreement [*see Civ. Code § 1468*]. It may run with the land and therefore be binding and enforceable by successive owners of the properties benefitted and burdened by the covenant, or may be personal and enforceable only by the parties to the agreement [*Civ. Code § 1468*]. The covenantee (that is, the person benefitted by the restriction on use) holds a property interest in the land [*see Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964* ; *Redevelopment Agency v. Tobriner (1984) 153 Cal. App. 3d 367, 374-375, 200 Cal. Rptr. 364]* .

For detailed coverage of covenants, see Ch. 28C, *Covenants, Conditions and Restrictions* . The *form in § 28C.220* consists of a deed that incorporates prior recorded restrictive covenants into the conveyance. For additional discussion of covenants, see *California Forms of Pleading and Practice, Ch. 184, Deeds, § 184.60 et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreation



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11-27 California Legal Forms--Transaction Guide § 27.22

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.22 Removal of Unlawful Restrictions in Recorded Documents

[1] Unlawful Restrictive Covenants

It is unlawful to discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, whether or not accompanied by a statement that the restrictive covenant is repealed or void [*Gov. Code § 12955* (*l*)].

[2] Recordation of Restrictive Covenant Modification

[a] Owner May Record Modification Document

A person who holds an ownership interest of record in property and believes that the interest is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955* (*l*) [*see § 27.22[1]*] may record a document titled "Restrictive Covenant Modification." The county recorder may choose to waive the fee prescribed for recording and indexing instruments [*see Gov. Code § 27361*] in the case of the modification document. The modification document must include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive language struck out [*Gov. Code § 12956.2(a)*].

The county recorder must make available to the public "Restrictive Covenant Modification" forms [*Gov. Code § 12956.2(e)*].

If the holder of an ownership interest of record in property causes a modified document to be recorded that contains modifications not authorized by *Gov. Code § 12956.2*, the county recorder will not incur liability for recording the document. Any liability that may result from the unauthorized recordation is the sole responsibility of the holder of the ownership interest of record who caused the document to be recorded [*Gov. Code § 12956.2(f)*].

Gov. Code § 12956.2 does not apply to persons holding an ownership interest in property that is part of a common

interest development [*see Civ. Code § 1351(c)* (definition)] if the board of directors of that common interest development is subject to the requirements of *Civ. Code § 1352.5(b)*, which proscribes restrictive covenants in any declaration or other governing document for the development [*Gov. Code § 12956.2(g)*].

[b] County Counsel Must First Examine Documents

Before recording the modification document, the county recorder must submit the modification document and the original document to the county counsel, who must determine whether the original document contains an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income [*see Gov. Code § 12955(p)* (definition)], or ancestry. The county counsel must return the documents and inform the county recorder of the determination. The county recorder must refuse to record the modification document if the county counsel finds that the original document does not contain an unlawful restriction [*Gov. Code § 12956.2(b)*].

[c] Modification Is Indexed Same as Original

The modification document must be indexed in the same manner as the original document being modified. It must contain a recording reference to the original document in the form of a book and page or instrument number and the date of the recording [*Gov. Code § 12956.2(c)*].

[d] Restrictions in Modification Are Paramount

Subject to covenants, conditions, and restrictions that were recorded after the recording of the original document that contains the unlawfully restrictive language and subject to covenants, conditions, and restrictions that will be recorded after the modification document, the restrictions in the modification document, once recorded, are the only restrictions having effect on the property. The effective date of the terms and conditions of the modification document must be the same as the original document's effective date [*Gov. Code § 12956.2(d)*].

[e] Adding Racially Restrictive Covenant Is Offense

Any person who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. Notwithstanding any other provision of law, a prosecution for a violation must commence within three years after the discovery of the document's recording. The county recorder will not incur any liability for recording the document [*Gov. Code § 12956.1(c)*].

[3] Duty to Inform Persons That Unlawful Restrictions Are Removable

A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person must place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following [*Gov. Code § 12956.1(a), (b)(1)*; *see Civ. Code § 1351* (definitions of "association," "governing document," and "declaration")]:

> If this document contains any restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to *Section 12956.2 of the Government Code*. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.

However, the requirement does not apply to documents being submitted for recordation to a county recorder [*Gov. Code*

§ 12956.1(b)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcement



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.23 Language of Conveyance

To be valid, a deed must contain words that indicate an intention to transfer an interest in the subject property from one person to another [*Cordano v. Wright (1911) 159 Cal. 610, 618, 115 P. 227]* . No precise words are required so long as the language used discloses an intent to make a present conveyance [*Carman v. Athearn (1947) 77 Cal. App. 2d 585, 596-597, 175 P.2d 926]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawOwnership & TransferGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.24

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.24 Consideration

A deed given without consideration is valid [*Freeman v. La Morte (1957) 148 Cal. App. 2d 670, 673, 307 P.2d 734* ; *see Civ. Code § 1040* (consideration is not necessary for voluntary transfer); *but see Bertelsen v. Bertelson (1942) 49 Cal. App. 2d 479, 484, 122 P.2d 130* (attorney in fact cannot make a deed without consideration)]. Consequently, a deed may not be rescinded on the grounds of failure of consideration unless (1) performance or payment of the consideration is made a condition subsequent [*Lavely v. Nonemaker (1931) 212 Cal. 380, 382, 298 P. 976* ; *see Teel v. Bank of Eureka (1941) 42 Cal. App. 2d 807, 809-811, 110 P.2d 78* ; *see also § 27.20[3]*], or (2) the deed was obtained through the use of fraud or undue influence [*Jackson v. Gorham (1929) 98 Cal. App. 112, 115, 276 P. 391* ; *Schott v. Schott (1914) 168 Cal. 342, 344-346, 143 P. 595* ; *see Civ. Code §§ 3439.04, 3439.07, 3439.08*]. The gross inadequacy of consideration is a factor in determining whether fraud and undue influence were present [*Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 136-137, 225 P.2d 238]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsEnforceability



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.25 Execution

[1] Requirement of Execution

To be valid, a deed must be executed by the grantor or an authorized agent of the grantor [*Civ. Code § 1091*; *see Code Civ. Proc. § 1971*; *see also* [2], *below*]. A grantor who cannot write can satisfy this requirement by making a mark [*Civ. Code § 14*]. If the mark is to be acknowledged [*see § 27.27[2]*], the following requirements must be satisfied [*Civ. Code § 14*]:

- It must be witnessed by two persons;
- Those persons must subscribe their own names as witnesses near the grantor's mark; and
- One of the witnesses must write the grantor's name near the grantor's mark.

If the mark will not be acknowledged, only one witness is required to perform the above tasks [*Civ. Code § 14*].

[2] By Agent

An agent's authority to execute a deed must be in writing [*Civ. Code § 1091*; *see Civ. Code § 2309*; *Code Civ. Proc. § 1971*]. If, as is usually the case, this written authorization is in the form of a power of attorney [*see Prob. Code § 4014, 4022* (definitions of "attorney in fact" and "power of attorney," respectively); *see also* Ch. 98, *Powers of Attorney*], the attorney in fact must sign both the grantor's name and his or her own name as attorney in fact [*Civ. Code § 1095*; *see Hodge v. Hodge (1967) 257 Cal. App. 2d 31, 33-36, 64 Cal. Rptr. 587* (failure to comply with this requirement invalidates transaction)]. Exceptions to the written authorization requirement permit (1) a grantor to orally request a third party to sign the deed for the grantor, provided the signature is written in the grantor's presence, and (2) a third party to aid the grantor in signing the deed, if the signature is acknowledged by words or acts [*Rich v. Ervin (1948) 86 Cal. App. 2d 386, 395, 194 P.2d 809]* .

[3] By Husband and Wife

Both spouses must join in executing any instrument by which community real property [*see Fam. Code § 760* ("community property" defined)] or any interest in such property is sold, conveyed, encumbered, or leased for a period of more than one year [*Fam. Code § 1102(a)*]. The spouses may do this personally or by duly authorized representative [*Fam. Code § 1102(a)*]. This restriction does not apply to leases, mortgages, conveyances, or transfers of real property or any interest in real property between the spouses [*Fam. Code § 1102(b)*].

[4] By One Spouse

Notwithstanding the joint execution requirement set forth in *Fam. Code § 1102* [*see § 27.25[2]*], a sole deed, lease, contract, or mortgage of either spouse holding record title to community real property to a purchaser, lessee, or encumbrancer who acts in good faith and without knowledge of the marriage relation is presumed valid if executed on or after 1974 [*Fam. Code § 1102(c)(2)*]. This rebuttable presumption also applies to any lease, contract, mortgage, or deed executed before that date by a husband [*Fam. Code § 1102(c)(1)*]. An action to avoid an instrument that is executed by one spouse alone and that affects real property to which that spouse alone holds record title may not be commenced more than one year after the instrument has been filed in the recorder's office in the county in which the land is situated [*Fam. Code § 1102(d)*]. Further, it does not prevent either spouse from encumbering his or her interest in community property, pursuant to *Fam. Code § 2033*, to pay reasonable attorneys' fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation [*Fam. Code § 1102(e)*].

When one spouse is named as record title holder and is conveying title to property that the spouse claims is his or her separate property, the grantee should insist (1) that the nongrantor spouse first execute a quitclaim deed to the property to the grantor spouse [*see § 27.203[2]*], or (2) that the nongrantor spouse execute a written waiver or statement indicating that he or she has no interest in the property being sold and will execute a quitclaim deed if necessary. For an illustrative waiver, see Ch. 23, *Real Property Sales Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsExecution FormalitiesReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property



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11-27 California Legal Forms--Transaction Guide § 27.26

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§ 27.26 Property Held and Instruments Executed with Former Spouse

[1] Joint Tenancy with Former Spouse

A joint tenancy between a decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse (as defined in *Prob. Code § 78*) as a result of the marriage's dissolution or annulment [*Prob. Code § 5601(a)*]. This also applies to property held as community property with a right of survivorship [*Prob. Code § 5601(d)*; *see Civ. Code § 682.1*]. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for these purposes [*Prob. Code § 5601(a)*]. In any case, a joint tenancy is not severed by this provision in either of these situations [*Prob. Code § 5601(b)*]:

- If the joint tenancy is not subject to severance by the decedent at the time of the decedent's death; or
- If there is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

In addition, this provision does not affect the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under these provisions or who lacks knowledge of a severance under these provisions [*Prob. Code § 5601(c)*]. Similarly, this does not affect the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury that includes the information and statements specified by statute [*Prob. Code § 5602(a)*]. A person relying on the affidavit or declaration has no duty to inquire into the truth of these statements [*Prob. Code § 5602(b)*; *see Prob. Code § 5602(c)* (affidavit or declaration may be recorded)].

These provisions apply to instruments creating a joint tenancy, whether the instrument was executed before, on, or after the operative date of January 1, 2002 [*Prob. Code § 5604(a), (b)*; *see Prob. Code § 5604(c)* (when provisions not applicable)]. Nothing in these provisions is intended to limit the court's authority to order a party to a dissolution or

marriage to preserve a joint tenancy in favor of the former spouse [*Prob. Code § 5603*].

[2] Nonprobate Transfer to Former Spouse

A nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferee before or during the marriage, fails if the former spouse is not the transferor's surviving spouse [*see Prob. Code § 78* (definition)] at the time of the transferor's death as a result of the marriage's dissolution or annulment [*Prob. Code § 5600(a)*; *see Prob. Code § 5600(e)* (definition of nonprobate transfer)]. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for these purposes [*Prob. Code § 5600(a)*]. However, a nonprobate transfer does not fail in the following situations [*Prob. Code § 5600(b)*]:

- If the nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

- If there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer for the former spouse.

- If a court order requiring that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

These provisions apply to instruments making a nonprobate transfer, whether the instrument was executed before, on, or after the operative date of January 1, 2002 [*Prob. Code § 5604(a), (b)*; *see Prob. Code § 5604(c)* (when provisions not applicable)]. Nothing in these provisions is intended to limit the court's authority to order a party to a dissolution or marriage to maintain the former spouse as a beneficiary on any nonprobate transfer [*Prob. Code § 5603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawOwnership & TransferGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.27 Acknowledgment and Recordation

[1] Effect

Every conveyance of real property that is acknowledged (or proved), certified, and recorded constitutes constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Civ. Code § 18* (constructive notice is that which is imputed by law)]. If a deed is not recorded, it is valid as between the parties and those who have notice of the deed [*Civ. Code § 1217*; *see Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 Cal. App. 2d 323, 328, 56 Cal. Rptr. 345]* but is void as against any subsequent bona fide purchaser or mortgagee for value whose conveyance is first duly recorded [*Civ. Code § 1214*]. Thus, the grantee should record the deed as soon as possible after receipt to prevent third parties from obtaining superior rights and to negate any claims of lack of delivery [*see § 27.31*].

[2] Requirements for Acknowledgment

Before a deed can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*; *see Civ. Code §§ 1198, 1199*; for requirements governing proof of execution of unacknowledged instrument, *see § 27.121*, P 3]. Proof of execution may be used in lieu of acknowledgment only for a trustee's deed or a deed of reconveyance [*Civ. Code § 1195(b)*]. Proof of execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted, pursuant to *Gov. Code § 27287* [*Civ. Code § 1195(b)*]. An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [*see, e.g., Civ. Code § 1189*]. A certificate of acknowledgment is a formal declaration by an authorized officer [*see Civ. Code § 1180 et seq.*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer either knew the executing party personally or had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*].

Civ. Code § 1189 sets forth one statutory certificate of acknowledgment form that must be used when the acknowledgment is taken within this state [*see Civ. Code § 1189(a)*]. Although there are no longer any special requirements applicable solely to certificates of acknowledgment executed by certain corporate officers [*see* former *Civ.*

Code § 1190.1], *Civ. Code § 1190* now provides that the execution of a certificate of acknowledgment on behalf of an incorporated or unincorporated entity by a duly authorized person will provide special protections regarding the authorization for the underlying transaction [*Civ. Code § 1190*]. For further discussion, see *§ 27.271[1]*.

All acknowledgments of deeds, quitclaim deeds, or deed of trust affecting real property (other than a trustee's deed resulting from a decree of foreclosure or a nonjudicial foreclosure pursuant to *Civ. Code § 2924*, or a deed of reconveyance) require the right thumbprint of the party signing the document [*see Gov. Code § 8206(a)(2)(G)*; *see Gov. Code § 8214.23* (notary public is subject to civil penalty for failure to obtain thumbprint)].

[3] Place of Recording

After being duly acknowledged or proved and certified, the deed must be recorded in the county in which the subject real property is situated [*Civ. Code §§ 1169, 1170*]. A certified copy of the instrument may be recorded in any other county, and, when so recorded, will have the same force and effect as if it were the original deed [*Civ. Code § 1218*]. If the original is recorded in a county where the real property is not situated, then a certified copy may be filed in the county where the real property is situated and will have the same force and effect as the original [*Civ. Code § 1213*].

[4] Required Taxes and Tax Statement

A deed will not be accepted for recording unless it sets forth, across the bottom of the first page, the name and address to which future tax statements may be mailed [*Gov. Code § 27321.5(a)*]. The failure to provide this information, or any misstatement of the required information, will not affect the validity of the deed or the notice imparted by recordation [*Gov. Code § 27321.5*].

California counties may tax transfers of real property [*Rev. & Tax. Code § 11911(a)*]. Also, cities within counties that have imposed such a tax may also tax these transfers [*Rev. & Tax. Code § 11911(b)*; *see Rev. & Tax. Code § 11911(c)* (credit allowed against county transfer tax for amount of any transfer tax imposed by city)]. A recorder cannot record a deed unless any required documentary transfer tax or taxes have been paid [*Rev. & Tax. Code § 11933*]. However, if the recorder records the deed anyway, failure to collect the tax does not affect the constructive notice imparted by the recordation of the deed [*Rev. & Tax. Code § 11933*].

[5] Computer-Related Innovations

[a] Recordation of Digitized Image From Government Entity

The recorder of any county may, in lieu of accepting a written paper, accept for recording digitized images or digital images, or both, of a recordable instrument, paper, or notice, if both of the following conditions are satisfied [*Gov. Code § 27279(b)*; *but see Gov. Code §§ 27279.1-27279.3* (special requirements for Orange and San Bernardino Counties)]:

- The image conforms to all other applicable statutes that prescribe recordability, except the requirement of original signatures [*see Gov. Code § 27201(b)* (signature requirement)]; and

- The requester and addressee for delivery of the recorded images are the same and can be readily identified as a local or state government entity, or an agency, branch, or instrumentality of the federal government.

Under the direction of the Attorney General, the Electronic Recordation Task Force has a mandate to address the technical, legal, security, and economic issues associated with electronic recordation, and to make recommendations to the Legislature regarding (1) which persons and entities should be authorized to digitize and record documents electronically, in order to limit real property fraud, forgery, and consumer risks associated with electronic recordation and provide a cost benefit to counties; (2) guidelines for the standardization of both software and hardware used by

counties to ensure maximum efficiency and cost-effectiveness and maximum use of the electronic recordation process by authorized requesters; and (3) appropriate recording fees and other assessments to cover increased costs to both county recorders and requesters [*Gov. Code § 27279.4(a)*].

[b] Electronic Transmission of Digital File for Recording

The Electronic Recording Delivery Act [*Gov. Code § 27390 et seq.*] authorizes the digitized electronic delivery, recording, and return of instruments submitted by title insurers [*see Ins. Code § 12340.4* (definition)], underwritten title companies [*see Ins. Code § 12340.5* (definition)], institutional lenders [*see Fin. Code § 50003(k)(l), (2), (4)* (definition)], and government entities. By limiting the entities that may use electronic transmission, the Legislature intends to enable county recorders, county district attorneys, and the Attorney General to develop an electronic recording delivery system that will protect property owners and lenders from fraud and identity theft. The Act imposes specific requirements for electronic recording of instruments generally; however, the authorized entities may submit digitized or digital electronic records for instruments of reconveyance, substitution of trustees, or assignment of deeds of trust without meeting the specific requirements [*Gov. Code § 27397.5*] because those instruments are not likely to result in consumer fraud. The Legislature will consider expanding this system to cover additional submitting entities and digital electronic records based on experience with the system [2004 Stats., ch. 621, § 1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.28 Special Procedures for Los Angeles and Riverside Counties

In Los Angeles County or Riverside County, the recorder may require, as a condition of recording, that a deed, quitclaim deed, or deed of trust indicate the assessor's identification numbers that fully contain all, or a portion of, the real property described in the legal description. If the description contains more than one assessor's parcel, all assessor's parcels must be indicated. The form of the entry must be substantially as follows: "Assessor's Identification Number _____-_____-_____." The recorder, within 30 days after recordation of a deed, quitclaim deed, or deed of trust, may mail a notice of this requirement to the party or parties executing the document [*Gov. Code §§ 27297.6(a), 27297.7(a)*; *see Gov. Code §§ 27297.6(d), 27297.7(d)* (competitive bid requirements apply to any contract for processing or mailing this notice)]. This requirement does not apply to the recordation of any document under which the federal government, the state, or any county, city, or subdivision of the state acquires title [*Gov. Code §§ 27297.6(b), 27297.7(b)*]. The recorder's failure to provide this notice will not result in any liability against the recorder or the county. If the notice is returned to the recorder by the U.S. Postal Service as undeliverable, the recorder is not required to retain the returned notice [*Gov. Code §§ 27297.6(c), 27297.7(c)*]. In addition to any other recording fee, the recorder may collect a fee from a party (other than a governmental entity) filing a deed, quitclaim deed, or deed of trust, which must not exceed the mailing cost of the foregoing notice and in any event must not exceed $7 [*Gov. Code § 27387.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.29 Recorder's Liability and Treatment of Unrecordable Documents

A recorder is liable for damages resulting from the recorder's neglecting or refusing to record an instrument proved or acknowledged according to law or any notice that may by law be recorded, as well as other specified actions or failures to act [*Gov. Code § 27203(a)(1)*; *see Gov. Code § 27203(b)- (d)*]. However, a recorder is not liable for neglecting or refusing to record an instrument, paper, or notice that the recorder has determined to be an unrecordable document [*Gov. Code § 27203(a)(1)*; *see Gov. Code § 27201*]. If a person presents a document to the recorder that the recorder determines to be unrecordable, the recorder may provide to that person a form stating the recorder's reason for refusing to record the document and the following information [*Gov. Code § 27203(a)(2)*]:

- The person has the right to judicial review of the recorder's refusal to record the document, in a court of competent jurisdiction.

- It is a public offense to make any further attempt to record the document without an order of the court as provided by *Gov. Code § 27204*.

A person who receives a form from the recorder stating that the proffered document is unrecordable, and who subsequently attempts to record the document without an order from the court requiring recordation of the document is guilty of a misdemeanor, punishable by incarceration in a county jail not exceeding six months, a fine not exceeding $1,000, or both, or is guilty of an infraction punishable pursuant to *Penal Code § 19.8* [*Gov. Code § 27204*].

The recorder must keep a correct copy of a rejected document [*Gov. Code § 27203(a)(2)*]. If the document is determined by the court to be a recordable document, the recorder must pay the filing fees for the judicial review proceeding and must record the document within a reasonable time [*Gov. Code § 27203(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawJudicial ReviewRemediesGeneral OverviewAdministrative LawJudicial ReviewReviewabilityJurisdiction & VenueReal Property LawDeedsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.30 Public Inspection of Records

Under the California Public Records Act [*Gov. Code § 6250 et seq.*], public records are open to inspection at all times during the office hours of the state or local agency, and every person has a right to inspect any public record, except as otherwise provided [*Gov. Code § 6253(a)*]. Any reasonably segregable portion of a record must be available for inspection by any person requesting the record after deletion of the portions that are exempted by law [*Gov. Code § 6253(a)*; *see Gov. Code § 6252* ("public agency," "public records," and other terms defined); *see also Gov. Code § 6252.5* (elected member or officer of state or local agency has access to public records on same basis as any other person)]. Within 10 days from the receipt of a request for documents, the agency must determine whether the request, in whole or in part, seeks copies of disclosable public records, and must promptly notify the person making the request concerning the agency's determination and the reasons for that determination, although special circumstances defined by statute may allow for an extension to 14 days [*Gov. Code § 6253(c)*; *see Gov. Code § 6253(d)* (agency may not obstruct copying of public records; any notification of denial of any request must set forth name and title or position of each person responsible for denial)]. When the agency dispatches the determination, and the agency determines that the request seeks disclosable public records, the agency must state the estimated date and time when the records will be made available [*Gov. Code § 6253(c)*].

Records that are not exempt from public disclosure must be made promptly available, on payment of fees covering the direct costs of duplication, or a statutory fee, if applicable, unless the records are exempt from disclosure [*see Gov. Code § 6253(b)*; *see also Gov. Code § 6253(e)* (faster, more efficient, or greater access to records is permissible)]. Certain state and local bodies must establish written guidelines for accessibility of records, and these guidelines must be posted at the agency and made available to any person who requests them [*Gov. Code § 6253.4(a)*]. Every agency may adopt regulations stating the procedures to be followed when making its records available, in accordance with statutory requirements [*Gov. Code § 6253.4(a)*; *see Gov. Code § 6253.4(b)*].

Any agency that has information that constitutes an identifiable public record that is in electronic format must make that information available in an electronic format when requested by any person, unless the record is exempt from disclosure or disclosure is otherwise prohibited by law [*Gov. Code § 6253.9(a)*; *see Gov. Code § 6253.9(g)*; *see also Gov. Code §*

6255]. The agency must make the information available in any electronic format in which it holds the information, and the cost charged for duplication is limited to the direct cost of producing a copy of the record in electronic format [*Gov. Code § 6253.9(a)*]. However, if the request requires that the agency produce the record at a different time than it typically produces the information, or the request requires data compilation, extraction, or programming, then the requester must bear that cost [*Gov. Code § 6253.9(b)*].

When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency must assist the requesting person in making a focused and effective request that reasonably describes identifiable records [*Gov. Code § 6253.1(a)*]. As part of that assistance, and in addition to the requirements imposed on the agency by *Gov. Code § 6253*, the public agency must do all of the following to the extent reasonable under the circumstances [*Gov. Code § 6253.1(a), (c)*]:

- Assist the member of the public to identify the records and information that are responsive to the request or to the purpose of the request, if stated.

- Describe the information technology and physical location in which the records exist.

- Provide suggestions for overcoming any practical basis for denying access to the records or the information sought.

A public agency is deemed to have satisfied these requirements if it is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records [*Gov. Code § 6253.1(b)*]. In addition, these requirements do not apply to a request for public records if the public agency (1) makes available the requested records in accordance with *Gov. Code § 6253, (2)* determines that the request should be denied because the records are exempt from disclosure under *Gov. Code § 6254*, or *(3)* makes available an index of its records [*Gov. Code § 6253.1(d)*].

Certain records are exempt from public inspection [*see Gov. Code § 6254*]. If records are withheld from public inspection, the agency doing so must justify that action either on the ground that the record in question is exempt under an express provision of law or on the ground that on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record [*Gov. Code § 6255(a)*; *see Gov. Code §§ 6258*, 6258.5, *6259* (court enforcement of right to inspect or copy public record)]. A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, must be in writing [*Gov. Code § 6255(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationDefenses & ExemptionsStatutory ExemptionsAdministrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsPublic InspectionReal Property LawDeedsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.31 Delivery

[1] Requirements

A deed will not take effect and transfer title to the grantee until the grantor delivers the deed with the intent to transfer title [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352* ; *see Code Civ. Proc. § 1933*]. No particular form of delivery is required [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919]* . The manual transfer of the deed by the grantor to the grantee or other change of possession of the deed is not required [*Civ. Code § 1059*; *Lavely v. Nonemaker (1931) 212 Cal. 380, 387, 298 P. 976]* . Instead, the essential requirement for a valid delivery is the present intention by the grantor to deliver title [*see Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435, 73 Cal. Rptr. 83]* . A legal delivery does not occur unless the grantor intends to divest himself or herself of the title to the subject property [*Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 506, 286 P.2d 399]* . Specifically, the grantor must intend that the deed pass title in the following ways: (1) unconditionally [*Civ. Code § 1056*; *see § 27.31[2], below*], (2) irrevocably [*Danenberg v. O'Connor (1961) 195 Cal. App. 2d 194, 200, 15 Cal. Rptr. 667]* , and (3) immediately [*Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435* ; *see § 27.31[3], below*].

A deed that has not been "actually delivered," that is, executed and delivered with the requisite intent by the grantor, will be deemed constructively delivered if either of the following conditions is satisfied [*Civ. Code § 1059*]:

- The parties agree at the time of execution that the grantee is entitled to immediate delivery and that the deed has been delivered [*see Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352* (grantor must manifest, by words or conduct, that he or she considered deed completely executed and title conveyed)]; or

- The deed is delivered to a third party for the grantee's benefit, and the grantee's assent is shown or may be presumed.

Whether a valid delivery has been made is a question of fact [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal.*

Rptr. 236 ; *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 482, 54 Cal. Rptr. 1]* . A trial court may consider evidence of the circumstances surrounding the transaction [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236]* , including the grantor's declarations made before and after the alleged delivery [*Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 478, 54 Cal. Rptr. 1* ; *Coffey v. Cooper (1960) 185 Cal. App. 2d 464, 468, 8 Cal. Rptr. 358]* .

[2] Conditional Delivery

A deed cannot be conditionally delivered [*Civ. Code § 1056*]. If a deed that is absolute on its face is delivered to the grantee with oral conditions attached, the oral conditions will be disregarded and the title will vest in the grantee free of the foregoing conditions [*Civ. Code § 1056*; *Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236]* . Oral conditions, however, may be considered as declarations by the grantor in determining whether the grantor possessed the necessary intent to transfer title [*Coffey v. Cooper (1960) 185 Cal. App. 2d 464, 468, 8 Cal. Rptr. 358]* . Further, although the oral conditions are discharged for title purposes, the grantor may bring an action for damages if the grantee breaches them [*Ivancovich v. Sullivan (1957) 149 Cal. App. 2d 160, 166, 307 P.2d 989]* .

[3] Delivery at Grantor's Death

A transfer of property from one individual to another is not valid unless both parties are living at the time of the transfer [*Civ. Code § 1039*]. If a grantor intends a deed to take effect only on the grantor's death, the document is testamentary in character and void as a deed [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236* ; *Henneberry v. Henneberry (1958) 164 Cal. App. 2d 125, 129, 330 P.2d 250]* . Similarly, a deed is invalid if the grantor delivers it to a third person along with instructions to deliver it to the grantee only if the grantee survives the grantor, and otherwise to return it to the grantor [*Civ. Code § 1056*; *Rothney v. Rothney (1940) 41 Cal. App. 2d 566, 572-573, 107 P.2d 294]* . In this case, the delivery is not valid because the grantor intends to retain title at the present time [*Stone v. Daily (1919) 181 Cal. 571, 574-577, 185 P. 665* ; *Rothney v. Rothney (1940) 41 Cal. App. 2d 566, 571-573, 107 P.2d 294]* .

A delivery of a deed that conveys a future interest will be valid if the grantor possesses the requisite intent to divest himself or herself of an interest in real property immediately and irrevocably [*Hitch v. Hitch (1938) 24 Cal. App. 2d 291, 294-296, 74 P.2d 1098]* . For example, the grantor may place the deed in the hands of a third party with instructions to deliver the deed to the grantee on the grantor's death. Provided the grantor intends to make the delivery absolute, the deed will pass a present title to the property to the grantee, the grantor will retain a life estate, and the third party will hold the deed as a trustee for the grantee [*Williams v. Kidd (1915) 170 Cal. 631, 637, 151 P. 1* ; *see Civ. Code § 1044*; *see also Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 437, 73 Cal. Rptr. 83* (grantor may retain possession of such a deed for life); *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 485, 54 Cal. Rptr. 1* (grantor may retain possession of subject property for life)].

[4] Presumptions and Inferences

A number of presumptions and inferences exist regarding the delivery of deeds. For example, recordation of the deed is prima facie evidence of execution and delivery by the grantor [*Evid. Code §§ 1532, 1600*]. This is a rebuttable presumption affecting the burden of proof [*see Evid. Code §§ 601, 602, 1601(b)*; *Rousseau v. Hurtado (1954) 122 Cal. App. 2d 705, 715, 265 P.2d 580]* . Furthermore, a duly executed deed is presumed to have been delivered on the date set forth on the deed [*Civ. Code § 1055*]. Because a deed has not been "duly executed" until it has been executed and delivered [*Code Civ. Proc. § 1933*], this presumption arises only as to the date of delivery, not the fact of delivery [*Miller v. Jansen (1943) 21 Cal. 2d 473, 476, 132 P.2d 801]* .

A grantee's physical possession of the deed raises an inference of delivery [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 28, 75 Cal. Rptr. 236]* . This inference may be refuted by evidence indicating that the grantor did not have the necessary intent to deliver the deed [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 29, 75 Cal. Rptr. 236* ; *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 484, 54 Cal. Rptr. 1* ; *see § 27.31[1], above*]. The retention of the deed by the grantor raises a

rebuttable presumption that the deed has not been delivered unless it is shown that the deed has been duly delivered and that the grantor is retaining the deed for safekeeping or a similar purpose [*Miller v. Jansen (1943) 21 Cal. 2d 473, 477, 478, 132 P.2d 801* ; *Condencia v. Nelson (1960) 187 Cal. App. 2d 300, 303, 9 Cal. Rptr. 759]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptionsReal Property LawDeedsDeliveryReal Property LawOwnership & TransferDeath & IncapacityGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityTestamentary Dispositions



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11-27 California Legal Forms--Transaction Guide § 27.32

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.32 Acceptance

[1] Requirement of Acceptance

Acceptance by the grantee (or the grantee's representative) is necessary to make a delivery effective and the deed operative [*Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352* ; *Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919]* . Delivery and acceptance are simultaneous and correlative acts [*Reina v. Erassarret (1949) 90 Cal. App. 2d 418, 426, 203 P.2d 72]* . The acceptance need not be formal or express and may be shown by the grantee's acts and conduct [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919]* .

[2] Constructive

An acceptance need not be actual; constructive acceptance may be presumed if the conveyance is beneficial to the grantee and the deed is delivered to a third person for the grantee's benefit [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919* (deed delivered to third person with directions to deliver it to grantee on grantor's death)]. Constructive acceptance may be presumed even if the grantee has no knowledge of the deed [*Blackburn v. Drake (1963) 211 Cal. App. 2d 806, 816, 27 Cal. Rptr. 651* ; *Windiate v. Moore (1962) 201 Cal. App. 2d 509, 515, 19 Cal. Rptr. 860]* . In addition, if a grantee knows of a deed that is beneficial to himself or herself and does not reject it, acceptance is presumed [*Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131]* . Acceptance is also presumed when a beneficial conveyance is made to a person incapable of accepting, such as a minor [*In re Guardianship of Yano (1922) 188 Cal. 645, 649, 206 P. 995]* or an incompetent person [*Estate of Kalt (1940) 16 Cal. 2d 807, 813, 108 P.2d 401]* . Finally, if a deed is accepted by one or more of several grantees and the deed is beneficial to all of them, acceptance by the others is presumed [*Blackburn v. Drake (1963) 211 Cal. App. 2d 806, 816, 27 Cal. Rptr. 651* ; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131]* .

[3] Conditional

If the grantee's acceptance is conditional, the acceptance and delivery will not be valid and binding until the condition is satisfied [*Brereton v. Burton (1938) 27 Cal. App. 2d 464, 468-469, 81 P.2d 238* ; *Imes v. MacDonald (1931) 113*

Cal. App. 427, 432-433, 298 P. 173] . For example, if an acceptance is conditioned on the transfer of the property to the grantees free of all encumbrances, and the property is subject to a judgment lien at the time of conveyance, the acceptance and delivery are not effective [*Brereton v. Burton (1938) 27 Cal. App. 2d 464, 468-469, 81 P.2d 238]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsDelivery



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11-27 California Legal Forms--Transaction Guide § 27.33

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.33 Interpretation of Deed

The primary objective of a court in interpreting a deed is to give effect to the intention of the parties, particularly that of the grantor, as it existed at the time of the execution of the deed [*Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 243, 131 Cal. Rptr. 438* ; *Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 437, 73 Cal. Rptr. 83]* . As a general rule, a deed must be interpreted in the same way that contracts in general are interpreted [*Civ. Code § 1066*; for discussion of the interpretation of contracts in general, *see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

Notwithstanding the above, the following statutory rules of interpretation apply solely to deeds. A deed must be interpreted in favor of the grantee with the following exceptions, which must be interpreted in the grantor's favor: a reservation in any grant; and every grant by a public officer or body, as such, to a private party [*Civ. Code § 1069*]. If the operative words of a deed are doubtful, recitals may be used to assist in construction [*Civ. Code § 1068*; *see City and County of San Francisco v. Union Pacific R.R. Co. (1996) 50 Cal. App. 4th 987, 995, 58 Cal. Rptr. 2d 1* (granting clause that did not include "fee," "easement," or "right-of-way" conveyed fee simple title in light of other deed provisions reserving certain rights to grantors)]. A clear and distinct limitation in a deed is not controlled by other words that are less clear and distinct [*Civ. Code § 1067*]. Finally, if several parts of a deed are absolutely irreconcilable, the first of those parts to appear in the deed will prevail over the subsequent conflicting parts [*Civ. Code § 1070*; *Duncan v. Wolfer (1922) 60 Cal. App. 120, 128, 212 P. 390]* .

The intention of the parties to a deed must be determined from the language used in the conveyance, if possible [*White v. California (1971) 21 Cal. App. 3d 738, 757, 99 Cal. Rptr. 58]* . If this language is plain, certain, and unambiguous, parol or extrinsic evidence is not admissible to add to, detract from, or vary the terms of the deed [*City of Manhattan Beach v. Superior Court (1996) 13 Cal. 4th 232, 246, 52 Cal. Rptr. 2d 82, 91* ; *French v. Brinkman (1963) 60 Cal. 2d 547, 552, 35 Cal. Rptr. 289* ; *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 309, 123 Cal. Rptr. 405]* . However, extrinsic evidence is admissible to interpret ambiguities in a deed [*Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1132, 235 Cal. Rptr. 857* ; *see Murphy Slough Assn. v. Avila (1972) 27 Cal. App. 3d 649, 653-655, 104 Cal. Rptr. 136]* . Further, parol evidence may be used to show fraud [*Kent v. First Trust & Sav. Bank (1950) 101 Cal. App. 2d 361,*

370, 225 P.2d 625] or mistake [*French v. Brinkman (1963) 60 Cal. 2d 547, 552-553, 35 Cal. Rptr. 289]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & Interpretation



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.34 Reformation of Deed

A deed or other contract may be revised or reformed when, through fraud, mutual mistake of the parties, or a mistake of one party that the other party knew of or suspected at the time, the deed does not express the intention of the parties [*Civ. Code § 3399*; *see Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10* (purpose of *Civ. Code § 3399* is to effectuate the common intention of both parties when that intention is incorrectly reduced to writing)]. Such a deed may be reformed on application of an aggrieved party so as to express the intention of the parties, but only to the extent that this can be done without prejudice to rights acquired in good faith and for value by third persons [*Civ. Code § 3399*]. A more detailed discussion of reformation is beyond the scope of this chapter. For complete coverage of this remedy, *see* California Forms of Pleading and Practice, Ch. 488, *Reformation of Instruments* (Matthew Bender), and California Real Estate Law and Practice, Ch. 80, *Deeds and Transfers of Title* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsRemediesReformation



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AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.35 Cancellation of Deed

If there is reasonable apprehension that a deed left outstanding may cause serious injury to a person against whom it is void or voidable, the deed may, on that person's application, be cancelled [*see Civ. Code § 3412*]. Further, a plaintiff seeking cancellation may have his or her title quieted with respect to the adverse claim made under the deed [*see Code Civ. Proc. § 760.010 et seq.*]. A detailed discussion of cancellation is beyond the scope of this chapter but is set forth in California Forms of Pleading and Practice, Ch. 184, *Deeds* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsRemediesCancellation & Rescission



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11-27 California Legal Forms--Transaction Guide § 27.36

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.36 Reporting Changes in Ownership

Following a change in ownership of taxable real property, the transferee must report the transfer to the county assessor of the county in which the property is located [*see Rev. & Tax. Code §§ 480(a), 480.3*]. This reporting requirement implements Cal. Const., Art. XIIIA, which provides in part that the taxable value of real property may be increased to fair market value when a change in ownership occurs [*see* Cal. Const., art. XIIIA, § 2; *see also* Cal. Const., art. XIII; *Rev. & Tax. Code § 50 et seq.* (implementing art. XIIIA)].

For these purposes, a "change in ownership" is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*]. The transfer may be voluntary, involuntary, by operation of law, or by grant, gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement, or any other means [*18 Cal. Code Reg. § 462.001*].

When the change in ownership is to be effected by the recordation of a deed, the transferee normally should obtain a preliminary change of ownership report form from the county assessor or recorder and file the completed form with the county recorder at the time of recordation of the transfer document [*see Rev. & Tax. Code § 480.3(a)*; *but see Rev. & Tax. Code § 480.3(e), (f)* (limited exceptions to foregoing filing requirement); *see also* Ch. 23, *Real Property Sales Agreements*]. The preliminary report will be forwarded to the county assessor, who will either accept it in lieu of a change in ownership statement if he or she determines that it is complete and accurate, or provide the transferee with a change in ownership statement, which must be completed and returned within 45 days [*see Rev. & Tax. Code § 482*].

Although the filing of a preliminary change of ownership report is not a prerequisite to recordation of a deed [*see Rev. & Tax. Code § 480(e)*], a transferee who fails to file such a report must (1) comply, within 45 days, with the more complicated procedures governing the use of change in ownership statements [*see Rev. & Tax. Code § 480(e)*], and (2) pay an additional recording fee if required to do so by the recorder [*see Rev. & Tax. Code § 480.3(b)*]. Failure to pay that additional fee may delay or preclude the recordation of the deed [*see Rev. & Tax. Code § 480.3(c)*].

Several rules and exceptions apply to the foregoing reporting requirements and definitions [*see Rev. & Tax. Code §§*

61-68; *18 Cal. Code Reg. § 462.001 et seq.*]. For further discussion of these rules and the reporting requirements in general, *see* Ch. 23, *Real Property Sales Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.37[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.100

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.100 Facts Relating to Grantor

NOTE:
The following information should be obtained for each grantor.

1. Name, address, and telephone number.

2. Name in which grantor took title to property (if different from current name).

3. Legal status:

    a. Individual.

    b. Corporation.

    c. General partnership.

    d. Limited partnership.

    e. Joint venture.

    f. Limited liability company.

    g. Unincorporated association.

h. Executor.

i. Administrator.

j. Guardian.

k. Conservator.

l. Trustee.

m. Other.

4. Manner in which grantor holds title, e.g.:

a. As individual.

b. As husband and wife in [*see Fam. Code § 750*; *Civ. Code § 682.1*]:
(1) Joint tenancy [*see § 27.210[1]*];

(2) Tenancy in common [*see § 27.212[1]*];

(3) Community property [*see § 27.213[1]*]; or

(4) Community property with right of survivorship [*see § 27.213[1][c]*].

c. As co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy;

(2) Tenancy in common; or

(3) Partnership [*see § 27.221[1]*].

d. As corporation in corporate name [*see § 27.220[1]*].

e. As partnership in [*see § 27.221[1]*]:

(1) Partnership name.

(2) Name of one or more partners.

f. As joint venture in [*see § 27.222[1]*]:

(1) Names of individual joint venturers.

(2) Other [*see § 27.222[1]*].

5. If grantor is an individual:

a. Age (in case party is a minor).

NOTE:
A minor (that is, anyone under the age of 18) [*Fam. Code § 6500*] may not make a contract relating to real property [*Fam. Code § 6701(b)*; ***see*** *§ 27.16[2]*].

b. Marital status.

c. If married:

(1) Name and address of spouse.

(2) Date and place of marriage.

(3) Date of grantor's acquisition of property.

d. Regarding any previous marriages:

(1) Date, place, and length of marriage.

(2) Name and address of former spouse.

(3) Circumstances of termination.

6. If grantor is not an individual:

a. Address of main office or principal place of business.

b. Name, address, and title of persons to whom communications should be directed.

c. Names and titles of persons authorized to execute and acknowledge deed on behalf of entity, e.g.:

(1) President and secretary;

(2) Partner; or

(3) Executor.

7. If grantor is a corporation:

a. Date and state of its incorporation.

b. Date on which its board of directors or shareholders approved or will approve transaction [*see § 27.220[1]*].

8. If grantor is a partnership:

a. If partnership holds title in partnership name, specify names of partners authorized to sign conveyance of property.

b. If title is held in name of one or more of the partners, specify names of these partners.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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11-27 California Legal Forms--Transaction Guide § 27.101

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.101 Facts Relating to Grantee

NOTE:
The following information should be obtained for each grantee.

1. Complete name.

NOTE:
If the grantee is an entity, counsel should check the documents creating the entity (e.g., the articles of incorporation or partnership agreement) to verify the name provided by the client.

2. Address and telephone number.

3. Address to which recorded deed and other documents should be mailed.

4. Legal status [*see § 27.100*, P 3].

5. Manner in which grantee will hold title [*see § 27.100*, P 4].

6. Name and address to which property tax statements are to be mailed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawEstatesPresent EstatesGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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11-27 California Legal Forms--Transaction Guide § 27.102

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.102 Facts Relating to Property to Be Conveyed

1. Street address, city, and county.

2. Popular name, if any.

3. Assessor's block and parcel number.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsProperty Descriptions



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11-27 California Legal Forms--Transaction Guide § 27.103

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.103 Facts Relating to Interest or Estate to Be Conveyed

NOTE:

The term "estate" signifies the degree, quantity, nature, and extent of an interest in real property [*Estate of Brunet (1949) 34 Cal. 2d 105, 107, 207 P.2d 567]* . The Civil Code classifies estates or interests in real property in several ways [***see** § 27.20*]. These methods of classification are not mutually exclusive and are listed below. Although the deed need not refer to these classifications, the following list should help counsel and the client understand and describe the exact interest or estate the client wishes to convey or receive.

1. Period of enjoyment:

a. Present interest [*see Civ. Code § 761*]:

NOTE:

A present interest entitles the owner to immediate possession of property [*Civ. Code § 689*].

(1) Estate in fee simple:

NOTE:

Every estate of inheritance is a fee estate [*Civ. Code § 762*].

(a) Fee simple absolute; or

NOTE:

An estate in fee simple absolute is the most complete form of ownership of real property. As a general rule, the owner of such an interest has absolute dominion over the property and may use or dispose of it as he or she wishes [***see*** *Civ. Code § 679*]. The interest is a perpetual estate; thus, it is of infinite duration [*Civ. Code § 761(1)*; ***see*** *Civ. Code § 691*]. Every estate of inheritance is deemed to be a fee simple absolute unless it is defeasible or conditional [*Civ. Code § 762*; ***see*** *§ 27.103* P 1(b), ***below***].

(b) Fee simple defeasible [*see § 27.202[2]* (grant of fee simple subject to condition subsequent)].

NOTE:

A "defeasible fee" is a fee estate that may be defeated or terminated [***see*** Restatement of Property, §§ 16, 24, 25 (classifying defeasible fees as those subject to a special limitation, condition subsequent, executory interest, or a combination of the foregoing)]. Because the fee simple determinable has been abolished in California [***see*** *Civ. Code § 885.020*], any estate that may be terminated by the grantor or the grantor's successors on the occurrence of a specific event is considered a fee simple subject to a condition subsequent [***see*** Restatement of Property, § 45; *People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504, 26 Cal. Rptr. 853* ; *Civ. Code § 885.020*]. The grantor's power to terminate the estate is a future interest that is characterized as a "power of termination" [***see*** *§ 27.103* P 1(b)(1), ***below***]. This interest is subject to time limitations and preservation requirements [***see*** *Civ. Code §§ 885.010-885.070*]. For further discussion, ***see*** *§ 27.289[1]*.

(2) Life estate [*see § 27.204*];

NOTE:

A life estate is an estate lasting for the duration of a life or lives in being at the creation of the estate [***see*** Restatement of Property, § 18; ***see also*** *Civ. Code § 761(2)*]. A life estate is usually measured by the life of the holder of the estate, but may be measured by the life of another (a life estate per autre vie) [***see*** *Civ. Code § 766*; ***see also*** Restatement of Property, § 18, Comment (a)].

(3) Estate for years; or

NOTE:

An estate for years [***see*** *Civ. Code § 761(3)*] is an estate having a duration fixed in terms of one or more years [Restatement of Property, § 19].

(4) Estate at will.

NOTE:

An estate at will [***see*** *Civ. Code § 761(4)*] is terminable solely at the will of the transferer, subject to certain statutory restrictions [Restatement of Property, § 21; ***see*** *Civ. Code § 789*].

b. Future interest:

NOTE:

A future interest entitles the owner to possession of the property at a future time [*Civ. Code § 690*; ***see*** *§ 27.20[2]*].

(1) Reversionary interest (including power of termination) [*see §§ 27.202[2]* (grant of fee simple subject to condition subsequent), 27.204[2] (life estate deed containing reversion provision)];

NOTE:

A reversionary interest is an interest left in the grantor or the grantor's successors in interest [Restatement of Property, § 154(1); ***see*** *§ 27.204[1][c]*].

(2) Remainder [*see § 27.204*]; or

NOTE:

A remainder is an interest in favor of a party other than the grantor or the grantor's successor in interest that will become a present interest on expiration of all prior interests that were created simultaneously [***see*** Restatement of Property, § 156; ***see also*** *discussion under § 27.204[1][c]*].

(3) Executory interest.

NOTE:

An executory interest exists in favor of a grantor and his or her successors in interest, and becomes possessory on the occurrence of any event stated in the applicable limitation [Restatement of Property, § 25]. An executory interest differs from a remainder in that the former cuts short, or divests, the prior estate on which it is limited [Restatement of Property, § 25(1)(a)].

c. Perpetual interest (duration equal to that of the property) [*Civ. Code § 691*].

d. Limited interest (duration less than that of the property) [*Civ. Code § 692*].

2. Quality of ownership [*see § 27.20[4]*]:

a. Absolute (single grantee to have absolute dominion over property) [*Civ. Code § 679*]; or

b. Qualified, that is [*Civ. Code § 680*]:

(1) Ownership will be shared by two or more grantees;

(2) Time of enjoyment will be deferred or limited; or

(3) Use of property will be restricted.

3. Conditions affecting enjoyment [*see § 27.20[3]*]:

a. Condition precedent (fixes beginning of right to property) [*Civ. Code § 708*].

b. Condition subsequent (fixes end of right) [*Civ. Code § 708*].

NOTE:

For discussion of the fee simple subject to condition subsequent [***see*** Restatement of Property, § 45; *People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504, 26 Cal. Rptr. 853* ; *Civ. Code § 885.020*], ***see*** *§ 27.103,* P 1(b).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsProperty DescriptionsReal Property LawEstatesFuture InterestsGeneral OverviewReal Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawEstatesPresent EstatesLife Estates



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11-27 California Legal Forms--Transaction Guide § 27.104

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.104 Documents

1. Deed to grantor.

2. Any other documents by which grantor derived title (e.g., court order).

3. Preliminary title report and title policy issued:

    a. In connection with present transaction, if available; or

    b. To grantor at time of grantor's acquisition of property.

4. Copies of any relevant conveyances, encumbrances, and declarations made by grantor.

5. Any agreements between grantor and any other person relating to use of property.

6. Copies of court orders relating to transfer of property or court proceedings that would affect transfer:

    a. Proceedings on property itself, e.g.:
    (1) Quiet title; or

    (2) Partition.

    b. Proceedings involving grantor personally, e.g.:

(1) Divorce;

(2) Guardianship; or

(3) Creditor's action.

7. Copies of any abstracts, judgments, or liens affecting grantor's interest in property:

a. Bankruptcy orders relating to any person having an interest in the property.

b. Court order appointing administrator, executor, guardian, etc., or orders authorizing such a person to act.

8. Grantor's power of attorney, if any.

9. If grantor is corporation, certified copy of resolution of board of directors or shareholders approving sale [*see § 27.281[1]*].

10. If grantor is partnership holding title in its name, certified copy of statement of partnership recorded in county where land is located [*see § 27.221[1]*].

11. Any related documents or agreements executed by grantor and grantee, e.g., contract of sale.

12. If grantor is minor or incompetent, records of all court proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawOwnership & TransferGeneral OverviewReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

11-27 California Legal Forms--Transaction Guide §§ 27.105-27.109

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.105[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

11-27 California Legal Forms--Transaction Guide § 27.110

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.110 Capacity of Grantor

1. Determine whether grantor will have capacity to convey title to grantee at time grantor executes and delivers deed [*Hughes v. Grandy (1947) 78 Cal. App. 2d 555, 564, 177 P.2d 939]* .

a. Determine whether grantor can comprehend the following concepts [*Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341* (grantor has capacity to convey if he or she can comprehend the following concepts); *see § 27.16[1]*]:
(1) Nature of act of conveyance.

(2) Character of subject property.

(3) Grantor's relation to natural objects of his or her act [*see Estate of Smith (1926) 200 Cal. 152, 158, 252 P. 325* (testamentary capacity requires, among other things, ability to understand relation to persons who have claims on the testator's property and whose interests are affected by the instrument)].

b. Determine whether grantor is a minor or is mentally incapacitated [*see Civ. Code §§ 38-40*; *Fam. Code §§ 6500, 6701*; *see also § 27.16[2]*].

2. If grantor is corporation:

a. Determine whether board of directors has adopted resolution authorizing conveyance [*see Corp. Code § 300(a)* (business and affairs of corporation are managed and all corporate powers are exercised by or under direction of board); *see also §§ 27.281[1]* (corporate resolution to convey property), 27.220[2]

(corporation deed)].

b. Determine whether property represents all or substantially all of corporation's assets.

NOTE:
Statutory approval requirements apply to the transfer of all or substantially all of the assets of a corporation [***see*** *Corp. Code § 1001(a)*; ***see also*** *§ 27.120*, P 1].

c. Ascertain whether conveyance is in usual and regular course of corporation's business.

NOTE:
If the property represents all or substantially all of the assets of the corporation and the transaction is not in the usual and regular course of its business, the transaction must be approved by the outstanding shares [*Corp. Code § 1001(a)*; ***see*** *Corp. Code § 152*; ***see also*** *§ 27.120*, P 1]. However, if the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; ***see*** *Corp. Code § 1150 et seq.* (conversions)].

3. If grantor is general partnership, determine whether statement of partnership authorizing specified partners to execute instruments on behalf of partnership has been signed by all partners and recorded [*see § 27.221[1][c]*].

4. If grantor is limited partnership:

a. Determine whether certified copy of certificate of limited partnership has been recorded in county where real property is located [*see Corp. Code § 15902.01(e)* (ULPA '08), *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010); *see also § 27.221[1][d]*].

b. Determine whether subject property constitutes all or substantial part of assets of partnership.

NOTE:
The consent of each partner is necessary to sell, lease, exchange, or otherwise dispose of all or substantially all of a limited partnership's property, with or without the goodwill, other than in the usual and regular course of the limited partnership's activities [*Corp. Code § 15904.06(a)* (ULPA '08)].

Under the CRLPA (repealed January 1, 2010), unless the limited partnership agreement provides to the contrary, a transfer of all or a substantial part of the assets of the limited partnership must be authorized by an affirmative vote of a majority in interest of the limited partners [*Corp. Code § 15636(f)(1)(B)*].

5. If grantor is unincorporated association:

a. Determine whether statement designating persons authorized to execute conveyances of association property has been recorded in county where real property is located [*see Corp. Code § 18120(a), (c)*; *see also §§ 27.223, 27.282*].

b. Ascertain whether member of association recorded statement repudiating prior recorded statement of unincorporated association [*see Corp. Code § 18120(d)*; *see also § 27.283*].

6. If grantor is a limited liability company:

a. Determine whether the articles of organization and the written operating agreement authorizes the transaction.

b. Determine whether a Limited Liability Company Certificate of Authorization has been signed regarding the transaction [For form, *see § 27.284*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.111

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.111 Capacity and Interest of Grantee

1. If grantee is natural person, determine whether he or she will be capable of taking and holding title to real property at time of conveyance [*Rixford v. Zeigler (1907) 150 Cal. 435, 437, 88 P. 1092* ; *see § 27.17[1]*].

2. If grantees will be tenants in common [*see § 27.212[1]*]:

a. Determine whether their shares or interests will be equal.

b. If their shares will be unequal, ascertain what proportion of interest held by each tenant will be.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawEstatesGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

11-27 California Legal Forms--Transaction Guide § 27.112

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.112 Deed and Estate or Interest Being Conveyed

1. Determine what type of deed should be used to accomplish desired conveyance.

a. Grant deed [*see §§ 27.200[2]* (grant deed), 27.201[2] (statutory form of grant deed), 27.202[2] (grant of fee simple subject to condition subsequent)], which:
(1) May convey any type of estate in real property [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* .

NOTE:
A grant deed is presumed to transfer a fee simple title unless it appears from the deed that a lesser estate was intended [*Civ. Code § 1105*; ***see*** *American Enterprise, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935]* .

(2) Transfers after-acquired title [*Civ. Code § 1106*; *see § 27.20[7]*].

(3) Contains implied covenants against prior conveyances and against encumbrances (unless deed provides otherwise) [*see Civ. Code § 1113*; *see also § 27.200[1][c]*].

b. Quitclaim deed [*see § 27.203[2]*], which:

(1) Conveys whatever present right or interest grantor has in property at time of deed [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Soares v. Steidtmann (1955) 130 Cal. App. 2d 401, 404, 278 P.2d 953]* .

NOTE:

A quitclaim deed does not transfer after-acquired title [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . However, if the grantor has an equitable interest at the time of the conveyance and later acquires a legal title, the legal title is deemed to be transferred to the grantee [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112]* .

(2) Does not contain implied covenants [*Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147]* .

c. Warranty deed, which:

(1) Contains grantor's warranty of good clear title.

(2) Is seldom used in California because buyers typically rely on title insurance [*see § 27.11[4]*].

d. Deed given at execution sale [*see § 27.11[3]*].

2. If transaction involves nonvested interest and a "donative transfer," determine whether either of following conditions will be satisfied:

NOTE:
Under the Uniform Statutory Rule Against Perpetuities (USRAP) [***see*** *Prob. Code § 21200 et seq.*], a nonvested property interest is invalid unless either of the conditions set forth in (a) or (b), ***below,*** is satisfied [*Prob. Code § 21205*]. However, the USRAP specifically excludes property interests arising out of "nondonative transfers" from its application [***see*** *Prob. Code § 21225(a)*]. "Nondonative" transfers are generally transfers that are supported by consideration, while "donative" transfers are not supported by consideration [***see Recommendation Relating to Uniform Statutory Rule Against Perpetuities***, 20 Cal. Law Rev. Comm'n 2501, 2595 (1990); ***see also*** *§ 27.20[6]*].

a. When interest is created, it is certain to vest or terminate no later than 21 years after death of individual then alive; or

b. Interest will either vest or terminate within 90 years after its creation.

3. If grantor wishes to impose a condition precedent or subsequent [*see § 27.103*, P 3], determine whether proposed condition falls within one of following categories of impermissible conditions:

a. Condition precedent requiring performance of act that is wrong of itself.

NOTE:
An instrument containing such a condition is void. However, if the condition precedent requires the performance of an act that is not wrong of itself, but is otherwise unlawful, the instrument takes effect and only the condition is void [*Civ. Code § 709*]. Neither the statute nor California case law elaborates on the distinction between an act that is "wrong of itself" and one that is otherwise unlawful, and the courts appear to have largely ignored the provision.

b. Condition imposing restraints on marriage, except on marriage of a minor [*Civ. Code § 710*].

NOTE:

Any such condition is void [*Civ. Code § 710*; ***see*** Ch. 67, ***Future Interests and Perpetuities***].

c. Condition imposing unreasonable restraint on alienation of property [*Civ. Code § 711*; *Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 316, 38 Cal. Rptr. 505, 392 P.2d 265]* .

NOTE:

Such a condition is void if it is deemed repugnant to the interest created [*Civ. Code § 711*]. Whether a restraint is reasonable and therefore permissible depends on two factors: (1) the justification for the particular restraint, and (2) the quantum of restraint or actual practical effect of the restriction [*Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal. 3d 629, 635-636, 116 Cal. Rptr. 633, 526 P.2d 1169* ; ***see*** *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 877-882, 97 Cal. Rptr. 849, 489 P.2d 1113]* . For further discussion, ***see*** Ch. 67, ***Future Interests and Perpetuities*** .

d. Condition purporting to restrict right of any person to sell, lease, rent, use, or occupy property on basis of person's having any of following characteristics [Civ. Code § 782(a); *see* Gov. Code § 12955(a), (d) (listings of protected characteristics)], or perception that person has any of these characteristics or that person is associated with person who has, or is perceived to have, any of these characteristics [*see* Gov. Code §§ 12926(m), 12955(m)]:

(1) Ancestry;

(2) Color;

(3) Disability [*see* Gov. Code § 12926.1 (legislative intent regarding meaning of "disability")];

(4) Familial status [*see* Gov. Code § 12955.2 (definition)];

(5) Marital status;

(6) National origin;

(7) Race;

(8) Religion [*see* Gov. Code § 12926(o) (definition)];

(9) Sex [*see* Gov. Code § 12926(p) (definition)];

(10) Sexual orientation [*see* Gov. Code § 12926(q) (definition)]; or

(11) Source of income [*see* Gov. Code § 12955(p)(1) (definition)].

NOTE:

However, with regard to familial status, this does not apply to housing for older persons and does not affect certain Civil Code sections relating to housing for senior citizens [Civ. Code § 782(b)]. Any deed, or other written instrument relating to title to real property, containing any provision that would be void under Civ. Code § 782(a), and any written

covenant, condition, or restriction annexed to or made a part of any such deed or instrument, by reference or otherwise, must be deemed to be revised to omit that provision [Civ. Code § 782.5(a)].

e. Provision prohibiting or restricting right of property owner (or owner's agent) to display or have displayed, on owner's real property or on real property owned by others with their consent, signs that satisfy following requirements [*Civ. Code § 712*; *see Civ. Code § 713*]:

NOTE:

Such a provision, when contained in or otherwise affecting a grant of a fee interest in real property, is void as an unreasonable restraint on the power of alienation [*Civ. Code § 712(a)(1)*].

(1) Advertise owner's property for sale, lease, or exchange, or advertise directions to owner's property;

(2) Are reasonably located;

(3) Are in plain view of public;

(4) Are of reasonable dimensions and design; and

(5) Do not adversely affect public safety, including traffic safety.

f. Restriction effectively prohibiting installation or use of solar energy system [*Civ. Code § 714(a)*; *see Civ. Code § 801.5* ("solar energy system" defined)].

NOTE:

Any covenant, restriction, or condition contained in a deed that imposes such a restriction is void [*Civ. Code § 714(a)*]. However, the following are not void: (1) reasonable restrictions on a solar energy system that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance; and (2) reasonable restrictions on such a system that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits [*Civ. Code § 714(b)*; ***see*** *Civ. Code § 714(d)* (definitions of "significantly" and "solar energy system")]. For these purposes, a solar energy system must meet applicable standards and requirements imposed by state and local permitting authorities [*Civ. Code § 714(c)(1)*]. A solar energy system for heating water must be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agencies. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification must be for the entire solar energy system and installation [*Civ. Code § 714(c)(2)*]. A solar energy system for producing electricity must also meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability [*Civ. Code § 714(c)(2)*]. Whenever approval is required for the installation or use of a solar energy system, the application for approval must be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and may not be

willfully avoided or delayed [***see*** *Civ. Code § 714(e)(1)*]. For an approving entity that is a homeowners' association [*see Civ. Code § 1351(a)* (definition)] and is not a public entity, the approval or denial of an application must be in writing. If an application is not denied in writing within 60 days from the date of receipt of the application, the application must be deemed approved, unless that delay is the result of a reasonable request for additional information [*Civ. Code § 714(e)(2)*].

4. If grantor wishes to detract from what grantee would otherwise receive under deed, determine whether deed should include [*see Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739* ; *see also § 27.20[8]*]:

a. Reservation, which allows grantor's entire interest in property to pass to grantee, but revests newly created interest in grantor or third party; or

b. Exception, which prevents part of grantor's interest from passing to grantee.

5. Determine whether deed is subject to local documentary transfer tax.

a. Ascertain whether county in which real property is located has imposed transfer tax by ordinance [*see Rev. & Tax. Code § 11911(a)*].

b. If county has imposed such a tax, determine whether city in which real property is located (if any) has also imposed a transfer tax [*see Rev. & Tax. Code § 11911(b)*; *see also Rev. & Tax. Code § 11911(c)* (credit allowed against county transfer tax for amount of any transfer tax imposed by city)].

c. If tax has been imposed, determine whether consideration or value of interest or property conveyed, exclusive of value of any lien or encumbrance remaining on the property at time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*].

NOTE:

Under the Documentary Transfer Tax Act [*Rev. & Tax. Code § 11901 et seq.*], a local legislative body may impose a transfer tax on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to or vested in another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsTypesWarrantyReal Property LawDeedsRemediesAfter-Acquired PropertyReal Property LawEstatesGeneral OverviewReal Property LawEstatesFuture InterestsGeneral OverviewReal Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawOwnership & TransferTransfer Not By DeedAcquisition by After-Acquired Title



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11-27 California Legal Forms--Transaction Guide §§ 27.113-27.119

AUTHOR: Timothy F. O'Leary, Practice Consultant

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§§ 27.113[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide

11-27 California Legal Forms--Transaction Guide § 27.120

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.120 Approval of Transaction

1. If grantor is corporation, and property being conveyed represents all or substantially all of grantor's assets, confirm that principal terms of sale have been or will be [*Corp. Code § 1001(a)*; *see § 27.220[1]*]:

a. Approved by board [*see Corp. Code § 151*]; and

b. Approved by outstanding shares (before or after board's approval and before or after transaction), unless transaction is in usual and regular course of grantor's business [*see Corp. Code § 152*].

NOTE:
This approval should be obtained before the execution of the purchase agreement, or other agreement evidencing the underlying agreement between the parties, that culminates in the execution of the deed. If the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; ***see*** *Corp. Code § 1150 et seq.* (conversions)].

2. If grantor is corporation, consider taking one of following steps to assure grantee that conveyance has been duly authorized:

a. If deed will be recorded, consider including statutory statement in corporate acknowledgment regarding execution of deed [*see discussion under § 27.220[1][f]*; *see also § 27.280[1]*]; or

NOTE:

This statement may be used if the deed is executed by the president, vice president, secretary, or assistant secretary of the corporation and includes the statutory certificate of acknowledgment form [***see*** *Civ. Code § 1190*; ***see also*** *Civ. Code § 1189(a)* (statutory form)].

b. Whether or not deed will be recorded, consider attaching to deed a certificate stating that conveyance has been validly approved by board and that [*Corp. Code § 1002*; *see Corp. Code § 1001*; *see also § 27.280[2]*]:

NOTE:

Any deed conveying corporate assets may have annexed to it a certificate of the corporate secretary or assistant secretary. If the certificate contains the information discussed in this paragraph, it will be prima facie evidence of the existence of the facts authorizing the conveyance and conclusive evidence in favor of any innocent purchaser or encumbrancer for value [*Corp. Code § 1002*]. Unlike the statutory statement that may be included in a corporate acknowledgment [***see*** *§ 27.120* P 2(a), ***above***], this certificate may be used (1) in conjunction with a deed that will not be recorded or (2) when the property being conveyed constitutes all or substantially all of the assets of the corporation. There is no need to have a secretary or assistant secretary prepare the certificate unless (1) the deed will not be recorded or (2) the deed will be recorded but will not be executed by a duly authorized person [***see*** *Civ. Code § 1190*]. For further discussion, ***see*** *§ 27.280[1]*.

(1) Property described in deed is less than substantially all of the corporate assets;

(2) Transfer is in usual and regular course of business of corporation; or

(3) If property constitutes all or substantially all of corporate assets and transfer is not in usual and regular course of business of corporation:

(a) Transfer has been approved by outstanding shares of corporation [*see Corp. Code § 152*] pursuant to Chapter 10 (governing sales of assets) [*see Corp. Code §§ 1000-1002*] or Chapter 12 (governing reorganizations) [*see Corp. Code §§ 1200-1203*] of Corporations Code; or

(b) Approval is not required by Chapter 12.

3. If property constitutes all or substantial part of assets of limited partnership, take following steps unless limited partnership agreement provides otherwise [*Corp. Code § 15636(f)(1)(B)*; *see also § 27.221[1][d]*]:

(a) Transfer has been approved by outstanding shares of corporation [*see Corp. Code § 152*] pursuant to *Corp. Code § 1000 et seq.* (sales of assets) or *Corp. Code § 1200 et seq.* (reorganizations); or

(b) Approval is not required by *Corp. Code § 1200 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.121

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.121 Preparation, Recordation, and Delivery of Deed

1. Draft deed [*see §§ 27.130*-27.135].

2. If grantor is married and claims that property is his or her separate property, have grantor's spouse do the following [*see § 27.25[4]*]:

a. Execute quitclaim deed [*see § 27.203[2]*]; or

b. Sign statement waiving any requirement that he or she execute deed [*see* Ch. 23, *Real Property Sales Agreements*].

3. Have deed executed as follows:

a. By either of the following, except as indicated in § 27.121 PP b-g, *below* [*Civ. Code § 1091*]:
(1) Grantor [*see § 27.25[1], [2]*]; or

NOTE:
If the grantor cannot write, he or she can satisfy this execution requirement by making a mark [***see*** *Civ. Code § 14*; ***see also*** *§ 27.270[1]*].

(2) Grantor's authorized agent [*see § 27.25[2]*].

NOTE:
An agent's authority to execute a deed normally must be in writing [*Civ. Code § 1091*; for discussion of

exceptions to this requirement, ***see*** *§ 27.25[2]*]. If the written authorization is in the form of a power of attorney, the attorney in fact must sign both the grantor's name and his or her own name as attorney in fact [*Civ. Code § 1095*; ***see*** *§ 27.272*]. Otherwise, the agent should sign as the grantor's agent.

b. By both spouses (or their duly authorized agents) when community real property is being conveyed, unless conveyance is between spouses [*Fam. Code § 1102*; *see § 27.25[3]*].

c. If grantor is a corporation, by [*Corp. Code § 313*; *see § 27.220[1]*]:

(1) Chairman of board, president, or any vice president; and

(2) Secretary, assistant secretary, chief financial officer, or assistant treasurer.

d. If grantor is general partnership, by [*see Corp. Code §§ 15010(1), 16302(a)(1), 16303*; *see also § 27.221[1]*]:

(1) All partners; or

(2) Partners expressly authorized to sign by statement of partnership.

e. If grantor is limited partnership, by all general partners [*see Corp. Code § 15643*; *see also § 27.221[1]*].

f. If grantor is unincorporated association, by [*Corp. Code § 18115*; *see § 27.223[1][b]*]:

(1) President (or other head) and secretary, recording secretary, or other comparable officer; or

(2) Other persons specifically designated by resolution adopted pursuant to articles of association or bylaws.

4. If deed is to be recorded [for discussion of the effect of recordation, *see § 27.27[1]*], do the following:

a. Confirm that any required documentary transfer tax has been paid [*Rev. & Tax. Code § 11933*; *see § 27.242[1]*].

NOTE:

A California county may impose a transfer tax, by ordinance, on deeds and other instruments conveying real property located in the county [*Rev. & Tax. Code § 11911(a), (b)*]. Further, any city within a county that has imposed such a tax may also tax the transfer [*Rev. & Tax. Code § 11911(b)*]. Payment of any required transfer tax or taxes is a prerequisite to recordation [*Rev. & Tax. Code § 11933*]. For further discussion, **see** *§ 27.242[1]*.

b. Have execution acknowledged [*Gov. Code § 27287*].

NOTE:

Before an instrument can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*]. An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [***see***, ***e.g.***, *Civ. Code § 1189*]. Proof of the execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security

agreement is not permitted, pursuant to *Gov. Code § 27287*, although proof of execution in lieu of acknowledgment of a trustee's deed or deed of reconveyance is permitted [*Civ. Code § 1195(b)*; ***see*** *Civ. Code § 1195(c)* (statutory form for proof of execution); ***see also*** *§ 27.285[2]*].

c. Have acknowledgment or proof certified [*Gov. Code § 27287*; *see discussion under § 27.27[2]*; *see also § 27.271*].

NOTE:

A certificate of acknowledgment is a formal declaration by an authorized officer [***see*** *Civ. Code §§ 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*]. The certificate must be in the form prescribed by *Civ. Code § 1189(a)*. For further discussion, **see** *§ 27.271[1]*.

An officer taking proof of the execution of an unacknowledged instrument must in his or her certificate set forth all the matters required by law to be proved before the officer [***see*** *Civ. Code §§ 1195-1199*] and the names, places of residence, and substance of testimony of all the witnesses examined before the officer [*Civ. Code § 1200*; ***see*** *§ 27.271*].

d. Record deed in county in which subject real property is situated [*Civ. Code §§ 1169, 1170*].

NOTE:

In Los Angeles County or Riverside County, the recorder, as a condition of recording a deed, quitclaim deed, or deed of trust, may require that the document indicate the assessor's identification numbers fully containing all, or a portion of, the real property described in the legal description. If the description covers more than one assessor's parcel, the number for each parcel must be provided [*Gov. Code §§ 27297.6(a), 27297.7(a)*]. This requirement does not apply to the recordation of any document under which the federal government, the state, or any county, city, or subdivision of the state acquires title [*Gov. Code §§ 27297.6(b), 27297.7(b)*]. For coverage of related statutory requirements, see *§ 27.28*.

e. Pay recording fee [*see Gov. Code § 27361*].

f. If desired, record deed in any other county [*Civ. Code § 1218*; *see § 27.27[3]*].

5. Have grantor deliver deed to grantee [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352]* .

NOTE:

A deed will not take effect until the grantor delivers it with the intent to transfer title [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352]* . No particular form of delivery is required [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919]* . For further discussion, ***see*** *§ 27.31*.

6. Confirm that grantee (or grantee's representative) accepts delivery at time of delivery [*Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352* ; *Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919]* .

NOTE:

The acceptance need not be formal or express [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919* ; ***see*** *§ 27.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsExecution FormalitiesReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-27 California Legal Forms--Transaction Guide § 27.122

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.122 Documentary Transfer Tax Act Requirements

1. If deed is subject to local documentary transfer tax [*see § 27.112*, P 5], compute amount of tax due [*see Rev. & Tax. Code §§ 11911, 11932*; *see also § 27.242[1][c]*].

2. Include following information on face of deed or in separate document [*see §§ 27.242[2]* (documentary transfer tax provisions for deed), 27.287 (separate tax statement)]:

a. Amount of tax due [*Rev. & Tax. Code § 11932*].

b. Incorporated or unincorporated location of real property described in deed [*Rev. & Tax. Code § 11932*].

c. Statement that consideration or value on which amount of tax was computed was, or was not, exclusive of value of a lien or encumbrance remaining on property at time of sale [*Rev. & Tax. Code § 11933*].

3. If separate document is used:

a. Include statement in deed that amount of tax due is shown on separate paper and is not for public record [*see § 27.242[2]*]; and

b. Submit separate document to recorder along with deed.

NOTE:
The recorder will record the deed but not the separate tax document. Thereafter, he or she

will affix the separate document to the deed after the permanent record is made and before the deed is returned to the party requesting recordation [*Rev. & Tax. Code § 11932*; ***see*** *Gov. Code § 27321*].

4. If deed is taken by beneficiary or mortgagee from trustor or mortgagor as a result of or in lieu of foreclosure, set forth following information on deed or in an affidavit or declaration under penalty of perjury [*Rev. & Tax. Code § 11926*; *see § 27.288*]:

NOTE:

The Documentary Transfer Tax Act applies to such a deed but only to the extent that the consideration exceeds the unpaid debt, including accrued interest and cost of foreclosure [*Rev. & Tax. Code § 11926*].

a. Consideration.

b. Unpaid debt amount.

c. Identification of grantee as beneficiary or mortgagee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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11-27 California Legal Forms--Transaction Guide §§ 27.123-27.129

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.123[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.130

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.130 Recording Information

1. Reserve top two and one half inches of first page for recording information [*Gov. Code § 27361.6*].

2. In left three and one half inches of space described in § 27.130 P 1, *above* [*Gov. Code § 27361.6*]:

a. Identify person requesting recordation.

b. Set forth name and address of person to whom deed should be returned.

NOTE:
The recorder must mail (or deliver if the deed so requests) the deed to the person named in the instrument, if any [*Gov. Code § 27321*]. If the deed does not name such a person, the recorder must deliver or mail it to the party that left it for recordation [*Gov. Code § 27321*].

3. If deed is being recorded in Los Angeles County or Riverside County, include assessor's identification numbers for real property identified in legal description in deed, if required to do so by recorder [*Gov. Code §§ 27297.6(a), 27297.7(a)*].

NOTE:
If the description includes more than one assessor's parcel, the number for each parcel must be provided. The entry for each number must be substantially as follows: "Assessor's Identification Number _____-_____-_____" [*Gov. Code §§ 27297.6(a)* 27297.7(a)]. For further discussion, see *§ 27.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.131

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.131 Tax Information

1. If deed is subject to local documentary transfer tax, include required information regarding tax on face of deed or in separate document [*see Rev. & Tax. Code §§ 11926, 11932, 11933*; *see also § 27.112*, P 5; § 27.242].

2. Set forth, across bottom of first page of deed, name and address to which future tax statements may be mailed [*Gov. Code § 27321.5(a)*; for alternative provisions that satisfy this requirement, *see § 27.241[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.132

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.132 Parties

1. Provide name or other sufficient description of grantor [*Childs v. Newfield (1934) 136 Cal. App. 217, 222, 28 P.2d 924* ; *see § 27.16[3]*].

a. Describe status of grantor if grantor is any of the following:
(1) Corporation [*see § 27.220[2]*].

(2) Partnership [*see § 27.221[2]*].

(3) Joint venture [*see § 27.222[2]*].

(4) Unincorporated association [*see § 27.223[2]*].

(5) Executor [*see § 27.230[2]*].

(6) Administrator [*see § 27.230[2]*].

(7) Guardian [*see § 27.231[2]*].

(8) Conservator [*see § 27.231[2]*].

b. If grantor wishes to transfer property under a name other than name in which grantor derived title, set forth both names [*see § 27.250[2]*].

NOTE:

If the deed does not include both names, it will be valid between the parties and those with notice, but recordation of the deed will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*; ***see*** *Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* ; ***see also*** *§ 27.16[3]*].

2. Include following information regarding grantee:

a. Name or other designation or description that is sufficient to identify grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447-448, 290 P.2d 590* ; *see § 27.17[2]*].

b. If desired, grantee's status, e.g.:

NOTE:
A title company may require the deed to describe the grantee's status.

(1) Single (or unmarried) man or woman.

(2) Husband and wife [*see § 27.254[1]*].

(3) Corporation [*see § 27.220[1]*].

(4) General or limited partnership [*see § 27.221[1]*].

(5) Joint venture [*see § 27.223[1]*].

(6) Minor [*see § 27.252[2]*].

(7) Ward (or guardian) [*see § 27.252[2]*].

(8) Conservatee (or conservator) [*see § 27.252[2]*].

(9) Group or class of persons (e.g., heirs and devisees of a decedent), provided there is a method of determining identities of class members [*California Trust Co. v. Kerckhoff-Cuzner Mill Etc. Co. (1936) 5 Cal. 2d 628, 630, 55 P.2d 865* ; *see § 27.17[2]*].

(10) Executor or administrator of estate [*see § 27.253[2]*].

(11) Trustee [*see § 27.253[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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11-27 California Legal Forms--Transaction Guide § 27.133

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.133 Property and Interest Being Conveyed

1. Include words indicating an intent to convey [*Cordano v. Wright (1911) 159 Cal. 610, 618, 115 P. 227* ; *see § 27.23*].

2. Set forth description of property that is sufficient to identify and locate it [*see § 27.19*].

3. Describe nature of estate being conveyed [*see § 27.103*, P 1(a)(present interests) and 1(b)(future interests)].

NOTE:

The term "estate" signifies the degree, quantity, nature, and extent of an interest in real property [*Estate of Brunet (1949) 34 Cal. 2d 105, 107, 207 P.2d 567* ; ***see*** *Civ. Code § 701*; ***see also*** *§ 27.20*].

A grant of real property is presumed to transfer a fee simple title unless it appears in the grant that a lesser estate was intended [*Civ. Code § 1105*; ***see*** *§ 27.200[1]*b]].

4. Specify nature of ownership, i.e.:

a. Ownership by one person [*Civ. Code § 681*].

b. Ownership by two or more persons in one of following forms [*Civ. Code §§ 682, 682.1*]:

(1) Joint tenancy;

(2) Tenancy in partnership;

(3) Tenancy in common;

(4) Community property; or

(5) Community property with right of survivorship.

5. In case of two or more grantees (other than a husband and wife or joint tenants), consider specifying respective interests.

NOTE:

The specification of interests is particularly important in the case of a tenancy in common deed because the interests of the cotenants need not be equal [***see*** *Civ. Code §§ 683, 685*]. If a tenancy in common deed does not specify the fractional interests of the tenants in common, there is a rebuttable presumption that their interests are equal [*Anderson v. Broadwell (1931) 119 Cal. App. 150, 153, 6 P.2d 267* ; ***see*** *§ 27.212[1]*].

6. If grantees are husband and wife, consider specifying whether they will hold the property in one of the following ways [*Fam. Code § 750*; *see § 27.254[1]*]:

NOTE:

Except as otherwise provided by statute, all property (wherever situated) acquired by a married person during marriage while domiciled in California is community property [*Fam. Code § 760*]. For the purpose of division of property on dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. This presumption may be rebutted by a clear statement in the deed that the property is separate property [*Fam. Code § 2581*]. For further discussion of this presumption and coverage of an additional one that applies to property acquired prior to 1975 [***see*** *Fam. Code § 803*], see *§ 27.254[1]*.

a. Community property (with or without express right of survivorship) [*see Civ. Code §§ 682, 682.1*, § 27.213[1]];

b. Separate property;

c. In joint tenancy; or

d. In tenancy in common.

7. If creating a joint tenancy and one of the joint tenants is married, include recital setting forth consent of that grantee and his or her nongrantee spouse to this arrangement [*see Ch. 23, Real Property Sales Agreements, § 23.254*].

NOTE:

If the deed includes such a recital, the nongrantee spouse should sign the deed [***see*** *§ 27.255[1]*].

8. Set forth any conditions precedent or subsequent [*see § 27.20[3]*].

9. If drafting a grant deed and grantor wishes to restrain implied covenants against prior conveyances and against encumbrances [*see § 27.200[1][c]*]:

a. Specify that grant is made without warranty of any kind; or

b. Set forth in deed any and all encumbrances to which property is subject.

10. If drafting a life estate deed [*see § 27.204*]:

a. Specify whether life estate is being conveyed to grantee or reserved in grantor [*see § 27.133* P 10(c), *below*].

b. Indicate whether duration of estate will be measured by [*see § 27.204[1][b]*]:

(1) Life of grantee; or

(2) Life of some other person (a life estate pur autre vie).

c. If desired, describe what will happen to property on death of measuring life:

NOTE:

If a life estate deed simply conveys the estate to the grantee without other instructions, the grantor retains an interest in the property (called a reversion). On the grantee's death, the property reverts to the grantor or the grantor's successors [*Civ. Code § 768*; ***see*** Restatement of Property, § 154(1), (2)].

(1) Property will revert to grantor or grantor's successors.

(2) Property will pass to third party.

NOTE:

This future interest is known as a remainder [***see*** *Civ. Code § 769*], and the third party is known as a "remainderman."

(3) If grantor conveyed a fee interest to a grantee and reserved a life estate in himself or herself, property will pass to grantee [*Civ. Code §§ 749, 773*; *Lowe v. Ruhlman (1945) 67 Cal. App. 2d 828, 834, 155 P.2d 671]* .

11. If joint tenant wishes to convey his or her interest to third person without joinder or consent of other joint tenants [*Civ. Code § 683.2*; *see § 27.211*]:

NOTE:

Civ. Code § 683.2 (discussed in this paragraph) does not authorize a severance of a joint tenancy that is contrary to a written agreement of the joint tenants. However, a severance contrary to such an agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement [*Civ. Code § 683.2(b)*].

a. Prepare deed conveying legal title to joint tenant's interest to third person [*Civ. Code § 683.2(a)*].

NOTE:

A joint tenant may also sever the joint tenancy as to the joint tenant's interest by executing an instrument or declaration [*Civ. Code § 683.2(a)*]. For further discussion of

these options, see *§ 27.211[1][b]*.

b. Have joint tenant execute and deliver deed [*Civ. Code § 683.2(a)*].

c. If joint tenancy is of record, have deed recorded in county where real property is located:

NOTE:
Severance of a joint tenancy of record by deed (or other written instrument or declaration) does not terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless either of the recordation requirements discussed in this paragraph is satisfied [*Civ. Code § 683.2(c)*]. These recordation requirements do not apply to (1) a written instrument executed by all the joint tenants that severs the joint tenancy, (2) a severance made by or pursuant to a written agreement of all the joint tenants, or (3) a deed from a joint tenant to another joint tenant [*Civ. Code § 683.2(d)*].

(1) Prior to death of severing joint tenant [Civ. Code § 682.3(c)(1)]; or

(2) Not later than seven days after joint tenant's death, provided joint tenant executed and acknowledged deed before notary public not earlier than three days before his or her death [*Civ. Code § 683.2(c)(2)*].

12. If grantor wishes to transmute marital real property [*see § 27.214*]:

NOTE:
Transmutation is the process of altering the statutory property rights of a husband and wife [***see** Fam. Code § 1500*].

a. Draft deed transmuting [*Fam. Code § 850*; *see § 27.214[2]*]:

(1) Community property to separate property of either spouse;

(2) Separate property of either spouse to community property; or

(3) Separate property of one spouse to separate property of other spouse.

b. Confirm that deed is made, joined in, consented to, or accepted by spouse whose interest is adversely affected [*Fam. Code § 852(a)*].

c. Have deed recorded [*Fam. Code § 852(b)*].

NOTE:
A transmutation of real property is not effective as to third parties without notice unless it is recorded [*Fam. Code § 852(b)*].

13. If preparing a deed in lieu of foreclosure, add language indicating that deed is an absolute conveyance in consideration for cancellation of debt [*see Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387* ; *see also § 27.260*].

14. Add description of consideration if [*see § 27.262*]:

a. Attorney in fact is making deed [*Bertelsen v. Bertelson (1942) 49 Cal. App. 2d 479, 484, 122 P.2d 130]* ; or

b. Title insurance company insists on inclusion of such a provision.

NOTE:

Title insurance companies frequently require consideration for deeds given in lieu of foreclosure and for deeds made by administrators, executors, guardians, trustees, and receivers who are conveying property under court order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty DescriptionsReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesFuture InterestsGeneral OverviewReal Property LawEstatesPresent EstatesGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property



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11-27 California Legal Forms--Transaction Guide § 27.134

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.134 Signature and Execution

1. Have deed executed as follows:

a. By either of the following, except as indicated in § 27.134 PP b-g, *below* [*Civ. Code § 1091*]:
(1) Grantor [*see § 27.25[1]* and *[2]*]; or

NOTE:
If the grantor cannot write, he or she can satisfy this execution requirement by making a mark [***see*** *Civ. Code § 14*; ***see also*** *§ 27.270[1]*].

(2) Grantor's authorized agent [*see § 27.25[2]*].

NOTE:
An agent's authority to execute a deed normally must be in writing [*Civ. Code § 1091*; for discussion of exceptions to this requirement, ***see*** *§ 27.25[2]*]. If the written authorization is in the form of a power of attorney, the attorney in fact must sign both the grantor's name and his or her own name as attorney in fact [*Civ. Code § 1095*; ***see*** *§ 27.272*]. Otherwise, the agent should sign as the grantor's agent.

b. By both spouses (or their duly authorized agents) when community real property is being conveyed, unless conveyance is between spouses [*Fam. Code § 1102*; *see § 27.25[3]*].

c. If grantor is a corporation, by [*Corp. Code § 313*; *see § 27.220[1]*]:

(1) Chairman of board, president, or any vice president; and

(2) Secretary, assistant secretary, chief financial officer, or assistant treasurer.

d. If grantor is general partnership, by [*see Corp. Code §§ 15010(1), 16302(a)(1), 16303*; § 27.221[1]]:

(1) All partners; or

(2) Partners expressly authorized to sign by statement of partnership.

e. If grantor is limited partnership, by all general partners [*see Corp. Code § 15904.02* (ULPA '08), *Corp. Code § 15643* (CRLPA, repealed January 1, 2010); § 27.221[1]].

f. If grantor is unincorporated association, by [*Corp. Code § 18115*; *see § 27.223[1][b]*]:

(1) President (or other head) and secretary, recording secretary, or other comparable officer; or

(2) Other persons specifically designated by resolution adopted pursuant to articles of association or bylaws.

g. If grantor is a limited liability company, by members [*Corp. Code § 17150*] or non-member/managers [*Corp. Code § 17151*] as specified in the either the articles of organization or operating agreement [*see Corp. Code §§ 17150, 17151*].

2. If deed is to be recorded [for discussion of the effect of recordation, *see § 27.27[1]*], do the following:

a. Confirm that any required documentary transfer tax has been paid [*Rev. & Tax. Code § 11933*; *see § 27.242[1]*].

NOTE:

A California county may impose a transfer tax, by ordinance, on deeds and other instruments conveying real property located in the county [*Rev. & Tax. Code § 11911(a), (b)*]. Further, any city within a county that has imposed such a tax may also tax the transfer [*Rev. & Tax. Code § 11911(b)*]. Payment of any required transfer tax or taxes is a prerequisite to recordation [*Rev. & Tax. Code § 11933*]. For further discussion, see *§ 27.242[1]*.

b. Have execution acknowledged [*Gov. Code § 27287*].

NOTE:

Before an instrument can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*]. An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [***see***, ***e.g.***, *Civ. Code § 1189*]. Proof of the execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted, pursuant to *Gov. Code § 27287*, although proof of execution in lieu of acknowledgment of a trustee's deed or deed of reconveyance is permitted [*Civ. Code § 1195(b)*; ***see*** *Civ. Code § 1195(c)* (statutory form for proof of execution); ***see also*** *§ 27.285[2]*].

c. Have acknowledgment or proof certified [*Gov. Code § 27287*; *see discussion under § 27.27[2]*; *see also § 27.271*].

NOTE:

A certificate of acknowledgment is a formal declaration by an authorized officer [***see*** *Civ. Code §§ 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*]. The certificate must be in the form prescribed by *Civ. Code § 1189(a)*. For further discussion, see *§ 27.271[1]*.

An officer taking proof of the execution of an unacknowledged instrument must in his or her certificate set forth all the matters required by law to be proved before the officer [***see*** *Civ. Code §§ 1195-1199*] and the names, places of residence, and substance of testimony of all the witnesses examined before the officer [*Civ. Code § 1200*; ***see*** *§ 27.271*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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11-27 California Legal Forms--Transaction Guide §§ 27.135-27.139

AUTHOR: Timothy F. O'Leary, Practice Consultant

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§§ 27.135[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Related and Subsequent Procedures

11-27 California Legal Forms--Transaction Guide § 27.140

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.140 Reporting Change in Ownership

NOTE:

The following requirements apply only to changes in ownership of real property or a manufactured home that is subject to local property taxation [*Rev. & Tax. Code § 480(a)*]. A "change in ownership" is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*]. This term expressly includes transfers by grant [*18 Cal. Code Reg. § 462.001*].

1. If deed will be recorded, complete preliminary change of ownership report (provided by county assessor or recorder) and file it with county recorder at time of recordation of deed [*Rev. & Tax. Code § 480.3*; *see* Ch. 23, *Real Property Sales Agreements*].

NOTE:

Although this is an optional procedure, failure to file such a report may result in the imposition of an additional recording fee of $20 [*Rev. & Tax. Code § 480.3(b)*]. Failure to tender that additional fee may delay or preclude the deed's recording [***see*** *Rev. & Tax. Code § 480.3(c)*].

Certain persons and transactions are exempt from the preliminary change of ownership reporting requirement and from the payment of the additional recording fee [***see*** *Rev. & Tax. Code § 480.3(e), (f)*; ***see also*** Ch. 23, ***Real Property Sales Agreements***].

As a practical matter, most counties encourage transferees to file preliminary change of ownership reports because that will expedite the change in ownership reporting process if

the assessor, after receiving the report from the recorder, accepts the preliminary report in lieu of a change in ownership statement. However, if the assessor feels that the preliminary report is inadequate, he or she will require the transferee to complete a change in ownership statement [***see*** *§ 27.240* P 2, ***below***]. For further discussion, see Ch. 23, ***Real Property Sales Agreements*** .

2. If preliminary change of ownership report is not filed in connection with change of ownership, complete change in ownership statement [*see* Ch. 23, *Real Property Sales Agreements*] and:

a. Have grantee file signed statement in county where real property or manufactured home is located [*Rev. & Tax. Code § 480(a)*] at either of the following times [*Rev. & Tax. Code § 480(e)*]:

NOTE:
A change in ownership statement may be filed by mail [*Rev. & Tax. Code § 480(g)*]. Most counties provide these statements on request.

(1) At same time deed is recorded; or

(2) If deed will not be recorded or if deed was recorded without concurrent filing of statement, then no later than 45 days from date change occurs.

NOTE:
However, if the change in ownership has occurred by reason of death, the statement must be filed within 150 days after the date of death or, if the estate is probated, the statement must be filed at the time the inventory and appraisal is filed [*Rev. & Tax. Code § 480(e)*].

b. If dealing with property of a decedent, have personal representative (typically an executor or administrator) file change in ownership statement [*Rev. & Tax. Code § 480(b)*; *see Prob. Code § 58(a)* ("personal representative" defined)]:

(1) With county recorder or assessor in each county where decedent owned real property at time of death that is subject to probate proceeding;

(2) Before or at time inventory and appraisal is filed with county clerk [*see Prob. Code §§ 8800-8980* (inventory and appraisal)].

NOTE:
In all other cases in which an interest in real property is transferred by reason of death, including a transfer through the medium of a trust, the change in ownership statement or statements must be filed by the trustee (if the property was held in trust) or the transferee with the county recorder or assessor in each county in which the decedent owned an interest in real property within 150 days after the date of death [*Rev. & Tax. Code § 480(b)*].

3. If county assessor makes written request for change in ownership statement, avoid penalty by filing statement within 45 days from date of request [*see Rev. & Tax. Code § 482(a)*].

NOTE:

The assessor will make this request if (1) he or she refuses to accept a filed preliminary change of ownership report in lieu of a change in ownership statement [***see*** *§ 27.240* P 1, ***above***], or (2) no preliminary change of ownership report or change in ownership statement is filed within the applicable statutory deadline [***see*** *Rev. & Tax. Code § 482*; ***see also*** *§ 27.240* P 2, ***above***].

The penalty for a failure to meet this 45-day filing deadline may be abated under certain circumstances [***see*** *Rev. & Tax. Code § 483*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.141

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.141 Adjudication of Identity

NOTE:

The following statutory procedure may be used to establish the identity of a grantor of real property when a discrepancy exists between the name in which the grantor acquired his or her interest in the property and the name in which the grantor transferred the property. This procedure may be commenced by any subsequent owner of the property to establish marketable title to the property when the discrepancy has resulted in a break in the chain of title and rendered the title unmarketable [*Code Civ. Proc. §§ 770.020, 770.040(a)*; ***see*** *Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* ; § 27.16[4]; ***see also*** California Forms of Pleading and Practice, Ch. 299, ***Identity, Establishment of*** (Matthew Bender).

1. Have subsequent owner file verified petition in superior court of county in which all or a portion of property is located [*Code Civ. Proc. §§ 770.030, 770.040(a)*].

2. After clerk sets court hearing on petition, have subsequent owner-petitioner post notices of time and place of hearing at least 10 days before hearing in following locations [*Code Civ. Proc. § 770.060(b), (c)*]:

a. Courthouse of county where proceeding is pending; and

b. Conspicuous place on subject property.

3. Have owner-petitioner attend hearing and offer proof.

4. If desired, appeal court decree [*Code Civ. Proc. § 770.070(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsReal Property LawTitle QualityMarketable TitleRemedies



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11-27 California Legal Forms--Transaction Guide § 27.142

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.142 Preservation of Power of Termination

NOTE:

For purposes of the statutory provisions governing marketable record title [***see*** *Civ. Code §§ 880.020-887.090*], "power of termination" means the power to terminate a fee simple estate following violation of a condition subsequent [*Civ. Code § 885.010(a)(1)*; ***see*** *Civ. Code § 885.010(a)(2)* (definition includes transferee's power to terminate estate); ***see also*** *§ 27.289[1]*]. This power of termination will normally expire of record at the later of the following times: (1) 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power is recorded; (2) 30 years after the date a notice of intent to preserve the power is recorded, if it is recorded within the period stated under (1) in this NOTE, ***above***; or (3) 30 years after the date an instrument or a notice (as described under (1) or (2) in this NOTE, ***above***) is recorded, if the instrument or notice is recorded within 30 years after the date such an instrument or notice was last recorded [*Civ. Code § 885.030*; ***but see*** *Civ. Code § 885.015* (exceptions to statutory expiration periods)].

1. Prepare notice of intent to preserve interest that:

a. Is substantially in the form specified by statute [*see Civ. Code § 880.340*; *see also § 27.289[2]*]; and

b. Includes the following information [*Civ. Code § 880.330(b)*]:
(1) Name and mailing address of each claimant.

(2) Statement that interest claimed is a power of termination.

(3) Reference by record location to recorded deed (or other document) that created or evidences claimant's interest.

2. Have notice signed and verified by or on behalf of claimant [*Civ. Code § 880.330(a)*].

3. If notice is made on claimant's behalf [*see* P 2, *above*], include statement of authority of person making the notice [*Civ. Code § 880.330(a)*].

4. Have notice recorded in county in which real property is situated [*Civ. Code § 880.350(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawEstatesFuture InterestsRight of EntryReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawTitle QualityMarketable TitleGeneral Overview



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11-27 California Legal Forms--Transaction Guide §§ 27.143-27.199

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.143[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.200

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.200 Grant Deed

[1] Comment

[a] Use of Form

This form is a basic grant deed. It includes the word "grant," which is the essential element of any grant deed [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . For other complete deeds, *see §§ 27.201-27.231*. For additional and alternative provisions that may be inserted into any of the complete deeds set forth in this chapter, *see §§ 27.240-27.272*. A guide to the drafting of deeds is *set forth in §§ 27.130-27.134*.

[b] Interests Transferred

As its name suggests, a grant deed grants an estate in real property [*see Civ. Code § 1092*]. A grant of real property is presumed to transfer a fee simple title unless it appears in the grant that a lesser estate was intended [*Civ. Code § 1105*; *see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112* (grant deed may convey any type of estate in real property); *see also American Enterprise, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935* (grant deed is presumed to convey grantor's entire interest in the property)]. In other words, if the grantor wishes to convey an estate other than a fee estate, the deed must express that intent. A grant deed also transfers any interest in the property acquired by the grantor after the date of the grant deed [*Civ. Code § 1106*; *see § 27.20[7]*].

For further discussion of the transfer of interests or estates in real property, *see §§ 27.20, 27.103*.

[c] Implied Covenants

[i] When Covenants Are Implied

If a conveyance uses the word "grant" and passes an estate of inheritance or fee simple, then the following two covenants are implied from the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns unless the conveyance expressly provides otherwise [*Civ. Code § 1113*]:

- The grantor has not previously conveyed the same estate, or any right, title, or interest in it, to any person other than the grantee; and

- As of the time of the execution of the conveyance, the property is free from any encumbrance made by the grantor or any person claiming under the grantor.

Thus, a grant deed carries with it implied covenants against prior conveyances and against encumbrances by the grantor unless it expressly provides otherwise [*Civ. Code § 1113*]. These covenants are not implied if the deed containing the word "grant" is a gift deed [*Estate of Porter (1903) 138 Cal. 618, 624, 72 P. 173]* or a quitclaim deed [*Southern Pacific Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147]* .

[ii] Covenant Against Prior Conveyances

The implied covenant against prior conveyances is personal to the grantee and does not run with the land. Consequently, any breach of the covenant occurs at the time the deed is executed, and only the original grantee may bring an action for breach [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188-189]* .

[iii] Covenant Against Encumbrances

For purposes of the implied covenant against encumbrances, the term "encumbrance" basically means anything that charges, burdens, obstructs, or impairs the use of an estate in land or impedes its transfer [*American Title Co. v. Anderson (1975) 52 Cal. App. 3d 255, 259, 125 Cal. Rptr. 24* ; *Evans v. Faught (1965) 231 Cal. App. 2d 698, 706, 42 Cal. Rptr. 133]* . The term specifically includes taxes, assessments, and all liens on real property [*Civ. Code § 1114*].

There are two categories of encumbrances: those affecting title (for example, mortgages and liens) and those affecting only the physical condition of the property (for example, rights-of-way and public roads). If the encumbrance affects title and was done, made, or suffered by the grantor, the implied covenant against encumbrances is broken at the time of the conveyance and the grantee's prior knowledge or notice of the encumbrance is immaterial [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 709, 42 Cal. Rptr. 133]* . If the encumbrance consists of a physical burden on the land that is permanent in character and of an open and notorious nature but is such that it affects only the physical condition of the property, it is not an encumbrance under *Civ. Code § 1113* [*see* [i], *above*] and therefore does not violate the implied covenant against encumbrances [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 709, 42 Cal. Rptr. 133]* .

This covenant imposes a personal obligation on the grantor [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 712, 42 Cal. Rptr. 133]* . When there are two or more grantors, the obligation is joint and several [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 712, 42 Cal. Rptr. 133]* . Because it is also personal to the grantee and does not run with the land, a succeeding grantee may not maintain an action in his or her own name for breach [*Babb v. Weemer (1964) 225 Cal. App. 2d 546, 550-551, 37 Cal. Rptr. 533]* .

[iv] Remedies for Breach

Both implied covenants may be sued on in the same manner as if they had been expressly inserted in the conveyance [*Civ. Code § 1113*; *see Civ. Code §§ 3304* (damages for breach of covenant against prior conveyances), 3305 (damages for breach of covenant against encumbrances)]. For extensive coverage of the available remedies, *see* California Forms of Pleading and Practice, Ch. 184, *Deeds* .

[v] Restraining Implied Covenants

As mentioned in [i], *above*, the foregoing covenants are not implied if they are restrained by express terms contained in the conveyance [*Civ. Code § 1113*]. Consequently, the grantor may specify that the grant is made without warranty of any kind or may specifically set forth in the deed the encumbrances to which the property is subject. As a practical matter, it is rare for a grant deed to restrain the implied covenants.

[2] FORM

Grant Deed

Grant Deed

Recording requested by
_____ _____
[*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

Mail tax statements to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or in an unincorporated area of*] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsCovenants of TitleReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesSpecial Warranty



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11-27 California Legal Forms--Transaction Guide § 27.201

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.201 Statutory Form of Grant Deed

[1] Comment--Use of Form

The form in [2], *below*, is the statutory form of the grant deed. The use of this form is optional [*Civ. Code § 1092*]. The statutory references to "A B" and "C D" have been retained and should be replaced with the names of the parties. Further, counsel should add the recording information, tax statements, and acknowledgment included in the other complete deeds in this chapter.

For further discussion and an alternative form for a grant deed, *see § 27.200*.

[2] FORM

Statutory Form of Grant Deed

Statutory Form of Grant Deed

I, A B, grant to C D all that real property situated in _____[*insert name of county*] County, State of California, bounded (or described) as follows: _____[*here insert property description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance*, "The Norris Ranch"].

Witness my hand this _____[*insert day*] day of _____[*insert month*], _____[*year*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty Descriptions



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1. Deeds in General

11-27 California Legal Forms--Transaction Guide § 27.202

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.202 Grant of Fee Simple Subject to Condition Subsequent

[1] Comment

[a] Use of Form

The form in [2], *below* grants a fee simple subject to a condition subsequent. A fee simple subject to a condition subsequent is an estate that may be terminated by the grantor or the grantor's successors if a stated event occurs [Restatement of Property, § 45; *People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504, 26 Cal. Rptr. 853]* . This definition applies whether the grantor's power to terminate the estate is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise [*Civ. Code § 885.010(a)(1)*; *see Civ. Code § 885.010(a)(2)* (transferee's power to terminate estate); *see also § 27.289[1][d]*. The power to terminate the fee if the stated condition occurs is an interest in the fee simple estate [*Civ. Code § 885.010(b)*]. This interest is transferable [*see Civ. Code § 1046*].

Because a condition subsequent may result in a forfeiture [*see* [c], *below*], it limits the marketability of the property. To avoid this result, covenants are more commonly used in commercial transactions [*see § 27.21*; *see also § 28C.220* (deed incorporating prior recorded restrictive covenant)]. However, a condition subsequent is useful in certain noncommercial transactions as insurance that a desired condition will be maintained or that an undesired condition will not occur. For example, in making a gift of real property to a charity, a grantor may want to provide that the donated land be used solely as a building site for a particular type of structure, such as a church.

[b] Abolition of Fee Simple Determinable

The fee simple determinable, an estate similar to a fee simple on condition subsequent; however, no positive action by the grantor was required to regain possession on occurrence of the stated condition, was repealed in 1982 [*Civ. Code §*

885.020]. The possibility of reverter, which was the future interest of the grantor that existed in connection with the fee simple determinable, was also abolished [*Civ. Code § 885.020*]. Every estate that would be a fee simple determinable at common law is deemed to be a fee simple subject to a condition subsequent, and every interest that would be a possibility of reverter at common law is deemed to be and is enforceable as a power of termination [*Civ. Code § 885.020*].

[c] Construction of Condition Subsequent

A condition involving a forfeiture will be strictly interpreted against the party for whose benefit it is created [*Civ. Code § 1442*]. When a restriction in a deed is drafted as a condition subsequent with a power of termination in the grantor, it will normally be enforceable on behalf of the grantor or the grantor's transferee unless it is shown that changed circumstances make the enforcement inequitable [*MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367* ; *see* [e], *below*]. However, due to the risk of forfeiture, conditions subsequent are disfavored by the courts and will be interpreted as covenants whenever possible [*MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367]* .

[d] Exercise of Power of Termination

A power of termination must be exercised only by notice or by civil action [*Civ. Code § 885.050*]. Further, if the power is of record, the exercise must also be of record [*Civ. Code § 885.050*]. The notice must be given and any civil action must be commenced within five years after a breach of the restriction, or within a longer period agreed on by the parties if they record a waiver or extension before expiration of the five-year period [*Civ. Code § 885.050*; *see also Civ. Code § 784* (definition of "restriction" includes condition subsequent); *Code Civ. Proc. § 336(b)* (action for violation of "restriction" must be commenced within five years)]. For additional coverage, *see* California Forms of Pleading and Practice, Ch. 184, *Deeds* .

[e] Expiration of Power

A power of termination of record will normally expire 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power is recorded [*Civ. Code §§ 885.030(a), 880.370*]. However, the expiration date may be postponed an additional 30 years by recordation of a notice of intent to preserve the power [*Civ. Code §§ 885.030(a), 880.370*; *see Civ. Code § 880.340*]. For a more detailed discussion of this expiration period and notice of intent, *see § 27.289[1]*.

A power of termination will expire before the statutory expiration date if it becomes obsolete [*Civ. Code § 885.040(a)*]. The power is obsolete if any of the following circumstances apply [*Civ. Code § 885.040(b)*]:

- The relevant restriction (condition subsequent) is of no actual and substantial benefit to the holder of the power.
- The enforcement of the power would not effectuate the purpose of the restriction.
- It would be otherwise inequitable to enforce the power because of changed conditions or circumstances.

Notwithstanding these three circumstances, no power of termination will expire because of obsolescence during the life of the grantor if the power arises from a grant by a natural person without consideration to a public entity or to a tax-exempt organization [*Civ. Code § 885.040(c)*].

[2] FORM

Grant of Fee Simple Subject to Condition Subsequent

Grant of Fee Simple Subject to Condition Subsequent

Recording requested by
_____ _____
[*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or in an unincorporated area of*] _____ County, California, described as follows: _____[*insert legal description*].

This grant is made on the condition that _____[*specify condition, e.g.*, the above property be used solely and perpetually for the purpose of conducting an educational institution]. If _____[*specify event triggering grantor's power of termination, e.g.*, the above property is not used solely and perpetually for that purpose], then _____[*grantor*] or _____[his *or* her] heirs, assigns, and successors, without paying any compensation for any buildings or other improvements on the above premises and without making any compensation or incurring any liability for damages or losses of any kind, shall have the power to terminate all right, title, and interest in the property granted by this deed to _____[*grantee*] and _____[his *or* her] heirs, successors, and assigns, in the manner provided by law for the exercise of this power of termination. Immediately on such a termination, grantee or _____[his *or* her] heirs, assigns, or successors shall forfeit all rights or title to that property, and the property shall revert to grantor or grantor's heirs, assigns, or successors.

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawDeedsTypesGeneral OverviewReal Property LawEstatesFuture InterestsRight of EntryReal Property LawEstatesPresent EstatesFee Simple Estates



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11-27 California Legal Forms--Transaction Guide § 27.203

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.203 Quitclaim Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a quitclaim deed. A quitclaim deed transfers whatever interest the grantor possesses at the time of the deed, including legal, equitable, and inchoate rights [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Soares v. Steidtmann (1955) 130 Cal. App. 2d 401, 404, 278 P.2d 953]* . It does not pass after-acquired title [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . However, if the grantor possesses an equitable interest at the time of the execution of the deed and later acquires a legal title, the title is deemed to have been transferred [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112* ; *see § 27.20[7]*].

Unlike a grant deed, a quitclaim deed does not contain implied covenants [*Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147]* . Also, a quitclaim deed is not subject to the presumption (applicable to grant deeds) that a fee simple title is intended to pass [*Winchell v. Lambert (1956) 146 Cal. App. 2d 575, 579, 304 P.2d 149]* .

[b] Wording

The operative words of a quitclaim deed are "remise, release, and quitclaim" [*Touchard v. Crow (1862) 20 Cal. 150, 160]* , or simply "quitclaim" [1 Bowman, Ogden's Revised California Real Property Law, Ch. 3, *Transfer by Deed*, § 3.5 (Cal. CEB 1975); *see Wholey v. Cavanaugh (1891) 88 Cal. 132, 135, 25 P. 1112* (omission of word "remise" was not material)].

[c] Recordation

A recorded quitclaim deed is good as against an unrecorded grant [*Beach v. Faust (1935) 2 Cal. 2d 290, 293, 40 P.2d 822]* . The grantee under a quitclaim deed is a bona fide purchaser under the recording laws and is therefore protected from unrecorded instruments affecting the title to the property of which the grantee had no notice [*Beach v. Faust (1935) 2 Cal. 2d 290, 293, 40 P.2d 822]* .

[2] FORM

Quitclaim Deed
Quitclaim Deed

Recording requested by
_____ _____
[*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]
[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]
_____ [*city, state, zip*]

QUITCLAIM DEED

I, _____[*name of grantor*], quitclaim to _____[*name of grantee*] all my right, title, and interest in the real property situated in the City of _____, [*or in an unincorporated area of*] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawDeedsTypesQuit Claim DeedsReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.204

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.204 Life Estate Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a grant deed that contains alternatives for granting or reserving the most frequently used types of life estate. It contains alternative provisions that a grantor may use to convey or reserve a life estate and to provide for the transfer of the remaining interest in the property. These alternatives are discussed below.

For an illustrative deed provision that may be used to reserve other types of estates or interests, *see § 27.261[2]*. For detailed coverage of the future interests discussed in this comment, *see* Ch. 67, *Future Interests and Perpetuities* . For discussion of grant deeds in general, *see § 27.200[1]*.

[b] Definition of Life Estate

A life estate is an estate the duration of which is measured either by the life of the person holding it or by the life of another [*Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93]* . It is a freehold estate [*Civ. Code § 765* (estates for life are called estates of freehold)] whether it is measured in its duration by the life of the tenant [*Civ. Code § 765*] or by the life of some other person [*Civ. Code § 766*; *Smythe Estate (1955) 132 Cal. App. 2d 343, 345, 282 P.2d 141]* . A life estate dependent on the life of a third person is called a life estate pur autre vie [Powell On Real Property, Ch. 15, *Estates for Life*, P 201 (Matthew Bender); *see* second and fourth alternatives in form; *but see* Restatement of Property, § 18, Comment (a)(Restatement does not use "pur autre vie" terminology)], that is, for the life of another.

[c] Reversions and Remainders

When a grantor conveys a life estate to the grantee without other instructions (for example, "to B for life") [*see* first alternative in form], then the grantor retains an interest in the property conveyed. This interest is called a "reversion" and means that the property reverts to the grantor or the grantor's successors on the death of the "remaining life" [*Civ. Code § 768*; *see* Restatement of Property, § 154(2)(a reversion is any reversionary interest that is not subject to a condition precedent); *see also* Restatement of Property, § 154(1)(a "reversionary interest" is any future interest that is left in the transferer or the transferer's successors in interest)].

Instead of retaining a reversion, the grantor may create a life estate, specifying that on the death of the measuring life, the property will pass to a third party [*see* third and fourth alternatives in form]. The interest created in the third party is known as a "remainder" [*see Civ. Code § 769* (a "remainder" is a future estate, other than a reversion, that is dependent on a precedent estate)]. The third party is known as a "remainderman."

[d] Reservation in Favor of Grantor

A grantor may convey a fee interest in real property to a grantee, reserving a life estate in himself or herself [*Civ. Code § 767*; *Merritt v. Rey (1930) 104 Cal. App. 700, 706, 286 P. 510* ; *see* fifth alternative in form]. This alternative means that the grantee does not come into possession of the property until the death of the grantor. Thus, the grant gives the grantee a future interest [*Civ. Code §§ 749, 773*; *Lowe v. Ruhlman (1945) 67 Cal. App. 2d 828, 834, 155 P.2d 671]* . For additional discussion of reservations, *see § 27.261[1]*.

A delivery of a deed that conveys a future interest will be valid if the grantor intends to make the delivery absolute, that is, to pass a present title to the property to the grantee [*Williams v. Kidd (1915) 170 Cal. 631, 637, 151 P. 1]* . For further discussion, *see § 27.31[3]*.

[e] Creation of Life Estate

A life estate may be created by grant in a deed (this form) [Restatement of Property, § 107]. The grant need not expressly declare the estate to be a life estate or use the term "life estate" [*Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93]* . Any language that describes the characteristics of the estate in such a way as to show that a life estate was intended to pass is sufficient [*Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93]* .

[2] FORM

Life Estate Deed

Life Estate Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____

Space above this line for recorder's use

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

[*Select one of the following*:]

GRANT DEED: LIFE ESTATE AND REVERSION

I, _____[*name of grantor*], grant to _____[*name of grantee*] for life,

[*OR*]

GRANT DEED: LIFE ESTATE PUR AUTRE VIE

I, _____[*name of grantor*], grant to _____[*name of grantee*] for the life of _____[*name of third party*],

[*OR*]

GRANT DEED: LIFE ESTATE AND REMAINDER

I, _____[*name of grantor*], grant to _____[*name of grantee*], for life, remainder to _____[*name of third party*],

[*OR*]

GRANT DEED: LIFE ESTATE PUR AUTRE VIE AND REMAINDER

I, _____[*name of grantor*], grant to _____[*name of grantee*], for the life of _____[*name of third party*], remainder to _____[*name of another third party*],

[*OR*]

GRANT DEED: FEE AND RESERVATION OF LIFE ESTATE

I, _____[*name of grantor*], grant to _____[*name of grantee*] the following, reserving from this grant a life estate:

[*Continue with the following*:]

all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawEstatesFuture InterestsRemaindersReal Property LawEstatesFuture InterestsReverter & ReversionsReal Property LawEstatesPresent EstatesLife Estates



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART IV. FORMS
A. Complete Deeds
1. Deeds in General

11-27 California Legal Forms--Transaction Guide §§ 27.205-27.209

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.205[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART IV. FORMS
A. Complete Deeds
2. Joint Ownership Deeds

11-27 California Legal Forms--Transaction Guide § 27.210

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.210 Joint Tenancy Grant Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a joint tenancy grant deed. It should be used when the grantor wishes to convey property to two or more grantees in equal shares and to create a right of survivorship. If the joint tenants are a married couple, the second (optional) paragraph set forth in this form should be used [*see* [c], *below*].

Joint tenancy is one of the forms in which two or more persons may hold property in California. The other forms are [*see Civ. Code §§ 682, 682.1*]:

- Tenancy in common [*see § 27.212*];
- Partnership [*see § 27.221*]; and
- Community property (with or without express right of survivorship) [*see § 27.213*].

These forms of joint ownership are mutually exclusive [*see Jacquemart v. Jacquemart (1956) 142 Cal. App. 2d 794, 796, 299 P.2d 281]* .

For a more detailed discussion of joint tenancy, *see* California Real Estate Law and Practice, Ch. 345, *Cotenancies: Creation, Characteristics, and Estate Planning Aspects* , Part B (Matthew Bender). For coverage of grant deeds in general, *see § 27.200[1]*.

[b] Joint Tenancy

[i] Definition and Methods of Creation

California law defines a joint tenancy in terms of joint interests. A joint interest is one owned by two or more persons in equal shares and created by one of the methods authorized by statute [*Civ. Code § 683*]. The joint tenants collectively have one estate, and their interest and rights in the estate must be equal, coextensive [*Yeoman v. Sawyer (1950) 99 Cal. App. 2d 43, 45, 221 P.2d 225]* and identical [*Kaupe v. Kaupe (1955) 131 Cal. App. 2d 511, 513, 280 P.2d 856]* .

One method of creating a joint tenancy is by a single transfer or will that expressly declares that a joint tenancy is being created (this form) [*Civ. Code § 683*; *see Estate of Horn (1951) 102 Cal. App. 2d 635, 639, 228 P.2d 99* (joint tenancy can be created only by a written transfer, an instrument, or an agreement)]. Obviously, under this method the joint tenants must obtain their interests at the same time and from the same grantor.

A second method permits one or more persons who already hold title to the property (in a form other than joint tenancy) to create a joint tenancy in the property. Under this method, a joint interest may be created by a transfer that expressly declares that the interest is a joint tenancy and that it is from [*Civ. Code § 683*]:

- A sole owner to that owner and others;

- Tenants in common or joint tenants to (1) themselves or some of them, or (2) to themselves or any of them and others; or

- A husband and wife when holding title as community property or otherwise to (1) themselves, (2) themselves and others, or (3) one of them and to another or others.

A joint tenancy may be created in any estate recognized by law [*Riley v. Turpin (1956) 47 Cal. 2d 152, 155, 301 P.2d 834]* , including undivided interests [*Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435, 73 Cal. Rptr. 83* ; *Estate of Galletto (1946) 75 Cal. App. 2d 580, 587, 171 P.2d 152]* .

[ii] Wording of Deed

As discussed under [i], *above*, a deed creating a joint tenancy must expressly declare that a joint tenancy is being created [*Civ. Code § 683*]. Because joint tenants necessarily own the joint tenancy property in equal shares [*Civ. Code § 683*; *see* [i], *above*], the deed need not mention these equal ownership interests. Language in a joint tenancy deed providing that the deed conveys the "rents, issues, and profits" from the subject land is mere surplusage and does not give the grantees any rights other than those implied by the grant [*Black v. Black (1949) 91 Cal. App. 2d 328, 333-334, 204 P.2d 950]* . Finally, although a joint tenancy grant deed need not contain words describing the right of survivorship or succession [*see* [iii], *below*], these words are often included.

[iii] Succession Feature

The principal distinguishing feature of joint tenancy is that the property belongs to the surviving joint tenant by virtue of the original joint tenancy title and not through inheritance or any other type of succession after death [*Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93]* . The probate court does not have jurisdiction over the property except to establish the fact of death [*Prob. Code §§ 200-204, 210-212*]. Thus, joint tenancy is often selected to avoid probate expenses and delays [*see Prob. Code § 10800(a)* (compensation of personal representative is based on value of estate)].

[c] Married Persons as Joint Tenants

Except as otherwise provided by statute, all real property (wherever situated) acquired by a married person during

marriage while domiciled in California is community property [*Fam. Code § 760*]. An important statutory presumption that applies solely for the purpose of division of property on dissolution of marriage or legal separation provides that property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption affects the burden of proof and may be rebutted by either of the following [*Fam. Code § 2581*]:

- A clear statement in the deed (or other documentary evidence of title) by which the property is acquired that the property is separate property and not community property, or
- Proof that the parties have made a written agreement that the property is separate property.

Another statutory presumption applies when real property (or any interest in or encumbrance on real property) was acquired by a husband and wife before 1975 by an instrument in which they are described as husband and wife. In that case, the presumption is that the property is the community property of the parties, unless a different intention is expressed in the instrument [*Fam. Code § 803*]. For further discussion of these presumptions and provisions rebutting them, *see § 27.254[2]*.

[2] FORM

Joint Tenancy Grant Deed

Joint Tenancy Grant Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

JOINT TENANCY GRANT DEED

I, _____[*name of grantor*], grant to _____[*name*] and _____[*name*], as joint tenants, all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART IV. FORMS
A. Complete Deeds
2. Joint Ownership Deeds

11-27 California Legal Forms--Transaction Guide § 27.211

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.211 Deed Conveying (Severing) Joint Tenant's Interest

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed that conveys legal title to a joint tenant's interest in real property to a third person. This type of conveyance severs the joint tenancy as to the joint tenant's interest without the joinder or consent of the other joint tenants [*see Civ. Code § 683.2*]. This method of severing a joint tenancy and the other methods prescribed by *Civ. Code § 683.2* [*see* [b][i], *below*] are not exclusive [*Civ. Code § 683.2(a)*; for discussion of other methods of severance, *see*; California Forms of Pleading and Practice, Ch. 316, *Joint Tenancy and Tenancy in Common* (Matthew Bender)].

For the definition of "joint tenancy" [*see Civ. Code § 683(a)*], a discussion of the features and methods of creation of joint tenancies, and an illustrative joint tenancy deed, *see § 27.210*. For further discussion of these topics, *see* California Real Estate Law and Practice, Ch. 345, *Cotenancies: Creation, Characteristics, and Estate Planning Aspects* (Matthew Bender), and California Forms of Pleading and Practice, Ch. 316, *Joint Tenancy and Tenancy in Common* (Matthew Bender).

[b] Severance by Unilateral Execution of Instrument

[i] Means of Severance

A joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means [*Civ. Code § 683.2(a)*]:

- Execution and delivery of a deed (this form) that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title

to the joint tenant.

- Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee.

- Execution of a written declaration stating that, as to the interest of the joint tenant, the joint tenancy is severed.

Civ. Code § 683.2(a) is a codification of the rule that a joint tenant need not utilize a "strawman" conveyance or other intermediary device to sever a real property joint tenancy unilaterally [18 Cal. L. Rev. Comm. Reports 69-70 (1986); *see Riddle v. Harmon (1980) 102 Cal. App. 3d 524, 528-530, 162 Cal. Rptr. 530* ; *Estate of Carpenter (1983) 140 Cal. App. 3d 709, 711-712, 189 Cal. Rptr. 651]* .

Civ. Code § 683.2 is intended to apply only to true joint tenancy property, not to community property that appears of record in joint tenancy form [18 Cal. L. Rev. Comm. Reports 69 (1986); *see Fam. Code § 2581* (property acquired during marriage in joint form presumed to be community); *see also § 27.210[1][c]*].

[ii] Joint Tenancy of Record

Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to *Civ. Code § 683.2(a)* does not terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied [*Civ. Code § 683.2(c)*]:

- Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located; or

- The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

This recording requirement does not limit the manner or effect of the following [*Civ. Code § 683.2(d)*]:

- A written instrument executed by all the joint tenants that severs the joint tenancy;

- A severance made by or pursuant to a written agreement of all the joint tenants; and

- A deed from a joint tenant to another joint tenant.

[iii] Conflicting Written Agreement

Civ. Code § 683.2 does not authorize a severance of a joint tenancy that is contrary to a written agreement of the joint tenants [*Civ. Code § 683.2*]. A severance contrary to such a written agreement, however, does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement [*Civ. Code § 683.2(b)*].

[iv] Date of Creation of Tenancy

The provisions of *Civ. Code § 683.2(a)* and *(b)* [*see* [b][i], [iii], *above*] apply to all joint tenancies in real property regardless of the date of creation, except that in the case of the death of a joint tenant before January 1, 1985, the

validity of a severance under those subdivisions is determined by the law in effect at the time of death [*Civ. Code § 683.2(e)*; for discussion of these laws, *see* California Forms of Pleading and Practice, Ch. 316, *Joint Tenancy and Tenancy in Common* (Matthew Bender)]. The provisions of *Civ. Code § 683.2(c)* and *(d)* [*see* [b][ii], *above*] do not apply to or affect a severance of a joint tenancy made before January 1, 1986 [*Civ. Code § 683.2(e)*].

[v] Effect of Severance

Following a severance pursuant to *Civ. Code § 683.2*, a tenancy in common relationship without the right of survivorship exists between the severing joint tenant (if he or she retains the interest) or the severing joint tenant's transferee (if applicable) and the other joint tenants. The other joint tenants continue to hold title as joint tenants among themselves [*see* 18 Cal. L. Rev. Comm. Reports 70 (1986); *see also Hammond v. McArthur (1947) 30 Cal. 2d 512, 516, 183 P.2d 1* , citing *Estate of Galletto (1946) 75 Cal. App. 2d 580, 587, 171 P.2d 152]* . For further discussion of the effects of severance, *see* California Forms of Pleading and Practice, Ch. 316, *Joint Tenancy and Tenancy in Common* (Matthew Bender).

[2] FORM

Deed Conveying (Severing) Joint Tenant's Interest

Deed Conveying (Severing) Joint Tenant's Interest

Recording requested by
_____ _____
[*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

Mail tax statements to
_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

GRANT DEED

I, _____[*name of severing joint tenant*], grant to _____[*name of third person*] all my right, title, and interest in and to the real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of severing joint tenant*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesDeeds of PartitionReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common



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DIVISION II: REAL ESTATE TRANSACTIONS
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11-27 California Legal Forms--Transaction Guide § 27.212

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.212 Tenancy in Common Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a tenancy in common deed. A tenancy in common is defined in terms of interests in common. An interest in common is an interest owned by several persons not in joint ownership or partnership [*Civ. Code § 685*; *see Civ. Code § 686*]. Consequently, every interest created in favor of several persons in their own right is an interest in common, unless (1) it is acquired by them in partnership, for partnership purposes, (2) it is declared in its creation to be a joint interest [*see § 27.210*], or (3) it is acquired as community property [*Civ. Code § 683*; *see § 27.213[1]*].

For a discussion of the other forms in which two or more persons may hold property, *see § 27.210[1][a]*. For coverage of grant deeds in general, *see § 27.200[1]*.

[b] Interests of Tenants in Common

The essence of a tenancy in common is the holding of an undivided interest in property [*Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281]* . The interests of the cotenants need not be equal [*see Civ. Code §§ 683, 685*]. If a tenancy in common deed simply lists the grantees as owners of the property without specifying their fractional interests, there is a rebuttable presumption that their interests are equal [*Anderson v. Broadwell (1931) 119 Cal. App. 150, 153, 6 P.2d 267]* . Consequently, the deed should describe any disproportionate interests. Title companies prefer that the deed specify the proportions of the grantee's interests even when they are equal.

[c] Married Persons as Joint Tenants

Except as otherwise provided by statute, all real property (wherever situated) acquired by a married person during

marriage while domiciled in California is community property [*Fam. Code § 760*]. An important statutory presumption that applies solely for the purpose of division of property on dissolution of marriage or legal separation provides that property acquired by the parties during marriage in joint form, including property held in tenancy in common, is presumed to be community property [*Fam. Code § 2581*]. This presumption affects the burden of proof and may be rebutted by either of the following [*Fam. Code § 2581*]:

- A clear statement in the deed (or other documentary evidence of title) by which the property is acquired that the property is separate property and not community property, or
- Proof that the parties have made a written agreement that the property is separate property.

Another statutory presumption applies when real property (or any interest in or encumbrance on real property) was acquired by a husband and wife before 1975 by an instrument in which they are described as husband and wife. In that case, the presumption is that the property is the community property of the parties, unless a different intention is expressed in the instrument [*Fam. Code § 803*]. For further discussion of these presumptions and provisions rebutting them, *see § 27.254[1]*.

[2] FORM

Tenancy in Common Deed

Tenancy in Common Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

GRANT DEED CREATING TENANCY IN COMMON

I, _____[*name of grantor*], grant to _____[*name*] an undivided _____[*e.g.*, one-half] interest and to _____[*name*] an undivided _____[*e.g.*, one-half] interest, as tenants in common, in all that real property situated in the City of _____[*or* in an unincorporated area of] _____ County, California, described as

follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]
GRANTOR
_____ [*signature of grantor*]
[*typed name*]
GRANTOR

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsReal Property LawDeedsTypesGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Joint Ownership Deeds

11-27 California Legal Forms--Transaction Guide § 27.213

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.213 Community Property Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a grant deed that conveys property to a husband and wife as their community property. A husband and wife may hold property as community property (with or without an express right of survivorship, as discussed below), or as joint tenants or tenants in common [*Fam. Code § 750*; *Civ. Code §§ 682*, *682.1*; *see §§ 27.210[1]* (discussion of joint tenancies) and 27.212[1] (discussion of tenancies in common)]. They may also each own separate property [*see Fam. Code § 770*; *see also* Ch. 120, *Complete Marital Settlement Agreements*].

This form includes optional provisions that should be used when the parties wish to create a right of survivorship in the property. Effective July 1, 2001, a transfer document may provide for a husband and wife to hold community property with a right of survivorship [*Civ. Code § 682.1*]. This express right of survivorship distinguishes this form of title from the "community interest of husband and wife" long provided for under *Civ. Code § 682*. Thus, a husband and wife may elect to hold community property with or without the express right of survivorship. For further discussion of the right of survivorship option, *see* [c][i], *below*.

For a deed that may be used to convey real property to a husband and wife as joint tenants, *see § 27.210[2]*. A grant deed that alters the statutory property rights of a husband and a wife in real property is *set forth in § 27.214[2]*. Coverage of grant deeds in general is *set forth in § 27.200[1]*. For a deed recital that may be used to rebut otherwise applicable presumptions regarding community property [*see* [d], *below*], *see § 27.254[2]*.

[b] Overview of Community Property

Except as otherwise provided by statute, all real property and personal property (wherever situated) acquired by a

married person during the marriage while domiciled in California is community property [*Fam. Code § 760*]. Further, community property that is transferred in trust remains community property during the marriage under the circumstances described in *Fam. Code § 761* [*see* Ch. 120, *Complete Marital Settlement Agreements*].

The respective interests of the husband and wife in community property during the continuance of the marriage relationship are present, existing, and equal interests [*Fam. Code § 751*]. Either spouse has the management and control of the community real property, regardless of when it was acquired. However, both spouses must join in executing any instrument by which community real property, or any interest in community real property, is sold, conveyed, encumbered, or leased for a period of more than one year [*Fam. Code § 1102(a)*]. The spouses may do this personally or by a duly authorized representative [*Fam. Code § 1102(a)*]. This execution requirement does not apply to leases, mortgages, conveyances, or transfers of real property or any interest in real property between the spouses [*Fam. Code § 1102(b)*]. Notwithstanding this requirement, a deed of either spouse holding record title to community real property to a purchaser in good faith without knowledge of the marriage relation is presumed to be valid [*Fam. Code § 1102(c)(2)* (applicable to deed executed on or after January 1, 1975; *see Fam. Code § 1102(c)(1)* (applicable to deed executed by husband prior to 1975)].

[c] Community Property With Right of Survivorship

[i] Overview and Operative Date

Under *Civ. Code § 682.1*, community property of a husband and wife, when expressly declared in the transfer document to be community property with right of survivorship, upon the death of one of the spouses, will pass to the survivor without administration [*Civ. Code § 682.1(a)*; *see Prob. Code § 100* (one-half of community property belongs to surviving spouse and other half to decedent unless spouses provide otherwise in writing)]. In addition to the avoidance of probate, this form of title essentially offers assurances that the grantees will be able to take full advantage of the tax benefits of community property [*see* [iii], *below*].

Civ. Code § 682.1 became operative on July 1, 2001, and applies to instruments created on or after that date [*Civ. Code § 682.1(c)*]. Married couples holding title as joint tenants prior to that date may wish to take advantage of this form of title by executing a new deed that satisfies the requirements of *Civ. Code § 682.1*.

Civ. Code § 682.1 does not apply to a joint account in a financial institution that is subject to *Prob. Code § 5100 et seq.* (the California Multiple-Party Account Law) [*Civ. Code § 682.1(b)*].

[ii] Acceptance By Grantee

The express declaration required by *Civ. Code § 682.1* "*may* be accepted in writing on the face of the document by a statement signed or initialed by the grantees" (emphasis added) [*Civ. Code § 682.1*]. The use of "may" in the quoted language suggests that acceptance is optional, and such a written acceptance by the grantees would be a departure from the standard practice of having only the grantor sign the grant deed. On the other hand, the analyses by various Assembly and Senate committees of the bill that added *Civ. Code § 682.1* indicate that the provision was intended to require acceptance by the grantee [*see, e.g.*, Assembly Committee on Judiciary analysis of AB 2913, August 25, 2000; Senate Rules Committee analysis of AB 2913, August 18, 2000]. Due to this uncertainly regarding the statutory acceptance language, counsel should strongly consider having the grantees sign or initial the deed. This form contains optional signature blocks providing for this acceptance.

[iii] Tax Benefits

If a married person dies leaving his or her share of the community property to his or her surviving spouse, a special provision of the Internal Revenue Code gives a new (sometimes called stepped-up) date-of-death basis for income tax purposes to both halves of the community property [*I.R.C. § 1014(b)(6)*]. This basis is the fair market value of the

property at the time of the decedent's death [*I.R.C. § 1014(a)(1)*]. If the property has appreciated substantially since it was originally purchased, and if the surviving spouse sells the property after the deceased spouse's death, this new date-of-death value basis will typically produce significant income tax savings. If the property received from the deceased spouse was separate property, however, only the decedent's half receives a new basis [*see I.R.C. § 1014(a)*]. For further discussion of the taxation of community property, see Ch. 60, *Estate Planning* .

The community property with right of survivorship form of title clearly establishes that the property is community property for taxation purposes. This is a significant benefit that is not present when a husband and wife hold property as joint tenants, because it is possible the IRS will find that each such spouse holds a separate property interest in the property [*see, e.g., Rev. Rul. 87-98* (IRS rejected any blanket rule allowing joint tenancy property to be treated as community property for federal tax purposes, and reiterated that controlling factor was determination under state law); *Estate of Young v. Commissioner (1998) 110 T.C. 297, 302, 306* (tax court was not bound by spousal property order issued by California superior court and finding that property was community property, and tax court concluded that estate failed to overcome presumption of joint tenancy with right of survivorship created by deeds under California law)].

[iv] Termination of Right of Survivorship

Before the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed [*Civ. Code § 682.1(a)*]. For a deed severing a joint tenant's interest and related discussion, see *§ 27.211*.

[d] Presumptions Regarding Community Property

For the purpose of division of property on dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property [*Fam. Code § 2581*]. This presumption affects the burden of proof and may be rebutted by either of the following [*Fam. Code § 2581*]:

- A clear statement in the deed (or other documentary evidence of title) by which the property is acquired that the property is separate property and not community property [*see § 27.254[2]*], or

- Proof that the parties have made a written agreement that the property is separate property.

Another statutory presumption applies when real property (or any interest in or encumbrance on real property) was acquired by a husband and wife before 1975 by an instrument in which they are described as husband and wife. In that case, the presumption is that the property is the community property of the parties, unless a different intention is expressed in the instrument [*Fam. Code § 803*]. For further discussion of these presumptions, see *§ 27.254[1]*.

Rather than relying on the foregoing presumptions, which, as discussed above, may be rebutted or may not apply under certain circumstances, this form clarifies the intent of the parties by stating that the grantees are husband and wife and are receiving the property as their community property.

[2] FORM

Community Property Deed
Community Property Deed

Recording requested by
_____ _____
[*name*]

When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of husband*] and _____[*name of wife*], husband and wife, as their community property [*with right of survivorship*], all that certain real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]
_____ [*signature of grantor*]
[*typed name*]

[*Insert following statement and signature blocks if property will be held as community property with right of survivorship*:]

The above grantees accept this grant of the property described above and agree that they shall hold the property as community property with right of survivorship.

_____ [*signature of grantee-spouse*]
[*typed name*]
_____ [*signature of grantee-spouse*]
[*typed name*]

[*Continue*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies by EntiretiesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Joint Ownership Deeds

11-27 California Legal Forms--Transaction Guide § 27.214

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.214 Grant Deed Transmuting Marital Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a grant deed that may be used to transmute marital real property. Transmutation is the statutory process of altering the statutory property rights of a husband and a wife [*see Fam. Code §§ 850-853, 1500*; *see also* Ch. 121, *Provisions for Division of Property*]. Subject to certain limitations discussed below, married persons may by agreement or transfer, with or without consideration, take any of the following actions [*Fam. Code § 850*]:

- Transmute community property to separate property of either spouse;

- Transmute separate property of either spouse to community property; or (3) transmute separate property of one spouse to separate property of the other spouse.

This form contains three alternative grant provisions, each of which accomplishes one of the foregoing transmutations.

For illustrative transmutation agreements and coverage of the tax aspects of transmutations, *see* Ch. 112, *Postnuptial Agreements* .

[b] Requirements

A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code § 852(a)*; *see Fam. Code § 852(e)* (statute does not apply to or affect a transmutation made before 1985)]. A writing is not an "express declaration" for these purposes unless it contains language that expressly states that the characterization or

ownership of the property is being changed [*Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153* (decided under former *Civ. Code § 5110.730(a)*]. However, *Fam. Code § 852* does not require the use of any particular term or expression, such as "transmutation," "community property," or "separate property" [*see Estate of MacDonald (1990) 51 Cal. 3d 262, 273, 272 Cal. Rptr. 153]* .

A transmutation of real property is not effective as to third parties without notice unless it is recorded [*Fam. Code § 852(b)*].

[c] Relationship of Transmutation Provisions to Other Laws

The statutory provisions governing transmutation do not affect the law governing the characterization of property that applies when separate property and community property are commingled or otherwise combined [*Fam. Code § 852(d)*]. A statement in a will concerning the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced before the death of the person who made the will [*Fam. Code § 853(a)*]. A written joinder or written consent to a nonprobate transfer of community property on death that satisfies *Fam. Code § 852* is a transmutation and is governed by the law applicable to transmutations and not by the provisions of the Probate Code governing nonprobate transfers of community property [*Fam. Code § 853(c)*; *see Prob. Code §§ 5010-5032*].

[d] Fraudulent Transfers

A transmutation is subject to the laws governing fraudulent transfers [*Fam. Code § 851*]. Consequently, the spouses cannot change the character of their property in order to defraud or avoid their creditors [*see Civ. Code § 3439 et seq.* (Uniform Fraudulent Conveyance Act)]. For detailed coverage of the laws governing fraudulent transfers, *see* California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances* (Matthew Bender).

[2] FORM

Grant Deed Transmuting Marital Property

Grant Deed Transmuting Marital Property

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

GRANT DEED

[*Select applicable transmutation provision*:]

[*To transmute community property to separate property of either spouse*:]

I, _____[*name of grantor-spouse*], grant to _____[*name of grantee-spouse*] all my right, title, and interest in and to all that real property situated in _____[the city of _____, *or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

The above grantor is the _____[wife *or* husband] of _____[*name of spouse*], and it is _____[his *or* her] intention to vest title in _____[her husband *or* his wife] as _____[his *or* her] separate property. This deed is given to accomplish that intention and the mutual desire and agreement of the parties that the above property be so vested in the _____[husband as his *or* wife as her] sole and separate property. Further, this deed is intended to change the characterization and ownership of the above property pursuant to the requirements for transmutation set forth in *Family Code Section 852(a)*].

[*OR*]

[*To transmute separate property of either spouse to community property*:]

I, _____[*name of grantor-spouse*], grant to _____[*name of grantee-spouse*] a community property interest in all that real property situated in _____[the city of _____, *or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

The above grantor is the _____[wife *or* husband] of _____[*name of spouse*], and it is _____[his *or* her] intention to transmute the above property to community property. This deed is given to accomplish that intention and the mutual desire and agreement of the parties that the above property be so vested in the husband and wife as their community property. Further, this deed is intended to change the characterization and ownership of the above property pursuant to the requirements for transmutation set forth in *Family Code Section 852(a)*.

[*OR*]

[*To transmute separate property of one spouse to separate property of other spouse*:]

I, _____[*name of grantor-spouse*], grant to _____[*name of grantee-spouse*] all that real property situated in _____[the city of _____, *or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

The above-named grantor is the _____[wife *or* husband] of _____[*name of spouse*], and it is _____[his *or* her] intention to vest title in _____[her husband *or* his wife] as _____[his *or* her] separate property. This deed is given to accomplish that intention and the mutual

desire and agreement of the parties that the above property be so vested in the _____[husband as his *or* wife as her] sole and separate property. Further, this deed is intended to change the characterization and ownership of the above property pursuant to the requirements for transmutation set forth in *Family Code Section 852(a).*

[*Continue with the following*:]

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property



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11-27 California Legal Forms--Transaction Guide §§ 27.215-27.219

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.215[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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3. Deeds With Business Grantors

11-27 California Legal Forms--Transaction Guide § 27.220

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.220 Corporation Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a corporation grant deed. A corporation has all of the powers of a natural person in carrying out its business activities, including the power to acquire and convey real property [*see Corp. Code § 207(g)*].

[b] Exercise of Corporation Powers

[i] By Board of Directors

Subject to the provisions of the General Corporation Law [*Corp. Code § 100 et seq.*] and to any limitations in the articles of incorporation relating to actions that must be approved by the shareholders [*see Corp. Code § 153*], by the outstanding shares [*see Corp. Code § 152*], or by a less than majority vote of a class or series of preferred shares [*see Corp. Code § 402.5*], the business and affairs of every corporation are managed and all corporate powers are exercised by or under the direction of the board of directors [*Corp. Code § 300(a)*]. A corporation must have a board chairperson or a president or both, a secretary, and a chief financial officer [*Corp. Code § 312(a)*]. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise [*Corp. Code § 312(a)*].

[ii] Execution of Conveyances

Any conveyance executed between a corporation and any other person, when signed by the appropriate officers, is not invalid for any lack of authority of the signing officers if the other person did not have actual knowledge of that lack of authority [*Corp. Code § 313*]. The appropriate officers are (1) the chairman of the board, the president, or any vice president, and (2) the secretary, assistant secretary, chief financial officer, or assistant treasurer of the corporation [

Corp. Code § 313; *but see Corp. Code § 208(a)* (rule inapplicable to certain intracorporate disputes not affecting rights of third persons)]. This form provides for execution by the president and secretary. Bylaws usually specify the manner in which deeds and conveyances may be executed on behalf of a corporation [*see Ch. 4, Bylaws, § 4.200[2]*].

[iii] Approval Requirements

If the property to be transferred represents all or substantially all of the assets of the corporation, the principal terms of the transaction must be approved by the board of directors [*Corp. Code § 1001(a)*; *see Corp. Code § 151* ("approved by the board" defined); *see also* [c], *below*]. In addition, unless the transaction is in the usual and regular course of the business of the corporation, the principal terms of the transfer must also be approved by the outstanding shares [*see Corp. Code § 152* ("approved by the outstanding shares" defined)] either before or after the board's approval and before or after the transaction [*Corp. Code § 1001(a)*]. However, if the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; *see Corp. Code § 1150 et seq.* (conversions)]. For further coverage of this requirement, *see* Ballantine & Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* , § 257 (Matthew Bender).

[c] Resolution Authorizing Conveyance

Because corporate powers must be exercised by or under the direction of the board of directors [*Corp. Code § 300(a)*; *see* [b][i], *above*], a grantee or title insurer may require a certified copy of the resolution of the directors authorizing the execution of the deed [*see § 27.281[2]*; *see also* Ch. 5, *Directors' Meetings, Actions, and Resolutions*]. However, this demand is rarely made when (1) the deed contains a certificate of acknowledgment that includes a statutory recital "by a duly authorized person" [*Civ. Code § 1190*] regarding the corporation's authority to execute the deed [*see Civ. Code § 1189*; *see also* [f], *below*], or (2) a certificate of the secretary or assistant secretary of the corporation is attached to the deed and provides that the conveyance was duly authorized [*see Corp. Code § 1002*; *see also* [f], *below*].

[d] Name Change Following Grantor's Acquisition of Property

If the name of the corporation has been changed since the corporation acquired the property being conveyed, and the deed does not include the name under which the corporation received title, it will be valid between the parties and those with notice [*Civ. Code § 1096*]. However, the recordation of such a deed will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*; *see Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* (grantor's use of substantially different name in conveyance instrument breaks recorded chain of title and renders title unmarketable)]. Consequently, both the former and the present name should appear on the deed. For examples of ways in which this can be accomplished, *see § 27.250[2]*. In the case of an existing deed that contains such a discrepancy, a statutory procedure may be used to establish (1) the identity of the grantor and (2) marketable title to the property [*see Code Civ. Proc. §§ 770.010-770.080*; *see also § 27.16[4]*].

[e] Corporate Seal

A corporation may adopt, use, and at will alter a corporate seal [*Corp. Code § 207(a)*]. However, failure to affix a seal does not affect the validity of any instrument [*Corp. Code § 207(a)*].

[f] Acknowledgment and Alternative Assurances Regarding Authorization of Conveyance

Civ. Code § 1189(a) sets forth the certificate of acknowledgment form that must be used when the acknowledgment is taken within this state [*see § 27.280[1]* for a detailed discussion of acknowledgments]. If this certificate is executed on behalf of the corporation by a "duly authorized person," it will be (1) prima facie evidence that the deed is the duly authorized act of the corporation named in the deed, and (2) conclusive evidence that the deed is the duly authorized act of the named corporation in favor of any good faith purchaser, lessee, or encumbrancer [*Civ. Code § 1190*]. For these

purposes, the president, vice president, secretary, and assistant secretary of the corporation are considered duly authorized persons [*Civ. Code § 1190*].

An alternative statutory procedure offering similar protections relating to the authorization for a corporate conveyance involves the use of a certificate of the secretary or assistant secretary of the corporation [*see Corp. Code § 1002*]. Unlike the statutory certificate of acknowledgment, the certificate of a secretary or assistant secretary may be used when the deed is not being recorded or when the deed will be executed by someone other than a duly authorized person [*Corp. Code § 1002*]. For an illustrative certificate and further discussion, *see § 27.280.*

If neither of the above procedures is followed, a title insurer may require a certified copy of the corporate resolution authorizing the transfer of the property [*see* [c], *above*; *see also § 27.281*].

[2] FORM

Corporation Deed

Corporation Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

CORPORATION GRANT DEED

_____[*Name of grantor corporation*], a California [*or other state*] corporation, grants to _____[*name of grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*name of corporation*]
By _____ [*signature of president*]
[*typed name and title*]

By _____ [*signature of secretary*]
[*typed name and title*]

[*If desired, place seal here*.]

Acknowledgment

[*Acknowledgments taken in California must be in following form* [*Civ. Code § 1189(a)*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

[*Consider attaching certificate regarding authorization for conveyance (prepared by secretary or assistant secretary of corporation pursuant to Corp. Code § 1002* if (1) deed will not be recorded, or (2) deed will not be executed by duly authorized person [*see § 27.280[2]*].]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.221

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.221 Partnership Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a partnership grant deed. A partnership can acquire real property in the partnership name or in the name of one or more of the partners [*see Corp. Code § 16204*]. Property acquired by a partnership is property of the partnership and not of the partners individually [*Corp. Code § 16203*]. Any partner in a general partnership, and a general partner of a limited partnership, can convey title in the partnership name by an instrument executed in the partnership name (this form) [*Corp. Code §§ 16302(a)(1)-(3), 16303* (general partnership); *see Corp. Code § 15904.02(a)* (ULPA '08), 15643 (CRLPA, repealed January 1, 2010)].

[b] Title in Name of Partner or Partners

If title to partnership property is held in the name of one or more of the partners, only the partners in whose name title stands can convey title [*see Corp. Code §§ 16302(a)(2), 16303*]. Title is rarely held in this manner, however, because it may not be clear from the record that the property is owned by the partnership instead of the named individuals.

[c] General Partnerships

Although any partner may convey title to real property held in the partnership name by a conveyance executed in the partnership name [*Corp. Code §§ 16302(a)(1), 16303*; *see* [a], *above*], the partnership can recover the property unless the partner's act binds the partnership or the property has been conveyed to a bona fide purchaser for value without knowledge that the partner exceeded his or her authority by executing the conveyance [*see Corp. Code §§ 16302(b), 16303*; *see also* Ch. 15, *General Partnerships*]. The act of every partner, including the execution of an instrument in the partnership name in the apparent course of the partnership business, binds the partnership [*Corp. Code §§ 16301, 16303*

]. This rule permits one partner to bind the partnership. However, title companies usually require the signatures of all of the partners or satisfactory evidence that the partners who signed the instrument were authorized to do so. A provision in a recorded statement of partnership signed by all the partners granting such authority is satisfactory evidence of that authority [*see* Ch. 15, *General Partnerships* ; *see also Corp. Code § 16303*].

For further discussion of the conveyance of partnership real property, *see* Ch. 15, *General Partnerships* .

[d] Limited Partnerships

The recordation of a certified copy of the certificate of limited partnership (or any amendment) in the county where partnership real property is located creates a conclusive presumption in favor of a bona fide purchaser of the property that the general partners named in the certificate are all of the general partnerships of the partnership [*Corp. Code § 15902.01(e)* (ULPA '08), *Corp. Code § 15621(d)* (CRLPA, repealed January 1, 2010)]. Title companies usually insist that a certificate of partnership be recorded and that all of the general partners sign a conveyance.

The consent of each partner is necessary to sell, lease, exchange, or otherwise dispose of all or substantially all of a limited partnership's property, with or without the goodwill, other than in the usual and regular course of the limited partnership's activities [*Corp. Code § 15904.06(a)* (ULPA '08)]. Under the CRLPA, unless the limited partnership agreement provides to the contrary, a transfer of all or a substantial part of the assets of the limited partnership that is not in the ordinary course of business must be authorized by the affirmative vote of a majority in interest of the limited partners [*Corp. Code § 15636(f)(1)(B)* (CRLPA, repealed January 1, 2010)].

For further discussion of limited partnerships, *see* Ch. 16, *Formation of Limited Partnerships* .

[2] FORM

Partnership Deed
Partnership Deed

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

PARTNERSHIP GRANT DEED

_____[*Name of partnership*], a [*limited*] partnership, [*composed of* _____ (*names of partners; if limited partnership, add*: as general partners)], grants to _____[*name of grantee*] all that real property situated in the City of _____[*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*name of partnership*]
By _____ [*signature*]
[*typed name and title*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a))*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.222

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.222 Joint Venture Deed

[1] Comment--Use of Form

The form in [2], *below*, is a grant deed that conveys title to joint venture real property. A joint venture is an association of two or more persons who combine their property, skill, or knowledge to carry out a single business enterprise for profit [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506, 319 P.2d 617* ; *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468]* . For a discussion of joint ventures, see Ch. 29A, *Joint Ventures* .

Because title insurance companies, for their purposes, consider individual joint venturers as owners of the joint venture real property in their individual capacities, this form assumes, as is commonly the case, that the property is held in the names of the individual joint venturers [*see § 27.251[2]* for a deed provision that may be used when the grantee is a joint venturer]. If title is held in some other form, the title insurance company will probably require the deed to adopt that alternative form. For example, the first sentence of the form should begin "_____ [*name of joint venture*], composed of _____ and _____ [*names of joint venturers*], grant ..." if title is held in that form.

[2] FORM

Joint Venture Deed
Joint Venture Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)

_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____

Space above this line for recorder's use

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

JOINT VENTURE GRANT DEED

We, _____[*name of person, corporation, or partnership*] and _____[*name of other joint venturer(s)*], constituting all the joint venturers in _____[*name of grantor joint venture, e.g.*, Z Company], a joint venture, grant to _____[*name of grantee*] all that real property located in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of individual joint venturer*]
[*typed name*]
_____ [*signature of individual joint venturer*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.223

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.223 Unincorporated Association Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a grant deed by an unincorporated association. An "unincorporated association" is an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not [*Corp. Code § 18035(a)*]. However, joint tenancy, tenancy in common, community property, or other form or property tenure does not by itself establish an unincorporated association, even if coowners share ownership of the property for a common purpose [*Corp. Code § 18035(b)*]. Further, marriage or creation of a registered domestic partnership does not by itself establish an unincorporated association [*Corp. Code § 18035(c)*]. The following are not unincorporated associations [*Corp. Code § 18055*]:

- Corporations.
- Government or governmental subdivisions and agencies.
- Partnerships or joint ventures.
- Limited liability companies.
- Labor organizations (including labor federations, labor councils, and labor committees) that are governed by a constitution or bylaws.

An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real or personal property [*Corp. Code §§ 18105, 18110*; *see Corp. Code § 21200* (capacity of unincorporated association that is

organized as medical society)].

For discussion of unincorporated associations that are formed as nonprofit associations, see Ch. 13A, *Nonprofit Unincorporated Associations* .

[b] Transfer Requirements

The acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers, (2) a person specifically designated by a resolution adopted by the association, or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property [*Corp. Code § 18120(a)*; *see § 27.282*].

[2] FORM

Unincorporated Association Deed

Unincorporated Association Deed

Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

UNINCORPORATED ASSOCIATION GRANT DEED

_____[*Name of unincorporated association*], an unincorporated association, grants to _____[*name of grantee*] all that real property situated in the City of _____[*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*name of association*]
By _____ [*signature*]
[*typed name and title*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment

[*See § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.224

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.224 Limited Liability Company Deed

[1] Comment--Use of Form

The form in [2], *below*, is a limited liability company grant deed. A limited liability company can acquire real property in the limited liability company name [*see Corp. Code § 17003*]. The business affairs, including real property transactions, may be completed by either members [*Corp. Code § 17150*] or non-member/managers [*Corp. Code § 17151*]; as authorized by the articles of organization or operating agreements [*see Corp. Code § 17150*; *Corp. Code § 17151*].

[2] FORM

Limited Liability Company Deed
Limited Liability Company Deed

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

LIMITED LIABILITY COMPANY GRANT DEED

_____[*Name of limited liability company*], a California [*or other state*] limited liability company, [*composed of* _____ (*names of members*)], grants to _____[*name of grantee*] all that real property situated in the City of _____[*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*name of limited liability company*]
By _____ [*signature*]
[*typed name and title*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a))*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide §§ 27.225-27.229

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.225[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.230

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.230 Personal Representative's Deed

[1] Comment--Use of Form

The form in [2], *below*, is a deed that conveys a decedent's real property to a purchaser. The form reflects the provisions of *Prob. Code §§ 10300-10316*, which govern probate sales of real property, and other provisions of the Probate Code that apply to transactions affecting title to property in an estate [*see Prob. Code §§ 7260-7263*]. Among other things, these statutes require the court to make an order confirming the sale to the person making the highest satisfactory offer and directing conveyances to be executed [*Prob. Code § 10313(a)*]. On confirmation of the sale, the personal representative [*see Prob. Code § 58(a)* ("personal representative" defined)] must execute a conveyance to the purchaser that refers to the court order and gives the date of the order [*Prob. Code §§ 7261, 10314(a)*]. A certified copy of the order must be recorded in the office of the recorder of the county in which the real property, or any portion of it, is located [*Prob. Code § 10314(a)*].

A conveyance that complies with the applicable court order vests the following in the purchaser: (1) all the right, title, and interest that the decedent had in the property at the time of the decedent's death, and (2) any other or additional right, title, or interest in the property acquired by the decedent's estate, by operation of law or otherwise, prior to the sale [*Prob. Code § 10314(c)*; *see Prob. Code § 7262*].

For an extensive discussion of personal representatives and the administration of decedents' estates, *see* Ch. 65, *Executors* , and California Forms of Pleading and Practice, Ch. 455, *Probate: Sale of Estate Property* .

[2] FORM

Personal Representative's Deed
Personal Representative's Deed

)

Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use
Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

PERSONAL REPRESENTATIVE'S DEED

I, _____[*name of personal representative*], as personal representative of the estate of _____[*name of decedent*], deceased, grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

This deed is made pursuant to order of the Superior Court of _____ County, State of California, in the matter of _____[*name of decedent*], deceased, No. _____[*court number*], dated _____[*date of order*], a certified copy of which is attached to this deed.

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & Fiduciaries



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11-27 California Legal Forms--Transaction Guide § 27.231

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.231 Guardian's or Conservator's Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed for use by either a guardian or a conservator to convey real property in the estate of a ward or conservatee. For a deed by a personal representative, *see § 27.230[2]*. For provisions of conveyance to a minor or conservatee, *see § 27.252[2]*.

[b] Deeds by Guardian or Conservator

If it appears necessary or convenient, the court may appoint a guardian of the person or estate of a minor [*Prob. Code § 1514(a)*; for discussion of the capacity of a minor to hold title to real property, *see § 27.17[1]*]. The court may appoint a conservator of the estate of an adult if this need is established to the satisfaction of the court and the other requirements of the law governing the appointment of conservators are met [*Prob. Code § 1800.3(a)*]. If the income from the estate of the ward or conservatee is insufficient for the purpose of providing the comfortable and suitable support, maintenance, and education of the ward or conservatee and of those legally entitled to support, maintenance, or education from the ward or conservatee, the guardian or conservator may sell any real property of the estate [*Prob. Code §§ 2420(b), 2541(a)*]. The guardian or conservator may also sell real property of the estate under the following conditions: (1) when the sale is necessary to pay certain debts of the ward or conservatee [*see Prob. Code §§ 2430* (debts payable from principal and income), 2431 (wage claims)], and (2) when it is for the advantage, benefit, and best interest of the ward or conservatee, the estate, or the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee [*Prob. Code § 2541(b), (c)*]. All sales of real property of the estate are subject to authorization, confirmation, or direction of the court [*Prob. Code § 2540*] and must otherwise conform to the requirements of the law governing sales of such property [*see Prob. Code §§ 2541-2548*].

For extensive coverage of guardians and conservators, *see* Ch. 66, *Guardianships* , and Ch. 66A, *Conservatorships* , and California Forms of Pleading and Practice, Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* (Matthew Bender).

[2] FORM

Guardian's or Conservator's Deed

Guardian's or Conservator's Deed

Recording requested by
_____ _____
[*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

Mail tax statements to

_____ [*name*]
_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

_____ [GUARDIAN'S *or* CONSERVATOR'S] DEED

I, _____[*name of guardian or conservator*], as _____[guardian *or* conservator] of the [person and] estate of _____[*name of minor or conservatee*], a _____[minor *or* conservatee], grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

This deed is made pursuant to order of the Superior Court, [City and] County of _____, State of California, in the matter of the _____[guardianship *or* conservatorship] of _____[*name of minor or conservatee*], a _____[minor *or* conservatee], No. _____[*court number*].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*see § 27.271[2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed*:]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & Fiduciaries



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11-27 California Legal Forms--Transaction Guide §§ 27.232-27.239

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.232[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Special, Alternative, and Additional Deed Provisions
1. Recording and Tax Information

11-27 California Legal Forms--Transaction Guide § 27.240

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.240 Recording Information

[1] Comment

[a] Use of Form

The form in [2], *below*, is a provision that, when completed, will contain all the recording information that must appear on any deed or other instrument that is to be recorded [*see* [b], *below*]. For discussion of additional information that must appear on any deed conveying fee title if the deed is to be recorded [*see Gov. Code § 27321.5(a)*], *see § 27.241[1]*. If the conveyance is subject to a documentary transfer tax, the provision *set forth in § 27.242[2]* must also be added to the deed [*see Rev. & Tax. Code §§ 11932, 11933*]. For discussion of additional information that may be required on any deed that is to be recorded in Los Angeles County or Riverside County [*Gov. Code §§ 27297.6(a), 27297.7(a)*], see [c], *below*.

[b] Required Format and Information

Any printed form primarily intended to be used for recordation purposes must comply with the following requirements [*Gov. Code § 27361.6*]:

- The top two and one-half inches of the first page must be reserved for recording information;
- The left three and one half inches of the space described above must identify the person requesting recordation [*see Gov. Code § 27320*] and to whom the document should be returned (*see* discussion *below*); and
- There must be a one-half inch margin on the two vertical sides (except in the space reserved for recording information).

If the first page or sheet of a document does not comply with the above requirements, a separate page must be attached by the party requesting recording to the front of the document that meets these criteria and that reflects the document's title or titles as required by *Gov. Code § 27324* [*Gov. Code § 27361.6*].

This form and the complete deeds in this chapter provide for the reservation of the top two and one-half inches of the first page for recording information by including a line across the page immediately below the recording information, and adding the following statement below that line: "Space above this line for recorder's use." However, the line and that statement are not required by statute and may be omitted or modified by counsel.

After recording the deed, the recorder must mail (or deliver if the deed so requests) the deed to the person named in the instrument, if any [*Gov. Code § 27321*]. Consequently, the deed should set forth that person's address. If the deed does not identify the person to whom the document should be returned, the recorder must deliver or mail it to the party that left the deed for recordation [*Gov. Code § 27321*].

[c] Additional Information in Los Angeles and Riverside Counties

In Los Angeles County or Riverside County, the recorder may require, as a condition of recording, that a deed, quitclaim deed, or deed of trust indicate the assessor's identification numbers that fully contain all, or a portion of, the real property described in the legal description. If the description contains more than one assessor's parcel, all assessor's parcels must be indicated. The form of the entry must be substantially as follows: "Assessor's Identification Number _____-_____-_____." The recorder, within 30 days after recordation of a deed, quitclaim deed, or deed of trust, may mail a notice of this requirement to the party or parties executing the document [*Gov. Code §§ 27297.6(a), 27297.7(a)*]. This requirement does not apply to the recordation of any document under which the federal government, the state, or any county, city, or subdivision of the state acquires title [*Gov. Code §§ 27297.6(b), 27297.7(b)*]. In addition to any other recording fee, the recorder may collect a fee from the person filing the deed, quitclaim deed, or deed of trust, other than a government entity. The fee may not exceed the mailing cost of the notice specified in that section, up to a prescribed maximum [*Gov. Code § 27387.1*].

[d] Type of Paper

All instruments [*see Gov. Code § 27279(a)* ("instrument" defined)] presented for recordation must be on a quality of paper and contain print of a size and color that will reproduce legibly by microphotographic or imaging processes [*Gov. Code § 27361.6*]. If the text of a deed or other document presented for record may be made out but is not sufficiently legible to reproduce a readable photographic record, the recorder may require the person submitting it for record to either substitute a legible original deed or to prepare a legible handwritten or typed copy of the original deed and to attach that copy to the original [*Gov. Code § 27361.7*]. Any handwritten or typed copy must be certified by the party creating it under penalty of perjury as being a true copy of the original [*Gov. Code § 27361.7*]. For these purposes, "text" includes the notary seal, certificates, and other appendages to a document [*Gov. Code § 27361.7*].

[e] Fees

The fee for recording and indexing a deed or other instrument is specified by statute [*see Gov. Code § 27361(a)*]. An additional fee is charged for every page of a printed form containing printing that is spaced more than nine lines per vertical inch or more than 22 characters and spaces per inch measured horizontally for not less than three inches in one sentence [*Gov. Code § 27361(a)(1)*]. This extra charge does not apply, however, to printed words that are directive or explanatory in nature for completion of the form or on vital statistics forms [*see Gov. Code § 27361(a)(1)*]. In addition, if a page or sheet does not conform with the dimensions described in *Gov. Code § 27361.5(a)* (page must be one printed side of a single piece of paper being 81/2 inches by 11 inches), an extra charge per page is assessed [*Gov. Code § 27361(a)(2)*].

[f] Change in Ownership Statement

If the deed is to effect a "change of ownership," the transferee normally should obtain a preliminary change of ownership report form from the county assessor or recorder and file the completed form with the county recorder at the time of recordation of the transfer document [*see Rev. & Tax. Code § 480.3(a)*; *but see Rev. & Tax. Code § 480.3(e), (f)* (limited exceptions to above filing requirement)]. For these purposes, a "change in ownership" is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*; *see 18 Cal. Code Reg. § 462.001*].

Although the filing of a preliminary change of ownership report is not a prerequisite to recording a deed [*see Rev. & Tax. Code § 480(e)*], a transferee who fails to file such a report must (1) comply, within 45 days, with the more complicated procedures governing the use of change in ownership statements [*see Rev. & Tax. Code § 480(e)*; *see also Gov. Code § 27321*], and (2) pay an additional recording fee if required to do so by the recorder [*see Rev. & Tax. Code § 480.3(b)*]. Failure to pay this additional fee may delay or preclude the deed's recordation [*see Rev. & Tax. Code § 480.3(c)*].

For further discussion of changes in ownership, *see § 27.36*.

[2] FORM

Recording Information
Recording Information

)
Recording requested by)
_____ _____)
[*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

_____
Space above this line for recorder's use

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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1. Recording and Tax Information

11-27 California Legal Forms--Transaction Guide § 27.241

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.241 Tax Statement Information

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth alternative tax statements that may be added to a deed. A deed conveying fee title will not be accepted for recording unless it sets forth, across the bottom of the first page, the name and address to which future tax statements may be mailed [*Gov. Code § 27321.5(a)*]. This requirement may be satisfied by taking the following actions:

- Providing the required name and address at the bottom of the first page [*see* first alternative of form];

- Adding a reference at the bottom of the first page to the address set forth in the recording information at the top of the deed, if the person who is to receive the recorded deed [*see Gov. Code § 27321*; *see also § 27.240[1][b]*] is also to receive the tax statements [*see* second alternative of form]; or

- Including the name and address below the recording information [*see* third alternative of form], and inserting a reference to that name and address at the bottom of the first page [*see* third alternative of form].

If a recorder mistakenly records a deed that omits or misstates the required tax statement information, the failure to comply with the foregoing requirements will not affect the validity of the deed or the notice imparted by recordation [*Gov. Code § 27321.5*].

[b] Deed That Does Not Convey Fee Title

A deed need not include the tax statement information described above if it does not convey fee title [*Gov. Code § 27321.5*]; *see Civ. Code § 762* (every estate of inheritance is a fee estate)]. Consequently, that information may be omitted from a deed conveying a life estate, an estate for years or an estate at will [*see Civ. Code §§ 761, 762*; § 27.103, P 1].

[2] FORM

Tax Statement Information

Tax Statement Information

[*First alternative; insert as last line at bottom of first page*:]

Mail tax statements to _____[*name*], _____[*address, city, state, zip*].

[*OR*]

[*Second alternative; insert after recorder's information on deed if tax statements are to be mailed to same person who is to receive recorded deed*:]

Mail Tax Statements to Return Address Above.

[*OR*]

Mail tax statements to

_____ [*name*]

_____ [*address*]

[*Add documentary transfer tax statement here, if applicable (see § 27.242[2])*]

_____ [*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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11-27 California Legal Forms--Transaction Guide § 27.242

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.242 Documentary Transfer Tax Information

[1] Comment

[a] Use of Form

The form in [2], *below*, contains two alternative provisions, one of which should be added to a deed that is subject to a documentary transfer tax [*see* [b], *below*]. If a local jurisdiction has imposed such a tax, the amount of the tax and related information must be noted on the face of the deed [*see* first alternative of form] or on a separate document [*Rev. & Tax. Code §§ 11932, 11933*; *see § 27.287[2]* (separate document containing transfer tax information)]. Counsel should use a separate document if the parties wish to avoid disclosing the purchase price of the property to third parties [*see § 27.287[1][a]*]. In this case, the deed should state, in the place where the transfer tax information would otherwise appear, that the amount of the tax due is shown on a separate document and is not for public record [*see* second alternative of form].

A county recorder cannot record a deed unless any required documentary transfer tax or taxes have been paid [*Rev. & Tax. Code § 11933*]. However, if the recorder records the deed anyway, failure to collect the tax does not affect the constructive notice imparted by the recordation of the deed [*Rev. & Tax. Code § 11933*].

[b] Transfers Subject to Tax

The Documentary Transfer Tax Act [*Rev. & Tax. Code § 11901 et seq.*] permits California counties to tax transfers of real property [*Rev. & Tax. Code § 11911(a)*]. In addition, cities within counties that have imposed such a tax may also tax these transfers [*Rev. & Tax. Code § 11911(b)*; *see* [c], *below*]. The local legislative body may impose the tax, by ordinance, on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to, or vested in, another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale,

exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*].

[c] Amount of Tax

A county may impose a transfer tax at the rate of $0.55 for each $500 (or fractional part of that amount) of the consideration or value of the interest or property conveyed, exclusive of the value of liens or encumbrances remaining on the property, in excess of $100 [Rev. & Tax. Code § 11911(a)]. The rate for a city is one half of that amount [*Rev. & Tax. Code § 11911(b)*]. If a city imposes such a tax, the county must allow a credit for the city tax [*Rev. & Tax. Code § 11911(c)*; *see Rev. & Tax. Code § 11931*]. Consequently, the total tax may not exceed the $0.55 rate, whether imposed solely by a county or by both a county and a city.

[d] Exemptions

A documentary transfer tax imposed under the Documentary Transfer Tax Act does not apply to any written instrument given to secure a debt [*Rev. & Tax. Code § 11921*]. A deed or other instrument given by a trustor or mortgagor to the beneficiary or mortgagee as a result of or in lieu of foreclosure [*see* [f], *below*] is also exempt from the documentary transfer tax, except to the extent that the consideration exceeds the unpaid debt, including accrued interest and cost of foreclosure [*Rev. & Tax. Code § 11926*]. Any such deed or other instrument must disclose the consideration and unpaid debt amount and must identify the grantee as the beneficiary or mortgagee [*Rev. & Tax. Code § 11926*]. Alternatively, these facts may be stated in a separate affidavit or declaration under penalty of perjury [*Rev. & Tax. Code § 11926*; *see § 27.288[2]*].

In any case, no transfer tax may be imposed by reason of any transfer between an individual or individuals and a legal entity, or between legal entities, that results solely in a change in the method of holding title to the realty, and in which proportional ownership interests in the realty, whether represented by stock, membership interest, partnership interest, cotenancy interest, or otherwise, directly or indirectly, remain the same immediately after the transfer [*Rev. & Tax. Code § 11925(d)*].

The following are also exempt from transfer taxes:

- Deeds or other instruments under which the United States, a state, or another political entity acquires title [*Rev. & Tax. Code § 11922*];

- Certain federal bankruptcy, receivership, and reorganization transfers [*Rev. & Tax. Code § 11923*];

- Conveyances conducted pursuant to orders of the Securities and Exchange Commission [*Rev. & Tax. Code § 11924*];

- Transfers of interests in certain partnerships or other entities treated as partnerships for federal income tax purposes that hold real property [*Rev. & Tax. Code § 11925*; *but see Rev. & Tax. Code § 11925(b)* (termination of partnership or other entity treated as partnership for federal income tax purposes under specified conditions is taxable transfer)];

- Deeds or other instruments that transfer, divide, or allocate community, quasi-community, or quasi-marital property between spouses for the purpose of effecting a judgment of dissolution, legal separation, or nullity, or pursuant to a written agreement between the spouses in contemplation of such a judgment [*Rev. & Tax. Code § 11927(a)*; *see Rev. & Tax. Code § 11927(b)* (deed or other instrument must contain a statement, signed by either spouse, that the instrument is entitled to the exemption)]; and

- Any deed or other instrument by which the State of California, a political subdivision of the State, or

any agency or instrumentality of either of the foregoing (1) conveys realty to a purchaser who has agreed to immediately reconvey the realty to the exempt entity [*Rev. & Tax. Code § 11928*], or (2) conveys to a nonprofit corporation any realty that was acquired, constructed, or improved through the use of obligations issued by the nonprofit corporation on behalf of a governmental unit [*Rev. & Tax. Code § 11929*; *see Treas. Reg. § 1.103-1(b)*].

[e] Declaration and Payment of Tax

The tax must be paid by any person who makes, signs, or issues the deed or other document subject to the tax, or for whose use or benefit the deed or other document is made, signed, or issued [*Rev. & Tax. Code § 11912*]. A declaration of the amount of tax due, signed by the party determining the tax or that party's agent, must appear on the face of the document (this form) or on a separate paper [*see Rev. & Tax. Code § 11932*; *see also* discussion in [a], *above*]. The declaration must include a statement indicating whether the consideration or value used to compute the tax [*see* discussion in [c], *above*] was exclusive of the value of a lien or encumbrance remaining on the interest or property conveyed at the time of sale [*Rev. & Tax. Code § 11933*].

The county recorder collects the transfer tax [*Rev. & Tax. Code § 11931*]. If the relevant city has also imposed a tax, the county auditor will allocate the collected amount between the county and city [*Rev. & Tax. Code § 11931*].

[f] Deed in Lieu of Foreclosure

As discussed in [d], *above*, a deed or other instrument to a beneficiary or mortgagee that is taken from a mortgagor or trustor as a result of or in lieu of foreclosure [*see § 27.260[2]*], must contain additional information regarding the transaction. Alternatively, this additional information may be set forth in an affidavit or declaration under penalty of perjury [Rev. & Tax. Code § 11926]. For further discussion and an illustrative declaration, *see § 27.288*.

[g] Tax Roll Parcel Number

An ordinance that imposes a documentary transfer tax may also require that each deed or other document by which the real property is sold, granted, assigned, transferred, or otherwise conveyed must have noted on it the tax roll parcel number [*Rev. & Tax. Code § 11911.1*]. The number is used only for administrative purposes and does not constitute proof of title in the event of a conflict with the legal description [*Rev. & Tax. Code § 11911.1*]. If the number is erroneous or omitted, the validity of the document is not affected and no liability attaches to anyone because of the error or omission [*Rev. & Tax. Code § 11911.1*].

[2] FORM

Documentary Transfer Tax Information

Documentary Transfer Tax Information

[*Insert below recorder's information*:]

[*Insert tax statement information here (see § 27.241[2])*]

Documentary Transfer Tax
_____ conveyed, [not] exclusive of liens and encumbrances remaining on that property at time of sale.

_____ [*signature*]
[Agent of] Party determining tax

[*Or, if separate statement of tax is to be used (see § 27.287[2]), insert following statement below recorder's information:*]

[*Insert tax statement information here (see § 27.241[2])*]

Amount of Documentary Transfer Tax shown on attached paper--not for public record.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawOwnership & TransferGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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1. Recording and Tax Information

11-27 California Legal Forms--Transaction Guide §§ 27.243-27.249

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.243[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.250

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.250 Grantor's Title in Name Other Than Grantor's Current Name

[1] Comment--Use of Form

The form in [2], *below*, consists of alternative descriptions of a grantor that may be inserted in any of the complete deeds in this chapter when the grantor wishes to transfer property under a name other than the name in which he or she derived title. If the deed does not set forth both names, it will be valid between the parties and those with notice, but the recordation of the deed will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*; *see Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249* (grantor's use of substantially different name in conveyance instrument breaks recorded chain of title)]. However, under some circumstances a subsequent owner may perfect the record title by obtaining an adjudication of identity of the grantor when such a discrepancy exists [*see Code Civ. Proc. §§ 770.010-770.080*; *see also § 27.16[4]*].

The alternatives in this form may be used when the grantor is an individual or a corporation. They may be easily modified for use with other types of grantors.

[2] FORM

Grantor's Title in Name Other Than Grantor's Current Name

Grantor's Title in Name Other Than Grantor's Current Name

[*Insert one of the following at the beginning of the deed:*]

I, _____[*name of grantor*], being the same person who acquired title to the property described below under the name of _____[*name in which title held*],

[*OR*]

I, _____[*name of grantor*], also known as _____[*name in which title held*],

[*OR*]

_____[*present name of corporation*], a California corporation, successor by _____[*method of succession, e.g.*, merger] to _____[*former name*],

[*OR*]

_____[*present name of corporation*], a California corporation, formerly _____[*former name*],

[*OR*]

_____[*present name of corporation*], a California corporation, which derived title under the name of _____[*former name*],

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsReal Property LawTitle QualityMarketable TitleRemedies



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11-27 California Legal Forms--Transaction Guide § 27.251

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.251 Business Entity as Grantee

[1] Comment--Use of Form

The form in [2], *below*, consists of alternative grantee recitals that may be used when the grantee is any of the following business entities: a corporation, a partnership, a joint venture, or an unincorporated association. For coverage of the authority of those entities to hold and convey real property, *see §§ 27.220[1]* (corporation), 27.221[1] (partnership), 27.222[1] (joint venture), 27.223[1] (unincorporated association); 27.224[1] (limited liability company). As discussed in the comments to those forms, deeds made by business entities are subject to a variety of special requirements, such as laws governing the approval of the transaction and the execution of the conveyance. However, there is nothing distinctive about a deed to a business entity except for the grantee provision. This form shows how the most common types of business entities should be described as grantees.

For coverage of the significance of grantee descriptions in general, *see § 27.17[2]*.

[2] FORM

Business Entity as Grantee

Business Entity as Grantee

[*Corporation*]

I, _____[*name of grantor*], grant to _____, a California [*or other state*] corporation,

[*OR*]

[*Partnership*]

I, _____[*name of grantor*], grant to _____, a [*limited*] partnership [composed of _____ (*names of partners; if limited partnership, add*:, as general partners)],

[*OR*]

[*Joint venture*]

I, _____[*name of grantor*], grant to _____[*name*], _____[*name*], and _____[*name*], doing business as _____[*name*], a joint venture,

[*OR*]

[*Limited Liability Company*]

I, _____[*name of grantor*], grant to _____, a California [*or other state*] limited liability company,

[*OR*]

[*Unincorporated association*]

I, _____[*name of grantor*], grant to _____, an unincorporated association,

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.252

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.252 Grantee: Minor, Ward, or Conservatee

[1] Comment--Use of Form

The form in [2], *below*, contains several alternative deed provisions designating the status of a real property grantee as either a minor, a ward (that is, a minor for whom a guardian has been appointed), or a conservatee. For discussion of the authority of the foregoing to hold and convey real property, *see § 27.231[1]*.

In a grant to a minor or conservatee, the deed may convey the property directly to the minor or conservatee or to the conservator or guardian [*see* California Real Property Sales Transactions, Ch. 9, *Deeds*, § 9.25c (Cal. CEB 1998)]. If the grant is to the conservator or guardian, the deed should describe that person's status and name the minor or conservatee [*see* California Real Property Sales Transactions, Ch. 9, *Deeds*, § 9.25c (Cal. CEB 1998)].

[2] FORM

Grantee: Minor, Ward, or Conservatee

Grantee: Minor, Ward, or Conservatee

[*Minority*]

_____[*name*], a minor

[*OR*]

[*Guardianship*]

_____[*name*], guardian of the [person and] estate of _____[*name*], a minor

[*OR*]

[*Conservatorship*]

[*EITHER*]

_____[*name*], a _____[single *or* married] _____[man *or* woman] and a conservatee

[*OR*]

_____[*name*], conservator of the [person and] estate of _____[*name*], a _____[single *or* married] _____[man *or* woman]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferNatural Persons



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11-27 California Legal Forms--Transaction Guide § 27.253

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.253 Grantee: Heir, Personal Representative, or Trustee

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative deed recitals that may be used when the grantee is an heir, personal representative, or trustee. For a deed conveying a decedent's real property, *see § 27.230[2]*.

[b] Heirs and Personal Representatives

Although a conveyance cannot be made to a deceased person [*Hunter v. Watson (1859) 12 Cal. 363, 376]* , it may be made to his or her personal representative on his or her death [*Hunter v. Watson (1859) 12 Cal. 363, 370-371]* . It is preferable, however, to make the grant run to the class of the deceased's heirs directly. Nothing should be conveyed simply to "the estate of _____." For discussion of the conveyance of a decedent's real property, *see § 27.230[1]*. Detailed coverage of executors and administrators is set forth in Ch. 65, *Executors* .

[c] Trusts

In the case of trusts, whether testamentary or inter vivos, the conveyance should be made to the trustee and not to the beneficiaries because the trustee has the power to acquire or dispose of the trust property [*Prob. Code § 16226*; *see* discussion in Ch. 64A, *Testamentary Trusts: Trustee Provisions* , § 64A.39[3]]. It is important to describe the trust exactly because there may be several trusts involved in any trust situation.

For detailed coverage of trusts, *see* Ch. 64, *Testamentary Trusts: Payment and Distribution Provisions* , Ch. 64A, *Testamentary Trusts: Trustee Provisions* , Ch. 64B, *Testamentary Trusts: Administrative Provisions* , Ch. 70, *Complete Revocable Trust Forms* and Ch. 72, *Irrevocable Trusts* .

[2] FORM

Grantee: Heir, Personal Representative, or Trustee

Grantee: Heir, Personal Representative, or Trustee

[*Insert one of the following as the name of the grantee*:]

[*Probate*]

[*EITHER*]

the heirs and devisees of _____[*name of decedent*]

[*OR*]

_____[*name*] as _____[executor *or* administrator] of the estate of _____[*name of decedent*]

[*OR*]

[*Trust*]

_____[*name*], as Trustee of _____[*describe trust, e.g.*, the _____ (*name*) Trust of _____ (*date*) or the _____ (*name*) Testamentary Trust No. _____, Superior Court No. _____, County of _____]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferNatural PersonsReal Property LawOwnership & TransferDeath & IncapacityTestamentary Dispositions



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11-27 California Legal Forms--Transaction Guide § 27.254

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.254 Rebuttal of Statutory Presumption Regarding Community Property

[1] Comment

[a] Use of Form

The form in [2], *below*, contains a provision that, when inserted into a joint tenancy or tenancy in common deed, will rebut statutory presumptions that property acquired during marriage by a husband and wife is community property [*see Fam. Code §§ 803, 2581*; [b], *below*].

For a deed that conveys community property, *see § 27.213[2]*. The comment to that form discusses, among other things, the ways in which a husband and wife may hold property [*see Fam. Code § 750*]. For a deed that may be used to alter the statutory property rights of a husband and wife, *see § 27.214[2]*.

[b] Presumptions Regarding Community Property

[i] Property Acquired by Spouses in Joint Form

For the purposes of the division of property on the dissolution of marriage or legal separation, property acquired by a husband and wife during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property [*Fam. Code § 2581*]. This presumption may be rebutted by either of the following means [*Fam. Code § 2581*]:

- A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property (this form); or

- Proof that the parties have made a written agreement that the property is separate property.

Fam. Code § 2581, which became operative on January 1, 1994, essentially restates the requirements set forth in former *Civ. Code § 4800.1*. The requirements of former *Civ. Code § 4800.1*, as operative on January 1, 1987, and as continued in *Fam. Code § 2581*, apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property [*Fam. Code § 2580(c)*]. Further, they apply in all proceedings commenced on or after January 1, 1984 [*Fam. Code § 2580(c)*]. However, they do not apply to property settlement agreements executed before January 1, 1987, or to proceedings in which judgments were rendered before January 1, 1987, regardless of whether those judgments have become final [*Fam. Code § 2580(c)*].

The recital set forth in this form may be inserted into a joint tenancy deed [*see § 27.210[2]*] or tenancy in common deed [*see § 27.212[2]*] to rebut the presumption of *Fam. Code § 2581*. The provision does not contain a tenancy in the entirety option because that common-law form of ownership is not available in California [*see Civ. Code § 682*; *Swan v. Walden (1909) 156 Cal. 195, 196-197, 103 P. 931]* . Counsel should be aware that reported decisions have yet to (1) consider the effectiveness of a particular rebuttal of the *Fam. Code § 2581* presumption, or (2) interpret the statutory wording authorizing the use of a deed provision or written agreement to rebut the foregoing presumption.

[ii] Property Acquired by Husband and Wife Prior to 1975

Special presumptions concerning the nature of property apply to real property (or any interest in or encumbrance on real property) acquired before January 1, 1975, by a married woman by an instrument in writing [*see Fam. Code § 803*]. Under one of these presumptions, if the property was acquired by the wife and her husband by an instrument in which they are described as wife and husband, the presumption is that the property is the community property of the parties, unless a different intention is expressed in the instrument (this form) [*Fam. Code § 803*; *see Fam. Code § 760* (except as otherwise provided by statute, all real property, wherever situated, acquired by a married person during the marriage while domiciled in California is community property)]. This presumption is conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property [*Fam. Code § 803*]. For further discussion of this presumption, *see* California Forms of Pleading and Practice, Ch. 122, *Community Property* (Matthew Bender).

This form may be used, along with the language found in any joint tenancy deed [*see § 27.210[2]*] or tenancy in common deed [*see § 27.212[2]*], to clearly express the intention of the parties to hold the property being conveyed as joint tenants or tenants in common.

[2] FORM

Rebuttal of Statutory Presumption Regarding Community Property

Rebuttal of Statutory Presumption Regarding Community Property

[*Insert just above execution section*]

The above grantees are husband and wife and consent to the creation of a _____[*joint tenancy or tenancy in common*] between themselves as grantees in the property described above. Further, the parties agree that each grantee shall hold his or her undivided interest in the property as his or her separate property and not as community property.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsCreation of PresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawDeedsExecution FormalitiesReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property



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11-27 California Legal Forms--Transaction Guide § 27.255

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.255 Spouses: Recital Consenting to Creation of Joint Tenancy Involving One Spouse

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of a deed recital that provides that a married couple agrees to the creation by the deed of a joint tenancy involving only one of the spouses. For complete coverage of joint tenancies, *see § 27.210[1]*.

For a recital that may be used to rebut community property presumptions when both spouses receive property under a joint tenancy or tenancy in common deed, *see § 27.254[2]*. For a grant deed that alters the statutory property rights of a husband and a wife, *see § 27.214[2]*.

[b] Joint Tenancy Involving One Spouse

If a married person is to receive property in joint tenancy and his or her spouse is not to be one of the other joint tenants, title companies usually insist that the deed contain a special recital clarifying the manner in which the property will be held. The recital typically describes the marital status of the spouses and provides that they consent to the creation of a joint tenancy in the grantees named in the deed [*see* first alternative of form; *see also* 1 Bowman, Ogden's Revised California Real Property Law, Ch. 7, *Joint Tenancy and Tenancy in Common* (Cal. CEB 1975)]. If this recital is used, the nongrantee spouse should sign the deed, and his or her signature should be acknowledged.

The use of this recital is important because, except as otherwise provided by statute, all real and personal property, wherever situated, acquired by a married person during the marriage while domiciled in California is community property [*Fam. Code § 760*]. Thus, this recital should be used only when the grantee spouse is entitled by statute to participate in a joint tenancy that does not include his or her spouse. For discussion of the statutory property rights of married persons, *see* [a], *above*.

[c] Use of Community Funds Without Consent of Spouse

If a spouse uses community funds to acquire real property without the consent of the other spouse and the deed designates the grantee spouse and a person other than his or her spouse as joint tenants, the deed does not create a joint tenancy [*Yeoman v. Sawyer (1950) 99 Cal. App. 2d 43, 45, 221 P.2d 225]* . In such a case, the nonspouse receives a one-half interest, and the husband and wife each obtain a one-quarter interest because community funds were used [*Yeoman v. Sawyer (1950) 99 Cal. App. 2d 43, 45, 221 P.2d 225]* . Because these shares are unequal, and joint tenants must own equal shares in a joint tenancy property [*see Civ. Code § 683*], the above deed creates a tenancy in common rather than a joint tenancy [*Yeoman v. Sawyer (1950) 99 Cal. App. 2d 43, 45-46, 221 P.2d 225]* .

[2] FORM

Spouses: Recital Consenting to Creation of Joint Tenancy Involving One Spouse

Spouses: Recital Consenting to Creation of Joint Tenancy Involving One Spouse

_____[*Name of grantee spouse*], a grantee under this deed, and _____[*name of nongrantee spouse*], _____[his wife *or* her husband], consent to the creation in the grantees named in this deed of a joint tenancy in the property conveyed by this deed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property



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11-27 California Legal Forms--Transaction Guide §§ 27.256-27.259

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.256[Reserved]



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3. Interest or Property Being Conveyed

11-27 California Legal Forms--Transaction Guide § 27.260

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.260 Provision for Deed in Lieu of Foreclosure

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of provisions that may be inserted into any of the complete grant or quitclaim deeds in this chapter [*see §§ 27.200-27.231*] to make the instrument a deed in lieu of foreclosure. A deed in lieu of foreclosure conveys a debtor's secured property to a creditor as consideration for the cancellation of the debt and precludes the creditor from filing a notice of default and instituting foreclosure proceedings [for complete coverage of foreclosures, *see* Ch. 25D, *Foreclosure*]. Consequently, the creditor avoids the time and expense of foreclosure. Of course, the acceptance of such a deed is advisable only if the value of the secured property is equal to or greater than the amount of the indebtedness.

[b] Requirements

An agreement to convey secured property to the mortgagee or beneficiary in consideration for a cancellation of the obligation is valid so long as it is executed after the default [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387* ; *see Civ. Code § 2889*]. The conveyance is not void so long as it is all of the following: fair; free from undue influence, oppression, or fraud; and for adequate consideration [*Phelan v. De Martin (1890) 85 Cal. 365, 367, 24 P. 725]* . The circumstances of each particular case will determine whether the consideration is adequate [*Wright v. Security-First Nat. Bank (1939) 35 Cal. App. 2d 264, 280-283, 95 P.2d 194]* . If the consideration given for the deed is grossly disproportionate to the value of the property (for example, if the value of the property greatly exceeds the unpaid balance of the debt), the conveyance may be held to be a mortgage or a strict foreclosure [*see Beeler v. American Trust Co. (1944) 24 Cal. 2d 1, 17, 147 P.2d 583* ; *Civ. Code § 2925*].

A deed in lieu of foreclosure may take the form of a grant or quitclaim deed and may be made at any stage of the

proceedings before the actual foreclosure sale [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387]* . For further discussion of deeds in lieu of foreclosure, *see* California Real Estate Law and Practice, Ch. 120, *Representing a Client After Default* (Matthew Bender).

[c] Estoppel Affidavits

Some title companies require the debtor to provide an estoppel affidavit stating that the transfer is an absolute conveyance, that the debtor acted freely and without coercion or duress, and that the amount of the debt is equal to the fair market value of the property transferred. In that case, the use of this form would not be necessary.

[d] Effect of Deed

In the absence of any intervening junior liens, a deed in lieu of foreclosure will merge the creditor's lien with the legal title acquired on execution of the deed, thus extinguishing the creditor's lien [*Anglo-Californian Bank v. Field (1908) 154 Cal. 513, 514-515, 98 P. 267]* . However, merger will not occur if there is an intervening lien on the property [*Hines v. Ward (1898) 121 Cal. 115, 118, 53 P. 427]* . In that case, the legal title and senior lien will be considered as separate interests in order to protect the rights of the senior creditor [*Hines v. Ward (1898) 121 Cal. 115, 118-119, 53 P. 427]* .

[e] Documentary Transfer Tax

The documentary transfer tax applies to a deed in lieu of foreclosure but only to the extent that the consideration for the transfer exceeds the unpaid debt, including any accrued interest and foreclosure costs [*Rev. & Tax. Code § 11926*]. The consideration and unpaid debt amount and an identification of the grantee as beneficiary must be noted on the deed, instrument, or writing or stated in an affidavit or declaration under penalty of perjury for tax purposes [*Rev. & Tax. Code § 11926*; *see § 27.288[2]* (declaration)].

[f] Notice of Nonacceptance

A holder of a security interest may execute and record a notice of nonacceptance of a recorded deed [*Civ. Code § 1058.5(a)*]. The notice must identify the security interest and the parties to the deed, and must set forth a legal description of the property, the date of recordation of the deed, the county in which the project is located, and the county assessor's parcel number of the real property referenced in the deed [*Civ. Code § 1058.5(a)*]. The notice must be recorded with the recorder of the county in which the real property is located [*Civ. Code § 1058.5(a)*]. A creditor may wish to record a notice of nonacceptance if, for example, the debtor recorded a deed in lieu of foreclosure without the creditor's consent in order to escape liability for a deficiency judgment resulting from a judicial foreclosure. Although such a deed would not be valid and effective because of the grantee's failure to accept it [*see Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131]* , its recordation could present title problems. The subsequent recordation of a notice of nonacceptance should help resolve those problems.

[2] FORM

Provision for Deed in Lieu of Foreclosure

Provision for Deed in Lieu of Foreclosure

This deed is an absolute conveyance in consideration for the full satisfaction of all obligations secured by the Deed of Trust [*or* Mortgage] dated _____, executed by _____[*name*] as Trustor [*or* Mortgagor] on _____[*date*], in which _____[*name*] is named as Beneficiary [*or* Mortgagee], and _____[*name*] as Trustee [*omit for mortgage*], and recorded _____[*date*], in Book _____, Page _____, Official Records of

_____ County, California.

Grantor declares that this conveyance was freely and fairly made in cancellation of the above obligations, and that there are no agreements, oral or written, except as contained in this deed, with respect to the described real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
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B. Special, Alternative, and Additional Deed Provisions
3. Interest or Property Being Conveyed

11-27 California Legal Forms--Transaction Guide § 27.261

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.261 Reservation or Exception

[1] Comment--Use of Form

The form in [2], *below*, consists of language that may be inserted into one of the complete deeds in this chapter to create a reservation or an exception. A reservation allows the grantor's entire interest in the subject property to pass to the grantee, but revests a newly created interest in the land for the benefit of the grantor or a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739* ; *see Civ. Code § 1085*]. In other words, a reservation is a grant back to the original grantor by the original grantee of a portion of the conveyed property. An exception prevents some part of the grantor's interest from passing to the grantee [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476 n.1, 102 Cal. Rptr. 739]* . Counsel may use this form to provide for the reservation or exception of any type of interest in the property. For language that specifically reserves a life estate, *see § 27.204[2]*. For deed provisions granting and reserving easements, *see* Ch. 28A, *Easements and Licenses* .

Notwithstanding the differences identified above, the terms "reservation" and "exception" are often used interchangeably. The question of whether a particular provision in a deed is an exception or a reservation is not conclusively determined by the use of the term "reservation" or "exception" alone [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677, 41 Cal. Rptr. 223]* . Instead, the resolution of this issue depends on the real intention of the parties as ascertained from the whole conveyance [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677-678, 41 Cal. Rptr. 223]* .

[2] FORM

Reservation or Exception

Reservation or Exception

[*Reservation*]

I, _____[*name of grantor*], grant to _____[*grantee*] all that real property situated in the City of _____, [*or in an unincorporated area of*] _____ County, California, described as _____[*insert legal description*], reserving _____[*describe, e.g.*, the exclusive possession, use, and enjoyment of the rents, issues, and profits of the above property for and during my lifetime].

[*OR*]

[*Exception*]

I, _____[*name of grantor*], grant to _____[*grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as _____[*insert legal description*], excepting from that property _____[*specify, e.g*., the northern 10 feet of the foregoing parcel].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawEstatesGeneral OverviewReal Property LawEstatesPresent EstatesGeneral OverviewReal Property LawEstatesPresent EstatesLife Estates



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11-27 California Legal Forms--Transaction Guide § 27.262

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.262 Consideration

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative deed provisions describing the consideration for a conveyance. Although, as a general rule, a deed given without consideration is valid [*Freeman v. La Morte (1957) 148 Cal. App. 2d 670, 673, 307 P.2d 734* ; *see Civ. Code § 1040* (consideration is not necessary for voluntary transfer)], there are circumstances under which the inclusion of a statement regarding consideration may be required or advisable. For discussion of those situations, *see* [b], *below*. When consideration is recited, it is customary to insert an acknowledgment of its receipt. However, there is no requirement that such an acknowledgment be included in a deed.

[b] Statement Regarding Consideration

Consideration is required in connection with certain conveyances of real property. For example, an attorney in fact cannot make a deed without consideration [*Bertelsen v. Bertelson (1942) 49 Cal. App. 2d 479, 484, 122 P.2d 130]* . Furthermore, title insurance companies require consideration for deeds given in lieu of foreclosure [*see § 27.260[2]*] and typically require a deed to recite the exact amount of consideration when the deed is made by an administrator, executor, guardian, trustee, or receiver who is conveying property under court order.

A deed may be rescinded on the ground of failure of consideration if (1) performance or payment of the consideration was made a condition subsequent [*Lavely v. Nonemaker (1931) 212 Cal. 380, 382, 298 P. 976* ; *see Teel v. Bank of Eureka (1941) 42 Cal. App. 2d 807, 809-811, 110 P.2d 78* ; *see also § 27.20[3]*], or (2) the deed was obtained through the use of fraud or undue influence [*Jackson v. Gorham (1929) 98 Cal. App. 112, 115, 276 P. 391* ; *Schott v. Schott (1914) 168 Cal. 342, 344-346, 143 P. 595* ; *see Civ. Code §§ 3439.04, 3439.07, 3439.08*]. Gross inadequacy of consideration is a factor in determining whether fraud or undue influence was present [*Sparks v. Sparks (1950) 101*

Cal. App. 2d 129, 136-137, 225 P.2d 238] .

[2] FORM

Consideration

Consideration

[*If desired, insert any of following before grantor's name at beginning of deed*:]

For valuable consideration, receipt of which is acknowledged,

[*OR*]

For a valuable consideration, the receipt of which is hereby acknowledged,

[*OR*]

In consideration of the sum of $_____, receipt of which is acknowledged,

[*OR*]

In consideration of the sum of $_____, and other good and valuable consideration, receipt of which is hereby acknowledged,

[*OR*]

For and in consideration of the love and affection of _____[*name of grantee*],

[*OR*]

For the better maintenance and support of _____[*name of grantee*],

[*OR*]

For and in consideration of the love and affection of _____[*name of grantee*], and for _____[his *or* her] better maintenance and support,

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of Foreclosure



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11-27 California Legal Forms--Transaction Guide §§ 27.263-27.269

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.263[Reserved]



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11-27 California Legal Forms--Transaction Guide § 27.270

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.270 Signature by Mark

[1] Comment

[a] Use of Form

The form in [2], *below*, is a signature blank that may be used by a grantor who cannot write to execute a deed by making his or her mark. It may be used in lieu of any of the standard signature blocks included in the complete deeds in this chapter [*Civ. Code § 14*].

[b] Signature by Mark

A deed must be executed by the grantor or an authorized agent of the grantor [*Civ. Code § 1091*; *see Code Civ. Proc. § 1971*; *see also § 27.272* (signature blank for grantor's agent)]. A grantor who cannot write can satisfy this execution requirement by making a mark [*Civ. Code § 14*]. If the mark is to be acknowledged, it must satisfy the following requirements [*Civ. Code § 14*]:

- It must be witnessed by two persons;
- Those persons must subscribe their own names as witnesses near the grantor's mark; and
- One of the witnesses must write the grantor's name near the grantor's mark. If the mark will not be acknowledged, only one witness need perform the foregoing tasks.

This form assumes that the mark will be acknowledged because acknowledgment is a prerequisite to recordation [*see § 27.27[1]*].

[2] FORM

Signature by Mark

Signature by Mark

[*Insert below property description*]

Executed on _____[*date*], at _____[*city and state*].

GRANTOR
_____ [*grantor's mark*]
_____ [*name of grantor, written by one witness*]
Grantor, being unable to write, made _____ [his *or* her] mark in the presence of the following witnesses. The first witness signed the Grantor's name at _____ [his *or* her] request and in _____ [his *or* her] presence.
FIRST WITNESS
_____ [*signature of witness who wrote name*]
[*typed name*]
SECOND WITNESS
_____ [*signature of other witness*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferNatural PersonsReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.271

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.271 Statutory Certificate of Acknowledgment

[1] Comment

[a] Use of Form

The form in [2], *below*, is the statutory certificate of acknowledgment that must be used when an acknowledgment is taken within California [*see Civ. Code § 1189(a)*]. Before a grant deed (other than a trustee's deed or deed of reconveyance) or other instrument may be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*; *see* [b][i], *below*; *see also Gov. Code § 27279(a)* ("instrument" defined); §§ 27.285[2] and 27.205[2] (certificates of proof of the execution of unacknowledged instruments)]. Proof of execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted, pursuant to *Gov. Code § 27287*; proof of execution in lieu of acknowledgment may be used only for a trustee's deed or a deed of reconveyance [*Civ. Code § 1195(b)*; *see Gov. Code § 27287*].

[b] Acknowledgments and Certificates of Acknowledgment

[i] Effect of Certificate

An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [*see Civ. Code § 1189(a)*]. A certificate of acknowledgment is a formal declaration by an authorized officer [*see Civ. Code §§ 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*; *see* [ii], *below*]. The certificate is prima facie evidence of the facts recited in it and of the genuineness of the signatures contained on the document, if the certificate meets the requirements set forth in *Civ. Code § 1180 et seq.* (discussed throughout this comment) [*Evid Code § 1451*; *see* discussion of *Civ. Code § 1190* in [v], *below*].

[ii] Identity of Person Making Acknowledgment

An officer may not take an acknowledgment unless the officer has "satisfactory evidence" that the person making the acknowledgment is the individual who is described in and who executed the instrument [*Civ. Code § 1185(a)*].

"Satisfactory evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person making the acknowledgment is not the individual he or she claims to be, together with any one of the following [*Civ. Code § 1185(b)*]:

- The oath or affirmation of a credible witness personally known to the officer whose identity is proved to the officer on presentation of any document satisfying the requirements of *Civ. Code § 1185(b)(3)* or *(4)* that the person making the acknowledgment is personally known to the witness and that each of the following are true [*Civ. Code § 1185(b)(1)(A)*; *see Civ. Code § 1185(b)(1)(B)* (civil penalty for notary public who fails to obtain this evidence)]:
  - The person making the acknowledgment is the person named in the document.
  - The person making the acknowledgment is personally known to the witness.
  - It is the reasonable belief of the witness that the circumstances of the person making the acknowledgment are such that it would be very difficult or impossible for that person to obtain another form of identification.
  - The person making the acknowledgment does not possess any of the identification documents named in *Civ. Code § 1185(b)(3)* and *(4)*.
  - The witness does not have a financial interest in the document being acknowledged and is not named in the document.
- The oath or affirmation under penalty of perjury of two credible witnesses whose identities are proved to the officer on the presentation of any document satisfying the requirements of *Civ. Code § 1185(b)(3)* or *(4)* that each statement in *Civ. Code § 1185(b)(1)* is true [*Civ. Code § 1185(b)(2)*].
- Reasonable reliance on the presentation to the officer of any one of the following, if the document is current or has been issued within five years [*Civ. Code § 1185(b)(3)*]:
  - An identification card or driver's license issued by the California Department of Motor Vehicles; or
  - A passport issued by the U.S. Department of State.
- Reasonable reliance on the presentation of any one of the following, provided that the document is current or was issued within five years, contains a photograph and a description of the person named on it, is signed by the person, and bears a serial or other identifying number [*Civ. Code § 1185(b)(4)(A)-(F)*]:
  - A passport issued by a foreign government, which has been stamped by the U.S. Immigration and Naturalization Service (superseded by the Citizenship and Immigration Services);

- A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses;

- An identification card issued by a state other than California;

- An identification card issued by any branch of the U.S. Armed Forces;

- An employee identification card issued by an agency or office of the State of California, or by an agency or office of a city, county, or city and county in California; or

- An inmate identification card issued after 1987 by the Department of Corrections and Rehabilitation, if the inmate is in custody.

- Reasonable reliance on the presentation of an inmate identification card issued before 1988 by the Department of Corrections and Rehabilitation, if the inmate is in custody [*Civ. Code § 1185(b)(4)(G)*].

[iii] Form of Certificate

An officer taking an acknowledgment of an instrument, such as a grant deed (other than a trustee's deed or deed of reconveyance), must endorse on it or attach to it a certificate of acknowledgment [*Civ. Code § 1188*]. If the certificate of acknowledgment is taken within this state, it must be in the form set forth in *Civ. Code § 1189(a)* (this form) [*Civ. Code § 1189(a)*]. If the certificate is taken in another place, it will be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made [*Civ. Code § 1189(b)*]. Finally, an acknowledgment provided before January 1, 1993, and conforming to applicable provisions of former *Civ. Code §§ 1189, 1190, 1190a, 1190.1, 1191*, and *1192*, as repealed by Chapter 335 of the Statutes of 1990, will have the same force and effect as if those statutes had not been repealed [*Civ. Code § 1189(d)*]. Those repealed statutes set forth alternative certificate forms for use by individuals, corporations, partnerships, public agencies, and attorneys-in-fact. They have been replaced by the one form of certificate prescribed by the current version of *Civ. Code § 1189*.

A California notary public may complete any acknowledgment form required in another state or jurisdiction of the United States for documents to be filed in the other state or jurisdiction, provided the form does not require the notary public to determine or certify that the signer holds a particular representative capacity or to make other determinations and certifications not allowed under California law [*Civ. Code § 1189(c)*].

[iv] Completion of Certificate

The officer's signature and name of office must be affixed to the certificate [*Civ. Code § 1193*]. Furthermore, the officer's seal of office must be affixed if by the laws of the state or country where the acknowledgment is taken, or by authority of which the officer is acting, the officer is required to have official seals [*Civ. Code § 1193*]. A notary public in California must have an official seal [*Gov. Code § 8207*].

[v] Certificate Executed on Behalf of Entity

The certificate of acknowledgment of an instrument executed on behalf of an incorporated or unincorporated entity by a duly authorized person in the form specified in *Civ. Code § 1189* will be (1) prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument, and (2) conclusive evidence that the instrument is the duly authorized act of the named entity in favor of any good faith purchaser, lessee, or encumbrancer [*Civ. Code § 1190*]. In the case of a domestic or foreign corporation, the definition of "duly authorized person" specifically includes the president, vice president, secretary, and assistant secretary of the corporation [*Civ. Code § 1190*]. For coverage of an alternative procedure that offers similar protections regarding the authorization for a conveyance or other transfer of

corporate assets [*see Corp. Code § 1002*], *see § 27.220[1][f]*.

[c] Defects in Execution and Acknowledgment

A failure to acknowledge or record a grant deed or most other types of instruments will not invalidate the instrument between the parties or those who have actual notice of it [*Civ. Code § 1217*]. Any defect, omission, or informality in the certificate of acknowledgment, or the absence of such a certificate, will not prevent the grant deed from imparting constructive notice of its contents to subsequent purchasers and encumbrancers one year after it has been copied into the proper book of record [*Civ. Code § 1207*]. A county recorder, on payment of proper fees and taxes, must accept for recordation any instrument that is authorized or required by statute or court order to be recorded, if the instrument contains sufficient information to be indexed as provided by statute, meets recording requirements of state statutes and local ordinances, and can be reproduced photographically [*Gov. Code § 27201(a)*]. The recorder must not refuse to record any instrument that is authorized or required by statute or court order to be recorded on the basis of its lack of legal sufficiency [*Gov. Code § 27201(a)*]. In addition, each instrument must contain an original signature or signatures, except as otherwise provided by law, or be a certified copy of the original [*Gov. Code § 27201(b)(1)*]. A facsimile signature will be accepted on a lien recorded by a governmental agency when the facsimile signature has been officially adopted by that agency [*Gov. Code § 27201(b)(2)*]. The lien must have a statement to that effect noted on its face [*Gov. Code § 27201(b)(2)*]. A copy of the agency's resolution or action adopting the signature for facsimile transmission purposes or a certified copy of the agency's adopted signature must be provided to the county recorder when the signature is officially adopted by the agency, or at the beginning of each calendar year [*Gov. Code § 27201(b)(2)*].

Because an officer must establish the proper identity of the person making the acknowledgment [*Civ. Code § 1185(a)*], a party may file an action for damages based on an officer's failure to comply with that requirement [*see Civ. Code § 1185(d)*]. The plaintiff will have the burden of proof in establishing the officer's negligence or misconduct [*Civ. Code § 1185(e)*].

Any person convicted of perjury under *Civ. Code § 1185* will forfeit any financial interest in the document [*Civ. Code § 1185(e)*].

[2] FORM

Statutory Certificate of Acknowledgment

Statutory Certificate of Acknowledgment

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a))*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.272

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.272 Signature by Attorney in Fact

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of a signature block that may be included in a grant deed when it is to be executed by an attorney in fact of the grantor. A deed may be executed by an agent of the grantor who is authorized to do so in writing [*Civ. Code § 1091*]. Typically, the written authorization is in the form of a power of attorney [*see Prob. Code §§ 4014, 4022* (definitions of "attorney in fact" and "power of attorney," respectively)].

For a power of attorney to convey real property, see *§ 98.221[2]*. A form revoking such a power of attorney is *set forth in § 98.241[2]*.

[b] Signature Requirement

An attorney in fact executing a deed or other instrument transferring an estate in real property must subscribe both the name of the principal and his or her own name as attorney in fact [*Civ. Code § 1095*]. The courts demand strict compliance with this requirement. Thus, an instrument purporting to transfer an estate in real property signed only by the attorney in fact does not convey the principal's title to the real property, even if the words "attorney in fact for" the named principal are added following the signature of the attorney in fact [*Morrison v. Bowman (1865) 29 Cal. 337, 352-353* ; *Mitchell v. Benj. Franklin B. & I. Corp. (1936) 13 Cal. App. 2d 447, 448, 57 P.2d 185]* . A deed by an attorney in fact is not valid if it sets forth the typed name of the attorney in fact (as agent for the grantor) but does not contain the signature of the attorney in fact [*Hodge v. Hodge (1967) 257 Cal. App. 2d 31, 33, 34, 64 Cal. Rptr. 587]* .

[c] Recordation of Power of Attorney

Because instruments affecting title to or possession of real property may be recorded [*Gov. Code § 27280(a)*], powers of attorney affecting title to or possession of real property are entitled to be recorded [*see Civ. Code §§ 1215, 1216; Jones v. Marks (1874) 47 Cal. 242, 246-247]* . Title companies and lenders frequently require that the power of attorney be recorded. The instrument must be recorded in the county in which the real property is located [*Civ. Code § 1169*].

A grantor who executed a recorded power to convey or execute instruments affecting real property can revoke the power only by recording an instrument containing the revocation in the same office in which the instrument containing the power was recorded [*Civ. Code § 1216*]. Of course, acts and events other than an intentional revocation by a grantor may also terminate the power of attorney (for example, the death or incapacity of the attorney in fact) [*see Civ. Code § 2355*].

[2] FORM

Signature by Attorney in Fact

Signature by Attorney in Fact

_____ [*grantor's name (signed by attorney-in-fact)*]
[*typed name of grantor*]
By _____ [*attorney-in-fact's signature*],
_____ [His *or* Her] Attorney-in-Fact
[*typed name of attorney-in-fact*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyEstate, Gift & Trust LawPowers of AttorneyGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferPowers of AttorneyReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide §§ 27.273-27.279

AUTHOR: Timothy F. O'Leary, Practice Consultant

[Reserved]

§§ 27.273[Reserved]



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C. Related Documents

11-27 California Legal Forms--Transaction Guide § 27.280

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.280 Certificate of Secretary or Assistant Secretary of Corporation Regarding Execution of Corporation Grant Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a certificate of a secretary or assistant secretary of a corporation stating that the board of directors has duly authorized a specific conveyance of real property of the corporation and that the conveyance meets certain other criteria [*see* [b], *below*]. The purpose of this certificate is to assure the parties to the conveyance that it has been authorized. As a practical matter, this certificate should be used only when (1) the deed will not be recorded, or (2) the deed will be recorded but will not be signed by the president, vice president, secretary, or assistant secretary of the corporation. If the deed is to be recorded, the inclusion of the required statutory certificate of acknowledgment form [*see Civ. Code § 1189(a)*] and the execution of the deed on behalf of the corporation by any of the foregoing officers will provide the same type of assurance offered by this certificate [*see Civ. Code § 1190*; *see also § 27.220[1][f]*]. In that case, there would be no reason to prepare this type of certificate as well.

If neither of the foregoing procedures is followed, a title insurer may require a certified copy of the corporate resolution authorizing the transfer of the property. For further discussion and an illustrative resolution, *see § 27.281*.

[b] Requirements Regarding Certificate

Any deed or instrument conveying or otherwise transferring corporate assets may have annexed to it a certificate of the corporation's secretary or assistant secretary that states that the transaction has been validly approved by the board and that [*Corp. Code § 1002*]:

- The property described in the deed is less than substantially all of the assets of the corporation;

- The transfer is in the usual and regular course of the business of the corporation; or

- If the property constitutes all or substantially all of the assets of the corporation and the transfer is not in the usual and regular course of the business of the corporation, that (1) the transaction has been approved by the outstanding shares [*see Corp. Code § 152*] pursuant to the requirements of Chapter 10 (governing sales of assets) [*see Corp. Code §§ 1000-1002*; *see also Ch. 3, Articles of Incorporation, § 3.271*] or Chapter 12 (governing reorganizations) [*see Corp. Code §§ 1200-1203*; *see also* Ch. 11, *Merger and Acquisition Issues*] of the General Corporation Law *Corp. Code § 100 et seq.*], or (2) that approval is not required by Chapter 12 of the General Corporation Law.

If properly drafted, the attached certificate will be prima facie evidence of the existence of the facts authorizing the conveyance or other transfer of the assets and conclusive evidence in favor of any innocent purchaser or encumbrancer for value [*Corp. Code § 1002*].

[2] FORM

Certificate of Secretary or Assistant Secretary of Corporation Regarding Execution of Corporation Grant Deed

Certificate of Secretary or Assistant Secretary of Corporation Regarding Execution of Corporation Grant Deed

_____ [*Name of corporation*]

CERTIFICATE OF [ASSISTANT] SECRETARY AS TO APPROVAL OF SALE OF CORPORATE ASSETS

_____[*Name*] certifies:

1. _____[He *or* She] is the _____[Assistant] Secretary of the above corporation, a California corporation (the "Corporation").

2. The conveyance of the property of the Corporation described in the deed to which this certificate is attached (the "Property") has been validly approved by the Board of Directors of the Corporation.

[*Select one of the following*:]

3. The Property is less than substantially all of the assets of the Corporation.

[*OR*]

3. The transfer of the Property is in the usual and regular course of the business of the Corporation.

[*OR*]

3. The transfer of the Property has been approved by the outstanding shares of the Corporation pursuant to Chapter _____[10 *or* 12] of the California General Corporation Law.

[*OR*]

3. Approval of the transfer of the Property by the outstanding shares of the Corporation is not required by Chapter 12 of the California General Corporation Law.

[*Continue with the following:*]

Dated: _____

_____ [*signature of secretary or assistant secretary*]
[*typed name*]
[Assistant] Secretary of the Corporation

[*If desired, add corporate seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPriorities & RecordingRecording Acts



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CHAPTER 27 DEEDS AND RECORDING
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11-27 California Legal Forms--Transaction Guide § 27.281

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.281 Corporate Resolution to Convey Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a resolution of the board of directors of a corporation authorizing the execution of a deed that conveys real property of the corporation. Corporate powers must be exercised by or under the direction of the board of directors [*Corp. Code § 300(a)*; *see § 27.220[1][b][i]*]. A title insurer or grantee may demand some type of assurance that a conveyance was properly exercised. There are two statutory methods for providing this assurance. First, a statutory recital may be added to the certificate of acknowledgment [*see Civ. Code § 1190*; *see also Civ. Code § 1189(a)* (statutory form) and § 27.220]. Second, a certificate of the secretary or assistant secretary regarding the authorization for the conveyance may be attached to the deed [*see Corp. Code § 1002*; *see also § 27.280*]. If neither of these procedures is utilized, the grantor is often required to provide the grantee or title insurer with a certified copy of the resolution of the directors authorizing the execution of the deed (this form).

For further discussion of directors' resolutions, *see* Ch. 5, *Directors' Meetings, Actions, and Resolutions* .

[b] Special Approval Requirements

If the property to be transferred represents all or substantially all of the assets of the corporation, the principal terms of the transaction must be approved by the board of directors *Corp. Code § 1001(a)*; *see Corp. Code § 151* ("approved by the board" defined)]. In addition, unless the transaction is in the usual and regular course of the business of the corporation, the principal terms of the transfer must also be approved by the outstanding shares [*see Corp. Code § 152* ("approved by the outstanding shares" defined)] either before or after the board's approval and before or after the transaction [*Corp. Code § 1001(a)*]. However, if the transaction constitutes a conversion to another form of business entity, it is not subject to these provisions but rather to provisions that specifically govern conversions [*Corp. Code § 1001(a)*; *see Corp. Code § 1150 et seq.* (conversions)]. This form contains an optional provision indicating that the

foregoing special approval requirements do not apply to the conveyance. For further coverage of those requirements, *see* Ballantine & Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* , § 257 (Matthew Bender).

[2] FORM

Corporate Resolution to Convey Property

Corporate Resolution to Convey Property

RESOLUTION AUTHORIZING CONVEYANCE OF CORPORATE PROPERTY

RESOLVED, that this corporation is the owner of the real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*] [*or* commonly described as _____ (*insert street address of property*)];

RESOLVED FURTHER, that this corporation shall sell, transfer, and convey the above property to _____[*name of grantee*] for the sum of $_____[*or* on the following terms and conditions: _____ (*specify*)];

RESOLVED FURTHER, that the _____[president, _____ (*name*), and the secretary, _____ (*name*) *or specify titles and names of other authorized officers*], shall execute, on behalf of this corporation, documents to transfer title as provided in these resolutions, including a deed or deeds and escrow instructions, [*add if desired*: that the seal of this corporation may be affixed to those documents,] and that the foregoing officers shall do any other acts on behalf of this corporation that are necessary or convenient to carry out the purpose of these resolutions.

[*Optional clause*]

RESOLVED FURTHER, that this transfer is in the usual and regular course of the business of this corporation, and is not (1) pursuant to a plan of winding up or dissolution or (2) the sale or transfer of all or substantially all of the corporate assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.282

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.282 Statement of Unincorporated Association

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement identifying the officers and other persons who are duly authorized to execute conveyances of real property owned by an unincorporated association. An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property [*Corp. Code § 18120(a)*]. Generally, it must be conclusively presumed in favor of a bona fide transferor, or purchaser, or encumbrancer for value of real property of the association located in the county in which a statement of authority has been recorded, that a person designated in the statement is authorized to acquire, transfer, or encumber real property on behalf of the association [*Corp. Code § 18120(c)*]. However, the presumption does not apply if, before the acquisition, transfer, or encumbrance, either (1) the statement of authority is revoked by the unincorporated association, or (2) a person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized [*Corp. Code § 18120(d)*; *see § 27.283*].

[b] Execution

The transfer or encumbrance of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers, (2) a person specifically designated by a resolution adopted by the association, or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

[c] Verification

This statement must be verified and acknowledged [*Corp. Code § 18120(a)*]. The Corporations Code provisions governing unincorporated associations [*see Corp. Code § 18000 et seq.*] do not set forth any requirements regarding verification, and no reported decisions have considered this type of verification. Because of this lack of binding requirements or other guidelines, the verification provision in this form reflects the verification requirements of the General Corporation Law [*Corp. Code § 100 et seq.*; *see Corp. Code § 193*]. For the purposes of this law, "verified" means that the statements contained in a certificate or other document are declared to be true as of the personal knowledge of the person executing the document in either (1) an affidavit signed by that person under oath before an officer authorized by the laws of California or of the place where it is executed to administer oaths, or (2) a declaration in writing executed by that person under penalty of perjury and stating the date and place (whether in or outside of California) of execution [*Corp. Code § 193*; for further discussion, *see* Ch. 3, *Articles of Incorporation*]. The verification in this form consists of a declaration by the president of the association.

[2] FORM

Statement of Unincorporated Association
Statement of Unincorporated Association

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

STATEMENT OF UNINCORPORATED ASSOCIATION OF
_____ [*name of association*]

1. The name of this unincorporated association is _____.

2. The names of the officers of the association are:

Name	Office
_____	_____
_____	_____
_____	_____

[*Continue to list all officers*]

3. The names and titles or capacities of officers [and other persons] who are authorized on behalf of the association to acquire, transfer, or encumber real property are as follows:

Name	Title or Capacity
_____	_____ [*e.g.*, President or Member of Real Property Management Committee or Member charged by

Resolution of _____ (*date*)
to convey real property]

_____ _____

[*Continue to list every authorized person*]

Executed on _____[*date*] at _____, California.

_____ [*name of association*]
By _____ [*signature*]
[*typed name and title*]
By _____ [*signature*]
[*typed name and title*]

Verification

_____, President of _____[*name of unincorporated association*], declares:

I am the President of the association named in the foregoing Statement of Unincorporated Association. I have read the above statement and know the contents of it. The statement and its contents are true as of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____[*date*] at _____, California.

Acknowledgment

[*See § 27.271[2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.283

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.283 Repudiation of Prior Recorded Statement of Unincorporated Association

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement repudiating a prior recorded "statement of unincorporated association." Any unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property [*Corp. Code § 18120(a)*; *see § 27.282*]. However, a person claiming to be a member, director, or officer of the unincorporated association may record, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized [*see Corp. Code § 18120(d)*].

[b] Effect of Repudiating Statement

Generally, it must be conclusively presumed in favor of a bona fide transferor, or purchaser, or encumbrancer for value of real property of the association located in the county in which a statement of authority has been recorded, that a person designated in the statement is authorized to acquire, transfer, or encumber real property on the association's behalf [*Corp. Code § 18120(c)*]. However, the presumption does not apply if, before the acquisition, transfer, or encumbrance, either (1) the statement of authority is revoked by the unincorporated association, or (2) a person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized [*Corp. Code § 18120(d)*].

[2] FORM

Repudiation of Prior Recorded Statement of Unincorporated Association

Repudiation of Prior Recorded Statement of Unincorporated Association

REPUDIATION OF PRIOR RECORDED STATEMENT OF UNINCORPORATED ASSOCIATION OF _____ [*name of association*]

1. This statement is recorded in repudiation of [a portion of the certified copy of] the statement of unincorporated association [*or set forth formal caption used in prior recorded document*] (the "previously recorded statement") of _____[*name of association*] recorded on _____[*date*] at Book _____, Page _____, of the Official Records of _____ County, California.

[*EITHER*]

2. The previously recorded statement was recorded without proper authority.

[*OR*]

2. The officers [*or identify particular officers or other persons designated in previously recorded statement*] identified in that statement as being authorized to execute, on behalf of the association, conveyances of real property owned or held by the association, are not so authorized.

[*Continue with the following*:]

Executed on _____[*date*] at _____, California.

_____ [*signature*]
[*typed name*]
Member of _____ [*name of association*]

Verification

I, _____[*name of member making repudiating statement*], declare:

I am the declarant in the foregoing Repudiation of Prior Recorded Statement of Unincorporated Association and am a member of _____[*name of association*]. I have read the above repudiating statement and know the contents of it. The statement and its contents are true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____[*date*] at _____, California.

Acknowledgment

[*See § 27.271[2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.284

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.284 Statement of Limited Liability Company

[1] Comment--Use of Form

The form in [2], *below*, is an optional statement identifying the members and other persons who are duly authorized to execute conveyances of real property owned by any limited liability company [*see Corp. Code §§ 17150*; 17151]. A person or persons may also be authorized in the operating agreement or the articles of organization [*Corp. Code § 17003*].

The statement should recite the names of the members, and the names and titles of any managers who are authorized on its behalf to execute conveyances of real property owned or held by the limited liability company [*Corp. Code §§ 17003*, *17150*, *17151*].

[2] FORM

Statement of Limited Liability Company

Statement of Limited Liability Company (Authorizing Purchase)

The undersigned members of _____[*name of limited liability company*], do certify that we are all of the members of the limited liability company and that there are no other members.

We further certify that any one of the following named persons:

_____ _____[*list names of persons authorized to purchase real estate for the limited liabity company*]

are, authorized and empowered, on behalf of and in the name of _____[*name of limited liability*

company], to execute and to deliver a _____[*type of document*] dated _____[*date of document*], to purchase certain property located at:

_____[*address*]

_____[*city*], _____[*state*], and all other documents to be executed in connection with this purchase, and to take all actions that may be considered necessary to conclude the subject transaction.

The authority conferred shall be retroactive, and any and all acts authorized in this document that were performed before the execution of this certificate are approved and ratified. The authority conferred shall continue in full force and effect until _____[*name of seller*] receives notice in writing from _____[*name of limited liability company*] of the revocation of this certificate.

We further certify that the activities covered by this certificate constitute duly authorized activities of _____[*name of limited liability company*]; that these certifications are now in full force and effect; that there is no provision in any document under which _____[*name of seller*] is organized and/or that governs _____'s [*name of limited liability company*] continued existence limiting the power of the undersigned to make the certifications set forth in this certificate, and the certificate is in conformity with the provisions of all such documents.

Executed on _____[*date*] at _____, California.

_____ [*name of limited liability company*]
By _____ [*signature*]
[*typed name and title*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferBusiness & Corporate Entities



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11-27 California Legal Forms--Transaction Guide § 27.285

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.285 Certificate of Proof of Execution--Proof by Subscribing Witness

[1] Comment

[a] Use of Form

The form in [2], *below*, is the certificate of proof prescribed by statute that may be used in conjunction with the recordation of an unacknowledged instrument. Any certificate for proof of execution taken within California may be in this form, although the use of other, substantially similar forms is not precluded [*Civ. Code § 1195(c)*]. An unacknowledged instrument cannot be recorded unless its execution is proved in one of the manners prescribed by law [*Gov. Code § 27287*; *see § 27.271[1][a]*]. Proof of execution may be used in lieu of acknowledgment only for a trustee's deed or a deed of reconveyance; proof of execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted, pursuant to *Gov. Code § 27287* [*Civ. Code § 1195(b)*; *see Gov. Code § 27287*]. The proof may be made by the party executing the instrument, a subscribing witness (this form), or other witnesses who prove the handwriting of (1) the party executing the instrument, and (2) any subscribing witness [*Civ. Code § 1195*; *see § 27.286[2]*]. Although such a proof may be made to any "authorized officer" [*see Civ. Code §§ 1180-1184*], this form assumes that the officer will be a notary public, as is usually the case. The officer taking the proof must then prepare a certificate (this form) that must contain specified information [*see* [b], *below*] and must be included in the instrument or attached to it [*Civ. Code § 1200*].

[b] Proof by Subscribing Witness

When proof of the execution of an unacknowledged instrument is offered by a subscribing witness, that witness must be proved to be a subscribing witness by the oath of a credible witness who provides the officer with any document satisfying the requirements of *Civ. Code § 1185(b)(3)* or *(4)* [*Civ. Code § 1196*; *see § 27.271[1][b][ii]*]. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, that that person executed it, and that the witness subscribed his or her name to it as a witness [*Civ. Code § 1197*].

[c] Officer's Certificate

An officer taking proof of the execution of an instrument must prepare a certificate (this form) that sets forth the proof required by *Civ. Code §§ 1196* and *1197* [*see* [b], *above*] and the names, places of residence, and substance of testimony of all the witnesses examined before the officer [*Civ. Code § 1200*]. The officer must sign the certificate, set forth the name of his or her office, and include his or her seal of office if, under the laws of the state or country where the proof of execution is taken, or by the authority of which the officer is acting, he or she is required to have an official seal [*Civ. Code § 1193*]. A notary public in California must have an official seal [*Gov. Code § 8207*]. The certificate must be included in or attached to the instrument [*Civ. Code § 1200*].

[2] FORM

Certificate of Proof of Execution--Proof by Subscribing Witness

CERTIFICATE OF PROOF BY SUBSCRIBING WITNESS

State of California)
) ss
County of _____)

_____

On _____[*date*], before me, the undersigned, a notary for the state, personally appeared _____[*subscribing witness's name*], _____[personally known to me *or* proved to me on the oath of _____ (*credible witness's name*) who is personally known to me] to be the person whose name is subscribed to the within instrument, as a witness thereto, who, being by me duly sworn, deposed and said that _____[he *or* she] was present and saw _____[*name(s) of principal(s)*], the same _____[person *or* persons] described in and whose _____[name is *or* names are] subscribed to the within and annexed instrument in _____[his *or* her *or* their] authorized _____[capacity *or* capacities] _____[a party *or* parties] thereto, execute the same, and that said affiant subscribed _____[his *or* her] name to the within instrument as witness at the request of _____[*name(s) of principal(s)*].

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.286

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.286 Certificate of Proof of Execution--By Proof of Handwriting

[1] Comment

[a] Use of Form

The form in [2], *below*, is a certificate of proof that should be used when the execution of an unacknowledged instrument is to be established by proof of the handwriting of the party and any subscribing witness [*see Civ. Code § 1195*; *see also § 27.285[1][a]*]. Proof of execution may be used in lieu of acknowledgment only for a trustee's deed or a deed of reconveyance; proof of the execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted [*Civ. Code § 1195(b)*; *see Gov. Code § 27287*]. For an example of the statutory form for a certificate for proof of execution taken within California, *see § 27.285[2]* [*Civ. Code § 1195(c)*]. Although this form assumes that the proof will be offered to a notary public, other types of officers are also authorized to take the proof [*see Civ. Code §§ 1180-1184*]. The notary public or other officer taking the proof must then prepare a certificate (this form) that must contain specified information and must be included in or attached to the instrument [*Civ. Code § 1200*; *see* [c], *below*].

[b] Proof of Handwriting

[i] When Permitted

The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness (if any) in the following cases [*Civ. Code § 1198*]:

- When the parties and all the subscribing witnesses are dead or are nonresidents of California.

- When the place of residence of the parties and all the subscribing witnesses is unknown to the party desiring the proof and cannot be ascertained by the exercise of due diligence.

- When the subscribing witness conceals himself or herself or cannot be found by an officer exercising due diligence in attempting to serve the subpoena or attachment.

- In the case of the continued failure or refusal of a witness to testify, for the space of one hour, after his or her appearance.

[ii] Sufficiency of Evidence

The evidence taken under *Civ. Code § 1198* [*see § 27.286[1][b][i], above*] must satisfactorily prove to the officer the following facts [*Civ. Code § 1199*]:

- The existence of one or more of the conditions specified in *Civ. Code § 1198*.

- That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party and is well acquainted with his or her signature.

- That the signature of the purported party is genuine.

- That the witness testifying personally knew the person who subscribed the instrument as witness and is well acquainted with his or her signature.

- That the signature of the witness is genuine.

- The place of residence of the witness.

[c] Certificate of Proof of Execution

An officer taking proof of the execution of an instrument must prepare a certificate (this form) that sets forth the proof required by *Civ. Code § 1199* [*see* [b][ii], *above*] and the names, places of residence, and substance of testimony of all the witnesses examined before the officer [*Civ. Code § 1200*]. The officer must sign the certificate, set forth the name of his or her office, and include his or her seal of office if, under the laws of the state or country where the proof of execution is taken, or by the authority of which the officer is acting, he or she is required to have an official seal [*Civ. Code § 1193*]. A notary public in California must have an official seal [*Gov. Code § 8207*]. The certificate must be included in or attached to the instrument [*Civ. Code § 1200*].

[2] FORM

Certificate of Proof of Execution--By Proof of Handwriting

Certificate of Proof of Execution--By Proof of Handwriting

CERTIFICATE OF PROOF OF HANDWRITING

	)	
State of California	)	ss
County of _____	)	

_____

On this _____ day of _____, in the year _____, before me, _____[*name of officer taking proof*], a notary public, personally appeared _____[*name of testifying witness*], who, having been duly sworn, gave the following testimony:

(1) _____[*Specify one of the conditions described in Civ. Code § 1198, e.g.,* The parties and the subscribing witnesses to the attached _____ (*set forth brief description of unacknowledged instrument*)(hereafter referred to as the "instrument") are deceased.]

(2) _____[*Name of testifying witness*] knew _____[*name*], whose name purports to be subscribed to the instrument as a party, and is well acquainted with _____[his *or* her] signature.

(3) The signature of _____[*repeat name of party*] as a party to the instrument is genuine.

[*Add if applicable*:]

(4) _____[*Name of testifying witness*] testified to personal knowledge of _____[*name*], the person who subscribed the instrument as witness, and is well acquainted with _____[his *or* her] signature.

[*Add if applicable*:]

(5) The signature of _____[*repeat name of subscribing witness*] as subscribing witness to the instrument is genuine.

[*Continue with the following*:]

(6) The place of residence of _____[*name of testifying witness*] is _____[*street address, city, state, zip*].

Dated: _____

[*Notarial Seal*]

_____
[*signature*]
[*typed name*]
Notary Public for the State
of California
My commission expires:

_____
[*date*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording Acts



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11-27 California Legal Forms--Transaction Guide § 27.287

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.287 Separate Statement of Documentary Transfer Tax Due

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statement containing a declaration of the amount of documentary transfer tax due in connection with a conveyance of real property. If a local jurisdiction has imposed such a tax, the amount of the transfer tax and related information [*see § 27.242[1][e]*] must be shown on the face of the deed [*see § 27.242[2]*] or on a separate paper (this form) [*Rev. & Tax. Code §§ 11932, 11933*].

Stating the amount of the tax on a separate document will prevent the disclosure of the amount of the tax to third parties because, as discussed below, the separate statement (unlike the deed) will not be recorded [*Rev. & Tax. Code §§ 11932*]. This point is important because the amount of the tax is based on the consideration or value of the property conveyed [*see Rev. & Tax. Code § 11911*; *see also § 27.242[1][c]*], and consequently the consideration or value may be computed by reference to the amount of the transfer tax.

[b] Preparation of Separate Statement

The party submitting the deed for recordation must request that the recorder affix the separate statement to the deed [*Rev. & Tax. Code §§ 11932*]. The recorder will affix it after the permanent record is made and before the original deed is returned to the appropriate person [*Rev. & Tax. Code § 11932*; *see Gov. Code § 27321*; *see also § 27.240[b]*].

[c] Reference in Deed to Separate Statement

When a separate statement is used, the deed should state that the amount of tax due is shown on a separate paper and is not for public record. This information may be inserted in the place where the amount of tax would otherwise be shown, as indicated in the second alternative provision of § 27.242[2].

For further discussion of documentary transfer taxes, *see § 27.242[1]*.

[2] FORM

Separate Statement of Documentary Transfer Tax Due

Separate Statement of Documentary Transfer Tax Due

REQUEST THAT STATEMENT OF DOCUMENTARY TRANSFER TAX NOT BE RECORDED

)
_____ [*name of recorder*])
County Recorder)
_____ [*name of county*])
_____ [*address*])
_____ [*city, state, zip*])
)

Dear _____ [Mr. *or* Ms.] _____ [*name of recorder*] :

The undersigned hereby requests that this statement of transfer tax due not be recorded with the attached deed but be affixed to the deed after recordation and before the deed is returned as directed on the deed.

The attached deed names _____[*name*] as grantor and _____[*name*] as grantee. The property subject to this deed is located in _____[*name of city, or* an unincorporated area of _____ County]. The amount of Documentary Transfer Tax due on the deed is $_____, computed on the full value of the property conveyed, [not] exclusive of liens or encumbrances remaining on the property at the time of sale.

This request is made pursuant to *Sections 11932* and *11933 of the California Revenue and Taxation Code*.

_____ [*signature*]
[*typed name*]
[Agent of] Party Determining Tax

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART IV. FORMS
C. Related Documents

11-27 California Legal Forms--Transaction Guide § 27.288

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.288 Beneficiary-Grantee's Declaration for Tax Purposes in Connection With Foreclosure

[1] Comment--Use of Form

The form in [2], *below*, is a declaration by a beneficiary-grantee setting forth information required under the Documentary Transfer Tax Act [*Rev. & Tax. Code §§ 11901-11934*]. The Act applies to any deed or other document taken by a beneficiary or mortgagee from the mortgagor or trustor as a result of or in lieu of foreclosure, but only to the extent that the consideration exceeds the unpaid debt, including accrued interest and cost of foreclosure [*Rev. & Tax. Code § 11926*]. To facilitate the computation of any tax that may be due, the consideration, unpaid debt amount, and identification of grantee as beneficiary or mortgagee must be noted on the deed or other instrument or stated in an affidavit or declaration (this form) under penalty of perjury [*Rev. & Tax. Code § 11926*].

[2] FORM

Beneficiary-Grantee's Declaration for Tax Purposes in Connection With Foreclosure

Beneficiary-Grantee's Declaration for Tax Purposes in Connection With Foreclosure

STATEMENT OF BENEFICIARY-GRANTEE REQUIRED BY DOCUMENTARY TRANSFER TAX ACT

The undersigned declares under penalty of perjury as follows:

1. The undersigned is the beneficiary [*or* mortgagee] under the deed of trust [*or* mortgage] covering that real property commonly known as _____[*street address of property*] and executed by _____[*name of trustor or mortgagor*] as trustor [*or* mortgagor] on _____[*date*], in which _____[*name*] is named as Beneficiary [*or* Mortgagee], and _____[*name*] as Trustee [*omit for mortgage*], and recorded at Book _____, Page _____, Official

Records of _____County, California.

2. The undersigned is also the grantee under that deed [*or other document*] executed by _____[*repeat name of trustor or mortgagor*] as grantor dated _____. That deed conveys the trustor's [*or* mortgagor's] interest in the property described in Paragraph 1 to the undersigned.

3. The consideration for the deed executed by _____[*repeat name of trustor or mortgagor*] was $_____[*or if consideration other than money was involved, describe it and its monetary value*].

4. The amount of the unpaid debt, including accrued interest [and cost of foreclosure] owed by _____[*repeat name of trustor or mortgagor*] to the undersigned was $_____.

Executed at _____, California, on _____[*date*].

_____ [*signature of beneficiary-grantee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27 DEEDS AND RECORDING
PART IV. FORMS
C. Related Documents

11-27 California Legal Forms--Transaction Guide § 27.289

AUTHOR: Timothy F. O'Leary, Practice Consultant

§ 27.289 Notice of Intent to Preserve Interest

[1] Comment

[a] Use of Form

The form in [2], *below*, is the statutory notice of intent to preserve any of the following types of interests in real property [*see Civ. Code § 880.340*; *see also* discussion in [b][ii], *below*]:

- A power of termination.
- A real property security instrument.
- An easement. The recordation of this notice will extend the statutory expiration date of any of these interests under the marketable record title provisions of the Civil Code [*see Civ. Code §§ 880.020-887.090*].

For a notice of intent to preserve an unused mineral right [*see Civ. Code §§ 883.110-883.140*], *see § 36A.211[2]*.

[b] Overview of Marketable Record Title Provisions

[i] Affected Interests

Fixed expiration periods have been established by statute for the following interests in real property:

- Certain powers of termination [*see* [d], *below*];
- Mortgages, deeds of trust, and other recorded real property security instruments [*see* [e], *below*];

- Abandoned easements [*see* [f], *below*];
- Unexercised options [*see Civ. Code §§ 884.010-884.030*; *see also § 22.30[5]*];
- Recorded unperformed contracts for the sale of real property [*see Civ. Code §§ 886.010-886.050*]; and
- Mineral rights [*see Civ. Code §§ 883.110-883.140*; *see also § 36A.211*].

The legislative intent behind the marketable record title laws was to simplify and facilitate real property title transactions by enabling persons to rely on record title to the extent provided in those laws [*Civ. Code § 880.020(b)*; *see Civ. Code § 880.020(a)* (related public policy declarations)].

[ii] Expiration Periods

The statutory expiration periods range from six months to 30 years, depending on the interest involved [*see Civ. Code §§ 882.020(a), 884.010, 885.030(a), 886.030(a)*]. Only the periods applicable to powers of termination, security instruments, and easements are discussed in detail in this comment because they are the only ones that may be extended by this form. The other expiration periods are discussed elsewhere in this publication [*see* [b][i], *above*].

Certain general rules govern the construction and application of the statutory expiration periods. For example, the periods are absolute and apply notwithstanding any disability or lack of knowledge of any person, any provisions for tolling a statute of limitations, or any longer time period applicable pursuant to a statute of limitations [*Civ. Code § 880.250(a)*]. Furthermore, the statutory periods do not extend the time period for doing any required act or revive any interest in real property that expires and is unenforceable because of an applicable statute of limitations [*Civ. Code § 880.250(b)*].

An interest in real property will not expire, expire of record, or become unenforceable pursuant to the statutory expiration periods if any action (including a special proceeding or an arbitration proceeding) to enforce, establish, clear title to, or otherwise affect the interest is commenced prior to expiration and a notice of the pendency of the action is recorded [*Civ. Code § 880.260*].

[c] Procedure for Preserving Interest

[i] Notice of Intent

A power of termination of record, a real property security interest, or an easement will be preserved if a notice of intent to preserve interest (this form) is recorded prior to the expiration of the interest [*see Civ. Code § 880.310(a), 880.340*]. The notice may be recorded either by a person who claims the interest or by another person acting on behalf of a claimant if (1) the person is authorized to so act, or (2) the claimant is one of a class whose identity cannot be established or is uncertain at the time the notice is recorded [*Civ. Code § 880.320*].

[ii] Contents of Notice

The notice must be in substantially the form specified by statute [*Civ. Code § 880.340*]. It must also contain all of the following information [*Civ. Code § 880.330(b)*]:

- The name and mailing address of each claimant.
- A statement of the character of interest claimed (for example, a power of termination), including a

reference by record location to the recorded document that creates or evidences the claimant's interest.

- A legal description of the real property, which may be the same as that contained in the recorded document that creates or evidences the claimant's interest.

The notice must be signed and verified by or on behalf of the claimant [*Civ. Code § 880.330(a)*]. If the notice is made on behalf of a claimant, it must include a statement of the authority of the person making the notice [*Civ. Code § 880.330(a)*].

For slightly different requirements applicable to notices of intent to preserve easements [*see Civ. Code § 887.060(b)*].

[iii] Recordation of Notice

The notice must be recorded in the county in which the real property is situated [*Civ. Code § 880.350(a)*]. An instrument cannot be recorded until its execution is acknowledged or proved and the acknowledgment or proof is certified [*Gov. Code § 27287*; *see Civ. Code § 1195(b)* (proof of execution in lieu of acknowledgment of grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted); *see also § 27.271[1]*]. Consequently, the statutory notice includes a certificate of acknowledgment [*see Civ. Code § 880.340*]. However, that certificate is based on a former version of *Civ. Code § 1189* [*see Civ. Code § 1189(a)* (required contents of any acknowledgment taken within California)]. Because *Civ. Code § 880.340* provides that the notice must be in "substantially" the form set forth in that statute, and also states that this requirement is subject to all statutory requirements for recorded documents, the acknowledgment in this form has been changed to reflect the requirements of the current version of *Civ. Code § 1189*.

The recordation of a notice creates a presumption affecting the burden of proof that the person who claims the interest has not abandoned and does not intend to abandon the interest [*Civ. Code § 880.310(b)*]. Recordation does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable, whether before or after the notice is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable [*Civ. Code § 880.310(b)*].

If a court in an action to establish or quiet title determines that a person recorded the notice for the purpose of slandering title (that is, publishing untrue and disparaging matter regarding the property of another [*see Gudger v. Manton (1943) 21 Cal. 2d 537, 541, 134 P.2d 217* , *disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405]* , that person will be liable for the costs of the action or proceeding, including attorneys' fees, and for damages [*Civ. Code § 880.360*].

[d] Powers of Termination

[i] Definition

For purposes of the marketable record title provisions, a power of termination is a power to terminate a fee simple estate following the violation of a condition subsequent [*Civ. Code § 885.010(a)(1)*; *see § 27.202[1]*]. Although referred to in the statute as a power of termination, such a power may be characterized in the instrument that creates or evidences it as a right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise [*Civ. Code § 885.010(a)(1)*]. The power of termination is an interest in the affected real property [*Civ. Code § 885.010(b)*].

The definition of "power of termination" includes the power created in a transferee to terminate a fee simple estate in real property to enforce a restriction on the use of the real property in the form of a limitation or condition subsequent [*Civ. Code § 885.010(a)(2)*]. This power may be characterized in the instrument that creates or evidences it as an executory interest, executory limitation, or otherwise [*Civ. Code § 885.010(a)(2)*]. "Power of termination" also includes

the interest known at common law as an executory interest preceded by a fee simple determinable [*Civ. Code § 885.010(a)(2)*]. For coverage of executory interests, see California Real Estate Law and Practice, Ch. 340, *Estates in Real Property* (Matthew Bender).

For discussion of the exercise of a power of termination [*see Civ. Code § 885.050*; *see also Civ. Code § 885.070*], *see § 27.202[1][d]*.

[ii] Expiration

A power of termination will normally expire of record at the later of the following times [*Civ. Code § 885.030*]:

- Thirty years after the date the instrument reserving, transferring, or otherwise evidencing the power is recorded;

- Thirty years after the date a notice of intent to preserve the power is recorded, if it is recorded within the period stated above; or

- Thirty years after the date an instrument or a notice (as described in either of the two preceding categories) is recorded, if the instrument or notice is recorded within 30 years after the date such an instrument or notice was last recorded.

Notwithstanding these expiration periods, a recorded document may provide for an expiration date that is earlier than the one determined under the statutory formulas; however, it cannot extend the statutory period [*Civ. Code § 885.030(b)*].

The following interests are not subject to the statutory expiration periods: (1) a power of termination conditioned on the continued production or removal of oil or gas or other minerals, or (2) a power of termination as to separately owned improvements or fixtures conditioned on the continued leasehold or possessory interest in the underlying land [*Civ. Code § 885.015*].

A power of termination will also expire if it becomes obsolete [*Civ. Code § 885.040(a), (b)*]. For discussion of the circumstances under which a power becomes obsolete, see *§ 27.202[1][e]*.

The expiration of a power of termination makes the power unenforceable and is equivalent for all purposes to a termination of the power of record and a quitclaim of the power to the owner of the fee simple estate [*Civ. Code § 885.060(a)*]. Execution and recording of a termination and quitclaim is not necessary to terminate or evidence the termination of the power [*Civ. Code § 885.060(a)*].

As a general rule, expiration of a power of termination terminates the restriction and makes it unenforceable by any means [*Civ. Code § 885.060(b)*]. However, the restriction will not be terminated if it is also an equitable servitude alternatively enforceable by injunction [*Civ. Code § 885.060(c)*]. Although such an equitable servitude will not be enforceable by a power of termination, it will be enforceable by injunction and by any other available remedies [*Civ. Code § 885.060(c)*]. However, the foregoing provisions will not make enforceable any restriction prohibited or made unenforceable by any other law, including *Civ. Code § 53* [*Civ. Code § 885.060(c)*]. Under *Civ. Code § 53*, a restriction is void if it directly or indirectly limits the acquisition, use, or occupation of real property based on a person's sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Civ. Code § 53(b)*; *see Civ. Code § 51(b), (e)*].

[e] Real Property Security Instruments

Unless the lien of a mortgage, deed of trust, or other real property security instrument has already expired because the statute of limitations has run on the principal obligation [*see Civ. Code § 2911*], the lien will expire at the later of the following times [*Civ. Code § 882.020(a)*; *see Civ. Code § 882.040*]:

- If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the recorded evidence of indebtedness, 10 years after that date.

- If the date described above is not ascertainable from the recorded evidence of indebtedness or if there is no such date, 60 years after the date the instrument that created the security interest was recorded.

- If a notice of intent to preserve the security interest is recorded within the time discussed in the two categories above, 10 years after the date the notice is recorded.

All of the above times may be extended a maximum of four years by recording, before the applicable expiration date, an extension that is signed by the person obligated under the security instrument [*Civ. Code § 882.020(c)*; *see Code Civ. Proc. § 360.5*].

The expiration of the lien of a real property security instrument renders the lien unenforceable by any means commenced or asserted thereafter and is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest [*Civ. Code § 882.030*]. Although not precluded by statute, the execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge is not necessary to terminate or evidence the termination of the security interest [*Civ. Code § 882.030*]. However, the reference to expiration of a "lien" in *Civ. Code § 882.030* includes only the security interest enforceable through judicial foreclosure pursuant to *Code Civ. Proc. § 725a*, which is subject to the four-year statute of limitations in *Civ. Code § 2911*, and does not extinguish the power of sale in a deed of trust [*Ung v. Koehler (2005) 135 Cal. App. 4th 186, 196, 37 Cal. Rptr. 3d 311]* .

A beneficiary of a deed of trust who is otherwise entitled to claim the 60-year time limit does not lose that entitlement by filing a notice of default prior to exercising a power of sale [*Civ. Code § 2924*] that specifies the "final maturity date" of the underlying debt. Otherwise, every beneficiary who would be entitled to 60 years under *Civ. Code § 882.020(a)(2)*, and who failed to seek nonjudicial enforcement within the first 10 years, would be entitled to the remaining years only until it filed the required notice of default. At that time, the beneficiary would retroactively be entitled to only 10 years, all of which by definition would have elapsed. Thus, to avoid a statutory absurdity, a notice of default under *Civ. Code § 2924* that is recorded more than 10 years after "the last date fixed for payment of the debt or performance of the obligation" does not constitute a part of the "record" for purposes of *Civ. Code § 882.020(a)* [*Ung v. Koehler (2005) 135 Cal. App. 4th 186, 203-204, 37 Cal. Rptr. 3d 311* ; *see also Schmidli v. Pearce (2009) 178 Cal. App. 4th 305, 316, 100 Cal. Rptr. 3d 343* (in amendments to *Civ. Code § 882.020* enacted in 2007, Legislature codified holding in *Ung* that notice of default is not part of the record for purposes of determining applicable statute of limitations)].

[f] Easements

[i] Applicability

For purposes of the marketable record title laws, "easement" means a burden or servitude on land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts on the land [*Civ. Code § 887.010*]. Easements that are part of a unified or reciprocal system for the mutual benefit of multiple parties are specifically excluded [*Civ. Code § 887.020*].

The marketable record title laws supplement and do not limit or otherwise affect the common law governing the abandonment of an easement or any other procedure for clearing an abandoned easement from title to real property [*Civ. Code § 887.030*]. For coverage of easements in general, see Ch. 28A, *Easements and Licenses* . For additional coverage, including coverage of the common law and statutory provisions governing the abandonment of easements, see California Forms of Pleading and Practice, Ch. 240, *Easements* (Matthew Bender).

[ii] Conditions Constituting Abandonment

An easement is abandoned if all of the following conditions are satisfied for a period of 20 years immediately preceding the commencement of the action to establish abandonment [*Civ. Code § 887.050(a)*]:

- The easement is not used at any time;
- No separate property tax assessment is made of the easement or, if made, no taxes are paid on the assessment; and
- No instrument creating, reserving, transferring, or otherwise evidencing the easement is recorded.

These conditions constituting abandonment apply notwithstanding any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the easement or in another recorded document, unless the instrument or other document provides an earlier expiration date [*Civ. Code § 887.050(b)*].

An abandoned easement is unenforceable and is deemed to have expired. A court order establishing abandonment pursuant to these laws is equivalent for all purposes to a conveyance of the easement to the owner of the real property [*Civ. Code § 887.080*].

[iii] Action to Establish Abandonment

The owner of real property subject to an easement may bring an action to establish the abandonment of the easement and to clear record title of the easement [*Civ. Code § 887.040(a)*]. The owner must bring the action in the superior court of the county in which the real property subject to the easement is located [*Civ. Code § 887.040(b)*]. Furthermore, the action must be brought in the same manner and will be subject to the same procedure as an action to quiet title [*Civ. Code § 887.040(c)*; *see Code Civ. Proc. § 760.010 et seq.*]. For detailed coverage of quiet title actions, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender).

In an action to establish the abandonment of an easement pursuant to these laws, the court must permit the owner of the easement to record a late notice of intent to preserve the easement as a condition of dismissal of the action, provided the owner of the easement pays into court (for the benefit of the owner of the real property) the litigation expenses attributable to the easement or the portion of the easement covered by the notice. For these purposes, "litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including reasonable attorneys' fees [*Civ. Code § 887.070*].

These litigation expenses are payable only when the sole theory of extinguishment of the easement was statutory abandonment (or other theories were dismissed voluntarily) and the application of *Civ. Code § 887.070* results in the preservation of the easement [*Worthington v. Alcala (1992) 10 Cal. App. 4th 1404, 1408-1412, 13 Cal. Rptr. 2d 374]* .

[iv] Notice of Intent

The owner of an easement may at any time record a notice of intent to preserve the easement (this form) [*Civ. Code § 887.060(a)*]. An easement is not abandoned if recordation takes place (1) within 20 years immediately preceding the

commencement of an action to establish the abandonment of the easement or (2) pursuant to *Civ. Code § 887.070* after commencement of an action to establish the abandonment of the easement and before judgment is entered in the action [*Civ. Code § 887.060(c)*; *see* [iii], *above*].

The required contents of a notice of intent to preserve an easement differ slightly from the mandatory contents of other notices of intent [*see Civ. Code § 880.330(b)*; *see also* [c][ii], *above*]. This type of notice may refer generally and without specificity to any or all easements claimed by the claimant in any real property situated in the county in lieu of [*Civ. Code § 887.060(b)*]:

- The statement of the character of the interest claimed and the record location of the documents creating or evidencing the easement claimed [*see Civ. Code § 880.330(b)(2)*]; and

- The legal description of the real property in which the interest is claimed [*see Civ. Code § 880.330(b)(3)*].

Although the other portions of the notice must be substantially in the form specified by statute [*see Civ. Code § 880.340*], there are no requirements governing the presentation of the foregoing information regarding the claimant's easement or easements [*see Civ. Code § 887.060(b)*].

[2] FORM

Notice of Intent to Preserve Interest
Notice of Intent to Preserve Interest

Recording requested by	)	FOR USE OF COUNTY RECORDER
_____ [*name*]	)	*Indexing instructions*.
When recorded mail to	)	This notice must be indexed as follows:
_____ [*name*]	)	Grantor and grantee index--Each claimant is a grant-
_____ [*address*]	)	or.
_____ [*city, state, zip*]	)	
	)	

_____

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with *Section 880.020) of Part 2 of Division 2 of the Civil Code* (Marketable Record Title).

Claimant	Name: _____
	Mailing address: _____
	[*Must be given for each claimant*]

[*Add if notice pertains to power of termination or real property security instrument*:]

Interest	Character: _____ [*specify, e.g.*, power of termination]

	Record location of document creating or evidencing interest in claimant:
Real Property	Legal description [*may be same as in recorded document creating or evidencing interest in claimant*]: _____

[*Or, add if notice relates to easement*:]

Interest[s]	Easement[s]: _____ [*refer generally to any or all easements claimed by claimant in any real property situated in county*].

[*Continue with following*:]

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true. If this notice is made on behalf of a claimant, I assert under penalty of perjury that I am authorized to act on behalf of the claimant.

Date: _____

Signed: _____ [*signature of claimant or of person signing on claimant's behalf*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a))*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersEasementsReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawMiningRegulationReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27A DEDICATION

12-27A California Legal Forms--Transaction Guide 27A.syn

§ 27A.syn Synopsis to Chapter 27A: DEDICATION

§ 27A.01 California Sources

[1] California Statutes

[2] California Regulations

§ 27A.02 Federal Statutes

§§ 27A.03-27A.04 [Reserved]

§ 27A.05 Law Reviews

§ 27A.06 Annotations

§ 27A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 27A.08-27A.09 [Reserved]

§ 27A.10 "Dedication" Defined

§ 27A.11 Authority to Dedicate and Persons Bound by Dedication

§ 27A.12 Common Law Dedication

[1] Elements

[2] Common Law Offer of Dedication

[3] Acceptance of Common Law Offer

[4] Revocation of Common Law Offer

[5] Implied Common Law Dedication

[6] Construction of Common Law Dedications

§ 27A.13 Dedication Under Subdivision Map Act

[1] Validity of Dedication Requirements

[2] Dedication or In-Lieu Fees for Park and Recreational Facilities

[3] Dedication of Public Access to Public Natural Resources

[4] Dedication of Land for Elementary School Purposes

[5] Other Purposes for Which Dedication May Be Required

[6] Filing of Tentative Map

[7] Filing and Approval of Final Map

[8] Acceptance of Offer Under the Act

[9] Effect of Acceptance on Liability of Public Entity and Subdivider

[10] Rejection and Termination of Offer Under the Act

§ 27A.14 Dedication Under Gov. Code § 7050

§ 27A.15 Covenants for Easement

§ 27A.16 Tax Aspects of Dedication

§§ 27A.17-27A.99 [Reserved]

§ 27A.100 Facts

Scope

§ 27A.101 Documents

Scope

§§ 27A.102-27A.109 [Reserved]

§ 27A.110 Determinations for All Dedications

Scope

§ 27A.111 Determinations for Common Law Dedications

Scope

§ 27A.112 Determinations for Dedications Under Subdivision Map Act

Scope

§§ 27A.113-27A.119 [Reserved]

§ 27A.120 Offer and Acceptance of Dedication

Scope

§ 27A.121 Revocation or Termination of Offer of Dedication

Scope

§ 27A.122 Preventing Implied Dedication of Private Coastal Property

Scope

§§ 27A.123-27A.199 [Reserved]

§ 27A.200 Irrevocable Offer of Dedication for Street, Highway, or Other Public Purpose [Gov. Code § 7050; Civ. Code § 1009(c)]

[1] Comment

[a] Use of Form

[b] Use of Form for Common Law Offer

[c] Public Easements

[d] Dedication Procedure

[e] Parties to Offer

[f] Liability for Maintaining Street or Highway

[g] Protection of Property Owners Not Making Offer of Dedication

[2] Form

Irrevocable Offer of Dedication for Street, Highway, or Other Public Purpose [Gov. Code § 7050; Civ. Code § 1009(c)]

§ 27A.201 Agreement Between Landowner and City for Deferment of Public Street Improvement Work

[1] Comment--Use of Form

[2] Form

Agreement Between Landowner and City for Deferment of Public Street Improvement Work

§ 27A.202 Agreement Between Landowner and City for Installation and Maintenance of Landscaping

[1] Comment--Use of Form

[2] Form

Agreement Between Landowner and City for Installation and Maintenance of Landscaping

§ 27A.203 Agreement Between Coastal Landowner and Agency Providing for Public Use of Land

[1] Comment

[a] Use of Form

[b] Coastal Property

[c] Indemnification

[d] Recording

[2] Form

Agreement Between Coastal Landowner and Agency Providing for Public Use of Land



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27A DEDICATION

12-27A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the dedication of land by a property owner in the form of a fee interest or some lesser interest for a public purpose. Both common law dedication and statutory dedication under the Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*] are covered. The Legal Background discusses the statutory dedication procedure and the principles and cases governing common law dedication. The Transaction Guide sets forth the steps involved in preparing and tendering statutory and common law offers of dedication, determining the status of previously tendered offers, revoking offers, and preventing implied dedication of privately owned coastal property. Forms include an offer of dedication and related agreements between landowners and local public entities.

This chapter does not discuss conveyances by deed or easements, which are covered in Ch. 27, *Deeds and Recording* and Ch. 28A, *Easements and Licenses* . Subdivisions, which are discussed in this chapter only insofar as they are related to dedications, are discussed generally in Ch. 30, *Subdivision Regulation* .



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27A DEDICATION
PART I. RESEARCH GUIDE
A. Primary Sources

12-27A California Legal Forms--Transaction Guide § 27A.01

§ 27A.01 California Sources

[1] California Statutes

Recording of notice of consent for public use of private property. *Civ. Code § 813*.

Posting of notice of consent for public use of private property. *Civ. Code § 1008*.

Protection for private property owners who permit public use of property. *Civ. Code § 1009*.

Termination of offer of dedication and action to clear title. *Code Civ. Proc. §§ 771.010*, *771.020*; *Gov. Code § 66477.2*.

Offers of dedication. *Gov. Code § 7050*.

Creation of public easements by covenant. *Gov. Code §§ 65870-65875*.

Subdivision Map Act. *Gov. Code §§ 66410-66499.37*.

Applicability of Act. *Gov. Code §§ 66412-66412.5*.

Dedication requirements generally. *Gov. Code §§ 66439*, *66447*, 77475-66478.

Dedication requirements for public access to public resources. *Gov. Code §§ 66478.1-66478.14*.

Dedication requirements for parks, recreational facilities, and similar uses. *Gov. Code §§ 66479-66482*.

Reimbursement for certain dedicated improvements. *Gov. Code §§ 66485-66489*.

Reversions to acreage. *Gov. Code §§ 66499.11-66499.20*3/4.

Dedication of property by county for use by veterans' association. *Mil. & Vet. Code § 1266*.

Dedication of ward's property for public streets. *Prob. Code § 2556*.

Dedication of real property of an estate. *Prob. Code §§ 9900-9901*.

Liability for dedicated streets. *Sts. & Hy. Code §§ 941, 1806*.

Authority to lease real property acquired for highway purposes. *Sts. & Hy. Code § 960.6*.

Public Streets, Highways, and Service Easements Vacation Law. *Sts. & Hy. Code §§ 8300-8363*.

[2] California Regulations

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§ 27A.02 Federal Statutes

Deductions for charitable gifts to public entities. *I.R.C. § 170(c)(1)*.



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12-27A California Legal Forms--Transaction Guide § 27A.05

§ 27A.05 Law Reviews

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§ 27A.06 Annotations

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Ch. 183, *Dedication*.

California Legal Forms(Matthew Bender).

Ch. 28A, *Easements and Licenses*.

Ch. 30, *Subdivision Regulation*.

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Ch. 292, *Procedural Requirements of the Subdivision Map Act*.

Ch. 361, *Dedication*.

Rabkin & Johnson, Current Legal Forms(Matthew Bender).

Ch. 22, *Development and Subdivision*.

Powell On Real Property(Matthew Bender).

Ch. 79B, *Takings and Injuries to Real Property Without Just Compensation*, § 866.3.

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§§ 27A.08[Reserved]



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§ 27A.10 "Dedication" Defined

"Dedication" refers to an intentional appropriation or donation of land, or of an easement or other interest in land, by the owner of that land, for some proper public use [*Clay v. City of Los Angeles (1971) 21 Cal. App. 3d 577, 583, 98 Cal. Rptr. 582]* . Generally, the public acquires a fee title to land dedicated for parks and similar purposes, and acquires an easement in the case of dedications for streets, highways, and similar purposes [*see, e.g., Morse v. E.A. Robey & Co. (1963) 214 Cal. App. 2d 464, 467-468, 29 Cal. Rptr. 734* ; *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 307, 123 Cal. Rptr. 405]* .

Dedications may be made under the common law [*see § 27A.12*] or pursuant to some specific statutory authority. For example, many dedications are made by developers to comply with the requirements of the Subdivision Map Act [*Gov. Code §§ 66410-66499.37*; *see § 27A.13*]. *Gov. Code § 7050* provides an alternative statutory method for making an irrevocable dedication of land to public use [*see § 27A.14*]. *Gov. Code § 65871* provides a procedure similar to dedication for the creation of public easements [*see § 27A.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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§ 27A.11 Authority to Dedicate and Persons Bound by Dedication

Any landowner, including a corporation, may dedicate land [*see Southern Pac. Co. v. City of Pomona (1904) 144 Cal. 339, 341-342, 77 P. 929* (corporation may dedicate land if permitted by articles of incorporation)]. A person who dedicates land that he or she does not own cannot bind the owner of the affected land [*City of Eureka v. McKay & Co. (1899) 123 Cal. 666, 671, 56 P. 439]* , although the nonowner will be estopped from denying the dedication if he or she subsequently acquires title to the land [*City of Napa v. Howland (1890) 87 Cal. 84, 86, 25 P. 247]* .

A dedication may be accomplished through an agent of the landowner if the agent acts with express or ostensible authority, especially if the landowner does not question or deny the agent's authority [*Southern Pac. Co. v. City of Pomona (1904) 144 Cal. 339, 347-349, 77 P. 929]* . A trustee may dedicate land if authorized to do so by the trust instrument [*see, e.g., City of Palos Verdes Estates v. Willett (1946) 75 Cal. App. 2d 394, 399, 171 P.2d 26]* . An executor or administrator may dedicate land belonging to an estate only if specifically authorized to do so by a probate court [*Prob. Code § 9900(a)*; *Gray v. Magee (1933) 133 Cal. App. 653, 662, 24 P.2d 948]* .

A landowner may not substantially impair the security interest of a prior mortgagee by dedicating the land subject to the mortgage [*Civ. Code § 2929*; *Archer v. Salinas City (1892) 93 Cal. 43, 55, 28 P. 839]* . If the mortgagee subsequently accepts title to the property in satisfaction of the debt, the mortgagee acquires the property subject to the dedication [*Archer v. Salinas City (1892) 93 Cal. 43, 55, 28 P. 839]* . A valid dedication can defeat or limit security interests and other property interests acquired subsequent to the dedication. In determining whether a lienholder, purchaser at a foreclosure sale, or other party who acquires an interest in dedicated property takes subject to the dedication, the key question is whether the transferee had constructive notice of the prior public use of the land [*City of Los Angeles v. Berk (1980) 26 Cal. 3d 201, 220, 161 Cal. Rptr. 742, 605 P.2d 381]* .

Public bodies may dedicate land to other public bodies for particular purposes that benefit the public at large. For example, the Department of Transportation may dedicate roadways to counties, cities, or other public municipal corporations [*Sts. & Hy. Code § 30411*]. Acts of acceptance are not necessary to complete a dedication by a public entity [*Arques v. City of Sausalito (1954) 126 Cal. App. 2d 403, 406, 272 P.2d 58* ; *see § 27A.12[3]*].

If a county provides and/or maintains any building, memorial hall, meeting place, memorial park, or recreation center

for the use or benefit of one or more veterans' associations pursuant to *Mil. & Vet. Code § 1262*, the provision of the facility and its acceptance by the veterans' association constitute a dedication of the property for a public purpose. So long as the veteran's association does not violate the terms and conditions of the dedication, the county may not revoke the dedication unless it dedicates substitute facilities, or unless the veterans' organization has consented to the proposed action or abandoned its use of the facilities [*Mil. & Vet. Code § 1266*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawOwnership & TransferPublic EntitiesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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§ 27A.12 Common Law Dedication

[1] Elements

The essential elements of a dedication of land under the common law are the landowner's unequivocal offer to dedicate his or her land to a public use, and the public's acceptance of the offer [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 240, 267 P.2d 10* ; *see* [2] and [3], *below*]. A common law dedication may be made for any proper public use [*see, e.g.*, *Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 267 P.2d 10* (streets and highways); *City of Palos Verdes Estates v. Willett (1946) 75 Cal. App. 2d 394, 171 P.2d 26* (parks); People ex res. *People ex rel. Keller v. La Vista Cemetery Asso. (1949) 175 Cal. App. 2d 197, 345 P.2d 590]* . The dedicator may impose any reasonable conditions and limitations on the dedication [*Hill v. City of Oxnard (1920) 46 Cal. App. 624, 625-626, 189 P. 825]* .

Common law dedication is governed by principles applicable to both grant and gift transactions, as well as those applicable to adverse possession claims [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 240, 267 P.2d 10* ; *People v. Sayig (1951) 101 Cal. App. 2d 890, 896, 226 P.2d 702]* . A common law dedication need not satisfy the statute of frauds or be supported by express words or documents [*Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist. (1973) 30 Cal. App. 3d 579, 584-585, 106 Cal. Rptr. 467]* . In fact, common law dedication cases often turn on principles of estoppel, arising out of the landowner's failure to object to acts or events that suggest an implied intent to dedicate property [*Sussman v. County of San Luis Obispo (1899) 126 Cal. 536, 539, 59 P. 24* ; *see* [5], *below*]. In each case, the question of whether there has been a dedication is a question of fact [*Sacramento v. Jensen (1956) 146 Cal. App. 2d 114, 118, 303 P.2d 549]* .

Although statutory and common law dedication are separate procedures, an unsuccessful statutory dedication may qualify as a common law dedication. This could occur, for example, if a city or county failed to accept an offer of dedication according to the procedure provided by the Subdivision Map [*see Gov. Code §§ 66477.1, 66477.2*; § 27A.13[8]], but all of the necessary elements for a common law dedication were present [*see, e.g.*, *Hanshaw v. Long Valley Road Assn. (2004) 116 Cal. App. 4th 471, 477, 11 Cal. Rptr. 3d 357* ; *Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 143, 37 Cal. Rptr. 141* ; *City of Sacramento v. Jensen (1956) 146 Cal. App. 2d 114, 118-123, 303 P.2d 549]* .

[2] Common Law Offer of Dedication

A common law offer of dedication may be made in any of a variety of ways. The most straightforward kind of offer is an express conveyance of the property to a governmental entity. The offer may be made by an absolute conveyance of the property in fee [*see, e.g., City & County of San Francisco v. Linares (1940) 16 Cal. 2d 441, 444, 106 P.2d 369]* or by a conditional grant of a fee interest for a specific public purpose [*see, e.g., Slavich v. Hamilton (1927) 201 Cal. 299, 304, 257 P. 60]* . For example, a deed may provide that the grantor dedicates the land for use as a public park, but that the land will revert to the grantor if it is used for any other purpose [*see, e.g., Palos Verdes Estates v. Willett (1946) 171 P.2d 26* ; *see also* [6], *below*].

An offer of dedication may also be made by recording a map or plat showing land subdivided into defined areas separated by roads or streets [*Flavio v. McKenzie (1963) 218 Cal. App. 2d 549, 553, 32 Cal. Rptr. 535]* ; the offer is repeated and reinforced when a landowner sells lots with reference to the recorded map [*Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 144, 37 Cal. Rptr. 141]* .

In many cases, the existence of a common law offer to dedicate land is much less clear than in the situations illustrated above, and must be inferred from the facts of the case. For a discussion of these dedications by implication, *see* [5], *below*.

[3] Acceptance of Common Law Offer

Acceptance of a common law offer of dedication is necessary to complete the dedication [*City of Santa Clara v. Ivancovich (1941) 47 Cal. App. 2d 502, 508, 118 P.2d 303]* . The acceptance may be express or, in a case involving an express, irrevocable written offer of dedication, it may be implied from the actions of the appropriate public body or the public at large [*City of Santa Clara v. Ivancovich (1941) 47 Cal. App. 2d 502, 508, 118 P.2d 303]* . For example, a city or county may indicate acceptance of an express, written, irrevocable offer of dedication on behalf of the public by commencing maintenance or repair work on the property [*Ackley v. City Etc. of San Francisco (1970) 11 Cal. App. 3d 108, 113, 89 Cal. Rptr. 480]* . Acceptance may also be established through the public's use of the property, although this element usually coexists with the above-described acts of dominion by a public body [*Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 145, 37 Cal. Rptr. 141]* . Except in cases involving coastal property or the expenditure of government funds to clean, maintain, or visibly improve the property, an implied acceptance is not valid if the offer of dedication was not an express, irrevocable offer in writing [*Civ. Code § 1009(b)-(e)*; *see* [5], *below*]. It is not necessary to an otherwise valid acceptance that the public body expend money to develop the dedicated property [*Morse v. E.A. Robey & Co. (1963) 214 Cal. App. 2d 464, 468, 29 Cal. Rptr. 734]* .

[4] Revocation of Common Law Offer

After a common law offer of dedication has been accepted, the dedication is complete and cannot be revoked by the landowner [*Brick v. Cazaux (1937) 9 Cal. 2d 549, 555, 71 P.2d 588]* . However, the offer of dedication may be revoked by the landowner at any time prior to acceptance [*County of Inyo v. Given (1920) 183 Cal. 415, 420, 191 P. 688]* . The revocation may be made expressly, or may be implied from action by the landowner that is inconsistent with the public's use of the land [*see, e.g., People v. Southern P. R. Co. (1924) 68 Cal. App. 153, 160, 228 P. 726* (conveying land without reference to dedication offer); *County of Inyo v. Given (1920) 183 Cal. 415, 420, 191 P. 688* (fencing property); *see also § 27A.121*]. The question of whether a revocation occurred before the offer of dedication was accepted is a question of fact [*Henry Cowell Lime & Cement Co. v. State (1941) 18 Cal. 2d 169, 173, 114 P.2d 331]* .

[5] Implied Common Law Dedication

Common law dedications may be implied in fact or implied in law. A dedication is implied in fact when a landowner

manifests by his or her affirmative acts or acquiescence an unequivocal intention to offer his or her property for a public purpose [*Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist. (1973) 30 Cal. App. 3d 579, 585, 106 Cal. Rptr. 467]* . The amount and nature of evidence required to establish a landowner's intent to dedicate varies with the location of the property and the nature of the public use. Generally, more evidence is required for dedications in sparsely populated areas than in urban areas [*Kitzman v. Newman (1964) 230 Cal. App. 2d 715, 723, 41 Cal. Rptr. 182]* .

A dedication implied in law is the common law result when various groups of persons use property for the required period without asking or receiving permission from the fee owner, in the absence of objection by the fee owner [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 43-44, 84 Cal. Rptr. 162, 465 P.2d 50]* . Public use of land before March 4, 1972, for a period of more than five years with the knowledge of the owner raised a conclusive presumption of dedication, unless the owner could show that the use was by license or permission, or that he or she had made bona fide attempts to prevent the use [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* . If the period of public use was less than five years, dedication could be established on a showing that the owner made an offer of dedication [*Gunn v. Fontes (1957) 148 Cal. App. 2d 351, 356, 306 P.2d 928]* or actually consented to the dedication [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* .

In 1971, the California Legislature recognized that the state has an interest in encouraging landowners to make their property available for public use, and found that the threat of implied dedication discourages that practice. In response to this finding, the Legislature severely limited the acquisition of public land rights by implied dedication [Stats. 1971, ch. 941, § 2; *Civ. Code § 1009(a)*]. Public use of private property after March 4, 1972, cannot ripen into an implied dedication of the property unless the owner executes an express irrevocable written offer of dedication that is accepted by the appropriate public body [*Civ. Code § 1009(b), (c)*; *see Gov. Code § 7050*; *see also § 27A.200*].

There are two exceptions to this rule. First, private land may be acquired for public use through implied dedication when a governmental entity expends public funds to make visible improvements on or across private land, or to clean and maintain private land, in a manner that should put the owner on notice that the public is using the land, if that use continues for five years and the owner neither gives his or her express permission for the public use to continue nor takes steps to stop the use [*Civ. Code § 1009(d)*]. Second, the public may obtain rights in certain coastal property through implied dedication notwithstanding the provisions of *Civ. Code § 1009* [*Civ. Code § 1009(e)*]. This exception applies to coastal property that lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean or any harbor, estuary, bay, or inlet of the Pacific Ocean. Property lying inland of the Carquinez Straits Bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less, is not included in this exception [*Civ. Code § 1009(e)*].

An owner of coastal property may prevent an implied dedication under the second exception by expressly permitting the public use of the property [*Civ. Code § 1009(f)*]. Permission may be conditioned on reasonable restrictions on the time, place, and manner of the use [*Civ. Code § 1009(g)*]. Any of the following actions is sufficient to bar an implied dedication [*Civ. Code § 1009(f)*]:

- Posting signs or publishing a notice meeting statutory requirements [*see Civ. Code § 1008*; *Gov. Code § 6066*; *see also § 27A.122*, P 1.a., b.; § 28A.236];

- Recording a notice as provided in *Civ. Code § 813* [*see § 27A.122*, P 1.c.; *see also* § 28.234]; or

- Entering into a written agreement with any federal, state, or local agency providing for the public use of the subject property [*see § 27A.203*].

Civ. Code § 1009 only restricts the establishment of public rights in private property through "use of such property by the public" [*Civ. Code § 1009(b)*].

[6] Construction of Common Law Dedications

The construction of a common law dedication generally depends on the nature of the situation in which the issue arises. In a suit by an individual grantor to force a public body to use dedicated land for the purposes specified in the dedication, the dedication will be strictly construed in favor of the grantor [*Big Sur Prop. v. Mott (1976) 62 Cal. App. 3d 99, 104, 132 Cal. Rptr. 835]* . In a similar situation involving a dedication by one public body to another public body, the dedication will be less strictly construed, in order to avoid limiting the permissible uses of the property as long as they "tend to further and promote the enjoyment of the people" [*City & County of San Francisco v. Linares (1940) 16 Cal. 2d 441, 444-445, 106 P.2d 369]* . However, in a suit by a grantor to recover dedicated property for breach of a condition of the dedication, the dedication will be strictly construed against the grantor as a forfeiture [*Savanna School Dist. v. McLeod (1955) 137 Cal. App. 2d 491, 494, 290 P.2d 593]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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§ 27A.13 Dedication Under Subdivision Map Act

[1] Validity of Dedication Requirements

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] empowers California cities and counties to enact ordinances requiring a dedication of land, an irrevocable offer of dedication, or payment of fees in lieu of dedication, for various public purposes as a condition of tentative approval of subdivision maps [*Gov. Code §§ 66475-66475.3, 66477*]. These dedication requirements do not violate federal or California constitutional due process or equal protection guarantees [*Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal. 3d 633, 637-645, 94 Cal. Rptr. 630, 484 P.2d 606* (construing former *Bus. & Prof. Code § 11546*; *now see Gov. Code § 66477*)]. For further discussion of the constitutionality of park dedication requirements under the Subdivision Map Act, *see* California Real Estate Law and Practice, Ch. 291, *Substantive Requirements of the Subdivision Map Act* (Matthew Bender).

[2] Dedication or In-Lieu Fees for Park and Recreational Facilities

A city or county may require the dedication of land for parks or recreation purposes, or the payment of fees instead of dedication, or a combination of both, but only if all statutory requirements are met [*Gov. Code § 66477(a)*]. An ordinance setting forth the requirement must have been in effect for at least 30 days prior to the filing of the required tentative map of the subdivision or parcel map [*Gov. Code § 66477(a)(1)*; *see* [6], *below*]. The ordinance must include definite standards, based on residential density and consistent with the formula prescribed by statute, for determining the proportion of the subdivision to be dedicated and the amount of the in-lieu fee [*see Gov. Code § 66477(a)(2)(B)*].

In addition to adopting an ordinance, the city or county must have adopted a general plan or a specific plan containing policies and standards for parks and recreation facilities. The proposed facilities must be in accordance with definite principles and standards [*Gov. Code § 66477(a)(4)*]. The local legislative body must also develop a schedule specifying how, when, and where it will use the land or fees, or both, to develop park or recreational facilities to serve the residents of the subdivision [*Gov. Code § 66477(a)(6)*].

The dedicated land and/or the in-lieu fees must be used only for the purpose of developing new neighborhood or community park or recreational facilities, or rehabilitating existing facilities (for example, by draining or landscaping), to serve the subdivision [*Gov. Code § 66477(a)(3)*]. The fees may not be used for purposes unrelated to the acquisition

and improvement of land [*Associated Home Builders Etc., Inc. v. Walnut Creek (1971) 4 Cal. 3d 633, 647, 94 Cal. Rptr. 630, 484 P.2d 606]* . The amount and location of land to be dedicated, or the amount of fees to be paid, must be reasonably related to the use of the facilities by the future inhabitants of the subdivision [*Gov. Code § 66477(a)(5)*]. The value of any park and recreational improvements provided by the subdivider, and of any equipment located on the dedicated land, must be credited against the payment of fees or the dedication of land required by the ordinance [*Gov. Code § 66477(a)(9)*].

Any fees collected must be committed within five years after payment or the issuance of building permits on half of the lots in the subdivision, whichever occurs later. Fees not committed by this deadline must be distributed to the owners of record of plots within the subdivision at the time of the deadline, according to the size of their plots within the subdivision [*Gov. Code § 66477(a)(6)*].

An ordinance cannot require the dedication of land for park and recreational facilities in subdivisions containing 50 or fewer parcels; only the payment of fees may be required. This restriction does not apply, however, to condominium projects, stock cooperatives, or community apartment projects, as those terms are defined in *Civ. Code § 1351*, with more than 50 dwelling units, even if the number of parcels is 50 or fewer [*Gov. Code § 66477(a)(7)*].

Subdivisions that contain fewer than five parcels and are not used for residential purposes are exempt from ordinances requiring dedication or in-lieu fees for park and recreational facilities [*Gov. Code § 66477(a)(8)*]. However, map approval for these subdivisions may include the condition that if a building permit for construction of a residential structure or structures is requested within four years after the map approval, the permit will not issue unless the in-lieu fee is paid by the owner of the parcel or parcels involved [*Gov. Code § 66477(a)(8)*].

Cities and counties are not authorized to require the dedication of land or the payment of in-lieu fees for park or recreational facilities for commercial or industrial subdivisions, or for condominium projects or stock cooperatives that consist of the subdivision of airspace in an existing apartment building that is no more than five years old when no new dwelling units are added [*Gov. Code § 66477(d)*].

Common interest developments [*see Civ. Code § 1351* (definition)] must be eligible to receive a credit, as determined by the legislative body, against the amount of land required to be dedicated or the amount of fees imposed pursuant to *Gov. Code § 66477*, for the value of private open space within the development that is usable for active recreational uses [*Gov. Code § 66477(e)*]. However, it is up to local legislative bodies to determine the exact criteria and procedures for granting a credit consistent with the statute. Thus, in the absence of such a municipal ordinance, a city had no clear, present, and ministerial duty to provide a developer with a specific amount of credit for private open space and the developer had no clear, present, and beneficial right to performance of such a duty [*Branciforte Heights, LLC v. City of Santa Cruz (2006) 138 Cal. App. 4th 914, 939, 42 Cal. Rptr. 3d 96]* .

If park and recreational services and facilities are provided by a public agency other than a city or a county, the amount and location of land to be dedicated or fees to be paid must be jointly determined, subject to *Gov. Code § 66477(a)(2)*, by the city or county having jurisdiction and that other public agency [*Gov. Code § 66477(c)*].

Park and recreation purposes include land and facilities for the activity of "recreational community gardening," defined as the cultivation by persons other than, or in addition to, the owner of the land, of plant material that is not for sale [*Gov. Code § 66477(f)*].

[3] Dedication of Public Access to Public Natural Resources

Before a local agency can approve a tentative or final map for a subdivision to be located adjacent to certain public waterways, the developer must dedicate reasonable public access from a public highway to the waterway [*Gov. Code §§ 66478.4(a)* (public waterway river or stream), 66478.11(a) (coastline or shoreline), 66478.12(a) (lake or reservoir)]. For

a development fronting on a public waterway river or stream [*see Gov. Code § 66478.4(c)* (definition)], the developer must also dedicate a public easement along the portion of the bank of the river or stream bordering or lying within the proposed subdivision [*Gov. Code § 66478.5(a)*]. Local agencies are required to determine what constitutes "reasonable public access" in each case, considering all of the following: (1) that access may be by any of a variety of means of travel; (2) the size of the subdivision; (3) the nature of the waterway and the types of recreational, educational, and scientific uses appropriate to it; and (4) the likelihood that the easement will lead to trespass on private property, and reasonable means of avoiding that trespass [*Gov. Code §§ 66478.4(b), 66478.5(b), 66478.11(b), 66478.12(b)*]. Nothing in these provisions requires developers to improve access routes that are primarily for the benefit of nonresidents or nonowners of the subdivision [*Gov. Code §§ 66478.11(g), 66478.14*].

The dedication requirement may be waived if the local agency finds that reasonable public access to the waterway in question is otherwise available within a reasonable distance from the subdivision, and identifies the location of this reasonable public access [*Gov. Code § 66478.8*]. This finding must be set forth on the face of the tentative or final map [*Gov. Code §§ 66478.8, 66478.11(d), 66478.12(d)*]. In addition, electric power generating facilities, industrial subdivisions and certain subdivisions for which map approvals were issued before March 1975 or other approvals were issued before 1987 are exempt from the waterway access requirements [*Gov. Code §§ 66478.9, 66478.10, 66478.11(e), (f)*].

Public access issues are discussed in more detail in California Real Estate Law and Practice, Ch. 291, *Substantive Requirements of the Subdivision Map Act* (Matthew Bender).

[4] Dedication of Land for Elementary School Purposes

Cities and counties are authorized to adopt ordinances requiring subdividers to dedicate land for elementary school purposes, to assure the subdivision residents of adequate public school service, if the subdivision is situated in a school district maintaining an elementary school [*Gov. Code § 66478*]. Requirements may not be imposed that would render the development economically unfeasible, or that would exceed the amount of land ordinarily allowed under State Allocation Board procedures [*Gov. Code § 66478*].

The dedication requirement must be imposed at the time the tentative map is approved [*see § 27A.13[6]*], and terminates automatically after 30 days if the school district has not offered to enter into a binding commitment to accept the dedication. The actual dedication may be made at any time before, concurrently with, or up to 60 days after the filing of the final map on any portion of the subdivision [*Gov. Code § 66478*].

If the offer of dedication is accepted, the school district must repay to the subdivider the original costs of the dedicated land and the costs of improvements made to the land since the subdivider's acquisition of it, taxes assessed from the date of the school district's offer to enter into a binding commitment to accept the dedication, and other costs incurred by the subdivider in the maintenance of the dedicated land [*Gov. Code § 66478*].

An ordinance calling for this type of dedication may not be enforced against a subdivider who has owned the subject land for more than 10 years prior to the filing of tentative subdivision maps [*Gov. Code § 66478*].

[5] Other Purposes for Which Dedication May Be Required

California cities and counties may also condition subdivision map approval on the dedication or an irrevocable offer of dedication of land for streets, alleys (including access rights and abutter's rights), drainage, public utility easements and other public easements [*Gov. Code § 66475*]. In addition, if certain requirements are satisfied, cities and counties may impose dedication requirements for bicycle paths, local transit facilities and solar easements [*Gov. Code §§ 66475.1-66475.3*].

Dedication requirements for the construction or improvement of public roads are valid and do not require the payment of compensation to the subdivider, even though they benefit the public at large and are based on future as well as present needs [*Ayres v. City Council of Los Angeles (1949) 34 Cal. 2d 31, 41, 207 P.2d 1]* .

[6] Filing of Tentative Map

The first step in accomplishing a dedication of land under the provisions of the Subdivision Map Act is to file a tentative map with the clerk of the advisory agency of the city or county in which the proposed subdivision is to be situated [*Gov. Code § 66452*; *see Gov. Code § 66424.5(a)* (tentative map defined)]. The advisory agency is the designated official or official body authorized to investigate and report on design and improvement of proposed divisions of real property, to impose requirements or conditions on the proposed divisions, and to approve or disapprove subdivision maps [*Gov. Code § 66415*]. If there is no advisory agency in the city or county in which the proposed subdivision is to be situated, the subdivider should file the tentative map with the city or county clerk or with the officer or other employee designated by local ordinance [*Gov. Code § 66452*].

For more detailed coverage of the issues involved in the preparation and approval of tentative plans, *see § 30.120*.

[7] Filing and Approval of Final Map

After the tentative map has been approved or conditionally approved by the legislative body for the city or county in which the proposed subdivision is to be situated [*see Gov. Code §§ 66474-66474.9*], the subdivider may prepare a final map that conforms to the tentative map [*Gov. Code § 66456*]. Any dedications or offers of dedication must be made by a statement appearing on the final map [*Gov. Code § 66439(a)*]. The statement must be signed and acknowledged by all parties having any record title interest in the real estate being subdivided, and should contain a declaration identifying any street shown on the map that is not offered for dedication [*Gov. Code § 66439(a), (b)*]. If a subdivider is required to make a dedication for specified public purposes on a final map, the local agency must specify whether the dedication is to be in fee or as an easement [*Gov. Code § 66439(d)(1)*], and the subdivider must include specified language in the dedication clause on the final map or any separate instrument, preceding a description of the dedicated property or easement that is adequate to convey it [*Gov. Code § 66439(d)(2), (3)*]. For further discussion of this requirement, and an illustrative statement form, see *Ch. 30, Subdivision Regulation, § 30.204*.

The final map must be filed with the appropriate local legislative body [*Gov. Code § 66457*], which will review the map to determine whether it conforms to the requirements of the Subdivision Map Act and any local subdivision requirements. The legislative body must approve or disapprove the map at the meeting at which it receives the map or at its next regular meeting following its receipt of the map [*Gov. Code § 66458(a)*].

If any improvements required by the city or county are not completed by the time the final map is approved, the city or county will require the subdivider to enter into an agreement to either (1) complete the improvements at his or her expense or (2) initiate and consummate proceedings for the financing and completion of the improvements under an appropriate special assessment act or the Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 66462(a)*; *see Gov. Code § 53311 et seq.* (Mello-Roos Act)].

For further discussion concerning the processing of final maps, *see* Ch. 30, *Subdivision Regulation* .

[8] Acceptance of Offer Under the Act

At the time it approves the final map, the legislative body must also (1) accept, (2) accept subject to improvement, or (3) reject the offer of dedication, by making a certification or statement on the map [*Gov. Code § 66477.1(a)*]. An acceptance of an offer of dedication under the Subdivision Map Act is effective only on the filing in the office of the county recorder of either the map containing the certification or statement of acceptance or the legislative body's

resolution of acceptance [Gov. Code § 66477.3]. Approval of the subdivision map does not, in itself, constitute acceptance of the offer of dedication [*Ackley v. City & County of San Francisco (1970) 11 Cal. App. 3d 108, 112, 89 Cal. Rptr. 480]* .

An effective dedication may result if a statutory offer is not accepted according to the procedure provided by the applicable statute [*see Gov. Code §§ 66477.1, 66477.2*] but all of the necessary elements for a common law dedication [*see § 27A.12*] are present [*see, e.g., Hanshaw v. Long Valley Road Assn. (2004) 116 Cal. App. 4th 471, 477, 11 Cal. Rptr. 3d 357* ; *Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 143, 37 Cal. Rptr. 141* ; *City of Sacramento v. Jensen (1956) 146 Cal. App. 2d 114, 118-123, 303 P.2d 549]* .

Prior to revocation, a statutory offer of dedication can be accepted in two ways. If the offeror engages in acts sufficient to revoke the offer under common law principles, then the offer is revoked as to the public at large, such that it cannot be implicitly accepted by further public use. However, the offer continues to remain open for formal acceptance by the public entity under the Subdivision Map Act. Thus, a statutory offer of dedication can be revoked as to the public at large, so that it can no longer be accepted by public use, even though the offer must remain open for formal acceptance by the public entity to which the offer was made [*Gov. Code § 66477.2(a)*; *Biagini v. Beckham (2008) 163 Cal. App. 4th 1000, 1016-1017, 78 Cal. Rptr. 3d 171]* .

A local agency to which property is dedicated in fee for public purposes or for making improvements or constructing public facilities must also record a certificate with the recorder for the county in which the property is located. The certificate must contain specified information, and must be attached to the map [*Gov. Code § 66477.5(a)*]. The subdivider that dedicated the land may request the local agency to make a determination that the same public purpose for which the dedication was required still exists [*Gov. Code § 66477.5(b)*]. For this service, the agency may assess a fee in an amount no greater than reasonably required to make the determination [*Gov. Code § 66477.5(b)*]. The determination may be made by reference to a capital improvement plan [*see Gov. Code §§ 65403, 66002*], an applicable general or specific plan requirement, the subdivision map, or other public documents that identify the need for the dedication [*Gov. Code § 66477.5(b)*].

If the local agency determines that the public purpose for which the dedication was required does not exist, it must reconvey the property to the subdivider or his or her successor in interest, except for any portion of the property that is still required for that purpose or for public utilities [*Gov. Code § 66477.5(c)*]. Before vacating, leasing, selling, or otherwise disposing of dedicated property, the agency must give at least 60 days' notice to the subdivider whose name appears on the certificate [*Gov. Code § 66477.5(b)*]. This notice is not required if the property will be used for the same public purpose for which it was dedicated [*Gov. Code § 66477.5(d)*].

These certification and reconveyance requirements do not apply to dedications made before 1990 [*Gov. Code § 66477.5(e)*], or to dedications for open space, parks, or schools [*Gov. Code § 66477.5(a)*].

[9] Effect of Acceptance on Liability of Public Entity and Subdivider

A city or county is not liable for failure to maintain a road within its jurisdiction unless the governing body of the city or county (or its designee) has caused the street to be accepted into its street system [*Sts. & Hy. Code §§ 941(b), 1806*]. Prior to a formal acceptance of the roadway, the subdivider is responsible for its maintenance [*County of Kern v. Edgemont Dev. Corp. (1963) 222 Cal. App. 2d 874, 879, 35 Cal. Rptr. 629]* . The "formal action" required is a resolution of acceptance of the roadway into the city or county system; approval of a subdivision map for recordation or acceptance of an offer of dedication pursuant to *Gov. Code § 66477.1* [*see § 27A.13[8]*] is not sufficient to impose liability in the absence of such a resolution [*Sts. & Hy. Code § 941(c)*; *Ackley v. City Etc. of San Francisco (1970) 11 Cal. App. 3d 108, 112-114, 89 Cal. Rptr. 480]* .

By formally accepting a road into its system, a city or county accepts both the advantages and the burdens of ownership.

Owners of property abutting a city or county road have a reasonable expectation that the city or county will maintain the road in usable condition, and the city or county will be liable for injuries caused by its failure to do so [*Clay v. City of Los Angeles (1971) 21 Cal. App. 3d 577, 584, 98 Cal. Rptr. 582]* . A subdivider/developer who is involved in designing or constructing improvements to the property prior to the dedication may also be liable for any injuries proximately caused by his or her negligence [*Fisher v. Morrison Homes, Inc. (1980) 109 Cal. App. 3d 131, 138, 167 Cal. Rptr. 133]* .

[10] Rejection and Termination of Offer Under the Act

The rejection of an offer of dedication under the Subdivision Map Act does not terminate the offer or foreclose the possibility of a later acceptance [*Gov. Code § 66477.2(a), (b)*]; an offer can be terminated only as provided by the Act [*Gov. Code § 66475*; *County of Orange v. Cole (1950) 96 Cal. App. 2d 163, 170, 215 P.2d 41]* .

If, at the time a final map is approved, the legislative body rejects an offers of dedication of land for storm drainage easements or for streets, paths, alleys, public utility easements or transit rights-of-way that directly benefit the residents of the subdivision, the rejected offers remain open. The legislative body may rescind the rejection and accept any of those offers by resolution at a later date and without further action by the subdivider [*Gov. Code § 66477.2(a)*].

Rejected offers may be terminated in the same manner as prescribed for the summary vacation of streets under the Streets and Highways Code [*Gov. Code § 66477.2(c)*; *see Sts. & Hy. Code § 8300 et seq.*]. The filing and approval of a re-subdivision or reversion to acreage of the tract will also operate as a termination of the previously rejected offer [*Gov. Code § 66477.2(e)*; *but see Gov. Code §§ 66499.16, 66499.17, 66499.18* (exceptions)]. Reversion is discussed in Ch. 30, *Subdivision Regulation* .

A conclusive presumption of rejection of the dedication arises if all of the following conditions are satisfied [*Gov. Code § 66477.2(a)*; *Code Civ. Proc. §§ 771.010, 771.020*]:

- The offer was made by filing a map only.
- No acceptance of the dedication was made and recorded within 25 years after the map was filed.
- The property was not used for the purpose for which the dedication was proposed within that 25-year period.
- The property was sold to a third person after the map was filed and used as if free of the dedication.

If the presumption is established, it will support an action to quiet title brought against the legislative body to which the offer was made [*Code Civ. Proc. § 771.020(a)*; *see Paris v. County of Santa Clara (1969) 270 Cal. App. 2d 691, 699, 76 Cal. Rptr. 66* (presumption also available in inverse condemnation action); *but see Corey v. City of San Diego (1958) 163 Cal. App. 2d 65, 71, 329 P.2d 99* (required conditions strictly construed)]. Quiet title actions are discussed in California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender).

Offers of dedication for access to public waterways [*see* [3], *above*] are deemed abandoned if not accepted within three years after the approval of the final map, except for dedications access to lakes or reservoirs wholly or partially owned by a public agency, which must be accepted within five years [*Gov. Code § 66477.2(b), (d)*]. These offers may also be terminated by resubdivision or reversion, as discussed above [*Gov. Code § 66477.2(e)*].

Offers of dedication for elementary school purposes terminate if the city or county does not offer to enter into a binding commitment to accept the dedication within 30 days after imposing the dedication requirement [*Gov. Code § 66478*; *see § 27A.13[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsLocal Regulation



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12-27A California Legal Forms--Transaction Guide § 27A.14

§ 27A.14 Dedication Under Gov. Code § 7050

With the consent of the city, county, or city and county, as the case may be, a landowner may make an offer of dedication of real property for any public purpose pursuant to *Gov. Code § 7050*. Offers of dedication may be made pursuant to this section for streets, highways, paths, alleys (including access rights and abutter's rights), drainage, open space, public utility or other public easements, parks or other public places, or other public purposes. The offer must be executed, acknowledged, and recorded in the same manner as a conveyance of real property [*Gov. Code § 7050*; *see § 27A.200*]. When recorded in the office of the county recorder, the offer becomes irrevocable and may be accepted at any time by the city council of the city within which the property is located or, if the property is located in unincorporated territory, by the board of supervisors of the county in which the property is located [*Gov. Code § 7050*].

An offer of dedication made pursuant to *Gov. Code § 7050* may be terminated and the right to accept the offer abandoned by the city council or county board of supervisors using the procedure for the summary vacation of streets and highways [*Gov. Code § 7050*; *see Sts. & Hy. Code §§ 8300-8363*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination



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12-27A California Legal Forms--Transaction Guide § 27A.15

§ 27A.15 Covenants for Easement

Local ordinances may authorize a city or county to require the creation of public easements on private lands for purposes of parking, ingress, egress, emergency access, light and air access, landscaping, or open space [*Gov. Code §§ 65870, 65871(a)*]. To create the easement, a property owner must record a covenant of easement in the county where all or a portion of the subject property is located [*Gov. Code § 65873*]. The covenant must describe the property subject to the easement and the property to be benefitted by it, as well as the approval, permit, or designation granted that relied on or required the covenant [*Gov. Code §§ 65871(c)*]. For a discussion of the legal requirements and effects of these easements, *see § 28A.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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12-27A California Legal Forms--Transaction Guide § 27A.16

§ 27A.16 Tax Aspects of Dedication

Gifts to or for the use of a state or a political subdivision of a state, for exclusively public purposes, qualify as charitable contributions for income tax purposes [*I.R.C. § 170(c)(1)*; *Rev. & Tax. Code § 17201*]. The key issue in determining whether a dedication of land qualifies as a gift for these purposes is whether the dedicator's intention was truly charitable; that is, whether the dedication was made without any expectation of receiving a direct economic benefit as a result of the dedication [*Collman v. Commissioner (9th Cir. 1975) 511 F.2d 1263, 1267-1268]* . If the dedicator receives any consideration for the dedication or is compelled to make the dedication by any moral or legal duty, the deduction will not be allowed [*Pettit v. Commissioner, (1974) 61 T.C. 634* ; *H. DeJong (1961) 36 T.C. 896 , aff'd, 309 F.2d 373 (9th Cir. 1962)]* .

Generally, a charitable deduction will not be allowed if the dedication was made in order to comply with a local ordinance and/or to obtain approval of a subdivision map or other proposed project [Forkan v. Commissioner (1977) 36 T.C.M. 798 ; *J. Perlmutter (1965) 45 T.C. 311]* . However, if the dedication is not required by the local legislative body, the value of the land dedicated is deductible as a charitable contribution [*Ben I. Seldin (1969) 28 T.C.M. 1215]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Allowance of DeductionTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsGeneral OverviewTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsDeductions



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[Reserved]

§§ 27A.17[Reserved]



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A. Client Interview--Facts and Documents

12-27A California Legal Forms--Transaction Guide § 27A.100

§ 27A.100 Facts

1. Parties to dedication:

a. Name, address, and telephone number of dedicator.

b. For any agent or other person authorized to act for dedicator:
(1) Name, address, and telephone number.

(2) Title (for corporate dedicator) and/or nature of relationship to dedicator.

(3) Scope of authority.

c. Name, address, and telephone number of any other parties holding record interests in land to be dedicated, and nature of their interests:

(1) Cotenants.

(2) Spouse, if land is either:
(a) Community property [*see* Ch. 111, *Premarital Agreements* and Ch. 112, *Post nuptial Agreements*]; or

(b) Subject to declaration of homestead [*see* Ch. 27B, *Homesteads*].

(3) Holder of prior, recorded security interest in land.

d. Name, address, and telephone number of city or county entity requiring dedication (if dedication is pursuant to

Subdivision Map Act [*see Gov. Code § 66410 et seq.*]) or to whom dedication is proposed to be made.

2. Nature and extent of dedicator's present interest in land to be dedicated.

3. Description of land to be dedicated:

a. City or county in which land is located.

b. Legal description.

c. Address or popular name of parcel.

4. Interest to be transferred by dedication:

a. Fee title.

b. Easement.

c. Other interest.

5. Specific use to which dedicated land is to be put:

NOTE:

Although the majority of dedications in California are for roads, parks, and beaches, land may be dedicated for virtually any public use [***see, e.g.,*** *Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 267 P.2d 10* (streets and highways); *City of Palos Verdes Estates v. Willett (1946) 75 Cal. App. 2d 394, 171 P.2d 26* (parks); *People ex rel. Keller v. La Vista Cemetery Asso. (1949) 175 Cal. App. 2d 197, 345 P.2d 590* (cemetery)].

a. Street, highway, sidewalk, etc.

b. Placement of public utilities.

c. Parks, beaches, or other public open spaces.

d. School or athletic facilities.

e. Recreational facilities.

f. Other.

6. Duration of dedication:

NOTE:

For forms illustrating grants of various interests in land generally, ***see*** Chapter 27, ***Deeds and Recording*** .

a. Perpetual.

b. Specified, limited term.

c. Subject to defeasance on abandonment or unauthorized change in use.

7. Conditions and limitations to be placed on dedication:

NOTE:
A dedicator may impose any reasonable conditions and limitations on a dedication of land [*Hill v. City of Oxnard (1920) 46 Cal. App. 624, 625-626, 189 P. 825* ; ***see*** Ch. 27, ***Deeds and Recording***].

a. Limits on use of property.

b. Interests reserved by dedicator:

(1) Right-of-way.

(2) Oil, gas, or mineral rights.

(3) Riparian rights.

(4) Other.

c. Prohibition against sale of land.

d. Time and manner of acceptance.

8. Reasons for dedication:

NOTE:
The reasons for the dedication will be important for purposes of determining, among other things, the income tax consequences of the dedication [***see § 27A.16***].

a. Dedicator wishes to make charitable gift to public.

b. Dedication is required under Subdivision Map Act [*see Gov. Code § 66410 et seq.*] and/or local ordinance, as condition of subdivision map approval.

c. Dedication will increase likelihood of approval sought by dedicator for land use project other than subdivision project.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsLocal RegulationTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)Allowance of Deduction



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§ 27A.101 Documents

1. Documents concerning title to property and right to dedicate property:

a. Deed evidencing dedicator's ownership of property.

b. Title report or title insurance policy [*see* Ch. 26A, *Title Insurance*].

c. Documents evidencing any existing easements or mortgages, prior dedications, or other restrictions on dedicator's interests in property.

d. Documents evidencing termination of any prior easements, dedications, mortgages, or other restrictions on dedicator's interest in property.

e. Written consents to dedication from all persons other than dedicator holding record interests in land to be dedicated [*see § 27A.100,* P 1.c.].

f. If dedicator is corporation:
(1) Articles of incorporation or bylaws evidencing corporation's general authority to dedicate land.

(2) Copy of resolution of board of directors authorizing dedication, certified by corporate secretary [*see Corp. Code §§ 314, 300(a)*; *see also* Ch. 5, *Directors' Meetings, Actions, and Resolutions*].

(3) Copy of minutes of meeting at which shareholders approved dedication, or other proof that shareholders have approved dedication, if corporate articles require such

approval [*see Corp. Code §§ 153, 300(a)*; *see also* Ch. 8A, *Shareholders' Meetings, Voting, and Agreements*].

g. If dedicator is partnership, statement of partnership authority, with information as to where and when recorded [*see Corp. Code §§ 15010.5, 16303*; *see also* Ch. 15, *General Partnerships*].

2. Documents concerning current dedication, if any:

NOTE:
If the client consults the attorney before taking any action to dedicate property, most of the documents listed below will not yet exist. The attorney should ascertain, however, that the client's activities prior to the consultation have not had the legal effect of creating a valid dedication or offer of dedication.

a. Preliminary documents.

(1) Tentative maps, resolutions, or other documents evidencing intent to offer or accept land for dedication.

(2) Correspondence between dedicator and public body to which dedication is contemplated.

b. Documents evidencing offer of dedication:

(1) Deed containing offer.

(2) Written declaration or offer of dedication.

(3) Final map on which written offer of dedication appears [*Gov. Code § 66439(a)*; *see § 30.204*].

c. Documents evidencing acceptance of dedication:

(1) Acceptance of dedication under Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*], in form of proof of filing with county recorder of:
(a) Final map on which written offer of dedication appears [*Gov. Code § 66477.3*];

(b) Resolution of acceptance by city or county [*Gov. Code § 66477.3*]; or

(c) Certificate of dedication for public purpose other than for open space, parks, or schools [*Gov. Code § 66477.5*].

2. Resolution or ordinance of city or county accepting offer of dedication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferPublic EntitiesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property

LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

12-27A California Legal Forms--Transaction Guide §§ 27A.102-27A.109

[Reserved]

§§ 27A.102[Reserved]



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12-27A California Legal Forms--Transaction Guide § 27A.110

§ 27A.110 Determinations for All Dedications

1. Ascertain that dedicator has capacity to dedicate subject land [*see § 27A.11*]:

a. Dedicator owns subject land;

b. Dedicator is trustee;

c. Dedicator is agent with authority to dedicate subject land; or

d. Dedicator is executor or administrator who has been specifically authorized by probate court to make dedication [*Prob. Code § 9900(a)*; *Gray v. Magee (1933) 133 Cal. App. 653, 662, 24 P.2d 948]* .

2. Ascertain whether effective offer of dedication has already been tendered.

a. Determine whether offer to dedicate land appears in any of following documents:
(1) Deed or other express conveyance.

(2) Correspondence with public body, or in other writing.

(3) Final subdivision map [*Gov. Code § 66439(a)*; *see § 30.204*].

(4) Recorded map or plat showing land subdivided into defined areas separated by roads or streets [*Flavio v. McKenzie (1963) 218 Cal. App. 2d 549, 553, 32 Cal. Rptr. 535]* .

NOTE:
The offer is repeated and reinforced when a landowner sells lots with reference to the

recorded map [*Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 144, 37 Cal. Rptr. 141]* .

(5) Irrevocable offer recorded in same manner as conveyance of real property [*Gov. Code § 7050*; *see § 27A.200*].

b. Determine whether dedicator evidenced unequivocal offer to dedicate land by his or her actions.

c. Determine whether dedicator failed to object to or permit public use of coastal property for five years expressly [*see Civ. Code § 1009(e), (f)*; *see also §§ 27A.12[5], 27A.203*].

d. Determine whether dedicator failed to permit expressly or to take reasonable steps to enjoin, remove, or prohibit public use of land on which government has spent public funds on visible improvements on or across land or on cleaning and maintenance of land related to public use [*Civ. Code § 1009(d)*; *see § 27A.12[5]*].

3. Confirm status of title to subject land:

a. Check for mortgagees, easement holders, other interest holders of record.

b. Check description of property.

4. Ascertain that all record title holders of subject land have consented to or will join in dedication [*see § 27A.100,* P 1.c.].

5. Ascertain whether particular subagency, committee, or individual is authorized to handle dedication matters for city or county and, if so:

a. Determine scope of authority of subagency, committee, or individual; and

b. Obtain appropriate addresses and telephone numbers.

6. Determine who will be legal owner of dedicated property.

a. City.

b. County.

c. Subdivider or property owner (if interest dedicated is easement or other nonfee interest).

NOTE:

The public generally acquires a fee title to land dedicated for parks and similar purposes, and acquires an easement in the case of dedications for streets and highways [***see, e.g.,*** *Morse v. E.A. Robey & Co. (1963) 214 Cal. App. 2d 464, 467-468, 29 Cal. Rptr. 734* ; *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 307, 123 Cal. Rptr. 405]* .

d. Other person or governmental entity.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure

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12-27A California Legal Forms--Transaction Guide § 27A.111

§ 27A.111 Determinations for Common Law Dedications

1. If offer of dedication has already been made by client, determine whether offer has been accepted [*see § 27A.120*, P 4.a.].

2. If offer of dedication has already been made, determine whether offer has been revoked before acceptance:

NOTE:
An offer of dedication cannot be revoked after it has been accepted [*Brick v. Cazaux (1937) 9 Cal. 2d 549, 555, 71 P.2d 588* ; ***see*** *§ 27A.12[4]*].

a. Dedicator has expressly revoked offer.

b. Dedicator has done any act that is inconsistent with public's use of subject land.
(1) Conveying land to third party without reference to offer [*see People v. Southern P. R. Co. (1924) 68 Cal. App. 153, 160, 228 P. 726]* .

(2) Fencing property to prevent public use [*see County of Inyo v. Given (1920) 183 Cal. 415, 420, 191 P. 688]* .

(3) Recording map that is inconsistent with offer [*see Eltinge v. Santos (1915) 171 Cal. 278, 282-283, 152 P. 915]* .

(4) Using subject land in manner that is inconsistent with offer [*see County of Orange v. Cole (1950) 96 Cal. App. 2d 163, 170, 215 P.2d 41]* .

(5) If client has already made offer and wishes to revoke it, determine whether and how that offer may be revoked [*see § 27A.12[4]* and *§ 27A.121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination

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12-27A California Legal Forms--Transaction Guide § 27A.112

§ 27A.112 Determinations for Dedications Under Subdivision Map Act

1. Ascertain that proposed dedication or in-lieu fee requirement involves permissible public purposes.

NOTE:
For a discussion of the validity of dedication and in-lieu fee requirements, *see* *§ 27A.13[1]*.

a. Determine whether dedication is required for permissible purpose, such as:
(1) Streets, sidewalks, bicycle paths, etc. [*Gov. Code §§ 66475, 66475.1*].

(2) Drainage [*Gov. Code § 66475*].

(3) Public utilities or other public easements [*Gov. Code § 66475*].

(4) Local transit facilities [*Gov. Code § 66475.2*].

(5) Solar access [*Gov. Code § 66475.3*; *see Civ. Code § 801.5*].

(6) Parks or recreational facilities [*Gov. Code § 66477*; *see § 27A.13[2]*].

(7) Public access to waterway [*Gov. Code §§ 66478.4(a), 66478.11(a), 66478.12(a)*; *see § 27A.13[3]*].

(8) Elementary schools [*Gov. Code § 66478*; *see § 27A.13[4]*].

2. Ascertain that subdivision proposal satisfies general requirements for subdivision approval [*Gov. Code § 66474*].

NOTE:

If any of the following requirements are not satisfied, the tentative map (or the parcel map, if a tentative map is not required) will not be approved [*Gov. Code §§ 66473.5, 66474*]. See *§ 30.120* for a guide to the preparation, filing, and processing of tentative and final maps.

a. Proposed map is consistent with local general plans [*see Gov. Code §§ 65300-65307*] and specific plans of city or county [*Gov. Code § 66451*; *see Gov. Code §§ 65450-65452*].

b. Proposed subdivision, including provisions for design and improvement, is consistent with local general plans [*see Gov. Code §§ 65300-65307*] and specific plans of city or county [*Gov. Code § 66473.5*; *see Gov. Code §§ 65450-65452*].

c. Site is physically suitable for type of development.

d. Site is physically suitable for proposed density of development.

e. Design of subdivision or proposed improvements are not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

f. Design of subdivision or type of improvements is not likely to cause serious public health problems.

g. Design of subdivision or type of improvements will not conflict with easements acquired by public at large, for access through or use of property within subdivision.

3. If offer of dedication already made, determine whether city or county has accepted offer [*see Gov. Code § 66477.3*; *see also § 27A.120*, P 4.b.].

4. If offer of dedication already made, determine whether passage of time and/or specific acts have terminated offer prior to acceptance [*Gov. Code § 66477.2(a)*].

NOTE:

An offer of dedication cannot be revoked after it has been accepted [*Brick v. Cazaux (1937) 9 Cal. 2d 549, 555, 71 P.2d 588* ; ***see*** *§ 27A.13[10]*; ***see also*** *§ 27A.121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsLocal Regulation



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12-27A California Legal Forms--Transaction Guide §§ 27A.113-27A.119

[Reserved]

§§ 27A.113[Reserved]



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12-27A California Legal Forms--Transaction Guide § 27A.120

§ 27A.120 Offer and Acceptance of Dedication

1. Draft dedication or offer of dedication:

a. If dedication is made pursuant to common law, draft map, deed, grant, or other written dedication or offer to include:

NOTE:
Although a common law offer of dedication must exhibit the grantor's unequivocal intention to make a dedication, the offer need not take any particular form and may even be implied by the grantor's actions [*Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist. (1973) 30 Cal. App. 3d 579, 584-585, 106 Cal. Rptr. 467* ; *Greyhound Lines, Inc. v. Public Utilities Com. (1968) 68 Cal. 2d 406, 413-414, 67 Cal. Rptr. 97, 438 P.2d 801]* . However, an unambiguous written offer and acceptance may serve to avoid future uncertainty and argument over the existence and terms of the dedication. For illustrative deed forms, ***see*** Ch. 27, ***Deeds and Recording*** . Forms for easements are contained in Ch. 28A, ***Easements and Licenses***.

(1) Legal description of land to be dedicated.

(2) Purpose for which land is dedicated.

(3) Names of dedicator and governmental entity to which offer or dedication is made.

(4) Nature of interest to be transferred:
(a) Fee title.

(b) Fee subject to reversion.

(c) Easement.

(d) Other.

(5) Terms, conditions, and duration of offer or dedication.

b. If offer is made pursuant to Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*], use statement of dedication in § 30.204.

c. If offer is made pursuant to *Gov. Code § 7050*, use § 27A.200.

2. Have offer or dedication executed:

a. Obtain certified signatures and acknowledgments from all parties having any record title interest in subject land [*Gov. Code §§ 7050, 27287, 27288, 66439(a)*].

b. If dedicator is corporation, obtain certified signature and acknowledgment of officer authorized to execute offer or dedication for corporation [*Gov. Code §§ 27287, 27288*].

3. Present offer or dedication as follows:

a. For offers of dedication other than under Subdivision Map Act, by mailing executed offer or dedication to county recorder's office in county where dedicated land is located [*Civ. Code § 1169*], along with required payment [*see Gov. Code § 27361*].

b. For offers made pursuant to Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*], by filing final map containing executed statement of dedication with appropriate local legislative body [*Gov. Code § 66457*].

4. Confirm public entity's acceptance of dedication:

a. For common law offers of dedication:

(1) Has public entity to which dedication was offered adopted formal resolution or taken similar official action to accept offer [*see Civ. Code § 1009(c)*; *Gov. Code § 7050*].

(2) Has public entity to which dedication was offered impliedly accepted express, irrevocable, written offer by commencing maintenance or repair work on subject land or similar action [*Ackley v. City Etc. of San Francisco (1970) 11 Cal. App. 3d 108, 113, 89 Cal. Rptr. 480* ; *see Civ. Code § 1009(c)*].

(3) Has public tendered acceptance of express, irrevocable, written offer through use of land [*Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 145, 37 Cal. Rptr. 141]* .

NOTE:
Except in cases involving coastal property or the expenditure of government funds to clean, maintain, or visibly improve the property, an implied acceptance will not be valid if

the offer of dedication was not an express, irrevocable offer in writing [*Civ. Code § 1009(b)-(e)*; ***see*** *§ 27A.12[5]*].

b. For offers of dedication under Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*]:

(1) Has public entity to which dedication was offered done following:

(a) Approved final map and made certification or statement of acceptance of dedication on map [*Gov. Code § 66477.1(a)*]; and

NOTE:
At the time the city or county approves the final map, it must also accept, accept subject to improvement, or reject the offer of dedication [*Gov. Code § 66477.1*]. If any improvements required by the city or county are not completed by the time the final map is approved, the city or county will require the subdivider to enter into an agreement to either (1) complete the improvements at his or her expense, or (2) initiate and consummate proceedings for the financing and completion of the improvements under an appropriate special assessment act or the Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 66462(a)*; ***see*** *Gov. Code §§ 53311-53368.3* (Mello-Roos Act)].

(b) Filed resolution of acceptance of map in office of county recorder [*Gov. Code § 66477.3*].

(c) For dedications other than for open space, parks, or schools, filed certificate of dedication for public purpose in office of county recorder [*Gov. Code § 66477.5*].

(2) If public entity has not formally accepted offer, do circumstances indicate acceptance under common law [*see § 27A.12[1], [5]*; *see also* P 4.a., *above*].

c. For dedications under *Gov. Code § 7050*, has city council or county board of supervisors adopted resolution or ordinance accepting offer of dedication [*see Gov. Code § 7050*; *see also § 27A.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferPublic EntitiesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsLocal Regulation

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12-27A California Legal Forms--Transaction Guide § 27A.121

§ 27A.121 Revocation or Termination of Offer of Dedication

1. To revoke common law offer of dedication, prepare one of following and record in county recorder's office in county where dedicated land is located [*Civ. Code § 1169*]:

NOTE:

An offer of dedication cannot be revoked after it has been accepted [*Brick v. Cazaux (1937) 9 Cal. 2d 549, 555, 71 P.2d 588* ; ***see*** *§ 27A.12[4]*]. For a common law offer of dedication, any act by the owner of the subject land that is inconsistent with the offer may serve to revoke the offer if the offer has not been accepted [***see, e.g.,*** *County of Inyo v. Given (1920) 183 Cal. 415, 420, 191 P. 688* (owner built fence across land offered for streets); *Henry Cowell Lime & Cement Co. v. State (1941) 18 Cal. 2d 169, 173, 114 P.2d 331* (owner erected buildings on land offered for dock)]. However, to avoid uncertainty and possible title disputes, it is advisable to execute and record a deed or other instrument explicitly revoking the offer.

a. Copy of letter or notice to public entity to which offer was made expressly revoking offer.

b. Deed conveying land to third party in which offer is specifically revoked [*see People v. Southern P. R. Co. (1924) 68 Cal. App. 153, 160, 228 P. 726]* .

c. Map or plat that is inconsistent with offer that explicitly revokes earlier dedication [*see Eltinge v. Santos (1915) 171 Cal. 278, 282-283, 152 P. 915]* .

2. Commence action to quiet title if conclusive presumption is established that offer of dedication was not accepted due to satisfaction of all following conditions [*Code Civ. Proc. §§ 771.010, 771.020*]:

NOTE:

Quiet title actions are discussed in California Forms of Pleading and Practice, Ch. 482, ***Quieting Title*** (Matthew Bender).

a. Offer made by filing map only;

b. No acceptance of dedication made and recorded within 25 years after map filed;

c. Land not used for purpose for which dedication proposed within 25 years after map filed; and

d. Land sold to third party after map filed, and used as if free of dedication.

3. Regarding termination and abandonment of offers under Subdivision Map Act pursuant to *Gov. Code § 66477.2*:

a. If offer of dedication for storm drainage easements, public utility easements, streets, paths, alleys, or transit rights of way has been rejected, request that agency to which offer was made consider terminating offer [*Gov. Code § 66477.2(a), (c)*].

NOTE:

An offer pursuant to *Gov. Code § 66477.2(a)* remains open indefinitely even after its rejection by the legislative body to which it was submitted, but may be terminated by action of that body in the manner prescribed for summary vacation of streets and highways [*Gov. Code § 7050*; ***see*** *Sts. & Hy. Code §§ 8300-8363*].

b. Commence action to quiet title if:

NOTE:

Quiet title actions are discussed in California Forms of Pleading and Practice, Ch. 482, ***Quieting Title*** (Matthew Bender).

(1) Conclusive presumption is established that offer of dedication for storm drainage easements, public utility easements, streets, paths, alleys, or transit rights of way was not accepted [*Gov. Code § 66477.2(a)*; *Code Civ. Proc. §§ 771.010, 771.020*; *see* P 2., *above*].

(2) Offer of dedication for public access to ocean coastline or bay shoreline is deemed abandoned because it was not accepted within three years after approval of final subdivision map [*Gov. Code § 66477.2(b), (d)*].

(3) Offer of dedication for public access to or easement along public waterway, river, or stream is deemed abandoned because it was not accepted within three years after approval of final subdivision map [*Gov. Code § 66477.2(b), (d)*].

(4) Offer of dedication for public access to lake or reservoir wholly or partially owned by public agency is deemed abandoned because it was not accepted within five years after approval of final subdivision map [*Gov. Code § 66477.2(b), (d)*].

4. For statutory offers of dedication for elementary school purposes, request letter from city or county confirming rejection of offer.

NOTE:

Offers of dedication for elementary school purposes terminate automatically if city or county has offered to enter into a binding commitment to accept an offer within 30 days after imposing a dedication requirement [*Gov. Code § 66478*; ***see*** *§ 27A.13[4]*]. However, it is good practice to request a confirming letter for the file.

5. If offer was made pursuant to *Gov. Code § 7050* and has not yet been accepted, request that agency to which offer was made consider terminating offer.

NOTE:

An offer pursuant to *Gov. Code § 7050* is irrevocable by the offeror, but may be terminated by action of the local agency in the manner prescribed for summary vacation of streets and highways [*Gov. Code § 7050*; ***see*** *Sts. & Hy. Code §§ 8300-8363*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawOwnership & TransferTransfer Not By DeedDedicationTerminationReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions



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12-27A California Legal Forms--Transaction Guide § 27A.122

§ 27A.122 Preventing Implied Dedication of Private Coastal Property

1. Advise property owner to take one of following actions to protect private property used by public from implied dedication to public use:

NOTE:

Unless the property owner takes one of the actions discussed below, public use of lands lying within 1,000 yards inland of the mean high tide line of the Pacific Ocean or any harbor, estuary, bay, or inlet of that ocean may confer on the public a vested right to continue to use the property in that way, under the theory of implied dedication [*Civ. Code § 1009(e)*; ***see*** *§ 27A.12[5]*]. Property lying inland of the Carquinez Straits Bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less, is not affected by these rules [*Civ. Code § 1009(e)*].

a. Post prescribed signs at each entrance to property or at intervals of not more than 200 feet along boundary of property, and renew at least once a year if removed [*Civ. Code §§ 1008, 1009(f)(1)*]; or

NOTE:

The signs must read substantially as follows: "Right to pass by permission, and subject to control, of owner. *Section 1008, Civil Code*." [*Civ. Code § 1009(f)(1)*; ***see*** *§ 28A.236*].

b. Publish annually, in newspaper of general circulation in county or counties in which subject land is located, notice describing property and containing above-described language [*Civ. Code § 1009(f)(1)*; *see Gov. Code § 6066*];

c. Record, in any county in which any part of subject land is situated, description of property and notice

as provided by *Civ. Code § 813* [*Civ. Code § 1009(f)(2)*]; or

NOTE:

The notice must read substantially as follows: "The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: *Section 813, Civil Code*." [*Civ. Code §§ 813, 1009(f)(2)*; ***see*** *§ 28A.235*].

d. Execute written agreement with any federal, state, or local agency providing for public use of subject property [*Civ. Code § 1009(f)(3)*; *see § 27A.203*].

2. Advise client that he or she may restrict time, place, and manner of public use permitted on land, but that restrictions must be reasonable [*Civ. Code § 1009(g)*].

3. Advise client that after taking any of these actions, he or she cannot prevent permitted public use by physically obstructing access to property or by other means [*Civ. Code § 1009(f)*].

4. If client wishes to revoke notice recorded under *Civ. Code § 813* [*see* P 1c., *above*], prepare and file notice of revocation in same county in which original notice was filed [*Civ. Code § 813*].

5. If client wishes to revoke permission granted by posting of signs, instruct client to remove signs and replace with "No Trespassing" signs [*see Civ. Code § 1009(f)*].

6. If client wishes to revoke permission granted by published notice, instruct client to post on property or publish in newspaper of general circulation in county or counties in which subject land is located notice revoking permission [*see Civ. Code § 1009(f)*; *Gov. Code § 6066*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsLicensesReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawPriorities & RecordingRecording Acts



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12-27A California Legal Forms--Transaction Guide §§ 27A.123-27A.199

[Reserved]

§§ 27A.123[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-27A California Legal Forms--Transaction Guide § 27A.200

§ 27A.200 Irrevocable Offer of Dedication for Street, Highway, or Other Public Purpose [Gov. Code § 7050; Civ. Code § 1009(c)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is an irrevocable offer of dedication of real property to a local government pursuant to *Gov. Code § 7050*. Under that statute, property may be dedicated for any public purpose. For example, an owner may offer to dedicate land for streets, highways, paths, alleys, drainage, open space, parks, or other public places, or may offer to dedicate access rights, abutters' rights, or public utility or other public easements [*Gov. Code § 7050*; *see Civ. Code § 1009(c)*].

The method of dedication provided in *Gov. Code § 7050* is a procedure that may be used in place of any other available dedication procedure. For discussion of alternative methods of dedication, *see § 27A.12*. For an offer of dedication pursuant to the Subdivision Map Act [*Gov. Code § 66410 et seq.*], which appears as a statement on the final map for the subdivision development [*Gov. Code § 66439(a)*], *see* Ch. 30, *Subdivision Regulation* .

[b] Use of Form for Common Law Offer

The form in [2], *below*, may also be used as a common law offer of dedication, in which case the offer need not be made irrevocable. For discussion of common law offers of dedication, *see § 27A.12[2]*.

[c] Public Easements

As an alternative to dedication, local ordinances may authorize the creation of public easements on private lands for specified purposes [*see Gov. Code §§ 65870-65875*]. For a discussion of these easements, *see* Ch. 28A, *Easements and Licenses* .

[d] Dedication Procedure

An offer of dedication made pursuant to *Gov. Code § 7050* must be made with the consent of the city, county, or city and county in which the subject property is located. The offer must be executed, acknowledged, and recorded in that county, in the same manner as a conveyance of real property [*Civ. Code § 1169*; *Gov. Code § 7050*; *see Gov. Code § 27361* (recording fee)]. On recordation in the office of the county recorder, the offer is irrevocable and may be accepted at any time by the governing body of the city or county in which the property is located at the time of acceptance. The offer may be terminated and the right to accept the offer abandoned by the appropriate governing body pursuant to the procedure used for the summary vacation of streets and highways [*Gov. Code § 7050*; *see Sts. & Hy. Code § 8300 et seq.*].

[e] Parties to Offer

No one can dedicate property that he or she does not own, and a dedication or an offer of dedication is not binding on nonconsenting parties who own interests in the affected land [*City of Eureka v. McKay & Co. (1899) 123 Cal. 666, 671, 56 P. 439]* . Thus for an offer of dedication to be effective, any cotenants, holders of prior recorded easements or security interests [*see Archer v. Salinas City (1892) 93 Cal. 43, 44, 28 P. 839]* should be made parties to the offer. If the affected property is community property or subject to declaration of homestead [*see* Ch. 27B, *Homesteads*], both spouses should be made parties to the offer.

If this offer of dedication involves property in which interests are held by any parties other than the principal offeror, the name, nature of interest held, and signature of each other party should be included in the form. An optional "Consents" section has been provided for this purpose.

[f] Liability for Maintaining Street or Highway

A city or county does not become liable for maintaining a street or highway until and unless its governing body (or its designee) has caused the street to be accepted into the city or county system [*Sts. & Hy. Code §§ 941* (county highway), 1806 (city street)]. Conditional acceptance of a subdivision map does not make the dedicated streets shown on the map public roads with a consequent obligation on the part of the city or county to maintain them. The governing body of the city or county must take appropriate affirmative action to make the streets a part of the city or county system [*County of Kern v. Edgemont Dev. Corp. (1963) 222 Cal. App. 2d 874, 879, 35 Cal. Rptr. 629* ; *see Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 244, 267 P.2d 10* (prior law provided for tort liability if city or county had taken some official action consistent with acceptance of dedication)].

[g] Protection of Property Owners Not Making Offer of Dedication

Before 1971, if members of the public used private property for a period of over five years with the full knowledge of the owner, without asking or receiving permission to do so, and without objection by anyone, that use could confer on the public a vested right to continue to use the property permanently, on the theory of implied dedication [*Smith v. Kraintz (1962) 201 Cal. App. 2d 696, 700-701, 20 Cal. Rptr. 471]* . A finding of implied dedication could also be made if the period of use was less than five years [*Gunn v. Fontes (1957) 148 Cal. App. 2d 351, 355-356, 306 P.2d 928]* , on proof of the owner's actual consent to the dedication [*see Gion v. Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* . Certain methods of avoiding an implied dedication, such as the recording of a notice of consent to use the property [*Civ. Code § 813*; *see § 28A.234*] or the posting of signs on the property to bar prescriptive rights [*Civ. Code § 1008*; *see § 28A.236*], were available to landowners.

More effective protection came with the 1971 enactment of *Civ. Code § 1009*, which provides that regardless of whether a private property owner has recorded a notice of consent or posted signs, no use of his or her property by the public will ever ripen into a permanent dedication in favor of the public or a governmental body unless the owner tenders an express, written, irrevocable offer of dedication of the property and that offer is accepted by the county, city, or other public body to which it is made [*Civ. Code § 1009(b)*]. This irrevocable offer of dedication may be made by

using this form [*Civ. Code § 1009(c)*].

The above-described provisions for protecting private property from implied dedication to public use do not apply to certain situations involving private land visibly improved or maintained by a governmental entity for over five years [*Civ. Code § 1009(d)*], or to certain coastal property [*Civ. Code § 1009(e)*]. For discussion of the protections available to owners under these circumstances, *see §§ 27A.12[5]* and *27A.122*.

[2] Form

Irrevocable Offer of Dedication for Street, Highway, or Other Public Purpose [Gov. Code § 7050; Civ. Code § 1009(c)]

Irrevocable Offer of Dedication for Street, Highway, or Other Public Purpose [*Gov. Code § 7050* ; *Civ. Code § 1009(c)*]

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

OFFER OF DEDICATION

I, _____[*name of property owner*], the owner of real property located in _____[*name of city, county, or city and county*] and described as follows: _____[*insert complete legal description of property*], hereby make an _____[*irrevocable offer* or, if offer is made pursuant to common law, *offer*] of dedication of that property to the _____[City/County/City and County] of _____[*name of city, county, or city and county*], for _____[*e.g.*, street and highway purposes *or describe other public purposes*].

The _____[City/County/City and County] of _____[*name of city, county, or city and county*] shall incur no liability with respect to this offer of dedication and shall not assume any responsibility for the offered property or any improvements to the property, until this offer has been accepted by appropriate action of the _____[City Council *or* County Board of Supervisors].

The provisions of this offer shall inure to the benefit of and be binding upon the heirs, successors, assigns, and personal representatives of the respective parties to the offer.

_____ Dated:

_____ [*signature of property owner*]
[*typed name*]

[*Add if any parties other than offeror hold interests in subject property:*]

CONSENTS

The undersigned, holder(s) of the specified interest(s) in the above-described real property, hereby consent(s) to the offer of dedication set forth above.
_____ Dated:

_____ [*signature*]
[*typed name*]
Interest owned: _____

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California

County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is/are] subscribed to the within instrument and acknowledged to me that _____[he/she/they] executed the same in _____[his/her/their] authorized _____[capacity/capacities], and that by _____[his/her/their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27A DEDICATION
PART IV. FORMS

12-27A California Legal Forms--Transaction Guide § 27A.201

§ 27A.201 Agreement Between Landowner and City for Deferment of Public Street Improvement Work

[1] Comment--Use of Form

The form in [2], *below*, is an agreement between a landowner/dedicator and a city to defer construction of improvements to land dedicated for public street purposes. In certain cases, a developer may be required to provide street improvements, in addition to dedication of land for street purposes, as a condition to approval of a development by the city or county in which the development is located. If the area is not sufficiently developed at the time of the dedication and approval to require the immediate installation of the improvements, the developer may enter into an agreement with the city or county to defer the improvements until such time as the city or county determines that they are necessary. This type of agreement may be advantageous to the developer, since it postpones the large capital outlay generally required for public street improvements. The following form is typical of the type of agreements in use, and was adapted from a form used by the City of Lafayette.

For a form of offer of dedication for street or highway purposes, *see § 27A.200*. For a form of agreement between a subdivider and city for construction of subdivision improvements such as streets, sidewalks, sewers, utilities, and related facilities, *see § 30.200*. That agreement would be executed by the parties prior to their execution of this deferment form, and would include a description of the improvements that are the subject of this form [*see* P C of this form].

[2] Form

Agreement Between Landowner and City for Deferment of Public Street Improvement Work

AGREEMENT FOR DEFERMENT OF PUBLIC STREET IMPROVEMENT WORK

This agreement is entered into on _____[*date*], between _____[*name of property owner*] ("Property Owner"), and the City of _____, a municipal corporation, located in the County of _____, State of California ("City").

Recitals

A. Property Owner owns real property in the City of _____, described as follows: _____[*insert legal description*], and more commonly known as _____[*insert street address*].

B. Property Owner applied to City for a _____[permit *or* approval] on _____[*date*], to _____[*specify project or development action requested*].

C. The Planning Commission of City held a public hearing on this application on _____[*date*], heard all proponents and opponents of the matter, and approved the _____[permit or approval], subject, among other conditions, to the following requirements:

Construction of Public Improvements consisting of _____[*specify improvements required; include reference to underlying agreement, if appropriate*].

D. A deferment of installing the improvements is in the best interests of both parties.

THEREFORE, THE PARTIES AGREE as follows:

Benefit of Improvement

1. Property Owner agrees that the improvements required to be installed as a condition of the _____[permit *or* approval] granted by the City Planning Commission are necessary and will materially benefit the abutting property.

Construction of Improvements

2. Property Owner shall construct improvements, consisting of _____[*specify*], in accordance with all applicable laws, statutes, ordinances, rules, regulations, and standards now in force and effect in City, particularly _____[*specify relevant portions of any applicable ordinances*], which are hereby incorporated by reference.

Deferment of Construction

3. City agrees that Property Owner may postpone the construction of the improvements until such time as City in its sole discretion finds that the improvements are necessary, based on the extent of the development along the street and the volume of the traffic. City shall give Property Owner written notice to proceed and Property Owner shall complete the improvements within 90 days after receiving written notice to construct the improvements.

Right of City to Complete Improvements

4. If Property Owner fails to construct the improvements within the 90-day period, City may complete the improvements and assess the cost as a lien against the described real property. City may foreclose the lien if Property Owner fails to reimburse City for the total costs within 30 days after receipt of notice to pay all sums due City on account of the work.

Attorneys' Fees

5. If legal action by City is necessary to enforce this Agreement, Property Owner agrees to pay to City reasonable attorneys' fees and costs, together with interest from the date the improvements should have been constructed.

Release

6. When the improvements are constructed in accordance with this Agreement, City agrees to release the described property from further obligation under this Agreement.

Covenants to Run With Land

7. All covenants in this Agreement shall pertain to and run with the described real property, and this Agreement shall apply to, bind, and inure to the successors in interest of the respective parties.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

PROPERTY OWNER
_____ [*signature of property owner*]
[*typed name*]
CITY OF _____
By _____ [*signature of City representative*]
[*typed name and title*]
Attest: _____ [*signature of city clerk*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-27A California Legal Forms--Transaction Guide § 27A.202

§ 27A.202 Agreement Between Landowner and City for Installation and Maintenance of Landscaping

[1] Comment--Use of Form

The form in [2], *below*, is an agreement in which a landowner, as a condition of the issuance of a building or related permit by a city or other governmental entity, agrees to install and maintain landscaping on the property in conformance with plans approved by the city or other governmental entity. Although an agreement by a landowner to construct and maintain improvements on his or her own property is not strictly a dedication of land, this type of agreement is similar to dedication because the landowner agrees to the imposition of a covenant on his or her land that is intended to provide a public benefit. The effect of the agreement is thus similar to the effect that would be achieved if the governmental entity required the landowner to dedicate a strip of land on which landscaping could be installed. The principal difference is that under the type of agreement illustrated by this form, the landowner retains title to the land but must pay the costs of installing and maintaining the landscaping.

This form was adapted from a form used by the City of Lafayette.

[2] Form

Agreement Between Landowner and City for Installation and Maintenance of Landscaping

AGREEMENT FOR INSTALLATION AND MAINTENANCE OF LANDSCAPING

This Agreement is entered into on _____[*date*], between _____[*name of property owner*] ("Property Owner"), and the City of _____, a municipal corporation ("City").

Recitals

A. Property Owner is the owner of real property in the City of _____described as follows: _____[*insert legal description*];

B. On _____[*date*], City granted a _____[permit *or* approval] to Property Owner

in accordance with City's zoning ordinance;

C. By the terms of the _____[permit *or* approval], Property Owner is required to install and maintain landscaping in accordance with a plan approved by City on _____[*date*], a copy of which is on file in City's office;

D. Both parties recognize that the installation and maintenance of landscaping is an integral part of Property Owner's plan for development of the property and is necessary to carry out the purpose and intent of City's land use regulations and that the development would not have been approved by City without the assurance that this Agreement would be executed by Property Owner.

THEREFORE, THE PARTIES AGREE as follows:

Purpose

1. The purpose of this Agreement is to assure (a) installation of the landscaping in accordance with the landscaping plan previously approved by City and (b) continued maintenance and care of the landscaping.

Property Subject to Agreement

2. The property that is the subject of this Agreement is described in Paragraph A of the recitals above, and is commonly known as _____[*insert street address, if any*].

City Proceedings

3. Reference is made to the _____[*specify nature*] proceedings conducted by the City (File No. _____) and the landscaping plan for the property, copies of which are on file in the City Office at _____[*address*].

Landscaping as Benefit

4. Property Owner agrees that the landscaping that _____[he/she/it] is obligated to provide will materially benefit the property and is necessary to comply with the _____[permit *or* approval] conditions imposed by City as a requirement of the development of the property.

Duty to Maintain Landscaping

5. Property Owner shall diligently maintain and care for the landscaping that _____[he/she/it] installs, using generally accepted methods of cultivation and watering. Property Owner shall maintain that standard of care necessary to prevent the landscaping from deteriorating to the extent that its value as landscaping is destroyed.

City Maintenance of Landscaping

6. If Property Owner fails to meet the standard of maintenance necessary to keep the landscaping in a healthy condition, City will give written notice of the deficiency to Property Owner who shall have 20 days to make the necessary correction. If the correction is not made within 20 days, City may elect to take the steps necessary to assure that the landscaping is maintained and cared for. To do this, City shall serve a notice of its intent to enter the premises for this purpose. City shall either personally serve the notice upon Property Owner or mail a copy of it by certified mail to Property Owner's last known address, or as shown on the tax rolls, at least 15 days in advance of the date when it intends to enter the premises.

For this purpose, City may enter on the property and perform such work as it considers reasonably necessary and proper to restore and maintain the landscaping. City may act either through its own employees or through an independent contractor.

Maintenance Costs as Lien

7. If City incurs costs in restoring or maintaining the landscaping after following the procedure set forth in Paragraph 6 above, City shall make demand upon Property Owner for payment. If Property Owner fails to pay the costs incurred by City within 30 days of the date demand is made, City may make the costs a lien upon the described real property by recording a notice that it has incurred expenses under the terms of this Agreement with the County Recorder of _____ County. The notice shall state the fact that City has incurred the costs under the terms of this Agreement and shall state the amount, together with the fact that it is unpaid and draws interest at the rate of 7 percent per year until paid.

Additional Remedies

8. City may as an alternative to the lien procedure set forth above in Paragraph 7 bring legal action to collect the sums due as the result of the making of expenditures for restoration and maintenance of the landscaping. Property Owner agrees that if legal action by City is necessary to collect the amount expended by City, Property Owner agrees to pay City a reasonable sum as attorneys' fees and court costs, together with interest from the date that is 30 days after City has given its notice under Paragraph 6 above.

Notices

9. Notice given by each party to this Agreement shall be given to the other party at the address shown below.

Notices to City shall be addressed to the City of _____, at _____[*address*].

Notices to Property Owner shall be addressed to _____[him/her/it] at _____[*address*].

When Property Owner ceases to be the owner, _____[he/she/it] may file with City a notice to that effect containing the name and address of the new owner and a copy of the deed. On Property Owner's filing of this information with City, the subsequent grantee is charged with the obligations under this Agreement.

Miscellaneous Provisions

10. (a) If any provision of this Agreement is adjudged invalid, the remaining provisions shall not be affected.

(b) Notice to Property Owner shall be considered to have been given to Property Owner when sent to _____[his or her or its] address above stated.

(c) This writing contains a full, final, and exclusive statement of the Agreement of the parties.

(d) Property Owner appoints City as its attorney-in-fact to do all acts and things that City considers necessary to restore or maintain the landscaping installed under the _____[*specify nature*] proceedings.

(e) If there is more than one signer of this Agreement as Property Owner, their obligations are joint and several.

(f) The obligations on Property Owner under this Agreement terminate as to _____[him/her/it] personally when Property Owner conveys _____[his/her/its] interest in the property and files for record with the County Recorder a copy of assignment of this Agreement. In such case, the new owner takes title

subject to the requirements of this Agreement.

Covenants Run With Land

11. The covenants in this Agreement pertain to and run with the real property described above. This Agreement binds the successors in interest of each of the parties.

Additional Security

12. If, either upon the execution of this Agreement or during the course of performance, City considers that it is necessary to have Property Owner post additional security to guarantee the performance of _____[his/her/its] obligations hereunder, City may require Property Owner to post additional security.

City may require either a cash deposit or a surety bond guaranteeing performance in a form and signed by sureties satisfactory to City. The condition of the security shall be that if Property Owner fails to perform _____[his/her/its] obligations under this Agreement, City may, in the case of a cash bond act for Property Owner using the proceeds, or in the case of a surety bond require the sureties to perform the obligations of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

PROPERTY OWNER
_____ [*signature of property owner*]
[*typed name*]
CITY OF _____
By _____ [*signature*]
[*typed name and title*]
Attest: _____ [*signature of city clerk*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsCovenants Running With LandReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseSpecial Permits & Variances



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-27A California Legal Forms--Transaction Guide § 27A.203

§ 27A.203 Agreement Between Coastal Landowner and Agency Providing for Public Use of Land

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement between an owner of coastal property and a federal, state, or local agency, providing for public use of the owner's property. Public use of privately owned coastal property may ripen over time to confer a vested public right in the property [*Civ. Code § 1009(a), (e)*; *County of Los Angeles v. Berk (1980) 26 Cal. 3d 201, 213-215, 161 Cal. Rptr. 742, 605 P.2d 381]* . An owner of coastal property may prevent this implied dedication by expressly permitting the public use of the property.

One of the ways in which this may be accomplished is by a written agreement between the landowner and any federal, state, or local agency providing for public use of the property [*Civ. Code § 1009(f)(3)*]. The agreement may include reasonable restrictions on the time, place, and manner of public use. No use in violation of these restrictions will be considered public use for purposes of finding an implied dedication [*Civ. Code § 1009(g)*].

For further discussion of implied dedications of land, *see § 27A.12[5]*.

[b] Coastal Property

For purposes of the law governing implied dedication of coastal property, coastal property is property that lies within 1,000 yards inland of the mean high tide line of the Pacific Ocean or any harbor, estuary, bay, or inlet of the Pacific Ocean. Property lying inland of the Carquinez Straits Bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less, is not included in this definition [*Civ. Code § 1009(e)*].

[c] Indemnification

This agreement contains a provision under which the public agency agrees to indemnify the property owner for any liability he or she might incur in connection with the permitted public use. For a discussion of indemnity agreements in general, *see* Ch. 79, *Suretyship, Guaranty, and Indemnity* [*see also Civ. Code §§ 2772-2784.5* (indemnity)].

[d] Recording

This agreement is entitled to be recorded in the county in which the subject property is located, as an instrument affecting title to real property [*Gov. Code § 27280(a)*; *see Gov. Code §§ 27287* (acknowledgment requirement), 27361 (fees)].

[2] Form

Agreement Between Coastal Landowner and Agency Providing for Public Use of Land

Agreement Between Coastal Landowner and Agency Providing for Public Use of Land

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
Space above this line for recorder's use

AGREEMENT FOR PUBLIC USE OF PRIVATE PROPERTY

This Agreement is entered into on _____[*date*] between _____[*name of federal, state, or local agency*] ("Agency") and _____[*name of landowner*], ("Owner") of _____[*landowner's complete address*], the owner of real property located in _____[*name of city or county*], California (the "Property") and described as follows: _____[*insert complete legal description of property*]. Agency and Owner agree as follows:

Public Use of Property by Permission

1. This Agreement is entered into pursuant to *Civil Code Section 1009(f)(3)*, and the Property is coastal property as defined by *California Civil Code Section 1009(e)*. The Owner grants express permission for the public use of the Property; that use is subject to the Owner's control and to the restrictions described in Paragraph 2, below. No use of the Property by members of the public and no maintenance of or improvements to the Property by Agency or any other government body during the effective period of this Agreement shall ripen to confer on the public a vested right in the Property.

Restrictions on Public Use of Property

2. The use of the Property permitted by Owner in Paragraph 1, above, is subject to the following restrictions: _____[*describe any reasonable restrictions on time, place, and manner of permissible use*]. No use in violation of these restrictions shall be considered public use for purposes of a finding of implied dedication. Owner shall not prevent by physical obstruction, notice, or otherwise, any public use that is appropriate under the permission as granted and restricted under this Agreement.

Limitation of Owner's Liability; Indemnity by Agency

3. Owner accepts no responsibility for property damage, personal injury, or death resulting from public use of the Property, whether that use is in conformance with or in violation of the restrictions described in Paragraph 2, above. Agency expressly agrees to defend Owner, on Owner's request, in any actions or proceedings brought against Owner in connection with the public use of the Property under this Agreement, and to indemnify Owner, and hold _____[him/her/it] harmless, for any liability incurred in connection with any such action or proceeding. A judgment against Owner shall be conclusive on Agency as to the nature and amount of liability incurred by Owner.

Maintenance and Improvements

4. Agency shall improve and maintain the Property as follows at Agency's expense: _____[*describe any improvement and/or maintenance measures to be undertaken by Agency*]. Owner shall not make any improvements to the Property without the prior written approval of Agency.

Transfer of Property; Successors and Assigns

5. If Owner ceases to be the owner of the Property, _____[he/she/it] shall file with Agency a notice to that effect containing the name and address of the new owner and a copy of the deed. The new owner shall take title subject to the provisions of this Agreement. If Agency ceases to exist, it shall notify Owner of this fact and of the name of its successor agency by letter addressed to Owner's address as set forth above. The successor agency shall assume Agency's responsibilities under this Agreement.

Termination Date

6. This Agreement shall terminate on _____[*date*], unless renewed by Agent and Owner prior to that date in writing.

OWNER
_____ [*signature of property owner*]
[*typed name*]
_____ [*name of agency*]
By _____ [*signature*]
[*typed name and title*]
Attest: _____ [*signature of city clerk*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California

County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is/are] subscribed to the within instrument and acknowledged to me that _____[he/she/they] executed the same in _____[his/her/their] authorized _____[capacity/capacities], and that by _____[his/her/their] signature[s] on the instrument the person[s], or the entity upon behalf of which

the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityReal Property LawLimited Use RightsLicensesReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS

12-27B California Legal Forms--Transaction Guide 27B.syn

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.syn Synopsis to Chapter 27B: HOMESTEADS

§ 27B.01 California Constitution

§ 27B.02 California Statutes

§§ 27B.03-27B.09 [Reserved]

§ 27B.10 Matthew Bender Publications

[1] California Forms of Pleading and Practice (Matthew Bender)

[2] California Real Estate Law and Practice (Matthew Bender)

[3] Powell on Real Property (Matthew Bender)

§ 27B.11 Law Reviews

§ 27B.12 Text References

§§ 27B.13-27B.19 [Reserved]

§ 27B.20 Nature of Homestead Exemption

§ 27B.21 Amount of Homestead Exemption

§ 27B.22 Property Covered by Homestead Exemption

[1] "Dwelling" Defined

[2] Residency Requirement

[3] Exemption of Proceeds

[4] Impact of Bankruptcy Filing on Homestead Exemption

[5] Protection of Homestead in Bankruptcy Through Lien Avoidance

§ 27B.23 Homestead Declaration

[1] Recording Declaration

[2] Effect of Recorded Lien on Exemption Amount

[3] When Surplus Arises After Lien Is Recorded

[4] Former Declaration of Homestead

§ 27B.24 Procedure for Claiming Exemption

§ 27B.25 Sale of Homestead

[1] Minimum Acceptable Bids

[2] Distribution of Sale Proceeds

[3] Debtor a Co-owner or Owner of Less Than Fee

§ 27B.26 Restrictions on Conveyance or Encumbrance of Dwelling

§ 27B.27 Abandonment of Homestead

§ 27B.28 Homestead Filing Services

§ 27B.29 Forced Sales Under Internal Revenue Code § 7403

§ 27B.30 Failure to Timely Claim Homestead Exemption in Chapter 11 Bankruptcy Case

§ 27B.31 Res Judicata Impact From Failure to Raise Homestead Issue Before Judgment Reached in Action

§§ 27B.32-27B.99 [Reserved]

§ 27B.100 Facts

Scope

§ 27B.101 Documents

Scope

§§ 27B.102-27B.109 [Reserved]

§ 27B.110 Determinations Concerning Availability and Amount of Exemption

Scope

§ 27B.111 Determinations Concerning Declared Homestead

Scope

§§ 27B.112-27B.119 [Reserved]

§ 27B.120 Preparation and Recordation of Optional Homestead Declaration

Scope

§ 27B.121 Claiming Exemption

Scope

§§ 27B.122-27B.129 [Reserved]

§ 27B.130 Reinvestment of Homestead Proceeds

Scope

§ 27B.131 Abandonment of Declared Homestead

Scope

§§ 27B.132-27B.199 [Reserved]

§ 27B.200 Homestead Declaration--One Declared Owner

[1] Comment

[a] Use of Form

[b] Former Declaration of Homestead

[c] Definition of "Dwelling"

[d] Contents of Declaration

[e] Execution, Acknowledgment, and Recordation

[f] Abandonment of Declared Homestead

[2] Form

Homestead Declaration--One Declared Owner

§ 27B.201 Homestead Declaration--Spouses as Declared Owners

[1] Comment--Use of Form

[2] Form

Homestead Declaration--Spouses as Declared Owners

§ 27B.202 Homestead Declaration--On Behalf of Declared Homestead Owner

[1] Comment--Use of Form

[2] Form

Homestead Declaration--On Behalf of Declared Homestead Owner

§ 27B.203 Declaration of Abandonment of Declared Homestead--By Declared Homestead Owner

[1] Comment

[a] Use of Form

[b] Execution and Acknowledgment

[c] Abandonment by Operation of Law

[2] Form

Declaration of Abandonment of Declared Homestead--By Declared Homestead Owner

§ 27B.204 Declaration of Abandonment of Declared Homestead--On Behalf of Declared Homestead Owner

[1] Comment--Use of Form

[2] Form

Declaration of Abandonment of Declared Homestead--On Behalf of Declared Homestead Owner

William M. Hensely, Practice Consultantn*

FOOTNOTES:

(n5)Footnote *. William M. Hensley is an attorney with the Irvine law firm of Jackson, DeMarco & Peckenpaugh. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender).



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12-27B California Legal Forms--Transaction Guide Scope

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Scope

William M. Hensely, Practice Consultantn* Scope

This chapter covers the exemption of homesteads from the enforcement of money judgments [*see Code Civ. Proc. §§ 704.710-704.850*; *see also Code Civ. Proc. §§ 704.910-704.995*]. It focuses on the procedures that must be followed by persons asserting the exemption, and also examines in detail the preparation and uses of the optional homestead declaration. The Transaction Guide briefly outlines the methods for contesting and defending a claimed exemption. However, because litigation-related matters are generally beyond the scope of this publication, the reader should refer to California Forms of Pleading and Practice, Ch. 294, *Homesteads* (Matthew Bender), for a more detailed discussion of litigation relating to the homestead exemption.

This chapter does not discuss the probate homestead, which provides for the selection by a probate court of property to be used by a surviving spouse and minor children [*see Prob. Code §§ 6520-6528*]. For a detailed discussion of the probate homestead, see California Forms of Pleading and Practice, Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads* (Matthew Bender).

FOOTNOTES:
(n6)Footnote *. William M. Hensley is an attorney with the Irvine law firm of Jackson, DeMarco & Peckenpaugh. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender).



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Primary Sources

12-27B California Legal Forms--Transaction Guide § 27B.01

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§ 27B.01 California Constitution

Protection of portion of homesteads. *Cal. Const., art. XX, § 1.5.*



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A. Primary Sources

12-27B California Legal Forms--Transaction Guide § 27B.02

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.02 California Statutes

Regulation of homestead filing services. *Bus. & Prof. Code § 17537.6*.

Restrictions on spouse's ability to transfer or encumber dwelling. *Fam. Code §§ 754, 1100*.

Enforcement of Judgments Law. *Code Civ. Proc. §§ 680.010-724.260*.

Judgment lien on real property. *Code Civ. Proc. §§ 697.310-697.410*.

Sale and collection following levy. *Code Civ. Proc. §§ 701.510-701.680*.

Distribution of sale proceeds. *Code Civ. Proc. §§ 701.810-701.830*.

Exemption for personal property and short-term leaseholds. *Code Civ. Proc. §§ 703.510-703.610*.

Homestead exemption. *Code Civ. Proc. §§ 704.710-704.850*.

Definitions. *Code Civ. Proc. § 704.710*.

Amount. *Code Civ. Proc. § 704.730*.

Procedure for execution sale. *Code Civ. Proc. § 704.740*.

Application for order for sale. *Code Civ. Proc. § 704.750*.

Hearing on exemption. *Code Civ. Proc. § 704.780*.

Minimum acceptable bid. *Code Civ. Proc. § 704.800*.

Distribution of sale proceeds. *Code Civ. Proc. § 704.850*.

Declared homesteads. *Code Civ. Proc. §§ 704.910-704.995*.

Definitions. *Code Civ. Proc. § 704.910*.

Contents of declaration. *Code Civ. Proc. § 704.930*.

Attachment of judgment liens. *Code Civ. Proc. § 704.950*.

Use of proceeds. *Code Civ. Proc. § 704.960*.

Increase of amount pursuant to statutory amendments. *Code Civ. Proc. § 704.965*.

Abandonment. *Code Civ. Proc. §§ 704.980, 704.990*.

Death of owner. *Code Civ. Proc. § 704.995*.



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§§ 27B.03[Reserved]



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12-27B California Legal Forms--Transaction Guide § 27B.10

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.10 Matthew Bender Publications

[1] California Forms of Pleading and Practice (Matthew Bender)

Ch. 254, *Executions and Enforcement of Judgments* .

Ch. 294, *Homesteads* .

Ch. 440, *Probate* .

[2] California Real Estate Law and Practice (Matthew Bender)

Ch. 344, *The Homestead Exemption* .

[3] Powell on Real Property (Matthew Bender)

Ch. 18, *Miscellaneous Possessory Interests in Land* .



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B. Secondary Sources

12-27B California Legal Forms--Transaction Guide § 27B.11

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.11 Law Reviews

Norwood and Jennings, *Before Declaring Bankruptcy, Move to Florida and Buy a House: The Ethics and Judicial Inconsistencies of Debtors' Conversions and Exemptions, 28 Sw. U. L. Rev. 439 (1999).*

Note, *First-to-File, Last-in-Line: After Jones v. Heskett, Creditors Dragged into Bankruptcy Lose the State Law Race of the Diligent, 33 U.S.F.L. Rev. 285 (1999).*

Note, *R.I.P. Chabot? Ninth Circuit Bankruptcy Debtors' Right to Avoid a Judicial Lien on a Homestead Is Still "Impaired" and the Clarification Doctrine in Doubt After In re Wilson, 31 U.S.F.L. Rev. 1051 (1997).*

Comment, *Cramdown Under the New 1338(C)(2) From Dewsnup to Nobelman to the Bankruptcy Reform Act of 1994: Did Congress Intend to Change "Pre-Amendment" Law When it Enacted 1322(C)(2)? 30 Loy. L.A. L. Rev. 841 (1997).*

Comment, *Exemptions Under the Bankruptcy Code: Using California's New Homestead Law as a Medium for Analysis, 72 Cal. L. Rev. 922 (1984).*

Neustader, *New California Exemptions in Bankruptcy: A Constitutional Reprise, 15 Pac. L.J. 1 (1983).*



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12-27B California Legal Forms--Transaction Guide § 27B.12

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.12 Text References

Miller & Starr, California Real Estate, Ch. 13, *Homesteads and the Residential Exemption* (3d ed. 2000).

Witkin, Summary of California Law, vol. 12, *Real Property*, § 53 (10th ed. 2005).



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12-27B California Legal Forms--Transaction Guide §§ 27B.13-27B.19

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§§ 27B.13[Reserved]



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12-27B California Legal Forms--Transaction Guide § 27B.20

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.20 Nature of Homestead Exemption

Unless specifically exempted by statute, all property of a judgment debtor is subject to enforcement of a money judgment [*Code Civ. Proc. § 695.010(a)*]. Property that qualifies as the debtor's "homestead" is one type of property that is exempt from the enforcement of these judgments [*Code Civ. Proc. § 704.720(a)*]. For purposes of the homestead exemption, the term "homestead" refers to the principal dwelling of a judgment debtor or a judgment debtor's spouse [*see Code Civ. Proc. § 704.710(c)*; *see § 27B.22[1], [2]*]. The policy underlying all homestead legislation is to provide a place where family members may reside and enjoy the comforts of a home, free from any anxiety that it may be taken from them against their will because of the homeowner's economic misfortune [*see Johnson v. Brauner (1955) 131 Cal. App. 2d 713, 719, 281 P.2d 50* (citations omitted); *see also Schoenfeld v. Norberg (1968) 267 Cal. App. 2d 496, 498, 72 Cal. Rptr. 924]* . Courts liberally construe the homestead statutes to achieve this underlying purpose [*Amin v. Khazindar (2003) 112 Cal. App. 4th 582, 588, 5 Cal. Rptr. 3d 224* ; *Bank of California v. Virtue & Scheck, Inc. (1983) 140 Cal. App. 3d 1026, 1033-1034, 190 Cal. Rptr. 54* ; *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47* ; *see Hitt v. Glass (In re Glass) (9th Cir. BAP 1994) 164 B.R. 759, 764 , aff'd, (9th Cir. 1995) 60 F.3d 565]* .

The homestead exemption is not a common law doctrine, but is based on a provision of the California Constitution that requires the Legislature to enact laws to protect a certain portion of the homestead and other property of all heads of families from forced sale [*Cal. Const., art. XX, § 1.5*]. The Legislature has implemented this constitutional requirement with the homestead exemption [*see Code Civ. Proc. § 704.730*].

The homestead exemption applies to all procedures for enforcement of a money judgment [*Code Civ. Proc. § 703.010(a)*]. However, it does not apply to enforcement of a judgment for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property, other than enforcement or attachment liens [*Code Civ. Proc. § 703.010(b)*; *see Spencer v. Lowery (1991) 235 Cal. App. 3d 1636, 1638-1639, 1 Cal. Rptr. 2d 795* (sale proceeds from nonjudicial foreclosure are not exempt from execution to satisfy money judgment; further court disagreed with *In re Cole (9th Cir. BAP 1988) 93 B.R. 707, 709* , which applied homestead exemption erroneously to all forced sales, even sale under consensual deed of trust); *see also Code Civ. Proc. §§ 695.010-709.030* (enforcement liens),

481.010-493.060 (attachment liens); *In re Mulch (Bankr. N.D. Cal. 1995) 182 B.R. 569, 573; but see § 27B.23[1]* (regarding recording of homestead declaration)]. Purported contractual or other prior waivers of the exemption are void because they contradict public policy, except for waivers by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought [*Code Civ. Proc. § 703.040*]. Recordation of a homestead declaration is not a prerequisite to claiming the exemption and does not affect the amount of the exemption or the right of levy pursuant to a writ of execution on a dwelling [*Code Civ. Proc. § 704.970(b)*].

PRACTICE TIP:

Advantages of Declared Homestead. Declared and automatic homesteads are very separate protections. A declared homestead is more advantageous than an automatic homestead because (1) the homeowner is entitled to the exemption on a *voluntary sale* of the dwelling, with the proceeds remaining exempt for six months so the homeowner can reinvest the proceeds into another residence, and (2) its protections survive the death of the homestead owner [*see In re Mulch (Bankr. N.D. Cal. 1995) 182 B.R. 569, 573* ; *In re Anderson (9th Cir. 1987) 824 F.2d 754, 756] . William M. Hensley*

The right to convey or encumber a homestead is also unaffected by the making or recording of a homestead declaration [*Code Civ. Proc. § 704.940*; *see § 27B.23*; *see also §§ 27B.200-27B.202* (forms of declaration)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawHomestead Exemptions



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.21 Amount of Homestead Exemption

The amount of the homestead exemption is $75,000 for most unmarried individuals [*Code Civ. Proc. § 704.730(a)(1)*]. This amount is increased to $100,000 if the judgment debtor or his or her spouse who resides in the homestead is, at the time of the attempted sale of the homestead, a member of a family unit, and at least one member of the family unit owns no interest or only a community property interest with the judgment debtor in the homestead [*Code Civ. Proc. § 704.730(a)(2)*]. The amount is increased to $175,000 if the judgment debtor or the debtor's spouse who resides in the homestead is, at the time of the attempted sale of the homestead, either (1) at least 65 years old or (2) physically or mentally disabled and, as a result of that disability, unable to engage in substantial gainful employment [*Code Civ. Proc. § 704.730(a)(3)(A), (B)*]. The $175,000 exemption amount also applies if the judgment debtor or the debtor's spouse who resides in the homestead is, at the time of an attempted involuntary sale of the homestead, at least 55 years old and has a gross annual income of not more than $15,000 if single or $20,000 (including spouse's income) if married [*Code Civ. Proc. § 704.730(a)(3)(C)*].

For purposes of the homestead exemption, a "family unit" consists of a judgment debtor and his or her spouse, or either one of those spouses plus a dependent relative [*Code Civ. Proc. § 704.710(b)*; *see § 27B.110*, P 3(a)(1) (statutory definition of "family unit")].

The combined homestead exemptions of spouses on the same judgment cannot exceed $100,000 or $175,000, whichever is applicable (*see* discussion above), regardless of whether the spouses are jointly obligated on the judgment or whether the homestead consists of community or separate property or both. If both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead will be apportioned between the spouses on the basis of their proportionate interests in the homestead [*Code Civ. Proc. § 704.730(b)*].

PRACTICE TIP:

The statutory limitations could produce a better result for two unmarried persons living together than for spouses similarly situated. If two unmarried persons were living together and were jointly obligated on a judgment, then each could be entitled to a separate homestead exemption of $75,000 on the judgment [

Code Civ. Proc. § 704.730(a)(1)], resulting in a total exemption of $150,000 for the household. However, if the debtors were married to each other, then the combined exemption for the couple would be limited to $100,000 [*Code Civ. Proc. § 704.730(a)(2), (b)*] except in a special case in which the $175,000 exemption could be applied [*Code Civ. Proc. § 704.730(a)(3), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions



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§ 27B.22 Property Covered by Homestead Exemption

[1] "Dwelling" Defined

As mentioned in *§ 27B.20*, a homestead is the principal dwelling of a judgment debtor or a judgment debtor's spouse [*Code Civ. Proc. § 704.710(c)*; *see Code Civ. Proc. § 704.710(d)* ("spouse" defined)]. For the purposes of this definition, "dwelling" means a place where a person resides and may include, but is not limited to, any of the following places [*Code Civ. Proc. § 704.710(a)*]:

- A house or mobilehome, together with the outbuildings and the land on which they are situated;
- A boat or other waterborne vessel;
- A condominium [*see Civ. Code § 783* (definition)];
- A planned development [*see Bus. & Prof. Code § 11003*; *Civ. Code § 1351(k)* (definition)];
- A stock cooperative [*see Bus. & Prof. Code § 11003.2*; *Civ. Code § 1351(m)* (definition)]; or
- A community apartment project [*see Bus. & Prof. Code § 11004*; *Civ. Code § 1351(d)* (definition)].

The use of the phrase "natural person" in *Code Civ. Proc. § 704.740(a)* ("the interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article") makes clear that the homestead exemption does not apply to the sale of an interest in a dwelling owned by a corporation or other artificial person. Thus, in one case the defendant was not entitled to claim an exemption because he had transferred ownership of the property to a corporation of which he was the sole shareholder [*California Coastal Commission v. Allen, (2008) 167 Cal. App. 4th 322, 329, 83 Cal. Rptr. 3d 906]* .

[2] Residency Requirement

A dwelling may not qualify as a homestead unless the judgment debtor or the debtor's spouse resides in the dwelling continuously from the date the judgment creditor's lien attaches to the dwelling until the date of a court determination that the dwelling is a homestead [*Code Civ. Proc. § 704.710(c)*]. Thus, the judgment debtor may not move into a dwelling and claim a homestead exemption in connection with a preexisting lien. An exception to this rule is discussed in *§ 27B.22[3]*.

In a rather unique factual situation, California's homestead law was applied extraterritorially to allow a California bankrupt to claim a homestead on a residence located in Michigan. The Ninth Circuit Court of Appeals affirmed a bankruptcy court decision holding that *Code Civ. Proc. § 704.710(a)* does not limit the "homestead" to dwellings situated in the State of California. Because the bankrupt was in California for the longer portion of the 180-day period before his bankruptcy petition filing, the debtor was allowed to use the California homestead exemption for his Michigan residence [*Arrol v. Broach (In re Arrol) (9th Cir. 1999) 170 F.3d 934, 936-937 , affirming (Bankr. N.D. Cal. 1997) 207 B.R. 662, 664-667*].

A judgment debtor may not establish the dwelling exemption under *Code Civ. Proc. § 704.710(c)* if the debtor moves into the claimed homestead after creation of a judgment lien or after levy [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 984, 4 Cal. Rptr. 3d 434* (citation omitted)].

If a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, that judgment debtor continues to be entitled to a homestead exemption until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time as specified by court order. Nevertheless, the judgment debtor is not entitled to more than one exempt homestead [*Code Civ. Proc. § 704.720(d)* (further providing that notwithstanding *Code Civ. Proc. § 704.710(d)*, for purposes of automatic homestead exemption, "spouse" may include separated or former spouse consistent with this subdivision)].

A person who resided elsewhere while retaining the right to be temporarily present in a room in the residential property he owned when he was in the area did not meet the continuous residence requirement for a principal dwelling under section 704.710 [*California Coastal Commission v. Allen, (2008) 167 Cal. App. 4th 322, 331, 83 Cal. Rptr. 3d 906]* .

[3] Exemption of Proceeds

If a homestead is sold in an execution sale [*see § 27B.25[1]*] or is damaged, destroyed, or acquired for public use, then any proceeds received from the sale or for indemnification or compensation are exempt in the amount of the homestead exemption for a period of six months after they are received by the judgment debtor [*Code Civ. Proc. § 704.720(b)*]. A martial dissolution judgment resulting in a prepetition bankruptcy sale of the homestead to divide community assets is considered a forced sale entitling a bankrupt debtor to an automatic homestead exemption in the sale proceeds [*In re Cumberbatch (Bankr. C.D. Cal. 2003) 302 B.R. 675, 680-681]* .

If the exempt proceeds are used toward the acquisition of a dwelling within this exemption period, the newly acquired dwelling will be a homestead if it is the principal dwelling in which the judgment debtor or the debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling qualifies as a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the second dwelling was acquired [*Code Civ. Proc. § 704.710(c)*]. Alternatively, if the debtor does not reinvest the proceeds in a new homestead, but instead applies a homestead exemption to other property belonging to the debtor or to the debtor's spouse (such as a boat that either spouse already owns) during the six-month exemption period, then the proceeds from the first homestead will immediately lose their exempt status [*Code Civ. Proc. § 704.720(b)*].

Proceeds from the voluntary sale of a regular homestead do not qualify for the exemptions above. However, an exemption is available for proceeds received from the voluntary sale of a declared homestead [*Code Civ. Proc. § 704.960(a)*; *see § 27B.25*].

[4] Impact of Bankruptcy Filing on Homestead Exemption

The filing of a bankruptcy petition is the functional equivalent of a forced or involuntary sale under California law, which means a judgment debtor/bankrupt has the rights, benefits, and protections of California's automatic homestead provisions. Practically speaking, the result is that the homestead trumps the judgment lien so that the debtor's exemption is deducted from the sale proceeds. Even if no execution sale occurs, the bankrupt judgment debtor is entitled to the benefit of the homestead through bankruptcy lien avoidance statutory provisions. The forced sale fiction results because bankruptcy law treats the bankruptcy petition filing as a hypothetical attempt by the trustee to levy on the property [*Katz v. Pike (In re Pike) (9th Cir. BAP 1999) 243 B.R. 66, 70* ; *In re Mulch (Bankr. N.D. Cal. 1995) 182 B.R. 569, 574* ; *In re Donaldson (Bankr. N.D. Cal. 1993) 156 B.R. 51, 53-54]* .

[5] Protection of Homestead in Bankruptcy Through Lien Avoidance

The Bankruptcy Code allows a bankrupt judgment debtor to avoid the fixing of a judgment creditor's lien that impairs the debtor's homestead exemption [*11 U.S.C. § 522(f)(1)*]. *11 U.S.C. § 522(f)* allows a debtor to avoid a judicial lien even though the debtor recorded a homestead declaration after creation of the judicial lien [*Katz v. Pike (In re Pike) (9th Cir. BAP 1999) 243 B.R. 66, 71-73* ; *In re Baxter (9th Cir. BAP 1982) 19 B.R. 674, 675]* .

Bankruptcy law provides a mathematical formula to determine whether a lien impairs an exemption [*Katz v. Pike (In re Pike) (9th Cir. BAP 1999)243 B.R. 66, 71]* . The formula for calculation of the extent to which a lien impairs an exemption is as follows: add the judicial lien, all other liens on the property, and the amount of the homestead exemption the debtor could claim assuming there were no liens on the property, and then subtract from that aggregate sum the value of the debtor's interest in the property absent any liens [*11 U.S.C. § 522(f)(2)*]. One then compares the impairment amount against the judicial lien; if the judicial lien is less than the impairment amount, the lien is avoidable in its entirety [*Bank of Am. Nat'l Trust & Sav. Ass'n v. Hanger (In re Hanger) (9th Cir. BAP 1997) 217 B.R. 592, 595* , *aff'd, (9th Cir. 1999) 196 F.3d 1292]* .

The homestead exemption protects exempted property in a bankruptcy proceeding from certain nondischargeable debts (such as fraud judgment liens) but does not protect the exemption from liens for taxes, alimony, maintenance or support, or debts incurred in connection with educational financial assistance fraud [*11 U.S.C. §§ 522(c), 523*]. However, the exempted property in *§ 522(c)* means only the property subject to the applicable amount of the homestead exemption, with the judgment creditor being able to attach its lien to any nonexempt equity in the real property [*S & C Home Loans, Inc. v. Farr (In re Farr), 278 B.R. 171, 178-179]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsBankruptcy CodeBankruptcy LawExemptionsState LawSpecific ExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawBankruptcyGeneral OverviewReal Property LawHomestead Exemptions



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.23 Homestead Declaration

[1] Recording Declaration

A homeowner may select a dwelling in which he or she, or his or her spouse, resides as a declared homestead by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located [*Code Civ. Proc. § 704.920*]. Although recordation of a homestead declaration does not affect the availability or amount of the exemption [*see § 27B.20*], it qualifies the declared homestead for special treatment in connection with the assertion of the exemption.

PRACTICE TIP:

Homestead Declaration Filed Post-Bankruptcy. Judgment debtors need to timely record their declared homestead paperwork. A declaration of homestead recorded after the homeowners file a bankruptcy petition is a nullity [*In re Halub (Bankr. C.D. Cal. 1982) 25 B.R. 617, 619, n.1* ; *In re Myers (Bankr. E.D. Cal. 1982) 17 B.R. 410, 411] . William M. Hensley*

The primary advantage of recording a homestead declaration is to guarantee that the proceeds of a voluntary sale of a declared homestead will be exempt from the enforcement of money judgments in the amount of the homestead exemption [*see Code Civ. Proc. § 704.730*] for a period of six months after the sale [*Code Civ. Proc. § 704.960(a)*]. This exemption is particularly significant because forced sales of dwellings are rare because of the burdensome procedural requirements [*see § 27B.25*]. Only declared homesteads are eligible for this exemption [*see Code Civ. Proc. § 704.960*].

If the proceeds from the sale of a declared homestead are invested in a new dwelling within six months after the date of a voluntary sale, or within six months after the receipt of proceeds of an execution sale, insurance proceeds, or other indemnification for damage or destruction, the homeowner may select the new dwelling as a declared homestead by recording a homestead declaration within the applicable six-month period. The new homestead declaration will have the same effect as if it had been recorded at the time the prior declaration was recorded [*Code Civ. Proc. § 704.960(b)*]. Thus, the attachment to the new dwelling of any lien created after the date of recordation of the first declaration will be

severely limited [*see* [2], *below*].

This exemption for proceeds from a declared homestead differs from the exemption available to undeclared homesteads in two ways. First, the proceeds from a voluntary sale of an undeclared homestead do not qualify for an exemption. Second, the exempt status of the proceeds of a declared homestead is not terminated if a homestead exemption is applied to other property of the judgment debtor or the debtor's spouse during the six-month exemption period [*see § 27B.22[3]*].

Another reason for recording a homestead declaration is to limit the extent to which a subsequently recorded judgment lien will attach to the declared homestead. Specifically, a judgment lien will only attach to the surplus value of a declared homestead over the total of the following: (1) all liens and encumbrances on the declared homestead at the time the abstract of judgment or certified copy of the judgment is recorded to create the judgment lien, and (2) the homestead exemption [*Code Civ. Proc. § 704.950(c)*; *but see Code Civ. Proc. § 704.950(b)* (no limitations on attachment of judgment lien on judgment for child, family, or spousal support)].

One court has held that *Code Civ. Proc. § 704.950(c)* determines the extent to which a judgment lien attaches to a declared homestead even in a proceeding other than that to enforce a money judgment, notwithstanding the general rule that the homestead exemption does not apply in other such proceedings [*see* discussion of the general rule in *§ 27B.20*]. Specifically, the court held that *Code Civ. Proc. § 704.950(c)* applied to reduce, by the amount of the applicable homestead exemption, the extent to which a judgment lien attached to a declared homestead, for the purpose of determining the amount of excess proceeds to which the judgment lienholder was entitled to receive following a senior lienholder's nonjudicial foreclosure sale of the declared property [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 101-102, 75 Cal. Rptr. 2d 108]* . By contrast, the owner of an *undeclared* homestead may not claim the exemption in a nonjudicial foreclosure sale [*Spencer v. Lowery (1991) 235 Cal. App. 3d 1636, 1638-1639, 1 Cal. Rptr. 2d 795]* . To the extent this distinction is valid, it provides another practical advantage to having a declared homestead: since a junior judgment lienholder is precluded from recovering excess proceeds from a nonjudicial foreclosure sale up to the amount of the exemption, these proceeds will go to the declared homestead owner (unless there are other junior emcumbrancers) [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 96-98, 100-102, 75 Cal. Rptr. 2d 108]* .

[2] Effect of Recorded Lien on Exemption Amount

For purposes of the statutory provisions governing the exemption of proceeds from the sale of a declared homestead and the attachment of a judgment lien to the "surplus value" of a declared homestead [*see Code Civ. Proc. §§ 704.950(c), 704.960*; *see also § 27B.23[1]*], the amount of the homestead exemption depends on the date on which the judgment lien is recorded. If a homestead declaration is recorded before the operative date of an amendment to *Code Civ. Proc. § 704.730* [*see § 27B.21*] that increases the amount of the homestead exemption, the amount of the exemption is ordinarily increased automatically to the new statutory amount. However, if a judgment creditor obtained a lien on the declared homestead before the operative date of the amendment, the pre-amendment exemption amount applies [*Code Civ. Proc. § 704.965*]. These general rules apply to any amendment to *Code Civ. Proc. § 704.730* that increases the amount of the homestead exemption [*Code Civ. Proc. § 704.965*].

[3] When Surplus Arises After Lien Is Recorded

A judgment creditor may reach surplus equity that develops in a declared homestead after the judgment lien is recorded, although there is disagreement as to when the judgment lien attaches. The law has just recently become consistent on allowing a creditor to attach surplus equity in a declared homestead. In an earlier 1997 decision, the Ninth Circuit, in the context of a bankruptcy proceeding, interpreted *Code Civ. Proc. § 704.950(c)* to mean that, if there is no surplus equity at the time a judgment lien is recorded, the lien does not attach to the declared homestead at that time, and cannot attach to it thereafter [*In re Jones (9th Cir. 1997) 106 F.3d 923, 927]* . A California appellate court subsequently declined to

follow this federal interpretation of California law, holding instead that even if a judgment lien does not attach to a declared homestead initially, because there is no surplus equity, it may nevertheless attach later, when and if a surplus develops, and the judgment creditor subsequently may reach this surplus [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1264-1266, 69 Cal. Rptr. 2d 705]* . Another panel of the court of appeal has taken a still different approach, holding that a judgment lien attaches when the abstract of judgment is recorded, but the *amount* of the lien is limited to the amount of surplus, if any, at the time the judgment creditor attempts to enforce the lien [*Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 100-102, 75 Cal. Rptr. 2d 108]* . The Ninth Circuit, in a later 2002 decision, followed the end results in *Teaman* and *Smith*, overruling the determination it earlier reached in *Jones* [*In re Watts (9th Cir. 2002) 298 F.3d 1077, 1082-1083]* . Nevertheless, *Watts* did not resolve the *Teaman-Smith* split in opinion as to when the judgment lien attaches in a surplus equity situation [*In re Watts (9th Cir. 2002) 298 F.3d 1077, 1081 n.4*].

If the declared homestead owner transfers the declared homestead property to a third party buyer, and at the time of transfer there is no surplus equity, the judgment lien thereafter may not be enforced against that property and against the third party buyer [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1267-1269, 69 Cal. Rptr. 2d 705]* . On the other hand, it may be possible for the judgment creditor to reach surplus equity from the seller, when the seller reinvested the proceeds of a sale within six months into another declared homestead, and this other homestead subsequently develops surplus equity [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1269 n.6, 69 Cal. Rptr. 2d 705]* .

PRACTICE TIP:

Third-Party Buyers Not Subject to Judicial Lien When Third Party Created Surplus Equity.

Teaman is important in establishing fairness for third party buyers of a property encumbered by a judicial lien when there is no surplus equity above the homestead exemption at the time of transfer to the third party. In effect, the judgment creditor in *Teaman* was attempting to levy on "surplus equity" created by the third party buyer *after* the sale even though there was no surplus equity for the judgment debtor sellers. This result is consistent with title company practice in such transactions. It is routine for title companies to delete or "write around" a judicial lien in a declared homestead no-equity situation so that the sale to the third party can go through. *Teaman* was consistent with title company real-world practice. Nevertheless, the prudent third party buyer must make sure that the title company provides adequate assurance under these situations to avoid further troubles with the disgruntled judgment creditor. *William M. Hensley*

[4] Former Declaration of Homestead

The homestead declaration is a revised version of the declaration of homestead that was used in California before July 1, 1983 [*see* former *Civ. Code §§ 1237-1349*]. Any declaration of homestead recorded before that date has the same effect as a homestead declaration recorded under current law [*see Code Civ. Proc. § 704.910(d)(2)*]. Similarly, a declarant named in a declaration of homestead and the declarant's spouse are considered to be the declared homestead owners [*Code Civ. Proc. § 704.910(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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12-27B California Legal Forms--Transaction Guide § 27B.24

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.24 Procedure for Claiming Exemption

Two statutory procedures, each applicable to a different type of dwelling, govern the manner in which the homestead exemption must be claimed and challenged. The following discussion summarizes those procedures. For further coverage, see *§§ 27B.120*, *27B.121*.

If the dwelling is personal property such as a mobilehome or a waterborne vessel [*see Code Civ. Proc. § 704.710(a)(2), (3)*], or real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of the levy, the procedure for claiming personal property exemptions applies [*Code Civ. Proc. § 704.740(b)(2)*; *see Code Civ. Proc. §§ 703.510-703.600*]. That procedure requires the claimant, following a levy on the proposed homestead, to file a claim of exemption with the levying officer [*Code Civ. Proc. § 703.520(a)*]. Thereafter, the judgment creditor may challenge the claim by filing certain documents and obtaining a court hearing [*see Code Civ. Proc. §§ 703.550-703.610*].

For all other types of dwellings, including declared homesteads, following a levy the levying officer will inform the creditor that the dwelling will be released unless the creditor applies for an order for sale of the dwelling and files a copy of the application with the levying officer [*Code Civ. Proc. § 704.750(a)*]. If the creditor obtains a court order for sale, the sale will be subject to numerous procedural requirements [*see Code Civ. Proc. §§ 701.510-701.680, 704.800*] which, among other things, provide that the sale cannot be completed unless the judgment debtor will receive sale proceeds equal to the amount of the exemption [*Code Civ. Proc. § 704.800(a)*; *see § 27B.25[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.25 Sale of Homestead

[1] Minimum Acceptable Bids

A bid received at a sale of a homestead pursuant to a court order for sale cannot be accepted unless it exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including, but not limited to, any attachment or judgment lien [*Code Civ. Proc. § 704.800(a)*]. The phrase "all liens and encumbrances" for purposes of a minimum bid refers to those that are senior to the executing judgment creditor lien and does not include this lien [*Bratcher v. Buckner (2001) 90 Cal. App. 4th 1177, 1189, 109 Cal. Rptr. 2d 534* ; *Rourke v. Troy (1993) 17 Cal. App. 4th 880, 885-886, 21 Cal. Rptr. 2d 660]* . A bid meeting that requirement is referred to as a minimum bid. If no minimum bid is received, then the homestead cannot be sold and must be released. Furthermore, the creditor will be prohibited for one year from obtaining another order for sale and will not be entitled to recover reasonable costs incurred in the proceedings [*Code Civ. Proc. §§ 704.800(a), 704.840*].

Under certain circumstances, even a minimum bid may not be acceptable. If the minimum bid is not equal to 90 percent or more of what the court determines to be the fair market value of the dwelling [*see Code Civ. Proc. § 704.780(b)*], then the homestead cannot be sold unless the court, on the motion of the judgment creditor, either grants permission to accept the highest bid that exceeds the amount of the minimum bid or makes a new order for sale of the homestead [*Code Civ. Proc. § 704.800(b)*]. In fact, the court may even decline to make an order for the sale if it has determined that the sale of the dwelling would not be likely to produce a sufficient minimum bid [*Code Civ. Proc. § 704.780(b)*].

PRACTICE TIP:

Court Has Great Discretion to Order Sale Even If No Surplus Equity Appears to Exist. Courts have great discretion to order a sale under homestead procedures. Even if the fair market value of the homesteaded property appears less than the value of senior liens to the executing judicial lien, a court can still order a sale on the premise that the property is unique and draw actual bids that will cover the senior liens, the homestead exemption, and part or all of the judgment creditor's lien [*see, e.g., Bratcher v. Buckner (2001) 90 Cal. App. 4th 1177, 1189-1190, 109 Cal. Rptr. 2d 534* ; *In re Bernard (9th Cir. 1994) 40 F.3d 1028, 1030 n.2 , cert. den. sub nom., Bernard v. Coyne (1995) 514 U.S. 1065]* . *William M.*

Hensley

[2] Distribution of Sale Proceeds

The levying officer must distribute the proceeds of the sale of a homestead in the following order [*Code Civ. Proc. § 704.850(a)*; *see Code Civ. Proc. §§ 701.820*, *701.830*, 701.850(b) (procedural requirements governing distribution of proceeds)]:

(1) To the discharge of all liens and encumbrances on the property [*see Code Civ. Proc. § 704.810* (amount payable to satisfy lien or encumbrance must not include any prepayment penalty)];

(2) To the judgment debtor in the amount of the homestead exemption [*see Code Civ. Proc. § 704.720*];

(3) To the levying officer for the reimbursement of the officer's costs for which an advance has not been made;

(4) To the judgment creditor to satisfy the following in the order in which they are listed: costs and interest accruing after issuance of the writ authorizing the sale, and the amount due on the judgment with costs and interest, as entered on the writ; and

(5) To the judgment debtor in the amount remaining.

The court's order for sale of the dwelling must specify the amount of proceeds of sale that is to be distributed to each person having a lien or encumbrance on the dwelling [*Code Civ. Proc. § 704.780(b)*]. Even when a court has not complied with this directive and a sale has occurred, this technical defect has been held not a sufficient basis for a reversal. Rather, the appellate court in one case simply remanded the matter with instructions for the lower court to modify its order and specify the sale distributees in line with *§ 704.780(b)* and the appellate court's ruling on a "circuity of liens" issue [*Bratcher v. Buckner (2001) 90 Cal. App. 4th 1177, 1190, 109 Cal. Rptr. 2d 534]* .

PRACTICE TIP:

Circuity of Liens. *Bratcher v. Buckner (2001) 90 Cal. App. 4th 1177, 1185-1188, 109 Cal. Rptr. 2d 534* , is must reading for practitioners facing a "circuity of liens" problem. This issue surfaces when a lienholder agrees to subordinate the priority of his or her lien to another. Under these circumstances, *Bratcher* discusses the proper distribution of funds to the various creditors, which will frequently come into play in a homestead exemption context. *William M. Hensley*

One California intermediate appellate court decision has faced the interplay between homestead protections and execution sales occurring in the absence of a court order. Even if there was an execution sale in violation of the *Code Civ. Proc. § 704.740* requirement to obtain a court order for a homestead, the remedies are limited if the property was sold to third-party purchasers. When there was a sale to a third-party purchaser, execution sales are absolute, with the judgment debtor having a damages remedy against the judgment creditor or sheriff but not having the option to set aside the sale to the third party [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 981-982, 4 Cal. Rptr. 3d 434* ; *Code Civ. Proc. § 701.680(c)(2)*]. However, if the execution sale purchaser was the judgment creditor, the judgment debtor or a successor has 90 days from the sale date to bring an action to set aside the sale for any irregularities in the proceeding [*Code Civ. Proc. § 701.680(c)(1)*].

Another appellate court decision has held that general receivership statutes do not provide an "alternative" remedy allowing judgment creditors to bypass the Enforcement of Judgments Law provisions for handling sales of dwellings subject to a homestead exemption [*Wells Fargo Financial Leasing, Inc. v. D&M Cabinets (2009) 177 Cal. App. 4th 59, 69, 99 Cal. Rptr. 3d 97]* . A judgment creditor must proceed via *Code Civ. Proc. § 704.740* and obtain a court order,

regardless of whether the property is to be sold by a sheriff or a receiver [*Wells Fargo Financial Leasing, Inc. v. D&M Cabinets (2009) 177 Cal. App. 4th 59, 66, 99 Cal. Rptr. 3d 97]* .

[3] Debtor a Co-owner or Owner of Less Than Fee

A special procedure applies if the dwelling constituting the homestead is owned by the judgment debtor as a joint tenant or tenant in common or if the debtor's interest in the dwelling is a leasehold or other interest less than a fee interest. In such a case, the debtor's interest in the dwelling, rather than the dwelling itself, will be sold at the execution sale. If there is more than one judgment debtor, the interests of the debtors in the dwelling will be sold together and each of the debtors entitled to a homestead exemption is entitled to apply his or her exemption to his or her own interest [*Code Civ. Proc. § 704.820*]. If the judgment debtor's interest is a community property interest, then the entire community interest is subject to enforcement [*see Code Civ. Proc. § 695.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawHomestead Exemptions

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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.26 Restrictions on Conveyance or Encumbrance of Dwelling

The conveyance or encumbrance of a dwelling is also subject to any applicable restrictions imposed by the laws governing marital property. Community property is subject to the enforcement of a money judgment as provided in these laws [*Code Civ. Proc. § 695.020(a)*; *see Fam. Code § 700 et seq.*]. Under these provisions, a spouse may not sell, convey, or encumber community personal property used as the family dwelling without the written consent of the other spouse [*Fam. Code § 1100(c)*]. Furthermore, if notice of the pendency of a proceeding for dissolution of the marriage, for nullity of the marriage, or for legal separation of the parties is recorded in any county in which the husband or wife resides on real property that is the separate property of the other, for a period of three months after recordation the real property cannot be transferred, encumbered, or otherwise disposed of voluntarily or involuntarily without the joinder of both spouses except pursuant to a court order [*Fam. Code § 754*].

For further discussion of marital property, see Ch. 110, *Marital Settlement Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawHomestead Exemptions



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.27 Abandonment of Homestead

A declared homestead owner may abandon his or her homestead by a declaration of abandonment [*Code Civ. Proc. § 704.980(a)*; *see §§ 27B.203, 27B.204* (forms of declaration of abandonment)]. A declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration [*Code Civ. Proc. § 704.980(c)*]. A declared homestead will be considered to be abandoned by operation of law with regared to a declared homestead owner if he or she, or a person authorized to act on his or her behalf, executes, acknowledges, and records a new homestead declaration on different property [*Code Civ. Proc. § 704.990(a)*]. However, if the declared homestead owner records a new homestead declaration that includes property declared in a previously recorded homestead declaration, the new declaration will not be considered to be an abandonment of the old declaration to the extent that the prior declaration is still valid [*Code Civ. Proc. § 704.990(b)*]. An abandonment by operation of law will not affect the declared homestead of any person other than the declared homestead owner named in the new declaration [*Code Civ. Proc. § 704.990(a)*].

In one case, a California intermediate appellate court held an implied abandonment occurs whenever a homestead declarant establishes another residence as his or her principal dwelling. The court determined abandonment was implied because the automatic residential exemption provided the same protection against the judicial lien in the declarant's new residence [*Webb v. Trippet (1991) 235 Cal. App. 3d 647, 652 n.2, 286 Cal. Rptr. 742]* .

An earlier bankruptcy decision recognized that continued residency is not a requirement for a valid declared homestead exemption, concluding that the California Legislature had not codified an abandonment of a homestead from the mere vacating of the homestead premises [*In re Anderson (9th Cir. 1987) 824 F.2d 754, 757]* . Then, in 2002, a bankruptcy judge found an implied abandonment when the homestead declarant had not lived on the property for seven years, rented the property to another, and depreciated the property on his tax returns [*In re Kelley (Bankr. N.D. Cal. 2002) 285 B.R. 1, 2 , aff'd on other grounds (9th Cir. BAP 2003) 300 B.R. 11]* . The bankruptcy judge in *Kelley* also criticized a reading of *Anderson* that suggested continued residency was a requirement for a valid California declared homestead exemption [*In re Kelley (Bankr. N.D. Cal. 2002) 285 B.R. 1, 3 , aff'd on other grounds (9th Cir. BAP 2003) 300 B.R. 11]* . Any conflict was cleared up subsequently when the Ninth Circuit Bankruptcy Appellate Panel found that the

bankruptcy judge in *Kelley* erred in finding an implied abandonment just because the homestead declarant showed no intention of using the property as a personal residence [*Kelley v. Locke (In re Kelley) (9th Cir. BAP 2003) 300 B.R. 11, 18-19]* . The Bankruptcy Appellate Panel also affirmed the viability of *Anderson*, reading it to mean that a declarant's moving away from the homestead does not destroy the exemption status [*Kelley v. Locke (In re Kelley) (9th Cir. BAP 2003) 300 B.R. 11, 19-20]* .

PRACTICE TIP:

Abandonment. The likely upshot of these cases is that simply moving away from the homestead does not destroy the declared exemption; rather, abandonment requires clear evidence the declarant had actually established a new residence as the principal dwelling. *William M. Hensley*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsState LawSpecific ExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawBankruptcyGeneral OverviewReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.28 Homestead Filing Services

A homestead filing service is any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration [*Bus. & Prof. Code § 17537.6(e)(1)*; *see Bus. & Prof. Code § 17537.6(e)(2)*; *Code Civ. Proc. § 704.910(d)* ("homestead declaration" defined)]. Services performed by attorneys are specifically excluded from this definition [*Bus. & Prof. Code § 17537.6(e)(1)*]. Offerers of homestead filing services must do all of the following:

- Provide a statutory disclosure regarding homestead declarations [*see Bus. & Prof. Code § 17537.6(b)(1)*]. This disclosure must be (1) inserted in all advertising and promotional material disseminated by the offerer [*see Bus. & Prof. Code § 17537.6(b)(2)*], (2) recited at the beginning of any oral solicitations or broadcast advertisements [*see Bus. & Prof. Code § 17537.6(b)(3)*], and (3) provided in written form before any person who responds to an oral solicitation or broadcast advertisement is obligated to pay for the service [*see Bus. & Prof. Code § 17537.6(b)(3)*].

- Deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant, but no later than 10 days after the declaration is notarized. The offerer must pay all notarization and recordation fees [*Bus. & Prof. Code § 17537.6(c)*].

- Refrain from charging for these services until after the homestead declaration is recorded, and refrain from charging more than $25 (including notarization and recordation fees) for these services [*Bus. & Prof. Code § 17537.6(d)*].

- Refrain from making any untrue or misleading statements in connection with the offering or performance of the service [*Bus. & Prof. Code § 17537.6(a)*; *see Bus. & Prof. Code § 17537.6(a)(1)-(8)* (examples of "untrue or misleading statements")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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12-27B California Legal Forms--Transaction Guide § 27B.29

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.29 Forced Sales Under Internal Revenue Code § 7403

I.R.C. § 7403, which authorizes actions to enforce tax liens or to subject property to the payment of taxes, empowers a federal district court to sell a taxpayer's homestead to satisfy a federal tax lien, subject to the following limitations and considerations:

- In distributing the resulting sale proceeds, any third parties who also had interests in the homestead must be compensated.

- Further, because financial compensation may not always be an adequate substitute for a home, the United States Supreme Court has stated that district courts have a "degree of equitable discretion" to determine whether or not to authorize a forced sale. In so ruling, the Court applied *I.R.C. § 7403* to the Texas homestead law, which grants each spouse a separate and individual interest (amounting to a vested property right) in the homestead, and the Court concluded that a homestead estate owned by a nondelinquent spouse in Texas may be converted into its fair cash value by a federal tax collector [*United States v. Rodgers (1983) 461 U.S. 677, 694, 701-709, 103 S. Ct. 2132, 76 L. Ed. 2d 236]* .

The California homestead exemption does not expressly grant each spouse a separate and individual interest in the homestead. Instead, it grants both the judgment debtor and the judgment debtor's spouse the right to claim the homestead exemption, and provides that the exemption is $100,000 for a married couple [*Code Civ. Proc. § 704.730(a)(2)*] (or it could be $175,000 in a special case [*Code Civ. Proc. § 704.730(a)(3)*]), regardless of whether the spouses are jointly obligated on the judgment or whether the homestead consists of community property or separate property or both [*Code Civ. Proc. § 704.730(b)*; *see § 27B.21*]. Based on the Supreme Court's decision in *Rogers*, it appears that a federal district court could force the sale of a California homestead pursuant to *I.R.C. § 7403*. Thereafter, the nondelinquent spouse would probably have to be compensated because that spouse's right to claim the full amount of the exemption independently is similar to the separate and individual right available in Texas. However, the spirit of the decision seems to suggest that the courts should exercise discretion and not force a sale when a minimum acceptable bid cannot be obtained [*see § 27B.25[1]*], although California courts have not yet made a definitive statement

concerning the extent to which this decision applies to California homesteads.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Actions to Enforce Liens & Subject Property To Tax



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.30 Failure to Timely Claim Homestead Exemption in Chapter 11 Bankruptcy Case

When debtors failed to claim a homestead exemption before confirmation of their Chapter 11 bankruptcy plan, the Ninth Circuit Bankruptcy Appellate Panel barred the debtors from later claiming an exemption by finding their confirmed plan raised a res judicata bar to the subsequent effort to claim the exemption [*Knupfer v. Wolfberg (In re Wolfberg (B.A.P. 9th Cir. 2000) 255 B.R. 879, 882-884]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsBankruptcy CodeBankruptcy LawExemptionsState LawSpecific ExemptionsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataReal Property LawBankruptcyGeneral OverviewReal Property LawHomestead Exemptions



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AUTHOR: William M. Hensely, Practice Consultant

§ 27B.31 Res Judicata Impact From Failure to Raise Homestead Issue Before Judgment Reached in Action

When a homestead claim was not raised in prior equitable and legal proceedings resulting in a judgment on property title issues, res judicata and collateral estoppel principles barred relitigation of the homestead claim after a judgment had been reached to the detriment of the litigants prevailing in the prior proceedings [*Krier v. Krier (1946) 28 Cal. 2d 841, 843-844, 172 P.2d 681* ; *Amin v. Khazindar (2003) 112 Cal. App. 4th 582, 590-591, 5 Cal. Rptr. 3d 224]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataReal Property LawHomestead Exemptions



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[Reserved]

§§ 27B.32[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-27B California Legal Forms--Transaction Guide § 27B.100

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.100 Facts

1. Name, address, and telephone number of homestead claimant.

2. Claimant's marital status.

3. Whether claimant resides in dwelling to be homesteaded.

4. If claimant is married, name of spouse and whether:

a. Claimant or spouse or both are judgment debtors on same or different judgments;

NOTE:
Although either the judgment debtor or the judgment debtor's spouse may claim the homestead exemption [*see Code Civ. Proc. § 704.710(c)*], the remainder of this Transaction Guide assumes that the judgment debtor is the claimant.

b. Spouse resides in dwelling to be homesteaded; and

NOTE:
If a judgment debtor and the judgment debtor's spouse reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the sale of the exempt homestead are exempt [*Code Civ. Proc. § 704.720(c)*]. If the spouses cannot agree on the selection of the exempt homestead, the court will decide [*Code Civ. Proc. § 703.110(c)*]. If a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, that judgment debtor continues to

be entitled to a homestead exemption until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time as specified by court order. Nevertheless, the judgment debtor is not entitled to more than one exempt homestead [*Code Civ. Proc. § 704.720(d)* (further providing that notwithstanding *Code Civ. Proc. § 704.710(d)*, for purposes of automatic homestead exemption, "spouse" may include separated or former spouse consistent with this subdivision)].

c. Judgment decreeing legal separation has been entered.

NOTE:

For purposes of the homestead exemption statutes, "spouse" does not include a married person following entry of a judgment decreeing legal separation of the parties, unless the married persons reside together in the same dwelling [*Code Civ. Proc. § 704.710(d)*]. Thus, the requirement that spouses select one exempt homestead [*see* NOTE to P (b)*, above*] is inapplicable to legally separated spouses, and each such spouse may claim a separate homestead.

5. Age of claimant and spouse.

6. Name, address, relationship, age, and telephone number of each member of "family unit" of claimant and spouse [*see Code Civ. Proc. § 704.710(b)* (definition); *see also* NOTE following *§ 27B.110*, P 3, (a), (1) (statutory definition of "family unit")].

7. Whether any family member requires care or support.

8. Type and character of property to be homesteaded.

9. Legal description (and address, if different from claimant's address in (1), *above*) of property.

10. Type of interest owned by each spouse in dwelling to be homesteaded, e.g.:

a. Joint tenancy;

b. Community property; or

NOTE:

Property acquired during marriage in joint form is presumed to be community property for purposes of division of property on dissolution of marriage or legal separation [*Fam. Code § 2581*].

c. Tenancy in common.

11. Date claimant and/or spouse moved into dwelling.

12. Whether claimant or spouse has previously claimed a homestead; if so:

a. Parties to homestead;

b. Property homesteaded;

c. Date executed;

d. Date recorded;

e. Where recorded (book, page, and county);

f. Whether prior homestead has been validly abandoned [*see § 27B.27*]:

(1) By declaration of abandonment [*Code Civ. Proc. § 704.980*; *see §§ 27B.203, 27B.204*]; or

(2) By operation of law [*Code Civ. Proc. § 704.990*]; and

g. Whether prior homestead was sold at execution sale, damaged, or destroyed, and, if so:

(1) Date of event; and

(2) Manner in which proceeds were handled.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawHomestead Exemptions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-27B California Legal Forms--Transaction Guide § 27B.101

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.101 Documents

1. Copy of deed or contract of sale covering property to be homesteaded.

2. Copies of liens, encumbrances, or judgments affecting property, claimant, or spouse.

3. Copies of any prior declarations of homestead by claimant or spouse.

4. Copies of any prior declarations of abandonment or conveyances of property on which homestead was claimed.

5. Copy of any judgment of legal separation or dissolution of marriage of debtor and spouse.

6. Copy of any transmutation agreement between debtor and spouse regarding manner of holding homestead property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal SeparationReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawHomestead Exemptions



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-27B California Legal Forms--Transaction Guide §§ 27B.102-27B.109

AUTHOR: William M. Hensely, Practice Consultant

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§§ 27B.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

12-27B California Legal Forms--Transaction Guide § 27B.110

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.110 Determinations Concerning Availability and Amount of Exemption

1. Determine whether proposed homestead is one of following, all of which qualify as "dwelling" [*Code Civ. Proc. § 704.710(a)*] and therefore potentially qualify for exemption [*Code Civ. Proc. § 704.720(a)*]:

a. House or mobilehome together with outbuildings and land on which they are situated.

b. Boat or other waterborne vessel.

c. Either:
(1) Condominium [*see Civ. Code § 783* (definition)];

(2) Planned development [*see Bus. & Prof. Code § 11003*; *Civ. Code § 1351(k)* (definition)];

(3) Stock cooperative [*see Bus. & Prof. Code § 11003.2*; *Civ. Code § 1351(m)* (definition)]; or

(4) Community apartment project [*see Bus. & Prof. Code § 11004*; *Civ. Code § 1351(d)* (definition)].

d. Other place where judgment debtor or debtor's spouse resides.

NOTE:
If neither the judgment debtor nor the debtor's spouse actually resides in the proposed homestead, then the structure is not a dwelling and cannot qualify for the exemption [*Code Civ.*

***Proc. § 704.710(c)*]**.

2. Determine whether dwelling meets both of following requirements and thus qualifies as homestead [*Code Civ. Proc. § 704.710(c)*]:

NOTE:
The following requirements do not apply to declared homesteads [*Code Civ. Proc. § 704.920*; ***see Code Civ. Proc. § 704.910(a)*** **(definition); see also *§§ 27B.23, 27B.200-27B.202*].**

a. Dwelling is principal dwelling in which judgment debtor or debtor's spouse actually resided on date judgment creditor's lien attached to dwelling; and

b. Debtor or spouse have resided in dwelling continuously from date judgment creditor's lien attached until date of court's determination that dwelling qualifies as homestead.

3. Determine amount of exemption [*Code Civ. Proc. § 704.730(a)*]:

a. If both of following apply, $100,000 [*Code Civ. Proc. § 704.730(a)(2)*]:

(1) Debtor or spouse who resides in homestead is at time of attempted sale of homestead a member of a family unit; and

NOTE:
For these purposes, "family unit" means any of the following: (1) the judgment debtor and the judgment debtor's spouse if both reside together in the homestead; (2) the judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead: the minor child or minor grandchild of the judgment debtor or the judgment debtor's spouse or the minor child or grandchild of a deceased spouse or former spouse; the minor brother or sister of the judgment debtor or judgment debtor's spouse or the minor child of a deceased brother or sister of either spouse; the father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor's spouse or the father, mother, grandfather, or grandmother of a deceased spouse; or any relative described under this item (2) who is unmarried, has obtained the age of majority, and is unable to take care of or support himself or herself; or (3) the judgment debtor's spouse and at least one of the persons listed in item (2), *above,* whom the judgment debtor's spouse cares for or maintains in the homestead [*Code Civ. Proc. § 704.710(b)*].

(2) At least one member of family unit owns no interest, or community property interest only with judgment debtor in homestead.

b. If either of following applies, $175,000:

(1) Judgment debtor or spouse of debtor who resides in homestead is at time of attempted sale of homestead either at least 65 years old or physically or mentally disabled and, as a result of disability, is unable to engage in substantial gainful employment [*Code Civ. Proc. § 704.730(a)(3)(A), (B)*]; or

NOTE:
There is a rebuttable presumption that a person qualifies for the disability

exemption if he or she receives disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act [*Code Civ. Proc. § 704.730(a)(3)(B)*; ***see 42 U.S.C. §§ 401-433*** **(disability insurance benefits), 1380-1383c (supplemental security income)**].

(2) Judgment debtor or spouse of debtor who resides in homestead is at time of attempted involuntary sale of homestead at least 55 years old and has gross annual income of not more than $15,000 if single or $20,000 (including spouse's income) if married [*Code Civ. Proc. § 704.730(a)(3)(C)*].

c. For other situations, $75,000 [*Code Civ. Proc. § 704.730(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions



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12-27B California Legal Forms--Transaction Guide § 27B.111

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.111 Determinations Concerning Declared Homestead

1. Determine whether homestead declaration can be recorded.

NOTE:
Any present or future, vested or contingent, legal or equitable interest in real property that is a "dwelling" as defined in *Code Civ. Proc. § 704.710(a)* [***see*** *§ 27B.22[1]*] may constitute a declared homestead except a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust [*Code Civ. Proc. § 704.910(c)*]. The above real property criterion prevents the following forms of personal property from qualifying as declared homesteads even though they are considered "dwellings" under *Code Civ. Proc. § 704.710(a)* and are therefore eligible for the homestead exemption: boats, other waterborne vessels, and mobilehomes that are not attached to land [***see*** *Health & Safety Code § 18551* (types of mobilehomes qualifying as fixtures and real property improvements)].

2. If declared homestead procedure is available [*see § 27B.110*], determine whether procedure should be used [*see generally § 27B.23*].

3. Determine who will execute and acknowledge homestead declaration [*see Code Civ. Proc. § 704.930(b)*]:

a. Declared homestead owner;

b. Declared owner's spouse;

c. Guardian or conservator of person or estate of declared owner or declared owner's spouse; or

NOTE:
A guardian or conservator may execute, acknowledge, and record the declaration without obtaining court authorization [*Code Civ. Proc. § 704.930(b)(3)*].

d. Person acting under power of attorney or otherwise authorized to act on behalf of declared owner or declared owner's spouse.

NOTE:
Powers of attorney are discussed in Ch. 98, ***Powers of Attorney*** .

4. Determine whether current homeowner's exemption or disabled veteran's exemption for dwelling has been recorded with county tax assessor.

NOTE:
A homeowner's property tax exemption is available to any owner of an eligible dwelling who completes an official claim form within a year following the acquisition of title to, and recordation of ownership of, the dwelling [***see*** *Rev. & Tax. Code §§ 218, 255.3*]. Once granted, the claim remains in effect until the title to the property changes, the owner no longer occupies the home as his or her principal residence, or the property ceases to qualify for the exemption [*Rev. & Tax. Code § 253.5*]. The amount of the exemption is established by statute. The exemption does not apply to property on which an owner receives a veteran's exemption [*Rev. & Tax. Code § 218(b)*]. The existence or nonexistence of a recorded exemption determines which party has the burden of proving the homestead status of the dwelling [*Code Civ. Proc. § 704.780(a)(1)*; ***see*** *§ 27B.121*, P 3, (b)]. A special veteran's exemption provides that a principal dwelling is exempt from taxation in an amount specified by statute if it is owned by a disabled veteran, a person who died while on active duty as a result of a service-connected injury or a disease, or a spouse of either of these. This exemption applies in lieu of other veteran's exemption to which the claimant may be entitled [*Rev. & Tax. Code § 205.5*].

A more detailed discussion of the above exemptions is beyond the scope of this publication but is contained in California Real Estate Law and Practice, Ch. 400, ***The Property Taxation System*** (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-27B California Legal Forms--Transaction Guide §§ 27B.112-27B.119

AUTHOR: William M. Hensely, Practice Consultant

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§§ 27B.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
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C. Procedural Guide to Claiming a Homestead

12-27B California Legal Forms--Transaction Guide § 27B.120

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.120 Preparation and Recordation of Optional Homestead Declaration

NOTE:
Recordation of a homestead declaration does not affect the availability or amount of the exemption [***see*** *§ 27B.20*], but does qualify the declared homestead for special treatment in connection with the assertion of the exemption. The primary advantage of recording a homestead declaration is to guarantee that the proceeds of a voluntary sale of a declared homestead will be exempt from the enforcement of money judgments in the amount of the homestead exemption [***see*** *Code Civ. Proc. § 704.730*] for a period of six months after the sale [*Code Civ. Proc. § 704.960(a)*].

1. If declaration is to be executed and acknowledged by person acting under power of attorney, prepare and record power of attorney [*Prob. Code § 4022*; *see* Ch. 98, *Powers of Attorney*] on behalf of declared owner or declared owner's spouse if such a power has not already been recorded.

2. Prepare homestead declaration containing [*Code Civ. Proc. § 704.930(a)*]:

NOTE:
For examples of homestead declarations, see *§§ 27B.200* (one declared owner), *27B.201* (spouses as declared owners), and *27B.202* (on behalf of declared owner).

a. Name of declared homestead owner, who must:
(1) Own an interest in declared homestead or be a declarant named in a homestead declaration recorded before July 1, 1983, pursuant to former *Civ. Code §§ 1237-1349*, or be that declarant's spouse [*Code Civ. Proc. § 704.910(b)(1)*]; and

(2) Use, or be spouse of person who uses, declared homestead as principal dwelling [*Code Civ. Proc. §§ 704.920, 704.930(a)(3)*].

NOTE:

A husband and wife may both be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead [*Code Civ. Proc. § 704.930(a)(1)*]. A married person who does not own an interest in the proposed declared homestead may nonetheless execute, acknowledge, and record a declared homestead if the declared homestead is the principal residence of at least one of the spouses and if the other spouse is an owner of an interest in the declared homestead and is named in the homestead declaration as the declared homestead owner [*Code Civ. Proc. §§ 704.920, 704.930(a)(3), (b)(2)*].

If unmarried persons reside in, and hold interests in, the same dwelling, each person who wishes to declare a homestead in the dwelling must execute, acknowledge, and record a separate homestead declaration [*Code Civ. Proc. §§ 704.920, 704.930(b)(1)*].

b. Legal description of declared homestead.

c. Statement that declared homestead is principal dwelling of declared homestead owner or spouse and that owner or spouse resides in declared homestead on date declaration is recorded.

d. Statement that facts stated in homestead declaration are known to be true as of personal knowledge of person executing and acknowledging declaration [*Code Civ. Proc. § 704.930(c)*].

e. If declaration is to be executed and acknowledged by guardian or conservator of person or estate of declared owner or declared owner's spouse, or by anyone acting under power of attorney or other authorization to act on behalf of declared owner or declared owner's spouse [*Code Civ. Proc. § 704.930(b)(3), (4), (c)*], include:

(1) Statement that person has authority to so act on behalf of declared homestead owner or owner's spouse; and

(2) Source of person's authority.

3. Have declaration executed and acknowledged by one of following parties [*Code Civ. Proc. § 704.930(b)*]:

a. Declared homestead owner;

b. Owner's spouse;

c. Guardian or conservator of person or estate of declared owner or declared owner's spouse; or

NOTE:

The guardian or conservator may execute, acknowledge, and record a homestead declaration without court authorization [*Code Civ. Proc. § 704.930(b)(3)*].

d. Person acting under power of attorney or otherwise authorized to act on behalf of declared owner or declared owner's spouse.

4. Record declaration in office of county recorder of county where dwelling is located [*Code Civ. Proc. § 704.920*].

NOTE:

On recordation, the dwelling is a declared homestead [*Code Civ. Proc. § 704.920*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Claiming a Homestead

12-27B California Legal Forms--Transaction Guide § 27B.121

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.121 Claiming Exemption

1. Wait for judgment creditor to serve notice of levy [*see Code Civ. Proc. §§ 699.540, 700.010*; *see also* Jud. Coun. Form No. EJ-150 (notice of levy form); *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.683* (Matthew Bender)].

NOTE:

A levy on a homestead that is subject to a lien or encumbrance is not by itself grounds for acceleration of the obligation secured by the lien or encumbrance, notwithstanding any provision of the obligation, lien, or encumbrance [*Code Civ. Proc. § 704.810*].

2. If dwelling is personal property or real property in which judgment debtor has leasehold estate with unexpired term of less than two years at time of levy, take following steps [*Code Civ. Proc. § 704.740(b)(2)*]:

NOTE:

In such a case, a court order for sale is not required and the exemption claim must be made and determined in the manner generally applicable to personal property exemptions [*Code Civ. Proc. § 704.740(b)* ***see Code Civ. Proc. §§ 703.510-703.610***].

If the court extends the time allowed for any of the following acts, written notice of the extension must be filed with the levying officer and, unless notice is waived, served promptly on the opposing party. Service must be made personally or by mail [*Code Civ. Proc. §§ 703.590, 704.830*].

a. Prepare claim of exemption that includes following information [*Code Civ. Proc. § 703.520(b)*]:

NOTE:

For an example of the claim of exemption form [*see* Jud. Coun. Form No. EJ-160], see Ch. 254, California Forms of Pleading and Practice *Executions and Enforcement of Judgments,* § 254.710 (Matthew Bender). ,

(1) Name of claimant and mailing address where service of notice of opposition to claim may be made on claimant.

(2) Name and last known address of judgment debtor if claimant is not judgment debtor.

(3) Description of property claimed to be exempt.

(4) Citation of provision of statute on which claim is based (i.e., *Code Civ. Proc. § 704.740*).

(5) Statement of facts necessary to support claim.

b. Have claim executed under oath [*Code Civ. Proc. § 703.520(b)*].

c. File claim and one copy with levying officer within 10 days after date of service of notice of levy [*Code Civ. Proc. § 703.520(a)*].

NOTE:

Promptly after the claim is filed, the levying officer will serve on the judgment creditor, personally or by mail (1) a copy of the claim, and (2) a notice of claim of exemption stating that the claim has been made and that the levying officer will release the property unless, within the time specified in the notice, a copy of a notice of opposition to the claim and a copy of a notice of motion for an order determining the claim are filed with the levying officer [*Code Civ. Proc. § 703.540*; ***see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.711*** **(notice of claim) (Matthew Bender)**].

Within 10 days after service of the notice of claim of exemption, a judgment creditor who opposes the claim must file with the court a notice of opposition to the claim [***see*** *Code Civ. Proc. § 703.560* (required contents); ***see also* Jud. Coun. Form No. EJ-170; *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.712*** **(notice of opposition) (Matthew Bender)**] **and a notice of motion for an order determining the claim [*see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.713*** **(notice of motion) (Matthew Bender)]. The creditor must also file a copy of each of these documents with the levying officer. Once they are filed, the levying officer must promptly file the claim with the court. If copies of the notice of opposition and notice of motion are not filed with the levying officer within the applicable time period, the levying officer must immediately release the property to the extent it is claimed to be exempt [*Code Civ. Proc. § 703.550*].**

The hearing on the above motion will be held not later than 20 days from the date the notice of motion was filed with the court unless continued by the court for good cause [*Code Civ. Proc. § 703.570(a)*; ***see*** **Judicial Council Form No. EJ-175; *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.714* (notice of hearing) (Matthew Bender)**].

d. After service of copy of notice of opposition to claim and notice on motion for order determining claim [*see Code Civ. Proc. § 703.570(b)*], attend hearing on motion and consider presenting additional evidence.

NOTE:

At the hearing, the exemption claimant has the burden of proof [*Code Civ. Proc. § 703.580(b)*]. Both the claim of exemption and the notice of opposition constitute the pleadings (subject to the court's power to permit amendments in the interest of justice) [*Code Civ. Proc. § 703.580(a)*], and both will be received in evidence. If no other evidence is offered, the court will make its determination or order the hearing continued for the production of other oral or documentary evidence [*Code Civ. Proc. § 703.580(c)*]. At the conclusion of the hearing, the court must determine by order whether or not the property is exempt in whole or in part [*Code Civ. Proc. § 703.580(d)*; ***see*** ***California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.715*** **(order determining claim of exemption) (Matthew Bender)**].

e. If the exemption is denied, consider appealing the order [*Code Civ. Proc. § 703.600*].

NOTE:

Notice of an appeal will be given to the levying officer, who will then hold, release, or dispose of the property in accordance with the statutory provisions governing enforcement and stay of enforcement of money judgments pending appeal [*Code Civ. Proc. § 703.610(c)*; ***see Code Civ. Proc. § 936.1***].

3. For all other dwellings, take following steps [*see Code Civ. Proc. § 704.740(a)*]:

NOTE:

The following statutory procedures apply whether or not a homestead declaration has been recorded [*Code Civ. Proc. § 704.970*].

If the court extends the time allowed for any of the following acts, written notice of the extension must be filed with the levying officer and, unless notice is waived, must be served promptly on the opposing party. Service must be made personally or by mail [*Code Civ. Proc. §§ 703.590, 704.830*].

a. Verify that creditor served copies of order to show cause, creditor's application, and notice of hearing not later than 30 days before hearing date as follows [*Code Civ. Proc. § 704.770(b)*]:

NOTE:

After a dwelling has been levied on, the creditor must apply to the court for an order for sale of the dwelling [*see Code Civ. Proc. §§ 684.120(b)* (extension of filing period), *704.750* (method of application), *704.760* (contents of application); *see also California Forms of Pleading and Practice, Ch. 294, Homesteads , § 294.102*

(application for order) (Matthew Bender)]. Once the application is filed, the court will set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application [*Code Civ. Proc. § 704.770(a)*; ***see California Forms of Pleading and Practice, Ch. 294, Homesteads , §§ 294.103 , 294.104*** **(order to show cause), (Jud. Coun. Form No. EJ-180, notice of hearing) (Matthew Bender)**].

If the judgment debtor is served by mail, the 30-day time period will be extended five days if the address is within California, 10 days if it is in another state, and 20 days if it is outside the United States [*Code Civ. Proc. § 684.120(b)*].

(1) Personally or by mail on judgment debtor; and

(2) Personally on occupant of dwelling or, if no occupant is present at time of attempted service, by posting above documents in conspicuous place at dwelling.

b. Determine whether debtor has burden of proof at hearing in following matters:

(1) Whether dwelling is a homestead [*Code Civ. Proc. § 704.780(a)(1)*].

NOTE:

If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records do not indicate an exemption, then the burden of proof is on the person who claims that the dwelling is a homestead [*Code Civ. Proc. § 704.780(a)(1)*]. As a practical matter, most homeowners will claim the homeowner's exemption. Thus, the creditor will normally have the burden of proof concerning the status of the dwelling.

(2) Amount of exemption [*see Code Civ. Proc. § 704.780(a)(2)*].

NOTE:

If the application states the amount of the exemption, the person claiming the exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application [*Code Civ. Proc. § 704.780(a)(2)*].

c. Attend hearing.

NOTE:

Code Civ. Proc. § 704.780(b) **provides that the court will make an order for sale of the dwelling "unless the court determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to [*Code Civ. Proc. § 704.800*]," that is, unless it determines there will not likely be a minimum acceptible bid. The purpose of the hearing is to determine whether the order should be "made in accordance with the [creditor's] application" [*Code Civ. Proc. § 704.770(a)*], that is, whether the terms of the order should be based on the statements made in the application concerning the availability and amount of the exemption, and the existence and amount of any liens and encumbrances [*see Code Civ. Proc. § 704.760* (contents of application)].**

At the hearing's conclusion, the court will determine the amount of the homestead exemption, if any, and the fair market value of the dwelling, and will make an order for sale of the dwelling if it determines it is appropriate to do so. The order for sale will (1) specify the amount of the sale proceeds that is to be distributed to each person having a lien or encumbrance on the dwelling, and (2) include the name and address of each such person [*Code Civ. Proc. § 704.780(b)*; ***see California Forms of Pleading and Practice, Ch. 294, Homesteads , § 294.105*** **(order for sale) (Matthew Bender)**].

d. Take following action after order for sale is made:

(1) If neither judgment debtor, judgment debtor's spouse, nor attorney for either one appeared at hearing on order [*Code Civ. Proc. § 704.790(a)*]:

(a) Verify that copy of order for sale and notice of order were served not later than 10 days after date of order for sale by judgment creditor in the following way [*Code Civ. Proc. § 704.790(b)*]:

NOTE:
If judgment creditor fails to comply with these service requirements, then the dwelling may not be sold under the order for sale [*Code Civ. Proc. § 704.790(c)*].

(i) Personally or by mail on judgment debtor and debtor's spouse;

(ii) Personally on occupant of dwelling or if no occupant was present when service attempted, by posting above documents in conspicuous place at dwelling.

(b) Consider filing with levying officer, within 10 days after service of notice of order, declaration that absence of judgment debtor and spouse or attorney for debtor or spouse from hearing was due to mistake, inadvertence, surprise, or excusable neglect, and that debtor or spouse wishes to assert exemption [*Code Civ. Proc. § 704.790(d)*; *see* Judicial Council Form No. EJ-182 (Declaration for Rehearing); *California Forms of Pleading and Practice, Ch. 294, Homesteads, § 294.106* (Matthew Bender)].

(c) Attend hearing on above declaration.

(2) If procedure described in (1), *above*, is unsuccessful or inapplicable, consider appealing the order [*Code Civ. Proc. §§ 703.600, 704.830*].

e. If execution sale occurs, monitor sale for compliance with applicable statutory procedure.

NOTE:
Subject to certain statutory provisions applicable solely to execution sales of homesteads [***see*** *Code Civ. Proc. §§ 704.800-704.850*; ***see also*** *§ 27B.25*; *California Forms of Pleading and Practice, Ch. 294, **Homesteads**, §§ 294.107-294.109* (Matthew Bender)], the provisions of the Enforcement of Judgments Law governing sales and collections [*Code Civ. Proc. §§ 701.510-701.680*] will govern the sale [*Code Civ. Proc. § 704.780(b)*]. One of the most important of these sales and collections provisions requires an execution sale to be delayed until the expiration of 120 days after the date the notice of levy was served on the judgment debtor [*Code Civ. Proc. § 701.545*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Claiming a Homestead

12-27B California Legal Forms--Transaction Guide §§ 27B.122-27B.129

AUTHOR: William M. Hensely, Practice Consultant

[Reserved]

§§ 27B.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

12-27B California Legal Forms--Transaction Guide § 27B.130

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.130 Reinvestment of Homestead Proceeds

1. Following execution sale, damage, destruction, or condemnation of any homestead, or voluntary sale of declared homestead, advise debtor to take following steps if he or she desires to establish new homestead [*Code Civ. Proc. §§ 704.710(c), 704.720(b)*; *see § 27B.22[3]*]:

a. Use resultant proceeds to purchase new dwelling within six months; and

b. Reside in that dwelling.

2. Warn debtor that application of homestead exemption to other property of debtor or spouse during six-month exempt period destroys exempt status of proceeds from sale of prior homestead [*Code Civ. Proc. § 704.720(b)*; *see § 27B.22[3]*].

NOTE:
The above provision does not apply to proceeds from the voluntary sale of a declared homestead [*Code Civ. Proc. §§ 704.720(b), 704.960*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

12-27B California Legal Forms--Transaction Guide § 27B.131

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.131 Abandonment of Declared Homestead

NOTE:

The following discussion is applicable both to homestead declarations recorded pursuant to current law and to declarations of homesteads recorded before July 1, 1983, under former law [*see Code Civ. Proc. § 704.910(d)(2)*; *see also* former *Civ. Code §§ 1237-1349*].

A declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration [*Code Civ. Proc. § 704.980(c)*].

1. Prepare declaration of abandonment [*see §§ 27B.203, 27B.204*] and have it executed and acknowledged in manner required for conveyances of real property [*see Civ. Code §§ 1180-1207*] by either one of following parties [*Code Civ. Proc. § 704.980(b)*]:

a. Declared homestead owner; or

b. Person authorized to act on behalf of declared homestead owner.

NOTE:

If the declaration of abandonment is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration must (1) contain a statement that the person has authority to act on behalf of the owner, and (2) identify the source of the person's authority [*Code Civ. Proc. § 704.980(b)*].

2. Alternatively, have declared homestead owner or person authorized to act on owner's behalf execute, acknowledge, and record new homestead declaration for owner on different property [*Code Civ. Proc. § 704.990(a)*].

NOTE:

Such an action will cause the declared homestead to be abandoned by operation of law as to the declared homestead owner named in the new homestead declaration, but will not affect the declared homestead of any other person [*Code Civ. Proc. § 704.990(a)*]. Notwithstanding this rule, a recorded homestead declaration that includes property described in a previously recorded homestead declaration will not be considered an abandonment of the prior declared homestead to the extent that the prior homestead declaration is still valid [*Code Civ. Proc. § 704.990(b)*; ***see*** *§ 27B.203[1][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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CHAPTER 27B HOMESTEADS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

12-27B California Legal Forms--Transaction Guide §§ 27B.132-27B.199

AUTHOR: William M. Hensely, Practice Consultant

[Reserved]

§§ 27B.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART IV. FORMS

12-27B California Legal Forms--Transaction Guide § 27B.200

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.200 Homestead Declaration--One Declared Owner

[1] Comment

[a] Use of Form

The form in [2], *below*, is a homestead declaration that may be used by the owner of an interest in a dwelling, or by the owner's spouse, to designate the dwelling as a declared homestead, provided that the owner, the owner's spouse, or both reside in the dwelling. Two other versions of the homestead declaration are also included in this chapter. The form in *§ 27B.201* should be used if both spouses own interests in the dwelling and wish to jointly designate it as a declared homestead. The form in *§ 27B.202* should be used if the declaration is to be made by a guardian or conservator of the declared homestead owner or the declared owner's spouse, or by a person acting under a power of attorney or otherwise authorized to act on behalf of the owner or spouse.

Recordation of a homestead declaration is not a prerequisite to claiming a homestead exemption [*see Code Civ. Proc. § 704.970*; *see also § 27B.20*]. However, selecting a dwelling as a declared homestead makes it eligible for special treatment not available to other dwellings if the homestead exemption is subsequently asserted. This special treatment includes the exemption of the proceeds of a voluntary sale of a declared homestead and limitations on the extent to which a judgment lien may attach to a declared homestead [*Code Civ. Proc. § 704.960(a), (b)*; *see § 27B.23[1]*].

Once properly recorded, a homestead declaration is prima facie evidence of the facts stated in the document, and is conclusive evidence of those facts in favor of a purchaser or encumbrancer in good faith and for a valuable consideration [*Code Civ. Proc. § 704.940*]. Recordation of a homestead declaration does not affect the amount of the exemption or the right of levy pursuant to a writ of execution on a dwelling [*see Code Civ. Proc. § 704.970*]. The right to convey or encumber a homestead is unaffected by the recordation of a homestead declaration [*Code Civ. Proc. § 704.940*].

[b] Former Declaration of Homestead

This homestead declaration is a revised version of the declaration of homestead that was used in California before July 1, 1983 [*see* former *Civ. Code §§ 1237-1349*]. Any declaration of homestead recorded under the law in effect before this date has the same effect as a homestead declaration recorded pursuant to current law. A declarant named in such a declaration of homestead and the declarant's spouse are considered declared homestead owners [*Code Civ. Proc. § 704.910(b)(2), (d)(2)*]. Accordingly, with the exception of the provisions relating to the contents of a declared homestead, the following discussion is applicable to any declaration of homestead recorded under the former law.

[c] Definition of "Dwelling"

Any interest in real property, whether present or future, vested or contingent, legal or equitable, that is a "dwelling" as defined in *Code Civ. Proc. § 704.710(a)* may constitute a declared homestead, except a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust [*Code Civ. Proc. § 704.910(c)*]. *Code Civ. Proc. § 704.710(a)* defines a "dwelling" as a place where a person resides, including, but not limited to, the following places:

- A house or mobilehome, together with the outbuildings and the land on which they are situated;
- A boat or other waterborne vessel;
- A condominium [*see Civ. Code § 783* (definition)];
- A planned development [*see Bus. & Prof. Code § 11003*; *Civ. Code § 1351(k)* (definition)];
- A stock cooperative [*see Bus. & Prof. Code § 11003.2*; *Civ. Code § 1351(m)* (definition)]; or
- A community apartment project [*see Bus. & Prof. Code § 11004*; *Civ. Code § 1351(d)* (definition)].

However, because only interests in real property may be selected as declared homesteads [*Code Civ. Proc. § 704.910(c)*], boats and other waterborne vessels, mobilehomes that are not attached to land [*see Health & Safety Code § 18551* ("attached" mobilehomes may qualify as fixture and real property improvement)], and other personal property dwellings cannot qualify as declared homesteads even though they are considered "dwellings" under *Code Civ. Proc. § 704.710(a)* and therefore qualify for the homestead exemption.

[d] Contents of Declaration

A homestead declaration must contain all of the following information [*Code Civ. Proc. § 704.930(a), (c)*]:

- The name of the declared homestead owner. A husband and wife may both be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead [*Code Civ. Proc. § 704.930(a)(1)*].
- A description of the declared homestead.
- A statement that the declared homestead is the principal dwelling of the declared homestead owner or the owner's spouse, and that the owner or spouse resides in the declared homestead on the date the homestead declaration is recorded.
- A statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the declaration. If that person is someone other than the declared homestead owner or the owner's spouse, the declaration must also state that person's

authority [*see* [e], *below*]. If the declaration is executed and acknowledged by a person other than the declared homestead owner or the owner's spouse, the *form in § 27B.202* should be used instead of this form.

The above requirements do not apply to any declaration of homestead recorded before July 1, 1983 [*see Code Civ. Proc. § 704.910(d)(2)*].

[e] Execution, Acknowledgment, and Recordation

A homestead declaration must be executed and acknowledged, in the manner of an acknowledgment of a conveyance of real property [*Civ. Code § 1189*; *see Civ. Code §§ 1180-1207*], by at least one of the following persons [*Code Civ. Proc. § 704.930(b)*]:

- The declared homestead owner.
- The spouse of the declared homestead owner.
- The guardian or conservator of the person or estate of the declared homestead owner or the owner's spouse [*see § 27B.202*]. The guardian or conservator may execute, acknowledge, and record a homestead declaration without court authorization [*Code Civ. Proc. § 704.930(b)(3)*].
- A person acting under a power of attorney or otherwise authorized to act on behalf of the declared homestead owner or the owner's spouse [*see § 27B.202*].

The completed homestead declaration must be recorded in the office of the county recorder of the county where the dwelling is located [*Code Civ. Proc. § 704.920*]. From the date of recordation, the dwelling constitutes a declared homestead [*Code Civ. Proc. § 704.920*].

[f] Abandonment of Declared Homestead

A declared homestead may be abandoned by recording either a declaration of abandonment or a new homestead declaration for the owner on different property [*Code Civ. Proc. §§ 704.980, 704.990*; *see §§ 27B.203, 27B.204*].

[2] Form

Homestead Declaration--One Declared Owner

Homestead Declaration--One Declared Owner

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

HOMESTEAD DECLARATION

I, _____[*name of owner*], hereby certify and declare:

(1) I hereby claim as a declared homestead the premises described as follows: _____[*set forth complete legal description*].

(2) I am the declared homestead owner of the above-declared homestead.

(3) I own the following interest in the above-declared homestead: _____[*specify*].

(4) The above-declared homestead is _____[my principal dwelling *or* the principal dwelling of my spouse], and _____[I am *or* my spouse is] currently residing in that declared homestead.

(5) My further act of causing this declaration to be recorded shall constitute a representation that _____[I *or* my spouse] reside[s] in the above-declared homestead on the date this declaration is recorded.

(6) The facts stated in this Declaration are true as of my personal knowledge.
Dated: _____.

_____ [*signature*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties &

RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART IV. FORMS

12-27B California Legal Forms--Transaction Guide § 27B.201

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.201 Homestead Declaration--Spouses as Declared Owners

[1] Comment--Use of Form

The form in [2], *below*, is a homestead declaration that names both spouses as declared homestead owners. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead [*Code Civ. Proc. § 704.930(a)(1)*]. This declaration may be used, for example, when the dwelling is community property, or when the spouses hold the property as joint tenants. For a general discussion of the statutory requirements relating to the preparation, execution, acknowledgment, and recordation of homestead declarations, see *§ 27B.200[1]*.

For a form of declaration for one declared owner, see *§ 27B.200*. For a form of declaration made on behalf of an owner, see *§ 27B.202*.

[2] Form

Homestead Declaration--Spouses as Declared Owners

Homestead Declaration--Spouses as Declared Owners

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

HOMESTEAD DECLARATION

We, _____ and _____[*names of spouses*], hereby certify and declare:

(1) We are married to each other.

(2) We hereby claim as a homestead, and make ourselves declared homestead owners of, the premises described as follows: _____[*set forth complete legal description*].

(3) I, _____[*name of first spouse*] own the following interest in the above-declared homestead: _____[*specify*].

(4) I, _____[*name of second spouse*] own the following interest in the above-declared homestead: _____[*specify*].

(5) The above-declared homestead is _____[our principal dwelling *or* the principal dwelling of _____ (*name of either spouse*)] and _____[we *or* _____ (he *or* she)] currently reside[s] in that declared homestead.

(6) Our further act of causing this declaration to be recorded shall constitute a representation that _____[we *or* _____ (*name of spouse residing in homestead*)] reside[s] in the above-declared homestead on the date this declaration is recorded.

(7) The facts stated in this Declaration are true as of our personal knowledge.
Dated: _____.

_____ [*signature of one spouse*]
[*typed name*]
_____ [*signature of other spouse*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART IV. FORMS

12-27B California Legal Forms--Transaction Guide § 27B.202

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.202 Homestead Declaration--On Behalf of Declared Homestead Owner

[1] Comment--Use of Form

The form in [2], *below*, is a homestead declaration that is to be executed and acknowledged on behalf of a declared homestead owner by the guardian or conservator of the declared homestead owner or the declared owner's spouse, or by a person acting under a power of attorney or otherwise authorized to act on behalf of the owner or spouse [*Code Civ. Proc. § 704.930(b)*]. A guardian or conservator does not need to obtain court authorization to act in this capacity [*Code Civ. Proc. § 704.930(b)(3)*].

A homestead declaration executed by anyone other than the declared homestead owner or the declared owner's spouse must contain a statement that the person has authority to execute and acknowledge the declaration on behalf of the owner or the owner's spouse, and must identify the source of the person's authority [*Code Civ. Proc. § 704.930(c)*]. For a discussion of the other required contents for homestead declarations, and related issues, see *§ 27B.200[1]*.

For a form of declaration made by the declared owner, see *§ 27B.200*. For a form of declaration made by spouses, see *§ 27B.203*.

[2] Form

Homestead Declaration--On Behalf of Declared Homestead Owner

Homestead Declaration--On Behalf of Declared Homestead Owner

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])

)

_____
Space above this line for recorder's use

HOMESTEAD DECLARATION

I, _____[*name of declarant*], hereby certify and declare:

(1) I am _____[the guardian *or* the conservator *or* acting under a power of attorney on behalf *or specify other authority*] of [the estate of] _____[*name of declared homestead owner or owner's spouse*] and have been authorized to act on behalf of _____[*repeat name specified above*] in connection with this homestead declaration by _____[*specify source of authority, e.g.*, the power of attorney recited and described in an instrument executed on _____ (*date power of attorney executed*) and recorded (as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California].

(2) On behalf of _____[*repeat name specified in Paragraph (1), above*], I hereby claim as a homestead the premises described as follows: _____[*set forth complete legal description*].

(3) _____[*name of declared homestead owner*] [*add if spouse is to be named as declared owner:*, the spouse of _____ (*repeat name specified in Paragraphs (1) and (2), above*),] is hereby made the declared homestead owner of the above-declared homestead.

(4) _____[*name of declared homestead owner*] owns the following interest in the above-declared homestead: _____[*specify*].

(5) The above-declared homestead is the principal dwelling of _____[*name of declared homestead owner or spouse or both*] and _____[he *or* she *or* they] currently reside[s] in that declared homestead.

(6) The facts stated in this Declaration are true as of my personal knowledge.
Dated: _____.

_____ [*signature*]
[*typed name and title*]

Acknowledgment

[*See § 27B.200 for acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART IV. FORMS

12-27B California Legal Forms--Transaction Guide § 27B.203

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.203 Declaration of Abandonment of Declared Homestead--By Declared Homestead Owner

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration of abandonment of a declared homestead. It may be used by a single declarant [*see § 27B.200*] or by spouse declarants [*see § 27B.201*] whether the homestead declaration was recorded pursuant to current law [*see Code Civ. Proc. §§ 704.910-704.995*] or in accordance with former law in effect before July 1, 1983 [*Code Civ. Proc. § 704.980(a)*; *see* former *Civ. Code §§ 1263-1265*].

A declaration of abandonment affects only the declared homestead of the declared homestead owner named in the declaration [*Code Civ. Proc. § 704.980(c)*]. For example, if a husband and wife are both named as declared homestead owners in the same declaration [*see Code Civ. Proc. § 704.930(a)(1)*; *see § 27B.201*], the marriage is subsequently dissolved, and one of the former spouses continues to reside in the declared homestead, the dwelling will remain the declared homestead of the resident former spouse even if the nonresident former spouse abandons the declared homestead.

[b] Execution and Acknowledgment

A declaration of abandonment must be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property [*Civ. Code § 1189*; ***see*** *Civ. Code §§ 1180-1207*] by a declared homestead owner or a person authorized to act on behalf of such an owner [*Code Civ. Proc. § 704.980(b)*]. For a declaration of abandonment that is designed to be executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, see *§ 27B.204*.

[c] Abandonment by Operation of Law

A declared homestead is abandoned by operation of law as to a declared homestead owner if the owner or a person

authorized to act on behalf of the owner executes, acknowledges, and records a new homestead declaration for the owner on different property. Such an abandonment does not affect the declared homestead of any person other than the person named as the declared homestead owner in the new declaration [*Code Civ. Proc. § 704.990(a)*]. Notwithstanding this rule, if a recorded homestead declaration includes property described in a previously recorded homestead declaration, the new declaration will not be considered an abandonment of the prior declared homestead to the extent that the prior declaration is still valid [*Code Civ. Proc. § 704.990(b)*]. This latter rule apparently applies when changed circumstances force a declared homestead owner to record a new homestead declaration for the same dwelling mentioned in a previous declaration. For example, person A may record a homestead declaration, and subsequently marry person B and enter into an antenuptial agreement with person B that changes the status of the dwelling from separate to community property [*see Fam. Code §§ 1100, 1102, 1500, 1620*; *see also* Ch. 112, *Postnuptial Agreements*]. After they are married, the spouses may record a homestead declaration that names both of them as declared homestead owners [*see Code Civ. Proc. § 704.930(a)(1)*; *see also § 27B.201*]. Under these circumstances, it appears that the first homestead declaration will remain valid and any rights that A had under the first homestead declaration will be preserved. For example, any judgment lien created between the two recording dates will only attach to the surplus value of the declared homestead over the total of all preexisting liens and encumbrances and the amount of the homestead exemption [*see Code Civ. Proc. § 704.950(c)*].

[2] Form

Declaration of Abandonment of Declared Homestead--By Declared Homestead Owner

Declaration of Abandonment of Declared Homestead--By Declared Homestead Owner

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

DECLARATION OF ABANDONMENT OF DECLARED HOMESTEAD

The undersigned hereby declare[s] that _____[he *or* she *or* they] hereby abandon[s] the homestead previously declared in the Homestead Declaration executed by _____[*name(s*)] on _____[*date*], and recorded on _____[*date*], in Book _____, Page _____, Official Records of _____ County, California, concerning the following premises: _____[*set forth complete legal description of property as contained in Homestead Declaration*].
Dated: _____.

_____ [*signature(s*)]
[*typed name(s)*]

Acknowledgment

[*See § 27B.200 for acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 27B HOMESTEADS
PART IV. FORMS

12-27B California Legal Forms--Transaction Guide § 27B.204

AUTHOR: William M. Hensely, Practice Consultant

§ 27B.204 Declaration of Abandonment of Declared Homestead--On Behalf of Declared Homestead Owner

[1] Comment--Use of Form

The form in [2], *below*, is a declaration of abandonment of a declared homestead to be executed and acknowledged by a person authorized to act on behalf of a declared homestead owner [*see Code Civ. Proc. § 704.980(b)*]. It contains the statement that the person making the execution and acknowledgment has authority to act on behalf of the declared homestead owner and identifies the source of the person's authority, as required by law [*Code Civ. Proc. § 704.980(b)*]. This form assumes that the authority is a power of attorney, although other types of authority are also permissible [*Code Civ. Proc. § 704.930(b)*; *see § 27B.200[1][e]*]. For a discussion of other requirements that are applicable to all abandonments of declared homesteads, see *§ 27B.203[1]*.

[2] Form

Declaration of Abandonment of Declared Homestead--On Behalf of Declared Homestead Owner

Declaration of Abandonment of Declared Homestead--On Behalf of Declared Homestead Owner

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

DECLARATION OF ABANDONMENT OF DECLARED HOMESTEAD

The undersigned hereby declares that _____[he *or* she]:

(1) Hereby abandons, on behalf of _____[*name(s) of declared homestead owner(s) for whom abandonment is executed*], the homestead previously declared by _____[*name(s) of declared homestead owner(s*)] in the Homestead Declaration for the premises described as _____[*set forth complete legal description*], which was recorded on _____[*date*], in Book _____, Page _____, Official Records of _____ County, California.

(2) Has been authorized to act on behalf of _____[*name(s) of declared homestead owner(s) for whom abandonment is executed*] in connection with this declaration of abandonment by _____[*specify source of authority, e.g.,* the power of attorney described in an instrument executed on _____ (*date power of attorney was executed*) and recorded (as Instrument No. _____) in Book _____, Page _____, Official Records of _____ County, California].
Dated: _____.

_____ [*signature*]
[*typed name*]

Acknowledgment

[*See § 27B.200 for acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead ExemptionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
Chapter 28 [Reserved]

12-28 California Legal Forms--Transaction Guide Chapter 28

[Reserved]

Chapter 28[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES

12-28A California Legal Forms--Transaction Guide 28A.syn

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES

12-28A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers easements and licenses. It emphasizes the drafting of instruments that grant and convey easements, and also discusses (1) the drafting of license agreements, (2) the prevention of prescriptive easements, and (3) statutory procedures governing the preservation, or establishment of abandonment, of easements. The chapter analyzes and discusses profits as a type of easement.

The Legal Background distinguishes easements from other rights in the property of another, covers the classification of easements, and describes particular types of easements. It also discusses the creation of an easement by express grant or reservation, and the maintenance and termination of easements. The Transaction Guide contains lists of information and documents needed to draft an instrument creating an easement, important determinations that the attorney should make before drafting the instrument, and procedures for drafting and executing the instrument. The forms include several complete deeds and agreements creating easements; alternative and additional contractual provisions; and related documents, such as a complete license agreement, and an agreement to share the expenses of maintaining a right-of-way.

For a reciprocal easement agreement for a shopping center, see *Ch. 34E, Shopping Centers: Leasing and Operation, § 34E.200*.



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§ 28A.01 California Statutes

Types of easements appurtenant. *Civ. Code § 801*.

Solar easements. *Civ. Code § 801.5*.

Types of easements in gross. *Civ. Code § 802*.

Definition of dominant and servient tenements. *Civ. Code § 803*.

Creation of servitude. *Civ. Code § 804*.

Holding of servitude. *Civ. Code § 805*.

Extent of servitude. *Civ. Code § 806*.

Apportionment of burden on partition of dominant tenement. *Civ. Code § 807*.

Extinguishment of servitude. *Civ. Code § 811*.

Prevention of acquisition of prescriptive easement. *Civ. Code §§ 813, 1008*.

Maintenance of private right-of-way. *Civ. Code § 845*.

Marketable record title provisions. *Civ. Code § 880.020 et seq.*
Notice of intent to preserve interest. *Civ. Code § 880.340*.
Definition of "easement." *Civ. Code § 887.010*.
Action to establish abandonment. *Civ. Code § 887.040*.

Conditions constituting abandonment of easement. *Civ. Code § 887.050*.
Procedure to preserve easement. *Civ. Code § 887.060*.
Dismissal of action to establish abandonment. *Civ. Code § 887.070*.
Effect of abandonment. *Civ. Code § 887.080*.

Natural Resources Agency must identify, for future conservation (including possible acquisition of conservation easements), key buffer properties adjacent to large ecologically valuable working landscapes that provide significant economic benefits to state, such as active military or national guard properties, whose future viability could be threatened by encroachment of incompatible land use activities. Gov. Code § 12805.6.

Comprehensive index of conservation easements; completing and filing notice of conservation easement. *Gov. Code § 27255*.

Covenants of easement. *Gov. Code § 65870 et seq.*
Purposes of easement. *Gov. Code § 65871(a)*.
Effects of recordation. *Gov. Code §§ 65871(b), 65873*.
Release. *Gov. Code § 65874*.

Solar Shade Control Act. *Pub. Res. Code § 25980 et seq.*



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B. Secondary Sources

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§ 28A.06 Annotations

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Ch. 240, *Easements* .
Ch. 575, *Waters* ,

California Legal Forms, Ch. 27, *Deeds and Recording* ; Ch. 28B *Party Walls and Boundary Agreements;* , Ch. 28C *Covenants, Conditions, and Restrictions;* , Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* (Matthew Bender).

California Real Estate Law Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

Powell On Real Property, Ch. 34, *Easements and Licenses* (Matthew Bender).

[2] Additional Text References

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[Reserved]

§§ 28A.08[Reserved]



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§ 28A.10 Definition of Easement

An easement is an interest in the land of another that entitles the owner of the easement to a limited use or enjoyment of the other's land [*Goble v. Dotson (1962) 203 Cal. App. 2d 272, 277, 21 Cal. Rptr. 769* ; *City of Long Beach v. Daugherty (1977) 75 Cal. App. 3d 972, 977, 142 Cal. Rptr. 593* ; *Restatement of Property § 450(a), (b)*]. For coverage of estates, see Ch. 27, *Deeds and Recording* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCharacteristics



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§ 28A.11 Definition of Profit

A profit (also sometimes referred to as a profit a prendre) is the right to make some use of another's land, such as the right to mine minerals. It includes (1) the right of entry, (2) the right to remove and take from the land the designated products or profit, and (3) the right to use the surface to the extent necessary and convenient for the exercise of the profit [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113* ; *see Callahan v. Martin (1935) 3 Cal. 2d 110, 120-121, 43 P.2d 788]* .

Although profits have traditionally been distinguished from easements [*see, e.g., Richfield Oil Co. v. Hercules Gasoline Co. (1931) 112 Cal. App. 431, 434, 297 P. 73]* , this limitation does not generally apply in California [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *see* Restatement of Property § 450, "Special Note"]. For example, the Civil Code does not distinguish between easements and profits. In fact, its lists of easements [*see Civ. Code §§ 801, 802*; *see also §§ 28A.14 [2], 28A.15 [2]*] include rights that constitute profits, including the "right of taking water, wood, minerals, or other things" [*Civ. Code § 802(6)*]. Thus, a profit may be characterized as an easement [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11, 62 Cal. Rptr. 113]* , and is subject to the same rules that apply to easements [*see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 880, 881, 69 Cal. Rptr. 612* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879, 880, 42 Cal. Rptr. 400* ; Restatement of Property § 450, "Special Note"]. Consequently, unless otherwise indicated, the statutory and case law discussed in this chapter apply to both easements and profits.

For additional coverage of profits, see California Real Estate Law Practice, Chapter 343, *Easements and Licenses* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsMineral EasementsReal Property LawLimited Use RightsEasementsTimber EasementsReal Property LawLimited Use RightsProfits a PrendreReal Property LawMiningSurface Rights



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§ 28A.12 Easements Distinguished From Other Rights

[1] In General

A property owner may have a right in the property of another that is not properly classified as an easement, but that may be quite similar in scope, creation, and use to an easement. These noneasement rights include licenses, covenants running with the land, and equitable servitudes. Property owners also have certain "natural rights" incident to the ownership of land that resemble easements. Each of these rights is discussed in [2]-[5], *below*.

[2] Licenses

A license entitles its holder to do an act or acts on the land of another [*Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142 ; see Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002]* . Licenses are often distinguished from easements on the ground that the former are revocable and the latter are irrevocable [*see, e.g., Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142]* . However, the California Supreme Court has recognized that the differences between a license and an easement are often subtle and difficult to discern [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 594, 171 P. 424]* .

For additional coverage of licenses, see *Section 28A.230[1]*.

[3] Covenants

A restrictive covenant is a promise to refrain from doing certain things in regard to the use of land [*Sackett v. Los Angeles City School Dist. (1931) 118 Cal. App. 254, 257, 5 P.2d 23]* . The covenant may be created in a deed or in a separate agreement [*see Civ. Code § 1468*]. Although covenants are similar to easements in that they impose restrictions on the use of land, California law recognizes significant differences between them. For example, covenants are subject to specific statutory provisions that limit the circumstances under which they will "run with the land" [*see Civ. Code §§ 1460-1470*]. Further, covenants do not generally impart a right to use another's land, but merely a right to control (that is, limit or restrict) that use. For complete coverage of covenants, see Chapter 28C, *Covenants, Conditions, and Restrictions* .

[4] Equitable Servitudes

The doctrine of equitable servitudes rests on the equitable notion that one who takes property with notice of a restriction should be bound to observe that restriction [*Richardson v. Callahan (1931) 213 Cal. 683, 687, 3 P.2d 927]* . The development of this concept led to restrictions that were enforceable in equity by any party in whose favor the restrictions were imposed [*Bryan v. Grosse (1909) 155 Cal. 132, 135-136, 99 P. 499]* .

Like covenants that run with the land, equitable servitudes are contractual arrangements that have, through a process of judicial evolution, taken on many of the characteristics of interests in real property. Unlike covenants, equitable servitudes are subject to the particular rules and requirements of courts of equity.

For additional coverage of equitable servitudes, see Chapter 28C, *Covenants, Conditions, and Restrictions* .

[5] Natural Rights

Certain "natural rights" in land do not depend on special grants, conveyances, or agreements. These rights are incidents of ownership that exist as corollaries to the possession of land [*see* Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)]. They include rights that owners of property abutting on public streets or roads have in those streets or roads, such as the right of ingress and egress to and from the street [*see, e.g., Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663, 39 Cal. Rptr. 903, 394 P.2d 719]* . They also include a landowner's rights and duties with respect to adjoining landowners. An example of such a right is the right to lateral and subjacent support that land receives from adjoining land [*see Civ. Code § 832*; *Sargent v. Jaegling (1927) 83 Cal. App. 485, 487, 256 P. 1116]* . For additional coverage of these natural rights, see California Real Estate Law Practice, Chapter 343, *Easements and Licenses* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsLicensesReal Property LawRestrictive CovenantsGeneral Overview



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§ 28A.13 Overview of Classification of Easements

Easements are classified as either appurtenant or in gross [*see Civ. Code §§ 801, 802*; *Restatement of Property §§ 453-454*]. Further, they may be classified as either affirmative or negative. These classifications are discussed in *Sections 28A.14* and *28A.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAffirmative & Negative EasementsReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsEasements in Gross



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§ 28A.14 Easements Appurtenant

[1] In General

An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him or her as the owner or possessor of that land [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 767, 147 Cal. Rptr. 336* ; *see Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Restatement of Property § 453*]. The property to which the easement is attached is referred to as the dominant tenement, and the land burdened by the easement (that is, the land over which the easement runs) is called the servient tenement [*Civ. Code § 803*; *City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 767, 147 Cal. Rptr. 336]* . The dominant and servient tenements need not be contiguous [*Jensen v. Ritter (1960) 185 Cal. App. 2d 473, 479, 8 Cal. Rptr. 263]* .

Since it is attached to a dominant tenement, an easement appurtenant passes with the transfer of the dominant tenement [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Rubio Canon etc. Assoc. v. Everett (1908) 154 Cal. 29, 33, 96 P. 811* ; *Civ. Code §§ 1084, 1104*]. It cannot be transferred to a third party or severed from the dominant tenement [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400]* . However, if a grantor reserves an existing easement appurtenant from the grant, the easement will not pass with the grant [*see Civ. Code § 1084*].

[2] Examples of Easements Appurtenant

Civil Code Section 801 sets forth the following list of types of easements appurtenant:

(1) The right of pasture.

(2) The right of fishing.

(3) The right of taking game.

(4) The right-of-way.

(5) The right of taking water, wood, minerals, and other things.

(6) The right of transacting business upon land.

(7) The right of conducting lawful sports upon land.

(8) The right of receiving air, light, or heat from or over land, or the right of discharging air, light, or heat upon or over land.

(9) The right of receiving water from, or discharging water upon, land.

(10) The right of flooding land.

(11) The right of having water flow without diminuition or disturbance of any kind.

(12) The right of using a wall as a party wall [*see* ch. 28B, *Party Walls and Boundary Agreements*].

(13) The right of receiving more than natural support from adjacent land or things affixed to adjacent land.

(14) The right of having the whole of a division fence maintained by a coterminous owner.

(15) The right of having public conveyances stopped, or of stopping public conveyances on land.

(16) The right of a seat in church.

(17) The right of burial.

(18) The right of receiving sunlight upon or over land [*see Civ. Code § 801.5*].

This list is not exclusive [*Jersey Farm Co. v. Atlanta Realty Co. (1912) 164 Cal. 412, 415, 129 P. 593* ; *Wright v. Best (1942) 19 Cal. 2d 368, 382, 121 P.2d 702]* . Additional easements may be created as long as no principle of public policy is violated [*Wright v. Best (1942) 19 Cal. 2d 368, 382, 121 P.2d 702]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral Overview



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§ 28A.15 Easements in Gross

[1] In General

An easement in gross is a personal interest in the real property of another. It is a personal right as well as a personal interest in real property. Because the easement belongs to the holder individually, there is no dominant tenement [*Balestra v. Button (1942) 54 Cal. App. 2d 192, 197* ; *see City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336* ; *see also § 28A.14 [1]* (discussion of dominant and servient tenements)]. However, an easement in gross always involves a servient tenement [*see Balestra v. Button (1942) 54 Cal. App. 2d 192, 197, 128 P.2d 816]* .

Although easements in gross were once considered to be nonassignable [*see Eastman v. Piper (1924) 68 Cal. App. 554, 567, 229 P. 1002]* , it is now clear that they are fully transferable [*Collier v. Oelke (1962) 202 Cal. App. 2d 843, 846-847, 21 Cal. Rptr. 140]* . Further, unlike an easement appurtenant, an easement in gross may be conveyed independently of land [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336* ; *see § 28A.14[1]*].

[2] Examples of Easements in Gross

The Civil Code sets forth the following list of types of easements in gross [*Civ. Code § 802*]:

(1) The right to pasture.

(2) The right to fish and take game.

(3) The right to a seat in church.

(4) The right of burial.

(5) The right of taking rents and tolls.

(6) The right-of-way.

(7) The right of taking water, wood, minerals, or other things.

This list is illustrative rather than exclusive [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 44 n.3, 84 Cal. Rptr. 162]* . For example, a common type of easement in gross that is not included in the list is the easement of a power company for utility lines [*see Hamaker v. Pacific Gas & Elec. Co. (1922) 59 Cal. App. 642, 644, 211 P. 265]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsEasementsPrivate Easements



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§ 28A.16 Classification of Easement as In Gross or Appurtenant

In determining whether an easement is in gross or appurtenant, the court will look primarily to the nature of the right and to the intention of the parties. The courts, however, favor the construction of easements as appurtenant [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879, 42 Cal. Rptr. 400]* .

The court will look to extrinsic evidence to determine the grantor's intent if (1) the intent does not appear from the grant, or (2) the language of the grant is ambiguous [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 521-523, 67 Cal. Rptr. 761* ; *City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 878, 42 Cal. Rptr. 400]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsEasements in Gross



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§ 28A.17 Affirmative and Negative Easements

Easements may be classified as either affirmative or negative, even though this distinction has no substantive effect under California law. This classification is based on the activity that the easement permits or forbids on the servient tenement.

An affirmative easement allows the easement owner to do something on the servient tenement that he or she would not otherwise be entitled to do [Restatement of Property § 451]. An example of an affirmative easement is the right to build and maintain power lines on another's land. A negative easement allows the easement owner to prohibit a property owner from doing acts on the property that the property owner would otherwise be entitled to do [Restatement of Property § 452]. For example, a negative easement may prevent the owner of the servient tenement from obstructing light passing over the servient tenement and onto the dominant tenement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAffirmative & Negative EasementsReal Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsCharacteristics



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§ 28A.18 Particular Kinds of Easements

[1] Rights-of-Way

A right-of-way is an easement that gives a person or class of persons the right to pass over the land of another [*Kripp v. Curtis (1886) 71 Cal. 62, 63, 11 P. 879* ; *Wood et al. v. Truckee Turnpike Co. (1864) 24 Cal. 474, 487]* . However, the term "right-of-way" is also commonly used to refer to the strip of land over which the easement runs [*Anderson v. Willson (1920) 48 Cal. App. 289, 295, 191 P. 1016* ; *Moakley v. Los Angeles Pacific Ry. Co. (1934) 139 Cal. App. 421, 424, 34 P.2d 218]* .

A right-of-way may be public or private. A public right-of-way, usually referred to as a highway or a public road, is a right-of-way that every citizen has a right to use. A private right-of-way may be used only by a particular person or class of persons [*Kripp v. Curtis (1886) 71 Cal. 62, 64, 11 P. 879]* .

[2] Water Easements

An easement may consist of the right to use water flowing on, over, or from land. Specifically, *Civil Code Section 801* [*see § 28A.14 [2]*] provides that the following are easements appurtenant:

(1) The right to take water [*Civ. Code § 801(5)*].

(2) The right to receive water from land [*Civ. Code § 801(9)*].

(3) The right to discharge water on land [*Civ. Code § 801(9)*].

(4) The right to flood land [*Civ. Code § 801(10)*].

(5) The right to have water flow without diminution or disturbance of any kind [*Civ. Code § 801(11)*].

Other water easements consist of the right to store water on land [*Security Pac. Nat. Bank v. City of San Diego (1971) 19 Cal. App. 3d 421, 428, 97 Cal. Rptr. 61]* , and the right to pollute a watercourse [*Wright v. Best (1942) 19 Cal. 2d*

368, 382, 121 P.2d 702] .

Water rights typically are easements appurtenant [*see Civ. Code § 662*; *Jones v. Deardorff (1906) 4 Cal. App. 18, 24, 87 P. 213]* . However, a water right, such as the right of taking water from land, may constitute an easement in gross [*see Civ. Code § 802(6)*; *see also § 28A.15 [2]*]. In the case of an easement appurtenant, the owner of the dominant tenement has a transferable easement over the servient tenement, and is entitled to judicial protection against diminution or disturbance [*LeBrun v. Richards (1930) 210 Cal. 308, 313-314, 291 P. 825* ; *Farmer v. Ukiah Water Co. (1880) 56 Cal. 11, 13-14]* .

[3] Party Walls

A party wall is essentially a common wall between two buildings, each of which is located on property owned by different owners [*see Equitable Bldg. & Loan Asso. v. Wolfangle (1931) 111 Cal. App. 119, 122, 295 P. 388* ; *Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* . It is considered an easement appurtenant under *Civ. Code § 801(12)* [*see § 28A.14[2]*]. For complete coverage of party walls, see Ch. 28B, *Party Walls and Boundary Agreements* .

[4] Support for Land and Buildings

Every owner of land is entitled to the lateral and subjacent support that his or her land receives from adjoining land [*Civ. Code § 832*]. The right of lateral support of land in its natural state is a "natural" right and not an easement [*Sargent v. Jaegling (1927) 83 Cal. App. 485, 487, 256 P. 1116]* . However, this right may be altered, expanded, or diminished by easement. For example, the right of receiving more than natural support from adjacent land is one of the types of appurtenant easements recognized by statute [*see Civ. Code § 801(13)*; *see also § 28A.14[2]*].

[5] Easements for Light, Air, and View

A landowner has no natural right to air, light, or an unobstructed view [*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community (1986) 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380]* . However, this type of right may be created by private parties through the granting of an easement [*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community (1986) 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380* ; *Petersen v. Friedman (1958) 162 Cal. App. 2d 245, 247-248, 328 P.2d 264* ; *see Civ. Code § 801(8), (18)*].

[6] Solar Easements

In addition to judicially-recognized easements for light, air, and view, California statutory law recognizes a "solar easement." A solar easement is defined as the the right of receiving sunlight across another person's real property for a solar energy system [*Civ. Code §§ 801(18), 801.5(a)*]. For these purposes, "solar energy system" means any solar collector or other solar energy device, or any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, electric generation, or for water heating [*Civ. Code § 801.5(a)(1)*]. For further discussion of these easements, see *§ 28A.211[1]*.

[7] Conservation, Open-Space, and Agricultural Conservation Easements

Conservation easements [*see Civ. Code § 815.1*], open-space easements [*see Gov. Code § 51075*], and agricultural conservation easements [*see Pub. Res. Code § 10211*] are additional types of easements recognized in California. These types of easements are included in each county recorder's comprehensive index of conservation easements and Notices of Conservation Easements on land within the county, which include all conservation easements recorded on or after January 1, 2002, as well as notices of conservation easements filed with the county recorder [*see Gov. Code § 27255*].

For further discussion of these types of easements and other types of related restrictions, see Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* . For additional coverage of the comprehensive index of

conservation easements, see *§ 28A.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawAdjoining LandownersParty WallsReal Property LawAdjoining LandownersWaterReal Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsEasementsPrivate EasementsReal Property LawLimited Use RightsEasementsPublic Easements



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§ 28A.19 Overview of Creation of Easements

Because an easement is an interest in land, it can be created by express or implied grant [*see Civ. Code § 1053* (a grant is a transfer in writing)], by express reservation in a grant of property, or by prescription, but generally not by parol [*Eastman v. Piper (1924) 68 Cal. App. 554, 561, 229 P. 1002]* . This chapter is concerned primarily with the express creation of easements, and only incidentally with the prevention of prescriptive easements. Implied easements are not covered in this chapter, but are discussed in detail in California Real Estate Law & Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

An easement can be created only by one who has a vested estate in the servient tenement [*Civ. Code § 804*]. The owner of the servient tenement cannot hold the easement [*Civ. Code § 805*]. However, a property owner who conveys less than full title may validly create easements in his or her favor on the property. "Owner" under *Civ. Code § 805* means the owner of the full fee title, both legal and equitable, such that a property owner who owns less than full title may validly create easements in his or her own favor on his or her land [*Beyer v. Tahoe Sands Resort (2005) 129 Cal. App. 4th 1458, 1473, 29 Cal. Rptr. 3d 561* (easements validly created by landowners who expressly reserved easements when they dedicated portion of their real property, including common areas, to time-share project and conveyed property's legal title to bank as trustee under trust agreement for project)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by ImplicationReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawLimited Use RightsEasementsCreationExpress Easements



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§ 28A.20 Creation by Express Grant

[1] Written Instrument

An express grant of an easement must be in writing, subscribed by the party (or by the duly authorized agent of the party) creating it [*see Empire Investment Co. v. Mort. (1915) 169 Cal. 732, 739, 147 P. 960* ; *Wagner v. Hanna (1869) 38 Cal. 111, 117]* . This requirement is based on (1) the principle that the creation of easements is subject to the same rules as the creation of other interests in real property [*see Restatement of Property § 467(a)*; *see also* Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)], and (2) certain statutory provisions (including the Statute of Frauds) that require that certain contracts be in writing. Under these statutes, an agreement for the sale of an interest in real property is invalid unless the agreement, or some note or memorandum of the agreement, is in writing and subscribed by the party to be charged or by the party's duly authorized agent [*Civ. Code § 1624(c)*]. Further, no interest in real property (other than leases not exceeding one year), nor any power over or concerning real property, can be created, granted, assigned, surrendered, or declared except by operation of law or by an instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring it (or the party's duly authorized agent) [*Code Civ. Proc. § 1971*]. An easement is subject to these statutory provisions because it is an interest in real property [*see § 28A.10*].

The form of the writing used to create an easement is usually a deed or an agreement [*see* Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender); Bowman, Ogden's Revised California Real Property Law, vol. 1, ch. 13, *Easements* (Cal. CEB 1974)]. However, an instrument other than a deed may be used to create an easement [*see, e.g., Renden v. Geneva Development Corp. (1967) 253 Cal. App. 2d 578, 586, 61 Cal. Rptr. 463* (lease); *A. Hamburger & Sons, Inc. v. Lemboeck (1937) 20 Cal. App. 2d 565, 568-569, 67 P.2d 380* (deed of trust); *Eastman v. Piper (1924) 68 Cal. App. 554, 561, 229 P. 1002* (separate instrument)].

There are limited exceptions to the requirement of a writing for the creation of an interest in real property. For example, an executed oral agreement between the creator of an easement and a person seeking to enforce rights in the easement is sufficient to vest the latter with rights enforceable in equity [*Wilkes v. Brady (1927) 84 Cal. App. 365, 369, 258 P. 108* ; *Stoner v. Zucker (1906) 148 Cal. 516, 519, 83 P. 808]* . Further, an easement may be enforceable under the doctrine of equitable estoppel if the owner of the dominant tenement relies on representations or conduct of the owner of the

servient tenement, and the imposition of an easement is necessary to prevent an injustice [*see, e.g., Prescott v. Edwards (1897) 117 Cal. 298, 302-303, 49 P. 178* ; *Cline v. Haines (1961) 192 Cal. App. 2d 560, 562-563, 13 Cal. Rptr. 797]* . For further discussion of these exceptions, see California Real Estate Law Practice, Chapter 343, *Easements and Licenses* (Matthew Bender).

[2] Required Contents of Writing and Additional Formalities

The instrument granting the easement must describe both the land subject to the easement and the use to which the land is to be put [*City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976]* . The description of the servient tenement must be sufficient to identify the property [*see Gas & E. Co. v. Crockett L. & C. Co. (1924) 70 Cal. App. 283, 293, 233 P. 370* ; *see also Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174* (description must definitely describe the servient tenement)]. However, the easement need not be described by metes or bounds or other descriptions providing definite dimensions of the easement [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174]* . If the location and limits of the easement are not specified in the grant, a reasonably convenient and suitable location is presumed to be intended [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174* ; *Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1034, 82 Cal. Rptr. 272]* .

The instrument need not mention the grantee by name if it contains a designation or description that is sufficient to identify the grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447, 290 P.2d 590* ("to the present owners of said lot 3" held to be a sufficient description); *Carlson v. Lindquer (1953) 119 Cal. App. 2d 292, 306, 259 P.2d 925]* . Further, the instrument need not contain the term "easement" if the clear implication of the grant is that an easement was intended [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174]* .

A present grant of an easement is an executed contract and does not require consideration for the grant to be valid [*Civ. Code § 1040*; *Eastman v. Piper (1924) 68 Cal. App. 554, 569, 229 P. 1002]* .

Although the instrument need not be recorded to be enforceable against the grantor, recordation may be necessary to assert easement rights against a transferee of the grantor who purchases the servient tenement for value and without notice of the easement [*Pollard v. Rebman (1912) 162 Cal. 633, 634, 124 P. 235* ; *see* Ch. 27, *Deeds and Recording*].

[3] Construction

In interpreting any document that creates an easement, the rules governing the construction of deeds generally apply [*Eastman v. Piper (1924) 68 Cal. App. 554, 561, 229 P. 1002* ; *McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 353, 49 Cal. Rptr. 592* ; *see* Ch. 27, *Deeds and Recording*]. Thus, as a general rule, a deed or other instrument creating an easement must be interpreted in the same way that contracts in general are interpreted [*see Civ. Code § 1066*; *City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976]* . For complete coverage of the interpretation of contracts, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . The remainder of this discussion will focus on the construction of easements and other grants.

If the language in an instrument conveying an easement is clear and explicit, parol evidence may not be used to show the nature and extent of the rights acquired [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272]* . However, if the language is ambiguous, extrinsic evidence may be admitted to determine its meaning [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 353, 49 Cal. Rptr. 592* ; *see Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270-271, 100 Cal. Rptr. 174]* .

As a general rule, any ambiguities in a grant of an easement must be construed against the drafter of the instrument [*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 525, 119 Cal. Rptr. 559]* .

However, this rule must be tempered by the rule that the grant of an easement must be liberally construed in favor of the grantee [*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 525, 119 Cal. Rptr. 559* ; *see Civ. Code § 1069* (a grant, other than a grant by a public officer or body to a private party, must be interpreted in the grantee's favor); *see also* City of Los Angeles v. Howard (1966) 244 Cal. App. 2d 538, 545, 53 Cal. Rptr. 274 (directive that every grant by public body is to be interpreted in favor of grantor applies only if there is ambiguity in grant); Red Mountain v. Fallbrook Public Utility Dist. (2006) 143 Cal. App. 4th 333, 347, 48 Cal. Rptr. 3d 875 (access easement had to be construed in favor of grantor public utility)].

[4] Extent of Easement

The extent or scope of an easement created by an express grant is determined by the language of the grant [*Civ. Code § 806* (extent of a servitude is determined by the terms of the grant); *City of Los Angeles v. Ingersoll-Rand Co. (1976) 57 Cal. App. 3d 889, 894, 129 Cal. Rptr. 485* ; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 526, 119 Cal. Rptr. 559]* . If the grant does not precisely define the rights conferred by the easement, the scope of the easement is construed as whatever is reasonably necessary and convenient for the purpose for which the easement was created [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1034, 82 Cal. Rptr. 272* ; *see Atchison, T. & S.F. R. Co. v. Abar (1969) 275 Cal. App. 2d 456, 464, 79 Cal. Rptr. 807]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawLimited Use RightsEasementsCreationExpress Easements



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§ 28A.21 Creation by Express Reservation

[1] In General

An easement may be created by express reservation in a deed or other instrument [*see Coon v. Sonoma Magnesite Co. (1920) 182 Cal. 597, 601-602, 189 P. 271* ; *City of Los Angeles v. Howard (1966) 244 Cal. App. 2d 538, 542-543, 53 Cal. Rptr. 274]* . A reservation allows the grantor's entire interest in the subject property to pass to the grantee, but revests a newly created interest in the grantor or a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739]* .

[2] Reservation Distinguished From Exception

Although the terms "reservation" and "exception" are frequently used interchangeably to refer to a clause in an instrument of conveyance that detracts from what the grantee would otherwise receive under the instrument, there are material differences between the two terms [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677, 41 Cal. Rptr. 223]* . For example, a reservation must be interpreted in favor of the grantor [*Civ. Code § 1069*], while an exception must be strictly interpreted against the grantor [*Lange v. Waters (1909) 156 Cal. 142, 146, 103 P. 889]* . Consequently, it is important to distinguish between these two types of clauses.

An exception prevents part of the grantor's interest from passing to the grantee. The excepted interest remains in the grantor [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476 n.1, 102 Cal. Rptr. 739]* . Typically, a physical part of the land is excluded from the conveyance [*see Sears v. Ackerman (1903) 138 Cal. 583, 586, 72 P. 171* ; *see also* Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)]. Thus, it has been argued that the use of an exception is not, technically, appropriate for the creation of an easement because an exception does not create a new interest in the land of another [*see* Bowman, Ogden's Revised California Real Property Law (Cal. CEB 1974), vol. 1, ch. 13, *Easements*; *see also § 28A.10*]. However, the question of whether a particular provision in an instrument of conveyance is an exception or a reservation is not conclusively determined by the use of the term "reservation" or "exception" alone, and the courts will disregard the words used if necessary to effectuate the real intentions of the parties as ascertained from the whole conveyance [*Coon v. Sonoma Magnesite Co. (1920) 182 Cal. 597, 600, 189 P. 271* ; *Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677-678, 41 Cal. Rptr. 223]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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§ 28A.22 Creation of Public Easement on Private Land

If authorized by a local ordinance, a local agency may require an owner of real property to record a covenant of easement that gives the city or county an easement for any of the following: parking, ingress, egress, emergency access, light and air access, landscaping, or open-space purposes [*see Gov. Code §§ 65870, 65871(a)*]. This method of creating an easement is in addition to any other method permitted by law [*Gov. Code § 65871(a)*].

The covenant of easement must (1) provide a legal description of the dominant and servient tenements, and (2) identify the approval, permit, or designation that relied upon or required the covenant [*Gov. Code §§ 65871(c), 65873*]. Once executed by the owner of the servient tenement, the covenant is enforceable by the successors in interest to the dominant tenement [*Gov. Code §§ 65871(d), 65873*].

The covenant of easement must be recorded in the county where all or a portion of the restricted property is located. At the time of recordation, all the real property benefited or burdened by the covenant must be in common ownership. The covenant becomes effective upon recordation and thereafter acts as an easement pursuant to the easement provisions of the Civil Code [*see Civ. Code §§ 801-813*], except that it cannot merge into any other interest in the real property [*Gov. Code § 65871(b)*; *see Civ. Code § 1104* (governing conveyance of affected real property)]. A recorded covenant also imparts notice of the covenant to all persons pursuant to the recording laws of California. Further, the burdens of the recorded covenant will be binding on, and the benefits of the covenant will inure to, all successors in interest to the servient tenement [*Gov. Code § 65873*].

Any local ordinance governing covenants for public easements must provide a procedure for the release of the covenant [*Gov. Code § 65874(a)*; *see Gov. Code § 65874(c)*]. The city or county must record a release upon a determination that the restriction of the property is no longer necessary to achieve the local land use goals [*Gov. Code § 65874(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsPublic EasementsReal

Property LawPriorities & RecordingRecording Acts



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§ 28A.23 Easements Acquired by Prescription

[1] In General

An easement may be acquired by prescription. Although the focus of this chapter is on easements that are created by express grant or reservation, the following summary of the laws governing easements by prescription is included because this chapter covers the procedures a property owner may follow to prevent the loss of real property by prescription [*see § 28A.142*].

The elements necessary to establish a prescriptive easement are, with the exception of the requirement that taxes be paid, essentially the same as those required for the acquisition of title by adverse possession [*Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 571, 199 Cal. Rptr. 773, 676 P.2d 584* ; *see Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138* ; *Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92* ; *Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1305, 54 Cal. Rptr. 2d 284* ; *Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 562-563, 53 Cal. Rptr. 2d 37]* . Thus, the person claiming the easement must show that he or she has used the property over which the easement is claimed for at least five years, and that the use has been open, notorious, continuous, uninterrupted, hostile to the true owner, and under a claim of right [*Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 570, 199 Cal. Rptr. 773, 676 P.2d 584* ; *Taormino v. Denny (1970) 1 Cal. 3d 679, 686, 83 Cal. Rptr. 359, 463 P.2d 711* ; *see Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1305, 54 Cal. Rptr. 2d 284* ; *Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 562-563, 53 Cal. Rptr. 2d 37]* . For extensive coverage of these elements, see California Real Estate Law Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

[2] Notice or Posting to Prevent Acquisition

The owner of real property may prevent another person from acquiring a prescriptive right in the property by following either of two statutory procedures. The first involves the recordation of a notice, and the second requires the posting of signs.

Under the first procedure, the holder of record title to land may record a description of the land that includes a statutory notice indicating that the right of others to use the land is by permission [*see Civ. Code § 813*; *see also § 28A.234*

(statutory notice)]. The notice may be recorded in the office of the recorder of any county in which any part of the land is situated. Further, if the property is used by other than the general public (that is, by a specific person or persons), the notice must be served by registered mail on the user(s). Following recordation, in any action involving the issue of whether land has been dedicated to public use or whether any user has acquired a prescriptive right to use land, the notice constitutes conclusive evidence that subsequent use of the land during the time the notice is in effect is permissive and with the owner's consent [*Civ. Code § 813*; *see § 28A.234[1]* (additional coverage)].

The second procedure authorizes a property owner to post signs at each entry to the property or at intervals of not more than 200 feet along the boundary. The signs must read substantially as follows: "Right to pass by permission, and subject to control, of owner: *Section 1008, Civil Code*." If these requirements are satisfied, no use by any person or persons, no matter how long the use continues, will ever ripen into an easement by prescription [*Civ. Code § 1008*; *see § 28A.236* (illustrative notice and additional coverage)]. To be legally operative, the "permission to pass" sign must be posted by the landowner or by the landowner's authorized agent [*Aaron v. Dunham (2006) 137 Cal. App. 4th 1244, 1252, 41 Cal. Rptr. 3d 32* (posting by lessee of "permission to pass" sign on private road did not prevent acquisition of prescriptive easement because sign was not posted by property owner or owner's authorized agent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawPriorities & RecordingRecording Acts



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§ 28A.24 Maintenance of Easement

The owner of an easement has the duty to keep the easement in repair [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592]* . The servient owner is under no duty to maintain or repair the easement [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 228, 259 P.2d 429]* . However, the parties may alter this obligation by contract. Consequently, the servient owner may enter into a binding agreement to join in keeping the easement in repair [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983]* .

An express or implied grant of an easement carries with it a "secondary" easement that gives the dominant owner the right to enter on the servient tenement to make repairs and do any other things that are necessary for the full exercise of the primary easement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401* ; *see Ward v. City of Monrovia (1940) 16 Cal. 2d 815, 821-822, 108 P.2d 425* ; *see also Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429* (easement owner has right to do everything that is reasonably necessary to use easement)]. This secondary easement must be exercised only when necessary, and in a reasonable manner that does not needlessly increase the burden on the servient tenement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401]* . To reduce the possibility of litigation, the grant of easement should set forth a specific description of the type of maintenance and repairs contemplated.

Special statutory requirements apply to the maintenance of a private right-of-way. Specifically, the owner of such an easement, or of any land to which any such easement is attached, must maintain it in repair [*Civ. Code § 845(a)*]. If the easement is owned by more than one person, or is appurtenant to parcels of land under different ownership, the cost of maintaining it in repair must be shared by each owner of the easement or each owner of an appurtenant parcel, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose [*Civ. Code § 845(b)*]. In the absence of such an agreement, the cost of maintaining the right-of-way in repair must be shared proportionately to the use made of the easement by each owner [*Civ. Code § 845(c)*]. For further discussion of these statutory requirements and an illustrative maintenance agreement, see *Section 28A.231*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use

RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsPrivate Easements



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§ 28A.25 Division of Dominant Tenement

If a dominant tenement is partitioned, the burden of the easement must be apportioned according to the division of the dominant tenement [*Civ. Code § 807*]. Thus, the owner or assignee of any portion of the dominant estate may assert his or her rights under the easement so far as applicable to his or her part of the property [*Herbert v. Russell (1969) 1 Cal. App. 3d 63, 66, 81 Cal. Rptr. 448* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881, 42 Cal. Rptr. 400]* . The burden, however, may not be apportioned so as to impose an undue or unreasonable burden on the servient tenement [*Civ. Code § 807*; *Jordan v. Worthen (1977) 68 Cal. App. 3d 310, 327, 137 Cal. Rptr. 282]* . For additional coverage of apportionment, see California Real Estate Law Practice, Chapter 343, *Easements and Licenses* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCharacteristics



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§ 28A.26 Termination of Easements

[1] In General

An easement may be terminated or extinguished in a number of ways. For example, an easement may be created to last for a specified term, or to last until the occurrence of a specified event. An easement that terminates according to its own terms is said to terminate by expiration [Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)].

The Civil Code recognizes the following ways in which an easement may be extinguished or terminated [*Civ. Code § 811*]:

> (1) By the vesting of the right to the easement and the right to the servient tenement in the same person (the doctrine of merger) [*Civ. Code § 811(1)*; *see Civ. Code § 805* (owner of servient tenement cannot own a servitude on the property); *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881-884, 42 Cal. Rptr. 400]* .
>
> (2) By the destruction of the servient tenement [*Civ. Code § 811(2)*].
>
> (3) By the performance of any act on either tenement, by the owner of the easement or with his or her assent, that is incompatible with its nature or exercise [*Civ. Code § 811(3)*; *see Crimmins v. Gould (1957) 149 Cal. App. 2d 383, 391, 308 P.2d 786]* .
>
> (4) When the easement was acquired by prescription, by disuse of the easement by the owner of the servitude for the period prescribed for acquiring title by enjoyment [*Civ. Code § 811(4)*; *see § 28A.23* (discussion of easements by prescription)].

Additional methods or causes of termination include the following: the release or abandonment of the easement by the dominant owner [*see* [2], *below*]; the abandonment of a public easement [*see Sts. & Hy. Code § 8300 et seq.* (Public Streets, Highways, and Service Easements Vacation Law)]; adverse possession by the servient owner [*see Glatts v.*

Henson (1948) 31 Cal. 2d 368, 371, 188 P.2d 745] ; application of the doctrine of equitable estoppel [*see* Restatement of Property § 505; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 531, 119 Cal. Rptr. 559]* ; condemnation [*see Code Civ. Proc. §§ 1240.030, 1240.110(a)*]; and foreclosure [*see* Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 471, 475, 144 Cal. Rptr. 478] . With the exception of the release or abandonment of the easement by the dominant owner [*see* [2], *below*], additional coverage of these methods and causes of termination is beyond the scope of this publication. For further discussion, see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* (Matthew Bender).

[2] By Dominant Owner

As mentioned in [1], above, a dominant owner may extinguish or terminate an easement by (1) performing or consenting to the performance of an act on either tenement that is incompatible with the nature or exercise of the easement [*Civ. Code § 811(3)*], (2) releasing the easement, or (3) abandoning the easement. The remainder of this section discusses the release or abandonment of an easement by the dominant owner.

The owner of an easement may terminate the easement by releasing it to the servient owner. Because a release is subject to the same formal requirements that apply to instruments creating easements [*Restatement of Property § 501, Comment a*; Gaudio, Powell on Real Property, Ch. 34, *Easements and Licenses* (Matthew Bender); *see §§ 28A.19-28A.21*], a release must ordinarily be evidenced by a writing signed by the party to be charged [*see Civ. Code § 1624(c)*; *Code Civ. Proc. § 1971*; *see also § 28A.233* (quitclaim deed releasing easement)].

A dominant owner may also terminate an easement by abandoning it [*Home R. E. Co. v. Los Angeles Pac. Co. (1912) 163 Cal. 710, 714, 126 P. 972]* . As a general rule, the two elements required for abandonment are nonuse of the easement accompanied by an express or implied intent to abandon it [*People v. Southern Pacific Co. (1916) 172 Cal. 692, 701, 158 P. 177* ; *Faus v. City of Los Angeles (1967) 67 Cal. 2d 350, 363, 62 Cal. Rptr. 193]* . For extensive coverage of the common law of abandonment, see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* .

An easement may also be extinguished if the dominant owner performs or authorizes some act that (1) results in a physical change that permanently and materially prevents the dominant owner from using the easement, or (2) makes the dominant owner's use of the easement severely burdensome on the servient tenement [*Reichardt v. Hoffman (1997) 52 Cal. App. 4th 754, 769, 60 Cal. Rptr. 2d 770]* .

A special statutory procedure establishes fixed expiration periods for certain interests in real property, including abandoned easements [*see Civ. Code § 880.020 et seq.*; *see also § 28A.141*]. That procedure supplements and does not otherwise affect the common law of abandonment [*Civ. Code § 887.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsTermination of Easements



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§ 28A.27 Statutory Procedures Governing Abandonment and Preservation of Easements

[1] In General

The marketable record title provisions of the Civil Code [*see Civ. Code § 880.020 et seq.*] establish fixed expiration periods for various interests in real property, including abandoned easements [*see Civ. Code § 887.010* ("easement" defined); *see also Civ. Code § 887.020*]. These provisions permit an owner of real property subject to an easement to bring an action to establish the abandonment of the easement and to clear record title of the easement. They also establish a procedure that permits the owner of the easement to preserve his or her rights in the easement [*see § 28A.141* (coverage of both of the foregoing procedures)].

The marketable record title laws supplement and do not limit or otherwise affect the common law governing the abandonment of an easement or any other procedure for clearing an abandoned easement from title to real property [*Civ. Code § 887.030*].

[2] Abandoned Easements

For these purposes, an easement is abandoned only if, during the 20 years immediately preceding the commencement of the action, all of the following conditions have been satisfied [*Civ. Code § 887.050(a)*; *see Civ. Code § 887.050(b)*]:

(1) The easement has not been used at any time.

(2) No separate property tax assessment has been made of the easement, or, if a separate property tax assessment has been made, no taxes have been paid on the assessment.

(3) No instrument creating, reserving, transferring, or otherwise evidencing the easement has been recorded.

To establish the abandonment of the easement and to clear record title of the easement, the owner of the real property subject to the easement must bring an action in the superior court of the county in which the real property is located [*Civ. Code § 887.040(a),(b)*; *see Civ. Code § 887.040(c)*]. However, the court must permit the owner of the easement to

record a late notice of intent to preserve the easement as a condition of dismissal of the action [*Civ. Code § 887.070*; *see* [3], *below*].

An abandoned easement is unenforceable and is deemed to have expired. A court order establishing abandonment pursuant to the marketable record title laws is equivalent for all purposes to a conveyance of the easement to the owner of the real property [*Civ. Code § 887.080*].

[3] Procedure to Preserve Easement

The owner of the easement may record a notice of intent to preserve the easement [*Civ. Code § 887.060(a)*]. An easement is not abandoned for purposes of the marketable record title provisions if recordation takes place (1) within 20 years immediately preceding the commencement of an action to establish the abandonment of the easement, or (2) pursuant to *Civil Code Section 887.070* after commencement of an action to establish the abandonment of the easement and before judgment is entered in the action [*Civ. Code § 887.060(c)*; *see* [2], *above*].

For additional coverage of the foregoing procedures and the official notice of intent to preserve interest form [*see Civ. Code § 880.340*], see *Chapter 27, Deeds and Recording, § 27.289*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawPriorities & RecordingRecording ActsReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleRemedies



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§ 28A.28 Income Tax Considerations

If the grant of an easement deprives the grantor of practically all of his or her beneficial interest in the land, the grant is deemed to be a taxable sale of the land [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issue, Rev. Rul. 72-433, 1972-2 CB 470*]. For example, a grant of perpetual air rights over land that rendered a portion of the land unsafe for use was considered a sale of that portion of the land [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issue, Rev. Rul. 72-433, 1972-2 CB 470*].

If the grant does not deprive the grantor of his or her beneficial interest in the land, the transaction is deemed to be a sale of an easement [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issue, Rev. Rul. 72-433, 1972-2 CB 470* ; Bender's Federal Tax Service, ch. E:1, *Sales and Exchanges*]. For example, the same grant of air rights described above was considered the sale of an easement over the portion of the land that remained usable [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issue, Rev. Rul. 72-433, 1972-2 CB 470*]. Similarly, the grant of a highway easement was not a taxable sale of the affected land when the taxpayer continued to pay realty taxes and to use the land to move cattle [Bledsoe v. U.S. (D.C. Okla. 1967) 67-2 U.S. Tax Cas. (CCH) P 9581]. The consideration received from the sale of an easement reduces the basis of the affected land [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issue, Rev. Rul. 72-433, 1972-2 CB 470*]. If only a portion of the property is affected by the easement and the basis for that portion is determinable, the amount received for the grant is offset against only that portion of the taxpayer's basis [*Fasken v. Commissioner (1979) 71 T.C. 650, 655, 660]* . If the allocation of basis is impractical, the amount realized is applied to reduce the basis for the entire property [Foster v. Commissioner (1983) 80 T.C. 34, 218-219 , *aff'd on other issues, 756 F.2d 1430 (9th Cir. 1985)* ; *Inaja Land Co. v. Commissioner (1947) 9 T.C. 727, 735-736* ; *Rev. Rul. 70-510, 1970-2 C.B. 159*]. If the proceeds exceed the basis, the excess is taxable gain [*see Rev. Rul. 54-575, 1954-2 C.B. 145 , modified on other issues, Rev. Rul. 72-433, 1972-2 CB 470*].

A grant of an easement may constitute the sale or exchange of a capital asset [*Rev. Rul. 59-121, 1959-1 C.B. 212*]. If the affected land was used in the taxpayer's trade or business and held for the capital gains holding period, any recognized gain from the conveyance of the easement receives capital gains treatment [*Fasken v. Commissioner (1979) 71 T.C. 650, 655, 660* ; *Rev. Rul. 59-121, 1959-1 C.B. 212*]. However, if the conveyance is limited to the time required to remove minerals or is subject to reversion for nonuse, the grant is considered a lease or license and does not constitute the sale of a capital asset [*Nay v. Commr (1952) 19 T.C. 114, 119* ; *Vest v. Commissioner (1971) 57 T.C.*

128, 151 , rev'd on other grounds, 481 F.2d 238 (5th Cir. 1973)] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General Overview



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§ 28A.29 Comprehensive Index of Conservation Easements

[1] Index Developed and Maintained by County Recorder

The county recorder in each county must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. This index must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*; *see* § 28.29[2]. When a county recorder records a new conservation easement affecting property within the county, the recorder must include the easement in the comprehensive index if the document contains an easement entitled "conservation easement" or if the notice described in [3], *below*, is properly filled out by the submitter and recorded at the same time, or at a later date [*Gov. Code § 27255(c)*; *see Gov. Code §§ 27255(e), (c), 27361* (no fee under *Gov. Code § 6103*, but standard fee charged for recording)].

[2] Index Includes Conservation, Open-Space, and Agricultural Conservation Easements

For purpose of inclusion in the comprehensive index, a "conservation easement" means any limitation in a recorded instrument that [*Gov. Code § 27255(b)*]:

- Contains an easement, restriction, covenant, condition, or offer to dedicate, which is or has been executed by or on behalf of the owner of the land subject to that limitation.

- Is binding on successive owners of the land.

- Has as its purpose to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Included in the definition of "conservation easement" for these purposes are conservation easements as defined in *Civ. Code § 815.1*, open-space easements as defined in *Gov. Code § 51075*, and agricultural conservation easements as defined in *Pub. Res. Code § 10211* [*Gov. Code § 27255(b)*; *see § 28A.18[7]*]. For a further discussion of these types of easements and other types of related restrictions, see Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

[3] Notice of Conservation Easement for Indexing Purposes

In addition to adding information to the comprehensive index concerning recorded documents that contain a specifically named conservation easement, a county recorder must also add information to the index concerning an easement that is described in a notice that is properly filled out by the submitter, and recorded at the same time as it is submitted, or at a later time. The form of that notice, entitled "NOTICE OF CONSERVATION EASEMENT," is prescribed by statute [*see Gov. Code § 27255(c)*]. The notice must include information on the recording of the easement, the grantors and grantees, and a declaration under penalty of perjury that the information given is true and correct. The notice itself is for indexing purposes only, and does not by itself constitute a conservation easement [*Gov. Code § 27255(c)*]. For a form of this statutory notice, see *§ 28A.237*.

[4] Conservation Easements Recorded Before January 1, 2002

A conservation easement recorded before January 1, 2002, may be included in the comprehensive index of conservation easements if a party to the easement fills out and records a Notice of Conservation Easement for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(d)*; *see § 28A.29[3]*]. Any party to a conservation easement may fill out and record a notice, including, but not limited to, counties, cities, recreation and park districts or agencies, state conservancies, state agencies, the California Coastal Commission, land trusts, and nonprofit organizations [*Gov. Code § 27255(d)*; *see § 28A.237*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawPriorities & RecordingRecording Acts



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§ 28A.30 State Registry for Conservation Easements

The Natural Resources Agency is required to establish a central public registry of all conservation easements held or required by the state, or purchased with state grant funds provided by any agency, department, or division of the state on or after January 1, 2006 [Pub. Res. Code § 5096.520(a); *see* Pub. Res. Code § 5096.520(b) ("conservation easement" defined); *see also* Stats. 2006, ch. 531, § 1 (legislative intent)]. The registry will include the recordation number assigned by the county recorder and the following information on each conservation easement [Pub. Res. Code § 5096.520(c)]:

- The purpose of the easement;
- The location of the easement, identified by county and nearest city;
- The identity of the easement holder;
- The size of the easement in acres; and
- The date the easement transaction was recorded.

On or before January 1, 2009, the registry must be made available for use by the general public. Only the items of information listed above may be provided on the internet. No personal identifying information may be posted on the internet. The registry is to be updated biennially [Pub. Res. Code § 5096.520(e)]. The updating is to be done by each agency, department, or division of the state with conservation easements that are held or required by the state or purchased with state grant funds [Pub. Res. Code § 5096.520(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART II. LEGAL BACKGROUND

12-28A California Legal Forms--Transaction Guide §§ 28A.31-28A.99

[Reserved]

§§ 28A.31[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28A California Legal Forms--Transaction Guide § 28A.100

§ 28A.100 Easements

[1] Facts

1. Names, addresses, and telephone numbers of parties and their attorneys.

2. Grantor's interest in servient tenement [*see Civ. Code § 804* (easement can be created only by one who has a vested estate in servient tenement)].

3. Grantee's interest in dominant tenement (if applicable).

4. Marital status of grantor.

5. Whether easement will be created by:

a. Express grant; or

b. Express reservation in grant of property.

NOTE:
A reservation allows the grantor's entire interest in the subject property to pass to the grantee, but revests a newly created interest in the grantor or a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739* ; ***see*** *§ 28A.202*].

6. If easement will be created by express grant, whether or not it will be granted in conjunction with conveyance of real property.

7. Type of instrument to be used to create easement:

a. Deed.

b. Agreement.

c. Other.

8. Whether easement is to attach to:

a. Land of grantee (easement appurtenant); or

NOTE:

An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him or her as the owner or possessor of that land [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 767, 147 Cal. Rptr. 336* ; ***see*** *§ 28A.14*].

b. Person or other legal entity (easement in gross).

NOTE:

An easement in gross is a personal interest in the real property of another [***see*** *Balestra v. Button (1942) 54 Cal. App. 2d 192, 197* ; § 28A.15].

9. General descriptive designation of easement, e.g.:

a. Right-of-way [*see § 28A.201*].

b. Solar easement [*see § 28A.211*].

c. Easement for air, light, or view [*see § 28A.211[1][b]*].

d. Well easement (i.e., right to use well) or other water easement [*see § 28A.212*].

e. Temporary easement to use servient tenement for construction purposes [*see § 28A.213*].

f. Driveway or roadway easement [*see § 28A.214*].

g. Profit [*see § 28A.215*].

NOTE:

A profit (also sometimes referred to as a profit a prendre) is the right to make some use of another's land, and includes (1) the right of entry, (2) the right to remove and take from the land the designated products or profit, and (3) the right to use the surface to the extent necessary and convenient for the exercise of the profit [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113]* . A profit may be characterized as an easement [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113]* .

10. Location of servient tenement and, if applicable, dominant tenement [*see § 28A.130*, PP 3c (servient tenement), 4c

(dominant tenement)].

a. Street address, city, and county; or

b. Other description sufficient to identify property.

11. Extent or scope of easement [*see § 28A.130*, P 3d].

12. Whether or not grantee's right to use easement will be exclusive [*see § 28A.130*, P 4e].

13. Any secondary easements or incidental rights to be granted to grantee [*see § 28A.130*, P 3d(3)].

14. Grantor's rights, if any, to use easement.

15. Whether or not easement will be assignable [*see § 28A.130*, P 4h].

16. Duration of grant.

17. Circumstances under which easement will terminate.

18. Amount of consideration, if any.

19. Duties of grantor and grantee to repair and maintain easement, as applicable.

NOTE:

The easement owner has the duty to keep the easement in repair [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592* ; ***see*** *Civ. Code § 845*]. However, the parties may alter this obligation by contract [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983]* .

20. If easement will be a private right-of-way that will be owned by more than one person, or will be appurtenant to parcels of land under different ownership, desired method of apportioning cost of maintaining easement in repair [*see Civ. Code § 845*; *see also § 28A.231*].

21. Whether client anticipates that any of the following will occur or may be desirable after creation of easement:

a. Change in use of easement.

b. Expansion of dominant tenement.

c. Subdivision, partition, or other division of dominant tenement.

d. Relocation of servient tenement.

[2] Documents

1.Grantor 's deed to servient tenement.

2. If easement is appurtenant, grantee's deed to dominant tenement.

3. Any instruments granting other easements or licenses in servient tenement.

4. Any leases of servient tenement.

5. Maps of servient tenement, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsEasementsTermination of Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

12-28A California Legal Forms--Transaction Guide § 28A.101

§ 28A.101 Licenses

[1] Facts

1. Names, addresses, and telephone numbers of licensor and licensee.

2. Licensor's interest in property to be subject to license.

3. Description of acts licensee will be permitted to perform on licensor's land.

4. Description of any incidental rights of licensee to use licensor's property.

5. Whether or not license will be assignable.

NOTE:
As a general rule, a license is not assignable because it is a personal privilege [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Shaw v. Caldwell (1911) 16 Cal. App. 1, 8, 115 P. 941]* . Notwithstanding this general rule, a license may be assigned if the original licensor and licensee agree that it may be assigned [*Herman v. Rohan (1918) 37 Cal. App. 678, 681, 174 P. 349]* .

6. Duration of license.

7. Revocability of license.

NOTE:
The general rule is that a license may be revoked at any time at the will of the licensor [*Wheeler v. West (1886) 71 Cal. 126, 129, 11 P. 871* ; *County of Alameda v. Ross (1939)*

32 Cal. App. 2d 135, 141-142, 89 P.2d 460] . However, there are exceptions to this rule. One major exception provides that a license "coupled with an interest" is not revocable but continues to exist for the period contemplated by the license [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729]* . The cases dealing with licenses coupled with an interest generally turn on the need of the licensee to cross the land of the licensor to reach property owned by the licensee [***see*** *§ 2.230[1][e]*].

[2] Documents

1. Licensor's deed to property to be subject to license.

2. Instruments granting other easements or licenses in licensor's property, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsLicenses



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

12-28A California Legal Forms--Transaction Guide §§ 28A.102-28A.109

[Reserved]

§§ 28A.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
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B. Preliminary Determinations

12-28A California Legal Forms--Transaction Guide § 28A.110

§ 28A.110 Easements

1. Does grantor have capacity to convey desired easement?

NOTE:

An easement can be created only by one who has a vested estate in the servient tenement [*Civ. Code § 804*].

A tenant in common cannot create an easement or servitude in the common land [*Pfeiffer v. Regents of University (1887) 74 Cal. 156, 162, 15 P. 622]* .

For coverage of the capacity of parties to convey real property, see Chapter 27, ***Deeds and Recording*** , and Volume 5, Chapter 23, ***Real Property Sales Agreements***. The capacity of parties to contract in general is covered in Volume 14, Chapter 75, ***Formation of Contracts and Standard Contractual Provisions***.

2. If instrument creating easement is to be recorded, is it subject to a documentary transfer tax?

a. Has such a tax been imposed by local ordinance on instruments conveying real property located in county or city in which servient tenement is situated [*Rev. & Tax. Code § 11911(a), (b)*]?

NOTE:

A California county may impose a transfer tax, by ordinance, on deeds and other instruments conveying real property located in the county [*Rev. & Tax. Code § 11911(a), (b)*]. Further, any city within a county that has imposed such a tax may also tax the transfer [*Rev. & Tax. Code § 11911(b)*]. Payment of any required transfer tax or taxes is a prerequisite to recordation [*Rev. & Tax. Code § 11933*]. For further discussion, see *§*

28A.220.

b. Will proposed easement endure for substantial period of time [*see 62 Cal. Op. Att'y Gen. 87 (1979)]* ?

NOTE:

An easement is subject to a documentary transfer tax imposed by local ordinance if the easement potentially may endure for a substantial period of time. The following are examples of easements that meet this criterion: a perpetual easement; an easement for life; or an easement for a fixed period of years that (1) can be renewed by the easement holder, or (2) is of sufficient length so as to approximate a perpetual easement or an easement for life *[62 Cal. Op. Att'y Gen. 87 (1979)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-28A California Legal Forms--Transaction Guide § 28A.111

§ 28A.111 Licenses

1. Will license be "coupled with an interest"?

NOTE:

A license coupled with an interest is not revocable but continues to exist for the period contemplated by the license [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729]* . The cases dealing with licenses coupled with an interest generally turn on the licensee's need to cross the licensor's land to reach property owned by the licensee [***see*** California Real Estate Law Practice, ch. 343, ***Easements and Licenses*** (Matthew Bender); *Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618*].

2. If licensor wishes license to be revocable, is it likely that licensee will make expenditures or perform work in reasonable reliance on license?

NOTE:

If the licensee does so, the license may become irrevocable on the basis of estoppel [*Hammond v. Mustard (1967) 257 Cal. App. 2d 384, 388-389, 64 Cal. Rptr. 829* ; *Stoner v. Zucker (1906) 148 Cal. 516, 520, 83 P. 808* ; ***see*** California Real Estate Law Pract Ice, ch. 343, ***Easements and Licenses*** (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsLicenses



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[Reserved]

§§ 28A.112[Reserved]



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12-28A California Legal Forms--Transaction Guide § 28A.120

§ 28A.120 Creation of Easement

1. If desired, retain licensed surveyor to prepare description of servient tenement [*see § 28A.130*, P 3c].

2. If instrument is subject to local documentary transfer tax [*see § 28A.110*, P 2]:

a. Compute amount of tax due [*see Rev. & Tax. Code §§ 11911, 11932*; *see also Ch. 27, Deeds and Recording, § 27.242*].

b. Confirm that tax has been paid [*see Rev. & Tax. Code § 11933*; *see also § 28A.220[1][b]*].

3. Draft instrument creating and conveying easement [*see § 28A.130* (drafting guide)].

4. Instruct following parties to sign instrument, as applicable:

NOTE:
For special execution requirements applicable to entities, see Chapter 27, ***Deeds and Recording*** .

a. Grantor (or grantor's duly authorized agent) [*see Civ. Code § 1624(c)*; *Code Civ. Proc. § 1971*].

b. If grantor is married and servient tenement is community property, grantor's spouse [*Fam. Code § 1102*].

NOTE:
Both spouses (either personally or by duly authorized agent) must execute any instrument by which community real property or any interest in such property is sold, conveyed, or encumbered, or is leased

for a period exceeding one year [*Fam. Code § 1102*].

c. Grantee, if instrument is an agreement [*see Civ. Code § 1624(c)*].

5. If grantor is married and claims that servient tenement is his or her separate property, have spouse sign statement (in instrument creating easement) indicating that he or she has no interest in servient tenement [*see § 28A.130*, P 5; *see also § 28A.210[1][f]*].

6. If instrument is to be recorded, take following steps:

a. Have execution acknowledged or proved [*Gov. Code § 27287*].

NOTE:

Before an instrument can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*]. An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [***see, e.g.,*** *Civ. Code §§ 1190, 1190a*]. In most cases, the execution will be acknowledged. An unacknowledged instrument cannot be recorded unless its execution is proved by the party executing the instrument, a subscribing witness, or other witnesses [*Civ. Code § 1195*; ***see*** *Civ. Code § 1198*]. Proof of execution may be used in lieu of acknowledgment only for a trustee's deed or a deed of reconveyance; proof of the execution in lieu of acknowledgment of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted [*Civ. Code § 1195(b)*; ***see*** *Gov. Code § 27287*; ***see also*** *Civ. Code § 1195(b)*; Ch. 27, ***Deeds and Recording***].

b. Have acknowledgment or proof certified [*Gov. Code § 27287*].

NOTE:

A certificate of acknowledgment is a formal declaration by an authorized officer [***see*** *Civ. Code § 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*]. The certificate must be substantially in the form prescribed by the appropriate provision of the Civil Code. For further discussion, see *Ch. 27,* ***Deeds and Recording****, § 27.271*.

An officer taking proof of the execution of an unacknowledged instrument must in his or her certificate set forth all the matters required by law to be proved before the officer [***see*** *Civ. Code §§ 1195-1199*] and the names, places of residence, and substance of testimony of all the witnesses examined before the officer [*Civ. Code § 1200*; Ch. 27, ***Deeds and Recording***].

c. Record instrument in county in which servient tenement is situated [*Civ. Code §§ 1169, 1170*].

d. Pay recording fee [*see Gov. Code § 27361*].

7. In the case of a deed:

a. Have grantor deliver deed to grantee [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352]* .

NOTE:

A deed will not take effect until the grantor delivers it with the intent to transfer title [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352]* . No particular form of delivery is required [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919]* . For further discussion, see the Legal Background to Ch. 27, ***Deeds and Recording***.

b. Confirm that grantee (or grantee's representative) accepts delivery at time of delivery [*Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352* ; *Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919]* .

NOTE:

The acceptance need not be formal or express [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral Overview



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12-28A California Legal Forms--Transaction Guide § 28A.121

§ 28A.121 Creation of License

NOTE:

A license is not deemed to be an interest in real property for purposes of the application of the statute of frauds [***see*** *Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002]* . Consequently, a license may be created by parol [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002]* or may arise by implication [***see*** *Lusk v. Krejci (1960) 187 Cal. App. 2d 553, 555, 9 Cal. Rptr. 703]* . Of course, a license may also be created by a writing [*Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* . This discussion assumes that a writing will be used.

1. Prepare instrument that contains the following:

NOTE:

Except as otherwise noted below, the following information is not expressly required by law but, as a practical matter, is necessary if the parties wish to create a legally binding license agreement.

a. Name of licensor.

b. Name of licensee.

c. Description of licensor's property.

d. Grant to licensee of right to perform specified acts on licensor's land, which includes expression of licensor's assent or consent to this use of the land by licensee.

NOTE:

The only "essential" to the creation of a license is some expression by the licensor of his or her assent or conse nt to the use of the land by the licensee [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Gravelly Ford Co. v. Pope-Talbot Co. (1918) 36 Cal. App. 717, 737, 178 P. 155* ; Restatement of Property § 512, Comment h].

e. Indication whether or not license is assignable.

NOTE:

Although a license normally is not assignable [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Shaw v. Caldwell (1911) 16 Cal. App. 1, 8, 115 P. 941]* , a license may be assigned if the original licensor and licensee agree that it may be assigned [*Herman v. Rohan (1918) 37 Cal. App. 678, 681, 174 P. 349* ; ***see*** Restatement of Property § 517 (license is assignable in so far as it was intended in its creation to be assignable); ***see also*** Restatement of Property § 518(a) (no particular formalities are required for assignment of license)].

f. Either of the following:

(1) Statement that license may be revoked at any time by licensor.

NOTE:

As a general rule, a license may be revoked at any time at the will of the licensor [*Wheeler v. West (1886) 71 Cal. 126, 129, 11 P. 871* ; *County of Alameda v. Ross (1939) 32 Cal. App. 2d 135, 141-142, 89 P.2d 460* ; ***see*** *Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729* (mere license to enter or use premises may be revoked by licensor at any time)].

(2) Statement specifying term of license.

NOTE:

An important exception to the general rule of revocability provides that a license "coupled with an interest" is not revocable but continues to exist for the period contemplated by the license [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729* ; ***see*** *§ 28A.111*, P 2].

g. If desired, include indemnity and insurance provisions [*see § 28A.230[1][g]*].

2. Have both parties sign instrument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsLicenses



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12-28A California Legal Forms--Transaction Guide §§ 28A.122-28A.129

[Reserved]

§§ 28A.122[Reserved]



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D. Drafting Guide

12-28A California Legal Forms--Transaction Guide § 28A.130

§ 28A.130 Document Creating and Conveying Easement

1. If instrument creating easement is to be recorded:

a. Reserve top two and one half inches of first page for recording information [*Gov. Code § 27361.6*].

b. In left three and one half inches of space described in (a), *above* [*Gov. Code § 27361.6*]:
(1) Identify person requesting recordation.

(2) Set forth name and address of person to whom instrument should be returned.

NOTE:
The recorder must mail (or deliver if the instrument so requests) the instrument to the person named in the instrument, if any [*Gov. Code § 27321*]. If the instrument does not name such a person, the recorder must deliver or mail it to the party that left it for recordation [*Gov. Code § 27321*].

2. If instrument is subject to local documentary transfer tax, include information regarding tax on face of instrument [*see Rev. & Tax. Code §§ 11932, 11933*; *see also § 28A.220*].

3. Include the following information in instrument [*see Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447, 290 P.2d 590* ; *City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976* ; *see also § 28A.20[2]*]:

NOTE:
The instrument creating and conveying the easement must include the following information [***see §***

28A.20[2]].

For requirements governing the drafting of deeds in general, see the Transaction Guide to Chapter 27, ***Deeds and Recording***.

a. Name of grantor.

b. Name or other sufficient description of grantee.

NOTE:

The instrument creating the easement need not mention the grantee by name if it contains a designation or description that is sufficient to identify the grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447, 290 P.2d 590* ("to the present owners of said lot 3" held to be a sufficient description)].

c. Description of servient tenement.

NOTE:

The instrument must describe the land subject to the easement [*City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976]* . This description must be sufficient to identify the property [***see*** *Gax & L. Co. v. Crockett L. & C. Co. (1924) 70 Cal. App. 283, 293, 233 P. 370]* . The easement need not be described by metes or bounds or other descriptions providing definite dimensions of the easements [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174]* . If the location and limits of the easement are not specified in the grant, a reasonably convenient and suitable location is presumed to be intended [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 100 Cal. Rptr. 174]* .

As a practical matter, the grantor often does not intend to make an entire parcel of land the servient tenement. Instead, the owner typically wishes to make a small part of the parcel the easement tract [***see*** Kratovil, ***Easement Draftmanship and Conveyancing,*** *38 Calif. L. Rev. 426, 441 (1950)*]. In that case, the description of the servient tenement should locate the easement tract on the grantor's parcel of land [***see, e.g.,*** Recitals A-C of *§ 28A.214 [2]*].

To minimize the likelihood of future disputes regarding the location of the easement, the grantor should consider retaining a licensed surveyor to locate the easement [***see*** Kratovil, ***Easement Draftsmanship and Conveyancing,*** *38 Calif. L. Rev. 426, 442 (1950)*; ***see also*** *§ 28A.120,* P 1].

d. Description of permitted use or other right granted to grantee, e.g.:

NOTE:

The instrument granting the easement must describe the use to which the servient tenement is to be put [*City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976]* . It is important that the grant describe in detail the permitted use or uses. The grantor normally wishes to make the scope of the easement as narrow as possible. The grantee, on the other hand, typically wants the easement to include important incidental rights [***see*** P (3), ***below***].

(1) Identification of type of right, e.g.:

(a) Right of ingress and egress.

(b) Right-of-way [*see § 28A.201[2]*].

(c) Right to receive sunlight across another person's property for solar energy system [*see Civ. Code §§ 801(18), 801.5(a)*; *see also § 28A.211[2],* P 3].

(d) Right to take and use water from well [*see § 28A.212[2],* P 3].

(e) Temporary right to use servient tenement in connection with construction work on another parcel [*see § 28A.213 [2],* P 3].

(f) Right to use existing road for "driveway" or "roadway" purposes [*see § 28A.214[2],* P 3].

(g) In case of profit, right to make specific use of grantor's land [*see Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113* ; *see also § 28A.215[2],* P 3].

(2) Description of any limitations or restrictions on exercise of right, e.g.:

(a) In case of well easement, statement that grantee may use well for domestic purposes only [*see § 28A.212[2],* P 3].

(b) In case of driveway easement, statement prohibiting or imposing restrictions on parking [*see § 28A.214[2],* P 3].

(c) In case of profit granting right to remove designated products from land, statement requiring grantee to use specified method of removal of the products.

(3) Description of any secondary easements or incidental rights, e.g.:

NOTE:

An express grant of an easement carries with it a "secondary" easement that gives the dominant owner the right to enter on the servient tenement to make repairs and to do any other things that are necessary for the full exercise of the primary easement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401* ; ***see*** *Ward v. City of Monrovia (1940) 16 Cal. 2d 815, 821-822, 108 P.2d 425]* . To avoid future controversy regarding the extent of a secondary easement, the instrument granting the primary easement should describe the nature and scope of any secondary easements.

(a) In case of well easement, right of ingress and egress to extent necessary to use well [*see § 28A.212[2],* P 4].

(b) In case of profit granting right to remove products from land, right to install and erect temporary roads, structures, and other improvements necessary or convenient for use

and enjoyment of profit [*see § 28A.215 [2]*, P 5].

4. Consider including one or more of the following in instrument creating and conveying easement:

a. The term "easement."

NOTE:

An instrument creating an easement need not contain the term "easement" if the clear implication of the grant is that an easement was intended [Maywood Mut. Water Co. No. 2 v. *City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174* ; ***see*** *Murphy Slough Assn v. Avila (1972) 27 Cal. App. 3d 649, 658, 104 Cal. Rptr. 136]* . However, because a grant of real property is presumed to transfer a fee simple title unless it appears in the grant that a lesser estate was intended [*Civ. Code § 1105*], it is preferable to include the term "easement" and other language indicating that an easement is being created and conveyed.

b. Indication whether easement is appurtenant or in gross.

NOTE:

In determining whether an easement is in gross or appurtenant, the court will look primarily to the nature of the right and to the intention of the parties. The courts, however, favor the construction of easements as appurtenant [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879, 42 Cal. Rptr. 400]* . The court will look to extrinsic evidence to determine the grantor's intent if (1) the intent does not appear from the grant, or (2) the language of the grant is ambiguous [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 521-523, 67 Cal. Rptr. 761* ; *City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 878, 42 Cal. Rptr. 400]* . To clarify the intention of the parties and to leave as little as possible to judicial construction, the instrument should characterize the easement as an easement appurtenant or an easement in gross [***see*** Kratovil, ***Easement Draftmanship and Conveyancing***, *38 Calif. L. Rev. 426, 437 (1950)*].

c. In the case of an easement appurtenant, description of dominant tenement.

NOTE:

It is recommended that the instrument include a description of the dominant tenement, even though this is not required by California law. If the instrument lacks such a description, questions may arise regarding the scope and extent of the easement. For example, if the grantee owns a second parcel that adjoins the dominant parcel, it may appear that the easement was intended to benefit both of grantee's parcels [***see*** Kratovil, ***Easement Draftsmanship and Conveyancing,*** *38 Calif. L. Rev. 426 (1950)*].

d. Indication of duration of easement, e.g.:

NOTE:

If possible, the instrument creating the easement should specify the duration of the easement. The drafter should avoid vague or ambiguous termination language, such as a clause authorizing the grantee to use the servient tenement for "as long as needed."

(1) In perpetuity.

(2) For specified period, e.g.:
(a) Until specified date.

(b) For lifetime of dominant owner, servient owner, or designated third party.

(3) Until occurrence of specified event or accomplishment of specified purpose.

e. Indication whether easement is exclusive or nonexclusive [*see* P 4f, *below*].

NOTE:

An easement is nonexclusive unless the parties clearly express an intent to make it exclusive [*Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 578-579, 110 P.2d 983* ; *Holbrook v. Telesio (1964) 225 Cal. App. 2d 152, 154, 37 Cal. Rptr. 153]* .

f. In case of nonexclusive easement, description of rights of grantor or others to use servient tenement.

NOTE:

When an easement is nonexclusive, the servient owner may make any use of the servient tenement that does not unduly interfere with the dominant owner's right to use the easement [*Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 579, 110 P.2d 983* ; ***see*** *City of Los Angeles v. Ingersoll-Rand Co. (1976) 57 Cal. App. 3d 889, 893-894, 129 Cal. Rptr. 485* (every incident of ownership is not inconsistent with the easement and the enjoyment of it is reserved to the grantor)]. As a practical matter, it is extremely rare for an easement to bar any use of the servient tenement by the servient owner [***see*** Real Estate Law (9th ed., Prentice-Hall, Inc. 1988), ch. 4, ***Easements***; ***see also*** *Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 578, 110 P.2d 983]* . However, it is not uncommon for a grantor to agree to refrain from granting additional easements in the servient tenement to others [***see, e.g.,*** *§ 28A.210 [2]*, P 6 (first alternative version)].

g. Description of maintenance obligations of parties [*see § 28A.214[1][d]*].

NOTE:

An easement owner has the duty to keep the easement in repair [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592* ; ***see*** *Civ. Code § 845*]. However, the parties may alter this obligation by contract [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983]* .

Maintenance obligations may be covered in a separate maintenance agreement [***see*** *§ 28A.231[2]*].

h. Indication whether or not easement is assignable.

NOTE:

Since it is attached to a dominant tenement, an easement appurtenant passes with the transfer of the dominant tenement [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; ***see*** *Civ. Code § 1104*]. It cannot be transferred to a third party or severed from the dominant tenement [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 767, 147 Cal. Rptr. 336* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400]* . An easement in gross, on the other hand, may be conveyed independently of land [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336]* .

i. Provision authorizing grantee to change or increase permitted uses of easement, provided new uses do not unreasonably increase burden on servient tenement [*see § 28A.221[2]*].

j. Clause providing for apportionment of easement upon subdivision, partition, or other division of dominant tenement [*see § 28A.222 [2]*].

k. Provision indicating that any property subsequently acquired by grantee that is contiguous to original dominant tenement will become part of dominant tenement [*see § 28A.223[2]*].

l. Paragraph authorizing grantor to relocate servient tenement [*see § 28A.224[2]*].

m. Attorneys' fees provision [*see* vol. 14, ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

n. Provision regarding status of agreement as entire agreement between the parties [*see* vol. 14, ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

o. Clause describing binding effect of agreement [*see* vol. 14, ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

5. If grantor is married and claims that servient tenement is his or her separate property, add statement indicating that spouse has no interest in servient tenement [*see § 28A.120*, P 5; *see also § 28A.210[1][f]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsEasements in Gross



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART III. TRANSACTION GUIDE
D. Drafting Guide

12-28A California Legal Forms--Transaction Guide §§ 28A.131-28A.139

[Reserved]

§§ 28A.131[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-28A California Legal Forms--Transaction Guide § 28A.140

§ 28A.140 Payment of Expenses of Maintaining Right-of-Way

NOTE:

The owner of an easement in the nature of a private right-of-way, or of any land to which any such easement is attached, must maintain it in repair [*Civ. Code § 845(a)*]. The statutory procedures discussed below, relating to the responsibility for payment of the cost of maintaining an easement, apply when the easement is owned by more than one person, or is appurtenant to parcels of land under different ownership [***see*** *Civ. Code § 845(b), (c)*]. For purposes of this transaction guide, "co-owner" means an owner of the easement or an owner of an appurtenant parcel.

1. If co-owners wish to share cost of maintaining easement in repair, take following steps:

a. Prepare agreement specifying how cost is to be shared by parties [*see § 28A.231 [2]* (illustrative agreement)].

b. Have parties execute agreement.

c. If any party fails to pay his or her proportionate share of any repair costs, provide that party with written demand for payment [*see Civ. Code § 845(b)*; *§ 28A.232 [2]* (illustrative demand)].

d. If any party fails to pay his or her share of repair costs after receiving written demand for payment, or otherwise refuses to perform his or her obligations under above agreement, assist other co-owner(s), either jointly or severally, in bringing action for contribution or specific performance [*Civ. Code § 845(b)*; for an illustrative complaint, *see* California Forms of Pleading and Practice, *Easements* (Matthew Bender)].

2. If co-owners are not willing to enter into an agreement providing for sharing of maintenance expenses, take following steps:

a. Notify co-owners that cost of maintaining easement in repair must be shared proportionately to use made of easement by each owner [*Civ. Code § 845(c)*].

b. If necessary, apply to appropriate court for apportionment of impartial arbitrator to apportion repair costs [*Civ. Code § 845(c)*].

NOTE:
Any co-owner may make the application at any time before, during, or after performance of the maintenance work [*Civ. Code § 845(c)*]. For an illustrative petition for appointment of an arbitrator, see California Forms of Pleading and Practice, ***Easements*** (Matthew Bender).

c. If arbitration award is not accepted by all co-owners, file petition for judgment determining proportionate liability of each owner [*see Civ. Code § 845(c)*].

NOTE:
If the court enters such a judgment, it may be enforced as a money judgment by any party against any other party to the action [*Civ. Code § 845(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral Overview



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E. Related and Subsequent Procedures

12-28A California Legal Forms--Transaction Guide § 28A.141

§ 28A.141 Statutory Procedures Governing Preservation, or Establishment of Abandonment, of Easement

NOTE:
The following section covers statutory procedures that require the performance of affirmative acts by the dominant or servient owner to establish the abandonment of, or to preserve, an easement. For coverage of other circumstances under which an easement may be terminated or extinguished, see *§ 28A.26*.

1. If servient owner wishes to utilize marketable record title provisions of Civil Code to establish abandonment of easement [*see Civ. Code §§ 887.010-887.090*; *see also Civ. Code §§ 880.020-880.370*; *§ 28A.27 [2]*], confirm that following conditions have been satisfied for a period of 20 years immediately preceding commencement of action to establish abandonment [*Civ. Code § 887.050(a)*]:

a. Easement has not been used at any time.

b. Regarding property taxes:
(1) No separate property tax assessment has been made; or

(2) If separate property tax assessment has been made, no taxes have been paid on assessment.

(3) No instrument creating, reserving, transferring, or otherwise evidencing the easement has been recorded.

2. If conditions described in (1), *above*, have been satisfied, take following steps:

a. Bring action, in superior court of county in which servient tenement is located, to accomplish the following [*Civ. Code § 887.040(b)*]:

NOTE:

The action must be brought in the same manner and must be subject to the same procedure as an action to quiet title pursuant to the Code of Civil Procedure [***see*** *Code Civ. Proc. §§ 760.010-764.080*], to the extent applicable [*Civ. Code § 887.040(c)*]. For an illustrative complaint to establish abandonment and additional coverage, see California Forms of Pleading and Practice, Ch. 240, ***Easements*** (Matthew Bender).

A court order establishing abandonment pursuant to this statutory procedure is equivalent for all purposes to a conveyance of the easement to the servient owner. An abandoned easement is unenforceable and is deemed to have expired [*Civ. Code § 887.080*].

(1) Establish abandonment of easement; and

(2) Clear record title of the easement.

b. Notify servient owner that court will permit easement owner to record a late notice of intent to preserve the easement [*Civ. Code § 887.070*; *see* (3), *below*].

NOTE:

If the easement owner files this notice, the action will be dismissed. To exercise this right, the easement owner must pay into court for the benefit of the servient owner the litigation expenses attributable to the easement or portion of the easement covered by the notice of intent. For these purposes, "litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in the preparation for the action, including reasonable attorneys' fees [*Civ. Code § 887.070*].

3. If easement owner wishes to preserve easement, take following steps:

a. Prepare notice of intent to preserve easement [*see Civ. Code § 887.060(a)*] that satisfies following requirements:

(1) As a general rule, is substantially in the form specified by statute [*see Civ. Code § 880.340*; *see also Ch. 27, Deeds and Recording, § 27.289*];

(2) Satisfies following requirements:
(a) Includes name and mailing address of each claimant [*Civ. Code § 880.330(b)*].

(b) Refers generally and without specificity to any or all easements claimed by claimant in any real property situated in county [*Civ. Code § 887.060(b)*].

NOTE:

This reference may be included in lieu of the following information, which must be included in notices of intent to preserve other types of interests in real property: (1) the statement of the character of the interest claimed and the record location of the documents creating or evidencing the interest claimed [***see*** *Civ. Code § 880.330(b)(2)*]; and (2) the legal description of the real property in which the interest is claimed [*Civ. Code § 887.060(b)*; ***see*** *Civ. Code § 880.330(b)(3)*].

Although the other portions of the notice must be substantially in the form specified by

statute [***see*** *Civ. Code § 880.340*], there are no requirements governing the presentation of the information described in Paragraph 3a(2), ***above*** [***see*** *Civ. Code § 887.060(b)*].

b. Have notice signed and verified by or on behalf of claimant [*Civ. Code § 880.330(a)*].

c. If notice is made on claimant's behalf, include statement of authority of person making the notice [*Civ. Code § 880.330(a)*].

d. Have notice recorded in county in which real property is situated [*Civ. Code § 880.350(a)*].

NOTE:

The easement owner may record the notice at any time [*Civ. Code § 887.060(a)*]. An easement is not abandoned if recordation takes place (1) within 20 years immediately preceding the commencement of an action to establish the abandonment of the easement, or (2) pursuant to *Civ. Code § 887.070* [***see*** P 2b, ***above***] after commencement of an action to establish the abandonment of the easement and before judgment is entered in the action [*Civ. Code § 887.060(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleRemedies

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12-28A California Legal Forms--Transaction Guide § 28A.142

§ 28A.142 Prevention of Acquisition of Prescriptive Rights

NOTE:

For discussion of the circumstances under which an easement may be acquired by prescription, see *§ 28A.23[1]*. This section covers two statutory procedures that an owner of real property may follow to prevent another person from acquiring a prescriptive right in the property.

1. If client wishes to prevent acquisition of prescriptive rights by recording a notice of consent, take following steps [*Civ. Code § 813*]:

a. Prepare notice of consent that contains the following [*see § 28A.234[2]* (illustrative notice)]:

(1) Description of land.

(2) Statutory notice indicating that right of others to use land is by permission [*see Civ. Code § 813* (statutory notice)].

(3) If desired, reasonable restrictions on time, place, and manner of public use.

b. Have holder of record title to the land record notice in office of recorder of any county in which any part of land is situated.

c. If property is used by other than the general public (i.e., by specific person or persons), have notice served by registered or certified mail on user(s) [*see Civ. Code § 17* (authorizing use of certified mail)].

d. After recordation of notice, and prior to any revocation of it [*see* P e, *below*], advise owner to refrain from preventing any appropriate public use of property.

e. If owner wishes to revoke a recorded notice of consent to use land, file notice of revocation in same office in which original notice of consent was recorded [*Civ. Code § 813*; *see § 28A.235 [2]* (illustrative notice of revocation)].

2. As an alternative to procedure set forth in Paragraph 1, *above*, take following steps to prevent acquisition of prescriptive rights [*Civ. Code § 1008*]:

a. Prepare sign that reads substantially as required by *Civil Code Section 1008* [*see § 28A.236[2]* (statutory wording)].

b. Have owner post sign at each entrance to property or at intervals of not more than 200 feet along boundary of property.

NOTE:

To be legally operative, the "permission to pass" sign must be posted by the landowner or by the landowner's authorized agent [*Aaron v. Dunham (2006) 137 Cal. App. 4th 1244, 1252, 41 Cal. Rptr. 3d 32* (posting by lessee of "permission to pass" sign on private road did not prevent acquisition of prescriptive easement because sign was not posted by property owner or owner's authorized agent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawPriorities & RecordingRecording Acts



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§§ 28A.143[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
A. Complete Deeds

12-28A California Legal Forms--Transaction Guide § 28A.200

§ 28A.200 Deed Conveying Dominant Tenement and Easement Appurtenant

[1] Comment

[a] Use of Form

This form is a grant deed that conveys a parcel of land (the dominant tenement) and an easement appurtenant that is attached to the land. As a practical matter, it is not necessary to mention an appurtenant easement in a deed conveying the dominant tenement because the easement passes with the transfer of the dominant tenement, whether or not the easement is mentioned in the instrument of conveyance [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Rubio Canon etc. Assoc. v. Everett (1908) 154 Cal. 29, 33, 96 P. 811* ; *Civ. Code §§ 1084, 1104*; *see Restatement of Property § 487, Comments e and h*; *but see Civ. Code § 1084*; *Restatement of Property § 487, Comment b* (easement appurtenant will not pass with dominant tenement if transfer instrument specifically excludes it)]. However, a title insurance company may not insure the title to an easement if there is no evidence in the recorded chain of title that the easement is appurtenant [*see* Bowman, Ogden's Revised California Real Property Law, vol. 1, ch. 13, *Easements* (Cal. CEB 1974); Miller & Starr, California Real Estate 2d, vol. 5, ch. 15, *Easements*].

Although a deed is often used to create an easement, counsel should consider using an easement agreement instead if the instrument is to include a detailed legal description or complex provisions. For a series of complete agreements, see *§§ 28A.210 through 28A.215*. For additional and alternative provisions that may be inserted into those complete agreements, see *§§ 28A.220 through 28A.224*.

[b] Required Formalities for Creation of Easement

An express grant of an easement must be in writing, subscribed by the party creating it or by the duly authorized agent of that party [*see Empire Investment Co. v. Mort. (1915) 169 Cal. 732, 739, 147 P. 960* ; *Wagner v. Hanna (1869) 38 Cal. 111, 117* ; *see also § 28A.20 [1]*]. The instrument granting the easement must describe both the land subject to the easement and the use to which the land is to be put [*City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976* ; *see § 28A.130*, P 3d (guide to drafting of description of permitted uses)]. The description of the servient tenement must be sufficient to identify the property [*see Gas & E. Co. v. Crockett L. & C. Co. (1924) 70 Cal. App.*

283, 293, 233 P. 370 ; *see also Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174* (description must definitely describe the servient tenement); *§ 28A.130, P 3c* (additional discussion of descriptions)].

The instrument need not mention the grantee by name if it contains a designation or description that is sufficient to identify the grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447, 290 P.2d 590* ("to the present owners of said lot 3" held to be a sufficient description); *Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 306, 259 P.2d 925]* . Further, the instrument need not contain the term "easement" if the clear implication of the grant is that an easement was intended [*Maywood Mut. Water Co. No. 2 v. City of Maywood (1972) 23 Cal. App. 3d 266, 270, 100 Cal. Rptr. 174]* .

A present grant of an easement is an executed contract and does not require consideration for the grant to be valid [*Civ. Code § 1040*; *Eastman v. Piper (1924) 68 Cal. App. 554, 569, 229 P. 1002]* .

For discussion of additional information that may be included in an instrument creating an easement, see *§ 28A.130[2]*, Paragraph 4.

[c] Grant Deeds

A grant deed grants an estate in real property [*see Civ. Code § 1092*]. In a grant deed, the term "grant" is the essential element or operative word of transfer [*see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* . Although a grant deed may convey any type of estate in real property [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112]* , it is presumed to transfer a fee simple title unless it appears in the grant that a lesser estate was intended [*Civ. Code § 1105*; *see American Enterprises, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935]* . This form assumes that a fee simple title in the dominant tenement is being conveyed.

For complete coverage of grant deeds, see Chapter 27, *Deeds and Recording* .

[d] Consent of Spouse

Both spouses must join in executing any instrument by which community real property or any interest in such property is sold, conveyed, encumbered, or leased for a period of more than one year. The spouses may do this personally or by duly authorized representative. This restriction does not apply to transactions between the spouses [*Fam. Code § 1102*].

For a statement that may be included in an easement agreement and that indicates that the grantor's spouse has no interest in the servient tenement, see *Section 28A.210[2]*.

[e] Acknowledgment and Recordation

Every conveyance of real property that is acknowledged (or proved), certified, and recorded constitutes constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Civ. Code § 18*]. Consequently, this form provides for the inclusion of recording information [*see Gov. Code § 27361.6*; *§ 28A.130, P 1*] and a certificate of acknowledgment [*see Gov. Code § 27287*; *Civ. Code § 1185(a)*]. For additional discussion of recordation, see Chapter 27, *Deeds and Recordation* .

[f] Tax Statement Information

A deed conveying fee title will not be accepted for recording unless it sets forth, across the bottom of the first page, the name and address to which future tax statements may be mailed [*Gov. Code § 27321.5(a)*]. This form satisfies that requirement by including the name and address below the recording information, and inserting a reference to that name

and address at the bottom of the first page. For discussion of alternative methods of satisfying the foregoing requirement, see *Ch. 27, Deeds and Recording, § 27.241*.

[g] Documentary Transfer Tax

This form provides for the inclusion, when applicable, of documentary transfer tax information. A local documentary transfer tax may be imposed, by ordinance, on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to, or vested in, another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*]. An easement is subject to the Act if it potentially may endure for a substantial period of time. The following are examples of easements that fall within this category: a perpetual easement; an easement for life; or an easement for a fixed period of years that (1) can be renewed by the easement holder, or (2) is of sufficient length so as to approximate a perpetual easement or an easement for life *[62 Cal. Op. Att'y Gen. 87 (1979)]* .

For further discussion and an illustrative transfer tax provision, see *Section 28A.220*.

[2] FORM

Deed Conveying Dominant Tenement and Easement Appurtenant

Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

.....Space above this line for recorder's use

Mail tax statements to	[*Add documentary transfer tax statement here, if applicable (see*
_____[*name*]	
_____[*address*]	

_____ [*city, state, zip*] § 28A.220[2])]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as _____[*insert legal description*], together with an easement appurtenant to that property consisting of _____[*describe easement, e.g.,* a perpetual easement for ingress and egress over and across _____ (*description of servient tenement*)].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature [s] on the instrument the person [s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ _____[*Seal*]

[*Insert following statement as last line at bottom of first page of deed:*]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
A. Complete Deeds

12-28A California Legal Forms--Transaction Guide § 28A.201

§ 28A.201 Deed Conveying Right-of-Way

[1] Comment

[a] Use of Form

This form is a grant deed that expressly creates and conveys a private right-of-way. It may be easily modified for use with other types of easements. For a grant deed that conveys an easement appurtenant and the dominant tenement, see *Section 28A.202[2]*.

For discussion of the recording and tax statement information included in this deed, see *Section 28A.130*, Paragraphs 1 and 2, and 28A.220, respectively. Because this deed does not convey fee title to property, it need not include the tax statement information that must appear on a deed conveying fee title [*see Gov. Code § 27321.5*].

[b] Overview of Rights-of-Way

A right-of-way is an easement that gives a person or class of persons the right to pass over the land of another [*Kripp v. Curtis (1896) 71 Cal. 62-63, 11 P. 879* ; *Wood et al. v. Truckee Turnpike Co. (1864) 24 Cal. 474, 487]* . However, the term "right-of-way" is also used to refer to the strip of land over which the easement runs [*Anderson v. Willson (1920) 48 Cal. App. 289, 295, 191 P. 1016* ; *Moakley v. Los Angeles Pacific Ry. Co. (1934) 139 Cal. App. 421, 424, 34 P.2d 218]* .

An easement for a right-of-way may be either appurtenant [*see Civ. Code § 801(4)*] or in gross [*see Civ. Code § 802(5)*]. Further, a right-of-way may be public or private. A public right-of-way, usually referred to as a highway or a public road, is a right-of-way that every citizen has a right to use. A private right-of-way may be used only by a particular person or class of persons [*Kripp v. Curtis (1886) 71 Cal. 62, 64, 11 P. 879]* .

[c] Easement or Fee Interest

Because the term "right-of-way" may be used to describe the land over which the easement runs [*see* [b], *above*], the

use of the term in a conveyance may raise a question whether the grantor intended to convey an easement or a fee interest in the subject land [*see Moakley v. Los Angeles P. R. Co. (1934) 139 Cal. App. 421, 423-425, 34 P.2d 218]* . The character of the interest conveyed depends on the intent of the parties, which must be gathered from the language of the document and the surrounding circumstances [*Warner v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 35, 96 Cal. Rptr. 317]* . In most cases, if the granting clause specifies that the document is conveying a right-of-way in a specified strip of land, it will be construed as conveying an easement [*see, e.g., Highland Realty Co. v. City of San Rafael (1956) 46 Cal. 2d 669, 676, 678, 298 P.2d 15* ; *Johnson v. Ocean Shore Railroad Co. (1971) 16 Cal. App. 3d 429, 433, 94 Cal. Rptr. 68]* .

[2] FORM

Deed Conveying Right-of-Way

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

[*Add documentary transfer tax statement here, if applicable (see § 28A.200[1][g], 28A.220*]

DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*] an easement consisting of a private right-of-way _____[*describe servient tenement, specifying (to the extent applicable) the location, width, and length of the servient tract, e.g.*, on and over the north 40 feet of the following tract of land: _____ (*insert legal description*) *or* on and over a strip of land 30 feet wide throughout and bounded on _____ (*set forth boundaries of easement*)]. This easement shall be _____[appurtenant to the following tract of land: _____ (*insert legal description*) *or* in gross and personal to _____ (*name of grantee*)]. The easement shall be used solely _____[*specify permitted uses and users, e.g.*, for road purposes by _____ (*name of grantee*) and _____ (his *or* her) heirs and assigns], and shall _____[*specify term or duration, e.g.*, continue so long as it is used for the purposes described above].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsEasementsPrivate EasementsReal Property LawLimited Use RightsEasementsPublic Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
A. Complete Deeds

12-28A California Legal Forms--Transaction Guide § 28A.202

§ 28A.202 Reservation of Easement Appurtenant From Grant of Property

[1] Comment

[a] Use of Form

This form is a deed that may be used when the grantor wishes to convey property and to reserve an easement in the conveyed property. An easement may be created by express reservation in a deed or other instrument [*see Coon v. Sonoma Magnesite Co. (1920) 182 Cal. 597, 601-602, 189 P. 271* ; *Los Angeles v. Howard (1966) 244 Cal. App. 2d 538, 543, 53 Cal. Rptr. 274]* . A reservation allows the grantor's entire interest in the subject property to pass to the grantee, but revests a newly created interest in the land for the benefit of the grantor or a third party [*Willard v. First Church of Christ, Scientist (1972) 102 Cal. Rptr. 739* ; *see Civ. Code § 1085*]. In other words, a reservation is a grant back to the original grantor by the original grantee of a portion of the conveyed property.

For coverage of grant deeds, see *Section 28A.200[1][c]*. An illustrative deed conveying a parcel of land and as easement appurtenant is set forth as Section 28A.200. For a deed conveying a right-of-way, see *Section 28A.201*.

[b] Reservation Distinguished From Exception

An exception prevents part of the grantor's interest from passing to the grantee. The excepted interest remains in the grantor [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476 n.1, 102 Cal. Rptr. 739]* . Typically, a physical part of the land is excluded from the conveyance [*see Sears v. Ackerman (1903) 138 Cal. 583, 586, 72 P. 171* ; *see also* Powell on Real Property, ch. 34, *Easements and Licenses*]. Thus, it has been argued that the use of an exception is not, technically, appropriate for the creation of an easement because an exception does not create a new interest in the land of another [*see* Bowman, Ogden's Revised California Real Property Law (Cal. CEB 1974), vol. 1, ch. 13, *Easements*].

Exceptions and reservations are subject to different rules of interpretation. A reservation must be interpreted in favor of the grantor [*Civ. Code § 1069*], while an exception must be strictly interpreted against the grantor [*Lange v. Waters (1909) 156 Cal. 142, 146, 103 P. 889]* .

Notwithstanding the foregoing, the terms "reservation" and "exception" are sometimes used interchangeably [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677, 41 Cal. Rptr. 223]* . As a practical matter, the question of whether a particular provision is an exception or a reservation is not conclusively determined by the use of the term "reservation" or "exception" alone, and the courts will disregard the words used if necessary to effectuate the real intentions of the parties as ascertained from the whole conveyance [*Coon v. Sonoma Magnesite Co. (1920) 182 Cal. 597, 600, 189 P. 271* ; *Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677-678, 41 Cal. Rptr. 223]* . This chapter does not use the term "exception." For a deed provision that creates an exception, see *Ch. 27, Deeds and Recording, § 27.261*.

[c] Reservation of Easement to Third Party

A grantor may, in deeding real property to one person, reserve an easement (or another type of interest) in the property to a third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 475, 479, 102 Cal. Rptr. 739]* . The grantor's intent to accomplish this result must be clearly shown in the instrument [*Willard v. First Church of Christ, Scientist (1972) 102 Cal. Rptr. 739]* or by extrinsic evidence [*Cushman v. Davis (1978) 80 Cal. App. 3d 731, 735, 145 Cal. Rptr. 791]* . The reservation vests the easement in the third party [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 475, 479, 102 Cal. Rptr. 739]* .

[2] FORM

Reservation of Easement Appurtenant From Grant of Property

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

.....Space above this line for recorder's use

Mail tax statements to	[*Add documentary transfer tax statement here, if applic*
_____[*name*]	
_____[*address*]	

	able (see
_____ [*city, state, zip*]	*§ 28A.220[2])*]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*] all that real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as _____[*insert legal description*], reserving as an easement _____[in gross *or* appurtenant to _____ (*description of dominant tenement*)], a _____[*describe term and purpose(s) of easement, e.g.*, perpetual easement for ingress and egress over and across _____ (*description of servient tenement, e.g.*, the south ten feet of the property conveyed by this deed)].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed:*]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
A. Complete Deeds

12-28A California Legal Forms--Transaction Guide §§ 28A.203-28A.209

[Reserved]

§§ 28A.203[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
B. Complete Easement Agreements

12-28A California Legal Forms--Transaction Guide § 28A.210

§ 28A.210 Basic Easement Agreement

[1] Comment

[a] Use of Form

This form is an agreement that creates an easement appurtenant or an easement in gross. It may be used when the grantor wishes to grant an easement independent of a conveyance of real property. Since an easement is an interest in land, it can be created by such a grant [*see Eastman v. Piper (1924) 68 Cal. App. 554, 561, 229 P. 1002]* .

A separate grant of an easement may be desirable even when the grantor is also making a simultaneous conveyance of the dominant tenement to the same grantee. This is particularly true when a lengthy legal description of the easement is required, or when detailed provisions will be used to describe the rights and duties of the grantor and grantee. In that case, inclusion of the easement grant in the deed conveying the dominant tenement would prove unwieldy [*see* Kratovil, *Easement Draftmanship and Conveyancing, 38 Calif. L. Rev. 426 (1950)*].

For a procedural guide to the creation of an easement, see *Section 28A.120*. Additional complete easement agreements are set forth at Sections 28A.210 through 28A.215. For additional and alternative provisions that may be included in any of the complete agreements in this chapter, see *Sections 28A.220 through 28A.224*.

[b] Required Formalities

An express grant of an easement must be in writing, subscribed by the party creating it or by the duly authorized agent of that party [*see Empire Investment Co. v. Mort. (1915) 169 Cal. 732, 739, 147 P. 960* ; *Wagner v. Hanna (1869) 38 Cal. 111, 117]* . For a discussion of the required contents of the instrument creating the easement, see *Section 28A.200 [1][b]*.

[c] Additional Information

Counsel should consider adding certain provisions and information to the easement grant that are not required by law

but that may result in a clearer expression of the intent of the parties. For example, it is advisable to indicate expressly whether the easement is appurtenant or in gross [*see* [2], P 2, *below*; *see also §§ 28A.14-28A.16*], and to specify the duration of the easement [*see* [2], P 5, *below*; *see also § 28A.26*]. Further, the inclusion of a description of the dominant tenement (in the case of an easement appurtenant) will make it less likely that questions will arise regarding the scope and extent of the easement [*see §§ 28A.10-28A.27*; *see also* [2], *below* (optional Recital C)].

The agreement should indicate whether or not the grantee's right to use the easement is exclusive [*see* [2], *below* (alternative versions of P 6)]. It should also describe any secondary easements or incidental rights [*see* [2], P 4, *below*; *see also § 28A.12*]. Further, if the grantor is creating and conveying an easement in gross, the agreement should indicate whether or not it is assignable [*see* [2], *below* (alternative versions of P 7); *see also § 28A.15*].

This form also includes standard contractual provisions regarding attorneys' fees [*see* [2], P 8, *below*], the status of the agreement as the entire agreement between the parties [*see* [2], P 9, *below*], and the binding effect of the agreement [*see* [2], P 10, *below*]. For discussion of those provisions, see Volume 14, Chapter 75, *Formation of Contracts and Standard Contractual Provisions*.

[d] Recordation

Although the instrument need not be recorded to be enforceable against the grantor, recordation may be necessary to assert easement rights against a transferee of the grantor who purchases the servient tenement for value and without notice of the easement [*Pollard v. Rebman (1912) 162 Cal. 633, 634, 124 P. 235* ; *see* ch. 27, *Deeds and Recording*]. This form assumes that the agreement will be recorded. Consequently, it provides for the inclusion of recording information [*see Gov. Code § 27361.6*; *§ 28A.20[2]*] and a certificate of acknowledgment [*see Gov. Code § 27287*; *Civ. Code § 1185(a)*; *see also § 28A.200[2]*].

[e] Documentary Transfer Tax

A local documentary transfer tax may be imposed, by ordinance, on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to, or vested in, another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*]. An easement is subject to the Act if it potentially may endure for a substantial period of time, such as the following: a perpetual easement; an easement for life; or an easement for a fixed period of years that (1) can be renewed by the easement holder, or (2) is of sufficient length so as to approximate a perpetual easement or an easement for life *[62 Cal. Op. Att'y Gen. 87 (1979)]* . For further discussion and illustrative transfer tax language, see *Section 28A.220*.

[f] Consent of Spouse

Both spouses must join in executing any instrument by which community real property [*see Fam. Code § 760*] or any interest in such property is sold, conveyed, encumbered, or leased for a period of more than one year. The spouses may do this personally or by duly authorized representative. This restriction does not apply to transactions between the spouses [*Fam. Code § 1102*].

If a grantor is married and claims that the servient tenement is the grantor's separate property, the spouse should execute a statement indicating that he or she has no interest in the property. This form includes such a statement, immediately following the signature blanks for the parties. A spouse who executes such a statement will be estopped from setting aside the conveyance [*see Rice v. McCarthy (1925) 73 Cal. App. 655, 662, 666, 239 P. 56* ; *Waldeck v. Hedden (1928) 89 Cal. App. 485, 491, 265 P. 340* ; *see also* Ch. 23, *Real Property Sales Agreements*].

[2] FORM

Basic Easement Agreement

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
.....Space above this line for recorder's use

[*Add documentary transfer tax statement here, if applicable (see § 28A.220)*]

EASEMENT AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Servient Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

[*Add if easement is to be appurtenant:*]

B. Grantee is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Dominant Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit B, which is attached to this Agreement and hereby incorporated by reference].

[*Continue with the following:*]

C. Grantee desires to acquire certain rights in the Servient Tenement.

Grant of Easement

1. [*Add if applicable:* In consideration of the sum of $_____,] Grantor grants to Grantee an easement, subject to the terms of this Agreement.

Character of Easement

2. The easement granted in this Agreement is _____[appurtenant to the Dominant Tenement *or* in gross].

Description of Easement

3. The easement granted in this Agreement is _____[*describe permitted uses*, e.g., an easement for ingress and egress over and across the Servient Tenement].

Secondary Easements

4. The easement granted in this Agreement includes the following incidental rights: _____[*specify*]. In exercising these rights, Grantee must use reasonable care and may not unreasonably increase the burden on the Servient Tenement or make any material changes to the Servient Tenement.

Term

5. The easement granted in this Agreement shall be _____[*specify term, e.g.,* for a term of 10 years].

[*Choose one of the following paragraphs:*]

Exclusive Easement

6. Grantee's use of the easement granted in this Agreement shall be exclusive. Grantor shall not grant or assign to others any right-of-way or easement in the Servient Tenement. Notwithstanding the terms of this provision, Grantor reserves the right to use the Servient Tenement in a manner consistent with Grantee's free use and enjoyment of the easement.

[*OR*]

Nonexclusive Easement

6. The easement granted in this Agreement is nonexclusive. Grantor retains the right to make any use of the Servient Tenement, including the right to grant concurrent easements in the Servient Tenement to third parties, that does not interfere unreasonably with Grantee's free use and enjoyment of the easement.

[*Choose one of the following paragraphs:*]

Assignment

7. This Agreement, including any interest in this Agreement, shall not be assigned without the prior written consent of the other party.

[*OR*]

Agreement Nonassignable

7. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

[*Continue with the following:*]

Attorneys' Fees

8. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

9. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above easement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

10. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee [*add if easement is in gross and nonassignable:*, except as otherwise provided in this Agreement].

Executed on _____[*date*].

GRANTOR
_____ [*signature of grantor*]
[*typed name*]

GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*Add if applicable:*]

Consent of Grantor's Spouse

I acknowledge that the interests conveyed in this instrument are the separate property of my spouse. I have read the foregoing instrument carefully and consent to its execution and performance in all respects.

_____ [*signature of spouse*]
[*typed name*]

[*Continue with the following:*]

Acknowledgment

[*See § 28A.200[2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Complete Easement Agreements

12-28A California Legal Forms--Transaction Guide § 28A.211

§ 28A.211 Solar Easement

[1] Comment

[a] Use of Form

This form is a complete solar easement. A solar easement is a type of negative easement [*see §§ 28A.17, 28A.18[6]*] and is defined as the the right of receiving sunlight across another person's real property for a solar energy system [*Civ. Code §§ 801(18), 801.5(a)*]. For purposes of the solar easement statutes, "solar energy system" means any solar collector or other solar energy device, or any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, electric generation, or for water heating [*Civ. Code § 801.5(a)*]. As a practical matter, all types of existing and future solar energy systems should fall within that broad definition.

For additional and alternative provisions that may be added to this form or to any of the other complete easement agreements in this chapter, see *§§ 28A.220-28A.224*.

[b] Easement for Air, Light, or Heat

A type of easement appurtenant that is similar to a solar easement is the right of receiving air, light, or heat from or over land, or the right of discharging air, light, or heat upon or over land [*Civ. Code § 801(8)*]. A landowner has no natural right to air, light, or an unobstructed view [*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community (1986) 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380]* . However, this type of right may be created by private parties through the granting of an easement [*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community (1986) 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380* ; *Petersen v. Friedman (1958) 162 Cal. App. 2d 245, 247-248, 328 P.2d 264* ; *see Civ. Code § 801(8), (18)*]. This form may be modified to create such an easement.

[c] Required Contents of Instrument

Any instrument creating a solar easement must include the following [*Civ. Code § 801.5(b)*]:

(1) An adequate description of the easement [*see Civ. Code § 801.5(b)(1)*; [d], *below*].

(2) Restrictions placed on vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement.

(3) The terms or conditions (if any) under which the easement may be revised or terminated.

An instrument creating a solar easement is also subject to the required formalities that apply to any grant of an easement. For coverage of those formalities, see *Section 28A.20[2]*.

[d] Description of Easement

The easement instrument must include a description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of those descriptions [*Civ. Code § 801.5(b)(1)*]. If the second type of description is provided, the instrument obviously must contain a description of an existing solar energy system. Thus, the system must be permanent if the easement is to remain effective. That can be a great disadvantage because ongoing technological advances will undoubtedly produce more efficient solar energy systems in the future.

A description of the dimensions of the easement expressed in measurable terms also may present problems. For example, it may be necessary to employ a surveyor or engineer in order to obtain an accurate description of the location of the easement. Further, any replacement systems must be installed in the area originally specified in the easement.

Regardless of the type of description selected, it is clear that drafting an adequate solar easement is a difficult task. Many variables must be considered and reflected in the description, such as the slope of the dominant and servient tenements, the number and nature of existing shadow-producing objects, and the value of the airspace.

Because of the many methods of describing solar easements and the presence of so many variables, no attempt has been made to include a single detailed hypothetical description of a solar easement in this form. Rather, this form is primarily intended to illustrate the format that should be followed in drafting the solar easement, and to alert the attorney to the applicable statutory requirements.

[e] Solar Shade Control Act

The Solar Shade Control Act [Pub. Res. Code § 25760 et seq.] establishes a limited right to receive sunlight that is not dependent on the creation of an easement but that does require the presence of a solar collector. For these purposes, "solar collector" means a fixed device, structure, or part of a device or structure, that is used primarily to transform solar energy into thermal, chemical, or electrical energy. The solar collector must be used as a part of a system that makes use of solar energy for any or all of the following purposes: water heating, space heating or cooling, or power generation [Pub. Res. Code § 25761; *see Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 882-883, 226 Cal. Rptr. 698 (Act does not apply to homes with entirely passive solar systems, such as windows and skylights)]* .

Under the Act, no person owning or in control of property may allow a tree or shrub on the property to grow so that it casts a shadow of a specified size and for a specified duration on an installed solar collector on the property of another [Pub. Res. Code § 25762]. Specifically, a tree or shrub cannot cast a shadow greater than 10 percent of the collector absorption area on the solar collector surface at any one time between the hours of 10 A.M. and 2 P.M., local standard time [Pub. Res. Code § 25762]. There are limited exceptions to this prohibition [*see* Pub. Res. Code §§ 25762, 25764, 25766; *see also* Pub. Res. Code § 25765(authorizing adoption of ordinance exempting local jurisdiction from

requirements of Act)].

If an owner of a solar collector establishes to the satisfaction of the district attorney or city attorney that the requirements of Public Resources Code Section 25762 have been violated, the district attorney or city attorney will serve the violator with an abatement notice. If the violation is not corrected within 30 days from the receipt of the notice, (1) the violator will be guilty of a public nuisance, and (2) the complainant may file an affidavit with the district attorney or city attorney alleging that the nuisance has not been abated. Following the filing of such an affidavit, the district attorney or city attorney must prosecute the violator. Every violation of the Act is punishable by a fine of up to $1,000 [*see* Pub. Res. Code § 25763].

[2] FORM

Solar Easement

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

.....Space above this line for recorder's use

SOLAR EASEMENT AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California, hereafter referred to as the "Servient Tenement" and more particularly described as follows: _____[*insert legal description*].

B. Grantee is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California, hereafter referred to as the "Dominant Tenement" and more particularly described as follows: _____[*insert legal description*].

C. Grantee desires to acquire certain rights in the Servient Tenement.

Grant of Easement

1. Grantor hereby grants to Grantee an easement, on the terms and conditions set forth in this Agreement.

Character of Easement

2. The easement granted in this Agreement is appurtenant to the Dominant Tenement.

Description of Easement

3. The easement granted in this Agreement is a right of receiving sunlight across the Servient Tenement for a solar energy system located on the Dominant Tenement.

Location of Easement

4. This solar easement is located as follows: _____[*insert description of dimensions of easement expressed in measurable terms (see Civ. Code § 801.5(b)(1)), e.g.,* That airspace located above an imaginary horizontal plane located 22 feet above the entire Servient Tenement. For purposes of determining that plane, the zero foot elevation point shall be the stretch of sidewalk of Maple Street that currently runs along the northern boundary of the Servient Tenement].

Restrictions on Use of Servient Tenement

5. The following restrictions are hereby imposed on the future use and enjoyment of the Servient Tenement to prevent the impairment or destruction of the passage of sunlight through the above solar easement: _____[*specify restraints on vegetation, structures, and other objects, e.g.,* No vegetation, structures, or other objects will be allowed to encroach into the above solar easement, with the exception of the existing eucalyptus tree that is located approximately two feet southwest of the northeast corner of the Servient Tenement].

Term of Easement

6. The easement and all other rights and privileges granted under this Agreement shall terminate _____[*specify, e.g.,* if Grantee permanently dismantles, removes, or abandons the solar energy system, or notifies Grantor in writing that Grantee no longer intends to use the solar energy system].

Agreement Nonassignable

7. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

Attorneys' Fees

8. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

9. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above solar easement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

10. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee.

Executed on _____[*date*].

GRANTOR
_____ [*signature of grantor*]
[*typed name*]

GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*If applicable, add spousal consent provision (see § 28A.210 [2]).*]

[*Continue as follows:*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
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B. Complete Easement Agreements

12-28A California Legal Forms--Transaction Guide § 28A.212

§ 28A.212 Well Easement

[1] Comment

[a] Use of Form

This form is an easement agreement conveying a right to use a well on the grantor's property. It sets forth the legal description of the parcel of land containing the well [*see* [2], Recital A, *below*], identifies the dominant tenement [*see* [2], Recital B, *below*], grants the right to use the well [*see* [2], P 3, *below*] and incidental rights of ingress and egress [*see* [2], P 4, *below*], and identifies the portion of the parcel that may be used for the ingress and egress [*see* [2], P 4, *below*]. Even though the form does not set forth the definite dimensions of the easement, its description of the easement is sufficient to identify the servient tenement [*see Pacific Gas & Electric Co. v. Crockett Land & Cattle Co. (1924) 233 P. 370* (authorizing use of such a description); *see also § 28A.12[2]*].

This form assumes that the easement will be appurtenant [*see* [2], P 2, *below*; *see also* [b], *below*] and nonexclusive [*see* [2], P 6, *below*; *§§ 28A.16, 28A.130,* P 4(b), (e)]. For coverage of other provisions in this form, see *Section 28A.200 [2]*. For additional and alternative provisions that may be added to this form or to any of the other complete easement agreements in this chapter, see *Sections 28A.220 through 28A.224*.

For a complex agreement and grant of an easement for a slant well [*see Stafford v. Union Oil Co. (1959) 173 Cal. App. 2d 307, 309, 343 P.2d 380* (a slant well is drilled at an angle toward a specific direction or reservoir of oil or gas)], see *Ch. 36, Oil and Gas and Other Natural Resources, § 36.230*.

[b] Water Easements

An easement may consist of any of several rights relating to the use of water flowing on, over, or from land [*see Civ. Code §§ 801, 802*; *Pogue v. Collins (1905) 146 Cal. 435, 440, 80 P. 623]* , including the right to take water [*Civ. Code §§ 801(5), 802(6)*]. Like other easements, a water right is an "interest" in real property [*see Wright v. Best (1942) 19 Cal. 2d 368, 382, 121 P.2d 702]* . Water rights typically are easements appurtenant [*see Civ. Code § 662* (watercourse as an appurtenance of land); *Jones v. Deardorff (1906) 4 Cal App. 18, 24, 87 P. 213* ; *see also* [2], P 2, *below*].

However, a water right may constitute an easement in gross [*Civ. Code § 802(6)*].

[2] FORM

Well Easement

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

.....Space above this line for recorder's use

[*Add documentary transfer tax statement here, if applicable (see § 28A.220)*]

EASEMENT AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as "Parcel 1"), and more particularly described _____[as follows: _____(*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

B. Grantee is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Dominant Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) or in Exhibit B, which is attached to this Agreement and hereby incorporated by reference].

C. Grantee desires to acquire certain rights in Parcel 1.

Grant of Easement

1. [*Add if applicable:* In consideration of the sum of $ _____,] Grantor grants to Grantee an easement, subject to the terms of this Agreement.

Character of Easement

2. The easement granted in this Agreement is appurtenant to the Dominant Tenement.

Description of Easement

3. The easement granted in this Agreement is an easement to take and use, solely for domestic purposes, the water from the existing well located on Parcel 1 [*or provide more specific description of portion of parcel containing well*].

Secondary Easements

4. The easement granted in this Agreement includes incidental rights of ingress and egress over and across a portion of Parcel 1 to the extent necessary to use the easement. These rights of ingress and egress shall exist over the following portion of Parcel 1: _____[*describe strip of land or other area within which rights of ingress and egress may be exercised*]. In exercising these rights, Grantee must use reasonable care and may not unreasonably increase the burden on Parcel 1 or make any material changes to Parcel 1. Further, Grantee must compensate Grantor for any damage resulting from the exercise of these rights of ingress and egress.

Term

5. The easement granted in this Agreement shall be _____[*specify, e.g.,* a perpetual easement *or* for a term of 20 years].

Nonexclusive Easement

6. The easement granted in this Agreement is nonexclusive. Grantor retains the right to make any use of the Servient Tenement, including the right to grant concurrent easements in the Servient Tenement to third parties, that does not interfere unreasonably with Grantee's free use and enjoyment of the easement.

Agreement Nonassignable

7. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

Attorneys' Fees

8. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

9. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above easement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

10. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee.

Executed on _____[*date*].

GRANTOR
_____ [*signature of grantor*]
[*typed name*]

GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*If applicable, add spousal consent provision (see § 28A.210).*]

[*Continue as follows:*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawWater RightsGeneral OverviewReal Property LawWater RightsGroundwater



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12-28A California Legal Forms--Transaction Guide § 28A.213

§ 28A.213 Temporary Easement for Construction Purposes

[1] Comment--Use of Form

This form is an agreement granting and conveying a temporary easement to use the servient tenement in connection with the performance of construction work on another parcel. A developer often needs to obtain such an easement to gain access to the construction site, to perform related off-site work (such as laying pipes), or to obtain additional space to store equipment and materials.

This form creates an easement in gross [*see* [2], P 2, *below*], but may be easily modified to create an easement appurtenant. For illustrative easement appurtenant language, see *Section 28A.212*, Paragraph 2. It provides for the attachment of plans and specifications describing the construction work [*see* [2], P 4, *below*]. This arrangement permits the grantor to review and approve the plans and specifications before the execution of the agreement. The form also states that the easement is to terminate on (1) the completion of the construction work, and (2) the grantee's satisfaction of its obligations under this agreement (such as the grantee's duty to restore and repair the servient tenement) [*see* [2], P 5, *below*; *see also* [2], P 6, *below*]. Optional language provides for a penalty, assessed on a daily basis, if the construction work and the use of the easement continue beyond a specified date [*see* [2], P 5, *below*]. If counsel uses that language, he or she should also include the optional "time of the essence" clause in this form [*see* [2], P 9, *below*]. For coverage of the remaining provisions in this form, see *Section 28A.210*.

For additional and alternative provisions that may be inserted into this form or into any of the other complete easement agreements in this chapter, see *Sections 28A.220 through 28A.224*.

[2] FORM

Temporary Easement for Construction Purposes

TEMPORARY EASEMENT AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as "Parcel 1"), and more particularly described _____[as follows: _____(*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

B. Grantee desires to acquire certain rights in that part of Parcel 1 described as follows: _____[*specify*] (hereafter referred to as the "Servient Tenement").

Grant of Easement

1. [*Add if applicable:* In consideration of the sum of $_____,] Grantor grants to Grantee and Grantee's agents and employees a temporary easement, on the terms and conditions set forth in this Agreement.

Character of Easement

2. The easement granted in this Agreement is an easement in gross.

Description of Easement

3. The easement granted in this Agreement is a temporary right _____[*specify permitted use(s), e.g.*, to enter upon the Servient Tenement, to store construction equipment and materials on the Servient Tenement, and to cross over the Servient Tenement], in connection with the performance of certain construction work on certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as "Parcel 2"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit B, which is attached to this Agreement and hereby incorporated by reference].

Construction Work

4. The construction work referred to in Paragraph 1 of this Agreement (hereafter referred to as the "construction work") consists of _____[*specify, e.g.*, the construction of an apartment building on Parcel 2, pursuant to the plans and specifications that are attached to this Agreement as Exhibit C and hereby incorporated by reference]. [The construction equipment and materials referred to in Paragraph 1 of this Agreement consist of the following: _____(*specify*)].

Term

5. The temporary easement granted in this Agreement shall terminate on completion of the construction work and satisfaction by Grantee of all requirements imposed by this Agreement. [If the construction work is not completed by _____ (*date*), _____ (*specify consequences, e.g.*, Grantee shall pay Grantor the sum of $_____ for each day thereafter that this easement remains in effect.]

Duty to Repair, Restore, or Replace

6. Within _____ days following completion of the construction work, Grantee shall (a) remove

Grantee's construction equipment and materials from the Servient Tenement, and (b) restore the Servient Tenement to the condition it was in on the date and at the time of the execution of this Agreement. That restoration work shall specifically include the repair or replacement of any landscaping, structures, fences, driveways, or other improvements on the Servient Tenement that belong to Grantor and that are removed, damaged, or destroyed by Grantee or Grantee's agents or employees.

Nonexclusive Easement

7. The easement granted in this Agreement is nonexclusive. Grantor retains the right to make any use of the Servient Tenement, including the right to grant concurrent easements in the Servient Tenement to third parties, that does not interfere unreasonably with Grantee's free use and enjoyment of the easement.

Agreement Nonassignable

8. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

[*Optional:*]

Time of Essence

9. Time is of the essence in this Agreement.

[*Continue as follows:*]

Attorneys' Fees

10. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

11. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above easement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

12. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee, except as otherwise provided in this Agreement.

Executed on _____[*date*].

GRANTOR

_____ [*signature of grantor*]

[*typed name*]

GRANTEE

_____ [*signature of grantee*]

[*typed name*]

[*If applicable, add spousal consent provision (see § 28A.210).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsEasementsPrivate EasementsReal Property LawLimited Use RightsEasementsTermination of Easements



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12-28A California Legal Forms--Transaction Guide § 28A.214

§ 28A.214 Driveway Easement and Maintenance Agreement

[1] Comment

[a] Use of Form

This form is an agreement creating and conveying an easement for "driveway purposes" and providing for the maintenance by the grantor of the easement. This type of easement may also be referred to as a "roadway" or "road" easement. For discussion of these easements, see [b], *below*.

This form provides that the easement is nonexclusive [*see* [2], P 5, *below*; *see also § 28A.210 [c]*]. Further, it obligates the grantor, at his or her sole expense, to maintain the easement [*see* [d], *below*]. For additional and alternative provisions that may be inserted into this form or into any of the other complete easement agreements in this chapter, see *Sections 28A.220 through 28A.224*.

[b] Driveway or Roadway Easement

The driveway easement created by this form is essentially a limited version of a right-of-way. A right-of-way is an easement that gives a person or class of persons the right to pass over the land of another [*Kripp v. Curtis (1896) 71 Cal. 62-63, 71 Cal. 62-63, 11 P. 879* ; *Wood et al. v. Truckee Turnpike Co. (1864) 24 Cal. 474, 487]* . This form restricts the grantee's right to pass over the servient tenement by providing for the use of an existing road by moving vehicular traffic. It also contains alternative language prohibiting or restricting parking [*see* [2], P 3, *below*].

When a grant provides for the use of land "as a driveway," a narrow construction must be placed on the term "driveway" [*Dolske v. Gormley (1962) 58 Cal. 2d 513, 519, 375 P.2d 174]* . Driveway rights are viewed as primarily for ingress and egress of vehicles, and do not include pedestrian and maintenance access to an adjoining property [*see Dolske v. Gormley (1962) 58 Cal. 2d 513, 519, 375 P.2d 174]* . Similarly, a conveyance "for road purposes only" does not permit the use of the servient tenement for any object or purpose other than a road [*see Marlin v. Robinson (1932) 123 Cal. App. 373, 377, 11 P.2d 70]* .

[c] Parking

A conveyance of a nonexclusive right to pass along, over, and upon a private road or alleyway for all purposes connected with the use of the dominant tenement, does not include the right to park vehicles in a way that would exclude others from exercising their right to travel over the same road [*see Keeler v. Haky (1958) 160 Cal. App. 2d 471, 475-476, 325 P.2d 648]* . However, a grant of a roadway over a strip of land may include, as an incidental easement [*see §§ 28A.18[1], 28A.215 [2],* P 5], the right to the reasonable use of the easement for transitory parking, if the parking does not interfere with the rights of others in the easement [*see Heath v. Kettenhofen (1965) 236 Cal. App. 2d 197, 204, 45 Cal. Rptr. 778]* . The parties to an easement transaction should attempt to resolve parking issues by including a parking provision in the easement grant [*see* [2], P 3, *below*].

[d] Maintenance and Repair Work

As a general rule, the owner of an easement has the duty to keep the easement in repair [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592* ; see *Civ. Code § 845*]. However, the parties may alter this obligation by contract [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983]* .

A grant of an easement carries with it a "secondary" right to enter on the servient tenement to make repairs and do any other things that are necessary for the full exercise of the primary easement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401* ; *see Ward v. City of Monrovia (1940) 16 Cal. 2d 815, 821-822, 108 P.2d 425]* . For example, a grant of an easement for road purposes may include the right to construct a guard rail if the road adjoins a steep embankment and the guardrails (1) are reasonably necessary, and (2) would not unduly burden the servient tenement [*see Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429]* .

This form requires the grantor to maintain the easement at the grantor's sole expense and cost [*see* [2], P 6, *below*]. For a maintenance agreement providing for sharing of maintenance expenses by co-owners of a private right-of-way or by owners of different parcels to which such an easement is attached, see *Section 28A.231*. The provisions in that agreement governing shared maintenance obligations may be incorporated into this form in lieu of Paragraph 6.

[2] FORM

Driveway Easement and Maintenance Agreement

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

[*Add documentary transfer tax statement here, if applicable (see § 28A.220*)]

EASEMENT AND MAINTENANCE AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as "Parcel 1"), and more particularly described _____[as follows: _____(*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

B. Grantee is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Dominant Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit B, which is attached to this Agreement and hereby incorporated by reference].

C. Grantee desires to acquire certain rights in that part of Parcel 1 described as follows: _____[*describe easement tract, e.g.,* the existing private road located on the northerly 20 feet of Parcel 1 and extending from the eastern boundary of Parcel 1 to the western boundary of Parcel 1] (hereafter referred to as the "Servient Tenement").

Grant of Easement

1. [*Add if applicable:* In consideration of the sum of $_____,] Grantor grants to Grantee (and Grantee's agents and employees) an easement, on the terms and conditions set forth in this Agreement.

Character of Easement

2. The easement granted in this Agreement is appurtenant to the Dominant Tenement.

Description of Easement

3. The easement granted in this Agreement is an easement for driveway purposes only. For purposes of this Agreement, "driveway purposes" means use for and by moving vehicular traffic for any purpose connected with the use of the Dominant Tenement. _____[*Prohibit parking or describe parking rights, e.g.,* These driveway purposes do not include parking. No parking shall be permitted on the Dominant Tenement].

Term

4. The easement granted in this Agreement shall be _____[*specify, e.g.,* for a term of 20 years].

Nonexclusive Easement

5. The easement granted in this Agreement is nonexclusive. Grantor retains the right to make any use of the Servient Tenement, including the right to grant concurrent easements in the Servient Tenement to third parties, that does not interfere unreasonably with Grantee's free use and enjoyment of the easement.

Maintenance of Easement

6. Grantor shall maintain the Servient Tenement in good repair, at Grantor's sole cost and expense.

Agreement Nonassignable

7. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

Attorneys' Fees

8. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

9. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above easement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

10. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee.

Executed on _____[*date*].

GRANTOR
_____ [*signature of grantor*]
[*typed name*]

GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*If applicable, add spousal consent provision (see § 28A.210).*]

[*Continue as follows:*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPrivate Easements

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B. Complete Easement Agreements

12-28A California Legal Forms--Transaction Guide § 28A.215

§ 28A.215 Profit Agreement

[1] Comment

[a] Use of Form

This form is an agreement granting a profit appurtenant or a profit in gross. A profit (also referred to as a profit a prendre) is the right to make some use of another's land, and includes the following: (1) the right of entry, (2) the right to remove and take from the land the designated products or profit, and (3) the right to use the surface to the extent necessary and convenient for the exercise of the profit [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113* ; *see Callahan v. Martin (1935) 3 Cal. 2d 110, 120-121, 43 P.2d 788]* .

For additional and alternative provisions that may be added to this form or to any of the complete easement agreements in this chapter, see *Sections 28A.220 through 28A.224*.

[b] Status as Easement

A profit may be characterized as an easement [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113* ; *see Civ. Code §§ 801, 802*; *see also § 28A.11*]. Consequently, the statutory and case law that applies to easements also applies to profits [*see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 880, 881, 69 Cal. Rptr. 612* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879, 880, 42 Cal. Rptr. 400* ; *Restatement of Property, § 450*, "Special Note"]. Thus, a profit, like an easement, can be either in gross or appurtenant [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400]* .

For coverage of the creation of easements in general, see *Section 28A.19*. For the reasons stated above, that discussion also applies to profits. Similarly, most of the discussion in *Section 28A.120* of the contents of the complete easement agreement set forth as Section 28A.210 also applies to this form.

[2] FORM

Profit Agreement

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
.....Space above this line for recorder's use

[*Add documentary transfer tax statement here, if applicable (see § 28A.220)*]

PROFIT AGREEMENT

Preamble and Recitals

This Agreement is entered into on _____[*date*] by and between _____[*name of grantor*], hereafter referred to as "Grantor," and _____[*name of grantee*], hereafter referred to as "Grantee."

A. Grantor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Servient Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

[*Add if profit is to be appurtenant:*]

B. Grantee is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "Dominant Tenement"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit B, which is attached to this Agreement and hereby incorporated by reference].

[*Continue with the following:*]

C. Grantee desires to acquire certain rights in the Servient Tenement.

Grant of Profit

1. [*Add if applicable:* In consideration of the sum of $ _____,] Grantor grants to Grantee a profit, subject to the terms of this Agreement.

Character of Profit

2. The profit granted in this Agreement is _____[appurtenant to the Dominant Tenement *or* in gross].

Description of Profit

3. The profit granted in this Agreement is a right to remove from the Servient Tenement _____[*description of products, e.g.,* all of the timber now standing, growing, or lying on the Servient Tenement] (hereafter referred to as "the Products").

Method of Removal

4. The method of removal of the Products shall be as follows: _____[*specify*].

Incidental Rights

5. The profit granted in this Agreement includes the following incidental rights to use the Servient Tenement: _____[*specify, e.g.,* (a) the right to enter upon and depart from the Servient Tenement to cut and remove the Products; and (b) the right to install and erect on the Servient Tenement, at Grantee's own cost and expense, any temporary roads, bridges, transportation facilities, buildings, and other improvements that are reasonably necessary or convenient for the use and enjoyment of the profit, provided that Grantee uses these improvements only in connection with the profit and only for as long as is reasonably necessary for the use and enjoyment of the profit]. In exercising these rights, Grantee must use reasonable care and may not unreasonably increase the burden on the Servient Tenement.

Term

6. The profit granted in this Agreement shall be _____[*specify term, e.g.,* for a term of 10 years].

[*Choose one of the following paragraphs:*]

Exclusive Profit

7. Grantee's use of the profit granted in this Agreement shall be exclusive. Grantor shall not remove the Products for commercial purposes or grant or assign to others any right or profit to remove the Products from the Servient Tenement. Grantor retains the right to use the Servient Tenement in any manner that is consistent with Grantee's exclusive use and enjoyment of the profit.

[*OR*]

Nonexclusive Profit

7. Grantor retains the right to make any use of the Servient Tenement, including the right to remove the Products for commercial use or to grant concurrent profits in the Servient Tenement to third parties, provided the use does not interfere unreasonably with Grantee's use and enjoyment of the profit.

[*Choose one of the following paragraphs:*]

Assignment

8. This Agreement, including any interest in this Agreement, shall not be assigned without the prior written consent of the other party.

[*OR*]

Agreement Nonassignable

8. This Agreement shall not be assigned. Any purported assignment of this Agreement or of any interest in this Agreement shall be void and of no effect.

[*Continue with the following:*]

Attorneys' Fees

9. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

10. This Agreement constitutes the entire agreement between Grantor and Grantee relating to the above profit. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Grantor and Grantee.

Binding Effect

11. This Agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Grantor and Grantee [*add if profit is in gross and nonassignable:*, except as otherwise provided in this Agreement].

Executed on _____[*date*].

GRANTOR
_____ [*signature of grantor*]
[*typed name*]

GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*If applicable, add spousal consent provision (see § 28A.210).*]

[*Continue as follows:*]

Acknowledgment

[*See § 28A.200 [2] for appropriate acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawLimited Use RightsProfits a Prendre



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
B. Complete Easement Agreements

12-28A California Legal Forms--Transaction Guide §§ 28A.216-28A.219

[Reserved]

§§ 28A.216[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
C. Additional and Alternative Provisions

12-28A California Legal Forms--Transaction Guide § 28A.220

§ 28A.220 Documentary Transfer Tax Information

[1] Comment

[a] Use of Form

This form is a provision that should be added to an instrument creating an easement, immediately following the recorder's information, if the instrument is subject to a documentary transfer tax and the easement potentially may endure for a substantial period of time [*see* [b], *below*]. The amount of the tax and related information must be noted on the face of the instrument (this form) or on a separate document [*Rev. & Tax. Code §§ 11932*, *11933*]. As a practical matter, a separate document is rarely used in an easement transaction. Separate documents are used in real property sales transactions when the parties wish to avoid disclosing the purchase price of the property to third parties.

[b] Documentary Transfer Tax

Under the Documentary Transfer Tax Act [*Rev. & Tax. Code §§ 11901-11934*], California counties may tax transfers of real property [*Rev. & Tax. Code § 11911(a)*]. If a county imposes such a tax, cities within that county may also tax these transfers [*Rev. & Tax. Code § 11911(b)*; *see Rev. & Tax. Code § 11911(c)* (credit allowed against county transfer tax for amount of any transfer tax imposed by city)]. The tax may be imposed, by ordinance, on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to, or vested in, another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a)*, *(b)*]. An easement is subject to the Act if it potentially may endure for a substantial period of time. The following are examples of easements that fall within this category: a perpetual easement; an easement for life; or an easement for a fixed period of years that (1) can be renewed by the easement holder, or (2) is of sufficient length so as to approximate a perpetual easement or an easement for life *[62 Cal. Op. Att'y Gen. 87 (1979)]* .

The tax must be paid by any person who makes, signs, or issues the instrument subject to the tax, or for whose use or benefit the instrument is made, signed, or issued [*Rev. & Tax. Code § 11912*]. As mentioned under [a], *above*, a declaration of the amount due, signed by the party determining the tax or that party's agent, must appear on the face of

the instrument (this form) or on a separate document [*see Rev. & Tax. Code § 11932*]. The declaration must include a statement indicating whether the consideration or value used to compute the tax [*see Rev. & Tax. Code § 11911*] was exclusive of the value of a lien or encumbrance remaining on the interest or property conveyed at the time of sale [*Rev. & Tax. Code § 11933*].

A county recorder cannot record an instrument unless any required documentary transfer tax or taxes have been paid. However, if the recorder records the instrument anyway, failure to collect the tax does not affect the constructive notice imparted by the recordation of the instrument [*Rev. & Tax. Code § 11933*].

For further discussion of the Act, see *Ch. 27, Deeds and Recording, § 27.242*.

[2] FORM

Documentary Transfer Tax Information

[*Insert below recorder's information:*]

Documentary Transfer Tax
$_____ computed on full value of interest conveyed, [not] exclusive of liens and encumbrances remaining on that interest at time of sale.

_____ [*signature*]
[Agent of] Party determining tax

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawPriorities & RecordingRecording ActsTax LawState & Local TaxesReal Property TaxGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
PART IV. FORMS
C. Additional and Alternative Provisions

12-28A California Legal Forms--Transaction Guide § 28A.221

§ 28A.221 Change in Use of Easement

[1] Comment--Use of Form

This form is a clause that may be inserted into any of the complete easement agreements in this chapter when the parties anticipate that the grantee's use of the easement will change in the future. It describes the current uses, and authorizes the grantee to change or increase these uses, provided the new uses do not unreasonably increase the burden on the servient tenement.

An instrument creating an easement must describe the use to which the servient tenement is to be put [*City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976* ; *see § 28A.20 [2]*]. The extent of the easement is determined by the terms of the grant [*Civ. Code § 806*]. Thereafter, the owner of the easement has no right to use the easement in such a way as to create a new burden on the servient tenement or materially increase the existing burden [*Wall v. Rudolph (1961) 198 Cal. App. 2d 684, 686, 18 Cal. Rptr. 123]* . Consequently, if the grantee feels that his or her needs will change in the future, he or she should insist on the inclusion in the easement grant of a provision permitting the grantee to use the easement for those changed needs [*see* Kratovil, *Easement Draftmanship and Conveyancing, 38 Calif. L. Rev. 426, 446 (1950)*].

[2] FORM

Change in Use of Easement

Changes in Use of Easement

_____. The parties to this Agreement anticipate that the Grantee's needs and requirements relating to the use of the easement granted in this Agreement will change in the future. Consequently, the parties agree that (a) Grantee's use of the easement is not limited to the use [s] described in Paragraph _____ of this Agreement, and that (b) _____[*describe grantee's right to change or increase use and any limitations on that right, e.g.,* Grantee may change or increase Grantee's use of the e asement, provided that any new use does not unreasonably increase the burden on the Servient Tenement].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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12-28A California Legal Forms--Transaction Guide § 28A.222

§ 28A.222 Division of Dominant Tenement

[1] Comment--Use of Form

This form is a clause providing for the apportionment of an easement upon the subdivision, partition, or other division of the dominant tenement. When a dominant tenement is subdivided or partitioned, the easement must be apportioned accordingly [*Civ. Code § 807*; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881, 42 Cal. Rptr. 400]* . This means that each part of the dominant tenement is entitled to claim the benefit of the easement for the service of that part [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881, 42 Cal. Rptr. 400* ; Powell on Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)]. However, the burden must not be apportioned so as to impose an undue or unreasonable burden on the servient tenement [*Civ. Code § 807*; *Jordan v. Worthen (1977) 68 Cal. App. 3d 310, 327, 137 Cal. Rptr. 282* ; *see Russell v. Palos Verdes Properties (1963) 218 Cal. App. 2d 754, 772-773, 32 Cal. Rptr. 488]* . This form essentially notifies the parties of the applicable laws, and may be inserted into any of the complete easement agreements in this chapter.

[2] FORM

Division of Dominant Tenement

Division of Dominant Tenement

_____. If the Dominant Tenement is hereafter subdivided, partitioned, or otherwise divided into two or more parts, the easement granted in this Agreement shall be apportioned so that the owner of each resulting part of the original Dominant Tenement, or the owner's assignee, shall be entitled to enjoy the benefit of the easement granted in this Agreement for the service of the owner's part, provided that the resulting use of the easement does not impose an undue or unreasonable burden on the Servient Tenement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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12-28A California Legal Forms--Transaction Guide § 28A.223

§ 28A.223 Additions to Dominant Tenement

[1] Comment

[a] Use of Form

This form is a clause that provides for the expansion of a dominant tenement. Specifically, it states that any property subsequently acquired by the grantee that is contiguous to the original dominant tenement shall become part of the dominant tenement. This form may be inserted into any of the complete easement agreements in this chapter.

[b] Subsequently-Acquired Property

An easement appurtenant may be used only for the benefit of the dominant tenement [*Wall v. Rudolph (1961) 198 Cal. App. 2d 684, 695, 18 Cal. Rptr. 123]* . Consequently, if the parties to an easement agreement anticipate that the grantee may subsequently acquire contiguous property, and wish to extend the benefit of the easement to that property, they should include this type of provision in the easement grant [*see* Kratovil, *Easement Draftmanship and Conveyancing, 38 Calif. L. Rev. 426, 440 (1950)*; Real Estate Law (9th ed., Prentice-Hall, Inc. 1988), ch. 4, *Easements*].

[2] FORM

Additions to Dominant Tenement

Additions to Dominant Tenement

_____. Any property acquired by Grantee after the execution of this Agreement that is contiguous to the Dominant Tenement shall become part of the Dominant Tenement and shall be entitled to the benefit of the easement [, provided _____ (*set forth any limitations on use of easement for benefit of subsequently-acquired property*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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12-28A California Legal Forms--Transaction Guide § 28A.224

§ 28A.224 Relocation of Servient Tenement

[1] Comment--Use of Form

This form may be inserted into any of the complete easement agreements in this chapter when the grantor wishes to reserve a limited right to relocate the servient tenement. As a general rule, once the location of an easement has been established, it cannot be substantially changed without the consent of both parties [*Youngstown Steel Products Co. v. Los Angeles (1952) 38 Cal. 2d 407, 410-411, 240 P.2d 977]* . The use of a relocation clause in an easement agreement permits the parties to provide for future changes in their needs. This type of agreement is particularly important when the easement is located on industrial property. In that case, the original location of the servient tenement may interfere with the servient owner's subsequent plans to construct additional roads or to expand existing facilities [*see* Kratovil, *Easement Draftmanship and Conveyancing, 38 Calif. L. Rev. 426, 442 (1950)*].

[2] FORM

Relocation of Servient Tenement

Relocation of Servient Tenement

_____. Grantor reserves the right, at Grantor's sole expense, to change the location of the Servient Tenement, provided the relocation satisfies or complies with all of the following conditions and limitations: _____[*specify, e.g.*, the relocation does not unreasonably interfere with the Grantee's use of the easement; Grantor gives Grantee written notice of the relocation at least _____ days prior to the relocation; the Servient Tenement is moved not more than _____ feet from its present location; Grantor presents Grantee with satisfactory evidence of Grantor's title to the relocated Servient Tenement; and Grantor, within _____ days after the relocation, records a new easement grant reflecting the new location of the Servient Tenement].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress Easements



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12-28A California Legal Forms--Transaction Guide §§ 28A.225-28A.229

[Reserved]

§§ 28A.225[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Related Instruments

12-28A California Legal Forms--Transaction Guide § 28A.230

§ 28A.230 License Agreement

[1] Comment

[a] Use of Form

This form is an agreement creating a license. As a general rule, a license is a personal, revocable, and nonassignable right to do one or more acts on the land of another without possessing an interest in that land [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *see* Restatement of Property § 512]. It is a personal privilege that confers on the licensee the authority to do an act that would otherwise be unlawful [*Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* .

Although courts have frequently stated that licenses are not "interests" in land [*see, e.g.,* *Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* , the better view is that a license is an interest in land [*see* *Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142* ; Restatement of Property § 512, Comment c (license as "interest" in property); Powell on Real Property, vol. 3, ch. 34, *Easements and Licenses;* Bowman, Ogden's Revised California Real Property Law (Cal. CEB 1974), vol. 1, ch. 13, *Easements*]. However, it is not the type of interest that is subject to the statute of frauds [*Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142* ; *Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002]* . One commentator has referred to licenses as insubstantial interests in real property with an "evanescent, fleeting, revocable character" [*see* Powell On Real Property, vol. 3, ch. 34, *Easements and Licenses* (Matthew Bender)].

[b] Comparison With Easements

The California Supreme Court has recognized that the differences between a license and an easement are often subtle and difficult to discern [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 594, 171 P. 424]* . It is possible in many cases to distinguish licenses from easements on the ground that the former are revocable [*see* [e], *below*] and the latter are irrevocable [*see § 28A.12 [2]*]. However, the courts have not always drawn the distinction in precisely those terms, and some easements are irrevocable [*see* [e], *below*]. Perhaps the principal distinction between an easement and a

license is that an easement is fully protected as an interest in land [*see § 28A.10*], while a license is considered a slight and insubstantial interest in real property [*see* Powell On Real Property, vol. 3, ch. 34, *Easements and Licenses* (Matthew Bender); [a], *above*].

Whether in a particular case an easement or a license has been created is a question of the parties' intent [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 594, 171 P. 424]* . However, the words used in creating the right are not controlling [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 594, 171 P. 424]* . In appropriate cases, extrinsic evidence may be admissible to interpret an agreement [*see Guerra v. Packard (1965) 236 Cal. App. 2d 272, 286, 46 Cal. Rptr. 25]* .

[c] Creation

As mentioned above, a license is not deemed an interest in real property for purposes of application of the statute of frauds [*see Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; [a], *above*]. Consequently, a license may be created by parol [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002]* or may arise by implication [*see Lusk v. Krejci (1960) 187 Cal. App. 2d 553, 555, 9 Cal. Rptr. 703]* . Of course, a license may also be created by a writing [*Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* . The only "essential" to the creation of a license is some expression by the licensor of his or her assent or consent to the use of the land by the licensee [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Gravelly Ford Co. v. Pope-Talbot Co. (1918) 36 Cal. App. 717, 737, 178 P. 155* ; *Restatement of Property § 512, Comment h*].

[d] Assignments

As a general rule, a license is not assignable because it is a personal privilege. An attempt to assign a license terminates it [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *Shaw v. Caldwell (1911) 16 Cal. App. 1, 8, 115 P. 941]* . Notwithstanding this general rule, a license may be assigned if the original licensor and licensee agree that it may be assigned [*Herman v. Rohan (1918) 37 Cal. App. 678, 681, 174 P. 349* ; *see Restatement of Property § 517* (license is assignable in so far as it was intended in its creation to be assignable); *see also Restatement of Property § 518(a)* (no particular formalities are required for assignment of license)]. This form contains alternative provisions prohibiting and permitting assignments [*see* [2], P 5, *below*].

[e] Revocation

The general rule is that a license may be revoked at any time at the will of the licensor [*Wheeler v. West (1886) 71 Cal. 126, 129, 11 P. 871* ; *County of Alameda v. Ross (1939) 32 Cal. App. 2d 135, 141-142, 89 P.2d 460* ; *see Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729* (mere license to enter or use premises may be revoked by licensor at any time)]. However, there are two major exceptions to this general rule of revocability. First, if the licensee has made expenditures or performed work in reasonable reliance on the license, the license may become irrevocable on the basis of estoppel [*Hammond v. Mustard (1967) 257 Cal. App. 2d 384, 388-389, 64 Cal. Rptr. 829* ; *Stoner v. Zucker (1906) 148 Cal. 516, 520, 83 P. 808* ; for further discussion, *see* California Real Estate Law Practice, vol. 10, ch. 343, *Easements and Licenses* (Matthew Bender)]. In that case, the license becomes an interest that is very similar to an easement [*see Stoner v. Zucker (1906) 148 Cal. 516, 520, 83 P. 808* ; *Cooke v. Ramponi (1852) 38 Cal. 2d 282, 286, 239 P.2d 638]* . Second, a license "coupled with an interest" is not revocable but continues to exist for the period contemplated by the license [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729]* . The cases dealing with licenses coupled with an interest generally turn on the need of the licensee to cross the land of the licensor to reach property owned by the licensee [*see* California Real Estate Law Practice, vol. 10, ch. 343, *Easements and Licenses* (Matthew Bender)]. For example, when there has been a sale of personal property located on the seller's land, the buyer has an irrevocable license to enter and remove the personal property within a reasonable time [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729]* .

The first alternative version of Paragraph 6 of this form should be used if the license is to be revocable. It provides that the licensor may terminate the license at any time by having a written termination notice delivered to the licensee. The second alternative version of that paragraph specifies the term of the license. It should be used if the parties wish to create a license "coupled with an interest" that will continue to exist for the specified term.

[f] Other Terminating Events

As discussed in [e], *above*, a licensor may revoke a license under certain circumstances. A license may also be terminated by (1) an attempted assignment by the licensee [*see Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; [d], *above*]; (2) a voluntary surrender of the licensee's rights under the license [*see* Powell On Real Property, vol. 3, ch. 34, *Easements and Licenses* (Matthew Bender)]; (3) the licensee's abandonment or nonuse of the property subject to the license [*Stoner v. Zucker (1906) 148 Cal. 516, 520, 83 P. 808]* ; (4) the destruction of the property subject to the license [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 594, 171 P. 424]* ; or (5) the death of either party [*DeHaro v. United States (1867) 72 U.S. 599, 627-628, 18 L. Ed. 681]* . For additional coverage of these terminating events, see California Real Estate Law Practice, Volume 10, Chapter 343, *Easements and Licenses* (Matthew Bender).

[g] Indemnity and Insurance

This form includes optional insurance and indemnity provisions. The insurance provision requires the licensee to obtain and maintain a policy of comprehensive liability insurance, and specifies the minimum amounts of coverage [*see* [2], P 9, *below*]. The indemnity clause provides, among other things, that the licensee agrees to hold the licensor exempt and harmless for any damage or injury arising from the licensee's use of the the property subject to the license or from licensee's failure to maintain that property [*see* [2], P 8, *below; see also Civ. Code § 2772* ("indemnity" defined)]. There are no unique legal considerations governing insurance or indemnification provisions in licenses. For coverage of indemnity in general, see Volume 14, Chapter 79, *Suretyship, Guaranty, and Indemnity*.

[2] FORM

License Agreement

LICENSE AGREEMENT

Identification of Parties

1. This License Agreement is entered into on _____[*date*] by and between _____[*name of licensor*], hereafter referred to as "Licensor," and _____[*name of licensee*], hereafter referred to as "Licensee."

Description of Property

2. Licensor is the owner of certain real property situated in _____[the City of _____, *or* an unincorporated area of _____] County, California (hereafter referred to as the "the Property"), and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this Agreement and hereby incorporated by reference].

Grant of License

3. [*Add if applicable:* In consideration of the sum of $_____,] Licensor grants to Licensee a license (hereafter referred to as "the License") to perform the following acts on the Property: _____[*specify*]. Licensee may not use the Property for any other purpose or business without obtaining Licensor's prior written consent.

Incidental Rights

4. The License includes the following incidental rights to use the Property: _____[*specify*]. In exercising these rights, Licensee must use reasonable care and may not unreasonably increase the burden on the Property.

[*Choose one of the following paragraphs:*]

License Nonassignable

5. This License is personal to the Licensee and shall not be assigned. Any attempt to assign the License shall automatically terminate it. No legal title or leasehold interest in the Property is created or vested in Licensee by the grant of this License.

[*OR*]

Assignment

5. This License shall not be assigned by either party without the prior written consent of the other party.

[*Choose one of the following paragraphs:*]

Revocation

6. Licensor may revoke this License at will by having a written revocation notice delivered to Licensee at least _____[*number*] _____[days *or* weeks] prior to the termination date specified in the notice.

[*OR*]

Term

6. This License shall be _____[*specify term, e.g.*, for a term of 10 years, commencing on the date of this License and terminating on _____ (*date*)].

[*Continue as follows:*]

Termination of Occupancy

7. _____[After receipt of a notice of termination from Licensor, Licensee, on or before the effective date of termination specified in that notice, *or* On or before the termination date for this License specified in Paragraph 6 of this Agreement, Licensee] shall remove all of Licensee's personal property from the Property and shall surrender possession of the Property to Licensor in good order and repair to the satisfaction of Licensor, normal wear and tear excepted.

[*Optional provision*]

Indemnity

8. Licensee, as a material part of the consideration to be rendered to Licensor under this Agreement, waives all claims against Licensor for damages to all personal property in, on, or about the Property, and for injuries to persons in or about the Property, from any cause arising at any time. Further, Licensee agrees to hold Licensor exempt and harmless for and on account of any damage or injury to any person or personal property of any person, arising from (a) Licensee's use of the Property, or (b) Licensee's failure to keep the Property and surrounding areas clean and in good condition. Licensor shall not be liable to Licensee for any damage by or from any act or negligence of any other occupant of the Property or any occupant of adjoining or contiguous property. Licensee agrees to pay for all damages to the Property, as well as all damage to occupants of the Property and to the property of those occupants caused by Licensee's misuse or neglect of the Property.

[*Optional provision:*]

Insurance

9. Licensee further agrees to maintain in full force during the term of this License, at Licensee's own expense, a policy of comprehensive liability insurance, including property damage, which will insure Licensee and Licensor against liability for injury to persons, damage to property, and death of any person occurring in or about the Property. The policy shall be approved as to form and insurance by Licensor. The insurance shall be not less than $_____ for any one person injured or killed, not less than $_____ for any one incident, and not less than $_____ for property damage. Licensee shall provide Licensor with a copy of the policy, including an endorsement that states that the policy will not be cancelled except after 10 days' notice in writing to Licensor.

[*Continue as follows:*]

Attorneys' Fees

10. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

11. This Agreement constitutes the entire agreement between Licensor and Licensee relating to the License. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Licensor and Licensee.

Executed on _____[*date*].

LICENSOR

_____ [*signature of licensor*]

[*typed name*]

LICENSEE

_____ [*signature of licensee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable InterestsReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsLicensesTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesLicensees



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28A EASEMENTS AND LICENSES
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D. Related Instruments

12-28A California Legal Forms--Transaction Guide § 28A.231

§ 28A.231 Agreement to Share Maintenance Expenses of Easement

[1] Comment

[a] Use of Form

This form is an agreement between co-owners of a private right-of-way providing for the sharing of the expenses of maintaining and repairing the easement [*see Civ. Code § 845(b)*; *see also* [c], *below*]. In the absence of such an agreement, the cost of maintaining the right-of-way in repair must be shared by the co-owners proportionately to the use made of the easement by each owner [*Civ. Code § 845(c)*; *see* [c], *below*].

This form assumes that the parties are co-owners of the easement. However, if the parties are owners of appurtenant parcels [*see* [c], *below*], this form may be easily modified to reflect that fact.

For a grant deed creating and conveying a private right-of-way, see *Section 28A.201*.

[b] Right and Duty to Maintain Easements in General

An easement owner has the duty to keep the easement in repair [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592* ; *see Civ. Code § 845*; *see also* [c], *below*]. However, the parties may alter this obligation by contract [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983]* .

An express or implied grant of an easement carries with it a "secondary" easement that gives the dominant owner the right to enter on the servient tenement to make repairs and do any other things that are necessary for the full exercise of the primary easement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401* ; *see Ward v. City of Monrovia (1940) 16 Cal. 2d 815, 821-822, 108 P.2d 425]* . This secondary easement must be exercised only when necessary, and in a reasonable manner that does not needlessly increase the burden on the servient tenement [*Oliver v. Agasse (1901) 132 Cal. 297, 299, 64 P. 401]* .

For additional coverage of the maintenance of easements in general, see *Section 28A.24*.

[c] Statutory Requirements Governing Repair of Right-of-Way

The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, must maintain it in repair [*Civ. Code § 845(a)*]. If the easement is owned by more than one person, or is appurtenant to parcels of land under different ownership, the cost of maintaining it in repair must be shared by each owner of the easement or each owner of an appurtenant parcel, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose (this form). If any owner who is a party to the agreement refuses to perform or fails (after receiving a written payment demand) to pay the owner's proportionate share of the cost [*see § 28A.232* (payment demand)], an action for specific performance or contribution may be brought against that owner in a court of competent jurisdiction by the other owners, either jointly or severally [*Civ. Code § 845(b)*; for an illustrative complaint, *see* California Forms of Pleading and Practice, *Easements* (Matthew Bender)].

An agreement to share expenses will be construed to include snow removal as a maintenance obligation if all of the following apply [*Civ. Code § 845(d)*]:

(1) Snow removal is not required under Civil Code Section § 845(a) (see discussion above) or under any independent contractual or statutory duty.

(2) Snow removal is not expressly precluded by the terms of the maintenance agreement.

(3) Snow removal is necessary to provide access to the properties served by the easement.

(4) Snow removal is approved in advance by the property owners or their elected representatives in the same manner as provided by the agreement for repairs to the easement.

In the absence of an agreement to share expenses, the cost of maintaining the right-of-way in repair must be shared proportionately to the use made of the easement by each owner. In that case, any owner of the easement or of an appurtenant parcel may apply to the appropriate court for the appointment of an impartial arbitrator to apportion the cost [*Civ. Code § 845(c)*; *see Healy v. Onstott (1987) 192 Cal. App. 3d 612, 617, 237 Cal. Rptr. 540* ; for an illustrative petition, *see* California Forms of Pleading and Practice, *Easements* (Matthew Bender)]. The application may be made before, during, or after performance of the maintenance work. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportionate liability of each owner [*Civ. Code § 845(c)*; *see Healy v. Onstott (1987) 192 Cal. App. 3d 612, 616, 237 Cal. Rptr. 540]* . The judgment may be enforced as a money judgment by any party against any other party to the action [*Civ. Code § 845(c)*].

There are two exceptions to the foregoing requirements. First, although nonconsenting co-owners of a right-of-way may be compelled to contribute to the costs of keeping the way in repair [*Civ. Code § 845(c)*], they may not, without their consent, be compelled to contribute to the cost of major improvements [*McManus v. Sequoyah Land Ass'n (1966) 240 Cal. App. 2d 348, 355, 49 Cal. Rptr. 592]* . For example, nonconsenting owners cannot be required to contribute to the cost of paving a dirt road [*Holland v. Braun (1956) 139 Cal. App. 2d 626, 633, 294 P.2d 51]* . Second, *Civil Code Section 845* does not apply to rights-of-way held or used by railroad common carriers subject to the jurisdiction of the Public Utilities Commission [*Civ. Code § 845(d)*].

[2] FORM

Agreement to Share Maintenance Expenses of Easement

AGREEMENT TO SHARE MAINTENANCE EXPENSES

Preamble

This Agreement is entered into on _____[*date*], by and between _____[*name*], and _____[*name*] (hereafter collectively referred to as "the Parties").

Recitals

A. The Parties are co-owners of a private right-of-way easement located on _____[*description of property*], in _____ County, California, as shown by the _____[*specify instrument, e.g.*, deed] dated _____, and recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California.

B. The Parties wish to enter into an agreement providing for the sharing by them of the cost of maintaining and repairing the above easement.

Term

1. This Agreement will be in effect for the period beginning _____[*date*], and ending _____[*date*].

Authorized Maintenance and Repairs

2. This Agreement covers the following maintenance and repair work: _____[*specify, including types of equipment and materials to be used*].

Costs and Expenses

3. The Parties will bear the costs and expenses of the maintenance and repair work specified in Paragraph 2 of this Agreement as follows: _____[*specify, e.g.*, _____(*name*) will bear _____ percent of the total costs and expenses, and _____ (name) will bear the remaining _____ percent of the total costs and expenses, provided that neither Party will be obligated under this Agreement to pay more than $_____].

Additional Maintenance or Repair Work

4. Maintenance or repair work that is not described in Paragraph 2 of this Agreement shall not be covered by this Agreement unless the Party wishing to undertake the work first obtains the written consent of the other Party.

Liability for Injury to Third Party

5. The Parties will bear the liability, in the same percentage as they share the costs of repairs and maintenance as set forth in Paragraph 3 of this Agreement, for any personal injury or property damage to any worker employed to perform maintenance or repair work covered by this Agreement or to any third person, provided the injury or damage results from or arises out of maintenance or repair work undertaken pursuant to this Agreement.

Liability Limited to Authorized Repairs

6. This Agreement shall not apply to liability resulting from personal injury or property damage when the injury or damage is not attributable to maintenance or repair work undertaken pursuant to this Agreement.

Insurance

7. Each Party is responsible for maintaining _____[his *or* her *or* his or her] own insurance, if any.

[*Optional provision*]

Indemnification

8. Each Party shall indemnify and hold the other (and the property of the other) free and harmless from any and all liability for personal injury to the Party or for damage to the Property of the Party when the injury or damage results from or is attributable to any maintenance or repair work undertaken pursuant to this Agreement.

[*Continue as follows:*]

Executed on _____[*date*].

_____ [*signature of co-owner*]
[*typed name*]

_____ [*signature of other co-owner*;]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationExpress Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-28A California Legal Forms--Transaction Guide § 28A.232

§ 28A.232 Demand on Co-owner of Private Right-of-Way to Pay Proportionate Share of Maintenance Expenses [Civ. Code § 845]

[1] Comment--Use of Form

This form is a demand by a co-owner of a private right-of-way easement that another co-owner pay the latter's proportionate share of the expenses of maintaining the easement [*see Civ. Code § 845(a)*]. If an easement in the nature of a private right-of-way is owned by more than one person, or is appurtenant to parcels of land under different ownership, the cost of maintaining it in repair must be shared by each owner of the easement or each owner of an appurtenant parcel, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose [*Civ. Code § 845(b)*; *see § 28A.231 [2]* (maintenance agreement)]. If any owner who is a party to the agreement refuses to perform or fails after demand in writing (this form) to pay the owner's proportionate share of the cost, an action for specific performance or contribution may be brought against that owner in a court of competent jurisdiction by the other owners, either jointly or severally [*Civ. Code § 845(b)*; for an illustrative complaint, *see* California Forms of Pleading and Practice, *Easements* (Matthew Bender)].

This form assumes that the parties to the underlying agreement to share expenses are co-owners of the easement. If the parties are owners of appurtenant parcels, the form should be modified to reflect that fact.

For further coverage of the statutory requirements governing the maintenance of a right-of-way, see *Sections 28A.140* and *28A.231[2]*.

[2] FORM

Demand on Co-owner of Private Right-of-Way to Pay Proportionate Share of Maintenance Expenses [Civ. Code § 845]

NOTICE OF DEMAND FOR CONTRIBUTION

To: _____[*name*]

_____[*address*]
_____[*city, state, zip*]

This notice relates to a private right-of-way easement (hereafter referred to as "the Easement") located on _____[*description of property*], in _____ County, California, as shown by the _____[*specify instrument, e.g.,* deed] dated _____, and recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California. The Easement is owned jointly by you and _____[the undersigned *or name(s) of other co-owner(s*)]. On _____[*date*], you and _____[the undersigned *or names of other co-owners*] entered into an agreement (hereafter referred to as "the Agreement") to share the cost of maintaining the Easement in repair. Pursuant to the Agreement, you are obligated to pay _____percent of the cost of repair [*or describe other repair obligation*].

Prior to _____[*date*], the right-of-way had fallen into a state of disrepair in that _____[*describe condition of easement requiring repair, e.g.,* it was so marred by numerous ruts and holes that automobile travel over the right-of-way was hazardous]. As a result of this state of disrepair, it was necessary to perform the following repairs to maintain the easement: _____[*specify, e.g.,* the ruts and holes were filled; additional gravel was poured on the road; and the surface of the road was regraded]. The cost of making those repairs was $_____, as shown in the attached itemized statement. The undersigned [*or specify other person(s*)] has [*or* have] caused those repairs to be made and has [*or* have] thereby incurred _____[an indebtedness *or* expenses] in the sum of $_____.

Your proportionate share of the above repair costs, determined pursuant to the terms of the Agreement, is $_____. The undersigned hereby demands that you submit this amount to _____[*specify*]. If you fail to pay, an action may be brought against you for damages.

Executed on _____[*date*].

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCharacteristicsReal Property LawLimited Use RightsEasementsCreationExpress Easements



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12-28A California Legal Forms--Transaction Guide § 28A.233

§ 28A.233 Quitclaim Deed Releasing Easement

[1] Comment

[a] Use of Form

This form is a quitclaim deed that the owner of an easement may use to release the easement to the servient owner [*see Westlake v. Silva (1942) 49 Cal. App. 2d 476, 478-479, 121 P.2d 872* ; *Restatement of Property § 500*]. The release terminates or extinguishes the easement [*Westlake v. Silva (1942) 49 Cal. App. 2d 476, 478, 121 P.2d 872]* .

For coverage of other methods of terminating easements, see *Section 28A.26[1]*.

[b] Requirements for Express Release

A release is subject to the same requirements that govern instruments creating easements [*Restatement of Property § 501, Comment a;* Powell On Real Property, ch. 34, *Easements and Licenses* (Matthew Bender)]. Consequently, the release must ordinarily be in writing [*see Civ. Code § 1624(c)*; *Code Civ. Proc. § 1971*; *see also § 28A.20[1], [2]*].

Because a quitclaim deed transfers and releases to the grantee whatever present title or interest the grantor has in the subject property, it is an appropriate instrument for the release of an easement [*Westlake v. Silva (1942) 49 Cal. App. 2d 476, 478-479, 121 P.2d 872* ; for coverage of grant deeds in general, *see* ch. 27, *Deeds and Recording*]. However, another type of written instrument may be used, provided it is executed and delivered as required by law [*see, e.g., Taylor v. Avila (1917) 175 Cal. 203, 206, 165 P. 533* (release by grant deed)].

[c] Wording

The operative words of a quitclaim deed are "remise, release, and quitclaim" [*Touchard v. Crow (1862) 20 Cal. 150, 160]* , or simply "quitclaim" [Bowman, Ogden's Revised California Real Property Law, vol. 1, ch. 3, *Transfer by Deed* (Cal. CEB 1975); *see Wholey v. Cavanaugh (1891) 88 Cal. 132, 135, 25 P. 1112* (omission of word "remise" was not material)].

[d] Recordation

A recorded quitclaim deed is good as against an unrecorded grant [*Beach v. Faust (1935) 2 Cal. 2d 290, 293, 40 P.2d 822]* . The grantee under a quitclaim deed is a bona fide purchaser under the recording laws and is therefore protected from unrecorded instruments affecting the title to the property of which the grantee had no notice [*Beach v. Faust (1935) 2 Cal. 2d 290, 293, 40 P.2d 822]* .

[2] FORM

Quitclaim Deed Releasing Easement

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

Mail tax statements to [*Add documentary transfer tax statement here, if applicable (see § 28A.220[2])*]
_____[*name*]
_____[*address*]
_____ [*city, state, zip*]

QUITCLAIM DEED

I, _____[*name of grantor/easement owner*], quitclaim to _____[*name of grantee/servient owner*] all my right, title, and interest in the real property situated in the City of _____, [*or* in an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

This deed is given specifically to release the easement granted [*or* reserved] by that certain _____[*heading of instrument, e.g.,* Easement Agreement] executed by _____[*name*] on _____[*date*] and recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California.

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*See § 28A.200 [2] for acknowledgment form.*]

[*Insert following statement as last line at bottom of first page of deed:*]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesQuit Claim DeedsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawPriorities & RecordingRecording Acts



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12-28A California Legal Forms--Transaction Guide § 28A.234

§ 28A.234 Notice of Consent to Use Land [Civ. Code § 813]

[1] Comment

[a] Use of Form

This form is a notice indicating that any public or private use of the land described in the notice is by permission of the owner. By posting this type of notice on real property, the owner of the property will prevent another person from acquiring a prescriptive right in the property [*see Civ. Code § 813*]. Otherwise, a person may acquire an easement by prescription in the property by using the property for at least five years, provided that the use is open, notorious, continuous, uninterrupted, hostile to the true owner, and under a claim of right [*see Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 570, 199 Cal. Rptr. 773* ; *Taormino v. Denny (1970) 1 Cal. 3d 679, 686, 83 Cal. Rptr. 359]* .

For another notice that may be used to prevent the acquisition of prescriptive rights [*see Civ. Code § 1008*], see *Section 28A.236*.

[b] Contents

The notice of consent must contain a description of the land and a notice reading substantially as follows: "The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: *Section 813, Civil Code*." Further, the notice may condition permission for public use of the property on reasonable restrictions on the time, place, and manner of public use [*Civ. Code § 813*].

[c] Recordation and Service

The holder of record title to the land must record the notice in the office of the recorder of any county in which any part of the land is situated [*Civ. Code § 813*; *see* ch. 27, *Deeds and Recording*]. Further, if the property is used by other than the general public (that is, by a specific person or persons), the notice must be served by registered or certified mail on

the user(s) [*Civ. Code § 813*; *see Civ. Code § 17* (authorizing use of certified mail)].

In any action involving the issue of whether any user has a prescriptive right in the land, the recorded notice will constitute conclusive evidence that use of the land during the time the notice is in effect, other than any use expressly allowed by a written or recorded map, agreement, deed, or dedication, is permissive and with the owner's consent. However, recordation does not affect rights that are vested at the time of recording [*Civ. Code § 813*].

After recording the notice, and prior to any revocation of it [*see* [d], *below*], the owner must not, by physical obstruction, notice, or otherwise, prevent any "appropriate" public use of the property [*Civ. Code § 813*].

[d] Revocation

The holder of record title to the property may revoke the notice of consent by recording a notice of revocation in the same office in which the original notice was recorded [*Civ. Code § 813*]. For an illustrative notice of revocation, see *Section 28A.235*.

[2] FORM

Notice of Consent to Use Land [Civ. Code § 813]

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

NOTICE OF CONSENT TO USE LAND

This notice relates to the following land: _____[*insert description*].

The right of the public or any person to make any use whatsoever of the above described land or any portion thereof (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is by permission, and subject to control, of owner: *Section 813, Civil Code*.

[*Optional*]

This permission is subject to the following restrictions: _____[*describe any reasonable restrictions on the time, place, and manner of public use*].

[*Continue as follows:*]

Dated: _____

_____ [*signature of record title holder*]
[*typed name*]

Acknowledgment

[*See § 28A.200 [2] for acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawPriorities & RecordingRecording Acts



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12-28A California Legal Forms--Transaction Guide § 28A.235

§ 28A.235 Notice of Revocation of Consent to Use Land [Civ. Code § 813]

[1] Comment--Use of Form

This form is a notice of revocation of a notice of consent that was recorded pursuant to *Civil Code Section 813*. Under Section 813, a holder of record title to land may prevent the acquisition of prescriptive rights in the land by recording a notice of consent. For further discussion and an illustrative notice, see *Section 28A.234*. The notice may be revoked by the holder of record title by the recordation of a notice of revocation (this form) in the same office in which the original notice was recorded [*Civ. Code § 813*].

[2] FORM

Notice of Revocation of Consent to Use Land [Civ. Code § 813]

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

NOTICE OF REVOCATION OF CONSENT TO USE LAND

Pursuant to *Civil Code Section 813*, the undersigned hereby revokes the Notice of Consent to Use Land [*or other heading*] that was executed by the undersigned on _____[*date*] and recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, of the Official Records of _____ County, California. The undersigned is the record holder of title to the property described in the above Notice of Consent to Use Land [*or other heading*].
Dated: _____

_____ [*signature*]
[*typed name*]

Acknowledgment

[*See § 28A.200 [2] for acknowledgment form.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawPriorities & RecordingRecording Acts



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12-28A California Legal Forms--Transaction Guide § 28A.236

§ 28A.236 Statutory Notice Barring Prescriptive Rights [Civ. Code § 1008]

[1] Comment--Use of Form

This form is a statutory notice that an owner of real property may post on the property to prevent the acquisition of prescriptive rights in the property [*see § 28A.23* (discussion of prescriptive rights)]. If the sign reads substantially as required by *Civ. Code § 1008* [*see* [2], *below* (statutory wording)], and the owner posts the sign at each entrance to the property or at intervals of not more than 200 feet along the boundary, no use of the land by any person or persons can ever ripen into an easement by prescription, regardless of how long the use continues [*Civ. Code § 1008*]. To be legally operative, the "permission to pass" sign must be posted by the landowner or by the landowner's authorized agent [*Aaron v. Dunham (2006) 137 Cal. App. 4th 1244, 1252, 41 Cal. Rptr. 3d 32* (posting by lessee of "permission to pass" sign on private road did not prevent acquisition of prescriptive easement because sign was not posted by property owner or owner's authorized agent)].

For discussion of another notice that may be used to prevent the acquisition of prescriptive rights [*see Civ. Code § 813*], see *§ 28A.234*.

[2] FORM

Statutory Notice Barring Prescriptive Rights [Civ. Code § 1008]

NOTICE

Right to pass by permission, and subject to control, of owner: *Section 1008, Civil Code*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by Prescription



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12-28A California Legal Forms--Transaction Guide § 28A.237

§ 28A.237 Notice of Conservation Easement [Gov. Code § 27255(c)] to be Filed with County Recorder for Placement in Comprehensive Index of Conservation Easements and Notices of Conservation Easements

[1] Comment

[a] Use of Form

This form is a Notice of Conservation Easement that may be completed and submitted to the county recorder in the county in which the easement is located. The information is to be added to the county's comprehensive index of conservation easements, which also includes information on recorded documents that contain a specifically named conservation easement. The conservation easement must be described in the notice, and all requested information must be properly filled out by the submitter. The notice may be recorded at the same time as it is submitted, or at a later time [*Gov. Code § 27255(c)*]. For information on the elements of a conservation easement, and the types of easements that fall into this category, see *§ 28A.29*.

[b] Comprehensive Index of Conservation Easements

The county recorder in each county must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. This index must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*; *see § 28A.29*]. In addition, a conservation easement recorded before January 1, 2002, may be included in the comprehensive index if a party to the easement fills out and records a notice for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(d)*]. Any party to a conservation easement may fill out and record a notice, including, but not limited to, counties, cities, recreation and park districts or agencies, state conservancies, state agencies, the California Coastal Commission, land trusts, and nonprofit organizations [*Gov. Code § 27255(d)*].

[2] FORM

Notice of Conservation Easement

Recording Requested by and When Recorded Return To:

_____ [*specify name, address, and phone number of person or agency filing*]

NOTICE OF CONSERVATION EASEMENT

The undersigned hereby gives notice that a Conservation Easement was recorded in the _____ County Recorder's Office on _____ and recorded as Document Number _____.

The grantors and grantees of the Conservation Easement were

Grantors _____
_____
Grantees _____
_____

I declare under penalty of perjury that the above statement is true and correct.

Signed _____
Dated _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawPriorities & RecordingRecording Acts



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§ 28B.23 Reestablishing Displaced Boundaries Under the Cullen Earthquake Act

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§ 28B.100 Party Wall Agreements

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§§ 28B.102-28B.109 [Reserved]

§ 28B.110 Execution, Acknowledgment, and Recordation of Party Wall and Boundary Agreements.

Scope

§§ 28B.111-28B.199 [Reserved]

§ 28B.200 Party Wall Agreement--One Owner to Build Party Wall

[1] Comment

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[c] Acknowledgment and Recordation

[2] Form

Party Wall Agreement--One Owner to Build Party Wall

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[2] Form

Party Wall Agreement--Both Owners to Build Party Wall

§ 28B.202 Agreement to Make Existing Wall Party Wall

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Agreement to Make Existing Wall Party Wall

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Agreement to Establish Boundary by Submission to Arbitration



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Scope

Scope

This chapter discusses party walls and boundary agreements. The law of party walls relates essentially to the law of easements and to the right of support by adjoining landowners in a common wall located on or near the line of division between their properties. The law of boundary agreements relates essentially to the procedure by which an uncertain boundary line between adjoining lands is defined and fixed, with the agreed boundary attaching to the deeds under which the adjoining owners claim title. The chapter contains a detailed treatment of the doctrine of agreed boundaries, the elements required under the doctrine, and the legal effect of a valid boundary agreement under the doctrine.

This chapter does not discuss either the law of easements or the area of contract formation. For a complete discussion of easements, see Ch. 28A, *Easements and Licenses* . For coverage of general contract principles, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .



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§ 28B.01 California Statutes

Occupation of land surveying regulated by statute. *Bus. & Prof. Code §§ 8700-8805*.

Party wall rights may be easements appurtenant. *Civ. Code § 801(12)*.

Coterminous owner's obligation to maintain whole of division fence may be an easement appurtenant. *Civ. Code § 801(14)*.

Extent of easement or servitude determined by terms of grant or nature of enjoyment by which acquired. *Civ. Code § 806*.

Right of owner in fee to surface and everything situated above and below it. *Civ. Code § 829*.

Coterminous owners mutually bound to maintain boundaries, monuments, and fences between them. *Civ. Code § 841*.

Surveyors' right to enter land with obligation of owner to provide reasonable access. *Civ. Code § 846.5*.

Occupancy for prescriptive period as sufficient to bar any action for recovery of real property confers title to property. *Civ. Code § 1007*.

Easements pass with transfer of property. *Civ. Code § 1104*.

Recordation requirements for agreements affecting real property. *Civ. Code § 1169*.

Five year statute of limitations to claim title by adverse possession founded upon occupancy of land. *Code Civ. Proc. § 321*.

Boundaries displaced by natural disasters reestablished by action in rem under the Cullen Earthquake Act. *Code Civ. Proc. §§ 751.50-751.65*.

Quiet title action under claim of adverse possession. *Code Civ. Proc § 760.020*.

Written agreement to submit to arbitration valid, enforceable and irrevocable. *Code Civ. Proc. § 1281*.

Fences regulated by statute. *Food & Agric. Code §§ 17121-17153*.

Acknowledgment and recordation requirements for written agreements. *Gov. Code §§ 27287, 27288, 27361*.



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§ 28B.05 Law Reviews and Periodicals

Comment, *Surveyors' Right to Enter Land; Consent [Civil Code § 846.5], 5 Pac. L.J. 465 (1975).*

Comment, *Real Property-Boundary Changes--Agreement, Acquiescence [established boundary may become binding by adverse possession, executed oral agreement, acquiescence], 14 So. Cal. L. Rev. 460 (1941).*

Note, *Contracts --Implied Terms-- Ordinances [effect of subsequently enacted ordinance on party wall agreement], 5 So. Cal. L. Rev. 62 (1930).*



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§ 28B.06 Annotations

Annot., Sufficiency of Showing, In Establishing Boundary by Parol Agreement, That Boundary Was Uncertain or in Dispute Before Agreement, 72 A.L.R.4th 132 (1989).

Annot., Fence as Factor in Fixing Location of Boundary Line--Modern Cases, 7 A.L.R.4th 53 (1981).

Annot., Necessary or Proper Parties to Suit or Proceeding to Establish Private Boundary Lines, 73 A.L.R.3d 948 (1976).

Annot., Adverse Possession Based on Encroachment of Building or Other Structure, 2 A.L.R.3d 1005 (1965).

Annot., Party Walls and Party-Wall Agreements as Affecting Marketability of Title, 81 A.L.R.2d 1020 (1962).

Annot., Adverse Possession Regarding Mistake as to Boundaries--Modern Views, 80 A.L.R.2d 1171 (1961).

Annot., Right to Increase Height of Party Wall, 24 A.L.R.2d 1053 (1952).

Annot., Establishment of Boundary Line by Oral Agreement or Acquiescence, 113 A.L.R. 421 (1938) .



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§ 28B.07 Text References

[1] Matthew Bender Sources

CALIFORNIA FORMS OF PLEADING AND PRACTICE (Matthew Bender)

Ch. 11, *Adjoining Landowners* .

Ch. 101, *Boundaries* .

CALIFORNIA LEGAL FORMS (Matthew Bender)

Ch. 28A, *Easements and Licenses.*

Ch. 75, *Formation of Contracts and Standard Contractual Provisions.*

CALIFORNIA REAL ESTATE LAW AND PRACTICE (Matthew Bender)

Ch. 81, *Boundaries and Descriptions.*

Ch. 383, *Adjoining Landowners' Relations.*

POWELL ON REAL PROPERTY (Matthew Bender)

Ch. 34, *Easements and Licenses* .

Ch. 61, *Party Walls* .

[2] Additional Text References

Bowman, Ogden's Revised California Real Property Law, (Cal. C.E.B. 1974).

Miller & Starr 2d, Current Law of California Real Estate, Ch. 14, *Adjoining Landowners* (Bancroft-Whitney 1968).

[3] Legal Encyclopedias

12 Am. Jur. 2d Boundaries §§ 1-118.

35 Am. Jur. 2d Fences §§ 1-49.

59A Am. Jur. 2d Party Walls §§ 1-53.

2 Cal. Jur. 3d Adjoining Landowners §§ 38-47 (party walls), 115-130 (fences).

11 C.J.S. Boundaries §§ 1-86, 71 (arbitration), 86 (private surveys).

36A C.J.S. Fences §§ 1-23.

69 C.J.S. Party Walls §§ 1-23.



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§ 28B.10 Party Wall Defined

[1] In General

A party wall is generally defined as a wall built next to, or astride, a boundary line [*see* POWELL ON REAL PROPERTY, Ch. 61, *Party Walls* (Matthew Bender)] between two adjacent parcels of land owned by different landowners. A party wall is used, or is intended to be used, by the adjoining landowners as the basis of support for another structure so as to be the common wall or common foundation of two different buildings [*see Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061* ; *Nippert v. Warneke (1900) 128 Cal. 501*].

It is not necessary for a party wall to stand half on each of the adjoining parcels of land. The wall may stand partly or half on each parcel, or wholly on one, and may or may not be the common property of the two landowners [*Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* .

[2] Party Wall as Easement

An agreement for a party wall does not create an interest in land [*Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 41 Cal. Rptr. 29]* , but rather an easement appurtenant [*Civil Code § 801(12)*; *see* Ch. 28A, *Easements and Licenses*]. Adjoining owners of party walls have rights of support and cross easements [*Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96]* .

When a party wall is constructed entirely on one owner's property, the adjoining owner has an easement to use the wall as a party wall, that is, to use its support in constructing other structures [*Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* . When the wall is constructed so as to be located half on each adjoining property, both owners have easements, with the right to rely on the other's land and share of the wall for support [*Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96]* . Thus, a party wall agreement, under California law, results in the creation of cross easements, with each party owning that part of the wall located on that owner's land, and having right of easement as to that part located on the other owner's land [*McCarthy v. Mutual Relief Ass'n (1889) 81 Cal. 584, 22 P. 933]* . The nature and scope of a party wall easement is determined by the parties' agreement [*Frowenfeld v. Casey (1903) 139 Cal. 421, 425, 73 P. 152* ; *see § 28B.11*].

[3] Partition Fence Distinguished

A division or partition fence is defined as a structure erected on the boundary of coterminous lands that may be used to mark the boundary line [*see* POWELL ON REAL PROPERTY, ch. 61, *Party Walls (Matthew Bender); Vowinckel v. N. Clark & Sons (1933) 217 Cal. 258, 261, 18 P.2d 58* ; *Kirkegaard v. McLain (1962) 199 Cal. App. 2d 484, 491, 18 Cal. Rptr. 641* ; *see also § 28B.20*]. If the fence is not built on the boundary line, but is located solely on the property of one of the adjoining landowners, it is not a division fence [*see Western Granite & Marble Co. v. Knickerbocker (1894) 103 Cal. 111, 116-117, 37 P. 192]* . The object of a fence is to protect and enclose land, and, historically, to prevent ingress and egress of domestic animals [*see Meade v. Watson (1885) 67 Cal. 591, 8 P. 311* ; *Food & Agric. Code § 17121*].

If a division fence is built on the line as a partition fence, it belongs to both adjoining owners as tenants in common [36A C.J.S. Fences § 15(b)]. Once coterminous owners have chosen to enclose lands by fencing, the duty of maintenance may become an easement [*see Civ. Code § 801(14)*; *see also Civ. Code § 841*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersFencesReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawAdjoining LandownersParty Walls



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§ 28B.11 Creation of Party Wall

In general, a party wall may be created in three ways: (1) by deed, either by express grant as when the owner of an already existing wall grants an easement to an adjoining landowner to use the wall as a party wall [*see § 28B.203*]; (2) by implication, as when the owner of two buildings with a common wall conveys each building to a different grantee [*see Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96]* ; and (3) by agreement, as when adjoining owners agree to construct a party wall [*see McCarthy v. Mutual Relief Ass'n (1889) 81 Cal. 584, 586, 22 P. 933]* .

By far the most common method of creating a party wall is by express agreement. However, a party wall agreement may be implied from the surrounding circumstances. For example, a party might be estopped to deny the existence of a party wall when a wall constructed on the lot of one owner projects onto or rests on the land of an adjoining owner [*see Bank of Escondido v. Thomas (1895) 41 P. 462, 5 Cal. Unrep. 94* ; *Guttenberger v. Woods (1876) 51 Cal. 523, 524]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdjoining LandownersParty WallsReal Property LawDeedsTypesGeneral Overview



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§ 28B.12 Scope of Party Wall Easement

[1] Terms of Agreement

The extent of the easement or cross easements relating to a party wall, and thus the rights and duties of the parties relating to the use of a party wall, is determined by the terms of the parties' agreement [*Frowenfeld v. Casey (1903) 139 Cal. 421, 424, 73 P. 152* ; *see McCarthy v. Mutual Relief Ass'n (1889) 81 Cal. 584, 586, 22 P. 933* (provision for finishing off wall face); *Watkins v. Glas (1907) 5 Cal. App. 68, 70-74, 78, 89 P. 840* (allocation of construction costs); *see also Civ. Code § 806* (extent of servitude determined by terms of grant, or nature of enjoyment by which acquired)].

[2] Modifications to Party Wall

In general, the scope of an easement in a party wall extends to permit either party to increase the height of the party wall. More specifically, absent an agreement to the contrary, either party may increase the height of a party wall when it can be done without injuring the adjoining structure or the wall itself [*Frowenfeld v. Casey (1903) 139 Cal. 421, 424, 73 P. 152* ; *Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* and without impairing the value of the cross easements to which the adjoining landowner is entitled [*Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061* ; *see § 28B.10 [2]*]. An agreement to build a party wall with no limit as to height gives the implied right to build as high as necessary for the proposed purposes, provided that the wall can be constructed without injury or damage to property [*Frowenfeld v. Casey (1903) 139 Cal. 421, 422, 73 P. 152]* . However, when the agreement specifically limits the height (or the height of an extension) of the party wall, the parties are limited to express terms [*Henne v. Lankershim (1905) 146 Cal. 70, 72, 79 P. 591* ; *Frowenfeld v. Casey (1903) 139 Cal. 421, 422, 73 P. 152]* .

When one adjoining landowner extends the height of a party wall, either under the specific terms of the agreement or the general power because the agreement has no limitations as to height, that landowner must build the extension so that the other landowner can use the extension. This rule is derived from the theory that the increase in height may not impair the value of the cross easements to which the adjoining landowner is entitled [*see Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* .

[3] Allocation of Construction and Maintenance Costs

Parties may allocate costs of construction and maintenance in an express party wall agreement [*Henne v. Lankershim (1905) 146 Cal. 70, 72, 79 P. 591* ; *Watkins v. Glas (1907) 5 Cal. App. 68, 74-78, 89 P. 840]* . Further, an agreement to share costs may be implied from an adjoining landowner's use of the party wall [*see Watkins v. Glas (1907) 5 Cal. App. 68, 74-78, 89 P. 840]* . However, if an agreement specifies the types of materials or the proportions to be used in rebuilding or extending a party wall, an adjoining landowner is not liable for the costs of an extension built over written protest and in violation of the express terms of the agreement [*Equitable Building & Loan Ass'n v. Wolfangle (1931) 111 Cal. App. 119, 123, 295 P. 388]* . If the noncontributing adjoining landowner subsequently uses the extension, he or she must then pay the reasonable value of the use [*Equitable Building & Loan Ass'n v. Wolfangle (1931) 111 Cal. App. 119, 123-124, 295 P. 388]* .

Adjoining owners of a party wall are liable to each other for damages caused by repairs to and the rebuilding of a party wall [*Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96]* . Further, an adjoining owner is liable for the wrongful removal of a party wall, or for injuring that portion of the wall belonging to the other owner [*Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96* ; *McCarthy v. Mutual Relief Ass'n (1889) 81 Cal. 584, 586, 22 P. 933]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawAdjoining LandownersParty Walls



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[Reserved]

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§ 28B.20 Boundary Defined

A boundary is a line or object indicating the limit or furthest extent of land or territory [11 C.J.S. Boundaries § 1]. The owner of land in fee has the right to the surface of the land in fee within its boundaries, extending to everything permanently situated beneath or above the land [*see Civ. Code § 829*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawEstatesPresent EstatesFee Simple Estates



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§ 28B.21 Methods of Establishing Boundaries

[1] Overview

Many methods exist by which boundaries may be located and established. In addition to establishing boundaries by a written description in a deed [*see* ch. 27, *Deeds and Recording*], boundaries may be established by agreement [*see* [2], *below*], by estoppel [*see* [3], *below*], or by adverse possession or prescriptive easement [*see* [4], *below*]. Further, if boundaries have been disturbed by earth movements, they can additionally be established under the Cullen Earthquake Act [*see § 28B.23*; *see also Code Civ. Proc. §§ 751.50-751.65*].

[2] By Agreement

When the location of a boundary between adjoining lands is uncertain, the adjoining landowners may make an agreement fixing the location of the boundary line under the doctrine of agreed boundaries [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214-215, 147 Cal. Rptr. 77* ; *French v. Brinkman (1963) 60 Cal. 2d 547, 551-553, 35 Cal. Rptr. 289, 387 P.2d 1* ; *see Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1302-1303, 54 Cal. Rptr. 2d 284* (agreed boundaries doctrine did not apply when there was no uncertainty as to boundary and no agreement that fence established boundary); *see also* 28B.22]. An agreement as to the location of a boundary line may be either oral or written, or express or implied from the conduct of the parties [*French v. Brinkman (1963) 60 Cal. 2d 547, 551-553, 35 Cal. Rptr. 289, 387 P.2d 1* ; *Roberts v. Brae (1936) 5 Cal. 2d 356, 360, 54 P.2d 698* ; *see Young v. Blakeman (1908) 153 Cal. 477, 482, 95 P. 888* ; *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139]* .

[3] By Estoppel

A boundary may be established using the principle of estoppel when reliance on misrepresentation as to the true boundary and resulting prejudice are shown [*see Wilder v. Nicolaus (1920) 50 Cal. App. 776, 195 P. 1068* ; *Friedman v. Southern California Trust Co. (1918) 179 Cal. 266, 270, 176 P. 442* ; *Humphrey v. Futter (1985) 169 Cal. App. 3d 333, 339, 215 Cal. Rptr. 178]* . A landowner is ordinarily presumed to know the boundaries of his or her property, and a purchaser is entitled to rely on the owner's representations as to its boundaries [*see Roman v. Ries (1968) 259 Cal. App. 2d 65, 68-69, 66 Cal. Rptr. 120]* . Further, this rule applies to any misrepresentations as to the

location of the boundary line made by an adjoining landowner [*see Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949* ; *Rast v. Fischer (1951) 107 Cal. App. 2d 129, 131-134, 236 P.2d 393]* . An owner will also be estopped to deny the true boundary line if, by conduct or assertions, that owner was instrumental in having improvements made beyond the true line [*Vowinckel v. N. Clark & Sons (1933) 217 Cal. 258, 260, 18 P.2d 58* ; *Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949]* .

[4] By Adverse Possession or Prescription

Title to real property, including property up to and including a boundary line, may be acquired by adverse possession for the prescribed period of time [*see, e.g., Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 24 Cal. Rptr. 856, 374 P.2d 824* ; *see also Code Civ. Proc. § 325*]. A person claiming adverse possession must show that he or she held possession under a claim of right or color of title; that the occupation of the property was actual, open, and notorious so as to constitute reasonable notice to the true owner; that the occupation of the property was exclusive and hostile to the true owner; that the possession was continuous and uninterrupted for at least five years; that the claimant paid all taxes assessed against the property during the five-year period [*see Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 24 Cal. Rptr. 856, 374 P.2d 824* ; *see California Maryland Funding, Inc. v. Lowe (1995) 37 Cal. App. 4th 1798, 1806* (party claiming title to property must establish right by litigation; merely sitting on one's rights allows statutory period for adverse possession to run)]. For extensive coverage of these elements, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Chapter 360, *Adverse Possession* (Matthew Bender).

In addition, rights to use real property, including property up to and including a boundary line, may be acquired by an easement by prescription [*see Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949* ; *Martin v. Lopes (1946) 28 Cal. 2d 618, 620, 170 P.2d 881]* . The elements necessary to establish a prescriptive easement are, with the exception of the requirement that taxes be paid, essentially the same as those required for the acquisition of title by adverse possession [*Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 571, 199 Cal. Rptr. 773, 676 P.2d 584* ; *see Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1305, 54 Cal. Rptr. 2d 284* ; *Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 562-563, 53 Cal. Rptr. 2d 37, 39* ; *see Civ. Code § 1007*; *see also Code Civ. Proc. § 325*]. Thus, the person claiming the easement must show that he or she has used the property over which the easement is claimed for at least five years, and that the use has been open, notorious, continuous, uninterrupted, hostile to the true owner, and under a claim of right [*Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 570, 199 Cal. Rptr. 773, 676 P.2d 584* ; *Taormino v. Denny (1970) 1 Cal. 3d 679, 686, 83 Cal. Rptr. 359, 463 P.2d 711* ; *see Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1305, 54 Cal. Rptr. 2d 284* ; *Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 562-563, 53 Cal. Rptr. 2d 37, 39]* . For extensive coverage of these elements, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Chapter 343, *Easements and Licenses* (Matthew Bender).

A claim to good title by adverse possession or prescription is distinct from a claim under the doctrine of agreed boundaries [*see § 28B.22*] because the latter is incompatible with the requirement of hostility necessary to establish title [*Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 104 Cal. Rptr. 293]* . When a party claims title on the basis of an agreed boundary line, agreement between the parties and acceptance and acquiescence in the fixed line are essential requirements [*see Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744* ; *Dalusio v. Boone (1969) 269 Cal. App. 2d 253, 75 Cal. Rptr. 287]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdverse PossessionGeneral OverviewReal Property LawDeedsConstruction & Interpretation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART II. LEGAL BACKGROUND
B. Boundary Agreements

12-28B California Legal Forms--Transaction Guide § 28B.22

§ 28B.22 Doctrine of Agreed Boundaries

[1] In General

When the boundary line between adjoining lands is uncertain, the adjoining owners may fix the common boundary line by agreement, either written or oral, express or implied, under the doctrine of agreed boundaries [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 55, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; *Roberts v. Brae (1936) 5 Cal. 2d 356, 358, 54 P.2d 698* ; *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214-215, 147 Cal. Rptr. 77* ; *see Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1302-1303, 54 Cal. Rptr. 2d 284* (agreed boundaries doctrine did not apply when there was no uncertainty as to boundary and no agreement that fence established boundary); *see also* [2], *below*]. The purpose of this doctrine is to secure repose and avoid uncertainty in land titles [*Young v. Blakeman (1908) 153 Cal. 477, 482, 95 P. 888* ; *Janes v. Le Deit (1964) 228 Cal. App. 2d 474, 483, 39 Cal. Rptr. 559* ; *Martin v. Lopes (1946) 28 Cal. 2d 618, 623, 170 P.2d 881* ; *see Cavanaugh v. Jackson (1891) 91 Cal. 580, 583, 27 P. 931]* . Further, to avoid spiteful and vexatious litigation, private boundary agreements are favored by the courts [*Loustalot v. McKeel (1910) 157 Cal. 634, 640-641, 108 P. 707* ; *Aborigine Lumber Co. v. Hyman (1966) 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371* ; *Crook v. Leinenweaver (1950) 100 Cal. App. 2d 790, 792, 224 P.2d 891]* .

Boundary agreements need not be in writing or express [*Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744* ; *Shelton v. Malette (1956) 144 Cal. App. 2d 370, 375, 301 P.2d 18]* . Boundary agreements do not operate to convey title; rather, boundary agreements locate and place beyond doubt the line of division between adjoining landowners [*Young v. Blakeman (1908) 153 Cal. 477, 95 P. 888* ; *Loustalot v. McKeel (1911) 157 Cal. 634, 640-641, 108 P. 707]* . Therefore, boundary agreements may be oral [*Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139]* , and are not within the statute of frauds [*Cavanaugh v. Jackson (1891) 91 Cal. 580, 27 P. 931]* . Thus, parol agreements setting boundary lines are permissible under the doctrine of agreed boundaries provided that all the other requirements are satisfied [*Grants Pass Land & Water Co. v. Brown (1914) 168 Cal. 456, 459, 143 P. 754* ; *Kraemer v. Superior Oil Company (1966) 240 Cal. App. 2d 642, 49 Cal. Rptr. 869* ; *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139* ; *Janes v. Le Deit (1964) 228 Cal. App. 2d 474, 483, 39 Cal. Rptr. 559* ; *Morris v. Vossler (1952) 110 Cal. App. 2d 678, 243 P.2d 43]* . Valid oral boundary agreements are binding on parties and successors in interest, particularly when there has been possession up to the agreed boundary line for the full

statutory period [*Muchenberger v. Santa Monica (1929) 206 Cal. 635, 642, 275 P. 803* ; *Nusbickel v. Stevens Ranch Co. (1921) 187 Cal. 15, 16, 200 P. 651* ; *see* [2], *below*].

Although the actual owners of adjoining properties are normally the proper parties to a boundary agreement [*see Sneed v. Osborn (1864) 25 Cal. 619, 624* ; *Carpentier v. Thirston (1864) 24 Cal. 268, 280-284]* , parties to such an agreement may also include a tenant of lands under a contract to purchase [*Silvarer v. Hansen (1888) 77 Cal. 579, 20 P. 136]* , or a purchaser who has not yet paid the purchase price [*Cavanaugh v. Jackson (1891) 91 Cal. 580, 583, 27 P. 931]* . Further, because a boundary agreement may affect the value and alienability of the properties involved, the parties should inform and obtain the consent of the holders of any liens on the properties.

[2] Requisites for Boundary Agreements

[a] Overview of Necessary Elements

The doctrine of agreed boundaries may be invoked only under carefully specified circumstances. It requires that the following be present [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 55, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; *French v. Brinkman (1963) 60 Cal. 2d 547, 551-553, 35 Cal. Rptr. 289, 387 P.2d 1* ; *Young v. Blakeman (1908) 153 Cal. 477, 95 P. 888* ; *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214-215, 147 Cal. Rptr. 77]* :

(1) Uncertainty as to the true boundary line [*see* [b], *below*].

(2) An express or implied agreement between adjoining owners fixing the true boundary line [*see* [c], *below*].

(3) Acceptance and acquiescence in the agreed boundary for a period equal to the statute of limitations [*see Code Civ. Proc. § 325* (five-year statute of limitations to acquire title by adverse possession based on occupancy)] or for a lesser period of time under such circumstances that substantial loss would be caused by a change of position [*see* [d], *below*].

[b] Uncertainty

[i] The Uncertain Boundary

The doctrine of agreed boundaries and the binding effect of the agreement on adjoining owners rests fundamentally on the fact that the adjoining landowners believe that the location of the true boundary line is uncertain [*Clapp v. Churchill (1913) 164 Cal. 741, 745, 130 P. 1061* ; *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 704, 43 Cal. Rptr. 139]* . Adjoining landowners may agree on a division line, but the agreed boundary doctrine only applies when both owners are uncertain as to the location of the true boundary [*see Moniz v. Peterman (1934) 220 Cal. 429, 436, 31 P.2d 353* ; *Vowinckel v. N. Clark & Sons (1933) 217 Cal. 258, 18 P.2d 58* ; *Humphrey v. Futter (1985) 169 Cal. App. 3d 333, 215 Cal. Rptr. 178* ; *Joaquin v. Shiloh Orchards (1978) 84 Cal. App. 3d 192, 198, 148 Cal. Rptr. 495* ; *Minson Co. v. Aviation Finance (1974) 38 Cal. App. 3d 489, 495, 113 Cal. Rptr. 223* ; *see also* [iii], *below*]. The requirement of uncertainty serves to prevent boundary shifts by oral agreement or acquiescence when either or both of the adjoining owners know the true location of the boundary [*Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 61-62, 104 Cal. Rptr. 293]* . When no uncertainty actually exists, the doctrine cannot be used to bypass the formalities of the conveyance of land, such as the statute of frauds [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 215, 147 Cal. Rptr. 77]* .

The element of uncertainty does not require an actual dispute as to the true location of the boundary [*Mello v. Weaver (1950) 36 Cal 2d 456, 460, 224 P.2d 691]* . Thus, boundaries are considered uncertain when they are shifting [*Muchenberger v. Santa Monica (1929) 206 Cal. 635, 641-642, 275 P. 803]* , or when there is conflict between the parties as to the location of the line [*see Loustalot v. McKeel (1910) 157 Cal. 634, 640-642, 108 P. 707]* . Further, the

element of uncertainty may be inferred from the surrounding facts and circumstances [*Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707-708, 336 P.2d 525* ; *Vella v. Ratto (1971) 17 Cal. App. 3d 737, 741, 95 Cal. Rptr. 72]* .

In a few cases, the doctrine of agreed boundaries may apply even though existing legal records are adequate to settle the boundary dispute. The California Supreme Court has reasoned that an inflexible rule prohibiting application of the doctrine when there is a reliable legal description of the true boundary would risk destabilizing long-standing agreements made in good faith by coterminous property owners in order to resolve uncertainty as to the location of their common boundaries [*Bryant v. Blevins (1994) 884 P.2d 1034* ; *see also Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525* (element of uncertainty does not require that true boundary be absolutely unascertainable)]. However, to prevail when available legal records provide a reasonable basis for fixing the boundary, the party relying on the doctrine must affirmatively show that uncertainty as to the location of the true boundary led to an agreement between the landowners to create a boundary at an agreed-upon location [*Bryant v. Blevins (1994) 884 P.2d 1034]* .

[ii] The Mistaken Boundary

An agreed boundary line may be founded on mistake; the mistake will not invalidate a boundary agreement provided that the parties did not know the location of the true boundary [*Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525* ; *Nusbickel v. Stevens Ranch Co. (1921) 187 Cal. 15, 19, 200 P. 651* ; *Janes v. Le Deit (1964) 228 Cal. App. 2d 474, 481-482, 39 Cal. Rptr. 559]* . Thus, a mistaken boundary line, that is accepted and acquiesced in and results from a good faith effort to resolve the uncertainty by fixing the location of the boundary, will constitute an agreed boundary [*see Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708-709, 336 P.2d 525* ; *compare Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 62, 104 Cal. Rptr. 293* (title under doctrine of agreed boundaries) *with Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 248 P.2d 949, 952* (title under prescription) *and with Gilardi v. Hallam (1981) 30 Cal. 3d 317, 178 Cal. Rptr. 624, 636 P.2d 588* (claim of adverse possession requirement of hostile possession also satisfied through mistaken use)], especially when the acquiescence is continuous for the period of statute of limitations [*Vowinckel v. N. Clark & Sons (1933) 217 Cal. 258, 18 P.2d 58]* .

[iii] Knowledge of True Boundary

If either or both parties know that the agreed line is not the true line, the requirement of uncertainty is not met and the agreement to fix the boundary is invalid [*Clapp v. Churchill (1913) 164 Cal. 741, 745, 130 P. 1061* ; *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139* ; *Johnson v. Buck (1935) 7 Cal. App. 2d 197, 46 P.2d 771* ; *see Appel v. Burman (1984) 159 Cal. App. 3d 1209, 1213, 206 Cal. Rptr. 259]* . Thus, when one party to a boundary agreement knows that the true line is elsewhere, the agreement is not binding as to agreed boundary line [*Lewis v. Ogram (1906) 149 Cal. 505, 508, 87 P. 60]* .

[c] Agreement Fixing the Boundary Line

[i] In General

The second essential element under the doctrine of agreed boundaries is that there is an express or implied agreement fixing the location of the boundary between the parties [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214, 147 Cal. Rptr. 77]* . The mutual concessions of the parties in order to settle the doubt or uncertainty concerning the location of a boundary line constitute sufficient consideration for the agreement to establish the line [*Lewis v. Ogram (1906) 149 Cal. 505, 507-509, 87 P. 60]* .

An agreement may be deduced from the surrounding circumstances or inferred from the conduct or declarations of adjoining owners [*see Roberts v. Brae (1936) 5 Cal. 2d 356, 358, 54 P.2d 698]* . Thus, an agreement may be implied from long-standing acceptance of the location of the boundary line [*Hannah v. Pogue (1944) 23 Cal. 2d 849, 147 P.2d*

572 ; *Ernie v. Trinity Lutheran Church (1959) 336 P.2d 525* ; *York v. Horn (1957) 154 Cal. App. 2d 209, 315 P.2d 912]* , and acquiescence in an agreed boundary for a substantial period of time may itself be evidence of a prior oral agreement [*Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293* ; *Clapp v. Churchill (1913) 164 Cal. 741, 130 P. 1061]* . However, mere acquiescence in the long-term existence of a fence, absent any uncertainty about the location of the true boundary and agreement that the fence would constitute the true boundary, does not establish a true boundary under the doctrine [*Vella v. Ratto (1971) 17 Cal. App. 3d 737, 740-742, 95 Cal. Rptr. 72* ; *see Holmes v. Harlan (1982) 138 Cal. App. 3d 209, 212-213, 187 Cal. Rptr. 708]* .

[ii] Identifiable Line

The doctrine of agreed boundaries requires that the agreed boundary be fixed and identifiable on the ground [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214, 147 Cal. Rptr. 77]* . The boundary line must be specified, certain and definite [*Meacci v. Kochergen (1956) 141 Cal. App. 2d 207, 213* ; *Garrett v. Cook (1948) 89 Cal. App. 2d 98, 103, 200 P.2d 21]* . Although many older cases required that the boundary be actually marked on the ground, modern cases have held that an agreed boundary that is clear to the parties and that can be made clear to others suffices [*see French v. Brinkman (1963) 60 Cal. 2d 547, 551-553, 35 Cal. Rptr. 289, 387 P.2d 1]* . When the boundary agreement is written, the intent of the parties in framing the legal description of the agreed boundary line is controlling [*see Miller & Lux Inc. v. Secara (1924) 193 Cal. 755, 227 P. 171]* .

[iii] Occupation

Many courts have applied an additional requirement of actual physical occupancy up to the agreed boundary line for a substantial period of time to establish the true boundary under the doctrine of agreed boundaries [*see Nusbickel v. Stevens Ranch Co. (1921) 187 Cal. 15, 16, 200 P. 651* ; *Kraemer v. Superior Oil Co. (1966) 240 Cal. App. 2d 642, 652, 49 Cal. Rptr. 869* ; *see Martin v. Lopes (1946) 28 Cal. 2d 618, 622, 170 P.2d 881* ; *Roberts v. Brae (1936) 5 Cal. 2d 356, 358-360, 54 P.2d 698]* . However, the California Supreme Court does not list occupancy as prerequisite to the doctrine [*compare French v. Brinkman (1963) 60 Cal. 2d 547, 551-553, 35 Cal. Rptr. 289, 387 P.2d 1 with Vella v. Ratto (1971) 17 Cal. App. 3d 737, 741, 95 Cal. Rptr. 72]* . In dicta, an appellate court has subsequently questioned the requirement of actual physical occupation, finding that occasional physical presence on the lands in question sufficient to meet the element of occupancy, assuming that such requirement was necessary in the first place [*see Aborigine Lumber Co. v. Hyman (1966) 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371]* .

[d] Acceptance and Acquiescence

The parties must accept and acquiesce in the agreed boundary line for a period equal to the statute of limitation on adverse possession, or a lesser period under circumstances that substantial loss would be caused by moving the boundary [*French v. Brinkman (1963) 60 Cal. 2d 547, 551-553* ; *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707* ; *Silva v. Azevedo (1918) 178 Cal. 495, 173 P. 929]* . The applicable statute of limitations to acquire title by adverse possession is five years [*Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707* ; *see Code Civ. Proc § 325*]; this requirement includes periods of use by predecessors in interest [*see Aborigine Lumber Co. v. Hyman (1966) 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371]* .

The period of acquiescence may be less than five years, provided that all other requirements are satisfied, if substantial loss would result unless the agreement is upheld [*Young v. Blakeman (1908) 153 Cal. 477, 482, 95 P. 888* ; *Roman v. Ries (1968) 259 Cal. App. 2d 65, 67-69, 66 Cal. Rptr. 120]* . For example, if the property has been substantially improved up to the agreed boundary [*see Needham v. Collamer (1949) 94 Cal. App. 2d 609, 611-612, 211 P.2d 308]* or the proposed boundary change results in serious inequity [*see McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 596, 37 Cal. Rptr. 544* ; *Roman v. Ries (1968) 259 Cal. App. 2d 65, 67-69, 66 Cal. Rptr. 120]* , the agreed boundary line is enforceable even though the period of acquiescence is less than five years.

[3] Written Agreements Under Doctrine of Agreed Boundaries

[a] In General

If the boundary is uncertain, adjoining landowners may agree to fix the line by express written agreement [*see Roberts v. Brae (1936) 5 Cal. 2d 356, 358, 54 P.2d 698]* . To be valid and enforceable under the doctrine of agreed boundaries, the written agreement must satisfy all the requirements [*see Clapp v. Churchill (1913) 164 Cal. 741, 745, 130 P. 1061* ; *see also* [1], [2], *above*].

[b] Based on Parties' Legal Description

[i] Intent of Parties Controlling

In construing boundary agreements, the intent of the parties is the controlling consideration [*Ferris v. Coover (1858) 10 Cal. 589, 603]* . The specific location of the boundary is a question of the parties' intent in drafting the description or making the agreement containing the description [*see Miller & Lux Inc. v. Secara (1924) 193 Cal. 755, 227 P. 171* ; *see also Machado v. Guarantee & Trust Co. (1940) 15 Cal. 2d 180, 186, 99 P.2d 245]* .

[ii] Terms of Legal Description

In interpreting a description of a boundary line, the court will adopt the description that is most certain, stable, and least likely to be mistaken or affected by error [*Piercy v. Crandall (1867) 34 Cal. 334]* ; the description that is most certain and definite will prevail over the less certain and indefinite [*Miller & Lux Inc. v. Secara (1924) 193 Cal. 755, 227 P. 171* ; *Garrett v. Cook (1848) 89 Cal. App. 2d 98, 200 P.2d 21* ; *see Martin v. Lloyd (1892) 94 Cal. 195, 29 P. 491]* .

Generally speaking, boundaries are established by retracing the steps of the person who made the original survey, by recourse to monuments placed in the original survey, if available, and then to the surveyor's field notes [*De Escobar v. Isom (1952) 112 Cal. App. 2d 172, 245 P.2d 1105* ; *see Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 332 P.2d 133]* . In determining a boundary, parties may make use of the original survey unless it is known to be inaccurate [*see Schneider v. Pascoe (1941) 47 Cal. App. 2d 709, 118 P.2d 860]* .

In construing the terms describing the boundaries, natural monuments will control if clearly identified or located [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 332 P.2d 133* ; *see McLeod v. Reyes (1935) 4 Cal. App. 2d 143, 40 P.2d 839]* ; further, natural monuments will prevail if there is conflict with other terms of description, such as courses and distances [*Kimball v. McKee (1906) 149 Cal. 435, 86 P. 1089* ; *Schwarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 103 P.2d 580]* , and measurements of lines and angles [*Curtis v. Upton (1917) 175 Cal. 322, 165 P. 935, 939]* . If a description is ambiguous, the court will interpret it in light of all circumstances [*Martin v. Lloyd (1892) 94 Cal. 195, 29 P. 491* ; *see Machado v. Title Guaranty Trust Co. (1940) 15 Cal. 2d 180, 185, 99 P.2d 245* ; *see also Hall v. Bartlett (1910) 158 Cal. 638, 112 P. 176* ("on"); *Lillis v. Urrutia (1908) 9 Cal. App. 557, 99 P. 992* ("true line")].

[c] Based on Survey

When a boundary is uncertain, the parties may establish an agreed line in a written agreement in which the legal description is based on the results of a survey [*see § 28B.210*]. In the absence of an agreement to abide by its findings, a private survey is not conclusive on the parties [*Williams v. Barrnett (1955) 135 Cal. App. 2d 607, 287 P.2d 789* ; *Pedersen v. Reynolds (1939) 31 Cal. App. 2d 18, 87 P.2d 51]* . A surveyor, acting in official capacity, has a right of entry onto lands for purpose of surveying to determine the location of the boundary line; the landowners are obligated to provide reasonable access [*Civ. Code § 846.5*; *see Bus. & Prof. Code §§ 8700-8805* (regulation and licensing of land surveyors)]. When ascertained, the surveyed lines constitute the true boundaries and generally control, provided that it is the intent of the parties that those lines are the boundaries [*see* 11 C.J.S. Boundaries § 49].

[d] Based on Submission to Arbitration

At common law, parties may submit any controversy between them to arbitration, and the decision resulting from that arbitration will be binding on the parties [*Pawling v. Malley (1951) 107 Cal. App. 2d 652, 237 P.2d 663]* . Thus, a boundary dispute may be submitted to arbitration [*see § 28B.211*]. A written agreement to submit an existing controversy to arbitration is valid, enforceable, and irrevocable, except upon such grounds for which any contract is revocable [*Code Civ. Proc. § 1281*].

[4] Legal Effect of Agreed Boundary

The doctrine of agreed boundaries does not involve a grant of property from one party to the other, and an agreement used to attempt the transfer of land that the parties know the true line does not embrace is unenforceable [*Lewis v. Ogram (1906) 149 Cal. 505, 508-509, 87 P. 60]* . However, once a boundary line is established under the doctrine of agreed boundaries, the agreed boundary becomes the true boundary line [*Ernie v. Trinity Lutheran Church (1959) 336 P.2d 525]* , and the agreement is conclusive evidence of that line [*Cavanaugh v. Jackson (1891) 91 Cal. 580, 27 P. 931* ; *Joaquin v. Shiloh Orchards (1978) 84 Cal. App. 3d 192, 198, 148 Cal. Rptr. 495* ; *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214, 147 Cal. Rptr. 77]* . Once established, the agreed boundary is binding on all consenting parties and all successors by subsequent conveyances [*Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139* ; *Young v. Blakemen (1908) 153 Cal. 477, 482, 95 P. 888]* . Although older cases held that the application of this doctrine to subsequent bona fide purchasers without knowledge of the agreement must be applied in conjunction with the rule that bona fide purchasers for value are entitled to protection against undisclosed rights [*see, e.g., Steele v. Shuler (1963) 211 Cal. App. 2d 698, 706, 27 Cal. Rptr. 569]* , the weight of authority holds that bona fide purchasers are bound by the preexisting agreement even in the absence of notice [*Humphrey v. Futter (1985) 169 Cal. App. 3d 333, 342, 215 Cal. Rptr. 178* ; *see Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708-709, 336 P.2d 525]* . Further, improvements in the disputed area are likely to put successors in interest on notice [*Humphrey v. Futter (1985) 169 Cal. App. 3d 333, 342, 215 Cal. Rptr. 178]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundaries



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§ 28B.23 Reestablishing Displaced Boundaries Under the Cullen Earthquake Act

Under the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*], if boundaries of land have been disturbed or displaced by earth movements such as slides, subsidence, lateral or vertical displacement or other disasters, whether caused by man, earthquake, or other acts of God, an action in rem may be brought to equitably reestablish boundaries and quiet title [*Code Civ. Proc. § 751.50*]. The boundaries established by the judgment in an action under the Cullen Earthquake Act are conclusive [*see Code Civ. Proc. § 751.62*].

The Cullen Earthquake Act was enacted for the purpose of reestablishing boundaries in a single action and to avoid numerous individual actions [Stats. 1972, ch. 936, p. 1690, § 1(a)(6)-(7)]. Its remedies are cumulative and in addition to any other remedy provided by law to establish or quiet title or to establish the location of boundaries [*see Code Civ. Proc. § 751.64*]. For detailed discussion of the Cullen Earthquake Act, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Chapter 81, *Boundaries and Descriptions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions



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§ 28B.24 Natural and Artificial Accretion

When land forms by imperceptible degrees on the bank of a river or stream (navigable or nonnavigable) by the natural accumulation of material or by the natural recession of the stream, the new land belongs to the owner of the bank, subject to any existing right-of-way over the bank [*Civ. Code § 1014*; *see Civ. Code §§ 1015-1018*]. This is referred to as the natural-accretion rule.

Under the artificial-accretion rule, in contrast, land along tidelands and navigable rivers that accretes by artificial means, such as local dredging and construction of wing dams and levees, remains in state ownership [*State of California ex rel. State Lands Com. v. Superior Court (1995) 11 Cal. 4th 50, 56, 44 Cal. Rptr. 2d 399, 900 P.2d 648]* . Accretion is artificial if directly caused by human activities, such as dredging or dumping, that occurred in the immediate vicinity. The larger the structure or the broader the scope of the activity, the farther away it can be and still be a direct cause of the accretion, although it must always be in the general location of the accretion to come within the artificial-accretion rule [*State of California ex rel. State Lands Com. v. Superior Court (1995) 11 Cal. 4th 50, 79-80, 44 Cal. Rptr. 2d 399, 900 P.2d 648]* .

The California Supreme Court applied the artificial-accretion rule in a case involving alluvion that, more than 100 years earlier, had been placed in the Sacramento River by hydraulic mining and had collected downstream to create 12 acres of land. Although technically the alluvion could be viewed as artificial, the connection between the mining and the accretion was too attenuated to render the accretion artificial under the rule [*State of California ex rel. State Lands Com. v. Superior Court (1995) 11 Cal. 4th 50, 77-78, 44 Cal. Rptr. 2d 399, 900 P.2d 648]* .

When a river gradually divides so as to surround land belonging to the owner of the bank, thereby forming an island, the island belongs to that owner [*Civ. Code § 1018*]. However, an island or accumulation of land that originates in the bed of a navigable river belongs to the state; and after the land emerges from beneath the water, if it subsequently adheres to either bank of the river through accretion or reliction, that change in circumstances does not change or destroy the state's title to the land [*People v. Ward Redwood Co. (1964) 225 Cal. App. 2d 385, 395, 37 Cal. Rptr. 397]* .

When accretions to federal land are involved, federal law governs, and the accretion belongs to the upland landowner,

regardless of whether the accretion was natural or caused by the construction of artifacts [*California ex rel. Lands Comm'n v. United States (1982) 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersWaterReal Property LawWater RightsAccretion, Avulsion & Reliction



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART II. LEGAL BACKGROUND
B. Boundary Agreements

12-28B California Legal Forms--Transaction Guide §§ 28B.25-28B.99

[Reserved]

§§ 28B.25[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28B California Legal Forms--Transaction Guide § 28B.100

§ 28B.100 Party Wall Agreements

[1] Facts

1. Names, addresses, and telephone numbers of adjoining owners and their attorneys.

2. Names, addresses, and telephone numbers of other interested parties, such as lien holders or mortgagees.

3. Street address, city, and county location of adjoining properties.

4. Other party's contractual capacity and ownership capacity to enter into agreement.

5. Legal description of adjoining properties, including buildings and walls.

6. Precise description of wall, if already existing, including dimensions, state of repair, and location.

7. Owner(s) who will build wall, if not already existing, and owner(s) who will use wall at outset.

8. Owner on whose property wall will be located, or precise allocation of portions of wall to be located on adjoining properties.

9. Owner who will supervise construction of wall, and specifications as to materials and manner of construction.

10. Current uses of property and any contemplated uses.

11. Permitted uses for wall, such as support, openings, etc.

12. Type of building or buildings to be supported by wall.

13. Owners' plans for future buildings or other plans for use of adjoining lot.

14. Costs, including cost of construction and type of maintenance required.

15. Arrangement as to each owner's share of building and maintenance expenses.

16. Right of either owner to extend height or length of wall.

17. Possible adverse effects on either owner if such extension(s) made.

18. Any objection to shared use of such extension.

19. Whether construction or maintenance require entry on other owner's property.

20. Any monetary consideration required if agreement involves grant of easement in existing wall.

21. Local zoning ordinances affecting construction, use, or location of wall.

[2] Documents

1.Deeds or other records containing description of existing wall or adjoining properties.

2. Any other documents containing related information, such as letters or writings concerning the use of wall in existence, or adjoining properties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersParty WallsReal Property LawDeedsTypesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28B California Legal Forms--Transaction Guide § 28B.101

§ 28B.101 Boundary Agreement

[1] Facts

1.Names , addresses, and telephone numbers of adjoining owners and their attorneys.

2. Street addresses, city, and county location of property of each adjoining owner.

3. Other party's contractual capacity and ownership capacity to enter into agreement.

4. Legal description of property of each adjoining owner, including section of township, range or survey in which located.

5. Description of disputed line or section of property where line is uncertain.

6. Existing legal descriptions of the boundary line between adjoining properties.

7. Nature and location of natural monuments placed in area of uncertain boundary.

8. Statement of facts from each party establishing matter of uncertainty as to boundary line.

9. Statement of facts as to description of disputed line or section of property where line is uncertain by third parties having such knowledge.

10. If establishing boundary by survey:

a. Name, address, and qualification of surveyor designated by parties.

b. Instructions for surveyor.

c. Manner of written findings.

11. If establishing boundary by submission to arbitration:

a. Names, addresses, and qualifications of persons chosen by parties to act as arbitrators.

b. Instructions for arbitrators.

c. Amount of fees.

d. Manner of written decision.

[2] Documents

1.Deeds , surveys, field notes, or other available records containing legal description of section of property where line is uncertain.

2. Other documents, such as letters, written statements of third parties, or articles in newspapers or other publications containing description or information relevant to area of properties where line is uncertain.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsBoundaries



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DIVISION II: REAL ESTATE TRANSACTIONS
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[Reserved]

§§ 28B.102[Reserved]



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CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART III. TRANSACTION GUIDE
B. Procedural Guide

12-28B California Legal Forms--Transaction Guide § 28B.110

§ 28B.110 Execution, Acknowledgment, and Recordation of Party Wall and Boundary Agreements.

1.Have agreement executed by parties and their spouses [*see Fam. Code § 1102*].

NOTE:

If one of the parties is married but claims that the property is separate property, the other party should consider having that party's nonowning spouse (1) execute a quitclaim deed to his or her spouse [***see*** Ch. 27, ***Deeds and Recording***] or (2) execute a written waiver or statement indicating that he or she has no interest in the property [***see*** Ch. 23, ***Real Property Sales Agreements ; see also*** *§ 28B.200 [1][b]*].

2. Have all signatures acknowledged [*Gov. Code §§ 27287, 27288*; *see Civ. Code § 1189*; *see also § 28B.200[1][c]*].

3. Record agreement in county recorder's office in county in which subject properties are located [*Civ. Code §§ 1169, 1170*], together with applicable fees, and any documentary transfer taxes due [*see Rev. & Tax. Code §§ 11911, 11932, 11933*; *see also* ch. 27, *Deeds and Recording*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersParty WallsReal Property LawDeedsTypesQuit Claim DeedsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
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12-28B California Legal Forms--Transaction Guide §§ 28B.111-28B.199

[Reserved]

§§ 28B.111[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART IV. FORMS
A. Party Walls

12-28B California Legal Forms--Transaction Guide § 28B.200

§ 28B.200 Party Wall Agreement--One Owner to Build Party Wall

[1] Comment

[a] Use of Form

This form is designed for use when a property owner plans to erect a building, one of whose walls will fall on or near the dividing line, and the owner of an adjoining property hopes to use that wall as a party wall to support future construction. Under the terms of the form, the first party bears all the expenses of construction; the second party may use the party wall only after reimbursing the first party for a specified share of the construction costs.

Before executing the agreement, the parties should obtain consent from the holders of any liens on the property involved, since the agreement may affect the value and alienability of the properties.

[b] Consent of Spouse

Both spouses must join in executing any instrument by which community real property [*see Fam. Code § 760*] or any interest in that property is sold, conveyed, encumbered, or leased for a period of more than one year. The spouses may do this personally or by duly authorized representative. This restriction does not apply to transactions between the spouses [*Fam. Code § 1102*]. However, if a party is married but claims that the property is separate property, the other party should consider having that party's nonowning spouse (1) execute a quitclaim deed to his or her spouse [*see* ch. 27, *Deeds and Recording*] or (2) execute a written waiver or statement indicating that he or she has no interest in the property [*see* vol. 5, ch. 23, *Real Property Sales Agreements*]. The execution of such a deed or statement estops that spouse from setting aside the conveyance [*see Rice v. McCarthy (1925) 73 Cal. App. 655, 662, 666, 239 P. 56* ; *Waldeck v. Hedden (1928) 89 Cal. App. 485, 491, 265 P. 340]* . For a statement that may be included in an easement agreement and that indicates that the grantor's spouse has no interest in the servient tenement, see *Section 28A.210 [2]*.

[c] Acknowledgment and Recordation

Every conveyance of real property that is acknowledged (or proved), certified, and recorded constitutes constructive

notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Civ. Code § 18*]. Consequently, this form provides for the inclusion of recording information [*see Gov. Code § 27361.6*; § 28A.130, P 1] and a certificate of acknowledgment [*see Gov. Code § 27287*; *Civ. Code § 1185(a)*]. For additional discussion of recordation, see Chapter 27, *Deeds and Recordation* .

[2] Form

Party Wall Agreement--One Owner to Build Party Wall

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
.....Space above this line for recorder's use

PARTY WALL AGREEMENT

This Agreement is made on _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party"):

Recitals

WHEREAS, the First Party is the owner of certain real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*]; and

WHEREAS, the Second Party is the owner of certain real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*]; and

WHEREAS, the property of the First Party and the Second Party's property are adjacent: the _____[*describe, e.g.,* northern] boundary of the First Party's property forms the _____[*describe, e.g.,* southern] boundary of the Second Party's property; and

WHEREAS, the First Party is about to erect a building on the First Party's property, and it is desired that the _____[*specify direction, e.g.,* north] wall of this building will be located on the dividing line between the premises of the parties, and that this wall should be a party wall and be constructed _____[*describe placement, e.g.,* with one half of its thickness on each side of the division line between the premises of the parties *or specify that wall is to be constructed all on one side of dividing line or any other arrangement*].

NOW, THEREFORE, for _____[valuable consideration *or, if sum of money is more than nominal, specify amount*], and the mutual covenants and agreements contained in this Agreement, the parties agree as follows:

Construction and Ownership

1. The First Party is permitted to erect the party wall pursuant to the conditions of this Agreement. _____[*Describe ownership of wall, e.g.,* The First Party shall at all times be owner of the party wall subject to an easement in the Second Party to use the wall as a party wall pursuant to the conditions of this agreement, provided that Second Party has paid a share of the construction costs pursuant to Paragraph 5, below *or* The party wall shall belong to both parties equally, as tenants in common, provided that Second Party has paid a share of the construction costs pursuant to Paragraph 5, below.]

License to Enter

2. For the purpose of erecting, extending, or repairing the party wall, each party licenses the other to enter onto _____[his *or* her] premises to make necessary excavations or perform other work necessary to the exercise of the rights provided in this Agreement.

Location

3. The party wall shall be located _____[*legal description*].

Materials and Workmanship

4. The party wall shall be constructed of _____[*e.g.,* brick], and shall be _____ inches in thickness and no more than _____ feet in height. The party wall, whether original, reconstructed, or restored, and any extension or addition to it, shall be built in a professional and workmanlike manner in strict conformity to the laws, ordinances, and regulations of the State of California and the _____[City *or* County] of _____ regulating the construction of buildings, as they are in force at the time of the construction.

Cost of Construction

5. The costs of the construction of the party wall shall be borne solely by the First Party, and the First Party agrees to indemnify and hold the Second Party harmless from any cost or liability arising from the original cost and construction of the party wall. However, if the Second Party constructs a building on _____[his *or* her] premises after the party wall has been erected and, as part of the construction of that building, desires to use the party wall as permitted in this Agreement, the Second Party shall pay to the First Party or _____[his *or* her] successors in ownership or assigns _____[*describe, e.g.,* 50 percent of the original cost of erecting the party wall *or* 50 percent of the value of the party wall at the time the Second Party begins to use it as a party wall].

Use of Party Wall

6. After payment of a share of construction costs pursuant to Paragraph 5, above, the Second Party shall have the full right to adapt the wall for use as a party wall at _____[his *or* her] expense, for the insertion of beams or otherwise in connection with the construction of a building on _____[his *or* her] premises. In addition, the Second Party may use the party wall as the _____[*describe, e.g.,* southern] wall of any building that may be erected on the Second Party's property. _____[*Describe additional conditions, e.g.,* In modifying the wall for use as a party wall, the Second Party shall fill in where any existing windows are removed, and shall finish off and paint, if necessary, the side of the wall currently inside the First Party's adjoining building so as to restore it to its current condition, in a professional and workmanlike manner, without expense to the First Party.] The Second Party shall not use or modify the party wall in any way that injures the adjoining building or that impairs the party wall benefits and support to which the adjoining building is entitled.

Right to Extend

7. The First Party and, after payment of a share of construction costs pursuant to Paragraph 5, above, the Second Party shall have the right to extend the party wall _____[*select one of the following:* horizontally *or* vertically *or* both horizontally and vertically] and to make that extension of a greater thickness than the party wall or any extension of the wall already built. No added thickness shall be placed on the land of the other party without the other party's written consent. No modification shall be made to the party wall that in any way injures the adjoining building or impairs the party wall benefits and support to which the adjoining building is entitled without the written consent of the owner of that building. _____[*Describe additional conditions, e.g.,* Any extension of the party wall shall be on a line with the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.]

Right to Use Extension

8. If the party wall is extended as provided in this Agreement, either party shall have the right to use the extended party wall in the same manner as that party is entitled under this Agreement to use the party wall as it was originally constructed.

Payment of Cost of Extension

9. If the party wall is extended as provided in this Agreement, all costs of the extension shall be borne by the party causing it to be made. However, if the other party then uses the extension or any portion of it as a party wall, then that party shall pay to the party who extended the wall or _____[his *or* her] successors or assigns _____[*describe, e.g.,* 50 percent of the cost of the extension *or* 50 percent of the cost of the portion of the extension used as a party wall *or* 50 percent of the value of the extension at the time the other party begins to use the extension as a party wall].

Repairs and Maintenance

10. If it becomes necessary to repair or rebuild any portion of the wall, as constructed or extended, the cost of repairing or rebuilding shall be borne by _____[both parties equally *or describe other arrangement, e.g.,* the party who uses that portion of the wall exclusively. If the portion of the party wall to be repaired or rebuilt is used by both parties, the costs of repairing or rebuilding that portion shall be borne by both parties in equal shares]. The party wall shall be repaired or rebuilt in the same location as the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.

[*Choose one of the following provisions:*]

[*If agreement is to survive destruction of party wall, use the following provisions:*]

Destruction of Party Wall

11. If the party wall is destroyed, either of the parties shall have the right to reconstruct the party wall at _____[his *or* her] own expense if _____[he *or* she] alone intends to continue to use the wall, or at the expense of both parties if both intend to continue to use the wall as a party wall.

Duration of Agreement

12. This Agreement shall continue in effect _____[perpetually *or specify a definite period of time*], and shall constitute an easement and a covenant running with the land. However, nothing contained in this Agreement shall be construed as a conveyance by either party of _____[his *or* her] respective title to the land on which the party wall stands.

[*If agreement is not to survive destruction of party wall, use the following provisions:*]

Destruction of Party Wall

11. If the party wall is destroyed, the costs of any demolition, cleanup, and other expenses attributable to the destruction of the party wall shall be borne by both parties in equal shares. [*Optional:* However, if the Second Party has not paid a share of the construction costs pursuant to Paragraph 5, above, and has, in fact, not used the party wall, these costs shall be borne solely by the First Party.]

Duration of Agreement

12. Subject to the obligations imposed by Paragraph 11, above, this Agreement shall terminate on the destruction of the party wall unless extended by the written consent of both parties. The provisions of this Agreement shall constitute an easement and a covenant running with the land. However, nothing contained in this Agreement shall be construed as a conveyance by either party of _____[his *or* her] respective title to the land on which the party wall stands.

[*Continue with following:*]

Entire Agreement

13. This instrument contains the entire agreement between the parties relating to the party wall. No oral representation or modification concerning this instrument shall have any effect unless it is represented in a subsequent written instrument, signed by the party to be charged.

Attorney's Fees

14. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or its breach, the prevailing party shall be entitled to recover reasonable expenses, attorney's fees, and costs from the losing party.

[*Optional:*]

Arbitration

15. Any dispute under this Agreement shall be submitted to arbitration under the rules of the American Arbitration Association. Judgment on the award rendered may be entered in any court with jurisdiction. Arbitration hearings shall be held in _____ County, California.

Binding Effect

16. This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY
_____ [*signature*]
[*typed name and address*]

[*Optional:*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature [s] on the instrument the person [s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ _____[Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawAdjoining LandownersParty WallsReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART IV. FORMS
A. Party Walls

12-28B California Legal Forms--Transaction Guide § 28B.201

§ 28B.201 Party Wall Agreement--Both Owners to Build Party Wall

[1] Comment--Use of Form

This form is appropriate when two adjacent landowners agree to build a party wall for present use and to share construction expenses.

Before finalizing the transaction, the parties should obtain consent from the holders of any liens on the properties involved, since the agreement may affect the value and alienability of the properties. If either party is married, spousal consent (or a statement that the spouse has no interest in the subject property) should be obtained [*see § 28B.200[1][b]*]. To provide notice, the parties should acknowledge and record the agreement [*see § 28B.200[1][c]*].

[2] Form

Party Wall Agreement--Both Owners to Build Party Wall

AGREEMENT TO BUILD PARTY WALL

This Agreement is made on _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party"):

Recitals

The First Party is the owner of certain real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*].

The Second Party is the owner of certain real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more

particularly described as follows: _____[*legal description*].

The property of the First Party and the Second Party's property are adjacent: the _____[*describe, e.g.,* northern] boundary of the First Party's property forms the _____[*describe, e.g.,* southern] boundary of the Second Party's property.

The parties intend to erect buildings on their respective properties.

The parties intend that these buildings share a party wall to be constructed _____[*describe location, e.g.*, on the dividing line between the respective properties, with one half of its thickness on each side of the division line between the parties *or specify that the wall is to be constructed entirely on one side of the dividing line, or other arrangement*].

THEREFORE, for _____[valuable consideration *or, if sum of money is more than nominal, specify amount*], and the promises contained in this Agreement, the parties agree as follows:

Agreement to Build

1. The parties agree to erect a party wall as described in this Agreement, the construction of which is to be arranged and supervised by _____[*specify, e.g.,* the First Party].

License to Enter

2. For the purpose of erecting, extending, or repairing the party wall, each party licenses the other to enter onto _____[his *or* her] premises to make necessary excavations or perform other work necessary to the exercise of the rights provided in this Agreement.

Location

3. The party wall _____[*describe location, e.g.,* shall start at a point not less than _____ feet from the street line in front of the premises, and shall not extend beyond a point _____ feet from the rear of the premises *or other suitable description, such as from a survey*].

Construction of Party Wall

4. The party wall shall be constructed of _____[*e.g.*, cement], and shall be _____ inches in thickness and no more than _____ feet in height. The party wall, whether original, reconstructed, or restored, and any extension or addition to it, shall be built in a professional and workmanlike manner in strict conformity to the laws, ordinances, and regulations of the State of California and the _____[City *or* County] of _____ regulating the construction of buildings, as they are in force at the time of the construction.

Cost of Construction

5. The expenses of constructing the party wall shall be borne and paid by both parties to this Agreement _____[in equal shares *or specify other arrangement*]. _____[*Specify responsible party, e.g.,* The First Party] shall pay all bills relating to the construction of the party wall as they are due, and keep a contemporaneous record of all construction expenditures. On completion of construction, _____[*specify same responsible party, e.g.,* the First Party] shall furnish to _____[*specify reimbursing party, e.g.,* the Second Party] a memorandum showing the details of those expenditures. _____[*Specify reimbursing party, e.g.,* The Second Party] shall reimburse

_____[*specify, e.g.,* the First Party] for _____[his *or* her] share of the construction costs _____[*describe reimbursement plan, e.g.,* within seven days of a request for reimbursement by the First Party *or* on the first day of each month following the payment of any construction expenditure by the First Party *or* on receipt of the final record of construction expenditures from the First Party].

Use of Party Wall

6. The parties shall each have the full right to use the party wall for the insertion of beams or to otherwise support the erection of buildings on their respective premises. However, no use shall injure the adjoining building or impair the value of the easement to which the adjoining building is entitled.

Right to Extend

7. Either party shall have the right to extend the party wall _____[*select one of the following:* horizontally *or* vertically *or* both horizontally and vertically] and to make that extension of a greater thickness than the party wall or any extension of the wall already built. No added thickness shall be placed on the land of the other party without the other party's written consent. No modification shall be made to the party wall that in any way injures the adjoining building or impairs the party wall benefits and support to which the adjoining building is entitled without the written consent of the owner of that building. _____[*Describe additional conditions, e.g.,* Any extension of the party wall shall be on a line with the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.]

Right to Use Extension

8. If the party wall is extended as provided in Paragraph 7, *above,* either party shall have the right to use the extended party wall in the same manner as that party is entitled under this Agreement to use the party wall as it was originally constructed.

Payment of Cost of Extension

9. If the party wall is extended as provided in this Agreement, all costs of the extension shall be borne by the party causing the extension to be made. However, if the other party then uses the extension or any portion of it as a party wall, then that party shall pay to the party who extended the wall or _____[his *or* her] successors or assigns _____[*describe, e.g.,* 50 percent of the cost of the extension *or* 50 percent of the cost of the portion of the extension used as a party wall *or* 50 percent of the value of the extension at the time the other party begins to use the extension as a party wall].

Repairs and Maintenance

10. If it becomes necessary to repair or rebuild any portion of the party wall, as constructed or extended, the cost of repairing or rebuilding shall be borne by _____[both parties equally *or describe other arrangement, e.g.,* the party who uses that portion of the wall exclusively. If the portion of the party wall to be repaired or rebuilt is used by both parties, the costs of repairing or rebuilding that portion shall be borne by both parties in equal shares]. The party wall shall be repaired or rebuilt in the same location as the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.

[*Choose one of the following provisions:*]

[*If agreement is to survive destruction of party wall, use the following provisions:*]

Destruction of Party Wall

11. If the party wall is destroyed, either of the parties shall have the right to reconstruct the party wall at _____[his *or* her] own expense if _____[he *or* she] alone intends to continue to use the wall, or at the expense of both parties if both intend to continue to use the wall as a party wall.

Duration of Agreement

12. This Agreement shall continue in effect _____[perpetually *or specify a definite period of time*], and shall constitute an easement and a covenant running with the land. However, nothing contained in this Agreement shall be construed as a conveyance by either party of _____[his *or* her] respective title to the land on which the party wall stands.

[*If agreement is not to survive destruction of party wall, use the following provisions:*]

Destruction of Party Wall

11. If the party wall is destroyed, the costs of any demolition, cleanup, and other expenses attributable to the destruction of the party wall shall be borne by both parties in equal shares. [*Optional:* However, if the Second Party has not paid a share of the construction costs pursuant to Paragraph 5, above, and has, in fact, not used the party wall, these costs shall be borne solely by the First Party.]

Duration of Agreement

12. Subject to the obligations imposed by Paragraph 11, above, this Agreement shall terminate on the destruction of the party wall unless extended by the written consent of both parties. The provisions of this Agreement shall constitute an easement and a covenant running with the land. However, nothing contained in this Agreement shall be construed as a conveyance by either party of _____[his *or* her] respective title to the land on which the party wall stands.

[*Continue with the following:*]

Entire Agreement

13. This instrument contains the entire agreement between the parties relating to the party wall. No oral representation or modification concerning this instrument shall have any effect unless it is represented in a subsequent written instrument, signed by the party to be charged.

Attorneys' Fees

14. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or its breach, the prevailing party shall be entitled to recover reasonable expenses, attorneys' fees, and costs from the losing party.

[*Optional:*]

Arbitration

15. Any dispute under this Agreement shall be submitted to arbitration under the rules of the American Arbitration Association. Judgment on the award rendered may be entered in any court with jurisdiction. Arbitration hearings shall be held in _____ County, California.

[*Continue with the following:*]

Binding Effect

16. This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY
_____ [*signature*]
[*typed name and address*]

[*For form for acknowledgment, see § 28B.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersParty Walls

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
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A. Party Walls

12-28B California Legal Forms--Transaction Guide § 28B.202

§ 28B.202 Agreement to Make Existing Wall Party Wall

[1] Comment--Use of Form

This form is designed to be used when a common existing wall has been constructed straddling the boundary of each adjoining property, and the adjoining owners wish to settle ownership in the wall, the right of cross easements, and the question of possible trespass.

Before finalizing the transaction, the parties should obtain consent from the holders of any liens on the properties involved, since the agreement may affect the value and alienability of the properties. If either party is married, spousal consent (or a statement that the spouse has no interest in the subject property) should be obtained [*see § 28B.200[1][b]*]. To provide notice, the parties should acknowledge and record the agreement [*see § 28B.200[1][c]*].

[2] Form

Agreement to Make Existing Wall Party Wall

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

PARTY WALL AGREEMENT

Preamble

This Agreement made on _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party"):

Recitals

The First Party is the owner of real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*].

The Second Party is the owner of real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*].

The property of the First Party and the Second Party's property are adjacent: the _____[*describe, e.g.,* northern] boundary of the First Party's property forms the _____[*describe, e.g.,* southern] boundary of the Second Party's property.

The First Party has erected a _____[*describe type of building, e.g.,* cement *or* brick] building on the First Party's property; the _____[*describe, e.g.,* northern] wall is located on the line dividing the property of the First Party from that of the Second Party; this wall is _____[*specify in feet or inches*] thick, with _____[*specify in feet or inches*] on either side of the dividing line, and _____[*specify in feet or inches*] in length.

The cost of constructing this wall by the First Party was $ _____.

The parties are desirous of settling all questions as to ownership of this wall, and of treating it as a party wall.

THEREFORE, for valuable consideration [*or, if sum of money is more than nominal, specify the amount*], and the mutual covenants and agreements contained in this Agreement, the parties agree as follows:

Declaration of Party Wall

1. The wall constructed by First Party constitutes a party wall. Second Party shall be entitled to use the wall jointly with First Party on payment of _____[*specify, e.g.,* one half] the cost of that part of the party wall as is contiguous to, and necessary for the support of, any future building that Second Party may build.

Permission for Easement

2. Second Party grants permission to First Party to let stand that part of the party wall encroaching _____[*specify in inches or feet*] onto the property of Second Party _____.

Right of Extension and Use

3. Second Party has the right to extend the party wall in the erection of any building on _____[his *or* her] land. Any extension would be part of the existing party wall. First Party is entitled to use any portion of the extension for future contiguous building, after payment of _____[*specify, e.g.,* one half] the cost of the original construction of the extension built by Second Party.

Duration of Agreement

4. This Agreement is _____[perpetual *or specify a definite period of time, or specify* for so long as such wall shall stand] and constitutes an easement and a covenant running with the land. However, nothing in this Agreement shall be construed as a conveyance by either party of the respective rights in the fee of the land on which the party wall stands.

Entire Agreement

5. This instrument contains the entire agreement between the parties relating to the party wall. No oral representation or modification concerning this instrument shall have any effect unless it is represented in a subsequent written instrument, signed by the party to be charged.

Attorneys' Fees

6. In the event of any controversy, claim, or dispute between the parties arising out of or relating to this Agreement or its breach, the prevailing party shall be entitled to recover reasonable expenses, attorneys' fees, and costs from the losing party.

[*Optional:*]

Arbitration

7. Any dispute under this Agreement shall be submitted to arbitration under the rules of the American Arbitration Association. Judgment on the award rendered may be entered in any court with jurisdiction. Arbitration hearings shall be held in _____ County, California.

[*Continue with the following:*]

Binding Effect

7. This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties.

Executed on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY
_____ [*signature*]
[*typed name and address*]

[*For form for acknowledgment, see § 28B.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersParty WallsReal Property LawEstatesPresent EstatesMarital EstatesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART IV. FORMS
A. Party Walls

12-28B California Legal Forms--Transaction Guide § 28B.203

§ 28B.203 Grant of Party Wall Easement

[1] Comment--Use of Form

This form is to be used by the owners of adjacent property when one owner possesses a building constructed wholly on that owner's lot, and the other owner wishes to purchase the right to use an existing wall as a party wall in the planned construction of a building on the other owner's property. The agreement provides for both a grant of an easement by the owner of the existing wall, and for covenants regarding the right of the adjoining owner to extend the wall and the right of future use by the owner of the existing wall of any extension.

Before finalizing the transaction, the parties should obtain consent from the holders of any liens on the properties involved, since the agreement may affect the value and alienability of the properties. If either party is married, spousal consent (or a statement that the spouse has no interest in the subject property) should be obtained [*see § 28B.200[1][b]*]. To provide notice, the parties should acknowledge and record the agreement [*see § 28B.200[1][c]*].

[2] Form

Grant of Party Wall Easement

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

.....Space above this line for recorder's use

PARTY WALL AGREEMENT

Preamble

This Agreement is made on _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party"):

Recitals

The First Party is the owner of real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*] ("Lot A").

The Second Party is the owner of real property located at _____[*street address*], _____[*city or* in an unincorporated area of] _____ County, California, more particularly described as follows: _____[*legal description*] ("Lot B").

The property of the First Party and the Second Party's property are adjacent: the _____[*describe, e.g.*, northern] boundary of Lot A forms the the _____[*describe, e.g.*, southern] boundary of Lot B.

The First Party owns a building, the _____[*describe, e.g.*, northern] wall of which stands on Lot A at the boundary line between the two properties.

[*Optional:*]

The cost of construction of the _____[*describe, e.g.*, southern] wall of the building on Lot A was $ _____; and

[*Continue with the following:*]

The Second Party intends to erect a building on Lot B using the _____[*describe, e.g.*, northern] wall of the First Party's building on Lot A as a party wall.

THEREFORE, for valuable consideration [*or, if sum of money is more than nominal, specify the amount*], and the mutual covenants and agreements contained in this Agreement, the parties agree as follows:

Grant of Easement

1. The First Party grants to Second Party an easement to use the _____[*describe, e.g.*, northern] of First Party's building as a party wall, with right of support for studs, crossbeams, and other such structural members as are necessary in the erection of the building by the Second Party on Lot B.

License to Enter

2. For the purpose of adapting, extending, or repairing the party wall, each party licenses the other party to enter onto _____[his *or* her] property to make necessary excavations or perform other work necessary to the exercise of the rights provided in this Agreement.

Use of Party Wall

3. The Second Party shall have the full right to adapt the wall, at _____[his *or* her] expense, for the insertion of beams or otherwise in connection with the construction of a building on _____[his *or* her] premises, and to use the wall as the _____[*describe, e.g.,* southern] wall of any building that may be erected on the Second Party's property. All construction work shall be completed in a professional and workmanlike manner in strict conformity with the laws, ordinances, and regulations of the State of California and the _____[City *or* County] of _____ regulating the construction of buildings, as they are in force at the time of construction. _____[*Describe additional conditions, e.g.,* In modifying the wall for use as a party wall, the Second Party shall fill in where any existing windows are removed, and shall finish off and paint, if necessary, the side of the wall currently inside the First Party's adjoining building so as to restore it to its current condition, in a professional and workmanlike manner, without expense to the First Party.] The Second Party shall not use or modify the party wall in any way that injures the adjoining building or that impairs the party wall benefits and support to which the adjoining building is entitled.

Right to Extend

4. Either party to this Agreement shall have the right to extend the party wall _____[*select one of the following:* horizontally *or* vertically *or* both horizontally and vertically] and to make that extension of a greater thickness than the party wall or any extension of the wall already built. No added thickness shall be placed on the land of the other party without the other party's written consent. The extension shall be built in a professional and workmanlike manner in strict conformity with the laws, ordinances, and regulations of the State of California and the _____[City *or* County] of _____ regulating the construction of buildings, as they are in force at the time of construction. No extension shall be made to the party wall that in any way injures the adjoining building or impairs the party wall benefits and support to which the adjoining building is entitled without the written consent of the owner of that building. _____[*Describe additional conditions, e.g.,* Any extension of the party wall shall be on a line with the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.]

Right to Use Extension

5. If the party wall is extended as provided in this Agreement, either party shall have the right to use the extended party wall in the same manner as that party is entitled under this Agreement to use the party wall as it was originally constructed.

Payment of Cost of Extension

6. If the party wall is extended as provided in this Agreement, all costs of the extension shall be borne by the party causing the extension to be built. However, if the other party then uses the extension or any portion of it as a party wall, then that party shall pay to the party who extended the wall or _____[his *or* her] successors or assigns _____[*describe, e.g.,* 50 percent of the cost of the extension *or* 50 percent of the cost of the portion of the extension used as a party wall *or* 50 percent of the value of the extension at the time the other party begins to use the extension as a party wall].

Repairs and Maintenance

7. If it becomes necessary to repair or rebuild any portion of the wall, as constructed or extended, the cost of

repairing or rebuilding shall be borne by _____[both parties equally *or describe other arrangement, e.g.*, the party who uses that portion of the wall exclusively. If the portion of the party wall to be repaired or rebuilt is used by both parties, the costs of repairing or rebuilding that portion shall be borne by both parties in equal shares]. The party wall shall be repaired or rebuilt in the same location as the present wall, and shall be constructed of materials similar to and of the same quality as the present party wall, and shall conform to the same general appearance as the present party wall.

Duration of Agreement

8. This Agreement shall continue in effect as long as the wall stands, and terminates on the destruction of the wall unless the parties execute a new agreement. The provisions of this Agreement constitute a covenant running with the land. However, nothing in this Agreement shall be construed as conveyance of rights of the First Party in fee of land on Lot A.

[*NOTE: If the agreement is to survive the destruction of the party wall, see § 28B.200 [2], PP 11, 12.*]

Entire Agreement

9. This instrument contains the entire agreement between the parties relating to the party wall. No oral representation or modification concerning this instrument shall have any effect unless it is represented in a subsequent written instrument, signed by the party to be charged.

Attorneys' Fees

10. In the event of any claim or dispute between the parties arising out of or relating to this Agreement or its breach, the prevailing party shall be entitled to recover from the losing party reasonable expenses, attorneys' fees, and costs.

[*Optional:*]

Arbitration

11. Any dispute under this Agreement shall be submitted to arbitration under the rules of the American Arbitration Association. Judgment on the award rendered may be entered in any court with jurisdiction. Arbitration hearings shall be held in _____ County, California.

[*Continue with the following:*]

Binding Effect

12. This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties.

Executed on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY
_____ [*signature*]
[*typed name and address*]

[*For form for acknowledgment, see § 28B.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersParty WallsReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
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12-28B California Legal Forms--Transaction Guide §§ 28B.204-28B.209

[Reserved]

§§ 28B.204[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART IV. FORMS
B. Boundary Agreements

12-28B California Legal Forms--Transaction Guide § 28B.210

§ 28B.210 Boundary Agreement Based on Parties' Legal Description or on Survey

[1] Comment--Use of Form

This form is designed for use when adjoining landowners are uncertain as to the location of a common boundary between their properties. The form contains two alternative methods to settle the boundary by agreement. The first alternative uses an informal method, not involving a grant of real property or a quiet title action, for fixing the common boundary permanently. If the parties can mutually agree to a particular legal description of the boundary line, this alternative places the boundary using that legal description.

The second alternative, used when the parties cannot reach an agreement as to the specific location or description of a fixed line, provides for the designation of a surveyor to survey the boundary and for the parties' agreement to accept the results of the survey as the agreed boundary.

Before finalizing the transaction, the parties should obtain consent from the holders of any liens on the properties involved, since the agreement may affect the value and alienability of the properties. If either party is married, spousal consent (or a statement that the spouse has no interest in the subject property) should be obtained [*see § 28B.200[1][b]*]. To provide notice, the parties should acknowledge and record the agreement [*see § 28B.200[1][c]*].

[2] Form

Boundary Agreement Based on Parties' Legal Description or on Survey

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

BOUNDARY AGREEMENT

This Agreement is made _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party"):

WHEREAS, First Party is the owner of real property in _____ County, commonly known as _____ Street, _____, California, more particularly described as follows: _____[*legal description*]; and

WHEREAS, Second Party is the owner of real property, adjoining that of First Party, located in _____ County, commonly known as _____ Street, _____, California, more particularly described as follows: _____[*legal description*]; and

WHEREAS, the parties are uncertain as to the exact location of the common boundary that separates their properties on the _____[*specify direction, e.g.,* north side] of the First Party's property and on the _____[*specify direction, e.g.,* south side] of the Second Party's property.

WHEREAS, the parties are desirous of establishing a common fixed boundary between their properties.

THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties agree as follows:

[*Choose one of the following paragraphs:*]

[*If the parties agree to legal a description of boundary on their own terms, use:*]

1. The common boundary between the properties of the parties is permanently and conclusively established and described as follows: _____[*state mutually agreed on legal description*].

[*If the parties agree to accept a legal description of the boundary established by survey, use:*]

1. The common boundary between the properties of the parties shall be established as follows:

(a) _____ [*Name of surveyor*], a surveyor duly licensed to practice in the State of California, shall conduct a survey of the common boundary based on the legal descriptions contained in the deeds by which both parties hold title to their respective properties.

(b) The surveyor shall represent the results of the survey on a map. The surveyor shall attach the map to an executed and acknowledged copy of this agreement and cause it to be recorded in the office of the county recorder of _____ County.

(c) The results of the survey shall conclusively establish the agreed boundary between the parties to this Agreement.

(d) The parties shall share equally the expenses of the survey.

[*Continue with the following:*]

2. This agreed common boundary shall be _____[marked *or* identified] as follows: _____[*describe physical features that would enable easy identification of the agreed boundary, such as monuments, or a fence or a wall either in existence or to be built by the parties*].

3. This instrument contains the entire agreement between the parties relating to the establishment of the boundary described above. No oral representation or modification concerning this agreement shall have any effect unless it is set down in a subsequent written modification, signed by the party against whom it is to be enforced.

4. If legal action is initiated by either party for the purpose of enforcing or interpreting this Agreement, the prevailing party shall be entitled to recover reasonable expenses, attorney's fees, and costs.

5. This Agreement shall be binding on and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties. This Agreement constitutes a covenant running with the land.

IN WITNESS WHEREOF, the parties execute this Boundary Agreement on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY
_____ [*signature*]
[*typed name and address*]

[*For form for acknowledgment, see § 28B.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundaries

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28B PARTY WALLS AND BOUNDARY AGREEMENTS
PART IV. FORMS
B. Boundary Agreements

12-28B California Legal Forms--Transaction Guide § 28B.211

§ 28B.211 Agreement to Establish Boundary by Submission to Arbitration

[1] Comment--Use of Form

This form may be used when the parties are uncertain as to the location of a common boundary between their properties and agree to submit their boundary line dispute to binding arbitration. This form provides that each party is entitled to choose one arbitrator, who will together select a third arbitrator. Instructions regarding the duty and authority of the arbitrators will vary according to the particular situation and to the parties' agreed terms.

Before finalizing the transaction, the parties should obtain consent from the holders of any liens on the properties involved, since the agreement may affect the value and alienability of the properties. If either party is married, spousal consent (or a statement that the spouse has no interest in the subject property) should be obtained [*see § 28B.200[1][b]*]. To provide notice, the parties should acknowledge and record the agreement [*see § 28B.200[1][c]*].

[2] Form

Agreement to Establish Boundary by Submission to Arbitration

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
.....Space above this line for recorder's use

BOUNDARY AGREEMENT

This Agreement is made on _____[*date*], between _____[*name*] ("First Party"), and _____[*name*] ("Second Party").

The First Party is the owner of real property located in _____ County, California, at _____[*address*], more particularly described as follows: _____[*legal description*].

The Second Party is the owner of real property located in _____ County, California, at _____[*address*], more particularly described as follows: _____[*legal description*].

The property of the First Party and the Second Party's property are adjacent: the _____[*describe, e.g.*, northern] boundary of the First Party's property forms the _____[*describe, e.g.*, southern] boundary of the Second Party's property.

The parties are uncertain as to the exact location of the common boundary between their properties and wish to resolve _____[all uncertainty *or* a dispute] as to the exact location of the common boundary that separates their properties.

THEREFORE, in consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. The common boundary between the properties of the parties shall be established by arbitration.

(a) The following persons are selected to serve as arbitrators under this Agreement:

(1) _____ [*Name of arbitrator*], of _____ [*address*], City of _____, County of _____, State of California, appointed by First Party; and

(2) _____ [*Name of arbitrator*], of _____ [*address*], City of _____, County of _____, State of California, appointed by Second Party.

These two arbitrators shall select a third arbitrator to act with them in making their final decision.

(b) The compensation of each arbitrator is to be set at the rate of _____ [*specify*].

(c) The arbitrators, as provided for in paragraph (a), may issue orders and incur expenses as are reasonably necessary to discharge their duties as arbitrators, including the retention of a qualified surveyor.

(d) The arbitrators shall use existing documents, deeds, field notes, surveys, or other records, to the extent they are available, in making their decision.

(e) The arbitrators shall fix the time and place for a hearing, with proper notice to the First Party and Second Party, at which the parties may offer evidence, testimony of witnesses, and may make any other desired showings. The parties shall produce any additional evidence that the arbitrators deem necessary to an understanding and determination of the location of the boundary.

(f) The arbitrators shall issue their decision in writing within _____ days of the hearing, in the form of a legal description. The decision shall be certified and filed with the Registry of Deeds of _____

County.

(g) The decision of the arbitrators is binding on the parties and conclusively establishes the location of the boundary.

[*Select one of the following paragraphs:*]

(h) The expenses of the witnesses for either side shall be paid by the party producing those witnesses. All other expenses of the arbitration, including travel and other expenses of any witnesses (or the cost of any other proofs) produced at the direct request of the arbitrators, shall be borne equally by the parties.

[*OR*]

(h) The expenses of the arbitration shall be allocated among the parties by decision of the arbitrators. The arbitrators shall state the allocation of these expenses in their written decision.

[*Continue with the following:*]

(i) The parties agree to execute all instruments that may be required to establish the true boundary between their properties as determined by the arbitrators.

2. This instrument contains the entire agreement between the parties relating to the establishment of the common boundary pursuant to binding arbitration. No oral representation or modification concerning this agreement shall have any effect unless it is set down in a subsequent written modification, signed by the party against whom it is to be enforced.

3. If legal action is initiated by either party for the purpose of enforcing or interpreting this Agreement, the prevailing party shall be entitled to recover reasonable expenses, attorney's fees, and costs.

4. This Agreement shall be binding on and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties. This Agreement constitutes a covenant running with the land.

Executed on the date stated above.

FIRST PARTY
_____ [*signature*]
[*typed name and address*]

SECOND PARTY _____ [*signature*] [*typed name and address*]

[*For form for acknowledgment, see § 28B.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewReal Property LawAdjoining LandownersBoundariesReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS

12-28C California Legal Forms--Transaction Guide 28C.syn

§ 28C.syn Synopsis to Chapter 28C: COVENANTS, CONDITIONS, AND RESTRICTIONS

§ 28C.01 California Sources

[1] Constitution

[2] Statutes

[3] Regulations

§ 28C.02 Federal Statutes

§§ 28C.03-28C.04 [Reserved]

§ 28C.05 Law Reviews and Periodicals

§ 28C.06 Annotations

§ 28C.07 Text References

[1] Matthew Bender Sources

[2] Other Sources

[3] Legal Encyclopedias

§§ 28C.08-28C.09 [Reserved]

§ 28C.10 Restrictions on Use of Property

[1] Methods of Restriction

[2] Validity of Restriction

§ 28C.11 Conditions

[1] In General

[2] Condition Distinguished From Covenant

§ 28C.12 Covenants

[1] In General

[2] Personal Covenants

§ 28C.12A Declaration of Covenants, Conditions, & Restrictions (CC&Rs) Recorded for Subdivision

§ 28C.13 Covenants Running With the Land

[1] In General

[2] Covenants Running With the Land Under Civil Code Section 1468

[a] Deed or Agreement Before 1969

[b] Deed or Agreement in 1969

[c] Deed or Agreement After 1969

[i] In General

[ii] Statutory Requirements

[iii] Effect on Persons in Special Capacities

[d] Persons Bound

[3] Covenants Imposing Environmental Restrictions and Running With the Land Under Civ. Code § 1471

§ 28C.14 Judicial Interpretation of Restrictive Covenants

[1] In General

[2] Equitable Power to Invalidate Unreasonable Restriction

§ 28C.15 Doctrine of Equitable Servitudes

[1] In General

[2] Rules of Construction

§ 28C.16 Enforcement of Equitable Servitudes

[1] Prerequisites to Enforcement

[2] Standing

§ 28C.16A Action for Violation of Restriction

§ 28C.17 Considerations for Developer of Subdivision

[1] Purpose of Declaration of Restrictions

[2] Applicability of Statutes Controlling Subdivisions

[a] In General

[b] Subdivision Map Act

[c] Subdivided Lands Act

[d] Davis-Stirling Common Interest Development Act

[e] Interstate Land Sales Full Disclosure Act

§§ 28C.18-28C.29 [Reserved]

§ 28C.30 Covenants Restricting Property to Specified Use

§ 28C.31 Covenants Requiring Approval of Improvements

§ 28C.32 Covenants Limiting Number of Residents

§ 28C.33 Covenants Restricting Height of Trees

§ 28C.34 Covenants Restricting Radio Antennas and Satellite Dishes

§ 28C.35 Covenants Restricting Solar Energy Systems

§ 28C.36 Covenants Restricting Modular Housing

§ 28C.37 Covenants Restricting Residence Based on Race, Religion, Sex, Age, and Other Factors

§ 28C.38 Unconstitutional Covenants Rendered Invalid Due to State Action

§ 28C.39 Discriminatory Restrictions Prohibited by California Fair Employment and Housing Act

§ 28C.40 Removal of Unlawful Restrictions in Recorded Documents

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[a] Owner May Record Modification Document

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[1] Facts

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§§ 28C.101-28C.109 [Reserved]

§ 28C.110 Determining Which Restrictive Covenants to Include in Agreement

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§ 28C.112 Determining Applicability of Local, State, and Federal Laws

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§ 28C.120 Procedural Guide to Adopting Restrictive Covenants

Scope

§ 28C.121 Procedural Guide for Subdivision

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§§ 28C.122-28C.129 [Reserved]

§ 28C.130 Drafting Guide for Agreement Containing Restrictive Covenants

Scope

§§ 28C.131-28C.199 [Reserved]

§ 28C.200 Declaration of Restrictions for Standard Residential Subdivision

[1] Comment

[a] Use of Form

[b] Enforcement of Restrictive Covenants

[i] Recorded CC&Rs for Subdivision

[ii] Covenants Running With the Land and Equitable Servitudes

[iii] Requirement That Covenant Not Violate Public Policy

[iv] Action for Violation of Restrictions

[c] Construction of Restrictive Covenants

[d] Specific Restrictive Covenants

[i] Residential Purposes Only

[ii] Minimum Dwelling and Lot Specifications

[iii] Protective Screening

[iv] Architectural Control

[v] Property Owners' Maintenance Association

[e] Procedure for Adopting Declaration

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Declaration of Restrictions for Standard Residential Subdivision

§ 28C.201 Declaration of Restrictions for Custom-Home Subdivision

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[a] Use of Form

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[i] Posting of Signs

[ii] Action Against Architectural and Planning Board

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Declaration of Restrictions for Custom-Home Subdivision

§§ 28C.202-28C.209 [Reserved]

§ 28C.210 Agreement for Mutual Restrictive Covenants Among Adjoining Landowners

[1] Comment

[a] Use of Form

[b] Providing for Mutual Covenants Under Civil Code Section 1468

[c] Procedure for Adopting Mutual Restrictive Covenants

[d] Deeds to Successors of Signatory Landowners

[2] FORM

Agreement for Mutual Restrictive Covenants Among Adjoining Landowners

§§ 28C.211-28C.219 [Reserved]

§ 28C.220 Deed Subject to Restrictive Covenants

[1] Comment

[a] Use of Form

[b] Recording

[2] FORM

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12-28C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers covenants and conditions that restrict the use of real property. The Legal Background presents an overview of applicable laws, including a discussion of conditions, restrictive covenants, the doctrine of equitable servitudes, and the statutory requirements governing the drafting of enforceable covenants. The Legal Background also includes a discussion of the use of a declaration of restrictions by a developer with a brief description of state and federal Acts regulating subdivisions and common interest developments. The Transaction Guide includes a checklist for facts and documents to be obtained from the client and preliminary determinations concerning the development. It also includes a procedural guide to adopting covenants and conditions when subdividing property. Also included in the Transaction Guide is a guide to drafting a declaration of restrictions for a residential subdivision.

The Forms section contains two declarations of restrictions: one for use by a developer of a standard subdivision, in which the developer builds and markets the houses, and one for use by a developer of a custom-home subdivision, in which the developer prepares the home sites and markets the lots, but each lot purchaser is responsible for building his or her own house. Also provided is an agreement for mutually restrictive covenants by adjoining landowners, and a deed containing restrictive covenants.

The statutory and regulatory requirements and associated documents relating to the entire subdivision process and to common-interest developments are outside the scope of this chapter. Refer to Ch, 30, *Subdivision Regulation*, for further discussion of the subdivision process. Refer to Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums*, if the client's project involves a subdivision that will have commonly owned areas or interests. For information on acknowledgment, recording, and notice, see Ch. 27, *Deeds and Recording* .

For discussion of related topics, see Ch. 28A, *Easements and Licenses* , and Ch. 28B, *Party Walls and Boundary Agreements* , and Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* . For forms relating to covenants contained in leases, including covenants limiting the use of premises, refer to Ch. 34B, *Residential Leases* , and Ch. 34C, *Retail, Industrial, and Office Leases* . For general information about the formation and performance of contracts, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and Ch. 77, *Discharge of Obligations* .



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§ 28C.01 California Sources

[1] Constitution

Compensation for public taking of private property. *Cal. Const., art. I, § 19.*

[2] Statutes

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Subdivided lands, definitions and applicability. *Bus. & Prof. Code §§ 11000-11004.8.*

Unruh Civil Rights Act. *Civ. Code § 51.*

Age discrimination in housing prohibited; exception for senior housing. *Civ. Code §§ 51.2-51.4.*

Restrictions on transfer or use of realty based on invidious discrimination (because of sex, race, color, religion, etc.) are void. *Civ. Code § 53.*

Conditions restraining alienation invalid. *Civ. Code § 711.*

Right to display signs advertising property for sale. *Civ. Code §§ 712, 713.*

Restrictions on solar energy systems. *Civ. Code §§ 714, 714.1.*

Restrictions on modular units. *Civ. Code § 714.5.*

Condition purporting to restrict right of any person to sell, lease, rent, use, or occupy property on basis of invidious

discrimination is void; any deed or other written instrument relating to title to real property, or any written covenant, condition, or restriction annexed or made part of any such deed or instrument, by reference or otherwise, must be deemed to be revised to omit any such condition. *Civ. Code §§ 782, 782.5*.

"Restriction" defined. *Civ. Code § 784*.

Fees simple determinable and possibility of reverter abolished. *Civ. Code § 885.020*.

Inurement of benefit of covenant to unnamed party. *Civ. Code § 1085*.

Davis-Stirling Common Interest Development Act. *Civ. Code § 1350 et seq.*

Conditional obligations. *Civ. Code § 1434 et seq.*

Conditions involving forfeiture strictly construed. *Civ. Code § 1442*.

Transfer of obligations. *Civ. Code § 1457 et seq.*

Covenants running with the land. *Civ. Code §§ 1460-1471*.

Five-year statute of limitation for action for violation of restriction. *Code Civ. Proc. § 336(b)*.

Subdivision Map Act. *Gov. Code § 66410 et seq.*

California Environmental Quality Act of 1970 (CEQA). *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

[3] Regulations

Subdivision regulations. *10 Cal. Code Reg. § 2790 et seq.*

Environmental impact regulations. *10 Cal. Code Reg. § 2820 et seq.*



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§ 28C.02 Federal Statutes

Interstate Land Sales Full Disclosure Act. *15 U.S.C. § 1701 et seq.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*



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§ 28C.05 Law Reviews and Periodicals

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Ch. 28C, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

Ch. 30, *Subdivision Regulation* .

Ch. 33A, *Time-Share Projects* .

Ch. 33B, *Membership Camping Contracts* .

Ch. 33C, *Stock Cooperatives* .

Ch. 33D, *Planned Developments* .

Ch. 34, *Condominiums* .

Ch. 34B, *Residential Leases* .

Ch. 34C, *Commercial, Industrial, and Office Leases* .

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California Real Estate Law & Practice(Matthew Bender)

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20 Am. Jur. 2d Covenants, Conditions, and Restrictions.

26 Cal. Jur. 3d Deeds.



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§ 28C.10 Restrictions on Use of Property

[1] Methods of Restriction

The use and enjoyment of property may be restricted by several methods. Restrictions are often imposed for the benefit of another parcel of property, but may also be for the mutual benefit of the property restricted and other property, or may not be for the benefit of property at all. Restrictions are commonly imposed by all of the following methods: personal covenants, which are created in agreements or deeds and which bind only the immediate parties to them [*see, e.g., Lyford v. North Pac. Coast R.R. Co. (1891) 92 Cal. 93, 95-96, 28 P. 103* ; *see § 28C.12 [2]*]; covenants that run with the land [*see §§ 28C.13, 28C.14*]; equitable servitudes [*see §§ 28C.15, 28C.16*]; and conditions subsequent [*see § 28C.11*]. Determination of whether a covenant is personal, runs with the land, or is enforceable as an equitable servitude depends on resolving various factual matters [*see McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252]* . The terms and duration of the restrictions, and testimony as to the understanding of the original covenanting parties are all relevant to whether a covenant was intended to be personal or intended to run with the land, binding later grantees [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 175, 195 Cal. Rptr. 14]* .

[2] Validity of Restriction

Conditions restraining alienation of property are void if they are repugnant to the interest created [*Civ. Code § 711*]. However, reasonable restrictions on alienation of property in the form of restrictive covenants do not violate *Civil Code Section 711*; only unreasonable restraints on alienation are invalid [*City of Oceanside v. McKenna (1989) 215 Cal App. 3d 1420, 1427-1430, 264 Cal. Rptr. 275]* . For further discussion of the validity of specific types of restrictions, see *§§ 28C.30-28C.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcement



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§ 28C.11 Conditions

[1] In General

A condition is a provision contained in an instrument of conveyance that tends to modify or rescind the conveyance if the grantee or the grantee's successors fail to fulfill that provision [*see Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926]* . At common law, the fee simple determinable and the fee simple subject to a condition subsequent (or right of reentry) were conditional estates. The fee simple determinable was repealed in California in 1982 [*see Civ. Code § 885.020*]. Current law provides that every estate that would be a fee simple determinable at common law is now deemed to be a fee simple subject to a condition subsequent [*Civ. Code § 885.020*].

A "condition subsequent" is a condition in a conveyance referring to a future event, on the occurrence of which the obligation will no longer binding on the other party, if he or she chooses to take advantage of the condition; the interest does, however, continue until the power of termination is exercised [*see Civ. Code § 1438*; *see, e.g., Quatman v. McCray (1900) 128 Cal. 285, 60 P. 855]* . A condition subsequent is distinguishable from a condition precedent in that a condition precedent must be performed before some right that is dependent on it accrues (or some act dependent on it is performed) [*Civ. Code § 1436*]. For example, a deed that required the grantee to perform certain acts before title vested in the grantee created a condition precedent [*see Civ. Code § 1439*; *Stockton v. Weber (1893) 98 Cal. 433, 440, 33 P. 332]* .

[2] Condition Distinguished From Covenant

There are several distinctions between a condition and a covenant [*see § 28C.12*]. While a covenant can be created by any agreement between grantor and grantee or between two or more landowners [*see Civ. Code § 1468*], a condition can only be created as part of the grant or conveyance of an estate in real property [*see Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 605, 134 P.2d 245]* . Another distinction is in the available remedy. The remedy for breach of a condition subsequent is forfeiture of the originally conveyed interest [*see Civ. Code § 1442*]; the remedy for breach of a covenant is an action for injunctive relief or damages [*see Doo v. Packwood (1968) 265 Cal. App. 2d 752, 758-759, 71 Cal. Rptr. 477]* , with no forfeiture or reversion. Finally, to bind subsequent owners, a covenant must either run with the land, be an equitable servitude, or a lien or easement, whereas a condition subsequent is enforceable against subsequent

owners regardless of the circumstances. However, because of the harshness of the result of breaching a condition (that is, forfeiture of the estate), condition provisions are strictly construed against the grantor [*see Civ. Code § 1442*], and will, if possible, be interpreted as covenants rather than as conditions [*Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 605, 134 P.2d 245]* . Conditions are not ordinarily used in modern planning to restrict property because the harsh results of breach also limit the marketability of the property. For a deed granting a fee simple subject to a condition subsequent, see Chapter 27, *Deeds and Recording* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcement



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§ 28C.12 Covenants

[1] In General

Covenants (also known as promises) are the most commonly used means of restricting land use between private parties. A restrictive covenant is a promise to do or refrain from doing certain things in regard to the use of land [*Sackett v. Los Angeles City School Dist. (1931) 118 Cal. App. 254, 257, 5 P.2d 23]* . The covenant may be created in a deed or in a separate agreement [*see Civ. Code § 1468*]. Any words in a deed that show an agreement to do a thing constitute a covenant. However, where words do not amount to an agreement, a covenant does not exist [*O'Sullivan v. Griffith (1908) 153 Cal. 502, 506, 95 P. 873]* . As between the covenantor and covenantee, a covenant can be enforced pursuant to the usual principles of contract law [*Anthony v. Brea Glenbrook Club (1976) 58 Cal. App. 3d 506, 510, 130 Cal. Rptr. 32* ; *see* vol. 14, ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

Once the covenantor or covenantee, or both, convey their property, the question arises as to whether the covenant is enforceable against the successor of the covenantor and/or enforceable by the successor of the covenantee. A covenant is enforceable by or against a successor only if it "runs with the land" [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 173-174, 195 Cal. Rptr. 14]* . Whether a covenant runs with the land is currently governed by statute [*see Civ. Code §§ 1460-1470*]. However, different rules apply for past conveyances. For complete discussion of covenants running with the land, see *§ 28C.13*.

[2] Personal Covenants

A personal covenant is one that, by its nature, is a mere personal undertaking, and not intended to have a binding effect beyond the immediate parties to the instrument [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 175, 195 Cal. Rptr. 14]* .

Determining whether a covenant is personal, runs with the land, or is enforceable as an equitable servitude depends on resolving factual matters such as intent, notice, and equitable factors [*McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252]* . The terms of the restrictions, the duration of the restrictions on the land, and testimony about the understanding of the original covenanting parties are all relevant to whether a covenant was intended to be

personal or intended to bind later grantees [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 175, 195 Cal. Rptr. 14]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



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§ 28C.12A Declaration of Covenants, Conditions, & Restrictions (CC&Rs) Recorded for Subdivision

In 1995, the California Supreme Court adopted the following rule: If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan, is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. The restrictions are not unenforceable merely because they are not **additionally** cited in a deed or other document at the time of the sale [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in deed to recorded restrictions)].

The Court further held that its rule was effective retroactively, with the majority noting that the only holdings that were inconsistent with the rule were those previously made by intermediate courts [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 367-368, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . Two prior California Supreme Court cases [*see Werner v. Graham (1919) 181 Cal. 174, 183 P. 945* (no recorded uniform plan); *Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 131 Cal. Rptr. 381, 551 P.2d 1213* (restrictions recorded *after* sale)] were factually distinguished, and language in those cases appearing to require that a servitude be created by *deed* was disregarded by the Court [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 367, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

By adopting its rule in *Citizens*, the California Supreme Court eliminated or at least minimized the necessity of characterizing subdivision CC&Rs as either covenants running with the land or as equitable servitudes, at least with respect to the issue of whether recorded CC&Rs are binding on subsequent purchasers. The Court noted that because of the statutory limitations on covenants running with the land, at least before the amendment of *Civil Code Section 1468* [*see § 28C.13[2][c]*], California courts have traditionally analyzed CC&Rs under the doctrine of equitable servitudes [citing *Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1544]* . It also pointed out that commentators have argued that covenants that run with the land and equitable servitudes should be, or possible have been, merged into a single doctrine [citing French, *Design Proposal for the New Restatement of the Law of Property--Servitudes* (1988) *21 U.C. Davis L. Rev. 1213*]. The Court noted, however, that this possible fusion was beyond the scope of the narrow

issue before it, which involved how a covenant is created. With respect to that particular issue, the court remarked that it saw no difference between covenants and equitable servitudes, and expressly stated that the rule it was adopting (and summarized above) applies equally to both [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

As stated by the Court, the issue before it in the *Citizens* case was whether a purchaser is bound by previously recorded CC&Rs even though none of the written documents executed at the time of the conveyance refer to them [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 356, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . In answering this question in the affirmative, the Court noted that the rule adopted by it has the advantage of simplicity. One recorded document will establish the rules for all parcels. It is also good policy to encourage the enforceability of CC&Rs that regulate land use for the benefit of all the owners. Further, a single set of recorded restrictions that applies to an entire subdivision fulfills the intent of the parties and the community as a whole [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 363-364, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

The Court also commented that the rule is fair because it requires recordation before execution of the contract of sale by a purchaser. All buyers could easily know exactly what they are purchasing. According to the majority of the Court, the rule is consistent with the rationale of prior cases. The requirement of those prior cases that there be an agreement between two parties is met because the CC&Rs are not enforceable until a conveyance is actually made and the buyer constructively agrees to the CC&Rs. The recording requirement of the Court's rule also satisifes the requirement of prior cases that there be a writing setting forth the restrictions [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 364-366, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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§ 28C.13 Covenants Running With the Land

[1] In General

The following discussion summarizes traditional judicial and statutory requirements for covenants running with the land. However, since the California Supreme Court's 1995 ruling in *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* , the process of classifying and analyzing covenants, conditions, and restrictions recorded for a subdivision (and of determining their effect on subsequent purchasers) has been significantly simplified. The simplified rule covering that issue and adopted by the Court in *Citizens* is retroactive [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 366-367, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* , and is equally applicable to covenants running with the land and to equitable servitudes [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . The rule is fully discussed in *§ 28C.12A*. The *Citizens* case did not overrule the law discussed below, but its rule does, for practical purposes, replace or supersede that law, at least with respect to the issue of the binding effect on purchasers of previously recorded covenants, conditions, and restrictions recorded for a subdivision.

If a private restriction on property is to have a continuing benefit, it must be created and imposed so that it burdens the land through subsequent transfers of ownership. A covenant that burdens and benefits land through subsequent transfers is said to be a "covenant running with the land" [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 173-174, 195 Cal. Rptr. 14]* .

Both the liability of a covenant that runs with the land and the power to enforce that covenant pass with the transfer of the estate in the property so that the covenant remains binding on subsequent transferees of the property even though they have not contractually assumed any responsibility for its performance [*Anthony v. Brea Glenbrook Club (1976) 58 Cal. App. 3d 506, 510, 130 Cal. Rptr. 32* ; *see Civ. Code § 1460*]. Only those covenants specified by statute, and those that are incident thereto, run with the land [*Civ. Code § 1461*]. The two statutes that are applicable to determine whether a covenant runs with the land are *Civil Code Sections 1462* and *1468* [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14]* . A covenant contained in a grant of an estate

in real property that is made for the direct benefit of the property conveyed or some part of it then in existence runs with the land [*Civ. Code § 1462*]. A restrictive covenant that burdens, rather than benefits, property does not run with the land to bind successors under *Civil Code Section 1462* [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14]* .

Even though a restrictive covenant will not run under *Civil Code Section 1462* because it burdens the land, it may run with the land if it satisfies the requirements of *Civil Code Section 1468*, under which both burdens and benefits may be enforced [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14* ; *see* [2], *below*].

Whether a covenant runs with the land and binds subsequent purchasers is determined by the statutes in effect when the covenant was created. Specifically, the various amendments to *Civil Code Section 1468*, governing covenants running with the land, are not applied retroactively [Taormina *Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 190 Cal. Rptr. 38* ; *see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14]* . For discussion of the effect of amendments to *Civil Code Section 1468*, see [2], *below*.

For forms of declarations of restriction containing restrictive covenants suitable for residential subdivisions that are intended to run with the land, see *§§ 28C.200* and *28C.201*. For a form of agreement for mutual restrictive covenants between adjoining landowners that are intended to run with the land, see *§ 28C.210*.

Covenants running with the land can be used to establish many types of restrictions. For example, under the Williamson Act [*see Gov. Code § 51200 et seq.*], the benefits and burdens of a land use restriction contract run with the land regardless of changes in ownership or subdivisions [*see Gov. Code § 51243*]. For coverage of the Williamson Act and other methods of restricting the use of agricultural, recreational, and open-space land, see Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

[2] Covenants Running With the Land Under Civil Code Section 1468

[a] Deed or Agreement Before 1969

Before January 1, 1969, Civil Code Section 1468 provided that a covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his or her own land, which was expressed to be for the benefit of the land of the covenantee, and which was made by the covenantor expressly for his or her assigns or to the assigns of the covenantee, ran with both parcels of land [former *Civ. Code § 1468* (Stats. 1905, ch. 450)]. To enforce a legal covenant running with the land created before 1969, a plaintiff must prove the common law elements by showing that (1) the covenant concerns some act on the covenantor's property (the covenant must "touch and concern" the land), (2) the covenant is for the benefit of the covenantee, (3) the covenant states it is binding on the assigns of the covenantor, and (4) the covenantor and covenantee were owners of the land at the time the covenant was made [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14]* .

Because former Section 1468 applied only to covenants between landowners and did not encompass covenants between a grantor and a grantee, restrictions referred to in pre-1969 deeds cannot be enforced against remote grantees unless they satisfy the requirements of *Civil Code Section 1462*. That is, the restrictions must benefit, rather than burden, the grantee's land [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 972 n.3, 190 Cal. Rptr. 38]* .

Unsuccessful attempts at drafting covenants intended to run with the land, due to failures in complying with the distinction between the running of burdens and benefits and other technical requirements such as privity, led to the alternative enforcement mechanism of equitable servitudes [*see § 28C.15*].

[b] Deed or Agreement in 1969

In 1969, *Civil Code Section 1468* was amended to expand the enforceability of covenants against successive owners by providing that, in addition to covenants between landowners, a covenant made by a grantor of land with a grantee, for the benefit of the land conveyed to the grantee, would run with both the grantor's and grantee's land, if specified new requirements were met [former *Civ. Code § 1468* (Stats. 1968, ch. 680, § 1)]. This amendment imposed the same requirements on covenants between landowners as it imposed on covenants between a grantor and grantee [*see* former *Civ. Code § 1468* (Stats. 1968, ch. 680, § 1)].

[c] Deed or Agreement After 1969

[i] In General

In 1970, *Civil Code Section 1468* was amended to provide that a grantee can covenant with a grantor, for the express benefit of land belonging to either party, to do or refrain from doing certain acts relating to the use, maintenance, repair, or improvement of land, or the payment of taxes and assessments on the land or some part of it. If the statutory conditions are satisfied [*see* [ii], *below*], the agreement can be enforced as a covenant running with the land of the grantor and the grantee. Such a covenant may also be made between the owner of land with the owner of other land [*Civ. Code § 1468*]. Furthermore, if the requirements are satisfied, it is not necessary for a successor to acquire the entire estate of the covenantor to be bound [*see Civ. Code §§ 1465, 1468*].

When several persons are subject to the burden of a covenant under *Civil Code Section 1468*, the burden must be apportioned among them according to the value of the burdened property held by them, respectively, if the value can be ascertained, or if not, then according to their respective interests by quantity. However, when only a portion of the land is burdened by the covenant, the apportionment must be only among the several owners of that portion [*Civ. Code §§ 1467, 1468*].

Despite *Civil Code Section 1465*, which provides that a covenant running with the land binds only those who acquire the whole estate of the covenantor in some part of the property, a covenant meeting the requirements of *Civil Code Section 1468* benefits and is binding on (1) each successive owner, during his or her ownership, of any portion of the land affected by the covenant, and (2) each person having an interest therein derived through any owner of the land, unless the instrument creating the covenant specifically provides otherwise [*Civ. Code § 1468*].

See *Section 28C.210[2]* for a form of agreement for mutual restrictive covenants among adjoining landowners.

[ii] Statutory Requirements

For a covenant to run with the land under *Civil Code Section 1468*, benefiting successive owners of the benefited land and binding successors of the burdened land, all of the following four requirements must be met [*Civ. Code § 1468*].

First, the land of the covenantor that is to be affected by the covenants, and the land of the covenantee to be benefited, must be particularly described in the instrument containing the covenant [*Civ. Code § 1468(a)*]. Without a description of the land to be benefited, the statute is not satisfied and the covenant is merely personal to the covenantor [*McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252]* .

Second, the successive owners of the land, in the instrument containing the covenants, must expressly be bound by the covenants for the benefit of the land owned by, granted by, or granted to the covenantee [*Civ. Code § 1468(b)*].

Third, each act required by the covenant must relate to the use, repair, maintenance, or improvement of, or payment of taxes and assessments on, the subject land or some part of it. If the subject land consists of undivided interests in the

same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a reasonable period is a permissible covenant [*Civ. Code § 1468(c)*].

Fourth, the instrument containing the covenants must be recorded in the office of the recorder of each county in which the land or a part of it is situated [*Civ. Code § 1468(d)*]. Recording the instrument gives constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see* Ch. 27, *Deeds and Recording*].

For forms of declarations of restriction for subdivisions that comply with *Civil Code Section 1468*, see *§§ 28C.200[2]* and *28C.201[2]*.

[iii] Effect on Persons in Special Capacities

A mortgagee, trustee, or beneficiary of a mortgage or deed of trust on land or any part of land affected by a covenant under Civil Code Section 1468 is subject to the provisions of that section, but only for the period during which that person is in possession of the land in his or her capacity as mortgagee, trustee, or beneficiary [*Civ. Code § 1468*].

[d] Persons Bound

A covenant running with the land binds the assigns of the covenantor and vests in the assigns of the covenantee, in the same manner as if they had personally entered into them [*Civ. Code § 1460*]. However, no one, merely by reason of acquiring an estate subject to a covenant running with the land, is liable for a breach of covenant before he or she acquired the estate, or after he or she has parted with or ceased to enjoy its benefits [*Civ. Code §§ 1466*, *1468*]. To part with property or cease to enjoy its benefits within the meaning of *Civ. Code § 1466*, a property owner must not only vacate the property, but must also voluntarily relinquish it with the intention of terminating his or her ownership, possession, and control and without vesting ownership in another person [*Cerro de Alcala Homeowners Assn. v. Burns (1985) 216 Cal. Rptr. 84]* .

[3] Covenants Imposing Environmental Restrictions and Running With the Land Under Civ. Code § 1471

Civ. Code § 1471 governs covenants running with the land that impose environmental restrictions intended to protect present or future human health or safety or the environment as a result of hazardous materials on the land. Under its terms, when an owner or grantee of land makes a covenant to do or refrain from doing some act on his or her own land, the covenant runs with the land owned or granted to the covenantor if the doing or refraining from doing of the act is expressed to be for the benefit of the covenantee. This rule applies regardless of whether or not the covenant is for the benefit of land owned by the convenantee, and notwithstanding *Civ. Code § 1468* or any other provision of law [*Civ. Code § 1471(a)*]. Except as provided by *Civ. Code § 1466* (breach of covenant before acquisition of land or after relinquishment of land) or as specifically provided in the instrument creating the covenant, such a covenant is binding on each successive owner, during his or her ownership, of any portion of the land affected by it, and on each person having any interest in the land derived through any owner of the land, if all of the following requirements are met [*Civ. Code § 1471(a), (b)*]:

- The land of the covenantor that is to be affected by the convenant is particularly described in the instrument containing the covenant.

- The successive owners of the land are expressed to be bound thereby for the benefit of the covenantee in the instrument containing the convenant.

- Each act described in the covenant relates to the use of land and each act is reasonably necessary to protect present or future human health or safety or the evironment as a result of the presence on the land of hazardous materials, as defined in *Health & Safety Code § 25260*.

- The instrument containing the covenant is recorded in the office of the recorder of each county in which the land or some portion of it is situated, and the instrument includes in its title the words "Environmental Restriction."

If several persons are subject to the burden of any such covenant, it must be apportioned among them pursuant to *Civ. Code § 1467*, except that when only a portion of the land is so affected by the covenant, the apportionment must be only among the several owners of that portion [*Civ. Code § 1471(c)*]. *Civ. Code § 1471* applies to the mortgagee, trustee, or beneficiary of a mortgage or deed of trust on the land or any part of the land, but only while he or she, in that capacity, is in possession of the land [*Civ. Code § 1471(d)*].

If an instrument containing a covenant is recorded as an "Environmental Restriction" [*see Civ. Code § 1471(a)(4)*], the office of the county recorder may send a certified copy of the instrument to the California Environmental Protection Agency (Cal-EPA) for posting on its Web site for informational purposes only [*see Health & Safety Code § 57012*], unless the instrument indicates that it is required by a specified board or department Safety Code [*Civ. Code § 1471(e)(1)*; *see Health & Safety Code § 57012(d)(1)-(3)* (specified board or department)]. The county recorder may assess a reasonable fee, as determined by resolution of its governing body, to cover the costs of sending the certificate to Cal-EPA [*Civ. Code § 1471(f)*]. However, notwithstanding any provision of law, the office of the county recorder and its employees are not subject to any liability under any state law or in any action for damages if the office does not send a certified copy of the instrument to Cal-EPA [*Civ. Code § 1471(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART II. LEGAL BACKGROUND
A. Covenants, Conditions, and Restrictions in General

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§ 28C.14 Judicial Interpretation of Restrictive Covenants

[1] In General

Restrictive covenants are construed strictly against the person seeking to enforce them and in favor of the unencumbered use of the property [*Terry v. James (1977) 72 Cal. App. 3d 438, 443, 140 Cal. Rptr. 201* ; *Biagini v. Hyde (1970) 3 Cal. App. 3d 877, 880, 83 Cal. Rptr. 875]* . The primary object, however, in construing all contracts, is to effectuate the legitimate desires of the covenanting parties [*Hannula v. Hacienda Homes (1949) 34 Cal. 2d 442, 444-445, 211 P.2d 302]* . The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation [*Lincoln Sav. & Loan Assn. v. Riviera Estates Assn. (1970) 7 Cal. App. 3d 449, 463, 87 Cal. Rptr. 150]* . For example, a tract restriction prohibiting any improvement that would "unreasonably obstruct" the view from other lots is not necessarily too vague or uncertain for judicial enforcement [*Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 693, 697-699, 86 Cal. Rptr. 187]* . The document must be construed as a whole to give effect to every part; particular words or clauses will be subordinated to general intent [*Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849, 861, 160 Cal. Rptr. 486]* . In ascertaining the intent of the language expressing the covenant, the court will look to the purpose for which the restriction was imposed [*Smith v. North (1966) 244 Cal. App. 2d 245, 248, 53 Cal. Rptr. 94]* .

[2] Equitable Power to Invalidate Unreasonable Restriction

A trial court has the equitable power to refuse enforcement of a restrictive covenant if the court finds the covenant so unreasonable that it violates public policy. A restrictive covenant is so unreasonable as to violate public policy when the harm caused by the restriction is so disproportionate to the benefit produced by performance of the covenant that the promise ought not to be enforced [*Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219* ; *see Restatement of Property § 539 (Comment f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy ViolationsContracts LawTypes of ContractsCovenantsReal Property

LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement



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§ 28C.15 Doctrine of Equitable Servitudes

[1] In General

At common law, many covenants respecting the use of land were, for a variety of technical reasons, unenforceable [*see* Powell On Real Property,P 670[2] (Matthew Bender)]. The doctrine of equitable servitudes developed as an enforcement mechanism for technically invalid but just claims [*see Richardson v. Callahan (1931) 213 Cal. 683, 687, 3 P.2d 927]* . For example, a restrictive covenant that is unenforceable because of a failure to comply with a statutory requirement for a covenant running with the land [*see § 28C.12[2]*], may, in an appropriate case, be enforced by a court's power in equity [*see Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493-494, 168 Cal. Rptr. 801]* .

The doctrine of equitable servitudes rests not on technical concepts of whether the covenant runs with the land but on the equitable notion that one who takes property with notice of a restriction should be bound to observe that restriction [*Richardson v. Callahan (1931) 213 Cal. 683, 687, 3 P.2d 927]* . In the context of subdivisions, this doctrine is also referred to as "mutual equitable servitudes" [*see Mock v. Shulman (1964) 226 Cal. App. 2d 263, 266, 38 Cal. Rptr. 39]* . An equitable servitude is enforceable in equity by any party in whose favor the restrictions were imposed [*Bryan v. Grosse (1909) 155 Cal. 132, 135, 99 P. 499* ; *see § 28C.16*].

Since the California Supreme Court's 1995 ruling in *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* , the necessity of classifying and analyzing covenants, conditions, and restrictions recorded for a subdivision (and of determining their effect on subsequent purchasers) has been minimized, if not eliminated. The Court in *Citizens* adopted a simplied rule covering that issue, which is retroactive [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 366-367, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* and is equally applicable to covenants running with the land and to equitable servitudes [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . The rule is fully discussed in *§ 28C.12A*.

[2] Rules of Construction

Although the doctrine of equitable servitudes is more liberal in enforcement than the doctrine of covenants running with

the land, equitable servitudes are still construed strictly against the person seeking their enforcement. However, the strict construction rule is not applicable when it would thwart the intent of the parties [*see Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849, 860-862, 160 Cal. Rptr. 486]* . This is because, above all, the intent of the parties governs [*White v. Dorfman (1981) 116 Cal. App. 3d 892, 897, 172 Cal. Rptr. 326]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



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§ 28C.16 Enforcement of Equitable Servitudes

[1] Prerequisites to Enforcement

Agreements restricting land use may be enforced, even though not meeting all the requisites of a common law covenant running with the land, by classifying them as equitable servitudes, enforceable by injunctive relief in equity [*B.C.E. Development, Inc. v. Smith (1989) 215 Cal. App. 3d 1142, 1146, 264 Cal. Rptr. 55]* . In the case of subdivision restrictions, they will be enforceable on subsequent purchasers and their successors if recorded as part of a common plan prior to the sale of the subdivision interests, regardless of whether the restrictions are classified as equitable servitudes or covenants running with the land [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; *see § 28C.12A* (discussion of *Citizens* case and its effect on subsequent purchasers of recorded subdivision restrictions)]. If only two parcels are involved, a court will enforce equitable servitudes between them if it concludes that the restrictions are of such a nature that, considering the intentions of the parties coupled with the result of failure to enforce, equity could not in conscience withhold relief [*see Richardson v. Callahan (1931) 213 Cal. 683, 686-687, 3 P.2d 927]* .

[2] Standing

In general, standing to enforce an equitable servitude is governed by intent. An equitable servitude is enforceable by any party in whose favor the restrictions were imposed [*Bryan v. Grosse (1909) 155 Cal. 132, 135, 99 P. 499]* . If a declaration of restrictions creating a covenant so provides, an enforcement action may also be brought by the declarant (that is, the developer) even if the declarant no longer owns an interest in the dominant estate [*B.C.E. Development, Inc. v. Smith (1989) 215 Cal. App. 3d 1142, 1148-1150, 264 Cal. Rptr. 55]* . Alternatively, the declaration may grant enforcement rights to the homeowner's association [*see Russell v. Palos Verdes Properties (1963) 218 Cal. App. 2d 754, 765, 32 Cal. Rptr. 488]* or limit enforcement rights to a current owner of the dominant estate [*see Kent v. Koch (1958) 166 Cal. App. 2d 579, 588, 333 P.2d 411]* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsCovenantsReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



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§ 28C.16A Action for Violation of Restriction

An action for violation of a restriction, as defined in *Civ. Code § 784*, must be commenced within five years [*Code Civ. Proc. § 336(b)*]. Under § 784, "restriction" means a limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction [*Civ. Code § 784*].

This five-year period runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action within this period does not result in a waiver of the right to commence an action for any other violation of the restriction, and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable [*Code Civ. Proc. § 336(b)*].

Code Civ. Proc. § 336(b) will not bar commencement of an action for violation of a restriction before January 1, 2002, and, until that date, any other applicable statutory or common law limitation will continue to apply to that action [*Code Civ. Proc. § 336(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawLimited Use RightsEasementsAffirmative & Negative EasementsReal Property LawRestrictive CovenantsGeneral Overview



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§ 28C.17 Considerations for Developer of Subdivision

[1] Purpose of Declaration of Restrictions

For the protection of the character and value of residential subdivision property, it is important that there be some uniform restrictions on the use and occupancy of the residences and, for custom-built homes, some minimum standards set for the cost and character of those residences. This is accomplished by recording, prior to any sale in the subdivision, a declaration or other instrument that (1) establishes a common plan for the ownership of property in the subdivision; (2) contains restrictions on the use of the property as part of the common plan; (3) describes the property it is to govern; and (4) states that it is to bind all purchasers and their successors. Subsequent purchasers who have constructive notice of the recorded declaration are then deemed to intend and agree to be bound by, and to accept the benefits of, the common plan [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; *see § 28C.12A*].

For a procedural guide to preparing a declaration of restrictions, see *§ 28C.120*. For forms of declarations of restrictions, see *§§ 28C.200* and *28C.201*.

[2] Applicability of Statutes Controlling Subdivisions

[a] In General

A variety of state and federal statutes regulate the subdivision process [*see* [b]-[e], *below*]. In addition to controlling the subdividing procedure, these statutes may also regulate particular covenants that may be included in a declaration of restrictions for a subdivision. For both of these reasons, a developer should ensure that he or she understands and has complied with the following statutes, if applicable, before proceeding with a subdivision. For complete discussion of the statutes affecting subdivisions, see Ch. 30, *Subdivision Regulation* . For discussion of the statutes affecting condominiums and similar developments, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

[b] Subdivision Map Act

Virtually every division of land is subject to the requirements of the Subdivision Map Act [*see Gov. Code § 66410 et seq.*] unless specifically excluded [*see Gov. Code § 66412*]. At a minimum, the Act requires that a developer file and receive approval for a parcel map; for larger subdivisions, the developer will generally have to file and receive approval for both a tentative and final subdivision map [*Gov. Code §§ 66426, 66428*]. The map requirements must be satisfied before any sale, lease, or financing of subdivision parcels can take place [*Gov. Code § 66499.30*].

The procedure for processing maps is governed by the Map Act. However, the Act is administered by cities and counties rather than by the state; procedures prescribed by the Map Act may be modified by local ordinance to the extent that the Map Act authorizes modification [*Gov. Code § 66451*]. For complete discussion of the subdivision process, see Ch. 30, *Subdivision Regulation* .

[c] Subdivided Lands Act

With certain exceptions, the sale or lease of land divided or proposed to be divided into five or more lots or parcels is subject to the requirements of the Subdivided Lands Act [*Bus. & Prof. Code § 11000*; *see Bus. & Prof. Code § 11000 et seq.*]. Any "planned development" [*see* [d], *below*] containing five or more units is subject to the Act [*see Bus. & Prof. Code §§ 11003, 11004.5*]. The Act also applies to land in which five or more undivided interests are created or proposed to be created [*Bus. & Prof. Code § 11000.1*].

In general, the Act requires the subdivider to file with the Real Estate Commissioner a notice of intention to sell or lease and an accompanying questionnaire [*Bus. & Prof. Code § 11010*]. The Commissioner may require a public report to be issued for the subdivision [*Bus. & Prof. Code § 11018.2*]. If issued, the report, along with certain other documents, must be provided to every prospective purchaser or lessee [*Bus & Prof. Code § 11018.1*; *10 Cal. Code Reg. §§ 2794(a), 2795.1(a)*]. The developer must also give a copy of the report to any member of the public who requests it, and must post a notice of the right to make such a request and a copy of the report [*Bus. & Prof. Code § 11018.1(b)*].

The Act prohibits false or misleading advertising regarding subdivisions [*Bus. & Prof. Code § 11022*].

[d] Davis-Stirling Common Interest Development Act

The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] regulates the creation and essential attributes of common interest developments. A "common interest development" is a community apartment project, a condominium project, a stock cooperative, or a planned development [*Civ. Code § 1351(c)*]. A "planned development" is a real estate development (other than a community apartment project, condominium project, or stock cooperative) that has either or both of the following features [*Civ. Code § 1351(k)*]:

- A common area [*see Civ. Code § 1351(b)*] owned by the owner's association or in common by the owners of the separate interests [*see Civ. Code § 1351*(*l*)(3)] who possess appurtenant rights to the beneficial use and enjoyment of the common area.

- An owner's association with the power to enforce any obligation of an owner of a separate interest relating to the beneficial use and enjoyment of the common area by means of an assessment on the owner's lot, which may become a lien on the separate interest in accordance with *Civ. Code § 1367* or *1367.1*.

For further discussion, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

[e] Interstate Land Sales Full Disclosure Act

The Department of Housing and Urban Development has the authority, pursuant to the Interstate Land Sales Full

Disclosure Act [*15 U.S.C. § 1701 et seq.*], to regulate interstate land sales. It is unlawful for a subdivider to sell or lease an interest in a subdivision subject to the Act through the facilities of interstate commerce unless a statement of record is filed with the Office of Interstate Land Sales Registration and a copy of the property report is furnished to each purchaser [*15 U.S.C. § 1703(a)(1)*]. In general, the Act does not apply to the sale or lease of lots in a subdivision containing fewer than 25 lots [*see 15 U.S.C. § 1702(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsSubdivisionsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART II. LEGAL BACKGROUND
A. Covenants, Conditions, and Restrictions in General

12-28C California Legal Forms--Transaction Guide §§ 28C.18-28C.29

[Reserved]

§§ 28C.18[Reserved]



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12-28C California Legal Forms--Transaction Guide § 28C.30

§ 28C.30 Covenants Restricting Property to Specified Use

California courts have long enforced lease provisions restricting the use of other portions of a lessor's property [*see Medico-Dental Etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 433-434, 132 P.2d 457]* . In this regard, as the developer of a planned development may be likened to a lessor of a large building or shopping center, the courts will not interfere with an agreement between a developer and a purchaser in a planned development to maintain and devote the development to a large number of uses when the declaration of covenants, conditions, and restrictions executed and recorded by the developer in connection with the development expressly permitted it to disapprove inconsistent uses [*Samuelson National v. Kaiser-Aetna (1979) 99 Cal. App. 3d 553, 558-559, 160 Cal. Rptr. 395]* . For example, a covenant restricting property to "residential purposes only" is enforceable as an equitable servitude and commercial logging is enjoinable as inconsistent and incompatible with the restriction [*Greater Middleton Assn. v. Holmes Lumber Co. (1990) 222 Cal. App. 3d 980, 994, 271 Cal. Rptr. 917]* . It has also been held that the operation of a boarding house violates a restriction limiting lots to residential purposes [*Seaton v. Clifford (1972) 24 Cal. App. 3d 46, 50-51, 100 Cal. Rptr. 779]* . However, the operation of a residential care facility for six or fewer residents was found to be consistent with a single-family residential restriction [*Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 408, 181 Cal. Rptr. 703]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawRestrictive CovenantsGeneral Overview



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§ 28C.31 Covenants Requiring Approval of Improvements

Restrictions that require the approval of a grantor, architectural board, or homeowners association before improving or landscaping are enforceable as long as the approval or disapproval is reasonable [*see Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81* ; *Samuelson National v. Kaiser-Aetna (1979) 99 Cal. App. 3d 553, 557, 160 Cal. Rptr. 395]* . The authority to approve or disapprove must be exercised in conformity with the declaration of restrictions and in good faith [*Hannula v. Hacienda Homes (1949) 34 Cal. 2d 442, 447, 211 P.2d 302]* . Any decision is subject to judicial review to ensure that it was neither arbitrary nor in violation of the restrictions [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 652, 191 Cal. Rptr. 209* ; *see also Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 771-773, 224 Cal. Rptr. 18]* . An arbitrary or unreasonable decision may support a cause of action based on any of the following: breach of covenants, breach of fiduciary duty, breach of duty of good faith and fair dealing, negligence, or intentional misconduct [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 647, 191 Cal. Rptr. 209]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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§ 28C.32 Covenants Limiting Number of Residents

A covenant that limits the number of residents in a household, without any reference to square footage, and absent any showing that this personal living arrangement has an adverse impact on the neighborhood, violates a resident's right of privacy in choosing living companions and can be voided if the restriction involves state action [*see Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 95-99, 226 Cal. Rptr. 199* ; *see also City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 131-137, 164 Cal. Rptr. 539, 610 P.2d 436* (resident limitation based on assumption that groups of unrelated persons present immoral environment for families invalid)]. In the context of a restrictive covenant, "state action" can be found in the affirmative action of the state courts, by enforcing a covenant, to further an unconstitutional invasion of a landowner's privacy [*see Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 98, 226 Cal. Rptr. 199* ; *see also § 28C.36*].

Accordingly, a developer who wishes to impose a residence restriction on a subdivision must be prepared to demonstrate that unrestricted living arrangements will have some adverse impact on the community [*see City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 128, 164 Cal. Rptr. 539, 610 P.2d 436]* . However, this may be an impossible goal to achieve. An approach more likely to be successful is to focus on the use of land, rather than on who the users are, by such measures as regulating floor space, permissible types of structures, and parking requirements [*see City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 133, 164 Cal. Rptr. 539, 610 P.2d 436]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement



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§ 28C.33 Covenants Restricting Height of Trees

The owner of a lot in a residential tract may enjoin the owner of an adjacent lot in the same tract from violating a restrictive covenant limiting the height of trees growing on all lots in the tract. This type of covenant might be used to preserve views or to prevent excessively tall trees from dropping leaves and branches, or falling, on adjoining lots. In this situation, the right to enforce the covenant does not rest solely in the developer. Each lot is both a dominant and subservient tenement with respect to the height restriction. The restriction creates a mutual equitable servitude, breach of which may be enjoined [*Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849, 861-862, 160 Cal. Rptr. 486]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcement



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12-28C California Legal Forms--Transaction Guide § 28C.34

§ 28C.34 Covenants Restricting Radio Antennas and Satellite Dishes

In general, covenants restricting radio antennas and satellite dishes are valid and may be enforced [*see Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219]* , and are not rendered unenforceable even when federal regulations grant a permit for construction of an antenna that would violate the restrictions on antenna height and placement [Hotz v. *Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219]* . The FCC has made clear it is not concerned with the effect of restrictive covenants, which it generally views as merely contractual agreements between private parties. In addition, no federal statute forbids voluntary agreements restricting radio equipment [*Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1054, 6 Cal. Rptr. 2d 219]* . A restriction on antennas is not rendered unenforceable as a violation of *First Amendment* free speech rights [*Conrad v. Dunn (1979) 92 Cal. App. 3d 236, 238, 154 Cal. Rptr. 726]* .

However, when enforcement of the restriction is sought in equity, the trial court has the equitable power to refuse enforcement if it finds the restriction so unreasonable that it violates public policy [*Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219* ; *see § 28C.14[2]*]. Accordingly, a restriction completely banning satellite dishes was found to be unreasonable as a matter of law when the satellite dish was not visible to other residents of the development or the public [Portola Hills Community Assn. v. James (1992) 4 Cal. App. 4th 289, 293, 5 Cal. Rptr. 2d 580] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy ViolationsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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§ 28C.35 Covenants Restricting Solar Energy Systems

A restriction in a deed or other instrument relating to the sale or transfer of an interest in real property, or any provision of a governing document of a homeowners' association [*see Civ. Code § 1351(j)* (definition)], that effectively prohibits or restricts the installation of a solar energy system is void and unenforceable [*Civ. Code § 714(a)*]. However, it is permissible to impose reasonable restrictions on solar energy systems. "Reasonable restrictions" are those that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits [*Civ. Code § 714(b)*; *see Civ. Code § 714(d)* (definitions of "significantly" and "solar energy system"); *see also Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81]* . For these purposes, a solar energy system must meet applicable standards and requirements imposed by state and local permitting authorities [*Civ. Code § 714(c)(1)*]. A solar energy system for heating water must be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agencies. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification must be for the entire solar energy system and installation [*Civ. Code § 714(c)(2)*]. A solar energy system for producing electricity must also meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability [*Civ. Code § 714(c)(2)*]. Whenever approval is required for the installation or use of a solar energy system, the application for approval must be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and may not be willfully avoided or delayed [*see Civ. Code § 714(e)(1)*]. For an approving entity that is a homeowners' association [*see Civ. Code § 1351(a)* (definition)] and is not a public entity, the approval or denial of an application must be in writing. If an application is not denied in writing within 60 days from the date of receipt of the application, the application must be deemed approved, unless that delay is the result of a reasonable request for additional information [*Civ. Code § 714(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawElectric Power IndustryGeneral OverviewEnergy & Utilities LawSolar & Biomass

IndustriesReal Property LawRestrictive CovenantsGeneral Overview



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§ 28C.36 Covenants Restricting Modular Housing

Covenants, conditions, and restrictions may not prohibit the sale, lease, rent, or use of real property merely on the basis that a structure intended for occupancy on the property was constructed at an offsite facility or factory, and subsequently moved or transported in sections or modules to the property. However, modular structures are otherwise subject to the same restrictions as other structures [*Civ. Code § 714.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcement



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§ 28C.37 Covenants Restricting Residence Based on Race, Religion, Sex, Age, and Other Factors

Housing restrictions based on improper discrimination are invalid and unenforceable. Any provision in any deed of real property in California, whether executed before or after the effective date of Civ. Code § 782, is void to the extent that it purports, by providing for payment of a penalty, forfeiture, reverter, or otherwise, to restrict the right of any person to sell, lease, rent, use, or occupy the property on the basis of the person's having any of the listed characteristics [Civ. Code § 782(a); *see* Gov. Code § 12955(a), (d) (listings of protected characteristics)], or a perception that the person has any of these characteristics or that the person is associated with a person who has, or is perceived to have, any of these characteristics [*see* Gov. Code §§ 12926(m), 12955(m)]. The listed characteristics are: ancestry, color, disability, familial status, marital status, national origin, race, religion, sex, sexual orientation, and source of income. However, with regard to familial status, this does not apply to housing for older persons and does not affect certain Civil Code sections relating to housing for senior citizens [Civ. Code § 782(b)]. Any deed, or other written instrument relating to title to real property, containing any provision that would be void under Civ. Code § 782(a), and any written covenant, condition, or restriction annexed to or made a part of any such deed or instrument, by reference or otherwise, must be deemed to be revised to omit that provision [*see* Civ. Code § 782.5(a)].

Similarly, every restriction or prohibition, whether by way of covenant or condition on use or occupation of, or on transfer of title to, real property that directly or indirectly limits acquisition, use, or occupation of real property because of the user's or occupier's race, color, religion, ancestry, sex, national origin, disability, medical condition, marital status, or sexual orientation is void [*Civ. Code § 53(b)*; *see Civ. Code § 51(b)*, (e)]. The Unruh Civil Rights Act [*Civ. Code § 51*] also prohibits enforcement of restrictions against residence based on age [*O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 793-797, 191 Cal. Rptr. 320, 662 P.2d 427* ; *see* Stats. 2005, ch. 420, § 2(d) (*O'Connor* holding is not affected by Civil Rights Act of 2005)]. However, the Act does not prohibit differential treatment based on actual characteristics or differences in needs of users [*Sunrise Country Club Ass'n v. Proud (1987) 190 Cal. App. 3d 377, 381, 235 Cal. Rptr. 404]* ; a prohibition on minors residing in a certain part of a development and banning minors from swimming in an adult pool has been upheld [*Sunrise Country Club Ass'n v. Proud (1987) 190 Cal. App. 3d 377, 382, 235 Cal. Rptr. 404]* . Age restrictions are enforceable in qualified senior citizen housing [*see Civ. Code §§ 51.2-51.4*; *Park Redlands Covenant Control v. Simon (1986) 181 Cal. App. 3d 87, 94-95, 226 Cal. Rptr. 199]* .

Under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], it is unlawful to engage in specified discriminatory practices in housing accommodations or employment on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation [*see Gov. Code § 12955*]. For additional discussion, see *§ 28C.39*.

The Federal Fair Housing Act also prohibits covenants that discriminate on the basis of race, color, religion, sex, familial status, or national origin [*see 42 U.S.C. § 3604(a)*]. A restriction that prohibits occupancy by individuals under 18 years of age and residing with a parent or custodian violates the prohibition on restrictions based on familial status [*see 42 U.S.C. § 3602(k)*]. Federal law also provides an exemption from the prohibition on familial status restrictions for housing for older persons [*see 42 U.S.C. § 3607(b)(2)(B)* (all residents over 62), (C) (80 percent of units occupied by at least one person over 55)]. Housing discrimination against disabled persons is also prohibited under federal law [*42 U.S.C. § 3604(f)*; *see 42 U.S.C. § 3602(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsFair Housing ActReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement



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§ 28C.38 Unconstitutional Covenants Rendered Invalid Due to State Action

Among the civil rights intended to be protected from discriminatory state action by the *Fourteenth Amendment* is the right to acquire, enjoy, own, and dispose of property [*Shelley v. Kraemer (1947) 334 U.S. 1, 10, 68 S. Ct. 836, 92 L. Ed. 1161]* . Standing alone, private restrictive covenants do not violate that property right or any other rights guaranteed by the *equal protection clause of the Fourteenth Amendment*, because such contractual restrictions involve only private action, not state action [*Shelley v. Kraemer (1947) 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161]* . However, in the affirmative action of a court granting judicial enforcement of an improper restrictive agreement, a state converts this private action to state action, thereby denying the aggrieved party equal protection under the *Fourteenth Amendment*. Accordingly, restrictive covenants based on improper discrimination are invalid [*Shelley v. Kraemer (1947) 334 U.S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161]* .

State action in the form of judicial enforcement of restrictive covenants can also further an unconstitutional invasion of a landowner's privacy under the California Constitution, and accordingly, such a covenant is invalid [*see Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 98, 226 Cal. Rptr. 199* ; *see also § 28C.32*].

Therefore, any restrictive covenant that would violate the federal or state constitutions can be enjoined as improper state action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement



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12-28C California Legal Forms--Transaction Guide § 28C.39

§ 28C.39 Discriminatory Restrictions Prohibited by California Fair Employment and Housing Act

Under the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], it is unlawful to engage in specified discriminatory practices in housing accommodations or employment on the basis of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation [*see Gov. Code § 12955*]. Discrimination on these bases is against public policy [*Gov. Code § 12920*], and the opportunity to seek, obtain, and hold housing without discrimination is a civil right [*Gov. Code § 12921(b)*; *see Civ. Code § 51*]. The Department of Fair Employment and Housing is authorized by the Act to take remedial and preventive actions [*Gov. Code § 12901*], such as to use the services of all governmental departments and agencies, including conciliation councils with regard to housing discrimination, and to receive, investigate, and conciliate complaints alleging discriminatory practices [*Gov. Code § 12930(d), (f)*]. It is unlawful for any person, organization, or entity to discriminate through public or private land use practices, decisions, and authorizations because of discrimination based on these characteristics. In this regard, discrimination includes, but is not limited to, restrictive covenants, zoning laws, and denial of use permits that make housing opportunities unavailable [*Gov. Code § 12955*(*l*)]. Any person who holds an ownership interest of record in property he or she believes is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955*(*l*) may record a modification document [*see Gov. Code § 12956.2*; *see also § 28C.40*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsEnforcementReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral Overview



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§ 28C.40 Removal of Unlawful Restrictions in Recorded Documents

[1] Recordation of Restrictive Covenant Modification

[a] Owner May Record Modification Document

A person who holds an ownership interest of record in property and believes that the interest is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955*(*l*) [*see § 28C.39*] may record a document titled "Restrictive Covenant Modification." The county recorder may choose to waive the fee prescribed for recording and indexing instruments [*see Gov. Code § 27361*] in the case of the modification document. The modification document must include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive language struck out [*Gov. Code § 12956.2(a)*].

The county recorder must make available to the public "Restrictive Covenant Modification" forms [*Gov. Code § 12956.2(e)*].

If the holder of an ownership interest of record in property causes a modified document to be recorded that contains modifications not authorized by *Gov. Code § 12956.2*, the county recorder will not incur liability for recording the document. Any liability that may result from the unauthorized recordation is the sole responsibility of the holder of the ownership interest of record who caused the document to be recorded [*Gov. Code § 12956.2(f)*].

Gov. Code § 12956.2 does not apply to persons holding an ownership interest in property that is part of a common interest development [*see Civ. Code § 1351(c)* (definition)] if the board of directors of that common interest development is subject to the requirements of *Civ. Code § 1352.5(b)*, which proscribes restrictive covenants in any declaration or other governing document for the development [*Gov. Code § 12956.2(g)*].

[b] County Counsel Must First Examine Documents

Before recording the modification document, the county recorder must submit the modification document and the original document to the county counsel, who must determine whether the original document contains an unlawful

restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income [*see Gov. Code § 12955(p)* (definition)], or ancestry. The county counsel must return the documents and inform the county recorder of the determination. The county recorder must refuse to record the modification document if the county counsel finds that the original document does not contain an unlawful restriction [*Gov. Code § 12956.2(b)*].

[c] Modification Is Indexed Same as Original

The modification document must be indexed in the same manner as the original document being modified. It must contain a recording reference to the original document in the form of a book and page or instrument number and the date of the recording [*Gov. Code § 12956.2(c)*].

[d] Restrictions in Modification Are Paramount

Subject to covenants, conditions, and restrictions that were recorded after the recording of the original document that contains the unlawfully restrictive language and subject to covenants, conditions, and restrictions that will be recorded after the modification document, the restrictions in the modification document, once recorded, are the only restrictions having effect on the property. The effective date of the terms and conditions of the modification document must be the same as the original document's effective date [*Gov. Code § 12956.2(d)*].

[e] Adding Racially Restrictive Covenant Is Offense

Any person who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. Notwithstanding any other provision of law, a prosecution for a violation must commence within three years after the discovery of the document's recording. The county recorder will not incur any liability for recording the document [*Gov. Code § 12956.1(c)*].

[2] Duty to Inform Persons That Unlawful Restrictions Are Removable

A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person must place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following [*Gov. Code § 12956.1(a), (b)(1)*; *see Civ. Code § 1351* (definitions of "association," "governing document," and "declaration")]:

> If this document contains any restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to *Section 12956.2 of the Government Code*. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.

However, the requirement does not apply to documents being submitted for recordation to a county recorder [*Gov. Code § 12956.1(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsEnforcementReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral Overview



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[Reserved]

§§ 28C.41[Reserved]



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12-28C California Legal Forms--Transaction Guide § 28C.50

§ 28C.50 Restrictive Covenants as Property for Purposes of Eminent Domain

Like any other property, property that is subject to a restrictive covenant may be acquired through eminent domain proceedings by a public agency for a purpose contrary to the covenant. In this event, the agency, which cannot be enjoined from carrying out its intended purpose through exercise of its eminent domain power, must compensate all landowners in whose favor the restrictive covenant runs [*see Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964]* . This is because, for purposes of eminent domain proceedings, a restrictive covenant in the form of a building restriction constitutes "property" within the meaning of *Cal. Const., art. I, § 19*, requiring just compensation for the public taking of private property [*Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964* (construing former *Cal. Const., art. I, § 14*; *now see Cal. Const., art. I, § 19*)]. Therefore, the public or private condemning agency must compensate any landowners for damage incurred as a result of the use of the condemned property in a manner that violates the restrictive covenant [*Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsGeneral OverviewReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawEminent Domain ProceedingsValuationReal Property LawRestrictive CovenantsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART II. LEGAL BACKGROUND
C. Restrictive Covenants as Property Interests

12-28C California Legal Forms--Transaction Guide §§ 28C.51-28C.99

[Reserved]

§§ 28C.51[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28C California Legal Forms--Transaction Guide § 28C.100

§ 28C.100 Client Interview for Subdivider

[1] Facts

1. Names, addresses, and telephone numbers of owner and of any consultants, engineers, or others employed by owner for development.

2. Legal status of owner:

a. Individual person.

b. Corporation.

c. Partnership.

d. Other.

3. Description of development, including:

a. Location (including street address, nearest cross streets, city, county, and state).

b. Legal description.

c. Zoning classification.

d. Description of improvements to be erected on lots.

e. Description of surrounding area, including proximity to elementary and secondary

schools, airports, and fire stations.

f. Description of required public dedications, including parks, sidewalks, and roads.

4. Government restrictions applicable to development, including:

a. County ordinances.

b. Municipal codes.

c. Zoning restrictions.

d. Restrictions of special entities, such as park and water districts.

5. Proposed method of financing, including:

NOTE:
For a detailed discussion of financing of common interest developments, see Ch. 30A, ***Construction Financing*** .

a. Sources.

b. Loan commitments already obtained.

c. Financial assistance to be offered to purchasers of lots.

d. Presale requirements imposed by lender.

[2] Documents

1. Copy of preliminary title report covering development.

2. Copy of any local building permits already issued.

3. Copy of any contracts owner has entered into with city or county with respect to development.

4. Copy of any subdivision maps that have been prepared for development.

5. Copy of any environmental impact report or draft environmental impact report that has been prepared for project.

6. Copy of relevant municipal codes, zoning restrictions, and other governmental controls covering development.

7. Copies of any existing loan documents.

8. Copies of declarations of restrictions used by developer for similar projects.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsSubdivisions



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28C California Legal Forms--Transaction Guide §§ 28C.101-28C.109

[Reserved]

§§ 28C.101[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

12-28C California Legal Forms--Transaction Guide § 28C.110

§ 28C.110 Determining Which Restrictive Covenants to Include in Agreement

1. Consult with client about specific needs and desires:

a. For standard or custom-home residential subdivision, comprehensive restrictions may be appropriate [*see §§ 28C.200, 28C.201*].

b. For agreement among landowners of existing lots, more limited restrictions tailored to specific needs may be appropriate [*see § 28C.210*].

2. Review applicable local, state, and federal law to determine whether specific restrictions may be invalid [*see § 28C.112*].

NOTE:
A restriction that violates a provision of law is likely to be unenforceable. For example, a covenant that restricts the installation or use of solar energy systems is void and unenforceable [*Civ. Code § 714(a)*; ***see*** *Civ. Code § 714(b)* (this prohibition does not apply to provisions that impose reasonable restrictions on solar systems)].

3. Review list of standard restrictive covenants to determine which standard clauses may be used, and which covenants should be specially drafted.

NOTE:
For a list of typical restrictive covenants, see *§ 28C.130*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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B. Preliminary Determinations

12-28C California Legal Forms--Transaction Guide § 28C.111

§ 28C.111 Determinations Related to Development and Formation of Subdivision

NOTE:

The following determinations are important to keep in mind, because governmental controls may restrict the type of covenants that are valid or required in a particular agreement.

1. What local requirements govern proposed development [*see Ch. 30B, Zoning, Building, and Environmental Entitlements and Permits, § 30B.100* et seq.]?

2. According to local governmental entities and utility company, are adequate utilities and other necessary services available?

3. According to local governmental entities and utility company, what type of utility and other easements are required?

4. Should developer characterize development as "common interest development" [*see* Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsSubdivisionsReal Property LawSubdivisionsLocal Regulation



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12-28C California Legal Forms--Transaction Guide § 28C.112

§ 28C.112 Determining Applicability of Local, State, and Federal Laws

NOTE:

A developer subdividing a parcel of land must comply with a variety of statutes. The primary statutes are listed here. The following statutes are also important to keep in mind in drafting an agreement, because they will affect the covenants that are appropriate in a particular agreement.

1.For purposes of Davis-Stirling Common Interest Development Act [*see Civ. Code §§ 1350-1372*], will proposed project have either or both of following features and therefore be considered "common interest development" and "planned development" [*see Civ. Code § 1351(c), (k)*; *see also § 28C.17[2][d]*]?

a. Common area owned by association or in common by owners of separate interests who possess appurtenant rights to beneficial use and enjoyment of common area.

b. Power exists in association to enforce obligation of owner of separate interest with respect to beneficial use and enjoyment of common area by means of assessment on separate interests.

2. Will development consist of at least five lots and therefore be subject to public report and other requirements of Subdivided Lands Act [*Bus. & Prof. Code §§ 11000-11200*; *see Bus. & Prof. Code § 11004.5(a)*]?

NOTE:

The Subdivided Lands Act incorporates the definition of "planned development" set forth in the Davis-Stirling Common Interest Development Act [*Bus. & Prof. Code § 11003*; [***see*** *Civ. Code § 1351(k)*].

3. What, if any, subdivision maps must (or may) be prepared under Subdivision Map Act [*see Gov. Code §§ 66410-66499.37*] and applicable local subdivision ordinance [*see § 28C.17[2][b]*]

NOTE:

For a detailed discussion of the general requirements of the Act, refer to Ch. 30, ***Subdivision Regulation***, § 30.100 et seq.

a. Tentative map and final map if development contains five or more lots [*Gov. Code §§ 66426*, *66428*; *see Ch. 30, Subdivision Regulation, § 30.100* et seq.].

b. Parcel map if development will contain four or fewer lots, unless local ordinance waives requirement of parcel map [*Gov. Code § 66428*; *see Ch. 30, Subdivision Regulation, § 30.100* et seq.].

c. Vesting tentative map in lieu of any tentative map required by Act, if developer wants to obtain vested right to proceed with development in substantial compliance with existing local requirements [*see Gov. Code §§ 66498.1-66498.7*; *see also Ch. 30, Subdivision Regulation, § 30.100* et seq.].

4. Is development subject to additional regulation under any of following?

NOTE:

For a discussion of these laws, refer to Ch. 34, ***Condominiums*** , § 34.100 et seq.

a. Interstate Land Sales Full Disclosure Act [*see 15 U.S.C. §§ 1701-1720*].

b. National Environmental Protection Act of 1969 (NEPA) [*see 42 U.S.C. §§ 4321-4370a*].

c. California Environmental Quality Act of 1970 (CEQA) [*see Pub. Res. Code §§ 21000-21177*] and environmental impact regulations [*see 10 Cal. Code Reg. §§ 2820-2823.1*].

d. California Coastal Act of 1976 [*see Pub. Res. Code §§ 30000-30900*].

e. Any other applicable environmental regulations.

NOTE:

For a complete discussion of applicable environmental law, see California Environmental Law & Practice(Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawRestrictive CovenantsSubdivisionsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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12-28C California Legal Forms--Transaction Guide §§ 28C.113-28C.119

[Reserved]

§§ 28C.113[Reserved]



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C. Procedural Guide

12-28C California Legal Forms--Transaction Guide § 28C.120

§ 28C.120 Procedural Guide to Adopting Restrictive Covenants

1. Determine which restrictive covenants to include.

NOTE:
For a checklist of types of restrictive covenants to include in particular types of agreements, see *Section 28C.130*. For a list of other considerations in determining which covenants to employ, see *Section 28C.110*. Covenants applicable to a subdivision declaration of restrictions will likely differ from those applicable to an agreement for restrictive covenants between adjoining landowners.

2. Draft restrictive covenants:

a. For developer of subdivision, draft declaration of restrictions [*see §§ 28C.200, 28C.201*].

b. For owners of existing adjoining lots, draft agreement for mutual restrictive covenants [*see § 28C.210*].

NOTE:
For a drafting guide to a typical subdivision declaration of restrictions, see *Section 28C.130*.

3. Ensure restrictions are not so unreasonable as to violate public policy, and thus be unenforceable.

NOTE:
A court may refuse to enforce a restrictive covenant if the covenant is so unreasonable that it violates public policy. A covenant is so unreasonable as to violate public policy if the harm caused by the

restriction is so disproportionate to the benefit produced by performance of the covenant that the promise ought not to be enforced [*Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219]* .

4. Ensure restrictions do not violate federal or state constitutions, and therefore become unenforceable

NOTE:
A court's enforcement of a private covenant that violates the federal or state constitution is unconstitutional because it lends the affirmative aid of the courts to furthering an unconstitutional action. This type of state action violates both the federal and state constitutions [*Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 98, 226 Cal. Rptr. 199* ; ***see*** *Shelley v. Kraemer (1947) 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161]* .

5. So that covenants will run with the land, binding and benefiting all current and future landowners, ensure that declaration complies with *Civil Code Section 1468* by including provisions that accomplish all of following [*Civ. Code § 1468(a)-(c)*; *see also* P 7c, *below*]:

a. Particularly describe land of covenantor to be affected by covenants, and land of covenantee to be benefited.

b. Expressly bind successive owners of land for benefit of land owned by, granted by, or granted to covenantee.

c. State that each act in declaration relates to use, repair, maintenance, or improvement of, or payment of taxes and assessments on, land or some part of it.

6. For subdivisions, verify that covenants and restrictions do all of following [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see also* P 7a, *below*]:

a. Establish common plan for ownership of property in subdivision (and impose those restrictions as part of common plan);

b. Describe property to which restrictions are to apply; and

c. State that they are to bind all purchasers and their successors.

7. Record restrictions in following manner:

NOTE:
For a complete discussion of deeds and recording, see Chapter 27, ***Deeds and Recording*** .

a. For subdivision, record:

(1) Declaration of restrictions before selling any homes, lots, or other interests in subdivision [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see §§ 28C.200, 28C.201*].

(2) Deed for each parcel on sale, stating that it is subject to restrictive covenants in declaration and incorporating declaration by reference [*see § 28C.220*].

NOTE:

In order for recorded subdivision CC&Rs to be enforceable and binding on subsequent purchasers, it is *not* required that they be referenced in a subsequent purchaser's deed [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . However, there is no prohibition against including such a reference in the deeds to purchasers, and practitioners may refer to and incorporate by reference the CC&Rs in deeds to subdivision interests (as most probably did and thought they were required to prior to the ruling in *Citizens*) [*see § 28C.12A*].

b. For agreement for mutual restrictions among adjoining landowners, record agreement after execution and acknowledgment [*see § 28C.210*].

c. Record in each county in which property is located [*see Civ. Code § 1468(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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12-28C California Legal Forms--Transaction Guide § 28C.121

§ 28C.121 Procedural Guide for Subdivision

1. Obtain necessary construction permits.

NOTE:
For the procedure required to procure local, state, and regional construction permits, refer to Ch. 30B, ***Zoning, Building, and Environmental Permits***, § 30B.100 et seq.

2. Prepare, process, and record subdivision map.

NOTE:
For a discussion of the requirements for preparing, processing, and recording subdivision maps under the Subdivision Map Act [***see*** *Gov. Code § 66410 et seq.*], refer to Ch. 30, ***Subdivision Regulation***, § 30.100 et seq.

3. Draft and record declaration of restrictions [*see §§ 28C.120, 28C.130*; *see also Civ. Code § 1468*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsSubdivisionsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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12-28C California Legal Forms--Transaction Guide §§ 28C.122-28C.129

[Reserved]

§§ 28C.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
D. Drafting Guide

12-28C California Legal Forms--Transaction Guide § 28C.130

§ 28C.130 Drafting Guide for Agreement Containing Restrictive Covenants

NOTE:

Before drafting a declaration of restrictions [***see*** *§§ 28C.200, 28C.201*] or an agreement for mutual restrictive covenants among adjoining landowners [***see*** *§ 28C.210*], the attorney should consult with the client to determine what types of covenants are appropriate to the needs of the parties. This section provides a checklist of common types of restrictive covenants and when each type is typically used.

1. If client is developer creating subdivision, include following restrictions in declaration of restrictions:

NOTE:

Most of these restrictions apply to a standard residential subdivision, in which the houses are built by the developer. They are also applicable to subdivisions of owner-built custom homes. Additional restrictions applicable only to custom-home subdivisions are also included and appropriately noted.

a. Control of land use and type of building that may be built on lot.

NOTE:

Most subdivision declarations limit land use to residential purposes only. Accordingly, permissible structures include single-family dwellings, private garages, and storage buildings for gardening and other household supplies and equipment.

A covenant may not prohibit the sale, lease, rent, or use of real property merely on the basis that a structure intended for occupancy on the property was constructed at an offsite facility and subsequently moved in sections to the property. Modular structures are

otherwise subject to the same restrictions as all other structures [*Civ. Code § 714.5*].

b. Restriction on redivision.

NOTE:

This type of restriction is commonly included in custom-home subdivisions, in which houses are not pre-built, to prevent owners from further subdividing their lots beyond the original subdivision by the developer.

c. Minimum lot area and width.

NOTE:

This type of restriction can be used to prevent any structure from being built on a lot that is less than a specified size.

d. Minimum dwelling cost, quality, and size.

NOTE:

This type of restriction is used to ensure that all houses in the subdivision will be of a consistent appearance, size, and high quality. Size restrictions are a permissible method to limit the number of residents of each household [***see*** *City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 131-137, 164 Cal. Rptr. 539, 610 P.2d 436* (resident limitation based on assumption that groups of unrelated persons present immoral environment for families invalid)].

e. Location of buildings.

NOTE:

Location restrictions are used to ensure that structures are not placed too near the edge of a lot, creating a congested appearance and reducing the privacy of adjoining lots. The client may wish to provide that storage buildings and garages have different restrictions from houses.

f. Maintenance of easements.

NOTE:

The subdivider will want to ensure that easements for utilities and drainage are sufficiently provided for. Generally, this type of covenant prevents owners from placing any structure, vegetation, or material on the easement. Further, it requires the owner to maintain drainage easements, and the utility company or district to maintain utility easements.

g. Prohibition on nuisances.

NOTE:

A nuisance restriction is intended to proscribe any noxious or offensive activity from being carried on on a lot, or anything else that might be an annoyance or nuisance to the neighborhood. In a custom-home subdivision, the covenant prohibiting various types of activities deemed to be nuisances can be quite extensive [***see*** *§ 28C.201[2]*, P 3.07].

h. Prohibition on temporary structures.

NOTE:

A restriction on temporary structures is intended to prevent an owner from using a trailer, basement, tent, shack, garage, barn, or other outbuilding as a residence. However, temporary offices used by building contractors during construction are typically permitted.

i. Prohibition on signs.

NOTE:

This type of restriction generally prohibits any type of sign other than a professional sign, a sign advertising the property for sale or rent, or a sign used by a builder to advertise the property during the construction and sales period.

j. Prohibition on oil and mining operations.

NOTE:

This restriction prohibits any oil or mining operations on the property, including the construction of wells, towers, derricks, tanks, tunnels, or anything else associated with the prohibited activity.

k. Prohibition on livestock and poultry.

NOTE:

A restriction on animals usually prevents any animals from being kept, raised, or bred on the property other than household pets, as long as the pets are not kept for commercial purposes.

l. Control of garbage and refuse disposal.

NOTE:

This type of restriction generally provides that each owner must keep garbage in sanitary containers, and prohibits any lot from being used to dump or store rubbish.

m. Approval of water supply system.

NOTE:

A water supply covenant will typically require that the owner obtain the local water authority's approval before installing the system.

n. Approval of sewage disposal system.

NOTE:

A sewage disposal covenant will typically require that the owner obtain the local health authority's approval before installing the system.

o. Approval of solar energy system.

NOTE:

Restrictions that effectively prohibit or restrict the installation of a solar energy system are void [*Civ. Code § 714(a)*]. However, it is permissible to impose reasonable restrictions on solar energy systems. "Reasonable restrictions" are those that do not significantly increase

the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits [*Civ. Code § 714(b)*; ***see*** *Civ. Code § 714(d)* (definitions of "significantly" and "solar energy system")]. For these purposes, a solar energy system must meet applicable standards and requirements imposed by state and local permitting authorities [*Civ. Code § 714(c)(1)*]. A solar energy system for heating water must be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agencies. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification must be for the entire solar energy system and installation [*Civ. Code § 714(c)(2)*]. A solar energy system for producing electricity must also meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability [*Civ. Code § 714(c)(2)*]. Whenever approval is required for the installation or use of a solar energy system, the application for approval must be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and may not be willfully avoided or delayed [***see*** *Civ. Code § 714(e)(1)*]. For an approving entity that is a homeowners' association [***see*** *Civ. Code § 1351(a)* (definition)] and is not a public entity, the approval or denial of an application must be in writing. If an application is not denied in writing within 60 days from the date of receipt of the application, the application must be deemed approved, unless that delay is the result of a reasonable request for additional information [*Civ. Code § 714(e)(2)*].

p. Provision for protective screening.

NOTE:

This type of restriction is intended to provide for walls, fences, and plants to shield the subdivision from busy streets or highways, or other conditions from which the residents seek view and noise protection. These screens are also intended to provide a measure of privacy between adjoining lots. The owners of the affected lots are generally responsible for maintaining the screens.

q. Protection of slope control areas.

NOTE:

Slope control area restrictions are intended to maintain the integrity of inclined areas too steep or unstable to be able safely to support construction. This can be achieved by prohibiting any construction within the affected area, maintaining drainage patterns, and requiring planting that will prevent excessive erosion.

r. Maintaining sight distance at intersections.

NOTE:

This type of restriction is intended to provide adequate lines of sight at intersections, to allow drivers to see traffic approaching from intersecting streets. This goal can be achieved by preventing plants, walls, fences, or signs from being placed in the restricted area.

s. Maintenance of open space near parks and water courses.

NOTE:

An open-space restriction is intended to maintain easy access to, and a pleasant appearance of, park space, and to prevent water courses from blockage due to dumped material.

t. Architectural control.

NOTE:

The purpose of an architectural control covenant is to ensure that all structures in a subdivision are of high-quality construction, are of harmonious design and construction, and are placed carefully in relation to each other and the topography. This can be achieved by establishing an architectural review committee, which will first approve designs and placement before construction or alteration. To be valid, the covenant should set forth the standards and procedures the committee will employ in reviewing applications. Any disapproval by the committee must be reasonable [***see*** *Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81* ; ***see also*** *§ 28C.31*].

u. Specific design criteria.

NOTE:

In custom-home subdivisions, this type of covenant may be included to require houses to include specified common elements, such as general design type, construction material, size, roof design and construction, color, ornamentation such as walls, lamps, and other fixtures, and landscaping.

2. In addition to the applicable covenants specified in Paragraph 1, *above*, include following general terms in agreement:

NOTE:

These general terms apply to both standard and custom-home subdivisions.

a. Description of property.

NOTE:

The property to be affected by the covenants, and the land to be benefited, should be specifically described, including the legal description [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; ***see*** *Civ. Code § 1468(a)*].

b. Description of parties.

NOTE:

The agreement should name the parties to the agreement, state that they and the successive owners are expressly bound for the benefit of the land owned by, granted by, or granted to the covenantee [***see*** *Civ. Code § 1468(b)*], and state that the agreement binds all purchasers and their successors [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

c. Purpose of agreement.

NOTE:

The agreement must establish a common plan for the ownership of property in the subdivision and impose specific restrictions as part of that common plan [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . To satisfy statutory requirements for covenants that run with the land, the agreement should state that the purpose of the agreement is to create covenants that run with the land for the benefit of all current and future owners [***see*** *Civ. Code § 1468*], and that the acts specified in each covenant relate to the use, repair, maintenance, or improvement of, or payment of taxes and assessments on, the land or some part of it [***see*** *Civ. Code § 1468(c)*].

d. Term of agreement.

NOTE:

The agreement should explicitly state that all of its covenants and restrictions are to be binding on all purchasers and their successors [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . To satisfy statutory requirements for covenants that run with the land, the agreement should state that the covenants are to run with the land and will be binding on all parties and all persons claiming under them for a specified period from the date the covenants are recorded [***see*** *Civ. Code § 1468(c)*]. The agreement may also provide that the covenants will be automatically extended for successive periods unless an instrument signed by a majority of the owners agrees to change the covenants.

e. Enforcement provision.

NOTE:

This type of provision may provide that enforcement will be by proceedings at law or in equity against any person who violates or attempts to violate any covenant. Enforcement may be by injunction as well as monetary damages.

f. Severability provision.

NOTE:

This provision should state that if any provision of the agreement is found to be unenforceable, the remainder of the agreement will remain in full force and effect, as if the unenforceable provision had never been included.

3. For agreement for mutual restrictive covenants among adjoining landowners [*see § 28C.210*]:

NOTE:

Because it may be drafted for a specific purpose, an agreement for mutual restrictive covenants among owners of existing property may not be as comprehensive as a declaration of restrictions for a subdivision, and may contain only certain specific covenants.

a. Choose appropriate restrictive covenants [*see* P 1, *above*].

b. Include applicable general provisions [*see* P 2, *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawElectric Power IndustryGeneral OverviewEnergy & Utilities LawSolar & Biomass IndustriesReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART III. TRANSACTION GUIDE
D. Drafting Guide

12-28C California Legal Forms--Transaction Guide §§ 28C.131-28C.199

[Reserved]

§§ 28C.131[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART IV. FORMS
A. Declarations of Restrictions

12-28C California Legal Forms--Transaction Guide § 28C.200

§ 28C.200 Declaration of Restrictions for Standard Residential Subdivision

[1] Comment

[a] Use of Form

This form is a declaration of restrictions intended to provide the restrictive covenants essential to the sound development of a proposed residential area. This form is meant to be used in a standard residential subdivision in which the houses are built by the developer and then sold. In subdivisions in which the developer performs all phases of work, including building and selling homes, the restrictions are generally not very extensive. This is because the developer is able to control the design of the individual homes. For a form containing significantly more restrictive declarations of restrictions for use in a custom-home subdivision in which each house is built separately by the property owner, see *Section 28C.201*. For a larger subdivision including park, business, and civic areas, additional covenants would be necessary. The covenants in this form should be scrutinized to determine whether they meet the particular goals of the intended development or require modification.

In order to be binding on *all* subsequent purchasers, the declaration must be recorded prior to the first sale of any home, lot, or other interest in the subdivision [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see also* [b], *below*].

For a guide to drafting a declaration of restrictions, with discussion of the effect of many of the covenants presented in this form, see *Section 28C.130*.

[b] Enforcement of Restrictive Covenants

[i] Recorded CC&Rs for Subdivision

If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan, is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent

purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. The restrictions are not unenforceable merely because they are not additionally cited in a deed or other document at the time of the sale [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in the deed to the recorded restrictions)].

Recorded restrictions are not effective, that is, they do not "spring into existence," until an actual conveyance subject to them is made. Therefore, the developer of a subdivision could modify or rescind any recorded restrictions before the first sale [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 365, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

The rules summarized above and announced by the California Supreme Court in 1995 in the *Citizens* case, are retroactive [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 367-368, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . For further discussion of the *Citizens* case, see *Section 28C.12A.*

[ii] Covenants Running With the Land and Equitable Servitudes

By adopting its rule in *Citizens* [*see* [i], *above*], the California Supreme Court eliminated or at least minimized the necessity of characterizing restrictions and covenants (CC&Rs) for a subdivision as either covenants running with the land or as equitable servitudes, at least with respect to the issue of whether recorded CC&Rs are binding on subsequent purchasers. The Court declined to "merge" the doctrines of covenants running with the land and equitable servitudes into a single doctrine (as some commentators have suggested be done). However, it did state that with respect to the issue before it, which involved how a covenant is created, it saw no difference between covenants and equitable servitudes, and expressly stated that the rule it was adopting (summarized in [i], *above*) applies equally to both [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 354-355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

For a discussion of the enforcement of covenants and restrictions as either covenants running with the land or as equitable servitudes, see *§§ 28C.13-28C.16.*

[iii] Requirement That Covenant Not Violate Public Policy

Generally, a restrictive covenant is unenforceable if it violates public policy. A trial court has the equitable power to refuse enforcement of a restrictive covenant if the court finds the covenant so unreasonable that it violates public policy. A restrictive covenant is so unreasonable as to violate public policy when the harm caused by the restriction is so disproportionate to the benefit produced by performance of the covenant that the promise ought not to be enforced [*Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1057, 6 Cal. Rptr. 2d 219* ; *see* Restatement of Property § 539 (Comment f)].

For example, restrictions intended to create a monopoly are void [*Burdell v. Grandi (1907) 152 Cal. 376, 383, 92 P. 1022]* . Any covenant is void if it purports to limit the acquisition, use, or occupation of real property because of the user's or occupier's race, color, religion, ancestry, sex, national origin, disability, medical condition, marital status, or sexual orientation [Civ. Code § 53(b); *see* Civ. Code § 51(b), (e) (listings of protected characteristics)]. Any deed, or other written instrument relating to title to real property, containing any provision that would be void under Civ. Code § 782(a) [*see § 28C.37*], and any written covenant, condition, or restriction annexed to or made a part of any such deed or instrument, by reference or otherwise, must be deemed revised to omit that provision [*Civ. Code § 782.5(a)*]. Age restrictions are enforceable only in specialized care facilities for the elderly; otherwise they violate the Unruh Civil Rights Act [*Civ. Code § 51*; *Park Redlands Covenant Control v. Simon (1986) 181 Cal. App. 3d 87, 94-95, 226 Cal. Rptr. 199]* .

In addition, a restriction placed on the installation or use of a solar energy system must be reasonable. Reasonable

restrictions are those that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits [*Civ. Code § 714*; *see § 28C.35*)]. A restriction may not prohibit the sale, lease, rent, or use of real property merely on the basis that a structure intended for occupancy on the property was constructed at an offsite facility or factory, and subsequently moved or transported in sections or modules to the property. However, modular structures are otherwise subject to the same restrictions as all other structures [*Civ. Code § 714.5*].

[iv] Action for Violation of Restrictions

An action for violation of a restriction, as defined in *Civ. Code § 784*, must be commenced within five years [*Code Civ. Proc. § 336(b)*]. Under Section 784, "restriction" means a limitation on, or provision affecting, the use of real property in a declaration, deed, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction [*Civ. Code § 784*]. For additional discussion, see *§ 28C.16A.*

[c] Construction of Restrictive Covenants

Because they limit the use and transfer of property, restrictive covenants are construed strictly against the person seeking to enforce them and in favor of the unencumbered use of the property [*Terry v. James (1977) 72 Cal. App. 3d 438, 443, 140 Cal. Rptr. 201* ; *Biagini v. Hyde (1970) 3 Cal. App. 3d 877, 880, 83 Cal. Rptr. 875]* . The primary object, however, in construing all contracts, is to effectuate the legitimate desires of the covenanting parties [*Hannula v. Hacienda Homes (1949) 34 Cal. 2d 442, 444-445, 211 P.2d 302]* . The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation [*Lincoln Sav. & Loan Assn. v. Riviera Estates Assn. (1970) 7 Cal. App. 3d 449, 463, 87 Cal. Rptr. 150]* . In ascertaining the intent of the language expressing the covenant, the court will look to the purpose for which the restriction was imposed [*Smith v. North (1966) 244 Cal. App. 2d 245, 248, 53 Cal. Rptr. 94]* .

[d] Specific Restrictive Covenants

[i] Residential Purposes Only

This form contains a covenant restricting the use of property to residential purposes [*see* [2], P 1, *below*]. This covenant precludes any business use of the restricted property. For example, a property owner may be enjoined by the other homeowners in the restricted tract from running a "boarding house" in violation of such a covenant [*see Seaton v. Clifford (1972) 24 Cal. App. 3d 46, 51, 100 Cal. Rptr. 779* ; *see also § 28C.30*].

[ii] Minimum Dwelling and Lot Specifications

This form contains covenants establishing the minimum dwelling cost, quality, and size, the location of the dwelling on a lot, and the minimum lot area and width [*see* [2], PP 2-4, *below*]. The covenant establishing minimum dwelling cost, quality, and size maintains property values by protecting desirable dwellings from the encroachment of buildings below the standards of residential character originally established. Minimum front and side yard regulations are essential to the appearance of the neighborhood and to provide light, air, and privacy. Setbacks from the rear lot line are typically required because, generally, dwellings at the rear of lots have had an adverse effect on the successful use of the remaining land in a subdivision and in maintaining its highest desirable value. A restrictive covenant prohibiting the resubdivision of lots is generally considered inadvisable because it is so inflexible; it is better to control lot size by specifying the minimum width and lot area.

[iii] Protective Screening

This form contains a covenant restricting the use of protective screening to certain areas [*see* [2], P 14, *below*]. Protective screening secures a reasonably effective physical barrier both between residential properties and adjoining

business uses and between arterial streets and lots backing into them; it also minimizes adverse views at block ends. Fences, walls, and/or plant material may be used for protective screening.

[iv] Architectural Control

This form contains a covenant restricting development to that approved by an architectural control committee [*see* [2], PP 18-20, *below*]. The purpose of the covenant is maintenance of property values through thoughtful development of the community accomplished by an architectural control committee's review of plans and specifications of buildings, fences, walls, and planting as to location and exterior design [*see, e.g., Weston v. Foreman (1952) 108 Cal. App. 2d 686, 239 P.2d 513]* . The committee should review both new construction and future alterations.

Initially, the committee will probably be composed of the original owner or owners. An owner who no longer owns any portion of the development loses all right to approve or disapprove of plans [*Bramwell v. Kuhle (1960) 183 Cal. App. 2d 767, 775-777, 6 Cal. Rptr. 839]* . Both the approval and disapproval of plans must be in good faith [*Bramwell v. Kuhle (1960) 183 Cal. App. 2d 767, 779, 6 Cal. Rptr. 839]* and must be reasonable [*Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81]* .

For further discussion of covenants requiring approval before construction or alteration, see *Section 28C.31*.

[v] Property Owners' Maintenance Association

If adequate public maintenance of streets, parks, or other facilities is not available, it is advisable to establish a property owners' maintenance association or other acceptable community maintenance organization with the powers to provide maintenance, to assess the benefited property owners at a reasonable rate, and to collect such assessments; however, this power of assessment will bring the development within the definition of a "planned development" and make it subject to the Davis-Stirling Common Interest Development Act [*see Civ. Code § 1350 et seq.*; *see also § 28C.17[2][d]*]. The association can also provide an effective means of obtaining adherence to protective covenants. The architectural control committee may be a part of the association. For articles and bylaws of an owners' association, see Ch. 13A, *Nonprofit Unincorporated Associations* .

[e] Procedure for Adopting Declaration

The drafting and recording of a declaration of restrictions is only part of a much larger transaction involving the subdivision of a tract of land. For a transaction guide covering the entire transaction context, see *Ch. 30, Subdivision Regulation, § 30.100* et seq.

This declaration should be executed by the owner of the subdivision, acknowledged [*see Civ. Code §§ 1180-1207*], and recorded in the office of the recorder in each county in which the land is located [*Civ. Code §§ 1169, 1468(d)*]. Recording the declaration prior to the sale or other transfer of any home, lot, or other interest in the subdivision gives constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *§ 28C.12A*]. At least for all property described, referred to, and made subject to the recorded declaration, it is not necessary to also refer to the restrictions in the deeds at the time of sale to subsequent purchasers of interests in the subject property [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in the deed to the recorded restrictions); *see § 28C.12A*]. Notwithstanding this rule, practitioners may elect to refer to the restrictions in individual deeds. For a deed that refers to recorded restrictions and incorporates them by reference, see *Section 28C.220*. For further discussion of notice, acknowledgment, and recording, see Chapter 27, *Deeds and Recording* .

[2] FORM

Declaration of Restrictions for Standard Residential Subdivision

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

_____
..... Space above this line for recorder's use

DECLARATION OF RESTRICTIONS

This DECLARATION OF RESTRICTIONS is made on _____[*date*], by _____[*name of owner of subdivision*] ("Declarant").

WHEREAS, Declarant is the owner of the following real property ("the Property"): _____[*describe tract with particularity either in this declaration or by reference to a recorded tract or subdivision map including lot numbers*]; and

WHEREAS, Declarant intends to sell the above described property, restricting it in accordance with a common plan designed to preserve the value and residential qualities of the land, for the benefit of its future ownersand their successors.

NOW, THEREFORE, Declarant declares that the Property described above is held and will be held, transferred, encumbered, used, sold, conveyed, leased, and occupied subject to the covenants, restrictions, and limitations set forth in this Declaration, all of which are declared and agreed to be in furtherance of a common plan for the subdivision, improvement, use, and sale of the Property, and are established and agreed on for the purpose of enhancing and protecting the value, desirability, and attractiveness of the Property and every part of it. All of the restrictions, covenants, and limitations will run with the land and will be binding on all parties having or acquiring any right, title, or interest in the Property described above or any part thereof, and will inure to the benefit of all of the Property and the future owners of that Property. Each grantee of a conveyance or purchaser under a contract or agreement of sale covering any right, title, or interest in any part of the Property, by accepting a deed or a contract of sale or agreement of purchase, accepts the document subject to, and agrees to be bound by, any and all of the restrictions, covenants, and limitations set forth in this Declaration.

Land Use and Building Type

1. No lot may be used except for residential purposes. No building may be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage for not more than two cars.

Dwelling Cost, Quality, and Size

2. No dwelling will be permitted on any lot at a cost of less than $ _____, based on cost levels

prevailing on the date these covenants are recorded. It is the intention and purpose of this covenant to assure that all dwellings are of a quality of workmanship and materials substantially the same or better than that which can be produced on the date these covenants are recorded at the minimum cost stated herein for the minimum permitted dwelling size. The ground floor area of the main structure, exclusive of one-story open porches and garages, must be not less than _____ square feet for a one-story dwelling, nor less than _____ square feet for a dwelling of more than one story.

Building Location

3. (a) No building may be located on any lot nearer to the front lot line or nearer to the side street line than the minimum building setback lines shown on the recorded _____[*specify, e.g.,* subdivision map]. In any event, no building may be located on any lot nearer than _____ feet to the front lot line, or nearer than _____feet to any side street line, except that on all lots abutting _____[*specify names of collector and arterial streets*], no building may be located nearer than _____ and _____ feet respectively to the street property lines of those streets.

(b) No building may be located nearer than _____ feet to an interior lot line, except that no side yard is required for a garage or other permitted accessory building located _____ feet or more from the minimum building setback line. No dwelling may be located on any interior lot nearer than _____ feet to the rear lot line.

(c) For the purposes of this covenant, eaves, steps, and open porches will not be considered as a part of a building, provided, however, that this will not be construed to permit any portion of a building on a lot to encroach on another lot.

(d) _____[*Specify any exceptions by lot number and permitted minimum*].

[*If greater flexibility is necessary in controlling house locations on steep topography, add:*]

(e) With written approval of the Architectural Control Committee, a one-story attached garage may be located nearer to a street than above provided, but not nearer than _____ feet to any street line, where the natural elevation of the lot along the established minimum building setback line is more than either _____[*e.g.,* eight] feet above or _____[*e.g.,* four] feet below the established roadway level along the abutting street and where, in the opinion of the Committee, the location and architectural design of the proposed garage will not detract materially from the appearance and value of other properties. Furthermore, under similar conditions and approval, a dwelling may be located nearer to a street than above provided, but not nearer than _____ feet to any street line.

[*Continue with the following:*]

Lot Area and Width

4. No dwelling may be erected or placed on any lot having a width of less than _____ feet at the minimum building setback line, nor may any dwelling be erected or placed on any lot having an area of less than _____ square feet, except that a dwelling may be erected or placed on lots numbered _____ as shown on the recorded _____[*specify, e.g.,* subdivision map].

Easements

5. Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the

recorded _____[*specify, e.g.,* subdivision map] and over the rear _____[*e.g.,* five] feet of each lot. Within these easements, no structure, planting, or other material may be placed or permitted to remain that may damage or interfere with the installation and maintenance of utilities, or that may change the direction of flow of drainage channels in the easements, or that may obstruct or retard the flow of water through drainage channels in the easements. The easement area of each lot and all improvements in it will be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible.

Nuisances

6. No noxious or offensive activity may be carried on on any lot, nor may anything be done on any lot that may be or may become an annoyance or nuisance to the neighborhood.

Temporary Structures

7. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding may be used on any lot at any time as a residence either temporarily or permanently.

Signs

8. No sign of any kind may be displayed to the public view on any lot except one professional sign of not more than one square foot, one sign of not more than five square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sales period.

Oil and Mining Operations

9. No oil drilling, oil development operations, oil refining, quarrying, or mining operations of any kind will be permitted on or in any lot, nor are oil wells, tanks, tunnels, mineral excavations, or shafts to be permitted on or in any lot. No derrick or other structure designed for use in boring for oil or natural gas may be erected, maintained, or permitted on any lot.

Livestock and Poultry

10. No animals, livestock, or poultry of any kind may be raised, bred, or kept on any lot, except that dogs, cats, or other household pets may be kept provided that they are not kept, bred, or maintained for any commercial purpose.

Garbage and Refuse Disposal

11. No lot may be used or maintained as a dumping ground for rubbish. Trash, garbage, or other waste must be kept in sanitary containers. All incinerators or other equipment for the storage or disposal of such material must be kept in a clean and sanitary condition.

Water Supply

12. No individual water-supply system will be permitted on any lot unless the system is designed, located, constructed, and equipped in accordance with the requirements, standards, and recommendations of _____[*specify, e.g.,* the state or local public health authority]. Approval of a water-supply system as installed must be obtained from the appropriate authority.

Sewage Disposal

13. No individual sewage-disposal system will be permitted on any lot unless the system is designed, located,

constructed, and equipped in accordance with the requirements, standards, and recommendations of _____[*specify, e.g.,* the state or local public health authority]. Approval of a sewage-disposal system as installed must be obtained from the appropriate authority.

Protective Screening

14. Protective screening areas are established as shown on the recorded _____[*specify, e.g.,* subdivision map], including a _____ -foot strip of land on the residential lots along the property lines of _____[*specify arterial streets, other streets having adverse influences, business areas, etc.*]. Except as otherwise provided in this Declaration regarding street intersections under Paragraph 16, "Sight Distance at Intersections," planting, fences, or walls will be maintained throughout the entire length of these areas by the owner or owners of the lots at their own expense to form an effective screen for the protection of the residential area. No building or structure except a screen fence or wall or utilities or drainage facilities may be placed or permitted to remain in these areas. No vehicular access over the area will be permitted except for the purpose of installation and maintenance of screening, utilities, and drainage facilities.

Slope Control Areas

15. Slope control areas are reserved as shown on the plan titled "_____," dated _____, and recorded as a part of these covenants. Affected lots are _____ and _____, as shown on the recorded _____[*specify, e.g.,* subdivision map]. Within these slope control areas no structure, planting, or other material may be placed or permitted to remain or other activities undertaken that may damage or interfere with established slope ratios, create erosion or sliding problems, or that may change the direction of flow of drainage channels or obstruct or retard the flow of water through drainage channels. The slope control areas of each lot and all improvements in them must be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible.

Sight Distance at Intersections

16. No fence, wall, hedge, or shrub planting that obstructs sight lines at elevations between _____[*e.g.,* two and six] feet above the roadways may be placed or permitted to remain on any corner lot within the triangular area formed by the street property lines and a line connecting them at points _____[*e.g.,* 25] feet from the intersection of the street lines, or in the case of a rounded property corner from the intersection of the street property lines extended. The same sight-line limitations apply on any lot within _____[*e.g.,* 10] feet from the intersection of a street property line with the edge of a driveway or alley pavement. No tree may be permitted to remain within these distances of these intersections unless the foliage line is maintained at sufficient height to prevent obstruction of the sight lines.

Land Near Parks and Water Courses

17. No building may be placed nor may any material or refuse be placed or stored on any lot within _____[*e.g.,* 20] feet of the property line of any park or edge of any open water course, except that clean fill may be placed nearer, provided that the natural water course is not altered or blocked by the fill.

Architectural Control

18. No building may be erected, placed, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Architectural Control Committee as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation. No fence or wall may be erected, placed, or altered on any lot nearer to any street than the minimum building setback line unless similarly approved by the Committee.

Architectural Control Committee

19. The Architectural Control Committee is composed of _____[*specify names and addresses of members, with a minimum of three*]. A majority of the committee may designate a representative to act for it. In the event of death or resignation of any member of the committee, the remaining members will have full authority to designate a successor. Neither the members of the committee, nor its designated representative, will be entitled to any compensation for services performed pursuant to this covenant. At any time, the then record owners of a majority of the lots will have the power through a duly recorded written instrument to change the membership of the committee or to withdraw from the committee or restore to it any of its powers and duties.

Committee Procedures

20. The committee's approval or disapproval as required in these covenants must be in writing. In the event the committee, or its designated representative, fails to approve or disapprove within _____[*e.g.,* 30] days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced before the completion of construction, approval will not be required and the related covenants will be deemed to have been fully complied with.

Term

21. These covenants are to run with the land and will be binding on all parties and all persons claiming under them for a period of _____[*e.g.,* 30] years from the date these covenants are recorded, after which time the covenants will be automatically extended for successive periods of _____[*e.g.,* 10] years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change the covenants in whole or in part.

Enforcement

22. Enforcement will be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.

Severability

23. Invalidation of any one of these covenants by judgment or court order will not affect any of the other provisions, which will remain in full force and effect.

IN WITNESS WHEREOF, Declarant has executed this Declaration of Restrictions on the date first above written.

DECLARANT
_____ [*signature*]
[*typed name and address*]

[*See § 28C.220 for form of acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy ViolationsReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive

CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART IV. FORMS
A. Declarations of Restrictions

12-28C California Legal Forms--Transaction Guide § 28C.201

§ 28C.201 Declaration of Restrictions for Custom-Home Subdivision

[1] Comment

[a] Use of Form

This form is a declaration of restrictions applicable to a custom-home subdivision development in which the developer performs necessary site preparation but does not construct the homes. The developer will market the lots to individual owners and speculating builders who will then design and construct homes according to their own specifications, but within the limits of the declaration. This form contains extensive conditions and restrictions due to the possible variety of architectural styles in the development. These covenants should be scrutinized to determine whether they meet the particular goals of the intended development or require modification. In subdivisions in which the developer performs all phases of work, including building and selling homes, the restrictions are not usually as extensive as in this form. This is because the developer is able to control the design of the individual homes. For a declaration of restrictions applicable to a standard residential subdivision in which the developer has built the homes, see *Section 28C.200*.

Recording a declaration that imposes a common plan for the subdivision prior to the sale or other transfer of any lot or other interest in the subdivision gives constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*; *see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *§ 28C.12A*]. At least for all property described, referred to, and made subject to restrictions contained in a recorded declaration for a subdivision, it is not necessary to also refer to the restrictions in the deeds at the time of sale to subsequent purchasers of interests in the subdivision [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in the deed to the recorded restrictions); *see also § 28C.12A* (detailed discussion of *Citizens* case)]. Notwithstanding this rule, practitioners may elect to refer to the restrictions in individual deeds. For a deed that does refer to and incorporate by reference recorded restrictions, see *Section 28C.220*.

For a general discussion of the validity and enforcement of restrictive covenants, see *Section 28C.200[1]*. For a guide to drafting a declaration of restrictions, with discussion of the effect of many of the covenants presented in this form, see *Section 28C.130*.

[b] Effect of Specific Restrictions

[i] Posting of Signs

A provision that denies or abridges an owner's right to sell or lease the property is unreasonable; this includes a prohibition against the posting of signs [*see Civ. Code §§ 712, 713*]. This form provides that the posting of a specified sign for the purpose of sale or lease is exempted from the general prohibition on posting signs [*see* [2], P 3.07(e), *below*].

[ii] Action Against Architectural and Planning Board

Despite exculpatory clauses in a declaration [*see* [2], P 6.03, *below*], an owner may be able to sue for breach of fiduciary duty and violation of the declaration [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 654, 191 Cal. Rptr. 209* (committee approved construction of fence that blocked plaintiff's view)].

[iii] Other Specific Restrictions

For discussion of the effect of other commonly used restrictive covenants, see *Sections 28C.30* through *28C.38* and *28C.200[1]*.

[2] FORM

Declaration of Restrictions for Custom-Home Subdivision

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
..... Space above this line for recorder's use

PREAMBLE

The intent and purpose of this document is _____[*describe, e.g.,* to preserve the inherent natural beauty of our area and to foster in the development of _____ (*name of development*) the blending of nature's attributes with the desire for a better place to live].

The quality of the development is dependent on the people and their attitudes towards the community in which they live. The covenants contained in this declaration are directed towards the goal of creating a fine residential community and creating an environment in which people will be proud to buy a home. The administration and enforcement of these covenants will be the responsibility of _____[*name of declarant*] ("Declarant") and its successors and assigns. Architectural control will be the responsibility of the Architectural and Planning Board appointed by Declarant, which will control construction of the homes proposed within the development for the mutual benefit of all lot owners.

[*If declarant has caused the formation of a maintenance district, add:*]

Declarant has caused to be formed _____[*specify, e.g.,* a County Open Space Service and Maintenance District (the "District")], which will maintain the back slopes of the lots within the subdivision, where landscaping, sprinklers, and lights will have been installed before sale of the property. This maintenance will be carried on by the County, with funds provided by property taxes on the property within the subdivision. In addition to landscape maintenance, the street lights, yard lights, street trees, and trash collection will be the responsibility of the District. The lot owners will have the right to make recommendations to the County regarding the responsibilities of the District, and also to enforce these covenants.

[*Continue with the following:*]

DECLARATION AND ESTABLISHMENT OF
PROTECTIVE COVENANTS AND RESTRICTIONS

_____[*NAME OF DEVELOPMENT*]

THIS DECLARATION is made on _____[*date*], by _____[*name of declarant*] ("Declarant").

WHEREAS, Declarant owns certain real property described in Article 1 of this Declaration; and

WHEREAS, Declarant intends by this Declaration to establish restrictions, limitations, and covenants that run with the land and will be binding on all parties (and their successors) having or acquiring any right, title, or interest in the real property described in Article 1; and

WHEREAS, it is the desire and intention of Declarant to sell the property described in Article 1 and to impose on it mutual, beneficial restrictions under a general plan or scheme of improvement for the benefit of all the real property described in Article 1 and the future owners of that real property;

NOW, THEREFORE, Declarant declares that all of the property described in Article 1 is held and will be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the following limitations, restrictions, covenants, and reservations, all of which are declared and agreed to be in furtherance of a plan for the subdivision, improvement, use, and sale of the property, and are established and agreed on for the purpose of enhancing and protecting the value, desirability, and attractiveness of the property and every part of it. All of the limitations, restrictions, and covenants will run with the land and will be binding on all parties having or acquiring any right, title, or interest in the property described in Article 1 or any part thereof, and will inure to the benefit of all of the property described in Article 1 and the future owners of that property. Each grantee of a conveyance or purchaser under a contract or agreement of sale covering any right, title, or interest in the real property described in Article 1, by accepting a deed or a contract of sale or agreement of purchase, accepts the document subject to, and agrees to be bound by, any and all of the restrictions, covenants, and limitations set forth in this Declaration.

ARTICLE 1. PROPERTY SUBJECT TO DECLARATION

1.01. The property subject to this Declaration is known as _____[*name of development*], and is more particularly described as:

_____ [*describe land with particularity by reference to recorded maps; lot numbers should be*

included].

ARTICLE 2. DEFINITIONS

2.01. (a) "Lot" means one of the numbered parcels of real property on the map referred to in Article 1.

(b) "The property" means the property described in Article 1 or any portion of that property.

(c) "Map" means the recorded map referred to in Article 1.

(d) "Setback" means the minimum distance between the residence or other structure referred to and a given street or line.

(e) "Building limits" means the area defined by the setback from the street and side lot lines and a building limit line across the rear of the lots.

(f) "Street" means any street, highway, or other thoroughfare shown on the Map of the property, whether designated on the Map as street, avenue, boulevard, place, drive, road, terrace, way, lane, circle, or otherwise.

(g) "Building site" means a single lot as shown on the Map of the property or a parcel consisting of contiguous portions of any two or more contiguous lots, or all of one lot and parts of one or more lots adjacent thereto, unless the context and circumstances otherwise require; any building site, however, is subject to the prior written approval of the Architectural and Planning Board.

[*If declarant has caused the formation of a maintenance district, add:*]

(h) "Maintenance District Easement" means the rear slopes of the lots, certain side lot easements, islands, and other areas to be deeded to the _____[*name of maintenance district*] by Declarant for maintenance purposes.

[*Continue with the following:*]

ARTICLE 3. BASIC RESTRICTIONS

Use of Property

3.01. No building may be erected, constructed, altered, or maintained on any of the lots other than a single family residence (including guests and household servants) with customary and suitable outbuilding as permitted by law and the Architectural and Planning Board ("Board").

Location of Structures

3.02. Construction of any and every nature must be confined to and take place only within the building limits of each building site. The location and design of swimming pools, covered gazebos, and other outbuildings, as well as the main structures on each of the building sites must be approved in writing by the Board before any construction or preparation for construction on any building site.

Resubdivision of Lots

3.03. None of the above-described lots may be resubdivided or split into lots of a lesser size than the size of the original lot without the prior written consent of the Declarant.

Height Limitations

3.04. No structures may be placed or landscape materials allowed to grow on any of the lots in a manner that substantially impairs the view from adjacent lots. The term "structures" includes fences.

Changing Grades, Slopes, and Drainage

3.05. No change in the established grade or elevation of the lots, and no change in the established slope or ratio of the cuts and fills, which alters established drainage patterns will be permitted without the prior written consent of the Board and without the prior written approval of the _____[*specify governmental body, e.g.,* County Building Department]. For the purpose of this Declaration, established drainage patterns are defined as the drainage patterns existing at the time the grading of the property was completed in conformity with the county-approved grading plan. No drainage will be allowed to drain over any banks.

Declarant reserves the right to make any and all cuts and fills on the property and on the building sites included on the property, and to do such grading as in its judgment may be necessary to grade streets and lots designated or delineated on the Map of the property or any part thereof.

Each of the owners of the lots covenants to permit free access by Declarant and owners of adjacent lots to slopes or drainageways located on his or her property when access is required for the maintenance or permanent stabilization of the slopes, maintenance of the drainage facilities, or protection and use of property other than the lot on which the slope or drainageway is located.

Wells, Derricks, and Mines

3.06. No wells for the production of, or from which there is produced, water, oil, or gas may be operated on any lot, nor may any machinery, appliance, or structure be placed, operated, or maintained on any lot for use in connection with any trading, manufacturing, or repairing business. No mining or quarrying operations of any kind will be permitted on or in any lot, nor will oil wells, tanks, tunnels, mineral excavations, or shafts be permitted on any lot. Declarant reserves all crude oil, petroleum, gas, asphaltum, and all kindred substances and other minerals under and in the land, and all surface entry rights.

Nuisance and Nonconformity

3.07. (a) Nuisance. No noxious or offensive trade or activity may be carried on on the property, nor may anything be done on the property that may be or may become an annoyance or nuisance to the owners or occupants of the property, including but not limited to storage of any materials that might create an insect pest control problem, or the ill-maintenance of any plant or landscape materials.

(b) Livestock. No farm animals, livestock, poultry, or fish of any kind may be raised, bred, or kept on the property, except that dogs, cats, or other common household pets may be kept provided that they are not kept, bred, or maintained for any commercial purposes or in unreasonable quantities, and provided that they do not become a nuisance to the owners or occupants of the property. Pets must be kept within lot areas or on leash or tether when out of lot areas.

(c) Temporary Structures. No tents, shacks, trailers, basement, garage, or outbuildings may at any time be used on any lot as a residence, either temporarily or permanently, nor may any residence of a temporary character be constructed, placed, or erected on any lot.

(d) Fences. As to side yard fences, all lot lines must be kept free and open one to another and no fences will be permitted on any lot line except where, in the opinion of the Board, such a fence or enclosure as a structural, protective, or aesthetic feature of a design concept will contribute to the character of the area. As to rear yard fences, no fences will be permitted except on the pad level. [*If declarant has caused the formation of a maintenance district, add:* Rear yard fences are specifically prohibited within the Maintenance District Easement.]

(e) Signs. No signs of any kind or other advertising device of any character for any purpose or use whatsoever, may be erected, posted, pasted, painted, displayed, or maintained on the property, except that on any one lot or building site _____[*describe exception, e.g.*, one sign not larger than 18 by 24 inches advertising the property for sale or lease, may be erected and maintained]; and further excepted that Declarant or its agents may erect and maintain on the property signs and other advertising devices it deems necessary or proper in connection with the conduct of its operations for the development, improvement, subdivision, or sale of the property.

(f) Poles, Masts, and Antennas. No poles, masts, or antennas of any type, size, or height may be constructed on any lot, or on or above the roof of any dwelling or structure.

(g) Upkeep of Real Property. Each lot owner covenants to keep, maintain, water, plant, and replant all areas, slopes, banks, rights of way, and setback areas located on that owner's lot so as to prevent erosion and to present an attractive, clean, sightly, and wholesome appearance at all times. [*If declarant has caused the formation of a maintenance district, add:* The Maintenance District Easement will be the primary responsibility of the County, but each lot owner will have a secondary obligation to maintain that portion of the easement on his or her lot if not properly maintained by the County or others.]

(h) Vending of Liquor or Beverages. No liquor or alcoholic beverages of any kind may be sold on the property.

(i) Mail Box and Post Lamps. A mail box or post lamp will be supplied by Declarant, at cost, to each owner when a home is constructed. The post lamp is required and must be wired and installed as part of construction with the house and landscaping. No other designs or fixtures will be acceptable for the purpose.

(j) Drying Yards. No utility area or drying yard may be constructed or maintained on the property unless a plan for it is first submitted to the Board and the Board then issues a written determination that the plan appropriately provides for screening of the area or yard from exterior view.

(k) Storage of Materials, Junk, Trash, and Manure. The storage of or accumulation of junk, trash, manure, or other offensive or noxious materials is specifically prohibited. No burning will be permitted except in fireplaces or barbecues.

(l) Storage of Cars, Trailers, Campers, Boats, Etc. No house trailer, living trailer, self-propelled vehicle (except a motor vehicle), boat, or boat trailer of any type may be parked on any street or building site, either temporarily or permanently, if visible from the street or adjoining lots. Motor vehicles may not be parked longer than 48 hours outside of a garage or on any building site where visible from the street. No painting, repairing, or mechanical work, other than customary maintenance work and minor emergency repairs, may be done on any building site except in enclosed areas approved by the Board in writing, which areas must be sufficiently screened from the street and adjacent lots to eliminate any possibility of a nuisance being created by the storage of such items or activities involving such items.

(m) Use of Garages. No dwelling may be constructed or maintained on a building site without a garage large enough to contain two standard sized automobiles, which garage must be used to park the automobiles belonging to the owner or occupants of the building site, and for other purposes not incompatible with that use. Automobiles are to be kept in the garage when not in use. The use of carports in place of garages is specifically prohibited. The doors of a garage facing the street or streets adjacent to the building site on which the garage is located must be kept closed at all times, except when an automobile is entering or exiting to or from the garage.

(n) Water Softeners and Air Conditioning Equipment. No water softener may be installed or maintained for use in connection with any building on the property that discharges effluent brine into the sewage system. Any water softener must be appropriately screened from exterior view. The type of water softener and a plan for its screening must first be approved by the Board before installation. The location of air conditioning units must first be approved by the Board before installation.

Diligence in Construction

3.08. The work of constructing and erecting any building or structure must be prosecuted diligently and continuously from the start thereof until it is completed. No outbuildings may be completed before the completion of the building, except that temporary office and storage buildings may be erected for workers engaged in building a dwelling on the property. Any temporary buildings must be removed as soon as the dwelling is completed. All structures must be suitably painted, colored, or stained immediately on construction as per plans and specifications. The construction schedule must be submitted as a part of the plans and specifications and are subject to the approval of the Board. A licensed general contractor is required and must be responsible on all construction.

Trees and Shrubs

3.09. No trees, shrubs, or other natural elements affecting the environment of the area may be placed, removed, trimmed, or cut without the written approval of the Board. [*If declarant has caused the formation of a maintenance district, add:* The Maintenance District Easement areas will be landscaped initially by Declarant, and any supplemental planting or changes in these areas must be approved in writing by the Board.]

[*If declarant reserves the right to enter to inspect and control plant or tree disease and insect pests, add:*]

Declarant reserves the right to enter on any of the lots at any time to inspect and control the plants, trees, and seed thereon and also to inspect for and control insect pests. This right will be exercised as follows: If, after notice to an owner from Declarant of the existence of infected plants, tree diseases, or insect pests, the owner fails or neglects to take measures for the eradication or control of same as Declarant may deem necessary for the protection of the community, Declarant may enter thereon and, at the expense of the owner thereof, destroy or remove infected or diseased plants and/or trees, and/or spray the same, and/or take other measures as may be deemed necessary in the opinion of Declarant to protect the community from the spread of such infection and/or pests. Declarant, or any officer or agent of Declarant, will not be deemed guilty of any manner of trespass for entry pursuant to this paragraph.

[*Continue with the following:*]

Easements and Rights of Way

3.10. The property, including all building sites on it, is subject to easements and rights of way for erecting, constructing, maintaining, and operating public sewers, and poles, wires, and conduits for lighting, heating, power, telephone, television, and any other method of conducting and performing any public or quasi-public utility service or function beneath the surface of the ground, as the easements and rights of way are more particularly set forth on the Map, or as they may hereafter be located and utilized by Declarant.

ARTICLE 4. ARCHITECTURAL STANDARDS AND CONTROLS

Subdivision Standards

4.01. These restrictions have neither the intent nor the purpose to in any way affect the subdivision standards that are set up by the County of _____[*name of county*]. Declarant and Declarant's agents as subdividers have the sole responsibility of developing the planning, engineering, and execution of the subdivision and development of the property before land sales. It will be their responsibility to coordinate and meet the County requirements for the subdivision.

Setbacks

4.02. The front setbacks must conform to County requirements per the grading plan approved by the County

relating to the property. The side yard setbacks must be a minimum of _____[*e.g.*, 10] feet along the entire side yard area, subject to a further minimum distance of _____[*e.g.*, five] feet from the toe of any slope or retaining wall, or from the top of any slope. In the case of an access road or driveway in the side yard leading to the rear yard, a minimum setback of _____[*e.g.*, 10] feet on the flat in addition to any banks or slopes will be required.

Location on Lots

4.03. The location of the structure or structures on the building site and the landscaping must bear an overall relation to the adjacent properties so as to create an aesthetically pleasing overall appearance and to maintain views. Buildings must be placed only on major pad areas as shown on the approved grading plan. Slopes are specifically excluded as building areas even though other setback requirements are met.

Lot Coverage

4.04. Not more than _____[*e.g.*, 50] percent of any lot may be covered with structures or paving material.

Fences

4.05. All fences, including their location, style, material, color, height,and function, will be subject to the written approval of the Board before installation. The Board will consider the topography of the land and the maintenance of views before granting approval. No fences, rails, hedges, or any structure over _____[*e.g.*, 36] inches in height may be placed or allowed to exist in front yard setbacks. Fences within _____[*e.g.*, 15] feet of the top or toe of the rear pad line will be limited to _____[*describe, e.g.*, chain link or split rail] construction. Chain link fences will be permitted only when there is sufficient landscaping to effectively screen the fence, and then only with prior written approval of the Board. Fences, walls, rails, or hedges elsewhere on the lot will be limited to _____[*e.g.*, 72] inches in height. The fences along the side yard of any lot may not be more than _____[*e.g.*, five] feet closer to the street or frontage than the rearmost point of the building at the side yard, except that garden screen fences for privacy may be permitted adjacent to the house, subject to approval of the Board. The owner will maintain and keep in good condition and repair the fences located on the owner's building site. If the owner fails or refuses to fully and faithfully comply with and conform to this paragraph, then Declarant will have the right to enter on the lot or lots and perform the work necessary to fulfill the requirements of this paragraph, charging the cost thereof to the owner.

Landscaping

4.06. The owner of each lot must spend an initial sum of not less than _____[*e.g.*, 2] percent of the total cost of the building site and the residence on it for ornamental plants, trees, shrubs, lawns, and flowers. Landscaping plans will be submitted to the Board with the plans and specifications and must be approved in writing before the start of any construction or preparation and must include the size, type, and location of all plants, materials, and sprinkler systems. Within _____[*e.g.*, 30] days after the completion of any residence, permanent landscaping must be installed around the residence in the front, side, and rear yard areas. The landscaping must be maintained in a neat and orderly condition at all times after installation so that it presents a pleasing appearance to the owners and occupants of the building sites.

[*If declarant reserves the right to enter and repair in the event of an owner's breach with regard to landscaping, add:*]

Declarant reserves the right at all times, on written or visual evidence of any unplanted or inadequately maintained vacant or improved building site, to enter in or on that building site after reasonable notice to the owner, to plant, cut or

replant, trim, cut back, remove, replace, and/or maintain hedges, trees, shrubs, and flowers within setback areas and/or to keep cultivated and/or remove plants on any portion of the lot, all at the expense of the owner. Declarant, or any officer or agent of Declarant, will not be deemed guilty of any manner of trespass for entry pursuant to this paragraph.

[*Continue with the following:*]

Structural Type and Character of Design

4.07. The exterior building design of all buildings will be encouraged to be of the following styling and character: _____[*describe, e.g.,* ranch, Spanish, or early California and compatible with a rural atmosphere]. Exterior design in each case is subject to approval by the Board, in its sole discretion. Decisions of the Board are final.

Color of Structures

4.08. All exterior colors, textures, and materials, including roofs, must be set forth in the plans and specifications and approved in writing by the Board before construction. Color samples must be submitted with plans and specifications, which must be coded or marked to indicate where the colors are to be used on the finished dwelling. Careful consideration of the adjacent and surrounding properties, as well as overall community appearance, will be the basis for approval or denial of color schemes.

Size Requirements for Structures

4.09. No residence may be erected on the property having a total ground floor area of the main structure, exclusive of open porches, garages, patios, exterior stairways, and landings, of less than _____[*e.g.,* 1900] square feet.

New Materials

4.10. No second-hand material may be used in the construction of any buildings or structures without the prior written approval of the Board.

Height Limitations

4.11. No building may be of more than _____[*describe, e.g.,* one story or one level]. The ridge height of any building may not exceed _____[*e.g.,* 15] feet from the ground or pad level without the written approval of the Board. Balconies or decks must be no higher than floor level.

Painting

4.12. All exterior wood and manufactured surfaces, with the exception of brick, must be painted or stained. All buildings and fences that are of frame construction must be painted or stained with at least two coats on completion.

Roof Design, Pitch, and Materials

4.13. The maximum roof pitch that may be used is _____[*e.g.,* 5 and 12]. No _____[*describe, e.g.,* flat or rock] roofs will be permitted, except where the design concept in the opinion of the Board is not detrimental to the environmental character of the adjacent property or the community. The roofing materials to be used must be _____[*describe, e.g.,* mission tile, clay fired flat tile, or extra heavy hand-split cedar shakes]. Other quality roofing materials may be submitted for review by the Board [*add if composition shingles are prohibited:*, but in no event may composition shingles be used].

ARTICLE 5. ALTERATIONS, ADDITIONS, REMODELING, REDECORATION OF EXTERIOR PORTIONS OF STRUCTURES

5.01. No alterations in the exterior design or color of any structure, including additions, may be made without the prior written approval of the Board. The materials used for any approved alteration must harmonize and complement the original building or buildings and must be approved in writing by the Board before the alteration. No approval is required to repaint or re-stain any structure with the same color scheme that was previously used and approved.

ARTICLE 6. ARCHITECTURAL AND PLANNING BOARD

Purpose and Functions

6.01. The purpose of the Architectural and Planning Board is to achieve and maintain the aesthetic goals of Declarant. The function of the Board is to enforce the restrictions contained in this Declaration by the review of plans and specifications submitted for approval and by the inspection of actual construction and progress to ensure conformity with the plans and specifications as approved. Declarant does not intend to deprive the individual owner from having a home of unique design; Declarant does intend to protect the community as a whole, and the individuals comprising it, from undesirable construction. Therefore, in the case of hardship or other good reason, the Board may make exceptions to any of the restrictions in this Declaration at any time after proper written application.

Board Members, Term, and Appointment

6.02. The Board will consist of _____[*e.g.*, three] persons to be appointed by Declarant. No person may be appointed to the Board by Declarant who is not actively engaged in and/or experienced in land-use planning, land development, architecture, engineering, or another associated field that would lend background and experience to the person to judge the intent of the restrictions and the conformity to the restrictions of plans and specifications submitted for review and approval.

Any Board member appointed by Declarant is subject to removal by Declarant at any time. The term of each Board member, unless earlier terminated by Declarant, will be _____[*e.g.*, three] years. At the discretion and option of Declarant, and while the Declarant has the right to fill vacancies on the Board by appointment, the term of a Board member may be extended for an additional term of _____[*e.g.*, three] years.

Declarant reserves the right to fill vacancies on the Board by appointment. If the Declarant fails to make an appointment within _____[*e.g.*, 90] days after a vacancy occurs, then that vacancy will be filled by an appointment made by _____[*describe, e.g.*, a majority of the owners of building sites other than Declarant's that have been subdivided for single family residential purposes at the time of the vacancy]. A duly executed written notice of any appointment or removal may be filed by Declarant with the _____[*name of county*] County Recorder and will then serve as notice to all persons of the matters set forth in the notice. Declarant may relieve itself of the obligation of appointing and maintaining the Board by filing with the _____[*name of county*] County Recorder a notice that Declarant has surrendered the powers of appointment and maintenance of the Board. On the recording of this notice, the powers and obligations of appointment and maintenance will immediately vest in _____[*describe, e.g.*, a majority of the owners of building sites other than Declarant's that have been subdivided for single family residential purposes at the time of recording].

Action by Board

6.03. The Board members will work as a panel. They will first review submitted plans and specifications individually and subsequently discuss them jointly. Written approval of _____[*e.g.*, two] members will constitute approval of preliminary or final submissions; provided that if no notice of rejection is received after

_____[*e.g.*, 30] days from the date of receipt of a submission, this inaction will be deemed approval. All decisions of the Board are final. Written notice of the Board's approval or rejection may be recorded with the _____[*name of county*] County Recorder and this will be conclusive evidence of approval or rejection.

Final acceptance will be in writing and signed by _____[*e.g.*, two] members; recordation of the final acceptance is conclusive evidence of it. If no final acceptance is given or recorded, or if no notice of noncompliance is recorded within _____[*e.g.*, 60] days after receipt by the Board and Declarant of a copy of the duly recorded notice of completion of the construction, alteration, or placement of any structure on the building site, then this failure to give or record final acceptance or to file a notice of noncompliance will be deemed conclusive evidence of final acceptance of the structure by the Board.

The actions or inactions of the Board or its agents when exercising in good faith its discretion in enforcing this Declaration will not be a basis for damages to any owner or any other person, nor will any such actions or inactions by Declarant, the Board, or any Board member, or their officers or agents, individually or collectively, constitute a cause of action for damages or equitable relief to any owner or any other person. Declarant, its successors or assigns, the Board or any Board member, or their officers or agents, individually or collectively, will not be responsible for any loss or damage, or be liable in any other way for any errors or defects, patent or latent, in the plans and specifications submitted for approval, or in any building or structure erected in accordance with those plans and specifications.

Architectural Permit and Fees

6.04. An Architectural Permit is required for any construction or alteration, and may be obtained by the architect or designer at Declarant's office. The permit is valid for _____[*e.g.*, one year]. The following fee schedule applies: preliminary plans must be accompanied by a fee of $ _____; plans for an addition or alteration to an existing residence must be accompanied by a fee of $ _____; any application for renewal of a permit or revisions must be accompanied by an additional fee of $ _____. All fees should be made payable to _____[*name of payee*].

Submission of Preliminary Plans

6.05. The owner of each lot on which construction is contemplated must submit to the Board a set of preliminary working drawings or plans, which must consist of a plot plan, floor plan, and elevation. On review, the Board may request additional drawings for clarification.

Submission of Final Plans and Specifications

6.06. On approval of the preliminary plans, _____[*e.g.*, two] sets of final plans and specifications must be submitted to the Board for final approval. These plans and specifications must describe in detail the floor plan arrangement, elevations, section structural solutions, use of materials, heights and dimensions, site placement, fences, grading, drainage plans, access, landscape and patio plans, and any other pertinent data required to fully illustrate the intended design, construction, and use. Physical samples of the exterior materials and colors must also be submitted for approval. Before giving final approval, the Board may require that the plans and specifications comply with any requirement imposed by the Board as to structural features, building materials used, or any characteristics not otherwise expressly covered by this Declaration. The approval of the Board does not relieve the owner from complying with any requirements of any public authority having jurisdiction and does not constitute any representation or guarantee by the Board, any Board member, or Declarant as to the structural sufficiency of any construction. Approval by the Board of any plans and specifications is not a waiver by the Board of its right to object to any of the features or elements embodied therein if and when the same features or elements are embodied in any subsequent plans and specifications submitted for approval for other building sites.

Inspection and Conformity to Plans

6.07. On reasonable notice, during and after completion of construction, Declarant, the Board, or any agent or officer thereof may from time to time at any reasonable hour enter into and inspect any property subject to this Declaration for compliance with the approved plans and specifications. Deviations must be diligently guarded against and all deviations or nonconformities set forth in any notice of noncompliance issued by the Board must be corrected before final acceptance. Declarant, the Board, or any agent or officer thereof acting in good faith will not be deemed guilty of, or become liable for, any manner of trespass for entry or inspection pursuant to this paragraph.

Final Acceptance

6.08. The owner of each building site agrees that use of the structure or structures on the building site will not commence until the Board's final acceptance in writing has been obtained.

Enforcement of Board Rulings

6.09. If the owner of any building site fails to comply with any notice of noncompliance or directive or order from the Board, then the Board or Declarant will have the right and authority, after reasonable notice, to perform the subject matter of the directive or order and the cost of that performance will be charged to the owner and may be recovered by the Board or Declarant in an action at law against the owner.

Furthermore, this Declaration vests the Board or Declarant with the right to bring a proceeding in equity to enforce the general and specific intent of this Declaration as follows: if written notice to the Board of steps to correct any noncompliance is not given within _____[*e.g.*, 15] days, or if the noncompliance is not thereafter cured within a reasonable time from the date notice of the noncompliance is given by the Board to the owner of the building site whose act or omission constitutes the noncompliance, the Board or Declarant may record the notice of noncompliance and thereafter file a proceeding in equity to restrain the noncompliance or attempted noncompliance.

ARTICLE 7. SCOPE AND DURATION

7.01. All the covenants and restrictions of this Declaration are imposed on the property for the direct benefit of the property and the owners of the property as a part of a general plan of improvement, development, building, occupation, and maintenance. These covenants and restrictions will run with the land and will be binding on all of the owners of the property and all persons claiming under them, and continue to be in full force and effect for a period of _____[*e.g.*, 25] years from the date that this Declaration is recorded. After the expiration of this period, the covenants and restrictions will be automatically extended for successive periods of _____[*e.g.*, 10] years each, unless an instrument, signed by three fourths of the then owners of record of the property has been recorded, agreeing to amend this Declaration in whole or in part or to terminate this Declaration.

ARTICLE 8. BREACH AND RIGHT OF ENFORCEMENT

Breach

8.01. The covenants and restrictions established in this Declaration will run with the land and will be binding on all parties (and their successors) having or acquiring any right, title, or interest in the real property described in Article 1. Declarant or any owner of any of the property, including any bona fide purchaser under contract, in the event of a breach of any restriction or covenant in this Declaration or a continuance of any such breach may by appropriate legal proceedings take steps to enjoin, abate, or remedy the breach. It is agreed that damages are not an adequate remedy for breach.

Every act or omission that violates in whole or in part any of the covenants contained in this Declaration is declared to be and constitutes a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, will be applicable and may be exercised by Declarant, the Board, or the owner of any of the property.

The remedies provided in this Declaration for breach of the covenants contained in this Declaration are cumulative; none of the remedies will be deemed exclusive.

A breach of the covenants contained in this Declaration will not affect or impair the lien or charge of any bona fide mortgage or deed of trust made in good faith and for value on any building site; provided, however, that any subsequent owner of such property will be bound by the covenants, whether that owner's title was acquired by foreclosure or in a trustee's sale or otherwise. A lender who acquired title by foreclosure or deed in lieu of foreclosure or trustee's sale will not be obligated to cure any breach of the covenants that occurred before that acquisition of title but will be bound by the covenants of this Declaration.

Right of Enforcement

8.02. The provisions in this Declaration will inure to the benefit of and be enforceable by Declarant, Declarant's successors or assigns, and the owner of any of the property, and each of their legal representatives, heirs, successors, or assigns. The failure to enforce any covenant or restriction in this Declaration will not be deemed a waiver of the right to enforce thereafter. In any legal proceeding begun by anyone entitled to enforce or restrain a violation of any provision of this Declaration, the losing party or parties must pay the attorneys' fees of the winning party or parties in the amount fixed by the court in the proceeding. Any right reserved by Declarant in this Declaration is also reserved to Declarant's successors or any entity designated by Declarant in writing including the Board; the designation may be recorded with the _____[*name of county*] County Recorder.

ARTICLE 9. PROTECTION FOR MORTGAGEES
AND TITLE INSURANCE COMPANIES

9.01. The owner of any encumbrance for value on any building site and any corporation insuring the lien of the encumbrance may conclusively presume that no breach exists under this Declaration, provided that the encumbrance is recorded with the _____[*name of county*] County Recorder before the start of any action to establish a breach and not within _____[*e.g.*, 60] days after the recording of any Notice of Noncompliance, anything contained in this Declaration to the contrary notwithstanding.

For the purpose of certifying, guaranteeing, or insuring title to, any lien on, or interest in, any lot or parcel of the property, and for the purpose of protecting purchasers and encumbrancers for value and in good faith as against the performance or nonperformance of any of the acts in this Declaration authorized, permitted, or to be approved by the Board, the records of the Board are prima facie evidence of all matters shown by those records. Furthermore, the issuance of a certificate of acceptance by the Board, which certificate shows approval of plans and specifications for improvement or other matters provided for in this Declaration and shows that the improvements have been made in accordance therewith, is prima facie evidence for all matters within the jurisdiction of the Board and will fully justify and protect any title company or person certifying, guaranteeing, or insuring the title, and will also fully protect any purchaser or encumbrancer for value and in good faith in acting thereon.

ARTICLE 10. GENERAL PROVISIONS

Amendments

10.01. This Declaration may be amended at any time, and from time to time, by an instrument in writing signed by three fourths of the then owners of record of the property, which written instrument will become effective on its recording with the _____[*name of county*] County Recorder.

Interpretation

10.02. All questions of interpretation or construction of any of the terms or restrictions in this Declaration will be resolved by the Board or the Declarant, and that decision will be final, binding, and conclusive on all parties affected. The singular includes the plural whenever the context of this Declaration requires. The headings are not a part of this Declaration, and will not affect the interpretation of any provision.

Severability

10.03. If any of the provisions of this Declaration are held to be invalid or unlawful by the final judgment of a Court of competent jurisdiction, that invalidity or illegality will not affect the validity of any other provisions of this Declaration.

Fair Housing

10.04. Neither Declarant nor any owner may directly or indirectly forbid the conveyance, encumbrance, renting, leasing, or occupancy of the owner's lot to any person on the basis of race, color, sex, religion, ancestry, national origin, disability, or other prohibited basis.

IN WITNESS WHEREOF, Declarant has executed this Agreement on the date first above written.

DECLARANT
_____ [*name of declarant*]
By _____ [*signature*]
[*typed name and title*]

[*See § 28C.220 for an acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisionsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART IV. FORMS
A. Declarations of Restrictions

12-28C California Legal Forms--Transaction Guide §§ 28C.202-28C.209

[Reserved]

§§ 28C.202[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART IV. FORMS
B. Agreements for Mutual Restrictive Covenants

12-28C California Legal Forms--Transaction Guide § 28C.210

§ 28C.210 Agreement for Mutual Restrictive Covenants Among Adjoining Landowners

[1] Comment

[a] Use of Form

This form is an agreement for use by the residents of an already developed area who wish to restrict the further use and development of their properties. Unlike the declarations of restrictions [*see §§ 28C.200, 28C.201*], it is not the original owner of the subdivision who sets the restrictions for the future owners, but rather the many owners themselves who attempt to coordinate their desires to apply land use planning and restrictions to their neighborhood. This type of agreement is authorized by *Civil Code Section 1468* [*see* [b], *below*]. This form provides the format for the agreement; refer to §§ 28C.200[2] and 28C.201[2] for specific restrictive provisions along with the terminal clauses for the agreement.

[b] Providing for Mutual Covenants Under Civil Code Section 1468

This form is based on *Civil Code Section 1468*, which provides that each covenant made by an owner of land with the owner of other land, or made by a grantor of land with the grantee of the land conveyed, to do or refrain from doing some act on the covenantor's own land, which is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by the covenantor and the land owned by, or granted to, the covenantee and will benefit or bind each successive owner, during that owner's ownership. To fulfill the requirements of the statute, all of the following must be met [*Civ. Code § 1468*]:

(1) The instrument containing the covenants must particularly describe the land of the covenantor to be affected and the land of the covenantee to be benefited;

(2) The instrument containing the covenants must express that each covenant is binding on successive owners of the covenantor's land to benefit the land owned by, granted by, or granted to the covenantee;

(3) Each act must relate to the use, repair, maintenance, or improvement of, or payment of taxes and

assessments on, the land or some part of it; and

(4) The instrument containing the covenants must be recorded in the office of the county recorder of each county in which land or some part of it is located [*see* [c], *below*].

For land consisting of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a reasonable period is a covenant that runs with the land involved [*see Civ. Code § 1468(c)*].

[c] Procedure for Adopting Mutual Restrictive Covenants

Each owner agreeing to be bound by these covenants must sign this agreement. The signatures should be acknowledged [*see Civ. Code §§ 1180-1207*], and the agreement should be recorded in the office of the recorder in each county in which the land is situated [*see Civ. Code § 1468(d)*; *see also Civ. Code §§ 18, 1169, 1170*]. Recording the agreement gives constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*]. For further discussion of notice, acknowledgment, and recording, see Chapter 27, *Deeds and Recording* .

[d] Deeds to Successors of Signatory Landowners

Restrictions contained in a recorded subdivision declaration are binding on subsequent purchasers and their successors who have constructive notice of the recorded declaration even if the deed to the subsequent purchaser (or successor) does not mention the restrictions, provided the declaration [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in the deed to the recorded restrictions); *see also § 28C.12A*]:

(1) Establishes a common plan for the ownership of property in the subdivision (and imposes those restrictions as a part of that common plan);

(2) Describes the property to which the restrictions are to apply;

(3) States that it is to bind all purchasers and their successors; and

(4) Is recorded before the execution of a contract of sale to the subsequent purchaser.

The above rule was announced by the California Supreme Court in the *Citizens* case, which involved restrictions imposed by an owner/subdivider on lots to be sold to purchasers (a grantor/grantee situation). The agreement in this form is one between separate landowners, intended to be be binding on the signatory landlowners and their successors.

The question arises whether the *Citizens* rule (i.e., restrictions need not be mentioned in the deed to be binding on successive owners, provided owners have constructive notice of previously recorded restrictions) applies to deeds given by the signatory landowners to *their* successors. It seems reasonable to conclude that the same rule should apply to deeds in that situation, provided the agreement imposing the restrictions between landowners meets the requirements of *Citizens* for a declaration of restrictions (e.g., common plan, description of subject property) discussed above and also meets the statutory requirements for covenants that run with the land [*see* [b], *above*]. Recording the agreement itself gives subsequent purchasers constructive notice of the restrictions [*Civ. Code § 1213*].

The Court in *Citizens* made its rule retroactive and noted that the rule was not inconsistent with the statutes regarding covenants that run with the land [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 368, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . It also stated that the rule applies equally to both covenants running with the land and equitable servitudes [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

Even if one adopts the view that *Citizens* does not require that a reference to a previously recorded agreement between separate landowners (such as the one in this form) appear in the deed to a subsequent purchaser, there is no prohibition against including the reference in a deed to a subsequent purchaser [*see § 28C.12A*] as a precautionary measure. For a deed that does refer to recorded restrictions and incorporates them by reference, see *Section 28C.220*.

[2] FORM

Agreement for Mutual Restrictive Covenants Among Adjoining Landowners

[*Recording heading; see § 28C.200[2]*]

AGREEMENT

THIS AGREEMENT is made on _____[*date*], by the undersigned parties.

WHEREAS, the undersigned are the owners of _____[*describe the land with particularity, either within the agreement, as an exhibit, or by reference to recorded maps; lot numbers should be included*]; and

WHEREAS, it is the desire and intention of all the parties to this Agreement to restrict the land according to a common plan as to use and permissible buildings so that all of the lands will be benefited and each successive owner of all or a part of the lands will be benefited by the preservation of the value and character of the lands;

NOW, THEREFORE, in consideration of the mutual promises of the parties to this Agreement, each to the others as Convenantors and Convenantees, and expressly for the benefit of, and to bind, their successors in interest, the parties agree as follows:

_____[*Specify restrictive covenants, such as those found in § 28C.200[2] (standard residential covenants) or § 28C.202[2] (custom-home residential covenants), and conclude with general clauses, such as PP 21-23 of § 28C.200[2]*].

IN WITNESS WHEREOF, the parties to this Agreement have executed this Agreement on the date first above written.

_____ [*signature*]
[*typed name and address*]

_____ [*signature*]
[*typed name and address*]

[*See § 28C.220 for an acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
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12-28C California Legal Forms--Transaction Guide §§ 28C.211-28C.219

[Reserved]

§§ 28C.211[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28C COVENANTS, CONDITIONS, AND RESTRICTIONS
PART IV. FORMS
C. Deeds

12-28C California Legal Forms--Transaction Guide § 28C.220

§ 28C.220 Deed Subject to Restrictive Covenants

[1] Comment

[a] Use of Form

This form is a deed that states that a conveyance is subject to specified recorded covenants and restrictions and incorporates those covenants and restrictions by reference. For covenants and restrictions contained in a recorded declaration for a subdivision [*see §§ 28C.200, 28C.201*], it is not necessary that the covenants and restrictions also be referenced in separate deeds to subsequent purchasers in order to be enforceable and binding on those subsequent purchasers [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* (disapproving prior appellate court cases that required at least some reference in the deed to the recorded restrictions)]. However, there is no prohibition against including such a reference in the deeds to purchasers, and practitioners may refer to and incorporate by reference recorded restrictions in the deeds to subdivision interests (as most probably did and thought they were required to prior to the ruling in *Citizens*). For further discussion of the *Citizens* case, see *Section 28C.12A*.

[b] Recording

When completed, this deed should be recorded in the office of the recorder in each county in which the land is located [*Civ. Code §§ 1169, 1468(d)*]. Recording gives constructive notice of the contents of the deed, including any incorporated reference to a previously recorded declaration of restrictions [*see* [a], *above*], to subsequent purchasers and mortgagees [*Civ. Code § 1213*]. For complete coverage of notice, acknowledgment, and recording, see Chapter 27, *Deeds and Recording* .

[2] FORM

Deed Subject to Restrictive Covenants

)
Recording requested by)

_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
..... Space above this line for recorder's use

Mail tax statements to
_____[*name*]
_____[*address*]
_____ [*city, state, zip*]

Documentary
Transfer Tax $ _____
_____ [*firm name, if any*]
[By] _____ [*signature*]
[*typed name*]
_____ [*e.g.*, Grantor, Agent for Grantee]

GRANT DEED

I, _____[*name of grantor*], grant to _____[*name of grantee*], all that real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California, described as follows: _____[*insert legal description*].

This conveyance is made subject to those covenants and restrictions contained in that certain declaration of restrictions dated _____, executed by _____[*name*(*s*)], and recorded on _____[*date*], in Book _____, Page _____, Official Records of _____ County, California.

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of grantor*]
[*typed name*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within

instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ _____[*Seal*]

[*Insert following statement as last line at bottom of first page of deed:*]

Mail tax statements as directed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND

12-28D California Legal Forms--Transaction Guide 28D.syn

§ 28D.syn Synopsis to Chapter 28D: CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND

§ 28D.01 California Sources

[1] Constitution

[2] Statutes

[3] Attorney General Opinions

§ 28D.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 28D.03-28D.04 [Reserved]

§ 28D.05 Law Reviews and Periodicals

§ 28D.06 Text References

[1] Matthew Bender Sources

[2] Legal Encyclopedias

§§ 28D.07-28D.09 [Reserved]

§ 28D.10 Nature of Agricultural Preserves

[1] Purpose of Williamson Act

[2] Definitions

[3] Agricultural Land Classification

§ 28D.11 Establishing, Disestablishing, and Altering Agricultural Preserves

[1] Establishing Agricultural Preserves

[a] Requirements Imposed on Cities and Counties

[b] Land Eligibility Requirements

[c] Procedures

[2] Disestablishing or Altering Boundaries of Agricultural Preserves

§ 28D.12 Administering Agricultural Preserves

[1] Rules for Administration

[2] Compatible Uses

[3] Effect of Annexation, Detachment, Incorporation, or Disincorporation

§ 28D.13 Land Conservation Contracts

[1] In General

[2] Eligible Land

[3] Effect of Prior Protest Against County Contracts Near Cities

[4] Duration, Terms, and Conditions

[5] Divisibility and Succession

[6] Interpretation and Enforcement

§ 28D.14 Terminating Contracts

[1] Nonrenewal

[a] Effect of Nonrenewal

[b] Procedures

[2] Cancellation

[a] In General

[b] Grounds for Cancellation

[i] In General

[ii] Consistent With Purposes of Williamson Act

[iii] In the Public Interest

[c] Petition and Proposal

[i] In General

[ii] Petition for Cancellation for Agricultural Laborer Housing

[d] Notice and Public Hearing

[e] Tentative Approval of Cancellation

[f] Cancellation Fee

[i] Amount of Fee and Time for Payment

[ii] Waivers and Extensions of Time

[iii] Special Fee Provisions for Agricultural Laborer Housing and Timberland

[g] Final Determination of Petition for Cancellation

[h] Judicial Review

[3] Nullification by Eminent Domain or Public Acquisition

[4] Simultaneous Rescission of and Entry Into Contract

[5] Cancellation and New Contract Designating Farmland Security Zone

§ 28D.15 Public Improvements on Agricultural Preserves

[1] State Policy

[2] Procedures

[3] Limitations on Location of Public Improvements

[a] Conditions and Exceptions

[b] Enforcement and Standing

§§ 28D.16-28D.29 [Reserved]

§ 28D.30 Open-Space Easements

[1] Nature of Open-Space Easements

[a] Purpose and Effect

[b] Comparison of Open-Space and Conservation Easements

[2] Requirements for Open-Space Easements

[a] Mandatory and Permissible Provisions

[b] Acceptance or Approval

[i] Necessity of Acceptance or Approval

[ii] Grounds for Acceptance or Approval

[c] Recordation, Filing, and Notice

[3] Enforcement

[4] Income Tax Benefits

[5] Terminating Open-Space Easements

[a] In General

[b] Nonrenewal

[c] Abandonment

[i] Grounds for Abandonment

[ii] Procedure

[iii] Abandonment Fee

[d] Eminent Domain and Acquisition

§ 28D.31 Conservation Easements

[1] Nature and Policy

[2] Requirements

[3] Effect and Enforcement

§ 28D.32 Comprehensive Index of Conservation Easements Developed and Maintained by County Recorder

§ 28D.33 State Registry for Conservation Easements

§§ 28D.34-28D.39 [Reserved]

§ 28D.40 Land Trusts

§ 28D.41 Zoning and Environmental Regulations

[1] Zoning

[2] Restrictions on Municipal Reorganization Decisions

[3] Coastal Regulations

[4] California Environmental Quality Act

[5] Transferable Development Rights

§§ 28D.42-28D.49 [Reserved]

§ 28D.50 Enforceable Restrictions

§ 28D.51 Valuation

§ 28D.52 Subventions

§ 28D.53 Effect of Nonrenewal on Valuation

§§ 28D.54-28D.99 [Reserved]

§ 28D.100 Facts

Scope

§ 28D.101 Documents

Scope

§§ 28D.102-28D.109 [Reserved]

§ 28D.110 General Determinations

Scope

§ 28D.111 Additional Determinations for Agricultural Preserves

Scope

§ 28D.112 Additional Determinations for Open-Space Easements

Scope

§§ 28D.113-28D.119 [Reserved]

§ 28D.120 Agricultural Preserves

[1] Establishing Agricultural Preserve

Scope

[2] Obtaining Williamson Act Contracts

Scope

§ 28D.121 Creating Open-Space Easements

Scope

§§ 28D.122-28D.129 [Reserved]

§ 28D.130 Terminating Williamson Act Contracts

[1] Nonrenewal

Scope

[2] Cancellation

Scope

§ 28D.131 Terminating Open-Space Easements

[1] Nonrenewal

Scope

[2] Abandonment

Scope

§ 28D.132 Disestablishing or Altering Agricultural Preserve Boundaries

Scope

§§ 28D.133-28D.199 [Reserved]

§ 28D.200 Application to Establish Agricultural Preserve

[1] Comment--Use of Form

[2] FORM

Application to Establish Agricultural Preserve

§ 28D.201 Resolution to Establish Agricultural Preserve [Gov. Code §§ 51230, 51237]

[1] Comment--Use of Form

[2] FORM

Resolution to Establish Agricultural Preserve [Gov. Code §§ 51230, 51237]

§ 28D.202 Consent to Establish Agricultural Preserve

[1] Comment--Use of Form

[2] FORM

Consent to Establish Agricultural Preserve

§§ 28D.203-28D.209 [Reserved]

§ 28D.210 Land Conservation Contract [Gov. Code §§ 51240-51255]

[1] Comment

[a] Use of Form

[b] Required Provisions

[2] FORM

Land Conservation Contract [Gov. Code §§ 51240-51255]

§ 28D.211 Amendment to Land Conservation Contract

[1] Comment--Use of Form

[2] FORM

Amendment to Land Conservation Contract

§§ 28D.212-28D.219 [Reserved]

§ 28D.220 Notice of Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

[1] Comment

[a] Use of Form

[b] Effect of Notice of Nonrenewal

[c] Cancellation and New Contract Designating Farmland Security Zone

[2] FORM

Notice of Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

§ 28D.221 Notice of Partial Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

[1] Comment--Use of Form

[2] FORM

Notice of Partial Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

§ 28D.222 Petition for Cancellation of Land Conservation Contract [Gov. Code §§ 51280-51287]--Letter Form

[1] Comment

[a] Use of Form

[b] Required Information

[c] Hearing and Fees

[2] FORM

Petition for Cancellation of Land Conservation Contract [Gov. Code §§ 51280-51287]--Letter Form

§ 28D.223 Petition for Cancellation of Land Conservation Contract--Standardized Form

[1] Comment--Use of Form

[2] FORM

Petition for Cancellation of Land Conservation Contract--Standardized Form

§ 28D.224 Certificate of Tentative Cancellation of Land Con servation Contract [Gov. Code §§ 51282, 51283.4]

[1] Comment

[a] Use of Form

[b] Information Required in Certificate

[2] FORM

Certificate of Tentative Cancellation of Land Conservation Contract [Gov. Code §§ 51282, 51283.4]

§§ 28D.225-28D.229 [Reserved]

§ 28D.230 Grant of Open-Space Easement [Gov. Code §§ 51075(d), 51080-51087]

[1] Comment

[a] Use of Form

[b] Required Provisions

[2] FORM

Grant of Open-Space Easement [Gov. Code §§ 51075(d), 51080-51087]

§ 28D.231 Notice of Nonrenewal of Open-Space Easement [Gov. Code §§ 51090-51092]

[1] Comment--Use of Form

[2] FORM

Notice of Nonrenewal of Open-Space Easement [Gov. Code §§ 51090-51092]

§ 28D.232 Petition for Abandonment of Open-Space Easement [Gov. Code §§ 51090, 51093, 51094]

[1] Comment

[a] Use of Form

[b] Abandonment Fee

[2] FORM

Petition for Abandonment of Open-Space Easement [Gov. Code §§ 51090, 51093, 51094]

§§ 28D.233-28D.239 [Reserved]

§ 28D.240 Deed of Conservation Easement [Civ. Code §§ 815-816]

[1] Comment--Use of Form

[2] FORM

Deed of Conservation Easement [Civ. Code §§ 815-816]

§ 28D.241 Articles of Incorporation of Land Trust

[1] Comment--Use of Form

[2] FORM

Articles of Incorporation of Land Trust



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND

12-28D California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the statutory requirements and necessary forms for placing restrictions on the use of agricultural or open-space land for conservation purposes. The chapter focuses on the Williamson Act, also known as the California Land Conservation Act of 1965, on the Open-Space Easement Act of 1974, and on conservation easements created under the Civil Code. Additionally, the chapter discusses the use of land trusts and transferable development rights as methods of conserving or managing natural resources. Consideration is also given to the potential tax benefits of placing conservation restrictions on land use.

The Legal Background and Form comments are intended as a basic orientation to the governing law. The Transaction Guide provides checklists concerning the creation and termination of agricultural preserves and open-space easements. The forms contained in this chapter include those necessary for the establishment and termination of an agricultural preserve and the accompanying land conservation contract; a sample open-space easement and forms necessary for the termination of the easement; a sample conservation easement; and sample articles of incorporation for a nonprofit land trust.

Other methods of land preservation are discussed briefly here, such as coastal and environmental regulatory statutes and open-space zoning. However, an in-depth review of these approaches to land conservation is beyond the scope of this chapter. For complete coverage of conservation and environmental law, see California Environmental Law and Land Use Practice(Matthew Bender). For further information on land use regulations and property tax consequences, see California Real Estate Law and Practice, Ch. 253, *Local Planning and the General Plan* , Ch. 322, *Taxation and Land Use Control* , Ch. 343, *Easements and Licenses* , and Ch. 361, *Dedication* (Matthew Bender). For further information on tax consequences of land use restrictions, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 11, *Contributions to Charities* (Matthew Bender).

Easements in general are covered in Ch. 28A, *Easements and Licenses* . General restrictions that may be imposed on land use are discussed in Ch. 28C, *Covenants, Conditions, and Restrictions* . Forms and procedures for the dedication of land to a city or county are covered in Ch. 27A, *Dedication* . Zoning and environmental regulations are discussed in detail in Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* . Specific environmental contamination issues in real property transactions are covered in Ch. 33, *Contamination Considerations in Real Property Transactions* . The formation of a nonprofit organization is discussed in Ch. 13, *Nonprofit Corporations* .



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART I. RESEARCH GUIDE
A. Primary Sources

12-28D California Legal Forms--Transaction Guide § 28D.01

§ 28D.01 California Sources

[1] Constitution

Property tax valuation of enforceably restricted open-space lands. *Cal. Const., art. XIII, § 8.*

[2] Statutes

Conservation easements.
Legislative findings and declarations. *Civ. Code § 815.*
Definition and requirements. *Civ. Code §§ 815.1-815.4, 815.5.*
Enforcement and interpretation. *Civ. Code §§ 815.7, 816.*
Authority of political subdivisions to hold comparable easements. *Civ. Code § 815.9.*

Department of Parks and Recreation may acquire conservation easement if department determines that conservation easement is necessary to protect unit of state park system from incompatible use or to preserve and enhance natural resource, cultural, or historic value of unit of state park system. *Pub. Res. Code § 5011.7.*

Recording of instruments. *Civ. Code § 1169.*

Publication of notice. *Gov. Code §§ 6060, 6061.*

Scenic restrictions. *Gov. Code § 6950 et seq.*

Natural Resources Agency must identify, for future conservation (including possible acquisition of conservation easements), key buffer properties adjacent to large ecologically valuable working landscapes that provide significant economic benefits to state, such as active military or national guard properties, whose future viability could be threatened by encroachment of incompatible land use activities. Gov. Code § 12805.6.

Subvention payments to local governments. *Gov. Code § 16140 et seq.*

Execution, acknowledgment, and recordation of instrument. *Gov. Code §§ 27287-27290*.

Recording fees. *Gov. Code § 27361*.

Open-Space Easement Act of 1974.
Legislative declarations. *Gov. Code §§ 51070-51073*.
Definitions. *Gov. Code § 51075*.
Execution and acceptance or approval. *Gov. Code §§ 51080-51085*.
Effect and enforcement. *Gov. Code § 51086*.
Recordation. *Gov. Code § 51087*.
Termination. *Gov. Code §§ 51090-51094*.
Eminent domain. *Gov. Code § 51095*.
Open-space easement deemed enforceable restriction. *Gov. Code § 51096*.
Purchase by municipality of property to preserve open space. *Gov. Code § 51097*.

Agricultural preserves.
Definitions. *Gov. Code § 51201*.
Inclusion of recreational land or land within scenic highway corridor, wildlife habitat, saltpond, managed wetland, or submerged area. *Gov. Code §§ 51205, 51205.1*.
Role of Department of Energy and Conservation. *Gov. Code §§ 51206, 51207*.
Legislative declarations. *Gov. Code § 51220 et seq.*
Establishment and administration of agricultural preserve. *Gov. Code § 51230 et seq.*
Land conservation contracts. *Gov. Code § 51240 et seq.*
Nonrenewal of land conservation contract. *Gov. Code §§ 51245, 51246*.
Cancellation of land conservation contract. *Gov. Code § 51280 et seq.*
Eminent domain or other acquisition by public agency. *Gov. Code §§ 51290-51295*.
Farmland security zones. *Gov. Code § 51296 et seq.*

Local government policies and priorities in loss of open-space land. *Gov. Code §§ 56001, 56377*.

General plan. *Gov. Code §§ 65300, 65302*.

Local open-space plan and definition of open-space land. *Gov. Code § 65560*.

California Environmental Quality Act. *Pub. Res. Code § 21000 et seq.*

California Coastal Act. *Pub. Res. Code § 30000 et seq.*

State Coastal Conservancy. *Pub. Res. Code § 31000 et seq.*

Land valuation for property tax assessment purposes.
General requirements. *Rev. & Tax. Code §§ 401-409*.
Effect of enforceable restrictions on assessment. *Rev. & Tax. Code § 402.1*.
Valuation of open-space land subject to certain enforceable restrictions. *Rev. & Tax. Code §§ 421-430.5*.

[3] Attorney General Opinions

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Eligibility requirements for an agricultural preserve. *56 Cal. Op. Att'y Gen. 160 (1973)* .

Subdivision of contracted land. *54 Cal. Op. Att'y Gen. 90 (1971)* .

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§ 28D.02 Federal Sources

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[2] Regulations

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12-28D California Legal Forms--Transaction Guide § 28D.05

§ 28D.05 Law Reviews and Periodicals

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseState & Regional Planning



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§ 28D.06 Text References

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California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* , Ch. 579, *Zoning and Planning* (Matthew Bender).

California Legal Forms(Matthew Bender)

Ch. 13, *Nonprofit Corporations* .

Ch. 27A, *Dedication,* Ch. 28A, *Easements and Licenses,* Ch. 28B, *Covenants, Conditions, and Restrictions* .

Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

California Real Estate Law Practice, Ch. 253, *Local Planning and the General Plan,* Ch. 322, *Taxation and Land Use Control,* Ch. 343, *Easements and Licenses,* Ch. 361, *Dedication* (Matthew Bender).

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3 Am. Jur. 2d *Agriculture § 25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 28D.10 Nature of Agricultural Preserves

[1] Purpose of Williamson Act

The Williamson Act [*Gov. Code § 51200 et seq.*] is designed to promote the general welfare and to protect the public interest in agricultural land [*Gov. Code § 51220(f)*]. The Williamson Act, also known as the California Land Conservation Act of 1965, is based on the following legislative findings:

> (1) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources, both to maintain the state's agricultural economy and to ensure adequate, healthful, and nutritious food [*Gov. Code § 51220(a)*].
>
> (2) The agricultural work force, which has the lowest average income of any occupational group in California, is vital to sustaining agricultural productivity, and the need to house this work force is of such crisis proportions that the housing of agricultural laborers must be included among agricultural uses and doing so is in the public interest [*Gov. Code § 51220(b)*].
>
> (3) Discouraging premature and unnecessary conversion of agricultural land to urban uses is in the public interest and will benefit urban dwellers by discouraging discontiguous urban development patterns that unnecessarily increase the costs of community services to community residents [*Gov. Code § 51220(c)*].
>
> (4) In a rapidly urbanizing society, agricultural lands have a definite value as open space, and preserving agricultural production on those lands constitutes an important physical, social, aesthetic, and economic asset to existing or pending urban or metropolitan development [*Gov. Code § 51220(d)*].
>
> (5) Land within a scenic highway corridor [*see Gov. Code § 51201(i)*] or wildlife habitat area [*see Gov. Code § 51201(j)*] has value to the state because of its scenic beauty and location adjacent to or within view of a state scenic highway, or because it is of great importance as habitat for wildlife and contributes to the preservation or enhancement of wildlife [*Gov. Code § 51220(e)*].

(6) Agricultural operations are often hindered or impaired by uses that increase the density of permanent or temporary human population of the agricultural area, and therefore cities and counties must determine the types of uses to be deemed compatible uses [*see Gov. Code § 51201(e)*; *see also § 28D.12 [2]*] in a manner consistent with the recognition of that fact [*Gov. Code § 51220.5*].

(7) It is in the public interest for local officials and landowners to retain agricultural lands that are subject to contracts entered into under the Williamson Act in parcels large enough to sustain the agricultural uses permitted under those contracts [*Gov. Code § 51222*].

In addition, the legislature has declared that expenditure of public funds under the Williamson Act's provisions is in the public interest and is necessary to accomplish the purposes described in paragraphs (1) through (7), *above* [*Gov. Code § 51221*].

The Williamson Act serves these findings by using land conservation contracts to restrict permitted uses of land within an agricultural preserve. Once a preserve is established, the local government may offer contracts to owners of land within the preserve [*see Gov. Code §§ 51230, 51240*; *see also Gov. Code § 51240 et seq.*; § 28D.13]. These Williamson Act contracts bind the local government to a lower property tax rate and bind the landowner to a promise to restrict use of the land to agricultural, recreational, or open-space purposes [*see Gov. Code §§ 51240, 51243(a)*; *see also Gov. Code § 51240 et seq.*; *Lewis v. City of Hayward (1986) 177 Cal. App. 3d 103, 108-110, 222 Cal. Rptr. 781* ; *Dorcich v. Johnson (1980) 110 Cal. App. 3d 487, 493, 167 Cal. Rptr. 897* (historical explanation of tax benefits); §§ 28D.13, 28D.50, 28D.51]. As compensation for decreased property tax revenues, cities and counties with Williamson Act agricultural preserves may receive subvention payments from the state [*Gov. Code §§ 16140-16154*; *see § 28D.52*]. The Act also restricts certain public actions within the agricultural preserves [*see, e.g., Gov. Code § 51290*; *see also § 28D.15*].

The Department of Energy and Conservation is authorized to meet with and assist government agencies, organizations, landowners, or any other person or entity in interpreting the Williamson Act and to disseminate information about the Act [*Gov. Code § 51206*; *see § 28D.120*].

[2] Definitions

An "agricultural preserve" is an area devoted to agricultural, recreational, or open-space use, or to any combination of these uses, that is established under the provisions of the Williamson Act (also known as the California Land Conservation Act of 1965) [*Gov. Code § 51201(d)*; *see Gov. Code §§ 51200, 51201(b), (n), (o)*; *see also Gov. Code § 51200 et seq.*]. An "agricultural use" is a use of land, including, but not limited to, greenhouses, to produce plant and animal products for commercial purposes [*Gov. Code § 51201(a), (b)*]. The term also includes recreational and open-space use for the purposes of placing contractual restrictions on the use of land in an agricultural preserve [*Gov. Code § 51205*; *see § 28D.13*].

"Recreational use" means the use of land by the public for walking, hiking, picnicking, camping, swimming, boating, fishing, hunting, or any other outdoor games or sports for which facilities are provided for public participation. Any fee charged for recreational use must be reasonable and must not have the effect of unduly limiting public use [*Gov. Code § 51201(n)*]. Any ancillary structures necessary for a recreational use must comply with the provisions of *Gov. Code § 51238.1*, which details the principles of compatibility and procedures for board or counsel action [*Gov. Code § 51201(n)*].

"Open-space use" means the use or maintenance of land (1) in a manner that preserves its natural characteristics, beauty, or openness for the benefit and enjoyment of the public; (2) to provide essential habitat for wildlife; or (3) for the solar evaporation of sea water in the course of salt production for commercial purposes [*Gov. Code § 51201(o)*]. Land used

for open space must be located in one of the following areas [*Gov. Code § 51201(o)*]: a scenic highway corridor [*see Gov. Code § 51201(i)*]; a wildlife habitat area [*see Gov. Code § 51201(j)*]; a saltpond [*see Gov. Code § 51201(k)*]; a managed wetland area [*see Gov. Code § 51201*(*l*)]; or a submerged area [*see Gov. Code § 51201(m)*].

[3] Agricultural Land Classification

The Williamson Act does not expressly define the term "agricultural land." In some circumstances, the term refers to land put to agricultural, recreational, or open-space use [*see Gov. Code §§ 51201(b), (d), (n), (o), 51205, 51205.1*]. In other circumstances, it seems to refer only to land used for agricultural production [*see Gov. Code § 51205* ("agricultural land" and "agricultural use" include recreation and open-space); *see, e.g., Gov. Code § 51230* (preserve may contain land that is not agricultural, but use must be restricted to be compatible with agricultural use)]. For a definition of "agricultural use," see [2], *above*.

The Williamson Act distinguishes for some purposes between prime and non-prime agricultural lands [*see, e.g., Gov. Code § 51222* (presumption of parcel size)]. "Prime agricultural land" refers to land of first quality, whether or not in actual use for agricultural production. It includes any of the following [*see Gov. Code § 51201(c)*]:

- Land qualifying for rating as class I or class II in the Soil Conservation Service land use capability classifications.

- Land qualifying for rating 80 through 100 in the Storie Index Rating.

- Land that supports livestock used for the production of food and fiber and that has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture.

- Land planted with fruit- or nut-bearing trees, vines, bushes, or crops that have a nonbearing period of less than five years and that normally return during the commercial bearing period of at least $200 per acre, on an annual basis, from the production of unprocessed agricultural plant production.

- Land that has returned from the production of unprocessed agricultural plant products an annual gross value of at least $200 per acre for three of the previous five years.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 28D.11 Establishing, Disestablishing, and Altering Agricultural Preserves

[1] Establishing Agricultural Preserves

[a] Requirements Imposed on Cities and Counties

In order to establish an agricultural preserve, a county or city must have a general plan [*Gov. Code § 51230*]. A "general plan" is a statement of development policies for use in local planning [*Gov. Code § 65302*; *see Gov. Code §§ 65100, 65101, 65300-65307, 65700*; *see also* California Real Estate Law and Practice, ch. 253, *Local Planning and the General Plan* (Matthew Bender)].

In general, cities and counties are not required to implement the Williamson Act [*Kelsey v. Colwell (1973) 30 Cal. App. 3d 590, 593-595, 106 Cal. Rptr 420]* . However, when an owner of land within a scenic highway corridor requests that the land be included in an agricultural preserve, the locality must establish a preserve and offer a contract, regardless of the size of the parcel [*Gov. Code § 51205.1*; *Borel v. County of Contra Costa (1990) 220 Cal. App. 3d 521, 527, 269 Cal. Rptr. 460]* . A "scenic highway corridor" is an area adjacent to and within view of the right-of-way of specified types of county scenic highways or existing or proposed state scenic highways [*see Gov. Code § 51201(i)*].

[b] Land Eligibility Requirements

In general, an agricultural preserve must consist of at least 100 acres of land, unless circumstances exist that permit the locality to establish smaller preserves [*Gov. Code § 51230*]. Two or more contiguous or commonly owned parcels of land may be combined to meet this requirement, and land zoned as timberland production [*see Gov. Code §§ 51100-51155*] may be taken into account [*Gov. Code § 51230*]. The governing body may create either a single large preserve including several landowners, or separate agricultural preserves for every qualifying land owner *[56 Cal. Op. Att'y Gen. 160, 161 (1973)]* .

Smaller preserves may be established if the city or county finds that doing so meets two criteria. First, the smaller preserve must be necessary because of the unique characteristics of the agricultural enterprises in the area. Second, the smaller preserve must be consistent with the city or county general plan [*Gov. Code § 51230*; *see* Comment, *Beyond the*

Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1157 (1984)].

Additionally, if the land proposed for inclusion in an agricultural preserve is within a scenic highway corridor [*see Gov. Code § 51201(i)*], the governing locality must establish an agricultural preserve and offer a contract regardless of the size of the parcel [*Gov. Code § 51205.1*; *Borel v. County of Contra Costa (1990) 220 Cal. App. 3d 521, 527, 269 Cal. Rptr. 460* ; *see* [a], *above*].

An agricultural preserve may contain land other than agricultural land. However, the use of any land within the preserve that is not subject to a Williamson Act contract must be restricted by zoning, including appropriate minimum parcel sizes that are at a minimum consistent with the Government Code provisions concerning agricultural land, to be compatible with the agricultural use of the land under contract [*Gov. Code § 51230*; *see § 28D.13[2]* (rules for compatible uses)]. Although the governing locality must restrict the use of the land not subject to contract within two years of the effective date of any contract on land within the preserve, the failure to so restrict the land is not sufficient grounds to cancel or otherwise invalidate the contract [*Gov. Code § 51230*]. No land occupied by gas, electric, water, communication, or agricultural laborer housing facilities may be excluded from an agricultural preserve because of that use [*Gov. Code § 51238(a)(2)*].

[c] Procedures

Each city or county must adopt by resolution rules governing the administration of agricultural preserves, including procedures for initiating, filing, and processing requests to establish agricultural preserves [*Gov. Code § 51231*]. These rules must be applied uniformly throughout the preserve [*Gov. Code § 51231*]. The city or county also may require the payment of a reasonable application fee [*see Gov. Code § 51231*]. Additionally, the Act prescribes certain procedures that must be followed in establishing an agricultural preserve [*see, e.g., Gov. Code §§ 51230-51237.5*]. For a detailed guide to those procedures, see *§ 28D.120[1]*.

In general, agricultural preserves are established at the request of a landowner or group of landowners [Comment, *Beyond the Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1156 (July 1984)*]. Typically, the first step to establish an agricultural preserve is to submit a proposal directly to the planning department of the county or city having jurisdiction over the land, or to the appropriate city or county department or agency, which will forward the proposal to the planning commission [*see Gov. Code § 51234*]. For a form of a proposal to establish an agricultural preserve, see *§ 28D.200[2]*.

The planning agency will submit a report on the proposal to the board of supervisors or city council. The report must state whether the proposed preserve is consistent or inconsistent with the locality's general plan. Final action on the proposal may not be taken until the report is received, or until the required time for submitting the report has elapsed. The board of supervisors or city council must make a finding of consistency with the general plan before taking final action to establish the preserve [*Gov. Code § 51234*].

The board of supervisors or city council must then give notice of and hold a public hearing on the proposed agricultural preserve [*Gov. Code § 51230*; *see Gov. Code §§ 6060, 6061*; *see also § 28D.120*]. The notice must include a legal description, or the assessor's parcel number, of the land proposed to be included in the preserve [*Gov. Code § 51230*]. A substantial error in the legal description of the land renders both the notice and the contract invalid, and the landowner will not be entitled to the benefits of the lower property tax valuation. The notice cannot be subsequently corrected unless special facts exist that clearly indicate that all interested persons, including the general public, would be misled by the notice *[53 Cal. Op. Att'y Gen. 305 (1970)]* .

Once an agricultural preserve has been established [*see § 28D.201* (form of resolution establishing preserve)], the board of supervisors or city council must adopt rules to govern the administration of the preserve [*Gov. Code § 51231*; *see §*

28D.12].

[2] Disestablishing or Altering Boundaries of Agricultural Preserves

The same procedures required by the locality's uniform rules [*see § 28D.12[1]*] to establish an agricultural preserve must be used to disestablish, or enlarge or diminish the size of, a preserve [*Gov. Code § 51231*]. However, additional notice requirements are imposed on the city or county if a proposal to disestablish or alter a preserve's boundaries will remove land under contract from the preserve [*see Gov. Code § 51232*; *see also § 28D.13*]. For a guide to these procedures, see *§ 28D.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseGrowth ControlReal Property LawZoning & Land UseLocal Planning



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§ 28D.12 Administering Agricultural Preserves

[1] Rules for Administration

Localities with agricultural preserves must adopt rules governing the administration of the preserves, which must be applied uniformly throughout the preserve [*Gov. Code § 51231*]. These rules must, in addition to governing the preserve's administration, outline procedures for initiating, filing, and processing requests to establish, disestablish, or alter the size of the agricultural preserves [*Gov. Code § 51231*]. The rules must also, in general, outline uses of land within agricultural preserves that have been determined to be compatible with the agricultural, recreational, or open-space use of land within the preserve and under contract [*see Gov. Code § 51231*; *see also Gov. Code § 51201(e)*]. Uses considered compatible for contracted land [*see § 28D.13*] may be enumerated separately from uses considered compatible for land within the preserve that is not under contract [*Gov. Code § 51231*; *see* [2], *below*]. The board of supervisors or city council may appoint an advisory board to advise on the administration of the preserves and on any matters relating to contracts entered into under the Williamson Act [*Gov. Code § 51239*].

Localities generally have broad discretion to tailor their rules to determine the kinds of property that may be included in a preserve. For example, a county or city may resolve to include only productive agricultural land, and may adopt rules requiring a minimum capital outlay for agricultural capital investments *[56 Cal. Op. Att'y Gen. 160, 162-164 (1973)* ; *see Gov. Code § 51240*]. The rules must, nevertheless, meet constitutional standards. Thus, while it is acceptable to require that the gross income derived from the preserve be at least 50 percent of its estimated agricultural capability, a requirement that a landowner within an agricultural preserve derive 51 percent of his or her income from agricultural pursuits constitutes a denial of equal protection *[56 Cal. Op. Att'y Gen. 160, 164 (1973)]* . Additionally, land may not be excluded from an agricultural preserve based on its use for gas, electric, water, communication, or agricultural laborer housing facilities [*Gov. Code § 51238(a)(2)*].

[2] Compatible Uses

A "compatible use" is any use determined by the city or county administering the preserve to be compatible with the agricultural, recreational, or open-space use of the land within the preserve and under contract [*Gov. Code § 51201(e)*; *see* [1], *above*]. Use of lands within the preserve that are not under a contract must be restricted, within two years of the

effective date of any contract on land within the preserve, by zoning, including appropriate minimum parcel sizes that are at a minimum consistent with the Government Code provisions concerning agricultural land, to be compatible with the agricultural, recreational, or open-space use of the land under contract [*Gov. Code § 51230*]. The effectiveness of this requirement is uncertain, however, since the Williamson Act does not include any provision to enforce this requirement, and since land conservation contracts may not be cancelled or invalidated based on the failure of the governing body to restrict the use of land not subject to a contract within a preserve [*see Gov. Code § 51230*].

Certain specified uses are deemed compatible unless the governing body finds otherwise after notice and a hearing. For example, agricultural, recreational, or open-space uses are considered compatible unless the board of supervisors or city council finds, after notice and a hearing, that such use is not compatible with the uses to which the land is restricted by a Williamson Act contract [*Gov. Code § 51201(e)*; *see § 28D.13*]. Further, the erection, construction, alteration, or maintenance of gas, electric, water, communication, or agricultural laborer housing facilities are compatible uses within any agricultural preserve, unless the board of supervisors or city council makes a finding to the contrary after notice and a hearing [*Gov. Code § 51238(a)*].

The governing body may impose additional conditions on lands within preserves to permit and encourage compatible use of the land, particularly public outdoor recreational uses [*Gov. Code § 51238(b)*]. Additionally, the governing body may encourage use of the land for free public recreation by agreeing to indemnify the owner against all claims arising from that use. Furthermore, the owner's agreement to the free, public recreational use of the land is not to be construed as an implied dedication to that use [*Gov. Code § 51238.5(a)*; *see* California Real Estate Law and Practice, ch. 361, *Dedication* (Matthew Bender)]. If an owner of land agrees to permit the use of his or her land for agricultural laborer housing facilities authorized pursuant to *Gov. Code § 51238*, the city, county, housing authority, state agency, or nonprofit organization may indemnify the owner against all claims arising from that use [*Gov. Code § 51238.5(b)*].

The fact that a county has entered into a contract restricting the use of the land to certain compatible uses [*see § 28D.13*] does not preclude the county's power to regulate those uses. Thus, a Williamson Act contract does not prevent the county from changing its zoning and placing more restrictive regulations on permitted uses of property within the preserve [*Delucchi v. County of Santa Cruz (1986) 179 Cal. App. 3d 814, 823-824, 225 Cal. Rptr. 43 , cert. denied, 479 U.S. 803 (1986)]* .

[3] Effect of Annexation, Detachment, Incorporation, or Disincorporation

In the event that land within an agricultural preserve is included in an annexation, detachment, incorporation, or disincorporation, the preserve continues in full effect. Any city or county acquiring jurisdiction over land in a preserve as a result of annexation, detachment, incorporation, or disincorporation succeeds to all the rights and responsibilities specified in the Williamson Act for cities and counties with agricultural preserves located within their boundaries [*Gov. Code § 51235*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsBoundariesReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.13

§ 28D.13 Land Conservation Contracts

[1] In General

Once an agricultural preserve is established, the city or county may enter into land conservation contracts with owners of land within the preserve limiting the use of the land for the purpose of preserving the land in accordance with the Williamson Act [*Gov. Code § 51240*]. An "owner" or "landowner" includes a contract purchaser under the California Veterans Aid Program [53 Cal. Op. Att'y Gen. 187, 188 (1970)] . A beneficiary or trustee is not an owner, and therefore his or her assent to the contract is not required [*51 Cal. Op. Att'y Gen. 80, 84, 88 (1968)]* .

Contracts may provide restrictions, terms, and conditions, including payments and fees, that are more restrictive than, or that are in addition to, those required by the Williamson Act [*Gov. Code § 51240*]. In addition, a governing body may place regulations in its zoning requirements that are more restrictive than those in its land conservation contracts even after it has entered into a contract [*Delucchi v. County of Santa Cruz (1986) 179 Cal. App. 3d 814, 823-824, 225 Cal. Rptr. 43 , cert. denied, 479 U.S. 803]* .

Land that is under a Williamson Act land conservation contract is eligible to be valued in the most advantageous methods for property tax purposes. However, land within a preserve that is not under contract is not eligible for this treatment [*see Rev. & Tax. Code §§ 421-423.4*]. For further discussion, see *§§ 28D.50* and *28D.51*.

The city or county must record a copy of a contract, together with a reference to the map showing the location of the agricultural preserve in which the property lies, with the county recorder no later than 20 days after entering into a contract [*Gov. Code § 51248*]. Alternatively, whenever a city or county is required to record a contract, it may file a fictitious contract and later include the provisions of the fictitious contract by reference in any contract required to be filed under the Williamson Act [*Gov. Code § 51248.5*; *see Civ. Code § 2952*].

[2] Eligible Land

To be eligible for a land conservation contract, the land must be located within an established agricultural preserve and must be devoted to agricultural use [*Gov. Code § 51242*]. For the purposes of inclusion in an agricultural preserve and a

Williamson Act contract, the term "agricultural land" includes the following [*Gov. Code § 51205*]: (1) land devoted to recreational use [*see Gov. Code § 51201(n)*; *see also Gov. Code § 51238.1*]; and (2) land within a scenic highway corridor [*see Gov. Code §§ 51201(i), 51205.1*], a wildlife habitat area [*see Gov. Code § 51201(j)*], a saltpond [*see Gov. Code § 51201(k)*], a managed wetland area [*see Gov. Code § 51201(l)*], or a submerged area [*see Gov. Code § 51201(m)*]. For the same purposes, the term "agricultural use" includes recreational and open-space use [*Gov. Code § 51205*; *see Gov. Code § 51201(n), (o)*]. The landowner must provide the governing locality with the information required to determine the eligibility of the land involved [*Gov. Code § 51247*].

The Legislature has declared that it is in the public interest for local officials and landowners to retain agricultural lands that are subject to Williamson Act contracts in parcels large enough to sustain the agricultural uses permitted under the contract. Parcels of at least 10 acres are presumed to be sufficient for prime agricultural land, and parcels of at least 40 acres are presumed to be sufficient for land that is not prime agricultural land [*Gov. Code § 51222*; *see Gov. Code § 51201(c)* ("prime agricultural land" defined); *see also § 28D.10[2]*].

[3] Effect of Prior Protest Against County Contracts Near Cities

Under former law, a city whose boundaries were within one mile of the land proposed to be placed under a contract was authorized to file a protest against the proposed contract. This provision allowed the city to preserve its option to cancel the contract on annexation of the land to the city [*see* former *Gov. Code §§ 51243, 51243.5* (repealed by Stats. 1990, ch. 841, § 5)].

Under current law, except as provided in *Gov. Code § 51243.5*, on and after the effective date of the annexation by a city of any land under contract with a county, the city succeeds to all rights, duties, and powers of the county under the contract [*Gov. Code § 51243(b)*].

Gov. Code § 51243.5 applies only to land that was within one mile of a city boundary when a contract was executed pursuant to the Act before 1991 [*Gov. Code § 51243.5(a)*]. For any proposal that would result in the annexation to a city of any land that is subject to a contract under the Act, the local agency formation commission (LAFCO) must determine whether the city may exercise its option to not succeed to the rights, duties, and powers of the county under the contract [*Gov. Code § 51243.5(b)*]. In making the determination, pursuant to *Gov. Code § 51206(b)*, the LAFCO may request, and the Department of Conservation must provide, advice and assistance in interpreting the requirements of this section [*Gov. Code § 51243.5(c)*]. If the Department of Conservation has concerns about an action proposed to be taken by a LAFCO pursuant to *Gov. Code § 51243.5* or *51243.6*, it must advise the LAFCO of its concerns, whether or not the LAFCO has requested it to do so. The LAFCO must address the Department's concerns in any hearing to consider the proposed annexation or a city's determination whether to exercise its option not to succeed to a contract, and must specifically find that substantial evidence exists to show that the city has the present option under this section to decline to succeed to the contract [*Gov. Code § 51243.5(c)*].

A city may exercise its option not to succeed to the rights, duties, and powers of the county under the contract if, before December 8, 1971, the land being annexed was within one mile of the city's boundary when the contract was executed, and the city had filed with the county board of supervisors a resolution protesting the execution of the contract [*Gov. Code § 51243.5(d)*]. A city may exercise its option not to succeed to the rights, duties, and powers of the county under the contract if each of the following occurred before 1991 [*Gov. Code § 51243.5(e)*]:

- The land being annexed was within one mile of the city's boundary when the contract was executed.
- The city filed with the LAFCO a resolution protesting the execution of the contract.
- The LAFCO held a hearing to consider the city's protest to the contract.

- The LAFCO found that the contract would be inconsistent with the publicly desirable future use and control of the land.

- The LAFCO approved the city's protest.

It is conclusively presumed that no protest was filed by the city unless there is a record of the filing of the protest and the protest identifies the affected contract and the subject parcel. It is also conclusively presumed that required notice was given before the execution of the contract [*Gov. Code § 51243.5(f)*].

The option of a city not to succeed to a contract extends only to that part of the land that was within one mile of the city's boundary when the contract was executed [*Gov. Code § 51243.5(g)*].

If the city exercises its option not to succeed to a contract, then the city must record a certificate of contract termination with the county recorder at the same time the executive officer of the LAFCO files the certificate of completion pursuant to *Gov. Code § 57203*. The certificate of contract termination must include a legal description of the land for which the city terminates the contract [*Gov. Code § 51243.5(h)*].

[4] Duration, Terms, and Conditions

Every contract must be for an initial term of at least 10 years [*Gov. Code § 51244*]. In addition, every contract must provide that on the anniversary date of the contract, or on any other annual date specified in the contract, a year will be added automatically to the initial term unless notice of nonrenewal is given as provided in the Williamson Act [*Gov. Code § 51244*; *see Gov. Code § 51245*]. This provision effectively retains the 10-year duration of the land use restrictions, and means that a contract will have at least nine additional years to run whenever notice of nonrenewal is given [*see Gov. Code §§ 51244, 51246(a)*; *see also § 28D.14[1]*].

If the initial term of the contract is for more than 10 years, the contract may provide that the annual automatic addition of a year to the contract's term will begin on the anniversary date (or other annual date specified by the contract) when the contract will have an unexpired term of nine years, unless notice of nonrenewal is given [*Gov. Code § 51244.5*]. Although this permissive language could be interpreted to mean that the automatic renewal provision is not required for contracts with terms longer than 10 years, the statute has not been interpreted in this manner. Further, such an interpretation might render the contract an unenforceable restriction for property tax valuation purposes (at least from the date that the contract has an unexpired term of less than 10 years) [*see, e.g., Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852, 171 Cal. Rptr. 619, 623 P.2d 180]* .

When a Williamson Act contract renews automatically on each anniversary date, the parties enter into a new contract each year. At the time of renewal, all applicable laws and ordinances then in existence, including provisions enacted or adopted after the contract was originally made, become part of the contract [*County of Humboldt v. McKee (2008) 165 Cal. App. 4th 1476, 1496-1497, 82 Cal. Rptr. 3d 38* (600-acre minimum parcel size for divisions of Class B preserves imposed by guidelines adopted by county in 1978 applied on renewal of Williamson Act contract originally entered into in 1977)].

Every land conservation contract must exclude uses that are not agricultural and that are not compatible with agricultural uses. This exclusion must remain in effect for the duration of the contract [*Gov. Code § 51243(a)*]. Every contract also must be binding on and inure to the benefit of all successors in interest of the owner [*Gov. Code § 51243(b)*; *see* [5], *below*]. In addition, the city or county may include restrictions, terms, and conditions, including payments and fees, that are more restrictive than or in addition to those required by the Williamson Act, as long as the minimum requirements of the Act are satisfied [*Gov. Code § 51240*].

Once a contract is made with any landowner, the governing locality must offer contracts with similar terms to every

other owner of agricultural land within the same agricultural preserve. The contracts need not be identical, except as required by the Williamson Act, provided that any contractual differences are related to the differences in location and characteristics of the land, and are pursuant to the uniform rules adopted by the locality [*Gov. Code § 51241*].

[5] Divisibility and Succession

In general, the benefits and burdens of a Williamson Act contract run with the land regardless of changes in ownership or subdivisions [*see Gov. Code § 51243*]. If land under a contract is divided, the owner of any parcel may exercise all of the rights of the owner in the original contract, including the right to give notice of nonrenewal and to petition for cancellation [*see § 28D.14[1], [2]*], independent of any other owner of a portion of the divided land [*Gov. Code § 51243(b)*]. If the owner of any subdivided land takes any action, such as giving a notice of nonrenewal or cancelling, the effect of the action is not imputed to the owners of the remaining parcels and does not affect the land conservation contract as it applies to them [*Gov. Code § 51243(b)*].

Special restrictions apply when ownership of land in an agricultural preserve is transferred among immediate family members [*see Gov. Code § 51230.1*]. An "immediate family member" is the spouse, natural or adopted children, parents, or siblings of the landowner [*Gov. Code § 51230.1(c)*]. The transfer of ownership between immediate family members does not affect a Williamson Act contract, and the transferred portion remains subject to the contract, if the following conditions are satisfied [*Gov. Code § 51230.1(a), (b)*]:

(1) The parcel to be transferred is at least 10 acres in size if it is prime agricultural land, or 40 acres in size if it is not prime agricultural land [*see § 28D.10[2]*].

(2) The parcel to be transferred conforms to the applicable local zoning and land division ordinances and to any applicable local coastal program certified pursuant to *Public Resources Code Sections 30500-30534*.

(3) The parcel to be transferred complies with all applicable requirements relating to agricultural income and permanent agricultural improvements that are imposed by the county or city as a condition of a land conservation contract covering the land of which the parcel to be transferred is a portion. If the contracted land already complies with these requirements, the portion of that land to be transferred is deemed to comply.

(4) A written agreement exists between the immediate family members who are parties to the proposed transfer stating that the land subject to a Williamson Act contract, as well as the portion to be transferred, will be operated under the joint management of the parties subject to the terms and conditions and for the duration of the Williamson Act contract.

The effect of the landowner's default and subsequent foreclosure or trustee's sale on land under a Williamson Act contract depends on when the trust deed or other encumbrance is recorded. If the encumbrance was executed and recorded after the execution and recordation of the Williamson Act contract, the buyer at the foreclosure or trustee's sale takes the land subject to the contract's use restrictions. If the encumbrance was executed and recorded before the execution and recordation of the Williamson Act contract, the buyer acquires the land free of the contract's restrictions unless the beneficiary of the encumbrance consented to subordinate his or her interest to the subsequent contractual restrictions [*51 Cal. Op. Att'y Gen. 80, 84-85, 88 (1968)]* .

[6] Interpretation and Enforcement

A Williamson Act contract is subject to the same principles of interpretation as other contracts. Thus, land conservation contracts are construed as a whole and interpreted so as to give effect to the main purpose of the contract. Language that

is inconsistent with the objective of the contract is rejected. If a contract is susceptible to multiple interpretations, a court will construe the contract to give it effect, provided that the construction does not violate the parties' intention [*County of Marin v. Assessment App. Bd. (1976) 64 Cal. App. 3d 319, 324-325, 134 Cal. Rptr. 349]* .

The county, city, or landowner may bring an action to enforce a Williamson Act contract. Enforcement actions may also be brought by any landowner whose exterior boundary is within one mile of the land under contract. In addition, an owner of land under contract may bring an action in court to enforce a contract on land located within the same county or city. Actions to enforce Williamson Act contracts may include, but are not limited to, actions for specific performance or injunction [*Gov. Code § 51251*].

Furthermore, a county may attempt to enjoin the subdivision of land under a land conservation contract if the board determines that the subdivision violates the Williamson Act [62 Cal. Op. Att'y Gen. 233, 241-243 (1979) ; *54 Cal. Op. Att'y Gen. 90, 92 (1971)]* . If the use of parcels for homesites is not incidental to their use for commercial agricultural production, the division of contract land into parcels violates the Williamson Act [62 Cal. Op. Att'y Gen. 233, 243 (1979) ; *54 Cal. Op. Att'y Gen. 90, 92 (1971)]* . In this situation, the county may seek specific performance of the land conservation contract and a civil injunction against subdividing and selling parcels located in an agricultural preserve, even if zoning laws permit the subdivision *[54 Cal. Op. Att'y Gen. 90, 91-92 (1971)]* . However, a violation of a Williamson Act contract does not constitute sufficient grounds, in and of itself, to permit the board to disapprove a tentative subdivision map. Although the statutory grounds for disapproving a tentative subdivision map are exclusive, the underlying facts that may constitute a violation of a Williamson Act contract may also constitute a ground for disapproval of a tentative subdivision map *[62 Cal. Op. Att'y Gen. 233, 243-245 (1979)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawZoning & Land UseGrowth ControlReal Property LawZoning & Land UseLocal Planning



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART II. LEGAL BACKGROUND
A. Agricultural Preserves Under Williamson Act

12-28D California Legal Forms--Transaction Guide § 28D.14

§ 28D.14 Terminating Contracts

[1] Nonrenewal

[a] Effect of Nonrenewal

A notice of nonrenewal prevents the automatic extension of a land conservation contract by one year on the annual renewal date. It does not immediately terminate the land conservation contract; the existing contract remains in effect for the balance of the period remaining after the original execution or the last renewal of the contract, usually nine years [*Gov. Code § 51246*; *see Gov. Code §§ 51244, 51244.5*; *see also § 28D.13[4], above*].

Nonrenewal of a contract is the preferred method of termination. The rationale for this preference is that a long-term commitment to agricultural or other open-space use prevents short-term speculators and developers from taking advantage of the Williamson Act's tax benefits. A long-term commitment also ensures fulfillment of the constitutional requirement of an "enforceable restriction" [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 853, 855, 171 Cal. Rptr. 619, 623 P.2d 180* ; *see Cal. Const., art. XIII, § 8*].

Once a notice of nonrenewal is served, taxes on the contracted land gradually return to the level of taxes on comparable nonrestricted property as the contract draws nearer to expiration [*Rev. & Tax. Code § 426*; *see Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852, 171 Cal. Rptr. 619, 623 P.2d 180]* . For an explanation of the impact of nonrenewal on valuation for property tax purposes, see *Section 28D.53*.

[b] Procedures

The county, city, or landowner may refuse to renew a land conservation contract by giving written notice of nonrenewal of the contract to the other party before the annual renewal date of the contract [*Gov. Code § 51245*; *see § 28D.220 [2]*]. On request of the landowner, the board of supervisors or city council may authorize the owner to give a notice of nonrenewal on a portion of the land under contract [*Gov. Code § 51245*; *see § 28D.221 [2]*]. However, the portion of land remaining under the contract must continue to conform to the parcel size requirements [*see Gov. Code § 51222*; *see § 28D.13[2]*].

A nonrenewing landowner must serve written notice of nonrenewal at least 90 days before the renewal date. The city or county must serve the notice at least 60 days before the renewal date. If no notice is served, or if the notice is not served in a timely manner, the contract will be deemed renewed and an additional year will be added to the remaining term [*Gov. Code § 51245(a)*; *see Gov. Code §§ 51244, 51244.5*; *Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852, 171 Cal. Rptr. 619, 623 P.2d 180* ; *see also § 28D.13 [4]*]. Nonrenewal is completed when the city or county delivers a notice of expiration to the Director of Energy and Conservation [*see Gov. Code § 51246*]. For a detailed guide to nonrenewal procedures, see *Section 28D.130[1]*.

If a landowner receives a notice of nonrenewal from a city or county, he or she may protest in writing, and the city or county may withdraw its notice at any time before the renewal date [*Gov. Code § 51245*]. Regardless of whether the city or county withdraws its notice, the written protest will have the additional effect of delaying the increase in valuation for property tax purposes [*see Rev. & Tax. Code § 426*; *see also § 28D.53*]

[2] Cancellation

[a] In General

Cancellation is the procedure to be used for terminating a Williamson Act land conservation contract in an emergency or extraordinary situation when the public interest no longer dictates that the contract be continued [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852-853, 171 Cal. Rptr. 619 , 623 P.2d 180]* . Before the Supreme Court's decision in *Sierra Club v. City of Hayward [(1981) 28 Cal. 3d 840, 171 Cal. Rptr. 619, 623 P.2d 180]* , and its subsequent codification in the Williamson Act, cancellation of these contracts was reasonably common in borderline urban areas where the increased demand for development justified the payment of cancellation fees. The decision clarified that nonrenewal [*see* [1], *above*] is the preferred method to terminate these contracts and that cancellation is an exception to the general rule of termination by nonrenewal [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 853, 855, 171 Cal. Rptr. 619, 623 P.2d 180]* . For example, cancellation might be appropriate for a parcel of land that is engulfed by urban development more rapidly than anticipated, if the land obstructs orderly development serving public needs, and if the agricultural production value of the land has become negligible [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 864, 171 Cal. Rptr. 619, 623 P.2d 180]* . Even when land still has agricultural value, cancellation may be appropriate if the land is urgently needed for a use that no other land can serve, such as an oil sump when the parcel is uniquely fit for the purpose and there is an immediate environmental need justifying cancellation rather than nonrenewal [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 864, 171 Cal. Rptr. 619, 623 P.2d 180]* .

Cancellation, unlike nonrenewal [*see* [1], *above*], takes effect as soon as the certificate of cancellation is recorded [*see Gov. Code § 51283.4*; *see also* [g], *below*]. To cancel a contract, the landowner files a petition for cancellation with the board of supervisors or city council [*Gov. Code § 51282*; *see* [c], *below*]. After notice and a public hearing [*Gov. Code § 51284*; *see* [d], *below*], the board or council may make the appropriate findings [*see* [b], *below*] and grant tentative approval of the cancellation [*see* [e], *below*]. Final cancellation depends on the payment of the cancellation fee [*see* [f], *below*] and the satisfaction of all other conditions and contingencies stated in the tentative cancellation [*Gov. Code § 51283.4*; *see* [g], *below*].

[b] Grounds for Cancellation

[i] In General

A city or county may cancel a contract only for the purpose of providing relief from the contract's provisions under the circumstances and conditions set forth in the Williamson Act [*Gov. Code §§ 51280, 51282*; *see Gov. Code §§ 51280-51287*]. To grant tentative cancellation of a contract [*see* [e], *below*], the board of supervisors or city council must find either that the cancellation is consistent with the purposes of the Williamson Act, or that cancellation is in the public interest [*Gov. Code § 51282(a)*]. The findings should be supported by substantial evidence on the record, and the

conclusions from the evidence must be adequate to sustain the findings [*see Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 510, 514, 113 Cal. Rptr. 836, 522 P.2d 12* (administrative grant of zoning variance must be accompanied by administrative findings supported by substantial evidence)]. For further discussion of the requirements for these findings, see [ii] and [iii], *below*.

The uneconomic character of an existing agricultural use is not by itself sufficient reason for cancellation of a contract. It may be considered only if there is no other reasonable or comparable agricultural use to which the land may be put [*Gov. Code § 51282(d)*]. If the agricultural use is the same use that existed when the contract was entered into, cancellation cannot be justified on the basis that the use is uneconomic unless the landowner shows that changed conditions, without consideration of increased development value, make the existing agricultural use unprofitable [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 863, 171 Cal. Rptr. 619, 623 P.2d 180]* .

In approving a petition for cancellation, the board of supervisors or city council is not required to make any findings other than those set forth in the Williamson Act [*see Gov. Code § 51282*] or, when applicable, in *Pub. Res. Code § 21081*, in connection with environmental impact reports [*Gov. Code § 51282(f)*; *see Friends of East Willits Valley v. County of Mendocino (2002) 101 Cal. App. 4th 191, 209, 123 Cal. Rptr. 2d 708]* .

When a proposed cancellation concerns a contract that was partially nullified by eminent domain or certain related proceedings [*see* [3], *below*], the cancellation may be approved based on a finding that no authorized use may be made of the land if the contract is continued [*Gov. Code § 51295*; *see Gov. Code § 51282(a)*].

[ii] Consistent With Purposes of Williamson Act

To find that cancellation is consistent with the purposes of the Williamson Act [*see Gov. Code § 51282(a)*; *see also* [i], *above*], the board of supervisors or city council must make all of the following additional findings [*Gov. Code § 51282(b)*]:

- A notice of nonrenewal was served concerning the land that is the subject of the proposed cancellation [*see Gov. Code § 51245*; *see also* [1], *above*];

- Cancellation is not likely to result in the removal of adjacent lands from agricultural use;

- Cancellation is for an alternative use that is consistent with the applicable provisions of the city or county general plan;

- Cancellation will not result in discontiguous patterns of urban development; and

- There is no proximate noncontracted land that is both available and suitable for the use proposed for the contracted land, or, alternatively, the development of the contracted land would provide more contiguous patterns of urban development than would development of proximate noncontracted land.

"Urban development," as used in the fourth required finding, *above*, does not have a fixed, precise definition. Whether a residential development is urban or rural must be determined by evaluating factors relating to the individual projects, such as density, surrounding development, existing public facilities, and water availability [*Honey Springs Homeowners Assn. v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1138-1144, 203 Cal. Rptr. 886* (factors to be considered)].

The contiguity requirement of the fourth required finding, *above*, may be satisfied by a showing that the owners of intervening parcels have the current ability and intent to develop their land within a reasonable time, not to exceed nine years. The mere fact that the intervening land is zoned in a manner consistent with development is not sufficient to

satisfy the requirement [*Honey Springs Homeowners Ass'n v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1144-1146, 203 Cal. Rptr. 886]* . Some intervening features, such as roadways, rural rights of way, or permanent open space, will not destroy contiguity [*Honey Springs Homeowners Assn. v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1145 n.20, 203 Cal. Rptr. 886]* .

"Proximate noncontracted land," as used in the fifth required finding, *above*, means land that is not restricted by a Williamson Act contract and that is sufficiently close to restricted land that the noncontracted land can serve as a practical alternative for the use proposed for the restricted land [*Gov. Code § 51282(b)(5)*]. "Proximate" in this context does not involve concepts of causation and does not imply contiguity; it is to be construed in the same manner that courts have construed the word "adjacent" [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 861, 171 Cal. Rptr. 619, 623 P.2d 180]* .

"Suitable" for the proposed use, as used in the fifth required finding, *above,* means that the salient features of the proposed use can be served by land that is not restricted by a Williamson Act contract. The nonrestricted land may be a single parcel or a combination of contiguous or discontiguous parcels [*Gov. Code § 51282(b)(5)*]. The size of the proposed development should not be a significant factor in the search for alternative sites, unless by its nature the developed use requires a minimum amount of land [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 862, 171 Cal. Rptr. 619, 623 P.2d 180]* .

From a practical standpoint, the fifth required finding, *above,* is the most critical and poses the greatest difficulties. Most cancellations are sought on the urban fringe for single-family residential development. Typically, other nonrestricted land is available for development within the same general area. As a result, this finding is not easily established.

Cancellation cannot be consistent with the purposes of the Williamson Act if the objectives to be served by cancellation should have been predicted and served by nonrenewal at an earlier time, or if those objectives can be served by nonrenewal at the time of the petition for cancellation [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 855, 171 Cal. Rptr. 619, 623 P.2d 180]* .

[iii] In the Public Interest

To find that cancellation is in the public interest, the board of supervisors or city council must make both of the following findings: (1) that other public concerns substantially outweigh the objectives of the Williamson Act; and (2) that there is no proximate noncontracted land that is both available and suitable for the use proposed for the contracted land or, alternatively, that development of the contracted land would provide more contiguous patterns of urban development than would development of proximate, noncontracted land [*Gov. Code § 51282(c)*; *see Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 857, 171 Cal. Rptr. 619, 623 P.2d 180* ; *see also Friends of East Willits Valley v. County of Mendocino (2002) 101 Cal. App. 4th 191, 206-208, 123 Cal. Rptr. 2d 708* (where Native American Tribe sought cancellation of contract to build low income housing, public interest in providing low income housing substantially outweighed interest in keeping property under Williamson Act and county could take irremediable financial constraints into account in determining that alternative property was unavailable); § 28D.10[1]].

The terms "proximate noncontracted land" and "suitable" for public use have the same meaning in this context as in the fifth required finding in [ii], *above*, concerning whether cancellation is consistent with the purposes of the Williamson Act [*see Gov. Code § 51282(c)*].

[c] Petition and Proposal

[i] In General

A city or county may cancel a contract only pursuant to a request by a landowner [*Gov. Code § 51281*]. A landowner requests cancellation by filing a petition for cancellation with the board of supervisors or the city council. The petition may request cancellation of any contract as to all or any part of land that is subject to a Williamson Act contract [*Gov. Code § 51282(a)*].

The petition must be accompanied by a proposal for a specified alternative use of the land. This proposal must, in addition to describing the proposed alternative use, list the governmental agencies known by the landowner to have permit authority related to the proposed alternative use. The board of supervisors or city council determines the level of specificity required of the proposal based on the level of specificity necessary to make the required findings [*Gov. Code § 51282(e)*; *see* [b], *above*]. For a detailed guide to cancellation procedures, see *§ 28D.130[2]*. For forms of petitions, see *§§ 28D.222*, *28D.223*.

Special provisions apply when a landowner petitions for cancellation of a contract on land proposed to be used for agricultural laborer housing [*see Gov. Code § 51282.3*; *see* [ii], *below*].

[ii] Petition for Cancellation for Agricultural Laborer Housing

If a city or county finds that agricultural laborer housing is an incompatible use on land that is subject to a Williamson Act contract [*see Gov. Code § 51238(a)*], the landowner may petition for cancellation to allow the land to be used exclusively for agricultural laborer housing. A petition for this purpose is deemed to be a petition for cancellation for a specified alternative use of the land [*Gov. Code § 51282.3(a)*; *see Gov. Code § 51282(e)*].

A petition brought for cancellation of a contract on land proposed to be for agricultural laborer housing must include all of the following [*Gov. Code § 51282.3(a)*]:

- A particular description of the acreage to be subject to the cancellation;

- A stipulation that the purpose of the cancellation is to allow the land to be used exclusively for agricultural laborer housing facilities;

- A demonstration that the contracted lands (or the portion of the contracted lands) for which cancellation is being sought are reasonably necessary for the development and siting of agricultural laborer housing; and

- A certification that the contracted lands (or the portion of the contracted lands) for which the cancellation is being sought will not be converted to any other alternative use within the first 10 years immediately following the cancellation.

The petition is then acted on in the same manner as any other petition, except for the payment of cancellation fees [*Gov. Code § 51282.3(a)*; *see Gov. Code §§ 51282.3(b)*, *51283*, *51283.1*, *51283.4*; *see also* [f], *below*].

[d] Notice and Public Hearing

Before approval of cancellation may be granted, the board or council must publish notice of and hold a public hearing on the matter [*Gov. Code § 51284*; *see Gov. Code §§ 6060*, *6061*]. In addition, notice of the hearing must be mailed to every owner of land under a Williamson Act contract that is situated within one mile of the exterior boundary of the land subject to the proposed cancellation [*Gov. Code § 51284*]. Further, notice and a copy of the landowner's petition must be mailed to the Director of Energy and Conservation [*Gov. Code § 51284*].

The owner of any property located in the city or county in which the agricultural preserve is situated may protest the

cancellation of a land conservation contract to the city or county conducting the hearing [*Gov. Code § 51285*]. However, presumably, any affected person may appear at the required public hearing in support or in protest of the proposed cancellation. Because approval or disapproval of cancellation is an adjudicatory act [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 849, 171 Cal. Rptr. 619, 623 P.2d 180]* , procedural due process applies, and no one may be deprived of life, liberty, or property by a cancellation without notice and some sort of hearing [*see Mathews v. Eldridge (1976) 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18* ; *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 563-566, 216 Cal. Rptr. 367, 702 P.2d 525* ; *see also Gov. Code § 51284*; California Environmental Law and Land Use Practice, Ch. 10, *State Administrative Law Issues* (Matthew Bender)].

The requirements for notice and a public hearing do not apply if the land covered by a cancellation petition is zoned as timberland production pursuant to *Gov. Code § 51112* or *51113* and the zoning has been recorded pursuant to *Gov. Code § 51117*. In this case, the board or council must approve the cancellation of the contract, and the requirement for the payment of the cancellation fee does not apply [*Gov. Code § 51282.5*].

[e] Tentative Approval of Cancellation

The board or council may grant tentative approval of the cancellation after making the required findings [*Gov. Code § 51282(a)*; *see* [b], *above*] and after determining and certifying the amount of the cancellation fee [*see Gov. Code § 51283*; *see also* [f], *below*]. The clerk of the board or council must then record a certificate of tentative cancellation setting forth, among other information, the conditions and contingencies that must be satisfied to obtain final cancellation [*Gov. Code § 51283.4(a)*]. These conditions must include payment in full of the cancellation fee [*Gov. Code § 51283.4*; *see* [f], *below*], and the requirement that the landowner obtain all permits necessary to begin the development project [*Gov. Code § 51283.4*]. For a form of certificate, see *§ 28D.224*.

Within 30 days after the tentative cancellation of the contract, the city or county must publish a notice of its decision as a display advertisement, at least one-eighth page in at least one newspaper of general circulation within the city or county. The notice must include, in addition to the date, time, and place of the public hearing, a general explanation of the decision, an explanation of the findings made by the governing body [*see* [b], *above*], and a general description, in text or by diagram, of the land under contract. The publication is for informational purposes only and creates no right, standing, or duty that otherwise does not exist regarding the cancellation proceedings [*Gov. Code § 51284*; *see § 28D.130*]. In addition, the city or county must deliver a copy of the published notice of decision to the Director of Energy and Conservation within 30 days of the tentative cancellation of the contract [*Gov. Code § 51284*].

Accompanying the petition for cancellation [*see* [c][i], *above*], the landowner must have submitted a proposal for an alternative use for the land [*Gov. Code § 51282(e)*]. At the request of the landowner, the board or council may amend a tentatively approved specified alternative use if the governing body finds that the amendment is consistent with the required findings [*Gov. Code § 51283.4(a)*; *see Gov. Code § 51282(a)*; *see also* [b], *above*].

[f] Cancellation Fee

[i] Amount of Fee and Time for Payment

The landowner must pay a fee on cancellation to the county treasurer (to compensate for deferred taxes) unless the county or city waives the fee [*see* [ii], *below*]. Before the board or council may tentatively approve the cancellation of a Williamson Act contract [*see* [e], *above*], the county assessor of the county in which the property is located must determine the current fair market value of the land, calculated as though the land were unrestricted. The assessor certifies the cancellation valuation to the board or council for the purposes of determining the cancellation fee [*Gov. Code § 51283(a)*]. At the same time, the assessor must (1) send a notice to the landowner and the Department of Conservation indicating the current fair market value of the land as though it were free of the contractual restriction, and (2) advise the parties that, on their request, the assessor will provide all information relevant to the valuation, excluding

third-party information. If any information is confidential or otherwise protected from release, the department and the landowner must hold it as confidential and return or destroy any protected information on termination of all actions relating to valuation or cancellation of the contract on the property [*Gov. Code § 51283(a)*]. The notice must also advise the landowner and the department of the opportunity to request formal review from the assessor [*Gov. Code § 51283(a)*; *see Gov. Code § 51203* (procedure for review)]. The fee is equal to 121/2 percent of the cancellation valuation. The fee must be determined and certified to the county auditor before tentative approval of the cancellation may be given [*Gov. Code § 51283(b)*]. Payment of the fee is included as one of the conditions and contingencies that must be set forth in the certificate of tentative cancellation [*Gov. Code § 51283.4(a)*; *see* [e], *above*]. The Legislature intended that fees paid to cancel a contract would not constitute taxes but would be treated as payments that, when made, provide a private benefit that tends to increase the value of the property [*Gov. Code § 51283(f)*].

In addition, the board or council may impose a fee for the recovery of the costs of cancellation. The fee may not exceed the amount necessary to recover the reasonable cost of services provided by the county or city under the cancellation provisions [*Gov. Code § 51287*]. In authorizing the fee, the Williamson Act refers to Chapter 13 of the Government Code, which was repealed in 1990. Analogous provisions may be found in *Gov. Code §§ 66013*, *66014*, and *66016*.

The landowner must pay the cancellation fee within one year. If the fee is not paid within that year, it will be recomputed as of the date the landowner requests a recomputation. The landowner may request a recomputation when the landowner believes that he or she will be able to satisfy the conditions and contingencies of the certificate of cancellation within 180 days. The board or council must request the assessor to recompute the cancellation valuation. The assessor must recompute the valuation, certify it to the board or council, and provide notice to the Department of Conservation and landowner as provided in *Gov. Code § 51283(a)*, and the board or council must certify the fee to the county auditor [*Gov. Code § 51283.4(a)*; *see Gov. Code § 51283.4(b)*; *see also* [g], *below*].

[ii] Waivers and Extensions of Time

Under certain circumstances, the board or council may waive any payment, or any portion of a payment, of the fee by the landowner, or may extend the landowner's time to pay the fee or any portion of it contingent on the future use made of the land and its economic return to the landowner. Extensions may not exceed the unexpired period of the contract, had it not been cancelled [*Gov. Code § 51283(c)*].

To waive or extend the time for payment of the cancellation fee, the board or council must find that the waiver or extension is in the public interest. In addition, all of the following must apply [*Gov. Code § 51283(c)*]:

> (1) The cancellation is caused by an involuntary transfer or change in the use that may be made of the land, and the land is not immediately suitable nor would it be immediately used for a purpose that produces a greater economic return to the owner.
>
> (2) The board or council has determined that the waiver or extension is in the best interests of the program to conserve agricultural use land.
>
> (3) The waiver or extension is approved by the Secretary of the Natural Resources Agency, based on the Secretary's finding that the waiver or extension is consistent with the policies of the Williamson Act and that the board or council complied with the Act's cancellation provisions [*see Gov. Code § 51280 et seq.*].

In evaluating a request for a waiver or extension of time, the Secretary of the Natural Resources Agency must review the findings of the board or council, the evidence of the board or council's record, and any other evidence the secretary may receive concerning the cancellation, waiver, or extension of time [*Gov. Code § 51283(c)*].

[iii] Special Fee Provisions for Agricultural Laborer Housing and Timberland

When cancellation is granted for the purpose of using land for agricultural laborer housing [*see Gov. Code § 51282.3(a)*; *see also* [c][ii], *above*], in lieu of the payment of cancellation fees, a lien in favor of the county or city is recorded in the amount of the fees and taxes that would otherwise be due [*Gov. Code § 51282.3(b)*; *see Gov. Code § 51283*]. The lien has the force, effect, and priority of a judgment lien from the date of its recordation, and bears interest at the annual rate of 10 percent [*Gov. Code § 51282.3(b)*].

The lien is released if, after 10 years from the date of the recordation of the certificate of cancellation of the contract, the property is not converted to a use other than agricultural laborer housing. If the property subject to the lien is converted to a use other than agricultural laborer housing, or the construction of agricultural laborer housing does not commence within one year from the date of recordation of the certificate of cancellation of the contract, the landowner will be required to pay the fees, taxes, and interest for which the lien was imposed in order to have the lien released. If construction commences after the one-year period, the amount of the interest will only be for that period from one year after the date of recordation of the certificate of cancellation until the actual commencement of construction [*Gov. Code § 51282.3(b)*].

If the petition for cancellation covers property that is zoned for timberland production pursuant to *Gov. Code § 51112* or *51113* and that zoning has been recorded [*see Gov. Code § 51117*], the board or council must approve the cancellation. In this situation, no cancellation fee is imposed [*Gov. Code § 51282.5*].

[g] Final Determination of Petition for Cancellation

Final cancellation depends on the satisfaction of the conditions and contingencies enumerated in the certificate of tentative cancellation [*see Gov. Code § 51283.4(b)*; *see also* [e], *above*]. When the requirements are satisfied, the landowner must notify the board or council. Within 30 days of the receipt of the notice, and on determining that the conditions and contingencies have in fact been satisfied, the board or council must execute and record a certificate of cancellation and send a copy of the certificate to the Director of Conservation [*Gov. Code § 51283.4(b)*].

If the landowner is unable to satisfy the conditions and contingencies enumerated in the certificate of tentative cancellation, the landowner must notify the board or council of the particular requirements that he or she cannot satisfy. Within 30 days of the receipt of this notice, the board or council will then withdraw its tentative approval of the cancellation. The landowner is not entitled to a refund of any cancellation fee paid [*Gov. Code § 51283.4(c)*].

[h] Judicial Review

A judicial challenge to a cancellation valuation pursuant to *Gov. Code § 51203*, *51283*, *51283.4*, or *51284* [*see* [d], [f], *above*] is subject to a short 180 days limitation period, and administrative remedies must be exhausted, if required notices were duly given to the landowner and the Department of Conservation; otherwise, the limitation period is three years. In either case, the determining event depends on which code section applies in the circumstances [*see Gov. Code § 51283.5(f)*].

Any challenge, based on the grounds of alleged noncompliance with the Williamson Act, to a decision of a board or council to cancel a land conservation contract must be brought pursuant to Code Civ. Proc. § 1094.5 [*Gov. Code § 51286(a)*]. The challenge must be commenced within 180 days from the date of the order of the board or council acting on a petition for cancellation [*Gov. Code § 51286(b)*].

Challenges to administrative orders are heard by the court sitting without a jury [*Code Civ. Proc. § 1094.5*]. For more information on judicial review of administrative orders, see California Forms of Pleading and Practice, Ch. 474B, *Standards in Reviewing Agency Decisions* (Matthew Bender).

[3] Nullification by Eminent Domain or Public Acquisition

A Williamson Act contract is deemed null and void if any of the following occurs [*Gov. Code § 51295*]:

- An action in eminent domain is filed for the condemnation of the fee title of an entire parcel of land subject to a Williamson Act contract.

- An entire parcel of land subject to a Williamson Act contract is acquired in lieu of eminent domain for a public improvement by a public agency or person.

- The federal government, or anyone acting under its authority or power, takes either of the actions described in the first two bulleted items, *above*.

The Williamson Act contract is deemed null and void as to the land actually being condemned or acquired as of the date that the action is filed. For the purpose of establishing the value of the land, the contract is deemed never to have existed. Upon the termination of the proceeding, the contract is null and void for all land actually taken or acquired [*Gov. Code § 51295*].

When an action is commenced to condemn or acquire an interest in less than the fee title of an entire parcel of land subject to a Williamson Act contract, the contract is deemed null and void only as to the portion of the title that is the subject of the action. Generally, in this circumstance, the contract is disregarded for valuation purposes only as to the land actually being taken. However, if the condemnation will adversely affect the remaining land subject to the contract, the value of that damage will be computed without regard to the contract [*Gov. Code § 51295*].

Only land that is actually taken is removed from the contract. However, when only a portion of the land or less than a fee interest is taken or acquired, either party may bring a petition to cancel the contract with regard to the remaining portion or interest [*Gov. Code § 51295*; *see* [2], *above*]. The board or council may grant tentative approval of cancellation only if there is finding that cancellation is consistent with the purposes of the Act or that cancellation is in the public interest [*see Gov. Code § 51282(a)*; *see also* [2][b], *above*]. A finding by the board or council that no authorized use may be made of the land if the contract is continued on the remaining portion or interest may satisfy this requirement [*Gov. Code § 51295*].

[4] Simultaneous Rescission of and Entry Into Contract

The parties to a Williamson Act contract may agree to rescind a contract in order to simultaneously enter into a new Williamson Act contract. The new contract must restrict the same property for an initial term that is at least as long as the unexpired term of the rescinded contract and, in any event, not less than 10 years. These actions may be taken even if a notice of nonrenewal relative to the former contract has been served [*Gov. Code § 51254*; *see* [1], *above*].

Alternatively, if parties to a Williamson Act contract choose to enter into an open-space easement agreement pursuant to the Open-Space Easement Act of 1974 [*see Gov. Code § 51070 et seq.*; *see also §§ 28D.30, 28D.230*], they may do so by mutually agreeing to rescind the Williamson Act contract and to simultaneously enter into an open-space easement agreement. The easement must be consistent with the Williamson Act for the duration of the original Williamson Act contract, must enforceably restrict the same property for an initial term of not less than 10 years, and must not be subject to the provisions of the Open-Space Easement Act of 1974 governing the termination of open-space easements [*Gov. Code § 51255(a)*; *see Gov. Code § 51090 et seq.*]. This action may be taken notwithstanding the prior serving of a notice of nonrenewal, and the land subject to the contract must be assessed pursuant to *Rev. & Tax. Code § 423* [*Gov. Code § 51255(a)*]. These provisions do not apply to any agreement entered into on or before August 12, 1998 [*Gov. Code § 51255(b)*].

A city council or board of supervisors, as the case may be, must, prior to rescinding a contract for the purpose of restricting the same land by an open-space contract pursuant to *Gov. Code § 51254* or by entering into an open-space agreement pursuant to *Gov. Code § 51255*, determine that the parcel or parcels will be large enough to provide open-space benefits, by providing habitat for wildlife, or preserving its natural characteristics, beauty, or openness for the benefit and enjoyment of the public [*Gov. Code § 51223(a)*].

Uses or development [*see Gov. Code § 51201(p)* (definition)] permitted on land subject to an open-space contract, or subject to an open-space easement agreement pursuant to *Gov. Code § 51255*, must satisfy one or both of the following requirements [*Gov. Code § 51223(b)*]:

- Comply with the provisions of *Gov. Code §§ 51238.1* or *51238.2* (stating principles of compatibility and conditions for approving mineral extraction when land cannot be reconciled with principles of compatibility);

- Consist of, cause, facilitate, or benefit any open-space use on the land.

If an open-space contract is executed pursuant to *Gov. Code § 51205* (stating what land may be included in an agricultural preserve), or if a contract is rescinded for the purpose of restricting the same land by an open-space contract pursuant to *Gov. Code § 51254*, or an open-space easement agreement pursuant to *Gov. Code § 51255*, then new development [*see Gov. Code § 51201(p)* (definition)] must not be permitted by [*Gov. Code § 51223(c)*]:

- The resulting open-space contract, during the period the contract is in effect, except that uses compatible with or related to the open-space uses would be permitted; or

- The resulting open-space easement agreement, during the time equal to the time remaining on the contract at the time of its rescission, except that uses compatible with, or related to, the open-space uses would be permitted.

For the purposes of *Gov. Code § 51223*, agriculture and uses compatible with agriculture are compatible with open-space uses, unless otherwise provided by local rules or ordinances [*Gov. Code § 51223(d)*].

A board or council must not accept or approve a petition for rescission pursuant to *Gov. Code §§ 51254* and *51255* if the city or county, within which the land for which the rescission is sought is located, has discovered or received notice of a likely material breach on the land pursuant to the process specified in *Gov. Code § 51250* (concerning identification of structures constituting material breaches of contract), unless the rescission is a part of the process specified in *Gov. Code § 51250* [*Gov. Code § 51223(e)*].

[5] Cancellation and New Contract Designating Farmland Security Zone

A landowner or group of landowners may petition to rescind a contract or contracts entered into pursuant to the Williamson Act [*Gov. Code § 51200 et seq.*] in order to simultaneously place the land subject to that contract or those contracts under a new contract designating the property as a farmland security zone [*Gov. Code § 51296(b)*; *see Gov. Code § 51296 et seq.*]. Only land that is designated on the Important Farmland Series maps or that is defined as predominantly prime agricultural land is eligible for this designation [*Gov. Code § 51296(i)*; *see Gov. Code § 51201(c)* (definition of prime agricultural land)]. Statutory provisions specify all of the requirements for the creation of a farmland security zone, including the petition process, as well as limitations with regard to matters such as annexation, special districts, and school districts [*see Gov. Code §§ 51296.1(a)-(e), 51296.3-51297.3.*].

A petition for cancellation of a farmland security zone contract may be filed only by the landowner with the city or county within which the contracted land is located. The city or county may grant a petition only in accordance with

specified procedures [*see Gov. Code § 51280 et seq.*] and only if all of the following requirements are met [*Gov. Code § 51296(k)*]:

- The city or county must make required specific findings [*see Gov. Code § 51282(a)(1), (2), (b)-(e)*] or instead make a finding that no authorized use may be made of a remnant contract parcel of five acres or less left by public acquisition pursuant to *Gov. Code § 51295*.

- In its resolutions tentatively approving cancellation of the contract, the city or county must find that (1) no beneficial public purpose would be served by the continuation of the contract, (2) the uneconomic nature of the agricultural use is primarily attributable to circumstances beyond the control of the landowner and the local government, and (3) the landowner has paid a cancellation fee equal to 25 percent of the cancellation valuation computed in accordance with *Gov. Code § 51283(b)*.

- The Director of Conservation must approve the cancellation after reviewing the record of tentative cancellation, or the director must find that (1) there is substantial evidence in the record supporting the decision, and (2) no beneficial public purpose would be served by the continuation of the contract.

Nothing in these provisions would limit the authority of a board to rescind a portion or portions of the Williamson Act contract or contracts for the purpose of immediately enrolling the land in a farmland security zone contract, as long as the remaining land was retained in a Williamson Act contract and the board determined that its action would improve the conservation of agricultural land within the county where the rescission occurs [*Gov. Code § 51296.4*.]. In any case, the creation of multiple contracts does not constitute a subdivision of the land [*Gov. Code § 51296.4*.].

Land within a designated farmland security zone is eligible for property tax valuation pursuant to *Rev. & Tax. Code § 423.4*, which requires the land to valued for assessment purposes at 65 percent of the value under *Rev. & Tax. Code § 423* or *Rev. & Tax. Code § 110.1*, whichever is lower. In addition, notwithstanding any other provision of law, any special tax approved by the voters after 1998 for urban-related services on the land or any living improvement must levied at a reduced rate unless the tax directly benefits the land or the living improvements [*Gov. Code § 51296.2*.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART II. LEGAL BACKGROUND
A. Agricultural Preserves Under Williamson Act

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§ 28D.15 Public Improvements on Agricultural Preserves

[1] State Policy

In locating public improvements on land in agricultural preserves, it is the policy of the state to do the following [*Gov. Code § 51290*]:

- To avoid, whenever practicable, locating or purchasing land for the purpose of locating any federal, state, or local public improvements and any improvements of public utilities in agricultural preserves.

- If it is necessary to locate an improvement in an agricultural preserve, to put the improvement on land that is not under a Williamson Act contract, whenever practicable.

- To have any agency or entity proposing to locate an improvement consider the value to the public [*see Gov. Code § 51220 et seq.*] of land, particularly prime agricultural land, within an agricultural preserve whenever considering the relative costs of parcels of land and development of improvements for the purpose of locating an improvement in an agricultural preserve.

[2] Procedures

In general, unless the public improvement is expressly excepted, a public agency or person considering using land within an agricultural preserve for a public use must advise the Director of Conservation and the local governing body responsible for the administration of the preserve of its intention to consider the location of a public improvement within the preserve [*Gov. Code § 51291(b)*; *see Gov. Code § 51291.5* (notice requirement does not apply to acquisition of land for gas, electric, piped water, or communication facilities)]. For this purpose, "public agency" any department or agency of the United States or the state, and any county, city, school district, or other local public district, agency, or entity. "Person" means any person authorized to acquire property by eminent domain [*Gov. Code § 51291(a)*].

The Director of Conservation and the local governing body have 30 days to comment to the public agency or person concerned on the effect of locating the public improvement in the agricultural preserve. In preparing these comments,

the Director must consider issues related to agricultural use, including the effects the proposal will have on the conversion of adjacent or nearby agricultural land to nonagricultural uses. In addition, the Director must consult with and incorporate the comments of the Director of Food and Agriculture on any other matters related to agricultural operations. These comments must be considered by the public agency or person proposing the improvements [*Gov. Code § 51291(b)*].

If the agricultural preserve was established before the proposed location of the public improvement was submitted for agreement or approval, the public agency or person seeking to locate a public improvement in an agricultural preserve must follow these procedures even if the proposed use has been determined by a city or county to be a compatible use [*Gov. Code § 51293.1*; *see Gov. Code § 51201(e)*].

The failure of any public agency or person to comply with these procedural requirements does not invalidate any action by the agency or person to locate a public improvement within an agricultural preserve. However, this failure, by any person or public agency other than a state agency, is admissible evidence in any litigation for the acquisition of the land or concerning the allocation of funds or the construction of the improvement [*Gov. Code § 51291(b)*].

These procedural requirements do not apply to the erection, construction, alteration, or maintenance of gas, electric, water, or communication utility facilities within an agricultural preserve if the preserve was established after the submission of the location of those facilities to the city or county for review or approval [*Gov. Code § 51291(b)*]. In addition, separate procedures exist concerning the proposed location within an agricultural preserve of water transmission facilities that will extend into more than one county [*see Gov. Code § 51294.1*; *see also Gov. Code § 51294.2*].

[3] Limitations on Location of Public Improvements

[a] Conditions and Exceptions

In general, public agencies and persons [*see Gov. Code § 51291(a)*] may not locate a public improvement within an agricultural preserve based primarily on a consideration of the lower cost of acquiring land in an agricultural preserve [*Gov. Code § 51292(a)*]. Additionally, public agencies and persons generally may not acquire prime agricultural land that is covered by a Williamson Act contract for any public improvement if it is reasonably feasible to use other land within or outside of the agricultural preserve [*Gov. Code § 51292(b)*].

However, these limitations on the location of public improvements do not apply to the following public works, facilities, or land, except when the proposed use is a compatible use and the agricultural preserve is already established [*Gov. Code § 51293*; *see Gov. Code § 51293.1*]:

(1) The location or construction of improvements that have been approved by the board or council administering the agricultural preserve.

(2) The acquisition of easements within a preserve by the board or council administering the preserve.

(3) The location or construction of any public utility improvement approved by the Public Utilities Commission.

(4) The location or construction of certain improvements that are statutorily determined to be compatible with or to enhance land within an agricultural preserve, including flood control works, public works for fish and wildlife enhancement, and improvements for the primary benefit of lands within the preserve.

(5) Improvements that have been specified by the legislature in such a manner that it is impossible to

avoid the acquisition of land under contract.

(6) All state highways on routes described in *Streets and Highways Code Sections 301-622*, as those sections appeared on October 1, 1965 [*see Gov. Code § 51293(f)*].

(7) Certain designated water facilities [*see Gov. Code § 51294(g)*; *see also Water Code §§ 12934(d)(1)-(5), 12934(d)(7)*].

(8) Land on which condemnation proceedings had commenced before October 1, 1965.

When the proposed public use has been determined to be a compatible use [*see Gov. Code § 51201(e)*] in an agricultural preserve that was established before the improvement was submitted for agreement or approval, the exceptions will apply only if one of the following circumstances is present: (1) the location or construction of the improvement was approved by the board or council [*see Gov. Code § 51293(a)*]; or (2) the compatible use is listed as one of the exceptions in (1) through (8), *above* [*see Gov. Code § 51293*].

[b] Enforcement and Standing

Compliance with the limitations placed on development of public works on agricultural lands [*see Gov. Code § 51292*] may only be enforced by mandamus proceedings brought by the local governing body administering the agricultural preserve or by the Director of Energy and Conservation [*Gov. Code § 51294*]. Property owners, including those whose land is affected by the proposed public improvement, have no standing to initiate enforcement proceedings [*see Gov. Code § 51294*; *see also* Comment, *Condemnation of Agricultural Property in California, 11 U.C.D. L. Rev. 555, 559*-560 (1978)]. When a condemnor's determination of necessity is not conclusive by statute, evidence of the condemnor's compliance with the procedural requirements [*see Government Code § 51292*; *see also* [2], *above*] is admissible on the motion of any party to an action otherwise authorized to be brought by the landowner or in any action against the landowner [*Gov. Code § 51294*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic Easements



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[Reserved]

§§ 28D.16[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND
B. Open-Space and Conservation Easements

12-28D California Legal Forms--Transaction Guide § 28D.30

§ 28D.30 Open-Space Easements

[1] Nature of Open-Space Easements

[a] Purpose and Effect

An open-space easement is a dedication to the public of the open-space character of the lands covered by the easement [*Gov. Code § 51075(d)*]. It is any right or interest in open-space land acquired by a county, city, or nonprofit organization pursuant to the Open-Space Easement Act of 1974 [*see Gov. Code § 51070 et seq.*] in which the instrument granting the right or interest imposes restrictions limiting future use of the land in a manner that effectively preserves the natural or scenic character of the land for public use or enjoyment [*Gov. Code § 51075(d)*; *see also Gov. Code § 6950 et seq.* (counties or cities may acquire contractual rights, including easements, for preservation of open space)].

For purposes of the Open-Space Easement Act of 1974, a "nonprofit organization" is an organization that (1) includes the preservation of open space as a stated purpose in its articles of incorporation, and (2) qualifies as an exempt organization under *Internal Revenue Code § 501(c)(3)* in the preceding tax year [*Gov. Code § 51075(f)*]. "Open-space land" means any parcel or area of land or water that is essentially unimproved and devoted to an open-space use [*Gov. Code § 51075(a)*]. "Open-space use" includes any of the following uses [*Gov. Code §§ 51075(a), 65560(b)*]:

- Preservation of natural resources;
- Managed production of resources;
- Outdoor recreation;
- Public health and safety;
- Support of the mission of military installations; and

- Protection of places, features, and objects associated with Native American history and culture [*see generally Pub. Res. Code §§ 5097.9, 5097.993* (description of protected places, features, and objects)].

"Landowner" includes a lessee or trustee, if the expiration of the lease or trust occurs at a time later than the expiration of the open-space restriction [*Gov. Code § 51075(c)*].

The purpose of the Open-Space Easement Act of 1974 is to provide a means of permitting any county or city to acquire or approve of an open-space easement in perpetuity or for a term of years in order to preserve and maintain open space [*Gov. Code § 51070*]. The Act is based on the following legislative findings and declarations:

- The rapid growth and spread of urban development is encroaching on or eliminating open-space lands, which are necessary for both the maintenance of the economy of the state and for the assurance of the continued availability of land for the production of food and fiber, the enjoyment of scenic beauty, for recreation, and for the use and conservation of natural resources [*Gov. Code § 51071*];

- Preserved and maintained open-space lands constitute important physical, social, economic, or aesthetic assets to existing or pending urban development [*Gov. Code § 51072*]; and

- The acquisition of open-space easements is in the public interest and constitutes a public purpose for which public funds may be expended or advanced [*Gov. Code § 51073*].

Once an open-space easement has been accepted or approved by the county or city and its acceptance or approval has been endorsed on the easement [*see* [2][b], *below*], no building permits may be issued that would violate the easement [*Gov. Code § 51086(a)*]. Lands subject to the grant of an open-space easement are deemed enforceably restricted within the meaning of *California Constitution, Article XIII, Section 8* [*Gov. Code § 51096*], and entitle the landowner to certain property tax benefits [*see Rev. & Tax. Code §§ 421(e), 422, 423, 423.3*; *see also §§ 28D.50, 28D.51*].

[b] Comparison of Open-Space and Conservation Easements

Open-space easements are similar in nature to conservation easements, which are governed by the Civil Code [*see Civ. Code § 815 et seq.*; *see also § 28D.31*]. The statutory definitions of both easements suggest that an open-space easement is a form of conservation easement [*see Civ. Code § 815.1*; *Gov. Code § 51075(d)*].

Although the two easements have the same effect on land use, they are created under and governed by different statutes and consequently must meet different requirements. For example, conservation easements do not require approval by a resolution of the governing body as do open-space easements [*see Gov. Code §§ 51083, 51083.5*]; conservation easements may be created for the purpose of retaining land in its historical condition [*Civ. Code § 815.1*], whereas open-space easements do not address historical value; and conservation easements must be created in perpetuity [*Civ. Code § 815.2*], whereas open-space easements may be created for a minimum term of 10 years [*Gov. Code § 51081*]. Additionally, land subject to a conservation easement is not entitled to the same property tax valuation treatment as is land subject to an open-space easement [*see Rev. & Tax. Code §§ 402.1, 421, 422*; *see also §§ 28D.50, 28D.51*].

For further discussion of conservation easements, see *Section 28D.31*.

[2] Requirements for Open-Space Easements

[a] Mandatory and Permissible Provisions

An open-space easement must run for a term of at least 10 years. Any open-space easement granted for a term of years must provide for an automatic, annual renewal that adds a year to the term, unless a notice of nonrenewal is given [*Gov.*

Code § 51081; *see Gov. Code § 51091*; *see also* [5][b], *below*]. The annual renewal date must be specified in the instrument creating the easement [*Gov. Code § 51081*; *see § 28D.230*].

The easement must contain a covenant with the city, county, or nonprofit organization, running with the land, prohibiting the landowner from permitting the construction of improvements except those for which the right is expressly reserved [*Gov. Code § 51075(d)*]. Any reservation of rights to construct improvements must be consistent with the purposes of the Open-Space Easement Act of 1974 [*see* [1][a], *above*] and must be compatible with maintaining and preserving the natural or scenic character of the land. However, the covenant may not prohibit the construction of public service facilities installed for the benefit of the land or installed pursuant to an authorization by the governing body of the county or city or the Public Utilities Commission [*Gov. Code § 51075(d)*].

Additionally, a city or county may require that the instrument creating the open-space easement contain any restrictions, conditions, or covenants necessary or desirable to maintain the natural or scenic character of the land, or to prevent any activity, use, or action that could impair the open-space character of the land [*Gov. Code § 51082*].

For a procedural guide to creating open-space easements, see *Section 28D.121*. For a form of open-space easement, see *Section 28D.230[2]*.

[b] Acceptance or Approval

[i] Necessity of Acceptance or Approval

In general, an open-space easement is not effective until it has been accepted or approved by resolution of the governing body of the county or city [*Gov. Code § 51083*]. Notwithstanding this general rule, an open-space easement granted to a nonprofit organization is effective on its acceptance by the organization [*Gov. Code § 51083.5*]. However, for the taxpayer to obtain the most beneficial valuation treatment for property tax purposes [*see Rev. & Tax. Code §§ 421-430.5*], the grant of the easement must be approved by the county or city in which the land is located in accordance with the provisions of the Open-Space Easement Act [*Gov. Code § 51083.5*; *see Gov. Code §§ 51084, 51085, 51087*; *see also* [ii], *below*, *§§ 28D.50, 28D.51*]. Similarly, if open-space easement land becomes the subject of a proceeding for condemnation for public use, city or county acceptance or approval is required in order for the owner to obtain the same compensation for the taking as he or she would have been entitled to without the easement [*see Gov. Code § 51095*; *see* [5][d], *below*].

[ii] Grounds for Acceptance or Approval

An open space easement may be accepted or approved by a county or city if the governing body, by resolution, makes two required findings. First, the governing body must find that the preservation of the land as open space is consistent with the general plan of the city or county [*Gov. Code § 51084(a)*; *see Gov. Code § 65302*; *see also § 28D.11[1][a]*]. However, before the governing body may accept or approve the grant of an open-space easement, the matter must be referred to the local planning agency for a report to the governing body, specifying whether the proposed easement is consistent with the general plan of the jurisdiction [*Gov. Code § 51085*].

Second, the governing body must find that the preservation of the land as open space is in the best interest of the county or city for one or more of the following reasons [*Gov. Code § 51084(b)*]:

> (1) The land is essentially unimproved and, if retained in its natural state, has scenic, watershed, or wildlife preserve value, and the instrument creating the easement has appropriate covenants that promote that value.
>
> (2) It is in the public interest to retain the land as open space because the land will either add to the

amenities of living in neighboring urbanized areas or help preserve the rural character of the area.

(3) The public interest will otherwise be served in a manner consistent with the purposes of *Government Code Section 51084* [*see* [1][a], *above*] and *California Constitution, Article XIII, Section 8*. When making this finding, the governing body must recite in the resolution the manner in which the public interest will be served.

The resolution of the governing body establishes a conclusive presumption that the required findings set forth above have been met [*Gov. Code § 51084*].

[c] Recordation, Filing, and Notice

On the acceptance or approval of an open-space easement, the clerk of the governing body must record the instrument creating the easement in the office of the county recorder and file a copy with the county assessor. This procedure effectively gives notice to all persons in accordance with the state's recording laws [*Gov. Code § 51087*; *see Gov. Code §§ 27320-27336*].

[3] Enforcement

The existence of an open-space easement precludes the issuance of building permits that are inconsistent with the easement [*Gov. Code § 51086(a)*]. When any threatened construction or other activity on land subject to an open-space easement would violate the easement, the governing city or county, or the official representatives of the nonprofit organization holding the easement, must institute appropriate proceedings to enjoin the activity. If any structure is erected in violation of the easement, the governing municipality or nonprofit organization must seek a mandatory injunction requiring the removal of the structure [*Gov. Code § 51086(a), (b)*].

If the county or city fails to seek an injunction when required, any owner or resident of any property within the county or city may seek an injunction. Similarly, if the county or city constructs any structure or development in violation of the easement, or conducts or permits any activity in violation of the easement, any owner or resident of any property in the city or county may seek an injunction [*Gov. Code § 51086(a)*].

This obligation to enforce open-space easements may not be construed to limit the power of the state or any of its departments or agencies, or any city, county, school district, or any other local public entity, or any other person authorized by law, to acquire by eminent domain land that is subject to an open-space easement [*Gov. Code § 51086(d)*; *see* [5][d], *below*].

The prevailing plaintiff or defendant in an injunction action may be awarded his or her costs of litigation, including attorneys' fees [*Gov. Code § 51086(c)*].

[4] Income Tax Benefits

The grant of an open-space easement to a city, county, or nonprofit organization may qualify as a deductible charitable contribution [*see I.R.C. § 170(f)(3)(B)(iii)*; *see also Rev. & Tax. Code § 17241*] if it meets the following requirements:

- The grant must be in perpetuity [*see I.R.C. § 170(h)(1)(A), (2)(C)*].
- The grant must be exclusively for conservation purposes [*see I.R.C. § 170(h)(5)*].

"Conservation purposes" are defined as the preservation of land areas for outdoor public recreation or public education; the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; the preservation of open

space for the scenic enjoyment of the public or pursuant to a clearly delineated governmental conservation policy for the public benefit; or the preservation of an historically important land area or a certified historic structure [*I.R.C. § 170(h)(4)(A)*; *see I.R.C. § 170(h)(4)(B), (C)*].

If a donation is made after February 13, 1986, in which the donor retains rights that, if exercised, could impair the property's conservation values, the donor must provide documentation before the grant sufficient to establish the condition of the property at the time of the gift [*Treas. Reg. § 1.170A-14(g)(5)(i)*]. This documentation may include: (1) United States Geological Survey maps; (2) maps drawn to scale showing all improvements, flora and fauna, land use history, and distinct natural features; and (3) aerial and on-site photographs [*see Treas. Reg. § 1.170A-14(g)(5)(i)*].

Additionally, for grants made after February 13, 1986, a deduction is permitted for property that is subject to a mortgage only if the mortgagee subordinates his or her rights in the property to the right of the qualified grantee to enforce the conservation purposes of the easement in perpetuity. For grants made before that date, the donor must demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights [*Treas. Reg. § 1.170A-14(g)(2)*]. For further information, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 11, *Contributions to Charities* (Matthew Bender).

[5] Terminating Open-Space Easements

[a] In General

An open-space easement may be terminated by nonrenewal or abandonment, in accordance with the procedures set forth in the Open-Space Easement Act of 1974 [*Gov. Code § 51090*; *see Gov. Code § 51090 et seq.*]. In addition, the filing of a complaint in condemnation will terminate the easement under certain circumstances [*see Gov. Code § 51095*; *see also § 28D.30[5][d]*].

Nonrenewal is available to any party to the easement, including the landowner, county, city, or nonprofit organization [*see Gov. Code § 51091*]. Abandonment, on the other hand, is only available to the landowner and to a nonprofit organization holding an open-space easement [*see Gov. Code §§ 51090, 51093*].

[b] Nonrenewal

To effect nonrenewal of an open-space easement, the landowner, county, city, or nonprofit organization must serve a written notice of nonrenewal of the easement on the other party to the easement at least 90 days before the annual renewal date [*Gov. Code § 51091*]. If a notice is not timely served, the easement is considered automatically renewed [*Gov. Code § 51091*; *see Gov. Code § 51081*].

If a landowner serves a notice of nonrenewal for an open-space easement that was granted to a nonprofit organization, the organization's governing body must approve the nonrenewal by an appropriate resolution. If the nonprofit organization itself serves a notice of nonrenewal, the nonrenewal must be approved by the city or county in which the land subject to the easement is located, in the same manner as provided for abandonment of easements [*Gov. Code § 51090*; *see Gov. Code § 51093*; *see also* [c], *below*].

A timely notice of nonrenewal does not immediately terminate the contract. Instead, it effectively stops the easement from annually automatically adding one year to its term. The easement remains in effect for the balance of the period remaining since the original execution or the last renewal of the easement [*Gov. Code § 51092*]. Once a notice of nonrenewal is served, taxes on the affected land gradually return to the level of taxes on comparable nonrestricted land as the easement draws nearer to expiration [*see Rev. & Tax. Code § 426*; *see also § 28D.53*]. Nonrenewal procedures do not apply to an open-space easement granted in perpetuity, since, by their nature, these easements are not renewed [*see Gov. Code § 51081*].

If an owner receives a notice of nonrenewal and wishes to continue the open-space easement, he or she may make a written protest. The county, city, or nonprofit organization may withdraw the notice of nonrenewal at any time before the renewal date [*Gov. Code § 51091*]. In addition, a written protest will delay the increase in property tax valuation that accompanies nonrenewal [*see Rev. & Tax. Code § 426*; *see also § 28D.53*].

For a guide to nonrenewal procedures, see *Section 28D.131[1]*. For a form of notice, see *Section 28D.231*.

[c] Abandonment

[i] Grounds for Abandonment

An open-space easement may be terminated by the landowner through an abandonment procedure, solely by petition approved by the governing body of the city or county in which the land is located [*Gov. Code § 51093(a)*]. If a landowner serves a notice of abandonment for an open-space easement that was granted to a nonprofit organization, the organization's governing body must approve the abandonment by an appropriate resolution. If the nonprofit organization itself serves a notice of abandonment, the abandonment must be approved by the city or county in which the land subject to the easement is located [*Gov. Code § 51090*].

The governing body of the city, county, or nonprofit organization must make all of the following findings by resolution to approve the abandonment of an open-space easement [*Gov. Code § 51093(a)*]:

(1) No public purpose described in *Government Code Section 51084* will be served by keeping the land as open space [*see* [2][b][ii], *above*];

(2) Abandonment is not inconsistent with the purposes of the Open-Space Easement Act of 1974 [*see* [1][a], *above*];

(3) Abandonment is consistent with the local general plan; and

(4) Abandonment is necessary to avoid a substantial financial hardship to the landowner due to involuntary factors unique to the landowner.

The resolution abandoning or approving the abandonment must recite these findings [*see Gov. Code § 51094*].

No case concerning the abandonment of an open-space easement has been reported. Presumably, cases construing the cancellation of a land conservation contract under the Williamson Act apply by analogy to the abandonment of an open-space easement [*see Gov. Code §§ 51280-51287*; *see also § 28D.14 [2]*]. In a case construing the Williamson Act, the California Supreme Court held that cancellation of an enforceable restriction based solely on a showing that the land is more valuable for developed use violates the enforceable restriction requirement of *California Constitution, Article XIII, Section 8* [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 855, 171 Cal. Rptr. 619, 623 P.2d 180]* . This holding suggests that abandonment of an open-space easement without sufficient justification may be subject to the same limitations as those applied by the Supreme Court to the cancellation of a Williamson Act contract [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 855-864, 171 Cal. Rptr. 619, 623 P.2d 180]* .

[ii] Procedure

The landowner [*see Gov. Code § 51075(c)*] or a nonprofit organization holding an easement may bring a petition for abandonment of the open-space easement as to all of the subject land to the governing body of the county, city, or, in the case of an open-space easement granted to a nonprofit organization, to the organization [*Gov. Code §§ 51090,*

51093(a)]. If a nonprofit organization seeks to abandon an easement, it must obtain approval from the city or county in the same manner as a landowner seeking that approval [*Gov. Code § 51090*]. For a guide to abandonment procedures, see *Section 28D.131 [2]*. For a form of petition, see *Section 28D.232*.

Before an abandonment petition is approved, the matter must be referred to the county or city planning commission. The commission must hold a public hearing on the matter and furnish a report to the governing body stating whether the abandonment is consistent with the local general plan [*Gov. Code § 51093(a)*]. The term "governing body" presumably includes the governing body of a nonprofit organization holding an open-space easement [*see Gov. Code §§ 51090, 51093(a), (c)*].

The governing body must hold a public hearing on the matter after giving 30 days' notice by publication [*Gov. Code § 51093(a)*; *see Gov. Code §§ 6060, 6061*; *see also § 28D.131*]. Additionally, the governing body must determine and certify the abandonment fee before approving the abandonment [*see Gov. Code § 51093(b), (c), (e)*; *see also* [iii], *below*].

The resolution abandoning or approving the abandonment of an open-space easement must recite compliance with these procedures [*see Gov. Code § 51094*]. The land subject to the open-space easement is deemed relieved of the easement and the covenants of the owner are deemed terminated once a certified copy of the resolution is recorded in the office of the county recorder [*Gov. Code § 51094*].

[iii] Abandonment Fee

A landowner [*see Gov. Code § 51075(c)*] seeking abandonment must pay an abandonment fee in the amount of 12 1/2 percent of the full cash value of the land free of the open-space easement before abandonment may be approved [*see Gov. Code § 51093(b), (c), (e)*]. The landowner must pay the abandonment fee to the county treasurer [*Gov. Code § 51093(c)*]. Abandonment does not become effective, and a copy of the resolution abandoning or approving the abandonment may not be recorded, until the fee has been paid in full [*Gov. Code §§ 51093(e), 51094*].

The language of the provision governing the fee only discusses payment by the landowner [*see, e.g., Gov. Code § 51093(c)*]. The Act does not indicate whether an abandoning nonprofit organization [*see Gov. Code § 51090*] is also required to pay the abandonment fee. However, by analogy to the Williamson Act cancellation provisions, the fee is probably required for the easement to qualify as an enforceable restriction for property tax purposes [*see Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 855, 171 Cal. Rptr. 619, 623 P.2d 180* (lax cancellation procedures might defeat legislative intent to reduce taxes in exchange for long-term binding commitments)].

In general, corporate and personal state income tax deductions or adjustments are not allowed for payment of the abandonment fee [*see Rev. & Tax. Code §§ 17299.1, 24441, 24916.2*].

[d] Eminent Domain and Acquisition

If condemnation proceedings are initiated against land subject to an open-space easement, the easement automatically terminates as of the date of the filing of the condemnation complaint [*Gov. Code § 51095*]. The easement is not considered in determining the amount of compensation for the taking, and the owner is thus entitled to the same compensation for the taking as if the land was not burdened by the easement, if the following two circumstances apply [Gov. Code § 51095]: (1) the open-space easement was accepted or approved by a city or county; and (2) the easement was received as a gift without payment of any compensation.

Nothing in the Open-Space Easement Act may be deemed to prevent or restrict the right or power of any county or city to acquire by any means any right or interest in real property for the purpose of preserving open space or for any other purpose under any other provision of law [*Gov. Code § 51097*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsLocal GovernmentsPropertyReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic Easements



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§ 28D.31 Conservation Easements

[1] Nature and Policy

A "conservation easement" is any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, executed for the purpose of retaining the land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition. It is executed by or on behalf of the owner of the land subject to the restriction, and is binding on successive owners [*Civ. Code § 815.1*]. Although similar in nature to open-space easements [*see § 28D.30*], conservation easements must meet different requirements. For a discussion of a comparison of the two interests, see *Section 28D.30[1][b]*.

The statute governing conservation easements is based on the following two legislative findings and declarations [*Civ. Code § 815*; *see also Civ. Code § 815.1*]: (1) that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California; and (2) that it is public policy and in the public interest to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations. For further discussion of easements in general, see Chapter 28A, *Easements and Licenses* .

[2] Requirements

A conservation easement must be binding on successive owners [*Civ. Code § 815.1*] and must meet the following requirements [*Civ. Code § 815.2*]:

(1) It must be voluntarily created and freely transferable in whole or in part for the purposes stated in [1], *above* [*see Civ. Code § 815.1*].

(2) It must be perpetual in duration.

(3) It must not be personal in nature and must constitute an interest in real property notwithstanding the fact that it may be negative in character.

(4) Its particular characteristics must be specified in the instrument creating or transferring the easement.

Conservation easements may be granted only to the following entities or organizations [*Civ. Code § 815.3*]:

(1) Tax-exempt nonprofit organizations qualified under *Internal Revenue Code Section 501(c)(3)* that are qualified to do business in California and that have as their primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

(2) The state or any city, county, city and county, district, or other state or local governmental entity that is otherwise authorized to acquire and hold title to real property, provided that the easement is voluntarily conveyed [*see Gov. Code §§ 6950-6954* (counties or cities may spend public funds to acquire or conserve open space within their jurisdictions)].

No local government may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement [*Civ. Code § 815.3*].

Any instrument creating, assigning, or otherwise transferring a conservation easement must be recorded in the county recorder's office in which the land subject to the easement is located, in whole or in part [*Civ. Code § 815.5*]. For a form of conservation easement, see *Section 28D.240*.

[3] Effect and Enforcement

A conservation easement is deemed to be an enforceable restriction for the purposes of *Rev. & Tax. Code § 402.1* [*Civ. Code § 815.10*], which permits the assessor to consider the effect of the enforceable restriction on the property's value for property tax purposes [*see §§ 28D.50, 28D.51*]. Additionally, the grant of a conservation easement may qualify as a charitable contribution under the same conditions as the grant of an open-space easement [*see § 28D.30[4]*].

All interests not transferred and conveyed by the conservation easement remain in the grantor, including the right to engage in all lawful uses of the land not affected by the easement [*Civ. Code § 815.4*]. The conservation easement provisions do not impair or conflict with any law conferring on any political subdivision the right or power to hold interests in land comparable to conservation easements including, but not limited to, open-space easements, Williamson Act contracts, other contractual interests held by a city or county for conservation purposes, and open-space land designated on a local open-space plan [*Civ. Code § 815.9*; *see* Gov. Code §§ 6950 et seq., 51050 et seq., 51070 et seq., 51200 et seq., 65560 et seq.].

Either the grantor or the owner of a conservation easement may enforce the easement by seeking injunctive relief against actual or threatened injury, impairment, or violation of or to the easement [*Civ. Code § 815.7(b)*]. Monetary damages also may be available to the holder of the easement. In addition to the cost of restoration and other usual rules of damages, the loss of scenic, aesthetic, or environmental value may be considered in assessing the damages [*Civ. Code § 815.7(c)*]. An easement will not be unenforceable based on lack of privity of contract or lack of benefit to particular land. Additionally, an easement will not be unenforceable merely because the instrument creating it did not state that the easement ran with the land [*Civ. Code § 815.7(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsCreationExpress EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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§ 28D.32 Comprehensive Index of Conservation Easements Developed and Maintained by County Recorder

The county recorder in each county must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. This index must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*]. When a county recorder records a new conservation easement affecting property within the county, the recorder must include the easement in the comprehensive index if the document contains an easement entitled "conservation easement" or a Notice of Conservation Easement that is properly completed and recorded at the same time, or at a later date [*Gov. Code § 27255(c)*]. A conservation easement recorded before January 1, 2002, may be included in the comprehensive index of conservation easements if a party to the easement fills out and records a Notice of Conservation Easement for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(d)*].

For purpose of inclusion in the comprehensive index, a "conservation easement" means any limitation in a recorded instrument that [*Gov. Code § 27255(b)*]:

- Contains an easement, restriction, covenant, condition, or offer to dedicate, which is or has been executed by or on behalf of the owner of the land subject to that limitation.
- Is binding on successive owners of the land.
- Has as its purpose to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Included in the definition of "conservation easement" for these purposes are conservation easements as defined in *Civ. Code § 815.1*, open-space easements as defined in *Gov. Code § 51075*, and agricultural conservation easements as defined in *Pub. Res. Code § 10211* [*Gov. Code § 27255(b)*].

For additional information on the comprehensive index of conservation easements, as well as an example of the Notice

of Conservation Easement that may be used to provide information for recording of an existing conservation easement, see Ch. 28A, *Easements and Licenses* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral Overview



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§ 28D.33 State Registry for Conservation Easements

The Natural Resources Agency is required to establish a central public registry of all conservation easements held or required by the state, or purchased with state grant funds provided by any agency, department, or division of the state on or after January 1, 2006 [Pub. Res. Code § 5096.520(a); *see* Pub. Res. Code § 5096.520(b) ("conservation easement" defined); *see also* Stats. 2006, ch. 531, § 1 (legislative intent)]. The registry will include the recordation number assigned by the county recorder and the following information on each conservation easement [Pub. Res. Code § 5096.520(c)]:

- The purpose of the easement;
- The location of the easement, identified by county and nearest city;
- The identity of the easement holder;
- The size of the easement in acres; and
- The date the easement transaction was recorded.

On or before January 1, 2009, the registry must be made available for use by the general public. Only the items of information listed above may be provided on the internet. No personal identifying information may be posted on the internet. The registry is to be updated biennially [Pub. Res. Code § 5096.520(e)]. The updating is to be done by each agency, department, or division of the state with conservation easements that are held or required by the state or purchased with state grant funds [Pub. Res. Code § 5096.520(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsConservation

EasementsReal Property LawLimited Use RightsEasementsPublic Easements



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[Reserved]

§§ 28D.34[Reserved]



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12-28D California Legal Forms--Transaction Guide § 28D.40

§ 28D.40 Land Trusts

Land trusts are private charitable organizations or governmental entities that purchase and hold interests in land for the purpose of preserving the land. Trusts adopt differing criteria for purchasing land. Some trusts acquire only environmentally unique property, while others focus on prime agricultural lands or open-space land [*see* Micek & Weubbe, *The California Farmland Trust: The Proposal to Balance the Rural and Urban Land Use Needs of Californians, 18 U.S.F. L. Rev. 171, 177*-178 (Winter 1984)].

The approach to management of the property differs as well. Some trusts acquire only easements, without purchasing the fee simple title to the land. Some trusts purchase the land outright and maintain it through the trust's organization. Some trusts purchase the entire fee simple in the property, impose restrictions such as easements, and then sell or lease the property subject to the restriction. Trusts also purchase development rights [*see § 28D.41[5]*]. Additionally, trusts advise landowners of the available transaction options [*see* Micek & Weubbe, *The California Farmland Trust: The Proposal to Balance the Rural and Urban Land Use Needs of Californians, 18 U.S.F. L. Rev. 171, 177*-178 (Winter 1984); *see also* Comment, *Beyond the Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1169 (July 1984)*].

Local governments may operate as land trusts by acquiring by purchase, gift, grant, bequest, devise, lease, or otherwise, the fee or any lesser interest, development right [*see § 28D.41[5]*], easement, covenant, or other contractual right necessary to achieve the conservation of open spaces within their jurisdiction [*see Gov. Code § 6950 et seq.*; *see also §§ 28D.30, 28D.31*]. Local governments may also acquire the fee to any property for the purpose of placing conservation restrictions on the land and then leasing or conveying the land back to its original owner [*Gov. Code § 6953*].

For a form of articles of incorporation that may be used by a nonprofit land trust, see *§ 28D.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive

& General PlansGovernmentsLocal GovernmentsPropertyReal Property LawTrustsGeneral OverviewReal Property LawTrustsHolding Trusts



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§ 28D.41 Zoning and Environmental Regulations

[1] Zoning

Cities and counties may adopt ordinances to regulate the use of land as between industry, business, residences, and open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes [*Gov. Code § 65850(a)*]. All cities and counties, including chartered cities [*see Gov. Code § 65700*], must adopt a general plan that includes an open-space element [*Gov. Code §§ 65300, 65302(e)*], also known as the "local open space plan" [*Gov. Code § 65560(a)*].

"Open-space land" is any essentially unimproved area of land or water devoted to the preservation of natural resources, including areas required for (1) the preservation of plant and animal life; (2) the managed production of resources, including rangeland and agriculture; (3) outdoor recreation, including areas of outstanding scenic, historic, and cultural value; (4) public health and safety, including areas requiring special management or regulation because of hazardous conditions; (5) support of the mission of military installations that comprise areas adjacent to military installations, military training routes, and underlying restricted airspace that can provide additional buffer zones to military activities and complement the resource values of the military lands; and (6) protection of places, features, and objects associated with Native American history and culture [*Gov. Code § 65560(b)*].

Except for most chartered cities [*see Gov. Code §§ 65803, 65860(d)*], zoning ordinances must be consistent with the general plan [*Gov. Code §§ 65860(a), 65910*]. Also, building permits, subdivision maps, and open-space zoning ordinances must be consistent with the local open space plan [*Gov. Code § 65567*; *see also Gov. Code § 65566*]. Thus, most zoning ordinances provide for agricultural use zones, and may also include zoning for recreation [*see, e.g., McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 890, 264 P.2d 932* ; *see also Town of Los Altos Hills v. Adobe Creek Properties, Inc. (1973) 32 Cal. App. 3d 488, 516, 108 Cal. Rptr. 271]* , use of natural resources [*see Gov. Code § 65850(a)*], and open space or urban reserve [*see Gov. Code §§ 65561, 65562*; *see, e.g., Furey v. City of Sacramento (E.D. Cal. 1984) 592 F. Supp. 463]* .

For further information on agricultural use and open-space zones, see California Environmental Law and Land Use

Practice, Ch. 70, *Agricultural Preservation* (Matthew Bender), and California Real Estate Law Practice, Ch. 261, *Types of Zoning Controls* (Matthew Bender). For coverage of zoning generally, including forms, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

[2] Restrictions on Municipal Reorganization Decisions

When a local government undergoes reorganization, such as annexation, the local agency formation commission (LAFCO) must follow certain policies in approving or disapproving proposals that might lead to the loss of open-space lands [*see Gov. Code §§ 56001, 56377*]. Those policies require the LAFCO to discourage development of prime agricultural lands and to encourage use of existing vacant or non-prime agricultural lands for urban uses [*see Gov. Code § 56377*].

For further discussion, see California Environmental Law and Land Use Practice, Ch. 70, *Agricultural Preservation* , and Ch. 73, *Annexation and Boundary Issues* (Matthew Bender).

[3] Coastal Regulations

Agricultural land within the coastal zone is protected from intrusion of nonagricultural uses by the California Coastal Act [*Pub. Res. Code § 30000 et seq.*] and the State Coastal Conservancy [*Pub. Res. Code § 31000 et seq.*]. The Coastal Act provides for the regulation, primarily by local governments, of development in the coast zone [*see* Pub. Res. Code §§ 30001, 30001.5]; to ensure protection of the agricultural economy of the coastal zone, the Coastal Act is designed to maintain the maximum amount of prime agricultural lands in agricultural production [*see Pub. Res. Code § 30241*]. For further discussion, including forms, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* , and California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* , and Ch. 70, *Agricultural Preservation* (Matthew Bender).

The State Coastal Conservancy is a state funded land trust [*see* Comment, *Beyond the Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1170 (July 1984)*; *see also § 28D.40*]. The Conservancy has responsibility for implementing a program of agricultural protection, area restoration, and resource enhancement within the coastal zone [*Pub. Res. Code § 31054*]. To do so, the Conservancy is authorized to accept dedication of or to acquire agricultural and other sensitive lands to carry out its purpose, especially the prevention of loss of agricultural land [*Pub. Res. Code §§ 31104-31105, 31150-31156*]. The Conservancy is also directed to take all feasible actions to return land acquired for agricultural preservation to private use or ownership, even though the lands are subject to appropriate use restrictions [*Pub. Res. Code § 31150*].

For further discussion, see California Environmental Law and Land Use Practice, Ch. 70, *Agricultural Preservation* (Matthew Bender).

[4] California Environmental Quality Act

Whenever a project that a state or local agency, board, or commission proposes to carry out or approve may have a significant effect on the environment, an environmental impact report must be prepared [*see Pub. Res. Code §§ 21080, 21100, 21150, 21151*]. The effect that a project will have on the environment is normally considered significant if the project will convert prime agricultural land into nonagricultural use, or impair the agricultural productivity of prime agricultural land, and an environmental impact report generally must be prepared pursuant to the provisions of the California Environmental Quality Act (CEQA) [*see Pub. Res. Code § 21000 et seq.*]. For further information, including forms, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* . For additional discussion, see California Environmental Law and Land Use Practice, Chs. 20- 23 (CEQA), and Ch. 70, *Agricultural Preservation* (Matthew Bender).

[5] Transferable Development Rights

Transferable development rights, created by local ordinance, involve the creation and sale among landowners of development rights [*see Gov. Code § 6953*; *see, e.g.*, Marin County, Cal. Ordinances 22.47.106, 22.56.037].

The details of a system of transferable development rights differ among localities. Generally, however, a jurisdiction designates a planning district, an area of undeveloped land subject to development pressure. This district encompasses a conservation zone and a transfer zone. The conservation zone consists of land appropriate for preservation; the transfer zone consists of land appropriate for development. Transfer zone lands are targeted for development, but restricted to permit only a minimal level of density. Landowners within the conservation zone are issued development rights that may be sold either to a government-operated development bank or directly to developers or other landowners in the transfer zone, thus permitting transfer zone land to be developed beyond the base level of density initially allowed [*see* Comment, *Beyond the Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1171-1175 (July 1984)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawZoning & Land UseState & Regional Planning



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[Reserved]

§§ 28D.42[Reserved]



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§ 28D.50 Enforceable Restrictions

When property is subject to assessment for property tax purposes under the California Constitution, real property must usually be assessed on the basis of its full cash value, that is, on the basis of the highest and best use for the property [*see Cal. Const., arts. XIII, § 1(a)*, XIIIA, § 2(a); *see also § 28D.51*]. One exception is that the assessment may be based on current use if the property is "enforceably restricted" to that use for a term of years [*see Cal. Const., art. XIII, § 8*]. For example, real property subject to a Williamson Act contract is deemed to be enforceably restricted [*see Rev. & Tax. Code §§ 421(b), (c), (g), 422*].

The type of tax benefit depends on the type of restriction placed on the property [*see Rev. & Tax. Code §§ 402.1, 422*]. In assessing land, the assessor must consider the effect on the property value of the following enforceable restrictions [*Rev. & Tax. Code § 402.1*]:

(1) Zoning;

(2) Recorded contracts with governmental agencies other than those described below;

(3) Permit authority of, and permits issued by, governmental agencies exercising land use powers concurrently with local governments, such as the state and regional coastal commissions;

(4) Development controls of local coastal and marsh preservation plans under the California Coastal Act [*see Pub. Res. Code § 30000 et seq.*];

(5) Local government development controls in accordance with a local protection program [*see Pub. Res. Code § 29000 et seq.*];

(6) Environmental constraints applied to the use of land pursuant to statute;

(7) Hazardous waste land use restrictions [*see Health & Safety Code § 25240*]; and

(8) A recorded conservation, trail, or scenic easement, as described in *Civil Code Section 815.1*, that is granted in favor of (i) a public agency, or (ii) a nonprofit corporation organized pursuant to *Internal Revenue Code Section 501(c)(3)* that has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use [*see Civ. Code § 815.10* (property subject to a conservation easement is deemed to be enforceably restricted for purposes of *Rev. & Tax. Code § 402.1*)].

Open-space land [*see Rev. & Tax. Code § 421(g)*] subject to one of the following restrictions is entitled to special valuation treatment for property tax purposes [*Rev. & Tax. Code § 422*; *see Rev. & Tax. Code §§ 421-430.5*; *see also § 28D.51*]:

(1) A Williamson Act contract [*see Rev. & Tax. Code § 421(a), (b)*; *see also Gov. Code § 51252*; § 28D.13].

(2) An agreement executed under certain former provisions of the Williamson Act [*see Rev. & Tax. Code § 421(c)*].

(3) A scenic restriction entered into before January 1, 1975.

(4) An open-space easement [*see Rev. & Tax. Code § 421(e)*; *see also Gov. Code § 51096*; § 28D.30].

(5) A "wildlife habitat contract," which is defined as any contract, amended contract, or covenant involving at least 150 acres of land entered into by a landowner and the federal or state government, or a federal or state agency, that limits the use of the land for at least 10 years to provide a habitat for native or migratory wildlife and native pasture [*Rev. & Tax. Code § 421(f)*; *see Rev. & Tax. Code § 421(i)*].

A "scenic restriction" is any interest in real property acquired by a city or county under Chapter 12 of Division 7 of Title 1 of the Government Code [*see Gov. Code §§ 6950-6954*; *see also § 28D.40*] in which the instrument granting the right imposes land use restrictions that effectively preserve the open-space character of the land [*Rev. & Tax. Code § 421(d)*; *see also Gov. Code § 6954*]. To be eligible for the most favorable property tax valuation treatment, scenic restrictions must be for an initial term of at least 10 years and must provide either a method of extending the term by mutual agreement or a provision for automatic annual one-year extensions of the initial term [*Rev. & Tax. Code § 421(d)*; *see Gov. Code §§ 51244-51246*]. A scenic restriction may not be terminated before its expiration except as provided for cancellation of contracts under the Williamson Act [*Rev. & Tax. Code § 421(d)*; *see Gov. Code §§ 51281-51283.3*; *see also § 28D.14[2]*].

Notwithstanding these statutory provisions, a restriction must be enforceable in the face of imminent urban development and may not be terminable merely because development is desirable or profitable. Although the Legislature may determine the manner in which land is enforceably restricted, it may not define the terms "enforceably restricted" and it may not render the restrictions ineffective for land conservation purposes [*Lewis v. City of Hayward (1986) 177 Cal. App. 3d 103, 113, 222 Cal. Rptr. 781]* . If the governing procedures include lax cancellation provisions, the restriction is not an enforceable restriction for the purposes of *California Constitution, Article XIII, Section 8*. For example, a restriction that may be cancelled on the mere showing that the restricted land would be more valuable if put to another use is not an enforceable restriction [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 855, 171 Cal. Rptr. 619, 623 P.2d 180* ; *see also Lewis v. City of Hayward (1986) 177 Cal. App. 3d 103, 113, 222 Cal. Rptr. 781]* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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§ 28D.51 Valuation

Most real property in California is assessed for property tax purposes on the basis of its full cash value, meaning fair market value [*Cal. Const., arts. XIII, § 1(a)*, XIIIA, § 2(a); *Rev. & Tax. Code §§ 110, 110.5*; *see also Rev. & Tax. Code §§ 110.1, 401*]. However, property that is enforceably restricted is entitled to be valued on a basis that is consistent with its restrictions and uses [*Cal. Const., art. XIII, § 8*; *see Rev. & Tax. Code §§ 402.1, 423, 430.5*]. Additionally, there is a rebuttable presumption that the present use of enforceably restricted open-space land devoted to agricultural use is its highest and best agricultural use [*Rev. & Tax. Code § 430*; *see Rev. & Tax. Code § 402.1(b), (c)* (rebuttable presumption that restrictions will not be removed or substantially modified; valuation)].

In assessing land subject to an enforceable restriction, the assessor must consider the effect of the restriction on the value of the land [*Rev. & Tax. Code § 402.1(a)*]. In general, if the restrictions will not be removed or substantially modified in the predictable future [*see Rev. & Tax. Code § 402.1(b), (c)*], the assessor may not consider sales of otherwise comparable land not similarly restricted as to use as indicative of the value of restricted land unless the restrictions have a demonstrable minimal effect on value [*Rev. & Tax. Code § 402.1(d)*].

Enforceably restricted open-space land, other than land used for the production of timber for commercial purposes, is valued using the capitalization of income method [*Rev. & Tax. Code § 423*]. "Open-space land" means land within an agricultural preserve subject to a Williamson Act contract, land subject to a scenic easement, and land subject to an open-space easement [*Rev. & Tax. Code § 421(g)*]. Special valuation rules apply to property restricted by wildlife habitat contracts [*see Rev. & Tax. Code § 423.7*; *see also Rev. & Tax. Code § 421(f)* (definition)]. Although other conservation restrictions, such as conservation easements, may qualify for similar tax treatment, land subject to conservation easements, zoning restrictions, and other types of conservation restrictions are not statutorily required to be assessed by the capitalization of income method [*see Rev. & Tax. Code § 422*; *see also Civ. Code § 815.10* (conservation easement is enforceable restriction for purposes of *Rev. & Tax. Code § 402.1*)].

Under the capitalization of income method, the income to be capitalized is either the property's fair rental value, if sufficient rental information is available, or the net income that the land can reasonably be expected to yield under prudent management and subject to the enforceable restrictions [*Rev. & Tax. Code § 423(a)(1), (2)*]. If the parties to an

instrument that enforceably restricts the land stipulate an amount of minimum annual income per acre to be capitalized, the amount of the income to be capitalized will not be less than that amount [*Rev. & Tax. Code § 423(a)(3)*]. "Income" is the difference between revenue and expenditures [*Rev. & Tax. Code § 423(a)*].

Once the rental value or net income is determined, the value of the land is derived by dividing that figure by the capitalization rate [*Rev. & Tax. Code § 423(c)*]. The "capitalization rate" is generally set according to the following components: yield rate for long-term United States bonds; risk; property taxes; and, under certain circumstances, amortization of any investment in perennials [*Rev. & Tax. Code § 423(b)*].

Unless a party to the instrument creating the enforceable restriction expressly prohibits this valuation, the valuation resulting from the capitalization of income method may not exceed the lesser of the following [*Rev. & Tax. Code § 423(d)*; *see also Rev. & Tax. Code §§ 423.3, 423.7*]:

- The valuation that would have resulted from calculating the restricted land's full cash value or fair market value as though the property was not subject to a restriction in the base year [*see Rev. & Tax. Code § 110*]; or

- The valuation that would have resulted from calculating the restricted land's full cash value, as restricted by the limitations imposed by Proposition 13, as though the property was not subject to a restriction in the base year [*see Rev. & Tax. Code § 110.1*].

Land subject to a farmland security zone contract must be valued for assessment purposes at 65 percent of the value under *Rev. & Tax. Code § 423* or 65 percent of the value under *Rev. & Tax. Code § 110.1*, whichever is lower [*Rev. & Tax. Code § 423.4*]. Farmland security zones were created by the legislature to encourage the creation of longer-term voluntary enforceable restrictions within agricultural preserves. The creation and functioning of these zones, and the methods by which a landowner or group of landowners may petition to enter a new contract designating their property as a farmland security zone, are specified by statute [*see Gov. Code §§ 51296-51297.4*]. For additional discussion, see *§ 28D.14[5]*.

Notwithstanding the provisions described above, the taxing authority may take into consideration the existence of any mines, minerals, and quarries on the land to be valued [*Rev. & Tax. Code § 427*]. Further, any city or county may allow land subject to a Williamson Act contract or a migratory waterfowl habitat contract to be assessed in a different manner [*see Rev. & Tax. Code § 423.3*]. In addition, the taxation rules described above do not apply to any residence, including any agricultural laborer housing facility as provided for in the Williamson Act [*see Gov. Code §§ 51220(b), 51231, 51238, 51282.3*], on the land being valued or to an area of reasonable size used as a site for that type of residence [*Rev. & Tax. Code § 428*].

For further discussion of property tax valuation, see California Environmental Law and Land Use Practice, Ch. 70, *Agricultural Preservation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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§ 28D.52 Subventions

To compensate for lost property tax revenues resulting from lowered tax assessments, localities establishing Williamson Act agricultural preserves may be partially subsidized by "subventions," or payments from the state [*see Gov. Code §§ 16140-16154*; *see also* Comment, *Beyond the Williamson Act: Alternatives for More Effective Preservation of Agricultural Land in California, 15 Pac. L.J. 1151, 1159*-1160 (July 1984)]. Subventions are not available, however, to reimburse for revenues lost as a result of an open-space easement under the Open-Space Easement Act of 1974 [*Gov. Code § 16141*]. The Secretary of Resources may request the California Attorney General to bring any action in court necessary to enforce any enforceable restriction as defined by *Rev. & Tax. Code § 422* on land for which the Secretary has certified payment of state funds to the local governing body [*Gov. Code § 16147*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsFinanceTax LawState & Local TaxesReal Property TaxGeneral Overview



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§ 28D.53 Effect of Nonrenewal on Valuation

When a notice of nonrenewal has been served [*see § 28D.14[1][b]*], special provisions go into effect, causing the property valuation to progressively increase until the property is taxed at its full cash value by the time the restriction expires [*see Rev. & Tax. Code § 426(b)*]. If the landowner serves the notice, or if the county, city, nonprofit organization serves the notice and the landowner does not protest [*see Gov. Code §§ 51091, 51245, 51296-51297.4*], the special provisions apply immediately. If the county, city, or nonprofit organization serves the notice and the owner protests [*see Gov. Code §§ 51091, 51245, 51296-51297.4*], the special provisions apply when less than six years remain on the term of the enforceable restrictions [*Rev. & Tax. Code § 426(a)*].

To achieve the increase in valuations, the taxing authority must use the following steps each year until the restriction terminates [*see Rev. & Tax. Code § 426(b)*]:

(1) Determine the full cash value of the land under *Rev. & Tax. Code § 110.1* if applicable or, if not, under *Rev. & Tax. Code § 110*, without regard to the restrictions. If the land will be subject to a use for which a special restricted assessment applies, the value is determined as if the property were subject to the new restriction.

(2) Determine the value of the land by the capitalization of income method as if the notice of nonrenewal had not been given.

(3) Subtract the amount determined in (2), *above*, from the amount determined in (1), *above*, to obtain the difference between the full cash value and the value determined from the capitalization of income method.

(4) Discount the difference found in (3), *above*, for the number of years remaining until the restriction expires by the rate determined from the interest component in the capitalization rate under *Rev. & Tax. Code § 423(b)(1)*.

(5) Add the amount determined in (2), *above*, to the amount obtained in (4), *above*, to derive the valuation of the land for tax purposes for that year.

(6) Apply the ratio prescribed in *Rev. & Tax. Code § 401* to the land value determined in (5), *above*, to obtain the assessed value.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandReal Property LawLimited Use RightsEasementsConservation EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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[Reserved]

§§ 28D.54[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28D California Legal Forms--Transaction Guide § 28D.100

§ 28D.100 Facts

1. Identity of owner or owners of subject land.

NOTE:
"Owner" or "landowner" includes a contract purchaser under the California Veterans Aid Program for the purposes of offering similar terms to landowners within a single Williamson Act agricultural preserve *[53 Cal. Op. Att'y Gen. 187 (1970)* ; ***see*** *Gov. Code § 51241*; ***see also*** *§ 28D.13[1][a]*].

a. Name, address, and telephone number of owner.

b. Legal status of owner, such as:
(1) Corporation.

(2) Partnership.

(3) Unincorporated association.

(4) Individual.

c. If owner is corporation or association:

(1) Type of association or corporation.
(a) For profit.

(b) Nonprofit.

(2) Date and state of incorporation, if applicable.

(3) Location of principal office.

(4) Name, title, and telephone number of officer or employee who will handle transaction.

d. If owner is partnership, name, address, and telephone number of partners.

2. Name, address, and telephone number of all trust deed beneficiaries and mortgagees of subject property.

3. City and county in which subject property is located.

4. Total area of subject property (in acres), including land zoned as timberland.

5. Name, address, and telephone number of owners of contiguous property.

6. Description of subject property, including:

a. Legal description.

b. Assessor's parcel number.

7. Current nature and use of subject property and approximate acreage used for each use, such as:

a. Agricultural use [*see Gov. Code § 51201(b)*].

b. Recreational use [*see Gov. Code § 51201(n)*; *see also Gov. Code § 51238.1*].

c. Open-space use [*see Gov. Code § 51201(o)*].

d. Wildlife habitat area [*see Gov. Code § 51201(j)*].

e. Saltpond [*see Gov. Code § 51201(k)*].

f. Managed wetland area [*see Gov. Code § 51201*(*l*)].

g. Submerged area [*see Gov. Code § 51201(m)*].

h. Scenic highway corridor [*see Gov. Code § 51201(i)*].

i. Public health and safety [*see Gov. Code §§ 51075(a), 65560*].

8. Future uses of subject property contemplated by landowner, if any.

9. Rural or urban character of neighboring areas.

10. Term of years that landowner desires to commit to restricted use.

NOTE:

The minimum term of years for a contract governing land use in agricultural preserves is 10 years [*Gov. Code § 51244*]. Similarly, a grant of an open-space easement must be at least for a term of 10 years [*Gov. Code § 51081*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal Planning



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§ 28D.101 Documents

1. Deed of subject property to current owner.

2. Title report.

3. Copies of any conveyances, encumbrances, or declarations of existing restrictions on property.

4. Map of subject property.

5. Any photographs, surveys, geological reports concerning subject property.

6. If subject property is within existing agricultural preserve:

a. Copy of any Williamson Act contract between city or county and other owners of property within preserve.

NOTE:
Within 30 days after a form of contract is first used, the clerk of the board of supervisors or city council must file with the Director of Energy and Conservation a sample copy of each form of contract and any applicable land use restrictions [*Gov. Code § 51249*].

b. Copy of prior land conservation contracts, if any, entered into concerning subject land.

7. If landowner is corporation:

a. Certified copy of articles of incorporation and current bylaws.

b. Certified copy of resolution, if any, accepting or approving open-space easement or proposal to establish agricultural preserve or to enter into Williamson Act contract.

8. If landowner is granting open-space easement to nonprofit organization [*see Gov. Code § 51075(f)*], letter of determination from Internal Revenue Service demonstrating that organization:

a. Includes preservation of open space as stated purpose in articles of incorporation.

b. Qualified under *I.R.C. § 501(c)(3)* in preceding tax year.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

12-28D California Legal Forms--Transaction Guide §§ 28D.102-28D.109

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§§ 28D.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

12-28D California Legal Forms--Transaction Guide § 28D.110

§ 28D.110 General Determinations

1. Determine whether property is subject to any current restrictions on use, including:

a. Existing agricultural preserve regulations [*see § 28D.12[1]*].

b. Existing Williamson Act contract [*see § 28D.13*].

c. Zoning restrictions [*see § 28D.41[1]*].

d. Restrictions on coastal development [*see § 28D.41 [3]*].

e. Existing conservation or open-space easement, or other contractual conservation restriction [*see §§ 28D.30, 28D.31, 28D.40*].

2. Determine whether city or county in which subject land is located has general plan.

NOTE:
The city or county must have a general plan to establish an agricultural preserve [*Gov. Code § 51230*; ***see*** *§ 28D.11[1][a]*; ***see also*** California Real Estate Law Practice, Ch. 253, ***Local Planning and the General Plan*** (Matthew Bender)].

3. Determine whether proposed use of property is consistent with general plan.

4. Determine whether any planned development in areas surrounding subject property may affect property's use and value.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
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12-28D California Legal Forms--Transaction Guide § 28D.111

§ 28D.111 Additional Determinations for Agricultural Preserves

1. Determine whether owner is willing to restrict use of property as required by Williamson Act [*see Gov. Code §§ 51230, 51231, 51243*] and any existing local rules.

2. Determine whether owner would obtain property tax benefit from inclusion of property in agricultural preserve [*see §§ 28D.50, 28D.51*].

3. Ascertain from county or city planning agency any existing rules and procedures governing agricultural preserves.

4. If land is proposed to be included in existing agricultural preserve, determine terms and conditions of existing contracts with landowners in same preserve.

5. Determine whether subject land meets following eligibility requirements [*see Gov. Code §§ 51247, 51242*]:

a. Parcel is of sufficient size to sustain agricultural uses permitted under contracts [*see Gov. Code § 51222*]:
(1) If prime agricultural land [*see Gov. Code § 51201(c); see also § 28D.10[2]*], at least 10 acres.

(2) If not prime agricultural land, 40 acres.

b. Land meets following size requirements for agricultural preserve:

NOTE:
The size requirements do not apply to land within a scenic highway corridor [***see*** P 6, Note, ***below***].

(1) At least 100 acres [*Gov. Code § 51230*].

NOTE:
Two or more contiguous or commonly owned parcels may be combined to meet this requirement. Land zoned as timberland may be taken into account for the purposes of this requirement [***see*** *Gov. Code § 51230*; ***see also*** *§ 28D.11[1][b]*].

(2) If land is smaller than 100 acres, city or county may establish smaller preserve based on finding that [*Gov. Code § 51230*]:

(a) Smaller preserve is necessary due to unique characteristics of agricultural enterprises in area; and

(b) Establishment of smaller preserve is consistent with local general plan.

c. Any eligibility requirements imposed by city or county [*see 56 Cal. Op. Att'y Gen. 160, 162-164 (1973)]* .

6. Determine whether land is within scenic highway corridor [*see Gov. Code § 51201(i)*].

NOTE:
The city or county is required to establish an agricultural preserve and offer a Williamson Act contract if requested to by an owner of land within a scenic highway corridor, regardless of the size of the parcel [*Gov. Code § 51205.1*; *Borel v. County of Contra Costa (1990) 220 Cal. App. 3d 521, 527, 269 Cal. Rptr. 460* ; ***see*** *§ 28D.11[1][a], [b]*].

7. Determine whether beneficiary under deed of trust is willing to subordinate his or her interest to contractual restrictions [*see 51 Cal. Op. Att'y Gen. 80, 84, 88 (1968)* ; *see also § 28D.13[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal PlanningTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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12-28D California Legal Forms--Transaction Guide § 28D.112

§ 28D.112 Additional Determinations for Open-Space Easements

1. Determine whether owner is willing to enter into restrictions on use of property as required by Open-Space Easement Act [*see §§ 28D.30[1][a], [2][a], [b][ii], 28D.121*].

2. Determine whether owner would benefit from lower property tax assessment resulting from grant of open-space easement [*see §§ 28D.50, 28D.51*].

3. Determine whether grant meets following requirements for deduction as charitable contribution [*see I.R.C. § 170(f)(3)(B)(iii)*; *see § 28D.30[4]*]:

a. Grant is in perpetuity [*see I.R.C. § 170(h)(1)(A), (2)(C)*].

b. Grant is exclusively for conservation purposes [*see I.R.C. § 170(h)(4)*].

c. If grant is executed after February 13, 1986, mortgagee has subordinated his or her rights to grantee's rights to enforce easement [*see Treas. Reg. § 1.170A-14(g)(2)*]

NOTE:
For grants executed before February 13, 1986, the donor must demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights [*Treas. Reg. § 1.170A-14(g)(2)*].

4. Determine whether city or county imposes any procedural requirements.

5. Determine whether city or county imposes requirements on restrictions, conditions, or covenants that must be included in instrument creating easement [*see Gov. Code § 51082*].

6. Determine whether subject land meets following requirements for open-space land:

a. Land is unimproved [*see Gov. Code §§ 51075(a), 51084(b)(1)*].

b. Land is devoted to open-space use, including any of following [*Gov. Code §§ 51075(a), 65560(b)*]:

(1) Preservation of natural resources.

(2) Managed production of resources.

(3) Outdoor recreation.

(4) Public health and safety.

(5) Support of mission of military installations.

(6) Protection of places, features, and objects associated with Native American history and culture.

c. If retained in natural state, land has any of following [*see Gov. Code § 51084(b)(1)*]:

(1) Scenic value to public.

(2) Value as watershed.

(3) Value as wildlife preserve.

7. Determine whether grant of easement is made to one of following entities that is qualified to accept easement [*see Gov. Code §§ 51075(d), 51080, 51083.5*; *see § 28D.30[1][a]*]:

a. County with open-space plan [*see Gov. Code § 51075(e)*].

b. City with open-space plan [*see Gov. Code § 51075(e)*].

c. Nonprofit organization, meeting following requirements [*Gov. Code § 51075(f)*]:

(1) In preceding tax year, organization qualified under *I.R.C. § 501(c)* of preceding tax year.

(2) Includes preservation of open space as stated purpose in articles of incorporation.

8. Determine whether owners of contiguous property are willing to enter into open-space easement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawZoning & Land UseLocal PlanningTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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12-28D California Legal Forms--Transaction Guide §§ 28D.113-28D.119

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12-28D California Legal Forms--Transaction Guide § 28D.120

§ 28D.120 Agricultural Preserves

NOTE:

The procedures outlined here are based on those prescribed in the Williamson Act. Because each governing locality must adopt its own procedures [***see*** *Gov. Code § 51231*], practitioners should consult the local rules to be certain that all of the necessary steps are accomplished.

The Department of Energy and Conservation is authorized to assist any person or entity in interpreting the Williamson Act, and to disseminate information about the Act's policies, purposes, procedures, and implementation [*Gov. Code § 51206*].

[1] Establishing Agricultural Preserve

1. Obtain form of application or proposal to establish agricultural preserve [*see §§ 28D.11[1][c], 28D.200*] from city or county with jurisdiction over subject land.

NOTE:

The specific agency that provides the forms differs among localities. Forms are commonly obtained from the planning agency, the board of supervisors, or the city council. Occasionally, localities provide them through the county or city counsel's office.

2. Prepare proposal and pay application fee, if any [*see Gov. Code § 51231*].

3. Submit proposal to appropriate city or county agency or department.

4. Determine that proposal has been submitted to planning department or commission of county or city [*see Gov. Code § 51234*].

NOTE:

Within 30 days after receiving the proposal, the planning agency must submit a report to the board of supervisors or city council stating whether the preserve is consistent with the general plan. The board or council may extend the agency's time for not more than an additional 30 days. Final action on the proposal may not be taken until the report is received or the time for submission has elapsed [*Gov. Code § 51234*]. The board of supervisors or city council also must make a finding of consistency with the general plan before taking final action [*Gov. Code § 51234*; ***see*** *§ 28D.11[1][c]*].

5. Review planning agency's report and finding of board of supervisors or city council, when available, and be prepared to provide evidence at public hearing in support of or controverting report.

6. Ascertain date of public hearing.

NOTE:

The board of supervisors or city council must hold a public hearing before establishing an agricultural preserve [***see*** *Gov. Code § 51230*; ***see also*** *§ 28D.11[1][c]*].

7. Determine whether board of supervisors or city council has given required notice by [*Gov. Code §§ 51230, 51233*]:

a. Giving notice one time by publication [*see Gov. Code §§ 6060, 6061*], including:
(1) Legal description of land to be included in preserve; or

(2) Assessor's parcel number of land to be included in preserve.

NOTE:

A significant error in the land's identifying reference renders both the notice and any subsequent contracts invalid, and cannot subsequently be corrected *[53 Cal. Op. Att'y Gen. 305 (1970)]* .

b. Giving written notice two weeks before hearing to [*Gov. Code § 51233*]:

(1) Local agency formation commission.

(2) Every city within county within one mile of exterior boundaries of preserve.

8. Attend public hearing and, if necessary, provide evidence in support of establishment of preserve.

NOTE:

If the board or council decides to establish the preserve, it must do so by resolution [*Gov. Code § 51230*; ***see*** *§§ 28D.11[1][c], 28D.201*]. As long as the preserve is in effect, a map of the preserve and the resolution under which it was established must be filed and kept current by the city or county with the county recorder [*Gov. Code § 51237*].

9. If no preexisting rules governing preserves are in effect, consider providing advice to board or council concerning which rules and procedures to adopt [*see Gov. Code § 51239*].

NOTE:

Once an agricultural preserve has been established, the board of supervisors or city council must adopt

rules governing the administration of the preserve [*Gov. Code § 51231*], which include rules concerning compatible uses that will be permitted on the preserve [***see*** *Gov. Code §§ 51201(e), 51231*; ***see also*** *§ 28D.12[1], [2]*].

10. Ascertain whether city or county has filed and kept current map of agricultural preserve and resolution establishing agricultural preserve with county recorder [*see Gov. Code § 51237*].

11. Ascertain whether city or county has filed map designating agricultural preserve on or before September 1 each year with Director of Energy and Conservation [*see* Gov. Code § 51287.5].

[2] Obtaining Williamson Act Contracts

1. Request standard form contract from city or county [*see § 28D.210*].

NOTE:
The application form for establishing an agricultural preserve may include a request for a contract [***see, e.g.,*** *§ 28D.200*].

2. Provide city or county with any information required to determine whether subject land meets following eligibility requirements [*see Gov. Code §§ 51242, 51247*; *see § 28D.13[2]*]:

a. Devoted to agricultural use, meaning any of following [*Gov. Code § 51205*]:
(1) Land used for recreation.

(2) Land within scenic highway corridor.

(3) Wildlife habitat area.

(4) Saltpond.

(5) Managed wetland area.

(6) Submerged area.

(7) Land, including, but not limited to, greenhouses, used for producing agricultural commodity for commercial purposes [*see Gov. Code § 51201(b)*].

b. Located in area designated as agricultural preserve.

c. Sufficient size to sustain agricultural uses [*see Gov. Code § 51222*; *see also § 28D.111*, P 5]

3. Compare contract offered for subject property to contracts covering other property, if any, within same agricultural preserve.

NOTE:
The governing locality must offer contracts with similar terms to all owners of land within the same preserve [*Gov. Code § 51241*; ***see*** *§ 28D.13[4]*].

4. Determine whether contract includes required terms, such as [*see § 28D.13[4]*]:

NOTE:

Contracts may provide restrictions, terms, and conditions, including payments and fees, that are more restrictive than or in addition to those required by the Williamson Act [*Gov. Code § 51240*].

a. Initial term of at least 10 years [*Gov. Code § 51244*].

b. Automatic renewal adding additional year to contract term unless notice of nonrenewal has been served [*Gov. Code § 51244*; *see §§ 28D.14[1], 28D.130[1]*].

NOTE:

If the initial term of the contract is for more than 10 years, the contract may include an automatic renewal provision beginning with the anniversary date on which the contract will have an unexpired term of nine years [*Gov. Code § 51244.5*; ***see*** *§ 28D.13[4]*].

c. Exclusion of uses for duration of contract that are not agricultural or compatible uses [*Gov. Code § 51243(a)*; *see Gov. Code § 51201(e)*].

d. Provision that contract is binding on and inures to benefit of all successors in interest to owner [*Gov. Code § 51243(b)*; *see § 28D.13[5]*].

NOTE:

Special provisions govern transfers of ownership within a family [***see*** *Gov. Code § 51230.1*; ***see also*** *§ 28D.13[5]*].

5. If land is to be used for public outdoor recreational use, obtain from the board of supervisors or city council indemnification agreement concerning all claims arising from that use [*see Gov. Code § 51238.5(a)*; *see also § 28D.12[2]*].

6. Obtain, if possible, subordination agreement from trustee or beneficiary.

NOTE:

The effect of the landowner's default and subsequent foreclosure or trustee's sale on land under a Williamson Act contract depends on when the trust deed or other encumbrance is recorded. If the encumbrance was executed and recorded before the execution and recordation of the Williamson Act contract, the buyer acquires the land free of the contract's restrictions unless the beneficiary of the encumbrance consents to subordinate his or her interest to the subsequent contractual restrictions [*51 Cal. Op. Att'y Gen. 80, 84-85, 88 (1968)* ; ***see*** *§ 28D.13[5]*].

7. Ascertain whether city or county has recorded copy of contract with reference to map showing location of relevant agricultural preserve within 20 days after execution of contract [*Gov. Code § 51248*].

NOTE:

Whenever a city or county is required to record a contract under the Williamson Act, the municipality may file a fictitious contract. Later, any of the provisions of the fictitious contract may be included by reference in any contract required to be filed under the Williamson Act [*Gov. Code § 51248.5*; ***see*** *Civ. Code § 2952*; ***see also*** *§ 28D.13[4]*].

8. Ascertain whether city or county has, within two years of effective date of contract, restricted use of noncontracted land within preserve to compatible uses [*see Gov. Code § 51230*; *see also § 28D.12[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal Planning

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12-28D California Legal Forms--Transaction Guide § 28D.121

§ 28D.121 Creating Open-Space Easements

NOTE:
The procedures described here follow the requirements of the Open-Space Easement Act of 1974 [***see*** *Gov. Code § 51070 et seq.*]. Counsel should ascertain whether the city or county with jurisdiction over the land imposes additional procedural requirements.

1. Assemble documentation of relevant features of property, such as:

a. Maps.

b. Surveys.

c. Reports, such as:
(1) Soil.

(2) Water.

d. Photographs.

NOTE:
This documentation is required by the Internal Revenue Service of a charitable donor who retains rights in the property which, if exercised, could impair the property's conservation values [***see*** *Treas. Reg. § 1.170A-14(g)(5)(i)*; ***see also*** *§ 28D.30[4]*].

2. Draft formal instrument granting easement [*see §§ 28D.30[2][a], 28D.230*].

a. Ensure that instrument includes following required provisions [*see § 28D.30[2][a]*]:

(1) Term of at least 10 years [*see Gov. Code § 51081*] or in perpetuity.

(2) If easement is for term of years, automatic annual renewal that adds one year to term unless notice of nonrenewal is served [*see Gov. Code §§ 51081, 51091*; *see also §§ 28D.30[5][b], 28D.131[1]*].

(3) Covenant running with land prohibiting landowner from permitting construction of improvements except those for which right has been expressly reserved [*see Gov. Code § 51075(d)*].

NOTE:
A reservation of the right to construct improvements must be consistent with the purposes of the Open-Space Easement Act, must be compatible with preserving the natural or scenic character of the land, and may not prohibit the construction of certain public service facilities [***see*** *Gov. Code § 51075(d)*; ***see also*** *§ 28D.30[2][a]*].

(4) Covenants to preserve land's scenic value or value as watershed or wildlife preserve [*see Gov. Code § 51084(b)(1)*].

b. Ensure that instrument satisfies any requirements imposed by city or county for maintenance of natural or scenic character of land [*see Gov. Code § 51082*].

3. Submit easement to appropriate agency or department of city, county, or nonprofit organization for approval [*see § 28D.30[2][b][i]*].

NOTE:
An open-space easement granted to a city or county is effective when it has been accepted or approved by resolution of the governing body [*Gov. Code § 51083*]. An open-space easement granted to a nonprofit organization is effective upon its acceptance by the organization. However, for the property taxpayer to obtain certain property tax benefits, the grant must be approved by the city or county [*Gov. Code § 51083.5*; ***see*** *Rev. & Tax. Code §§ 421-430.5*; ***see also*** *§§ 28D.50, 28D.51*]. Additionally, city or county approval is required for the owner of property subject to an eminent domain proceeding to receive reimbursement at full value for the taking [***see*** *Gov. Code § 51095*; ***see also*** *§ 28D.30[5][d]*].

4. Determine whether offer has been referred to county or city planning agency for report specifying whether proposed easement is consistent with jurisdiction's general plan [*Gov. Code § 51085*].

NOTE:
The governing body of the county or city may not accept or approve a grant of an open-space easement until the planning agency's report has been received [*Gov. Code § 51085*; ***see*** *§ 28D.30[2][b][ii]*].

5. Review planning agency's report, when available, and be prepared to provide evidence in support of or controverting agency's finding.

6. Attend and, if necessary, provide evidence at meeting or hearing of city council or board of supervisors at which offer will be discussed in support of following required findings [*Gov. Code § 51084*; *see § 28D.30[2][b][ii]*]:

a. Preservation of land as open space is consistent with general plan.

b. Land is essentially unimproved.

c. If retained in natural state, land has scenic value to public, or value as watershed or wildlife preserve.

d. Instrument contains appropriate covenants in support of retaining land's open-space value.

e. It is in public interest to keep land as open space because of either of following:

(1) Preservation will add to amenities of living in neighboring urbanized areas.

(2) Preservation will help save rural character of area.

f. Public interest will be served in manner recited in resolution and consistent with purposes of land preservation.

7. If easement is accepted, ascertain whether clerk of governing body has done following [*see Gov. Code § 51087*; *see also § 28D.30[2][c]*]:

a. Recorded instrument creating easement in county recorder's office.

b. Filed copy of instrument creating easement with county assessor.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Related and Subsequent Procedures

12-28D California Legal Forms--Transaction Guide § 28D.130

§ 28D.130 Terminating Williamson Act Contracts

[1] Nonrenewal

NOTE:
Nonrenewal does not immediately terminate the contract. It prevents the automatic extension of the contract by one year on the renewal date. The existing contract remains in effect for the balance of the period remaining on the contract, generally nine years [***see*** *Gov. Code § 51246*; ***see also*** *§ 28D.14[1]*].

1. If landowner desires to remove portion of land from contract, determine locality's procedure for obtaining authorization from board of supervisors [*see Gov. Code § 51245*; *see §§ 28D.14[1]*, *28D.221*].

NOTE:
When a landowner terminates the contract covering only a portion of the land, the portion remaining under contract must continue to meet the requirements for parcel size [***see*** *Gov. Code § 51222*].

2. Draft and serve notice of nonrenewal [*see §§ 28D.14[1][b]*, *28D.220*].

NOTE:
The notice of nonrenewal must be in writing. It must be served by a landowner at least 90 days before the contract's renewal date. If served by the city or county, it must be served at least 60 days before the renewal date. If the notice is not timely served, the contract will be deemed automatically renewed for an additional year [*Gov. Code § 51245(a)*; ***see*** *Gov. Code §§ 51244*, *51244.5*].

3. If landowner who wishes to renew contract receives notice of nonrenewal, consider making written

protest of notice [*see Gov. Code § 51245(b)*; *see also § 28D.14[1][b]*].

NOTE:

The city or county may withdraw the notice of nonrenewal at any time before the contract's renewal date [***see*** *Gov. Code § 51245(b)*]. The written protest delays the increase in valuation for property tax purposes [***see*** *Rev. & Tax. Code § 426*; ***see also*** *§ 28D.53*].

4. Ensure that city or county delivers to Director of Energy and Conservation following notices, as applicable:

a. Copy of notice of nonrenewal, within 30 days of receipt from landowner [*Gov. Code § 51245(c)*].

b. Copy of notice of nonrenewal served on landowner, within 30 days of service [*Gov. Code § 51245*].

c. Notice of expiration of contract, within 30 days after expiration [*Gov. Code § 51246(a)*].

d. Withdrawal of notice of nonrenewal, within 30 days of withdrawal [*Gov. Code § 51245(c)*].

[2] Cancellation

NOTE:

A Williamson Act contract may be cancelled only at the request of the landowner in an emergency or extraordinary situation [***see*** *Gov. Code § 51281*; *Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852-853, 171 Cal. Rptr. 619, 623 P.2d 180* ; ***see also*** *§ 28D.14[2][a]*].

A landowner or group of landowners may petition to rescind a contract or contracts entered into pursuant to the Williamson Act [*Gov. Code § 51200 et seq.*] in order to simultaneously place the land subject to that contract or those contracts under a new contract designating the property as a farmland security zone [*Gov. Code § 51296.1*; ***see*** *Gov. Code § 51296*]. Only land that is designated on the Important Farmland Series maps or that is defined as predominantly prime agricultural land is eligible for this designation [*Gov. Code § 51296.8*; ***see*** *Gov. Code § 51201(c)* (definition of prime agricultural land)]. Statutory provisions specify all of the requirements for the creation of a farmland security zone, including the petition process, as well as limitations with regard to matters such as annexation, special districts, and school districts [***see*** *Gov. Code §§ 51296.1(a)-(e), 51296.3-51297.3*.]. For additional discussion, see *§ 28D.14[5]*. A petition for cancellation of a farmland security zone contract may be filed only by the landowner with the city or county within which the contracted land is located. The city or county may grant a petition only in accordance with specified procedures [***see*** *Gov. Code § 51280 et seq.*] and only if all specified requirements are met [*Gov. Code § 51297*; ***see*** *§ 28D.14[5]*].

Nothing in these provisions would limit the authority of a board to rescind a portion or portions of the Williamson Act contract or contracts for the purpose of immediately enrolling the land in a farmland security zone contract, as long as the remaining land was retained in a Williamson Act contract and the board determined that its action would improve the conservation of agricultural land in the county where the rescission occurs [*Gov. Code § 51297.4*]. In any case, the creation of multiple contracts does not

constitute a subdivision of the land [*Gov. Code § 51297.4*].

1. Determine whether grounds exist for either of required findings required for cancellation [*see Gov. Code § 51282*; *see also § 28D.14[2][b]*]:

NOTE:
The uneconomic character of the existing use may be considered only if there is no other reasonable or comparable agricultural use for the land [*Gov. Code § 51282(d)*].

a. Determine whether all of following circumstances exist on which governing body may base finding that cancellation is consistent with purposes of Williamson Act [*see Gov. Code § 51282(b)*]:
(1) Notice of nonrenewal has been served concerning land for which cancellation is proposed.

(2) Cancellation is not likely to result in removal of adjacent lands from agricultural use.

(3) Cancellation is for alternative use consistent with local general plan.

(4) Cancellation will not result in discontiguous patterns of urban development.

NOTE:
Whether a development is urban or rural depends on factors relating to the individual project [*Honey Springs Homeowners Assn. v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1141-1144, 203 Cal. Rptr. 886* ; ***see*** *§ 28D.14[2][b][ii], [iii]*].

The mere fact that intervening land is zoned for development is not sufficient to show contiguity. Contiguity may be shown by demonstrating that the owners of the intervening parcels have the ability and intent to develop their land within a reasonable time, not to exceed nine years [*Honey Springs Homeowners Assn. v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1141-1144, 203 Cal. Rptr. 886* ; ***see*** *§ 28D.14[2][b][ii], [iii]*].

(5) Either of following circumstances apply:

(a) No proximate, noncontracted land is available and suitable for use proposed for land that is subject of cancellation.

NOTE:
"Proximate, noncontracted land" means land that is not restricted by a Williamson Act contract and that is sufficiently close to contracted land that it can serve as a practical alternative for the use that is proposed for the land subject to the request for cancellation [*Gov. Code § 51282(b), (c)*].

"Suitable" for the proposed use means that the salient features of the proposed use can be served by land not restricted by a Williamson Act contract. The nonrestricted land may be a single parcel or may be a combination of contiguous or discontiguous parcels [*Gov. Code § 51282(b), (c)*].

(b) Development of contracted land that is subject of cancellation would provide more contiguous patterns of urban development than would development of proximate noncontracted land.

b. Determine whether all of following circumstances exist on which governing body may base finding that cancellation is in public interest [*see Gov. Code § 51282(c)*]:

(1) Other public concerns substantially outweigh objectives of Williamson Act.

(2) Either of following circumstances apply:

(a) No proximate, noncontracted land is available and suitable for use proposed for land that is subject of cancellation.

(b) Development of contracted land that is subject of cancellation would provide more contiguous patterns of urban development than would development of proximate noncontracted land.

2. Draft petition for cancellation [*see §§ 28D.14[2][c], 28D.222, 28D.223*].

NOTE:
Some localities provide form petitions, while others accept letter requests [***see*** *§§ 28D.222, 28D.223*]. Counsel should ascertain which method is preferred in the particular locality.

a. Include proposal for specified alternative use of land, setting forth [*see Gov. Code § 51282(e)*]:

(1) Governmental agencies known by landowner to have permit authority related to proposed alternative use.

(2) Information with sufficient specificity to permit governing body to make required findings [*see* P 1, *above*].

b. If petition for cancellation is for purpose of using land for agricultural laborer housing, include all of following [*see Gov. Code § 51282.3(a)*; *see also § 28D.14[2][c][ii]*]:

(1) Particular description of acreage to be subject to cancellation.

(2) Stipulation that purpose of cancellation is to allow land to be used exclusively for agricultural laborer housing facilities.

(3) Demonstration that contracted land subject to proposed cancellation is reasonably necessary for development and siting of agricultural laborer housing.

(4) Certification that contracted land subject to proposed cancellation shall not be converted to any other alternative use within first 10 years following cancellation.

3. File petition with board of supervisors or city council and pay application fee, if any.

4. Ascertain that city or county has [*Gov. Code § 51284*; *see § 28D.14[2][d]*]:

a. Published notice of public hearing [*see Gov. Code §§ 6060, 6061*].

b. Mailed notice of public hearing to every owner of contracted land situated within one mile of land subject to proposed cancellation.

c. Mailed copy of petition and published notice to Director of Energy and Conservation.

NOTE:

The requirement for a noticed hearing does not apply if the land subject to the proposed cancellation is zoned as timberland and recorded [*Gov. Code § 51282.5*; ***see*** *Gov. Code §§ 51112, 51113, 51117*].

5. Ascertain whether any landowner of property located in city or county, or any other affected person, will protest cancellation, and be prepared to offer controverting evidence and argument, if necessary [*see Gov. Code § 51285*; § 28D.14[2][d]].

6. Attend public hearing and, if necessary, offer testimony, evidence, or argument in support of required findings [*see* P 1, *above*].

7. If tentative approval of cancellation is granted [*see Gov. Code §§ 51283.4(a), 51284*; *see also §§ 28D.14[2][e], 28D.224*]:

a. Obtain copy of certificate of tentative cancellation.

b. Ascertain from certificate conditions and contingencies required to obtain final cancellation.

NOTE:

The conditions and contingencies must include payment in full of the cancellation fee [***see*** *Gov. Code § 51283*; ***see also*** *§ 28D.14[2][f]*] and the requirement that the landowner obtain all permits necessary to begin the development project [*Gov. Code § 51283.4*]. No cancellation fee is required if the land subject to the cancellation is zoned as timberland production and recorded [*Gov. Code §§ 51282.5*; ***see*** *Gov. Code §§ 51112, 51113, 51117*; ***see also*** *§ 28D.14[2][f][iii]*]. A lien in lieu of a fee is recorded on the land when cancellation is granted for use of the land as agricultural laborer housing [*Gov. Code § 51282.3*; ***see*** *§ 28D.14[2][f]*].

c. Ascertain whether city or county published, within 30 days of tentative cancellation, display advertisement setting forth [*Gov. Code § 51284*]:

(1) Date, time, and place of hearing.

(2) Explanation of decision and findings.

(3) Description of land.

NOTE:

The advertisement must be published as a display advertisement, at least one eighth of a page, in at least one newspaper of general circulation in the city or county. The

advertisement is for information purposes only. A copy of the notice must be sent to the Director of Energy and Conservation [*Gov. Code § 51284*; ***see*** *§ 28D.14[2][e]*].

8. If following circumstances exist, request city council or board of supervisors to waive or extend landowner's time to pay cancellation fee [*see Gov. Code § 51283(c)*; *see also § 28D.14[2][f][ii]*]:

NOTE:

Ascertain from the governing locality the appropriate procedure for making the request.

Any waiver of or extension of time to pay a fee or any portion of it must be made contingent on the future use of the land and its economic return to the landowner. Any extension of time to pay must not exceed the unexpired period of the contract had it not been cancelled [*Gov. Code § 51283(c)*].

a. It is in public interest to waive or extend time to pay the fee.

b. Cancellation is caused by involuntary transfer or change in use that may be made of land.

c. Land is not immediately suitable and would not be immediately used for purpose that produces greater economic return to owner.

d. Deferral or waiver is in best interests of program to conserve agricultural land.

e. Waiver or extension is approved by Secretary of Natural Resources Agency on Secretary's findings that:

(1) Waiver or extension is consistent with Williamson Act; and

(2) Board of supervisors or city council complied with Williamson Act's cancellation provisions [*see Gov. Code § 51280 et seq.*].

NOTE:

In evaluating a request for a waiver or extension of time, the secretary must review the findings of the board or council, the evidence of the board or council's record, and any other evidence the secretary may receive concerning the cancellation, waiver, or extension of time [*Gov. Code § 51283(c)*].

9. Satisfy all contingencies and conditions.

NOTE:

The landowner, if required to pay the cancellation fee, must do so within one year from the date of the recording of the certificate of tentative cancellation or the cancellation fee will be recomputed as of the date of the notice described in *Gov. Code § 51283.4(b)* [***see*** *§ 28D.14[2][g]*] or the date the landowner requests a recomputation [*Gov. Code § 51283.4(a)*; ***see*** *§ 28D.14[2][f][i]*].

10. If landowner is able to satisfy all contingencies and conditions [*see § 28D.14[2][g]*]:

a. Notify board of supervisors or city council when landowner has satisfied all contingencies and conditions [*see Gov. Code § 51283.4*].

b. Ascertain that city or county has executed and recorded certificate of cancellation:

(1) Within 30 days of receipt of notice that contingencies and conditions have been satisfied; and

(2) On determination that contingencies and conditions have been satisfied.

11. If cancellation is granted for using land for agricultural laborer housing [*see Gov. Code § 51282.3(b)*; *see also § 28D.14[2][f][iii]*]:

a. Commence construction of housing within one year after recording of certificate of cancellation.

NOTE:
If construction is not started within one year from the date of recordation, the landowner will be required to pay the fees, taxes, and interest for which the lien was imposed in order to have the lien released. If construction begins after one year, the amount of the interest will be for that period from one year after recordation until the start of construction [*Gov. Code § 51282.3(b)*].

b. If land continues to be used for agricultural laborer housing within 10 years from date of recordation of certificate of cancellation, ascertain that lien recorded in lieu of fee is released.

12. If landowner is unable to satisfy all conditions and contingencies [*see § 28D.14[2][g]*:

a. Notify board of supervisors or city council and identify requirements that were not satisfied [*see Gov. Code § 51283.4(c)*].

b. Ensure that board or council withdraws tentative approval of cancellation.

NOTE:
The landowner will not be entitled to a refund of any cancellation fee paid [*Gov. Code § 51283.4(c)*; ***see*** *§ 28D.14[2][f]*].

13. If county or city did not fully comply with Williamson Act requirements in reaching decision on petition to cancel, consider challenging county or city order by bringing proceeding under Civil Code Section 1094.5 within 180 days from date of city or county order [*see Gov. Code § 51286*; *see also § 28D.14[2][h]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
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12-28D California Legal Forms--Transaction Guide § 28D.131

§ 28D.131 Terminating Open-Space Easements

[1] Nonrenewal

NOTE:
Nonrenewal does not immediately terminate the easement. It stops the easement from automatically adding a year to its term. The easement remains in effect for the balance of the remaining period [*Gov. Code § 51092*; ***see*** *§ 28D.30[5][b]*].

1. Draft notice of nonrenewal [*see Gov. Code § 51091*; *see also §§ 28D.30[5][b]*, *28D.231*].

NOTE:
The landowner, county, city, or nonprofit organization may serve a nonrenewal notice. "Landowner" includes a lessee or trustee, if the expiration of the lease or trust occurs at a time later than the expiration of the open-space easement [*Gov. Code § 51075(c)*].

2. Serve notice on other party to easement at least 90 days before annual renewal date [*see Gov. Code § 51091*].

NOTE:
If notice is not served timely, the easement will automatically renew [*Gov. Code §§ 51091, 51092*].

3. If landowner serves notice of nonrenewal on nonprofit organization, ensure that organization's governing body approves nonrenewal by appropriate resolution [*see Gov. Code § 51090*; *see also § 28D.30[5][b]*].

4. If nonprofit organization serves notice of nonrenewal, obtain approval by city or county in same manner as provided for abandonment [*see Gov. Code § 51090*; *see also* [2], *below*].

5. If owner who wishes to renew receives nonrenewal notice, consider making written protest.

NOTE:
A written protest will delay the increase in property tax valuation that accompanies renewal [***see*** *Rev. & Tax. Code § 426*; ***see also*** *§ 28D.53*]. The county, city, or nonprofit may withdraw the notice of nonrenewal at any time before the renewal date [*Gov. Code § 51092*].

[2] Abandonment

1. Determine whether circumstances surrounding decision to abandon open-space easement will permit city, county, or nonprofit organization to make all of following required findings [*see Gov. Code § 51093(a)*; *see also § 28D.30[5][c][i]*]:

a. No public purpose [*see Gov. Code § 51084*] will be served by keeping land as open space.

b. Abandonment is not inconsistent with purposes of Open-Space Easement Act of 1974.

c. Abandonment is consistent with local general plan.

d. Abandonment is necessary to avoid substantial financial hardship to landowner due to involuntary factors unique to him or her.

2. Draft petition for abandonment [*see Gov. Code § 51093*; *see also §§ 28D.30[5][c][ii]*], 28D.232].

a. If landowner initiates abandonment, submit to governing body of appropriate city, county, or nonprofit organization for approval [*see Gov. Code §§ 51090, 51093(a)*].

b. If nonprofit organization initiates abandonment, submit to city or county for approval [*see Gov. Code § 51090*; *see also Gov. Code § 51093(a)*].

NOTE:
The Open-Space Easement Act does not expressly require that a copy of the petition be sent to the landowner when the nonprofit organization initiates abandonment [***see*** *Gov. Code §§ 51090, 51093(a)*]. However, doing so is probably necessary to satisfy due process and contract law requirements.

3. Refer, or ascertain whether city, county, or nonprofit organization has referred, petition to local planning commission [*see Gov. Code § 51093(a)*; *see also § 28D.30[5][c][ii]*].

4. Ascertain date of public hearing by planning commission [*see Gov. Code § 51093(a)*; *see also § 28D.30[5][c][ii]*].

5. Attend public hearing of planning commission and, if necessary, provide evidence in support of abandonment.

NOTE:

The planning commission must furnish a report on the matter to the governing body stating whether abandonment is consistent with the local general plan [*Gov. Code § 51093*; ***see*** *§ 28D.30[5][c][ii]*].

6. Ascertain whether governing body has given required 30 days' notice of public hearing by publication [*see Gov. Code § 6061*] and by posting notice on land [*see Gov. Code § 51093(a)*].

7. Attend public hearing of governing body and, if necessary, provide evidence in support of abandonment.

8. Ascertain amount of and pay abandonment fee determined by governing body [*see Gov. Code § 51093(b), (c)*; *see also § 28D.30[5][c][iii]*].

NOTE:

The abandonment fee is equal to 12 1/2 percent of the full cash value of the land as though it were free of the open-space easement [***see*** *Gov. Code § 51093(b), (c)*]. Abandonment is not effective until the fee has been paid in full [*Gov. Code § 51093(e)*], and there are no provisions for waiver or extension of time to pay. For further discussion, see *Section 28D.30[5][c][iii]*.

9. Obtain certified copy of resolution by city, county, or nonprofit organization.

10. Ascertain whether resolution sets forth [*Gov. Code § 51094*]:

a. Approval of abandonment of easement.

b. Compliance with abandonment provisions of Open-Space Easement Act of 1974.

11. Record, or determine whether city, county, or nonprofit organization has recorded, certified copy of resolution in county recorder's office.

NOTE:

The resolution cannot be recorded until the abandonment fee is paid in full [*Gov. Code § 51094*]. Once the resolution is recorded in the county recorder's office, the land is deemed relieved of the easement and the covenants contained in the easement are deemed terminated [*Gov. Code § 51094*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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12-28D California Legal Forms--Transaction Guide § 28D.132

§ 28D.132 Disestablishing or Altering Agricultural Preserve Boundaries

1. Determine rules of city or county for establishing and disestablishing agricultural preserves.

NOTE:
The same procedure required to establish an agricultural preserve must be used to disestablish, enlarge, or diminish the size of an agricultural preserve [*Gov. Code § 51231*].

2. Follow procedures outlined in rules of city or county and in Section 28D.120 [1], substituting request for alteration or disestablishment instead of application or proposal [*see § 28D.11 [2]*].

3. If alteration or disestablishment will remove contracted land from agricultural preserve, ascertain that board of supervisors or city council gave notice of proposed alteration or disestablishment and date of hearing as follows [*Gov. Code § 51232*]:

a. By certified mail to owner of land at last address known to board or council.

b. By publication pursuant to *Government Code Section 6061*.

c. By first class mail to each owner of land under contract if any port ion of land is situated within one mile of exterior boundary of land to be remo ved from preserve.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide §§ 28D.133-28D.199

[Reserved]

§§ 28D.133[Reserved]



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1. Establishing Agricultural Preserves

12-28D California Legal Forms--Transaction Guide § 28D.200

§ 28D.200 Application to Establish Agricultural Preserve

[1] Comment--Use of Form

This form is an application for use by a landowner to propose the establishment of an agricultural preserve. The language of this form is based on the application form used by San Luis Obispo County, and is typical of application forms used throughout the state. Although the Williamson Act uses the term "proposal" [*see, e.g., Gov. Code §§ 51233, 51234*], most localities refer to the form as a request or application. The submission of an application form requesting the establishment of an agricultural preserve is the first step that a landowner must take to place his or her lands within a preserve [*see Gov. Code § 51234*; *see also §§ 28D.11 [1]*], 28D.120[1]].

The information required on the initial application varies depending on the locality. Typically, the application includes the legal description of the property, the assessor's parcel number, the existing use of the property, the legal owner of the property, and the names of any other persons holding an interest in the property. As is evident from this form, some municipalities also require information on the amount of income currently received from the land, and a map, often the assessor's map, showing the boundaries of the property proposed to be included in the preserve. Some localities require a current lot book report and deed description or a title report specifying the entire extent of current ownership in the property. Most cities and counties require that an application fee accompany the form.

[2] FORM

Application to Establish Agricultural Preserve

PROPERTY OWNER'S REQUEST TO ESTABLISH AN AGRICULTURAL PRESERVE UNDER THE PROVISIONS OF THE LAND CONSERVATION ACT OF 1965
STATE OF CALIFORNIA

Date _____

BOARD OF SUPERVISORS
County of San Luis Obispo
Courthouse Annex
San Luis Obispo, California

ATTENTION: PLANNING DEPARTMENT, COUNTY GOVERNMENT CENTER, SAN LUIS OBISPO, CALIFORNIA 93408

Members of the Board:

I hereby request the Board to notice and hold a public hearing for the purpose of establishing an Agricultural Preserve including my properties described below pursuant to *Government Code Section 51201(d)* of the California Land Conservation Act of 1965 (as amended).

It is my intent to enter into Contract pursuant to the Act. I have read a sample copy of the Contract proposed to be offered to these property owners within such a Preserve and understand its contents, restrictions, terms and conditions.

OWNER'S NAME _____

ADDRESS _____ .....PHONE NO. _____

I am the _____[principal *or* sole] owner of _____ acres and I desire to place _____ acres of my property under Contract.

Assessor's Parcel Number(s) of property to be placed under Contract:

_____
_____
_____

_____[The Assessor's map(s) *or describe other prepared map*] clearly showing property boundaries is attached to this request.

OTHER PART OWNERS OF RECORD OR INTEREST

NAME	ADDRESS	TYPE OF INTEREST
_____	_____	_____
_____	_____	_____
_____	_____	_____

NOTE:
All fee owners of any surface interest, including all trust deed beneficiaries or mortgagees of record, must join in any Contracts.

DESCRIPTION OF LAND AND INCOME

LAND CLASS	CROP OR USE	LAND CAPABILITY CLASSIFICATION	ACREAGE
PRIME AGRICULTURAL LAND ($200/ac. gross or more)			
PRIME AGRICULTURAL LAND (less than $200/ac. gross)			
OPEN SPACE LANDS			
TOTAL ACREAGE			

Annual Gross Agricultural Income: _____
(highest 3 of last 5 years)

Do you have plans for more intensive agricultural use of your property? _____

Proposed crop type(s) and acreage(s): _____

How many acres of your property could be irrigated with locally available water resources? _____

Click here to view image.

I understand that this Agricultural Preserve request also constitutes a request for appropriate agricultural zoning, which will be processed subsequent to the Agricultural Preserve request as needed.

Your favorable consideration of my request will be appreciated.

VERIFICATION:

I hereby certify that the petitioners listed above are the owners of property affected by the requested preserve and zoning and certify under penalty of perjury that all statements in this application are true and correct. *I am one of the petitioners listed above.*

_____ ..... _____
Signature ..... Date

AGRICULTURAL PRESERVE ESTABLISHMENT AND CONTRACT FILING FEE PAID

_____ _____ _____
(date) (receipt no.) (received by)

NOTE:
Please retain one completed application. After the Board of Supervisors approves establishment of your agricultural preserve, complete the section below the dotted line and return the application with a completed standard form Agricultural Preserve contract and a title company lot book report. Standard form Agricultural Preserve contracts are provided and processed by the Planning Department.

_____

APPLICATION FOR CONTRACT

I hereby request that the processing to place the property described under Agricultural Preserve contract be completed.
_____ Dated:

RECEIVED BY: _____
(Planning Department)

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.201

§ 28D.201 Resolution to Establish Agricultural Preserve [Gov. Code §§ 51230, 51237]

[1] Comment--Use of Form

This form, adapted from the form used in San Luis Obispo County, illustrates a simple form of resolution establishing an agricultural preserve. To establish an agricultural preserve, a city or county must comply with the notice requirements [*see Gov. Code §§ 6061, 51230*; *see also § 28D.120*], hold a public hearing, and adopt a resolution establishing the preserve [*see Gov. Code § 51230*]. The resolution must include a finding on whether the proposed agricultural preserve is consistent with the local general plan [*see Gov. Code § 51234*].

This form states the Williamson Act requirements and the board of supervisors' compliance, recites the findings of the board of supervisors, states the required minimum parcel size, and identifies and establishes the preserve. Some localities provide a more detailed resolution, setting forth procedures and compatible uses in the resolution itself.

When an agricultural preserve is established, the city or county must file the resolution and a map of the agricultural preserve with the county recorder [*Gov. Code § 51237*].

[2] FORM

Resolution to Establish Agricultural Preserve [Gov. Code §§ 51230, 51237]

IN THE BOARD OF SUPERVISORS
County of _____, State of California

Date: _____

RESOLUTION NO. _____
RESOLUTION ESTABLISHING AN AGRICULTURAL PRESERVE PURSUANT TO THE CALIFORNIA LAND CONSERVATION ACT OF 1965

The following resolution is hereby offered and read:

WHEREAS, *Section 51230 of the Government Code* of the State of California provides that this Board of Supervisors may, by resolution, establish an agricultural preserve after a public hearing is held and after notice of hearing has been published pursuant to *Government Code Section 6061*; and

WHEREAS, the County of _____ has a General Plan; and

WHEREAS, *Government Code Section 51233* provides that two weeks' written notice of the public hearing shall be given to the Local Agency Formation Commission and to every city within one mile of the exterior boundaries of the preserve; and

WHEREAS, a public hearing has been held to consider the establishment of an Agricultural Preserve (File No. _____) for the real property situated in the County of _____, State of California, and more particularly described in Exhibit "A," attached to and by this reference incorporated in this resolution; and

WHEREAS, notice of hearing has been published and written notice of hearing given as required by *Government Code Sections 51230* and *51233*.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED by the Board of Supervisors of the County of _____, State of California, as follows:

1. This board finds that:

(a) Having received and reviewed the report of the Planning Commission as to the request to establish this preserve, the establishment of this preserve is consistent with the General Plan of the County of _____, State of California.

(b) The area described in Exhibit "A" will qualify for an Agricultural Preserve contract for _____ [*number, no fewer than 10*] years.

(c) A public hearing has been held pursuant to *Section 51230 of the Government Code* of the State of California after publication of notice and after giving written notice as required by *Sections 51230* and *51233 of the Government Code* of the State of California.

2. The area described in Exhibit "A" is hereby designated Agricultural Preserve No. _____. The appropriate minimum parcel size in Agricultural Preserve No. _____ is to be _____ acres.

On motion of Supervisor _____[*name of supervisor*], seconded by Supervisor _____[*name of supervisor*], and on the following roll call vote, to wit:

Ayes:	_____
Nays:	_____
Absent:	_____
Abstaining:	_____

This resolution is hereby

adopted.

_____
Chair, Board of Supervisors, County of _____, State of California

ATTEST

_____
County Clerk and Ex-Officio Clerk,
Board of Supervisors, County of _____,
State of California

APPROVED AS TO FORM AND LEGAL EFFECT:

_____
County Counsel
BY: _____
Deputy County Counsel
Date: _____

_____[SEAL]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.202

§ 28D.202 Consent to Establish Agricultural Preserve

[1] Comment--Use of Form

This form is for use by a landowner seeking to establish an agricultural preserve to obtain the consent of contiguous property owners to the establishment of the preserve. In general, an agricultural preserve must generally consist of at least 100 acres [*Gov. Code § 51230*]; however, smaller preserves may be established under certain circumstances [*see Gov. Code § 51230*; *see also § 28D.11[1][b]*]. To meet the acreage requirement, two or more parcels of land that are contiguous or under common ownership may be combined [*Gov. Code § 51230*]. When the requirement of 100 acres must be met, the landowner with a smaller parcel must obtain the consent of contiguous property owners to similarly restrict use of their land so that the preserve will contain at least 100 acres [*see Gov. Code § 51230*].

This form, adapted from the form used by Fresno County, has the effect of permitting the owner of contiguous property to place his or her land in an agricultural preserve without entering into a land conservation contract [*see §§ 28D.13, 28D.120[2], 28D.210, 28D.211*]. However, the owner of the contiguous property may elect to enter into a land conservation contract. In that case, the city or county must offer a similar contract to that used for the landowner initiating the preserve [*see Gov. Code § 51241*]. If any land inside an agricultural preserve is not subject to a Williamson Act contract, its use must be restricted by zoning, including appropriate minimum parcel sizes that are at a minimum consistent with the Government Code provisions concerning agricultural land, so as not to be incompatible with the agricultural use of the land that is under contract [*Gov. Code § 51230*]. The failure by a city or county to restrict the use of land not under contract that is within a preserve is not a sufficient reason to cancel or invalidate any contract on land within the preserve [*Gov. Code § 51230*; *see §§ 28D.12[2], 28D.13*].

[2] FORM

Consent to Establish Agricultural Preserve

CONSENT TO ESTABLISH AN AGRICULTURAL PRESERVE

I have no objection to having my land placed within an agricultural preserve and understand that this consent is not an application for a Land Conservation Contract.

Assessor's Parcel No. _____

Owner:	Mailing Address:
_____	_____
_____	_____
_____	_____

Signatures:

_____
[*Name of owner*]

_____
[*Name of owner*]

_____
[*Name of owner*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & Farmland



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
A. Agricultural Preserves
1. Establishing Agricultural Preserves

12-28D California Legal Forms--Transaction Guide §§ 28D.203-28D.209

[Reserved]

§§ 28D.203[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
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A. Agricultural Preserves
2. Land Conservation (Williamson Act) Contract

12-28D California Legal Forms--Transaction Guide § 28D.210

§ 28D.210 Land Conservation Contract [Gov. Code §§ 51240-51255]

[1] Comment

[a] Use of Form

This form is a land conservation contract, also referred to as a Williamson Act contract, for use by a municipality and an owner of land within an established agricultural preserve to enter into a contract restricting the use of the land for the purpose of preserving the land in accordance with the Williamson Act. Land that is restricted by a Williamson Act contract is entitled to special valuation methods for property tax purposes; land that is in the agricultural preserve but not under contract is not entitled to the same treatment [*see Rev. & Tax. Code §§ 421-430.5*; *see also Rev. & Tax. Code § 402.1*; §§ 28D.50, 28D.51].

This form is a short form of contract adapted from the form used by Marin County. Some counties use an even shorter contract form, which reduces the recording costs associated with a long agreement. For example, a county might use a very short contract form that simply incorporates by reference the previously recorded resolution of the board of supervisors [*see § 28D.201*], which includes the applicable restrictions and conditions.

Once a contract is entered into with any landowner, the governing locality must offer contracts with similar terms to every other owner of land within the same preserve. The contracts need not be identical, except as required by the Williamson Act, as long as any differences are related to the location and characteristics of the land and are pursuant to the uniform rules adopted by the locality [*Gov. Code § 51241*].

For more information on Williamson Act land conservation contracts, see *Sections 28D.13, 28D.120[2]*.

[b] Required Provisions

Land subject to a Williamson Act contract must be devoted to agricultural use and must be within a designated agricultural preserve [*Gov. Code § 51242*]. Every land conservation contract must prohibit any use that is not

agricultural or compatible with agricultural uses [*Gov. Code § 51243*]. The city or county may require terms that are more restrictive than or in addition to those required by the Williamson Act [*Gov. Code § 51240*].

Every contract must be for an initial term of at least 10 years [*Gov. Code § 51244*]. In addition, every contract must provide for the automatic addition of one year to the term of the contract on the anniversary date of the contract, or on some other annual date specified in the contract, unless one of the parties gives a notice of nonrenewal [*Gov. Code § 51244*; *see Gov. Code § 51244.5*; *see also §§ 28D.14 [1], 28D.220*]. The contract must be binding on and inure to the benefit of all successors in interest of the landowner [*Gov. Code § 51243*].

[2] FORM

Land Conservation Contract [Gov. Code §§ 51240-51255]

LAND CONSERVATION CONTRACT

THIS CONTRACT, made and entered into this _____[*date*], by and between _____[*name of property owner or owners*] (referred to as Owner in this contract) and _____[*name of city or county*], a political subdivision of the State of California (referred to as _____[City *or* County] in this contract):

Recitals

1. Owner possesses certain real property (referred to as the Property in this contract) located within _____[City *or* County], which is currently devoted to agricultural use and is generally described as follows: _____[*insert legal description*], Assessor's Parcel Number _____.

2. The Property is situated within an agricultural preserve established by _____[City *or* County].

3. Both Owner and _____[City *or* County] desire to limit the use of the Property to agricultural purposes (or uses compatible with agricultural purposes) in order to discourage premature and unnecessary conversion of the Property to urban use, recognizing that the Property has substantial public value as open space and that the preservation of the Property in agricultural production constitutes an important physical, social, aesthetic, and economic asset to _____[City *or* County].

THEREFORE, the parties, in consideration of the mutual covenants and conditions set forth in this contract and the substantial public benefits to be derived from this contract, agree as follows:

Williamson Act

1. This contract is made and entered into pursuant to the provisions of the Williamson Act, appearing at Division 1, Title 5, Chapter 7 (commencing with *Section 51200) of the Government Code* of California, and is subject to all of the provisions of that act.

Agricultural Use Restriction

2. During the term of the contract, the Property shall not be used for any purpose other than (1) the production of agricultural commodities for commercial purposes, (2) uses within the purview of *Government Code Section 51205*, or *(3)* other uses that are determined by _____[County *or* City] to be compatible with agricultural uses. No structures will be erected on the Property except those structures that are directly related to and compatible with the uses allowed in this contract.

Condemnation

3. If any action in eminent domain for the condemnation of any land described in this contract is filed after the execution of this contract, or if any portion of the Property is acquired in lieu of condemnation, the provisions of *Section 51295 of the Government Code* apply.

Term and Renewal of Contract

4. This contract is effective commencing on _____[*date*], and will remain in effect for a period of _____[*number, no fewer than 10*] years from that date. Each year, on _____[the anniversary date of this contract *or specify other date*], one year will be automatically added to the initial term, unless notice of nonrenewal is given as provided in *Section 51245 of the Government Code*.

No Compensation

5. Owner shall not receive any payment from _____[City *or* County] in consideration of the obligations imposed by this contract. The parties recognize and agree that the consideration for the execution of this contract is the substantial public benefit to be derived from this contract and the advantage that will accrue to Owner as a result of any reduction in the assessed value of the Property due to the imposition of the limitations on its use contained in this contract.

Cancellation

6. This contract may not be terminated or cancelled by either party except in the manner provided in *Sections 51280 through 51287 of the Government Code*.

Contract Runs With Land

7. This contract runs with the land described as the Property in this contract and is binding on the heirs, successors, and assigns of the parties.

IN WITNESS WHEREOF, the parties have executed this contract on the date written above.

_____ [*name of county or city*]
By: _____ [*signature*]
[Chair, Board of Supervisors *or* Mayor]

ATTEST:

_____[*signature*]
Clerk

Owner: _____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.211

§ 28D.211 Amendment to Land Conservation Contract

[1] Comment--Use of Form

This form, adapted from a form used by San Diego County, is for use by the landowner or the municipality in adopting amendments to an existing land conservation contract. The form as illustrated is for use in changing the minimum parcel size; however, the form may be adapted for purposes of other amendments as well.

Although the Williamson Act does not expressly provide for amendments to land conservation contracts, several localities have adopted forms to enable landowners and governing municipalities to amend the contract. When the amendment alters the boundaries of the existing preserve, the same procedures must be followed as those required for establishing a preserve [*see § 28D.11 [2]*], including referral to the local planning agency and a noticed public hearing, with additional notice requirements imposed on the municipality [*Gov. Code §§ 51231, 51232*; *see §§ 28D.11[2], 28D.132*].

[2] FORM

Amendment to Land Conservation Contract

AMENDMENT TO LAND CONSERVATION CONTRACT

Agricultural Preserve Number _____

THIS AMENDMENT, made and entered into on _____[*date*], by and between _____[*name of owner*] "Owner," and _____[*name of county or city*, a political subdivision of the State of California, _____ ["County" *or* "City"]:

WITNESS:

WHEREAS, ON _____[*date*], Owner and _____[County *or* City] entered into Land Conservation Contract No. _____, referred to as "Contract"; and

WHEREAS, The Contract provides that _____[*specify provision, e.g.,* the premises cannot be divided so as to create a parcel of land having an area of less than _____ acres]; and

WHEREAS, _____[*describe the general policy of the city or county on subject of amendment, e.g.,* the minimum parcel size is prescribed by the Board of Supervisors' Policy No. _____ and varies depending on the various agricultural activities authorized to be conducted in the agricultural preserve]; and

WHEREAS, the Owner requests _____[*specify requested amendment, e.g.,* a reduction in the parcel size allowed under the contract but not below the minimum parcel size prescribed by Board Policy No. _____ for the particular agricultural activities authorized in this agricultural preserve];

NOW, THEREFORE, THE PARTIES AGREE TO AMEND SECTION(S) OF EXHIBIT _____ OF LAND CONSERVATION CONTRACT _____ TO READ AS FOLLOWS:

_____[*Specify, e.g.,* The premises subject to this Contract may not be divided to create a parcel of land having an area of less than _____ acres. This restriction will not be construed to prohibit the owner of premises having an area of more than _____ acres (referred to as "Grantor") from conveying to the owner of contiguous premises subject to a contract of equal or longer unexpired term a parcel containing less than _____ acres for the purpose of enlarging the contiguous premises where the remainder of the Grantor's premises after the conveyance has an area of not less than _____ acres.]

All other provisions of the Contract remain in full force and effect.

IN WITNESS WHEREOF, the Owner and the _____[County *or* City] have executed this Amendment on the date written above.

_____
Owner

_____ [*name of city or county*]
By: _____
Clerk of the Board of Supervisors

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide §§ 28D.212-28D.219

[Reserved]

§§ 28D.212[Reserved]



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12-28D California Legal Forms--Transaction Guide § 28D.220

§ 28D.220 Notice of Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

[1] Comment

[a] Use of Form

This form is a notice of nonrenewal for use by a landowner to notify the city or county of his or her intent not to renew a land conservation contract. Several localities do not use a standardized notice of nonrenewal form and will, instead, accept a letter from the landowner stating his or her intent not to renew the land conservation contract. This form, provided by San Diego County, may be used as a model for drafting a letter of nonrenewal.

Any of the parties to a land conservation contract may serve a notice of nonrenewal on all of the land subject to the contract [*Gov. Code § 51245(a)*]. With authorization by the county or city, a landowner may serve a nonrenewal notice on only a portion of the land covered by the contract [*see Gov. Code § 51245(b)*]. This form is for use when the notice of nonrenewal applies to all of the land under contract. For a form of partial nonrenewal, see *§ 28D.221*.

A landowner must give a notice of nonrenewal at least 90 days before the renewal date of the contract. If the notice of nonrenewal is given by the county or city, it must be given at least 60 days before the renewal date of the contract [*Gov. Code § 51245*].

For further discussion and a detailed guide to the nonrenewal procedures, see *§§ 28D.14[1], 28D.130[1]*.

[b] Effect of Notice of Nonrenewal

The notice of nonrenewal effectively stops the contract from annually automatically renewing itself and adding an additional year to its term. It does not immediately terminate the contract. The contract terminates at the end of the balance of the time period remaining on the contract, usually nine years [*see Gov. Code § 51246(a)*; *see § 28D.14[1]*].

Once the landowner has served a notice of nonrenewal, taxes on the contracted land gradually return to the level of

taxes on comparable nonrestricted property as the contract draws nearer to expiration [*Rev. & Tax. Code § 426*; *see Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 853, 171 Cal. Rptr. 619, 623 P.2d 180]* . For a further explanation of the effect a notice of nonrenewal has on property taxes, see *§ 28D.53*.

[c] Cancellation and New Contract Designating Farmland Security Zone

A landowner or group of landowners may petition to rescind a contract or contracts entered into pursuant to the Williamson Act [*Gov. Code § 51200 et seq.*] in order to simultaneously place the land subject to that contract or those contracts under a new contract designating the property as a farmland security zone [*Gov. Code § 51296.1*; *see Gov. Code § 51296*]. Only land that is designated on the Important Farmland Series maps or that is defined as predominantly prime agricultural land is eligible for this designation [*Gov. Code § 51296.8*; *see Gov. Code § 51201(c)* (definition of prime agricultural land)]. Statutory provisions specify all of the requirements for the creation of a farmland security zone, including the petition process, as well as limitations with regard to matters such as annexation, special districts, and school districts [*see Gov. Code §§ 51296.1(a)-(e), 51296.3-51297.3*.].

A petition for cancellation of a farmland security zone contract may be filed only by the landowner with the city or county within which the contracted land is located. The city or county may grant a petition only in accordance with specified procedures [*see Gov. Code § 51280 et seq.*] and only if all of the following requirements are met [*Gov. Code § 51297*]:

- The city or county must make required specific findings [*see Gov. Code § 51282(a)(1), (2), (b)-(e)*] or instead must make a finding that no authorized use may be made of a remnant contract parcel of five acres or less left by public acquisition pursuant to *Gov. Code § 51295*.

- Prior to issuing tentative approval of the cancellation of the contract, the board or council must determine and certify to the county auditor the amount of the cancellation fee that the landowner will be required to pay the county treasurer on cancellation of the contract. The cancellation fee must equal 25 percent of the cancellation valuation of the property.

- In its resolutions tentatively approving cancellation of the contract, the city or county must find that (1) no beneficial public purpose would be served by the continuation of the contract, (2) the uneconomic nature of the agricultural use is primarily attributable to circumstances beyond the control of the landowner and the local government, and (3) the landowner has paid a cancellation fee equal to 25 percent of the cancellation valuation computed in accordance with *Gov. Code § 51283(b)*.

- The Director of Conservation must approve the cancellation after reviewing the record of tentative cancellation, or the director must find that (1) there is substantial evidence in the record supporting the decision, and (2) no beneficial public purpose would be served by the continuation of the contract.

Nothing in these provisions would limit the authority of a board to rescind a portion or portions of the Williamson Act contract or contracts for the purpose of immediately enrolling the land in a farmland security zone contract, as long as the remaining land was retained in a Williamson Act contract and the board determined that its action would improve the conservation of agricultural land in the county where the rescission occurs [*Gov. Code § 51297.4*]. In any case, the creation of multiple contracts does not constitute a subdivision of the land [*Gov. Code § 51297.4*].

Land within a designated farmland security zone is eligible for property tax valuation pursuant to *Rev. & Tax. Code § 423.4*, which requires the land to valued for assessment purposes at 65 percent of the value under *Rev. & Tax. Code § 423* or *Rev. & Tax. Code § 110.1*, whichever is lower. In addition, notwithstanding any other provision of law, any special tax approved by the voters after 1998 for urban-related services on the land or any living improvement must be levied at a reduced rate unless the tax directly benefits the land or the living improvements [*Gov. Code § 51296.2*].

[2] FORM

Notice of Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

WHEN RECORDED, PLEASE MAIL THIS
INSTRUMENT TO:

Clerk, Board of Supervisors
San Diego County Administration Center
1600 Pacific Highway
San Diego, California 92101

_____
SPACE ABOVE FOR RECORDER'S USE ONLY

NOTICE OF NONRENEWAL

Agricultural Preserve: _____
Control No.: _____

Dated: _____.

NOTICE IS HEREBY GIVEN:

WHEREAS, the undersigned _____[(*name* is) *or* (*names* are)] the owner(s) of land described under Land Conservation Contract No. _____, recorded on _____[*date*], Document No. _____, in the Office of San Diego County, more particularly described in attached Exhibit "A," and;

WHEREAS, the _____[owner desires *or* owners desire] a nonrenewal of Contract No. _____;

NOW, THEREFORE, the _____[owner declares *or* owners declare] the intent not to renew Contract No. _____, effective _____[*date*].

_____
Owner

_____
Owner

_____
Owner

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal PlanningTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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12-28D California Legal Forms--Transaction Guide § 28D.221

§ 28D.221 Notice of Partial Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

[1] Comment--Use of Form

This form, based on a form provided by San Luis Obispo County, is for use by a landowner to serve notice of nonrenewal of his or her Williamson Act contract as to only a portion of the land under contract. For a form of notice of nonrenewal covering the entire portion of land subject to contract, see *§ 28D.220[2]*.

A city or county is authorized to permit the landowner, on request, to give a notice of nonrenewal on only a portion of the land under contract [*Gov. Code § 51245(b)*]. Landowners should be aware that the portion of the property remaining under contract must conform to the existing legal parcels and minimum parcel standards applied by the locality to the preserve.

Most localities require that each owner sign the notice, and some also require each signature to be notarized. Counsel is advised to consult with the locality to ensure compliance with applicable rules.

For further discussion of the procedure and effect of nonrenewal, see *§§ 28D.14[1]*, *28D.130[1]*, and *28D.220[1]*.

[2] FORM

Notice of Partial Nonrenewal of Land Conservation Contract [Gov. Code §§ 51245, 51246]

NOTICE OF PARTIAL NONRENEWAL OF LAND CONSERVATION CONTRACT

NOTICE IS HEREBY GIVEN BY "OWNER" that the Land Conservation Contract for the real property described in Exhibit "A," which is a portion of the land described in the Land Conservation Contract by and between _____[*name of owner*] and the County of _____, recorded on _____[*date*], as Instrument Number _____, in Book _____, Pages _____ through _____ of the Official Records of _____

County, California, IS NOT TO BE RENEWED. The expiration date of this Land Conservation Contract is _____.

OWNER

_____
_____

Pursuant to *Government Code Section 51245*, service of the above notice of partial nonrenewal is hereby authorized by the Board of Supervisors of the County of San Luis Obispo.

COUNTY OF SAN LUIS OBISPO

By: _____
Chairperson of the Board of Supervisors

ATTEST:

_____
Clerk of the Board of Supervisors

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.222

§ 28D.222 Petition for Cancellation of Land Conservation Contract [Gov. Code §§ 51280-51287]--Letter Form

[1] Comment

[a] Use of Form

This form is a letter for use as a petition to cancel a land conservation contract [*see Gov. Code § 51282*; *see also Gov. Code §§ 51280-51287*]. Cancellation is the termination procedure to be used in an emergency or extraordinary situation when the public interest no longer dictates that the contract be continued [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 852-853, 171 Cal. Rptr. 619, 623 P.2d 180]* . Many cities and counties do not provide form petitions, and instead accept letters that set forth the required information. Some counties require both a petition form [*see § 28D.223*] and an accompanying letter.

This form is designed for use by an attorney representing a landowner. However, there is no requirement that it be submitted by an attorney, and the letter may be signed by the landowner or by another agent on his or her behalf.

The form refers to an attestation by the landowner client as to the truth of the information provided in the letter. Many cities and counties require this type of declaration. For a form of declaration that may be adapted for use with this letter, see *§ 28D.223[2]*.

For a detailed discussion of cancellation, see *§ 28D.14[2]*. For a guide to cancellation procedures, see *§ 28D.130[2]*.

[b] Required Information

A landowner may petition for cancellation of a land conservation contract as to all or any part of the subject land [*Gov. Code § 51282(a)*]. Most cities and counties require that a cancellation petition fully describe the contracted land that will be freed from the contractual restrictions, and state the names and addresses of all of the affected landowners.

The petition must be accompanied by or include a proposal for a specified alternative use of the land. The proposal must

list the governmental agencies known by the landowner to have permit authority related to the proposed alternative use. Further, the proposal must provide sufficiently specific information on the proposed alternative use to permit the board of supervisors or city council to make the required findings [*Gov. Code § 51282(e)*].

Landowners planning projects that require environmental impact reports under the California Environmental Quality Act [*see Pub. Res. Code § 21000 et seq.*] generally submit the report as part of the proposal for a specified alternative use. For further discussion of the California Environmental Quality Act, see California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender).

[c] Hearing and Fees

The city or county may require the payment of a reasonable application fee at the time that a cancellation petition is filed [*Gov. Code § 51281.1*]. Once the petition is filed, the city or county must give notice of, and hold, a public hearing [*Gov. Code § 51284*].

To approve a request for cancellation, the governing body must make one of the following two required findings [*Gov. Code § 51282(a)*; *see Gov. Code § 51282(c)*]: (1) cancellation is consistent with the purposes of the Williamson Act; or (2) cancellation is in the public interest. For a detailed discussion of the elements of each of these required findings, see *§§ 28D.14[2][b]* and *28D.130[2]*. If cancellation is approved, the landowner is generally required to pay, within one year from the date of the recording of the certificate of tentative cancellation [*see Gov. Code § 51283.4*], a cancellation fee equal to 121/2 percent of the fair market value of the property, valued as if it were free of the contractual restriction [*see Gov. Code § 51283*; *see also § 28D.14[2][f]*]. Under some circumstances, the city or county may waive or extend the time to pay the fee [*see Gov. Code § 51283(c)*; *see § 28D.14[2][f][ii]*]. In any case, the legislature intended that fees paid to cancel a contract would not constitute taxes but would be payments that, when made, provide a private benefit that tends to increase the value of the property [*Gov. Code § 51283(f)*].

[2] FORM

Petition for Cancellation of Land Conservation Contract [Gov. Code §§ 51280-51287]--Letter Form

[*Letterhead of attorney*]
_____[*date*]
Clerk, _____[Board of Supervisors *or* City Council]
_____[*city or county*]
_____[*address*]

Re: Request for cancellation of Land Conservation
Contract No. _____
Dear Sir or Madam:

On behalf of my client, _____[*name of landowner*], owner of the property described below, I request the cancellation of Land Conservation Contract No. _____, entered into between _____[*name of city or county*] and _____[*name of landowner or landowners who entered into contract*] on _____[*date of contract*] as it applies to the property described below, which constitutes _____[all *or* a portion of] the land described in that contract. This request is made pursuant to *Government Code Sections 51280-51287*.

The subject property is within Agricultural Preserve No. _____. The legal description of the subject property is _____[*give legal description or* attached as Attachment _____]. It is located at _____[*state street address or describe location, e.g.,* the southeast side of the agricultural

preserve, situated between Oak Street on the north, Magnolia Street on the south, Elm Street on the east, and Pine Street on the west]. The Assessor's Parcel Number is _____. The subject property includes _____[*specify number*] parcels of _____ acres each.

The subject property is currently used for _____[*describe current use, e.g.,* production of dairy products for commercial purposes]. During the past five years, the subject land has been _____[*describe past uses, e.g.,* used as a dairy farm and also for the growth and production of corn and alfalfa crops]. Existing on the property currently are the following structures: _____[*describe existing structures, e.g.,* one barn, one residence, one chicken coop].

[*If appropriate, add:*]

Adjacent lands are used in a manner that conflicts with the existing agricultural operations in the following manner: _____[*explain uses of surrounding property and impact of those uses on agricultural use of subject property*].

[*Continue with the following:*]

The proposed alternative use for the subject property is _____[*describe proposed project or development, e.g.,* the development of the subject property into light industrial, research and development buildings, warehouses, and mixed uses]. The development _____[will *or* will not] include subdividing the land [*add, if land will be subdivided:* into _____ lots of _____ (*specify size of lots*)]. Access into the proposed development will be by _____[*describe proposed access*]. Construction of the development is proposed to begin on _____[*date*] and to be completed by _____[*date*]. Enclosed as Attachment _____ is the following: _____[*list and enclose any reports, plans, maps, or other documents, including environmental impact reports, that describe proposed project*].

The following permits _____[will be required *or* have been applied for]: _____[*list required permits and government agencies having authority over permits*].

[*Choose one of the following paragraphs:*]

The _____[board of supervisors *or* city council] may find that cancellation is consistent with the purposes of the Williamson Act in that:

(1) A notice of nonrenewal concerning the subject property was given on _____ [*date*].

(2) Cancellation is not likely to result in the removal of adjacent lands from agricultural use because _____ [*give reasons, e.g.,* the adjacent lands are currently used for light industrial and residential purposes].

(3) The proposed alternative use is consistent with the applicable provisions of the General Plan of _____ [*name of city or county*] in that _____ [*specify reasons, e.g.,* the General Plan calls for industrial development or agricultural use of the subject property].

(4) Cancellation will not result in discontiguous patterns of urban development because

_____ [*give reasons, e.g.,* all of the property surrounding the subject property is currently used for the same industrial purpose as that proposed for the subject property].

(5) _____ [There is no proximate noncontracted land available and suitable for the proposed alternative use because _____ (*specify reasons*) *or* Development of the subject property would provide more contiguous patterns of urban development than development of proximate noncontracted land because _____ (*specify reasons*)].

[*OR*]

The _____[board of supervisors *or* city council] may find that cancellation is in the public interest in that:

(1) Other public concerns substantially outweigh the objectives of the Williamson Act in that _____ [*set forth reasons, e.g.,* (a) early termination of the contract will help to prevent leapfrog development or relieve pressures for urban expansion and conversion of agricultural land in the surrounding rural areas by providing land for more orderly, compact, and timely development within the community; (b) the site has insignificant value to the public as agricultural land because of its small size, nonprime soils, the discontinuation of greenhouse operations that originally qualified the site for the agricultural preserve program, location within an urban area and the clearly destined use of the site for urban development; and (c) the site has no significant open space value because of its similarity to other land within the area and the much greater open space value of rural lands surrounding the area].

(2) _____ [There is no proximate noncontracted land available and suitable for the proposed alternative use because _____ (*specify reasons*) *or* Development of the subject property would provide more contiguous patterns of urban development than development of proximate noncontracted land because _____ (*specify reasons*)].

[*Continue with the following:*]

Enclosed as Attachment _____ please find a declaration, signed by all of the persons having an interest in the subject property, attesting to the information provided in this letter.

Thank you for your attention and cooperation. My client and I look forward to a favorable resolution of this matter.

Yours truly,

_____ [*signature*]
[*typed name*]
Attorney for _____ [*name of client*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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12-28D California Legal Forms--Transaction Guide § 28D.223

§ 28D.223 Petition for Cancellation of Land Conservation Contract--Standardized Form

[1] Comment--Use of Form

This form is a standardized application form adopted by San Luis Obispo County for use by a landowner applying for cancellation of a land conservation contract. The form sets forth identifying information about the property, the past and existing uses, and about proposed alternative uses of the land. It does not include all of the information required by statute to be included in a petition for cancellation. It is designed to be accompanied by a letter and maps fully describing the proposed alternative use of the land and setting forth the justification for cancellation that would support the findings required by the Williamson Act [*see Gov. Code § 51282*].

Many localities do not use standard cancellation forms and instead accept letters drafted with the required information. For a discussion of the required information and a sample form of cancellation letter, which may be adapted for use as a letter to accompany the form petition, see *Section 28D.222*.

For further information on cancellation, see *Sections 28D.14 [2], 28D.130[2], 28D.222[1]*.

[2] FORM

Petition for Cancellation of Land Conservation Contract--Standardized Form

Agricultural Preserve Contract Cancellation

San Luis Obispo County Planning Department
File No. _____
_____

Please complete this form accurately and legibly. Attach additional sheets if necessary.

APPLICANT INFORMATION

Applicant Name _____ Daytime Phone _____

Mailing Address _____ Zip _____

Landowner Name _____ Daytime Phone _____

Mailing Address _____ Zip _____

Names of Owners Under Original Contract _____

PROPERTY INFORMATION

Agricultural Preserve Area and Number _____

Contract Recording Data:

Volume _____ Page _____ Date _____

Cancellation Request applies to all _____ or a portion _____ of the contracted property.

Assessor Parcel Number(s) _____ .....Parcel Size _____

Legal Description:
Lot _____ Block _____
Tract _____ Section _____
Township _____ Range _____
Parcel Map Number _____

Site Location (if no street address, describe first with name of road providing access to the site, then nearest roads, landmarks): _____
_____

PAST AND EXISTING LAND USES

1. EXISTING USE: What is present use of the property? _____

2. FORMER AGRICULTURAL USES: List agricultural uses of the property during the past five years: _____
If farmed, specify crops and acreages: _____

3. EXISTING STRUCTURES: List existing structures, improvements and vegetation on the property:

_____

4. EXISTING PARCELS: List the number of lots and their sizes that make up the agricultural preserve proposed for cancellation: _____

5. ADJACENT LAND USES: Do adjacent land uses conflict with existing agricultural operations? Yes _____
No _____ If yes, explain: _____
_____

PROPOSED ALTERNATE USE OF THE PROPERTY

1. PROPOSED USE: What is the proposed development and/or land use? If residential, how many units? _____

2. LAND DIVISION: Does the proposed use involve land division? Yes _____ No _____ If yes, list the number and sizes of lots proposed: _____

3. ACCESS: Describe the proposed access to the development: _____

4. PHASING: Explain the proposed phasing schedule if development or alternate use is proposed to occur in phases: _____

ATTACHMENTS

This application must be accompanied by a letter and maps fully describing the proposed alternative use of the land. The letter should also include justification for your cancellation request according to the state-required findings for approval. State law allows the Board of Supervisors to approve cancellation only if it makes all the findings under one of the following two alternative sets of findings:

Alternative A:

1. A notice of nonrenewal has been served.

2. Cancellation is not likely to result in the removal of adjacent lands from agricultural use.

3. The alternative use is consistent with the local general plan.

4. Cancellation will not result in discontiguous patterns of urban development.

5. There is "no proximate noncontracted land" which is both available and suitable for the specified use, or that development of the contracted land would provide more contiguous patterns of urban development than development of proximate noncontracted land, which is sufficiently close to the contracted land that it can serve as a practical alternative for the use which is proposed for the contracted land (*Government Code Section 51282(b)(5)*).

Alternative B:

1. Other public concerns substantially outweigh the objectives of the Williamson Act.

2. There is no proximate noncontracted land which is both available and suitable for the specified use or that

development would provide more contiguous patterns of development than development of proximate noncontracted land (*Government Code Section 51282(c)*).

LEGAL DECLARATION

I have completed this form accurately and declare that all statements here are true.
I am: _____ Applicant and land owner
_____ Applicant
_____ Agent for applicant

Signature _____Date _____

Attach landowner authorization if the above signature is not that of the land owner.

_____
OFFICE USE ONLY

Planning Area _____ Urban Area/ Village _____ Map No. _____

Land Use Categories _____ Combining Designations _____

Planning Area Stds. (page & number) _____

LUO Special Standards _____

Date received _____ Receipt No. _____ Received by _____

Comments _____ FEES: Application _____

_____ Environmental _____

_____ TOTAL FEE _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative

BoardsReal Property LawZoning & Land UseLocal Planning



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
A. Agricultural Preserves
3. Termination of Land Conservation Contract

12-28D California Legal Forms--Transaction Guide § 28D.224

§ 28D.224 Certificate of Tentative Cancellation of Land Con servation Contract [Gov. Code §§ 51282, 51283.4]

[1] Comment

[a] Use of Form

This form is a certificate of tentative cancellation, adapted from the form used by San Luis Obispo County. It illustrates the certificate that is issued after a petition for cancellation has been tentatively approved and before the conditions and contingencies have been fulfilled. In addition to the mandatory provisions [*see* [b], *below*], the form includes several optional conditions and contingencies that illustrate the types of additional requirements that a board or council might impose.

The board or council may grant tentative approval only after making one of the findings required by the Williamson Act [*see Gov. Code § 51282(a)*; *see also §§ 28D.14[2][b], 28D.130 [2], 28D.222[1][b]*], and determining the amount of the cancellation fee [*see Gov. Code § 51283*; *see also § 28D.14[2][f]*]. After tentative approval of a cancellation petition, the clerk of the board or council must record a certificate of tentative cancellation in the office of the county recorder. For further information on cancellation, see *Sections 28D.14 [2], 28D.130[2], 28D.222[1]*.

[b] Information Required in Certificate

A certificate of tentative cancellation must state the name of the landowner requesting the cancellation, a description of the conditions and contingencies that the landowner must satisfy to obtain final cancellation, and the fact that a certificate of cancellation of the contract will be issued and recorded when the conditions and contingencies are met [*Gov. Code § 51283.4*; *see also § 28D.14[2][e]*]. The conditions to be satisfied must include the payment in full of the cancellation fee. Further, the certificate must state that the fee must be paid or a certificate of cancellation issued within one year of the recording date of the tentative cancellation certificate, or the fee will be recomputed as of the date of the notice described in *Gov. Code § 51283.4(b)* [*see § 28D.14[2][g]*] or the date the landowner requests a recomputation [*Gov. Code § 51283.4(a), (b)*].

The stated conditions and contingencies also must include the requirement that the landowner obtain all permits necessary to start the project [*Gov. Code § 51283.4(a)*]. For further discussion, including information on obtaining a waiver of the cancellation fee, see *§§ 28D.14[e], [f], 28D.130[2]*.

[2] FORM

Certificate of Tentative Cancellation of Land Conservation Contract [Gov. Code §§ 51282, 51283.4]

RECORDING REQUESTED BY:
County of _____
WHEN RECORDED MAIL TO:
Clerk, _____[Board of Supervisors *or* City Council]
_____[*address*]

Re: Assessor's Parcel No. _____

CERTIFICATE OF TENTATIVE CANCELLATION OF
LAND CONSERVATION CONTRACT

NOTICE IS HEREBY GIVEN that _____[*name of owner(s*)], current [owner *or* owners] of the land described in Land Conservation Contract No. _____, by and between _____[*name of owner(s) who signed contract*] and _____[*city or county*], recorded on _____[*date*], as Document No. _____ in Book _____, Pages _____ through _____ of the Official Records of _____[*city or county*], _____[has *or* have] been granted tentative approval for cancellation.

A certificate of cancellation of contract for this parcel of land will be issued and recorded only if the following conditions are satisfied:

(1) Payment of the cancellation fee to the _____ [*specify, e.g.*, county treasury *or* city treasury] in the amount of $_____, as determined pursuant to *California Government Code Section 51283*. Unless the fee is paid or a certificate of cancellation of contract is issued within one year of the date of the recording of this certificate of tentative cancellation, the cancellation fee shall be recomputed as of the date of the notice described in *Government Code Section 51283.4(b)* or the date the landowner requests a recomputation pursuant to *Government Code Section 51283.4(a)*.

(2) The landowner must obtain all discretionary and ministerial permits needed to begin the project, including, if applicable, reclassification of the property to an appropriate zoning district, and tentative and final subdivision maps within one year of the recording of this tentative cancellation.

[*Include optional conditions or contingencies as appropriate:*]

(3) A showing must be made that water and sewage disposal are available, either by a letter from the _____ [*name of city or county*] or by a letter from the Health Department; the letter must state that there are adequate wells on the property to serve employee needs and that septic tanks will be adequate for sewage disposal.

(4) The subdivision of property will be limited to a minimum parcel size of _____ acres unless and until public sewer and water utilities are extended to the property.

(5) Any individual sewage disposal system must be approved in addition by _____ [*name of appropriate city or county departments*] to ensure that the intensity of use is consistent with the policies of _____ [*name of department*].

(6) The landowner must bind _____ [himself *or* herself] and _____ [his *or* her] successors in interest not to oppose timely annexation to the _____ [*name of appropriate city*] by a recorded document that runs with the land and is acceptable to the County Counsel.

(7) If sewer and water lines are not extended to the property before the development, the landowner must bind _____ [himself *or* herself] and _____ [his *or* her] successors in interest to agree to participate in an assessment district or similar mechanism for the extension of water and sewer lines when the district is formed with costs limited to its pro rata share.

(8) The landowner must comply with the provisions of *Government Code Section 51282(b)(1)* by serving notice of nonrenewal on subject property pursuant to *Government Code Section 51245*.

[*Continue with the following:*]

IN WITNESS WHEREOF, this certificate of tentative cancellation of land conservation contract is hereby approved and executed on _____[*date*].

_____ [*name of county or city*]

By: _____
Chair, _____ [Board of Supervisors *or* City Council]

ATTEST:

_____
Clerk, _____[Board of Supervisors *or* City Council]

APPROVED AS TO FORM AND LEGAL EFFECT:

_____[*name*]
_____[County Counsel *or* City Attorney]
By: _____
Deputy _____[County Counsel *or* City Attorney]

Dated: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawZoning & Land UseAgriculture & FarmlandGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseLocal Planning



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
A. Agricultural Preserves
3. Termination of Land Conservation Contract

12-28D California Legal Forms--Transaction Guide §§ 28D.225-28D.229

[Reserved]

§§ 28D.225[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
B. Open-Space Easements

12-28D California Legal Forms--Transaction Guide § 28D.230

§ 28D.230 Grant of Open-Space Easement [Gov. Code §§ 51075(d), 51080-51087]

[1] Comment

[a] Use of Form

This form is a grant of an open-space easement for use by an owner of open-space land to offer and grant an open-space easement on the land to a city, county, or nonprofit organization under the Open-Space Easement Act of 1974 [*see Gov. Code § 51070 et seq.*]. Most counties do not require an application or offer form, but instead will accept the instrument itself as an offer and will base their acceptance or refusal on the terms of the instrument.

An open-space easement constitutes a dedication to the public of the open-space character of the land for the term specified [*Gov. Code § 51081*]. Additionally, it entitles the landowner to certain property tax benefits [*see Rev. & Tax. Code §§ 402.1, 421-430.5*; *see also §§ 28D.50-28D.53*], and possibly to an income tax deduction as a charitable contribution [*see § 28D.30[4]*].

This form illustrates provisions commonly found in open-space easements. Instruments creating open-space easements must be tailored to each situation, because the provisions included in the grant depend on the individual characteristics of the land and the activities that will be allowed on the land. Additionally, localities may require provisions in addition to those required by the Open-Space Easement Act of 1974 that differ from those in other localities [*see Gov. Code § 51082*].

Before accepting a grant of an open-space easement, the city or county must find, by resolution, that the preservation of the land in issue as open space is consistent with the general plan of the city or county and is in the best interest of the city or county [*Gov. Code § 51084*]. For further discussion of open-space easements, see *§ 28D.30*. For a comparison of open-space and conservation easements, see *Section 28D.30[1][b]*. For a guide to procedures, see *Section 28D.121*.

[b] Required Provisions

An open-space easement must run in perpetuity or for a term of at least 10 years [*Gov. Code §§ 51075(d), 51081*]. If for

a term of years, the easement must provide for the automatic addition of one year to the term of the grant on a specified annual renewal date, unless a notice of nonrenewal [*see § 28D.231 [2]*] is given by the landowner, city, county, or nonprofit organization [*Gov. Code §§ 51081, 51091*].

The instrument creating the easement must impose restrictions on the use of the land that will preserve the natural or scenic character of the open-space land for public use or enjoyment [*Gov. Code § 51075(d)*]. The easement must contain a covenant, running with the land, with the city, county, or nonprofit organization that prohibits the landowner from permitting the construction of improvements. However, improvements for which the right to construct was expressly reserved, and that were determined to be consistent with the purposes of the Open-Space Easement Act, are permissible [Gov. Code § 51705(d)].

A city or county may require that the instrument creating the open-space easement contain any restrictions, conditions, or covenants necessary or desirable to maintain the natural or scenic character of the land, or to prevent any activity, use, or action that could impair the open-space character of the land [*Gov. Code § 51082*].

[2] FORM

Grant of Open-Space Easement [Gov. Code §§ 51075(d), 51080-51087]

Recording Requested by:
_____[*name*]
After recordation, mail to:
_____[*name and address*]

_____

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

GRANT OF OPEN-SPACE EASEMENT

THIS GRANT DEED OF OPEN-SPACE EASEMENT is made on _____[*date*], by _____[*name of grantor or grantors*], having an address at _____[*address*] (called _____[Grantor *or* Grantors] in this grant), in favor of _____[*name of city, county, or nonprofit organization. If nonprofit organization, add:*, a nonprofit corporation qualified to do business in California, having an address at _____ (*address*)] (called Grantee in this grant).

Recitals

Description of Property

1. _____[Grantor *or* Grantors] _____[is *or* are] the sole _____[owner *or* owners] of the property that is the subject of this grant (called Subject Property in this grant), located in the County of _____, State of California, legally described as fully set forth in Exhibit A, which is attached to and made a part of this grant by reference. The Subject Property is delineated on the map or plat on file in the office of the Clerk of the _____[Board of Supervisors *or* City Council] of _____[*name of county or city*] as Map No. _____ and listed and described on Exhibit B, which is attached to and made a part of this grant by reference.

Conservation Values

2. The Subject Property possesses _____[*describe value of open-space property, e.g.,* natural *or* scenic *or* open-space *or* recreational *or* agricultural *or* wildlife *or* public safety and health] values. In particular, _____[*describe conservation values of property, e.g.*, the Subject Property, which exists in an essentially unimproved, natural state, harbors a diversity of plant and animal life in an unusually broad range of habitats for property of its size, including wetlands, nesting ledges, a fir forest, and open meadows, and is an active nesting territory for the endangered spotted owl]. The specific conservation values of the Subject Property are documented in an inventory of relevant features of the Subject Property, dated _____, which is attached as Exhibit C and made a part of this grant by reference. This inventory consists of _____[*specify, e.g.*, reports, maps, photographs, and other documentation that the parties to this grant deed agree provide, collectively, an accurate representation of the Subject Property at the time of this grant].

Intention of _____ [Grantor *or* Grantors]

3. It is the intention of _____[Grantor *or* Grantors] to grant to Grantee an open-space easement on, over, across, and under the Subject Property pursuant to the Open-Space Easement Act of 1974, appearing at Chapter 6.6 (commencing with *Section 51070) of Part 1, Division 1, Title 5 of the California Government Code*, whereby _____[Grantor relinquishes *or* Grantors relinquish] certain rights and _____[enters *or* enter] into certain covenants concerning the Subject Property, as more particularly set forth below.

Purpose of Easement

4. The purpose of this grant of an open-space easement in the Subject Property is to preserve the natural and scenic character of the property for public use and enjoyment.

[*If grantee is nonprofit organization, add:*]

Description of Grantee

5. Grantee is a tax-exempt nonprofit organization, qualified under *Internal Revenue Code Section 501(c)(3)* and *Internal Revenue Code Section 170(h)*, whose primary purpose is _____[*describe purpose, e.g.*, the preservation, protection, or enhancement of open-space property in its natural condition].

[*Continue with the following:*]

Acceptance by Grantee

6. By accepting this grant, Grantee agrees to honor the intentions of _____[Grantor *or* Grantors], to act in a manner consistent with the purposes of this grant, and to preserve and protect for the term of this easement the conservation values of the Subject Property.

Grant of Easement

7. In consideration of the above and the mutual covenants, terms, conditions, and restrictions contained in this grant deed, and pursuant to the laws of California and in particular to the Open-Space Easement Act of 1974, _____[Grantor *or* Grantors] voluntarily _____[grants and conveys *or* grant and

convey] to Grantee an open-space easement in the Subject Property _____[in perpetuity *or* for a term of _____ (*specify number not less than 10*) years], subject to the terms of this grant deed. [*Add, if grant is for a term of years:* Every year on _____ (*specify date and month*), a year shall be automatically added to the term of this grant unless a notice of nonrenewal is given as provided in *Section 51091 of the California Government Code*.]

Covenants

8. The Subject Property shall be used by _____[Grantor *or* Grantors] and _____[Grantor's *or* Grantors'] successors in interest only for those purposes that will maintain the existing open-space character of the Subject Property. _____[Grantor *or* Grantors] and _____[Grantor's *or* Grantors'] successors in interest will refrain from doing, causing, or permitting any of the following acts with respect to the Subject Property:

(1) Using or permitting the use of the Subject Property for any purpose except as is consistent with the stated purposes, terms, conditions, restrictions, and covenants of this easement, with the provisions of the Open-Space Easement Act of 1974, and with the findings of the _____ [Board of Supervisors *or* City Council] of _____ [*name of city or county*] pursuant to *California Government Code Section 51084*.

(2) Constructing improvements on the Subject Property, other than those that exist at the time of the grant of this open-space easement, as are described in Exhibits B and C, and except those for which the right is expressly reserved in this grant.

(3) Locating any advertising of any kind or nature on the Subject Property.

(4) Constructing, placing, or maintaining a parking lot, storage area, or dump site for the storage or disposal of anything that is not indigenous or natural to the Subject Property.

(5) Constructing, placing, or maintaining overhead pipes, conduits, or wires above the Subject Property for the purpose of transmitting communications or power.

(6) Surfacing the Subject Property, in whole or in part, with any asphalt, stone, concrete, or other material that does not constitute natural cover for the land, except acts reserved in this grant.

[*If rights to mine, extract, or remove natural resources are restricted, add:*]

(7) Mining, extracting, severing, or removing any natural resource found or located on, above, or below the Subject Property, or otherwise engaging in any activity that will alter the unique physical and scenic characteristics of the Subject Property.

[*If fishing rights are restricted, add:*]

(8) Fishing, trapping, hunting, capturing, killing, or destroying fish or other marine or aquatic life on the Subject Property, except with prior written permission of the Grantee and for health or safety purposes only.

[*If hunting rights are restricted, add:*]

(9) Hunting, trapping, killing, capturing, or destroying animal life on the Subject Property, except with prior written permission of the Grantee and for health and safety purposes only.

[*If rights to cut or remove trees are restricted, add:*]

(10) Cutting or removing timber or trees found or located on the Subject Property, except as may be required for fire prevention, thinning, elimination of diseased growth, or similar preventive measures in a manner compatible with the purposes of this grant.

[*If rights to remove natural growth are restricted, add:*]

(11) Cutting, uprooting, or removing natural growth found or located on the Subject Property, except as may be required for fire prevention, thinning, elimination of diseased growth, or similar preventive measures in a manner compatible with the purposes of this grant.

[*If right to divide or subdivide property is restricted, add:*]

(12) Dividing or subdividing the Subject Property or otherwise conveying (other than under threat of condemnation) a portion of the Subject Property to another party, subject to those rights reserved in Paragraph 9, below; provided, however, that the exercise of any reserved rights may not materially impair the open-space character of the land.

[*If rights to grade, excavate, or alter topography are restricted, add:*]

(13) Excavating, grading, or placing any sand, soil, rock, gravel, or any material on the Subject Property, subject to those rights reserved in Paragraph 9, below, and except with prior written permission of grantee, provided that the excavation, grading, or placing of material on the Subject Property is consistent with the purposes of this grant.

[*If rights to operate motor-powered vehicles are restricted, add:*]

(14) Operating a motor bike, trail bike, go-cart, or other motor-powered vehicle, except those motor vehicles that are reasonably necessary for the use and convenience of the _____ [Grantor *or* Grantors] or reasonably necessary for the accomplishment of the purposes of this grant.

[*Continue with the following:*]

Reservation of Rights

9. _____[Grantor reserves *or* Grantors reserve] the right to all uses and occupancy of, and ingress and egress to and from, the Subject Property in any manner consistent with the stated purposes, terms, conditions, restrictions, and covenants of this grant. [*Add, if grantor wishes to reserve specific rights:* Without limiting the generality of the foregoing, the following rights are expressly reserved: _____ (*specify rights reserved, e.g.,* to engage in any and all agricultural uses of the Subject Property in accordance with sound, generally accepted agricultural practices, including but not limited to breeding, raising, pasturing, and grazing livestock; breeding and raising bees, fish, poultry, and other fowl; planting, raising, harvesting, and producing agricultural, aquacultural, horticultural, and forestry crops and products of every nature and description; and the primary processing, storage, and sale, including direct retail sale to the public, of crops and products harvested and produced principally on the Subject Property).]

Grantee's Approval

10. Whenever this grant deed requires _____[Grantor *or* Grantors] to obtain the prior written approval or permission of the Grantee, the _____[Grantor *or* Grantors] will notify the Grantee not less than _____[*specify number*] days in advance of the date _____ that [Grantor intends *or* Grantors intend] to undertake the activity. The notice must describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to the consistency of the activity with the purpose of this grant. The Grantee shall grant or deny approval in writing within _____[*specify number*] days of receipt of _____[Grantor's *or* Grantors'] notice. Grantee may deny approval only on a reasonable determination that the proposed action would be inconsistent with the purpose of this grant.

Right to Prevent Prohibited Use

11. _____[Grantor grants *or* Grantors grant] to Grantee and Grantee's successors and assigns, for the duration of this grant, the right, but not the obligation, to prevent or prohibit any activity that is inconsistent with the stated purposes, terms, conditions, restrictions, or covenants of this grant and the right to enter the Subject Property for the purpose of removing any building, structure, improvement, or any material whatsoever constructed, placed, stored, deposited, or maintained on the Subject Property contrary to the stated purposes of this grant or to any term, condition, restriction, or covenant of this grant.

Enforcement

12. The purposes, terms, conditions, restrictions, and covenants in this grant may be specifically enforced or enjoined by proceedings in the Superior Court of the State of California, consistent with the terms of _____ *[Section 51086(a) of the California Government Code or, if grantee is nonprofit organization: Section 51086(b) of the California Government Code*].

Costs of Enforcement

13. Any costs incurred by Grantee in enforcing, against _____[Grantor *or* Grantors], the terms, conditions, restrictions, and covenants in this grant, including, but not limited to, the costs of suit and attorneys' fees, and any costs of restoration required by _____[Grantor's *or* Grantors'] violation of the terms of this easement will be borne by _____[Grantor *or* Grantors]. If _____[Grantor prevails *or* Grantors prevail] in an action to enforce the terms of this easement, _____[Grantor's *or* Grantors'] cost of suit, including, without limitation, attorneys' fees, will be borne by Grantee.

Acts Beyond _____ [Grantor's *or* Grantors'] Control

14. Nothing contained in this instrument may be construed to entitle Grantee to bring any action against _____[Grantor *or* Grantors] for any injury to or change in the Subject Property resulting from causes that are beyond _____[Grantor's *or* Grantors'] control, including, but not limited to, fire, flood, storm, earth movement, or any prudent or reasonable action undertaken by _____[Grantor *or* Grantors] in emergency situations to prevent or mitigate significant damage or injury to the Subject Property resulting from such causes.

No Authorization for Public Trespass

15. The granting of this open-space easement by this instrument and the acceptance of the easement by the Grantee do not authorize, and are not to be construed as authorizing, the public or any member of the public to enter, trespass on, or use all or any portion of the Subject Property, or as granting to the public or any member of the public any tangible rights in or to the Subject Property. It is understood that the purpose of this grant is solely to restrict the use of the Subject Property, so that it may be kept as near as possible in its natural state.

Costs, Taxes, and Liabilities

16. _____[Grantor retains *or* Grantors retain] all responsibility and shall bear all costs and liabilities of any kind concerning the ownership, operation, and maintenance of the Subject Property, including maintaining comprehensive liability insurance. _____[Grantor *or* Grantors] must pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Subject Property by competent authority. _____[Grantor *or* Grantors] must keep the Subject Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by _____[Grantor *or* Grantors].

Condemnation

17. If an action in eminent domain for condemnation of any interest in the Subject Property is filed, or if the Subject Property is acquired for a public improvement by a public agency or person, these restrictions will be null and void as to the interest in the Subject Property actually condemned or acquired. However, all conditions, restrictions, and covenants of this grant will be in effect during the pendency of such an action; if such an action is abandoned before the recordation of a final order of condemnation, any portion of the Subject Property that is not actually acquired for public use will once again be subject to all of the terms, conditions, restrictions, and covenants of this grant. _____[Grantor *or* Grantors] will be entitled to the amount of compensation as if the Subject Property had not been burdened by the open-space easement, consistent with *Section 51095 of the California Government Code*.

Abandonment

18. The easement granted by this instrument may be abandoned in the manner provided in *Sections 51093* and *51094 of the California Government Code*.

Amendment

19. This open-space easement may not be amended in whole or in part as to any term, condition, restriction, or covenant without the prior written consent of the Grantee.

Binding on Successors and Assigns

20. This grant, and each and every term, condition, restriction, and covenant of this grant, is intended for the

benefit of the public and is enforceable pursuant to the provisions of the Open-Space Easement Act of 1974. This grant binds _____[Grantor and Grantor's *or* Grantors and Grantors'] successors and assigns and constitutes a servitude on the Subject Property that runs with the land.

Liberal Construction

21. This easement is to be liberally construed in favor of the grant in order to effectuate the purposes of the easement and the policy and purpose of the Open-Space Act of 1974. If any provision in this grant is found to be ambiguous, an interpretation consistent with the purpose of this easement that would render the provision valid will be adopted over any interpretation that would render it invalid.

Severability

22. If any provision of this grant is found to be invalid, or if the application of this easement to any person or circumstance is disallowed or found to be invalid, the remainder of the provisions of the grant, or the application of the grant to persons or circumstances other than those to which its application was disallowed or found invalid, will not be affected and will remain in full force and effect.

Controlling Law

23. This grant of easement is to be interpreted, enforced, and performed in accordance with the laws of the State of California.

Entire Agreement

24. This grant sets forth the entire agreement of the parties with respect to the open-space easement and supersedes all previous conversations, negotiations, understandings, settlements, or agreements related to the open-space easement.

Captions

25. The captions in this grant have been inserted solely for the purpose of convenience of reference and are not to be construed as part of this instrument and do not affect the construction or interpretation of the grant.

Enforceable Restriction

26. This easement is intended to constitute an enforceable restriction pursuant to the provisions of *California Constitution, Article XIII, Section 8,* and Sections 402.1 and 421 through 423.3 of the California Revenue and Taxation Code.

Counterparts

27. The parties may execute this instrument in two or more counterparts, which shall, collectively, be signed by all parties. Each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart controls.

_____ Dated:

_____, GRANTOR
[*Grantor's name*]

[*If grantor is business entity, add:*]

By: _____
[*name and title*]

ACCEPTANCE OF OPEN-SPACE EASEMENT

Pursuant to the provisions of the Open-Space Easement Act of 1974, appearing at Chapter 6.6 of Part 1, Division 1, Title 5 of the California Government Code (commencing with Section 51070), _____[*name of city, county, or nonprofit organization*] accepts this grant of an open-space easement.
_____ Dated:

_____ [*name of county, city, or nonprofit organization*]
By: _____
[*name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic EasementsTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsDeductionsTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
B. Open-Space Easements

12-28D California Legal Forms--Transaction Guide § 28D.231

§ 28D.231 Notice of Nonrenewal of Open-Space Easement [Gov. Code §§ 51090-51092]

[1] Comment--Use of Form

This form is for use by a landowner to give written notice to the city, county, or nonprofit organization holding an open-space easement of the landowner's intention not to renew the open-space easement [*see § 28D.230*]. It may be adapted for use by a city, county, or nonprofit organization.

Any party to an open-space easement may serve written notice of nonrenewal [*see Gov. Code § 51091*]. The notice must be served at least 90 days before the annual renewal date, that is, the anniversary date of the grant or other date identified in the instrument creating the easement [*Gov. Code § 51091*]. If timely notice of nonrenewal is not given, one year is automatically added to the initial term of an open-space easement on the annual renewal date [*Gov. Code § 51081*]. On service of the nonrenewal notice, the automatic renewals cease and the existing open-space easement remains in effect for the balance of the period remaining since either the original execution or the last renewal of the easement [*Gov. Code § 51092*].

Once the landowner has served a notice of nonrenewal, taxes on the restricted land gradually return to the level of taxes on comparable nonrestricted property as the contract draws nearer to expiration [*Rev. & Tax. Code § 426*]. For further discussion, see *§ 28D.53*.

For a discussion of nonrenewal of an open-space easement, see *§ 28D.30[5][a], [b]*. For a guide to the procedures of nonrenewal, see *§ 28D.131[1]*.

[2] FORM

Notice of Nonrenewal of Open-Space Easement [Gov. Code §§ 51090-51092]

Recording requested by:
_____[*name*]
When recorded, mail to:

_____[*name*]
_____[*address*]

_____

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

NOTICE OF NONRENEWAL OF GRANT OF
OPEN-SPACE EASEMENT

NOTICE IS GIVEN by the undersigned that the open-space easement granted by _____[*name of grantor or grantors*] to _____[*name of city, county, or nonprofit organization that is party to the open-space easement*], recorded on _____[*date*], as Instrument Number _____in Book Number _____, Page Number _____ of the Official Records of the County of _____, State of California, will not be renewed. The annual renewal date of the open-space easement is _____[*date*].
_____ Dated:

_____ [*signature of owner*]
[*typed name of owner*]

[*If owner is business entity, add:*]

By: _____ [*signature*]
[*typed name and title*]

[*Continue with the following:*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____[is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature [s] on the instrument the person [s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ _____[Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
B. Open-Space Easements

12-28D California Legal Forms--Transaction Guide § 28D.232

§ 28D.232 Petition for Abandonment of Open-Space Easement [Gov. Code §§ 51090, 51093, 51094]

[1] Comment

[a] Use of Form

This form is for use by a landowner to petition the governing body of the city, county, or nonprofit organization for abandonment of an open-space easement [*see Gov. Code § 51093(a)*]. To approve an abandonment [*see Gov. Code §§ 51090, 51093(a)*], the city, county, or nonprofit organization must, by resolution, make all of the following findings [*Gov. Code § 51093(a)*; *see also §§ 28D.30[5][c][i], 28D.131[2]*]:

(1) No public purpose considered by the governing body in its approval of the easement [*see Gov. Code § 51084*] will be served by keeping the land as open space;

(2) Abandonment is not inconsistent with the Open-Space Easement Act of 1974;

(3) Abandonment is consistent with the local general plan; and

(4) Abandonment is necessary to avoid a substantial financial hardship to the landowner due to involuntary factors unique to him or her.

For a discussion of abandonment and a guide to abandonment procedures, see *Sections 28D.30[5][a], [c], 28D.131[2]*.

[b] Abandonment Fee

If the petition for abandonment is approved, the landowner must pay an abandonment fee in order for the abandonment to become effective [*Gov. Code §§ 51093(e), 51094*]. The fee is equal to 12 1/2 percent of the full cash value of the land, valued as though it were free of the open-space easement [*Gov. Code § 51093(b), (c)*]. For more information on the abandonment fee, see *Section 28D.30 [5][c][iii]*.

When the abandonment fee has been paid in full, a certified copy of the resolution abandoning the open-space easement is recorded in the office of the county recorder. Once the resolution is recorded, the land is relieved of the easement and the covenants contained in the easement are terminated [*Gov. Code § 51094*].

[2] FORM

Petition for Abandonment of Open-Space Easement [Gov. Code §§ 51090, 51093, 51094]

PETITION FOR ABANDONMENT OF OPEN-SPACE EASEMENT

1. _____[The *or* Each] petitioner, _____[*name or names*], petitions _____[*name of city, county, or nonprofit organization*] for the abandonment of the open-space easement granted by _____[*name of grantor*] to _____[*name of city, county, or nonprofit organization*], by an instrument recorded on _____[*date*] as Instrument Number _____, in Book Number _____, Page Number _____ of the official records of the County of _____, State of California.

2. This petition for abandonment involves _____[all *or* a portion] of the land specified in the above-described instrument, and includes the property described in Exhibit A, which is attached to and made a part of this petition by this reference.

3. For the following reasons, no public purpose described in *Section 51084 of the Government Code* will be served by keeping the land as open space: _____[*state reasons*].

4. The abandonment of this open-space easement is not inconsistent with the purposes of the Open-Space Easement Act of 1974.

5. The abandonment of this open-space easement is consistent with the general plan of _____[*name of city or county*].

6. The abandonment of this open-space easement is necessary to avoid a substantial financial hardship to the _____[petitioner *or* petitioners] due to the following involuntary factors unique to _____[him *or* her *or* them]: _____[*describe*].
_____ Dated:

_____
[*name of grantor*]

[*If grantor is business entity, add:*]

By: _____
[*name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawLimited Use RightsEasementsTermination of Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
B. Open-Space Easements

12-28D California Legal Forms--Transaction Guide §§ 28D.233-28D.239

[Reserved]

§§ 28D.233[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
C. Conservation Easement and Land Trusts

12-28D California Legal Forms--Transaction Guide § 28D.240

§ 28D.240 Deed of Conservation Easement [Civ. Code §§ 815-816]

[1] Comment--Use of Form

This form is a conservation easement for use by a landowner to grant an agricultural conservation easement on the land to a governmental agency or nonprofit organization under *Civil Code Sections 815 through 816*. This form is a sample agricultural conservation easement drafted by, and reprinted here with the permission of, the Marin Agricultural Land Trust. The form can be adapted for use for any kind of conservation easement.

A conservation easement is an interest in real property voluntarily created and freely transferable in whole or in part for the purpose of retaining the land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition [*Civ. Code §§ 815.1, 815.2*]. Conservation easements may be granted to nonprofit, tax-exempt organizations, or to an agency or entity of the state, city, county, city and county, district, or other state or local government [*Civ. Code § 815.3*]. For further discussion, see *Section 28D.31*. For a comparison of conservation and open-space easements, see *Section 28D.30[1][b]*.

A conservation easement must be tailored to the specific property and to the uses that will be made of the property. This form illustrates some common provisions.

[2] FORM

Deed of Conservation Easement [Civ. Code §§ 815-816]

SAMPLE AGRICULTURAL CONSERVATION EASEMENT

When Recorded Mail To:
MARIN AGRICULTURAL LAND TRUST
P.O. Box 809
Pt. Reyes Station, CA 94956
Telephone: (415) 663-1158

Deed of Agricultural Conservation Easement and Development Rights

THIS DEED OF AGRICULTURAL CONSERVATION EASEMENT AND DEVELOPMENT RIGHTS (the "Deed") is made by _____ and _____, husband and wife ("Grantors"), to MARIN AGRICULTURAL LAND TRUST, a California nonprofit public benefit corporation ("Grantee").

WITNESS THAT:

WHEREAS, Grantors are the owners in fee simple of certain real property in Marin County, California, more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"); and

WHEREAS, the Property possesses agricultural, open-space, and scenic values of great importance to Grantors, the people of Marin County, and the people of the State of California; and

WHEREAS, Grantors intend that the Property be maintained in agricultural production by the maintenance of the agricultural values thereof and that the open-space and scenic values of the Property be preserved by the continuation of the agricultural and ranching uses that have proven historically compatible with such values; and

WHEREAS, the County of Marin (the "County") has established an Agricultural Conservation Easement Grant Program to help preserve Marin County's agricultural lands by making grants to Grantee for the acquisition of agricultural conservation easements using funds authorized by the California Wildlife, Coastal and Park Land Conservation Bond Act of 1988; and

WHEREAS, the County has made a grant to Grantee for the acquisition of this Deed of Agricultural Conservation Easement and Development Rights from Grantors; and

WHEREAS, Grantors intend, as owners of the Property, to convey to Grantee the right to preserve and protect the agricultural, open-space, and scenic values of the property in perpetuity; and

WHEREAS, Grantee is a publicly supported, tax-exempt nonprofit organization qualified under *Sections 501(c)(3)* and *170(h) of the Internal Revenue Code*, whose primary purpose is the preservation and protection of agricultural, open space, and scenic lands in Marin County, California; and

WHEREAS, Grantee intends, by acceptance of the grant made hereby, forever to honor the intentions of Grantors to preserve and protect in perpetuity the agricultural, open space, and scenic values of the Property;

NOW, THEREFORE, for good and valuable consideration, and in consideration of the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of the State of California including, inter-alia, *Sections 815-816 of the California Civil Code*, Grantors do hereby voluntarily grant to Grantee an Agricultural Conservation Easement in gross in perpetuity over the Property of the nature and character and to the extent hereinafter set forth (the "Easement"). Grantors also grant to Grantee certain development rights associated with the Property as hereinafter described.

1. Purpose. It is the purpose of this Easement to enable the Property to remain in agricultural use for the production of food and fiber by preserving and protecting in perpetuity its agricultural values, character, use, and utility, and to prevent any use of the Property that would significantly impair or interfere with its agricultural values, character, use, or utility. To the extent that the preservation of the open space and scenic values of the Property is consistent with such

use, it is within the purpose of this Easement to protect those values.

2. Affirmative Rights and Interests Conveyed. To accomplish the purpose of this Easement, the following rights and interests are conveyed to Grantee by this Easement:

(a) To identify, preserve, and protect in perpetuity the agricultural values, character, use, and utility, including the soil and water quality and the open-space and scenic values, of the Property (the "protected values").

(b) To enter on, inspect, observe, and study the Property for the purposes of (1) identifying the current uses and practices thereon and the baseline condition thereof, and (2) monitoring the uses and practices regarding the Property to determine whether they are consistent with this Easement. Such entry shall be permitted on prior notice to Grantors, and shall be made in a manner that will not unreasonably interfere with Grantors' use and quiet enjoyment of the Property.

(c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use. However, it is the intention of this Easement not to limit Grantors' discretion to employ their choices of farm and ranch uses and management practices so long as those uses and practices are consistent with the purpose of this Easement.

(d) Subject to Grantors' consent, to erect and maintain a sign or other appropriate marker in a prominent location on the Property, visible from a public road, bearing information indicating that the Property is protected by Grantee. The wording of the information shall be determined by Grantee, but shall clearly indicate that the Property is privately owned and not open to the public. Grantee shall be responsible for the costs of erecting and maintaining such sign or marker.

(e) The development rights referred to in Paragraph 11 below.

3. Uses and Practices. Grantee and Grantors intend that this Easement shall confine the uses of the Property to agriculture, ranching, residential use associated with the agricultural use of the Property, and the other uses which are described herein. Examples of uses and practices which are consistent with the purpose of this Easement, and which are hereby expressly permitted, are set forth in Exhibit B, attached hereto and incorporated herein by this reference. Examples of uses and practices which are inconsistent with the purpose of this Easement, and which are hereby expressly prohibited, are set forth in Exhibit C, attached hereto and incorporated herein by this reference. The uses and practices set forth in Exhibits B and C are not necessarily exhaustive recitals of consistent and inconsistent activities, respectively. They are set forth both to establish specific permitted and prohibited activities, and to provide guidance in determining the consistency of other activities with the purpose of this Easement.

4. Current Practices and Conditions. Grantee acknowledges by acceptance of this Easement that Grantors' present uses of the Property are compatible with the purpose of this Easement. In order to establish the present condition of the Property's protected values, Grantee may prepare an inventory of the Property's relevant features and conditions. Grantors and Grantee recognize that changes in economic conditions, in agricultural technologies, in accepted farm and ranch management practices, and in the situations of Grantors may result in an evolution of agricultural uses of the Property, provided such uses are consistent with the purpose of this Easement.

5. Reserved Rights. Grantors reserve to themselves, and to their personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement. Without limiting the generality of the foregoing, the following rights are expressly reserved: (a) all right, title, and interest in and to all tributary and non-tributary water, water rights, and related interests in, on, under, or appurtenant to the Property, provided that such water rights are used on the Property in a manner consistent with the purpose of this Easement; and (b) all right, title, and interest in subsurface oil, gas, and minerals; provided that the manner of exploration for, and extraction of any oil, gas, or minerals shall be only by a subsurface method, and shall

not damage, impair, or endanger the protected values of the Property.

6. Arbitration. If a dispute arises between the parties concerning the consistency of any proposed use or activity with the purpose of this Easement, and Grantors agree not to proceed with the use or activity pending resolution of the dispute, either party may refer the dispute to arbitration by request made in writing upon the other. Within 30 days of the receipt of such a request, the parties shall select a single arbitrator to hear the matter. If the parties are unable to agree on the selection of a single arbitrator, then each party shall name one arbitrator and the two arbitrators thus selected shall select a third arbitrator; provided, however, if either party fails to select an arbitrator, or if the two arbitrators selected by the parties fail to select the third arbitrator within 14 days after the appointment of the second arbitrator, then in each such instance a proper court, on petition of a party, shall appoint the second or third arbitrator or both, as the case may be. A judgment on the arbitration award may be entered in any court having jurisdiction thereof. The prevailing party shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for all its costs and expenses related to such arbitration, including, without limitation, the fees and expenses of the arbitrator(s) and attorneys' fees, which shall be determined by the arbitrator(s) and any court of competent jurisdiction that may be called on to enforce or review the award.

7. Grantee's Remedies. If Grantee determines that Grantors are in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantors of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantors fail to cure the violation within 30 days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a 30-day period, fail to begin curing such violation within the 30-day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement or injury to any protected values, including damages for any loss thereof, and to require the restoration of the Property to the condition that existed prior to any such injury. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the protected values of the Property, Grantee may pursue its remedies under this paragraph without waiting for the period provided for cure to expire. Grantee's rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantors agree that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

7.1. Costs of Enforcement. Any costs incurred by Grantee in enforcing the terms of this Easement against Grantors, including, without limitation, costs of suit and attorneys' fees, and any costs or restoration necessitated by Grantors' violation of the terms of this Easement shall be borne by Grantors. If Grantors prevail in any action to enforce the terms of this Easement, Grantors' costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantee.

7.2. Grantee's Discretion. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantors shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy on any breach by Grantors shall impair such right or remedy or be construed as a waiver.

7.3. Acts Beyond Grantors' Control. Nothing contained in this Easement shall be construed to entitle Grantee to

bring any action against Grantors for any injury to or change in the Property resulting from causes beyond Grantors' control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantors under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

8. Costs and Taxes. Grantors retain all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property. Grantors shall pay any and all taxes, assessments, fees, and charges levied by competent authority on the Property or on this Easement. It is intended that this Easement constitute an enforceable restriction within the meaning of *California Constitution, Article XIII, Section 8*, and that this Easement qualify as an enforceable restriction under the provisions of *California Revenue and Taxation Code Section 402.1*.

9. Hold Harmless. Grantors shall hold harmless, indemnify, and defend Grantee and its directors, officers, employees, agents, and contractors and the heirs, personal representatives, successors, and assigns of each of them (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' fees arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, regardless of cause, except to the extent of the adjudicated proportionate fault of any of the Indemnified Parties; (2) the obligations specified in Paragraph 8.

10. Access. No right of access by the general public to any portion of the Property is conveyed by this Easement.

11. Development Rights. The parties acknowledge that under currently applicable zoning regulations of the County the property is so classified that on receipt of required government approvals the Property could be developed to a density of _____ single family residential dwelling units ("the development rights"), and, further, that under certain circumstances the development rights may be transferred to and utilized on other property or properties. The parties agree to deal with the development rights as follows:

(a) Grantors retain one of the _____ development rights associated with the Property. [The development right retained by Grantor shall apply and relate to the existing residential improvements on the Property, which consist of _____. Grantors reserve the right to maintain, use, repair, and replace the existing improvements on the property with approval of appropriate governmental agencies and in conformity with Paragraph 3 of Exhibit B and all other applicable provisions of this Deed. The development right retained by Grantors shall not be used to support or enable the creation of any additional residential uses or units on the Property except as expressly provided in Paragraph 3 of Exhibit B hereto.] [*If property has no existing residence:* The development right retained by Grantors shall apply to and may be utilized on the Property. Grantors may build, use, maintain, repair, and replace a residence on the Property with the approval of appropriate governmental agencies and in conformity with all applicable provisions of this Deed, provided that Grantors first obtain the express written approval of Grantee as to the exact size and location of such residence.]

(b) The _____ development rights associated with the Property which are not retained by Grantors are conveyed to Grantee. Grantee shall have the right to use, sell, or otherwise benefit from the development rights owned by it in accordance with applicable laws and regulations of the County, provided that such development rights shall not be used on the Property.

(c) Neither Grantors nor Grantee shall use or receive the benefit from any increase in allowable development rights associated with the Property resulting from future zoning changes.

(d) Grantors understand and acknowledge that any transfer of the development rights acquired herein by Grantee to another property is subject to the provisions of applicable laws including, inter alia, the County's Code which requires,

among other things, a master plan of the Property and a conservation easement or restrictions recorded against it which reflect the conditions of approval of the master plan. Grantors covenant and agree to cooperate fully with Grantee in Grantee's attempts to obtain approval for transfer of development rights acquired herewith pursuant to the County's Code and other applicable laws including, without limitation, executing and delivering such consents, master plan applications, conservation easements or restrictions and other documents as may be required by the County for review and approval of such transfers, provided that any such master plan, conditions of approval, and/or conservation easement or restrictions do not materially differ from the terms and conditions of this Deed. Grantee shall be responsible for all fees and costs of preparing and processing documents required by the County for review and approval of such transfers.

12. Extinguishment. If circumstances arise in the future that render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the compensation to which Grantee shall be entitled from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by California law at the time, in accordance with Paragraph 13. Grantee shall use all such proceeds in a manner consistent with the purposes of Section 5709(b)(3)(P) of the California Wildlife, Coastal and Park Land Conservation Bond Act of 1988.

13. Compensation. This Easement constitutes a real property interest immediately vested in Grantee. For the purpose of Paragraph 12, the parties stipulate that this Easement has a fair market value determined by multiplying (a) the fair market value of the property unencumbered by the Easement (minus any increase in value attributable to improvements made after the date of this grant) by (b) the ratio of the value of the Easement at the time of this grant to the value of the Property, unencumbered by the Easement, at the time of this grant.

For the purposes of this paragraph, Grantor and Grantee agree that the ratio of the value of the Easement to the value of the Property unencumbered by the Easement is _____. This ratio shall remain constant.

14. Condemnation. If the Easement is taken, in whole or in part, by exercise of the power of eminent domain, Grantee shall be entitled to compensation in accordance with applicable law.

15. Assignment of Grantee's Interest. Grantee may assign its interest in this Easement only to an organization that is a "qualified organization," within the meaning of *Section 170(h) of the Internal Revenue Code*, as amended, or any successor provision, and that is authorized to acquire and hold conservation easements under California law, on obtaining the prior written consent of Grantors and the County. Any assignment without such consents shall be void and of no effect. Such consents shall not be unreasonably withheld by Grantors and the County.

16. Executory Limitation. If Grantee shall cease to exist, or to be a qualified organization under *Section 170(h) of the Internal Revenue Code of 1954*, as amended, or to be authorized to acquire and hold conservation easements under California law, then Grantee's rights and obligations under this Easement shall become immediately vested in the County.

17. General Provisions.

(a) Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of California.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purpose of the California Conservation Easement Act of 1979, as amended. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein.

(e) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

(f) Joint Obligation. The obligations imposed by this Easement on Grantors shall be joint and several.

(g) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding on, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property.

(h) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate on transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring before transfer shall survive transfer.

(i) Future Conveyance. Grantors agree that reference to this Deed will be made in any subsequent deed or other legal instrument by means of which they convey any interest in the Property (including but not limited to a leasehold interest).

(j) Not Governmental Approval. No provision of this Easement nor the approval by the County of a grant for the acquisition of this Easement shall constitute governmental approval of any improvements, construction, or other activities which may be permitted under this Easement.

IN WITNESS WHEREOF, Grantors have executed this Deed of Easement this _____ day of _____.

Grantors

By: _____
By: _____

Accepted:
MARIN AGRICULTURAL LAND TRUST

By: _____

[Notarization of Grantors' signatures.]

[*Attach Exhibit A, the property description.*]

Exhibit B

Permitted Uses and Practices

The following uses and practices, though not necessarily an exhaustive recital of consistent uses and practices, are expressly permitted under this Easement, and they are not to be precluded, prevented, or limited by this Easement.

1. To reside on the Property.

2. To engage in any and all agricultural uses of the Property in accordance with sound, generally accepted agricultural practices. For the purposes of this Easement "agricultural uses" shall be defined as: breeding, raising, pasturing, and grazing livestock of every nature and description for the production of food and fiber; breeding and raising bees, fish, poultry, and other fowl; planting, raising, harvesting, and producing agricultural, aquacultural, horticultural, and forestry crops and products of every nature and description; and the processing, storage, and sale, including direct retail sale to the public, of crops and products harvested and produced principally on the Property, provided that the processing, storage, and sale of any such crops or products that are not food or fiber shall require the consent of Grantee; provided, however, that such agricultural uses shall not result in significant soil degradation, or significant pollution or degradation of any surface or subsurface waters.

3. To maintain and repair existing structures, housing, fences, corrals, roads, ditches, and other improvements on the Property. Additional improvements accessory to the residential use of the Property, and additional structures, housing, facilities, and roads reasonably necessary to the agricultural uses of the Property, shall be permitted, provided that Grantors obtain the express written approval of Grantee for the construction of any such additional improvements, structure, housing, facility, or road, including the size, function, capacity, and location, which consent should not be unreasonably withheld. Grantor shall provide Grantee written notice of Grantor's intention to undertake such construction, together with information on its size, function, capacity, and location, not less than 45 days before the commencement thereof. Additional fencing deemed by Grantors to be reasonably necessary to ranching and agricultural activities may be constructed without Grantee's consent. In the event of destruction, deterioration, or obsolescence of any improvements, structures, housing, fences, corrals, roads, or ditches, whether existing at the date hereof or constructed after pursuant to the provisions of this paragraph, Grantors may replace the same with improvements or structures of similar size, function, capacity, and location.

4. To develop and maintain such water resources on the Property as are necessary or convenient for ranching, agricultural, irrigation, and residential uses in a manner consistent with the purpose of this Easement.

5. To use agrichemicals, including, but not limited to, fertilizers and biocides in those amounts and with that frequency of application necessary to accomplish reasonable grazing and agricultural purposes. Such use shall be carefully circumscribed near surface water and during periods of high ground water.

6. To control predatory and problem animals by the use of selective control techniques.

7. To utilize the Property for recreational or educational purposes, including, without limitation, hiking, horseback riding, hunting and fishing, that require no surface alternation or other development of the land.

Exhibit C

Prohibited Uses and Practices

The following uses and practices, though not necessarily an exhaustive recital of inconsistent uses and practices, are inconsistent with the purposes of this Easement and are expressly prohibited on or within the Property:

1. The impairment of the protected values, except as otherwise provided herein.

2. The establishment of commercial or industrial uses or the construction, placing, or erection of any signs or billboards; provided, however, that neither ranching, agriculture, nor the production or processing of food and fiber products as contemplated by the provisions of Exhibit B, shall be considered commercial or industrial uses.

3. The construction, reconstruction, or replacement of any road or structure except as provided in Paragraph 11(a) of this Easement or Paragraph 3 of Exhibit B.

4. The division, subdivision, or de facto subdivision of the Property, provided, however, that a lease of a portion of the Property for agricultural use shall not be prohibited by this paragraph.

5. The use of motorized vehicles, except by Grantors or others under Grantors' control for agricultural, ranching, or attendant residential use of the Property. Any use of motorized vehicles off of roadways is prohibited except when necessary for agricultural and ranching purposes.

6. The commercial harvesting of timber; provided, however, that Grantors shall have the right (a) to cut or collect firewood for the heating of ranch and residential facilities on the Property; (b) to cut trees as necessary or desirable for agricultural purposes, for the construction of fences, and for the repair and construction of such buildings or other improvements on the Property as are allowed hereunder; and (c) to develop and implement a long-range plan for the growing and harvesting of plants and trees in a manner that is consistent with the purpose of this Easement, on the express written consent of Grantee, which shall not be withheld unreasonably.

7. The dumping or other disposal of non-combustible refuse on the Property.

8. Ranching, agricultural, or other uses, otherwise permitted under th is Easement, which result in significant degradation of topsoil quality.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandReal Property LawDeedsTypesGeneral OverviewReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsCreationExpress Easements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 28D CONSERVATION RESTRICTIONS ON USE OF AGRICULTURAL AND OPEN-SPACE LAND
PART IV. FORMS
C. Conservation Easement and Land Trusts

12-28D California Legal Forms--Transaction Guide § 28D.241

§ 28D.241 Articles of Incorporation of Land Trust

[1] Comment--Use of Form

This form represents articles of incorporation for use by an organization incorporating as a nonprofit, tax-exempt land trust. It is based on a form provided by the California Coastal Conservancy, a statutorily created, state funded land trust [*see Pub. Res. Code §§ 31000-31405*].

A land trust may be a private, charitable organization or a governmental entity. Its purpose is to purchase and hold interests in land in order to preserve the natural, open-space, scenic, or agricultural character of the land. For further discussion, see *Section 28D.40*.

Both the Open-Space Easement Act of 1974 [*see Gov. Code §§ 51070-51097*] and the provisions governing conservation easements [*see Civ. Code §§ 815-815.5*] require that a nonprofit organization granted an easement qualify as a tax-exempt nonprofit organization under *Internal Revenue Code Section 510(c)(3)* and have as its primary purpose certain conservation goals [*see Gov. Code § 51075(f)*; *Civ. Code § 815.3*]. For a nonprofit organization to accept an open-space easement, it must include the preservation of open space as a stated purpose in its articles of incorporation [*Gov. Code § 51075(f)*]. For a nonprofit organization to accept a conservation easement, it must have as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use [*Civ. Code § 815.3*].

For further information about corporations and nonprofit organizations, including forms of bylaws, see Volume 1, Chapters 2, *Preincorporation Planning*, 3, *Articles of Incorporation*, and 4, *Bylaws*, and Volume 4, Chapter 13, *Nonprofit Corporations and Associations.*

[2] FORM

Articles of Incorporation of Land Trust

ARTICLES OF INCORPORATION

OF
_____ [*name of land trust*]

I.

The name of this Corporation is _____[*name*].

II.

A. This organization is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Benefit Corporation Law for charitable purposes.

B. The specific purposes for which this Corporation is organized include, but are not limited to: _____[*specify, e.g.*, the preservation, protection and enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use *or* the preservation of open space].

III.

The name and address in the State of California of this Corporation's legal agent for service of process is:
Name: _____
Address: _____

IV.

A. This Corporation is organized and operated exclusively for charitable purposes within the meaning of *Section 501(c)(3) of the Internal Revenue Code*.

B. Notwithstanding any other provision of these Articles, this Corporation may not carry on any other activities not expressly permitted for (1) corporations exempt from federal income tax under *Section 501(c)(3) of the Internal Revenue Code*, or *(2)* corporations to which contributions are deductible under *Section 170(c)(2) of the Internal Revenue Code*, or the corresponding provisions of any future statute of the United States.

C. No substantial part of the activities of this Corporation may consist of carrying on propaganda or otherwise attempting to influence legislation. Further, this Corporation may not participate or intervene in any political campaign (including publishing or distributing statements) on behalf of any candidate for public office.

V.

The names and addresses of the persons designated to act as the initial Board of Directors of this Corporation are: _____[*list names and addresses*].

VI.

A. The property of this Corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this Corporation may inure to the benefit of any director, trustee, member, or officer of this Corporation, or to any private person.

B. On the dissolution or winding up of this Corporation, any assets remaining after payment of, or provision for

payment of, all debts and liabilities must be distributed to a governmental entity described in *Section 170(b)(1)(A)(v) of the Internal Revenue Code*, or to a nonprofit fund, foundation, or corporation that (1) is organized and operated exclusively for charitable purposes, (2) has established its tax exempt status under *Section 501(c)(3) of the Internal Revenue Code*, and *(3)* is qualified to receive "qualified conservation contributions" within the meaning of *Section 170(h) of the Internal Revenue Code*, or the corresponding provisions of any future statute of the United States.

C. If this Corporation is liquidated, all corporate assets shall be disposed of in such a manner as may be directed by decree of the superior court for the county in which this Corporation has its principal office, on petition by the Attorney General or by any person concerned in the dissolution, in a proceeding to which the Attorney General is a party.

IN WITNESS, the Incorporators of _____[*name of nonprofit organization*] and the initial directors named in the Articles of Incorporation place their signatures on _____[*date*].

INCORPORATORS

_____ [*signature*]
[*typed name*], Incorporator

_____ [*signature*]
[*typed name*], Incorporator

DIRECTORS

_____ [*signature*]
[*typed name*], Director

_____ [*signature*]
[*typed name*], Director

_____ [*signature*]
[*typed name*], Director

DECLARATION

We are the persons whose names are subscribed below. We collectively are all of the incorporators of _____[*name of nonprofit organization*] and all of the initial directors named in the Articles of Incorporation, and we have executed these Articles of Incorporation. The foregoing Articles of Incorporation are our act and deed, jointly and severally.

Executed on _____[*date*], at _____, California.

We, and each of us, declare that the foregoing is true and correct.

_____ [*signature*]
[*typed name*], Incorporator

_____ [*signature*]
[*typed name*], Incorporator

_____ [*signature*]
[*typed name*], Director

_____ [*signature*]
[*typed name*], Director

_____ [*signature*]
[*typed name*], Director

_____ [*signature*]
[*typed name*], Director

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsFormationReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawTrustsHolding TrustsTax LawFederal Taxpayer GroupsExempt OrganizationsCharitable, Religious & Scientific Organizations



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES

13-29A California Legal Forms--Transaction Guide 29A.syn

§ 29A.syn Synopsis to Chapter 29A: JOINT VENTURES

§ 29A.01 California Sources

[1] Statutes

[2] Regulations

§ 29A.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 29A.03-29A.04 [Reserved]

§ 29A.05 Law Reviews and Periodicals

§ 29A.06 Annotations

§ 29A.07 Text References

§§ 29A.08-29A.09 [Reserved]

§ 29A.10 Nature of Real Estate Joint Venture

[1] Real Estate Joint Venture Defined

[2] General Partnership Distinguished

[3] Limited Partnership Distinguished

§ 29A.11 Deciding to Use Joint Venture

[1] Choice of Entities to Hold Investment Property

[2] Tax Considerations Not Significant in Choosing Entity

[3] Advantages of Real Estate Joint Venture

[a] Persons Who May Form Joint Venture

[b] Ease of Formation of Joint Venture

[c] Flexible Structure of Joint Venture

[d] Joint Venturers' Participation and Control

[4] Disadvantages of Real Estate Joint Venture

[a] Unlimited Personal Liability of Joint Venturers

[b] Lack of Centralized Management of Joint Venture

§§ 29A.12-29A.19 [Reserved]

§ 29A.20 Forming Joint Venture

§ 29A.21 Joint Venture Property

[1] Acquiring and Holding Real Property

[2] Transfer of Real Property

§ 29A.22 Management of Joint Venture Property

[1] Right to Manage Joint Venture's Property

[2] Joint Venturers' Mutual Fiduciary Duties

[3] Liabilities of Joint Venturers

§ 29A.23 Dissolution of Real Estate Joint Venture

§§ 29A.24-29A.29 [Reserved]

§ 29A.30 Overview

§ 29A.31 At-Risk Limitation on Losses

§ 29A.32 Losses and Credits From Passive Activities

§ 29A.33 Depreciation Deductions

§§ 29A.34-29A.99 [Reserved]

§ 29A.100 Facts

Scope

§ 29A.101 Documents

Scope

§ 29A.110 Determining Whether to Organize Project as Joint Venture

Scope

§ 29A.111 Planning Structure of Joint Venture

Scope

§§ 29A.112-29A.119 [Reserved]

§ 29A.120 Formation of Joint Venture

Scope

§§ 29A.121-29A.129 [Reserved]

§ 29A.130 Joint Venture Agreement

Scope

§§ 29A.131-29A.139 [Reserved]

§ 29A.200 Joint Venture Agreement for Real Property Investment--Agreement Between Two Persons for Joint Purchase and Operation of Apartment Building

[1] Comment--Use of Form

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Two Persons for Joint Purchase and Operation of Apartment Building

§ 29A.201 Joint Venture Agreement for Real Property Investment--Agreement to Purchase Property for Speculative Resale to Developer

[1] Comment--Use of Form

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement to Purchase Property for Speculative Resale to Developer

§ 29A.202 Joint Venture Agreement for Real Property Investment--Agreement Between Real Property Owner and General Contractor to Construct Apartment Building on Owner's Land for Speculative Sale

[1] Comment--Use of Form

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Real Property Owner and General Contractor to Construct Apartment Building on Owner's Land for Speculative Sale

§ 29A.203 Joint Venture Agreement for Real Property Investment--Agreement Between Two Corporations, With One Corporation Lending Funds to Joint Venture

[1] Comment--Use of Form

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Two Corporations, With One Corporation Lending Funds to Joint Venture



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES

13-29A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers joint ventures for investment in or development of real estate. The term "joint venture" is sometimes used to describe any type of unincorporated real estate investment association, including a syndicate or limited partnership. As used in this chapter, however, "joint venture" refers to a general partnership that is limited in scope and duration to a single transaction or a single series of transactions. Thus, like partners in a general partnership, joint venturers are personally liable for obligations of the joint venture.

Organizing a real estate investment as a joint venture is most effective when a small number of investors are involved, all of the investors will actively participate in managing the investment, and the investors desire some flexibility in the structure of their organization. The Legal Background of this chapter provides discussion of the law governing joint ventures, including the tax consequences of organizing an investment as a joint venture.

The Transaction Guide provides step-by-step guides to determining whether a joint venture is appropriate and to forming a real estate joint venture. The Drafting Guide and Forms include checklists and sample forms of typical real estate joint venture agreements. Included are forms for joint ventures created by individuals to purchase and operate an apartment building, to purchase land for speculative resale, and to construct a building for sale, as well as a form of agreement for a joint venture between two corporations, with one corporation lending funds to the venture.

For further coverage of all aspects of general partnerships, see Ch. 15, *General Partnerships* . The Legal Background of that chapter regarding the property rights and liability of a partner, as well as the taxation of a partnership, is equally applicable to a joint venture. Also, many of the alternative provisions for partnership agreements set forth in that chapter, especially those relating the term of the partnership, capital, profits, taxes, and attention to partnership business, may be substituted for equivalent provisions of the agreements in this chapter.

Depending on the circumstances of a particular investment transaction, a different legal entity, such as a limited partnership or limited liability company, might better serve the investors' interests. For general coverage of limited partnerships, see Ch. 16, *Formation of Limited Partnerships* ; for general coverage of limited liability companies, see Ch. 12C, *Limited Liability Companies* . Special aspects of limited partnerships and limited companies formed to invest in real estate are covered in Ch. 29B, *Nonpublic Real Estate Syndicates* . For coverage of real estate investment trusts, see California Real Estate Law and Practice, Chs. 40- 45 (Matthew Bender).



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A. Primary Sources

13-29A California Legal Forms--Transaction Guide § 29A.01

§ 29A.01 California Sources

[1] Statutes

Uniform Partnership Act of 1994. *Corp. Code § 16100 et seq.*

Taxation of partnerships. *Rev. & Tax. Code § 17851 et seq.*

Partnership as including joint venture for income-tax purposes. *Rev. & Tax. Code § 17921(a)*

Capital gains and losses generally determined in accordance with provisions of Internal Revenue Code. *Rev. & Tax. Code § 18151 et seq.*

[2] Regulations

California limited offering exemption. *10 Cal. Code Reg. §§ 260.102.12*-260.102.14



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§ 29A.02 Federal Sources

[1] Statutes

Limitation on deduction of investment interest. *I.R.C. § 163(d)*

Depreciation of residential rental property and nonresidential real property. *I.R.C. § 168(b)-(d)*

At-risk limitation on losses. *I.R.C. § 465*

Limitations on losses and credits from passive activities. *I.R.C. § 469*

Income taxation of partners and partnerships. *I.R.C. §§ 701-761*

Joint venture included in term "partnership" for income-tax purposes. *I.R.C. § 761(a)*

Capital gain or loss on sale or exchange of property. *I.R.C. §§ 1211, 1212, 1221, 1222*

Informational income-tax return to be filed by partnership. *I.R.C. § 6031*

Time for filing partnership income-tax return. *I.R.C. § 6072(a)*

[2] Regulations

Income taxation of partners, partnerships, joint ventures, and joint venturers. Treas. Reg. § 1.701 et seq.

Filing of partnership or joint venture income tax return. *Treas. Reg. § 1.6031(a)-1*



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[Reserved]

§§ 29A.03[Reserved]



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B. Secondary Sources

13-29A California Legal Forms--Transaction Guide § 29A.05

§ 29A.05 Law Reviews and Periodicals

Richard R. Spore III, *The Economics of Real Estate Joint Ventures, 21 Prob.* & Prop. 26 (2007)

Stevens A. Carey, *Buy/Sell Provisions in Real Estate Joint Venture Agreements, 39 Real Prop. Prob. & Tr. J. 651 (2005)*



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§ 29A.06 Annotations

"Joint Venturers' Comparative Liability for Losses, in Absence of Express Agreement," 51 A.L.R. 4th 371 (1987)

"Partnership and joint venture interests as securities within meaning of Federal Securities Act of 1933 (*15 U.S.C. § 77a et seq.*) and Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*)," *58 A.L.R. Fed. 408 (1982)*

"Corporation's Power to Enter Into Joint Venture," 60 A.L.R.2d 917 (1958)



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§ 29A.07 Text References

California Legal Forms, Ch. 12C, *Limited Liability Companies*; Ch. 15, *General Partnerships*; Ch. 15A, *Formation of Limited Partnerships*; Ch. 29B, *Nonpublic Real Estate Syndicates* (Matthew Bender).

California Real Estate Law and Practice, Ch. 3, *Choice of Entities for Holding Investments* (Matthew Bender)

Rabkin & Johnson, Current Legal Forms With Tax Analysis, Ch. 2, *Joint Ventures and Business Trusts* ; Ch. 20, *Real Estate Entities* (Matthew Bender)

Rohan, Real Estate Financing, Ch. 11, *Real Estate Programs* (Matthew Bender)



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[Reserved]

§§ 29A.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART II. LEGAL BACKGROUND
A. Nature and Purpose of Real Estate Joint Ventures

13-29A California Legal Forms--Transaction Guide § 29A.10

§ 29A.10 Nature of Real Estate Joint Venture

[1] Real Estate Joint Venture Defined

A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506, 319 P.2d 617* ; *580 Folsom Assocs. v. Prometheus Dev. Co. (1990) 223 Cal. App. 3d 1, 15, 272 Cal. Rptr. 227]* . Three elements are generally necessary for the creation of a joint venture [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1666, 60 Cal. Rptr. 2d 179* ; *580 Folsom Assocs. v. Prometheus Dev. Co. (1990) 223 Cal. App. 3d 1, 15-16, 272 Cal. Rptr. 227]* :

- Joint ownership of a business enterprise.
- An understanding to share profits and losses.
- A joint right to control the business (although this may be delegated).

The existence of a joint venture depends on the intention of the parties [*580 Folsom Assocs. v. Prometheus Dev. Co. (1990) 223 Cal. App. 3d 1, 16, 272 Cal. Rptr. 227* ; *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 285, 55 Cal. Rptr. 610* ; *Rennick v. O.P.T.I.O.N. Care, Inc. (9th Cir. 1996) 77 F.3d 309, 317]* . A formal written contract is not essential to the creation of a joint venture. Thus, a joint venture may be formed by an oral agreement, or it may be reasonably inferred from the acts and declarations of the parties [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *580 Folsom Assocs. v. Prometheus Dev. Co. (1990) 223 Cal. App. 3d 1, 16, 272 Cal. Rptr. 227]* .

[2] General Partnership Distinguished

The major distinction between a typical partnership and a joint venture is that a partnership ordinarily is formed to engage in a continuing business for an indefinite or fixed period of time, but a joint venture is a species of general partnership limited in scope and duration to a single transaction or a single series of transactions [*Rickless v. Temple*

(1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828 ; *see* Ch. 15, *General Partnerships*].

A joint venture resembles a general partnership in that its members associate themselves together as co-owners of a business enterprise, agreeing to share profits and losses [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828]* , and the incidents of both relationships, partnership and joint venture, are the same in all essential respects [*Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468]* .

Unless the parties form a distinct legal entity such as a limited liability company or a limited partnership [*see Corp. Code § 15900 et seq.* (California Uniform Limited Partnership Act of 2008); *Corp. Code § 17000 et seq.* (Beverly-Killea Limited Liability Company Act)], their relations as between themselves and as to third parties generally are the same as those of general partners, and to that extent the joint venture is governed by the same law as general partnerships [*Weiner v. Fleischman (1991) 54 Cal. 3d 476, 482, 286 Cal. Rptr. 40, 816 P.2d 892* ; *Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125]* . Thus, in all essential characteristics joint ventures, like other partnerships, are governed by the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*]. For detailed discussion of the Uniform Partnership Act of 1994, and the requirements for formation of general partnerships, see Ch. 15, *General Partnerships* .

[3] Limited Partnership Distinguished

A limited partnership is different from a joint venture in two important respects. First, a limited partner is not personally liable for any obligation of the limited partnership unless the partner is named as a general partner in the limited partnership certificate or participates in the control of the business [*see Corp. Code § 15903.03(a)*]. A joint venturer, in contrast, is jointly liable for all debts and obligations of the venture [*see Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1666, 60 Cal. Rptr. 2d 179]* .

Second, the general partner in a limited partnership has sole control over the management and conduct of the partnership business, while the limited partners are essentially passive investors [*see Corp. Code §§ 15903.03(a), 15904.06(a)*]. A joint venture, in contrast, has no passive investors, and the joint venturers have joint rights to participate in the management of the enterprise [*see Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1666, 60 Cal. Rptr. 2d 179]* .



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART II. LEGAL BACKGROUND
A. Nature and Purpose of Real Estate Joint Ventures

13-29A California Legal Forms--Transaction Guide § 29A.11

§ 29A.11 Deciding to Use Joint Venture

[1] Choice of Entities to Hold Investment Property

Persons voluntarily associating themselves together to invest in real property may select any of several types of legal entities to acquire, hold, and eventually sell the property. For example, they may form a corporation, business trust, general or limited partnership, limited liability company, or real estate investment trust.

Traditionally, the income-tax factors involved and the purposes sought to be attained by the investors usually dictated that some form of partnership or unincorporated association, such as a joint venture, should be the entity used for the real property investment. More recently, limited liability companies (LLCs) have become available as vehicles for real estate investments [*see Corp. Code § 17000 et seq.*]. If structured properly, a California LLC can be taxed as a partnership on both the federal and California level, without some of the restrictions imposed on corporations [*see Treas. Reg. § 301.7701-3(a)* (noncorporate business entity such as LLC with two or more members can simply elect to be taxed as partnership or as corporation); *see also* Ch. 12C, *Limited Liability Companies*].

[2] Tax Considerations Not Significant in Choosing Entity

Under the Tax Reform Act of 1986, the tax-shelter advantages of real estate investments have been significantly curtailed and virtually eliminated with regard to passive investors such as limited partners. The "at risk" rules now apply to real estate, so that a taxpayer generally may not deduct losses in excess of the taxpayer's cash and property contributions to the venture, plus borrowed amounts for which the taxpayer is personally liable for repayment or has pledged property as security for repayment ("recourse financing") [*I.R.C. § 465(a),(b)(1),(2)*; *see Rev. & Tax. Code § 17851*].

Under IRS regulations that took effect on January 1, 1997, a noncorporate business entity (such as a joint venture or limited partnership) with two or more members can simply elect to be taxed as a partnership or as a corporation [*Treas. Reg. § 301.7701-3(a)*]. If a no election is made, the entity will be automatically classified as a partnership for tax purposes [*Treas. Reg. § 301.7701-3(b)*].

As a result, most of the income-tax reasons for choosing a particular form of business entity have been eliminated. However, there are certain non-tax advantages that may indicate in a particular situation that a joint venture rather than a general or limited partnership or a corporation should be formed for an investment in real property [*see* [3], *below*].

[3] Advantages of Real Estate Joint Venture

[a] Persons Who May Form Joint Venture

Like any other general partnership, a joint venture may be formed by any combination of natural and artificial persons, including individuals, corporations, partnerships, trusts, and limited liability companies [*see Corp. Code § 16101(9),(13)* ("partnership" is association of two or more persons to carry on business; "person" encompasses any legal or commercial entity, including individual, corporation, business trust, estate, trust, partnership, limited partnership, and limited liability company)].

At one time, a corporation could not enter into a partnership unless expressly authorized to do so in its articles of incorporation. It could, however, enter into a joint venture for any business within its legitimate powers [*see Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88* ; *Consolidated Furniture Mfrs. v. Goldstein (1934) 140 Cal. App. 563, 565, 35 P.2d 627]* . Under current law, this distinction between general partnerships and joint ventures has been erased. The specific powers of a corporation, such as the power to enter into a partnership, no longer need be stated in its articles of incorporation [*see Corp. Code § 202(b)*]. Any corporation organized under the General Corporation Law may participate in any partnership, joint venture, or other association, transaction, or arrangement of any kind [*Corp. Code § 207(h)*].

[b] Ease of Formation of Joint Venture

An advantage a joint venture has over a corporation, limited partnership, or limited liability company is the ease and minimal expense with which it may be formed. The agreement creating a joint venture may be oral [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828]* , and it need not even be express; an agreement to form a joint venture may be inferred from the acts and declarations of the parties [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617* ; *Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828]* .

[c] Flexible Structure of Joint Venture

One advantage a joint venture has over a corporation is flexibility. A corporation's shareholders are more or less bound by the fixed corporate structure. Each shareholder's entitlement to the earnings of the corporation is usually based on the percentage of shares he or she owns in the corporation. The income and losses of a partnership or joint venture can, however, be distributed among the partners or joint venturers in any manner provided by the partnership or joint venture agreement [*see I.R.C. § 704(a)*]; there is no federal or state requirement that income or losses of the partnership or joint venture be allocated among the partners or joint venturers according to their respective contributions to the capital of the partnership or joint venture.

However, the allocation of income and losses among partners or joint venturers provided in their partnership or joint venture agreement must, for federal income-tax purposes, have a "substantial economic effect" independent of income tax consequences, or it will be disregarded [*see I.R.C. § 704(b)(2)*].

A partnership or joint venture agreement may provide for the venturers to share the venture's losses in a different ratio than their shares of the venture's income, as long as the agreement has the required "substantial economic effect" [*see I.R.C. § 704(b)(2)*]. Furthermore, the provisions of the agreement for the sharing of income and losses by the joint venturers may be modified at any time. The modifications, whether written or oral, will be honored for income tax purposes, even if they are made after the close of a taxable year so long as they are made prior to the date for filing the

venture's informational income-tax return [*Treas. Reg. § 1.761-1(c)*]. However, when any venturer's interest changes during the taxable year of the venture, each venturer's distributive share of income, gain, loss, deduction, or credit must be determined by using any method prescribed by the Treasury Regulations that takes into account the varying interests of the venturers in the venture during the taxable year [*I.R.C. § 706(c)(2)(B),(d)*]. Thus, the joint venture agreement may not be amended in a manner that would retroactively allocate all or a large portion of the venture's loss for the entire taxable year to a venturer entering the venture at the end of the taxable year. Instead, income or losses are allocable to a venturer only if they are paid or incurred by the venture during the portion of the year in which the venturer is a member of the venture [*see I.R.C. § 706(d)*].

[d] Joint Venturers' Participation and Control

Unlike limited partners, all joint venturers have equal rights in the management and conduct of the joint venture business, unless otherwise agreed by the joint venturers [*see Corp. Code §§ 15904.06(a), 16401(f)*; *Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468]* . A limited partner in a limited partnership loses his or her status as a limited partner if he or she takes part in control of the partnership business [*Corp. Code § 15903.03(a)*]. In contrast, an essential element of a joint venture is the right of all joint venturers to participate in the management and control of the partnership or joint venture business [*Corp. Code § 16401(f)*; *Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468* ; *see § 29A.10[3]*].

[4] Disadvantages of Real Estate Joint Venture

[a] Unlimited Personal Liability of Joint Venturers

Joint venturers are agents of each other in carrying out partnership business [*Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23* ; *Campagna v. Market St. Ry. Co. (1944) 24 Cal. 2d 304, 308, 149 P.2d 281]* , and joint venturers are jointly and severally liable for all debts and obligations of the venture [*Corp. Code § 16306(a)*]. Thus, each joint venturer risks unlimited liability for contracts made or torts committed by another joint venturer [*see Corp. Code §§ 16305(a),* 16036(a); *Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23* ; *Lindner v. Friednash (1958) 160 Cal. App. 2d 511, 517, 325 P.2d 612]* . In contrast, corporate shareholders, limited partners, and members of a limited liability company generally are not at risk of incurring unlimited personal liability for debts and obligations of the business entity [*see Corp. Code §§ 15903.03(a), 17101(a)*].

[b] Lack of Centralized Management of Joint Venture

An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business [*Corp. Code § 16401(f)*; *Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468* ; *see* [3][d], *above*]. If there are many members of the joint venture, control of the joint venture business may become unwieldy. In effect, therefore, the usefulness of a joint venture or for real property investment purposes is limited to a situation in which there are only two or three persons interested in associating themselves together for the investment.

Joint venturers may agree to give one of them the right to manage the business [*see Constans v. Ross (1951) 106 Cal. App. 2d 381, 389, 235 P.2d 113]* . However, such an agreement would eliminate one of the advantages of using a joint venture for investing in real property [*see* [3][d], *above*].



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A. Nature and Purpose of Real Estate Joint Ventures

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[Reserved]

§§ 29A.12[Reserved]



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§ 29A.20 Forming Joint Venture

Although a joint venture agreement may be an oral agreement or even implicit agreement [*see Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506-507, 319 P.2d 617]* , a written agreement is advisable to avoid future disputes over the terms of the parties' agreement. For a checklist of common provisions used in a typical joint venture agreement, see *§ 29A.130*. Sample agreements are *set forth in § 29A.200* et seq.



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§ 29A.21 Joint Venture Property

[1] Acquiring and Holding Real Property

Generally, a joint venture is treated as a separate entity rather than merely an aggregation of the individual venturers [*Corp. Code § 16201*]. Thus, property is treated as acquired by the entity if it is acquired either (1) in the name of the joint venture; or (2) in the name of one or more venturers, with an indication in the instrument transferring title to the property of either (a) the transferee's capacity as a joint venturer or (b) the existence of the joint venture, but without an indication of the name of the joint venture [*Corp. Code § 16204(a)*]. Property is acquired "in the name of" the joint venture by a transfer either (1) to the joint venture in its name, or (2) to one or more venturers in their capacity as such, with the name of the joint venture indicated in the instrument transferring title to the property [*Corp. Code § 16204(b)*].

In addition, property purchased with the joint venture's assets is presumed to be property of the venture, even if the foregoing requirements are not satisfied [*Corp. Code § 16204(c)*]. In contrast, property (other than property purchased with the joint venture's assets) that is acquired in the name of one or more of the joint venturers, without an indication in the instrument transferring title to the property of the transferee's capacity as a venturer or of the existence of the joint venture, is presumed to be separate property, even if used for partnership purposes [*Corp. Code § 16204(d)*].

Property acquired by a joint venture is the property of the venture, and not of the venturers individually [*Corp. Code § 16203*]. Thus, a venturer is not a co-owner of the joint venture's property and has no transferable interest in that property [*Corp. Code § 16502*]. A joint venturer's only transferable interest in the venture is his or her share of the profits and losses of the venture, and the right to receive distributions; that interest is treated as personal property [*Corp. Code § 16502*].

Thus, if the parties want property that will be used for joint venture purposes not to be treated as joint venture property, that property should not be purchased with joint venture assets, and title to that property should be taken in the names of the joint venturers individually or as tenants in common, without reference to the existence of the joint venture [*see Corp. Code § 16204(c),(d)*]. In addition, to avoid later disputes, the joint venture agreement, or a separate agreement between the joint venturers, should clearly spell out the rights of the individual joint venturers in any such property.

[2] Transfer of Real Property

Property held in the joint venture's name may be transferred by an instrument of transfer executed by a joint venturer in the venture's name [*Corp. Code § 16302(a)(1)*]. If the venturers wish to limit their authority to make such a transfer, they should file a statement of partnership authority to document that limitation [*see Corp. Code § 16303*; *see also §§ 29A.22[1], 29A.120*].

Joint venture property held in the name of one or more of the venturers with an indication, in the instrument transferring the property to the venture, of their capacity as venturers or of the existence of the joint venture, but without an indication of the name of the joint venture, may be transferred by an instrument of transfer executed by the persons in whose name the property is held [*Corp. Code § 16302(a)(2)*]. After a transfer of either kind, the joint venture may recover the property from a transferee only if (1) execution of the instrument of initial transfer did not bind the joint venture [*see Corp. Code § 16301* (when partner's act does not bind partnership)]; and (2) as to a subsequent transferee who gave value, the subsequent transferee knew or had received notice that the person who executed the instrument of initial transfer lacked authority to bind the joint venture [*Corp. Code § 16302(b)(1)*].

Joint venture property held in any name or names other than the venture's name without an indication, in the instrument transferring the property to the venture, of the holders' capacity as joint venturers or of the existence of the joint venture, may be transferred by an instrument of transfer executed by the persons in whose names the property is held [*Corp. Code § 16302(a)(3)*]. The joint venture may recover the property from a transferee only if (1) execution of the instrument of initial transfer did not bind the joint venture [*see Corp. Code § 16301* (when partner's act does not bind partnership)]; and (2) as to a transferee who gave value, the transferee knew or had received notice that the property was joint venture property and that the person who executed the instrument of initial transfer lacked authority to bind the venture [*Corp. Code § 16302(b)(2)*].

A joint venture may not recover its property from a subsequent transferee if the venture would not have been entitled to recover the property from any earlier transferee of the property [*Corp. Code § 16302(c)*].



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§ 29A.22 Management of Joint Venture Property

[1] Right to Manage Joint Venture's Property

In general, every joint venturer is an agent of the venture for the purpose of conducting the venture's business, and the act of any venturer apparently carrying on that business in the usual way binds the joint venture [*Corp. Code § 16301(1)*].

A partnership (including a joint venture) may file a statement of partnership authority, which may specify the authority, or limitations on the authority, of some or all the joint venturers to enter into transactions on behalf of the venture and any other matters [*Corp. Code § 16303(a)(2)*]. A person that is not part of a joint venture is deemed to know of a limitation on the authority of a joint venturer to transfer real property held in the venture's name if a certified copy of the filed statement of partnership containing the limitation is of record in the office for recording transfers of real property [*Corp. Code § 16303(e)*].

[2] Joint Venturers' Mutual Fiduciary Duties

Like any partner, a joint venturer owes a duty of loyalty and a duty of care to the joint venture [*Corp. Code § 16404(a)*]. A joint venturer must discharge those duties and any duties imposed by the joint venture agreement, and must exercise any rights as a joint venturer, in a manner that is consistent with the obligation of good faith and fair dealing [*Corp. Code § 16404(d)*]. A joint venturer does not violate a duty or obligation or the joint venture agreement simply because the venturer's conduct furthers his or her own interest [*Corp. Code § 16404(e)*].

The obligation of good faith and fair dealing may not be eliminated by the joint venture agreement. However, the agreement may prescribe standards to measure a venturer's performance of the obligation [*Corp. Code § 16103(b)(5)*].

For further discussion of partners' fiduciary duties to each other and the partnership, see Ch. 15, *General Partnerships* .

[3] Liabilities of Joint Venturers

Joint venturers are agents of each other in carrying out the business of the joint venture [*Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23* ; *Campagna v. Market St. Ry. Co. (1944) 24 Cal. 2d 304, 308, 149 P.2d 281]* , and joint venturers are jointly and severally liable for all debts and obligations of the venture [*Corp. Code § 16306(a)*; *see § 29A.11[4][a]*]. Thus, one joint venturer may bind all other members of the joint venture by a contract made with a third person in furtherance of the joint venture's purpose [*Lindner v. Friednash (1958) 160 Cal. App. 2d 511, 517, 325 P.2d 612* ; *see Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125]* .

Similarly, joint venturers are jointly and severally liable for all torts committed by any joint venturer in the ordinary course of business [*Corp. Code §§ 16305(a), 16306(a)*]. Thus, the negligence or other wrong of one joint venturer or his or her employees acting in connection with the joint venture ordinarily is imputed to the other joint venturers [*Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23* (negligence); *Rickless v. Temple (1970) 4 Cal. App. 3d 869, 894, 84 Cal. Rptr. 828* (fraud); *but see Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1669-1670, 60 Cal. Rptr. 2d 179* (nonnegligent joint venture is not liable when member of joint venture negligently injures member's employee, and member has provided workers' compensation coverage)].



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§ 29A.23 Dissolution of Real Estate Joint Venture

A joint venture established for a definite term or a particular undertaking is dissolved, and its business must be wound up, on the occurrence of any of the following:

- Express agreement by all the partners to dissolve the joint venture [*Corp. Code § 16801(2)(B)*].

- Expiration of the term of the joint venture, or the completion of the joint venture's undertaking [*Corp. Code § 16801(2)(C)*]. A transferee of a transferable interest in a joint venture may seek a judicial determination that is equitable to dissolve after the expiration of the term or completion of the undertaking [*see Corp. Code § 16801(6)*].

- The passage of 90 days after a joint venturer's dissociation by death or otherwise [*see Corp. Code § 16601(6)-(10)*], or a joint venturer's wrongful dissociation [*see Corp. Code § 16602(b)*], unless before that time a majority in interest of the joint venturers, including those who have rightfully dissociated [*see Corp. Code § 16602(b)(2)(A)*], agree to continue the joint venture [*Corp. Code § 16801(2)(A)*].

If the joint venturers have not agreed to continue the joint venture until the expiration of a definite term or the completion of a particular undertaking [*see Corp. Code § 16101(11)*], the joint venture must be dissolved and wound up if it is the express will of at least half the joint venturers (including venturers, other than wrongfully dissociating venturers, who have dissociated within the preceding 90 days) [*Corp. Code § 16801(1)* (dissociation under *Corp. Code § 16601(1)* constitutes expression of will to dissolve venture)].

Whether or not the joint venturers have agreed on a definite term or a particular undertaking, the joint venture is dissolved, and its business must be wound up, on the occurrence of an event specified in the joint venture agreement as triggering the winding up of the venture [*Corp. Code § 16801(3)*]. In addition, a joint venture must be dissolved and wound up if an event makes it unlawful for all or substantially all of the venture's business to be continued [*Corp. Code § 16801(4)* (cure of illegality within 90 days after notice to joint venture of event causing illegality is effective retroactively to date of event for purposes of this provision)].

In addition, a court may, on the application of a joint venturer, order the dissolution and winding up of the joint venture if the court finds any of the following [*Corp. Code § 16801(5)*]:

- The economic purpose of the joint venture is likely to be unreasonably frustrated.

- Another joint venturer has engaged in conduct relating to the venture's business that makes it not reasonably practicable to carry on the business in partnership with that venturer.

- It is not otherwise reasonably practicable to carry on the joint venture's business in conformity with the joint venture agreement.

For detailed coverage of the dissolution of partnerships, see Ch. 15, *General Partnerships* .



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§ 29A.30 Overview

Under the Tax Reform Act of 1986, the tax-shelter advantages of real estate partnerships were significantly curtailed and virtually eliminated with regard to passive investors. The "at risk" rules now apply to real estate, so that a taxpayer generally may not deduct losses in excess of the taxpayer's cash and property contributions to, and recourse financing in, the real estate activity, plus borrowed amounts for which the taxpayer is personally liable for repayment or has pledged property as security for repayment ("recourse financing") [*I.R.C. § 465(a),(b)(1),(2)*; *see Rev. & Tax. Code § 17851*]. Furthermore, the extent to which losses from real estate ventures may be taken against other income has been greatly reduced [*see I.R.C. § 469*; *see also § 29A.32*]. Depreciation deductions must be taken under the straight-line method [*see I.R.C. § 168*; *see also § 29A.33*].



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§ 29A.31 At-Risk Limitation on Losses

Individual and certain corporate taxpayers may deduct losses from an activity only to the extent of the aggregate amount with respect to which the taxpayer is "at risk" at the close of the taxable year [*I.R.C. § 465(a)*]. In general, the taxpayer is "at risk" with respect to money and property contributed to the activity and with respect to borrowed amounts for which the taxpayer is personally liable for repayment or has pledged property as security for repayment (recourse financing) [*see I.R.C. § 465(b)(1), (2)*]. However, in the case of an activity of holding real property, the taxpayer is considered at risk with respect to the taxpayer's share of qualified nonrecourse financing secured by the real property used in the activity [*I.R.C. § 465(b)(6)(A)*].

"Qualified nonrecourse financing" in this context is any financing borrowed by the taxpayer with respect to the activity of holding real property for which no person is personally liable for repayment [*I.R.C. § 465(b)(6)(B)(i),(iii)*]. The financing may not be convertible debt [*I.R.C. § 465(b)(6)(B)(iv)*] and must be borrowed from a qualified person [*see I.R.C. § 465(b)(6)(D)* ("qualified person" defined)] or borrowed from or insured by a governmental instrumentality [*I.R.C. § 465(b)(6)(B)(ii)*]. In the case of a joint venture, a venturer's share of any qualified nonrecourse financing is determined on the basis of his or her share of liabilities of the joint venture incurred in connection with the financing [*I.R.C. § 465(b)(6)(C)*; *see I.R.C. § 752*].



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§ 29A.32 Losses and Credits From Passive Activities

The at-risk rule acts as a ceiling on the amount of loss that may be deducted in regard to any activity [*see § 29A.31*]. The passive-activity rule then acts as a potential further limitation on the deductibility of losses that are otherwise allowable under the at-risk rule.

An activity involving the conduct of a trade or business in which the taxpayer does not materially participate is a "passive" activity for federal income tax purposes [*I.R.C. § 469(c)(1)*]. Deductions and credits arising from passive activities may be taken only against income and tax liability attributable to all passive activities [*I.R.C. § 469(a)(1),(d)*]. Deductions and credits that are disallowed under the passive-activity rule in any taxable year may be carried forward to the next taxable year but not back to any previous taxable year [*I.R.C. § 469(b)*].

A taxpayer is deemed to "materially participate" in an activity if the taxpayer i s involved in the operations of the activity on a regular, continuous, and substantial basis [*I.R.C. § 469(h)(1)*]. Each case is to be determined independently based on its facts and circumstances. Relevant considerations are whether the activity is the taxpayer's principal business, the taxpayer's physical presence on the premises of the activity, and the taxpayer's performance of management functions and services for the activity [*see* Senate Finance Committee Report on Tax Reform Act of 1986, 732-735]. Although a limited partner generally is not deemed a material participant [*see I.R.C. § 469(h)(2)*], a joint venturer who is involved in the day-to-day management of the venture probably will be found to be materially participating in the venture's activity [*see I.R.C. § 469(h)(1)*].

The passive-activity rule applies to any taxpayer that is an individual, estate, trust, closely held corporation, or personal services corporation [*I.R.C. § 469(a)(2)*]. However, there is an exception that permits closely held corporations to use passive losses and credits against active income but not against investment income [*see I.R.C. § 469(e)(2)*].

A rental activity in which payments are principally for the use of tangible property is generally deemed to be a passive activity, regardless of material participation [*I.R.C. § 469(c)(2), (j)(8); but see I.R.C. § 469(c)(7)* (special rules for taxpayers in real property business)]. However, there is a limited allowance of deductions and credits attributable to real-estate rental activities against other income. A natural person may apply his or her passive-activity losses and

credits against up to $25,000 of nonpassive income, if the person "actively participates" in the real-estate rental activities [*I.R.C. § 469(i)(1),(2)*]. The $25,000 limit is reduced by 50 percent of the taxpayer's adjusted gross income over $100,000 [*I.R.C. § 469(i)(3)*; *see I.R.C. § 469(i)(5)* (all amounts halved for married taxpayers filing separately)].

"Active" participation in relation to real-estate rental activity is a less stringent standard than "material" participation in relation to other passive activities. "Active" participation requires only significant and bona fide participation in the making of management decisions, even if arrangements are made for others to provide services. However, at a minimum, the taxpayer must have an interest of at least 10 percent of all interests in the activity for the entire taxable year, regardless of the personal time and effort invested in the activity [*I.R.C. § 469(i)(6)(A)*; *see* Senate Finance Committee Report on Tax Reform Act of 1986, 736-738]. The taxpayer must satisfy this active participation standard in both the year in which the deduction or credit arises and in the year in which it is taken [*I.R.C. § 469(i)(1)*]. As with the material-participation standard, a joint venturer who is involved in the day-to-day management of the venture probably will be found to be actively participating in the venture's activity.

If the taxpayer disposes of his or her interest in a passive activity during the taxable year in a transaction in which all gain or loss from the disposition is recognized for income tax purposes, any and all previously suspended passive activity losses from the activity will be deductible from any (*i.e.*, passive or nonpassive) income [*I.R.C. § 469(g)(1)(A)*]. The Internal Revenue Service however, may promulgate regulations requiring that these deductible losses be reduced by any income or gain from the activity for preceding taxable years, to the extent necessary to prevent the avoidance of the statutory limitations on passive activity losses and credits [*I.R.C. § 469(g)(1)(C)*; *see I.R.C. § 469*]. Transactions between related taxpayers do not trigger the allowance of suspended losses [*I.R.C. § 469(g)(1)(B)*; *see I.R.C. §§ 267(b), 707(b)(1)* (definitions of related taxpayers)].



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§ 29A.33 Depreciation Deductions

Residential rental property and nonresidential real property placed in service after December 31, 1986, must be depreciated according to the straight-line method [*I.R.C. § 168(b)(3)*; *see I.R.C. § 168(e)(2), 1250(c)* (definitions of residential rental property and nonresidential real property); *see also* Pub. L. No. 99-514, 203(a)(1) (effective date)]. The applicable recovery periods are 27.5 years for residential rental property and 39 years for nonresidential real property [*I.R.C. § 168(c)*], and the applicable recovery convention for both is the mid-month convention [*I.R.C. § 168(d)(1)*; *see I.R.C. § 168(d)(4)(B)* (definition of mid-month convention)]. An additional first-year depreciation deduction is available for qualified property acquired after December 31, 2007, and before January 1, 2010 [*I.R.C. § 168(k)(1),(2)(A)(iii)*]. The additional deduction is equal to 50 percent of the property's adjusted basis [*I.R.C. § 168(k)(1)(A)*]. The additional deduction generally applies to personal property, but it is also available for qualified leasehold improvement property, and it may come into play for real estate in this context [*I.R.C. § 168(k)(2)(A),(3)*]. Qualified leasehold improvement property includes an improvement to an interior portion of a building that is nonresidential real property if all of the following requirements are met [*I.R.C. § 168(k)(2)(A)(i)(IV),(3)(A)*]:

- The improvement is made under or pursuant to a lease between unrelated persons by either the lessee or the lessor.
- That portion is to be occupied exclusively by the lessee (or sublessee) of that portion.
- The improvement is placed in service more than three years after the date the building was first placed in service.

Certain improvements cannot qualify as qualified leasehold improvement property, including expenditures attributable to the enlargement of a building, any elevator or escalator, any structural component benefiting a common area, or the internal structural framework of the building [*I.R.C. § 168(k)(3)(B)*]. In order to be qualified property, the original use of the property generally must commence with the taxpayer after December 31, 2007 [*I.R.C. § 168(k)(2)(A)(ii)*] and generally must be placed in service by the taxpayer before January 1, 2010 [*I.R.C. § 168(k)(2)(A)(iv)*]. Property that is originally placed in service by a person and that is sold to the taxpayer and leased back to that person by the taxpayer

within three months after the date that the property was placed in service is treated as originally placed in service by the taxpayer not earlier than the date that the property is used under the leaseback [*I.R.C. § 168(k)(2)(E)(ii)*].

A taxpayer may elect an alternative to the bonus depreciation [*see I.R.C. § 168(k)(4)*]. If such an election is made for the taxpayer's first taxable year ending after March 31, 2008, for that taxable year and each subsequent taxable year *I.R.C. § 168(k)(1)* will not apply to any eligible qualified property [*see I.R.C. § 168(k)(4)(D), (k)(2)*] placed in service by the taxpayer [*I.R.C. § 168(k)(4)(A)(i)*]; the applicable depreciation method used with respect to that property will be the straight line method [*I.R.C. § 168(k)(4)(A)(ii)*]; and the limitations described in *I.R.C. § 38(c)* (general business credit) and *I.R.C. § 53(c)* (minimum tax credit) [*see I.R.C. § 168(k)(4)(B)*] will be increased by a bonus depreciation amount, which is determined under *I.R.C. § 168(k)(4)(C)* and allocated to that limitation under *I.R.C. § 168(k)(4)(E)* [*I.R.C. § 168(k)(4)(A)(iii)*].



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART II. LEGAL BACKGROUND
C. Tax Considerations

13-29A California Legal Forms--Transaction Guide §§ 29A.34-29A.99

[Reserved]

§§ 29A.34[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-29A California Legal Forms--Transaction Guide § 29A.100

§ 29A.100 Facts

1. For each person who will invest in the joint venture:

a. Name, address, telephone number, and e-mail address.

b. Name of spouse, if any.

c. If person is not individual, form of entity, such as:
(1) Corporation.

(2) General partnership.

(3) Limited partnership.

(4) Limited liability company.

c. Contribution each will make to joint venture, including:

(1) Cash.

(2) Property.

(3) Services.

2. Taxable year of each joint venturer.

NOTE:

This information will help in determining what the fiscal or taxable year of the joint venture should be [*see § 29A.111*, P 6].

3. Type of real property transaction or series of transactions for which joint venture will be formed, such as:

a. Acquisition and operation of apartment or office building [*see § 29A.200* (form)].

b. Purchase of vacant land with developmental potential for speculative resale to developer [*see § 29A.201* (form)].

c. Construction on real property of apartment, office, or other building for speculative sale on completion, such as:

(1) Property already owned by one of joint venturers [*see § 29A.202* (form)].

(2) Property to be purchased by one of joint venturers.

(3) Property to be acquired by joint venture itself.

(4) Property to be leased by the joint venture.

d. Acquisition of real property for investment, using funds lent to joint venture by one venturer [*see § 29A.203* (form)].

e. Purchase, and perhaps remodeling or construction, of suitable facilities for major tenant such as government or large corporation.

4. Location of real property that is to be subject of joint venture investment, including:

a. Exact legal description of real property.

b. Street address of real property.

c. Political subdivisions in which real property is located, including:

NOTE:

This information will be important in determining whether the property can be developed, if it is the desire of the joint venture to develop it, and what permits will be required to develop it. It may be difficult, for example, for a joint venture to sell land for subdivision purposes if the land is located in a sanitation district that will permit no new connections to be made to the sewer system it operates.

(1) County.

(2) City.

(3) School district.

(4) Fire district.

(5) Water, sanitation, and other districts.

5. Initial capital of joint venture, including:

a. Dollar amount to be contributed by each joint venturer.

b. If property is to be contributed by one or more joint venturers:

(1) Legal description of property.

(2) Value to be attributed on joint venture account books to property.

(3) Adjusted income tax basis for property of joint venturer who is contributing it to joint venture.

c. Manner in which contributions are to be made to joint venture, such as:

(1) By deposit in joint venture bank account at specific financial institution.

(2) By deposit in escrow account at specific title or escrow company for purchase of real property investment.

(3) By direct payment to third person for real property or for services rendered, such as architectural or engineering services, in connection with real property investment of joint venture.

6. Terms on which joint venture real property investment will be acquired, including:

a. Terms of purchase, including:

(1) Down payment.

(2) Installments on unpaid balance.
(a) When payments commence.

(b) Frequency of payments.

(c) Amount of payments.

(3) Subordination provisions.

(4) Partial release provisions, including:

(a) Amount that can be released at one time.

(b) Payments required for partial releases.

(c) Order in which parcels may be released.

b. Name, address, and contact information for seller.

c. Name, address, and contact information for real estate broker.

d. Escrow number, and name, address, and contact information for title company.

e. Details of construction to be done on property, including:

(1) Name, address, and contact information for architect.

(2) Name, address, and contact information for general contractor.

f. Details of construction loan, including:

(1) Name, address, and contact information for construction lender.

(2) Amount of loan.

(3) Interest terms.

(4) Repayment schedule.

(5) Whether lender has made commitment for permanent (take-out) loan.

7. Names in which title to joint venture real property investment is to be held, such as:

a. In name of joint venture.

b. In names of all joint venturers.

c. In name of one joint venturer as trustee for venture.

d. In name of title company under holding agreement.

8. Each joint venturer's role in conduct of venture's business, such as:

a. Resident manager of joint venture apartment or office building investment.

b. Broker for resale of speculation property purchased by joint venture as investment.

c. General contractor for construction of apartment or office building or other development joint venture is constructing for sale.

d. Resident manager of joint venture development after it is completed until it can be sold.

e. Nominal manager, keeping track of local taxes and assessments, and arranging for short-term rental of property purchased for eventual speculative resale to developer.

f. Solely investor in the joint venture real property project.

9. Manner in which profits and losses from joint venture investment are to be divided among joint venturers, including:

NOTE:

For income tax purposes, a joint venturer's distributive share of income, gain, loss, deduction, or credit is determined by the joint venture agreement [*I.R.C. § 704(a)*]. However, if the agreement does not provide for allocation of the venturers' distributive shares, or if the allocations provided for in the agreement do not have substantial economic effect independent of income tax consequences, the distributive shares are determined in accordance with each venturer's interest in the venture [*I.R.C. § 704(b)*]. A joint venture agreement may provide for the venturers to share the venture's losses in a different ratio than their shares of the venture's income, as long as the shares have "substantial economic effect" apart from tax consequences [*see I.R.C. § 704(b)(2)*; *see § 29A.11[3][c]*].

a. Venturers' shares of profits and losses from operation or rental of investment.

b. Venturers' shares of profits and losses on liquidation or resale of investment.

10. When accountings are to be made and profits or losses divided, such as:

a. Quarterly.

b. Monthly.

c. Monthly during operation of investment until sold.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-29A California Legal Forms--Transaction Guide § 29A.101

§ 29A.101 Documents

1. Preliminary report of title on real property investment, showing:

    a. Exact legal description of real property.

    b. Names in which title to real property stands.

    c. Names in which title will stand after acquisition by joint venture.

2. If any joint venturer is corporation, certified copy of its articles of incorporation.

3. If any joint venturer is partnership or unincorporated association, copy of its partnership agreement or articles of association.

4. If any joint venturer is limited liability company, copy of its operating agreement.

5. Copy of any contract for purchase by joint venture of real property investment or for construction of real property investment.

6. Copy of any promissory notes and mortgages or deeds of trust proposed to be executed by joint venture.

7. Any other instruments or contracts executed or proposed to be executed by joint venture or pertaining to joint venture's proposed real property investment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

13-29A California Legal Forms--Transaction Guide § 29A.110

§ 29A.110 Determining Whether to Organize Project as Joint Venture

1. Consider advantages and disadvantages of proceeding as joint venture.

a. Consider existence of any of following circumstances that favor use of joint venture:
(1) Participants are small group, usually fewer than five.

(2) Joint venture will invest in single property or project.

(3) Participants prefer flexibility in structure of their association [*see § 29A.11[3][c]*].

(3) All participants desire equal voice in management and control of investment [*see § 29A.11[3][d]*].

(4) Risks giving rise to personal liability of participants for joint venture's activities are insurable.

(5) No participant plans to assign his or her interest to third person.

b. Consider existence of any of following circumstances that favor formation of some association other than joint venture.

(1) There are five or more participants.

(2) Participants plan to invest in several successive transactions.

(3) Centralized management of investments will be needed [*see § 29A.11[4][b]*].

(4) Participants include "passive" investors who prefer:

NOTE:
discussion of the income tax considerations applicable to passive investors, see *§ 29A.32*.

(a) Not to participate personally in management of real property investments.

(b) To avoid personal liability for obligation or debts of association beyond their original capital contributions [*see § 29A.11[4][a]*].

(5) Association will make numerous conveyances and acquisitions of real property.

(6) Transactions contemplated by association will be complex and will require full-time attention of persons with considerable experience in real property transactions.

2. Consider advantages and disadvantages of other forms of business entity, such as [*see* Ch. 1B, *Selecting Form of Business Entity*]:

a. Corporation [*see* Ch. 2, *Formation of Corporations*].

b. Limited partnership [*see* Ch. 15A, *Formation of Limited Partnerships*].

c. Limited liability company [*see* Ch. 12C, *Limited Liability Companies*].

d. Business trust.

e. Real estate investment trust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

13-29A California Legal Forms--Transaction Guide § 29A.111

§ 29A.111 Planning Structure of Joint Venture

1. Clarify purpose of joint venture, such as:

    a. Indefinite operation of real property investment, such as apartment building.

    b. Acquisition of particular piece of land for speculative resale.

    c. Construction of real property development for speculative sale.

2. Determine term of joint venture, such as:

    a. Short term, for purchase and speculative sale of real property in short time.

    b. Time required to construct apartment building, office building, or other major real property development, and to sell it.

    c. Indefinite duration, for joint venture for permanent operation of apartment building or other real property investment.

3. Determine how title to real property investment should be held by joint venture, such as:

    a. In name of joint venture.

    b. In names of all joint ventures as tenants in common.

    c. In name of one joint venturer as trustee for all other joint venturers.

d. In name of title company under holding agreement.

e. In names of one joint venturer and spouse, as joint tenants as to undivided half interest, and in names of other joint venturer and spouse, as joint tenants as to undivided half interest.

4. Determine whether and how joint venture real property investment should be managed, considering:

a. Whether investment needs no management except continuous listing with reputable brokers for sale.

b. Whether investment needs only one person to keep track of when installment payments become due, and to arrange short-term rental of property pending sale by joint venture.

c. Whether investment requires resident manager to maintain premises and collect rents.

5. Determine what, if any, restrictions should be imposed on ability of joint venturer to incur liabilities in name and on credit of joint venture, such as:

NOTE:

Any restrictions placed in joint venture agreement will be binding only as between joint venturers. They will not be binding on a third person dealing with joint venture who has no knowledge of restrictions [*see Corp. Code § 15009*].

a. No restrictions at all.

b. No joint venturer may contract for liabilities over designated amount without consent of all joint venturers.

c. No liabilities at all may be contracted for without consent of all joint venturers.

6. Determine taxable year of joint venture.

NOTE:

There are three alternative methods of determining the taxable year of a partnership, including a joint venture. The first method determines the taxable year by reference to the taxable year and ownership interests of certain partners [*see I.R.C. § 706(b)(1)(B)*]. Under the second method, the partnership may use a taxable year that is based on a business purpose [*see I.R.C. § 706(b)(1)(C)*]. The third method permits the use of a taxable year other than a taxable year determined by reference to the partners or established by its business purposes [*I.R.C. § 444(a),(e)*]. Such an election may be made only if the "deferral period," that is, the period of time between the beginning of the tax period elected and the close of the first taxable year otherwise required ending within that year, is no longer than three months [*I.R.C. § 444(b)*]. If the partnership makes such an election, it must make advance tax payments [*I.R.C. § 444(c)(1)*; *see I.R.C. § 7519*]. For further discussion of these methods, see Ch. 15, *General Partnerships* .

7. If joint venture is for indefinite operation of real property investment, determine following:

a. Method of accounting, cash or accrual, to be used by joint venture.

b. Frequency, such as quarterly, monthly, or annually, with which accounting should be rendered of the joint venture enterprise [*see, e.g., § 29A.200[2],* P 11].

c. Whether any joint venturer is to receive any compensation for services in and about joint venture enterprise.

8. If joint venture is formed simply to acquire particular piece of land for speculation, determine following:

a. Contributions each joint venturer must make toward purchase price of land and toward payment of its taxes.

b. Manner in which contribution of joint venturers to installments coming due on purchase price of land and taxes levied on land will be collected.

c. What will happen if any joint venturer defaults in payment of any contribution due from him or her under joint venture agreement.

d. Terms on which real property will be resold by joint venture without further agreement among venturers.

9. If joint venture is formed to construct a real property development for speculation, determine following:

a. Duties of each joint venturer in relation to construction of project, including identification of:
(1) Venturer who is to obtain plans and specifications for project.

(2) Venturer or venturers who are to arrange construction financing for project.

(3) Venturer or venturers who are to obtain necessary permits and governmental authorizations to construct project.

(4) Venturer who is to supervise actual construction of project.

b. Manner in which construction funds for project are to be disbursed and construction costs paid, such as:

NOTE:

The manner in which construction funds will be disbursed will depend to some extent at least on the requirements imposed by the construction lender. The construction lender's requirements as to the manner in which construction loan funds are to be disbursed will usually be specified in the construction loan agreement between the lender and the joint venture. However, if construction financing has not yet been arranged at the time the joint venture agreement is drafted, counsel should include protective measures as to the disbursement of construction funds in the joint venture agreement. The joint venture agreement can be modified if the construction lender, when construction financing is arranged, requires disbursement procedures different from those included in the joint venture agreement. For a general discussion of construction financing, see Ch. 30A, *Basic Construction Financing* .

(1) On presentation of vouchers signed by all joint venturers [*see § 29A.202[2],* P 10].

(2) On vouchers to reimburse general contractor for amounts paid to subcontractors and material providers in accordance with cost estimates made by general contractor before construction began.

(3) On warrants or checks requiring signature of general contractor and one or more joint venturers.

(4) Through joint control or disbursement control agency [*see* Ch. 30E, *Joint (Builders') Control Agreements*].

c. What insurance should be carried by joint venture during construction and operation of project [*see § 29A.202[2]*, P 11], such as:

(1) General liability insurance.

(2) Fire, burglary, and other insurance:

(3) Employers' liability and workers' compensation insurance.

d. Manner in which project will be operated or preserved after completion, pending sale by joint venture, such as:

(1) Lease to one joint venturer for operation pending sale.

(2) Operation by joint venture pending sale.

e. Manner in which project after completion will be offered for sale, including:

(1) Broker who will handle sale.

(2) Acceptable terms of sale.

(3) How sale proceeds will be distributed [*see § 29A.202[2]*, P 13].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormationBusiness & Corporate LawJoint VenturesManagement Duties & Liabilities



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DIVISION II: REAL ESTATE TRANSACTIONS
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13-29A California Legal Forms--Transaction Guide §§ 29A.112-29A.119

[Reserved]

§§ 29A.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide

13-29A California Legal Forms--Transaction Guide § 29A.120

§ 29A.120 Formation of Joint Venture

1. Draft joint venture agreement [*see § 29A.130*; *see, e.g., §§ 29A.200, 29A.201, 29A.202, 29A.203*].

2. Prepare sufficient originals and copies of joint venture agreement:

a. One original copy for each of joint venturer.

b. One conformed copy for counsel's office files.

c. One conformed copy for joint venture's accountant.

d. Additional conformed copies as may be required by any:
(1) Title company.

(2) Construction or purchase money lender.

(3) Accountant for joint venturer.

3. Have joint venturers execute originals of joint venture agreement.

a. Have each joint venturer sign sufficient copies so that each joint venturer will have fully executed original of agreement.

b. Conform copies to show agreement was signed by all joint venturers on specified date.

4. Distribute copies of joint venture agreement.

5. Ensure that joint venture complies with any applicable local and state regulatory requirements, including:

a. Obtaining city, county, and state licenses and permits for business joint venture will operate.

b. Filing fictitious business name statement [see *Bus. & Prof. Code §§ 17910, 17913*; see also Ch. 1A, *Role of Counsel in Starting a New Business*]

c. If joint venture will have employees, obtaining requisite workers' compensation insurance.

6. If joint venture agreement limits authority of any joint venturer to act on behalf of venture, arrange for filing of statement of partnership authority [*see Corp. Code § 16303*; *see also* Ch. 15, *General Partnerships*].

a. Prepare statement of partnership authority, specifying following [*Corp. Code § 16303(a)*]:

(1) Name of joint venture.

(2) Street address of joint venture's chief executive office and, if chief executive office is not in California, one office in California, if there is one.

(3) Names and mailing addresses of all joint venturers or of agent appointed and maintained by the joint venture to maintain list of venturers' names and mailing addresses [*see Corp. Code § 16303(b)*].

(4) Names of joint venturers authorized to execute any instrument transferring real property held in name of joint venture.

(5) Specification of authority, or limitations on authority, of some or all joint venturers to enter into other transactions on behalf of joint venture and any other matter.

b. Have statement of partnership authority executed by at least two joint venturers [*Corp. Code § 16105(c)*].

c. File statement of partnership authority with Secretary of State [*Corp. Code § 16105(a)*].

d. Obtain certified copies of filed statement of partnership authority from Secretary of State, and file certified copies in recorder's office in each county in which joint venture will do business [*see Corp. Code § 16303(e)*].

NOTE:

A person that is not part of a joint venture is deemed to know of a limitation on the authority of a joint venturer to transfer real property held in the venture's name if a certified copy of the filed statement of partnership containing the limitation is of record in the office for recording transfers of real property [*Corp. Code § 16303(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormation



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide

13-29A California Legal Forms--Transaction Guide §§ 29A.121-29A.129

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§§ 29A.121[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Drafting Guide

13-29A California Legal Forms--Transaction Guide § 29A.130

§ 29A.130 Joint Venture Agreement

1. Draft general provisions and recitals, specifying date of agreement and identifying parties [*see, e.g., §§ 29A.200[2]*; *29A.201[2]*; *29A.202[2]*; *29A.203[2]*].

2. State purpose of joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 1; 29A.201[2], P 1; 29A.202[2], P 1; 29A.203[2], P 1].

3. Specify name of joint venture [*see, e.g., §§ 29A.200[2]*, P 2; 29A.202[2], P 2; 29A.203[2], P 2].

4. Specify term of joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 3; 29A.201[2], P 10; 29A.202[2], P 20; 29A.203[2], P 10].

5. Specify how title to joint venture real property is to be acquired and held by joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 4; 29A.201[2], P 2; 29A.203[2], P 3].

6. Specify contributions to be made by each joint venturer to capital of joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 5; 29A.201[2], P 4; 29A.202[2], PP 4, 5; 29A.203[2], P 5].

7. Draft provisions for management of joint venture real property [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 7; 29A.201[2], P 5; 29A.203[2], P 13].

8. Draft provisions for sharing of profits and losses among joint venturers [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, PP 12, 13; 29A.201[2], P 9; 29A.202[2], PP 13, 14; 29A.203[2], P 6].

9. Draft provision governing payment of compensation to joint venturers for services rendered to venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 8; 29A.202[2], P 15; 29A.203[2], P 12].

10. If appropriate, draft authorization for manager to make short-term rental of property pending disposition of property by joint venture [*see §§ 29A.111*, P 1; *see, e.g., § 29A.201[2]*, P 11].

11. If appropriate, draft provisions for construction of improvements on joint venture real property, including provisions for financing of construction [*see §§ 29A.111*, P 1; *see, e.g., § 29A.202[2]*, PP 6-10].

12. Specify insurance to be obtained by joint venture [*see §§ 29A.111*, P 1; *see, e.g., § 29A.202[2]*, P 11].

13. Provide for keeping of books of account for joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 9; 29A.202[2], P 16; 29A.203[2], P 8].

14. Specify fiscal year of joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 10; 29A.202[2], P 17].

15. Draft provisions for joint venture's bank account [*see §§ 29A.111*, P 1; *see, e.g., § 29A.202[2]*, P 18].

16. Provide for accountings between joint venturers [*see §§ 29A.111*, P 1; *see, e.g., § 29A.200[2]*, P 11].

17. If desired, include provision for arbitration of disputes between joint venturers [*see, e.g., § 29A.202[2]*, P 19].

18. Draft provisions governing dissolution of joint venture [*see §§ 29A.111*, P 1; *see, e.g., §§ 29A.200[2]*, P 14; 29A.202[2], P 20; 29A.203[2], PP 10, 11].

19. Specify manner of giving notices [*see, e.g., §§ 29A.200[2]*, P 15; 29A.201[2], P 12; 29A.202[2], P 23; 29A.203[2], P 14].

20. Draft provision making agreement binding on heirs, successors, and assigns of joint venturers [*see, e.g., §§ 29A.201[2]*, P 13; 29A.202[2], P 24; 29A.203[2], P 16].

21. State that agreement is sole agreement as to joint venture [*see, e.g., §§ 29A.200[2]*, P 17; 29A.201[2], P 14; 29A.202[2], P 25; 29A.203[2], P 15].

22. Specify whether and how joint venture agreement may be modified or amended [*see, e.g., §§ 29A.200[2]*, P 18; 29A.201[2], P 15; 29A.202[2], P 26; 29A.203[2], P 17].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormation



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Drafting Guide

13-29A California Legal Forms--Transaction Guide §§ 29A.131-29A.139

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§§ 29A.131[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART IV. FORMS

13-29A California Legal Forms--Transaction Guide § 29A.200

§ 29A.200 Joint Venture Agreement for Real Property Investment--Agreement Between Two Persons for Joint Purchase and Operation of Apartment Building

[1] Comment--Use of Form

This form is a basic agreement for the ownership and operation of an apartment building as a joint venture. Because the venture is intended to last for a long period of time, it provides that legal title to the apartment building will be held in the names of one joint venturer and his or her spouse as joint tenants as to an undivided half interest and in the names of the other joint venturer and his or her spouse as joint tenants as to an undivided half interest. Thus, on the death of either joint venturer, his or her interest in the apartment building will automatically vest in his or her spouse. For additional discussion of the manner in which title to real property may be held and conveyed by a joint venture, see *§ 29A.21[1]*.

This form provides that each joint venturer must bear the same proportion of joint venture losses that he or she would receive of profits if the joint venture is successful. The provision may be modified to make each joint venturer's share of profits different from his or her share of losses. However, for federal income-tax purposes, the allocation to a joint venturer under the joint venture agreement of any item of income, gain, loss, deduction, or credit will not be upheld unless it has substantial economic effect independent of income-tax consequences [*I.R.C. § 704(b)(2)*; *see § 29A.11[3][c]*].

Many of the provisions contained in the agreements *set forth in §§ 29A.201*, *29A.202*, and *29A.203* may be substituted for particular provisions in this form. Also, provisions in the forms in Ch. 15, *General Partnerships* , may be added to or substituted for provisions of the agreement in this form.

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Two Persons for Joint Purchase and Operation of Apartment Building

JOINT VENTURE AGREEMENT

THIS JOINT VENTURE AGREEMENT is entered into this _____ day of _____ [*month*], _____ [

year], by and between _____ [*name*] and _____ [*name*]. The parties have agreed and by these presents do hereby agree to associate themselves as joint venturers on the following terms and conditions.

Purpose of Joint Venture

1. The purpose of this joint venture shall be the purchase, ownership, and operation of an apartment building known as the "_____ Apartments," with an address of _____ [*number and street*], _____ [*city*], in _____ [*name of county*] County, California, and more particularly described as follows: _____ [*insert legal description of real property on which apartment building is located*].

Name of Joint Venture

2. The name of this joint venture shall be "_____ Apartments."

Term of Joint Venture

3. This joint venture shall commence on execution of this Agreement by the parties and shall continue until dissolved by mutual consent of the parties or terminated as provided for this Agreement.

Ownership of Apartment Building

4. Legal title to the apartment building and the real property on which it is located shall be acquired by this joint venture and maintained thereafter during the term of this joint venture in the names of _____ [*name of first joint venturer*] and _____ [*name of spouse*], _____ [his *or* her] spouse, as joint tenants as to an undivided half interest, and _____ [*name of second joint venturer*] and _____ [*name of spouse*], _____ [his *or* her] spouse, as joint tenants as to an undivided half interest.

Initial Capital

5. The initial capital of this joint venture shall be the sum of $_____, which shall, on or before _____ [*date*], be contributed to the joint venture by the parties as follows:

(a) _____ [*Name*] shall deposit in an escrow for the purchase of the apartment building to be opened at the _____ [*location*] Office of the _____ [*name*] Title Company in _____ [*city*], California, the sum of $_____, to be used as part of the down payment for the apartment building, together with an option for the purchase of the apartment building for which _____ [he *or* she] paid $_____ and for which _____ [he *or* she] shall be credited as contributing that sum to the joint venture;

(b) _____ [*Name*] shall deposit in an escrow for the purchase of the apartment building to be opened at the _____ [*location*] Office of the _____ [*name*] Title Company in _____ [*city*], California, the sum of $_____, to be used as part of the down payment for the apartment building, and shall deposit in a checking account in the name of the joint venture at the _____ [

location] Office of _____ [*name*] Bank in _____ [*city*], California, the sum of $_____ to be used as initial operating capital of the joint venture.

Purchase of Apartment

6. This joint venture shall purchase the apartment building on the terms contained and manner described in the "Option for Purchase of Real Property," attached to this Agreement and marked "Exhibit A."

Management

7. Each party shall have an equal voice in the management of this joint venture and the apartment building, and each party shall have authority to bind the joint venture in making contracts and incurring obligations in the name and on the credit of the joint venture, provided, however, that:

(a) _____ [*name*] shall be the resident manager of the apartment building having full charge of its day-to-day operations, and

(b) Neither party shall incur any obligations in the name or on the credit of the joint venture exceeding $_____ without the express written consent of the other party.

Salaries

8. Neither of the parties to this Agreement shall be entitled to any compensation for rendering services in and about the joint venture business or the apartment building, but _____ [*name*] shall be entitled to rent-free occupancy of a two-bedroom, two-bath apartment in the apartment building in exchange for _____ [his *or* her] services as resident manager of the apartment building.

Books of Account

9. At all times during the continuation of this joint venture, the parties shall keep accurate books of account in which all matters relating to the joint venture and the apartment building, including all income, expenditures, assets, and liabilities thereof, shall be entered. The books of account shall be kept on _____ [an accrual *or* a cash] basis and shall be open to examination by either party to this Agreement at any time.

Fiscal Year

10. The fiscal year of this joint venture shall end on the _____ day of [*month*] each year.

Accountings

11. A complete accounting of the joint venture affairs as of the close of business on the last day of March, June, September, and December of each year shall be rendered to each party to this Agreement within _____ [*number*] days after the close of each of those months. On each such accounting being made, the net profits and losses of the joint venture shall be distributed between the parties as herein provided. Except as to manifest errors brought to

the attention of the other party to this Agreement within _____ [*number*] days after its rendition, each such accounting shall be final and conclusive as to each party to this Agreement.

Profits and Losses

12. Any net profits or losses that may accrue to the joint venture shall be distributed to or borne by the joint venturers in equal proportions [*or* in the following proportions: _____ (*specify, e.g.*, Jones 60 percent and White 40 percent].

Net Profits and Losses Defined

13. The terms "net profits" and "net losses" as used in this Agreement shall mean the net profits or net losses of this joint venture as determined by generally accepted accounting principles for each accounting period provided for in this Agreement.

Dissolution of Joint Venture

14. On dissolution of this joint venture, the affairs of the joint venture shall be wound up, the assets of the joint venture liquidated, the debts of the joint venture paid, and the surplus divided among the parties to this Agreement according to their then net worth in the joint venture.

Notices

15. Any notice or other communication required or permitted by this Agreement or by law to be delivered to, served on, or given to either party to this Agreement by the other party to this Agreement shall be in writing and shall be deemed properly delivered, served, or given when personally delivered to the party to whom it is directed or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to _____ [*name of party*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], or to _____ [*name of party*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], as appropriate. Either party may change _____ [his *or* her *or* his or her] address for purposes of this paragraph by giving written notice of such change.

Consents and Agreements

16. Any consent or agreement provided for or permitted by this Agreement shall be in writing, and a signed copy thereof shall be filed and kept with the books of the joint venture.

Sole Agreement

17. This instrument contains the only agreement of the parties relating to their joint venture and correctly sets forth the rights, duties, and obligations of each to the other in connection with the joint venture as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

Amendment

18. This Agreement may be amended or modified in any way by an instrument in writing, stating the amendment or modification, signed by both parties and attached to this Agreement.

EXECUTED at _____ County, California, on the day and year first above written.

_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART IV. FORMS

13-29A California Legal Forms--Transaction Guide § 29A.201

§ 29A.201 Joint Venture Agreement for Real Property Investment--Agreement to Purchase Property for Speculative Resale to Developer

[1] Comment--Use of Form

This form sets forth an agreement between two or more persons to speculate on certain specific land having potential for subdivision or other development. Because the length of time the joint venture will need to hold the real property before it can be sold at a profit to a developer is uncertain, the agreement appoints a manager for the joint venture property. However, the duties, and therefore the authority, of the manager are rather limited. He or she is charged with the duty of keeping track of the payments and taxes on the property and seeing they are paid as they become due. The only express authority given to the manager is the authority to rent the real property for grazing or other temporary purposes pending its sale to a developer. In a typical case, any of the joint venturers, the bookkeeper for the joint venture, or the real estate broker who helped bring about the joint venture will be named manager.

Because the length of time the joint venture will hold the speculative real property is uncertain, the agreement in this form also provides for contributions by the joint venturers of such amounts as may be needed from time to time to meet mortgage and tax payments on the property. In the ideal situation, the property can be sold at a profit to a developer before any installment on the purchase-money mortgage or deed of trust executed by the joint venturers or any installment of taxes levied on the property becomes due. It also contains a provision that can be used either to require rentals received from use of the property pending its sale to be divided among the joint venturers equally, or to authorize their retention by the property manager.

Many of the provisions contained in the agreements *set forth in §§ 29A.200*, *29A.202*, and *29A.203* may be substituted for particular provisions in this form. Also, provisions in the forms in Ch. 15, *General Partnerships* , may be added to or substituted for provisions of the agreement in this form.

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement to Purchase Property for Speculative Resale to Developer

JOINT VENTURE AGREEMENT

THIS JOINT VENTURE AGREEMENT is entered into this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name*] and _____ [*name*]. The parties have agreed and by these presents do hereby agree to associate themselves as joint venturers on the following terms and conditions.

Purpose of Joint Venture

1. The only purpose of this joint venture shall be the purchase, ownership, and resale for development purposes of the real property in the County of _____, California, described as follows: _____ [*insert legal description of real property*]. This property shall be referred to in this Agreement as the "Joint Venture Property."

Title to Joint Venture Property

2. Legal title to the Joint Venture Property shall be acquired and maintained during the term of this joint venture in the names of _____ [*name of first joint venturer*] and _____ [*name of second joint venturer*] as tenants in common.

Purchase of Joint Venture Property

3. This joint venture shall purchase the Joint Venture Property on the terms and conditions contained, and in the manner described, in that certain "Contract for Sale of Real Property" dated _____, executed by the parties to this Agreement as "Buyers," a copy of which contract is attached to this Agreement and marked "Exhibit A." Each party agrees to promptly on request execute, or execute and acknowledge, any and all instruments, including proper instructions, necessary to the complete performance by them as Buyers under the contract.

Initial Investment

4. Each party to this Agreement shall contribute the sum of $_____, which is half of the down payment required for the purchase of the Joint Venture Property, by depositing that sum on or before _____ [*date*] in an escrow established for the purchase of the Joint Venture Property with the _____ [*location*] Office of the _____ [*name*] Title Company in _____ [*city*], California. Further, each party to this Agreement agrees to pay promptly into that escrow, on request of _____ [*name*] Title Company, half of all the prorations, expenses, and costs required to be paid by "Buyers" pursuant to the contract attached as "Exhibit A" in order to close the escrow for the purchase of the Joint Venture Property by this joint venture.

Management

5. _____ [*Name*] shall have active management of the Joint Venture Property during the continuation of this joint venture, shall make all payments coming due on the Joint Venture Property during the term of this joint venture, and shall promptly notify each party to this Agreement at least 20 days before they become due of all installments of principal or interest and taxes becoming due on account of the Joint Venture Property or the purchase of the Joint Venture Property by this joint venture. However, no sale or other action shall be taken concerning the Joint Venture Property except as expressly provided in this Agreement without the express consent of all parties to this

Agreement.

Taxes and Installments

6. Each party to this Agreement agrees to pay by depositing with _____ [*name of manager*] at _____ [*number and street*], _____ [*city*], California, at least 10 days before they become due:

(a) Half of any and all installments of principal or interest becoming due under the contract attached as "Exhibit A" during the term of this joint venture, and

(b) Half of any and all taxes, including any water or sewer taxes imposed by any district charged with the responsibility for furnishing water or sewer services to the Joint Venture Property, levied or assessed against the Joint Venture Property during the term of this joint venture.

Default Clause

7. Should any party to this Agreement default in the payment of any amounts required by Paragraph 6 of this Agreement, such amount may be paid by the other party to this Agreement and charged as a lien on the interest of the defaulting party in the Joint Venture Property payable, together with interest at the annual rate of 6 percent, from the share of the defaulting party on the sale of the Joint Venture Property.

Sale of Property

8. The Joint Venture Property, after its acquisition by this joint venture, shall be continuously listed for sale by this joint venture with _____ [*name of broker*], a licensed real estate broker, and shall be sold on receipt of an offer for its purchase by a reputable buyer, acceptable to the parties to this Agreement, at a price agreeable to the parties to this Agreement at least _____ [*number, e.g.,* 150] percent of the purchase price recited in the contract hereto attached marked "Exhibit A." However, no such offer to purchase shall be accepted by this joint venture unless:

(a) The proposed buyer is a reputable firm or individual in a solvent condition able to pay all its or his obligations as they mature;

(b) Not less than _____ [*number*] percent, but not more than 30 percent, of the full purchase price for the Joint Venture Property is payable in cash at the close of escrow;

(c) The unpaid balance of the purchase price shall be secured by a Deed of Trust on the Joint Venture Property that may be subordinate or subordinated only to construction loans from institutional lenders that (1) are to be used only to finance the construction of designated improvements on the Joint Venture Property; (2) do not bear interest, exclusive of late charges and penalties or fees payable in case of default, greater than _____ [*number*] percent per annum; and (3) do not exceed half of the contemplated value of the improvement, when completed, each is to finance.

Proceeds of Sale

9. The net proceeds of any sale pursuant to Paragraph 8 of this Agreement, including payments made on any promissory note executed as part of the purchase price in a sale pursuant to Paragraph 8, shall be divided among and distributed to the parties to this Agreement equally [*or* according to the contribution made by each to the purchase price paid by this joint venture for the Joint Venture Property *or* in the following manner: _____ (*specify, e.g.,* 60 percent to John Jones and 40 percent to John White)].

Term of Joint Venture

10. The term of this joint venture shall commence on execution of this Agreement and continue until the full purchase price agreed to be paid to this joint venture as part of any sale pursuant to Paragraph 8 of this Agreement has been paid in full.

Rental of Joint Venture Property

11. Pending close of escrow for any sale described in Paragraph 8 of this Agreement, the manager named in Paragraph 5 of this Agreement may at any time and from time to time rent the Joint Venture Property, for grazing or other purposes that do not require the erection of permanent improvements on the Joint Venture Property, for such rental as may to _____ [him *or* her] seem reasonable. Any such rental shall, however, be on express condition it may be terminated within _____ [*number*] days after the close of escrow for any sale described in Paragraph 8 of this Agreement. Any rentals received for renting of the Joint Venture Property pursuant to this paragraph shall be equally divided, as received, among the parties to this Agreement [*or* retained by the manager for _____ [his *or* her] efforts in renting the Joint Venture Property].

Notices

12. Any notice or other communication required or permitted by this Agreement or by law to be delivered to, served on, or given to either party to this Agreement by the other party to this Agreement shall be in writing and shall be deemed properly delivered, served, or given when personally delivered to the party to whom it is directed or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to _____ [*name of party*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], or to _____ [*name of party*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], as appropriate. Any party may change _____ [his *or* her *or* his or her] address for purposes of this paragraph by giving written notice of such change.

Binding on Heirs

13. The provisions of this Agreement shall be binding on and inure to the benefit of the parties hereto and their heirs, administrators, and executors.

Sole Agreement

14. This instrument contains the only agreement of the parties relating to their joint venture and correctly sets forth the rights, duties, and obligations of each to the other in connection with the joint venture as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

Amendment

15. This Agreement may be amended or modified in any way by an instrument in writing, stating the amendment or modification, signed by both parties.

EXECUTED at _____ County, California, on the day and year first above written.

_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29A JOINT VENTURES
PART IV. FORMS

13-29A California Legal Forms--Transaction Guide § 29A.202

§ 29A.202 Joint Venture Agreement for Real Property Investment--Agreement Between Real Property Owner and General Contractor to Construct Apartment Building on Owner's Land for Speculative Sale

[1] Comment--Use of Form

This is a joint venture agreement between two parties who wish to combine their assets and talents to build an apartment house and sell it for a profit. Under the agreement, the apartment house is to be constructed by a joint venturer who is a licensed general contractor, on a specific piece of real property owned by the other joint venturer. Each joint venturer agrees to pay half of certain fees and to deposit specified sums in a joint venture bank account to cover general operating expenses of the joint venture. The major part of the cost of constructing the apartment building is, however, to be financed by a construction loan from a commercial lending institution [*see* [2], P 7, *below*].

By the terms of this agreement, the joint venture--consisting of the real property owner and the general contractor--is to sign a construction contract with the general contractor to construct the apartment building that is the subject of their joint venture. In other words, one joint venturer will assume full control and responsibility as a general contractor for construction of the apartment building. For the construction contracts that may be made between the joint venture and the general contractor, see Ch. 30D, *Construction Contracts and Subcontracts* .

This form provides that title to the real property involved is to remain in the name of the owner as trustee for both joint venturers until the apartment building is sold. Because the apartment building may not be sold as soon as it is completed, this form provides that the joint venturer who owns the real property may manage and operate the apartment building on behalf of the joint venture until it is sold. The proceeds from the operation are to be divided equally at the end of each month.

This form provides that on sale of the apartment building the net proceeds are to be divided equally between the joint venturers. If the sale results in a loss, however, the agreement provides for different proportions in which the loss will be borne by the two joint venturers. For federal income tax purposes, an allocation to a joint venturer under a joint venture agreement of any item of income, gain, loss, deduction, or credit will not be upheld unless it has substantial economic effect independent of income tax consequences. If the allocation agreement is not upheld, the allocation to a joint venturer is determined in accordance with the person's interest in the joint venture (determined by taking into

account all facts and circumstances) [*I.R.C. § 704(b)*; *see § 29A.11[3][c]*].

Many of the provisions contained in the agreements *set forth in §§ 29A.200*, *29A.201*, and *29A.203* may be substituted for particular provisions in this form. Also, provisions in the forms in Ch. 15, *General Partnerships* , may be added to or substituted for provisions of the agreement in this form.

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Real Property Owner and General Contractor to Construct Apartment Building on Owner's Land for Speculative Sale

JOINT VENTURE AGREEMENT

THIS JOINT VENTURE AGREEMENT is entered into this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name*], "Owner," and _____ [*name*], "Contractor."

Recitals

A. *Identity of Owner and Property.* Owner is the owner of [*or* will acquire at _____ (his *or* her) own cost and expense] certain real property in the County of _____, California, described as follows: _____ [*insert legal description of real property*]. This property shall be referred to in this Agreement as the "Joint Venture Property."

B. *Identity of Contractor*. Contractor is a General Contractor duly licensed as such by the Contractors State License Board of the State of California and experienced in the construction of apartment buildings and other multiple-unit buildings.

C. *Identity of Project.* Owner and Contractor wish to erect for operation and sale an apartment building, herein called the "_____ [*name*] Apartment Building," of approximately _____ [*number*] units on the Joint Venture Property.

Formation of Joint Venture

The parties have agreed and by these presents do hereby agree to associate themselves as joint venturers on the following terms and conditions.

Purpose of Joint Venture

1. The purpose of this joint venture is to erect, operate, and sell the _____ [*name*] Apartment Building on the Joint Venture Property.

Name of Joint Venture

2. The name of this joint venture shall be _____ [*name of joint venture*].

Office for Joint Venture

3. This joint venture shall maintain an office for the transaction of its business at _____ [*number and street*], _____ [*city*], California. However, the location of the office may be changed by mutual agreement of the parties to any other site or sites that may be convenient to the erection, operation, and sale of the _____ [*name*] Apartment Building.

Contributions of Owner

4. Owner shall contribute all of the following to this joint venture:

(a) The Joint Venture Property, having an agreed value of $_____. However, record title to the Joint Venture Property shall remain in the name of Owner until the _____ [*name*] Apartment Building is sold pursuant to Paragraph 13 of this Agreement.

(b) The sum of $_____, to be used for general operational expenses of this joint venture and to be deposited in a checking account in the name of the joint venture at the _____ [*location*] Office of _____ [*name*] Bank in _____ [*city*], California, within _____ [*number*] days after execution of this Agreement.

(c) Half the cost, payable as they become due, of both of the following:

(1) Securing architect's plans and specifications for the _____ [*name*] Apartment Building.

(2) Obtaining any permits or licenses required for the construction or operation of the _____ [*name*] Apartment Building.

Contributions of Contractor

5. Contractor shall contribute all of the following to this joint venture:

(a) The 10-percent profit, normally earned by Contractor on multiple-unit construction contracts, that would otherwise be earned by Contractor on the contract for constructing the _____ [*name*] Apartment Building.

(b) The sum of $_____, to be used for general operational expenses of this joint venture and to be deposited in a checking account in the name of the joint venture at the _____ [*location*] Office of _____ [*name*] Bank in _____ [*city*], California, within _____ [*number*] days after execution of this Agreement.

(c) Half the cost, payable as they become due, of both of the following:

(1) Securing architect's plans and specifications for the _____ [*name*] Apartment Building.

(2) Obtaining any permits or licenses required for the construction or operation of the _____ [*name*] Apartment Building.

Architectural Plans and Specifications

6. Immediately following execution of this Agreement by both parties [*or* Immediately following the Joint Venture Property becoming available for construction of the _____ (*name*) Apartments], Contractor shall cause complete architectural plans and specifications, complying with the laws of the State of California and the city and county in which the Joint Venture Property is located, to be prepared for the _____ [*name*] Apartment Building by a qualified licensed architect. However, no such plans and specifications shall be placed into execution or accepted by this joint venture until approved by both parties to this Agreement. Further, the costs and expenses of causing such architectural plans and specifications to be prepared shall be an expense of this joint venture payable by it as provided in this Agreement.

Construction Financing

7. Immediately following preparation and acceptance by this joint venture of the plans and specifications described in Paragraph 6 of this Agreement, Contractor shall use _____ [his *or* her] best efforts to obtain from a commercial lending institution, at the most favorable rates and on the most favorable terms reasonably available, construction financing for the _____ [*name*] Apartment Building. In obtaining such financing, Contractor will attempt to arrange for all of the following:

(a) Payments on the construction loan not to commence until after completion of the _____ [*name*] Apartment Building.

(b) Interest to be charged on the construction loan only on funds actually paid out by the lending institution and then only from the date they are paid out by the lending institution.

(c) Construction loan funds to remain on deposit with the lending institution making the construction loan and to be paid out by it only pursuant to vouchers issued pursuant to the voucher system described in Paragraph 10 of this Agreement.

(d) A commitment, if possible, for long-term permanent financing of the _____ [*name*] Apartment Building after the completion of construction.

Building Permits

8. When a binding commitment for construction financing has been obtained from a lending institution pursuant to Paragraph 7 of this Agreement, Contractor shall apply for and secure, at the cost and expense of this joint venture, all building and use permits required for the construction of the _____ [*name*] Apartment Building.

Construction of Apartment Building

9. When arrangements for construction financing have been made and a building permit has been issued for the _____ [*name*] Apartment Building, this joint venture as owner of the _____ [*name*] Apartment Building shall enter into a construction contract in the form attached to this Agreement, with Contractor as General Contractor for the construction of the _____ [*name*] Apartment Building. In Contractor's capacity as General Contractor under the construction contract, and not in a capacity as a member of this joint venture, Contractor shall supply, purchase, hire, and make subcontracts for all labor, material, and equipment required for the construction of the _____ [*name*] Apartment Building. All such contracts, purchases, and hiring shall

be made in the individual [*or* corporate] name of Contractor and not in the name of this joint venture. Contractor shall have no authority to enter into any contracts or incur any obligations in the name or on the credit of this joint venture or Owner. Contractor, in Contractor's capacity as General Contractor under the above construction contract, shall supervise complete construction of the _____ [*name*] Apartment Building. Contractor agrees that the _____ [*name*] Apartment Building will be completed within _____ [*number, e.g.,* eight] months after commencement of construction unless delayed by acts of God or other acts beyond Contractor's control. Contractor further agrees to commence, as General Contractor under the construction contract, construction of the _____ [*name*] Apartment Building within _____ [*number, e.g.,* 30] days after issuance of a building permit for the work, weather permitting.

Payment of Construction Costs

10. All construction funds for the construction of the _____ [*name*] Apartment Building shall remain on deposit with the lending institution making the construction loan and shall be disbursed only on vouchers signed by Contractor and countersigned as approved by Owner. Vouchers will be prepared by Contractor. No voucher will be issued for an amount in excess of 90 percent of the cost of work, labor, or materials already actually performed or furnished to the construction of the _____ [*name*] Apartment Building. Contractor's signature on a voucher will be Contractor's certification that the amount of the voucher represents no more than 90 percent of the value of work, labor, or materials actually performed or supplied to the construction of the _____ [*name*] Apartment Building by the person or firm to whom the voucher is payable. Owner shall have the power to inspect any work, labor, or materials allegedly furnished in connection with the construction of the _____ [*name*] Apartment Building before approving a voucher for the work, labor, or materials. All amounts withheld and not paid by vouchers during the course of construction for work, labor, or materials furnished in the construction of the _____ [*name*] Apartment Building shall be paid to the person who performed or furnished the work, labor, or materials after completion of the _____ [*name*] Apartment Building and expiration of the period within which mechanics' liens could be filed for the construction of the _____ [*name*] Apartment Building.

Insurance

11. Owner, at the cost and expense of this joint venture, shall procure and maintain insurance to protect and hold this joint venture, and each of the joint venturers, harmless from all liability arising because of the construction, operation, and sale of the _____ [*name*] Apartment Building, including all of the following:

(a) A comprehensive general liability policy with limits not less than $_____ per occurrence.

(b) Fire, burglary, and other insurance indemnifying this joint venture for any loss or damage caused to the _____ [*name*] Apartment Building during the course of construction and thereafter by fire, water, burglary, or act of God.

(c) Workers' compensation insurance insuring any persons who become employees of this joint venture. Owner and Contractor have procured and will maintain during the continuation of this Agreement adequate workers' compensation insurance to cover persons employed by each of them in their individual capacities. Contractor will require each subcontractor employed by it to perform work or labor in the construction of the _____ [*name*] Apartment Building to furnish a certificate to Owner showing the employees of the subcontractor are fully covered by adequate workers' compensation insurance. Contractor will at all times maintain with Owner a certificate showing all persons employed by Contractor in the construction of the _____ [*name*] Apartment Building as General Contractor under the contract described in Paragraph 9 of this Agreement are covered by adequate workers'

compensation insurance.

Operation and Sale of Apartment Building

12. On completion of construction of the _____ [*name*] Apartment Building, it and the land on which it is located shall be promptly listed for sale with reputable real estate brokers at such price and on such terms as may be agreed on by the parties to this Agreement. Pending any such sale of the _____ [*name*] Apartment Building, it shall be operated as an apartment building in the following manner:

(a) Owner shall have charge of the day-to-day management of the _____ [*name*] Apartment Building and shall be entitled to a two-bedroom apartment, rent free, in the _____ [*name*] Apartment Building as resident manager of the _____ [*name*] Apartment Building.

(b) The _____ [*name*] Apartment Building shall be maintained and managed in accordance with the standards of reasonable apartment management in the community and, should Owner fail to maintain such standards, Contractor may demand that Contractor or Contractor's nominee be entrusted with day-to-day management of the _____ [*name*] Apartment Building.

(c) No expenditures or liabilities shall be made in the name or on this credit of this joint venture in the management and operation of the _____ [*name*] Apartment Building exceeding $_____ without the express written consent of both parties to this Agreement.

(d) The rentals to be charged for and the terms on which apartments are to be rented in the _____ [*name*] Apartment Building shall be determined according to prevailing rental policies in the community and at all times shall be sufficient to pay any installments coming due on the construction loan used to finance construction of the _____ [*name*] Apartment Building.

(e) A complete accounting of the operation of the _____ [*name*] Apartment Building shall be rendered as of the close of business each calendar month to each party to this Agreement within _____ [*number*] days after the close of each month, and on such accounting being made, the net profits and losses of the operation shall be distributed between the parties to this Agreement in equal proportions. If not objected to within _____ [*number*] days after it is rendered, each such accounting shall be binding and conclusive as to each party to this Agreement.

Sale of Apartment Building

13. On sale of the _____ [*name*] Apartment Building after its completion, the net proceeds from the sale, after payment of all necessary costs and expenses and commissions of the sale and the escrow for the sale, shall be disbursed as follows:

(a) First, all liens and encumbrances, including any mortgage or deed of trust securing a construction loan, then encumbering the _____ [*name*] Apartment Building and the land on which it is located, shall be paid;

(b) Second, all other unpaid debts incurred by this joint venture shall be paid;

(c) Third, Owner shall be reimbursed for the costs expended by Owner in acquiring the Joint Venture Property on which the _____ [*name*] Apartment Building is located; and

(d) Finally, any remaining balance of the purchase price paid to this joint venture for the _____ [*name*] Apartment Building shall be equally divided between and distributed to the parties to this Agreement.

Loss on Sale

14. Notwithstanding anything specified in Paragraph 13 of this Agreement, if the sale of the _____ [*name*] Apartment Building after completion should result in a net loss to this joint venture, that loss shall be borne by the parties in the following proportions: Owner shall bear _____ percent of the loss, and Contractor shall bear _____ percent of the loss.

No Compensation

15. Neither of the parties to this Agreement shall be entitled to any compensation for services rendered in and about this joint venture, the construction of the _____ [*name*] Apartment Building, or the operation and sale of the _____ [*name*] Apartment Building after it is completed.

Books of Account

16. At all times during the continuation of this joint venture, the parties shall keep accurate books of account in which all matters relating to the joint venture and the apartment building, including all income, expenditures, assets, and liabilities thereof, shall be entered. The books of account shall be kept on _____ [an accrual *or* a cash] basis and shall be open to examination by either party to this Agreement at any time.

Fiscal Year

17. The fiscal year of this joint venture shall end on the _____ day of [*month*] each year.

Bank Account

18. A bank account in the name of this joint venture shall be maintained at the _____ Office of _____ [*name*] Bank in _____ [*city*], California. All expenditures made by or on behalf of this joint venture directly shall be made by check drawn on that account, and all rentals received from apartments in the _____ [*name*] Apartment Building, after its completion, shall be deposited in that account. All checks on that account must be signed by an authorized representative of both parties to the Agreement.

Arbitration

19. Should any controversy arise between the parties to this Agreement concerning this joint venture, construction of the _____ [*name*] Apartment Building, operation of the _____ [*name*] Apartment Building, sale of the _____ [*name*] Apartment Building, or the rights and duties of either party under this Agreement, the controversy shall be settled by arbitration in the following manner. Each party shall select and appoint one arbitrator. The two arbitrators so appointed shall select and appoint a third arbitrator. The decision in writing of any two of the arbitrators so appointed shall be binding and conclusive as to both parties to this Agreement. Should either party to this Agreement fail to appoint an arbitrator as required by this paragraph within

_____ [*number*] days after receiving written notice from the other party to so do, the arbitrator appointed by the other party shall act for both parties and his or her decision in writing shall be binding and conclusive on both parties to this Agreement. The cost and expense and fees of the arbitrators shall be borne by the parties equally or may be assessed by the arbitrators, in whole or in part, against either party to this Agreement.

Termination of Joint Venture

20. This joint venture shall commence on execution of this Agreement and shall continue until the first of any of the following events or conditions occurs:

(a) The sale, after completion, of the _____ [*name*] Apartment Building and the distribution of the proceeds of that sale in the manner provided in this Agreement.

(b) The insolvency of either party, as defined in Paragraph 21 of this Agreement.

(c) The Contractor's failure to complete construction of the _____ [*name*] Apartment Building within the time specified in this contract.

(d) The Contractor's cessation of labor on the construction of the _____ [*name*] Apartment Building for a period in excess of 60 days, unless the cessation is due to causes beyond Contractor's control.

(e) Any voluntary or involuntary assignment or transfer by either party to this Agreement, without the consent of the other party, of an interest in this joint venture.

(f) The mutual agreement of the parties to this Agreement.

(g) A substantial default or breach of this Agreement by either party.

(h) The death of either party to this Agreement.

Insolvency Defined

21. For purposes of Paragraph 20 of this Agreement, neither party shall be deemed "insolvent" unless that party either (a) is adjudged a bankrupt; (b) has a receiver appointed to take possession of all or substantially all that party's property because of insolvency; (c) makes a general assignment for the benefit of creditors; or (d) allows any attachment, execution, or judgment against that party to remain unsatisfied or unbonded for a period of 30 days or longer.

Remedies on Termination

22. Should this joint venture be terminated for any cause mentioned in Paragraph 20 of this Agreement other than the sale after completion of the _____ [*name*] Apartment Building or mutual agreement of the parties, then:

(a) If the termination is caused by Contractor, Owner may secure the services of any other General Contractor licensed as such by the Contractors State License Board of the State of California to complete the _____ [*name*] Apartment Building on such terms as Owner may find reasonable, and charge the same against Contractor's interest in this joint venture.

(b) If the termination is caused by Owner, Contractor may complete the _____ [*name*] Apartment Building, operate it for a period not exceeding six months after its completion, and then sell it, charging Owner's interest in this joint venture with any loss sustained by Contractor or any damages suffered by Contractor because of Owner's action causing termination.

Notices

23. Any notice or other communication required or permitted by this Agreement or by law to be delivered to, served on, or given to either party to this Agreement by the other party to this Agreement shall be in writing and shall be deemed properly delivered, served, or given when personally delivered to the party to whom it is directed or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Owner at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], or to Contractor at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], as appropriate. Either party may change _____ [his *or* her *or* his or her] address for purposes of this paragraph by giving written notice of such change.

Binding on Heirs

24. The provisions of this Agreement shall be binding on and inure to the benefit of the parties and their heirs, administrators, and executors.

Sole Agreement

25. This instrument contains the only agreement of the parties relating to their joint venture, the Joint Venture Property, and the _____ [*name*] Apartment Building and correctly sets forth the rights, duties, and obligations of each to the other in connection with the joint venture as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

Amendment

26. This Agreement may be amended or modified in any way by an instrument in writing, stating the amendment or modification, signed by both parties.

EXECUTED at _____ County, California, on the day and year first above written.

OWNER
_____ [*signature*]
[*typed name*]
CONTRACTOR
_____ [*signature*]
[*typed name*]



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CHAPTER 29A JOINT VENTURES
PART IV. FORMS

13-29A California Legal Forms--Transaction Guide § 29A.203

§ 29A.203 Joint Venture Agreement for Real Property Investment--Agreement Between Two Corporations, With One Corporation Lending Funds to Joint Venture

[1] Comment--Use of Form

This is a joint venture agreement between two corporations to invest in real property, with the venture terminating when its properties are sold or on a specified date, whichever is earlier. Under this agreement, one corporation is obligated to lend additional funds needed by the joint venture beyond the parties' initial capital contributions. In return, the lending corporation is given the option of continuing the joint venture beyond the contractual termination date if its loans have not been repaid [*see* [2], P 10, *below*].

Many of the provisions contained in the agreements *set forth in §§ 29A.200 through 29A.202* may be substituted for particular provisions in this form. Also, provisions in the forms in Ch. 15, *General Partnerships* , may be added to or substituted for provisions of the agreement in this form.

[2] FORM

Joint Venture Agreement for Real Property Investment--Agreement Between Two Corporations, With One Corporation Lending Funds to Joint Venture

JOINT VENTURE AGREEMENT

THIS JOINT VENTURE AGREEMENT is entered into this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name of first corporation*] and _____ [*name of second corporation*]. The parties have agreed and by these presents do hereby agree to associate themselves as joint venturers on the following terms and conditions.

Purpose of Joint Venture

1. The purpose of this joint venture shall be to purchase, own, operate, maintain, and lease, as an investment, certain

real property in the County of _____, California, described as follows: _____ [*insert legal description of real property*]. This property shall be referred to in this Agreement as the "Joint Venture Property."

Name of Joint Venture

2. The name of this joint venture shall be _____ [*name of joint venture*]. The joint venture shall file a fictitious-name certificate with the _____ [*name*] County Recorder's Office indicating that the parties are doing business in the name of _____ [*name of joint venture*]. The parties may, from time to time, jointly designate other persons and entities to act as nominees for the joint venture.

Title to Joint Venture Property

3. Legal title to the Joint Venture Property shall be acquired and maintained during the term of this joint venture in the names of _____ [*name of corporation*] and _____ [*name of second corporation*] as tenants in common.

Purchase of Joint Venture Property

4. This joint venture shall purchase the Joint Venture Property on the terms and conditions contained, and in the manner described, in that certain "Contract for Sale of Real Property" dated _____, entered into by _____ [*name*] as buyer and nominee for this joint venture. A copy of the contract is attached to this Agreement and marked "Exhibit A." Each party agrees to promptly on request execute, or execute and acknowledge, any and all instruments, including proper instructions, necessary to the complete the purchase of the Joint Venture Property.

Initial Capital

5. The initial capital of this joint venture shall be $_____, to be contributed by the parties in equal shares. An individual capital account shall be maintained for each party, and no interest shall be paid or shall accrue on the capital account of either party.

Interests of Parties

6. Each party shall have a 50-percent interest in this joint venture and in the net profits and losses of this joint venture. The respective interests of the parties in the joint venture shall not be transferred or assigned in whole or in part

Loans to Joint Venture

7. _____ [*Name of venturer that will make loans to venture*] shall lend to this joint venture all additional funds necessary or required in connection with the purchase, ownership, operation, maintenance, and leasing of the Joint Venture Property, as and when required. Each such loan is referred to in this Agreement as a "Joint Venture Loan," At the time of making any Joint Venture Loan, the joint venture shall execute and deliver to _____ [*name of venturer that will make loans to venture*] a promissory note in the principal amount of the loan, payable to the order of _____ [*name of venturer that will make loans to venture*]. Each note

shall be in the form and contain the provisions of the form of note attached to this Agreement and marked "Exhibit B."

Books of Account

8. At all times during the continuation of this joint venture, _____ [*name of party that will maintain books of account*] shall keep accurate books of account in which all matters relating to the joint venture, including all income, expenditures, assets, and liabilities thereof, shall be entered. The books of account shall be kept on _____ [an accrual *or* a cash] basis and shall be open to examination by _____ [*name of other party*] at any time.

Repayment of Joint Venture Loans

9. All receipts, income, and proceeds of and from the Joint Venture Property, except funds required for the operation and maintenance of the Joint Venture Property, shall be paid by the joint venture in repayment of Joint Venture Loans. So long as any part of any Joint Venture Loan remains unpaid, _____ [*name of party not making Joint Venture Loans*] shall not be entitled to any distributions or loans from the joint venture, except with the express written consent of _____ [*name of party making Joint Venture Loans*].

Term of Joint Venture

10. This joint venture shall dissolve and terminate when the Joint Venture Property is sold or otherwise disposed of, or until _____ [*date*], whichever is earlier, unless the parties agree in writing to dissolve and terminate the joint venture at a different time. If, as of the date on which the joint venture terminates, any Joint Venture Loan has not been fully repaid, _____ [*name of party making Joint Venture Loans*] shall have the exclusive right to exercise either of the following options within 30 days:

(a) To require the termination and dissolution of the joint venture. Within 90 days after any exercise of such option, all of the joint venture's noncash assets shall be sold for cash at the highest cash prices then available. If after such sale the cash assets shall not be sufficient to pay all of the joint venture's liabilities, the parties shall each contribute, as capital contributions, half of the aggregate cash amount required to pay and discharge in full all of such liabilities. The joint venture shall thereupon fully pay all of its liabilities, including without limitation all unpaid amounts on the Joint Venture Loans. All remaining assets of the joint venture shall be distributed as provided in Paragraph 11.

(b) To continue the joint venture until such time as the joint venture shall have fully repaid all of the Joint Venture Loans. If _____ [*name of party making Joint Venture Loans*] exercises this option to continue the joint venture, the maturity date of all then unpaid Joint Venture Loans shall be deemed extended to the end of the then-current fiscal year.

Distribution on Dissolution

11. On the dissolution of this joint venture, the assets of the joint venture, after full payment of all liabilities, including the repayment of all Joint Venture Loans, shall be distributed to the parties as follows: first, in discharge and to return the respective capital contributions of the parties, and second, in proportion to the respective rights of the parties to share net profits and losses of the joint venture, as set forth in Paragraph 6. In the event the assets of the joint venture are insufficient to return to the parties all or any part of their respective capital contributions (including the contributions made under the provisions of subparagraph (a) of Paragraph 11), neither party shall have any claim or recourse against

the other for any unreturned portion of their capital contributions. In the event that the assets of the joint venture are insufficient to pay and discharge all of its obligations and liabilities (including without limitations all of the obligations of the joint venture under the Joint Venture Loans), each of the parties shall contribute as capital contributions half of the aggregate amount required to pay and discharge in full all of such obligations and liabilities.

No Compensation

12. Neither of the parties to this Agreement shall be entitled to any compensation for services rendered to this joint venture, or in connection with any of its business or property, except as may be expressly agreed to in writing by both of the parties.

Management

13. All questions relating to activities and operations of this joint venture, and all questions relating to the sale or other disposition of the Joint Venture Property, shall be determined by agreement of the parties.

Notices

14. Any notice or other communication required or permitted by this Agreement or by law to be delivered to, served on, or given to either party to this Agreement by the other party to this Agreement shall be in writing and shall be deemed properly delivered, served, or given when personally delivered to the party to whom it is directed or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to _____ [*name of first corporation*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], or to _____ [*name of second corporation*] at _____ [*number and street*], _____ [*city*], California _____ [*zip code*], as appropriate. Either party may change its address for purposes of this paragraph by giving written notice of such change.

Sole Agreement

15. This instrument contains the only agreement of the parties relating to their joint venture and correctly sets forth the rights, duties, and obligations of each to the other in connection with the joint venture as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

Binding on Successors and Assigns

16. The provisions of this Agreement shall be binding on and inure to the benefit of the parties and their respective successors and assigns.

Amendment

17. This Agreement may be amended or modified in any way by an instrument in writing, stating the amendment or modification, and executed by both parties.

EXECUTED at _____ County, California, on the day and year first above written.

_____ [*name of first corporation*]
by _____ [*signature*]
[*typed name and title*]
_____ [*name of second corporation*]
by _____ [*signature*]
[*typed name and title*]



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§ 29B.syn Synopsis to Chapter 29B: NONPUBLIC REAL ESTATE SYNDICATES

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[1] Statutes

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[1] Statutes

[2] Regulations

§§ 29B. 03-29B.04 [Reserved]

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[2] Governing Law

§ 29B.11 Benefits and Risks of Nonpublic Syndication

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[1] Overview

[2] Limited Partnership

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§ 29B.20 Role of Syndicator

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§ 29B.41 Exemption From California Securities Regulation

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§ 29B.110 Determining Whether Syndicate Is Exempt From Registration Under Federal Securities Act

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§§ 29B.112-29B.119 [Reserved]

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§ 29B.200 Limited Partnership Agreement for Nonpublic Real Estate Syndicate

[1] Comment

[a] Use of Form

[b] Uniform Limited Partnership Act of 2008

[2] FORM

Limited Partnership Agreement for Nonpublic Real Estate Syndicate

§ 29B.201 Limited Liability Company Operating Agreement for Nonpublic Real Estate Syndicate

[1] Comment--Use of Form

[2] FORM

Limited Liability Company Operating Agreement for Nonpublic Real Estate Syndicate

§ 29B.202 Subscription Agreement

[1] Comment

[a] Use of Form

[b] California's Limited Offering Exemption

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[d] Federal Intrastate Exemption

[2] FORM

Subscription Agreement

§ 29B.203 Investor Questionnaire

[1] Comment

[a] Use of Form

[b] Federal Requirements

[c] California Limited Offering Exemption Requirements

[2] FORM

Investor Questionnaire



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Scope

Scope

This chapter discusses the formation and operation of real estate syndicates and the "nonpublic" offering of syndicate interests. A real estate syndicate is basically an organization of investors who have joined together for the purpose of pooling capital for the acquisition of real property interests. A nonpublic syndicate, typically a relatively small investment group organized as a limited partnership or limited liability company, is one that is exempt from federal and California securities regulation.

The Legal Background presents an overview of applicable laws, including exemptions from securities requirements under the securities laws, and federal tax law, which treats most nonpublic real estate syndicates as partnerships. Federal tax considerations applicable to such entities are discussed in more detail in Ch. 29A, *Joint Ventures* .

The Transaction Guide provides a step-by-step guide to the formation and operation of syndicates and to the offer and sale of syndicate interests. The Drafting Guide and Forms include checklists and samples that are helpful in preparing some of the more important syndicate documents, including a limited partnership agreement, limited liability company operating agreement, private offering memorandum, and subscription agreement.

For coverage of the requirements for "qualifying" the sale of real estate syndicate interests under the California Corporate Securities Law of 1968 [*see Corp. Code § 25000 et seq.*], see Ch. 29C, *Public Real Estate Syndicates* . Detailed coverage of all aspects of nonpublic and public real estate syndicates can be found in California Real Estate Law and Practice, Chs. 20- 35 (Matthew Bender).



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§ 29B.01 California Sources

[1] Statutes

California Uniform Limited Partnership Act of 2008. *Corp. Code § 15900 et seq.*

Beverly-Killea Limited Liability Company Act. *Corp. Code § 17000 et seq.*

Corporate Securities Law of 1968. *Corp. Code § 25000 et seq.*

Taxation of Partnerships. *Rev. & Tax. Code § 17851 et seq.*

California limited offering exemption. *Corp. Code § 25102(f).*

[2] Regulations

California limited offering exemption. *10 Cal. Code Reg. §§ 260.102.12*-260.102.14.



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§ 29B.02 Federal Sources

[1] Statutes

Securities Act of 1933. *15 U.S.C. § 77a et seq.*
Limited partnership interests as securities. *15 U.S.C. § 77b(a)(1).*
Intrastate exemption. *15 U.S.C. § 77c(a)(11).*
Private offering exemption. *15 U.S.C. § 77d(2).*
Registration requirement. *15 U.S.C. § 77e.*

At-risk limitation on losses. *I.R.C. § 465*.

Limitations on losses and credits from passive activities. *I.R.C. § 469*.

Income taxation of partners and partnerships. *I.R.C. §§ 701-771*.
Partner's tax return. *I.R.C. § 702(a).*
Deduction limitation--basis. *I.R.C. § 704(d)*.
Adjusted basis. *I.R.C. § 705*.
Partner's contribution as basis. *I.R.C. § 722*.
Increase in partner's basis--share of partnership's liabilities. *I.R.C. § 752*.

Capital gain or loss on sale or exchange of property. *I.R.C. §§ 1211, 1212, 1221, 1222*.

[2] Regulations

Intrastate offering exemption (SEC Rule 147). *17 C.F.R. § 230.147*.

SEC Regulation D. *17 C.F.R. §§ 230.501-230.508*.

General definitions and requirements. *17 C.F.R. §§ 230.501-230.503*.
Unrestricted limited offering exemption for offerings not exceeding $1,000,000 (Rule 504). *17 C.F.R. § 230.504*.
Private offering exemption (SEC Rule 506). *17 C.F.R. § 230.506*.
Denial of exemption under Rule 504, 505, or 506 for certain failures to comply with Rule 503. *17 C.F.R. § 230.507*.
Insignificant deviations from Regulation D requirements. *17 C.F.R. § 230.508*.

Tax treatment of partnership liabilities. *Treas. Reg. §§ 1.752-0*-1.752-5.
Partner's share of recourse liabilities. *Treas. Reg. § 1.752-2*.
Partner's share of nonrecourse liabilities. *Treas. Reg. § 1.752-3*.

Tax-shelter opinions by practitioners before Internal Revenue Service. *31 C.F.R. § 10.33*.



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§ 29B.05 Law Reviews and Periodicals

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Elizabeth Ayres Whitman, *A "TIC"ing Time Bomb: Rule 506 Meets Section 1031, 12 Fordham J. Corp. & Fin. L. 121 (2007).*

Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act, 37 Suffolk U.L. Rev. 583 (2004).*



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§ 29B.06 Annotations

" 'Common enterprise' element of Howey test to determine existence of investment contract regulable as 'security' within meaning of Federal Securities Act of 1933 (*15 U.S.C.A. § 77a et seq.*) and Securities Exchange Act of 1934 (*15 U.S.C.A. § 78a et seq.*)," *90 A.L.R. Fed. 825 (1988)* .

"Partnership and joint venture interests as securities within meaning of Federal Securities Act of 1933 (*15 U.S.C. § 77a et seq.*) and Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*)," *58 A.L.R. Fed. 408 (1982)* .

"What constitutes 'public' or 'private' offering within meaning of state securities regulation," 84 A.L.R.3d 1009 (1978) .

"What constitutes a 'public offering' within meaning of § 4(2) of Securities Act of 1933 (*15 U.S.C. § 77d(2)*), exempting from its registration and prospectus requirements transactions by an issuer not involving 'any public offering'," *6 A.L.R. Fed. 536 (1971)* .



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§ 29B.07 Text References

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART II. LEGAL BACKGROUND
A. Nature and Purpose of Nonpublic Real Estate Syndication

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§ 29B.10 Nature of Nonpublic Real Estate Syndicate

[1] Nonpublic Real Estate Syndicate Defined

A real estate syndicate is simply a combination of two or more persons to invest in some form of real estate. No particular form of organization is implied by the term "syndicate"; the investment property may be held by the investors as tenants in common, or they may form a corporation, partnership, or limited liability company [*see § 29B.12*].

For purposes of this chapter, a "nonpublic" or "private" real estate syndicate is one that is exempt from the qualification requirements of the California Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] and the Federal Securities Act of 1933 [*15 U.S.C. § 77a et seq.*]. Typically, a nonpublic syndicate attains exempt status by meeting the requirements of the limited offering exemption [*see § 29B.41[2]*]; thus, nonpublic syndicates tend to be smaller--in number of investors and total capital--than public syndicates. Nonpublic syndicates are popular because they are exempt from the expensive and time-consuming qualification and registration requirements of federal and state securities law. They also have more flexibility because they are not subject to the detailed syndicate regulations promulgated by the California Commissioner of Corporations [*see 10 Cal. Code Reg. §§ 260.140, 260.140.110.1 et seq.*; *see also* Ch. 29C, *Public Real Estate Syndicates*].

A real estate syndicate may be formed by a small group of investors, all of whom make capital contributions and actively participate in management of the syndicate. However, this chapter focuses on the kind of nonpublic syndicate put together by a syndicator (sometimes called a "promoter"), who finds a specific property, organizes the entity, sells interests to investors, and manages the syndicate, with a significant amount of capital contributed by "passive" investors who do not participate in management.

The nonpublic real estate syndicates discussed in this chapter are "specified property" syndicates, as opposed to "nonspecified property" syndicates. A specified property syndicate sells its interests in an offering based on a plan to purchase a specific property or properties [*see § 29B.21*]. A "nonspecified property" syndicate, sometimes called a "blind pool" syndicate, sells interests to raise a pool of capital without specifying the properties it will invest in. Because nonpublic syndicates are smaller than public syndicates, they tend to be specified property syndicates; a typical

nonpublic syndicate can only raise enough capital to invest in one or two properties and thus will usually be able to select the property before making its offering to investors.

[2] Governing Law

Real estate syndicates in California are governed by several separate sets of laws. The manner in which they must be formed and operated, and the rights of the parties, are determined by the law governing the particular form of entity chosen, such as the Beverly-Killea Limited Liability Company Act (Act) [*Corp. Code § 17000 et seq.*; *see* Ch. 12C, *Limited Liability Companies*] or the Uniform Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*; *see* Ch. 16, *Formation of Limited Partnerships*]. The manner in which interests in real estate syndicates are offered and sold is governed by the California Corporate Securities Law of 1968 [Corp. Code § 15000 et seq.] and the federal Securities Act of 1933 [*15 U.S.C. § 77a et seq.*]. Finally, numerous Internal Revenue Code and California Revenue and Taxation Code sections determine the tax consequences of syndicate structure and operations.



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§ 29B.11 Benefits and Risks of Nonpublic Syndication

A person who has the knowledge and experience to find a suitable property, raise the necessary capital, and manage the investment is a potential syndicator. Instead of using his or her own funds to purchase, develop, and resell property as a sole investor, a syndicator can realize greater profits by pooling his or her funds with those of passive investors to purchase larger properties, while earning promotional consideration and fees for other services rendered to the syndicate.

There are some risks or disadvantages to syndication. For example, in a typical specified property syndicate, the syndicator generally must put up the deposit money on the property before any passive investors have contributed to the syndicate's capital. In such a case, the syndicator risks losing the deposit if his or her efforts to raise the necessary additional capital fail. Also, once the syndicate is formed, if the property or project has problems, the investors may look to the syndicator for satisfaction to redeem their interests or to supply extra funds needed to complete the project.

Once the decision has been made to form a syndicate, the syndicator must decide whether to proceed with a public syndicate or a nonpublic syndicate. The main advantage of a nonpublic syndicate is that it is exempt from the expensive and time-consuming qualification and registration requirements of federal and state securities laws [*see 15 U.S.C. § 77a et seq.*; *Corp. Code § 25000 et seq.*], and it is not subject to the detailed syndicate regulations promulgated by the California Commissioner of Corporations [*see 10 Cal. Code Reg. §§ 260.140, 260.140.110.1 et seq.*; Ch. 29C, *Public Real Estate Syndicates*].

One disadvantage of a nonpublic syndicate is that to qualify for exemption from the securities qualification and registration requirements, the syndicate must be relatively small [*see, e.g., 17 C.F.R. §§ 230.504, 230.505, 230.506*; *Corp. Code § 25102(f)(1)* (California limited offering exemption applies only if there are no more than 35 investors)]. This effectively limits the amount of capital that can be raised.



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§ 29B.12 Legal Structure of Syndicate

[1] Overview

A real estate syndicate can be organized as one of many different legal entities, such as a tenancy in common, joint tenancy with right of survivorship, joint venture, general or limited partnership, trust, real estate investment trust, corporation, or limited liability company. In practice, however, most real estate syndicates are organized as limited partnerships or as limited liability companies [*see* [2], [3], *below*], primarily because those entities allow for "pass-through" tax treatment [*see § 29B.61[1]*], limited personal liability for most or all investors, and centralized management.

The corporate form does provide its shareholders with protection against personal liability for obligations of the corporation. However, for tax reasons a corporation may not be advisable for a real estate syndicate. For a regular "C" corporation, income is taxed both at the corporate level and again at the shareholder level when distributions are made [*see I.R.C. §§ 1, 11*]. With an "S" corporation, the shareholders can elect to be taxed individually on the corporation's income [*see I.R.C. § 1363*]. However, an "S" corporation has structural and membership restrictions that may make it less desirable than a limited partnership or limited liability company as a vehicle for a real estate syndicate. For example, only individuals, estates, and qualified trusts can be shareholders in an "S" corporation, and nonresident aliens may not be shareholders [*see I.R.C. § 1361(b)(1), (c)(2)*]. In addition, an "S" corporation may not have more than one class of stock [*I.R.C. § 1361(b)(1)(D), (c)*].

Organizing a syndicate as a partnership or limited liability company (which can elect to be classified as a partnership for tax purposes) carries significant tax benefits. An entity classified as a partnership is essentially a "pass-through" entity, so that taxation occurs only at the partner or member level, not at the level of the entity [*see I.R.C. § 701*; *Rev. & Tax. Code § 17851*].

[2] Limited Partnership

Until the 1994 enactment of legislation authorizing the formation of limited liability companies [*see* [3], *below*], almost all real estate syndicates were formed as limited partnerships. The popularity of limited partnerships was attributable

primarily to the following features. First, a limited partner is not personally liable for any obligation of the limited partnership unless the partner is named as a general partner in the limited partnership certificate or participates in the control of the business [*see Corp. Code § 15903.03(a)*]. Second, the general partner has sole control over the management and conduct of the partnership business, while the limited partners are essentially passive investors [*see Corp. Code §§ 15903.03(a), 15904.06(a)*]. This centralized management is important when the success of the investment depends on the performance of experienced managers and when management by a large group of investors would be unwieldy.

Prior to passage of the Tax Reform Act of 1986 [Pub. L. No. 99-514], a third, and perhaps predominant, reason for the use of the limited partnership entity was the availability to the limited partners of favorable income tax features. These advantages have now been virtually eliminated [*see § 29B.61[1]*], with the result that the syndicate must now depend more on the expectation of profits rather than tax shelter features to attract investors. These changes lessened the attractiveness of the limited partnership as the preferred form of business organization used by real estate syndicates.

The limited partnership entity is no longer the most popular form of real estate syndicate; limited liability companies provide the same benefits as limited partnerships, plus the added advantage of limited personal liability for the syndicator-manager as well as for the members who are passive investors [*see* [3], *below*]. However, in some circumstances it may be desirable to organize the syndicate as a limited partnership, such as when a lender on the property or project insists that the syndicator-manager assume personal liability for any obligations that exceed the syndicate's capital.

Like a limited liability company [*see Rev. & Tax. Code § 17941*], a limited partnership must pay an annual minimum corporate franchise tax [*Rev. & Tax. Code §§ 17935(a), 23153*].

[3] Limited Liability Company

On September 30, 1994, the Beverly-Killea Limited Liability Company Act took effect [Stats. 1994, ch. 1200, § 27; *see Corp. Code § 17000 et seq.*]. The Limited Liability Company ("LLC") is essentially a hybrid of a corporation and a partnership. If structured properly, a California LLC can be taxed as a partnership on both the federal and California level, without some of the restrictions imposed on corporations [*see § 29B.61[1]*]. Properly structured LLCs can also provide their members, managers, and officers limited liability similar to that enjoyed by corporate shareholders; that is, liability limited to their investments and commitments to invest in the LLC [*see Corp. Code § 17101(a)*].

LLCs offer great flexibility of form and structure, which can range from the extremely simple to the very complex and, if desired, can closely resemble the management and ownership structures of either corporations or general or limited partnerships.

Like a limited partnership [*see Rev. & Tax. Code § 17935(a)*], an LLC must pay an annual minimum corporate franchise tax [*Rev. & Tax. Code §§ 17941, 23153*]. In addition, however, an LLC must pay the State of California an annual fee of up to $11,790, based on the company's gross annual receipts [*Rev. & Tax. Code § 17942*].



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§ 29B.20 Role of Syndicator

In forming a small nonpublic real estate syndicate, the syndicator typically performs a variety of functions, including the following:

- Identifying and "tying up" the investment property [*see § 29B.21*].
- Forming the syndicate's legal entity [*see § 29B.22*].
- Raising capital by obtaining qualified investors [*see § 29B.23*].
- Following through with the acquisition of the property on behalf of the syndicate [*see § 29B.24*].



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§ 29B.21 Identifying and Tying Up Property or Project

[1] Selection of Suitable Property or Project

Once the decision has been made to form a specified property syndicate [*see § 29B.10[1]*], the syndicator must select a suitable property for the syndicate to acquire. For discussion of the general process of evaluating real estate as investment property, see California Real Estate Law and Practice, Ch. 1, *Analysis of Real Estate Investments* (Matthew Bender). In addition, in selecting investment property, the syndicator should consider factors such as the following:

- Whether the primary purpose of the investment will be to realize income from the property or to make substantial capital gains through appreciation of the property.

- How much of the syndicator's own funds are available to tie up the property [*see* [2], *below*] pending the capitalization of the syndicate. If a substantial down payment or option payment is required, the syndicator's resources may not be sufficient to ensure that the property will be available when the syndicate is ready to make the purchase.

[2] Tying Up the Property

Once the property has been selected, the syndicator must take steps to "tie up" the property for the time necessary to form the syndicate and raise the capital necessary to make the purchase. This may be accomplished in a number of ways. For example, the syndicator might make an outright purchase of the property, using the syndicator's funds to pay the purchase price or make a down payment. In such a case, if the syndicate entity has not yet been formed, the syndicator will have to transfer the property to the entity once it has been formed [*see § 29B.24*].

Alternatively, the syndicator might enter into a purchase agreement that conditions completion of the sale on the formation of the syndicate, or on capitalization of the syndicate to a specified minimum level. Such an agreement should incorporate a sufficiently lengthy escrow period (typically, several months), to enable the syndicator to raise the necessary funds for the syndicate. Also, in case unforeseen problems arise, the purchase agreement can include a provision for the extension of the escrow period on the payment of a specified additional sum into escrow, or on the

release of a specified sum from escrow. Similarly, the seller of the property might bargain for the inclusion of a provision treating the syndicator's deposit as liquidated damages, to be forfeited if the syndicate fails to complete the purchase.

Another method of tying up the property is for the syndicator to acquire an option to purchase the property, to be exercised by the syndicate once it is formed.

For detailed coverage of these and other methods of tying up the property, see California Real Estate Law and Practice, Ch. 29, *Syndicate Property Acquisition and Management* (Matthew Bender).



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§ 29B.22 Formation of Legal Entity

The timing of the creation of the legal entity can be important, especially in a specified property syndicate. If the syndicator has entered into an agreement to purchase the subject property on behalf of the syndicate, the syndicator should take steps to ensure that the legal entity is in existence before the closing date of the sale.

If the syndicate is organized as a limited partnership, it comes into existence when both (1) a certificate of limited partnership is filed with the Secretary of State; and (2) the partners shall have entered into a partnership agreement [*Corp. Code § 15902.01(a)*]. Since there must be at least two partners [*see Corp. Code § 15902.01(a)* ("partners" must have entered into partnership agreement)], the syndicator must obtain at least one limited partner before the entity can be created. For detailed coverage of the formation and operation of limited partnerships, see Ch. 16, *Formation of Limited Partnerships* .

If the syndicate is organized as a limited liability company, it comes into existence when the articles of organization are filed with the Secretary of State [*Corp. Code § 17050(c)*]. The operating agreement among the members need not be made before the articles are filed [*Corp. Code § 17050(a)*]. An LLC may be formed with only one member, so the syndicator will be able to form the entity with himself or herself as its sole member [*Corp. Code §§ 17001(t), 17050(b)*; *see Corp. Code § 17001(x), (ae)* (members may be natural persons, partnerships, limited partnerships, trusts, estates, associations, corporations, other LLCs, or other types of entities, whether domestic or foreign)]. For detailed coverage of the formation and operation of limited partnerships, see Ch. 12C, *Limited Liability Companies* .



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§ 29B.23 Attracting Investors

[1] Private Offering Memorandum

The main document used to offer interests in a nonpublic real estate syndicate is the private offering memorandum (sometimes called a private placement memorandum). The purpose of the document is to give potential investors the information they need to make an informed investment decision. For the syndicator, it is important that the offering memorandum disclose all relevant information, to protect the syndicator from later charges of misrepresentation. Thus, the memorandum has the same purposes as, and will contain the same information as, a prospectus or offering circular in a public offering.

If the syndicator is relying on SEC Regulation D for exemption, the private offering memorandum must comply with that regulation's requirements [*see 17 C.F.R. § 230.502*]. This means that, in essence, the syndicator will have to disclose the financial information required by SEC Form S-11, the registration form for a public offering of securities, which details the information required in the prospectus [*see 17 C.F.R. § 230.502(b)*].

Unless the offering is made under SED Regulation D, there are no regulatory requirements for the contents or format of a private offering memorandum. However, to protect the syndicator and provide complete information to prospective investors, the SEC's guide to preparing S-11 prospectuses ("Guide 5") can be used as a guide to preparing a private offering memorandum [*see* SEC, Securities Act Industry Guides, Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships (Guide 5), http://www.sec.gov/about/forms/industryguides.pdf]. Guide 5 requires that the following matters be discussed:

- The syndicator's "suitability standards," that is, the standards for determining the acceptance of investors' subscription agreements.
- A summary of the syndicate entity (e.g., partnership or LLC) and use of proceeds.
- Compensation and fees for the general partner or manager and any of its affiliates.

- Potential conflicts of interest between the general partner or manager and the passive investors.
- Fiduciary responsibilities of the general partner or manager.
- Particular risk factors applicable to the offering and to the syndicate's plan of operations.
- Previous performance of the general partner or manager and any affiliates.
- The management of the syndicate.
- The syndicate's investment objectives and policies.
- A description of the syndicate's real estate investments.
- Federal income tax aspects of the offering.
- A glossary of technical terms used in the offering.
- A summary of the partnership agreement or limited liability company operating agreement.
- The offering itself, including a description of the units.
- Any agreements allowing the syndicate to redeem or repurchase interests, or allowing the investor to seek redemption or repurchase.
- The plan of distribution.

Guide 5 also sets forth requirements for a cover page.

For a detailed guide to drafting a private offering memorandum, see *§ 29B.132*.

[2] Use of Questionnaire to Establish Investor Qualifications

To meet the requirements of SEC Regulation D, the syndicator must have a reasonable belief, immediately prior to the sale of an interest in the syndicate, that a purchaser who is not an accredited investor (either alone or with his or her representative) has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the investment [*17 C.F.R. § 230.506(b)(2)(ii)*; *see § 29B.203*].

To meet the requirements of the California limited offering exemption, all purchasers must either (1) have a preexisting personal or business relationship with the offeror (or any of its partners, officers, directors or controlling persons, or managers appointed or elected by the members if the offeror is a limited liability company), or (2) by reason of their business or financial experience or the business or financial experience of their professional advisers who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, be reasonably assumed to have the capacity to protect their own interests in connection with the transaction [*Corp. Code § 25102(f)(2)*; *see § 29B.41[2]*].

To obtain the information necessary to make these determinations, syndicators commonly have potential investors fill out pre-offering questionnaires and apply investor-suitability standards similar to those imposed by the Commissioner of Corporations for public offerings [*see 10 Cal. Code Reg. § 260.140.112.1*].

For a sample form of an investor questionnaire, see *§ 29B.203*.

[3] Preserving Exemption

The nonpublic offering must be marketed in a way that does not cause it to lose its exemption from securities regulation. Thus, to ensure that the requirements of the limited offering and intrastate exemptions are met, the syndicator must do the following:

- Restrict the number of sales made, to no more than 35 investors [*see 17 C.F.R. § 230.506*; *Corp. Code § 25102(f)(1)*; *see also § 29B.40*].

- Sell syndicate interests only to persons who meet the suitability requirements and who have sufficient experience to evaluate the investment [*see Corp. Code § 25102(f)(2)*; *see also § 29B.41[2]*].

- Offer and sell only to California residents, if the intrastate exemption under federal law is being used [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147*; *see also § 29B.40*].

- Avoid any public advertising or general solicitation, such as offers made at any seminar or meeting held pursuant to a public solicitation or advertising [*see 17 C.F.R. § 230.502(c)*; *Corp. Code § 25102(f)(4)*; *see also §§ 29B.40, 29B.41[2][c]*].

- Provide offerees the opportunity to ask questions and obtain additional information about the offering and the syndicate, to comply with the requirements of SEC Regulation D [*see 17 C.F.R. § 230.502(b)(2)(v)*] and to avoid later charges of misrepresentation.

[4] Subscription Agreement

The sale of an interest in a real estate syndicate is usually consummated by the execution of an instrument of purchase, commonly called a subscription agreement. This document serves several purposes:

- It is a contract obligating the investor to purchase a specified interest in the syndicate.

- It contains representations by the investor regarding facts that are necessary to qualify the sale for the applicable exemptions from federal and state securities laws.

- It acknowledges that the investor has received all relevant information and understands the restrictions on subsequent transfers of the interest in the syndicate.

For a form of subscription agreement, see *§ 29B.202*.



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§ 29B.24 Acquisition of Property

Once the syndicate's legal entity has been formed [*see § 29B.22*], it may acquire and hold property. In a specified property syndicate, the typical type of private syndicate, the acquisition ordinarily consists of closing the transaction that tied up the property [*see § 29B.21[2]*].

If the syndicator tied up the property by making an outright purchase before formation of the syndicate's legal entity, then the syndicate will acquire the property by purchasing it from the syndicator. If the syndicate is exempt from state securities regulation, the transfer of the property from the syndicator to the syndicate will not be subject to the regulations that apply to such a transfer to a public syndicate [*see 10 Cal. Code Reg. §§ 260.140, 260.140.114.1*]. However, to avoid later claims of misrepresentation, the private offering memorandum [*see § 29B.23[1]*] should fully disclose the intended transfer, and the sale price paid to the syndicator should not exceed the price paid by the syndicator to acquire the property, plus any reasonable construction costs incurred by the syndicator [*see 10 Cal. Code Reg. § 260.140.114.6*], except that the syndicator may also receive a reasonable acquisition fee [*see 10 Cal. Code Reg. § 260.140.113.3*]. Further, any loan secured by the property should be assumable by the syndicate at the same interest rate as when the syndicator owned the property [*see 10 Cal. Code Reg. § 260.140.114.1(a)*].

For detailed coverage of the acquisition of syndicate property, see California Real Estate Law and Practice, Ch. 29, *Syndicate Property Acquisition and Management* (Matthew Bender).



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§ 29B.30 Property Management

Once the syndicate has acquired the property, the syndicator must arrange for the management of the property. Depending on the nature of the property and the syndicate's investment objective, management of the property might consist of managing and maintaining income property such as an apartment building, or it might involve overseeing construction of an improvement to the property.

A distinction must be drawn between management of the legal entity that is the syndicate and management of the real property acquired by the syndicate. Although the general partner of the limited partnership or the manager of the LLC will always manage the syndicate itself, that person may be unwilling or unqualified to assume the day-to-day management of the particular kind of property involved. For discussion of management of the syndicate, see *§ 29B.31*.

In a private syndicate, the syndicator may perform property-management services for the syndicate and is not subject to the fairness requirements imposed by regulations of the Corporations Commissioner [*see 10 Cal. Code Reg. §§ 260.140, 260.140.114.5*]. However, to avoid claims of misrepresentation or overreaching, a syndicator providing management services should provide only services that are necessary to the prudent operation of the property and should receive reasonable compensation for those services pursuant to a written contract [*see 10 Cal. Code Reg. § 260.140.114.5(d)*]. The syndicator should fully disclose the scope of intended services and rate of compensation in the private offering memorandum.

Alternatively, the syndicate may hire competent employees or independent contractors to provide management services.

For detailed coverage of the management of syndicate property, see California Real Estate Law and Practice, Ch. 29, *Syndicate Property Acquisition and Management* (Matthew Bender).



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§ 29B.31 Syndicate Management

Management of the syndicate as an entity involves several elements:

- Ensuring that the entity complies with applicable statutory and regulatory formalities, such as filing necessary documents and reports with the Commissioner of Corporations, and conducting members' or partners' meetings for an LLC or limited partnership.

- Managing the syndicate's financial activities, including the maintenance of financial records for the syndicate entity and providing the investors with periodic financial reports.

- Preparing applicable federal and state tax returns and providing appropriate information and forms to the investors.

These entity-management duties are dependent more on the nature of the legal entity than the nature of the property held by the entity. For discussion of the operation and management of a limited partnership, see Ch. 16, *Formation of Limited Partnerships* . For discussion of the operation and management of an LLC, see Ch. 12C, *Limited Liability Companies* .



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§ 29B.32 Transfer of Syndicate Shares

Depending on the federal or state securities exemption that is being used, there may be limitations on the transfer of the interests in the syndicate. For example, interests sold under the federal exemption for intrastate transactions may not be resold for nine months after the issuer's last sale, and any resales after the nine-month period may be made only to buyers residing in the same state [*17 C.F.R. § 230.147(e)*]. The syndicator must disclose these restrictions in the offering memorandum [*see § 29B.23[1]*] and must prevent any improper transfers [*17 C.F.R. §§ 230.144, 230.147(f)(3), 230.502(d)*].

SEC Rule 237 allows the sale of unregistered privately placed securities after they have been held for five years if they are not sold through a broker or dealer [*17 C.F.R. § 230.237*]. The number of shares sold in any one year is limited to the lesser of the gross proceeds from the sale of 1 percent of the relevant class of securities, or $50,000 in aggregate gross proceeds [*17 C.F.R. § 230.237(b)*].



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§ 29B.40 Exemption From Federal Securities Regulation

Under the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*], it is generally unlawful for any person to use any means of interstate commerce to sell a security unless a registration statement has been filed and is in effect with the Securities and Exchange Commission (SEC), or unless the transaction is exempt from the registration requirement [*15 U.S.C. 77e*]. For purposes of the Act, "security" is defined broadly to include any "certificate of interest or participation in any profit-sharing agreement, ... preorganization certificate or subscription, transferable share, investment contract, investment contract, ... or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing"; thus, an interest in a limited-partnership or LLC real estate syndicate is a "security" [*see 15 U.S.C. § 77b(a)(1)*; *Securities & Exch. Com. v. Howey Co. (1945) 328 U.S. 293, 300, 66 S. Ct. 1100, 90 L. Ed. 1244]* .

Very large real estate syndicates may also be subject to the registration provisions of the Securities Exchange Act of 1934 [*see 15 U.S.C. § 781(g)(1)*; *see also* California Real Estate Law and Practice, Ch. 27, *Registration of a Syndicate Offering With the SEC* (Matthew Bender)].

There are three principal exemptions from the registration requirement under the Securities Act of 1933 that may be applicable to real estate syndicate offerings:

- The intrastate offering exemption under SEC Rule 147 [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147* (SEC Rule 147)].

- The private offering exemption under SEC Regulation D [*see 15 U.S.C. § 77d(2)*; *17 C.F.R. §§ 230.501-230.508* (SEC Regulation D)].

- The small offering exemption [*see 15 U.S.C. § 77c(b)*].

SEC Regulation D establishes guidelines for three different exemptions: the Rule 504 exemption [*17 C.F.R. § 230.504*], available to certain offerings not exceeding $1,000,000; the Rule 505 exemption [*17 C.F.R. § 230.505*], available to

offerings not exceeding $5,000,000 and sold to no more than 35 purchasers; and the Rule 506 exemption [*17 C.F.R. § 230.506*], available to offerings to no more than 35 purchasers, regardless of the dollar amount. Of these three, the Rule 506 exemption will be the most useful to the majority of real estate syndicates. However, a syndicator ordinarily will try to qualify under as many exemptions as possible in case one or more claimed exemptions are unavailable due to inadvertent violation of the applicable requirements [*but see 17 C.F.R. § 230.508* (certain insignificant deviations from the requirements of a Regulation D exemption will not result in the loss of the exemption]. For further discussion, see Ch. 6A, *Federal Securities Exemptions for California Nonpublic Corporations* .

Under Regulation D, an issuer must disclose specific information to every purchaser who is not an "accredited investor" [*17 C.F.R. § 230.502(b)(1)*; *see 17 C.F.R. § 230.501(a)* (definition)]. The issuer need not furnish the information when selling securities to an accredited investor or pursuant to the Rule 504 exemption [*17 C.F.R. § 230.502(b)(1)*]. The most common method of complying with this requirement is to prepare a private placement memorandum that complies with "Guide 5," a drafting guide prepared by the Securities and Exchange Commission's Division of Corporation Finance [*see* SEC, Securities Act Industry Guides, Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships (Guide 5), http://www.sec.gov/about/forms/industryguides.pdf; *see also § 29B.132*].

The offer or sale in California of a real estate syndicate interest that comes within one of the exemptions of the Securities Act of 1933 still must be qualified by the California Commissioner of Corporations, unless it also comes within an exemption of California's Corporate Securities Law of 1968. For discussion, see *§ 29B.41[2]*.



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§ 29B.41 Exemption From California Securities Regulation

[1] General Applicability of California Securities Laws

[a] Interests in Real Estate Syndicate Generally Are Securities

Under the California Corporate Securities Law of 1968, it is unlawful to offer or sell any security in California unless the security is qualified for sale by the California Commissioner of Corporations or is exempt from qualification, or not subject to qualification [*Corp. Code §§ 25110*, *25120*, *25130*].

The Securities Law broadly defines "security" as including any membership in an incorporated or unincorporated association, certificate of interest or participation in any profit-sharing agreement, investment contract, and interest in a limited liability company [*Corp. Code § 25019*]. Thus, a real estate syndicate will be subject to the requirements of the Securities Law unless an exemption applies or the particular interest involved fits within an exception to the definition of "security" [*see* [b], *below*]. Although there are numerous exemptions from the California Securities Law qualification requirements [*see, e.g., Corp. Code § 25102(h)* ("small offering" exemption); *Corp. Code § 25102(i)* ("institutional investor" exemption); *Corp. Code § 25102(n)* ("qualified purchaser" exemption)], the limited offering exemption is perhaps the most attractive and most often utilized by nonpublic real estate syndicates, because its general and nontechnical criteria make it relatively easy to use [*see Corp. Code § 25102(f)*]. For discussion of the limited offering exemption, see [2], *below*; other exemptions are covered in Ch. 6B, *California Limited Offering Exemptions* , and Ch. 6D, *California Qualified Purchaser Exemptions* .

A real estate syndicate that does not qualify for an exemption must comply with the detailed qualification requirements promulgated by the Commissioner of Corporations. Those requirements are discussed in Ch. 6H, *Qualification of Securities* and Ch. 29C, *Public Real Estate Syndicates* .

[b] Exception for Certain Interests in Limited Liability Company

The Securities Law's definition of "security" generally includes an interest in a limited liability company, and any class or series of those interests (including any fractional or other interest in that interest) [*Corp. Code § 25019*; *see* [a], *above*

]. However, an exception to this definition provides that a membership interest in a limited liability company will not be treated as a security if all the members are actively engaged in the management of the limited liability company [*Corp. Code § 25019*]. For purposes of this exception, evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, does not establish, without more, that all members are actively engaged in the management of the limited liability company [*Corp. Code § 25019*]. This exception is not available to a typical nonpublic real estate syndicate organized as a limited liability company, since most of the members of the company are passive investors who do not participate in management.

[2] Limited Offering Exemption

[a] Requirements of Exemption

Under the limited offering exemption, an offering or sale of a security (other than an offer or sale to a pension or profit-sharing trust of the issuer) need not be qualified with the California Commissioner of Corporations if the transaction meets all of the following requirements [*Corp. Code § 25102(f)*]:

- Sales of the security are not made to more than 35 persons, including purchasers outside California [*see* [b], *below*].

- All purchasers either (1) have a preexisting personal or business relationship [*see 10 Cal. Code Reg. § 260.102.12(d)*] with the offeror or any of its partners, officers, directors or controlling persons, or managers (as appointed or elected by the members) if the offeror is a limited liability company, or (2) by reason of their business or financial experience or the business or financial experience of their professional advisers who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction [*see 10 Cal. Code Reg. § 260.102.12(d)* ("preexisting personal or business relationship" defined); *10 Cal. Code Reg. § 260.102.12(e)* ("partner" defined as general partner); *10 Cal. Code Reg. § 260.102.12(f)* ("controlling person" defined); *10 Cal. Code Reg. § 260.102.12(g)* ("professional adviser" defined); *10 Cal. Code Reg. § 260.102.12(h)* ("unaffiliated" defined); *10 Cal. Code Reg. § 260.102.12(i)* ("affiliate" defined)].

- Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to, or for sale in connection with, any distribution of the security.

- The offer and sale of the security are not accomplished by the publication of any advertisement [*see* [c], *below*].

[b] Calculating Number of Purchasers

For purposes of the 35-purchaser limit, a "purchaser" is a person who acquires the beneficial ownership of the security, whether individually or in joint ownership, in the transaction under the exemption. Each person who takes in joint ownership with another counts as one, except as follows [*10 Cal. Code Reg. § 260.102.12(c)*].

The following are not counted for purposes of the 35-purchaser limit [*Corp. Code § 25102(f)*; *10* Cal. Code Reg. § 260.102.13]:

(1) Institutional investors [*see Corp. Code § 25102(i)*].

(2) Any officer, director, or affiliate of the issuer [*see 10 Cal. Code Reg. § 260.102.12(i)* ("affiliate" defined)].

(3) Any manager of the issuer (as appointed or elected by the members), if the issuer is a limited liability company.

(4) The trustee of an issuer that is a trust, and the general partner of an issuer that is a partnership, who exercises managerial functions with respect to those entities, and any officer, director, or general partner of a general partner of an issuer that is a partnership.

(5) Any person who occupies a position with the issuer, or with a general partner of an issuer that is a partnership, with duties and authority substantially similar to those of an executive officer of a corporation.

(6) Any relative, spouse, or relative of the spouse of a purchaser who has the same principal residence as the purchaser [*see 10 Cal. Code Reg. § 260.102.13(c)(3)* ("relative" is person related by blood, marriage, or adoption)].

(7) Any trust or estate in which a purchaser and any of the persons related to that purchaser (*see* PP 6, 8) collectively have more than 50 percent of the beneficial interest, excluding contingent interests.

(8) Any corporation or other organization of which a purchaser and any of the persons related to that purchaser (*see* PP 6, 7) collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests.

(9) Any individual who is a "promoter" of the issuer [*see 10 Cal. Code Reg. § 260.102.12(f)* ("promoter" is person who, acting alone or in conjunction with one or more other persons, takes initiative in founding and organizing issuer's business or enterprise)].

(10) Any person who purchases $150,000 or more of the securities offered in the transaction, provided that the person either meets or is reasonably believed by the issuer to meet either of the following requirements:

(a) That person, or that person's professional advisor, has the capacity to protect his or her own interests in connection with the transaction.

(b) The investment (including mandatory assessments) does not exceed 10 percent of that person's net worth (or joint net worth with that person's spouse).

(11) A small business investment company, business development company, or private business development company as defined by federal law [*see 15 U.S.C. §§ 80a-2(a)(48), 80b-2(a)(22), 681(c), (d)*].

(12) An "accredited investor" under federal law [*see 17 C.F.R. § 230.501(a)*].

(13) Any entity in which all of the equity owners are officers, directors, or affiliates of the issuer, who are institutional investors, or who are specified above (other than persons exempt under P 10, the $150,000-purchase provision).

For purposes of the 35-purchaser limit, a husband and wife (together with any custodian or trustee acting for the account

of their minor children) are counted as one person [*Corp. Code § 25102(f)*]. Also, a partnership, corporation, or other organization that was not specifically formed for the purpose of purchasing the security offered in reliance on the limited offer exemption is counted as one person [*Corp. Code § 25102(f)*; *see 10 Cal. Code Reg. § 260.102.12*(*l*)].

[c] Prohibition of Advertising

To qualify for the limited offering exemption, the offer and sale of the security must not be accomplished by the publication of any advertisement [*Corp. Code § 25102(f)(4)*; *see* [a], *above*]. This prohibition, however, is to be interpreted so as to facilitate the circulation of disclosure materials to offerees and purchasers, so long as those materials are not disseminated to the public. Thus, private placement memoranda, offering circulars, and similar disclosure documents are not considered to be disseminated to the public for purposes of the limited offering exemption if the issuer limits such circulation (1) to persons reasonably believed to be interested in purchasing the securities, or (2) to persons the issuer believes may meet the qualifications required of purchasers under the exemption [*10 Cal. Code Reg. § 260.102.12(j)*].

[d] Filing of Notice

An issuer conducting a transaction within the limited offering exemption must file a notice with the Commissioner of Corporations [*10 Cal. Code Reg. § 260.102.14*; *see Corp. Code § 25102(f)*]. The notice must be filed with the Commissioner no later than 15 calendar days after the first sale of a security in the transaction in California. No notice is required if none of the securities offered are purchased in California [*10 Cal. Code Reg. § 260.102.14(b)*].

If in connection with the transaction the issuer is filing a notice with the SEC [*see 15 U.S.C. § 77d(6)*; *17 C.F.R. § 230.503*], the notice may be a copy of the SEC form. The issuer must also file a consent to service of process, unless it is a California corporation or has already filed a consent to service. The filing should be accompanied with a cover letter indicating that the filing is pursuant to *Corp. Code § 25102(f)*, and if a consent to service is not included, a statement that the issuer already has a consent to service on file with the Commissioner [*10 Cal. Code Reg. § 260.102.14(a)(1)*].

If a copy of the SEC form is not filed, the notice ordinarily must be filed electronically through the Internet process made available by the Department of Corporations at www.corp.ca.gov. However, if the issuer claims a hardship exemption from the electronic-filing requirement, the notice must be in the form specified by Department regulations [*10 Cal. Code Reg. § 260.102.14(a)(2), (c)-(f)*].

The failure to file a timely notice does not affect the availability of the exemption. An issuer who fails to file the notice must, within 15 business days after discovery of the failure to file the notice or after demand by the commissioner, whichever occurs first, file the notice and pay the commissioner a fee equal to the fee payable had the transaction been qualified under *Corp. Code § 25110* [*Corp. Code § 25102(f)*].

[e] Integration of Transactions

The limited offering exemption applies to a single "transaction" [*Corp. Code § 25102(f)*]. Generally, a "transaction" does not include any offer or sale of a security made more than six months before the start of an offering under the exemption or made more than six months after completion of an offering under the exemption, so long as during those six-month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold pursuant to the exemption [*10 Cal. Code Reg. § 260.102.12(b)(1)*].



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§ 29B.42 Licensing Requirements for Persons Offering Syndicate Interests

[1] Distinguished From Registration and Qualification of Securities

Even if an offering of real estate syndicate interests is exempt from registration and qualification under federal and California law, the persons or entities that sell those interests to the public ordinarily must be properly licensed [*see 15 U.S.C. § 780(a)*; *Corp. Code § 25210*]. Exemptions from the licensing requirements are available under both federal and California law, however [*see* [2], [3], *below*].

[2] Federal Registration Requirement and Exemption

A broker or dealer generally is prohibited from using the mails or interstate commerce to effect any transaction in, or to induce the purchase or sale of, and security (including a real estate syndicate interest), unless the broker or dealer is registered with the SEC [*15 U.S.C. § 780(a)*]. A "broker" for this purpose is any person, other than a bank, engaged in the business of effecting transactions in securities for the account of others [*15 U.S.C. § 78c(a)(4)*]. A "dealer" is a person, other than a bank, who buys and sells securities for his or her own account, either individually or in a fiduciary capacity [*15 U.S.C. § 78c(a)(5)*].

Exempt from the registration requirement is a broker or dealer whose business is exclusively intrastate [15 U.S.C. § 780a]. Thus, a syndicator who sells syndicate interests only to investors located in California will be exempt from the registration requirement.

Also, a person is not considered a dealer--and therefore need not register--if he or she only sells, but does not buy, securities for his or her own account [*see 15 U.S.C. § 78c(a)(5)*].

For further coverage of the requirements and procedure for federal registration of brokers and dealers, see California Real Estate Law and Practice, Ch. 21, *Regulation of Syndicates* (Matthew Bender).

[3] California Licensing Requirement and Exemptions

A broker-dealer ordinarily may not effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this California unless the broker-dealer has obtained from the Corporations Commissioner a certificate authorizing that person such actions [*Corp. Code § 25210(a)*; *see Corp. Code § 25210(b)* (agent of broker-dealer must be employed in compliance with regulations)]. A "broker-dealer" generally is any person engaged in the business of effecting transactions in securities in California for the account of others or for his or her own account [*Corp. Code § 25004(a)*].

The foregoing broker-dealer certificate requirement is subject to a narrow exemption for certain real-estate syndicates. Specifically, a licensed real-estate broker is exempt when engaged in transactions in any interest in any general or limited partnership, joint venture, unincorporated association, or similar organization (but not a corporation) owned beneficially by no more than 100 persons and formed for the sole purpose of, and engaged solely in, investment in or gain from an interest in real property, including, but not limited to, a sale, exchange, trade, or development [*Corp. Code § 25206* (interest held by husband and wife is considered held by one person for this purpose)].



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[Reserved]

§§ 29B.43[Reserved]



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§ 29B.50 Dissolution and Winding Up of Syndicate Entity

Eventually, the syndicate will be wound up and terminated, usually after the syndicate completes its investment plan and sells the investment property. When the syndicate's operations terminate because of the sale of the property, the legal entity can be dissolved and its affairs wound down, following general procedures applicable to the particular kind of entity involved. For discussion of the dissolution and winding up of a limited partnership, see Ch. 16A, *Dissolution of Limited Partnerships* . For discussion of the dissolution and winding up of an LLC, see Ch. 12C, *Limited Liability Companies* .

Termination of the syndicate may also be triggered by the actions of the passive investors, or through the actions or threatened actions of creditors, if the syndicate runs into financial trouble. For detailed coverage of the reasons and procedures for involuntary termination of real estate syndicates, see California Real Estate Law and Practice, Ch. 32, *Dissolution and Termination of Syndicates* (Matthew Bender).



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[Reserved]

§§ 29B.51[Reserved]



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§ 29B.60 Classification of Real Estate Syndicate for Tax Purposes

[1] Noncorporate Syndicate Is Usually Classified as Partnership

Under IRS regulations that took effect on January 1, 1997, a noncorporate business entity (such as a limited partnership or LLC) with two or more members can simply elect to be taxed as a partnership or as a corporation [*Treas. Reg. § 301.7701-3(a)*]. If a noncorporate business entity with two or more members makes no election, it will be classified as a partnership [*Treas. Reg. § 301.7701-3(b)*]. Thus, a real estate syndicate organized as a limited partnership or LLC will automatically be treated as a partnership unless it affirmatively elects to be taxed as a corporation [*see Treas. Reg. § 301.7701-3(c)* (election procedures)].

Under IRS regulations in effect prior to 1997, a real estate syndicate would be classified as an "association taxable as a corporation" if it possessed a majority of the four "corporate characteristics" established by the IRS (continuity of life, centralized management, limited liability, free transferability of interests). An entity in existence prior to January 1, 1997, retains its former tax classification unless it affirmatively elects to change it [*Treas. Reg. § 301.7701-3(b)(3)*].

California generally conforms to the federal entity classification rules [*see Rev. & Tax. Code § 23038(b)(2)(B)(ii), (iii)*]. The classification of a business entity as an association taxable as a corporation is determined under FTB regulations, which must be consistent with the federal regulations in effect on January 1, 1997, that classify a business entity as a partnership or an association taxable as a corporation, or disregard the separate existence of the business entity [*Rev. & Tax. Code § 23038(b)(2)(B)(i)*]. The classification of an eligible business entity as a partnership or an association taxable as a corporation is the same as the classification of the entity for federal tax purposes [*Rev. & Tax. Code § 23038(b)(2)(B)(i)*]. However, if an eligible business entity was properly classified as an association taxable as a corporation for any income year beginning with the 60-month period preceding January 1, 1997, the entity continues to be an association taxable as a corporation until it elects to be classified the same as the entity is classified for federal purposes. This latter rule does not apply to any entity that was not doing business in California, did not derive income from California, and had no California resident owner during the 60-month period preceding January 1, 1997 [*Rev. & Tax. Code § 23038(b)(2)(C)*].

Because the tax classification of a noncorporate real estate syndicate is simply a matter of preference, tax considerations are no longer important in deciding how to structure a private real estate syndicate.

Under *I.R.C. § 7704*, a partnership may be classified as a corporation for tax purposes if it is "publicly traded" [*I.R.C. § 7704(a)*]. However, interests in nonpublic real estate syndicates are not registered with the SEC and are not traded on established securities markets. Thus, *I.R.C. § 7704* is inapplicable to the nonpublic syndicates discussed in this chapter.

[2] Syndicate's Taxable Year

A real estate syndicate classified as a partnership generally is required to adopt a taxable year as follows:

(1) The taxable year of the syndicate will be the taxable year of the partners who have an aggregate interest in partnership profits and capital of more than 50 percent [*I.R.C. § 706(b)(1)(B)(i), (4)*; *Rev. & Tax. Code § 17851*].

(2) If there is no taxable year that fits the description in (1), the taxable year of the syndicate will be the taxable year of all of its principal partners [*I.R.C. § 706(b)(1)(B)(ii)*; *Rev. & Tax. Code § 17851*]. A "principal" partner is one having an interest of 5 percent or more in the syndicate's profits or capital [*I.R.C. § 706(b)(3)*; *Rev. & Tax. Code § 17851*].

(3) If there is no taxable year that fits the description in (1) or (2), the taxable year of the syndicate will be the one that produces the least aggregate deferral of income [*Treas. Reg. § 1.706-1(b)(2)(i)(C), (3)*; *see I.R.C. § 706(b)(1)(B)(iii)*; *Rev. & Tax. Code § 17851*].

A newly formed partnership may adopt its required taxable year (as determined above), a taxable year elected under *I.R.C. § 444*, or a 52-53-week taxable year ending with reference to its required taxable year or a taxable year elected under *I.R.C. § 444*, without securing approval of the Commissioner [*see Treas. Reg. § 1.441-1(c)(1)* (taxable year of new taxpayer generally is adopted by filing its first federal income tax return using that taxable year)]. If a newly formed partnership wants to adopt any other taxable year, it must establish a business purpose and secure the approval of the Commissioner under *I.R.C. § 442* [*Treas. Reg. § 1.706-1(b)(7)*].

Under *I.R.C. § 444*, a partnership may adopt or retain an otherwise improper taxable year. A newly formed partnership that would otherwise have a required taxable year may elect a fiscal year with a deferral period of three months or less [*I.R.C. § 444(b)(1)*]. However, if a § 444 election is in effect, the partnership must make a required payment that approximates the tax deferral arising from the use of the fiscal year [*I.R.C. §§ 444(c)(1), 7519*].

An existing partnership may change its taxable year by securing the Commissioner's approval under *I.R.C. § 442* or by making an election under *I.R.C. § 444* [*Treas. Reg. § 1.706-1(b)(8)(i)(A)*].

As a practical matter, most real estate syndicates with individuals as investors adopt the calendar year as the taxable year, because of the limitations on required taxable years and the complexities of the payments required pursuant to a § 444 election.



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§ 29B.61 Tax Treatment of Income and Loss Resulting From Syndicate Operations

[1] Income and Losses Are Passed Through to Investors

A real estate syndicate that is taxed as a partnership is not required to pay either federal or California income taxes; rather, its income and losses--from regular operations and, ultimately, from the sale or other disposition of the investment property--are "passed through" to the partners [*see I.R.C. § 701*; *Rev. & Tax. Code § 17851*]. Each year the syndicate must file an "informational" income tax return showing its gains, losses, deductions, and credits for the year [*I.R.C. § 6031*; *Rev. & Tax. Code § 18633*]. Each partner must include on his or her individual income tax return the partner's distributive share of any profits earned by the partnership during the year [*I.R.C. § 702(a)*; *Rev. & Tax. Code § 17851*].

Under the Tax Reform Act of 1986, the tax-shelter advantages of real estate syndicates have been significantly curtailed and virtually eliminated with regard to passive investors such as limited partners in a real estate syndicate. The "at risk" rules now apply to real estate, so that a taxpayer generally may not deduct losses in excess of the taxpayer's cash and property contributions to the syndicate, plus borrowed amounts for which the taxpayer is personally liable for repayment or has pledged property as security for repayment ("recourse financing") [*I.R.C. § 465(a), (b)(1), (2)*; *see Rev. & Tax. Code § 17851*].

Deductions for losses incurred in "passive" activities are subject to additional limitations. An activity involving the conduct of a trade or business in which the taxpayer does not materially participate is denominated a "passive" activity for federal income tax purposes [*I.R.C. § 469(c)(1)*]. For most investors, therefore, a nonpublic real estate syndicate is a passive activity. Deductions and credits arising from passive activities may be taken only against income and tax liability attributable to all passive activities [*I.R.C. § 469(a)(1), (d)*]. Deductions and credits that are disallowed under this rule in any taxable year may be carried forward to the next taxable year but not back to any previous taxable year [*I.R.C. § 469(b)*; *see Rev. & Tax. Code § 17851*]. Further, even if the investor actively participates in management of the syndicate, any deduction for the partner's distributive share of losses sustained by the syndicate is allowable only to the extent of the adjusted basis of the partner's interest in the syndicate [*I.R.C. § 704(d)*; *see Rev. & Tax. Code § 17851*].

The Tax Reform Act of 1986 also eliminated the Accelerated Cost Recovery System is no longer available for real property depreciation and lengthened the recovery periods [*see I.R.C. § 168(b), (c)*]. For detailed coverage of deductions for depreciation of real property, see Ch. 29A, *Joint Ventures* .

[2] Investors' Distributive Shares

The tax consequences for each investor are based on his or her "distributive share" of the syndicate's income, loss, and other items [*I.R.C. § 702(a)*; *Rev. & Tax. Code § 17851*]. The "distributive share" does not refer to actual distributions made to the partners. Rather, it refers to the syndicate's allocation of income or loss to the partner, whether those items are actually distributed to the partner or retained and added to the partner's capital account.

Generally, each partner's distributive share of income, gain, loss, deduction, or credit is determined by the partnership agreement (or the equivalent document, such as the operating agreement for an LLC) [*I.R.C. § 704(a)*]. However, if the agreement does not specify a partner's distributive share, or if the agreement makes an allocation to the partner that does not have "substantial economic effect," the partner's distributive share will be determined in accordance with the partner's interest in the partnership [*I.R.C. § 704(b)*].

Thus, the partnership agreement (or the equivalent document, such as the operating agreement of an LLC) may allocate income, gain, loss, deductions, and credits so as to minimize the partners' overall tax burden. The partners may decide to share certain kinds of income or loss in different proportions than they share other items. For example, partners with substantial passive income from other sources might be allocated a greater proportion of operating losses than the proportion of income that is allocated to them. Such an allocation is limited, however, by the requirement that the allocation have "substantial economic effect" [*see I.R.C. § 704(b)*].

To have "substantial economic effect," an allocation must satisfy two requirements [*Treas. Reg. § 1.704-1(b)(2)(i)*]. First, the allocation must have economic effect. That is, the allocation must be consistent with the underlying agreement between the parties, which means that in the event there is an economic benefit or economic burden that corresponds to an allocation, the partner to whom the allocation is made must receive that economic benefit or bear that economic burden [*Treas. Reg. § 1.704-1(b)(2)(ii)*]. Second, the economic effect of the allocation must be substantial, that is, there must be a reasonable possibility that the allocation will substantially affect the dollar amounts to be received by the partners, independent of tax consequences [*Treas. Reg. § 1.704-1(b)(2)(iii)*]. For detailed coverage of "substantial economic effect," see Ch. 15, *General Partnerships* .



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13-29B California Legal Forms--Transaction Guide § 29B.62

§ 29B.62 Investor's Basis in Syndicate Interest

[1] Original Basis and Adjustments to Basis

A partner's original income tax basis for his or her partnership interest is the amount the partner contributed to the capital of the partnership, that is, the amount the partner paid for the partnership interest [*I.R.C. § 705(a)*; *see I.R.C. § 722*]. Thereafter, a partner's income tax basis is adjusted each year based on the partnership's earnings, losses, and distributions. The basis of the partner's partnership interest is decreased by any distributions made to the partner by the partnership, by the partner's distributive share of any partnership losses, and by the partner's distributive share of any partnership expenditures that, although not deductible on the partnership's informational income tax return, are not capital expenditures [*I.R.C. § 705(a)(2)*]. The basis is increased by the partner's distributive share of all taxable and exempt income earned by the partnership each year [*I.R.C. § 705(a)(1)*]. Any increase in a partner's share of the liabilities of a partnership, or any increase in a partner's individual liabilities by reason of the partner's assumption of partnership liabilities, also increases the partner's basis [*I.R.C. §§ 722*, *752(a)*]. This increase in basis is treated, for income tax purposes, as a further contribution by the partner of money in the amount of the increase to the capital of the partnership [*I.R.C. § 752(a)*].

[2] Allocation of Syndicate's Liabilities

An important aspect of the tax treatment of real estate syndicates is the inclusion of a share of the syndicate's liabilities in each investor's basis in his or her interest in the syndicate [*see I.R.C. § 752(a)* (increase in partner's share of partnership liabilities is treated as money contribution to partnership)]. This ability to increase basis is significant, because each investor's deduction of his or her share of the syndicate's losses is limited to the investor's adjusted basis [*see I.R.C. § 704(d)*; *see also § 29B.61[1]*].

Treasury Regulations for determining a partner's share of partnership liabilities distinguish between recourse and nonrecourse liabilities of the partnership. A partnership liability is a "recourse" liability to the extent that any partner or related person bears the economic risk of loss for that liability [*Treas. Reg. § 1.752-1(a)(1)*]. A partner's share of any recourse partnership liability equals the portion of that liability, if any, for which the partner (or related person) bears the economic risk of loss [*Treas. Reg. § 1.752-2(a)*]. The determination of the extent to which a partner bears the

economic risk of loss for a partnership liability is made by applying the rules in *Treas. Reg. § 1.752-2(b)*-(k) [*Treas. Reg. § 1.752-2(a)*].

A partnership liability is a "nonrecourse" liability to the extent that no partner (or related person) bears the economic risk of loss for that liability [*Treas. Reg. § 1.752-1(a)(2)*; *see Treas. Reg. § 1.752-2*]. The nonrecourse liabilities of a partnership must be allocated among the partners (1) to reflect the partners' shares of a partnership minimum gain; (2) to reflect any gain that would be allocated to the partners under *I.R.C. § 704(c)* if the partnership, in a taxable transaction, disposed of all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of those liabilities and for no other consideration; and (3) in accordance with the partners' interests in partnership profits [*Treas. Reg. § 1.752-3(a)*].

A debt incurred by an LLC is a nonrecourse liability, because if the net assets of LLC are insufficient to pay the debt, the members, managers, and officers of the LLC generally are not personally liable on the debt [*Corp. Code §§ 17101(a), 17158*]. However, if one of the member of the LLC personally guarantees the debt, then it will be treated as a recourse debt, since the guaranteeing member bears the economic risk of loss on the debt [*see Treas. Reg. § 1.752-1(a)(1)*].

Another example of a nonrecourse liability is a purchase money deed of trust or mortgage given by a general partnership to a seller of property in California. A "purchase money" deed of trust is security for an obligation incurred in the purchase of real property and owed to the seller or a lender. Under California law, a deficiency judgment may not be obtained against a buyer on a purchase money deed of trust; therefore, the buyer is not personally liable and the security is a nonrecourse liability [*see Code Civ. Proc. § 580b*].

The increase of each partner's basis in the partnership through the use of nonrecourse financing potentially may increase the partners' distributive share of partnership losses. However, any potential tax deduction arising from a distributive share of partnership losses is limited by the "at risk" rule, which generally limits deductions for borrowed amounts to those for which the borrower is personally liable [*see I.R.C. § 465(b)(2)*; *see § 29B.61[1]*]. There is an exception to the "at risk" rule in regard to "qualified nonrecourse financing" secured by the real property used in the activity [*see I.R.C. § 465(b)(6)(A)*]. For further discussion of the "at risk" rule and qualified nonrecourse financing, see Ch. 29A, *Joint Ventures* .

As an example of application of the basis rules, suppose one general and nine limited partners, all ten of whom are to share equally in partnership profits, each contribute $2,000 toward the capital of a limited partnership. Suppose further that the limited partnership uses the $20,000 to purchase a $100,000 apartment building that is subject to an existing $80,000 deed of trust, and, although the partnership takes title to the apartment house subject to the deed of trust, it does not assume the deed of trust. Automatically, the income tax basis of each partner's interest in the partnership is increased from $2,000 to $10,000. Each partner may deduct $10,000 of partnership losses from his or her aggregate passive income as shown on his or her individual income tax return in the first year of the partnership's operation, assuming that the existing note and deed of trust represent qualified nonrecourse financing [*see I.R.C. § 465(b)(6)(A), 469(a), (d)*].



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[Reserved]

§§ 29B.63[Reserved]



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13-III California Legal Forms--Transaction Guide Scope

Scope

NOTE: This Transaction Guide assumes that the proposed real estate syndicate will be organized as a limited partnership or as a limited liability company (LLC). Most real estate syndicates are organized as limited partnerships or as LLCs, primarily because those entities allow for "pass-through" tax treatment, limited personal liability for most or all investors, and centralized management [***see*** *§ 29B.12*].



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§ 29B.100 Facts

1. Identifying information for syndicator, each known investor, and any other person who will act as manager of syndicate (general partner in limited partnership, or manager of LLC):

a. If individual:
(1) Name, address, telephone number, and e-mail address.

(2) Occupation and licenses.

(3) Education and experience.

(4) Net worth.

b. If corporation or other business entity:

(1) Name, address, telephone number, and e-mail address.

(2) Name, telephone number, and e-mail address of contact person at entity.

(3) State and date of incorporation or organization.

(4) Principal business of entity.

(5) If entity has real estate broker's license or other professional license:
(a) Name of officer or employee who qualified for license.

(b) Principal activity carried on by entity under license.

(6) Following information for each officer, general or managing partner, or manager of LLC:

(a) Name.

(b) Office or responsibility in entity.

(c) Education and experience.

2. Following information about real property to be acquired by syndicate:

NOTE:

The following assumes that the syndicate will be a "specified property" syndicate, with a particular piece of property already selected before formation of the syndicate. Because nonpublic syndicates are smaller than public syndicates, they tend to be specified property syndicates; a typical nonpublic syndicate can only raise enough capital to invest in one or two properties and thus will usually be able to select the property before making its offering to investors **[*see* *§§ 29B.10[1], 29B.21*].**

a. Type of real property to be acquired, such as:

(1) Existing residential building.

(2) Existing commercial building.

(3) Existing industrial building.

(4) Land on which residential building will be constructed.

(5) Land on which commercial building to be constructed.

(6) Undeveloped land for speculative resale.

b. Location of property, including:

(1) Exact legal description.

(2) Address.

(3) General description of surrounding area.

c. Size of property, including following as applicable:

(1) Acreage, if vacant land.

(2) Number of existing or planned residential units.

(3) Existing or planned square footage, if office or other commercial building.

3. Following information about planned acquisition and development of real property:

a. Steps syndicator has taken or plans to take to tie up property, such as:

(1) Completed purchase, with title now held in syndicator's name.

(2) Execution of purchase agreement, contingent on formation of syndicate to complete purchase.

(3) Obtaining option to purchase property, exercisable by syndicator.

(4) Obtaining option to purchase property, exercisable by syndicate.

b. Price and relevant terms of syndicate's planned purchase of property.

c. If syndicate will develop property, estimated cost of construction.

d. Known or expected terms of proposed financing for syndicate's purchase or development of property, including:

(1) Total purchase price or construction cost.

(2) Amount of down payment by syndicate.

(3) Manner in which deferred payments will be evidenced and secured, such as:
(a) Promissory note and all-inclusive, or wrap-around, deed of trust.

(b) Promissory note secured by second deed of trust and assumption by syndicate of existing first deed of trust.

(c) Promissory note secured by first deed of trust.

(4) Terms of promissory note or other instrument evidencing deferred balance of purchase price or construction cost, including:

(a) Interest rate on deferred payments.

(b) Any prepayment penalty.

(c) Any lump-sum "balloon" payments at end of term evidenced by promissory note.

(d) Any due-on-sale clause.

e. Name, address, telephone number, and e-mail address of persons involved in acquisition of property, including:

(1) Seller.

(2) Seller's real estate broker.

(3) Attorney.

f. Following information concerning any real estate broker handling transaction for syndicate:

(1) Name, address, telephone number, and e-mail address of particular salesperson or other employee handling transaction.

(2) Connection and affiliation, if any, of broker or salesperson with person or entity forming syndicate and proposed general partner or manager of syndicate.

(3) Commission to be paid by seller or syndicate to broker.

g. If syndicator has executed purchase agreement for property, following information concerning escrow:

(1) Escrow number.

(2) Name, address, telephone number, and e-mail address of title or escrow company office.

(3) Name of particular escrow or title clerk handling escrow.

(4) Anticipated closing date, if available.

h. If syndicator has option to purchase any property to be acquired by syndicate, information about option, including:

(1) Terms of option.

(2) Expiration date of option.

(3) Amount to be paid by syndicate for assignment of option to syndicate.

i. If syndicate plans to develop property, following information:

(1) Name, address, telephone number, and e-mail address of architect or engineer responsible for structure's design.

(2) Name, address, telephone number, and e-mail address of any proposed general contractor.

(3) Relationship (business or otherwise) of architect, engineer, and proposed general contractor to persons organizing syndicate and any proposed general partner or manager of syndicate.

(4) Following information about financing of project:

NOTE:
For a discussion of construction financing, see Ch. 30A, ***Basic Construction Financing*** .

(a) Name, address, telephone number, and e-mail address of lenders for construction loan and take-out loan.

(b) Type of disbursement control of construction loan funds required by lender or

proposed by syndicate.

(c) Terms of proposed loans.

4. How syndicate property will be managed, such as following:

NOTE:
A distinction must be drawn between management of the legal entity that is the syndicate itself and management of the real property acquired by the syndicate. Although the general partner or general partners will always manage the syndicate itself, they may be unwilling or unqualified to assume the day-to-day management of a large apartment complex or shopping center, especially when they are real property investment specialists or professional real estate syndicators.

a. By general partner or manager of syndicate.

b. Under management agreement to be executed with property's seller.

c. Under lease-back of property to seller.

d. Under management agreement with third-party real property management firm, either.

5. Information on passive investors' interests in syndicate, including:

a. Amount of money that must be raised through sale of interests for:

(1) Down payment on property and initial operating expenses.

(2) Anticipated commissions and compensation for brokers and dealers who sell interests.

(3) Other anticipated selling expenses, such as costs of printing subscription agreement and private offering memorandum.

(4) Estimated organizational costs, such as:

NOTE:
Generally, no income tax deduction is allowed to a partnership or partner (or to a member of an LLC taxed as a partnership) for amounts paid or incurred to organize the partnership (or LLC) or for syndication expenses incurred to sell or promote the sale of interests in the partnership (or LLC) [*I.R.C. § 709(a)*]. However, a partnership (or LLC taxed as a partnership) may elect to deduct its organizational expenses ratably over a 15-year period [*I.R.C. § 709(b)*; *Rev. & Tax. Code § 17851*].

(a) Attorney's fees.

(b) Accounting fees.

(c) Filing fees for organization documents such as certificate of limited partnership or articles of organization for LLC.

b. Number and structure of interests.

c. Offering price of each unit of interest.

d. Whether interests are to be assessable or nonassessable, and, if so, for what expenses.

6. Following information on any prior real estate syndicates or real estate investment trusts organized or operated by syndicator:

a. Name.

b. Property acquired.

c. Names and addresses of accountants and attorneys.

d. Which prior syndicates (if any) were registered with Securities and Exchange Commission or qualified with California Corporations Commissioner.

7. Any fees to be paid to syndicator for services rendered in organizing syndicate.

NOTE:

An income tax deduction is not allowed to the partnership or any partner for organizational and syndication expenditures. However, the partnership may elect to amortize certain organizational expenditures [*I.R.C. § 709*]. In addition, payments made to a general partner for services rendered in connection with the syndication and organization of the partnership are not currently deductible and must be capitalized if they are in the nature of capital expenditures [*I.R.C. § 707(c)*; ***see*** *I.R.C. § 263*].

8. Proposed interest of syndicator in syndicate, including any proposed dollar amounts or percentages reflecting following:

a. Promotional interest in syndicate's capital.

b. Promotional interest in profits and earnings.

c. Syndicate interest in exchange for cash contribution to capital.

9. Information about intended duration of syndicate, such as:

a. Termination on sale of property.

b. Termination after specified period of time.

c. Indefinite duration of syndicate, with reinvestment of all or portion of proceeds from sale of property.

d. Death or retirement of general partner or manager.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited PartnershipsFormationReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate Syndicates



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13-29B California Legal Forms--Transaction Guide § 29B.101

§ 29B.101 Documents

1. If syndicator is corporation:

    a. Copy of articles of incorporation.

    b. Copy of bylaws.

    c. If corporation is a foreign corporation, copy of certificate of qualification to transact intrastate business in California [*see* Ch. 12B, *Foreign Corporations and Associations*].

2. If syndicator is partnership:

    a. Copy of partnership agreement.

    b. Copy of certificate of limited partnership, if applicable.

3. If syndicator is LLC:

    a. Copy of articles of organization.

    b. Copy of operating agreement.

4. For syndicator and any other person who will be general partner or manager of syndicate:

    a. Balance sheet showing net worth.

b. Cash-flow or profit-and-loss statement for last taxable year.

5. Copy of documents reflecting syndicator's efforts to tie up property for syndicate, such as:

a. Any option taken by syndicator on property to be acquired by syndicate.

b. Purchase agreement entered into by syndicator.

6. Preliminary title report for any real property to be acquired by syndicate.

7. Copy of any promissory note or deed of trust to be executed by syndicate in purchasing specified real property or otherwise.

8. Copy of any deed of trust or other encumbrance that syndicate will assume or acquire property "subject to."

9. If syndicate is to construct building:

a. Copy of any letter of commitment issued for construction loan or take-out loan.

b. Copy of proposed agreement, promissory note, and deed of trust for construction loan.

c. Copy of any proposed design or construction contracts with any engineer, architect, or general contractor [*see* Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals*].

10. Copy of any proposed management agreement for any property to be acquired by syndicate.

11. Copy of any proposed lease-back to sellers of any property to be acquired by syndicate.

12. Any other proposed contracts or agreements.

13. Syndicator's real estate license, if any.

14. If applicable, licenses of proposed seller of interests.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited PartnershipsFormationReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate Syndicates



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13-29B California Legal Forms--Transaction Guide § 29B.110

§ 29B.110 Determining Whether Syndicate Is Exempt From Registration Under Federal Securities Act

NOTE:

For an introductory discussion of the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*], see *§ 29B.40*. For detailed coverage of the Act, see Ch. 6, ***Securities Regulation Issues*** . For detailed discussion and checklists of requirements for each of the following exemptions, see Ch. 6A, ***Federal Securities Exemptions for California Nonpublic Corporations*** .

Even if a federal exemption is available, the sale of syndicate interests still must be qualified by the California Commissioner of Corporations unless it comes within an exemption to California's securities laws [***see*** *§ 29B.111*].

1. Determine whether syndicate meets requirements for intrastate exemption, which is available if both [*15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147*]:

a. Syndicate is organized and does business in California.

b. Syndicate interests are offered and sold only to persons resident within California.

2. Determine whether syndicate meets requirements of any of following Regulation D exemptions:

a. Small or limited offering exemption, applicable to offerings not exceeding $1,000,000 [*17 C.F.R. § 230.504*].

b. "Accredited investor" exemption, which is available if both [*17 C.F.R. § 230.505*]:
(1) Total offerings do not exceed $5,000,000.

(2) There are no more than 35 buyers, not counting accredited investors.

c. Private offering exemption, which is applicable if there are no more than 35 sophisticated buyers, not counting accredited investors [*17 C.F.R. § 230.506*].

3. Determine whether syndicate meets requirements of Regulation A small offering exemption, which is available if aggregate sales will not exceed $5,000,000 [*15 U.S.C. § 77c(b)*; *17 C.F.R. § 230.251 et seq.*].

NOTE:

The Regulation A exemption [*17 C.F.R. § 230.251 et seq.*] under Section 3(b) of Securities Act [*15 U.S.C. § 77c(b)*] is actually an exemption only from full registration, since a notification of the issuance is required [***see*** *17 C.F.R. § 230.251(d)(1)(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationReal Estate SyndicatesSecurities LawBlue Sky LawsSecurities Exempt From RegistrationSecurities LawExemptions From RegistrationExempt Classes of Securities



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13-29B California Legal Forms--Transaction Guide § 29B.111

§ 29B.111 Determining Whether Syndicate Is Exempt From Qualification Under California Securities Law

NOTE:

For an overview of the limited offering exemption from qualification under the California Corporate Securities Law of 1968 [*Corp. Code § 25102(f)*; ***see*** *§ 29B.41[2]*]. For detailed coverage, see Ch. 6B, ***California Limited Offering Exemptions*** .

1. Verify that sales of syndicate interests will be made to 35 or fewer persons [*Corp. Code § 25102(f)(1)*].

2. Verify that each purchaser either [*Corp. Code § 25102(f)(2)*]:

a. Has preexisting personal or business relationship with syndicator (or any of its partners, officers, directors or controlling persons, or managers appointed or elected by the members if the offeror is a limited liability company).

b. Can be reasonably assumed to have the capacity to protect his or her own interests in connection with the transaction, by reason of the purchaser's business or financial experience or the business or financial experience of the purchaser's professional advisers who are unaffiliated with and who are not directly or indirectly compensated by the issuer or any affiliate or selling agent of the issuer.

3. Verify that proposed offering does not involves same property as, or have some other connection with, prior offerings or sales so that they will be combined for purposes of exemption [*see 10 Cal. Code Reg. § 260.102.12(b)(1)*; *see also § 29B.41[2][e]*].

NOTE:

Under certain circumstances, past offerings or sales that have some connection with the proposed offering may be considered by the Commissioner to be a part of the limited offering transaction. In such cases, the prior offerings or sales, either alone or in conjunction with the other offers and sales of the transaction, may violate the conditions of the exemption [***see*** Ch. 6B, ***California Limited Offering Exemptions***].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationReal Estate SyndicatesSecurities LawExemptions From RegistrationExempt Classes of Securities



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§§ 29B.112[Reserved]



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13-29B California Legal Forms--Transaction Guide § 29B.120

§ 29B.120 Formation of Nonpublic Real Estate Syndicate

1. Prepare following documents needed to form legal entity for syndicate.

a. If syndicate will be organized as limited partnership, prepare following:

NOTE:
The two statutory requirements for the formation of a limited partnership are the execution of a partnership agreement and the filing of a certificate of limited partnership [*Corp. Code § 15902.01(a)*]. For detailed coverage of the formation of limited partnerships, ***see*** Ch. 16, ***Formation of Limited Partnerships*** .

(1) Limited partnership agreement [*see Corp. Code § 15902.01(a)*; *see also §§ 29B.130* (drafting guide), 29B.200 (form)].

(2) Certificate of limited partnership [*see Corp. Code § 15902.01(a)*; *see also* Ch. 16, *Formation of Limited Partnerships*].

b. If syndicate will be organized as limited liability company, prepare following:

NOTE:
The two statutory requirements for the formation of a limited liability company are the filing of articles of organization and the execution of an operating agreement among the members [*Corp. Code § 17050(a), (c)*]. For detailed coverage of the formation of limited liability companies, ***see*** Ch. 12C, ***Limited Liability Companies*** .

(1) Articles of organization [*see Corp. Code § 17050(c)*; *see also* Ch. 12C, *Limited Liability Companies*].

(2) Operating agreement [*see Corp. Code § 17050(a)*; *see also §§ 29B.131* (drafting guide), 29B.201 (form)].

2. Prepare following documents needed to complete sales of interests in syndicate:

a. Private offering memorandum [*see §§ 29B.23[1], 29B.132* (drafting guide)].

NOTE:
The distribution of a private placement memorandum or a similar document is required for most offerings under SEC Rule 506 [***see*** *17 C.F.R. § 230.506*]. Although the other exemptions from the registration and qualification requirements of federal and California securities laws do not require distribution of a private placement memorandum, such a document is distributed for any nonpublic offering in actual practice.

b. Investor questionnaire [*see §§ 29B.23[2], 29B.203* (form)].

c. Subscription agreement [*see §§ 29B.23[4], 29B.202* (form)].

3. If claiming California limited offering exemption [*see Corp. Code § 25102(f)*; *see also § 29B.41[2]*], prepare complete official notice of transaction form [*10 Cal. Code Reg. § 260.102.14(b)*; *see* Ch. 6B, *California Limited Offering Exemptions*].

4. Raise necessary capital for syndicate by selling interests to investors.

a. Present each prospective investor with package containing following:

(1) Organizational documents (*see* P 1, *above*).

(2) Documents needed to complete sale of interest in syndicate (*see* P 2, *above*).

b. Preserve relevant exemptions from securities laws by observing following precautions [*see §§ 29B.40, 29B.41*; *see also* 6A, *Federal Securities Exemptions for California Nonpublic Corporations*; Ch. 6B, *California Limited Offering Exemptions*].

(1) If claiming California limited offering exemption and federal regulation D exemptions, restrict the number of sales made, to no more than 35 investors [*see 17 C.F.R. §§ 230.505, 230.506*; *Corp. Code § 25102(f)(1)*; *see also §§ 29B.40, 29B.41[2]*[[b]].

NOTE:
In determining the number of purchasers, certain persons and entities, such as institutional investors and any officer, director, affiliate of the issuer, or a manager if the offeror is a limited liability company, are excluded from the count [***see*** *Corp. Code § 25102(f)*; *10* Cal. Code Reg. § 260.102.13]. Furthermore, certain combinations and classes of persons and entities are counted as one purchaser. For example, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person [*Corp. Code § 25102(f)*]. For a detailed coverage of the rules affecting the

purchaser count, ***see*** *§ 29B.41[2][b]* and Ch. 6B, ***California Limited Offering Exemptions*** .

(2) If claiming California limited offering exemption, sell syndicate interests only to persons who meet suitability requirements and who have sufficient experience to evaluate investment [*see Corp. Code § 25102(f)(2)*; *see §§ 29B.41[2][a], [b], 29B.111*].

(3) If claiming California limited offering exemption, have each purchaser represent that purchase is for his or her own account and not for resale [*see Corp. Code § 25102(f)(3)*; *see § 29B.41[2][a]*].

(4) Avoid any general solicitation or general advertising, such as offers made at any seminar or meeting whose attendees were invited by general solicitation or general advertising [*see 17 C.F.R. § 230.502(c)*; *Corp. Code § 25102(f)(4)*; *see also §§ 29B.40*, 41[2][c]].

NOTE:

This does not preclude distribution of documents and other material that are not disseminated to the public [***see*** *10 Cal. Code Reg. § 260.102.12(j)*].

(5) If claiming intrastate exemption under federal law, offer and sell only to California residents [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147*; *see also § 29B.40*].

(6) Provide offerees opportunity to ask questions and obtain additional information about offering and syndicate, to comply with requirements of SEC Regulation D [*see 17 C.F.R. § 230.502(b)(2)(v)*] and to avoid later charges of misrepresentation.

NOTE:

Any oral or written communication made in connection with the offer or sale must disclose all material facts that are necessary to prevent the communication from being misleading [***see*** *Corp. Code § 25401*, *25501*].

c. Have each interested, acceptable investor complete and sign necessary documentation, including:

(1) Investor questionnaire [*see § 29B.203* (form)].

(2) Subscription agreement.

(3) Limited partnership agreement [*see § 29B.200* (form)] or limited liability company operating agreement [*see § 29B.201* (form)], as appropriate.

d. If interests are sold under California limited offering exemption, file official notice of transaction [*see* Ch. 6B, *California Limited Offering Exemptions*] with Commissioner of Corporations no later than 15 days after first sale of security in transaction in California [*10 Cal. Code Reg. § 260.102.14(b)*; *see Corp. Code § 25102(f)*; *see also § 29B.41[2][d]*].

NOTE:

If in connection with the transaction the issuer is filing a notice with the SEC [***see*** *15 U.S.C. § 77d(6)*; *17 C.F.R. § 230.503*], the notice filed in California may be a copy of the SEC form. The issuer must also file a consent to service of process, unless it is a California corporation or has already filed a consent to service. The filing should be accompanied with a cover letter indicating that the filing is pursuant to *Corp. Code § 25102(f)*, and if a consent to service is not included, a statement that the issuer already has

a consent to service on file with the Commissioner [*10 Cal. Code Reg. § 260.102.14(a)(1)*].

(1) File notice electronically through the Internet process made available by Department of Corporations at www.corp.ca.gov [*10 Cal. Code Reg. § 260.102.14(a)(2), (c)-(f)*].

(2) If issuer claims hardship exemption from electronic-filing requirement, notice must be in form specified by Department regulations [*10 Cal. Code Reg. § 260.102.14(a)(2), (c)-(f)*].

5. Complete procedures for formation of syndicate's legal entity.

a. If syndicate will be organized as limited partnership, file certificate of partnership [*see Corp. Code § 15902.01(a)*; *see also* Ch. 16, *Formation of Limited Partnerships*].

b. If syndicate will be organized as limited liability company, file articles of organization [*see Corp. Code § 17050(c)*; *see also* Ch. 12C, *Limited Liability Companies*].

6. Complete acquisition of property by syndicate [*see § 29B.24*; *see also* California Real Estate Law and Practice, Ch. 29, *Syndicate Property Acquisition and Management* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited PartnershipsFormationReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate Syndicates



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[Reserved]

§§ 29B.121[Reserved]



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13-29B California Legal Forms--Transaction Guide § 29B.130

§ 29B.130 Limited Partnership Agreement

NOTE:

Generally, the limited partnership agreement governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. To the extent the partnership agreement does not provide otherwise, the Uniform Limited Partnership Act of 2008 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. However, the partnership agreement may not vary certain provisions of the Act [*Corp. Code § 15901.10(b)*]. For example, an agreement may not vary the information required to be maintained by the limited partnership [***see*** *Corp. Code § 15901.11*], unreasonably restrict partners' inspection of that information [***see*** *Corp. Code §§ 15903.04, 15904.07*], eliminate the general partner's fiduciary duties [***see*** *Corp. Code § 15904.08*], or vary the general partner's power to withdraw, or "dissociate," from the partnership [***see*** *Corp. Code § 15906.04(a)*]. For further discussion, see Ch. 16, Formation of ***Limited Partnerships***].

1. Include names of all partners [*see § 29B.200[2]*, Introductory Clause].

2. State intention to form partnership [*see § 29B.200[2]*, P 1.01].

3. Set forth name that [*see § 29B.200[2]*, P 1.02]:

a. Contains either of following at end of name [*Corp. Code § 15901.08(b)*]:
(1) "Limited partnership;" or

(2) Abbreviation "L.P."

b. If desired, contains name of limited partner [*Corp. Code § 15901.08(a)*].

c. Does not contain words "bank," "insurance," "trust," "trustee," "incorporated," "inc.," "corporation," or "corp." [*Corp. Code § 15901.08(g)*].

d. Is distinguishable from the following [*Corp. Code § 15901.08(d)*]:

NOTE:
A limited partnership may apply to the Secretary of State for authorization to use one of the following names if the present user, registrant, or owner of the conflicting name consents to the use and undertakes to change its name to one that does not conflict with the name applied for [*Corp. Code § 15901.08(e)(1)*].

(1) Name already reserved for another limited partnership.

(2) Name of limited partnership that previously filed a certificate.

(3) Name of registered foreign limited partnership.

4. State that business and purpose of partnership is to own and manage real property, and describe property if already selected [*see § 29B.200[2]*, P 1.03].

5. Provide address of office in California at which required records will be kept [*Corp. Code §§ 15901.11*, *15901.14(a)(1)*; *see § 29B.200[2]*, P 1.04].

6. If desired, state intention to file certificate of limited partnership [*see Corp. Code § 15902.01*; *see also § 29B.200[2]*, P 1.05].

7. Specify partnership term [*see § 29B.200[2]*, P 1.06].

8. If desired, specify method of holding title to syndicate property [*see § 29B.200[2]*, P 1.07].

9. Provide the following information concerning partners:

a. Names and residence addresses of original general and limited partners [*see § 29B.200[2]*, PP 2.01, 2.02].

b. If desired, method of admission of:

(1) Additional limited partners on acquisition of interest directly from partnership [*see Corp. Code § 15903.01(a)*; *see also § 29B.200[2]*, P 2.03].

(2) Assignee of limited partnership interest as substituted limited partner [*see Corp. Code §§ 15903.01(a)*, *15907.02(h)*; *see also § 29B.200[2]*, PP 2.04, 8.02].

(3) Additional general partner after filing of original certificate [*see Corp. Code § 15904.01(a)*; *see also § 29B.200[2]*, P 2.05].

(4) Replacement for general partner when former general partner ceases to be such and there is no remaining general partner [*see Corp. Code § 15904.01(a)*].

NOTE:
This action may be taken only by the affirmative vote of a majority in interest of the limited partners [***see*** *Corp. Code § 15908.01(c)(2)*].

c. If desired, procedure for removal of general partner [*see Corp. Code § 15906.03(c)*; *see also § 29B.200[2]*, P 2.06].

d. If desired, provision that interests of partners and assignees in partnership will be evidenced by certificates of interest issued by limited partnership [*see § 29B.200[2]*, P 2.08].

10. Set forth the following information concerning partnership finances:

a. Amount of initial capital [*see § 29B.200[2]*, PP 2.02, 2.03(a)].

b. Total number of partnership units and, if appropriate, cost of units and minimum number of units to be purchased by each limited partner [*see § 29B.200[2]*, P 2.03(a), (c)].

c. If minimum capitalization is stated, type of impound account to be used, closing date for receipt of above minimum, and procedure for return of purchase funds if minimum not received [*see § 29B.200[2]*, P 2.03(a)].

d. If appropriate, each original partner's initial contribution of any of the following, with description of contribution and its agreed on value [*see § 29B.200[2]*, PP 2.03, 3.01]:

(1) Money.

(2) Property.

(3) Services rendered.

(4) Promissory note or other obligation to contribute money or property.

(5) Obligation to render services.

e. If desired, provision permitting general partner to make contributions and share in profits, losses, and distributions, as limited partner [*see Corp. Code § 15905.01*; *see also* Ch. 16, *Formation of Limited Partnerships*].

f. Partners' rights to withdraw and receive return of capital [*see § 29B.200[2]*, P 3.03].

NOTE:
A limited partner may withdraw, or "dissociate" from the partnership, on the happening of events specified in the partnership agreement [*Corp. Code § 15906.01(b)*].

g. Manner of allocation of profits and losses [*see § 29B.200[2]*, PP 3.04, 3.05]:

NOTE:
The profits and losses of the partnership must be allocated among the partners in the manner provided in the partnership agreement. If no manner of allocation is specified, then the profits and losses must be allocated in the same manner as the partners share distributions [*Corp. Code § 15905.035*].

Any special allocation of profits and losses will be recognized by the IRS only if it has a "substantial economic effect" [***see*** *I.R.C. § 704(b)(2)*; ***see also*** *Treas. Reg. § 1.704-1*]. For a discussion of this matter, see the Legal Background to Ch. 15, ***General Partnerships***.

h. Method of distribution of profits [*see § 29B.200[2]*, PP 3.06, 3.07].

11. Concerning management of partnership:

a. State that powers of control and management belong only to designated general partners [*see § 29B.200[2]*, P 4.01].

b. Specify management duties and restrictions on authority of managing general partners [*see § 29B.200[2]*, P 4.01].

c. Provide for general partner's compensation, e.g. [*see § 29B.200[2]*, P 4.02]:

(1) Reimbursement for business expenses.

(2) For services rendered as general partner.

12. Specify which of the following rights and powers will belong to limited partners [*Corp. Code § 15632(b)*; *see § 29B.200[2]*, PP 5.01, 5.02]:

NOTE:

A limited partner is not liable for any obligation of a limited partnership unless he or she is named as a general partner in the certificate or participates in the control of the business to a greater extent than merely exercising the rights and powers of a limited partner. However, even if a limited partner participates in the control of the business without being named as a general partner, he or she is liable as a general partner only to persons who transact business with the limited partnership (1) with actual knowledge of that partner's participation in control, and (2) with a reasonable belief, based on the limited partner's conduct, that the partner is a general partner at the time of the transaction. Nothing in the California Uniform Limited Partner Act of 2008, however, will be construed to affect the liability of a limited partner to third parties for the limited partner's participation in tortious acts [*Corp. Code § 15903.03(a)*; ***see, e.g.,*** *Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217]* .

A limited partner does not participate in the control of the business solely by engaging in, attempting to engage in, or having the right or power to engage in, any of the activities listed below [*Corp. Code § 15903.03(b)*]. Conversely, a limited partner's possession or exercise of any power not listed below does not necessarily constitute participation in the control of the partnership's business [*Corp. Code § 15903.03(c)*].

a. Being any of following [*Corp. Code § 15903.03(b)*; *see, e.g., Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217* (limited partner may not be deemed to have participated in control merely because he exercised his duties as president of corporate general partner)]:

(1) An independent contractor for, or an agent or employee of, limited partnership or general partner.

NOTE:

A limited partner also does not participate in the control of the business solely by transacting (or attempting to transact, or having the right or power to transact) business with the limited partnership or a general partner of the limited partnership [*Corp. Code § 15903.03(b)(1)(A)*].

(2) Officer, director, or shareholder of corporate general partner of limited partnership.

(3) Member, manager, or officer of limited liability company that is general partner of limited partnership.

(4) Limited partner of partnership that is general partner of limited partnership.

(5) Trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust that is a general partner.

(6) Trustee, officer, advisor, shareholder, or beneficiary of business trust that is a general partner.

b. Consulting with and advising general partner with respect to business of limited partnership [*Corp. Code § 15903.03(b)(2)*].

c. Doing any of the following [*Corp. Code § 15903.03(b)(3)*; *see, e.g., Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217* (limited partner not deemed to have participated in control merely because he acted as surety, lent money to limited partnership, or exercised duties as president of corporate general partner)]:

(1) Acting as surety for limited partnership or for general partner.

(2) Guaranteeing one or more specific debts of limited partnership.

(3) Providing collateral for limited partnership or general partner.

(4) Borrowing money from limited partnership or general partner.

(5) Lending money to limited partnership or general partner.

d. Approving or disapproving an amendment to partnership agreement [*Corp. Code § 15903.03(b)(4)*].

e. Voting on, proposing, or calling a meeting of the partners [*Corp. Code § 15903.03(b)(5)*; *see § 29B.200[2]*, P 5.02]:

f. Winding up partnership [*Corp Code 15903.03(b)(6)*; *see Corp. Code § 15908.03*].

g. Executing and filing certificate of limited partnership, certificate of withdrawal, or certificate of cancellation [*Corp. Code § 15903.03(b)(7)*; *see Corp. Code §§ 15902.04(a)(4), (6), 15902.05*].

h. Serving on audit committee or committee performing functions of audit committee [*Corp. Code § 15903.03(b)(8)*].

i. Serving on committee of limited partnership or of limited partners for purpose of approving actions of general partner [*Corp. Code § 15903.03(b)(9)*].

j. Calling, requesting, attending, or participating in any meeting of partners or limited partners [*Corp. Code §*

15903.03(b)(10)].

k. Taking any action required or permitted by law to bring, pursue, settle, or terminate derivative action on behalf of limited partnership [*Corp. Code § 15903.03(b)(11)*].

l. Performing any of following acts for any person in which limited partnership has an interest [*Corp. Code § 15903.03(b)(12)*]:

(1) Serving on board of directors or committee.

(2) Consulting or advising.

(3) Being or acting as officer, director, stockholder, partner, member, manager, agent, or employee.

(4) Being or acting as fiduciary.

m. Exercising any other right or power permitted to limited partners under the California Uniform Limited Partnership Act of 2008 [*Corp. Code § 15903.03(b)(13)*].

13. Include provisions governing partnership meetings [*see § 29B.200[2]*, art. 6].

14. Set forth syndicate's responsibilities concerning syndicate books, records, and reports [*see § 29B.200[2]*, art. 7].

15. If desired, prohibit or authorize assignment of partnership interests and substitution of limited partners [*Corp. Code § 15907.01 et seq.*; *see § 29B.200[2]*, PP 8.01, 8.02].

16. Concerning dissolution of partnership, specify:

a. That partnership will dissolve on happening of first to occur of events causing dissolution [*Corp. Code § 15908.01(a)*; *see § 29B.200[2]*, P 9.01].

b. Events causing dissolution [*see § 29B.200[2]*, P 9.01]:

c. Dissolution procedure, including distribution of proceeds resulting from liquidation of partnership assets [*see § 29B.200[2]*, PP 9.02, 9.03].

17. Include miscellaneous provisions specifying:

a. Procedure for giving notice of meetings and distributing reports [*see § 29B.200[2]*, P 10.01].

b. Governing law [*see § 29B.200[2]*, P 10.02].

c. Binding effect on heirs and assigns [*see § 29B.200[2]*, P 10.03].

d. Use of counterparts [*see § 29B.200[2]*, P 10.04].

e. Status as sole and only agreement of parties [*see § 29B.200[2]*, P 10.05].

f. Amendment procedure [*see § 29B.200[2]*, P 10.06].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate Syndicates



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§ 29B.131 Limited Liability Company Operating Agreement

NOTE:

The members of an LLC must enter into an operating agreement, either written or oral, before or after filing of its articles or organization [*Corp. Code § 17050(a)*]. An operating agreement is any agreement among all the members as to the affairs of the LLC and the conduct of its business in a manner not inconsistent with law or its articles, including amendments [*Corp. Code § 17001(ab)*]. For an LLC that will operate as a real estate syndicate, the operating agreement should be written. Generally, any contractual provision authorizing the syndicator or other manager to buy or sell real property on behalf of the syndicate must be written [***see*** *Civ. Code §§ 1624(a)(3), 2309*]. Also, as a practically matter, without a written operating agreement the syndicate would never come into being: investors will not be willing to buy interests in a real estate syndicate whose operations are governed by an oral agreement.

The following drafting guide presents provisions that are typical for an LLC that will operate as a real estate syndicate. For further guidance in drafting an operating agreement, see Ch. 12C, ***Limited Liability Companies*** . In addition, provisions typically found in corporate bylaws or partnership agreements can be adapted to LLC operating agreements in appropriate instances. For a variety of corporate bylaw provisions, see Ch. 4, ***Bylaws*** . For partnership provisions, see Ch. 15, Part A, ***Formation of General Partnerships.*** For other provisions that may be appropriate to this type of agreement, see Ch. 8C, ***Close Corporation Shareholder Agreements*** .

If the operating agreement conflicts with a provision of the articles of organization, the articles control [*Corp. Code § 17005(f)*]. If the articles of organization and operating agreement do not cover a particular matter, the provisions of the Limited Liability Company Law govern [*Corp. Code § 17005(a)*].

1. Define terms used in operating agreement, in accordance with statutory definitions as applicable [*see Corp. Code § 17001*; *see also § 29B.201[2],* art. 1].

NOTE:

An operating agreement may not vary the definitions set forth in *Corp. Code § 17001*, except as specifically provided in that section [*Corp. Code § 17005(b)(1)*].

2. State name, purpose, and operative date of LLC [*see § 29B.201[2]*, art. 2].

3. Set forth names and addresses of members.

4. Detail initial and additional (if any) capital contributions of members [*see § 29B.201[2]*, P 3.01].

5. Enumerate LLC's remedies in the event of member's failure to make initial and subsequent capital contributions.

6. Specify capital accounts and capital structure [*see § 29B.201[2]*, P 3.05].

7. Include provisions governing transfers and assignment of membership interests, and disposition of member's interest on death of that member [*see § 29B.201[2]*, P 3.09].

NOTE:

If the syndicate will be an association of closely acquainted individuals, in the nature of a small general partnership, the members may wish to place significant limitations on the transfer of membership interests, to ensure that they are not forced to accept as a member someone they do not want. Similarly, the disposition of a membership interest on the death of a member may be limited in appropriate cases. If desired, provisions similar to those frequently included in corporate or partnership buy-sell agreements should be included. The operating agreement in this chapter contains significant transfer restrictions on membership interests [***see*** *§ 29B.201[2]*, P 3.09], as well as simple buy-sell provisions for optional or mandatory purchase of a membership interest [***see*** *§ 29B.201[2]*, PP 3.13-3.17]. For other buy-sell provisions, see Ch. 8D, ***Buy-Sell Agreements*** , and Ch. 15, ***General Partnerships***).

8. Specify rights and duties of members, including limiting authority and liability [*see, e.g., § 29B.201[2]*, PP 3.06-3.08].

9. Specify rights and duties of classes of members, if any.

10. Specify procedures for amending articles of organization and operating agreement [*see, e.g., § 29B.201[2]*, P 4.01].

NOTE:

The power to adopt and change the operating agreement of an LLC is vested in its members, but its articles of organization or written operating agreement may prescribe the manner in which the operating agreement may be changed [*Corp. Code § 17059*].

11. Identify syndicator or other person who will serve as manager of LLC [*see § 29B.201[2]*, P 6.01].

NOTE:

Generally, an LLC may be managed by members, managers, or officers [*Corp. Code §§ 17150, 17151*]. In a private real estate syndicate, however, the syndicator typically manages the syndicate, usually as a member of the LLC, while the other members are

essentially "passive" investors.

12. Detail members' meeting requirements and voting rights, in accordance with statutory requirements as applicable [*see Corp. Code § 17103(b), (c)*; *see also § 29B.201[2]*, art. 10].

NOTE:
An operating agreement may not vary the voting requirements or voting rights set forth in *Corp. Code § 17103(b)* and *(c)* [*Corp. Code § 17005(b)(3)*].

13. Set forth method of allocating profits and losses and any special allocations [*see § 29B.201[2]*, art. 13].

14. Provide for indemnification of members and manager, and specify members' and managers' fiduciary duties [*see § 29B.201[2]*, art. 14].

15. Set forth provisions as to accounting, records, financial statements, and reports [*see § 29B.201[2]*, art. 15].

NOTE:
An operating agreement may not vary the members' information and inspection rights set forth in *Corp. Code § 17106* [*Corp. Code § 17005(b)(4)*].

16. Set forth method of making distributions.

17. Include provisions covering various tax matters such as tax elections and identification of "tax matters" member [*see § 29B.201[2]*, art. 11].

18. Include provisions governing dissolution and winding up [*see § 29B.201[2]*, art. 16].

19. Include provisions governing procedures common to detailed contracts, such as [*see § 29B.201[2]*, art. 17]:

a. Statements of consideration.

b. Provisions for notice, severability, integration, governing law, and confidentiality (if appropriate).

20. Provide for consents of spouses of married members with respect to any portion of membership interests that are community property.

21. Attach schedule showing:

a. Each member's initial contributions to capital.

b. Percentage interest of each member in LLC.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesFormationReal Property LawSecurities RegulationReal Estate

Syndicates



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§ 29B.132 Private Offering Memorandum

NOTE:

A private placement memorandum is a disclosure document typically distributed to potential investors by issuers who are asserting one or more exemptions from the registration requirements of the federal Securities Act of 1933 [*15 U.S.C. § 77a et seq.*] or the qualification requirements of California's Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*]. Most private placement memoranda contain the information set forth in "Guide 5," which is basically a drafting guide prepared by the Securities and Exchange Commission's Division of Corporation Finance [***see*** SEC, Securities Act Industry Guides, Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships (Guide 5), http://www.sec.gov/about/forms/industryguides.pdf; ***see also*** *§ 29B.23[1]*].

The information in the memorandum may be presented in the order indicated below. References to the general partner and its affiliates or to sponsors are intended to include references to the general partners, promoters of the syndicate, and all persons that, directly or indirectly, through one or more intermediaries, control or are controlled by, or are under common control with, the general partner or promoters [Guide 5, Introductory Paragraph]. Counsel may wish to include a table of contents that indicates the pages on which each major discussion begins.

1. Prepare cover page containing [*see* Guide 5, P 1]:

a. Basic information about the offering, e.g.:
(1) Name of syndicate.

(2) Number of syndicate units.

(3) Status as California limited partnership or limited liability company.

b. Termination date of offering.

c. Any minimum required purchase.

d. Any arrangements to place funds received in escrow trust or similar arrangement.

e. Tabular presentation of total maximum and minimum interests to be offered.

f. A brief identification of material risks involved in purchase of interests, including:

(1) Cross-references to further discussion in prospectus; and

(2) Identification of most significant risk factors, if applicable.

2. Immediately following cover page, describe suitability standards to be utilized by syndicate in accepting or rejecting subscription agreements, including [*see* Guide 5, P 2]:

a. Those standards established by syndicate, and by California Corporations Commissioner.

b. Methods syndicate intends to employ to assure adherence to suitability standards by persons selling interests.

c. Brief discussion of factors pertaining to need for these standards.

NOTE:
These factors include lack of liquidity (resale or assignment of securities), importance of investor's federal income tax bracket in terms of the tax benefits to be derived, the long term nature of the investment, and possible adverse tax consequences of premature sale of the interests [Guide 5, P 2].

d. Any suitability standards applicable to resale of interests.

3. Include two-part concise outline summary of partnership or LLC and use of proceeds as follows [Guide 5, P 3]:

a. For summary of partnership or LLC, disclose following information in outline form with cross-references (if applicable):

(1) Name, address, and telephone number of general partner or manager.

(2) Names of persons making investment decisions for entity.

(3) Intended termination date of entity.

(4) If true, state that general partner or manager, and its affiliates, will receive substantial fees and profits in connection with offering.

(5) If current distributions are investment objective, state estimated maximum time from closing date that investor might have to wait to receive these distributions.

(6) Brief description of properties to be purchased.

(7) If material portion of minimum net proceeds of offering (allowing for reserves) is not committed to specific properties, indicate this fact.

(8) Depreciation method to be used.

(9) Maximum leverage expected to be used by entity as a whole and on individual properties, when it may differ.

(10) Cross-reference to glossary.

b. For summary of use of proceeds, prepare tabular summary including [Guide 5, P 3(B)]:

NOTE:
Although this summary will vary according to the circumstances, an example is attached to Guide 5 as Appendix I.

(1) Estimated amounts to be paid to general partner or manager, and its affiliates.

(2) Dollar amounts and percentages of maximum and minimum proceeds of offering.

(3) The following, if appropriate:
(a) Estimates of public offering expenses (both organizational and sales).

(b) Amount available for investment.

(c) Nonrecurring initial investment fees.

(d) Prepaid items.

(e) Financing fees.

(f) Cash down payments.

(g) Reserves.

(h) Acquisition fees, including those paid by seller.

(4) If desired, percentages of estimated maximum and minimum total assets.

4. Prepare summary tabular presentation of all compensation, fees, profits, and other benefits (including reimbursement of out-of-pocket expenses) to be paid general partner or manager, and its affiliates, prepared as follows [Guide 5, P 4]:

NOTE:
Examples of the types of compensation, fees, and other items that should be disclosed are set forth in the Guide [***see*** Guide 5, P 4].

a. Indicate clearly whether compensation relates to offering and organizational stage, developmental or acquisition stage, operational stage, or termination and liquidation stage of partnership or LLC (separate subcaptions are recommended).

b. Itemize by category and specify dollar amounts when possible.

c. If more detailed information is required, place it in Summary of Partnership Agreement or Summary of LLC Operating Agreement section and insert appropriate cross-reference in this section.

d. Identify person who will receive above compensation, including affiliations with general partner or manager.

e. Discuss any limitations partnership agreement or LLC operating agreement places on losses which general partner or manager, and its affiliates, can sustain.

f. Disclose maximum aggregate dollar front-end fees to be paid during first fiscal year of operations, based on assumption that entity's maximum leverage is utilized.

g. If compensation arrangements are based on formula or percentage, disclose and illustrate terms of arrangement, and:

(1) Disclose assumptions underlying dollar figures;

(2) If compensation is to equal percentage of contributed investor capital, disclose whether percentage is cumulative or noncumulative.

5. Draft conflict of interest section setting forth a summary of [Guide 5, P 5]:

a. Each type of transaction that may result in conflict between interests of investors and general partner or manager, and its affiliates; and

b. Proposed method of dealing with each potential conflict.

NOTE:
An organization chart should be included in this section if it would assist investors in understanding the relationship between the various organizations managed or controlled by the general partner or manager, or its affiliates, that will do business with the syndicate [Guide 5, P 5(B)].

6. Discuss fiduciary obligation owed by general partner or manager to passive investors [Guide 5, P 6].

7. Include short risk factors section containing [Guide 5, P 7]:

NOTE:
Risk factors relating to real estate limited partnership or LLC offerings in general should be briefly discussed after those relating to the specific syndicate. These risks might include the risks associated with the ownership of real estate, including uncertainty of cash flow to meet fixed and maturing obligations, adverse local market conditions, risks of "leveraging," and uninsured losses [Guide 5, P 7(D)].

a. Series of short, concise subcaptioned paragraphs, with cross-references to more complete discussions when appropriate, summarizing principal risk factors applicable to offering and to syndicate's particular plan of operations.

b. Summary of each material risk of adverse tax consequences with cross-references to more complete discussions in federal tax section [*see* Guide 5, P 7(B)].

8. Provide narrative summary ("track record") of prior performance of programs sponsored by syndicator and its affiliates containing specified information [*see* Guide 5, P 8].

9. Prepare management section setting forth the following information [Guide 5, P 9]:

a. If a material portion of maximum net proceeds (allowing for reserves) is not committed to specific properties, identity of (and certain background information concerning) individuals who will make investment decisions [*see* Guide 5, P 9(A)].

b. Any substantial reliance on a nonaffiliate in running syndicate's operations, including:

(1) Any relevant prior experience of nonaffiliate.

(2) If material amount of compensation or fees will be paid to nonaffiliates, a tabular presentation describing the fees under a separate heading entitled, "Fees and Compensation Arrangements with Nonaffiliates."

c. If partnership agreement or LLC operating agreement contains provision for change in entity's management, a description of how change could be accomplished.

d. Amount of, and reason for, any contingent liabilities of syndicator and its affiliates concerning prior programs now in existence.

NOTE:
If this information appears in the financial statements, it may be incorporated into the memorandum by reference [Guide 5, P 9(D)].

10. Specify investment objectives and policies, including [Guide 5, P 10]:

NOTE:
As a general rule, if the net proceeds of the offering will be invested in nonspecified properties or in properties that do not have any significant operating histories, it is not appropriate to make any statement setting forth a rate of return on the investment [Guide 5, P 10(C)].

a. Nature of property intended to be purchased (e.g., commercial, residential).

b. Criteria (e.g., method of depreciation, location) to be utilized in evaluating proposed investments.

c. If partnership agreement or LLC operating agreement contains provision for change in investment objectives, a description of how change could be made.

11. Describe real estate investments, including [Guide 5, P 11]:

a. Risks associated with specified properties.

NOTE:
Examples of these risks include competitive factors, environmental regulation, rent control regulation, and fuel or energy requirements and regulation [Guide 5, P 11(A)].

b. If applicable, a statement indicating that material portion of minimum net proceeds (allowing for reasonable reserves) is not committed to specific properties.

c. If reasonable probability exists that material portion of net proceeds of minimum offering will be used to acquire specific property, a description of that property.

12. Summarize all material federal income tax aspects of offering, dividing discussion into following subsections [*see* Guide 5, P 12]:

NOTE:
Citations to sections of the Internal Revenue Code, the Treasury Regulations, and decided cases or other sources should be included. Furthermore, an opinion of counsel as to all material tax aspects of the offering should be included as an exhibit. That opinion should cite relevant authority for any conclusions expressed, and should be prepared by a knowledgeable tax attorney. The tax section should summarize or restate the tax information contained in the opinion [Guide 5, P 12].

a. Election to be treated as partnership for tax purposes.

b. Taxation of limited partners or members of LLC.

c. Basis.

d. Depreciation and recapture.

e. Deductibility of prepaid and other expenses.

f. Tax liabilities in later years.

g. Sale or other disposition of syndicate interest.

h. Sale or other disposition of syndicate property.

i. Impact of *Internal Revenue Code § 183*.

j. Liquidation or termination of syndicate.

k. State, local, and foreign taxes.

l. Tax returns and tax information.

m. Other headings.

13. Include glossary of any terms used in memorandum that are technical or susceptible to varying methods of computation [*see* Guide 5, P 13 (examples provided)].

14. Provide brief summary of material provisions of limited partnership agreement or LLC operating agreement [Guide 5, P 14].

15. Identify all reports and other documents to be furnished to passive investors [*see* Guide 5, P 15 for further requirements].

16. Disclose all restrictions on transfer of interests [Guide 5, P 16].

17. Discuss any redemption, repurchase, and right of presentment provisions contained in partnership agreement or LLC operating agreement [*see* Guide 5, P 17].

18. Concerning any plan of distribution [Guide 5, P 18]:

a. Disclose any proposed understanding or arrangement between syndicate and any broker or dealer relating to distribution of interests.

b. Disclose any intention to pay referral or similar fees to any person in connection with distribution of interests.

c. If syndicator or its affiliates intend to purchase interests, and these interests will be included in satisfying minimum offering requirements, disclose the following:

(1) Whether these interests are intended to be resold.

(2) If resale is intended, period of time interests will be held prior to resale.

19. Summarize promotional and sales material, including [Guide 5, P 19]:

NOTE:

"Sales materials" include memoranda, summary descriptions, graphics, supplemental exhibits, media advertising, charts, and pictures relating to the offering and proposed to be transmitted to prospective investors [Guide 5, P 20(B)].

Any advertising must comply with the requirements of the relevant exemptions. Private syndicates are likely to be subject to the general prohibitions against advertising contained in California's limited offering exemption [***see*** *Corp. Code § 25102(f)(4)*; ***but see*** *10 Cal. Code Reg. § 260.102.12(j)* (documents and other material not disseminated to public); ***see also*** 29B.41[2][c]] and SEC Rule 506 [***see*** *17 C.F.R. § 230.502(c)*; ***see also*** Ch. 6A, ***Federal Securities Exemptions for California Nonpublic Corporations***].

a. Balanced discussion of both risk and reward.

b. All written sales material proposed to be transmitted to prospective investors, identified as follows:

(1) Identified by title and character.

(2) Separately categorized either as syndicate's material or that of another person.

(3) If material is provided by another person:
(a) Name of author and publication.

(b) Date of prior publication (if any).

(c) Identity of any persons quoted without being identified.

(d) Whether or not publication and author's consent have been obtained, unless source is an official public document or statement.

20. Attach issuer's financial statements [Guide 5, P 20; see *17 C.F.R. § 230.502(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationReal Estate SyndicatesSecurities LawExemptions From RegistrationExempt Classes of Securities



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART III. TRANSACTION GUIDE
D. Drafting Guide

13-29B California Legal Forms--Transaction Guide §§ 29B.133-29B.199

[Reserved]

§§ 29B.133[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29B California Legal Forms--Transaction Guide § 29B.200

§ 29B.200 Limited Partnership Agreement for Nonpublic Real Estate Syndicate

[1] Comment

[a] Use of Form

This form is a limited partnership agreement for a real estate syndicate. It may be used when the sale of syndicate interests need not be qualified under the California Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] or registered under the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*]. There are numerous exemptions from these qualification and registration requirements; the most commonly used exemptions are the California limited offering exemption [*Corp. Code § 25102(f)*; *see § 29B.41[2]*; *see also* Ch. 6B, *California Limited Offering Exemptions*] and the federal "private offering" and intrastate exemptions [*15 U.S.C. § 77d(2)*; *see* § 27B.40; *see also* Ch. 6A, *Federal Securities Exemptions for California Nonpublic Corporations*]. A syndicator ordinarily will attempt to comply with as many exemptions as possible to ensure that if one is inapplicable for some reason, there will be another to fall back on.

If a real estate syndicate does not qualify for an exemption under California's Corporate Securities Law of 1968, then it is a public real estate syndicate and any sale of interests in the syndicate must be qualified with the Corporations Commissioner. Syndicates that must qualify their securities are discussed in Ch. 29C, *Public Real Estate Syndicates* . That chapter presents a form of limited partnership agreement that complies with the Commissioner's qualification requirements, and any of the provisions in that form in may be substituted for or added to the provisions of the form presented in [2], below. However, care must be taken in attempting to use any of the provisions of the form presented in [2], below, for a public real estate syndicate.

[b] Uniform Limited Partnership Act of 2008

Generally, the limited partnership agreement governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. To the extent the partnership agreement does not provide otherwise, the Uniform Limited Partnership Act of 2008 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. However, the partnership agreement may not vary certain provisions of the Act [*Corp. Code § 15901.10(b)*]. For example, an agreement may not vary the information required to be maintained by the limited partnership [*see Corp. Code § 15901.11*], unreasonably restrict partners' inspection of that information [*see*

Corp. Code §§ 15903.04, 15904.07], eliminate the general partner's fiduciary duties [*see Corp. Code § 15904.08*], or vary the general partner's power to withdraw, or "dissociate," from the partnership [*see Corp. Code § 15906.04(a)*].

The Uniform Limited Partnership Act of 2008 is discussed in detail in Ch. 16, *Formation of Limited Partnerships* . The limited partnership agreements in that chapter contain provisions that may be inserted into this agreement.

[2] FORM

Limited Partnership Agreement for Nonpublic Real Estate Syndicate

LIMITED PARTNERSHIP AGREEMENT

THIS LIMITED PARTNERSHIP AGREEMENT is entered into this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name*], hereinafter referred to as "General Partner," and those persons executing this Agreement as limited partners, hereinafter collectively referred to as "Limited Partners."

IT IS HEREBY AGREED:

ARTICLE 1
FORMATION OF PARTNERSHIP

Formation of Limited Partnership

1.01. The parties to this Agreement hereby form a limited partnership, hereinafter referred to as "the Partnership," pursuant to the provisions of Chapter 5.5 of Title 2 of the California Corporations Code, known as the Uniform Limited Partnership Act of 2008.

Name of Partnership

1.02. The name of the Partnership shall be _____ [*name of partnership*], a limited partnership.

Business and Purpose of Partnership

1.03. The business and purpose of the Partnership is to acquire, hold, and operate that certain real property bearing an address of _____ [*street address*], _____ [*city*], _____ County, California, [*specify any improvement, e.g.,* on which is located a _____ (*number*)-unit apartment building,] and which is the real property situated in the County of _____, State of California more particularly described on the exhibit attached to this Agreement and marked "Exhibit A."

[*EITHER:*]

Principal Place of Business

1.04. The principal place of business of the Partnership shall be at _____ [*street address*], _____ [*city*], _____ County, California [, or at such other place as may be

determined from time to time by the General Partner, after _____ (*number*) days written notice of the change has been given to each Limited Partner].

[*OR*]

Partnership Office

1.04. The office at which all required Partnership records shall be kept is located at _____ [*street address*], _____ [*city*], _____ County, California _____ [*zip code*] [, or at such other place as may be determined from time to time by the General Partner, after _____ (*number*) days written notice of the change has been given to each Limited Partner].

[*CONTINUE:*]

Certificate of Limited Partnership

1.05. The General Partner shall, concurrently with the execution of this Agreement, execute a Certificate of Limited Partnership and cause the Certificate to be filed in the office of the Secretary of State of California. [The General Partner shall also record a certified copy of the Certificate in the office of the County Recorder in every county in which the Partnership owns real property.]

Term

1.06. The Partnership shall commence on the filing of a Certificate of Limited Partnership in the manner required by the California Limited Partnership Act and shall continue until _____ [*specify date or event on which partnership will terminate*], unless previously terminated in accordance with the provisions of this Agreement.

Title to Property

1.07. Title to all property, real or personal, acquired by the Partnership shall be acquired, held, and conveyed in the name of the Partnership.

ARTICLE 2
PARTNERS

Original General Partner

2.01. _____ [*Name of general partner*], whose residence address is _____ [*street address*], _____ [*city*], _____ County, California _____ [*zip code*] shall be the sole original General Partner of the Partnership and shall have full and exclusive charge and control of the management, conduct, and operation of the affairs and business of the Partnership in all respects.

Original Limited Partners

2.02. The names and residence addresses of the persons who shall be and are original Limited Partners in the Partnership are as specified on the signature page at the end of this Agreement under "LIMITED PARTNERS." [These Limited Partners shall purchase one Class A Partnership Unit each for the price specified in Paragraph 2.03(a) of this Agreement. On the first business day following the admission of additional Limited Partners, the Partnership will redeem the Class A Partnership Units of the original Limited Partners by returning their cash contributions, without interest. After the return of these contributions, each original Limited Partner shall cease to be a Limited Partner.]

Admission of Additional Limited Partners

2.03.(a) Class A Units. The Partnership intends to sell an additional _____ [*number*] Class A Units at a purchase price of $_____ per Unit, and to admit persons who acquire a minimum of _____ Class A Units as Limited Partners. The total amount paid by a Limited Partner for these Units shall constitute the Partner's initial capital contribution to the Partnership. [Amounts so received will be deposited in a Partnership impound account with _____ (*specify, e.g.*, a bank qualified to do business in California *or name impound account holder*) as the impound account holder. While in impound, these funds may be temporarily invested in short-term highly liquid investments that have an appropriate safety of principal. If a total of _____ (*number*) additional Class A Units has not been issued in exchange for a total contribution of $_____ on or before _____ [*date*], all amounts received will be returned, together with interest earned on those amounts, if any.]

(b) Admission of Limited Partners. Subject to any other provision of this Agreement, after the formation of the Partnership, a person may acquire a Class A Unit directly from the Partnership and be admitted as an additional Limited Partner on _____ [*specify, e.g.*, (1) purchasing Partnership Units in the manner specified in Paragraph 2.03(a) of this Agreement; (2) executing and filing with the Partnership a written instrument that states an intention to become a Limited Partner holding Class A Units and requests admission to the Partnership in that capacity; and (3) submitting any other instruments requested by the General Partner, including a written acceptance and adoption of this Agreement].

(c) Class B Units. _____ [*Name*] shall contribute _____ [*specify, e.g.*, to the capital of the Partnership all plans, specifications, permits, contracts, engineering reports, appraisals, economic studies, and any other tangible or intangible property it may have affecting or relating to the Property, for which contribution it shall receive _____ (*number*) Class B Units]. That contribution shall constitute the above Limited Partner's initial capital contribution to the Partnership.

Admission of Substituted Limited Partner

2.04. After the formation of this Partnership, a person may be admitted as a substituted Limited Partner _____ [*specify, e.g.*, in the manner set forth in Paragraph 8.02 of this Agreement].

Admission of Additional General Partners

2.05. Subject to any other provision of this Agreement, after the filing of a Certificate of Limited Partnership for the Partnership, _____ [*specify, e.g.*, no additional persons shall be admitted as General Partners].

Removal of General Partner

2.06. The Limited Partners shall have the right to vote on, prepare or solicit written consents to, or call a meeting of the Partners for a vote on, the removal of the General Partner. The removal of the General Partner shall be effective without further action upon the vote or written consent of a majority in interest of all Partners. Written notice of the General Partner's removal shall be served on the General Partner by certified mail. If [*add if partnership may have more than one general partner:* there is no remaining General Partner, and] the Limited Partners fail to elect a new General Partner pursuant to Paragraph 2.07 of this Agreement within 90 days after the removal becomes effective, the Partnership shall be dissolved and its business shall be wound up and terminated. If the removal of the General Partner does not cause the dissolution of the Partnership, that removal _____ [shall *or* shall not] cause that Partner's interest in the Partnership to be converted to that of a Limited Partner. [*Add if general partner's interest is converted to that of a limited partner:* A former General Partner whose interest has been converted to that of a Limited Partner shall have the same rights and obligations under this Agreement as any other Limited Partner and shall have that interest in profits, losses, and distributions reduced pro rata with all other partners to provide compensation and an interest in the Partnership to the new General Partner.]

Replacement of General Partner

2.07. If the General Partner ceases to be General Partner for any reason, a new General Partner may be admitted with the consent of _____ [a majority in interest of the Limited Partners *or require approval by greater than majority in interest*].

[*Optional provision:*]

Certificate of Interest

2.08. The interest of a Partner or assignee may be evidenced by a certificate of interest in the Partnership. The certificate will be in a form to be determined by the General Partners. The assignment and transfer of the interest represented by the certificate, and the admission of transferees of the certificate, will be determined in accordance with Article 8 of this Agreement.

[*Continue with the following:*]

ARTICLE 3
CAPITAL AND FINANCES

General Partner's Capital Contribution

3.01. The General Partner shall _____ [*specify, e.g.*, contribute the sum of $_____ to the capital of the Partnership. This contribution shall be made by a demand promissory note without interest. For this contribution, the General Partner shall receive the _____ percent interest in the Net Income, Net Loss, and Distributions of the Partnership that is provided to the General Partner in Paragraphs 3.04(a) and 3.06(a) of this Agreement].

No Additional Capital Contributions

3.02. Except for the initial amount to be contributed to the capital of the Partnership pursuant to Paragraph 2.03 of this Agreement, no Limited Partner shall be required to contribute or pay any further sum to the capital of the Partnership or to the creditors of the Partnership, and the liability of each Limited Partner shall therefore be limited to the amount of the Limited Partner's agreed initial contribution to the capital of the Partnership.

Interest and Withdrawal of Capital

3.03. No Partner, General or Limited, shall be entitled to receive any interest on that Partner's contribution to the capital of the Partnership except as herein provided, nor shall any Partner have a right to withdraw or demand the return of this capital contribution except on dissolution of the Partnership or withdrawal of that Partner from the Partnership.

Allocation of Profits and Losses

3.04.(a) Except as provided in Subparagraph (b) of this Paragraph, all net profits and net losses of the Partnership shall be _____ [*specify, e.g.,* allocated 1 percent to the General Partner, and 99 percent to the Limited Partners as a group].

(b) Notwithstanding Subparagraph (a) of this Paragraph, after each Limited Partner holding Class A Units has received an amount equal to that Partner's contributed capital plus an amount equal to _____ percent per annum cumulative cash distribution return on the balance of the Partner's invested capital, determined as of the close of each calendar year by an accountant for the Partnership, profit on sale and cash flow attributable thereto shall be allocated (1) _____ percent to the General Partner, (2) _____ percent to the Limited Partners holding Class A Units; and (3) to the Limited Partner holding Class B Units.

Definition of Net Profits and Losses

3.05. The terms "net profits" and "net losses" as used in this Agreement shall mean the net profits and net losses of the Partnership as determined by generally accepted accounting principles for each accounting period provided for in this Agreement.

Distributions

3.06. (a) Generally. The Partnership shall make _____ [*specify, e.g.,* quarterly] distributions, commencing with the calendar year following the calendar quarter in which it first has Limited Partners owning at least _____ [*number*] Partnership Units, of all cash funds that the General Partner determines, in its sole discretion, to be in excess of the amount reasonably necessary for the conduct of the Partnership business and therefore available for distribution. Any distributions to Limited Partners "as a group" shall be allocated in proportion to the number of Partnership Units held by each Partner in the group.

(b) Cash From Operations. All cash that has been determined by the General Partner to be available for distribution from operations shall be distributed _____ percent to the General Partner, _____ percent to the Limited Partners holding Class A Units, as a group, and _____ percent to the Limited Partner holding Class B Units.

(c) Cash From Sale or Refinancing. Cash from sales or refinancing of Partnership property shall be distributed among, and allocated to, the Partners as follows:

(1) First, _____ percent to the General Partner and _____ percent to the Limited Partners holding Class A Units, as a group, until these Limited Partners have received distributions equal to 100 percent of their invested capital contributions plus an amount equal to _____ percent per annum cumulative non-compounded return on an amount equal to their original invested capital less any other distributions received under this Paragraph 3.06.

(2) Second, 100 percent to the Limited Partner holding Class B Units, until this Limited Partner has received Distributions in an amount equaling 100 percent of its original invested capital.

(3) Third, _____ percent to the General Partner, and _____ percent to the Limited Partners holding Class A Units, as a group, until these Limited Partners have received distributions equal to a _____ percent per annum cumulative return on their original invested capital less any other distributions received under this Paragraph 3.06.

(4) Thereafter, any remaining cash from sales or refinancing shall be allocated _____ percent to the General Partner, _____ percent to the Limited Partners holding Class A Units, as a group, and _____ percent to the Limited Partner holding Class B Units.

"Cash From Operations" and "Cash From Sale or Refinancing" Defined

3.07.(a) Cash From Operations. "Cash from operations" shall mean the Gross Property Revenues less all cash funds used to pay the expenses of the Partnership Property, including rents, debt payments, and all other expenses related to the operation of the Property, including repair, maintenance, replacements, and capital improvements.

(b) Cash From Sale or Refinancing. "Cash from sale or refinancing" shall mean the net cash received by the Partnership from the sale, refinancing, or other disposition of Partnership property.

ARTICLE 4
MANAGEMENT

Duties of General Partner

4.01. The General Partner shall have a fiduciary responsibility to the Partnership and the Partners and, in the exercise of that responsibility, shall have all authority, rights, and powers conferred by law to act for and on the behalf of the Partnership and, in addition, shall have all the authority, rights, and powers required or appropriate to the management of the Partnership business. The General Partner shall devote itself and so much of its time to the business of the Partnership as it, in its sole discretion, deems necessary to the efficient and successful conduct of that business. The General Partner now and at any time in the future, and from time to time in the future, may engage in any other business or enterprise for its own account, including a business or enterprise similar in nature to that of the Partnership.

Compensation

4.02. Apart from its share of profits, losses, and distributions of cash described in Paragraphs 3.04 and 3.06 of this

Agreement, the General Partner shall receive the following compensation:

(a) Real Estate Brokerage Commissions. A real estate broker's commission of $_____, to be paid by the seller on the purchase of the Property by the Partnership. Furthermore, _____ [*name*], an Affiliate of the General Partner, shall be paid a real estate broker's commission of $_____ by the seller on the above purchase.

(b) Property Management Fee. For its services in providing day-to-day property management services for the Property, _____ [*name*], an Affiliate of the General Partner, shall receive a property management fee of _____ percent of the gross property revenues, payable monthly as these revenues are received, up to a maximum of $_____ in _____ [*year*] and $_____ in _____ [*year*]; provided, however, that no such fee shall be paid by the Partnership to any third parties retained by _____ [*name of above affiliate*] to perform property management services.

(c) Nonrecurring Partnership Management Fee. The General Partner or an Affiliate shall be paid a nonrecurring partnership management fee of $_____, payable in _____ [*year*], and $_____, payable in _____ [*year*]. This fee shall be payable as compensation for providing overall Partnership administration and management.

(d) Minimum Compensation. Notwithstanding any other provisions of this Paragraph, the General Partner shall be allocated not less than _____ [*specify, e.g.,* 1] percent of the Net Income and Net Loss.

ARTICLE 5
RIGHTS OF LIMITED PARTNERS

Restrictions on Limited Partners

5.01. No Limited Partner, Assignee, or Assignees of Record shall take part in or interfere in any manner with the control, conduct, or operation of the Partnership, nor shall they have any right or authority to act for or bind the Partnership.

Voting Rights

5.02. All Limited Partners [*if desired, add:* (but not Assignees or Assignees of Record)] shall have the right to vote, call and give notice of meetings, and solicit written consents, with respect to the matters described in this Paragraph as follows. [*If appropriate, add:* No distinction shall be drawn between Class A Units and Class B Units for purposes of the provisions of this Agreement relating to any voting rights.]

(a) Limited Partners shall have the right to vote on the following actions, which may be taken only by the General Partners, and then only with the affirmative vote of a majority in interest of the Limited Partners.

(1) The dissolution and winding up of the Partnership.

(2) The merger of the Partnership.

(3) The sale, exchange, lease, mortgage, pledge, or other transfer of, or the granting of a security interest in, all or a substantial part of the assets of the Partnership other than in the ordinary course of its business.

(4) The incurrence of indebtedness by the Partnership other than in the ordinary course of its business.

(5) A change in the nature of the business of the Partnership.

(6) Any transaction in which the General Partner has an actual or potential conflict of interest with the Limited Partners or the Partnership.

(7) An election to continue the business of the Partnership under circumstances other than those described in subparagraph (c), below.

[*If admission of general partners is permitted under 2.05, add:*]

(8) The admission of a General Partner other than under the circumstances described in subparagraph (c), below.

[*Continue as follows:*]

(b) The Limited Partners shall have the right to vote on the removal of the General Partner as provided in Paragraph 2.06 of this Agreement.

(c) The Limited Partners shall have the right to vote, as provided in Paragraph 2.07, on the admission of a General Partner, or an election to continue the business of the Partnership after the General Partner ceases to be a General Partner, when there is no remaining or surviving General Partner.

(d) The Limited Partners shall have the right to vote on the amendment of this Partnership Agreement, which may be accomplished only by the affirmative vote of a majority in interest of the Limited Partners.

(e) The Limited Partners shall have the right to vote on _____ [*describe any other matter related to the business of the partnership on which limited partners are to be entitled to vote*].

ARTICLE 6
PARTNERSHIP MEETINGS

Call and Place of Meetings

6.01. Meetings of the Limited Partners to vote on any matters on which the Limited Partners are authorized to vote pursuant to Paragraph 5.02 of this Agreement may be called at any time by the General Partner, or by one or more Limited Partners having not less than 10 percent of the Partnership Units by delivering written notice of the call to the General Partner. Meetings may be held _____ [*specify, e.g.,* at the office identified in Paragraph 1.04 of this Agreement or at any other location designated by the person or persons calling the meeting].

Notice of Meetings

6.02. Following the call of a meeting, the General Partner shall give notice of the meeting not less than 10, or more than 60, days before the date of the meeting to all Limited Partners entitled to vote at the meeting. The notice shall state the place, date, and hour of the meeting and the general nature of business to be transacted. Furthermore, on written request by any Limited Partner entitled to call a meeting of Partners, the General Partner must send a notice to all Limited Partners that a meeting will be held at a time requested by the Limited Partner calling the meeting. This notice must be sent not less than 10, or more than 60, days after receipt of the foregoing request.

Quorum

6.03. A quorum at any meeting of Limited Partners shall consist of _____ [*specify, e.g.*, a majority of the voting power of the Limited Partners, represented in person or by proxy]. The Limited Partners present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment, notwithstanding the withdrawal of enough Limited Partners to leave less than a quorum, if the action taken, other than adjournment, is approved by the requisite percentage of Partnership Units specified in this Agreement.

Use of Communications Equipment

6.04. Partners may participate in a meeting through the use of conference telephones or similar communications equipment if all Partners participating in the meeting can hear one another. Partners using this equipment will be considered to be present in person at the meeting.

Adjournment for Lack of Quorum

6.05. In the absence of a quorum, any meeting of Limited Partners may be adjourned from time to time by the vote of a majority of the interests represented either in person or by proxy, but no other business may be transacted, except as provided in Paragraph 6.03 of this Agreement.

Action Without Meeting by Written Consent

6.06. Any action that may be taken at any meeting of the Limited Partners may be taken without a meeting if a consent in writing, setting forth the proposed action, is signed by Limited Partners having not less than the minimum number of votes that would be necessary to authorize or take that action at a meeting at which all entitled to vote on the matter were present and voted. If the Limited Partners are requested to give this written consent, each Limited Partner must be given notice of the matter to be voted on in the same manner described in Paragraph 6.02 of this Agreement. If the General Partner, or Limited Partners representing more than 10 percent of the Partnership Units, request a meeting for the purpose of discussing or voting on the matter, the notice of a meeting must be given in accordance with Paragraph 6.02 and no action shall be taken until the meeting is held. Unless delayed by such a meeting, any action taken without a meeting will normally be effective 15 days after the required minimum number of voters have signed the consent. However, the action will be effective immediately if the General Partner and Limited Partners representing at least 90 percent of the Limited Partnership interests have signed the consent.

Proxies

6.07.(a) Every Limited Partner entitled to vote may authorize another person or persons to act by proxy with respect to that Limited Partner's interest in the Partnership.

(b) Any proxy purporting to be executed in accordance with this Paragraph 6.06 shall be valid.

(c) No proxy shall be valid after the expiration of 11 months from the date of the proxy unless otherwise provided in the proxy. Every proxy continues in full force and effect until revoked by the Limited Partner executing it prior to the vote pursuant to the proxy, except as provided in Subparagraphs (f) and (g) of this Paragraph 6.06. The dates contained on the forms of proxy presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(d) A proxy is not revoked by the death or incapacity of the maker, (except as provided in Subparagraph (f) of this Paragraph 6.06), unless, before the vote is counted, written notice of the death or incapacity is received by the Partnership.

(e) Revocation of a proxy is effected by a writing delivered to the Partnership stating that the proxy is revoked, or by a subsequent proxy executed by the Limited Partner executing the proxy, or by attendance at the meeting and voting in person by the person executing the proxy.

(f) A proxy that states that it is irrevocable is irrevocable for the period specified in the proxy (notwithstanding Subparagraph (d) of this Paragraph 6.06) when it is held by any of the following or their nominee: a creditor or creditors of the Partnership or the Limited Partner who extended or continued credit to the Partnership or the Limited Partner in consideration of the proxy, if the proxy states that it was given in consideration of the extension or continuation of credit and the name of the person extending or continuing credit. In addition, a proxy may be made irrevocable (notwithstanding Subparagraph (d) of this Paragraph 6.06) if it is given to secure the performance of a duty or to protect a title, either legal or equitable, until the happening of events that, by its terms, discharge the obligations secured by it.

(g) Notwithstanding the period of irrevocability specified in the proxy as provided in Subparagraph (f) of this Paragraph 6.06, the proxy becomes revocable when the debt of the Partnership or Limited Partner is paid.

(h) A proxy may be revoked, notwithstanding a provision making it irrevocable, by the assignment of the interest in the Partnership of the Limited Partner who executed the proxy to an assignee without knowledge of the existence of the proxy and the admission of that assignee to the Partnership as a Limited Partner.

(i) The General Partner may, in advance of any Partnership meeting, prescribe additional regulations concerning the manner of execution and filing of proxies and their validation.

Fixing Record Date

6.08.(a) The General Partner, or Limited Partners representing more than 10 percent of the Limited Partners' interests, may fix a record date for and in advance of a meeting. This date must be not more than 60, or less than 10, days before the date of the meeting, or more than 60 days before any other action.

(b) If no record date is fixed as provided in Subparagraph (a) of this Paragraph 6.07, then the record date shall be determined as follows:

> (1) The record date for determining Limited Partners entitled to receive notice of, or to vote at, a meeting of Limited Partners shall be at the close of business on the business day preceding the day on which notice is given, or, if notice is waived, at the close of business on the business day preceding the day on which the meeting is held.

(2) The record date for determining Limited Partners entitled to give consent to Partnership action in writing without a meeting shall be the day on which the first written consent is given.

(3) The record date for determining Limited Partners for any other purpose shall be at the close of business on the day on which the General Partner adopts the record date, or the sixtieth day before the date of the action relating to that other purpose, whichever is later.

(4) The record date for adjourned meetings shall be the record date set in determining the Limited Partners entitled to receive notice of, or to vote at, the original meeting; however, the Limited Partners who called the original meeting may fix a new record date if the meeting is adjourned for more than 45 days from the date set for the original meeting.

ARTICLE 7
BOOKS, RECORDS, AND REPORTS

Books of Account

7.01. At all times during the continuance of the Partnership, the General Partner shall keep complete and accurate books of account in which all matters relating to the Partnership, including all income, expenditures, assets, and liabilities, shall be entered. The books of account shall be kept on the _____ [cash *or* accrual] basis of accounting in accord with generally accepted accounting practices and shall be open to inspection by any Limited Partner or the Partner's authorized representative at any and all reasonable times.

Required Records

7.02. The General Partner shall keep at the office identified in Paragraph 1.04 of this Agreement all of the following records:

(a) A current alphabetical list of the full name and last known business or residence address of each Partner, together with the contribution and the share in profits and losses of each Partner.

(b) A copy of the Certificate of Limited Partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed.

(c) Copies of the Partnership's federal, state, and local income tax or information returns and reports, if any, for the six most recent taxable years.

(d) Copies of this Agreement and all amendments to this Agreement.

(e) Financial statements of the Partnership for the six most recent fiscal years.

(f) The Partnership's books and records for at least the current and past three fiscal years.

Delivery of Records to Limited Partners

7.03. On the request of a Limited Partner, or his or her agent or attorney, the General Partner must promptly deliver to

the Limited Partner, or his or her agent or attorney, at the expense of the Partnership, a copy of the following documents:

(a) The current list of Partners' names, addresses, contributions, and share in profits and losses.

(b) The Certificate of Limited Partnership, as amended, and any powers of attorney pursuant to which any certificate was amended.

(c) This Agreement, as amended.

Access to Records by Limited Partners

7.04. Each Limited Partner has the right, upon reasonable request, to each of the following:

(a) To inspect and copy during normal business hours any of the Partnership records required to be maintained pursuant to Paragraph 7.02 of this Agreement.

(b) To obtain from the General Partner, promptly after becoming available, a copy of the Partnership's federal, state, and local income tax or information returns for each year.

Any request, inspection, or copying by a Limited Partner may be made by that Limited Partner, or by his or her agent or attorney.

Amendments to Agreement

7.05. The General Partner shall promptly furnish to any Limited Partner a copy of any amendment to this Agreement executed by the General Partner pursuant to a power of attorney from the Limited Partner.

Income Tax Information

7.06. The General Partner shall send to each of the Limited Partners, within 90 days after the end of each taxable year, such information as is necessary to complete federal and state income tax or information returns [*add if partnership has 35 or fewer limited partners:*, and a copy of the Partnership's federal, state, and local income tax or information returns for the year].

[*Add the following 7.07 if partnership has more than 35 limited partners:*]

Financial Statements

7.07. The General Partner shall distribute financial statements as follows:

(a) The General Partner shall cause an annual report to be sent to each Limited Partner not later than 120 days after the close of the fiscal year. The report shall contain a balance sheet as of the end of the fiscal year and an income statement and statement of changes in financial position for the fiscal year.

(b) Within 30 days after receiving a written request from Limited Partners representing at least 5 percent of the interests of Limited Partners, the General Partner shall provide the Limited Partners with (1) an income statement of the Partnership for the initial three-month, six-month, or nine-month period of the current fiscal year ended more than 30 days before the date of the request, and (2) a balance sheet of the Partnership as of the end of that period.

(c) Any of the financial statements referred to in this Paragraph 7.07 shall be accompanied by any report on the statement prepared by independent accountants engaged by the Partnership, or, if there is no such report, the certificate of the General Partner that the financial statements were prepared without audit from the books and records of the Partnership.

ARTICLE 8
TRANSFER OF PARTNERSHIP INTERESTS

Assignment of Units

8.01. Limited Partners shall _____ [*specify, e.g.,* have the right to assign and transfer _____ (*restate minimum number of units that may be purchased, as specified in Paragraph 2.03*) or more Partnership Units owned by the Partner at any time. The assignment shall be effective as to the Partnership, and the Assignee shall become an Assignee of Record, when a bill of sale for the assigned Partnership Units signed by the Assignor and specifying the name and address of both the Assignor and Assignee are received by the General Partner at the office specified in Paragraph 1.04 of this Agreement]. An Assignee who becomes an Assignee of Record shall have the right to receive, to the extent assigned, the distributions and the allocations of income, gain, loss, deduction, credit, or similar items to which the assignor would be entitled under Article 3 of this Agreement. The Partnership interest of the General Partner cannot be voluntarily assigned or transferred.

Substituting Limited Partners

8.02. No Assignee shall have the right to become a substituted Limited Partner in place of the Assignor [*if desired, permit substitution, e.g.,* unless all of the following conditions are satisfied:

(a) A duly executed and acknowledged written instrument of assignment is filed with the Partnership, specifying the number of Units being assigned, which number is not less than the minimum purchase set forth in Paragraph 2.03 of this Agreement, and setting forth the Assignor's intention that the Assignee become a substituted Limited Partner in the Assignor's place.

(b) The Assignor and Assignee execute and acknowledge any other instruments deemed necessary or desirable by the General Partner to effect the substitution, including the written acceptance and adoption by the Assignee of the provisions of this Agreement.

(c) The written consent of the General Partner to the substitution is obtained, the granting or denial of which shall be within the absolute discretion of the General Partner.

(d) A transfer fee which is sufficient to cover all reasonable expenses in connection with the substitution, including any attorneys' fees, is paid to the Partnership by either the Assignor or Assignee.

(e) By executing or adopting this Agreement, each Limited Partner hereby consents to the admission of additional or substituted Limited Partners, and to any Assignee of the Partner's Units becoming a substituted Limited Partner on the

terms and subject to the conditions specified herein].

Death of Limited Partner

8.03. On the death of any Limited Partner owning Class A Units, or any Limited Partner owning Class A Units being adjudicated a bankrupt by any court of competent jurisdiction to make such an adjudication, the remaining Limited Partners owning Class A Units shall have the option to purchase the Class A Partnership Units in the Partnership owned by the deceased or bankrupt Limited Partner. Each such remaining Limited Partner shall have the right to purchase such proportionate part of the deceased or bankrupt Limited Partner's interest in the Partnership as the remaining Partner's interest in the _____ [profits *or* capital] of the Partnership bears to the total interest of all [profits *or* capital] of the Partnership. Provided, however, if any remaining Limited Partner shall fail to purchase that Partner's proportionate share, notice of that fact shall be given to each Limited Partner owning Class A Units, and that unpurchased proportionate share may be purchased by any one or more of the remaining Limited Partners owning Class A Units. The purchase shall be accomplished by paying to the person entitled thereto, within _____ [*number*] months of the death or adjudication, the value of the Partnership Units determined as follows:

(a) Within _____ [*number*] days after the date of death or bankruptcy adjudication of the Limited Partner, the General Partner and the person entitled to receive the value of the deceased or bankrupt Limited Partner's interest shall each appoint an appraiser;

(b) Within _____ [*number*] days after their appointment, the two appraisers appointed pursuant to Subparagraph (a) of this Paragraph shall appoint a third appraiser;

(c) The decision in writing of any two of the three appraisers shall be final and binding on the parties hereto and on the party entitled to receive the value of the deceased or bankrupt Limited Partner's interest in the Partnership; and

(d) If the three appraisers appointed pursuant to this Paragraph are unable to agree on a value within _____ [*number*] days after appointment of the third appraiser, both the highest value placed on the Partnership Units by any of the three appraisers and the lowest value placed on the Partnership Units by any of the three appraisers shall be disregarded, and the value placed on the Partnership Units owned by the deceased or bankrupt Limited Partner by the remaining appraiser shall be conclusive.

ARTICLE 9
DISSOLUTION OF PARTNERSHIP

Events Causing Dissolution

9.01. This Partnership shall be dissolved upon the first to occur of the following events:

(a) The written decision of the General Partner and a majority in interest of the Limited Partners.

(b) The expiration of the term of the Partnership as stated in Paragraph 1.06 of this Agreement.

(c) The General Partner ceases to be General Partner under *Corporations Code Section 15906.03* and at the time there is no remaining General Partner, unless _____ [a majority in interest *or specify greater percentage in interest*] of the Limited Partners agree in writing to continue the business of the Partnership and to the admission, within six months after the General Partner has ceased to be General Partner, of one or more new General Partners.

(d) The failure of a new General Partner to be appointed following removal of the General Partner in accordance with Paragraphs 2.06 and 2.07 of this Agreement.

[*Add if partnership may have more than one general partner:*]

(e) A General Partner ceases to be General Partner under *Corporations Code Section 15906.03*, unless there is at least one remaining General Partner, and the remaining General Partner or Partners continue the business of the Partnership. The remaining General Partner or Partners shall not refuse to continue the business of the Partnership, and thereby dissolve the Partnership under this Subparagraph, without the concurrence of _____ [a majority *or specify greater percentage in interest*] of the Limited Partners.

Responsibility for Winding Up

9.02. Upon dissolution of the Partnership, the affairs of the Partnership shall be wound up by the General Partner or, if there is no General Partner, by the Limited Partners; provided, however, that if dissolution occurs pursuant to court order, the winding up shall be conducted in accordance with the decree of dissolution. If the Limited Partners wind up the Partnership's affairs, they _____ [shall *or* shall not] be entitled to reasonable compensation.

Liquidation and Distribution

9.03. The person or persons responsible for winding up the affairs of the Partnership pursuant to Paragraph 9.02 of this Agreement shall take full account of the Partnership assets and liabilities, shall liquidate the assets of the Partnership as promptly as is consistent with obtaining the fair value of the assets, and shall apply and distribute the proceeds from the liquidation in the following order:

(a) To creditors, including Partners who are creditors to the extent permitted by law, in satisfaction of liabilities of the Partnership other than liabilities for any of the following:

(1) Distributions owing to Partners prior to their withdrawal from the Partnership and prior to dissolution and winding up of the Partnership.

(2) Distributions owing to Partners upon their withdrawal from the Partnership.

(b) To Partners and former Partners in satisfaction of liabilities for distributions owing to them prior to their withdrawal from the Partnership and prior to dissolution and winding up of the Partnership and upon their withdrawal from the Partnership.

(c) To the Partners pursuant to Paragraphs 3.04 and 3.06 of this Agreement.

ARTICLE 10
MISCELLANEOUS PROVISIONS

Notices

10.01. Any notice of any meeting of the Partners, or any report be given under this Agreement or otherwise in connection with the business of this Partnership, shall be given either personally, by mail, or by other means of written communication. The notice or report shall be addressed to the person to whom it is authorized to be given at the address appearing on the records of the Partnership or provided by the person for that purpose. If no such address appears or is given, then the notice or report must be given at the principal executive office of the Partnership or by publication at least once in a newspaper of general circulation in the county in which the principal executive office of the Partnership is located. The General Partner shall execute an affidavit of the giving of the notice or report. Notices and reports shall be deemed to have been given at the time when delivered personally, deposited in the mail, or sent by other means of written communication.

Governing Law

10.02. All questions with respect to the construction of this Agreement and the rights and liabilities of the parties to this Agreement shall be governed by the laws of the State of California.

Binding on Heirs and Assigns

10.03. Subject to any restrictions against assignments set forth herein, this Agreement shall inure to the benefit of and be binding on the assigns, successors in interests, personal representatives, estates, heirs, and legatees of each party to this Agreement.

Counterparts

10.04. This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which shall constitute one Agreement notwithstanding the fact that all Partners are not signatories either on the same date or to the same counterpart.

Sole and Only Agreement

10.05. This Agreement contains the entire understanding of the parties and constitutes the sole and only agreement between them concerning the Partnership or the rights and duties of any of them in connection with the Partnership or the property of the Partnership. Any agreements or representations among the parties hereto, or between the General Partner and any Limited Partner, regarding the Partnership or the property of the Partnership not expressly set forth in this Agreement are null and void.

Amendment

10.06. This Agreement may be amended _____ [*specify, e.g.,* only by written consent or affirmative vote of Limited Partners owning a majority of the outstanding Partnership Units].

EXECUTED on the day and year first above written.

GENERAL PARTNER
_____[*typed name of corporation*]
By _____[*signature*]

[*typed name and title*]

ORIGINAL LIMITED PARTNERS
HOLDING CLASS A UNITS
_____[*signature*]
[*typed name*]
_____[*street address*]
_____[*city, state, zip*]
_____[*signature*]
[*typed name*]
_____[*street address*]
_____[*city, state, zip*]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29B California Legal Forms--Transaction Guide § 29B.201

§ 29B.201 Limited Liability Company Operating Agreement for Nonpublic Real Estate Syndicate

[1] Comment--Use of Form

This form is an operating agreement for a California LLC that will operate as a real estate syndicate. It is intended to provide a basic outline of what an operating agreement should cover. It should be modified to meet the particular operating needs of the LLC being formed.

The members of an LLC must enter into an operating agreement either before or after the filing of the LLC's articles of organization [*Corp. Code § 17050(a)*]. An "operating agreement" is any agreement among all the members as to the affairs of the LLC and the conduct of its business in a manner not inconsistent with law or the LLC's articles, including amendments to those articles. An operating agreement may be written or oral, and it may be as simple as an agreement to organize an LLC [*Corp. Code § 17001(ab)*]. Nevertheless, for an LLC that will operate as a real estate syndicate, the agreement should be written. Generally, any contractual provision authorizing the managing member to buy or sell real property on behalf of the partnership must be written [*see Civ. Code §§ 1624(a)(3), 2309*]. Also, as a practically matter, without a written operating agreement the syndicate would never come into being: investors will not be willing to buy interests in a real estate syndicate whose operations are governed by an oral agreement. Finally, having the agreement in written form will help prevent subsequent disagreements over its terms.

This form is for an LLC that will be managed by the syndicator, who may also be a member of the LLC. For additional forms of operating agreements for LLCs, see Ch. 2C, *Limited Liability Companies* . In addition, many of the same types of provisions typically found in corporate bylaws or partnership agreements may be appropriate in a LLC operating agreement if desired. For a variety of corporate bylaw provisions, see Ch. 4, *Bylaws* . For partnership provisions, see Ch. 15, *General Partnerships* . For other provisions that may be appropriate to this type of agreement, see Ch. 8C, *Close Corporation Shareholder Agreements* .

[2] FORM

Limited Liability Company Operating Agreement for Nonpublic Real Estate Syndicate

OPERATING AGREEMENT OF

_____ [*full name of limited liability company*],
A CALIFORNIA LIMITED LIABILITY COMPANY

In accordance with the Beverly-Killea Limited Liability Company Act and subject to the Articles of Organization, which were filed on _____ [*date*], with the Secretary of State of California, the members of _____ [*name of limited liability company*], listed on the signature page, make the following agreement on _____ [*date*], regarding the conduct of the business and affairs of _____ [*name of limited liability company*], a California limited liability company ("Company")]:

ARTICLE 1
DEFINITION OF TERMS

1.01. When used in this agreement, the following terms have the meanings set forth here:

(a) "Act" means California's Beverly-Killea Limited Liability Company Act, as set forth in Corporations Code Title 2.5.

(b) "Agreement" means this operating agreement, as originally executed and as amended from time to time.

(c) "Articles" means the Articles of Organization for the Company filed under *Corp. Code § 17050*, including all amendments thereto or restatements thereof.

(d) "Available cash" of the Company means all cash funds of the Company on hand from time to time (other than cash funds obtained as contributions to the capital of the Company by the members and cash funds obtained from loans to the Company), after (1) payment of all operating expenses of the Company as of such time, (2) provision for payment of all outstanding and unpaid current obligations of the Company as of such time, and (3) provision for a working capital reserve, as defined below.

(e) "Bankrupt" or "bankruptcy" means, with respect to any person, being the subject of any order for relief under Title 11 of the United States Code, or any successor statute.

(f) "Capital account" means the individual accounts established and maintained pursuant to Paragraph 3.05.

(g) "Capital contribution" means the total value of cash and agreed fair market value of property contributed and agreed to be contributed to the Company by each member, as shown in Exhibit A, as the same may be amended from time to time.

(h) "Code" means the Internal Revenue Code of 1986, as amended. All references in this Agreement to sections of the Code include any corresponding provision or provisions of succeeding law.

(i) "Company" means _____ [*name of limited liability company*], a California limited liability company.

(j) "Entity" means any association, corporation, general partnership, limited partnership, limited liability company, joint stock association, joint venture, firm, trust, business trust, cooperative, or foreign association of like structure.

(k) "Interest" in the Company means the entire ownership interest of a Member in the Company at any particular time, including the right of the member to any and all benefits to which a Member may be entitled as provided in this Agreement and under the Act, together with the obligations of the member to comply with all of the terms and provisions of this Agreement.

(l) "Manager" means _____ [*name of syndicator*] or any other person elected by the Members of the Company to manage it.

(m) "Member" means a person who:

(1) Has been admitted to the Company as a Member in accordance with the Articles of Organization or Operating Agreement, or an assignee of an interest in the Company who has become a Member pursuant to *Corp. Code § 17303*.

(2) Has not resigned, withdrawn, or been expelled as a Member or, if other than an individual, been dissolved.

(n) "Percentage interest" of a Member means the percentage of the member set forth opposite the name of the Member in Exhibit A attached to this Agreement, as the percentage may be adjusted from time to time pursuant to the terms of this Agreement.

(o) "Principal office" means the office of the agent of this Company as shown in its Articles.

(p) "Pro Rata Part" means the proportion that a percentage interest of a Member bears to the aggregate interest in the Company of all Members.

(q) "Share" refers to an interest in the Company representing a contribution to capital. Whenever reference is made to "percentage interest," a share may be converted into the same by dividing a Member's number of shares by the total of all shares outstanding.

(r) "Substitute Member" means any individual or entity that is admitted into membership on the written consent of all Members in accordance with Paragraph 3.11.

(s) "Tax Matters Member" means the member chosen pursuant to *Internal Revenue Code § 6231(a)(7)* to deal with the Internal Revenue Service on tax matters.

ARTICLE 2
ORGANIZATION OF COMPANY

Formation of Company

2.01. The Members have formed a limited liability company under the Act by properly executing and filing the Articles and executing this Agreement. The rights, duties, and liabilities of the Members and the Manager are determined pursuant to the Act, the Articles, and this Agreement.

Company Name

2.02. The name of the Company is _____. The Company will transact business under that name. However, the Company may conduct business under another name if the _____ [Members *or* Manager] think it advisable, provided that the _____ [Members *or* Manager] comply with the Act and any other applicable laws, file fictitious name certificates and the like, and file any necessary amendments.

Company Purpose

2.03. The purpose of the Company is to engage in _____ [*specify business for which LLC is to formed, e.g.*, to purchase real property located at 123 Main Street, Bay City, California, and to develop and operate that property as a 10-unit residential apartment building].

Operative Date of Agreement

2.04. The provisions of this Agreement shall take effect on _____ [the date of execution of this agreement as specified above *or specify delayed operative date for agreement*].

ARTICLE 3
MEMBERS AND MEMBERSHIP INTERESTS

Names, Addresses, and Initial Capital Contributions of Members

3.01. Members, their respective addresses, their initial capital contributions to the Company, and their respective percentage interests in the Company are set forth on Schedule A, attached to this Agreement and made a part of it. Each Member agrees to make the initial contribution set out in Schedule A within _____ days from the date _____ [of execution of this Agreement *or* specified in Paragraph 2.04 of this Agreement]. Schedule A shall be amended from time to time to reflect any changes or adjustments in the respective contributions or percentage interests of the Members as required or permitted under this Agreement.

Failure to Make Contribution

3.02. (a) If a Member is required to contribute property or services in accordance with Paragraph 3.01 and Schedule A of this Agreement and fails to make that contribution within _____ days from the date _____ [of execution of this agreement *or* specified in Paragraph 2.04 of this Agreement], that Member shall be obligated, at the option of the Company, to contribute cash equal to that portion of the agreed value, as stated in Schedule A, of the contribution that has not been made. The foregoing option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the Company may have against the Member.

(b) The interest of a Member who fails to make the initial contribution provided for in Paragraph 3.01 shall be subject, at the option of the Company, to any or all of the following remedies:

(1) Loss of voting and approval rights until contribution has been made.

(2) Payment of damages in the amount of the agreed contribution.

(c) In addition to the remedies provided for in Subparagraph (b) of this Paragraph, the defaulting Member's interest in the Company is subject, at the option of the Company, to the following:

(1) Reduction, dilution or elimination of the defaulting Member's proportionate interest in the limited liability company;

(2) Subordination the defaulting Member's interest in the Company to that of nondefaulting Members;

(3) Forced sale of the Membership interest on the terms specified in Paragraphs 3.13 through 3.17 of this Agreement;

(4) The lending or contribution by other Members of the amount necessary to meet the defaulting Member's commitment;

(5) Adjustment of the interest rates or other rates of return, preferred, priority, or otherwise, with respect to contributions by or capital accounts of the other Members; or

(6) Fixing the value of the defaulting Member's interest in the limited liability company by appraisal, formula and redemption, or sale of the defaulting Member's interest in the limited liability company at a percentage of that value.

(d) The obligation of a Member to make the initial contribution required by Paragraph 3.01 may be compromised only by _____ [*specify, e.g.*, two-thirds *or* unanimous] vote of the Members.

Future Contributions

3.03. (a) No Member may required to make any capital contribution to the Company other than that required under Paragraph 3.01, except upon unanimous agreement of the Members.

(b) All additional contributions made in accordance with Subparagraph (a), above, shall be made on a pro rata basis in accordance with the respective percentage interests of the Members of the Company, unless the Members unanimously agree to a different method of determining contributions. If additional contributions are made other than on a pro rata basis, the respective percentage interests of the Members in the Company shall be adjusted to reflect the total respective contributions of the Members, and Schedule A of this Agreement shall be amended accordingly.

(c) Any Member who fails to make an additional capital contribution after that contribution has been validly authorized in accordance with Subparagraph (a), above, shall be subject to the remedies specified in Paragraph 3.02(a) and (c).

Member Loans or Services

3.04. Except as specified in Schedule A, services by any Member to the Company may not be considered to be contributions to the capital of the Company, and loans by any member to the Company shall not be treated as capital contributions to the Company. Any compensation that the Company pays to a Member for services, and any payment made by the Company to a Member on that Member's loan to the Company, shall not be treated as payment made to that Member acting in his, her, or its capacity as a Member under *Internal Revenue Code § 707*.

Capital and Capital Accounts

3.05. (a) The initial Capital Contribution of each Member is as set forth in Exhibit A. No interest may be paid on any Capital Contribution.

(b) The Company will establish and maintain an individual Capital Accounts for each Member pursuant to *Treasury*

Regulations § 1.704-1(b)(2)(iv).

(c) No Member has the right to withdraw his or her capital contribution or to demand and receive property of the Company or any distribution in return for his or her Capital Contribution, except as may be specifically provided in this Agreement or required by law. No Member may receive out of Company property any part of that Member's capital contribution until (1) all liabilities of the Company, except liabilities to Members on account of their loans, have been paid or sufficient Company property remains to pay them, and (2) all Members consent, unless the return of the contribution to capital is rightfully demanded as provided in the Act.

(d) Subject to the provisions of Subparagraph 3.05(c), a Member may rightfully demand the return of that Member's Capital Contribution (1) after the Company has been dissolved and wound up pursuant to Article 21 of this Agreement, or (2) as may otherwise be provided in the Act. A member may demand and receive only cash in return for the Member's Capital Contribution.

Admission of Additional Members

3.05. The Members may admit to the Company additional members to participate in the profits, losses, available cash flow, and ownership of the assets of the Company on such terms as are determined by all of the Members. Admission of any additional Member requires the written consent of all members then having any interest in the Company. Any additional Members are allocated gain, loss, income, or expense by the method provided in this Agreement.

Limitation on Liability

3.06. No Member is liable under a judgment, decree, or order of the court, or in any other manner, for a debt, obligation, or liability of the Company, except as provided by law. No Member is required to loan any funds to the Company.

No Individual Authority

3.07. Unless expressly provided in this Agreement, no Member, acting alone, has any authority to act for, or to undertake or assume, any obligation, debt, or responsibility on behalf of, any other Member of the Company.

No Member Responsible for Other Member's Commitment

3.08. In the event that a Member (or a Member's shareholders, partners, members, owners, or affiliates) has incurred any indebtedness or obligation before the date of this Agreement that relates to or otherwise affects the Company, neither the Company nor any other Member has any liability or responsibility with respect to the indebtedness or obligation unless the indebtedness or obligation is assumed by the Company pursuant to a written instrument signed by all Members. Furthermore, neither the Company nor any Member is responsible or liable for any indebtedness or obligation that is subsequently incurred by any other Member (or a Member's shareholder, partners, members, owners, or affiliates). In the event that a Member (or a Members' shareholders, partners, members, owners, or affiliates; collectively called the "liable Member"), whether before or after the date of this Agreement, incurs (or has incurred) any debt or obligation that neither the Company nor any of the other Members is to have any responsibility or liability for, the liable Member must indemnify and hold harmless the Company and the other Members from any liability or obligation they may incur in respect of the debt or obligation.

Transfer and Assignment of Membership Interests

3.09. No Member may assign, convey, sell, encumber, or in any way alienate all or any part of his or her interest in the Company as a Member without the prior written consent of all the other Members, which consent may be given or withheld, conditioned or delayed (as allowed by this Agreement or the Act), as the remaining Members may determine in their sole discretion. The remaining members in their sole discretion may require that any Member proposing to sell, assign, or in any way alienate all or any part of his or her interest in the Company offer the remaining members a right of first refusal to purchase that interest on the terms specified in Paragraphs 3.13 through 3.17 of this Agreement. Within _____ days after notice by a Member that the Member proposes to sell, assign, or in any way alienate all or any part of his or her interest in the Company, the remaining members shall advise the Member in writing of their consent or refusal to consent to the proposed transfer, and of any terms or conditions imposed with respect to the sale. If the remaining Members do not advise the Member of their consent or refusal to consent, or of any applicable conditions, within that _____-day period, they shall be deemed to have consented to the proposed sale, assignment, or other transaction. Transfers in violation of this Paragraph are effective only to the extent set forth in Paragraph 3.12(b), below.

Further Restrictions on Membership Transfers

3.10. No Member may assign, convey, sell, encumber, or in any way alienate all or any part of his or her interest in the Company (1) without registration under applicable federal and state securities laws, or unless the Member delivers an opinion of counsel satisfactory to the Company that registration under those laws is not required; or (2) if the interest to be sold or exchanged, when added to the total of all other sold or exchanged in the preceding _____ [*specify number*] consecutive months prior to that time, would result in the tax termination of the Company under *Internal Revenue Code § 708*.

Substitute Members

3.11. A transferee may become a Substitute Member if (1) the requirements of Subparagraphs 3.09 and *3.10, above*, are met; (2) the person executes an instrument satisfactory to the remaining Members accepting and adopting the terms and provisions of this Agreement; and (3) the person pays all reasonable expenses in connection with his or her admission as a remaining Member.

Effect of Transfer

3.12. (a) Any permitted transfer of all or any portion of a Member's interest in the company takes effect on the first day of the month following receipt by the Members of written notice of transfer. Any transferee of an interest in the company takes subject to the restrictions on transfer imposed by this Agreement.

(b) On a transfer of a Member's interest in the Company in violation of this Agreement, the transferee has no right to participate in the management of the business and affairs of the Company or to become a Member, but the transferee is entitled only to receive the share of profits or other compensation by way of income and the return of contributions to which the transferor of the interest in the Company would otherwise be entitled.

[*EITHER*]

Option to Purchase Member's Interest

3.13. In the event of the death of any Member, or the forced sale of any Member's interest as otherwise provided in this Agreement, the remaining Members shall have an option to purchase that Member's interest in the Company by paying to that Member or the person legally entitled thereto the value of that Member's interest, determined as provided in Paragraph 3.14. The remaining Members shall give written notice of their exercise of this option to the Member, or the personal representative of a deceased Member. In the case of a deceased Member, this notice shall be given within _____ [*number*] days after the death of the deceased Member. The portion of the interest that an individual remaining Member may purchase under this Agreement shall be that proportion which the remaining Member's net worth in the Company bears to the total net worth in the Company of all remaining Members. The amount of the purchase prices shall be determined under Paragraph 3.14 of this Agreement. If any remaining Member is unable or unwilling to purchase his or her proportionate share of the interest of a Member as provided in this Paragraph, that right may be exercised and the interest purchased by the other remaining Members. No remaining Member shall be denied a right to participate in any such purchase if that Member delivers to all other Members a written declaration of intent to participate. This written declaration shall be delivered to each other Member within _____ [*number*] days after the death, retirement, resignation, or expulsion of the departing Member.

[*OR*]

Mandatory Purchase of Membership Interest

3.13. In the event of the death of any Member, or the forced sale of any Member's interest as otherwise provided in this Agreement, that Member or that Member's personal representative shall sell, and each remaining Member shall buy, a portion of the departing or deceased Member's interest in the Company. The portion of the interest that an individual remaining Member shall be obligated to buy under this Agreement shall be that proportion which the individual remaining Member's net worth in the Company bears to the total net worth in the Company of all remaining Members. The amount of the purchase prices shall be determined under Paragraph 3.14 of this Agreement.

[*CONTINUE*]

Purchase Price of Member's Interest

3.14. On any purchase or sale of a Member's interest under Paragraph 3.02(c)(3), 3.09, or 3.13 of this Agreement, the purchase price of that interest shall be determined as follows:

(a) The departing or deceased Member, or that Member's legal representative, and the remaining Members shall appoint a single appraiser. If the parties are unable to agree on the identity of the appraiser within _____ days after _____ [the death, retirement, resignation, or expulsion of the departing Member *or* the giving of the notice required in Paragraph 3.09 or 3.13], each party thereafter shall appoint his or her own appraiser. If the two appraisers so appointed are unable to agree on the value of the interest within _____ [*number*] days after being so appointed, they shall appoint a third appraiser. The decision in writing of any two of the three appraisers so appointed shall be binding and conclusive on the parties to this Agreement and on any person legally entitled to receive the value of the departing or deceased Member's interest. All fees and expenses of each appraiser shall be paid by the _____ [Company *or* remaining Members *or* purchasing and selling parties in equal proportions *or* party on whose behalf that appraiser was appointed, and the fees and expenses of the third appraiser to be paid equally by the purchasing and selling parties].

(b) In determining the value of the membership interest to be purchased, the appraisers shall value:

(1) All items of inventory at their actual cost to the Company.

(2) All tangible assets of the Company, including lands, buildings, fixtures, machinery, automobiles, and equipment, at their fair cash market value.

(3) All accounts receivable due the Company that are not more than 90 calendar days old and not barred by the statute of limitations at half their face value.

(4) All accounts receivable due the Company that are less than 90 calendar days old at their full face value.

(5) Goodwill and other intangible assets of the Company at their fair cash market value.

Payment of Purchase Price

3.15. On any purchase and sale of a Member's interest under to this Agreement, the remaining Members shall pay to the person legally entitled thereto the value of the interest, determined as provided in Paragraph 3.14 of this Agreement, in the following manner: _____ [*describe payment terms, e.g.*, One half in cash on receipt of the appraisers' report, and the balance in 12 equal monthly installments commencing not later than 30 days after receipt of that report. Each monthly installment shall be applied first to interest at the rate of _____ percent per annum on the then remaining unpaid principal balance of the purchase price from the date the appraisers' report was received by the remaining Members and then to the reduction of principal].

Assumption of Departing Member's Obligations

3.16. On any purchase and sale of a Membership interest under this Agreement, the remaining Members shall assume all Membership obligations and shall protect, defend, and indemnify the departing Member, the personal representative and estate of a deceased Member, and the property of any departing Member, from liability for any Membership obligations of the departing Member.

Publication of Notice

3.17. On any purchase and sale of a Membership interest under this Agreement, the remaining Members shall, at their own cost and expense, as soon as reasonably practicable, prepare, publish, file, and serve all notices that may be required by law to protect the departing Member and the personal representative and estate of a deceased Member from liability for future obligations of the Membership business.

ARTICLE 4
POWER TO AMEND AGREEMENT

4.01. The power to adopt, alter, amend, or repeal this Agreement is vested entirely in the Members of the Company.

ARTICLE 5

MANAGEMENT BY MANAGER

5.01. The right to exercise the powers of the Company and to manage the business and affairs of the Company is vested entirely in the Manager.

ARTICLE 6
ELECTION OF MANAGER

6.01. The initial Manager specified in the articles of organization and identified in Paragraph 1.01(l) of this Agreement will serve as Manager until _____ [he *or* she] resigns or is removed under Article 7.

ARTICLE 7
REMOVAL OF MANAGER

7.01. The Members may remove the Manager if _____ [*specify events and circumstances that trigger members' rights to remove manager, e.g.,* the Manager acts outside the scope of the Manager's authority].

ARTICLE 8
COMPENSATION OF MANAGER

8.01. Members may, by _____ [*specify, e.g.,* a vote of a majority in interest *or* unanimous consent] establish reasonable compensation for the Manager for services to the Company.

ARTICLE 9
EXECUTION OF DOCUMENTS

9.01. The Manager has the authority to execute documents and instruments for the acquisition, mortgage, or disposal of property on behalf of the Company.

ARTICLE 10
MEETINGS OF MEMBERS

No Annual Meeting

10.01. The Company is not required to hold a regular annual meeting of Members.

Special Meetings

10.02. Special meetings of the Members will be held on request of the Manager or of Members holding _____ (*e.g.,* 10) percent or more interest in the Company]. The Manager or Members calling the meeting shall cause written notice of the location, date, and time of the meeting, and the general nature of the business to be transacted, to be sent by first class mail to the Members entitled to vote at that meeting at least _____ [*specify notice period, e.g.,* 10 days] before the

scheduled date of the meeting.

Record Date

10.03. Only persons whose names are listed as members in the official records of the Company _____ [*number*] days before any meeting of the Members are entitled to notice of or to vote at that meeting.

Waiver of Notice

10.04. (a) The transactions of any meeting of Members, however called and noticed and wherever held, are valid if a quorum is present either in person or by proxy and if, either before or after the meeting, each of the Members entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the minutes of the meeting. All waivers, consents, and approvals must be filed with the records of the Company or made a part of the minutes of the meeting. Except as otherwise provided, neither the business to be transacted nor the purpose of any meeting of Members need be specified in any written waiver of notice, consent to the holding of the meeting, or approval of the minutes of the meeting.

(b) Attendance by a Member at any meeting also constitutes a waiver of notice to that person if he or she fails to object at the beginning of the meeting to the transaction of business because the meeting was not lawfully called or convened, but attendance does not constitute a waiver of the right to object to the consideration of matters required to be included in the notice but not so included if the objection is expressly made at the meeting.

Quorum

10.05. At all meetings of the Members, _____ [*number*] Members must be present to constitute a quorum for transaction of business.

ARTICLE 11
ACTIONS BY MEMBERS AND VOTING RIGHTS

Votes Required to Act

11.01. Except as otherwise provided in this Agreement, an act of the Members of record is effective if _____ [the majority *or specify percent*] of Members' votes adopt the act at a meeting at which a quorum of Members is present. The voting rights of the Members are to be distributed in proportion to each Member's contribution to capital in the following manner: _____ [*specify general voting rights*].

Vote by Proxy

11.02. Members may vote either in person or by proxy. Proxies must be executed in writing by the Members. A telegram, cablegram, or similar transmission by the member or a photographic, photostatic, facsimile, or similar reproduction of a writing executed by a Member is deemed an execution in writing for purposes of this Agreement.

Actions of Tax Matters Member

11.03. The Tax Matters Member of the Company, chosen pursuant to *Internal Revenue Code § 6231(a)(7)*, is _____ [*name of syndicator*], who has the same authority as granted by the Internal Revenue Code to a tax matters partner.

ARTICLE 12
ACTION BY CONSENT WITHOUT MEETING

12.01. Any action permitted to be taken by the Members may be taken without a meeting if all Members individually or collectively consent by signing a written approval of the action. Any action by written consent shall have the same force and effect as a unanimous vote of the Members.

ARTICLE 13
ALLOCATIONS: DISTRIBUTIONS AND INTERESTS

Allocation of Net Income, Net Loss, or Capital Gains

13.01. (a) Except as may be expressly provided otherwise in this Article 13, and subject to the provisions of *Internal Revenue Code § 704(c)*, the net income, net loss, or capital gains of the Company for each fiscal year of the Company is allocated to the Members pro rata, in accordance with their percentage interests in the Company.

(b) If a Member, on formation of the Company or at any time thereafter, contributes property with an adjusted income tax basis different from the fair market value at which the property is accepted and credited to that Member's capital account, then solely for income tax purposes and the determination of each Member's distributive share of the net Company profits and losses, any depreciation, depletion, gain, or loss with respect to that property shall, pursuant to *Internal Revenue Code § 704(c)* of 1986 and *Treasury Regulations § 1.704-3*, be allocated according to the _____ [traditional method *or* traditional method with curative allocations, *or* traditional method with remedial allocations].

Distribution of Available Cash

13.02. Periodically, but not less frequently than at the end of each calendar quarter, the available cash of the Company, if any, must be distributed to the Members, pro rata in accordance with their percentage interests. For any calendar quarter, available cash need not be distributed to the extent that the cash is required for a reasonable working capital reserve for the Company; the amount of the reasonable working capital reserve is to be determined by the Manager.

Allocation of Income and Loss and Distributions in Respect of Interests Transferred

13.03. (a) If any interest in the company is transferred, or is increased or decreased by reason of the admission of a new Member or otherwise, during any fiscal year of the Company, each item of income, gain, loss, deduction, or credit of the Company for the fiscal year must be assigned pro rata to each day in the particular period of the fiscal year to which the item is attributable (that is, the day on or during which it is accrued or otherwise incurred) and the amount of each item so assigned to any day shall be allocated to the Member based on his or her respective interest in the Company at the close of the day. For the purpose of accounting convenience and simplicity, the Company may treat a transfer of, or

an increase or decrease in, an interest in the Company that occurs at any time during a semimonthly period (commencing with the semimonthly period including the date of this Agreement) as having been consummated on the first day of the semimonthly period, regardless of when during the semimonthly period the transfer, increase, or decrease actually occurs (that is, sales and dispositions made during the first 15 days of any month are deemed to have been made on the 16th day of the month).

(b) Distributions of the Company assets in respect of any interest in the Company shall be made only to the Members who, according to the books and records of the Company, are holders of record of the interests in respect of which the distributions are made on the actual date of distribution. Neither the Company nor any Member incurs any liability for making distributions in accordance with the provisions of the preceding sentence, whether or not the Company or Member has knowledge or notice of any transfer or purported transfer of ownership of interest in the Company that has not been approved by unanimous vote of the Members. Notwithstanding any provision above to the contrary, gain or loss of the Company realized in connection with a sale or other disposition of any of the assets of the Company must be allocated solely to the parties owning interests in the Company as of the date the sale or other disposition occurs.

ARTICLE 14
INDEMNIFICATION AND FIDUCIARY DUTIES

Indemnification and Fiduciary Duties

14.01. The Company will indemnify the Manager for any act taken in that capacity other than acts that involve a breach of fiduciary duty. The standard of the fiduciary duty the Manager owes to the Company and to its Members are those of a partner to a partnership and to the partners of the partnership. The Manager's standard of conduct owed to the Company and its Members is to act in the highest good faith to the Members, and the Manager may not seek to obtain an advantage in the Company affairs by the slightest misconduct, misrepresentation, concealment, threat, or adverse pressure of any kind.

Power to Do Business With LLC

14.02. Any Member or the Manager, acting in that Member's or the Manager's individual capacity, shall have the power to do business with the Company at any time, provided that the transaction is fair and equitable to the Company, in the Company's best business interest, and in accordance with the basic fiduciary principles specified in Paragraph 14.01. This power includes, but is not limited to, the power to purchase property from or sell property to the Company at fair market value; exchange property for the Company's property of equal value; lease property from or to the Company at fair rental value; borrow funds from or lend or advance funds to the Company, with interest at then-prevailing rates, and give or receive security for any such loans in any commercially reasonable form.

ARTICLE 15
COMPANY RECORDS AND REPORTS

Required Books and Records

15.01. The Company shall keep the following books and records in compliance with *Corporations Code § 17058*:

(a) A current list setting forth, in alphabetical order, the full name and last known business or residence address of each

Member and of each holder of an economic interest in the Company, together with the contribution and the share in profits and losses of each Member and holder of an economic interest.

(b) A copy of the Company's articles of organization and all amendments thereto, together with any powers of attorney pursuant to which the articles of organization or any amendments thereto were executed.

(c) Copies of the Company's federal, state, and local income tax or information returns and reports, if any, for the six most recent taxable years.

(d) A copy of this Agreement, and any amendments thereto, together with any powers of attorney pursuant to which any written operating agreement or any amendments thereto were executed.

(e) Copies of the Company's financial statements, if any, for the six most recent fiscal years.

(f) Accurate books and records of the Company's internal affairs for at least the current and past four fiscal years.

Records and Accounting; Fiscal Year

15.02. The books and records of the Company must be kept, and the financial position and the results of its operations recorded, in accordance with the accounting methods elected to be followed by the Company for federal and state income tax purposes. The books and records of the Company must reflect all Company transactions and must be appropriate and adequate for the Company's business. The fiscal year of the Company for financial reporting and for federal income tax purposes is the calendar year.

Access to Accounting Records

15.03. All books and records of the Company must be maintained at any office of the Company or at the Company's principal place of business, and each Member, and his or her duly authorized representative, must have access to them at the office of the Company and the right to inspect and copy them at reasonable times.

Annual and Tax Information

15.04. The Company shall deliver to each Member, within _____ days after the end of each fiscal year, all information necessary for the preparation of each Member's federal income tax return. The Company must also prepare, within _____ days after the end of each fiscal year, a financial report of the Company for the fiscal year, which must contain a balance sheet as of the last day of the year then ended, an income statement for the year then ended, a statement of sources and applications of funds, and a statement of reconciliation of the capital accounts of the Members.

ARTICLE 16
DISSOLUTION AND WINDING UP OF COMPANY

Events Causing Dissolution

16.01. The Company shall be dissolved, its assets shall be disposed of, and its affairs shall be wound up on the first to occur of the following events:

(a) On determination by Members owning more than 50 percent of the interests in the Company that the Company should be dissolved.

(b) On the death, insanity, bankruptcy, retirement, resignation, or expulsion of any Member, unless at least 50 percent of the remaining Members consent to continue the Company within 90 days of the dissolution event.

(c) On the failure of the Company by _____ [*date*] to _____ [*e.g.*, complete the purchase of the property described in Paragraph 2.03 of this Agreement, or to obtain the necessary permits, approvals, or financing to develop and operate that property in accordance with the purpose stated in Paragraph 2.03].

[*Optional; if articles of organization specify a date for expiration of the company term:*]

(d) On the expiration of the term of the Company, as stated in the Articles.

[*CONTINUE*]

(e) At any earlier time at which dissolution may be required under any applicable law.

Winding Up

16.02. If the Company is dissolved, the Manager may wind up the Company's affairs and shall give written notice of the commencement of winding up by mail to all known creditors and claimants whose addresses appear on the records of the Company.

Distribution of Assets After Provision for Payment of Creditors.

16.03. (a) After determining that all the known debts and liabilities of the Company including, without limitation, debts and liabilities to Members who are creditors of the Company, have been paid or adequately provided for, the remaining assets shall be distributed among the Members according to their respective rights and preferences as follows:

(1) To members in satisfaction of liabilities for distributions pursuant to *Corporations Code § 17201*, *17202*, or *17255*.

(2) To Members for the return of their contributions.

(3) To Members in the proportions in which those Members share in distributions.

(b) The payment of a debt or liability, whether the whereabouts of the creditor is known or unknown, has been adequately provided for if the payment has been provided for by either of the following means:

(1) Payment has been assumed or guaranteed in good faith by one or more financially responsible persons or by the United States government or any agency thereof, and the provision, including the financial responsibility of the person, was determined in good faith and with reasonable care by the Manager to be adequate at the time of any distribution of the Company's assets pursuant to this Paragraph 16.03.

(2) The amount of the debt or liability has been deposited with the Controller of the State of California pursuant to *Corporations Code § 2008*.

ARTICLE 17
MISCELLANEOUS PROVISIONS

Complete Agreement

17.01. This Agreement and the Articles of this Company constitute the complete and exclusive statement of agreement among the Members with respect to the subject matter described. This Agreement and the Articles replace and supersede all prior agreements by and among any of the Members. This Agreement and the Articles supersede all prior written and oral statements; no representation, statement, or condition or warranty not contained in this Agreement or the Articles is binding on the Members or has any force or effect.

Governing Law

17.02. This Agreement and the rights of the parties under this Agreement will be governed by, interpreted, and enforced in accordance with the laws of the State of California.

Binding Effect

17.03. Subject to the provisions of this Agreement relating to transferability, this Agreement is binding on and inures to the benefit of the Members, and their respective distributees, successors, and assigns.

Severability

17.04. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under the present or future laws effective during the term of this Agreement, the provision is fully severable; this Agreement is construed and enforced as if the illegal, invalid, or unenforceable provision had never comprised a part of this agreement; and the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid, or unenforceable provision; and there will be added automatically as a part of this Agreement a provision as similar in terms to the illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

Multiple Counterparts

17.05. This Agreement may be executed in several counterparts, each of which is deemed an original but all of which constitute one and the same instrument. However, in making proof only one copy signed by the party to be charged is required.

Additional Documents and Acts

17.06. Each Member agrees to execute and deliver additional documents and instruments and to perform all additional

acts necessary or appropriate to effectuate, carry out, and perform all of the terms, provisions, and conditions of this Agreement and the transactions contemplated by it.

No Third-Party Beneficiary

17.07. This Agreement is made solely and specifically among and for the benefit of the parties to it, and their respective successors and assigns, subject to the express provisions of the agreement relating to successors and assigns, and no other person has or will have any rights, interest, or claims under this Agreement as a third-party beneficiary or otherwise.

Tax Consequences

17.08. Members acknowledge that the tax consequences of each Member's investment in the Company are dependent on each Member's particular financial circumstances. Each Member will rely solely on the Member's financial advisors and not the Company. The Company makes no warranties as to the tax benefits that the Members receive or will receive as a result of their investment in the Company.

Notices

17.09. Any notice to be given or to be served on the Company or any party to this Agreement in connection with this Agreement must be in writing and is deemed to have been given and received when delivered to the address specified by the party to receive the notice. Notices must be given to each Member at the address specified in Exhibit A. Any Member or the Company, at any time, may designate any other address in substitution of the foregoing address to which notice will be given by giving written notice to the other Members and the Company _____ days before the date of delivery of the notice.

Amendments

17.10. Any provision of this Agreement may be amended only with affirmative vote of the number of Members that would be required to approve the action authorized by the provision prior to its amendment. All amendments to this Agreement must be in writing and signed by all of the Members.

Title to Company Property

17.11. Legal title to all property of the Company must be held and conveyed in the name of the Company.

Reliance on Authority of Person Signing Agreement

17.12. In the event that a Member is not a natural person, neither the Company nor any Member will (1) be required to determine the authority of the individual signing this agreement to make any commitment or undertaking on behalf of the entity or to determine any fact or circumstance bearing on the existence of the authority of the individual, or (2) be required to see to the application or distribution of proceeds paid or credited to individuals signing this Agreement on behalf of the entity.

Execution of Spousal Consent

17.13. Each Member who is a married person agrees that at the time that Member executes this Agreement, he or she shall supply a signed consent by that Member's spouse, in the form attached to this Agreement, by which that Member's spouse agrees to be bound by the provisions of this Agreement.

Warranty of Each Member

17.14. Each Member agrees, represents, and warrants that at the time he or she executes this agreement, either:

(a) He or she is under no legal obligation, by way of judgment, agreement, contract, or otherwise, specifically including but not limited to any employment agreement, marital settlement agreement, prenuptial or postnuptial agreement, nonmarital property agreement, or creditor's agreement, that conflicts with the terms of this Agreement or might impede that Member's ability to comply with the terms of this Agreement, including but not limited to those provisions of this Agreement respecting the operation and management of the Company or dealing with the transfer of interests in the Company; or

(b) That if he or she is under any legal obligation referred to in Subparagraph (a), above, he or she shall supply, at the time he or she executes this Agreement, a signed consent by each person legally to entitled to enforce that obligation, in substantially the form of the spousal consent form attached to this Agreement, modified as appropriate to the circumstances and approved by all the other members of the Company, by which that person legally entitled to enforce the obligation agrees to be bound by all provisions of this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement, to be effective as of the date the Articles of Organization of the Company are accepted for filing by the Secretary of State.
_____ [*date*]

_____[*name of limited liability company*]

By _____[*signature*]
[*typed name and title*]
_____[*address*]
_____[*telephone number*]

By _____[*signature*]
[*typed name and title*]
_____[*address*]
_____[*telephone number*]

By _____[*signature*]
[*typed name and title*]
_____[*address*]
_____[*telephone number*]

Consent of Spouses

The undersigned are the spouses (referred to individually as "spouse" or collectively as "spouses") of the Members of _____ [*name of limited liability company*] ("Company"). Each spouse acknowledges that he or she has read and understands the Operating Agreement of the Company ("Agreement"). Each spouse understands that by signing the Agreement, each Member has agreed that the Member's interest in the Company, including any portion of that interest that is the community property of the Member and that Member's spouse, shall be subject to all the provisions of the Agreement. Each spouse agrees to be bound by the provisions of the Agreement in their entirety, including, but not limited to, those provisions of the Agreement governing the sale or transfer of interests in the Company. Each spouse further agrees that in the event his or her Member spouse predeceases him or her, the non-Member spouse will not devise all or any part of any community property interest that he or she may have in the Member's interest in the Company in violation of this Agreement. The spouse of each Member understands and acknowledges that the Member is operating or managing the business of the Company to the extent provided in the Agreement and that the Member has and will continue to have the primary management and control of the Company's business, as provided in the Agreement, to the maximum extent that the member may lawfully do so.

Executed on _____ [*date*], at _____ [*city*], _____ [*county*], California.

SPOUSES

[*Repeat, as required:*]

_____[*signature*]
[*typed name of spouse*], spouse of _____[*name of member*]

_____[*signature*]
[*typed name of spouse*], spouse of _____[*name of member*]

_____[*signature*]
[*typed name of spouse*], spouse of _____[*name of member*]

Schedule A

Contributions and Percentage Interests of Members of _____ [*name of limited liability company*]

As of _____ [*date*]

Name	Cash	Property or Services--Agreed Value	Total Agreed Value of Capital Contribution	Percentage Interest



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29B California Legal Forms--Transaction Guide § 29B.202

§ 29B.202 Subscription Agreement

[1] Comment

[a] Use of Form

This is a basic subscription agreement that may be used in a sale of real estate syndicate interests that fits within the "private offering" [*see 15 U.S.C. § 77d(2)*; *17 C.F.R. § 230.501 et seq.*] and intrastate exemptions [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147*] from federal registration under the Securities Act of 1933, and the "limited offering exemption" from qualification with the California Commissioner of Corporations [*see Corp. Code § 25102(f)*]. All three of these exemptions are covered in this form because an issuer will ordinarily attempt to comply with as many exemptions as possible in order to increase the likelihood that the offering and sale will satisfy the requirements of at least one exemption. The three exemptions identified above are the ones most often asserted by issuers.

For a subscription agreement that may be used when the offering and sale must be qualified with the California Commissioner of Corporations under the Corporate Securities Law of 1968, see Ch. 29C, *Public Real Estate Syndicates* .

[b] California's Limited Offering Exemption

Paragraph 3, subparagraphs (b) and (i), of this form contains representations that the purchaser meets the investor suitability requirements of the California limited offering exemption [*see Corp. Code § 25102(f)(2)*; *see also § 29B.41[2][a]*; Ch. 6B, *California Limited Offering Exemptions*].

[c] Federal Private Offering Exemption

If the issuing real estate syndicate is asserting the federal private offering exemption, the interests cannot be resold without registration under the Securities Exchange Act of 1933 or an exemption from registration. Thus, the limited partnership must exercise reasonable care to assure that the purchasers of the interests are not acting as "underwriters" [*see 15 U.S.C. § 77b(a)(11)*]. Reasonable care includes, but is not limited to, the following: (1) reasonable inquiry to determine if a purchaser is acquiring the securities for himself or herself or for other persons; (2) written disclosure to

each purchaser prior to sale that the securities have not been registered under the Securities Exchange Act, and that they cannot be resold unless so registered or unless an exemption from registration is available; and (3) placement of a legend on the certificate or other document stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale [*17 C.F.R. § 230.502(d)*; *see* Ch. 6I, *Issuance of Equity Securities*]. Paragraphs 3(c) and 4 of this form contain representations that the subscriber will abide by these limitations on resale.

[d] Federal Intrastate Exemption

Under the "intrastate exemption" under SEC Rule 147 [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147* (SEC Rule 147)], any security that is part of an issue offered and sold only to persons residing within a single state or territory need not be registered with the Securities and Exchange Commission, if the issuer resides in and does business in that state or territory [*15 U.S.C. § 77c(a)(11)*]. This exemption is discussed in detail in Ch. 6A, *Federal Securities Exemptions for California Nonpublic Corporations* .

To comply with Rule 147, the issuer must obtain a written representation from each purchaser as to the purchaser's residence [*17 C.F.R. § 230.147(f)(1)(iii)*]. That representation is contained in Paragraph 3(b) of this form. An individual who is a subscriber will be deemed a resident of the state where the individual has his or her principal residence [*17 C.F.R. § 230.147(d)(2)*]. A corporation, partnership, or other business organization will be deemed a resident of the state in which it has its principal office, unless it is organized for the specific purpose of purchasing the limited partnership interests [*17 C.F.R. § 230.147(d)(1), (3)*].

Any document evidencing the syndicate interests must contain a legend stating that the interests have not been registered under the Securities Act of 1933 because of the intrastate exemption, and that transfers of the interests are restricted as required by Rule 147. Furthermore, every purchaser must be informed in writing of the above matters [*17 C.F.R. § 230.147(f)(1)(i), (3)*]. The transfer restriction required by Rule 147 is contained in Paragraph 3(h) of this form [*see 17 C.F.R. § 230.147(e)*].

[2] FORM

Subscription Agreement

SUBSCRIPTION AGREEMENT

_____ [*name of limited partnership or limited liability company, in capital letters*],

A California _____ [Limited Partnership *or* Limited Liability Company]

TO: _____ [*name of limited partnership or limited liability company*]
c/o _____ [*name of general partner or manager*]
_____ [*address in California*]

I, the undersigned, hereby make the following agreements and representations:

Subscription

1. I subscribe for and agree to purchase, at the price of $_____ per _____ [Partnership *or* Membership] Unit, the number of Units in _____ [*name of limited partnership or limited liability*

company], a California _____ [Limited Partnership *or* Limited Liability Company], set forth below immediately above my signature. I understand this subscription may be rejected by _____ [*name of general partner or manager*], hereinafter referred to as _____ ["General Partner" or "Manager"] of the above _____ [Limited Partnership *or* Limited Liability Company].

Exemption From Securities Law

2. I stipulate that I understand the _____ [Partnership *or* Membership] Units described in this Agreement are being offered and sold without registration under the federal Securities Act of 1933 and without being qualified pursuant to the California Corporate Securities Law of 1968, on the ground that federal registration is not required because of the private offering and interstate exemptions of that Act and that qualification in California is not necessary due to the limited offering exemption of that Law. I also understand that the applicability of those exemptions to the offer and sale of the _____ [Partnership *or* Membership] Units described in this Agreement depends, at least in part, on the accuracy of the representations made by me in this Agreement and in the "Investor Questionnaire" attached to, and hereby made a part of, this Agreement. I declare the representations made by me in this Agreement and in the "Investor Questionnaire" are true and correct to the best of my knowledge and are intended by me to be relied on by the _____ [General Partner *or* Manager] in determining my eligibility to purchase _____ [Partnership *or* Membership] Units in this _____ [Limited Partnership *or* Limited Liability Company].

Representations

3. I certify, represent, and warrant that:

(a) I have received a full copy of the _____ [Limited Partnership Agreement for this Limited Partnership *or* Articles of Organization and Operating Agreement for this Limited Liability Company] and a copy of the Private Placement Memorandum dated _____, prepared by the _____ [General Partner *or* Manager] for the _____ [Partnership *or* Membership] Units described in this Agreement.

(b) I am a bona fide permanent resident of the State of California, domiciled in California with no intent to move elsewhere, and this Subscription Agreement has been presented to and executed by me in California.

(c) The _____ [Partnership *or* Membership] Units described in this Agreement are being purchased by me:

(1) As a long-term investment and not for resale; and

(2) For my own account or in a fiduciary capacity for a person or entity described in subdivision (g)(2) of Rule 147 of the United States Securities and Exchange Commission.

(d) I am aware that registration of the _____ [Partnership *or* Membership] Units described in this Agreement with the Securities and Exchange Commission is unlikely, and that the _____ [Limited Partnership and General Partner *or* Limited Liability Company and Manager] have no obligation or intent so to register the Units described in this Agreement.

(e) I am also aware that the possibility of a public market developing for the _____

[Partnership *or* Membership] Units described in this Agreement is unlikely, and thus Rules 144 and 237 of the Securities and Exchange Commission, which authorize the routine sales of unregistered securities without investment letters in limited amounts, are inapplicable to these securities.

(f) I have not relied in executing this Agreement and making the purchase herein described on any representations not contained in the _____ [Limited Partnership Agreement *or* Limited Liability Company Operating Agreement] and the Private Placement Memorandum for the _____ [Partnership *or* Membership] Units described in this Agreement.

(g) I understand that no state or federal regulatory agency has passed on the merits of the _____ [Partnership *or* Membership] Units described in this Agreement or their sale to investors.

(h) I understand that transferability of the _____ [Partnership *or* Membership] Units described in this Agreement is limited by rules of the Securities and Exchange Commission, that they can be transferred only subject to the following conditions, and that any certificate or other document evidencing them must bear the following legend:

"The _____ [Limited Partnership *or* Limited Liability Company] Interests evidenced by this document have not been registered under the Securities Act of 1933 on the grounds that they are exempt from such registration requirement under the intrastate offering exemption set forth in Section 3(a)(11) of that Act. Therefore, during the period in which _____ [Partnership *or* Membership] Units are being offered and sold by the _____ [limited partnership *or* limited liability company] above named, and for a period of nine months from the date of the last sale of _____ [Partnership *or* Membership] Units by such _____ [limited partnership *or* limited liability company], all resales of any such _____ [Partnership *or* Membership] Units by any person shall be made only to persons resident, that is, to persons having at the time of resale their principal residence, within the State of California."

(i) I meet the investor suitability requirements for this _____ Limited Partnership *or* Limited Liability Company] by virtue of the fact that either: (1) I have a preexisting personal or business relationship with the _____ [General Partner *or* Manager *or specify issuer, if other than general partner or manager*] or any of its partners, members, officers, directors, or controlling persons; or (2) by reason of my business or financial experience, or the business or financial experience of my professional advisors who are unaffiliated with, and not compensated by, the _____ [Limited Partnership or the General Partner *or* Limited Liability Company or Manager], directly or indirectly, I have the capacity to protect my own interests in connection with my acquisition of these _____ [Partnership *or* Membership] Units.

Agreement Not To Resell

4. I agree the _____ [Partnership *or* Membership] Units described in this Agreement will not be sold by me unless either:

(a) They become registered with the Securities and Exchange Commission under the Securities Act of 1933, or

(b) Are sold in a transaction coming within an exemption contained in the Securities Act of 1933 from the registration requirements of that Act.

Adoption of _____ [Partnership Agreement *or* Limited Liability Company Operating Agreement]

5. I adopt, accept, and agree to be bound by all the terms and conditions of the _____ [Limited Partnership Agreement of this Limited Partnership *or* Operating Agreement of this Limited Liability Company].

Special Power of Attorney

6. I make, constitute, and appoint the _____ [General Partner *or* Manager] my true and lawful attorney, with full power of substitution, for me and in my name, place, and stead, and for my use and benefit, to execute, acknowledge, file, and record:

[*If syndicate is organized as limited partnership:*]

(a) A Certificate of Limited Partnership as required by the California Uniform Limited Partnership Act of 2008 for the Limited Partnership and any amendments to the Certificate that may hereafter become required or be deemed advisable by the General Partner;

(b) Any other instrument or document that may be required to be filed or recorded by the Limited Partnership by the laws of any state, by any governmental agency, or that the General Partner deems advisable for the Limited Partnership to file or record;

(c) Any instrument or document that may be required to effect the continuation of the Limited Partnership, the admission of an additional or substituted Limited Partner, or the dissolution or termination of the Limited Partnership; provided such continuation, admission, or dissolution and termination is in accordance with the terms and provisions of the Limited Partnership Agreement for the Limited Partnership.

[*Or, if syndicate is organized as limited liability company:*]

(a) Any instrument or document that may be required to be filed or recorded by the Limited Liability Company by the laws of any state, by any governmental agency, or that the Manager deems advisable for the Limited Liability Company to file or record;

(b) Any instrument or document that may be required to effect the continuation of the Limited Liability Company, the admission of an additional or substituted member, or the dissolution or termination of the Limited Liability Company; provided such continuation, admission, or dissolution and termination is in accordance with the terms and provisions of the Operating Agreement for the Limited liability Company.

[*Continue as follows:*]

This power of attorney and grant of authority:

(a) Is a special power of attorney coupled with an interest and is therefore irrevocable and shall survive the death of the undersigned;

(b) May be exercised by the _____ [General Partner *or* Manager] either by:

(1) Having one of its officers sign any instrument separately as the attorney in fact for each _____ [Limited Partner or Member of the Limited Liability Company] executing the instrument, or

(2) Listing the names of all the _____ [Limited Partners or Members of the Limited Liability Company] executing an instrument with the single signature of one of its officers executing the instrument as attorney-in-fact for all of them.

(c) Shall survive the delivery of an assignment by me of all or any portions of the _____ [Partnership *or* Membership] Units purchased by me.

Title to Partnership Units

7. The _____ [Partnership *or* Membership] Units being purchased pursuant to this Agreement will be owned by, and should be shown on the _____ [Limited Partnership *or* Limited Liability Company] records as held in the names of (please print) _____ and _____ as:

☐ Community Property

☐ Joint Tenants

☐ Tenants in Common

☐ Separate Property

☐ Other (please describe: _____).

Total Purchase Price: $_____

Number of _____ [Partnership *or* Membership] Units being Purchased: _____

EXECUTED on _____ [*date*] at _____, California.

SUBSCRIBER
_____[*signature of subscriber*]
[*typed name*]
_____[*street address*]
_____[*city, state, zip*]

SUBSCRIPTION ACCEPTED:
_____[*date*]

_____[*name of general partner or manager*]
By _____[*signature*]
_____[*title*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29B NONPUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29B California Legal Forms--Transaction Guide § 29B.203

§ 29B.203 Investor Questionnaire

[1] Comment

[a] Use of Form

This form is a questionnaire that should be completed by each potential investor who desires to purchase an interest in a California nonpublic real estate syndicate. The questionnaire is designed to provide the syndicator with reasonable proof that a sale of a syndicate interest to the potential investor will not violate the intrastate and private offering exemptions of the federal Securities Act of 1933 [*see 17 C.F.R. §§ 230.147(d), (f)(1)(iii), 230.502(d)(1), 230.506(b)(2)(i), (ii)*]. This form also requests sufficient information to determine whether the investor satisfies one or both of the investor qualification tests for purposes of the California limited offering exemption [*Corp. Code§ 25102(f)(2)*; *10* Cal. Code Reg.§ 260.102.12; *see § 29B.41[2][a]*; *see also* Ch. 6B, *California Limited Offering Exemptions*]. Each exemption is based on different requirements, and not all the information requested in this form relates to every exemption.

[b] Federal Requirements

The intrastate exemption from the Securities Act of 1933 requires that all purchasers of limited partnership interests, or limited liability company interests, be residents of the state in which the entity is organized and does business [*15 U.S.C. § 77c(a)(11)*]. The issuer is required, under SEC rules establishing objective standards for compliance with the exemption, to obtain a written representation to that effect from each purchaser [*17 C.F.R. § 230.147(f)(1)(iii)*]. SEC guidelines for the federal offering exemption require that (1) each purchaser who is not an accredited investor must possess, either alone or with his or her purchaser representatives, sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment; or (2) the issuer must reasonably believe before making any sale that the purchaser comes within the foregoing description [*17 C.F.R. § 230.506(b)(2)*]. Thus, if each nonaccredited investor in fact possesses this "knowledge and experience," it does not matter whether the issuer has a reasonable belief as to the investor's sophistication.

[c] California Limited Offering Exemption Requirements

A syndicate using the California limited offering exemption [*see Corp. Code§ 25102(f)*] must also comply with

investor-suitability requirements. This form complies with those suitability requirements, which are discussed in *§ 29B.41[2][a]* and Ch. 6B, *California Limited Offering Exemptions* .

[2] FORM

Investor Questionnaire

INVESTOR QUESTIONNAIRE

_____ [*name of limited partnership or limited liability company, in capital letters*],

A California _____ [Limited Partnership *or* Limited Liability Company]

(Please complete separate sheet for each person signing Subscription Agreement)

Name: _____ Social Security No.: _____

Age: _____ Occupation: _____

Spouse's Name: _____ Spouse's Age: _____

Spouse's Social Security No.:

_____

Home Address:

_____

Home Telephone No.:

_____

Present Employer:

_____

Business Address:

_____

Business Telephone No.:

_____

No. of Years in Occupation:

_____

Education:

- ☐ High School
- ☐ College Degree (specify): _____
- ☐ Other (specify): _____

California Drivers License No.: _____

Place of Voter Registration in California: _____

Have you had advice concerning this investment from a financial advisor?

☐ Yes ☐ No

If yes, name of advisor: _____
Address: _____
Profession: _____

Describe any knowledge or experience you or your financial advisor (if any) have in financial and business matters that you feel will be useful in evaluating the merits and risks of this investment: _____

I am interested in this investment [*check one*]:

☐ as a long term investment for my own account.

☐ for the purpose of subsequent resale.

☐ on behalf of the following individual or entity: _____

I will file a:

☐ Joint Income Tax Return

☐ Separate Income Tax Return

☐ Other (specify): _____

I wish correspondence concerning this investment sent to my:

☐ home address

☐ business address

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on _____ [*date*] at _____, California.

INVESTOR
_____[*signature of subscriber*]
[*typed name*]
_____[*street address*]
_____[*city, state, zip*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES

13-29C California Legal Forms--Transaction Guide 29C.syn

§ 29C.syn Synopsis to Chapter 29C: PUBLIC REAL ESTATE SYNDICATES

§ 29C.01 California Sources

[1] Statutes

[2] Regulations

§ 29C.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 29C.03-29C.04 [Reserved]

§ 29C.05 Law Reviews and Periodicals

§ 29C.06 Annotations

§ 29C.07 Text References

§§ 29C.08-29C.09 [Reserved]

§ 29C.10 Syndicate Interests as Securities

§ 29C.11 Commissioner's Regulations for Real Estate Syndicates

[1] In General

[2] Overview of Substantive Requirements

[3] Permitted Modifications

[4] Coordination With Federal Securities Registration

§ 29C.12 Specified Property and Nonspecified Property Syndicates

§ 29C.13 Application for Qualification and Opinions of Counsel

§ 29C.14 Requirements for Syndicate Sponsors

[1] Definition of "Sponsor"

[2] General Requirements

§ 29C.15 Standards for Investor Suitability

[1] In General

[2] Presumptive Suitability Standards

[3] Duties of Sponsor

§ 29C.16 Restrictions on Fees, Compensation, and Expenses

§ 29C.17 Capital and Finance

§ 29C.18 Conflict of Interest and Investment Restrictions

§ 29C.19 Rights and Obligations of Investors

§ 29C.20 Disclosure and Marketing Requirements

§ 29C.21 Federal Tax Considerations

§§ 29C.22-29C.99 [Reserved]

§ 29C.100 Information for Nonexempt Real Estate Syndicate

[1] Facts

Scope

[2] Documents

Scope

§§ 29C.101-29C.109 [Reserved]

§ 29C.110 Federal Securities Registration

Scope

§ 29C.111 Syndicate Formation and Organization

Scope

§§ 29C.112-29C.119 [Reserved]

§ 29C.120 Compliance With Restrictions on Organization and Operating Fees, Expenses, and Services

Scope

§ 29C.121 Preparation and Filing of Application for Qualification

Scope

§ 29C.122 Selling Limited Partnership Interests

[1] Compliance With Investor Suitability Requirements

Scope

[2] Marketing and Advertising Disclosures and Requirements

Scope

§§ 29C.123-29C.129 [Reserved]

§ 29C.130 Limited Partnership Agreement

[1] Partnership Interests

[a] General Rights and Restrictions

Scope

[b] Assignment and Termination of Interests

Scope

[2] Capital and Finance

Scope

[3] Management and Investment

[a] General Rights and Obligations

Scope

[b] Fees, Compensation, and Expenses

Scope

[c] Investment Authority and Restrictions

Scope

[4] Meetings

Scope

[5] Books, Records, and Reports

Scope

[6] Dissolution of Partnership

Scope

[7] Other Provisions

Scope

§ 29C.131 Prospectus

Scope

§§ 29C.132-29C.139 [Reserved]

§ 29C.140 Maintenance and Distribution of Required Records and Reports

Scope

§§ 29C.141-29C.199 [Reserved]

§ 29C.200 Limited Partnership Agreement for Nonexempt, Specified Property Syndicate

[1] Comment

[a] Use of Form

[b] Specific Provisions of Form

[c] Formation of Partnership

[d] Partners

[e] Capital and Finance

[f] Management and Investment

[g] Assignment and Termination of Interests

[i] Limited Partners

[ii] General Partner(s)

[h] Partnership Meetings

[i] Books, Records, and Reports

[j] Dissolution of Partnership

[k] Miscellaneous Provisions

[2] FORM

Limited Partnership Agreement for Nonexempt, Specified Property Syndicate

§ 29C.201 Limited Partnership Agreement Provisions for Nonspecified Property Syndicate

[1] Comment

[a] Use of Form

[b] Other Regulatory Requirements

[2] FORM

Limited Partnership Agreement Provisions for Nonspecified Property Syndicate

§ 29C.202 Cross-Reference Sheet for Application for Qualification

[1] Comment

[a] Use of Form

[b] General Applicability of Commissioner's Regulations

[2] FORM

Cross-Reference Sheet for Application for Qualification

§ 29C.203 Limited Partner Information Sheet

[1] Comment

[a] Use of Form

[b] Investor Suitability Requirements

[c] Recordkeeping Requirements

[2] FORM

Limited Partner Information Sheet

§ 29C.204 Subscription Agreement--Nonexempt Offering Subject to Impound Condition

[1] Comment

[a] Use of Form

[b] Federal Intrastate Exemption

[c] Commissioner's Impound Condition

[d] Requirements for Subscription Agreement

[2] FORM

Subscription Agreement--Nonexempt Offering Subject to Impound Condition



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES

13-29C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the special regulatory requirements of the California Commissioner of Corporations [*see 10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*] applicable to a real estate syndicate that must be qualified with the Commissioner. These regulations apply primarily to syndicates organized as limited partnerships but will be applied by the Commissioner to real estate programs in other forms [*10 Cal. Code Reg. § 260.140.110.1(a)*; *see § 29C.11[1]* (definition of "real estate program")]. This chapter's coverage of the relevant regulations assumes that a real estate syndicate is organized as a limited partnership; an illustrative limited partnership agreement is included [*see § 29C.200*]. Substantive requirements under the Commissioner's regulations extend to all aspects of a syndicate's organization and operation and are briefly summarized in *Section 29C.11[2]*.

Syndicates are referred to in this chapter as "nonexempt"or "public" because they do not qualify for any of the exemptions under state securities laws applicable to private or nonpublic offerings and sales of syndicate interests. For coverage of real estate syndicates that do qualify for one or more exemptions from the California qualification requirements and the federal registration requirements, see Ch. 29B, *Nonpublic Real Estate Syndicates* . That chapter also discusses relevant tax considerations and provisions of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*] as they apply to real estate syndicates generally, and that information is not repeated in this chapter.

The general requirements for qualifying the offering and sale of any security with the California Corporations Commissioner (including the streamlined procedure available for an offering and sale of securities subject to federal registration) are covered in Ch. 6H, *Qualification of Securities* . For discussion of limited partnerships in general, see Ch. 16, *Formation of Limited Partnerships* .

A real estate syndicate that must qualify in California may or may not be required to register with the Securities and Exchange Commission (SEC) under federal securities laws. Federal securities requirements are not covered in this chapter, but for general coverage of the subject, see California Real Estate Law & Practice, Ch. 27, *Registration of a Syndicate Offering With the SEC,* § 27.70 et seq. (Matthew Bender); Sowards, Business Organizations--Federal Securities Act, Volume 11 (Matthew Bender); and Gadsby, Business Organizations--Federal Securities Exchange Act of 1934, Volume 11A (Matthew Bender). Also, various exemptions from registration available under the Securities Act of 1933, are summarized in Ch. 29B, *Nonpublic Real Estate Syndicates,* § 29B. 40.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART I. RESEARCH GUIDE
A. Primary Sources

13-29C California Legal Forms--Transaction Guide § 29C.01

§ 29C.01 California Sources

[1] Statutes

NOTE:
See Research Guide to Ch. 29B, *Nonpublic Real Estate Syndicates*.

[2] Regulations

Corporations Commissioner's regulations governing qualification of real estate syndicate limited partnership interests. *10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*.

Experience and net worth requirements for general partners. *10 Cal. Code Reg. §§ 260.140.111.1, 260.140.111.2*.

Commitment to submit required reports to Commissioner. *10 Cal. Code Reg. § 260.140.111.3*.

Exculpatory and indemnification clauses favoring general partner. *10 Cal. Code Reg. § 260.140.111.4*.

General partner's fiduciary duty. *10 Cal. Code Reg. § 260.140.111.5*.

Payments to terminated general partner. *10 Cal. Code Reg. § 260.140.111.6*.

Investors' suitability standards. *10 Cal. Code Reg. §§ 260.140.112.1-260.140.112.4*.

Fees, compensation, and expenses. *10 Cal. Code Reg. §§ 260.140.113.1-260.140.113.10*.

Conflict of interest and investment restrictions on sponsor. *10 Cal. Code Reg. §§ 260.140.114.1-260.140.114.14*.

Nonspecified property (blind pool) syndicates. *10 Cal. Code Reg. §§ 260.140.115.1-260.140.115.6*.

Limited partners' rights and obligations. *10 Cal. Code Reg. §§ 260.140.116.1-260.140.116.9.*
Voting rights. *10 Cal. Code Reg. § 260.140.116.2.*
Reports. *10 Cal. Code Reg. § 260.140.116.3.*
Transferability of interests. *10 Cal. Code Reg. § 260.140.116.7.*

Disclosure and marketing requirements. *10 Cal. Code Reg. §§ 260.140.117.1-260.140.117.5.*
Content of prospectus. *10 Cal. Code Reg. §§ 260.140.117.2, 260.140.117.3.*
Sales projections. *10 Cal. Code Reg. § 260.140.117.4.*
Opinions of counsel. *10 Cal. Code Reg. § 260.140.117.5.*

Deferred payments for syndicate interests. *10 Cal. Code Reg. § 260.140.118.1.*

Financial information required with application. *10 Cal. Code Reg. § 260.140.118.4.*

Legend condition. *10 Cal. Code Reg. § 260.140.118.5.*

Impound condition. *10 Cal. Code Reg. § 260.140.118.6.*

Limited partnership agreement required provisions. *10 Cal. Code Reg. § 260.140.119.1.*



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§ 29C.02 Federal Sources

[1] Statutes

NOTE:
See Research Guide to Ch. 29B, *Nonpublic Real Estate Syndicates*.

[2] Regulations

NOTE:
See Research Guide to Ch. 29B, *Nonpublic Real Estate Syndicates*.



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[Reserved]

§§ 29C.03[Reserved]



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B. Secondary Sources

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§ 29C.05 Law Reviews and Periodicals

NOTE:
See listings Research Guide to Ch. 29B, *Nonpublic Real Estate Syndicates* .



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§ 29C.06 Annotations

NOTE:
See Research Guide Ch. 29B, *Nonpublic Real Estate Syndicates* .



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§ 29C.07 Text References

NOTE:
See Research Guide to Ch. 29B, *Nonpublic Real Estate Syndicates*.



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[Reserved]

§§ 29C.08[Reserved]



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PART II. LEGAL BACKGROUND

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§ 29C.10 Syndicate Interests as Securities

The Corporate Securities Law of 1968 [*Corp. Code §§ 25000-25706*] defines "security" broadly enough to extend to a limited partnership interest in a limited partnership real estate syndicate [*see Corp. Code § 25019*]. Accordingly, the offer or sale of this type of interest must be qualified with the California Commissioner of Corporations unless an exemption applies or the interest is not subject to qualification [*see Corp. Code §§ 25019*, *25110*, *25120*, *25130*; *see, e.g., Corp. Code § 25102.1*]. The limited offering exemption from qualification in California [*see Corp. Code § 25102(f)*] is discussed in Ch. 29B, *Nonpublic Real Estate Syndicates* . Other exemptions are discussed in Ch. 6C, *California Small Offering Exemption* [*see Corp. Code § 25102(h)*] and Ch. 6D, *California Qualified Purchaser Exemptions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.11 Commissioner's Regulations for Real Estate Syndicates

[1] In General

The Commissioner of Corporations may impose conditions on the qualification of offerings and sales of securities to ensure that they are fair, just, and equitable [*see Corp. Code §§ 25110, 25140*]. Pursuant to this general authority, the Commissioner has promulgated general regulations that outline the qualification procedures for any securities offering [*see, e.g., 10 Cal. Code Reg. §§ 260.110-260.131*]. In addition to these general regulations, the Commissioner has promulgated specific regulations that apply to the qualification of real estate programs in the form of limited partnerships [*10 Cal. Code Reg. § 260.140.110.1(a)*; *see 10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*]. The focus of this chapter is on these specific regulations.

Under these regulations, a "program" means any organization, other than a corporation or a real estate investment trust, which has as a primary purpose the investment in, operation of, or receipt of gain from an interest in real property [*10 Cal. Code Reg. § 260.140.110.2(s)*]. A "program interest" is a limited partnership unit or other indicia of ownership in a program [*10 Cal. Code Reg. § 260.140.110.2(t)*]. Although the Commissioner's regulations apply specifically to the qualification of real estate programs in the form of limited partnerships, they will also be applied by analogy to real estate programs in other forms [*10 Cal. Code Reg. § 260.140.110.1(a)*]. For purposes of the coverage in this chapter, it is assumed that the syndicate is organized as a limited partnership.

The term "syndicate" is not defined in the Commissioner's Rules. However, the broad definition of "program" under the regulations (discussed above) encompasses the type of limited partnership commonly referred to as a real estate syndicate [*see* discussion in Ch. 29B, *Nonpublic Real Estate Syndicates*]. The terms "real estate program" and "real estate syndicate" may be used interchangeably in this chapter's coverage of the Commissioner's regulations, with the understanding that both terms exclude any entity organized as either a corporation or a real estate investment trust.

[2] Overview of Substantive Requirements

Guidelines contained in the Commissioner's regulations cover several broad subject matters: 1) requirements for sponsors; 2) suitability, rights and obligations of investors; 3) permitted fees, compensation, and expenses; 4) capital and finance; 5) conflicts of interest and investment restrictions; 6) disclosure and marketing requirements; and 7) special

requirements for nonspecified property programs. The Legal Background to this chapter summarizes these main subject matters [*see §§ 29C.14-29C.20*]; cross-references to other chapters are provided for more detailed coverage of particular subjects.

The substantive requirements of the Commissioner's regulations for a real estate syndicate must be incorporated, as appropriate, into the partnership agreement, the partnership prospectus (or other appropriate disclosure agreement), and the application for qualification [*see 10 Cal. Code Reg. §§ 260.140.110.1(c), 260.140.119.1*]. At the time an application for qualification is submitted [*see § 29C.121*], it must be accompanied by a cross-reference sheet [*see § 29C.202*] that shows where in a specific partnership document or instrument each provision of the regulations is covered. Any variance from provisions of the regulations must be explained and justified, and any regulations that do apply to a particular offering must be identified and stated to be inapplicable [*see 10 Cal. Code Reg. § 260.140.110.1(c)*].

Requirements or provisions of specific regulations must appear in the partnership agreement. These requirements are outlined in *Section 29C.130* and an illustrative limited partnership agreement is set forth in *Section 29C.200*. For discussion of the requirements for the partnership prospectus (or equivalent disclosure document), see *Section 29C.131*.

[3] Permitted Modifications

Applications for qualification with the Commissioner of Corporations that do not conform to the standards contained in the Commissioner's regulations are looked upon with disfavor. However, where good cause is shown, certain guidelines may be modified or waived by the Commissioner [*10 Cal. Code Reg. § 260.140.110.1(a)*]. In cases where individual characteristics of specific programs warrant modification of the standards, they will be accommodated insofar as possible, to the extent consistent with the spirit of the Commissioner's regulations [*10 Cal. Code Reg. § 260.140.110.1(b)*]. If any guidelines contained in the Commissioner's regulations conflict with a provision of the Securities and Exchange Commission, that guideline does not apply [*10 Cal. Code Reg. § 260.140.110.1(d)*].

[4] Coordination With Federal Securities Registration

If an offering is being registered with the Securities and Exchange Commission (SEC) [*see* discussion in Ch. 29B, *Nonpublic Real Estate Syndicates*] and is being qualified with the Commissioner by "coordination" [*see Corp. Code § 25111*], any regulation of the Commissioner that conflicts with SEC requirements will not apply [*10 Cal. Code Reg. § 260.140.110.1(d)*]. Also under those circumstances, a prospectus that is part of a registration statement that has been declared effective by the SEC is deemed to comply with all requirements of the Commissioner's regulations as to form except that the Commissioner may exercise his or her discretion to require additional, substantive disclosures [*see 10 Cal. Code Reg. § 260.140.117.2*; *see also § 29C.131*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawBlue Sky LawsGeneral OverviewSecurities LawBlue Sky LawsJoint Ventures & Partnerships

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§ 29C.12 Specified Property and Nonspecified Property Syndicates

Types of real estate programs or syndicates regulated by the Commissioner's regulations fall into one of two broad categories. The first type is a nonspecified property syndicate, commonly referred to as a "blind pool" syndicate [*see* California Real Estate Law & Practice, vol. 1, ch. 20, *Introduction to Syndication,* § 20.04 (Matthew Bender)]. A "nonspecified property" syndicate includes any program where, at the time its qualification becomes effective, less than 75 percent of the net proceeds from the sale of program interests is allocable to the purchase, construction, or improvement of specific properties [*see 10 Cal. Code Reg. § 260.140.110.2(o)*]. The purpose of this type of syndicate is to raise a "pool" of money to invest in various real properties [*see* California Real Estate Law & Practice, vol. 1, ch. 20, *Introduction to Syndication,* § 20.04 (Matthew Bender)].

Even if a syndicate is not considered a nonspecified property syndicate under the circumstances described above, it may qualify as one under another set of circumstances. Specifically, any syndicate that permits the reinvestment of proceeds obtained from the sale or refinancing of syndicate properties is included in the Commissioner's definition of a "nonspecified property" syndicate [*see 10 Cal. Code Reg. § 260.140.110.2(o)*].

A "specified property" syndicate is defined under the regulations as simply any program other than a nonspecified property program [*see 10 Cal. Code Reg. § 260.140.110.2(y)*]. The type of syndicate must be determined since special regulations, in addition to those applicable to all real estate syndicates, apply to nonspecified property programs [*see 10 Cal. Code Reg. § 260.140.115.1*; *see also § 29C.201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.13 Application for Qualification and Opinions of Counsel

The offering and sale of interests in a nonexempt real estate syndicate must comply with the general application requirements and other qualification procedures applicable to the offer and sale of any other type of security [*see 10 Cal. Code Reg. § 260.110-260.131*; *see also* Ch. 6D, *California Qualified Purchaser Exemptions*]. The Commissioner's regulations for a nonexempt real estate syndicate also contain specific, additional requirements for qualification.

For example, the application must contain a favorable ruling from the Internal Revenue Service or an opinion of counsel to the effect that the issuer will be taxed as a "partnership" and not as an "association" for federal income tax purposes [*10 Cal. Code Reg. § 260.140.117.5*; *see § 29C.21*]. An opinion of counsel to the effect that the securities being offered are duly authorized or created and validly issued interests in the issuer, and that the liability of the public investors will be limited to their respective total agreed upon investment in the issuer must also be included with the application. The Commissioner may also request an opinion of counsel concerning tax benefits flowing to the partnership when this appears necessary for the protection of investors [*10 Cal. Code Reg. § 260.140.117.5*]. Opinions of counsel must be satisfactory to the Commissioner (in form and substance) and must be unqualified except to the extent permitted by the Commissioner. However, the opinion may be based on reasonable assumptions outlined in the regulations [*see 10 Cal. Code Reg. § 260.140.117.5*; *see also* Ch. 29B, *Nonpublic Real Estate Syndicates, ,* § 29B.15].

Other specific information that must be included in an application for qualification of a nonexempt real estate syndicate is outlined in *Section 29C.121*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.14 Requirements for Syndicate Sponsors

[1] Definition of "Sponsor"

Specific regulations apply to "sponsors" of a syndicate. A sponsor is any person directly or indirectly instrumental in organizing all or part of the syndicate, or any person who will manage or participate in the management of the syndicate, including the general partner(s) and any affiliate of a general partner. The term does not include a person whose only relation with the syndicate is that of an independent property manager, whose only compensation is for that service. Similarly, wholly independent third parties such as attorneys, accountants, and underwriters whose only compensation is for professional services rendered in connection with the offering of interests in the syndicate are also excluded from the definition of "sponsor"[*10 Cal. Code Reg. § 260.140.110.2(z)*].

In most instances the sponsor will also be the proposed general partner of the syndicate [*see* California Real Estate Law & Practice, vol. 1, ch. 23, *Types of Syndicates and Syndicator's Compensation*, pt. B (Matthew Bender)]. However, the definition of "sponsor" outlined above may include persons other than the general partner(s). Some of the Commissioner's requirements apply only to general partners while others extend to any person who falls within the definition of a sponsor.

[2] General Requirements

The general partner(s) of a real estate syndicate must satisfy specific experience and net worth requirements outlined in the regulations [*see 10 Cal. Code Reg. §§ 260.140.111.1, 260.140.111.2*; *see also § 29C.111*]. Additional experience requirements apply to the general partner of a nonspecified property syndicate [*10 Cal. Code Reg. § 260.140.115.2*; *see § 29C.12* (definition)]. The sponsor has a fiduciary responsibility for the safekeeping and use of all syndicate funds and assets; an investor may not contract away the fiduciary duty owed to him or her by the sponsor [*10 Cal. Code Reg. § 260.140.111.5*]. Certain conditions must be satisfied if a sponsor is to be indemnified or held harmless for any liability or loss, and specific restrictions apply to losses arising from securities law violations and to the payment of liability insurance or legal expenses [*10 Cal. Code Reg. § 260.140.111.4*; *see § 29C.130[3][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.15 Standards for Investor Suitability

[1] In General

Because of the limited transferability, lack of liquidity, and the risks associated with investments in real estate syndicates, the sponsor and each person selling syndicate interests on behalf of the sponsor or syndicate must be cautious concerning the persons to whom the securities are marketed. The Commissioner will impose suitability standards that are reasonable in view of these inherent risks and the type of syndicate to be offered. In determining how restrictive the suitability standards must be, the Commissioner will consider the type of program and the existence of such factors as high leverage, tax implications, mandatory deferred payments, balloon payments financing, excessive investments in unimproved land, and the prospect of uncertain or no cash available for distribution from operations. Programs that involve more than ordinary investor risk should emphasize suitability standards for investors of high net worth or income [*10 Cal. Code Reg. § 260.140.112.1*].

[2] Presumptive Suitability Standards

In addition to the general guidelines outlined in [1], *above,* the Commissioner's regulations contain specific standards for determining the presumptive suitability of a prospective investor in a syndicate. These standards vary based on the risk-level of the program but are generally based on the investor's annual gross income or minimum net worth, or a combination of both. Special rules apply in calculating an investor's net worth and in the case of sales to fiduciary accounts [*10 Cal. Code Reg. § 260.140.112.3*]. The presumptive suitability standards are outlined in *Section 29C.122[1]*.

[3] Duties of Sponsor

The syndicate sponsor and each person selling syndicate interests on behalf of the sponsor or syndicate must make every reasonable effort to assure that the persons being offered or sold interests in the syndicate can be reasonably assumed to have the capacity to understand the fundamental aspects of the program and to meet the suitability standards imposed. This assumption must be based on the educational, business, or financial experience of the prospective investor. The sponsor or its representatives must ascertain that the investor can bear the economic risk of an investment in the program and that the program interests are appropriate for the investor's investment objectives, portfolio structure,

and financial situation [*10 Cal. Code Reg. § 260.140.112.2*]. For an "Information Sheet" that may be used to solicit information from a potential investor necessary to establish his or her suitability for investment, see *Section 29C.203 [2]*. The sponsor must maintain for a least 4 years a record of the information obtained to determine than an investor meets the suitability standards imposed on the offer and sale of syndicate interests [*see 10 Cal. Code Reg. § 260.140.112.4*; *see also § 29C.203[1][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.16 Restrictions on Fees, Compensation, and Expenses

The total amount of consideration of all kinds that may be paid by a real estate syndicate directly or indirectly to all persons must be reasonable. Unless otherwise permitted by the Commissioner's regulations, consideration may only be paid for reasonable and necessary goods, property, or services. Detailed information regarding any compensation paid to a sponsor (or its affiliate or underwriter) must appear in the partnership prospectus [*see 10 Cal. Code Reg. § 260.140.113.1*].

In addition to the general requirements discussed above, specific regulatory restrictions apply to the amount and payment of various types of fees and expenses. These include, but are not limited to organization and offering expenses, acquisition services and expenses, program management fees, real estate brokerage fees, and property management fees. Restrictions on these fees and expenses are outlined in *Sections 29C.120* and *29C.130[3][b]* and incorporated into the limited partnership agreement in this chapter [*see § 29C.200[2]*, art. 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.17 Capital and Finance

Several of the Commissioner's regulations for a nonexempt real estate syndicate govern matters relating to a limited partnership's capital and finance. Some of these matters concern the redemption or transferability of limited partnership interests [*see 10 Cal. Code Reg. §§ 260.140.116.6*, *260.140.116.7*] and the reinvestment of program proceeds [*see 10 Cal. Code Reg. § 260.140.116.9*]. These provisions are outlined in *Section 29C.130[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.18 Conflict of Interest and Investment Restrictions

Many of the Commissioner's regulations prohibit the real estate syndicate from engaging in certain activities which involve or may involve a conflict of interest with the syndicate sponsor or general partner. Some of these activities are permitted provided there is compliance with regulatory safeguards. For example, a syndicate may not purchase or lease property in which a sponsor has an interest unless several conditions outlined in the regulations are satisfied [*see 10 Cal. Code Reg. § 260.140.114.1*]. Other specific restrictions are discussed in *Section 29C.130[3][c]*.

Certain aspects of a real estate syndicate's investment policy are also specifically regulated. For example, the type of mortgage financing a syndicate may obtain on property it purchases, is restricted [*see 10 Cal. Code Reg. § 260.140.114.3*]. In addition, the total indebtedness that may be incurred by the syndicate is limited [*see 10 Cal. Code Reg. § 260.140.114.4*]. For a discussion of additional investment restrictions, see *Section 29C.130[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.19 Rights and Obligations of Investors

Certain rights and obligations of limited partners in a real estate limited partnership are governed by the applicable California limited partnership law [*Corp. Code §§ 15900-15912.07* (ULPA '08), operative January 1, 2008); *see also Corp. Code §§ 15912.04, 15912.06* (operative date and limited application of former limited partnership acts prior to January 1, 2010)]. For detailed discussion of California limited partnership law, see Chs. 16-16B. If the syndicate is not exempt from qualification in California, additional requirements under the Commissioner's regulations also regulate these rights and obligations. Among other matters, these regulations cover partnership meetings [*see 10 Cal. Code Reg. § 260.140.116.1*], voting rights [*see 10 Cal. Code Reg. § 260.140.116.2*] and required partnership information that must be given to limited partners [*see 10 Cal. Code Reg. § 260.140.116.3*]. Specific requirements of regulations that pertain to the rights and obligations of investors are covered in *Section 29C.130[1], [4],* and *[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.20 Disclosure and Marketing Requirements

Advertising by a real estate syndicate subject to qualification in California must conform to the standards generally applicable to the sale of any type of securities [*10 Cal. Code Reg. § 260.140.117.1(a)*; *see 10 Cal. Code Reg. § 260.302* (applicable standards)]. The Commissioner's regulations impose additional requirements for advertising and on the use of forecasts (predicted future results of syndicate operations) [*see 10 Cal. Code Reg. §§ 260.140.117.1(b)-(d), 260.140.117.4*]. For further discussion of these requirements, see *Section 29C.122*. The specific requirements for a partnership prospectus are outlined in *Section 29C.131*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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§ 29C.21 Federal Tax Considerations

The application for qualification of a real estate syndicate must be submitted with a favorable ruling from the Internal Revenue Service or an opinion of counsel to the effect that the issuer will be taxed as a partnership and not as an "association" (in other words, a corporation) for federal income tax purposes [*see 10 Cal. Code Reg. § 260.140.117.5*; *§ 29C.13*]. Prior to January 1, 1997, this requirement was important because the tax classification of a limited partnership was detemined based on the presence or absence of four "corporate characteristics": continuity of life, centralized management, limited liability, and free transferability of interests. As a general rule, a partnership having three or more of these characteristics would be taxable as a corporation, rather than as a partnership.

However, entity classification rules effective January 1, 1997, substantially simplified the classification issue by permitting non-corporate entities, including limited partnerships, to elect whether to be taxed as a partnership or as a corporation [*see Treas. Reg. § 301.7701-3(a)*]. In light of these liberalized requirements, it should be a relatively simple matter for counsel to issue an opinion to the effect that the partnership will be taxable as such and not as a corporation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsGeneral OverviewReal Property LawSecurities RegulationReal Estate SyndicatesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDefinitionsPartners & Partnerships



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[Reserved]

§§ 29C.22[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-29C California Legal Forms--Transaction Guide § 29C.100

§ 29C.100 Information for Nonexempt Real Estate Syndicate

NOTE:

For general information (facts and documents) that should be obtained from the client for any real estate syndicate, see Chapter 29B, ***Nonpublic Real Estate Syndicates*** , § 29B.100 et seq. Listed below are only those additional facts and documents that are necessary to comply with regulations of the California Corporations Commissioner for nonexempt real estate syndicates, that is, those that must qualify with the Commissioner [***see*** ;*10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*].

[1] Facts

1.Type of syndicate:

a. Specified property syndicate; or

b. Nonspecified property syndicate [*see § 29C.12* (definition)].

2. For specified property syndicate, description of particular property or properties to be acquired by syndicate.

3. If syndicate is nonspecified, investment objectives of syndicate:

a. To obtain specific type of income-producing property, such as apartment buildings.

b. To obtain any type of income-producing real property that appears to satisfy syndicate's tax and other financial purposes.

[2] Documents

1.For each real estate syndicate or similar real estate investment program organized or managed by sponsor and each proposed general partner:

a. Cash flow statement.

b. Balance sheet.

2. Any proposed promotional materials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsFormationReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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[Reserved]

§§ 29C.101[Reserved]

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B. Preliminary Determinations

13-29C California Legal Forms--Transaction Guide § 29C.110

§ 29C.110 Federal Securities Registration

1. Is registration required under federal law?

NOTE:

Securities subject to federal registration requirements may be qualified in California under streamlined procedures [***see*** Ch. 6, ***California Qualified Purchaser Exemptions***]. A detailed discussion of federal registration requirements is beyond the scope of this chapter. However, some federal exemptions are discussed in Ch. 29B, *Nonpublic Real Estate Syndicates* , and the registration requirements are covered in Sowards, Business ORGANIZATIONS--FEDERAL Securities Act, Volume 11 (Matthew Bender), and Gadsby, Business ORGANIZATIONS--FEDERAL Securities Exchange Act of 1934, Volume 11A (Matthew Bender).

2. Which (if any) exemptions from federal registration requirements will be asserted [*see* Ch. 29B, *Nonpublic Real Estate Syndicates* .

NOTE:

Issuers often attempt to comply with as many exemptions as possible to ensure that if one is inapplicable for any reason, one or more others will still be available.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawExemptions From RegistrationGeneral Overview



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§ 29C.111 Syndicate Formation and Organization

NOTE:
For other preliminary considerations relative to the formation and organization of a real estate limited partnership, such as those required to determine whether the partnership qualifies to be taxed as a partnership (rather than as a corporation), see Ch. 29B, *Nonpublic Real Estate Syndicates* .

1.Who is (are) person(s) considered under regulations to be "sponsor" of syndicate [*see 10 Cal. Code Reg. § 260.140.110.2(z)*]?

NOTE:
This identification is important since the Commissioner's regulations contain specific requirements and restrictions that apply to a sponsor.

a. General partner(s).

b. Any person directly or indirectly instrumental in organizing syndicate.

NOTE:
"Sponsor" does not include wholly independent third parties such as attorneys, accountants, and underwriters whose only compensation is for professional services rendered in connection with the offering of limited partnership interests [*10 Cal. Code Reg. § 260.140.110.2(z)*].

c. Any person who will manage or participate in management of syndicate.

NOTE:

A person whose only relationship with the syndicate is that of an independent property manager and who receives compensation from the syndicate only for that purpose is not considered to be a "sponsor" [*10 Cal. Code Reg. § 260.140.110.2(z)*].

d. "Affiliate" of person described in (a)-(c), *above* [*see* P 2, *below; 10 Cal. Code Reg. § 260.140.110.2(c)* ("affiliate" defined)].

2. Does sponsor [*see* P 1, *above*] have any "affiliate(s)" [*10 Cal. Code Reg. § 260.140.110.2(c)*]?

a. Any person directly or indirectly controlling, controlled by, or under common control with sponsor.

NOTE:

For purposes of the real estate syndicate regulations, a "person" is any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or other legal entity [*10 Cal. Code Reg. § 260.140.110.2(r)*].

b. Any person owning or controlling 10 percent or more of sponsor's outstanding voting securities or beneficial interests.

c. Any officer, director, partner, or trustee of sponsor (or any other persons acting in substantially similar capacity to sponsor).

d. Any officer, director, partner, trustee, or holder of 10 percent or more of the voting securities or beneficial interests of any person listed in a-c, *above.*

e. Any entity in which any person listed in a-d, *above,* is an officer, director, partner, or trustee (or serves in substantially similar capacity).

3. Does general partner (or, if general partner is not an individual, does general partner's principal operating officer) possess requisite experience?

a. For any type of real estate syndicate [*10 Cal. Code Reg. § 260.140.111.1*]:

(1) At least two years relevant real estate or other experience demonstrating knowledge and experience necessary to acquire and manage type of properties to be acquired.

(2) Either:

NOTE:

This experience requirement may be satisfied by the general partner (or its principal operating officer) or by any affiliate that will provide services to the syndicate [*10 Cal. Code Reg. § 260.140.111.1*; ***see*** P 2, ***above*** ("affiliate")].

(a) At least four years relevant experience in kind of service being rendered; or

(b) Ability to demonstrate sufficient knowledge and experience to perform proposed services.

b. For nonspecified property syndicate [*10 Cal. Code Reg. § 260.140.115.2*; *see §§ 29C.12* (definition)]:

(1) Experience described in subparagraph (a), *above;*

(2) At least 5 years experience in real estate business in executive capacity; and

(3) At least 2 years experience in management and acquisition of type of property to be acquired.

NOTE:

Absent this two-year management experience, a general partner must demonstrate to the satisfaction of the Commissioner that he or she has sufficient knowledge and experience to acquire and manage the type of properties proposed to be acquired by the syndicate [*10 Cal. Code Reg. § 260.140.115.2*].

4. Does general partner(s) satisfy basic financial requirements [*10 Cal. Code Reg. § 260.140.111.2*]:

NOTE:

If the limited partnership will seek to obtain an advance ruling from the IRS that it will be taxed as a partnership rather than a corporation, specific conditions must be satisfied, including additional requirements for a general partner's net worth [***see*** *Rev. Proc. 74-17, 1974-1 C.B. 438* ; Ch. 29B, *Nonpublic Real Estate Syndicates*.

a. Is financial condition commensurate with any financial obligations assumed in offering and in operation of syndicate?

b. Is aggregate financial net worth equal to or greater than lesser of one of following [*10 Cal. Code Reg. § 260.140.111.2(a)*]?

NOTE:

If contingent liabilities and promissory notes are used to determine net worth, an evaluation must be made to determine the appropriateness of including these items in the calculation of net worth [*10 Cal. Code Reg. § 260.140.111.2(a)*]. Also, if promissory notes are used to satisfy the net worth requirements for a general partner, special requirements apply [***see*** *10 Cal. Code Reg. § 260.140.111.2(b)*]. The Commissioner may require the general partner(s) to present evidence of the ability to maintain any claimed net worth for a period of three years following completion of the offering [*10 Cal. Code Reg. § 260.140.111.2(a)*].

(1) One million dollars; or

(2) Greater of either:

(a) One hundred thousand dollars; or

(b) Five percent of gross amount of all offerings sold within prior 12 months plus 5 percent of gross amount of current offering.

NOTE:

The gross amount of offerings includes amounts to be received on account of mandatory

deferred payments [*10 Cal. Code Reg. § 260.140.111.2(a)*].

5. For estimated or actual expenses, fees, and compensation to be paid by syndicate:

NOTE:

The total amount of consideration of all kinds that may be paid by a syndicate to all persons (directly or indirectly) must be reasonable. As a general rule, consideration may only be paid for reasonable and necessary goods, property, or services [*10 Cal. Code Reg. § 260.140.113.1(a), (b)*; ***see*** *§§ 29C.120, 29C.130[3][b]* (specific restrictions)].

a. What type of expenses or compensation have or will be paid?

(1) Expenses.
(a) Organization and offering expenses.

(b) Acquisition expenses.

(c) Goods or materials.

(d) Other.

(2) Fee or compensation for services:

(a) Acquisition.

(b) Development.

(c) Construction.

(d) Real estate brokerage.

(e) Management of syndicate or syndicate property.

(f) Insurance brokerage.

(g) Other

b. What is actual or estimated amount of each item?

c. How was or will each item be paid?

(1) Direct payment or reimbursement of original payor.

(2) Cash.

(3) Granting of subordinated interest in partnership [*see § 29C.130[2]*, P 6].

(4) Asset based fee [*see § 29C.200[1][f]*].

d. For each item, who was or will be payee?

(1) General partner.

(2) Syndicate "sponsor" other than general partner.

(3) Affiliate of syndicate sponsor.

(4) Underwriter or other independent third party.

e. When is each item payable?

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

13-29C California Legal Forms--Transaction Guide §§ 29C.112-29C.119

[Reserved]

§§ 29C.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART III. TRANSACTION GUIDE
C. Procedural Guide

13-29C California Legal Forms--Transaction Guide § 29C.120

§ 29C.120 Compliance With Restrictions on Organization and Operating Fees, Expenses, and Services

1.Advise client to limit all organization and offering expenses for selling limited partnership interests to no more than 15 percent of aggregate capital contributions [*10 Cal. Code Reg. § 260.140.113.2*]:

NOTE:

"Organization and offering expenses" are the actual expenses incurred in connection with and in preparing a syndicate for qualification and subsequently offering and selling the limited partnership interests. These include, but are not limited to, sales commissions paid to broker-dealers in connection with the distribution of partnership interests and all advertising expenses related to the offer and sale of the interests [*10 Cal. Code Reg. § 260.140.110.2(p)*]. The 15 percent limitation referred to above applies only to the portion of aggregate capital contributions when and as paid to the limited partnership [*10 Cal. Code Reg. § 260.140.113.2*]. "Capital contribution" is the gross amount of investment in a limited partnership by the limited partners [*10 Cal. Code Reg. § 260.140.110.2(g), (q), (t)*]; any mandatory deferred payments [***see*** *10 Cal. Code Reg. § 260.140.110.2(m)* (definition)] are included only as these amounts are paid to the limited partnership [*10 Cal. Code Reg. § 260.140.113.2*].

2. For payment by syndicate of acquisition fee [*see § 29C.130[3][b]*, P 1 (definition)] for property acquisition services and/or acquisition expenses [*see § 29C.130[3][b]*, P 2 (definition)], advise client that:

a. Maximum amount of fee is limited by regulations [*see 10 Cal. Code Reg. § 260.140.113.3(a), (b)*; *§ 29C.130[3][b]*, P 1];

b. Amount of all acquisition fees that will be paid must be set forth on face of prospectus [*see 10 Cal. Code Reg. § 260.140.113.3(c)*; *§ 29C.131*];

c. After last property acquisition, sponsor must forward verified schedule to Commissioner that lists acquisition fees and other information regarding property acquisitions [*se* e *10 Cal. Code Reg. § 260.140.113.3(c)*; *§ 29C.140*, P 9];

d. Syndicate may not reimburse sponsor for certain types of acquisition expenses [*see 10 Cal. Code Reg. § 260.140.113.4*; *§ 29C.130[3][b]*, P 2].

3. If interest in partnership will be given to person, e.g., general partner, as promotional interest and syndicate management fee, advise client that amount or percentage of interest must be reasonable and adequately subordinated [*see 10 Cal. Code Reg. § 260.140.113.5*; *§ 29C.130[2]*, P 6].

4. If sponsor intends to perform property management services for syndicate:

a. Verify that services are necessary to prudent operation of partnership and that sponsor has adequate staff to perform services [*10 Cal. Code Reg. § 260.140.113.8(a)*].

b. Confirm existence of (or draft) separate property management contract that, at a minimum [*10 Cal. Code Reg. § 260.140.113.8(b)*; *see* vol. 8A, ch. 38, *Real Property Management*]:

(1) Precisely describes services to be rendered and all compensation to be paid; and

(2) Permits material modification only by vote of majority of limited partners.

c. Confirm that limited partnership agreement details amount of property management fees to be paid to sponsor [*see 10 Cal. Code Reg. § 260.140.113.8(a)*; *§ 29C.130[3][b]*, P 6 (illustrative provision)].

d. Confirm that existence of property management agreement is disclosed in prospectus [*10 Cal. Code Reg. § 260.140.113.8(b)*; *see § 29C.131*].

5. If sponsor intends to provide insurance brokerage services in connection with obtaining insurance on syndicate property, advise sponsor that it may do so only if [*10 Cal. Code Reg. § 260.140.113.9*]:

a. Sponsor is independently engaged in business of providing these services other than to affiliates, and at least 75 percent of its insurance brokerage service gross revenue is derived from other than affiliates; and

b. Cost of providing services, including cost of insurance, is no greater than lowest quote obtained from two unaffiliated insurance agencies, and coverage and terms are likewise comparable.

6. Advise sponsor that it may not provide goods or services to syndicate unless all of following conditions are satisfied [*10 Cal. Code Reg. § 260.140.114.5(d)*]:

NOTE:

The requirements outlined below apply to any goods or services except those otherwise covered by a separate regulation of the Commissioner, for example property management or insurance services [*10 Cal. Code Reg. § 260.140.114.5(d)*; ***see*** *10 Cal. Code Reg. §§ 260.140.113.3-260.140.113.9, 260.140.114.6*, and *260.140.114.5(a)* (regulations covering specific services); ***see also*** 10 Cal. Code Reg. § 260.114.5(e) (goods and services also permitted in compliance with NASAA Statement of Policy on Real Estate Programs)].

a. Goods or services are necessary to prudent operation of syndicate.

b. Sponsor must have been previously engaged in business of rendering particular services or providing particular goods, independently of syndicate and as ordinary and ongoing business.

c. Goods or services must be provided at price that does not exceed maximum set by regulations [*see 10 Cal. Code Reg. § 260.140.114.5(d)(2)*; *§ 29C.130[3][b],* P 9].

d. Goods or services must be specified in a written contract that [*10 Cal. Code Reg. § 260.140.114.5(d)(3)*]:

(1) Precisely describes goods or services to be provided and all compensation to be paid;

(2) May be materially modified only by vote of majority of limited partners;

(3) Allows termination without penalty on 60 days' notice; and

(4) Is fully disclosed in prospectus.

e. Applicable requirements and restrictions above are contained in partnership agreement [*see 10 Cal. Code Reg. § 260.140.119.1*; *§ 29C.130[3][b],* P 9 (illustrative provision)].

7. Advise sponsor that it may not construct or develop properties (or render related services in this area) unless following conditions are satisfied [*10 Cal. Code Reg. § 260.140.114.6*]:

a. Transactions occur at formation of syndicate.

b. Specific terms of development and construction of identifiable properties are ascertainable and fully disclosed in prospectus.

c. Purchase price to be paid by syndicate is based on firm contract price that cannot exceed sum of cost of land and sponsor's cost of construction.

NOTE:
"Cost of construction" includes the contractor or construction fee customarily paid for services as a general contractor, provided, however, that any overhead of the general contractor is not charged to the syndicate or included in the cost of construction [*10 Cal. Code Reg. § 260.140.114.6(c)*].

d. Any construction fees paid to sponsor, other than development fees, consist solely of:

(1) Construction fee for acting as general contractor that is comparable and competitive with fee of unaffiliated persons rendering comparable services (excluding contractor's overhead); and

(2) Real estate commission in connection with acquisition of land, if appropriate, that complies with regulatory requirements for acquisition fee [*see 10 Cal. Code Reg. § 260.140.113.3*; *see also* P 2, *above,* and *§ 29C.130[3][b],* P 1].

e. For both development and construction fees, sponsor complies with general fee and contract requirements applicable to goods or services provided by sponsor [*see 10 Cal. Code Reg. § 260.140.114.5(d)(2), (3)*; *§ 29C.130[3][b]*, P 9].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide

13-29C California Legal Forms--Transaction Guide § 29C.121

§ 29C.121 Preparation and Filing of Application for Qualification

1.Prepare standard application for qualification.

NOTE:
The basic application for qualification of limited partnership interests in a real estate syndicate is the same one used for qualification of securities to be issued by a California corporation. That application is set forth and discussed in full in Ch. 6H, *Qualification of Securities*. In addition, the Transaction Guide to that chapter contains a detailed procedural guide to qualification of securities.

2. As part of application, submit cross reference sheet that shows compliance with Commissioner's regulations [*10 Cal. Code Reg. § 260.140.110.1(c)*; *see § 29C.202*].

3. Include sponsor's commitment (a letter should be acceptable) to submit to Commissioner, upon request, any report or statement required to be distributed to limited partners [*10 Cal. Code Reg. § 260.140.111.3*; *see 10 Cal. Code Reg. § 260.140.116.3* (required reports to limited partners); *see also § 29C.140*].

4. If promissory notes are used to satisfy net worth requirements of general partner(s) [*see 10 Cal. Code Reg. § 260.140.111.2(a)*; *see also § 29C.111*], include copy of notes and financial statement of maker demonstrating maker's ability to satisfy terms of note [*10 Cal. Code Reg. § 260.140.111.2(b)*].

5. Submit following financial information with application [*10 Cal. Code Reg. § 260.140.118.4*]:

NOTE:
The Commissioner may permit the omission of one or more the financial statements described below and the filing of a substitute statement that verifies financial information

and has comparable relevance to an investor in determining whether to invest in the program. Substitution will only be allowed if the Commissioner finds it would be consistent with the protection of investors [*10 Cal. Code Reg. § 260.140.118.4(f)*].

a. For syndicate that has been in operation one year or longer, audited financial statements of syndicate for each of last three fiscal years (or for life of syndicate, if less).

NOTE:

These audited financial statements must be contained in the prospectus. The only audited balance sheet required is the one for the end of the most recent fiscal year of the syndicate. If a syndicate has operated less than one year, audited financial statements are not required unless requested by the Commissioner [*10 Cal. Code Reg. § 260.140.118.4(a)*]. If an audited financial statement covers a period ending more than 90 days (or 135 days where an application is made in coordination with a Registration Statement submitted to the SEC) prior to the date of filing, a more recent interim, unaudited financial statement must also be submitted [***see** 10 Cal. Code Reg. § 260.140.118.4(e)*].

b. Audited balance sheet and statement of income of each corporate sponsor, covering end of most recent fiscal year [*10 Cal. Code Reg. § 260.140.118.4(b)*].

NOTE:

Each corporate sponsor's audited balance sheet must appear in the prospectus; the inclusion in the prospectus of the sponsor's statement of income is at the discretion of the Commissioner [*10 Cal. Code Reg. § 260.140.118.4(b)*]. If an audited financial statement covers a period ending more than 90 days (or 135 days where an application is made in coordination with a Registration Statement submitted to the SEC) prior to the date of filing, a more recent interim, unaudited financial statement must also be submitted [***see** 10 Cal. Code Reg. § 260.140.118.4(e)*].

c. Balance sheet for each non-corporate sponsor (including individual partners or individual joint venturers of sponsor) as of date not more than 135 days prior to date application is filed [*see 10 Cal. Code Reg. § 260.140.118.4(c)*].

NOTE:

A representation of the amount of a non-corporate sponsor's net worth or a representation that the sponsor meets the net worth requirements must be included in the prospectus [***see** 10 Cal. Code Reg. § 260.140.118.4(c)*].

d. If requested by Commissioner, financial statements of affiliates of sponsor [*see 10 Cal. Code Reg. § 260.140.118.4(d)*].

6. Submit either favorable IRS ruling or opinion of counsel that issuer will be taxed as "partnership" and not as "association" for federal income tax purposes [*10 Cal. Code Reg. § 260.140.117.5*].

NOTE:

Supplemental information may be requested from counsel as deemed appropriate by the Commissioner. Also, to the extent the opinion of counsel or an IRS ruling is based on the maintenance of or compliance with certain requirements or conditions by the issuer or general partner(s), the offering circular or prospectus must contain representations that these requirements or conditions will be satisfied. In

addition, the partnership agreement must, to the extent practicable, contain provisions requiring this compliance [*10 Cal. Code Reg. § 260.140.117.5*]. Requirements for and assumptions on which the opinion of counsel may be based are outlined in the regulations [***see*** *10 Cal. Code Reg. § 260.140.117.5*].

7. Submit opinion of counsel to effect that securities are duly authorized or created and validly issued interests in the issuer, and that the liability of public investors will be limited to their respective total agreed on investment in the issuer [*see 10 Cal. Code Reg. § 260.140.117.5*].

8. If requested by Commissioner, submit opinion of counsel concerning tax benefits flowing to the partnership [*see 10 Cal. Code Reg. § 260.140.117.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawBlue Sky LawsJoint Ventures & PartnershipsSecurities LawBlue Sky LawsOffer & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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13-29C California Legal Forms--Transaction Guide § 29C.122

§ 29C.122 Selling Limited Partnership Interests

[1] Compliance With Investor Suitability Requirements

1.Restrict sales to investors who:

NOTE:
The determination concerning investor suitability is usually made on the basis of an investor information sheet [***see*** *§ 29C.203*], and the representations in the subscription agreement [***see*** *§ 29C.204*].

a. By reason of their educational, business, or financial experience, can be reasonably assumed to understand fundamental aspects of syndicate [*10 Cal. Code Reg. § 260.140.112.2*].

b. Can bear economic risk of investment in syndicate [*10 Cal. Code Reg. § 260.140.112.2*].

c. Have investment objectives, portfolio structure, and financial situation appropriate to those of syndicate interests [*10 Cal. Code Reg. § 260.140.112.2*].

d. Satisfy Commissioner's "presumptive suitability" standards [*10 Cal. Code Reg. § 260.140.112.3*]:

NOTE:
For purposes of these suitability requirements, "net worth" must be determined exclusive of home, home furnishings, and automobiles. Assets included in the computation of net

worth may be valued at fair market value [*10 Cal. Code Reg. § 260.140.112.3(c)*].

(1) For most offerings:
(a) Minimum annual gross income of $30,000 and net worth of $30,000; or

(b) Minimum net worth of $75,000.

(2) For syndicate offering mandatory deferred payments on account of purchase price of limited partnership interest [*see 10 Cal. Code Reg. § 260.140.110.2(m)* (definition of "mandatory deferred payments")]:

(a) Minimum annual gross income of $60,000 and net worth of $60,000; or

(b) Minimum net worth of $225,000.

(3) In high-risk or principally tax-oriented offerings, higher suitability standards than those set forth in (1) or (2) *above*, if required by Commissioner.

(4) In low-risk or non-tax-oriented offerings, lower standards than those set forth in (1) or (2), *above*, if allowed by Commissioner.

(5) For offering that varies from that permitted under Commissioner's regulations:

NOTE:
In this case, the Commissioner may require a statement signed by the investor acknowledging how the program varies from the standards set forth in the Commissioner's regulations [*10 Cal. Code Reg. § 260.140.112.3(b)*].

(a) Minimum net worth of up to $500,000; or

(b) Minimum net worth of up to $250,000 and gross of income of $65,000 for last tax year (or estimates of that amount for current tax year).

2. If sale is made to fiduciary account, verify that suitability standards are met by [*10 Cal. Code Reg. § 260.140.112.3(d)*]:

a. Each beneficiary of account.

b. Fiduciary, if it is donor of funds for investment in syndicate.

c. Donor to account, if only beneficiaries of fiduciary account are donor's ancestors, descendants, or spouse.

3. Have sponsor (or broker-dealer) prepare or obtain, and maintain for minimum of four years, all required records regarding investor suitability [*10 Cal. Code Reg. § 260.140.112.4*; *see § 29C.203[1][b], [c]*].

[2] Marketing and Advertising Disclosures and Requirements

1. Confirm that all advertising conforms to general requirements applicable to any materials used to sell corporate securities [*10 Cal. Code Reg. § 260.140.117.1(a)*; *see 10 Cal. Code Reg. § 260.302*].

NOTE:
These requirements are discussed in *Ch. 6H,* ***Qualification of Securities****, § 6H.180* et seq. The requirements do not apply to meetings attended solely by representatives of securities broker-dealers [*10 Cal. Code Reg. § 260.140.117.1(c)*].

2. Verify that all advertisements for and oral or written invitations to seminars or other group sales meetings [*10 Cal. Code Reg. § 260.140.117.1(b)*]:

NOTE:
The requirements below do not apply to meetings attended solely by representatives of securities broker-dealers [*10 Cal. Code Reg. § 260.140.117.1(c)*].

a. Clearly indicate:
(1) That purpose of meeting is to offer interests for sale;

(2) Minimum purchase price; and

(3) Name of sponsor, underwriter, or selling agent.

b. Do not offer cash, merchandise, or any other item of more than nominal value as inducement to attend meeting.

c. Do not make general offer of "free" or "bargain price" trips to visit property in which syndicate has invested or intends to invest.

3. If written or prepared audio-visual presentations will be used (including prepared script for oral presentation), submit them to Commissioner at least three business days prior to first use [*10 Cal. Code Reg. § 260.140.117.1(b)*].

4. Do not include photograph of properties acquired by previous syndicate of same or affiliated issuers in offering circular (or any supplement) unless [*10 Cal. Code Reg. § 260.140.117.1(d)*]:

a. Photograph is representative of type of property syndicate seeks to acquire under present offering.

b. Circular or similar material prominently features caveat required by regulations.

5. For specified property programs investing primarily in improved property, include, if desired, predicted future results of syndicate operations ("forecasts") in prospectus or other sales materials only if [*see 10 Cal. Code Reg. § 260.140.117.4*]:

a. Warning required by Commissioner's regulations appears in boldface print on cover of prospectus; and

b. Forecasts otherwise comply with detailed requirements of Commissioner's regulations.

6. For nonspecified property syndicate *or* for specified property syndicate investing primarily in unimproved land [*see 10 Cal. Code Reg. § 260.140.117.4(a)*]:

a. Do not use forecasts in prospectus or other sales material; and

b. Include statement of prohibition required by Commissioner's regulations (in boldface print) on cover of prospectus.

7. Prepare and distribute prospectus containing required information [*see 10 Cal. Code Reg. §§ 260.140.117.2, 260.140.117.3*; *see also § 29C.131*].

8. Confirm records of information used to determine investor suitability are kept and maintained for at least four years [*10 Cal. Code Reg. § 260.140.112.4*; *see § 29C.203[1][b], [c]*].

9. Do not permit deferred payments (or similar arrangement) for payment of limited partnership interest except on terms and conditions authorized by Commissioner, and, for nonspecified property syndicate, unless prior approval of Commissioner is obtained [*see 10 Cal. Code Reg. § 260.140.118.1(a)* (specified property syndicates), (b) (nonspecified property syndicates)].

10. Do not permit use of warrants or options (or their equivalents) for purchase of limited partnership interests except as permitted and on terms approved by Commissioner [*see 10 Cal. Code Reg. § 260.140.118.1(c)*].

11. Comply with any impound condition imposed by Commissioner [*10 Cal. Code Reg. § 260.140.118.6*; *see § 29C.204[1][c]*].

NOTE:

The sale of interests in a real estate syndicate is normally subject to an impound [*10 Cal. Code Reg. § 260.140.118.6*].

12. Comply with Commissioner's transfer restrictions applicable to most securities (e.g., disclosure and legend requirements) [*10 Cal. Code Reg. § 260.140.118.5* (applicability of restrictions to real estate syndicates); for specific transfer restrictions, *see 10 Cal. Code Reg. § 260.141.11*; *see also Ch. 6I, Issuance of Equity Securities, § 6I.200*].

13. For nonspecified property syndicate [*see 10 Cal. Code Reg. § 260.140.110.2(o)*; *§ 29C.12* (definition)], instruct client to not commence business until at least $1,000,000 in gross proceeds from offering have been generated (after payment of all offering and selling expenses) [*10 Cal. Code Reg. § 260.140.115.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawBlue Sky LawsJoint Ventures & PartnershipsSecurities LawBlue Sky LawsOffer & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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13-29C California Legal Forms--Transaction Guide §§ 29C.123-29C.129

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§§ 29C.123[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART III. TRANSACTION GUIDE
D. Drafting Guide

13-29C California Legal Forms--Transaction Guide § 29C.130

§ 29C.130 Limited Partnership Agreement

NOTE:

The provisions for a partnership agreement covered in this Drafting Guide consist mainly of those required under the Commissioner's regulations for a real estate syndicate that must qualify with the Commissioner (referred to in this chapter as a "public" or "nonexempt" syndicate) [***see*** *10 Cal. Code Reg. § 260.140.110.1-260.140.119.1*]. Requirements and/or provisions of appropriate portions of specific regulations designated by the Commissioner must be included in the partnership agreement [***see*** *10 Cal. Code Reg. § 260.140.119.1* (list of required regulations)].

This guide must be used in conjunction with the drafting guide in Ch. 29B, ***Nonpublic Real Estate Syndicates*** . That guide covers required provisions of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*] that apply to any limited partnership and also contains other provisions that are commonly included in a limited partnership agreement. Appropriate cross-references to that guide are included below.

Under the ULPA '08, except as provided below, the partnership governs relations among the partners and between the partners and the partnership. To the extent that the agreement does not otherwise provide, the ULPA '08 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. The partnership agreement, however, may not vary certain statutory provisions [***see*** *Corp. Code § 15901.10(b)*]. For further discussion, see *Ch. 16,* ***Formation of Limited Partnerships****, § 16.21[4][b]*].

[1] Partnership Interests

[a] General Rights and Restrictions

1. Draft provisions governing formation of limited partnership [*see § 29C.200[2],* Article 1; *see also* Ch.

29B, *Nonpublic Real Estate Syndicates*].

2. Require that purchasers be recognized as limited partners not later than [*10 Cal. Code Reg. § 260.140.116.5(a)*; *see § 29C.200[2]*, P 2.03 (illustrative provision)]:

a. Fifteen days after release of their funds from impound, if purchasers' funds are impounded [*see 10 Cal. Code Reg. § 260.140.118.6*]; or

b. If funds are not impounded, last day of calendar month following date partnership accepted subscription.

3. Permit majority in interest of limited partners to vote to do any of following without concurrence of general partner(s) [*see 10 Cal. Code Reg. § 260.140.116.2(a)(1)*; *see also § 29C.200[2]*, P 2.06 (illustrative provision)]:

a. Amend limited partnership agreement.

NOTE:
Any amendment to the partnership agreement that modifies the compensation or distributions to which a general partner is entitled or that affects the duties of a general partner may be conditioned on the consent of the general partner [*10 Cal. Code Reg. § 260.140.116.2(a)(2)*].

b. Remove general partner(s).

c. Elect new general partner(s).

d. Approve or disapprove sale of all or substantially all of partnership assets other than in ordinary course of its business.

e. Dissolve partnership.

4. Require general partner(s) to obtain concurrence of majority of outstanding limited partnership interests before general partner does any of following [*10 Cal. Code Reg. § 260.140.116.2(a)(2)*; *see* P 3, *above; see also § 29C.200[2]*, P 2.08 (illustrative provision)]:

a. Amends partnership agreement (except for amendments that do not adversely affect rights of limited partners).

NOTE:
Any amendment to the partnership agreement that modifies the compensation or distributions to which a general partner is entitled or that affects the duties of a general partner may be conditioned upon the consent of the general partner [*10 Cal. Code Reg. § 260.140.116.2(a)(2)*].

b. [Voluntarily withdraws as general partner.]

NOTE:
Corp. Code § 15901.10(b)(8), however, provides that a partnership agreement may not vary the power of a person to dissociate as a general partner under *Corp. Code §*

15906.04(a), except to require that the notice under *Corp. Code § 15906.03(a)* be in a record.

c. Appoints new general partner(s).

NOTE:

An additional general partner may be appointed without obtaining the consent of the limited partners if the addition of that person is necessary to preserve the tax status of the syndicate, that person has no authority to manage or control the syndicate under the partnership agreement, there is no change in the identity of persons who have authority to manage or control the program, and the admission of that person as an additional general partner does not materially adversely affect the participants [***see*** *10 Cal. Code Reg. § 260.140.116.2(a)(2)*; ***see also*** *§ 29C.200[2]*, P 5.05(b)].

d. Sells all or substantially all of syndicate's assets other than in ordinary course of business.

e. Causes merger or other reorganization of syndicate; or

f. Dissolves partnership syndicate.

[b] Assignment and Termination of Interests

1. Describe rights of limited partners to assign limited partnership interests and to substitute limited partners [*see § 29C.200[2]*, PP 5.02, 5.03 (illustrative provisions)]:

NOTE:

Only the regulatory requirements of the Commissioner are outlined below; for discussion of relevant statutory requirements applicable to any partnership ***see*** *Ch. 29B, Nonpublic Real Estate Syndicates, § 29B.130*.

a. Permit assignment of limited partnership interest in whole or part and do not include any restrictions on assignment of limited partnership interests or on substitution of limited partner unless restrictions are [*10 Cal. Code Reg. § 260.140.116.7*]:

NOTE:

Restrictions are generally disfavored and will be allowed only if the following requirements are satisfied [*10 Cal. Code Reg. § 260.140.116.7*].

(1) Intended to preserve tax status of partnership or characterization or treatment of income or loss;

NOTE:

For a discussion of why restrictions on a limited partner's right of substitution are necessary to preserve the partnership's tax status, see *Section 29C.200[1][g][i]*].

(2) Supported by opinion of counsel or demonstration by syndicate that restriction is necessary based on tax laws, regulations, rulings, notices, or other official pronouncements governing Internal Revenue

Service; and

(3) Limited partnership agreement requires general partner to eliminate or modify any restriction at such time as restriction is no longer necessary.

b. For valid assignment, require partnership to [*10 Cal. Code Reg. § 260.140.116.5(b)*; *see § 29C.200[2]*, P 5.03 (illustrative provision)]:

(1) Recognize assignment not later than first day of fiscal quarter following date that notice of assignment and other required documentation is received and accepted by general partner.

(2) Amend certificate of limited partnership on first day of each fiscal quarter to effect valid substitutions.

(3) Inform transferee in writing, within 45 days of receiving any notice of actual transfer, whether or not transferee will be recognized as possessing all of rights of limited partner.

c. If partnership has participants who hold interests by assignment from entities holding limited partnership interests for purpose of assigning all or portion of these interests to persons investing in the partnership, grant these participants same rights as limited partners except as may be otherwise prohibited by law [*see 10 Cal. Code Reg. § 260.140.116.5(c)*].

NOTE:

In these situations, the assignor/entity owes the assignees a fiduciary duty that must be expressly stated in the assignment agreement and prospectus [***see*** *10 Cal. Code Reg. § 260.140.116.5(c)*].

2. For termination (voluntary or involuntary) of general partner:

a. Describe events that will cause termination [*see Corp. Code §§ 15906.03*; *see also § 29C.200[2]*, P 5.05(a) (illustrative provision)].

b. Provide for disposition of general partner's interest by paying general partner its then present fair market value [*see 10 Cal. Code Reg. § 260.140.111.6* (requirements for determination of value and payment); *see also § 29C.200[2]*, P 5.06, (illustrative provision)].

3. If syndicate has only one general partner, describe procedure for electing new general partner and continuing business of syndicate to prevent dissolution of partnership [*see 10 Cal. Code Reg. § 260.140.116.2(a)(2), Corp. Code §§ 15908.01*; *see also §§ 29C.200[2]*, PP 2.06, 5.05(b) (illustrative provisions)].

NOTE:

If the syndicate has a sole general partner who is an individual, the partnership agreement should provide for a successor general partner [***see*** *10 Cal. Code Reg. § 260.140.116.2*].

[2] Capital and Finance

NOTE:

For additional discussion of capital and finance provisions for a real estate limited partnership, see Ch. 29B, *Nonpublic Real Estate Syndicates*, § 29B.130.

1. Specify otal amount of capital to be raised, total number of units, and dollar amount of each unit [*see § 29C.200[2],* P 3.01 (illustrative provision)].

2. Specify required contributions of general partner(s) and limited partners [*see § 29C.200[2],* PP 3.02, 3.03 (illustrative provisions)].

3. Require compliance with any impound condition imposed by Commissioner [*see § 29C.204[1][c]* (requirements for impound); *see also § 29C.200[2],* P § 3.04 (illustrative provision)].

4. For subscriptions received by partnership, require partnership to [*10 Cal. Code Reg. § 260.140.116.5(a)*; *see § 29C.200[2],* P 3.03 (illustrative provision)]:

a. Accept or reject any subscription within date 30 days of its receipt; and

b. Return all monies from rejected subscription within 10 business days.

5. If deferred payments [*see 10 Cal. Code Reg. § 260.140.110.2(m)*; *17 C.F.R. § 240.3a12-9* (definition)] are authorized for purchase of syndicate interests, describe all terms and conditions for payment and default (which must meet requirements outlined in Commissioner's regulation) [*see 10 Cal. Code Reg. § 260.140.118.1*].

NOTE:

For specified property programs, mandatory deferred payments may be permitted to the extent they bear a reasonable and demonstrable relationship to the capital needs and objectives of the program as described in the business development plan of the prospectus and provided they satisfy detailed conditions outlined in the Commissioner's regulation [***see*** *10 Cal. Code Reg. § 260.140.118.1(a)*]. Mandatory deferred payments are prohibited for a nonspecified property syndicate except if the sponsor is able to satisfy the Commissioner that the mandatory deferred payments bear a reasonable and demonstrable relationship to the capital needs and objectives of the program described in the business development plan in the prospectus, and then, only if specific conditions are satisfied [***see*** *10 Cal. Code Reg. § 260.140.118.1(b)*].

6. If interest in syndicate will be granted as promotional interest or syndicate management fee [*10 Cal. Code Reg. § 260.140.113.5*; *see § 29C.200[2],* P 3.07 (illustrative provision)]:

a. Specify amount or percentage of interest that is reasonable and adequately subordinated, e.g., one that is within one of following limitations:

NOTE:

Interests that fall within the limitations described below are considered by the Commissioner to be adequately subordinated and presumptively reasonable [***see*** *10 Cal. Code Reg. § 260.140.113.5(a)*].

(1) Twenty-five percent in distributions from any source remaining after payment to limited partners of an amount equal to 100 percent of capital contributions plus an amount equal to 6 percent of capital contributions per annum cumulative; or

NOTE:

"Capital contribution" as used above means the gross amount of investment in the syndicate by the limited partners [*10 Cal. Code Reg. § 260.140.110.2(g), (q), (t)*]. For purposes of computation, these capital contributions may only be reduced by a distribution to the limited partners from cash available from sale and refinancing of syndicate properties and distributions from reserves created from the proceeds of the offering [*10 Cal. Code Reg. § 260.140.113.5(b)*]. For the definition of "cash available from sale and refinancing" [*10 Cal. Code Reg. § 260.140.110.2(i)*], see the NOTE to subparagraph (2)(b), ***below***.

(2) Sum of following:

(a) Ten percent of distributions from cash available for distribution from operations; and

NOTE:
"Cash available for distribution from operations" means all syndicate cash funds provided from operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements, amounts set aside for restoration or creation of reserves, and replacements [*10 Cal. Code Reg. § 260.140.110.2(h)*].

(b) Fifteen percent of distributions from cash available from sale and refinancing of properties remaining after payment to limited partners of an amount equal to 100 percent of capital contributions plus an amount equal to 6 percent of capital contributions per annum cumulative.

NOTE:
"Cash available from sale and refinancing" means syndicate cash funds provided from a sale, financing, or refinancing of property less the amount necessary for the payment of all debts and obligations of the syndicate related to the particular property, the expenses incurred in the sale, financing, or refinancing, and amounts set aside for restoration or creation of reserves [*10 Cal. Code Reg. § 260.140.110.2(i)*]. For the definition of "capital contribution," see the Note to subparagraph (1), ***above***.

b. Require distribution of assets on dissolution and liquidation of partnership to conform to applicable subordination provisions described in subparagraphs a(1) and a(2)(b), *above* [*see 10 Cal. Code Reg. § 260.140.113.5(c)*].

7. Require that adequate reserves for normal repairs, replacements, and contingencies be maintained by retention of reasonable percentage of proceeds from offering and regular receipts [*10 Cal. Code Reg. § 260.140.118.2*; *see § 29C.200[2],* P 3.09 (illustrative provision)].

NOTE:
A minimum of 3 percent of the proceeds of the offering is ordinarily considered adequate as an initial reserve fund [*10 Cal. Code Reg. § 260.140.118.2*].

8. Effective at time offering is terminated, prohibit syndicate from incurring indebtedness that exceeds sum of following, as determined by lender as of date of refinancing [*10 Cal. Code Reg. § 260.140.114.14*; *see § 29C.200[2],* P 3.12 (illustrative provision)]:

a. Eighty percent of aggregate purchase price of properties that have not been refinanced; and

b. Eighty percent of aggregate fair market value of all refinanced properties.

NOTE:

For purposes of this requirement, "indebtedness" includes the principal of any loan together with any interest that may be deferred pursuant to the terms of the loan agreement that exceeds 5 percent per annum of the principal balance of the indebtedness (excluding contingent participations in income and/or appreciation in the value of the syndicate property). The term excludes any indebtedness incurred by the syndicate for necessary working capital [*10 Cal. Code Reg. § 260.140.114.14*]:

9. If syndicate will be authorized to reinvest partnership proceeds or limited partners will be permitted to elect reinvestment of proceeds, describe reinvestment procedure and/or plan that satisfies Commissioner's requirements [*see 10 Cal. Code Reg. §§ 260.140.116.9, 260.140.118.3*].

NOTE:

If a syndicate permits the investment of proceeds from the sale or refinancing of syndicate properties, it is considered to be a "nonspecified property" syndicate [*10 Cal. Code Reg. § 260.140.110.2(o)*; *§ 29C.12*] and subject to special requirements of the Commissioner [***see*** *§ 29C.201*].

10. For specified property syndicate *only*, consider granting syndicate power to levy assessments on limited partners if anticipated cash flow from property (after payment of debt service and all operating expenses) is not sufficient to pay taxes and/or special assessments imposed by governmental or quasi-governmental units [*see 10 Cal. Code Reg. § 260.140.116.8(a)*].

NOTE:

Assessments are not allowed for nonspecified property syndicates [*10 Cal. Code Reg. § 260.140.116.8(a)*; ***see*** *§ 29C.12* (definition)].

a. Limit power to specific purpose described, *above.*

b. Require that all amounts derived from assessments be applied only to satisfy obligation described above.

c. State that default in payment occurs on failure to pay assessment within 30-day period from date of notice imposing assessment [*10 Cal. Code Reg. § 260.140.116.8(c)*].

d. Provide fair and reasonable penalty for default in payment of assessment, for example [*10 Cal. Code Reg. § 260.140.116.8(b)*]:

NOTE:

A limited partner's interest may not be subject to forfeiture for nonpayment of assessments. The penalties described below are examples cited by the regulations [***see*** *10 Cal. Code Reg. § 260.140.116.8(b)*].

(1) Reduction of limited partner's proportionate interest in partnership;

(2) Subordination of defaulting limited partner's interest to that of nondefaulting partners;

(3) Forced sale that complies with notice of sale requirements;

(4) Loan by nondefaulting partners of amount necessary to meet obligation;

(5) Delayed payment for interest over reasonable period after value of interest is fixed by independent appraisal or other suitable formula.

NOTE:
Any debt security issued for the interest may not have a claim prior to that of the other limited partners in the event of liquidation [*10 Cal. Code Reg. § 260.140.116.8(b)*].

e. Provide for reinstatement to full status as limited partner on payment of delinquent assessment with interest at maximum rate allowed by law within 30 days of date of default [*10 Cal. Code Reg. § 260.140.116.8(c)*].

11. Regarding redemption of limited partnership interests:

a. If desired, *permit* partnership to redeem or repurchase outstanding limited partnership interests (voluntary redemption) if redemption will not impair capital or operation of partnership [*see 10 Cal. Code Reg. § 260.140.116.6*; *§ 29C.200[2]*, P 3.11(a) (illustrative provision)].

b. If desired, *require* partnership to redeem or repurchase outstanding limited partnership interests (mandatory redemption) but only on occurrence of following [*10 Cal. Code Reg. § 260.140.116.6*; *see § 29C.200[2]*, P 3.11(b) (illustrative provision)]:

(1) Death or legal incapacity of owner of interest; or

(2) Substantial reduction in owner's net worth or income, but then only if:

NOTE:
"Substantial reduction" means an involuntary loss of not less than 50 percent in income or net worth during the year in which redemption occurs [*10 Cal. Code Reg. § 260.140.116.6(b)*].

(a) Syndicate has sufficient cash to make purchase;

(b) Purchase is permissible under law; and

(c) Syndicate purchases no more than 15 percent of its outstanding units in any year.

c. Describe formula or other method that will be used to determine purchase price.

d. Require arbitration of any dispute over redemption purchase price [*see 10 Cal. Code Reg. § 260.140.116.6(b)*].

[3] Management and Investment

NOTE:
For illustrative provisions in a limited partnership agreement, see *Section 29C.200*, Article 4. For additional information, see Ch. 29B, *Nonpublic Real Estate Syndicates*.

[a] General Rights and Obligations

1. Describe sponsor's fiduciary duty to syndicate [*10 Cal. Code Reg. § 260.140.111.5*; *see § 29C.200[2]*, P 4.03 (illustrative provision)].

2. If general partner will be indemnified or held harmless for loss or liability suffered by syndicate:

a. Set forth Commissioner's required conditions that must be satisfied [*10 Cal. Code Reg. § 260.140.111.4(a)*; *see § 29C.200[2]*, P 4.16(a), (b) (illustrative provisions)].

b. If protection will extend to any losses, liabilities, or expenses arising from or out of alleged violation of federal or state securities law, set forth additional conditions that must be satisfied [*10 Cal. Code Reg. § 260.140.111.4(b)*; *see § 29C.200[2]*, P 4.16(c) (illustrative provision)].

c. Prohibit syndicate from paying or incurring cost of any portion of liability insurance that insures the sponsor for any liability for which sponsor is prohibited from being indemnified [*10 Cal. Code Reg. § 260.140.111.4(c)*; *see § 29C.200[2]*, P 4.16(d) (illustrative provision)].

d. If syndicate will be authorized to advance funds to sponsor for legal expenses and other costs incurred as result of any legal action, set forth Commissioner's conditions that must be satisfied and state that advancement may be made only if required conditions are satisfied [*10 Cal. Code Reg. § 260.140.111.4(d)*; *see § 29C.200[2]*, P 4.16(e) (illustrative provision)].

[b] Fees, Compensation, and Expenses

1. If syndicate will pay acquisition fee for property acquisition services [*see § 29C.200[2]*, P 4.05(a) (illustrative provision)], provide for fee that satisfies following requirements [*10 Cal. Code Reg. § 260.140.113.3*]:

NOTE:
An "acquisition fee" is the total of all fees and commissions paid by any party in connection with the purchase or development of property by a syndicate, except a development fee paid to a person not affiliated with a sponsor, in connection with the actual development of a project after acquisition of the land by the syndicate. It includes any real estate commission, acquisition fee, selection fee, development fee, non-recurring management fee, and any similar fee, regardless of its designation [*10 Cal. Code Reg. § 260.140.110.2(b)*]. For additional compliance requirements in connection with an acquisition fee, see *Section 29C.120*.

a. Fee may be paid only for services actually rendered and to be rendered directly or indirectly; and

b. Amount of fee must be reasonable, for example, one that does not exceed lesser of:

NOTE:
The total of all acquisition fees paid to everyone involved in the transaction by the

syndicate and/or any other person is deemed to be presumptively reasonable if it does not exceed the limits set forth in (1) or (2), ***below*** [*10 Cal. Code Reg. § 260.140.113.3(a)*].

(1) Compensation for acquisition services customarily charged in arms' length transactions by others rendering similar services as ongoing public activity in same geographical location and for comparable property; or

(2) Amount equal to 18 percent of gross proceeds of offering.

NOTE:
Notwithstanding the general limits outlined in (1) and (2), ***above***, an acquisition fee paid to a sponsor must be reduced to the extent that other real estate commissions, acquisition fees, finder's fees, or other similar fees or commissions are paid by any person in connection with the transaction [*10 Cal. Code Reg. § 260.140.113.3(a)*]. For purposes of (2), ***above***, "gross proceeds of the offering" includes mandatory deferred payments [***see*** *10 Cal. Code Reg. § 260.140.110.2(m)* (definition)] only as those amounts are paid to the limited partnership [*10 Cal. Code Reg. § 260.140.113.3(a)*].

c. For syndicate with multiple property acquisitions, limits on fees described in (b), *above*, apply separately to each acquisition.

NOTE:
The 18 percent maximum percentage is computed on that portion of the proceeds (adjusted to include a pro rata amount of any organization and offering expenses) applicable to the property that is the subject of the transaction [*10 Cal. Code Reg. § 260.140.113.3(b)*].

2. For payment of acquisition expenses [*see § 29C.200[2]*, P 4.05(b) (illustrative provision)]:

NOTE:
"Acquisition expenses" include, but are not limited to, legal fees and expenses, travel and communication expenses, cost of appraisals, non-refundable option payments on property not acquired, accounting fees and expenses, title insurance, and miscellaneous expenses related to selection and acquisition of properties, whether or not acquired [*10 Cal. Code Reg. § 260.140.110.2(a)*].

a. Permit syndicate to reimburse sponsor for actual cost of acquisition expenses consisting of goods or services provided to syndicate by persons who are unaffiliated with sponsor if those expenses were incurred by sponsor prior to time that syndicate had funds available to pay those expenses directly [*10 Cal. Code Reg. § 260.140.113.4(b)*].

b. Prohibit syndicate from directly paying or reimbursing sponsor for acquisition expenses consisting of salaries, fringe benefits, miscellaneous expenses related to evaluation, selection, or acquisition of properties, unless these expenses reduce the acquisition fee [*see* P 1, *above*] being paid to sponsor [*10 Cal. Code Reg. § 260.140.113.4(c)*].

c. For all other acquisition expenses not described in subparagraphs a or b, *above*, require syndicate to comply with requirements applicable to payment of expenses in general [*10 Cal. Code Reg. § 260.140.113.4(a)*; *see* P 9, *below*].

3. If sponsor is to receive commission or fee for any reinvestment, confirm that sum of that compensation or fee and acquisition fee received on initial acquisition together do not exceed regulatory limitations on acquisition fees [*see 10 Cal. Code Reg. § 260.140.113.3*; P 1 *above*] had initial and subsequent purchase occurred simultaneously on combined leverage basis not exceeding 80 percent of purchase price of properties [*10 Cal. Code Reg. § 260.140.114.4*].

4. For payment of management fee to general partner, provide for one of following:

a. Promotional interest in partnership that is adequately subordinated [*see 10 Cal. Code Reg. § 260.140.113.5*; *§ 29C.130[2]*, P 6 (requirements); *§ 29C.200[2]*, P 3.07 (illustrative provision).

b. If syndicate owns unimproved land, annual compensation that may not exceed one quarter of 1 percent of cost of land until [*10 Cal. Code Reg. § 260.140.113.6(a)*]:

(1) Land is sold; or

(2) Syndicate begins improving land.

NOTE:
Regardless of the number of years the property is held, the annual management fee may not exceed a cumulative total of 2 percent of the original cost of the land [*10 Cal. Code Reg. § 260.140.113.6(a)*].

c. If syndicate holds property in government subsidized projects, annual compensation that may not exceed one half of 1 percent of cost of property, until property is sold, provided aggregate of all compensation received is consistent with maximum allowed for nonsubsidized syndication [*10 Cal. Code Reg. § 260.140.113.6(b)*; *see* b, *above*].

d. Asset based fee, but only if offering is declared effective by Securities and Exchange Commission and if other requirements are satisfied [*see 10 Cal. Code Reg. § 260.140.113.10*; *§ 29C.200[1][f]*].

5. If eligible sponsor [*see § 29C.120*, P 7] is acting as developer or contractor for syndicate property (or rendering related services) [*see 10 Cal. Code Reg. § 260.140.114.6(a), (b)*]:

a. Specify price to be paid by syndicate for property.

NOTE:
The price may not exceed the sum of the cost of the land and the sponsor's cost of construction [***see*** *10 Cal. Code Reg. § 260.140.114.6(c)*].

b. Specify amount of any construction and/or development fee to be paid to sponsor.

NOTE:
Guidelines for maximum amounts are outlined in the Commissioner's regulations [***see*** *10 Cal. Code Reg. § 260.140.114.6(d), (e)*; ***see*** *§ 29C.120*, P 7].

6. If eligible sponsor [*see § 29C.120*, P 4] will perform property management services for partnership [*see § 29C.200[2]*, P 4.07 (illustrative provision)]:

a. State that services will be performed pursuant to separate written contract that [*10 Cal. Code Reg. § 260.140.113.8(b)*]:

(1) Precisely describes services to be rendered and all compensation to be paid.

(2) Permits material modification only by vote of majority of limited partners.

b. Detail amount of property management fees to be paid to sponsor, which may not exceed lesser of [*10 Cal. Code Reg. § 260.140.113.8(a)*]:

NOTE:
A "property management fee" is the fee paid for professional property management services in connection with a syndicate's real property projects [*10 Cal. Code Reg. § 260.140.110.2(v)*]. Any amounts paid for bookkeeping services and fees paid to persons unaffiliated with the sponsor for property management services must be included in this fee [*10 Cal. Code Reg. § 260.140.113.8(a)*].

(1) Fees that are competitive with amounts charged by unaffiliated parties for similar services in same geographic location; or

(2) Maximum percentage of property's gross revenues permitted by Commissioner's regulations.

NOTE:
The maximum percentage permitted depends on the type of property and the precise services performed by the sponsored [***see*** *10 Cal. Code Reg. § 260.140.113.8(a)(1)-(3)*].

c. Consider permitting sponsor to be reimbursed for actual cost of on-site property management personnel but only if [*10 Cal. Code Reg. § 260.140.114.5(a)(5)*]:

(1) These amounts are customarily reimbursed for similar property in same geographical location in addition to payment of property management fee.

(2) Sponsor's regular fee for property management complies with requirements outlined in subparagraph b, *above;* and

(3) Amount of reimbursement does not exceed competitive rate for comparable services for similar property in same geographic location.

7. If eligible sponsor [*see 10 Cal. Code Reg. § 260.140.113.9*; *§ 29C.120*, P 5] will provide insurance brokerage services in connection with obtaining insurance on syndicate property, require that cost of providing services, including cost of insurance, be no greater than lowest quote obtained from two unaffiliated insurance agencies (for comparable coverage and terms) [*see 10 Cal. Code Reg. § 260.140.113.9*; *§ 29C.200[2]*, P 4.09 (illustrative provision)].

8. For real estate brokerage commission payable on sale of syndicate property [*10 Cal. Code Reg. § 260.140.113.7*; *see § 29C.200[2]*, P 4.08 (illustrative provision)]:

a. Limit total compensation paid to all persons for sale to competitive real estate commission, not to exceed 6 percent of contract price for property.

NOTE:
"Competitive real estate commission" means a real estate or brokerage commission paid for the purchase or sale of property that is reasonable, customary, and competitive in light of the size, type, and location of the property [*10 Cal. Code Reg. § 260.140.110.2(j)*].

b. If it is anticipated that sponsor may or will provide substantial amount of sales services, consider including provision that:

(1) Provides sponsor with up to one half of commission, not to exceed 3 percent; and

(2) Subordinates commission in same manner as required by regulations for promotional interest or program management fee [*see 10 Cal. Code Reg. § 260.140.113.5(a)*; *see also § 29C.130[2]*, P 6]:

NOTE:
If the sponsor participates with an independent broker on resale, the subordination requirement applies only to the commission earned by the sponsor [*10 Cal. Code Reg. § 260.140.113.7*].

9. If eligible sponsor will provide goods or services to syndicate [*see 10 Cal. Code Reg. § 260.140.114.5(d)*; *§ 29C.120*, P 6 (eligibility requirements)]:

NOTE:
The requirements outlined below apply to any goods or services except those otherwise covered by a specific regulation of the Commissioner, for example property management or insurance services [*10 Cal. Code Reg. § 260.140.114.5(d)*; ***see*** *10 Cal. Code Reg. §§ 260.140.113.3-260.140.113.9*, *260.140.114.6*, and *260.140.114.5(a)* (regulations covering specific services); ***see also*** 10 Cal. Code Reg. § 260.114.5(e) (goods and services also permitted in compliance with NASAA Statement of Policy on Real Estate Programs)].

a. State that goods or services will be rendered pursuant to separate written contract that [*10 Cal. Code Reg. § 260.140.114.5(d)(3)*]:

(1) Precisely describes goods or services to be provided and all compensation to be paid;

(2) May be materially modified only by vote of majority of limited partners;

(3) Allows termination without penalty on 60 days' notice.

b. Specify that goods or services must be provided at price that does not exceed lesser of [*10 Cal. Code Reg. § 260.140.114.5(d)(2)*]:

(1) Actual cost of goods and services to sponsor; or

NOTE:
The regulations set forth specific items that must be included or excluded in computing the "actual cost" of goods or services [***see*** *10 Cal. Code Reg. § 260.140.114.5(d)(5)*].

(2) Ninety percent of compensation, price, or fee charged by unaffiliated persons for providing comparable goods or services on competitive terms in same geographic location.

10. For billing and payment of syndicate expenses in general [*see § 29C.200[2]*, P 4.04 (illustrative provision)]:

a. Require all expenses to be billed directly and paid by syndicate, but if desired, permit sponsor to pay and to be reimbursed for following [*10 Cal. Code Reg. § 260.140.114.5(a)*]:

(1) Organization and offering expenses [*see 10 Cal. Code Reg. § 260.140.113.2*; *§ 29C.120*, P 1];

(2) Acquisition expenses [*see 10 Cal. Code Reg. § 260.140.113.4*; P 2, *above*].

(3) Actual cost of goods and materials used for or by syndicate and obtained from unaffiliated persons;

(4) Reasonable and necessary administrative and transfer agency type services provided by sponsor, such as legal, accounting, and investor communications services [*see 10 Cal. Code Reg. § 260.140.114.5(a)(4)* (required conditions)].

(5) If sponsor provides property management services to syndicate, actual, reasonable, and customary costs of on-site property management personnel [*see 10 Cal. Code Reg. § 260.140.114.5(a)(5)*; P 6, *above* (required conditions)].

b. Prohibit reimbursement for any of following [*10 Cal. Code Reg. § 260.140.114.5(b)*]:

(1) Any services for which sponsor is entitled to compensation by way of separate fee.

(2) Rent or depreciation, utilities, capital equipment, and other administrative items generally falling under category of overhead;

(3) Salaries, fringe benefits, travel expenses, and other administrative items incurred or allocated to any controlling persons of sponsor [*see 10 Cal. Code Reg. § 260.140.114.5(c)* ("controlling persons" defined)].

[c] Investment Authority and Restrictions

1.For purchase by syndicate of any real property:

a. Prohibit syndicate from purchasing any property for price that exceeds appraised value of property [*see 10 Cal. Code Reg. § 260.140.113.3(d)*].

b. Require that any purchase be supported by appraisal [*10 Cal. Code Reg. § 260.140.114.12*; *see § 29C.200[2]*, P 4.15 (illustrative provision)].

NOTE:
Any appraisal obtained by the syndicate, whether or not required by the Commissioner's regulations, must be maintained in the sponsor's records for at least five years [*10 Cal. Code Reg. § 260.140.114.12*].

2. For all mortgage financing to be obtained by syndicate or retained on acquired properties:

a. Outline terms permitted by Commissioner and require that all syndicate financing comply with these terms [*see 10 Cal. Code Reg. § 260.140.114.13(a)*; *§ 29C.200[2]*, P 4.13(a) (illustrative provision)].

b. Set forth required restrictions on balloon payments [*see 10 Cal. Code Reg. § 260.140.114.13(b)*; *§ 29C.200[2]*, P 4.13(b)].

c. If desired, describe types of financing exempt from requirements referred to in subparagraphs (a) and (b), but only to extent specifically authorized by regulations [*see 10 Cal. Code Reg. § 260.140.114.13(c)*; *§ 29C.200[2]*, P 4.13(c)].

3. If syndicate will acquire property that is under construction, require that completion of construction be guaranteed at contract price by adequate completion bond or by other satisfactory arrangements, e.g. [*see 10 Cal. Code Reg. § 260.140.114.11*]:

a. Written guarantee of completion by a person, supported by financial statements demonstrating sufficient net worth or adequately collateralized by real or personal properties or other personal guarantees.

b. Retention of reasonable portion of purchase consideration as potential in event seller does not perform in accordance with purchase and sale agreement.

c. Other satisfactory arrangements to guarantee completion if:

(1) Arrangements are disclosed in prospectus; and

(2) Prior written approval of Commissioner has been obtained.

4. For purchase or lease of property in which sponsor has interest, either:

NOTE:
Subject to two exceptions described in subparagraphs a(1) and a(2), ***below***, a syndicate is not permitted to purchase or lease property in which a sponsor has an interest unless the conditions described in subparagraph b(2), ***below***, are satisfied [***see*** *10 Cal. Code Reg. § 260.140.114.1(a)*].

a. Prohibit syndicate from purchasing or leasing property [*see 10 Cal. Code Reg. § 260.140.114.1(a)*].

(1) Consider including limited exception for property only temporarily owned by sponsor for purpose of acquiring it or financing it or for other related business purpose [*see 10 Cal. Code Reg. § 260.140.114.1(a)(4)* (detailed requirements for this exception)];

(2) Consider including exception for purchase of property owned by other syndicate formed by same sponsor through exercise of right of first refusal [*see 10 Cal. Code Reg. §§ 260.140.114.1(a)(5), 260.140.114.9*].

b. Permit syndicate to purchase or lease property in which sponsor has interest:

(1) If desired, grant authority for circumstances described in subparagraphs a(1) and a(2), *above* [*see 10 Cal. Code Reg. § 260.140.114.1(a)(4), (5)*].

(2) For all other situations, grant authority only if following conditions are satisfied [*10 Cal. Code Reg. § 260.140.114.1(a)(1)-(3)*]:

(a) Transaction occurs at formation of syndicate and is fully disclosed in prospectus;

(b) Property is sold on terms fair to syndicate and at price not in excess of its appraised value; and

(c) Cost of property and its improvements (if any) to sponsor is clearly established.

NOTE:

If the sponsor's cost was less than the price to be paid by the syndicate, that price will not be deemed fair, regardless of the appraised value, unless some material change has occurred to the property that would increase the value since the sponsor acquired the property. Material factors may include holding the property for a period of at least two years, the assumption by the promoter of the risk of obtaining a rezoning of the property and its subsequent rezoning, or some other extraordinary event that in fact increases the property's value [*10 Cal. Code Reg. § 260.140.114.1(a)(3)*].

5. For leasing of property by syndicate to sponsor, either prohibit it or permit it only as follows [*10 Cal. Code Reg. § 260.140.114.1(b)(1), (2)*]:

a. Pursuant to leaseback arrangement made at time syndicate is formed and that:

(1) Has its specific terms fully disclosed in prospectus; and

(2) Has terms that are not less favorable to syndicate that those offered to and accepted by persons who are not affiliates of sponsor.

b. If leasing will not result in more than 10 percent of aggregate leasable space owned by syndicate being under lease to sponsor on terms not less favorable to syndicate than those offered to and accepted by persons who are not affiliates of sponsor, and provided sponsor is not permitted to sublet leased properties unless all profits derived from subleases in excess of rentals due on master lease are paid to syndicate.

6. For sale of property (or contract rights) by syndicate to sponsor, either prohibit it or permit it but only if following criteria are satisfied [*10 Cal. Code Reg. § 260.140.114.1(b)(3)*]:

a. Syndicate does not have sufficient offering proceeds available to retain property.

b. Sponsor pays syndicate amount in cash equal to cost of property to syndicate (including all related cash payments and carrying costs).

c. Sponsor assumes all of syndicate's obligations and liabilities incurred in connection with holding of property by syndicate.

d. Sale to sponsor occurs not later than 90 days following termination date of offering.

e. A reasonable and satisfactory methodology to be used by sponsor in determining that properties it will purchase in event syndicate's offering proceeds are insufficient to retain all properties is fully disclosed

in prospectus.

7. If sponsor will provide financing to syndicate [*10 Cal. Code Reg. § 260.140.114.10*]:

a. Impose following limitations on sponsor [*10 Cal. Code Reg. § 260.140.114.10(a)*]:

(1) May not receive interest and other financing charges or fees in excess of the amounts that would be charged by unrelated lending institutions on comparable loans for same purpose in same locality of property.

(2) May not require prepayment charge or penalty on loan to syndicate secured by either first, junior, or all-inclusive trust deed, mortgage, or encumbrance on property, except to extent that charge or penalty is attributable to underlying encumbrance.

(3) May not provide permanent financing for syndicate except on terms outlined in subparagraph b, *below.*

b. Permit sponsor to provide permanent financing for purchase of syndicate property (through use of "all-inclusive" or "wrap around"note) only if following conditions are satisfied [*10 Cal. Code Reg. § 260.140.114.10(b)*]:

NOTE:
"Permanent financing" means all indebtedness encumbering syndicate properties or incurred by the syndicate, the principal amount of which is scheduled to be paid over a period at not less than 48 months, and more than 50 percent of the principal amount of which is scheduled to be paid during the first 24 months. This definition does not prohibit a bona-fide prepayment provision in the financing agreement [*10 Cal. Code Reg. § 260.140.114.10(c)*].

(1) General partner must not receive interest on amount of underlying encumbrance included in all-inclusive note in excess of that payable to lender on underlying encumbrance;

(2) Syndicate must receive credit on its obligation under note for payments made directly on underlying encumbrance; and

(3) Either:
(a) All payments on all-inclusive and underlying note must be made directly by syndicate; or

(b) Paying agent (e.g., financial institution or escrow company) must collect payments (other than any initial payment of prepaid interest or loan points not to be applied to underlying encumbrance) on note and make disbursements to holder of underlying encumbrance prior to making any disbursement to holder of note, subject to requirements of subparagraph b(1), *above.*

8. Prohibit syndicate from making any loans to sponsor, but if syndicate is otherwise authorized to advance legal fees to sponsor in certain legal actions [*see 10 Cal. Code Reg. § 260.140.111.4(d)*; *§ 29C.200[2],* P 4.16(e) (illustrative provision)], provide for limited exception in that case [*see 10 Cal. Code Reg. § 260.140.114.1(c)*].

9. Prohibit syndicate from acquiring property from another syndicate in which sponsor has an interest, but if syndicate is otherwise permitted to acquire this property under circumstances described in Paragraph 4(a)(2), *above* [*see 10 Cal.*

Code Reg. § 260.140.114.1(a)(5)], provide for that limited exception [*see 10 Cal. Code Reg. § 260.140.114.1(d)*].

10. Prohibit syndicate from acquiring property in exchange for limited partnership interests unless [*10 Cal. Code Reg. § 260.140.114.2*]:

a. Partnership agreement contains provision describing terms of exchange.

b. Prospectus describes:

(1) Property and specific terms of transaction; and

(2) Tax effects of exchange.

c. Property will be exchanged immediately on effectiveness of qualification.

d. Exchange meets following conditions:

(1) Property to be acquired comes within objectives of syndicate;

(2) Purchase property assigned to property may be no higher than its appraised value.

(3) Each syndicate interest must be valued at no less than market value if there is a market (or if there is no market, at fair market value of syndicate's assets as determined by independent appraiser within preceding 90 days), less its liabilities, divided by number of syndicate interests outstanding.

(4) No more than one half of interests issued by syndicate may have been issued in exchange for property; and

(5) No securities sales or underwriting commissions may be paid in connection with exchange.

11. If syndicate plans to make one of following types of investment in or with other syndicates, permit investment only on conditions outlined in Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.114.9*].

NOTE:
For each specific type of investment listed below, a cross-reference is included to the appropriate regulation that outlines conditions that must be satisfied.

a. Investment in general partnership or joint venture with non-affiliates that own and operate one or more particular properties [*see 10 Cal. Code Reg. § 260.140.114.9(a)*].

b. Investment in general partnership or joint venture with other publicly registered affiliates of syndicate [*see 10 Cal. Code Reg. § 260.140.114.9(b), (d)*].

c. Investment in general partnership or joint ventures with affiliates other than publicly registered affiliates of syndicate [*see 10 Cal. Code Reg. § 260.140.114.9(c), (d)*].

d. Investment in general partnership interests of limited partnerships [*see 10 Cal. Code Reg. §*

260.140.114.9(e)].

e. Investment in limited partnership interests of other limited partnerships [*see 10 Cal. Code Reg. § 260.140.114.9(f), (g)*].

12. For nonspecified property syndicate [*see 10 Cal. Code Reg. § 260.140.110.2(o)*; *§ 29C.12* (definition); *see also § 29C.201 [2]* (illustrative provisions)]:

a. Prohibit syndicate from acquiring unimproved or non-income producing property unless [*10 Cal. Code Reg. § 260.140.115.3(a)*]:

(1) Terms can be financed by syndicate proceeds or from cash available for distribution from operations [*see 10 Cal. Code Reg. § 260.140.110.2(h)* (definition of "cash available for distribution from operations")].

(2) Acquisition will not result in total investment in this type of property exceeding 25 percent of gross proceeds of offering.

NOTE:
Properties that are expected to produce income within a reasonable period of time will not be considered non-income producing. For purposes of this rule, a two-year period is deemed to be presumptively reasonable [*10 Cal. Code Reg. § 260.140.115.3(a)*].

b. Describe manner in which acquisitions will be financed and amount of leverage to be employed [*10 Cal. Code Reg. § 260.140.115.3(c)*].

NOTE:
This information must also be included in the statement of investment objectives section of the prospectus [***see*** *10 Cal. Code Reg. § 260.140.115.3(c)*].

c. Prohibit investment in junior trust deeds or similar obligations, except for junior trust deeds that arise from sale of syndicate properties [*10 Cal. Code Reg. § 260.140.115.3(b)*].

d. Describe any joint venture arrangements syndicate will enter into [*see 10 Cal. Code Reg. § 260.140.115.3(d)*].

NOTE:
This information must also be included in the prospectus [***see*** *10 Cal. Code Reg. § 260.140.115.3(d)*].

e. Consider authorizing temporary investment of offering's net proceeds in short-term, highly liquid investments, with appropriate safety of principal (e.g., U.S. Treasury Bonds or Bills), until proceeds are invested in real property [*10 Cal. Code Reg. § 260.140.115.4*].

f. Require pro rata distribution to partners, as return of capital, of any offering proceeds (except for necessary operating capital) not invested within [*10 Cal. Code Reg. § 260.140.115.4*]:

(1) Later of two years from date of effectiveness of qualification or one year after termination of offering; or

(2) Six months from last scheduled mandatory deferred payment date, if permitted by Commissioner.

g. Require syndicate to prepare "special report" [*see § 29C.140,* P 5] describing any real property acquisitions made during most recent quarter and to distribute it to all limited partners within 60 days after end of quarter [*10 Cal. Code Reg. § 260.140.115.5*].

h. If sponsor is acting in same capacity for one or more other syndicates and is seeking to acquire similar types of properties for two or more syndicates, describe reasonable method that will be used by sponsor for allocating acquisition of properties among multiple syndicates [*10 Cal. Code Reg. § 260.140.115.6*].

NOTE:

The method that will be used must also be described in the prospectus [*10 Cal. Code Reg. § 260.140.115.6*].

13. Prohibit syndicate from giving general partner exclusive right or exclusive employment to sell syndicate property [*10 Cal. Code Reg. § 260.140.114.3*; *see § 29C.200[2],* P 4.08 (illustrative provision)].

14. Prohibit any rebates or kickbacks to sponsor and prohibit sponsor and general partner (and affiliates of either) from participating in any reciprocal business arrangement that would circumvent this prohibition [*10 Cal. Code Reg. § 260.140.114.7(a)*; *see § 29C.200[2],* P 4.11 (illustrative provision)].

NOTE:

The prospectus must also expressly state this prohibition [*10 Cal. Code Reg. § 260.140.114.7(a)*].

15. Prohibit sponsor, underwriter, dealer, and salesperson of syndicate's interests from directly or indirectly paying or awarding any finder's fees, commissions, or other compensation to a potential investor's investment advisor to induce advisor to recommend purchase of syndicate's interests [*10 Cal. Code Reg. § 260.140.114.7(b)*; *see § 29C.200[2],* P 4.11 (illustrative provision)].

NOTE:

This prohibition does not extend to normal sales commissions payable to a registered broker-dealer or other properly licensed person for selling syndicate interests [*10 Cal. Code Reg. § 260.140.114.7(b)*].

16. Prohibit commingling of syndicate funds with funds of any other person [*10 Cal. Code Reg. § 260.140.114.8*; *see § 29C.200[2],* P 4.12 (illustrative provision)], but, if appropriate, provide limited exceptions for:

a. Establishment by sponsor of master fiduciary account under which separate subtrust accounts are established for the benefit of affiliated limited partnerships and syndicate funds are protected from claims of those other partnerships and/or creditors [*10 Cal. Code Reg. § 260.140.114.8*].

b. Investments by syndicate in or with other syndicates [*see 10 Cal. Code Reg. § 260.140.114.9*; *see* P 11, *above*].

[4] Meetings

NOTE:

The Commissioner's requirements for meetings of nonexempt real estate limited partnerships are outlined below. Unlike prior law [*see, e.g., Corp. Code § 15637* (CRLPA, repealed January 1, 2010)], the ULPA '08 does not contain default provisions regarding partnership meetings. Therefore, the partnership agreement should set forth all desired provisions governing this topic [*see* Ballantine & Sterling,

California Corporation Laws, Ch. 25, *Limited Partnerships* , § 732.01[2] (Matthew Bender)].

1. For matters on which limited partners may vote, authorize meeting of limited partners to be called at any time by general partner(s) or limited partners holding not less than 10 percent of outstanding limited partnership interests [*10 Cal. Code Reg. § 260.140.116.1*;*see § 29C.200[2],* P 6.01 (illustrative provision)].

2. Designate place(s) for meetings [*see § 29C.200[2],* P 6.01 (illustrative provision)].

3. Describe notice requirements for meetings [*§ 29C.200[2],* P 6.02 (illustrative provision)].

a. Require written notice to be given whenever:
(1) Partners are required or permitted to take any action at meeting.

(2) Written request has been made to general partner by any person(s) entitled to call meeting [*see* P 1, *above*].

b. Set forth following information in notice:

(1) Place, date, and hour of meeting.

NOTE:
If the meeting will be called pursuant to a written request by any partner entitled to call a meeting of partners [***see*** P 1, ***above***], the meeting date must be set for the date specified in the written request, provided that date is not less than 15 nor more than 60 days after the date on which the request is received [***see*** *10 Cal. Code Reg. § 260.140.116.1*].

(2) General nature of business to be transacted.

(3) Detailed statement of action proposed, including verbatim statement of wording of any resolution proposed for adoption and/or of any proposed amendment to partnership agreement [*see 10 Cal. Code Reg. § 260.140.116.1*].

(4) Statement that no other business may be transacted at meeting.

c. Require that notice of any meeting be accompanied by proxies or written consents that specify a choice between approval and disapproval of each matter to be acted upon at meeting [*10 Cal. Code Reg. § 260.140.116.1*].

d. Require notice to be sent either personally or by first class mail not less than 10, nor more than 60, days before date of meeting, to each limited partner [*10 Cal. Code Reg. § 260.140.116.1*].

4. State that majority of limited partnership interests entitled to vote, represented in person or by proxy, will constitute a quorum [*10 Cal. Code Reg. § 260.140.116.1*].

5. If desired, permit participation in meeting through use of conference telephones or similar communications equipment.

6. Describe consequences of withdrawal of partners resulting in less than quorum.

7. Set out requirements for adjournment of meeting.

8. Specify method (i.e., waiver of notice or consent) to validate meeting not duly called, noticed, or held.

9. Include requirements for waiver of notice.

10. If desired, specify method for taking action without holding otherwise-required meeting.

11. State requirements for use of proxies.

12. Include provisions that provide for setting of record date for determination of partners entitled to notices of meetings, right to vote, distributions, or right to take any other lawful action as of record date.

13. If desired, specify who will preside at meetings.

[5] Books, Records, and Reports

NOTE:

Statutory and regulatory requirements relating to partnership books, records, and reports are outlined in *Section 29C.140* and are not repeated here. Most of the requirements must be incorporated into provisions of the partnership agreement [***see*** *10 Cal. Code Reg. § 260.140.119.1*; ***see also*** *§ 29C.200[2]*, Article 7 (illustrative provisions)].

[6] Dissolution of Partnership

NOTE:

The statutory requirements applicable to the dissolution of any limited partnership [Ch. 29B, *Nonpublic Real Estate Syndicates*, § 29B.130]. For illustrative dissolution provisions for a nonexempt limited partnership agreement, see *Section 29C.200[2]*, Article 8.

[7] Other Provisions

1. Define "affiliate" of general partner [*see 10 Cal. Code Reg. § 260.140.110.2(c)*; *§ 29C.200[2]*, P 9.01 (illustrative provision)].

2. Describe procedure for amending agreement [*see 10 Cal. Code Reg. § 260.140.116.2(a)*; *§ 29C.200[2]*, P 9.02 (illustrative provision)].

3. Include other provisions desired, e.g. [*see* are *set forth in Ch. 29B, Nonpublic Real Estate Syndicates, § 29B.130*]:

a. Governing law.

b. Binding effect on heirs and assigns.

c. Use of counterparts.

d. Status as sole and only agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
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13-29C California Legal Forms--Transaction Guide § 29C.131

§ 29C.131 Prospectus

NOTE:

If an offering is registered with the Securities and Exchange Commission (SEC) and qualified with the Commissioner by coordination [***see*** Ch. 6H, *Qualification of Securities*], a prospectus that is part of a registration statement declared effective by the SEC will be deemed to comply with all requirements as to form of the Commissioner's regulations. However, the Commissioner reserves the right to require additional disclosures [*10 Cal. Code Reg. § 260.140.117.2*].

1. Provide all information required by SEC Guide 5, plus following information [*10 Cal. Code Reg. § 260.140.117.3*]:

NOTE:

SEC Guide 5 is a guide to the preparation of registration statements under the Securities Act of 1933 [*15 U.S.C. §§ 77a-77aa*]. For a discussion of Guide 5 as it relates to a private placement memorandum (the "nonpublic" offering equivalent of a prospectus), see are *set forth in Ch. 29B, Nonpublic Real Estate Syndicates, § 29B.132*.

a. For foreign limited partnership that does not provide limited partners with voting rights required by Commissioner, include legend required by Commissioner [*see 10 Cal. Code Reg. § 260.140.116.2(c)*].

b. If sponsor also serves as sponsor for one or more other syndicates seeking to acquire similar types of properties, describe method that will be used to allocate acquisition of properties between or among multiple syndicates [*see 10 Cal. Code Reg. §§ 260.140.115.6, 260.140.117.3*].

c. Fully describe terms, consequences, and risks to participants and syndicate of any mandatory deferred payments [*see 10 Cal. Code Reg. § 260.140.118.1* (requirements and restrictions for these payments)].

d. Make any additional disclosures required by Commissioner for specific offering.

2. Fully disclose and itemize in one location, in tabular form [*10 Cal. Code Reg. § 260.140.113.1(c)*]:

a. All consideration that may be received from syndicate directly or indirectly by sponsor, its affiliates, and underwriters;

b. What consideration is for; and

c. How and when consideration will be paid.

3. On face of prospectus, set forth amount of all acquisition fees that may be paid [*10 Cal. Code Reg. § 260.140.113.3(c)*; *see § 29C.130[3][b]*, P 1 (restriction on amount of acquisition fees)]:

a. Must be expressed in both absolute dollars and as percentage of gross proceeds of offering.

b. May be expressed as percentage of purchase price of property.

4. If sponsor will receive "asset based" fee [*see 10 Cal. Code Reg. § 260.140.113.10*], include statement that primary investment objective of syndicate is to generate and to distribute to participants cash flow from operation of syndicate properties [*10 Cal. Code Reg. § 260.140.113.10(b)(1)*].

5. Disclose, in tabular form, estimate of expenses that are proposed to be reimbursed to sponsor for next fiscal year, with breakdown by year of these expenses actually reimbursed in each of last five public syndicates formed by sponsor [*see 10 Cal. Code Reg. § 260.140.114.5(f)(B)*].

6. Prohibit sponsor, general partner, and affiliates from receiving any rebates or kickbacks and from participating in any reciprocal business arrangement that would circumvent Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.114.7(a)*].

7. For nonspecified property syndicate [*see 10 Cal. Code Reg. § 260.140.110.2(o)*; *§ 29C.12* (definition)]:

a. Describe manner in which acquisitions will be financed (including use of all-inclusive note or wrap-around mortgage) and amount of leverage to be used [*10 Cal. Code Reg. § 260.140.115.3(c)*].

b. State whether syndicate will enter into joint venture arrangements and if so, projected extent of these [*10 Cal. Code Reg. § 260.140.115.3(d)*].

c. If same sponsor will be allocating acquisition of properties among two or more syndicates, describe reasonable method of allocation that will be used [*see 10 Cal. Code Reg. § 260.140.115.6*].

8. If sponsor is to construct or develop properties, or render any related services:

a. Fully disclose specific terms of development and construction of identifiable properties [*10 Cal. Code Reg. § 260.140.114.6(b)*; *see § 29C.130[3][b]*, P 5].

b. State that written contract exists between syndicate and sponsor for services to be rendered [*10 Cal. Code Reg. §§ 260.140.114.6(e), 260.140.114.5(d)(3)*].

9. If sponsor will provide property management services to syndicate [*see § 29C.130[3][b]*, P 6], state that written contract exists for services to be rendered [*see 10 Cal. Code Reg. § 260.140.113.8(b)*].

10. If completion of construction of property acquired by syndicate will be guaranteed by method other than one ordinarily required under Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.114.11(a), (b)*; *§ 29C.130[3[[c]*, P 3], disclose alternative method (which must have been previously approved by Commissioner) [*see 10 Cal. Code Reg. § 260.140.114.11(c)*].

11. If syndicate has participants who hold program interests by assignment from entities holding limited partnership interests for purpose of assigning all or portion of interests to persons investing in syndicate [*see § 29C.130[1][b]*, P 1], state that assignor's management owes fiduciary duty to assignees for safekeeping and use of all funds and assets of assignees [*see 10 Cal. Code Reg. § 260.140.116.5(c)*].

12. If photographs of properties acquired by previous syndicates of same or affiliated issuers will be included in prospectus as representative of property to be acquired by this syndicate, include caveat required by regulations [*see 10 Cal. Code Reg. § 260.140.117.1(d)*].

13. If syndicate is authorized to obtain financing with balloon payment due not less than two years after anticipated holding period of acquired property [*see § 29C.130[3][c]*, P 2], specify anticipated holding period for property [*10 Cal. Code Reg. § 260.140.114.13(b)(2)*].

14. If syndicate will purchase or lease property in which sponsor has interest *or* if program will sell or lease property to sponsor, fully describe transaction [*see 10 Cal. Code Reg. § 260.140.114.1(a)(1), (b)(1)*; *§ 29C.130[3][c]*, P 4].

15. If syndicate will acquire property in exchange for limited partnership interest(s) [*10 Cal. Code Reg. § 260.140.114.2*; *see 29C.130[3][c]*, P 10 (additional requirements for exchange of this type)]:

a. Describe specific terms of transaction;

b. Disclose tax effects of exchange.

16. If syndicate is specified property syndicate investing primarily in improved property and predicted future results ("projections") are to be included in prospectus, include required statement on cover of prospectus and comply with other detailed regulatory disclosure requirements [*see 10 Cal. Code Reg. § 260.140.117.4*].

17. If syndicate is nonspecified property syndicate *or* specified property syndicate investing primarily in *un* improved land, verify that prospectus does not contain any "projections" [*see* P 16, *above*] and include required statement regarding prohibition on cover of prospectus [*see 10 Cal. Code Reg. § 260.140.117.4(a)*].

18. Include financial statements and other financial information required by Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.118.4*].

NOTE:

Specific financial information must be submitted to the Commissioner at the time an application for qualification is filed, and certain of the information must be included in the prospectus [***see*** *§ 29C.121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawInitial Public Offerings & the Securities Act of 1933ProspectusesGeneral Overview



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§§ 29C.132[Reserved]



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E. Related and Subsequent Procedures

13-29C California Legal Forms--Transaction Guide § 29C.140

§ 29C.140 Maintenance and Distribution of Required Records and Reports

NOTE:

The requirements below incorporate recordkeeping requirements from both California limited partnership law [***see*** *Corp. Code §§ 15900-15912.07* (ULPA '08)] and the Commissioner's regulations for nonexempt real estate syndicates [*10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*].

Under the ULPA '08, except as provided below, the partnership governs relations among the partners and between the partners and the partnership. To the extent that the agreement does not otherwise provide, the ULPA '08 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. The partnership agreement, however, may not vary certain statutory provisions [***see*** *Corp. Code § 15901.10(b)*]. For further discussion, see *Ch. 16,* ***Formation of Limited Partnerships****, § 16.21[4][b]*]. For detailed discussion of California limited partnership law, see Chs. 16-16B.

1. Keep following documents at partnership's office in California [*Corp. Code § 15901.11*; *see § 29C.200[2]*, P 7.04]:

a. Current list containing following information about each partner:

NOTE:

The Commissioner requires syndicates to maintain a list of names and addresses of all limited partners [*10 Cal. Code Reg. § 260.140.116.4*].

(1) Full name (listed alphabetically);

(2) Last known street and mailing address; and

(3) Contribution and share in profits and losses.

b. Copy of initial certificate of limited partnership and all amendments to and and restatements of certificate, with executed copies of any powers of attorney pursuant to which any certificate was executed.

c. Copies of limited partnership's federal, state, and local income tax returns and reports, if any, for six most recent taxable years.

d. Copies of original partnership agreement and all amendments.

e. Financial statements of limited partnership for six most recent fiscal years.

f. Partnership's books and records for at least current and past three fiscal years.

g. Copy of any filed certificate of conversion or merger.

h. Unless contained in partnership agreement made in record:

(1) Amount of cash, and description and statement of agreed value of other benefits, contributed and agreed to be contributed by each partner;

(2) Times at which or events upon which additional contributions agreed to be made by each partner are to be made;

(3) For person that is both general and limited partner, specification of what transferable interest person owns in each capacity; and

(4) Any events upon which limited partnership will be dissolved and activities wound up.

2. Permit any limited partner to do following [*Corp. Code § 15903.04*; *see § 29C.200[2]*, P 7.05, 7.06]:

a. Upon 10 days' demand made in record received by limited partnership, inspect and copy during normal business hours any partnership records required to be maintained [*see Corp. Code § 15901.11*; P 1, *above*].

NOTE:
The Commissioner's regulation does not specifically require that a request be made. Instead, it simply provides that limited partners must have access to syndicate records (for inspection or copying) at all times and that the syndicate may impose reasonable copying charges [*10 Cal. Code Reg. § 260.140.116.4*].

b. Inspect and copy during regular business hours at reasonable location specified by partnership, true and full information regarding state of activities and financial condition of partnership and other just and reasonable information regarding its activities if [*Corp. Code § 15903.04(b)*; *see also Corp. Code § 15903.04(d)* (rights of dissociated limited partner)]:

NOTE:

This right is subject to a partnership's right to keep certain information confidential [*see Corp. Code § 15903.04(g)*; *see Ch. 16, **Formation of Limited Partnerships, § 16.30[1]*]. This information may be transmitted to the limited partner via electronic transmission [*Corp. Code § 15903.04(b)*; ***see** Corp. Code § 15901.02(h)* (definition)].

(1) Limited partner seeks information for purpose reasonably related to partner's interest as limited partner;

(2) Limited partner makes demand in record received by partnership, describing with reasonable particularity information sought and purpose for which sought; and

(3) Information sought is directly connected to limited partner's purpose.

3. Have general partner distribute financial reports and documents to limited partners as follows [*see § 29C.200[2]*, PP 7.05, 7.07-7.10]:

a. If syndicate is registered under Section 12 of Securities Exchange Act of 1934, distribute within 60 days after end of each quarter a report that contains financial statements and other information required by Commissioner [*see 10 Cal. Code Reg. § 260.140.116.3(a)*; *see also § 29C.200[2]*, P 7.10 (illustrative partnership agreement provision that describes required statements and information)].

b. Not later than 75 days after end of fiscal year, furnish information necessary to complete federal and state income tax or information returns [*10 Cal. Code Reg. § 260.140.116.3(b)*; *see § 29C.200[2]*, P 7.08 (illustrative partnership agreement provision)].

c. Not less than 120 days after end of syndicate's fiscal year, distribute annual report containing [*10 Cal. Code Reg. § 260.140.116.3(c)*; *see § 29C.200[2]*, P 7.07 (illustrative partnership agreement provision)]:

(1) Audited financial statements [*see 10 Cal. Code Reg. § 260.140.110.2(f)* (definition)] covering fiscal year, plus auditor's report that may contain qualified opinion or explanatory paragraph.

(2) Report of syndicate activities during period covered by report.

(3) If forecasts [*see 10 Cal. Code Reg. § 260.140.117.4* (requirements and restrictions for forecasts)] have been provided to limited partners, table comparing forecasts previously provided with actual results during period covered by report.

(4) Schedule of all distributions to limited partners that identifies source of each and dollar amount attributable to each source.

(5) Schedule of all compensation paid and distributions made to sponsor, which must:
(a) Include description of services performed;

(b) Identify source of each distribution; and

(c) Include breakdown of costs reimbursed to sponsor [*see 10 Cal. Code Reg. § 260.140.114.5(f)*].

NOTE:
As part of the annual audit of the syndicate's financial statement, the independent certified public accountant must verify the allocation of costs reimbursed to the sponsor under an approved verification method [***see*** *10 Cal. Code Reg. § 260.140.114.5(f)*].

4. For nonspecified property syndicate [*see § 29C.12* (definition)], provide all limited partners, within 45 days after end of each quarter during which there has been any acquisition of real property, a special report that contains [*10 Cal. Code Reg. § 260.140.115.5*; *see § 29C.201 [2]* (illustrative partnership agreement provisions)]:

NOTE:
The special report must be sent periodically, until the time proceeds of the offering are committed or returned to investors [*10 Cal. Code Reg. § 260.140.115.5*; ***see*** *10 Cal. Code Reg. § 260.140.115.4*; *§ 29C.201* (requirements for return of proceeds for noninvestment)]. If the syndicate is registered under Section 12 of the Securities Exchange Act of 1934, the special report may be a part of the regular quarterly report [*10 Cal. Code Reg. § 260.140.115.5*; ***see*** *10 Cal. Code Reg. § 260.140.116.3(a)*; P 4a, ***above*** (required quarterly report)].

a. Location and description of general character of all materially important real properties acquired or presently intended to be acquired by or leased to syndicate during quarter.

b. Present or proposed use of properties described in subparagraph a, *above*, and their suitability and adequacy for such use.

c. Terms of any material lease affecting property.

d. Proposed method of financing, including:

(1) Estimated down payment;

(2) Leverage ratio;

(3) Prepaid interest;

(4) Balloon payment(s);

(5) Prepayment penalties;

(6) Due-on-sale or encumbrance clauses, (including possible adverse effects of those clauses); and

(7) Similar details of proposed financing plan.

e. Statement that following will be obtained on all properties acquired:

(1) Title insurance;

(2) Any required financing (construction, permanent, or other); and

(3) Performance bonds or other assurances from builders.

f. Statement of amount of proceeds that remain uncommitted or unexpended, stated as both dollar amount and percentage of total amount of syndicate's offering proceeds.

5. Maintain, for minimum of four years, required records regarding investor suitability [*10 Cal. Code Reg. § 260.140.112.4*; *see § 29C.203[1][b], [c]* (required records); *§ 29C.200[2],* P 7.13 (illustrative partnership agreement provision)].

6. If requested by Commissioner, submit copy of any report or statement syndicate is required to distribute to limited partners [*10 Cal. Code Reg. § 260.140.111.3*; *see 10 Cal. Code Reg. § 260.140.116.3*].

7. If acquisition fees are paid on syndicate property purchases [*see 10 Cal. Code Reg. §§ 260.140.113.3, 260.140.113.4*; *§ 29C.130[3][b],* P 1 (restrictions on amount and payment of acquisition fees and expenses)], within 30 days after last property acquisition, forward to Commissioner a verified schedule that describes [*10 Cal. Code Reg. § 260.140.113.3(b)*]:

a. Each acquisition made;

b. Purchase prices paid;

c. Aggregate of all acquisition fees paid on each transaction; and

d. Computation showing compliance with rule limiting total acquisition fees paid [*see 10 Cal. Code Reg. § 260.140.113.3*].

8. Retain any appraisal(s) of syndicate's real property for at least five years [*10 Cal. Code Reg. § 260.140.114.12*; *see § 29C.200[2],* P 7.14 (illustrative partnership agreement provision)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

13-29C California Legal Forms--Transaction Guide §§ 29C.141-29C.199

[Reserved]

§§ 29C.141[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29C California Legal Forms--Transaction Guide § 29C.200

§ 29C.200 Limited Partnership Agreement for Nonexempt, Specified Property Syndicate

[1] Comment

[a] Use of Form

This form is a limited partnership agreement for a real estate limited partnership that must qualify with the California Commissioner of Corporations [*see 10 Cal. Code Reg. § 260.140.110.1(a)*]. It incorporates the regulatory requirements of the Commissioner of Corporations for a nonexempt limited partnership real estate syndicate [*see 10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*]. Because this agreement is intended for a "specified property" syndicate [*see § 29C.12* (definition); *see also* [e], *below*], it does not include provisions for the special regulatory requirements that apply to a "nonspecified property" syndicate [*see § 29C.201*].

A limited partnership agreement for a real estate limited partnership that is exempt from qualification in California is set forth in Chapter 29B, *Nonprofit Real Estate Syndicates* . Unlike this form, that form does not contain the special provisions required by the Commissioner's regulations for a nonexempt real estate syndicate. However, any provisions from that form that do not concern matters regulated by the Commissioner's regulations may be used in lieu of similar provisions included in the form below. For example, the Commissioner does not restrict the number of classes of partnership units that may be created, and § 29B.300[2], Article 2 (unlike this form) creates two classes of limited partnership units.

Federal securities laws are not covered in this chapter, and this agreement does not incorporate (except perhaps coincidentally) any requirements for a partnership agreement that may be required for a limited partnership required to register with the Securities and Exchange Commissioner.

[b] Specific Provisions of Form

Several of the requirements and/or provisions contained in the Commissioner's regulations governing nonexempt real estate syndicates are specifically required to be included in the limited partnership agreement [*see 10 Cal. Code Reg. § 260.140.119.1*]. As part of the application for qualification, the limited partnership must submit a cross-reference sheet that identifies the location in the prospectus, partnership agreement, or other exhibit, of the required provisions of the

Commissioner's regulations. Regulations that are inapplicable to a particular limited partnership must be indicated in the cross-reference sheet and any provision that varies from the requirements of a Commissioner's regulation must be explained and justified [*see 10 Cal. Code Reg. § 260.140.110.1(c)*]. For an illustrative cross reference sheet, see *Section 29C.202*.

The Transaction Guide to this chapter includes a lengthy drafting guide for a nonexempt limited partnership agreement [*see § 29C.130*]. That drafting guide must be used in conjunction with this form since it contains a detailed summary of specific provisions required under the Commissioner's regulations and that summary is not repeated here. Many of the provisions included in this form are governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*]. Except in a few instances, the specific requirements of that Act are not covered in this chapter. However, requirements of the Act as they relate to a real estate syndicate are covered in Ch. 29B, *Nonpublic Real Estate Syndicates* .

Under the ULPA '08, except as provided below, the partnership governs relations among the partners and between the partners and the partnership. To the extent that the agreement does not otherwise provide, the ULPA '08 governs relations among the partners and between the partners and the partnership [*Corp. Code § 15901.10(a)*]. The partnership agreement, however, may not vary certain statutory provisions [*see Corp. Code § 15901.10(b)*]. For further discussion, see *Ch. 16, Formation of Limited Partnerships, § 16.21[4][b]*]. For detailed discussion of California limited partnership law, see Chs. 16-16B. For the most part, the discussion below merely summarizes the provisions of this form and cross-refers the drafter to the drafting guide or other source for a discussion of applicable law.

[c] Formation of Partnership

The matters covered in Article I of this agreement are governed by specific provisions of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*]. Because this agreement is intended for a "specified property" syndicate [*see § 29C.12* (definition)], Paragraph 1.03 identifies the specific property or properties to be owned by the Partnership. For the same reason, Paragraph 3.10 prohibits reinvestment of the proceeds from the sale or refinancing of partnership properties [*see 10 Cal. Code Reg. § 260.140.110.1(o), (y)*; *see also* [e], *below*]. For special provisions that must be included in a limited partnership agreement for a nonspecified property syndicate, see *Section 29C.201*.

[d] Partners

This agreement provides for a sole corporate general partner [*see* [2], P *2.01, below*], but the partnership may have more than one general partner and the general partner is not required to be a corporation [*see Corp. Code § 15901.02(q)*].

For the most part, the other provisions of Article 2 are based on specific requirements of the Commissioner's regulations that are outlined in *Section 29C.130[1][a]*.

[e] Capital and Finance

Limited partners under this agreement are required to pay cash for their interests in the partnership [*see* [2], P *3.03, below*]. Deferred payments for partnership interests are not permitted except under specific circumstances outlined by the Commissioner [*see 10 Cal. Code Reg. § 260.140.118.1*].

Under this agreement, assessments on limited partners after their initial contribution of required capital to the partnership are prohibited [*see* [2], P *3.06, below*]. Assessments are not permitted for a nonspecified property syndicate but may be permitted for a specified property syndicate when special circumstances demonstrate a need. If permitted, the assessments may be made only to cover certain obligations, and the types of penalties that may be imposed for

nonpayment are restricted [*see 10 Cal. Code Reg. § 260.140.116.8*; *§ 29C.130[2]*, P 10].

Unless a partnership agreement otherwise provides, the profits and losses of a limited partnership must be allocated among the partners in the same manner as the partners share distributions [*Corp. Code § 15905.035*]. A distribution is shared among the partners on the bases of the value, as stated in the required records when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner [*Corp. Code § 15905.03*].

This agreement provides for the allocation of profits and losses and the distribution of income based on granting the general partner an interest in the partnership as a promotional interest and partnership management fee [*see* [2], PP 3.07, 3.08, *below*]. This type of arrangement is sanctioned by the Commissioner's regulations if the interest is "adequately subordinated"; the interest is considered to be adequately subordinated if it falls within regulatory limitations noted in either alternative of Paragraph 3.07(b) [*see 10 Cal. Code Reg. § 260.140.113.5*]. For a discussion of alternative partnership management fees that may be required or used, see [f], *below.*

This agreement prohibits the reinvestment by the Partnership of cash available for distribution from operations or cash available from the sale or refinancing of partnership property [*see* [2], P *3.10, below ; see also* [2], P 3.07(d), (e), *below* (definition of terms)]. If a partnership permits reinvestment of cash available from sale or refinancing, it is considered to be a "nonspecified property" syndicate and must satisfy additional requirements of the Commissioner for that type of syndicate [*see 10 Cal. Code Reg. §§ 260.140.115.1-260.140.115.6*; *§ 29C.201*]. Also, the authority of a partnership to reinvest proceeds or any partnership plan that allows limited partners to elect to have cash distributions reinvested is subject to specific regulatory requirements [*see 10 Cal. Code Reg. §§ 260.140.116.9, 260.140.118.3*].

Requirements for other provisions in Article 3 of this agreement, such as those covering the repurchase by the partnership of partnership interests [*see* [2], P *3.11, below*] and the maximum indebtedness of a limited partnership [*see* [2], P *3.12, below*] are outlined in *Section 29C.130[2]*.

[f] Management and Investment

Most of the provisions in Article 4 of this agreement are based on requirements of the Commissioner's regulations for a nonexempt real estate syndicate. These cover the general powers and duties of a general partner; investment authority and restrictions; fees, compensation and expenses that may be paid by the limited partnership; and conflict of interest restrictions. Specific requirements and citations to the appropriate regulations are outlined in *Section 29C.130[3]*.

Paragraph 4.06 is compatible with Paragraph 3.07 of the agreement, which, as discussed under [e], *above,* provides the general partner with a partnership management fee in the form of an interest in the partnership. If the real property owned by the limited partnership is unimproved land or a government subsidized project, Paragraph 4.06 should be modified to provide for a different partnership management fee [*see 10 Cal. Code Reg. § 260.140.113.6*] and Paragraph 3.07 should be modified accordingly.

A real estate limited partnership that has been declared effective by the Securities and Exchange Commission and that meets other specific requirements may authorize payment of an "asset based" fee to its general partner(s) [*see 10 Cal. Code Reg. § 260.140.113.10*]. An illustrative clause for this type of fee is not included here since its inclusion would be materially inconsistent with other provisions of the agreement. For example, if an asset based fee will be paid, the partnership must comply with requirements relating to capitalization, maximum allowable expenses, reinvestment, and reserves that differ significantly from the illustrative provisions used in this agreement. Also, if an asset based fee is paid, the general partner is restricted as to which other amounts or compensation it may receive from the partnership. For example, only a portion of the distributions provided for in Paragraph 3.07 of this Agreement could be paid to the general partner under these circumstances. The method of computing the fee and all conditions that must be satisfied if this fee will be paid are fully described in the relevant regulation [*see 10 Cal. Code Reg. § 260.140.113.10*].

[g] Assignment and Termination of Interests

[i] Limited Partners

Under the Uniform Limited Partnership Act of 2008, a transfer of a partner's transferable interest [*see Corp. Code § 15901.02(ak)* (right to receive distributions)] is permissible [*Corp. Code § 15907.02(a)*]. Upon transfer, the transferor retains the rights of a partner other than the interest in distributions transferred, and retains all duties and obligations of a partner [*Corp. Code § 15907.02(d)*]. Under the Commissioner's regulations, restrictions on the assignment of limited partner interests or on the substitution of a limited partner are generally disfavored. The regulations provide that these types of restrictions will be permitted, however, if they are intended to preserve the tax status of the partnership or the characterization or treatment of income or loss. Any restriction must be affirmatively supported by an opinion of counsel [*see 10 Cal. Code Reg. § 260.140.117.5*] or a demonstration by the limited partnership that the restriction is necessary based on the tax laws, regulations, rulings, notices, or other official pronouncements governing the Internal Revenue Service. In addition, the partnership agreement must require the general partner to eliminate or modify any restriction on substitution or assignment at such time as the restriction is no longer necessary [*10 Cal. Code Reg. § 260.140.116.7*]. In light of the liberalized entity classification rules, effective January 1, 1997, that eliminate the former reliance on the presence or absence of certain corporate characteristics to determine an entity's classification for tax purposes, and instead permit limited partnerships simply to elect whether they are to be classified as a partnership or as a corporation [*see Treas. Reg. § 301.7701-3(a)*], restrictions on the assignment of limited partnership interests are no longer necessary for federal tax purposes.

The provision in this agreement that governs the effect on a limited partnership interest of a limited partner's death [*see* [2], P 5.04, *below*] is based on a provision of the Uniform Limited Partnership Act of 2008 [*see Corp. Code § 15907.04*].

[ii] General Partner(s)

The events or circumstances under which a general partner will cease to be a general partner should be described in the agreement. The provisions included in this agreement [*see* [2], P *5.05, below*] are based on statutory provisions contained in the Uniform Limited Partnership Act of 2008 [*see Corp. Code § 15906.03*].] and the Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.116.2(a)*]. Under one of these provisions, a majority in interest of the limited partners may remove the general partner [*see* [2], PP 2.06(b), 5.05(a), *below*]. Because this agreement uses only one general partner, provisions are included to replace the general partner and continue the partnership business [*see* [2], P 5.05(b), *below*]. If the only general partner is an individual, the agreement should provide for a successor general partner [*see 10 Cal. Code Reg. § 260.140.116.2(a)*].

This agreement terminates the general partner's interest and requires the partnership to pay the fair market value of that interest to the terminated general partner [*see 10 Cal. Code Reg. § 260.140.111.6*; *§ 29C.130[1][b]*].

[h] Partnership Meetings

The provisions for partnership meetings included in this form reflect requirements of the Commissioner [*see 10 Cal. Code Reg. § 260.140.116.1*]. Specific requirements are outlined in *§ 29C.130[4]*. Unlike prior law [*see, e.g., Corp. Code § 15637* (CRLPA, repealed January 1, 2010)], the ULPA '08 does not contain default provisions regarding partnership meetings [*see* Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* , § 732.01[2] (Matthew Bender)].

[i] Books, Records, and Reports

Article 7 of this agreement incorporates report and recordkeeping requirements of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*] and the Commissioner's regulations [*see, e.g., 10 Cal. Code Reg.*

§ 260.140.116.3]. For a discussion of these specific requirements, see *§ 29C.140*.

[j] Dissolution of Partnership

Dissolution of a limited partnership and its winding up and distribution of assets are governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15900-15912.07*]. Article 8 of this agreement is an example only for a partnership's dissolution that is consistent with the other provisions of this particular agreement.

[k] Miscellaneous Provisions

Paragraph 9.01 of this agreement sets forth the definition of a general partner's "affiliate" contained in the Commissioner's regulations [*see 10 Cal. Code Reg. § 260.140.110.2(c)*]. Other common "miscellaneous" type provisions are included in 29B, *Nonpublic Real Estate Syndicates*, § 29B.200.

[2] FORM

Limited Partnership Agreement for Nonexempt, Specified Property Syndicate

LIMITED PARTNERSHIP AGREEMENT

THIS LIMITED PARTNERSHIP AGREEMENT is entered into on _____[*date*], by and between _____[*name of general partner*], a California corporation (referred to in this Agreement as the "General Partner") and those persons executing this Agreement as limited partners (collectively referred to in this Agreement as the "Limited Partners").

THE PARTIES AGREE AS FOLLOWS:

ARTICLE 1.
FORMATION OF PARTNERSHIP

Formation of Limited Partnership

1.01. The parties to this Agreement hereby form a limited partnership (referred to in this Agreement as "the Partnership") pursuant to the provisions of the Uniform Limited Partnership Act of 2008, *Corp. Code § 15900 et seq.*

Name of Partnership

1.02. The name of the Partnership shall be _____[*name of partnership*], a limited partnership.

Business and Purpose of Partnership

1.03. The business of the Partnership is to invest in real property by acquiring, holding, and operating for purposes of eventual sale, the real property owned by the Partnership. Real property owned [*or* to be acquired] by the Partnership consists of: _____[*describe specific property or properties, by type of improvement, street address, city, and state*], which is [*or* all of which are] more particularly described in Exhibit A attached to and incorporated in this Agreement. This real property [*if Partnership will also purchase additional property, add:* and any other real property purchased by the Partnership] is referred to in this Agreement as the Partnership property.

Principal Place of Business

1.04. The principal place of business of the Partnership shall be at _____[*street address and city*],

California.

Certificate of Limited Partnership

1.05. The General Partner shall concurrently with the execution of this Agreement duly execute and acknowledge a Certificate of Limited Partnership and cause the Certificate to be filed in the office of the Secretary of State of California. The General Partner shall also record a certified copy of the Certificate in the office of the County Recorder of any county in which Partnership property is located.

Term of Partnership

1.06. The Partnership shall commence on the filing of a Certificate of Limited Partnership in the manner required by the Uniform Limited Partnership Act of 2008, *Corp. Code § 15900 et seq.*, and shall continue until _____[*specify date, event, or other that causes termination, e.g.,* the earlier of thirty days after the close of escrow for the sale of the (last) Partnership property *or* _____ (*date certain*)], unless sooner terminated in accordance with the provisions of this Agreement or by law.

Title to Property

1.07. Title to all property, real or personal, acquired by the Partnership shall be acquired, held, and conveyed in the name of the Partnership.

ARTICLE 2.
PARTNERS

General Partner

2.01. _____[*name of general partner*], a California corporation, whose address is _____[*street address, city, state, and zip code*], is and shall be the sole original General Partner of the Partnership. No other person or entity shall be admitted to the Partnership as a General Partner except that if the General Partner ceases to be a General Partner, a new General Partner may be elected pursuant to the provisions of Paragraphs 2.06 and 5.05(c) of this Agreement.

Original Limited Partners

2.02. The names and residences of the original Limited Partners are set forth on a schedule attached to this Agreement and marked "Exhibit B."

Time Periods for Admission of Limited Partners

2.03. Persons who purchase Partnership Units directly from the Partnership ("Original Limited Partners") shall be admitted into the Partnership as Limited Partners not later than 15 days after release to the Partnership from impound of the money they have paid for their Partnership Units [*or, if impound condition is not imposed by Commissioner:* not later than the last day of the calendar month following the date the Partnership accepts their subscription]. Additional Limited Partners, if any are permitted under the provisions of Paragraph 2.04 of this Agreement, shall be admitted into the Partnership not later than the last day of the calendar month following the date on which the Partnership accepts the subscription of the Additional Limited Partner. Substitute limited partners shall be admitted to the Partnership only in accordance with the provisions of Paragraph 5.03 of this Agreement.

Additional Limited Partners

2.04. After the sale of the initial _____[*number, e.g.*, 5,000] Partnership Units described in Paragraph 3.01 of this Agreement, _____ [*describe conditions of admission, e.g.*, the General Partner shall admit no additional Limited Partners to the Partnership except on the affirmative vote of 51 percent or more of the Partnership Units already sold to Limited Partners. Notwithstanding the foregoing, a substitute Limited Partner may be admitted to the Partnership pursuant to the provisions of Paragraph 5.03 of this Agreement].

Prohibition Against Withdrawal by Limited Partner

2.05. Once admitted to the Partnership, a Limited Partner may not withdraw from the Partnership but may assign its interest in the Partnership as provided in Paragraph 5.02. Substitution of a Limited Partner is permitted only as authorized under Paragraph 5.03 of this Agreement.

Voting Rights

2.06. The Limited Partners shall have the right to vote, call and give notice of meetings, and solicit written consents, as follows.

(a) The Limited Partners shall have the right to vote on the following actions, which may be taken only by the General Partners, and then only with the affirmative vote of a majority in interest of the Limited Partners.

(1) The dissolution and winding up of the Partnership.

(2) The merger of the Partnership.

(3) The sale, exchange, lease, mortgage, pledge, or other transfer of, or the granting of a security interest in, all or a substantial part of the assets of the Partnership other than in the ordinary course of its business.

(4) The incurrence of indebtedness by the Partnership other than in the ordinary course of its business.

(5) A change in the nature of the business of the Partnership.

(6) Any transaction in which the General Partner has an actual or potential conflict of interest with the Limited Partners or the Partnership.

(7) An election to continue the business of the Partnership under circumstances other than those described in subparagraph (c), below.

(8) The admission of a General Partner other than under the circumstances described in subparagraph (c), below.

(b) The Limited Partners shall have the right to vote on the removal of the General Partner. This action shall be effective without further action on the affirmative vote or written consent of a majority in interest of all Partners. If this action is taken by written consent, written notice of the General Partner's removal shall be served on the General Partner by certified mail. The notice shall set forth the day on which the removal is to be effective.

(c) The Limited Partners shall have the right to vote on the admission of a General Partner, or an election to continue the business of the Partnership after the General Partner ceases to be a General Partner, when there is no remaining or surviving General Partner. Each of these actions may be taken only by the affirmative vote of _____[a majority *or greater percentage; see 10 Cal. Code Reg. § 260.140.116.2(a)(1)(C)*] in interest of the Limited Partners.

(d) The Limited Partners shall have the right to vote on the amendment of this Partnership Agreement, which may be accomplished only by the affirmative vote of a majority in interest of the Limited Partners.

(e) The Limited Partners shall have the right to vote on _____[*describe any other matter related to the business of the partnership on which limited partners are to be entitled to vote*].

Restrictions on Limited Partners

2.07. No Limited Partner or Assignee of a Limited Partner shall take part in or interfere in any manner with the control, conduct, or operation of the Partnership, nor shall he or she have any right or authority to act for or bind the Partnership.

Limitations on General Partner

2.08. Without the vote or written consent of Limited Partners holding at least 51 percent of the Partnership Units of the Partnership then outstanding, the General Partner shall have no power or authority to:

(a) Amend any provision of this Agreement.

(b) Appoint a new General Partner.

(c) Sell all or substantially all of the assets or properties of the Partnership other than in the ordinary course of the Partnership's business.

(d) Cause the merger or other reorganization of the Partnership.

(e) Dissolve the Partnership.

(f) _____[*Describe any other desired restrictions*].

General Rights of Partners

[*Paragraph 2.09 is an example only, based on Corp. Code §§ 15905.02(c), 15905.06; the partnership agreement may provide otherwise.*]

2.09. The obligation of a Partner to make a contribution or return money or property distributed in violation of the Uniform Limited Partnership Act of 2008 may be compromised only by the written consent of all of the Partners. No Partner shall have the right to receive property other than money upon any distribution made by the Partnership.

ARTICLE 3.
CAPITAL AND FINANCE

Initial Capital

3.01. The initial capital of the Partnership shall be $_____[*specify, e.g.,* $10,000,000] divided into _____[*number, e.g.,* 5,000] Partnership Units having a Unit value of $_____[*specify, e.g.,* $2,000] each.

Contribution of General Partner

3.02. The General Partner shall contribute to the Partnership _____[*describe contribution, if any, e.g.,* the sum of $_____ in the form of a demand promissory note (with no interest) payable to the Partnership]. The General Partner shall be entitled to distributions of the Partnership provided for in Paragraph 3.07 of this Agreement and shall share in any Partnership losses to the extent provided for in Paragraph 3.08 of this Agreement.

Contribution of Limited Partners

3.03. Each Limited Partner shall contribute to the capital of the Partnership by paying the amount of $_____[*repeat unit value specified in Paragraph 3.01*] for each Partnership Unit purchased in the Partnership. The full amount of $_____[*repeat amount specified above*] per Partnership Unit must be tendered in cash by each Limited Partner the Partnership at the time the Partner submits a subscription for the purchase of Partnership Units to the General Partner [*or permit mandatory deferred payments for partnership interests but only on conditions permitted by the Commissioner (see 10 Cal. Code Reg. § 260.140.118.1)*]. Each subscription shall be accepted or rejected by the General Partner within 30 days after it is received by the General Partner. All moneys tendered with any rejected subscription shall be returned to the subscriber within 10 business days. [*If minimum purchase is required, add:* Each subscriber must subscribe for not less than _____ (*number*) Partnership Units or the subscription shall be automatically rejected by the General Partner.] Except as may be expressly provided otherwise in this Agreement, a Limited Partner has no right to demand the return of his or her capital contribution to the Partnership.

[*Use Paragraph 3.04 if formal impound condition is imposed by Commissioner (see § 29C.204[1][c]):*]

Impound of Funds

3.04. All funds tendered with and for initial subscriptions for Partnership Units in the Partnership shall be placed in a separate escrow account with a depositary selected by the General Partner and approved by the California Commissioner of Corporations. Should the full amount of the initial capital of the Partnership, as specified in Paragraph 3.01 of this Agreement, not be subscribed at or before 5:00 P.M. Pacific Time _____[*state date specified in Commissioner's impound condition*], the Partnership shall not be formed and each subscriber will promptly receive a refund of the payments tendered by the subscriber with his or her subscription. If the California Commissioner of Corporations extends the time for satisfying the impound condition stated in this Paragraph, the General Partner shall give each subscriber notice of the extension. Any subscriber who does not agree to the extension shall be entitled, on demand made to the Commissioner within 30 days from the date the notice of extension is distributed, to a refund of payments tendered by the subscriber with his or her subscription.

Capital Accounts

3.05. A capital account shall be maintained for the General Partner and for each Limited Partner on the books of the Partnership. The capital account for a Partner shall be credited with the Partner's capital contribution under this Agreement and shall be credited or charged with the Partner's respective share of profits and losses of the Partnership.

Further Assessments

3.06. Except as otherwise expressly provided in this Agreement, none of the Partners shall be required to make any further contributions to the capital of the Partnership after their original purchase of Partnership Units pursuant to this Article and no assessments of any kind may be made on any Partnership Units owned by Limited Partners. Any amounts paid to the Partnership by any General Partner or Limited Partner in excess of the Partner's original contribution to the capital of the Partnership shall be considered a mere loan to the Partnership repayable on such terms and conditions as may be agreed on at the time it is received by the Partnership.

[*Or, for specified property limited partnership only:*]

Further Assessments

3.06. Following the initial capitalization of the Partnership provided for in Paragraph 3.01, assessments may be levied on Partnership Units owned by Limited Partners and Limited Partners shall be required to pay any Assessment so levied but only as provided in this Paragraph. _____[*Describe circumstances under which assessments may be levied and penalties for default, subject to limitations contained in 10 Cal. Code Reg. § 260.140.116.8*].

Distributions to Partners

3.07. Prior to dissolution of the Partnership, distributions by the Partnership shall be made only as follows:

[*Describe method and manner of disposition; the following is an example only, based on granting the General Partner a subordinated partnership interest as a promotional interest and management fee (see 10 Cal. Code Reg. § 260.140.113.5; see also 10 Cal. Code Reg. § 260.140.110.2(g)-(i) for definitions used below). For an alternative method of allocating profits and losses and distributing income, see Ch. 29B, Nonpublic Real Estate Syndicates, § 29B.200.*]

(a) Right to Distributions. Following initial capitalization of the Partnership provided for in Paragraph 3.01, Limited Partners and the General Partner shall have the right to receive distributions from the Partnership described in subparagraph (b), below, to the extent available, at the end of each calendar quarter.

[*Include either of the following provisions:*]

(b) Amount and Method of Distributions. All cash that has been determined by the General Partner to be "available for distribution from operations," as that term is defined in this Paragraph, shall be distributed 90 percent to the Limited Partners, in proportion to their respective holdings of Units, and 10 percent to the General Partner. All cash that has been determined by the General Partner to be "available from sale and refinancing" of properties shall be distributed as follows: First to the Limited Partners, in proportion to their respective holdings of Units, until they have received a return equal to 100 percent of their "capital contributions," as that term is defined in this Paragraph, plus an amount equal to 6 percent of capital contributions per annum cumulative. Thereafter, 85 percent shall be distributed to the Limited Partners, in proportion to their respective holdings of Units, and 15 percent to the General Partner.

[*OR*]

(b) Amount and Method of Distributions. Any cash that has been determined by the General Partner to be "available for distribution from operations" or to be "available from sale and refinancing" (as those terms are defined in this Paragraph) shall be distributed as follows: first, to the Limited Partners, in proportion to their respective holdings of Units, until they have received a return equal to 100 percent of their "capital contributions," as that term is defined in this Paragraph, plus an amount equal to 6 percent of capital contributions per annum cumulative; thereafter, 75 percent shall be distributed to the Limited Partners, in proportion to their respective holdings of Units, and 25 percent to the General Partner.

[*Continue:*]

(c) Capital Contributions Defined. The term "capital contributions" as used in this Agreement means the gross amount of investment in the Partnership by a Limited Partner, or all Limited Partners as the case may be. For purposes of making any computation required under subparagraph (b), above, the amount of capital contributions by a Limited Partner shall be reduced by any previous distributions to the Limited Partner from cash available from sale and refinancing of Partnership properties and by any distribution to the Limited Partner from reserves created from the

Partnership's initial capitalization.

(d) Cash Available From Sale and Refinancing Defined. The term "cash available from sale and refinancing" as used in this Agreement means Partnership cash funds provided from a sale, financing, or refinancing of property, less the amount necessary to pay all debts and obligations of the Partnership related to the particular property, the expenses incurred in the sale, financing, or refinancing, and amounts set aside for restoration or creation of reserves.

(e) Cash Available for Distribution From Operations Defined. The term "cash available for distribution from operations" as used in this Agreement means the Partnership cash funds realized from operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements, amounts set aside for restoration or creation of reserves, and replacements.

Allocation of Losses

3.08. Any Partnership net losses shall be allocated to Limited Partners and to the General Partner in the same proportion as distributions are payable to each under Paragraph 3.07.

Reserve Account

3.09. The Partnership shall create and maintain a reserve account for normal repairs, replacements, and contingencies. _____ percent [*specify, e.g., normally a minimum of 3 percent is considered adequate (see 10 Cal. Code Reg. § 260.140.118.2)*] of the initial capital of the Partnership as specified in Paragraph 3.01 of this Agreement and _____ percent [*specify, e.g.*, 3] of the cash available for distributions from operations, as defined in Paragraph 3.07(e) of this Agreement, of the Partnership for each fiscal year, shall be set aside in and credited to the reserve account of the Partnership.

Reinvestments Prohibited

3.10. The Partnership shall not reinvest cash available for distribution from operations or cash available from sale and refinancing, as those terms are defined in Paragraph 3.07, but rather shall distribute all such amounts as provided in Paragraph 3.07 [*or authorize reinvestment on terms authorized by Commissioner's regulations (see 10 Cal. Code Reg. §§ 260.140.114.4, 260.140.116.9, 260.140.118.3); also, if reinvestment of proceeds from sale or refinancing is authorized, comply with all regulations for "non-specified property" limited partnership (see § 29C.201)*].

[*Continue:*]

For purposes of this Paragraph, "reinvestment" does not include the placement of funds held as reserves or short-term deposits (90 days or less) to fund distributions to Partners.

Repurchase of Partnership Units

3.11. (a) Voluntary Repurchases. The Partnership shall have the right, but not the obligation [*if mandatory repurchases are required under certain circumstances, add:* (except as otherwise provided in subparagraph (b), below)], to repurchase any of the Partnership Units outstanding. This right may be exercised at any time and under any circumstances determined necessary by the General Partner, but only if the General Partner determines, for each proposed repurchase, that payment of the repurchase price will not impair the capital or operation of the Partnership. The purchase price paid for any Partnership Units shall not exceed that determined in accordance with subparagraph (d), below.

[*Optional; use if partnership will be required to repurchase under certain circumstances:*]

(b) Conditionally Mandatory Repurchase. Subject to the limitations stated in this Paragraph 3.11, the Partnership shall repurchase Partnership Units under the following circumstances:

(1) The owner of the Partnership Units dies or becomes legally incapacitated;

(2) The owner of the Partnership Units suffers a substantial reduction in net worth or income. For purposes of this requirement, "substantial reduction in net worth or income" means an involuntary loss of at least 50 percent in income or net worth during the year in which the repurchase of Partnership Units occurs. In no event may the Partnership repurchase Partnership Units under the circumstances described in this subparagraph unless the Partnership has sufficient cash to make the purchase; the purchase will not violate applicable legal requirements; and for any fiscal year of the Partnership, not more than 15 percent of the outstanding Partnership Units are repurchased by the Partnership. Units described in this subparagraph shall be repurchased in the order in which a written request is received for their repurchase by the Partnership, but only to the extent the Partnership is able to make the repurchase in compliance with the limitations stated in this subparagraph. The purchase price for Partnership Units may not exceed the amount stated in subparagraph (d) below.

[*Continue:*]

(c) Limited Repurchase Reserve Account. The General Partner shall establish on behalf of the Partnership a special account to be known as the "Limited Repurchase Reserve Account" ("Account"). This account shall be funded by depositing in the account _____[*describe method and source of funding, e.g.,* 2 percent of the net proceeds of the Partnership derived from the public offering of its Units (after deduction of underwriting commissions and estimated expenses of the offering)]. All funds shall be invested _____[*describe, e.g.,* in the same manner as funds held in the reserve account described in Paragraph 3.09 of this Agreement]. Any income earned by the investment of these funds must be retained in the account [*or* may be retained in the account or transferred to the general account of the Partnership, at the discretion of the General Partner *or describe other disposition*].

[*Include either of the following:*]

The repurchase of Partnership Units permitted [*if mandatory repurchases are required, add:* and conditionally required] under this Paragraph shall be paid solely from the Limited Repurchase Reserve Account and to the extent there are no available funds in that Account, any repurchase shall not be made by the Partnership.

[*OR*]

The repurchase of Partnership Units permitted [*if mandatory repurchases are required, add*: and conditionally required] under this Agreement shall be paid first, to the full extent available, from the Limited Repurchase Reserve Account. In the event additional funds are required for a repurchase, the General Partner shall determine whether or not other Partnership funds are available for a particular repurchase within the limitations expressed and conditions stated in subparagraph (a) [*if optional subparagraph (b) is used, add:* and subparagraph (b)] of this Paragraph].

(d) Purchase Price. The purchase price for each Partnership Unit shall be _____[*describe formula or method for determining price, e.g.,* the price per Unit stated in Paragraph 3.03 of this Agreement, less any cash distributions from the sale or refinancing of Partnership property previously made to the owner of the unit (including the original Limited Partner and any subsequent assignee of the original Limited Partner)].

Limit on Partnership Indebtedness

3.12. Following initial capitalization of the Partnership described in Paragraph 3.01, the Partnership shall at no time incur indebtedness that exceeds the sum of _____[*specify percentage which may not exceed 80 percent*] percent of the aggregate purchase price of Partnership properties that have not been refinanced, and _____ percent [*specify percentage which may not exceed 80 percent*] of the aggregate fair market value of all refinanced Partnership properties, as determined by the lender as of the date of refinancing. For purposes of this paragraph only, the term "indebtedness" includes the principal of any loan together with any interest that may be deferred pursuant to the terms of the loan agreement that exceeds five percent per annum of the principal balance of the indebtedness (excluding contingent participations in income and/or appreciation in the value of the Partnership property). The term excludes any indebtedness incurred by the Partnership for necessary working capital.

ARTICLE 4.
MANAGEMENT AND INVESTMENT

Management by General Partner

4.01. Except as expressly provided otherwise in this Agreement, the General Partner has full and complete management and control of the Partnership business and affairs. This authority includes, but is not limited to, the power to do any of the following:

(a) Sell, exchange, and convey any property of the Partnership, whether real or personal or mixed, except that the General Partner may not sell, convey, or encumber all or substantially all of the Partnership assets other than in the ordinary course of the Partnership's business, without the approval of at least 51 percent of the Partnership Units owned by Limited Partners.

(b) Borrow money and incur obligations on behalf of the Partnership in the name and on the credit of the Partnership, and as security for the repayment of any such obligations to mortgage or otherwise encumber property of the Partnership.

(c) Negotiate, execute, and modify leases of real or personal property owned by the Partnership in the name and on behalf of the Partnership.

(d) Prepay in whole or in part, refinance, increase, modify, or extend any obligation affecting the property of the Partnership.

(e) Authorize the purchase of and payment for by the Partnership, at a reasonable price, of all goods and materials that are necessary for prudent operation of the Partnership.

(f) Employ or retain from time to time at the expense of the Partnership, at a reasonable rate of compensation, persons who render services required for the prudent operation and maintenance of the Partnership business.

(g) Pay all attorneys' fees and accountants' fees and other organization and offering expenses incurred in the formation of the Partnership and sale of Partnership Units, provided these expenses do not exceed _____ percent [*specify percentage, up to maximum of 15 percent*] of aggregate capital contributions to the Partnership.

(h) Pay a competitive real estate commission for the sale of Partnership property, provided that the total commission paid to all persons for the sale of any Partnership property may not exceed _____ percent [*specify percentage, up to maximum of 6 percent*].

(i) Cause the Partnership to comply with all federal and state laws applicable to a California limited partnership.

(j) Execute, acknowledge, and deliver any and all instruments in writing required to effectuate any of its other powers.

Nonexclusive Services of General Partner

4.02. The General Partner shall devote itself and so much of its time to the business of the Partnership as it, in its sole discretion, deems necessary to the efficient and successful conduct of that business. The General Partner, now and at any time in the future, may engage in any other business or enterprise for its own account, including a business or enterprise that may be similar in nature to that of the Partnership.

Fiduciary Duty to Keep Funds and Assets

4.03. The General Partner has a fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in the General Partner's immediate possession or control. The General Partner may not employ, or permit another to employ, funds or assets of the Partnership in any manner except for the exclusive benefit of the Partnership. A Limited Partner may not waive or otherwise contract away the fiduciary duty owned to the Limited Partner by the General Partner under common law.

Payment of Expenses

4.04. All operating and administrative expenses of the Partnership must be billed directly to the Partnership, in the name of the Partnership, and must be paid by the Partnership from the total net revenue received by it from its properties.

[*If desired, add any of following, as appropriate for particular partnership:*]

Notwithstanding, the General Partner may be reimbursed by the Partnership for any of the following that have been paid directly by the General Partner: organization and offering expenses not to exceed 15 percent of aggregate capital contributions to the Partnership, acquisition expenses provided for in Paragraph 4.05(b), the actual costs of goods and materials used for or by the Partnership and obtained from any person or entity unaffiliated with the General Partner, reasonable and necessary administrative services provided by the General Partner (such as legal, accounting, or investor communication services) [*if General Partner provides property management services to Partnership (see P 4.07), add:* , and the actual, reasonable, and customary costs of on-site property management personnel].

[*Continue:*]

In no event may the General Partner be reimbursed by the Partnership for any of the following: any services for which the General Partner is entitled to a separate fee either under this Agreement or by other written agreement; administrative items that fall under the general category of overhead (including, but not limited to, rent or depreciation, utilities, capital equipment); or any administrative items incurred or allocated to any controlling person of the General Partner (as that term is defined in *Section 260.140.114.5(c) of Title 10 of the California Code of Regulations*) including, but not limited to salaries, fringe benefits, and travel expenses.

Payment of Acquisition Fees and Expenses

4.05. (a) Acquisition Fee. The Partnership may pay an acquisition fee(s) for services actually rendered and for services to be rendered directly or indirectly to the Partnership. As used in this Paragraph, "acquisition fee" means the

total of all fees and commissions paid by any party in connection with the purchase or development of property by the Partnership, except a development fee paid to a person not affiliated with the General Partner, in connection with the actual development of a project after acquisition of the land by the Partnership. Any real estate commission, acquisition fee, selection fee, development fee, non-recurring management fee, or any fee of a similar nature, however designated, shall be included in the computation of these fees or commissions. Total acquisition fees to all persons or entities may in no event exceed _____[*specify, e.g., an amount up to 18 percent of gross proceeds of the offering or other lesser percentage customary for similar activity in same geographical location for comparable property*].

[*If any acquisition fee will be paid to General Partner or affiliate, add:*]

The General Partner [*or name of affiliate*] shall receive an acquisition fee equal to $_____[*specify*], but that amount shall be reduced to the extent that other real estate commissions, acquisition fees, finder's fees, or other similar fees or commissions are paid to the General Partner [*or name of affiliate*] by any other person in connection with the transaction.

[*If Partnership will make multiple property acquisitions, add:*]

The limitations imposed above on the amount of any acquisition fee shall be applied separately to each property acquisition, with the _____[*use same percentage as above*] percent limitation computed on that portion of the gross proceeds of the Partnership offering (adjusted to include a pro rata amount of any organization and offering expenses of the Partnership) applicable to the property that is the subject of the transaction.

[*Continue:*]

Within 30 days of the _____[last] acquisition of property by the Partnership, the General Partner shall forward to the California Commissioner of Corporations a schedule that describes each acquisition made, the purchase price paid, the aggregate of all acquisition fees paid on each transaction, and such other information as the Commissioner may require. The schedule shall be verified by the General Partner under penalty of perjury.

(b) Acquisition Expenses. The Partnership shall pay only necessary and reasonable acquisition expenses. "Acquisition expenses" include, but are not limited to, legal fees and expenses, travel and communication expenses, cost of appraisals, nonrefundable option payments on property not acquired by the Partnership, accounting fees and expenses, title insurance, and miscellaneous expenses related to the selection and acquisition of properties, whether or not ultimately acquired by the Partnership. Subject to the exceptions described in this subparagraph (b), all acquisition expenses shall be billed directly to and paid by the Partnership. The Partnership may reimburse the General Partner for the actual cost of acquisition expenses incurred by the General Partner prior to the time the Partnership had available funds to pay the expenses but only if the expenses consist of goods or services provided to the Partnership by persons who are unaffiliated with the General Partner. Notwithstanding this exception, the Partnership may not directly pay or reimburse the General Partner or its affiliate for acquisition expenses consisting of salaries, fringe benefits, or miscellaneous expenses related to the evaluation, selection or acquisition of properties, unless those expenses reduce the amount of the acquisition fee permitted under subparagraph (a), above.

Partnership Management Fee

4.06. As a promotional interest and program management fee, the General Partner shall receive the amounts described in Paragraph 3.07 of this Agreement [*or if partnership property is unimproved land or government subsidized project or if general partner will be paid "asset based" fee, provide for alternative discussed in § 29C.200[1][f] and*

also revise Paragraphs 3.07 and 3.08].

[*Optional: use Paragraph 4.07 if eligible general partner (see § 29C.120, P 4) will provide property management services:*]

Real Property Management Fee

4.07. Pursuant to separate written contract, the General Partner shall provide all property management services to the Partnership that are necessary to the prudent operation of the Partnership and shall at all times provide adequate staff to perform these services. The contract may be modified in any material respect only by a vote of a majority in interest of Limited Partners and shall permit termination without penalty on 60 days' written notice. The General Partner shall be paid a real property management fee equal to _____[*specify amount of fee, which is usually a percentage of yearly gross revenues, with specific maximum percentage that varies depending on type of property and geographic location (see 29C.130[3[[b], P 6; 10 Cal. Code Reg. § 260.140.113.8(a))*]. All amounts paid for bookkeeping services and fees paid to persons unaffiliated with the General Partner for property management services shall be included in this property management fee. [*If actual cost of on site property management personnel is to be paid in addition to basic property management fee, add:* The property management fee payable under this subparagraph does not include the actual cost of on site property management personnel that the General Partner is authorized, at the expense of the Partnership, to employ for the prudent management and operation of the Property].

Real Estate Brokerage Commission on Resale of Property

4.08. The total compensation paid to all persons for the sale of a Partnership property shall not exceed a competitive real estate commission based on the geographic location of the property, and in any event, may not exceed six percent of the contract price for the sale of the property. Neither the General Partner nor any affiliate of the General Partner may be granted an exclusive right to sell or exclusive employment to sell any property of the Partnership.

[*If general partner will provide brokerage services, add:*]

If the General Partner provides a substantial amount of real estate brokerage services in the sale of any Partnership Property, the General Partner may receive a real estate brokerage commission equal to _____ percent [*specify percentage, up to maximum of 3 percent*] of the sale price of the property, provided the commission is subordinated in the same manner as the distributions payable to the General Partner under Paragraph 3.07 of this Agreement. If the General Partner participates with an independent broker in the resale of property, only the commission earned by the General Partner need be subordinated.

[*Optional: use Paragraph 4.09 if eligible general partner (see § 29C.120, P 5) will provide insurance brokerage services:*]

Insurance Services Provided by General Partner

4.09. The General Partner may provide insurance brokerage services in connection with obtaining insurance on the Partnership property, but only if the cost of providing the insurance, including the cost of the insurance, is no greater than the lowest quote obtained from two unaffiliated insurance agencies and the coverage and terms are likewise comparable.

Conflict of Interest Restrictions

[*The restrictions below are not mandatory; rather, the described actions are permitted if certain conditions and requirements of the Commissioner's regulations are satisfied (see § 29C.130[3][c], PP 4-11, and § 29C.130[3][b], P 5 (detailed list of conditions and requirements).*]

4.10. The Partnership shall not, and the General Partner shall have no power or authority to allow or permit the Partnership to:

(a) Purchase or lease property in which the General Partner or an affiliate of the General Partner has an interest;

(b) Sell or lease property to the General Partner or any affiliate of the General Partner;

(c) Obtain financing (permanent or otherwise) from the General Partner or its affiliate;

(d) Make a loan to the General Partner or any affiliate of the General Partner [*if optional paragraph 4.16(e) is used, add:* , except as provided in Paragraph 4.16(e) of this Agreement];

(e) Acquire any property from any other real estate syndicate in which the General Partner or its affiliate has an interest;

(f) Exchange Partnership Units in the Partnership for any property other than money;

(g) Invest in general partnership or joint venture with any other entity;

(h) Invest in general partnership interests of any other limited partnership;

(i) Invest in limited partnership interests of any other limited partnership; or

(j) Permit the General Partner or any affiliate of the General Partner to construct or develop Partnership properties, or render any services in connection with that development or construction.

Rebates and Reciprocal Arrangements

4.11. The General Partner may not accept or receive any rebates, kickbacks, or similar payments because of transactions involving the Partnership, nor may the General Partner participate in any reciprocal business arrangements that would circumvent the provisions of this Paragraph, this Agreement, or any provision of law. The General Partner, underwriter, dealer or salesman of Limited Partnership Units may not directly or indirectly pay or award any finder's fees, commissions, or other compensation to any person engaged by a potential Limited Partner for investment advice as an inducement to that advisor to advise or recommend the purchase of Limited Partnership Units. This latter prohibition does not prohibit the lawful payment of a sales commission ordinarily payable to a registered broker-dealer or other properly licensed person for selling Limited Partnership Units.

Commingling and Interests in Other Partnership

4.12. Except as this Agreement may specifically otherwise authorize, the funds of the Partnership shall not be commingled with the funds of any other entity or person.

Mortgage Financing

4.13. (a) Permitted Financing. Except as provided in subparagraph (c), below, all mortgage financing obtained by the Partnership or retained on any property acquired by the Partnership must provide for one of the following:

(1) Equal periodic payments (except for differences attributable to adjustable rate loans) on a schedule sufficient to fully amortize the loan over a 20-40-year period;

(2) Payments of interest only for a period not greater than 10 years, with the remaining balance payable in equal periodic payments on a schedule sufficient to fully amortize the loan over a 20-30-year period;

(3) Payments of a portion of stated interest currently, and the deferral of remaining interest for a period not greater than 5 years, with the remaining principal and interest payable in equal periodic payments on a schedule sufficient to fully amortize the loan over a 20-35-year period (provided that the amount of deferred interest is included in calculating the 25 percent exception referred to in subparagraph (c), below).

(b) Balloon Payments. The Partnership shall not obtain any financing (including all-inclusive and wrap-around loans and interest-only loans) that provides for any balloon payment to become due any sooner than the earlier of either: ten years from the date the Partnership acquires the property, or two years beyond the anticipated holding period of the property stated in the Partnership prospectus (provided that no balloon payment may become due sooner than seven years from the date the Partnership acquires the property).

(c) Inapplicability of Restrictions. The restrictions described in subparagraphs (a) and (b), above, do not apply to the following:

(1) Financing representing, in the aggregate, 25 percent or less of the total purchase price of Partnership properties or 25 percent or less of the fair market value of properties that have been financed subsequent to acquisition;

(2) Interim financing, including construction financing, with a full take-out commitment for financing that complies with subparagraphs (a) or (b), above; or

(3) The Partnership establishes a reserve equal to the amount of any balloon payment and holds the reserve for the purpose of the balloon payment.

Execution of Conveyances

4.14. The General Partner has and is granted full power and authority to sign, execute, acknowledge, and deliver in the name and on behalf of the Partnership any deed, deed of trust, lease, contract of sale, bill of sale, or other instrument as to property owned by, held by, or being purchased by the Partnership.

Appraisal of Real Property

4.15. All real property acquired by the Partnership shall be appraised by a competent, independent appraiser before it is acquired by the Partnership, and the acquisition price to the Partnership must be supported by the appraisal. A copy of any appraisal obtained by the Partnership must be maintained in the General Partner's records for at least 5 years after the date of the appraisal.

Indemnification of General Partner

4.16. (a) General Restrictions. Except as otherwise provided in this Paragraph 4.16, the Partnership shall not indemnify the General Partner for any liability or loss suffered by the General Partner, and shall not hold the General Partner harmless for any loss or liability suffered by the Partnership, unless:

(1) The General Partner has determined, in good faith, that the course of conduct that caused the loss or

liability was in the best interests of the Partnership;

(2) The General Partner was acting on behalf of or performing services for the Partnership; and

(3) The liability or loss was not the result of gross negligence or gross misconduct by the General Partner.

(b) Indemnification by the Partnership or the Partnership's agreement to hold the General Partner harmless under the circumstances described in subparagraph (a), above, is recoverable only from and may be enforced only against the assets of the Partnership and not from or against the Limited Partners, individually or collectively.

(c) Notwithstanding subparagraph (a), above, the General Partner shall not be indemnified for any losses, liabilities, or expenses arising from or out of an alleged violation of federal or state securities laws unless:

(1) There has been a successful adjudication on the merits of each count involving alleged securities law violations as to the particular indemnitee;

(2) The claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee; or

(3) A court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and related costs should be made (provided that prior to seeking court approval, the court has been apprised of the position of the California Commissioner of Corporations and the Securities and Exchange Commission with respect to indemnification for securities laws violations).

(d) The Partnership shall not pay or incur the cost of any portion of liability insurance that insures the General Partner for any liability for which the General Partner may not be indemnified under this Agreement.

[*Optional:*]

(e) The Partnership may advance funds to the General Partner for legal expenses and other costs incurred as a result of any legal action, but only under the following circumstances:

(1) The legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the Partnership;

(2) The legal action is initiated by a third party who is not a Limited Partner, or legal action is initiated by a Limited Partner and a court of competent jurisdiction specifically approves the advancement; or

(3) In cases in which the General Partner is not entitled to indemnification under the provisions of this Agreement, the General Partner agrees in writing and undertakes to repay any advanced funds [*if obligation must be secured, add:* and that agreement and undertaking is secured as follows _____ (*describe security required*)].

ARTICLE 5.
ASSIGNMENT AND TERMINATION OF INTERESTS

[*Optional; use Paragraph 5.01 to prohibit general partner from assigning or encumbering its interest in partnership:*]

Assignment by General Partner

5.01. The General Partner may not assign or encumber its interest in the Partnership. [*If Paragraph 5.06 (Alternative 1) is used, add:* However, if the General Partner ceases to be General Partner of the Partnership and becomes a Limited Partner as provided in Paragraph 5.06, the former General Partner may assign its interest in the Partnership to the same extent and subject to the same limitations as a Limited Partner, as provided in Paragraph 5.02.]

Assignment by Limited Partners

5.02. A Limited Partner may assign and transfer any full, but not fractional, Partnership Units owned by the Partner at any time. The assignment shall be effective as to the Partnership when a written notice of assignment for the assigned Partnership Units signed by the Assignor and specifying the name and address of both the Assignor and Assignee are received by the General Partner at the principal place of business of the Partnership.

5.03. [Reserved]

Death of Limited Partner

5.04. If a Limited Partner who is an individual either dies, the deceased Limited Partner's personal representative or other legal representative may exercise the rights of a transferee under *Corporations Code Section 15907.02*. For purposes of settling the estate, the representative may exercise the rights of a current limited partner under *Corporations Code Section 15903.04*.

Termination of General Partner

5.05. (a) Causes of Dissociation of General Partner. The General Partner shall cease to be a General Partner of the Partnership on the occurrence of any of the events specified in *Corporations Code Section 15906.03*, including voluntary withdrawal from the Partnership, or removal in accordance with Paragraph 2.06(b) of this Agreement.

(b) Election to Continue Business or Dissolve. During the period beginning on the occurrence of any event that results in the General Partner ceasing to be a General Partner and ending _____[*specify time period (see Corp. Code § 15908.01; see also 10 Cal. Code Reg. § 260.140.116.2(a))*] thereafter (the "transition period"), the Limited Partners shall vote, as provided in Paragraph 2.06 of this Agreement, either: (1) to dissolve and wind up the Partnership; or (2) to continue the existence of the Partnership, in which event they shall also elect a new General Partner. For purposes of continuing the existence of the Partnership, an election by the Limited Partners to continue the existence of the Partnership shall be effective as of the date the General Partner ceased to be a General Partner of the Partnership. Failure by the Limited Partners to elect a new General Partner within the transition period shall be deemed to be a vote by the Partnership to dissolve and wind up.

[*Optional:*]

Effective immediately on the occurrence of any event that causes the General Partner to cease to be General Partner of the Partnership, _____[*name of entity or individual*] shall serve as successor General Partner of the Partnership for the limited purposes of continuing the existence of the Partnership and preserving the tax status of the Partnership. The successor General Partner shall have no authority under this Agreement or otherwise to manage or control the Partnership and shall not take any action that adversely affects the Partnership or the Limited Partners. The successor General Partner shall serve only until such time as the Limited Partners either vote to dissolve the Partnership or to elect a new General Partner to continue the business of the Partnership.

Rights of Terminated General Partner

5.06. (a) Valuation of Interest. If the General Partner ceases to be a General Partner of the Partnership and the business of the Partnership continues, the new General Partner shall determine all amounts then accrued and owing to the terminated General Partner and the then present fair market value of the terminated General Partner's interest in the Partnership. These determinations shall be made not later than _____[*specify time period, e.g.,* 120 days after occurrence of the event that caused the General Partner to cease to be General Partner of the Partnership]. The fair market value of the terminated General Partner's interest shall be the amount the terminated General Partner would receive upon dissolution and termination of the Partnership, assuming that the dissolution or termination occurred on the date of the terminating event and the assets of the Partnership were sold for their then fair market value without any compulsion on the part of the Partnership to sell the assets. However, from the fair market value so determined shall be deducted any damages resulting to the Partnership from a General Partner's voluntary withdrawal from the Partnership in breach of this Agreement. The valuation by the new General Partner of the fair market value of the terminated General Partner's interest (as adjusted, if necessary, for damages described above) shall be deemed approved by the terminated General Partner and shall become binding on it unless within 30 days after receiving the written valuation, the former General Partner notifies the new General Partner in writing of an objection to the valuation. In that case, the matter shall be settled by arbitration under the then current rules of the American Arbitration Association. Judgment on arbitration awards may be entered by any court with appropriate jurisdiction. The costs of this arbitration shall be borne equally by the terminated General Partner and the Partnership.

(b) Payment of Interest. Not later than _____[*specify, e.g,* 30 days after final agreement or judicial determination of the fair market value of the terminated General Partner's interest in the Partnership], the Partnership shall pay to a terminated General Partner the fair market value of the terminated General Partner's interest in the Partnership, as determined in accordance with subparagraph (a), above. Payment of this amount shall terminate all interests of the terminated General Partner in Partnership income, losses, distributions, and capital provided for under this Agreement. Payment to the terminated General Partner shall be made as follows: _____[*describe fair method of payment which protects solvency and liquidity of partnership, e.g., see examples listed in 10 Cal. Code Reg. § 260.140.111.6*].

ARTICLE 6.
PARTNERSHIP MEETINGS

Call and Place of Meetings

6.01. Meetings of the Limited Partners to vote on any matters that the Limited Partners are entitled to vote on may be called at any time by the General Partner, or by one or more Limited Partners holding not less than 10 percent of the outstanding limited partnership interests by delivering a written request for a meeting to the General Partner. Meetings shall be held at the Partnership's principal place of business designated in Paragraph 1.04.

Notice of Meeting

6.02. The General Partner shall give written notice of a meeting to all Limited Partners entitled to vote at the meeting. This notice shall be given either personally or by first class mail not less than 10 nor more than 60 days prior to the date of the meeting. The notice shall state the place, date, and hour of the meeting. If the meeting has been called by one or more Limited Partners pursuant to Paragraph 6.01, the meeting date must be set for the date specified in the written request for a meeting delivered to the General Partner, provided that date is not less than 15 nor more than 60 days after the date on which the request is received by the General Partner. The notice shall also state the general nature of business to be transacted and shall be accompanied by a detailed statement of the proposed action, including a verbatim statement of the wording of any resolution proposed for adoption by the Limited Partners and of any proposed amendment to this Agreement. Notice of any meeting must be accompanied by proxies or written consents that specify

a choice between approval and disapproval of each matter to be acted upon at the meeting.

Quorum

6.03. A quorum at any meeting of Limited Partners must consist of _____[*specify, e.g.*, a majority of the voting power of the Limited Partners, represented in person or by proxy]. The Limited Partners present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment, notwithstanding the withdrawal of enough Limited Partners to leave less than a quorum, if the action taken, other than adjournment, is approved by the requisite percentage of Partnership Units specified in this Agreement.

Adjournment for Lack of Quorum

6.04.

[*See Paragraph 6.05 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Action Without Meeting by Written Consent

6.05.

[*See Paragraph 6.06 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Proxies

6.06.

[*See Paragraph 6.07 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Fixing Record Date

6.07.

[*See Paragraph 6.08 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

ARTICLE 7.
BOOKS, RECORDS, AND REPORTS

Books of Account

7.01. At all times during the continuance of the Partnership, the General Partner shall keep complete and accurate books of account in which all matters relating to the Partnership, including all income, expenditures, assets, and liabilities, shall be entered. The books of account shall be kept on a _____[cash *or* accrual] basis of accounting in accordance with generally accepted accounting practices.

Access to Books and Records

7.02. The books of account of the Partnership and all records of the Partnership shall be maintained by the General Partner at the address specified in Paragraph 1.04 of this Agreement and shall be available, on request, for inspection and copying by any Limited Partner or the Partner's designated representative at all times between 9:00 A.M. and 5:00 P.M. Monday through Friday, federal and California legal holidays excepted.

Fiscal Year

7.03. The fiscal year of the Partnership shall end on the _____ day of _____[*month*] each year.

Required Records

7.04. The General Partner shall keep at the address specified in Paragraph 1.04 of this Agreement all of the following records:

(a) A current list of the full name and last known street or mailing address of each Partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order

(b) A copy of the initial Certificate of Limited Partnership, any certificates of amendment or restatement, and executed copies of any powers of attorney pursuant to which any certificate has been executed.

(c) Copies of the Partnership's federal, state, and local income tax or information returns and reports, if any, for the six most recent taxable years.

(d) Copies of this Agreement and any amendments to the Agreement.

(e) Financial statements of the Partnership for the six most recent fiscal years.

(f) A copy of any filed certificate of conversion or merger.

(g) A copy of any record made by the Partnership during the past three years of any consent given by or vote take of any partner pursuant to the Uniform Limited Partnership Act of 2008 or this Partnership Agreement.

(h) Unless contained in partnership agreement made in record:

(1) Amount of cash, and description and statement of agreed value of other benefits, contributed and agreed to be contributed by each partner;

(2) Times at which or events upon which additional contributions agreed to be made by each partner are to be made;

(3) For person that is both general and limited partner, specification of what transferable interest person owns in each capacity; and

(4) Any events upon which limited partnership will be dissolved and activities wound up.

Access to Records by Limited Partners

7.05. Each Limited Partner has the right, on 10 days' demand to inspect and copy during normal business hours any of the Partnership records required to be maintained pursuant to Paragraph 7.04 of this Agreement, provided, however, that the Limited Partner shall pay any reasonable copying charge imposed by the Partnership.

Information Regarding Partnership Activities

7.06. A limited partner has the right to obtain from the Partnership, during regular business hours at a reasonable location specified by the Partnership, true and full information regarding the state of the activities and financial

condition of the Partnership and other just and reasonable information regarding its activities if:

(1) The Limited Partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

(2) The Limited Partner makes the demand in a record received by the Partnership, describing with reasonable particularity the information sought and purpose for which sought; and

(3) The information sought is directly connected to the Limited Partner's purpose.

Annual Financial Report

7.07. Not less than 120 days after the end of each fiscal year of the Partnership, the General Partner shall cause to be prepared and distributed to each Limited Partner an annual report containing:

(a) Audited financial statements for the fiscal year (balance sheet, statement of income, statement of partners' equity, and statement of cash flows) prepared in accordance with generally accepted accounting principles, accompanied by an independent auditor's report (which may contain a qualified opinion or explanatory paragraph).

(b) A report of the Partnership activities during the period covered by the report.

(c) A schedule of all distributions to Limited Partners, identifying the source of each distribution.

(d) A schedule of all compensation paid and distributions made to the General Partner or its affiliates, which includes a description of the services performed and identifies the source of each distribution, and also includes a breakdown of costs reimbursed to the General Partner (with verification of the allocation of these costs to the Partnership by an independent certified public accountant).

[*If limited partners were previously provided with forecasts of predicted future results of Partnership operations, add:*]

(e) A table comparing forecasts previously provided to the Limited Partners of predicted future results of Partnership operations with actual results of Partnership operations for the period covered by the report.

Tax or Information Return Data

7.08. Not later than 75 days after the end of the Partnership's fiscal year, the General Partner shall cause to be prepared and distributed to each Limited Partner all information necessary for the preparation of the Limited Partners' federal and state income tax or information returns.

[*Use Paragraph 7.09 only if partnership agreement authorizes levying of assessments against limited partners (see 10 Cal. Code Reg. § 260.140.116.8) or if partnership permits deferred payments for purchase of limited partnership interests (see 10 Cal. Code Reg. § 260.140.118.1):*]

Other Required Reports

7.09. Within 75 days after the end of the Partnership's fiscal year, the General Partner shall provide the following to the Limited Partners: (1) a detailed statement of any assessments levied against Limited Partners during the fiscal year, including a description of how and where the proceeds derived from the assessments were applied; and (2) for any fiscal year in which there remains an unpaid balance of mandatory deferred payments for the purchase of Limited Partnership interests, a detailed statement of the status of all mandatory deferred payments, actions taken by the Partnership in

response to any defaults, and a discussion and analysis of the impact of the outstanding payments on capital requirements of the Partnership.

[*Use Paragraph 7.10 only if syndicate is registered under Section 12 of Securities Exchange Act of 1934:*]

Quarterly Financial Report

7.10. Within 60 days after the end of each quarter of the Partnership, the General Partner shall provide to each Limited Partner a quarterly report containing:

(a) A balance sheet, which may be unaudited;

(b) A statement of income for the quarter, which may be unaudited;

(c) A cash flow statement for the quarter, which may be unaudited; and

(d) Any other pertinent information regarding the Partnership and its activities during the quarter.

[*If assessments on limited partners are authorized (see Paragraph 3.06 (second alternative) of this agreement), add:*]

(e) A detailed statement of any assessments levied against Limited Partners during any quarter, with a description of how and where the proceeds derived from the assessments were applied.

[*If partnership permits purchase of limited partnership interests on mandatory deferred payment basis, add:*]

(f) For any quarter in which there remains an unpaid balance of mandatory deferred payments for the purchase of Limited Partnership interests, a detailed statement of the status of all mandatory deferred payments, actions taken by the Partnership in response to any defaults, and a discussion and analysis of the impact of outstanding payments on capital requirements of the Partnership.

Records of Investor Suitability

7.11. The Partnership shall maintain for a period of at least four years the following information for each Limited Partner: (1) A record of the information obtained to determine that the Limited Partner meets the purchaser suitability standards set forth in the Prospectus; and (2) either a representation by the Limited Partner that he or she is investing for his or her own account or information indicating that the Limited Partner for whose account the investment was made met the suitability standards.

Retention of Real Property Appraisals

7.12. All real property appraisals obtained by the Partnership shall be maintained for at least 5 years after the date of the appraisal.

Agent of Limited Partner

7.13. Any right granted to a Limited Partner under this Agreement to request, inspect, or copy Partnership records or information may be exercised by a Limited Partner's agent, attorney, or other authorized representative, provided the Partnership is provided with written authorization, signed by the Limited Partner.

ARTICLE 8.
DISSOLUTION OF PARTNERSHIP

Events Causing Dissolution

8.01. Notwithstanding any other provision of this Agreement, the Partnership shall terminate and dissolve upon the first to occur of the following events:

(a) The written decision of the General Partner and a majority in interest of the Limited Partners to dissolve and terminate the Partnership.

(b) The expiration of the term of the Partnership as stated in Paragraph 1.06 of this Agreement.

(c) The General Partner ceases to be General Partner under circumstances described in Paragraph 5.05, unless before the end of that period the Limited Partners owning a majority of the rights to receive distributions as Limited Partners consent to continue the activities of the Limited Partnership and admit at least one General Partner, and at least one person is admitted as a General Partner in accordance with the consent.

(d) The Partnership's last Limited Partner ceases to be a Limited Partner, unless before the end of the period specified in *Corporations Code § 15908.01(d)* the Partnership admits at least one Limited Partner.

(e) Pursuant to an action filed by a Partner, a court of competent jurisdiction decrees the dissolution of the limited partnership.

Responsibility for Winding Up

8.02. Upon dissolution of the Partnership, the affairs of the Partnership shall be wound up by the General Partner or, if there is no General Partner, by a person appointed in accordance with *Corporations Code Section 15908.03*. If the Limited Partners wind up the Partnership's affairs, they _____[shall *or* shall not] be entitled to reasonable compensation.

Liquidation and Distribution

8.03. The person or persons responsible for winding up the affairs of the Partnership pursuant to Paragraph 8.02 of this Agreement shall take full account of the Partnership assets and liabilities and shall liquidate the assets of the Partnership as promptly as is consistent with obtaining their fair value. Subject to the requirements of Paragraph 2.09, the proceeds shall be applied and distributed in the following order:

(a) To creditors, including partners who are creditors to the extent permitted by law, in satisfaction of liabilities of the Partnership other than liabilities for any of the following:

(1) Distributions, if any, that may be owing to Partners under Paragraph 3.07 of this Agreement; or

(2) Distributions, if any, that may be owing to a former General Partner under Paragraph 5.06.

[*Continue with priority, e.g.:*]

(b) To Partners in satisfaction of distributions owing to them under Paragraph 3.07 and to a former General Partner in satisfaction of any amount owing under Paragraph 5.06.

ARTICLE 9.
MISCELLANEOUS

Definition of "Affiliate"

9.01. For purposes of this Agreement, an "affiliate" of the General Partner means the following:

(a) Any persons directly or indirectly controlling, controlled by or under common control with the General Partner;

(b) Any person owning or controlling ten percent or more of the outstanding voting securities or beneficial interests of the General Partner;

(c) Any officer of, director of, partner of, trustee of, or anyone acting in a substantially similar capacity with respect to, the General Partner;

(d) Any person who is an officer, director, partner, trustee, or holder of ten percent or more of the voting securities or beneficial interests of any person described in subparagraphs (a)-(c), above; or

(e) Any entity of which any of the persons described in subparagraphs (a)-(d), above, is an officer, director, partner, or trustee, or with respect to which the General Partner serves in a substantially similar capacity.

Amendment of Agreement

9.02. This Agreement may be amended by the General Partner with the written consent or affirmative vote of at least a majority of the outstanding interests of the Limited Partners. The Agreement may also be amended by a majority of the outstanding interests of the Limited Partners, without the necessity of obtaining the concurrence of the General Partner.

Notices

9.03.

[*See Paragraph 10.01 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Governing Law

9.04.

[*See Paragraph 10.02 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Binding on Heirs and Assigns

9.05.

[*See Paragraph 10.03 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Counterparts

9.06.

[*See Paragraph 10.04 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

Sole and Only Agreement

9.07.

[*See Paragraph 10.04 of § 29B.200 in Ch. 29B, Nonpublic Real Estate Syndicates*].

This Limited Partnership Agreement has been executed by the General Partner on the date first above written. Each Limited Partner has executed the Agreement by placing his or her signature on a "Signature Page" attached to the Agreement and delivering that Signature Page to the General Partner.

GENERAL PARTNER

[*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

SIGNATURE PAGE FOR LIMITED PARTNERS

The undersigned hereby executes the Limited Partnership Agreement dated _____ for _____[*name of partnership*], a limited partnership.
_____ Dated:

_____ [*signature of limited partner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29C California Legal Forms--Transaction Guide § 29C.201

§ 29C.201 Limited Partnership Agreement Provisions for Nonspecified Property Syndicate

[1] Comment

[a] Use of Form

This form contains various provisions for a limited partnership agreement of a nonspecified property real estate syndicate [*see § 29C.12* (definition)]. The provisions cover matters regulated by the Commissioner's special regulations for this type of syndicate [*see 10 Cal. Code Reg. §§ 260.140.115.1-260.140.115.6*]. A nonspecified property syndicate is subject to these special regulations, in addition to all of the other general regulations that apply to a real estate syndicate subject to qualification with the California Commissioner of Corporations [*see 10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1*]. For a detailed outline of the regulatory requirements that pertain to the provisions of this form, see *§ 29C.130[3][c]*, P 12. For the most part, the provisions below may be added to the complete partnership agreement in *§ 29C.200[2]*, with appropriate renumbering of paragraphs and other revisions made as necessary for internal consistency.

By definition, a limited partnership is considered to be a nonspecified property syndicate under either of the following circumstances: (1) the partnership, at the time of its initial qualification is effective, has 75 percent or less of the net proceeds from its initial offering allocated to the purchase, construction, or improvement of specific properties; or (2) the partnership permits the reinvestment of proceeds obtained from the sale or refinancing of partnership properties [*see 10 Cal. Code Reg. § 260.140.110.2(o)*; *see also § 29C.200[1][e]*]. If the partnership is considered a nonspecified property syndicate under the first set of circumstances, the first provision in the form below, which describes the business and purpose of the partnership, should be substituted for Paragraph 1.03 of the agreement in *§ 29C.200[2]* since that Paragraph 1.03 describes an appropriate business purpose for a specified property syndicate. If the partnership is considered a nonspecified property syndicate under the second set of circumstances described above, the partnership agreement in *Section 29C.200[2]* must be modified to authorize the reinvestment of sale or refinancing proceeds and to change the distributions otherwise payable to partners [*see § 29C.200[1][e]*].

[b] Other Regulatory Requirements

Some of the Commissioner's regulations for a nonspecified property syndicate do not apply specifically to the

partnership agreement but rather pertain to the formation and operation of the limited partnership. For example, a nonspecified property syndicate may not commence business until it has obtained minimum gross proceeds from its initial offering of at least $1,000,000 (after payment of all organizational and offering expenses) [*10 Cal. Code Reg. § 260.140.115.1*]. Also, the experience requirements for a general partner of a nonspecified property syndicate are more stringent than those that apply to the general partner of a specified property syndicate [*see 10 Cal. Code Reg. § 260.140.115.2*]. The partnership prospectus must also contain additional information not specifically required for a specified property syndicate prospectus [*see 10 Cal. Code Reg. §§ 260.140.115.3, 260.140.115.6*; *see also, e.g.* Article 4, second, third, and fourth paragraphs of form].

[2] FORM

Limited Partnership Agreement Provisions for Nonspecified Property Syndicate

ARTICLE 1. FORMATION OF PARTNERSHIP

Business and Purpose of Partnership

_____. The purpose of the Partnership is to acquire, own, operate, improve, lease, and sell income-producing real property and to engage in any and all general business activities related or incidental to that purpose. [*If partnership is limited as to type of property in which it may invest, add:* The Partnership shall invest its capital in the following types of real property only: _____ (*describe type of property, e.g., office buildings or new apartment projects or other*)].

ARTICLE 3. CAPITAL AND FINANCE

[*Optional:*]

Temporary Investment of Proceeds

_____. Until the time the net proceeds received by the Partnership from the initial offering of Partnership Units are invested in real property, the proceeds may [*or* shall] be temporarily invested in short-term highly liquid investments that provide appropriate safety of principal, such as United States Treasury Bonds or Bills [*or designate specific type of investment that meets these requirements*].

Refund of Uninvested Proceeds

_____. Any net proceeds received by the Partnership from its initial offering of Partnership Units that are not invested in real property within the later of two years from the effective date of the Partnership's qualification with the California Commissioner of Corporations or one year after the Partnership's initial offering is terminated [*if approved by Commissioner for partnership that provides for deferred payments for Partnership interests, add:* or six months from the last scheduled mandatory deferred payment date for the purchase of Partnership Units] shall, except for any amounts that may be necessary for operating capital of the Partnership, be distributed to the Limited Partners, in accordance with the number of Partnership Units owned by each, as a return of their capital contribution.

ARTICLE 4. MANAGEMENT AND INVESTMENT

Specific Investment Restrictions

_____. (a) Unimproved Property. The Partnership shall not acquire any unimproved or non-income producing property unless it is able to do so on terms that can be financed by the proceeds received by the Partnership from its initial offering of Partnership Units or from the cash available for distribution from operations of the Partnership (as that term is defined in Paragraph _____[*specify (see § 29C.200[2], P 3.07(e) for example)*] of this Agreement). In any event, investments in unimproved or non-income producing property may not exceed _____ percent [*specify percentage which may not exceed 25 percent*] of the gross proceeds received by the Partnership from its initial offering of Partnership Units. For purposes of this limitation, properties that are expected to produce income within a reasonable period of time shall not be considered non-income producing, and two years shall be presumed to be a reasonable period of time.

(b) *Junior Trust Deeds*. The Partnership may not invest in junior trust deeds or other similar obligations, except for junior trust deeds that arise from the sale of Partnership properties.

Mortgage Financing

_____. All mortgage financing obtained to acquire Partnership properties, including, but not limited to, the use of any all-inclusive note or wrap-around mortgage and the maximum permitted financing leverage, shall satisfy the requirements set forth in the Partnership prospectus and all of the following requirements _____[*set forth all requirements, e.g., those in P 4.13 of § 29C.200[2]*].

Joint Venture Arrangements

_____. The Partnership shall not enter into any joint venture arrangements except as may be described in the Partnership prospectus.

[*Optional: use if general partner is also general partner of one or more other syndicates that seek to acquire property similar to that to be acquired by this syndicate:*]

Allocation of Property Acquisitions

_____. The General Partner does, and is permitted under this Agreement to, serve as general partner for one or more other real estate syndicates that seek to acquire real property similar in type to that which this Partnership will acquire. In allocating the acquisition of properties between or among this Partnership and any other syndicate(s), the General Partner shall at all times strictly adhere to the requirements of the acquisition allocation plan described in the Partnership prospectus.

ARTICLE 7. BOOKS, RECORDS, AND REPORTS

Special Reports of Acquisitions

_____. Until the proceeds received by the Partnership from the sale of Partnership Units have been fully invested or returned to the Limited Partners pursuant to Paragraph _____ of this Agreement, a Special Report of real property acquisitions shall be sent to all Limited Partners by the Partnership within 60 days after the end of each quarter during which the Partnership has acquired real property. [*Consider adding, if syndicate is registered under § 12 of Securities Exchange Act of 1934 (see 10 Cal. Code Reg. § 260.140.116.3(a)):* This report may be a part of the

quarterly report described in Paragraph _____ (*specify [see § 29C.200[2], P 7.10 for example]*) of this Agreement. Whether or not it is included in the quarterly report,] This special report shall contain the following information:

(a) The location and a description of the general character of all materially important real properties acquired or presently intended to be acquired by or leased to the syndicate, during the quarter.

(b) The present or proposed use of those properties and their suitability and adequacy for such use.

(c) The terms of any material lease affecting the property.

(d) The proposed method of financing, including estimated down payment, leverage ratio, prepaid interest, balloon payment(s), prepayment penalties, due-on-sale or encumbrance clauses, possible adverse effects of these clauses, and similar details of the proposed financing plan.

(e) A statement that title insurance and any required construction, permanent, or other financing and performance bonds or other assurances with respect to builders have been or will be obtained on all properties acquired.

(f) A statement of the amount of Partnership proceeds that remain uncommitted or unexpended, stated as both a dollar amount and percentage of the total amount of the Partnership's initial offering proceeds.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29C California Legal Forms--Transaction Guide § 29C.202

§ 29C.202 Cross-Reference Sheet for Application for Qualification

[1] Comment

[a] Use of Form

This form is a suggested format for the cross-reference sheet that must be submitted with an application for qualification of a real estate syndicate. The sheet must show the location in the prospectus, partnership agreement, or other documents or exhibits, of compliance with, or variance from, all of the provisions of the Commissioner's regulations for real estate syndicates [*10 Cal. Code Reg. § 260.140.110.1(c)*; *see 10 Cal. Code Reg. §§ 260.140.110.1-260.140.119.1* (applicable regulations)]. Requirements and/or provisions of designated regulations are specifically required to be included in the partnership agreement [*see 10 Cal. Code Reg. § 260.140.119.1*]. Part I of the cross-reference sheet below should be used to satisfy these requirements.

If the prospectus or partnership agreement contains any provision which varies from requirements of a regulation, the cross-reference sheet must contain a concise statement explaining and justifying each variance [*see* pt. III of cross-reference sheet]. If any of the regulations are inapplicable to a particular syndicate, a statement to that effect must be included in the cross-reference sheet [*10 Cal. Code Reg. § 260.140.110.1*; *see* pt. II of cross-reference sheet].

[b] General Applicability of Commissioner's Regulations

The guidelines contained in the Commissioner's regulations apply to qualifications of real estate syndicates in the form of limited partnerships but will also be applied by analogy to real estate programs in other forms. As a general rule, applications that do not conform to the standards contained in the Commissioner's regulations are looked upon with disfavor. However, where good cause is shown, certain guidelines may be modified or waived by the Commissioner [*10 Cal. Code Reg. § 260.140.110.1(a)*]. Where the individual characteristics of a particular program warrant modification from the regulatory standards, they will be accommodated to the extent possible if they are consistent with the spirit of the Commissioner's regulations [*10 Cal. Code Reg. § 260.140.110.1(b)*]. In the event of any conflict between requirements of the Securities and Exchange Commissioner and the Commissioner's regulations, the regulations do not apply [*10 Cal. Code Reg. § 260.140.110.1(d)*].

[2] FORM

Cross-Reference Sheet for Application for Qualification

CROSS-REFERENCE SHEET

This cross-reference sheet is submitted in conjunction with the application for qualification of [*name of limited partnership*], a limited partnership. Part I shows the location in the partnership agreement, prospectus, and application for qualification, where required provisions of the Commissioner's regulations for real estate programs [*10 Cal. Code Reg. §§ 260.140.110.1-260.240.119.1*] are covered. Part II lists all regulations that do not apply to this offering. Part III explains any provisions of this offering that vary from those contained in the regulations. All references and citations to "Regulations" are to Title 10 of the California Code of Regulations.

I. Location of Required Provisions

A. Limited Partnership Agreement

Regulation.....Location in Agreement

[*List all regulations set forth in 10 Cal. Code Reg. § 260.140.119.1 (regulations which must be included in partnership agreement) and, for each regulation, cross-refer to appropriate provision of partnership agreement where provisions of that regulation are covered. If any required regulations do not apply to particular partnership or if partnership agreement contains provisions which vary from requirements of these regulations, list those, as appropriate, in pt. II and pt. III, below.*]

B. _____ [Prospectus *or* Offering Circular *or other disclosure document*]

Regulation.....Location in Prospectus

[*List all of Commissioner's regulations which apply to the prospectus (or equivalent disclosure document)(e.g., see § 29C.131) and, for each regulation, cross-refer to appropriate provision of prospectus where provisions of that regulation are covered.*]

C. Application for Qualification

Regulation.....Location in Application or Exhibit

[*List all of Commissioner's regulations which apply to the application for qualification (e.g., see § 29C.121) and, for each regulation, cross-refer to appropriate provision of application (or exhibit) where provisions of that regulation are covered.*]

II. Inapplicable Regulations

The following regulations are inapplicable to this offering: [*list all inapplicable regulations, if any*].

[*If necessary, add*:]

III. Variances From Regulations

The _____[*relevant document(s), e.g., partnership agreement, prospectus, application for qualification or other*] contains the following provisions that vary from the Commissioner's regulations, for the reason(s) stated: [*describe specific variation and concisely explain or justify variance*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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13-29C California Legal Forms--Transaction Guide § 29C.203

§ 29C.203 Limited Partner Information Sheet

[1] Comment

[a] Use of Form

This form is an information sheet that should be completed by every potential investor in a real estate syndicate when the offering and sale of interests in the syndicate must be qualified by the California Commissioner of Corporations. The syndicate sponsor [*see 10 Cal. Code Reg. § 260.140.110.2(z)*; *§ 29C.14 [1]* (definition)] may then use this form to satisfy the investor suitability and recordkeeping requirements of the Commissioner [*see* [b], [c], *below*].

For a limited partner information sheet that incorporates the requirements of several exemptions from the qualification and registration requirements of California and federal securities laws, see Form 29B.203 in Ch. 29B, *Nonpublic Real Estate Syndicates*.

[b] Investor Suitability Requirements

Because of the limited transferability, lack of liquidity, and the risks associated with investments in real estate syndicates, the sponsor and each person selling syndicate interests on behalf of the sponsor or syndicate must be cautious concerning the persons to whom the securities are marketed. The Commissioner will impose suitability standards that are reasonable in view of these inherent risks and the type of syndicate to be offered. In determining how restrictive the suitability standards must be, the Commissioner will consider the type of program and the existence of such factors as high leverage, tax implications, mandatory deferred payments, balloon payments financing, excessive investments in unimproved land, and the prospect of uncertain or no cash available for distribution from operations. Programs that involve more than ordinary investor risk should emphasize suitability standards for investors of high net worth or income [*10 Cal. Code Reg. § 260.140.112.1*]. By regulation, the Commissioner has outlined, for various types of offerings, specific standards based on gross income or net worth (or a combination of these) by which a potential investor may be determined to be "presumptively suitable' [*see 10 Cal. Code Reg. § 260.140.112.3*]. These standards are outlined in *Section 29C.122[1]*.

The sponsor (and each person selling syndicate interests on behalf of the sponsor or syndicate) must make every

reasonable effort to assure that those persons being offered or sold syndicate interests, by reason of their educational, business, or financial experience, can be reasonably assumed to have the capacity to understand the fundamental aspects of the program and to meet the applicable suitability investment standards. In addition, the sponsor or its representatives must ascertain that the investor can bear the economic risk of an investment in the syndicate and that the syndicate interests are appropriate for the investor's investment objectives, portfolio structure, and financial situation [*10 Cal. Code Reg. § 260.140.112.2*].

[c] Recordkeeping Requirements

A syndicate sponsor must maintain the following for at least four years [*10 Cal. Code Reg. § 260.140.112.4*]:

(1) A record of the information obtained to determine that an investor meets the suitability standards for investment in the syndicate; and

(2) Either a representation by the investor that he or she is investing for his or her own account, or information indicating that the investor for whose account the investment was made met the suitability standards. If the offering is underwritten or sold by a broker-dealer, the sponsor must obtain a commitment from the broker-dealer to maintain the same record of information [*10 Cal. Code Reg. § 260.140.112.4*].

[2] FORM

Limited Partner Information Sheet

LIMITED PARTNER INFORMATION SHEET

(Please complete separate sheet for each person signing Subscription Agreement)

Name: _____ Social Security No.: _____

Age: _____ Occupation: _____

Spouse's Name: _____ Spouse's Age: _____

Spouse's Social Security No.: _____

Home Address: _____

Home Telephone No.: _____

Present Employer: _____

Business Address: _____

Business Telephone No.: _____

No. of Years in Occupation: _____

Education: [ ] High School
[ ] College Degree (specify):
[ ] Other (specify):
California Drivers License No.: _____
Place of Voter Registration in California: _____

Approximate Annual Gross Income: $_____
Approximate Net Worth (exclusive of home, home furnishings, and automobiles): $_____

The following is a description of the knowledge and/or experience I have in financial and business matters that I feel will enable me to evaluate the merits and risks of this investment: _____

I am making this investment for my own account.

I will file a: [ ] Joint Income Tax Return
[ ] Separate Income Tax Return
[ ] Other (specify):
Correspondence concerning this investment should be sent to my:
[ ] Home
[ ] Office

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on _____[*date*] at _____, California.

SUBSCRIBER

[*signature of subscriber*]
[*typed name*]
[*street address*]
[*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 29C PUBLIC REAL ESTATE SYNDICATES
PART IV. FORMS

13-29C California Legal Forms--Transaction Guide § 29C.204

§ 29C.204 Subscription Agreement--Nonexempt Offering Subject to Impound Condition

[1] Comment

[a] Use of Form

This form is a subscription agreement to purchase limited partnership interests in a California real estate syndicate that must qualify with the California Commissioner of Corporations and that is subject to an impound condition imposed by the Commissioner [*see* [c] and [d], *below*]. It also contains representations concerning investor suitability requirements imposed by the Commissioner [*10 Cal. Code Reg. §§ 260.140.112.1-260.140.112.4*; *see* [2], P 3(c), *below*]. These requirements are discussed in *Section 29C.122[1]*. The agreement also contains representations and other matters required to establish an "intrastate exemption" from registration under federal securities law [*see* [b], *below*].

[b] Federal Intrastate Exemption

Syndicates subject to the Commissioner's qualification requirements often attempt to assert one or more federal exemptions in order to avoid the expensive and time-consuming federal securities registration requirements. The requirements of the federal intrastate exemption [*see 15 U.S.C. § 77c(a)(11)*; *17 C.F.R. § 230.147*] are incorporated into this form [*see* [2], PP 2, 3(b), (f), *below*] because it is frequently asserted by issuers and because it may be available to syndicates even though they do not qualify for any exemption from California registration. For a discussion of the specific requirements of this exemption, see the comment to 29B.202 in Ch. 29B, *Nonpublic Real Estate Syndicates*. For discussion of various federal exemptions, see *§ 29B.40* in the Legal Background of that chapter.

For a subscription agreement that may be used by a syndicate that is exempt from qualification in California, see Ch. 29B, *Nonpublic Real Estate Syndicates*, § 29B.303[2].

[c] Commissioner's Impound Condition

The sale of limited partnership interests in a real estate syndicate that must be qualified in California must normally be subject to an impound [*10 Cal. Code Reg. § 260.140.118.6*]. Whether the standard impound requirements applicable to the sale of securities [*see 10 Cal. Code Reg. §§ 260.141.20-260.141.27*] will be imposed on a real estate syndicate is

determined by the Commissioner on a case-by-case basis. This subscription agreement incorporates the standard requirements for an impound condition [*see* [2], P 6, *below*] and these requirements are discussed below. The impound requirements are also included in the limited partnership agreement in this chapter [*see § 29C.200[2]*, P 3.04].

An impound condition requires that all funds received from the sale of securities subject to the condition be placed in a separate escrow account with an approved depositary, which will normally be a national bank located in California or a California bank [*10 Cal. Code Reg. §§ 260.141.21, 260.141.23(a)*]. To obtain the Commissioner's approval of a depositary, the issuer must submit a separate application containing prescribed information [*see 10 Cal. Code Reg. § 260.141.23(b)*].

Ordinarily, the order imposing the impound condition specifies a minimum amount of money that must be raised by a certain date [*see 10 Cal. Code Reg. §§ 260.141.20, 260.141.24(a), 260.141.25(a)*]. If the specified amount of impounds has not been obtained as of the date stated in the impound condition, the Commissioner will issue an order directing the depositary to return to each subscriber the amount he or she has paid for the securities [*10 Cal. Code Reg. § 260.141.25(a)*]. In unusual cases, an extension may be granted [*see 10 Cal. Code Reg. § 260.141.25(b)*]. An issuer who satisfies the Commissioner's conditions must apply to the Commissioner for an order authorizing the release of impounds [*see 10 Cal. Code Reg. § 260.141.24(b)*].

[d] Requirements for Subscription Agreement

When an impound condition is imposed, the issuer must deliver to each subscriber a subscription agreement in a form approved by the Commissioner [*10 Cal. Code Reg. § 260.141.22*]. The Commissioner has not approved an official subscription form, but any subscription agreement must (and the form below does) set forth the following minimum information: (1) the complete names and addresses of the issuer and the subscriber; (2) the complete name of the agent of the issuer or broker receiving the payment; (3) the number of securities purchased and the total purchase price; (4) the amount of the payment received; (5) the complete name and address of the depositary with whom the payment will be placed; and (6) the date of the payment. In addition, the subscription agreement should contain the following statement: "This subscription is made pursuant to, and is subject to, the terms and conditions of the qualification approved by the Commissioner of Corporations of the State of California for _____ [*name of issuer*] under date of _____ [*date of qualification*]" [*10 Cal. Code Reg. § 260.141.22(a)*; *see* [2], P 1, *below*].

Subscription agreements must be consecutively numbered and prepared in quadruplicate. The original copy must be given to the subscriber, the first copy to the depositary together with the payment received, the second copy to the issuer, and the third copy must be retained by the broker (if any) unless the Commissioner approves another form of subscription agreement. For example, the Commissioner may require that the subscription agreements be press-numbered [*10 Cal. Code Reg. § 260.141.22(a)*]. If securities are paid for in installments, each subscriber must be given a receipt, in a form satisfactory to the Commissioner, for each installment payment made subsequent to the first payment [*see 10 Cal. Code Reg. § 260.141.22(b)*].

[2] FORM

Subscription Agreement--Nonexempt Offering Subject to Impound Condition

SUBSCRIPTION AGREEMENT

This subscription is made pursuant to, and is subject to, the terms and conditions of the qualification approved by the Commissioner of Corporations of the State of California for _____[*name of issuer*], under date of _____[*date of qualification*].

_____ [*Name of limited partnership in capital letters*]

A California Limited Partnership

To: _____[*name of limited partnership*]
c/o _____[*name of security dealer or broker*]

To whom it may concern:

Subscription

1. I subscribe for and agree to purchase at the price of $_____ per Partnership Unit the number of Partnership Units in _____[*name of limited partnership*], a California Limited Partnership, set forth below immediately above my signature. I understand this subscription may be rejected by _____[*name of general partner*], the general partner of the Limited Partnership ("the General Partner").

Exemption From Federal Registration

2. I stipulate that I understand the Partnership Units described in this Agreement are being offered and sold without registration under the federal Securities Act of 1933 on the ground that registration is not required because these Partnership Units qualify for the intrastate exemption of that Act. I understand that the applicability of this exemption to this transaction depends in part on the accuracy of the representations made by me in this Agreement and in the "Limited Partner Information Sheet" attached to and made a part of this Agreement. I declare that the representations made by me in this Agreement and in the "Limited Partner Information Sheet" are true and correct to the best of my knowledge and are intended by me to be relied on by the General Partner in determining my eligibility to purchase the Partnership Units described in this Agreement.

Representations

3. I certify, represent, and warrant that:

(a) I have received a full copy of the Limited Partnership Agreement executed by the General Partner for the Limited Partnership and a copy of the Prospectus [*or* Offering Circular *or other similar disclosure document*] dated _____, for the Partnership Units described in this Agreement.

(b) I am a bona fide resident of and I have my principal residence in the State of California, and this Subscription Agreement has been presented to and executed by me in California.

(c) I have either: _____[*describe minimum investor suitability standards (the following is an example only based on 10 Cal. Code Reg. § 260.140.112.3; see § 29C.122[1])*]

(1) A minimum annual gross income of $30,000 and a net worth of $30,000 (exclusive of my home, home furnishings, and automobiles); or

(2) A minimum net worth of $75,000 (exclusive of my home, home furnishings, and automobiles).

(d) I am aware that it is unlikely that the Partnership Units described in this Agreement will be registered with the Securities and Exchange Commission, and that the limited partnership issuing the Partnership Units and its General Partner have no obligation or intent to so register those Partnership Units.

(e) I am also aware that the possibility of a public market developing for the Partnership Units described in this

Agreement is unlikely and thus Rules 144 and 237 of the Securities and Exchange Commission, which authorize the routine sales of unregistered securities without investment letters in limited amounts, are inapplicable to these securities.

(f) I understand that transferability of the Partnership Units described in this Agreement is limited by rules of the Securities and Exchange Commission, that they can be transferred only subject to the following conditions, and that any certificate or other document evidencing them must bear the following legend: "The Limited Partnership Interests evidenced by this document have not been registered under the Securities Act of 1933 on the grounds that they are exempt from such registration requirement under the intrastate offering exemption set forth in Section 3(a)(11) of that Act. Therefore, during the period in which Partnership Units are being offered and sold by the limited partnership above named, and for a period of nine months from the date of the last sale of Partnership Units by such limited partnership, all resales of any such Partnership Units by any person shall be made only to persons who are a resident of the State of California at the time of resale."

(g) I have not relied in executing this Agreement and making the above purchase on any representations not contained in the Limited Partnership Agreement or the Prospectus [*or* Offering Circular *or other required disclosure document*] for the Partnership Units described in this Agreement.

Adoption of Partnership Agreement

4. I adopt, accept, and agree to be bound by all the terms and conditions of the Limited Partnership Agreement of the Limited Partnership.

[*If special power of attorney will be granted to general partner, add:*]

Special Power of Attorney

5. _____[*Describe power, e.g., see* 29B.202, Paragraph 6 in Ch. 29B, *Nonpublic Real Estate Syndicates*].

Payment for Subscription

6. I enclose with this Subscription Agreement my check payable to "_____[*name of bank*]--Escrow Holder" for the full amount of the purchase price of the Partnership Units for which I have subscribed in this Agreement.

Title to Partnership Units

7. The Partnership Units being purchased pursuant to this Agreement will be owned by, and should be shown on the partnership records as held in the names of (please print) _____ and _____ as:

[ ] Community Property [ ] Joint Tenants

[ ] Tenants in Common [ ] Separate Property

[ ] Other (please indicate whether corporation, trust, single person, etc.):

Number of Partnership Units Being Purchased:

Total Purchase Price: $_____

MAKE ALL CHECKS, DRAFTS, AND MONEY ORDERS ISSUED IN PAYMENT OF THIS SUBSCRIPTION PAYABLE TO _____[*complete name of depositary*], ESCROW AGENT, _____[*complete address of depositary*], _____, CALIFORNIA.

EXECUTED on _____[*date*], at _____[*city*], California.

SUBSCRIBER

_____[*signature of subscriber*]
[*typed name*]
_____[*street address*]
_____[*city, state, zip*]

SUBSCRIPTION ACCEPTED:
_____[*date*]
_____[*name of general partner*]
By _____[*signature*]
_____[*title*]
Amount of payment received: $_____

BROKER-DEALER INFORMATION
Dealer's Name: _____
Main Office Address: _____
Registered Representative: _____
Address of Representative's Branch Office: _____
Dealer Authorized Signature: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSecurities RegulationPartnershipsReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawBlue Sky LawsOffer & SaleSecurities LawExemptions From RegistrationIntrastate Offerings & Recapitalizations



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION

13-30 California Legal Forms--Transaction Guide 30.syn

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.syn Synopsis to Chapter 30: SUBDIVISION REGULATION

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[2] Statutes

[3] Regulations

[4] California Attorney General Opinions

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§ 30.05 Law Reviews and Periodicals

§ 30.06 Text References

[1] Matthew Bender Sources

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§ 30.10 Governing Laws

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[b] Administration Consistent With Statutory Purposes

[c] Authority and Limitations on Supplemental Ordinances

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[c] Subdivisions Into Four or Fewer Parcels for Removable Commercial Buildings or by Public Entities

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[c] Vesting Tentative Map

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[e] Dedication and Public Easements

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Scope

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[1] Comment

[a] Use of Form

[b] Time Limitations

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[d] Insufficient Title or Interest

[2] FORM

Agreement Between Subdivider and Governmental Entity for Construction of Subdivision Improvements

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[b] Approval of Security

[c] Amount of Security

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[ii] Exemptions for Nonprofit Corporations

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[1] Comment--Use of Form

[2] FORM

Labor and Material Bond

§ 30.203 Notice of Election to Void Transaction

[1] Comment

[a] Use of Form

[b] Violations Leading to Voidability

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[i] In General

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Notice of Election to Void Transaction

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[1] Comment

[a] Use of Form

[b] Persons Responsible for Filing Consent

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[ii] Exemptions

[c] Owner's Dedication of Real Property

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[2] FORM

Owner's Statements of Consent and Dedication

§ 30.205 Owner's Grant of Easements

[1] Comment--Use of Form

[2] FORM

Owner's Grant of Easements

§ 30.206 Statement of Preparer of Map

[1] Comment

[a] Use of Form

[b] Required Contents

[2] FORM

Statement of Preparer of Map

§ 30.207 Statement or Certificate of Approval by City Engineer or County Surveyor

[1] Comment

[a] Use of Form

[b] Required Contents

[2] FORM

Statement or Certificate of Approval by City Engineer or County Surveyor

§ 30.208 Clerk's Certificate Regarding Special Assessment

[1] Comment

[a] Use of Form

[b] Required Contents

[2] FORM

Clerk's Certificate Regarding Special Assessment

§ 30.209 Certificate of Clerk of Board of Supervisors

[1] Comment--Use of Form

[2] FORM

Certificate of Clerk of Board of Supervisors

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§ 30.220 Notice of Intention for Standard Subdivision [RE Form 628 (Rev. 6/05)]

[1] Comment

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[1] Comment

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[b] Conditions for Reservation of Subdivision Interest

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Reservation Instrument [RE Form 612 (Rev. 1/04)]

§ 30.222 Receipt for Public Report [RE Form 614E (Rev. 6/05)]

[1] Comment--Use of Form

[2] FORM

Receipt for Public Report [RE Form 614E (Rev. 6/05)]

§ 30.223 Amendment/Renewal Application [RE Form 635 (Rev. 6/05)]

[1] Comment

[a] Use of Form

[b] Renewal of Final Subdivision Public Report

[i] In General

[ii] Filing Fees

[c] Renewal of Conditional Public Report

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§ 30.224 Expedited Amendment Application [RE Form 635A (Rev. 5/03)]

[1] Comment

[a] Use of Form

[b] When Expedited Process is Unavailable

[2] FORM

Expedited Amendment Application [RE Form 635A (Rev. 5/03)]

§§ 30.225-30.229 [Reserved]

§ 30.230 Registration Application for Out-of-State Subdivision [RE Form 626C Part II (Rev. 1/97)]

[1] Comment

[a] Use of Form

[b] Registration Required for Subdivisions in Other States

[c] Registration Not Required for Subdivisions Located Outside United States

[d] Required Form and Contents

[e] Submission Requirements

[f] Processing

[g] Term of Registration

[h] Disclaimers Required in Promotional Materials/Contracts for Out-of-State Offerings

[2] FORM

Registration Application for Out-of-State Subdivision [RE Form 626C Part II (Rev. 1/97)]

§ 30.231 Disclaimers Required for Subdivisions Located in Other States [Bus. & Prof. Code § 10249.8]

[1] Comment

[a] Use of Form

[b] Disclaimer Required in Promotional Materials

[c] Disclaimer Required in Contracts or Agreements or Prior to Contact with Subdivider

[2] FORM

Disclaimers Required for Subdivisions Located in Other States [Bus. & Prof. Code § 10249.8]

§ 30.232 Disclaimer Required for Subdivisions Located Outside United States [Bus. & Prof. Code § 10249.9]

[1] Comment

[a] Use of Form

[b] When and Where Disclaimer is Required

[2] FORM

Disclaimer Required for Subdivisions Located Outside United States [Bus. & Prof. Code § 10249.9]

§§ 30.233-30.249 [Reserved]

§ 30.250 Notice of Blanket Encumbrance

[1] Comment--Use of Form

[2] FORM

Notice of Blanket Encumbrance

§ 30.251 Notice of Special Tax

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Termination of Sale Agreement

[d] Effect of Noncompliance

[2] FORM

Notice of Special Tax

Reviewed by Edward L. Shaffern*

FOOTNOTES:

(n8)Footnote *. Edward L. Shaffer reviewed the coverage in this chapter of the Subdivision Map Act. Mr. Shaffer is a partner in Norris & Norris, heading their land use practice. He holds a J.D. from Hastings College of the Law, a Masters Degree in City and Regional Planning from Rutgers University, and a B.A. in Urban Government from Boston University. Mr. Shaffer previously worked for eight years as a city planner and planning consultant. His legal practice emphasizes land use, environmental review, and development regulation, as well as general real estate. Mr. Shaffer coauthored chapters in Matthew Bender's California Environmental Law and Land Use Practice treatise. He currently serves on the Editorial Board and writes case commentaries for Matthew Bender's monthly California Environmental Law Reporter.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION

13-30 California Legal Forms--Transaction Guide Scope

AUTHOR: Reviewed by Edward L. Shaffer

Scope

Reviewed by Edward L. Shaffern* Scope

This chapter discusses the laws and regulations that cover the creation of subdivisions. It is designed primarily for use by counsel representing the owner of real property to be subdivided and sold. It may, however, be used by counsel for any party involved in the process of creating or selling subdivided lands. Part II of this chapter provides a discussion of the law applicable to subdivision creation and sales in California. It focuses primarily on the Subdivision Map Act [*Gov. Code § 66410 et seq.*] and the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*]. For coverage of the Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1701 et seq.*], which may apply to certain transactions also covered by this chapter, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Chapter 22, *Development and Subdivision* (Matthew Bender).

Part III of this chapter sets forth the procedures that counsel for a developer must follow to obtain the necessary approval for the subdivision of land and/or the sale or lease of interests in land that has already been subdivided. Part IV of this chapter contains forms for use in connection with those procedures. It reproduces several official forms promulgated by the California Department of Real Estate (DRE) for use in connection with transactions covered by the Subdivided Lands Act and indicates how those official forms may be obtained from the DRE.

This chapter also discusses the provisions of California law that govern the sale or lease, within California, of out-of-state subdivision interests. Further, it covers "land projects," which are subject to somewhat stricter regulation than standard subdivisions.

Subdivisions are to a large extent regulated by local municipalities. Thus, counsel must consult the laws of the city or county where the subdivision is to be located to ensure compliance with specific local requirements.

Most of the statutory requirements discussed in this chapter apply to all types of subdivisions. However, this chapter does not specifically cover special requirements applicable to common interest subdivisions or common interest developments, generally referred to as "condominium projects," "planned developments," "stock cooperatives," or "time share projects." For comprehensive coverage of common interest subdivisions and common interest developments, see Ch. 33A, *Time-Share Projects* , Ch. 33B, *Membership Camping Contracts* , Ch. 33C, *Stock Cooperatives* , Ch. 33D,

Planned Developments , and Ch. 34, *Condominiums* . Special requirements for mobilehome parks are also not covered in this chapter [*see* Ch. 39, *Mobilehome Parks*].

A complete discussion of the many environmental laws and regulations applicable to land development is beyond the scope of this chapter. For a discussion of those laws and regulations, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

FOOTNOTES:

(n9)Footnote *. Edward L. Shaffer reviewed the coverage in this chapter of the Subdivision Map Act. Mr. Shaffer is a partner in Norris & Norris, heading their land use practice. He holds a J.D. from Hastings College of the Law, a Masters Degree in City and Regional Planning from Rutgers University, and a B.A. in Urban Government from Boston University. Mr. Shaffer previously worked for eight years as a city planner and planning consultant. His legal practice emphasizes land use, environmental review, and development regulation, as well as general real estate. Mr. Shaffer coauthored chapters in Matthew Bender's California Environmental Law and Land Use Practice treatise. He currently serves on the Editorial Board and writes case commentaries for Matthew Bender's monthly California Environmental Law Reporter.



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A. Primary Sources

13-30 California Legal Forms--Transaction Guide § 30.01

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.01 California Sources

[1] Constitution

Takings. *Cal. Const., art. I, § 19.*

[2] Statutes

Out-of-state land promotions. *Bus. & Prof. Code § 10249 et seq.*

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Senior citizen housing development. *Civ. Code § 51.3.*

Notice of community facilities district tax. *Gov. Code § 53341.5.*

Creation of public easement by covenant. *Gov. Code §§ 65870-65875.*

Development agreements. *Gov. Code § 65864 et seq.*

Review and approval of development projects (Permit Streamlining Act). *Gov. Code § 65920 et seq.*

Subdivision Map Act. *Gov. Code § 66410 et seq.*

Parcel maps. *Gov. Code §§ 66430, 66445-66450, 66463.*

Processing of subdivision improvement plan. *Gov. Code § 66456.2*.

San Francisco Bay Conservation and Development Commission. *Gov. Code § 66600 et seq.*

Tahoe Regional Planning Agency. *Gov. Code § 66800 et seq.*

Tahoe Conservancy Agency Compact. *Gov. Code § 66900 et seq.*

California Tahoe Conservancy. *Gov. Code § 66905 et seq.*

California Tahoe Regional Planning Agency. *Gov. Code § 67000 et seq.*

Community development housing. *Health & Safety Code § 33000 et seq.*

California Environmental Quality Act of 1970. *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

[3] Regulations

Subdivided lands. *10 Cal. Code Reg. § 2790 et seq.*
Land projects. *10 Cal. Code Reg. § 2819.5 et seq.*

California Coastal Act. *14 Cal. Code Reg. § 13001 et seq.*

California Environmental Quality Act (CEQA). *14 Cal. Code Reg. § 15000 et seq.*

[4] California Attorney General Opinions

Local agency requirements under the California Environmental Quality Act (CEQA). 60 Ops. Cal. Atty. Gen. 335 (1977) .

Division of land--real estate broker's compliance with *Business and Professions Code Sections 11010, 11018.2. 59 Ops. Cal. Atty. Gen. 630 (1976)* .

Requirement of parcel map under Subdivision Map Act. 59 Ops. Cal. Atty. Gen. 581 (1976) .

Subdivision Map Act--requirements for creation of subdivision of five or more parcels. *59 Ops. Cal. Atty. Gen. 493 (1976)* .

Division of land under Subdivision Map Act--requirements of parcel map. *59 Ops. Cal. Atty. Gen. 239 (1976)* .

Approval of subdivision of land by cities and counties. *59 Ops. Cal. Atty. Gen. 129 (1976)* .

Applicability of Subdivision Map Act to a land developer's creation of several deeds of trust upon different portions of parcel or unit of land. *58 Ops. Cal. Atty. Gen. 408 (1975)* .

Filing of parcel map after division of land. *57 Ops. Cal. Atty. Gen. 388 (1974)* .

Filing a final map on a portion of a previously approved tentative map. *57 Ops. Cal. Atty. Gen. 239 (1974)* .

Applicability of Subdivision Map Act to acquisition of contiguous land parcel for construction of second building. *56 Ops. Cal. Atty. Gen. 509 (1973)* .

Applicability of Subdivision Map Act to construction of five or more buildings on one parcel of land. *56 Ops. Cal. Atty. Gen. 496 (1973)* .

Tax assessment of subdivisions spanning two tax code areas. *55 Ops. Cal. Atty. Gen. 132 (1972)* .

Right of California Real Estate Commissioner to refuse to issue permit for foreign subdivision. *54 Ops. Cal. Atty. Gen. 70 (1971)* .

Dividing or selling a portion of land within or contiguous to a prior subdivision. *52 Ops. Cal. Atty. Gen. 79 (1969)* .

Protection of purchaser's or lessee's money until legal title or leasehold interest is delivered free of those liens and encumbrances not assumed or taken subject to by purchaser or lessee. *39 Ops. Cal. Atty. Gen. 16 (1962)* .

Applicability of subdivision law to conveyance of undivided interest in a parcel to five persons who do not receive an exclusive right to occupy a portion of the property. *17 Ops. Cal. Atty. Gen. 79 (1951)* ; *38 Ops. Cal. Atty. Gen. 125, 128 (1961)* .

Applicability of subdivision law to division of land into 10 lots and subsequent conveyance of same to three members of family who, in turn, reconvey lots separately to others. 27 Ops. Atty. Gen. 66 (1956).



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[Reserved]

§§ 30.02[Reserved]



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13-30 California Legal Forms--Transaction Guide § 30.05

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.05 Law Reviews and Periodicals

Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution, 102 Harv. L. Rev. 992 (March 1989).*

Comment, *When Real Property Rights Vest in California: What Happens When a Plaintiff Has Not Secured Required Governmental Approvals, 28 Santa Clara L. Rev. 389 (1988).*

Bell, *California Opens the Door for Municipalities to Obtain Greater Revenue From Subdivision Exactions, 22 Real Prop., Prob. & Tr. J. 345 (1987).*

Note, *Single-Family Zoning: Ramifications of State Court Rejection of Belle Terre on Use and Diversity Control, 32 Hastings L.J. 1687 (1981).*

Cataline, *From the Legislature: Interstate Land Sales-- Tightening Consumer Protection*, 10 Real Estate L. J. 72 (1981).

Note, *The Pines v. City of Santa Monica: Redefining the focus of California's Subdivision Map Act, 16 Loyola L.Rev. 61 (1983).*

Note, *The Supreme Court of California 1974-1975, Application of the California Environmental Quality Act to Municipal Annexations of Land, 64 Calif. L. Rev. 239, 532 (1976).*

Kerr, *Guide to the Interstate Land Sales Full Disclosure Act: A Checklist for Developers*, 4 Real Estate L.J. 416 (1976).

Note, *Subdivision Land Dedication: Objectives and Objections, 27 Stan. L. Rev. 419 (1975).*

Comment, *Land Development and the Environment; The Subdivision Map Act, 5 Pacific L.J. 723 (1974).*



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AUTHOR: Reviewed by Edward L. Shaffer

§ 30.06 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice

ch. 579, *Zoning and Planning*.

California Legal Forms

ch. 22, *Options to Purchase Real Property*.

ch. 23, *Real Property Sales Agreements*.

ch. 24, *Exchanges of Real Property*.

ch. 25, *Real Estate Loans*.

ch. 25A, *Security Instruments for Real Estate Financing*.

ch. 26, *Real Property Escrows*.

ch. 27A, *Dedication.*

ch. 28A, *Easements and Licenses.*

ch. 30A, *Construction Financing.*

ch. 30B, *Zoning, Building, and Environmental Permits.*

ch. 33A, *Time-Share Projects*.

ch. 33B, *Membership Camping Contracts*.

ch. 33C, *Stock Cooperatives*.

ch. 33D, *Planned Developments*.

ch. 34, *Condominiums*.

ch. 34B, *Residential Leases.*

ch. 34C, *Commercial, Industrial, and Office Leases.*

California Real Estate Law and Practice

ch. 290, *The Subdivision Map.*

ch. 291, *Substantive Requirements of the Subdivision Map Act.*

ch. 292, *Procedural Requirements of the Subdivision Map Act.*

ch. 424, *Regulation of Subdivided Land Sales*.

Powell, The Law of Real Property

ch. 79, *Police Power Regulations Affecting Land*.

ch. 79C, *Zoning*.

Rabkin & Johnson, Current Legal Forms With Tax Analysis

ch. 22, *Development and Subdivision*.

[2] Additional Text References

Anderson, American Law of Zoning, vol 13, ch. 19, *Subdivision Controls*.

Miller & Starr, Current Law of California Real Estate (2d ed.), vol 14, ch. 24, *Subdivisions and Condominiums*.

Rohan, Zoning and Land Use Controls, Vol 7, ch. 45, *Subdivision Controls*.

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A. Overview

13-30 California Legal Forms--Transaction Guide § 30.10

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.10 Governing Laws

The division and sale of interests in subdivisions are primarily governed by the Subdivided Lands Act (SLA) [*Bus. & Prof. Code § 11000 et seq.*; *see § 30.40*] and the Subdivision Map Act (SMA) [*Gov. Code § 66410 et seq.*; *see § 30.20*]. State laws and local ordinances that do not conflict with the SMA, such as building, health, and zoning laws, also indirectly regulate subdivisions because they prevent subdivided developments from proceeding until developers have complied with the laws and the minimum standards imposed as conditions for granting approval or issuing permits [*see Pratt v. Adams (1964) 229 Cal. App. 2d 602, 605, 40 Cal. Rptr. 505* ; *see also Modesto Irrigation Dist. v. Modesto (1962) 210 Cal. App. 2d 652, 655-657, 27 Cal. Rptr. 90]* .

The Department of Real Estate (DRE) administers extensive regulations that are designed to implement the SLA [*see 10 Cal. Code Reg. § 2790 et seq.*; *see also Bus. & Prof. Code § 11001*]. Furthermore, governmental entities have the power to adopt local ordinances that regulate and control the design and improvement of subdivisions as long as those ordinances and regulations are not more restrictive than the provisions of the SMA [*see Gov. Code § 66421*]. Similarly, pursuant to their general police powers, cities and counties may adopt local ordinances that (1) do not conflict with the SMA [*see § 30.20[2]*] and (2) are reasonably related to the protection of the public health, safety, and general welfare [*Longridge Estates v. Los Angeles (1960) 183 Cal. App. 2d 533, 538-539, 6 Cal. Rptr. 900* (decided under former *Bus. & Prof. Code §§ 11500-11628*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide §§ 30.11-30.19

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[Reserved]

§§ 30.11[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.20

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.20 Subdivision Map Act

[1] "Subdivision" Defined

For purposes of the Subdivision Map Act (SMA) [*Gov. Code § 66410 et seq.*], a "subdivision" is the division by any subdivider of any unit or units of improved or unimproved land shown on the latest equalized county assessment roll as a unit or contiguous units for the purpose of immediate or future sale, lease, or financing [*Gov. Code § 66424*]. A "subdivider" is the person who causes land to be divided into a subdivision; in virtually all cases, the "subdivider" is the property owner and/or developer [*see Gov. Code § 66423*]. The mere fact that property is separated by roads, streets, utility easements, or railroad rights-of-way does not preclude it from being considered as "contiguous" for purposes of the SMA [*see Gov. Code § 66424*].

PRACTICE TIP:

Watch Out For Common Ownership of Nearby Property. Two pieces of land on opposite sides of a street owned by the same person may constitute one legal parcel, unless they were legally subdivided or otherwise qualify for separate handling. Thus a sale, lease, or financing of only one may constitute an illegal subdivision. Land has been found to be "contiguous" when separated by a highway; even land divided by a canal may be treated as only one parcel [*61 Ops. Cal. Atty. Gen. 299 (1978)] . By Edward Shaffer*

The definition of "subdivision" under the SMA specifically includes condominium projects [*Gov. Code § 66424*; *see Civ. Code § 1351(f)* (definition)], community apartment projects [*Gov. Code § 66424*; *see Civ. Code § 1351(d)* (definition)], and the conversion of five or more existing dwelling units to a stock cooperative [*Gov. Code § 66424*; *see Civ. Code § 1351(m)*]. For a discussion of these common interest developments, see Ch. 33A, *Time-Share Projects* , Ch. 33B, *Membership Camping Contracts* , Ch. 33C, *Stock Cooperatives* , and Ch. 33D, *Planned Developments* Ch. 34, *Condominiums*.

The definition of the term "development project," as used in the Permit Streamlining Act [*Gov. Code § 65920 et seq.*]

includes any project undertaken for the purpose of subdividing land pursuant to the SMA [*Gov. Code §§ 65927, 65928*]. Consequently, the term encompasses the preparation, processing, and approval of subdivision maps. Notwithstanding the provisions of the SMA, local agencies that regulate subdivisions are subject to the procedural requirements applicable to development projects under the Permit Streamlining Act [*Gov. Code § 65920(b)*].

[2] Purpose and Administration

[a] Authority of Cities and Counties to Administer SMA

The SMA governs the approval of subdivision maps filed by property owners and developers. It is administered by the cities and counties in which subdivisions are created [*see Gov. Code § 65000 et seq.*; *Cal. Const., Art. XI, § 7* (city or county may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws); *see also Gov. Code §§ 65800-65912* (city or county may adopt and administer zoning laws, ordinances, rules, and regulations)]. Each city or county has the power necessary to carry out the laws applicable to planning and land use either through an assigned planning agency or through its legislative body [*see, e.g., Clemons v. City of Los Angeles (1950) 36 Cal. 2d 95, 103-104, 222 P.2d 439* (ordinance prescribing minimum lot size is valid as promotion of public health and general welfare)]. The legislative body of each city and county may assign the functions of the planning agency to a planning department or one or more planning commissions, administrative bodies, hearing officers, and/or the legislative body itself. In the absence of such an assignment, the legislative body will carry out all of the functions of a planning agency [*Gov. Code § 65100*].

Under the SMA, regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency must, by ordinance, regulate the initial design and improvement of subdivisions [*Gov. Code § 66411*].

[b] Administration Consistent With Statutory Purposes

The manner in which the cities and counties administer the SMA may vary. However, the manner of administration must be designed to achieve the purposes of the SMA, which are to:

- Provide local regulation and control of design and improvement of nonexempt subdivisions [*Gov. Code § 66411*; *see 56 Ops. Cal. Atty. Gen. 496, 497 (1973)* (SMA is intended to encourage wholesome and orderly community development and to prevent fraud in real estate transactions); *see also Pratt v. Adams (1964) 229 Cal. App. 2d 602, 606, 40 Cal. Rptr. 505]* .

- Ensure that the proposed subdivision is consistent with applicable land use plans [*Gov. Code § 66473.5*; *see Woodland Hills Residents Assn., Inc. v. City Council (1975) 44 Cal. App. 3d 825, 838-839, 118 Cal. Rptr. 856* (decided under former *Bus. & Prof. Code § 11526*)].

- Prescribe dedication requirements [*see Gov. Code §§ 66475-66478*].

  PRACTICE TIP:
  Subdivision Law Not the Only Source of Conditions. The SMA authorizes a broad range of dedications, exactions, and other conditions to subdivision approval. Other possible sources of fees, dedications, design restrictions, ongoing maintenance obligations and other conditions include the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], general plan law [*Gov. Code § 65300 et seq.*], and the general police power of cities and counties to protect the public health, safety, and welfare. *By Edward Shaffer*

- Increase public access to public resources [*Gov. Code §§ 66478.1-66478.14*].

- Relieve the tax burden of the community involved by requiring that the subdivider initially improve the areas dedicated for public purposes [*see Gov. Code §§ 66462(a), 66477.1*; *see also Hoover v. Kern County (1953) 118 Cal. App. 2d 139, 142, 257 P.2d 492* (decided under former *Bus. & Prof. Code § 11611*)].

[c] Authority and Limitations on Supplemental Ordinances

Local agencies may enact supplemental ordinances applicable to the activities governed under the SMA [*see Gov. Code § 66411*]. However, supplemental ordinances must be reasonably related to the purposes and requirements of the SMA and may not be inconsistent with it [*see* Benny v. Alameda (1980) 105 Cal. App. 3d 1006, 1011-1012, 164 Cal. Rptr. 776] . For example, a city ordinance preconditioning the filing of a tentative map on compliance with zoning regulations is consistent with the authority of a city to disapprove a map when the project does not conform to zoning ordinances, or to condition its approval on future compliance [*see* Benny v. Alameda (1980) 105 Cal. App. 3d 1006, 1011-1012, 164 Cal. Rptr. 776] . In the event that current land use regulations would not allow the proposed development, the subdivider may be required to obtain other approvals, such as general plan amendment or rezoning, in addition to subdivision of the property.

PRACTICE TIP:

Beware of Need for Multiple Approvals. Although the Planning Commission ordinarily is the final decision maker for subdivisions (barring an appeal), only the legislative body (city council or board of supervisors) can approve most general plan and zoning amendments. When both types of approval are needed to allow the project, the subdivider normally will prefer following the most efficient procedure: to have the commission hold one combined hearing on both applications, vote to recommend council/board approval of the general plan/zoning amendment, and also vote to approve the subdivision *conditioned on approval of the amendment by the council/board*. However, some jurisdictions will require final action on the regulatory amendment before the subdivision application will be processed--either under a formal ordinance, as in *Benny v. Alameda*, or informally by custom. This may cause considerable delay. *By Edward Shaffer*

[3] Exemptions

[a] Miscellaneous Exemptions

A number of transactions that relate to the development and sale of subdivided land are specifically exempted from the requirements of the SMA. The SMA does not apply to the financing or leasing of apartments, offices, stores, or similar spaces in apartment, industrial, or commercial buildings or trailer or mobilehome parks [*Gov. Code § 66412(a)*]. It does not apply to mineral, oil, or gas leases [*Gov. Code § 66412(b)*]. It does not apply to land dedicated for cemetery purposes under the Health and Safety Code [*Gov. Code § 66412(c)*]. It does not apply to boundary line or exchange agreements to which the State Lands Commission or a local agency holding a trust grant of tide and submerged lands is a party [*Gov. Code § 66412(e)*]. Leases of land for agricultural purposes (defined as cultivating food or fiber, or grazing or pasturing livestock) are exempted under the SMA [*Gov. Code § 66412(k)*]. It is inapplicable to the leasing of, or the granting of an easement to, all or a portion of a parcel of land in conjunction with the financing, erection, and sale or lease of a wind-powered electrical generation device on the land if the project is subject to discretionary action by the appropriate advisory agency or legislative body [*Gov. Code § 66412(i)*]. It is inapplicable to the leasing or licensing of a portion of a parcel, or the granting of an easement, use permit, or similar right on a portion of a parcel, to a telephone corporation [*see Pub. Util. Code § 234* (definition)] exclusively for the placement and operation of cellular radio transmission facilities in connection with projects that are subject to discretionary action by an advisory agency or legislative body [*Gov. Code § 66412(j)*]. The SMA also does not apply to leasing or granting an easement in conjunction with the financing, erection, and sale or lease of either (1) a solar electrical generation device, or (2) a biogas project that utilizes agricultural waste or by-products from the land where the project is located and reduces

overall emissions of greenhouse gases from agricultural operations on the land; provided in either case that the project is subject to review either under other local agency ordinances regulating design and improvement, or by discretionary action by the local advisory agency or legislative body [*Gov. Code § 66412(l), (m)*]. It is important to remember that even when the SMA exempts a certain type of financing or leasing activity, *sale* of the same property still requires subdivision approval.

The SMA also is inapplicable to the conversion of either a community apartment project or a stock cooperative to a condominium if certain conditions are met [*Gov. Code § 66412(g), (h)*]. For a detailed discussion of those conditions, see Ch. 33C, *Stock Cooperatives* , and Ch. 34, *Condominiums* .

[b] Exclusion for Lot Line Adjustments

The SMA contains an exclusion for lot line adjustments between four or fewer adjoining legal parcels that satisfy detailed criteria. The land taken from one parcel must be added to an adjoining parcel, and a greater number of parcels than originally existed must not result. The lot line adjustment must be approved by resolution of a local agency or advisory agency. The local agency or advisory agency must limit its review and approval of the adjustment to a determination of whether or not the parcels resulting from the adjustment will conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances. Furthermore, the agency must not impose conditions or exactions on its approval except to (1) conform to local zoning and building ordinances, (2) require the prepayment of real property taxes prior to the approval of the lot line adjustment, or (3) facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map can be required as a condition to the approval. A recorded deed must reflect the adjustment; a record of survey is required only under limited circumstances. A local agency must approve or disapprove a lot line adjustment pursuant to the Permit Streamlining Act [*Gov. Code § 66412(d)*; *see Gov. Code § 65920 et seq.*; *see also § 30.23[2][b][ii]*].

PRACTICE TIP:

Fighting Over Lot Line Adjustments. Many planners think that lot line adjustments can only be used for "minor" changes in boundaries between two parcels. In fact, this procedure can be used to accomplish substantial changes to an already-approved subdivision, and is a useful tool. However, be prepared for a fight [*see San Dieguito Partnership, L.P. v. City of San Diego (1992) 7 Cal. App. 4th 748, 9 Cal. Rptr. 2d 440] . By Edward Shaffer*

PRACTICE TIP: Lot Line Adjustment May be Trap for the Unwary. Moving the boundary between existing parcels can violate the SMA if any property involved is subject to a lease or deed of trust. The end result may be that only part of a legal parcel is included within the leasehold or loan security--which will constitute an illegal subdivision unless covered by one of the SMA exemptions. The cooperation of all parties involved to revise the lease or deed and conform to the new parcel boundaries is needed to avoid a messy situation! *By Edward Shaffer*

[c] Subdivisions Into Four or Fewer Parcels for Removable Commercial Buildings or by Public Entities

If a local ordinance so specifies, the SMA is inapplicable to subdivisions of four parcels or less for construction of removable commercial buildings having a floor area of less than 100 square feet [*Gov. Code § 66412.5*]. If four or fewer parcels are created and the local jurisdiction does not impose its option to require a tentative parcel map [*see § 30.22[3][d]*], no subdivision approval is needed for a conveyance (via sale, lease, or easement) *to or from* a public entity (for example, school district, utility) [*Gov. Code § 66428(a)(2)*].

PRACTICE TIP:

Non-educational Use of School Property. The city/county will have no authority to require subdivision approval if a school district conveys part of its property by sale, lease, or easement. However, if the planned use of school property is not related to education (for example, housing development, flea

market), the use still must be consistent with zoning and other approvals (for example, use permit, design review) may be needed [*People v. Rancho Santiago College (1990) 226 Cal. App. 3d 1281, 277 Cal. Rptr. 69* ; *see Gov. Code §§ 53091, 53094*]. *By Edward Shaffer*

[d] Leasing or Financing of Commercial or Industrial Buildings on Single Large Parcel

Leasing or financing of separate commercial or industrial buildings on a single large parcel does not require subdivision approval; leasing or financing of parts of a large parcel for construction of separate commercial or industrial buildings also are exempt, so long as the construction is subject to some other form of local design review [*Gov. Code § 66412.1*]. However, *sale* of such a building or portion of land cannot occur without subdividing the property to create a separate parcel for the site.

PRACTICE TIP:

What About Land Around the Building? The Legislature adopted *Gov. Code § 66412.1* to encourage development of shopping centers and business parks. This is similar to the exemption under *Gov. Code § 66412(a)* for individual offices or stores within a building. However, there is one question not answered by the statute and not yet addressed by the courts: does *Gov. Code § 66412.1* also exempt leasing or financing of land surrounding a building (for example, fenced space used for outdoor sales, protected parking)? The developer can argue the logic of such a result, but the statute is silent on the matter. *By Edward Shaffer*

PRACTICE TIP: Beware Financing Traps for the Unwary. Attorneys and planners generally do not think of financing as a subdivision issue, because the SMA focuses on development. However, granting a security interest in less than an entire parcel does violate the SMA, because the lender could foreclose and effectively split the parcel in two. Another problem scenario occurs when an entire parcel is given as security but the lender releases a portion in return for partial repayment; this also violates the SMA because it creates the potential for later foreclosure and division of the parcel. And do not forget that a lot line adjustment involving property subject to a deed of trust may result in the same problems. *By Edward Shaffer*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
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13-30 California Legal Forms--Transaction Guide § 30.21

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.21 Establishment of Subdivision

[1] Map Approval Requirement

The approval and recordation of a final map [*Gov. Code § 66499.30(a)*; *see § 30.23[4]*] or a parcel map [*Gov. Code § 66499.30(b)*; *see § 30.23[5]*] is a prerequisite to the sale, lease, or financing of subdivided property or the commencement of construction of any building other than model homes on subdivided land [*Gov. Code § 66499.30(a), (b)*]. Generally, a developer must obtain approval of a tentative map before filing a final subdivision map; this may also apply to a parcel map if required by local ordinance [*see Gov. Code §§ 66426, 66428*; *see also § 30.22[3][d]*].

[2] When Subdivision Deemed Established

For purposes of the SMA, a subdivision is usually deemed "established" on the date of recordation of the final map or parcel map [*Gov. Code § 66412.7*]. However, a subdivision is deemed to have been established on the date the subdivision map or application for a certificate of exception was filed with a local agency if (1) the subdivision map was filed for approval prior to March 4, 1972, and subsequently approved by a local agency, or (2) the subdivision was exempted from map requirements by a certificate of exception or its equivalent applied for prior to March 4, 1972, and subsequently issued by the local agency pursuant to local ordinance [*Gov. Code § 66412.7*]. For purposes of the SMA or any local ordinance, any parcel created prior to March 4, 1972, is conclusively presumed to have been lawfully created if (1) at the time of the creation of the parcel there was compliance with any local ordinance or there was no local ordinance in effect that regulated divisions of land creating fewer than five parcels, or (2) any subsequent purchaser acquired the parcel for valuable consideration without actual or constructive knowledge of a violation of the SMA or a local ordinance [*Gov. Code § 66412.6(b)*].

In the absence of an applicable local subdivision statute, ordinance, or regulation, a subdivision map recorded before 1893, when subdivisions were first regulated in California, does not in and of itself establish subdivisions or create legal parcels for which certificates of compliance must be issued [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1006, 129 Cal. Rptr. 2d 869, 62 P.3d 103] . Gov. Code §§ 66499.30(d)* and *66412.7* protect subdivisions that either

already were approved by local agencies, or were deemed exempt under previous subdivision laws in effect at the time the subdivisions were established [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1000, 129 Cal. Rptr. 2d 869, 62 P.3d 103* (subdivision map recorded in Sonoma County in 1865 did not qualify under these statutes because there was no subdivision statute, ordinance, or regulation specifically authorizing public agency approval of subdivisions in Sonoma County in 1865)].

A map that was undisputedly recorded in compliance with subdivision map laws in effect in 1915 was not valid under the Subdivision Map Act, because the statutes in effect in 1915 did not regulate the design and improvement of subdivisions as required by *Gov. Code § 66499.30(d)* [*Witt Home Ranch., Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543, 564, 81 Cal. Rptr. 3d 123]* . As a result of this decision, the Act's grandfather provisions do not validate subdivision maps approved under the statutes in effect from 1893 (the date of the state's first regulation of private subdivision maps) through 1915 [Witt Home Ranch., Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543, 548, 81 Cal. Rptr. 3d 123] . The reasoning of *Witt* was subsequently applied by a court holding that maps recorded in compliance with the 1907 statewide subdivision map law do not come within the scope of the Subdivision Map Act grandfather clause [*Abernathy Valley, Inc. v. County of Solano (2009) 173 Cal. App. 4th 42, 51, 92 Cal. Rptr. 3d 459]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.22

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.22 Types of Maps

[1] Applicable Requirements Dependent on Number of Parcels Created by Proposed Subdivision

The SMA treats subdivisions differently depending on their size. Large projects dividing a property into five or more parcels (often referred to as a "major" subdivision) ordinarily will involve a two-step process based on discretionary approval of a "tentative map" followed by later approval and recording of a "final map" after conditions of approval are satisfied [*Gov. Code § 66426*; *see* [2] (tentative maps), [4] (final maps), *below*]. Projects creating only two-to-four parcels ("minor subdivisions")--as well as some subdivisions specifically exempted from the tentative/final map process--require only a "parcel map," which may be approved pursuant to a simplified procedure and is subject to fewer conditions [*Gov. Code §§ 66426(f), 66428*; *see* [3], *below*]. However, cities and counties are authorized to require a tentative parcel map when a parcel map is required by the SMA. An election by a local jurisdiction to require this additional map eliminates many of the procedural differences between the parcel map and the tentative/final map procedures, although there still will be fewer conditions allowed in the case of the parcel maps [*Gov. Code § 66428*; *see Gov. Code § 66426*].

[2] Tentative Maps

[a] Definition

A "tentative map" is a map that shows the design and improvement of a proposed subdivision and the existing conditions in and around the subdivision. A tentative map need not be based on an accurate or detailed final survey of the property [*Gov. Code § 66424.5(a)*; *see § 30.120[1]*; *see also § 30.23[2]*]. It is normally the first type of map prepared and submitted to a governmental entity with regulatory jurisdiction over a proposed subdivision. Its approval by the governmental entity allows the subdivider to proceed with the initial phases of the development.

[b] Effect of Approval

With some exceptions, once a tentative map has been approved for a subdivision of single-family or multiple-family residential units, a local agency cannot condition the issuance of a building permit or equivalent permit on the satisfaction of requirements that the agency could have imposed as conditions to the tentative map. The limitation on imposing conditions extends for five years from the recordation of the final map or parcel map [*Gov. Code § 65961*; *but see Gov. Code § 65961(e), (f)*]. However, the local jurisdiction may impose conditions applicable to an approved tentative map if those conditions are (1) required by state or federal law, or (2) necessary to protect the health or safety of the subdivision residents [*Gov. Code § 65961(a)*]. The local agency may also take any steps necessary to ensure compliance with the applicable zoning ordinance and may withhold or refuse to issue a permit if it finds that it must do so to comply with state or federal law [*Gov. Code § 65961(b), (c)*].

[c] Vesting Tentative Map

A "vesting tentative map" is a tentative map that (1) serves as a guarantee to the subdivider that only those local requirements in effect at the time the map application is accepted as complete will apply to the development of the proposed project, and (2) complies with certain statutory requirements in addition to the statutes applicable to tentative maps [*Gov. Code §§ 66498.1-66498.9*; *see* Gov. Code § 66472.2; *see also Gov. Code § 66424.5(b)*]. A vesting tentative map enables a private subdivider to rely on an approved vesting tentative map and to expend resources and incur liabilities in connection with the project without the risk of having the project frustrated by subsequent action by the local agency [*Gov. Code § 66498.9(b)*; *see Gov. Code § 66498.9(a), (c)*; *see also Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 792, 24 Cal. Rptr. 2d 618]* . Thus, it provides greater statutory protection to the subdivider than was afforded under the common law vested rights doctrine [*see Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 792, 24 Cal. Rptr. 2d 618]* . Vesting tentative maps may be obtained for both residential and nonresidential subdivisions [*Gov. Code § 66498.7*]. A subdivider has the discretion to file a vesting tentative map in lieu of a tentative map [*Gov. Code § 66498.1(a)*] or a parcel map [*Gov. Code § 66498.1(a)*]. For additional discussion relating to the approval or disapproval of vesting tentative maps, see *§ 30.23[3]*.

[3] Parcel Maps

[a] When Required

A parcel map, instead of tentative and final maps, is required for the five types of subdivisions described in *Gov. Code § 66426(a) through (e)* even if five or more parcels will be created [*Gov. Code § 66426(f)*].

First, a parcel map is required if, prior to the proposed division, all of the following apply [*Gov. Code § 66426(a)*]:

- The land contains fewer than five acres;
- Each new parcel will abut a maintained public street or highway; and
- The legislative body will not require dedications or improvements.

Second, a parcel map is required if each new parcel will have [*Gov. Code § 66426(b)*]:

- A gross area of at least 20 acres; and
- Approved access to a maintained public street or highway.

Third, a parcel map will be required if the land consists of a parcel or parcels [*Gov. Code § 66426(c)*]:

- With approved access to a public street or highway;

- That is or are part of a tract of land zoned for industrial or commercial development; and
- That is or are approved by the governing body as to street alignments and widths.

Fourth, a parcel map is required if each new parcel will be [*Gov. Code § 66426(d)*]:

- A minimum of 40 acres in gross area; or
- Not less than a quarter of a quarter section.

Fifth, a parcel map is required for land being subdivided solely for the creation of an environmental subdivision under *Gov. Code § 66418.2* [*Gov. Code § 66426(e)*].

In addition to the above, a parcel map is required for subdivisions for which a final or parcel map is not otherwise required by *Gov. Code §§ 66425-66431*, unless the preparation of that parcel map is waived by a local ordinance [*Gov. Code § 66428*]. Because a tentative and final map normally are required for subdivisions consisting of five or more parcels [*Gov. Code § 66426*], this provision means that a subdivision consisting of four or fewer parcels will, as a general rule, require a parcel map.

PRACTICE TIP:

Conveyances to Public Entities. Under *Gov. Code § 66426.5*, selling or giving land to a public agency (for example, for a school or fire station) will not count as a parcel when determining if a subdivision has more than four parcels. This may be significant in a jurisdiction that treats parcel map applications more casually than "major" subdivisions. *By Edward Shaffer*

PRACTICE TIP: Beware Controversy Over Number of Parcels. Because subdivisions with five or more parcels may trigger more burdens than a "minor" subdivision, subdividers sometimes try to manipulate the process. This has become less of a risk because few jurisdictions waive parcel maps entirely and many now impose additional tentative map procedures on even small parcel splits. One red flag is if the parcel being subdivided was itself the product of one or more earlier "minor" subdivisions that involved the current owner or a related party--a trick known as "quartering." Public agencies and the courts do not take such evasion lightly; even lengthy delays between subdivisions may not provide immunity [*Bright v. Board of Supervisors (1977) 66 Cal. App. 3d 191, 135 Cal. Rptr. 758* ; *55 Ops. Cal. Atty. Gen. 414 (1972)]* . *By Edward Shaffer*

[b] When Not Required

A parcel map is *not* required for either of the following [*Gov. Code § 66428(a)*]:

- Subdivisions of a portion of the operating right-of-way of a railroad corporation [*see Pub. Util. Code § 230*] that are created by short-term leases; or
- Land conveyed to or from a governmental agency, public entity, or public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that utility for rights-of-way, unless a showing is made in individual cases, on substantial evidence, that public policy necessitates a parcel map.

For these purposes, land conveyed to or from a governmental agency includes a fee interest, a leasehold interest, an easement, or a license [*Gov. Code § 66428(a)(2)*].

[c] Contents of Parcel Map

The SMA does not define "parcel map." Generally, parcel maps must indicate the (1) durable monuments on the property to be subdivided, and (2) location of streets and property lines that bound the proposed subdivision [*Gov. Code §§ 66445, 66495, 66496-66498*]. Parcel maps must be prepared by, or under the direction of, registered civil engineers or licensed land surveyors [*Gov. Code § 66445*]. For a detailed list of the requirements applicable to the preparation of parcel maps, see *§ 30.120[7]*.

[d] Relationship to Final Map and Tentative Map

When a parcel map is required for a project, a final map [*see* [4], *below*; *see also § 30.23[4]*] will not be required [*see Gov. Code §§ 66426, 66428*]. Similarly, when a final map is required for a project, a parcel map will not be required [*see Gov. Code §§ 66426, 66428*].

The subdivider must file a tentative map [*see* [2], *above*; *see also § 30.23[2]*] before he or she may file a final map. However, the filing and approval of a tentative map is not a prerequisite to the filing of a parcel map unless local ordinances so require [*see Gov. Code § 66428(a), (c)*].

[4] Final Maps

The SMA does not define "final map." The subdivider must file the final map for approval before the tentative map expires [*see Gov. Code § 66452.6*; *see also § 30.23[4]*].

Final maps must be prepared by registered civil engineers or licensed land surveyors [*see Gov. Code § 66434*]. Final maps must (1) be based on approved tentative maps, and (2) show durable monuments on the subdivided property [*see Gov. Code § 66495*; *see also Gov. Code §§ 66496-66498*]. The engineer or surveyor retained to prepare a final map must ensure that it complies with the detailed requirements of the SMA and any local ordinances as to form and content [*see Gov. Code § 66434(a)*].

For a detailed list of the requirements applicable to the preparation of final maps, see *§ 30.120[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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AUTHOR: Reviewed by Edward L. Shaffer

§ 30.23 Approval or Disapproval of Map

[1] In General

A city or county may disapprove a tentative or parcel map for failure to comply with any provision of the SMA or local ordinances that do not conflict with the SMA. Once the tentative map has been approved, a final map may be disapproved only for failure to meet or perform requirements or conditions that were applicable to the subdivision when the tentative map was approved [*Gov. Code § 66473*].

Under certain circumstances, the SMA specifies the final action that must be taken on a proposed subdivision map. For example, the legislative body of a city or county must deny approval of a tentative map or a parcel map for which a tentative map was not required if the legislative body finds that the proposed map is inconsistent with applicable plans adopted for the city or county [*Gov. Code § 66474(a)*].

For a list of the factors that affect approval or disapproval of maps under the SMA, see *§ 30.120[2]*, Paragraph 15.

[2] Tentative Maps

[a] In General

Approval of a tentative map is classified as an adjudicatory (quasi-judicial) function: it applies previously adopted standards to a specific property (in contrast with legislative approvals such as general plans and zoning, which adopt those general standards). An adjudicatory approval requires a noticed public hearing, followed by adoption of findings that justify the approval.

Approval of the tentative map generally will be accompanied by a set of conditions, which the subdivider must satisfy (or else provide security to ensure future satisfaction) before the final map can be approved and recorded. The subdivider likely will have to spend substantial sums to comply with the conditions, and in doing so relies on the ability

to obtain the final map. Therefore, the SMA emphasizes that the last opportunity for discretion on the part of the city or county is at the time of tentative map approval. The governing body cannot impose new conditions or change its mind later; approval of the final map is ministerial (meaning it must be approved if all previous conditions of approval have been satisfied).

PRACTICE TIP:

The Battle Over Exactions. It should come as no surprise that the most controversy (and case law) regarding development involves the ability of cities and counties to require payments, dedication of land, construction of public improvements, and other "exactions" in return for approval. Developers call it legal (and not so legal) extortion; local officials consider it necessary to offset the burdens created by the new development on the surrounding community. The statutes [*see Gov. Code §§ 66000-66025*] and court decisions [*see Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 ; Dolan v. City of Tigard (1994) 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304]* try to set standards (for example, "nexus," "rough portionality")--but the question of when an exaction goes too far and becomes a taking is similar to the problem in defining pornography: You can't define it, but you know it when you see it. *By Edward Shaffer*

Final map approval (and recording) only grants a subdivider the right to sell, lease, or finance newly created parcels--but not an absolute right to build the project as envisioned. Changes to applicable land use regulations may restrict actual development or impose new conditions. The option of a vesting tentative map [*Gov. Code § 66498.1 et seq.*; *see* [3], *below*] provides some protection from such changes; another alternative means of gaining a vested right to build is to negotiate a development agreement [*Gov. Code § 65864 et seq.*].

[b] Standards and Procedures

[i] Local Ordinance and Role of Local Agencies

The mechanics of processing a map application are governed by the local ordinance(s) adopted by the city or county pursuant to *Gov. Code § 66441* [*see § 30.20[2]*]. Thus, it is essential that counsel consult the ordinance(s) for the applicable procedures.

The Act grants the local jurisdiction flexibility to decide who may approve a subdivision map. Thus, the local ordinance may authorize an "advisory agency" [*see Gov. Code § 66415*], such as the planning commission, to approve, conditionally approve, or disapprove a map [*see Gov. Code § 66452.1(b)*]. Alternatively, the local ordinance may require an advisory agency to prepare a written report on the map application and to submit the report to the legislative body for its decision [*Gov. Code § 66452.2(a)*; *see Gov. Code § 66452.2(a)*]. Finally, if the local ordinance does not provide for participation by an advisory agency, the map will be handled by the legislative body [*see Gov. Code § 66452.2(b)*].

[ii] Permit Streamlining Act

The Permit Streamlining Act [*Gov. Code § 65920 et seq.*] regulates the review and approval of development projects. The definition of "development project" includes any project undertaken for the purpose of subdividing land pursuant to the SMA [*see Gov. Code §§ 65927, 65928*], and therefore includes the preparation, processing, and approval of subdivision maps. Notwithstanding the provisions of the SMA, public agencies that regulate subdivisions are subject to the procedural requirements set forth in the Permit Streamlining Act [*Gov. Code § 65920(b)*]. Thus, for example, when processing an application for a tentative map, the local agency must comply with the time limits specified in the Permit Streamlining Act for the (1) approval or disapproval, by a lead agency, of a project [*see Gov. Code § 65950(a)(1)-(3)* (requiring action within 180 days from the date of certification of the environmental impact report, 90 days from date of certification if project is affordable to low-income or very-low-income households, or 60 days from date of adoption of negative declaration or determination that project is exempt from CEQA); *see also Gov. Code § 65929* ("lead agency"

defined)], or the (2) approval or disapproval of a project by a responsible agency [*Gov. Code § 65952.1(a)*; *see Gov. Code § 65952* (responsible agency must act within 180 days from date on which lead agency approved project, or within 180 days of date on which completed application was received and accepted as complete by responsible agency, whichever is longer); *see also Gov. Code § 65933* ("responsible agency" defined)]. However, notwithstanding the above, the time limits specified in the SMA for action on tentative maps apply and are not extended by the Permit Streamlining Act [Gov. Code § 6952.1(b); *see Gov. Code § 65952.1(a)*; *see also Gov. Code §§ 66452.1, 66452.2, 66463*]. The Permit Streamlining Act does not apply to the approval or disapproval of final maps [*Gov. Code § 65927*].

Under the Permit Streamlining Act, the local agency must compile one or more lists that specify in detail the information that will be required from any applicant for a development project [*Gov. Code § 65940*; *see Gov. Code § 65942* (list revisions normally apply prospectively only)]. Not later than 30 calendar days after the agency has received an application for a development project, it must determine in writing whether the application is complete and immediately transmit the determination to the applicant. If the application is determined not to be complete, the agency's determination will specify those parts of the application that are incomplete and indicate the manner in which they can be made complete. If the written determination is not made within 30 days after receipt of the application, and the application includes a statement that it is an application for a development permit, the application will be deemed complete [*Gov. Code § 65943(a)* (statute also provides for resubmittals and appeals)].

After the agency accepts the application as complete, the agency must not subsequently request of the applicant any new or additional information that was not required as a part of the application [*Gov. Code § 65944(a)*]. The date the application is considered complete pursuant to *Gov. Code § 65943* is extremely important because, in determining whether to approve or disapprove an application for a tentative map under the SMA, the local agency must apply only those ordinances, policies, and standards in effect on that date [*Gov. Code § 66474.2(a)*; *but see Gov. Code § 66474.2(b), (c)* (limited exceptions)]. Similarly, when a local agency approves or conditionally approves a vesting tentative map under the SMA, the approval confers a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards in effect on the date the application is considered complete under *Gov. Code § 65943* [*Gov. Code § 66498.1(b)*].

If a lead agency or responsible agency fails to approve or disapprove a map within the time limits specified in the Permit Streamlining Act, the failure to act will be deemed approval of the permit application, but only if the public notice required by law has occurred [*Gov. Code § 65956(b)*]. The right to deemed approval is subject to common law waiver, which can be evidenced by the applicant's conduct indicating an intent to relinquish the right [*see Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 68 Cal. Rptr. 2d 758, 946 P.2d 427]* .

[iii] SMA Deadlines

The deadlines under the SMA for the approval, conditional approval, or disapproval of a tentative map vary depending on whether the map is to be approved by an advisory agency or by the local legislative body [*Gov. Code §§ 66452.1, 66452.2*]. The following are the most important time limits [*see Gov. Code § 65952.1(b)* (following time limits are not extended by Permit Streamlining Act); *see also* [ii], *above*]:

- If an advisory agency is authorized by local ordinance to approve, conditionally approve, or disapprove a tentative map, it must take that action within 50 days after the filing of the map with its clerk [*Gov. Code § 66452.1(b)*].

- If, under the local ordinance, an advisory agency must submit a written report on a tentative map to the legislative body, it must do so within 50 days after the filing of the map with its clerk [*Gov. Code § 66452.1(a)*]. At the next regular meeting of the legislative body following the filing of the report, the legislative body must fix the meeting date at which the tentative map will be considered by it, which date must be within 30 days thereafter, and the legislative body must approve, conditionally approve, or

disapprove the tentative map within that 30-day period [*Gov. Code § 66452.2(a)*].

- If there is no advisory agency, the clerk of the legislative body must submit the tentative map to the legislative body at its next regular meeting, and the legislative body must approve, conditionally approve, or disapprove the map within 50 days thereafter [*Gov. Code § 66452.2(b)*].

The above time periods do not commence until after certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from CEQA [*Gov. Code §§ 66452.1(c), 66452.2(c)*; *see Pub. Res. Code § 21000 et seq.*]. Further, the local agency must comply with the time periods set forth in *Pub. Res. Code § 21151.5* [*Gov. Code §§ 66452.1(c), 66452.2(c)*], which govern the preparation of EIRs and negative declarations. For comprehensive coverage of CEQA, see California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender).

Under the SMA, if the advisory agency or legislative body fails to approve, conditionally approve, or disapprove a tentative map within the above time limits, the map will be deemed approved, insofar as it complies with other applicable requirements of the SMA and local ordinance [*Gov. Code § 66452.4(a)*; *but see Horn v. Ventura County (1979) 24 Cal. 3d 605, 612-616, 156 Cal. Rptr. 718, 596 P.2d 1134* ; *see also* [iv], *below*]. An advisory agency or legislative body may not deny an application for a map solely because the time to approve or deny the map is due to expire; there must be other reasons for disapproval [*Gov. Code § 66451.4*].

[iv] Notice and Hearing Requirements

Appropriate notice of an application for approval of a tentative map and an opportunity to be heard must be given to persons whose property interests may be significantly affected by the proposed subdivision [*Horn v. Ventura County (1979) 24 Cal. 3d 605, 612-616, 156 Cal. Rptr. 718, 596 P.2d 1134]* . This requirement essentially means that a map will not be automatically approved following a failure by the advisory agency or legislative body to act on they application within the statutory time periods [*see* [iii], *above*].

The SMA contains numerous other notice requirements. For example, notice of a hearing held pursuant to the SMA must be given pursuant to the requirements set forth in the Permit Streamlining Act [*Gov. Code § 65920 et seq.*] for public notices [*Gov. Code § 66451.3*; *see Gov. Code §§ 65090, 65091*].

PRACTICE TIP:

Monitor Notices Carefully. State and local regulations contain a bewildering array of notice requirements. Both the SMA and CEQA trigger various notices at different stages in the review and approval process, directed at both the general public and other government entities. Failure to comply may jeopardize project approval; courts have been known to force a city or county to repeat the approval process because of deficient notices. The developer is well-advised to monitor all notices: this practitioner has caught planning staff using outdated codes that omitted newly adopted notice requirements! *By Edward Shaffer*

[v] Notice to School Districts and Other Agencies

A tentative map must be reviewed by some agencies other than the local agency with primary jurisdiction over the subdivision, and may be reviewed by others [*see Gov. Code § 66453 et seq.*]. For example, a local agency must send a detailed notice of the filing of a tentative map to all affected school districts for their review. Each school district may submit a report to the local agency regarding possible impacts of the proposed subdivision on the district and recommending appropriate solutions [*Gov. Code § 66455.7*]. For a complete list of other agencies that must or may review a tentative map application, see *§ 30.120[2],* Paragraph 14.

PRACTICE TIP:

Monitor Consultations Carefully. As with notices, both the SMA and CEQA require various efforts to involve other local and state agencies in project review. Make sure planning staff has followed the proper steps, and document that an agency was contacted but failed to respond (a common occurrence). This practitioner once observed approval of a use permit delayed by months because the planning department forgot to send the application to the public works department for review. *By Edward Shaffer*

[vi] Findings for Approval or Disapproval

A map cannot be deemed approved if it does not comply with all applicable requirements of the SMA and applicable local ordinances [*Gov. Code § 66473*; *Pongputmong v. City of Santa Monica (1993) 15 Cal. App. 4th 99, 104-105, 18 Cal. Rptr. 2d 550]* . Approval must be denied if the local legislative body makes certain findings [*see Gov. Code §§ 66473, 66474*]. For example, a local agency cannot approve a tentative map unless it has affirmatively found that the proposed subdivision is consistent with the general plan or specific plans [*Gov. Code § 66473.5*; *see Gov. Code §§ 66412.3, 66473.1* (additional findings regarding regional housing needs and heating or cooling opportunities)]. For a complete list of the statutory standards governing the approval or disapproval of maps, see *§ 30.120[2]*, Paragraph 15.

PRACTICE TIP:

Beware Perfunctory Approval Findings. When the proposed subdivision is controversial and the decision may be challenged in court, beware bare bone findings that simply recite the statutory language (e.g., "the map is consistent with the general plan"), without any supporting documentation. Findings serve as the legal footprints that bridge the gap between background information and the ultimate decision, and courts will overturn actions if the findings do not explain the decision making path followed by the legislative body. A prudent developer will insist on detailed findings confirming the appropriateness of subdivision approval under each of the criteria specified in *Gov. Code § 66474* and other SMA statutes, as described below [*see Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* ; an excellent discussion of findings is provided in "Bridging the Gap: Using Findings in Local Land Use Decisions" (1989), a report published by the Governor's Office of Planning and Research]. *By Edward Shaffer*

[vii] Approval Conditioned on Availability of Sufficient Water Supply

The local legislative body or the advisory agency (to the extent that the latter is authorized by local ordinance to approve, conditionally approve, or disapprove a tentative map) must include as a condition in any tentative map that includes a subdivision consisting of a residential development of more than 500 dwelling units, a requirement that a sufficient water supply be available. Proof of the availability of a sufficient water supply must be requested by the subdivision applicant or local agency, at the agency's discretion, and must be based on written verification from the applicable public water system within 90 days of a request [*Gov. Code § 66473.7(b)*; *see Gov. Code § 66473.7(a)(1), (2)* ("subdivision" and "sufficient water supply" defined for these purposes)].

The condition does not apply to any residential project proposed for a site that is within an urbanized area and has been previously developed for urban uses, or when the immediate contiguous properties surrounding the residential project site are, or previously have been, developed for urban uses, or housing projects that are exclusively for very low and low-income households [*Gov. Code § 66473.7(i)*].

[viii] Appeals

A subdivider may appeal any action of the advisory agency (or legislative body, when there is no advisory agency) with respect to a tentative map. The appeal must be filed within 10 days of the disputed action, with the clerk of the appeal board established by local ordinance or, if none, with the clerk of the legislative body. Once an appeal is filed, the appeal board or legislative body will set the matter for hearing, which must be held within 30 days after the date of the subdivider's or appellant's request. If the legislative body is not scheduled to meet within that 30-day period, the appeal

may be heard at the next regular meeting for which notice can be given, or within 60 days from the date the request for hearing was received, whichever period is shorter [*Gov. Code § 66452.5(a)*]. The decision of the appeal board may be further appealed to the legislative body or the advisory agency [*see Gov. Code § 66452.5(b)*]. If the appeal board or legislative body fails to act on an appeal within the statutory time limits, the tentative map, insofar as it complies with the requirements of the SMA and local ordinance, will be deemed approved as it was last approved [*Gov. Code § 66452.5(c)*].

Any interested person adversely affected by a decision of the advisory agency or appeal board may file an appeal with the clerk of the legislative body within 10 days after the disputed action. Once an appeal is filed, the legislative body will set the matter for hearing, which must be held within 30 days after the date of the subdivider's or appellant's request. If the legislative body is not scheduled to meet within that 30-day period, the appeal may be heard at the next regular meeting for which notice can be given, or within 60 days from the date the request for hearing was received, whichever period is shorter. The findings and decision must be rendered within 10 days of the hearing's conclusion [*Gov. Code § 66452.5(d), (e)*].

[c] Effect of Subsequent Law

The local agency generally must apply only ordinances, policies, and standards in effect at the time an application for approval of a tentative map is deemed complete when determining whether to approve or disapprove that application [*Gov. Code § 66474.2(a)*; *see Gov. Code § 65943* (determination regarding completeness of application); *see also § 30.120[2], [3]*]. However, the local agency may apply amendments to applicable general or specific plans or to zoning or subdivision ordinances that became effective after the application was accepted as complete, if (1) the amendments are in effect when the map is approved or disapproved, and (2) the agency initiated the amendment process and published notice of the proposed change before accepting the application as complete [*see Gov. Code § 66474.2(b)*; *see also Gov. Code § 65090(a)*]. Similarly, any changes in the applicable ordinances, policies, or standards requested by the applicant in connection with the same development project will apply if they are adopted [*Gov. Code § 66474.2(c)*].

PRACTICE TIP:

Remember to Check Out Amendments in the Works. This rule can cause unpleasant surprises for an unwary developer. Be sure to ask staff what zoning or other amendments are in process or being considered that may restrict or prohibit subdivision approval if adopted in time. This rule also qualifies what regulations will apply to development of a project protected by a vesting tentative map [*see Gov. Code § 66498.1(b)*]. Sometimes there are serious disagreements over whether a new restriction should apply. For example, when the city council has been considering wholesale general plan amendments over a long period of time, and the proposed changes are continually modified, at what stage is the test of *Gov. Code § 66474.2(b)* satisfied to bind future projects? Another source of dispute is whether--and at what time--a restriction adopted by initiative might apply under *Gov. Code § 66474.2*. *By Edward Shaffer*

Furthermore, with some exceptions, within five years after a tentative map for a residential subdivision has been approved, a city or county cannot condition the issuance of a building permit on the satisfaction of conditions that could have been lawfully imposed when the map was approved or filed. Neither can a permit be refused for failure to satisfy later-imposed conditions. This restriction is referred to as the "one bite of the apple rule" [*Gov. Code § 65961*; *but see Gov. Code § 65961(e), (f)*]. Notwithstanding this prohibition, a city or county may impose conditions or withhold permits if (1) failure to do so would jeopardize the health or safety of its residents, (2) the condition is necessary to ensure compliance with applicable state or federal requirements, (3) withholding or refusing to issue a building permit is required under the circumstances by state or federal law, or (4) the conditions are necessary to assure compliance with local zoning ordinances [*Gov. Code § 65961(a)-(c)*]; *see Golden State Homebuilding Assoc. v City of Modesto (1994) 26 Cal. App. 4th 601, 31 Cal. Rptr. 2d 572* (because city did not adopt impact fees until after tentative map approved, fee condition could not have been lawfully imposed on map approval--and so city could require fees for building

permits without violating *Gov. Code § 65961*)]. For a discussion of building permits, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

[d] Term of Approved Map

Generally, an approved tentative map expires (1) 24 months after the approval, or (2) after any additional period of time beyond 24 months prescribed by local ordinance and not in excess of 12 months [*Gov. Code § 66452.6(a)(1)*]; *but see Gov. Code § 66452.6(a)(1)* (conditions under which subdivider may obtain extension of expiration date)]. In 1993, the Legislature adopted an urgency statute that extended the life of any approved tentative map that had not expired as of September 13, 1993, by another 24 months [*Gov. Code § 66452.11*]. In 1996, the Legislature again amended the SMA to extend the life of approved tentative maps that had not expired as of May 14, 1996, by another 12 months [*Gov. Code § 66452.13*]. These two extensions were automatic, and in addition to all other discretionary and mandatory extensions available under the SMA.

Because of a severely depressed housing market with subdividers facing the prospect of having their tentative and parcel maps expire before they could obtain financing or have their projects be economically viable on completion, legislation was enacted in 2008 to extend by 12 months the expiration date of any tentative or vesting tentative map or parcel map that had not expired on July 15, 2008, but was due to expire before January 1. 2011 [*Gov. Code § 66452.21(a)*]. The extension is in addition to any other statutory extensions [*Gov. Code § 66452.21(b)*; *see Gov. Code §§ 66452.6, 66452.11, 66452.13, 66463.5*]. The determination of whether a map expires before January 1, 2011, will count only those local discretionary extensions of time pursuant to *Gov. Code § 66452.6(e)* approved on or before July 15, 2008, and any additional time in connection with the filing of a final map pursuant to *Gov. Code § 66452.6(a)* for a map that was recorded on or before July 15, 2008. The determination does not include any development moratorium or litigation stay [*Gov. Code § 66452.21(d)*].

In 2009, the Legislature again amended the Act to extend, for an additional 24 months, the expiration date of any tentative or vesting tentative map that (1) was in existence on July 15, 2009, and (2) will not expire before January 1, 2012 [*Gov. Code § 66452.22(a)*; *see Gov. Code § 66452.22(d)* (determining whether map expires before January 1, 2012)]. The extension also applies to any legislative, administrative, or other state agency approval pertaining to a development project included in the map, provided the approval had not expired on July 15, 2009 [*Gov. Code § 66452.22(c)*]. These extensions are automatic, and in addition to all other discretionary and mandatory extensions available under the Act [*Gov. Code § 66452,22(b), (c)*].

For a detailed outline of the periods of validity of tentative maps, see *§ 30.120[4]*.

The periods of validity do not include any time during which a "development moratorium" exists, provided that the moratorium was imposed after approval of the map and that the original length of the moratorium does not exceed five years [*Gov. Code § 66452.6(b)(1)*]. For these purposes, a development moratorium includes a water and/or sewer moratorium, as well as certain other actions of public agencies that regulate land use, development, or land services and that interfere with the processing of subdivision maps [*see Gov. Code § 66452.6(f)*]. Further, a development moratorium will be deemed to exist for any period of time during which a condition imposed by the city or county could not be satisfied because of the failure of the local jurisdiction or another public agency to take certain necessary actions [*see Gov. Code § 66452.6(f)*]. When the moratorium is terminated, the map is valid for the same period of time as was left to run on the map at the time the moratorium was imposed. However, if the remaining time is less than 120 days, the map will be valid for at least 120 days following termination of the moratorium [*Gov. Code § 66452.6(b)(3)*].

A local agency may approve a stay of the period of validity pending the outcome of a lawsuit involving the approval of the map. The subdivider must apply for this stay after service of the initial petition or complaint in the lawsuit. Within 40 days after receiving this application, the agency must either deny the request or grant a stay of up to five years. Additional requirements may be established by local ordinance [*Gov. Code § 66452.6(c)*].

[3] Vesting Tentative Maps

[a] Significance and Use

A subdivider has the discretion to file a vesting tentative map [*see § 30.22[2][c]*] in lieu of a tentative map [*Gov. Code § 66498.1(a)*] or a parcel map [*Gov. Code § 66498.1(a)*]. A "vesting tentative map" is a tentative map that (1) serves as a guarantee to the subdivider that only those local requirements in effect at the time the map application is accepted as complete will apply to the development of the proposed project, and (2) complies with certain statutory requirements in addition to the statutes applicable to tentative maps [*Gov. Code §§ 66498.1-66498.9*; *see* Gov. Code § 66472.2; *see also Gov. Code § 66424.5(b)*].

PRACTICE TIP:

Malpractice Not to Suggest a Vesting Map. Attorneys and engineers commit malpractice every day by not advising their developer clients to consider applying for a vesting map. In some jurisdictions all that is needed to gain this significant vested rights protection is to add the word "VESTING" to the map! The subdivider can weigh the added up-front cost of submitting additional plans earlier in the approval process, versus the risk of more restrictive regulations being adopted before the project is built. *By Edward Shaffer*

PRACTICE TIP: Vesting Maps Not Only for Residential Development. Do not forget that vesting maps can be used for any type of project. Subdividing a shopping center into two or more parcels (even if not necessary for the development) may provide valuable vested rights. This practitioner once subdivided a church from its parking lot with a vesting tentative parcel map, to preserve the ability to expand in a community considering potential new restrictive regulations. *By Edward Shaffer*

[b] Conditions for Approval

The local agency may condition approval of the vesting map on obtaining a necessary change in a zoning ordinance that is inconsistent with the proposed subdivision [*Gov. Code § 66498.3*]. If the change is obtained, the approved or conditionally approved vesting tentative map must confer the vested right to proceed with the development in substantial compliance with the change in the zoning ordinance and the map as approved [*Gov. Code § 66498.3*; *but see Gov. Code § 66498.1* (vested rights conferred by approval of vesting tentative map)]. Further, a local agency may grant any other departures from zoning ordinance that are authorized under applicable law (for example, variances) [*see Gov. Code § 66498.4*].

[c] Filing and Processing

In general, a vesting tentative map must be filed and processed in the same manner as a tentative map [*Gov. Code § 66452(b)*; *see § 30.120[1], [2]*].

PRACTICE TIP:

Ability to Demand Information Still Restricted. The city/county should have an ordinance regulating the processing of vesting map applications [*Gov. Code § 66498.8*]. Some communities try to burden the application with detailed design submissions that otherwise would only be required after subdivision approval as part of final design review. *Gov. Code § 66498.8(d)* has triggered heated debate over how far these demands can go. Never forget that the Permit Streamlining Act requires a formal list of information needed to complete the application, so staff cannot keep coming up with new ideas [*see Gov. Code § 65940*]. *By Edward Shaffer*

[d] Effect of Approval on Subsequent Conditions

An approved or conditionally approved vesting map will not limit a local agency's authority to impose reasonable conditions on subsequent approvals or permits necessary for the development and authorized by local ordinances, policies, or standards in effect when the vesting map application was deemed complete [*Gov. Code § 66498.1(e)*; *see Gov. Code § 66498.1(b)*].

PRACTICE TIP:

Beware Attempts to End-Run Freeze on Regulations. Planners can be creative in attempting to tack on new conditions or fees, notwithstanding approval of a vesting map that locks in what local regulations can apply to project construction. They may claim the right to add new conditions so long as they do not preclude development, despite the plain language and intent of *Gov. Code § 66498.1(e)*. The court in *Kaufman & Broad Central Valley, Inc. v. City of Modesto* [*Kaufman & Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal. App. 4th 1577, 30 Cal. Rptr. 2d 904]* rejected as a violation of this rule an open-ended fee escalator imposed on a vesting tentative map; this fee escalator attempted to collect *whatever fee was in effect at the time of building permit issuance*. *By Edward Shaffer*

[4] Final Map

[a] In General

Before the tentative map expires, the subdivider must arrange for the preparation of a final map [*see § 30.120[5]*] and file an application for its approval, along with all necessary supporting documents, with the appropriate legislative body [*Gov. Code §§ 66457(a), 66452.6(d)*; *see § 30.120[6]*]. As long as the final map is filed before expiration of the tentative map, subsequent approval and recording can proceed. A final map may be disapproved only for failure to meet or perform requirements or conditions imposed when the tentative map was approved [*Gov. Code § 66473*]. Any disapproval must be accompanied by a finding identifying the requirements or conditions that have not been met or performed. Local ordinances must include procedures for waiver of this disapproval requirement when final map noncompliance results from a technical and inadvertent error that the city or county determines does not materially affect the validity of the map [*Gov. Code § 66473*]. Furthermore, a final map must contain any certificates, statements, and acknowledgments required by applicable local ordinances [*see Gov. Code § 66443*]. Local agencies may require that these certificates, statements, and acknowledgments be made by separate instrument to be recorded concurrently with the final map [*Gov. Code § 66435.1*]. Whenever a separate instrument is required, the county recorder must place a reference to the separately recorded document on the final map [*Gov. Code §§ 66435.2, 66468.1*].

If the local governing body certifies that the final map substantially complies with a previously-approved tentative map, approval of the subdivision becomes a ministerial matter and no notice of approval of the final map is necessary [*Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 653-657, 150 Cal. Rptr. 242, 586 P.2d 556]* .

For territory being incorporated into a newly incorporated city after 1998, when any area in a subdivision or proposed subdivision as to which a tentative map or vesting tentative map has been approved by a county board of supervisors is incorporated into a newly incorporated city, the city must approve the final map (and give effect to the vesting tentative map) if it meets all of the conditions of the tentative map and the requirements and conditions for approval of final maps under the Subdivision Map Act [*Gov. Code § 66413.5(a), (b), (g)*; *see Gov. Code § 66413.5(f)*]. The newly incorporated city may condition or deny approval, however, if it determines that failure to condition or deny approval would place the subdivision residents or the immediate community, or both, in a dangerous condition or the condition or denial is required in order to comply with state or federal law [*Gov. Code § 66413.5(c)*]. The newly incorporated city may impose reasonable conditions on subsequent approvals or permits necessary for the development and authorized by the ordinances, policies, and standards in effect when the tentative or vested tentative map application was complete [*Gov. Code § 66413.5(e)*].

Under *Gov. Code § 66413.5(f)*, a newly-incorporated city is only compelled to approve a final map if two temporal conditions are met: (1) the application for the tentative map or vesting tentative map was submitted before the first signature was placed on the incorporation petition; and (2) the county approved the tentative map before the incorporation election. Thus, a city properly disapproved a final map when neither of those conditions were met, even though at the time of incorporation the city had adopted the county ordinance providing for ministerial approval of final maps that conformed with approved tentative maps [*City of Goleta v. Superior Court (2006) 40 Cal. 4th 270, 277-279, 52 Cal. Rptr. 3d 114, 147 P.3d 1037*].

The county recorder who examines a final map must either accept or reject it for filing within 10 days [*Gov. Code § 66466(a)*]. If the county recorder accepts the map for filing, an acceptance must be certified on the face of the map [*Gov. Code § 66466(c)*; *see § 30.120[6]*].

For a step-by-step guide to the procedures that must be followed in filing an application for the approval of a final map, see *§ 30.120[6]*.

[b] Effect of Multiple Final Maps

Local agencies may impose reasonable conditions relating to the filing of multiple final maps. The filing of a final map on a portion of an approved or conditionally approved tentative map will not invalidate any part of the tentative map [*Gov. Code § 66456.1*].

The subdivider may file multiple final maps relating to different portions of an approved or conditionally approved tentative map prior to the expiration of the tentative map [*see* [2][d], *above*] if (1) after the filing of the tentative map, the local agency and the subdivider concur in the filing of multiple final maps; or (2) the subdivider, at the time the tentative map is filed, informs the local advisory agency of the intention to file multiple final maps. In the latter case, the subdivider's notice of intention need not define the number or configuration of the proposed multiple final maps [*Gov. Code § 66456.1*].

If the subdivider must provide public off-site improvements [*see* [d], *below*], the filing of multiple final maps will extend the expiration of the approved or conditionally approved tentative map. In 2004, the Legislature set the threshold value for such off-site public improvements to extend map life at $178,000, subject to annual adjustment for inflation beginning January 1, 2005 [*see* Gov. Code § 66432.6(a)(1), (2)].

PRACTICE TIP:

Abutting Road Improvements Do Not Count. Developers are disappointed to learn that the opportunity to extend tentative map life by filing multiple final maps requires the minimum expenditure for off-site improvements that do not include rights-of-way that abut the property and are related to the planned development [*Gov. Code § 66452.6(a)*]. Merely widening the road fronting on the project site will not qualify. *By Edward Shaffer*

The recordation of several final maps on various phases of a project covered by a single vesting tentative map will affect the period of validity of the vesting tentative map. Ordinarily, the rights conferred by such a map will last for an initial time period, as provided by ordinance, that must not be less than one year or more than two years beyond the recording of the final map. When several final maps are recorded, however, the "one year initial time period" will begin for each phase when the final map for that phase is recorded [*Gov. Code § 66452.6(g)* (statute also provides for automatic extensions under specified circumstances)].

[c] Expiration of Vested Rights

A vesting tentative map [*see* [3], *above*] is subject to the same rules regarding effective life and expiration as other tentative maps [*see* [2], *above*]. After the final map is recorded, the vested rights protected by the map pursuant to *Gov. Code § 66498.1* [*see* [3], *above*] are not permanent, but will only last initially for one or two more years (depending on the local implementing ordinance), with a possible one-year extension at the local agency's discretion [*Gov. Code § 66452.6(g)*]. Thereafter, development of the property again will be subject to any regulations that may have been adopted but blocked by the vesting tentative map application and approval. If multiple final maps are filed for phases of the project, these time periods will apply separately for each phase. The time periods also will be extended during prolonged review of grading permits or project design. Finally, if a complete building permit application is submitted before expiration of the vested rights, those rights will continue for the future life of the building permit (as it may be extended) [*Gov. Code § 66452.6(g)*].

PRACTICE TIP:

Beware Expiring Vested Rights. Developers often receive their vesting tentative map approval, record their final map, and forget about the deadline to build--until they eventually apply for permits, only to face a recently adopted zoning restriction that severely restricts or prevents the intended project! Attorneys and engineers should advise their clients carefully on this matter, and calendar deadlines for action. For projects with potential delays or extended buildout schedules, developers should consider the merits of negotiating a development agreement that may extend vested rights considerably longer. Another tactic is to delay recording the final map as long as possible, and take advantage of the opportunities to extend the life of the tentative map. *By Edward Shaffer*

[d] Agreement for Off-Site Improvements

As a condition precedent to the approval of a final map, a city or county may require the subdivider to install any public facilities that are reasonably necessary for the general use of the lot owners in the subdivision, the local neighborhood traffic, and area drainage needs [*Gov. Code §§ 66411, 66418, 66419*; *see Gov. Code §§ 66451, 66473*]. These facilities or improvements are referred to as "off-site improvements" and are generally provided for in an agreement between the subdivider and the governmental entity with approval jurisdiction under the SMA. This agreement is in lieu of requiring the improvement before the final map is approved.

The agreement will generally provide for either (1) the completion of the improvements by the subdivider at his or her expense, or (2) the initiation of proceedings under a special assessment act [*see Sts. & Hy. Code § 5000 et seq.* (Improvement Act of 1911); *see also Sts. & Hy. Code § 10000 et seq.* (Municipal Improvement Act of 1913)] or the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) [*Gov. Code § 53311 et seq.*; *see § 30.24[2]*] to finance and complete the improvements [*Gov. Code § 66462*; *see* Ch. 30A, *Construction Financing*]. If the agreement requires special assessment proceedings, it must also obligate the subdivider to complete the improvements at the subdivider's expense if they are not completed under the special assessment or Mello-Roos [*Gov. Code § 66462(a)(2)(B)*].

In situations involving parcel map subdivisions, unless required by the public health and safety or as a prerequisite to the orderly development of the surrounding area, the subdivider cannot be required to fulfill any requirements to construct off-site or on-site improvements until either (1) the local agency has issued a permit [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*] or other grant of approval for development of the parcel, or (2) the time construction of the improvements is required pursuant to any authorized agreement and the public agency finds that fulfillment of the construction requirement is necessary for either the public health and safety or as a prerequisite to the orderly development of the surrounding area. The subdivider may be required to fulfill the requirements within a reasonable time after the parcel map is approved or a waiver is granted but before a permit or other approval for the development is issued [*Gov. Code § 66411.1(b)*]. Although the local agency cannot require that the improvements be finished before approving the parcel map, it can require the developer to provide security to ensure that the improvements will be completed [*see 62 Ops. Cal. Atty. Gen. 175, 176-179 (1971)]* .

"Off-site improvements" or "public improvements" include traffic controls, streets and highways, bridges, overcrossings, street interchanges, flood control or storm drain facilities, sewer facilities, water facilities, and lighting facilities [*Gov. Code § 66452.6(a)(3)*]. Local ordinances may require the developer to construct off-site improvements at its own expense and to dedicate them without charge to the city or county [*see Gov. Code §§ 66439, 66447*], which is legal to the extent that the need for the improvement is reasonably related to burdens caused by the new development.

For further discussion of off-site improvements and a form of agreement between a subdivider and a local government, see *§ 30.200*.

[e] Dedication and Public Easements

As a condition precedent to the approval of a final map, a local ordinance may require that any or all of the parcels shown on the map as intended for public use be offered for dedication for that use [*Gov. Code §§ 66439, 66447*; *see Gov. Code §§ 66475-66478*]. A local agency may require that a waiver of direct access rights to a dedicated street from property abutting that street be included in any dedication or offer for dedication [*Gov. Code § 66476*]. An offer of dedication of real property for street or public utility easement purposes will be deemed not to include any public utility facilities located on or under the real property unless an intent to dedicate the facilities is expressly declared in the statement [*Gov. Code § 66439(c)*].

If the subdivider is required to make a dedication for specified public purposes on a final map, the local agency must specify whether the dedication is to be in fee or as an easement, and the dedication statement must include statutorily prescribed language to that effect [*Gov. Code § 66439(d)*; *see Gov. Code § 66439(d)(2), (3)* (prescribed language)].

The local governmental entity or its designated official must accept or reject any or all offers of dedication contained on the final map when it approves that map [*Gov. Code §§ 66458, 66462, 66477.1*].

A local agency to which property is dedicated in fee for public purposes or for making public improvements or constructing public facilities (other than for open space, parks, or schools) must record a certificate with the county recorder in the county where the property is located. The certificate must be attached to the map and must contain specified information regarding the dedication and the obligation to reconvey [*Gov. Code § 66477.5(a)*]. If the local agency later determines that the same public purpose for which the dedication was required no longer exists [*Gov. Code § 66477.5(b)* (subdivider may request local agency to determine whether or not original public purpose still exists)], it must reconvey the property to the subdivider or the subdivider's successor in interest. The local agency need not reconvey any portion of the property that is still required for the same public purpose or for public utilities [*Gov. Code § 66477.5(c)*]. Finally, the local agency must give at least 60 days' notice to the subdivider whose name appears on the certificate before vacating, leasing, selling, or otherwise disposing of the dedicated property, unless that property will be used for the same public purpose for which it was dedicated [*Gov. Code § 66477.5(d)*].

As an alternative to dedication, local ordinances may authorize the creation of public easements on private lands for specified purposes [*see Gov. Code §§ 65870-65875*]. For a discussion of public easements, see Ch. 28A, *Easements and Licenses* . For a detailed discussion of dedication, see Ch. 28, *Dedication* , and California Real Estate Law and Practice, Ch. 291, *Substantive Requirements of the Subdivision Map Act* (Matthew Bender).

[5] Parcel Maps

[a] In General

A parcel map generally is not subject to local survey and map requirements that do not affect record title interests [*Gov. Code § 66445(g)*]; *but see Gov. Code § 66434.2*]. Generally, an approved parcel map must include, among other things [*see § 30.120[7], [8]*], a statement consenting to its recordation, signed and acknowledged by all parties with record

title interest in the property [*Gov. Code § 66445(e)*; *but see § 30.120[7]*, P 3]. Dedications or offers of dedication may be made by separate instrument as well as by a statement affixed to the parcel map. If made by separate instrument, they must be recorded before or concurrently with the filing of the parcel map for recordation [*Gov. Code § 66447(a)*].

In general, the SMA grants local legislative bodies wide discretion in establishing the procedure for processing, approval, conditional approval, disapproval, and filing of parcel maps [*see Gov. Code § 66463*]. However, local procedures must comply with certain requirements. For example, whenever a local ordinance requires the legislative body (as opposed to the advisory agency or a designated official, such as the county engineer) to approve parcel maps, the statutory procedures for the filing [*see Gov. Code § 66457*; *see also § 30.120[6]*] and approval [*see Gov. Code § 66458*; *see also § 30.120[6]*] of final maps are applicable [*Gov. Code § 66463*].

The county recorder who examines a parcel map must either accept or reject it for filing within 10 days [*Gov. Code § 66466(a)*]. If the county recorder accepts the map for filing, an acceptance must be certified on the face of the map [*Gov. Code § 66466(c)*].

[b] Approval or Disapproval

The SMA specifies the grounds for approval and disapproval of certain parcel maps [*see Gov. Code §§ 66473.5, 66474, 66474.1, 66474.4(a)*]. At the time of approval, the legislative body or its designated official must also accept, accept subject to improvement, or reject any offer of dedication [*Gov. Code §§ 66477.1, 66463*]. A local ordinance that provides for the approval, conditional approval, or disapproval of parcel maps by the county engineer, surveyor, or other designated official may also provide that the officer may accept or reject dedications and offers of dedication that are made by a statement on the map [*Gov. Code § 66463*].

The local time limits for action or approval of a parcel map for which a tentative map is not required must be no longer than the time limits applicable to (1) action by an advisory agency on a tentative map and (2) consideration of a tentative map by a legislative body [*Gov. Code § 66463(d)*; *see Gov. Code §§ 66452.1, 66452.2*]. Even when a tentative map is required by local ordinance for a parcel map, more relaxed procedures may apply.

For discussion of the limited circumstances under which a subdivider can be required, as a condition to the approval of a parcel map, to defend, indemnify, or hold harmless a local agency and local officials from claims relating to any local approval of the subdivider's application [*see Gov. Code § 66474.9*], see [6], below.

[c] Recordation

The parcel map must be recorded before the expiration of the approved or conditionally approved tentative map [*Gov. Code § 66463.5(a)*; *see Gov. Code § 66463.5(d)- (f)*].

PRACTICE TIP:

Six-Year Potential Extension. *Government Code Section 66463.5(c)* was amended effective July 15, 2008, to allow discretionary extensions of parcel map life for up to six years instead of five. The other opportunities to extend the deadline for filing the map discussed above regarding tentative maps also will apply for parcel maps. *By Edward Shaffer*

[d] Effect on Building Permits

Generally, within five years after the approval of a parcel map for a residential subdivision for which a tentative map was not required, a city or county cannot condition the issuance of a building permit on the satisfaction of conditions that could have been lawfully imposed when the map was approved or filed. A permit also cannot be refused for failure to satisfy subsequently-imposed conditions [*Gov. Code § 65961*; *but see Gov. Code § 66961(e), (f)*]. Notwithstanding this prohibition, a city or county may impose conditions or withhold permits if (1) failure to do so would jeopardize the

health or safety of its residents, (2) the condition is necessary to ensure compliance with applicable state or federal requirements, (3) withholding or refusing to issue a building permit is required under the circumstances by state or federal law, or (4) the conditions are necessary to assure compliance with local zoning ordinances [*Gov. Code § 65961(a)-(c)*].

For a discussion of building permits, see Ch. 30B, *Zoning, Building, and Environmental Permits* .

[6] Indemnification Requirements

Generally, a local agency may not require as a prerequisite to the approval of a tentative, parcel, or final map that the subdivider defend, indemnify, or hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency as a result of the action or inaction of the local agency or an advisory agency, appeal board, or legislative body in reviewing, approving, or denying the map [*Gov. Code § 66474.9(a)*]. However, the agency may impose such a condition for any claim, action, or proceeding to attack, set aside, void, or annul an approval of the local agency, advisory agency, appeal board, or legislative body concerning a subdivision [*Gov. Code § 66474.9(b)(1)*; *see Gov. Code § 66499.37* (limitations period)], provided that the condition requires the local agency to promptly notify the subdivider of any claim, action, or proceeding, and to cooperate fully in the defense [*Gov. Code § 66474.9(b)(2)*]. If the local agency fails to perform either of those tasks, the subdivider will not be required to defend, indemnify, or hold harmless the local agency [*Gov. Code § 66474.9(b)(2)*].

PRACTICE TIP:

Obligation to Defend Universally Imposed. In these days of frequent litigation over controversial development, it is rare to see any major project approval that does not include a condition requiring the developer to handle litigation expenses. However, prudent developers will choose to take charge of the defense in any case, rather than trust their approvals to government attorneys who likely are not as strongly motivated to defend the project. *By Edward Shaffer*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseImpact Fees



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AUTHOR: Reviewed by Edward L. Shaffer

§ 30.24 Financing Considerations

[1] Security Requirements

When the SMA or a local ordinance that was adopted to implement the SMA authorizes or requires the subdivider to post security in connection with the performance of any act or agreement, the security must be one of the following:

- A bond or undertaking by one or more duly authorized corporate sureties [*Gov. Code §§ 66499(a)(1), 66499.1*; *see Code Civ. Proc. § 995.210*; *see also Gov. Code § 66499.2* (labor and material bond)].

- A deposit, either with the local agency or a responsible escrow agent or trust company, of money or negotiable bonds of the kind approved for securing deposits of public moneys [*Gov. Code § 66499(a)(2)*].

- An instrument of credit from an agency of the state, federal, or local government that provides at least 20 percent of the financing for the portion of the act or agreement requiring security, or from one or more financial institutions subject to regulation by the state or federal government and pledging that the funds necessary to carry out the act or agreement are on deposit and guaranteed for payment, or a letter of credit issued by such a financial institution [*Gov. Code § 66499(a)(3)*; *see Sts. & Hy. Code § 6400 et seq.* (Improvement Act of 1911); *see also Sts. & Hy. Code § 8500 et seq.* (Improvement Bond Act of 1915)].

- A lien on the property to be subdivided, created by an agreement between the owner and the local agency, if the local agency finds that it would not be in the public interest to require the installation of the required improvement sooner than two years after the recordation of the map [*Gov. Code § 66499(a)(4)*].

- Any form of security, including security interests in real property, that is acceptable to the local agency and specified by the appropriate local ordinance [*Gov. Code § 66499(a)(5)*].

If the developer is a California nonprofit corporation funded by the state or federal government or one of its agencies [*see Gov. Code § 66499.3(c)*], the security will be subject to the approval of the local agency. In the case of any other developer, the local agency will select the type of security and then have the right to approve the security [*Gov. Code § 66499(a)*].

When an action is commenced on the subdivider's bond, the Real Estate Commissioner (Commissioner) may require the filing of a new bond. Immediately upon the recovery in any action on the bond, the subdivider must file a new bond [*Bus. & Prof. Code § 10237.9*].

[2] The Mello-Roos Community Facilities Act

The Mello-Roos Community Facilities Act ("Mello-Roos") [*Gov. Code § 53311 et seq.*] provides for the establishment of a community facilities district to finance the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer [*Gov. Code § 53313.5*]. Mello-Roos may also be used to finance planning and design work directly related to the purchase, construction, expansion, or rehabilitation of any real or tangible property [*Gov. Code § 53313.5*]. Unless other funds are available, the purchase or work provided for in a Mello-Roos proceeding will be financed by a special tax assessed on an annual basis [*see Gov. Code §§ 53321(d), 53326, 53328*].

For purposes of a special tax under Mello-Roos, a "subdivision" is improved or unimproved land that is divided or proposed to be divided into two or more lots, parcels, or units for the purpose of immediate or future sale, lease, or financing. This definition specifically includes condominium projects [*see Civ. Code § 1350*], community apartment projects [*see Bus. & Prof. Code § 11004*], stock cooperatives [*see* Bus. & Prof. Code § 11003.2], and limited-equity housing cooperatives [*Gov. Code § 53341.5(b)*; *see Bus. & Prof. Code § 11003.4*]. For a discussion of these common interest developments, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

For a detailed discussion of Mello-Roos, see Ch. 30A, *Construction Financing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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AUTHOR: Reviewed by Edward L. Shaffer

§ 30.25 Effect of Noncompliance

[1] In General

A subdivider may not sell or lease subdivided lands that have not been established as conforming to applicable subdivision laws and ordinances through the procedures mandated by the SMA [*Gov. Code §§ 66499.30, 66499.31*; *see § 30.120*]. A subdivider who does so will be subject to penalties [*see Gov. Code §§ 66499.30, 66499.31*]. A city or county may refuse to issue building or other permits pending the developer's compliance with applicable subdivision laws and ordinances [*see Pratt v. Adams (1964) 229 Cal. App. 2d 602, 606, 40 Cal. Rptr. 505]* .

PRACTICE TIP:

"A Subdivision by Any Other Name?" There are several ways that use of property can unexpectedly be deemed a "division for purposes of sale, lease or finance, immediate or future" without the benefit of formal approval--that is, an illegal subdivision. The key element to investigate is whether some *right of exclusive occupancy* has been created--especially if that right is transferable. This may apply to an exclusive easement, a will that divides land among heirs, or a "permit" to build and use a cabin. Before conveying an interest in land that appears to be a separate legal parcel, the attorney should look closely at the legal description: use of metes and bounds rather than reference to a recorded map is a definite red flag. Another common mistake is to assume that any separate assessor's parcel number denotes a legal parcel; in fact, one has nothing to do with the other. *By Edward Shaffer*

[2] Certificate of Compliance

[a] Effect of Issuance

A certificate of compliance must be issued for any real property that has been approved for development pursuant to *Gov. Code § 66499.34* [*Gov. Code § 66499.35(c)*]. The existence of a certificate of compliance constitutes a conclusive determination that parcels have not been merged [*Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214,*

1226-1228, 15 Cal. Rptr. 2d 220] . If a local agency determines that the property is not in compliance with applicable ordinances or the SMA, it will issue a *conditional* certificate of compliance. A local agency may, as a condition to granting the conditional certificate of compliance, impose conditions that (1) would have been applicable to the division of the property at the time the applicant acquired his or her interest, and (2) had been established at that time by the SMA or local ordinance. However, when an applicant was the owner of record at the time of the initial violation of the SMA or local ordinance and, by a grant of the real property, created parcels in violation of the SMA or local ordinance, and that person is the current owner of record of one or more of those parcels, then the local agency may impose those conditions that would be applicable to a current division of the property. On making that determination and establishing those conditions, the city or county will file a conditional certificate of compliance with the recorder of the county where the real property is located. That certificate will serve as notice that the full formal implementation of those conditions will be required prior to the issuance of a permit or other grant of approval for development of the property [*Gov. Code § 66499.35(b)*]. Compliance with those conditions will not be required until the local agency issues a permit or other grant of approval for development of that property [*see Gov. Code § 66499*].

[b] Required Contents

A certificate of compliance must identify the property to which it relates and state that the division of the property complies with the provisions of the SMA and local ordinances [*Gov. Code § 66499.35(a)*]. The certificate or conditional certificate of compliance must include any information required by local ordinance, as well as the following [*see Gov. Code § 66499.35(f)(1)*]:

- The names of the owners of the parcels.
- The assessment or parcel number.
- The number of parcels for which the certificate or conditional certificate of compliance is being issued or recorded.
- The legal description of the parcels for which the certificate or conditional certificate of compliance is being issued and recorded.
- Any conditions to be fulfilled and implemented before a permit or other grant of development approval will be issued.
- A prescribed notice stating the effect of the certificate.

A recorded final map, parcel map, or official map will constitute a certificate of compliance with respect to the parcels of real property described in it [*Gov. Code § 66499.35(d)*]. An official map prepared pursuant to *Government Code Section 66499.52(b)*will constitute a certificate of compliance with respect to the parcels of real property described and may be filed for record, whether or not the parcels are contiguous, as long as the parcels are within the same section or, with the approval of the city engineer or county surveyor, within contiguous sections of land [*Gov. Code § 66499.35(e)*].

[3] Purchaser's Rights

[a] In General

The purchaser may declare a deed that was issued in violation of the SMA void [*Gov. Code § 66499.32(a)*; *see* [c], *below*; *see also Gov. Code § 66473* (map that does not indicate compliance with SMA and local ordinances may be rejected or disapproved by local agency)]. However, an innocent purchaser of subdivided land sold in violation of the

SMA is not subject to any sanction if he or she has neither actual nor constructive notice of the violation [*see Gov. Code § 66499.32(b)*; *see also Munns v. Stenman (1957) 152 Cal. App. 2d 543, 554-555, 314 P.2d 67* (decided under former *Bus. & Prof. Code §§ 11500-11641*)]. Thus, for example, an innocent purchaser for value may not be denied a building permit on a lot sold by a subdivider who violated the SMA by the sale of the lot [*Keizer v. Adams (1970) 2 Cal. 3d 976, 980, 88 Cal. Rptr. 183* (decided under former *Bus. & Prof. Code §§ 11500-11641*)]. On the other hand, a purchaser who violates the SMA may be denied a building or other permit pending compliance with applicable subdivision laws and ordinances [*Pratt v. Adams (1964) 229 Cal. App. 2d 602, 606, 40 Cal. Rptr. 505]* .

For a detailed discussion of the rights of purchasers in real estate transactions, see Ch. 23, *Real Property Sales Agreements* .

[b] Effect of Failure to Record Final Map or Parcel Map

If a final map or parcel map has not been properly recorded for a subdivision, no person may (1) sell, lease, or finance any parcel of real property in the subdivision; (2) commence construction of any building for sale, lease, or financing, except model homes; or (3) allow occupancy of the real property [*Gov. Code § 66499.30(a), (b)*]. Furthermore, a conveyance of any part of a division of real property for which a final or parcel map is required cannot be made by parcel or block number, initial, or other designation, unless and until the required map has been properly recorded [*Gov. Code § 66499.30(c)*].

Any person who enters into a prohibited transaction with the subdivider may void that transaction. However, subdividers are allowed to make offers or enter into agreements to sell, lease, or finance real property or to construct improvements in advance of map recording if the sale, lease, or financing or the commencement of the construction is expressly conditioned on the approval and filing of a final subdivision map or parcel map [*Gov. Code § 66499.30(e)*].

[c] Voidability of Deeds, Sales, or Contracts

Any deed of conveyance, sale, or contract to sell real property that was divided or resulted from a division in violation of the SMA or applicable local ordinances is voidable at the sole option of the grantee, buyer, or person contracting to purchase, or his or her heirs, personal representative, or trustee in insolvency or bankruptcy. The option to void must be exercised within one year after discovery of the violation of the SMA or local ordinances [*Gov. Code § 66499.32(a)*].

A deed of conveyance, sale, or contract to sell is binding on any successor in interest of the grantee, buyer, or person contracting to purchase, other than the grantee, buyer, or person contracting to purchase, or his or her heirs, personal representative, or trustee in insolvency or bankruptcy. Likewise, a deed of conveyance, sale, or contract to sell is binding on the grantor, vendor, or person contracting to sell, or his or her assignee, heir, or devisee [*Gov. Code § 66499.32(a)*].

A conveyance of real property identified in a certificate of compliance [*see Gov. Code § 66499.35*] or in a recorded final map or parcel map from and after the date of recording may not be voided [*Gov. Code § 66499.32*].

[d] Action for Damages

Any grantee, or the grantee's successor in interest, of real property that was divided or resulted in a division in violation of the SMA or applicable ordinances may bring an action to recover damages resulting from the improper division of the subdivided property. The action must be brought in superior court within one year from the date on which the grantee or his or her successor in interest discovered the violation of the SMA. The action may be brought against the subdivider who violated the SMA as well as against his or her successors in interest who had actual or constructive knowledge of the improper division of property [*Gov. Code § 66499.32(b)*].

The right to bring an action for damages is inapplicable to the conveyance of real property identified in (1) a certificate of compliance [*see Gov. Code § 66499.35*], or (2) a recorded final map or parcel map from and after the date of recording [*Gov. Code § 66499.32(b)*].

For a discussion of actions for damages resulting from violations of the SMA, see California Forms of Pleading and Practice, Chapter 579, *Zoning and Planning* (Matthew Bender).

[e] Enjoining Subdivision or Sale

A public agency or any person, firm, or corporation may seek to restrain or enjoin any proposed violation of the SMA, such as the sale of subdivided land for which a map has not been approved [*Gov. Code § 66499.33*; *see Gov. Code § 66420* (SMA does not bar any legal, equitable, or summary remedy to which aggrieved public or private party would otherwise be entitled)]. A suit for injunctive relief must be filed in the superior court of the county where the property attempted to be subdivided or sold, leased, or financed in violation of the SMA or local ordinance is located [*Gov. Code § 66499.33*; *see Tiburon v. Northwestern P.R. Co. (1970) 4 Cal. App. 3d 160, 174-181, 84 Cal. Rptr. 469* (decided under former *Bus. & Prof. Code § 11542*)].

For a detailed discussion of injunctive relief, see California Forms of Pleading and Practice, Chapter 579, *Zoning and Planning* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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AUTHOR: Reviewed by Edward L. Shaffer

§ 30.26 Requirements Related to Sales of Real Property

Contracts for the sale for real property must contain certain information relevant to the SMA. The contracts must specify that the subject parcel was either made in compliance with or was exempt from the requirements of the SMA [*see Civ. Code § 2985.51*]. The specific information required to be included in the contract depends on whether the property was subdivided prior to or after January 1, 1978 [*see Civ. Code § 2985.51*]. For purposes of the SMA, a "real property sales contract" is an agreement in which one party agrees to convey title to unimproved real property to another party upon the satisfaction of the conditions specified in the contract and that does not require conveyance of title within one year from the date of the contract [*Civ. Code § 2985.51(e)*]. "Unimproved real property" is real property on which no permanent structure intended for human occupancy or commercial use is located [*Civ. Code § 2985.51(e)*].

The sale of subdivided land is primarily governed by the Subdivided Lands Act (SLA) [*see Bus. & Prof. Code § 11000 et seq.*]. For a detailed discussion of the SLA, see *Sections 30.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.27

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.27 Resubdivision

[1] Reversion to Acreage

[a] In General

Subdivided lands may be reverted to acreage under the procedures set out in *Government Code Sections 66499.11-66499.20* 3/4 [*see Gov. Code § 66499.11*]. Reversion proceedings may be initiated by the legislative body on its own motion or by petition of all of the landowners within the subdivision [*Gov. Code § 66499.12*]. The petition by the landowners must (1) be in the form prescribed by the local agency, and (2) include the contents specified in *Government Code Section 66499.13*. The petition may be acted on only following a properly noticed public hearing [*see Gov. Code § 66499.15*; *see also Gov. Code § 66451.3* (hearing conducted pursuant to SMA must provide notice in compliance with *Gov. Code § 65090*)].

[b] When Permissible

Reversion to acreage may only take place if the legislative body finds that the dedications to be abandoned by the reversion are unnecessary for present or prospective public purposes. Furthermore, the legislative body must find that one of the following conditions exists [*see Gov. Code § 66499.16*]:

- All owners of interests in the subdivided property have consented to the reversion.

- None of the improvements required to be made have been made within two years from the date on which the final parcel map was filed for record or within the time allotted by agreement for completion of improvements, whichever is later.

- No lots shown on the final parcel map have been sold within five years from the date on which the map was recorded.

[c] Conditions Imposed

As conditions for reversion, the legislative body must require the following [*Gov. Code § 66499.17*]:

- Dedication or offers of dedication necessary for the purposes specified by local ordinance following reversion.

- Retention of all previously paid fees if necessary to accomplish the purposes of the SMA or applicable local ordinances.

- Retention of any portion of the required improvement security or deposits necessary to accomplish the purposes of the SMA and applicable local ordinances.

[d] When Effective

Reversion will be effective when the final map is filed for record by the county recorder. At that time, any dedication not shown on the map will be of no further effect [*Gov. Code § 66499.18*; *see* ch. 27A, *Dedication*].

[e] Parcel Map for Reversion

A city or county may authorize a parcel map to be filed under *Government Code Sections 66499.11-66499.29* for the purpose of reverting to acreage land previously subdivided and consisting of four or less contiguous parcels under the same ownership. That map must be accompanied by evidence of title and nonuse or lack of necessity of any streets or easements to be left in effect after the reversion. The filing of the map with the county recorder will constitute legal reversion to acreage and abandonment of all streets and easements not shown on the map. It will also constitute a merger of the separate parcels into one parcel. The parcel map used for reverting acreage must include a certificate of consent to the reversion to acreage. The certificate must be signed by all parties with record title interest in the land being reverted [*Gov. Code § 66499.20* 1/4].

[2] Merger Without Reversion

Subdivided lands may be merged and resubdivided without the added step of reversion to acreage by complying with all of the requirements of the SMA and applicable local ordinances. The filing of the final map [*see § 30.23[4]*] or parcel map [*see § 30.23[5]*] will constitute legal merging of the separate parcels into one parcel and the resubdivision of that parcel. Any unused fees or deposits previously made will be credited pro rata towards any similar requirements applicable at the time of resubdivision [*see Kaufman and Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal. App. 4th 1577, 1588-1589, 30 Cal. Rptr. 2d 904* (because subdivider will be bound by local ordinances, policies, and standards in effect at time map application is deemed complete, due process requires that subdivider have actual or constructive notice of ordinances, policies, and standards, including development fees)]. Any streets or easements [*see* ch. 28A, *Easements and Licenses*] to be left in effect after the resubdivision must be delineated on the map. The filing of the map with the county recorder will constitute (1) legal merger, (2) resubdivision of the land, and (3) abandonment of all streets and easements not shown on the map [*Gov. Code § 66499.20*].

A city or county may adopt an ordinance that both authorizes the merger of contiguous parcels under common ownership without reverting to acreage and requires the recordation of an instrument evidencing the merger [*Gov. Code § 66499.20* 3/4]. For example, a resubdivision was accomplished when, as required by a county waiver ordinance, a unilateral agreement was recorded setting forth, among other matters, a statement signed by the owner and subdivider under penalty of perjury attesting that all the conditions of approval had been met. When the unilateral agreement was endorsed by the county director of planning and recorded, a subdivision was deemed effective under *Government Code Section 66499.20* [*see Gomes v. County of Mendocino (1995) 37 Cal. App. 4th 977, 44 Cal. Rptr. 2d 93]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationTerminationReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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[Reserved]

§§ 30.28[Reserved]



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C. Subdivided Lands Act

13-30 California Legal Forms--Transaction Guide § 30.40

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.40 Overview of Subdivided Lands Act

[1] Administration and Purpose

The Subdivided Lands Act (SLA) [*Bus. & Prof. Code § 11000 et seq.*] governs the sale and leasing of subdivided lands. It is administered by the California Department of Real Estate (DRE) through an extensive series of regulations [*see 10 Cal. Code Reg. § 2790 et seq.*]. The provisions of the SLA and the implementing regulations are intended to protect purchasers and lessees of subdivision lots from fraud, misrepresentation, or deceit [*see Bus. & Prof. Code § 11018*; *see also People v. Byers (1979) 90 Cal. App. 3d 140, 148, 153 Cal. Rptr. 249]* .

The SLA has been held to be a limited economic regulation of the use of real property imposed to protect the members of the public exposed to that land use. The object of the law is the prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses [*People v. Byers (1979) 90 Cal. App. 3d 140, 148, 153 Cal. Rptr. 249]* .

[2] "Subdivision" and "Subdivided Lands" Defined

For purposes of the SLA, "subdivisions" and "subdivided lands" are improved or unimproved land or lands, wherever situated within California, divided or proposed to be divided into five or more lots or parcels for the purpose of immediate or future sale, lease, or financing [*Bus. & Prof. Code § 11000(a), (c)*]. This definition includes improved or unimproved lands, lots, and parcels of any size in which, for the purpose of immediate or future sale or lease or financing, five or more undivided interests are created or are proposed to be created [*Bus. & Prof. Code § 11000.1*]. The definition specifically includes the following types of developments [for discussion of the following developments, *see* Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums*]:

- Planned developments of five or more lots [*see Bus. & Prof. Code § 11003*].
- Community apartment projects of five or more apartments [*see Bus. & Prof. Code § 11004*].

- Condominium projects of five or more condominiums [*see Civ. Code § 1351(f)*; *see also Civ. Code § 783*].

- Stock cooperatives having or intended to have two or more shareholders [*see Bus. & Prof. Code § 11003.2*].

- Certain limited-equity housing cooperatives [*see Bus. & Prof. Code § 11003.4*].

Time-share plans, exchange programs, incidental benefits, and short-term product subject to the Vacation Ownership and Time-Share Act of 2004 [*Bus. & Prof. Code § 11210 et seq.* (effective July 1, 2005)] are not subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11004.5(g)*].

[3] Basic Public Report Requirement

As a condition precedent to the sale or lease of subdivided property situated within California, the SLA requires that a public report on the subdivision be provided to the prospective purchaser or lessee [*Bus. & Prof. Code §§ 11010, 11018.1, 11018.2*; *see § 30.41*]. To obtain a public report, the owner or subdivider must file a notice of intention to sell or lease subdivided lots, units, or parcels [*see 10 Cal. Code Reg. § 2801.5*; *see also § 30.220*]. The public report must be issued by the Commissioner, who will do so only if he or she is assured that the purchaser or lessee is protected [*Bus. & Prof. Code § 11018*].

Prior to issuing a final public report, the Commissioner may, if requested, issue a preliminary public report [*see § 30.41[1]*] or a conditional public report [*see § 30.41[3]*] covering the project. A preliminary public report permits the subdivider to solicit and accept reservations to purchase or lease subdivision interests before a final public report is issued, provided certain other requirements are met [*10 Cal. Code Reg. § 2795(b)*]. A conditional public report permits the subdivider to sell, lease, or offer for sale or lease lots or parcels in the subdivision prior to the issuance of the final public report, provided that (1) delivery of legal title will not take place until issuance of a final public report, and (2) certain other requirements are satisfied [*Bus. & Prof. Code § 11018.12(d)*].

[4] Applicability to Other Transactions, Interests, and Projects

In addition to the sale and leasing of interests in subdivisions, the SLA applies to various types of memberships and other rights and privileges in subdivisions [*Bus. & Prof. Code § 11004.5*]. For example, the leasing of apartments in a community apartment project [*see Bus. & Prof. Code § 11004*] in an apartment or similar space within a commercial building or complex is governed by the SLA [*Bus. & Prof. Code § 11000(a)*].

For coverage of the applicability of the SLA to out-of-state subdivisions see [5], below.

[5] Out-of-State Subdivisions

[a] Out-of-State Subdivisions Located *Inside* United States

Before offering in California to sell or lease any lots, parcels, or interests in a subdivision that is situated outside of California but within the United States, a person acting as principal or agent must register the subdivision with the Commissioner and comply with applicable disclaimer requirements [*Bus. & Prof. Code § 10249 et seq.*; *see §§ 30.230-30.232*]. For purposes of these requirements, "subdivision" includes the following [*Bus. & Prof. Code § 10249.1*]:

- Improved or unimproved land or lands that, for purposes of sale or lease (1) are divided or proposed to be divided into five or more lots or parcels, or (2) are not divided, but out of which five or more

undivided interests are created or proposed to be created.

- Common-interest subdivisions, such as condominiums and planned developments.

An application for registration must be filed by anyone seeking to promote out-of-state subdivision interests in California [*Bus. & Prof. Code § 10249(a)*; *see § 30.230* (application form)]. Once the Commissioner has received the application, he or she must provide the applicant with a notice of completion or notice of deficiency within 10 days. If no notice is provided within that time, the registration will be deemed complete [*Bus & Prof. Code § 10249(b)*]. The term of the registration is one year unless the Commissioner prescribes a longer term [*Bus & Prof. Code § 10249.91*].

Any printed material, literature, advertising, or invitation in California that is related to the sale or lease or offer of sale or lease of any of the out-of-state subdivision interests must clearly and conspicuously include a disclaimer informing the prospect that the DRE has not inspected, examined, or qualified the offering [*Bus. & Prof. Code § 10249.8(a)*]. A more detailed disclaimer is required to be furnished to a California resident who is presented in California with an agreement or contract to lease or purchase an interest in an out-of-state subdivision [*Bus. & Prof. Code § 10249.8(c)*]. Both required disclaimers are *set forth in § 30.231*.

[b] Subdivisions Located Outside United States

It is unlawful for a person in California to sell, lease, or offer to sell or lease, a lot, parcel, or interest in a subdivision located outside the United States, unless the printed material, literature, advertising, or invitation and the contract or agreement relating to the sale, lease, or offer of sale or lease clearly and conspicuously contains a disclaimer required by the Commissioner [*Bus. & Prof. Code § 10249.9*; *see § 30.232* (disclaimer)]. Unlike out-of-state subdivisions located in the United States, which must be registered with the Commissioner [*see* [a], *above*], subdivisions located outside the Unites States need not be registered.

[6] Exemptions

[a] All Requirements of the SLA

Leases of apartments, offices, stores, or similar space within an apartment building, industrial building, or commercial building are not governed by the SLA [*Bus. & Prof. Code § 11000(a)*; *see § 30.110[2]*]. Likewise, the leasing of space within a mobilehome park [*see Health & Safety Code § 18214*] is exempt from the requirements of the SLA, provided that tenants are not required to sign a lease for a term in excess of five years as a prerequisite to tenancy [*Bus. & Prof. Code § 11000(a)*]. The proposed sale or lease of lots or other subdivision interests that are limited to industrial or commercial uses, whether by zoning or by a duly recorded declaration of CC&Rs, is not subject to the SLA [*Bus. & Prof. Code § 11010.3*]. The sale, lease, or financing of subdivided land by state agencies, including the University of California, local agencies, and other public agencies is not subject to the SLA [*Bus. & Prof. Code § 11010.6*]. Land sold by lots or parcels of 160 acres or more is generally exempt from the requirements of the SLA [*Bus. & Prof. Code § 11000(a)*]. Subdivisions [*see Bus. & Prof. Code § 10249.1* (applicable definition)] located entirely *outside* California are exempt from the SLA [*Bus. & Prof. Code § 11000(c)*], but are subject to registration and/or disclaimer requirements of the Commissioner [*Bus. & Prof. Code § 10249 et seq.*; *see § 30.40[5][b]*].

For transactions entered into after 2000 [*see Bus. & Prof. Code § 11010.35(c)*], a notice of intention is generally not required when one developer sells parcels to another. Specifically, the notice of intention requirement does not apply in the case of either (1) a sale of one or more lots or parcels in a subdivision, when the lots or parcels are intended to be further subdivided into five or more subdivision interests, or (2) a sale or lease of five or more lots, parcels, or other subdivision interests, to (in either case) any person who acquires the lots, parcels, or other subdivision interests to engage in the business of constructing residential, commercial, or industrial buildings, or for the purpose of resale or lease to persons engaged in such a business [*see Bus. & Prof. Code §§ 11000, 11000.1, 11004.5*]. To qualify for this

exemption, the purchase or lease agreement (or a separate disclosure document) must include a statement or provision that the purchaser or tenant is required to comply with the applicable provisions of the SLA before offering for sale or lease any lot, parcel, or other subdivision interest acquired pursuant to the exemption [*Bus. & Prof. Code § 11010.35(a)*].

[b] Notice of Intention and Public Report Requirements

The following activities are exempt from the notice of intention and public report requirements of the SLA [*Bus. & Prof. Code § 11018.2*], but are subject to its other requirements:

- The proposed offering of subdivided land that is located within city limits, when all arrangements for improvements have been made and each lot is improved with a residence, is not subject to the notice of intention and public report requirements of the SLA [*see Bus. & Prof. Code § 11010.4*].

- Efforts by a subdivider to obtain a nonbinding expression of intent to purchase or lease units that are proposed for conversion to a condominium, community apartment project, or stock cooperative project [*see Bus. & Prof. Code §§ 11010.7, 11018.2*; *see also* Ch. 33A, *Time-Share Projects* , Ch. 33C, *Stock Cooperatives* , and Ch. 34, *Condominiums*].

- The purchase of mobilehome parks by certain tenant-controlled nonprofit corporations [*see Bus. & Prof. Code § 11010.8*].

For a checklist designed to be used to determine whether a proposed transaction is exempt from the provisions of the SLA, see *§ 30.110[2]*.

[7] Application for Review of Declaration When Notice of Intention Not Required

In a situation described below, a developer who plans to offer for sale or lease any lots or other subdivision interests may submit an application requesting review of the declaration, along with any required supporting documentation, to the Real Estate Commissioner, without filing a notice of intention for the subdivision for which the declaration is being prepared [*see Bus. & Prof. Code § 11010.10*; *see also Bus. & Prof. Code § 11011(c)* (filing fee)]. The application process is generally intended for sales of lots or parcels between subdividers when the buyer-subdivider will ultimately sell the lots or parcels to individual retail buyers. The process specifically is available when the sale or lease either [*Bus. & Prof. Code § 11010.10*]:

- Is not subject to the SLA;

- Does not require a notice of intention to be submitted [*see* [3], *above*]; or

- In the case of a common interest development that is subject to the SLA: the local jurisdiction requires review and approval of the declaration [*see Civ. Code § 1351(h)*] before or at the same time the subdivision map is recorded and before the declaration is approved pursuant to a notice of intention.

The Commissioner must notify the applicant of any deficiency or inadequacy in the declaration within 60 days after receiving the application. Once an application has been resubmitted, the applicant must be notified of further deficiencies with 30 days [*Bus. & Prof. Code § 11010.2(e)*]. On approval, the Commissioner must give notice to the applicant that the declaration will be approved for a subsequent notice-of-intent filing for any public report for the subdivision identified in the application, provided the subdivision setup is substantially the same as that originally described in the application for review of the declaration [*Bus. & Prof. Code § 11010.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART II. LEGAL BACKGROUND
C. Subdivided Lands Act

13-30 California Legal Forms--Transaction Guide § 30.41

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.41 Public Reports

[1] Preliminary Public Reports

[a] Use

A subdivider who wants to take reservations for the purchase or lease of subdivided lots from prospective purchasers or tenants before obtaining a final public report [*see* [2], *below*] must obtain a preliminary public report from the Commissioner [*10 Cal. Code Reg. § 2795(b)*]. The subdivider (or person acting on his or her behalf) must (1) provide a copy of the preliminary public report to each prospective purchaser or tenant ("potential buyer") [*10 Cal. Code Reg. §§ 2795(b), 2795.1*], and (2) obtain an official receipt for the report signed by each recipient before any money or other thing of value is accepted by or on behalf of the subdivider in connection with the reservation [*10 Cal. Code Reg. §§ 2795(b), 2795.1*]. Further, the subdivider and potential buyer must complete and execute an official reservation instrument [*see § 30.221*]. This instrument and any deposit taken from the potential buyer must be placed into a neutral escrow depository acceptable to the Commissioner [*10 Cal. Code Reg. § 2795(b)(2)*; *see 10 Cal. Code Reg. § 2795(b)(3)(C)*].

Preliminary public reports only allow a subdivider to take nonbinding reservations that, unlike written offers, will not result in an enforceable agreement if accepted. Either party may unilaterally cancel the reservation at any time, and the total deposit must be returned to the potential buyer on cancellation [*see 10 Cal. Code Reg. § 2795(b)(3)*].

[b] Standards for Issuance; Term

The Commissioner may issue a preliminary public report when he or she finds that it is reasonable to expect that the developer will satisfy, in due course, all of the requirements for issuance of a final public report [*see 10 Cal. Code Reg. § 2795*; *see also* [2], *below*].

The initial term of a preliminary public report may not exceed one year from the date of issuance. The authority to use

the report automatically terminates with respect to the subdivision interests covered by a final report, if any, that is issued before the scheduled termination date of the preliminary report [*10 Cal. Code Reg. § 2795(c)*].

[2] Final Public Reports

[a] Contents; Use

A final public report contains detailed consumer information relating to a particular subdivision. It specifies the developer's name, the location, size, and name of the project, the nature of the interest offered, and procedures for handling monies and operating the project. It also describes unusual features of the project, if any, such as hazards, land or other use restrictions, and financial requirements or arrangements [*see § 30.42*].

The owner, developer, or an agent of either must give a copy of the final public report to a prospective purchaser before the execution of a binding contract or agreement to purchase or lease an interest in subdivided lands. The prospective purchaser must acknowledge receipt of the report on a prescribed form, which prominently directs the purchaser not to sign it until he or she has received and read a copy of the final public report [*Bus. & Prof. Code § 11018.1(a)*; *see 10 Cal. Code Reg. § 2795.1(c)* (form)].

[b] Preparation, Filing, and Processing of Application Packet

In preparing and filing an application for a final public report, the developer must disclose substantial information concerning the subdivision and provide extensive supporting documentation [*see 10 Cal. Code Reg. § 2792(a)*; *see also § 30.121[2]*]. The developer must certify that the information and documentation is accurate [*see Code Civ. Proc. § 2015.5*]. If the developer fails to furnish all necessary information and documentation within three years from that date that he or she filed a notice of intention, the Commissioner may abandon the application [*Bus. & Prof. Code § 11018.13(a)*; *see Bus. & Prof. Code § 11018.13(b)*].

Before final processing of an application for a final public report may begin, the DRE must determine that the application is substantially complete with respect to quantitative requirements [*see Bus. & Prof. Code § 11010.2(b)*; *10* Cal. Code Reg. § 2792; *see also Bus. & Prof. Code § 11010.2(a)(1)-(3)*]. For a list of the documents and information required for a substantially complete application (SCA), and related notification and resubmittal requirements, see *§ 30.121[2]*.

Once the Commissioner determines that an application is substantially complete with respect to quantitative requirements, he or she will provide the applicant with a list of any deficiencies and substantive inadequacies that must be corrected before the application will be qualitatively complete [*Bus. & Prof. Code § 11010.2(b)(2)*; *see Bus. & Prof. Code § 11010.2(a)(2)*]. Within 20 days of the receipt of the additional information, the Commissioner will notify the applicant whether the application is qualitatively complete [*Bus. & Prof. Code § 11010.2(c)* (provision also sets forth requirements for resubmittals)]. The Commissioner will issue a final public report within 10 days after (1) the determination that the application is qualitatively and substantially complete, and (2) the applicant has submitted all recorded or filed instruments and evidence of financial arrangements required by the Commissioner [*Bus. & Prof. Code § 11010.2(d)*].

For a step-by-step guide to the preparation, filing, and processing of the application, see *§ 30.121[2]*.

[c] Standards for Issuance or Denial

If the Commissioner determines that the developer's application is qualitatively complete, he or she may take either of two steps. If the developer has established that a prospective purchaser or lessee of the subdivided land is adequately informed concerning the subdivision, the final public report will be issued [*Bus. & Prof. Code §§ 11010.2*, *11018*]. On the other hand, the Commissioner may refuse to issue the final public report until the developer has satisfied any

additional conditions that the Commissioner deems necessary for the protection of prospective purchasers or lessees [*see Bus. & Prof. Code § 11010.2*].

The Commissioner may deny the issuance of a final public report for a subdivision if the subdivider fails to comply with the SLA or its implementing regulations [*Bus. & Prof. Code §§ 11018, 11018.5*]. A subdivider whose application has been denied may, within 30 days after receipt of the order of denial, file a written request for a hearing. The Commissioner must hold the hearing within 20 days of the request unless the subdivider has requested a postponement. The Commissioner must render a proposed decision within 45 days and must issue an order adopting or rejecting the proposed decision within 15 days after it is reached. If the Commissioner fails to meet any of these procedural requirements, the order of denial must be rescinded and a public report must be issued [*Bus. & Prof. Code § 11018.3*].

The Commissioner may deny the issuance of a report if the developer (1) is unable to deliver title or other interest contracted for, or (2) fails or is unable to demonstrate that adequate financial arrangements have been made for improvements and guaranties or warranties included in the offering [*Bus. & Prof. Code § 11018*].

[d] Distribution and Display of Copies; Receipts

As noted in [a], *above*, the owner, developer, or an agent of either must give a copy of the final public report to a prospective purchaser before the execution of a binding contract or agreement to purchase or lease an interest in subdivided lands. The prospective purchaser must acknowledge receipt of the report on a prescribed form [*Bus. & Prof. Code § 11018.1(a)*; *see 10 Cal. Code Reg. § 2795.1(c)* (form)].

A copy of the public report must also be given by the owner, subdivider, or agent at any time it is requested by any member of the public. A statement disclosing this requirement and a copy of the public report must be posted in a conspicuous place where sales or leases or offers to sell or lease lots within the subdivision are regularly made [*Bus. & Prof. Code § 11018.1(b)*].

The subdivider or his or her agent must retain any receipt taken for a final public report for three years from the date of the receipt, and all such receipts must be made available for inspection by the Commissioner or the designated representative of the Commissioner during regular business hours [*10 Cal. Code Reg. § 2795.1(b)*].

[e] Term

The initial term of a final subdivision public report is five years [*10 Cal. Code Reg. § 2795.3*]. However, a renewal will be issued upon application of the subdivider, owner, or agent [*see § 30.121[4]*]. The Commissioner may require the submission of additional information in connection with any application for renewal of a final public report [*10 Cal. Code Reg. § 2795.3*].

[3] Conditional Public Reports

[a] Use

If an application for a public report has been determined to be qualitatively complete [*see Bus. & Prof. Code § 11010.2*; [2][b], *above*] but the applicant has not satisfied certain other requirements for the issuance of the final report [*see Bus. & Prof. Code § 11018.12*], the Commissioner may, under certain circumstances, issue a conditional public report for the subdivision. A conditional public report permits the applicant to sell or lease, or offer for sale or lease, lots or parcels in the subdivision only if the following conditions are met [*Bus. & Prof. Code § 11018.12(d)*]:

- Delivery of legal title or other interest contracted for must not take place until issuance of the final public report.

- The requirements of *Bus. & Prof. Code § 11018.12(e)* (discussed in the next paragraph) are satisfied.

Bus. & Prof. Code § 11018.12(e) requires the developer to supply evidence that all purchase money will be deposited in compliance with the provisions of the SLA that govern financing [*see Bus. & Prof. Code §§ 11013.2(a), 11013.4(a)*; *see also § 30.42*]. The developer must also describe the nature of the transaction to which the conditional public report will relate [*Bus. & Prof. Code § 11018.12(e)(2)*]. Further, the developer must provide for the return of the entire sum of money paid or advanced by the purchaser if (1) the subdivision public report has not been issued within six months of the date of issuance of the conditional public report, or (2) the purchaser is dissatisfied with the public report because of a material change in the setup of the offering [*Bus. & Prof. Code § 11018.12(e)(3)*; *see Bus. & Prof. Code § 11012*].

[b] Standards for Issuance

The Commissioner may issue a conditional public report if the application for the public report has been determined to be qualitatively complete, the requirements of *Bus. & Prof. Code § 11018.12(e)* [*see* [a], *above*] are satisfied, and all requirements for issuance of a public report have been met except for one or more of the following [*Bus. & Prof. Code § 11018.12(b)*]:

- A final map has been approved pursuant to *Gov. Code § 66458*, but has not been recorded pursuant to *Gov. Code § 66466(c)*.

- A declaration of covenants, conditions, and restrictions has not been recorded.

- A current preliminary report of a licensed title insurance company issued after the filing of the final map and recording of the declaration covering all subdivision interests to be included in the public report has not been provided.

- The Commissioner determines that other requirements are likely to be timely satisfied by the applicant, notwithstanding the fact that the failure to meet these requirements makes the application qualitatively incomplete.

The Commissioner must give the developer written notification of any decision to not issue a conditional public report. The notice must be provided within five business days and must specify the reasons why the report will not be issued [*Bus. & Prof. Code § 11018.12(c)*].

[c] Distribution of Report and Related Written Statement; Receipt

The subdivider, principal, or agent of either must provide a prospective purchaser or lessee with a copy of the conditional public report and a written statement that does the following [*Bus. & Prof. Code § 11018.12(f)*]:

- Specifies the information required for issuance of a public report.

- Specifies the information required in the public report that is not available in the conditional public report, along with a statement of the reasons why that information is not available at the time of issuance.

- States that no person acting as a principal or agent may sell or lease or offer for sale or lease lots or parcels in a subdivision for which a conditional public report has been issued except as provided in the applicable provisions of the SLA [*see Bus. & Prof. Code §§ 11010-11023*].

- Specifies the requirements of *Bus. & Prof. Code § 11018.12(e).*

The prospective purchaser must sign a receipt indicating that he or she has received and has read the conditional public report and the written statement [*Bus. & Prof. Code § 11018.12(g)*].

[d] Term

A conditional public report remains valid for up to six months. It may be renewed for one additional six-month term if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h)*].

The term of a conditional public report for attached residential condominium units [*see Civ. Code § 783*] consisting of 25 units or more as specified on the approved tentative tract map may not exceed 30 months. It may be renewed for one additional term of six months if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(i)*].

[4] Persons Required to Obtain Public Reports

The SLA requirement that a public report be obtained prior to the sale or lease of interests in subdivided land applies to the landowner or developer who originally subdivides a parcel of land. It also applies to persons who purchase or have an option or contract to purchase five or more interests in a subdivision and subsequently plan to sell or lease those interests. In the case of subdivided lands for which a public report has previously been issued, the terms "owner" and "subdivider" include any person who, at any point in time, owns or has an option or contract to acquire the subdivision interests for purposes of sale, lease, or financing, if the subdivision interests were acquired or are to be acquired from the original recipient of a public report or from a person who succeeded to the interest of the original recipient in (1) five or more subdivision interests in a subdivision other than a time-share project, or (2) 12 or more time-share estates or uses in a time-share project [*10 Cal. Code Reg. § 2801.5*]. For a discussion of time-share projects, see Ch. 33A, *Time-Share Projects* .

[5] Fees

A schedule of maximum fees that may be charged in connection with applications for subdivision public reports is established by statute [*see Bus. & Prof. Code § 11011*]. However, the DRE may establish lower fees if it determines that they are sufficient to offset the costs and expenses of administering the SLA [*see 10 Cal. Code. Reg. § 2790.1.5*]. All necessary filings related to securing public reports must be made on official DRE forms. The instructions that accompany those forms generally specify the required filing fees.

[6] Effect of Subsequent Changes

The public report will include only the lots or parcels shown by the recorded map or other documents or reports acceptable to the Commissioner. If a particular lot or parcel within a subdivision is to be subsequently subdivided into smaller lots or parcels, the subdivider must obtain a new public report [*Bus. & Prof. Code §§ 11000(a), 11010, 11011*].

A subdivider may, for the purpose of developing and marketing subdivided land in increments or phases, obtain a public report that covers less than all of the contiguous subdivision interests or land that the subdivider intends ultimately to develop as part of an overall project. In that case, the subdivider must submit a new notice of intention, questionnaire, and original filing fee in connection with each subsequent application for a public report covering subdivision interests to be annexed to the subdivision interests for which a final public report was previously issued [*10 Cal. Code Reg. § 2798*].

[7] Prohibited Acts and Penalties

It is unlawful for any person to knowingly make, issue, publish, deliver, or transfer as true and genuine any public

report that is forged, altered, false, or counterfeit. It is also unlawful for any person to cause to be made or participate in the making, issuance, delivery, transfer, or publication of a public report with knowledge that it is forged, altered, false, or counterfeit [*Bus. & Prof. Code § 11020(a)*]. Any person who commits one of these acts is guilty of a public offense punishable by either or both (1) a fine not exceeding $10,000, and/or (2) imprisonment in the state prison or the county jail for up to one year [*Bus. & Prof. Code § 11020(b)*]. This penalty does not affect any other penalty, relief, or remedy provided by law [*Bus. & Prof. Code § 11020(c)*].

Anyone who violates or fails to comply with the provisions of the SLA may be guilty of a public offense punishable by a fine not exceeding $10,000, or by imprisonment in the state prison or in the county jail not exceeding one year, or by both such fine and imprisonment [*Bus. & Prof. Code § 11023*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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13-30 California Legal Forms--Transaction Guide § 30.42

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.42 Blanket Encumbrances and Release Clauses

[1] Definitions

[a] "Blanket Encumbrance"

For purposes of the SLA, a "blanket encumbrance" is a trust deed, mortgage, other lien or encumbrance, or mechanics' lien that secures or evidences the payment of money and affects either (1) land to be subdivided, or (2) more than one lot or parcel of subdivided land. This definition also includes an agreement that affects more than one lot or parcel of subdivided land by which the owner or subdivider holds the subdivision under an option, contract to sell, or trust agreement [*Bus. & Prof. Code § 11013*; *see Bus. & Prof. Code § 11013.3* (taxes and assessments levied by public authority are not blanket encumbrances within meaning of SLA)].

[b] "Release Clause"

A "release clause" is a provision in a blanket encumbrance or other supplementary agreement that unconditionally provides that the purchaser or lessee of a lot or parcel can obtain legal title or other interest contracted for, free and clear of the blanket encumbrance, on compliance with the terms and conditions of the purchase or lease [*Bus. & Prof. Code § 11013.1*].

[2] Sale or Lease Subject to Blanket Encumbrance

[a] Release Required

If subdivided property is subject to a blanket encumbrance, proper releases of that encumbrance must be obtained and legal title or a leasehold interest must be delivered to the purchaser or lessee free of any liens and encumbrances that are not assumed or taken subject to by the purchaser or lessee [*see Bus. & Prof. Code §§ 11013-11013.5*; *10* Cal. Code Reg. §§ 2791-2791.2]. If the necessary releases have not been obtained, all moneys paid by the purchaser or lessee must be

impounded or some other approved alternative measure must be taken to protect the purchaser or lessee who has paid money on account of the purchase price or rental [*Bus. & Prof. Code §§ 11013-11013.5*; *10* Cal. Code Reg. §§ 2791-2791.8; *39 Ops. Cal. Atty. Gen. 16 (1962)* ; *see* [b], *below*]. The public report must indicate what, if any, alternative measure has been employed to address the blanket encumbrance [*Bus. & Prof. Code § 11013.5*].

[b] Sale or Lease Subject to Blanket Encumbrance Without Unconditional Release Clause

[i] Overview of Alternative Procedures

If an unconditional release clause is not included in the contract of sale or lease, one of four procedures established by the SLA must be complied with in any sale or lease of a subdivision lot or parcel that is subject to a blanket encumbrance [*see Bus. & Prof. Code § 11013.2*; *see also* [ii]-[v], *below* (alternative procedures)]. These procedures are designed to protect the prospective purchaser or lessee from unanticipated liabilities arising from the encumbrance.

[ii] Deposit of Money Into Escrow Depository

Under the first of the four procedures mentioned in [i], above, the entire sum of money paid or advanced by the purchaser or lessee (or any portion of the sum of money that the Commissioner deems sufficient to protect the interest of the purchaser or lessee) must be deposited into an escrow depository acceptable to the Commissioner [*see* [4], *below*]. The deposit will remain in escrow until (1) a proper release is obtained from the blanket encumbrance [*see 10 Cal. Code Reg. § 2791.1(b)* (requirements for proper release)]; (2) either the owner, subdivider, agent, purchaser, or lessee defaults under the contract of sale or lease and there is a determination as to the disposition of the moneys; or (3) the owner, subdivider, or agent orders the return of the moneys to the purchaser or lessee [*Bus. & Prof. Code § 11013.2(a)*]. The amount of money deposited and retained in escrow must ordinarily be the entire amount of money received, less disbursements made to third parties for credit reports, escrow services, preliminary title reports, appraisals, and loan processing services [*10 Cal. Code Reg. § 2791.1(a)*; *see 10 Cal. Code Reg. § 2791(b)*].

[iii] Title Held in Trust

Under the second procedure, the title to the subdivision must be held in trust under an agreement of trust acceptable to the Commissioner until a proper release from the blanket encumbrance is obtained [*Bus. & Prof. Code § 11013.2(b)*]. The trustee must ordinarily be a trust company [*see Fin. Code § 107* (definition)] that is qualified to do business in California [*10 Cal. Code Reg. § 2791.6*]. The Commissioner may, however, approve a different trustee [*10 Cal. Code Reg. § 2791.6*].

[iv] Bond or Undertaking

Under the third procedure, a bond or undertaking to the State of California must be furnished to the Commissioner for the benefit and protection of purchasers or lessees of the lots or parcels, in an amount and subject to any terms that are approved by the Commissioner [*Bus. & Prof. Code § 11013.2(c)*; *see Code Civ. Proc. § 995.010 et seq.* (undertaking may be substituted for bond)]. The amount of the bond or undertaking must ordinarily be 100 percent of the money paid or advanced by any purchasers or lessees, less the amount held in escrow depositories pursuant to *Bus. & Prof. Code § 11013.2(a)* and the disbursements made to third parties for credit reports, escrow services, preliminary title reports, appraisals, and loan processing services [*10 Cal. Code Reg. § 2791.2*; *see 10 Cal. Code Reg. § 2791(b)*]. The bond or undertaking must provide for the return of the moneys paid or advanced by any purchaser or lessee for or on account of the purchase or lease of any subdivision lot or parcel, if a proper release from the blanket encumbrance is not obtained [*Bus. & Prof. Code § 11013.2(c)*]. However, in the event that the purchaser or lessee, by reason of default or otherwise, is not entitled to the return of all or any portion of the funds, the bond or undertaking must be exonerated in the amount to which the purchaser or lessee is not entitled [*Bus. & Prof. Code § 11013.2(c)*]. For a detailed discussion of bonds, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[v] Other Procedure Approved by Commissioner

Under the fourth "procedure," the subdivider must comply with any other alternative requirement or method that the Commissioner deems acceptable for purposes of the SLA [*Bus. & Prof. Code § 11013.2(d)*].

[3] Sale or Lease Not Subject to Blanket Encumbrance

[a] Overview of Alternative Conditions

If a subdivision is not subject to a blanket encumbrance, it is unlawful for the owner, subdivider, or agent to sell or lease lots or parcels within the subdivision unless one of the conditions set forth in *Bus. & Prof. Code § 11013.4* is satisfied. These alternative conditions are described in [b]-[g], below.

[b] Deposit of Money Into Escrow

Under the first procedure specified in *Bus. & Prof. Code § 11013.4*, the purchaser or lessee must advance or pay the entire sum of money for the lot or parcel, or a portion of that sum deemed by the Commissioner to be sufficient to protect the interest of the purchaser or lessee. That advance or payment must be deposited into an escrow depository or trust account. The escrow depository or trust account, whichever is used, must be acceptable to the Commissioner [*see* [4], *below*]. The money must be held in the escrow depository or trust account until either of the following requirements is satisfied [*Bus. & Prof. Code § 11013.4(a)*]:

- The legal title or other interest contracted for is delivered to the purchaser or lessee; or

- The owner, subdivider, agent, purchaser, or lessee defaults and a determination is made as to the disposition of the funds, or the owner, subdivider, or agent orders the return of the funds to the purchaser or lessee.

[c] Bond or Undertaking

Under the second procedure, a bond or undertaking to the state of California must be furnished to the Commissioner for the benefit and protection of purchasers or lessees of the lots or parcels [*Bus. & Prof. Code § 11013.4(b)*; *see Code Civ. Proc. § 995.010 et seq.* (undertaking may be substituted for bond)]. The bond or undertaking must be in an amount and subject to any terms approved by the Commissioner [*Bus. & Prof. Code § 11013.4(b)*]. Ordinarily, the bond will be 100 percent of the money paid or advanced by any purchasers or lessees, less (1) the amount held in escrow depositories or trust accounts, and (2) the disbursements made to third parties for credit reports, escrow services, preliminary title reports, appraisals, and loan processing services by the third parties [*10 Cal. Code Reg. § 2791.2*; *see 10 Cal. Code Reg. § 2791(b)*].

The bond must provide for the return of the money that any purchaser or lessee pays or advances for or on account of the purchase or lease of any subdivision lot or parcel in the event that the owner, subdivider, or agent does not, within the time specified in the contract, deliver the legal title or other interest contracted for. The return of the money must be required regardless of whether the failure to deliver title is attributable to any reason other than an uncured default of the purchaser or lessee [*Bus. & Prof. Code § 11013.4(b)*].

[d] Certificate Filed by Association

Under the third procedure, an association must file a certificate with the Commissioner. The certificate must state that (1) the owner, subdivider, or agent is a member of the association, and (2) there is on file with the Commissioner a bond or undertaking that has been approved as to amount, terms, and coverage for the benefit and protection of all purchasers and lessees of subdivided lots or parcels to be sold or leased by members of the association. The Commissioner may

require that the certificate be verified [*Bus. & Prof. Code § 11013.4(c)*; *see Code Civ. Proc. § 995.010 et seq.* (undertaking may be substituted for bond)].

[e] Security and Lien and Completion Bonds

The fourth procedure is available to owners, subdividers, or agents who propose to sell or lease lots or parcels that contain residential structures [*Bus. & Prof. Code § 11013.4(d)(2)*]. Under it, the Commissioner must be given satisfactory proof that (1) security for payment of taxes [*see Gov. Code § 66493*] and improvements [*Gov. Code § 66499 et seq.*] has been approved or is unnecessary, and (2) a lien and completion bond (or bonds) approved by the Commissioner as to amount, terms, and coverage, and including within its scope all on-site construction work to be undertaken on the lots or parcels, has been written and issued by an admitted surety insurer [*see Code Civ. Proc. § 995.120(a)*].

[f] Escrow When Property Has Residential Improvements

The fifth procedure is available to owners, subdividers, or agents who propose to sell or lease lots or parcels with improvements that are in the nature of residential structures. Under that procedure, the entire sums of moneys paid or advanced by the purchasers or lessees of the lots or parcels, or any portion of the funds that the Commissioner determines is sufficient to protect the interest of the purchaser or lessee, must be deposited into an escrow depository or other agency acceptable to the Commissioner [*see* [4], *below*]. The deposit must be held in whole or in part by the escrow depository or other agency or, at the election of the owner, subdivider, or agent, must be disbursed in whole or in part for the construction of residential or other structures to be built on the lots or parcels within the subdivision (or any unit or units specified by the Commissioner), in the manner and pursuant to the instructions approved by the Commissioner [*Bus. & Prof. Code § 11013.4(e)*].

[g] Another Alternative Procedure

The sixth "procedure" consists of any alternative procedure or method that the Commissioner deems acceptable for purposes of the SLA [*Bus. & Prof. Code § 11013.4(f)*].

[4] Requirements for Escrow Depositories

[a] Acceptable Entities

An escrow depository will be acceptable to the Commissioner under *Bus. & Prof. Code §§ 11013.2* or *11013.4* [*see* [2], [3], *above*] if it is qualified to do business in California. Acceptable depositories include licensed escrow agents, banks, trust companies, savings and loan associations, title insurers, and underwritten title companies [*10 Cal. Code Reg. § 2791.4(a)*]. In exceptional circumstances, the Commissioner may approve an escrow depository other than one of the entities enumerated above [*see 10 Cal. Code Reg. § 2791.4(b)*].

[b] Escrow Instructions

The instructions to the escrow depository must include the following [*10 Cal. Code Reg. § 2792(a)(13)* (regulation also requires submission of instructions to DRE as part of public report application)]:

- A description of the nature of the transaction.
- A requirement for the return to nondefaulting buyers of funds deposited toward the purchase of subdivision interests if escrows are not closed on or before a date specified in the instructions.
- The name and address of the escrow depository.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawFinancingSecondary FinancingBlanket & Third MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.43

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.43 Contractual Provisions Regarding Purchase or Rental Monies

[1] In General

Regulations promulgated under the SLA that affect agreements between subdividers and prospective purchasers and lessees of subdivided lands are designed primarily to protect those purchasers and lessees [*see* [2]-[4], *below*]. A detailed discussion of contracts for the sale or lease of real property is beyond the scope of this chapter. For a complete discussion of sales contracts, see Ch. 23, *Real Property Sales Agreements* . For a discussion of leases, see Ch. 34B, *Residential Leases* , and Ch. 34C, *Commercial, Industrial, and Office Leases* .

[2] Purchase Money Disbursements

[a] In General

The sale or lease agreement relating to land governed by the SLA must contain certain provisions with respect to purchase money. The agreement must require the remittance of all purchase money if the escrow for sale or lease of the subdivision interest does not close on or before the date specified in the agreement or a later closing date mutually agreed to by the subdivider and the prospective buyer or lessee. The agreement must require that the order for remittance be made within 15 days after the closing date set forth in the contract or an extended closing date mutually agreed to by the subdivider and buyer [*10 Cal. Code Reg. § 2791(a)*].

The agreement may provide for disbursements or charges from purchase monies for payments to third parties for credit reports, escrow services, preliminary title reports, appraisals, and loan processing services by third parties. If a provision of that nature is included, the agreement must also (1) enumerate all of the disbursements or charges that may be made against purchase money, and (2) specify the subdivider's estimate of the total amount of these disbursements and charges [*10 Cal. Code Reg. § 2791(b)*].

[b] Defaults

[i] Liquidated Damages

Except in the case of disbursements for services performed by third parties [*see § 30.43[2][a]*], any contractual provision that requires a disbursement or charge against purchase money based on the buyer's failure to complete the purchase of the subdivision interest must conform to certain liquidated damages provisions of the California Civil Code [*10 Cal. Code Reg. § 2791(c)(1)*; *see Civ. Code §§ 1675-1678*; *see also* Ch. 23, *Real Property Sales Agreements*]. Except for a disbursement made following an adequate waiver by the buyer [*see 10 Cal. Code Reg. § 2791(c)(4)*], or pursuant to a written agreement that either cancels the contract or is executed after the final closing date specified by the parties, a disbursement or charge against purchase money as liquidated damages may be accomplished only pursuant to a determination by a court or by an arbitrator if the parties have provided for the disbursement in their agreement and the buyer has defaulted [*10 Cal. Code Reg. § 2791(c)(2)*].

[ii] Arbitration

A contractual provision for a determination of default by arbitration must require that (1) the arbitration be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, and (2) the subdivider remit the fee to initiate arbitration, with the costs of the arbitration ultimately to be borne as determined by the arbitrator [*10 Cal. Code Reg. § 2791(c)(3)*].

[iii] Escrow Holder's Obligation to Disburse Purchase Money to Subdivider as Liquidated Damages

The agreement may require that the escrow holder disburse the purchase money to the subdivider as liquidated damages upon the buyer's waiver of the right to a determination of default by a court or arbitrator. If the agreement contains a provision to this effect, it must require that the subdivider give written notice by registered or certified mail to the escrow holder that the buyer is in default and that the subdivider is demanding that the escrow holder remit a specified sum from the purchase money to the subdivider as liquidated damages unless the buyer gives appropriate written notice to the escrow holder within 20 days [*10 Cal. Code Reg. § 2791(c)(4)(A)*]. The buyer then has 20 days from the date he or she receives the subdivider's notice and demand in which to give the escrow holder a written objection to disbursement of purchase money as liquidated damages [*10 Cal. Code Reg. § 2791(c)(4)(B)*]. The contract cannot make the buyer's failure to provide such a written objection a waiver of any cause of action the buyer may have against the subdivider under the contract, other than a waiver of the right to specific performance of the contract, unless the waiver is conditioned on proper service of the subdivider's 20-day notice and demand [*10 Cal. Code Reg. § 2791(c)(5)*].

[iv] Subdivider's Obligation to Transmit Purchase Money to Escrow Holder

If the subdivider has had the use of purchase money pending consummation of the sale or lease transaction under authorization by the DRE pursuant to *Bus. & Prof. Code § 11013.2(c)* or *(d)* or *Bus. & Prof. Code § 11013.4(b)* or *(c)* the subdivider, immediately upon alleging default by the buyer, must transmit to the escrow holder funds equal to all of the purchase money paid by the buyer [*see 10 Cal. Code Reg. § 2791(c)(6)*].

[3] Real Property Sales Contract

[a] Definition; Required Contents

A "real property sales contract" is an agreement in which one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract and that does not require conveyance of title within one year from the date of formation of the contract [*Civ. Code § 2985(a)*; *see also Bus. & Prof. Code § 10029*]. These agreements generally provide for payment of the purchase price in installments. A "real property sales contract" does not include a contract for purchase of an attached residential condominium unit entered into pursuant to a conditional public report issued by the Department of Real Estate under *Bus. & Prof. Code § 11018.12* (applicable to condominium projects containing five or more units) [*Civ. Code § 2985(b)*].

A real property sales contract must specify the number of years required to complete payments under the contract and the basis upon which the tax estimate is made [*Civ. Code § 2985.5*]. The contract must also set forth the legal description of the property, the encumbrances outstanding at the date of the contract, and the controlling terms [*Bus. & Prof. Code § 11200*].

[b] Buyer's Lien and Risks

Under a real property sales contract, the buyer has a special lien upon the property and does not receive legal title until he or she completes the payments called for under the agreement [*Civ. Code § 3050*].

A buyer of subdivided land under a real property sales contract may face several potential risks. For example, if the subdivider fails to make payments on an encumbrance on the individual lot existing at the time the contract is executed, the holder of the encumbrance may start foreclosure proceedings even though the buyer is current in his or her payments. Thus, the buyer may lose the payments, the home, and any home improvements he or she has made. Furthermore, after delivery of the contract, the subdivider may place subsequent liens on the subdivision lot or may suffer mechanics' liens for both on-site and off-site improvements. This problem is accentuated by the fact that most contracts are not executed in a recordable form or the subdivider frequently specifies that on pain of forfeiture the contract is not to be recorded. The seller under a real property sales contract may suffer delinquent federal and/or state tax liens on the property. Finally, on completion of the payments, the buyer may be forced to initiate litigation to secure title if the subdivider has been adjudicated bankrupt [*see 39 Ops. Cal. Atty. Gen. 16 (1962)]* .

[c] Restrictions on Transfer

In general, a real property sales contract is nontransferable unless it is accompanied by a transfer of the real property to which it relates. Similarly, real property covered by an installment sale contract may not be transferred unless it is accompanied by an assignment of the contract. However, there are two exceptions to these prohibitions on transfers. First, a real property sales contract may be transferred to the holder of a first lien as security or for collection purposes. Second, a fee title in trust is transferable [*Civ. Code § 2985.1*].

[d] Prepayment

A buyer may prepay all or any part of the balance due on any real property sales contract with respect to the sale of land that has been subdivided into a residential lot or lots that contain a dwelling for not more than four families. However, the seller may enter into a written agreement with the buyer to prohibit prepayment for up to a 12-month period following the sale [*Civ. Code § 2985.6(a)*]. Any waiver by the buyer of his or her legal entitlement to prepay will be void and unenforceable as contrary to public policy. However, the unenforceability and voidability of a prepayment waiver will in no way affect the validity of the remainder of the real property sales contract [*Civ. Code § 2985.6(b)*].

[e] Prohibited Acts

Under certain conditions, it is illegal to sell a parcel of land under an unrecorded real property sales contract if the seller later encumbers the property in a manner that the parties have not consented to in writing. This prohibition applies only if (1) the encumbrance is in an amount that, together with existing encumbrances, exceeds the amount due under the contract, or (2) the aggregate amount of any periodic payments under the encumbrance exceeds the periodic payments due on the contract, excluding any pro rata amount for insurance and taxes. A person who violates these prohibitions is guilty of a public offense punishable by a fine not exceeding $10,000 or by imprisonment in the state prison and/or in the county jail for up to one year [*Civ. Code § 2985.2*].

The seller of improved or unimproved real property under a real property sales contract is prohibited from knowingly receiving certain installment payments from the buyer. These payments are prohibited if (1) they would result in a

payment by the seller or his or her assignee being due on an obligation secured by an encumbrance on the property, and (2) the seller appropriates the payment to a use other than payment of the amount then due on the seller's or assignee's obligation (except to the extent that the payment received exceeds the amount due from the seller or assignee). A person who violates these prohibitions is guilty of a public offense punishable by a fine of up to $5,000 and/or imprisonment in the state prison or county jail [*Civ. Code § 2985.3*].

Every seller of improved or unimproved real property under a real property sales contract who receives pro rata payments for insurance and taxes must hold these amounts in trust for the purpose designated [*see Civ. Code § 2985.4*]. The seller is prohibited from disbursing those amounts for any other purpose without the consent of the payor and any person or corporation holding an encumbrance on the property [*Civ. Code § 2985.4*]. However, this prohibition does not apply to a state or federal supervised assignee of a seller who as agent for the seller receives and disburses payments [*Civ. Code § 2985.4*]. A person who violates these prohibitions is guilty of a public offense punishable by a fine of up to $5,000 and/or imprisonment in the state prison or county jail for up to one year [*Penal Code § 506b*; *see Civ. Code § 2985.4*].

[4] Conveyances in Trust

[a] Basic Requirements

Most subdividers sell subdivision interests using real property sales contracts [*see Bus. & Prof. Code § 10029*; *see also* [3], *above*]. However, *Bus. & Prof. Code §§ 11013.2(d)* and *11013.4(f)* provide for an alternative sales method under which the subdivider conveys the subdivision interests in trust and records the conveyance before the execution of a sales contract by a prospective purchaser [*10 Cal. Code Reg. § 2791.9*]. Under this type of arrangement, the Commissioner must approve of the original trustee and any successor trustee. The trust instrument may not be amended in a way that affects the purchaser's interests, either directly or indirectly, without the Commissioner's prior written approval. The trustee must agree to continue in that capacity until a successor trustee acceptable to the Commissioner has assumed the position. The trust instrument must expressly designate purchasers as beneficiaries [*Bus. & Prof. Code §§ 11013.2(d), 11013.4(f)*; *see 10 Cal. Code Reg. § 2791.9*].

[b] Additional Requirements When Interests Not Subject to Blanket Encumbrance

If the subdivision interests held in trust under this type of arrangement are not subject to a blanket encumbrance [*see § 30.42*], provisions for the purchaser to make payments under the contract to the trustee and for the trustee to make disbursements from purchase money must satisfy specific requirements. The trustee must pay or set aside funds to pay the debt service, taxes, assessments, insurance premiums, and any other periodic payments related to the ownership and use of the subdivision interest that the purchaser is obligated to make under terms of the sales contract. Payment must be made to the subdivider from the balance of purchase money remaining after the trustee has paid or set aside those funds [*Bus. & Prof. Code §§ 11013.2(d), 11013.4(f)*; *see 10 Cal. Code Reg. § 2791.9*].

[c] Additional Requirements When Interests Subject to Blanket Encumbrance

If the subdivision interests are subject to a blanket encumbrance, different requirements must be satisfied [*see Bus. & Prof. Code § 11013*; *see also § 30.42*]. Unless there has been an independent determination that the purchaser is in default under the terms of the sales contract, the trustee will hold all of the purchase money in an interest-bearing account for the benefit of the purchaser until the subdivision interest that the purchaser has contracted to purchase is released from the blanket encumbrance. Unless there has been an independent determination that the purchaser is in default under the terms of the sales contract, a refund of the entire purchase money amount must be made, on the purchaser's demand, if the subdivision interest has not been released from the blanket encumbrance within a specified period determined by the Commissioner to be reasonable. If the subdivider wishes to disburse purchase money to himself or herself or for his or her account based on the purchaser's default under the sales contract, there must be a procedure for a determination of default by a court or arbitrator and for the disbursement by the trustee of funds as

liquidated damages on the basis of the determination that the purchaser has defaulted [*Bus. & Prof. Code §§ 11013.2(d), 11013.4(f)*; *see 10 Cal. Code Reg. § 2791.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.44

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.44 Restrictions on Sales Representations and Advertising

It is unlawful for a subdivider to intentionally use any false or misleading statement, pictorial representation, or sketch in connection with the sale or lease of subdivided lands, lots, or parcels. It is also unlawful to authorize, use, direct, or aid in the publication, distribution, or circularization of any advertisement, radio broadcast, or telecast concerning the subdivided lands that is false or misleading. However, a newspaper or magazine publisher, job printer, broadcaster, telecaster, or employee of any of the above will not be deemed liable for any publication violating these prohibitions unless that person or entity had actual knowledge of the falsity of the publication or has an interest either as an owner or agent in the advertised lands [*Bus. & Prof. Code § 11022*]. The Commissioner has issued detailed regulations setting forth the standards that will be applied in determining whether advertising for the sale or lease of subdivision interests is false, untrue, or misleading [*see 10 Cal. Code Reg. § 2799.1*].

Statements appearing in the public report for a subdivision may not be quoted, paraphrased, or cited out of context, nor may any part of the public report be underscored, italicized, boldfaced, or otherwise highlighted except in strict conformance with highlighting in the public report itself [*10 Cal. Code Reg. § 2799.1(a)(37)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.45

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.45 Changes in Offering

It is unlawful for the owner, the owner's agent, or the subdivider to materially change the setup of an offering after it is submitted to the DRE without first notifying the DRE in writing of the intended change. This requirement applies only when the owner, agent, or subdivider has knowledge or constructive knowledge of the change [*Bus. & Prof. Code § 11012*; *see 10 Cal. Code Reg. § 2800*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.46

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.46 Changes in Documents Affecting Interests

[1] Approval Requirement

The Commissioner's consent must be obtained for any proposed change to documents, such as bylaws and articles of incorporation, that control or affect rights, preferences, privileges, or restrictions on subdivision interests or the owner of subdivision interests [*see Bus. & Prof. Code §§ 11000.1, 11004.5*]. If a subdivider fails to take the steps necessary to obtain the Commissioner's approval within 90 days after the application is filed, the Commissioner may deem the application to be abandoned. In that case, the applicant must file a new application [*10 Cal. Code Reg. § 2793(e)*].

[2] Ownership Rights

Subject to certain conditions, any amendment or modification of provisions in the declaration of restrictions, bylaws, articles of incorporation, or other documents that control or otherwise affect rights to ownership, possession, or use of interests in subdivisions [*see Bus. & Prof. Code §§ 11000.1, 11004.5*] that would materially change an owner's rights must be approved in writing by the Commissioner before it will be effective [*Bus. & Prof. Code § 11018.7(a)*]. The Commissioner's written consent is necessary even if the change in the owner's rights is only indirect, such as a change that is generally applicable to an owners' association of which he or she is a member. The Commissioner's consent must be obtained whenever the subdivider or his or her successor in interest holds or directly controls one-fourth of the votes necessary to effect the change [*Bus. & Prof. Code § 11018.7(a)*].

[3] Limitations on Meetings and Solicitations

The Commissioner's prior approval must be obtained prior to any official meeting of owners or members or written solicitation of them for the purpose of changing rights to ownership, possession, or use of subdivision interests [*Bus. & Prof. Code § 11018.7*]. Nevertheless, the governing body of the owners association may meet and vote on the question of submission of a proposed change to the Commissioner [*Bus. & Prof. Code § 11018.7(b)*].

[4] Conditions for Approval

The Commissioner will not consent to the submission of a proposed change to a vote of owners or members if the proposed change will create a new condition or circumstance that would form the basis for denial of a public report [*Bus. & Prof. Code § 11018.7(b)*; *10* Cal. Code Reg. § 2793(d); *see § 30.41[2][c]*]. If the Commissioner finds that the proposed change will not materially change the rights of any owner or member, he or she will consent to the submission of the proposed change to a vote of the owners or members. If the Commissioner finds that the proposed change will materially change any owner's rights, he or she will require, as a condition to consent, that a notice describing the change be given to those persons eligible to vote at least 15 days before the vote [*10 Cal. Code Reg. § 2793(c)*].

[5] [Reserved]

[6] Responses to Violations

[a] Desist and Refrain Orders

The Commissioner may order a person to desist and refrain from violating provisions of the SLA or from the further sale or lease of interests in a subdivision pending correction of the violation. Specifically, a desist and refrain order may by directed toward any person who has done any of the following [*Bus. & Prof. Code § 11019(a)*]:

- Violated any provision of the SLA, its implementing regulations, or specified statutory provisions regulating the offering of prices in connection with promotional, advertising, and marketing programs [*see Bus. & Prof. Code §§ 17537, 17537.1, 17539.1*].

- Not yet fulfilled representations or assurances with respect to the subdivision or the subdivision offering on which the DRE relied in issuing the subdivision public report.

- Failed to inform the DRE of material changes in the subdivision or subdivision offering that have caused the subdivision public report to be misleading or inaccurate or that would have caused the DRE to deny a public report if the conditions had existed at the time of issuance [*see § 30.223[1]*].

A person who receives a desist and refrain order must immediately comply with its terms [*Bus. & Prof. Code § 11019(b)*]. The recipient may, within 30 days, file with the Commissioner a written request for hearing to contest the order. The Commissioner must, after receipt of that request, assign the matter to the Office of Administrative Hearings to conduct a hearing for findings of fact and determinations of the issues set forth in the order. The hearing must be commenced within 15 days after receipt of the request, unless the subdivider agrees to a continuance, and the Commissioner must render a decision within 30 days after completion of the hearing. If these procedural requirements are not satisfied, the order will be deemed to be vacated [*Bus. & Prof. Code § 11019(c)*].

Service and proof of service of an order to desist and refrain may be made in the same manner prescribed for the service of summons in *Code of Civil Procedure Sections 415.10 through 417.40* [*Bus. & Prof. Code § 11019(d)*]. A written order to desist and refrain must specify the nature of the subject activity and the factual and legal basis for the Commissioner's determination that the recipient has engaged or is engaging in an activity that violates the Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*] or its implementing regulations [*Bus. & Prof. Code § 10086(a)*].

[b] Disciplinary Actions Against Licensees

The Commissioner may suspend or revoke the license of any real estate licensee or deny the issuance of a license to an applicant who has willfully disregarded or violated any of the provisions of the SLA or its implementing regulations [*Bus. & Prof. Code § 10177(d)*]. Generally, an action to revoke or suspend a license must be taken within three years of the date the infraction occurred. However, in the case of fraud, misrepresentation, or a false promise, the action to

revoke or suspend a license must be taken within the later of (1) one year after the date of discovery by the aggrieved party of the fraud, misrepresentation, or false promise, or (2) three years after the occurrence of the act. Under no circumstances may an action to revoke or suspend a license be taken later than 10 years from the occurrence of the alleged grounds for disciplinary action [*Bus. & Prof. Code § 10101*].

[c] Accrual of Action for Wrongful Sale or Lease

The period of any applicable statute of limitations in a civil or criminal action or proceeding involving a violation of the SLA is based on the date on which the instrument of conveyance that describes the lot or parcel that was wrongfully sold or leased is recorded. The limitations period commences running after the deed, lease, or contract of sale conveying the property in violation of the SLA was recorded with the county recorder of the county in which the property is situated. However, the SLA does not prohibit the maintenance of an action at any time before the recording of those instruments [*Bus. & Prof. Code § 11021*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART II. LEGAL BACKGROUND
C. Subdivided Lands Act

13-30 California Legal Forms--Transaction Guide §§ 30.47-30.99

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.47[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-30 California Legal Forms--Transaction Guide § 30.100

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.100 Facts

1. Client's name, address, and telephone number.

2. Nature of client's ownership interest in property to be subdivided [*see* ch. 27, *Deeds and Recording*].

3. Names, addresses, and telephone numbers of all other entities involved in proposed project, such as:

    a. Owner of real property to be subdivided (if other than client).

    b. Engineers.

    c. Consultants.

    d. Surveyors.

4. Names, addresses, and telephone numbers of counsel representing any other parties to project.

5. Name, location, and identity of officer of any financial institution with which client has discussed project.

6. Forms of client's business organization, such as:

    a. Sole proprietorship or individual.

b. General partnership.

c. Limited partnership.

d. Corporation.

e. Nonprofit corporation [*see Gov. Code § 66499.3* (exemptions from certain off-site improvement security requirements for nonprofit corporations); *see also § 30.201[1][c][ii]*].

7. Legal description of real property to be subdivided.

a. Numbered/lettered parcel from recorded subdivision map; or

b. Only metes and bounds description based on recorded deeds.

NOTE:
If only a metes and bounds description exists, counsel should verify the legality of the property as a separate parcel.

8. Status of real property to be subdivided, such as:

a. Unimproved land.

b. Improved or partially improved land.

9. Status of areas adjacent to and in proximity to real property to be subdivided, e.g.:

a. Owner (client or related party?).

b. General plan and zoning classification.

c. Actual or proposed usage.

d. Location in city or unincorporated county.

10. Source for the following services on real property to be subdivided and adjacent real property:

a. Water supply.

b. Sewage.

c. Utilities.

11. General plan and zoning classification of real property to be subdivided and adjacent real property.

12. Location of nearest facilities, such as:

a. Elementary schools.

b. Transportation lines.

c. Fire and police stations.

13. Proposed nature of subdivision, including:

a. Types of structures, such as:

(1) Single-family residences.

(2) Condominiums or other shared-interest projects [*see* Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums*].

(3) Planned unit developments.

b. Number of lots or parcels.

c. Nature and source of financing.

d. Whether subdivided lots will be sold or leased.

e. Manner in which payment for subdivided lots will be made [*see* Ch. 30A, *Construction Financing*].

14. Past subdivisions creating or including parcel (if facts suggest quartering or other history of avoiding "major" subdivision).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-30 California Legal Forms--Transaction Guide § 30.101

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.101 Documents

1. Conveyance documents that created client's ownership interest in real property to be subdivided.

2. Title report covering real property to be subdivided.

3. Latest equalized county assessment roll.

4. Any documents already ordered or executed by client, such as:

    a. Surveyors' written reports.

    b. Maps.

    c. Environmental impact report.

    d. Applications related to financing of project.

    e. Contracts with financial institutions or public entities.

5. Property line or boundary survey map that shows:

    a. Bearings and distances of all boundaries.

    b. Location and dimensions of connecting and adjacent streets and tracts.

c. Any encroachments on the property as well as easements within and contiguous to the property.

d. Names of record owners or references to recorded subdivisions of adjacent property.

e. All monuments found or set that determine boundary or boundary references.

f. Computed areas and other special data pertinent to parcel.

6. Topographic, drainage, and contour maps that show:

a. Elevations or contours (to show topography of property).

b. Location and elevations of all structures, such as:
(1) Buildings.

(2) Bridges.

(3) Walls.

(4) Culverts.

c. Location and elevations of all physical features, such as:

(1) Roads.

(2) Watercourses.

(3) Marsh or pond areas.

(4) Rock outcrops.

d. Location and size of trees and wooded areas.

e. Location of test pits or borings.

7. Site location or vicinity map that shows:

a. Highway and street pattern.

b. Size and extent of commercial establishments.

c. Character of neighboring area and employment potentials.

d. Locations of churches, schools, recreational facilities, etc.

e. Zoning and area of jurisdiction.

f. Other special features.

8. Public utility maps that show:

a. All utilities easements and rights-of-way.

b. Location and size of all parts of storm and sanitary sewage system.

c. Location and size of all underground conduits for:

(1) Water.

(2) Gas.

(3) Steam.

d. Location of public transportation, police and fire alarms, and similar facilities.

9. Complete aerial photographs of:

a. Real property to be subdivided.

b. All adjacent properties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawPriorities & RecordingGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

13-30 California Legal Forms--Transaction Guide §§ 30.102-30.109

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

13-30 California Legal Forms--Transaction Guide § 30.110

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.110 Determining Applicability of Laws

[1] Subdivision Map Act

1. Determine whether proposed project falls within following definition of "subdivision" for purposes of Subdivision Map Act (SMA) [*Gov. Code § 66424*; *see Gov. Code § 66410 et seq.* (SMA)]:

a. Division by subdivider [*see Gov. Code § 66423*]:

NOTE:
A "subdivider" is the person who causes land to be divided into a subdivision [*Gov. Code § 66423*].

(1) Of unit(s) of improved or unimproved land shown on latest equalized county assessment roll as unit or as contiguous units;

NOTE:
The mere fact that property is separated by roads, streets, utility easements, or railroad rights-of-way does not preclude it from being considered as "contiguous" [*Gov. Code § 66424*; ***see*** *61 Ops. Cal. Atty. Gen. 299 (1978)* ; ***see also*** "PRACTICE TIP: Watch Out For Common Ownership of Nearby Property" in § 30.20[1]].

(2) For purpose of immediate or future sale, lease, or financing.

b. Condominium project [*see Civ. Code § 1351(f)*; *see also* Ch. 34, *Condominiums*].

c. Community apartment project [*see Civ. Code § 1351(d)*].

d. Conversion of five or more existing dwelling units to stock cooperative [*see Civ. Code § 1351(m)*].

2. Determine whether proposed project falls within one of following exceptions from requirements of SMA:

a. Financing or leasing of apartments, offices, stores, or similar space within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks [*Gov. Code § 66412(a)*].

b. Mineral, oil, or gas leases [*Gov. Code § 66412(b)*].

c. Land dedicated for cemetery purposes under Health and Safety Code [*Gov. Code § 66412(c)*].

d. Lot line adjustment between four or fewer adjoining parcels, if following conditions are met [*Gov. Code § 66412(d)*]:

NOTE:

Lot line adjustments need not be limited to relatively minor changes in boundaries; they can be used to accomplish substantial changes to an already-approved subdivision [***see*** "PRACTICE TIP: Fighting Over Lot Line Adjustments" in § 30.20[3][b]]. Moving the boundary between existing parcels can violate the SMA if any of the property involved in subject to a lease or trust deed [***see*** "PRACTICE TIP: Lot Line Adjustment May Be Trap for the Unwary" in § 30.20[3][b]].

(1) Land taken from one parcel is added to adjoining parcel.

(2) Adjustment does not result in creation of greater number of parcels than originally existed.

(3) Adjustment is approved by resolution of local agency.

NOTE:

The local agency must limit its review and approval to a determination of whether or not the resulting parcels will conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances. The agency must approve or disapprove a lot line adjustment pursuant to the Permit Streamlining Act [*Gov. Code § 66412(d)*; *see Gov. Code § 65920 et seq.*; *see also § 30.23[2][b][ii]*].

e. Boundary line or exchange agreement to which State Lands Commission or local agency holding a trust grant of tide and submerged lands is a party [*Gov. Code § 66412(e)*].

f. Separate assessment of community apartment project, stock cooperative, or limited equity housing cooperative under *Rev. & Tax. Code § 2188.7* [*Gov. Code § 66412(f)*].

g. Conversion of community apartment project [*see Bus. & Prof. Code § 11004* (definition)] or stock cooperative [*see Bus. & Prof. Code § 11003.2* (definition)] to condominium [*see Civ. Code § 1351(f)* (definition)], if conversion meets specified requirements [*see Gov. Code § 66412(g), (h)*].

h. Leasing of, grant of easement to, all or portion of parcel of land if it is [*Gov. Code § 66412(i)*]:

(1) In conjunction with financing, erection, and sale or lease of wind-powered electrical generation device on parcel; and

(2) Subject to discretionary action by advisory agency or legislative body.

i. Lease, license, or grant of easement, use permit, or similar right, with respect to portion of parcel, to telephone corporation if project is [*Gov. Code § 66412(j)*; *see Pub. Util. Code § 234* (definition)]:

(1) Exclusively for placement and operation of cellular radio transmission facilities.

(2) Subject to discretionary action by advisory agency or legislative body.

j. Leases of agricultural land for agricultural purposes [*Gov. Code § 66412(k)*].

k. Financing or leasing of [*Gov. Code § 66412.1*]:

NOTE:
It is not clear whether this exemption also exempts the leasing or financing of land surrounding a building [***see*** "PRACTICE TIP: What About Land Around the Building" in § 30.20[3][d]].

(1) Any parcel of land in conjunction with construction of commercial or industrial buildings on single parcel, unless project is to subject to review under other local agency ordinances regulating design and improvement.

(2) Existing separate commercial or industrial buildings on single parcel.

l. Subdivision of four parcels or less for construction of removable commercial buildings of less than 100 square feet in floor area, if exempted by local ordinance [*Gov. Code § 66412.5*].

m. Construction, financing, or leasing (but not sale or transfer) of [*Gov. Code § 66412.2*]:

(1) Senior citizen multiple dwelling units in areas zoned for single-family residences [*see Gov. Code § 65852.1*].

NOTE:
The statutory authorization for a zoning variance, special use permit, or conditional use permit for construction of these dwelling units became inoperative on January 1, 2007, and thereafter has no effect. However, a variance, special use permit, or conditional use permit issued before that date remains valid, and a dwelling unit constructed pursuant to such a variance or permit is considered in compliance with all relevant laws, ordinances, rules, and regulations after January 1, 2007 [*Gov. Code § 65852.1(b)*].

(2) Specified "second units" in certain residential areas [*see Gov. Code § 65852.2*].

n. Conversion of mobilehome park to tenant-owned condominium project if:

NOTE:

The local agency with jurisdiction over the park must provide applications for a waiver and issue an approval or denial of submitted map within 50 days [*Gov. Code § 66428.1(c)*].

(1) At least two-thirds of mobilehome owners who rent parcels in park sign petition indicating intent to purchase park for purposes of converting it to resident ownership [*Gov. Code § 66428.1(a)* (requirement for parcel map or tentative and final map may be waived)].

(2) Field survey is performed and following conditions do not exist [*see Gov. Code § 66428.1(a)* (requirement for parcel map or tentative and final map must be waived)]:

(a) Health or safety concerns make significant design or improvement requirements necessary.

(b) Exterior boundary discrepancy exists.

(c) Existing lot or lots were not created by recorded parcel or final map.

(d) Conversion would create additional parcels.

o. Leasing or granting an easement in conjunction with financing, erection, and sale or lease of either [*Gov. Code § 66412(l), (m)*]:

(1) Solar electrical generation device; or

(2) Biogas project that utilizes agricultural waste or by-products from land where project is located and reduces overall emissions of greenhouse gases from agricultural operations.

NOTE:
In either case, for the exemption to apply, the project must be subject to review either under other local agency ordinances regulating design and improvement, or by discretionary action by the local advisory agency or legislative body [*Gov. Code § 66412(l), (m)*].

3. Determine whether proposed projects falls within any of following categories for which parcel map must be prepared [*Gov. Code §§ 66426, 66428*]:

a. Land (before division) contains less than five acres, each divided parcel will abut a maintained public street or highway, and legislative body will not require any dedications or improvements [*Gov. Code § 66426(a)*].

b. Each new parcel created by division will have [*Gov. Code § 66426(b)*]:

(1) Gross area of at least 20 acres.

(2) Approved access to maintained public street or highway.

c. Land consists of parcel or parcels with approved access to public street or highway that [*Gov. Code § 66426(c)*]:

(1) Is part of tract of land zoned for industrial or commercial development.

(2) Has approval of governing body as to street alignments and widths.

d. Each divided parcel will have gross area of at least 40 acres or is not less than a quarter of a quarter section [*Gov. Code § 66426(d)*].

e. Land is being subdivided solely to create environmental subdivision pursuant to *Gov. Code § 66418.2* [*Gov. Code § 66426(e)*].

NOTE:

An environmental subdivision is a subdivision of land for biotic and wildlife purposes that meets specified conditions. Among other things, the parcel must usually consist of at least 20 acres, and be encumbered by an easement to ensure compliance with the goal of maintaining and preserving the biotic or wildlife character of the land [*Gov. Code § 66418.2*].

f. Final or parcel map is not otherwise required by SMA [*Gov. Code § 66428*].

NOTE:

Because a tentative and final map normally are required for all subdivisions creating five or more parcels [***see*** *Gov. Code § 66426*], the above provision essentially means that a parcel map will normally be required if the subdivision will consist of four or fewer parcels. For important considerations relating to the counting of the number of parcels, see "PRACTICE TIP: Conveyances to Public Entities" and "PRACTICE TIP: Beware Controversy Over Number of Parcels" in § 30.13[3].

4. If parcel map is required by SMA [*see* P 3, *above*], determine whether local ordinance [*Gov. Code § 66428*]:

a. Waives parcel map requirement; or

b. Requires preparation of tentative map in addition to parcel map [*see § 30.120[1]*].

5. If SMA requires parcel map [*see* P 3, *above*], and local ordinance does not require tentative map, determine whether subdivider wishes to exercise option of submitting either of following in addition to parcel map [*Gov. Code § 66428*]:

a. Tentative map [*see Gov. Code § 66424.5(a)*; *see also § 30.120[1]*].

b. Vesting tentative map [*see Gov. Code § 66424.5(b)*; *see also § 30.120[1]*].

6. Determine whether proposed project satisfies following criteria, and therefore requires both tentative map and final map [*Gov. Code § 66426*]:

a. Parcel map is not required by statute [*see Gov. Code § 66426(a)-(d)*; *see also* P 3, *above*].

b. Proposed project would create:

(1) Five or more parcels;

(2) Five or more condominiums;

(3) Community apartment project containing five or more parcels; or

(4) Stock cooperative containing five or more dwelling units.

7. If proposed project requires tentative map and final map [*see* P 6, *above*], determine whether:

a. Proposed project involves construction of condominiums on single parcel and, if so, whether local ordinance waives map requirement [*Gov. Code § 66428*].

b. Subdivider intends to file multiple final maps [*see Gov. Code § 66456.1*; *see also § 30.120[2]*, P 2].

c. Subdivider intends to file "vesting tentative map" in lieu of tentative map [*Gov. Code §§ 66498.1, 66498.7*; *see Gov. Code § 66499.6*].

NOTE:
The attorney should advise the subdivider to consider the benefits of a vesting map application [***see*** "PRACTICE TIP: Malpractice Not To Suggest A Vesting Map" in § 30.23[3][a]].

[2] Subdivided Lands Act

1. Determine whether proposed project falls within one of the following categories, which are considered "subdivided land" or "subdivisions" subject to Subdivided Lands Act (SLA) [*see Bus. & Prof. Code § 11000 et seq.* (SLA); *see also § 30.40[2][a]*]:

a. Improved or unimproved land, wherever situated within California, divided or proposed to be divided into five or more parcels for immediate or future sale, lease, or financing, with following exceptions [*Bus. & Prof. Code § 11000(a)*]:
(1) Land sold by lots or parcels of not less than 160 acres that:
(a) Are designated by lot or parcel description by government surveys; and

(b) Appear as such on current assessment roll of county in which land is situated.

NOTE:
The exception set forth in a(1), ***above***, does not apply if the land is divided or proposed to be divided for sale for oil and gas purposes. In that case, the land will be deemed to be subdivided land or a subdivision under the SLA [*Bus. & Prof. Code § 11000(a)*].

(2) Leasing of:

(a) Apartments;

(b) Offices;

(c) Stores; or

(d) Similar space within apartment building, industrial building, commercial building, or mobilehome park [*see Health & Safety Code § 18214*].

b. Leasing apartments in community apartment project in apartment or similar space within commercial building or complex [*Bus. & Prof. Code § 11000(a)*; *see Bus. & Prof. Code § 11004* ("community apartment project" defined)].

c. Improved or unimproved land(s), lot(s), or parcel(s) of any size, in which, for purpose of immediate or future sale, lease, or financing, five or more undivided interests are created or proposed to be created, unless creation or proposed creation of undivided interests involves or will involve any of the following [Bus. & Prof. Code § 11001.1(b)]:

NOTE:
If any of the following conditions are met, the land, lot, or parcel will not be considered subdivided land or a subdivision under the SLA [*Bus. & Prof. Code § 11000.1(b)*].

(1) Undivided interests are held or to be held by persons related one to the other by blood or marriage.

(2) Undivided interests are to be purchased and owned solely by persons who present evidence satisfactory to Real Estate Commissioner that they:

(a) Are knowledgeable and experienced investors.

(b) Comprehend nature and extent of risks involved in ownership of the interests.

NOTE:
The Commissioner will grant an exemption from the SLA if the undivided interests described in (2), ***above***, are to be purchased by no more than 10 persons, each of whom furnishes a signed statement to the Commissioner that he or she (1) is fully informed concerning the real property to be acquired and his or her interest in the property, including the risks involved in ownership of undivided interests, (2) is purchasing the interest(s) for his or her own account and with no present intention to resell or otherwise dispose of the interest for value, and (3) expressly waives protections afforded to a purchaser by the SLA [*Bus. & Prof. Code § 11000.1(b)(2)*].

(3) Undivided interests are created as result of foreclosure sale.

(4) Undivided interests are created by valid judicial order or court decree.

(5) Offering and sale of undivided interests have been expressly qualified by permit issued by California Commissioner of Corporations pursuant to Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*].

d. Planned development containing five or more lots [*Bus. & Prof. Code § 11004.5(a)*; *see Bus. & Prof. Code § 11003*].

e. Community apartment project containing five or more apartments [*Bus. & Prof. Code § 11004.5(b)*; *see Bus. & Prof. Code § 11004*].

f. Condominium project containing five or more condominiums [*Bus. & Prof. Code § 11004.5(c)*; *see Civ. Code § 1351(f)*; *see also Civ. Code § 783*].

g. Stock cooperative that [*see Bus. & Prof. Code § 11003.2*]:

(1) Includes legal or beneficial interests.

(2) Has or is intended to have five or more shareholders [*Bus. & Prof. Code § 11004.5(d)*].

h. Limited-equity housing cooperatives [*Bus. & Prof. Code § 11004.5(e)*; *see Bus. & Prof. Code § 11003.4*].

NOTE:

Time-share plans, exchange programs, incidental benefits, and short-term product subject to the Vacation Ownership and Time-Share Act of 2004 [*Bus. & Prof. Code § 11210 et seq.* (effective July 1, 2005)] are not subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11004.5(g)*].

2. Determine whether proposed project is exempt from SLA coverage:

NOTE:

The following transactions are exempt from all provisions of the SLA. If the proposed project falls within an exemption but will result in a subdivision of two to four units [*Civ. Code § 1133*; ***see*** *Bus. & Prof. Code § 11000*] that is subject to a blanket encumbrance [***see*** *Bus. & Prof. Code § 11013*; ***see also*** *§ 30.42*], the subdivider must provide a prospective purchaser or lessee with an official notice warning that person of the existence of the blanket encumbrance; the prospective purchaser or lessee must sign the notice to indicate that the subdivider has complied with the warning requirement [*Civ. Code § 1133*; ***see*** *§ 30.250*].

a. Subdivision located entirely outside California [*Bus. & Prof. Code § 11000(c)*; *see Bus. & Prof. Code § 10249.1*; § 30.40[5]].

NOTE:

Although subdivisions located outside California are exempt from the SLA, any person who intends, in California, to sell or lease or offer for sale or lease lots, parcels, or interests in a subdivision located outside California, must still comply with certain registration, disclosure, and/or other requirements of the Commissioner [***see*** *Bus. & Prof. Code § 10249 et seq.*; ***see also*** *§ 30.40[5]*].

b. Leasing of apartments, offices, stores, or similar space within apartment building, industrial building, commercial building, or mobilehome park [*Bus. & Prof. Code § 11000(a)*; *see* P 1a(2), *above*].

c. Proposed sale or lease of subdivision interests in which interests are limited to industrial or commercial uses by [*Bus. & Prof. Code § 11010.3*]:

(1) Zoning; or

(2) Duly recorded declaration of CC&Rs.

d. Offer or proposed offer of subdivided land for sale, lease, or financing by state agency, including University of California, local agency, or other public agency [*Bus. & Prof. Code § 11010.6*].

e. Sale of land by lot or parcel of not less than 160 acres [*Bus. & Prof. Code § 11000(a)*; for further discussion of this exemption, *see* P 1a(1), *above*].

f. Creation or proposed creation of certain undivided interests in land [*see Bus. & Prof. Code § 11000.1(b)*; for further discussion of this exemption, *see* P 1d, *above*].

g. Purchase of mobilehome park by tenant-controlled nonprofit corporation [*see Bus. & Prof. Code § 11010.8*; *see also* Ch. 39, *Mobilehome Parks*].

h. For transactions entered into after 2000, either proposed sale or lease of five or more lots, parcels, or other subdivision interests, or sale of one or more lots or parcels if lots or parcels are intended to be further subdivided into five or more subdivision interests [*see Bus. & Prof. Code §§ 11000, 11000.1, 11004.5*], when (in either case) sale or lease is to any person who is acquiring those lots, parcels, or other subdivision interests in order to construct residential, commercial, or industrial buildings, or for to resell or lease them to persons engaged in such construction business [*Bus. & Prof. Code § 11010.35(a)*].

NOTE:
To qualify for this exemption, the purchase or lease agreement (or a separate disclosure document) must include a statement or provision that the purchaser or lessee is required to comply with the applicable provisions of the SLA before offering for sale or lease any lot, parcel, or other subdivision interest acquired pursuant to the exemption [*Bus. & Prof. Code § 11010.35(a)*].

3. Determine whether proposed transaction involves one of following projects that are exempt from notice of intention and public report requirements, but not from other requirements of SLA [*see Bus. & Prof. Code § 11018.2*; § 30.40[6]]:

a. Subdivided lands located within city limits and improved with residences [*see Bus. & Prof. Code § 11010.4*].

b. Nonbinding expressions of intent to purchase or lease units proposed to be converted to a condominium, community apartment project, or stock cooperative project [*see Bus. & Prof. Code § 11010.7*].

[3] Environmental Laws

NOTE:
A detailed discussion of environmental laws that may affect real estate development is beyond the scope of this chapter. For a complete analysis of these laws, see Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** .

1. Determine whether National Environmental Policy Act (NEPA) [*42 U.S.C. § 4321 et seq.*] applies to proposed project by ascertaining whether project [*see 42 U.S.C. § 4332*]:

a. Is major federal action.

NOTE:
A "major federal action" is one with effects that may be major and that are potentially subject to federal control and responsibility [42 C.F.R. § 1508.18].

b. Potentially affects quality of human environment.

2. Determine whether California Environmental Quality Act (CEQA) applies to proposed project [*Pub. Res. Code § 21000 et seq.*].

NOTE:

CEQA requires public agencies to consider environmental factors before deciding whether or not to approve or carry out "discretionary projects," unless the project is exempt from the requirements of CEQA [*Pub. Res. Code §§ 21000, 21001*; *14* Cal. Code Reg. § 15002(a)].

3. If project will be located in coastal zone [*see Pub. Res. Code § 30103(a)*], determine whether it is subject to California Coastal Act [*Pub. Res. Code § 30000 et seq.*].

NOTE:

A subdivider who intends to subdivide land in a coastal zone must obtain a coastal development permit [*Pub. Res. Code § 30600(a)*]. A detailed discussion of the California Coastal Act is beyond the scope of this chapter. For coverage of that law, see Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** .

4. Determine existence and applicability of regional environmental regulations, if any [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationReal Property LawZoning & Land UseGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

13-30 California Legal Forms--Transaction Guide § 30.111

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.111 Determining Applicability of Local Ordinances

1. Ascertain identity of legislative body of city and/or county that controls land use and planning matters, such as [*Gov. Code § 66421*]:

a. Planning commission.

b. City council.

NOTE:
If the property is near a city boundary, the project may require annexation and/or conformance to city as well as county land use designations.

2. If no legislative body exists in area where proposed subdivision will be developed, ascertain what entity carries out functions of planning agency [*Gov. Code § 65100*].

3. Determine which local ordinances are applicable to design and improvement of subdivisions.

NOTE:
The Subdivision Map Act (SMA) [*Gov. Code § 64100 et seq.*] authorizes cities and counties to adopt additional ordinances and regulations so long as they are not more restrictive than the provisions of the SMA [***see*** *Gov. Code § 66421*].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsBoundariesGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

13-30 California Legal Forms--Transaction Guide §§ 30.112-30.119

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
C. Procedural Guide

13-30 California Legal Forms--Transaction Guide § 30.120

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.120 Submissions Under Subdivision Map Act

[1] Preparation of Vesting Tentative Maps and Tentative Maps

NOTE:

Unless otherwise provided by the Subdivision Map Act (SMA) [*Gov. Code § 66410 et seq.*] or a local ordinance, a vesting tentative map must be filed and processed in the same manner as a tentative map [*Gov. Code § 66452(b)*]. Thus, all references in this Part to tentative maps should be deemed to include vesting tentative maps unless otherwise indicated. For a detailed discussion of vesting tentative maps and tentative maps, see *§ 30.22*.

1. Have map prepared and confirm that it complies with all applicable local requirements as to form, content, required number of copies, and processing fee [*see Gov. Code §§ 66451, 66451.2, 66473, 66498.8*].

NOTE:

A civil engineer or licensed land surveyor must prepare the final map, which will be based on the tentative map [***see*** *Gov. Code § 66434*]. Consequently, counsel should consider the advantages of eliminating duplicative work by retaining the services of a registered civil engineer or licensed land surveyor to prepare the tentative map or vesting tentative map.

A vesting tentative map must have the words "Vesting Tentative Map" printed conspicuously on its face before filing [*Gov. Code § 66452(c)*]. If the proposed development, at the time of filing the vesting tentative map, is inconsistent with the applicable zoning ordinance, that inconsistency must be noted on the map. The local

agency may deny the map or approve it conditioned on obtaining the necessary change in the zoning ordinance to eliminate the inconsistency. If the change is obtained, the approved or conditionally approved vesting tentative map must confer the vested right to proceed with the development in substantial compliance with the change in the zoning ordinance and the map, as approved, notwithstanding *Gov. Code § 66498.1(b)*, which sets forth the basic rule governing the vested rights conferred by the approval of a vesting tentative map [*Gov. Code § 66498.3(a)*].

2. Confirm that map application:

a. Includes all information required by local ordinance [*see Gov. Code § 65940*; *see also § 30.23[2][b][ii]*]; and

b. States that it is application for development permit [*Gov. Code § 65943*].

NOTE:
This statement will preserve the subdivider's right to claim that the application has been deemed complete in the event that the agency fails to issue a written determination within the appropriate time period [***see*** *Gov. Code §§ 65940, 65943*].

3. Satisfy any pre-filing requirements imposed by local ordinance.

NOTE:
A city or county may enact supplemental ordinances in connection with matters covered by the SMA as long as those regulations are reasonably related to the SMA purposes and requirements and are not inconsistent with it. For example, a local ordinance that requires zoning approvals be obtained before a tentative map may be filed is valid because it is consistent with the undisputed authority of a city or county to disapprove a map when a project does not conform to zoning ordinances, or to condition approval on future compliance [Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1011-1012, 164 Cal. Rptr. 776] . When the subdivider must obtain planning commission approval for the subdivision and the legislative body's approval of a general plan or zoning amendment, the subdivider should attempt to have the planning commission hold one combined hearing on both applications [***see*** "PRACTICE TIP: Beware Need for Multiple Approvals" in § 30.20[2][c]].

[2] Filing, Processing, and Approval or Disapproval of Vesting Tentative Maps and Tentative Maps

1. File map with [*Gov. Code § 66452*]:

a. Clerk of appropriate advisory agency;

NOTE:
The "advisory agency" is the designated official or official body, such as the local planning commission, charged with (1) making investigations and reports on the design and improvement of proposed divisions of real property; (2) imposing conditions or requirements on subdivisions; and/or (3) approving, conditionally approving, or disapproving maps [*Gov. Code § 66415*].

b. Clerk of appropriate legislative body if there is no advisory agency; or

c. Other local officer or employee designated by local ordinance.

2. If subdivider wishes to file multiple final maps relating to approved or conditionally approved tentative map, inform local advisory agency of this intention at time tentative map is filed [*Gov. Code § 66456.1*].

NOTE:

Multiple final maps relating to different portions of an approved or conditionally approved tentative map may be filed prior to the expiration of the tentative map if (1) after the filing of the tentative map, the local agency and the subdivider concur in the filing of multiple final maps, or (2) the subdivider, at the time the tentative map is filed, informs the local advisory agency of this intention. Such a notice of intention need not define the number or configuration of the proposed multiple final maps [*Gov. Code § 66456.1*].

Local agencies may impose reasonable conditions relating to the filing of multiple final maps. The filing of a final map on a portion of an approved or conditionally approved tentative map will not invalidate any part of the tentative map [*Gov. Code § 66456.1*].

If the subdivider must provide $178,000 or more for public off-site improvements, the filing of multiple final maps will extend the expiration of the approved or conditionally approved tentative map [*Gov. Code § 66452.6(a)(1)*; ***see*** *Gov. Code § 66452.6(a)(2)* ($178,000 threshold subject to annual inflation adjustment beginning January 1, 2005)].

3. After application is filed with appropriate agency:

a. Provide any further information that agency requires in order to complete final action [*Gov. Code § 65944(b)*].

NOTE:

If an application is accepted as complete and the proposed project is located either within 1,000 feet of a military installation, within special use airspace, or beneath a low-level flight path, the agency that accepted the application must provide a copy to any branch of the United States Armed Forces that has provided the Office of Planning and Research with a single California mailing address for delivery of a copy of such applications [*Gov. Code § 65944(d)(1)*]. Once the copy of the application has been received, the relevant branch of the U.S. Armed Forces may request consultation with the agency and the project applicant to discuss the effects of the proposed project on military installations, low-level flight paths, or special use airspace, and potential alternatives and mitigation measures [*Gov. Code § 65944(e)*].

b. Provide any information needed by agency to demonstrate compliance with CEQA [*see Pub. Res. Code § 21000 et seq.*; *see also Gov. Code § 65944(c)*].

c. Expect to receive written determination regarding completeness of application for approval of map within 30 days of filing date [*Gov. Code § 65943*].

NOTE:

The subdivider and the appropriate legislative body or advisory agency may agree to extend the 30-day time limit. However, the agency or legislative body may not require a routine waiver of time limits as a condition of accepting the application for or processing of the map unless the routine waiver is obtained to permit concurrent processing of related

approvals or an environmental review on the same development project [*Gov. Code § 66451.1(a)*; ***see*** Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits***].

d. Ensure that agency's written determination satisfies following requirements [*Gov. Code § 65943(a)*]:

(1) Identifies incomplete portions of application, if any.

NOTE:
The agency's determination regarding the completeness of the application must be based on the formal list, prepared by the agency, that specifies in detail the information that is required from any applicant for a development project [***see*** *Gov. Code § 65940*].

(2) Lists and describes specific information required to complete application.

(3) Indicates method of completion.

NOTE:
Generally, if the agency fails to issue a written determination with 30 days of the filing date, the application is deemed complete [***see*** *Gov. Code § 65943* (application must include necessary statement to trigger time-limit default provision of SMA)].

PRACTICE TIP:
Document "Deemed Complete" Status of Application. Prudent developers will send a letter stating that because the city/county has not responded within 30 days, the application is deemed complete. This may be important later when disputes arise--such as when a vesting tentative map locked in local regulations. It also may stimulate more timely responses and cooperation in handling the application by showing that the developer plans to monitor the process closely. *By Edward Shaffer*

4. Submit any additional information specified as missing in agency's determination [*Gov. Code § 65943(b)*].

NOTE:
After the application is accepted as complete, the public agency cannot subsequently request a subdivider to provide new or additional information that was not required as part of the application. While processing the application, the public agency may ask the subdivider to clarify, amplify, correct, or otherwise supplement the required information [*Gov. Code § 65944(a)*].

5. Not later than 30 calendar days after agency receives any additional information described in P 4, *above*, expect to receive written determination as to whether application, including additional information, is complete.

NOTE:
If the public agency fails to provide a written determination within 30 days, the application and additional materials will be deemed complete [*Gov. Code § 65943(b)*]. If the application and additional materials are determined to be incomplete, the public agency must provide an appeal process [***see*** *Gov. Code § 65943(c)*].

6. If notified by local agency that it will not be able to issue written determination on application within 30 days, either:

NOTE:

At the time a subdivider submits an application for approval of a subdivision map, the local agency must determine whether or not it is able to comply with the relevant statutory time limits [*Gov. Code § 66451.1(b)*].

a. Agree to extension [*Gov. Code § 66451.1(a)*];

b. Request agency to contract or employ private entity or person to perform services necessary to meet time limits; or

NOTE:

The local agency must grant this request unless (1) no qualified entities or persons are available, or (2) the agency would be able to perform the services in a more rapid fashion than would any available and qualified substitute. Any person or entity hired pursuant to this request may perform all processing functions except those required by the SMA or local ordinance to be performed by the legislative body. The agency may charge the subdivider for costs directly attributable to this arrangement [*Gov. Code § 66451.1(b)*].

c. Allow time limit to expire.

PRACTICE TIP:

Do Not Count on Statutory Deadlines. The time limits for map decisions described above sound nice, but are of little or no value--primarily because of the due process requirement of notice and opportunity to be heard [*see Horn v. Ventura County (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134]* . The only deadlines with any potential usefulness are in the Permit Streamlining Act [*see Gov. Code § 65950 et seq.*]--and even they require overcoming substantial obstacles regarding (1) completion of the CEQA process, and (2) public notice of an impending deemed approval. *By Edward Shaffer*

7. If map was filed with advisory agency, expect agency to either:

a. Submit written report to legislative body within 50 days after filing, if agency is not authorized to approve, conditionally approve, or disapprove map [*Gov. Code § 66452.1(a)*]; or

NOTE:

A failure of the advisory agency to act within the 50-day period will trigger the 30-day period within which the legislative body must act [Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1012, 164 Cal. Rptr. 776 ; ***see*** *Gov. Code § 66452.2(a)* (discussed in P 8, ***below)***].

b. Approve, conditionally approve, or disapprove map within 50 days after filing, if authorized to take such an action, and report its action to subdivider [*Gov. Code § 66452.1(b)*].

NOTE:

Although the SMA provides that the filing of the tentative map triggers the 50-day deadlines discussed in a and b, ***above***, it also states that those 50-day periods will not commence until the environmental impact report has been certified, a negative declaration has been adopted, or the local agency has determined that the project is exempt from the requirements of CEQA [*Gov. Code § 66452.1(c)*]. For a discussion of the environmental laws applicable to real estate development, see Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** .

8. If report by advisory agency is filed with legislative body [*see* P 7a, *above*], expect legislative body to [*Gov. Code § 66452.2(a)*; *see § 30.23[2][b][iii]*]:

a. Fix, at its next regular meeting following that filing, the meeting date (within 30 days after that regular meeting) at which it will consider the map; and

b. Approve, conditionally approve, or disapprove map within that 30-day period.

NOTE:

Although the SMA provides that the next regular meeting of the legislative body will trigger the 30-day deadline, it also states that the 30-day time period will not commence until the environmental impact report has been certified, a negative declaration has been adopted, or the local agency has determined that the project is exempt from the requirements of CEQA [*Gov. Code § 66452.2(c)*].

9. If there is no advisory agency and map is filed with clerk of legislative body, ensure that [*Gov. Code § 66452.2(b)*; *see § 30.23[2][b][iii]*]:

a. Clerk submits map to legislative body at its next regular meeting.

b. Within 50 days after that meeting, legislative body approves, conditionally approves, or disapproves map.

NOTE:

Although the SMA provides that the next regular meeting of the legislative body will trigger the 50-day deadline, it also states that the 50-day period will not commence until the environmental impact report has been certified, a negative declaration has been adopted, or the local agency has determined that the project is exempt from the requirements of CEQA [*Gov. Code § 66452.2(c)*].

10. Ensure that all reports or recommendations by staff of local agency are in writing and served on subdivider at least three days prior to hearing or action on map by advisory agency or legislative body [*Gov. Code § 66452.3*].

NOTE:

A copy of the report must also be served within the time period discussed above on each tenant of the subject property, in the case of a proposed conversion of residential real property to a condominium project, community apartment project, or stock cooperative project. The subdivider may be charged for expenses incurred informing the tenants [*Gov. Code § 66452.3*].

11. If hearing is to be held on application, ensure that local agency provides notice of hearing at least 10 days prior to hearing date [*Gov. Code § 66451.3*; *see Gov. Code §§ 65090, 65091* (procedural notice requirements); *but see Gov. Code § 66474.64* (special rules applicable when City of Los Angeles authorizes advisory agency to report disposition of map application directly to subdivider)].

12. If legislative body or advisory agency fails to act within time limits specified in SMA and no extension of time limit has been granted [*Gov. Code § 66452.4(a)*]:

NOTE:

As mentioned in the PRACTICE TIP preceding P 7, ***above***, the SMA deadlines for map decisions are of limited importance because of the due process requirement of notice and opportunity to be heard [***see***

Horn v. Ventura County (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134] .

a. Map is deemed approved to extent it is in compliance with applicable laws.

b. Clerk of legislative body must verify approval of map.

NOTE:

An advisory agency or legislative body may not disapprove an application for approval of a tentative map merely to comply with applicable time limits. Disapproval must be based on other substantive reasons [*Gov. Code § 66451.4*].

Once the tentative map is deemed approved, the subdivider is entitled to request and receive a written certification of approval [*Gov. Code § 66452.4(b)*].

13. Ensure that final approval or disapproval of the subdivision map is made [*see Gov. Code § 65952.1*]:

NOTE:

The time limits discussed below are set forth in the Permit Streamlining Act [*Gov. Code § 65920 et seq.*] and apply to all proposed development projects, including subdivision maps [***see*** *Gov. Code § 65952.1*].

a. By lead agency, if any, within following time periods, as applicable:

NOTE:

The time limits set forth in (1) and (2), ***below***, may be extended once for a period up to 90 days if the public agency and the applicant consent to that extension [*Gov. Code § 65957*]. If the lead agency fails to approve or disapprove the project within the applicable time limit, the project will be deemed approved [***see*** *Gov. Code § 65956(b)*; ***but see*** *Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 68 Cal. Rptr. 2d 758, 946 P.2d 427* (right to deemed approval subject to common law waiver)].

(1) If environmental impact report (EIR) is prepared [*see Pub. Res. Code §§ 21100, 21151*], within 180 days from date of certification by lead agency of EIR [*Gov. Code §§ 65950(a)(1), 65952.1*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

NOTE:

This period is reduced to 90 days for subdivisions that are affordable to low-income or very-low-income households, provided certain conditions are met [***see*** *Gov. Code § 65950(a)(2)*].

(2) If combined environmental impact report-environmental impact statement is prepared, within 60 days after completion and adoption of combined document [*Gov. Code § 65951*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

(3) If negative declaration is prepared or if project is exempt from CEQA and proponent of project has not requested extension, within 60 days from [*Gov. Code § 65950(a)(3), (4)*; *see* Ch. 30B, *Zoning, Building, and Environmental Permits*]:

(a) Date of adoption of a negative declaration; or

(b) Determination by lead agency that project is exempt.

b. By any responsible agency within 180 days from later of [*Gov. Code §§ 65952, 65952.1*; *see Gov. Code § 65933* ("responsible agency" is public agency, other than lead agency, responsible for carrying out or approving development project)]:

NOTE:

The following time periods apply only if the development project has been approved by the lead agency [*Gov. Code § 65952(a)*]. If a lead agency disapproves a development project, applications for the project that have been filed with responsible agencies will be deemed withdrawn when the decision to disapprove becomes final [*Gov. Code § 65952(b)*]. If the lead agency or responsible agency fails to act within statutory time limits [***see*** *Gov. Code §§ 65952, 65952.1*] the development project will be deemed approved, provided that proper public notice has been given [*Gov. Code § 65956(b)*; ***see*** Ch. 30B, ***Zoning, Building, and Environmental Permits*** ; ***but see*** *Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 68 Cal. Rptr. 2d 758, 946 P.2d 427* (right to deemed approval subject to common law waiver)].

(1) Date on which lead agency approved project; or

(2) Date on which completed application was received and accepted as complete by responsible agency.

NOTE:

The public agency and applicant may agree to extend this time period once for up to 90 days [*Gov. Code § 65957*].

14. Notify subdivider that map may or will be reviewed by other agencies and entities as follows:

NOTE:

Counsel should monitor carefully all efforts to involve other state and local agencies and entities in the review of the map [***see*** "PRACTICE TIP: Monitor Consultations Carefully" in § 30.23[2][b][v]].

a. Local agency.

NOTE:

Local agencies may make recommendations concerning subdivisions in adjoining cities or unincorporated territories if the subdivision is within three miles of the agency's exterior boundary of agency [*Gov. Code § 66453*].

b. Adjacent cities.

NOTE:

If the map involves the proposed subdivision of unincorporated territory, the subdivider may file the tentative map with an adjacent city [*Gov. Code § 66454*]. Approval of the map must be conditioned on annexation of the property to the city within a specified time period. Annexation must be completed within that time period (or any extension) and before the final map is approved [*Gov. Code § 66454*].

c. Legislative body of any local agency having jurisdiction of any territory within one mile of state highway [*Gov. Code § 66455(a)*].

NOTE:

The State Department of Transportation may file a map with the legislative body of any such local agency if it believes that the subdivision would have an effect on an existing or future state highway in that territory [*Gov. Code § 66455(a)*].

d. Governing board of any of following within whose boundaries subdivision would be located [*Gov. Code § 66455.7(a)* (submission must be made by local agency within five days of time tentative map is determined to be complete)].

NOTE:

The notice must include information about the location of the proposed subdivision, the number of units, density, and any other information that would be relevant to the affected district [*Gov. Code § 66455.7(b)*].

(1) Elementary school.

(2) High school.

(3) Unified school district.

NOTE:

Within 15 days after receipt of the notice, the school district may make recommendations regarding the effect of the subdivision on the district. If the school district does not respond within the 15-day period, the district will be deemed to have approved the subdivision. The local agency with jurisdiction over the proposed subdivision must consider any recommendations from the school district before acting on the tentative map [*Gov. Code § 66455.7(c)*].

e. Other officials or agencies, such as:

(1) City or county surveyor or engineer;

(2) Health department;

(3) Assessor;

(4) Gas and electric company;

(5) Telephone company; or

(6) Department of Real Estate.

15. Notify client that map will be disapproved if any of following circumstances exist [*see Gov. Code § 66473* (circumstances under which disapproval is mandatory)]:

PRACTICE TIP:

Beware Perfunctory Approval Findings. When the proposed subdivision is controversial and the decision may be challenged in court, beware bare bone findings that simply recite the statutory language (for example, "the map is consistent with the general plan"), without any supporting documentation. Findings serve as the legal footprints that bridge the gap between background information and the ultimate decision, and courts will overturn actions if the findings do not explain the decision making path followed by the legislative body. A prudent developer will insist on detailed findings confirming the appropriateness of subdivision approval under each of the criteria specified in *Gov. Code § 66474* and other SMA statutes, as described below [*see Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836* ; for an excellent discussion of findings, *see Bridging the Gap: Using Findings in Local Land Use Decisions* (1989), a report published by the Governor's Office of Planning and Research]. *By Edward Shaffer*

NOTE:

A map cannot be deemed approved if it does not comply with all applicable requirements of the SMA and applicable local ordinances [*Pongputmong v. City of Santa Monica (1993) 15 Cal. App. 4th 99, 104-105, 18 Cal. Rptr. 2d 550]* .

a. Local agency finds that map fails to meet or perform any requirements of SMA or local ordinance [*Gov. Code § 66473*].

b. Legislative body of city or county makes any of following findings:

(1) Map is not consistent with applicable general and specific plans as specified in *Gov. Code § 65451* [*Gov. Code § 66474(a)*].

(2) Design or improvement of proposed subdivision is not consistent with applicable general and specific plans [*Gov. Code § 66474(b)*].

(3) Site is not physically suitable for:
(a) Type of development [*Gov. Code § 66474(c)*]; or

(b) Proposed density of development [*Gov. Code § 66474(d)*].

(4) Design of subdivision or proposed improvements are likely to cause substantial environmental damage or substantially and unavoidably injure fish or wildlife or their habitat [*Gov. Code § 66474(e)*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* ; *but see Gov. Code § 66474.01* (local government may approve tentative map or parcel map for which tentative map was not required if EIR was prepared for the project and finding was made under *Pub. Res. Code § 21081(c)* that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the EIR)].

(5) Design of subdivision or type of improvements:

(a) Is likely to cause serious public health problems [*Gov. Code § 66474(f)*]; or

(b) Will conflict with easements, acquired by the public at large, for access through or use of property within proposed subdivision [*Gov. Code § 66474(g)*].

(6) Subdivision would result in residential development not incidental to commercial agricultural use of

land, or resulting parcels would be too small to sustain agricultural use, and land is subject to any of following entered into on or after January 1, 2003 [*Gov. Code § 66474.4(a), (k)* as amended by 2002 Stats., ch. 613, § 1; *but see Gov. Code § 66474.4(c)* (limited exceptions)]:

(a) Williamson Act contract [*Gov. Code § 51200 et seq.*; *see* Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land*], including easement entered into pursuant to *Gov. Code § 51256*;

(b) Open-space easement entered into pursuant to Open Space Easement Act of 1974 [*see* Gov. Code § 51074 et seq.];

(c) Agricultural conservation easement entered into pursuant to *Pub. Res. Code § 10260 et seq.*]; or

(d) Conservation easement entered into pursuant to *Civ. Code § 815 et seq.* [*see § 28D.240*].

NOTE:
Land (whether agricultural or not) is presumed to be in parcels too small to sustain their agricultural use if the land is either less than 10 acres if it is prime agricultural land, or less than 40 acres if it is land that is not prime agricultural land [*Gov. Code § 66474.4(b)* as amended by 2002 Stats., ch. 613, § 1].

c. Legislative body does not make affirmative finding that proposed subdivision, together with provisions for design and improvement, is consistent with applicable general or specific land use plans [*Gov. Code § 66473.5*].

d. Governing body of any local agency determines that discharge of water from proposed subdivision into existing community sewer system would result in or add to violation of existing requirements prescribed by a California regional water quality control board [*Gov. Code §§ 66474.6, 66474.63*].

NOTE:
In this case disapproval is discretionary [*Gov. Code §§ 66474.6, 66474.63*].

e. Local agency finds that:

(1) Proposed subdivision is to front on public waterway, river, or stream and no provision has been made for:

(a) Reasonable public access [*Gov. Code § 66478.4(a)*]; and

(b) Public easement along bank of waterway, river, or stream [*Gov. Code § 66478.5(a)*]; or

(2) Subdivision fronts on any of following and no provision for reasonable public access has been made to:

(a) Coastline or shoreline [*Gov. Code § 66478.11(a)*]; or

(b) Publicly owned lake or reservoir [*Gov. Code § 66478.12(a)*].

NOTE:
Property within the coastal zone will be subject to very detailed local and state regulations imposed under the California Coastal Act [*Pub. Res. Code § 30000 et seq.*].

[3] Appeal From Decisions on Vesting Tentative Maps and Tentative Maps

1. If public agency determines that filing is incomplete, ensure that agency [*see Gov. Code § 65943(c)*]:

a. Provides process by which applicant may appeal its decision.

b. Makes final written determination on appeal no later than 60 calendar days after receipt of appeal.

NOTE:
If the public agency fails to make a timely written determination on the appeal, the submitted materials will be deemed complete. However, the applicant and public agency may mutually agree to an extension of the 60-day time limit [*Gov. Code § 65943(d)*].

2. Consider advisability of pursuing appeal from any decision of agency [*Gov. Code § 66452.5(a)*; *see* P 3, *below*]:

a. Rejecting map.

b. Attaching conditions to approval of map.

NOTE:
In the case of a proposed conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, any tenant of the subject property also has the right to appeal using the procedure described in Paragraph 3, ***below***. If the appeal is taken by tenants of residential property, notice of each hearing in the process must be mailed to those tenants at least three days prior to the hearing [***see*** *Gov. Code § 66452.5(f)*].

3. If desired, file appeal of any action of advisory agency within 10 days after disputed action with clerk of [*Gov. Code § 66452.5(a)(2)*]:

a. Appeal board; or

NOTE:
An "appeal board" is a designated board or other official body responsible for hearing and making determinations on appeals with respect to the following: divisions of real property; the imposition of requirements or conditions on those divisions; and the kind, nature, and extent of the design or improvements, or both, recommended or imposed by the advisory agency [*Gov. Code § 66416*].

b. Legislative body if no appeal board exists.

4. Ensure that appeal board or legislative body [*Gov. Code § 66452.5(a)(3)*]:

a. Hears appeal within 30 days after hearing was requested.

NOTE:
If the legislative body is not scheduled to meet within that 30-day period, the appeal may be heard at the next regular meeting for which notice can be given, or within 60 days from the date the request for hearing was received, whichever period is shorter [*Gov. Code § 66452.5(a)(3)*].

b. Renders decision within 10 days following conclusion of hearing.

5. If decision of appeal board is unacceptable [*Gov. Code § 66452.5(b)*]:

NOTE:
The advisory agency may also appeal the decision [*Gov. Code § 66452.5(b)(1)*].

a. Draft written appeal.

b. File appeal with clerk of legislative body within 10 days after disputed action and request hearing.

6. If appeal board fails to take timely action on appeal, notify appellant that decision is deemed affirmed and [*Gov. Code § 66452.5(c)*]:

a. Appellant may file further appeal with legislative body; or

b. If no further appeal is taken, map (to extent it complies with SMA and local ordinance) is deemed approved or conditionally approved as last approved or conditionally approved by advisory agency, and:

(1) Clerk of legislative body must certify or state that approval; or

(2) If advisory agency is not authorized to approve, conditionally approve, or disapprove map, advisory agency must submit its report to legislative body as if no appeal had been taken.

7. If necessary, prepare for appeal of advisory agency or appeal board decision by interested persons adversely affected by decision within 10 days of hearing request [*Gov. Code § 66452.5(d)(1)*].

NOTE:
Once an appeal is filed, the legislative body will set the matter for hearing, which must be held within 30 days after the date of the subdivider's or appellant's request. If the legislative body is not scheduled to meet within that 30-day period, the appeal may be heard at the next regular meeting for which notice can be given, or within 60 days from the date the request for hearing was received, whichever period is shorter. The findings and decision must be rendered within 10 days of the hearing's conclusion [*Gov. Code § 66452.5(d)(1), (2)*].

[4] Amendment and Expiration of Approved Vesting Tentative Maps and Tentative Maps

1. Notify client that approved or conditionally approved tentative map expires [*Gov. Code § 66452.6(a)(1)*; *but see Gov. Code § 66452.6(a)(1), (2)* (conditions under which subdivider may obtain extension of expiration date)]:

NOTE:

The periods specified below do not apply to tentative maps that have been prepared in connection with parcel maps. For a discussion of applicable periods, see [8], ***below***.

a. Twenty-four months after approval or conditional approval; or

b. After any additional period of time, not exceeding 12 months, prescribed by local ordinance.

NOTE:

As noted in "PRACTICE TIP: Count the Years Carefully" in § 30.23[2][d], the life of a tentative map may extend more than 26 years under current law [***see*** *Gov. Code § 66452.6*], and future statutory revisions may provide for even more extensions.

2. Advise client regarding expiration of rights conferred by vesting tentative map, as follows [*Gov. Code § 66498.1(d)*; *see Gov. Code § 66498.5(b)-(d)*]:

a. Rights will expire with expiration of vesting tentative map unless final map is approved in interim [*see* P 1, *above*].

NOTE:

Subdividers often receive their vesting tentative map approval, record their final map, and then forget about the deadline to build [***see*** "PRACTICE TIP: Beware Expiring Vested Rights" in § 30.23[4][c]].

b. If final map is approved before vesting tentative map expires:

(1) Rights will last for initial time period provided by ordinance, but not less than one year nor more than two years beyond recording of final map [*Gov. Code § 66498.5(b)*].

NOTE:

When several final maps are recorded on various phases of a project covered by a single vested tentative map, the one-year initial time period begins for each phase when the final map for that phase is recorded [*Gov. Code § 66498.5(b)*].

(2) Initial time period will be automatically extended by any time used by local agency for processing a complete application for grading permit or for design or architectural review, if this time exceeds 30 days from date of filing of complete application [*Gov. Code § 66498.5(c)*].

(3) Client may apply for one-year extension anytime during initial time period [*Gov. Code § 66498.5(c)*].

NOTE:

If application is denied, client may appeal to legislative body within 15 days [*Gov. Code § 66498.5(c)*].

(4) If client submits complete application for building permit during initial time period, including any extensions described in PP (2) and (3), *above*, rights will continue until building permit expires [*Gov. Code § 66498.5(d)*].

3. Monitor changes in ordinances, policies, and standards in effect when application for map was accepted as complete and, if they change following approval or conditional approval of vesting tentative map, take following steps, as desired [*Gov. Code §§ 66498.1(b), 66498.2*]:

a. Advise subdivider or subdivider's assignee that application for amendment to map may be made any time prior to expiration of map [*see* PP 1, 2, *above*], to secure vested right to proceed with changed ordinances, policies, or standards.

b. If client desires to exercise this right, file application for amendment, which must clearly specify changes for which amendment is sought.

4. If desired, obtain or provide for extension of expiration date of map as follows:

a. If subdivider is required to expend at least $178,000 to construct, improve, or finance construction or improvement of offsite public improvements, and subdivider wishes to file multiple final maps [*see § 30.120[2],* P 2], inform subdivider that [*Gov. Code § 66452.6(a)(1)*]:

NOTE:

For these purposes, "public improvements" include traffic controls, streets, roads, highways, freeways, bridges, overcrossings, street interchanges, flood control or storm drain facilities, sewer facilities, water facilities, andlighting facilities. That term does not include improvements of public rights-of-way that abut the boundary of the property to be subdivided and that are reasonably related to the development of the property [*Gov. Code § 66452.6(a)(3)*].

The $178,000 threshold is adjusted annually for inflation beginning January 1, 2005 [***see*** Gov. Code § 66432.6(a)(2)].

(1) Each filing of a final map extends expiration of approved or conditionally approved map by 36 months from later of:

(a) Expiration date applicable to standard (non-multiple) final maps [*see Gov. Code § 66452.6(a)(1)*]; or

(b) Date of previously filed final map.

(2) Extensions for multiple maps must not extend tentative map more than 10 years from its approval or conditional approval.

b. If tentative map is for property subject to development agreement [*see Gov. Code §§ 65864-65869.5*], notify client that map may be extended for period of time provided for in agreement, but not beyond duration of agreement [*Gov. Code § 66452.6(a)(1)*; *see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

PRACTICE TIP:

Pros and Cons of Development Agreements. A development agreement can provide more definite protection from future restrictive regulations; for larger-scale projects it may extend for 20 years or more. It also guarantees issuance of any follow-up discretionary approvals (for example, use permit, design review), in contrast to a vesting map, which says only that any other approval will be based on locked-in regulations and not new amendments. However, a development agreement is discretionary, while a

vesting map must be treated the same as a standard subdivision and cannot be denied or overly conditioned based on its vesting nature. There often will be a price to pay for a development agreement, in terms of extra dedications or other concessions that could not legally be imposed on a subdivision. In some cases the best course is to obtain both a vesting map and a development agreement--they each have unique benefits. *By Edward Shaffer*

c. For extension up to six years for tentative map [*Gov. Code § 66452.6(e)*; *see Gov. Code § 66452.6(c)* (local agency also may approve stay of extension period pending outcome of lawsuit involving approval of map)]:

NOTE:

The period of the extension will be in addition to the period of time provided by *Gov. Code § 66452.6(a)(1)* [***see*** PP a, b, ***above***].

(1) File application before expiration date with legislative body or advisory agency authorized to approve or conditionally approve map.

NOTE:

If a subdivider, before the expiration of an approved or conditionally approved tentative map, files an application to extend the expiration date of that map, the expiration date will automatically be extended for 60 days or until the application is approved, conditionally approved, or denied, whichever occurs first [*Gov. Code § 66452.6(e)*].

PRACTICE TIP:

Use Processing Time to Squeeze Under the Wire. Even if political or other circumstances make denial of the extension certain, there still may be a value to applying. If the developer is almost ready to file for the final map, the extra time (up to 60 days) while the application is being processed and scheduled for one or more hearings may be enough to complete needed work to submit the final map. *By Edward Shaffer*

(2) If advisory agency denies application, appeal to legislative body within 15 days after denial.

d. If vesting tentative map is about to expire, consider advising subdivider to apply for one-year extension by taking following steps [*Gov. Code § 66452.6(g)*]:

(1) Submitting application to advisory agency or legislative body prior to expiration of initial time period; and

(2) If extension is denied by advisory agency, filing appeal of advisory agency's denial to legislative body within 15 days.

NOTE:

If the subdivider submits a complete application for a building permit prior to expiration of the vested rights protected by a vesting tentative map, the rights conferred by the map will continue until the expiration (including any extensions) of that permit [*Gov. Code § 66452.6(h)*].

[5] Preparation of Final Maps

NOTE:

Attorneys are rarely involved in the process of final map preparation.

1. Before expiration of tentative map [*see Gov. Code § 66452.6*; *see also § 30.23[2][d]*], have final map prepared as follows [*Gov. Code § 66456*]:

a. Hire registered civil engineer or licensed land surveyor to [*Gov. Code §§ 66433, 66434, 66456*; *see* [1], *above* (this individual may have been hired to prepare tentative map or vesting tentative map as well)]:

(1) Survey all or part of real property included within tentative map.

(2) Set sufficient durable monuments on real property in manner required by SMA [*see Gov. Code § 66495*; *see also Gov. Code §§ 66496-66498*].

(3) Prepare (or direct preparation of) final map.

b. Confirm that content and form of map comply with local ordinance and with following requirements of SMA [*Gov. Code § 66433*]:

(1) Map must be legibly drawn, printed, or reproduced by process that ensures permanent record in black on tracing cloth or polyester base film [*Gov. Code § 66434(a)*].

NOTE:
Certificates, affidavits, and acknowledgments may be legibly stamped or printed on the map with opaque ink. If ink is used on polyester base film, the ink surface must be coated with a suitable substance to assure permanent legibility [*Gov. Code § 66434(a)*].

(2) Scale of map must be large enough to show all details clearly, and enough sheets must be used to accomplish this [*Gov. Code § 66434(b)*].

(3) Each sheet must [*Gov. Code § 66434(b)*]:

(a) Measure 18 by 26 inches (or 460 by 660 millimeters).

(b) Contain marginal lines drawn completely around the sheets leaving entirely blank margins of one inch (or 25 millimeters).

(c) State particular number of sheet and total number of sheets making up map.

(d) Clearly show its relation to adjoining sheets.

(4) All survey and mathematical information and data necessary to locate all monuments and to locate and retrace any and all interior and exterior boundary lines appearing thereon must be shown, including [*Gov. Code § 66434(c)*]:

(a) Bearings and distances of straight lines.

(b) Radii and arc length or chord bearings and length for all curves.

(c) Information necessary to determine location of centers of curves and ties to existing monuments used to establish subdivision boundaries.

(5) Each parcel must be numbered, each block may be numbered or lettered, each street must be named or otherwise designated, and the subdivision number must be shown together with the description of the property being subdivided [*Gov. Code § 66434(d)*].

(6) Exterior boundary of subdivision must be indicated by distinctive symbols and clearly designated as such, and definite location of subdivision (particularly its relation to surrounding surveys) must be shown [*Gov. Code § 66434(e)(1)*].

NOTE:

The exterior boundary must not include a designated remainder or omitted parcel that is designated or omitted under *Gov. Code § 66424.6*. The designated remainder or omitted parcel must be labeled as such [*Gov. Code § 66434(e)(1)*]. The map need not show any designated remainder parcel of five acres or more in gross area. The survey also need not indicate the location of the remainder parcel. However, the parcel must at least be indicated by a deed reference to the existing boundaries of the remainder parcel [Gov. Code § 55434(e)(2). For these purposes, a parcel designated as "not a part" will be deemed to be a designated remainder [*Gov. Code § 66434(e)(3)*].

(7) Map must contain notation or reference to any additional information required by local ordinance, if any, adopted pursuant to *Gov. Code § 66434.2* [*Gov. Code § 66434(f)*].

(8) Map must adequately delineate any public streets or public easements to be left in effect after subdivision [*Gov. Code § 66434(g)*].

NOTE:

Filing the map constitutes abandonment of all public streets and public easements not shown on the map, provided a written notation of each abandonment is listed by reference to the recording data or other official record creating these public streets or easements and certified to on the map by the clerk of the legislative body approving the map. Before a public easement vested in another public entity may be abandoned, however, that entity must receive notice of the proposed abandonment. No public easement vested in another public entity will be abandoned if that entity objects to the proposed abandonment [*Gov. Code § 66434(g)*].

2. Confirm that following statements, certificates, and acknowledgments appear on map [*Gov. Code § 66457(a)*; *see Gov. Code § 66435*]:

NOTE:

Required certificates, acknowledgments, and statements may be combined when appropriate [*Gov. Code § 66435*]. Before the map is filed, all required certificates or statements on the map must be signed and, when necessary, acknowledged [*Gov. Code § 66457(a)*]. A person or entity that omits a signature from a final map pursuant to *Gov. Code § 66436* will not be subject to civil or monetary liability based on that omission [*Gov. Code § 66436(b)*].

a. Statement consenting to preparation and recordation of final map, signed and acknowledged by all parties with record title interest in property, except as follows [*Gov. Code § 66436*; *see § 30.204*]:

NOTE:

Trust interests under bond indentures, mechanics' liens, and liens for special assessments or for state, county, municipal, or local taxes are not "record title interests." Generally,

therefore, they need not be included. However, local agencies may require that statements of this nature be made by separate instruments [*Gov. Code § 66436(a)(1)*; *Gov. Code § 66436(a)(2)* (trustee's or beneficiary's signature will constitute subordination of deed of trust lien and any interest created by the final map)].

(1) Map may omit signature of either [*Gov. Code § 66436(a)(2)*]:
(a) Holder of beneficial interests under trust deeds; or

(b) Trustee under trust deeds.

NOTE:
The map may omit either of these signatures, but not both [*Gov. Code § 66436(a)(2)*].

(2) Map may omit signatures of parties with following types of interests, provided that final map states their names and respective interests [*see Gov. Code § 66436(a)(3)(A)(i)*]:

(a) Rights-of-way, easements, or other interests that cannot ripen into fees [*Gov. Code § 66436(a)(3)(A)(i)*; *see* Ch. 28A, *Easements and Licenses*].

(b) Obsolete rights-of-way, easements, or reversions [*Gov. Code § 66436(a)(3)(B)*].

(c) Interests in or rights to minerals, including oil, gas, or other hydrocarbon substances [*see Gov. Code § 66436(a)(3)*].

(3) Real property originally patented by United States or State of California under patent that reserved interest to either or both of them may be included in map without their consent to map or dedications made by it.

b. If map includes any dedication, or offer to dedicate, statement of every party having record title interest in property being subdivided, offering affected property for dedication [*Gov. Code § 66439(a)*; *see § 30.204*].

NOTE:
The individuals and entities that need not sign the statement consenting to the preparation and recordation of the final map are also exempted from this statement requirement [***see*** *Gov. Code §§ 66436, 66439(a)*; ***see also*** a, ***above***].

If any street shown on the map is not offered for dedication, the statement may contain a declaration to that effect [*Gov. Code § 66439(b)*].

An offer of dedication of real property for street or public utility easement purposes will be deemed not to include any public utility facilities located on or under the real property unless an intent to dedicate the facilities is expressly declared in the statement [*Gov. Code § 66439(c)*].

c. Statement or certificate by clerk of each approving legislative body, verifying that body approved map and acted on offer of dedication [*Gov. Code § 66440*].

d. Statement by engineer or surveyor responsible for survey and final map, which specifies date on which survey was conducted and states that [*Gov. Code § 66441*]:

(a) Survey and final map were made by certifier or under certifier's direction.

(b) Survey is true and complete as shown.

(c) All monuments are of the character and occupy the positions indicated, or will be set in those positions on or before a specified later date.

(d) Monuments are or will be sufficient to enable survey to be retraced.

e. Statement by engineer or surveyor responsible for survey and final map stating that final map substantially conforms to conditionally approved tentative map [*Gov. Code § 66442.5(a)*].

NOTE:

This statement is not the same as that described in P d., ***above***. The form for the statement is prescribed by statute [***see*** *Gov. Code § 66449(a)*].

f. Certificate or statement signed by county surveyor (if subdivision is within unincorporated area) or city engineer or city surveyor (if within a city), stating that [*Gov. Code § 66442(a)*]:

NOTE:

City or county engineers registered as civil engineers after January 1, 1982, can only make the statements required by Paragraphs (1) through (3), ***below***, while the statement required by Paragraph (4), ***below***, can only be made by a person authorized to practice land surveying under the Professional Land Surveyor's Act or a person registered as a civil engineer before January 1, 1982 [*Gov. Code § 66442(b)*; ***see*** *Bus. & Prof. Code § 8700 et seq.*]. The certifying official must sign and date the certificate and indicate his or her license number and expiration date and the stamp of his or her seal immediately below or adjacent to the signature [*Gov. Code § 66442(a)*], and file it with his or her legislative body within 20 days from the time the final map is submitted to him or her by the subdivider for approval [*Gov. Code § 66442(b)*; *see Gov. Code § 66442(c)* (referencing *Bus. & Prof. Code §§ 6735.5* and *8770.6* to define "certificate," "certify," and "certified" in this context)].

(1) Surveyor or engineer has examined map;

(2) Subdivision as shown is substantially same as it appeared on tentative map and any approved alterations of tentative map;

(3) All provisions of SMA and any applicable local ordinances have been complied with; and

(4) Surveyor or engineer is satisfied that map is technically correct.

g. Any certificates required by local ordinance [*Gov. Code § 66443*].

NOTE:

Local agencies may require that these certificates be made by separate instrument recorded concurrently with the final map filed for recording [*Gov. Code § 66435.1*]. If this procedure is required, the final map must contain a reference to the separately recorded document. This reference must be completed by the county recorder pursuant to *Gov. Code § 66468.1* [*Gov. Code § 66435.2*].

h. Recorder's certificate or statement indicating filing date, citation to county records, and identifying person who requested filing [*Gov. Code § 66442.5(b)*].

NOTE:
The form for the certificate or statement is prescribed by statute [***see*** *Gov. Code § 66449(b)*].

[6] Filing and Processing of Final Map and Related Documents

1. File following tax-related documents and security with recorder of county where subdivision is located:

a. Certificate or statement showing that there are no liens against all or any part of subdivision for unpaid taxes or special assessments collected as taxes, except taxes or assessments not yet payable [*Gov. Code § 66492*].

NOTE:
This certificate or statement must be prepared by the official who computes redemptions in any public agency where subdivision is located, and must be filed prior to the filing of the final map [*Gov. Code § 66492*].

b. If any part of subdivision is subject to lien for taxes or special assessments, certificate or statement by appropriate state or local official giving that official's estimate of amounts that are lien but that are not yet payable [*Gov. Code § 66493(a)(1)*].

NOTE:
The requirements of *Gov. Code § 66493* must be satisfied prior to the recordation of the final map [***see*** *Gov. Code § 66493(a)*; ***see also*** P b, ***above***, and PP c, d, ***below***].

c. Security conditioned on payment of all state, county, municipal, and local taxes and current installment of principal and interest of all special assessments collected as taxes that, at time final map is recorded, are a lien against the property but not yet payable [*Gov. Code § 66493(a)(2)*; *see Gov. Code § 66494*].

NOTE:
After consulting with the tax collector, a county may adopt an ordinance permitting waiver of the security requirement for a final parcel map of four or fewer parcels or for a lot line adjustment [*Gov. Code § 66493(d)*]. A county may also adopt an ordinance requiring the tax collector, when a property owner or subdivider deposits cash to satisfy the security requirement, to draw on the cash deposit, at the taxpayer's request, to pay the taxes or special assessments when they become payable [*Gov. Code § 66493(c)*].

If the land being subdivided is a portion of a larger parcel shown as a unit on the last preceding tax roll, the security is required to be only for the sum that the county determines is sufficient to pay the current and delinquent taxes on the land being subdivided, together with accrued penalties and costs if those taxes have been or are allowed to become delinquent. If the land being subdivided is tax-defaulted, it may be redeemed without redeeming the remainder of the larger parcel as if it were held in ownership separate from and other than that of the remainder [*Gov. Code § 66493(b)*].

d. If subdivision land is part of larger parcel that is subject to special assessment, and special assessment is not paid in full or secured pursuant to *Gov. Code § 66493(e)*, certificate that [*Gov. Code § 66493(f)*]:

NOTE:
Generally, when the line of a subdivision lot or parcel divides land that is subject to a special assessment

or bond that is payable in full, the assessment or bond must be paid in full, or security must be filed with the clerk of the board of supervisors, payable to the county as trustee for the assessment bondholders [*Gov. Code § 66493(e)*].

(1) Was prepared by clerk of legislative body that created assessment district.

(2) Certifies that legislative body has determined that responsibility for assessment payment obligation has been adequately allocated among affected parcels.

2. Prior to expiration of tentative map, file final map with appropriate legislative body as follows [*Gov. Code §§ 66457(a), 66452.6(d)*].

NOTE:

If the subdivision lies entirely within the territory of a city, the map must be filed with the city. If it is entirely within unincorporated territory, the map must be filed with the county. If it is partially within two or more of those territories, the map must be filed with each [*Gov. Code § 66457(b)*].

Gov. Code § 66458(c) states that the meeting at which the legislative body receives the map will be the date on which the clerk of the legislative body receives the map.

3. If required by local ordinance, file or record any additional map sheet or other document that [*Gov. Code § 66434.2*]:

a. Contains additional information required by local ordinance, such as:

(1) Setback lines.

(2) Flood hazard zones.

(3) Seismic lines and setbacks.

(4) Geologic mapping.

(5) Archaeological sites.

b. Indicates its relationship to final map.

NOTE:

If the requirement is being applied to a parcel map, then the additional map sheet or document must indicate its relationship to the parcel map [*Gov. Code § 66434.2(a)*].

c. Includes statement that additional information:

(1) Is for informational purposes;

(2) Describes conditions as of filing date; and

(3) Is not intended to affect record title interest [*see Gov. Code § 66434(f)*].

d. If desired, contains notation that:

(1) Its additional information is derived from public records or reports; and

(2) It does not imply correctness or sufficiency of those records or reports by preparer of document or sheet [*Gov. Code § 66434.2(a)*].

e. Contains notation of each abandonment of public street or public easement listed by reference to recording date or other official record creating streets or easements to be abandoned [*Gov. Code § 66434(g)*].

NOTE:
The notations must be certified to on the map by the clerk of the legislative body approving the map [*Gov. Code § 66434(g)*].

4. If required by local agency as condition for approval of final map, arrange for indemnification of claims against local agency [*see Gov. Code § 66474.9*].

5. Confirm that legislative body and subdivider comply with following procedures for processing map:

NOTE:
In lieu of these procedures, the local legislative body may by ordinance delegate the responsibility for approving or disapproving final maps to the city or county engineer, surveyor, or other designated official, who may also be authorized to accept, or accept subject to improvement, or reject dedications and offers of dedications that are made by statement on the map. The designated official must notify the legislative body at its next regular meeting after the official receives the map that he or she is reviewing the map for final approval. The clerk of the legislative body must provide notice of any pending approval or disapproval by the designated official by attaching a notice to the regular meeting agenda, posting the notice, and mailing it to interested persons who request notice. The designated official must approve or disapprove the final map within 10 days following the legislative body's meeting. The designated official's action may be appealed to the legislative body. The legislative body must periodically review the delegation of authority [*Gov. Code § 66458(d)*; ***see*** *Gov. Code § 66462(d)*].

a. At meeting at which it receives map or at its next regular meeting, legislative body must [*Gov. Code § 66458(a)*]:

(1) Approve map if it conforms to applicable requirements; or

NOTE:
In addition to satisfying the requirements of the SMA, the map must comply with any local subdivision ordinance applicable at the time of approval or conditional approval of the tentative map, and to any rulings made thereunder [*Gov. Code § 66458(a)*].

The legislative body must not deny approval if it finds that the map substantially complies with the tentative map previously approved for the proposed subdivision [*Gov. Code §§ 66474.1, 66474.62*].

(2) Disapprove map if it does not conform to these requirements.

b. At time of approval, legislative body or its designated official must unconditionally accept, accept subject to improvement, or reject any or all offers of dedication contained on map [*Gov. Code § 66477.1(a)*].

NOTE:

The clerk of the legislative body or its designated official must certify or state on the map the action taken [*Gov. Code § 66477.1(a)*].

The legislative body of a county, or a designated county officer, may, by adoption of a resolution [***see*** *Sts. & Hy. Code § 941*], accept into the county road system any road for which an offer of dedication has been accepted or accepted subject to improvements [*Gov. Code § 66477.1(b)*].

c. At time of approval, if any required public improvements have not been completed and accepted by agency, legislative body and subdivider (as condition precedent to approval of map) must enter into agreement providing for [*Gov. Code § 66462(a)*]:

(1) Completion of improvements at subdivider's expense [*see § 30.200*]; or

(2) Either of following:

(a) Initiation and consummation of proceedings under appropriate special assessment act or Mello-Roos Community Facilities Act [*Gov. Code § 53311 et seq.*] to complete improvements at subdivider's expense; or

(b) If improvements are not completed under special assessment act or Mello-Roos, completion of improvements at subdivider's expense [*see § 30.200*].

d. If subdivider and local agency enter into one of the agreements described in P c, *above*, subdivider must provide security in form and amount required by local agency [*see Gov. Code §§ 66499, 66499.3, 66499.4, 66499.7, 66499.9*; *see also §§ 30.201, 30.202*].

e. If legislative body does not act on map at meeting when map was submitted or next regular meeting [*see Gov. Code § 66458(a)*; *see also Gov. Code § 66458(c)* (meeting at which legislative body receives map will be date on which clerk of legislative body receives map)] or authorized time extension and map conforms to applicable requirements and rulings, ensure that [*Gov. Code § 66458(b)*]:

(1) Map is approved; and

(2) Clerk of legislative body certifies or states approval on map.

6. After appropriate local official has transmitted approved map to county recorder [*see Gov. Code §§ 66464, 66468.2*]:

a. Have subdivider present county recorder with evidence that at time of filing of map, all parties having record title interest in affected property whose signatures are required by statute, as shown by recorder's records, have consented to filing [*Gov. Code § 66465*].

NOTE:

All persons having any record title interest in real property that is being subdivided must sign and acknowledge (1) a statement by which they consent to the preparation and recordation of the final subdivision map [*Gov. Code § 66436(a)*; ***see*** *§ 30.120[5],* P 2a]; and (2) if applicable, a statement offering specified property for dedication [*Gov. Code § 66439*; ***see*** P 30.120[5], P 2b]. The "evidence" referred to in a, ***above***, customarily consists of a subdivision guarantee that (1) is issued in favor of a named county and any

city within which the subdivision is located, and (2) provides assurance that the only parties having any record title interest whose signatures must appear on the foregoing statement(s) are as specified in the guarantee.

b. Notify subdivider that county recorder must accept or reject map for filing within 10 days after its receipt, and that [*Gov. Code § 66466(a)*]:

(1) If map is rejected, county recorder must, within 10 days thereafter, mail notice to subdivider that [*Gov. Code § 66466(b)*; *see Gov. Code § 66468.2*]:

NOTE:
The county recorder must also mail this notice to the city engineer if the subdivision property is within a city or the county surveyor if the property is within an unincorporated area [*Gov. Code § 66466(b)*].

(a) Map has been rejected for filing (giving reasons); and

(b) Map is being returned to appropriate clerk or officer for action by legislative body.

(2) If map is returned, it will be placed on agenda of legislative body's next regular meeting [*see Gov. Code § 66468.2*; *see also Gov. Code § 66458(c)* (meeting at which legislative body receives map will be date on which clerk of legislative body receives map)].

NOTE:
Within 15 days after the next regular meeting, the legislative body must rescind its approval and return the map to the subdivider unless the subdivider presents evidence that the basis for the rejection by the county recorder has been removed. The subdivider may consent to a continuance of the meeting date; however, the prior approval of the legislative body is deemed rescinded during any period of continuance. If a map is returned to the county recorder, the recorder has 10 days to accept or reject it for filing [*Gov. Code § 66466(b)*].

(3) If map is accepted, county recorder will [*see Gov. Code § 66466(c)*]:

(a) Certify acceptance on face of map.

(b) Securely fasten map in book of subdivision maps or other appropriate location.

(c) If map preparer has provided postage-paid, self-addressed envelope or postcard, provide preparer with filing data within 10 days of map filing.

NOTE:
For these purposes, "filing data" includes the date, book or volume number, and page number at which the map is filed by the county recorder [*Gov. Code § 66466(c)*].

[7] Preparation of Parcel Map

1. Retain registered civil engineer or licensed land surveyor to prepare or direct preparation of parcel

map [*Gov. Code § 66445*].

2. Confirm that map:

a. Shows location of street and property lines bounding property [*Gov. Code § 66445*].

b. Conforms to technical format specifications outlined in *Gov. Code § 66445*.

NOTE:
These specifications are similar to those applicable to final maps [***see*** *Gov. Code § 66433*; ***see also*** [5], P 1, ***above***].

If the map contains notations of abandonment of any public streets or public easements, the notations must be certified to on the map by the clerk or other designee of the legislative body approving the map [*Gov. Code § 66445(j)*].

c. Satisfies any additional map requirements of applicable local ordinances, such as:

NOTE:
A parcel map is generally not subject to local survey and map requirements that do not affect record title interests [***see*** *Gov. Code § 66445(g)*].

(1) Requirement for notation of reference to any survey and map information required by *Gov. Code § 66434.2* [*Gov. Code § 66445(g)*].

(2) Requirement that parcel map be based on field survey made in conformity with Professional Land Surveyors' Act [*Gov. Code § 66448*; *see Bus. & Prof. Code § 8700 et seq.* (Land Surveyors Act)].

d. Satisfies either of following if local ordinance does not require field survey [*Gov. Code § 66448*]:

(1) Is based on such a field survey; or

(2) Is compiled from recorded or filed data, but only if:
(a) Sufficient survey information exists on filed maps to locate and retrace exterior boundary lines of map; and

(b) Location of at least one of these boundary lines can be established form existing monumented line.

3. When parcel map is completed, affix following documents to it before its recording:

a. Statement signed and acknowledged by all parties having any record title interest in subdivided real property, consenting to preparation and recordation of map [*Gov. Code § 66445(e)*].

NOTE:
This statement is subject to the requirements of *Gov. Code § 66436* [***see*** [5], P 2, ***above***]. Further, the local ordinance may specify less inclusive requirements, which would apply in lieu of the statutory requirements [***see*** *Gov. Code § 66445(e)*].

Local agencies may require that this statement be made by separate instrument recorded

concurrently with the parcel map [*Gov. Code § 66445(f)*]. In that case, the county recorder must include a reference to the separately recorded document in the parcel map [*Gov. Code §§ 66445(h), 66468.1*].

If the land is to be divided into four or fewer parcels and no dedications or offers of dedication are required, only the subdivider need sign and acknowledge the statement [*Gov. Code § 66445(e)*].

b. Statement of dedications or offers of dedication, if necessary [*Gov. Code § 66447*; *see § 30.204*].

NOTE:

Any required dedications or offers of dedication may be made either by a statement on the parcel map or by separate instrument, as provided by local ordinance. If made by separate instrument, they must be recorded before or concurrently with the filing of the parcel map for recordation [*Gov. Code § 66439(a)*]. Whether by statement or separate instrument, the dedication or offers of dedication must be signed by the same parties and in the same manner as set forth in *Government Code Section 66439* for dedications on a final map [*Gov. Code § 66447(b)*; *see* [5], P 2, *above*]. If the subdivider is required to make a dedication for specified public purposes on a parcel map, the local agency must specify whether the dedication is to be in fee or as an easement, and the dedication statement must include statutorily prescribed language to that effect [*Gov. Code § 66447(c)*].

c. Engineer's or surveyor's statement [*see Gov. Code § 66449(a)*].

NOTE:

Although *Gov. Code § 66449* sets forth the official engineer's (or surveyor's) statement that must appear on a parcel map, the statement set forth in that section does not reflect the provisions of *Gov. Code § 66445(i)*. Under Section 66445(i), if a field survey was prepared, the parcel map must contain a statement by the engineer or surveyor responsible for the preparation of the map, providing (1) that all monuments are of the character and occupy the positions indicated, or that they will be set in those positions on or before a specified date; and (2) that all monuments are, or will be, sufficient to enable the survey to be retraced.

d. Certificate or statement by one of following [*see Gov. Code § 66450*]:

(1) County surveyor.

(2) City engineer.

(3) City surveyor.

e. Certificate or statement of legislative body signifying its acceptance or rejection of any offer of dedication [*Gov. Code §§ 66463, 66477.1*].

[8] Filing and Processing of Parcel Map and Related Documents

1. File same tax-related documents and security that are required in connection with filing of final maps [*see Gov. Code §§ 66463, 66477.1*; *see also* [6], P 1, *above*].

2. File map with appropriate local agency of [*Gov. Code § 66457(b)*; *see Gov. Code § 66463*]:

a. Every city within which any part of subdivision is located; and

b. Every county within whose unincorporated territory any part of subdivision is located.

NOTE:

The parcel map will be deemed filed on the date on which the clerk of the legislative body receives it [*Gov. Code § 66457(a)*; ***see*** *Gov. Code § 66428*]. If a tentative map was required for the project [***see*** *Gov. Code § 66428*], the parcel map must be filed before the expiration of the approved or conditionally approved tentative map [*Gov. Code § 66463.5(a)*; ***see*** *Gov. Code § 66463.5(b)* (expiration of tentative map before filing of parcel map terminates all proceedings, and new tentative map must be obtained before parcel map can be filed)]. Any tentative map will expire 24 months after its approval or conditional approval, or after any additional period of time (up to 12 months) specified by local ordinance [*Gov. Code § 66463.5(a)*; ***see*** *Gov. Code § 66463.5(d)-(f)* (period of validity excludes any time during which a development moratorium or lawsuit is pending)].

A subdivider may apply for an extension (of up to six years) of the expiration date of a tentative map. The application will automatically extend the expiration date for 60 days or until the local jurisdiction acts on the application, whichever occurs first. The subdivider may appeal, within 15 days, a denial of an extension [***see*** *Gov. Code § 66463.5(c)*].

A local agency may, following the timely filing of a parcel map with the county surveyor or city engineer, subsequently process, approve, and record the map and take other related actions, whether or not the tentative map has expired [*Gov. Code § 66463.5(b)*].

3. If applicable, file or record any additional information required by local ordinance [*Gov. Code § 66434.2*].

4. Follow local procedures for processing and filing of map [*see Gov. Code § 66463*].

NOTE:

As a general rule, the SMA grants local legislative bodies wide discretion in establishing the procedure for processing, approval, conditional approval, disapproval, and filing of parcel maps [***see*** *Gov. Code § 66463*]. For example, whenever the local ordinance requires the legislative body (as opposed to the local agency or a designated official, such as the county engineer) to approve parcel maps, the statutory procedures for the filing [***see*** *Gov. Code § 66457*; ***see also*** [6], ***above***] and approval [***see*** *Gov. Code § 66458*; ***see also*** [6], ***above***] of final maps are applicable [*Gov. Code § 66463(c)*]. Further, the Act specifies the grounds for approval and disapproval of certain parcel maps [***see*** *Gov. Code §§ 66473.5* (requiring consistency with general and specific plans), 66474 (requiring disapproval on making of certain findings), 66474.1 (requiring approval of parcel map that complies with previously approved tentative map), 66474.4(a) (requiring disapproval if land is subject to California Land Conservation Act of 1965 and certain other conditions exist)]. As a matter of practice, many legislative bodies base any procedural requirements not governed by statute on those applicable to the processing and approval of tentative maps [***see*** [2], ***above***].

5. Have map recorded.

NOTE:

The procedure for recording a parcel map is the same as that required for recording a final map. For a discussion of that procedure, see [5], ***above***.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
C. Procedural Guide

13-30 California Legal Forms--Transaction Guide § 30.121

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.121 Submissions Under Subdivided Lands Act

[1] Application for and Use of Preliminary Public Report

1. If developer wishes to take reservations for purchase or lease of lots in subdivision from prospective purchasers or tenants before obtaining final public report [*10 Cal. Code Reg. § 2795(b)*]:

a. Apply for preliminary public report by submitting appropriate filing fee [*see Bus. & Prof. Code § 11011(b)(7)*; *10* Cal. Code Reg. § 2790.1.5] along with official application [*see § 30.220*].

b. Complete and file reservation instrument [*see § 30.221*].

2. Provide copy of preliminary public report to each prospective purchaser or tenant and:

a. Ensure that reservation agreement is signed by [*10 Cal. Code Reg. §§ 2795(b), 2795.1*]:
(1) Developer or someone else on developer's behalf.

(2) Each prospective purchaser.

(3) Each prospective tenant.

b. Ensure that official receipt for preliminary public report [*see § 30.222*] is signed by [*10 Cal. Code Reg. §§ 2795(b), 2795.1*]:

NOTE:

Before the developer may accept any money or other thing of value in connection with the reservation, he or she must obtain these signed receipts [*10 Cal. Code Reg. § 2795(b)(1)*]. The developer or developer's agent must retain each receipt for three years and must make the receipts available for inspection by the Commissioner or his or her designated representative during regular business hours [*10 Cal. Code Reg. § 2795.1(b)*].

(1) Each prospective purchaser.

(2) Each prospective tenant.

3. Prepare and execute official escrow agreement and place following documents into escrow depository [*10 Cal. Code Reg. § 2795(b)(2)*]:

a. Executed reservation instruments.

b. Any deposit taken from prospective purchaser or tenant.

[2] Application for Public Report for Standard Subdivision

1. Complete official application for public report [*Bus. & Prof. Code § 11010*; *see 10 Cal. Code Reg. § 2790*; *see also § 30.220*].

2. Include following documents in application package [*10 Cal. Code Reg. § 2792(a)*]:

a. Subdivision filing fee, including fee for preliminary public report if applicable.

b. Completed subdivision questionnaire.

c. Approved tentative subdivision map, unless Commissioner found that because of processing delays, tentative subdivision map has not been approved but will be approved within reasonable time.

d. Certificate of qualification from Secretary of State if applicant is foreign corporation.

e. Consent to service of process on Secretary of State if applicant is nonresident of California [*see* DRE Form 608 (official consent form)].

f. Current preliminary title report covering all subdivision interests for which public report is sought and including:

(1) Legal description of subdivided property;

(2) Nature of interest or estate covered by report;

(3) Record owner of interest or estate covered by report;

(4) All easements, liens, rights, interest, and claims disclosed by examination of indices

in office of recorder of county where property is located;

(5) Existence of any encroachment of improvements over lines of record title;

(6) All mechanics' liens arising out of work completed or in progress; and

(7) Existence of assessments or potential assessments for public improvements completed or under construction.

g. Proposed or existing covenants, conditions, and restrictions for subdivision.

h. Coastal Commission permit or exemption if subdivision is in coastal zone.

i. Evidence of availability of domestic utilities and services to subdivision.

j. Information concerning hazards and other unusual conditions within or in vicinity of subdivision.

k. Assessment and improvement bond information, if applicable to subdivision interests to be offered.

l. Exemplars of all marketing, financing, and conveyancing instruments to be used in offering of subdivision interests.

m. Exemplar of escrow instructions, which must include:

(1) Description of nature of transaction;

(2) Provision for return to nondefaulting buyers of funds deposited toward purchase of subdivision interests if escrows are not closed on or before date prescribed in instructions; and

(3) Name and address of escrow depository to be used.

n. Bond or other device to be used as means of compliance with *Bus. & Prof. Code §§ 11013.2* and *11013.4* [*see* DRE Forms 600, 600A (official surety and blanket surety bonds)].

o. Completed documents for reservations and reservation deposits if preliminary public report is requested [*see § 30.221*; *see also* [1], *above*].

p. Evidence of financial arrangements to assure completion of all off-site improvements included in offering.

q. Evidence of financial arrangements for any guarantee or warranty included in offering.

r. Evidence of all arrangements to assure completion, maintenance, and availability for use of any privately owned facility that will be offered as inducement to purchase of subdivision interests.

3. Have application executed by or on behalf of developer or other person to whom public report is to be issued and [*10 Cal. Code Reg. § 2790*]:

a. If executed within California, have developer either:

(1) Verify information in application and supporting documents before notary public or other person qualified to administer oaths; or

(2) Execute written certificate that specifies [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(a)*]:
(a) That all information in application is certified to be true under penalty of perjury.

(b) Date and place of execution.

(c) That it is certified under California law.

b. If executed outside of California, have developer either:

(1) Verify information in application and supporting documents before person qualified to administer oaths within jurisdiction where application is executed; or

(2) Execute written certificate that specifies [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(b)*]:

(a) That it is certified to be true under penalty of perjury.

(b) Date of execution.

(c) That it is certified under California law.

4. Submit application package and filing fee [*see Bus. & Prof. Code § 11011(b)(3)*; *10* Cal. Code Reg. § 2790.1.5(a), (c)] to DRE [*see Bus. & Prof. Code § 11010*; *see also 10 Cal. Code Reg. § 2790*].

NOTE:
If the subdivider does not furnish the data required by *Bus. & Prof. Code § 11010* [***see*** P 2, ***above***] within three years from the date a notice of intention is filed, the Commissioner may abandon the application after written notice to the subdivider or the subdivider's representative [*Bus. & Prof. Code § 11018.13(a), (b)*; ***see*** *10 Cal. Code Reg. § 2804*].

5. If, after Commissioner determines that application is qualitatively complete [*see Bus. & Prof. Code § 11010.2*], developer is currently unable to satisfy certain remaining conditions for issuance of public report but wishes to commence sale or leasing of lots or parcels in subdivision:

NOTE:
The Commissioner may issue a conditional public report if, among other things, all requirements for issuance of a public report have been met except for one or more of the requirements specified in *Bus. & Prof. Code § 11018.12(b)*. Those requirements generally involve the recordation or submission of certain supporting documentation [***see*** *Bus. & Prof. Code § 11018.12(b)*].

a. Apply for conditional public report by:

(1) Providing evidence that all purchase money will be deposited in compliance with

Bus. & Prof. Code § 11013.2(a) or *11013.4(a)* [*Bus. & Prof. Code § 11018.12(e)(1)*].

(2) Providing description of nature of transaction [*Bus. & Prof. Code § 11018.12(e)(2)*].

(3) Making provision for return of entire sum of money paid or advanced by purchaser if [*Bus. & Prof. Code § 11018.12(e)(3)*]:

(a) Public report is not issued within six months of date of issuance of conditional public report; or

(b) Purchaser is dissatisfied with public report because of material change in setup of offering [*see Bus. & Prof. Code § 11012* (material changes)].

b. If Commissioner issues conditional public report, notify developer of his or her right to sell or lease, or offer for sale or lease, lots or parcels in subdivision pursuant to report, provided that following requirements are satisfied:

(1) As condition of sale, lease, or offer, delivery of legal title or other interest contracted for will not take place until issuance of final public report.

(2) Requirements of *Bus. & Prof. Code § 11018.12(e)* are met [*see* P a, *above*].

(3) Each prospective purchaser is provided with copy of conditional public report and written statement that includes all of the following:

(a) Specification of information required for issuance of public report.

(b) Specification of information required in public report that is not available in conditional public report, along with statement of reasons why that information is not available at time of issuance of conditional public report.

(c) Statement that no person acting as principal or agent may sell, lease, or offer for sale or lease lots or parcels in subdivision for which conditional public report has been issued except as provided in applicable provisions of SLA [*see Bus. & Prof. Code §§ 11010-11023* (applicable provisions)].

(d) Specification of requirements of *Bus. & Prof. Code § 11018.12(e)* [*see* P a, *above*].

(4) Prospective purchaser signs receipt indicating that he or she has received and read conditional public report and written statement accompanying report [*Bus. & Prof. Code § 11018.12(g)*; *see* P b(3), *above*].

c. If term of conditional public report is about to expire, apply for six-month renewal (if desired) [*see Bus. & Prof. Code § 11018.12(h), (i)*].

NOTE:

A conditional public report may be renewed for one additional six-month term if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h), (i)*].

6. After obtaining public report, and prior to entering into any contract or agreement for sale or lease of any lot or parcel

in subdivision, have developer [*Bus. & Prof. Code § 11018.1*]:

NOTE:

The Real Estate Commissioner will issue a public report unless there are grounds for denial [*Bus. & Prof. Code § 11018*; ***see*** *Bus. & Prof. Code § 11018(a)-(i)* (grounds for denial)].

a. Give each prospective purchaser or tenant copy of report and obtain his or her receipt for report [*see Bus. & Prof. Code § 11018.1*; *10* Cal. Code Reg. § 2795.1].

NOTE:

The prospective purchaser or tenant must execute this receipt before the developer or the developer's agent may accept any money or other thing of value in connection with the reservation [*10 Cal. Code Reg. § 2795(b)(1)*].

b. Have developer, on oral or written request, give copy of public report to any member of public [*Bus. & Prof. Code § 11018.1(b)*].

c. Have developer post following documents in conspicuous place at any office where sales or leases or offers to sell or lease are regularly made [*Bus. & Prof. Code § 11018.1(b)*]:

(1) Copy of public report; and

(2) Statement advising that developer will provide copy of public report at any time, on oral or written request.

[3] Registering and Promoting Out-of-State Subdivision

NOTE:

Before offering in California to sell or lease any lots, parcels, or interests in a subdivision that is situated outside of California but within the United States, a person acting as principal or agent must register the subdivision with the Commissioner and comply with applicable disclaimer requirements, as described below [*Bus. & Prof. Code § 10249(a)*; ***see*** *Bus. & Prof. Code § 10249.1* (applicable definition of subdivision)]. If the out-of-state subdivision is located outside the United States, compliance with disclaimer requirements is, but registration is not, required.

1. Complete application for registration [*see § 30.230*], which must include following information [*Bus. & Prof. Code § 10249(a)*]:

a. Description of offering.

b. Applicant's certification that subdivision complies with all applicable requirements of state or states where subdivision is located.

c. Evidence from state or states of such compliance, if applicable.

d. Irrevocable consent to service of process [*see* DRE Form 608 (official consent form)].

NOTE:

This consent must state that if, in any action commenced against the applicant in California, personal service cannot be made after a due diligence effort, the applicant may be validly served by delivering the process to the Secretary of State [***see*** *Bus. & Prof. Code § 10249.92*].

2. File application with DRE accompanied by prescribed, non-refundable filing fee [*Bus. & Prof. Code § 10249.3*; *see § 30.230* (form of application)].

NOTE:

Once the Commissioner has received the application, he or she must provide the applicant with a notice of completion or notice of deficiency within 10 days. If no notice is provided within that time, the registration will be deemed complete [*Bus. & Prof. Code § 10249(b)*]. Presumably, if a notice of deficiency is issued, the applicant may cure the deficiency and file an amended application accompanied by an additional filing fee [***see*** *Bus. & Prof. Code § 10249.3(b)(3)*]. The term of the registration is one year unless the Commissioner prescribes a longer term [*Bus. & Prof. Code § 10249.91*].

3. Provide following disclaimers on materials specified below [*Bus. & Prof. Code § 10249.8*].

a. On any printed material, literature, advertising, or invitation in California that is related to sale, lease, or offer of sale or lease of any subdivision situated outside California but within United States, include following disclaimer (which must be presented clearly and conspicuously) in at least 10-point type [*Bus. & Prof. Code § 10249.8(a)*; *see § 30.231[2]* (Disclaimer #1)]:

WARNING:

THE CALIFORNIA DEPARTMENT OF REAL ESTATE HAS NOT INSPECTED, EXAMINED, OR QUALIFIED THIS OFFERING.

NOTE:

Failure to include this disclaimer is unlawful [*Bus. & Prof. Code § 10249.8*].

b. If California resident is to be presented in California with agreement or contract to lease or purchase interest in subdivision situated outside California but within United States, insert copy of statutory disclaimer [*see § 30.231[2]* (Disclaimer #2)], in at least 10-point type, at top of first page of that agreement or contract, and have offeree initial it [*Bus. & Prof. Code § 10249.8(c)*].

NOTE:

If an offer is not initially made in writing, this same disclaimer must be mailed to the offeree, first-class postage prepaid, at least five days before the offeree attends any scheduled or arranged visit to a location, sales presentation, or contact with a person representing the offeror, when the visit or contact was scheduled or arranged by the offeror or its representative [*Bus. & Prof. Code § 10249.8(b)*].

c. In case of subdivision located entirely outside United States, insert statutory disclaimer, in at least 10-point capital type, in any printed material, literature, advertising, or invitation in California that is related to the sale, lease, or offer of sale or lease [*Bus. & Prof. Code § 10249.9(a)* (statute also requires disclaimer to be placed "clearly and conspicuously"); *see § 30.232[2]* (required disclaimer)].

NOTE:

Inclusion of this disclaimer is the only requirement imposed on the marketing and promoting of subdivisions situated entirely outside the United States. Failure to include the disclaimer is unlawful [*Bus. & Prof. Code § 10249.9(a)*]. The disclaimer must also be

inserted at the top of the first page of any agreement or contract to lease or purchase an interest in a subdivision located outside the United States that is presented in California to a California resident. The offeree must initial the disclaimer [*Bus. & Prof. Code § 10249.9(c)*].

If an offer is not initially made in writing, this same disclaimer must be mailed by U.S. mail to the offeree, first-class postage prepaid, at least five days before the offeree attends any scheduled or arranged visit to a location, sales presentation, or contact with a person representing the offeror, when the visit or contact was scheduled or arranged by the offeror or its representative [*Bus. & Prof. Code § 10249.9(b)*].

[4] Advertising Subdivisions for Sale

1. Review proposed advertising for subdivisions and consider submitting it to appropriate DRE District Office for review and clearance.

NOTE:
Each submission to the DRE must be accompanied by a prescribed fee [***see*** *10 Cal. Code Reg. § 2799.2*].

2. Verify that any proposed advertising:

a. Contains no false or misleading statement, pictorial representation, or sketch [*Bus. & Prof. Code § 11022*; *see Bus. & Prof. Code §§ 10140, 10177(c), 17500, 17530*].

b. Complies with all criteria set forth in Commissioner's detailed regulation for subdivision advertising [*see 10 Cal. Code Reg. § 2799.1*].

3. For out-of-state subdivision, confirm that any promotional materials contain disclaimers required by statute [*Bus. & Prof. Code §§ 10249.8, 10249.9; see §§ 30.231, 30.232*].

[5] Application for Review of Declaration When Notice of Intention Not Required

NOTE:
This application process is generally intended for sales of lots or parcels between subdividers when the buyer-subdivider will ultimately sell the lots or parcels to individual retail buyers.

1. Submit application requesting review of declaration, along with required supporting documentation and filing fee [*see Bus. & Prof. Code § 11011(c)* (filing fee)], to Real Estate Commissioner if [*Bus. & Prof. Code § 11010.10*]:

a. Transaction is not subject to SLA;

b. Transaction does not require notice of intention to be submitted; or

c. In case of common interest development that is subject to SLA, local jurisdiction requires review and approval of declaration [*see Civ. Code § 1351(h)*] before or at same

time subdivision map is recorded and before declaration is approved pursuant to notice of intention.

2. Await Commissioner's notification of approval or of any deficiency or inadequacy in declaration [*Bus. & Prof. Code § 11010.10*].

NOTE:

The Commissioner must notify the applicant of any deficiency or inadequacy in the declaration within 60 days after receiving the application. Once an application has been resubmitted, the applicant must be notified of further deficiencies within 30 days [*Bus. & Prof. Code § 11010.2(e)*]. On approval, the Commissioner must give notice to the applicant that the declaration will be approved for a subsequent notice-of-intent filing for any public report for the subdivision identified in the application, provided the subdivision setup is substantially the same as that originally described in the application for review of the declaration [*Bus. & Prof. Code § 11010.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
C. Procedural Guide

13-30 California Legal Forms--Transaction Guide §§ 30.122-30.129

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
D. Drafting Guide

13-30 California Legal Forms--Transaction Guide § 30.130

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.130 Agreement for Off-Site Improvements

NOTE:
The local legislative body may provide by ordinance that the agreement for off-site improvements may be entered into by a designated official in accordance with standards adopted by the local agency. The designated official's action may be appealed to the legislative body for conformance with the SMA and any applicable local subdivision ordinance [*Gov. Code § 66462(d)*].

1. If necessary public improvements are incomplete when final subdivision map is submitted for approval under SMA, prepare agreement that either [*Gov. Code §§ 66458, 66462, 66477.1*]:

a. Obligates subdivider to construct and pay for improvements [*see § 30.200*]; or

b. Specifies that special assessment district [*see Gov. Code § 66462(a)(2)(B)*] or community facilities district must be created to finance improvements [*see Gov. Code § 53311 et seq.* (Mello-Roos Community Facilities Act); *see also § 30.24[2]*].

2. Ensure that agreement specifies [*see § 30.200*]:

a. All improvements for which the subdivider will be responsible.

b. Time within which all improvements must be completed.

c. Reference to specific improvement plan [*Gov. Code § 66456.2(a)*].

d. Security that will guarantee performance under agreement [*see Gov. Code §§ 66462,*

66499], such as bond or undertaking issued by authorized corporate surety [*Code Civ. Proc. § 995.210*; *see Code Civ. Proc. § 995.010 et seq.*; *see also Code Civ. Proc. § 995.190*].

e. Estimated cost of improvements.

f. City or county will own improvements on completion.

g. Party who will be liable for any errors and omissions in completion of improvements and extent of required insurance coverage for that party.

h. Approval rights, if any, that may be exercised by either party.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART III. TRANSACTION GUIDE
D. Drafting Guide

13-30 California Legal Forms--Transaction Guide §§ 30.131-30.139

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.131[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Related and Subsequent Procedures

13-30 California Legal Forms--Transaction Guide § 30.140

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.140 Construction of Improvements

1. If subdivider entered into contract with city or county to form special assessment district to finance off-site improvements [*see § 30.130*], ensure that [*see* Ch. 30A, *Construction Financing*]:

a. Governmental entity initiates necessary proceedings for formation of special assessment district of subdivided land.

b. Contract for off-site improvement construction is awarded in manner required by law.

2. If applicable, assist subdivider in arranging loans (including any necessary interim loans) to finance construction of on-site improvements [*see* Ch. 30A, *Construction Financing*].

3. If necessary, arrange commitments for loans to be available to prospective purchasers of homes or buildings to be erected in subdivision [*see* Ch. 30A, *Construction Financing*].

4. If governmental agency or its designee determines that subdivider cannot complete improvements for which he or she is responsible under agreement [*see § 30.200*] and parties cannot agree on an extension, have subdivider request that agency temporarily retain private party to assist it in meeting time limits unless agency or designee determines that no private parties [*Gov. Code § 66456.2(c)*]:

NOTE:
The governmental agency may charge the subdivider for any fees charged by the private party [*Gov. Code § 66456.2(c)*].

a. Are available or qualified to perform required services; or

b. Would be able to perform required services faster than any available and qualified persons or entities.

5. On completion of all off-site and on-site improvements in subdivision, arrange for sale or leasing of homes and any other buildings in subdivision in accordance with all applicable laws [*see* Ch. 30A, *Construction Financing*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsFinanceGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawSubdivisionsLocal RegulationTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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13-30 California Legal Forms--Transaction Guide § 30.141

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.141 Notices to Purchasers

1. If subdivision is subject to special tax levied under Mello-Roos Act, ensure that subdivider furnishes prospective purchaser or tenant with notice of any special tax to be levied [*Gov. Code § 53341.5(a)*; *see Gov. Code § 53311 et seq.*; *see also § 30.251*].

2. Provide notice of blanket encumbrance [*see § 30.250*] to prospective tenant if [*Civ. Code § 1133(a)*]:

a. Lease terms are to exceed five years.

b. Lot, parcel, or unit is:
(1) Subject to blanket encumbrances that do not contain release clauses.

(2) Not subject to requirements of SLA.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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13-30 California Legal Forms--Transaction Guide § 30.142

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.142 Amendment and Renewal of Public Report

NOTE:

The following requirements apply to California subdivisions. Out-of-state subdivisions located within the United States must be registered with the Commissioner but are not subject to the SLA's public report requirements [***see*** *Bus. & Prof. Code § 10249*]. The effective term for registration of an out-of-state subdivision is one year unless the Commissioner prescribes a longer term [*Bus. & Prof. Code § 10249.91*]. For a form of application that may be used to renew a registration, see *§ 30.230[2]*.

1. Report any material changes in subdivision or in program for marketing subdivision to DRE after [*Bus. & Prof. Code § 11012*; *see 10 Cal. Code Reg. § 2800*; *see also § 30.223*]:

a. Application for public report has been filed; or

b. Public report has been issued.

2. File application for amended public report and pay necessary fee if change in subdivision results in public report that does not [*see Bus. & Prof. Code § 11011(b)(11)*; *see also 10 Cal. Code Reg.§ 2790.1.5(a)(11), (c), (d)*]:

a. State true facts.

b. Represent offering because of omission of facts.

3. Before expiration of five-year period following issuance of public report, apply for renewal by [*Bus. & Prof. Code § 11011(b)(9)*; *10* Cal. Code Reg. § 2795.3]:

a. Completing and filing DRE renewal application [*see § 30.223*].

b. Paying required fee [*see Bus. & Prof. Code § 11011(a)* (Commissioner may lower fee)].

4. File certificate of correction or amendment of map if necessary to [*Gov. Code §§ 66469, 66472.1*]:

a. Correct error in course or distance indicated on original filing.

b. Show course or distance indicated on original filing.

c. Correct error in description of real property shown on map.

d. Indicate monuments set after death, disability, retirement from practice, or replacement of engineer or surveyor responsible for setting monuments.

e. Show proper location or character of any relocated monument that:
(1) Has been relocated.

(2) Has changed in character.

(3) Was originally shown at wrong location.

(4) Was originally shown incorrectly as to its character.

f. Correct any additional survey or map information that has been filed or recorded, if correction does not impose additional burden on property's present fee owner and does not alter any right, title, or interest in property reflected on recorded map [*see Gov. Code § 66434.2* (authorization for local government to require additional information)].

g. Correct any other type of map error or omission approved by county surveyor or city engineer, provided correction does not affect property rights, such as mistakes involving [*Gov. Code § 66469(g)*]:

(1) Lot numbers.

(2) Acreage.

(3) Street names.

(4) Identification of adjacent record maps.

h. Reflect changes in circumstances that make conditions of map no longer appropriate or necessary, provided that correction or amendment does not [*Gov. Code § 66472.1*]:

(1) Impose additional burden on present fee owner; or

(2) Alter right, title, or interest in property.

5. Ensure that amending map or certificate of correction [*Gov. Code § 66470*]:

a. Is signed by registered civil engineer or licensed land surveyor.

b. Details corrections made.

c. Shows names of present fee owners of property affected by correction or omission on date original recorded map was filed or recorded.

6. Before filing, submit amending map or certificate of correction for examination and certification by [*see Gov. Code § 66471*]:

a. County surveyor if subdivision is in unincorporated territory.

b. City surveyor or city engineer if subdivision is in city.

NOTE:

The official will examine the amending map or certificate of correction and, if the only changes made are those set forth in *Gov. Code § 66469* [***see*** P 4, ***above***], he or she will certify to this fact on the amending map or certificate of correction [*Gov. Code § 66471(a)*]. In the case of a certificate of correction, statutory procedures and deadlines apply to the examination, revision, certification, and recordation of the certificate [***see*** *Gov. Code § 66471(b)*].

7. File or record amending map or certificate of correction in recorder's office of county where original final map was filed [*Gov. Code § 66472*; *see Gov. Code § 66471* (requirements governing recordation of certificate of correction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide § 30.143

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.143 Reversion of Subdivision to Acreage

1. If owners wish to initiate proceedings for reversion to acreage [*Gov. Code § 66499.13*; *see § 30.27[1]*]:

a. Prepare petition in form required by local agency.

b. Ensure that petition includes:
(1) Adequate evidence of title to real property within subdivision.

(2) Sufficient data to enable legislative body to make necessary determinations and findings [*see Gov. Code § 66499.16*].

(3) Delineation of dedications that:
(a) Will not be vacated.

(b) Are conditions to reversion.

(4) Other information required by local agency.

2. If required by local agency, pay fee for processing of reversion petition [*Gov. Code § 66499.14*].

3. Ensure that legislative body:

a. Schedules public hearing for consideration of petition [*Gov. Code § 66499.15*].

b. Makes all of following finding prior to processing reversion [*Gov. Code § 66499.16*]:

(1) Dedications or offers of dedication to be vacated or abandoned are unnecessary for present or prospective public purposes.

(2) Either:

(a) All owners of interests in subdivider property have consented to reversion and no improvements required to be made have been made within later of:

(i) Two years from date final parcel map was filed for record.

(ii) Time allowed by agreement for completion of improvements, whichever is later.

(b) No lots shown on final or parcel map have been sold within five years from date map was filed for record.

4. Confirm that client is prepared to [*Gov. Code § 66499.17*]:

a. Dedicate or offer to dedicate property necessary for purposes specified by local ordinance following reversion [*see § 30.204*].

b. Retain all previously paid fees if necessary to accomplish purposes of SMA or applicable local ordinance.

c. Retain any portion of required improvement security or deposits if necessary to accomplish purposes of SMA or local ordinance.

5. File final map for recordation to ensure reversion to acreage [*see Gov. Code § 66499.18*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationTerminationReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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13-30 California Legal Forms--Transaction Guide §§ 30.144-30.199

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.144[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.200

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.200 Agreement Between Subdivider and Governmental Entity for Construction of Subdivision Improvements

[1] Comment

[a] Use of Form

This form is an agreement between a subdivider and a governmental entity for the construction of subdivision off-site improvements. It is designed to be executed, if necessary, at the time the final subdivision map is submitted to a governmental entity for approval [*see § 30.120[6]*].

If required public improvements are incomplete when the final subdivision map is submitted for approval, either the subdivider must agree to construct and pay for the improvements or a special assessment district or community facilities district must be created to finance the improvements [*Gov. Code §§ 66458, 66462, 66477.1*]. The special assessment proceedings must be conducted pursuant to the provisions of the Mello-Roos Community Facilities Act [*Gov. Code § 53311 et seq.*]. Under this form, the subdivider agrees to complete and pay for the improvements if they are not completed under the special assessment provisions of Mello-Roos [*Gov. Code § 66462(a)(2)(B)*]. Paragraph 2.00 requires the drafter to specify the particular improvements for which the subdivider will be responsible. Subparagraph (a) should be included if the subdivider will be required to submit a soils report [*see Gov. Code § 66490*].

A subdivider must furnish a prospective purchaser of a lot, parcel, or unit in the subdivision (or a prospective lessee if the lease term is to exceed five years) with a "notice of special tax" if the subdivision is subject to a special tax levied under Mello-Roos [*Gov. Code § 53341.5(a)*; *see § 30.251[2]* (notice of special tax)].

For coverage of the Subdivision Map Act (SMA) [*Gov. Code § 66410 et seq.*] in general, see *§ 30.20* et seq.

[b] Time Limitations

Paragraph 3.00 of this form requires the subdivider to complete the improvements by a date to be specified by the drafter. On the date of completion, the improvements will be subject to the inspection and approval or disapproval of the city engineer or county surveyor.

An improvement plan processed in conjunction with an approved tentative, parcel, or final subdivision map must be acted on within 60 working days of its submittal, except that at least 15 working days must be provided for processing any resubmitted improvement plan. This 60-day period does not include any days during which the plan has been returned to the applicant for correction or has been subject to review by an entity other than the local agency [*Gov. Code § 66456.2(a)*].

The subdivider and reviewing advisory agency or legislative body may agree to extend any applicable time limits. However, an advisory agency or legislative body may not require a routine waiver of time limits as a condition of accepting the plan. The agency may require a routine waiver for the purpose of permitting concurrent processing of other requirements related to the plan or map [*Gov. Code § 66456.2(b)*].

[c] Required Security

A subdivider who enters into an agreement for the construction of off-site subdivision improvements must guarantee performance of the agreement by providing security that meets detailed statutory requirements [*see Gov. Code §§ 66462*, *66499*; *see also § 30.23[4][d]*]. Typically, the security must be a bond issued by an authorized corporate surety. The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] provides that an undertaking may be substituted for any bond required by statute [*see Code Civ. Proc. § 995.210*; *see also Code Civ. Proc. § 995.190*].

California nonprofit corporations that receive state or federal funds are exempt from certain security requirements under specified circumstances [*see Gov. Code § 66499.3(c)*]. For discussion of these exemptions and circumstances, see *§ 30.201[1][c]*.

Paragraph 4.00 of this form allows the drafter to provide for either a surety bond or undertaking commitment on the part of the subdivider. For a statutory performance bond, see *§ 30.201[2]*.

[d] Insufficient Title or Interest

The approval of a tentative map may be conditioned on the requirement that the subdivider construct or install off-site improvements. In some cases, however, neither the subdivider nor the local agency will have sufficient title or interest in the property involved when the tentative or final map is filed to permit the improvements to be made. Under those circumstances, the city or county may not postpone or refuse approval of the final map because the subdivider has failed to meet that condition [*Gov. Code § 66462.5(a)*]. Unless the local government requires the subdivider to enter into an agreement to complete the improvements [*see Gov. Code § 66462.5(c)*], the local government must, within 120 days of the filing of the final map [*see Gov. Code § 66457*], acquire by negotiation, or commence proceedings under the Eminent Domain Law [*Code Civ. Proc. § 1230.010 et seq.*] to acquire, a sufficient interest in the property to permit the necessary improvements to be made. Furthermore, the local government must seek immediate possession of the property on which the improvements are to be constructed [*see Code Civ. Proc. §§ 1255.410-1255.480*]. If the local government fails to meet the 120-day time limitation, the condition for construction of off-site improvements will be conclusively deemed to have been waived. The waiver will occur whether or not the local government has postponed or refused to approve the final map [*Gov. Code § 66462.5(b)*].

An off-site improvement condition is not waived, however, unless the local jurisdiction refuses to approve the final map. If the map is approved, the subdivider remains obligated to satisfy the condition [*Hill v. City of Clovis (2000) 80 Cal. App. 4th 438, 447-450, 94 Cal. Rptr. 2d 901]* .

When the subdivider or local agency has insufficient title or interest in property to allow the construction of off-site improvements, the local government may require the subdivider to enter into an agreement, prior to the approval of the final map, to complete the required off-site improvements when the sufficient title or interest is acquired. Further, the local government may require the subdivider to pay the cost of acquiring the necessary off-site real property interests. For these purposes, improvements that are necessary to assure replacement or construction of housing for persons and families of low or moderate income are specifically excluded from the definition of "off-site improvements" [*Gov. Code § 66462.5(c)*; *see Health & Safety Code § 50093*].

[2] FORM

Agreement Between Subdivider and Governmental Entity for Construction of Subdivision Improvements

AGREEMENT BETWEEN _____ [*name of subdivider*]
AND _____ [*name of city or county*]

This Agreement is entered into on_____[*date*], between_____[*name of city or county*], referred to in this Agreement as_____["City" *or* "County"], a [*specify, e.g.,* municipal corporation] of the State of California, and_____[*name of subdivider*], [*specify legal status of subdivider, e.g.,* a California corporation], referred to in this Agreement as "Subdivider." This Agreement is entered into pursuant to the provisions of [*specify applicable ordinance*] with respect to Tract No. [*specify tract number*], located in_____[*name of subdivision*], referred to in this Agreement as the "Subdivision."

RECITALS

Subdivider owns fee title to the tract of land located in_____[*name of city or county*], California, and described as [*full legal description of property*], generally known as Tract No. _____, in [*identify public office where legal description and title are recorded*].

Certain public improvements, as described in Paragraph 2.00 of this Agreement, are necessary to bring the Subdivision in accordance with the contents of_____[*specify, e.g.,* the final map submitted and approved on _____ (*date*)].

_____[City *or* County] wishes to ensure that Subdivider will construct the improvements covered by this Agreement in accordance with all applicable laws, statutes, ordinances, rules, and regulations in effect in_____[*name of city or county*] on the date on which those improvements are constructed. In particular,_____[City *or* County] wishes to ensure that Subdivider conforms to the requirements of [specify law or rule of particular application to improvements to be constructed], which is attached as Exhibit A and hereby incorporated by reference. Subdivider declares that it is familiar with, and agrees to comply with, the requirements contained in [*specify law or rule of particular application to improvements to be constructed*] and in the California Subdivision Map Act set forth in Division 2 of Title 7 of the California Government Code.

Subdivider has prepared a final map of Tract No. _____ in accordance with the provisions of [*specify provision of applicable ordinance*] and filed that final map with the_____[City Council *or* Board of Supervisors] of_____[*name of city or county*].

In consideration of the construction and dedication of the improvements specified in this Agreement and the approval and acceptance of the final map by the_____[City Council *or* Board of Supervisors] of_____[*name of city or county*], the parties agree as follows:

ARTICLE I

1.00. General Requirements. Subdivider shall, at Subdivider's own expense, complete all of the improvements described in Paragraph 2.00 of this Agreement to the satisfaction of_____[*specify governmental official with approval authority, e.g.,* the City Engineer] of_____[*name of city or county*]. Subject to the provisions of Paragraph 3.00 of this Agreement, subdivider shall complete the improvements described in Paragraph 2.00 of this Agreement on or before_____[*date*]. The_____[*specify governmental official with approval authority, e.g.,* City Engineer] may extend time for completion of the improvements covered by this Agreement for good cause shown by the Subdivider. Any such extension must be in writing, signed by both parties to this Agreement.

1.01. Estimated Cost. The improvements shall be completed at an estimated cost of $ _____, including the cost of checking and inspection. The estimated cost has been determined by the_____[*specify governmental official with approval authority, e.g.,* City Engineer] and [*specify individuals acting on subdivider's behalf, e.g.,* the XYZ Civil Engineering Firm retained by and acting on behalf of Subdivider].

ARTICLE II

2.00. Definition of Improvements. As used in this Agreement, the term "improvements" means_____[*specify all types of improvements to be covered by agreement, e.g.,* grading, paving, curbs and gutters, pathways, storm and sanitary sewers, utilities, and streetlights], which shall be shown in detail on an improvement plan, profiles, and specifications that have been or are being prepared by [*specify individuals acting on subdivider's behalf, e.g.,* the XYZ Civil Engineering Firm retained by and acting on behalf of Subdivider]. Work shall not commence on those improvements until the plan, profiles, and specifications have been submitted to and approved by the_____[*specify governmental official with approval authority, e.g.,* City Engineer] within the time periods set forth in *Government Code Section 66456.2*. Subdivider shall pay all costs incurred in the inspection conducted incident to obtaining the approval of the plans, profiles, and specifications.

2.01. Ownership of Improvements. On the acceptance of all public improvements constructed pursuant to this Agreement, including, but not limited to, water and sewer lines, those improvements shall become the sole property of_____[*name of city or county*].

ARTICLE III

3.00. Time of Completion. All public improvements specified in Paragraph 2.00 of this Agreement shall be completed within _____ months from the date of execution of this Agreement.

3.01. Failure of Timely Completion. If Subdivider fails to complete the public improvements within the above time period,_____[City *or* County] may complete the work and recover all expenses of the work from Subdivider or Subdivider's guarantor as required under Paragraph 4.00 of this Agreement._____[City *or* County] may require Subdivider or Subdivider's guarantor to pay_____[City *or* County], in advance, sufficient monies to cover_____[City *or* County]'s costs in completing the construction of the improvements.

ARTICLE IV

4.00. [Surety Bond *or* Undertaking]. Contemporaneously with the execution of this Agreement, Subdivider shall file with_____[City *or* County] a [surety bond *or* undertaking], in an amount determined by the_____[City Council *or* Board of Supervisors] pursuant to *California Government Code Section*

66499.3, to guarantee performance of all of the provisions of this Agreement and compliance with all applicable laws and regulations of_____[*name of city or county*], and to secure payment to the Contractor, its subcontractors, and persons renting equipment or furnishing labor or materials to them for the improvements required under this Agreement.

4.01. Compliance With Bond and Undertaking Law. The [bond *or* undertaking] shall reflect the requirements of *Government Code Sections 66499 through 66499.10* and any provisions of the Bond and Undertaking Law that are not inconsistent with those Government Code sections.

ARTICLE V

5.00. Effective Date. This Agreement shall not become effective unless and until the final subdivision map of Tract No. _____ is approved by the_____[City Council *or* Board of Supervisors] of_____[*name of city or county*] and accepted for recordation by the County Recorder of _____ County, California.

ARTICLE VI

6.00. Liability for Errors and Omissions. Neither_____[*name of city or county*] nor any of its officers or agents shall be liable to Subdivider or its Contractors for any error or omission arising out of or in connection with any work to be performed under this Agreement.

6.01. Liability for Personal Injury._____[City *or* County] shall not be liable to Subdivider or to any other person or entity for any injury or damage that may result to any person or property by or from any cause in, on, or about the subdivision of all or any part of the subdivision covered by this Agreement.

ARTICLE VII

7.00. Indemnification. Subdivider shall indemnify and hold_____[City *or* County] free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons, or from the damage or destruction of any property or properties, caused by or connected with the performance of this agreement by Subdivider or Subdivider's agents, employees, or subcontractors.

7.01. Insurance. Subdivider's contractor shall, prior to the commencement of any work pursuant to this Agreement, furnish to_____[City *or* County] satisfactory evidence of an insurance policy that is acceptable to_____[City *or* County]. The policy shall insure_____[City *or* County] and its officers, agents, and employees against loss or liability that may arise during, or result from, the performance of work on the improvements covered by this Agreement, including all costs of defending any claim arising from that work. The minimum limits of that policy shall be $ _____for the death of or injury to any person in any one accident, $ _____ for death of or injury to more than one person in any one accident, and $ _____ for property damage in any one accident. The policy shall be in favor of Subdivider or its contractors and of_____[City *or* County], its officers, agents, and employees and shall be maintained in full force and effect from the effective date until the full performance of this Agreement. The policy shall state by its terms and by an endorsement that it shall not be canceled until City shall have had at least _____ days' notice in writing of the cancellation.

ARTICLE VIII

8.00. Use of Streets and Improvements Prior to Completion. The use of the streets and improvements covered by this Agreement shall be at Subdivider's sole risk at all times prior to the final acceptance by_____[City *or* County] of the completed streets and improvements; provided, however, that acceptance by_____[City

or County] shall in no way eliminate or lessen any of Subdivider's obligations or undertakings contained in this agreement. The issuance of any occupancy permits by_____[City *or* County] for dwellings located within the subdivision shall not be construed in any manner to constitute an acceptance and approval of any or all of the streets and improvements in the subdivision.

8.01. Obligations of Subdivider. Subdivider shall take all steps and make all related payments as set forth below: [*include any of following subparagraphs as appropriate:*

(1) Subdivider shall arrange and pay for the preparation of a preliminary soils report by a civil engineer registered in the State of California. The report shall be based on adequate test borings.

(2) Subdivider shall arrange and pay for soil tests to be made by a reputable soils testing laboratory to determine gradation, bearing, and resistance value of soils within the subdivision for purposes of the improvement work covered by this Agreement. Subdivider shall also arrange and pay for all compaction tests necessary to determine that the utility trenches have been satisfactorily backfilled.

(3) Subdivider and Subdivider's subcontractors shall pay for any materials, provisions, and other supplies or equipment used for the performance of the work covered by this Agreement and for any related work or labor.

(4) All required improvements shall be constructed under the inspection and subject to the approval of the_____[*specify governmental official with approval authority, e.g.,* City Engineer]. Subdivider shall pay for all inspections conducted to determine Subdivider's compliance with the terms of this Agreement.

(5) Subdivider shall pay for sewer and water connection fees as established by_____[City *or* County] for each lot in the subdivision. Subdivider shall pay these connection fees before the time of connection to any existing sewer or water line, or to any extension of an existing sewer or water line. If Subdivider sells lots before paying the sewer and water connection fees, no building permit shall be issued for any lot within the subdivision until the sewer and water connection fees are paid. The payment of the connection fees shall be the primary obligation of Subdivider, subject to the right of_____[City *or* County] to collect connection fees at the time of issuance of a building permit.

8.02. Approval Not Waiver. Notwithstanding the fact that Subdivider's plans and specifications, completion of the work, and other acts are subject to approval of_____[City *or* County], it is understood and agreed that any such approval by_____[City *or* County] shall in no way relieve Subdivider of Subdivider's obligation to perform the work in a satisfactory manner, or from Subdivider's obligations under this agreement. The construction shall be done strictly in accordance with (1) the improvement plan and specifications prepared by Subdivider or Subdivider's agents; (2) the_____[*specify applicable local standards, e.g.,* Standard Specification of _____ (City *or* County)]; and (3) the provisions of the laws and regulations of_____[*name of city or county*], particularly but not exclusively [*specify provisions*]. Subdivider warrants that the improvement plan and specifications conform to all applicable local standards and that they are adequate to accomplish the work in accordance with sound construction practices.

ARTICLE IX

9.00. Warranty. Subdivider warrants and guarantees all materials and work for a period of three years after they are completed by the Subdivider and accepted by the _____ [*specify governmental official with approval authority, e.g.,* City Engineer].

9.01. Notice of Completion. Subdivider shall execute, acknowledge, and record in the manner provided by law, a notice of completion of all work covered under this Agreement within _____ days after final inspection and

approval of the work by the_____[*specify governmental official with approval authority, e.g.,* City Engineer].

9.02. Relationship of Contractors. The parties to this Agreement acknowledge and agree that any and all contractors retained by Subdivider shall not be agents of_____[City *or* County] and that contractors' relations to_____[City *or* County] shall be those of independent contractors.

9.03. Certification of Satisfactory Completion. Upon the satisfactory completion of the improvements by the Subdivider, the_____[*specify governmental official with approval authority, e.g.,* _____(City *or* County) Engineer] shall certify that the work has been satisfactorily completed.

9.04. Approval by_____[*specify governmental official with approval authority, e.g.,* City Engineer]. The_____[*specify governmental official with approval authority, e.g.,* City Engineer] shall have the right to reject any or all of the work to be performed under this Agreement if the work does not conform with the Subdivider's improvement plan and specifications or the laws and regulations of_____[City *or* County]. Subdivider shall repair any damage to the sewer system, utilities, concrete work, or street paving that occurs after installation to the satisfaction of the_____[*specify governmental official with approval authority, e.g.,* City Engineer] before release of the [bond or undertaking] specified in Paragraph 4.00 of this Agreement or final acceptance of the completed work.

9.05. No Assignment. This Agreement shall not be assignable by Subdivider without the written consent of_____[City *or* County].
Dated: _____

_____ [City *or* County] of _____
By _____ [*signature*]
[*Title, e.g.,* City Manager]
_____ [*name of subdivider*]
By _____ [*signature*]

Approved as to form:
_____
_____[City Attorney *or* County Counsel]

Approved as to content:
_____
[*Title, e.g.,* City Engineer]

EXHIBIT A

[*Attach list of improvement requirements*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsFinanceReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.201

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.201 Performance Bond

[1] Comment

[a] Use of Form

This form is a performance bond. It is designed to be used by a corporate surety to secure a subdivider's performance of its obligation to construct subdivision improvements pursuant to a written agreement with a city or county prior to approval of the final subdivision map under the SMA [*Gov. Code § 66499.1*; *see § 30.200*].

For a discussion of arrangements for public improvements as a prerequisite to the approval of a final subdivision map, see *Section 30.23[4][d]*. For a form of the labor and material bond required by the SMA [*see Gov. Code § 66499.2*], see *Section 30.202[2]*.

If desired, the subdivider may substitute an undertaking for the bond provided in this form [*Code Civ. Proc. § 995.210*; *see Code Civ. Proc. § 995.190*; *see also Code Civ. Proc. § 995.010 et seq.*].

[b] Approval of Security

If the subdivider is a California nonprofit corporation funded by the state or federal government or one of its agencies [*see Gov. Code § 66499.3(c)*], the security will be subject to the approval of the local agency. In the case of any other subdivider, the local agency will select the type of security and then have the right to approve the security [*Gov. Code § 66499(a)*].

[c] Amount of Security

[i] In General

The security must cover the costs and reasonable expenses and fees, including reasonable attorneys' fees, incurred by the local agency in successfully enforcing the secured obligation [*Gov. Code § 66499.4*]. Furthermore, the security provided under this form must be in the following amounts [*Gov. Code § 66499.3*]:

(1) An amount determined by the legislative body, which must be neither less than 50 percent nor more than 100 percent of the total estimated cost of the improvement or of the act to be performed, conditioned on performance of the act or agreement [*but see Gov. Code § 66499.3(c)* (nonprofit corporation generally exempt from requirement)].

(2) An additional amount determined by the legislative body, which must be neither less than 50 percent nor more than 100 percent of the total estimated cost of the improvement or the performance of the required act, securing payment to the contractor, the subcontractors, and persons furnishing labor, materials, or equipment to them for the improvement or the performance of the required act [*but see Gov. Code § 66499.3(c)* (nonprofit corporation generally exempt from requirement)].

(3) Generally, an amount determined by the legislative body to be necessary for the guarantee and warranty of the work for a period of one year following the completion and acceptance of the work against any defective work or labor done, or defective materials furnished.

[ii] Exemptions for Nonprofit Corporations

A subdivider who is a California nonprofit corporation funded by the state or federal government or one of its agencies need not comply with the requirements specified in the first two numbered paragraphs in [i], above, if the following requirements are satisfied [*Gov. Code § 66499.3(c)*]:

(1) The nonprofit corporation provides a letter of credit [*see Gov. Code § 66499(a)(3)*] for 100 percent of the improvements, or the contractor installing the improvements has bonded to the nonprofit corporation and the local agency as co-obligee the amount of 100 percent of the agreement for the performance of the work, and has further bonded to the nonprofit corporation and the local agency as co-obligee an amount of not less than 50 percent of the agreement for the payment of labor and materials, and those bonds comply with the improvement security requirements of the SMA.

(2) All moneys under the control of the nonprofit corporation and payable to the contractor by the nonprofit corporation are deposited in a depository that complies with the improvement security requirements of the SMA, and progress payments made from those moneys are conditioned on the following: (a) the contractor's certification to the nonprofit corporation that all labor and materials have been paid for in full to the date of the certification; (b) the written approval of the nonprofit corporation; (c) review and approval of progress payment billings by the local government; and (d) final payment to the contractor not being made until 30 days after a notice of completion has been recorded, the work has been accepted, and the contractor has provided a written waiver of lien rights to the local agency.

(3) All certifications of progress payments are delivered through the United States mail to the nonprofit corporation. For these purposes, "progress payments" are payments made in compliance with the schedule of partial payments agreed on in the agreement [*see § 30.200*] for the work. No less than 10 percent of the total agreement [*see § 30.200*] price must be retained for the 60 days following the filing of the notice of completion.

[d] Security and Recordation

Performance under the bond may be secured in several ways. For a discussion of the various forms of security, see *Section 30.24*. For a general discussion of security in real estate transactions, see Ch. 25A, *Security Investments for Real Estate Financing* .

The bond must be recorded if the security is in the form of either of the following:

(1) A lien on the subdivision property created by an agreement between the owner and the local agency pursuant to a finding by the local agency that it would not be in the public interest to require the installation of the improvement sooner than two years after the recordation of the map [*Gov. Code § 66499(a)(4)*]; or

(2) Any type of security, including security interests in real property, that is acceptable to the local agency and specified by the appropriate local ordinance [*Gov. Code § 66499(a)(5)*].

Consequently, this form must be recorded with the county recorder of the county where the subdivision is located. From the time of recordation, a lien will attach to the real property described in the document and will have the priority of a judgment lien in an amount necessary to complete the subject improvements. The recorded document must be indexed in the Grantor Index to the names of all record owners of the real property as specified on the map and in the Grantee Index to the local agency approving the map [*Gov. Code § 66499(b)*].

At any time, the local agency may release all or any portion of the property subject to the lien or security interest. Alternatively, the local agency may subordinate the lien or security interest to other liens or encumbrances if it determines that security for performance is sufficiently secured by a lien on other property or that the release or subordination of the lien will not jeopardize the completion of improvements [*Gov. Code § 66499(b)*].

[e] Liability Under Bond

Liability on the security for a subdivider's performance under an agreement for the construction of off-site improvements is limited to the following [*Gov. Code § 66499.9*]:

- The performance of the work covered by the agreement.
- The performance of any changes or alterations in the work, provided that all the changes or alterations do not exceed 10 percent of the original estimated cost of the improvement.
- The guarantee and warranty of the work, for a period of one year following its completion and acceptance, against any defective work, labor, or materials.
- Costs and reasonable expenses and fees, including reasonable attorneys' fees.

[2] FORM

Performance Bond

FAITHFUL PERFORMANCE BOND

Bond. No. _____

Premium No. _____

Whereas, the_____[Board of Supervisors of the County of _____ *or* the City Council of the City of _____], State of California, and_____[*name of subdivider*], designated as the "Principal," have entered into an Agreement under which Principal agrees to install and complete certain designated public improvements. That Agreement, dated _____, and identified as project [*specify project number*], is hereby incorporated by reference as if fully copied and set forth in this Agreement.

Whereas, Principal is required under Paragraph [*specify paragraph number*] of the Agreement dated _____ to furnish a bond for the faithful performance of that Agreement.

Now, therefore, we, the Principal and_____[*name of surety*], as surety, are held and firmly bound unto the_____[City *or* County] of_____[*name of city or county*] referred to as "_____[City *or* County]," in the penal sum of $ _____, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the above-bounded Principal,_____[his *or* her *or* its] heirs, executors, administrators, successors, or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions, and provisions in the Agreement and any alteration of the Agreement made according to its terms, on_____[his *or* her *or* their] part, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless_____[*name of city or county*], its officers, agents, and employees, as stipulated in the Agreement dated _____, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the face amount specified therefor, there shall be included costs and reasonable expenses and fees, including reasonable attorneys' fees, incurred by_____[City *or* County] in successfully enforcing that obligation, all to be taxed as costs and included in any judgment rendered.

The surety hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Agreement or to the work to be performed thereunder or the specifications accompanying that work shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration, or addition to the terms of the agreement or to the work or to the specifications.

In witness whereof, this instrument has been duly executed by the above-named Principal and surety, on_____[*date*].

_____ [*name of principal*]
By _____ [*signature*]
[*typed name and title*]

[*seal of surety*] ..... _____[*name of surety*]

By _____[*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawTypes of ContractsGuaranty ContractsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.202

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.202 Labor and Material Bond

[1] Comment--Use of Form

This form is a labor and material bond. It is designed to be executed in connection with an agreement between a subdivider and a governmental agency for the construction of off-site improvements to a subdivision [*see Gov. Code § 66499.2*; *see also Gov. Code § 66462(c)*]. For a complete discussion of the various types of security that may be used to guarantee the performance of an agreement for the construction of off-site improvements, see *§ 30.24*.

The subdivider may substitute an undertaking for the bond provided in this form [*Code Civ. Proc. § 995.210*; *see Code Civ. Proc. § 995.190*; *see also Code Civ. Proc. § 995.010 et seq.*]. For a general discussion of security arrangements in real estate transactions, see Ch. 25A, *Security Instruments for Real Estate Financing* .

When the subdivider's obligation to pay contractors, subcontractors, and persons who furnished labor, materials, or equipment in connection with the construction of off-site improvements is secured by a labor and material bond, any unpaid claimant may seek to recover the amounts owed to him or her by filing suit against the surety [*Gov. Code § 66499.10*].

[2] FORM

Labor and Material Bond

LABOR AND MATERIAL BOND

Reference: _____
Estimate: _____
Agreement: _____

Bond Number: _____

Whereas, the_____[Board of Supervisors *or* City Council] of the_____[City *or* County] of_____[*specify name of city or county*], State of California, and_____[*name of subdivider*], referred to as the "Principal," have entered into an Agreement dated _____, under which the Principal agrees to install and complete certain designated public improvements. That Agreement is identified as Project_____[*specify name of project*] and is hereby incorporated by reference and made a part of this instrument as if fully copied and set forth; and

Whereas, under the terms of the Agreement, Principal is required before entering upon the performance of the work, to file a good and sufficient payment bond with the_____[City *or* County] of_____[*specify name of city or county*] to secure the claims to which reference is made in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code.

Now, therefore, the Principal and the undersigned as corporate surety, are held firmly bound unto the_____[City *or* County] of_____[*specify name of city or county*] and all contractors, subcontractors, laborers, materialmen, and other persons employed in the performance of the Agreement and referred to in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code, in the sum of $_____, for materials furnished or labor of any kind, or for amounts due under the Unemployment Insurance Act with respect to this work or labor, that the surety will pay the same in an amount not exceeding the amount set forth above, and also in case suit is brought upon this bond, will pay, in addition to the face amount thereof, costs and reasonable expenses and fees, including reasonable attorneys' fees, incurred by the_____[City *or* County] of_____[*specify name of city or county*] in successfully enforcing this obligation, to be awarded and fixed by the court, and to be taxed as costs and to be included in the judgment rendered.

It is hereby expressly stipulated and agreed that this bond shall inure to the benefit of any and all persons, companies, and corporations entitled to file claims under Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond.

Should the condition of this bond be fully performed, then this obligation shall become null and void. Otherwise, it shall be and remain in full force and effect.

The surety hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the agreement or the specifications accompanying it shall in any manner affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration, or addition.

In witness whereof, this instrument has been duly executed by the above-named Principal and surety on_____[*date*].

[*surety's seal*] ..... _____[*name of surety*]

By _____ [*signature*]
[*typed name and title*]

[*Add statutory certificate of acknowledgment (see § 30.204[2]).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.203

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.203 Notice of Election to Void Transaction

[1] Comment

[a] Use of Form

This form is a notice to a subdivider that the purchaser of a subdivision interest is exercising his or her option to void the deed, sale, or purchase agreement because the real property involved has been divided or has resulted from a division in violation of the SMA or local implementing legislation. The purchaser may exercise this option at any time within one year after discovery of the violation [*Gov. Code § 66499.32(a)*]. However, a conveyance of real property cannot be voided in this manner after the date on which a final or parcel map has been filed [*Gov. Code § 66499.32(b)*].

For a complete discussion of the remedies available to parties aggrieved by a violation of the SMA, see *§ 30.25[3]*.

[b] Violations Leading to Voidability

If a final map or parcel map has not been properly recorded for a subdivision, no person may do any of the following [*Gov. Code § 66499.30(a), (b)*]:

- Sell, lease, or finance any parcel of real property in the subdivision.
- Commence construction of any building for sale, lease, or financing, except model homes.
- Allow occupancy of the real property.

Furthermore, a conveyance of any part of a division of real property for which a final or parcel map cannot be made by parcel or block number, initial, or other designation, unless and until the required map has been properly recorded [*Gov. Code § 66499.30(c)*]. Any person who enters into a prohibited transaction with the subdivider may void that transaction.

These prohibitions. however, do not extend to offers or agreements to sell, lease, or finance real property or to construct improvements when the sale, lease, or financing, or the commencement of the construction, is expressly conditioned on the approval and filing of a final subdivision map or parcel map [*Gov. Code § 66499.30(e)*].

[c] Parties Entitled to Exercise Option to Void

The option to void a transaction prohibited under the SMA may be exercised by the grantee, buyer, or person contracting to purchase and by the heirs, personal representative, or trustee in insolvency or bankruptcy of those persons. However, the option cannot be exercised by other successors in interest of the grantee, buyer, or person contracting to purchase, or by the grantor, vendor, or person contracting to sell, or his or her assignee, heir, or devisee [*Gov. Code § 66499.32(a)*].

[d] Certificate of Compliance

[i] In General

A certificate of compliance identifies subdivided property and states that its division complies with applicable requirements [*Gov. Code § 66499.35(a)*]. Recorded final maps, parcel maps, official maps, and certificates of exception [*see Gov. Code §§ 66499.35(d), (e), 66499.52*; *see also Gov. Code § 66422*] constitute certificates of compliance with respect to the parcels of real property that they describe [*Gov. Code § 66499.35(d)*].

Any person who owns real property, or that person's vendee under a sales agreement, may ask a local government to record a certificate of compliance for the property. The local government must do so if it finds that the property complies with the SMA and its local implementing ordinances and may charge a reasonable fee to cover the cost of issuing and recording the certificate [*Gov. Code § 66499.35(a)*].

If the local government finds that the real property does not comply with applicable laws, it will issue a conditional certificate of compliance. It may, as a condition to granting a conditional certificate, impose any conditions that would have been applicable to the division of the property at the time the applicant acquired an interest in it. However, the local government may impose any conditions that would apply to a current division of the property if the applicant (1) was the owner of record at the time of the initial violation, (2) granted a parcel or parcels in violation of applicable requirements, and (3) is the current owner of record of one or more of the parcels created by the violative act [*Gov. Code § 66499.35(b)*].

A conditional certificate of compliance constitutes notice that the fulfillment of the conditions will be required prior to subsequent issuance of a permit or other grant of approval for development of the property to (1) the property owner or vendee who applied for the certificate, (2) a grantee of the property owner, or (3) any subsequent transferee or assignee of the property. Compliance with the conditions will not be required until the local government issues a permit or other grant of approval for development [*Gov. Code § 66499.35(b)*].

[ii] Effect on Voidability

The election to void is not available in the case of a conveyance of any parcel of real property identified in a certificate of compliance [*Gov. Code § 66499.32(b)*]. A certificate of compliance must be issued for any real property that has been approved for development pursuant to *Gov. Code § 66499.34(b)* [*Gov. Code § 66499.35(c)*; *see Gov. Code § 66499.34* (authorizing local agency to approve development of illegally subdivided lands subject to certain restrictions)]. The following actions constitute this approval for development: (1) the issuance of a permit or grant of approval for development of real property or with respect to improvements that have been completed prior to the time a permit or grant of approval for development was required by local ordinances in effect at the time of the improvements; or (2) with respect to improvements that have been completed in reliance on a permit or grant of approval. On request of the owner of real property affected by any of these actions or a vendee of the owner under a sales contract, the local

agency must issue a certificate of compliance for the affected property [*Gov. Code § 66499.34*].

[e] Notice of Violation

A local government that has knowledge that real property has been divided in violation of applicable laws must send a notice of intention to record a notice of violation by certified mail to the current owner of record of the property. A notice of violation must do the following [*Gov. Code § 66499.36*]:

- Describe the real property in detail.
- Name the owners of the real property.
- Describe the violation.
- Explain why the subject parcel is not presumed to be lawful under *Government Code Section 66412.6(a), (b)*.
- State that an opportunity will be given to the owner to present evidence.

The notice must also specify a time, date, and place for a meeting at which the owner may present evidence to the legislative body or advisory agency of why the notice should not be recorded [*Gov. Code § 66499.36*]. The meeting must take place no sooner than 30 days and no later than 60 days from the date of mailing. If, within 15 days of receipt of the notice, the owner fails to inform the local agency of his or her objection to recording the notice of violation, the legislative body or advisory agency will record the notice of violation with the county recorder [*Gov. Code § 66499.36*].

If, after the owner has presented evidence, it is determined that there has been no violation, the local agency must mail a clearance letter to the current owner of record. However, if it is determined that the property has been illegally divided, the legislative body or advisory agency must record the notice of violation with the county recorder. The recorded notice will be deemed to be constructive notice of the violation to all successors in interest in the property. The county recorder will index the names of the fee owners in the general index [*Gov. Code § 66499.36*].

[2] FORM

Notice of Election to Void Transaction

NOTICE OF ELECTION TO VOID

_____[*Specify transaction or document, e.g.,* SALE]

To: [*name and address of grantor, seller, or person contracting to sell*]

From: [*name and address of grantee, buyer, or person contracting to buy*]

Date: _____

This document shall constitute notice that the undersigned,_____[*name*], pursuant to *Government Code Section 66499.32(a)*, has elected to exercise the right to void the [*specify transaction, e.g.,* sale or deed or sales contract] executed on_____[*date*] pertaining to [*describe parcel*] in the_____[*name of subdivision*] subdivision between the undersigned, as [grantee *or* buyer *or* the person contracting to purchase], and the addressee of this notice, as [grantor *or* seller *or* the person contracting to sell]. This election to void is exercised on

the grounds that the [*specify transaction, e.g.,* sale *or* deed *or* sales contract] is in violation of the provisions of the [Subdivision Map Act *or identify local ordinance enacted pursuant to Subdivision Map Act*] as follows: [*specify all violations of Subdivision Map Act or local implementing ordinance, e.g.,* The grantor did not file a subdivision map before creating the previously described subdivision and executing the sales agreement described above].

Dated: _____

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.204

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.204 Owner's Statements of Consent and Dedication

[1] Comment

[a] Use of Form

This form is an owner's statement of consent to the preparation and recordation of the final map under the SMA [*see Gov. Code §§ 66435*, *66436*] and of dedication of designated portions of the subdivided property for public use [*see § 30.23[4][e]*]. It may be combined, if appropriate, with the statement of the person who prepared the map [*see § 30.206*], the approval of the city engineer or county surveyor [*see § 30.207*], the clerk's certificate regarding any special assessment [*see § 30.208*], and/or the certificate of the clerk of a board of supervisors [*see § 30.209*]. It must either be affixed to the final subdivision map or submitted along with the map for approval [*see Gov. Code § 66435*; *see also* [b][i], *below*].

This form is appropriate for use by either individuals or business entities. If the owner is an individual, the drafter should use the first signature block. If the owner is a business entity, the drafter should use the second signature block.

For a discussion of final maps, see *Section 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *Section 30.120[5]*, *[6]*.

[b] Persons Responsible for Filing Consent

[i] In General

Unless specifically exempted, [*see* [c], *below*], any party who has a record title interest in real property being subdivided under the SMA must sign and acknowledge a statement consenting to the preparation and recordation of the final map [*see Gov. Code §§ 66435, 66436*]. The statement of consent must generally appear on the final map [*Gov. Code § 66436*; *see Gov. Code § 66435*]. However, a local agency may require that the statement be made by separate

instrument and recorded concurrently with the final map [*Gov. Code § 66435.1*]. If a separate instrument is required, the county recorder must place on the final map a reference to the separately recorded document [*Gov. Code §§ 66435.2, 66468.1*].

This form contains alternative provisions. The first alternative is designed to be used when the statement of consent appears on the final map. The second alternative may be used when the statement of consent is to be filed in a separate instrument.

[ii] Exemptions

Under certain conditions, specified persons need not execute and file statements of consent in connection with the filing of final maps under the SMA. For example, the trustee and the holder of a beneficial interest under a trust deed need not both execute statements of consent; only one or the other must do so. Similarly, owners of rights-of-way, easements, and other interests that cannot ripen into fees need not execute a statement of consent. Owners of interests in or rights to minerals need not execute such a statement. Finally, neither the United States nor the State of California need execute and file a statement of consent if the subdivided property was patented and the federal or state government reserved an interest in it [*see Gov. Code § 66436*]. For a detailed checklist of the conditions applicable to the exemptions from the statement of consent requirement for final maps, see *Section 30.120[5]*, Paragraph 2.

[c] Owner's Dedication of Real Property

This form includes an optional statement dedicating or offering to dedicate interests in portions of the subdivided property for specified public purposes [*see Gov. Code §§ 66436, 66439(a)*; *see also § 30.23[4][e]*].

As an alternative to dedication, local ordinances may authorize the creation of public easements on private lands for specified purposes [*see Gov. Code §§ 65870-65875*]. For a discussion of these easements, see Ch. 28, *Easements, Covenants, and Adjoining Owners* . For forms to be used in connection with granting these easements in lieu of making a dedication, see *Section 30.205[2]*.

A final map must contain a certificate or statement for execution by the clerk of each approving legislative body stating that the legislative body (1) approved the map, and (2) either accepted, subject to improvement, or rejected on the public's behalf any real property offered for dedication for public use [*Gov. Code § 66440*]. This form includes an appropriate form of certification for use by the clerk of the legislative body with which the final map is filed for approval.

[d] Acknowledgment

The owner's statements of consent and dedication must be acknowledged. The officer who takes the acknowledgment must endorse on it or attach to it a statutory certificate of acknowledgment [*Civ. Code § 1188*; *see* ch. 27, *Deeds, Conveyancing, Dedication, and Homesteads*]. Normally, the officer's seal of office must be affixed to the certificate [*Civ. Code § 1193*; *see Gov. Code § 8207*]. However, a notary acknowledgment on the owner's statement need not contain the notary's official seal if the following information is typed or printed below or immediately adjacent to the notary's signature in the acknowledgment: (1) the notary's name, (2) the county of the notary's principal place of business, and (3) the expiration date of the notary's commission [*Gov. Code § 66436(c)*]. This limited exception to the standard acknowledgment requirements applies regardless of whether the owner's statement includes dedication provisions [*see Gov. Code §§ 66436(c), 66439*; *see also § 30.23[4][e]*]. The acknowledgment in this form complies with the requirements of *Civil Code Section 1189(a)*.

[2] FORM

Owner's Statements of Consent and Dedication

OWNER'S STATEMENT OF CONSENT [*add if appropriate:* AND DEDICATION]

[*Alternative One: to be affixed to final map*]

The undersigned, being the [party who has *or* parties who have] record title interest in the lands delineated and embraced within the red lines on this final map, [does *or* do] hereby consent to the making and recordation of this final map.

[*Add as appropriate*]

[*Either:*]

The real property described below is dedicated in fee for public purposes: _____[*insert description of dedicated property that is adequate to convey the property*].

[*Or*]

The real property described below is dedicated as an easement for public purposes: _____[*insert description of easement that is adequate to convey the dedicated property*].

[*Alternative Two: to be filed as separate instrument*]

The undersigned, being the [party who has *or* parties who have] record title interest in the lands delineated and embraced within the red lines on the final map entitled Subdivision [*number*] recorded concurrently with the filing of this Statement, in Book [*number*] of Maps at Page [*number*], in the office of the County Recorder of [*specify county*] County, State of California, [does *or* do] hereby consent to the making and recordation of that final map.

[*Add as appropriate*]

[*Either:*]

The real property described below is dedicated in fee for public purposes: _____[*insert description of dedicated property that is adequate to convey the property*].

[*Or*]

The real property described below is dedicated as an easement for public purposes: _____[*insert description of easement that is adequate to convey the dedicated property*].

_____ Dated:

_____ [*signature*]
[*typed name*]

_____ [*name of entity*]
By _____ [*signature*]
[*typed name and title*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in substantially the following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ .....

[*Seal; optional if certificate of acknowledgment sets forth notary's principal place of business and commission expiration date (see Gov. Code § 66436(c)).*]

[*Add if appropriate*]

_____[CITY *or* COUNTY] CLERK'S [CERTIFICATE *or* STATEMENT]

I,_____[*name*] am the Clerk of _____ the [City *or* County]
of_____[*name of city or county*], State of California, and I [certify *or* state] that
the_____[*title of legislative body, e.g.*, City Council *or* Board of Supervisors]
of_____[*name of city or county*], at its regular meeting held on_____[*date*], duly approved the map entitled Subdivision [*number*], authorized its recordation, and [accepted *or* rejected] on behalf of the public all parcels of land that are shown and designated on the map as being offered for dedication for public use in conformity with the terms of the offer of dedication.
_____ Dated:

_____ [*name of entity*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawPriorities &

RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.205

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.205 Owner's Grant of Easements

[1] Comment--Use of Form

This form is an owner's grant of easements in connection with the filing of a final map for approval under the SMA. It is designed to be included, if appropriate, with the owner's statement of consent [*see § 30.204*] and the statement of the person who prepared the map [*see § 30.206*], the approval of the city engineer or county surveyor [*see § 30.207*], the clerk's certificate regarding any special assessment [*see § 30.208*], and/or the certificate of the clerk of a board of supervisors [*see § 30.209*]. If local ordinances allow the creation of public easements on private lands for specified purposes [*see Gov. Code §§ 65870-65875*], this form may be used in lieu of the dedication provisions that appear above the acknowledgment *form in Section 30.205[2]*. For a detailed discussion of easements, see Ch. 28, *Easements, Covenants, and Adjoining Owners* .

For a discussion of final maps, see *Section 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *Section 30.120[5]*, *[6]*.

[2] FORM

Owner's Grant of Easements

DRAINAGE EASEMENT

The area marked "drainage easement" is dedicated to the County of [*specify county*], or its designee, and to the public for public use for storm, flood, and surface water drainage, including construction, access, or maintenance of works, improvements, and structures, whether covered or open, or the clearing of obstructions and vegetation.

SEWER EASEMENT

The area marked "sewer easement" is dedicated to the [*specify sanitary district*] Sanitary District, or its designee, for public use for sanitary sewers including construction, access, or maintenance of works, improvements, and structures whether covered or open, or the clearing of obstructions and vegetation.

COMMON AREAS

The areas designated as parcels [*specify, e.g.,* A, B, C, and D] are "common areas" and are not dedicated for use by the general public but are dedicated for use of the homeowners of Subdivision [*number*] for, but not limited to, access, recreation, parking, utilities, drainage, ingress, and egress in accordance with the Subdivision Restrictions recorded concurrently with the filing of this map, in Book [*number*], Official Records of [*specify county*] County, at Page [*number*].

ABUTTERS' RIGHTS

The undersigned [does *or* do] relinquish all abutters rights of access to_____[*road name*], a county road, along the property line adjacent to_____[*road name*] on lot numbers [*specify numbers*].

EASEMENTS

The map shows all easements on the premises or of record.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.206

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.206 Statement of Preparer of Map

[1] Comment

[a] Use of Form

This form is a statement by the preparer of a final map filed for approval under the SMA. It is designed to be included, if appropriate, with the owner's statement of consent and dedication [*see § 30.204*], the owner's grant of easements [*see § 30.205*], the approval of the city engineer or county surveyor [*see § 30.207*], the clerk's certificate regarding any special assessment [*see § 30.208*], and/or the certificate of the clerk of a board of supervisors [*see § 30.209*].

For a discussion of final maps, see *Section 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *Section 30.120[5], [6]*.

[b] Required Contents

The engineer or surveyor responsible for the survey and final map [*see Gov. Code § 66434*] must prepare a statement that includes (1) the date on which the survey was conducted; (2) a statement that the survey and final map were made by or under the direction of the engineer or surveyor; (3) a statement that the survey is true and complete as shown; (4) a statement that all of the monuments are of the character and occupy the positions indicated, or that they will be set in those positions on or before a specified later date; and (5) a statement that the monuments are, or will be, sufficient to enable the survey to be retraced [*Gov. Code § 66441*].

The drafter must affix the statement of the engineer or surveyor to the final map before filing it for approval [*Gov. Code § 66441*].

[2] FORM

Statement of Preparer of Map

STATEMENT OF PREPARER OF MAP

I am a [registered civil engineer *or* licensed land surveyor]. I state that the final map entitled Subdivision [*number*] was prepared from a survey that [I made *or* was made under my direction] on_____[*date*] and that the survey is true and complete as shown. I further state that_____[the monuments set are of the character shown and occupy the positions indicated on the final map and are sufficient to enable the survey to be retraced *or* monuments of the character shown on the final map will be set in the positions indicated on the map on or before _____ (*date*), and will be sufficient to enable the survey to be retraced].

The subdivision contains approximately [*number*] acres._____[No part of this subdivision lies within the incorporated area of any city or town *or* This subdivision lies partly in the incorporated _____ (City *or* Town) of _____ (*specify*) and partly in the unincorporated area of _____ (*specify*) County].
_____ Dated:

_____ [*signature*]
[*typed name*]
_____ [*specify license or registration number and seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.207

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.207 Statement or Certificate of Approval by City Engineer or County Surveyor

[1] Comment

[a] Use of Form

This form is a statement of approval of a final subdivision map by the city engineer or county surveyor. It is designed to be included with the final subdivision map when it is filed for approval under the SMA. It may be combined, if appropriate, with the owner's statement of consent and dedication [*see § 30.204*], the owner's grant of easements [*see § 30.205*], the statement of the engineer or surveyor who prepared the final map [*see § 30.206*], the clerk's certificate regarding any special assessment [*see § 30.208*], and/or the certificate of the clerk of a board of supervisors [*see § 30.209*].

For a discussion of final maps, see *Section 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *Section 30.120[5], [6]*.

[b] Required Contents

The final map must contain a certificate or statement signed by the county surveyor, the city engineer, or the city surveyor. If the subdivision is in an unincorporated area, the certificate must be signed by the county surveyor, and if it lies within a city it must be signed by the city engineer or the city surveyor [*Gov. Code § 66442(a)*; *see Gov. Code § 66416.5(a)* (authority of city surveyor to perform land surveying functions of city engineer)]. The certificate must state the following [*Gov. Code § 66442(a)*]:

- The certifying official has examined the final map.

- The subdivision as shown is substantially the same as it appeared on the tentative map and any approved alterations of the tentative map.

- All provisions of the SMA governing maps and any applicable local ordinances have been complied with.

- The certifying official is satisfied that the map is technically correct.

Only city or county engineers who are registered as civil engineers may make the first three statements listed above. The fourth statement set fourth above may be made only by a person authorized to practice land surveying under the Professional Land Surveyors' Act [*see Gov. Code § 66442(b)*; *see also Bus. & Prof. Code § 8700 et seq.*]. The certifying official must sign the certificate and indicate his or her license number and expiration date and the stamp of his or her seal immediately below or adjacent to the signature [*Gov. Code § 66442(a)*] and file it with his or her legislative body within 20 days after it has been submitted for certification [*Gov. Code § 66442(b)*; *see Gov. Code § 66442(c)* (referencing *Bus. & Prof. Code §§ 6735.5* and *8770.6* to define "certificate," "certify," and "certified" in this context)].

[2] FORM

Statement or Certificate of Approval by City Engineer or County Surveyor

_____ [CERTIFICATE *or* STATEMENT] of APPROVAL BY _____

[COUNTY SURVEYOR *or* CITY ENGINEER *or* CITY SURVEYOR]

I,_____[*name*], am the_____[county surveyor *or* city engineer *or* city surveyor] of_____[*specify name of city or county*], State of California, hereby_____[certify *or* state] that I have examined the map entitled Subdivision [*specify number*], that the subdivision is substantially as it appeared on the tentative map, that all the provisions of state laws and local ordinances governing the filing of subdivision maps have been complied with, and that I am satisfied that the map is technically correct.
_____ Dated:

_____ [*signature*]
[*typed name*]
_____ [License *or* Registration] number: _____
Expiration date of _____ [license *or* registration]: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.208

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.208 Clerk's Certificate Regarding Special Assessment

[1] Comment

[a] Use of Form

This form is a clerk's certificate regarding the status of a special assessment to which subdivided land is subject. It is designed to be included with the final subdivision map when it is filed for approval under the SMA. It may be combined, if appropriate, with the owner's statement of consent and dedication [*see § 30.204*], the owner's grant of easements [*see § 30.205*], the statement of the engineer or surveyor who prepared the final map [*see § 30.206*], the statement or certificate of approval by the city engineer or county surveyor [*see § 30.207*], and/or the certificate of the clerk of a board of supervisors [*see § 30.209*].

For a discussion of final maps, see *§ 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *§ 30.120[5], [6]*.

[b] Required Contents

Before the approval of a final map under the SMA, any special assessment or bond to which the lands involved are subject must be paid in full or security must be filed with the clerk of the board of supervisors, payable to the county as trustee for the assessment bondholders [*Gov. Code § 66493(e)*]. If the assessment is not properly paid in full or secured, the final map cannot be recorded until the owner or subdivider files with the clerk of the board of supervisors a certificate prepared by the clerk of the legislative body that created the assessment district. The certificate must state that the legislative body has determined that responsibility for the assessment payment obligation has been allocated among the affected parcels in the manner required by the applicable statutes [*Gov. Code § 66493(f)*].

[2] FORM

Clerk's Certificate Regarding Special Assessment

_____ [COUNTY *or* CITY] CLERK'S CERTIFICATE REGARDING SPECIAL ASSESSMENT

I,_____[*name*], am the Clerk of the_____[Board of Supervisors *or* City Council] of_____[*name of county or city*], State of California, certify that:

1. [All *or* A portion of] the lands delineated and embraced within the red lines on the final map entitled Subdivision [*number*] recorded concurrently with the filing of this certificate, in Book [*number*] of Maps at Page [*number*], in the office of the County Recorder of [*specify county*] County, State of California, lies within the special assessment district created by the_____[Board of Supervisors *or* City Council] of_____[*name of county or city*], State of California, and identified in Resolution No. [*number*].

2. The_____[Board of Supervisors *or* City Council] has determined that adequate provision has been made for the allocation to each subject subdivided parcel of responsibility for its share of the assessment payment obligation in the manner provided in [*identify statute under which assessments were levied or bonds were issued*].
_____ Dated:

_____ [*name*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsFinanceReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide § 30.209

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.209 Certificate of Clerk of Board of Supervisors

[1] Comment--Use of Form

This form is a certificate of approval by a clerk of a board of supervisors whose approval is required for a final map. It is designed to be included with the final subdivision map when it is filed for approval under the SMA. It may be combined, if appropriate, with the owner's statement of consent and dedication [*see § 30.204*], the owner's grant of easements [*see § 30.205*], the statement of the engineer or surveyor who prepared the final map [*see § 30.206*], the statement or certificate of approval by the city engineer or county surveyor [*see § 30.207*], and/or the clerk's certificate regarding a special assessment district [*see § 30.208*].

Whenever a board of supervisors must approve a final map, the map must contain a certificate or statement for execution by the clerk of the board stating that the board approved the map and accepted subject to improvement, or rejected on behalf of the public, any real property offered for dedication for public use in conformity with the terms of the offer of dedication [*Gov. Code § 66440*]. Furthermore, if a final map is subject to the security requirements of *Gov. Code § 66493* [*see § 30.120[6]*], the clerk of the board of supervisors must (1) certify that the required certificates or statements and security have been filed and deposited with the clerk and approved by the county; and (2) transmit the final map to the county recorder [*Gov. Code § 66464(b)*]. This form includes an optional paragraph that the drafter may insert if the final map is subject to these statutory security requirements.

For a discussion of dedication, see *§ 30.23[4][e]*. For a discussion of final maps, see *§ 30.23[4]*. For a guide to the procedures to be followed in preparing and filing final maps for approval under the SMA, see *§ 30.120[5], [6]*.

[2] FORM

Certificate of Clerk of Board of Supervisors

CERTIFICATE OF CLERK

I,_____[*name*], am the County Clerk of the Board of Supervisors of the County of [*county*], State of California. I certify that the final map entitled Subdivision [*number*] was presented to the Board of Supervisors, as provided by law, at a regular meeting of the Board held on_____[*date*], and that the Board of Supervisors duly passed and adopted at that meeting a resolution approving the final map and [accepting *or* rejecting] on behalf of the public all parcels of land that are shown and designated on the map as being offered for dedication for public use in conformity with the terms of the offer of dedication.

[*Add if appropriate:* I further certify that all bonds, certificates, and statements as required by law to accompany the map have been approved by the Board of Supervisors and filed in my office and that I have transmitted the final map to the county recorder.]
_____ Dated:

_____ [*name of county clerk*]
By _____ [*signature*]
Deputy County Clerk

_____ [*name of county clerk*]
By _____ [*signature*]
Deputy County Clerk

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
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A. Subdivision Map Act

13-30 California Legal Forms--Transaction Guide §§ 30.210-30.219

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.210[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide § 30.220

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.220 Notice of Intention for Standard Subdivision [RE Form 628 (Rev. 6/05)]

[1] Comment

[a] Use of Form

This form is the official application for a public report for a standard subdivision. It may be used for a final public report, conditional public report, or preliminary public report. The form was prepared by the Department of Real Estate (DRE) and is reproduced here for illustrative purposes only. Only Parts II (index/quantitative deficiency notice) and III (questionnaire) of the three-part form are set forth below. Although the official instructions (Part I) for the completion and submittal of the form are not reproduced, their requirements are discussed throughout this comment.

Applications for public reports are distributed and processed by DRE subdivision offices in Los Angeles and Sacramento. The Los Angeles office processes applications for subdivisions located in Imperial, Orange, San Bernardino, Santa Barbara, Los Angeles, Riverside, San Diego, and Ventura counties. The Sacramento office handles subdivisions located in all other California counties. The following are the addresses and phone numbers for the two offices:

Subdivisions Office--North
2201 Broadway
P.O. Box 187005
Sacramento, CA 95818-7005
Telephone: (916) 227-0813

Subdivisions Office--South
320 W. 4th Street, Suite 350
Los Angeles, CA 90013-1105

Telephone: (213) 576-6983

Application forms also may be filled in online and printed out by visiting the forms page at DRE's website at <<www.dre.ca.gov/forms_sub.htm >>.

For extensive coverage of final, conditional, and preliminary public reports, see *§ 30.41*. For a checklist of the public report application process, see *§ 30.121*. For discussion of additional requirements of the Subdivided Lands Act (SLA) [*Bus. & Prof. Code § 11000 et seq.*], see *§ 30.40* et seq.

For public report applications appropriate for use in transactions involving common-interest developments, such as condominiums projects and planned developments, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

[b] Overview of Application and Public Report Requirements

Any person who intends to offer subdivided lands [*see Bus. & Prof. Code § 11000*; *see also § 30.40[2][a]*] within California for sale or lease must (1) file with the DRE an application for a public report consisting of a notice of intention and a completed questionnaire on a form prepared by the DRE (this form) [*Bus. & Prof. Code § 11010(a)*; *see Bus. & Prof. Code § 11011*; § 30.121[2]], and (2) obtain a public report covering the subdivision from the Real Estate Commissioner [*Bus. & Prof. Code § 11018.2*].

The remainder of this comment discusses issues relating to the completion and filing of the application. For a step-by-step guide to the entire public report application process, see *§ 30.121[2]*.

[c] Overview of Functions of Index and Questionnaire

The index portion of the application (Part II) is used as a guide in assembling and filing the supporting documentation for the application. The questionnaire portion (Part III) requires the applicant to provide detailed information about the subdivision project and to submit supporting documentation.

[d] Waiver of Questionnaire

The Commissioner may, by regulation, or on the basis of the particular circumstances of a proposed offering, waive the requirement of the submission of a completed questionnaire if the Commissioner determines that prospective purchasers or lessees of the subdivision interests to be offered will be adequately protected through the issuance of a public report based solely on information contained in the notice of intention [*Bus. & Prof. Code § 11010(c)*; *see 10 Cal. Code Reg. § 2790.4* (waiver for Rural Housing Service project)].

[e] Alternative Methods of Filing for Final Public Report

[i] In General

The DRE has developed two alternative methods of filing for a final public report. These methods permit the applicant to stagger the submission of the large amount of supporting documentation required for an acceptable application, or to submit a complete application package at the outset. Below is a summary of these filing methods, which are also described in the official instructions (Part I) to this form, and of the interrelated review process followed by the DRE.

[ii] Minimum Filing Package

The first method of filing involves submission of a "minimum filing package" (MFP). The MFP consists of a completed index and questionnaire, the filing fee [*see* [g], *below*], and a minimum amount of supporting documentation. The

required supporting documents are requested by those questions in the index and questionnaire that are marked with an asterisk.

After receiving an acceptable MFP, the DRE will accept the filing as a notice of intention and will continue processing to determine if the filing is a substantially complete application [*see* [iii], *below*]. Alternatively, the applicant may request that the MFP serve as an application for a preliminary public report. Whether the applicant initially requests that the MFP serve as an application for a final public report or a preliminary public report, no further processing of the MRP for a final public report will occur until the filing is substantially complete.

If the MRP requirements are not met, the application and filing fee will be returned to the applicant.

[iii] Substantially Complete Application

Before final processing of an application for a final public report may begin, the DRE must determine that the application is substantially complete with respect to quantitative requirements [*see Bus. & Prof. Code § 11010.2(b)*; *see also Bus. & Prof. Code § 11010.2(a)(1)-(3)* (definitions)]. A substantially complete application (SCA) includes an MFP plus most of the other documentation required for the issuance of a final public report. By matching the answers in columns 2 and 3 of the index (this form), the applicant can determine what must be included in the SCA. For a list of the documents and information required for an SCA [*see 10 Cal. Code Reg. § 2792*], see *§ 30.121[2]*.

Within 10 days of the receipt of the application, the Commissioner must (1) determine whether it is substantially complete with respect to quantitative requirements, and (2) notify the applicant in writing of this determination [*Bus. & Prof. Code § 11010.2(b)*]. If it is not complete, the notification will specify the missing or incomplete information. If the application is then resubmitted, the Commissioner will make and submit another written determination regarding the "substantially complete" status of the application within 10 days [*Bus. & Prof. Code § 11010.2(b)(1)*].

[iv] Processing of Substantially Complete Application; List of Deficiencies; Qualitatively Complete Application

If the Commissioner determines that the application is substantially complete with respect to quantitative requirements, he or she will take the following steps:

- Provide the applicant, within 20 days of the foregoing determination, with a list of any deficiencies and substantive inadequacies that must be corrected before the application will be qualitatively complete [*Bus. & Prof. Code § 11010.2(b)(2)*; *see Bus. & Prof. Code § 11010.2(a)(2)* ("qualitatively complete" defined)].

- Notify the applicant, within 20 days of the receipt of the information submitted in response to the list described above, whether the application is qualitatively complete. If it is not, the notification will identify the remaining deficiencies and substantive inadequacies. On receipt of any resulting resubmittal, the Commissioner will have another 20 days to determine whether or not the application is qualitatively complete and to notify the applicant of the decision [*Bus. & Prof. Code § 11010.2(c)*].

- Issue a public report within 10 days after (i) the determination that the application is qualitatively and substantially complete, and (ii) the applicant has submitted all recorded or filed instruments and evidence of financial arrangements required by the Commissioner [*Bus. & Prof. Code § 11010.2(d)*].

The Commissioner may adopt emergency regulations providing for the extension of the above deadlines if the number of applications for subdivision public reports filed with the DRE during the preceding six months has increased by more than 15 percent over the monthly average number of applications filed for a specified base period [*see Bus. & Prof.*

Code § 11010.2(g)].

For a detailed step-by-step guide to the preparation and filing of notices of intention, see *§ 30.121[2]*.

[f] Contents of Notice of Intention and Questionnaire

[i] In General

Bus. & Prof. Code § 11010(b) requires the notice of intention (this form) to contain detailed information about the subdivision project. For example, it must contain the names and addresses of both the owner and the subdivider [*Bus. & Prof. Code § 11010(b)(1), (2)*; *see* Pt. III, PP 1I, 1J of Form], as well as a legal description and specification of the area of subdivided lands [*Bus. & Prof. Code § 11010(b)(3)*; *see* Pt. III, P 1C of Form]. The additional information required by Section 11010(b) (and, in a few cases, related information required by other statutes or regulations) is described in the following subsections.

[ii] Title and Liens

The notice of intention must include a true statement of the condition of the title to the land, including all encumbrances [*Bus. & Prof. Code § 11010(b)(4)*; *see* Pt. III, PP 6, 7 of Form]. The owner, subdivider, or agent of the foregoing must submit with the questionnaire a current preliminary title report covering all subdivision interests for which a public report is sought. This report must include the following [*10 Cal. Code Reg. § 2792(a)(6)*]:

- A legal description of the subdivided property.
- The nature of the interest or estate covered by the report.
- The record owner of the interest or estate covered by the report.
- All easements, liens, rights, interest, and claims disclosed by an examination of the indices in the office of the recorder of the county in which the property is located.
- The existence of any encroachment of improvements over lines of record title.
- All mechanics' liens arising out of work completed or in progress.
- The existence of assessments or potential assessments for public improvements completed or under construction.

Furthermore, the notice of intention must specify the amount of any indebtedness that constitutes a lien on the subdivision or any party to the subdivision transaction if the lien was incurred to pay for the construction of on-site or off-site improvements or community or recreational facilities [*Bus. & Prof. Code § 11010(b)(9)*; *see* Pt. III, P 16C of Form].

The subdivider's failure to demonstrate that adequate financial arrangements have been made is grounds for the denial of issuance of a public report. Similarly, a public report may be denied if the Commissioner determines that the subdivider is unable to deliver the title or other interest contracted for [*Bus. & Prof. Code § 11018*].

[iii] Uses, Covenants, and Restrictions

The notice of intention must specify the uses for which the proposed subdivision will be offered [*Bus. & Prof. Code § 11010(b)(7)*; *see* Pt. III, P 9A of Form]. It must also identify any provisions that limit the use or occupancy of the

parcels in the subdivision [*Bus. & Prof. Code § 11010(b)(8)*; *see* Pt. III, PP 46, 47 of Form].

The subdivider's failure to show that the parcels can be used for the purpose for which they are offered, or, if the subdivision is offered for residential purposes, that vehicular access and a source of potable domestic water either is or will be available, is grounds for denying the issuance of a public report [*Bus. & Prof. Code § 11018(f)*]. Similarly, the failure to specify in the sales contract or other writing the uses for which the parcels are offered, together with any relevant covenants or conditions, is grounds for the denial of a public report [*Bus. & Prof. Code § 11018(g)*].

[iv] Special Districts

The notice of intention must contain a true statement or reasonable estimate, if applicable, of the amount of any indebtedness proposed to be incurred by an existing or proposed special district, entity, taxing area, or assessment district, within the boundaries of which all or any part of the subdivision is located and that (1) is to pay for the construction or installation of any improvement or to furnish community or recreational facilities to the subdivision, and (2) is to be obtained by ad valorem tax or assessment or by a special assessment or tax on all or any part of the subdivision [*Bus. & Prof. Code § 11010(b)(10)* (also applicable to indebtedness incurred or proposed to be incurred by existing or proposed community facilities district); *see 10 Cal. Code Reg. § 2792(a)(11)*; Pt. III, P 18 of Form]. If the subdivider is unable to demonstrate that adequate financial arrangements have been made for any facilities or off-site improvements included in the offering, the Commissioner may deny the issuance of a public report [*Bus. & Prof. Code § 11018(d), (e)*].

[v] Conditions of Sale or Lease

The notice of intention must specify the terms and conditions on which the subdivider intends to dispose of the subdivided land and must include copies of any contracts that he or she intends to use [*Bus. & Prof. Code § 11010(b)(5)*; *see 10 Cal. Code Reg. § 2792(a)(12)*; Pt. III, PP 21, 23 of Form]. The terms and conditions must include purchase money disbursement provisions required by the Commissioner [*10 Cal. Code Reg. § 2791 ; see* Pt. III, P 20 of Form]. The Commissioner may use and rely on any relevant information or data concerning a subdivision obtained from the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), or any other federal agency having comparable duties and functions in relation to subdivisions or the property in the subdivision [*Bus. & Prof. Code § 11014*].

If the subdivider fails to specify in the contract or other writing the uses for which the parcels are offered and any applicable covenants or conditions, the Commissioner may deny the issuance of a public report [*Bus. & Prof. Code § 11018(g)*].

[vi] Geologic Report on Soil Condition

The notice of intention must contain, if applicable, an accurate statement referencing any soils or geologic reports that have been prepared specifically for the subdivision [*Bus. & Prof. Code § 11010(b)(14)*; *see* Pt. III, P 12 of Form]. It must also contain a true statement that (1) indicates whether or not fill has been or is proposed to be used in the subdivision, and (2) provides the name and address of the public agency from which information concerning soil conditions in the subdivision is available [*Bus. & Prof. Code § 11010(b)(15)*; *see* Pt. III, P 12 of Form].

[vii] On-site and Off-site Improvements

The notice of intention must specify the amount of indebtedness that (1) is a lien on all or any portion of the subdivision, and (2) was incurred to pay for the construction of any on-site or off-site improvement or any community or recreational facility [*Bus. & Prof. Code § 11010(b)(9)*; *see* Pt. III, P 16C of Form].

[viii] Water Supply and Public Utilities

The notice of intention must accurately state what, if any, provisions have been made for public utilities in the proposed subdivision, including water, electricity, gas, telephone, and sewerage facilities [*Bus. & Prof. Code § 11010(b)(6)*; *see 10 Cal. Code Reg. § 2792(a)(9)*; *see* Pt. III, PP 11, 14 of Form].

If the development includes a subdivision consisting of a residential development of more than 500 dwelling units, a copy of the written verification of the available water supply obtained by the developer in accordance with *Gov. Code § 66473.7(b)* will satisfy the requirement for an accurate statement of the provisions made for water facilities [*Bus. & Prof. Code § 11010(b)(6)*; *see Gov. Code § 66473.7*].

If the financing of these facilities or other off-site improvements requires the creation of special assessment districts, the notice of intention must also indicate the amount of indebtedness that the special district is likely to incur [*Bus. & Prof. Code § 11010(b)(10)*; *see* [vii], *above*].

[ix] Location of Schools

The notice of intention must include a statement from the appropriate school district indicating the location of each high school, junior high school, and elementary school that serves the subdivision. Alternatively, the notice of intention may include documentation that a statement providing all of this information has been requested from the school district [*Bus. & Prof. Code § 11010(b)(12)(A)*; *see* Pt. III, P 15 of Form].

If, as of the date the notice of intention and application for a public report are otherwise deemed to be qualitatively and substantially complete, any school district serving the area has not provided a requested statement, the subdivider or other person who filed the notice of intention and application must immediately provide the DRE with the name, address, and telephone number of that district [*Bus. & Prof. Code § 11010(b)(12)(B)*].

[x] Suitability of Land

The developer must make a showing that the parcels can be used for the purpose for which they are offered; in the case of a residential subdivision, this includes a showing that there is or will be vehicular access and a source of potable domestic water. Failure to make such a showing is grounds for denial of a public report [*Bus. & Prof. Code § 11018(f)*].

[xi] Nearby Airports

The notice of intention must disclose the location of all existing airports, and of all proposed airports shown on the local general plan, located within two statute miles of the subdivision. If the property is located within an airport influence area, the notice must also include a statutorily-prescribed statement informing potential buyers of the possible annoyances and inconveniences associated with living near an airport [*Bus. & Prof. Code § 11010(b)(12)(A)*; *see Bus. & Prof. Code § 11010(b)(13)(B)* ("airport influence area" defined); Part III, P 9C of Form].

[xii] San Francisco Bay Conservation and Development Commission Jurisdiction

On or after July 1, 2005, if the property is located within the San Francisco Bay Conservation and Development Commission's jurisdiction, the notice of intention must include a statement that the property is so located and a statutory notice stating that the use and development of the property may be subject to special regulations, restrictions, and permit requirements [*Bus. & Prof. Code § 11010(b)(16)*].

[xiii] Notice of Supplemental Property Tax Bill

The notice of intention must include a "Notice of Your 'Supplemental' Property Tax Bill" informing the prospective purchaser that a reassessment of the property on the change of ownership may result in the issuance of one or two

supplemental tax bills, payment of which will be the purchaser's responsibility, notwithstanding the fact that the purchaser has arranged with the lender to pay property taxes through an impound account [*Bus. & Prof. Code § 11010(b)(11)*; *see Civ. Code § 1102.6c* (text of notice)].

[xiv] Notice of Right to Farm

If the property is located within one mile of a farm or ranch designated on the current county-level GIS "Important Farmland Map" issued by Department of Conservation's Division of Land Resource Protection, the notice of intention must include a statutory Notice of Right to Farm. The notice basically warns of possible inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character [*Bus. & Prof. Code § 11010(b)(17)*].

[g] Filing Fees

Bus. & Prof. Code § 11011 sets forth a schedule for filing fees charged in connection with applications for subdivision public reports. These are maximum fees; the Commissioner may by regulation prescribe lower fees if he or she determines that the reduced fees are sufficient to offset the costs and expenses incurred in the administration of the SLA. The Commissioner's fee schedule is set forth in *10 Cal. Code Reg. § 2790.1.5*.

[h] Consent to Service of Process by Nonresident Subdivider

Every nonresident subdivider must file an irrevocable consent to service of process along with his or her application for a public report [*see Bus. & Prof. Code § 11007*]. The consent must specify that if, in any action commenced against the subdivider in California, personal service of process upon him or her cannot be made in California after exercise of due diligence, a valid service may be made by delivering the process to the Secretary of State [*Bus. & Prof. Code § 11007*; *10* Cal. Code Reg. § 2792(a)(5); *see* DRE Form 608 (official consent form)].

[i] Abandonment of Application by Commissioner

[i] Circumstances Justifying Abandonment; Required Notices

The Commissioner may abandon an application for a final public report if [*10 Cal. Code Reg. § 2804*; *see Bus. & Prof. Code § 11018.13*]:

- The data required by *Bus. & Prof. Code § 11010* [*see* [f], *above*] has not been furnished within three years from the date the application was filed;

- Six months have elapsed since the Commissioner has given notice of deficiencies or substantive inadequacies contained in the documents that are required to make the filing substantially complete and the deficiencies and inadequacies have not been corrected by the applicant; and

- The term of any one-year extension of time in which to complete the application [*see* [ii], *below*] has elapsed.

Ninety days before abandoning the application, the Commissioner must mail to the applicant and the applicant's designated representative, notice of the Commissioner's intent to abandon the application. The notice must include a statement that the applicant may, in accordance with *10 Cal. Code Reg. § 2804(d)*, file a petition to keep the application open [*10 Cal. Code Reg. § 2804(b)*].

Sixty days or more following the mailing of the notice described above, the Commissioner may issue a final notice of intention to abandon the application. The application will be deemed abandoned 30 days after the final notice is mailed

to the applicant and the applicant's designated representative unless, before the expiration of the 30-day period, a one-year extension has been granted [*10 Cal. Code Reg. § 2804(c)*; *see* [ii], *below*].

[ii] One-Year Extension

The Commissioner, on his or her own motion, or after receipt of a petition from the applicant or the applicant's designated representative, may, under the following terms and conditions, grant a one-year extension to allow the applicant to complete the application [*10 Cal. Code Reg. § 2804(d)*]:

- The petition is received prior to the expiration of the 30-day notice period described in [i], *above*.

- The petition sets forth reasons of hardship or justifiable extenuating circumstances explaining why the file has been inactive. Hardship and justifiable extenuating circumstances include mistake, inadvertence, surprise, excusable neglect, or circumstances beyond the control of the applicant or the applicant's designated representative.

Written notice of the decision to grant or deny the petition will be mailed or delivered to the applicant and the applicant's designated representative, within 30 calendar days after receipt of the petition [*10 Cal. Code Reg. § 2804(d)*]. The Commissioner may grant one or more one-year extensions, provided that the application has not been abandoned [*10 Cal. Code Reg. § 2804(e)*; *see* [i], *above*].

[2] FORM

Notice of Intention for Standard Subdivision [RE Form 628 (Rev. 6/05)]

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Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide § 30.221

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.221 Reservation Instrument [RE Form 612 (Rev. 1/04)]

[1] Comment

[a] Use of Form

This form is the official DRE form that must be used by a subdivider to take reservations for the purchase or lease of subdivided lots after the subdivider has obtained a preliminary public report [*see 10 Cal. Code Reg. §§ 2795, 2795.1*]. For the locations at which official DRE forms appropriate for filing may be obtained, see *§ 30.220[1][a]*. Forms also may be filled in online and printed out by visiting the forms page at DRE's website at <<www.dre.ca.gov/forms_sub.htm >>.

For a detailed discussion of preliminary public reports, see *§ 30.41[1]*. For a step-by-step guide to the process for obtaining a preliminary public report, see *§ 30.121[1]*.

[b] Conditions for Reservation of Subdivision Interest

If a preliminary public report has been issued for a subdivision, the subdivider and persons acting on his or her behalf may solicit and accept reservations to purchase or lease subdivision interests, provided the following conditions are met [*10 Cal. Code Reg. § 2795(b)*]:

- The person making the reservation (potential buyer) has been given a copy of the preliminary public report and has executed a receipt for a copy before any money or other thing of value has been accepted by or on behalf of the subdivider in connection with the reservation [*see § 30.222* (receipt)].

- The potential buyer and subdivider (or person acting on the subdivider's behalf) have completed and signed a copy of the official reservation instrument (this form).

- The executed reservation instrument, along with any deposit taken from the potential buyer, is placed into a neutral escrow depository acceptable to the Commissioner [*see* DRE Form 612A (reservation deposit handling agreement between subdivider and escrow depository)].

[c] Contents of Instrument; Rights and Obligations of Parties

The rights and obligations of the parties to the reservation instrument include the following [*see 10 Cal. Code Reg. § 2795(b)(3)*]:

- The right of either the subdivider or the potential buyer to unilaterally cancel the reservation at any time.

- The right of the potential buyer to have his or her total deposit returned upon cancellation of the reservation by either party.

- The right of the potential buyer to have the deposit placed into an interest-bearing account for his or her benefit, provided he or she requests that this be done and agrees to pay any charges of the escrow depository for this service.

[2] FORM

Reservation Instrument [RE Form 612 (Rev. 1/04)]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide § 30.222

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.222 Receipt for Public Report [RE Form 614E (Rev. 6/05)]

[1] Comment--Use of Form

This form is the official receipt that must be signed by each person (1) who executes a reservation agreement under authority of a preliminary public report [*see § 30.221*], or (2) who has made a written offer to purchase or lease a subdivision interest under authority of a final subdivision public report [*see 10 Cal. Code Reg. § 2795.1(a), (c)*; § 30.41[2]]. After obtaining the recipient's signature, the subdivider or his or her agent must retain the receipt for a period of three years from the date of the receipt. Further, the subdivider or agent must make the receipt available for inspection by the Commissioner or his or her designated representative during regular business hours [*10 Cal. Code Reg. § 2795.1(b)*].

For the locations at which official DRE forms may be obtained, see *§ 30.220[1][a]*. This form also may be filled in online and printed out by visiting the forms page at DRE's website at www.dre.ca.gov/forms_sub.htm.

NOTE:
DRE made minor revisions to Form 614E in March 2006; as of June 1, 2006, the new form was not available on the Department's website. The revised form may be found at *10 Cal. Code Reg. § 2795.1(c)*.

[2] FORM

Receipt for Public Report [RE Form 614E (Rev. 6/05)]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide § 30.223

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.223 Amendment/Renewal Application [RE Form 635 (Rev. 6/05)]

[1] Comment

[a] Use of Form

This form is the official DRE application that must be used to request an amendment or renewal of a final public report or conditional public report. Specifically, Parts II (index/checklist) and III (application) of the form are set forth below. Part I, consisting of detailed instructions for the completion and submission of the application, is not reproduced here. The completion and submission procedures are, however, discussed below.

DRE forms may be filled in online and printed out by visiting the forms page at DRE's website at <www.dre.ca.gov/forms_sub.htm>.

In addition to being used for a standard renewal or amendment, this form may serve as a notice of intention and statement that must be filed by a purchaser of five or more lots, units, or memberships [*see 10 Cal. Code Reg. § 2801.5*; *see also* [d], *below*].

For a form that may be used in lieu of this application to expedite the process for obtaining an amended public report under certain circumstances, see *§ 30.224[2]*. For the locations at which official DRE forms appropriate for filing may be obtained, see *§ 30.220[1][a]*.

This form is appropriate for use with respect to standard and common interest subdivisions. For comprehensive coverage of common interest developments, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

[b] Renewal of Final Subdivision Public Report

[i] In General

A final public report remains effective for five years from the date of issuance. The subdivider, owner, or agent may apply for a renewal of the final report. If an application for renewal (this form) is filed, the Commissioner may require the applicant to furnish supplemental information concerning the subdivision [*10 Cal. Code Reg. § 2795.3*].

For a step-by-step guide to submitting applications for renewal of public reports, see *§ 30.142*. For a discussion of the duration of public reports and the effect of their expiration, see *§ 30.41*.

[ii] Filing Fees

A filing fee, in the amount specified by statute, must accompany this application [*Bus. & Prof. Code § 11011(b)(9)* (renewal), (11) (amendment); *10 Cal. Code. Reg. § 2790.1.5(a)(9)* (renewal), (11) (amendment)].

[c] Renewal of Conditional Public Report

A conditional public report remains valid for up to six months. It may be renewed for one additional six-month term if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h)*].

A conditional public report for attached residential condominium units [*see Civ. Code § 783*] consisting of 25 units or more as specified on the approved tentative tract map is valid for up to 30 months. It may be renewed for one additional term of six months if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(i)*].

[d] Notice and Statement by Purchaser of Five or More Interests

A person who purchases or has an option or contract to purchase five or more interests in a subdivision and plans to subsequently sell or lease those interests must obtain a public report before proceeding with the transaction. If a public report was previously issued for the subdivision, the terms "owner" and "subdivider" include any person who owns or has an option or contract to acquire (1) five or more subdivision interests in a subdivision other than a time-share project, or (2) 12 or more time-share estates or time-share uses in a time-share project for sale, lease, or financing under certain circumstances. A public report is necessary if the subdivision interests are acquired from (1) the original recipient of the public report, or (2) a person who succeeded to the interest of the original recipient in five or more subdivision interests in a subdivision other than a time-share project or in 12 or more time-share estates or uses in a time-share project [*10 Cal. Code Reg. § 2801.5*].

Before proceeding with the transaction, the owner or subdivider must obtain a public report that expressly authorizes the sale or lease of the designated interests [*10 Cal. Code Reg. § 2801.5*]. This form is for use in connection with the subsequent sale of lots or parcels that have already been subdivided. It serves as both (1) notice to the Commissioner of the intention to sell or lease the lots, units, or parcels, and (2) the application for the required public report.

[e] Notice of Material Changes

[i] Reporting Requirements and Options

The owner of a subdivision that is the subject of an outstanding public report must immediately report to the Commissioner any relevant details concerning any "material change" in the subdivision itself or in the program for marketing the subdivision interests [*Bus. & Prof. Code § 11012* (report of material changes required only if owner, owner's agent, or subdivider has knowledge or constructive knowledge of change); *10 Cal. Code Reg. § 2800*]. The report should be made on this form. Generally, the DRE will prepare and issue an amended report following the receipt

of a report of material change in a subdivision. However, if the subdivider reports the material change on the DRE form that appears in § 30.224[2], he or she may prepare a proposed amended report as part of the application package that must accompany the filing [*see § 30.224[1]*].

[ii] "Material Change" Defined

A "material change" in a subdivision or in an offering includes, but is not limited to, the following [*10 Cal. Code Reg. § 2800*]:

(1) The sale, conveyance (including a transfer of title in trust), or granting of an option to another to acquire five or more interests in a subdivision other than a time-share project, or 12 or more time-share estates or time-share uses in a time-share project.

(2) A change in the name or organization of the subdividing entity, such as incorporation, corporate dissolution, or change in corporate or fictitious business name.

(3) A change in purchase money handling procedures under *Bus. & Prof. Code § 11013.2* or *11013.4* [*see § 30.42*], including (but not limited to) a change in name or location of escrow or trust account depository or the creation of a blanket lien or encumbrance affecting a lot, parcel, or unit of subdivided land being offered for sale.

(4) A change in methods of marketing or conveyance of subdivision interests, including, but not limited to (a) the use of real property sales contracts, lease-option agreements, or similar marketing instruments, and (b) special sales inducements involving a financial commitment to purchasers by or on behalf of the subdivider, such as buy-back agreements, special interest rates or a short-term basis, and prizes, gifts, or premiums.

(5) The subdivider's inability to fulfill agreements and assurances to purchasers of subdivision interests given by the subdivider to the Commissioner in the application for a public report.

(6) The creation or discovery of latent hazards affecting the subdivision, such as adverse geologic conditions not apparent at the time of issuance of the current public report for the subdivision.

(7) Addition of common areas or common facilities for the use and enjoyment of owners in the subdivision that were not contemplated at the time of issuance of the current public report for the subdivision.

(8) A relocation of easements affecting unsold subdivision interests.

(9) The creation of a district, or the annexation of the subdivision into a district, having the power to tax or levy assessments against real property interests within the subdivision.

(10) An increase of 20 percent or more or a decrease of 10 percent or more in the regular assessment charged by an association against owners in a common interest subdivision over the amount of the regular assessment reflected in the current public report for the subdivision.

(11) Delinquencies in the payment of regular assessments by owners within a common interest subdivision resulting in the receipt by the association of income that is more than 10 percent less than scheduled income from the assessments.

(12) A proposed change in the use for which the subdivision is offered as, for example, from residential to investment, or a proposed change from an offering of the sole and exclusive use of a unit in a common interest subdivision to a program involving the sharing of ownership or use with others as, for example, a time-sharing program.

(13) Changes in the means for furnishing potable water, sewage disposal, and other public services to lots, parcels, or units within the subdivision.

(14) Any change in the configuration of the subdivision interest being offered for sale from the configuration according to the subdivision map or parcel map upon which the current public report for the subdivision was based.

(15) An amendment to the CC&Rs or other governing instruments for the subdivision or for an association of owners of subdivision interests.

(16) A failure by the subdivider as an owner of interests in a common interest subdivision to pay regular assessments when (a) assessments are payable on a monthly basis and the subdivider has failed to pay these assessments for three or more months, or (b) assessments are not payable on a monthly basis and the subdivider has failed to pay these assessments within three months after they become due and payable.

(17) An undertaking by the subdivider to subsidize the costs of operating and maintaining common areas and of providing services in lieu of payment of regular assessments by the subdivider, when the subsidization program does not comply with the subsidization requirements of *10 Cal. Code Reg. § 2792.10*.

[2] FORM

Amendment/Renewal Application [RE Form 635 (Rev. 6/05)]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide § 30.224

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.224 Expedited Amendment Application [RE Form 635A (Rev. 5/03)]

[1] Comment

[a] Use of Form

This form is an "expedited amendment application," which may be used to provide notice of a "material change" in a subdivision and to submit an amended public report for approval. It is an official DRE form and is reproduced here for illustrative purposes only. For information on obtaining and filing the form, see *§ 30.220[1][a]*.

This form may be used in lieu of the standard amendment/renewal application to report a material change in either the subdivision or the marketing program used to sell interests in the subdivision [*see Bus. & Prof. Code § 11012*; *10* Cal. Code Reg. § 2800; *see also § 30.223*] when (1) the subdivider wishes to submit a proposed amended public report along with the application (instead of relying on the DRE to prepare and issue the amended public report), and (2) none of the categories requiring the use of the standard application applies [*see* [b], *below*].

DRE forms may be printed out by visiting the forms page at DRE's website at http://www.dre.cahwnet.gov/forms_sub.htm.

[b] When Expedited Process is Unavailable

The expedited process to which the following form relates is unavailable under certain circumstances. Under those circumstances, the subdivider or owner must file the standard application form that appears in § 30.223[2]. Specifically, the expedited form is not appropriate for use when any of the following applies:

- The applicant is someone other than the person to whom the original or previously-amended public report was issued (except in the case of a change of ownership in a standard subdivision offered with

completed residential structures) [*see* discussion under "Change of Ownership" on p. 4 of this form].

- A budget review is necessary.

- There has been a material change in the homeowners' association's budget.

- The amended public report will involve proposed amendments of the governing instruments of a common interest subdivision for which the Commissioner's consent to a vote of owners is required [*see Bus. & Prof. Code § 11018.7*].

- The public report was originally issued prior to May 5, 1962.

- The amended public report relates to a subdivision offering that is, or is to be, registered with the HUD, Interstate Land Sales Registration Division.

- The public report is for a raw land subdivision.

- The offering involves the use of real property sales contracts, all inclusive deeds of trust, balloon payments, subsidized interest and loan payments, creative financing plans, equity sharing plans, affordable housing financing, or similar financing provisions.

[2] FORM

Expedited Amendment Application [RE Form 635A (Rev. 5/03)]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
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B. Subdivided Lands Act
1. Subdivisions Located Within California

13-30 California Legal Forms--Transaction Guide §§ 30.225-30.229

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.225[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
2. Subdivisions Located Outside of California

13-30 California Legal Forms--Transaction Guide § 30.230

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.230 Registration Application for Out-of-State Subdivision [RE Form 626C Part II (Rev. 1/97)]

[1] Comment

[a] Use of Form

This form must be used for an original, renewal, or amended registration of an out-of-state subdivision with the Department of Real Estate (DRE) [*see* [b], *below*, for description of subdivisions subject to registration requirement]. It is an official DRE form, and is reproduced here for illustrative purposes. Only Part II of the form (the application portion) is set forth below; Part I (the general information sheet) is not reproduced. For the locations at which official DRE forms may be obtained, see *§ 30.220[1][a]*.

When completed, this application form should be submitted to the Department of Real Estate, Subdivisions--Technical Office, 2201 Broadway, P.O. Box 187005, Sacramento, CA 95818. For items and fees that must accompany this application at the time of filing, see the following subsections.

[b] Registration Required for Subdivisions in Other States

A person acting as a principal or agent who intends, in California, to sell or lease any lots, parcels, or interests in a subdivision that is situated outside of California but within the United States, must first register the subdivision with the Real Estate Commissioner and comply with applicable disclaimer requirements [*Bus. & Prof. Code § 10249(a)*; *see* [h], *below* (disclaimer requirements)]. For purposes of these requirements, "subdivision" includes the following [*Bus. & Prof. Code § 10249.1*]:

- Improved or unimproved land or lands that, for purposes of immediate or future sale or lease, are divided or proposed to be divided into five or more lots or parcels.

- Improved or unimproved land(s) in which, for purposes of immediate or future sale or lease, five or more undivided interests are created or proposed to be created.

- Common-interest subdivisions, such as condominiums and planned developments [*see Bus. & Prof. Code § 11004.5(a)-(d), (e), (f)*].

Time-share plans, exchange programs, incidental benefits, and short-term product subject to the Vacation Ownership and Time-Share Act of 2004 [*Bus. & Prof. Code § 11210 et seq.* (effective July 1, 2005)] are not subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11004.5(g)*].

[c] Registration Not Required for Subdivisions Located Outside United States

Only out-of-state subdivisions located in the United States must be registered with the Commissioner [*see Bus. & Prof. Code § 10249(a)*; [b], *above*]. For subdivisions located outside the United States, registration is not required, but the promotional material and contracts for those subdivisions presented to California residents must contain a statutory disclaimer [*Bus. & Prof. Code § 10249.9*; *see* [h], *below*].

[d] Required Form and Contents

The application for registration must be made on this form and include a description of the offering [*Bus. & Prof. Code § 10249(a)*; *see* Boxes 2-7 of form]. Certification by the applicant that the subdivision is in compliance with all applicable requirements of the state or states where the project is located and supporting evidence of that compliance are also required [*Bus. & Prof. Code § 10249(a)*; *see* Box 9 of form and Certification at end of form].

[e] Submission Requirements

The application must be submitted with the required filing fee [*Bus. & Prof. Code §§ 10249(a), 10249.3(b)*] and the subdivider's consent to service of process [*Bus. & Prof. Code §§ 10249(a), 10249.92*]. If someone other than the subdivider files the registration application on behalf of the subdivider, the subdivider's written authorization for that individual to submit the application and to make representations on behalf of the subdivider must also accompany the application [*see* Box 8 and Certification portion of form].

[f] Processing

Once the Commissioner has received the application, he or she must provide the applicant with a notice of completion or notice of deficiency within 10 days. If no notice is provided within that time, the registration will be deemed complete [*Bus. & Prof. Code § 10249(b)*]. Presumably, if a notice of deficiency is issued, the applicant may cure the deficiency and file an amended application accompanied by an additional filing fee [*see Bus. & Prof. Code § 10249.3(b)(3)*].

[g] Term of Registration

The term of the registration is one year unless the Commissioner prescribes a longer term [*Bus. & Prof. Code § 10249.91*]. This form may be used for an amended registration or a renewal registration, as well as for original registration [*see* Box 1 of form].

[h] Disclaimers Required in Promotional Materials/Contracts for Out-of-State Offerings

Specific disclaimers mandated by statute must appear in any promotional or advertising material pertaining to an out-of-state subdivision and in any agreement or contract to lease or purchase presented to a California resident [*see Bus. & Prof. Code §§ 10249.8, 10249.9*]. The precise disclaimer(s) required depends on whether the out-of-state

subdivision is located in the United States or outside the United States. For the required disclaimer language, see *§§ 30.231* (inside United States), 30.232 (outside United States).

[2] FORM

Registration Application for Out-of-State Subdivision [RE Form 626C Part II (Rev. 1/97)]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
2. Subdivisions Located Outside of California

13-30 California Legal Forms--Transaction Guide § 30.231

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.231 Disclaimers Required for Subdivisions Located in Other States [Bus. & Prof. Code § 10249.8]

[1] Comment

[a] Use of Form

This form contains two separate statutory disclaimers required in promotional materials and contracts pertaining to out-of-state subdivision interests offered to California residents. These disclaimers apply to subdivisions located outside California but within the United States [*see Bus. & Prof. Code § 10249.8*]. Subdivisions fitting that description must also be registered with the Commissioner [*Bus. & Prof. Code § 10249(a)*; *see § 30.230* (registration application)]. For a different disclaimer required in connection with offerings in California of out-of-state subdivisions located *outside* the United States, see *§ 30.232*.

[b] Disclaimer Required in Promotional Materials

It is unlawful for a person, in California, to sell or lease or offer for sale or lease lots, parcels, or interests in a subdivision (as defined in *Bus. & Prof. Code § 10249.1*) [*see § 30.230[1][b]*] entirely located outside of California but within the United States, unless any printed material, literature, advertising, or invitation in California relating to that sale, lease, or offer clearly and conspicuously contains the disclaimer first set forth in the form below (designated "DISCLAIMER #1"). The disclaimer must be in at least 10-point type [*Bus. & Prof. Code § 10249.8(a)*].

[c] Disclaimer Required in Contracts or Agreements or Prior to Contact with Subdivider

If a California resident is presented in California with an agreement or contract to lease or purchase an interest in a subdivision situated outside California but within the United States, the second disclaimer in the form below (designated DISCLAIMER #2) must be inserted in at least 10-point type at the top of the first page of that agreement or contract. It must also be initialed by the California resident offeree [*Bus. & Prof. Code § 10249.8(c)*].

If an offer to lease or purchase is not initially made in writing, this same disclaimer must be mailed to the offeree, first-class postage prepaid, at least five days before the offeree attends any scheduled or arranged visit to a location, sales presentation, or contact with a person representing the offeror, when the visit or contact was scheduled or arranged by the offeror or its representative [*Bus. & Prof. Code § 10249.8(b)*].

[2] FORM

Disclaimers Required for Subdivisions Located in Other States [Bus. & Prof. Code § 10249.8]

DISCLAIMER #1

[*Set forth following disclosure clearly and conspicuously, in at least 10-point type, in any printed material, literature, advertising, or invitation (Bus. & Prof. Code § 10249.8(a)):*]

WARNING:
THE CALIFORNIA DEPARTMENT OF REAL ESTATE HAS NOT INSPECTED, EXAMINED, OR QUALIFIED THIS OFFERING.

DISCLAIMER #2

[*In at least 10-point type, set forth following disclosure (1) at top of first page of agreement or contract to lease or purchase, and (2) if initial sales offering was not in writing, in written instrument delivered to offeree prior to offeree's visit to location, sales presentation, or other contact with person representing offeror (Bus. & Prof. Code § 10249.8(b), (c)):*]

WARNING:
THE CALIFORNIA DEPARTMENT OF REAL ESTATE HAS NOT QUALIFIED, INSPECTED, OR EXAMINED THIS OFFERING, INCLUDING, BUT NOT LIMITED TO, THE CONDITION OF TITLE, THE STATUS OF BLANKET LIENS ON THE PROJECT (IF ANY), ARRANGEMENTS TO ASSURE PROJECT COMPLETION, ESCROW PRACTICES, CONTROL OVER PROJECT MANAGEMENT, RACIALLY- DISCRIMINATORY PRACTICES (IF ANY), TERMS, CONDITIONS, AND PRICE OF THE OFFER, CONTROL OVER ANNUAL ASSESSMENTS (IF ANY), OR THE AVAILABILITY OF WATER, SERVICES, UTILITIES OR IMPROVEMENTS. IT MAY BE ADVISABLE FOR YOU TO CONSULT AN ATTORNEY OR OTHER KNOWLEDGEABLE PROFESSIONAL WHO IS FAMILIAR WITH REAL ESTATE AND DEVELOPMENT LAW IN THE STATE WHERE THIS SUBDIVISION IS SITUATED.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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2. Subdivisions Located Outside of California

13-30 California Legal Forms--Transaction Guide § 30.232

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.232 Disclaimer Required for Subdivisions Located Outside United States [Bus. & Prof. Code § 10249.9]

[1] Comment

[a] Use of Form

This form is a disclaimer that must be furnished by a subdivider to California residents in connection with any offering in California to sell or lease any interest in a subdivision located *outside* the United States [*see Bus. & Prof. Code § 10249.9*]. The disclaimer requirement is the only one imposed by the Commissioner on offerings in California of subdivision interests located *outside* of the United States. Out-of-state subdivisions located *inside* the United States must register with the Commissioner [*Bus. & Prof. Code § 10249*; *see § 30.230* (registration requirements and application)] and comply with separate disclaimer requirements [*Bus. & Prof. Code § 10249.8*; *see § 30.231*].

[b] When and Where Disclaimer is Required

It is unlawful for a person in California to sell, lease, or offer to sell or lease, a lot, parcel, or interest in a subdivision located outside the United States, unless the printed material, literature, advertising, or invitation in California that is related to the sale, lease, or offer of sale or lease clearly and conspicuously contains the disclaimer prescribed by statute and set forth in the form below. The disclaimer must be set forth in at least 10-point capital type [*Bus. & Prof. Code § 10249.9(a)*].

If an offer on property described above is not initially made in writing, the same disclaimer set forth in the form below must be mailed to the offeree, first-class postage prepaid, at least five days before the offeree attends any scheduled or arranged visit to a location, sales presentation, or contact with a person representing the offeror, when the visit or contact was scheduled or arranged by the offeror or its representative [*Bus. & Prof. Code § 10249.9(b)*].

If a California resident is presented in California with an agreement or contract to lease or purchase any interest in a

subdivision situated outside the United States, a copy of the disclaimer set forth in this form must be inserted in at least 10-point type at the top of the first page of that agreement or contract. It must also be initialed by the California resident offeree [*Bus. & Prof. Code § 10249.9(c)*].

[2] FORM

Disclaimer Required for Subdivisions Located Outside United States [Bus. & Prof. Code § 10249.9]

WARNING:

THE CALIFORNIA DEPARTMENT OF REAL ESTATE HAS NOT EXAMINED THIS OFFERING, INCLUDING, BUT NOT LIMITED TO, THE CONDITION OF TITLE, THE STATUS OF BLANKET LIENS ON THE PROJECT (IF ANY), ARRANGEMENTS TO ASSURE PROJECT COMPLETION, ESCROW PRACTICES, CONTROL OVER PROJECT MANAGEMENT, RACIALLY-DISCRIMINATORY PRACTICES (IF ANY), TERMS, CONDITIONS, AND PRICE OF THE OFFER, CONTROL OVER ANNUAL ASSESSMENTS (IF ANY), OR THE AVAILABILITY OF WATER, SERVICES, UTILITIES OR IMPROVEMENTS. IT MAY BE ADVISABLE FOR YOU TO CONSULT AN ATTORNEY OR OTHER KNOWLEDGEABLE PROFESSIONAL WHO IS FAMILIAR WITH REAL ESTATE AND DEVELOPMENT LAW IN THE COUNTRY WHERE THIS SUBDIVISION IS SITUATED.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Subdivided Lands Act
2. Subdivisions Located Outside of California

13-30 California Legal Forms--Transaction Guide §§ 30.233-30.249

AUTHOR: Reviewed by Edward L. Shaffer

[Reserved]

§§ 30.233[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
3. Miscellaneous

13-30 California Legal Forms--Transaction Guide § 30.250

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.250 Notice of Blanket Encumbrance

[1] Comment--Use of Form

This form is a statutory notice of blanket encumbrance. It must be signed by a prospective purchaser or lessee (if the lease term is to exceed five years) of a lot, parcel, or unit of a subdivision that (1) is subject to a blanket encumbrance that does not contain a release clause, and (2) is not subject to the requirements of the SLA [*Civ. Code § 1133(a)*]. A subdivider or a subdivider's agent or representative may not directly or indirectly sell or lease for a term exceeding five years a lot, parcel, or unit in a subdivision subject to a blanket encumbrance and not governed by the SLA until this notice requirement has been satisfied [*Civ. Code § 1133(a)*].

For purposes of the notice requirement, a "subdivision" is improved or unimproved land that is divided or proposed for division into two or more lots, parcels, or units, for immediate or future sale, lease, or financing [*Civ. Code § 1133(b)*]. This definition specifically includes the following: condominium projects [*see Civ. Code § 1351(f)*]; community apartment projects [*see Civ. Code § 1351(d)*]; stock cooperatives [*see Civ. Code § 1351(m)*]; and limited-equity housing cooperatives [*Civ. Code § 1133(b)*; *see Civ. Code § 1351(m)*]. For a complete discussion of these types of projects, see Ch. 33A, *Time-Share Projects* , through Ch. 34, *Condominiums* .

The failure of a buyer or lessee to sign this notice will not invalidate any grant, conveyance, lease, or encumbrance [*Civ. Code § 1133(c)*]. However, any person who willfully violates this notice requirement will be liable to purchasers (but not lessees) for actual damages, and will be guilty of a public offense punishable by a fine of up to $500 [*Civ. Code § 1133(d)*]. In an action to enforce the liability or fine, the prevailing party will be awarded reasonable attorneys' fees [*Civ. Code § 1133(d)*].

[2] FORM

Notice of Blanket Encumbrance

NOTICE OF BLANKET ENCUMBRANCE

[BUYER *or* LESSEE] IS AWARE OF THE FACT THAT THE LOT, PARCEL, OR UNIT THAT_____[HE *or* SHE] IS PROPOSING TO [PURCHASE *or* LEASE] IS SUBJECT TO A DEED OF TRUST, MORTGAGE, OR OTHER LIEN KNOWN AS A "BLANKET ENCUMBRANCE."

IF [BUYER *or* LESSEE] [PURCHASES *or* LEASES] THIS LOT, PARCEL, OR UNIT,_____[HE *or* SHE] COULD LOSE THAT INTEREST THROUGH FORECLOSURE OF THE BLANKET ENCUMBRANCE OR OTHER LEGAL PROCESS EVEN THOUGH [BUYER *or* LESSEE] IS NOT DELINQUENT IN_____[HIS *or* HER] PAYMENTS OR OTHER OBLIGATIONS UNDER THE MORTGAGE, DEED OF TRUST, OR LEASE.
_____ Dated:

_____ [BUYER *or* LESSEE]
_____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingBlanket & Third MortgagesReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30 SUBDIVISION REGULATION
PART IV. FORMS
B. Subdivided Lands Act
3. Miscellaneous

13-30 California Legal Forms--Transaction Guide § 30.251

AUTHOR: Reviewed by Edward L. Shaffer

§ 30.251 Notice of Special Tax

[1] Comment

[a] Use of Form

This form is a notice of a special tax levied under the Mello-Roos Community Facilities Act (Mello-Roos) [*see Gov. Code § 53311 et seq.*; *see also § 30.24[2]*]. If a lot, parcel, or unit of a subdivision is subject to such a special tax, the subdivider or the subdivider's agent or representative must provide this notice to a prospective (1) purchaser of the lot, parcel, or unit, or (2) lessee of the lot, parcel, or unit if the proposed lease term exceeds five years [*Gov. Code § 53341.5(a)*]. The subdivider must give this notice before the lot, parcel, or unit is sold or leased and before the prospective purchaser or lessee signs a contract of purchase, a deposit receipt, or any substantially equivalent document used in a rental transaction [*Gov. Code § 53341.5(a)*]. The prospective purchaser or lessee must sign the notice [*Gov. Code § 53341.5(a)*].

[b] Required Contents

The notice must be in substantially the form specified by *Government Code Section 53341.5* and must be printed in at least eight-point type. However, the notice may be modified as needed to clearly and accurately (1) describe the tax structure and other characteristics of a district created before January 1, 1993, or (2) consolidate information about the tax structure and other characteristics of two or more districts that levy or are authorized to levy special taxes with respect to the lot, parcel, or unit [*Gov. Code § 53341.5(a)*].

[c] Termination of Sale Agreement

The purchaser may terminate an agreement for the sale of a lot, parcel, or unit that is subject to a special tax levied under Mello-Roos. The purchaser must exercise his or her termination rights within three days after personal delivery of

the following notice or five days after delivery by deposit in the mail. A purchaser who wishes to terminate his or her agreement must deliver a written termination notice to the owner, subdivider, or agent [*Gov. Code § 53341.5(c)*].

[d] Effect of Noncompliance

Neither the subdivider's failure to furnish this notice to the buyer or lessee nor the buyer's or lessee's failure to sign the notice of special tax will invalidate any grant, conveyance, lease, or encumbrance [*Gov. Code § 53341.5(d)*]. However, willful failure to comply with the notice requirements will subject the subdivider to liability to a purchaser for actual damages and to a fine in an amount not to exceed $500. In any action to enforce the liability or fine, the prevailing party will be awarded reasonable attorneys' fees [*Gov. Code § 53341.5(e)*].

[2] FORM

Notice of Special Tax

NOTICE OF SPECIAL TAX

COMMUNITY FACILITIES DISTRICT NO. _____ COUNTY OF _____, CALIFORNIA

TO: THE PROSPECTIVE PURCHASER OF THE REAL PROPERTY KNOWN AS: [*describe property*]

THIS IS A NOTIFICATION TO YOU PRIOR TO YOUR ENTERING INTO A CONTRACT TO PURCHASE THIS PROPERTY. THE SELLER IS REQUIRED TO GIVE YOU THIS NOTICE AND TO OBTAIN A COPY SIGNED BY YOU TO INDICATE THAT YOU HAVE RECEIVED AND READ A COPY OF THIS NOTICE.

(1) This property is subject to a special tax, that is in addition to the regular property taxes and any other charges, fees, special taxes, and benefit assessments on the parcel. It is imposed on this property because it is a new development, and is not necessarily imposed generally upon property outside of this new development. If you fail to pay this tax when due each year, the property may be foreclosed upon and sold. The tax is used to provide public facilities or services that are likely to particularly benefit the property. YOU SHOULD TAKE THIS TAX AND THE BENEFITS FROM THE FACILITIES AND SERVICES FOR WHICH IT PAYS INTO ACCOUNT IN DECIDING WHETHER TO BUY THIS PROPERTY.

(2) The maximum special tax that may be levied against this parcel to pay for public facilities is $_____ during the _____- _____ tax year. This amount will increase by _____ percent per year after that (if applicable). The special tax will be levied each year until all of the authorized facilities are built and all special tax bonds are repaid, but in any case not after the _____- _____ tax year. An additional special tax will be used to pay for ongoing service costs, if applicable. The maximum amount of this tax is _____ dollars ($_____) during the _____- _____tax year. This amount may increase by _____ percent, if applicable, and that part may be levied until the _____- _____ tax year (or forever, as applicable).

(3) The authorized facilities which are being paid for by the special taxes, and by the money received from the sale of bonds which are being repaid by the special taxes, are: [*list facilities*].

These facilities may not yet have all been constructed or acquired and it is possible that some may never be constructed or acquired.

In addition, the special taxes may be used to pay for costs of the following services: _____.

YOU MAY OBTAIN A COPY OF THE RESOLUTION OF FORMATION THAT AUTHORIZED CREATION OF THE COMMUNITY FACILITIES DISTRICT, AND THAT SPECIFIES MORE PRECISELY HOW THE SPECIAL TAX IS APPORTIONED AND HOW THE PROCEEDS OF THE TAX WILL BE USED, FROM THE [*specify jurisdiction*] BY CALLING [*telephone number*]. THERE MAY BE A CHARGE FOR THIS DOCUMENT NOT TO EXCEED THE REASONABLE COST OF PROVIDING THE DOCUMENT.

[I *or* WE] ACKNOWLEDGE THAT [I *or* WE] HAVE READ THIS NOTICE AND RECEIVED A COPY OF THIS NOTICE PRIOR TO ENTERING INTO A CONTRACT TO PURCHASE OR SIGNING A DEPOSIT RECEIPT WITH RESPECT TO THE ABOVE-REFERENCED PROPERTY. [I *or* WE] UNDERSTAND THAT [I *or* WE] MAY TERMINATE THE CONTRACT TO PURCHASE OR DEPOSIT RECEIPT WITHIN THREE DAYS AFTER RECEIVING THIS NOTICE IN PERSON OR WITHIN FIVE DAYS AFTER IT WAS DEPOSITED IN THE MAIL BY GIVING WRITTEN NOTICE OF THAT TERMINATION TO THE OWNER, SUBDIVIDER, OR AGENT SELLING THE PROPERTY.

[*Add signature blocks for all purchasers or lessees*]

_____ Dated:

_____ [*signature of purchaser or lessee*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawSubdivisionsState RegulationTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30A BASIC CONSTRUCTION FINANCING

14-30A California Legal Forms--Transaction Guide 30A.syn

§ 30A.syn Synopsis to Chapter 30A: BASIC CONSTRUCTION FINANCING

§ 30A.01 California Statutes

§ 30A.02 Federal Sources

[1] Federal Statutes

[2] Federal Regulations

§§ 30A.03-30A.04 [Reserved]

§ 30A.05 Law Reviews

§ 30A.06 Annotations

§ 30A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 30A.08-30A.09 [Reserved]

§ 30A.10 Construction Loans Generally

§ 30A.11 Long-Term Financing

[1] Permanent or Take-Out Loans

[2] Standby Commitments

[3] Long-Term Construction Loans

§ 30A.12 Relationship Between Construction and Permanent Loans

§ 30A.13 Sources and Regulation of Loans

§ 30A.14 Subordination of Purchase Money Deed of Trust

§ 30A.15 Marks-Foran Residential Rehabilitation Act of 1973

§ 30A.16 Liability of Construction Lender

[1] Defects in Construction

[2] Bonded Stop Notices and Mechanics' Liens

§ 30A.17 Availability of Purchase Money Protection

§§ 30A.18-30A.99 [Reserved]

§ 30A.100 Facts

Scope

§ 30A.101 Documents

Scope

§§ 30A.102-30A.109 [Reserved]

§ 30A.110 Governmental Requirements

Scope

§ 30A.111 Miscellaneous Considerations

Scope

§§ 30A.112-30A.119 [Reserved]

§ 30A.120 Obtaining Commitment for Permanent Loan

Scope

§ 30A.121 Obtaining Construction Loan

Scope

§ 30A.122 Disbursing Construction Loan Funds

Scope

§§ 30A.123-30A.129 [Reserved]

§ 30A.130 Preparing Financial Reports

Scope

§ 30A.131 Satisfying Ongoing Financial Obligations

Scope

§§ 30A.132-30A.199 [Reserved]

§ 30A.200 Approval (Commitment) for Variable Interest Rate Loan

[1] Comment

[a] Use of Form

[b] Written Loan Commitments

[2] FORM

Approval (Commitment) for Variable Interest Rate Loan

§ 30A.201 Construction (Building) Loan Agreement

[1] Comment

[a] Use of Form

[b] Loan Conditions

[i] Disbursement of Proceeds by Lender

[ii] Miscellaneous Requirements

[2] FORM

Construction (Building) Loan Agreement

§ 30A.202 Construction Loan Escrow Instructions

[1] Comment--Use of Form

[2] FORM

Construction Loan Escrow Instructions

§ 30A.203 Promissory Note Evidencing Construction Loan

[1] Comment--Use of Form

[2] FORM

Promissory Note Evidencing Construction Loan

§ 30A.204 Multifamily Deed of Trust, Assignment of Rents, and Security Agreement for Construction Loan Agreement

[1] Comment

[a] Use of Form

[b] California Requirements Governing Security Instruments

[c] Security Agreement

[d] Assignment of Rents

[2] FORM

Multifamily Deed of Trust, Assignment of Rents, and Security Agreement for Construction Loan Agreement



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30A BASIC CONSTRUCTION FINANCING

14-30A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter considers the terms and methods of obtaining "construction financing," that is, the loans that are typically used to finance improvements to real property. Specifically, it focuses on short-term or interim construction loans, which finance actual construction. It also considers permanent or long-term loans, which pay off the construction costs after completion of the project. Of course, the lender will determine what types of financing will be offered to a prospective developer. However, a developer's attorney can use this chapter to make recommendations concerning the types of financing that should be pursued and to participate in negotiations concerning loan terms, rates, conditions, and related matters.

The Legal Background presents an overview of the laws and practices relevant to construction financing. The Transaction Guide sets forth a guide to sources of construction financing and a step-by-step procedural guide to obtaining financing. Finally, the forms section contains several construction loan documents prepared by a major construction lender.

This chapter does not reproduce permanent loan documents, because permanent commitments are becoming increasingly difficult to obtain, as discussed throughout this Legal Background. Long-term real estate loans are discussed in detail in Ch. 25, *Real Estate Loans* . Although this chapter does not repeat that coverage, it does contain numerous cross-references to relevant Ch. 25 discussions.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30A BASIC CONSTRUCTION FINANCING
PART I. RESEARCH GUIDE
A. Primary Sources

14-30A California Legal Forms--Transaction Guide § 30A.01

§ 30A.01 California Statutes

Insurance.

Hazard insurance on real property securing a loan. *Civ. Code § 2955.5*.

State banks.

Installment loans on real estate. *Fin. Code § 1227(a), (b).*

Installment loans on agricultural land. *Fin. Code § 1227(d).*

Real estate construction loans. *Fin. Code § 1227(f).*

State savings and loan associations.

Real estate loans. *Fin. Code §§ 7500-7509.*

Inspection and appraisal of security. *Fin. Code § 7500.*

Note or instrument of obligation. *Fin. Code § 7501*.

Deed of trust or mortgage. *Fin. Code § 7502.*

Definitions. *Fin. Code § 7504(a).*

Adjustments to home loans. *Fin. Code § 7504(b).*

Loans on real property. *Fin. Code § 7505.*

Residential real estate loans secured by reliance on borrower's credit standing and projected future income, or by other assurances for repayment. *Fin. Code § 7505.5*.

Limited authority to make loans that are not otherwise authorized under applicable laws. *Fin. Code § 7507*.

Maximum loan-to-value ratios. *Fin. Code § 7509*.

Liability.

Immunity of lender from liability for defects in construction. *Civ. Code § 3434*.

"Cal-Vet" loan programs.

Farm and Home Purchase Act of 1943. *Mil. & Vet. Code § 985 et seq.*

Farm and Home Purchase Act of 1974. *Mil. & Vet. Code § 987.50 et seq.*



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30A BASIC CONSTRUCTION FINANCING
PART I. RESEARCH GUIDE
A. Primary Sources

14-30A California Legal Forms--Transaction Guide § 30A.02

§ 30A.02 Federal Sources

[1] Federal Statutes

Department of Housing and Urban Development (HUD).

Mortgage insurance for residential dwellings. *12 U.S.C. § 1709(b)*.

Mortgage insurance for rental housing projects. *12 U.S.C. § 1713*.

Mortgage insurance by Department of Veterans Affairs. *38 U.S.C. §§ 3701-3736*.

Federal chartered savings and loan associations.

Loans secured by real property. *12 U.S.C. § 1464(c)*.

[2] Federal Regulations

Federal Housing Administration (FHA).

Approval of mortgagees. *24 C.F.R. §§ 203.1-203.7*.

Supervised mortgagees. *24 C.F.R. § 203.3*.

Application and commitment. *24 C.F.R. §§ 203.1-203.7*.

Certification of appraisal amount. *24 C.F.R. § 203.15*.

Eligible mortgages. *24 C.F.R. §§ 203.17-203.31*.

Maximum mortgage amounts. *24 C.F.R. § 203.18*.

Maximum interest rate. *24 C.F.R. § 203.20*.

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Dwelling unit. *12 C.F.R. § 541.10*.

Improved nonresidential real estate. *12 C.F.R. § 541.15*.

Improved residential real estate. *12 C.F.R. § 541.16*.

Residential real estate. *12 C.F.R. § 541.23*.

Single-family dwelling. *12 C.F.R. § 541.25*.

Unimproved real estate. *12 C.F.R. § 541.27*.

Real estate loans. 12 C.F.R., Part 560.

General lending and investment powers. *12 C.F.R. § 560.30*.

Adjustments to home loans. *12 C.F.R. § 560.35*.

Lending limitations. *12 C.F.R. § 560.93*.

Real estate lending standards. *12 C.F.R. §§ 560.100, 560.101*.



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§§ 30A.03[Reserved]



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B. Secondary Sources

14-30A California Legal Forms--Transaction Guide § 30A.05

§ 30A.05 Law Reviews

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§ 30A.06 Annotations

Financing Agency's Liability to Purchaser of New Home or Structure for Consequences of Construction Defects, 20 A.L.R. 5th 499 (1994) .

Annot., Promissory Estoppel of Lending Institution Based on Promise to Lend Money, 18 A.L.R. 5th 307 (1994) .

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14-30A California Legal Forms--Transaction Guide § 30A.07

§ 30A.07 Text References

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Ch. 104, *Building Contracts* .

Ch. 555, *Trust Deeds and Real Property Mortgages* .

California Legal Forms

Ch. 23, *Real Property Sales Agreements* .

Ch. 25, *Real Estate Loans* .

California Points and Authorities

Ch. 230, *Trust Deeds and Real Property Mortgages* .

California Real Estate Law and Practice

Ch. 420, *Financing Construction and Development* .

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Powell On Real Property

Ch. 84B, *Liability of Construction Lenders to Purchasers of Defective Homes* .

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Vol. 6, Ch. IX *Torts*, § 1279.



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§§ 30A.08[Reserved]



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§ 30A.10 Construction Loans Generally

A construction loan is a short-term or interim loan of money to be used for construction of improvements on real property and for incidental expenses [*see Pollock v. Tiano (1967) 253 Cal. App. 2d 183, 186, 61 Cal. Rptr. 235]* . The loan is made on the basis of plans and specifications, and is necessary because construction costs must be paid when accrued and before completion of construction [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender)]. Construction loans are repaid with the proceeds from permanent loans [*see § 30A.11[1]*].

A "construction lender" is any mortgagee or beneficiary under a deed of trust that lends funds for the complete or partial payment of works of improvement [*see Civ. Code § 3087*]. The lender's security will be the first lien on the completed property [*see § 30A.14*].

Typical features of a construction loan include the following [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* , Part C (Matthew Bender)]:

- A term of up to three years, with maturity occurring shortly after the completion of construction;
- A relatively high interest rate, which is based on the lender's expenses and risks [*see § 30A.12*];
- Disbursement of loan proceeds on the completion of specified stages or percentages of construction (progress payments), with interest accruing only on the amount advanced; and
- Use of the proceeds to pay for most or all construction costs, including labor, materials, loan interest, appraisal costs, incidental fees, and title insurance premiums.

For a discussion of long-term construction loans whose terms may be extended at the option of the borrowers, see *§ 30A.11[3]*.

Any contract subject to the California Statute of Frauds is invalid unless the contract, or some note or memorandum of

it, is in writing and subscribed by the party to be charged or by the party's agent [*Civ. Code § 1624*]. A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than $100,000, is subject to the Statute of Frauds if (1) it is made by a person engaged in the business of lending or arranging for the lending of money or extending credit, and (2) it is not primarily for personal, family, or household purposes. A contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units is deemed to be for personal, family, or household purposes [*Civ. Code § 1624(a)(7)*], and therefore is not subject to the Statute of Frauds. For further discussion, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

As a condition to making a construction loan, the construction lender may insist that the developer first obtain a written commitment for a permanent loan [*see § 30A.11[1]*]. However, it is more likely that at this early stage the construction lender will be expected to obtain only conditional permanent financing [*see § 30A.11[2]* or special interim financing that can be extended for a relatively long term [*see § 30A.11[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsRequirementsGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalities



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§ 30A.11 Long-Term Financing

[1] Permanent or Take-Out Loans

A "permanent" or "take-out" loan is a long-term loan, payable in installments over a period of several years, which is used to "take out" or pay off an interim construction loan. Although the loan is not made until construction has been completed, a permanent lender may make a written commitment to make the loan before the construction lender proceeds with a construction loan [*see § 30A.10*]. That contractual commitment, which is made in consideration of a fee and is contingent on the satisfaction of specified conditions [*see § 30A.12*], serves as a guarantee that the permanent loan will be made (and the construction loan repaid) if the construction project is completed according to specifications and is free from mechanics' liens [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender)]. In a subdivision, the home buyer usually obtains the permanent loan while the subdivider or builder makes the construction loan [*Jones v. Sacramento Sav. & Loan Asso. (1967) 248 Cal. App. 2d 522, 527, 56 Cal. Rptr. 741]* .

These written permanent commitments were almost always required until the late 1970s and early 1980s, when permanent commitments became quite difficult to obtain because of fluctuating interest rates. Now most construction projects go forward without written permanent commitments. A construction loan that is not conditioned on receipt of a permanent commitment is referred to in the industry as an "uncovered" loan [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender)]. For discussion of alternatives to permanent commitments and uncovered loans, see *§ 30A.11[2], [3]*.

Most permanent commitments offered today do not establish a fixed rate of interest, but instead specify an index that will be used to determine the rate if and when the loan is funded. This commitment assures the borrower of permanent funding without giving a prior indication of its cost and therefore protects the lender from unstable interest rates [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender)].

If the attorney's client is unable to obtain permanent financing before commencing construction, the attorney should consult Ch. 25, *Real Estate Loans* , for a discussion of long-term real estate loans.

[2] Standby Commitments

If high interest rates or other conditions make it undesirable or impossible for a developer to obtain a permanent loan commitment when the developer wishes to commence construction, the construction lender may agree to accept a standby commitment in lieu of a standard permanent loan commitment. A lender who makes a standby commitment agrees to provide permanent financing on the completion of construction if the developer is unable to obtain alternative (more attractive) financing in the meantime. The lender will charge a fee for this arrangement and, if the loan is made, will charge an interest rate that is higher than the rate that would have been charged for a standard permanent loan [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender)].

As a practical matter, lenders are frequently hesitant to make standby commitments because of the risk that fluctuating interest rates will cause the borrower to accept the funding when the offered rate is relatively low. However, some lenders will make a standby commitment, collect high commitment fees, and avoid the risk of unfavorable interest rates by identifying, in the commitment documents, an index which will be used to compute a competitive interest rate at the time of funding [*see § 30A.11[1]*].

[3] Long-Term Construction Loans

A long-term construction loan is an interim financing device and an alternative to the standard construction loan. These "long-term" loans actually have a short initial term that rarely exceeds 24 months; however, the borrower may elect to extend the term to up to five (or, occasionally, as many as 15) years by paying annual or semi-annual extension fees. This term and its optional extensions provide the borrower with additional time in which to obtain permanent funding. Although the interest rate is usually tied to an index, the borrower may be permitted to fix the rate for specified periods [*see* Matkins, Loan Commitments and Negotiations, First Annual Real Property Institute: Capital Formation in Real Property Development (Cal. C.E.B. Program Material, Feb. 1984)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction Loans



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§ 30A.12 Relationship Between Construction and Permanent Loans

Assuming that a developer is able to obtain both a construction loan and a permanent loan commitment at the outset of the project, the two loans may be made by the same lender, either as separate loans or as a combination loan. However, in most cases the two loans are obtained from different lenders, with the construction lender's interest in the improvements terminating once the construction loan is repaid with the proceeds from the permanent loan. Thus, the construction lender's security consists of the permanent loan commitment. Because that commitment will inevitably be contingent on the satisfaction of certain conditions, such as the timely completion of construction in accordance with the plans and specifications, the lender must protect its security by seeing that the conditions can and will be satisfied. To minimize the risks associated with these conditions, the construction lender will attempt to make the conditions subject to its control, rather than the control of the permanent lender or a third party (such as an architect or an engineer).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 30A.13 Sources and Regulation of Loans

The major sources for construction loans are savings and loan associations and commercial banks. Permanent loan lenders include savings and loans, life insurance companies, and mutual savings banks. Other institutional lenders such as pension funds and foundations rarely enter the construction loan field because they usually maintain lending offices only in one or more major cities and do not have adequate staffs available in local communities to supervise construction financed by these loans [*see* California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* , Part B (Sources of Financing) (Matthew Bender)].

A number of significant governmental factors influence the terms and conditions of available loans. For example, California banks and savings and loan associations are directly regulated by the California Financial Code [*see Fin. Code §§ 1227, 7500-7507*] and the regulations of the Federal Home Loan Bank Board and the Board of Governors of the Federal Reserve System [*see 12 U.S.C. §§ 1421-1470*]. For an outline of the restrictions applicable to construction and permanent loans, see *§ 30A.120*.

Various governmental loan assistance programs are also available. It is often to the developer's advantage to qualify for Veterans Administration or Federal Housing Administration financing, since this may enhance the marketability of the project, especially residential subdivisions. For the procedure required to qualify for government-insured financing, see *§ 30A.110*. These programs are discussed in detail in California Real Estate Law and Practice, Ch. 101, *Conventional Financing (Loans)* and Ch. 420, *Financing Construction and Development* (Matthew Bender).

For additional discussion of long-term real estate loans, see Ch. 25, *Real Estate Loans* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawRegulatory AgenciesFederal Home Loan Bank SystemReal Property LawFinancingConstruction LoansReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingState Regulation



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§ 30A.14 Subordination of Purchase Money Deed of Trust

A commercial bank will [*Fin. Code § 1227*; *12 U.S.C. § 371(a)*], and any other type of construction lender may, insist that its loan be secured by a first lien, or in other words a first deed of trust, on the property on which the financed project is to be constructed. Thus, the construction lender must confirm that any purchase money deed of trust given for the land on which the project is to be constructed can properly be subordinated to the deed of trust securing its construction loan [*see* Ch. 23, *Real Property Sales Agreements*].

To be specifically enforceable, a subordination provision contained in a purchase money deed of trust must specify enough terms of the subordinating loan to minimize the risk that the new loan will impair or destroy the seller's security [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329]* . Those terms should include all of the following [*see Roskamp Manley Associates, Inc. v. Davin Development & Investment Corp. (1986) 184 Cal. App. 3d 513, 518, 229 Cal. Rptr. 186* ; *see also* Ch. 25B, *Subordination, Assumption, and Assignment*]:

- The maximum principal amount;
- The maximum interest rate;
- The term (i.e., maturity date) of the loan;
- Maximum loan fees and costs, and whether they are to be paid from the principal amount of the subordinating loan;
- Repayment terms, including any provisions for balloon payments;
- Prepayment terms, such as maximum penalties, if any;
- Restrictions on the use of the loan proceeds; and
- Specifics as to any commitment for "take-out" or permanent financing after completion of the

construction or development.

A construction loan that does not comply with the specified terms will not gain priority over the purchase money deed of trust and be a first lien on the security property [*Jones v. Sacramento Sav. & Loan Asso. (1967) 248 Cal. App. 2d 522, 526, 56 Cal. Rptr. 741]* . When the proceeds of the construction loan are used for purposes not allowed by the subordination provisions of the purchase money deed of trust, the purchase money deed of trust may not be subordinated to the construction loan [*Miller v. Citizens Sav. & Loan Asso. (1967) 248 Cal. App. 2d 655, 663, 56 Cal. Rptr. 844]* . However, the lender may receive an equitable lien, with priority over the purchase money deed of trust, for the portion of loan funds actually used for the permitted purposes [*Jones v. Sacramento Sav. & Loan Asso. (1967) 248 Cal. App. 2d 522, 529, 56 Cal. Rptr. 741]* , or the loan may be held to have lost priority only as to the amounts that were misappropriated [*Miller v. Citizens Sav. & Loan Asso. (1967) 248 Cal. App. 2d 655, 665, 56 Cal. Rptr. 844]* . For a complete discussion of subordination agreements, see Ch. 25B, *Subordination, Assumption, and Assignment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien Priorities



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§ 30A.15 Marks-Foran Residential Rehabilitation Act of 1973

The Marks-Foran Residential Rehabilitation Act of 1973 [*Health & Safety Code § 37910 et seq.*] authorizes cities and counties, housing authorities, and redevelopment agencies to conduct programs for the financing of residential rehabilitation of housing. Under the Act, the local entities must report directly to the California Debt and Investment Advisory Commission [*Health & Safety Code § 37913*]. Loans for residential rehabilitation must be repaid within the lesser of 40 years or four-fifths of the economic life of the property [*Health & Safety Code § 37922(d)(2)*]. The maximum amount of all loans for residential rehabilitation under the Act, exclusive of acquisition costs or refinancing, is $45,000 for each dwelling unit and for each commercial unit. However, financing by a redevelopment agency may exceed that limitation with respect to loans for rehabilitation of one- to four-unit dwellings, provided the total amount financed, including any amount loaned for acquisition or refinancing, does not exceed the lesser of $80,000 per dwelling unit or 90 percent of the after-rehabilitation value [*see Health & Safety Code § 37922(d)(1)*], regardless of whether the loan is or is not insured or guaranteed [*Health & Safety Code § 37922(d)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingState ProgramsReal Property LawFinancingState Regulation



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§ 30A.16 Liability of Construction Lender

[1] Defects in Construction

Under *Civ. Code § 3434*, if a loan is or may be used by the borrower to finance the design, manufacture, construction, repair, modification, or improvement of real property for sale or lease to others, the lender is not liable to third persons for any loss or damage resulting from the borrower's failure to use due care in performing the above activities, or for any loss or damage caused by any defect in the property. However, the lender may be liable if the loss or damage results from acts that are outside the scope of a lender's activities, or if the lender has been a party to misrepresentations with respect to the property [*Civ. Code § 3434*].

Before the enactment of *Civ. Code § 3434*, the California Supreme Court had held a construction lender liable for construction defects because the lender's actions went beyond those of a mere lender of money. Specifically, the lender had the right to exercise extensive control over the enterprise and received substantial fees for making the loans, a 20 percent capital gain for warehousing the land, and protection from loss of profits if individual home buyers sought permanent financing elsewhere. Consequently, the lender was found to be an "active participant in a home construction enterprise" and held to have a duty to the purchasers of the homes to exercise reasonable care to protect them from damages caused by major structural defects, but not to holders of second deeds of trust on the property [*Connor v. Great Western Sav. & Loan Asso. (1968) 69 Cal. 2d 850, 864, 866-870, 73 Cal. Rptr. 369, 447 P.2d 609]* . Although that decision has been overruled at least in part by *Civ. Code § 3434*, it does provide examples of acts that are beyond the scope of a typical lender's activities and which would therefore appear to subject the lender to liability under *Civ. Code § 3434*.

[2] Bonded Stop Notices and Mechanics' Liens

Because a construction loan is based on the value of improvements not yet constructed, the construction lender must take precautions and exercise controls to insure that the general building contractor is able to complete construction of the project on which it has loaned its money. These precautions and controls are ordinarily contained in a construction (or building) loan agreement [*see § 30A.201*] executed by the landowner-borrower, the general contractor, and the lender at the time the construction loan is made. In addition to giving the lender the right to inspect the project as work progresses and to control disbursement of the loan proceeds, the agreement usually provides that if construction work is

discontinued before the project is fully completed, any funds in the loan account not due or payable as progress payments to the contractor will revert to the lender and be credited toward repayment of the construction loan. Thus, if a $100,000 construction loan were payable to the contractor in five equal progress payments, each due as a specified stage of construction was completed, and the contractor abandoned the project after he or she had finished the fourth stage of construction, $20,000 should remain in the loan account, revert to the lender, and be credited toward repayment of the $100,000 construction loan. The lender would then have a deed of trust securing an unpaid principal balance of $80,000 on a partially completed building theoretically worth $80,000.

Any person furnishing labor, services, equipment, or materials for any improvement work cannot assert a right to a construction fund unless the right is created by direct written contract with the person holding the fund or is created by a duly served stop notice [*Civ. Code § 3264*; *see Civ. Code § 3103* (stop notices); *see also* Ch. 31, *Mechanics' Liens*]. A person who has not been paid for labor or materials furnished for a construction project may serve a stop notice on a lender or other persons holding any funds that were furnished or are to be furnished to pay the construction costs of the project. An owner who is served with a stop notice, whether or not it is bonded, has a mandatory duty to withhold funds unless a payment bond has been previously recorded [*Civ. Code § 3161*]. A construction lender's withholding responsibilities--that is, whether a lender has a duty to withhold funds or merely discretion to do so--depend on various factors, including whether or not the stop notice is a bonded stop notice [*Civ. Code § 3162(a)*]. On receipt of a stop notice, a lender must withhold funds when either of the following occur [*Civ. Code § 3162(a)(2), (3)*]:

- The stop notice is a bonded stop notice filed by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code § 3162(a)(1)*]; or

- The stop notice is a bonded stop notice filed by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was not recorded before the first stop notice was served.

A construction lender may, but is not required to, withhold funds on receipt of a stop notice when (1) the stop notice is not bonded, regardless of who gives it [*Civ. Code § 3161(a)*]; or (2) the stop notice is a bonded stop notice filed by any person entitled to do so other than an original contractor and a payment bond was recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code § 3162(a)(2), (3)*]. No assignment by the owner or contractor of construction loan funds, whether made before or after the stop notice is filed, takes priority over a claim represented by a bonded stop notice [*Civ. Code § 3166*].

Because a stop notice claim requires the fund holder to withhold sufficient moneys from "the fund," and not just from the portion of the fund that is or will become due to the contractor or landowner, the stop notice claim attaches to the portion of the fund that, after construction is stopped, will revert to the lender under the construction loan agreement [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Asso. (1964) 61 Cal. 2d 728, 732-734, 40 Cal. Rptr. 85, 394 P.2d 829]* . Thus, under the example given in the first paragraph under this heading, if all progress payments had been made to the contractor as they became due and a $10,000 bonded stop notice claim was thereafter duly served on the lending institution, the $10,000 claim would have to be withheld from the $20,000 remaining in the loan account and the lender would have a deed of trust securing an unpaid principal balance of $90,000 on a partially completed building theoretically worth only $80,000.

Notwithstanding the above, a bonded stop notice does not require the lender to withhold any amount from the construction loan funds if, before the serving of the first stop notice or bonded stop notice, the original construction contract between the landowner and contractor was duly recorded in the county where the project is located, together with a bond equal to 50 percent of the contract price [*Civ. Code §§ 3162, 3235*]. Following that recordation, the court in any action to enforce a stop notice claim must, when it would be equitable to do so, restrict the recovery under lien claims to an aggregate amount equal to the amount found to be due from the owner to the original contractor and render judgment against the original contractor and his or her sureties on the bond for any deficiency or difference remaining

between the amount found to be due to the original contractor and the whole amount found to be due to claimants [*Civ. Code § 3235*].

For a discussion of the relationship between stop notices and mechanics' liens, see Ch. 31, *Mechanics' Liens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDefectsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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§ 30A.17 Availability of Purchase Money Protection

If, following a judicial foreclosure of a loan secured by real estate, the value of the security does not pay off the debt, a court may award a deficiency judgment for the difference [*see Code Civ. Proc. § 726*]. However, a court does not have this option if the security is a purchase money security (i.e., security for an obligation incurred in the purchase of real property and owed to the seller or, in some cases, a third party) [*Code Civ. Proc. § 580b*; *see* Ch. 25B, *Subordination, Assumption, and Assignment*].

This prohibition against deficiency judgments generally applies to sales of real property in which the lender is a third party other than the seller and the real property is intended to be an owner-occupied, one-to-four-family residential structure, or in which the seller retains a security interest in the property sold. The latter situation does not include the customary construction loan transaction, because construction loans are usually made by third-party lenders. Thus, only construction loans made to construct owner-occupied, one-to-four-family residential units are protected by the antideficiency provisions of *Code Civ. Proc. § 580b*. For instance, protection against deficiency judgments is not available if real property is purchased with third-party financing and a home to be built on the real property is not originally intended to be occupied by the purchasers [*Paramount Sav. & Loan Asso. v. Barber (1968) 263 Cal. App. 2d 166, 169, 69 Cal. Rptr. 390]* . However, antideficiency protection will apply to a construction loan to build an owner-occupied home on real property even though the real property is owned by the borrower at the time the loan is executed. This type of construction loan is, in fact, used to pay the purchase price of a dwelling, and the deed of trust is a purchase money instrument within the meaning of *Code Civ. Proc. § 580b* [*Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 436-437, 112 Cal. Rptr. 370]* .

For a detailed discussion of purchase money antideficiency protection, see California Real Estate Law and Practice, Ch. 122, *Antideficiency Legislation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security

InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money Mortgages



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND

14-30A California Legal Forms--Transaction Guide §§ 30A.18-30A.99

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§§ 30A.18[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30A BASIC CONSTRUCTION FINANCING
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

14-30A California Legal Forms--Transaction Guide § 30A.100

§ 30A.100 Facts

1. Type of project, e.g.:

    a. Single-family residence.

    b. Residential duplex or triplex.

    c. Multiunit residential development (e.g., apartment building, condominium, etc.).

    d. Shopping center.

    e. Single-purpose commercial building.

    f. Office or multipurpose commercial building.

    g. Industrial park.

    h. Residential subdivision, with or without commercial and industrial sites.

    i. Off-site improvements for subdivision.

    j. Housing for elderly.

    k. Nursing home or intermediate care facility.

    l. Residential rehabilitation or urban renewal facility.

m. Group practice facility.

2. Purpose for which project is being constructed, e.g.:

a. Occupancy by present landowner as residence.

b. Rental of dwelling units.

c. Leasing to commercial tenants.

d. Occupancy by present landowner's business.

e. Operation as going business, such as hotel or theater.

f. Sale to long-term investors such as investment syndicates.

g. Sale to potential subdivision home buyers.

3. Concerning developer/borrower:

a. Name and address.

b. Legal status, e.g., individual, partnership, corporation.

c. Experience in development projects.

d. Financial ability and worth.

e. Reputation.

4. Concerning contractor:

a. Name and address.

b. Legal status, e.g., individual, partnership, corporation.

c. Contractor's license number.

NOTE:
Every contractor licensed in California must include his or her contractor's license number in all construction contracts, subcontracts, calls for bid, and all forms of advertising [*Bus. & Prof. Code § 7030.5*]. The lending institution will use the number to determine whether or not any complaints have been filed against the contractor with the Contractors' State License Board.

d. Net worth and financial ability.

e. General experience as contractor.

f. Major projects previously completed.

g. Projects now under construction and possibility that work or other matters connected with those projects might interfere with work on proposed project.

h. Reputation for quality work and complaints of persons for whom he or she had previously done construction work.

NOTE:

Probably the best method of making this determination is to have the landowner visit projects previously constructed by contractor and talk with the occupants of those projects.

i. Reputation among subcontractors and materialmen for payment and quality of work.

j. Mechanics' liens and collection problems of subcontractors and materialmen who performed labor or furnished material for previous projects constructed by contractor.

k. Ability and willingness of contractor to post performance and payment bonds for project [*see* Ch. 30D, *Construction Contracts and Subcontracts*].

NOTE:

A performance bond guarantees the faithful performance of the contract by the contractor. A payment bond guarantees the payment of all mechanics' liens that may be filed against the real property on which the project is being constructed [***see*** *Civ. Code § 3235*]. A reputable contractor should have no objection to posting these bonds when the landowner agrees to pay the premiums on them.

5. Governmental requirements relating to:

NOTE:

Counsel should consult Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** , for additional discussion of these governmental requirements.

a. Zoning.

b. Off-site improvements.

c. Improvements to off-site facilities, such as:

(1) Sewage disposal plant.

(2) Water trunk lines.

d. School, highway, and other public building plans.

e. Minimum lot or building area requirements.

f. Parking area requirements.

NOTE:

These requirements are usually expressed in terms of so many feet of parking space for each commercial

or dwelling unit to be constructed.

g. Street or sidewalk improvements required by project.

NOTE:

When a commercial structure is built or a residential structure is remodeled into a commercial structure in a suburban area, some counties require that curbs, gutters, and sidewalks designed by a privately hired civil engineer be installed by the property owner along the street(s) on which the structure fronts.

h. Any considerations that might require filing environmental impact reports and statements.

NOTE:

For a discussion of state and federal requirements regarding the filing of environmental impact documents, see California Real Estate Law and Practice, Ch. 303, ***Requirements of the California Environmental Quality Act*** (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 22, ***Environmental Impact Reports*** (Matthew Bender). For forms and a discussion of the California Real Estate Commissioner's requirements, see *Ch. 30,* ***Subdivision Regulation****, §§ 30.220-30.224*.

6. Financial requirement analysis, i.e.:

a. Cost of land.

b. Cost of any off-site improvements.

c. Construction costs, including:

(1) Architects' fees.

(2) Engineers' fees.

(3) Cost of on-site improvements.

d. Financial costs.

(1) Costs during construction, including:
(a) Interest.

(b) Taxes.

(c) Insurance.

(2) Interim and permanent lenders' fees.

(3) Performance bond and labor and material bond.

(4) Title and recording expenses.

(5) Escrow expenses.

e. Miscellaneous costs, e.g.:

(1) Legal expense.

(2) Organization expense.

(3) Promotion expense.

(4) Commission expense.

(5) Advertising expense.

(6) Ground lease rental.

(7) Cash required to furnish or equip project.

(8) Operating expenses during construction.

(9) Costs of obtaining governmental approval regarding zoning, subdivision maps, and environmental clearance.

f. Funds available:

(1) Mortgage proceeds.

(2) Loan sources.

(3) Other sources of funds.

7. Economic potential of project.

NOTE:

The detail in which the economic potential of the project is to be studied will depend on the type and size of the project. When a large project such as a shopping center or large subdivision is contemplated, a competent planning or research organization should be engaged to make a complete economic survey of the project and the area in which it is to be located. However, some (if not all) of the items listed under this heading will be relevant to any construction project.

a. Exact location of project.

b. Type of area in which project is located, e.g., residential, commercial, retail, or industrial.

c. If single-family dwelling is to be constructed and occupied by landowner, the income and potential continued employment of landowner.

d. If other than a single-family dwelling is to be constructed and occupied by landowner, the market area to be served by project.

NOTE:

Even when the building project is a single-family dwelling to be occupied by the landowner, the market area in which it is located may have an important bearing on the eventual resale value of the home and the landowner's potential for continued employment while living in it.

e. If residential subdivision or multiple-dwelling project is to be built, the housing market in the area.

NOTE:

An evaluation of the housing market in a given area requires analysis of several factors, including the number of unsold houses in the area, the vacancy factor in apartment buildings in the area, and the price of similar houses or apartments in the area. This information is usually available from real estate departments of lending institutions and such local agencies as apartment owner associations, real estate boards, and credit reporting concerns.

f. If residential subdivision, the type and contemplated sales price of homes that will be built in subdivision.

g. If shopping center or other multi-rental commercial project, the potential tenants and leases for space in project.

NOTE:

Lending institutions will usually ask the applicant for a construction loan to present copies of already executed leases for space in the project [***see*** Ch. 34E, ***Shopping Centers: Leasing and Operation***].

8. Other liens and encumbrances on land on which project is to be constructed.

a. Purchase money deed of trust for land.

(1) Amount, interest, terms of payment.

(2) Provisions for subordination to construction loans [*see § 30A.14*].

(3) Contemplated payment from construction loan.

b. Bonds or special assessments for off-site improvements [*see* California Real Estate Law and Practice, Ch. 470, *Subdivisions* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money Mortgages



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§ 30A.101 Documents

1. Detailed plans and specifications of project.

2. Signed construction contract between owner/developer and general building contractor [*see* Ch. 30D, *Construction Contracts and Subcontracts*].

NOTE:
The attorney must confirm that the financing documents are consistent with the provisions of the construction contract, particularly the contractual provisions governing change orders, disbursements, and inspections.

3. Detailed cost breakdown sheet for project prepared by contractor.

4. Copy of any purchase money deed of trust for land or other lien encumbering property containing subordination provisions.

5. Financial statement for owner.

6. Balance sheet and recent profit and loss statement for contractor.

7. If project is a shopping center or multirental commercial building, copies of all leases with major tenants.

8. Any documents bearing on project's environmental impact.

9. Additional documents required by lender at initial interview [*see § 30A.121*, P 2.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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§§ 30A.102[Reserved]



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B. Preliminary Determinations

14-30A California Legal Forms--Transaction Guide § 30A.110

§ 30A.110 Governmental Requirements

1. What governmental approvals must be obtained for construction project?

a. Zoning permits.

b. Environmental clearances.

c. Building permits.

2. Should client seek a construction loan from a state bank, considering that any such loan must be secured by first lien on real property and will be subject to following limitations [*see Fin. Code § 1227*]?

NOTE:

Both state and federal commercial banks are much more likely to make short-term construction loans (particularly for projects larger than single-family residential dwellings) than long-term permanent loans. Note that California banks are extremely reluctant to make construction loans for the maximum terms and amounts permitted by statute [***see*** California Real Estate Law and Practice, Ch. 420, ***Financing Construction and Development*** (Matthew Bender)].

a. Term cannot exceed 60 months [*Fin. Code § 1227(f)*].

b. Amount will not exceed 85 percent of appraised market value of land and improvements in place at time each disbursement is made [*Fin. Code § 1227(f)*].

c. Purpose of loan must be to finance building operations under plan providing for payment of loan in

lawful manner [*Fin. Code §§ 1200-1239*].

3. Does client's desired financing fall within following limitations on real estate loans made by California savings and loan associations?

NOTE:

A "real estate loan" for state savings and loan purposes is a loan or other obligation secured by a lien on real estate, if the security property is "real estate" as defined in *Civ. Code § 658*; the security interest of the association may be enforced as a real estate mortgage, deed of trust, or equivalent; the security property is capable of separate appraisal; and the association relies substantially on the real estate as primary security for the loan [*Fin. Code § 5115*]. A California savings and loan association may adjust the interest rate, payment, balance, or term-to-maturity on any loan secured by real property as authorized by the loan contract, subject to certain limitations [*Fin. Code § 7504*; ***see*** *Fin. Code § 7504(b)*; ***see also*** *12 U.S.C. § 1701j-3* (applicable limitations)].

The statutory authorization for a California savings and loan association to originate or otherwise deal in real estate loans specifically includes the authority to make construction loans [*Fin. Code § 7500(a)*]. Savings and loans tend to make construction loans for smaller construction projects, such as single-family residences, and are often willing to offer long-term, permanent financing [***see*** California Real Estate Law and Practice, Ch. 420, ***Financing Construction and Development*** (Matthew Bender)].

A savings and loan association may, under very limited circumstances, make a loan that (1) is secured by real property, but (2) does not comply with some of the statutory restrictions normally governing these loans [***see*** *Fin. Code § 7507*].

For additional discussion of real estate loans made by state and federal savings and loan associations, see Ch. 25, ***Real Estate Loans*** , and California Real Estate Law and Practice, Ch. 101, ***Conventional Financing (Loans)*** (Matthew Bender).

a. Any real estate loan must:
(1) Be evidenced by note or instrument of obligation that [*Fin. Code § 7501*]:
(a) Is for amount of the loan;

(b) Specifies amount and terms of repayment including any penalty or charge for late payment; and

(c) May contain all other terms of loan contract.

(2) Be secured by deed of trust, mortgage, or other transaction or instrument constituting a lien or claim (or its equivalent) on real estate securing loan; transaction or instrument must [*Fin. Code § 7502*]:

(a) Provide specifically for full protection to association with respect to loan and additional advances; and

(b) Include any terms and conditions that association deems necessary and appropriate to state agreement between parties.

NOTE:
In making a residential real estate loan, a savings and loan may rely substantially on the

borrower's general credit standing and projected future income for repayment, without other security, or may rely on other assurances for repayment, such as guarantees or other obligations of third parties [*Fin. Code § 7505.5(a)*; *see* *Fin. Code § 7505.5(b)*].

(3) Not exceed maximum loan-to-value ratio established by associations's board of directors [*Fin. Code § 7509*].

NOTE:

At the time of origination, a real estate loan may not exceed 100 percent of the market value of the security property. The board of directors of each savings and loan association must establish maximum loan-to-value ratios for loans secured by real estate [Fin. Code § 7509(a)(1); *see* *Fin. Code § 7509(e)* (requirements governing determination of whether particular loan complies with applicable loan-to-value ratio)]. An association may not make a loan secured by unimproved real property if the loan-to-value ratio would exceed 80 percent of the appraised value of the unimproved real property [*Fin. Code § 7509(d)*]. Statutory requirements and restrictions apply to loans in excess of 90 percent of the appraised value of the security property [***see*** *Fin. Code § 7509(a)-(c)*].

4. Is national bank or federally chartered savings association suitable lender for client's purposes, considering real estate loans are subject to following maximum loan-to-value limits set forth below [12 C.F.R. pt. 34, subpt. D, app. A (national banks), § 560.101, appendix (savings associations); *see 12 U.S.C. § 84*; *12 C.F.R. §§ 32.3, 34.62* (national banks), 560.93, 560.101 (savings associations)]?

NOTE:

These limits are the maximum allowable by law. Individual banks and savings associations may establish their own lower limits. The limits should be applied to the underlying property that collateralizes the loan. For loans that fund multiple phases of the same project, the appropriate loan-to-value limit is the limit applicable to the final phase of the project funded by the loan (for example, the limit applicable to a loan for both land development and construction of an office building should be 80 percent); loan disbursements should not, however, exceed actual development or construction costs. When a loan is fully cross-collateralized by two or more properties or is secured by a collateral pool of two or more properties, the appropriate maximum loan amount is the sum of the value of each property, less senior liens, multiplied by the appropriate loan-to-value limit for each property [12 C.F.R. pt. 34, subpt. D, app. A (national banks), § 560.101, appendix (savings associations)].

a. Sixty-five percent for raw land.

b. Seventy-five percent for land that is ready for development.

c. Eighty percent for commercial, multifamily (including condominiums and cooperatives), and other nonresidential construction.

d. Eighty-five percent for one-to-four-family, non-owner-occupied, residential construction.

e. Eighty-five percent for improved property.

NOTE:

There is no established limit for owner-occupied, one-to-four-family residential construction and home equity construction loans. For any such loan with a loan-to-value ratio that equals or exceeds 90 percent at origination, however, an

institution should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral [12 C.F.R. pt. 34, subpt. D, app. A, n.2 (national banks), § 560.101, appendix, n.2 (savings associations)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseBuilding & Housing Codes



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14-30A California Legal Forms--Transaction Guide § 30A.111

§ 30A.111 Miscellaneous Considerations

1. If purchase money deed of trust was given for land on which project is to be constructed, can it be subordinated to deed of trust securing construction loan [*see § 30A.14*]?

2. Should client retain a mortgage loan broker or other "packager" to perform any or all of the following services?

NOTE:

Mortgage loan brokers are helpful when (1) the borrower and the attorney lack a working knowledge of real estate financing; or (2) extensive negotiations are anticipated because the proposed project is large. These brokers are usually contacted after the loan package has been assembled [***see*** Ch. 25, ***Real Estate Loans***].

a. Rendering advice concerning lenders who are currently interested in type of project proposed.

b. Providing specific information concerning the term, interest rate, conditions, and contents of application package likely to be offered or required.

c. Completing loan application.

d. Preparing or otherwise obtaining supporting documentation for application.

e. Drafting some or all of the loan documents.

f. Representing borrower in negotiations.

g. Performing ongoing services (e.g., inspections) after loan is made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide to Obtaining Construction Financing

14-30A California Legal Forms--Transaction Guide § 30A.120

§ 30A.120 Obtaining Commitment for Permanent Loan

NOTE:

Although written permanent loan commitments have traditionally been prerequisites to the making of a construction loan, it is becoming increasingly difficult for borrowers to obtain those commitments. Thus, most construction projects are commenced before permanent financing has been obtained [***see*** *§§ 30A.10, 30A.11*]. Consequently, the attorney for a developer who cannot obtain a permanent commitment by following the procedure in this section should refer to Ch. 25, ***Real Estate Loans***, for a discussion of real estate loans.

1. To obtain commitment for conventional, uninsured permanent loan, have developer participate in following procedure:

a. Negotiate conditions to permanent commitment, e.g.:

NOTE:

It is very important that the developer's attorney participate in these negotiations because they will serve as the basis for all of the permanent documents (permanent loan agreement, buy-sell or tri-party agreement, etc.) and for the funding of the permanent loan [***see*** *§ 30A.12*].

For a detailed discussion of conditions to permanent commitments, see California Real Estate Law and Practice, Ch. 420, ***Financing Construction and Development*** **(Matthew Bender).**

(1) Receipt of construction loan commitment [*see § 30A.122*].

(2) Execution of buy-sell or tri-party agreement [*see* P 1.b., *below*].

(3) Submission of copies of related documents, e.g.:

NOTE:
The permanent lender will use these documents to independently determine whether or not the developer can afford to complete the project.

(a) Construction contract.

(b) Subcontracts.

(c) Cost breakdown sheet.

(4) Completion of construction by certain date.

(5) Approval of title insurance.

(6) Concerning final plans and specifications:

NOTE:
The expiration date of the permanent loan may require the developer to commence construction before the final plans and specifications have been completed. If that is the case, the attorney should arrange with the lender to submit the final version at a later date.

(a) Approval of foregoing by lender.

(b) Certification, by independent architect, that project was completed in accordance with terms of above documents.

(c) Specific procedures for obtaining permanent lender's approval of change orders.

NOTE:
Permanent lenders always insist on the right of approval of change orders. The borrower's attorney should insist that this right be subject to reasonable, written restrictions.

(7) Receipt by lender of survey of completed improvements showing no violations of applicable zoning requirements or recorded restrictions and no encroachments.

b. Anticipate execution of one of the following agreements prepared by lender and governing permanent loan conditions:

NOTE:
This chapter does not reproduce the following types of documents because, as discussed in the Legal Background, lenders are becoming increasingly hesitant to make written permanent commitments for construction projects.

(1) Buy-sell agreement, under which construction lender and permanent lender agree on set of loan documents that former will sell to latter when permanent loan is made.

(2) Tri-party agreement between borrower, permanent lender, and construction lender which:

(a) Lists conditions to funding of permanent loan; and

(b) Provides that permanent lender will record new loan documents for permanent loan.

c. Pay commitment fee, which is usually:

(1) Designed to compensate permanent lender, if loan is not funded, for:

(a) Special treatment of funds (e.g., placement in short-term investments) during commitment period.

(b) Lender's out-of-pocket expenses for commitment, such as attorneys' fees and appraisal fees.

(2) Nonrefundable or, if loan is made, refundable only after subtracting processing costs.

d. Anticipate receipt of written commitment.

NOTE:

As mentioned above, this chapter does not include permanent loan documents. For an illustrative permanent loan commitment, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , pt. F, Form 22.85 (Matthew Bender).

2. To obtain commitment for government-financed permanent loan, take following steps:

NOTE:

This discussion does not repeat the detailed information regarding government-financed real estate loans contained in Ch. 25, *Real Estate Loans*. Instead, this section considers only those matters that apply solely to construction loans and sets forth cross-references to the more general discussion in Ch. 25, ***Real Estate Loans*** .

a. For loans insured by Federal Housing Administration (FHA):

NOTE:

The FHA will insure loans for a variety of development and construction projects, including the construction of one- to four-family homes [*see* *12 U.S.C. § 1709*; *24 C.F.R. §§ 200.10, 203.1-203.499*; *see also* Ch. 25, *Real Estate Loans*]. For an overview of these FHA-insured projects, see California Real Estate Law and Practice, Ch. 420, ***Financing Construction and Development*** (Matthew Bender).

One of the more significant FHA loan programs, dealing with multifamily residential rental projects [*see* *12 U.S.C. § 1713*], should be mentioned here because it is not considered in either of the sources discussed in the preceding paragraph. The loans for those projects are usually take-out loans; combination construction and take-out loans

are authorized, but few are made because of FHA fee limitations. The maximum amount of the loan cannot exceed the lesser of either 90 percent of the estimated value of the project [*12 U.S.C. § 1713(c)(2)*] or a specified amount, ranging from $38,025 to $85,328, per family unit, depending on the number of bedrooms and whether the structure contains an elevator [*12 U.S.C. § 1713(c)(3)*]. The rent, charges, capital structure, rate of return, and methods of operation of any FHA-financed project are subject to regulatory restrictions [*12 U.S.C. § 1713(b)(2)*; ***see*** 24 C.F.R. Part 290].

(1) Request approved lender to submit application for insurance [*24 C.F.R. § 200.45*].

(2) Obtain conditional and firm commitment from FHA [*see 24 C.F.R. §§ 200.46-200.47*].

(3) Obtain endorsement from FHA evidencing insurance [*see 24 C.F.R. §§ 200.100*].

b. For home take-out loan insured by Department of Veterans Affairs, follow statutory and regulatory application procedure [*see 38 U.S.C. §§ 3701-3736*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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14-30A California Legal Forms--Transaction Guide § 30A.121

§ 30A.121 Obtaining Construction Loan

1. Advise owner to be prepared to discuss following matters at initial interview with lender:

a. Amount and terms of loan.

b. Method for handling any difference between amount of loan and total cost of construction.

c. Loan fees.

d. Bond requirements.

2. Have owner submit following information to lender at initial interview:

a. Two copies of either of the following:
(1) Contract for construction of project, signed by owner and general building contractor and acknowledged by notary public; or

NOTE:
If the lending institution makes the construction loan, it will retain one signed copy of the construction contract and will record the other one as a protection against mechanics' liens for amounts exceeding the contract price [*see* *Civ. Code § 3124*].

(2) Plans and specifications for project, signed by owner and contractor.

NOTE:
The appraiser for the lending institution will use these documents in evaluating the project.

Assuming it makes the loan, the lending institution will retain one copy in its construction loan file and will record the other one as part of the contract between the owner and the general building contractor [*see* NOTE to (1), *above*]. Because the contract between the owner and the contractor usually specifically refers to the plans and specifications, they can normally be recorded with the contract as one instrument and therefore need not be acknowledged before a notary public so long as the signatures on the contract are so acknowledged.

b. Two copies of contractor's detailed cost (or "trade payment") breakdown sheet for project, which should contain:

(1) Figures on types of work and purchases; and

(2) Lists of necessary subcontractors and materialmen.

c. Concerning property to be developed:

(1) Evidence of title;

(2) Legal description;

(3) Survey; and

(4) If available, photographs sufficient for appraiser to find and identify property.

d. Copies of any purchase money deeds of trust or other security instruments encumbering property to be developed [*see § 30A.14*].

e. Owner's current and complete financial statement.

f. Concerning general contractor:

(1) License number assigned by Contractors' State License Board.

NOTE:

Every contractor licensed in California must include his or her contractor's license number in all construction contracts, subcontracts, calls for bid, and all forms of advertising [*Bus. & Prof. Code § 7030.5*]. The lending institution will use the number to determine whether or not any complaints have been filed against the contractor with the Contractors' State License Board.

(2) Two copies of current balance sheet.

(3) Two copies of recent profit and loss statement.

NOTE:

The lending institution may not require the financial information listed under (2) and (3), *above*, if it has had prior dealings with the contractor or the contractor is well known.

g. Copies of any leases executed for space in proposed project.

NOTE:

The lending institution may also require a financial statement from one or more of the major tenants.

h. Any economic or other analyses of market area and feasibility of project.

i. Any appraisals of property.

NOTE:

Although lenders typically select appraisers for large projects, they may permit owner-developers of smaller projects to submit an appraisal with the loan application, provided that the owner-selected appraiser meets the lender's standards. If this is done, the developer should demand that the lender's acceptance of the appraisal be stated in the loan commitment.

j. Copies of any commitment for permanent financing obtained by owner [*see § 30A.120*].

k. Evidence that required governmental permits (*e.g.*, building and zoning permits) and permission have been or can be obtained.

NOTE:

Questions concerning zoning can be answered to the satisfaction of most lenders by obtaining a letter from the planning department. Also, it may be possible to obtain a zoning endorsement from a title company. For a discussion of zoning and related environmental permits and approvals, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

l. Any other project documents.

3. Inform owner that lender may, if impressed with owner's presentation, ask owner to do the following at initial interview:

a. Complete and sign loan application [*see* Ch. 25, *Real Estate Loans*].

b. If required, pay good-faith deposit that will usually be refundable if loan commitment is not issued by lender and accepted by owner.

c. Grant lender authority to open an escrow with title company acceptable to lender.

d. Agree to pay for two copies of preliminary title report.

4. Advise owner that lender, if it decides to make loan, will issue written commitment [*see § 30A.200*] that will:

NOTE:

Although written loan commitments have traditionally been in the form of a letter which incorporates the terms of the borrower's application, lenders now use a variety of formats [*see § 30A.200[1]*].

a. Commit lender to making loan on certain specified conditions, such as:

(1) Execution of loan documents.

(2) Commitment for permanent loan and satisfaction of all conditions of this commitment which lender feels can be fulfilled before closing of construction loan.

(3) Approval of construction contract, title insurance report, appraisal, insurance, contractor's bonds, and similar documents and agreements.

(4) Execution of written acceptance of commitment by borrower.

b. Describe terms of loan, including amount, term, interest rate, prepayment provisions, and loan fees.

NOTE:

Any loan commitment will be slanted in favor of the lender because of the lender's superior bargaining position. However, attorneys for borrowers often succeed in negotiating with lenders regarding provisions that, in their original form, are unacceptable to borrowers.

5. Pay loan commitment fee, which will be:

a. Negotiable in most cases.

b. Designed to reimburse lender for processing costs and for withholding funds during period of commitment.

c. Refundable or applied against loan fee if loan closes.

d. Retained if loan fails to close for any reason other than lender's default.

6. Have owner and contractor sign construction loan agreement with lender [*see § 30A.201*].

7. Instruct owner to deposit following documents with lender for transmittal to title company that furnished preliminary title report:

a. Duly executed promissory note in form used by lending institution and evidencing construction loan [*see § 30A.203*].

b. Duly executed and acknowledged deed of trust securing promissory note [*see Civ. Code § 3097(j); see also § 30A.204*].

c. Instructions to issue to lender an ALTA title insurance policy at owner's expense.

NOTE:

The lending institution will insist on the issuance of certain endorsements at appropriate times during the construction phase of the project. These endorsements, which are set forth in Ch. 26A, *Title Insurance* , are (1) a foundation endorsement [***see*** *§ 26A.262*], which must be issued before the first progress payment is made to the contractor; (2) a covenants, conditions, and restrictions endorsement [***see*** *§ 26A.260*], which will be issued after completion of the project; and (3) a mechanics' liens endorsement [***see*** *§ 26A.261*], which must be issued before final disbursement of the construction contract price is made.

d. Instructions to record the following at owner's expense:

(1) Deed of trust.

(2) Contract between owner and contractor.

(3) Signed copy of plans and specifications for project.

(4) Completion and payment bonds to be furnished by contractor [*see* P 9., *below*].

(5) Any other instruments required by lending institution.

e. Sufficient funds to pay all recording and other escrow costs.

8. Have owner deposit the following with lending institution:

a. If applicable, funds equaling amount by which estimated construction costs exceed amount of construction loan.

b. Fire and other risk insurance policies that must:

(1) Be acceptable to lending institution.

(2) Have extended coverage endorsement insuring property and project in amount at least equal to amount of construction loss.

(3) Have loss payable endorsement in favor of lender.

NOTE:
**The lender must disclose to the borrower in writing the fact that the borrower cannot be required, as a condition of receiving or maintaining the loan, to provide hazard insurance coverage against risks to the improvements on the real property in an amount exceeding the replacement value of the improvements [*Civ. Code § 2955.5(a), (b)*; *see* *Civ. Code § 2955.5(e)* (definitions of "hazard insurance coverage" and "improvements")]. Failure to make the disclosure or a violation of its prohibition will not affect the validity of the loan, deed of trust or mortgage, or secured note; but any person harmed by such a failure or violation may obtain injunctive relief and recover damages and reasonable attorneys' fees and costs [*Civ. Code § 2955.5(c), (d)*].

9. Confirm that general contractor secures and deposits with lender bonds that must [*see* Ch. 30D, *Construction Contracts and Subcontracts* ; *see also* Ch. 79, *Suretyship, Guaranty, and Indemnity*]:

a. Be issued by sureties acceptable to lender.

b. Guarantee the following:

(1) Faithful performance of construction contract by general contractor.

(2) Payment of all mechanics' liens that may be recorded against project.

c. Be in amount required by lending institution, which will not be less than 50 percent of construction contract price.

NOTE:

If a construction contract and the above bond have been recorded, then, in any subsequent action on a mechanic's lien, any judgment returned against the owner will be for only the amount found due under the contract from the owner to the contractor. Judgment for any additional amount due on the mechanic's lien will be returned only against the contractor and the sureties on the bonds [*Civ. Code § 3235*].

d. By its terms, inure to the benefit of the lending institution, owner, and all claimants so as to give claimants a right of action to recover on bond in any suit brought to foreclose mechanic's lien or in a separate suit brought on bond [*see Civ. Code § 3096*].

e. Must be issued by corporate surety in response to an application and current financial statement filed by contractor with local insurance broker.

10. If one or more construction loans are obtained after commencement of construction, have owner provide name and address of construction lender(s) to each person who has given owner a preliminary 20-day notice [*Civ. Code § 3097(n)*; *see § 31.202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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14-30A California Legal Forms--Transaction Guide § 30A.122

§ 30A.122 Disbursing Construction Loan Funds

1. If loan terms provide for monthly progress payments, confirm that:

NOTE:

These payments are intended to pay the contractor for the increase in value of the project during a month, with that increase being measured by construction costs. For a discussion of progress payments and the owner-prime contractor contract, see California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender).

a. Contractor files application for payment with lender on or about first day of each month stating nature and value of work completed during month.

b. Lender's inspector visits jobsite on monthly or biweekly basis and inspects and values the following:

NOTE:

The inspector will be an architect, engineering consultant, or other person familiar with construction. Although larger lenders tend to have inspectors on their staffs, the permanent lender may insist on an independent, unbiased inspector.

(1) Work completed during prior month; and

(2) Materials delivered to jobsite during prior month and properly stored thereon.

c. On receipt of inspector's monthly report, lender pays contractor from construction loan funds an amount equal to specified percentage (typically 90 percent) of:

NOTE:
The retained funds serve as additional security for the lender. The amount retained will be subject to negotiation.

(1) Value of work completed during prior month, as determined by inspector; and

(2) Materials delivered to and stored property on jobsite during prior month.

d. Lending institution pays remaining percentage only after expiration of lien period following completion of project [*see* P 5., *below*].

2. If fixed stage of completion disbursement schedule is to be used, inform client that following procedure usually applies:

a. Lender, developer, and contractor agree in construction loan agreement that specified installment payments (usually from three to seven) will be made to contractor as various portions of project are completed and accepted by lender's inspector.

b. If single-family dwelling is involved, installment payments from loan proceeds are often made as follows:

(1) Twenty percent when foundations and subflooring, if required, have been completed.

(2) Twenty percent when exterior walls have been completed, roof is finished, and utilities have been roughed in.

(3) Twenty percent when interior walls are ready for painting or papering and doors and windows have been installed.

(4) Twenty percent when building has been completed and notice of completion has been duly recorded.

(5) Twenty percent after expiration of mechanics' lien period.

3. If "voucher" or "warrant" system is selected, notify client that following or similar procedure will be used:

NOTE:
As a general rule, this system is only used on large projects because its specific documentation requirements are more costly than other disbursement methods.

a. At or before time construction loan is made, contractor must file detailed estimated cost breakdown sheet with lending institution showing:

(1) Cost of each portion of project; and

(2) Name of subcontractor or supplier that is to perform each portion.

NOTE:
The items are usually listed by building trade as, for example, "grading and excavating," "concrete-rough," "concrete-finish," "carpentry-rough," "carpentry-finish," "masonry," "electrical and fixtures," "plumbing," etc.

b. Either of the following payment methods will be used:

(1) Special checking account will be established with loan proceeds, then, as amounts become due to contractor, subcontractors, or suppliers:

(a) Contractor will make out and sign check, then send it to lender with applicable voucher or invoice.

(b) Lender will sign check and distribute it to payee if amount agrees with cost breakdown.

NOTE:
Before signing and mailing the check, the lender will confirm that the requested payment will not, when combined with the amount already disbursed for that portion of the project, exceed the amount listed on the estimated cost breakdown sheet for that portion.

(2) Contractor will pay bills of subcontractors and suppliers on receipt and then:

(a) Contractor will file voucher or "request for reimbursement" for each bill with lender.

NOTE:
This document will list the name of the payee and the relevant portion of the project, as it is listed on the estimated cost breakdown sheet.

(b) Lender will pay contractor for voucher if requested amount is consistent with estimated cost breakdown sheet and lender inspections indicate that payment request is justified.

c. Final payment of contractor's profit and overhead will be made only after lien period following completion of project has expired [*see* P 5., *below*].

4. If joint (builders') control agency is to be used, participate in agency's procedure [*see* Ch. 30D, *Construction Contracts and Subcontracts*].

5. For disbursement of final payment:

a. After project has been completed, inspected, and accepted as fully or substantially complete, have client execute, verify, and record a notice of completion containing [*Civ. Code § 3093*]:

NOTE:
Under most construction loan agreements, the lending institution is authorized to execute and record the notice of completion as agent of the owner and will do so if the owner is unavailable. The notice must be recorded in the office of the county

recorder of the county in which the project is located, within 10 days after the project is completed. It need not be acknowledged [*Civ. Code § 3093*].

(1) Date of completion (other than a cessation of labor).

NOTE:
The recital of an erroneous date of completion will not affect the validity of the notice if the true date of completion is within 10 days preceding the date of recordation [*Civ. Code § 3093*; *see* *Fontana Paving, Inc. v. Hedley Bros., Inc. (1995) 38 Cal. App. 4th 146, 154, 45 Cal. Rptr. 2d 295* (notice recorded more than 10 days after completion was invalid)].

(2) Name and address of owner(s).

NOTE:
If there is more than one owner and the notice is signed by less than all of the co-owners, the notice must recite the names and addresses of all of the co-owners. If the notice is signed by a successor in interest, it must recite the names and addresses of the transferor(s) [*Civ. Code § 3093*; *see* *Civ. Code § 3092(g)* ("owner")].

(3) Nature of interest or estate of owner.

(4) Description of project site sufficient for identification, containing street address, if any.

NOTE:
If a sufficient legal description of the site is given, the validity of the notice will not be affected by the fact that the street address is omitted or incorrectly recited [*Civ. Code § 3093(d)*].

(5) Name of original contractor, if any.

NOTE:
If the construction work is performed under two or more original construction contracts, each covering a particular portion of the work of improvement [*see* *Civ. Code § 3117*], and the notice of completion relates only to one of the contracts, then the name of the original contractor under that contract must be accompanied by a general statement of the kind of work done or materials furnished under the contract [*Civ. Code § 3093(e)*].

b. Lending institution will request title company that issued ALTA title insurance policy at time construction loan was made to issue and forward to lender, at expiration of mechanics' lien period, CLTA Endorsement 101.5 or 101.6 [*see § 26A.261*].

NOTE:
Subcontractors and materialmen have 30 days from the date of recording the notice of completion to record claims of liens against the project [*Civ. Code § 3116*]. CLTA Endorsement 101.5 protects the lender against the existence of mechanics' liens recorded against the land covered by the lender's deed of trust and against the absence of a valid recorded notice of completion. It provides coverage up to an amount specified in the endorsement. CLTA Endorsement 101.6 insures the lender against the same risks for the face amount of the title insurance policy to which it is

attached instead of an amount specified in the endorsement itself [*see* California Real Estate Law and Practice, Ch. 92, ***Title Insurance*** (Matthew Bender); ***see also*** *§ 26A.261*].

c. General building contractor must deliver to lending institution an executed and acknowledged waiver of mechanics' lien [*see* Ch. 31, *Mechanics' Liens*].

d. Lender will disburse final payment due under construction loan agreement to contractor after:

(1) Passage of at least 35 days since recordation of notice of completion of project; and

(2) Receipt of the following:

(a) CLTA Endorsement 101.5 or 101.6 from title company [*see* P 5.b., NOTE, *above*]; and

(b) Waiver of mechanic's lien duly executed and acknowledged by general building contractor [*see* P 5.c., *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens



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14-30A California Legal Forms--Transaction Guide §§ 30A.123-30A.129

[Reserved]

§§ 30A.123[Reserved]



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14-30A California Legal Forms--Transaction Guide § 30A.130

§ 30A.130 Preparing Financial Reports

1. Advise client to prepare and update financial reports on project, for example:

    a. Audited financial statements.

    b. Budgets.

    c. Marketing plans.

    d. Records of disbursements.

2. Have client comply with lender's requests for submission of specified financial reports.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction Loans



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14-30A California Legal Forms--Transaction Guide § 30A.131

§ 30A.131 Satisfying Ongoing Financial Obligations

1. Inform client of applicable taxes on project, for example:

    a. Rent taxes.

    b. Taxes in lieu of real estate taxes.

    c. Taxes imposed under loan documents.

2. Notify client of relevant assessments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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14-30A California Legal Forms--Transaction Guide §§ 30A.132-30A.199

[Reserved]

§§ 30A.132[Reserved]



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14-30A California Legal Forms--Transaction Guide § 30A.200

§ 30A.200 Approval (Commitment) for Variable Interest Rate Loan

[1] Comment

[a] Use of Form

This form is an approval for a variable interest rate loan. As explained in Paragraph 6 of the form, it may be used as a commitment to make a construction loan. Alternatively, it may be attached to a commitment offer that must be executed in conjunction with this approval in order to create a binding commitment. The lender would use the latter approach to make a standby commitment, with the attached commitment offer describing the terms of the commitment [*see § 30A.11[1]*].

For a commitment to make a permanent loan, which is in the more traditional letter format, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , pt. E, Form 22.85 (Matthew Bender).

For discussion of *Civ. Code § 1921*, which imposes disclosure requirements on lenders who make certain adjustable-rate residential mortgage loans, see Ch. 25, *Real Estate Loans* .

[b] Written Loan Commitments

Construction lenders frequently make binding written commitments to make construction loans. Written loan commitments are often referred to as "commitment letters" because these commitments have traditionally been in the form of letters which set forth the terms of the loan (and/or incorporate terms contained in the loan application), list numerous lender-imposed conditions, are signed by the lender, and require the borrower's signature to become binding. However, lenders also use alternative formats such as this preprinted form, which sets forth standard conditions, provides blanks for the insertion of the basic terms, and reserves space for any conditions unique to a particular loan. Another approach is to use the loan application form as the commitment document, which will become binding if the lender approves and countersigns the application after it has been completed and signed by the borrower. This alternative obviously gives the lender, rather than the borrower, the final option to make the agreement binding.

As mentioned above, this particular form is used as a construction loan commitment. Binding written commitments may

also be issued for permanent take-out loans, standby commitments, and long-term construction loans [*see § 30A.11*].

[2] FORM

Approval (Commitment) for Variable Interest Rate Loan

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsAdjustable Rate MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsFormalities



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14-30A California Legal Forms--Transaction Guide § 30A.201

§ 30A.201 Construction (Building) Loan Agreement

[1] Comment

[a] Use of Form

This form is a construction (or building) loan agreement which, in addition to providing for a construction loan, creates deposit accounts for the loan proceeds and imposes other strict requirements designed to protect the lender's security [*see § 30A.201[1][b][i]*].

For additional construction loan agreements, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , Part G (Matthew Bender).

[b] Loan Conditions

[i] Disbursement of Proceeds by Lender

The construction agreement will contain many provisions that are designed to increase the likelihood that the project will be completed in a satisfactory manner [*see § 30A.10*]. One such provision contained in this form establishes four "loans in process accounts" [*see* P 2 of this form]. The funds deposited into each of these accounts are earmarked for specified purposes and must be disbursed in accordance with the restrictions set forth in this agreement. Among other things, these restrictions provide for disbursement only on completion of specified stages of construction and give the lender the authority to demand evidence of amounts due. For further discussion of loan disbursements, see *§ 30A.122*.

[ii] Miscellaneous Requirements

This agreement contains other provisions that are commonly used to protect the lender's security. For example, if the lender determines at any time that the loan proceeds are insufficient to pay all construction costs, it may demand that the owner deposit funds to cover this deficiency [*see* P 8 of this form]. Further, the lender has the right to approve changes [*see* P 4(b) of this form], to inspect the work, to order stoppages and replacement of unsatisfactory work [*see* P 9 of this form], and to complete the work following the developer's default [*see* P 11 of this form]. Finally, the general contractor

must join in executing this form if he or she is not the owner, and by so doing agrees to be bound by its terms, commence construction promptly after recordation of the deed of trust and consummation of the loan, continue construction with reasonable speed, and complete the improvements promptly in accordance with the plans and specifications and applicable laws [*see* provisions immediately following signature blocks for owner(s) and lender].

For a list that includes other common construction contract provisions, see California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender).

[2] FORM

Construction (Building) Loan Agreement

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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14-30A California Legal Forms--Transaction Guide § 30A.202

§ 30A.202 Construction Loan Escrow Instructions

[1] Comment--Use of Form

This form contains construction loan escrow instructions and incorporates by reference the fund disbursement schedule contained in a construction loan agreement. For an illustrative construction loan agreement, see *§ 30A.201*.

For thorough discussions of escrow transactions, see Ch. 26, *Real Property Escrows* , and California Real Estate Law and Practice, Ch. 91, *Escrow* (Matthew Bender).

[2] FORM

Construction Loan Escrow Instructions

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawPurchase & SaleEscrow



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14-30A California Legal Forms--Transaction Guide § 30A.203

§ 30A.203 Promissory Note Evidencing Construction Loan

[1] Comment--Use of Form

This form is a promissory note evidencing a construction loan. This note is intended to be used in conjunction with the other construction loan documents set forth in this chapter. It is likely that any construction loan note will provide for a short term (rarely longer than three years) and a balloon payment of all or a major portion of the principal when the note is due [*see § 30A.10*].

For a discussion of the types of promissory notes encountered in real estate transactions, see Ch. 25A, *Security Instruments for Real Estate Financing* . For other illustrative construction loan promissory notes, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , Part G (Matthew Bender).

[2] FORM

Promissory Note Evidencing Construction Loan

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory NotesReal Property LawFinancingConstruction Loans



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14-30A California Legal Forms--Transaction Guide § 30A.204

§ 30A.204 Multifamily Deed of Trust, Assignment of Rents, and Security Agreement for Construction Loan Agreement

[1] Comment

[a] Use of Form

This form is a combination deed of trust, assignment of rents, and security agreement for a loan for the construction of a multifamily structure. Because there is no statutorily required format for deeds of trust, many lenders use their own preprinted forms or, as is the case with this form, a uniform document approved by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. However, as stated in Paragraph 22 of the form, this uniform security instrument will be governed by the law of the jurisdiction in which the property is located [*see § 30A.204[1][b]*].

If the property is located in California, certain conditions must be met for this instrument to be valid.

[b] California Requirements Governing Security Instruments

Any deed of trust or other instrument securing a construction loan should contain the following information [*Civ. Code § 3097(j)*]:

- The designation "Construction Trust Deed" (which must be placed prominently on the face of the instrument);
- The name and address of the lender, and of the owner of the subject real property; and
- A legal description (and the street address, if known) of the real property that secures the loan.

However, the failure to set forth any of this information will not affect the validity of the security instrument [*Civ. Code § 3097(j)*]. In fact, many lenders do not use the "Construction Trust Deed" designation, as demonstrated by this form.

The trust deed should be executed and acknowledged by the trustor and recorded in every county in which any portion of the property is located [*Civ. Code §§ 1169, 2952*]. The trustor should execute the trust deed in the same manner as his or her name appears of record as the owner of the property. The trustor's spouse must also execute the trust deed if the property is community property, even though the spouse's name may not appear of record [*Fam. Code § 1102*]. However, this joint execution requirement does not prevent either spouse from encumbering his or her interest in community real property, pursuant to *Fam. Code § 2033*, to pay reasonable attorneys' fees to retain or maintain legal counsel in a proceeding for dissolution or nullity of marriage, or legal separation [*Fam. Code § 1102(e)*].

Civ. Code § 1189 sets forth a single statutory certificate of acknowledgment that must be used when the acknowledgment is taken within California [*see Civ. Code § 1189(a)*].

For additional discussion of deeds of trust, see Ch. 25A, *Security Instruments for Real Estate Financing* , and Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , pt. G (Matthew Bender).

[c] Security Agreement

This multipurpose instrument is intended to be, among other things, a security agreement for any of the items covered by the instrument that are subject to the secured transactions division of the Uniform Commercial Code [*see* P 15 of this form; *see also Com. Code § 9101 et seq.*]. For a discussion of the secured transactions provisions of the Uniform Commercial Code, as adopted in California, see Ch. 42, *Secured Transactions* . A lender will always insist that a security agreement be provided, either in the deed of trust or as a separate security agreement.

[d] Assignment of Rents

Most deeds of trust contain a rents-and-revenues provision which grants the beneficiary and the beneficiary's agent the right to the rents, issues, and profits of the property following a default by the borrower. If the provision pledges the rent as additional security, it operates as a prospective lien on the property which must be perfected (usually by taking possession) before the creditor is entitled to the rents [*Childs Real Estate Co. v. Shelburne Realty Co. (1943) 23 Cal. 2d 263, 268-269, 143 P.2d 697* ; *Snyder v. Western Loan & Bldg. Co. (1934) 1 Cal. 2d 697, 701, 37 P.2d 86]* . Paragraph 26 of this form takes the alternative approach of absolutely and unconditionally assigning and transferring the rents and revenues of the property to the lender immediately on execution of the agreement. However, the borrower may collect those amounts and use them for specified purposes unless the lender delivers a written notice of default to the borrower, at which time lender is entitled to immediate possession without the need to take possession of the property [*see Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 263, 115 P.2d 450]* .

A written assignment of interest in rents, issues, and profits of real property made in connection with a loan secured by real property, stating that it is absolute, will be deemed to constitute a present transfer of the assignor's interest in existing and future rents, issues, and profits of that real property [*Civ. Code § 2938(a)*; *see Childs Real Estate Co. v. Shelburne Realty Co. (1943) 23 Cal. 2d 263, 268-269, 143 P.2d 697* (courts will not enforce a clause providing for absolute assignment of rents unless an absolute assignment is the clearly-expressed intention of the parties)]. The transfer will be effective on the execution and delivery of the assignment by the assignor [*Civ. Code § 2938(a)*].

This type of written assignment, whether it is a part of a trust deed or mortgage or is in a separate document, may be recorded in the county in which the real property is located, in the same manner as any other conveyance of an interest in real property. When duly recorded (1) the assignment will be deemed to give constructive notice of the content and effect of the assignment, and (2) the interest granted by the assignment will be deemed perfected as of the date of recordation, notwithstanding any provision of the assignment or of any other provision of law that would otherwise preclude or defer enforcement of the rights granted the assignee under the assignment until the occurrence of a subsequent event, including a subsequent default of the assignor [*Civ. Code § 2938(b)*].

For additional coverage of the assignment of rents, see California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgage* s (Matthew Bender).

[2] FORM

Multifamily Deed of Trust, Assignment of Rents, and Security Agreement for Construction Loan Agreement

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingFederal RegulationsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS

14-30B California Legal Forms--Transaction Guide 30B.syn

AUTHOR: Revision Author Andrew L. Faber

§ 30B.syn Synopsis to Chapter 30B: ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS

§ 30B.01 California Constitution

§ 30B.02 California Statutes

§ 30B.03 California Regulations

§ 30B.04 Federal Statutes

§ 30B.05 Federal Regulations

§ 30B.06 California Attorney General Opinions

§§ 30B.07-30B.09 [Reserved]

§ 30B.10 Matthew Bender Publications

[1] California Legal Forms(Matthew Bender)

[2] California Environmental Law and Land Use Practice(Matthew Bender)

[3] California Forms of Pleading and Practice (Matthew Bender)

[4] California Real Estate Law and Practice(Matthew Bender)

[5] Powell On Real Property(Matthew Bender)

§ 30B.11 Law Reviews and Periodicals

§ 30B.12 Annotations

§ 30B.13 Text References

§§ 30B.14-30B.19 [Reserved]

§ 30B.20 Review and Approval of "Development Projects"

§ 30B.21 Zoning and General Plan Requirements

[1] Zoning Defined

[2] State and Local Laws

[3] Relation to General Plan Requirements

[4] Annexation and Changes of Boundaries

§ 30B.22 Zoning Relief

[1] Administrative Options

[a] Variances and Conditional Use Permits

[b] Exhaustion of Administrative Remedies

[2] Legislative Option--Rezoning

§ 30B.23 Development Agreements Between Developers and Local Governments

[1] Purpose of Development Agreements

[2] Required Provisions of Development Agreements

[3] Procedure for Adoption of Development Agreements

[4] Amending or Canceling Development Agreements

§§ 30B.24-30B.29 [Reserved]

§ 30B.30 Overview of Environmental Regulations

§ 30B.31 National Environmental Policy Act of 1969 (NEPA)

§ 30B.32 California Environmental Quality Act of 1970 (CEQA)

[1] General Requirements; Environmental Impact Reports

[2] Relationship to NEPA Requirements

§ 30B.33 California Coastal Act

[1] Area Covered

[2] Permit Requirement

§ 30B.34 Other Federal and State Permit Requirements

[1] Overview

[2] Army Corps of Engineers Section 404 Permit

[3] Endangered Species Acts Incidental Take Permits

[4] State Fish & Game Permit

§§ 30B.35-30B.39 [Reserved]

§ 30B.40 State Building Requirements

[1] State Housing Law and Building Standards Law

[2] Adoption and Submission of Standards

§ 30B.41 Special Building Requirements

[1] Earthquake Standards and Special Studies Zones

[a] Earthquake Protection Laws

[b] Exceptions to Earthquake Protection Laws

[c] Enforcement of Earthquake Protection Laws

[2] Housing for the Elderly

[3] Access for Persons with Disabilities

[a] General Rule

[b] Funding

[c] Approval of Contracts

[d] Exception to Access and Approval Requirements

[e] Alternative Access Requirements

[4] Smoke Detectors

§§ 30B.42-30B.99 [Reserved]

§ 30B.100 Facts

Scope

§ 30B.101 Documents

Scope

§§ 30B.102-30B.109 [Reserved]

§ 30B.110 Applicability of Local Requirements

Scope

§ 30B.111 Applicability of Development Agreement with Local City or County

Scope

§ 30B.112 Applicability of National Environmental Policy Act and California Environmental Quality Act

Scope

§ 30B.113 Applicability of California Coastal Act

Scope

§ 30B.114 Applicability of McAteer-Petris Act

Scope

§ 30B.115 Applicability of Other State and Federal Permitting Requirements

Scope

§§ 30B.116-30B.119 [Reserved]

§ 30B.120 Submitting Applications for Entitlements and Local Permits

Scope

§ 30B.121 Obtaining Relief From Zoning Ordinance

Scope

§ 30B.122 Obtaining Development Agreement with Local City or County

Scope

§ 30B.123 Obtaining State Permits in General

Scope

§ 30B.124 Complying With Requirements of CEQA

Scope

§ 30B.125 Filing and Processing Applications for Coastal Development Permits

Scope

§ 30B.126 Obtaining Regional Approvals and Permits

Scope

§ 30B.127 Obtaining Other State and Federal Permits

Scope

§§ 30B.128-30B.199 [Reserved]

§ 30B.200 Application for Rezoning, Conditional Use Permit, Variance, or Design Review--City of Oakland Form

[1] Comment

[a] Use of Form

[b] Rezoning

[c] Variances Defined

[d] Statutory Limitations on Variances

[e] Special Standards for Specified Types of Variances

[f] Additional Requirements Commonly Imposed by Ordinance

[g] Conditional Use Permits

[2] FORM

Application for Rezoning, Conditional Use Permit, Variance, or Design Review--City of Oakland Form

§ 30B.201 Resolution Granting Variance

[1] Comment

[a] Use of Form

[b] Recitals

[c] Findings

[d] Conditional Grant

[2] FORM

Resolution Granting Variance

§ 30B.202 Notice of Appeal From Action of Planning Commission--City and County of San Francisco Form

[1] Comment--Use of Form

[2] FORM

Notice of Appeal From Action of Planning Commission--City and County of San Francisco Form

§ 30B.203 Petition for Annexation--Imperial County LAFCO Form

[1] Comment

[a] Use of Form

[b] Role of LAFCOs Generally

[2] FORM

Form--Petition for Annexation--Imperial County LAFCO Form

§ 30B.204 Development Agreement

[1] Comment

[a] Use of Form

[b] Recitals

[c] Effective Date

[d] Term

[e] Applicable Rules

[f] Timing of Development

[g] Processing

[h] Amendment or Cancellation

[i] Annual Review

[j] Default

[k] Mortgagee Protection

[l] Severability

[m] Transfers and Assignments

[n] Force Majeure

[2] FORM

Development Agreement

§§ 30B.205-30B.209 [Reserved]

§ 30B.210 Flow Chart Describing Environmental Impact Evaluation Process

[1] Comment

[a] Use of Form

[b] Applicability of CEQA

[i] Introduction

[ii] "Project"

[iii] "Discretionary" and "Ministerial" Projects

[iv] "Significant Effect on the Environment"

[v] "Lead" and "Responsible" Agencies

[c] Environmental Impact Evaluation Process

[i] Preliminary Review

[ii] Initial Study

[d] Negative Declaration Process

[i] Contents of Negative Declaration

[ii] Process for Review of Negative Declaration

[e] EIR Process

[i] Preliminary Steps

[ii] Draft EIR

[iii] Comment and Review Period

[iv] Final EIR and Project Approval

[f] Contents of EIR

[g] Subsequent EIRs and Supplements and Addenda to EIRs

[h] Master EIRs and Focused EIRs

[i] Legislative Intent

[ii] Master EIRs

[iii] Focused EIRs

[2] FORM

Flow Chart Describing Environmental Impact Evaluation Process

§ 30B.211 Notice of Exemption From CEQA Requirements

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Exemptions From CEQA Requirements

[i] Statutory Exemptions

[ii] Categorical Exemptions

[d] Filing of Notice

[i] Statute of Limitations

[ii] By Public Agency

[iii] By Applicant

[e] Distribution of Copies

[2] FORM

Notice of Exemption From CEQA Requirements

§ 30B.212 Contract Between Public Agency and Environmental Consultant to Prepare Environmental Impact Report

[1] Comment

[a] Use of Form

[b] Conditions of Concern to Developer

[c] Requirements on Developer to Fund Work

[2] FORM

Contract Between Public Agency and Environmental Consultant to Prepare Environmental Impact Report

§ 30B.213 Contract Between Public Agency and Developer to Pay for CEQA Services

[1] Comment

[a] Use of Form

[b] Conditions of Concern to Developer

[2] FORM

Contract Between Public Agency and Developer to Pay for CEQA Services

§ 30B.214 Environmental Information Form

[1] Comment

[a] Use of Form

[b] Preparation of Initial Study

[c] Alternative Forms

[d] Required Contents

[e] Submission of Data by Private Individuals and Private Organizations

[f] Consultations

[g] Purposes of Initial Study

[h] Results of Initial Study

[2] FORM

Environmental Information Form

§ 30B.215 Environmental Checklist Form

[1] Comment

[a] Use of Form

[b] Sample Language

[2] FORM

Environmental Checklist Form

§ 30B.216 Notice of Preparation

[1] Comment

[a] Use of Form

[b] Contents of Notice of Preparation

[2] FORM

Notice of Preparation

§ 30B.217 Negative Declaration

[1] Comment

[a] Use of Form

[b] Decision to Prepare Negative Declaration

[c] Contents of Negative Declaration

[d] Notice Requirements

[e] Public Review

[f] Recirculation Before Adoption

[g] Consideration and Approval

[h] Notice of Determination

[2] FORM

Negative Declaration

§ 30B.218 Environmental Impact Report (Table of Contents, Introduction, and Summary Sections)

[1] Comment

[a] Use of Form

[b] Table of Contents

[c] Introduction

[d] Initial Study and Notice of Preparation

[e] Draft EIR

[f] Summary

[g] Summary Table of Impacts and Mitigations

[2] FORM

Environmental Impact Report (Table of Contents, Introduction, and Summary Sections)

§ 30B.219 Resolution Making CEQA Findings

[1] Comment

[a] Use of Form

[b] Introduction

[c] Recitals

[d] Findings Concerning Significant Impacts

[e] Findings Concerning Alternatives

[f] Statement of Overriding Considerations

[2] FORM

Resolution Making CEQA Findings

§ 30B.220 Mitigation Monitoring Program

[1] Comment

[a] Use of Form

[b] Contents of Mitigation Monitoring Program

[2] FORM

Mitigation Monitoring Program

§ 30B.221 Notice of Determination

[1] Comment

[a] Use of Form

[b] Filing Notice of Determination

[2] FORM

Notice of Determination

§ 30B.222 Application for Coastal Development Permit--Marin County Form

[1] Comment

[a] Use of Form

[b] Coastal Zone Defined

[c] California Coastal Commission and Local Coastal Programs

[d] Disclosures Regarding Contacts

[e] Local Governments and Local Coastal Programs (LCPs)

[f] Requirement to Obtain Coastal Development Permit

[g] Developments Exempt From Permit Requirements

[h] Issuance of Permit After LCP Certified

[i] Issuance of Permit Before LCP Certified

[j] Exemptions From Normal Permit Application Procedures

[i] Administrative Permits

[ii] Emergency Work

[iii] "De Minimis" Developments

[k] Violations of California Coastal Act

[2] FORM

Application for Coastal Development Permit--Marin County Form

§ 30B.223 Application for Permit From San Francisco Bay Conservation and Development Commission

[1] Comment

[a] Use of Form

[b] General Guidelines to Completing Application

[c] Overview of Jurisdiction of BCDC

[d] McAteer-Petris Act and San Francisco Bay Plan

[e] Area of Jurisdiction of BCDC

[f] Administrative Permits

[i] Issued for Minor Repairs or Improvements

[ii] Submission and Processing of Application

[g] Major Permits

[i] Contents of Application Package

[ii] Filing and Processing of Application

[iii] Staff Recommendation

[iv] Public Hearing

[v] Disapproval or Approval and Permit Issuance

[h] Emergency Permits

[i] Regionwide Permits

[2] FORM

Application for Permit From San Francisco Bay Conservation and Development Commission

§ 30B.224 Mitigation Agreement Between California Department of Fish and Game and Developer

[1] Comment

[a] Use of Form

[b] Recitals

[c] Protection of Existing Wildlife

[d] Habitat Enhancement

[e] Funding Requirements

[f] Certificate of Public Purpose

[g] Escrow Instructions

[2] FORM

Mitigation Agreement Between California Department of Fish and Game and Developer

§§ 30B.225-30B.229 [Reserved]

§ 30B.230 [Reserved]

§ 30B.231 Application for Building Permit--Santa Clara County Form

[1] Comment

[a] Use of Form

[b] Filing Procedures

[c] Supporting Documents

[d] Special Permit Requirements

[e] Fees

[2] FORM

Application for Building Permit--Santa Clara County

Revision Author
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FOOTNOTES:

(n11)Footnote *. Andrew L. Faber is a partner in the San Jose law firm of Berliner Cohen. He is a graduate of Swarthmore College (B.A., physics), Harvard University (A.M., applied physics), and Stanford Law School (J.D. 1974, Articles Editor of Stanford Law Review).

Mr. Faber's practice is focused on land use law and litigation. He represents both public and private clients working through the entitlement process, with an emphasis on general plan and zoning entitlements, and compliance with the California Environmental Quality Act and other environmental protection laws. His litigation practice emphasizes land use and CEQA litigation, and eminent domain trial work.



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14-30B California Legal Forms--Transaction Guide Scope

AUTHOR: Revision Author Andrew L. Faber

Scope

Revision Author
Andrew L. Fabern* Scope

This chapter covers the various types of governmental permits and other approvals that are frequently required in connection with real estate development projects. The focus of this chapter is on the legal requirements and procedures for obtaining zoning and building approvals from local governments, and environmental approvals or clearances from federal, state, or local governmental agencies. The Legal Background surveys the laws that govern the issuance of these entitlements and permits. The Transaction Guide lists the steps that counsel, the applicant, and the local governmental entity must take in completing and processing applications for entitlements and permits. The Forms reproduce representative forms from various jurisdictions and government entities, and a number of useful agreements. The forms are included in this chapter for illustrative purposes only.

This chapter does not provide detailed coverage of the unique governmental regulations applicable to subdivisions, condominium-type developments, or mobilehomes. Those topics are extensively covered in Ch. 30, *Subdivision Regulation* , Ch. 33A, *Time-Share Projects* Ch. 33B, *Membership Camping Contracts* Ch. 33C, *Stock Cooperatives* Ch. 33D, *Planned Developments* Ch. 34, *Condominiums* , Ch. 39, *Mobilehome Parks* , and Ch. 40, *Mobilehomes* . In addition, this chapter does not cover contamination issues in real property transactions. These issues are discussed in Ch. 33, *Contamination Considerations in Real Property Transactions* .

FOOTNOTES:
(n12)Footnote *. Andrew L. Faber is a partner in the San Jose law firm of Berliner Cohen. He is a graduate of Swarthmore College (B.A., physics), Harvard University (A.M., applied physics), and Stanford Law School (J.D. 1974, Articles Editor of Stanford Law Review).

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AUTHOR: Revision Author Andrew L. Faber

§ 30B.01 California Constitution

Charters; adoption by counties and cities. *Cal. Const., art. XI, § 3*.

City charters; provisions. *Cal. Const., art. XI, § 5*.

Counties and cities; ordinances and regulations; authority. *Cal. Const., art. XI, § 7*.



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§ 30B.02 California Statutes

Signed statement that preparer of plans and specifications for proposed construction is licensed architect required before issuance of construction permit. *Bus. & Prof. Code § 5536.2*.

Streambed Alteration Agreements. *Fish & Game Code § 1600 et seq.*

Endangered Species Act. *Fish & Game Code §§ 2050-2098*.

Access to public accommodations or buildings by individuals with disabilities. *Gov. Code §§ 4450-4460*; *Health & Safety Code §§ 19952-19959*.

Planning and Zoning Law. *Gov. Code § 65000 et seq.*

Zoning requirements. *Gov. Code §§ 65800-65912*.

Development agreements with governmental agencies. *Gov. Code §§ 65864-65869.5*.

Requirements for development projects ("Permit Streamlining Act"). *Gov. Code §§ 65920-65964*.

Local agency handling of fees collected for development projects. *Gov. Code §§ 66000-66019, 66023*.

San Francisco Bay Conservation and Development Commission. *Gov. Code § 66600 et seq.*

Tahoe Regional Planning Agency. *Gov. Code §§ 66800, 66801*.

California Tahoe Regional Planning Agency. *Gov. Code § 67000 et seq.*

Installation of smoke detectors as condition precedent to issuance of permit for alterations, repairs, or additions. *Health & Safety Code § 13113.7*.

Essential Services Buildings Seismic Safety Act of 1986. *Health & Safety Code § 16000 et seq.*

Employee Housing Act. *Health & Safety Code § 17000 et seq.*

State Housing Law. *Health & Safety Code § 17910 et seq.*

Mobilehomes-Manufactured Housing Act of 1980. *Health & Safety Code § 18000 et seq.*

Mobilehome Parks Act. *Health & Safety Code § 18200 et seq.*

California Building Standards Law. *Health & Safety Code § 18901 et seq.*

State Historical Building Code. *Health & Safety Code § 18950 et seq.*

Earthquake Protection Laws. *Health & Safety Code §§ 19100-19183*.

Required copies of building plans. *Health & Safety Code §§ 19850-19853*.

Plans and specifications for developments. *Health & Safety Code §§ 19870-19872*.

Housing for the elderly. *Health & Safety Code §§ 19900, 19901*.

Shared housing for the elderly and handicapped. *Health & Safety Code §§ 19902-19959*.

California Factory-Built Housing Law. *Health & Safety Code § 19960 et seq.*

Department of Housing and Community Development. *Health & Safety Code § 50400 et seq.*

Certificate of workers compensation insurance required before issuance of building permit. *Lab. Code § 3800*.

State Mining and Geology Board and Division of Mines and Geology. *Pub. Res. Code § 660 et seq.*

Alquist-Priolo Earthquake Fault Zoning Act. *Pub. Res. Code § 2621 et seq.*

Seismic Hazards Mapping Act. *Pub. Res. Code § 2690 et seq.*

Strong-Motion Instrumentation Program. *Pub. Res. Code § 2700 et seq.*

California Environmental Quality Act of 1970. *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

Consolidated permit processing by state environmental protection agencies. *Pub. Res. Code §§ 71000-71030*.



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.03 California Regulations

Regulations of San Francisco Bay Conservation and Development Commission. *14 Cal. Code Reg. § 10110 et seq.*

Regulations of California Coastal Commission. *14 Cal. Code Reg. § 13001 et seq.*

State CEQA Guidelines. *14 Cal. Code Reg. § 15000 et seq.*

Regulations of State Architect pertaining to access to public structures by physically handicapped. *21 Cal. Code Reg. §§ 81-86.*

California Building Standards Code

California Building Standards Administrative Code. 24 Cal. Code Reg., Part 1.

California Building Code. 24 Cal. Code Reg., Part 2.

California Electrical Code. 24 Cal. Code Reg., Part 3.

California Mechanical Code. 24 Cal. Code Reg., Part 4.

California Plumbing Code. 24 Cal. Code Reg., Part 5.

California Energy Code. 24 Cal. Code Reg., Part 6.

California Elevator Safety Construction Code. 24 Cal. Code Reg., Part 7.

California Historical Building Code. 24 Cal. Code Reg., Part 8.

California Fire Code. 24 Cal. Code Reg., Part 9.

California Code for Building Conservation. 24 Cal. Code Reg., Part 10.

Regulations of Department of Housing and Community Development

State Housing Law Regulations. *25 Cal. Code Reg. § 1 et seq.*

Earthquake Protection Law regulations. *25 Cal. Code Reg. § 500*.

Mobilehome parks. *25 Cal. Code Reg. § 1000 et seq.*

Special occupancy parks. *25 Cal. Code Reg. § 2000 et seq.*

Factory-built housing. *25 Cal. Code Reg. § 3000 et seq.*

Mobilehomes, recreational vehicles, and commercial coaches. *25 Cal. Code Reg. § 4000 et seq.*



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.04 Federal Statutes

Water Pollution Control Act of 1972 ("Clean Water Act"). *33 U.S.C. § 1251 et seq.*

National Environmental Policy Act of 1969 ("NEPA"). *42 U.S.C. § 4321 et seq.*

Endangered Species Act. *16 U.S.C. §§ 1531-1544*.



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14-30B California Legal Forms--Transaction Guide § 30B.05

AUTHOR: Revision Author Andrew L. Faber

§ 30B.05 Federal Regulations

Regulations of Federal Environmental Protection Agency pertaining to National Environmental Policy Act of 1969. *40 C.F.R. § 6.100 et seq.*



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14-30B California Legal Forms--Transaction Guide § 30B.06

AUTHOR: Revision Author Andrew L. Faber

§ 30B.06 California Attorney General Opinions

Eligibility of insects as threatened or endangered species under California Endangered Species Act. 81 Ops. Cal. Atty. Gen. 222 (1998) .

Disqualification of city council member who signed petition opposing land use project from participating in council proceeding during which application for conditional use permit for project is considered. *78 Ops. Cal. Atty. Gen. 77 (1995)* .

As a condition of issuing a building permit for the construction of a single-family residence, city or county may require by ordinance the installation of a paved driveway from the property line to the residence for emergency vehicle access. *78 Ops. Cal. Atty. Gen. 53 (1995)* .

Is a local agency prohibited from charging building permit and similar fees that exceed the estimated reasonable costs of providing the services rendered unless the amounts of the fees are approved by the electorate? *76 Ops. Cal. Atty. Gen. 4 (1993)* .

In chartered or general law city, planning director is considered "interested person" within meaning of *Gov. Code § 66452.5(d)* so as to authorize planning director to appeal to city council from subdivision map decision made by planning commission, acting as advisory agency. *71 Ops. Cal. Atty. Gen. 326 (1988)* .

Use restrictions or limits created by California Coastal Act of 1976 or certified local coastal programs must be considered by tax assessor in computing tax assessment valuations. *61 Ops. Cal. Atty. Gen. 97 (1978)* .

Violation of a local building code ordinance may not be prosecuted as a violation of the penalty provision of the State Housing Law. 60 Ops. Cal. Atty. Gen. 83 (1977) .

Construction of sidewalks and curbs for use by physically handicapped persons. *57 Ops. Cal. Atty. Gen. 186 (1974)* .

Ordinance requiring architectural review does not unlawfully discriminate against factory-built housing; requirement calling for use permits for all factory-built housing is invalid. *55 Ops. Cal. Atty. Gen. 234 (1972)* .

Local conditions exceptions to State Housing Law. 55 Ops. Cal. Atty. Gen. 157 (1972) .



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§§ 30B.07[Reserved]



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.10 Matthew Bender Publications

[1] California Legal Forms(Matthew Bender)

Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

Ch. 30, *Subdivision Regulation* .

Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals* .

Ch. 33, *Contamination Considerations in Real Property Transactions* .

Ch. 33A, *Time-Share Projects* .

Ch. 33B, *Membership Camping Contracts* .

Ch. 33C, *Stock Cooperatives* .

Ch. 33D, *Planned Developments* .

Ch. 34, *Condominiums* .

Ch. 39, *Mobilehome Parks* .

Ch. 40, *Mobilehomes* .

[2] California Environmental Law and Land Use Practice(Matthew Bender)

Chs. 20- 23 (CEQA).

Ch. 60, *Zoning* .

Ch. 61, *Subdivision Regulation* .

Ch. 62, *Planning* .

Ch. 63, *Growth Management and Development Limits* .

Ch. 64, *Exactions* .

Ch. 65, *Takings and Other Constitutional Controls* .

Ch. 66, *Coastal Zone Regulation* .

Ch. 67, *The San Francisco Bay Conservation and Development Commission* .

Ch. 73, *Annexation and Boundary Issues* .

Ch. 74, *Development Agreements and Other Negotiated Land Use Agreements* .

[3] California Forms of Pleading and Practice (Matthew Bender)

Ch. 104, Building Contracts, § 104.233 (complaint by owner against contractor for restitution based on rescission of contract due to inability to procure building permit).

Ch. 418, *Pollution and Other Environmental Concerns* .

Ch. 579, *Zoning and Planning* .

[4] California Real Estate Law and Practice(Matthew Bender)

Chs. 250- 331 (Zoning and Land Use Control).

Ch. 303, *Requirements of the California Environmental Quality Act* .

[5] Powell On Real Property(Matthew Bender)

Ch. 79, *Police Power Regulations Affecting Land; Generally* .

Ch. 79A, *Environmental Protection* .



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14-30B California Legal Forms--Transaction Guide § 30B.11

AUTHOR: Revision Author Andrew L. Faber

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Strand & Liebesman, *The Section 404 Nationwide Permit: An Endangered Species?, 14 Nat. Resources & Env't 29 (1999).*

Smith & Pendleton, *San Francisco Bay Conservation and Development Commission: Challenge and Response After 30 Years, 28 Golden Gate U. L. Rev. 269 (1998).*

Tosta, Davidoff & Dietrich, *How Citizens of Goleta Valley v. Board of Supervisors Changed the California Environmental Review Process, 26 Sw. U. L. Rev. 57 (1996).*

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Strand, *Individual Permits Under Section 404, 23 Envtl. L. Rep. 10285 (1993) .*

Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man, 25 Urb. Law. 589 (1993).*

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§ 30B.12 Annotations

Annot., *Zoning: Construction and effect of statute requiring that zoning application be treated as approved if not acted on within specified period of time*, 66 A.L.R.4th 1012 (1988) .

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Annot., *Retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit*, 49

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AUTHOR: Revision Author Andrew L. Faber

§ 30B.13 Text References

Witkin, *Summary of California Law*, vol. 12, *Real Property*, (10th ed. 2005).

California Zoning Practice, Ch. 3, "Land-Use Controls Related to Zoning," §§ 3.5-3.6 (Cal. CEB 1969); §§ 3.5-3.6A (Cal. CEB Supp. 1982).

California Department of Real Estate Reference Book, Ch. 19, "Subdivisions and Other Public Controls"; Ch. 20, "Planning, Zoning and Redevelopment" (2000 ed.).



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§§ 30B.14[Reserved]



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§ 30B.20 Review and Approval of "Development Projects"

Most construction projects are considered "development projects" for purposes of state legislation that regulates the processing of development permit applications by state and local agencies [*see Gov. Code §§ 65927, 65928, 65931* (definitions); *see also Gov. Code §§ 65920-65957.1*]. This legislation, called the Permit Streamlining Act, requires agencies with permit authority to do all of the following:

- Prepare lists of required application information [*Gov. Code §§ 65940, 65941*];
- Provide notice, on request, of proposed changes in laws potentially affecting proposed development projects [*Gov. Code §§ 65945, 65945.3, 65945.5*];
- Decide, within 30 days, whether or not an application is complete [*Gov. Code § 65943*];
- Refrain from demanding new or additional information once an application has been accepted as complete [*Gov. Code § 65944*]; and
- Take final action on an application within specified periods [*Gov. Code §§ 65950-65952.2*].

PRACTICE TIP:
Is the Project in the Permit Streamlining Act? The Permit Streamlining Act (PSA) has important exclusions: (1) it does not apply to legislative entitlements, such as a rezoning or a general plan amendment [*see Landi v. County of Monterey (1983) 139 Cal. App. 3d 934, 189 Cal. Rptr. 55]* ; and (2) it does not apply to Local Agency Formation Commision (LAFCO) approval of annexations, or to ministerial project approvals [*see Gov. Code §§ 65927, 65928*]. The developer has more influence over the speed of processing of entitlements if the PSA does apply. In certain circumstances, it might be advisable to modify the project to remove the need for legislative approvals (which also means that the

approvals are not subject to referendum).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning



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§ 30B.21 Zoning and General Plan Requirements

[1] Zoning Defined

"Zoning" is the division of a city, county, or other geographical area into districts and the imposition and application of different restrictions on the use of private property in each district. Zoning regulations have traditionally been divided into two classes [*Miller v. Board of Public Works (1925) 195 Cal. 477, 486, 234 P. 381 , appeal dismissed, 273 U.S. 781 (1927)]* :

- Those that regulate the height or bulk of buildings within designated districts; and
- Those that prescribe the permissible uses of buildings and land within designated districts.

Modern zoning has moved well beyond this traditional dichotomy. Regulation of height and bulk has expanded to include regulation of many aspects of site design, including parking, architectural design, minimum lots size, setbacks, and the like. Likewise, the concept of zoning districts arranged in a "Euclidean" pattern [*see Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816]* has been expanded to include such innovations as floating zones, overlay zones, historic zones, and planned developments.

For extensive discussions of the modern scope and limits of the use of zoning, see California Environmental Law and Land Use Practice, Ch. 60, *Zoning* (Matthew Bender), and California Real Estate Law and Practice, Chs. 260- 265 (zoning as instrument of land use control) (Matthew Bender).

[2] State and Local Laws

Cities and counties may make and enforce within their jurisdictional boundaries any local, police, sanitary, and other ordinances and regulations that do not conflict with general laws [*see Cal. Const., art. XI, § 7*; *see also* discussion of Planning and Zoning Law, *below*]. Local zoning ordinances fall within this home rule power [*Miller v. Board of*

Public Works (1925) 195 Cal. 477, 486, 234 P. 381 , appeal dismissed, 273 U.S. 781 (1927)] .

The zoning provisions [*see Gov. Code § 65800 et seq.*] of the Planning and Zoning Law [*Gov. Code § 65000 et seq.*] provide for the adoption and administration of zoning laws, ordinances, rules, and regulations by counties and cities. These provisions also establish certain minimal limitations that must be incorporated into local ordinances but that still leave local jurisdictions with the power to exercise a great deal of control over local zoning matters [*Gov. Code § 65800*; *see Gov. Code § 65804*; *see also Gov. Code § 65860* (scope of power to regulate by ordinance)].

Those statutory zoning requirements apply to all counties and general law cities, but do not (with a few exceptions) [*see, e.g., Gov. Code § 65804*] apply to a charter city unless adopted by it [*Gov. Code § 65803*]. A "charter city" is one that has adopted a charter governing its municipal affairs [*see Cal. Const., art. XI, §§ 3, 5*]. For a complete list of California charter and general law cities, see *California Real Estate Law and Practice, Ch. 260, Sources and Limitations of Zoning Power, § 260.90* (Matthew Bender).

Because there are so many potential methods for regulating uses of land and building designs, zoning ordinances differ widely from jurisdiction to jurisdiction. However, most local zoning ordinances specify three types of permissible uses: (1) permitted, (2) accessory (uses that are supplementary to the main permitted uses), and (3) conditional (uses that are not automatically allowed but that may be conditionally approved).

[3] Relation to General Plan Requirements

All cities and counties must have a general plan [*see Gov. Code § 65300*], which has, in the last three decades, achieved a level of primacy over zoning as the fundamental blueprint for growth in the jurisdiction. Its power arises primarily from the fact that certain other approvals must be consistent with it, for example, subdivisions and conditional use permits. In general law cities, zoning must also be consistent, but, with a few exceptions, that requirement does not apply to charter cities unless the charter city has by local ordinance made the consistency requirement applicable to itself [*see Gov. Code §§ 65803, 65860*; *but see Gov. Code § 65860(d)* (consistency requirement does apply to Los Angeles)].

The general plan is adopted and amended by resolution [*see Gov. Code § 65356*]. Both processes are legislative acts, which are subject to referendum, and can be accomplished by initiative.

PRACTICE TIP:

General Plan Amendment Process. If a general plan amendment will be needed for a project, the developer should ascertain early on what local requirements apply. Cities vary widely in their procedures for amending their general plans. General law cities can amend the plan only four times per year [*see Gov. Code § 65358(b)*]. Although charter cities are not subject to that limitation, some have their own limitations, such as the practice in the City of San Jose of hearing all proposed amendments only once a year. In some cities, the amendment must be initiated by the city council itself.

For detailed coverage of general plans, see California Environmental Law and Land Use Practice, Ch. 62, *Planning* (Matthew Bender), and California Real Estate Law and Practice, Ch. 253, *Local Planning and the General Plans* (Matthew Bender).

[4] Annexation and Changes of Boundaries

If a project needs some change to city or special district boundaries, then approval must be obtained from the Local Agency Formation Commission (LAFCO). There is a LAFCO in each county, and they operate under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 [*Gov. Code § 56000 et seq.*]. Common examples would include an annexation of county land into a city and modifying the boundaries of a services district,

such as a water district or fire district, to include the project site. Note that there are exceptions to the general rules of LAFCO jurisdiction, for example, a special exemption for annexations into cities in Santa Clara County under certain circumstances [*see Gov. Code § 56757*].

For further discussion of LAFCO jurisdiction, see *§ 30B.203*. For detailed coverage of all aspects of LAFCOs, see California Environmental Law and Land Use Practice, Ch. 73, *Annexation and Boundary Issues* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsBoundariesReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional PlanningReal Property LawZoning & Land UseZoning Methods



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.22 Zoning Relief

[1] Administrative Options

[a] Variances and Conditional Use Permits

Every zoning ordinance specifies administrative procedures that must be followed when a developer wishes to obtain approval of a proposed project that is not a permitted use or is otherwise inconsistent with the existing zoning laws. Variances and conditional use permits are two of the more common administratively-approved departures from standard zoning requirements. A "variance" is a deviation from the standa rd established by the zoning ordinance, and is granted for the benefit of an individual property owner [*see Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 88, 4 Cal. Rptr. 493, 351 P.2d 765* ; *Essick v. City of Los Angeles (1950) 34 Cal. 2d 614, 623, 213 P.2d 492]* . A "conditional use" is one that is expressly authorized by ordinance, subject to conditions that may be specified in the ordinance or applied by the city or county on an individual basis [*see Essick v. City of Los Angeles (1950) 34 Cal. 2d 614, 622, 213 P.2d 492* ; *see also* California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Conditional Use Permits, and Variances* (Matthew Bender)]. For further discussion and an illustrative application for a conditional use permit or variance, see *§ 30B.200*.

[b] Exhaustion of Administrative Remedies

A frustrated developer must exhaust any and all administrative remedies established by the applicable zoning ordinance before seeking judicial relief [*see United States v. Superior Court (1941) 19 Cal. 2d 189, 194, 120 P.2d 26]* . For a discussion of judicial zoning remedies, see *California Forms of Pleading and Practice, Ch. 579, Zoning and Planning, § 579.260 et seq.* (Matthew Bender).

[2] Legislative Option--Rezoning

As an alternative to administrative actions, the developer can apply for a rezoning of the property. Rezoning is

accomplished by amending the zoning map to change the zoning district designation for a given property (e.g., changing zoning from "agricultural" to "residential-single family"). Alternatively, the text of the zoning ordinance can be amended to change the uses permitted in a given zone. This is a legislative rather than an administrative remedy because it requires a legislative act effected by ordinance [*see* California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender)]. The Planning and Zoning Law [*Gov. Code §§ 65000-66499.58*] sets forth rezoning procedures [*see Gov. Code § 65853*] which require, among other things, that the planning commission hold a public hearing on the matter [*Gov. Code § 65854*] and submit a recommendation to the legislative body [*Gov. Code § 65856*], which must take the final action [*see Gov. Code § 65857*].

Whether or not a local entity is subject to or has adopted the zoning procedures established in the Planning and Zoning Law [*see § 30B.21[2]*], it may establish rezoning procedures that are more stringent than the ones contained in that law [*see Gov. Code § 65804*]. For example, local ordinances may require the owner to demonstrate that the proposed amendment conforms with existing policies and laws (including the general plan) and would benefit the public. Or, an owner may have to demonstrate that the amendment is justified by changed conditions affecting the land, such as recent population increases, the construction of a new freeway, or the development of a new subdivision. Obviously, the attorney or developer must consult the zoning ordinance for rezoning requirements before commencing the application process.

When a planning commission is required to hold a hearing and make a recommendation, the board hearing notice cannot be published until the commission (1) has completed its hearing, (2) adopted its recommendation, and (3) formally delivered the recommendation. Furthermore, the board hearing notice must include the commission's recommendation [*Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 893, 70 Cal. Rptr. 3d 474]* . Thus, a "streamlined zoning process," under which the county gave notice of a hearing before the board of supervisors before the planning commission made its recommendation on a proposed amendment to the zoning ordinance, violated the Planning and Zoning Law [*Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 881, 70 Cal. Rptr. 3d 474]* .

For an application for rezoning, see *§ 30B.200*. For further discussion of rezoning procedures, see California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseSpecial Permits & VariancesReal Property LawZoning & Land UseZoning Methods



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§ 30B.23 Development Agreements Between Developers and Local Governments

[1] Purpose of Development Agreements

A developer can receive assurances that existing versions of local rules, regulations, and official policies will govern the future development of a particular property by entering into a development agreement with the appropriate city or county provided that the arrangement complies with the state Development Agreement Law [*see Gov. Code §§ 65864-65869.5*]. The Development Agreement Law was passed in 1979 to establish a procedure to ameliorate the harsh "no vested rights in existing zoning" rule enunciated by the *California Supreme Court in Avco Community Developers, Inc. v. South Coast Regional Commission (1976) 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546* .

PRACTICE TIP:

Other Ways to Vest Rights in a Project. The attractiveness of a development agreement should always be weighed against other possible ways of vesting rights in a project. Of these, probably the most useful is a vesting tentative map [*see Gov. Code § 66498.1 et seq.*]. Vesting tentative maps lock in the right to build using the same ordinances, policies, and standards in effect at the time the map application is deemed complete. Cities and counties are required to have an ordinance authorizing the use of vesting tentative maps, and their use avoids the time and expense of negotiating a customized development agreement. In addition, the scope of exactions that can be required for approval of a tentative map is less open-ended than the consideration that may have to be given by a developer to obtain a development agreement. Another advantage of a vesting tentative map is that its approval is deemed to be an administrative act, so it is not subject to being overturned by referendum. Development agreements, by contrast, are approved legislatively, and are by statute subject to referendum [*see Gov. Code § 65867.5(a)*].

[2] Required Provisions of Development Agreements

First, the developer must have a legal or equitable interest in the subject parcel [*see Gov. Code § 65865(a)*]. The

property must also be within the jurisdiction of the city or county, although a city can enter into a development agreement for property in unincorporated territory conditional on annexation [*see Gov. Code § 65865(b)*]. In addition, the development agreement must contain certain provisions, including the following:

- The duration of the agreement;
- If applicable, provisions for reservation or dedication of land for public purposes; and
- A description of the following aspects of the proposed development:

  (1) The permitted uses of the property;

  (2) The density or intensity of use; and

  (3) The maximum height and size of the buildings.

A development agreement that includes a subdivision, as defined by *Gov. Code § 66473.7* [*see Gov. Code § 66473.7(a)(1)*], must provide that any tentative map prepared for the subdivision will comply with the provisions of § 66473.7, which requires proof that a sufficient water supply will be available for the subdivision [*Gov. Code § 65867.5(c)*; *see Gov. Code § 66473.7*; *see also Ch. 30, § 30.23[2][b][vii]*].

A development agreement may also include limitations on subsequent discretionary actions, and may establish times for commencement or completion of all or part of the project [*see Gov. Code § 65865.2*].

PRACTICE TIP:

Representing the Legal Owner. Commonly a developer will be an equitable owner of the property by virtue of being under contract to purchase the property from the legal owner. Local jurisdictions vary as to whether they want to have the legal owner as a party to the agreement, even though the negotiations are with the developer. If the landowner is a party, his or her counsel should be sure that there are appropriate provisions in the agreement to release the landowner from the burdens of the agreement after the sale closes. The landowner must also consider whether he or she wants to retain the possible benefits of the agreement if the developer does not actually purchase the property.

[3] Procedure for Adoption of Development Agreements

In entering into a development agreement, the local jurisdiction must do all of the following:

- Find that the proposed agreement is consistent with the general plan and any applicable specific plan [*Gov. Code § 65867.5(b)*];
- Hold a noticed public hearing on the developer's agreement application in front of both the planning agency (e.g., the planning commission) and the legislative body (e.g., the city council or board of supervisors) [*see Gov. Code § 65867*; *see also Gov. Code §§ 65090, 65091* (applicable notice requirements)];
- Approve the agreement by ordinance [*Gov. Code § 65867.5*]; and
- Have the agreement recorded [*see Gov. Code § 65868.5*].

The local jurisdiction must review the agreement at least annually [*see Gov. Code § 65865.1*]. Any party to the

agreement may enforce it [*Gov. Code § 65865.4*].

[4] Amending or Canceling Development Agreements

The parties may agree to amend or cancel the agreement [*see Gov. Code § 65868*], and must amend the agreement to reflect subsequent changes in state or federal laws that are inconsistent with provisions of the agreement [*Gov. Code § 65869.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewEnvironmental LawZoning & Land UseComprehensive & General PlansGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.30 Overview of Environmental Regulations

The following federal and state environmental laws, among others, may affect a proposed development project in California:

- The National Environmental Policy Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*; *see 40 C.F.R. § 6.100 et seq.*].
- The California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see 14 Cal. Code Reg. § 15000 et seq.*].
- The California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*; *see 14 Cal. Code Reg. § 13001 et seq.*].
- The federal Endangered Species Act [*16 U.S.C. §§ 1531-1544*].
- The California Endangered Species Act [*Fish & Game Code §§ 2050-2098*].
- The federal Water Pollution Control Act of 1972 ("Clean Water Act") [*33 U.S.C. § 1251 et seq.*].

In addition, projects in certain areas are subject to further regulations and restrictions, such as those on lands under the jurisdiction of the San Francisco Bay Conservation and Development Commission [*see Gov. Code § 66600 et seq.*; *14 Cal. Code Reg. § 10110 et seq.*], the California Tahoe Regional Planning Agency [*Gov. Code § 67000 et seq.*], or the Tahoe Regional Planning Compact [*Gov. Code §§ 66800, 66801*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawWater QualityClean Water ActGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationIndoor Air & Water Quality



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§ 30B.31 National Environmental Policy Act of 1969 (NEPA)

The National Environmental Policy Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*; *see 40 C.F.R. § 6.100 et seq.* (implementing regulations)] requires an environmental impact statement (EIS) in connection with every major federal action significantly affecting the quality of the human environment [*42 U.S.C. § 4332*]. If the federal agency examining a proposed project subject to NEPA determines that the project will not have a significant effect on the environment, it must prepare a finding of no significant impact [*40 C.F.R. § 1508.13*].

For purposes of NEPA, "major federal action" is an action with effects that may be major and that are potentially subject to federal control and responsibility. The term "major" reinforces but does not have a meaning independent of "significant" [42 C.F.R. § 1508.18; *see City of Davis v. Coleman (9th Cir. 1975) 521 F.2d 661, 673 n.15* (federal action need only have significant effect and need not independently be "major")]. "Significantly" requires consideration of both context and intensity [*40 C.F.R. § 1508.27*]. "Effects" include direct effects that are caused by the action and occur at the same time and place, and indirect effects [*see 40 C.F.R. § 1508.8*].

PRACTICE TIP:

Possible Increased Role for NEPA. Traditionally, NEPA has played only a minor role in private developments in California, while CEQA has been preeminent. NEPA involvement in the main has been restricted to projects involving federal money, such as public highway and mass transit projects. However, with the expansion of habitat conservation and endangered species listings, more and more private projects are requiring action by a federal agency, such as the Army Corps of Engineers or the U.S. Fish and Wildlife Service, and these agencies are subject to NEPA. It therefore seems likely that counsel for private developers will have to become more conversant with NEPA in the coming years.

A detailed discussion of NEPA is beyond the scope of this chapter but is contained in Treatise On Environmental Law, Ch. 9, *The National Environmental Policy Act of 1969 and Related Provisions* (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* , Part C (Matthew

Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact Statements



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14-30B California Legal Forms--Transaction Guide § 30B.32

AUTHOR: Revision Author Andrew L. Faber

§ 30B.32 California Environmental Quality Act of 1970 (CEQA)

[1] General Requirements; Environmental Impact Reports

The California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*] requires public agencies to consider environmental factors before deciding whether or not to approve or carry out "discretionary projects," unless the project is exempt from the requirements of CEQA [*see Pub. Res. Code §§ 21000, 21001*; *14 Cal. Code Reg. § 15002(a)*]. The analysis of environmental impacts must follow statutory and regulatory procedures [*see § 30B.210*; *see also 14 Cal. Code Reg. § 15000 et seq.* (implementing regulations, referred to as the "CEQA Guidelines")]. The single most important procedural step involves the preparation, by the public agency that has the principal responsibility for carrying out or approving the project (the "lead agency"), of an environmental impact report (EIR) or a mitigated negative declaration if the project may have a significant effect on the environment. The EIR must contain detailed information regarding the project and its impact on the environment [*Pub. Res. Code §§ 21100, 21151*; *14 Cal. Code Reg. § 15120 et seq.*]. After considering the EIR or mitigated negative declaration, the lead agency will decide whether or how to approve or carry out the project [*14 Cal. Code Reg. § 15092*].

There are numerous CEQA forms contained in this chapter, along with considerable discussion of the procedural and substantive requirements of CEQA [*see §§ 30B.210-30B.221*].

For detailed coverage of CEQA, including discussion of the requirements applicable to EIRs, see California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender), and CALIFORNIA Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender).

[2] Relationship to NEPA Requirements

When a project requires both an EIR prepared pursuant to CEQA and an EIS prepared pursuant to NEPA [*42 U.S.C. § 4321 et seq.*], the lead agency must, whenever possible, use the EIS to satisfy the CEQA requirements [*Pub. Res. Code § 21083.7(a)*; *see 14 Cal. Code Reg. § 15221*]. In these situations, the lead agency must (1) consult with the federal

agency required to prepare the EIS, and (2) notify the federal agency regarding any scoping meeting for the proposed project [*Pub. Res. Code § 21083.7(b)*].

If a lead agency finds that an EIS or finding of no significant impact would not be prepared by the federal agency by the time the lead agency will need to consider an EIR or negative declaration, the lead agency should try to prepare a combined EIR/EIS or negative declaration/finding of no significant impact. The lead agency must involve the federal agency in the preparation of the joint document [*14 Cal. Code Reg. § 15222*; *see 14 Cal. Code Reg. §§ 15223-15228*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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14-30B California Legal Forms--Transaction Guide § 30B.33

AUTHOR: Revision Author Andrew L. Faber

§ 30B.33 California Coastal Act

[1] Area Covered

The California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*; *see 14 Cal. Code Reg. § 13001 et seq.* (implementing regulations)] provides for the regulation, primarily by local governments, of developments undertaken within the coastal zone. The "coastal zone" established by the Act runs the length of the California coast, and extends seaward to the outer limit of California jurisdiction. The zone extends inland less than 1,000 yards in urban areas, up to five miles in significant estuarine, habitat, and recreational areas, and 1,000 yards in all other areas [*Pub. Res. Code § 30103(a)*; *see § 30B.222[1][b]*]. The coastal zone does not include the area under the jurisdiction of the San Francisco Bay Conservation and Development Commission [*see § 30B.223[1][e]*], or any area contiguous thereto [*Pub. Res. Code § 30103(a)*]. A detailed map of the coastal zone is on file with the county clerk of each coastal zone jurisdiction [*see Pub. Res. Code § 30103(b)*].

For detailed coverage of the Coastal Act, see California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender), and California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender).

[2] Permit Requirement

In addition to obtaining any other permit required by law, developers undertaking most types of development in the coastal zone must obtain a coastal development permit [*Pub. Res. Code § 30600(a)*]. The permit must be obtained from the local government having jurisdiction over the development if the local government has a certified local coastal program (LCP) [*Pub. Res. Code § 30600(d)*; *see Pub. Res. Code § 30510 et seq.*]. Before certification of the LCP, the California Coastal Commission is the permit-issuing authority [*Pub. Res. Code § 30600(c), (d)*], unless the local government has established interim permit review procedures [*see Pub. Res. Code § 30600(b)*] or has been delegated the authority to issue these permits before certification [*see Pub. Res. Code § 30600.5*].

In *Marine Forests Society v. California Coastal Commission* [Marine Forests Society v. California Coastal Com. (2002) 104 Cal. App. 4th 1232, 128 Cal. Rptr. 2d 869 , *review granted, 132 Cal. Rptr. 2d 527 (2003)]* , the court of appeal held that the appointment structure of the California Coastal Act, which gave the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Coastal Commission's voting members but also to remove them at will, contravened the separation of powers clause of the California Constitution. Accordingly, the court held that the trial court properly enjoined the Commission from granting, denying, or conditioning permits and from issuing and hearing cease and desist orders. In response to *Marine Forests*, the Legislature amended *Pub. Res. Code § 30312* to address the constitutional issues by changing the manner of appointment [2003 Stats., ch. 1, ABX2 1]. The California Supreme Court granted review in the case and reversed the court of appeal [Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 57-58, 30 Cal. Rptr. 3d 30] , *cert. denied, 546 U.S. 979, 126 S. Ct. 577 (2005)* .

The Supreme Court concluded that the current statutory provisions governing the composition of the Coastal Commission do not violate the separation of powers clause of the California Constitution. The Court found that the history of the State Constitution, as well as case law, made it clear that the California Constitution, unlike the United States Constitution, does not categorically preclude the Legislature from enacting a statutory provision authorizing the Legislature itself to appoint a member or members of an executive commission or board [Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 43, 30 Cal. Rptr. 3d 30] , *cert. denied, 546 U.S. 979, 126 S. Ct. 577 (2005)* . Rather, the Court concluded that the California separation of powers clause precludes the adoption of a statutory scheme authorizing the legislative appointment of an executive officer or officers whenever the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. The Court found that the current versions of *Pub. Res. Code §§ 30301* and *30312* did not violate that standard [Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 45, 30 Cal. Rptr. 3d 30] , *cert. denied, 546 U.S. 979, 126 S. Ct. 577 (2005)* .

The parties in *Marine Forests* also requested, in light of the court of appeal's conclusion that the prior statutory scheme was unconstitutional, that the Supreme Court clarify the status of the numerous actions that were taken by the Coastal Commission during the period in which the prior statutes were in effect. The Court stated that even if it assumed that the prior version of the statutes violated the separation of powers clause, the past actions of the Commission could not properly be set aside on that ground. The Court stated that the applicable statute of limitations would bar a present challenge to most of the prior actions of the Commission [Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 54, 30 Cal. Rptr. 3d 30] , *cert. denied, (2005) 546 U.S. 979, 126 S. Ct. 577* . The Court further stated that even with regard to those cases in which a timely separation of powers challenge to the Commission's composition had been raised and remained pending, under the "de facto officer" doctrine, prior actions of the Commission could not be set aside on the ground that the appointment of the commissioners who participated in the decision might be vulnerable to constitutional challenge [Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 54-55, 30 Cal. Rptr. 3d 30 , *cert. denied, 546 U.S. 979, 126 S. Ct. 577* , citing *In re Redevelopment Plan for Bunker Hill (1964) 61 Cal. 2d 21, 37 Cal. Rptr. 74* (given existence of de jure office, "persons claiming to be public officers while in possession of an office, ostensibly exercising their function lawfully and with the acquiescence of the public, are de facto officers. ... The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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14-30B California Legal Forms--Transaction Guide § 30B.34

AUTHOR: Revision Author Andrew L. Faber

§ 30B.34 Other Federal and State Permit Requirements

[1] Overview

There are other federal and state permits that may be required for a private development project, depending on the location of the project and the activities to be undertaken. Some of the more commonly implicated procedures are discussed below. In general these are the requirements to get a federal permit for any impact to wetlands [*see* [2], *below*], both federal and state permits for adverse impacts on endangered species [*see* [3], *below*], and both federal and state permits for any impact to streams, rivers, or lakes [*see* [4], *below*].

[2] Army Corps of Engineers Section 404 Permit

Anyone proposing to locate a structure, excavate, or discharge dredged or fill material into waters of the United States must obtain a permit issued under Section 404 of the Clean Water Act [*33 U.S.C. § 1344*]. In addition to the waters that are truly navigable, such as oceans and major rivers, "waters of the United States" has a very broad definition, including, streams, lakes, and noncoastal wetlands [*but see Solid Waste Agency v. U.S. Army Corps of Eng'rs (2001) 531 U.S. 159, 185, 121 S. Ct. 675, 148 L. Ed. 2d 576* ("migratory bird rule" cannot confer Section 404 jurisdiction over isolated pond)]. For an extensive discussion of the regulation of wetlands, see California Environmental Law and Land Use Practice, Ch. 68, *Wetlands Regulation* (Matthew Bender).

The Army Corps of Engineers, which administers the Section 404 process, issues both individual and "nationwide" permits. The issuance of either is a federal action triggering the application of NEPA (although nationwide permits are designed to be issued more quickly, as the environmental analysis has already been performed for conforming activities). If there is likely to be jeopardy to any species protected by the Endangered Species Act [*16 U.S.C. § 1531 et seq.*], then the application will also trigger a "Section 7" consultation between the Corps and the United States Fish and Wildlife Service.

[3] Endangered Species Acts Incidental Take Permits

There are both federal and state Endangered Species Acts [*16 U.S.C. § 1531 et seq.*; *Fish & Game Code § 2050 et seq.*]. Both are designed to protect rare and endangered species, as well as their habitat. Under both Acts it is possible to obtain an "incidental take" permit, which authorizes the "take" of protected species incidental to other lawful activity, such as real estate development. For complete discussion of the application of these laws, see California Environmental Law and Land Use Practice, Ch. 81, *Endangered, Threatened, and Sensitive Species Regulation* (Matthew Bender).

PRACTICE TIP:

Can the Project be Redesigned? The obtaining of permits under either the federal or state Endangered Species Acts can be a very long, arduous, and uncertain process, that may involve opposition from various special interest groups. It may also require the approval of a complex, multi-species Habitat Conservation Plan. Rather than be subjected to this process, it is often desirable to scale back a project, if possible, to avoid a sensitive habitat area. Even though that may reduce the yield of the project, it may avoid a lengthy and costly delay (as well as helping achieve the purposes of endangered species protection).

[4] State Fish & Game Permit

If the proposed activity would obstruct the natural flow or change the bed, channel, or bank of any river, stream, or lake, the developer must reach agreement with the Department of Fish and Game as to measures necessary to protect fish and wildlife [*see Fish & Game Code §§ 1602, 1603*]. Such actions may also trigger the need for a federal Section 404 permit, as discussed in [2], *above*. For further discussion of these agreements, see *California Enviromental Law and Land Use Practice, Ch. 80, Forestry Development, § 80.17[3][c]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsEndangered Species ActFederal AgenciesEnvironmental LawWater QualityClean Water ActCoverage & DefinitionsGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsDredged or Fill MaterialGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsGeneral Permits



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§§ 30B.35[Reserved]



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14-30B California Legal Forms--Transaction Guide § 30B.40

AUTHOR: Revision Author Andrew L. Faber

§ 30B.40 State Building Requirements

[1] State Housing Law and Building Standards Law

The two most important laws regulating the construction and modification of buildings in California are the State Housing Law [*Health & Safety Code § 17910 et seq.*; *see 25 Cal. Code Reg. § 1 et seq.* (implementing regulations)] and the California Building Standards Law [*Health & Safety Code § 18901 et seq.*; *see* 24 Cal. Code Reg. § 1-101 et seq. (administrative regulations)]. The State Housing Law establishes minimum construction and occupancy requirements for buildings used for human habitation. The California Building Standards Law requires the California Building Standards Commission [*see Health & Safety Code §§ 18910-18934.5*] to codify all building standards adopted by state agencies, and all statutes defining building standards, into one California Building Standards Code [*Health & Safety Code § 18931(b)*]. That standard code is contained in Title 24 of the California Code of Regulations [24 Cal. Code Reg. § 2-100 et seq.]. Any building standard adopted by any state agency must be approved by the California Building Standards Commission before codification [*Health & Safety Code § 18930*].

[2] Adoption and Submission of Standards

The Department of Housing and Community Development is the principal agency authorized to adopt and submit building standards for approval by the California Buildings Standards Commission in the manner discussed in [1], *above* [*Health & Safety Code § 17921(a)*]. The building standards submitted by that Department, and any regulations adopted, amended, or repealed under the State Housing Law, must impose substantially the same requirements as those contained in the most recent editions of the following uniform industry codes, as adopted by the organizations specified [*Health & Safety Code § 17922(a)*]:

- The Uniform Housing Code of the International Conference of Building Officials, except its definition of "substandard building" [*see Health & Safety Code § 17920.3*].

- The Uniform Building Code of the International Conference of Building Officials.

- The Uniform Plumbing Code of the International Association of Plumbing and Mechanical Officials.

- The Uniform Mechanical Code of the International Conference of Building Officials and the International Association of Plumbing and Mechanical Officials.

- The National Electrical Code of the National Fire Protection Association.

- Appendix Chapter 1 of the Uniform Code for Building Conservation of the International Conference of Building Officials [*Health & Safety Code § 17922(a)(6)*].

In the absence of adoption by regulation, the most recent editions of the uniform codes referred to above are considered to be adopted and in effect one year after the date of publication [*Health & Safety Code § 17922(a)*]. Although as a general rule all California cities and counties must adopt the rules and regulations of the California Building Standards Commission, a city or county may make modifications to the requirements of the state code and regulations that it determines to be reasonably necessary because of local conditions, including, but not limited to, green building standards [*Health & Safety Code § 17958.5*; *see 55 Ops. Cal. Atty. Gen. 157, 161-162 (1972)]* . Before making these modifications, the city or county must make an express finding that the changes are reasonably necessary because of local climatic, geological, or topographical conditions [*Health & Safety Code § 17958.7(a)*]. Thereafter, the finding and modification must be filed with the California Building Standards Commission to be effective [*Health & Safety Code § 17958.7*].

PRACTICE TIP:

Role of Private Attorney in Building Code Disputes. Attorneys for private developers rarely play a major role in connection with the obtaining of building permits or the compliance with building codes. Occasionally, however, great sums of money can ride on a particular interpretation of a building code requirement. In such a case, the attorney should carefully review the ordinances of the local jurisdiction to see exactly which editions of the applicable building code have actually been adopted. It is not unusual for the officially adopted code to be several years behind the latest revision, and the differences can be significant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseBuilding & Housing Codes



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14-30B California Legal Forms--Transaction Guide § 30B.41

AUTHOR: Revision Author Andrew L. Faber

§ 30B.41 Special Building Requirements

[1] Earthquake Standards and Special Studies Zones

[a] Earthquake Protection Laws

The following are the three most important earthquake protection laws in California:

- The Alquist-Priolo Earthquake Fault Zoning Act [*Pub. Res. Code §§ 2621-2630*], which applies to potentially hazardous earthquake fault zones identified by the State Geologist [*see Pub. Res. Code § 2622*]. Various construction and development projects within these zones are subject to a variety of requirements enforced by local governments [*see Pub. Res. Code § 2623*].

- The Seismic Hazards Mapping Act [*Pub. Res. Code §§ 2690-2699.6*], which requires the State Geologist to compile and distribute maps identifying seismic hazard zones [*Pub. Res. Code § 2696(a)*; *see Pub. Res. Code §§ 2695, 2696(b)*]. A city or county normally must require, before the approval of a "project" [*see Pub. Res. Code § 2693(d)* (definition)] located in a seismic hazard zone, a geotechnical report defining and delineating any seismic hazard [*Pub. Res. Code § 2697(a)*; *see Pub. Res. Code § 2693(b)*; *see also Pub. Res. Code §§ 2697(b), 2698*].

- The general earthquake protection laws [*see Health & Safety Code §§ 19100-19217*].

As a general rule, these laws apply throughout the State. The local entity must make compliance with the general earthquake protection laws a condition precedent to the issuance of a building permit [*Health & Safety Code § 19130*], and must enforce the fault zone requirements by approving or disapproving proposed construction based on special reports filed with the entity [*Pub. Res. Code § 2623*].

[b] Exceptions to Earthquake Protection Laws

All buildings in California are subject to the general earthquake protection laws except the following [*Health & Safety Code § 19100*]:

- Buildings outside the limits of any city that are not intended for the occupancy of human beings or are to be used exclusively as a dwelling by not more than two families;

- Buildings that do not exceed certain structural and size limitations and that are located in a labor camp; and

- Buildings designed to house farm animals, machinery, or supplies.

[c] Enforcement of Earthquake Protection Laws

The local agency charged with the enforcement of laws or ordinances regulating the erection, construction, or alteration of buildings must also enforce the building standards derived from the earthquake protection laws [*Health & Safety Code §§ 19120, 19121*], unless the city or county has designated a separate officer or agency to enforce the earthquake regulations [*Health & Safety Code § 19122*].

[2] Housing for the Elderly

A local jurisdiction cannot require more than one building permit for a project that involves the development of low-rent housing for the elderly and that will be financed or insured, in whole or in part, by the federal or state government [*Health & Safety Code § 19900*]. The fee for such a permit must not exceed $25 per one-story building contained in the development, provided that those buildings do not contain more than 10 dwelling units. These requirements apply on a statewide basis, notwithstanding any other statutory provisions [*Health & Safety Code § 19900*].

[3] Access for Persons with Disabilities

[a] General Rule

As a general rule, all buildings, structures, and related facilities built with state or local governmental funds must be constructed so that they are usable by persons with disabilities [*see Gov. Code § 4450*]. Buildings, structures, and related facilities built with private funds must be similarly constructed if they are to be used by the general public [*see Health & Safety Code §§ 19955, 19955.5, 19956.5*].

[b] Funding

The source of construction funds will determine which agency will enforce this requirement. If the construction project is to be built with private funds, the officer or department charged with enforcing building standards within the city or county where the structure is to be located is the enforcement agency [*Health & Safety Code § 19958*]. When local governmental funds are used, the governing body of the funding entity is the enforcement agency [*Gov. Code § 4453(a)*]; however, if those funds are used to construct elementary, secondary, or community college projects, then the State Director of the Department of General Services is responsible for enforcement [*Gov. Code § 4453*; *see Gov. Code §§ 14602-14608*]. The Director is also charged with enforcing those requirements for any project using state funds [*Gov. Code § 4453(a)*].

[c] Approval of Contracts

When the Director of the Department of General Services is responsible for enforcing the access requirement, the

Department must approve, in writing, the awarding of any contract [*Gov. Code § 4454(a), (b)*]. An application for approval must be accompanied by a filing fee, plans, and full, complete, and accurate specifications meeting Department requirements [*Gov. Code § 4454(c), (d)*].

[d] Exception to Access and Approval Requirements

The statutory access and approval requirements do not apply to buildings that were constructed before the effective date of the statutes discussed above, but do apply to any alterations, structural repairs, or additions to pre-existing buildings [*Gov. Code § 4456* (effective date 11/13/68); *Health & Safety Code § 19959* (effective date 7/1/70)]. In the case of a pre-existing structure, only the area of specific alteration, structural repair, or addition, and not the entire building, is subject to these requirements [*Gov. Code § 4456*; *Health & Safety Code § 19959*].

[e] Alternative Access Requirements

Alternative access requirements apply to any publicly or privately owned place of amusement or resort for which a building permit or a building plan for new construction was issued on or after January 1, 1985. The owner or manager of a facility subject to this requirement must provide seating or accommodations for physically disabled persons in a variety of locations within the facility, so as to provide those persons with a choice of admission prices otherwise available to members of the general public, if this variety can be provided while meeting fire and panic safety requirements of the State Fire Marshal [*Health & Safety Code § 19952(a), (c)*; *see Health & Safety Code § 19952(d)*]. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users [*Health & Safety Code § 19952(b)*].

[4] Smoke Detectors

A smoke detector must be installed in each dwelling unit intended for human occupancy. Installation of the smoke detector must occur on the owner's application for a permit for alterations, repairs, or additions to the dwelling unit exceeding $1,000. Smoke detectors in all other dwelling units intended for human occupancy were required to be installed on or after January 1, 1987 [*Health & Safety Code § 13113.7(a)*].

"Dwelling units intended for human occupancy" include a duplex, lodging house, apartment complex, hotel, motel, condominium, stock cooperative, time-share project, or dwelling unit of a multiple-unit dwelling complex. It does not include manufactured homes [*see Health & Safety Code § 18007*], mobilehomes [*see Health & Safety Code § 18008*], or commercial coaches [*Health & Safety Code § 13113.7(b)*; *see Health & Safety Code § 18001.8*]. Factory built housing [*see Health & Safety Code § 19971*] and single family residences sold on or after January 1, 1986 are also required to have smoke detectors [*see* discussion of *Health & Safety Code § 13113.8(a)* in the Legal Background to Ch. 23, *Agreements to Sell Real Property*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseBuilding & Housing Codes



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§§ 30B.42[Reserved]



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14-30B California Legal Forms--Transaction Guide § 30B.100

AUTHOR: Revision Author Andrew L. Faber

§ 30B.100 Facts

1. Identity of landowner or developer.

a. Name and address.

b. Legal status:
(1) Corporation.

(2) Partnership.

(3) Joint venture.

(4) Husband and wife.

(5) Individual.

c. Financial ability to carry out project.

d. General business reputation.

2. Type of proposed construction.

a. Residential.

b. Commercial.

c. Industrial.

d. Mixed Use.

3. Size and extent of proposed construction.

4. Location and size of site of proposed construction.

a. Street address.

b. Legal description.

c. City or county.

5. Estimated cost and value of proposed construction.

6. Method of financing of proposed construction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawZoning & Land UseGeneral Overview



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.101 Documents

1. Instrument showing legal description of proposed construction site.

2. Plat map of proposed construction site.

3. Plans and specifications of proposed construction.

4. Elevations or other architectural renderings of proposed construction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral Overview



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14-30B California Legal Forms--Transaction Guide §§ 30B.102-30B.109

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§§ 30B.102[Reserved]



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14-30B California Legal Forms--Transaction Guide § 30B.110

AUTHOR: Revision Author Andrew L. Faber

§ 30B.110 Applicability of Local Requirements

1. Ascertain whether client's proposed project complies with following local zoning and planning laws and policies:

a. General Plan [*see Gov. Code §§ 65300-65403*], particularly following sections:

NOTE:
For detailed coverge of general plans, see California Real Estate Law and Practice, Ch. 253, ***Local Planning and the General Plan*** (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 62, ***Planning*** (Matthew Bender).

(1) Land use designation for client's property.

(2) Standards for development.

(3) Transportation.

(4) Open space.

(5) Public facilities.

b. Any Specific Plans adopted pursuant to General Plan [*see Gov. Code §§ 65450-65452*].

NOTE:

A specific plan contains detailed plans for the systematic implementation of the general plan for all or part of the area covered by the general plan [*Gov. Code §§ 65450, 65451*; for further discussion, see California Real Estate Law and Practice, Ch. 253, ***Local Planning and the General Plan***, § 253.14, and California Environmental Law and Land Use Practice, Ch. 62, ***Planning***].

c. Redevelopment Plan, if property is within redevelopment area established under Community Redevelopment Law [*Health & Safety Code § 33000 et seq.*].

d. Any applicable land use plan created by county Airport Land Use Commission, if property is near an airport [*see Pub. Util. Code §§ 21670-21679.5*].

e. Any applicable Regional Transportation Plan [*see Gov. Code §§ 65080-65086.5*] or Congestion Management Program [*see Gov. Code §§ 65088-65089.1*].

f. Zoning ordinance, particularly the following items:

(1) Zoning map.

(2) Zoning districts and permitted uses.

(3) Standards for development.

(4) Procedures for relief [*see § 30B.121*].

g. Any formal written administrative interpretations of zoning ordinance or related ordinances.

PRACTICE TIP:

Rule Number 1--Visit the Site. Any land use lawyer involved in obtaining entitlements for a development project should make an invariable rule: Always visit the site early in the engagement. Examine the property. Look at the character of the neighborhood. Size up possible sources of opposition. Unless you have first-hand knowledge of the site, you cannot talk intelligently to city staff or others involved in the approval process. Do not rely on the client's description of the property, or his or her desire to save money by having you stay in your office. If you do, you will not see either opportunities or problems, and may seriously dilute your effectiveness.

2. Determine whether city or county is contemplating changes to its zoning laws and policies.

NOTE:

A local legislative body may adopt, under specified circumstances, an interim ordinance prohibiting any uses that may conflict with proposed changes to the general plan, specific plan, or zoning laws [***see*** *Gov. Code § 65858*; ***but see*** *Building Indus. Legal Defense Foundation v. Superior Court (1999) 72 Cal. App. 4th 1410, 1420, 85 Cal. Rptr. 2d 828* (interim ordinance may not prohibit formal processing of development applications)].

3. Determine whether any boundary changes of public agencies are necessary to implement project (e.g., annexation into city or modifying boundary of special district to include property) [*see § 30B.203*].

4. According to local building standards enforcement agency, ascertain the following:

a. Applicable construction standards;

b. Types of construction requiring permits, and whether proposed project will require permit or other approval from applicable state agencies [*see § 30B.123*];

c. Types of permits required;

d. Other local departments or officers to consult; and

e. Procedural requirements for issuance of building permits.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsBoundariesReal Property LawZoning & Land UseAnnexationReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseComprehensive PlansReal Property LawZoning & Land UseLocal PlanningTransportation LawAir TransportationAirportsGeneral Overview



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14-30B California Legal Forms--Transaction Guide § 30B.111

AUTHOR: Revision Author Andrew L. Faber

§ 30B.111 Applicability of Development Agreement with Local City or County

1. Determine scope of project.

2. Ascertain whether development agreement would be in applicant's interest.

3. Determine whether client has legal or equitable interest in property.

4. Determine whether City or County is receptive to development agreement.

PRACTICE TIP:

Pros and Cons of Development Agreements. There are times when it may make sense for both parties to avoid the time and expense of negotiating a development agreement. Development agreements are most appropriate for long-term, phased projects that require substantial initial investment in infrastructure. Then the public agency gets the early school site, road improvements, or other public improvements, and the developer can justify spending large sums up front in the knowledge that he or she is guaranteed the right to complete the entire project. From the agency's viewpoint, if there are not substantial up front exactions, then it may not be a good bargain to lock in the zoning and other entitlements. Similarly, from the developer's perspective, if the entire project will be built out at once, then he or she may not want to risk opening up the project for exactions above those that could legally be required in the absence of the development agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawZoning & Land UseLocal Planning



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14-30B California Legal Forms--Transaction Guide § 30B.112

AUTHOR: Revision Author Andrew L. Faber

§ 30B.112 Applicability of National Environmental Policy Act and California Environmental Quality Act

NOTE:

This section focuses on the National Environmental Policy Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*] and the California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*]. For discussions of regional environmental legislation, see *§ 30B.113* (California Coastal Act of 1976) [*Pub. Res. Code § 30000 et seq.*] and *§ 30B.114* (McAteer-Petris Act) [*Gov. Code § 66600 et seq.*].

1. Determine whether project is major federal action potentially affecting quality of human environment and thus is subject to National Environmental Protection Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*; *see § 30B.31*].

2. Determine whether project is potentially subject to California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*].

a. Ascertain whether project is to be carried out or approved by a public agency [*see Pub. Res. Code § 21065*; *14 Cal. Code Reg. § 15378(a)*; *see also § 30B.210[1][b][ii]*].

b. Ascertain whether project is a "discretionary" project [*Pub. Res. Code § 21080(a)*; *14 Cal. Code Reg. § 15357*; *see § 30B.210[1][b][iii]*].

c. Ascertain whether it is likely that appropriate public agency will determine that project may have significant effect on environment [*see Pub. Res. Code §§ 21068, 21100, 21151*; *14 Cal. Code Reg. § 15382*; *see also § 30B.210[1][b][iv]*].

3. If project is potentially subject to CEQA, ascertain whether project falls within statutory or regulatory exemption from requirements of CEQA [*see Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. §§ 15061(d), 15062, 15282*; *see also § 30B.211[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawNational Environmental Policy ActGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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14-30B California Legal Forms--Transaction Guide § 30B.113

AUTHOR: Revision Author Andrew L. Faber

§ 30B.113 Applicability of California Coastal Act

NOTE:

Under the California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*], any person wishing to perform or undertake a development in the coastal zone must obtain a coastal development permit in addition to any other permit required by law [*Pub. Res. Code § 30600(a)*]. For a discussion of the Coastal Act and this permit requirement, see *§ 30B.222*.

1. Ascertain whether proposed development is to be located within coastal zone subject to Act, according to either:

a. Appropriate district office of California Coastal Commission; or

b. Coastal zone map that is on file with county clerk of each coastal county [*see Pub. Res. Code § 30103(b)*].

2. Ascertain whether proposed project is a "development" for purposes of Act [*see Pub. Res. Code § 30106*].

NOTE:

Most activities that alter existing conditions in the coastal zone will be considered "developments" under *Pub. Res. Code § 30106*. For a discussion of that statutory definition, see *§ 30B.222[1][f]*.

3. Ascertain whether proposed development falls within one of following categories, which are exempt from Act's permit requirement:

NOTE:

The following exempted developments are discussed in greater detail under *§ 30B.222[1][g]*. Although the following list is nonexclusive, it contains the exemptions that are most likely to apply to private developers.

a. Most improvements to existing structures [*Pub. Res. Code § 30610(a), (b)*; *see 14 Cal. Code Reg. §§ 13250, 13253*].

b. Repair or maintenance activities that do not [*Pub. Res. Code § 30610(d)*; *see 14 Cal. Code Reg. § 13252*]:

(1) Result in additions, enlargements, or expansions; or

(2) Involve risk of substantial adverse environmental impact.

c. Replacement of structure (other than public works facility) destroyed by a disaster [*Pub. Res. Code § 30610(g)*].

d. Conversion of existing multiple-unit residential structure to a time-share project, estate, or use, and related improvements [*Pub. Res. Code § 30610(h)*; *see Bus. & Prof. Code § 11212(x), (z)* (effective July 1, 2005)].

e. Categories of developments that have been exempted by vote of Coastal Commission [*Pub. Res. Code § 30610(e)*; *14 Cal. Code Reg. §§ 13240-13249*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.114 Applicability of McAteer-Petris Act

NOTE:

For a discussion of the McAteer-Petris Act [*Gov. Code § 66600 et seq.*], which regulates projects involving any substantial change in the use of San Francisco Bay or its shoreline [***see*** *Gov. Code § 66632*], see *§ 30B.223*.

1. Determine whether proposed project is within jurisdiction of San Francisco Bay Conservation and Development Commission (BCDC) [*see Gov. Code § 66610*].

NOTE:

The area of jurisdiction of the BCDC essentially includes San Francisco Bay, all land within 100 feet of the Bay's shoreline, salt ponds, managed wetlands, and certain specified waterways [***see*** *Gov. Code § 66610*].

2. Determine whether proposed project requires permit from BCDC [*see Gov. Code § 66632(a)*].

a. Ascertain whether project involves making any substantial change in use of San Francisco Bay or its shoreline [*see Gov. Code § 66632*], for example:
(1) Shoreline construction; or

(2) Dredging, filling, or diking Bay.

b. Ascertain whether project involves construction of either of the following, which are exempt from permit requirements:

(1) Public service facilities [*see Gov. Code § 66632.2*]; or

(2) Certain planned community developments on land already filled [*see Gov. Code § 66660.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewReal Property LawZoning & Land UseLocal Planning



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AUTHOR: Revision Author Andrew L. Faber

§ 30B.115 Applicability of Other State and Federal Permitting Requirements

1. Determine whether proposed project is within jurisdiction of Army Corps of Engineers under federal Clean Water Act so as to need a Section 404 Permit [*see 33 U.S.C. § 1344*].

a. Ascertain whether project area impacts "waters of the United States."

NOTE:
The Army Corps of Engineers has jurisdiction over "waters of the United States," including oceans, rivers, streams, and wetlands. The Corps has interpreted such jurisdictional grant very broadly, but recent case law may cut back on the expansive scope of the Corps interpretation [***see*** *Solid Waste Agency v. U.S. Army Corps of Eng'rs (2001) 531 U.S. 159, 174, 121 S. Ct. 675, 148 L. Ed. 2d 576* ("migratory bird rule" cannot confer Section 404 jurisdiction over isolated pond)].

b. Determine whether activity involves locating structure, excavating, or discharging dredged or fill material.

2. Determine whether proposed project adversely impacts endangered or threatened species or their habitat.

NOTE:
If a project has an adverse impact on endangered or threatened species or their habitat, it will be necessary to redesign the project, or consult with the United States Fish & Wildlife Service pursuant to the Endangered Species Act [*16 U.S.C. § 1531 et seq.*] or the California Department of Fish and Game pursuant to the California Endangered Species Act [*Fish & Game Code §§ 2050-2098*].

3. Determine whether proposed project would obstruct natural flow or change bed, channel, or bank of any river, stream, or lake.

NOTE:

If a project will have this effect, it will be necessary to redesign the project, or to negotiate a Section 1603 Permit with the Department of Fish and Game [***see*** *Fish & Game Code § 1603*] or, if necessary, obtain a Section 404 Permit from the Army Corps of Engineers [***see*** *33 U.S.C. § 1344*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsEndangered Species ActGeneral OverviewEnvironmental LawNatural Resources & Public LandsEndangered Species ActPermitsEnvironmental LawNatural Resources & Public LandsWetlands ManagementEnvironmental LawWater QualityClean Water ActCoverage & DefinitionsGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsGeneral PermitsEnvironmental LawWater QualityClean Water ActWetlandsInternational Trade LawTrade AgreementsEnvironmental ProvisionsFish



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AUTHOR: Revision Author Andrew L. Faber

[Reserved]

§§ 30B.116[Reserved]



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14-30B California Legal Forms--Transaction Guide § 30B.120

AUTHOR: Revision Author Andrew L. Faber

§ 30B.120 Submitting Applications for Entitlements and Local Permits

PRACTICE TIP:

Obtaining Entitlements and Permits. The following is the general procedure required to procure construction permits in most California jurisdictions. A more detailed discussion is not possible due to variations in local procedures and requirements.

Generally speaking, there is a certain sequence of entitlements that must be obtained to allow a development to proceed. Not all of these entitlements will be required for any one project, but the following is a list of categories of entitlements and permits, the need for which should be considered in planning and scheduling a course of project approval:

- General Plan Amendment.
- Zoning Change.
- Administrative zoning relief.
- Variance.
- Use permit.
- Subdivision.
- Regional Permits (e.g., from Regional Water Quality Control Boards).

- State Permits (e.g., from Department of Fish and Game or California Coastal Commission).

- Federal permits (e.g., from Army Corps of Engineers to fill wetlands).

- Local Agency Formation Commision (LAFCO) reorganization (e.g., annexation and district boundary changes).

- Building permits, including demolition and grading.

All along the way, compliance must be ensured with the National Environmental Policy Act (NEPA) [*42 U.S.C. § 4321 et seq.*] and the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], as applicable.

1. Before completing applications:

a. Obtain application information list from each local agency with jurisdiction over proposed development project [*see Gov. Code §§ 65940, 65941*]; and

NOTE:
Each local agency must also notify applicants for development permits of (1) the time limits established for the review and approval of development permits [***see*** *Gov. Code §§ 15399.50-15399.56, 65940-65945.7, 65950-65957*; ***see also*** *§ 30B.123*], (2) the applicable public notice distribution requirements, (3) requirements governing the use of lists of local hazardous waste sites [***see*** *Gov. Code § 65962.5(f)*; ***see also*** P b, ***below***], and (4) limitations on the imposition of certain conditions to the approval of a building permit or a tentative map or parcel map [*Gov. Code § 65941.5*; ***see*** *Gov. Code § 65961*].

b. If proposed development project will be used by any person [*Gov. Code §§ 65940, 65962.5*]:

(1) Consult any lists of local hazardous waste sites filed by state agencies with local jurisdiction in which development will be located; and

(2) Submit signed statement to local agency indicating:
(a) Whether or not project and any alternatives will be situated on listed sites; and

(b) What (if any) list(s) contain(s) project site [*see Gov. Code § 65962.5(f)* (procedure lead agency must follow if statement does not identify applicable list)].

2. Submit entitlement or permit applications, supporting documents, and fees to local building standards enforcement agency.

3. At time application is filed with city or county, consider requesting that local entity notify applicant of any proposal to adopt or amend any of the following [*Gov. Code § 65945(a)*]:

NOTE:
The city or county will inform the applicant of this right and of the manner in which it must be exercised. The applicant will be required either to submit a written request or to subscribe to a

periodically updated notice or set of notices that list pending proposals. A reasonable fee may be charged for the notice(s) [*Gov. Code § 65945*]. A slightly different procedure applies if the local permit agency is not a city or county [***see** Gov. Code § 65945.3*].

a. General plan.

b. Specific plan.

c. Zoning ordinance [*see § 30B.121*].

d. Ordinance affecting building permits or grading permits.

4. Monitor local agencies' actions in reviewing applications to ensure that agencies comply with statutory requirements [*see § 30B.123*, PP 4-12].

NOTE:

Statutory requirements govern the handling of development projects by public agencies [***see** Gov. Code § 65932*; ***see also** Gov. Code §§ 65920-65957.1* (Permit Streamlining Act)]. "Development project" is broadly defined to include almost every kind of construction project [***see** Gov. Code §§ 65927, 65928*]. Among other things, this legislation regulates the contents, processing, approval, and disapproval of applications for development projects. It does not apply, however, to legislative actions, such as rezonings or general plan amendments. The primary discussion of this legislation is contained in *§ 30B.123* (Obtaining State Permits).

5. Obtain approvals or permits from other concerned agencies.

NOTE:

The applicant will be required to obtain and file any additional permits or approvals as a condition precedent to the issuance of the building permit. Regional, state, or federal permits and approvals also must be on file if they will be a major determinative factor in the granting or denying of the local permits.

6. Correct plans, if necessary.

NOTE:

An enforcement agency [***see** Health & Safety Code § 19870(b)(2)* (definition)] may require, as a condition of issuing a building permit, that a permittee participate in a preconstruction conference before the completion of the checking of the permittee's submitted plans and specifications. The purpose of the conference must be to review the plans to ensure (1) consistency of building code interpretations, and (2) adequacy and sufficiency of plan details [*Health & Safety Code § 19872(a)*; ***see** Health & Safety Code § 19872(b)* (participation of other appropriate enforcement agencies)]. The agency may require the permittee to maintain at the project site a set of plans and specifications that reflect any points of discussion, understandings, or agreements derived from the conference [*Health & Safety Code § 19872(c)*].

7. Secure building permits and comply with inspection procedures.

a. Permit applications may include:

(1) Building permit applications.

(2) Plumbing permit applications.

(3) Electrical permit applications.

(4) Mechanical (or heating and ventilation) permit applications.

(5) Demolition, grading, and landscaping applications.

b. Supporting documents may include:

(1) Plot plans.

(2) Structural plans.

(3) Survey plats.

(4) Grading and drainage plans.

(5) Street improvement plans.

(6) Architect's statement.

(7) Workers' compensation insurance.

(8) Permits and approvals issued by other agencies.

c. Fees may include:

(1) Filing fees.

(2) Plan checking fees.

(3) Site inspection fees.

(4) Permit issuance fees.

(5) Development or aesthetic control commission fees.

(6) Plan maintenance fees.

(7) Strong motion instrumentation fees.

(8) Hazard zone administration fees.

(9) Area Housing Council fees.

(10) Impact mitigation fees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNational Environmental Policy ActEnvironmental Impact StatementsEnvironmental LawNatural Resources & Public LandsWetlands ManagementEnvironmental LawWater QualityClean Water ActEnforcementGeneral OverviewEnvironmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawConstruction LawGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseState & Regional Planning



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14-30B California Legal Forms--Transaction Guide § 30B.121

AUTHOR: Revision Author Andrew L. Faber

§ 30B.121 Obtaining Relief From Zoning Ordinance

NOTE:

This section examines legislative and administrative methods for resolving conflicts between the applicable zoning laws and a client's development proposal. Most of the statutory procedural requirements discussed are established by the Planning and Zoning Law [*Gov. Code § 65800 et seq.*]. Because these statutory requirements do not necessarily apply to charter cities [***see*** *Gov. Code § 65803*; ***see also*** *§ 30B.21[2]*], and they are intended to provide only a minimum of limitations so that local jurisdictions may exercise a maximum degree of control over local zoning matters [*Gov. Code § 65800*], it is essential that counsel comply with any supplementary requirements established by local ordinance.

1. Consult planning department to:

a. Attempt to resolve disagreements;

b. Ascertain whether or not it will make favorable recommendation to planning commission;

c. Discover what (if any) conditions it may place on its approval; and

d. Learn role and inclinations of other possible participants in application process, for example:

(1) City council or board of supervisors.

(2) City attorney or county counsel, who is responsible for legal interpretations of zoning

ordinance and for evaluating related legal claims.

(3) City or county engineer, who makes recommendations concerning certain conditions of approval of construction projects.

(4) Department of Building and Safety, which issues building permits.

(5) City manager or other chief administrative officer.

2. Consult local ordinance to determine how closely local entity follows procedural and administrative zoning requirements [*see Gov. Code § 65800 et seq.*] of Planning and Zoning Law [*Gov. Code § 65000 et seq.*; *see § 30B.21[2]*].

3. Select form of zoning relief:

a. Change of zone [*see* P 5, *below*].

b. Variance [*see* P 6, *below*].

c. Conditional use permit [*see* P 6, *below*].

4. Review general and specific plans, if any, to determine if general plan amendment is necessary.

PRACTICE TIP:

Interpreting General Plan to Avoid Need for Amendment. General plans typically contain a multitude of goals, policies, guidelines, implementation strategies, and the like. Of necessity, these are not always reconcilable as applied to a given project. While general plans must be internally consistent, it is the province of the legislative body to interpret the plan and to resolve perceived inconsistencies. In practice, this means that there may be enough flexibility for the decision makers to interpret the plan so that a project that is seemingly contrary to one or more policies of the plan actually does not require a general plan amendment, particularly when the amendment would be to the text of the plan, rather than to the land use diagram.

5. If client is applying for rezoning, take following steps [*see Gov. Code § 65853*]:

PRACTICE TIP:

Charter Cities and Zoning Conformance. When all else fails, remember that a charter city is not obligated by State law to conform its zoning to its general plan [*see Gov. Code § 65803*]. Thus, a rezoning that appears to conflict with the general plan can be approved, though most charter cities are reluctant to do so in practice, and Los Angeles is prevented from doing so by statute [*see Gov. Code § 65860(d)*].

a. Submit application to appropriate city official.

b. Work with staff and review staff recommendation, when available.

c. Attend public hearing [*see Gov. Code § 65854*].

d. Obtain copy of written recommendation of planning commission [*see Gov. Code § 65855*].

e. If planning commission recommends rejecting application and legislative body does not intend to take further action, file written request for hearing with clerk of legislative body within five days after filing of recommendation with legislative body [*Gov. Code § 65856(a)*].

f. Attend public hearing conducted by legislative body [*Gov. Code § 65856(a)*].

6. For conditional use permit or variance, take following steps:

a. Submit application to appropriate city official for action by board of zoning adjustment or zoning administrator [*Gov. Code § 65900*] or, if there is none, by planning commission [*Gov. Code § 65902*; for discussion of limitations on the granting of variances (*see Gov. Code §§ 65906, 65906.5, 65909*), see *§ 30B.201[1][c]*].

PRACTICE TIP:

Variances--Neutralize Planning Staff and City Attorney. The planning staff, if opposed to your project, may use the requirement for variance findings as an excuse, claiming that it is not possible for the decision-making body to make the findings. Or the city attorney may opine that the findings cannot legally be made. It can be very difficult for the decision-makers to approve the variance when confronted with such internal opposition. Thus, an applicant should take two steps to help with the findings. First, write a letter to the decision-making body quoting each required finding and stating the supporting evidence that allows the finding to be made. Second, try to get the staff to a more neutral position: even if staff opposes the variance, see if they will agree to state their opposition, but leave it up to the decision-making body as to whether or not that body thinks the appropriate findings can and should be made.

b. Attend public hearing on application [*Gov. Code § 65905(a)*; *see Gov. Code §§ 65905(b), 65091* (notice requirements)].

NOTE:

The local ordinance may authorize either the board of zoning adjustment or the zoning administrator to decide an application for a variance without a public hearing. Any such ordinance must specify the kinds of variances that the board or administrator may grant [***see*** *Gov. Code § 65906*], and the extent of the permissible variation [*Gov. Code § 65901(b)*].

c. If application is rejected and appeal is desired, take following steps [*see § 30B.202*]:

(1) Submit appeal in strict compliance with local ordinance and on a local form if required, with any applicable appeal fee.

(2) Attend public hearing on appeal [*Gov. Code § 65905*].

(3) After final decision is made, either consider seeking judicial relief or, if decision is favorable, recommend that client consider postponing work until expiration of opposition's appeal period.

NOTE:

Litigation-related matters are beyond the scope of this publication. For discussions of

zoning litigation, see California Forms of Pleading and Practice, Ch. 579, ***Zoning and Planning*** (Matthew Bender), and California Real Estate Law and Practice, Ch. 283, ***Judicial Review of Zoning Decisions*** (Matthew Bender).

d. If variance is granted, work with city staff to make sure that resolution granting variance makes proper findings and supports them with substantial evidence in the record [*see § 30B.201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances



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14-30B California Legal Forms--Transaction Guide § 30B.122

AUTHOR: Revision Author Andrew L. Faber

§ 30B.122 Obtaining Development Agreement with Local City or County

1. Negotiate the Agreement.

PRACTICE TIP:

Form of Agreement. There is no standard form for a development agreement. The sample form in *§ 30B.204* may be used as a guide. It is recommended that, if possible, developer's counsel should start with his or her own draft submittal to the agency. Because the developer typically ends up making concessions to the agency as consideration for the agreement over and above those that could legally be imposed on the project, it can be important to "time your give-aways." It is often desirable to leave some public benefit for the planning commission or city council to extract.

2. Be involved with process for approval.

PRACTICE TIP:

A Development Agreement Prior to Entitlements? Most commonly, development agreements are approved as part of an overall package of entitlements, including environmental review under CEQA. This is generally the easiest way to get an agency's cooperation, and avoids calling the public's attention to the development agreement as a separate entitlement. For large-scale projects, however, it may be more appropriate to enter into a development agreement before receiving any entitlements, as a way of "testing the waters" to justify proceeding further with such a project. Doubts about the validity of such an agreement were laid to rest when an appellate court, in overruling a challenge to the validity of the agreement, noted that the Development Agreement Law "permits local government to make commitments to developers at the time the developer

makes a substantial investment in a project" [*Santa Margarita Area Residents Together v. Board of Supervisors (2000) 84 Cal. App. 4th 221, 230, 100 Cal. Rptr. 2d 740]* .

3. Get staff report in advance of hearing required by planning agency (usually a planning commission) and attend hearing.

4. Get staff report in advance of hearing required by City Council and attend hearing.

PRACTICE TIP:

Two Hearings. Two hearings are required to adopt any ordinance, including approving a development agreement or a rezoning [*see Gov. Code § 36934*]. The first hearing is when the ordinance is "introduced." This is generally the important hearing at which any significant public debate takes place. The second hearing is technically when the ordinance is "adopted," often on the consent calendar without debate. Usually the second hearing is pro-forma, but it should be monitored as well.

5. Get fully executed copy of agreement and make sure it is recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal Planning



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14-30B California Legal Forms--Transaction Guide § 30B.123

AUTHOR: Revision Author Andrew L. Faber

§ 30B.123 Obtaining State Permits in General

1. [Reserved]

2. If proposed project will require permit or other approval, contact appropriate state agency, for example:

a. Air Pollution Control Districts.

b. California Coastal Commission [*see § 30B.125*].

c. California Energy Commission.

d. California Environmental Protection Agency, Division of Toxic Substances Control (DTSC).

e. California Public Utilities Commission.

f. Department of Forestry and Fire Protection.

g. Department of Conservation: Division of Oil and Gas.

h. Department of Fish and Game.

i. Department of Health Services.

j. Department of Housing and Community Development.

k. Department of Parks and Recreation.

l. Department of Transportation.

m. Department of Water Resources.

n. Integrated Solid Waste Management Board.

o. San Francisco Bay Conservation and Development Commission [*see § 30B.126*, P 1].

p. State Lands Commission.

q. State Water Resources Control Board.

r. Tahoe Regional Planning Agency [*see § 30B.126*, P 2].

3. Apply for permits, using application information lists that must be provided by all state agencies with jurisdiction over proposed project [*see Gov. Code §§ 65940, 65941*].

NOTE:

Each state agency must also notify applicants for development permits of (1) the time limits established for review and approval of development permits [***see*** *Gov. Code §§ 15399.50-15399.56, 65940-65945.7, 65950-65957.5* (discussed throughout the remainder of this *§ 30B.123*)]; (2) the applicable public notice distribution requirements; (3) requirements governing the use of lists of local hazardous waste sites [***see*** *Gov. Code § 65962.5(f)*; ***see also*** *§ 30B.120*, P 1, b.]; and (4) limitations on the imposition of certain conditions to the approval of a building permit, tentative map, or parcel map [*Gov. Code § 65941.5*; ***see*** *Gov. Code § 65961*].

4. Consider submitting written request to each agency with permit authority for notice of any proposal to adopt or amend any regulation affecting issuance of permit [*Gov. Code § 65945.5*].

5. Consider application to be complete if applicant does not receive written determination regarding completeness from governing agency within 30 days after filing date [*Gov. Code § 65943(a)*].

6. If applicant receives timely written determination by agency that application is incomplete [*see* P 5, *above*], have applicant submit missing information identified in written determination [*Gov. Code § 65943(a)*].

NOTE:

The applicant and the public agency may agree to extend any of the time limits specified by *Gov. Code § 65943* [*Gov. Code § 65943(d)*; ***see*** PP 5, ***above***, 7, ***below***].

7. If applicant, within 30 days after agency receives resubmission [*see* P 6, *above*], receives another written determination of incompleteness, have applicant take following steps if appeal is desired [*see Gov. Code § 65943(b)*]:

NOTE:

If the applicant does not receive a response concerning the resubmission within that 30-day period, the application and supporting documentation will be deemed complete [*Gov. Code § 65943(b)*].

a. Following agency procedure, submit written appeal to [*Gov. Code § 65943(c)*]:
(1) Governing body of agency, if any; or

(2) Director of agency.

b. Notify client that application and submitted materials will be deemed complete unless agency makes a final, adverse written determination on appeal not later than 60 calendar days after agency's receipt of appeal [*Gov. Code § 65943(c)*].

8. Inform applicant that public agency, once it has accepted application as complete, cannot subsequently request any new or additional information that was not required as part of application [*Gov. Code § 65944(a)*; *but see Gov. Code § 65944(c)* (discussed in NOTE, *below*)].

NOTE:

This rule does not mean the applicant must submit with the initial application all the information that a public agency may require to take final action on the application. Before accepting an application, each agency must inform the applicant of any information that will subsequently be required to complete final action on the application [*Gov. Code § 65944(b)*].

The prohibition against requesting additional information does not limit the ability of the agency to request and obtain information that is needed to comply with the California Environmental Quality Act (CEQA) (*Pub. Res. Code § 21000 et seq.*) [*Gov. Code § 65944(c)*; ***see*** *§ 30B.210[1]*]. In addition, if an application is accepted as complete and the proposed project is located either within 1,000 feet of a military installation, within special use airspace, or beneath a low-level flight path, the agency that accepted the application must provide a copy to any branch of the United States Armed Forces that has provided the Office of Planning and Research with a single California mailing address for delivery of a copy of such applications [*Gov. Code § 65944(d)(1)*]. Once the copy of the application has been received, the relevant branch of the U.S. Armed Forces may request consultation with the agency and the project applicant to discuss the effects of the proposed project on military installations, low-level flight paths, or special use airspace, and potential alternatives and mitigation measures [*Gov. Code § 65944(e)*].

9. Notify applicant that final approval or disapproval of project must be made:

a. By lead agency within [*Gov. Code § 65950(a)(1), (3)*]:

NOTE:

The "lead agency" is the public agency that has the principal responsibility for carrying out or approving the development project [*Gov. Code § 65929*]. The applicant and lead agency may agree to extend the applicable time limit once for up to 90 days [*Gov. Code § 65957*].

A public agency may not disapprove a development project application merely to comply with the following time limits. Any disapproval of an application must give reasons for disapproval other than the agency's failure to timely act [*Gov. Code § 65952.2*].

(1) 180 days from date of certification by lead agency of environmental impact report [*see Pub. Res. Code §§ 21100, 21151*; *see also § 30B.124*].

NOTE:
Notwithstanding the above requirement, if the lead agency has extended the deadline for the completion and certification of the environmental impact report [***see*** *Pub. Res. Code §§ 21100.2, 21151.5*], it must approve or disapprove the project within 90 days after certification of the environmental impact report [*Gov. Code § 65950.1*]. This time limit may be extended once for up to 90 days with the consent of the public agency and the applicant [*Gov. Code § 65957*]. The 180-day period is also reduced to 90 days for subdivisions that are affordable to low-income or very-low-income households, provided certain conditions are met [***see*** *Gov. Code § 65950(a)(2)*].

(2) 60 days from date of adoption of negative declaration or determination by lead agency that project is exempt from CEQA, unless applicant requests extension of time limit.

NOTE:
For detailed coverage of all aspects of CEQA, see California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender).

b. By any responsible agency within 180 days from later of [*Gov. Code § 65952(a)*]:

NOTE:
A "responsible agency" is a public agency, other than the lead agency, that has responsibility for carrying out or approving a development project [*Gov. Code § 65933*].

(1) Date on which lead agency approved project; or

(2) Date on which completed application was received and accepted as complete by responsible agency.

NOTE:
The public agency and the applicant may agree to extend this time limit once for up to 90 days [*Gov. Code § 65957*].

10. If lead agency or responsible agency is obligated to provide public notice of project or to hold a public hearing and agency has not done so at least 60 days before expiration of time limits specified in P 9, *above*, consider filing petition for writ of mandate [*see Code Civ. Proc. § 1085*] to compel agency to do so [*Gov. Code § 65956(a)*].

NOTE:
The public agency must notify the applicant of all applicable public notice distribution requirements [*Gov. Code § 65941.5*; ***see*** NOTE to P 3, ***above***].

For a general discussion of writs of mandate, see California Forms of Pleading and Practice, Ch. 358, ***Mandate and Prohibition*** (Matthew Bender).

11. If lead agency or responsible agency fails to act within time limits specified in P 9, *above*, and any required public notice has been given, inform applicant that permit application will be deemed approved by that agency [*Gov. Code § 65956(b)*; *but see Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 68 Cal. Rptr. 2d 758, 946 P.2d 427* (right to deemed approval subject to common law waiver)].

12. If lead agency or responsible agency fails to act within time limits specified in P 9, *above*, and any required public notice has not been given, applicant can give notice in following manner [*Gov. Code § 65956(b)*]:

a. Provide seven days' advance notice to permitting agency of applicant's intent to provide public notice; and

b. No earlier than 60 days from expiration of time limits specified in P 9, *above*, provide required public notice by:

NOTE:

If the applicant provides the public notice in the following manner, the time limit for action by the permitting agency will be extended to 60 days after the public notice is provided. Further, the permitting agency must refund to the applicant any fees that were collected for providing notice and that were not used for that purpose [*Gov. Code § 65956(b)*].

(1) Using distribution information provided by public agency pursuant to *Gov. Code § 65941.5* [*see* P 3, NOTE, *above*]; and

(2) Including following information in public notice:

(a) Description of proposed development substantially similar to descriptions that are commonly used in public notices by permitting agency;

(b) Location of proposed development;

(c) Permit application number;

(d) Name and address of permitting agency; and

(e) Statement that project will be deemed approved if permitting agency does not act within 60 days [*Gov. Code § 65956(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseState & Regional Planning



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14-30B California Legal Forms--Transaction Guide § 30B.124

AUTHOR: Revision Author Andrew L. Faber

§ 30B.124 Complying With Requirements of CEQA

NOTE:

If the proposed project is subject to both the California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*] and the National Environmental Policy Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*], counsel should consult the discussion in *§ 30B.32[2]*.

1. Submit application for first required governmental approval of project.

NOTE:

At a potential applicant's request, the lead agency must provide consultation before the filing of an application regarding CEQA compliance issues [*Pub. Res. Code § 21080.1(b)*].

For further discussion of the permit approval process under CEQA, see California Real Estate Law and Practice, Ch. 303, ***Requirements of the California Environmental Quality Act*** (Matthew Bender).

2. After application is accepted as complete by appropriate public agency:

a. If public agency determines that project is exempt from CEQA and approves project, file or request that public agency file a notice of exemption [*see Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. §§ 15061(d), 15062(a)*; *see also § 30B.211*].

NOTE:

Once an application is deemed complete, the lead agency must first determine whether an activity is subject to CEQA before conducting an initial study. An activity is not subject to CEQA if (1) it does not involve the exercise of discretionary powers by a public agency; (2) it will not result in a direct or reasonably foreseeable indirect physical change in the environment; or (3) it is not a "project" [*14 Cal. Code Reg. § 15060(c)*; *see 14 Cal. Code Reg. § 15378*]. If the lead agency determines that an activity is a project subject to CEQA, the agency must then determine whether the project is exempt [*14 Cal. Code Reg. § 15061*]. If such a determination is made, the agency will prepare a notice of exemption [*Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. §§ 15061(d), 15062(a)*; ***see*** *§ 30B.211*].

The filing of a notice of exemption shortens the statute of limitations for legal challenges to the finding of exemption [***see*** *14 Cal. Code Reg. § 15062(d)*].

b. Monitor scope of work contracted for and attempt to get as much control as possible.

PRACTICE TIP:

Remain Informed of Contractors and Consultants. Since most environmental documentation is prepared by third party consultants at the developer's expense, counsel should determine the practice of the applicable lead agency in contracting with developers and consultants [*see §§ 30B.212* and *30B.213* for representative contracts between the agency and the consultant and between the agency and the developer].

c. If lead agency [*see Pub. Res. Code § 21067*; *14 Cal. Code Reg. § 15367*; *see also § 30B.210[1][b][v]*] conducts an initial study [*see 14 Cal. Code Reg. §§ 15060(d), 15063*]:

(1) Submit any environmental data and information requested by agency [*14 Cal. Code Reg. § 15063(e)*, App. H; *see § 30B.214*].

(2) During or immediately after preparation of initial study, if requested to do so, meet with lead agency regarding possible project modifications that would reduce or avoid significant environmental effects identified in initial study [*14 Cal. Code Reg. § 15063(g)*].

d. Inform client that lead agency will prepare:

NOTE:

At the applicant's request, a responsible agency must begin processing a development project permit application before final lead agency action on the project to the extent information needed to begin processing is available [*Gov. Code § 65941(c)*].

(1) A negative declaration if [*Pub. Res. Code § 21080(c)*; *14 Cal. Code Reg. § 15070*; *see § 30B.217*]:

(a) It finds that there is no substantial evidence, in light of whole record, that project may have significant effect on environment (this is a plain negative declaration); or

(b) Potentially significant effects identified in initial study will be avoided or sufficiently mitigated by revisions made by or agreed to by applicant, and there is no substantial evidence, in light of whole record, that project as revised may have significant

effect on environment (this is a mitigated negative declaration) [*see Pub. Res. Code § 21064.5*; *14 Cal. Code Reg. § 15369.5*].

(2) Following documents (among others) if project may have significant effect on environment [*see § 30B.210[1][b][iv]*]:

NOTE:
For discussion of the various types of Environmental Impact Reports (EIRs) and their differing uses and requirements, see *§ 30B.210[1][e]*.

(a) Notice of Preparation [*Pub. Res. Code § 21080.4*; *14 Cal. Code Reg. § 15082*; *see § 30B.216*].

(b) Draft EIR [*Pub. Res. Code §§ 21082.1, 21100, 21151*; *14 Cal. Code Reg. § 15084*; *see 14 Cal. Code Reg. §§ 15120-15132*; *see § 30B.218*].

(c) Final EIR [*Pub. Res. Code §§ 21100, 21151*; *14 Cal. Code Reg. § 15089(a)*; *see 14 Cal. Code Reg. § 15132*].

(d) Notice of Determination if project is approved [*Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. § 15094*; *see § 30B.221*].

(e) Resolution of findings regarding significant effects [*Pub. Res. Code § 21081*; *14 Cal. Code Reg. § 15091*; *see § 30B.219*].

(f) Mitigation Monitoring Program [*Pub. Res. Code § 21081.6*; *14 Cal. Code Reg. § 15097*; *see § 30B.220*].

e. Make sure that lead agency provides copy of final, certified EIR (if any) to each responsible agency [*14 Cal. Code Reg. § 15095(d)*; *see Pub. Res. Code § 21069*; *14 Cal. Code Reg. § 15381*; *see also § 30B.210[1][b][v]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental AssessmentsEnvironmental LawNational Environmental Policy ActEnvironmental Impact Statements



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14-30B California Legal Forms--Transaction Guide § 30B.125

AUTHOR: Revision Author Andrew L. Faber

§ 30B.125 Filing and Processing Applications for Coastal Development Permits

1. Determine whether California Coastal Commission has certified local coastal program (LCP) for applicable city or county [*see Pub. Res. Code §§ 30500-30525*].

2. If LCP has been certified, apply for permit in the following manner:

NOTE:
After certification of an LCP, a coastal development permit must be issued if the issuing agency finds that the proposed development conforms to the certified LCP [*Pub. Res. Code § 30604(b)*].

a. Complete and file official application with appropriate district office of statewide Commission and comply with applicable regulatory procedure [*see* NOTE, *below*] if proposed development is to be located [*Pub. Res. Code § 30519(b)*]:

NOTE:
The applicant must also provide the Commission with the names and addresses of all persons who, for compensation, will be communicating on the applicant's behalf or on behalf of the applicant's business partners. The disclosure must be made before any communication with the Commission takes place [*Pub. Res. Code § 30319*; ***see*** *Pub. Res. Code § 30319.5*].

(1) On any tidelands, submerged lands, or on public trust lands [*but see Pub. Res. Code §*

30613], whether filled or unfilled, lying within coastal zone;

(2) Within certain enumerated port districts [*see Pub. Res. Code §§ 30700-30721*; *see also 14 Cal. Code Reg. §§ 13600-13648*]; or

(3) Within any state university or college or private university located within coastal zone [*see Pub. Res. Code §§ 30605, 30606*; *see also 14 Cal. Code Reg. §§ 13500-13577*].

b. For any other type of proposed development, complete and file local application form with city or county and comply with any other requirements set forth in LCP [*Pub. Res. Code §§ 30519(a), 30600(d)*].

c. If decision by local agency is adverse, consider appealing decision in court.

NOTE:

The right to appeal an action by a local government on a coastal development permit application is strictly limited by *Pub. Res. Code § 30603(b)* if the LCP has been certified. *Pub. Res. Code § 30603(b)* specifies the only permissible grounds for such an appeal. As a general rule, those grounds are limited to allegations that the development does not conform to the applicable LCP or the public access policies of the Coastal Act [*Pub. Res. Code § 30603(b)(1)*]. Because these allegations are useful only to those challenging permit approvals, an unsuccessful applicant must resort to litigation to try to overturn a permit denial. An exception to this restriction applies to major public works projects or major energy facilities, a denial of which must be appealed to the Commission based on the allegations that the development conforms to the applicable LCP and the public access policies of the Coastal Act [*Pub. Res. Code § 30603(b)(2)*].

3. If LCP has not been certified, take following steps:

NOTE:

Before certification of an LCP, a coastal development permit must be issued if the issuing agency finds that the proposed development conforms to the coastal resources planning management policies of the Act [***see*** *Pub. Res. Code §§ 30200-30265.5*], and that the permitted development will not prejudice the ability of the local government to prepare an LCP that conforms to those policies [*Pub. Res. Code § 30604(a)*].

a. File application with:

(1) Appropriate city or county, if it has authority to issue development permits before certification of its LCP [*see Pub. Res. Code §§ 30600(b), 30600.5*]; or

(2) In all other cases, appropriate district office of statewide Commission [*Pub. Res. Code § 30600(c)*].

b. Participate in regulatory or local procedure governing processing of application.

c. If decision by local agency is adverse, consider appealing local decision to Commission.

NOTE:

Before certification of an LCP, any action taken by a local government on a coastal development permit application may be appealed to the Commission [*Pub. Res. Code § 30602*] by complying with the applicable interim appeals procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseJudicial Review



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14-30B California Legal Forms--Transaction Guide § 30B.126

AUTHOR: Revision Author Andrew L. Faber

§ 30B.126 Obtaining Regional Approvals and Permits

1. For projects in San Francisco Bay Area subject to McAteer-Petris Act [*Gov. Code § 66600 et seq.*; *see § 30B.223[1]*], take following steps:

a. Determine which type of permit must be obtained:
(1) Emergency permit [*see* P b, *below*].

(2) Administrative permit [*see* P c, *below*].

(3) Major permit [*see* P d, *below*].

(4) Regionwide permit [*see* P e, *below*].

b. For emergency permit, apply by letter if time allows, and by telephone or in person otherwise [*14 Cal. Code Reg. § 10640*; *see Gov. Code § 66632(f)*].

NOTE:
The Executive Director may grant an emergency permit, on reasonable terms and conditions, if he or she finds that an emergency exists and requires action more quickly than permitted by the procedures for other types of permits, and that the proposed work would be consistent with applicable laws [*14 Cal. Code Reg. § 10652*; ***see*** *Gov. Code § 66632(f)*; ***see also*** *§ 30B.223[1][h]*].

c. For administrative permit, submit completed application along with all attachments and exhibits specified in form [*14 Cal. Code Reg. § 10610*; *see § 30B.223[1][f]*].

NOTE:

If the Executive Director denies the application, the applicant may resubmit it as an application for a major permit [*14 Cal. Code Reg. § 10624*]. For further discussion of the processing of an application for an adminstrative permit, see *§ 30B.223[1][f]*.

d. If major permit is required, submit completed application along with all attachments and exhibits specified in form as follows [*14 Cal. Code Reg. § 10610*; *see § 30B.223[1][g]*].

(1) If application is accepted and filed:

(a) Obtain Executive Director's approval of any amendments to application [*see 14 Cal. Code Reg. §§ 10370, 10371*; *see also § 30B.223[1][g][v]*]; and

(b) Attend public hearing and, if desired, present additional information [*14 Cal. Code Reg. § 10410(a)(3)*; *see § 30B.223[1][g][iv]*].

(2) If permit is denied, either:

(a) Contest denial in court within 90 days after date of denial [*Gov. Code § 66632(i)*]; or

(b) Submit another application to San Francisco Bay Conservation and Development Commission (BCDC) more than 90 days after date of denial [*Gov. Code § 66632(g)*].

(3) If permit is granted, either:

(a) Inform Executive Director in writing, within 30 days of receiving permit, if permit appears not to express action of BCDC correctly [*14 Cal. Code Reg. § 10526(a)*]; or

(b) Instruct permittee to return permit to BCDC after acknowledging on it that he or she has received it and understands and accepts its contents [*14 Cal. Code Reg. § 10525*].

e. For authorization to perform work covered by existing regionwide permit:

(1) Submit to Executive Director notice of intent to proceed [*14 Cal. Code Reg. § 11710*; *see 14 Cal. Code Reg. § 11711* (required contents)].

(2) If Executive Director determines that project is covered by existing regionwide permit and provides sponsor with copy of permit, have project sponsor sign and date copy of permit and return it to Executive Director within 14 days of receipt [*14 Cal. Code Reg. § 11715*].

f. Within two weeks of completion of work authorized in permit, have permittee file executed notice of completion with Executive Director [*14 Cal. Code Reg. § 10540*].

2. For projects in Lake Tahoe area:

NOTE:

These requirements are not discussed in detail in this Transaction Guide because of their limited applicability. For further discussion, see California Real Estate Law and Practice, Ch. 252, ***State and Regional Planning*** (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 69, ***Tahoe Regional Planning Agency*** (Matthew Bender).

a. Comply with requirements of Tahoe Regional Planning Compact, if applicable [*Gov. Code §§ 66800, 66801*].

b. Comply with requirements of California Tahoe Regional Planning Agency, if applicable [*see Gov. Code §§ 67000-67132*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsReal Property LawZoning & Land UseState & Regional Planning



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14-30B California Legal Forms--Transaction Guide § 30B.127

AUTHOR: Revision Author Andrew L. Faber

§ 30B.127 Obtaining Other State and Federal Permits

1. For projects within jurisdiction of Army Corps of Engineers under federal Clean Water Act, negotiate a Section 404 Permit [*see 33 U.S.C. § 1344*; *see also* California Environmental Law and Land Use Practice, Ch. 68, *Wetlands Regulation* (Matthew Bender)].

2. For projects that may adversely affect endangered or threatened species or their habitat, redesign project or:

a. Consult with U.S. Fish & Wildlife Service pursuant to federal Endangered Species Act [*16 U.S.C. § 1531 et seq.*].

b. Consult with California Department of Fish and Game pursuant to California Endangered Species Act [*Fish & Game Code §§ 2050-2098*].

3. For projects that would obstruct natural flow or change the bed, channel, or bank of any river, stream, or lake, redesign project or:

a. Negotiate Section 1603 Permit with Department of Fish & Game [*see Fish & Game Code § 1603*].

b. If necessary, obtain Section 404 Permit from Army Corps of Engineers [*see 33 U.S.C. § 1344*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsEndangered Species ActGeneral OverviewEnvironmental LawNatural Resources & Public LandsEndangered Species ActPermitsEnvironmental LawWater QualityClean Water ActGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsGeneral Permits



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14-30B California Legal Forms--Transaction Guide §§ 30B.128-30B.199

AUTHOR: Revision Author Andrew L. Faber

[Reserved]

§§ 30B.128[Reserved]



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PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide § 30B.200

AUTHOR: Revision Author Andrew L. Faber

§ 30B.200 Application for Rezoning, Conditional Use Permit, Variance, or Design Review--City of Oakland Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a combined application for a variety of zoning actions, as well as for other entitlements, for the City of Oakland. It includes a general plan change and approval of a subdivision map. Earlier versions of this form were less detailed. The City of Oakland form, for example, has evolved over the years into a more complicated document.

The form in [2], *below*, is representative of applications used throughout the state. Local jurisdictions typically also require supporting documentation (usually on official forms) such as environmental assessment forms, disclosures of all persons having any interest in the application and in the property involved, and evidence of ownership.

PRACTICE TIP:

Get Forms Online. Most cities and counties now have their zoning codes, and in many cases, application packages, available on the Internet. Since the forms and procedures are subject to change, and may or may not be updated online immediately, counsel should obtain the information from the agency's web site, then call or visit the planning or community development department to verify that the forms downloaded are complete and reflect the agency's latest revisions. Links to all city and county web sites can be found at the State of California home page at http://my.ca.gov.

Application forms and requirements vary from jurisdiction to jurisdiction. The Oakland form in [2], *below*, obviously reflects some issues of particular concern to that city, for example, tree preservation and creek protection. Other cities or counties may have similarly detailed requirements relating to other features of particular interest to that jurisdiction.

As noted above, the application form in [2], *below*, has become much more complex over the years. The assistance of various professionals is now required to fill out and certify some of the technical components of the form. For example, a professionally certified tree survey is required for all new construction. Similarly, a licensed professional must certify that there are no creeks on the property (or application must be made for a creek permit). And, of course, various types of plans (as applicable) must be attached to the application, such as a floor plan, site plan, grading plan, landscape and irrigation plan, and the like.

For a step-by-step guide to the application process, see *§ 30B.123*.

[b] Rezoning

The effect of an ordinance on a particular parcel of land can be changed legislatively by an amendment of the zoning map that places the property in a different zone, or by amendment of the text of the zoning ordinance to change the use(s) permitted in the relevant district. The owner of the subject property, owners of adjacent parcels who wish to impose restrictions on the use of the subject property, or the local legislative body may initiate the amendment process. For further discussion, see California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* , Part B.

A decision by a legislative body on a petition for rezoning is normally a quasi-legislative (as opposed to quasi-judicial) function, does not need written findings, and may be reviewed by ordinary mandamus [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304] , overruled in part, 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442* . The motive of the governing body in denying an application is irrelevant as long as its action is reasonable. The reasonableness of its action must be judged on the objective results of the decision; if the objective facts provide any rational basis for the zoning decision, the decision will be deemed reasonable [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 478, 137 Cal. Rptr. 304] , overruled in part, 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442* .

On the other hand, when approval or rejection of a petition involves the application of general standards to specific parcels of real property, affects relatively few people, and is determined by facts peculiar to the individual case, it is an adjudicatory action by the local governing body. These adjudicative or quasi-judicial, local agency decisions require adequate findings for purposes of judicial review [*see Horn v. Ventura County (1979) 24 Cal. 3d 605, 614, 156 Cal. Rptr. 718, 596 P.2d 1134]* .

In applying this distinction, the California Supreme Court has determined that all rezonings are to be deemed quasi-legislative acts, even if only a small parcel is involved [*see Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 516, 169 Cal. Rptr. 904, 620 P.2d 565]* . On the other hand, the decision to grant a use permit or variance is deemed to be an adjudicative or quasi-judicial act [*see Horn v. Ventura County (1979) 24 Cal. 3d 605, 614, 156 Cal. Rptr. 718, 596 P.2d 1134* ; *Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12]* .

PRACTICE TIP:

Significance of the Distinction. There are significant consequences to the characterization of a land use action in California as legislative versus adjudicative. First, legislative actions are subject to being overturned by referendum, while adjudicative decisions are not. Second, the standard of judicial review of legislative decisions is much lower. They are reviewable by ordinary mandamus under *Code Civ. Proc. § 1085*, so that no findings are required and the agency's decision will be upheld if it is not arbitrary or capricious. Adjudicative actions, by contrast, are reviewable by administrative mandamus under *Code Civ. Proc. § 1094.5*. This requires that the decision be supported by findings, and that the findings be supported by substantial evidence in the record.

[c] Variances Defined

A variance is essentially a permitted deviation from the strict terms of a zoning ordinance to alleviate a hardship affecting a particular parcel while adhering to the general purposes of the zoning ordinance. The typical variance provides for a relatively minor deviation affecting setback lines, floor/area ratios, etc. It therefore differs from a conditional use permit, which permits a use conditionally authorized under the zoning ordinance [*see* California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender); *see also* [d]-[g], *below*].

PRACTICE TIP:

Keeping Up With the Joneses. When neighboring businesses have been granted variances to allow signs larger than those permitted by the zoning code, your client may quite reasonably feel entitled to the same consideration for his or her proposed sign. Unfortunately, the law is clear that the grant of variances to similarly situated properties does not justify your client's variance [*see Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 286-287, 98 Cal. Rptr. 785, 491 P.2d 369]* . What the agency should do when it grants repeated variances is change the underlying zoning requirement.

[d] Statutory Limitations on Variances

Under the Planning and Zoning Law [*Gov. Code § 65000 et seq.*], variances can be granted only when, because of special circumstances applicable to the property (e.g., its size, shape, topography, location, or surroundings), the strict application of the zoning ordinance deprives the property of privileges enjoyed by other property in the vicinity and under identical zoning classification. Any variance must be subject to conditions that will assure that the authorized adjustment will not constitute a grant of special privileges inconsistent with the limitations applicable to other properties in the same vicinity and zone [*Gov. Code § 65906*]. Variances (unlike conditional use permits) may not be used to allow a use of property that is not otherwise expressly authorized by the zone regulation governing the parcel of property [*Gov. Code § 65906*]. For further discussion, see California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender).

PRACTICE TIP:

No "Use" Variance in California. Not infrequently, property owners want a variance to permit a use of property not allowed by the zoning classification. For example, on a street of old houses that are being converted to commercial uses over time, the owner of a house may desire a variance for professional office use. If the property is zoned residential, and office use is not an allowed use in that zoning district, then a variance cannot be granted; the proper remedy is a rezoning to a district that allows the office use. Unlike in some states, in California, a "use" variance may not be granted [*see Gov. Code § 65906*].

[e] Special Standards for Specified Types of Variances

Special statutory provisions apply under the following circumstances:

- When the proposed variance covers land in an open-space zoning district [*see Gov. Code § 65911*]; or

- When the proposed variance would locate required parking spaces offsite or provide for in-lieu fees or facilities as an aid to use of public transit [*see Gov. Code § 65906.5*].

For additional discussion of these special standards, see California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender).

[f] Additional Requirements Commonly Imposed by Ordinance

Local ordinances usually impose additional requirements that supplement the statutory provisions governing the granting of variances. For example, many local ordinances require that a variance not adversely affect neighboring property or persons who live and work nearby [*see* California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender)].

Any local jurisdiction that is subject to the above zoning requirements of the Planning and Zoning Law may adopt additional or supplemental requirements or conditions governing variances [*Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 511, 113 Cal. Rptr. 836, 522 P.2d 12]* .

For additional discussion of variances, including the need for factual support for the grant, see *§ 30B.201* (Resolution Granting Variance). For restrictions on the conditions that can be attached to the grant of a variance, see [d], *above*.

[g] Conditional Use Permits

Most zoning ordinances authorize the administrative issuance of a conditional use permit (CUP) for specified uses, subject to certain conditions [*see* discussion *below*]. Unlike variances, these permits do not authorize departures from the terms of the ordinance [*see Essick v. Los Angeles (1950) 34 Cal. 2d 614, 623, 213 P.2d 492]* . By providing for the use of these permits, local governments leave open the possibility of approving a use that should not be automatically authorized for an entire district or without the imposition of restrictions.

PRACTICE TIP:

CUP versus a Rezoning. Sometimes a particular project could be approved either under a conditional use permit without a zone change, or with an actual rezoning. There are benefits to each approach. *Pro CUP:* (1) May be faster, due to lower level approval; (2) Approval is an administrative act, not subject to referendum. *Pro Rezoning:* (1) For tactical reasons, you may prefer a hearing in front of the legislative body (see next Practice Tip); (2) Rezoning is of indefinite duration, while a CUP might be issued for a limited time, or subject to review.

PRACTICE TIP:

Choice of Approving Body? Sometimes the choice of whether to go with a rezoning or a conditional use permit under the existing zoning may depend on the identity of the approving body. Generally, the lower the level of the approving body (e.g., director of planning or planning commission versus city council), the quicker the approval process. On the other hand, there are cities where the city council may be easier for a developer to deal with than the planning commission, due to greater sophistication, knowledge, or maybe just a more favorable attitude towards a particular type of project. In that case, the longer process ending up with an approval hearing in front of the city council may be preferable, particularly if under the local ordinance, a denial cannot be appealed to the council.

A conditional use permit cannot be granted unless the use will be in the best interests of public convenience and necessity, and will not be contrary to the public health, morals, or welfare [*see Upton v. Gray (1960) 269 Cal. App. 2d 352, 357, 74 Cal. Rptr. 783]* . When the local ordinance authorizes a board of zoning adjustment or zoning administrator to hear and decide applications for conditional uses, the ordinance must establish criteria to be used in reaching that decision [*Gov. Code § 65901*]. These criteria are not established by state law, but are left to the local jurisdiction.

The ordinance may specify the conditions to the granting of a conditional use permit or variance, or it may authorize the permit-issuing entity to impose conditions that are tailored to each particular application. Under the Planning and Zoning Law, the ordinance and permit-issuing authority cannot condition the issuance of a conditional use permit or a variance on either of the following [*Gov. Code § 65909*]:

- The dedication of land for any purpose not reasonably related to the use of the property; or

- The posting of a bond to guarantee installation of public improvements not reasonably related to the use of the property.

PRACTICE TIP:

Periodic Review of a CUP. For a newly permitted use, public agencies or neighbors often push to have the permit last for only a limited period, say one year, or to have it automatically reviewed after a certain period of time. Since the permit can be modified or revoked at such a review, it is in the applicant's interest to (1) try and have the permit issued with no definite expiration date, (2) have any periodic review date be as far in the future as possible, or (3) have the review condition written so that there need be no review unless complaints are received. This later provision may avoid the need for periodic review altogether. Note that even a time-limited CUP may create a vested right to continued operation of a business [*see Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 8 Cal. Rptr. 2d 385]* .

Conditional use permits run with the land and are available to subsequent owners barring expiration or revocation by the issuing body [*Imperial Co. v. McDougal (1977) 19 Cal. 3d 505, 510, 138 Cal. Rptr. 472, 564 P.2d 14]* .

[2] FORM

Application for Rezoning, Conditional Use Permit, Variance, or Design Review--City of Oakland Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseSpecial Permits & Variances



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide § 30B.201

AUTHOR: Revision Author Andrew L. Faber

§ 30B.201 Resolution Granting Variance

[1] Comment

[a] Use of Form

The form in [2], *below*, is an example of a resolution by a city planning commission granting a variance. Some sample language is included in the form to illustrate the kind of factual support that must underlie the findings for the grant of the variance.

Two examples are provided throughout this form. The first is a classic variance from street setbacks for a residential corner lot. The second is a more unusual situation and is adapted from a restaurant project that needed a variance from the requirement that all parking required by city code be provided on site. The justification for the variance for this second situation is primarily the existence of an historical structure on the property that limits normal utilization of the site.

PRACTICE TIP:

Need for Evidentiary Findings. Variances are the poster children for administrative findings. In fact, the leading land use case in California requiring that administrative agencies make detailed, evidentiary findings is a variance case [*see Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12]* . Each of the required statutory findings must be supported by substantial evidence in the record.

[b] Recitals

The Recitals should give some of the procedural history of the project, and explain that the granting body has carried out its duties to hold a public hearing and consider all the evidence in front of it. This is also a good place to define basic terms used in the Resolution.

[c] Findings

Findings are the heart of the resolution and the critical part that is necessary to defend the grant of the variance against any legal challenge. The form contains sample findings. The specific findings that must be made are governed by state law [*see Gov. Code § 65906*] and by local ordinance.

Gov. Code § 65906 essentially requires the following two findings:

- First, that "because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."

- Second, that the variance is subject to such conditions that it "shall not constitute a grant of a special privileges inconsistent with the limitations on other properties in the vicinity and zone."

PRACTICE TIP:

Difficulty of Development Is Not Enough. The issue is not whether the property would be hard to develop, but rather how its development difficulties compare to those of nearby properties. For example, the California Supreme Court found evidence of development difficulties due to three streambeds, rugged terrain, and a public road's bisecting the property to be insufficient to justify a variance absent a showing that such conditions do not apply to other properties in the area [*see Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12]* .

Local law may impose additional requirements, such as that the variance be consistent with the general intent of the zoning ordinance, and that it not adversely affect adjoining properties. Findings generally should be drafted to parrot the required finding, with the supporting evidence and reasoning added thereto, as on the form in [2], *below*.

PRACTICE TIP:

Special Circumstances Must Relate to the Property, not the Owner. The special circumstance that justify the grant of a variance must relate to the property itself, not to the owner or user. For example, if the client needs a setback variance to squeeze a second unit (permitted by the zoning) onto his or her lot, it should be justified by the size, shape, and peculiar circumstances of the property itself, thus warranting the variance to give that property the same rights and privileges as neighboring properties enjoy. The owner's desire to care for his or her sick parents may be helpful at a hearing, but is not a legal justification for the variance.

[d] Conditional Grant

Note that the grant of the variance in the form in [2], *below*, is conditioned to reduce neighborhood impacts caused by the grant of the variance.

[2] FORM

Resolution Granting Variance

Resolution Granting a Variance

RESOLUTION Number _____

Resolution Of The Planning Commission of _____ Granting a Variance to

Allow_____[*e.g., for variance from street setback for residential corner lot,* Reduced Setbacks for a Residential Parcel on a Corner Lot *or, for variance from requirement that all parking required by city code be provided on site,* Off-Site Parking for a Property Located in the LM Zone].

RECITALS

WHEREAS, This matter came before the Planning Commission of the City of _____ ("City") for public hearing on_____[*date*] and was regularly noticed in conformance with State and City law.

WHEREAS, the Planning Commission received testimony and documentary evidence from the applicant and all interested persons who wished to testify or submit documents. The Commission considered all testimony and materials submitted, including the record of the Design Review Board proceedings and the packet of material contained in the Commission Agenda Report dated_____[*date*], along with subsequent reports and materials prepared concerning this application.

WHEREAS, Variance Application _____ seeks relief from the requirements of City Code Section _____ requiring that_____[*e.g., for variance from street setback for residential corner lot,* a residential structure have a front yard setback of no less than 25 feet from the curb *or, for variance from requirement that all parking required by city code be provided on site,* all required parking spaces be provided on site] in order to provide the applicant_____[*e.g., for variance from street setback for residential corner lot,* the ability to build a 3,000 square foot house on the lot *or, for variance from requirement that all parking required by city code be provided on site,* thirty (30) additional off-site parking spaces needed to meet the parking requirements for the increased number of seats] for the property located at _____ (the "Property").

FINDINGS

THE PLANNING COMMISSION MAKES THE FOLLOWING FINDINGS, required by City Code Section _____ to grant a variance:

(1) There are special circumstances applicable to the Property in that the size, shape, location and surroundings of the Property are unique and deprive the Property of privileges enjoyed by other property in the vicinity and under the identical zone. [*Insert facts, e.g., for variance from street setback for residential corner lot,* The Property is a standard 5,000 square foot lot. However, unlike all the other lots in the subdivision, it is on the corner of two streets, so that the application of the front yard setback of 25 feet as required by the City Code to each street would allow the applicant to construct a house of only 1,000 square feet *or, for variance from requirement that all parking required by city code be provided on site,* The Property covers 39,396 square feet with a 10,877 square foot historic industrial building that is nonconforming, since it does not meet the front setback requirements; thus, the applicant is restrained from re-designing the size or shape of the building and/or altering the building's location on the Property to provide for adequate parking to allow full utilization of the building and adjacent outdoor area.]

(2) The strict application of the ordinance would deprive the applicant of privileges enjoyed by other properties in the vicinity and under the identical zone._____[*Insert facts, e.g., for variance from street setback for residential corner lot,* All other lots in the subdivision have a 25 foot front setback and five foot side setbacks, so they can accommodate a 3,000 square foot house. However, unlike all the other lots in the subdivision, the Property is on the corner of two streets, so that the application of a front yard setback of 25 feet as required by the City Code to each street would allow the applicant to construct a house of only 1,000 square feet *or, for variance from requirement that all parking required by city code be provided on site,* Since the Property has a historic structure located on it, the demolition or aggressive remodeling of the building would not be allowed and the applicant is limited to restoring and

rehabilitating an existing historic industrial building. However, another property owner without a historic building on his or her property would be able to alter or demolish the existing building to provide for parking on site.]

(3) The granting of the variance would not constitute a grant of special privileges inconsistent with limitations on other properties in the vicinity and zone because the Property_____[*insert facts, e.g., for variance from street setback for residential corner lot,* will then be able to accommodate the same size house as all the other similarly sized and zoned lots in the subdivision *or, for variance from requirement that all parking required by city code be provided on site,* being improved with a historic building, is subject to development limitations that do not affect other properties in the vicinity and zone.]

(4) Furthermore,_____[*insert any other supporting facts, e.g., for variance from street setback for residential corner lot,* XYZ Street is a small cul-de-sac street with no other house fronting on it; thus a normal front yard setback is not necessary *or, for variance from requirement that all parking required by city code be provided on site,* the proposed off-site parking is a functional equivalent to on-site parking because it is located on private properties which are directly adjacent to the Property and are accessible only by way of an alley; therefore, this off-site parking will not interfere with public traffic and/or street parking and will provide safe and convenient pedestrian access to the Property.]

(5) The applicant's request for a variance is consistent with the intent of the City's Zoning Code which is_____[*insert rationale, e.g., for variance from street setback for residential corner lot,* to promote a uniform pattern of housing sizes on a subdivision such as this one so that property values do not suffer and that neighborhood integrity is maintained *or, for variance from requirement that all parking required by city code be provided on site,* to promote a safe, effective traffic circulation system, and to provide adequate off-street parking].

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1) Variance Application _____ is hereby granted.

2) The following additional conditions of approval shall be added to the variance, a complete copy of which is attached hereto as Exhibit A and incorporated herein:_____[*Insert appropriate conditions, e.g., for variance from street setback for residential corner lot,* The setback from ABC Avenue shall be no less than 15 feet and the setback from XY *Z* Street shall be no less than 10 feet *or, for variance from requirement that all parking required by city code be provided on site,* Fifteen (15) parking spaces in each lot shall be prominently marked as "reserved for patrons of the restaurant during the hours of 5:00 p.m. to 10:00 p.m. Monday through Saturday and 7:00 p.m. to 10:00 p.m. Sunday."]

PASSED AND ADOPTED at a regular meeting of the Planning Commission of _____, California, held on _____ by the following vote.

COMMISSION MEMBERS:

AYES: _____
NOES: _____
ABSTAIN: _____
SIGNED: _____ CHAIRPERSON
ATTEST: _____ CLERK OF THE COMMISSION

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseSpecial Permits & Variances



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide § 30B.202

AUTHOR: Revision Author Andrew L. Faber

§ 30B.202 Notice of Appeal From Action of Planning Commission--City and County of San Francisco Form

[1] Comment--Use of Form

The form in [2], *below*, is a notice of appeal from an action of the San Francisco Planning Commission. Under the zoning provisions of the Planning and Zoning Law [*Gov. Code § 65800 et seq.*], local legislative bodies may, by ordinance, provide that applications for conditional uses or other zoning permits will be heard by the planning commission or by either a board of zoning adjustment or a zoning administrator [*Gov. Code §§ 65900-65902*]. An appeal of the decision of that entity must be made to the board of appeals [*Gov. Code § 65903*] or, if there is none, to the legislative body [*Gov. Code § 65904*]. In San Francisco, the Planning Commission and Board of Supervisors handle these matters.

Appeals procedures vary from jurisdiction to jurisdiction. Some agencies have required forms, while others will accept appeals by letter. There is generally a filing fee, and there is always a time deadline (usually 10 days), which must be strictly observed. Counsel facing an appeal situation should immediately determine the local time requirement, filing method, and whether a special form must be used. In San Francisco, for example, the appeal time is 30 calendar days, and the fee is $275. The appeal must be subscribed to by owners of at least 20 percent of specified neighboring properties to the property at issue.

In filling out such a form, it is recommended that the reasons given for the appeal track the provisions of the zoning code that cover the appeal. For example, if local ordinance requires that the city council can only grant an appeal if it finds that the planning commission erred, or it attempted to modify a policy over which it has no jurisdiction to modify, then the reasons for appeal should track this language (for example, "The planning commission erred and abused its discretion when it ..." or "The effect of the planning commission's denial would be to modify a policy of the city council, in that ...").

PRACTICE TIP:

Trap for the Unwary--Appeal the CEQA Determination, Not Just the Project Approval. Suppose an

Environmental Impact Report (EIR) is certified or a negative declaration is adopted by a lower agency body, for example, a planning commission, when it approves a project that does not need to go to the city council. In that case, an opponent must appeal both the project approval *and* the certification of the EIR or adoption of the negative declaration to the city council. If only the project approval itself is appealed, then the opponent may be held to have waived any challenge to the project on CEQA grounds [*see Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal. App. 4th 577, 592-593, 96 Cal. Rptr. 2d 880]* .

[2] FORM

Notice of Appeal From Action of Planning Commission--City and County of San Francisco Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseSpecial Permits & Variances



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide § 30B.203

AUTHOR: Revision Author Andrew L. Faber

§ 30B.203 Petition for Annexation--Imperial County LAFCO Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a petition to initiate proceedings in front of a Local Agency Formation Commission (LAFCO) under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 [*Gov. Code § 56000 et seq.*]. Such proceedings are necessary for any city or special district boundary changes that may be required for the project. These commonly include an annexation of county land into a city, or modifying the boundaries of a services district, such as a water district or fire district, to include the project site. Note that there are exceptions to the general rules of LAFCO jurisdiction, for example, a special exemption for annexations into cities in Santa Clara County applies under certain circumstances [*see Gov. Code § 56757*].

Any single boundary change has a specific descriptive name, such as an annexation, or a detachment, while any two or more are collectively called a reorganization [*see Gov. Code § 56073*].

[b] Role of LAFCOs Generally

A petition to initiate proceedings in front of LAFCOs can be filed by registered voters or landowners, and is subject to numerous statutory requirements [*see Gov. Code § 56700 et seq.*]. If a proceeding is begun by petition, then the LAFCO is actually the lead agency under the California Environmental Quality Act (CEQA). More commonly, a proceeding is initiated by a resolution adopted by an affected local agency [*see Gov. Code § 56654*]. Thus, for example, adoption of such a resolution might be one of a package of project approvals granted by a city, which has been the lead agency to consider the project.

A reorganization under a LAFCO's jurisdiction can be a complicated legal and political activity. The requirements of the LAFCO must be observed, but general agreement must also be reached among taxing agencies as to an

apportionment of tax revenues. For an extensive discussion of the role of LAFCOs, see California Environmental Law and Land Use Practice, Ch. 73, *Annexation and Boundary Issues* (Matthew Bender).

Although a LAFCO is forbidden to impose terms on an approval that regulates "land use density or intensity, property development, or subdivision requirements" [*Gov. Code § 56375(a)(6)*], the LAFCO is charged to attempt to preserve prime agricultural land in open-space use [*Gov. Code § 56377*].

PRACTICE TIP:

Ascertain LAFCO Requirements in Advance. For most private projects, if a LAFCO is involved, it is as a responsible agency. Typically, after a city or county has approved the project, the LAFCO will have to act on any annexation or special district boundary changes. The LAFCO's requirements should be considered from the very beginning, however, so that one does not run into any last-minute roadblocks. One should visit the local LAFCO and obtain any policies or rules they may have at an early stage, especially since their procedures may have changed as a result of the extensive reorganization of their enabling legislation in 2000 (one effect of the new law was to give LAFCOs more autonomy and freedom from their county government) [*see* the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, *Gov. Code § 56000 et seq.*].

[2] FORM

Form--Petition for Annexation--Imperial County LAFCO Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsBoundariesReal Property LawZoning & Land UseAnnexationReal Property LawZoning & Land UseLocal Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide § 30B.204

AUTHOR: Revision Author Andrew L. Faber

§ 30B.204 Development Agreement

[1] Comment

[a] Use of Form

The form in [2], *below*, is a generic development agreement that is relatively neutral in tone, but slightly weighted towards the developer. Statutory development agreements are authorized under the California Development Agreement Law [*Gov. Code § 65864 et seq.*]. Generally, development agreements can provide certainty to developers in the form of a contractual vested right to complete a development but also can provide local governments with the ability to require public improvements or other concessions from a developer.

It is possible for development agreements to be much more detailed than the form in [2], *below*. For example, the specific obligations of the developer and a detailed phasing schedule can be spelled out either in the text or in exhibits.

For detailed coverage of development agreements, see California Environmental Law and Land Use Practice, Ch. 74, *Development Agreements and Other Negotiated Land Use Agreements* (Matthew Bender).

[b] Recitals

The Recitals should explain the background of the agreement, say a little of its processing history, and describe some of the rationale for its adoption. It is not uncommon for there to be turnover of city staffs and elected officials, as well as developer's representatives. Recitals are thus particularly helpful if the factual background is unusual or not likely to be remembered by those administering the agreement during the project's development lifetime.

PRACTICE TIP:
The Importance of Recitals in a Development Agreement. A development agreement may be challenged on the grounds that it is invalid for failure of consideration, particularly if it appears that the developer is

vesting rights without giving the agency additional consideration over and above the exactions of fees and/or land dedications that the agency could require anyway. Recitals are very important in defending such a suit, as they would certainly be given substantial weight by a court. Thus, the recitals should contain a clear explanation of the public benefits that the agency is receiving and should explicitly state that such consideration is over and above the level of exactions that could normally be imposed on the project.

[c] Effective Date

If not explicitly defined, then the agreement vests the developer's rights as of the "time of execution of the agreement" [*Gov. Code § 65866*]. The date of adoption of the ordinance, which is readily ascertainable from the public record, should be used instead of the date of execution. This avoids any confusion in the event the agency may intentionally or accidentally delay execution to the detriment of the developer [*see* Section 4.1 in form in [2], *below*].

[d] Term

The term of the agreement is often hotly negotiated. It may be keyed to specific development milestones, or there could be a relaxation of vesting if a certain intensity of development is not completed by a specific date (for example, vesting might relax as against increased fees) [*see* Section 4.2 in form in [2], *below*].

[e] Applicable Rules

Usually the heart of a development agreement is the freezing of applicable "rules, regulations, and official policies" [*see Gov. Code § 65866*], as of the Effective Date of the agreement. Sometimes a similar vesting is agreed to with regard to building codes, but Section 6.2 of the form in [2], *below*, provides for the application of building codes in effect at the time a complete application is submitted for a construction permit.

[f] Timing of Development

The agency may not want to give the developer the unrestricted right to develop at its own pace, and may wish to negotiate incentives to encourage timely development [*see* Section 8 of form in [2], *below*]. In particular, if there are substantial public improvements to be put in by the developer up front, the timing of such improvements should be clearly stated. The wording of this section is also designed specifically to prevent the timing of development from being restricted by a slow-growth initiative, as happened in *Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 208 Cal. Rptr. 228, 690 P.2d 701* .

[g] Processing

It is often unclear exactly how much discretionary approval authority the public agency has left after entering into a development agreement. The agreement itself can include restrictions on subsequent discretionary actions [*see Gov. Code § 65864*; *see also* Section 10 in form in [2], *below*].

PRACTICE TIP:

Lock in the Ability to Build at Maximum Density, Height, etc. A development agreement is typically entered into at a stage of project approvals when major approvals are being granted concurrently, such as a general plan amendment or rezoning. Often design review or site and architectural review for specific buildings is left for later approvals. In the normal project review process, it is not uncommon for total density or maximum heights of individual buildings to be scaled back in design review, particularly when the design review body is not the legislative body that approved the development agreement. Developers, accordingly, are well-advised to try to include language in the development agreement that specifically gives them the right to build at the maximum density, height, or other parameters as

authorized by the zoning approvals, and specifically prevents the agency from cutting back on the project during design review.

[h] Amendment or Cancellation

Section 12.1 is designed to allow the developer an out in the event of a significant change in federal or state law. Section 12.3 allows for relatively minor modifications to the agreement to be approved at the staff level, rather than being treated as formal amendments which would trigger the same public hearing process as the original adoption of the agreement.

[i] Annual Review

The Development Agreement Law requires review by the local agency of a development agreement at least every 12 months [*see Gov. Code § 65865.1*; Section 13 of form in [2], *below*]. It is generally in the developer's interest to have the review conducted at a staff level if possible. Thus, this part of the agreement could be worded so that the Community Development Director makes an initial determination of compliance, and the review only goes to the legislative body for a hearing if he or she finds noncompliance. The other extreme would be that all reviews are conducted by the legislative body with full public hearings. The wording in the form in [2], *below*, is a compromise provision.

PRACTICE TIP:

The Missing Annual Review. The annual review of a development agreement can have significant consequences, as the public agency has the power to modify or revoke the development agreement if it finds a lack of good faith compliance [*see Gov. Code § 65865.1*]. However, the requirement for annual review is often overlooked, particularly in a multi-year project when there might not be much point to such a review in early years. From the developer's perspective, therefore, it is desirable to put a clause in the agreement like Section 13.6 in the form in [2], *below*, so that failure to initiate and complete such a review must be conclusively deemed to be the same as if the review had been successfully conducted. The agency may want such a clause to put the onus on the developer to initiate the review process.

[j] Default

Although not in the sample form in [2], *below*, often the public agency will insist that the developer waive all right to obtain money damages against the agency for breach of the agreement. The developer should then try to negotiate an expedited dispute resolution process, including the explicit right to seek specific performance [*see* Section 14 (Default), of form in [2], *below*].

[k] Mortgagee Protection

A mortgagee protection provision is normally required to obtain third-party financing of the project [*see* Section 15 of form in [2], *below*]. A lender then knows that it is not bound to complete the project after foreclosure, though if it does want to take the benefits of the development agreement, then it must accept the burdens also.

[l] Severability

This clause [*see* Section 16 of form in [2], *below*] deals with the tricky issue of what happens to the agreement if part of it is determined to be invalid.

PRACTICE TIP:

Beware of Severability Clauses. Many drafters of agreements of all types treat the severability clause as boilerplate. Commonly it provides that if any part of the agreement is invalidated, then the remainder

continues in effect. However, this provision should not be included in a development agreement. The reason is that the part of a development agreement that is most valuable to the developer, i.e., the vesting of the developer's rights, is precisely the part most likely to be attacked by a project opponent. If a developer will not receive the benefits of the agreement, then the agreement should be renegotiated or terminated, as provided in Section 16 of the form in [2], *below*. A poorly drafted severability clause, however, could conceivably leave the developer without a project but still bearing the burdens of the agreement.

[m] Transfers and Assignments

These clauses should be carefully thought through [*see* Section 18 of form in [2], *below*]. The agency wants to retain liability for the developer, at least until all the public improvements are in place. The developer, on the other hand, typically needs to be able to sell or lease developed product without having the ultimate user or owner be subject to the agreement. If parts of the property are to be sold to different entities, then the respective obligations to be assumed by each buyer should be spelled out as specifically as possible. This is much easier to do at the drafting stage then later when the agency may have less incentive to cooperate.

[n] Force Majeure

Section 23 is definitely biased towards the developer, and the agency may want to limit the scope of excusable delay, particularly when it is expecting substantial public improvements to be installed by the developer.

[2] FORM

Development Agreement

Development Agreement

THIS DEVELOPMENT AGREEMENT (hereafter "Agreement") is made and entered into on_____[*date*], by and between the City of_____[*name of city*], a Municipal Corporation (hereafter "City"), and_____[*name of developer*], a [*capacity of developer, e.g.,* California corporation] ("Developer"), pursuant to the authority of *California Government Code Section 65864 et seq.*

RECITALS

A. *California Government Code Section 65864 et seq.* authorizes the City to enter into an agreement for the development of real property with any person having a legal or equitable interest in such property in order to establish certain development rights in such property.

B. On_____[*date*], Developer submitted an application to develop certain real property owned by Developer, which application includes a request for General Plan Text Amendment, approval of a Use Permit and Design Review, approval to renovate, redevelop, relocate, and expand facilities currently existing on the Property (defined below), and to construct additional facilities on the Property described as follows: [*use appropriate description of the project*] (the "Project").

C. City has approved various land use approvals in connection with the development of the Project, including [*list approvals, e.g.,* a general plan amendment, rezoning, and a conditional use permit], by Resolution No. [*refer to resolution for general plan amendment*] and Ordinance No. [*refer to ordinance for rezoning*], adopted on_____[*date*] (collectively, together with any approvals or permits now or hereafter issued with respect to the Project, the "Project Approvals").

D. Pursuant to the California Environmental Quality Act ("CEQA") the City prepared an Environmental Impact Report ("EIR") for the Project. The EIR was certified by the City Council on_____[*date*]. Pursuant to CEQA, a mitigation/monitoring program for the Project was approved by the City Council. As to all environmental impacts identified in the EIR as not being capable of mitigation to an insignificant level, the City has determined that the benefits of the proposed Project outweigh these unmitigated environmental effects and the City accordingly adopted a Statement of Overriding Considerations on_____[*date*].

E. The purpose of this Agreement is to facilitate the implementation of the Project Approvals through the development of the Project, thereby realizing the public benefits to City and private benefits to Developer, including those described in these Recitals. The development of the Project requires a major investment by the Developer in public facilities, substantial front-end investment in on-site and off-site improvements, dedications of land, participation in other programs for public benefit and purposes, and substantial commitments of resources to achieve both private benefits of the Project for the Developer and the public purposes and benefits of the Project for the City. The Developer will be unable to make and realize the benefits from such commitments of land and resources without the assurances of a realized Project provided by this Agreement.

F. The City Council has found that, among other things, this Agreement is consistent with its General Plan; that this Agreement is compatible with the uses authorized in, and the regulations prescribed for, the Property; that this Agreement is in conformity with public convenience, general welfare, and good land use practice; that this Agreement will not be detrimental to the health, safety, or general welfare; and that this Agreement will not adversely affect the orderly development of property or the preservation of property values.

G. Developer is willing, pursuant to the terms of this Agreement, to make expenditures and provide benefits to the City including, without limitation [*describe improvements, e.g.,* construction of public traffic improvements, and control of flood drainage in a manner that benefits a wider area, and mitigates traffic and flooding impacts resulting in part from certain existing conditions and cumulative development in addition to those impacts caused by the Project], thus conferring a public benefit on the City.

H. Some or all of those expenditures and dedications of land by Developer are over and above those that City could require of Developer in the normal course of granting project approvals. Developer is willing to make such additional expenditures and/or grant such additional dedications in return for receiving the benefits conferred on Developer by this Agreement.

I. City desires the timely, efficient, orderly, and proper development of the Project, and believes it is in the public interest to accept the benefits conferred by the additional expenditures and additional dedications by Developer referred to above. City further believes it is in the public interest to provide for the vesting of Developer's rights to develop the Project in conformance with the Project Approvals and the terms and conditions contained herein so that such vested rights shall not be disturbed by changes in laws, rules, or regulations, including measures passed by initiative, that occur after the Effective Date (as defined below) of this Agreement.

J. City and Developer have reached agreement and desire to express herein a development agreement that will facilitate development of the Project subject to conditions set forth in this Agreement and set forth in the Project Approvals, as defined herein.

K. On_____[*date*], the City Council adopted Ordinance No. _____ approving this Agreement.

NOW, THEREFORE, with reference to the above recitals and in consideration of the mutual promises, obligations and covenants herein contained, City and Developer agree as follows:

AGREEMENT

1. Description of Property. The Property which is the subject of this Agreement is described in Exhibit A attached to this agreement ("Property").

2. Interest of Developer. The Developer has a legal or equitable interest in the Property.

3. Relationship of City and Developer. This Agreement is a contract that has been negotiated and voluntarily entered into by City and Developer. The Developer is not an agent of City. The City and Developer hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained in this Agreement or in any document executed in connection with this Agreement shall be construed as making the City and Developer joint venturers or partners.

4. Effective Date and Term.

4.1. Effective Date. The effective date of this Agreement ("Effective Date") shall be the date on which the ordinance approving this Agreement is adopted by City.

4.2. Term. The term of this Agreement ("Term") shall commence on the Effective Date and extend [*insert term, e.g.* ten (10)] years thereafter, unless this term is otherwise terminated or modified as set forth in this Agreement.

4.3. Term of Project Approvals. Pursuant to *California Government Code Section 66452.6(a)*, the term of any tentative map and the other Project Approvals described in the Recital above shall automatically be extended for the Term of this Agreement.

5. Use of the Property.

5.1. Right to Develop. Developer shall have the vested right to develop the Project on the Property in accordance with the terms and conditions of this Agreement, the Project Approvals (as and when issued), and any amendments to any of them as shall, from time to time, be approved pursuant to this Agreement.

5.2. Permitted Uses. The permitted uses of the Property, the maximum density and intensity of use, the maximum height, bulk and size of proposed buildings, provisions for reservation or dedication of land for public purposes and location and maintenance of on-site and off-site improvements, location of public utilities, and other terms and conditions of development applicable to the Property, shall be those set forth in this Agreement, the Project Approvals, and any amendments to this Agreement or the Project Approvals, and the "Applicable Rules" (as defined in this Agreement).

5.3. Additional Conditions. Provisions for the following additional conditions (the "Additional Conditions") are set forth in Exhibit B attached to this Agreement and incorporated herein by reference. These include additional or modified conditions agreed on by the parties to eliminate or mitigate adverse environmental impacts of the Project or otherwise relating to development of the Project, including certain conditions that otherwise would not be required.

6. Applicable Rules, Regulations, and Official Policies.

6.1. Rules re Permitted Uses. For the term of this Agreement except as otherwise provided in this Agreement, the City's ordinances, resolutions, rules, regulations, and official policies, including, without limitation, the Project Approvals, governing the permitted uses of the Property, governing density, design, improvement and construction standards and

specifications applicable to the Property, including but not limited to, all public improvements, shall be those in force and effect on the Effective Date of this Agreement (the "Applicable Rules").

6.2. Uniform Codes Applicable. The Project shall be constructed in accordance with the provisions of the Uniform Building, Mechanical, Plumbing, and Electrical Codes and Title 24 of the California Code of Regulations, relating to Building Standards, in effect in City at the time a completed application is submitted for the appropriate building, grading, or other construction permits for the Project.

7. Subsequently Enacted Rules and Regulations.

7.1. New Rules and Regulations. During the term of this Agreement, the City may, in subsequent actions applicable to the Property, apply new or modified ordinances, resolutions, rules, regulations and official policies of the City which were not in force and effect on the Effective Date of this Agreement and which are not in conflict with the Applicable Rules, provided that (1) such new or modified ordinances, resolutions, rules, regulations or official policies do not affect the permitted uses of the Property, the maximum density and intensity of use, the maximum height, bulk and size of proposed buildings, provisions for reservations or dedication of land for public purposes and location and maintenance of on site and off site improvements, location of public utilities or any other terms and conditions set forth in this Agreement; and (2) such laws are applied on a city-wide basis and in a manner which does not discriminate against Developer.

7.2. Denial or Conditional Approval. Nothing in this Agreement shall prevent the City from denying or conditionally approving any subsequent land use permit or authorization for any subsequent development project application on the basis of any new or modified ordinances, resolutions, rules, regulations, or policies applicable to the Property pursuant to and subject to Section 7.1.

7.3. Moratorium Not Applicable. Notwithstanding anything to the contrary contained in this Agreement, in the event an ordinance, resolution, or other measure is enacted, whether by action of City, by initiative, referendum, or otherwise, that imposes a building moratorium which would otherwise affect the Project or all or any part of the Property or which would require a vote of the people as a condition to the grant of any approvals for the Project, City agrees that such ordinance, resolution, or other measure shall not apply to the Project, the Property, this Agreement, or the Project Approvals. If, however, it is determined by a court of competent jurisdiction that a building moratorium or voter approval referenced above is effective as to any portion of the Project, this Agreement shall remain unchanged and in full force and effect as to the portion of the Project not affected by such moratorium or voter requirement, unless Developer elects to terminate this Agreement within ninety (90) days after Developer receives written notice of such court determination.

8. Timing of Development. It is the parties' specific intent that this Agreement shall prevail over any later-adopted initiative that might otherwise have the effect of restricting or limiting the timing or sequencing of development of the Project. Therefore, subject to the terms of this Agreement, the Project Approvals, and the Applicable Rules, Developer shall have the right (without obligation) to develop the Property in such order and at such rate and at such times as Developer deems appropriate within the exercise of its subjective business judgment, and such order, rate, and time selected by Developer shall in no way affect or impair Developer's vested rights under this Agreement.

9. Infrastructure Capacity. City hereby acknowledges that it has sufficient capacity in its existing infrastructure, services, and utility systems, including, without limitation, traffic circulation, flood control, sewer collection, sewer treatment, sanitation service and, except for services not provided by and outside City's control, water supply, treatment, distribution, and service, to accommodate the Project as provided in this Agreement. To the extent that City renders these services or provides such utilities, City hereby agrees that it will serve the Project and that there shall be no restriction on hookups or service for the Project except for reasons beyond City's control.

10. Processing.

10.1. Further Approvals and Permits. On satisfactory completion by Developer of all required preliminary actions and payments of all required processing fees, if any, City shall, subject to all legal requirements, promptly initiate, commence, diligently process, complete at the earliest reasonable time, all required steps, and expeditiously consider any approvals and permits necessary for the development by Developer of the Property in accordance with this Agreement, including, but not limited to, the following:

10.1.1. The processing of applications for and issuing of all discretionary approvals requiring the exercise of judgment and deliberations by City ("Discretionary Approvals"); and

10.1.2. The processing of applications for and issuing of all ministerial approvals requiring the determination of conformance with the Applicable Rules, including, without limitation, site plans, development plans, land use plans, grading plans, improvement plans, building plans and specifications, and ministerial issuance of one or more final maps, zoning clearances, grading permits, improvement permits, wall permits, building permits, lot line adjustments, encroachment permits, certificates of use and occupancy and approvals, and entitlements and related matters as necessary for the completion of the development of the Project ("Ministerial Approvals").

10.2. No Abridgement of Density or Height. City acknowledges that notwithstanding its ability to issue Discretionary Approvals in relation to site and architectural review and design review, City may not refuse such approvals, or require changes in the Project, that would have the effect of restricting or preventing the ability of Developer to construct buildings at the maximum density and maximum height allowed in the Project Approvals as of the Effective Date of this Agreement.

10.3. Processing During Third Party Litigation. The filing of any third party lawsuit(s) against City or Developer relating to this Agreement or to other development issues affecting the Property shall not delay or stop the development, processing, or construction of the Project, or issuance of Discretionary Approvals or Ministerial Approvals, unless the third party obtains a court order preventing the activity. City shall not stipulate to the issuance of any such order.

11. Subsequently Enacted or Revised Fees, Assessments, and Taxes.

11.1. New Fees. No fees, dedications, or exactions imposed on new development adopted by the City after the Effective Date of this Agreement, and no fees, dedications, or exactions which result from any modification after the Effective Date of any existing ordinances, resolutions, rules, regulations, or official policies of the City (except as expressly provided in Section 11.2, below), shall be applicable to the Project.

11.2. Revised Application Fees. Any existing application, processing, and inspection fees that are revised during the term of this Agreement shall apply to the Project provided that (1) such fees have general applicability on a city-wide basis and do not discriminate against Developer; (2) the application of such fees to the Property is prospective; and (3) the application of such fees would not prevent development in accordance with this Agreement.

11.3. New Taxes. Except for taxes solely imposed on new development, any subsequently enacted city-wide taxes shall apply to the Project provided that (1) such taxes have general applicability on a city-wide basis and do not discriminate against Developer; (2) the application of such taxes to the Property is prospective; and (3) the application of such taxes would not prevent development in accordance with this Agreement.

11.4. Assessments. Nothing in this Agreement shall be construed to relieve the Property from assessments levied against it by City pursuant to any statutory procedure for the assessment of property to pay for infrastructure and/or services which benefit the Property.

11.5. Right to Contest. Nothing contained in this Agreement shall prevent Developer from paying any such fee, tax, or assessment under protest, or otherwise asserting its legal rights to protest or contest a given fee, tax, or assessment assessed against the Project or the Property.

12. Amendment or Cancellation.

12.1. Modification Because of Conflict with State or Federal Laws. In the event that State or Federal laws or regulations enacted after the Effective Date of this Agreement prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps, or permits approved by the City, the parties shall meet and confer in good faith in a reasonable attempt to modify this Agreement to comply with such State or Federal laws or regulations. Any such amendment or suspension of the Agreement shall be approved by the City Council. If such modification or suspension is infeasible in Developer's reasonable business judgment, then Developer may elect any one or more of the following in any sequence:

12.1.1. To terminate this Agreement by written notice to City;

12.1.2. To challenge the new law preventing compliance with the terms of this Agreement, and extend the Term of this Agreement for the period of time required to make such challenge. If such challenge is successful, this Agreement shall remain unmodified, except for the extension of the Term and shall remain in full force and effect.

12.2. Amendment by Mutual Consent. This Agreement may be amended in writing from time to time by mutual consent of the parties to this Agreement and in accordance with the procedures of State law.

12.3. Operating Memoranda. The provisions of this Agreement require a close degree of cooperation between City and Developer, and refinements and further development of the Project may demonstrate that clarifications with respect to the details of performance of City or Developer or minor revisions to the Project are appropriate. If and when, from time to time, during the term of this Agreement, City and Developer agree that such clarifications or minor modifications are necessary or appropriate, they shall effectuate such clarifications through operating memoranda approved by City and Developer, which, after execution, shall be attached to this Agreement. No such operating memoranda shall constitute an amendment to this Agreement requiring public notice or hearing. The City Attorney shall be authorized to make the determination whether a requested clarification may be effectuated pursuant to this Section or whether the requested clarification is of such a character to require an amendment hereof pursuant to Section 12.2 of this Agreement. The parties agree that modifications which would be categorized as exempt under CEQA, or which, after an initial study, the City determines do not require any further environmental review, or do not increase the density or intensity of use or the maximum height, bulk, size or architectural style of proposed buildings may be effectuated through operating memoranda pursuant to this Section. The City Manager may execute any operating memoranda hereunder without further City Council action.

12.4. Cancellation by Mutual Consent. Except as otherwise permitted in this Agreement, this Agreement may be cancelled in whole or in part only by the mutual consent of the parties or their successors in interest, in accordance with the same procedure used when entering into this Agreement.

13. Annual Review.

13.1. Review Date. The annual review date for this Agreement (the "Review Date") shall be one year following the Effective Date and the annual anniversary of said date each year thereafter.

13.2. Annual Review Process. The Community Development Director shall initiate the annual review by giving to Developer no later than sixty (60) days following the Review Date written notice that the City intends to undertake such review for the annual period ending with the Review Date. Developer shall provide evidence of good faith compliance

with the terms and conditions of this Agreement to the Community Development Director within thirty (30) days following receipt of the Community Development Director's notice. The Community Development Director shall review the evidence submitted by Developer and shall, within thirty (30) days following receipt of Developer's evidence, make a recommendation to the City Council either (1) that the City Council find that Developer has demonstrated good faith compliance with the terms and conditions of this Agreement, or (2) that the City Council find that Developer has not demonstrated good faith compliance with the terms and conditions of this Agreement, setting forth with specificity the basis on which the Community Development Director makes his/her recommendation of a finding of non-compliance. Developer shall provide additional evidence as and when reasonably determined necessary by the Community Development Director.

13.3. Hearing. The Community Development Director's recommendation shall be considered by the City Council at a regularly scheduled meeting following the Council's receipt of the Community Development Director's recommendation. If the Community Development Director's recommendation is that the City Council find that Developer has demonstrated good faith compliance with the terms and conditions of this Agreement, the matter shall be placed on the "Consent Calendar." If the matter is either removed from the Consent Calendar or the Community Development Director's recommendation is that the City Council find that Developer has failed to demonstrate good faith compliance with the terms and conditions of this Agreement, the matter shall be heard by the City Council. The burden of proof of good faith compliance with the terms of this Agreement shall be on the Developer.

13.4. Determination. If the City Council finds and determines that the Developer has complied in good faith with the terms and conditions of this Agreement during the period under review, the review for that period shall be concluded. If the City Council finds and determines, on the basis of substantial evidence, that the Developer has not complied in good faith with the terms and conditions of this Agreement during the period under review, and Developer has been notified and given an opportunity to cure in accordance with the provisions of Section 14.2, below, the Council may modify or terminate this Agreement in accordance with State law.

13.5. Fee for Annual Review. The fee for City's annual review shall be paid by Developer, and shall not exceed the costs of reimbursement of City staff time and expenses at the customary rates then in effect.

13.6. Failure to Hold Review. In the event that City does not initiate an annual review or that the City Council does not make its determination within six months of the Review Date for a given year, then it shall be deemed conclusive that Developer has complied in good faith with the terms and conditions of this Agreement during the period under review.

14. Default.

14.1. Other Remedies Available. On the occurrence of an event of default, the parties may pursue all other remedies at law or in equity which are not otherwise provided for in this Agreement expressly including the remedy of specific performance of this Agreement.

14.2. Notice and Cure. On the occurrence of an event of default by either party, the nondefaulting party shall serve written notice of such default on the defaulting party. If the default is not cured by the defaulting party within thirty (30) days after service of such notice of default, the nondefaulting party may then commence any legal or equitable action to enforce its rights under this Agreement; provided, however, that if the default cannot be cured within the thirty (30) day period, the nondefaulting party shall refrain from any such legal or equitable action so long as the defaulting party begins to cure such default within the thirty (30) day period and diligently pursues such cure to completion. Failure to give notice shall not constitute a waiver of any default.

14.3. Judicial Reference. Pursuant to *Code of Civil Procedure Section 638 et seq.*, all legal actions shall be heard by a referee who shall be a retired judge from either the [*insert county, e.g.*, San Francisco] County Superior Court, the California Court of Appeal, the United States District Court, or the United States Court of Appeals, provided that the

selected referee shall have experience in resolving land use and real property disputes. Developer and City shall agree on a single referee who shall then try all issues, whether of fact or law, and report a finding and judgment thereon and issue all legal and equitable relief appropriate under the circumstances of the controversy before such referee. If Developer and City are unable to agree on a referee within ten (10) days of a written request to do so by either party to this Agreement, either party may seek to have one appointed pursuant to *Code of Civil Procedure Section 640*. The cost of such proceeding shall initially be borne equally by the parties. Any referee selected pursuant to this Paragraph shall be considered a temporary judge appointed pursuant to *Article 6, Section 21 of the California Constitution*.

14.4. Estoppel Certificate. Either party may, at any time, and from time to time, request written notice from the other party requesting such party to certify in writing that, to the knowledge of the certifying party, (1) this Agreement is in full force and effect and a binding obligation of the parties, (2) this Agreement has not been amended or modified either orally or in writing, or if so amended, identifying the amendments, and (3) the requesting party is not in default in the performance of its obligations under this Agreement, or if in default, to describe therein the nature and amount of any such defaults. A party receiving a written request under this Section shall execute and return such certificate within thirty (30) days following the receipt thereof, or such longer period as may reasonably be agreed to by the parties. City Manager of City shall be authorized to execute any certificate requested on behalf of City. The failure to deliver such certificate within such time shall be conclusive evidence on the party which fails to deliver such statement that this Agreement is in full force and effect without modification and that there are no uncured defaults in the performance of the requesting party. Failure to execute such an estoppel certificate shall not be deemed a default.

15. Mortgagee Protection; Certain Rights of Cure.

15.1. Mortgagee Protection. This Agreement shall be superior and senior to any lien placed upon the Property, or any portion thereof after the date of recording this Agreement, including the lien for any deed of trust or mortgage ("Mortgage"). Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against any person or entity, including any deed of trust beneficiary or mortgagee ("Mortgagee") who acquires title to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise.

15.2. Mortgagee Not Obligated. Notwithstanding the provisions of Section 15.1, above, no Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion of improvements; provided, however, that a Mortgagee shall not be entitled to devote the Property to any uses or to construct any improvements thereon other than those uses or improvements provided for or authorized by the Project Approvals and by this Agreement and only on payment to City of any delinquent and current fees and other mandatory obligations due under this Agreement.

15.3. Notice of Default to Mortgagee. If City receives notice from a Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying the address for service thereof, then City shall deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an event of default. Each Mortgagee shall have the right during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the event of claimed default set forth in the City's notice.

16. Severability. The unenforceability, invalidity, or illegality of any provision, covenant, condition, or term of this Agreement shall not render the other provisions unenforceable, invalid, or illegal, except that if it is determined in a final judgment by a court of competent jurisdiction that Developer's rights are not vested in the manner and to the extent agreed to in this Agreement, then the Parties shall meet and confer in a good faith attempt to agree on a modification to this Agreement that shall fully achieve the purposes hereof. If such a modification cannot be agreed on, then Developer or City may terminate this Agreement on 90-days' written notice to the other Party.

17. Attorneys' Fees and Costs. If City or Developer initiates any action at law or in equity to enforce or interpret the terms and conditions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs in addition to any other relief to which it may otherwise be entitled. In addition to the above award of attorneys' fees to the prevailing party, the prevailing party in any lawsuit shall be entitled to its attorneys' fees incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this Agreement into any judgment on this Agreement. If any person or entity not a party to this Agreement initiates an action at law or in equity to challenge the validity of any provision of this Agreement or the Project Approvals, the parties shall cooperate in defending such action. Developer shall bear its own costs of defense as a real party in interest in any such action, and shall reimburse City for all reasonable court costs and attorneys' fees expended by City in defense of any such action or other proceeding. Developer shall be entitled to select counsel to conduct the defense of City, who shall be authorized to represent City if City issues its written consent thereto as well as Developer. If City elects to select counsel other than counsel selected by Developer, City shall be responsible for paying the fees and costs of counsel it selects and shall continue to be obligated to cooperate in Developer's defense of such action. City shall not reject any financial settlement acceptable to Developer, provided that Developer pays any and all consideration which is part of said settlement; if City does reject any financial settlement acceptable to Developer, City may continue to defend such action at its own expense.

18. Transfers and Assignments.

18.1. Right to Assign. Developer's rights under this Agreement may be transferred, sold, or assigned in conjunction with the transfer, sale, or assignment of all or a portion of the Property subject to this Agreement at any time during the term of this Agreement; provided that, except as provided in this Agreement, no transfer, sale, or assignment of Developer's rights hereunder shall occur without prior written notice to City and the consent of the City Council, which consent shall not be unreasonably withheld or delayed.

18.2. Release Upon Transfer. Upon the transfer, sale, or assignment of Developer's rights and interests hereunder pursuant to the preceding subparagraph of this Agreement, Developer shall be released from the obligations under this Agreement with respect to the Property transferred, sold, or assigned, arising after the date of City Council approval of such transfer, sale, or assignment; provided, however, that if any transferee, purchaser, or assignee approved by the City Council expressly assumes the obligations of Developer under this Agreement, Developer shall be released with respect to all such assumed obligations. In any event, the transferee, purchaser, or assignee shall be subject to all the provisions of this Agreement and shall provide all necessary documents, certifications, and other necessary information before City Council approval.

18.3. Pre-Approved Transfers. The following transfers shall not require approval by the City Council, and shall automatically, on the satisfaction of the other conditions in Section 18.2, above, result in the release of Developer from its obligations under this Agreement as they may relate specifically to the specific property or asset sold or transferred: (1) sale or lease of a subdivided parcel of the Property or of one or more completed buildings or portions thereof by Developer; and (2) transfer of any interest in the Project or the Property by Developer to an affiliated or related company or entity.

18.4. Foreclosure. Nothing contained in this Section 18 shall prevent a transfer of the Property, or any portion of the Property, to a lender as a result of a foreclosure or deed in lieu of foreclosure, and any lender acquiring the Property, or any portion of the Property, as a result of foreclosure or a deed in lieu of foreclosure shall take such Property subject to the rights and obligations of Developer under this Agreement; provided, however, in no event shall such lender be liable for any defaults or monetary obligations of Developer arising before acquisition of title to the Property by such lender, and provided further, in no event shall any such lender or its successors or assigns be entitled to a building permit or occupancy certificate until all fees due under this Agreement (relating to the portion of the Property acquired by such lender) have been paid to City.

19. Agreement Runs with the Land. Except as otherwise provided in this Agreement, all of the provisions, rights, terms, covenants, and obligations contained in this Agreement shall be binding on, and inure to the benefit of, the parties and their respective heirs, successors, and assignees, representatives, lessees, and all other persons acquiring the Property, or any portion of the Property, or any interest therein, whether by operation of law or in any manner whatsoever. All of the provisions of this Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to applicable laws, including, but not limited to, *California Civil Code Section 1468*. Each covenant to do, or refrain from doing, some act on the Property under this Agreement, or with respect to any owned property, (1) is for the benefit of such properties and is a burden on such properties, (2) runs with such properties, and (3) is binding on each party and each successive owner during its ownership of such properties or any portion thereof, and shall be a benefit to and a burden on each party and its property hereunder and each other person succeeding to an interest in such properties.

20. Bankruptcy. The obligations of this Agreement shall not be dischargeable in bankruptcy.

21. Indemnification. Developer agrees to indemnify and hold harmless City, and its elected and appointed councils, boards, commissions, officers, agents, employees, and representatives from any and all claims, costs, and liability for any personal injury or property damage which may arise directly or indirectly as a result of any actions or negligent omissions by the Developer, or any actions or negligent omissions of Developer's contractors, subcontractors, agents, or employees in connection with the construction, improvement, operation, or maintenance of the Project; provided, however, the provisions of this Paragraph 21 shall not apply to the extent the City or its elected and appointed councils, boards, commissions, officers, agents, employees, or representatives are found to have been negligent or to have committed willful misconduct.

22. Insurance.

22.1. Public Liability and Property Damage Insurance. During the term of this Agreement, Developer shall maintain in effect a policy of comprehensive general liability insurance with a per-occurrence combined single limit of not less than One Million Dollars ($1,000,000) and a deductible of not more than _____ Thousand Dollars ($_____) per claim. The policy so maintained by Developer shall name the City as an additional insured and shall include either a severability of interest clause or cross-liability endorsement.

22.2. Workers Compensation Insurance. During the term of this Agreement Developer shall maintain Workers Compensation insurance for all persons employed by Developer for work at the Project site. Developer shall require each contractor and subcontractor similarly to provide Workers Compensation insurance for its respective employees. Developer agrees to indemnify the City for any damage resulting from Developer's failure to maintain any such insurance.

22.3. Evidence of Insurance. Before City Council approval of this Agreement, Developer shall furnish City satisfactory evidence of the insurance required in Sections 22.1 and 22.2, above, and evidence that the carrier is required to give the City at least thirty (30) days' prior written notice of the cancellation or reduction in coverage of a policy. The insurance shall extend to the City, its elective and appointive boards, commissions, officers, agents, employees, and representatives and to Developer and each contractor and subcontractor performing work on the Project.

23. Force Majeure. In addition to any specific provisions of this Agreement, performance of obligations under this Agreement shall be excused and the term of this Agreement shall be similarly extended during any period of delay caused at any time by reason of acts of God such as floods, earthquakes, fires, or similar catastrophes; wars, riots, or similar hostilities; strikes and other labor difficulties beyond the party's control; shortage of materials; the enactment of new laws or restrictions imposed or mandated by other governmental or quasi-governmental entities preventing this Agreement from being implemented; litigation involving this Agreement or the Project Approvals, which delays any

activity contemplated under this Agreement; or other causes beyond a party's control. City and Developer shall promptly notify the other party of any delay under this Agreement as soon as possible after the delay has been ascertained.

24. Notices. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, by overnight delivery or by facsimile.

Notices required to be given to City shall be addressed as follows:

_____ [*name, address, and fax number*]

Notices required to be given to Developer shall be addressed as follows:

_____ [*name, address, and fax number*]

A party may change its address for notices by giving notice in writing to the other party, and thereafter all notices shall be addressed and transmitted to the new address. Notices shall be deemed given and received on the earlier of personal delivery, or if mailed, on the expiration of 48 hours after being deposited in the United States Mail or on the delivery date or attempted delivery date shown on the return receipt, air bill, or facsimile.

25. Agreement Is Entire Understanding. This Agreement is executed in four duplicate originals, each of which is deemed to be an original. This Agreement constitutes the entire understanding and agreement of the parties.

26. Exhibits. The following documents are referred to in this Agreement and are attached to this Agreement and incorporated herein as though set forth in full:

Exhibit A: Legal Description of Property

Exhibit B: Additional Conditions

27. Recordation of Development Agreement, Amendment, or Cancellation. Within ten (10) days after the Effective Date of this Agreement, the City Clerk shall submit a fully-executed original of this Agreement for recording with the County Recorder. If the parties to the Agreement or their successors-in-interest amend or cancel the Agreement or if the City terminates or modifies the Agreement for failure of the Developer to comply in good faith with the terms or conditions of the Agreement, the City Clerk shall submit for recording the notice of such action with the County Recorder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date and year first above written.

CITY OF _____: Developer:

By: _____ _____
Mayor

APPROVED AS TO FORM:

_____ (NOTARIZATION ATTACHED)
City Attorney

EXHIBIT A

[*Description of the Property*]

EXHIBIT B

[*Additional Conditions*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal Planning



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
A. Zoning Relief

14-30B California Legal Forms--Transaction Guide §§ 30B.205-30B.209

AUTHOR: Revision Author Andrew L. Faber

[Reserved]

§§ 30B.205[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.210

AUTHOR: Revision Author Andrew L. Faber

§ 30B.210 Flow Chart Describing Environmental Impact Evaluation Process

[1] Comment

[a] Use of Form

The form in [2], *below*, is a flow chart that illustrates the process for determining environmental impact established by the California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*]. It appears as Appendix A to the implementing regulations of CEQA (the "CEQA Guidelines") [*14 Cal. Code Reg. § 15000 et seq.*]. For private projects, this process is triggered when a public agency accepts as complete the first application for a governmental approval submitted by the developer [*see Gov. Code §§ 65920-65964* (restrictions on governmental consideration and approval of application); *see also § 30B.123*].

Although this is not a typical form that is filled out or created by the applicant or a public agency, it is helpful in that it illustrates the entire process for complying with CEQA for private and public projects. It is thus used in this chapter as a springboard for a discussion of CEQA's substantive and procedural provisions. Further additional discussion of other CEQA requirements, see *§§ 30B.211-30B.221*.

For detailed coverage of all aspects of CEQA, see California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender).

PRACTICE TIP:

CEQA Information Online. CEQA statutes, Guidelines, and cases can all be found on the Internet. A very good starting point is a state site maintained by the California Resources Agency and the Governor's Office of Planning and Research (OPR). Its web address is http://ceres.ca.gov/ceqa/. The statutes and Guidelines are also available for purchase in a handy booklet published by the Consulting Engineers and Land Surveyors of California. An order form can be downloaded at http://www.celsoc.org. Documents filed with the State Clearinghouse can be tracked from the OPR web site at http://www.opr.ca.gov. Some

cities and counties put the full text of CEQA documents (including EIRs) online at their own sites.

[b] Applicability of CEQA

[i] Introduction

The California Environmental Quality Act (CEQA) requires public agencies to consider environmental factors when deciding whether or not to approve or carry out a "project" [*see Pub. Res. Code §§ 21000, 21001*; *14 Cal. Code Reg. § 15002(a)*]. The single most important aspect of CEQA is the requirement that any state or local agency prepare an environmental impact report (EIR) whenever the agency proposes to carry out or approve a "discretionary" (as opposed to "ministerial") project that may have a "significant effect on the environment" [*Pub. Res. Code §§ 21100, 21151*].

Several of the above terms have been defined by statute and regulation; these definitions are set forth in [ii] through [v], *below*.

If the project will not have a significant effect on the environment, the public agency must prepare a negative declaration [*Pub. Res. Code § 21064*; *see § 30B.217*].

Some projects are exempt from the requirements of CEQA. For a discussion of these exemptions, see *§ 30B.211[1][c]*.

[ii] "Project"

For purposes of CEQA, a "project' " is an activity that may cause either a direct physical change, or a reasonably foreseeable indirect physical change, in the environment, and that is any of the following [*Pub. Res. Code § 21065*; *14 Cal. Code Reg. § 15378(a)*]:

- An activity directly undertaken by any public agency;

- An activity undertaken by a person that is supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; or

- An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

The term "project" refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies. It does not mean each separate governmental approval [*14 Cal. Code Reg. § 15378(c)*; for limited exclusions from the definition of project, see *14 Cal. Code Reg. § 15378(b)*].

PRACTICE TIP:

Plan the Level of Detail in the EIR. It is important at the outset of EIR preparation to consider which approvals will be covered in the EIR. Because each subsequent approval is not deemed to be a separate project, more environmental analysis is not needed unless the original EIR lacks the detail necessary to analyze the later approval. For example, if an EIR prepared for a general plan change is intended to cover actual construction of a development, then it must be prepared at a greater level of detail than normally required for a general plan change. This may not be possible if the actual development project has not yet been fully designed--but then additional analysis will be necessary at further stages of review.

[iii] "Discretionary" and "Ministerial" Projects

CEQA applies solely to "discretionary" projects [*Pub. Res. Code § 21080(a)*]. A discretionary project is a project that requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a

particular activity. It does not include situations in which the public agency or body merely has to determine whether an activity conforms to applicable statutes, ordinances, or regulations [*14 Cal. Code Reg. § 15357*]. Discretionary projects specifically include the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps [*Pub. Res. Code § 21080(a)*].

CEQA does not apply to "ministerial" projects proposed to be carried out or approved by public agencies [*Pub. Res. Code § 21080(b)(1)*]. As used in CEQA, "ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. A public official makes a ministerial decision when he or she merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. Put another way, a ministerial decision involves only the use of fixed standards or objective measurements, and does not permit the public official to use personal, subjective judgment in deciding whether or how the project should be carried out [*14 Cal. Code Reg. § 15369*].

Examples of ministerial permits given in the Guidelines include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his or her fee [*14 Cal. Code Reg. § 15369*].

For additional discussion of ministerial projects, see *§ 30B.211[1][c][i]*.

[iv] "Significant Effect on the Environment"

"Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance [*Pub. Res. Code §§ 21100(d), 21068*; *14 Cal. Code Reg. § 15382*]. An economic or social change by itself is not a significant effect on the environment. However, a social or economic change related to a physical change may be considered in determining whether the physical change is significant [*14 Cal. Code Reg. § 15382*].

PRACTICE TIP:

Dealing with Non-Environmental Effects. There is often pressure from project opponents to analyze every concern in an EIR, and to some extent in recent years the EIR has become the focal point for public debate about the merits of a project having nothing to do with the environment. An example is the question of whether there might be a decline of neighborhood property values due to the project, which is not an environmental impact except in the rare case when it can be projected to lead to actual blight. Generally, it is best to leave such a subject out of the EIR completely. If that cannot be done, then any analysis of non-environmental effects should be put in a technical appendix, and the EIR should state clearly that it is included for convenience only and is not actually part of the EIR itself.

Numerous legislative, administrative, and judicial guidelines assist public agencies in determining whether or not a project may have a significant effect on the environment [*see, e.g., Pub. Res. Code § 21083*; *14 Cal. Code Reg. §§ 15064-15065* and Appendix G to the CEQA Guidelines]. For a detailed discussion of these official guidelines, see *California Environmental Law and Land Use Practice, Ch. 22, Environmental Impact Reports, § 22.04[6]* (environmental impacts), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender).

[v] "Lead" and "Responsible" Agencies

The "lead agency," for purposes of administering the requirements of CEQA, is the public agency that has the principal responsibility for carrying out or approving a project that may have a significant effect on the environment [*Pub. Res.*

Code § 21067; *14 Cal. Code Reg. § 15367*]. The lead agency will decide whether an EIR or negative declaration will be required for the project and will have the document prepared [*14 Cal. Code Reg. § 15367*]. If two or more public agencies have jurisdiction over a project, they should apply certain criteria given in the Guidelines to determine the identity of the lead agency [*see 14 Cal. Code Reg. § 15051*]. If the agencies cannot agree on this designation, the applicant or any of the agencies may request the Office of Planning and Research to make this determination [*Pub. Res. Code § 21165*; *14 Cal. Code Reg. § 15053*].

A "responsible agency" is a public agency, other than the lead agency, that has responsibility for carrying out or approving a project that requires the preparation of an EIR or negative declaration [*Pub. Res. Code § 21069*; *14 Cal. Code Reg. § 15381*]. Under certain circumstances, a responsible agency can become a lead agency for a given project [*see 14 Cal. Code Reg. § 15052* (shift in lead agency designation)].

All public agencies must adopt objectives, criteria, and procedures for evaluating projects and preparing EIRs and negative declarations [*see Pub. Res. Code § 21082*; *see also* [c][i], *below*].

PRACTICE TIP:

Check Local Rules. Always check with the local jurisdiction to see if it has adopted local rules governing the implementation of CEQA. Many agencies, particularly special districts and general law cities, have no special rules, and merely follow state law. Other agencies have rather elaborate procedural and substantive regulations to govern the process. Such rules may not be on an agency's web site, since they may not have been adopted in ordinance form, but rather as a policy resolution. Finally, many agencies have informal guidelines that can only be learned from a preliminary face-to-face meeting before starting the CEQA process.

[c] Environmental Impact Evaluation Process

[i] Preliminary Review

A public agency has 30 days to review for completeness any application for a development permit or other entitlement for use [*Gov. Code § 65943(a)*; *14 Cal. Code Reg. § 15060(a)*]. Once the lead agency accepts an application as complete, it must determine whether an activity is subject to CEQA [*14 Cal. Code Reg. § 15060(c)*]. An activity is not subject to CEQA if [*14 Cal. Code Reg. § 15060(c)*; *see 14 Cal. Code Reg. § 15378*]:

- It does not involve the exercise of discretionary powers by a public agency;
- It will not result in a direct or reasonably foreseeable indirect physical change in the environment; or
- It is not a "project."

If the lead agency determines that an activity is a project subject to CEQA, the agency must then determine whether the project is exempt from CEQA [*14 Cal. Code Reg. § 15061*]. If such a determination is made, the agency will prepare a notice of exemption [*Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. §§ 15061(d), 15062(a)*; *see* further discussion of exempt categories in *§ 30B.211[1][c]*].

[ii] Initial Study

If a project is not exempt from CEQA and it is not clear whether an EIR will be required, the lead agency will conduct an initial study to determine if the project may have a significant effect on the environment [*14 Cal. Code Reg. § 15063*; *see 14 Cal. Code Reg. §§ 15064-15065*; *see also §§ 30B.214[1][b], 30B.215*]. This determination is made based on substantial evidence in light of the whole record [*Pub. Res. Code § 21082.2(a)*; *see Pub. Res. Code § 21082.2(b)-(e)* (factors to consider in determining whether there is substantial evidence of significant effect)]. If the project will not

have such an effect, the lead agency will prepare a negative declaration [*Pub. Res. Code § 21064*; *14 Cal. Code Reg. § 15371*; *see § 30B.217*].

If there is substantial evidence in light of the whole record that the project will have a significant effect on the environment, the lead agency must prepare an EIR [*Pub. Res. Code §§ 21100, 21080(d)*]. However, if the initial study identifies potential significant impacts, but the project applicant and the agency agree to modify the project to mitigate to all such impacts to the level of insignificance, then the agency may use a mitigated negative declaration (MND) instead of an EIR [*see Pub. Res. Code § 21064.5*; *14 Cal. Code Reg. § 15369.5*].

PRACTICE TIP:

MND or EIR? When an applicant is willing to incorporate mitigations into the project and there are no remaining unmitigated impacts, it may be possible to comply with CEQA using either a mitigated negative declaration (MND) or an environmental impact report (EIR):

- *Pro MND*: It is a simpler, shorter process with less paper work. The EIR process has much more complex rules and more can go wrong.

- *Pro EIR*: An EIR may be more appropriate for a controversial project. The record is fuller, with more opportunity for public input. Furthermore, there is a lower standard of judicial review. For an EIR, the standard of review is substantial evidence, while negative declarations are subjected to greater scrutiny, and will be set aside if a "fair argument" can be made that the project will have a significant environmental impact [*see No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 75, 118 Cal. Rptr. 34, 529 P.2d 66]* .

As noted, the negative declaration process is simpler and less time-consuming than the full EIR process, although there are many elements of similarity. Although practice guides tend to focus on EIR preparation, many more projects are approved by local agencies each year on the basis of negative declarations.

[d] Negative Declaration Process

[i] Contents of Negative Declaration

A negative declaration is a shorter document than an EIR. It is required to be a "brief written statement" explaining why the project will not have significant effect on the environment [*see Pub. Res. Code §§ 21064, 21064.5*; *14 Cal. Code Reg. §§ 15369.5, 15371*; *see also § 30B.217* for further discussion of the negative declaration process].

Although CEQA itself does not specify the contents of a negative declaration, the CEQA Guidelines require that it include all of the following elements [*see 14 Cal. Code Reg. § 15071*]:

- A brief description of the project, including a commonly used name for the project, if any;

- The location of the project, preferably shown on a map, and the name of the project proponent;

- A proposed finding that the project will not have a significant effect on the environment;

- An attached copy of the Initial Study documenting reasons to support the finding [*see* [c][ii], *above*, and *§ 30B.214[1][b]*]; and

- Mitigation measures, if any, included in the project to avoid potentially significant effects.

[ii] Process for Review of Negative Declaration

A negative declaration for private projects must be completed and approved within 180 days of the time the application for entitlement is accepted as being complete [*see 14 Cal. Code Reg. § 15107*]. Noticing requirements are similar to those for an EIR [*see* [e], *below*], including a notice of intent to adopt a negative declaration [*see 14 Cal. Code Reg. § 15071*], and a notice of determination after the project is approved [*see 14 Cal. Code Reg. § 15075*]. As with EIRs, the agency must also adopt a mitigation monitoring program when adopting a mitigated negative declaration [*see 14 Cal. Code Reg. § 15074(d)*].

There must be at least a 20-day public review period [*see 14 Cal. Code Reg. § 15073(a)*], and the agency must consider the negative declaration and the comments received in deciding whether or not to approve the project [*see 14 Cal. Code Reg. § 15074*]. Unlike with EIRs, however, there is no duty to respond in writing to comments received, and there is no concept of a "draft" or "final" negative declaration.

[e] EIR Process

[i] Preliminary Steps

A lead agency that has decided to prepare an EIR must send a notice of preparation to the responsible agencies, the Office of Planning and Research, and those public agencies having jurisdiction by law over natural resources that are held in trust for the people of California and that are affected by the project. Thereafter, the lead agency, in conjunction with the above recipients of the notice of preparation, must determine the scope of the EIR [*Pub. Res. Code § 21080.4(a)*; *see 14 Cal. Code Reg. § 15082*].

[ii] Draft EIR

Next, the lead agency must prepare or have prepared a draft EIR [*Pub. Res. Code §§ 21082.1, 21100, 21151*; *14 Cal. Code Reg. § 15084*; *see also* [f], *below* (contents of EIR) and *§ 30B.218* (sample draft EIR)]. As soon as the draft EIR is completed, the lead agency must file a notice of completion with the Office of Planning and Research in printed hard copy, on diskette, or by E-mail [*14 Cal. Code Reg. § 15085(a)*; *see 14 Cal. Code Reg. § 15085(b)* (required contents)].

PRACTICE TIP:

Contact Between Developer and EIR Consultant. The EIR is technically the lead agency's EIR, even though on private projects the costs are almost always paid by the private developer. Public agencies vary greatly in the degree of contact they allow between the developer and the EIR authors, ranging from having the developer hire the consultant and supervise his or her work (subject to agency approval), at one extreme, all the way to "hands off" until the developer gets to review the draft EIR along with the public, at the other. This latter approach is obviously highly undesirable to the developer, who should try to push for as much contact as possible (even if it is "supervised visitation" with agency staff present), to make sure that the EIR is properly prepared and that the developer's money is not wasted. It is most useful for the developer to have input into the initial scoping of the EIR, to comment on the administrative draft of the draft EIR, and to discuss proposed responses to comments received on the draft EIR.

The public review period for a draft EIR may not be less than 30 days [*Pub. Res. Code § 21091(a)*]. If the draft EIR is submitted to the State Clearinghouse for review, the review period must be at least 45 days [*Pub. Res. Code § 21091(a)*], and the public review period must be at least as long as the clearinghouse review period [*Pub. Res. Code § 21091(c)*]. The lead agency must consider any comments it receives during the public review period [*Pub. Res. Code § 21091(d)*; *see* [iii], *below*].

[iii] Comment and Review Period

The lead agency must consult with and obtain comments from, the following entities, after preparing a draft EIR: each responsible agency, trustee agencies any public agency that has jurisdiction by law over the project, and any city or county that borders on a city or county within which the project is located, unless the state lead agency and the city or county annually enter into an agreement that provides otherwise [*Pub. Res. Code §§ 21104(a), 21153*; *see 14 Cal. Code Reg. § 15086*]. The lead agency must also provide the public with notice of, and an opportunity to comment on, the draft EIR.

Notice must be given by mail to all those who have requested it, and also by one of the following methods [*Pub. Res. Code § 21092(b)*; *see 14 Cal. Code Reg. § 15087(a)*]:

- Published notice;
- Posted notice; or
- Mailed notice to owners and occupants of contiguous property.

The notice must include all of the following information [*Pub. Res. Code § 21092(b)*; *see 14 Cal. Code Reg. § 15087(c)*]:

- A description of the project, its location, and its significant environmental impacts;
- The starting and ending dates of the public comment period;
- Information regarding public meetings about the project;
- A list of the significant environmental effects anticipated as a result of the project, to the extent they are known;
- The presence of the site on any of the lists of sites enumerated under *Gov. Code § 65962.5*; and
- The address where copies of the draft EIR are available.

Agencies may provide additional notice by other means [*Pub. Res. Code § 21092(e)*]. The lead agency must evaluate and respond to comments concerning the draft EIR [*14 Cal. Code Reg. § 15088*]. The lead agency is required to recirculate the EIR when significant new information is added to it after public notice is given of the draft EIR [*14 Cal. Code Reg. § 15088.5*].

PRACTICE TIP:

To Recirculate or Not to Recirculate. Project opponents may submit new information or expert opinions during the comment period on a draft EIR and then demand that the draft be revised and recirculated to take into account their new information. Whether to do so is often a judgment call. The recirculation process adds at least two to three months to the timeline, and may generate a new round of comments requiring still further responses. On the other hand, if the demand for recirculation is ignored, a court might later conclude that the new information was indeed significant and invalidate the EIR. A decision not to recirculate must be supported by substantial evidence.

The lead agency must mail the notices required by *Pub. Res. Code §§ 21080.4* (notice to responsible agencies of determination that EIR is required), *21092* (notice of preparation of EIR), *21108* (notice of approval or determination to carry out state project), and *21152* (notice of approval or determination to carry out local project) to every person who

has filed a written request for notices with either the clerk of the governing body or, if there is no governing body, the director of the agency. If the agency offers to provide the notices by e-mail, on filing a written request for notices, a person may request that the notices be provided by e-mail. The request may also be filed with any other person designated by the governing body or director to receive these requests. The agency may require these requests to be renewed annually, and may charge a fee for providing the notices [*Pub. Res. Code § 21092.2*].

The lead agency must post the notices required by *Pub. Res. Code §§ 21080.4* (notice to responsible agencies of determination that EIR is required) and 21092 (notice of preparation of EIR) in the office of the county clerk of the county or counties in which the project will be located. The notices must remain posted for 30 days [*Pub. Res. Code § 21092.3*].

PRACTICE TIP:

Opponents Must Comment. Opponents of an EIR must comment on the draft, or they may be barred from judicial remedies by the doctrine of failure to exhaust administrative remedies. It is not enough to make critical comments; rather, the public agency should specifically be put on notice by written comments that the EIR is defective because of the failures noted in the comment. Finally, a plaintiff challenging a project approval for failure to comply with CEQA must have appeared and objected in front of the agency, though in court he or she can take advantage of CEQA arguments that had been raised below by others [*see Pub. Res. Code § 21177*].

[iv] Final EIR and Project Approval

Finally, the lead agency will prepare a final EIR (FEIR) and consider it along with the project [*14 Cal. Code Reg. § 15089(a)*; *see 14 Cal. Code Reg. § 15132* (required contents)]. This involves all of the following:

- Considering providing an opportunity for review of the final EIR by the public or by commenting agencies [*14 Cal. Code Reg. § 15089(b)*];
- Responding to comments from public agencies in writing at least 10 days before certification of the EIR (often done by sending a copy of the FEIR) [*see Pub. Res. Code § 21092.5*];
- Certifying that the FEIR has been completed in compliance with CEQA, that it was presented to the decisonmaking body, which has reviewed and considered it, and that it reflects the agency's independent judgment and analysis [*Pub. Res. Code § 21061*; *14 Cal. Code Reg. § 15090*]; and
- Approving or rejecting the project [*14 Cal. Code Reg. § 15092*], and if the project is approved:
    - Preparing written findings concerning the handling of any significant environmental effects identified in the EIR [*Pub. Res. Code § 21081*; *14 Cal. Code Reg. § 15091*; *see § 30B.219*];
    - Adopting a Mitigation Monitoring Program [*see Pub. Res. Code § 21081.6*; *14 Cal. Code Reg. § 15097*; *see also § 30B.220*]; and
    - Filing a notice of determination [*Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. § 15094*] and filing and retaining copies of the final EIR [*14 Cal. Code Reg. § 15095*].

At the applicant's request, a responsible agency must begin processing a development project permit application before final lead agency action on the project to the extent information needed to begin processing is available [*Gov. Code §*

65941(c)].

When an EIR is certified by a local lead agency's decisionmaking body that is not elected, certification may be appealed to the agency's elected decisionmaking body, if any [*Pub. Res. Code § 21151(c)*; *14 Cal. Code Reg. § 15090(b)*; *see § 30B.202*].

[f] Contents of EIR

The contents of the EIR is prescribed by statute [*see Pub. Res. Code § 21100*] and by the CEQA Guidelines [*see 14 Cal. Code Reg. §§ 15120-15132*]. Whenever feasible, a standard format should be used for an EIR [*Pub. Res. Code § 21100(a)*]. The EIR may be prepared as a separate document, as part of a general plan, or as part of a project report [*14 Cal. Code Reg. § 15120(b)*].

The EIR must include a detailed statement of all of the following [*Pub. Res. Code § 21100(b)*]:

- The significant effects on the environment of the proposed project [*see 14 Cal. Code Reg. § 15126.2(a)*; *see also 14 Cal. Code Reg. §§ 15127, 15128*];

- In a separate section [*see Pub. Res. Code § 21100(b)(2)*] (1) any significant effects that cannot be avoided if the project is implemented [*see 14 Cal. Code Reg. § 15126.2(b)*], and (2) any significant effects that would be irreversible if the project is implemented [*see 14 Cal. Code Reg. § 15126.2(c)*];

- Any growth-inducing impacts of the project [*see Pub. Res. Code § 21100(b)(5)*; *14 Cal. Code Reg. § 15126.2(d)*];

- Mitigation measures proposed to minimize the significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy [*see Pub. Res. Code § 21100(b)(3)*; *14 Cal. Code Reg. § 15126.4*]; and

- Alternatives to the proposed project [*see Pub. Res. Code § 21100(b)(4)*; *14 Cal. Code Reg. § 15126.6*].

The EIR must also contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant, and consequently have not been discussed in detail [*Pub. Res. Code § 21100(c)*; *14 Cal. Code Reg. § 15128*].

In addition, the EIR must contain all of the following:

- A table of contents or index [*14 Cal. Code Reg. § 15122*];

- A summary of the proposed actions and their consequences [*14 Cal. Code Reg. § 15123*];

- A description of the project [*14 Cal. Code Reg. § 15124*];

- A description of the project's environmental setting [*14 Cal. Code Reg. § 15125*];

- A list of all governmental agencies, other organizations, and individuals consulting in preparing the draft EIR [*14 Cal. Code Reg. § 15129*];

- The identity of the preparer of the draft EIR [*14 Cal. Code Reg. § 15129*];

- A discussion of any significant cumulative impacts [*14 Cal. Code Reg. § 15130*]; and
- Economic and social information, when appropriate [*14 Cal. Code Reg. § 15131*].

The final EIR must contain all of the following [*14 Cal. Code Reg. § 15132*]:

- The draft EIR or a revision of the draft;
- Comments and recommendations received about the draft EIR;
- A list of persons, organizations, and public agencies commenting on the draft EIR;
- The response of the lead agency to significant environmental points raised in the review and consultation process; and
- Any other information added by the lead agency.

PRACTICE TIP:

What Comprises the Final EIR? A Final EIR consists of the Draft EIR, plus comments on the Draft EIR and responses to those comments by the lead agency, plus any changes to the Draft. If you are doing due diligence on a project for which an EIR has already been approved, when requesting a copy of a Final EIR, make sure to request the Draft EIR as well, since sometimes the comments and responses are bound in a separate document misleadingly called the "Final EIR." Without the Draft EIR, this separate document is incomplete (though it is often the best place to get a quick look at areas of controversy revealed by comments received from critics of the Draft EIR).

An EIR may incorporate by reference all or part of any other document that is a matter of public record or generally available to the public, provided that certain conditions are satisfied [*see Pub. Res. Code § 21061*; *14 Cal. Code Reg. § 15150*]. An EIR may be used for more than one project if the projects have essentially the same impact on the environment [*see 14 Cal. Code Reg. § 15153*]. A program EIR may be prepared for a series of integrated actions that are related geographically and in other specified ways [*see 14 Cal. Code Reg. § 15168*].

Alternative EIR requirements apply to all of the following types of projects:

- EIRs on all or portions of local general plans [*see 14 Cal. Code Reg. § 15166*];
- Redevelopment projects [*see Health & Safety Code § 33352*; *Pub. Res. Code § 21090*; *14 Cal. Code Reg. § 15180*];
- Projects pursuant to a specific plan or consistent with a community plan or zoning [*see Pub. Res. Code § 21083.3*; *14 Cal. Code Reg. §§ 15182*, *15183*];
- State mandated local projects [*see Pub. Res. Code § 21154*; *14 Cal. Code Reg. § 15184*];
- Phased or multiple projects [*see 14 Cal. Code Reg. § 15165*]; and
- Large capital projects requiring more than two years for the receipt of applicable governmental entitlements [*see 14 Cal. Code Reg. § 15167*].

For further discussion of the required contents of EIRs, see California Environmental Law and Land Use Practice, Ch. 22, *Environmental Impact Reports* (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender).

[g] Subsequent EIRs and Supplements and Addenda to EIRs

A subsequent EIR must be prepared when (1) major revisions to an EIR will be required because substantial changes are proposed to the project, (2) substantial changes occur with regard to the circumstances under which the project will be undertaken, or (3) new information of substantial importance to the project becomes available [*Pub. Res. Code § 21166*; *see 14 Cal. Code Reg. § 15162*].

A supplement to an EIR must be prepared when any of the conditions requiring a subsequent EIR occurs, and only minor changes are necessary to make the previous EIR apply to the project in the changed situation. The supplement need contain only the information necessary to make the previous EIR adequate [*14 Cal. Code Reg. § 15163*; *see Pub. Res. Code § 21166*].

If none of the conditions that would require a subsequent EIR have occurred, but minor technical changes or additions that do not raise important new issues about the project's environmental effects are necessary to make the EIR adequate for CEQA purposes, the lead agency or a responsible agency must prepare an addendum to the EIR [*14 Cal. Code Reg. § 15164*; *see Pub. Res. Code § 21166*].

PRACTICE TIP:

Subsequent/Supplemental EIR versus Addendum. A supplemental or subsequent EIR is really a new EIR, although it may be more focussed than the original EIR on the project. Thus, it is subject to all the same procedural considerations that govern the preparation of any EIR. An addendum to an EIR or negative declaration, by contrast, can be a very short document (even one page in appropriate circumstances), and need not be circulated for public review at all. It thus can be prepared and adopted very quickly, and is generally less visible.

[h] Master EIRs and Focused EIRs

[i] Legislative Intent

The 1993 CEQA revisions added detailed procedures for preparing master EIRs to address broad issues and focused EIRs for subsequent projects [1993 Stats., ch. 1130, § 18]. In making these changes to CEQA, the Legislature intended that a master EIR evaluate cumulative, growth-inducing, and irreversible significant environmental effects of subsequent projects to the greatest extent feasible. The Legislature further intended that environmental review of subsequent projects be substantially reduced to the extent that the master EIR reviews project impacts and sets forth mitigation measures [*Pub. Res. Code § 21156*; *see 14 Cal. Code Reg. §§ 15175-15179* (implementing regulations)].

[ii] Master EIRs

A master EIR may be prepared for any of the following [*Pub. Res. Code § 21157(a)*; *14 Cal. Code Reg. § 15175(b)*]:

- A general plan;
- A specific plan;
- A project consisting of smaller individual phased projects;
- A regulation to be implemented by subsequent projects;

- A project to be carried out or approved pursuant to a development agreement;
- A project to be carried out or approved pursuant to a redevelopment plan;
- A state highway or mass transit project subject to multiple reviews or approvals;
- A regional transportation plan or congestion management plan;
- A proposed plan for reuse of a federal military base that is closed or proposed for closure; or
- A plan for district projects to be undertaken by a school district that also complies with applicable school facilities requirements.

The master EIR must describe and present sufficient information about anticipated subsequent projects within its scope. Information required about subsequent projects includes their size, location, intensity, and scheduling. The master EIR must also preliminarily describe potential impacts of anticipated subsequent projects for which insufficient information is available to support a full impact assessment [*Pub. Res. Code § 21157(b)*; *see 14 Cal. Code Reg. § 15176*].

The lead agency and responsible agencies identified in the master EIR may use the master EIR to limit review of subsequent projects. The subsequent project lead agency must prepare an initial study [*see* [c][ii], *above*, and *§ 30B.214[1][b]*] to determine whether the subsequent project and its significant environmental effects were included in the master EIR. If the lead agency finds that the subsequent project will have no additional significant environmental effects and that no new mitigation measures or alternatives may be required, it may prepare a written finding to that effect without preparing a new environmental document. The lead agency must provide public notice of its intent to approve or carry out the project and incorporate all feasible applicable mitigation measures or alternatives [*Pub. Res. Code § 21157.1*; *see 14 Cal. Code Reg. § 15177(a), (b)*]. If the lead agency for the subsequent project cannot make the above finding, it must prepare either a mitigated negative declaration or an EIR for the subsequent project [*Pub. Res. Code § 21157.1(d)*]. With limited exceptions, the master EIR may not be used to limit subsequent project reviews if it was certified more than five years before the filing of an application for a subsequent project [*see Pub. Res. Code §§ 21157.5, 21157.6*; *14 Cal. Code Reg. § 15179*].

[iii] Focused EIRs

A focused EIR is an EIR for a subsequent project identified in a master EIR. It may be used only if the lead agency finds the master EIR analyses of cumulative, growth-inducing, and irreversible significant environmental effects are adequate for the subsequent project [*Pub. Res. Code § 21158(a)*]. The focused EIR must analyze additional project-specific significant environmental effects not addressed in the master EIR and any new mitigation measures or alternatives not included in the master EIR. It must also examine significant effects discussed in the master EIR for which substantial new information exists that shows those effects may be more significant than described in the master EIR, and it must examine those mitigation measures found to be infeasible in the master EIR for which substantial new information exists that shows those measures may now be feasible [*Pub. Res. Code § 21158(c)*; *see Pub. Res. Code § 21158(d)*]. It need not examine effects that were mitigated through master EIR mitigation measures, examined in the master EIR in sufficient detail to allow project-specific mitigation, or for which mitigation was found to be the responsibility of another agency [*Pub. Res. Code § 21158(b)*; *see 14 Cal. Code Reg. § 15178*].

Special rules govern focused EIRs for small multi-family projects, mixed use projects, and the installation of pollution control devices [*see Pub. Res. Code § 21158.5, 21159.1*; *14 Cal. Code Reg. § 15179.5*]. For further discussion of master EIRs and focused EIRs, see California Environmental Law and Land Use Practice, Ch. 22, *Environmental Impact Reports* (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California*

Environmental Quality Act (Matthew Bender).

[2] FORM

Flow Chart Describing Environmental Impact Evaluation Process

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.211

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§ 30B.211 Notice of Exemption From CEQA Requirements

[1] Comment

[a] Use of Form

The form in [2], *below*, is the official notice of exemption of a project or governmental action from the requirements of the California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*]. It appears as Appendix E to the CEQA Guidelines [*14 Cal. Code Reg. § 15000 et seq.*]. A Notice of Exemption may be filed by a public agency or the project applicant after the agency has approved or determined to carry out a project and has determined that the project is exempt from the requirements of CEQA [*Pub. Res. Code §§ 21108(a), 21152(a)*; *14 Cal. Code Reg. §§ 15061(d), 15062(a)*]. The filing of a Notice of Exemption shortens the statute of limitations for legal challenges to the exemption determination [*see 14 Cal. Code Reg. § 15062(d)*; *see also* [d][i], *below*].

[b] Required Contents

A Notice of Exemption must include all of the following [*14 Cal. Code Reg. § 15062(a)*]:

- A brief description of the project;
- The location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 71/2 ' topographical map identified by quadrangle name);
- A finding that the project is exempt, including a citation to the CEQA Guidelines section or statute under which it is found to be exempt; and
- A brief statement of reasons to support the finding.

[c] Exemptions From CEQA Requirements

[i] Statutory Exemptions

Some projects that might normally be considered discretionary projects subject to CEQA have been specifically exempted from the requirements of CEQA. These exemptions fall into two categories: (1) statutory exemptions [*see below*], and (2) "categorical" or regulatory exemptions [*see* [ii], *below*]. The statutory exemptions are listed in the Public Resources Code itself, while the categorical exemptions are created by the Office of Planning and Research as authorized by *Pub. Res. Code § 21084*, and are listed in the CEQA Guidelines. Note that there is actually a third category of CEQA exemptions: certain public actions listed in *14 Cal. Code Reg. § 15378(b)* that are explicitly excluded from the definition of "project" contained in that section. In practice, these are treated as statutory exemptions.

The statutory exemptions [*see Pub. Res. Code §§ 21080(b), 21080.01-21080.33, 21083.3*; *see also 14 Cal. Code Reg. §§ 15260-15285*] primarily involve projects that are undertaken by public agencies (e.g., projects for the institution or increase of certain public transportation services) [*see 14 Cal. Code Reg. § 15275*] and therefore are, as a class, beyond the scope of this chapter. However, there are also statutory exemptions for certain private or public projects to provide affordable housing [*see Pub. Res. Code § 21080.10*; 14 Cal. Code Reg. §§ 15079, *15080*]. For a complete list of these statutory exemptions, see *California Environmental Law and Land Use Practice, Ch. 21, Preliminary Review, Exemptions, and Negative Declarations, § 21.06* (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender).

The statutory exemptions for ministerial and emergency projects frequently do apply to private projects. For a discussion of exempt ministerial projects [*see Pub. Res. Code § 21080(b)(1)*; *14 Cal. Code Reg. § 15300.1*], see *§ 30B.210[1][b][iii]*.

PRACTICE TIP:

Are Building Permits Ministerial? The ministerial project exemption is widely used, for example, for final subdivision maps, and, perhaps most importantly, for building permits. Traditionally, the issuance of building permits had been regarded as a ministerial act. This doctrine was put to the test in a case where a 26-story office building was to be constructed on the issuance of a building permit without any environmental review at all. In *Friends of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal. App. 3d 259, 271-273, 235 Cal. Rptr. 788* , however, the court concluded that when there was some discretion available to the agency in the issuance of a building permit, the decision to issue one could be considered discretionary. In practice, this may constitute a "too big to be ministerial" rule. It has since been put in the Guidelines [*see 14 Cal. Code Reg. §§ 15268(b)(1), 15369*].

The following emergency projects are exempted by statute from the requirements of CEQA [*Pub. Res. Code § 21080(b)(2)-(4)*; *14 Cal. Code Reg. § 15269*]:

- Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor, including projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation [*see Pub. Res. Code § 5028(b)*];

- Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety, or welfare;

- Specific actions necessary to prevent or mitigate an emergency, not including long-term projects

undertaken to prevent or mitigate a situation that has a low probability of occurrence in the short-term;

- Projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided the project is within the existing right of way of that highway and is initiated within one year of the damage occurring; and

- Seismic work on highways and bridges [*see Sts. & Hy. Code § 180.2*].

For these purposes, "emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services. The term includes fires, floods, earthquakes, other soil or geologic movements, riots, accidents, and sabotage [*Pub. Res. Code § 21060.3*; *14 Cal. Code Reg. § 15359*].

[ii] Categorical Exemptions

The categorical exemptions are set forth in the CEQA Guidelines [*see 14 Cal. Code Reg. §§ 15300-15333*; *see also Pub. Res. Code §§ 21080(b)(9), 21084*]. For a complete list of these exemptions, see *California Environmental Law and Land Use Practice, Ch. 21, Preliminary Review, Exemptions, and Negative Declarations, § 21.06* (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender). The following list summarizes the categorical exemptions that are most likely to apply to private projects:

- Minor work on existing facilities and structures that involves negligible or no expansion of use [*see 14 Cal. Code Reg. § 15301*].

- Replacement or reconstruction of existing structures, provided that the new structure is on the same site and has substantially the same purpose and capacity as the replaced structure [*see 14 Cal. Code Reg. § 15302*].

- New construction or conversion of small structures, such as single-family residences [*see 14 Cal. Code Reg. § 15303*].

- Minor alterations in the condition of land, water, and/or vegetation that (with certain exceptions) do not involve the removal of trees [*see 14 Cal. Code Reg. § 15304*].

- Minor alterations in land use limitations (not involving changes in land use or density) in areas with an average slope of less than 20 percent [*see 14 Cal. Code Reg. § 15305*].

- Construction or addition of minor accessory structures to existing commercial, industrial, or institutional facilities [*see 14 Cal. Code Reg. § 15311*].

- Divisions of urban properties into four or fewer parcels if the division does not require zoning relief and other conditions are met [*see 14 Cal. Code Reg. § 15315*].

- Establishment or acceptance of open space contracts or similar easements [*see 14 Cal. Code Reg. § 15317*].

- Actions by regulatory agencies to enforce land use entitlements [*see 14 Cal. Code Reg. § 15321*].

- Normal operations of existing facilities for appropriate public gatherings [*see 14 Cal. Code Reg. § 15323*].

- Transfers of ownership of interests in land to preserve open space [*see 14 Cal. Code Reg. § 15325*].

- Leasing of a private facility by a public agency when the building has been found to be exempt from CEQA [*see 14 Cal. Code Reg. § 15327*].

- In-fill development projects on urban sites no larger than five acres [*see 14 Cal. Code Reg. § 15332*].

PRACTICE TIP:

Big Exemption--In-fill Projects. The exemption for in-fill developments in urban areas was added to the Guidelines in 1998. It is potentially applicable to many projects where (1) the project is consistent with the general plan and zoning, (2) the site is no larger than five acres in an urban area with all public services and no habitat value, and (3) approval would lead to no significant effects on traffic, noise, and air or water quality. It is suggested that every small urban project be examined closely to see if it can be positioned to take advantage of this exemption.

[d] Filing of Notice

[i] Statute of Limitations

Either the public agency [*see* [ii], *below*] or the applicant [*see* [iii], *below*] may file the Notice of Exemption after the project has been approved [*14 Cal. Code Reg. § 15062(c)*]. The filing of a Notice of Exemption and the posting on the list of notices start a 35-day statute of limitations period on legal challenges to the decision by the agency that the project is exempt from CEQA. If a notice is not filed, a 180-day statute of limitations will apply [*14 Cal. Code Reg. § 15062(d)*].

[ii] By Public Agency

State agencies that choose to file the notice must file it with the Office of Planning and Research. A list of these filings is posted on a weekly basis at the Office (1400 Tenth Street, Sacramento, California, 95814). Each weekly list must remain posted for at least 30 days. OPR must retain each notice for not less than 12 months [*14 Cal. Code Reg. § 15062(c)(1)*]. Local agencies must file the notice with the county clerk of the county or counties in which the project will be located. Copies of all notices will be available for public inspection and must be posted within 24 hours of receipt by the clerk. Each notice must remain posted for 30 days. Thereafter, the clerk will return the notice to the local agency with a notation that it was posted. The agency must retain the notice for not less than 12 months [*14 Cal. Code Reg. § 15062(c)(2)*]. In addition, public agencies are encouraged to post filed notices on the Internet [*14 Cal. Code Reg. § 15062(c)(3)*].

PRACTICE TIP:

Find Notices Online. It is always a good practice to verify that the notice of exemption has been received by the State. This can now be done online, by searching the State CEQA database at http://www.ceqanet.gov.

[iii] By Applicant

Applicants who file the notice must file it with the Office of Planning and Research if the project was approved by a state agency, or with the county clerk of the county or counties in which the project will be located if the approval was granted by a local agency [*14 Cal. Code Reg. § 15062(c)(4)(A)*]. The notice must contain the required information [*see* [b], *above*] and be accompanied by a certified document issued by the public agency stating that the agency has found

the project to be exempt. This certified document may be a certified copy of an existing document or record of the public agency [*14 Cal. Code Reg. § 15062(c)(4)(B)*]. Notices filed by applicants are subject to the same posting and time requirements as notices filed by public agencies [*14 Cal. Code Reg. § 15062(c)(4)(C)*; *see* [ii], *above*].

[e] Distribution of Copies

An agency that prepares a notice of exemption must mail a copy of the notice to any person who has filed a written request for CEQA notices with either the clerk of the governing body or, if there is no governing body, the director of the agency. The request may also be filed with any other person designated by the governing body or director to receive these requests. The agency may require these requests to be renewed annually, and may charge a fee for providing the notices [*Pub. Res. Code § 21092.2*].

[2] FORM

Notice of Exemption From CEQA Requirements

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Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
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14-30B California Legal Forms--Transaction Guide § 30B.212

AUTHOR: Revision Author Andrew L. Faber

§ 30B.212 Contract Between Public Agency and Environmental Consultant to Prepare Environmental Impact Report

[1] Comment

[a] Use of Form

The form in [2], *below*, is a form that a public agency would use to enter into a contract with an environmental consultant to prepare environmental documentation for a project. It could cover an initial study, negative declaration, full environmental impact report (EIR), or whatever appropriate documents are needed. Although this form is usually prepared by public agency counsel and is often on a standard form, it is included here because there are some terms and conditions that the applicant's attorney should carefully review.

The form is drafted as a two-party agreement between the agency and the consultant. Some agencies will allow the developer to contract directly with the consultant, even though the agency itself is responsible under CEQA to prepare the documentation, and the consultant ultimately must take direction from the agency [*see Pub. Res. Code § 21082.1*; *14 Cal. Code Reg. § 15084*]. In that event, the form can be modified to be used as a contract between the developer and the consultant.

[b] Conditions of Concern to Developer

Below is a discussion of the major terms of concern to the developer. Note that some of these terms are not contained in the form, but are in the exhibits to the form which would be different for each project. These exhibits must be carefully reviewed, particularly if they are taken directly from the consultant's proposal, since in that event they may not pin down the consultant to a sufficiently precise scope of work or schedule of performance.

- Price. Is the basis for the price to be charged clearly spelled out, e.g., fixed price, time and materials, or time and materials with a "not to exceed" number?

- Scope of Work. This would normally be produced by the consultant in response to a request for a proposal, and must be acceptable to the agency. Review it carefully for completeness. Does it include all activities reasonably foreseeable in the process, for example, meetings with applicant and staff, appearance at public hearings, etc.? Does it include drafting findings, and/or the mitigation monitoring plan? Does it provide for a suitable number of deliverables and include the full costs of reproduction and printing?

- Schedule. Is the schedule detailed? Is it realistic? Does it allow time for the agency staff and the developer to review administrative drafts of the EIR and of the responses to comments? What turnaround time does it assume for responding to comments? Does it include a time schedule for deliverables?

- Subconsultants. If technical studies are being done by others, make sure that the prices are stated and that the companies chosen are acceptable.

- Designated Individuals. It is often desirable to get the commitment of certain named individuals to supervise the work, do the work, and/or be available for presentations at hearings.

- Cancellation Clause. Since the developer's plans or time schedule may change, the contract should be terminable on notice without fault and with the only obligation to pay for work done to date.

[c] Requirements on Developer to Fund Work

Assuming the form is prepared as a contract between the agency and the consultant as set forth in [2], *below*, there will normally be a companion agreement between the developer and the agency obligating the developer to fund the work of the consultant [s *ee § 30B.213*].

PRACTICE TIP:

Use a Three-Party Agreement? It is possible to draft an agreement for preparation of environmental documentation to which the agency, the developer, and the consultant are all parties. This approach is not recommended, however, because it is difficult to spell out precisely who owes what duties to whom in a three-party agreement. The benefit, if any, of having only one agreement instead of two is likely to be outweighed by the extra drafting and negotiation time and expense necessary to create such a document.

[2] FORM

Contract Between Public Agency and Environmental Consultant to Prepare Environmental Impact Report

AGREEMENT

THIS AGREEMENT ("Agreement") is made and entered into on_____[*date*], by and between the City of_____[*name of city*], a Municipal Corporation ("City"), and_____[*name of Consultant*], a [*capacity of consultant, e.g.*, California corporation] ("Contractor").

WHEREAS, City desires to retain consulting services to assist City in providing an Environmental Impact Report for the _____ project, and

WHEREAS, City desires to engage Contractor to provide these services by reason of its qualifications and experience for performing such services, and Contractor has offered to provide the required services on the terms and in the manner set forth herein;

NOW, THEREFORE, with reference to the foregoing recitals and in consideration of the mutual promises, obligations, and covenants contained in this Agreement, City and Contractor agree as follows:

1) PROJECT COORDINATION

a) City. The Planning Director of City shall be the representative of City for all purposes under this Agreement. Mr./Ms. _____ hereby is designated as the Project Manager for the Planning Director, and shall supervise the progress and execution of this Agreement.

b) Contractor. Contractor shall assign a single person to have overall responsibility for the progress and execution of this Agreement for Contractor, and to be Contractor's representative for all purposes under this Agreement (the "Project Director"). Mr./Ms. _____ hereby is designated as the Project Director for Contractor. The Project Director may not be replaced or substituted without the prior written consent of City's Project Manager, which consent shall not be unreasonably withheld.

2) DUTIES OF CONTRACTOR

a) Services to be Furnished. Contractor shall provide all specified services as set forth in, and in strict compliance with, Exhibit A-"Scope of Work," which is attached to this Agreement and incorporated herein by this reference. Such services shall be supplied, and the specified deliverables shall be delivered as set forth in, and in strict compliance with, Exhibit B-"Schedule of Services," which is attached to this Agreement and incorporated herein by this reference. Time is of the essence of each and every obligation calendared in Exhibit B.

b) Further Obligations. Contractor shall:

i) Procure all permits and licenses, pay all charges and fees, and give all notices which may be necessary and incident to the due and lawful prosecution of the services to be performed by Contractor under this Agreement;

ii) Keep itself fully informed of all existing and future federal, state, and local laws, ordinances, regulations, orders, and decrees which may affect those engaged or employed under this Agreement, any materials used in Contractor's performance under this Agreement, or the conduct of the services under this Agreement;

iii) At all times observe and comply with, and cause all of its subcontractors and employees, if any, to observe and comply with, all of said laws, ordinances, regulations, orders, and decrees mentioned above; and

iv) Immediately report to the Project Manager in writing any discrepancy or inconsistency it discovers in said laws, ordinances, regulations, orders, and decrees mentioned above in relation to any plans, drawings, specifications, or provisions of this Agreement.

c) Release of Reports and Information. Any reports, information, data, or other material given to, or prepared or assembled by, Contractor or its subcontractors, if any, under this Agreement shall be the property of City and shall not be made available to any individual or organization by Contractor or its subcontractors, if any, without the prior written approval of City.

d) Qualifications of Contractor. Contractor represents that it is qualified to furnish the services described under this Agreement.

3) COMPENSATION

For the full performance of the services described in this Agreement by Contractor, City shall pay Contractor based on fees shown in Exhibit C-"Payment Schedule," attached to this Agreement and incorporated herein by this reference. Contractor shall submit monthly bills to City specifying the amount due for services performed by Contractor's staff and a list of incurred expenses for the past calendar month. On approval of the services performed and the bill, City shall pay Contractor in accordance with such bills up to the agreed-upon maximum. Bills will be payable within thirty (30) days of invoice date.

4) TERM

The services to be performed under this Agreement shall commence on the execution of this Agreement by City and shall continue until terminated by either party or until completion.

5) SUSPENSION AND TERMINATION

a) Right to Suspend or Terminate. City may suspend or terminate this Agreement for any reason with or without cause by giving fifteen (15) days' written notice to Contractor. On receipt of such notice, Contractor shall immediately discontinue his/her performance under this Agreement.

b) Payment. On such suspension or termination, Contractor shall be paid for all services actually rendered to City to the date of the suspension or termination; provided, however, if this Agreement is suspended or terminated for fault of Contractor, City shall be obligated to compensate Contractor only for that portion of Contractor's services which are of benefit to City.

c) Return of Materials. On such suspension or termination, Contractor shall, on written demand, turn over to the Planning Director immediately any and all copies of studies, sketches, drawings, computations, and other data, whether or not completed, prepared by Contractor or its subcontractors, if any, or given to Contractor or its subcontractors, if any, in connection with this Agreement. Such materials shall become the permanent property of City. Contractor, however, shall not be liable for City's use of incomplete materials or for City's use of complete documents if used for other than the project contemplated by this Agreement.

6) ASSIGNMENT

Contractor shall not assign, transfer, convey, or otherwise dispose of this Agreement or any right, title, or interest in or to the same or any part thereof, nor delegate its duties under this Agreement, without the prior written consent of City, which consent may be withheld in City's sole and absolute discretion. A consent to one assignment shall not be deemed to be a consent to any subsequent assignment. This Agreement and any interest herein shall not be assignable by operation of law without the prior written consent of the other party.

7) SUBCONTRACTORS; EMPLOYEES

Contractor shall be responsible for employing or engaging all persons necessary to perform the services of Contractor under this Agreement. No subcontractor of Contractor will be recognized by City as such; rather, all subcontractors are deemed to be employees of Contractor, and it agrees to be responsible for their performance. Contractor shall give its personal attention to the fulfillment of the provisions of this Agreement by all of its employees and subcontractors, if any, and shall keep the work under its control. If any employee or subcontractor of Contractor fails or refuses to carry out the provisions of this Agreement or appears to be incompetent or to act in a disorderly or improper manner, he/she shall be discharged immediately from the work under this Agreement on demand of the Project Manager.

8) NOTICES

All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, by overnight delivery or by facsimile.

Notices required to be given to City shall be addressed as follows:

_____ [*name, address, and fax number*]

Notices required to be given to Contractor shall be addressed as follows:

_____ [*name, address, and fax number*]

A party may change its address for notices by giving notice in writing to the other party, and thereafter all notices shall be addressed and transmitted to the new address. Notices shall be deemed given and received on the earlier of personal delivery, or if mailed, on the expiration of 48 hours after being deposited in the United States Mail or on the delivery date or attempted delivery date shown on the return receipt, air bill, or facsimile.

9) INTEREST OF CONTRACTOR

Contractor covenants that it presently has no interest, and shall not acquire any interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of the services under this Agreement. Contractor further covenants that, in the performance of this Agreement, no subcontractor or person having such an interest shall be employed. Contractor certifies that no one who has or will have any financial interest under this Agreement is an officer or employee of City. It is expressly agreed that, in the performance of the services under this Agreement, Contractor shall at all times be deemed an independent contractor and not an agent or employee of City.

10) INDEMNIFICATION

Contractor agrees to defend, indemnify, and hold harmless City, and its elected and appointed councils, boards, commissions, officers, agents, employees, and representatives from any and all claims, costs, and liability for any personal injury or property damage which may arise directly or indirectly as a result of any actions or negligent omissions by the Contractor, or any actions or negligent omissions of Contractor's subcontractors, agents, or employees in connection with the performance of services under this Agreement; provided, however, the provisions of this Paragraph shall not apply to the extent the City or its elected and appointed councils, boards, commissions, officers, agents, employees, or representatives, are found to have been negligent or to have committed willful misconduct.

11) INSURANCE

a) Public Liability and Property Damage Insurance. During the term of this Agreement, Contractor shall maintain in effect a policy of comprehensive general liability insurance with a per-occurrence combined single limit of not less than One Million Dollars ($1,000,000) and a deductible of not more than _____ Thousand Dollars ($_____) per claim. The policy so maintained by Contractor shall name the City as an additional insured and shall include either a severability of interest clause or cross-liability endorsement.

b) Workers Compensation Insurance. During the term of this Agreement, Contractor shall maintain Workers Compensation insurance for all persons employed by Contractor for work under this Agreement. Contractor shall require each contractor and subcontractor similarly to provide Workers Compensation insurance for its respective employees. Contractor agrees to indemnify the City for any damage resulting from Developer's failure to maintain any

such insurance.

c) Evidence of Insurance. Prior to City Council approval of this Agreement, Contractor shall furnish City satisfactory evidence of the insurance required in this Agreement and evidence that the carrier is required to give the City at least thirty (30) days' prior written notice of the cancellation or reduction in coverage of a policy. The insurance shall extend to the City, its elective and appointive boards, commissions, officers, agents, employees and representatives and to Contractor and each subcontractor performing work under this Agreement.

12) AGREEMENT BINDING

The terms, covenants, and conditions of this Agreement shall apply to, and shall bind, the heirs, successors, executors, administrators, assigns, and subcontractors of both parties.

13) WAIVERS

The waiver by either party of any breach or violation of any term, covenant, or condition of this Agreement or any provision, ordinance, or law shall not be deemed to be a waiver of any other term, covenant, condition, ordinance, or law or of any subsequent breach or violation of the same or of any other term, covenant, condition, ordinance, or law.

14) COSTS AND ATTORNEYS' FEES

The prevailing party in any action brought to enforce or interpret the terms of this Agreement or arising out of this Agreement may recover its reasonable costs and attorneys' fees (including experts' costs and fees) expended in connection with such an action from the other party.

15) EQUAL OPPORTUNITY EMPLOYER

Contractor represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee, or applicant for employment because of race, religion, color, natural origin, handicap, ancestry, sex, or age. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff, or termination. Contractor shall also comply with all relevant portions of City's Minority Business Enterprise program, Affirmative Action Plan, or other related programs or guidelines currently in effect or enacted at a later time.

16) ENTIRE AGREEMENT. This document represents the entire and integrated Agreement between City and Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral. This document may be amended only by written instrument, signed by both City and Contractor. This Agreement shall be governed by the laws of the State of California.

IN WITNESS WHEREOF, City and Contractor have executed this Agreement the day and year first above written.

CITY OF _____: Contractor

By: _____ _____
Mayor

_____

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT A--Scope of Work

EXHIBIT B--Schedule of Performance

EXHIBIT C--Payment Schedule

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.213

AUTHOR: Revision Author Andrew L. Faber

§ 30B.213 Contract Between Public Agency and Developer to Pay for CEQA Services

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sample contract between a public agency and a developer to pay for CEQA related services. It is a companion form to the *form in § 30B.212[2]* (Contract Between Public Agency and Environmental Consultant to Prepare EIR), which would also be used for other appropriate CEQA documentation, such as an initial study and negative declaration [*see §§ 30B.214*, *30B.217*]. It should be reviewed carefully to see that its terms for payment and delivery of product by the consultant are consistent with the contract between the agency and the consultant.

[b] Conditions of Concern to Developer

Below are some provisions the parties should consider before entering this agreement:

- Timing of Reimbursement. The developer should try for a provision that will require it to put up a minimal deposit, but pay bills promptly on receipt. There should be some mechanism for questioning a bill without being in breach of the agreement.

- Deposit. Normally the agency will want a deposit to start the consultant doing its work. Some agencies may want all or a significant portion of the total estimated costs deposited at the start of the project, but this is usually negotiable.

- Cancellation. The agreement should be cancelable on notice from the developer, with the obligation to pay for work to date.

- Payment of Actual Bills. The developer should try to limit the payments to reimbursement of actual

bills from the consultant, without agency markup.

Note that this agreement is not intended necessarily to cover all aspects of the relationship between the agency and the developer with regard to the CEQA process. For example, other agency procedures may govern application fees and reimbursement for staff time. Similarly, there may be other, informal working agreements, such as a staff commitment to periodic meetings with the consultant and the developer.

[2] FORM

Contract Between Public Agency and Developer to Pay for CEQA Services

AGREEMENT FOR COST REIMBURSEMENT RELATED TO ENVIRONMENTAL DOCUMENTATION SERVICES

This agreement (the "Agreement") is made and entered on_____[*date*], by and between the City of _____, a municipal corporation ("City"), and _____, ("Developer"), and is made with respect to the following facts and circumstances:

A. Developer has applied for entitlements to allow for the permitting and construction of the _____ ("Project") and City staff has determined that the following documentation is required to be prepared in accordance with the California Environmental Quality Act ("CEQA") in order to allow the City to process the requested entitlements for the Project: _____ [*e.g.,* an EIR *or* an initial study and a mitigated negative declaration] (collectively, the "CEQA Documents").

B. To prepare the CEQA Documents, City has retained the services of _____ ("Consultant") based on the proposal for services (the "Proposal") City received from Consultant, dated _____ [*date*]. City will retain Consultant's services with the express understanding by City and Developer that all of the costs and expenses incurred by City under the Proposal shall be reimbursed promptly to City in full by Developer.

C. This Agreement provides for reimbursement to City by Developer of all costs and expenses incurred by City under its agreement with Consultant to implement the Proposal (the "City-Consultant Contract").

NOW, THEREFORE, with reference to the above recitals and in consideration of the mutual promises, obligations, and covenants contained in this Agreement, City and Developer agree as follows:

SECTION 1. Cost Reimbursement

1. Developer acknowledges that Consultant is or will be entitled to a maximum compensation in the amount of _____ dollars (the "Contract Amount") under the City-Consultant Contract, and hereby agrees to reimburse City in full for any and all costs or expenses incurred, billed, or charged to City pursuant to the City-Consultant Contract, or an amendment thereto, up to a maximum amount of the Contract Amount on certification by City that the work has been performed in a satisfactory manner.

2. Developer shall provide City with an initial deposit of _____ dollars within ten (10) days of execution of this Agreement, and shall pay the remainder of costs and expenses incurred by City under the City-Consultant Contract within ten (10) days of demand for said payment by City, which shall be based on a bill submitted by Consultant to City and provided to Developer. If Developer questions a bill from Consultant, Developer's and City's representatives shall promptly meet to review the matter, but Developer shall be bound by City's good faith decision as to the bill.

SECTION 2. Use of Funds

1. City shall use the funds provided to City by Developer pursuant to SECTION 1, above, solely to compensate Consultant for work and services provided and charged to City under the City-Consultant Contract, without adjustment or markup by City.

2. City shall promptly return to Developer all excess, unexpended, and unencumbered funds provided by Developer under SECTION 1, if any, remaining after City determines that Consultant has completed all work and services required under the City-Consultant Contract or after the termination of this Agreement.

SECTION 3. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to the subject matter covered hereby, and no other agreement, statement, or promise made by any party, or made to any employee, officer, or agent of any party, with respect to the matters covered in this Agreement shall be binding.

SECTION 4. Compliance with Laws. Each party shall comply with all applicable laws, ordinances, codes, and regulations of the federal, state, and local governments in rendering performance under this Agreement.

SECTION 5. Governing Law and Venue. The parties agree that the law governing all aspects of this Agreement shall be that of the State of California. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the state courts of the County of _____.

SECTION 6. Termination. Either party shall have the right to terminate this Agreement, without cause, by giving not less than fifteen (15) days' prior written notice of the termination to the other party. In the event of termination, City shall refund any unexpended and unencumbered portion of the funds provided by Developer under SECTION 1, above. Any termination of this Agreement shall not affect Developer's obligation to reimburse City for any costs incurred by or charged to City pursuant to the City-Consultant Contract before the effective date of the termination of this Agreement so long as City has certified that said work has been satisfactorily performed by Consultant.

SECTION 7. Notices. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, by overnight delivery or by facsimile.

Notices given to City shall be addressed as follows:

_____ [*name, address, and fax number*]

Notices given to Developer shall be addressed as follows:

_____ [*name, address, and fax number*]

A party may change its address for notices by giving notice in writing to the other party, and thereafter all notices shall be addressed and transmitted to the new address. Notices shall be deemed given and received on the earlier of personal delivery, or if mailed, on the expiration of 48 hours after being deposited in the United States Mail or on the delivery date or attempted delivery date shown on the return receipt, air bill, or facsimile.

SECTION 8. Amendments. This Agreement may be modified only by a written amendment duly executed by the parties to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date and year first above written.

CITY OF _____:

By: _____
Mayor

Developer: _____

By: _____

Its: _____

APPROVED AS TO FORM:

_____
City Attorney

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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14-30B California Legal Forms--Transaction Guide § 30B.214

AUTHOR: Revision Author Andrew L. Faber

§ 30B.214 Environmental Information Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is the environmental information form contained in Appendix H of the CEQA Guidelines [*14 Cal. Code Reg. § 15000 et seq.*]. A lead agency [*see Pub. Res. Code § 21067*; *14 Cal. Code Reg. § 15367*; *see also § 30B.210[1][b][v]*] may elect to use this form (which must be completed by a project applicant) and the environmental checklist form set forth in Appendix G of the CEQA Guidelines [*see § 30B.215*] (which must be completed by the agency) to satisfy the initial study requirements of CEQA [*14 Cal. Code Reg. § 15063(f)*; *see* [b], *below*].

[b] Preparation of Initial Study

An "initial study" is a preliminary analysis prepared by a lead agency to determine whether an environmental impact report (EIR) or a negative declaration must be prepared for a particular project or to identify the significant environmental effects to be analyzed in an EIR [*14 Cal. Code Reg. § 15365*]. The lead agency normally prepares the initial study immediately after conducting a preliminary review and determining that the project is subject to CEQA. However, if the lead agency determines (after a preliminary review) that an EIR will clearly be required for the project, an initial study is not required but may still be desirable [*14 Cal. Code Reg. § 15063(a)*].

PRACTICE TIP:
Skip the Initial Study? The initial study is primarily designed to be used as a tool to decide whether an EIR is necessary. In recent years, initial studies have often become bloated documents that are nearly the size of full EIRs themselves. They may take months to prepare, particularly if the agency requires the same technical studies to be prepared as would be required for the ultimate EIR. An initial study is not required if the decision has already been made to do an EIR [*see 14 Cal. Code Reg. § 15063(a)*], either because there are unmitigatable environmental impacts or because of project controversy. Some

practitioners recommend doing an initial study in that case anyway, as a means to help focus the ultimate EIR. This can, however, result in the additional time and expense of preparing two bulky environmental documents instead of one. Therefore, in many cases it is better to skip the initial study altogether, and apply the time and money saved directly to preparation of the EIR.

The lead agency must determine, within 30 days after accepting an application as complete, whether it intends to prepare an EIR or a negative declaration or use a previously prepared EIR or negative declaration. However, the lead agency and project applicant may agree to extend that 30-day period an additional 15 days [*14 Cal. Code Reg. § 15102*; *but see 14 Cal. Code Reg. § 15111*].

[c] Alternative Forms

As an alternative to using the model forms in Appendices G and H of the CEQA Guidelines, a public agency may devise its own initial study form [*14 Cal. Code Reg. § 15063(f)*] or use either an environmental analysis or similar analysis prepared pursuant to the National Environmental Policy Act (NEPA) [*14 Cal. Code Reg. § 15063(a)(2)*], or a previously prepared EIR [*14 Cal. Code Reg. § 15063(f)*], as an initial study.

[d] Required Contents

The initial study must consider all phases of project planning, implementation, and operation [*14 Cal. Code Reg. § 15063(a)(1)*]. It must also contain all of the following in brief form [*14 Cal. Code Reg. § 15063(d)*]:

- A description of the project, including its location;
- An identification of the environmental setting;
- An identification of environmental effects by use of a checklist, matrix, or other method;
- A discussion of ways to mitigate any significant effects identified;
- An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls; and
- The name of the person(s) who prepared or participated in the initial study.

Generally speaking, if the form in [2], *below*, and the environmental checklist form in Appendix G of the CEQA Guidelines [*see § 30B.215*] are used to comprise the initial study, the first two bullet points above will be covered in the environmental information form in [2], *below*, while the checklist will cover the remaining four bullets (with some slight overlap).

The study may rely on expert opinion supported by facts, technical studies, or other substantial evidence to document its findings. However, it is neither intended nor required to include the level of detail included in an EIR [*14 Cal. Code Reg. § 15063(a)(3)*].

[e] Submission of Data by Private Individuals and Private Organizations

If the project is to be carried out by a private person or private organization, the lead agency may require the person or organization to submit data and information that will enable the lead agency to prepare the initial study. Any person may submit any information in any form to assist the lead agency in preparing the initial study [*14 Cal. Code Reg. § 15063(e)*].

[f] Consultations

As soon as it determines that an initial study will be required, the lead agency must consult informally with all responsible agencies and all trustee agencies responsible for resources affected by the project to obtain the recommendations of those agencies as to whether an EIR or a negative declaration should be prepared. During or immediately after preparation of an initial study for a private project, the lead agency may consult with the applicant to determine if the applicant is willing to modify the project to reduce or avoid the significant effects identified in the initial study [*14 Cal. Code Reg. § 15063(g)*].

[g] Purposes of Initial Study

An initial study is designed to accomplish the following purposes [*14 Cal. Code Reg. § 15063(c)*]:

- Provide the lead agency with information to use as the basis for deciding whether to prepare an EIR or a negative declaration.
- Facilitate environmental assessment early in the design of a project.
- Enable an applicant or lead agency to modify a project, mitigating adverse impacts before an EIR is prepared, and thereby enabling the project to qualify for a negative declaration.
- Assist in the preparation of an EIR, if one is required, by (1) focusing the EIR on the effects determined to be significant, (2) identifying the effects determined insignificant, and (3) explaining the reasons for determining that potentially significant effects would not be significant.
- Provide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment.
- Determine whether a previously prepared EIR could be used with the project.
- Determine whether one of the tiering approaches encouraged by CEQA [*see 14 Cal. Code Reg. § 15063(b)(1)(C)*] can be used so that portions of an earlier EIR can be supplemented by a more limited analysis in the new EIR or negative declaration.

[h] Results of Initial Study

If the lead agency determines from the initial study that there is substantial evidence that any aspect of the project, either individually or cumulatively, may significantly affect the environment, regardless of whether the overall effect of the project is adverse or beneficial, the lead agency must do one of the following [*14 Cal. Code Reg. § 15063(b)(1)*; *see § 30B.210[1][b][i]*]:

- Prepare an EIR;
- Use a previously prepared EIR that the lead agency determines would adequately analyze the project at hand; or
- Determine, pursuant to a program EIR, tiering, or "another appropriate process," which of the project's effects were adequately examined by an earlier EIR or negative declaration. The lead agency must then ascertain which effects, if any, should be analyzed in a later EIR or negative declaration.

"Another appropriate process" may include, for example, a master EIR, a master environmental assessment, approval of housing and neighborhood commercial facilities in urban areas, approval of residential projects pursuant to a specific plan, approval of residential projects consistent with a community plan, general plan, or zoning, or an environmental document prepared under a state certified regulatory program [*14 Cal. Code Reg. § 15063(b)(1)(C)*].

The lead agency must prepare a negative declaration if the agency perceives no substantial evidence that the project or any of its aspects may cause a significant effect on the environment [*14 Cal. Code Reg. § 15063(b)(2)*; *see § 30B.217*].

[2] FORM

Environmental Information Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.215

AUTHOR: Revision Author Andrew L. Faber

§ 30B.215 Environmental Checklist Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is the model CEQA environmental checklist form [Appendix G of the CEQA Guidelines, *14 Cal. Code Reg. § 15000 et seq.*] which, when completed by the lead agency and used in conjunction with the model environmental information form [*see § 30B.214*], will satisfy the CEQA requirements for an initial study. For further discussion, see the comment to *§ 30B.214*.

PRACTICE TIP:

Use the Checklist--But Supplement It. Although the CEQA Guidelines clearly state that no particular form need be used for an initial study, and that agencies are free to develop their own forms [*see 14 Cal. Code Reg. § 15063(f)*], it is common practice to use the checklist in Appendix G, often with extensive augmentation. An attorney defending an initial study in court will surely want to show the judge that the recommended format has been used, so that there will be no implication of evasion of the Code or the Guidelines. An initial study will typically include the checklist with an extensive discussion after each section of checked boxes.

[b] Sample Language

The statements made in an initial study must be supported by factual data; merely checking the boxes is not adequate [*see Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 305-306, 248 Cal. Rptr. 352]* . As a result, the analysis and conclusions in the initial study are often similar in format and scope to the environmental findings that must be made by the lead agency to approve the project [*see Pub. Res. Code § 21081*; *14 Cal. Code Reg. § 15091*].

The following examples illustrate two sample analyses adapted from an initial study for a residential development in a

hillside area:

Analysis of Visual Impacts where the box "Less than Significant Impact" is checked

Discussion: The project site is located on a slope in a rural open space area. Existing views of the site are shown in Photographs 1 through 4.

Although the site is located in a scenic area, given the topography of the site, its separation from XYZ Road, and the dense vegetation on and surrounding the site, it has been determined that no scenic vistas would be affected by this project. While the project area is located in a scenic area, the house and improvements would only be visible from ABC Lane at the property's frontage, because the house would be set back from ABC Lane and dense vegetation in the area screens the site from view. There are no scenic resources (i.e., historic buildings, outcroppings, etc.) that would be impacted by the proposed development. Furthermore, the development would be required to meet the City's design standards and would conform to current architectural and landscaping standards.

Finding: While the project would alter the view of the site by replacing rural open space with a private residence and other improvements, the project would not result in a significant aesthetic impact. Completion of the City's design review process for the proposed new building, site improvements required by the zoning code, and the City's open space policies will ensure that development of the site is compatible with the surrounding development and the City's design standards. (Less Than Significant Impact)

Analysis of Impact of Health and Safety Risk Due to Wildfires where the box "Less than Significant Impact with Mitigation" is checked

Impact: In the event of a wildfire, residents and structures could be exposed to a significant risk of loss and injury.

Mitigation: The following measures are included in the project to reduce the risk of fire:

- ABC Lane from XYZ Road to the project site would be improved to 20 feet in width with a 13 foot, six inch vertical clearance. The road would be designed to meet the weight bearing requirements of fire equipment (60,000 pounds) and provide for a turning radius of 36 feet. The road improvements would be all weather from XYZ Road and shall reach to within 150 feet of any point on the first floor exterior.

- A fire hydrant would be installed at a distance not greater than 200 feet from the structure, with additional hydrants spaced at a maximum of 500 feet from XYZ Road to the driveway entrance.

- The residence shall be equipped with a fire sprinkler system that meets the requirements of NFPA Standard No. 13.

Finding: Implementation of the above mitigation measures will reduce impacts from the risk of fire to a less than significant level. (Less Than Significant)

[2] FORM

Environmental Checklist Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.216

AUTHOR: Revision Author Andrew L. Faber

§ 30B.216 Notice of Preparation

[1] Comment

[a] Use of Form

The form in [2], *below*, is the Notice of Preparation (NOP) under CEQA that can be found in Appendix I of the CEQA Guidelines [*14 Cal. Code Reg. § 15000 et seq.*]. This form is the one that is customarily used by public agencies. When a lead agency determines to prepare an environmental impact report (EIR) for a project, it sends out a NOP to the State Clearinghouse responsible agencies, trustee agencies (i.e., those state agencies having jurisdiction by law over natural resources affected by the project), and involved federal agencies [*see Pub. Res. Code § 21080.4*; *14 Cal. Code Reg. §§ 15082(a), 15375*]. Note that this notice is sometimes misleadingly called a "notice of determination," but that terminology is normally reserved for the notice sent at the end of the process, when the agency has approved the project based on an EIR or a negative declaration [*see §§ 30B.217, 30B.218*].

Responsible and trustee agencies and the State Clearinghouse must respond to the lead agency with their concerns and suggestions for the scope and content of information to be included in the draft EIR. If there is no response within 30 days, then the lead agency may presume that they have no response to give [*see Pub. Res. Code § 21080.4*; *14 Cal. Code Reg. §§ 15082(b), 15103*]. In response to the tendency of some state agencies in the past to respond with very detailed comments and suggestions about matters that were not within the jurisdiction of that agency, the Code and CEQA Guidelines were amended to provide that responses must be specific, and must concern that agency's area of responsibility [*see Pub. Res. Code § 21080.4*; *14 Cal. Code Reg. § 15082(b)*].

PRACTICE TIP:

Verify the Address List for the NOP. It can cause delays and embarrassment if a public agency, some time late in the process, suddenly surfaces with the claim that they have environmental concerns that have not been addressed, and that they did not respond to the NOP because it was not sent to them. Although the NOP is sent out by the lead agency, counsel for a private developer should verify that it

was sent out, that it contains the required information, and that the address list is complete.

[b] Contents of Notice of Preparation

The Notice of Preparation (NOP) must include all of the following [*see 14 Cal. Code Reg. § 15082(a)(1)*]:

- A description of the project;
- A location map or street address; and
- A list of probable environmental effects.

This is normally accomplished by attaching the Initial Study prepared for the project [*see § 30B.214*]. If an Initial Study was not prepared, as sometimes happens if the agency has always intended to do an EIR for the project, then similar information must be prepared and attached to the NOP.

PRACTICE TIP:

Importance of Project Description in Notice of Preparation. The primary function of the Notice of Preparation is to alert other public agencies, including potential responsible agencies, that an EIR is being prepared on a project, so that they can make suggestions for issues and analyses that should be included. There is a danger that if the project is significantly modified or expanded during the approval process, a public agency could claim that its advice might have been different; this could conceivably lead to the requirement of additional environmental analysis by a responsible agency that felt that it had been misled by the NOP. The obvious moral is to make sure that the project description in the original NOP is sufficiently broad and general to cover any foreseeable project modifications. If the project description is changed after the Initial Study was prepared, then either an amended Initial Study should be prepared, or the NOP should explicitly note the revised description.

[2] FORM

Notice of Preparation

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.217

AUTHOR: Revision Author Andrew L. Faber

§ 30B.217 Negative Declaration

[1] Comment

[a] Use of Form

The form in [2], *below*, is the negative declaration form used by the City of Oakland. A "negative declaration" is a written statement by a lead agency briefly describing the reasons that a proposed project, not exempt from CEQA, will not have a significant effect on the environment and therefore does not require an environmental impact report (EIR) [*see Pub. Res. Code §§ 21064, 21064.5*; *14 Cal. Code Reg. §§ 15369.5, 15371*].

[b] Decision to Prepare Negative Declaration

CEQA requires the lead agency to determine whether an EIR or a negative declaration is required for any project subject to CEQA [*Pub. Res. Code § 21080.1*]. If the lead agency determines that a proposed project not otherwise exempt from CEQA will not have a significant effect on the environment, the agency must adopt a negative declaration to that effect. The negative declaration must be prepared for the proposed project in either of the following circumstances [*Pub. Res. Code § 21080(c)*; *see 14 Cal. Code Reg. § 15070*]:

- When there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment; or

- An initial study [*see § 30B.214*] identifies potentially significant effects on the environment but (1) revisions made, or agreed to, by the applicant would avoid the effects or mitigate them to where no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the lead agency that the revised project would have a significant effect on the environment. This approach has been formally recognized and codified by the Legislature as a "Mitigated Negative Declaration" [*see Pub. Res. Code § 21064.5*; *14 Cal. Code Reg. § 15369.5*].

The lead agency must determine within 30 days after accepting an application as complete whether it intends to prepare a negative declaration or use a previously prepared negative declaration. However, the lead agency and the applicant may agree to extend the 30-day period an additional 15 days [*Pub. Res. Code § 21080.2*; *14 Cal. Code Reg. § 15102*; *but see 14 Cal. Code Reg. § 15111* (special rules for projects subject to conflicting time limits)].

With private projects involving the issuance of a lease, permit, license, certificate, or some other entitlement for use by one or more public agencies, the negative declaration must be completed and approved within 180 days from the date when the lead agency accepted the application as complete [*14 Cal. Code Reg. § 15107*].

[c] Contents of Negative Declaration

A negative declaration circulated for public review [*see* [d] and [e], *below*] must include all of the following [*14 Cal. Code Reg. § 15071*]:

- A brief description of the project, including a commonly used name for the project, if any;
- The location of the project, preferably shown on a map;
- The name of the project proponent;
- A proposed finding that the project will not have a significant effect on the environment;
- An attached copy of the initial study [*see § 30B.214*] documenting reasons to support the finding; and
- Mitigation measures, if any, included in the project to avoid potentially significant effects.

[d] Notice Requirements

The lead agency must provide public notice of its intent to adopt a negative declaration within a reasonable time before its final adoption of the negative declaration [*Pub. Res. Code § 21092(a)*; *14 Cal. Code Reg. § 15072(a)*]. The notice must specify the period during which comments will be received on the negative declaration, and must include all of the following [*Pub. Res. Code § 21092(b)(1)*]:

- The date, time, and place of any public meetings or hearings on the proposed project;
- A brief description of the project and its location;
- The project's significant environmental effects, if any; and
- The address where copies of the negative declaration, and all documents referenced in the negative declaration, are available for review.

The notice must be mailed to all organizations and individuals who have filed a written request to receive such notices [*Pub. Res. Code § 21092(b)(3)*]. In addition, the lead agency must publish the notice by at least one of the following methods [*Pub. Res. Code § 21092(b)(3)*; *14 Cal. Code Reg. § 15072(a)*]:

- Publishing the notice at least once in a newspaper of general circulation in the area affected by the proposed project. If more than one area will be affected, the notice must be published in the newspaper

of largest circulation from among the newspapers of general circulation in the affected areas;

- Posting the notice on-site and off-site in the area where the project is to be located; or

- Mailing the notice to the owners and occupants of contiguous property.

If it chooses to, the lead agency may provide additional notice by other means [*see 14 Cal. Code Reg. § 15072(c)*].

The lead agency must send a copy of the notice to every responsible agency and trustee agency concerned with the project and every other public agency with jurisdiction by law over resources affected by the project [*14 Cal. Code Reg. § 15073(c)*]. When at least one state agency will be a responsible agency or a trustee agency or will exercise jurisdiction by law over natural resources affected by the project, the lead agency must send copies of the negative declaration to the State Clearinghouse for distribution to the state agencies [*14 Cal. Code Reg. § 15073(d)*].

[e] Public Review

The lead agency must provide a public review period for a proposed negative declaration of not less than 20 days. If the proposed negative declaration is submitted to the State Clearinghouse for review, the review period must be at least 30 days [*Pub. Res. Code § 21091(b)*; *14 Cal. Code Reg. § 15073(a)*]. If the State Clearinghouse review period is actually longer than the prescribed review period, the public review period must be at least as long as the State Clearinghouse review period [*Pub. Res. Code § 21091(c)*; *14 Cal. Code Reg. § 15073(b)*].

[f] Recirculation Before Adoption

A lead agency is required to recirculate a negative declaration when the document must be substantially revised after public notice of its availability has previously been given, but before its adoption. The notice of recirculation must comply with *14 Cal. Code Reg. §§ 15072* and *15073*, which are discussed in [d] and [e], *above* [*14 Cal. Code Reg. § 15073.5(a)*; *see 14 Cal. Code Reg. § 15073.5(b)* ("substantial revision" defined for these purposes)].

[g] Consideration and Approval

Before approving a project, the decision-making body of the lead agency will consider the proposed negative declaration or mitigated negative declaration together with any comments received during the public review process. Unlike with EIRs, however, there is no requirement to respond in writing to comments received, nor to produce a "final" negative declaration. The decision-making body will adopt the proposed negative declaration or mitigated negative declaration only if it finds, on the basis of the whole record before it (including the initial study and any comments received), that [*14 Cal. Code Reg. § 15074(b)*]:

- There is no substantial evidence that the project will have a significant effect on the environment; and

- The negative declaration or mitigated negative declaration reflects the lead agency's independent judgment and analysis.

In adopting a mitigated negative declaration, the agency must also adopt a mitigation monitoring program [*see Pub. Res. Code § 21081.6*; *14 Cal. Code Reg. § 15097*; *see also § 30B.220*].

[h] Notice of Determination

After deciding to carry out or approve a project for which a negative declaration has been approved, the lead agency must file a notice of determination [*Pub. Res. Code § 21152(a)*; *14 Cal. Code Reg. § 15075(a)*; *see 14 Cal. Code Reg. §*

15373; *see also § 30B.221*]. The notice of determination must include all of the following [*14 Cal. Code Reg. § 15075(b)*]:

- An identification of the project including the project title as identified on the proposed negative declaration, its location, and the State Clearinghouse identification number for the proposed negative declaration if the notice of determination is filed with the State Clearinghouse;
- A brief project description;
- The agency's name and the date on which the agency approved the project;
- The agency's determination that the project will not have a significant effect on the environment;
- A statement that a negative declaration or a mitigated negative declaration was adopted pursuant to CEQA;
- A statement indicating whether mitigation measures were made a condition for project approval, and whether a mitigation monitoring plan or program was adopted; and
- The address where a copy of the negative declaration or mitigated negative declaration can be examined.

Each public agency may devise its own form as long as these minimum content requirements are met [*14 Cal. Code Reg. § 15075(h)*].

If the lead agency is a local agency, it must file the notice of determination with the county clerk of the county or counties in which the project will be located within five days after the lead agency approved the project. If the project requires a discretionary approval from any state agency, the lead agency must also file the notice with the Office of Planning and Research within five days of approval [*14 Cal. Code Reg. § 15075(d)*].

A notice of determination filed with the county clerk must be available for public inspection and must be posted by the clerk within 24 hours of receipt for at least 30 days. Thereafter, the clerk must return the notice to the local lead agency with a notation of the period during which it was posted. The local lead agency must retain the notice for not less than 12 months [*14 Cal. Code Reg. § 15075(e)*]. A notice of determination filed with OPR must be available for public inspection and must be posted for at least 30 days, and OPR must retain it for at least 12 months [*14 Cal. Code Reg. § 15075(f)*]. Public agencies are also encouraged to make copies of all notices of determination available on the Internet [*14 Cal. Code Reg. § 15075*].

The filing of the notice of determination for state agencies and the filing and posting of the notice of determination for local agencies start the 30-day statute of limitations on court challenges to the approval under CEQA [*Pub. Res. Code § 21167(b)*; *14 Cal. Code Reg. § 15075(g)*].

[2] FORM

Negative Declaration

City of _____
Mitigated Negative Declaration
(California Environmental Quality Act)

City File Number: _____

1. Project Description

Name of Project:

Nature of Project:

2. Project Location

Location:

Assessor's Parcel Number:

The project location is further shown on the map contained in the attached initial study.

3. Identity of Project Proponent

Name:

Address:

4. Initial Study

An initial study dated_____[*date*] was prepared for this project. A copy is attached hereto and incorporated herein by this reference. The initial study documents the reasons in support of the finding, below, that the project as mitigated will have no significant effect on the environment.

5. Finding of No Significant Effect

The initial study identified potentially significant effects on the environment. However, the project has been modified by the incorporation of mitigation measures proposed in the initial study (listed below) to the point where no significant effects will occur. The City of _____ hereby finds that there is no substantial evidence in light of the record as a whole that the project may have a significant effect on the environment.

6. Mitigation Measures

The following mitigation measures have been included in the project to mitigate all potentially significant effects to a level of insignificance: [*List mitigation measures*]

Date Prepared:_____[*date*]

Date adopted by City Council:_____[*date*]

_____ [*name*]
Planning Director

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.218

AUTHOR: Revision Author Andrew L. Faber

§ 30B.218 Environmental Impact Report (Table of Contents, Introduction, and Summary Sections)

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sample environmental impact report (EIR) that includes only (1) a "Table of Contents," (2) an "Introduction," and (3) a portion of the summary table of impacts. An EIR may be hundreds of pages long. Depending on the degree of technical analysis required, the budget for its preparation can be in the hundreds of thousands, or millions, of dollars. Accordingly, the form in [2], *below*, is merely the shadow of an EIR. It does illustrate, however, some of the required contents of an EIR, and gives an example of the kind of language in which EIRs are written. It is adapted from an EIR for a research and development/office commercial project.

[b] Table of Contents

The Table of Contents in [2], *below*, is a fairly typical list of contents, designed to contain all of the information required to be in a draft EIR [*see § 30B.210[1][e]*]. The "Alternatives" discussion should be in a separate chapter of the EIR, due to the importance placed on it by the courts. Sometimes "Cumulative Impacts" are placed in a separate chapter as well, or, as here, they can be analyzed along with the project impacts.

[c] Introduction

Chapter 1 in the form summarizes the project and the EIR process. It contains more explanatory verbiage than is required by CEQA itself. The reason is that the EIR may be read by many persons, such as neighbors to the project, and even perhaps elected officials, who are relatively unfamiliar with the CEQA process. Thus, many EIR consultants prefer to include an explanatory section generally introducing the CEQA process to their readers.

As with most EIRs, the citations to authority given are to the CEQA Guidelines [*14 Cal. Code Reg. § 15000 et seq.*],

rather than to CEQA itself [*Pub. Res. Code § 21000 et seq.*]. The Guidelines are more complete and more logically organized than the Public Resources Code. Thus, most consultants are more familiar with the Guidelines and sometimes have never even read the Code. This can occasionally be important, for example, if an in-house disagreement arises over the scope of an EIR regarding an issue that is not required by the Public Resources Code, but is suggested for inclusion by the CEQA Guidelines.

Note that there is a brief summary of the alternatives given at the beginning of this section. This EIR is unusual in that an alternative in addition to the proposed project is also being analyzed at a sufficient level of detail that it could be approved as a project in lieu of the proposed project.

PRACTICE TIP:

Level of Analysis of Alternatives. The alternatives need not be analyzed in the same level of detail as the proposed project [*see 14 Cal. Code Reg. § 15126.6(d)*]. However, if there is a good chance an alternative will become the approved project, then that alternative should be analyzed in the same level of detail as the proposed project, and the EIR should explicitly state that it is doing so. This is particularly important when such an alternative might have different impacts than the proposed project, not just the same impacts to a lesser degree, as is the case with most reduced density impacts. For example, reducing land coverage to avoid sensitive habitat might result in increased visual impacts of redesigned buildings which now would be taller to accommodate the reduced footprint. Sometimes such an alternative will be called a "mitigated alternative," or a similar term indicating that it is being analyzed from the start as an environmentally superior alternative.

The other alternatives are not discussed in the introduction, since the point of the reference to the alternatives was to alert the reader that throughout the EIR, two separate alternatives are receiving serious consideration.

PRACTICE TIP:

Choice of Alternatives. Alternatives are generally to be chosen such that they would feasibly attain "most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project" [*14 Cal. Code Reg. § 15126.6(a)*]. One of the alternatives must be the "no project" alternative. However, another alternative should be an off-site alternative, and there should be one or more alternative projects. Typically such alternative projects might include a modification of uses, e.g., adding some retail to an office project, and at least one alternative with reduced density. Although increased density often is not an alternative that would reduce environmental effects, its study can be beneficial when it would arguably achieve more of the public agency's objectives than would the proposed project. An example might be adding density to a housing development with some earmarking for low income or senior housing.

[d] Initial Study and Notice of Preparation

The discussion in Section 1.2 and 1.2.2 in the form in [2], *below*, focuses on the CEQA process, and the issues that were raised in the initial scoping sessions and in response to the notice of preparation [*see § 30B.216*]. It is helpful to be able to show a reviewing court that all issues suggested to be studied by interested persons and agencies have in fact been analyzed.

Note, however, that a project EIR need not reanalyze previously adopted general plan or area-wide land use policies.

PRACTICE TIP:

Do Not Reinvent the Analytical Wheel. In the 1980's, projects were being challenged on broad-ranging EIR grounds, with the result that EIRs were frequently invalidated for failure to analyze whether a certain type of land use was appropriate in that location, even though it was consistent with the applicable general plan. Thus, an EIR on a sewage disposal plant or a road widening project might be

required to analyze growth inducement, even though it was being proposed to service growth that had been analyzed in a general plan EIR. The California Supreme Court put a stop to that trend in *Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 276 Cal. Rptr. 410, 801 P.2d 1161* . The Court noted that decisions made and analyzed in adopting comprehensive planning documents did not have to be reanalyzed in the context of approval of individual projects consistent with that planning.

[e] Draft EIR

Section 1.2.4 in the form in [2], *below*, contains the definition of the various levels of impacts. These should be carefully reviewed for accuracy and possible overbreadth.

PRACTICE TIP:

Do Not Mitigate Non-Significant Impacts. In the form, the EIR authors note after the definition of "Less than Significant" the following: "(no mitigation required under CEQA, but may be recommended)." One often finds in an administrative draft EIR that the EIR authors have, in an excess of well-intentioned zeal, included suggested "mitigations" for effects found not to be significant. This is not required by CEQA, and the inclusion of such surplusage in the EIR is not recommended. The problem is that the legal status of such "pseudo-mitigations" is not defined. For example, must the agency make a finding as to why such a mitigation is not included in the project approval? If it is made part of the approval, must it also be included in the mitigation monitoring program? How would a court judge the adequacy of such a pseudo-mitigation? It is better to eliminate all such references entirely.

[f] Summary

In the form in [2], *below*, the summary of project impacts in Chapter 2 states that in this particular case, all project impacts can be mitigated to a level of significance. This means that in this example, the agency could decide to approve this project on the basis of a mitigated negative declaration, instead of an EIR.

PRACTICE TIP:

Should an EIR be Prepared Even When it Is Not Warranted? Technically, a full EIR is only required when there are significant impacts that cannot be fully mitigated, so a project can only be approved with a Statement of Overriding Considerations under *Pub. Res. Code § 21081*. However, when a project is controversial, it can be preferable to do an EIR when legally a negative declaration or a mitigated negative declaration would suffice. One reason is the general belief that an EIR is more "bullet-proof" than a negative declaration, because the substance of an EIR is held to a lower standard of review than is the decision to do a negative declaration instead of an EIR. In addition, there may be political pressure to calm critics by producing a full EIR, which is perceived by most agencies as more of a full-disclosure document than a negative declaration. A supportive elected official may not want to be seen to be allowing the developer to shortcut environmental analysis by not doing an EIR.

[g] Summary Table of Impacts and Mitigations

Table 2-1 is one of the most important sections of the EIR, as it is frequently the only part that is actually examined by reviewers. Great care should be used to make sure that the entries are all accurate, and that if the body of the EIR is changed after the draft is circulated, the summary table is revised accordingly.

Because of the prominence of the summary table, it may be appropriate also to list beneficial impacts of the project. There is no need to do so under CEQA, but it may have a positive impact on readers.

PRACTICE TIP:

Do Not Overload the Table. Some EIR authors like to discuss impacts that are not found to be

significant in the body of the EIR, just to show that the possible effect has not been overlooked. Often they will include these non-impacts in the summary table, as in Table 2-1 under "Land Use." However, these should be taken out. They are not required by CEQA to be in the summary, and their inclusion can negatively impact the project. They make the number of impacts look greater to the casual reader, and can be used by an opponent to overstate the environmental effects of the project.

[2] FORM

Environmental Impact Report (Table of Contents, Introduction, and Summary Sections)

Environmental Impact Report (Table of Contents, Introduction, and Summary Sections)

TABLE OF CONTENTS

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Chapter 8 Appendices
Appendix A Initial Study
Appendix B Geology Report
Appendix C Traffic Report

Chapter 1. Introduction

1.1 Purpose of the Environmental Impact Report

This Draft Environmental Impact Report (EIR) has been prepared in compliance with the California Environmental Quality Act (CEQA) of 1970 (as amended), State CEQA Guidelines, and City CEQA Guidelines. CEQA requires the preparation of a full disclosure document to inform the public, Lead Agency, and Responsible/Trustee Agencies of the direct and indirect environmental effects of the proposed project on the local and regional environment. This document must also provide alternatives and mitigation measures that could reduce or eliminate any identified potential significant impacts.

1.2 CEQA EIR Process

This EIR assesses the environmental impacts of a proposed rezoning. Approval of this request would allow construction of a research and development (R&D)/office complex. This EIR also evaluates, at an equal level of detail, the environmental impacts of an alternative that would involve the same size R&D/office complex as the project plus 105 apartment units. The proposal involving only the R&D/office complex is referred to as the "Proposed Project" in this EIR, while the alternative is referred to as the "R&D+Housing Alternative." Other alternatives are also examined in the EIR (refer to Chapter 6), but in less detail than the proposed project consistent with CEQA Guidelines Section 15126.6(d).

1.2.2 Initial Study and Notice of Preparation

In accordance with Section 15063 of the CEQA Guidelines, the City, as Lead Agency, prepared an Initial Study and Notice of Preparation of an EIR. Copies of these documents are on file at the Community Development Department. The Notice of Preparation (NOP) for this EIR was issued on_____[*date*]. The NOP and Initial Study were circulated to local, state and federal agencies and other interested parties. The Initial Study determined that the project could result in significant impacts on the environment, although some of the project's potential impacts were determined to be less than significant. The Initial Study is included as Appendix A of this document. The Initial Study required preparation of an EIR, and focused the EIR on the following issues:

- Land Use, Plans, and Policies
- Aesthetics
- Geology and Soils
- Hydrology and Water Quality
- Traffic and Circulation
- Air Quality

- Noise
- Cultural Resources

The Initial Study addresses all other issues as identified by the CEQA Guidelines.

1.2.3 Scoping

Subsequent to circulation of the Initial Study and NOP, responses to the NOP were received, raising the following concerns:

- California Department of Transportation. A traffic impact analysis is recommended and it should include: the project's trip generation, distribution, assignment; average daily traffic (ADT) and peak hour volumes at all significantly affected intersections; evaluation of existing, existing + project, and cumulative conditions at these intersections; and mitigation measures (including financing, scheduling, and implementation responsibilities), with particular attention to solutions that do not rely on highway construction.
- _____ [*other issues*]

These issues as well as those already identified in the Initial Study are addressed in this EIR.

1.2.4 Draft EIR

This document constitutes the Draft EIR. It contains a description of the project, description of the environmental setting (existing conditions), identification of project impacts and mitigation measures for impacts found to be significant or potentially significant, and an analysis of project alternatives. This EIR addresses the issues that were identified by the Initial Study as potentially significant environmental impacts of the project as well as issues that were raised in the responses to the Notice of Preparation.

Significance criteria vary for each environmental issue analyzed in this EIR and are defined at the beginning of each impact analysis section. Impacts are categorized as follows:

- Significant and Unavoidable (no feasible mitigation or mitigation does not reduce impact to a less-than-significant level)
- Potentially Significant (impacts that could occur but are mitigable to a less-than-significant level)
- Less than Significant (no mitigation required under CEQA, but may be recommended)

Significance is the basis for determining whether or not mitigation is required for a potential project impact. CEQA requires that, under most circumstances, a lead agency shall neither approve nor carry out a project as proposed unless the significant environmental effects have been reduced to an acceptable or less-than-significant level (CEQA Guidelines Sections 15091 and 15092). Mitigation is required for impacts that are significant and must, when implemented, accomplish a reduction of the impacts to a level that is less than significant. A less-than-significant or

acceptable level is defined as eliminating, avoiding, or substantially lessening the significant effects. Under certain circumstances, the lead agency may allow significant, unavoidable impacts to occur.

1.2.5 Public Review

The information in this report is subject to review by the City, responsible and interested agencies, as well as the public for a period of 45 days. Publication of this Draft EIR marks the beginning of the public review period, during which written comments will be received by the City at the following address:_____[*address*].

1.2.6 Final EIR and EIR Certification

Following the close of the 45-day review period, relevant written and oral comments received on the Draft EIR will be responded to in writing in a Comments and Responses document. The Comments and Responses document, together with the Draft EIR, will constitute the Final EIR. After circulation of the Final EIR, the Planning Commission and City Council will hold public hearings on the Final EIR to consider EIR certification. Upon EIR certification, the City may proceed with project approval actions.

If the lead agency approves the project with significant unavoidable impacts, the agency must state in writing the reasons for its actions. A Statement of Overriding Considerations must be included in the record of project approval and mentioned in the Notice of Determination (CEQA Guidelines Section 15093(c)).

1.3 EIR Organization

The Draft EIR has been organized into the following sections:

Chapter 1, Introduction. This section describes the purpose of the EIR, the CEQA review and certification process, and organization of the EIR.

Chapter 2, Summary. This section summarizes the project description, significant environmental impacts that would result from project implementation, and mitigation measures proposed as part of the project or recommended by the EIR to reduce or eliminate impacts.

Chapter 3, Project Description. This section describes the project location and the objective's of the project sponsor, as well as providing a detailed project description.

Chapter 4, Environmental Setting, Potential Impacts, and Mitigation Measures. These sections describe existing conditions in the vicinity of proposed facilities, discuss project consistency with relevant local plans and policies, identify the environmental impacts associated with project construction and operation, and present mitigation measures for the eight issue areas studied by this Draft EIR.

Chapter 5, Other CEQA Considerations. This section discusses several issues required by CEQA, including significant unavoidable impacts, growth inducing impacts, and cumulative impacts.

Chapter 6, Alternatives. This section discusses and evaluates the environmental impacts of alternatives to the project.

Chapter 7, Report Preparation and Persons/Agencies Consulted.

Chapter 8, Appendices. The appendices provide relevant reference material and data that support discussions in the EIR. In addition, the appendices contain the amended Initial Study.

Chapter 2. Summary

2.1 Project Description

The project applicant is requesting approval of a zone change from CM to CM:PD (Planned Development) to allow development of an R&D/office complex. [*Describe project*].

2.2 Summary of Environmental Impacts and Mitigation

Chapter 4 of the Draft EIR presents a description of the existing environmental setting, an analysis of environmental impacts resulting from development of the proposed R&D/office complex project or the R&D+housing alternative, and required or proposed mitigation measures. These impacts and mitigation measures are summarized in Table 2-1. Impacts are identified as either "potentially significant" or "less than significant." If an impact is potentially significant, mitigation measures are listed to reduce the impact to less-than-significant levels.

The impact analysis indicates that all identified environmental impacts could be mitigated to a less-than-significant level. There would be no unavoidable adverse impacts associated with construction or operation of the proposed project or R&D+housing alternative. The project or the R&D+housing alternative would not be considered growth-inducing, since no new roads or utilities would be extended to any contiguous undeveloped areas.

When the proposed project or R&D+housing alternative is considered with other nearby proposed or approved developments in the City and adjacent communities, potential cumulative impacts that could result would relate primarily to increases in traffic on local roadways and associated noise and air emissions. [*Describe cumulative impacts*].

For the proposed project, this EIR identified potentially significant impacts related to geology and traffic. All of these impacts could be reduced to a less-than-significant level by incorporating mitigation measures or implementing appropriate construction methods. For the R&D+housing alternative, these impacts would also occur but there would be one additional significant traffic impact at the _____ intersection during the A.M. peak hour. This impact could be mitigated to a less-than-significant level by implementation of a Transportation Demand Management (TDM) Program to reduce trip generation and by adding a second westbound left-turn lane at that intersection.

Table 2-1
Summary of Environmental Impacts and Mitigation Measures

Potential Impact	Significance	Mitigation Measures	Significance After Mitigation
Land Use			
4.1-1: The project and R&D+ housing alternative would alter former and existing land uses on the site.	Less than Significant	None Required	Less than Significant

Geology and Soils			
4.3-1: The project and R&D+ housing alternative would likely be subject to one or more severe earthquakes and associated seismic hazards during the life of the project.	Potentially Significant	4.3-1: Prior to issuance of the building permit, project plans shall demonstrate compliance with 1997 Uniform Building Code requirements for structural and seismic loads and recommendations made in the geological report, as required by the Building Department.	Less than Significant
Traffic			
4.5-1: The R&D+ housing alternative result in traffic increases at local intersections and incrementally degrade the level of service at these intersections.	Potentially Significant	4.5-1: Institute and Operate a Transportation Demand Management Program. 4.5-2: Install a second left-turn lane on westbound _____Street at _____Ave.	Less than Significant

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.219

AUTHOR: Revision Author Andrew L. Faber

§ 30B.219 Resolution Making CEQA Findings

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sample "Resolution" that makes a variety of specific CEQA "findings." A public agency approving a project is required to make written findings for every significant effect identified in the EIR. For each such effect, the agency must find that the effect has been mitigated, that mitigation is the responsibility of another public agency, or that there are overriding considerations that make the identified mitigation measures infeasible [*see Pub. Res. Code § 21081*; *14 Cal. Code Reg. §§ 15091*, *15093*].

The form in [2], *below*, contains several main sections. It is adapted from one used for a large, mixed use project, and contains sample language illustrating an appropriate level of analytic detail for the findings. They must be based on substantial evidence in the record of the proceedings as a whole [*see Pub. Res. Code § 21081.5*; *14 Cal. Code Reg. § 15091(b)*], which includes not only the EIR, but also all written and oral communications received by the agency during the project approval process, including at public hearings.

[b] Introduction

The findings are in the form of a resolution to be adopted by the legislative body of the agency, here the city council. They contain the following four main sections:

- Recitals [*see* [c], *below*];
- Findings concerning significant impacts [*see* [d], *below*];
- Findings concerning alternatives [*see* [e], *below*]; and

- A statement of overriding considerations [*see* [f], *below*].

[c] Recitals

The Recitals should give some of the procedural history of the project, and explain the respective roles of the legislative body and the planning agency in the approval process of the EIR. This is also a good place to define basic terms used in the findings.

[d] Findings Concerning Significant Impacts

This section contains the required finding for each impact found in the EIR to be significant, whether or not it can be mitigated. There is no specific statutory form required for these findings; the style presented here is a generic format that is adaptable to a wide range of impacts.

PRACTICE TIP:

Long-Winded Findings. Lawyers are continually urged by legal writing experts to be brief and to the point. While they should not exemplify useless long-windedness, findings are one category of legal writing where a writer's sins should be those of commission rather than of omission. An extra finding on a marginal impact, a few extra recitals, or an extra paragraph or two of explanation will not invalidate the findings, but leaving out a required finding surely may. And a judge who lacks the time to read the findings completely may be impressed by the thoroughness of weighty, thoughtfully-crafted findings.

The form in [2], *below*, contains two sample findings. The first, for tree removal, is one for which a finding of complete mitigation can be made. In other words, the described mitigations reduce the impact to a level of insignificance. The second sample finding is for traffic impact to a freeway segment. For this impact, the EIR recommends various mitigation measures, but the city cannot find that this provides adequate mitigation. As a result, a Statement of Overriding Considerations [*see 14 Cal. Code Reg. § 15093*], must be made. Alternatively, if the EIR had examined the possibility of widening the freeway and found that such widening was physically feasible and would mitigate the impact of increased traffic, then the third type of finding allowed by *Pub. Res. Code § 21081* could have been made: that a mitigation does exist, but it is within the responsibility and jurisdiction of another public agency (here, the State), and such mitigation either has been adopted by the State or can and should be adopted. If it has not been adopted by the other jurisdiction, then a Statement of Overriding Considerations should still be made (although *Pub. Res. Code § 21081* is actually ambiguous on this point).

[e] Findings Concerning Alternatives

Many cases have held that the core of an EIR is the analysis of alternatives [*see, e.g., Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 564, 276 Cal. Rptr. 410, 801 P.2d 1161]* . CEQA requires that an EIR identify alternatives to a project as proposed which "would feasibly attain most of the basic objectives of the project, but would avoid or substantially lessen many of the significant effects of the project" [*Pub. Res. Code § 21002*; *14 Cal. Code Reg. § 15126.6*]. Thus, it is extremely important that findings be made that explain why the chosen project has been approved, particularly if there are alternatives that are environmentally superior.

PRACTICE TIP:

Are Alternatives Infeasible? Often an EIR will conclude that the environmentally superior alternative, required to be identified by *14 Cal. Code Reg. § 15126.6(e)(2)* is not the project as proposed. If the proposed project is approved, then the EIR findings should include a thorough explanation of why any environmentally superior alternatives are rejected. It is not enough that they be less desirable than the approved project. Instead, they must explicitly be found to be "infeasible" for specific economic, legal, social, technological, or other considerations [*see Pub. Res. Code § 21081(a)(3)*; *14 Cal. Code Reg. §*

15091(a)(3)]. Alternative sites mentioned in the EIR must also be found to be infeasible [*see San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino (1984) 155 Cal. App. 3d 738, 753, 202 Cal. Rptr. 423]* .

The form in [2], *below*, contains sample findings comparing and rejecting alternatives to the proposed project. Several sample alternatives are given for illustration. These include the statutorily required "No Project" alternative, a modified project alternative (here, reduced density), and an alternative to build the project at a different site.

PRACTICE TIP:

"No Project" May Not Mean "No Build." The classic no project alternative is environmentally superior to the normal development project, because it would leave the land undeveloped. However, that is not always the case. For example, the no project condition may predictably lead to pressures for some other development, which may have more environmental consequences than the proposed project. Or, for public infrastructure projects such as roads, waste disposal facilities, flood control projects, and the like, it may be argued that the no project alternative would have more impact on the environment than the proposed work of improvement. Thus, do not assume that the no project alternative is either a no build alternative, or one that is environmentally superior to the proposed development [*see generally 14 Cal. Code Reg. § 15126.6(e)*].

PRACTICE TIP:

Information in the Record. All information relied on to justify findings must be in the administrative record of the proceedings, but need not necessarily be in the EIR itself. For example, information as to the financial feasibility of alternatives to the project should not normally be in the EIR, but would normally be presented to the agency by the developer in written form [*see 14 Cal. Code Reg. § 15131(c)*]. Note that a court may be skeptical of a conclusory finding based on a statement by the developer that an alternative "doesn't pencil out" [*see Citizens of Goleta Valley v. Board of Supervisors (1988) 197 Cal. App. 3d 1167, 243 Cal. Rptr. 339]* . Thus, agencies should use caution in finding an alternative to be infeasible for this reason. A finding of infeasibility for a reduced scale alternative is more defensible if based on failure to meet the goals and objectives of City plans and policies, than if based on alleged financial infeasibility for the developer.

[f] Statement of Overriding Considerations

This section explains which impacts cannot feasibly be mitigated, and then explains why the benefits of the project outweigh these unmitigated impacts.

PRACTICE TIP:

Each Benefit Is Individually Significant. Note that the form in [2], *below*, contains the following statement: "The City Council finds that each of the benefits set forth below in this Statement constitutes a separate and independent ground for finding that the benefits of the Project outweigh the risks of its potential significant adverse environmental impacts." This is included because an opponent might challenge the approval on the basis that one or more of the factors given in the statement of overriding considerations is not supported by substantial evidence. If a court agrees with the challenge, it could decide to remand the matter to the agency to reevaluate the statement, as happened when a court found three of 12 benefits to be unsupported by substantial evidence [*see Sierra Club v. Contra Costa County (1992) 10 Cal. App. 4th 1212, 13 Cal. Rptr. 2d 182]* . The quoted language allows the agency to argue that any remaining factors are sufficient to support the decision.

[2] FORM

Resolution Making CEQA Findings

Resolution Making CEQA Findings

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF _____ MAKING CERTAIN FINDINGS CONCERNING IMPACTS AND MITIGATION MEASURES, IN ACCORDANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT FOR THE _____ PROJECT FOR WHICH AN ENVIRONMENTAL IMPACT REPORT HAS BEEN PREPARED.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF _____:

WHEREAS, the City Council of the City of _____ ("City") intends to approve Planned Development Zoning for construction of approximately [*describe project, e.g.,* 1,000,000 square feet of office space, 315 multi-family residential units, and 700 hotel rooms on an approximately 40-acre site]; and

WHEREAS, on_____[*date*] the Planning Commission of the City certified that the Final Environmental Impact Report ("FEIR") for the _____ Project ("Project") was completed in accordance with the requirements of the California Environmental Quality Act of 1970 ("CEQA"), as amended; and

[*Or, if City Council is certifying body for EIR*]

WHEREAS, on_____[*date*] the Planning Commission of the City held a hearing on the Final Environmental Impact Report ("FEIR") for the _____ Project ("Project") at which hearing the Commission voted to recommend that the City Council certify the document as having been completed in compliance with the requirements of the California Environmental Quality Act of 1970 ("CEQA"), as amended; and

WHEREAS, the City Council of the City is the decision-making body for [*describe approval, e.g.,* Planned Development rezoning]; and

WHEREAS, CEQA requires that in connection with the approval of a project for which an EIR identifies one or more significant environmental effects, the decision-making agency must make certain findings regarding those effects.

NOW, THEREFORE, BE IT RESOLVED:

THAT THE CITY COUNCIL does hereby find that the FEIR has been presented to it, that it has independently reviewed and analyzed the FEIR and other information in the record and has considered the information contained therein including the written and oral comments received at the public hearings on the FEIR and on the Project, prior to acting upon or approving the Project, and has found that the FEIR represents the independent judgment and analysis of the City as Lead Agency for the Project, and designates the Director of Planning, Building and Code Enforcement at his/her office at_____[*address*], as the custodian of documents and records of proceedings on which this decision is based; and

[*If City Council is certifying body for EIR, add:*]

THAT THE CITY COUNCIL does hereby find that the FEIR has been completed in compliance with CEQA; and

THAT THE CITY COUNCIL does hereby make the following findings with respect to the significant effects on the

environment of the Project, as identified in the FEIR:

FINDINGS CONCERNING SIGNIFICANT IMPACTS

[*Sample language for fully mitigated impact:*]

IMPACT: Redevelopment of the site may result in the removal of up to 131 ordinance size trees. (Significant Impact)

MITIGATION: The following measures are included in the Project to minimize impacts to trees: Loss of ordinance size trees would be mitigated by implementation of landscaping plans approved by the City, in conformance with the City's Landscaping Guidelines. Tree replacement ratios typically required include: (1) 1:1 ratio for trees less than 11 inches in diameter, (2) 2.1 ratio for trees 12 to 17 inches in diameter, and (3) 4:1 ratio for trees 18 inches or greater in diameter.

FINDING: The above mitigation measures, which are incorporated into the Project as a condition of approval, will avoid or substantially lessen the significant environmental impact described above to **a less than significant level**.

[*Sample language for impact that cannot be fully mitigated:*]

IMPACT: The Project will add more than 1 percent of segment capacity to the ABC Freeway in City, which will operate at an unacceptable LOS F during at least one of the peak hours under project conditions.

PARTIAL MITIGATION: Mitigation measures proposed to reduce impacts to the above freeway are the following Immediate Implementation Actions:

- Bike Lockers, Racks, and Facilities
- Bus Stop and Transit Improvements
- Public Information Programs for carpooling and transit use
- HOV Parking Preference Program
- Bike Storage at Residential Development Sites
- Shuttle Service to transit
- An onsite Transportation Demand Management (TDM) Program

FINDING: The mitigation measures listed above will reduce but not eliminate impacts to the freeway. No feasible mitigation measures are available to the City that would fully reduce impacts to the freeway. Therefore, implementation of the Project will result in **a significant unavoidable traffic impact.**

FINDINGS CONCERNING ALTERNATIVES

CEQA requires that an EIR identify alternatives to a project as proposed which "would feasibly attain most of the basic

objectives of the project, but would avoid or substantially lessen many of the significant effects of the project." The significant unmitigated impacts identified for the proposed Project are impacts to traffic and air quality; therefore, the EIR examined the following alternatives which might reduce those impacts.

[*Sample finding for required No Project Alternative:*]

No Project Alternative: Under this alternative the property would physically remain as is. It is assumed that the existing uses could continue indefinitely or another office/industrial user would take over a portion or the entire site and reuse the existing buildings and facilities. No new construction or expansion of facilities would occur under this alternative.

Potential impacts to traffic, air quality, vegetation and wildlife, and cultural resources resulting from the proposed redevelopment of the site would be avoided under this alternative. This alternative would not result in an increase in traffic impacts or air quality impacts as with the proposed Project.

Finding: This alternative would be environmentally superior to the proposed project. This alternative would not, however, be compatible with any of the Project objectives. This alternative would not add to the economic vitality of the area. In addition, the site would remain underutilized and would not support the identified land uses of the City's General Plan and the Specific Plan.

[*Sample finding for alternate design for project:*]

Reduced Scale Alternative: The reduced scale alternative would consist of clearing the site of existing structures and redeveloping the property with mixed uses totaling approximately the same square footage as the existing development onsite. All of the proposed uses would remain the same but at a lower density.

Reduction in the size of the project would generate fewer trips and less associated congestion. Because this alternative would only replace the existing development with an equivalent amount of square footage (albeit in a mixed-use configuration) this alternative could result in an incremental improvement in traffic in the region. Therefore, this alternative would have less air quality impact than the proposed Project. By replacing existing square footage with a mix of uses in equivalent building space, this alternative could result in an overall reduction in air pollution.

Finding: This alternative is environmentally superior to the Project as proposed because less density would lead to corresponding reductions in air quality, and traffic. If the entire site is developed the loss of habitat would still occur. To the extent that this alternative provides some economic benefits it meets some of the Project objectives. This alternative includes fewer jobs, and thereby falls short of having the same beneficial effects on City's jobs/housing balance as the proposed Project. It also provides less housing and less hotel space, and this, along with fewer jobs causes it to fail to fulfill the objectives of the City's economic development policies and of the Specific Plan.

[*Sample finding for alternative location:*]

Alternative Location: The XYZ Redevelopment Area (the "Area") located in the southern part of City contains a possible alternative location for the office portion of the Project. Currently more than 300 acres of vacant land are available for development in the Area.

Development of the proposed project in the Area would result in an expected higher rate of trip generation because the Area does not have a planned rapid transit station; therefore, the project would not have the same potential for transit

diversion. Because the Area is still rural, costly infrastructure is needed, including internal roadways. Thus, there is a potential that this alternative would have greater localized congestion impacts than the proposed Project.

To the extent that development of the proposed square footage at an alternative location generates approximately the same amount of traffic, the emissions will not be significantly reduced. The net result of over a million square feet of development will remain a significant impact on regional air quality.

Finding: This alternative is not environmentally superior to the Project as proposed because it would convert vacant land to urban uses, thus resulting in other significant unavoidable impacts including loss of open space, and loss of agricultural land, while still having significant traffic and air quality impacts. This alternative also fails to provide housing proximate to the rapid transit and an existing concentration of jobs in the northern part of City. This alternative also would not fully meet the objectives of the proposed Project to provide uses to support the Specific Plan.

[*Sample conclusion giving reasons to reject alternatives:*]

Conclusion: Of the alternatives studied, The No Project and the Reduced Scale would be environmentally superior to the Project. All are rejected by the City as infeasible because none would fully meet the objectives of the Project or of the City's economic development policies, nor would they maximize the use of the Project area contemplated by the Specific Plan.

The No Project alternative basically leaves an underdeveloped, semi-blighted site that detracts from the adjoining residential neighborhood, does little to interact adjacent development, and does not take advantage of the new light rail transit opportunities nearby.

The Reduced Scale alternative includes fewer jobs, and thereby falls short of having the same beneficial effects on City's jobs/housing balance as the proposed Project. It also provides less housing and less hotel space, and this, along with fewer jobs causes it to fail to fulfill the objectives of the City's economic development policies and of the Specific Plan. While the Reduced Scale alternative does meet some of the Project objectives, it fails to take maximum advantage of the infill opportunities presented by the site, and thus does less than the Project to meet the City's economic development goals and the objectives of the Specific Plan. Although it does have reduced environmental effects, it does not eliminate significant unavoidable effects on traffic and air quality, and the City Council finds that the incremental reductions in these impacts are outweighed by the Project benefits.

STATEMENT OF OVERRIDING CONSIDERATIONS

After review of the entire administrative record, including the Final EIR, the staff report, and the oral and written testimony and evidence presented at public hearings, the City Council finds that specific economic, legal, social, technological and other considerations justify the approval of this Project in spite of the existence of unavoidable environmental effects that are deemed significant and that cannot be completely mitigated to a level of insignificance.

The City Council adopts and makes this Statement of Overriding Considerations regarding the significant unavoidable impacts of the Project and the anticipated benefits of the Project. The City Council finds that each of the benefits set forth below in this Statement constitutes a separate and independent ground for finding that the benefits of the Project outweigh the risks of its potential significant adverse environmental impacts. The benefits of the Project, which constitute the specific economic, legal, social, technological and other considerations that justify the approval of the Project are as follows:

[*Sample abridged list of project benefits:*]

1. The Project is consistent with the City's economic development strategy and will help to revitalize an already urbanized area of the City characterized by older, inefficient and partly vacant industrial/office development.

2. The Project is consistent with, and will help the City to accomplish, all nine key objectives of the Specific Plan for this area of the City, as follows [*list all objectives, such as*]:

- Support Transit Use and Create a Pedestrian Friendly Environment. Project design emphasizes pedestrian access, open space, and use of landscaping and walkways, etc.

-

_____ [*List all other objectives*].

3. The Project is consistent with the housing strategy of the general plan and will provide up to 315 units of housing to help satisfy the demand in the County for new housing, which is currently estimated to be for 25,000 units.

ADOPTED and issued this _____ day of [*month*], [*year*], by the following vote:
AYES:
NOES:
ABSENT:

_____
Mayor

ATTEST:

_____
City Clerk

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.220

AUTHOR: Revision Author Andrew L. Faber

§ 30B.220 Mitigation Monitoring Program

[1] Comment

[a] Use of Form

The form in [2], *below*, constitutes a mitigation reporting or monitoring program. CEQA was amended in 1989 in an attempt to make the imposition of mitigation measures on projects more effective. Mitigation measures imposed pursuant to an environmental impact report (EIR) [*see § 30B.218*] or mitigated negative declaration [*see § 30B.217*] are required to be made fully enforceable through permit conditions, agreements, or other measures [*see Pub. Res. Code § 21081.6(c)*; *14 Cal. Code Reg. § 15091(d)*]. In addition, an agency imposing mitigation measures is required to adopt a "reporting or monitoring program" for the mitigation measures [*see Pub. Res. Code § 21081.6(a)*; *14 Cal. Code Reg. §§ 15091(d), 15097*]. The difference between a reporting program and a monitoring program is not necessarily clear, and for a normal construction project, the resulting document may contain a mixture of both reporting and monitoring conditions.

The operative document for construction projects is commonly called a Mitigation Monitoring Program (MMP). There is no statutory form, nor is there a form suggested in the CEQA Guidelines. As a result, in practice a wide variety of formats may be encountered. Often the MMP is adopted as an appendix to another CEQA document, e.g., a resolution making CEQA findings [*see § 30B.219*], or a resolution actually granting the entitlements sought. The form in [2], *below*, is drafted as a fairly generic form containing some sample language for typical mitigation measures.

PRACTICE TIP:

Circulate the MMP with the Draft EIR? There is no requirement that the MMP be circulated for public review. Although some agencies see such circulation as good public policy, it is rarely in the developer's best interest to have the MMP circulated with the Draft EIR, as it just gives project opponents another target at which to shoot. To make the approvals as defensible as possible, however, the developer's attorney should verify that the adopted MMP does cover each and every mitigation imposed on the

project.

[b] Contents of Mitigation Monitoring Program

Some MMPs do not contain a "General Conditions" section. If enforcement provisions are specifically spelled out, the developer should try to insert protective provisions, such as a notice of default, cure period, and administrative appeal process.

Typically, this section lists for each mitigation a responsible party for performance and a responsible party or agency for verifying the performance. A column could be added to the table defining a time, or project stage (e.g., before issuance of building permits) for implementation of each mitigation measure.

PRACTICE TIP:

Must the Mitigation be Successful? The monitoring/reporting required by CEQA is to ensure that the appropriate mitigation measure has been carried out, not that it has worked. For example, if the developer must mitigate intersection traffic by adding a left turn lane, then his or her responsibility normally ends with the construction of the lane, and he or she is not required to do another traffic study to verify that the congestion has been cured. There is a tendency now, however, to mandate more complex reporting and monitoring, in some cases with follow on mitigation measures imposed if the mitigation is not successful. This may be appropriate, for example, if the developer is required to create a certain kind of biological habitat, such as a wetland.

[2] FORM

Mitigation Monitoring Program

Mitigation Monitoring Program

General Conditions

It is required that the City use the attached monitoring checklist for the proposed project. The monitoring program shall be implemented as follows:

1. The Planning Director shall be responsible for coordination of the monitoring program, including the monitoring checklist. The Planning Director shall be responsible for completing the monitoring checklist and distributing the checklist to the responsible individuals or agencies for their use in monitoring the mitigation measures.

2. Each responsible individual or agency will then be responsible for determining whether the mitigation measures contained in the monitoring checklist have been complied with. Once all mitigation measures have been complied with, the responsible individual or agency shall submit a copy of the monitoring checklist to the Planning Director to be placed in the project file. If the mitigation measure has not been complied with, the monitoring checklist should not be returned to the Planning Director.

3. Prior to issuance of an occupancy permit, the Planning Director shall review the checklist to ensure that all mitigation measures and additional conditions of project approval included in the monitoring checklist have been complied with. An occupancy permit shall not be issued until all mitigation measures and additional conditions of project approval included in the monitoring checklist have been complied with.

4. If the Planning Director determines that a non-compliance has occurred, a written notice should be delivered by certified mail to the developer within 10 days describing the non-compliance and requiring compliance within a specified period of time. If a non-compliance still exists at the expiration of the specified period of time, construction may be halted and/or fines may be imposed at the discretion of the City. The developer shall have the right to an administrative hearing pursuant to the City's administrative hearings procedures in the event of any dispute over whether there has been compliance.

Mitigation Monitoring Checklist

[*Note: Sample data is included for illustrative purposes*]

Impact	**Mitigation**	**Implementation Responsibility**	**Oversight Responsibility and Implementation Mechanism**
Project vehicle use would result in a significant increase in reactive organic gases and nitrogen oxides, which would have a temporary significant impact on regional air quality. Significant Impact	*The project includes vehicle trip reduction measures (TDM), which could reduce regional impact of the project by 5-15%. However, these measures would not be sufficient to reduce the regional air quality impacts of the project to a level of non-significance.*	*Project Applicant*	*The Director of Planning, will oversee implementation of the mitigation measures. Significant Unavoidable Impact with Mitigation*
Future residential uses on the site would be exposed to noise levels above City and Title 24 standards if measures are not incorporated to reduce noise exposure levels.	*The site will be designed to provide maximize protection for outdoor use areas. At the time specific residential uses are proposed, a site specific noise analysis in compliance with Title 24 will be required that outlines recommendations to reduce noise impacts.*	*Project Applicant*	*The Director of Building, will oversee implementation of the mitigation measures as part of the grading and building permit process. Less Than Significant Impact with Mitigation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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14-30B California Legal Forms--Transaction Guide § 30B.221

AUTHOR: Revision Author Andrew L. Faber

§ 30B.221 Notice of Determination

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sample Notice of Determination (NOD). It can be found as Appendix D to the CEQA Guidelines [*14 Cal. Code Reg. § 15000 et seq.*]. When a lead agency approves a project for which an environmental impact report (EIR) [*see § 30B.218*] or a negative declaration [*see § 30B.217*] has been prepared, it files a NOD with the county clerk of each county within which the project will be located [*see Pub. Res. Code §§ 21108, 21152*; *14 Cal. Code Reg. § 15094*]. Although CEQA only prescribes a minimal content for the notice, the CEQA Guidelines add additional items as set forth in the form in [2], *below*.

[b] Filing Notice of Determination

The NOD must be filed by the lead agency within five working days of the final approval of the project, although there is no sanction for either not filing the notice, or filing late. There is, however, one very important consequence attached to the filing of the notice: It starts the 30-day statute of limitations to challenge the project approval on the grounds of non-compliance with CEQA [*see Pub. Res. Code § 21167(b)*]. If no NOD is filed, the statute of limitations is normally 180 days from final approval [*see Pub. Res. Code § 21167(a)*]. Counsel should also note that on the filing of the NOD, any fees due to the State Department of Fish and Game must be paid [*see Pub. Res. Code § 21089*; *Fish & Game Code § 711.4*].

For obvious reasons, counsel for a private developer should verify that the NOD has been filed, and that it is properly posted by the County Clerk (an affidavit of posting can normally be obtained if needed for litigation), as required by CEQA [*see Pub. Res. Code § 21152(c)*; *14 Cal. Code Reg. § 15094(d)*].

PRACTICE TIP:

When is Final Approval? It is not always obvious when final approval of a project occurs. Since an NOD filed too early is probably ineffective (whereas a late-filed NOD just starts the 30-day clock running on the date of filing), counsel must be careful of early filing. One common situation of concern is when the project is approved by ordinance (e.g., a rezoning). Technically an ordinance is first "introduced," then not less than five days later it can be "adopted" [*see Gov. Code § 36934*]. Sometimes this process is referred to as the "first reading" and the "second reading" of the ordinance. Since the major public hearing is at the first reading, the city staff may assume that is when the NOD should be filed. However, the proper procedure is to file the NOD after the second reading, or formal adoption, of the ordinance.

[2] FORM

Notice of Determination

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.222

AUTHOR: Revision Author Andrew L. Faber

§ 30B.222 Application for Coastal Development Permit--Marin County Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a multi-purpose Marin County application form, which may be used to obtain a coastal development permit (discussed in this comment) or various other permits and entitlements. Any person wishing to undertake a development in the coastal zone must obtain a coastal development permit in addition to any other permits required by law [*Pub. Res. Code § 30600(a)*]. As explained below, the permit-issuing authority will be either the California Coastal Commission or the coastal city or county in which the proposed development is to be located. This application form is representative of the forms prepared by these local coastal entities.

For extensive discussions of development in coastal areas, see California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender), and California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender).

[b] Coastal Zone Defined

Under the California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*; *see 14 Cal. Code Reg. § 13001 et seq.* (implementing regulations)], most developments in the "coastal zone" require a coastal development permit. The "coastal zone" extends from the northern to the southern border of California. It extends seaward to the outer limit of California's jurisdiction and extends inward, generally, 1,000 yards from the mean high tide line of the sea. It includes all offshore islands. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less. In developed urban areas the zone generally extends inland less than 1,000 yards. The coastal zone does not include the area under the jurisdiction of the San Francisco Bay Conservation and Development Commission [*see Gov. Code § 66600 et seq.*; *see also § 30B.223*] or any area contiguous thereto [*Pub. Res. Code § 30103(a)*].

A detailed map of the coastal zone, prepared and adopted by the California Coastal Commission, is on file with the county clerk of each coastal county [*Pub. Res. Code § 30103(b)*].

[c] California Coastal Commission and Local Coastal Programs

The California Coastal Commission ("Commission") has the primary responsibility for implementing the provisions of the Coastal Act, and is the state coastal zone planning and management agency for all purposes [*Pub. Res. Code § 30330*]. The principal function of the Commission is to supervise the adoption and continual updating of local coastal programs by local governments [*see Pub. Res. Code §§ 30004, 30519.5*; *see also* [e], *below*]. Other powers and duties of the Commission include the power to adopt or amend rules and regulations to carry out the purposes and provisions of the Act [*see Pub. Res. Code § 30333*].

The Commission operates six district offices, each of which performs various functions relating to the Act, such as assisting in the completion and initial processing of applications for proposed coastal developments to be located within certain specified counties.

PRACTICE TIP:

Coastal Commission Information Online. The locations of the Coastal Commission offices can easily be found online, along with much information about the activities of the Commission, including downloadable versions of the applicable statutes and regulations. The home page of the Commission is at http://www.coastal.ca.gov.

The Act originally provided for the establishment of six regional coastal commissions [*see* former *Pub. Res. Code §§ 30300, 30304.5*]. These regional commissions were terminated on July 1, 1989 [*see Pub. Res. Code § 30305*].

[d] Disclosures Regarding Contacts

Any person applying to the Commission for approval of a development permit must provide the Commission with the names and addresses of all persons who, for compensation, will be communicating with the Commission or the Commission's staff on the applicant's behalf or on behalf of the applicant's business partners. Full disclosure of the names and addresses must be provided before any such communication. Failure to comply with this disclosure requirement is a misdemeanor punishable by a fine of $5,000 or imprisonment in the county jail for up to six months. Further, such a failure will result in the immediate denial of the permit [*Pub. Res. Code § 30319*; *see Pub. Res. Code § 30319.5* (if permit is denied for this reason, applicant may not reapply for two years)].

[e] Local Governments and Local Coastal Programs (LCPs)

The principal purpose of the Coastal Act is to require local governments (i.e., cities and counties) [*Pub. Res. Code § 30109*] to protect the portion of the coastal zone lying in each of their jurisdictions [*see Pub. Res. Code §§ 30004, 30108.6*]. Each local government lying, in whole or in part, within the coastal zone must prepare a local coastal program ("LCP") for that portion of the coastal zone within its jurisdiction [*Pub. Res. Code § 30500(a)*]. An LCP consists of a local government's land use plans, zoning ordinances, zoning district maps, and, if applicable, other implementing actions for sensitive coastal resources [*Pub. Res. Code § 30108.6*]. These documents must collectively meet the requirements of, and implement the provisions and policies of, the Act at the local level [*Pub. Res. Code § 30108.6*]. The Commission must certify every LCP [*Pub. Res. Code § 30512*]. A local government may request, in writing, that the Commission prepare all or a portion of its LCP [*Pub. Res. Code § 30500(a)*]; however, even LCPs prepared in that manner must be adopted by the local government and then certified by the Commission [*see Pub. Res. Code §§ 30500(a), 30512*].

As of mid-2001, the Commission had certified LCPs for 88 of the 125 total "segments" contained in the 58 cities and 15

counties lying within the coastal zone.

[f] Requirement to Obtain Coastal Development Permit

The California Coastal Act of 1976 provides that any person wishing to undertake a development in the coastal zone must obtain a coastal development permit in addition to any other permits required by law [*Pub. Res. Code § 30600(a)*]. Under the Coastal Act, most activities that alter existing conditions within the coastal zone are considered developments. Specifically, for purposes of the Act, "development" means any of the following activities occurring on land or in or under water [*Pub. Res. Code § 30106*]:

- The placement or erection of any solid material or structure. "Structure" includes any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

- The discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste.

- The grading, removing, dredging, mining, or extraction of any materials.

- A change in the density or intensity of use of land, including subdivision under the Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see* Ch. 30, *Subdivision Regulation*], unless the division occurs in connection with the purchase of the land by a public agency for public recreational use.

- A change in access or intensity of use of water.

- The construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility.

- The removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations that are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*].

A coastal development permit is required for a lot line adjustment because, like a subdivision of land, it can result in changes in the density or intensity of use and constitutes a division of land [*La Fe, Inc. v. Los Angeles County (1999) 73 Cal. App. 4th 231, 240, 86 Cal. Rptr. 2d 217]* .

[g] Developments Exempt From Permit Requirements

Certain types of development in the coastal zone do not require a coastal development permit [*see Pub. Res. Code §§ 30608-30610.5*; for a complete list of these exemptions, see California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender)]. The principal types of exempted developments are the following:

- Improvements to existing single-family residences, unless the improvement belongs to a class of development that is identified in a regulation as involving a risk of adverse environmental effect [*Pub. Res. Code § 30610(a)*; *see 14 Cal. Code Reg. § 13250*].

- Improvements to any structure other than a single-family residence or a public works facility, unless the improvement is a type that, according to a regulation, either involves a risk of adverse environmental effect, adversely affects public access, or involves a change in use contrary to any policy of the Act [*Pub. Res. Code § 30610(b)*; *see 14 Cal. Code Reg. § 13253*].

- Repair or maintenance activities that do not result in additions, enlargements, or expansions, unless a permit is required by regulation because the Commission has found that the methods of repair or maintenance involve a risk of substantial adverse environmental impact [*Pub. Res. Code § 30610(d)*; *see 14 Cal. Code Reg. § 13252*].

- Certain categories of developments described or identified by two-thirds vote of the Commission [*Pub. Res. Code § 30610(e)*; *14 Cal. Code Reg. §§ 13240-13249*].

- The replacement of any structure, other than a public works facility, destroyed by a disaster, provided that the replacement structure (1) conforms to existing zoning requirements; (2) has the same use as the destroyed structure; (3) does not exceed the floor area, height, or bulk of the destroyed structure by more than 10 percent; and (4) is sited in the same location as the destroyed structure [*Pub. Res. Code § 30610(g)*].

- Any activity involving the conversion of any existing multiple-unit residential structure to a time-sharing project, estate, or use, as defined in *Bus. & Prof. Code § 11212* (effective July 1, 2005) [*see* Ch. 33A, *Time-Share Projects*] and any related improvement that is otherwise exempt from the permit requirements of the Act [*Pub. Res. Code § 30610(h)*].

- Developments for which a vested right existed before enactment of the Act [*Pub. Res. Code § 30608*].

[h] Issuance of Permit After LCP Certified

After a local government has had its local coastal program (LCP) certified by the Commission, only that local government will have the authority to issue coastal development permits for new developments (with certain exceptions noted below) proposed within the area to which the LCP applies [*Pub. Res. Code §§ 30519(a), 30600(d)*]. A permit must be issued if the local government, or the Commission on appeal, finds that the proposed development conforms to the certified LCP [*Pub. Res. Code § 30604(b)*].

Even after an LCP has been certified, the Commission, rather than the local government, retains sole authority to review and issue permits for any development proposed or undertaken in any of the following areas [*Pub. Res. Code § 30519(b)*]:

- On any tidelands, submerged lands, or on public trust lands [*but see Pub. Res. Code § 30613*], whether filled or unfilled, lying within the coastal zone;

- Within certain enumerated port districts [*see Pub. Res. Code §§ 30700-30721*; *14 Cal. Code Reg. §§ 13600-13648*]; or

- Within any state university or college or private university within the coastal zone [*see Pub. Res. Code §§ 30605, 30606*; *14 Cal. Code Reg. §§ 13500-13577*].

Considering the limited scope of *Pub. Res. Code § 30519(b)*, there will be a substantial reduction in the number of permits issued by the Commission once all the LCP's of the coastal cities and counties have been certified. As a result, the regulations governing the issuance of permits by the Commission pursuant to *Pub. Res. Code § 30519(b)* [*see 14 Cal. Code Reg. §§ 13050-13109.6, 13156-13170*] are not discussed in this comment. For a detailed discussion of those regulations, see California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender).

[i] Issuance of Permit Before LCP Certified

Because the process of preparing and certifying an LCP typically takes several years, alternative interim procedures govern the precertification processing and approval of coastal development permit applications. Although a detailed discussion of those temporary procedures is beyond the scope of this discussion, they are summarized below. For an extensive discussion of the interim procedures, see California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender).

Before certification of an LCP, a local government has the option of establishing its own interim procedures for handling the filing, processing, reviewing, modification, and approval or denial of coastal development permits [*Pub. Res. Code § 30600(b)*; *see Pub. Res. Code § 30620.5*]. These procedures may be incorporated into the procedures relating to any other appropriate land use development permit issued by the local government [*Pub. Res. Code § 30600(b)*]. A coastal development permit cannot be issued by a local government under such an optional interim procedure, but instead must be obtained from the Commission, if the application involves the development of tidelands, submerged lands, or public trust lands, whether filled or unfilled, or any development by a public agency for which a local government permit is not otherwise required [*Pub. Res. Code § 30600(b), (c)*; *see 14 Cal. Code Reg. § 13300(c)*].

[j] Exemptions From Normal Permit Application Procedures

[i] Administrative Permits

The standard coastal development permit application and processing procedures do not apply under the circumstances specified in *Pub. Res. Code § 30624*. If a permit is issued pursuant to *Pub. Res. Code § 30624* under nonemergency circumstances, it is referred to as an "administrative permit" [*see 14 Cal. Code Reg. §§ 13145-13153*; *see also* [ii], *below*]. Under *Pub. Res. Code § 30624* either of the following persons are authorized (under the circumstances indicated) to issue administrative permits [*Pub. Res. Code § 30624(a)*]:

- The executive director of the Commission, if the Commission has the authority to issue a coastal development permit for the proposed project [*see Pub. Res. Code §§ 30519(b), 30600(c)*]; or

- A designated local official, if the local government has the authority to issue a permit before certification of its LCP [*Pub. Res. Code § 30600.5*; *see* [i], *above*].

Although this discussion concentrates on *Pub. Res. Code § 30624*, it is important to note that the certified LCP of a local government may authorize and regulate the issuance of an administrative permit [*see Pub. Res. Code §§ 30519(a), 30600(d)*]. This type of local procedure would likely be similar to the statutory and regulatory procedures discussed throughout this section.

Under *Pub. Res. Code § 30624*, only the following developments may qualify for an administrative permit [*Pub. Res. Code § 30624(a)*]:

- Improvements to any existing structure;

- Any single-family dwelling;

- Any development of four dwelling units or less within any unincorporated area that does not require demolition;

- Any other developments not in excess of $100,000 other than a division of land; and

- Any development specifically authorized as a principal permitted use and proposed in an area for which the land use portion of the applicable local coastal program has been certified.

Because a large number of proposed developments will qualify for an administrative permit under the above provisions, the regulatory procedure for obtaining these permits from the Commission's Executive Director pursuant to *Pub. Res. Code § 30624* [*see 14 Cal. Code Reg. §§ 13145*-13153] is set forth below. A similar regulatory procedure governs the pre-certification issuance of administrative permits by a local government pursuant to *Pub. Res. Code §§ 30624* and *30600.5* [*see 14 Cal. Code Reg. §§ 13328-13328.9*].

To apply for an administrative permit, the applicant must submit an official application form, together with a $2,500 filing fee [*see 14 Cal. Code Reg. § 13055(a)(1)*] and one copy of whatever maps and drawings are reasonably required to describe the proposal [*14 Cal. Code Reg. § 13148*; *see* 14 Cal. Code Reg. §§ 13053.3, *13146*]. A reasonable number of additional copies may subsequently be required [*14 Cal. Code Reg. § 13148*]. At the time of filing, the applicant must post, in a conspicuous place at the project site, a standardized notice form that is furnished by the Commission [*14 Cal. Code Reg. §§ 13054(d), 13149*]. The applicant may also be required to provide the Commission with stamped envelopes for mailing a notice of public hearing to all addresses on a list prepared by the applicant of adjacent landowners and residents and other interested persons [*see 14 Cal. Code Reg. § 13054(b)*]. The Executive Director may also require the applicant to provide additional notice to the public [*14 Cal. Code Reg. § 13149*]. The Commission will notify any persons known to be interested in the proposed development [*14 Cal. Code Reg. § 13149*; *see 14 Cal. Code Reg. § 13328.4*].

The Executive Director will approve or modify the application on the same grounds that the Commission may approve an ordinary application, and may include reasonable terms and conditions required for the development to comply with the policies of the Act [*14 Cal. Code Reg. § 13150(a)*; *see 14 Cal. Code Reg. § 13328.5(a)*]. The format, receipt, and acknowledgment of administrative permits are governed by the same rules that apply to other coastal development permits [*14 Cal. Code Reg. § 13150(b)*; *see 14 Cal. Code Reg. §§ 13156, 13158*].

If the Executive Director finds that an application does not meet the criteria of *Pub. Res. Code § 30624*, he or she will notify the applicant that a regular permit application is required [*14 Cal. Code Reg. § 13147*]. With the applicant's concurrence, the Executive Director may accept the application for filing as a regular permit and will adjust the application fees accordingly [*14 Cal. Code Reg. § 13147*]. If the application is properly filed but the Executive Director denies the permit, the Executive Director must promptly mail written notice of the denial to the applicant with an explanation of the reasons for this determination [*14 Cal. Code Reg. § 13151*; *see 14 Cal. Code Reg. § 13328.6(a)*]. The applicant may then file an application for a standard (nonadministrative) permit [*14 Cal. Code Reg. § 13151*; *see 14 Cal. Code Reg. § 13328.6(b)*].

The issuance of an administrative permit will not be effective until after reasonable public notice and adequate time for the review of the issuance has been provided [*Pub. Res. Code § 30624(a)*]. It also will not be effective if, at the first meeting following the issuance, one third of the appointed members of the Commission or one third of the members of the governing body of the agency, as the case may be, request that the issuance not become effective [*Pub. Res. Code § 30624(b), (c)*; *14 Cal. Code Reg. §§ 13153, 13328.7*]. If the issuance is ineffective, the application will be treated and processed as an application for a standard (nonadministrative) coastal development permit [*Pub. Res. Code § 30624(b), (c)*; *14 Cal. Code Reg. §§ 13153, 13328.7*]. No approved permit will become effective until a copy of the permit has been returned to the Commission, on which all permittees or their authorized agents have acknowledged that they have received a copy of the permit and have accepted its contents. The acknowledgment should be returned within 10 days following issuance of the permit [*14 Cal. Code Reg. § 13158(b), (d)*].

[ii] Emergency Work

Special application procedures apply to emergencies. An "emergency" is a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property, or essential public services [*14 Cal. Code Reg. § 13009*]. Depending on the nature of the emergency, one of the two alternative procedures discussed below are applicable to work that would have required a coastal development permit under nonemergency circumstances.

If the emergency requires a person or public agency performing a public service to take immediate action to protect life and public property from imminent danger, or to restore, repair, or maintain public works, utilities, or services destroyed, damaged, or interrupted by natural disaster, serious accident, or other emergency, then the permit requirement may be waived [*see Pub. Res. Code § 30600(e)*]. However, a waiver cannot be obtained for emergency work that consists of a permanent erection of structures valued at more than $25,000 [*Pub. Res. Code § 30611*].

In recognition of the fact that these emergencies require "immediate action" [*see Pub. Res. Code § 30611*], waivers are obtained after the fact by reporting specified information to the Executive Director shortly after the disaster or the discovery of the danger [*see Pub. Res. Code § 30611*; *14 Cal. Code Reg. § 13144*]. Although a permit is not required under these circumstances, any person performing this exempt work must also comply, to the maximum extent feasible, with the regulatory procedure (discussed below) for obtaining an emergency permit [*14 Cal. Code Reg. § 13137*; *see 14 Cal. Code Reg. §§ 13136-13143*].

If any emergency coastal development does not qualify for a waiver of the permit requirements of the Act [*see* discussion, *above*], it may be possible to obtain a coastal development permit through an expedited application process [*Pub. Res. Code § 30624*; *see 14 Cal. Code Reg. § 13009* ("emergency" defined)]. These emergency permits are issued by the Commission in the manner prescribed by regulation [*see 14 Cal. Code Reg. §§ 13138, 13139*] if the Commission has jurisdiction over the proposed development pursuant to *Pub. Res. Code § 30519(b)* [*Pub. Res. Code § 30624*; *see* [h], *above*]. A local government may issue an emergency permit if a certified LCP authorizes and regulates the issuance [*see Pub. Res. Code § 30519(a)*], or if the local government has been delegated the authority to issue coastal development permits before certification of its LCP pursuant to *Pub. Res. Code § 30600.5* [*see* [i], *above*], in which case the method of application is governed by regulation [*Pub. Res. Code § 30624(a)*; *see 14 Cal. Code Reg. § 13329.1*].

[iii] "De Minimis" Developments

The Executive Director may issue a waiver from coastal development permit requirements for any de minimis development [*Pub. Res. Code § 30624.7*; *see 14 Cal. Code Reg. §§ 13238-13238.2*]. A proposed development is "de minimis" if the Executive Director determines that it will be consistent with the coastal resources planning and management policies of the Act [*see Pub. Res. Code §§ 30200-30265.5*], and that it involves no potential for any adverse effect, either individually or cumulatively, on coastal resources [*Pub. Res. Code § 30624.7*].

[k] Violations of California Coastal Act

A person may be civilly liable if he or she performs or undertakes development in violation of the California Coastal Act, or performs or undertakes development that is inconsistent with any coastal development permit previously issued by the Commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan. The maximum and minimum amounts of the fines vary depending on whether or not the person intentionally and knowingly violated the Act or permit requirements [*see Pub. Res. Code § 30820(a)-(c)*]. The Commission may also maintain an action for exemplary damages against a person who intentionally and knowingly violates any provision of the Act or an order issued under the Act [*Pub. Res. Code § 30811*].

When the Executive Director has determined that real property has been developed in violation of the Coastal Act, he or she may issue a notification of intention to record a notice of violation (NOV) to be mailed to the owner of the property [*Pub. Res. Code § 30812(a), (h)*]. The owner then has the opportunity to object to the filing of the NOV. If no objection

is made, the NOV will be filed in each county in which all or part of the property is located [*Pub. Res. Code § 30812(b)*]. If the owner files an objection, a public hearing will be held at which the owner may present evidence as to why the NOV should not be recorded [*Pub. Res. Code § 30812(c)*]. If, following the hearing, the Commission finds that a violation has occurred, the NOV will be recorded. If there is a finding that no violation occurred, a clearance letter will be issued to the property owner [*Pub. Res. Code § 30812(d)*].

When the NOV is properly recorded and indexed, it will be considered notice of the violation to all successors in interest in the subject property. It is for informational purposes only, however, and does not constitute a defect, lien, or encumbrance on the property [*Pub. Res. Code § 30812(e)(2)*]. Once the violation has been finally resolved, a clearance letter will be mailed to the owner and a notice of rescission will be recorded in each county office in which the NOV was recorded. The notice will indicate that the NOV is no longer valid and has the same effect as a withdrawal or expungement under *Code Civ. Proc. § 405.61* [*Pub. Res. Code § 30812(f)*].

An NOV may not be issued until existing methods (excluding the commencement of formal administrative or judicial proceedings) for resolving the violation have been utilized and the property owner has been made aware of the possibility that the NOV will be recorded [*Pub. Res. Code § 30812(g)*].

The Commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may, after a public hearing, order restoration of a site if it finds all of the following [*Pub. Res. Code § 30811*]:

- Development has occurred without a coastal development permit from the Commission, local government, or port governing body;
- The development is inconsistent with the California Coastal Act; and
- The development is causing continuing resource damage.

[2] FORM

Application for Coastal Development Permit--Marin County Form

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Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
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14-30B California Legal Forms--Transaction Guide § 30B.223

AUTHOR: Revision Author Andrew L. Faber

§ 30B.223 Application for Permit From San Francisco Bay Conservation and Development Commission

[1] Comment

[a] Use of Form

The form in [2], *below*, is the official application for a permit from the San Francisco Bay Conservation and Development Commission ("BCDC"). Under the McAteer-Petris Act ("Act") [*Gov. Code § 66600 et seq.*], any project involving a substantial change [*see* definition in [d], *below*] in the use of San Francisco Bay or its shoreline requires a permit. These changes may consist of shoreline construction, or dredging, filling, or diking the Bay [*see Gov. Code § 66632(a)*].

This application form may be used to obtain any of the following:

- An administrative permit [*see* [f], *below*];
- A major permit from the BCDC [*see* [g], *below*]; or
- Authorization to proceed with a project under a BCDC regionwide permit [*see* [i], *below*].

This comment also covers emergency permits, even though this form is not used for those permits [*see* [h], *below*].

Copies of this application form are available from the BCDC office at 50 California Street, Suite 2600, San Francisco, CA 94111, (415) 352-3600. The BCDC has also prepared detailed instructions for completing this application [*see* BCDC Application Instructions (March 1998)]. Those instructions recommend that applicants contact the BCDC's staff for assistance in completing the application.

PRACTICE TIP:

BCDC Information Is Available Online. The BCDC has a very helpful internet web site. There is contact information, information on their programs, and downloadable versions of the applicable statutes, regulations, and forms. The BCDC Application Instructions is also available online, as is a companion publication, Applying for Project Approval from BCDC (September 1994). The home page of BCDC is at http://www.bcdc.ca.gov.

For extensive discussions of development in the San Francisco Bay area, see California Environmental Law and Land Use Practice, Ch. 67, *The San Francisco Bay Conservation and Development Commission* (Matthew Bender), and California Real Estate Law and Practice, Ch. 301, *Control by the San Francisco Bay Conservation and Development Commission* (Matthew Bender).

[b] General Guidelines to Completing Application

The form is divided into 12 sections; each section appears in a numbered box. In addition to the completed application, the applicant must provide the BCDC with the materials listed in the checklist that appears at page 2 of the form. These items are described in detail in the BCDC Application Instructions.

The BCDC strongly encourages applicants to submit a draft application if the project is large or complex. The use of a draft application permits the BCDC staff to better advise the applicant on the applicable policies and procedures and on the information that is required to complete the application [*see* Applying for Project Approval From BCDC (September 1994), p. 3].

[c] Overview of Jurisdiction of BCDC

The BCDC administers two state laws, the McAteer-Petris Act [*Gov. Code § 66600 et seq.*; *see* [d], *below*] and the Suisun Marsh Preservation Act of 1977 [*Pub. Res. Code § 29000 et seq.*; *see 14 Cal. Code Reg. § 11200 et seq.*]. In doing so, it issues two legally different types of permits: (1) San Francisco Bay permits, and (2) Suisun Marsh development permits. This comment focuses on the provisions of the McAteer-Petris Act. If counsel is dealing with a project in the Suisun Marsh, he or she should contact the BCDC for information regarding the unique requirements that apply to projects located in that area.

[d] McAteer-Petris Act and San Francisco Bay Plan

The McAteer-Petris Act [*Gov. Code § 66600 et seq.*] was enacted to protect San Francisco Bay as a natural resource and to plan for and control the development of the Bay and its shoreline to their highest potential [*Gov. Code §§ 66600, 66651*]. The BCDC promulgated these policies [*see Gov. Code § 66620*] in the San Francisco Bay Plan (the Plan) [*Gov. Code §§ 66603, 66651*].

Among other things, the Plan provides for all of the following:

- Controlling bay fill [*Gov. Code §§ 66601, 66605*];
- Developing and preserving shoreline [*Gov. Code §§ 66602, 66605.1*]; and
- Preserving saltponds and managed wetlands [*Gov. Code § 66602.1*].

This is accomplished by the issuance or denial of applications for permits for proposed substantial changes in the use of the Bay [*Gov. Code §§ 66604, 66632, 66653*]. A "substantial change in use" means, as to any salt pond or managed wetland, any change in use, including abandonment or the draining of water (except temporary draining for a short period of time in accordance with routine operating practices) [*14 Cal. Code Reg. § 10125(a)*]. As to other areas, that

term means any construction, reconstruction, alteration, or other activity (whether or not involving a structure), if the activity [*14 Cal. Code Reg. § 10125(b)*]:

- Has an estimated cost of $250,000 or more;
- Involves a change in the general category of use of a structure or of land;
- Involves a substantial change in the intensity of use;
- Adversely affects existing public access or future public access as shown on any BCDC permit, the San Francisco Bay Plan, any BCDC special area plan, or any other BCDC planning document; or
- Is a subdivision under the Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see* Ch. 30, *Subdivision Regulation*] or another division of land, including a lot split, that (1) will substantially affect either present or future public access to or along the shoreline, or (2) will substantially affect either the present or future suitability of a water-oriented priority land use site for that priority use. However, this category does not include any subdivision or other division of land that is brought about in connection with the acquisition of an interest in the land by a public agency for wildlife habitat, marsh restoration, public recreation, or public access [*14 Cal. Code Reg. § 10125(b)*].

[e] Area of Jurisdiction of BCDC

The BCDC has jurisdiction over all areas of San Francisco Bay that are subject to tidal action. These subject areas include specifically named creeks, rivers, and flood control channels, sloughs, marshlands (land between the mean high tide and five feet above mean sea level), tidelands (land between the mean high tide and the mean low tide), and submerged lands (land below the mean low tide). The area of jurisdiction also includes (1) a shoreline bank of land extending 100 feet inland (except for any land within this band that the BCDC has specifically excluded from its area of jurisdiction as not being of regional importance to the Bay); and (2) saltponds and managed wetlands that have been diked off from the Bay and that have been used or maintained from November 10, 1966 [*Gov. Code § 66610*; *14 Cal. Code Reg. §§ 10121-10123, 10130-10132*; *see Gov. Code § 66660.1* (exempting certain planned community developments approved before July 1, 1969); *see also* Gov. Code § 66432.2; *14 Cal. Code Reg. § 10660* (exempting construction of certain public service facilities)].

[f] Administrative Permits

[i] Issued for Minor Repairs or Improvements

This form may be used to obtain an administrative permit. An administrative permit is generally processed and issued faster than a major permit [*see* Applying for Project Approval From BCDC (September 1994), p. 3; *see also* [g], *below* (major permits)]. The Executive Director of the BCDC issues administrative permits for projects involving minor repairs or improvements [*Gov. Code § 66632(f)*; *14 Cal. Code Reg. § 10600*; *see 14 Cal. Code Reg. §§ 10601-10624*]. For these purposes, "minor repairs or improvements" means any activity that (1) requires a permit from the BCDC, (2) is either consistent with applicable laws or necessary to the health, safety, or welfare of the public in the entire Bay Area, and (3) falls into one or more of the numerous categories specified in the BCDC regulations [*see 14 Cal. Code Reg. § 10601*]. These categories include construction of a new single boat dock no larger than 1,000 square feet or a new multiple boat dock no larger than 5,000 square feet, routine repairs, reconstruction, replacement, removal, and maintenance that do not involve substantial enlargement or change in use, and building one- and two-family residences and ancillary residential structures on certain parcels [*see 14 Cal. Code Reg. § 10601(a), (b)(2)*; *see also 14 Cal. Code Reg. §§ 10601(f), 10602* (permit process for maintenance dredging and disposal)].

[ii] Submission and Processing of Application

An applicant for an administrative permit must submit one copy of this form, certain supporting documentation, and a filing fee [*see 14 Cal. Code Reg. § 10610*; *see also 14 Cal. Code Reg. §§ 10330(a), 10610(e)* (filing fee)]. If the Executive Director believes that the application is complete and properly qualifies for processing as an administrative permit application, he or she will file the application and notify the applicant of that fact [*14 Cal. Code Reg. § 10611(a)*; *see 14 Cal. Code Reg. § 10611(b)* (notification of rejection of application)].

Before acting on a complete application, the Executive Director will prepare a listing that (1) summarizes the proposed work, (2) provides a summary of all significant environmental points raised during the review process and a staff response to each of those points, and (3) indicates whether the Executive Director recommends approval or denial or has yet to reach a decision [*see 14 Cal. Code Reg. § 10620(a)*]. This listing will be mailed at least five days before a regularly scheduled BCDC meeting date [*14 Cal. Code Reg. § 10620(b)*]. Thereafter, the Executive Director cannot act on the application if either of the following sets of circumstances occurs [*14 Cal. Code Reg. § 10621(a)*; *but see 14 Cal. Code Reg. § 10621(b)* (limited exception to following restrictions)]:

- The BCDC holds a meeting within 14 days of the mailing of the listing, and a majority of the commissioners at that meeting determine (by a vote) that the application should be processed as an application for a major permit; or

- The BCDC does not hold a meeting within 14 days of the mailing, but (1) at least one commissioner submits to the Executive Director, within that 14-day period, a written objection to the issuance of the administrative permit, and (2) at the next BCDC meeting following the objection, a majority of the commissioners at the meeting determine (by a vote) that the application should be processed as an application for a major permit.

If the BCDC determines that the application should be processed as an application for a major permit, the Executive Director will, within five working days, notify the applicant that the permit has been denied and provide information on how the applicant should proceed [*14 Cal. Code Reg. § 10621(c)*]. If the BCDC does not make such a determination, the Executive Director will act on the application within five working days [*14 Cal. Code Reg. § 10621(d)*].

The Executive Director will approve the application if he or she determines that the proposed activity, including reasonable terms and conditions, qualifies as a minor repair or improvement and is consistent with applicable laws [*14 Cal. Code Reg. § 10622*]. If the Executive Director rejects the application, he or she will notify the applicant of the reasons for the denial [*14 Cal. Code Reg. § 10623*]. Thereafter, the applicant may resubmit it to the BCDC as an application for a major permit.

[g] Major Permits

[i] Contents of Application Package

A major permit is any BCDC permit other than an administrative permit, an emergency permit, or a regionwide permit [*14 Cal. Code Reg. § 10300*; *see 14 Cal. Code Reg. §§ 10310-10381*]. The application package must consist of all of the following [*see 14 Cal. Code Reg. § 10310*]:

- This official application form;

- Supporting documentation; and

- Filing fees [*see* Appendix M of BCDC regulations (filing fees)].

[ii] Filing and Processing of Application

The BCDC has 30 days from its receipt of the application to determine whether or not it is complete [*see Gov. Code § 65943* (imposing 30-day deadline for review of application for any development project); *see also § 30B.123*, PP 5-7], unless the applicant requests in writing that the application not be accepted as submitted for filing at that time [*14 Cal. Code Reg. § 10350(a)*; *see 14 Cal. Code Reg. § 10350(b)*]. The Executive Director will either file the application [*see 14 Cal. Code Reg. § 10351(a)*] or decide that it cannot be filed and notify the applicant of this decision [*14 Cal. Code Reg. §§ 10351(b), 10352*].

If the application is accepted and filed, the Executive Director will prepare a summary of the application [*14 Cal. Code Reg. § 10380*] and will normally distribute it to certain interested parties no less than 10 days before the public hearing [*14 Cal. Code Reg. § 10381(a)*; *see* [v], *below*]. However, if the summary application contains an environmental assessment, the Executive Director will distribute it no less than 30 days before the scheduled hearing [*14 Cal. Code Reg. § 10381(b)*].

[iii] Staff Recommendation

The Executive Director must prepare a staff recommendation on the application for presentation at the meeting at which the BCDC will vote on the application [*14 Cal. Code Reg. § 10500*]. This recommendation must be in the form of a proposed BCDC resolution [*14 Cal. Code Reg. § 10500(b)*; *see 14 Cal. Code Reg. §§ 10501* (required contents of resolution of approval), 10502 (required contents of resolution of denial)]. A resolution of approval must state any terms and conditions to which the permit will be subject [*14 Cal. Code Reg. § 10501(c)*; *see 14 Cal. Code Reg. § 10503(b)* (permit must contain those terms and conditions)]. The Executive Director must also prepare for presentation at the meeting a summary of all significant environmental points raised during the process of reviewing the application and a staff response to each of those points [*14 Cal. Code Reg. § 10500(c)*].

[iv] Public Hearing

The BCDC will hold a public hearing on the application [*see 14 Cal. Code Reg. §§ 10400-10423*] after the Executive Director has provided notice of the hearing in the manner required by regulation [*see 14 Cal. Code Reg. § 10401*]. At the hearing, the applicant may present any additional information, and other persons may also speak concerning the application [*see 14 Cal. Code Reg. § 10410*]. Ordinarily, the BCDC will complete the hearing in one BCDC meeting. However, the BCDC may continue the hearing if it feels that there is good reason to do so [*see 14 Cal. Code Reg. § 10420*].

[v] Disapproval or Approval and Permit Issuance

Within 90 days after it files the application, the BCDC will deny or grant the permit. If the application is denied, the BCDC will notify the applicant in a letter that will (1) specify the reasons for the denial and the relevant vote count or contain the text of the resolution of denial, and (2) be mailed no later than 15 working days following denial [*14 Cal. Code Reg. § 10530(a), (b)*]. The applicant may then contest the denial in court, provided the legal proceeding is commenced within 90 days following the date of the BCDC's action [*Gov. Code § 66632(i)*], or submit another application to the BCDC more than 90 days after the date of denial [*Gov. Code § 66632(g)*].

The BCDC will issue the permit if 13 of its members (excluding the two nonvoting federal members) vote to do so [*Gov. Code § 66632(f)*; *see 14 Cal. Code Reg. §§ 10500-10505* (use of staff recommendations), 10510-10515 (voting)], after determining that the project is either necessary to the health, safety, or welfare of the public in the entire Bay Area, or of such a nature that it will be consistent with the Act and the San Francisco Bay Plan [*Gov. Code § 66632(f)*]. The permit may be granted subject to reasonable terms and conditions [*Gov. Code § 66632(f)*; *see 14 Cal. Code Reg. § 10503*].

Within two weeks of completion of the work authorized in the permit, the permittee must file an executed notice of completion with the Executive Director [*14 Cal. Code Reg. § 10540*].

[h] Emergency Permits

The Executive Director must grant an emergency permit, on reasonable terms and conditions, if he or she finds all of the following [*Gov. Code § 66632(f)*; *14 Cal. Code Reg. § 10652*; *see 14 Cal. Code Reg. §§ 10640-10660*]:

- An emergency exists;
- The emergency requires action more quickly than can reasonably occur when the BCDC's procedures for issuing permits are followed; and
- The proposed work would be consistent with applicable laws.

For these purposes, an "emergency" is a situation that poses an immediate danger to life, health, or property [*14 Cal. Code Reg. § 10120*].

Applications for emergency permits may be made by letter if time allows, or by telephone or in person otherwise [*14 Cal. Code Reg. § 10640*]. The application or applicant must describe the nature and location of the emergency and the proposed work. The amount of information provided to describe these aspects of the emergency must be consistent with the time the emergency allows [*14 Cal. Code Reg. § 10641*]. The Executive Director must verify the facts surrounding the emergency, particularly the existence and nature of the emergency, insofar as time allows [*14 Cal. Code Reg. § 10650*]. Within five working days after the receipt of the emergency permit, the permittee must submit to the Executive Director (1) descriptive material concerning the emergency work that is substantially similar to the documentation required in applications for administrative permits [*see* [f], *above*], and (2) all appropriate fees for the work [*14 Cal. Code Reg. § 10653*].

[i] Regionwide Permits

The BCDC may issue, by resolution, a regionwide permit to authorize throughout its jurisdiction a specific category or categories of activities that the BCDC determines will have no substantial impact on the subject areas, such as routine repair and maintenance of existing structures located within San Francisco Bay [*14 Cal. Code Reg. § 11700*; *see 14 Cal. Code Reg. §§ 11710-11716*]. A regionwide permit has the same force and effect as other BCDC permits, and the BCDC may enforce the terms and conditions of a regionwide permit in the same manner as it enforces other permits [*14 Cal. Code Reg. § 11700*].

If the project sponsor believes that the proposed work is covered by such a permit, he or she must submit to the Executive Director a written notice of intent to proceed. The Executive Director will determine whether or not the project is covered by an existing regionwide permit and therefore can be approved without a public hearing or review by the BCDC [*see 14 Cal. Code Reg. §§ 11712, 11713*]. If the project is approved, the Executive Director will provide the sponsor with a copy of the applicable regionwide permit [*14 Cal. Code Reg. § 11714(a)*]. If the project does not qualify under the regionwide permit, the sponsor will be provided with the reasons for the disapproval [*14 Cal. Code Reg. § 11714(b)*]. Thereafter, if the sponsor wishes to proceed with the work, he or she must apply for a major permit [*see* [g], *above*].

[2] FORM

Application for Permit From San Francisco Bay Conservation and Development Commission

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Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsEnvironmental LawNatural Resources & Public LandsWetlands ManagementEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide § 30B.224

AUTHOR: Revision Author Andrew L. Faber

§ 30B.224 Mitigation Agreement Between California Department of Fish and Game and Developer

[1] Comment

[a] Use of Form

The form in [2], *below*, is a mitigation agreement between a developer and the California Department of Fish and Game (the "Department"). The creation of a mitigation agreement would be used in an environmental impact report (EIR) [*see § 30B.218*] or mitigated negative declaration [*see § 30B.217*] as a mitigation measure. It would be deemed to mitigate a significant impact to existing animals or plants, and/or to their habitat, to a level of insignificance. The form comes from an actual agreement in which the developer agreed to relocate a species of special concern, the Western burrowing owl, and to either provide mitigation habitat or to pay the Department a sum sufficient to fund the purchase.

A mitigation agreement would typically come about through the investigation of a site and the preparation of California Environmental Quality Act ("CEQA") documentation. If the area is known to contain habitat for a sensitive species, the Department might suggest at the earliest scoping phase of CEQA compliance (for example, in response to a notice of preparation [*see § 30B.216*]) that there would be such an impact that must be mitigated. Alternatively, if the impact were discovered by the EIR preparers, the Department might raise its concerns in response to receipt of the draft EIR [*see § 30B.210* for a fuller discussion of the CEQA process].

[b] Recitals

Recitals set out the factual background of the Agreement. They describe the existing species problem, and also specify that this agreement does not authorize the "take" of individual wildlife (i.e., it is assumed that no wildlife will be killed, since any individuals found on the site will be relocated).

[c] Protection of Existing Wildlife

Section 3 contains standard measures to be implemented during construction to prevent the loss of any individual animals. Depending on the species, these can have a large financial impact on the contractor. The developer must make sure that his or her contractors understand and honor these provisions, as any violation ultimately will be attributed to the developer.

[d] Habitat Enhancement

In addition to the costs of providing substitute habitat, the developer must also enhance the habitat, if applicable, and must demonstrate that the property selected has suitable habitat values [*see* Section 6].

[e] Funding Requirements

Section 7 is the heavily-negotiated financial heart of the agreement. The Department will want not only that the lands be purchased or conserved, but also that their future management be funded, as well as having its own transaction costs reimbursed. The developer will normally want to fund as little as possible up front, but will have to post some kind of security for the balance. Here the security is in the form of a deposit of funds into an irrevocable escrow account.

[f] Certificate of Public Purpose

Exhibit A to the Agreement is a certificate that must be attached to a deed conveying the property or an easement on the property to a public agency [*see Gov. Code § 27281*]. The form was supplied by the Department.

[g] Escrow Instructions

Exhibit B embodies the security required by the agreement for the balance of the developer's financial obligations under the agreement (unless the mitigation land costs more than foreseen, see Section 7E). Alternatively, a bond or letter of credit might be procured.

[2] FORM

Mitigation Agreement Between California Department of Fish and Game and Developer

MITIGATION AGREEMENT
Between
_____ [***developer***],
a California limited liability company
and the
CALIFORNIA
DEPARTMENT OF FISH AND GAME

Ref. No. _____

This Mitigation Agreement ("Agreement") is made and entered into by and between_____[*name of developer*], a California limited liability company ("Owner") and the California Department of Fish and Game (the "Department"), a Department of the State of California, collectively the "Parties."

The purpose of this Agreement is to mitigate significant environmental impacts to the Western burrowing owl (*Athene cunicularia*, sometimes referred to herein as "burrowing owl" or "owl"), caused by the build out of the existing_____[*property name*] and an adjacent 4.5 acre grassland area. The Western burrowing owl is a State designated Species-of-Special-Concern.

RECITALS

A. WHEREAS, Owner proposes razing and redeveloping a commercial/residential community on the land of an existing shopping center located [*location*], and approximately 4.5 acres of undeveloped grassland habitat in_____[*city*], California (the "Project"). Owner proposes to mitigate for impacts to a single owl or a pair of burrowing owls and habitat essential for their survival which occurs on the parcels proposed for development; and

B. WHEREAS, the Environmental Impact Report ("EIR") for the Project found that significant environmental impacts to the Western burrowing owls will occur as a result of development; and whereas the Department is a responsible agency under the California Environmental Quality Act ("CEQA"); and

C. WHEREAS, Owner and the Department have reached agreement on one acceptable way to mitigate the significant environmental impacts to the Western burrowing owls; and

D. WHEREAS, the Department requires mitigation of Western burrowing owl habitat at the ratio of 6.5 acres of owl habitat for every pair of owls or single owl located in the project area; and

E. WHEREAS, the Department is trustee for the fish and wildlife resources of the State of California and has jurisdiction over the conservation and protection of fish, wildlife, and native plants, and the habitat necessary for biologically sustainable populations thereof pursuant to *California Fish and Game Code Section 1802*; and

F. WHEREAS, Western burrowing owls and approximately 4.5 acres of habitat occurs on the parcel identified for development; and

G. WHEREAS, development of the present Project will result in permanent impacts to a single owl or a pair of burrowing owls; and

H. WHEREAS, the Department desires, consistent with the policies of *California Fish and Game Code Section 1802*, that there be permanent protection for burrowing owls and their habitat to assure the conservation, restoration, and long-term survival of this species; and

I. WHEREAS, Owner agrees to undertake the mitigation measures set forth in this Agreement to offset the adverse impacts to burrowing owls caused by the project; and

J. WHEREAS, the Project will not result in the take of individual burrowing owls, which is prohibited by *Fish and Game Code Section 3503.5*, and whereas measures will be implemented to assure that no take will occur through the eviction of burrowing owls from the proposed construction site during the nesting season.

NOW, THEREFORE, in consideration of the foregoing recitals and of the mutual promises, obligations, and covenants herein contained, the Parties agree as follows:

1. NOTIFICATION

Owner intends to pursue development of the Project upon execution of this Agreement. This Agreement serves as notification that Owner intends to commence ground disturbing activities on the land underlying the Project, including some or all of the approximately 4.5 acres.

2. RESPONSIBLE PARTY

By execution of this Agreement, Owner is notifying the Department that_____[*name of individual*], or his/her designee, is responsible for overseeing compliance with this Agreement.

3. EVICTION OF OWLS, BUFFER ZONES, AND REPORTING OF TAKE

Owner agrees to comply with the following restrictions during construction of the Project:

A. No burrowing owls will be evicted from burrows during the nesting season (February 1 through August 31). This Agreement authorizes eviction outside the nesting season pending receipt of formal written approval from the Department authorizing the eviction.

B. A 250-foot buffer, within which no new activity will be permissible, will be maintained between Project activities and nesting burrowing owls. This protected area will remain in effect during the Western burrowing owl's nesting season, or at the Department's discretion and based upon monitoring evidence, until the young owls, if any, are foraging independently.

C. If an accidental take occurs, Owner will contact the Department immediately.

4. ACQUISITION OF HABITAT LANDS

A. Owner agrees to acquire and preserve an area of 6.5 acres of existing burrowing owl foraging and breeding habitat management (HM) lands. Alternatively, suitable habitat not currently sustaining a burrowing owl population but that (at Owner's expense) can be suitably modified to become HM lands may be provided. This acreage is based on 6.5 acres of habitat for a single owl or a pair of owls.

B. HM lands acquired by Owner shall be transferred to the Department in fee title or preserved through a conservation easement or a declaration of deed restriction that is approved by the Department. In lieu of transfer to the Department, the HM lands may be transferred to a non-profit corporation or public entity approved by the Department under terms approved by the Department. Owner agrees to obtain the Department's approval of the HM lands for their biological suitability prior to acquisition under this agreement or any transfer.

5. LAND RATIO REQUIREMENT

The required HM lands acreage is based upon the agreement between Owner and the Department that the development site is utilized for foraging and/or breeding habitat by one pair of owls, or by a single owl and that one acceptable method of mitigating impacts to burrowing owls and their habitat is off-site preservation of existing burrowing owl habitat at a ratio sufficient to sustain the displaced birds or an equivalent population of burrowing owls.

6. CONDITIONS OF HABITAT ENHANCEMENT

A. The HM lands must comprise existing burrowing owl habitat, or Owner must undertake habitat enhancement measures. Enhancement measures intended to fulfill suitability requirements for HM lands must be reviewed and approved by the Department. Owner agrees to demonstrate that the HM lands are suitable for burrowing owl mitigation by providing information that shows burrowing owl distribution on the proposed HM lands or in the vicinity. The total acreage of HM lands protected through this Agreement may exceed the 6.5 acres required, because areas of the HM lands that are not suitable for burrowing owls will not be applied to the total mitigation requirement. Any HM lands protected for the purposes of this Agreement must include areas on-site where burrowing owls can breed successfully. Owner will be responsible for creating breeding habitat (artificial burrows) on the HM lands if it is determined to be

necessary by the Department. Owner agrees to provide the Department a recent preliminary title report and Level I environmental report for the HM lands. All documents conveying HM lands and all conditions of title are subject to the approval of the Department, the Department of General Services and, if applicable, the Fish and Game Commission.

B. Owner agrees to acquire 6.5 acres of HM lands within 18 months of the execution of this Agreement. This requirement will mitigate impacts to burrowing owl habitat caused by grading and development activities from the Owner project.

C. If Owner fails to complete the acquisition of 6.5 acres of HM lands within 18 months, or fails to perform other duties identified in this Agreement within the time periods specified, the Department, at its option, may demand that Owner cure its breach forthwith. The Department may draw upon the security to complete the required acquisition, enhancement, and management of HM lands and may pursue other remedies if Owner fails to cure its breach upon demand.

7. FUNDING REQUIREMENTS FOR MITIGATION LANDS

A. Owner shall enhance burrowing owl habitat on the HM lands if the species is not already found on the HM lands, and if the Department approves proposed enhancements as a means of fulfilling suitability requirements on lands not presently suitable. In addition, Owner shall be responsible for initial protection and enhancement measures on the HM lands; these measures may include but are not limited to fencing, trash clean-up, artificial burrow creation, grazing or mowing, and any habitat restoration deemed necessary by the Department. Alternatively, Owner may fund the Department's initial protection and enhancement activities on the HM lands by providing the Department a check in the amount of $_____ drawn from a banking institution located within California. Any unobligated funds for initial protection and enhancement of the HM lands shall be returned to Owner upon completion of all such activities.

B. Owner agrees to provide the Department (or non-profit corporation or other public entity, as applicable) with a check in the amount of $_____ to establish an endowment for the long-term management of the HM lands. Owner shall transfer these funds to the Department, or its designee, upon the Department's approval of the biological suitability of the HM lands, exceptions and conditions of title, and acquisition by the Department or an agent approved by the Department of HM lands as provided herein. The funds shall be in the form of a check drawn from a banking institution located within California. Such funding shall be used as principal for a permanent capital endowment. Interest from this amount shall be available for operations, management, and protection of the HM lands acquired pursuant to this Agreement. Operation, management, and protection activities may include reasonable administrative overhead, biological monitoring, improvements to biological carrying capacity, law enforcement measures, and any other actions designed to protect or improve the habitat values of the HM lands. Money received by the Department pursuant to this provision shall be deposited in a special account established pursuant to *Government Code Section 16370*. The Department may pool the endowment with other endowments for the operation, management, and protection of HM lands for local populations of the Western burrowing owl.

C. Owner agrees to reimburse the Department for reasonable expenses incurred as a result of the approval and implementation of this Agreement, including costs of title and documentation review, expenses incurred from other state agency reviews, and reasonable overhead directly related to this Agreement. The Parties estimate that this Agreement will create an additional cost to the Department of up to $_____ per HM lands acquisition transaction processed regardless of the number of acres in each transaction.

D. Owner plans to proceed with the Project prior to fully performing the mitigation described in this Agreement. Owner therefore agrees to secure the performance of its mitigation duties by providing the Department with security in the amount of $_____ within 10 working days from the date of execution of this Agreement. If Owner has not fully performed its duties and obligations under this agreement within 18 months of the execution of this

Agreement, Owner shall pay the Department the estimated cost of performing any unperformed obligation. In the event that Owner does not pay such a sum to the Department within 10 days' written notice of such an amount being due, the Department may draw upon the security provided pursuant to this Agreement and use such funds to acquire, protect, enhance, and manage HM lands. The security shall be approved by the Department and shall be in the form of a trust account, escrow account subject to irrevocable instructions attached as Exhibit B, irrevocable letter of credit, cash payment, or a combination of the aforementioned, or other security approved by the Department. The amount of security specified above includes: (1) $_____ for initial protection and enhancement of the HM lands, (2) $_____ (6.5 acres at an estimated $_____ an acre) for the acquisition and/or preservation of the HM lands, (3) $_____ for an endowment for the long-term management of the HM lands, and (4) $_____ for transaction processing, if required. It is the intention of Owner to post said security by depositing cash with the Department in the amount of $_____, and to provide the remainder of the required security, $_____, in one of the acceptable forms described above.

E. The Parties estimate that Owner's costs for the acquisition and transfer of suitable HM lands totaling 6.5 acres of burrowing owl habitat will be $_____, at an estimated cost of $_____ an acre. In the event that acquisition costs are less than estimated, Owner's obligation shall be the actual acquisition cost and associated expenses described in this Agreement. In the event that actual acquisition costs are greater than estimated, Owner shall not be released from performance of the requirements hereunder unless the Department and Owner agree to modify this Agreement to provide for alternate burrowing owl mitigation measures acceptable to the Department, provided, however, Owner's obligations for the actual acquisition costs shall not exceed $_____ an acre.

F. The Department will authorize the release or return of security to Owner as mitigation duties are completed by Owner. Upon timely request and upon presentation of documentary evidence of full compliance with the terms and conditions of this Agreement, the Department shall release or request the release of the remaining security.

8. OTHER PROVISIONS

A. The Department, its designee, or successor shall hold title to and protect all HM lands conveyed in fee title under this Agreement solely for the purposes of conservation, protection, restoration, and enhancement of the Western burrowing owl and/or its habitats. This covenant shall remain in effect with the land and no use of such land shall be permitted by the Department or any subsequent title holder or assignee which is in conflict with the stated conservation purposes of this Agreement. The Department, its designee, or successor may allow some limited grazing on the HM lands if said uses or the management of said uses do not conflict in any way with the Department's conservation goals for burrowing owls.

B. The Department, its designee, or successor shall record on each deed a statement that the HM lands described in the deed of record have been conveyed to the Department, its designee, or successor for purposes of conservation, protection, restoration, and enhancement of the burrowing owl and its habitat.

C. In the event Owner defaults on any of its material obligations under this Agreement, the Department shall have all rights with respect to any cash security and all remedies available at law or in equity, including specific performance injunction, and without limitation all rights of a secured party pursuant to the California Uniform Commercial Code.

D. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, by overnight delivery or by facsimile.

Notices required to be given to Owner shall be addressed as follows:

_____ [*name, address, and fax number*]

Notices required to be given to Department shall be addressed as follows:

_____ [*name, address, and fax number*]

A party may change its address for notices by giving notice in writing to the other party, and thereafter all notices shall be addressed and transmitted to the new address. Notices shall be deemed given and received upon the earlier of personal delivery, or if mailed, upon the expiration of 48 hours after being deposited in the United States Mail or on the delivery date or attempted delivery date shown on the return receipt, air bill, or facsimile.

E. Any sale or assignment of this Agreement or any of the rights or obligations thereunder is void absent the written consent of the Parties; provided, however, that no consent shall be required for assignment or pledge made by Owner (a) to any company that shall succeed by purchase, merger or consolidation to the properties of Owner; or (b) as security for a debt under the provision of any mortgage, deed of trust, indenture, bank credit agreement, or similar instrument.

F. This Agreement comprises the entire agreement and understanding between the Parties concerning the project, and the mitigation of significant environmental impacts regarding Western burrowing owls and their habitat. This Agreement supercedes all prior and contemporaneous agreements, representations or understandings, whether oral or written.

G. This Agreement shall be governed by the laws of the State of California. Actual or threatened breach of this Agreement may be prohibited or restrained by a court of competent jurisdiction.

H. This Agreement is solely for the benefit of the People of the State of California, by and through the Department or its designated representative, and Owner.

I. From time to time, the Parties shall by mutual agreement execute such instruments and other documents, and take such other actions, as may be reasonably necessary to carry out the terms of this Agreement. This Agreement cannot be amended or modified in any way except by a written instrument duly executed by the Parties. In any action requiring the agreement or approval of either of the Parties, such agreement or approval shall not be unreasonably denied or withheld, so long as it does not substantially alter the Agreements, duties, and remedies of the parties.

J. It is acknowledged that the purpose of this Agreement is to set forth the obligations and rights of the Parties with respect to the project and the mitigation of significant environmental impacts on the Western burrowing owl and its habitat. The Department will not seek further mitigation or compensation for the Western burrowing owl or its habitat from Owner for impacts within the project area.

K. This Agreement shall be immediately effective upon execution by the Parties.

L. This Agreement includes and incorporates the following:

EXHIBIT A--Certificate of Public Purpose

EXHIBIT B--Irrevocable Escrow Instructions

THE PARTIES ACKNOWLEDGE AND ACCEPT the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the last date written below.

OWNER _____, a California limited liability company
By: _____
Its: _____

CALIFORNIA DEPARTMENT OF FISH AND GAME

_____[*Name*]
Regional Manager, Region _____
Dated: _____

Approved as to Form:

_____[*Name*]
Deputy General Counsel

EXHIBIT A

CERTIFICATE OF PUBLIC PURPOSE

This is to certify that the interest in real property conveyed by the deed or grant of the following property _____, dated _____, from _____, to the California Department of Fish and Game (the "Department"), grantee, a governmental agency (under *Section 27281 of the Government Code*) is hereby accepted by the undersigned officer on behalf of the Department, pursuant to authority conferred upon him by resolution of the _____ on _____.

The public purpose of this real property conveyance and the recordation hereof is being accomplished pursuant to the terms and conditions of the Mitigation Agreement ("Agreement") entered into on _____ by and between Owner _____, a California limited liability company, ("Owner") and the Department.

The Agreement, among other terms and conditions not relevant here, provides at paragraph 8:

"The Department, its designee, or successor shall hold title to and protect all HM lands conveyed in fee title under this Agreement solely for the purposes of conservation, protection, restoration, and enhancement of the western burrowing owl. This covenant shall run with the land and no use of such land shall be permitted by the Department or any subsequent title holder or assignee which is in conflict with the stated conservation purposes of this Agreement. The Department, its designee, or successor may allow some limited grazing on the HM lands if said uses or the management of said uses do not conflict in any way with the conservation goals for burrowing owls."

A copy of this Agreement in its entirety may be obtained by interested parties by sending a request to the Director of the Department at the address below.

DEPARTMENT OF FISH AND GAME
STATE OF CALIFORNIA
1416 Ninth Street
Sacramento, CA 95814

By: _____
Title: _____

Authorized Representative
Date: _____

EXHIBIT B

IRREVOCABLE ESCROW INSTRUCTIONS

_____[*Date*]
_____[*Name of Escrow Company*]
_____[*Address*]

Re: Escrow Account number _____ by [*developer*], for the benefit of the California Department of Fish & Game
Dear Sir or Madam:

This letter will constitute irrevocable escrow instructions on behalf of Owner [*developer*], a California limited liability company ("Owner") for the benefit of the California Department of Fish & Game (the "Department"). The funds deposited herewith are intended to be used towards the acquisition of suitable habitat for burrowing owls or credits at a mitigation bank to mitigate the impact on burrowing owls caused by the development of Owner's project, all as set forth in that certain Mitigation Agreement between Owner and the Department (the "Agreement") effective on_____[*date*].

Owner hereby deposits with you the sum of $_____ cash. This sum shall be placed by you in an interest bearing account, said interest for the benefit of Owner, and shall be disbursed only as follows:

A. In the event that Owner is able to identify suitable mitigation land for purchase and opens an escrow account (the "Purchase Escrow Account") with your company or another financial institution to consummate said purchase, then, upon the written authorization of a representative of the Department, funds equal in an amount to complete said purchase shall be transferred by you to the Purchase Escrow Account for said purchase, and the funds shall be used exclusively for said purchase. In the event the purchase of the mitigation land is not consummated, then the funds shall be returned immediately from the Purchase Escrow Account to this escrow to be disbursed pursuant to these instructions.

B. In the event that Owner is able to purchase credits for mitigation at a mitigation bank, then, upon the written authorization of a representative of the Department, funds shall be transferred by you to the mitigation bank solely for the purchase of said credits.

C. In the event that Owner obtains suitable mitigation land without the use of these funds, then, upon the written authorization of a representative of the Department that the mitigation conditions in the Agreement have been satisfied by said acquisition, said funds shall promptly be returned to Owner.

D. If the funds have not been earlier disbursed in accordance with the preceding subparagraphs on or before_____[*date*], then upon the written notice of a representative of the Department that Owner is in default under the Agreement, the funds shall be promptly disbursed to an authorized representative of the Department.

E. Upon the written authorization of a representative of the Department, any remaining funds, and accumulated interest thereon, shall be promptly returned to Owner.

F. Upon the complete disbursement of these funds, this escrow shall be closed. These escrow instructions are irrevocable. Owner hereby agrees to execute any subsidiary or supplemental instructions not inconsistent with these instructions that may be necessary or convenient to carry out the purposes of this escrow.

Dated: _____ Owner: _____
By: _____
Its: _____

ACCEPTANCE OF ESCROW INSTRUCTIONS

_____[*Name of Escrow Company*] hereby acknowledges and agrees to the forgoing Escrow instructions executed by Owner for the benefit of the Department, Escrow Account no. _____.

Dated: _____ _____ [*Name of Escrow Company*]
By: _____
Its: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsFish & Wildlife ProtectionEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30B ZONING, BUILDING, AND ENVIRONMENTAL ENTITLEMENTS AND PERMITS
PART IV. FORMS
B. Environmental Approvals

14-30B California Legal Forms--Transaction Guide §§ 30B.225-30B.229

AUTHOR: Revision Author Andrew L. Faber

[Reserved]

§§ 30B.225[Reserved]



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C. Miscellaneous Forms

14-30B California Legal Forms--Transaction Guide § 30B.230

AUTHOR: Revision Author Andrew L. Faber

[Reserved]

§ 30B.230[Reserved]



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PART IV. FORMS
C. Miscellaneous Forms

14-30B California Legal Forms--Transaction Guide § 30B.231

AUTHOR: Revision Author Andrew L. Faber

§ 30B.231 Application for Building Permit--Santa Clara County Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is the application for a building permit used by the Santa Clara County Building Inspection Office for unincorporated areas of that county. It is representative of application forms used throughout the state by city and county building standards enforcement agencies. When properly executed, the applicant's copy of this application becomes the building permit.

This form is reproduced here for illustrative purposes only. The form, along with other county building permit applications, can be filled in and filed using the E-Permit application for online filings [*see* http://www.sccgov.org].

For the application form for a permit to construct a mobilehome park or a related enterprise or facility in a mobilehome park [*see 25 Cal. Code Reg. § 1032(a)*; *see also Health & Safety Code § 18500*], see Ch. 39, *Mobilehome Parks* .

[b] Filing Procedures

The main types of permits issued by cities and counties for construction projects are building, plumbing, electrical, and mechanical (or heating and ventilation). Although some local jurisdictions only require one application for these four types of permits, most require separate applications for each. This chapter does not reproduce applications for plumbing, electrical, and mechanical permits.

Various names are applied to local building standards enforcement agencies, including "central permit bureau," "building department," "building inspection department," and "building and safety department." Some local jurisdictions have centralized permit issuance procedures, with one agency having either sole control over the approval and issuance of all construction permits or the responsibility for transferring the applicant's papers to other concerned

agencies for their approval. The majority of local jurisdictions are centralized only as to the four basic permits (building, plumbing, electrical, and mechanical) and usually require the applicant to seek other permits or approvals from the appropriate local agencies. Under this arrangement the function of the building department is usually ministerial and not discretionary. That is, it checks the plans for compliance with the applicable building codes, ordinances, rules, and regulations and issues permits based on this compliance. The discretionary function is handled by a planning department or other development control agency.

Although the issuance of building permits has traditionally been thought of as a ministerial action, it is possible for local ordinances to include provisions that actually make their grant a discretionary action [*see § 30B.211* (Notice of Exemption From CEQA Requirements) for further discussion].

[c] Supporting Documents

Building permit applications generally must be accompanied by an appropriate set of plans and supporting materials. For example, the County of Santa Clara form requires all of the following supporting documents:

- Plot plan.
- Deed showing access, if not shown on assessor's parcel map.
- Foundation plan.
- Floor plan.
- Exterior elevations.
- Cross sections.
- Framing plan.
- Roof plan.
- Construction details.
- Soil report, for new buildings.
- Manufacturers' engineering reports for prefabricated structural framing components.
- Title 24 energy calculations.

The plans and specifications must be accompanied by a signed statement that the person who prepared or was in responsible control of the plans and specifications is licensed to perform those functions. The person's signature and stamp or seal on the plans and specifications constitutes compliance with this requirement [*Bus. & Prof. Code § 5536.2*]. Persons designing any of the following are exempt from the requirement to furnish a signed statement [*Bus. & Prof. Code § 5537(a)*]:

- A single-family wood frame dwelling not more than two stories high and garages or other appurtenant buildings;
- Multiple dwellings containing no more than four dwelling units of wood frame construction not

more than two stories high; or

- Farm or ranch buildings of wood frame construction.

[d] Special Permit Requirements

A city may enact an ordinance prohibiting the issuance of residential building permits until local educational, sewage disposal, and water supply facilities comply with specified standards. The ordinance need not be required by a compelling state interest but must be reasonably related to the welfare of the region it affects [*see Associated Home Builders of the Greater Eastbay, Inc. v. Livermore (1976) 18 Cal. 3d 582, 607-610, 135 Cal. Rptr. 41, 557 P.2d 473]* .

Special statutory provisions govern the terms of building permits issued by a county before the incorporation or annexation of the subject real property. Generally, if an application for a building permit is filed with a county before a vote on incorporation affecting that property, and the permit is issued by the county before the effective date of the incorporation, the permit will remain valid for 180 days from its date of issuance [*Health & Safety Code § 19829(a)*]. A building permit issued by a county for construction on real property subsequently annexed to a city will remain valid for the life of the permit as issued [*Health & Safety Code § 19829(b)*]. Both of the above provisions are subject to various statutory qualifications and to any conflicting local ordinances [*see Health & Safety Code § 19829*].

As a condition to issuing a building permit, an enforcement agency [*see Health & Safety Code § 19870(b)(2)* (definition)] may require a permittee to participate in a preconstruction conference before the process of checking the permittee's submitted plans and specifications can be completed. The purpose of the conference is to review the plans to ensure that the building code is interpreted consistently and that the plans are adequately and sufficiently detailed [*Health & Safety Code § 19872(a)*; *see Health & Safety Code § 19872(b)* (participation of other appropriate enforcement agencies)]. The agency may require the permittee to maintain at the project site a set of plans and specifications that reflect any points of discussion, understandings, or agreements derived from the conference [*Health & Safety Code § 19872(c)*].

With some exceptions, once a tentative map or a parcel map has been approved for a subdivision of single-or multiple-family residential units, a local agency may not condition the issuance of a building permit or equivalent permit on the satisfaction of conditions that the city or county could have imposed as a condition to the previously approved tentative map or parcel map. This prohibition applies from the time the tentative or parcel map is approved until five years after the final or parcel map was recorded [*Gov. Code § 65961*; *but see Gov. Code § 65961(e), (f)*]. Exceptions to this prohibition permit a local jurisdiction to (1) impose subsequent conditions if they are required by state or federal law or are necessary to protect the health or safety of the residents, (2) withhold or refuse to issue a permit if the local agency finds it must do so to comply with state or federal law, or (3) assure compliance with the applicable zoning ordinance [*Gov. Code § 65961(a)-(c)*]. The section does not prevent the imposition of later-enacted development fees (nor, presumably, application of later-enacted building code requirements) [*see Golden State Homebuilding Associates v. City of Modesto (1994) 26 Cal. App. 4th 601, 31 Cal. Rptr. 2d 572]* .

No city or county may require an applicant for a building or encroachment permit to file a certificate of insurance evidencing coverage for bodily injury or property damage liability as a condition to the issuance of either (or both) of those permits, unless that requirement is imposed by ordinance [*Gov. Code § 53080.5(a)*]. This does not apply to contracts for public works of improvement entered into by a city or county [*Gov. Code § 53080.5(b)*].

[e] Fees

Required fees often include the following:

- Filing fees;

- Plan checking fees;
- Site inspection fees;
- Permit issuance fees;
- Development or aesthetic control fees [*Health & Safety Code §§ 17951, 18502, 19132.3*];
- Plan maintenance fees [*Health & Safety Code § 19852*];
- Strong motion instrumentation fees [*Pub. Res. Code § 2705*];
- Hazard zone administration fees [*Pub. Res. Code § 2625*]; and

Various kinds of development impact mitigation fees or dedications may also be imposed by local ordinance at the building permit stage. These might include, for example, a public facilities fee, transit development fee, or an open space dedication requirement [*see Gov. Code § 65567* (building permit must be consistent with open space element of general plan)].

[2] FORM

Application for Building Permit--Santa Clara County

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseSpecial Permits & Variances



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§ 30C.syn Synopsis to Chapter 30C: AGREEMENTS WITH ARCHITECTS, ENGINEERS, AND OTHER DESIGN PROFESSIONALS

§ 30C.01 California Statutes

§§ 30C.02-30C.04 [Reserved]

§ 30C.05 Law Reviews and Periodicals

§ 30C.06 Annotations

§ 30C.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§§ 30C.08-30C.09 [Reserved]

§ 30C.10 Overview of Professional Areas of Competence

[1] Architecture

[2] Engineering and Civil Engineering

[3] Landscape Architecture

[4] Land Surveying

[5] Interior Design

§ 30C.11 Construction Organizations and Standardized Agreements

§ 30C.12 Regulation and Role of Architects

[1] Licensing

[a] In General

[b] Exemptions

[2] Overview of Services

[3] Services Rendered Prior to Commencement of Construction

[4] Services Performed During Course of Construction

[5] Construction Supervision or Observation

§ 30C.13 Owner-Architect Agreement

[1] Contents Generally

[2] Architect's Compensation

§ 30C.14 Role of Engineer

§ 30C.15 Professional Consultants

§ 30C.16 Design Documents

[1] Requirements of Architects Practice Act

[a] Preparer's Signature and Stamp

[b] Preparation by Unlicensed Persons

[c] Liability and Responsibility of Person Signing Documents

[2] Civil Engineering Documents

[a] Preparation

[b] Liability and Responsibility of Person Signing Plans

[3] Ownership

§ 30C.17 Insurance

§ 30C.18 Design Professionals' Liens

§ 30C.19 Actions Against Architects

[1] Negligence

[2] Cost Estimates

§§ 30C.20-30C.99 [Reserved]

§ 30C.100 Project

[1] Facts

Scope

[2] Documents

Scope

§ 30C.101 Design Professional

[1] Facts

Scope

[2] Documents

Scope

§ 30C.102 Consultants

[1] Facts

Scope

[2] Documents

Scope

§§ 30C.103-30C.109 [Reserved]

§ 30C.110 Budgetary Considerations

Scope

§ 30C.111 Miscellaneous Considerations

Scope

§§ 30C.112-30C.119 [Reserved]

§ 30C.120 Selection of Prime Design Professional

Scope

§ 30C.121 Selection and Retention of Consultants

Scope

§§ 30C.122-30C.129 [Reserved]

§ 30C.130 Project Documentation

Scope

§ 30C.131 Miscellaneous Responsibilities

Scope

§§ 30C.132-30C.199 [Reserved]

§ 30C.200 Standard Form of Agreement Between Owner and Engineer for Professional Services [EJCDC Form 1910-1]

[1] Comment

[a] Use of Form

[b] Modifications

[c] Description of Basic Services

[d] Construction Phase Obligations Relating to Project Site

[i] Resident Project Representative

[ii] Engineer's Visits to Project Site

[e] Additional Services

[f] Project Data

[g] Owner's Use of Consultants

[h] Method of Payment of Engineer

[i] Agreements for Less Than Customary Full Engineering Services

[j] Mediation and Binding Arbitration

[2] FORM

Standard Form of Agreement Between Owner and Engineer for Professional Services [EJCDC Form 1910-1]

§ 30C.201 [Reserved]

§ 30C.202 Contract Between Owner and Civil Engineer to Plan, Map, and Supervise Development of Subdivision

[1] Comment

[a] Use of Form

[b] Compensation of Engineer

[2] FORM

Contract Between Owner and Civil Engineer to Plan, Map, and Supervise Development of Subdivision

§§ 30C.203-30C.219 [Reserved]

Scope

§ 30C.220 Standard Form of Agreement Between Owner and Construction Manager [AGC Document 510]

[1] Comment

[a] Use of Form

[b] Responsibilities of Construction Manager in General

[c] Requirements of Form

[2] FORM

Standard form of Agreement Between Owner and Construction Manager [AGC Document 510]

§ 30C.221 Standard Form of Agreement Between Engineer and Architect for Professional Services [EJCDC Document 1910-10]

[1] Comment

[a] Use of Form

[b] Engineer-Architect Relationship

[c] Architect's Services

[d] Architectural Project Representative

[e] Methods of Payment

[f] Insurance

[g] Signature and Certificate Number of Preparer of Plans

[2] FORM

Standard Form of Agreement Between Engineer and Architect for Professional Services [EJCDC Document 1910-10]

APPENDIX A Standard Form of Agreement Between Owner and Architect [AIA Document B141]

Standard Form of Agreement Between Owner and Architect [AIA Document B141]

APPENDIX B Standard Form of Agreement Between Architect and Consultant [AIA Document C141]

Standard Form of Agreement Between Architect and Consultant [AIA Document C141]



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14-30C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses agreements for the performance of professional design services in connection with a construction project. The design professionals that commonly participate in construction projects include architects, engineers, surveyors, landscape architects, building designers, and interior designers. These professionals may serve in either of the following capacities on a construction project: as the prime design professional, who is solely responsible (pursuant to a contractual agreement with the owner) for the successful completion of the design work; or as a consultant who is retained by the prime design professional, the owner, or the prime contractor to provide a specialized service. This chapter considers several types of design professionals, but focuses on architects because they are usually the prime design professionals for construction projects. Engineers also receive relatively extensive coverage in this chapter because they frequently serve as construction consultants, and are sometimes retained as prime design professionals.

The Legal Background describes the construction services performed by a variety of design professionals. The Transaction Guide contains a guide to the creation of the owner-design professional and design professional-consultant relationships. The Forms section and the appendices reproduce standardized owner-architect and owner-engineer agreements as well as interprofessional agreements (such as an architect-consultant agreement).

One of the first steps that an owner should take after deciding to commence a construction project is to retain a design professional whose services will be required early in the planning and design of the proposed project. Once the design has been completed, the owner will hire a contractor to execute the drawings or plans. Thus, in using this chapter, the practitioner should also consult Ch. 30D, *Construction Contracts and Subcontracts*, which examines the owner-contractor relationship and contract. There is some overlap in the coverage of these two chapters because they both consider the secondary services performed by design professionals after the completion of the planning and design work. These post-design duties include assisting the owner in retaining a contractor and in supervising, observing, and/or administering the construction work. In most cases, the discussions of post-design work in this chapter will be relatively general and will contain cross-references to the more detailed discussions in Ch. 30D.

In addition to Ch. 30D, the practitioner should consult the following for coverage of construction-related topics: Ch. 30A, *Construction Financing* ; Ch. 30B, *Zoning, Building, and Environmental Permits* ; Ch. 30E, *Joint (Builders') Control Agreements* ; Ch. 31, *Mechanics' Liens* ; Ch. 88, *Licensing of Contractors* ; Ch. 89, *Home Improvement and Specialty Contracts* ; Ch. 90A, *State Government Contracts* ; Ch. 90B, *Federal Government Contracts* .

This chapter does not consider construction litigation in detail because that topic is beyond the scope of this publication. However, this chapter does suggest precautionary steps that may improve the position of the design professional in any litigation that may arise. For a comprehensive discussion of actions by and against architects, see California Forms of Pleading and Practice, Ch. 56, *Architects* (Matthew Bender).



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A. Primary Sources

14-30C California Legal Forms--Transaction Guide § 30C.01

§ 30C.01 California Statutes

Architects Practice Act. *Bus. & Prof. Code § 5500 et seq.*

Licensing requirement. *Bus. & Prof. Code §§ 5500, 5551*.

Practice of architecture. *Bus. & Prof. Code § 5500.1*.

Written contract requirement. *Bus. & Prof. Code § 5536.22*.

Exemptions from licensing requirement. *Bus. & Prof. Code §§ 5537-5537.7*.

Practice of landscape architecture. *Bus. & Prof. Code § 5615*.

Certified interior designers. *Bus. & Prof. Code §§ 5800-5805*.

Exemption from laws governing contractors. *Bus. & Prof. Code § 5803*.

Professional engineer defined. *Bus. & Prof. Code § 6701*.

Practice of civil engineering. *Bus. & Prof. Code §§ 6731-6731.4*.

Practice of land surveying. *Bus. & Prof. Code § 8726*.

Late payment penalty in lieu of interest in private works contracts. *Civ. Code §§ 3319-3321*.



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[Reserved]

§§ 30C.02[Reserved]



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B. Secondary Sources

14-30C California Legal Forms--Transaction Guide § 30C.05

§ 30C.05 Law Reviews and Periodicals

Dibert, *Architects' Site Services Liability: Contract Meets Reality, 25 Tort & Ins. L.J. 810 (1990).*

Elickson, *Shop Drawings for Construction: Who Really Is Responsible? 24 Real Prop., Prob. & Tr. J. 611 (1990).*

Shapiro, *The 1987 AIA A201 General Conditions: An Owner's View, 24 Real Prop., Prob. & Tr. J. 523 (1990).*



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§ 30C.06 Annotations

Annot., Statutes of Limitation: Actions by Purchasers or Contractees Against Vendors or Contractors Involving Defects in Houses or Other Buildings Caused by Soil Instability, 12 A.L.R.4th 866 (1982) .



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§ 30C.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice, ch. 56, *Architects* (Matthew Bender).

California Real Estate Law and Practice, ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis, ch. 22, *Development and Subdivision* (Matthew Bender).

[2] Additional Text References

Acret, Attorney's Guide to California Construction Contracts and Disputes, ch. 7, *Architects and Engineers* (Cal. C.E.B. 2d ed. 1990).

Acret, California Construction Law Manual (West Group 5th ed. 1997).

Architect's Handbook of Professional Practice (AIA 1994).

[3] Legal Encyclopedias

11 Cal. Jur. 3d Building and Construction Contracts.

13 Am. Jur. 2d Building and Construction Contracts.



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[Reserved]

§§ 30C.08[Reserved]



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PART II. LEGAL BACKGROUND

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§ 30C.10 Overview of Professional Areas of Competence

[1] Architecture

The practice of architecture consists of offering or performing, or being in responsible control of, professional services that require the skills of an architect in the planning of sites and the designing (in whole or in part) of buildings or groups of buildings and structures [*Bus. & Prof. Code § 5500.1(a)*; *see Bus. & Prof. Code § 5535.1* ("responsible control" defined)]. An architect's professional services may include any of the following: (1) investigation, evaluation, consultation, and advice; (2) planning, schematic and preliminary studies, designs, working drawings, and specifications; (3) coordination of the work of technical and special consultants; (4) compliance with generally applicable codes and regulations; (5) assistance in the governmental review process; (6) technical assistance in the preparation of bid documents and agreements between clients and contractors; (7) contract administration; and (8) construction observation [*Bus. & Prof. Code § 5500.1(b)*]. For further discussion of an architect's role in the construction process, see *§ 30C.12*.

[2] Engineering and Civil Engineering

A "professional engineer" is a person who renders services or creative work requiring education, training, and experience in engineering sciences and the application of special knowledge of the mathematical, physical, and engineering sciences in certain professional or creative work. This work includes (1) consultation, investigation, evaluation, planning, or design of public or private utilities, structures, machines, processes, circuits, buildings, equipment, or projects, and (2) supervision of construction for the purpose of securing compliance with applicable specifications and design [*Bus. & Prof. Code § 6701*; *see Bus. & Prof. Code § 6700 et seq.*].

Civil engineering has a greater impact on small construction projects than any other branch of engineering. The practice of civil engineering involves the following activities, which are performed in connection with certain fixed works (discussed below): the determination of the physical qualities, economics, use, and design of construction materials; the supervision of engineering construction; the investigation of natural forces; the performance of appraisals or valuations; the preparation or submission of designs, plans, specifications, and engineering reports; the coordination of the work of professional, technical, or special consultants; and the creation, preparation, or modification of electronic or computerized data in the performance of the aboveactivities [*Bus. & Prof. Code § 6731*]. The practice of civil

engineering also includes city and regional planning (insofar as the above activities are involved) [*Bus. & Prof. Code § 6731*], work involving the alignment or elevation of fixed works [*Bus. & Prof. Code § 6731.1(a), (c)*], and incidental land surveying work [*Bus. & Prof. Code § 6731.2*; *see Bus. & Prof. Code § 6731*]. Civil engineers perform these services in connection with fixed works for, among other things, irrigation, flood control, drainage, water power, water supply, sewerage, refuse disposal, foundations, framed and homogeneous structures, and buildings [*Bus. & Prof. Code § 6731*].

In addition to the above activities, a registered civil engineer may practice or offer to practice, either in a public or private capacity, construction project management services. These services include construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project [*Bus. & Prof. Code § 6731.3*; *see Bus. & Prof. Code § 6731.4*].

For discussion of an engineer's responsibilities with respect to the preparation of engineering documents [*see Bus. & Prof. Code §§ 6735-6735.6*], see *§ 30C.16[2]*.

[3] Landscape Architecture

The practice of landscape architecture consists of offering or performing professional land planning and design services for the purposes of landscape preservation, development, and enhancement. These services include consultation, investigation, research, planning, design, responsible construction observation, and the preparation of drawings, specifications, and construction documents [*Bus. & Prof. Code § 5615*].

The practice of a landscape architect may include the following: investigation, selection, and allocation of land and water resources for appropriate uses; feasibility studies; formulation of graphic and written criteria to govern the planning and design of land construction programs; preparation review and analysis of master plans for land use and development; production of overall site plans, landscape grading and landscape drainage plans, irrigation plans, planting plans, and construction details; specifications; cost estimates and reports for land development; collaboration in the design of roads, bridges, and structures with respect to the functional and aesthetic requirements of the areas on which they are to be placed; negotiation and arrangement for execution of land area projects; and field observation and inspection of land area construction, restoration, and maintenance [*Bus. & Prof. Code § 5615*].

It is a misdemeanor to engage in the practice of landscape architecture or to use the title or term "landscape architect," "landscape architecture," "landscape architectural," or any other titles, words, or abbreviations that would imply or indicate that the person is a landscape architect without possessing a valid, unrevoked license to practice landscape architecture in California. It is also a misdemeanor for a person without a valid, unrevoked license to use the stamp of a licensed landscape architect, or to advertise or put out a sign, card, or other device that might indicate to the public that he or she is a licensed landscape architect or qualified to engage in the practice of landscape architecture [*Bus. & Prof.Code § 5640*; *see Bus. & Prof. Code §§ 5615* ("landscape architect" defined), *5650-5659* (licenses)]. Any landscape architect who agrees to provide professional services must provide every client with a detailed written contract. The contract must include, but is not limited to, all of the following [*Bus. & Prof. Code § 5616(a)*; *see Bus. & Prof. Code § 5616(d)* ("written contract" includes contract in electronic form)].

- A description of the services to be provided by the landscape architect to the client.

- A description of any basis of compensation applicable to the contract, including the total price that is required to complete the contract, and the method of payment agreed on.

- A notice that reads: "Landscape architects are licensed by the State of California."

- The landscape architect's name, address, and license number.
- The client's name and address.
- A description of the procedure the parties will use to accommodate additional services.
- A description of the procedure to be used by either party to terminate the contract.

These contract requirements may be waived if the client, after full disclosure, knowingly and in writing states that a contract that complies with the requirements is not necessary [*Bus. & Prof. Code § 5616(b)*].

The contract requirements also do not apply when [*Bus. & Prof. Code § 5616(c)*]:

- The professional services to be rendered by a landscape architect will not require compensation by the client.
- An arrangement as to the basis for compensation and manner of providing professional services may be implied from the fact that the landscape architect's services are of the same general kind that the architect has previously rendered to and received payment from the same client.
- The professional services to be rendered by a landscape architect are (1) to another landscape architect, a licensed architect, a licensed professional engineer, a licensed professional land surveyor, a licensed contractor, a licensed geologist or geophysicist, or (2) to an industrial corporation, if the services are provided in connection with, or incidental to, the products, systems, or services of that corporation or its affiliates.
- The professional services are to be rendered to a public agency.

The laws governing landscape architects in California [*Bus. & Prof. Code § 5615 et seq.*] do not apply to any person who wishes to make plans, drawings, or specifications for any property that he or she owns, or who wishes to make plans or drawings for the selection, placement, or use of plants when the execution of the plans or drawings does not affect the public health, safety, and welfare [*Bus. & Prof. Code § 5641*]. The landscape architect laws also do not apply to golf course architects [*see Bus. & Prof. Code § 5641.5*], irrigation consultants [*see Bus. & Prof. Code § 5645*], and other licensed professionals acting within the scope of their professions [*Bus. & Prof. Code § 5644*].

[4] Land Surveying

The practice of land surveying [*see Bus. & Prof. Code § 8700 et seq.*] includes the following activities: locating, relocating, establishing, reestablishing, or retracing any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries [*Bus. & Prof. Code § 8726(c)*]; and making any survey for a subdivision [*see Bus. & Prof. Code § 8726(d)*]. This practice does not include making surveys for geological and landscaping purposes, provided they do not determine any property lines [*Bus. & Prof. Code § 8727*].

Any person practicing or offering to practice land surveying in California must be licensed as a land surveyor [*Bus. & Prof. Code § 8725*; *see Bus. & Prof. Code § 8701* ("land surveyor"); *see also Bus. & Prof. Code §§ 8740-8752* (licensing procedures and requirements), *8730, 8731* (limited exemptions from licensing requirements)].

[5] Interior Design

A certified interior designer [*see Bus. & Prof. Code § 5800(a)* (definition); *see also Bus. & Prof. Code §§ 5800-5805*]

may obtain a stamp from an interior design organization [*see Bus. & Prof. Code § 5800(b)* (definition)] that certifies that the interior designer has provided the organization with evidence of passage of an interior design examination approved by that organization and certain evidence regarding the education, training, and/or experience that he or she has received in the field of interior design [*see Bus. & Prof. Code § 5801*]. A certified interior designer is exempt from the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*; *see* Ch. 30D, *Construction Contracts and Subcontracts*] to the extent that he or she designs systems for work to be performed by a licensed contractor [*Bus. & Prof. Code § 5803*]. The statutes regulating interior design professionals are scheduled for repeal on January 1, 2013, unless a later-enacted statute, which is enacted before that date, deletes or extends the automatic repeal [*Bus. & Prof. Code § 5810(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawDesign Professionals



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§ 30C.11 Construction Organizations and Standardized Agreements

Architects, engineers, and other design professionals commonly belong to professional, trade, or comparable organizations that represent the interests of their members at the national, state, and local levels. Examples of these organizations include the American Institute of Architects (AIA) and the Associated General Contractors of America (AGC). These organizations promulgate ethical standards and educate and assist their members in the performance of construction-related functions. Perhaps their most important function, from the attorney's perspective, is the publication of standard forms of construction contracts and related documents. These forms are widely used and are considered by many commentators and construction participants to be complete and fair [*see, e.g.,* Sweet, *Your First Construction Contract, 21 Prac. Law. 28 (Mar. 1975)*].

The forms part of this chapter reproduces numerous agreements prepared by professional associations of engineers. AIA forms have been set forth in separate appendices at the end of this chapter pursuant to the terms of the license governing the reproduction of those forms in this publication. The standardized agreements have been reproduced solely for illustrative purposes, and should not be used by counsel in lieu of blank versions obtained from the preparer organizations. Instead, counsel should use the reproduced forms to determine which agreements should be ordered and to commence work on the transaction before receiving the blank originals.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 30C.12 Regulation and Role of Architects

[1] Licensing

[a] In General

Unless a person is licensed to practice architecture under the Architects Practice Act [*Bus. & Prof. Code § 5500 et seq.* (Act); *see Bus. & Prof. Code § 5535* ("person" defined)], it is a misdemeanor for the person to affix a stamp or seal, which represents that the person is licensed in California, to plans, specifications, or instruments of service [*Bus. & Prof. Code § 5536(a)*].

A licensed architect may form a business entity or collaboration with unlicensed persons but the architect's name must appear as the architect on all instruments of service and in no case may the other partners be designated as architects [*Bus. & Prof. Code § 5535.2*; *see Bus. & Prof. Code § 5535.25* ("business entity" and "collaboration" defined)]. However, such a partnership may not recover compensation for any partnership architectural work done by an unlicensed person unless it is done under the licensed architect's responsible direction and control [*Palmer v. Brown (1954) 127 Cal. App. 2d 44, 54-57, 273 P.2d 306]* .

The Act allows a corporation to furnish or supply architectural services by contract, as long as any architects' professional services are offered and provided under the responsible control of a licensed architect or architects [*Bus. & Prof. Code § 5535.3*]. The corporation and its shareholders, officers, directors, and employees rendering professional services who are licensed architects must comply at all times with the Moscone-Knox Professional Corporation Act [*Corp. Code § 13400 et seq.*], the laws regulating professional architectural corporations [*see Bus. & Prof. Code §§ 5610-5610.7*], and all other applicable statutes and regulations [*Bus. & Prof. Code § 5610*; *see W.M. Ballard Corp. v. Dougherty (1951) 106 Cal. App. 2d 35, 39-41, 234 P.2d 745* ; *see also* Ch. 12A, *Professional Corporations*].

Effective January 1, 1986, the design professional classification of "building designer" was abolished in California [*see* former *Bus. & Prof. Code §§ 5500.2, 5500.3, 5552.1*]. It is a misdemeanor for any person to advertise or represent that he or she is a "registered building designer" or is registered or otherwise licensed by California as a building designer [*Bus. & Prof. Code § 5536(c)*].

[b] Exemptions

The Architects Practice Act does not apply to structural, professional, and civil engineers, contractors, landscape architects, and land surveyors when they are working within their own fields of expertise [*Bus. & Prof. Code §§ 5537.1-5537.7*]. Further, the Act does not prohibit unlicensed persons from preparing plans, drawings, or specifications for certain specified structures [*see Bus. & Prof. Code § 5537*; *see also § 30C.16[1][b]*].

For further discussion of the relevant licensing requirements, see California Real Estate Law Practice, Ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender).

[2] Overview of Services

The owner usually retains an architect after obtaining the property and making preliminary planning decisions concerning the use of the land [*see § 30C.120*]. Most owner-architect contracts require the architect to perform basic architectural services in the following areas: schematic design, design development, construction documents, bidding and negotiation, and contract administration [*see* app. A (AIA Doc. B141); *§ 30C.101*, P 2 (examples of these basic services); *see also* Architect's Handbook of Profess ional Practice, Ch. 2.2, *Contractual Issues* (AIA 1987)].

For coverage of some of the most important services typically performed by a project architect, see [3]-[5], *below*. For a discussion of an architect's responsibilities with respect to work performed pursuant to plans, specifications, reports, or other documents signed by the architect [*Bus. & Prof. Code § 5536.25*], see *Section 30C.16[1][c], below*.

[3] Services Rendered Prior to Commencement of Construction

Initially, the architect investigates all aspects of the proposed project and explores alternative approaches to it, arriving at a conclusion concerning the best approach and recommending that approach to the owner. After obtaining the owner's approval of a particular approach, the architect designs the project and translates that design into working documents, project drawings, technical specifications, and contractual and bidding information [*see* Ch. 30D, *Construction Contracts and Subcontracts*]. While studying and designing the proposed project, the architect serves as an independent contractor for the owner [*Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726, 73 Cal. Rptr. 279]* .

During this planning and design phase, the architect will prepare a statement of probable construction cost, which the owner will use to assess the economic feasibility of the project [*see* California Real Estate Law & Practice, Ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender)]. A decision by the owner that the project is not feasible would conclude the owner-architect relationship.

After performing the basic planning and design work, the architect will usually assist the owner in selecting a contractor [*see* Ch. 30D, *Construction Contracts and Subcontracts*]. If the owner uses competitive bidding to select the contractor [*see* Ch. 30D, *Construction Contracts and Subcontracts*] and receives bids that are too high, he or she may have the architect modify the drawings and specifications to reduce the cost of construction.

[4] Services Performed During Course of Construction

During the course of construction, the architect will typically serve as the owner's agent or representative [*see Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 575, 126 P. 351* ; *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726 , 73 Cal. Rptr. 279* ; *see also* [5], *below*]. The architect's specific duties, as described in the owner-architect agreement, will be based on the allocation of responsibilities contained in the owner-contractor agreement [*see* Sweet, *Owner-Architect-Contractor: Another Eternal Triangle, 47 Cal. L. Rev. 645, 646 (1959)*].

During this stage, the architect is essentially responsible for administering the owner-contractor agreement. Among

other things, this involves interpreting the contract documents and any changes to them, establishing standards of acceptability, and judging the contractor's performance [*see* [5], *below*]. The architect is normally expected to be impartial while interpreting the contract documents and judging the performance of the participants [Walker & Rohdenburg, Legal Pitfalls in Architecture, Engineering, and Building Construction, ch. 2, *Legal Pitfalls in the Owner-Architect (Engineer) Relationship: Professional Services*, p. 53 (McGraw-Hill 1968)]. Other construction-related duties of the architect include supervising or observing the work [*see* [5], *below*], issuing certificates authorizing payments to the contractor, determining when the work is substantially complete, and deciding when to authorize final payment [*see* Ch. 30D, *Construction Contracts and Subcontracts ; see also* Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.92 (AIA 1994)].

The owner-architect contract documents normally give the architect limited authority to order extra work, to authorize changes in the work, and/or to determine whether or not compensation is due for work claimed by the contractor to be "extra." Usually any such action requires the owner's approval [*see* Ch. 30D, *Construction Contracts and Subcontracts ; see also* app. A (AIA Doc. B141-1997), P 2.6.13]; however, the parties may agree that the architect's action or decision is binding on the contractor and the owner. For further discussion, see the Legal Background to Ch. 30D, *Construction Contracts and Subcontracts.*

[5] Construction Supervision or Observation

The supervision of construction work does not require a contractor's license [*see Bus. & Prof. Code § 7051*] or an architect's license [*see McDowell v. Long Beach (1936) 12 Cal. App. 2d 634, 637-638, 55 P.2d 934]* . However, licensed architects are qualified to supervise or observe construction [*see Peak v. Richmond Elementary School Dist. (1958) 161 Cal. App. 2d 366, 368, 326 P.2d 860]* , and to act as the owner's agent or representative when supervising construction work [*see Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 299, 136 Cal. Rptr. 603]* .

The extent of the architect's role as project supervisor will usually depend on the make-up of the project team. For relatively large projects, the owner may hire a project representative or construction manager (generally selected by the architect) to provide continuous on-site supervision and to report to the architect [*see* Sweet, *Your First Construction Contract*, Prac. Law., p. 29 (March 1975); *see also §§ 30C.200[1][d][i]* (project representative), *30C.220 [1]* (construction manager)]. On smaller projects, the architect, contractor, or owner may have the primary responsibility for supervising the construction work [*see* Attorney's Guide to California Construction Contracts and Disputes, Ch. 7, *Architects and Engineers* (Cal. C.E.B. 2d ed. 1990)].

Regardless of the size of the project, when a prime contractor is involved, the architect's responsibility for the construction work is typically limited to observing and administering the work [*see* Miller & Starr, Current Law of California Real Estate, ch. 24, *Construction Contracts* (Bancroft-Whitney 2d ed. 1990)]. Under the Standard Form of Agreement Between Owner and Architect: Design and Construction Administration prepared by the American Institute of Architects [*see* app. A (AIA Doc. B141-1997), arts. 2.1-2.9)], however, the parties can choose to allocate to the architect a wide range of responsibilities. These include the traditional responsibility of the overall management and administration of the project, which includes consulting with the owner, researching design criteria, attending meetings, maintaining communications, issuing progress reports, and coordinating the work of the architect's consultants with work performed by the owner's consultants. Other responsibilities that may be specifically allocated to the architect include providing (1) project administration services, such as evaluating the owner's proposed budget, schedule and project site; (2) planning and evaluation services, such as space schematics and flow diagrams, on-site and off-site utility services, energy studies, and site survey; (3) design services, including materials research and specifications; (4) construction and procurement services, which may generally include either bidding or negotiation services; (5) contract administration services, such as site visitation, administration of changes in the work, and construction management; and (6) facility operations services, such as maintenance and operational programming, warranty review, and post-contract evaluation.

An architect must exercise due care in conducting any supervisory responsibilities required by the owner-architect contract. This means properly inspecting and testing the work and carefully certifying that the work is done properly [*Hart v. Buckley (1912) 164 Cal. 160, 163-164, 128 P. 29* ; *see Pancoast v. Russell (1957) 148 Cal. App. 2d 909, 913-914, 307 P.2d 719* ; *see also § 30C.19[1]*].

The owner-architect agreement may also require the architect to serve as an arbiter, resolving disputes between the owner and the prime contractor. When performing this duty, the architect is serving as a quasi-judicial officer with limited immunity from suit, provided that his or her decisions as arbiter do not involve wilful misconduct or malice [*see Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 300, 306, 136 Cal. Rptr. 603]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 30C.13 Owner-Architect Agreement

[1] Contents Generally

While there are obvious practical reasons to justify a formal, written agreement between architect and owner, with the exceptions noted below, such an agreement is also required by statute. The contract must be executed by the architect and the client, or the client's representative, before the architect begins work unless the client knowingly states in writing that work may begin before the contract is executed [*Bus. & Prof. Code § 5536.22(a)*]. At a minimum, the contract must include the following [*Bus. & Prof. Code § 5536.22(a)*]:

(1) A description of the services the architect will provide.

(2) A description of any basis for compensation under the contract and the payment method to which the parties agree.

(3) The names and addresses of both the architect and the client.

(4) A description of the procedure to be used to accommodate additional services under the contract.

(5) A description of the procedure to be used by either party to terminate the contract.

The forms in this chapter meet these requirements.

A written contract is not required by statute under the following circumstances [*Bus. & Prof. Code § 5536.22(b)*]:

(1) When the architect will not be compensated for providing the client with professional services.

(2) When the architect and the client have an arrangement as to the basis for compensation and manner of providing professional services, which is implied by the fact that the services are of the same general kind that the architect has previously rendered to and received payment from the same client.

(3) When the client knowingly states in writing, after full disclosure of the right to use a written contract, that a written contract is not required.

(4) When the architect is rendering services to a registered professional engineer or a licensed land surveyor.

These circumstances notwithstanding, it is good practice to reduce this type of agreement to writing.

A licensed architect who enters into a contract for the performance of architectural services must sign, and affix a stamp to, the contract [*Bus. & Prof. Code § 5536.1(a)*; *see § 30C.16[1]*].

[2] Architect's Compensation

The owner-architect agreement should provide for the architect's compensation [*see § 30C.12 [1]* regarding the requirement that an architect possess a license before receiving compensation for architectural services]. Most agreements provide for one of the following methods of compensation: lump sum plus reimbursable expenses; percentage of construction cost; direct labor cost times a factor; direct labor cost times a factor plus a fixed fee; or salary costs times a factor.

The agreement may establish one or more conditions precedent to the owner's obligation to pay the architect. For example, the parties may condition payment on the owner's ability to obtain financing for the project based in part on initial drawings prepared by the architect [*see Rosenheim v. Howze (1918) 179 Cal. 309, 311-312, 176 P. 456* (requiring good faith effort on part of owner to obtain financing)]. If the owner cannot obtain financing, the owner-architect relationship will terminate, and the terms of the agreement will determine whether or not the architect will be compensated for the preparation of the initial drawings or for other services rendered [*see, e.g., Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 868, 44 Cal. Rptr. 767]* .

Under some agreements, separate fees apply to specified stages of the work, and the owner has the right to terminate the agreement at any time. If the owner exercises the right to terminate, then the architect is compensated according to the schedule of payments for the work performed, and the owner is not liable for any further compensation [*see Kingsbury v. Arcadia Unified School Dist. (1954) 43 Cal. 2d 33, 39, 271 P.2d 40]* .

If the agreement does not provide for the architect's compensation, then California law implies an agreement to pay the reasonable value of services rendered, based on the customary charges for architects for similar services [*Laver v. Hotaling (1897) 115 Cal. 613, 616, 47 P. 593* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 30C.14 Role of Engineer

An owner will retain an engineer as the prime design professional when the major design work involves the practice of engineering [*see § 30C.10[2]*]. Subdividers in particular are likely to hire a registered civil engineer to plan the subdivision and to prepare the necessary improvement plans, subdivision maps [*see Gov. Code § 66434* (final map must be prepared by or under direction of registered civil engineer or licensed surveyor)], and studies and analyses of soil and site conditions [*see § 30C.202[2]* (subdivision development agreement between owner and civil engineer)].

Engineers frequently serve as consultants on construction projects when the prime design professional is an architect. Typically, the engineer/consultant is retained by, and serves as an independent advisor to, the architect [*see § 30C.15*].

An engineer has a duty to exercise the same care, skill, and diligence ordinarily exercised by professional engineers under similar circumstances. The engineer can not insure that the contractor will perform properly in every respect [*see Wynner v. Buxton (1979) 97 Cal. App. 3d 166, 176, 158 Cal. Rptr. 587]* . Instead, the engineer has a duty to exercise reasonable care to see that the contractor complies with the contract documents [*see Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 249, 73 Cal. Rptr. 127* (holding engineering firm liable for damages proximately caused by its failure to conform to prevailing good soils engineering practices in supervising and inspecting a contractor's grading work); *see also* Acret, Architects and Engineers, Ch. 1, *Liability for Negligence* (Shepard's/McGraw-Hill 2d ed. 1977)].

For coverage of the responsibilities of a registered civil engineer for plans, specifications, or other documents prepared and signed by the engineer [*see Bus. & Prof. Code §§ 6735, 6735.1*], see *§ 30C.16[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 30C.15 Professional Consultants

Professional consultants are often employed to supplement the knowledge and experience of the prime design professional. These consultants offer services in highly specialized areas, such as engineering, site planning, landscaping, interior design, elevators, lighting, traffic, parking, and the construction of special building types such as airports, hospitals, laboratories, and schools [*see § 30C.102[1],* P 1]. Professional engineers provide the majority of consulting services [*see* Architect's Handbook of Professional Practice, Ch. 3.4, Practice Topic 3.43 (AIA 1994); *see also § 30C.14*].

A consultant may be retained by the prime design professional or by the owner. When the design professional is an architect, he or she typically retains any structural, mechanical, or electrical engineers, while the owner normally retains the other consultants [*see* California Real Estate Law and Practice, Ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender)].

When the prime design professional retains a consultant, the consultant serves as an independent advisor to the design professional and has no contractual relationship with the owner. The consultant assists the design professional in fulfilling the latter's responsibilities under the owner-design professional contract. The consultant accomplishes this by becoming familiar with the foregoing responsibilities; recommending avenues for their proper execution; and assisting the design professional in planning the project, executing the contract documents, and administering the owner-prime contractor contract. During their association, the design professional coordinates the consultant's activities and provides the consultant with all pertinent information concerning the work.

If the owner contracts directly with a consultant, the latter serves as an advisor to the owner or a project coordinator, and does not have a contractual relationship with the prime design professional. The owner may wish to enter into such a contract when, for example, (1) the owner has worked with the consultant in the past, (2) the owner seeks independent advice, or (3) the services to be performed by the consultant are significantly different from the design professional's contractual obligations [*see* Architect's Handbook of Professional Practice, ch. 3.4, Practice Topic 3.43 (AIA 1994)]. Under this arrangement, the consultant and the design professional cooperate and coordinate their activities so that each may fulfill his or her obligations to the owner [*see* California Real Estate Law and Practice, Ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender)].

The project documentation must recognize and formalize the mutual interdependence between the prime design professional and the consultant. Consequently, the parties must coordinate the design professional's responsibilities under the owner-design professional agreement with the nature, timing, and sequence of the consultant's performance and compensation as described in the consultant's agreement with the design professional or owner [*see* Architect's Handbook of Professional Practice, ch. 3.4, Practice Topic 3.43 (AIA 1994)].

Legal Topics:

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§ 30C.16 Design Documents

[1] Requirements of Architects Practice Act

[a] Preparer's Signature and Stamp

Under the Architects Practice Act [*see Bus. & Prof. Code § 5500 et seq.*; *see also § 30C.12[1]*], all persons who prepare or are in responsible control of plans, specifications, and instruments of service for others must sign those documents and all related contracts. If that person is a licensed architect, he or she must affix a stamp to the documents and contracts as evidence of his or her responsibility for them [*Bus. & Prof. Code § 5536.1(a)*; *see Bus. & Prof. Code § 5536.1(b)* (requirements for stamp or seal)].

[b] Preparation by Unlicensed Persons

Although it is a misdemeanor for a person who is not licensed under the Architects Practice Act to practice architecture in California [*see Bus. & Prof. Code § 5536(a)*; *§ 30C.12[1]*], the Act does not prohibit unlicensed persons from preparing plans, drawings, or specifications for any of the following structures: (1) single-family dwellings of woodframe construction not more than two stories high (excluding any basement); (2) garages or other structures appurtenant to any of the buildings falling within this exemption, provided they are of woodframe construction and are not more than two stories high (excluding basement); (3) agricultural and ranch buildings of woodframe construction, unless the building official having jurisdiction deems that an undue risk to the public health, safety, or welfare is involved; or (4) multiple dwellings of woodframe construction not more than two stories high (excluding basement) and containing no more than four dwelling units [*Bus. & Prof. Code § 5537(a)*]. The above exemption for multiple dwellings must not be construed as allowing an unlicensed person to design multiple clusters of up to four dwelling units each to form apartment or condominium complexes when the total exceeds four units on any lawfully divided lot [*Bus. & Prof. Code § 5537(a)(2)*].

If any portion of any of the structures described above deviates from substantial compliance with conventional framing requirements for woodframe construction in the most recent edition of Title 24 of the California Code of Regulations or tables of limitation for woodframe construction, as defined by the applicable state or local building code, the appropriate building official must require the preparation of plans, drawings, specifications, or calculations for that

portion by, or under the responsible control of, a licensed architect or registered engineer. The documents for that portion must bear the stamp and signature of the licensee/preparer [*Bus. & Prof. Code § 5537(b)*].

It is a misdemeanor for any person who is not licensed to practice architecture in California to affix a stamp or seal to plans, specifications, or instruments of service, if the stamp or seal bears the legend "State of California" or words or symbols that represent or imply that the person is licensed [*Bus. & Prof. Code § 5536(b)*].

[c] Liability and Responsibility of Person Signing Documents

A licensed architect who signs and stamps plans, specifications, reports, or other documents will not be responsible for damages caused by subsequent changes to or uses of those plans or other documents if the following apply: (1) the architect/signer did not authorize or approve those changes or uses in writing; (2) the architect/signer did not unreasonably withhold written authorization or approval; and (3) the architectural service rendered by the architect was not a proximate cause of the damage [*Bus. & Prof. Code § 5536.25(a)*].

The signing and stamping of plans, specifications, reports, or other documents that relate to the design of fixed works will not impose a legal duty or responsiblity on the signer to observe the construction of the fixed works that are the subject of the plans or other documents. However, this does not preclude an architect from entering into a contract to provide construction observation services [*see Bus. & Prof. Code § 5536.25(c)* (definition)] for a client, or modify the liability of an architect for rendering these services, whether pursuant to a contract or otherwise [*Bus. & Prof. Code § 5536.25(b); see § 30C.12[5]*].

[2] Civil Engineering Documents

[a] Preparation

All civil (including structural and geotechnical) engineering plans, calculations, specifications, and reports (also referred to as "documents") must be prepared by, or under the responsible charge of, a licensed civil engineer and must include the engineer's name and license number. Interim documents must include a notation as to the intended purpose of the document, such as "preliminary," "not for construction," "for plan check only," or "for review only" [*Bus. & Prof. Code § 6735(a)*]. All plans and specifications that are permitted or to be released for construction, and all final calculations and reports, must include [*Bus. & Prof. Code § 6735(a)*]:

- The licensee's signature and seal or stamp; and
- The date they were signed and sealed or stamped.

If the plans that are permitted or to be released for construction have multiple sheets, the information listed above must appear on each sheet. If the specifications, final calculations, and reports have multiple pages, the listed information must appear at a minimum on the title sheet, cover sheet, or signature sheet [*Bus. & Prof. Code § 6735(a)*].

Similar requirements apply to electrical and mechanical engineers [*see Bus. & Prof. Code §§ 6735.3(a), 6735.4(a)* (electrical and mechanical engineers, respectively)].

[b] Liability and Responsibility of Person Signing Plans

Notwithstanding *Bus. & Prof. Code § 6735(a)* [*see* [a], *above*], a licensed civil engineer who signs civil engineering documents is not responsible for damage caused by subsequent changes to or uses of those documents, if subsequent changes or uses, including changes or uses made by state or local government agencies, are not authorized or approved by the engineer who originally signed the documents, provided the engineering service rendered by that engineer was not also a proximate cause of the damage [*Bus. & Prof. Code § 6735(b)*]. Similar protection is afforded to licensed civil

engineers and licensed land surveyors who prepare land surveying documents [*see Bus. & Prof. Code § 8761.2*] as well as to electrical and mechanical engineers [*see Bus. & Prof. Code §§ 6735.3(b), 6735.4(b)* (electrical and mechanical engineers, respectively)].

The signing of civil engineering plans, specifications, reports, or other documents that relate to the design of fixed works will not impose a legal duty or responsibility on the signer to supervise the construction of engineering structures or the construction of the fixed works that are the subject of the plans or other documents. However, this does not preclude a civil engineer from entering into a contract to provide construction supervision services for a client, or modify the liability of a civil engineer for rendering these services, whether pursuant to a contract or otherwise [*Bus. & Prof. Code § 6735.1*].

[3] Ownership

Standardized forms usually provide that the design professional owns the project drawings and specifications, whether or not the project is executed [*see, e.g.*, app. A (AIA Doc. B141-1997), P 1.3.2.1; *see also* Ch. 30D, *Construction Contracts and Subcontracts*]. In the absence of such an agreement, it appears that the plans and specifications belong to the owner by virtue of the fact that he or she employed and paid the design professional to prepare these documents [*see May v. Morganelli-Heumann & Assoc. (9th Cir. 1980) 618 F.2d 1363, 1368-1369* ; *see also* Nimmer On Copyright, Ch. 2, *The Subject Matter of Copyright* (Matthew Bender); Miller & Starr, Current Law of California Real Estate, Ch. 24, *Construction Contracts* (Bancroft-Whitney 2d ed. 1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawDefectsReal Property LawConstruction LawDesign ProfessionalsTortsMalpractice & Professional LiabilityProfessional Services



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14-30C California Legal Forms--Transaction Guide § 30C.17

§ 30C.17 Insurance

Most design professionals maintain professional liability (errors and omissions) insurance, public liability insurance, property damage insurance, workers' compensation insurance, and comprehensive liability insurance [*see* California Real Estate Law and Practice, Ch. 431, *The Owner-Architect Relationship and Contract* (Matthew Bender)]. Some design professionals choose not to carry professional liability policies because they consider it inordinately expensive [*see* Acret, Architects and Engineers, ch. 13, *Insurance* (Shepard's/McGraw-Hill 2d ed. 1977)]. Counsel should carefully review any professional liability insurance carried by his or her client because there is little uniformity in the available coverage [Walker & Rohdenburg, Legal Pitfalls in Architecture, Engineering, and Building Construction, ch. 21, *Legal Pitfalls in the Owner-Architect (Engineer) Relationship: Professional Services* (McGraw-Hill 1968)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMalpractice InsuranceArchitects & EngineersInsurance LawMalpractice InsuranceErrors & Omissions PoliciesReal Property LawConstruction LawDesign ProfessionalsTortsMalpractice & Professional LiabilityProfessional Services



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14-30C California Legal Forms--Transaction Guide § 30C.18

§ 30C.18 Design Professionals' Liens

A licensed architect, registered professional engineer, or licensed land surveyor is entitled to a design professionals' lien if he or she enters into a contract with a landowner for the design, engineering, or planning of a work of improvement, and the landowner defaults in or refuses to make any payment required by the contract [*see Civ. Code §§ 3081.1-3081.3*]. To create the lien, the design professional must make a written demand for payment [*Civ. Code § 3081.3(b)*], and then record a notice of lien within the time specified by statute [*Civ. Code § 3081.3(c)*; for a payment demand and notice of lien, *see* Ch. 31, *Mechanics' Liens*]. The lien will be for the lesser of the following: the amount of the design professional's fee for any services rendered prior to commencement of the work of improvement, or the reasonable value of those services. This amount must be reduced, however, by the amount of any deposit or prior payments [*Civ. Code § 3081.2*].

A number of conditions and restrictions apply to design professionals' liens. For example, the lien does not apply to a work of improvement relating to a single-family, owner-occupied residence when the construction costs are less than $100,000 [*Civ. Code § 3081.10*]. Further, the lien will not arise unless a building permit or other governmental approval has been obtained for the work [*Civ. Code § 3081.2*].

For additional discussion, including coverage of the enforcement and expiration of these liens, see Ch. 31, *Mechanics' Liens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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14-30C California Legal Forms--Transaction Guide § 30C.19

§ 30C.19 Actions Against Architects

[1] Negligence

An architect's liability for negligence extends not only to the owner but also to persons other than those in privity of contract with the architect if they foreseeably and with reasonable certainty might be injured by the architect's actions, whether during the course of construction [*see Mallow v. Tucker, Sadler & Bennett, Architects etc., Inc. (1966) 245 Cal. App. 2d 700, 703, 54 Cal. Rptr. 174]* or after the owner has accepted the completed structure(s) [*see Montijo v. Swift (1963) 219 Cal. App. 2d 351, 352, 33 Cal. Rptr. 133]* . The duty even extends to the contractor because the architect, as the judge of performance under the construction contract and the official interpreter of its conditions, must exercise impartial judgment [*Macomber v. State of California (1967) 250 Cal. App. 2d 391, 398, 58 Cal. Rptr. 393]* .

Because persons who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15]* , the services of a design professional are not subject to the doctrine of strict liability [*see Swett v. Gribaldo, Jones & Associates (1974) 40 Cal. App. 3d 573, 575-576, 115 Cal. Rptr. 99]* or the doctrine of implied warranty [*see Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-857, 102 Cal. Rptr. 259]* .

For further discussion of liability for the performance of architectural services, see California Forms of Pleading and Practice, Ch. 56, *Architects* , Pt. II (Matthew Bender).

[2] Cost Estimates

An architect's estimates concerning the cost of a construction project are often the subject of litigation because of the frequency of cost overruns. The architect's attorney can reduce the likelihood that the architect will be held liable for costs exceeding the estimate and the architect's commission by providing exculpatory language in the owner-architect contract [*see* Attorney's Guide to California Construction Contracts and Disputes, Ch. 7, *Architects and Engineers* (2nd ed., Cal. CEB 1990)]. For example, the contract may provide that the architect cannot and does not warrant or represent that bids or negotiated prices will be consistent with estimates prepared by the architect [*see* app. A (AIA Doc. B141-1997), P 5.2.1].

A determination regarding an architect's liability for underestimates must be based on the facts of the particular case because there are no concrete judicial or statutory guidelines to apply. However, as a general rule, the architect will be held liable when he or she also serves as the contractor on the job and the underestimate is fraudulent [*see Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 573-574, 126 P. 351* ; *see also Goldberg v. Underhill (1950) 95 Cal. App. 2d 700, 702, 213 P.2d 516]* , or when the underestimate violates an agreement to keep construction costs below a specified amount [*see Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 204-205, 13 Cal. Rptr. 354]* . However, a finding of architect liability is less likely if the owner should have realized that the estimate was unrealistic and proceeded to enter into contracts that were likely to exceed the estimated amount [*see Benenato v. McDougall (1913) 166 Cal. 405, 407-408, 137 P. 8]* .

For further discussion, see California Forms of Pleading and Practice, Ch. 56, *Architects* , Pt. II (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDefectsReal Property LawConstruction LawDesign ProfessionalsTortsMalpractice & Professional LiabilityProfessional Services



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§§ 30C.20[Reserved]



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14-30C California Legal Forms--Transaction Guide § 30C.100

§ 30C.100 Project

[1] Facts

1. Type of project, e.g.:

    a. Shopping center.

    b. Residential subdivision.

    c. Industrial park.

    d. Office building.

    e. Commercial building or store.

    f. Apartment building.

    g. Duplex or triplex.

    h. Single-family dwelling.

2. Address or other description of location of project site.

3. Size and scope of project, e.g.:

    a. Number of lots or parcels in development.

b. Zoning classification (if known by owner).

c. Concerning proposed structure(s):
(1) Number of structures, units, or stories.

(2) Estimated cost.

(3) Estimated value after completion.

d. Description of surrounding area.

e. Proximity to elementary and secondary schools, airports, fire stations, etc.

f. Plans for water supply and utilities.

4. Primary design discipline required for proposed project, e.g.:

NOTE:
The "primary design discipline" is the profession that encompasses the skills required in connection with the primary design work for the project.

a. Architecture.

b. Engineering.

c. Land surveying.

d. Landscape architecture.

e. Interior design.

[2] Documents

1. Instrument showing legal description of project site.

2. Any financing documents [*see* Ch. 30A, *Construction Financing*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign ProfessionalsReal Property LawFinancingConstruction Loans



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14-30C California Legal Forms--Transaction Guide § 30C.101

§ 30C.101 Design Professional

[1] Facts

1. Concerning any design professional who has already been selected:

a. Name.

b. Address.

c. Profession.

d. Status of professional as:
(1) Individual practitioner.

(2) Partnership.

(3) Corporation.

(4) Joint venture.

e. If applicable, license or certification number.

2. If services of licensed architect are required or desired, nature of services, e.g.:

NOTE:
The following classification of possible services that may be provided by a design professional is based on a listing included in the instructions for the AIA's Standard Form of Agreement Between Owner and

Architect with Standard Form of Architect's Services [***see*** AIA Doc. B141-1997 Instructions, "Identifying the Services Needed for the Project" (pp. 5-7); ***see also*** app. A (AIA Doc. B141-1997), art. 2.8, "Schedule of Services"].

a. Project administration services, which may include:

(1) Program management.

(2) Management and administration.

(3) Owner-consultant coordination.

(4) Project presentation.

(5) Special presentations.

(6) Evaluation of project budget.

(7) Schedule development and monitoring.

(8) Preliminary estimate of cost of work.

(9) Detailed estimate of cost of work.

(10) Owner-supplied data coordination.

(11) Value analysis.

(12) Agency consulting.

b. Planning and evaluation services, which may include:

(1) Programming.

(2) Space schematics and flow diagrams.

(3) Existing facilities surveys.

(4) Economic feasibility studies.

(5) Marketing studies.

(6) Project financing.

(7) Site analysis and selection.

(8) Site development planning.

(9) Detailed site utilization studies.

(10) On-site utility studies.

(11) Off-site utility studies.

(12) Environmental studies and reports.

(13) Energy studies and reports.

(14) Zoning processing assistance.

(15) Geotechnical engineering.

(16) Site surveying.

c. Design Services, which may include:

(1) Architectural design.

(2) Structural design.

(3) Mechanical design.

(4) Electrical design.

(5) Civil design.

(6) Interior design.

(7) Landscape design.

(8) Graphic design.

(9) Special design.

(10) Materials research and specifications.

(11) Special furnishings design.

d. Construction procurement services, which may include:

(1) Bidding or proposal documents.

(2) Reproduction and distribution of bidding or proposal documents.

(3) Special bidding or negotiation addenda.

(4) Analysis of alternates or substitutions.

(5) Pre-bid conference or selection interviews.

(6) Bid or proposal evaluation.

(7) Contract award.

(8) Report of bidding or negotiation results.

e. Contract administration services, which may include:

(1) General administration.

(2) Submittal services.

(3) Site visitation.

(4) On-site project representation.

(5) Payment certification.

(6) Administration of testing and inspection.

(7) Supplemental documentation.

(8) Administration of changes in the work.

(9) Interpretations and decisions.

(10) Project close-out.

(11) Construction management.

f. Facility operation services

(1) Maintenance and operational programming.

(2) Start-up assistance.

(3) Record drawings.

(4) Warranty review.

(5) Facility operations and performance meeting.

(6) Post-contract evaluation.

(7) Tenant-related services.

(8) Project promotion.

(9) Leasing brochures.

3. If primary design work involves practice of engineering [*see §§ 30C.10 [2], 30C.14*], nature of required services:

a. Basic services [*see § 30C.200[1][c], [d]*].

b. Additional services [*see § 30C.200[1][e]*].

c. Less than customary full engineering services [*see § 30C.200[1][i]*].

[2] Documents

1. Copy of owner-design professional agreement owner wishes to use for this project, if applicable.

2. Any brochures, correspondence, or other documentation already obtained from prospective or selected design professionals.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsJoint ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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§ 30C.102 Consultants

[1] Facts

1. Specialized services to be performed by consultants:

NOTE:
The following list of consultant services is based on and derived from a more extensive list prepared by The American Institute of Architects (AIA) [***see*** Architect's Handbook of Professional Practice, Ch. 3.4, Practice Topic 3.43 (AIA 1994)].

a. Design/practice, e.g.:
(1) Accessibility.

(2) Acoustics.

(3) Audiovisual technology.

(4) Civil engineering.

(5) Construction management.

(6) Cost estimating.

(7) Environmental analysis.

(8) Facilities management.

(9) Financial issues.

(10) Fire protection or life safety.

(11) Graphic or interior design.

(12) Landscape architecture.

(13) Lighting.

(14) Market analysis.

(15) Scheduling.

(16) Security.

(17) Soils/foundations.

(18) Telecommunications.

(19) Traffic/parking.

(20) Urban planning.

b. Building type, e.g.:

(1) Airports.

(2) Athletics/sports facilities.

(3) Computer facilities.

(4) Health care facilities.

(5) Laboratories.

(6) Theater/performing arts.

2. Party responsible for retaining each consultant.

NOTE:

When the prime design professional is an architect, he or she typically retains any structural, mechanical, or electrical engineers, while the owner normally retains the other consultants [***see*** California Real Estate Law and Practice, Ch. 431, ***The Owner-Architect Relationship and Contract*** (Matthew Bender)].

3. Role (if any) of owner in selection of consultants to be retained by design professional, e.g.:

a. Recommend particular consultants to design professional.

b. Reserve right to approve consultants.

c. Establish standards governing qualifications of acceptable consultants.

[2] Documents

1. Copy of any consultant agreement owner wishes to use for this project, if appropriate.

2. Any brochures, correspondence, or other documentation already obtained from prospective or selected consultants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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[Reserved]

§§ 30C.103[Reserved]



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B. Preliminary Determinations

14-30C California Legal Forms--Transaction Guide § 30C.110

§ 30C.110 Budgetary Considerations

1. Is owner's budget realistic, i.e., does it include amounts for all potentially applicable expenses and charges?

NOTE:

The design professional and his or her attorney may wish to make a preliminary assessment of the economic feasibility of the proposed project before the design professional enters into a contract with the owner. Whether or not such a preliminary assessment is performed, a design professional who has entered into a contract with an owner should help the owner select the best approach to the project, and then prepare a statement of the probable cost for the project, which the owner and design professional may use to assess the economic feasibility of the project. This Section lists potential expenses that should be taken into account when making either of the foregoing assessments. The following list is based on a checklist set forth in AIA Document D200, Project Checklist (AIA 1995).

a. Land acquisition.

b. Survey and soils reports.

c. Site preparation.

d. Predesign and programming.

e. Architectural and engineering compensation.

f. Special consultants.

g. On-site and off-site improvements.

h. Testing and inspections.

i. Construction.

j. Tenant improvements.

k. Furniture.

l. Equipment.

m. Telecommunications systems.

n. Security.

o. Landscaping.

p. Property taxes.

q. Insurance.

r. Fees for mortgage loan and interim loan.

s. Interest payments.

t. Closing costs.

u. Post-design services.

v. Contingency allowances.

2. Are project budget and schedule compatible?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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14-30C California Legal Forms--Transaction Guide § 30C.111

§ 30C.111 Miscellaneous Considerations

1. Does design professional meet applicable licensing or registration requirements [*see §§ 30C.12 [1], 30C.14*, *30C.16 [2]*; *see also* Architect's Handbook of Professional Practice, Ch. 1.1, Practice Topic 1.13 (AIA 1994)]?

2. Do either of the following present problems in connection with proposed project:

a. Building permits [*see* Ch. 30B, *Zoning, Building, and Environmental Permits*]; or

b. Local special interest or community groups?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseBuilding & Housing Codes



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§§ 30C.112[Reserved]



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C. Procedural Guide

14-30C California Legal Forms--Transaction Guide § 30C.120

§ 30C.120 Selection of Prime Design Professional

NOTE:
The following procedures are not required by law and are offered here as a suggested approach to the retention of a prime design professional for a construction project. Although they are normally used to select an architect, they may be used when the prime design professional is an engineer.

1. If direct selection is desired, take following steps:

NOTE:
This method of selection is most commonly used when the owner has previously worked with a particular design professional and wishes to do so again [***see*** Architect's Handbook of Professional Practice, Ch. 3.2, Practice Topic 3.23 (AIA 1994)].

a. Choose one or more design professionals to contact.

NOTE:
This selection may be based on, among other things, the owner's past experiences with the selected design professional(s), recommendations, the reputation of the design professional(s), or factors peculiar to the project or the owner.

b. Advise owner to request following data from potential prime design professional(s), to extent owner has not already acquired this information:

(1) Legal status:
(a) Individual.

(b) Partnership.

(c) Corporation.

(d) Other.

(2) Names and professional histories of likely key participants in project.

(3) List of recent design projects.

(4) Business and project record-keeping procedures.

(5) Any other information that may be instrumental in determining thoroughness, financial responsibility, and adequacy of candidate's construction supervision functions.

c. Have owner personally interview candidate(s), preferably in offices of candidate(s).

d. Encourage owner to take following steps to investigate work of candidate(s):

(1) Visit prior projects.

(2) Interview owners and contractors of prior projects.

2. If comparative selection method is desired, take following steps:

NOTE:

This method is typically used by sophisticated owners for relatively large projects [***see*** California Real Estate Law and Practice, ch. 431, ***The Owner-Architect Relationship and Contract*** (Matthew Bender); Architect's Handbook of Professional Practice, ch. 3.2, Practice Topic 3.23 (AIA 1994)]. As a practical matter, there is no method of "comparative selection." Instead, that term essentially refers to a relatively formal process of soliciting information from interested design professionals, comparing the candidates, and selecting one of them [***see*** California Real Estate Law and Practice, ch. 431, ***The Owner-Architect Relationship and Contract*** (Matthew Bender)].

a. Solicit submissions from interested and qualified design professionals.

NOTE:

In many cases, the owner will publish or otherwise circulate invitations to apply in the architectural or engineering community. Alternatively, the owner may target particular potential candidates, based on their experience or the recommendations of other owners [***see*** Architect's Handbook of Professional Practice, ch. 3.2, Practice Topic 3.23 (AIA 1994)]. The invitations will provide a general description of the proposed project and the information to be submitted by interested candidates. This information should describe the design professional's experience (including prior projects) and capabilities in terms of staff and available time. The owner may also ask for specific proposals or ideas regarding the proposed project [***see*** California Real Estate Law and Practice, ch. 431, ***The Owner-Architect Relationship and Contract*** (Matthew Bender)].

b. Assist owner in reviewing submissions and selecting most attractive candidates for interviews.

NOTE:

During the interviews, the candidates will make presentations or otherwise indicate how they would approach the project. The owner may wish to have a committee review the submissions, conduct the interviews, and make the final selection or a recommendation to the owner.

3. Once owner has made final selection, take following steps:

a. Negotiate design professional's compensation.

NOTE:

For coverage of common methods of compensating engineers, see *§ 30C.200[1][h]*. In the case of architects, the AIA's Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services [***see*** app. A (AIA Doc. B141-1997)] allows the parties to describe their own compensation arrangements, which may include stipulated sums, multiples, and percentages. If necessary, the compensation provision should identify project phases to which particular compensation methods apply. For additional coverage of the compensation of architects and engineers, see Construction Law, ch. 3, ***Construction and Design Contracts*** (Matthew Bender).

b. Prepare or select contract and have owner and design professional execute it.

NOTE:

Under the Architects Practice Act [*Bus. & Prof. Code § 5500 et seq.*], all persons who prepare or are in responsible control of plans, specifications, and instruments of service for others must sign those documents and all related contracts. If that person is a licensed architect, he or she also must affix a stamp to the documents and contracts as evidence of his or her responsibility for them [*Bus. & Prof. Code § 5536.1(a)*; ***see*** *Bus. & Prof. Code § 5536.1(b)*(requirements for stamp or seal); ***see also*** *§ 30C.16[1]*].

For an owner-engineer agreement prepared by the Engineers' Joint Contract Documents Committee, see *§ 30C.200[2]*. A custom-drafted subdivision development agreement between an owner and a civil engineer is set forth at *§ 30C.202[2]*. Finally, for an owner-architect agreement prepared by the American Institute of Architects, see Appendix A.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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14-30C California Legal Forms--Transaction Guide § 30C.121

§ 30C.121 Selection and Retention of Consultants

1. For each consultant needed for project [*see § 30C.102*], have owner or prime design professional:

a. Verify ability of consultant to comply with requirements of project.

b. Negotiate compensation that is consistent with provisions of one or more of the following documents, as appropriate:
(1) Agreement between engineer and architect [*see § 30C.221[1][e]*].

(2) Agreement between architect and consultant [*see* app. B (AIA Doc. C141-1997)].

2. If design professional is retaining consultant, have design professional disclose to consultant any terms and conditions of owner-design professional agreement from which consultant's duties are derived.

3. Obtain proof of consultant's professional liability insurance coverage, for example:

a. Cancelled check or receipt for premium payment.

b. Any documentation consultant has received from insurer, for example:

(1) Endorsement page(s).

(2) Declaration sheet(s).

4. If applicable, have owner approve design professional's proposed consultant in manner required in owner-design professional agreement, for example:

a. Orally.

b. By any form of writing.

NOTE:

The obligation of a prime design professional to arrange for the performance of services by a consultant is normally an "additional service"--it is not considered one of the basic or standard services provided by the design professional and therefore is not applicable unless specifically mentioned by the parties in the owner-design professional agreement. The agreement will usually require the owner to authorize, in advance and in writing, the performance of this and other additional services listed in the basic agreement [***see, e.g.,*** app. A (AIA Doc. B141-1997, P 2.8.3)]. It is highly unlikely that the provisions of any standardized agreement will impose a more specific requirement governing the authorization of any additional service.

5. Have owner or design professional and consultant enter into contract setting forth terms governing consultant's work on project [*see § 30C.221* (engineer-architect agreement); app. B (AIA Doc. C141-1997, architect-consultant agreement)].

NOTE:

Under the Architects Practice Act [*Bus. & Prof. Code § 5500 et seq.*], all persons who prepare or are in responsible control of plans, specifications, and instruments of service for others must sign those documents and all related contracts. If that person is a licensed architect, he or she also must affix a stamp to the documents and contracts as evidence of his or her responsibility for them [*Bus. & Prof. Code § 5536.1(a)*; ***see*** *Bus. & Prof. Code § 5536.1(b)*(requirements for stamp or seal); ***see also*** *§ 30C.16[1]*].

6. If consultant is retained by design professional, provide consultant with copy of owner-design professional agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMalpractice InsuranceArchitects & EngineersReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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14-30C California Legal Forms--Transaction Guide §§ 30C.122-30C.129

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§§ 30C.122[Reserved]



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14-30C California Legal Forms--Transaction Guide § 30C.130

§ 30C.130 Project Documentation

NOTE:

The American Institute of Architects (AIA) has prepared an excellent checklist of the procedures an architect should follow for the typical construction project [***see*** AIA Doc. D200, Project Checklist (AIA 1995)]. It divides the architect's responsibilities into eight phases, lists the duties commonly required during each phase, and includes space following each item for notes. Counsel may wish to obtain this checklist from any office of the AIA so that he or she can intelligently discuss and monitor the progress of the project. Further, the attorney should advise the owner to maintain his or her own set of records, which need not be as detailed as the design professional's.

1. Advise owner and design professional to maintain detailed records of all construction activity.

2. Periodically, confirm that owner and design professional are maintaining adequate project documentation.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-30C California Legal Forms--Transaction Guide § 30C.131

§ 30C.131 Miscellaneous Responsibilities

1. If project is relatively large, schedule meetings and take any other necessary steps to promote communication among and coordinate efforts of members of construction team.

NOTE:

For smaller projects, the design professional will probably be responsible for this activity. Larger projects typically require the attorney to serve as a team leader simply because of the large number of participants in the construction project (for example, the owner, design professional, construction manager, consultants, contractor, and subcontractors).

2. Monitor actions of project participants as they:

a. Supervise or administer construction work [*see § 30C.12[4], [5]*; *see also* Ch. 30D, *Construction Contracts and Subcontracts*].

b. Complete and manage completion of work [*see* Ch. 30D, *Construction Contracts and Subcontracts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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14-30C California Legal Forms--Transaction Guide §§ 30C.132-30C.199

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§§ 30C.132[Reserved]



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14-30C California Legal Forms--Transaction Guide § 30C.200

§ 30C.200 Standard Form of Agreement Between Owner and Engineer for Professional Services [EJCDC Form 1910-1]

[1] Comment

[a] Use of Form

This form consists of the Standard Form of Agreement Between Owner and Engineer for Professional Services prepared by the Engineers' Joint Contract Documents Committee (EJCDC). Under the terms of this agreement, the engineer will serve as the prime design professional for a particular construction project. For forms that may be used when an architect rather than an engineer will be the prime design professional, see Appendices A (Agreements Between Owner and Architect) and B (Agreements Between Architect and Other Design Professionals) at the end of this chapter.

The EJCDC is a joint committee made up of members of the following national professional organizations of engineers: the National Society of Professional Engineers (NSPE); the American Consulting Engineers Council (ACEC); and the American Society of Civil Engineers (ASCE). The EJCDC offers a group of standardized documents intended to guide engineers in their contractual relationships with owners. The provisions of many of these standardized forms are discussed in the EJCDC User's Guide (EJCDC Doc. No. 1910-50). Counsel should consult that extremely helpful publication before using any of the EJCDC forms, including Form 1910-1 [*see* [2], *below*]. Further, because the EJCDC regularly revises its forms, the attorney must confirm that he or she has the most recent edition of the form and any related guides or commentaries.

This form is intended to be used in conjunction with the Standard General Conditions of the Construction Contract (EJCDC Document 1910-8), which is reproduced in Ch. 30D, *Construction Contracts and Subcontracts* .

[b] Modifications

Standardized forms prepared by the EJCDC are designed to be used in conjunction with each other and offer the advantages of (1) uniformity from project to project, and (2) savings in time spent reviewing and understanding the documents. However, the attorney for any party to a construction contract should be aware that any standardized form

will be somewhat slanted in favor of the members of the preparing organization, and therefore should not hesitate to suggest modifications to the forms that would benefit his or her client. Also, as noted in the forms themselves, a change in one form often necessitates changes in other related forms, and counsel should be diligent in ensuring that the terms of the forms are harmonized.

Modifications to EJCDC Form 1910-1 can be accomplished by completing its preprinted exhibits. Exhibit A ("Engineer's Services"), for example, sets out in detail the services the engineer will perform, supplementing the rather cursory provision contained in the main body of the form. Accordingly, counsel can merely amend the exhibit rather than altering the substance of the primary agreement. Similarly, Exhibits F ("Construction Cost Limit"), G ("Insurance"), H ("Dispute Resolution") and I ("Allocation of Risks") are designed to modify specified portions of the agreement. Finally, Exhibit J ("Special Provisions") may be used to modify any other provisions of the form.

[c] Description of Basic Services

Exhibit A, as incorporated by Article 1 of this form, describes the basic services to be performed by the engineer, dividing them into the following customary phases: study and report phase; preliminary design phase; final design phase; bidding or negotiating phase; construction phase [*see* [d], *below*]; and the post-construction phase. However, because each project will have unique characteristics and requirements, the form and Exhibit A should be modified to describe any services necessitated by those peculiarities and the timing of those services.

[d] Construction Phase Obligations Relating to Project Site

[i] Resident Project Representative

This form and Exhibit A generally presume that the engineer will provide a Resident Project Representative at the project site during the construction phase of the project [*see* [2], P 101(C) and Exhibit A, P A1.05(A)(2), *below*]. This duty is generally considered a "basic service" because many engineers are unwilling to assume responsibility for full construction phase services without providing regular resident services at the site. The scope of the resident's duties should be described in detail in Exhibit D ("Duties, Responsibilities, and Limitations of Authority of Resident Project Representative"). The preprinted provisions of that exhibit provide, among other things, that to protect the owner against defects and deficiencies in the contractor's work, the resident project representative will make extensive on-site observations of the construction work and field checks of the construction materials and assistants. However, the exhibit also provides that the engineer will not supervise, direct, or have control over the contractor's work [*see* [2], Exhibit D, *below*].

For a standardized owner-architect agreement that considers this type of project representation to be an additional service, see Appendix A, AIA Document B141-1997.

[ii] Engineer's Visits to Project Site

Exhibit A of this form provides generally that the engineer will make visits to the construction site at appropriate intervals in order to observe the progress and quality of the work. These visits are not intended to be exhaustive, or to extend to all aspects of the contractor's work. Exhibit A also provides that the engineer will not supervise or control the contractor's work, nor will the engineer have authority over the methods of completion. Finally, the exhibit states that the engineer does not guarantee the contractor's performance or assume responsibility for the contractor's failure to perform on its contractual obligations [*see* [2], Exhibit A, P A1.05(A)(6), *below*]. If, based on these visits, the engineer concludes that the project will not be completed in conformity with the integrity of the design concept, the engineer is to recommend to the owner that the contractor's work be disapproved and rejected while in progress [*see* [2], Exhibit A, P A1.05(A)(7), *below*].

[e] Additional Services

In addition to the foregoing services, Exhibit A of this form lists a number of additional services to be performed by the engineer when the owner authorizes them in writing [*see* [2], Exhibit A, P A*2.01, below*]. Examples of these additional services include the following:

- Preparation of various governmental documents, including loan or grant applications, or environmental impact statements.
- Providing renderings or models for the owner's use.
- Services resulting from changes in scope, extent, or character of the project.
- Preparing special investigations and studies, such as feasibility studies, cash flow and economic evaluations, and rate schedules and appraisals.

Because these services are considered to be additional, the engineer will be entitled to additional compensation for performing them, as provided in Article 4 and Exhibit C of the form.

Exhibit A also details some additional services the engineer must perform or furnish without requesting or receiving express advance authorization from the owner [*see* [2], Exhibit A, P A*2.02, below*]. Generally, these services are limited to those in which the consent of the owner can be inferred, or that arise from emergency situations requiring quick action.

[f] Project Data

Exhibit B ("Owner's Responsibilities") of this form requires the owner to furnish certain project information to the engineer, including all criteria and requirements as to the project, property descriptions, any land use restrictions, and environmental assessment and impact statements [*see* [2], Exhibit B, P B*2.01, below*]. In some cases, the owner may not have access to all portions of this project data, and the parties may contract to have the engineer procure the necessary information. Doing so would be an additional service by the engineer, entitling the engineer to additional compensation [*see* [e], *above*].

[g] Owner's Use of Consultants

Exhibit B ("Owner's Responsibilities") of this form states that if the owner hires a construction manager or other consultant to represent the owner at the site, the parties should prepare an attachment to the exhibit describing the consultant's functions and the extent to which they will affect the obligations of the engineer [*see* [2], Exhibit B, P B2.01(L), *below*]. Counsel should also consider whether the hiring of the consultant will necessitate changes in the portions of the agreement describing the engineer's obligations with respect to the construction [*see* [d], *above*], or in the standard general conditions that relate to the engineer's functions.

[h] Method of Payment of Engineer

Article 4 of this form provides that the owner will pay the engineer for basic and additional services and reimbursable expenses pursuant to the provisions of Exhibit C ("Payments to Engineer for Services and Reimbursable Expenses"). Exhibit C contains alternative compensation provisions, which permit the parties to chose from several possible methods of compensation. As to basic services with a determined scope, Exhibit C provides six options for payment: (1) lump sum; (2) hourly rates; (3) percentage of construction cost; (4) direct labor costs times a factor; (5) direct labor costs, plus overhead, plus a fee; and (6) salary costs times a factor [*see* [2], Exhibit C, alternative PP C*4.01, below*]. The parties should select one of these methods of compensation, complete the appropriate version of the Paragraph

C4.01 of Exhibit C, and discard the remaining versions.

When the services or some portion thereof are of indeterminate scope, certain of these payment options are basically out of the question. In particular, neither side should agree to a lump sum when the scope of the project is uncertain. The remaining portions of Exhibit C recognize this reality, providing for only three payment options as to basic services of an indeterminate scope: (1) hourly rates; (2) direct labor costs times a factor; and (3) salary costs times a factor [*see* [2], Exhibit C, alternative PP C4.02, C*4.03, below*]. Again, the parties should agree on one of these methods of compensation and complete the appropriate versions of Paragraphs C4.02 and C4.03 of Exhibit C.

Reimbursable expenses are provided for in C4.04 and in Appendix 1 to Exhibit C.

[i] Agreements for Less Than Customary Full Engineering Services

Engineers sometimes agree to provide less than the full services customarily performed by members of their profession during a construction project. These agreements fall into three categories. Under the first type, the engineer agrees to perform only design services, that is, the services typically performed during the study and report, preliminary design, and final design phases [*see* [c], *above*]. The second type of agreement is also for design services only, but is used when the parties anticipate that, following the completion of the design services, the engineer will be retained to provide some construction services under a separate or supplemental agreement. If the parties wish this form to serve as the basis for either of those types of agreements, they should make the modifications described in the EJCDC User's Guide (EJCDC Doc. No. 1910-50).

The third type of limited service agreement calls on the engineer to perform construction services only, with no participation in the design phases. However, the EJCDC recommends that engineers refuse to perform contraction services when the related design phases were performed by another party.

[j] Mediation and Binding Arbitration

This form provides for the optional attachment of Exhibit H ("Dispute Resolution"), which requires the parties to submit any dispute to mediation or arbitration. Under that exhibit, the parties may designate a cap on the amount of the claims that are subject to mandatory arbitration, leaving any claims in excess of that cap for litigation.

[2] FORM

Standard Form of Agreement Between Owner and Engineer for Professional Services [EJCDC Form 1910-1]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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14-30C California Legal Forms--Transaction Guide § 30C.201

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§ 30C.201[Reserved]



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14-30C California Legal Forms--Transaction Guide § 30C.202

§ 30C.202 Contract Between Owner and Civil Engineer to Plan, Map, and Supervise Development of Subdivision

[1] Comment

[a] Use of Form

This form is a contract between an owner and a civil engineer under which the engineer agrees to perform a variety of services in connection with the development of a new subdivision. When an owner decides to create a subdivision on undeveloped land, he or she will probably retain a registered civil engineer to do the following: (1) make a survey and conduct soil tests of the property to determine whether or not it can be economically developed; (2) prepare and gain approval of the tentative and final subdivision maps required by the Subdivision Map Act [*Gov. Code § 66410 et seq.*]; and (3) supervise the construction of the required off-site or public improvements [*see* Rabkin & Johnson, Current Legal Forms with Tax Analysis, ch. 22, *Development and Subdivision* , pt. C (Matthew Bender)].

For a complete discussion of the requirements of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* . For a consideration of the financing of subdivision off-site improvements, see Ch. 30A, *Construction Financing* . Finally, for standardized owner-engineer agreements that may be used for any type of construction project, see *§ 30C.200*.

[b] Compensation of Engineer

Because this contract will be executed prior to the preparation of the subdivision maps and the determination of the construction costs, this form provides that the engineer will be paid a fixed professional fee plus an amount equal to a specified multiple of the engineer's direct personnel expenses (i.e., the wages paid to the engineer and the engineer's staff for the work). This form also provides that the direct personnel expenses and all allowable costs will be paid to the engineer monthly, but that the engineer's professional fee will be paid in progress payments following completion of specified portions of the contract.

[2] FORM

Contract Between Owner and Civil Engineer to Plan, Map, and Supervise Development of Subdivision

ENGINEERING CONTRACT

This Contract is made between _____[*name*] of _____ County, California ("Owner"), and _____[*name*] of _____ County, California ("Engineer").

Preamble

Owner wishes to develop a [residential subdivision *or* residential and commercial subdivision *or* planned community subdivision] on the real property ("the Property") [in the City of _____, *or* in an unincorporated area of] _____ County, California, described as follows: [*legal description of property*].

Owner and Engineer hereby agree as follows:

Engineer's Duties

1. Engineer will furnish and perform the following professional services:

(1) Prepare a complete boundary survey of the Property showing all rights-of-way, easements, and other physical burdens now encumbering the land, and stake out all property corners of the Property.

(2) Make necessary soil-bearing tests, investigations, and reports to determine the soil-bearing capacity of the Property, the types of soil contained in the Property, and the amount of filling and other remedial work that may be necessary to render the Property suitable for the purposes intended by Owner.

(3) Prepare a tentative subdivision map for the Property as required by *Government Code Section 66426* and any applicable local ordinances.

(4) Do all things reasonably required to gain approval or conditional approval of the tentative subdivision map by the governmental agencies required by the California Subdivision Map Act or local ordinances to approve the tentative subdivision map.

(5) Prepare a survey and final subdivision map for the Property as required by the California Subdivision Map Act and any applicable local ordinances.

(6) Do all things reasonably required of a licensed civil engineer to gain approval of the final subdivision map by the appropriate governmental agencies; provided, however, that Engineer will not be required to post or become bound on or for any bond or other security required by any governmental agency as a condition to the approval of the map.

(7) Prepare detailed plans, specifications, and cost estimates for all streets, utilities, and other improvements ("the off-site improvements") required by law or otherwise to be installed on the Property by Owner.

(8) Prepare, subject to Owner's approval, the invitations for bids, instructions to bidders, and bid forms reasonably required to enable Owner to award a beneficial contract or contracts for construction and installation of the off-site improvements.

(9) Receive bids, and assist Owner in evaluating any bids received, for the construction and installation of the off-site improvements.

(10) Exercise general supervision over the work of any contractor or contractors employed by Owner to construct and install the off-site improvements; provided, however, that Engineer will not guarantee the performance of any contract or contracts for the construction and installation of the off-site improvements awarded by Owner to any contractor or contractors.

Amount of Compensation Payable to Engineer

2. Owner will pay to Engineer, as compensation for the services agreed to be furnished and performed by Engineer under this Contract, the following amounts:

(1) A professional fee of $_____.

(2) An amount equal to _____ times the direct personnel expenses incurred by Engineer in performing this Contract. The term "direct personnel expenses incurred by Engineer" means the cost to Engineer of time spent by Engineer or Engineer's employees, including engineers, designers, draftspersons, specification writers, surveying crews, typists, and project representatives, in performing services required by this Contract. In determining these costs, Engineer's own time must be valued at $_____ per hour, and the time of Engineer's employees must be calculated according to their regular rates of pay and the costs of vacation, sick leave, and other employee benefits furnished the employees pursuant to union contracts or Engineer's normal employment practices.

(3) Actual expenses incurred by Engineer under this Contract for the following: long distance telephone calls; telegrams; travel by Engineer or Engineer's employees to locations more than _____ miles from the Property (including transportation costs not exceeding _____ cents per mile and living expenses while on the trips of $_____ per day); and fees paid pursuant to statute or ordinance to governmental agencies or bodies required to approve the tentative or final subdivision maps for the Property.

Manner of Payment of Costs

3. On or before the _____ day of each calendar month, Engineer must prepare, certify as correct, and deliver to Owner an itemized statement of all expenses described in Paragraphs 2(2) and 2(3) of this Contract incurred by Engineer during the preceding calendar month. Within _____ days after delivery to Engineer of the itemized statement, Owner will pay to Engineer the full amount of all expenses shown on that statement. Engineer must keep records of the foregoing expenses in accordance with generally accepted accounting practices, and must make copies of those records available to Owner upon request.

Manner of Payment of Fee

4. Owner will pay to Engineer the professional fee specified in Paragraph 2(1) of this Contract in installments as follows:

(1) _____ percent on execution of this Contract, receipt of which is hereby acknowledged by Engineer.

(2) _____ percent on [*specify, e.g.*, completion of the boundary survey, soil-bearing tests, investigations, and reports specified in Paragraphs 1(1) and 1(2) of this Contract].

(3) _____ percent on [*specify, e.g.*, approval or conditional approval of the tentative subdivision map

for the Property by all appropriate governmental agencies or bodies].

(4) _____ percent on [*specify, e.g.*, approval of the final subdivision map by all appropriate governmental agencies and bodies].

(5) _____ percent on [*specify, e.g.*, completion of construction and installation of all the off-site improvements].

Indemnity Agreement

5. Engineer will indemnify and hold Owner and the property of Owner free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons (including employees of Engineer), or from the damage or destruction of any property or properties, caused by or connected with the performance of this Contract by Engineer or Engineer's agents or employees.

Workers' Compensation Insurance

6. Engineer, at Engineer's own cost and expense, must procure and maintain during the continuance of this Contract a policy of workers' compensation or employer's liability insurance for the protection of Engineer's employees (including executive, managerial, and supervisorial employees) engaged in work required by this Contract. Further, Engineer must, on demand, deposit a certificate evidencing the policy with Owner.

Ownership of Plans, Maps, Drawings

7. All maps, plans, drawings, specifications, and other instruments prepared by Engineer pursuant to this Contract will remain the property of Engineer and may not be used by Owner for any project or purpose other than the construction and development of the subdivision described in this Contract.

Termination Without Fault

8. If the requirements imposed on Owner by any governmental agency or body required to approve the tentative or final subdivision map for the Property render the subdivision of the Property as contemplated by this Contract economically unfeasible, Owner may cancel this Contract by giving _____ days' written notice of the cancellation to Engineer. Upon cancellation of this Contract by Owner, Engineer will be paid (1) all expenses described in Paragraphs 2(2) and 2(3) of this Contract incurred by Engineer prior to expiration of the notice period, and (2) the percentage of _____[his *or* her] professional fee specified in Paragraph 4 of this Contract applicable to the services furnished or performed by Engineer under this Contact prior to the expiration of the notice period. The subdivision of the Property contemplated by this Contract will be economically unfeasible if, after the sale of all lots in the subdivision proposed or allowed for the Property at prices not exceeding $_____ per lot, the net profit to Owner would be less than _____ percent of the cost of acquiring the Property and creating the subdivision.

Termination With Fault

9. If either party to this Contract is declared a bankrupt, makes a general assignment for the benefit of creditors, or

commits a substantial breach of this Contract, the other party to this Contract will be excused from rendering or accepting any further performance under this Contract.

Assignment

10. Neither this Contract nor any rights or duties under it may be assigned or delegated to any other person or entity by either party to this Agreement without the express written consent of the other party.

Arbitration

11. If any dispute arises between the parties to this Contract concerning this Contract or their rights and duties under it, the dispute must be settled by arbitration held in accordance with the Construction Industry Rules of the American Arbitration Association in effect at the time a demand for arbitration is filed with the Association. Either party may file, in the manner provided by the Construction Industry Rules of the Association, a demand for arbitration. The written decision of the arbitrator or arbitrators appointed by the Association will be final and conclusive as to the parties to this Contract.

Notices

12. Any and all notices or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either Owner or Engineer by the other party to this Contract must be in writing and will be deemed duly served, given, or delivered when (1) personally delivered to the party to whom it is addressed [or to a supervisorial employee of that party], or (2) deposited in the United States mail, first-class postage prepaid, addressed to Owner at _____[*address*], California, or to Contractor at _____[*address*], California. Either party may change the party's address for these purposes by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

13. If any legal action or proceeding arising out of or relating to this Contract is brought by either party to this Contract, the prevailing party will be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Sole and Only Agreement

14. This Contract constitutes the sole agreement of the parties to this Contract relating to the Property and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force or effect.

Binding on Heirs

15. This Contract will inure to and be binding on the heirs, executors, administrators, successors, and assigns of the parties to this Contract. However, nothing contained in this paragraph will constitute a consent to the assignment or delegation by either party of any rights or duties under this Contract.

Executed _____[*date*], at _____ County, California.

OWNER
_____ [*signature of owner*]
[*typed name*]
ENGINEER
_____ [*signature of engineer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign ProfessionalsReal Property LawSubdivisionsGeneral Overview



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B. Architect Agreements

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NOTE:

For American Institute of Architects forms, see Appendices A (Standard Form of Agreement Between Owner and Architect) and B (Standard Form of Agreement Between Architect and Consultant) at the end of this chapter. Those forms have been set forth in appendices pursuant to the terms of the license governing the reproduction of the forms in this publication.



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C. Other Design Service Agreements

14-30C California Legal Forms--Transaction Guide § 30C.220

§ 30C.220 Standard Form of Agreement Between Owner and Construction Manager [AGC Document 510]

[1] Comment

[a] Use of Form

This form is an agreement between an owner and a construction manager in which the construction manager will be the owner's on-site agent, and the owner will enter into separate agreements with the contractors. This form was prepared by the Associated General Contractors of America (AGC), and is compatible with AGC Document 520 (Standard Form of Agreement Between Owner and Trade Contractor) [*see* Ch. 30D, *Construction Contracts and Subcontracts*]. This form should not be used if the construction manager is also the primary contractor; instead, the AGC and the American Institute of Architects (AIA) have jointly published standard forms of agreement for that circumstance [*see* AGC Documents 565, 566; AIA Documents 121/Cmc, 131 Cmc].

An owner may wish to retain a construction manager to provide continuous on-site supervision of the construction work, particularly when (1) the project is relatively large, or (2) the parties have agreed to strictly limit the supervisorial responsibilities of the design professional [*see § 30C.12[5]*].

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[b] Responsibilities of Construction Manager in General

The construction manager on a construction project may be a design professional, such as an architect or engineer, or a contractor (other than the prime contractor who is responsible for actual construction of the project). The construction manager coordinates all aspects of the construction project during both the design and actual construction phases. This relieves the owner and prime contractor from many administrative duties, ensures an independent review of the prime

contractor's performance, and should result in better coordination of labor and materials needs and improved integration of project phases [*see* California Real Estate Law and Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

For further coverage of construction management, see Construction Law, ch. 3, *Construction and Design Contracts* (Matthew Bender).

[c] Requirements of Form

Under this form and the related general conditions, the construction manager basically agrees to act as the owner's advisor and consultant prior to the commencement of construction [*see* [2], P 2.1, *below*] and then to administer construction of the project using contractors retained by the owner (referred to as trade contractors) [*see* [2], PP 3.2, 5.2, 5.3, *below*]. For this work, the construction manager receives (1) an initial payment upon execution of the agreement; (2) compensation for services in the preconstruction phase based on a lump sum, reimbursable costs, or a combination of the two; and (3) a fee for construction phase services [*see* [2], art. 7, *below*]. The construction manager's compensation is subject to equitable adjustment in the event of events or circumstances specified in the agreement [*see* [2], PP 7.1, 7.5, *below*]. In addition to the fee, the construction manager also is reimbursed for costs specified in the agreement [*see* [2], art. 8, *below*]. Progress payments are made based on the construction manager's submission of a monthly statement to the owner, listing compensation due. The owner is obligated to then make the payment in the statement amount within 10 days after the statement is submitted.

For extensive coverage of this form and additional construction management forms, see Construction Law, ch. 3, *Construction and Design Contracts* (Matthew Bender).

[2] FORM

Standard form of Agreement Between Owner and Construction Manager [AGC Document 510]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30C AGREEMENTS WITH ARCHITECTS, ENGINEERS, AND OTHER DESIGN PROFESSIONALS
PART IV. FORMS
C. Other Design Service Agreements

14-30C California Legal Forms--Transaction Guide § 30C.221

§ 30C.221 Standard Form of Agreement Between Engineer and Architect for Professional Services [EJCDC Document 1910-10]

[1] Comment

[a] Use of Form

This form is the Engineers' Joint Contract Documents Committee (EJCDC) standard form of agreement between an engineer and an architect for the performance of professional services. Under this agreement, the engineer retains the architect to provide architectural services in connection with a construction project for which the engineer is the prime design professional. In other words, the architect is to serve as a consultant to the engineer. For coverage of the role of consultants in the construction process, see *§ 30C.15*.

This form assumes that it will be used in conjunction with the standardized EJCDC documents for construction and design services, such as the Standard Form of Agreement Between Owner and Engineer for Professional Services [*see § 30C.200[2]*] and the EJCDC's Standard General Conditions of the Construction Contract [*see* Ch. 30D, *Construction Contracts and Subcontracts*]. The preamble to the form provides for the attachment and incorporation by reference of the portions of the underlying owner-engineer agreement governing the architect's responsibilities, compensation, and timing of services. Thus, if changes are made to this form, amendments may also be necessary to these related forms.

For a discussion of the EJCDC, see *§ 30C.200[1][a]*. For an agreement between an architect and a consultant that may be used when the consultant is not an engineer [*see* AIA Doc. C141], see Appendix B.

[b] Engineer-Architect Relationship

The EJCDC Standard Form of Agreement Between Owner and Engineer for Professional Services provides that the engineer will serve as the owner's prime design professional for the project and may employ any consultants the engineer deems necessary to assist in the performance or furnishing of professional engineering and related services under that agreement [*see § 30C.200[2]*, P 6.01(C)]. This form states that the architect will serve as the engineer's independent professional associate and will assist the engineer in performing services under each phase of the project as

set out in the owner-engineer agreement [*see* [2], Exhibit A, *below*]. Paragraph E of the preamble to the form states that the architect is an independent contractor, not a joint venturer with the engineer.

[c] Architect's Services

Exhibit A, which is incorporated by Article 1 of this form, describes the services to be performed by the architect. It divides these services into the same phases in which the work is divided in the primary owner-engineer agreement, that is: study and report phase; preliminary design phase; final design phase; bidding or negotiating phase; construction phase; and, post-construction phase. Exhibit A also sets out any additional services the architect is to perform.

These provisions are adequate when the architect is to provide comprehensive assistance throughout the entire project. However, because an architect is sometimes hired to assist in some discrete portion of the project, it may be necessary to amend Exhibit A accordingly. In addition, if applicable, Exhibit A should clarify the extent to which (1) the architect's design responsibilities will require the services of other consultants, and (2) the architect may rely upon the services of others employed by the engineer.

[d] Architectural Project Representative

The standard form of agreement between the owner and the engineer generally presumes that the engineer will provide a Resident Project Representative at the project site during the construction phase of the project [*see § 30C.200[1][d]*]. Similarly, this form and its Exhibit A provide for the architect to provide the services of an on-site architectural project representative [*see* [2], Exhibit A, P A.1.06(A)(2), *below*]. The scope of the architectural project representative's duties should be described in detail in Exhibit D ("Duties, Responsibilities, and Limitations of Authority of Architectural Project Representative"). This description should include an indication of how the architectural project representative will work in conjunction with the Resident Project Representative at the site.

[e] Methods of Payment

Article 4 of this form provides that the engineer will pay the architect for architectural services pursuant to the provisions of Exhibit C ("Payments to Architect for Services"). The form also includes several alternatives for Exhibit C, which are based on the method of compensation chosen by the parties. As to basic services with a determined scope, Exhibit C provides four options for payment: (1) lump sum; (2) hourly rates; (3) percentage of construction cost; and (4) direct labor costs times a factor [*see* [2], Exhibit C, P C.*4.01, below*]. The engineer and the architect should select one of these methods of compensation, complete the appropriate version of Paragraph C.4.01, and discard the remaining versions.

The remaining portions of Exhibit C provide only two payment options as to basic services of an indeterminate scope, and for additional services: (1) hourly rates; or (2) direct labor costs times a factor [*see* [2], Exhibit C, PP C.4.02, C.*4.03, below*]. Again, the parties should agree on one of these methods of compensation and complete the appropriate versions of Paragraphs C.4.02 and C.4.03.

Reimbursable expenses are provided for in Paragraph C.4.06 and in Appendix 1 to Exhibit C.

[f] Insurance

Paragraph 6.05 of this agreement states that both the engineer and the architect will procure and maintain insurance coverage as described in detail in Exhibit G of the agreement. Any specific coverages, amounts, or deductible provisions that are required by law or by the engineer or owner should be set forth in Exhibit G. An owner will often require both the engineer and the consultant architect to maintain professional liability or malpractice insurance.

[g] Signature and Certificate Number of Preparer of Plans

Under the Architects Practice Act [*see Bus. & Prof. Code § 5500 et seq.*], persons who prepare or are in responsible control of plans, specifications, and instruments of service for others must sign those documents and all related contracts. If that person is a licensed architect, he or she also must affix a stamp to the documents and contracts as evidence of his or her responsibility for them [*Bus. & Prof. Code § 5536.1(a)*; *see Bus. & Prof. Code § 5536.1(b)* (requirements for stamp or seal); *see also § 30C.16[1]*]. The signature and stamp should be included (to the extent applicable) on the last page of this form.

[2] FORM

Standard Form of Agreement Between Engineer and Architect for Professional Services [EJCDC Document 1910-10]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMalpractice InsuranceArchitects & EngineersReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30C AGREEMENTS WITH ARCHITECTS, ENGINEERS, AND OTHER DESIGN PROFESSIONALS
APPENDICES (AIA FORMS) Scope

14-30C California Legal Forms--Transaction Guide APPENDIX A

APPENDIX A Standard Form of Agreement Between Owner and Architect [AIA Document B141]

Standard Form of Agreement Between Owner and Architect [AIA Document B141]

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30C AGREEMENTS WITH ARCHITECTS, ENGINEERS, AND OTHER DESIGN PROFESSIONALS
APPENDICES (AIA FORMS) Scope

14-30C California Legal Forms--Transaction Guide APPENDIX B

APPENDIX B Standard Form of Agreement Between Architect and Consultant [AIA Document C141]

Standard Form of Agreement Between Architect and Consultant [AIA Document C141]

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS

15-30D California Legal Forms--Transaction Guide 30D.syn

§ 30D.syn Synopsis to Chapter 30D: CONSTRUCTION CONTRACTS AND SUBCONTRACTS

§ 30D.01 California Sources

[1] Statutes

[2] Regulations

§§ 30D.02-30D.04 [Reserved]

§ 30D.05 Law Reviews and Periodicals

§ 30D.06 Annotations

§ 30D.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§ 30D.08 Pamphlets

§ 30D.09 [Reserved]

§ 30D.10 Laws Governing Construction Contracts

[1] In General

[2] Exemption From Unruh Act

[3] Public Construction Contracts

[4] Home Improvement, Swimming Pool, and Specialty Contracts

[5] Liability Immunity for Persons Providing Independent Quality Review Services

[6] Owner's Obligation to Provide Security for Payment Obligations on Certain Projects

[a] Background

[b] Nature of Obligation

[c] Exempt Projects and Owners

[d] Amount of Security Required

[e] Authorized Means for Providing Security

[7] Statutory Scheme Governing Actions for Construction Defects in New Residences Sold On or After January 1, 2003

[8] Wrap-Up Insurance Programs

[a] Use of Wrap-Up Insurance

[b] Use of Wrap-Up Insurance in Public and Other Non-Residential Projects Put Out for Bid After January 1, 2009

[c] Requirements for Wrap-Up Policy Insuring Private Residential Project Commencing After January 1, 2009

[d] Enforceability of Indemnity Provisions in Post-January 1, 2009, Residential Construction Contracts For Projects Covered by Wrap-Up Insurance

§ 30D.11 Selection of Project Delivery Approach

[1] Overview and Design-Award-Build Approach

[2] Design and Build Agreements

[3] Fast Track Contracts

[4] Use of Single or Multiple Construction Contracts

[5] Construction Management Contracts

§ 30D.12 Selection of Type of Contract

[1] Stipulated Sum Agreement

[2] Cost-Plus Contracts

§ 30D.13 Parts of Construction Contract

[1] In General

[2] Owner-Prime Contractor Agreement

[3] General, Supplementary, and Other Conditions of Construction Contract

[4] Drawings and Specifications Generally

[5] Soils Report as Part of Specifications

§ 30D.14 Extra Work and Change Orders

§ 30D.15 Indemnity in Connection With Construction Contracts

[1] In General

[2] Contractor Liability Under Negligence and Warranty Theories

[3] Statutory Limitations on Construction-Related Indemnity Provisions

[a] General Rule

[b] Indemnity By Subcontractor in Specified Residential Construction Defect Situations

[c] Parties' Right to Seek Equitable Indemnity for Claims Governed by Civil Code Section 2782

[4] Wording of Indemnity Clause

§§ 30D.16-30D.19 [Reserved]

§ 30D.20 Construction Organizations

[1] In General

[2] Use of Standardized Forms

§ 30D.21 Contractors' State License Law

[1] In General

[2] Definition of Contractor

[3] Classifications of Contractors

[4] License Requirement

[5] Exemptions From Licensing Requirements

[6] Required Licensing Information

[7] Construction Supervision

[8] Local Business Tax Requirements

§ 30D.22 Method of Selecting Prime Contractor

[1] In General

[2] Competitive Bidding

[3] Direct Selection and Negotiation

§ 30D.23 Withdrawal and Other Relief From Bid Mistakes

[1] Prior to Acceptance

[2] After Acceptance

§ 30D.24 Construction Security

[1] Bid Bonds and Bid Guarantees

[2] Performance Bonds and Labor and Material Payment Bonds

§§ 30D.25-30D.29 [Reserved]

§ 30D.30 Subcontracts and Subcontractors

[1] In General

[2] Overview of Bidding Procedure

[3] Liability of Subcontractor for Erroneous Bid

[4] Extra Work Performed by Subcontractors

§ 30D.31 Construction-Related Joint Ventures

§§ 30D.32-30D.99 [Reserved]

§ 30D.100 Client Interview

[1] Facts

Scope

[2] Documents

Scope

§§ 30D.101-30D.109 [Reserved]

§ 30D.110 Selection of Project Delivery Approach and Contract System

Scope

§ 30D.111 Method of Selecting Contractor and Related Bidding Requirements

Scope

§ 30D.112 Extra Work and Other Changes in Work

Scope

§ 30D.113 Subcontracts and Subcontractors

Scope

§ 30D.114 Subdivision Improvements

Scope

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§ 30D.120 Preparing or Selecting Bidding and Contract Documents

Scope

§ 30D.121 Selecting Prime Contractor by Competitive Bidding

Scope

§ 30D.122 Bid Withdrawal and Other Procedures Occurring Between Bid Opening and Execution of Contract

Scope

§ 30D.123 Executing Contract Documents and Commencing Work

Scope

§ 30D.124 Executing Subcontracts

Scope

§ 30D.125 Providing for Construction of Subdivision Improvements

Scope

§§ 30D.126-30D.129 [Reserved]

§ 30D.130 Supervising or Administering Construction Work

Scope

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Scope

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Scope

§ 30D.133 Handling Follow-Up Inspections

Scope

§§ 30D.134-30D.199 [Reserved]

§ 30D.200 Letter Inviting Construction Bids From General Contractors

[1] Comment

[a] Use of Form

[b] Use of Form as Invitation for Subcontract Bids

[c] Selection of Potential Bidders

[d] Use of Contractor's Qualification Statement

[e] Contents of Letter Invitation

[f] Lowest Responsible Bidder and Rejection of All Bids

[g] Bid Bond

[2] FORM

Letter Inviting Construction Bids From General Contractors

§ 30D.201 Advertisement Inviting Construction Bids

[1] Comment

[a] Use of Form

[b] Comparison of Public Advertisements and Letter Bids

[c] Use of Notice on Public Projects

[2] FORM

Advertisement Inviting Construction Bids

§ 30D.202 Addendum to Bidding Document

[1] Comment

[a] Use of Form

[b] Timing for Distribution of Addendum

[2] FORM

Addendum to Bidding Document

§ 30D.203 Bid of General Contractor

[1] Comment--Use of Form

[2] FORM

Bid of General Contractor

§ 30D.204 Acceptance of Bid

[1] Comment--Use of Form

[2] FORM

Acceptance of Bid

§§ 30D.205-30D.209 [Reserved]

§ 30D.210 Agreement to Jointly Bid and to Execute Joint Venture Agreement if Awarded Contract

[1] Comment

[a] Use of Form

[b] Definition of Joint Venture

[c] Advantages of Joint Ventures in Connection With Construction Projects

[d] Requirement for Joint Venture Contractor's License

[e] Joint Venture Agreement

[2] FORM

Agreement to Jointly Bid and to Execute Joint Venture Agreement if Awarded Contract

§§ 30D.211-30D.219 [Reserved]

§ 30D.220 Owner-Contractor Letter of Intent

[1] Comment

[a] Use of Form

[b] Nature and Recommended Contents of Letter

[c] Contractor's Statement and License Number Required by California Law

[d] Name and Address of Owner and Construction Lender

[e] Construction of Single-Family Dwelling to Be Retained by Owner

[2] FORM

Owner-Contractor Letter of INTENT

§ 30D.221 Construction Contract (Stipulated Sum)

[1] Comment

[a] Use of Form

[b] Stipulated Sum Agreements

[c] Alternative Methods of Making Progress Payments

[i] Overview and Statutory Restrictions

[ii] Stages of Construction

[iii] Overview of Retention of Percentage of Progress Payment

[iv] Statutory Requirements Governing Retentions

[v] Mechanics' Liens and Retainages

[d] Contractor's License Number and Related Statutory Statement

[e] Name and Address of Owner and Construction Lender

[f] Construction of Single-Family Dwelling to Be Retained by Owner

[f.1] Owner's Obligation to Provide Security for Contractual Payment Obligations

[g] Provisions Favoring Either Party

[i] Description of Boundaries

[ii] Authorization of Extra Work

[iii] Contractor's Authority to Stop Work

[iv] Recordation of Notice of Completion

[v] No Waiver by Payment

[h] Miscellaneous Provisions

[i] Commencement of Work

[ii] Arbitration

[2] FORM

Construction Contract (Stipulated Sum)

§ 30D.222 Contractual Provisions for Construction of Subdivision Off-Site Improvements

[1] Comment

[a] Use of Form

[b] Subdivision Off-Site Improvements

[i] In General

[ii] Use of Separate Construction Contracts

[2] FORM

Contractual Provisions for Construction of Subdivision Off-Site Improvements

§ 30D.223 Construction Contract (Houses in a Subdivision)

[1] Comment

[a] Use of Form

[b] Possible Priorities of Mechanics' Liens Over Construction Loans

[c] Contractor's Statement and License Number

[d] Name and Address of Owner and Construction Lender

[2] FORM

Construction Contract (Houses in a Subdivision)

§ 30D.224 Standard Form of Agreement Between Owner and Contractor on the Basis of a Stipulated Price [EJCDC Document 1910-8-A-1]

[1] Comment

[a] Use of Form

[b] Engineers' Joint Contract Documents Committee (EJCDC)

[c] Stipulated-Sum Agreements

[d] Effective Date of Agreement

[e] Substantial Completion and Final Payment

[f] Liquidated Damages

[g] Contractor's Statement and License Number

[h] Name and Address of Owner and Lender

[i] Construction of Single-Family Dwelling to be Retained by Owner

[j] Owner's Obligation to Provide Security for Contractual Payment Obligations

[2] FORM

Standard Form of Agreement Between Owner and Contractor on the Basis of a Stipulated Price [EJCDC Document 1910-8-A-1]

§ 30D.225 Standard Form of Agreement Between Owner and Contractor on the Basis of Cost-Plus [EJCDC Document 1910-8-A-2]

[1] Comment

[a] Use of Form

[b] Cost-Plus Requirements

[i] Calculation of Contractor's Fee

[ii] Progress Payments

[iii] Guaranteed Maximum Contract Price

[c] Contractor's Statement and License Number

[d] Name and Address of Owner and Lender

[e] Construction of Single-Family Dwelling to be Retained by Owner

[2] FORM

Standard Form of Agreement Between Owner and Contractor on the Basis of Cost-Plus [EJCDC Document 1910-8-A-2]

§ 30D.226 Standard General Conditions of the Construction Contract [EJCDC Document 1910-8]

[1] Comment

[a] Use of Form

[b] Comparison of EJCDC and AIA General Conditions

[c] Modifications to Standard General Conditions (Supplementary Conditions)

[d] Progress Payments

[i] In General

[ii] Certificates of Payment

[2] FORM

Standard General Conditions of the Construction Contract [EJCDC Document 1910-8]

§ 30D.227 Cross Reference Between EJCDC Standard General Conditions of the Construction Contract and AIA General Conditions of the Contract for Construction [EJCDC Document 1910-11]

[1] Comment--Use of Form

[2] FORM

Scope

§ 30D.228 Standard Form of Design-Build Agreement and General Conditions Between Owner and Design-Builder (When Basis of Payment Is Cost of Work Plus Fee With Guaranteed Maximum Price) [AGC Document 410]

[1] Comment

[a] Use of Form

[b] Relationship to Other AGC Forms

[c] Information Required by California Law

[d] Obtaining Copies of Form

[2] FORM

Standard Form of Design-Build Agreement and General Conditions Between Owner and Design-Builder (When Basis of Payment Is Cost of Work Plus Fee With Guaranteed Maximum Price) [AGC Document 410]

§ 30D.228A Standard Form of Agreement Between Owner and Trade Contractor [AGC Document 520]

[1] Comment

[a] Use of Form

[b] Relation to Other AGC Forms

[2] FORM

Standard Form of Agreement Between Owner and Trade Contractor [AGC Document 520]

§ 30D.229 Addendum Containing Mandatory Disclosures [Bus. & Prof. Code §§ 7030(a), 7030.5, 7164; Civ. Code § 3097(m)]

[1] Comment

[a] Use of Form

[b] Required Information

[i] Contractor's Statement and License Number

[ii] Name and Address of Owner and Construction Lender

[iii] Construction of Single-Family Dwelling to Be Retained by Owner

[iv] Arbitration Disclosure in Small Residential Contracts

[c] Execution

[2] FORM

Addendum Containing Mandatory Disclosures [Bus. & Prof. Code §§ 7030(a), 7030.5, 7164; Civ. Code § 3097(m)]

§ 30D.230 Contract Modification or Addendum

[1] Comment

[a] Use of Form

[b] Distinction Between Modification and Addendum

[c] Execution

[d] Notification of Certain Changes

[2] FORM

Contract Modification or Addendum

§ 30D.231 Notice to Proceed

[1] Comment

[a] Use of Form

[b] Authorizing Commencement Before Execution of Contract

[2] FORM

Notice to Proceed

§ 30D.232 Commercial General Liability Insurance Notice

[1] Comment--Use of Form

[2] FORM

Commercial General Liability Insurance Notice

§§ 30D.233-30D.239 [Reserved]

§ 30D.240 Standard Form of Agreement Between Contractor and Subcontractor (When Contractor Assumes Risk of Owner Payment) [AGC Document 650]

[1] Comment

[a] Use of Form

[b] Role of Subcontracts

[c] Assumption of Risk of Owner Payment

[d] Comparison With AIA Subcontract

[e] Information Required by California Law

[2] FORM

Standard Form of Agreement Between Contractor and Subcontractor (When Contractor Assumes Risk of Owner Payment) [AGC Document 650]

§ 30D.241 Standard Form of Agreement Between Contractor and Subcontractor (When Contractor and Subcontractor Share Risk of Owner Payment) [AGC Document 655]

[1] Comment

[a] Use of Form

[b] Shared Risk of Owner Payment

[c] Comparison With AIA Subcontract

[2] FORM

Standard Form of Agreement Between Contractor and Subcontractor (When Contractor and Subcontractor Share Risk of Owner Payment) [AGC Document 655]

§ 30D.242 Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder Assumes Risk of Owner Payment) [AGC Document 450]

[1] Comment

[a] Use of Form

[b] Design-Build Agreements

[c] Relation to Other AGC Forms

[d] Assumption of Risk of Owner Payment

[e] Information Required by California Law

[2] FORM

Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder Assumes Risk of Owner Payment) [AGC Document 450]

§ 30D.243 Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder and Subcontractor Share the Risk of Owner Payment) [AGC Document 455]

[1] Comment

[a] Use of Form

[b] Shared Risk of Owner Payment

[2] FORM

Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder and Subcontractor Share the Risk of Owner Payment) [AGC Document 455]

§ 30D.244 Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor (When Subcontractor Provides Guaranteed Maximum Price and When Design-Builder Assumes Risk of Owner Payment) [AGC Document 460]

[1] Comment

[a] Use of Form

[b] Guaranteed Maximum Price

[c] Assumption of Risk of Owner Payment

[d] Information Required by California Law

[2] FORM

Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor (When Subcontractor Provides Guaranteed Maximum Price and When Design-Builder Assumes Risk of Owner Payment) [AGC Document 460]

§ 30D.245 Standard Form of Agreement Between Design-Builder and Architect/Engineer for Design-Build Projects [AGC Document 420]

[1] Comment

[a] Use of Form

[b] Architect/Engineer's Responsibilities

[c] Information Required by California Law

[2] FORM

Standard Form of Agreement Between Design-Builder and Architect/Engineer for Design-Build Projects [AGC Document 420]

Appendix A Contractor's Qualification Statement [AIA Document A305]

Contractor's Qualification Statement [AIA Document A305]

Appendix B Joint Venture Agreement [AIA Document C801]

Joint Venture Agreement [AIA Document C801]

Appendix C Standard Form of Agreement Between Owner and Contractor (Stipulated Sum) [AIA Document A101]

Standard Form of Agreement Between Owner and Contractor (Stipulated Sum) [AIA Document A101]

Appendix D Abbreviated Form of Agreement Between Owner and Contractor [AIA Document A107]

Abbreviated Form of Agreement Between Owner and Contractor [AIA Document A107]

Appendix E General Conditions of the Contract for Construction [AIA Document A201]

General Conditions of the Contract for Construction [AIA Document A201]

Appendix F Standard Form of Agreement Between Contractor and Subcontractor [AIA Document A401]

Standard Form of Agreement Between Contractor and Subcontractor [AIA Document A401]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS

15-30D California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses private construction contracts and subcontracts, with an emphasis on bidding procedures and contract drafting considerations. Counsel should use this chapter in conjunction with Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*, which examines the contracts under which a design professional agrees to design a proposed project and (in most cases) to observe and inspect the future construction work. While the design professional may complete the design duties before the owner retains a contractor, the observation and inspection responsibilities will obviously be performed after the execution of the owner-contractor agreement and the commencement of the construction work. Consequently, this chapter contains numerous cross-references to the construction observation discussions in Ch. 30C.

This chapter does not cover public works projects, swimming pool construction contracts, home improvement contracts, or service and repair contracts. For comprehensive coverage of those topics, see Ch. 89, *Home Improvement and Specialty Contracts* , Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* .

The Legal Background of this chapter discusses applicable contract laws, methods for selecting licensed contractors, the role of the design professional in the construction process [for a more detailed discussion of that topic, see Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*] construction contracting methods, the documents making up a construction contract, financial considerations (for example, compensation for extra work, bid security, and indemnity clauses), joint ventures, and subcontracts.

The Transaction Guide contains a step-by-step guide to the establishment of a contractual relationship between an owner and a contractor. The Forms section contains numerous bidding documents, documents that collectively make up a construction contract (including various owner-contractor agreements and alternative general conditions of the construction contract), related notices and other documents, joint venture forms, and subcontract agreements and conditions. Several of these construction documents are standardized agreements that have been prepared by major construction industry organizations. Additional standardized forms, prepared by the American Institute of Architects (AIA), have been set forth in appendices at the end of this chapter pursuant to an agreement with the AIA. The standardized forms have been reproduced in recognition of the fact that they are widely used in the California construction industry.

For discussions of other aspects of construction law, see Ch. 30A, *Construction Financing* , Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* , Ch. 30E, *Joint (Builders') Control Agreements* , Ch. 31, *Mechanics' Liens* , and Ch. 33, *Contamination Considerations in Real Property Transactions* .



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§ 30D.01 California Sources

[1] Statutes

Home improvement contracts. *Bus. & Prof. Code §§ 7150-7164*.

Swimming pool construction contracts. *Bus. & Prof. Code §§ 7165-7168*.

Contractors' State License Law. *Bus. & Prof. Code § 7000 et seq.*

"Contractor" defined. *Bus. & Prof. Code § 7026*.

License requirement. *Bus. & Prof. Code §§ 7028, 7065-7077*.

Joint venture license. *Bus. & Prof. Code § 7029*.

Required notice for inclusion in construction contracts, except home improvement and service and repair contracts. *Bus. & Prof. Code § 7030(a)*.

Required notice for inclusion in home improvement and service and repair contracts. *Bus. & Prof. Code § 7030(b)*.

Pre-contract discipline disclosure for small residential contracts. *Bus. & Prof. Code § 7030.1*.

Exemptions. *Bus. & Prof. Code §§ 7040-7054.5*.

Classifications. *Bus. & Prof. Code §§ 7055-7059.1*.

Requirements governing all California contracts. *Civ. Code § 1549 et seq.*

Inapplicability of Unruh Act to construction contracts. *Civ. Code § 1801.4*.

Indemnity provisions. *Civ. Code §§ 2772-2784.5*.

Indemnification (other than by insurance) of promisee against liability for negligence, misconduct, or design defects void. *Civ. Code § 2782*.

Allocation, release, liquidation, exclusion, or limitation of liability between parties valid. *Civ. Code § 2782.5*.

Indemnification of engineer or geologist against liability for damages exceeding $250,000 and arising from subterranean contamination or other concealed conditions caused by hazardous materials. *Civ. Code § 2782.6*.

Wrap-up insurance programs. *Civ. Code §§ 2782.9-2782.96*.

"Construction contract" defined. *Civ. Code § 2783*.

"Design defect" defined. *Civ. Code § 2784*.

"Subcontractor" defined. *Civ. Code § 3104*.

Mechanics' liens. *Civ. Code § 3109 et seq.*

Property subject to lien. *Civ. Code §§ 3128-3131*.

Priorities of liens. *Civ. Code §§ 3134-3140*.

Release bond. *Civ. Code § 3143*.

Lender immunity from liability for construction defects. *Civ. Code § 3434*.

[2] Regulations

Implementation of Contractors' State License Law. *16 Cal. Code Reg. § 810 et seq.*

Definition of joint venture license. *16 Cal. Code Reg. § 821*.

Classification of licensed contractors. *16 Cal. Code Reg. § 830*.



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15-30D California Legal Forms--Transaction Guide § 30D.05

§ 30D.05 Law Reviews and Periodicals

Sherman, *Construction Contracts by Objective*, *36 Prac. Law. 13 (1990).*

Note, *The Role of Lender's Counsel in the Design and Construction Process: Contract Review, Conditional Assignments of Contracts, and Related Due Diligence, 24 Real Prop., Prob. & Tr. J. 557 (1990).*

Ferguson, *Lender's Liability for Construction Defects*, 11 Real Estate L.J. 310 (1983).



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§ 30D.06 Annotations

Annot., Validity and Construction of State Statutes Requiring Construction of Handicapped Access Facilities in Buildings Open to the Public, 82 A.L.R.4th 121 .

Annot., Liability of Subcontractor Upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property, 68 A.L.R.3d 7 .

Annot., Allowance of Prejudgment Interest on Builder's Recovery in Action for Breach of Construction Contract, 60 A.L.R.3d 487 .



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§ 30D.07 Text References

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California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender).

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Ch. 30, *Subdivision Regulation.*

Ch. 79, *Suretyship, Guaranty, and Indemnity.*

Ch. 88, *Licensing of Contractors* .

Ch. 89, *Home Improvement and Specialty Contracts* .

Ch. 90A, *State Government Contracts* .

Ch. 90B, *Federal Government Contracts* .

California Real Estate Law and Practice(Matthew Bender)

Ch. 432, *The Owner-Prime Contractor Relationship and Contract* .

Ch. 433, *Subcontractors and Subcontracts* .

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Ch. 6, *Credit and Finance*.

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Acret, California Construction Law Manual (West 4th ed. 1997).

Architect's Handbook of Professional Practice (AIA).

Miller & Starr, Current Law of California Real Estate, Ch. 24, *Construction Contracts* (West 2d ed. 1990).

Witkin, Summary of California Law, vol. 1, *Contracts* (10th ed. 2005).

[3] Legal Encyclopedias

11 Cal. Jur. 3d Building and Construction Contracts §§ 1-20, 35-37.

13 Am. Jur. 2d Building and Construction Contracts.



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§ 30D.08 Pamphlets

Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995).



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PART II. LEGAL BACKGROUND
A. Construction Contracts

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§ 30D.10 Laws Governing Construction Contracts

[1] In General

A contract is an agreement to do or not to do a certain thing [*Civ. Code § 1549*] that creates a legal duty enforceable by a civil action or proceeding [*Civ. Code §§ 1427, 1428*]. A construction contract is simply a contract between the owner of a parcel of land and a prime contractor (who is usually a general contractor) to construct a specified building or project on the parcel.

In general, the laws that govern other types of contracts in California [*see Civ. Code §§ 1549-1701*] also apply to construction contracts. For coverage of the law of contracts, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . However, because of the nature of the construction industry, the statutory provisions governing the enforcement of liens for labor or materials [*see Civ. Code §§ 3082-3267*; *see also* Ch. 31, *Mechanics' Liens*], and the fact that a completed building becomes part of the land to which it is affixed [*Civ. Code § 658*], a somewhat specialized field of law also applies to construction contracts. This chapter focuses on those unique characteristics of construction contracts.

[2] Exemption From Unruh Act

The Unruh Act [*see Civ. Code § 1801 et seq.*], which regulates retail installment sales contracts, does not apply to any contract or series of contracts providing for the following: (1) the construction, sale, or construction and sale of an entire residence (including a mobilehome), or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in real property; or (2) the sale of a lot or parcel of real property, including any site preparation incidental to the sale [*Civ. Code § 1801.4*].

[3] Public Construction Contracts

This chapter does not discuss the detailed statutory requirements governing construction contracts awarded by governmental agencies and entities. For discussion of publicly-financed construction contract bid and award procedures, see Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* .

[4] Home Improvement, Swimming Pool, and Specialty Contracts

Unique sets of statutory requirements regulate home improvement and service and repair contracts [*see Bus. & Prof. Code §§ 7150-7164*] and contracts for the construction of swimming pools [*see Bus. & Prof. Code §§ 7165-7168*]. For these purposes, "home improvement" means repairing, remodeling, altering, converting, adding to, or modernizing residential property [*Bus. & Prof. Code § 7151*]. Contracts for specialty construction work, such as plumbing or painting work, are not subject to special statutory requirements but do have a unique format as a result of practical considerations [*see Bus. & Prof. Code § 7058* ("specialty contractor")]. For a consideration of these types of construction contracts, which are not discussed in this chapter, see Ch. 89, *Home Improvement and Specialty Contracts* .

[5] Liability Immunity for Persons Providing Independent Quality Review Services

A person or other legal entity who is under contract with an applicant for a residential building permit to provide independent quality review of (1) the plans and specifications provided with the application to determine their compliance with the State Housing Law, or (2) the work of improvement to determine compliance with the plans and specifications, is immune from liability arising from his or her review provided he or she has completed not less than five years of verifiable experience in the appropriate field, and [*Civ. Code § 43.99(a)*]:

- Has been certified as a building inspector, combination inspector, or combination dwelling inspector from the International Conference of Building Officials and has successfully passed the technical written examination for those certification categories; or

- Is a registered professional engineer, licensed general contractor, or licensed architect rendering independent quality review of the work of improvement or plan examination services within the scope of his or her registration or license.

A qualified person must also maintain at least $2,000,000 in professional errors and omissions coverage [*Civ. Code § 43.99(f)*].

The immunity will not extend to protect a qualified person from liability for damages caused solely by that person's negligence of willful misconduct while performing services under a contract with an applicant [*Civ. Code § 43.99(g)*].

The fact that an independent quality review has been performed by a qualified person has no effect on the potential liability of those who are actually responsible for designing and constructing the work of improvement. Information related to such a review is inadmissible in any subsequent construction defect action initiated by anyone other than the applicant who retained the qualified person [*Civ. Code § 43.99(b)*].

A qualified person who performs an independent review may not have any other involvement in the work of improvement for which he or she is providing quality review services [*Civ. Code § 43.99(e)*].

[6] Owner's Obligation to Provide Security for Payment Obligations on Certain Projects

[a] Background

The potential failure of an owner to make timely progress payments under a construction contract led to use of a "pay if paid" provision in subcontracts, pursuant to which payment by the owner to the general contractor is a condition precedent to the general contractor's obligation to pay the subcontractor. In *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (Safeco)*, however, the California Supreme Court held that a "pay if paid" provision effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanic's lien rights in the event of nonpayment by the owner and is therefore against public policy and unenforceable [*Wm. R. Clarke Corp. v. Safeco*

Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372] . This put the prime contractor in the undesirable position of being obligated under the subcontract to make payments to the subcontractor without having the funds from the owner to do so. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in [b]-[d], *below*.

[b] Nature of Obligation

An owner of property who contracts for a private work of improvement in an amount exceeding $5 million if the owner's interest is a fee simple absolute interest, or $1 million if the owner's interest is less than a fee simple interest, including a leasehold interest, has an obligation to do both of the following [*Civ. Code § 3110.5(a)(2), (b)*]:

- If a lender is providing a construction loan, the owner must provide the original contractor with a certified copy of the recorded construction mortgage or deed of trust, which must disclose the amount of the construction loan; and

- If the owner is not the majority owner of the original contractor, the owner must provide security for his or her contractual payment obligations to the original contractor to be used only when the owner defaults on those obligations [*see Civ. Code § 3110.5(b)(1)-(3)*; *see also* [c], *below*].

A lessee of real property is considered to be the owner of a fee simple absolute interest if, and only if (1) the initial term of the lease is at least 35 years, and (2) the lease covers one or more lawful parcels under the Subdivision Map Act [*Civ. Code § 3110.5(a)(1)*; *see Gov. Code § 66410 et seq.* (Subdivision Map Act)]. The status of the owner of a fee simple absolute interest is not affected by the fact that the property is encumbered by any mortgages, deeds of trust, ground leases, or other liens or encumbrances or rights of occupancy [*Civ. Code § 3110.5(a)(1)*].

When the contracting owner is the holder of less than a fee simple absolute interest, the owner of the fee simple absolute interest has no obligation to provide security for the contracting owner's contractual payment obligations. Similarly, when the contracting owner is the holder of the fee simple absolute interest, the owner of a lesser interest has no obligation to provide security for the contracting owner's payment obligations [*Civ. Code § 3110.5(a)(1)*].

If a contracting owner fails to provide or maintain the security as required, the original contractor may demand in writing that the owner do so. If the owner fails to provide and maintain that security within 10 days after the written demand is made, the contractor may suspend work until the security is provided and maintained as required [*Civ. Code § 3110.5(c)*].

Any contractual waiver of the obligation to provide security is void as against public policy [*Civ. Code § 3110.5(g)*].

The contracting owner's obligation to provide security does not affect a subcontractor's rights under the statutory provisions providing for mechanics' liens, stop notices, bond remedies, or prompt payment rights, including the original contractor's payment responsibilities set forth in *Bus. & Prof. Code § 7108.5* and *Pub. Contract Code § 10262* [*Civ. Code § 3110.5(d)*].

[c] Exempt Projects and Owners

The obligation to provide security for an owner's contractual payment obligations does not apply to any of the following projects [*Civ. Code § 3110.5(e)*]:

- Construction of single-family residences (i.e., real property improvements used or intended to be used as dwelling units for one family), including those located within a subdivision, and any associated

fixed works that require the services of a general engineering contractor [*see Bus. & Prof. Code § 7056*];

- Public works projects; or
- Housing developments that are eligible for a density bonus [*see Gov. Code § 65915*].

The security requirement also does not apply to any contract when the contracting owner is a qualified publicly traded company, a qualified private company, or a wholly-owned subsidiary of either, provided the subsidiary's obligations under the construction contract are guaranteed by the parent company [*Civ. Code § 3110.5(f)*]. A qualified publicly traded company is any company with a class of equity securities listed for trading on the New York, American, or NASDAQ stock exchange, and whose nonsubordinated debt securities are rated as "investment grade" [*Civ. Code § 3110.5(f)(1)*]. A qualified private company is any company that has no equity securities listed for trade on one of the major stock exchanges, and that has a net worth in excess of $50 million [*Civ. Code § 3110.5(f)(2)*]. The exemption from the security requirement will no longer apply if, before final payment on the construction is due, a qualified publicly traded company's debt securities are downgraded to below investment grade, or if a private company's net worth falls below the $50 million threshold [*Civ. Code § 3110.5(f)(1), (2)*].

[d] Amount of Security Required

Regardless of which means of security a contracting owner uses, when the construction contract is a fixed price contract, the security posted must be in the amount of either of the following [*Civ. Code § 3110.5(b)(1), (2), (3)(B)*]:

- Not less than 25 percent of the total amount of the construction contract when the contract provides that the work of improvement is scheduled to be substantially completed within six months after it is begun; or
- Not less than 15 percent of the total amount of the construction contract when the contract provides that the work is scheduled to take longer than six months.

When the construction contract is not a fixed price contract, the amount of security to be provided must be determined with reference to the guaranteed maximum price, if there is one. If there is no guaranteed maximum price, the amount must be determined with reference to the contracting owner's and original contractor's good faith estimate as to the total cost anticipated to be incurred under the contract [*Civ. Code § 3110.5(c)*].

[e] Authorized Means for Providing Security

The security for a contracting owner's payment obligations under a construction contract must be provided by one of the following means [*Civ. Code § 3110.5(b)(1)-(3)*]:

- A payment bond;
- An irrevocable letter of credit; or
- An escrow account.

If a contracting owner chooses the payment bond alternative, the bond must be payable if the owner defaults on payment of any undisputed amount under the contract that has been due and payable for more than 30 days. It must be from a listed California admitted surety that has an underwriting limit greater than the value of the contract amount of the bond [*Civ. Code § 3110.5(b)(1)*].

If an irrevocable letter of credit is used, it must be from a financial institution [*see Fin. Code § 5107*] inuring to the benefit of the original contractor. The letter's maturity date and other terms are to be determined by agreement between the contracting owner, the original contractor, and the institution issuing the letter of credit; provided that the contracting owner is required to maintain the letter of credit in effect until the owner has satisfied all of its payment obligations to the original contractor [*Civ. Code § 3110.5(b)(2)*].

If the contracting owner opts to establish an escrow account (designated as a "construction security escrow account"), it must be maintained in California with one of the following [*Civ. Code § 3110.5(b)(3)(A)*; *see Fin. Code § 17006(a)(1), (3)*]:

- An escrow agent licensed under the Escrow Law [*see Fin. Code § 17000 et seq.*];

- A California or federally regulated financial institution, such as a bank, trust company, building and loan or savings and loan association, or insurance company; or

- A title insurer doing business under California law.

The original contractor is not obligated to accept a construction security escrow account as security unless the contracting owner establishes to the contractor's reasonable satisfaction that the owner has granted the contractor a perfected, first priority security interest in the funds and proceeds from the funds deposited in the account. A written opinion of the owner's legal counsel is suggested as a means of establishing the contractor's first priority status. The funds on deposit in the account remain the sole property of the owner, subject to the contractor's security interest. The owner and contractor will instruct the escrowholder to disburse the funds in the account only on the joint authorization of the owner and contractor, or in accordance with a court order that is binding on both the owner and the contractor. A construction lender cannot be required to deposit construction loan proceeds in the account [*Civ. Code § 3110.5(b)(3)(A)*].

In addition to the amount of security required to be deposited in the account as discussed in [b], *above* [*see Civ. Code § 3110.5(b)(3)(B)(i), (ii)*], if the construction contract provides for a so-called retainage or retention to be withheld from periodic payments to the original contractor, the owner must deposit all amounts withheld as retainage or retention in the escrow account at the same time the owner makes the corresponding payment to the contractor. In no event, however, can the amount required to be maintained on deposit exceed the total amount of remaining payments due the contractor under the contract. Whenever the amount of funds on deposit equals or exceeds the total amount of the remaining payments, the escrowholder is authorized to disburse to the contractor funds on deposit to pay progress payments then due under the contract. In no event, however, can either party be obligated to authorize funds to be disbursed when doing so would cause the amount remaining on deposit to be less than the total amount of future payments remaining to be due to the contractor. Once the contractor has been paid all amounts due under the contract, any remaining funds must be disbursed to the owner [*Civ. Code § 3110.5(b)(3)(B)*].

[7] Statutory Scheme Governing Actions for Construction Defects in New Residences Sold On or After January 1, 2003

In accordance with Title Seven of Part Two of Division Two of the Civil Code [*Civ. Code § 895 et seq.* ("Requirements for Actions for Construction Defects")], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residence (excluding a condominium conversion) for which the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896, 938*]. The action is preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a

repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all in accordance with statutory time frames [*see Civ. Code §§ 910-938*].

The provisions, standards, rights, and obligations set forth in Title Seven are binding on all original purchasers and their successors-in-interest. Homeowners' associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code § 945*].

These provisions do not apply to any action by a claim to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of any other statute [*Civ. Code § 943(a)*]. In addition, for a claim involving a single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is generally limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law [*Civ. Code § 943(b)*].

To make a claim for violation of these statutory standards [*see Civ. Code § 896 et seq.*], a homeowner only needs to demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in *Civ. Code § 945.5*. No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard, provided that the violation arises out of, pertains to, or is related to, the original construction [*Civ. Code § 942*].

Title Seven is primarily concerned with handling defects in construction, a subject which, at first blush, would seem more appropriate for coverage in the materials dealing with construction and development. However, Title Seven imposes obligations and responsibilities on sellers of property subject to its provisions that must be satisfied in connection with the sales agreement and before close of escrow. Thus, for more detailed coverage and sample language in a general form of contract for the sale of real property, see *Ch. 23, Real Property Sales Agreements, §§ 23.20A, 23.200[2]*. The California Association of Realtors (CAR) applicable form is *set forth in § 23.205*.

[8] Wrap-Up Insurance Programs

[a] Use of Wrap-Up Insurance

A "wrap-up" insurance policy is an insurance policy, or series of policies, written to cover risks associated with a work of improvement, and covering two or more of the builders, general contractors, or subcontractors that work on that work of improvement [*Ins. Code § 11751.82(b)*; *see Civ. Code § 3106* ("work of improvement" defined)]. Wrap-up insurance policies are generally purchased by project owners, builders, or general contractors to cover themselves as well as any subcontractors and other participants involved with a project. The policy generally includes general liability, workers' compensation, umbrella, and builders' risk coverage. Because such insurance covers an entire project (or, in some cases, more than one project) and involves a single insurer, the potential for duplication and overlap of coverage that invariably accompanies the alternative approach in which owners, general contractors, and subcontractors each purchase their own insurance, is minimized. This should result in reduced litigation and cost savings for project owners and contractors.

[b] Use of Wrap-Up Insurance in Public and Other Non-Residential Projects Put Out for Bid After January 1, 2009

If an owner, builder, or general contractor obtains a wrap-up insurance policy (or some other consolidated insurance program) for a public work [*see Labor Code § 1720* ("public work" defined)] or any other project other than residential construction [*see Civ. Code § 895 et seq.*] that is put out for bid after January 1, 2009, the bid documents must clearly delineate the total amount or method of calculating any credit or compensation for premium required from the subcontractor for that policy [*Civ. Code § 2782.96(a)*]. The contract documents must disclose the policy limits, known

exclusions, and the length of time the policy is intended to remain in effect. On written request and once available, copies of the wrap-up policy must be provided to all those who are to be covered. Until the actual policy is available, the named insured may satisfy this requirement by providing a copy of the insurance binder or declaration of coverage. Any subcontractor or their insurance broker or attorney who receives a copy of the policy, binder, or declaration may not disclose it to third parties unless required by law to do so [*Civ. Code § 2782.96(b)*].

These disclosure requirements do not apply to any policy purchased by an owner, builder, or general contractor that provides additional coverage beyond what was contained in the original wrap-up policy if the subcontractor is not required to pay a credit or compensation for premium for the additional policy [*Civ. Code § 2782.96(c)*].

[c] Requirements for Wrap-Up Policy Insuring Private Residential Project Commencing After January 1, 2009

The contract documents for any private residential work of improvement that commences construction after January 1, 2009, and is insured by a wrap-up insurance policy (or other consolidated insurance program) must disclose the total amount or method of calculation of any credit or compensation for premium required from a subcontractor for the policy [*Civ. Code § 2782.95(a)*; *see Civ. Code § 895 et seq.*]. If and to the extent known, the contract documents must also disclose [*Civ. Code § 2782.95(b)(1)-(6)*]:

1. The policy limits.

2. The scope of coverage.

3. The policy term.

4. The basis upon which the deductible or occurrence is triggered by the insurance carrier.

5. If the policy covers more than one work of improvement, the number of units, if any, indicated on the policy application.

6. A good faith estimate of the amount of available limits remaining under the policy as of a date indicated in the disclosure obtained from the insurer.

The requirement to provide the information described in 1.-4., above, may be satisfied by providing the subcontractor with a copy of the policy, binder, or declaration of coverage [*Civ. Code § 2782.95(c)*]. Because the disclosures required by 5. and 6., above, are based on information at a given moment in time, they may not accurately reflect either the actual number of units covered by the policy or the amount of any available insurance when a later claim is made. Thus, there is a presumption that these disclosures are made in good faith if the disclosure required by 5. is the same as that contained in the application to the wrap-up insurer, and the disclosure required by 6. was obtained from the insurer or broker. Overcoming the presumption requires a showing that the insurer, broker, builder, or general contractor intentionally misrepresented the facts [*Civ. Code § 2782.95(7)*].

If available, a copy of the insurance policy showing the coverage terms, including the policy limits, scope of coverage, policy term, and the basis on which the deductible or occurrence is triggered by the carrier, must be provided on the written request of any project subcontractor [*Civ. Code § 2782.95(c)*; *see Civ. Code § 2782.95(b)(1)-(4)*]. If the actual policy is not available when a request is made, a copy of the insurance binder or declaration of coverage may be provided instead. Any subcontractor, or their insurance broker or attorney who receives a copy of the policy, binder or declaration may not disclose it to third parties unless required by law [*Civ. Code § 2782.95(c)*].

If the owner, builder, or general contractor (1) requires a subcontractor to offset the original bid amount with a

deduction for the wrap-up insurance policy, but (2) fails to disclose the total amount or method of calculation of the premium credit or compensation related to wrap-up insurance to be charged the subcontractor before it submits its bid [*see Civ. Code § 2782.95(a)*], the subcontractor is not legally bound by the bid unless the subcontractor has the right to increase that bid up to the amount equal to the difference between any amount the subcontractor included in the original bid for insurance and the amount of the actual bid credit required [*Civ. Code § 2782.95(d)*].

[d] Enforceability of Indemnity Provisions in Post-January 1, 2009, Residential Construction Contracts For Projects Covered by Wrap-Up Insurance

All contracts, provisions, clauses, amendments, or agreements entered into after January 1, 2009, for a residential construction project that is covered by a wrap-up insurance policy (or other consolidated insurance program), that require an enrolled and participating subcontractor to indemnify, hold harmless, or defend another for any claim or action covered by that policy or program, arising out of that project, are unenforceable [*Civ. Code § 2782.9(a)*]. To the extent any contractual provision is deemed unenforceable, any party may pursue an equitable indemnity claim against another party for a claim or action unless the claim or action is covered under the wrap-up policy [*Civ. Code § 2782.9(b)*].

This does not prohibit a builder or general contractor from requiring a subcontractor to make a reasonably allocated contribution to the self-insured retention or deductible required under the wrap-up policy if the maximum amount and method of collecting the contribution is disclosed in the contract, and the contribution is reasonably limited so that each subcontractor may have some financial obligation in the event of a claim alleged to be caused by that subcontractor's scope of work. The contribution may only be collected when and as the builder or contractor incurs a self-insured retention or deductible in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim alleged to be caused by the subcontractor's scope of work, when viewed in the context of the entirety of the alleged claim. Any contribution will only be collected after written notice to the subcontractor of the amount and basis for the contribution. In no event may the total amount of contributions collected from subcontractors exceed the amount of any self-insured retention of deductible due and payable by the builder or contractor for the claim. This does not, however, prohibit any legally permissible recovery of costs and legal fees to collect a subcontractor's contribution if that contribution is reasonable and is not paid when due [*Civ. Code § 2782.9(b)*].

For further coverage of construction-related indemnity provisions, see *§ 30D.15*.

Legal Topics:

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§ 30D.11 Selection of Project Delivery Approach

[1] Overview and Design-Award-Build Approach

One of the first steps in the construction process is the selection of an approach to be used for the design and construction of the project. In making this selection, the owner must make two determinations. First, the owner must decide whether the design and construction tasks will be performed by one entity or by separate entities. Traditionally, separate entities are used, with a design professional providing professional design services and one or more contractors providing goods and construction services [*see* Architect's Handbook of Professional Practice, Ch. 3.2, Practice Topic 3.22 (AIA 1994)]. One entity is used when the owner wishes to enter into a design and build contract [*see* [2], *below*].

The second preliminary determination the owner must make is whether or not construction is to commence before the completion of the construction documents. Usually, the owner does not enter into a construction contract with a prime contractor until the owner's design professional has completed the construction documents and all other design work. This standard approach is sometimes referred to as the "design-award-build" process [*see* Architect's Handbook of Professional Practice, ch. 3.2, Practice Topic 3.22 (AIA 1994)]. A significant advantage of this approach is the fact that interested contractors are able to base their bids on the completed design. A disadvantage is the time it takes to complete the construction documents. Time constraints may cause an owner to reject the design-award-build process in favor of a design and build or fast track arrangement [*see* [2], [3], *below*].

[2] Design and Build Agreements

Under a design and build ("design-build") contract, which is sometimes referred to as a turnkey contract, a single contractor assumes responsibility for the design and construction of the project [*see § 30D.228* (design-build agreement); *see also §§ 30D.242-30D.244* (agreements between design-builder and subcontractor), 30D.245 (agreement between design-builder and architect/engineer)]. This differs from the traditional construction contract, which simply requires the contractor to perform construction work that has already been designed pursuant to a separate, owner-design professional contract [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*].

Most design-build contracts apply to large construction projects, such as industrial plants, because they provide for complete coordination of the many phases of the work, which in turn results in lower administrative costs, more effective utilization of equipment and personnel, simplified lines of communication, savings in materials costs (through the use of large volume orders with substantial lead time), and time savings [*see* California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)]. Participants in these projects commonly include (1) contractors and other builders who have architects and engineers on their staffs or who hire these design professionals as consultants, (2) architects and engineers who act as general contractors on projects they design, and (3) developers, contractors, architects, and engineers who enter into joint ventures to design and build structures for a specific client or a speculative market [*see* Construction Law, Ch. 3, *Construction and Design Contracts* (Matthew Bender)].

[3] Fast Track Contracts

An owner may wish to enter into "fast track" contracts that provide for the commencement of the construction work while the design professional is still preparing the initial design studies and the design documents. This approach frequently requires the owner (or the owner's prime contractor) to enter into multiple contracts covering different phases of the work [*see* [5], *below*]. In many cases, the owner will retain a construction manager to coordinate the design and construction work [*see* [4], *below*], particularly if the owner is contracting directly with multiple contractors rather than with one prime contractor.

This approach is intended to shorten the duration of the project, and is most likely to be used when interest rates are high, strict time limits apply to land-use entitlements, or the project involves tight occupancy schedules [*see* Architect's Handbook of Professional Practice, Ch. 3.2, Practice Topic 3.22 (AIA 1994); Acret, Attorney's Guide to California Construction Contracts and Disputes, Ch. 2, *Drafting Construction Contracts* (Cal. C.E.B. 2d ed. 1990)].

[4] Use of Single or Multiple Construction Contracts

While deciding on a project delivery approach, the owner should determine whether to utilize a single prime construction contract or multiple prime contracts. A single contract should be used when one prime contractor is to supervise (and is to be solely responsible for completion of) all of the work. This centralized supervision often results in lower administrative costs. In many cases, the prime contractor will subcontract a large portion of the work.

Rather than utilizing one prime contract, the owner may wish to award separate prime contracts to different contractors for the primary areas of work to be performed. Typically, one contractor is responsible for the general construction work, while other contractors are individually responsible for the other major divisions of work, such as electrical and mechanical work. This multiple contract system must be used by some governmental entities, and may be preferable to the single contract system for some projects because it assigns tasks to qualified specialists [*see* California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

This chapter assumes that one prime contractor will be used for a particular project. However, the coverage also applies to projects involving multiple prime contracts.

[5] Construction Management Contracts

A construction management contract is an agreement between an owner and a construction manager under which the manager assumes responsibility for overseeing an entire construction project. The agreement may provide for the construction manager to construct the project using prime contractors retained by the owner (referred to as trade contractors) [for an example of such an agreement, *see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*]. Alternatively, the construction management agreement may be used in connection with either a design-build agreement [*see* [2], *above*] or a fast track agreement [*see* [3], *above*]. Management contracts are commonly

used for large projects in order to relieve the owner and prime contractor of responsibility for administrative duties and to provide for an independent review of the prime contractor's performance. These contracts are also designed to improve coordination of labor and material needs and the integration of project phases [*see* California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 30D.12 Selection of Type of Contract

[1] Stipulated Sum Agreement

Construction contracts are usually classified by the method of compensation of the contractor. The two basic types of construction contracts are the "stipulated sum" (also referred to as "lump sum") agreement and the "cost-plus" contract [*see* [2], *below*]. Under a stipulated sum agreement, the contractor performs the construction work for a specified sum that includes the contractor's costs, overhead, and profit and that is paid in the form of progress payments. This type of agreement is more common than the cost-plus contract, and is almost always used when the prime contractor is selected by competitive bidding [*see § 30D.22[2]*]. Its advantages for the owner include knowledge, at the time the contract is awarded, of the cost of construction, and an uncomplicated method for making payments to the contractor [*see* Architect's Handbook of Professional Practice, Ch. 3.4, Practice Topic 3.44 (AIA 1994)].

There are some disadvantages to the use of stipulated sum agreements. First, inexperienced owners and attorneys often fail to realize that construction projects almost inevitably require additional expenditures (that is, beyond the amount specified in the stipulated sum agreement) for changes in work, dispute resolutions, delays, and inadequate performances. Second, the concomitant use of competitive bidding [*see § 30D.22[2]*] means emphasizing price over the contractor's qualifications and experience. Thus, a low-bidding contractor who is not concerned about his or her business reputation or with obtaining repeat business may cut corners to minimize costs and maximize profit. This inherent temptation may result in the owner having to take extra steps to monitor the contractor's work [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 34 (Mar. 1, 1975)].

[2] Cost-Plus Contracts

Under a cost-plus contract, the prime contractor receives the cost of the construction work and a fee (in the form of a fixed amount or a percentage of construction cost) for overhead and profit. Thus, although the total cost is not fixed, the only construction costs the owner must pay are those that are actually incurred by the contractor. In the case of the contractor's fee, the owner normally will prefer a fixed fee rather than a percentage of construction cost because the fixed fee does not provide the contractor with an incentive to increase costs.

A common variation of these cost-plus agreements is the cost-plus contract that includes a guaranteed maximum price. Under this type of agreement, the contractor receives a fixed fee and is reimbursed for costs up to a specified ceiling or target cost. Any costs above the stated maximum are the contractor's sole responsibility. The contract may include an incentive clause that permits the parties to share in savings (according to a predetermined formula) if the final cost is below the specified ceiling [*see* Architect's Handbook of Professional Practice, Ch. 3.4, Practice Topic 3.44 (AIA 1994)].

A cost-plus agreement provides the contractor with an interest in the timely, economical, and satisfactory completion of the contract. Consequently, this type of agreement may be desirable if the parties wish the contractor to commence construction at an earlier date (that is, before completion of the drawings and specifications) than he or she would under a stipulated sum agreement.

Cost-plus agreements have some drawbacks. First, because these contracts are usually negotiated, there is no price competition among potential bidders. Second, the guaranteed profit may remove some of the contractor's incentive to do a good job; thus, the owner will probably spend more time and money supervising the work [*see* California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)]. Third, the owner does not know in advance what the project will cost. However, it is questionable whether the stipulated sum agreement offers an accurate estimate either [*see* [1], *above*].

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§ 30D.13 Parts of Construction Contract

[1] In General

An entire, integrated construction contract consists of the owner-prime contractor agreement ("agreement"), drawings and specifications, conditions (general, supplementary, and other), addenda (changes made to the contract documents prior to the execution of the agreement), and modifications (post-execution changes).

Since construction contract documents tend to be complex, inconsistency among the provisions of the various documents is a common problem. This is particularly true when the parties modify or do not use standardized forms [*see § 30D.20[2]*]. One precaution, in addition to a careful review of the documents, is to expressly rank the documents so that some take precedence over others. Another possibility for the owner's attorney is to provide in the documents that any work prescribed under any of the documents should be considered necessary under all of the documents [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 33 (Mar. 1, 1975)].

[2] Owner-Prime Contractor Agreement

The owner-prime contractor agreement is the most important of the contract documents [*see §§ 30D.221-30D.229*; *see also* App. C (AIA Doc. A101-1997)]. It should set forth the responsibilities of the parties, the name of the design professional, the work to be performed, the contract price, the time of commencement and completion of work, and the method of payment of the contractor, and incorporate by reference the other contract documents. Further, it must contain specified information regarding the owner, contractor, and construction lender, and a statutory statement indicating (1) that contractors are required by law to be licensed and regulated by the Contractors' State License Board, and (2) that the Board has jurisdiction to investigate complaints against contractors that are filed within four years of the alleged violation in the case of patent acts or omissions, and 10 years of the alleged violation in the case of latent acts or omissions [*see Bus. & Prof. Code §§ 7030(a), 7030.5*; *Civ. Code § 3097(l), (m)*]. Additional information must be included if the contract provides for the construction of a single-family dwelling to be retained by the owner for at least one year [*see Bus. & Prof. Code § 7164*].

[3] General, Supplementary, and Other Conditions of Construction Contract

The general conditions of a construction contract describe and allocate the rights, duties, responsibilities, and relations of the owner and prime contractor. They also set forth responsibilities of the design professional, even though the design professional is contractually bound by the owner-design professional contract and is not a party to the owner-prime contractor agreement [*see* Architect's Handbook of Professional Practice, *A201 Commentary* (AIA 1994); *see also* App. E (AIA Doc. A201-1997)]. Consequently, the attorney must confirm that the provisions of the general conditions do not conflict with the owner-prime contractor and owner-design professional agreements, and with the other contract documents.

Supplementary conditions are frequently used to modify or expand the general conditions to accurately reflect unique aspects of the project, such as local legal, geological, or climatic conditions. They often include provisions relating to payments and insurance, and are particularly useful when the project involves multiple prime construction contracts or phased construction. Occasionally, the supplementary conditions are modified through the use of "other" conditions [*see* Architect's Handbook of Professional Practice, *A201 Commentary* (AIA 1994)].

[4] Drawings and Specifications Generally

The drawings (also referred to as "plans") and specifications of a proposed project are prepared by the design professional and assist the contractor in preparing estimates and in performing the work. The drawings are graphic portrayals of the design, location, and dimensions of the proposed project. They usually contain, among other things, site and building plans, elevations, schedules, and diagrams. However, they do not, as a general rule, contain explicit information on every detail of the project. Although a single drawing may be used, it is more common to depict structural, mechanical, and electrical work on separate drawings [*see* Architect's Handbook of Professional Practice, Ch. 3.8, Practice Topics 3.81, 3.82 (AIA 1994); Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

Specifications complement the drawings by providing written requirements governing the materials, equipment, installation methods, systems, and techniques to be used for the construction work [*see* Architect's Handbook of Professional Practice, Ch. 3.8, Practice Topics 3.81, 3.82 (AIA 1994); Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)]. The specifications are frequently broken down into sections by individual construction trades, such as sitework, masonry, mechanical, and electrical. The specifications within each section may list acceptable brand names and models for products and assemblies, set forth performance standards for products and assemblies, incorporate by reference standards published by various testing organizations or industry or trade associations, or adopt some other approach. Many design professionals have a set of master specifications that they modify to use for a particular project [*see* Architect's Handbook of Professional Practice, Ch. 3.8, Practice Tips 3.81, 3.82 (AIA 1994)].

For coverage of statutory requirements governing the preparation and contents of plans [*see Bus. & Prof. Code §§ 5536.1, 6735*], see Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* . For a discussion of various methods for authorizing substitutions of specified materials, see *§ 30D.120*.

[5] Soils Report as Part of Specifications

From the owner's perspective, it is essential that the drawings and specifications contain accurate subsurface information, because the owner can be held liable for the financial damages resulting from a contractor's justifiable and detrimental reliance on an incorrect soils report [*see Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 404*]. Thus, the owner, the owner's attorney, and the design professional should consider the risk of subsurface problems as early as possible in the planning stage of the project [*see* Sweet, *Your First Construction Project*, 21 Prac. Law. No. 2 (March 1, 1975) at 36], and see that the project drawings and specifications presented to prospective bidders include an adequate soils report.

The owner may attempt to limit his or her potential liability for inaccuracies in the soils report by (1) requesting the bidders to conduct independent soil investigations, or (2) expressly disclaiming liability for the accuracy of the owner's report. A disclaimer shifts the risk of unforeseen subsurface conditions from the owner to the prime contractor. In other words, if the owner uses such a disclaimer, the contractor will not receive additional compensation for any unanticipated work required by the unexpected condition [*see Wunderlich v. State of California (1967) 65 Cal. 2d 777, 785-787, 56 Cal. Rptr. 473, 423 P.2d 545* ; *see also § 30D.14*]. However, this shifting of the burden from the owner to the contractor causes an increase in construction costs because the bidders will take that increased risk and the soils report preparation costs into account when making their bids [*see* California Real Estate Law & Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

The owner may bear the risks of subsurface conditions (and therefore avoid the increased costs associated with contractor-ordered soils reports) by using a changed conditions clause in the construction contract that permits the contractor to claim an equitable adjustment of the contract price following the discovery of unusual subsurface conditions. This type of clause usually requires prompt notice to the owner of the conditions and prohibits any action on the conditions until a determination of the right to an equitable adjustment is made [*see* California Real Estate Law & Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

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§ 30D.14 Extra Work and Change Orders

The construction contract documents typically provide that any extra work or other changes in the work occurring after the execution of the contract documents must be authorized by written change orders [*see, e.g.,* Appendix E at the end of this chapter (AIA Doc. A201-1997, General Conditions of the Contract for Construction), Art. 7]. For these purposes, "extra work" is work that is not required or controlled by a construction contract and that was not contemplated by the parties when the contract documents were executed [*Frank T. Hickey, Inc. v. L.A.J.C. Council (1954) 128 Cal. App. 2d 676, 683, 276 P.2d 52]* . The change order is usually prepared by the design professional or the contractor and signed by the owner or the design professional. It should describe the change and specify the modification, if any, in the contract price [*see* Architect's Handbook of Professional Practice, Ch. 3.9, Practice Topic 3.92 (AIA 1994)].

Whether the contractor is entitled to additional compensation for work that the contractor asserts is "extra" depends generally on whether the contract can be construed to include the work in the stated price (which would make additional compensation unavailable). Of particular importance to this determination is the construction placed on the contract by the parties; thus, an agreement by the parties that additional compensation is due precludes a claim that the original contract requires the work [*Frank T. Hickey, Inc. v. L.A.J.C. Council (1954) 128 Cal. App. 2d 676, 683, 276 P.2d 52]* .

Many contracts require the parties to agree on the price of any extra work before proceeding with the work. If the work and materials are of the same character as the work and materials covered by a price schedule in the contract, the general rule is that the price schedule will apply to the extra work [*see Frank T. Hickey, Inc. v. L.A.J.C. Council (1954) 128 Cal. App. 2d 676, 684, 276 P.2d 52]* . If the work is unlike the contract work and the parties cannot agree on the amount of the compensation, the contractor is entitled to recover the reasonable value of the work [*see C.F. Bolster Co. v. J.C. Boespflug etc. Co. (1959) 167 Cal. App. 2d 143, 151, 334 P.2d 247]* .

In the absence of a contractual provision requiring the use of written change orders, the parties can order extra work and changes by oral agreement [*see Murray v. California Conserving Co. (1920) 49 Cal. App. 625, 630, 193 P. 959]* . Even when the contract requires written change orders, the parties may waive this requirement. A waiver may be implied when the extra work is performed without a change order at the request and with the full knowledge of the owner [*Howard J. White, Inc. v. Varian Associates (1960) 178 Cal. App. 2d 348, 353, 2 Cal. Rptr. 871* ; *Wilson v.*

Keefe (1957) 150 Cal. App. 2d 178, 180-181, 309 P.2d 516] . Consequently, the owner's attorney should discourage the client from issuing oral change orders, paying for changes that were not made pursuant to written change orders, or engaging in any other activities that could result in a waiver of the requirement for written change orders.

The owner's attorney should also consider utilizing a change order clause that expressly authorizes the owner to order extra work but prohibits any other person (including any agent, employee, or subordinate of the owner) from ordering extra work. The clause should also state that the contractor will not be compensated for extra work ordered by anyone other than the owner [*see Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 910-912, 92 Cal. Rptr. 723* ; *Bennett v. Carlen (1963) 213 Cal. App. 2d 307, 310, 28 Cal. Rptr. 647]* .

Under the mechanics' lien law [*Civ. Code § 3082 et seq.*], an owner must notify the prime contractor and construction lenders of any changes in the contract if the change has the effect of increasing the price stated in the contract by 5 percent or more [*Civ. Code § 3123(c)*]. For further discussion of the mechanics' lien law, see Ch. 31, *Mechanics' Liens* .

For coverage of the design professional's role in the approval of change orders, see Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* . For a discussion of unanticipated work resulting from the discovery of unexpected soils conditions, see *§ 30D.13[5]*.

Legal Topics:

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§ 30D.15 Indemnity in Connection With Construction Contracts

[1] In General

"Indemnity" is basically the obligation of one party to make good a loss or damage incurred by another party [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Civ. Code § 2772*]. Construction contracts usually contain provisions that provide for indemnification of the owner and design professional by the contractor for loss or liability on account of injuries to or the deaths of third persons arising from or in connection with the construction work. These indemnity clauses may, among other things (1) provide for the indemnification of the indemnitee for his or her passive, but not active, negligence, or (2) indemnify the indemnitee for his or her liabilities caused by the indemnitor, provided that the indemnitee was not contributorily negligent [*see Western Contracting Corp. v. Southwest Steel Rolling Mills, Inc. (1976) 58 Cal. App. 3d 532, 539-540, 129 Cal. Rptr. 782]* . For further discussion of various types of indemnity agreements, see Ch. 79, *Suretyship, Guaranty, and Indemnity* , and California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender).

[2] Contractor Liability Under Negligence and Warranty Theories

A contractor has a duty to use reasonable care to prevent damage to persons who the contractor may reasonably expect will be affected by his or her work, regardless of their relationship to the contractor or owner [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 378, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 249, 73 Cal. Rptr. 127* (duty not limited to those in privity of contract with contractor); *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 802-808, 157 Cal. Rptr. 407, 598 P.2d 60* (duty extends to tenant when undue injury to tenant's business is reasonably foreseeable)]. A contractor remains potentially liable for negligence even after the construction work has been completed and accepted by the owner [*Dow v. Holly Manufacturing Co. (1958) 49 Cal. 2d 720, 725, 321 P.2d 736]* .

When a contractor agrees to build an entire building, there is an implied warranty of fitness that protects the owner from defective construction [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88* ; *Green v. Superior Court (1974) 10 Cal. 3d 616, 626, 111 Cal. Rptr. 704, 517 P.2d 1168]* . However, if the

contractor faithfully performs the work pursuant to owner-supplied plans, there is no implied warranty that the contractor will supplement any inadequacy in the plans [*see Sunbeam Constr. Co. v. Fisci (1969) 2 Cal. App. 3d 181, 185, 82 Cal. Rptr. 446]* .

For further discussion of contractor liability, and a consideration of owner liability, see California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender).

[3] Statutory Limitations on Construction-Related Indemnity Provisions

[a] General Rule

An indemnity provision in a construction contract will be void and unenforceable (with certain exceptions discussed below) if it purports to indemnify a promisee against liability for damages (1) for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or (2) for defects in design furnished by the foregoing persons [*Civ. Code § 2782(a)*; *see National Union Fire Ins. Co. v. Nationwide Ins. Co. (1999) 69 Cal. App. 4th 709, 717-718, 82 Cal. Rptr. 2d 16* ; *see also Civ. Code §§ 2772* ("indemnity" defined), *2784* ("design defect" defined)]. Such a provision would also be a violation of the Contractors' State License Law [*Bus. & Prof. Code § 7034(a)*; *see Bus. & Prof. Code § 7000 et seq.* (Contractors' State License Law)].

When interpreting express indemnity agreements, courts have historically focused on the indemnitee's active or passive negligence [*see Macdonald & Krause, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 419-420, 105 Cal. Rptr. 725]* . More recently, however, courts have moved away from a mechanical application of an active-passive dichotomy, emphasizing instead a contractual interpretation approach subject to certain public policy limitations, such as those imposed by *Civ. Code § 2782* [*see Heppler v. J.M. Peters Co. (1999) 73 Cal. App. 4th 1265, 1276-1277, 87 Cal. Rptr. 2d 497* ; *Hernandez v. Badger Construction Equipment Co. (1994) 28 Cal. App. 4th 1791, 1818-1823, 34 Cal. Rptr. 2d 732* ; *see also Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 632, 119 Cal. Rptr. 449, 532 P.2d 97]* . Thus, the parties may establish a duty in the indemnitor to save the indemnitee harmless from the results of his or her active negligence, provided the language of the indemnity agreement is sufficiently specific and clear to evidence this intent [*see E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 507, 146 Cal. Rptr. 614, 579 P.2d 505* ; *but see Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 44, 41 Cal. Rptr. 73, 396 P.2d 377* (these agreements will be strictly construed against indemnitee)]. Likewise, the parties may require negligence by the indemnitor as a condition to indemnification [*see Peter Culley & Associates v. Superior Court (1992) 10 Cal. App. 4th 1484, 1492, 13 Cal. Rptr. 2d 624]* , or they may establish a duty in the indemnitor to save the indemnitee harmless even if the indemnitor is not negligent [*see Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal. App. 4th 500, 61 Cal. Rptr. 2d 668]* .

There are several significant statutory exemptions from, or qualifications of, the general rule stated in *Civ. Code § 2782(a)*. For example, *§ 2782(a)* itself exempts any insurance contract, workers' compensation, or agreement issued by an admitted insurer as defined by the Insurance Code [*see Ins. Code §§ 23, 24* (definitions of "insurer" and "admitted," respectively)]. A second exemption authorizes the use of an accommodation agreement under which the contractor fully indemnifies a person or entity who is not a party to the construction contract but who agrees to permit the contractor to enter upon or adjacent to its property for the purpose of performing the construction contract for others [*Civ. Code § 2782.1*]. Additional exemptions apply to agreements to indemnify (1) a professional engineer for negligence in providing inspection services [*see Civ. Code § 2782.2*], and (2) a professional engineer or geologist from liability in providing hazardous materials identification [*see Civ. Code § 2782.6*].

Another important exception provides that nothing in *Civ. Code § 2782* prevents a party to a construction contract and the owner or other party for whose account the contract is being performed from "negotiating and expressly agreeing" [

see definition, *below*] with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (1) for design defects [*see Civ. Code § 2784* (definition of "design defects")], or (2) of the promisee to the promisor arising out of or relating to the construction contract [*Civ. Code § 2782.5*]. For these purposes, the phrase "negotiating and expressly agreeing" does not impose an affirmative duty on one party to specifically advise the other party of the existence of the clause and to inform that other party of the risks involved in the construction project [*Markborough California, Inc. v. Superior Court (1991) 227 Cal. App. 3d 705, 712-713, 277 Cal. Rptr. 919]* . Instead, this statutory exception requires that the parties have a fair opportunity to accept, reject, or modify a limitation of liability clause [*Markborough California, Inc. v. Superior Court (1991) 227 Cal. App. 3d 705, 714, 277 Cal. Rptr. 919]* .

[b] Indemnity By Subcontractor in Specified Residential Construction Defect Situations

For all construction contracts, and amendments to such contracts, entered into after January 1, 2009, for residential construction [*see Civ. Code § 895 et seq.*; § 30D.10[7]], all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract that purport to insure or indemnify, including the cost to defend, the builder, or the general contractor or contractor not affiliated with the builder, by a subcontractor against liability for construction defect claims are unenforceable to the extent the claims either [*Civ. Code § 2782(c)*; *see Civ. Code §§ 911, 2782(h)* ("builder" and "construction defect" defined); *see also Civ. Code § 895 et seq.*; § 30D.10[7]]:

1. Arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, servants, or independent contractors who are directly responsible to the builder;

2. Are for defects in design furnished by the persons described in 1., above; or

3. Do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties.

This prohibition on indemnification may not be waived or modified by contract, act or omission; but contractual provisions, clauses, covenants, or agreements that are not expressly rendered unenforceable by the prohibition are reserved to the parties' agreement [*Civ. Code § 2782(c)*]. This does not affect the obligations of a builder or subcontractor pursuant to the statutory scheme applicable to actions for defective construction in new residences sold on or after January 1, 2003 [*Civ. Code § 2782(c)*; *see Civ. Code § 895 et seq.*; § 30D.10[7]], including the right to attempt to repair any alleged construction defect prior to litigation [*Civ. Code § 2782(c)*; *see Civ. Code § 910 et seq.*; § 34.49]. It also does not affect a subcontractor's insurance carrier's obligation to provide a complete defense in a construction defect action when the subcontractor added the builder to its liability insurance policies as an additional insured [*Civ. Code § 2782(c)*; *see* Presley Homes, Inc. v. American States Ins. Co. (2001) 90 Cal. App. 4th 571, 575-577, 108 Cal. Rptr. 686] .

The prohibition on indemnification does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs so long as that agreement does not waive or modify the above-described prohibition on indemnity. Before a subcontractor may be obligated to provide a defense or indemnify a builder or general contractor, the builder or contractor must first provide the subcontractor with a written tender of the claim, or a portion of the claim, that includes all of the information provided to the builder or general contractor by the claimant, including, but not limited to the information required for a notice of claim for an action for defective residential construction related to claims caused by the subcontractor's scope of work [*Civ. Code § 2782(d)*; *see Civ. Code § 910(a)*; § 34.49[5][b]]. The tender has the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a proper claim for construction defects to a subcontractor, the subcontractor must elect to either:

1. Defend the claim with counsel of its choice, in which case the subcontractor will maintain control of

the defense for any claim to which the defense obligation applies [*Civ. Code § 2782(d)(1)*.]; or

2. Pay, within 30 days of receipt of an invoice, a reasonable allocated share of the builder's or general contractor's defense fees and costs on an ongoing basis during the pendency of the claim, including any amounts reallocated on final resolution of the claim by settlement or judgment [*Civ. Code § 2782(d)(2)*].

If, as described in 1., above, a subcontractor elects to defend, the subcontractor must give the builder or general contractor notice of its election within a reasonable time period not to exceed 90 days from receipt of the written tender. The defense must be a complete defense of the builder or general contractor of all claims to the extent alleged to be caused by the subcontractor, including any vicarious liability claims resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work of any other party. Any vicarious liability imposed on a builder or general contractor for claims caused by a subcontractor electing to defend will be directly enforceable against the subcontractor by the builder, general contractor, or claimant [*Civ. Code § 2782(d)(1)*]. If a subcontractor elects to defend, and fails to timely and adequately perform its obligation to do so, the builder or general contractor will have the right to pursue a claim against the subcontractor for any resulting damages and reasonable attorney's fees. The builder or general contractor will bear the burden of proof to establish a subcontractor's failure to defend and any resulting damages [*Civ. Code § 2782(e)*].

If, as described in 2., above, a subcontractor elects to pay its reasonably allocated share of the builder's or general contractor's defense costs, the builder or general contractor must allocate a share to itself to the extent a claim is alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim is alleged to be caused by the subcontractor, regardless of whether the builder or general contractor actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense. Any amount not collected from any particular subcontractor may not be collected from any other subcontractor [*Civ. Code § 2782(d)(2)*]. If a subcontractor fails to perform its obligation to pay its share of defense costs, the builder or general contractor will have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, and for its reasonable attorney's fees. The builder or general contractor will bear the burden of proof to establish the subcontractor's failure to perform and any resulting damages. If, on a subcontractor's request, a builder or general contractor does not reallocate defense fees within 30 days following final resolution of a claim, the subcontractor will have the right to pursue a claim against the builder or general contractor for resulting damages as well as for interest on the fees, from the date of final resolution. The subcontractor will bear the burden of proof to establish both the failure to reallocate and any resulting damages [*Civ. Code § 2782(e)*].

[c] Parties' Right to Seek Equitable Indemnity for Claims Governed by Civil Code Section 2782

A builder, general contractor, or subcontractor will have the right to seek equitable indemnity for any claim governed by *Civil Code Section 2782*, and nothing in that section limits, restricts, or prohibits the right of a builder, general contractor, or subcontractor to seek equitable indemnity against any supplier, design professional, or product manufacturer [*Civ. Code § 2782(f), (g)*].

[4] Wording of Indemnity Clause

The negotiations over the inclusion and wording of an indemnity provision are relatively unimportant to most parties to a proposed contract because they are actually bargaining for their insurance carriers and any resulting increase in liability premiums will be minimal compared to the contract price. Accordingly, contractors rarely decline to enter into a construction contract because of the wording of a proposed indemnity clause, and the parties are likely to use the wording proposed by the owner (who is in a stronger bargaining position) or the indemnity clauses included in the standardized documents prepared by the American Institute of Architects, the Associated General Contractors of America, and other construction organizations [*see* Acret, Architects and Engineers, Ch. 12, *Indemnity* (Shepard's/McGraw-Hill 2d ed. 1977)]. Those standardized forms tend to utilize broad and sweeping indemnity

provisions [*see, e.g.,* App. E (AIA Doc. A201-1997), P 3.18.1 (requiring contractor to indemnify and hold harmless owner and architect from damages, etc. "caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable")]. Contractors and subcontractors accept broadly worded indemnity clauses at their peril, however. Courts hav e enforced indemnity agreements even for losses caused by acts over which the indemnitor had no control on the basis that the parties enjoy great freedom of action in allocating risk [*see, e.g., Continental Heller Inc. v. Amtech Mech. Servs. (1997) 53 Cal. App. 4th 500, 504-507, 61 Cal. Rptr. 2d 668]* .

For further discussion of indemnification, see Ch. 79, *Suretyship, Guaranty, and Indemnity* , and California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign ProfessionalsReal Property LawTortsConstruction DefectsTortsProcedureMultiple DefendantsIndemnityContractual Indemnity



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[Reserved]

§§ 30D.16[Reserved]



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§ 30D.20 Construction Organizations

[1] In General

Most participants in the construction industry belong to one or more professional, business, technical, or trade organizations that exist to educate and assist their members in the performance of construction-related functions. Examples of these organizations include the American Institute of Architects (AIA) and the Associated General Contractors of America (AGC). Trade directories, available in most public libraries, provide detailed information concerning these organizations.

[2] Use of Standardized Forms

Many organizations of construction professionals offer standardized, copyrighted construction contracts and related documents for use by their members. Most commentators and construction participants consider these forms to be complete, fair, and particularly useful when the attorneys for the parties to a project do not have the time or experience to prepare individualized documents [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 28 (1975)]. Although these preprinted forms may be slanted in favor of the members of the preparer-organization, it is not unusual for one organization to endorse the use of specified forms prepared by another organization.

This chapter reproduces numerous forms prepared by various construction organizations. Although the reproductions are to be used solely for illustrative purposes and must not be used in lieu of blank versions obtained from the appropriate organizations, this exposure to the contents of the forms will provide counsel with the opportunity to review their contents, target provisions that may be modified following negotiations with the other parties, and select from competing versions of the same type of agreement before ordering or being presented with blank originals.

Counsel should exercise great care in modifying any standardized construction documents. Any interlineations, deletions, or other modifications to standardized forms defeat one of the principle attractions of these forms, which is the familiarity most construction participants have with their contents. Further, modifications to one form might cause it to be inconsistent with other standardized documents making up the construction contract. For these reasons, the attorney should use addenda or riders whenever changing standardized forms [*see §§ 30D.202*, *30D.230*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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§ 30D.21 Contractors' State License Law

[1] In General

The Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] imposes a set of licensing requirements on any person who engages in construction work for more than $500 in compensation [*see Bus. & Prof. Code § 7048*]. The statute is administered by the Contractors' State License Board [*Bus. & Prof. Code § 7010*; *see Bus. & Prof. Code §§ 7000.5-7020*]. Many of the administrative duties of the Board are carried out by the Registrar, who is the executive officer and secretary of the Board [*Bus. & Prof. Code § 7011* (to remain in effect until January 1, 2011, and repealed as of that date, unless later enacted statute that is enacted before January 1, 2011, deletes or extends that date)].

[2] Definition of Contractor

Under the Contractors' State License Law, the terms "contractor" and "builder" are synonymous. "Contractor" means any person who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, parking facility, railroad, excavation, or other structure, project, development, or improvement, whether or not the performance of the work involves the addition to or fabrication of any structure, project, development, or improvement of any material or article of merchandise. Certain work performed in connection with the foregoing tasks, such as erecting scaffolding, cleaning grounds or structures, or preparing and removing roadway construction zones, lane closures, flagging, or traffic diversions, or installing, repairing, maintaining, or calibrating monitoring equipment for underground storage tanks, is also the work of a contractor. Further, the term "contractor" specifically includes subcontractors and specialty contractors [*Bus. & Prof. Code § 7026*; *see Civ. Code § 3104* ("subcontractor") discussed in *§ 30D.30[1]*].

[3] Classifications of Contractors

Every licensed contractor is classified into one or more of the following categories by the Registrar: general building contractor, general engineering contractor, or specialty contractor [*Bus. & Prof. Code § 7055*; *16 Cal. Code Reg. § 830(a)*]. A general building contractor's principal contracting business involves structures used for people, animals, chattels, or any kind of movable property, requiring in their construction the use of at least two unrelated building trades

or crafts [*Bus. & Prof. Code § 7057(a)*]. A general engineering contractor deals primarily with fixed works requiring specialized engineering knowledge and skill, such as irrigation projects, highways, and excavations [*Bus. & Prof. Code § 7056*]. Finally, specialty contractors perform construction work that requires special skill and involves the use of specialized building trades or crafts [*Bus. & Prof. Code § 7058(a)*].

For additional coverage of these classifications, see Ch. 88, *Licensing of Contractors* .

[4] License Requirement

No person engaged in the business of, or acting in the capacity of, a contractor may bring or maintain an action, or recover in law or equity in any action, for the collection of compensation under the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] without alleging that he or she was a duly licensed contractor at all times during the performance of the subject act or contract, regardless of the merits of the cause of action brought by the person [*Bus. & Prof. Code § 7031(a)*; *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 430-431, 30 Cal. Rptr. 3d 755, 115 P.3d 41* ; *see Bus. & Prof. Code § 7031(d)* (if licensure or proper licensure is controverted, proof of licensure must be made by production of verified certificate of licensure from Contractors' State License Board; burden of proof to establish licensure or property licensure is on licensee; *Advantec Group, Inc. v. Edwin's Plumbing Co. (2007) 153 Cal. App. 4th 621, 627, 63 Cal. Rptr. 3d 195* (general denial is sufficient to "controvert" contractor's pleading of licensure so that contractor must produce verified certificate of licensure))]. *Bus. & Prof. Code § 7031* does not allow a contractor who was unlicensed at any time during contractual performance to recover compensation for individual acts performed while he or she was duly licensed [*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* . However, if fully licensed at all times during contractual performance, a contractor is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed [*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 440, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* .

The prohibition of *Bus. & Prof. Code § 7031* does not apply to contractors who are each individually licensed under the Contractors' State License Law but who enter into a joint venture without obtaining a joint venture license [*Bus. & Prof. Code § 7031(a)*; *see Bus. & Prof. Code § 7029*; *see also § 30D.31*]. The prohibition does apply to "master builders" or "master developers," that is, developers who provide labor and materials through licensed, third-party general contractors [*Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 939-943, 29 Cal. Rptr. 2d 669]* . The prohibition also applied to a licensed contractor whose unlicensed corporation entered in a subcontract with a general contractor who could not sue to recover compensation, even though the contractor's license number appeared on all documents relating to the contract. The corporation was the contracting party, and recovery therefore was barred [*Opp v. State Farm Fire & Marine Ins. Co. (2007) 154 Cal. App. 4th 71, 76, 64 Cal. Rptr. 3d 260]* . A similar statutory prohibition provides that a security interest taken to secure any payment for the performance of any act or contract for which a contractor's license is required is unenforceable if the person performing that act or contract was not a duly licensed contractor at all times during the performance of the act or contract [*Bus. & Prof. Code § 7031(c)*].

If an unlicensed contractor is paid for performing work for which a professional license is required, the person who utilized the contractor's services and paid the compensation has a cause of action against the contractor to recover all compensation paid for work for which a license was required [*Bus. & Prof. Code § 7031(b)*].

As a general rule, the judicial doctrine of substantial compliance does not apply in these circumstances. However, under narrowly-defined circumstances in most cases commenced on or after January 1, 1995, a court may determine that there has been substantial compliance with the licensure requirements. To sustain a claim of substantial compliance, all of the following must be shown at an evidentiary hearing [*Bus. & Prof. Code § 7031(e), (f)*]:

- The contractor had been duly licensed in California before the contract was performed;

- The contractor acted reasonably and in good faith to maintain proper licensure;

- The contractor did not know or reasonably should not have known that he or she was not duly licensed; and

- The contractor acted promptly and in good faith to reinstate his or her license on learning it was invalid.

Slightly different rules apply to cases commenced before January 1, 1995 [*see Bus. & Prof. Code § 7031(e)*; *see also* California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors* (Matthew Bender)].

For a detailed discussion of the licensing of contractors, see Ch. 88, *Licensing of Contractors* .

[5] Exemptions From Licensing Requirements

Some persons, projects, and businesses are exempt from the requirements of the Contractors' State License Law. For example, improvements made by a homeowner on his or her own principal residence are exempt [*Bus. & Prof. Code § 7044(a)(3)*]. Another important exemption applies to improvements made by the owner of the affected property, if the work is not done for purposes of sale and certain other requirements are met [*see Bus. & Prof. Code § 7044(a)(1)*]. For a complete list of these exemptions, see Ch. 88, *Licensing of Contractors* .

[6] Required Licensing Information

Every contractor licensed in California must include his or her license number in all construction contracts, subcontracts, and all forms of advertising [*Bus. & Prof. Code § 7030.5*]. Further, a prime contractor must include a statutory statement (in at least 10-point type) on all construction contracts, except home improvement and service and repair contracts. The statement indicates (1) that contractors are required by law to be licensed and regulated by the Contractors' State License Board, and (2) that the Board has jurisdiction to investigate complaints against contractors that are filed within four years of the alleged violation in the case of patent acts or omissions, and 10 years of the alleged violation in the case of latent acts or omissions [*Bus. & Prof. Code § 7030(a)*; *see § 30D.229*]. Home improvement contracts written pursuant to *Bus. & Prof. Code § 7151.2* and service and repair contracts written pursuant to *Bus. & Prof. Code § 7159.10* must include a statement informing the owner of the Contractors' State License Board's role in regulating contractors and warning the owner to use only a licensed contractor [*see Bus. & Prof. Code § 7030(b)*]. For complete coverage of home improvement and service and repair contracts, see Ch. 89, *Home Improvement and Specialty Contracts* .

[7] Construction Supervision

Although the supervision of construction work does not require a contractor's license [*see Bus. & Prof. Code § 7051*], the prime contractor for a relatively small construction project may supervise the work, or may share the supervisorial responsibilities with the design professional [*see* Acret, Attorney's Guide to California Construction Contracts and Disputes, Ch. 7, *Architects and Engineers* (Cal. C.E.B. 2d ed. 1990)]. It is unlikely that the contractor will perform these duties in connection with a larger project [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 29 (Mar. 1, 1975)]. For further discussion of construction supervision, see Chapter 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .

[8] Local Business Tax Requirements

Nothing in the Contractors' State License Law prohibits a city, county, or city and county from (1) requiring a contractor to show proof that the contractor is in compliance with local business tax requirements prior to issuing any

city, county, or city and county permit, or (2) denying the issuance of a permit to a licensed contractor who is not in compliance with these local requirements [*Bus. & Prof. Code § 7000.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesFormationGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & Subcontractors



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§ 30D.22 Method of Selecting Prime Contractor

[1] In General

After the owner of a parcel of land has hired a design professional (usually an architect or engineer) to prepare drawings and specifications for a proposed development project on the parcel [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*], the owner and the design professional will select and commence contract negotiations with a prime contractor. As used in this chapter, "prime contractor" means the contractor who (1) contracts directly with the owner, and (2) supervises and directs the construction work. Usually, the prime contractor is a general contractor [*see* Architect's Handbook of Professional Practice, ch. 2.1, *Delivery Approaches* (AIA 1987)].

Unlike the owner of a public project, a private owner is not required to award the contract to the lowest responsible bidder [*see Pub. Contract Code § 10180* (public award requirement); *see also* Ch. 90, *Government Contracts*]. However, the primary goal for any private or public owner normally is to obtain the best product and performance for the lowest possible price. To accomplish this goal, a private owner typically employs either of the following methods to solicit bids and award the contract: competitive bidding [*see* [2], *below*]; or direct selection [*see* [3], *below*].

[2] Competitive Bidding

Competitive bidding is the most common method for selecting prime contractors. As its name suggests, competitive bidding involves issuing an invitation (in the form of a letter or published advertisement) to prospective contractors to bid on a proposed project [*see §§ 30D.200, 30D.201*]. This invitation for bids is a mere request to submit a bid or an offer for work and is not an offer to contract [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 155-156, 117 Cal. Rptr. 525]* unless the owner indicates that he or she will accept the lowest bid. Unlike public construction projects [*see* Ch. 90, *Government Contracts*], private construction contracts are not governed by statutory bidding procedures.

This method is based on the theory that head-to-head competition for the work will produce the lowest realistic contract price consistent with marketplace conditions [*see* Architect's Handbook of Professional Practice, ch. 2.1, *Delivery Approaches*, App. C (AIA 1987)]. However, the owner should not give the impression that the contract will

automatically be awarded to the lowest bidder. Instead, the invitation for bids should notify the bidders that the owner reserves the right to reject any and all bids, and to award the contract to other than the lowest bidder. In this way, the owner may take all of the bidders' qualifications into account, and will not be forced to accept a low but otherwise inadequate bidder [*see* California Real Estate Law & Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender); *see also § 30D.200[1]*].

Invitations to make competitive bids may be made to all interested contractors in the area (open bidding), or to a restricted number of selected, prequalified contractors (restricted or closed bidding). In the latter case, the prequalification process is designed to identify prospective bidders who have the ability, experience, reputation, financial integrity, and other qualifications necessary to complete the owner's project. The architect typically assists the owner in making these determinations [*see* Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)]. For a contractor's qualification statement that may be used to obtain relevant information from potential contractors [*see* AIA Doc. A305], see Appendix A.

The bid invitations will be accompanied by supporting documentation that may be used by the contractors to prepare their bids. The supporting documentation typically includes the following, as appropriate: the proposed owner-contractor agreement, general conditions of the contract, drawings, specifications, addenda [*see § 30D.202*], instructions to bidders [*see* Pt. III(A)(3) of the Transaction Guide], bonds, and information on bid security or bonds [*see* Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation*]. This bidding package will also include a blank bid form [*see § 30D.203 [2]*], which the bidder must complete and submit as the formal bid.

[3] Direct Selection and Negotiation

Under the direct selection method, the owner and design professional select a capable, interested contractor and negotiate solely with that contractor. The direct selection method may be preferable to competitive bidding when (1) construction is to be commenced prior to the completion of detailed drawings and specifications, (2) the selected contractor is particularly well-qualified for the proposed project, or (3) the owner and contractor have worked together successfully in the past [*see* California Real Estate Law & Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender); Architect's Handbook of Professional Practice, ch. 2.1, *Delivery Approaches,* App. C (AIA 1987)].

The primary disadvantage of direct selection is that the contractor does not have a competitive incentive to specify a low contract price. However, the owner and design professional can refuse to award the contract unless they determine that the price is reasonable. Further, the owner may provide the contractor with an incentive to keep costs down by using a cost-plus construction contract that includes a guaranteed maximum price [*see § 30D.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.23

§ 30D.23 Withdrawal and Other Relief From Bid Mistakes

[1] Prior to Acceptance

Because an invitation for bids is merely a request for bids and not an offer to contract, there is no contractual relationship between a bidder and the owner until after the bid is accepted [*see Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 155-156, 117 Cal. Rptr. 525* ; *Civ. Code § 1586*]. Thus, a bidder should be permitted to withdraw the bid at any time prior to its acceptance. Notwithstanding the foregoing, a subcontractor may not be permitted to withdraw an erroneous bid if the prime contractor, in making a bid to the owner, relied on the subcontractor's bid [*see § 30D.30[3]*].

[2] After Acceptance

After a bid has been accepted, the bidder's right to withdraw the bid or to rescind the contract will depend on several factors. As a general rule, a contractor who had made a material mistake of fact in the bid may rescind if the mistake was not due to neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in his or her original position. However, the bidder must give prompt notice of the mistake and the election to rescind [*see M.F. Kemper Const. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 701, 235 P.2d 7* (rescission was granted when city had been notified, prior to its acceptance of bid, of clerical error that did not constitute a neglect of legal duty); *see also Civ. Code § 1689(b)(1)*].

Courts distinguish between bid mistakes that are due to clerical error and those that are the result of poor business judgment. Generally, relief is allowed for clerical or mathematical mistakes, such as underestimating the cost of labor or materials, because a failure to grant relief would force the contractor to perform an agreement he or she had no intention of making [*M.F. Kemper Const. Co. v. City of L.A. (1951) 37 Cal. 2d 696, 703, 235 P.2d 7* ; *see Elsinore Union etc. Sch. Dist v. Kastorff (1960) 54 Cal. 2d 380, 388-389, 6 Cal. Rptr. 1]* . On the other hand, relief is normally denied for an error in judgment [*see M.F. Kemper Const. Co. v. City of L.A. (1951) 37 Cal. 2d 696, 703, 235 P.2d 7* ; *see also* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982) (withdrawal should not be permitted for errors of judgment)]. Relief has also been denied for a contractor's failure to independently investigate and calculate the cost of construction work [*see Kneer v. Baruch*

Corp. (1941) 47 Cal. App. 2d 601, 603-604, 118 P.2d 488] .

If a bid is withdrawn, the bidder should be disqualified from rebidding on the same project, and the remaining bids should be handled as if the withdrawn bid had never been submitted [*see* California Real Estate Law & Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender); Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersRevocable OffersReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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B. Contractors and Construction Organizations

15-30D California Legal Forms--Transaction Guide § 30D.24

§ 30D.24 Construction Security

[1] Bid Bonds and Bid Guarantees

Owners usually require some form of bid security. The most common type of required security is the bid bond. A bid bond is a guarantee to the owner that the selected bidder will execute the construction contract and furnish performance and payment bonds (if required) within a specified period of time or forfeit the penal sum of the bond. This penal sum is an amount (up to the amount of the bid security) intended to cover the difference between the defaulting bidder's proposal and the price at which the owner contracts in good faith with another party to perform the work [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982); Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)].

Other forms of bid security are occasionally used. These alternatives include other types of bonds and negotiable securities [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982); *see § 30D.111*].

The advertisement or invitation for bids should specify the amount and form of the security, stating the amount as a lump sum (usually determined by the design professional) or as a percentage of the base bid proposal [*see* Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)].

[2] Performance Bonds and Labor and Material Payment Bonds

Although there is no statutory requirement that performance or labor and material bonds be furnished in connection with private construction projects, a property owner will usually require the prime contractor to provide both. A performance bond guarantees that the contractor (or the surety in the event of the contractor's default) will fulfill the terms of the contract. The owner usually has an exclusive, non-transferable right of action on the bond.

The labor and material bond, also referred to as a payment bond, guarantees the payment of all bills incurred by the contractor for labor, materials, and supplies used in connection with the contract. The owner may receive additional

protection by recording the bond in the manner set forth in the mechanics' lien law [*Civ. Code §§ 3082-3267*]. This will limit the owner's potential liability to unpaid suppliers [*see Civ. Code §§ 3235, 3236*; for additional coverage, see Ch. 31, *Mechanics' Liens* ; Ch. 79, *Suretyship, Guaranty, and Indemnity*].

Owners should permit contractors to obtain surety bonds from any reputable company acceptable to the owner [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

For a detailed discussion of surety bonds, see Volume 14, Chapter 79, *Suretyship, Guaranty and Indemnity*. Part D of that chapter sets forth and discusses numerous construction contract bonds. The American Institute of Architects has also prepared bond forms [*see* AIA Doc. A311 (performance bond and labor and material payment bond), A312 (performance bond and payment bond)]. For further discussion, see California Real Estate Law & Practice, Volume 12, Chapter 422, *Insurance and Bonding Practice,* and Volume 13, Chapter 453, *Payment Bonds* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBonds, Guarantees & Letters of CreditBonds & GuaranteesContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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§§ 30D.25[Reserved]



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PART II. LEGAL BACKGROUND
C. Other Contractual Relationships: Subcontracts and Joint Ventures

15-30D California Legal Forms--Transaction Guide § 30D.30

§ 30D.30 Subcontracts and Subcontractors

[1] In General

A subcontractor is any contractor who does not have a direct contractual relationship with the owner [*Civ. Code § 3104*]. The term includes those who subcontract with the general contractor to furnish the material and construct for the general contractor some part of that which the general contractor has agreed with the owner to construct [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 180, 5 Cal. Rptr. 161, 352 P.2d 529]* . The essential feature of the relationship is that in the course of performance, the subcontractor constructs a definite, substantial part of the improvement in accordance with the drawings and specifications of the basic contract between the general contractor and owner [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529]* .

Subcontractors are often specialty contractors, that is, contractors who are licensed in certain specialized fields [*see § 30D.21 [3]*]. For a detailed discussion of specialty contractors, see Volume 16, Chapter 89, *Home Improvement and Specialty Contracts.*

[2] Overview of Bidding Procedure

A general contractor who is preparing to bid on a construction project must have an accurate idea of the cost of any necessary subcontract work because the contractor must incorporate the subcontract prices into the bid on the prime construction contract. Therefore, the contractor will solicit bids from subcontractors before bidding on the basic construction contract. General contractors make the solicitations in the same manner as owners when they invite bids from general contractors, for example, by placing advertisements in trade journals or by direct mailing to known and capable subcontractors [*see § 30D.22[2]*].

The deadline for bids on the prime contract is also the closing date for the subcontractors' bids. In fact, subcontractors often submit their bids a matter of hours before the opening of the general contractors' bids. This is done to prevent a general contractor from engaging in "bid shopping," that is, using a specific bid to initiate a bidding competition among several subcontractors. Instead, after receiving the subcontractors' bids at the last possible moment (commonly over the phone), the general contractor only has the time to record the bids and then prepare and submit his or her own bid [*see*

Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 15 Cal. App. 3d 95, 100, 92 Cal. Rptr. 799 ; *see also* California Real Estate Law & Practice, ch. 433, *Subcontractors and Subcontracts* (Matthew Bender); Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry, 18 UCLA L. Rev. 389 (1970)*].

The general contractor who is awarded the contract will negotiate with the subcontractor over the scope of the subcontractor's work. The contractor is free to choose another subcontractor unless the owner requires otherwise [*see* California Real Estate Law & Practice, ch. 433, *Subcontractors and Subcontracts* , (Matthew Bender)].

Owners almost always reserve the right to approve the subcontractors. Owners exercise this right in one of two ways. Some owners require bidders to list in their bids all prospective subcontractors, and then use those lists as one of the factors in awarding the contract. In this case, the bidding documents should state whether and how unlisted subcontractors can be substituted for the listed ones (for example, only with the owner's consent) [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 36 (Mar. 1, 1975)].

Alternatively, the owner will (1) require the successful bidder to submit a list of subcontractors for the owner's approval, and (2) prohibit the contractor from contracting with unapproved or rejected subcontractors. When this method is used, the owner will agree that any material change in construction costs caused by the substitution of a subcontractor rejected by the owner must be subtracted from or added to the contract price [*see* California Real Estate Law and Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

[3] Liability of Subcontractor for Erroneous Bid

A subcontractor has a duty to exercise reasonable care in preparing a bid and is presumed to foresee the harm that could befall a general contractor from an erroneous underestimate [*see Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 416, 333 P.2d 757]* . Thus, if a general contractor, in making a bid to an owner, relies on an erroneous bid from a subcontractor, the doctrine of promissory estoppel will be invoked to prevent the subcontractor from withdrawing its bid unless the general contractor had knowledge of the error before making his or her bid to the owner [*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 416, 333 P.2d 757* ; *see H. W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc. (1971) 14 Cal. App. 3d 848, 852, 92 Cal. Rptr. 669]* . For a detailed discussion of the effect of the doctrine of promissory estoppel on erroneous bids by subcontractors, see California Real Estate Law and Practice, ch. 433, *Subcontractors and Subcontracts* (Matthew Bender).

[4] Extra Work Performed by Subcontractors

Subcontractors typically seek compensation for extra work from the prime contractor rather than the owner because they are in privity of contract with the former. After reviewing the request, the prime contractor should either reject the request in writing (specifying the reasons for the rejection) or forward the request to the owner for payment. Prime contractors sometimes provide in the subcontract agreement that the subcontractor will not be compensated until the prime contractor receives the funds from the owner [*see § 30D.241*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.31

§ 30D.31 Construction-Related Joint Ventures

Two or more licensed contractors may jointly submit a bid for a construction project, provided that they first obtain a joint venture license. The joint venture license may be issued in any classification in which at least one of the contractors is licensed [*Bus. & Prof. Code § 7029*]. After obtaining the joint venture license, the contractors will usually enter into an agreement to prepare and submit the joint bid [*see § 30D.210*]. If the owner accepts the bid, the contractors will then enter into a formal joint venture agreement [*see* App. B].

Architects, engineers, and other design professionals also commonly enter into joint ventures for construction projects, either with members of their own professions or with other types of professionals. Unlike contractors, these design professionals are not subject to any special joint venture licensing requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesGeneral OverviewReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

15-30D California Legal Forms--Transaction Guide § 30D.100

§ 30D.100 Client Interview

[1] Facts

1. Concerning owner:

a. Name and address.

b. Legal status, e.g.:
(1) Corporation.

(2) Partnership.

(3) Joint venture.

(4) Husband and wife.

c. Financial ability and worth.

NOTE:
Knowing the owner's financial ability will help the attorney determine whether or not the owner will need, and be able to obtain, outside financing.

2. Concerning design professional (if any) retained by owner to work on project:

NOTE:
The design professional will usually be an architect or an engineer. For a detailed discussion of the design, supervisorial, and other services typically performed by a design professional for a construction

project, see Chapter 30C, ***Agreements with Architects, Engineers, and Other Design Professionals*** .

a. Name and address.

b. Legal status, e.g.:

(1) Individual.

(2) Partnership.

(3) Corporation.

c. Method of compensation.

d. Extent of supervisorial authority.

3. Type of project, e.g.:

a. Single-family dwelling.

b. Apartment building.

c. Commercial building or store.

d. Office building.

e. Industrial park.

f. Residential subdivision.

g. Shopping center.

4. Size and scope of project, e.g.:

a. Estimated cost.

b. Number of structures, units, or stories.

5. Location of project:

a. Street address.

b. Legal description of land.

c. City or county.

d. Market area.

6. Manner in which project is to be financed [*see* Ch. 30A, *Construction Financing*]:

a. Standard construction loan.

NOTE:
A standard construction loan is a short-term or interim loan, the proceeds of which are used to pay for the actual construction work [***see*** Ch. 30A, ***Construction Financing***]. This loan is repaid with the proceeds from a permanent loan [***see*** P 6c NOTE, ***below***].

b. Long-term construction loan.

NOTE:
A long-term construction loan is an interim financing device that typically has a short initial term (rarely exceeding two years). Its term may be extended several years if necessary in order to provide the borrower with additional time in which to obtain permanent financing [***see*** Ch. 30A, ***Construction Financing***].

c. Permanent or "take-out" loan.

NOTE:
A permanent or take-out loan is used to pay off an interim construction loan [***see*** P 6a, ***above***]. It is made after construction has been completed and is payable in installments over a period of several years [***see*** Ch. 30A, ***Construction Financing***].

d. Owner's own funds.

7. Concerning any construction loans already obtained:

a. Name and address of lender.

b. Amount of loan.

c. Loan period.

d. Loan terms.

e. Manner in which loan proceeds will be disbursed.

8. If financing has not been arranged, information concerning potential economic feasibility of project, e.g.:

a. Market area to be served by project.

b. Economic conditions in targeted market area.

c. Need for project in market area.

d. Estimated value after completion.

NOTE:
This information is relevant because it is the primary factor considered by the construction lender in deciding whether or not to make a construction loan.

e. Anticipated income from completed project.

[2] Documents

1. Copies of any bidding documents already prepared or obtained, e.g. [*see § 30D.120*]:

NOTE:
For a discussion of the standardized documents (including bidding documents) commonly used in the construction industry, see *Section 30D.20*.

a. Letter inviting bids or advertisement for bids.

b. Instructions to bidders.

c. Contractor's qualification statement.

d. Addenda to bidding documents.

e. Information concerning bid security, including (if applicable) blank bid bond form.

2. Copies of all other contract documents already prepared or obtained, e.g. [*see § 30D.120*]:

a. Owner-design professional agreement.

b. Design professional-consultant agreement.

c. Project drawings and specifications.

d. Addenda to (or other modifications of) construction contract documents.

e. General conditions of construction contract.

f. Supplemental conditions.

g. Other conditions.

h. Interpretations supplied by design professional.

i. Subcontracts.

j. Joint venture agreement.

3. Deed or long-term lease showing:

a. Owner's property rights.

b. Legal description.

4. Financing documents, e.g.:

NOTE:
For complete coverage of construction financing law and techniques, see Chapter 30A, ***Construction Financing*** .

a. Loan commitment or approval.

b. Construction loan agreement.

c. Construction loan escrow instructions.

d. Promissory note evidencing construction loan.

e. Deed of trust.

5. If standard construction contract between owner and prime contractor is to be used:

a. Complete set of drawings and specifications for project.

NOTE:
The drawings and specifications for a construction project are generally drafted by a design professional who may also be hired to supervise the construction project and the work of the contractor. For further discussion, see Chapter 30C, ***Agreements With Architects, Engineers, and Other Design Professionals*** .

b. Any construction loan agreement signed or proposed for signature by owner.

6. If subdivision construction contract is to be used:

NOTE:
For a detailed discussion of the laws governing subdivisions, see Ch. 30, ***Subdivision Regulation.*** For coverage of the financing of subdivision off-site improvements through the formation of special assessment districts, see Ch. 30A, ***Construction Financing*** .

a. Copy of recorded final subdivision map for project.

b. Copy of any agreements between developer and city or county for installation of off-site improvements.

c. Copy of any covenants, conditions, and restrictions recorded or proposed for subdivision.

d. Copy of drawings for any houses or other buildings to be erected in subdivision.

e. Copy of any bonds posted by owner under Subdivision Map Act [*Gov. Code §§ 66410-66499.37*] to assure installation of off-site improvements in subdivision.

7. If applicable, copies of insurance policies covering project and issued to:

a. Owner.

b. Prime design professional.

c. Prime contractor.

d. Subcontractors.

8. Long-term or other leases:

a. To be entered into at or before time of commencement of project; or

b. Proposed for use when project is completed.

9. Any option agreement between developer of project and property owner [*see* Ch. 22, *Options to Purchase Real Property*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign ProfessionalsReal Property LawFinancingConstruction Loans



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B. Preliminary Determinations

15-30D California Legal Forms--Transaction Guide § 30D.110

§ 30D.110 Selection of Project Delivery Approach and Contract System

1. Will design and construction tasks be performed by one entity or by separate entities?

NOTE:
Traditionally, a design professional provides professional design services, and one or more contractors provide goods and construction services [***see*** Architect's Handbook of Professional Practice, ch. 2.1, ***Delivery Approaches*** (AIA 1987); ***see also*** *§ 30D.11 [1]*]. One entity is used when one prime contractor will design and build the project [***see*** P 3a, ***below***].

2. Will construction commence before completion of construction documents [*see* P 3c, *below*]?

NOTE:
If time constraints or other considerations make it important to commence construction prior to the completion of the design work, the owner should utilize either a design-build contract or a fast track contract [***see*** P 3b, c, ***below***].

3. What project delivery approach should be used, based on answers to Paragraphs 1 and 2, *above*, and on owner's wishes in general?

a. Design-award-build approach.

NOTE:
When this standard approach is used, the owner does not enter into a construction contract with a prime contractor until the owner's design professional has completed the construction documents and all other design work [***see*** Architect's Handbook of Professional Practice, ch. 2.1, ***Delivery Approaches*** (AIA 1987); ***see also*** *§ 30D.11[1]*].

b. Design and build approach.

NOTE:
Under a design-build contract, a single contractor assumes responsibility for the design and construction of the project. This approach is often used for large construction projects, such as industrial plants, to provide complete coordination of the many phases of the work [***see*** *§ 30D.11[2]*].

c. Fast track approach.

NOTE:
Fast track contracts provide for the commencement of the construction work while the design professional is still preparing the design documents. This approach is intended to shorten the duration of the project when, for example, strict time limits apply to land-use entitlements [***see*** *§ 30D.11 [3]*]. Frequently, an owner utilizing the fast track approach will enter into multiple prime contracts covering different phases of the work [***see*** *§ 30D.11 [4]*], and will retain a construction manager to coordinate the design and construction work [***see*** *§ 30D.11[5]*].

4. Will owner utilize a single construction contract or multiple prime contracts?

NOTE:
A single contract should be used when one prime contractor is to supervise the work. Alternatively, the owner may wish to award a separate prime contract for each of the primary areas of work to be performed [***see*** *§ 30D.11[4]*].

Although this chapter assumes that only one prime contract will be used, the coverage also applies to projects involving multiple prime contracts (unless the discussion indicates otherwise).

5. What type of construction contract (based on compensation of contractor) will be used?

a. Stipulated sum (or "lump sum") agreement.

NOTE:
Under a stipulated sum agreement, the contractor performs the construction work for a specified sum that includes the contractor's costs, overhead, and profit. This type of agreement is almost always used when the prime contractor is selected by competitive bidding [***see*** *§ 30D.111*, P 3].

b. Cost-plus contract, with or without guaranteed maximum price.

NOTE:
Under a cost-plus contract, the prime contractor receives the cost of the construction work and a fee, in the form of a fixed amount or a percentage of construction cost, for overhead. A ceiling (a "guaranteed maximum price") may be placed on the amount of fees that will be reimbursable [***see*** *§ 30D.12[2]*].

6. Will owner hire a construction manager?

NOTE:

A construction manager is responsible for overseeing the entire construction project. These managers are often used in connection with design and build or fast track delivery approaches, or with relatively large projects in general, when the parties desire to (1) relieve the owner and prime contractor from administrative duties, and (2) provide for an independent review of the prime contractor's performance [***see*** *§ 30D.11[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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§ 30D.111 Method of Selecting Contractor and Related Bidding Requirements

NOTE:
This Section sets forth preliminary determinations that may assist the attorney and client in deciding on a method for the selection of a prime contractor. For a procedural guide to the selection of a contractor, see *Section 30D.121*.

1. Concerning project design work:

a. Has owner already retained a design professional [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*]?

b. Does owner intend to have contractor perform design work [*see 30D.110*, P 1]?

2. How will prime contractor be selected?

a. Competitive bidding [*see* P 4, *below*].

NOTE:
The head-to-head competition that occurs during the competitive bidding process is intended to produce the lowest realistic contract price consistent with marketplace conditions [***see*** Architect's Handbook of Professional Practice, ch. 2.1, ***Delivery Approaches,*** App. C (AIA 1987); ***see also*** *§ 30D.22[2]*].

b. Direct selection of one capable contractor [*see § 30D.22[3]*].

3. If owner selects competitive bidding:

a. Who will be invited to submit bids?

(1) All licensed contractors in area (open bidding); or

(2) Selected, pre-screened contractors (restrictive or closed bidding).

NOTE:
The prequalification process is designed to identify prospective contractors who have the experience, reputation, and other qualifications necessary to complete the owner's project [***see*** Architect's Handbook of Professional Practice, ch. 2.7, ***Bidding and Negotiations; see also*** App. A (illustrative contractor's qualification statement)].

b. What will be the basis for bid price?

(1) Project as specified; or

(2) Alternative cost estimates based on:

NOTE:
An alternate bid is an amount bid for a specified change in the proposed project drawings and specifications [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982); ***see also*** *§ 30D.13 [4]*]. For example, an owner may list a series of similar project alternatives, each of which contains a different number of structures. In that case, the instructions to bidders [***see*** *§ 30D.120*, P 3] should state which alternates are preferred if bids do not go above a specified amount [***see*** Sweet, ***Your First Construction Contract,*** 21 Prac. Law. No. 2 (March 1, 1975) at 35]. The AIA and AGC recommend that owners solicit alternate bids only when they are necessary to insure a proposal within a limited budget or to reach an important decision concerning materials or processes, and further recommend that owners keep the number of alternates to a minimum and avoid complex alternates [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

(a) Alternative methods of construction; or

(b) Different types of equipment and materials.

c. Will time for performance be an element to be bid on?

d. Who will be designated to receive bids?

NOTE:
There are no legal requirements governing bid recipients. It is likely that the owner or design professional (or a designated member of their staffs) will receive the bids.

e. What deadline should invitation indicate for submission of bids?

f. When should bids be opened?

NOTE:

Normally, bids should be opened immediately after the deadline in order to prevent any possibility of bid tampering and eliminate disputes with respect to late bids. Further, the bids should be opened in the presence of the bidders (public bidding) [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

g. Will owner accept late bids?

NOTE:

In the construction industry, the prevailing view is that owners should automatically reject any bids received after the applicable deadline for submission to prevent bid shopping by late bidders [Acret, Attorney's Guide to California Construction Contracts and Disputes, ch. 3, ***Private Contract Disputes*** (Cal. C.E.B. 2nd ed. 1990)].

4. Concerning bidding documents:

a. How will bidders examine or obtain bidding documents, e.g.:

(1) Sent with letter inviting bids;

(2) Available for inspection at offices of owner, design professional, or builders' exchange?

b. What will be amount of refundable deposit for documents?

c. What is deadline for return (in good condition) of project documents by unsuccessful bidders?

5. Concerning bid security [*see § 30D.24*]:

a. What will be required amount?

b. What form must it be in?

(1) Bid bond.

(2) Cash.

(3) Certified check.

(4) Bank draft.

(5) Cashier's check.

(6) Money order.

6. Should owner require contractor to provide performance bond and/or labor and material payment bond [*see § 30D.24[4]*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.112

§ 30D.112 Extra Work and Other Changes in Work

1. What procedures will contract documents establish for authorizing extra work or other changes in work (including adjustments to contract price or time of completion) [*see § 30D.14*]?

a. Who will have power to issue written change order?
(1) Owner.

(2) Design professional.

(3) Both of the foregoing.

b. What form of written change order will be used?

NOTE:
Most general contractors and active developers have their own change order forms.

c. If contract documents will permit use of oral change orders, should they be:

(1) Made by owner and/or design professional; and

(2) If made by design professional, should contract require approval by owner before work commences?

2. Should contract documents favor owner by prohibiting:

a. Issuance of written change order by anyone not expressly authorized to do so [*see* P 1a, *above*]; and

b. Compensation for extra work ordered by any unauthorized person?

3. Regarding responsibility for potential problems with subsurface conditions, should construction contract contain "changed conditions" clause that provides for equitable adjustment of contract price following discovery of unusual subsurface conditions [*see § 30D.115*, P 3b]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.113

§ 30D.113 Subcontracts and Subcontractors

1. What portions of project work will be performed by subcontractors?

2. How will subcontract sum be disbursed?

NOTE:
Subcontractors are usually paid monthly progress payments, and are typically required to submit an application for each payment. After completing the work, the subcontractor may be required to submit evidence that all known indebtedness connected with his or her work has been satisfied [***see, e.g.,*** App. F (AIA Doc. A401-1997), P 12.2].

3. Will subcontractor be charged for using general (prime) contractor's equipment?

4. How will contractor authorize additional or extra work?

a. Written order signed by contractor and/or owner.

b. Oral orders of contractor.

NOTE:
In this case, the contractor should be required to give the owner prior written notice of the order.

5. What is amount of any required performance bond or labor and material payment bond that subcontractor will be required to post?

6. Will controversies arising out of or relating to subcontract be settled by mediation and arbitration [*see* Art. 6 of App.

F (AIA Doc. A401-1997), Art. 6]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.114

§ 30D.114 Subdivision Improvements

1. What types of structures or other improvements will be constructed on subdivided land, e.g.:

NOTE:
For a detailed discussion of subdivisions, see Ch. 30, ***Subdivision Regulation*** **.**

a. Single-family residences;

b. Condominium project;

c. Planned developments; or

d. Community apartments?

2. How many of each type of on-site improvement are planned?

3. What off-site improvements are required [*see* Ch. 30A, *Construction Financing*]?

4. How does owner propose to finance off-site improvements?

5. Has owner entered (or should owner enter) into any agreements with city or county for installation of off-site improvements [*see* Ch. 30A, *Construction Financing*]?

6. What bonds guaranteeing construction of off-site improvements are required by city or county?

7. What will owner do with subdivided lots?

a. Sell lots to home builders.

b. Sell lots on which they will have custom-built houses erected to homeowners.

c. Have homes constructed by general building contractor [*see § 30D.226*].

8. If owner will construct homes, what is anticipated selling price of completed homes?

9. If owner will sell unimproved lots to house builders or homeowners, what is anticipated selling price of lots?

10. What is name and address of civil engineer or other professional, if already selected, who did or will prepare tentative and final subdivision maps?

11. What are names and addresses of any other experts (e.g., planners, real estate economists, etc.) retained by owner to participate in development of subdivision?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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15-30D California Legal Forms--Transaction Guide § 30D.115

§ 30D.115 Miscellaneous Considerations

1. Does proposed work involve:

a. Government contract [*see* Ch. 90, *Government Contracts*]?

b. Home improvement, swimming pool, or specialty work [*see § 30D.10[4]*; *see also* Ch. 89, *Home Improvement and Specialty Contracts*]?

c. Single-family dwelling to be retained by owner for at least one year [*see Bus. & Prof. Code § 7164*]?

NOTE:
Every contract between an owner and a contractor for the construction of such a dwelling, and any changes to such a contract, must be evidenced in writing [*Bus. & Prof. Code § 7164(a)*]. The writing must be signed by both parties [*Bus. & Prof. Code § 7164(a)*] and must contain (1) specified information regarding the contractor and the work, (2) official notices regarding the mechanics' lien laws and the value of commercial general liability insurance encouraging the owner to verify the contractor's insurance coverage and status, and (3) a notice describing the right of the owner to require the contractor to provide performance and payment bonds [*Bus. & Prof. Code § 7164(b), (d)*]. For further discussion, see *§ 30D.229[1][b][iii]*.

2. If project involves joint venture between two or more contractors or other construction professionals [*see § 30D.31*]:

a. Do contractors possess joint venture license?

b. If contractors have yet to obtain joint venture license:

(1) Does each potential joint venturer possess current contractor's license?

(2) Does at least one potential joint venturer hold license in same classification as that desired for joint venture license?

3. How will owner allocate responsibility for potential problems with subsurface conditions [*see § 30D.13[5]*]?

a. Will owner shift responsibility to bidders by:

(1) Requiring them to conduct independent soil investigations; or

(2) Expressly disclaiming owner's liability for accuracy of owner's report?

NOTE:
If either of the foregoing approaches is used to shift the risk of unforeseen subsurface conditions from the owner to the bidders, construction costs will increase because interested bidders, when making their bids, will take into account the increased risk and the soils report preparation costs [***see*** California Real Estate Law and Practice, Ch. 432, ***The Owner-Prime Contractor Relationship and Contract*** (Matthew Bender).

b. Will owner bear risks by agreeing to inclusion in construction contract of "changed conditions" clause that:

(1) Permits contractor to claim equitable adjustment of contract price following discovery of unusual subsurface conditions;

(2) Requires prompt notice to owner of the discovery; and

(3) Prohibits action on unanticipated conditions until owner makes determination regarding right to equitable adjustment?

4. How will contract price be paid to contractor?

NOTE:
The manner in which progress or other payments are to be made to the contractor will, in many cases, be determined by the manner in which the lending institution requires the construction loan proceeds to be disbursed. For a discussion of the various methods lending institutions use for the disbursement of construction loan funds, see Ch. 30A, ***Construction Financing*** **.**

a. In progress payments as specified stages of construction are completed [*see § 30D.221[1][c][ii]*].

b. In progress payments equal to specified percentage of value of work completed during identified time period [*see § 30D.221[1][c][iii], [iv]*].

c. Under "voucher system" directly to subcontractors and suppliers.

d. Under "warrant system" reimbursing contractor for expenses and costs actually paid.

e. Pursuant to terms of joint (builders') control agency agreement [*see* Ch. 30E, *Joint (Builders') Control Agreements*].

5. Do any of following types of governmental regulations and requirements apply to proposed project [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*]?

a. Zoning requirements.

b. Setback and parking requirements.

c. Requirements of local building codes and regulations.

d. Local, regional, state, and federal environmental requirements.

e. Licensing requirements for members of project team.

6. Is owner required to obtain security for payment obligations under contract [*see Civ. Code § 3110.5*]? If so, owner must:

NOTE:
Generally, the owner must provide security if the contract does not exceed $5 million if the owner's interest is a fee simple absolute interest, or $1 million if the owner's interest is less than a fee simple interest (including a leasehold interest) [*Civ. Code § 3110.5(a)*]. The requirement does not apply to contracts for construction of single-family residences, public works projects, or housing developments that are eligible for a density bonus [*Civ. Code § 3110.5(e)*]. For coverage of the owner's obligation to provide security for its contractual payment obligations, see *§ 30D.10[6]*.

a. Provide original contractor with certified copy of recorded construction mortgage or deed of trust, which must disclose amount of construction loan [*Civ. Code § 3110.5(b)*].

b. Determine amount of security required based on amount of contract, either [*Civ. Code § 3110.5(b)*]:

(1) Not less than 25 percent of contract price if project is to be substantially completed within six months; or

(2) Not less than 15 percent of contract price for all other contracts.

c. Determine appropriate form of security [*Civ. Code § 3110.5(b)(1)-(3)*]:

(1) Payment bond;

(2) Irrevocable letter of credit; or

(3) Escrow account.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property

LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawZoning & Land UseGeneral Overview



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15-30D California Legal Forms--Transaction Guide §§ 30D.116-30D.119

[Reserved]

§§ 30D.116[Reserved]



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15-30D California Legal Forms--Transaction Guide § 30D.120

§ 30D.120 Preparing or Selecting Bidding and Contract Documents

NOTE:

This Section covers the preparation and selection of the bidding and contract documents. As a practical matter, these two sets of project documents should be prepared at roughly the same time because the vast majority of the bidding documents will eventually become contract documents.

For a guide to the solicitation of bids, see *§ 30D.121*.

1. Insert following (if applicable) into at least one of the bidding documents discussed in remainder of this Section:

a. If multiple prime contracts will be used, or if owner will perform part of work, include identification of:

NOTE:

When multiple prime contracts are used, the owner awards separate contracts to different contractors, with each contract covering a different portion of the work [***see*** *§ 30D.11 [4]*]. In that case, it is obviously extremely important that the bidding documents describe the division of work so that bidders know exactly what portion they are bidding on [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

(1) Separate elements of work.

(2) Party responsible for coordinating work of prime contractor(s) and owner.

b. Provision reserving right of owner to reject any and all bids [*see § 30D.200[1][f]*].

2. If competitive bidding will be used, prepare one of following invitations for bids:

a. Letter inviting bids from prime contractors selected by owner or design professional [*see § 30D.200*].

b. Formal public notice or advertisement inviting bids [*see § 30D.201*].

NOTE:
Public advertisements for bids are rarely used in connection with private construction projects [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

3. Prepare or obtain standardized, preprinted instructions to bidders, and include in them information concerning following matters:

NOTE:
The instructions to bidders should set forth in detail information concerning the preparation, submission, and consideration of bids. The following list is based on the contents of the commonly-used Instructions to Bidders prepared by the American Institute of Architects [***see*** AIA Doc. A701; ***see also*** Architect's Handbook of Professional Practice, Ch. 2.7, ***Bidding and Negotiation*** (AIA 1987)].

a. Relevant definitions.

b. Procedure for examination by bidders of bidding documents.

c. Representations of bidders that they have:

(1) Read bidding documents; and

(2) Become familiar with project site.

d. Bidding procedures, including submission, execution, withdrawal, modification, and opening of bids.

e. Substitutions of specified materials or supplies [*see* P 7, *below*].

f. Qualifications of bidders.

g. Rejection of bids.

h. Addenda to bidding documents [*see § 30D.202*].

i. Return of bidding documents.

j. Procedures for clarification of bidder's questions.

k. Submission of post-bid information by successful bidder, such as:

(1) Statement of construction costs.

(2) Description of work to be performed by contractor.

(3) List of names of subcontractors and suppliers of materials.

l. Performance bond and labor and material payment bond requirements.

m. Schedule of drawings, if not contained in another contract document.

4. Prepare or obtain standardized contractor's qualification statement [*see* App. A (AIA Doc. A305)].

NOTE:

A contractor's qualification statement contains questions concerning the organization, history, experience, operational methods, character, and financial references of the contractor [***see*** Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.91 (AIA 1994)]. The owner may use the completed statements to evaluate the contractors' financial responsibility.

5. Prepare rough draft of, or select particular standardized version of, contract to be executed by owner and successful bidder.

NOTE:

This chapter reproduces standardized owner-contractor forms prepared by the American Institute of Architects [***see*** Apps. C, D], the Engineers Joint Contract Documents Committee [***see*** *§§ 30D.224, 30D.226*], and the Associated General Contractors of America [***see*** *§ 30D.228*]. It also includes custom-drafted (that is, nonstandardized) construction contracts [***see*** *§§ 30D.221-30D.223*].

6. Instruct design professional to prepare project drawings pursuant to his or her contract with owner [*see § 30D.13[4]*].

7. Have design professional prepare specifications [*see § 30D.13[4]*] which, if desired, adopt one of the following methods for specifying acceptable alternative materials and supplies [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

a. Insert "or approved equal" after each specification, but only if none of remaining alternatives listed below can be used.

NOTE:

The AIA has noted that use of the foregoing phrase, without prior determination of acceptable materials or products, often leads to differences of opinion concerning the acceptability of a contractor-proposed substitute, and that it should be used with caution [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

b. If only one product will suffice, utilize "closed specifications" that:

NOTE:

Narrowing the choices in this fashion may increase costs [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

(1) List one acceptable trade name for each item; and

(2) Prohibit substitutions.

c. Set forth "contractor's option specifications" that list trade names of all acceptable products.

d. Adopt "product approval specifications" that:

(1) List one or more acceptable trade names for each product;

(2) Permit bidders to submit written proposals for substitutions at specified time before deadline for submission of bids; and

(3) Allow bidders to use substitutes in their bids if substitution proposal is approved by addendum.

e. Use "substitute bid specifications" that:

(1) List one or more acceptable trade names for each product; and

(2) Require bidder to use those specified products in base bid, unless:
(a) Bidder attaches substitution proposal to bid;

(b) Proposal indicates how base bid would be affected if proposal is accepted; and

(c) Proposal is accepted.

8. Assemble information regarding bid security, including, if applicable, blank bid bond form [*see § 30D.24[1]*].

9. Prepare information concerning any performance bond and labor and material payment bond requirement [*see § 30D.24[2]*].

10. Prepare or obtain standardized general conditions of construction contract.

NOTE:
This chapter reproduces preprinted general conditions prepared by the American Institute of Architects [***see*** App. E (AIA Doc. A201-1997)] and the Engineers Joint Contract Documents Committee (EJCDC) [***see*** *§ 30D.226* (EJCDC Doc. 1910-8)]. It also includes a cross reference sheet, prepared by the EJCDC, that indicates where specified topics are covered in the two foregoing documents [***see*** *§ 30D.227* (EJCDC Doc. 1910-11)].

11. If necessary, prepare supplementary conditions that modify or expand general conditions [*see § 30D.13[3]*].

12. Draft any desired changes to other standardized documents mentioned above.

13. Confirm that all project documents are consistent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.121

§ 30D.121 Selecting Prime Contractor by Competitive Bidding

NOTE:
As an alternative to the competitive bidding method of contractor selection, the owner and design professional may select one contractor who they know to be capable of performing the proposed work, and then negotiate solely with that contractor [***see*** *§ 30D.22[3]*].

1. Have design professional or owner solicit bids as follows:

NOTE:
When soliciting bids, the owner should not state or imply that he or she will accept the lowest bid. The selection should be based not only on the bid amount but also on the bidders' qualifications. Thus, the owner should provide in the bid invitation or advertisement [***see*** P 2a, b, ***below***] that the bid will go to the lowest responsible bidder (or similar wording), and specifically reserve the right to reject any and all bids [***see*** *§ 30D.22[2]*].

a. If bidding is to be restricted to selected bidders, mail bid invitation letters (and contractor qualification statements, if desired) [*see § 30D.120*, P 4] to those bidders.

NOTE:
The design professional ordinarily helps the owner select prospective bidders. The bidders should have the ability, experience, reputation, financial integrity, and other qualifications necessary to complete the owner's project.

An owner may distribute contractor qualification statements before issuing invitations to

bid, in which case the completed qualification statements are used to select the contractors who will actually be invited to bid on the project. More commonly, the owner will distribute blank qualification statements along with the bid invitations, and require the bidders to submit the completed statements along with their bids [***see*** P 9, ***below***] or after the submission of the bids but before the award of the construction contract.

b. If bidding is to be open to all licensed contractors in area, publish formal notice inviting bids in:

NOTE:
Although public advertisements for bids may be used in connection with private construction projects, it is much more common to restrict the bidding in the manner described in P 1a, ***above*** [***see*** Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

(1) Local construction industry periodical; or

(2) Newspaper.

2. Provide invited bidders with opportunity to inspect (and obtain copies of) bidding documents [*see § 30D.120*].

3. If desired, demand refundable deposit for bidding documents.

4. If any bidder requests extra copies of bidding documents, consider charging bidder for them.

5. Provide potential subcontractors, material suppliers, and vendors with opportunity to review project documents at offices near project site.

NOTE:
These potential participants in the construction project may be approached at this stage by the owner, design professional, or the prime contract bidders.

6. If owner desires to extend original deadline for receipt of bids, notify bidders and potential bidders as soon as possible before original deadline.

NOTE:
The AIA and AGC recommend that this notification be given at least three working days before the original deadline [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

7. Consider holding pre-bid conference to answer bidders' questions orally.

8. If any project documents must be modified:

a. Prepare addendum in written and/or graphic form [*see § 30D.202*].

b. Send addendum to every potential bidder.

NOTE:
An addendum should not be issued later than four working days before the scheduled deadline for receipt of bids, except to withdraw the request for bids or to postpone the

deadline for receipt [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

c. Assemble record of addenda.

9. Require delivery of bids and bid security to designated place, not later than a specified time.

NOTE:

A contractor whose license has been suspended or revoked for disciplinary reasons within the last eight years must disclose that fact in writing, whether or not the suspension or revocation was stayed [*Bus. & Prof. Code § 7030.1(a), (b)*]. For further discussion of these requirements, see *§ 30D.10[5]*.

10. Open bids at specified time.

NOTE:

The bid opening may be public or private. The AIA and AGC suggest that the bids be opened in the presence of the interested bidders [Recommended Guide for Competitive Bidding Procedures and Contracts Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)]. At a public opening, the bids are read aloud by the design professional or owner. He or she should announce what each proposal indicates, and indicate whether or not the bidder has provided all required information, bonds, securities, and attachments. The AIA and AGC advise against making any additional statements regarding the bidders or identifying a bid as the low bid [***see*** Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.91 (AIA 1994)]. A private opening attended by the owner and design professional (and perhaps by other parties) may be more informal [***see*** Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.91 (AIA 1994)].

11. If bids are not opened in presence of all interested bidders, furnish tabulation of all bids to each bidder shortly (e.g., 10 days) after bid opening date [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995)].

12. After bid opening, review bids (and accompanying qualifications statements, if applicable) with owner and design professional, paying particular attention to following issues for each bidder:

a. Net worth and financial ability.

b. General experience as contractor.

c. Similar projects previously completed, and opinions of occupants of those projects.

d. Reputation among subcontractors and material suppliers for satisfying payment obligations and for quality of work.

e. Mechanics' liens and collection problems of subcontractors and material suppliers who performed labor or furnished material for previous projects constructed by contractor.

NOTE:

As with the information described in P 12d, ***above,*** the best source of this information will be the municipal and superior court plaintiff/defendant indices and local subcontractors and material suppliers. For other potential sources, see P 12g, ***below.***

f. Contractor's general credit history.

NOTE:
The contractor's general credit history can be determined from a review of a credit report obtained from a credit bureau. It is highly desirable to do this in order to make sure that the contractor is a responsible party with whom to deal.

g. Existence of any complaints filed against contractor with nearest office of:

(1) Contractors' State License Board [*see § 30D.21[1]*; *see also* Ch. 88, *Licensing of Contractors*].

(2) Better Business Bureau.

h. Ability of bidder to post any required performance and payment bonds for project [*see § 30D.24[2]*].

i. Legal status of contractor (e.g., joint venturer) [*see § 30D.31*].

13. Select two or three lowest bidders.

14. Have owner or design professional visit projects previously completed by each finalist and interview their owners, or take other additional steps to investigate finalists.

15. If necessary, assist owner in negotiations with finalists.

NOTE:
Assuming the owner is not obligated by the bid documents to accept the low bid [***see*** *§ 30D.200[1][f]*], the owner will commonly negotiate with one or more of the bidders after the bids have been opened. The owner may attempt to obtain a lower bid from the lowest responsible bidder or from one of the other bidders, or may simply wish to negotiate minor changes with the lowest responsible bidder [***see*** Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.91 (AIA 1994)].

16. Have owner select lowest responsible bidder [*see § 30D.200[1][f]*].

NOTE:
Alternatively, the owner may wish to reject all bids [***see*** *§ 30D.200[1][f]*].

17. Have owner or design professional notify successful bidder in writing of award of construction contract [*see Southern Cal. Acoustics Co. v. C.V. Holdler, Inc. (1969) 71 Cal. 2d 719, 722, 79 Cal. Rptr. 319* (silence in face of offer is not acceptance unless it would be understood as acceptance because of parties' relationship or previous course of dealing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.122

§ 30D.122 Bid Withdrawal and Other Procedures Occurring Between Bid Opening and Execution of Contract

1. If low bidder can support claim that he or she made substantial error in preparing bid, consider utilizing following guidelines in deciding whether or not to permit withdrawal of bid [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1995); *see also § 30D.23*]:

    a. Permit withdrawal in cases of mathematical errors or errors of transcription.

    b. Prohibit withdrawals based on errors of judgment.

2. Insist that each unsuccessful bidder return project documents:

    a. When contract is awarded; or

    b. When bidder is eliminated from consideration.

3. Return document deposit [*see § 30D.121*, P 3] to each unsuccessful bidder who returns project documents in good condition within specified period of time.

4. Retain bid security of successful bidder until he or she signs construction contract.

5. Have owner and design professional decide on any alternatives and notify contractors of decision [*see § 30D.111*, P 3b(2)].

6. Obtain any post-bond information listed in instructions to bidders [*see § 30D.120*, P 3k].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersRevocable OffersContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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§ 30D.123 Executing Contract Documents and Commencing Work

1. If owner wishes to authorize commencement of work before execution of contract, prepare and have owner execute and issue letter of intent to contractor [*see § 30D.220*].

NOTE:

Owners frequently use letters of intent to authorize contractors to commence construction on a limited basis prior to the execution of a more formal form of construction agreement. This may be done for a variety of reasons, such as an anticipated delay in the completion of the final drawings and specifications (which will be a part of the more formal construction contract package) or a desire to have the construction work performed before the rainy season. For further discussion, see *Section 30D.220[1]*.

2. Have parties execute owner-contractor agreement.

3. Have parties initial and date drawings and specifications as they exist at time contract is signed.

NOTE:

This will prevent the initial documents from being confused with any addenda and further drawings and specifications that are prepared during the course of the construction work [Acret, Attorney's Guide to California Construction Contracts and Disputes, ch. 2, ***Drafting Construction Contracts*** (Cal. C.E.B. 2d ed. 1990)].

4. Have contractor obtain and transmit performance and labor and material payment bonds [*see § 30D.24[2]*].

5. Require contractor to:

a. Obtain liability and property damage insurance; and

b. File certificate of insurance with owner.

6. Have contractor obtain and pay for all required permits.

NOTE:

For a detailed discussion of permits that are commonly required in connection with construction projects, see Ch. 30B, ***Zoning, Building, and Environmental Permits*** .

As a result of a construction inspection, an enforcement agency [***see*** *Health & Safety Code § 19870(b)(2)* (definition)] must not impose a new or modified building standard that is different from those specified in the drawings and specifications approved during plan checking functions for which a building permit is issued, unless any of certain specified circumstances exists [***see*** *Health & Safety Code § 19870(a)*].

7. Review contractor's list of subcontractors with owner and, if appropriate, assist owner in exercising right to reject subcontractor [*see § 30D.30[2]*].

8. Instruct owner to review and approve any drawings, estimates, and schedules that contractor is required to submit.

9. Instruct owner to apply for permanent services to work site (e.g., electricity and telephone).

10. Advise owner to file copies of all project insurance policies with contractor.

11. If contract does not specify date for commencement of work:

a. Decide on date; and

b. Prepare notice to proceed and have owner execute it and issue it to contractor [*see § 30D.231*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.124

§ 30D.124 Executing Subcontracts

NOTE:

When a subcontractor makes a bid to a general contractor knowing the general contractor will rely on it in making the bid for the general contract, the subcontractor is estopped from revoking the bid and is bound by it [*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 413, 333 P.2d 757]* .

The following procedure for approving and retaining subcontractors is commonly followed, and is required by the American Institute of Architect's General Conditions of the Contract for Construction [***see*** App. E (AIA Doc. A201-1997), Art. 5].

1. As soon as practicable after award of contract, require contractor to provide list of proposed subcontractors.

NOTE:

In most cases, bidders will have been required to submit a list of proposed subcontractors along with their bids. In that case, the bidding documents should have reserved to the owner the right to approve the proposed subcontractors, and the list would have been one of the factors considered by the owner in selecting the bidder.

2. Have design professional promptly provide contractor with written indication of:

a. Owner or design professional's approval or rejection of each proposed subcontractor; and

b. Authorization to execute contracts with accepted subcontractors.

NOTE:
Failure of the owner or design professional to reply promptly will constitute notice of no reasonable objection [***see*** App. E (AIA Doc. A201-1997), P 5.2.1].

3. If owner or design professional has reasonable objection to any proposed subcontractor, have contractor promptly suggest substitute.

NOTE:
The contractor may not unilaterally change a subcontractor if the owner or design professional makes reasonable objection to the proposed substitute [***see*** App. E (AIA Doc. A201-1997), P 5.2.4].

4. If proposed but rejected subcontractor was reasonably capable of performing work:

a. Increase or decrease contract sum and contract time by any difference occasioned by change;

b. Issue appropriate change order before commencement of substitute subcontractor's work; and

c. Notify contractor of authorization to execute subcontract.

NOTE:
The owner or design professional is not required to allow an increase in the contract sum or contract time for a change in subcontractor unless the contractor acted promptly and responsively in submitting names of alternative subcontractors [***see*** App. E (AIA Doc. A201-1997), P 5.2.3].

5. If proposed substitute is unacceptable, encourage parties to agree on another subcontractor.

NOTE:
Because the subcontractor will enter into a contractual relationship with the contractor and not with the owner or design professional, the owner and design professional should not require the contractor to contract against his or her will with a particular subcontractor [***see*** App. E (AIA Doc. A201-1997), P 5.2.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.125

§ 30D.125 Providing for Construction of Subdivision Improvements

1. Prepare and have parties execute agreement under which qualified civil engineer agrees to perform following services for owner [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*]:

a. Survey project site;

b. Conduct soil tests; and

c. Prepare and obtain approval of tentative and final subdivision maps for subdivision.

2. After approval of subdivision maps [*see* Ch. 30, *Subdivision Regulation*], arrange for completion of required off-site improvements in subdivision [*see § 30D.222*; *see also* Ch. 30A, *Construction Financing*].

3. If owner will have houses constructed in subdivision, have owner select qualified general building contractor to construct structures [*see § 30D.22[3]*].

NOTE:
Even when the same prime contractor is licensed to construct both off-site and on-site improvements, these two types of improvements should be constructed under separate contracts [***see*** *§§ 30D.222[1], 30D.223[1]*].

4. Prepare and have owner and selected contractor execute contract for construction of homes and/or other on-site improvements [*see § 30D.223[2]*].

5. Arrange construction loan financing for on-site improvements [*see* Ch. 30A, *Construction Financing*].

6. Instruct owner and general building contractor not to commence work or to have materials delivered until recordation of all deeds of trust for construction loans used to finance on-site improvements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign ProfessionalsReal Property LawFinancingConstruction LoansReal Property LawSubdivisionsGeneral Overview



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15-30D California Legal Forms--Transaction Guide §§ 30D.126-30D.129

[Reserved]

§§ 30D.126[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Related and Subsequent Procedures

15-30D California Legal Forms--Transaction Guide § 30D.130

§ 30D.130 Supervising or Administering Construction Work

NOTE:

The extent of the design professional's role as project supervisor will usually depend on the make-up of the project team. When a prime contractor is involved, the design professional's responsibility for the construction work is usually limited to observing and administering the progress of the work [***see*** Miller & Starr, Current Law of California Real Estate, ch. 24, ***Construction Contracts;*** (Bancroft-Whitney 2d ed. 1990); ***see also*** Ch. 30C, ***Agreements With Architects, Engineers, and Other Design Professionals***].

Under the General Conditions of the Contract of Construction prepared by the American Institute of Architects, the design professional provides administration of the contract as described in the contract documents. He or she, as an owner's representative, will visit the site at appropriate intervals to become generally familiar with and keep the owner informed about the progress and quality of the work, and to guard the owner against defects and deficiencies. The design professional will not have control or charge of, nor be responsible for, construction means and methods and safety procedures [***see*** App. E (AIA Doc. A201-1997), PP 4.2.1, 4.2.2].

1. Monitor compliance of design professional with construction supervision or administration responsibilities (if any) set forth in owner-design professional agreement, such as obligation:

a. To visit site to observe work and to determine whether or not it is being performed in accordance with the construction contract.

b. To prepare field reports on work progress.

c. To review contractor's applications for payment.

2. Instruct design professional to review contractor's applications for payment and, if application is in order, issue certificates of payment.

NOTE:

Contractors typically receive progress payments for their work on construction projects. Normally, the contractor must submit an application for a progress payment to the design professional. If the design professional determines that the contractor has adequately performed the work described in the application, he or she will indicate this approval by issuing a certificate of payment (or other written payment recommendation). The certificate is then presented to the owner for payment. Unless otherwise provided in writing, the payment by the owner of progress payments is subject to statutory restrictions [***see*** *Civ. Code § 3260.1(b)*; ***see also*** *§ 30D.221[1][c][i]*]. For further discussion, see *Sections 30D.221[1][c]* and *30D.226[1][d]*.

The contractor's applications for payment will include amounts owed by the contractor to the subcontractors pursuant to the contractor-subcontractor agreement [***see*** *§ 30D.30*].

3. Instruct design professional to notify owner regarding extent of contractor's compliance with conditions stated in prime contract for reduction in amount of retainage when work reaches point at which contract calls for reduction [*see § 30D.221[1][c][iii]*].

4. Advise owner to comply with contractual procedures for approving extra work or changes in work [*see § 30D.14*].

a. Issue, or have design professional issue, written change order for extra work or other changes in work occurring after execution of contract documents.

b. Avoid oral change orders.

c. Do not pay for any changes not done pursuant to written change order.

5. Notify owner of his or her obligation to notify prime contractor and construction lenders of any change in contract that has effect of increasing price stated in contract by 5 percent or more [*Civ. Code § 3123(c)*].

6. If one or more construction loans are obtained after commencement of construction, instruct owner to provide name and address of construction lender(s) to each person who has given owner a preliminary 20-day notice [*Civ. Code § 3097(n)*; *see* Ch. 31, *Mechanics' Liens*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15-30D California Legal Forms--Transaction Guide § 30D.131

§ 30D.131 Managing Completion of Work

NOTE:
The following procedures are based on the provisions of the General Conditions of the Contract of Construction prepared by the American Institute of Architects [***see*** App. A (AIA Doc. A201-1997), PP 9.8, 9.10].

1. After design professional receives contractor's notification of substantial completion of work, confirm that design professional satisfies contractual obligations to:

NOTE:
Under the forms prepared by the American Institute of Architects, work is "substantially complete" when the owner can occupy or utilize the work for its intended purpose [***see*** App. E (AIA Doc. A201-1997), P 9.8.1].

a. Inspect work; and

b. If work is adequate, prepare certificate of substantial completion that:

NOTE:
If the design professional's inspection reveals any item, whether or not included on the contractor's list, that prevents the work from being substantially complete, the contractor must, before the certificate of substantial completion can be issued, complete or correct the item on notification by the design professional. The contractor must then submit a request for another inspection by the design professional to determine substantial completion [***see*** App. E (AIA Doc. A201-1997), P 9.8.3].

(1) Establishes date of substantial completion;

NOTE:
Unless the certificate of substantial completion provides otherwise, warranties required by the contract documents will commence on the date of substantial completion [***see*** App. E (AIA Doc. A201-1997), P 9.8.4].

(2) Establishes responsibilities of owner and contractor for security, maintenance, heat, utilities, damage to work, and insurance; and

(3) Fixes time within which contractor must finish all items on list accompanying certificate.

c. Submit to certificate of substantial completion to owner and contractor for their written acceptance of assigned responsibilities.

NOTE:
On acceptance, the owner must pay any retainage that applies to the work or a designated portion of the work. The payment must be adjusted for work that is incomplete or not in accordance with the requirements of the contract documents [***see*** App. E (AIA Doc. A201-1997), P 9.8.5].

2. Notify contractor of materials he or she must submit after completing work specified in certificate of substantial completion, including following documents:

a. Written notice that work is ready for final inspection and acceptance.

b. Application for final payment.

c. Release of liens [*see* Ch. 31, *Mechanics' Liens*].

d. Consent of surety (if applicable).

3. After receiving above documents:

a. Have design professional:

(1) Inspect work for compliance with certificate of substantial completion; and

(2) If work is adequate and complete, issue final certificate for payment.

b. Have owner make final payment.

4. Arrange for any required governmental pre-occupancy inspections and apply for any required certificate of occupancy or occupancy permit [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15-30D California Legal Forms--Transaction Guide § 30D.132

§ 30D.132 Special Subdivision Completion Procedures

1. Instruct owner to do the following:

NOTE:
The following steps are commonly required by construction lenders as a way of protecting the priority of their deeds of trust on the lots in the subdivision over any mechanics' liens recorded against the on-site improvement work. For further discussion, see *§ 30D.223[1][b]*.

a. Retain different contractors to do off-site and on-site improvements; and

b. Instruct contractor for off-site improvements to refrain from doing any on-site improvement work.

2. After completion of off-site improvements, have owner record notice of completion and follow contract procedure for making final payment to off-site contractor [*see § 30D.131*].

3. On completion of each house or other on-site improvement in subdivision, have owner:

a. Record notice of completion.

b. Within 10 days of recordation, notify original contractor and any claimant other than original contractor who has provided preliminary 20-day notice that notice of completion has been recorded [*see* Civ. Code § 3259.2(a); *see also* Civ. Code § 3259.2(b) ("owner" defined for these purposes)].

NOTE:

Notice must be sent by registered or certified mail, or by first-class mail, evidenced by a certificate of mailing. Failure to give timely notice will extend the period of time in which that contractor or claimant may file a mechanics' lien or stop notice to 90 days beyond the date that a notice of completion has been recorded [Civ. Code § 3259.2(a)].

c. Thirty-one days after recordation, request mechanics' lien report on lot on which improvement was constructed.

NOTE:

The reason for waiting 31 days is that a mechanics' lien claimant has 30 days after the completion of his or her services to record a claim of lien [***see*** *Civ. Code § 3116*]. For further discussion, see *§ 30D.221[1][c][v]*, and Chapter 31, ***Mechanics' Liens*** **.**

d. Withhold final payment for improvement from contractor until:

(1) Lot has been freed from effects of any recorded mechanics' liens; and

(2) Contractor has delivered waiver of lien for improvement to owner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawSubdivisionsGeneral Overview



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15-30D California Legal Forms--Transaction Guide § 30D.133

§ 30D.133 Handling Follow-Up Inspections

1. Advise owner to authorize design professional (as an additional service) to investigate any potential defects discovered within one year of completion of work.

NOTE:

Construction contracts customarily include a guarantee by the contractor that the equipment, materials, supplies, and work furnished pursuant to the contract will be free of defects for a period of one year after completion. However, if any defect amounts to a breach of contract, then this one-year guarantee will not constitute a limitation period for a breach of contract action [***see*** *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 379-380, 96 Cal. Rptr. 825* ; Acret, Attorney's Guide to California Construction Contracts and Disputes, ch. 2, ***Drafting Construction Contracts*** (Cal. C.E.B. 2d ed. 1990)].

For a discussion of owner-design professional agreements, see Chapter 30C, ***Agreements With Architects, Engineers, and Other Design Professionals*** .

2. Recommend that owner authorize design professional, as an additional service, to inspect work shortly before first anniversary of completion of work to determine whether contractor should be required to correct defects.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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§§ 30D.134[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
A. Bidding Procedures

15-30D California Legal Forms--Transaction Guide § 30D.200

§ 30D.200 Letter Inviting Construction Bids From General Contractors

[1] Comment

[a] Use of Form

This form is a letter inviting general contractors to bid on a proposed project. It may be used when (1) the prime contractor for the project is to be selected by competitive bidding [*see § 30D.22[2]*], and (2) invitations are to be sent only to preselected contractors. The letter is a mere request for bids rather than an offer to contract [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 155-156, 117 Cal. Rptr. 525]* .

Even when the owner selects the alternative bid invitation procedure of publishing an advertisement inviting bids from all contractors in the project area [*see § 30D.201*], the owner or design professional may wish to send a copy of a letter invitation to contractors he or she knows might be interested in bidding on the project and are competent to construct the project, but who may have overlooked the published notice inviting bids.

The invitation to bid is only one of a number of bidding documents. The others are a contractor's qualification statement [*see* [d], *below*], instructions to bidders [*see § 30D.120*, P 3], a blank bid form [*see § 30D.203*], proposed contract documents, and addenda to the foregoing bidding documents [*see § 30D.202*].

[b] Use of Form as Invitation for Subcontract Bids

This form may be adapted by a general contractor for the purpose of soliciting bids for subcontracts [*see § 30D.30[2]*]. In that case, in addition to making appropriate changes to the existing language, the general contractor must include his or her contractor's license number in the letter [*see Bus. & Prof. Code § 7030.5*].

[c] Selection of Potential Bidders

The owner and design professional should select potential bidders who have demonstrated financial capacity and integrity and an ability to construct projects similar to the one for which bids are being solicited. Further, the invitees

should be licensed contractors [*see § 30D.21 [4]*] who have adequate staffs (including qualified supervisors). Finally, the number of invitees should not exceed the number required to insure adequate price competition [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

[d] Use of Contractor's Qualification Statement

Many owners require potential bidders to complete a contractor's qualification statement [*see* App. A (AIA Doc. A305)]. The statement should contain questions concerning the organization, history, experience, operational methods, character, and financial references of the contractor/bidder [*see* Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)].

An owner may distribute qualification statements before issuing invitations to bid, in which case the completed qualification statements are used to select the contractors who will actually be invited to bid on the project. More commonly, the owner will require bidders to return the completed statements along with their bids or after the submission of the bids but before the award of the construction contract. This form contains optional language requiring the submission of a qualification statement along with the bid.

[e] Contents of Letter Invitation

Although there are no requirements governing the form or contents of invitations to bid, the attorney and client should consider including the following information in the invitation, to the extent applicable [*see* Architect's Handbook of Professional Practice, ch. 2.7, *Bidding and Negotiation* (AIA 1987)]:

(1) Name and location of project.

(2) Names and addresses of owner and design professional.

(3) Name and address of party making bid invitation, and date of issuance of invitation.

(4) Short description of project.

(5) Type of owner-contractor agreement to be used (that is, whether owner will use one or multiple prime contracts).

(6) Date, place, and time for receipt of bids.

(7) Indication of whether or not opening of bids will be public.

(8) Place and requirements for obtaining bidding documents.

(9) Amount and type of deposit for bidding documents.

(10) Locations where bidding documents may be examined.

(11) Requirements governing submission of proposals.

(12) Bid security requirements.

(13) Statement regarding right of owner to accept or reject bids.

(14) List of applicable laws and regulations.

[f] Lowest Responsible Bidder and Rejection of All Bids

It is important that the owner not create the impression that the contract will automatically be awarded to the lowest bidder. Instead, the owner should reserve the right to reject any and all bids, and to award the contract to other than the low bidder. This form contains such a provision. By following this approach, the owner will be able to consider all relevant information, including contractor's qualification statements [*see* [d], *above*], and will not be forced to accept a low but otherwise inadequate bidder. The owner should not exercise these rights, however, in order to accept a bid that was not submitted before other bids were made public, or solely to obtain an estimate of the cost of the proposed work [*see* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

The language providing for an award to other than the low bidder may indicate that the contract will be awarded, if at all, to the lowest responsible bidder, the lowest qualifying bidder, or the lowest and best bidder. This approach is based on the mandatory bidding procedure for public contracts, which requires that the contract be awarded to the "lowest responsible bidder" [*see Pub. Contract Code § 10180*]. For coverage of that procedure, see Volume 16, Chapter 90, *Government Contracts.*

[g] Bid Bond

Owners frequently require bidders to provide a bid bond. The bond guarantees the owner that the successful bidder will execute the construction contract and furnish performance and payment bonds (if required) within a specified period of time. If the bidder fails to do so, he or she must forfeit the penal sum of the bond. This sum is an amount (up to the amount of the bid security) equal to the difference between the successful bid and the next bid (but not exceeding the amount of the bond) [*see § 30D.24 [1]*; *see also* Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

[2] FORM

Letter Inviting Construction Bids From General Contractors

INVITATION FOR BIDS
..... _____[*Date*]
_____ [*Name of general contractor*]
_____ [*Address*]
_____ [*City, state, zip*]

Re: Invitation to Submit Bid

Project:_____[*name*]
Owner:_____[*name*]
Architect [*or* Engineer *or other design professional*]:_____[*name*]
Dear [*name of contractor*]:

You are hereby invited to submit a sealed bid, as general contractor, on a contract for the construction of the above project. That project will consist of_____[*describe project, e.g.*, a 12-unit, three-story apartment building at _____ (*address*), _____ (*city*), California, to be known as "The _____ Building"].

Copies of the drawings and specifications for the above project will be available for inspection at the undersigned's office [*or specify other location*], located at_____[*address*],_____[*city*], California, on and after_____[*date*]. The undersigned is the architect [*or other design professional*] for the project. If you wish to obtain copies of the drawings and specifications, you must give the undersigned a deposit of $_____. Of that amount, $_____ will be refunded to you, provided that you return the copies in good condition to the undersigned not later than_____[*date*].

To be considered, you must complete the enclosed blank bid form in accordance with the enclosed "Instructions to Bidders," and submit it to the undersigned's office [*or specify other location*] no later than [*time*] on_____[*date*]. At that time and place, all bids will be opened publicly and read aloud.

Each bid must be accompanied by_____[*specify method for establishing financial responsibility of bidders, e.g.,* a bid bond in the amount of $_____ *or* a certified check in the amount of $_____ as bid security *or* the enclosed Contractor's Qualification Statement, which is to be completed and executed by you].

The owner of the above project reserves the right to reject any and all bids, to award the contract to other than the low bidder, and to waive any informality in bidding.

The successful bidder, if any, will be required to furnish a bond issued by a corporate surety authorized to issue surety insurance in California for the faithful performance of the contract for the project in an amount equal to _____ percent of the contract price for the project, and an additional bond issued by such a corporate surety in an amount equal to _____ percent of the contract price for the project to secure payment of claims for materials furnished to or labor performed in constructing the project.

Very truly yours,

_____ [*signature of design professional*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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PART IV. FORMS
A. Bidding Procedures

15-30D California Legal Forms--Transaction Guide § 30D.201

§ 30D.201 Advertisement Inviting Construction Bids

[1] Comment

[a] Use of Form

This form is a public advertisement soliciting bids from general contractors for a specified private construction project. It is designed to be published in a newspaper or a trade periodical circulated among contractors in the area where the project is to be located. Even when the owner publishes such an advertisement, the owner and/or design professional may choose to send letters inviting bids as well [*see § 30D.200[1]*].

The advertisement should contain the same information that is commonly included in an invitation to bid [*see* Architect's Handbook of Professional Practice, ch. 2.7, Bidding and Negotiation (AIA 1987)]. For a list of that information, see *Section 30D.200[1][e]*.

[b] Comparison of Public Advertisements and Letter Bids

The owner of a project must decide whether to send letters inviting bids to selected general contractors [*see § 30D.200*] or to publish a public advertisement for bids of the type illustrated in this form. Public advertisements are rarely utilized for private projects. In fact, the American Institute of Architects and the Associated General Contractors of America recommend that the letter method be used when public bidding is not required by law [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982); *see* [c], *below*]. This recommendation appears to be based on other AIA/AGC statements that encourage the owner and design professional to be selective in choosing potential bidders [*see § 30D.200[1][c]*]. Nevertheless, public announcements may be used under certain circumstances, such as when the owner and design professional are not familiar with local contractors, or when the proposed work does not require special skills.

An owner who wishes to publish an announcement and to limit the number or specify the quality of potential bidders may do so by specifying bidding-eligibility prerequisites (for example, membership in a stated professional association) in the public notice. The owner may also publish the notice in a medium having a limited circulation.

[c] Use of Notice on Public Projects

This form should not be used in connection with public works projects because it does not specify the prevailing rate of per diem wages for each craft that will be involved in the construction of the project, or include a statement that copies of the prevailing rates are on file at the principal office of the awarding body and available to any interested party on request [*see Lab. Code § 1773.2* (requiring inclusion of foregoing information in bidding documents for public works projects)]. For a discussion of public works construction contracts, see Volume 16, Chapter 90, *Government Contracts.*

[2] FORM

Advertisement Inviting Construction Bids

NOTICE INVITING BIDS

NOTICE IS HEREBY GIVEN that_____[*name of owner*] will receive sealed bids for the construction of [*name of project and brief description, e.g.,* The Emerald Building, a 12-unit, three-story apartment building] at_____[*address of project*], California. Bids must be prepared in strict conformity with drawings and specifications prepared by [*name of design professional*]. Further, they must be received_____[*specify location, e.g.,* at the offices of _____ (*name of design professional*) at _____ (*address*)] no later than [*time*] on_____[*date*]. At that time and place, all bids will be opened publicly and read aloud.

The above drawings and specifications are available for inspection [*specify, e.g.,* at the above offices of _____ (*name of design professional*)]. Copies of the drawings and specifications may be obtained by depositing $_____ with that office. Of that amount, $_____ will be refunded on return of the drawings and specifications to that office, provided they are in good condition and are returned no later than_____[*date*].

Each bid must be accompanied by a check certified by a bank in _____ County, California, payable to the order of_____[*name of owner*] for an amount equal to not less than _____ percent of the aggregate amount of the bid, or a surety bond in that amount and so payable issued by a corporate surety authorized to issue surety insurance in California. The check or surety bond will serve as a guarantee that the bidder will enter into a contract for the work on the terms stated in his or her bid should the contract be awarded to him or her.

The successful bidder will also be required to furnish a bond for the faithful performance of the contract for the work in an amount equal to _____ percent of the contract price for the work, and an additional bond in an amount equal to _____ percent of the contract price for the work to secure payment of claims for materials furnished for or labor performed in the performance of the work.

_____[*Name of owner*] reserves the right to reject any or all bids, to accept other than the low bid, and to waive any informality in bidding.
Dated: _____.

_____ [*signature of owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
A. Bidding Procedures

15-30D California Legal Forms--Transaction Guide § 30D.202

§ 30D.202 Addendum to Bidding Document

[1] Comment

[a] Use of Form

This form is a bidding addendum that may be used prior to the execution of the construction contract to modify or interpret one or more of the bidding documents. The addendum becomes part of the contract documents when the construction contract is executed. For a document that may be used following the execution of the construction contract to modify one or more of the contract documents, see *Section 30D.230[2]*.

Each potential bidder must receive the same information concerning the project. Thus, when a bidder asks for an explanation of some provision of the bidding documents, or when a correction or change is made in the bidding documents before the bids are opened, the design professional must (1) prepare an addendum containing the explanation or describing the change or correction, and (2) mail a copy of the addendum to each prospective bidder. Each addendum should be consecutively numbered so that a bidder can be sure he or she has received all addenda that have been issued.

[b] Timing for Distribution of Addendum

As a general rule, an addendum should not be distributed less than four working days before the date set for receipt of bids, unless the addendum withdraws the request for bids or postpones the date for receipt of bids [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)].

[2] FORM

Addendum to Bidding Document

BIDDING ADDENDUM

ADDENDUM No. _____
Project:_____[*name*]
Owner:_____[*name*]
Architect [*or other design professional*]:_____[*name*]

To All Bidders:

[*Choose one of the following paragraphs:*]

[*If addendum modifies a bidding document, use:*]

[*Specify affected provision and document, e.g.,* Division 3 of the Specifications] for the above project, specifying the requirements for [*e.g.*, steel-bar joists used in the project], is modified to read as follows: [*set forth modification in detail*].

[*OR*]

[*If addendum interprets a provision of a bidding document, use:*]

This addendum interprets a portion of [*identify affected provision and document, e.g.,* Division 3 of the Specifications] for the above project. That [*specify, e.g.,* Division] specifies the requirements for [*e.g.*, steel-bar joists used in the project], and includes the following language: "_____" [*quote exact language at issue*]. The quoted language should be interpreted to mean [*set forth explanation of provision*].

[*Continue with the following:*]

Dated: _____.

_____ [*signature of architect or other design professional*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContracts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
A. Bidding Procedures

15-30D California Legal Forms--Transaction Guide § 30D.203

§ 30D.203 Bid of General Contractor

[1] Comment--Use of Form

This form is a bid form on which bidders can be required to submit their bids for a particular construction project. The instructions to bidders [*see § 30D.120*, P 3] usually contain instructions for the completion of the form. Each bidder should receive at least two copies of the blank bid form.

The design professional for the project usually prepares the bid forms [Recommended Guide for Competitive Bidding Procedures and Contract Awards for Building Construction (AIA Doc. A501, AGC Doc. 325, 1982)]. By requiring all bidders to use the same bid form, the owner and design professional can be assured that all bids will set forth, in a standardized format, the information required by the owner as outlined in the instructions to bidders.

For a discussion of the law governing the withdrawal of erroneous bids, see *Section 30D.23*.

[2] FORM

Bid of General Contractor

BID

Bidder:_____[*name*]
Project:_____[*name*]

To:_____[*name of owner*]
c/o [*name of architect or other design professional*]
_____[*address*]
_____[*city, state, zip*]

Dear_____[*name of owner*]:

Contract Price

1. I propose, as general contractor, to furnish all labor and materials required for the above project, and to construct the project in strict conformity with the relevant drawings and specifications and all applicable laws, statutes, ordinances, rules, and regulations, for the sum of $_____.

Execution of Contract

2. I agree to execute a contract for the project in the form issued to bidders in connection with the project, and to deliver the bonds required by the Instructions to Bidders, within _____ days after notice of award of the contract for the project has been mailed to me.

Examinations and Investigations

3. I stipulate that I have done the following:

(1) Carefully examined all documents issued in connection with the project, including the following:

(a) Invitation for bids;

(b) Instructions to bidders;

(c) Bid form;

(d) General conditions;

(e) Contract form;

(f) Drawings;

(g) Specifications;

(h) Performance bond;

(i) Labor and materials bond;

(j) Addenda Nos.

_____ [*list numbers*].

(2) Examined the job site on which the project is to be constructed.

(3) Determined to my own satisfaction all conditions or limitations that exist or that may arise affecting the project and all difficulties that may be encountered in the construction of the project.

(4) Made this bid on the basis of the foregoing examinations, inspections, and determinations, and not on

the basis of any representations or promises made to me by the Owner or the Architect [*or other design professional*], or by any agent of the Owner or the Architect [*or other design professional*], and not contained in the drawings and specifications for the project or in the documents listed above issued in connection with the project.

Submission of Security

4. I submit with this bid_____[a bond issued by a corporate surety authorized to issue surety insurance in California *or* a check duly certified by _____ Bank in _____, _____ County, California], payable to the order of_____[*name of owner*] in the amount of $_____. That amount will be forfeited if I do not execute a contract for the project in the form issued to bidders in connection with the project and post the bonds required by the Instructions to Bidders within _____ days after notice of award of the Contract for the project has been mailed to me.
Dated: _____.

_____ [*signature of bidder*]
[*typed name*]
Contractor's License No. _____
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-30D California Legal Forms--Transaction Guide § 30D.204

§ 30D.204 Acceptance of Bid

[1] Comment--Use of Form

This form may be used by an owner to accept a general contractor's bid. When executed, it creates a binding owner-contractor construction contract, based on the terms of the invitation for bids and other designated documents.

For a discussion of the treatment of erroneous bids, see Section 30E.23.

[2] FORM

Acceptance of Bid

Owner:_____[*name*]
Project:_____[*name*]
Architect [*or* other design professional]:_____[*name*]

TO: _____[*name of successful bidder*]
_____[*street address*]
_____[*city, state, zip*]

ACCEPTANCE OF BID AND AWARD OF CONTRACT

This is to inform you of the acceptance of your bid, dated _____, in the amount of _____, for the construction of the above project. The contract, which includes [*specify documents constituting the contract documents, e.g.,* the bid, the contract form, the general conditions of contract, the instructions to bidders, and the drawings and specifications for the project], is hereby awarded to you.

The contract between us is to be formalized by mutual execution of the contract form referred to above.

Dated: _____.

_____ [*signature of owner or agent*]
[*typed name*]
_____ [*address*]
_____ [*city, state, zip*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationAcceptanceMethods of AcceptanceOvert ActsContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide §§ 30D.205-30D.209

[Reserved]

§§ 30D.205[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Joint Ventures Between Contractors

15-30D California Legal Forms--Transaction Guide § 30D.210

§ 30D.210 Agreement to Jointly Bid and to Execute Joint Venture Agreement if Awarded Contract

[1] Comment

[a] Use of Form

This form is an agreement between two general contractors to prepare and submit, or at least to attempt to prepare and submit, a joint bid for a specified construction project. Paragraph 3 of the form provides that if the joint bid is successful and the contract for the construction project is awarded to the joint bidders, they will execute a formal joint venture agreement for the construction of the project. For an illustrative joint venture agreement prepared by the American Institute of Architects (AIA), see Appendix B (AIA Document C801, Joint Venture Agreement) [*see* [e], *below*].

If the parties are unable to agree on a joint bid, Paragraph 6 of this form allows either of them to withdraw from the agreement without liability at any time before the joint bid is actually submitted to the project owner.

For a more detailed discussion of joint ventures, see Ch. 29A, *Joint Ventures* .

[b] Definition of Joint Venture

A joint venture is an association of two or more persons who combine their property, skill, or knowledge for the purpose of carrying out a particular business transaction or conducting business for a certain period of time [*Holtz v. United Plumbing & Heating Co. (1957) 49 Cal. 2d 501, 506, 319 P.2d 617]* . It resembles a partnership, which is an association of two or more persons to carry on (as co-owners) a business for profit [*Corp. Code § 16100(7)*]. The main difference between a partnership and a joint venture is that a joint venture typically is formed for a single transaction or a single series of transactions, while a partnership ordinarily is formed to engage in a continuing business for an indefinite or fixed period of time [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893, 84 Cal. Rptr. 828]* .

[c] Advantages of Joint Ventures in Connection With Construction Projects

The creation of a joint venture permits the joint venturers to combine their resources, experience, and expertise to work

on a particular project, while allowing each of them to continue to undertake other projects outside of the joint venture [*see* Architect's Handbook of Professional Practice, ch. 1.13, *Interprofessional Relationships* (AIA 1988)]. A joint venture can also result in decreased overhead costs for the joint venturers, and lessen their need to hire temporary help.

[d] Requirement for Joint Venture Contractor's License

Two or more contractors, each of whom is licensed to act separately as a contractor within California, must obtain a joint venture license before they may be awarded a contract jointly or otherwise act as a contractor [*Bus. & Prof. Code § 7029.1(a)*]. However, before obtaining a joint venture license, licensed contractors may jointly bid for the performance of work for which a joint venture license is otherwise required [*Bus. & Prof. Code § 7029.1(b)*].

A joint venture license is a license issued to any combination of individuals, corporations, partnerships, or other joint ventures, each of which holds a current, active contractor's license in good standing. The joint venture license may be issued in any classification in which at least one of the entities is licensed. An active joint venture license will be suspended automatically by operation of law during any period in which any member of the entity does not hold a current, active license in good standing [*Bus. & Prof. Code § 7029*].

A violation of the above license requirement may result in disciplinary action. Further, if a combination of licensed contractors submits a bid for the performance of work for which a joint venture license is required, a failure to obtain the license will not prevent the imposition of any penalty specified by law for the failure of a contractor/bidder to enter into a contract pursuant to the bid [*Bus. & Prof. Code § 7029.1(b)*].

[e] Joint Venture Agreement

As mentioned in [a], *above*, Appendix B consists of a standardized joint venture agreement prepared by the American Institute of Architects [*see* AIA Doc. C801]. That form provides for the creation of a policy board consisting of a representative and an alternate representative from each joint venturer [*see* App. B, Art. 3]. The board is responsible, among other things, for the management of the joint venture and the project [*see* App. B, Art. 4].

Other significant features of the AIA joint venture agreement include the two alternative versions of Article 21, which set forth different methods of joint venture operations that specify how profits or losses are to be allocated to the joint venturers. Under the "division of compensation" method, each joint venturer is assigned, at the outset of the construction project, a portion of the total compensation for the project. This compensation may be expressed in percentages or dollar amounts, and is based on the services allocated to each party in Article 19 of the form ("Schedule of Services"). From this portion, the joint venturer must absorb all costs of the services he or she provides, except for expenses reimbursed under the construction agreement.

The second version of Article 21 provides for a "profit/loss" arrangement, under which each joint venturer bills the joint venture at cost plus a specified amount for overhead. At the conclusion of the project, any remaining profit or loss is divided among the joint venturers according to the percentages set forth in the article [*see* Architect's Handbook of Professional Practice, ch. 3.4, Practice Topic 3.43 (AIA 1994)].

[2] FORM

Agreement to Jointly Bid and to Execute Joint Venture Agreement if Awarded Contract

AGREEMENT TO SUBMIT JOINT BID

We, the undersigned, hereby agree to prepare and submit to_____[*name*] ("Owner") a joint bid to perform, as general contractors, the contract for construction of_____[*name of project*] as described in the Letter [*or* Notice] Inviting Bids dated _____. This agreement is subject to the following terms and

conditions:

1. A joint bid will not be submitted by us unless

(1) The amount and terms of the bid are agreed on by us.

(2) The bid bond required to be submitted with the bid has been obtained by us.

(3) We have obtained binding commitments to issue to us all other bonds required to be posted under the contract.

2. Each of us will jointly and severally execute the bid bond and any indemnity agreement required to obtain the bond.

3. If the contract is awarded to us, we will

(1) Execute a joint venture agreement for the construction of the project in the form attached to this agreement and marked as Exhibit A.

(2) Each jointly and severally execute the contract, all bonds required by the contract, and all indemnity agreements required for the issuance of the bonds.

4. All costs incurred by either of us in preparing the bid will be borne by the party incurring the cost.

5. All negotiations with Owner or Owner's Architect [*or other design professional*] occurring after our joint bid has been submitted will be conducted by us jointly.

6. Either of us without liability to the other may withdraw from this Agreement at any time before a joint bid is actually submitted by us pursuant to this Agreement.

7. Should either of us withdraw from this Agreement prior to the time a joint bid is submitted by us, the other party to this Agreement may, without liability to the withdrawing party, submit a bid for the contract either alone or jointly with another person or firm.

Executed_____[*date*], at _____ County, California.

_____ [*signature of first contractor*]
[*typed name*]
_____ [*address*]
_____ [*city, state, zip*]

_____ [*signature of second contractor*]
[*typed name*]
_____ [*address*]
_____ [*city, state, zip*]

[*Attach copy of joint venture agreement as Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawJoint VenturesFormationContracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsJoint ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
B. Joint Ventures Between Contractors

15-30D California Legal Forms--Transaction Guide §§ 30D.211-30D.219

[Reserved]

§§ 30D.211[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
C. Construction Contracts

15-30D California Legal Forms--Transaction Guide § 30D.220

§ 30D.220 Owner-Contractor Letter of Intent

[1] Comment

[a] Use of Form

This form is a letter of intent authorizing a contractor to commence construction of a project on a limited basis. Once accepted and executed by the contractor, it becomes a bilateral contract. A letter of intent is normally used when the work must be commenced before more formal forms of agreement have been prepared. Because the content of the letter of intent is dictated by the particular facts of each case, this form is presented solely for illustrative purposes.

For a similar document that instructs the contractor to proceed with the construction work but which is not to be executed until after execution of the formal construction contract, see *§ 30D.231[2]*.

For a discussion of the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*], see *§ 30D.21*.

[b] Nature and Recommended Contents of Letter

Because the nature of the responsibilities and obligations of the parties to the letter of intent agreement are intended to be very limited, the letter should expressly and clearly specify all limitations. For example, the letter should (1) provide that the contractor may enter into subcontracts only on a contingency basis, and (2) prohibit the contractor from placing orders for materials that are not required for the work described in the letter. Further, it should indicate that the insurance requirements set forth in the contract documents will apply to the work performed pursuant to the letter. Finally, the letter should expressly state it will expire after a specified period of time, and that it will be superseded by the execution of the formal contract documents [*see* Architect's Handbook of Professional Practice, ch. 3.9, Practice Topic 3.91 (AIA 1994)].

The normal basis for payment under a letter of intent is the cost-plus method [*see § 30D.12[2]*]. This form provides for that method of payment.

[c] Contractor's Statement and License Number Required by California Law

California law requires a licensed contractor to include his or her contractor's license number and a statutory statement on all written construction contracts [*Bus. & Prof. Code §§ 7030(a), 7030.5*]. This form contains the required statement and a space for the contractor's license number. For a discussion of these statutory requirements, see *§ 30D.221[1][d]*.

[d] Name and Address of Owner and Construction Lender

Every written contract entered into between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*]. Further, unless the contract is a home improvement or service and repair contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7168*], the contract must also provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*]. This form provides for the inclusion of this information.

[e] Construction of Single-Family Dwelling to Be Retained by Owner

Every contract between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year, and any changes in such a contract, must be evidenced in writing and must contain certain information and notices [*see Bus. & Prof. Code § 7164*]. Because of the limited applicability of this requirement, the foregoing information is not set forth in this form. For further discussion and illustrative provisions that may be added to this form to satisfy the above requirements, see *§ 30D.229*.

[2] FORM

Owner-Contractor Letter of INTENT

..... _____[*date*]
LETTER OF INTENT
[*Name of contractor*]
_____[*address*]
_____[*city, state, zip*]

Re: [*project description*]

Construction lender[s]:
_____[*Name*]
_____[*address*]
_____[*city, state, zip*]

[*Repeat for each additional lender.*]

Dear [*name of contractor*]:

Your bid in connection with the above project has been accepted by the undersigned as owner of the project. Pending execution of the formal contract documents for the project, this letter will authorize you to start work on this project subject to the following terms and conditions:

(1) Owner hereby authorizes you to begin presite layout and excavation according to the drawings and specifications for that work contained in the formal contract documents. If you complete the foregoing items prior to the execution of the

formal contract documents, you must cease further work on the project and will have no authority to proceed further on the project.

(2) For the above services, Owner agrees to pay you the actual cost of all labor, materials, and supplies expended on the items of work, including the actual cost of renting any equipment utilized for those items. In addition, Owner agrees to pay to you a sum equal to _____ percent of the actual cost of the labor, materials, and supplies. You must keep accurate records of all costs expended, and must provide Owner with copies of all payroll vouchers, bills, invoices, and any other documents necessary to substantiate the costs incurred by you. Progress payments will be made in accordance with the terms of [*specify document and provision, e.g.,* Article _____ of the proposed Contract of Construction between Owner and Contractor].

(3) All sums paid to you under this letter agreement will be deducted from the contract sum as that term is defined in [*specify document and provision, e.g.,* Article _____ of the proposed Contract of Construction between Owner and Contractor].

(4) If you and Owner do not execute the formal contract documents, you will be entitled to payment only in the manner provided in this letter agreement, and only for work accomplished by you under the terms of this agreement.

(5) Before beginning work under this agreement, you must furnish to Owner all bonds and certificates of insurance required by the formal contract documents.

(6) By executing this agreement, you agree to abide by and proceed with work according to the proposed [*set forth title of general conditions, e.g.,* General Conditions of the Contract for Construction between Owner and Contractor]. To the extent that any of the terms of the [*repeat title of general conditions*] are inconsistent or are in conflict with any of the terms of this agreement, the terms of the latter will govern.

(7) This letter agreement is intended to be an interim agreement between Owner and you, and is being used so that you may proceed with work on the project pending execution of the formal contract documents. On execution of those documents, this agreement will become null, void, and of no further force or effect.

(8) This agreement does not obligate Owner to execute the formal contract documents, or relieve you of your obligations as expressed in any of the bidding or contract documents.

(9) This agreement is expressly conditioned on its execution by you in the space provided below.

Very truly yours,
_____ [*signature of owner*]
[*typed name*]
Residence address: _____
Business address (if any): _____

Accepted:

[*signature of contractor*]
[*typed name*]

California contractor's license number: _____

[*Include following statement in at least 10-point type (Bus. & Prof. Code § 7030(a)):*]

Contractors are required by law to be licensed and regulated by the Contractors' State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within ten years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, CA 95826.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBilateral ContractsContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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PART IV. FORMS
C. Construction Contracts

15-30D California Legal Forms--Transaction Guide § 30D.221

§ 30D.221 Construction Contract (Stipulated Sum)

[1] Comment

[a] Use of Form

This form is a contract between a property owner and a general building contractor for the construction of a building. It is a stipulated sum agreement [*see § 30D.221[1][b]*] that requires the owner to make progress payments to the contractor, and sets forth two alternative methods for making these payments [*see § 30D.221[1][c]*]. The form is designed to be the sole and only agreement of the parties [*see § 30D.221[2]*, P 23]. Consequently, the only other documents it refers to are the drawings and specifications for the building [*see § 30D.221[2]*, P 1]. Thus, it differs from the standardized construction contracts included in this chapter, which are designed to be used in conjunction with one or more other forms (for example, the general conditions of the contract prepared by the American Institute of Architects) [*see* App. E (AIA Doc. A201-1997)]. Although this form is particularly useful for relatively small development projects, such as the construction of a single-family dwelling, duplex, or small commercial building, it may be used for larger construction projects as well.

For provisions that may be inserted into this form when the development is to include subdivision off-site improvements, see *§ 30D.222[2]*. For standardized stipulated sum agreements prepared by the Engineers' Joint Contract Documents Committee (EJCDC) and the American Institute of Architects (AIA), see *§ 30D.224* and Appendix C, respectively.

[b] Stipulated Sum Agreements

A stipulated or lump sum agreement specifies the amount that the contractor will receive for the construction work. This amount must cover the contractor's costs, overhead, and profit, and is normally distributed in the form of progress payments. For further discussion, see *§ 30D.12[1]*.

[c] Alternative Methods of Making Progress Payments

[i] Overview and Statutory Restrictions

Because contractors rarely have sufficient funds to finance an entire construction project, most construction contracts provide that the owner will make progress payments to the contractor. Paragraph 2 of this form provides two alternative methods for making progress payments. For discussion of these alternatives, see *§ 30D.221[1][c][ii]* and *[iii]*.

Except as otherwise agreed in writing, the owner must pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due under the contract, provided there is no good faith dispute between the parties relating to the payment. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. If any amount is withheld in violation of the foregoing requirements, the contractor will be entitled to an amount equal to 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Further, in an action for the collection of funds wrongfully withheld, the contractor will be entitled to his or her attorneys' fees and costs [*Civ. Code § 3260.1(b)*; *see Civ. Code § 3260(g)*; *McAndrew v. Hazegh (2005) 128 Cal. App. 4th 1563, 1566, 27 Cal. Rptr. 3d 836* (before penalty or attorneys' fees may be recovered under *Civ. Code § 3260(g)*, contractor must establish that owner being sued has actually withheld retention proceeds/payments); *see also Civ. Code § 3260.1(a)* (statute applies to any contract entered into on or after January 1, 1992, for the construction of a private work of improvement)]. The alternative versions of Paragraph 2 of this form incorporate the above requirements for all progress payments, but not for the final payment due under the contract [*see § 30D.221[1][c][ii]-[v]* for discussion of these final payments]. It is unlikely that *Civ. Code § 3260.1* applies to such a final payment. However, even if it does, § 3260.1 permits the parties to enter into a written agreement that supersedes the requirements of that statute, as discussed above.

The requirements of *Civ. Code § 3260.1* do not supersede any requirement of *Civ. Code § 3260* [*Civ. Code § 3260.1(c)*]. Section 3260 sets forth requirements governing retained funds [*see § 30D.221[1][c][iv]*].

If a progress payment (or other payment) has not been made under the contract, the original contractor may serve the owner with a "10-day stop work order." If the amount due is not paid within 10 days, the contractor is entitled to seek a judicial determination of liability for the amount not paid in addition to any and all other rights he or she has under law [*Civ. Code § 3260.2(a), (b), (d)*]. For coverage of this remedy, see Ch. 31, *Mechanics' Liens* .

For purposes of *Civ. Code § 3260.1*, a progress payment is a payment other than a down payment that is to be made before the project is completed [*Murray's Iron Works Inc. v. Boyce (2008) 158 Cal. App. 4th 1279, 1299, 71 Cal. Rptr. 3d 317]* . Thus, penalties for the wrongful withholding of progress payments [*Civ. Code §§ 3260(g), 3260.1(b)*] were inapplicable where a contract provided for "50% Deposit/Net upon Satisfactory Completion of Project" and the homeowner did not pay the total amount due. The payment that was alleged to have been withheld was a portion of the final payment. Since the payment was not due until the project was completed, it was a "final payment" and not a progress payment [*Murray's Iron Works Inc. v. Boyce (2008) 158 Cal. App. 4th 1279, 1299, 71 Cal. Rptr. 3d 317]* .

[ii] Stages of Construction

The first alternative version of Paragraph 2 of this form sets forth the standard "stages of construction" progress payment plan insisted on by many construction lenders when they finance the construction of a relatively small building. Under this plan, 20 percent of the total contract price is paid to the contractor as each of four specified portions of the building are completed; the remaining 20 percent is retained until the project is completed and the owner and his or her construction lender are assured no mechanics' liens are outstanding against the project or the land on whic h it is located. Of course, the parties may agree on different percentages or stages.

[iii] Overview of Retention of Percentage of Progress Payment

The second alternative version of Paragraph 2 provides that on or about a specified day of each month the owner will make a progress payment to the contractor in an amount equal to a stated percentage of the value, based on the contract price, of the work completed by the contractor during the preceding calendar month. It also provides that the owner will retain the balance of the contract price for a specified period of time following the completion of the work. The retention language reflects statutory requirements governing the handling and release of retained funds [*see Civ. Code § 3260*; *see also* [iv], *below*].

This type of arrangement permits the owner to retain the withheld funds until the work is complete and the owner is assured that no mechanics' liens have been recorded against the property on which the construction project was built [*see* [v], *below*]. The retained sum or retainage would also compensate the owner (at least in part) for any expenses caused by the contractor's failure to complete the job.

The amount of the retainage will vary with the type of work. For small projects, it commonly amounts to 10 percent of the value of the work completed. The percentage may be reduced or eliminated after a designated portion of the work is completed [*see* Sweet, *Your First Construction Contract*, 21(2) Prac. Law. 27, 28 (Mar. 1975)]. However, any reduction of retainage should be conditioned on a finding by the design professional that the work is proceeding satisfactorily. In addition, if the contractor has furnished a bond, the contractor should be required to provide a consent of the surety to the reduction [*see, e.g.*, AIA Doc. G707A (Consent of Surety to Reduction in or Partial Release of Retainage)].

[iv] Statutory Requirements Governing Retentions

If an owner wishes to retain a percentage of progress payments [*see* [iii], *above*] in connection with the construction of a private work of improvement, the retention must comply with statutory requirements [*see Civ. Code § 3260* (applicable to retainage withheld by an owner from an original contractor, or by an original contractor from a subcontractor); *but see Civ. Code § 3260(i)* (statute does not apply to retention withheld by a lender in accordance with a construction loan agreement)]. Except as provided below, the statutory requirements apply to contracts entered into on or after July 1, 1991 [*Civ. Code § 3260(a)*].

Under Section 3260, within 45 days after the date of completion, the retention withheld by the owner must be released [*Civ. Code § 3260(c)*; *see Civ. Code § 3260(a)* (this version of subdivision (c) applies only to contracts entered into on or after January 1, 1993)]. For these purposes, "date of completion" means any of the following [*Civ. Code § 3260(c)*]:

> (1) The date of completion indicated on a valid notice of completion recorded pursuant to *Civ. Code § 3093* [*see* [v], *below*; *see also* Ch. 31, *Mechanics' Liens*].
>
> (2) The date of completion as defined in *Civ. Code § 3086* [*see* Ch. 31, *Mechanics' Liens*].
>
> (3) The date of issuance of any certificate of occupancy covering the work by the public agency issuing the building permit.

The term "certificate of occupancy" as used in Item (3), *above*, is not defined by statute. However, building inspectors or other officials in many local jurisdictions issue a certificate of occupancy after a notice of completion is filed, to finalize the local review of the construction of a work of improvement.

There are two exceptions to the foregoing release requirement. First, in the event of a dispute between the owner and the original contractor, the owner may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. Second, in the case of retentions withheld for any portion of the work that ultimately will become the property of a public agency, the release may be conditioned on the acceptance of the work by the public agency [*Civ. Code § 3260(c)*].

As a general rule, within 10 days from the time that the original contractor receives all or any portion of the retention proceeds, the original contractor must pay each subcontractor from whom proceeds have been withheld the subcontractor's share of the released funds. However, if released proceeds received by the original contractor are specifically designated for a particular subcontractor, the original contractor must distribute the proceeds to the designated subcontractor, provided the payment is consistent with the terms of the subcontract [*Civ. Code § 3260(d)*]. If there is a bona fide dispute between a subcontractor and the original contractor, the original contractor may withhold from that subcontractor its portion of the retention proceeds. The amount withheld from the retention payment must not exceed 150 percent of the estimated value of the disputed amount [*Civ. Code § 3260(e)*].

Within 10 days of receipt of written notice by the owner from the original contractor or by the original contractor from the subcontractor that any work in dispute has been completed in accordance with the terms of the contract, the owner or original contractor must advise the notifying party of the acceptance or rejection of the disputed work. Within 10 days of acceptance of the disputed work, the owner or original contractor must release the retained portion of the retention proceeds [*Civ. Code § 3260(f)*]. This provision is applicable only to contracts entered into on or after January 1, 1994, relating to the construction of any private work of improvement [*Civ. Code § 3260(a)*].

If retention payments are not made within the above time periods, the owner or original contractor withholding the unpaid amounts will be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of wrongfully withheld funds, the prevailing party will be entitled to his or her attorneys' fees and costs [*Civ. Code § 3260(g)*].

It is against public policy for any party to require any other party to waive any provision of § 3260 [*Civ. Code § 3260(h)*].

[v] Mechanics' Liens and Retainages

As mentioned under [iii], *above*, one of the reasons for retaining a percentage of each progress payment is to assure the owner that, at the time the final payment is requested, no mechanics' liens have been recorded against the property on which the construction project was built. The following is a brief explanation of the impact of mechanics' liens.

Any person who performs labor on or furnishes materials or supplies used in the construction of any work of improvement is entitled to a lien on the work of improvement for the reasonable value of his or her labor, materials, or supplies [*Civ. Code § 3110*]. Any lien claimant other than an original contractor must first give a written preliminary notice [*see Civ. Code § 3097(a)*; *see also* Ch. 31, *Mechanics' Liens*]. Thereafter, the claimant must record a claim of lien after completing his or her services and before the expiration of 30 days after the owner gives notice that a notice of completion or cessation has been recorded. If the owner fails to give notice, the time to record a claim of lien is extended to 90 days after the work of improvement is completed [*Civ. Code §§ 3116, 3259.5(a)*]. If the owner occupies the property as a personal residence and the dwelling contains not more than four residential units, he or she is not obligated to notify the claimant that a notice of completion or cessation has been recorded, in which case the 30-day period within which the claimant must record a claim of lien begins to run when the notice of completion or cessation is recorded [*Civ. Code §§ 3116, 3259.5(b)*].

An owner who intends to record a notice of completion can assure himself or herself of the opportunity to check for recorded mechanics' liens before making the final disbursement to the original contractor by providing in the construction contract that retained funds will be withheld from the original contractor for a specified period exceeding 30 days, but not exceeding 45 days [*see Civ. Code § 3260(c)*; *see also* [iv], *above*], after recordation of the notice of completion [*see § 30D.221[2]*, second version of P 2]. Under this arrangement, the owner or owner's agent will be able to check, after the expiration of the 30-day lien period [*see* discussion of that period, *above*] and before the statutory deadline for the release of the retained funds, for any recorded claims of lien. Thereafter, the release or continued withholding of the retained funds must comply with the requirements set forth in *Civ. Code § 3260* [*see* [iv], *above*].

If the owner or any contractor disputes the correctness or validity of the recorded claim of lien, he or she may record (either before or after commencement of an action to enforce the lien) a surety bond in a penal sum equal to 11/2 times the amount of the claim guaranteeing the payment of any sum that the claimant may recover on the claim. Thereafter, the real property is freed from the effect of the claim of lien and any action brought to foreclose the lien [*Civ. Code § 3143*].

For further discussion of this release bond and of mechanics' liens, see Ch. 31, *Mechanics' Liens* .

[d] Contractor's License Number and Related Statutory Statement

A licensed contractor must include his or her contractor's license number on all construction contracts [*Bus. & Prof. Code § 7030.5*]. This form provides for the inclusion of the number immediately below the contractor's signature. Further, the contractor must include a statutory statement in at least 10-point type on all written contracts with respect to which the contractor is a prime contractor [*Bus. & Prof. Code § 7030(a)*; *see § 30D.221[2],* P 26]. For further discussion of these requirements, see *§ 30D.220[1]*.

[e] Name and Address of Owner and Construction Lender

Every written contract entered into between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and business address (if any) [*Civ. Code § 3097*(*l*)]. In this form, the owner's name should appear in the first paragraph, and the address or addresses should be set forth below the owner's signature. Further, unless the contract is a home improvement contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7168*], the contract also must provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*; *see § 30D.221[2],* P 25].

[f] Construction of Single-Family Dwelling to Be Retained by Owner

Every contract between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year, and any changes in such a contract, must be evidenced in writing and signed by both parties [*Bus. & Prof. Code § 7164(a)*]. The writing must include all of the following information [*Bus. & Prof. Code § 7164(b), (d)*]:

- The contractor's name, address, and license number.
- The approximate dates when the work will begin and be substantially completed.
- A legal description of the location where the work will be done.
- A statutorily-prescribed statement with the heading "Mechanics' Lien Warning," which informs the owner of the contractor's rights under the Mechanics' Lien Law and suggests measures the owner can take to protect himself or herself from liens [*see Bus. & Prof. Code § 7164(b)(4)* (text of statement)].
- A CSLB statement that emphasizes the value of commercial general liability insurance and encourages the owner to verify the contractor's coverage and status, and a check box indicating whether or not the contractor carries commercial general liability insurance, and if so, the insurer's name and telephone number [*see § 30D.232* (form)].
- A notice in close proximity to the parties' signatures, in at least 10-point bold type or all capital letters, stating that the owner has the right to require the contractor to have a performance and payment

bond and that the expense of the bond may be borne by the owner.

The contract may also contain other matters agreed to by the parties. It must clearly describe any other document incorporated into the contract. Before work begins, the owner must be furnished with a copy of the contract signed by the contractor [*Bus. & Prof. Code § 7164(c)*].

[f.1] Owner's Obligation to Provide Security for Contractual Payment Obligations

To protect general contractors from the undesirable position of being obligated under a subcontract to make payments to a subcontractor without having the funds from the owner to do so, in some situations the owner must provide security for its payment obligations under the construction contract. Generally, this security requirement applies when the contract exceeds $5 million if the owner's interest is a fee simple absolute interest, or $1 million if the owner's interest is less than a fee simple interest (including a leasehold interest) [*Civ. Code § 3110.5(a)*]. The requirement does not apply to contracts for construction of single-family residences, public works projects, or housing developments that are eligible for a density bonus [*Civ. Code § 3110.5(e)*]. The security may be in the form of a payment bond, an irrevocable letter of credit, or establishment of an escrow account [*Civ. Code § 3110.5(b)(1)-(3)*].

The amount of security required depends on the contract's duration. If the contract calls for the work to be substantially completed within six months, the security provided cannot be less than 25 percent of the amount of the contract price. If the contract is scheduled to take longer to complete, the security cannot be less than 15 percent of the contract price [*see Civ. Code § 3110.5(b)*].

For further discussion of the owner's security requirement, see *§ 30D.10[6]*.

[g] Provisions Favoring Either Party

[i] Description of Boundaries

The last (optional) sentence of Paragraph 1 of this form provides that it is the owner's responsibility to identify the boundaries of the project site. This language has been included because the owner usually specifies the location of the construction and therefore should (at least from the contractor's perspective) be held responsible for encroachments [*see* Acret, California Construction Law Manual, Ch. 2, *What to Put In (and Keep Out of) Contracts* (West 5th ed. 1997)].

[ii] Authorization of Extra Work

The attorney should select one of the two alternative extra work provisions set forth as Paragraph 3 of this form. The first version favors the contractor by authorizing compensation for extra work ordered by the owner, his or her design professional, or any public agency. The second version favors the owner by specifying that only the owner has the right to authorize compensable extra work. Note that both versions authorize written or oral requests for extra work. For provisions requiring the use of written change orders, see Article 7 of Appendix E (AIA Doc. 201-1997, General Conditions of the Contract for Construction). For further discussion of extra work and change orders, see *§ 30D.14*.

Under the mechanics' lien law [*Civ. Code § 3082 et seq.*], an owner must notify the prime contractor and construction lenders of any changes in the contract if the change has the effect of increasing the price stated in the contract by 5 percent or more [*Civ. Code § 3123(c)*].

[iii] Contractor's Authority to Stop Work

Under Paragraph 15 of this form, the contractor may, by following a specified procedure, stop work on the project following any missed payment. It is possible for the parties to provide that the contractor cannot stop work over any dispute, and that the dispute must be submitted to arbitration after completion of the project [*see B.C. Richter*

Contracting Co. v. Continental Casualty Co. (1964) 230 Cal. App. 2d 491, 500-501, 41 Cal. Rptr. 98] . However, it is unlikely that a contractor would agree to this provision and thereby waive the right to rescind the contract.

[iv] Recordation of Notice of Completion

A notice of completion may be signed and verified by the owner or the owner's agent [*Civ. Code § 3093*]. Because the timing of the contractor's final payment depends on the recordation of the notice of completion [*see § 30D.222[2]*, P 2; *see also* [c][v], *above*], Paragraph 17 of this form authorizes the contractor to serve as the owner's agent for this purpose so that the contractor may trigger the 35-day retention period if the owner is lax for any reason in recording the notice of completion.

[v] No Waiver by Payment

Paragraph 18 of this form provides, among other things, that the owner does not waive the right to make a claim for defective work when he or she makes a progress or final payment to the contractor. An owner who makes progress payments and does not include such a waiver in the construction contract cannot subsequently claim that the work is inadequate [*see Sirch Electrical & Testing Laboratories v. Garbutt (1910) 13 Cal. App. 435, 439, 110 P. 140]* .

[h] Miscellaneous Provisions

[i] Commencement of Work

The owner-prime contractor agreement should state the dates of commencement and completion of the work or provide a method for determining these times. If the contract provides for the construction of a single-family dwelling to be retained by the owner for at least one year, it must contain the approximate dates when the work will begin and will be substantially completed [*Bus. & Prof. Code § 7164(b)*; *see* [f], *above*]. This form states that the work must commence within a specified number of calendar days after the execution of the contract, and must be completed not more than a specified number of days after commencement. It also contains optional language setting forth the approximate dates required by *Bus. & Prof. Code § 7164* [*see § 30D.221[2]*, P 4].

If the contract is not subject to Section 7164 and the dates of commencement and completion will not be established prior to the execution of the agreement, the agreement should provide that the owner will subsequently specify the applicable dates by providing the contractor with a notice to proceed [*see § 30D.231*].

For a letter of intent that may be used to authorize commencement of construction work prior to the execution of the contract documents, see *§ 30D.220*.

[ii] Arbitration

The attorney should include an arbitration provision in the contract in order to facilitate the resolution of disputes between the owner and prime contractor and avoid lengthy and costly delays resulting from litigation. The arbitration clause in this form provides that the arbitration proceedings will be governed by the Construction Industry Rules of the American Arbitration Association [*see § 30D.221[2]*, P 19]. For further discussion of arbitration and the American Arbitration Association, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

If the contract is for work on residential property with four or fewer units and includes an arbitration provision, it must also include a disclosure statement to be initialed by both parties. The wording of the disclosure is prescribed by statute. In such contracts, both the arbitration provision itself, and the disclosure must be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type. If the contract is typed, the

provision and disclosure must be set out in capital letters. Failure to comply with these requirements will preclude the contractor from being able to enforce the contract [*Bus. & Prof. Code § 7191*].

[2] FORM

Construction Contract (Stipulated Sum)

CONSTRUCTION CONTRACT

Preamble

_____[*Name*] of _____ County, California ("Owner"),
and_____[*name*] of _____ County, California ("Contractor"), agree as follows:

Construction of Building

1. Contractor will furnish all labor and materials necessary to construct [*describe type of building, e.g.*, an apartment building] ("the Project"), according to drawings and specifications prepared by [*name of architect or other design professional*], for Owner on the real property [in the City of _____, *or* in the unincorporated area of _____,] _____ County, California, described as follows: [*insert description of property; must be legal description if contract is for construction of single-family dwelling to be retained by owner for at least one year (see Bus. & Prof. Code § 7164(b))*]. [Owner will identify the property lines to Contractor, and will provide a report prepared by a licensed land surveyor and a map if there is any uncertainty concerning the property lines.]

Contract Price

2. Owner will pay Contractor $_____ (the "contract price") for labor and materials, as follows:

[*EITHER, if progress payments will be made as specified portions of project are completed:*]

Twenty percent when the foundations and subflooring, if required, for the project have been completed.

Twenty percent when the exterior walls for the project have been completed, the roof is finished, and the utilities have been roughed in.

Twenty percent when the interior walls of the project are ready for painting or papering and doors and windows have been installed.

Twenty percent when the project has been completed and a notice of completion, signed by Owner, has been duly recorded in the county where the project is located.

The balance at such time, at least [*number, e.g.*, 35] days after a notice of completion of the project has been duly recorded by Owner, as Owner is assured by_____[*name of title company*] that the project and the real property on which it is located are free from all liens recorded or recordable pursuant to *Civil Code Sections 3115-3117*.

If Owner fails to make any of the first four payments described above, Contractor may submit a written demand for

payment to Owner. In that case, Owner must provide Contractor with the progress payment within 30 days following receipt of the demand. Notwithstanding the foregoing, if a dispute exists between Owner and Contractor regarding any of those progress payments, Owner may withhold from the payment an amount not exceeding 150 percent of the disputed amount.

[*OR, if owner will retain percentage of each progress payment (see Civ. Code § 3260):*]

(a) On or about the _____ day of each month an amount equal to _____ percent of the value, based on the contract price, of all work performed on and materials actually used in the construction of the project during the preceding calendar month as certified by [Architect *or other design professional*]. If Owner fails to make any of these progress payments, Contractor may submit a written demand for payment to Owner. In that case, Owner must provide Contractor with the progress payment within 30 days following receipt of the demand. Notwithstanding the foregoing, if a dispute exists between Owner and Contractor regarding any progress payment, Owner may withhold from the payment an amount not exceeding 150 percent of the disputed amount.

(b) The balance within 45 days after the date of completion. For these purposes, "date of completion" means any of the following: (1) the date of completion indicated on a valid notice of completion recorded pursuant to *Civil Code Section 3090*; (2) the "date of completion" as that term is defined in *Civil Code Section 3093*; or (3) the date of issuance of a certificate of occupancy covering the Project. Notwithstanding the foregoing, if a dispute exists between Owner and Contractor, Owner may withhold from the final payment an amount not exceeding 150 percent of the disputed amount.

(c) Within 10 days of receipt of written notice by Owner from Contractor that any work in dispute has been completed in accordance with the terms of the contract, Owner must advise Contractor of the acceptance or rejection of the disputed work. Within 10 days of acceptance of the disputed work, Owner must release the retained portion of the retention proceeds.

Extra Work

[*EITHER, if owner and certain others may authorize extra work:*]

3. If Owner,_____[his *or* her] [architect *or other design professional*], or any public agency directs or requests that additional work not shown on the present drawings and specifications for the project be done by Contractor, the cost of the additional work will be added to the contract price and paid by Owner on completion of the additional work. The term "cost" as used in this paragraph means the actual cost to Contractor of the labor, materials, or subcontracts required for the additional work increased by [*e.g.,* 10] percent for Contractor's overhead and another [*e.g.,* 10] percent for Contractor's profits. Contractor is entitled to be paid for all additional work requested or directed, in writing or orally, by any of the persons or entities identified above. Further, any related expenses incurred by Contractor because of unusual ground conditions will be paid for by Owner as additional work done by Contractor.

[*OR, if only the owner may authorize extra work:*]

3. If Owner directs or requests that additional work not shown on the present drawings and specifications for the project be done by Contractor, the cost of the additional work will be added to the contract price and paid by Owner on completion of the additional work. No other person, including the project [architect *or other design professional*], is authorized to direct or request additional work. The term "cost" as used in this paragraph means the actual cost to Contractor of the labor, materials, or subcontracts required for the additional work, increased by 10 percent for Contractor's overhead and another 10 percent for Contractor's profits. Contractor is entitled to be paid for all additional

work requested or directed, in writing or orally, by Owner. Further, any related expenses incurred by Contractor because of unusual ground conditions will be paid for by Owner as additional work done by Contractor.

Time for Completion

4. Contractor must commence work on the project within _____ calendar days after the execution of this Contract and, unless delayed by one of the causes mentioned in Paragraph 16 of this Contract, complete construction of the project in not more than _____ working days thereafter. [*Add if contract is for construction of single-family dwelling to be retained by owner for at least one year (see Bus. & Prof. Code § 7164(b)):* For purposes of *Business and Professions Code Section 7164(b)*, the approximate date when the work will begin is _____, and the approximate date when the work will be substantially completed is _____.]

Correlation Between Drawings, Specifications, and Contract

5. The drawings for the project, the specifications for the project, and this Contract are intended to supplement each other so that any work mentioned in one of those instruments but not in the others will be performed in the same manner as if mentioned in all of the instruments. If a conflict arises between the instruments, the specifications will control over the drawings, and this Contract will control over both the drawings and the specifications.

Charges and Liens

6. Contractor must pay all charges incurred by [him *or* her] for labor and materials used in the construction of the project as they become due. If Contractor fails to pay any such charge, Owner may pay the charge on Contractor's behalf and will be reimbursed by Contractor, on request, for the payment. Owner, however, will not be entitled to collect from Contractor any greater amount under this paragraph than the amount actually paid by Owner in settlement or discharge of the charge.

Examination by Contractor

7. Contractor has by careful examination ascertained the following: (1) the nature and location of the project; (2) the condition of the ground on which the project is to be erected; (3) the character, quality, and quantity of the materials, equipment, and facilities necessary to complete the project; (4) the general and local conditions pertaining to the project; and (5) all other matters that in any way can affect the performance of this Contract by Contractor. Contractor enters into this Contract solely because of the results of that examination and not because of any representations pertaining to the project or the completion of the project made to [him *or* her] by Owner or any agent of Owner and not contained in this Contract.

Indemnity Agreement

8. Contractor will indemnify and hold Owner and the property of Owner free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons, or from the damage or destruction of any property or properties, caused by or connected with the performance of this Contract by Contractor or Contractor's agents, subcontractors, or employees.

Workers' Compensation Insurance

9. Contractor, at_____[his *or* her] own cost and expense, must procure and maintain during the continuance of this Contract a policy of workers' compensation or employer's liability insurance for the protection of_____[his *or* her] employees (including executive, managerial, and supervisorial employees) engaged in work on the project, and must, on demand, deposit with Owner a certificate evidencing the policy.

Subcontractor's Insurance

10. Contractor must require each subcontractor employed by [him *or* her] to perform labor on the project to do the following: (1) to procure and maintain during the performance of the labor, at the subcontractor's own cost and expense, a policy of workers' compensation or employer's liability insurance for the protection of the subcontractor's employees (including executive, managerial, and supervisorial employees) engaged in work on the project, and (2) to deposit with Contractor a certificate satisfactory to Contractor evidencing that insurance.

Fire Insurance

11. Owner, at_____[his *or* her] own cost and expense, must procure promptly after the execution of this Contract and maintain during the continuance of this Contract a policy of fire insurance with course of construction, vandalism, and malicious mischief clauses attached, insuring the project and all materials delivered to the project site for their full insurable value with loss thereunder payable to the following, as their interests may appear: Owner; any beneficiary of a deed of trust encumbering the property on which the project is located; and Contractor.

Destruction of Project

12. If all or any portion of the project is destroyed by fire, theft, vandalism, accident, act of God, or other cause not the fault of Contractor, any work done or materials furnished by Contractor in restoring or rebuilding the project will be paid for by Owner as extra work performed by Contractor pursuant to Paragraph 3 of this Contract.

Owner's Power to Terminate Contract

13. If Contractor commits any of the acts specified in this paragraph, Owner may, without prejudice to any other rights or remedies given Owner by law or by this Contract, do the following by giving _____ days' written notice to Contractor: terminate the services of Contractor under this Contract; take possession of the project and the premises on which it is located; take possession of all materials, tools, and appliances located on the premises; and complete the project by whatever method_____[he *or* she] deems expedient. Contractor will be deemed to have committed an act covered by this paragraph if Contractor is adjudged bankrupt or does any of the following:

(1) Makes a general assignment for the benefit of

_____ [his *or* her] creditors;

(2) Refuses or fails, except as provided in Paragraph 16 of this Contract, to supply enough properly skilled workers or proper materials to complete the project in the time specified in this Contract;

(3) Fails to make prompt payment to subcontractors, laborers, or material suppliers for labor performed on or materials furnished to the project;

(4) Persistently disregards any law or ordinance relating to the project or the completion of it; or

(5) Otherwise commits a substantial violation of any provision of this Contract.

Rights on Termination by Owner

14. If Owner terminates the services of Contractor under this Contract and completes the project pursuant to Paragraph 13 of this Contract, Contractor will not be entitled to receive any further payment under this Contract until the project is fully completed. On completion of the project by Owner, if the unpaid balance of the contract price exceeds the expenses incurred by Owner in completing the project, including any compensation paid by Owner for managerial, administrative, or supervisorial services in completing the project, Owner must promptly pay the excess to Contractor. If, however, on completion of the project by Owner the expenses incurred by Owner in completing the project, including any compensation paid by Owner for managerial, administrative, or supervisorial services in completing the project, exceed the unpaid balance of the contract price, Contractor must promptly pay the excess to Owner.

Contractor's Power to Terminate Contract

15. If Owner fails to pay to Contractor within _____ days after it becomes due any amount payable by Owner to Contractor pursuant to this Contract, Contractor may, by giving _____ days' [*or* hours'] written notice to Owner, stop work on the project. Thereafter, Contractor may use all lawful means, including actions by labor or contractors' associations induced by Contractor, to prevent further work from being done on the project until all past due payments have been received by Contractor and Owner has posted a bond satisfactory to Contractor for the payment of all amounts that will thereafter become due to Contractor under this Contract.

Unavoidable Delays and Defaults

16. Either party to this Contract will be excused for any delays or defaults by that party in the performance of this Contract that are unavoidably caused by any of the following: an act of the other party; an act of any agent of the other party; an act of any governmental authority; an act of any public enemy; an act of God; the elements; war; war defense conditions; riots; litigation; strikes; walkouts; or any other causes beyond that party's control. Each party must use reasonable diligence to avoid any such delay or default and to resume performance under this Contract as promptly as possible after any such delay or default.

Notice of Completion

17. Owner will execute, acknowledge, and record in the manner provided by law a notice of completion of the project within _____ days after final inspection and approval of the project. [Owner hereby appoints Contractor as Owner's agent to sign and record a notice of completion on Owner's behalf if Owner, following the foregoing final inspection and approval, fails to record a notice of completion. This agency is irrevocable and is coupled with an interest.]

No Waiver by Payment

18. The recordation of a notice of completion of the project by Owner, the payment to Contractor by Owner of any progress payment or the full contract price, or the occupation of the project by Owner will not relieve Contractor of liability (1) for defective materials or workmanship used in the completion of the project, or (2) for failure to construct the project according to this Contract or according to the drawings and specifications mentioned in this Contract. Acceptance by Contractor of any payment provided for in this Contract will be a representation by Contractor to Owner that all work on the project required by this Contract to be performed before the payment became due has been completed by Contractor in accordance with the terms of this Contract and in accordance with the drawings and specifications mentioned in this Contract.

[*If contract is for work on residential property with four or fewer units, arbitration provision and disclosure that follows must be in 10-point boldface type or 8-point red boldface type; if contract is typed, provision must be in capital letters. (Bus. & Prof. Code § 7191(a)):*]

Arbitration of Disputes

19. If any dispute arises concerning the project, any provision of this Contract, or any provision of a subcontract that is subject to this Contract, the dispute will be settled by arbitration held in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is filed with the Association. Any party to the dispute may file, in the manner provided by the Construction Industry Arbitration Rules of the Association, a demand for arbitration. The written decision of the arbitrator or arbitrators appointed by the Association will be final and conclusive as to all parties to the dispute. If any party fails or refuses to appear or participate in the arbitration proceedings, the arbitrator(s) may decide the dispute on the evidence presented in the proceedings by the other party or parties to the dispute. The arbitrator(s) will have the power to award to any party or parties to the dispute any sums for costs, expenses, and attorneys' fees that the arbitrator(s) deem(s) proper. Judgment may be entered on the award in any court of competent jurisdiction. This provision will be binding on Owner, Contractor, and any subcontractor or sub-subcontractor who signs this Contract or another contract that incorporates this Contract by reference.

[*Include if contract is for work on residential property with four or fewer units (Bus. & Prof. Code § 7191(b)):*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

_____ [*Owner's Initials*]
_____ [*Contractor's Initials*]

Clean Up

20. Contractor must, on completion of the project by [him *or* her], remove all debris and surplus materials from the property of Owner and leave the property in "broom clean" condition.

Notices

21. Any and all notices or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either Owner or Contractor by the other party to this Contract must be in writing and will be deemed duly served, given, or delivered when (1) personally delivered to the party to whom it is addressed [or to a supervisorial employee of that party], or (2) deposited in the United States mail, first-class postage prepaid, addressed to Owner at_____[*address*], California, or to Contractor at_____[*address*], California. Either party may change the party's address for these purposes by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

22. If any legal action or proceeding arising out of or relating to this Contract is brought by either party to this Contract, the prevailing party will be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Sole and Only Agreement

23. This instrument constitutes the sole and only agreement of the parties to this Contract relating to the project and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force and effect.

Assignments by Contractor

24. This Contract is for the personal services of Contractor in constructing the project. Contractor may not assign this Contract, Contractor's right to moneys becoming due under this Contract, or Contractor's duties under this Contract to any other person or entity without the written consent of Owner.

Construction _____ [Lender *or* Lenders]

25. The following name[s] and address [es] of the construction lender [s] for the above project are provided by Owner pursuant to *Civil Code Section 3097(m)*:

Construction lender[s]:
_____[*name*]

_____ [*address*]

[*Repeat for each additional lender.*]

Licensing and Regulation of Contractors

[*Include following statement in at least 10-point type (Bus. & Prof. Code § 7030(a)):*]

26. Contractors are required by law to be licensed and regulated by the Contractors' State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within ten years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, California 95826.

[*Add if owner is required to provide security for its contract payment obligations (see Civ. Code § 3110.5; see also § 30D.10[6]):*]

27. In accordance with *Civil Code Section 3110.5*, Owner agrees to provide the following:

(a) A certified copy of any recorded deed of trust securing any construction loan obtained for this contract; and

(b) An appropriate form of security for Owner's payment obligations under this contract.

[*Add if contract is for construction of single-family dwelling to be retained by owner for at least one year (see Bus. & Prof. Code § 7164(b)):*]

Statutory Notice Regarding Mechanics' Liens

28. The following statutory notice is provided in accordance with *Business and Professions Code Section 7164*:

MECHANICS' LIEN WARNING:

Anyone who helps improve your property, but who is not paid, may record what is called a mechanics' lien on your property. A mechanics' lien is a claim, like a mortgage or home equity loan, made against your property and recorded with the county recorder.

Even if you pay your contractor in full, unpaid subcontractors, suppliers, and laborers who helped to improve your property may record mechanics' liens and sue you in court to foreclose the lien. If a court finds the lien is valid, you could be forced to pay twice or have a court officer sell your home to pay the lien. Liens can also affect your credit.

To preserve their right to record a lien, each subcontractor and material supplier must provide you with a document called a "20-day Preliminary Notice." This notice is not a lien. The purpose of the notice is to let you know that the person who sends you the notice has the right to record a lien on your property if he or she is not paid.

BE CAREFUL. The Preliminary Notice can be sent up to 20 days after the subcontractor starts work or the supplier provides material. This can be a big problem if you pay your contractor before you have received the Preliminary Notices.

You will not get Preliminary Notices from your prime contractor or from laborers who work on your project. The law assumes that you already know they are improving your property.

PROTECT YOURSELF FROM LIENS. You can protect yourself from liens by getting a list from your contractor of all the subcontractors and material suppliers that work on your project. Find out from your contractor when these subcontractors started work and when these suppliers delivered goods or materials. Then wait 20 days, paying attention to the Preliminary Notices you receive.

PAY WITH JOINT CHECKS. One way to protect yourself is to pay with a joint check. When your contractor tells you it is time to pay for the work of a subcontractor or supplier who has provided you with a Preliminary Notice, write a joint check payable to both the contractor and the subcontractor or material supplier.

For other ways to prevent liens, visit CSLB's Web site at www.cslb.ca.gov or call CSLB at 800-321-CSLB (2752).

REMEMBER, IF YOU DO NOTHING, YOU RISK HAVING A LIEN PLACED ON YOUR HOME. This can mean that you may have to pay twice, or face the forced sale of your home to pay what you owe.

[*Add, if contract is for construction of single-family dwelling to be retained by owner for at least one year (see Bus. & Prof. Code § 7164(d)):*]

Bonds

[*Set forth following notice in at least 10-point bold type or in all capital letters (see Bus. & Prof. Code § 7164(d)):*]

29. OWNER HAS THE RIGHT TO REQUIRE CONTRACTOR TO SECURE A PERFORMANCE BOND AND A PAYMENT BOND. THE EXPENSE OF THESE BONDS MAY BE BORNE BY OWNER.

[*Continue with the following:*]

Executed_____[*date*], at _____ County, California.

OWNER
_____ [*signature of owner*]
[*typed name*]
Residence address: _____
Business address (if any): _____
CONTRACTOR
_____ [*signature of contractor*]
[*typed name*]
California Contractor's License Number: _____
[*Add, if contract is for construction of single-family dwelling to be retained by owner for at least one year (see Bus. & Prof. Code § 7164(b)):*]

Business [*or* Residence] address: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawFormationExecutionContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
C. Construction Contracts

15-30D California Legal Forms--Transaction Guide § 30D.222

§ 30D.222 Contractual Provisions for Construction of Subdivision Off-Site Improvements

[1] Comment

[a] Use of Form

This form contains provisions for the construction of subdivision "off-site improvements" [*see* [b][i], *below* (definition)]. The attorney can create a complete contract for the construction of these improvements by substituting the provisions of this form for Paragraphs 1-3 of *§ 30D.221[2]*. However, the contract must be supplemented by an improvement plan that describes the improvements in detail [*see Gov. Code § 66456.2(d)* ("improvement plan" defined); *§ 30D.222[2]*, P 1 (providing for attachment of improvement plan); *see also* Ch. 30, *Subdivision Regulation*]. This form does not attempt to list or enumerate subdivision off-site improvements because the number and type of improvements will vary greatly from subdivision to subdivision, depending on local ordinances, the requirements imposed by the California Real Estate Commissioner, and the nature of the proposed subdivision.

In addition to the substitution of the provisions of this form for Paragraphs 1-3 of *§ 30D.221[2]*, the words "the off-site improvements" should be substituted for the words "the project" wherever they appear in the other provisions of *§ 30D.221[2]*. Finally, Paragraph 11 of *§ 30D.221[2]* dealing with fire insurance should be deleted and the remaining paragraphs of that form renumbered accordingly.

[b] Subdivision Off-Site Improvements

[i] In General

Subdivision "off-site improvements" consist of the public facilities that are reasonably necessary for the general use of lot owners in the subdivision, the local neighborhood traffic, and area drainage needs [*see Gov. Code §§ 66418, 66419, 66451, 66473*], such as streets, gutters, and sidewalks. Typically, the owner has these off-site improvements installed before constructing the "on-site improvements," that is, the homes or other structures on the subdivided lots. It is extremely important that the owner award the off-site and on-site improvements under separate contracts to different general engineering and/or general building contractors because that practice will give the construction lenders' deeds of

trust on the subdivided lots priority over any mechanics' liens recorded against the on-site improvements [*see Civ. Code § 3135*]. For a discussion of the lending requirements and laws providing for that result, see [ii], *below.*

[ii] Use of Separate Construction Contracts

Subdividers usually arrange to have the construction of off-site improvements commenced before construction of homes or other on-site improvements on the subdivided lots [Hopkins, *Selected Mechanics' Lien Priority Problems, 16 Hastings L.J. 155, 158 (1964)*]. Financing for the off-site improvements is provided by the subdivider or by the formation of a special assessment district [*see* Ch. 30A, *Construction Financing*]. In the case of on-site improvements, private lenders usually provide the financing. These private lenders often record a deed of trust on all lots in the subdivision or separate deeds of trust on each of the lots in the subdivision. This recordation typically takes place after commencement of the work on the off-site improvements.

The practice of recording deeds of trust is important because of the laws governing the priority of mechanics' liens in California. With one exception (that is, when the holder of a subordinate deed of trust alters some of the standard priority rules by recording a specified type of payment bond) [*see Civ. Code § 3138*], a mechanics' lien has priority over any lien, mortgage, deed of trust, or other encumbrance on the "work of improvement" and the site that attaches subsequent to the commencement of the work of improvement [*Civ. Code § 3134*; *see* Ch. 31, *Mechanics' Liens*]. "Work of improvement" means the entire scheme of improvement as a whole [*Civ. Code § 3106*]. The "commencement" of a work of improvement means doing some work and labor on the ground, the effects of which are apparent, easily seen by everybody, and easily understood by everybody as the beginning of construction [*Arthur B. Siri, Inc. v. Bridges (1961) 189 Cal. App. 2d 599, 602, 11 Cal. Rptr. 322* ; *English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 637, 20 P.2d 946* ; *Simons Brick Co. v. Hetzel (1925) 72 Cal. App. 1, 5, 236 P. 357]* .

If the entire scheme of improvement for a subdivision consists of both the off-site improvements and the on-site improvements for each subdivided lot, and the off-site construction work is commenced first, all mechanics' liens will relate back to the time work was commenced on the off-site improvements and will have priority over any deeds of trust subsequently recorded on the subdivided land. However, if the contract for the construction of the off-site improvements is separate from any contract governing the construction of subdivision structures, the off-site improvements will be deemed a separate work of improvement and the commencement of work on those improvements will not constitute the commencement of the "work of improvement" of erecting the subdivision on-site improvements [*Civ. Code § 3135*]. For a discussion of the steps construction lenders frequently take in order to maintain this on-site/off-site separation, see *§ 30D.223[1][b]*.

[2] FORM

Contractual Provisions for Construction of Subdivision Off-Site Improvements

CONSTRUCTION CONTRACT

_____[*Name*] of _____ County, California ("Owner"),
and_____[*name*] of _____ County, California ("Contractor"), agree as follows:

Construction of Improvements

1. Contractor will furnish all labor and materials necessary to construct all the improvements ("the off-site improvements") described in the improvement plan that is attached to this Agreement as Exhibit A and hereby incorporated by reference, on the real property in_____[the City of _____, *or* the unincorporated area of _____,] _____ County, California, shown on the Official Map of_____[*name of subdivision*] recorded_____[*date*], in Book

_____ of Maps, Map No. _____, of the Official Records of that county. Contractor must construct the off-site improvements according to drawings and specifications prepared by_____[*name of engineer*] ("Engineer").

Contract Price

2. Owner will pay Contractor $_____ ("the contract price") for labor and materials, as follows: [*set forth terms of payment (see § 30D.222[2], P 2)*].

Extra Work

3. If Owner, Engineer, or any public agency directs or requests in writing that additional work not shown on the present drawings and specifications for the off-site improvements be done by Contractor, the cost of the additional work must be added to the contract price and paid by Owner on completion of the additional work. The term "cost" as used in this paragraph means the actual cost to Contractor of the labor, materials, or subcontracts required for the additional work, increased by [*e.g.,* 10] percent for Contractor's overhead and another [*e.g.,* 10] percent for Contractor's profits. Notwithstanding the foregoing, no driveways for prospective building sites may be bladed out, no pads may be leveled or rolled for any building or material stockpile, no holes for slab foundations may be dug, and no other work not described in Exhibit A that might reasonably be considered by persons engaged in the construction industry in _____ County, California to be part of any "on-site" improvement may be done by Contractor unless expressly authorized in a writing signed by both Owner and an authorized representative of_____[*name of lending institution that is to make construction loans for on-site improvements*].

[*Continue with remaining paragraphs of § 30D.222, to extent applicable*]

[*Attach Exhibit A (improvement plan*)]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-30D California Legal Forms--Transaction Guide § 30D.223

§ 30D.223 Construction Contract (Houses in a Subdivision)

[1] Comment

[a] Use of Form

This form is a construction contract designed for use when an owner chooses to contract directly with a general contractor for the construction of houses in a subdivision. This form assumes that detailed arrangements for the necessary construction loans will not be finalized prior to the execution of the form, and therefore provides that the contractor will (1) receive progress payments [*see § 30D.223 [2]*, P 3], or (2) comply with any joint control agreement or other agreement for disbursement of funds required by a construction lender [*see § 30D.223 [2]*, P 9]. If arrangements for the construction loans are completed prior to the execution of this form, the attorney should omit Paragraph 9 of this form and insert in Paragraph 3 the lender's requirements governing the disbursement of construction funds to the contractor.

[b] Possible Priorities of Mechanics' Liens Over Construction Loans

As discussed in *Section 30D.222[1][b][ii]*, mechanics' liens on a work of improvement have priority over encumbrances that attach after the commencement of the work of improvement [*Civ. Code § 3134*; *see Civ. Code §§ 3115*, *3116*]. If the off-site improvements and on-site improvements for a subdivision are constructed under separate contracts, commencement of the work on the off-site improvements does not constitute commencement of work on the on-site improvements [*Civ. Code § 3135*; *see § 30D.222[1][b][ii]*].

Because the foregoing provisions of *Civil Code Section 3135* apply only to separate contracts for on-site and off-site improvements, it is unclear whether each house constructed under a subdivision development contract is a separate project for lien purposes or whether all liens, even for work on the last house built in the subdivision, relate back to the time work was commenced on the first house to be built in the subdivision. *Civil Code Section 3131* does provide that if a work of improvement consists of the construction of two or more separate residential units, each unit will be considered a separate work of improvement, and the time for filing claims of liens against each residential unit will commence to run on the completion of each such residential unit. However, *Civil Code Section 3131* mentions nothing

about the commencement of construction of each such residential unit, and its wording suggests that it was intended to define each unit as a separate work of improvement only for completion, not commencement, purposes [*see* Bowman, Ogden's Revised California Real Property Law, vol. II, ch. 20, *Mechanics' Liens* (Cal. C.E.B. 1975)]. As a result, all liens of the contractor, subcontractors, and material suppliers for any labor performed or materials furnished for any house in a subdivision may relate back to and take priority over any deed of trust recorded after work on the first house was begun [*see* Hopkins, *Selected Mechanics' Lien Priority Problems, 16 Hastings L.J. 155, 157 (1964)*].

The law discussed above governing priorities of mechanics' liens concerns private lenders who provide financing for subdivision on-site improvements (that is, construction loans) and consequently record a deed of trust on all lots in the subdivision or separate deeds of trust on each of the lots in the subdivision. To avoid the possibility that their construction loan deeds of trust may become subordinated to mechanics' liens, most construction lenders insist that the following occur [*see* Hopkins, *Selected Mechanics' Lien Priority Problems, 16 Hastings L.J. 155, 157 (1964)*]:

(1) The off-site and on-site improvements be constructed under separate contracts [*see 30D.222[1][b] [ii]*];

(2) The off-site improvement contractor be careful not to perform any on-site improvement work, such as the grading of driveways;

(3) No work of any kind be done on any house in the subdivision and no materials to be used in the building of any such house be delivered to the jobsite or to property adjoining the jobsite until the construction loan deeds of trust for the houses have been recorded; and

(4) All construction loan deeds of trust be recorded at the same time, before commencement of work on any house to be built in the subdivision.

Paragraph 5 of this form provides that the contractor will not commence any work on any house in the subdivision until notified in writing by the owner to do so.

[c] Contractor's Statement and License Number

California law requires all licensed contractors to include on all written construction contracts a prescribed statement and their California contractor's license number [*Bus. & Prof. Code §§ 7030(a), 7030.5*; *see § 30D.229[1][b][i]*]. This form contains the required statement and a space for the contractor's license number.

[d] Name and Address of Owner and Construction Lender

Every written contract entered into between a property owner and an original contractor must provide space for the owner's name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*]. Further, unless the contract is a home improvement contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7173*], the contract also must provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*]. This form provides for the inclusion of the foregoing information.

[2] FORM

Construction Contract (Houses in a Subdivision)

CONSTRUCTION CONTRACT

Preamble

This Contract is entered into on_____[*date*], by and between_____[*name*] of _____ County, California ("Owner"), and_____[*name*] of _____ County, California ("Contractor").

Contractor agrees to furnish all labor and materials required to construct a residential dwelling (a "house") on each of Lots _____ through _____ as shown on the official map of_____[*name of subdivision*] recorded in Book _____ of Maps, Map No. _____ of the Official Records in the Office of the County Recorder of _____ County, California, on the following terms and conditions:

Plans

1. Contractor must construct each house in accordance with one of the sets of plans (Plan A, Plan B, Plan C, or Plan D) attached to this Contract. For each house, Owner will indicate in writing which set of plans is to be used by Contractor.

Contract Price

2. Owner will pay Contractor for each house completed by Contractor pursuant to this Contract one of the following amounts, as appropriate (the "contract price"):

(1) For houses constructed pursuant to Plan A, $

_____ .

(2) For houses constructed pursuant to Plan B, $

_____ .

(3) For houses constructed pursuant to Plan C, $

_____ .

(4) For houses constructed pursuant to Plan D, $

_____ .

Payment of Contract Price

3. Owner will pay to Contractor the contract price for each house constructed by Contractor pursuant to this Contract in installments as follows: _____ [*specify installments, e.g.:*

Twenty percent when the foundations and subflooring, if required, for the house have been completed.

Twenty percent when the exterior walls have been completed, the roof is finished, and the utilities for the house have been roughed in.

Twenty percent when the interior walls of the house are ready for painting or papering and doors and windows have

been installed.

Twenty percent when the house has been completed and a notice of completion, signed by Owner, has been duly recorded in the county where the house is located.

The balance at least 35 days after a notice of completion of the house has been duly recorded by Owner.]

Extra Work

4. If Owner, any authorized agent of Owner, or any public agency directs or requests that additional work not shown on the plan designated by Owner for any house be done on the house by Contractor, the cost of the additional work will be added to the contract price for the house and paid by Owner to Contractor on completion of the house. The term "cost" as used in this paragraph means the actual cost to Contractor of the labor, materials, or subcontracts required for the additional work, increased by [*e.g.,* 10] percent for Contractor's overhead and another [*e.g.,* 10] percent for Contractor's profits. Contractor is entitled to be paid for all additional work requested or directed, in writing or orally, by any of the persons or entities identified above.

Commencement of Work

5. Contractor must not commence work of any kind under this Contract or allow any materials that are to be used in the performance of this Contract to be delivered to any of the property described in this Contract or to be delivered to any property, including any streets or alleys, adjoining the property described in this Contract until_____[he *or* she] has received written notice from Owner to do so.

Completion of Houses

6. Unless delayed by one of the causes mentioned in Paragraph 11 of this Contract, Contractor must complete construction of the houses covered by this Contract in not more than _____ working days after receiving a written notice from owner (pursuant to Paragraph 5 of this Contract) to commence construction.

Charges and Liens

7. Contractor must pay all charges incurred by [him *or* her] for labor and materials used in the construction of each house as they become due. All charges incurred by Contractor for labor or materials used in the construction of any particular house must be paid by [him *or* her] within [*e.g.,* 30] days after a notice of completion of the house has been duly recorded by Owner. If a claim of lien for any such charge or alleged charge is recorded against a house, Owner will notify the Contractor in writing of the recordation of the claim. Within _____ days after receipt of that notice, Contractor must either obtain a release of the claim of lien or procure and record, at_____[his *or* her] own cost and expense, the bond that is required by *Civil Code Section 3143* to free the house and the real property on which it is located from the effects of the claim of lien and any action brought to foreclose the claim of lien. Contractor's failure to record the bond or obtain a release of the claim of lien as provided in this paragraph shall constitute a substantial breach of this Contract by [him *or* her].

Owner's Right to Demand Bond

8. Contractor must, on demand of Owner at any time during the continuance of this Contract, secure and furnish to Owner at Owner's sole cost and expense the following:

(1) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to

_____ percent of the contract prices for all uncompleted houses covered by this Contract, securing the faithful performance by Contractor of this Contract; and

(2) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to

_____ percent of the contract prices for all uncompleted houses covered by this Contract, securing the payment of claims for materials furnished for or labor performed in the construction of the houses.

Joint Control Agreement

9. In lieu of the installment provisions contained in Paragraph 3 of this Contract, Contractor must accept, execute, and abide by any joint control agreement or other type of agreement for the disbursement of funds under this Contract required by any financial institution that loans money to Owner to finance the construction of any houses covered by this Contract.

Failure of Payments

10. If Owner fails to pay to Contractor within _____ days after it becomes due any amount payable by Owner to Contractor pursuant to this Contract or pursuant to any joint control agreement or other agreement referred to in Paragraph 9 of this Contract, Contractor may, by giving _____ days' written notice to Owner, stop work on all houses covered by this Contract. Thereafter, Contractor may use all lawful means, including actions by labor or contractors' associations induced by Contractor, to prevent further work from being performed on those houses until all past due payments have been received by [him *or* her] and Owner has posted a bond satisfactory to Contractor for the payment of all amounts that will thereafter become due to Contractor under this Contract.

Unavoidable Delays and Defaults

11. Either party to this Contract will be excused for any delays or defaults by that party in the performance of this Contract that are unavoidably caused by any of the following: an act of the other party; an act of any agent of the other party; an act of any governmental authority; an act of any public enemy; an act of God; the elements; war; war defense conditions; riots; litigation; strikes; walkouts; or other causes beyond that party's control. Each party must use reasonable diligence to avoid any such delay or default and to resume performance under this Contract as promptly as possible after any such delay or default.

Indemnity Agreement

12. Contractor will indemnify and hold Owner and the property of Owner, including any lots covered by this Contract, free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of

any person or persons, including employees of Contractor or any subcontractor, or from the damage or destruction of any property or properties, caused by or connected with the performance of this Contract by Contractor or Contractor's agents, subcontractors, or employees.

Liability Insurance

13. Contractor, at_____[his *or* her] own cost and expense, must procure and maintain during the performance of this Contract by [him *or* her] policies of liability insurance issued by insurance companies acceptable to Owner and insuring Owner against loss or liability caused by or connected with the performance of this Contract by Contractor or Contractor's agents, subcontractors, or employees. The insurance must be in amounts not less than the following:

(1) $

_____ for injury to or death of one person and, subject to that limitation for the injury to or death of one person, $

_____ for injury to or death of two or more persons as a result of any one accident or incident;

(2) $

_____ for damage to or destruction of any property of others.

Workers' Compensation Insurance

14. Contractor, at_____[his *or* her] own cost and expense, must procure and maintain during the performance of this Contract by [him *or* her] a policy of workers' compensation or employer's liability insurance issued by an insurance company acceptable to Owner for the protection of Contractor's employees (including executive, managerial, and supervisorial employees) engaged in any work required by this Contract.

Subcontractor's Insurance

15. Contractor must require each subcontractor employed by [him *or* her] to work on the project to procure and maintain, at the subcontractor's own cost and expense, a policy of workers' compensation or employer's liability insurance issued by an insurance company acceptable to Owner for the protection of the subcontractor's employees (including executive, managerial, and supervisorial employees) engaged in any work on the project.

Evidence of Insurance

16. Before Contractor commences work under this Contract and before any subcontractor commences work under any subcontract executed pursuant to this Contract, Contractor must deposit or cause the subcontractor to deposit a certificate evidencing each policy of insurance required by this Contract with Owner.

Fire Insurance

17. Owner, at_____[his *or* her] own cost and expense, must procure promptly after the execution of this Contract and maintain during the continuance of this Contract the policies of insurance that insure each house being constructed pursuant to this Contract and all materials delivered to the site of each house for their full insurable value against loss or destruction during the course of construction by fire, the elements, vandalism, or malicious mischief. The loss under those policies must be payable to the following, as their interests may appear: Owner; any beneficiary of a deed of trust encumbering the property on which any house is located; and Contractor.

Destruction of Work

18. If all or any portion of any house being constructed pursuant to this Contract is destroyed by fire, theft, vandalism, accident, act of God, or other cause that is not the fault of Contractor, any work done or materials furnished by Contractor in restoring or rebuilding the house will be paid for by Owner as extra work performed by Contractor pursuant to Paragraph 4 of this Contract.

Permits and Inspections

19. Each house required to be constructed by this Contract must be constructed in strict compliance with all laws, statutes, ordinances, rules, and regulations of any governmental agency or public authority having jurisdiction over the house. Contractor must obtain, at_____[his *or* her] own cost and expense, all permits, inspections, and approvals for each house required by any governmental agency or public authority.

Water and Power

20. Contractor must arrange for and furnish at_____[his *or* her] own cost and expense temporary facilities that furnish to the jobsite for any houses covered by this Contract any water or power, electric or otherwise, needed by Contractor during the course of construction of any house to allow [him *or* her] to successfully perform this Contract.

Security Devices

21. Contractor must furnish, install, and operate at_____[his *or* her] own cost and expense any fences, warning lamps or lights, and other security devices, including security guards, that any insurance company insuring any portion of the property or houses covered by this Contract against loss by fire, theft, or vandalism deems necessary or advisable to prevent unauthorized persons from trespassing on the property and committing acts of theft, vandalism, or destruction on it.

Bankruptcy, Insolvency, or Incompetency

22. If either party to this Contract is adjudged bankrupt, makes a general assignment for the benefit of the party's creditors, or is adjudged an insane or incompetent person in a proceeding brought to have a guardian or conservator appointed for the party's estate, the other party to this Contract may terminate this Contract by giving written notice to the trustee, assignee, guardian, or conservator of the party within _____ days after_____[his *or* her] appointment. In that case, all progress payments specified in Paragraph 4 of this Contract or in any agreement referred to in Paragraph 9 of this Contract due Contractor at 5:00 P.M. on the date of the

notice, and the reasonable value of all other work performed or materials furnished by Contractor pursuant to this contract prior to that time, must be paid to Contractor or to the person legally entitled to manage_____[his *or* her] affairs.

Breach by Contractor

23. If Contractor commits a substantial violation of any provision of this Contract, Owner may, by giving written notice to Contractor, do the following: terminate Contractor's services under this Contract; take possession of the real property and houses covered by this Contract; evict Contractor and any agent, servants, subcontractors, or employees of Contractor from the property and houses; and complete the houses by whatever method Owner in_____[his *or* her] absolute discretion deems expedient. On final completion of all the houses, Contractor must immediately pay to Owner (1) the full amount by which the costs incurred by Owner in completing the houses (including any compensation paid by Owner for managerial, administrative, or supervisorial services) exceeded the total contract prices for the houses as specified in this Contract, and (2) all other damages suffered by Owner because of the breach by Contractor.

Notice of Completion

24. Owner will execute, acknowledge, and record in the manner provided by law a notice of completion for each house covered by this Contract within _____ days after final inspection and approval of the house.

Final Payment for House

25. The payment by Owner to Contractor of the full contract price for any house will not relieve Contractor of liability for (1) defective materials or workmanship used in the completion the house, or (2) failure to construct the house in the manner required by this Contract and the applicable set of plans. Acceptance by Contractor of any payment provided for in this Contract will be a representation by Contractor to Owner and to Owner's successors and assigns that all work required to be performed before the payment became due has been completed by Contractor in accordance with the terms of this Contract and the applicable set of plans.

Assignment by Contractor

26. This Contract is for the personal services of Contractor in constructing the houses covered by this Contract. Contractor may not assign this Contract or any payments due under this Contract to any other person or entity without the written consent of Owner.

Notices

27. Any and all notices, demands, requests, or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either Owner or Contractor by the other party to this Contract must be in writing and will be deemed duly served, given, or delivered when (1) personally delivered to the party to whom it is addressed [or to a supervisorial employee of that party], or (2) deposited in the United States mail, duly registered or certified, with postage prepaid, and addressed to Owner at_____[*address*], _____, California, or to Contractor at_____[*address*], _____, California. Either party may change the party's address for these purposes by giving written notice of the change to the other party in the manner provided in this

paragraph.

Attorneys' Fees

28. If any legal action or proceeding arising out of or relating to this Contract is brought by either party to this Contract, the prevailing party will be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Sole and Only Agreement

29. This Contract constitutes, together with the attached plans, the sole and only agreement of the parties to this Contract relating to the work, materials, or houses described in this Contract, and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in the Contract are of no force and effect.

Construction _____ [Lender *or* Lenders]

30. The following name[s] and address [es] of the construction lender [s] for the project are provided by Owner in accordance with *Civil Code Section 3097(m)*:

Construction lender[s]:
_____ [*name*]
_____ [*address*]

[*Repeat for each additional lender.*]

Licensing and Regulation of Contractors

[*Include following statement in at least 10-point type (Bus. & Prof. Code § 7030(a)):*]

31. Contractors are required by law to be licensed and regulated by the Contractors' State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within ten years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, California 95826.

[*Continue with the following:*]

Executed on_____[*date*], at _____ County, California.

OWNER
_____ [*signature of owner*]
[*typed name*]

Residence address: _____
Business address (if any): _____

CONTRACTOR
_____ [*signature of contractor*]
[*typed name*]
California Contractor's License
Number: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' LiensReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
PART IV. FORMS
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15-30D California Legal Forms--Transaction Guide § 30D.224

§ 30D.224 Standard Form of Agreement Between Owner and Contractor on the Basis of a Stipulated Price [EJCDC Document 1910-8-A-1]

[1] Comment

[a] Use of Form

This form is an owner-contractor construction contract in which the basis of payment for the prime contractor's services is a stipulated sum [*see* [c], *below*]. It was prepared by the Engineers' Joint Contract Documents Committee (EJCDC) [*see* [b], *below*] for use when the primary design work for the project will involve the practice of engineering [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*].

This form is intended to be part of an integrated set of contract documents that will include other EJCDC forms, such as the EJCDC general conditions of the construction contract [*see § 30D.226*]. Because most of the provisions of this form have more detailed counterparts in the EJCDC general conditions, the practitioner should refer to § 30D.226[1] for further discussion. The basic concept of these forms is that the standard general conditions form will remain essentially untouched, while unique characteristics of the particular project will be accounted for in this form or in supplementary conditions or other modifications to the contract documents.

For a pair of stipulated-sum agreements published by the American Institute of Architects (AIA), see Appendices C and D [AIA Docs. A101-1997, A107-1997]. For a standard form of stipulated sum agreement published by the Associated General Contractors of America (AGC), see AGC Document 200. A brief comparison of the various standardized stipulated-sum agreements is contained in [c], *below*. For a custom-drafted stipulated-sum construction contract that contains all agreements between the parties and is not intended to be used with any other documents (other than project drawings and specifications), see *§ 30D.221*. Finally, for an EJCDC owner-contractor agreement that provides for the cost-plus method of contractor compensation, see *§ 30D.225*.

[b] Engineers' Joint Contract Documents Committee (EJCDC)

The Engineers' Joint Contract Documents Committee (EJCDC) is a joint committee made up of members of the

following national professional organizations of engineers: the National Society of Professional Engineers (NSPE); the American Consulting Engineers Council (ACEC); and the American Society of Civil Engineers (ASCE). The EJCDC offers a group of standardized documents intended to guide engineers in their contractual relationships with owners (also referred to as clients in the literature prepared by the foregoing organizations). Because it is the policy of the EJCDC to review every one of its documents within three years of publication, the practitioner must confirm that he or she has the most recent edition of the form and any related guides or commentaries.

[c] Stipulated-Sum Agreements

A stipulated-sum or lump-sum agreement specifies the amount that the contractor will receive for the construction work. This amount must cover the contractor's costs, overhead, and profit, and is normally distributed in the form of progress payments. For further discussion, see *§ 30D.12[1]*.

Each of the construction industry's professional organizations has published at least one standardized form of agreement between owner and contractor based on a stipulated sum for the contract price. These forms are much the same, but there are some notable differences. The primary distinction between the forms is their coordination with other forms. Two of the forms are intended to be rather self-contained, and so contain not only the primary owner-contractor agreement, but also the general conditions of the contract [*see* App. D (AIA Doc. A107-1997); *see also* AGC Doc. 200]. In contrast, other forms incorporate by reference a separate document that sets out the general conditions of the contract [*see* [2], *below*; App. C (AIA Doc. A101-1997)]. Those standardized forms setting out the general conditions are discussed in *§§ 30D.13, 30D.226, 30D.227*.

Whether to use a single form containing the general conditions or separate forms is largely a matter of individual choice, but single forms are generally more suitable to projects of limited scope when not much alteration to the contract documents will be required. On larger projects, the flexibility provided by multiple contract documents is more suitable to address the greater number of contingencies inherent in these projects. Additionally, if earlier agreements such as the owner-design professional agreement have come from a particular organization, use of the stipulated sum contract from the same organization is highly recommended for the sake of consistency.

[d] Effective Date of Agreement

The effective date of the agreement is the date indicated in the form on which it becomes effective [*see § 30D.226[2]*, P 1.01(A)(18) (EJCDC Doc. 1910-8)]. The parties may use the space just above the signature lines for the owner and contractor in this form to indicate the effective date. If no such date is indicated, the general conditions specify that the effective date of the agreement will be the date on which the agreement is signed and delivered by the last of the two parties to sign and deliver [*see § 30D.226[2]*, P 1.01(A)(18) (EJCDC Doc. 1910-8)].

[e] Substantial Completion and Final Payment

The owner-contractor agreement must establish a contract completion date. Each of the stipulated sum contracts requires the contractor to achieve *substantial completion* either by a specified date or within a certain specified time as measured from the commencement of the work or the contract [*see* [2], P *4.02, below* ; App. C, P 3.3 (AIA Doc. A101-1997); App. D, P 2.3 (AIA Doc. A107-1997)]. *Substantial completion* is usually defined by the general conditions as the point at which the owner can occupy or utilize the work for the intended purpose [*see, e.g., § 30D.226[2]*, P 1.01(A)(43) (EJCDC Doc. 1910-8); App. E, P 9.8.1 (AIA Doc. A201-1997)]. The design professional generally determines when the work is substantially complete and issues a certificate of substantial completion accordingly [*see, e.g., § 30D.226[2]*, P 14.04 (EJCDC Doc. 1910-8); App. E, P 9.8 (AIA Doc. A201-1997)].

Although the time requirements of the contract are satisfied when the work is substantially complete, the contractor will not be entitled to the final payment until he or she brings the work to final completion. This essentially means

completing or correcting any work that was unfinished or defective at time the project was found to be substantially complete. After completing or correcting this work, the contractor must submit an application for final payment. On receipt of the application, the design professional will inspect the work for compliance with the requirements of the contract and of the certificate of substantial completion and for any outstanding claims, including mechanics' liens. If all applicable requirements have been satisfied, the design professional will certify the final completion of the project and approve the contractor's final request for payment [*see § 30D.226[2]*, PP 14.06-14.09 (EJCDC Doc. 1910-8); App. E, P 9.10 (AIA Doc. A201-1997)].

[f] Liquidated Damages

Standardized contracts usually include a liquidated damages provision that specifies in advance the amount of damages a contractor must pay the owner for the latter's losses arising from delayed construction [*see* [2], P *4.03, below*]. The AIA stipulated sum agreements provide for optional liquidated damages clauses drafted by counsel [*see* App. C, P 3.3 (AIA Doc. A101-1997); App. D, P 2.3 (AIA Doc. A107-1997)]. A promise to pay liquidated damages for a breach of a construction contract is valid unless it is established that the promise was unreasonable under the circumstances existing when the contract was made [*see Civ. Code § 1671(b)*]. Any liquidated damages provision relating to the failure to complete the work by the completion date should contain explicit and reasonable conditions to its enforcement [*see* California Real Estate Law and Practice, Ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)]. For further discussion of liquidated damages, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[g] Contractor's Statement and License Number

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.229*.

[h] Name and Address of Owner and Lender

Every written contract entered into between a property owner and an original contractor must provide space for the owner's name, residence address, and place of business, if any [*Civ. Code § 3097(l)*]. In this form, the owner's name should appear in the first paragraph, and the address or addresses may be added following the owner's signature.

Unless the contract is a home improvement contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7168*], the contract also must provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*]. This information should be set forth in Paragraph 9.5 of this form or in an addendum to the form [*see § 30D.229[2]* (addendum)].

[i] Construction of Single-Family Dwelling to be Retained by Owner

Every contract between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year, and any changes in such a contract, must be evidenced in writing and must contain certain information and notices [*see Bus. & Prof. Code § 7164*]. For further discussion and an addendum that may be used to add this information to this form, see *§ 30D.229*.

[j] Owner's Obligation to Provide Security for Contractual Payment Obligations

To protect general contractors from the undesirable position of being obligated under a subcontract to make payments to a subcontractor without having the funds from the owner to do so, in some situations the owner must provide security for its payment obligations under the construction contract. Generally, this security requirement applies when the contract does not exceed $5 million if the owner's interest is a fee simple absolute interest, or $1 million if the owner's

interest is less than a fee simple interest (including a leasehold interest) [*Civ. Code § 3110.5(a)*]. The requirement does not apply to contracts for construction of single-family residences, public works projects, or housing developments that are eligible for a density bonus [*Civ. Code § 3110.5(e)*]. The security may be in the form of a payment bond, an irrevocable letter of credit, or establishment of an escrow account [*Civ. Code § 3110.5(b)(1)-(3)*].

The amount of security required depends on the contract's duration. If the contract calls for the work to be substantially completed within six months, the security provided cannot be less than 25 percent of the amount of the contract price. If the contract is scheduled to take longer to complete, the security cannot be less than 15 percent of the contract price [*see Civ. Code § 3110.5(b)*].

For further discussion of the owner's security requirement, see *§ 30D.10[6]*.

[2] FORM

Standard Form of Agreement Between Owner and Contractor on the Basis of a Stipulated Price [EJCDC Document 1910-8-A-1]

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' Liens



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15-30D California Legal Forms--Transaction Guide § 30D.225

§ 30D.225 Standard Form of Agreement Between Owner and Contractor on the Basis of Cost-Plus [EJCDC Document 1910-8-A-2]

[1] Comment

[a] Use of Form

This form is the EJCDC owner-contractor construction contract in which the basis of payment for the services of the prime contractor is the contractor's costs plus a specified fee or profit. It was prepared for use when the primary design work will involve the practice of engineering [*see* Ch. 30C, *Agreements With Design Professionals*]. The only significant differences between this form and the EJCDC stipulated sum contract [*see § 30D.224[2]*] are the additional requirements set forth in this form relating to the cost-plus method of compensation [*see* [b], *below*].

This form, like the EJCDC stipulated sum contract, is intended to be part of an integrated set of contract documents that will include other EJCDC forms, such as the EJCDC general conditions of the construction contract [*see § 30D.226*].

[b] Cost-Plus Requirements

[i] Calculation of Contractor's Fee

Under cost-plus agreements, the owner agrees to pay the prime contractor all of the latter's costs plus a fee for overhead and profit [*see § 30D.12[2]*]. Article 7 of this agreement contains alternative fee provisions for the "plus" portion of the fee: one establishes a fixed fee and the other one a percentage fee. The percentage-fee alternative provides the parties with the opportunity to specify different percentages for different categories of costs (for example, payroll costs and material and equipment costs).

[ii] Progress Payments

Both this form and the EJCDC stipulated sum agreement [*see § 30D.224[2]*] provide for progress payments. However, in keeping with the cost-plus method of compensation, only this form establishes two progress payment schedules; one

for the cost of the work, and the other for the contractor's fee [*see* [2], P *10.02, below*].

[iii] Guaranteed Maximum Contract Price

If the parties agree to establish a maximum contract price, that ceiling may be set forth in Article 8 of this form. The ceiling would serve as an incentive to the contractor to keep costs down. However, many contractors are hesitant to agree to such a limitation [*see § 30D.12[2]*]. Consequently, many of the provisions of this form set forth alternatives that are based on the presence or absence of a maximum contract price [*see* [2], P 9.01A, *below*].

In addition to providing an optional cap on the overall price, this form also provides an optional cap on the "plus" portion of the fee when it is calculated as a percentage of costs [*see* [2], P *7.02, below*].

[c] Contractor's Statement and License Number

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.229*.

[d] Name and Address of Owner and Lender

Every written contract entered into between a property owner and an original contractor must provide space for the owner's name, residence address, and place of business, if any [*Civ. Code § 3097(l)*]. In this form, the owner's name should appear in the first paragraph, and the address or addresses may be added following the owner's signature.

Unless the contract is a home improvement contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7168*], the contract also must provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*]. This information should be set forth in Paragraph 15.05 of this form or in an addendum to the form [*see § 30D.229[2]* (addendum)].

[e] Construction of Single-Family Dwelling to be Retained by Owner

Every contract between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year, and any changes in such a contract, must be evidenced in writing and must contain certain information and notices [*see Bus. & Prof. Code § 7164*]. For further discussion and an addendum that may be used to add this information to this form, see *§ 30D.229*.

[2] FORM

Standard Form of Agreement Between Owner and Contractor on the Basis of Cost-Plus [EJCDC Document 1910-8-A-2]

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.226

§ 30D.226 Standard General Conditions of the Construction Contract [EJCDC Document 1910-8]

[1] Comment

[a] Use of Form

This form is a set of standard general conditions of a construction contract that may be used when engineering is the primary design discipline for the construction project. It was prepared by the Engineers' Joint Contract Documents Committee (EJCDC) [*see § 30D.224[1][b]*]. It is important to note that the standard conditions are not a stand-alone agreement; instead, they were designed to be used with and incorporated by reference into either of the owner-contractor agreements prepared by the EJCDC [see *§§ 30D.224[2]* (stipulated price), *30D.225[2]* (cost-plus)]. The general conditions were also designed to be used in conjunction with an owner-engineer contract prepared by the EJCDC [*see* Ch. 30C, *Agreements With Design Professionals*].

This form describes the rights, responsibilities, and relationships of the parties to the owner-contractor agreement. It also assigns responsibilities to the project engineer as the owner's representative, even though the engineer is not a party to the owner-contractor agreement [*see* [2], Art. 9, *below*]. As a result, the engineer and his or her attorney must review this form at the same time that they examine the proposed owner-engineer agreement.

For general conditions prepared by the American Institute of Architects for use when the primary design work will be performed by an architect [*see* AIA Doc. A201-1997], see Appendix E. For discussion of differences between the AIA and EJCDC general conditions, see [b], *below*. Extensive coverage of the contents of the AIA general conditions is set forth in the Architect's Handbook of Professional Practice (AIA 1994) and in Construction Law, ch. 3, *Construction and Design Contracts* (Matthew Bender).

[b] Comparison of EJCDC and AIA General Conditions

The EJCDC and AIA general conditions are similar in many ways. Both provide for progress payments following certification by the design professional of the amount due [*see* [2], Art. 14, *below*; App. E, Art. 9; *see also* [d], *below*], and require substantial completion within the time specified in the contract [*see § 30D.226[2]*, P *14.04*, *below* ; App. E,

PP 8.2.3, 9.8 (AIA Doc. A201-1997); *see also § 30D.224[1][e]*]. The design professional is authorized to interpret the contract documents [*see* [2], P 9.04, *below* ; App. E, PP 4.2.11, 4.2.12 (AIA Doc. A201-1997)] and to decide certain disputes between the owner and contractor (subject to arbitration) [*see* [2], P *10.05*, *below* ; App. E, PP 4.3, 4.4 (AIA Doc. A201-1997)]. He or she may reject, and require the correction of, nonconforming work [*see* [2], P 9.06, Art. 13, *below*; App. E, P 4.2.6, Art. 12 (AIA Doc. A201-1997)]. Further, the design professional may require the contractor (1) to make covered work available for inspection or testing if the design professional suspects that the work is defective, and (2) to bear the cost of the inspection or testing if the work proves defective [*see* [2], Art. 13, *below*; App. E, P 12.1 (AIA Doc. A201-1997)]. Following substantial completion of the work by the contractor, he or she must specifically correct, within one year, any defects or deficiencies in the work [*see* [2], P *13.07*, *below* ; App. E, P 12.2.2 (AIA Doc. A201-1997); *see also § 30D.224[1][e]*].

Notwithstanding the foregoing similarities, there are several substantive differences and significant language variations between the EJCDC and AIA general conditions. For example, the EJCDC form places greater emphasis on site conditions, hazardous materials [*see* [2], Art. 4, *below*], unit-price work [*see* [2], P 11.03, *below*], and substitutions [*see* [2], P *6.05*, *below*]. Further, it provides that the contract documents generally include the bidding documents [*see* [2], P. 1.01(A)(12), *below*], whereas the AIA form states that the contract documents do not include the bidding documents unless the latter are "specifically enumerated" in the owner-contractor agreement [*see* App. E, P 1.1.1 (AIA Doc. A201-1997)]. The AIA form contains more detailed requirements governing the selection and payment of subcontractors [*see* App. E, arts. 5, 9 (AIA Doc. A201-1997)] than its EJCDC counterpart [*see* [2], P *6.06*, *below*].

For an EJCDC cross-reference sheet that shows where subject matter covered by this form is discussed in the AIA general conditions (or other AIA forms), see *§ 30D.227[2]*.

[c] Modifications to Standard General Conditions (Supplementary Conditions)

Because no set of standard general conditions can cover every contingency or reflect the unique aspects and characteristics of any particular project, this form should be modified when necessary through the use of supplementary general conditions [Walker & Rohdenburg, Legal Pitfalls in Architecture, Engineering, and Building Construction, Ch. 2, *Legal Pitfalls in the Owner-Architect (Engineer) Relationship: Professional Services* at 35 (McGraw-Hill 1968); *see § 30D.13[3]*]. For an addendum/modification form that illustrates the format for any written changes to contract documents, see *§ 30D.230*. For AIA and EJCDC guidelines for the preparation of supplementary conditions, see AIA Document A511 (Guide for Supplementary Conditions) and EJCDC Document 1910-17 (Guide to the Preparation of Supplementary Conditions).

[d] Progress Payments

[i] In General

Although the owner-contractor agreement will specify the contract sum and the schedule of progress payments [*see § 30D.221[1][c]*], the general conditions should set forth all applicable preconditions to those payments [*see* [2], Art. 14, *below*; App. E, Art. 9 (AIA Doc. A201-1997)]. Most payment arrangements require the contractor to submit an application for each progress payment to the design professional. The exact procedures for this submission should be reasonable and fair to the owner and the contractor, and should be consistent with the conditions of disbursement of the owner's construction loan [*see* California Real Estate Law and Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

For coverage of statutory requirements governing the payment and withholding of progress payments that apply unless the owner and contractor agree in writing to an alternative arrangement [*see Civ. Code § 3260.1*; *see also Civ. Code § 3260*], see *§ 30D.221[1][c]*. Because this form sets forth an "alternative arrangement," the remainder of this discussion examines the types of progress payment provisions typically included in standardized agreements, and does not discuss

the foregoing statutory requirements.

[ii] Certificates of Payment

Most general conditions require the design professional to issue a certificate of payment (or other written payment recommendation) under specified circumstances [*see* [2], P 14.02(B), *below* (written payment recommendation); App. E, PP 9.4.1, 9.4.2 (certificate of payment)]. This certificate is an indication of the design professional's approval of the contractor's application for payment. Usually, the issuance of a certificate is a condition precedent to a progress payment. Therefore, it is only after the issuance of a certificate that the corresponding installment payment becomes payable and a right of action for nonpayment can accrue, unless the design professional unreasonably refuses to issue the certificate [*see Ahlgren v. Walsh (1916) 173 Cal. 27, 31, 158 P. 748* ; *Coplew v. Durand (1908) 153 Cal. 278, 281, 95 P. 38]* .

When the design professional is to issue certificates of payment, the general conditions must clearly define the design professional's authority and limitations for withholding payment, with the causes for withholding enumerated. Typical enumerated causes include the following: defective work; claims of third persons; unexcused delay by the contractor; reasonable expectation that work will not be completed within the contract time; contractor's failure to pay subcontractors or to make other project payments; damage to another contractor; reasonable doubt that the contract can be completed for the contract price; and unsatisfactory performance by the contractor [*see* California Real Estate Law and Practice, ch. 432, *The Owner-Prime Contractor Relationship and Contract* (Matthew Bender)].

The general conditions should also describe the effect of an unjustified refusal to issue a certificate for payment on the contractor's obligation to continue to perform under the contract. For example, the contactor may be given the right to stop work (after giving proper notice) until paid, to seek arbitration, or to terminate the agreement [*see* [2], P 15.04, *below* ; App. E, PP 9.7.1, 14.1].

Finally, the general conditions should provide for the issuance by the design professional of (1) a certificate of substantial completion, and (2) a final certificate for payment (or other written recommendation for final payment) [*see* [2], PP 14.07- 14.09, *below* ; App. E, art 9]. For coverage of these certificates, see *§ 30D.224[1][e]*.

[2] FORM

Standard General Conditions of the Construction Contract [EJCDC Document 1910-8]

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-30D California Legal Forms--Transaction Guide § 30D.227

§ 30D.227 Cross Reference Between EJCDC Standard General Conditions of the Construction Contract and AIA General Conditions of the Contract for Construction [EJCDC Document 1910-11]

[1] Comment--Use of Form

This form, prepared by the Engineers' Joint Contract Documents Committee (EJCDC), is a cross-reference sheet that (1) lists every paragraph of the EJCDC standard general conditions of the construction contract [*see § 30D.226[2]* (EJCDC Doc. 1910-8)], and (2) indicates where comparable provisions appear in the American Institute of Architect's general conditions of the contract for construction (or other AIA forms) [*see* App. E (AIA Doc. A201-1997)]. The cross-reference is two-way, so that the user can find the comparable provision in either document if starting from the other. For discussion of those two standardized general condition forms, see *§ 30D.226*.

This form cross-references the 1990 edition of the EJCDC form against the 1987 edition of the AIA form. Both of these editions have been superseded by more current versions, but the cross-references in this form have not been revised accordingly. Nevertheless, the cross-references remain useful because the revisions, though significant in many respects, were not organizational, so the references remain largely accurate.

[2] FORM

Cross Reference Between EJCDC Standard General Conditions of the Construction Contract and AIA General Conditions of the Contract for Construction [EJCDC Document 1910-11]

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property

LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.228

§ 30D.228 Standard Form of Design-Build Agreement and General Conditions Between Owner and Design-Builder (When Basis of Payment Is Cost of Work Plus Fee With Guaranteed Maximum Price) [AGC Document 410]

[1] Comment

[a] Use of Form

This form is the standard form of "design-build agreement" between an owner and design-builder, with general conditions, prepared by the Associated General Contractors of America (AGC). The design-build method of construction contracting utilizes a single construction contract under which the design-builder assumes responsibility for both designing and constructing the project (typically a large industrial project) in accordance with the contract documents. The actual design work may be performed by members of the design-builder's staff or by a consultant designer pursuant to a contract with the design-builder [*see § 30D.11[2]*]. This method of contracting is an alternative to the traditional method, which awards separate contracts for design and for construction [*see § 30D.11[1]*]. The methods for awarding the contract and compensating the design-builder are the same ones used for traditional construction contracts.

Under this form, the design-builder agrees to provide design and construction services on a cost-plus basis, subject to a guaranteed maximum price [*see § 30D.228[2]*, P 3.2 and arts. 7 (compensation), 8 (cost of the work); *see also § 30D.12[2]* (coverage of cost-plus contracts)].

Architectural and engineering services are either to be (1) procured from licensed, independent design professionals retained by the design-builder, or (2) furnished by licensed employees of the design-builder [*see* [2], P 2.2, *below*; *see also § 30D.245* (agreement between design-builder and architect/engineer)]. Fees for these services are to be shown as separate items on applications for payment if an architect/engineer is retained by the design-builder [*see* [2], P 7.1.1, *below*].

[b] Relationship to Other AGC Forms

This form is only one of a series of design-build documents prepared by the AGC. The other agreements include a preliminary design-build agreement [*see* AGC Doc. 400], which may be used when (1) the design-builder is to provide preliminary design work that will be used to establish the scope of the project, and (2) the owner and design-builder will enter into a subsequent design-build agreement providing for a lump sum payment based on the owner's program [*see* AGC Doc. 415], which will include schematic design documents addressed in the preliminary design-build agreement. The AGC also offers design-builder/subcontractor agreements [*see §§ 30D.242-30D.245*].

[c] Information Required by California Law

California laws requires construction contracts to include specified information (when applicable) regarding the project contractor [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], the owner [*see Civ. Code § 3097(l)*], the construction lender [*see Civ. Code § 3097(m)*], and the project [*see Bus. & Prof. Code § 7164* (applicable when project involves construction of single-family dwelling to be retained by owner for at least one year)]. For coverage of those requirements and an illustrative addendum that may be used to add the required information to this form, see *§ 30D.229*.

[d] Obtaining Copies of Form

As a copyrighted document of the AGC, this form has been reproduced with the permission of the AGC for informational purposes only, as an illustration of a standard form used in the construction industry. Further reproduction in whole or in part is not authorized, and this form is not intended for use as a model for the drafting of an agreement. Copies of this document may be purchased from the AGC. For additional information on all AGC contract documents, consult the AGC website at www.agc.org.

[2] FORM

Standard Form of Design-Build Agreement and General Conditions Between Owner and Design-Builder (When Basis of Payment Is Cost of Work Plus Fee With Guaranteed Maximum Price) [AGC Document 410]

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign Professionals



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15-30D California Legal Forms--Transaction Guide § 30D.228A

§ 30D.228A Standard Form of Agreement Between Owner and Trade Contractor [AGC Document 520]

[1] Comment

[a] Use of Form

This form is an agreement between an owner and a trade contractor for use when the owner has hired a construction manager as the owner's on-site agent, and the owner will enter into separate agreements with the contractors. An owner may wish to retain a construction manager to provide continuous on-site supervision of the construction work, particularly if (1) the project is relatively large, or (2) the parties have agreed to strictly limit the supervisory responsibilities of the design professional.

[b] Relation to Other AGC Forms

This form was prepared by the Associated General Contractors of America (AGC) and is compatible with AGC Document 510 (Standard Form of Construction Management Agreement Between Owner and Construction Manager) [*see* Ch. 30C, *Agreements With Design Professionals*]. This form should not be used if the construction manager is also the primary contractor; instead, the AGC and the American Institute of Architects (AIA) have jointly published standard forms of agreement for that circumstance [*see* AGC Documents 565, 566; AIA Documents 121/Cmc, 131 Cmc].

For additional information on all AGC contract documents, consult the AGC website at www.agc.org.

[2] FORM

Standard Form of Agreement Between Owner and Trade Contractor [AGC Document 520]

Please see Original Source or contact Editorial Support for assistance.

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors



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15-30D California Legal Forms--Transaction Guide § 30D.229

§ 30D.229 Addendum Containing Mandatory Disclosures [Bus. & Prof. Code §§ 7030(a), 7030.5, 7164; Civ. Code § 3097(m)]

[1] Comment

[a] Use of Form

This form is an addendum to a standardized owner-contractor construction contract. It ensures that the contract will comply with California law requiring the inclusion of specified information regarding the project owner and contractor, the construction lender, and certain rights of the parties. An addendum such as this form is necessary because standardized printed contracts prepared by national construction organizations [*see § 30D.20[2]*] do not, as a general rule, contain all of the required information.

For an addendum that may be used to amend or replace existing contractual provisions (or to add provisions other than the statutory disclosures), see *§ 30D.230[2]*. That addendum may also be used to modify a construction contract after it has been executed.

[b] Required Information

[i] Contractor's Statement and License Number

Every person licensed pursuant to the California Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] must include his or her contractor's license number on all construction contracts, subcontracts, calls for bid, and all forms of advertising [*Bus. & Prof. Code § 7030.5*; *see § 30D.220[2]*, P 2(a)]. A licensed contractor must also include the statutory statement set forth in Paragraph 2(b) of this form in at least 10-point type on all written contracts with respect to which the contractor is a prime contractor [*Bus. & Prof. Code § 7030(a)*]. The term "prime contractor" is not defined by statute for these purposes, but presumably refers to any contractor who has a direct contractual relationship with an owner or an owner's agent, as opposed to a subcontractor whose only contractual relationship is with a general contractor.

[ii] Name and Address of Owner and Construction Lender

Every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*; *see § 30D.220[2],* P 3(b), (c)]. Further, unless the contract is a home improvement contract [*see Bus. & Prof. Code §§ 7150-7164*] or a swimming pool contract [*see Bus. & Prof. Code §§ 7165-7168*], the contract also must provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*; *see § 30D.220[2],* P 3(a)].

[iii] Construction of Single-Family Dwelling to Be Retained by Owner

Every contract between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year, and any changes in such a contract, must be evidenced in writing [*Bus. & Prof. Code § 7164(a)*]. The writing must be signed by both parties [*Bus. & Prof. Code § 7164(a)*], and must contain the following information [*Bus. & Prof. Code § 7164(b), (d)*]:

- The contractor's name, address, and license number.
- The approximate dates when the work will begin and be substantially completed.
- A legal description of the location where the work will be done.
- A statutorily-prescribed statement with the heading "Mechanics' Lien Warning," which informs the owner of the contractor's rights under the Mechanics' Lien Law and suggests measures the owner can take to protect himself or herself from liens [*see* P 4 of form].
- A CSLB statement that emphasizes the value of commercial general liability insurance and encourages the owner to verify the contractor's coverage and status, and a check box indicating whether or not the contractor carries commercial general liability insurance, and if so, the insurer's name and telephone number [*see § 30D.232* (form)].
- A notice in close proximity to the parties' signatures, in at least 10-point bold type or all capital letters, stating that the owner has the right to require the contractor to have a performance and payment bond and that the expense of the bond may be borne by the owner.

Some of the information described above will appear in standardized construction contracts. Consequently, this form provides for the inclusion of the information required by *Bus. and Prof. Code § 7164* to the extent that it is not set forth in the contract.

The writing may also contain other matters agreed to by the parties. The writing must be legible and must clearly describe any other document that is to be incorporated into the contract. Prior to commencement of any work, the owner must be furnished with a copy of the written agreement, signed by the contractor [*Bus. & Prof. Code § 7164(c)*].

The provisions of *Bus. & Prof. Code § 7164* are not exclusive and do not relieve the contractor from the obligation to comply with all other applicable provisions of law [*Bus. & Prof. Code § 7164(c)*].

[iv] Arbitration Disclosure in Small Residential Contracts

An arbitration provision in a contract for work on residential property with four or fewer units must be clearly titled and set out according to statutory specifications. In addition, immediately preceding the place in the contract where the parties are to evidence their assent or nonassent to the arbitration provision, there must appear a statutory notice, also set

out according to statutory specifications, relating the consequences of agreeing to arbitrate any disputes under the contract. An arbitration provision that does not comply with these requirements "may not be enforceable against any person other than the licensee" [*Bus. & Prof. Code § 7191*], which apparently is intended to preclude the contractor from enforcing the contract.

[c] Execution

There is no formal requirement that addenda be signed by the affected parties. However, this form provides signature blocks so that the contractor and owner can indicate that they satisfied their statutory obligations to supply the required disclosures. Further, by including signature blocks, counsel may comply with the requirement of *Bus. & Prof. Code § 7164* that any contract subject to that statute contain, in close proximity to the signatures of the owner and contractor, a notice regarding payment and performance bonds [*see Bus. & Prof. Code § 7164(d)*; *see also* [b][iii], *above*].

[2] FORM

Addendum Containing Mandatory Disclosures [Bus. & Prof. Code §§ 7030(a), 7030.5, 7164; Civ. Code § 3097(m)]

ADDENDUM TO CONTRACT

Project:_____[*name*]
Owner:_____[*name*]
Architect [*or other design professional*]:_____[*name*]

1. This addendum supplements the [*insert heading of standardized form, e.g.,* Standard Form of Agreement Between Owner and Contractor] ("contract") between_____[*name of owner*] ("Owner") and [*name of contractor*] ("Contractor") providing for the construction of the above project. This addendum and the contract must be executed concurrently by the parties.

2. The contract is hereby modified to include the following information, which is provided by Contractor in accordance with *Business and Professions Code Sections 7030(a)* and *7030.5*:

(1) Contractor's license number is _____.

[*Include following statement in at least 10-point type (Bus. & Prof. Code § 7030(a)):*]

(2) Contractors are required by law to be licensed and regulated by the Contractors' State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within ten years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, CA 95826.

3. The contract is further modified by this addendum to include the following information, which is provided by Owner under *Civil Code Section 3097(m)*:

(1) The name and address of the construction lender [*or* lenders] for the project described above is [*or* are]

_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

[*Repeat for each lender*]

[*Add, if not included in owner-contractor contract:*]

(2) Owner's residence address is _____.

[*Add, if applicable and not included in owner-contractor contract:*]

(3) Owner's business address is: _____.

[*Include following information (to extent not set forth in contract) if contract is for construction of single-family dwelling to be retained by owner for at least one year:*]

4. The contract is further modified by this addendum to include the following information, which is provided in accordance with *Business and Professions Code Section 7164*:

(1) The Contractor's address is _____.

(2) The approximate date when the work will begin is _____, and the approximate date when the work will be substantially completed is _____.

(3) The following is a legal description of the location where the work covered by the contract will be done: _____.

(4) The following is a notice required by *Business and Professions Code Section 7164*:

MECHANICS' LIEN WARNING:

Anyone who helps improve your property, but who is not paid, may record what is called a mechanics' lien on your property. A mechanics' lien is a claim, like a mortgage or home equity loan, made against your property and recorded with the county recorder.

Even if you pay your contractor in full, unpaid subcontractors, suppliers, and laborers who helped to improve your property may record mechanics' liens and sue you in court to foreclose the lien. If a court finds the lien is valid, you could be forced to pay twice or have a court officer sell your home to pay the lien. Liens can also affect your credit.

To preserve their right to record a lien, each subcontractor and material supplier must provide you with a document called a "20-day Preliminary Notice." This notice is not a lien. The purpose of the notice is to let you know that the person who sends you the notice has the right to record a lien on your property if he or she is not paid.

BE CAREFUL. The Preliminary Notice can be sent up to 20 days after the subcontractor starts work or the supplier provides material. This can be a big problem if you pay your contractor before you have received the Preliminary Notices.

You will not get Preliminary Notices from your prime contractor or from laborers who work on your project. The law

assumes that you already know they are improving your property.

PROTECT YOURSELF FROM LIENS. You can protect yourself from liens by getting a list from your contractor of all the subcontractors and material suppliers that work on your project. Find out from your contractor when these subcontractors started work and when these suppliers delivered goods or materials. Then wait 20 days, paying attention to the Preliminary Notices you receive.

PAY WITH JOINT CHECKS. One way to protect yourself is to pay with a joint check. When your contractor tells you it is time to pay for the work of a subcontractor or supplier who has provided you with a Preliminary Notice, write a joint check payable to both the contractor and the subcontractor or material supplier.

For other ways to prevent liens, visit CSLB's Web site at www.cslb.ca.gov or call CSLB at 800-321-CSLB (2752).

REMEMBER, IF YOU DO NOTHING, YOU RISK HAVING A LIEN PLACED ON YOUR HOME. This can mean that you may have to pay twice, or face the forced sale of your home to pay what you owe.

[*For the notice referred to in (5), below, see § 30D.232[2]*]

(5) The attached Contractors' State License Board notice "Information About Commercial General Liability Insurance," is hereby incorporated by reference in this Addendum.

[*If contract is for work on residential property with four or fewer units and parties desire to arbitrate disputes, include arbitration provision here followed by the disclosure below. Both the arbitration provision and the disclosure must be in 10-point boldface type or 8-point red boldface type; if contract is typed, both must be in capital letters. (Bus. & Prof. Code § 7191(a), (b)):*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

_____ [*Owner's Initials*]
_____ [*Contractor's Initials*]

[*Set forth following notice in at least 10-point bold type or in all capital letters:*]

(6) OWNER HAS THE RIGHT TO REQUIRE CONTRACTOR TO SECURE A PERFORMANCE BOND AND A PAYMENT BOND. THE EXPENSE OF THESE BONDS MAY BE BORNE BY_____[*name of owner*].

[*Continue with the following:*]

Dated: _____.

OWNER
_____ [*signature of owner*]
[*typed name*]
CONTRACTOR
_____ [*signature of contractor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction Loans



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-30D California Legal Forms--Transaction Guide § 30D.230

§ 30D.230 Contract Modification or Addendum

[1] Comment

[a] Use of Form

This form may be used to modify one or more of the construction documents used in connection with a particular construction project. It is designed to be used as an addendum or as any modification other than a change order [*see* [b], *below*]. It is not intended to be used as a change order because most construction organizations and contractors have their own change order forms [*see, e.g.,* AIA Doc. G701].

For an addendum that may be used to add certain statutory disclosures to a standardized owner-contractor agreement prior to the execution of the agreement, see *§ 30D.229*. Unlike that addendum, this form may be used to modify any standardized or custom-drafted construction document, including documents that have already been executed by the parties [*see* [b], *below*]. For an addendum to a bidding document, see *§ 30D.202*.

The construction documents for a particular project will necessarily be interrelated. Therefore, a modification of the terms of one document may create a conflict or inconsistency in the other contract documents unless the attorney makes any necessary corresponding changes to the other documents. Further, the attorney should take the additional precaution of providing in any addendum or modification that the change governs not only the document being modified but also the other contract documents [*see* [2], *below*, P 2].

For an addendum to a bidding document, see *§ 30D.202*.

[b] Distinction Between Modification and Addendum

If a modification occurs prior to execution of the basic construction contract, then the change is referred to as an addendum. Post-execution changes are known as contract modifications. Any addendum or contract modification is considered one of the project documents.

Examples of contract modifications include written amendments to the contract signed by both parties, change orders, and written orders for changes in the work issued by the design professional [*see* App. E, P 1.1.1 (AIA Doc. A201)].

[c] Execution

Although there is no formal requirement that addenda or modifications be signed by the affected parties, a cautious attorney should always obtain the signatures of the parties affected by alterations to the contract documents. This form provides appropriate signature blocks.

[d] Notification of Certain Changes

Under the mechanics' lien law [*Civ. Code § 3082 et seq.*], an owner must notify the prime contractor and construction lenders of any changes in the contract if the change has the effect of increasing the price stated in the contract by 5 percent or more [*Civ. Code § 3123(c)*]. For comprehensive coverage of the mechanics' lien law, see Ch. 31, *Mechanics' Liens* .

[2] FORM

Contract Modification or Addendum

_____ [ADDENDUM TO *or* MODIFICATION OF]
CONTRACT DOCUMENT

Project:_____[*name*]
Owner:_____[*name*]
Architect [*or other design professional*]:_____[*name*]

1. This [addendum *or* modification] [amends *or* replaces by substitution *or* supplements *or specify other method or methods of modification*] the following contract documents relating to the above construction project: [*list all contract documents to be affected*].

2. It is the intention of the parties affected by this [addendum *or* modification] that the terms of this instrument will govern and take precedence over any provisions contained in the contract documents relating to the above construction project that are inconsistent with the terms of this instrument, whether or not the contract documents containing the conflicting provisions are listed in Paragraph 1, above.

Modification

3. The parties agree that [*identify provision, e.g.,* Paragraph 7] of [*identify document, e.g.,* the Standard Form of Agreement Between Owner and Contractor] is hereby modified _____ [*describe modification, e.g.,* to read as follows:

"7. Owner must have the project site ready for commencement of construction within 30 calendar days after the execution of this Agreement, and must thereafter provide Contractor with written notice to commence work. Contractor must commence work within 10 calendar days after receiving that notice, and must complete the construction within 40 working days thereafter, subject to any of the permissible delays specified in Paragraph 16 of this Agreement."]

[*Repeat for each additional modification.*]

4. Any subsequent amendment, modification, expansion, or supplementation of the contract documents or of this [addendum *or* modification] will govern and take precedence over any conflicting provisions of the contract documents or of this instrument.
Dated: _____

OWNER
_____ [*signature of owner*]
[*typed name*]

CONTRACTOR
_____ [*signature of contractor*]
[*typed name*]

ARCHITECT [*or other design professional*]
_____ [*signature of design professional*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawFormationExecutionContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts



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15-30D California Legal Forms--Transaction Guide § 30D.231

§ 30D.231 Notice to Proceed

[1] Comment

[a] Use of Form

This form is a notice that may be used to notify the prime contractor for a construction project of the required dates of commencement and completion of the work for which the contractor is responsible. When these dates are not set forth in the owner-contractor agreement, the agreement should require the owner to subsequently specify the applicable dates in a notice to proceed (this form). The notice may set forth specific dates, or require commencement or completion within a specified number of working days after a triggering event (such as the execution of the owner-contractor agreement).

[b] Authorizing Commencement Before Execution of Contract

A notice to proceed cannot be used to authorize commencement of work before the formal execution of the construction contract. However, the owner may use a letter of intent [*see § 30D.221*] to authorize pre-execution work.

[2] FORM

Notice to Proceed

NOTICE TO PROCEED

_____[*name of owner*]
_____[*address*]
_____[*city, state, zip*]

TO: [*name of contractor*]
_____[*address*]

_____[*city, state, zip*]

RE: Project:_____[*name*]
Owner:_____[*name*]
Architect [*or* Engineer]:_____[*name*]

This is to notify you that work on the above project must commence_____[on _____ (*date*) *or* on or before _____ (*date*) *or* within _____ (*number*) working days of the execution and delivery of the _____ (*title of owner-contractor agreement*), a copy of which accompanies this Notice].

The work must be completed_____[on or before _____ *or* within _____ working days after commencement of the work].
Dated: _____

_____ [*signature of owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors

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15-30D California Legal Forms--Transaction Guide § 30D.232

§ 30D.232 Commercial General Liability Insurance Notice

[1] Comment--Use of Form

This form, developed by the Contractors' State License Board to comply with *Bus. & Prof. Code § 7164*, sets forth requirements for contracts between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year. Among those requirements is a statement that:

- Emphasizes the value of commercial general liability insurance;
- Encourages the owner to verify the contractor's coverage and status; and
- Includes a check box indicating whether or not the contractor carries commercial general liability insurance, and if so, the insurer's name and telephone number.

The form is available at www.cslb.ca.gov/forms/glisfd.pdf. It should be included with the contract addendum containing mandatory disclosures that is the subject of *§ 30D.229* when the information required by *Bus. & Prof. Code § 7164* is a required part of the contract.

[2] FORM

Commercial General Liability Insurance Notice

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsInsurance LawGeneral Liability InsuranceGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors &

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15-30D California Legal Forms--Transaction Guide §§ 30D.233-30D.239

[Reserved]

§§ 30D.233[Reserved]



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15-30D California Legal Forms--Transaction Guide § 30D.240

§ 30D.240 Standard Form of Agreement Between Contractor and Subcontractor (When Contractor Assumes Risk of Owner Payment) [AGC Document 650]

[1] Comment

[a] Use of Form

This form is a standardized subcontract agreement for building construction that may be used when the contractor assumes the risk of owner payment. It was prepared by the Associated General Contractors of America (AGC) and is compatible with (1) AGC Document 200, Standard Form of Agreement and General Conditions Between Owner and Contractor (Where Contract Price Is a Lump Sum), and (2) the American Institute of Architect's general conditions [*see* [2], *below*; *see also* App. E (AIA Doc. A201-1997)], which do not mandate the use of an AIA subcontract. The AGC endorses the use of other AIA forms as well [*see* Construction Law, Ch. 3, *Construction and Design Contracts* (Matthew Bender)].

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For a subcontract agreement when the contractor and subcontractor agree to share the risk of owner payment, see *§ 30D.241*. For a subcontract agreement prepared by the AIA, see Appendix F [AIA Doc. A401-1997].

[b] Role of Subcontracts

A construction subcontract is a construction agreement between a general contractor and a "subcontractor," defined as any contractor who does not have a direct contractual relationship with the owner [*Civ. Code § 3104*]. Subcontracts permit general contractors to let out a part of the work for which they are responsible under a construction contract with an owner [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161* ; *see § 30D.30[1]*].

[c] Assumption of Risk of Owner Payment

In this form, payment by the contractor to the subcontractor is not conditioned on payment by the owner to the contractor for the subcontracted work [*see* [2], P 8.2.5, *below*]. In other words, the contractor is obliged to pay for the subcontracted work even if the owner defaults on its payment obligations to the contractor, provided, of course, that the failure of the owner to pay is not due to any fault of the subcontractor.

The alternative to this arrangement is a "pay if paid" provision pursuant to which payment by the owner to the contractor is a condition precedent to the contractor's obligation to pay the subcontractor. In California, however, if a "pay if paid" provision effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanics' lien rights in the event of the owner's nonpayment, the provision is against public policy and unenforceable [*see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* . As a result, under a "pay if paid" arrangement, a contractor, rather than the owner or the construction lender, is at risk of becoming, in effect, the project's guarantor. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in *§ 30D.10[6]*.

[d] Comparison With AIA Subcontract

An alternative standard form of subcontract agreement has been published by the American Institute of Architects (AIA), and is set out in Appendix F [AIA Doc. A401-1997]. The primary distinction between the AIA subcontract and this form is that the AIA document naturally assumes that the design specialty at issue is architecture, while this form may be used in a project designed by an engineer or by an architect. It is important to note that both the AIA subcontract and this form place the risk of owner non-payment on the contractor [*see* [c], *above*; [2], P 8.2.5, *below*; App. F, P 11.3].

Some additional distinctions of note between this form and the AIA subcontract include the following:

- Designation of representatives. This form requires each party to designate a representative for all communications between the parties [*see* [2], PP 3.11, 4,1, *below*]; the AIA form contains no such provisions.

- Safety precautions. Although both forms require the subcontractor to perform the work in a safe and reasonable manner, this form's provisions are substantially more exhaustive than those of the AIA form [*see* [2], P *3.14, below* ; App. F, P 4.3].

- Completion of work. The AIA form employs the typical "substantial completion" test [*see* App. F, P 11.9], while this form requires "fulfillment of the Subcontractor's obligations" [*see* [2], P 8.3.1, *below*].

[e] Information Required by California Law

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.220*.

To facilitate a subcontractor's ability to give a preliminary notice before recording a mechanic's lien, filing a stop notice, or asserting a claim against a payment bond, every contract between an original contractor and a subcontractor, or between subcontractors, must provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*].

[2] FORM

Standard Form of Agreement Between Contractor and Subcontractor (When Contractor Assumes Risk of Owner Payment) [AGC Document 650]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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15-30D California Legal Forms--Transaction Guide § 30D.241

§ 30D.241 Standard Form of Agreement Between Contractor and Subcontractor (When Contractor and Subcontractor Share Risk of Owner Payment) [AGC Document 655]

[1] Comment

[a] Use of Form

This form is a standardized subcontract agreement for building construction under which the contractor and the subcontractor agree to share the risk of owner payment. Although it was prepared by the Associated General Contractors of America (AGC), it was drafted to be compatible with the American Institute of Architect's general conditions [*see* [2], *below*; *see also* App. E (AIA Doc. A201-1997)], which do not mandate the use of an AIA subcontract. The AGC endorses the use of other AIA forms as well [*see* Construction Law, Ch. 3, *Construction and Design Contracts* (Matthew Bender)].

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For a subcontract agreement under which the contractor assumes the risk of owner payment, see *§ 30D.240*. For a subcontract agreement prepared by the AIA, see Appendix F [AIA Doc. A401-1997].

For further discussion of particular requirements of California law and of the role of subcontracts, see *§ 30D.240[1]*.

[b] Shared Risk of Owner Payment

In this form, payment by the owner to the contractor for the subcontracted work is a "condition precedent" to the payment of the subcontractor [*see* [2], P 8.2.5, *below*]. In other words, if the owner refuses to pay for the subcontracted work, the contractor is under no obligation to pay the subcontractor. In California, this "pay if paid" arrangement has

been held to be against public policy and therefore unenforceable if the arrangement effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanics' lien rights in the event of the owner's nonpayment [*see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* . As a result, under a "pay if paid" arrangement, a contractor, rather than the owner or the construction lender, is at risk of becoming, in effect, the project's guarantor. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in *§ 30D.10[6]*.

For an AGC subcontract in which payments to the subcontractor are not conditioned on owner payment, see *§ 30D.240*.

[c] Comparison With AIA Subcontract

An alternative form of subcontract agreement has been published by the American Institute of Architects (AIA), and is set out in Appendix F [AIA Doc. A401-1997]. The most important distinction between the AIA subcontract and this form is that the AIA form does not condition payment to the subcontractor on owner payment for the subcontracted work [*see* App. F, P 11.3]. Other distinctions between this form and the AIA form are discussed in *§ 30D.240[1][d]*.

[2] FORM

Standard Form of Agreement Between Contractor and Subcontractor (When Contractor and Subcontractor Share Risk of Owner Payment) [AGC Document 655]

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Legal Topics:

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15-30D California Legal Forms--Transaction Guide § 30D.242

§ 30D.242 Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder Assumes Risk of Owner Payment) [AGC Document 450]

[1] Comment

[a] Use of Form

This form is a standardized subcontract agreement for building construction for use when project delivery is based on the design-build approach [*see § 30D.11*] and the design-builder assumes the risk of owner payment [*see* [d], *below*; *see also § 30D.243* (form providing for shared risk of owner payment)]. This form is designed for use in the usual circumstances in which the subcontractor has not been retained to provide substantial portions of the design for the project, but will instead construct the project as designed by or under the supervision of the design-builder. If the subcontractor is to furnish substantial portions of the design for the project, see *§ 30D.244*.

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[b] Design-Build Agreements

Under a design-build contract, a single contractor (the design-builder) assumes responsibility for both the design and construction of the project. The actual design work may be performed by members of the design-builder's staff, or by a consulting design professional hired by contract with the design-builder [*see § 30D.245*]. This approach is often used for large construction projects, such as industrial plants, to provide complete coordination of the many phases of the work. For a sample standardized design-build agreement between the owner and the design-builder, see *§ 30D.228*.

[c] Relation to Other AGC Forms

This form is compatible with the other AGC forms for design-build agreements [*see § 30D.228*]. This agreement is a stand-alone document that does not incorporate by reference any general conditions for its performance.

[d] Assumption of Risk of Owner Payment

In this form, payment by the design-builder to the subcontractor is not conditioned on payment by the owner to the design-builder for the subcontracted work [*see* [2], P 8.2.5, *below*]. In other words, the design-builder is obliged to pay for the subcontracted work even if the owner defaults on its payment obligations to the design-builder, provided, of course, that the failure of the owner to pay is not due to any fault of the subcontractor. Progress payments to the subcontractor are to be made within seven days after the design-builder receives payment from the owner for the subcontract work. If, through no fault of the subcontractor, the owner does not pay the design-builder for the subcontract work, the design-builder assumes that responsibility to pay the subcontractor "within a reasonable time." A "reasonable time" allows the design-builder to try to secure payment from the owner.

The alternative to this arrangement is a "pay if paid" provision pursuant to which payment by the owner to the contractor is a condition precedent to the contractor's obligation to pay the subcontractor. In California, however, if a "pay if paid" provision effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanics' lien rights in the event of the owner's nonpayment, the provision is against public policy and unenforceable [*see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* . As a result, under a "pay if paid" arrangement, a contractor, rather than the owner or the construction lender is at risk of becoming, in effect, the project's guarantor. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in *§ 30D.10[6]*.

[e] Information Required by California Law

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.220*.

To facilitate a subcontractor's ability to give a preliminary notice before recording a mechanic's lien, filing a stop notice, or asserting a claim against a payment bond, every contract between an original contractor and a subcontractor, or between subcontractors, must provide space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*].

[2] FORM

Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder Assumes Risk of Owner Payment) [AGC Document 450]

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Legal Topics:

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15-30D California Legal Forms--Transaction Guide § 30D.243

§ 30D.243 Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder and Subcontractor Share the Risk of Owner Payment) [AGC Document 455]

[1] Comment

[a] Use of Form

This form is a standardized subcontract agreement for building construction for use when project delivery is based on the design-build approach [*see § 30D.11*] and the design-builder and subcontractor agree to share the risk of owner payment [*see* [b], *below*; *see also § 30D.242[2]* (form under which design-builder assumes this risk)]. This form is designed for use in the usual circumstances in which the subcontractor has not been retained to provide substantial portions of the design for the project, but will instead construct the project as designed by or under the supervision of the design-builder. If the subcontractor is to furnish substantial portions of the design for the project, see *§ 30D.244*.

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[b] Shared Risk of Owner Payment

In this form, payment by the owner to the design-builder for the subcontracted work is a "condition precedent" to the payment of the subcontractor [*see* [2], P 8.2.5, *below*]. In other words, if the owner refuses to pay for the subcontracted work, the design-builder is under no obligation to pay the subcontractor.

In California, this "pay if paid" arrangement has been held to be against public policy and therefore unenforceable if the arrangement effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanics' lien rights in the event of the owner's nonpayment [*see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* . As a result, under a "pay if paid"

arrangement, a contractor, rather than the owner or the construction lender, is at risk of becoming, in effect, the project's guarantor. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in *§ 30D.10[6]*.

For an AGC agreement between a design-builder and subcontractor in which payments to the subcontractor are not conditioned on owner payment, see *§ 30D.242*.

[2] FORM

Standard Form of Agreement Between Design-Builder and Subcontractor (When Design-Builder and Subcontractor Share the Risk of Owner Payment) [AGC Document 455]

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Legal Topics:

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15-30D California Legal Forms--Transaction Guide § 30D.244

§ 30D.244 Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor (When Subcontractor Provides Guaranteed Maximum Price and When Design-Builder Assumes Risk of Owner Payment) [AGC Document 460]

[1] Comment

[a] Use of Form

This form is a standardized subcontract agreement for building construction for use when project delivery is based on the design-build approach [*see §§ 30D.11*, *30D.242[1][b]*]. This form is designed for use when the design-builder hires the subcontractor early in the design phase of the project, so that the subcontractor performs virtually the same design services as those required by the prime contract. Thus, the subcontractor retained in this form is referred to as a "design-build subcontractor." For forms in which the design-builder performs the design services and wishes to subcontract some portion of the construction work, see *§§ 30D.242* and *30D.243*.

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[b] Guaranteed Maximum Price

In this form the design-build subcontractor is compensated on a cost-plus basis [*see § 30D.12[2]*], including a guaranteed maximum price (GMP) [*see* [2], P 3.3, *below*]. If the design-builder is dissatisfied with the GMP and no adjustment can be agreed on, the design-builder retains the option to proceed without a GMP, or to terminate the agreement and hold the project out for bidding based on the design documents prepared by the subcontractor [*see* [2], P 3.3.4, *below*].

[c] Assumption of Risk of Owner Payment

In this form, payment to the subcontractor is not conditioned on the design-builder having received from the owner payment for subcontract work satisfactorily performed [*see* [2], P 9.1.5, *below*]. Progress payments to the subcontractor are to be made within seven days after the design-builder receives payment from the owner for the subcontract work. If, through no fault of the subcontractor, the owner does not pay the design-builder for the subcontract work, then the design-builder assumes the responsibility to pay the subcontractor "within a reasonable time."

The alternative to this arrangement is a "pay if paid" provision pursuant to which payment by the owner to the contractor is a condition precedent to the contractor's obligation to pay the subcontractor. In California, however, if a "pay if paid" provision effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanics' lien rights in the event of the owner's nonpayment, the provision is against public policy and unenforceable [*see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888-890, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* . As a result, under a "pay if paid" arrangement, a contractor, rather than the owner or the construction lender is at risk of becoming, in effect, the project's guarantor. To remedy this situation, the Legislature enacted *Civ. Code § 3110.5*, which requires owners of certain private works of improvement to provide security for their payment obligations under the construction contract. The owner's obligations under § 3110.5 are discussed in *§ 30D.10[6]*.

[d] Information Required by California Law

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.220*.

To facilitate a subcontractor's ability to give a preliminary notice before recording a mechanic's lien, filing a stop notice, or asserting a claim against a payment bond, every contract between an original contractor and a subcontractor, or between subcontractors, must provide space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*].

[2] FORM

Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor (When Subcontractor Provides Guaranteed Maximum Price and When Design-Builder Assumes Risk of Owner Payment) [AGC Document 460]

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15-30D California Legal Forms--Transaction Guide § 30D.245

§ 30D.245 Standard Form of Agreement Between Design-Builder and Architect/Engineer for Design-Build Projects [AGC Document 420]

[1] Comment

[a] Use of Form

This form is a standard form of agreement used to delineate the respective rights and responsibilities assumed by a design-builder and a design professional such as an architect or engineer when project delivery is based on the design-build approach and the design professional will assist in the design portion of the contract [*see §§ 30D.11, 30D.242[1][b]*]. Although technically not a subcontract, this agreement is included in the subcontracts part of this chapter because the obligations in this form reflect the obligations imposed by the related agreement between the owner and the design-builder [*see* [2], P 3.1, *below*]. For a discussion of the more common situation, in which the design professional is hired directly by the owner prior to any involvement with the contractor, see Ch. 30C, *Agreements With Design Professionals* .

This form is published by the Associated General Contractors of America (AGC) and is designed for use in conjunction with an AGC owner and design-builder agreement [*see § 30D.228* (AGC Doc. 410); *see also* AGC Doc. 415]. As a copyrighted document of the AGC, this form has been reproduced with the permission of the AGC for information purposes only, as an illustration of a standard form used in the construction industry. Further reproduction in whole or in part is not authorized, and this form is not intended for use as a model for the drafting of an agreement. Copies of this document may be purchased from the AGC. For additional information on all AGC contract documents, consult the AGC website at www.agc.org.

[b] Architect/Engineer's Responsibilities

Inapplicable provisions should be stricken from the architect/engineer's statement of basic services [*see* [2], P 3.2, *below*]. For example, if the form is used in conjunction with AGC Document 415, which establishes a lump sum price, then reference to a guaranteed maximum price [*see* [2], P 3.2.4, *below*] should be stricken.

The form includes a designation of a representative by the architect/engineer [*see* [2], P 3.6, *below*]. Further, it provides for a listing of the architect/engineer's key project personnel, including the percentage of their time to be devoted to the project [*see* [2], P 3.7, Example D, *below*].

[c] Information Required by California Law

Every licensed contractor in California must include his or her contractor's license number and a specified statement on all construction contracts [*see Bus. & Prof. Code §§ 7030(a), 7030.5*], including this standardized form. For the required statement and further discussion, see *§ 30D.220*.

[2] FORM

Standard Form of Agreement Between Design-Builder and Architect/Engineer for Design-Build Projects [AGC Document 420]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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15-30D California Legal Forms--Transaction Guide Appendix A

Appendix A Contractor's Qualification Statement [AIA Document A305]

Contractor's Qualification Statement [AIA Document A305]

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15-30D California Legal Forms--Transaction Guide Appendix B

Appendix B Joint Venture Agreement [AIA Document C801]

Joint Venture Agreement [AIA Document C801]

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15-30D California Legal Forms--Transaction Guide Appendix C

Appendix C Standard Form of Agreement Between Owner and Contractor (Stipulated Sum) [AIA Document A101]

Standard Form of Agreement Between Owner and Contractor (Stipulated Sum) [AIA Document A101]

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Appendix D Abbreviated Form of Agreement Between Owner and Contractor [AIA Document A107]

Abbreviated Form of Agreement Between Owner and Contractor [AIA Document A107]

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Appendix E General Conditions of the Contract for Construction [AIA Document A201]

General Conditions of the Contract for Construction [AIA Document A201]

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30D CONSTRUCTION CONTRACTS AND SUBCONTRACTS
APPENDICES (AIA FORMS) Scope

15-30D California Legal Forms--Transaction Guide Appendix F

Appendix F Standard Form of Agreement Between Contractor and Subcontractor [AIA Document A401]

Standard Form of Agreement Between Contractor and Subcontractor [AIA Document A401]

Please see Original Source or contact Editorial Support for assistance.



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CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS

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§ 30E.syn Synopsis to Chapter 30E: JOINT (BUILDERS') CONTROL AGREEMENTS

§ 30E.01 California Sources

[1] Statutes

[2] Regulations

§§ 30E.02-30E.04 [Reserved]

§ 30E.05 Law Reviews and Periodicals

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§ 30E.10 Need for Management of Construction Funds

§ 30E.11 Applicability of Escrow Law

[1] Overview of Law

[2] Joint Control Agents

[3] Escrow Regulations

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[1] In General

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§ 30E.100 Client Interview

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§ 30E.110 Establishing Control Mechanism

Scope

§ 30E.111 Disbursing Funds

Scope

§§ 30E.112-30E.199 [Reserved]

§ 30E.200 Joint Control (or Cost Disbursement) Agreement

[1] Comment

[a] Use of Form

[b] Fee Provision

[c] Summary of Other Provisions

[d] Notice of Other Involvement in Transaction

[2] FORM

Joint Control (or Cost Disbursement) Agreement

§ 30E.201 Fee Provision for Joint Control Agreement

[1] Comment--Use of Form

[2] FORM

Fee Provision for Joint Control Agreement

§ 30E.202 Voucher for Disbursement of Joint Control Funds

[1] Comment

[a] Use of Form

[b] Inspection and Disbursement by Joint Control Agent

[2] FORM

Voucher for Disbursement of Joint Control Funds



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15-30E California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers joint control agreements and joint control agents. A joint control agent is a type of escrow agent. The exclusive function of this entity is to properly allocate and render all payments during the course of construction of a building project. Although the industry frequently refers to the joint control mechanism by other names, such as "builders' control," "builders' disbursement control," or "builders' construction control service," this chapter uses "joint control" because it is the one contained in the applicable laws.

The Legal Background to this chapter discusses certain basic concepts relating to the joint control industry and reviews the relevant statutory and regulatory provisions. The Transaction Guide outlines the steps followed by a joint control agent in processing a construction disbursement assignment. Finally, the Forms part features examples of the primary papers that must be drafted by a control agent in order to arrange for and execute its services.

Obviously, entering into a joint control agreement is only one optional step in the construction process. Therefore, the attorney should use this chapter in conjunction with the following chapters, which cover other aspects of construction law: Chapter 30A, *Construction Financing;* Chapter 30B, *Zoning, Building, and Environmental Permits;* and Chapter 31, *Mechanics' Liens.* Further, because control funds are usually disbursed to the general contractor, the attorney may wish to consult the following chapters: Chapter 88, *Licensing of Contractors,* and Chapter 89, *Home Improvement and Specialty Contracts.*



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PART I. RESEARCH GUIDE
A. Primary Sources

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§ 30E.01 California Sources

[1] Statutes

Exemption from Check Sellers, Bill Payers, and Proraters Law. *Fin. Code § 12100(d)*.

Escrow Law. *Fin. Code § 17000 et seq.*

"Escrow" defined. *Fin. Code § 17003*.

"Escrow agent" defined. *Fin. Code § 17004*.

"Joint control agent" defined. *Fin. Code § 17005.1*.

Licensing and bonding requirements. *Fin. Code § 17200 et seq.*

General escrow requirements. *Fin. Code § 17400 et seq.*

Disbursement of funds. *Fin. Code § 17422*.

License violations. *Fin. Code § 17600 et seq.*

[2] Regulations

Escrow agent regulations. *10 Cal. Code Reg. § 1709 et seq.*

Applicability of regulations to joint control agents and internet escrow agents. *10 Cal. Code Reg. § 1710*.

Bond requirements. *10 Cal. Code Reg. § 1718 et seq.*

Books, records, and accounts. *10 Cal. Code Reg. § 1730 et seq.*



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[Reserved]

§§ 30E.02[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS
PART I. RESEARCH GUIDE
B. Secondary Sources

15-30E California Legal Forms--Transaction Guide § 30E.05

§ 30E.05 Law Reviews and Periodicals

Marsh, *The Joint Control Industry and State Regulation, 16 Hastings L.J. 229 (1964).*



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DIVISION II: REAL ESTATE TRANSACTIONS
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§ 30E.10 Need for Management of Construction Funds

Joint control arrangements were developed to solve the problems connected with construction fund management. Problems frequently develop in this area because the parties involved in a construction project are expected to, but typically do not, possess the expertise or the capability to adequately handle construction funds. For example, general contractors are normally responsible for charging the customer for subcontractors' services and then distributing payments to the subcontractors while retaining a profit. However, many contractors are inexperienced in financial matters for the following reasons: they have little capital because they deal primarily with services rather than goods; in addition, they have few assets because they typically lease equipment and perform at a site belonging to another person.

Other parties to a construction transaction may also be unable to handle the funds competently. In most cases, the owner will not be equipped with either the information or the expertise to supervise the general contractor's financial arrangements, and cannot afford to hire the construction manager, certified public accountants, inspectors, or other personnel needed to perform this supervision. Even the lending institution often does not have a sufficient staff of investigators or an adequately detached interest to satisfactorily perform a construction audit. Thus, owners and lending companies may find it advantageous to accept financial supervision of building projects.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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§ 30E.11 Applicability of Escrow Law

[1] Overview of Law

Joint control agents are governed by the Escrow Law [*see Fin. Code §§ 17005.1, 17005.6*; *see also Fin. Code § 17000 et seq.* (Escrow Law); *see also* [2], *below*]. The Escrow Law defines an escrow as any transaction in which one person, for the purpose of effecting the sale, transfer, encumbrance, or leasing of real or personal property to another person, delivers a written instrument, evidence of title, money, or other thing of value to a third person to be held by the third person until the happening of a specified event or the performance of a prescribed condition, when it is to be delivered to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or the agent or employee of one of those parties [*Fin. Code § 17003(a)*].

With regard to internet escrow companies, "escrow" also includes any transaction in which one person, for the purpose of effecting the sale or transfer of personal property or services to another person, delivers money (or its internet-authorized equivalent) to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of those parties [*Fin. Code § 17003(b)*].

Under the Escrow Law, any person engaged in the business of receiving escrows for deposit or delivery for compensation is classified as an "escrow agent" [*Fin. Code § 17004*]. Only a corporation licensed under the Escrow Law may engage in business as an escrow agent [*see Fin. Code § 17200*]. Notwithstanding the foregoing, certain classes of professional escrow holders are exempted from the requirements of the Escrow Law [*see Fin. Code § 17006*].

For comprehensive coverage of the Escrow Law, see Ch. 26, *Real Property Escrows* .

[2] Joint Control Agents

"Escrow agent" as used in the Escrow Law includes joint control agents [*Fin. Code § 17005.6*; *see* [1], *above; 10 Cal. Code Reg. § 1710*]. A "joint control agent" is a person or entity [*see Fin. Code § 17002.5*] engaged in the business of receiving money or other property for disbursal or use in payment of the cost of labor, materials, services, permits, fees,

or other expenses incurred in the construction of improvements on real property. "In the business" means conducting any of the above transactions as a primary business or as an incidence to another business, whether or not for compensation, but does not include real estate lending or acting as an authorized representative, agent, or loan correspondent for a real estate lender [*Fin. Code § 17005.1*]. Although this business involves the disbursement of funds, joint control agents are exempt from the provisions of the Check Sellers, Bill Payers and Proraters Law [*Fin. Code § 12100(d)*; *see Fin. Code § 12000 et seq.*].

[3] Escrow Regulations

Because a joint control agent is a type of escrow agent, a joint control agent is governed by the regulations that apply to escrow agents [*10 Cal. Code Reg. § 1710*; *see 10 Cal. Code Reg. § 1709 et seq.*; *see also Fin. Code § 17400*]. As a result, joint control agents must be licensed as escrow agents [*see Fin. Code § 17200 et seq.*] and comply with other regulatory requirements discussed in this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesDual AgencyGovernmentsFiduciary ResponsibilitiesReal Property LawPurchase & SaleEscrow



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§ 30E.12 Services Performed by Joint Control Agents

[1] In General

The term "joint" is used in connection with the control agent designation to indicate that control over project funds is officially shared by the joint control agent and certain other parties, typically the contractor, lender, and owner. However, as the following discussion of the standard control arrangement indicates, the joint control agent has the exclusive right to disburse project funds, while other parties have only an advisory or ministerial role in the disbursement process.

A joint control agent will not enter into a joint control agreement unless the agent independently determines that the estimates of the contractor or owner are realistic and that there appears to be sufficient funds available to complete the project in the manner required by the construction contract. Once this has been established, the joint control agreement executed by the parties will (1) require the owner to assign the construction funds to the agent, and (2) require the lender to pay these funds directly to the agent according to a pre-arranged schedule. As they are received, the funds must be deposited by the agent in a trust account that is established solely for the particular project [*Fin. Code § 17409(a)*; *10 Cal. Code Reg. § 1737*] and is not subject to the agent's own liabilities [*Fin. Code § 17410*]. If desired, the funds may subsequently be deposited into an interest-bearing account [*see Fin. Code § 17409(a)*; *10 Cal. Code Reg. § 1737*].

[2] Disbursements

The joint control agreement will set forth the requirements governing the disbursement of project funds by the joint control agent. Typically, the agreement will require the use of voucher forms (also referred to as disbursement orders or applications for payment) supplied by the agent [*see § 30E.202*]. Each voucher should describe the work or supplies that are the subject of the payment request, and should be signed by the payee (that is, the subcontractor or material supplier) and the contractor or owner. It should also contain, or be accompanied by, a waiver of the payee's mechanics' lien rights.

In addition to requiring the use of vouchers, the joint control agreement may also grant the joint control agent the discretion to pay certain specified costs without a disbursement order or other request for payment.

Unless the principals have prepared written instructions specifying a different disbursement arrangement, project funds cannot be disbursed for the payment of the cost of labor, materials, services, permits, fees, or other expenses incurred in the construction of the project until the joint control agent has determined that the person furnishing the labor, materials, services, permits, fees, or other items has substantially complied with the specifications contained in the control agreement [*Fin. Code § 17422*]. As a practical matter, the joint control agreement will probably (1) strictly limit the agent's obligation to inspect the property, and (2) expressly provide that the agent does not guarantee the performance of the other parties or the completion or quality of any part of the project. Further, it may provide that the signature of the contractor or the owner on a voucher will conclusively establish the agent's right to draw a check for the work covered by the voucher.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensMechanics' Liens



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§§ 30E.13[Reserved]



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A. Client Interview--Facts and Documents

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NOTE:

This Section considers factors that are applicable solely to a joint control agreement. For a list of the information that should be obtained prior to the preparation or negotiation of a construction contract, see Ch. 30D, ***Construction Contracts and Subcontracts .***



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§ 30E.100 Client Interview

[1] Facts

1. Contractor's previous experience with similar construction projects.

2. Contractor's experience in handling project funds.

3. Whether or not contractor or lender employs any of the following:

    a. Auditor.

    b. Accountant.

    c. Architect.

    d. Experienced construction inspector or investigator.

4. Number and types of subcontractors to be involved in project.

5. Type and amount of financing obtained.

6. Estimated cost of proposed project.

7. Whether or not parties want trust funds deposited into interest-bearing account.

[2] Documents

1. Copy of construction contract between owner and builder.

2. Any written estimates prepared by contractor, subcontractors, and material suppliers.

3. Copies of all documents relating to financing.

4. Copies of any plans and specifications.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction Loans



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NOTE:

Although the focus of this Section is on the steps that should be followed by the attorney for the joint control agent, attorneys representing other parties should be familiar with these steps so that they can (1) determine whether or not their clients need the services of a joint control agent, and (2) monitor the agent's compliance with its fiduciary duties and contractual obligations.



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§ 30E.110 Establishing Control Mechanism

1. Confirm that joint control agreement accomplishes the following, to extent applicable:

NOTE:

The contents of a joint control agreement will be determined by agreement between the parties. However, as a practical matter, most joint control companies use their own agreement forms [***see, e.g.,*** *§ 30E.200[2]*], and it is up to the owner and contractor to decide whether or not the provisions in those agreements are acceptable. It is rare that a joint control company will amend such a form to satisfy another party. This Section contains a nonexclusive list of some of the more common types of provisions found in these forms. Most statutory and regulatory requirements affecting the control relationship do not affect the provisions of the agreement and therefore are discussed elsewhere in this chapter.

If a joint control agent, or a person or company related to or affiliated with the agent, is a principal in a particular joint control transaction or is acting or has acted as a broker or salesperson in relation to the transaction, the agent must include a notice of that fact on the face of the joint control agreement. The notice may also be transmitted electronically to all parties [*10 Cal. Code Reg. § 1740.1*]. For further discussion, see *§ 30E.200[1][c]*.

a. Requires owner to assign all construction loan funds to joint control agent [*see* P 3, *below*].

b. Requires owner and/or contractor to deposit, upon request, additional funds if existing funding is prematurely exhausted or appears inadequate.

c. Guarantees application of all funds to purposes described in agreement, except in cases of fraud, forgery, or misrepresentation.

d. Does not guarantee:
(1) Progress, quality, or completion of construction; or

(2) Complete payment of construction costs.

NOTE:
Although the joint control agent must release available funds upon completion of specified tasks, the agent does not guarantee that the other parties will satisfy their contractual obligations, or that the funds will be adequate to pay all construction costs.

e. Requires joint control agent to pay for extra work, but only if owner and contractor have:

(1) Approved extra work in writing; and

(2) Deposited reasonable cost of extra work.

NOTE:
The agreement may provide that extras or changes may be permitted without prior consent if a deposit (including a reserve fund) is made, and a specified fee is paid.

f. Specifies method of charging for services, e.g. [*see § 30E.200[1][b]*]:

(1) Minimum charge for nominal job.

(2) Regular percentage of all costs disbursed through control.

(3) If project not completed on time, a late charge (equaling specified percentage of total fee payable at end of original construction period) for each additional month beyond specified period.

g. Authorizes advances for general contractor's overhead expenses [*see § 30E.111*, P 9].

h. Specifies circumstances triggering joint control agent's right to take possession of premises and to complete project, e.g.:

(1) Abandonment of project by contractor.

(2) Inability of contractor to demonstrate availability of sufficient construction funds.

(3) Contractor's death, incapacity, or bankruptcy.

(4) Contractor's violation of joint control agreement or owner-contractor agreement.

NOTE:
Joint control agents typically insist on the inclusion of this type of provision, and will frequently elect to have the project completed following the occurrence of one of the triggering events described in the agreement. In many cases, particularly after all construction funds have been received from the lender and/or the project is close to

completion, it is easier to complete the project than to transfer the remaining funds, documents, and obligations to the lender. Owners are often pleased with this result because they do not necessarily want the project to be cancelled solely due to the occurrence of one of the triggering events.

i. Provides that if contractor elects not to exercise right to complete project [*see* P h, *above*], lender will succeed to agent's rights.

2. Instruct joint control agent to prepare and maintain books adequately reflecting joint control transaction as follows [*10 Cal. Code Reg. § 1732.2*]:

NOTE:
These books should be preserved for at least five years [*10 Cal. Code Reg. § 1737.3(a)*].

a. Prepare ledger sheet.

b. Set up liability controlling account.

NOTE:
This account is simply a record of all the money that has been deposited with the agent in connection with a particular control job.

c. Reconcile ledger sheet at least once each week with liability controlling account.

d. Once a month, reconcile ledger and liability controlling accounts with bank statements of trust account.

e. Set up cash receipt and disbursement journal or file containing copies of all receipts and checks (and/or check stubs) for posting to above records.

3. Handle deposits of funds in following manner:

a. Have all right and title to funds assigned to joint control agent [*see § 30E.200[1][c]*].

b. Have lender pay out funds to joint control agent in appropriate installments, such as:

(1) Initial advance on acquisition of property or furnishing of loan.

(2) Foundation advance when all foundations are laid, subfloors are in, and basic building materials are gathered at construction site.

(3) Exteriors (hull or shell) advance when outside facing and roof are completed or are finished except for decorative factors.

(4) Interiors advance when inside walls have been completed or finished except for decorative factors.

(5) Completion funding when all construction is finished and claims period has expired or danger is cleared by agreements or indemnities.

c. Issue consecutively prenumbered receipts for all money or checks to be deposited, and keep copies of receipts in separate file [*10 Cal. Code Reg. § 1741.1*].

4. Establish and operate special trust account as follows [*Fin. Code § 17409(a)*; *10 Cal. Code Reg. § 1737*]:

a. Receive first deposit of money for control job from owner, lender, contractor, or other source.

b. On or before close of next full working day after initial receipt of funds, deposit funds in account designated "trust" or "escrow" account [*10 Cal. Code Reg. § 1737(a)*].

NOTE:
No funds other than those received as part of an escrow transaction can be deposited in the account or otherwise commingled with escrow money [*10 Cal. Code Reg. § 1737(a)*].

c. Do not commingle funds with other funds [*see Fin. Code § 17411*].

5. If desired, instruct joint control agent to arrange for subsequent deposit of trust funds into interest-bearing escrow account, and to maintain account, as follows [*10 Cal. Code Reg. § 1737*; *see Fin. Code § 17409(a)*]:

NOTE:
Because the joint control agent will probably receive the construction funds from the lender in periodic installments and then immediately use those funds to pay costs incurred up to that point, it is unlikely that the funds will be in the agent's possession long enough to justify the establishment of an interest-bearing escrow account. However, this option may be desirable if, for example, the owner will be depositing cash with the agent.

The following procedural requirements must be followed unless the joint control agent first receives a written waiver or variance from the Commissioner of Corporations [***see*** *10 Cal. Code Reg. § 1737(k)*].

a. Establish account solely for deposit of trust funds [*10 Cal. Code Reg. § 1737(b)*]:

(1) At bank, savings bank, savings and loan association, or credit union; and

(2) In name of joint control agent as trustee for principals to control job identified by control number.

b. Prepare escrow instructions that [*10 Cal. Code Reg. § 1737(c)*]:

NOTE:
The attorney for the joint control agent will usually prepare these instructions.

(1) Authorize opening of above account;

(2) Specify type of account to be opened and amount of deposit;

(3) Identify name and location of bank or other institution;

(4) Specify disposition of:
(a) Interest both at close of escrow and in event that escrow fails to close; and

(b) Any accrued interest retained in account after close of escrow;

(5) Indicate that principals have been advised by agent of possible restrictions and/or penalties for early withdrawal of funds; and

(6) Prohibit agent from withdrawing funds from account except for redeposit into trust or escrow account.

c. Have joint control agent:

(1) Take steps to ensure that funds are fully insured or guaranteed [*10 Cal. Code Reg. § 1737(d)*]; and

(2) Establish and maintain adequate controls over passbooks and certificates issued by financial institution in connection with account [*10 Cal. Code Reg. § 1737(e)*].

d. Establish and maintain control ledger summarizing deposits in account or make memo entry on each individual escrow ledger.

NOTE:
The posting of the ledger must include the control number, interest-bearing account number, date of deposit, and amount of deposit [*10 Cal. Code Reg. § 1737(f)*].

e. Transfer all funds in account, and any interest paid on those funds, into "trust" or "escrow account" [*see* P 4, *above*] before close of escrow [*10 Cal. Code Reg. § 1737(g)*].

NOTE:
Notwithstanding the foregoing, a specified portion of the accrued interest may be retained in the interest-bearing account until the end of the current calendar quarter, if the escrow instructions so provide [*10 Cal. Code Reg. § 1737(g)*].

f. Do not make disbursements from trust or escrow account against funds in interest-bearing account until those funds have been transferred and receipted into trust or escrow account with proper posting to particular control job [*10 Cal. Code Reg. § 1737(h)*].

g. When transferring funds between trust or escrow account and interest-bearing accounts [*10 Cal. Code Reg. § 1737(i)*]:

(1) Comply with regulatory transfer requirements [*see 10 Cal. Code Reg. § 1740.4*; *see also* P 7, *below*].

(2) Transfers may be made electronically.

h. Confirm that interest paid on account is paid over to principal having deposited moneys in escrow unless escrow instructions clearly specify that interest is to be paid to named person other than agent [*10 Cal. Code Reg. § 1787(j)*].

NOTE:
Notwithstanding any provisions in any escrow instructions, the interest paid or payable on the interest-bearing account must not be transferred to the account of, accrue to the benefit of, or otherwise

be treated as an asset of the agent [*10 Cal. Code Reg. § 1737(j)*].

6. Instruct joint control agent to refrain from using funds from control account for following purposes [*Fin. Code § 17420*]:

a. Referral fee for obtaining joint control business.

b. Broker fee that is contingent on any performance under applicable construction or loan contracts unless and until control job is completed.

7. If transfer is to be made between any joint control accounts, instruct joint control agent to take following steps to consummate transfer [*10 Cal. Code Reg. § 1740.4(a)*]:

a. Make appropriate book entries.

b. Write check from one account and deposit in other.

c. Obtain and retain receipt for transfer deposit.

d. Include in files documentation of reasons for, and parties' approval of, transfer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawPurchase & SaleEscrow



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§ 30E.111 Disbursing Funds

NOTE:

The procedure for disbursing funds will vary from project to project. The disbursement responsibilities of the joint agent will depend in part on the experience of the project participants and the size and complexity of the project. In any event, the disbursement procedure should be described in detail in the joint control agreement.

Many joint control agreements provide for the use of a voucher system for the disbursement of funds. This Section describes such a system.

1. Confirm that joint control agent provides general contractor with blank vouchers, disbursement orders, or other applications for payment [*see § 30E.202*].

2. Have general contractor prepare voucher for subcontractor or material supplier ("payee") on following occasions:

a. If payee is performing single phase operation, on completion of item.

b. If payee is responsible for completing several phases of work, on completion of each major item requiring substantial expenditure.

3. Confirm that completed voucher form contains all relevant information, e.g.:

a. Description of item completed, including:
(1) Names of owner, contractor, and payee.

(2) Address or other description of site.

(3) Types of materials used and labor performed.

(4) Separate cost figures for labor and materials.

b. Appropriate representations by payee, e.g.:

(1) That services and/or materials identified in voucher were performed for or used on project covered by voucher.

(2) That subcontractor has not potentially incurred mechanics' liens for property involved.

(3) That materials identified in voucher conform with specifications.

(4) That all independent entities performing for and under subcontractor have been fully compensated.

c. Agreement by payee to waive all mechanic's lien rights to extent of payment covered by voucher [*see Civ. Code § 3262*].

NOTE:
For complete coverage of the waiver of mechanics' lien rights, see Chapter 31, ***Mechanics' Liens*** **.**

4. Confirm that joint control agent fulfills contractual obligation to inspect jobsite [*see Fin. Code § 17422*; *see also § 30E.12[2]*].

5. Instruct joint control agent to take following steps when making disbursements from trust account:

a. Comply with disbursement provisions of joint control agreement [*10 Cal. Code Reg. § 1738*; *see Fin. Code § 17421*].

b. Unless above agreement provides otherwise, when paying for construction items, make payment only after determining that person furnishing item has substantially complied with specifications contained in control agreement [*Fin. Code § 17422*; *see Fin. Code § 17421*].

c. Obey any order of court of competent jurisdiction [*10 Cal. Code Reg. § 1738*].

6. Instruct joint control agent to refrain from withdrawing, paying out, or transferring money, or drawing, executing, or dating check, in excess of amount in account [*10 Cal. Code Reg. §§ 1738.1, 1741.2*].

7. If work is unsatisfactory, have joint control agent call in contractor (and subcontractor, when necessary) and explain standards to be met before disbursement will be made.

8. Whenever any construction problems develop, advise joint control agent to call all principals in for conference to discuss possible solutions.

9. Instruct joint control agent to make advances to general contractor for overhead operations in following manner:

a. Estimate overhead in advance and decide on total figure for all advances.

b. Space out draws for overhead over life of project.

10. After all costs have been paid, have joint control agent use remaining funds to:

a. Provide contractor with his or her profit; and

b. Distribute remainder to owner or lender as required by control agreement.

11. On completion of control disbursements, instruct joint control agent to give each principal a written statement of account that meets following requirements [*10 Cal. Code Reg. § 1741.3*]:

NOTE:

Joint control agents frequently use a computer printout rather than a preprinted form to satisfy this requirement. The statement of account may be transmitted electronically to the principals. In the event a person is not able to electronically receive the statement, the joint control agent will mail a true and correct copy within 24 hours of its completion.

a. Specifies all receipts and disbursements made during job.

b. Clearly designates charges made for control services and for any commissions paid to other sources, and sets these apart from other disbursements.

c. Shows any payments made outside of control arrangement, and sets these apart from payments made by or to agent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS
PART III. TRANSACTION GUIDE
B. Procedural Guide

15-30E California Legal Forms--Transaction Guide §§ 30E.112-30E.199

[Reserved]

§§ 30E.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS
PART IV. FORMS

15-30E California Legal Forms--Transaction Guide § 30E.200

§ 30E.200 Joint Control (or Cost Disbursement) Agreement

[1] Comment

[a] Use of Form

This form is a "cost disbursement" or joint control agreement that was prepared by Builders Cost Disbursement & Evaluation Services, Inc. of Walnut Creek, California. As discussed in *§ 30E.110*, very few statutory or regulatory requirements apply to these agreements. Thus, the contents are largely determined by the parties. However, as a practical matter, many joint control agents routinely use standard forms such as this one.

For a step-by-step description of the typical functions performed by a joint control agent pursuant to this type of agreement, see *§ 30E.110*. For a discussion of the joint control industry, see the Legal Background.

[b] Fee Provision

This form was designed to be used in conjunction with a separate control fee authorization agreement establishing the joint control agency's fee for its services [*see* [2], P 12, *below*]. Other control agreements contain a provision that specifies this fee. For an example of such a provision, see *§ 30E.201[2]*.

[c] Summary of Other Provisions

This form requires the owner to assign to the joint control agent the proceeds of the owner's construction loan [*see* [2], P 2, *below*]. The agent must place the proceeds (and any additional money deposited by the owner or contractor) [*see* [2], P 1, *below*] in a segregated building fund account, and must use the funds to pay construction costs covered by the agreement [*see* [2], PP 3, 4, *below*]. Thereafter, disbursements must be made by the agent, either (1) following the receipt of a disbursement order [*see § 30E.202*] containing any of the signatures specified in Paragraph 19 of the agreement, or (2) at the discretion of the agent, to pay any of the construction costs covered by the agreement [*see* [2], P 19, *below*]. The agent may make the payments to the contractor, a subcontractor or material supplier, or other appropriate payee, and must secure mechanics' lien releases when appropriate [*see* [2], PP 3, 7, *below*]. If, during the term of the agreement, the funds provided by the owner prove to be inadequate to pay the construction costs and to

maintain a reasonable reserve, the owner or contractor will be required to deposit additional amounts with the agent [*see* [2], P 6, *below*]. Further, the owner must deposit with the agent any additional sums necessary to pay the cost of any extra work approved in writing by the owner and contractor [*see* [2], P 5, *below*].

Under this agreement, the joint control agent guarantees that the money received by it will be applied solely to the purposes specified in the agreement [*see* [2], P 7, *below*]. The agent does not guarantee that the construction work will proceed or be completed, or that the fund established pursuant to the agreement will be sufficient to satisfy all incurred expenses [*see* [2], PP 7, 8, *below*]. Further, the agent does not guarantee that the work will comply with the plans and specifications or building code requirements, or meet minimum performance standards [*see* [2], P 10, *below*].

If the contractor abandons the project or certain other specified events occur, the agent may take possession of the premises and complete the work [*see* [2], P 11, *below*]. If the agent elects not to proceed with the work under those circumstances, the project lender will have the right to do so [*see* [2], PP 9, 11, *below*]. If the lender elects to exercise that right, the agent must (on demand) disburse to the lender all unused funds and will then be relieved of any further obligation under the agreement [*see* [2], P 9, *below*].

[d] Notice of Other Involvement in Transaction

If a joint control agent or a person or company related to or affiliated with the agent is a principal in a particular joint control transaction, or is acting or has acted as a broker or salesperson in relation to the transaction, the agent must notify all parties to the transaction of that fact before being employed by them as the joint control agent. This notification must be accomplished by including an appropriate notice, in at least eight-point bold type (or its equivalent), on the face of the joint control agreement. The notice may also be transmitted electronically to all parties [*10 Cal. Code Reg. § 1740.1*]. As a practical matter, the neutral third party role of the joint control agent [*see § 30E.11 [1]*] makes it unlikely that a joint control agent would also be a principal, broker, or salesperson for the same joint control transaction.

[2] FORM

Joint Control (or Cost Disbursement) Agreement

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPurchase & SaleEscrow



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS
PART IV. FORMS

15-30E California Legal Forms--Transaction Guide § 30E.201

§ 30E.201 Fee Provision for Joint Control Agreement

[1] Comment--Use of Form

This form is a provision that establishes the fee a joint control agent is to receive for his or her services. It is designed to be inserted into a joint control agreement [*see § 30E.200[1][b], [2]*].

There are no legal requirements governing joint control fees. However, the typical fee is approximately 1 1/2 or 1 3/4 percent of the total contract price.

[2] FORM

Fee Provision for Joint Control Agreement

Fee

The regular fee for the usual services to be performed by [*name or other designation of joint control agent*] as outlined in this Agreement will be $ _____ or _____ percent of the gross contract amount to be paid to [*name or other designation of joint control agent*] by the other signatories to this Agreement, in cash or from the construction funds received by [*name or other designation of joint control agent*] from Lender, Contractor, or Owner. The signatories other than [*name or other designation of joint control agent*] will also pay the following to [*name or other designation of joint control agent*]: (1) a fee of _____ percent of all sums disbursed by [*name or other designation of joint control agent*] or paid or payable to Contractor by Owner in addition to the contract price, whether paid for "extras" or otherwise; and (2) a sum of money equal to the reasonable value of any services rendered, or money expended, or indebtedness incurred, including any indebtedness incurred for reasonable attorneys' fees in connection with this Agreement, by [*name or other designation of joint control agent*], outside of the usual services rendered by [*name or other designation of joint control agent*] in performance of the Agreement. Further, unless contrary to governmental regulation, the other signatories will pay to [*name or other designation of control agent*] an amount equal to [*specify fraction, e.g.,* one eighth] of the total fee payable under this Agreement, for each month in excess of [*number* ;] required to complete the construction and render a final accounting.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 30E JOINT (BUILDERS') CONTROL AGREEMENTS
PART IV. FORMS

15-30E California Legal Forms--Transaction Guide § 30E.202

§ 30E.202 Voucher for Disbursement of Joint Control Funds

[1] Comment

[a] Use of Form

This form is an order of disbursement and waiver of liens that was prepared by Builders Cost Disbursement & Evaluation Services, Inc., of Walnut Creek, California. It is representative of the disbursement orders, vouchers, or applications for payment that are usually used to request that a joint control agent disburse funds to a designated payee.

Typically, at the outset of the project, the joint control agent provides the parties with blank voucher forms. Thereafter, each time a subcontractor or material supplier wishes to be paid for services rendered and/or materials supplied in connection with the project, a voucher is completed. It should identify each type of service performed or material supplied by the payee, and set forth the amount due for each service or material. By signing, the payee certifies that the voucher is accurate. The payee will also be required to waive mechanics' lien rights, either by signing the voucher or by attaching a waiver. The attorney should confirm that the waiver satisfies statutory requirements [*see Civ. Code § 3262*; *see also* Ch. 31, *Mechanics' Liens* (complete coverage of waiver and release requirements)]. The contractor should verify the accuracy of the information set forth in the voucher, sign it, and then submit it to the joint control agent for payment [*see* [b], *below*].

For a procedural guide to the use of vouchers, see *Section 30E.111*.

[b] Inspection and Disbursement by Joint Control Agent

Unless the principals have prepared written instructions specifying a different disbursement arrangement, joint control funds cannot be disbursed until the joint control agent has determined that the person furnishing the labor, materials, services, permits, fees, or other items has substantially complied with the specifications contain ed in the control agreement [*Fin. Code § 17422*]. As a practical matter, the joint control agreement will usually contain language strictly limiting the inspection obligations of the agent. For example, the agreement may provide that the agent will inspect the construction site solely to determine what services or materials have been supplied to the site, and that the agent does not guarantee the quality or completion of the work. Further, the agreement may make the contractor or owner

responsible for verifying the accuracy of requests for payment, and provide that the signature of the contractor or owner on a payment voucher will conclusively establish the right of the agent to disburse the funds covered by the voucher. After satisfying all of its obligations regarding the processing of the voucher and the inspection of the work, the agent will disburse the funds directly to the payee.

[2] FORM

Voucher for Disbursement of Joint Control Funds

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
Special Alert--Ch. 31 LEGISLATIVE ALERT

15-SA31 California Legal Forms--Transaction Guide Scope

Scope

Proposed Revision of California Mechanics' Lien Law

In 1999, the California Law Revision Commission was requested to undertake a study of the law governing mechanics' liens, and associated construction remedies in California. The resulting recommendation, which includes proposed legislation, was sent to the Governor and the Legislature in February, 2008 [*see* http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf]. The recommendation provided the basis for SB 1691, which was introduced during the 2007-2008 session, passed both the Assembly and Senate but was vetoed by the governor as not being of sufficiently high priority. The legislation has been resurrected in the 2009-2010 session as SB 189, which, as of December, 2009, is under consideration by the Senate Committee on the Judiciary. In its current form, SB 189 closely tracks the Commission's proposed legislation, and if enacted, would be operative January 1, 2011. Provided the legislation is enacted, it will be fully incorporated into the text in a future release.

Some of the more significant changes to current law that would be made by the proposed legislation include:

1. Reorganization. The proposed legislation relocates the provisions of the mechanics' lien law relating to private works of improvement to the end of the Civil Code, beginning with Section 8000. This avoids the confusion of using old section numbers for new and different provisions and allow for future expansion of the law without having to resort to decimal section numbering.

The proposed legislation also relocates the statutes governing public work construction remedies, such as the stop notice and payment bond. The public work provisions would be moved into the Public Contract Code commencing with Section 41010. This is intended to solve the problems created by multiple sets of corresponding, but dissimilar provisions for public and private works.

2. Terminology. The proposed legislation cleans up and systematizes the statutory definitions to provide more consistent usage throughout the mechanics lien law.

3. Standardization of various notice provisions. The current mechanics lien law provides for many types of notice, including: preliminary notice, stop notice, notice of overdue laborer compensation, notice of non-responsibility, notice

to principal and surety, stop work notice, notice of completion, and notice of cessation. Each notice is subject to unique provisions governing such things as content, service, and proof of service. The proposed legislation standardizes these notice provisions to provide consistency throughout the range of remedies [*see* proposed Civ. Code §§ 8100-8118]. For example, the legislation prescribes standard content applicable to all notices [*see* proposed Civ. Code § 8102; Pub. Con. Code § 42120]. It replaces the individual variants in existing law applicable to one type of notice or another by establishing a general procedure for giving notice to be applied throughout the mechanics lien law [*see Code Civ. Proc. § 415.20*]. It also standardizes the proof of mailing and proof of delivery provisions and adds a provision for proof of electronic notice [*see* proposed Civ. Code § 8118; Pub. Con. Code § 42190].

4. Preliminary notice. While the proposed legislation retains most of the substance of the preliminary notice provisions of existing law, the existing provisions are broken into smaller, more comprehensible pieces, which streamlines and simplifies their wording, and clarifies the language of the notice [*compare Civ. Code §§ 3097, 3098 with* proposed Civ. Code §§ 8200-8214].

The proposed legislation eliminates the appearance in existing law that seems to require a direct contractor to both give preliminary notice to the construction lender and exempt the contractor from having to do so [*see Civ. Code § 3097(b)*]. Under the proposed legislation, the contractor is required to give the lender preliminary notice [*see* proposed Civ. Code § 8200].

5. Notice of claim of lien. Existing law does not require a lien claimant to notify the owner when a claim of lien is recorded; nor does it require the county recorder to do so, except in some counties on request. Recognizing that the constitutionality and fairness of the mechanics lien law would be enhanced if the lien claimant were required to notify the owner on recording a claim of lien, the proposed legislation imposes a recording requirement [*see* proposed Civ. Code §§ 8418, 8420].

6. New lis pendens requirement. The proposed legislation requires that a claimant who commences an action to enforce a lien claim record a lis pendens disclosing the enforcement action within 110 days of recording the lien claim. Failure to do so results in expiration of the claim, rather than having to wait a year or more [*see* proposed Civ. Code § 8460(a)].



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS

15-31 California Legal Forms--Transaction Guide 31.syn

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.syn Synopsis to Chapter 31: MECHANICS' LIENS

§ 31.01 California Sources

[1] California Constitution

[2] California Statutes

[3] California Attorney General Opinions

§ 31.02 Federal Statutes

§§ 31.03-31.04 [Reserved]

§ 31.05 Law Reviews

§ 31.06 Annotations

§ 31.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

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§ 31.10 Governing Law

§ 31.11 Definitions

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[3] "Work of Improvement"

§ 31.12 Cumulative Remedies Available to Claimants

§ 31.13 Mechanics' Liens

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[2] Entitlement to Lien

[3] Authorization of Owner Required

[4] Amount of Lien

[5] Property Subject to Lien

§ 31.14 Priority of Mechanics' Liens

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§ 31.15 Filing Mechanics' Liens

[1] Preliminary 20-Day Notice

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§ 31.16 Foreclosing Mechanics' Liens

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§ 31.17 Stop Notices

§ 31.18 Stop Notices on Private Works

[1] Entitlement and Service

[2] Effect of Stop Notice

[3] Effect on Assignment of Construction Loan Funds

[3A] Voluntary Release

[4] Stop Notice Release Bond

[5] Actions to Enforce Payment of Claim

§ 31.19 Stop Notices on Public Works

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[2] Public Entity's Duty to Withhold

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[3] Release by Bond

[4] Release by Summary Proceedings

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[6] Priorities

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§ 31.21 Right to Serve 10-Day Stop Work Order When Payments Are Untimely

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[2] Liability of Sureties

[3] Payment Bond on Private Works

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§ 31.23 Arbitration

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[1] Persons Entitled to Lien

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§ 31.100 Facts When Client Is Claimant

Scope

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Scope

§ 31.102 Documents

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§ 31.110 Claimant

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Scope

§ 31.120 Procedures to Protect Rights of Claimants

Scope

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§ 31.134 Notice of Cessation

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Scope

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Scope

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§ 31.150 Filing Stop Notice on Private Work

Scope

§ 31.151 Filing Stop Notice on Public Work

Scope

§ 31.152 Demand for Stop Notice

Scope

§ 31.153 Stop Notice Release Bond

Scope

§ 31.154 Enforcing Stop Notice on Private Work

Scope

§ 31.155 Enforcing and Contesting Stop Notice on Public Work

Scope

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Scope

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Scope

§ 31.172 Recovery on Bond for Public Work

Scope

§ 31.173 Recovery on Bond for Private Work

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§ 31.174 Commencing Action on Payment Bonds

Scope

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§ 31.180 Creation of Lien

Scope

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Scope

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Scope

§ 31.190 Drafting, Posting, and Service Requirements

Scope

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Scope

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§ 31.201 Notice of Nonresponsibility

[1] Comment

[a] Use of Form

[b] Necessity of Giving Notice

[c] Contents of Notice

[d] Giving and Recording Notice

[2] FORM

Notice of Nonresponsibility

§ 31.202 Preliminary 20-Day Notice

[1] Comment

[a] Use of Form

[b] Purpose of Preliminary Notice

[c] Persons Required to Give Notice

[i] Private Works

[ii] Public Works

[iii] Exceptions to Notice Requirement

[iv] Express Trust Funds

[d] Single Notice Required

[e] Disciplinary Action for Failure to Give Notice

[f] Time for Giving Notice

[g] Contents of Notice

[h] Names of Owner and Construction Lender

[i] Service of Notice

[j] Filing With Recorder

[i] Right of Notification

[ii] Required Contents

[iii] Purpose and Effect of Filing

[2] FORM

Notice of Nonresponsibility

§ 31.203 Cover Letter Accompanying Preliminary 20-Day Notice

[1] Comment--Use of Form

[2] FORM

Cover Letter Accompanying Preliminary 20-Day Notice

§ 31.204 Proof of Service Affidavit (Private Work)

[1] Comment

[a] Use of Form

[b] Manner of Service of Preliminary 20-Day Notice

[c] Proof of Service by Affidavit

[d] Proof of Service by Declaration

[2] FORM

Proof of Service Affidavit (Private Work)

§§ 31.205-31.209 [Reserved]

§ 31.210 Notice of Completion of Project--Private Work

[1] Comment

[a] Use of Form

[b] "Completion" Defined

[c] Purpose of Notice

[d] Contents of Notice

[e] Recording and Fees

[2] FORM

Notice of Completion of Project--Private Work

§ 31.211 Notice of Cessation of Labor

[1] Comment

[a] Use of Form

[b] Purpose of Notice

[c] Contents of Notice

[d] Recording and Fees

[2] FORM

Notice of Cessation of Labor

§ 31.211A Owner's Notice That Notice of Completion or Cessation Has Been Recorded

[1] Comment--Use of Form

[2] FORM

Owner's Notice That Notice of Completion or Cessation Has Been Recorded

§ 31.212 Notice of Completion and Acceptance of Public Works Project

[1] Comment--Use of Form

[2] FORM

Notice of Completion and Acceptance of Public Works Project

§ 31.213 Notice of Delinquent Compensation

[1] Comment

[a] Use of Form

[b] Rights of Express Trust Funds

[c] Contents of Notice

[2] FORM

Notice of Delinquent Compensation

§ 31.214 Ten-Day Stop Work Order

[1] Comment

[a] Use of Form

[b] Prior Posting of Notice of Intention to File Stop Work Order

[c] Service of Stop Work Order; Copy to Lender

[d] Liability to Others; Relationship to Other Laws; Waiver

[2] FORM

Ten-Day Stop Work Order

§§ 31.215-31.219 [Reserved]

§ 31.220 Claim of Mechanics' Lien

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Amount of Lien

[d] Recordation of Claim

[2] FORM

Claim of Mechanics' Lien

§ 31.221 Claim of Mechanics' Lien--Alternative Printed Form

[1] Comment--Use of Form

[2] FORM

Claim of Mechanics' Lien--Alternative Printed Form

§ 31.222 Notice of Extension of Credit

[1] Comment

[a] Use of Form

[b] Necessity of Recording Extension of Credit

[c] Multiple Extensions of Credit

[2] FORM

Notice of Extension of Credit

§ 31.223 Notice of Lis Pendens

[1] Comment

[a] Use of Form

[b] Commencement of Action

[c] Content and Filing Requirements

[2] FORM

Notice of Lis Pendens

§§ 31.224-31.229 [Reserved]

§ 31.230 Stop Notice

[1] Comment

[a] Use of Form

[b] Nature of Remedy

[c] Persons Entitled to Serve Notice

[i] Private Works

[ii] Public Works

[d] Contents of Notice

[e] Effect of Stop Notice

[i] Private Works

[ii] Public Works

[f] Time for Giving Notice

[i] Private Works

[ii] Public Works

[g] Service of Notice

[g.1] Voluntary Release

[h] Release by Bond

[i] Private Works

[ii] Public Works

[i] Release by Summary Proceedings

[j] Enforcement of Stop Notice

[2] FORM

Stop Notice

§ 31.231 Stop Notice on Public Work--Department of Transportation

[1] Comment--Use of Form

[2] FORM

Stop Notice on Public Work--Department of Transportation

§ 31.232 Stop Notice Bond--Printed Form

[1] Comment

[a] Use of Form

[b] Effect of Bonded Stop Notice

[c] Service of Notice

[d] Objection to Sufficiency of Sureties

[2] FORM

Stop Notice Bond--Printed Form

§ 31.233 Notice of Construction Lender's Objection to Sureties of Bonded Stop Notice

[1] Comment--Use of Form

[2] FORM

Notice of Construction Lender's Objection to Sureties of Bonded Stop Notice

§ 31.234 Owner's Demand for Stop Notice

[1] Comment--Use of Form

[2] FORM

Owner's Demand for Stop Notice

§ 31.235 Declaration of Original Contractor on Public Work Demanding Release of Funds

[1] Comment

[a] Use of Form

[b] Service of Affidavit

[2] FORM

Declaration of Original Contractor on Public Work Demanding Release of Funds

§ 31.236 Counterdeclaration by Claimant Contesting Original Contractor's Declaration and Demand for Release of Funds

[1] Comment

[a] Use of Form

[b] Purpose and Contents of Counteraffidavit

[c] Determination of Rights by Court Action

[2] FORM

Counterdeclaration by Claimant Contesting Original Contractor's Declaration and Demand for Release of Funds

§ 31.237 Notice of Commencement of Action on Stop Notice Claim

[1] Comment

[a] Use of Form

[b] Time for Filing Action

[i] Private Works

[ii] Public Works

[c] Service of Notice

[i] Private Works

[ii] Public Works

[d] Attorneys' Fees in Action Relating to Private Work

[2] FORM

Notice of Commencement of Action on Stop Notice Claim

§§ 31.238-31.239 [Reserved]

§ 31.240 Public Work Payment Bond

[1] Comment

[a] Use of Form

[b] Approval and Amount of Bond

[c] Contents of Bond

[d] Exemption From Bond Requirements

[e] Recovery on Payment Bond

[2] FORM

Public Work Payment Bond

§ 31.241 Notice to Surety and Bond Principal on Private or Public Work Payment Bond

[1] Comment

[a] Use of Form

[b] Contents of Notice

[c] Service of Notice

[2] FORM

Notice to Surety and Bond Principal on Private or Public Work Payment Bond

§§ 31.242-31.249 [Reserved]

§ 31.250 Mechanics' Lien Release Bond

[1] Comment

[a] Use of Form

[b] Bond Requirements

[c] Notice to Lienholder

[2] FORM

Mechanics' Lien Release Bond

§ 31.251 Stop Notice Release Bond

[1] Comment

[a] Use of Form

[b] Use of Stop Notice Release Bond for Private Work

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[2] FORM

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[2] FORM

Legal Release of Claim of Mechanics' Lien

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[a] Use of Form

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[2] FORM

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[b] Who May Waive Rights

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[1] Comment--Use of Form

[2] FORM

Conditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

§ 31.258 Unconditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

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Unconditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

§ 31.259 [Reserved]

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[1] Comment

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[1] Comment

[a] Use of Form

[b] Related Requirements

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[1] Comment--Use of Form

[2] FORM

Satisfaction and Release of Design Professionals' Lien [Civ. Code § 3081.4(c)]

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FOOTNOTES:

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15-31 California Legal Forms--Transaction Guide Scope

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Scope

Timothy F. O'Learyn*
Practice Consultant Scope

This chapter covers the legal and practical aspects of the three remedies available under the mechanics' lien law [*Civ. Code § 3082 et seq.*]: mechanics' liens, stop notices, and payment bonds. It includes discussion of payment bonds for private works and state public works, but does not include coverage of payment bonds for federal public works. It discusses the rights and remedies of the various parties involved in construction projects, including the property owner. This chapter also covers design professionals' liens [*see Civ. Code §§ 3081.1-3081.10*].

For further discussion of construction contract bonds, see *Ch. 79, Suretyship, Guaranty, and Indemnity, § 79.240 et seq.* For a detailed discussion of the mechanics' lien law, see California Real Estate Law & Practice, Chs. 450- 453 (Matthew Bender).

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§ 31.01 California Sources

[1] California Constitution

Right of materialmen, mechanics, artisans, and laborers to claim of lien. *Cal. Const., art. XIV, § 3.*

[2] California Statutes

Mechanics' lien consent requirements for condominiums. *Civ. Code § 1369.*

Design professionals' liens. *Civ. Code § 3081.1 et seq.*

Definition of "design professional." *Civ. Code § 3081.1.*

Amount of lien. *Civ. Code § 3081.2.*

Requirements for perfection of lien. *Civ. Code § 3081.3.*

Expiration of lien. *Civ. Code § 3081.4(b).*

Enforcement. *Civ. Code § 3081.5.*

Availability of mechanics' lien. *Civ. Code § 3081.6.*

Mechanics' Lien Law. *Civ. Code § 3082 et seq.*

General definitions. *Civ. Code §§ 3082-3106*.

Entitlement to mechanics' liens. *Civ. Code §§ 3109-3112*.

Conditions to enforcing mechanics' liens. *Civ. Code §§ 3114-3118*.

Amount of liens. *Civ. Code §§ 3123, 3124*.

Property subject to lien. *Civ. Code §§ 3128-3131*.

Priorities. *Civ. Code §§ 3134-3140*.

Enforcement of lien. *Civ. Code §§ 3143-3154*.

Stop notices for private works of improvement. *Civ. Code §§ 3156-3176.5*.

Stop notices for public works. *Civ. Code §§ 3179-3214*.

General provisions relating to bonds. *Civ. Code §§ 3225, 3226*.

Payment bond for private works. *Civ. Code §§ 3235-3242*.

Payment bond for public works. *Civ. Code §§ 3247-3252*.

Application of Code of Civil Procedure. *Civ. Code § 3259*.

Ten-day stop work order. *Civ. Code § 3260.2*.

Waiver and release forms. *Civ. Code § 3262*.

Effect of owners' acts on contract. *Civ. Code § 3263*.

Law governing suppliers' rights. *Civ. Code § 3264*.

Statute of limitations for action on payment bond (private work). *Code Civ. Proc. § 337*.

Method of service of claimants' notice to sureties. *Code Civ. Proc. § 413.10 et seq.*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

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§ 31.02 Federal Statutes

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§§ 31.03[Reserved]



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B. Secondary Sources

15-31 California Legal Forms--Transaction Guide § 31.05

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15-31 California Legal Forms--Transaction Guide § 31.07

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Ch. 6, *Mechanics' Liens and Stop Notices*.

Ch. 8, *Claims of Subcontractors and Suppliers on Public Jobs*.



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§ 31.10 Governing Law

The California Constitution states that mechanics, persons furnishing materials, artisans, and laborers of every class will have a lien on the property on which they have bestowed labor or furnished materials, for the value of the labor done or material furnished [*Cal. Const., art. XIV, § 3*]. *Civ. Code § 3082 et seq.*, referred to as the mechanics' lien law, governs the legal enforcement of these liens. Except as otherwise provided, the provisions of the Code of Civil Procedure governing civil actions in general [*see Code Civ. Proc. § 307 et seq.*] govern proceedings brought under the mechanics' lien law. The provisions of the Code of Civil Procedure relating to new trials and appeals also govern proceedings under the mechanics' lien law, except when inconsistent with the provisions of that law [*Civ. Code § 3259*]. Transactions governed by the Oil and Gas Lien Act [*Code Civ. Proc. § 1203.50 et seq.* (labor or services for oil or gas wells)] or *Pub. Contract Code §§ 20457-20464* (former *Sts. & Hy. Code §§ 5290-5297*, relating to labor or services for street work) are not governed by the mechanics' lien law [*Civ. Code § 3266*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureAppealsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens



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§ 31.11 Definitions

[1] "Claimant"

A "claimant" is any person entitled under the mechanics' lien law to record a claim of lien, to give a stop notice in connection with any work of improvement, to recover on any payment bond, or any combination of the above [*Civ. Code § 3085*].

[2] "Original Contractor"

An "original contractor" is any contractor who has a direct contractual relationship with the property owner [*Civ. Code § 3095*].

[3] "Work of Improvement"

A "work of improvement" includes, but is not restricted to, the construction, alteration, addition to, or repair in whole or part of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. This term refers to the entire structure or scheme of improvement as a whole [*Civ. Code § 3106*].

A work of improvement must result in a permanent improvement to give rise to a mechanic's lien. However, in United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479, 95 Cal. Rptr. 3d 471 , the court of appeal concluded that the permanency requirement cannot have much significance when the improvement is the removal or demolition of a building. In that case the improvement consisted of the removal of wood drying kilns that were 68 and 120 feet long, made of a steel frame and bolted to concrete slabs. There is no requirement in the statute that the land remain vacant permanently after the removal or demolition. Logically, the permanency doctrine must be satisfied in such a context by the fact that the removed or demolished building is removed or demolished [United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (200) *174 Cal. App. 4th 1479, 1484-1485, 95 Cal. Rptr. 3d*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensMechanics' Liens



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.12 Cumulative Remedies Available to Claimants

A person who has contributed to a work of improvement but has not received full payment may pursue several remedies simultaneously. That person may file a mechanics' lien claim and foreclosure action on the work of improvement and the real property on which it is situated [*see Civ. Code §§ 3109-3154*]. He or she may file a stop notice, also known as a notice to withhold, on the construction lender or person holding unexpended construction funds, thus requiring funds in the amount of the claim to be withheld rather than paid out to the original contractor [*see Civ. Code §§ 3156-3214*]. If the original contractor has given the property owner a payment bond, also known as a labor and materials bond, the claimant can bring an action directly against the surety on the bond to recover the amount of the claim [*see Civ. Code §§ 3225-3252*]. These three remedies under the mechanics' lien law are cumulative [*see Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 61, 95 Cal. Rptr. 673]* , and may be enforced in any order [*see Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 653, 149 Cal. Rptr. 711]* .

In addition, the claimant may maintain an action against the person who contracted for the labor or materials furnished [*Civ. Code § 3152*]. He or she may also seek recovery against the contractor's bond if the contractor has an active license [*see Bus. & Prof. Code §§ 7071.5, 7071.6*]. Finally, if a payment has not been made under the contract, the original contractor may serve the owner with a "10-day stop work order." If the amount due is not paid within 10 days, the contractor is entitled to seek a judicial determination of liability for the amount not paid in addition to any and all other rights he or she has under law [*Civ. Code § 3260.2(a), (b), (d)*; *see Civ. Code § 3260.1* (requires owner to pay progress payment within 30 days following payment demand, except as otherwise agreed to in writing)].

Any money collected on a judgment obtained by the claimant in a personal action or mechanics' lien action will offset the amount of the lien [*Civ. Code § 3152*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.13 Mechanics' Liens

[1] Nature of Remedy

A mechanics' lien is an encumbrance on the improved property that may be foreclosed in a court action [*see § 31.16[1]*]. Mechanics' liens do not apply to public works [*Civ. Code § 3109*]. A "public work" is any work of improvement contracted for by a public entity [*Civ. Code § 3100*]. A "public entity" is the state, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*Civ. Code § 3099*].

Because of principles of sovereign immunity, any right to impress a mechanic's lien on public property must be expressly, not implicitly, provided for by statute [Mayrhofer v. Board of Education (1891) 89 Cal. 110, 112, 26 P. 646; *see* North Bay Construction, Inc. v. City of Petaluma (2006) 143 Cal. App. 4th 552, 557, 49 Cal. Rptr. 3d 455]. Thus, a paving contractor who contracted with a developer to perform grading work on property leased by the developer from the city could not enforce a mechanic's lien against the city's property, even though the express exemption for public work provided by Civ. Code § 3109 did not apply. No statute imposes liability on a public entity for debts incurred by a tenant for improving property owned by and leased from the public entity [North Bay Construction, Inc. v. City of Petaluma (2006) 143 Cal. App. 4th 552, 557-558, 49 Cal. Rptr. 3d 455].

[2] Entitlement to Lien

Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, draymen, and all persons and laborers of every class who perform labor on, bestow skill or other necessary services on, furnish materials or leasing equipment to be used or consumed in, or furnish appliances, teams, or power to a work of improvement, have a lien on the property that has benefitted from their labor, for the value of labor done or materials furnished, and for the value of the use of any appliances, equipment, teams, or power [*Civ. Code § 3110*].

In addition, an express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an

applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, employer payments described in *Lab. Code § 1773.1*), is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code § 3111* is intended to reinstate the ability of laborers and employee trust funds to use mechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Before this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53 Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296]* . The Ninth Circuit has subsequently held that ERISA does not preempt California's stop notice and payment bond remedies [*Southern Cal. IBEW-NECA Trust Funds v. Standard Industrial Electric. Co. (9th Cir. 2001) 247 F.3d 920, 925]* .

Finally, any claimant who has made any site improvement at the instance or request of the owner of any lot or tract of land has a lien on that lot or tract for work done or materials furnished [*Civ. Code § 3112*]. A site improvement means any of the following [*Civ. Code § 3102*]:

- Demolishing or removing improvements, trees, or other vegetation;
- Drilling test holes;
- Grading, filling, or otherwise improving any lot or tract of land, or the street, highway, or sidewalk in front of or adjoining any lot or tract of land;
- Constructing or installing sewers or other public utilities; or
- Constructing any areas, vaults, cellars, or rooms under sidewalks or making any improvements on them.

A mechanics' lien does not attach until construction has been undertaken by the doing of actual visible work on the land or the delivery of construction materials to the land [*Walker v. Lytton Sav. & Loan Assn. (1970) 2 Cal. 3d 152, 156-157, 84 Cal. Rptr. 521, 465 P.2d 497]* . Thus, a claimant is not entitled to a lien for preparing preliminary plans and specifications for a work of improvement if actual physical construction of the intended improvement is never commenced [*Tracy Price Associates v. Hebard (1968) 266 Cal. App. 2d 778, 787, 72 Cal. Rptr. 600* ; *D'Orsay Int'l Partners v. Superior Court (2004) 123 Cal. App. 4th 836, 842, 20 Cal. Rptr. 3d 399]* . However, under the design professional's lien law, a design professional has a lien remedy in cases when no actual construction of the planned work of improvement is commenced before recordation of the notice of lien [*Civ. Code § 3081.1 et seq.*; *see § 31.180*]. Nevertheless, in enacting the design professional's lien law, the Legislature did not establish a general public policy supporting the protection of design/planning work in all cases. Thus, a contractor who performed design and planning services for a project on which construction never commenced could not rely on the principles underlying the design professional's lien to file a mechanic's lien [*D'Orsay Int'l Partners v. Superior Court (2004) 123 Cal. App. 4th 836, 841, 20 Cal. Rptr. 3d 399]* .

[3] Authorization of Owner Required

For a mechanics' lien to encumber property, the work or materials must be done or furnished at the instance of the owner or of a person acting by the owner's authority. For this purpose, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of all or any part of a work of improvement is deemed to be an agent of the owner [*Civ. Code § 3110*]. Every work of improvement constructed on any land, and all

work or labor performed or materials furnished in connection with that work with the knowledge of the owner or of any person having or claiming any estate in the property, will be held to have been constructed, performed, or furnished at the instance of the owner or person claiming an estate, unless the owner or person claiming an estate gives a notice of nonresponsibility [*Civ. Code § 3129*; *see § 31.20[1]*].

[4] Amount of Lien

A mechanics' lien is a direct lien for either the reasonable value of the labor, services, equipment, or materials furnished, or for the price agreed on by the claimant and the person with whom the claimant contracted, whichever is less [*Civ. Code § 3123(a)*]. The lien will not be limited by the contract price unless the property owner records the contract and original contractor's payment bond [*Civ. Code § 3123(a)*; *see § 31.22[3]*]. The lien may include any amount due for labor, services, equipment, or materials furnished based on a written modification of the contract or as a result of the rescission, abandonment, or breach of the contract. The amount of any lien based on modification, rescission, abandonment, or breach, however, may not exceed the reasonable value of the labor, services, equipment, or materials furnished [*Civ. Code § 3123(b)*]. The amount that an original contractor or subcontractor is entitled to recover on a claim of lien is net of all claims of other claimants for labor, services, equipment, or materials furnished and embraced within the contract of the original contractor or subcontractor [*Civ. Code § 3140*].

[5] Property Subject to Lien

A mechanics' lien attaches to the work of improvement for which the claimant has provided labor or materials and the land on which it is situated. It also encumbers as much of the property surrounding the work as is required or convenient for the use and occupation of the improvement [*Civ. Code § 3128*]. If the person causing the work to be constructed owned less than a fee simple estate in the land, then only that lesser interest is subject to the lien, unless the owner of the fee simple knew of the work of improvement but failed to post and record a notice of nonresponsibility [*see Civ. Code §§ 3128, 3129*; *see also § 31.20[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstPublic Contracts LawGovernmental ImmunitiesSovereign ImmunityReal Property LawNonmortgage LiensMechanics' Liens



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§ 31.14 Priority of Mechanics' Liens

[1] Relationship to Other Liens

In general, different liens on the same property have priority according to the time of their creation [*see Civ. Code § 2897*]. Mechanics' liens, with one exception [*see Civ. Code § 3138*; *see also* [3], *below*], are preferred to any lien, mortgage, deed of trust, or other encumbrance on the work of improvement and the site, that attaches subsequent to the commencement of the work of improvement. They are also preferred to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of commencement of the work [*Civ. Code § 3134*]. A mortgage or deed of trust that would be prior to the liens to the extent of obligatory advances made in accordance with the commitment of the lender will also be prior to the liens as to any other advances, secured by the mortgage or deed of trust, that are used in payment of any claim of lien recorded at the dates of the other advances and thereafter in payment of costs of the work of improvement. The priority will not exceed the original obligatory commitment of the lender as shown in the mortgage or deed of trust [*Civ. Code § 3136*].

PRACTICE TIP:

Maintaining Priority. A principal concern of construction lenders is whether a contractor has "broken priority" by performing work before the trust deed was recorded. Representations by the borrower in the loan instruments that no such work has been performed is not binding on the third party contractor. The construction lender usually will purchase title insurance to insure its loan's priority. The title company will conduct inspections just prior to funding to ensure that no work of improvement has been performed. Such inspections are not fool-proof. Any work of improvement that has begun before the loan is funded may jeopardize the trust deed's priority vis-'a-vis the entire work of improvement and all the liens that are enveloped by the general contractor's lien. *Commentary by Timothy F. O'Leary*

[2] Site Improvements

Any site improvement that is provided for in a separate contract with respect to the erection of residential units or other structures will be considered a separate work of improvement. Commencement of the site improvement will not

constitute commencement of the work of improvement consisting of the erection of any residential unit or other structure [*Civ. Code § 3135*].

Liens for site improvements [*Civ. Code § 3112*] are, subject to one exception [*see Civ. Code § 3129*; *see also* [3], *below*], preferred to (1) any mortgage, deed of trust, or other encumbrance that attaches subsequent to the commencement of the site improvement work; (2) any mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded at the time of the commencement of the site improvement; and (3) any mortgage, deed of trust, or other encumbrance recorded before the commencement of the site improvement work that was given for the sole or primary purpose of financing the site improvements, unless the loan proceeds are, in good faith, placed in the control of the lender under a binding agreement with the borrower to the effect that the proceeds are to be applied to the payment of claims of claimants and that no portion of those proceeds will be paid to the borrower in the absence of satisfactory evidence that all claims have been paid or that the time for recording claims of liens has expired and no such claims have been recorded [*Civ. Code § 3137*].

To preserve the priority of a mortgage or deed of trust recorded before the commencement of site improvement work, the lender is required to do more than secure a binding agreement that references the borrower's obligations and merely hold the funds in good faith. *Civ. Code § 3137(c)* further requires the lender to control the loan proceeds until all liens have been paid. Thus, a construction lender was not entitled to have its earlier recorded deed of trust maintain priority over an asphalt contractor's mechanics' lien for site improvements when evidence indicated the lender knew that the developer used a portion of the loan funds for other than site improvement costs, and the loan officer did not refer to the construction loan agreement to determine when, where, and how funds should be disbursed [*see Schmitt v. Tri Counties Bank (1999) 70 Cal. App. 4th 1234, 1244-1246, 83 Cal. Rptr. 2d 257]* .

[3] Effect of Payment Bond

If the holder of any mortgage or deed of trust that is subordinate to any mechanics' lien procures a payment bond in an amount not less than 75 percent of the principal amount of the mortgage or deed of trust, and records the bond in the county recorder's office in the county where the site is located, then the mortgage or deed of trust will be preferred to all liens for labor, services, equipment, or materials furnished after recording [*Civ. Code § 3138*]. Similarly, if the owner or holder of any mortgage or deed of trust that is subordinate to any lien for site improvements [*see Civ. Code § 3137*] procures a payment bond in an amount no less than 50 percent of the principal amount of the mortgage or deed of trust, and records the payment bond in the office of the county recorder's office in the county where the site is located before completion of the work of improvement, then the mortgage or deed of trust will be preferred to all such site improvement liens [*Civ. Code § 3139*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND

15-31 California Legal Forms--Transaction Guide § 31.15

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.15 Filing Mechanics' Liens

[1] Preliminary 20-Day Notice

Most claimants are entitled to enforce a mechanics' lien only after giving a preliminary notice no later than 20 days after they first furnish labor, services, equipment, or materials to the jobsite [*Civ. Code §§ 3097*, *3114*]. Every person who furnishes labor, services, equipment, or materials for which a mechanics' lien can be claimed, a stop notice given, or a claim against a payment bond asserted (other than persons under direct contract with the owner, persons performing actual labor for wages, and persons or entities, such as express trust funds, to whom a portion of a laborer's compensation is paid by agreement with that laborer or the laborer's collective bargaining agent) must serve a written preliminary notice on the owner or reputed owner, the original contractor or reputed contractor, and to the construction lender or reputed construction lender, if any [*Civ. Code § 3097(a)*; *see Civ. Code § 3089*; *see also Civ. Code § 3111* (express trust funds)]. All persons under direct contract with the owner and who furnish labor, service, equipment, or material for which a mechanics' lien can be claimed, a stop notice given, or a claim against a payment bond asserted (other than the original contractor, persons performing actual labor for wages, and persons or entities, such as express trust funds, to whom a portion of a laborer's compensation is paid by agreement with that laborer or the laborer's collective bargaining agent) must give a written preliminary notice only to the construction lender or the reputed construction lender, if any [*Civ. Code § 3097(b)*; *see Civ. Code § 3089*; *see also Civ. Code § 3111* (express trust funds)]. A claimant who fails to give preliminary notice is not precluded from giving notice at a later time, but that claimant will only be entitled to record a lien, file a stop notice, or assert a claim against a payment bond only for labor, service, equipment, or material furnished within 20 days before the date the preliminary notice was served and at any time thereafter [*Civ. Code § 3097(d)*].

To accommodate those entitled to give a preliminary 20-day notice, every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name and residential and business addresses. If the contract is not one for home improvements or swimming pool construction, it must also include space for the owner to enter the name and address of any construction lenders. The original contractor must make the owner's and lender's information available to anyone seeking to serve a preliminary 20-day notice [*Civ. Code § 3097(l), (m)*]. If

a private work of improvement involves subcontracting any of the work, any contract between an original contractor and a subcontractor, or between subcontractors, must provide space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(l), (m)*]. If the owner secures construction financing after construction is under way, he or she must provide all lenders' names and addresses to each person who has given the owner a preliminary 20-day notice [*Civ. Code § 3097(n)*].

Any person who has properly served a preliminary 20-day notice may file the notice with the county recorder in the county in which any portion of the property is located [*Civ. Code § 3097(o)(1)*]. Thereafter, the recorder will notify the person whenever a notice of completion or notice of cessation is recorded on the property [*Civ. Code § 3097(o)(2)*].

For a discussion of the preliminary 20-day notice, see *§ 31.202[1]*.

[2] Claim of Lien

To enforce a mechanics' lien, every claimant must record a written claim of lien [*Civ. Code § 3115*]. An original contractor must record the claim of lien between completion of the contract and either 90 days after the completion of the work of improvement if no notice of completion [*see § 31.20[2]*] or notice of cessation [*see § 31.20[3]*] has been recorded, or 60 days after recordation of a notice of completion or cessation [Civ. Code § 3115]. A contract is complete for purposes of commencing the recordation period under *Civ. Code § 3115* when all work under the contract has been performed, excused, or otherwise discharged [*Howard S. Wright Construction Co. v. BBIC Investors (2006) 136 Cal. App. 4th 228, 241, 38 Cal. Rptr. 3d 769* (recording of mechanic's lien was not premature because contract was "complete" on anticipatory breach of other contracting party)].

Any claimant other than an original contractor must record the claim of lien after the claimant has ceased furnishing labor, services, equipment, or materials, and before the expiration of 90 days after completion of the work of improvement if no notice of completion or cessation has been recorded, or 30 days after recordation of a notice of completion or cessation [*Civ. Code § 3116*]. The 90-day period of limitation on an action to foreclose the lien begins to run on recording the lien [*Civ. Code § 3144(b)*].

However, if the owner does not occupy an improved property of four or fewer units as a personal residence, he or she is obligated to notify the original contractor and any claimants who have provided a preliminary 20-day notice that a notice of completion or notice of cessation has been filed. Failure to notify the contractor and claimants extends the time within which they have to file a claim of lien to 90 days beyond the date a notice of completion or cessation is recorded [*see Civ. Code § 3259.5*].

A person who willfully includes in the claim of lien labor, services, equipment, or materials not furnished for the property described in the claim will forfeit the lien [*Civ. Code § 3118*]. However, no mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due the claimant, or in the description of the property against which the lien is recorded, will invalidate the lien, unless a court finds that the mistake or error was made with the intent to defraud. The lien may also be invalidated if the court finds that an innocent third party, without direct or constructive notice, has become the bona fide owner of the property since the claim was recorded, and that the notice of claim was so deficient that it did not put the party on further inquiry in any manner [*Civ. Code § 3261*].

For a discussion of the required contents of the claim of lien, see *§ 31.220[1]*.

[3] Mechanics' Lien Release Bond

If the owner of the property, the owner of any interest in the property, any original contractor, or any subcontractor disputes the correctness or validity of any claim of lien, that person may record, either before or after commencement of

an action to enforce the lien, a surety bond in a penal sum equal to one and one-half times the amount of the claim or one and one-half times the amount allocated in the claim of lien to the parcel of property sought to be released, and conditioned on the payment of any sum that the claimant may recover on the claim. When this bond is filed, the real property is released from the lien and from any action brought to foreclose the lien. The principal on the bond may be either the owner of the property, the owner of any interest in the property, any original contractor, subcontractor, or sub-subcontractor affected by the claim of lien [*Civ. Code § 3143*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*], which applies to all bonds given pursuant to any California statute unless the statute is inconsistent or prescribes a different rule [*Code Civ. Proc. § 995.020(a)*], allows two other forms of security to be given in lieu of a bond. An undertaking that otherwise satisfies the requirements for a bond may be given in its place with the same effect as if a bond were given [*Code Civ. Proc. § 995.210(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.16

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.16 Foreclosing Mechanics' Liens

[1] Action to Foreclose

No recorded mechanics' lien will bind any property for longer than 90 days after recording, unless within that time the lien claimant brings an action in the proper court to foreclose the lien. The time for filing a foreclosure suit may be extended if the lien claimant gives an extension of credit to the lien debtor and records notice of the fact and terms of the extension before expiration of the 90-day period. The lien will continue in force until 90 days after the expiration of the credit, but in no case longer than one year from the time of completion of the work of improvement [*Civ. Code § 3144(a)*]. However, no giving of credit or extension of the lien or the time to enforce the lien will be effective as against any purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to the expiration of the 90-day period following recordation of the claim of lien, unless a notice or agreement is recorded before the acquisition of the rights of the purchaser or encumbrancer [*Civ. Code § 3145*]. If the claimant fails to commence an action to foreclose the lien within these time limitations, the lien automatically becomes null and void [*Civ. Code § 3144(b)*].

[2] Failure to File Suit

The failure to file suit, while barring the right to foreclosure, does not extinguish the lien itself. The claimant retains an inchoate personal right, created by the Constitution, to a lien. Consequently, he or she may file and enforce a second claim of lien for the same work, provided the owner has not petitioned for a decree to release the property from the lien pursuant to *Civ. Code § 3145* [*Coast Central Credit Union v. Superior Court (1989) 209 Cal. App. 3d 703, 711, 257 Cal. Rptr. 468]* . The same result obtains when the claimant voluntarily records a release of the lien [*Solit v. Tokai Bank, Ltd. (1999) 68 Cal. App. 4th 1435, 1443-1445, 81 Cal. Rptr. 2d 243]* , unless the release states that the claim of lien has been "fully satisfied," in which case the claimant's inchoate right to a lien is extinguished because the release expressly provides that the underlying obligation has been paid [*Koudmani v. Ogle Enterprises, Inc. (1996) 47 Cal. App. 4th 1650, 1658-1659, 55 Cal. Rptr. 2d 330]* . Similarly, the failure to file suit to foreclose a lien does not preclude the lien from being granted a valid preference under federal bankruptcy law [*see In re Paul Potts Builders, Inc. (9th Cir. 1979) 608 F.2d 1279, 1280-1283]* .

[3] Release of Lien by Court

At any time after the time for bringing an action to enforce the claim of lien has expired [*Civ. Code § 3144*] without the commencement of an action, the owner of the property or any interest in the property may petition the proper court for a decree to release the property from the lien [*Civ. Code § 3154(a)*]. A decree cancelling the claimant's lien will bar the claimant from bringing an action to foreclose the lien, but will not bar that claimant from other forms of relief [*Civ. Code § 3154(h)*]; in fact, it may not bar the claimant from filing another, otherwise timely, lien based on the same inchoate right to a lien for satisfaction of the underlying obligation [*see Solit v. Tokai Bank, Ltd. (1999) 68 Cal. App. 4th 1435, 1443-1445, 81 Cal. Rptr. 2d 243* (dicta)].

PRACTICE TIP:

Second Lien Recording. A common tactic employed by contractors is to record a lien when the project is not yet complete. The purpose of the lien is to place the owner on notice of its claim. If the lien is not satisfied within the next 90 days, but other work is continuing, the contractor may wait to file suit. Instead, the contractor may record a second lien, thus extending for another 90 days the time within which the contractor may file suit. The statutes do not appear to prohibit this common practice of multiple lien recordings. While the owner may file a petition to expunge the first lien, owners rarely elect to do so when the contractor has recorded a second, valid lien. *Commentary by Timothy F. O'Leary*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.17

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.17 Stop Notices

A stop notice, also known as a notice to withhold, is a written notice to a property owner or construction lender from a claimant who has furnished labor, services, materials, or equipment to the work of improvement but has not been paid, demanding that sufficient funds be withheld from the construction fund for payment of the claim [*see Civ. Code § 3103*]. A "construction lender" is any mortgagee or beneficiary under a deed of trust lending funds with which the cost of the work of improvement is to be wholly or partially defrayed; any assignee or successor in interest of either; or any escrow holder or other party holding any funds furnished or to be furnished by the owner, lender, or any other person as a fund from which to pay construction costs [*Civ. Code § 3087*]. Although separate provisions of the mechanics' lien law govern stop notices for private works of improvement [*see Civ. Code §§ 3156-3175*] and those for public works [*see Civ. Code §§ 3179-3214*], stop notices given for either type of work must contain the same information [*see Civ. Code § 3103*; *see also § 31.150*]. While the amount that may be claimed in a stop notice is not set by statute, that amount should be determined by analogy to the amount for mechanics' liens [*University Casework Systems, Inc, v. Superior Court (1974) 41 Cal. App. 3d 263, 266-267, 115 Cal. Rptr. 836* ; *see § 31.13[4]*].

A "bonded stop notice" is a stop notice given to any construction lender that is accompanied by a bond with good and sufficient sureties in a penal sum equal to one and one-quarter times the amount of the claim. The bond must be given with the condition that if the defendant recovers judgment in an action brought on the verified claim or on the lien filed by the claimant, the claimant will pay all costs awarded against the owner, original contractor, or construction lender and all damages that they may sustain by reason of the equitable garnishment effected by the claim or by reason of the lien, not exceeding the sum specified in the bond [*Civ. Code § 3083*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.18

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.18 Stop Notices on Private Works

[1] Entitlement and Service

Any person entitled to a mechanics' lien claim [*see § 31.13[2]*], other than the original contractor, may give the property owner a stop notice. An owner may also demand a stop notice from a potential lien claimant, in order to satisfy the claim from construction funds rather than from a foreclosure action on the real property. If the claimant fails to serve a stop notice after such a demand, that claimant forfeits any right to a mechanics' lien [*see Civ. Code § 3158*; *see also § 31.233[1]*].

Any person entitled to a mechanics' lien claim, including the original contractor, may also give a construction lender a stop notice or bonded stop notice for materials, equipment, or services furnished or labor performed [*see Civ. Code §§ 3159*, *3235*]. If that notice is filed by the original contractor or by a subcontractor contracting directly with an owner, the claimant will be entitled to recover only the net amount due the claimant after deducting the stop notice claims of all subcontractors or material suppliers who have filed bonded stop notices on account of work done on behalf of the original contractor or the subcontractor [*Civ. Code § 3159*].

Claimants who are required to give a preliminary 20-day notice before filing a mechanics' lien [*see § 31.15[1]*] must also give the 20-day notice as a prerequisite to serving a stop notice [*Civ. Code § 3160(a)*; *see Civ. Code § 3097(a)*]. The stop notice must be served during the period within which a claim of lien must be recorded [*Civ. Code § 3160*; *see Civ. Code §§ 3115-3117*; *see also § 31.15[2]*].

[2] Effect of Stop Notice

A property owner who receives a stop notice must withhold from the original contractor, or from any person acting under the contractor's authority to whom labor or materials (or both) have been furnished or agreed to be furnished, sufficient money due or to become due to answer the claim and any claim of lien that may be recorded. However, if a payment bond [*see Civ. Code § 3235*] has been recorded, the owner is not obligated to withhold the money, but may still do so. If the owner elects not to withhold, he or she must, within 30 days after receipt of the stop notice, (1) send

the claimant, at the address shown in the stop notice, a written notice that the bond has been recorded, and (2) give the claimant a copy of the bond [*Civ. Code § 3161*].

As a general rule, a construction lender receiving a stop notice may, and on receipt of a bonded stop notice must, withhold from the borrower or other person to whom it or the owner is obligated to make payments or advancement out of the construction fund, sufficient money to answer the claim and any claim of lien that may be recorded. However, if a payment bond [*see Civ. Code § 3235*] is recorded in the office of the county recorder where the site is located at any time before the serving of the first stop notice, the construction lender (1) must withhold funds pursuant to a bonded stop notice filed by an original contractor, and (2) may, at its option, withhold funds pursuant to a stop notice or bonded stop notice given by anyone other than an original contractor [*Civ. Code §§ 3159, 3162*]. If the construction lender elects not to withhold because of prior recordation of a payment bond, the lender must furnish the claimant with a copy of the bond within 30 days after making the election, so long as the claimant provided the construction lender with a written request for notice of the election and a preaddressed, stamped envelope at the time the claimant gave the lender the stop notice or bonded stop notice [*see Civ. Code §§ 3159, 3162*]. A lender will not be liable for a failure to furnish a copy of the bond if (1) the failure was not intentional and resulted from a bona fide error, (2) the lender maintains reasonable procedures to avoid such an error, and (3) the lender corrects the error not later than 20 days from the date on which the violation was discovered [*Civ. Code § 3162*; *see Civ. Code § 3159*].

If a construction lender objects to the sufficiency of the sureties on the bond accompanying a bonded stop notice, the lender must give the claimant written notice of the objection within 20 days after service of the bonded stop notice. If the claimant fails to substitute another bond of like amount executed by a corporate surety licensed to write bonds in California, the construction lender may disregard the bonded stop notice and release all withheld funds [*Civ. Code § 3163*].

[3] Effect on Assignment of Construction Loan Funds

No assignment of construction loan funds by the owner or contractor, whether made before or after a stop notice or bonded stop notice is given to a construction lender, will take priority over the stop notice or bonded stop notice. Further, such an assignment will have no effect on the rights of the stop-notice claimants [*Civ. Code § 3166*].

[3A] Voluntary Release

A stop notice claimant may reduce the amount of, or release in its entirety, a properly served private work stop notice without prejudicing the claimant's right to serve a subsequent timely and proper stop notice. The reduction or release must be in writing, but is not required to conform to the statutory forms of release required by *Civ. Code § 3262(d)* for use in a mechanics' lien context [*Civ. Code § 3262(b)(2)*]. To the extent of the reduction or release, it [*Civ. Code § 3262(b)(2)(A)-(D)*]:

- Releases the owner from any obligation to withhold money on account of the stop notice;
- Is effective to release the claimant's right to enforce the stop notice; and
- Does not operate as a release of any right that the claimant may have, other than the claimant's right to enforce the stop notice.

[4] Stop Notice Release Bond

A property owner, construction lender, original contractor, or subcontractor who disputes the correctness or validity of a private work stop notice or bonded stop notice may file a bond with the person on whom the notice was served. The bond must be executed by good and sufficient sureties in a penal sum equal to one and one-quarter times the amount

stated in the notice, conditioned on the payment of any sum not exceeding the penal obligation of the bond that the claimant may recover on the claim together with the costs of suit in the action, if recovered. Once a bond is filed, the funds withheld to respond to the stop notice or bonded stop notice will be released [*Civ. Code § 3171*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of bond [*see Code Civ. Proc. § 995.210 et seq.*; *see also § 31.15[3]*].

[5] Actions to Enforce Payment of Claim

An action against the owner or construction lender to enforce payment of the claim stated in the stop notice or bonded stop notice may be commenced at any time after 10 days from the date of service, but no later than 90 days following the expiration of the period within which claims of liens must be recorded [*see § 31.16[1]*]. If an action is not brought within that period, the stop notice will cease to be effective, and the money will be paid or delivered to the contractor or other person to whom it is due [*Civ. Code § 3172*]. Any number of persons who have given stop notices or bonded stop notices may join in the same action [*Civ. Code § 3175*]. Notice of commencement of the action must be given within five days after commencement [*Civ. Code § 3172*].

If the action involves a bonded stop notice, the prevailing party will be entitled to collect from the party held liable by the court for payment of the claim, reasonable attorneys' fees in addition to other costs and to any liability for damages [*Civ. Code § 3176*]. If the plaintiff is the prevailing party, any amount awarded on the claim will include interest at the legal rate, calculated from the date the bonded stop notice was served on the owner or construction lender [*Civ. Code § 3176.5*]. The court, on notice and motion by a party,will determine who is the prevailing party for these purposes [*see Civ. Code § 3176*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.19

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.19 Stop Notices on Public Works

[1] Entitlement and Service

Any of the following persons may serve a stop notice on the public entity responsible for a public work:

- Any person, other than an original contractor, who would be entitled to a mechanics' lien on a private work of improvement [*see Civ. Code §§ 3110-3112*; § 31.13[2]].

- A hazardous waste hauler subcontractor [*see Pub. Contract Code § 4107.7*; *see also Health & Safety Code § 25163*].

- Any person who furnished provisions, provender, or other supplies [*Civ. Code § 3181*].

The stop notice and payment bond are the exclusive remedies for persons contributing labor or materials to a public work of improvement, since mechanics' liens do not apply to public works [*see Civ. Code § 3109*].

Any person furnishing labor or materials for a public work who is entitled to file a stop notice and who has no direct contractual relationship with the original contractor (other than a person who performed actual labor for wages or an express trust fund [*see Civ. Code § 3111*]) must give a preliminary notice to the contractor and the public agency concerned no later than 20 days after the claimant has first furnished labor, services, equipment, or materials to the jobsite [*Civ. Code § 3098(a)*]. If the contract price to be paid to any licensed subcontractor on a public work of improvement exceeds $400, the failure to give the preliminary notice constitutes grounds for disciplinary action by the Registrar of Contractors [*Civ. Code § 3098(b)*].

A claimant must serve the stop notice within 30 days after the property owner records a notice of completion or cessation, provided the owner notifies the claimant that the notice of completion or cessation has been recorded, or within 90 days after completion or cessation if either the owner fails to so notify the claimant, or a notice of completion

or cessation was not recorded [*Civ. Code §§ 3184, 3259.5*].

[2] Public Entity's Duty to Withhold

On receipt of a stop notice, the public entity has a duty to withhold from the original contractor, or from any person acting under the contractor's authority, money or bonds (when bonds are to be issued as payment for the work of improvement) due or to become due to the contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the reasonable cost of any litigation relating to the claim [*Civ. Code § 3186*]. However, this withholding requirement does not prohibit (1) the payment of any money or bonds to the original contractor or contractor's assignee, unless a stop notice is on file before the disbursing officer has actually surrendered possession of either the warrant, check, bonds, or money; or (2) the payment to the original contractor or the contractor's assignee of any money due in excess of an amount sufficient to answer the total amount of the claims stated in stop notices on file at the time of payment, plus interest and court costs that might be reasonably anticipated in connection with the claims [*Civ. Code § 3187*].

[2A] Voluntary Release

A stop notice claimant may reduce the amount of, or release in its entirety, a properly served public work stop notice without prejudicing the claimant's right to serve a subsequent timely and proper stop notice. The reduction or release must be in writing, but is not required to conform to the statutory forms of release required by *Civ. Code § 3262(d)* for use in a mechanics' lien context [*Civ. Code § 3262(b)(2)*]. To the extent of the reduction or release, it [*Civ. Code § 3262(b)(2)(A)-(D)*]:

- Releases the owner from any obligation to withhold money on account of the stop notice;
- Is effective to release the claimant's right to enforce the stop notice; and
- Does not operate as a release of any right that the claimant may have, other than the claimant's right to enforce the stop notice.

[3] Release by Bond

If the original contractor or subcontractor disputes the correctness, validity, or enforceability of any stop notice, the public entity may permit that person to file with the public entity a bond executed by a corporate surety in an amount equal to 125 percent of the claim stated in the stop notice, conditioned on the payment of any sum that the stop notice claimant may recover on the claim, together with the costs of suit in the action, if recovered. Once the bond is filed with the public entity, the entity will not withhold any money or bonds from the original contractor on account of the stop notice. The sureties on the bond will be jointly and severally liable to the stop notice claimant with the sureties on any payment bond [*Civ. Code § 3196*; *see § 31.22[1]*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of the bond [*see Code Civ. Proc. § 995.210 et seq.*; *see also § 31.15[3]*].

[4] Release by Summary Proceedings

The original contractor may bring summary court proceedings to contest a stop notice and release the funds held. The contractor must serve on the public entity an affidavit alleging the legal grounds on which the claim is based, and demand the release of any money alleged to be improperly withheld or excessive [*Civ. Code §§ 3197, 3198*; *see § 31.235*]. The public entity will then serve on the claimant a copy of the affidavit and demand for release, together with a written notice that the public entity will release the demanded money unless the claimant files a counter-affidavit with the public entity [*Civ. Code § 3199*]. If the claimant wishes to contest the affidavit, the claimant must serve a

counter-affidavit alleging the details of the claim and the basis on which the affidavit is contested [*Civ. Code § 3200*]. Either the original contractor or the claimant may then file an action in superior court for a summary declaration of the rights of the respective parties [*Civ. Code § 3201*].

[5] Actions to Enforce Stop Notice

A claimant may bring an action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice at any time after 10 days from the date of service of the stop notice on the public entity, but not later than 90 days following the expiration of the period in which stop notices must be filed [*Civ. Code § 3210*; *see Civ. Code § 3184*; *see also* [1], *above*]. The money or bonds cannot be withheld by reason of the stop notice longer than the expiration of the 90-day period, unless proceedings have been commenced by the claimant in a proper court within that time. If timely proceedings are not initiated, the stop notice will cease to be effective and the money or bonds withheld will be paid or delivered to the contractor or other person to whom they are due [*Civ. Code § 3210*]. Notice of commencement of the action must be given to the public entity within five days after commencement [*Civ. Code § 3211*].

[6] Priorities

If the money withheld pursuant to stop notices is insufficient to pay all of the valid claims stated in those notices, the money will be distributed among the stop notice claimants in the same ratio that their respective claims bear to the aggregate of valid claims, without regard to the order of time in which their respective notices were served or actions commenced [*Civ. Code § 3190*]. However, any person who willfully gives a false stop notice to the public entity or who willfully includes in the stop notice labor, services, equipment, or materials not furnished for the work of improvement with respect to which the notice is given, forfeits all right to participate in the pro rata distribution [*Civ. Code § 3192*].

No assignment by the original contractor of any of the money due or to become due to the original contractor under the contract, whether made before or after the service of a stop notice, takes priority over a stop notice, and such an assignment has no effect on the rights of stop notice claimants. Any garnishment of that money by any creditor of the original contractor [*see Code Civ. Proc. §§ 708.710-708.795*] and any statutory lien thereon are subordinate to the rights of all stop notice claimants [*Civ. Code § 3193*]. Nothing in the statutes impairs the right of a stop notice claimant to recover from the contractor or the contractor's sureties any deficit that may remain unpaid after a pro rata distribution in an action on a payment bond [*Civ. Code § 3191*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawContract ProvisionsPayment SchedulesPublic Contracts LawGovernmental ImmunitiesSovereign ImmunityPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART II. LEGAL BACKGROUND

15-31 California Legal Forms--Transaction Guide § 31.20

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.20 Protecting Against Liens and Stop Notices

[1] Notice of Nonresponsibility

An owner or person with an interest in property may avoid the presumption of having requested work or labor performed or materials furnished in connection with a work of improvement on the property, and thus liability for amounts due any claimants, by filing a notice of nonresponsibility [*Civ. Code § 3129*]. The person claiming nonresponsibility must post the notice in some conspicuous place on the site within 10 days after he or she becomes aware of the work of improvement, and record the notice within that same period [*Civ. Code § 3094*]. For a discussion of the notice requirements, see *§ 31.201[1]*.

A notice of nonresponsibility will not insulate the property from a lien for construction work if the property owner "participated" in the construction work through lease provisions requiring the tenant to make improvements on the property [*Howard S. Wright Construction Co. v. Superior Court (2003) 106 Cal. App. 4th 314, 326, 130 Cal. Rptr. 2d 641* (notice of nonresponsibility posted and recorded by property owner did not insulate property from lien for construction work; undisputed evidence showed that contractor was likely to succeed in its claim that property owner participated in construction work through lease provisions requiring tenant to make improvements on property); *Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 597-601, 159 P.2d 663* (lessor not entitled to notice of nonresponsibility protection when lease required lessee to build improvements that lessor would benefit from on return of property)].

[2] Notice of Completion

To limit the time in which claims of lien may be recorded or stop notices served by claimants, the owner of a private work of improvement must notify the original contractor, and any other claimant who has provided a preliminary 20-day notice, that a notice of completion has been recorded. The notice must be sent by registered or certified mail, or first class mail evidenced by a certificate of mailing, within 10 days after the notice of completion or cessation was recorded [*Civ. Code § 3259.5(a)*].

For these purposes, "owner" means a person who has an interest in real property, or the person's successor in interest on the date of notice of completion or cessation from labor is recorded, who causes a building, improvement, or structure, to be constructed, altered, or repaired on the property. If the property is owned by two or more persons as joint tenants or tenants in common, any one of the cotenants may be deemed to be the owner. "Owner" does not include a person who occupies the property as a personal residence and the dwelling contains not more than four residential units. In addition, "owner" does not include a person who has a security interest in the property or obtains an interest by virtue of a court order, a default on a mortgage, or a transfer by a fiduciary in the course of administering a decedent's estate, guardianship, conservatorship, or trust [*Civ. Code § 3259.5(b)*; *see Civ. Code § 1102.2(b)-(d)*].

Owners who are not required to give notice of the filing of a notice of completion may limit the time in which claims of lien may be recorded or stop notices served by claimants simply by recording a notice of completion within 10 days after completion of the work [*see Civ. Code § 3116*].

Although "completion" of a nonpublic work of improvement means actual completion, the following will be deemed equivalent to completion [*Civ. Code § 3086*]:

- The occupation or use of a work of improvement by the owner, or the owner's agent, accompanied by a cessation of labor.

- The acceptance by the owner or the owner's agent of the work of improvement.

- After commencement of a work of improvement, a cessation of labor for a continuous period of 60 days, or a cessation of labor for a continuous period or 30 days or more if the owner files a notice of cessation.

If a work of improvement is subject to acceptance by any public entity, the completion of that work will be deemed to be the date of acceptance. However, except as to contracts awarded under the State Contract Act [*see Pub. Contract Code § 10100 et seq.*], a cessation of labor on any public work for a continuous period of 30 days will be a completion [*Civ. Code § 3086*].

[3] Notice of Cessation

An owner of property may also limit the time in which claims of lien may be recorded or stop notices given by claimants by recording a notice of cessation in the county recorder's office where the jobsite is located, if there has been a continuous cessation of labor for at least 30 days before recording [*see Civ. Code § 3092*]. For purposes of this notice, "owner" has the same meaning as for a notice of completion [*Civ. Code § 3092(g)*; *see Civ. Code § 3093*; *see also* [2], *above*]. For a discussion of the required contents of a notice of cessation, see *§ 31.211[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.21

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.21 Right to Serve 10-Day Stop Work Order When Payments Are Untimely

For private construction project contracts entered into on or after January 1, 1999, a special remedy exists for an original contractor who is not paid money owed pursuant to the contract within 35 days from the date payment is due, when there is no dispute as to the contractor's satisfactory performance [*see Civ. Code § 3260.2*; *see also Civ. Code § 3260.1* (requires owner to pay progress payment within 30 days following payment demand, except as otherwise agreed to in writing); for discussion of *Civ. Code § 3260.1*, see *§ 30D.221[1][c]*]. In this case, the original contractor may serve the owner with a "10-day stop work order" stating that the original contractor will stop work on the project unless all amounts then due him or her are paid within 10 days from the date notice is provided. If payment is not made within 10 days from the date the notice is served, the original contractor or his or her surety may stop work and may seek a judicial determination of liability for the unpaid amount in an expedited proceeding in the superior court in the county in which the work of improvement is located [*Civ. Code § 3260.2(a), (d)*]. The right to stop work does not apply to retentions withheld by a lender in accordance with the construction loan agreement [*Civ. Code § 3260.2(f)*].

If all procedural requirements are met, the original contractor or his or her surety, or a subcontractor or his or her surety, will not be liable for any delays or damages that the owner or contractor of a subcontractor may suffer as a result of the original contractor serving the owner with a 10-day stop work order, and subsequently stopping work for nonpayment [*Civ. Code § 3260.2(c)*].

An original contractor's or original subcontractor's liability to a subcontractor or material supplier resulting from the cessation of work is limited to the amount of monetary damages the subcontractor or material supplier could recover under the mechanics' lien law for goods and services provided up to the date the "subcontractor" [*see Civ. Code § 3260.2(c)* (statute refers to "subcontractor" here, but it appears that "contractor" was intended)] ceases work, provided that the following conditions are satisfied [*Civ. Code § 3260.2(c)*]:

- Liability continues for work performed and materials supplied up to and including the 10-day notice period and not beyond; and

- There is no limitation on monetary damages for custom work, including materials that have been fabricated, manufactured, or ordered to unique specifications.

The right to stop work by serving a 10-day notice is in addition to any and all other rights the contractor may have under the law [*Civ. Code § 3260.2(b)*]. Any contractual waiver of this right to stop work is against public policy [*Civ. Code § 3260.2(e)*].

For the procedural requirements associated with a 10-day stop work order, see *§§ 31.190* and *31.191*. For an illustrative 10-day stop work order, see *§ 31.214[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.22

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.22 Payment Bonds

[1] Nature of Bond

A payment bond is a bond that is conditioned on full payment of the claims of all claimants and gives all claimants a right to recover on the bond in any suit brought to foreclose the liens or any separate suit brought on the bond [*Civ. Code § 3096*]. Any bond given under the mechanics' lien law is a good and sufficient bond if the surety is an admitted surety insurer [*see Code Civ. Proc. §§ 995.120, 995.610*]. Either an owner, an original contractor, or a subcontractor may be the principal on any payment bond [*Civ. Code § 3096*]. Any claimant who is entitled to a mechanics' lien [*see § 31.13[2]*] and who has not been paid the full amount of that claim for contributions to a work of improvement may recover against a payment bond [*Civ. Code § 3226*].

[2] Liability of Sureties

A bond given under the mechanics' lien law is construed most strongly against the surety and in favor of the persons for whose benefit the bond was given [*Civ. Code § 3226*]. A surety will not be released or exonerated from the bond due to any of the following [*Civ. Code §§ 3225, 3226*]:

- A change or alteration in, or modification of, any contract, plans, specifications, or agreement relating to any scheme or work of improvement, or relating to the furnishing of labor, materials, or equipment for that work.

- A change or modification of any terms of payment, or extension of the time for any payment relating to any scheme or work of improvement.

- A rescission or attempted rescission of the contract, agreement, or bond.

- Any conditions precedent or subsequent in the bond attempting to limit the right of recovery to which claimants are otherwise entitled under the contractor agreement or under the bond.

- Any fraud practiced by any person other than the claimant seeking to recover on the bond, if the bond is given for the benefit of claimants.

- A breach of the contract between the owner and the original contractor, or a breach by any other obligee named in the bond.

[3] Payment Bond on Private Works

A property owner may protect against any failure of the original contractor to perform the contract and make full payment for all work done and materials furnished on a private work of improvement by exacting a bond or any other security necessary [*Civ. Code § 3236*]. Although the original contractor is not required by statute to furnish a payment bond on a private work of improvement, unlike some public works [*see* [4], *below*], it is customary for a property owner to require a payment bond in the contract with the original contractor. If the property owner files the original contract in the county recorder's office before the work is commenced, and records the original contractor's payment bond (for not less than 50 percent of the contract price), the owner's liability to claimants will be limited to the contract price. A court, when it is equitable to do so, must restrict the recovery under lien claims to an aggregate amount equal to the amount due from the owner to the original contractor, and render judgment against the original contractor and the contractor's sureties for any deficiency or difference that may remain between the amount due to the original contractor and the whole amount due to claimants [*Civ. Code §§ 3235, 3236*].

To enforce a claim against a payment bond given in connection with a private work contract entered into on or after January 1, 1995, the claimant must give the same 20-day preliminary notice that is required as a prerequisite to establishing a mechanics' lien or stop notice [*Civ. Code § 3242(a)*; *see Civ. Code § 3097*; *see also § 31.202[2]* (preliminary 20-day notice)]. If preliminary notice is not given, a claimant may nonetheless enforce a claim against the bond by giving written notice to the surety and the bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completion of the work of improvement [*Civ. Code § 3242(b)*; *see § 31.241[2]* (notice to surety and bond principal)].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of the bond [*see Code Civ. Proc. § 995.210*; *see also § 31.15[3]*].

[4] Payment Bond on Public Works

Every original contractor who is awarded a contract by a public entity other than a "state entity" [*see* discussion of *Pub. Contract Code § 7103(d), below*] involving an expenditure in excess of $25,000 for any public work must, before beginning performance of the work, file a payment bond with the officer or public entity that awarded the contract [*Civ. Code § 3251*]. The bond must be approved by that officer or entity, and must be in a sum that is not less than 100 percent of the amount payable by the terms of the contract [*Civ. Code § 3247(a)*]. Unless a payment bond is filed and approved, no claim in favor of the original contractor arising under the contract will be audited, allowed, or paid by the public entity awarding the contract [*Civ. Code § 3251*].

Similarly, every original contractor who is awarded a contract by a "state entity" involving an expenditure in excess of $25,000 for any public work must, before beginning performance of the work, file a payment bond with the officer or state entity that awarded the contract. The bond must be approved by that officer or entity, and must be in a sum that is not less than 100 percent of the amount payable by the terms of the contract [*Pub. Contract Code § 7103(a)*]. A state entity is any state office department, division, bureau, board, or commission other than the Legislature, the courts, any agency in the judicial branch of government, or the University of California [*Pub. Contract Code § 7103(d)*]. Providers of architectural, engineering, and land surveying services under a contract with a public or state entity for a public work

will not be deemed to be original contractors and will not be required to post or file a payment bond [*Civ. Code § 3247(c)*; *Pub. Contract Code § 7103(c)*]. For a discussion of the requirements of the payment bond, see *§ 31.240[1]*.

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of the bond [*see Code Civ. Proc. § 995.210*; *see also § 31.15[3]*]. However, a deposit may not be given in lieu of a bond [*Civ. Code § 3248(d)*].

To enforce a claim against a payment bond given in connection with a public work contract entered into on or after January 1, 1995, the claimant must give the same 20-day preliminary notice that is required as a prerequisite to enforcing a stop notice [*Civ. Code § 3252(a)*; *see Civ. Code § 3098*; *see also § 31.202[2]* (preliminary 20-day notice)]. If preliminary notice is not given, a claimant may nonetheless enforce a claim against the bond by giving written notice to the surety and the bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving written notice to the surety is extended to 75 days after completion of the work of improvement [*Civ. Code § 3252(b)*; *see § 31.241[2]* (notice to surety and bond principal)]. Any claimant may bring suit against the surety or sureties on the payment bond at any time after the claimant has furnished the last of the labor or materials, but must commence the suit within six months after the period in which stop notices may be filed [*Civ. Code § 3249*; *see Civ. Code § 3184*; *see also § 31.19[1]*]. The filing of a stop notice is not a condition precedent to the maintenance of an action against the surety on the payment bond. An action on the bond may be brought separately from and without the filing of an action against the public entity [*Civ. Code § 3250*].

For a discussion and example of payment bonds on federal public works under the Miller Act [*40 U.S.C. §§ 270a-270f*], see *Ch. 79, Suretyship, Guaranty, and Indemnity, § 79.240*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance BondsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.23

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.23 Arbitration

Any claimant who wishes to file an action to enforce a mechanics' lien will not waive any right of arbitration that the claimant may have under a written agreement to arbitrate if, in filing the action to enforce the claim of lien, the claimant either [*Code Civ. Proc. § 1281.5(a)(1), (2)*]:

- Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action; or

- At the same time the complaint is filed, files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and is relevant to the action to enforce the claim of lien.

Within 30 days after service of the summons and complaint, the claimant must file and serve a motion and notice of motion to stay the action pending the outcome of the arbitration proceeding. Failure to comply with this requirement waives the claimant's right to compel arbitration [*Code Civ. Proc. § 1281.5(b)*]. For further discussion, see California Forms of Pleading & Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* (Matthew Bender).

PRACTICE TIP:

Split Litigation. The general practice is to split the litigation. The contractor will file an action to foreclose on mechanic's lien in superior court, and ask the court to stay the action pending arbitration. The contractor will proceed with the arbitration, and an award will be rendered. The contractor will petition to confirm the award as a judgment in superior court, and seek an order of judicial foreclosure if the award is not satisfied. *Commentary by Timothy F. O'Leary.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.24

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.24 Design Professionals' Liens

[1] Persons Entitled to Lien

A certificated architect, registered professional engineer, or licensed land surveyor is entitled to a design professionals' lien if he or she enters into a contract with a landowner for the design, engineering, or planning of a work of improvement, and the landowner defaults in or refuses to make any payment required by the contract [*see Civ. Code §§ 3081.1-3081.3*]. The lien will be for the lesser of the amount of the design professional's fee for any services rendered before commencement of the work of improvement, or the reasonable value of those services. This amount must be reduced, however, by the amount of any deposit or prior payments [*Civ. Code § 3081.2*].

A number of conditions and restrictions apply to design professionals' liens. For example, the lien does not apply to a work of improvement relating to a single-family, owner-occupied residence when the construction costs are less than $100,000 [*Civ. Code § 3081.10*]. Further, the design professional is not entitled to the lien if (1) construction work has commenced on the proposed improvement or (2) no building permit or other governmental approval has been obtained for the work [*Civ. Code §§ 3081.2, 3081.4(b)(1)*]. To create the lien, the design professional must make a written demand for payment [*Civ. Code § 3081.3(b)*; *see § 31.260[2]*], and then record a notice of lien within the time specified by statute [*Civ. Code § 3081.3(c)*; *see § 31.261[2]*].

[2] Expiration, Enforcement, or Satisfaction

A design professionals' lien automatically expires and is void on the occurrence of either of the following [*Civ. Code § 3081.4(b)*]:

- The commencement of the work of improvement for which the design professional furnished services; or

- The expiration of 90 days after the recordation of the notice of lien, unless the design professional files suit to enforce the lien within that 90-day period.

If the design professional does file suit, the lien must be enforced in accordance with the enforcement provisions of the mechanics' lien law [*Civ. Code § 3081.5*; *see Civ. Code § 3082 et seq.* (law); *Civ. Code §§ 3143-3154* (enforcement provisions)].

If the landowner partially or fully satisfies the lien, the design professional must execute and record a document that evidences a partial or full satisfaction and release of the lien, as appropriate [*Civ. Code § 3081.4(c)*; *see § 31.262[2]*].

[3] Impact on Other Laws

The laws governing design professionals' liens do not affect the ability of a design professional to obtain a mechanics' lien [*Civ. Code § 3081.6*]. Further, a perfected design professionals' lien will not affect the ability of the design professional to pursue other remedies [*Civ. Code § 3081.8*]. Finally, the lien will not affect or take priority over: (1) the interest of a purchaser, lessee, or encumbrancer in the real property subject to the contract between the design professional and the landowner, if the interest of the purchaser, lessee, or encumbrancer in the real property was duly recorded before recordation of the design professionals' lien; or (2) an encumbrance of a construction lender, when the construction loan is used to commence the work of improvement for which the design professional furnished services [*Civ. Code § 3081.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens



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AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.25[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

15-31 California Legal Forms--Transaction Guide § 31.100

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.100 Facts When Client Is Claimant

NOTE:
A "claimant" is any person entitled under the mechanics' lien law to record a claim of lien, to give a stop notice in connection with any work of improvement, to recover on any payment bond, or any combination of the above [*Civ. Code § 3085*].

1. Name, address, and telephone number of claimant.

2. Claimant's status with respect to construction project:

a. Original contractor;

b. Subcontractor;

c. Materialman; or

d. Laborer.

3. Name and address of property owner.

4. Name and address of original contractor.

5. Name and address of construction lender, if any.

6. If project is public work of improvement:

a. Name and address of public entity contracting for work.

b. Date of acceptance by public entity.

7. Description (sufficient for identification) and street address of jobsite.

8. Date of commencement of work of improvement.

9. Date of completion of work of improvement.

10. Date claimant first furnished labor, services, equipment, or materials to job site.

11. General description of labor, services, equipment, or materials furnished or to be furnished by claimant.

12. Name of person to or for whom labor, services, equipment, or materials were furnished.

13. Value of:

a. All labor, services, equipment, or materials agreed to be furnished.

b. Portion of agreed-upon labor, services, equipment, or materials that were actually furnished.

14. Amount of any payment received by claimant for contributions to work of improvement.

15. If claimant is original contractor, date contract with owner was completed.

16. If claimant is materialman or subcontractor, date that claimant ceased furnishing labor, services, equipment, or materials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-31 California Legal Forms--Transaction Guide § 31.101

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.101 Facts When Client Is Property Owner

1. Name, address, and telephone number.

2. Description of property (sufficient for identification) and street address.

3. Nature of interest in real property.

4. Names and addresses of any cotenants in property.

5. Names and addresses of any successors in interest.

6. Name and address of original contractor.

7. Whether property owner is aware of any claimants who remain unpaid for work on property.

8. Whether property owner received any preliminary notices from claimants.

9. Whether mechanics' lien claims have been recorded against property.

10. Whether correctness or validity of lien claim is disputed.

11. Whether stop notice claims have been served on owner or construction lender by any claimants.

12. Whether correctness or validity of stop notice or bonded stop notice is disputed.

13. Whether original contractor provided payment bond for work of improvement.

14. Whether owner received any notices of commencement of action on stop notices.

15. Whether any claimants have commenced actions on mechanics' liens or payment bonds.

16. If notice of nonresponsibility is desired:

    a. Date owner first obtained knowledge of work of improvement.

    b. Name of any purchaser under contract or lessee.

17. If notice of cessation is desired, date when cessation of labor commenced.

18. If notice of completion is desired, date of completion of work of improvement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.102

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.102 Documents

1. Contract between claimant and owner, if any.

2. Contract between claimant and original contractor, if any.

3. Any of following served or filed by claimant:

    a. Notice to owner regarding mechanics' lien law.

    b. Preliminary 20-day notice and proof of service.

    c. Claim of lien.

    d. Notice of extension of credit.

    e. Stop notice and bond, if any.

    f. Payment bond.

    g. Notice to sureties on payment bond.

    h. Notice to express trust fund regarding delinquent payments.

    i. Counteraffidavit opposing demand for release of funds held pursuant to stop notice.

j. Release or waiver of rights to lien, stop notice, or payment bond.

k. Declaration to procure payment.

4. Any of following served or filed by property owner, construction lender, or original contractor:

a. Notice of nonresponsibility.

b. Notice of completion.

c. If project is public work of improvement, notice of acceptance by public entity.

d. Notice of cessation.

e. Notice of objection to sureties.

f. Demand for stop notice.

g. Payment bond.

h. Mechanics' lien release bond.

i. Stop notice release bond.

j. Affidavit demanding release of funds held pursuant to stop notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

15-31 California Legal Forms--Transaction Guide §§ 31.103-31.109

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.103[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

15-31 California Legal Forms--Transaction Guide § 31.110

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.110 Claimant

1. Determine whether prospective claimant is entitled to record claim of mechanics' lien [*see § 31.13[2]*].

NOTE:
The prospective claimant must satisfy both of the prerequisites enumerated in (a) and (b), ***below,*** to be able to file a mechanics' lien [*Civ. Code § 3110*].

a. Is prospective claimant one of following?

NOTE:
In addition to those persons enumerated below, an express trust fund and any claimant making site improvements at the owner's instance are entitled to file a mechanics' lien [***see*** *Civ. Code §§ 3111, 3112*; ***see also*** *§ 31.13[2]*].

(1) Mechanic.

(2) Materialman.

(3) Contractor or subcontractor.

(4) Lessor of equipment.

(5) Artisan.

(6) Architect.

(7) Registered engineer.

(8) Licensed land surveyor.

(9) Machinist.

(10) Builder.

(11) Teamster.

(12) Drayman.

(13) Other laborer who does one of the following for work of improvement:
(a) Performs labor;

(b) Bestows skill or other necessary services;

(c) Furnishes materials;

(d) Leases equipment; or

(e) Furnishes appliances, teams, or power.

b. Was work done or were materials furnished at instance of owner or owner's agent?

NOTE:
Work or materials provided after the owner has posted and recorded a timely notice of nonresponsibility were not furnished at the owner's instance [***see*** *Civ. Code § 3129*; ***see also*** *§ 31.132*].

c. Is project private work of improvement?

NOTE:
Mechanics' liens are not available for public works [*Civ. Code § 3109*].

2. Determine whether prospective claimant is entitled to serve stop notice [*see §§ 31.18[1], 31.19[1]*].

NOTE:
The prospective claimant must satisfy the following prerequisites in order to be able to file a stop notice.

a. For private work, is person [*Civ. Code § 3158*]:

(1) Not the original contractor; and

(2) Entitled to mechanics' lien [*see Civ. Code §§ 3110-3112*; *see also* P 1, *above*]?

b. For public work, is person [*Civ. Code § 3181*]:

(1) Not original contractor; and

(2) Either:
(a) Entitled to mechanics' lien [*see Civ. Code §§ 3110-3112*; *see also* P 1, *above*];

(b) Registered hazardous waste hauler [*Pub. Contract Code § 4107.7*; *see Health & Safety Code § 25163*]; or

(c) Furnisher of provisions, provender, or other supplies for work?

3. If work is private work of improvement, ascertain whether claimant should seek recovery by means of mechanics' lien, stop notice, or both.

NOTE:
Mechanics' liens are not available for public works [*Civ. Code § 3109*]. The remedies available under the mechanics' lien law may be pursued simultaneously, since they are cumulative [***see*** *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 61, 95 Cal. Rptr. 673* ; ***see also*** *§ 31.12*]. However, one remedy may be more advantageous than the other.

a. Have other claims with priority to a mechanics' lien been recorded?

NOTE:
The existence of other claims with priority should be ascertained from the county recorder's office before a mechanics' lien is filed. If such other claims exist, it may be advantageous to serve a stop notice instead of or in addition to the lien. For a discussion of the priority of mechanics' liens over other claims, see *§ 31.14[1], [2]*.

b. Are unexpended construction funds available?

NOTE:
A stop notice may have more potential for recovery on the claim when there are construction funds available, since a mechanics' lien will have to compete with a lender's foreclosure on the deed of trust on the property. However, a lien is a better remedy when no unexpended construction funds are available.

c. Has property owner made demand for stop notice [*see § 31.152*]?

NOTE:
If such a demand has been made, the claimant must serve a stop notice within the required deadlines, even if it is not the preferred remedy, or that claimant forfeits any right to a mechanics' lien [***see*** *Civ. Code § 3158*].

4. Determine whether property owner has already filed notice of completion or cessation.

NOTE:
Provided the owner timely notifies the claimant that a notice of completion or cessation has been filed, the time period in which to file a claim of lien or stop notice is 60 days for the original contractor and 30 days for other claimants from the filing of the notice of completion or cessation. If the owner does not

provide this notice, the claimant has 90 days to file a claim of lien [*Civ. Code § 3259.5(a)*]. This does not apply to resident owners of properties consisting of four dwelling units or less [*Civ. Code § 3259.5(b)*]. They have no obligation to notify claimants that a notice of completion or cessation has been recorded. The 60- or 30-day period within which to file a lien claim begins to run when the notice of completion or cessation has been filed [***see*** *Civ. Code § 3116*]. For stop notices on private works, the filing deadlines correspond to those for mechanics' liens [*Civ. Code §§ 3160(b), 3259.5*]. For stop notices on public works, any claimant has 30 days in which to file after recording a notice of completion or cessation [*Civ. Code § 3184*].

5. Ascertain whether claimant is required to file preliminary 20-day notice before filing mechanics' lien or stop notice.

a. For private work, claimant must file notice if claimant [*Civ. Code § 3097(a), (b)*]:

NOTE:
A claimant meeting these requirements who is not an original contractor must give notice to the owner, the original contractor, and the construction lender. An original contractor meeting these requirements is required only to give notice to the owner [*Civ. Code § 3097(a), (b)*].

(1) Is not under direct contract with owner;

(2) Is not performing actual labor for wages [*see Civ. Code § 3089(a)*];

(3) Is not person or entity to whom portion of laborer's compensation is paid by agreement with laborer or laborer's collective bargaining agent [*see Civ. Code §§ 3089(b), 3111*]; and

(4) Furnishes labor, service, equipment, or material for which lien can otherwise be claimed or notice to withhold can otherwise be given.

b. For public work, claimant must file notice if claimant [*Civ. Code § 3098(a)*]:

(1) Furnishes labor or materials;

(2) Has not been paid;

(3) Is entitled to file stop notice or assert claim against payment bond; and

(4) Has no direct contractual relationship with contractor.

NOTE:
The notice requirements do not apply to a laborer, described in *Civ. Code § 3089*, or to an express trust fund, described in *Civ. Code § 3111* [*Civ. Code § 3098(c)*].

6. Determine whether any stop notice should be bonded or unbonded.

NOTE:
A property owner receiving an unbonded notice must withhold construction funds in the amount of the claim [*Civ. Code § 3161*]. A construction lender is required to withhold funds on receiving a bonded stop

notice when the stop notice is filed either by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code § 3162(a)(1)*], or by any person entitled to do so [***see** Civ. Code § 3159(a)*] other than an original contractor and a payment bond was not recorded before the first stop notice was served [*Civ. Code § 3162(a)(2)*; ***see** Civ. Code § 3235* (payment bonds)]. A lender may, but is not required to, withhold funds on receipt of a bonded stop notice when the notice is filed by any person entitled to do so, other than an original contractor, and a payment bond was recorded before the first stop notice was served [*Civ. Code § 3162(a)(2)*].

7. Ascertain whether original contractor has recorded a payment bond.

NOTE:

A construction lender is obligated to withhold funds pursuant to a bonded stop notice filed by an original contractor, regardless of whether a payment bond has previously been recorded [*Civ. Code § 3159(a)(1)*]. However, if a payment bond has been filed and anyone other than an original contractor files a stop notice, whether bonded or unbonded, the lender is not required to withhold funds, but may do so at its option [*Civ. Code § 3159(a)(2)*].

8. Determine whether claimant is entitled to recover on any payment bond.

NOTE:

The claimant must be one of those persons entitled to a claim of lien [***see** Civ. Code §§ 3110-3112*; ***see also** § 31.13[2]*] to recover on a payment bond [*Civ. Code § 3226*].

9. Ascertain whether claimant is an original contractor and is entitled to stop work due to nonpayment by owner [*see Civ. Code § 3260.2*].

NOTE:

This remedy is available only when the construction contract was entered into on or after January 1, 1999 [*Civ. Code § 3260.2(f)*]. For coverage of this remedy, see *§ 31.21*. For the procedural requirements associated with this remedy, see *§§ 31.190* and *31.191*. For an illustrative 10-day stop work order, see *§ 31.214[2]*.

a. Has original contractor not been paid money owed pursuant to written contract for private work of improvement within 35 days of due date?

NOTE:

This 35-day deadline for payment reflects the requirements for progress payments set forth in *Civ. Code § 3260.1*. Under that provision, unless the construction contract specifies otherwise, the owner must pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due as to which there is no good faith dispute between the parties. If there is such a dispute, the owner may withhold from the progress payment an amount equal to no more than 150 percent of the disputed amount [*Civ. Code § 3260.1(b)*; ***see** § 30D.221[1][c]*].

b. Is there a dispute as to original contractor's satisfactory performance?

NOTE:

The remedy is not available if such a dispute exists [*Civ. Code § 3260.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

15-31 California Legal Forms--Transaction Guide § 31.111

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.111 Property Owner

1. Ascertain present status of work of improvement on owner's property.

NOTE:
The status of the project determines the type of remedy available [***see*** P 3, ***below***].

a. Owner has signed construction contract but construction has not commenced.

b. Owner has not signed any contract and has just become aware of work on property.

c. Work has commenced but has not yet ceased.

d. Work has ceased but is not completed.

e. Work has been completed and one or more of following legal actions has been taken:
(1) Lien has been filed.

(2) Stop notice has been served.

(3) Action to enforce claim of lien or stop notice has been filed.

2. Ascertain which of following procedures is most appropriate to protect client's rights at present stage.

a. Obtaining and recording payment bond from original contractor [*see § 31.121*].

NOTE:

The bond is recorded before the work of improvement is commenced [*Civ. Code § 3236*]. The bond should be filed to limit the owner's liability to potential claimants on the work to the contract price [*Civ. Code §§ 3235, 3236*].

b. Posting and recording notice of nonresponsibility [*see § 31.132*].

NOTE:

The notice is posted and recorded after the person asserting nonresponsibility learns of the work of improvement [*Civ. Code § 3094*]. Recording the notice prevents the presumption that all labor or materials on the work were furnished at the instance of the owner. After recordation, the property will not be subject to mechanics' liens [***see*** *Civ. Code § 3129*].

c. Recording notice of cessation [*see § 31.134*].

NOTE:

This notice is recorded when there has been a continuous cessation of labor on the project [*Civ. Code § 3092*]. By filing a notice of cessation, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131*, P 2] or a stop notice [***see*** *§§ 31.150*, P 4 (private work), 31.151, P 5 (public work)].

d. Recording notice of completion [*see § 31.135*].

NOTE:

The notice is recorded after completion of work of improvement [*Civ. Code § 3093*]. By filing a notice of completion, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131*, P 2] or a stop notice [***see*** *§§ 31.150*, P 4 (private work), 31.151, P 5 (public work)].

e. Serving written demand for stop notice on potential lien claimants [*see § 31.152*].

NOTE:

The demand may be made at any time, but a claimant is not required to serve the stop notice until after the work has been completed or after a notice of completion or cessation has been filed [*Civ. Code § 3158*]. An owner should demand a stop notice from potential lien claimants in order to withhold funds from payments due the original contractor and satisfy the claims of subcontractors and materialmen. If the claimant fails to serve a stop notice after the demand, that claimant forfeits any right to a mechanics' lien [***see*** *Civ. Code § 3158*].

f. Recording mechanics' lien release bond [*see § 31.133*].

NOTE:

The bond may be recorded either before or after a claimant has filed an action to enforce the lien [*Civ. Code § 3143*]. The bond should be recorded if the correctness or validity of the lien claim is in dispute, in order to release the real property from the lien [*Civ. Code §§ 3143, 3144.5*].

g. Obtaining and filing stop notice release bond [*see § 31.153*].

NOTE:

The bond should be filed if the correctness or validity of the stop notice or bonded stop notice is in dispute, in order to release funds withheld to respond to stop notice [***see*** *Civ. Code §§ 3171, 3196*].

h. Filing petition for release from mechanics' lien [*see § 31.137*].

NOTE:

The petition should be filed if a claimant fails to bring an action to enforce a lien within the time allowed [*Civ. Code § 3154*; ***see*** *Civ. Code § 3144*].

3. Determine whether appropriate remedy is still available to property owner.

NOTE:

Some owner remedies have strict deadlines, after which they become unavailable. For this reason, the attorney should also anticipate the desirability of a particular remedy and advise the client to notify the attorney on the event, e.g., completion of the project, that starts the deadline period running.

a. For notice of nonresponsibility, have more than 10 days elapsed since owner first became aware of work on site [*Civ. Code § 3094*]?

b. For notice of cessation, have less than 30 days elapsed since there has been a continuous cessation of labor on project [*Civ. Code § 3092*]?

c. For notice of completion, have more than 10 days elapsed since the date of completion of project [*Civ. Code § 3093*]?

d. For petition for decree releasing property from lien, have more than 90 days since filing of lien elapsed without commencement of action to foreclose?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
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B. Preliminary Determinations

15-31 California Legal Forms--Transaction Guide §§ 31.112-31.119

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 31.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Rights and Remedies Under Mechanics' Lien Law

15-31 California Legal Forms--Transaction Guide

AUTHOR: Timothy F. O'Leary Practice Consultant

NOTE:

This Part C contains a general chronological overview of the steps that claimants and property owners must, should, or may take in order to protect their rights at various stages of the construction project. For more specific discussion of these steps, see Parts D (mechanics' liens), E (stop notices), F (payment bonds), and H (10-day stop work order) of this Transaction Guide].



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide to Rights and Remedies Under Mechanics' Lien Law

15-31 California Legal Forms--Transaction Guide § 31.120

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.120 Procedures to Protect Rights of Claimants

1. If claimant is original contractor and wishes to enter into contract for construction of single-family dwelling to be retained by another for at least one year, ensure that contract satisfies requirements of *Bus. & Prof. Code § 7164(b)*, including "Mechanics' Lien Warning."

NOTE:
The warning (1) explains to the owner the nature of a mechanics' lien and (2) provides information to the owner regarding how to protect himself or herself from mechanics' liens [***see*** *Bus. & Prof. Code § 7164(b)(4)*].

2. If claimant is original contractor, before beginning work on project:

a. Obtain and file payment bond for public work if contract involves expenditure over $25,000 ($5,000 for contract with "state entity") [*Civ. Code § 3247(a)*; *see Pub. Contract Code § 7103(d)* (definition of state entity); *see also § 31.170*].

b. Obtain and record payment bond and contract for private work if contract requires contractor to furnish payment bond [*Civ. Code § 3236*; *see § 31.171*].

3. Serve preliminary notice within 20 days after first furnishing labor or services [*Civ. Code § 3097(a), (b)*; *see § 31.130*].

NOTE:
Every claimant other than an original contractor or a laborer as defined by *Civ. Code § 3089* must give the preliminary notice as a prerequisite to recording a mechanics' lien,

filing a stop notice, or asserting a claim against a payment bond [***see*** *Civ. Code § 3097(a), (b)*]. To facilitate this process, the original contractor on a private work of improvement must give any person seeking to serve a preliminary 20-day notice the owner's name and residence address and the lender's name and address [*Civ. Code § 3097(**l**), (m)*]. If an owner obtains construction financing after construction has begun, he or she must also provide the lender's name and address to each person who has given a preliminary 20-day notice [*Civ. Code § 3097(n)*].

4. Record claim of mechanics' lien after original contractor completes contract, or after claimant other than original contractor has ceased furnishing labor, services, equipment, or materials [*Civ. Code §§ 3115, 3116*; *see § 31.131*]:

NOTE:

A contract is complete for purposes of commencing the recordation period under *Civ. Code § 3115* when all work under the contract has been performed, excused, or otherwise discharged [***see*** *Howard S. Wright Construction Co. v. BBIC Investors (2006) 136 Cal. App. 4th 228, 241, 38 Cal. Rptr. 3d 769* (recording of mechanic's lien was not premature because contract was "complete" on anticipatory breach of other contracting party)].

The deadline for recording may be 60 days for the original contractor, 30 days for other claimants, or 90 days for both, depending on whether a notice of completion or cessation is recorded, and whether the owner notifies the original contractor and claimants who have recorded preliminary 20-day lien notices that a notice of completion or cessation has been recorded [***see*** *Civ. Code §§ 3115, 3116, 3259.5*; ***see also*** *§ 31.131*, P 2].

5. If claimant is original contractor and has not been paid within 35 days of deadline for payment of any amount governed by written contract entered into on or after January 1, 1999, and no dispute exists as to claimant's satisfactory performance, serve 10-day stop work order on owner [*see Civ. Code § 3260.2*; *see also §§ 31.190, 31.191*].

6. Serve stop notice or bonded stop notice after completion or cessation of work.

NOTE:

A stop notice requires the construction lender or owner to withhold funds in the amount of the claim, instead of paying them out to the original contractor. If the project is a private work, the stop notice must be served during the same period in which lien claims must be recorded [*Civ. Code § 3160(b)*; ***see*** *§ 31.150*]. If the project is a public work, the deadline may be 30 or 90 days, depending on whether a notice of completion or cessation has been filed and whether or not the owner has notified the claimant that a notice of completion or cessation has been filed [***see*** *Civ. Code §§ 3184, 3259.5*; ***see also*** *§ 31.151*].

7. If original contractor wishes to challenge stop notice, serve affidavit stating grounds for challenge [*Civ. Code § 3197*; *see § 31.155*, P 1].

8. If claimant is served with original contractor's affidavit challenging stop notice, serve counteraffidavit rebutting allegations [*Civ. Code § 3200*; *see § 31.155*, P 2].

9. If there is payment bond on project and preliminary 20-day notice was not given, draft and serve written notice on surety and bond principal within either [*Civ. Code §§ 3242(b)* (private works), 3252(b) (public works)]:

a. Within 15 days after notice of completion is recorded; or

b. If no notice of completion is recorded, within 75 days after completion of work of improvement.

NOTE:
For a form for the written notice from the claimant to the surety and bond principal, see *§ 31.241[2]*.

10. If claim is paid, execute written waiver and release [*see Civ. Code § 3262*; *see also § 31.136*].

11. If claim remains unpaid, bring action to foreclose mechanics' lien within 90 days after recording claim of lien [*Civ. Code § 3144*; *see § 31.138*].

NOTE:
The time for filing the complaint may be extended by giving credit and recording a notice of extension of credit [*Civ. Code § 3144(a)*; ***see*** *§ 31.138*, P 1].

12. Record lis pendens after filing complaint to foreclose lien [*Civ. Code § 3146*; *see § 31.138*, P 2].

13. Bring action to enforce stop notice at any time after 10 days from date of service [*Civ. Code §§ 3172, 3210*; *see §§ 31.154, 31.155*].

NOTE:
The deadline for bringing an action is 90 days following the expiration of the period for recording claims of liens for private works [*Civ. Code § 3172*; ***see*** *§ 31.154*], and 90 days following the expiration of the period for filing stop notices for public works [*Civ. Code § 3210*; ***see*** *§ 31.155*].

14. Give notice of commencement of action on stop notice within five days after bringing action [*Civ. Code §§ 3172, 3211*; *see §§ 31.154*, P 2, *31.155*, P 4].

15. Bring action on payment bond after completion of work of improvement [*Civ. Code § 3249*].

NOTE:
The deadline for filing an action depends on whether the project is a private or public work [***see*** *§ 31.154*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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C. Procedural Guide to Rights and Remedies Under Mechanics' Lien Law

15-31 California Legal Forms--Transaction Guide § 31.121

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.121 Procedures to Protect Rights of Owners

1. Obtain payment bond from original contractor and record bond along with contract before private work of improvement is commenced [*Civ. Code § 3236*; *see § 31.171*].

NOTE:
Recordation of the bond limits the owner's liability on the work to the contract price [*Civ. Code §§ 3235, 3236*].

2. Post and record notice of nonresponsibility within 10 days after person asserting nonresponsibility learns of work of improvement [*Civ. Code § 3094*; *see § 31.132*].

NOTE:
Recording the notice prevents the presumption that all labor or materials on the work were furnished at the instance of the owner. After recordation, the property will not be subject to mechanics' liens [***see*** *Civ. Code § 3129*].

3. Record notice of cessation if there has been a continuous cessation of labor for at least 30 days [*Civ. Code § 3092*; *see § 31.134*].

NOTE:
By filing a notice of cessation, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131,* P 2] or a stop notice [***see*** *§§ 31.150,* P 4 (private work), 31.151, P 5 (public work)].

4. Record notice of completion within 10 days after completion of work of improvement [*Civ. Code §*

3093; *see § 31.135*].

NOTE:

By filing a notice of completion, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131,* P 2] or a stop notice [***see*** *§§ 31.150,* P 4 (private work), *31.151,* P 5 (public work)].

5. Serve written demand for stop notice on potential lien claimants on completion of work or on filing of notice of completion or cessation [*Civ. Code § 3158*; *see § 31.152*].

NOTE:

An owner may demand a stop notice from potential lien claimants in order to withhold funds from payments due the original contractor and satisfy the claims of subcontractors and materialmen. The demand may be made at any time, but a claimant is not required to serve the stop notice until after the work has been completed or after a notice of completion or cessation has been filed [*Civ. Code § 3158*]. If the claimant fails to serve a stop notice after the demand, that claimant forfeits any right to a mechanics' lien [***see*** *Civ. Code § 3158*].

6. Record mechanics' lien release bond if correctness or validity of lien claim is in dispute, in order to release real property from lien [*Civ. Code §§ 3143, 3144.5*; *see § 31.133*].

NOTE:

The bond may be recorded either before or after the filing of an action to enforce the lien [*Civ. Code § 3143*].

7. Obtain and file stop notice release bond if correctness or validity of stop notice or bonded stop notice is in dispute, in order to release funds withheld to respond to stop notice [*see Civ. Code §§ 3171, 3196*; *see also § 31.153*].

8. File petition for release from mechanics' lien if claimant fails to bring action to enforce lien within time allowed [*Civ. Code § 3154*; *see Civ. Code § 3144*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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C. Procedural Guide to Rights and Remedies Under Mechanics' Lien Law

15-31 California Legal Forms--Transaction Guide §§ 31.122-31.129

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 31.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART III. TRANSACTION GUIDE
D. Procedural Guide to Mechanics' Liens

15-31 California Legal Forms--Transaction Guide § 31.130

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.130 Preliminary 20-Day Notice

1. If required to do so [*see § 31.110*, P 5], draft preliminary 20-day notice containing [*Civ. Code § 3097(c)*; *see § 31.202[2]*]:

NOTE:
Every claimant other than an original contractor or a laborer as defined by *Civ. Code § 3089* must give the preliminary notice [***see*** *Civ. Code § 3097(a), (b)*]. If an invoice for materials contains the following information, a copy of the invoice served in the prescribed manner [***see*** *§ 31.120*, P 3] will be sufficient notice [*Civ. Code § 3097(c)*].

a. General description of labor, services, equipment, or materials furnished or to be furnished.

b. If there is a construction lender, an estimate of total price.

c. Name and address of person furnishing labor, service, equipment, or materials.

d. Name of person who contracted for purchase of labor, service, equipment, or materials.

e. Description of jobsite sufficient for identification.

f. Statutory statement in boldface type.

NOTE:

For the statutory "Notice to Property Owner" [*Civ. Code § 3097(c)(5)*], see *§ 31.202[2]*.

g. If notice is given by subcontractor who has failed to pay all compensation due to his or her laborers on the job, identity and address of any laborer and any express trust fund [*see Civ. Code § 3111*] to whom employer payments are due.

NOTE:
For an example of the notice to a union trust fund of the delinquent payment of supplemental fringe benefits, see *§ 31.213[2]*.

2. If desired, draft cover letter to accompany notice [*see § 31.203[2]*].

3. Serve notice no later than 20 days after claimant first furnishes labor, services, equipment, or materials to jobsite.

NOTE:
If claimant is certificated architect, registered engineer, or licensed land surveyor, notice must be given no later than 20 days after work of improvement has commenced [*Civ. Code § 3097(c)*].

a. Serve notice on following persons [*Civ. Code § 3097(a), (b)*]:

(1) If claimant is not under direct contract with owner and is not original contractor or laborer as defined by *Civ. Code § 3089*, on:
(a) Owner or reputed owner;

(b) Original contractor or reputed contractor; and

(c) Construction lender or reputed lender.

(2) If claimant is under direct contract with owner and is not original contractor or laborer as defined by *Civ. Code § 3089*, on construction lender or reputed construction lender.

NOTE:
To accommodate those entitled to give preliminary 20-day notice in connection with private works of improvement, the original contractor must make the owner's and lender's information available to anyone seeking to serve a preliminary 20-day notice [*Civ. Code § 3097(**l**),(m)*].

b. Serve notice in following manner [*Civ. Code § 3097(f)*]:

NOTE:
A claimant need only give one notice with regard to all materials, service, labor, or equipment furnished for the entire structure or work of improvement as a whole, unless it is furnished under contracts with more than one subcontractor. In the latter case, the notice requirements must be met with regard to materials, services, labor, or equipment furnished to each contractor [*Civ. Code § 3097(g)*].

(1) If person to be notified resides in California:

(a) By personal delivery;

(b) By leaving notice at residence or place of business with person in charge; or

(c) By first-class registered or certified mail, addressed to recipient at recipient's residence, business address, address shown on building permit on file with authority issuing permit, or address recorded on mortgage, deed of trust, or other instrument securing construction loan [*see Civ. Code § 3097(j)*].

(2) If recipient resides outside California and cannot be served by manner prescribed for residents [*see* (1), *above*], by first class certified or registered mail addressed to:

(a) Construction lender; or

(b) Original contractor.

4. Complete proof of service [*Civ. Code § 3097.1*].

NOTE:
The attorney should retain the proof of service for use in an action to foreclose the mechanics' lien [***see** § 31.138*] or enforce payment on the stop notice [***see** §§ 31.154* (private work), *31.155*, P 3 (public work)].

a. If served by mail, include both:

(1) Proof of service affidavit [*see § 31.204[2]*] showing:
(a) Time, place, and manner of service.

(b) Facts showing that service was made in accordance with law.

(c) Name, address, and title or capacity, if appropriate, of person served.

(2) One of following:

(a) Return receipt of registered or certified mail;

(b) Photocopy of record of delivery and receipt maintained by post office showing date of delivery and person to whom delivered; or

(c) Returned envelope if not delivered.

b. If served by personal delivery or by leaving at address or place of business, by proof of service affidavit [*see* (a)(1), *above*].

5. After notice has been served, notify claimant of owner's obligation to provide claimant with name and address of lender of any construction loan obtained after commencement of construction [*Civ. Code § 3097(n)*].

6. If dealing with private work of improvement, consider filing notice with county recorder in county in which any portion of property is located.

NOTE:
Under *Civ. Code § 3097(o)*, any person who has served a preliminary 20-day notice in connection with a

private work of improvement may file the notice with the county recorder in any county in which any portion of the property is located [***see*** *Civ. Code § 3097(o)(1)* (required information); ***see also*** *§ 31.202[1][j]*]. Following the filing, the recorder will mail to the claimant a notification when any notice of completion or notice of cessation is recorded on the property [*Civ. Code § 3097(o)(2)*]. For further discussion, see *§ 31.202[1][j]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.131

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.131 Claim of Lien

1. Draft written claim of lien containing [*Civ. Code § 3084*; *see §§ 31.220[2]*, *31.221[2]*]:

a. Statement of amount of claimant's demand after deducting all just credits and offsets.

NOTE:
The lien must be for the lesser of the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed on by the claimant and the other party to the contract. In addition, the demand may include any amount due because of (1) a written contract modification, or (2) rescission, abandonment, or breach of the contract. In the case of rescission, abandonment, or breach, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, and materials furnished by the claimant [*Civ. Code § 3123*; ***see*** *§ 31.13[4]*].

b. Name of owner or reputed owner, if known.

c. General statement of kind of labor, services, equipment, or materials furnished by claimant.

d. Name of person by whom claimant was employed or to whom claimant furnished labor, services, equipment, or materials.

e. Description of site sufficient for identification.

f. Signature and verification of claimant or claimant's agent.

2. Record claim of lien.

NOTE:
Although the claim must be recorded, it does not need to be served on any party.

a. If claimant is original contractor, record claim after completion of contract but before expiration of [*Civ. Code §§ 3115, 3259.5*]:

(1) 90 days after completion of work of improvement, if no notice of completion or cessation has been recorded, or if owner failed to notify contractor that notice of completion or cessation had been recorded.

(2) 60 days after notice of completion or cessation has been recorded if notice of completion or cessation has been filed and owner has notified contractor of that fact.

(3) 60 days after notice of completion or cessation has been recorded if owner owns residential property with four or fewer residential units.

b. If claimant is not original contractor, record claim after claimant has ceased furnishing labor, services, equipment, or materials, but before expiration of [*Civ. Code §§ 3116, 3259.5*]:

(1) 90 days after completion of work of improvement, if no notice of completion or cessation has been recorded, or if owner failed to notify claimant that notice of completion or cessation had been recorded.

(2) 30 days after notice of completion or cessation has been recorded if notice of completion or cessation has been filed and owner has notified contractor of that fact.

(3) 30 days after notice of completion or cessation has been recorded if owner owns residential property with four or fewer residential units.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.132

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.132 Notice of Nonresponsibility

NOTE:

Every work of improvement constructed on any land, and all work or labor performed or materials furnished in connection with the knowledge of the owner or person claiming an estate will be held to have been done at the instance of that owner or person, and will therefore be subject to mechanics' liens, unless the owner or person with an interest files a notice of nonresponsibility [*Civ. Code § 3129*].

1. Draft notice of nonresponsibility including [*Civ. Code § 3094*; *see § 31.201[2]*]:

a. Description of site sufficient for identification.

b. Name and nature of title or interest of person giving notice.

c. Name of purchaser under contract, if any, or lessee if known.

d. Statement that person giving notice will not be responsible for any claims arising from work of improvement.

2. Within 10 days after person claiming nonresponsibility obtains knowledge of work of improvement [*Civ. Code § 3094*]:

a. Post notice in conspicuous place on site.

b. Record notice in office of county recorder in county where site is located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.133

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.133 Mechanics' Lien Release Bond

NOTE:
If the owner of the property, the owner of any interest in the property, or any original contractor or subcontractor disputes the correctness or validity of any claim of lien, that person may record a surety bond, either before or after commencement of an action to enforce the lien. When this bond is filed, the real property is released from the lien and from any action brought to foreclose the lien [*Civ. Code § 3143*].

1. Record surety bond that is [*Civ. Code § 3143*; *see § 31.250*]:

a. In a penal sum equal to either:
(1) One and one-half times amount of claim; or

(2) One and one-half times amount allocated in claim of lien to parcel of property sought to be released.

b. Conditioned for payment of any sum that claimant may recover on claim, together with any costs of suit in action.

2. Give notice of recording to lienholder by mailing copy of bond to lienholder at address appearing on lien [*Civ. Code § 3144.5*]:

a. By certified or registered mail.

b. Return receipt requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.134

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.134 Notice of Cessation

NOTE:
By filing a notice of cessation, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131*, P 2] or a stop notice [***see*** *§§ 31.150*, P 4 (private work), *31.151*, P 5 (public work)].

1. Draft notice of cessation, including all of following [*Civ. Code § 3092*; *see § 31.211[2]*]:

a. Approximate date when labor ceased.

b. Statement that cessation has continued until recording of notice of cessation.

NOTE:
For the notice to be effective, there must have been a continuous cessation of labor for at least 30 days before recordation [*Civ. Code § 3092*].

c. Name and address of owner.

NOTE:
For purposes of notices of completion or cessation, an "owner" is the person who causes a building, improvement, or structure to be constructed, altered, or repaired, whether the interest or estate is in fee, as a vendee under a contract of purchase, as lessee, or other interest or estate less than fee. If the interest is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the owner [*Civ. Code §§ 3092(g)*, *3093*].

d. If notice is signed by less than all of cotenants, names and addresses of all cotenants.

e. Nature of interest or estate of owner.

f. Description of site sufficient for identification, including street address, if any.

NOTE:
If a sufficient legal description of the site is given, the validity of the notice will not be affected by the fact that the street address is erroneous or omitted [*Civ. Code § 3092(e)*].

g. Name of original contractor, if any, for work of improvement as a whole.

2. Have owner or owner's agent sign and verify notice.

3. Record notice in county recorder's office where jobsite is located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.135

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.135 Notice of Completion

NOTE:

By filing a notice of completion, a property owner shortens the time in which a claimant may file a claim of lien [***see*** *§ 31.131*, P 2] or a stop notice [***see*** *§§ 31.150*, P 4 (private work), *31.151*, P 5 (public work)]. For a public work, this notice is also known as a notice of acceptance [*Civ. Code § 3184*]. For a form for acceptance and completion by a public entity, see *§ 31.212[2]*.

1. Draft notice of completion containing [*Civ. Code § 3093*; *see § 31.210*]:

a. Date of completion (other than cessation of labor).

NOTE:

Although "completion" of a private work means actual completion, the following will be deemed equivalent to completion: (1) the occupation or use of a work of improvement by the owner, or the owner's agent, accompanied by a cessation of labor; (2) the acceptance by the owner or the owner's agent of the work of improvement; and (3) after commencement of a work of improvement, a cessation of labor for a continuous period of 60 days, or a cessation of labor for a continuous period of 30 days or more if the owner files a notice of cessation [*Civ. Code § 3086*]. In the case of a public works project, completion is deemed to be the date of acceptance by the public agency responsible for the project rather than the date of actual completion. Except for certain state contracts [***see*** *Pub. Contract Code §§ 10100-10105*], a cessation of labor for a continuous period of 30 days will also be deemed a completion of the work [*Civ. Code § 3086(c)*].

An erroneous date will not affect the validity of the notice if the correct date of

completion is within 10 days preceding the date of recording [*Civ. Code § 3093(a)*; ***see*** *Fontana Paving, Inc. v. Hedley Brothers, Inc. (1995) 38 Cal. App. 4th 146, 154, 45 Cal. Rptr. 2d 295* (notice recorded more than 10 days after completion was invalid)].

b. Name and address of owner.

c. Nature of owner's interest or estate.

d. Description of site sufficient for identification, including street address, if any.

NOTE:

If a sufficient legal description of the site is given, the validity of the notice will not be affected by an absent or erroneous street address [*Civ. Code § 3093(d)*].

e. Name of original contractor, if any.

NOTE:

If the notice covers only completion of a contract for a particular portion of the work [***see*** *Civ. Code § 3117*], the name of the original contractor under the contract and a general statement of the kind of work done or the materials furnished under the contract must be included [*Civ. Code § 3093(e)*].

f. If there is more than one owner, and notice is signed by less than half of all co-owners, names and addresses of all co-owners.

NOTE:

For the definition of an "owner" for purposes of notices of completion or cessation, see *§ 31.134*, P 1c.

g. If notice is signed by successor in interest, names and addresses of transferor(s).

2. Record notice in county recorder's office where jobsite is located within 10 days after completion of work [*Civ. Code § 3093(e)*].

NOTE:

If a work of improvement is made in whole or in part in accordance with two or more original contracts, each covering a particular portion of the work, the owner may record a notice of completion within 10 days after completion of a contract for a particular portion of the work of improvement [*Civ. Code § 3117*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.136

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.136 Filing Releases on Payment

NOTE:
The person holding construction funds may require the original contractor to sign a declaration to procure payment [***see*** *§ 31.253[2]*] before releasing any funds.

1. If claimant is original contractor, execute waiver of lien [*see § 31.254[2]*] after receiving payment in full.

2. If claimant is party other than original contractor and waiver is required for payment, execute [*Civ. Code § 3262*]:

a. Conditional waiver and release on progress payment [*see § 31.255[2]*], if release is to become effective when bank pays check.

b. Unconditional waiver and release on progress payment [*see § 31.256[2]*], if release is to be effective on execution.

c. Conditional waiver and release on final payment [*see § 31.257[2]*], if release is to become effective when bank pays check.

d. Unconditional waiver and release on final payment [*see § 31.258[2]*], if release is to be effective on execution.

3. On full payment of claim, execute and record legal release of claim of mechanics' lien [*see § 31.252[2]*] to clear title to property subject to lien.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.137

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.137 Petition for Release of Property From Lien

1. Draft verified property owner's petition for release from lien if claimant fails to bring action to enforce lien within time allowed [*Civ. Code § 3154*; *see Civ. Code § 3144*].

NOTE:
For examples and discussion of the verified petition, see California Forms of Pleading & Practice, Ch. 361, ***Mechanics' Liens*** (Matthew Bender).

2. File petition with proper court.

NOTE:
After filing, the court will set a hearing within the next 30 days. If judgment is rendered for the property owner, the filing of a certified copy of the decree will release the property from the lien [*Civ. Code § 3154(c), (e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.138

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.138 Foreclosing Mechanics' Lien

1. Within 90 days after recording claim of lien, either [*Civ. Code § 3144*]:

NOTE:
Unless one of these actions is taken within the 90-day period, the lien automatically becomes null and void [***see*** *Civ. Code § 3144*].

a. File complaint to foreclose lien in proper court [*Civ. Code § 3144(a)*]; or

NOTE:
For examples and discussion of the complaint to foreclose, see California Forms of Pleading & Practice, Ch. 361, ***Mechanics' Liens*** (Matthew Bender).

b. Give extension of credit and record notice of extension of credit [*see § 31.222[2]*].

NOTE:
If a notice of extension of credit is recorded, the mechanics' lien will continue in force for a period of 90 days after the expiration of the credit, but will not continue longer than one year after the original date of the completion of the work of improvement [***see*** *Civ. Code § 3144*].

2. After filing complaint, record notice of lis pendens in county recorder's office in county where property is located [*Civ. Code § 3146*; *see § 31.223[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide §§ 31.139-31.149

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.139[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Procedural Guide to Stop Notices

15-31 California Legal Forms--Transaction Guide § 31.150

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.150 Filing Stop Notice on Private Work

1. If required to do so [*see § 31.110,* P 3], draft and serve preliminary 20-day notice [*see § 31.202[2]*] and complete proof of service [*see § 31.204[2]*] within required period [*Civ. Code § 3160(a)*; *see § 31.130*].

NOTE:
Every stop notice claimant other than an original contractor or a laborer as defined by *Civ. Code § 3089* must give the preliminary notice [*Civ. Code § 3097(a), (b)*].

2. Draft stop notice including [*Civ. Code §§ 3103, 3160(b)*; *see § 31.230[2]*]:

NOTE:
No notice will be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information required [*Civ. Code § 3103*].

a. Type of labor, services, equipment, or materials furnished or agreed to be furnished by claimant.

b. Name of person to or for whom labor, services, equipment, or materials were furnished.

c. Value, stated as accurately as possible, of:
(1) Portion of labor, services, equipment, or materials done or furnished; and

(2) All labor, services, equipment, or materials agreed to be performed or furnished.

d. Name and address of claimant.

3. If stop notice will be bonded [*see § 31.110*, P 6; *see also § 31.18[2]*], obtain bond that [*Civ. Code § 3083*; *see § 31.232[2]*]:

a. Has good and sufficient sureties;

b. Is in penal sum equal to one and one-quarter times amount of claim; and

c. Is conditioned that if defendant recovers judgment in an action brought on the claim or lien filed by claimant, claimant will pay all costs and damages resulting from garnishment effected by claim or lien.

4. Serve stop notice during period for recording lien claims [*see § 31.131*, P 2] in following manner [*Civ. Code § 3103*]:

NOTE:
Any stop notice may be served by registered or certified mail with the same effect as by personal service [*Civ. Code § 3103*].

a. Serve notice on owner by either:

(1) Personal delivery;

(2) Leaving notice at owner's residence;

(3) Leaving notice at owner's place of business with some person in charge; or

(4) Delivery to owner's architect, if any.

b. Serve notice on construction lender as follows:

(1) If construction lender is holding construction funds and maintaining branch offices, by delivery to manager or other responsible officer or person at office or branch administering or holding construction funds.

(2) If stop notice is bonded, by either [*Civ. Code § 3083*]:

NOTE:
If the notice is delivered or sent to any institution or organization maintaining branch offices, it will not be effective unless delivered or sent to the office or branch administering or holding the construction funds [*Civ. Code § 3083*].

(a) Delivery to manager or other responsible officer or person at office of construction lender; or

(b) By registered or certified mail to office of construction lender.

5. If construction lender serves notice of objection to sureties on bonded stop notice [*see § 31.233[2]*], substitute another bond executed by corporate surety licensed to write bonds in California within 10 days after notice received [*Civ. Code § 3163*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Procedural Guide to Stop Notices

15-31 California Legal Forms--Transaction Guide § 31.151

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.151 Filing Stop Notice on Public Work

1. If required to do so [*see § 31.110*, P 3], draft written preliminary 20-day notice, stating with substantial accuracy [*Civ. Code § 3098*; *see § 31.202[2]*]:

NOTE:
Any claimant not under contract with the original contractor (other than a laborer or express trust fund) must give the preliminary notice [*Civ. Code § 3098(a)*].

a. General description of labor, services, equipment, or materials furnished or to be furnished.

b. Name of party to whom it was furnished.

NOTE:
If labor, service, equipment, or materials are furnished to a jobsite by a claimant who did not give a preliminary notice, the claimant is not precluded from subsequently filing a preliminary notice. The claimant will, however, only be entitled to file a stop notice only for labor, service, equipment, or material furnished within 20 days before service of the preliminary notice and any time thereafter [*Civ. Code § 3098(d)*].

2. If desired, draft cover letter to accompany preliminary notice [*see § 31.203[2]*].

3. Serve preliminary notice within 20 days after claimant has first furnished labor, services, equipment, or materials to jobsite, to [*Civ. Code § 3098(a)*]:

a. Contractor, by either:

(1) Personal service; or

(2) First-class, registered, or certified mail addressed to contractor at:
(a) Contractor's residence;

(b) Any place contractor maintains an office; or

(c) Any place contractor conducts business.

b. Public agency concerned.

NOTE:
If the public work is constructed by the Department of Public Works or the Department of General Services the notice must be addressed to office of the disbursing officer of the department constructing the work or personally served on that officer [*Civ. Code § 3098(a)*].

4. Draft stop notice [*see § 31.150*, P 2; *see also §§ 31.230[2], 31.231[2]*].

5. Serve stop notice:

a. Serve notice within applicable time period [*Civ. Code § 3184*]:

NOTE:
The public entity must give notice to the claimant of the expiration of the period for filing stop notices no later than 10 days after the filing of a notice of completion, after the cessation of labor has been deemed a completion of the public work, or after the acceptance of completion, whichever is later. However, the notice is only required if the claimant has paid the public entity a sum of $2 at the time of filing the stop notice [*Civ. Code § 3185*].

(1) If notice of acceptance [*see § 31.212[2]*] or cessation [*see § 31.211[2]*] has been recorded, serve notice within 30 days after recordation.

(2) If no notice of completion or cessation has been recorded, serve notice within 90 days after completion or cessation [*Civ. Code § 3184(b)*].

b. Serve notice on following [*Civ. Code § 3103*]:

(1) If work is for state, director of department that let contract.

(2) If work is for entity other than state:
(a) Office of controller, auditor, or other public disbursing officer who has duty to make payments under provisions of contract; or

(b) Commissioners, managers, trustees, officers, board of supervisors, board of trustees,

common council, or other body by whom contract was awarded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & Subcontractors



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15-31 California Legal Forms--Transaction Guide § 31.152

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.152 Demand for Stop Notice

NOTE:

An owner may demand a stop notice from potential lien claimants to withhold funds from payments due the original contractor and satisfy the claims of subcontractors and materialmen. If a claimant fails to serve a stop notice after the demand, that claimant forfeits any right to a mechanics' lien [***see*** *Civ. Code § 3158*; ***see also*** *§ 31.234[1]*].

1. Draft written demand for stop notice [*Civ. Code § 3158*; *see § 31.234[2]*].

2. Serve written demand on any potential lien claimants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
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E. Procedural Guide to Stop Notices

15-31 California Legal Forms--Transaction Guide § 31.153

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.153 Stop Notice Release Bond

1. For private work:

NOTE:
If the owner, construction lender, any original contractor, or subcontractor disputes the correctness or validity of any stop notice or bonded stop notice, that person may file a bond to release the funds withheld to respond to the stop notice [***see*** *Civ. Code § 3171*].

a. Obtain bond that is [*Civ. Code § 3171*; *see § 31.251[2]*]:
(1) Executed with good and sufficient sureties.

(2) In penal sum equal to one and one-quarter times amount stated in stop notice or bonded stop notice.

(3) Conditioned for payment of any sum not exceeding penal obligation of bond that claimant may recover on claim, together with costs of suit if recovered.

b. File bond with person on whom stop notice was served.

2. For public work:

NOTE:
If original contractor or subcontractor disputes the correctness, validity, or enforceability of any stop notice, the public entity may permit that person to file a bond with the entity to release any money or

bonds (if issued in payment for the work) withheld from the original contractor on account of the stop notice [*Civ. Code § 3196*].

a. Obtain bond that is [*Civ. Code § 3196*]:

(1) Executed by corporate surety;

(2) In amount equal to 125 percent of claim stated in stop notice; and

(3) Is conditioned for payment of any sum that claimant recovers on claim, together with costs of suit if claimant recovers.

b. File bond with public entity.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.154

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.154 Enforcing Stop Notice on Private Work

1. Bring action to enforce payment of claim within following time periods [*Civ. Code § 3172*]:

NOTE:
No funds will be withheld under a stop notice after expiration of the 90-day period unless an action is commenced within that time. If an action is not commenced, the stop notice will cease to be effective and the money withheld will be paid or delivered to the contractor or other person to whom it is due [*Civ. Code § 3172*].

a. At any time after 10 days from date of service; and

b. No later than 90 days following expiration of the period for recording claims of liens [*see § 31.121*, P 2].

2. Give notice of commencement of action [*see § 31.237[2]*] within five days after commencement to same persons and in same manner provided for service of a stop notice or bonded stop notice [*Civ. Code § 3172*; *see § 31.150*, P 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Procedural Guide to Stop Notices

15-31 California Legal Forms--Transaction Guide § 31.155

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.155 Enforcing and Contesting Stop Notice on Public Work

1. If original contractor wishes to challenge stop notice [*Civ. Code § 3197*]:

a. Draft affidavit containing [*Civ. Code § 3198*; *see § 31.235[2]*]:
(1) Allegations of legal grounds on which contractor challenges stop notice;

NOTE:
An original contractor may assert that the claim on which the stop notice is based is not within the mechanics' lien law, that the claimant is not a proper claimant, that the amount of the claim is excessive, or that there is no basis in law for the claim [*Civ. Code § 3197*].

(2) All facts in support of contractor's allegations;

(3) Demand for release of all or portion of money or bonds alleged to be improperly withheld or excessive; and

(4) Address of contractor for purpose of service by mail of notices or legal documents.

b. Serve affidavit and copy on public entity.

NOTE:
The public entity must then serve the claimant with a copy of the affidavit and a written notice stating that it will release the money or bonds unless the claimant files a counteraffidavit within a specified time period [*Civ. Code § 3199*].

2. If claimant has been served with original contractor's affidavit challenging stop notice [*see § 31.235[2]*]:

a. Draft counteraffidavit setting forth [*Civ. Code § 3200*; *see § 31.236[2]*]:

NOTE:
If no counteraffidavit is filed, the public entity will release the money or bonds without further notice to the claimant [*Civ. Code § 3200*].

(1) Details of claim of lien.

(2) Specific basis on which claimants contests or rebuts allegations of original contractor's affidavit.

(3) Proof of service of copy of counteraffidavit on original contractor.

b. Serve counteraffidavit within time period specified in affidavit on:

(1) Public entity; and

(2) Original contractor.

NOTE:
After a counteraffidavit has been filed, either the original contractor or the claimant may file an action in superior court for a declaration of the parties' respective rights [*Civ. Code § 3201*].

3. Bring action to enforce stop notice within following time periods [*Civ. Code § 3210*]:

a. At any time after 10 days from date of service of stop notice on public entity.

b. No later than 90 days following expiration of period for filing stop notices [*see Civ. Code § 3184*].

NOTE:
No money or bond will be withheld under a stop notice after the 90-day period expires, unless the claimant commences proceedings to enforce the claim in a proper court. If an action is not brought within that period, the notice will cease to be effective and the moneys or bonds withheld will be paid or delivered to the contractor or other person to whom they are due [*Civ. Code § 3210*].

4. Give notice of commencement of action [*see § 31.237[2]*] to public entity, in same manner as stop notice, within five days after commencement of action [*Civ. Code § 3211*; *see § 31.151*, P 5].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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E. Procedural Guide to Stop Notices

15-31 California Legal Forms--Transaction Guide §§ 31.156-31.169

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 31.156[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.170

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.170 Filing and Approval of Bond on Public Work

NOTE:

Every original contractor who is awarded a contract by a public entity involving an expenditure in excess of $25,000 ($5,000 for a contract with a "state entity") [***see*** *Pub. Contract Code § 7103(d)* (definition)] for any public work must file a payment bond with the public entity before beginning work on the project [*Civ. Code § 3247(a)*]. Providers of architectural, engineering, and land surveying services are excluded from this requirement [*Civ. Code § 3247(c)*]. Although there is no statutory bond requirement on private works, property owners are entitled to require that the original contractor furnish a bond [***see*** *Civ. Code § 3236*; ***see also*** *§ 31.22[3]*] and customarily do make this requirement in construction contracts [***see*** *§ 31.121*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of the bond [***see*** *Code Civ. Proc. § 995.210*; ***see also*** *§ 31.15[3]*]. However, the payment bond cannot be in the form of a deposit in lieu of a bond [*Civ. Code § 3248(d)*].

1. Obtain payment bond rather than cash deposit [*Civ. Code § 3248(d)*].

2. Ensure that bond [*Civ. Code § 3248(a)-(c)*; *see § 31.240[2]*]:

a. Is in amount not less than 100 percent of total amount payable by terms of contract.

b. Provides that surety will pay any of following if original contractor fails to do so:
(1) Any person entitled to give public works stop notice [*Civ. Code § 3181*; *see § 31.18[1]*].

(2) Amounts due under Unemployment Insurance Code with regard to work or labor performed by claimant.

(3) Any amount required to be deducted, withheld, and paid over to Franchise Tax Board from wages of employees of contractor and subcontractor [*Unemp. Ins. Code § 13020*].

c. Provides for reasonable attorneys' fee to be fixed by court if suit is brought on bond.

d. Inures to benefit of persons entitled to give public works stop notice [*see Civ. Code § 3181*] so as to give right of action to those persons (or their assigns) if suit is brought on bond.

3. Obtain approval of bond from officer or public entity that awarded contract [*Civ. Code § 3247(a)*].

NOTE:

Unless a payment bond is filed and approved, no claim in favor of the original contractor arising under the contract may be audited, allowed, or paid by the public entity or officer awarding the contract [*Civ. Code § 3251*].

4. File bond with officer or public entity that awarded contract [*Civ. Code § 3247(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance Bonds



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F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.171

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.171 Obtaining Bond on Private Work

NOTE:

Although a payment bond is not required by statute on private works as it is on large public works [*Civ. Code § 3247(a)*; ***see*** *§ 31.150*], most property owners require the original contractor to furnish the bond. For examples of payment bonds on private works, see *Ch. 79,* ***Suretyship, Guaranty, and Indemnity****, §§ 79.244, 79.245*

1. Ensure that construction contract of property owner requires payment bond of at least 50 percent of contract price from original contractor.

2. Record contract and payment bond in county recorder's office in county where property is located before work of improvement is commenced [*Civ. Code § 3236*].

NOTE:

If the property owner records the payment bond and contract in the recorder's office before the work of improvement is commenced, then a court, when it is equitable to do so, must restrict the recovery under lien claims to an aggregate amount equal to the amount found to be due from the owner to the original contractor, and render judgment against the original contractor and the contractor's sureties for any deficiency or difference that may remain between the amount found due to the original contractor and the whole amount found to be due to claimants [*Civ. Code § 3235*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.172

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.172 Recovery on Bond for Public Work

NOTE:

To enforce a claim on any payment bond given in connection with a public work contract entered into on or after January 1, 1995, a claimant must give the same 20-day public works preliminary notice that is required before filing a stop notice on a public work [*Civ. Code § 3252(a)*; ***see*** *Civ. Code § 3098*]. This procedure is described in *§ 31.151*, PP 1-3. If a 20-day preliminary notice was not given, a claim may nonetheless be enforced as described below.

1. If no preliminary 20-day notice (public work) was given, draft written notice to surety and bond principal including [*Civ. Code § 3227(b)*]:

a. Kind of labor, services, equipment, or materials that claimant furnished or agreed to furnish;

b. Name of person to or for whom labor, services, equipment, or materials were furnished; and

c. Amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

2. Serve notice on surety and bond principal within 15 days after notice of completion has been recorded, or if no notice of completion has been recorded, within 75 days after completion of work of improvement [*Civ. Code § 3252(b)*].

3. Serve notice either by personal delivery or by mail, postage prepaid, certified, or registered and

addressed in any of following ways [*Civ. Code § 3227(a)*]:

a. If the surety is individual, to surety's residence or place of business, if known. If residence address is unknown, to clerk of county in which bond has been recorded.

b. If surety is corporation, to office of or in care of agent designated on bond, to office of or in care of any of surety's officers located in California, or to office of or in care of surety's statutory agent in California.

c. To bond principal at last known address.

d. In same manner provided for service of summons in civil actions [*see Code Civ. Proc. §§ 415.10-415.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance Bonds



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F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.173

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.173 Recovery on Bond for Private Work

NOTE:

To enforce a claim against a payment bond given in connection with a private work contract entered into on or after January 1, 1995, the claimant must give the same 20-day preliminary notice that is required to establish a mechanics' lien before filing a stop notice [*Civ. Code § 3242(a)*; ***see*** *Civ. Code § 3097*]. This procedure is described in *§ 31.150*, PP 1, 2, and 4. If a 20-day preliminary notice was not given, a claim may nonetheless be enforced as described below.

1. If no preliminary 20-day notice (public work) was given, draft written notice to surety and bond principal including [*Civ. Code § 3227(b)*]:

a. Kind of labor, services, equipment, or materials that claimant furnished or agreed to furnish;

b. Name of person to or for whom labor, services, equipment, or materials were furnished; and

c. Amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

2. Serve notice on surety and bond principal within 15 days after notice of completion has been recorded, or if no notice of completion has been recorded, within 75 days after completion of work of improvement [*Civ. Code § 3242(b)*].

3. Serve notice either by personal delivery or by mail, postage prepaid, certified, or registered and

addressed in any of following ways [*Civ. Code § 3227(a)*]:

a. If the surety is individual, to surety's residence or place of business, if known. If residence address is unknown, to clerk of county in which bond has been recorded.

b. If surety is corporation, either to office of or in care of agent designated on bond, to office of or in care of any of surety's officers located in California, or to office of or in care of surety's statutory agent in California.

c. To bond principal at last known address.

d. In same manner provided for service of summons in civil actions [*see Code Civ. Proc. §§ 415.10-415.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.174

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.174 Commencing Action on Payment Bonds

1. Bring suit against surety on public work within following time period [*Civ. Code § 3249*]:

a. At any time after claimant has last furnished labor or materials or both; and

b. Before expiration of six months after period in which stop notices must be filed [*see Civ. Code § 3184*; *see also § 31.151*, P 5a].

2. Bring suit against surety on private work within following time periods:

NOTE:
The filing of a stop notice is not a condition precedent to the maintenance of an action against the surety on a payment bond [*Civ. Code § 3250*]. For a complaint on a payment bond, see California Forms of Pleading & Practice, Ch. 538, ***Suretyship, Bonds, and Undertakings*** (Matthew Bender).

a. If bond includes provision allowing shorter limitation period than that allowed in b., *below*, and bond is recorded, within period specified in bond [*see Civ. Code § 3239*].

NOTE:
A bond provision is invalid if it shortens the period for filing an action on the payment bond to less than six months from the date the work of improvement is completed [*Civ. Code § 3239*].

b. If bond is not recorded, within four years of completion of work of improvement [*see Code Civ. Proc. § 337*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsPublic Contracts LawTerminationsPerformance BondsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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F. Procedural Guide to Payment Bonds

15-31 California Legal Forms--Transaction Guide §§ 31.175-31.179

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.175[Reserved]



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G. Procedural Guide to Design Professionals' Liens

15-31 California Legal Forms--Transaction Guide § 31.180

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.180 Creation of Lien

1. Confirm that following apply:

a. Design professional has entered into contract with landowner for design, engineering, or planning of work of improvement on landowner's property [*see Civ. Code §§ 3081.1, 3081.2*].

NOTE:
The "design professional" must be a certificated architect, registered professional engineer, or licensed land surveyor [***see*** *Civ. Code § 3081.1*].

b. Construction of planned work of improvement has not commenced [*see Civ. Code §§ 3081.2, 3081.4(b)(1), 3081.7*].

c. Building permit or other governmental approval for work of improvement has been obtained [*see Civ. Code § 3081.2*].

d. Landowner has defaulted in any payment required under terms of above contract, or has refused to pay following a demand for payment made by design professional in accordance with contract [*Civ. Code § 3081.3(a)*].

2. If requirements discussed in P 1, *above*, have been satisfied, prepare demand for payment that [*Civ. Code § 3081.3(b)*; *see § 31.260[2]*]:

a. States that default has occurred under contract; and

b. Sets forth amount of default.

3. Mail demand to landowner by first-class registered or certified mail, postage prepaid [*Civ. Code § 3081.3(b)*].

4. Prepare notice of lien that [*Civ. Code § 3081.3(c)*]:

a. States that a lien is created in favor of named design professional.

b. Specifies amount of lien.

c. Identifies current owner of record of real property that is subject to contract described in P 1a, *above*.

d. Provides legal description of that real property.

e. Specifies building permit or other governmental approval that has been obtained for work of improvement [*see* P 1c, *above*].

5. Have notice of lien recorded in recorder's office for county in which all or portion of real property is located, within following time periods [*Civ. Code §§ 3081.3(b), (c), 3081.7*]:

a. At least 10 days after demand for payment is mailed; and

b. No later than 90 days after design professional learns or has reason to know that landowner is not commencing work of improvement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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PART III. TRANSACTION GUIDE
G. Procedural Guide to Design Professionals' Liens

15-31 California Legal Forms--Transaction Guide § 31.181

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.181 Enforcement, Expiration, or Satisfaction of Lien

1. Notify design professional that lien automatically expires and becomes void on occurrence of either of following [*Civ. Code § 3081.4(b)*]:

a. Commencement of work of improvement for which design professional furnished services.

b. Expiration of 90 days after recordation of notice of lien, unless design professional files suit to enforce lien within 90 days of recordation.

2. If landowner partially or fully satisfies lien, have design professional execute and record document that evidences partial or full satisfaction and release of lien, as appropriate [*Civ. Code § 3081.4(c)*; *see § 31.262[2]*].

3. To enforce lien, file suit within 90 days after recordation of notice of lien and comply with enforcement provisions of mechanics' lien law [*Civ. Code §§ 3081.4(b)(2), 3081.5*; *see Civ. Code §§ 3143-3154*; *see also § 31.138*, P 1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' Liens



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G. Procedural Guide to Design Professionals' Liens

15-31 California Legal Forms--Transaction Guide §§ 31.182-31.189

AUTHOR: Timothy F. O'Leary Practice Consultant

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§§ 31.182[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
H. Procedural Guide to 10-Day Stop Work Orders

15-31 California Legal Forms--Transaction Guide

AUTHOR: Timothy F. O'Leary Practice Consultant

NOTE:

An original contractor's right to stop work pursuant to a 10-day stop work order is available in connection with any contract entered into on or after January 1, 1999 [*Civ. Code § 3260.2(f)*]. The right cannot be waived by contract, and is in addition to any and all other rights the original contractor may have under the law [*Civ. Code § 3260.2(b), (e)*]. For substantive discussion, see *§ 31.21*.



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H. Procedural Guide to 10-Day Stop Work Orders

15-31 California Legal Forms--Transaction Guide § 31.190

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.190 Drafting, Posting, and Service Requirements

1. Draft notice of intention to serve 10-day stop work order and post as follows [*Civ. Code § 3260.2(a)*]:

NOTE:
The notice of intention must be posted at least five days before serving the 10-day stop work order on the owner [*Civ. Code § 3260.2(a)*].

a. Post in conspicuous location at job site; and

b. Post at main office of job site, if any.

2. Draft 10-day stop work order stating that unless all amounts then due original contractor are paid within 10 days from date of notice, original contractor will stop work on project [*Civ. Code § 3260.2(a)*; *see § 31.214[2]*].

3. Serve 10-day stop work order on owner and on all subcontractors with whom original contractor has direct contractual relationship, as follows [*Civ. Code § 3260.2(a)*]:

a. If person to be notified resides in California, either [*Civ. Code § 3260.2(g)(1)*]:
(1) By personal delivery;

(2) By leaving notice at residence or place of business with person in charge; or

(3) By first-class registered or certified mail, addressed to recipient at recipient's

residence, business address, address shown on building permit on file with authority issuing permit, or address recorded on mortgage, deed of trust, or other instrument securing construction loan [*see Civ. Code § 3097(j)*].

b. If person to be notified resides outside California and cannot be served in manner prescribed for residents, by first class certified or registered mail addressed to construction lender [*Civ. Code § 3260.2(g)(2)*].

NOTE:

Service by certified mail is effective on receipt. Service by registered mail is effective five days after mailing [*Civ. Code § 3260.2(g)(3)*].

Within five days of receiving the notice, the owner must forward a copy by first class mail to the construction lender, if any, at the address on the construction loan agreement [*Civ. Code § 3260.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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H. Procedural Guide to 10-Day Stop Work Orders

15-31 California Legal Forms--Transaction Guide § 31.191

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.191 Subsequent Procedures

1. If dispute is resolved or notice is canceled, draft notice of that fact and do following [*Civ. Code § 3260.2(a)*]:

a. Post notice of resolution or cancellation in conspicuous location at job site and main office, if any; and

b. Serve notice of resolution or cancellation on subcontractors with whom original contractor has direct contractual relationship [*see § 31.190*, P 3].

2. If payment is not made within 10 days from date 10-day stop work order was served [*Civ. Code § 3260.2(d)*]:

a. Advise original contractor of right to stop work; and

b. Consider filing complaint for judicial determination of liability for amount not paid for work performed.

NOTE:
Judicial relief may be sought by the original contractor or his or her surety in an expedited proceeding in superior court in the county in which the work of improvement is located [*Civ. Code § 3260.2(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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H. Procedural Guide to 10-Day Stop Work Orders

15-31 California Legal Forms--Transaction Guide §§ 31.192-31.199

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.192[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide § 31.200

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§ 31.200[Reserved]



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PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide § 31.201

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.201 Notice of Nonresponsibility

[1] Comment

[a] Use of Form

The form in [2], *below*, is the notice of nonresponsibility that a person who owns or has an interest in real property may post to avoid mechanics' liens for works of improvement which that person has not caused to be constructed on the property [*Civ. Code § 3094(d)*]. For the notice to be effective, the person claiming the benefits of nonresponsibility must give notice within 10 days after he or she has obtained knowledge of the work [*Civ. Code § 3094*].

[b] Necessity of Giving Notice

For a mechanics' lien to encumber property, the work or materials must be done or furnished at the instance of the owner or of any person acting by the owner's authority. For this purpose, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of all or part of a work of improvement is deemed to be an agent of the owner [*Civ. Code § 3110*]. Every work of improvement constructed on any land, and all work or labor performed, or materials furnished in connection with that work with the knowledge of the owner or of any person having or claiming any estate therein, will be deemed to have been constructed, performed, or furnished at the instance of the owner or person claiming an estate, and therefore subject to any mechanics' lien filed, unless the owner or person claiming an estate gives a notice of nonresponsibility [*Civ. Code § 3129*].

[c] Contents of Notice

The notice must be written and must contain all of the following [*Civ. Code § 3094*]:

- A description of the site sufficient for identification;

- The name and nature of the title or interest of the person giving the notice;
- The name of the purchaser under contract, if any, or lessee if known; and
- A statement that the person giving the notice will not be responsible for any claims arising from the work of improvement.

The notice must be signed and verified by the person owning or claiming an interest in the site who has not caused the work of improvement to be performed, or by that person's agent [*Civ. Code § 3094*]. However, the failure to verify a notice that otherwise complies with the statutory requirements will not cause the notice to be insufficient. The absence of verification relates solely to the question of the assurance of good faith in the statements of the declarant rather than to the issue of the sufficiency of notice to the lien claimants [*Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 232-233, 161 Cal. Rptr. 551]* .

[d] Giving and Recording Notice

The person claiming nonresponsibility must post the notice in some conspicuous place on the site of the work of improvement within 10 days after he or she first obtains knowledge of the work. That person must also record the notice in the office of the county recorder of the county in which the site or some part of it is located within the same time period [*Civ. Code § 3094*].

[2] FORM

Notice of Nonresponsibility

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

NOTICE OF NONRESPONSIBILITY

NOTICE IS HEREBY GIVEN IN ACCORDANCE WITH *CALIFORNIA CIVIL CODE SECTION 3094* THAT:

1. The undersigned, _____[*name*], is the [*specify nature of title or interest of the person giving the notice, e.g.*, owner in fee simple] of the following described property: _____[*insert full legal description and street address, if any*].

2. On _____[*date not more than 10 days preceding the date on which the notice is posted or recorded*], the undersigned first obtained knowledge that a work of improvement was being constructed on the above-described property.

3. The undersigned did not cause the above work of improvement to be performed and will not be responsible for any claims arising from that work of improvement.

[*If there is a purchaser of the property under contract or a known lessee, add*:]

4. The name of the purchaser under contract [*or* lessee] of the above property is _____[*name*].
Dated: _____.

_____ [*signature*]
[*typed name*]

VERIFICATION

I, the undersigned, say:

I am the person who signed the foregoing notice. I have read that notice and know its contents, and the facts stated therein are true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, this _____ day of [*month*], [*year*].

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide § 31.202

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.202 Preliminary 20-Day Notice

[1] Comment

[a] Use of Form

The form in [2], *below*, is a general form for a preliminary 20-day notice for use by an individual subcontractor or materialman who has furnished labor, services, equipment, or material to a work of improvement owned by a private person or entity. It may be used for either a private or public work of improvement. Printed versions of the preliminary notice are also available from commercial publishers.

[b] Purpose of Preliminary Notice

The preliminary 20-day notice is intended to provide early notice to the general contractor, lender, and property owner or public agency that there are persons present on the job, including contractors, who are entitled to file a mechanics' lien, and the amount of their potential liens *[51 Ops. Cal. Atty. Gen. 65, 69 (1968)]* . On a typical construction job, it is not unusual for the property owner or public agency and lending institution to be unaware of the identity of the persons, other than the general contractor with whom they have dealt directly, who are furnishing labor and supplies. The preliminary 20-day notice is intended as a means of identifying these unknown persons, who are potential lien claimants, so that there can be meaningful communications among the property owner, lending institution, and general contractor to insure timely payment of these persons' claims and avoidance of costly work stoppages, mechanics' liens foreclosure sales, and double payments by the owner *[51 Ops. Cal. Atty. Gen. 65, 69 (1968)* ; *see Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 630, 103 Cal. Rptr. 106]* .

[c] Persons Required to Give Notice

[i] Private Works

For a private work of improvement, every person not under direct contract with the owner who furnishes labor, services, equipment, or material for which a lien otherwise can be claimed, a stop notice can otherwise be given, or a claim against a payment bond can otherwise be asserted, must give a written preliminary notice to the owner or reputed owner, the original contractor or reputed contractor, and any construction lender or reputed construction lender as a prerequisite to the validity of any valid claim of lien or stop notice [*Civ. Code § 3097(a)*]. A claimant who has a direct contract with the owner must give a written preliminary notice only to any construction lender or reputed construction lender [*Civ. Code § 3097(b)*]. The persons required by statute to give notice must do so despite a waiver by the owner. Any agreement by an owner to waive the rights or privileges conferred on the owner pursuant to the preliminary notice provisions will be void [*Civ. Code § 3097(e)*].

[ii] Public Works

For a public work, any person who has no direct contractual relationship with the contractor, has furnished labor or materials for a public work, and who is entitled to file a stop notice or assert a claim against a payment bond, must give a preliminary 20-day notice to the original contractor and the public agency for whom the job is being done as a prerequisite to filing a stop notice or asserting a claim against a payment bond [*Civ. Code §§ 3183(a), 3098(a)*].

[iii] Exceptions to Notice Requirement

The preliminary notice requirements for both private and public works of improvement do not apply to a person who performed actual labor for wages [*see Civ. Code § 3089(a)*] or to a person or entity, including an express trust fund [*see Civ. Code § 3111*; *see also* [iv], *below*], to whom a portion of a laborer's compensation is paid by agreement with the laborer or the laborer's collective bargaining agent [*Civ. Code §§ 3097(a), 3098(a), (c)*; *see Civ. Code § 3089(b)*].

[iv] Express Trust Funds

For purposes of the mechanics' lien law, an express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, employer payments described in *Lab. Code § 1773.1*) is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code § 3111* is intended to reinstate the ability of laborers and employee trust funds to umechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Before this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53 Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296]* . The Ninth Circuit has subsequently held that ERISA does not preempt California's stop notice and payment bond remedies [*Southern Cal. IBEW-NECA Trust Funds v. Standard Industrial Electric. Co. (9th Cir. 2001) 247 F.3d 920, 925]* .

[d] Single Notice Required

A person who is required to give a preliminary notice on a private work need give only one notice with respect to all materials, services, labor, or equipment that person furnished for a work of improvement as a whole. However, if the materials, services, labor, or equipment are furnished under contracts with more than one subcontractor, the notice requirements must be met with respect to that furnished to each contractor [*Civ. Code § 3097(g)*].

[e] Disciplinary Action for Failure to Give Notice

If the contract price to be paid to any licensed subcontractor on a particular work of improvement exceeds $400, the failure of that contractor to give the notice constitutes grounds for disciplinary action by the Registrar of Contractors [*Civ. Code §§ 3097(h), 3098(b)*]. If the notice for a private work is required to contain information regarding supplemental fringe benefits [*see Civ. Code § 3097(c)(6)*], a failure to give a notice including that information that results in the filing of a lien or delivery of a stop notice by the express trust fund to which the obligation is owing constitutes grounds for disciplinary action by the Registrar of Contractors against the subcontractor if the amount due the trust fund is not paid [*Civ. Code § 3097(h)*; *see § 31.213*].

[f] Time for Giving Notice

The notice must be given no later than 20 days after the claimant has first furnished labor, services, equipment, or materials to the jobsite as a prerequisite to the validity of any claim of lien or notice to withhold [*Civ. Code §§ 3097(c), 3098(a)*]. If labor, services, equipment, or materials have been furnished to a jobsite by a claimant who did not give a preliminary notice within 20 days, that claimant is not precluded from subsequently giving notice. However, any payment bond claim asserted, stop notice filed, or (in the case of private works) mechanics' lien recorded, will only apply to labor, services, equipment, or materials furnished within 20 days before service of the preliminary notice and any time thereafter [*Civ. Code §§ 3097(d), 3098(d)*].

A certified architect, registered engineer, or licensed land surveyor who has furnished services for the design of a private work of improvement and who gives a preliminary notice no later than 20 days after the work of improvement has commenced will be deemed to have complied with the notice requirements with respect to architectural, engineering, or surveying services furnished or to be furnished [*Civ. Code § 3097(c)*].

[g] Contents of Notice

For a private work, the preliminary 20-day notice must be written and must contain the following information [*Civ. Code § 3097(c)*]:

- A general description of the labor, services, equipment, or materials furnished or to be furnished.

- An estimate of the total price of the labor, services, equipment, or material described in the item above [*see Rental Equipment, Inc. v. McDaniel Builders, Inc. (2001) 91 Cal. App. 4th 445, 449-450, 109 Cal. Rptr. 2d 922* (estimate of the total price of labor, service, equipment, or materials must be "a derived figure, arrived at by rational analysis")].

- The name and address of the person furnishing the labor, service, equipment, or materials.

- The name of the person who contracted for the purchase of the labor, service, equipment, or materials.

- A description of the jobsite sufficient for identification.

- A boldface statement notifying the property owner that nonpayment of bills for labor and service on the jobsite may result in the filing of a mechanics' lien, and of the obligation of most private project owners to notify the original contractor and any lien holder who provided a 20-day preliminary notice that a notice of completion or notice of cessation has been filed [*see* [2], *below*, for exact text of statement].

- If notice is given by a subcontractor who has failed to pay all compensation due to his or her laborers on the job, the identity and address of any laborer and any express trust fund [*see Civ. Code § 3111*] to

whom employer payments are due.

If an invoice for materials contains the required information, a copy of that invoice transmitted as required will constitute sufficient notice [*Civ. Code § 3097(c)*].

A preliminary notice on a public work need only state with substantial accuracy a general description of labor, services, equipment, or materials furnished or to be furnished to the job site, and the name of the party to whom they were furnished [*Civ. Code § 3098(a)*].

[h] Names of Owner and Construction Lender

To accommodate those entitled to give preliminary 20-day notice in connection with private works of improvement, every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name and residential and business addresses. If the contract is not one for home improvements or swimming pool construction, it must also include space for the owner to enter the name and address of any construction lenders. The original contractor must make the owner's and lender's information available to anyone seeking to serve a preliminary 20-day notice [*Civ. Code § 3097(l), (m)*]. If a private work of improvement involves subcontracting any of the work, any contract between an original contractor and a subcontractor, or between subcontractors, must provide space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(l), (m)*]. If the owner secures construction financing after construction is underway, he or she must provide all lenders' names and addresses to each person who has given the owner a preliminary 20-day notice [*Civ. Code § 3097(n)*].

[i] Service of Notice

On a private work, a claimant may serve the notice on a California resident by personal service, by leaving it at the person's residence or place of business with some person in charge, or by mailing it by first-class registered or certified mail to the person's residence address, business address, address shown on the building permit, or address recorded on the mortgage or other loan instrument [*Civ. Code § 3097(f)(1)*]. If a person residing outside California cannot be served by any of the foregoing methods, notice may be given by first-class certified or registered mail addressed to the construction lender or the original contractor [*Civ. Code § 3097(f)(2)*]. A proof of service affidavit must also be completed [*see Civ. Code §§ 3114, 3097.1*; *see also § 31.204*].

On a public work, notice may be given to the contractor by personal service, or by first-class, registered, or certified mail, postage prepaid, at any place the contractor maintains an office, conducts business, or resides. In case of public works constructed by the Department of Public Works or the Department of General Services, the notice may be given by first-class, registered, or certified mail to the office of the disbursing officer of the department constructing the work, or by personal service on that officer. When service is by registered or certified mail, service is complete at the time of deposit [*Civ. Code § 3098(a)*].

[j] Filing With Recorder

[i] Right of Notification

Any person who has served a preliminary 20-day notice on a private work pursuant to *Civ. Code § 3097(f)* may file the notice with the county recorder in the county in which any portion of the property is located [*Civ. Code § 3097(o)(1)*]. Thereafter, if a notice of completion or notice of cessation is recorded on the property, the recorder must notify the person who has served the notice of the recordation. This notification (which must be by mail) will include the date of recordation of the notice of completion or notice of cessation [*Civ. Code § 3097(o)(2)*].

If the county recorder fails to notify the person who filed the preliminary 20-day notice of the recordation, or that person does not receive the notification, the failure will not affect the period within which a claim of lien must be recorded.

However, the county recorder must make a good faith effort to mail the notification within five days after the recording of a notice of completion or notice of cessation [*Civ. Code § 3097(o)(3)*].

[ii] Required Contents

A preliminary 20-day notice cannot be filed with a county recorder unless it contains all of the following [*Civ. Code § 3097(o)(1)*]:

- The name and address of the person furnishing the labor, service, equipment, or materials.
- The name of the person who contracted for purchase of the labor, service, equipment, or materials.
- The common street address of the job site.

With the possible exception of the common street address, all of the foregoing information will appear on any preliminary 20-day notice [*see Civ. Code § 3097(c)*; *see also* [g], *above*].

[iii] Purpose and Effect of Filing

The limited purpose of this filing procedure is to facilitate the mailing of notice by the county recorder of recorded notices of completion and notices of cessation. The filed notice is not a recordable document, will not be entered into official county records that by law impart constructive notice, and will be indexed separately. Further, the filed notice will not give rise to (1) any actual or constructive notice of the existence or contents of the filed notice, or (2) any duty of inquiry as to the existence or contents of the notice [*Civ. Code § 3097(o)(5)*].

[2] FORM

Notice of Nonresponsibility

PRELIMINARY 20-DAY NOTICE

TO _____, owner or reputed owner [*or* public agency],
TO _____, original contractor or reputed contractor, and
TO _____, construction lender or reputed construction lender:

NOTICE IS HEREBY GIVEN that the undersigned _____[*name*], whose address is _____[*street address*], _____[*city*], California [*zip code*] has furnished or will furnish _____[*set forth a general description of the labor, service, equipment, or materials furnished or to be furnished, e.g.*, general electrical wiring and electrical materials] for the work of improvement at _____[*set forth description of job site sufficient for identification, e.g.*, 1110 L Street, Sacramento, California]. The name of the person or firm who contracted with the undersigned for the purchase of such labor, service, equipment, or materials is [*name of general contractor*]. [*For private work, add*: The estimated total price of all that labor, service, equipment, or materials to be furnished for that work of improvement by the undersigned is $_____].

[*Add if subcontractor has failed to pay all compensation due to his or her laborers on the job*:]

Employer payments remain due to the following [laborer(s) [and] *or* express trust fund(s)]:

_____ _____ [*name*] _____ _____ [*address*]

_____ _____ [*name*] _____ _____ [*address*]

_____ _____ [*name*] _____ _____ [*address*]

[*Optional (for use only with private works)*:]

The owner of this project is required by *California Civil Code Section 3097(n)* to provide the undersigned with the name(s) and address(es) of any construction lender or lenders who make any construction loans for the project after the commencement of construction.

[*For a private work, add*:]

NOTICE TO PROPERTY OWNER

IF BILLS ARE NOT PAID IN FULL FOR THE LABOR, SERVICES, EQUIPMENT, OR MATERIALS FURNISHED OR TO BE FURNISHED, A MECHANIC'S LIEN LEADING TO THE LOSS, THROUGH COURT FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR PROPERTY BEING SO IMPROVED MAY BE PLACED AGAINST THE PROPERTY EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY (1) REQUIRING YOUR CONTRACTOR TO FURNISH A SIGNED RELEASE BY THE PERSON OR FIRM GIVING THIS NOTICE BEFORE MAKING PAYMENT TO YOUR CONTRACTOR, OR (2) ANY OTHER METHOD OR DEVICE THAT IS APPROPRIATE UNDER THE CIRCUMSTANCES. OTHER THAN RESIDENTIAL HOMEOWNERS OF DWELLINGS CONTAINING FEWER THAN FIVE UNITS, PRIVATE PROJECT OWNERS MUST NOTIFY THE ORIGINAL CONTRACTOR AND ANY LIEN CLAIMANT WHO HAS PROVIDED THE OWNER WITH A PRELIMINARY 20-DAY LIEN NOTICE IN ACCORDANCE WITH SECTION 3097 OF THE CIVIL CODE THAT A NOTICE OF COMPLETION OR NOTICE OF CESSATION HAS BEEN RECORDED WITHIN 10 DAYS OF ITS RECORDATION. NOTICE SHALL BE BY REGISTERED MAIL, CERTIFIED MAIL, OR FIRST-CLASS MAIL, EVIDENCED BY A CERTIFICATE OF MAILING. FAILURE TO NOTIFY WILL EXTEND THE DEADLINES TO RECORD A LIEN.

[*Continue with the following*:]

Dated: _____.

_____ [*signature*]
[*typed name*]

[*For proof of service affidavit, see § 31.204* .]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide § 31.203

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.203 Cover Letter Accompanying Preliminary 20-Day Notice

[1] Comment--Use of Form

The form in [2], *below*, is an informal cover letter designed to accompany the preliminary 20-day notice. The cover letter is especially useful to describe the purpose of the preliminary notice to owners of property who are only infrequently involved in construction projects and who can be expected to be unfamiliar with the operation of the mechanic's lien laws. The letter explains that the notice is being given to satisfy statutory requirements and is not intended to reflect adversely on the integrity or credit standing of any other party, such as the general contractor, connected with the construction project. This form has been adapted from a printed cover letter form used in connection with the standard preliminary notice jointly prepared by the California Society of Professional Engineers, the Consulting Engineers Association of California, the California Council of Landscape Architects, the California Council of the American Institute of Architects, the Structural Engineers Association of California, and the California Council of Civil Engineers and Land Surveyors.

[2] FORM

Cover Letter Accompanying Preliminary 20-Day Notice

Cover Letter Accompanying Preliminary 20-Day Notice

_____[*date*]
_____[*Name of person or firm to whom preliminary notice is being sent*]
_____[*street address*]

_____[*city, state, zip*]

To whom it may concern:

We are required by law (*California Civil Code Sections 3097* and *3098*) to notify each of you that we are furnishing labor, services, equipment, and/or materials of the type described on the enclosed standard form for the building and structure or other work of improvement located on the jobsite described on that standard form. Such labor, services, equipment, and/or materials were contracted for by [*name of general contractor*], whom we understand to be the general contractor for the job.

We are further required by law to notify you at this time that if bills are not paid in full for labor, services, equipment, and/or materials furnished, or to be furnished, the improved property may be subject to mechanics' liens and/or a stop notice or notice to withhold may be filed when applicable.

The total price of the labor, services, equipment, or materials furnished and to be furnished by the undersigned is estimated to be $_____.

The enclosed notice is not intended to reflect in any way on the integrity or credit standing of the general contractor for the job, but is given merely to comply with the above-mentioned provisions of the California Civil Code.

[*Optional; may be added if letter is to be addressed to owner of private project (see Civ. Code § 3097(n))*:]

Under *California Civil Code Section 3097(n)*, you are required, as the owner of this project and the recipient of the enclosed notice, to provide the undersigned with the name(s) and address(es) of any construction lender or lenders who make construction loans for the project after commencement of construction.

[*Continue with the following*:]

We appreciate the opportunity of furnishing our services for this job and hope that it is progressing to your satisfaction.

Sincerely,
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide § 31.204

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.204 Proof of Service Affidavit (Private Work)

[1] Comment

[a] Use of Form

The form in [2], *below*, is a proof of service affidavit that is designed to prove that the preliminary 20-day notice [*see § 31.202[2]*] was served in accordance with the requirements set forth in *Civ. Code § 3097(f)*. The term "proof of service affidavit" is defined as an affidavit of the person making the service, showing the time, place, and manner of service, and facts showing that service was made in accordance with *Civ. Code § 3097*. The affidavit is required to show the name and address of the person on whom a copy of the preliminary 20-day notice was served and, if appropriate, the title or capacity in which the person was served [*Civ. Code § 3097.1(c)*].

A mechanics' lien claimant is entitled to enforce a lien only if the claimant has given the preliminary 20-day notice (private work) [*see § 31.202[2]*] when required by *Civ. Code § 3097* and has made proof of service in accordance with the requirements of *Civ. Code § 3097.1* [*Civ. Code § 3114*].

[b] Manner of Service of Preliminary 20-Day Notice

Under *Civ. Code § 3097(f)*, the permissible methods of serving the preliminary 20-day notice differ slightly depending on the intended recipient's state of residence. A California resident may be served with the notice by any of the following methods: (1) by delivering the notice personally; (2) by leaving it at the person's residence address or place of business with some person in charge; or (3) by first-class registered or certified mail, postage prepaid, addressed to the person to be notified at that persons' residence or place of business, or at the address shown by the building permit on file with the authority issuing a building permit for the work, or at an address shown on a recorded construction trust deed [*Civ. Code § 3097(f)(1)*; *see Civ. Code § 3097(j)*; *see also Ch. 30A, Construction Financing, § 30A.204[1]*]. Normally one of those methods must also be used to serve an out-of-state resident; however, if such a person cannot be

served by any of those methods, service must be by first-class certified or registered mail, addressed to the construction lender or to the original contractor [*Civ. Code § 3097(f)(2)*].

When service is made on any person by first-class certified or registered mail, service is complete at the time the mail is deposited [Civ. Code § 3097(f)(3)]. "First-class certified or registered mail" means by certified or registered mail only, and notice by ordinary first-class mail will not be effective [*IGA Aluminum Products, Inc. v. Manufacturers Bank (1982) 130 Cal. App. 3d 699, 704, 181 Cal. Rptr. 859]* .

[c] Proof of Service by Affidavit

If the preliminary 20-day notice is delivered personally or is left at a residence or place of business in the manner specified in *Civ. Code § 3097(f)*, proof of service must be made by preparing the proof of service affidavit [*Civ. Code § 3097.1(b)*]. If the preliminary 20-day notice is served by mail, the proof of service affidavit must be accompanied either by the return receipt of certified or registered mail, or by a photocopy of the record of delivery and receipt maintained by the post office, showing the date of delivery and to whom delivered [*Civ. Code § 3097.1(a)*]. In the event of nondelivery, the affidavit must be accompanied by the returned envelope itself [*Civ. Code § 3097.1(a)*].

[d] Proof of Service by Declaration

The form in [2], *below*, is an affidavit in the form prescribed by *Civ. Code § 3097.1*. However, since a declaration under penalty of perjury has the same force and effect as a sworn affidavit [*see Code Civ. Proc. § 2015.5*], the following form may be adapted by using a declaration under penalty of perjury clause in lieu of the affidavit.

[2] FORM

Proof of Service Affidavit (Private Work)

PROOF OF SERVICE AFFIDAVIT (Private Work)

_____[*name of affiant*], being first duly sworn, deposes and says:

I served a true copy of the attached preliminary 20-day notice on _____[*name of person served*], whose residence [*or* business] address is _____[*street address, city, state, zip*], [in the capacity of _____ (*title or position*) of _____ (*name of company or firm)*] on _____[*date*], at [*place of service*] by _____[*manner of service, e.g.*, delivering the said notice to him/her personally or leaving the said notice at his/her residence (*or* place of business) address with _____ (*name and title of person*), a person in charge *or* first-class, registered (*or* certified) mail, postage prepaid, addressed to _____ (*name of the person to whom the notice is to be given*) at his/her residence (*or* place of business) address (*or* at the address shown by the building permit on file with the authority issuing a building permit for the work or at the address shown on the recorded Construction Deed of Trust for the work)]. [*If the person to be notified does not reside in California and cannot be served by any of the alternative methods set forth above, specify manner of service above as follows*: first-class, certified (*or* registered) mail, addressed to the construction lender (*or* original contractor) _____ (*name*) at _____ (*street address, city, state, zip*). Service on _____ (*name of person to whom the notice is to be given*) was made in this manner because that person is not a resident of California and cannot be served by any of the methods prescribed in *California Civil Code Section 3097(f)(1)*.]

[*If service was made by mail, add*: The return receipt of certification (*or* registration) for the letter containing the above-described preliminary 20-day notice is attached hereto *or* A photocopy of the record of delivery of the above-described preliminary 20-day notice and receipt maintained by the post office is attached hereto.]

[*In the event of nondelivery of notice when service by mail was attempted, add*: The returned envelope containing the above-described preliminary 20-day notice is attached.]

Subscribed and sworn to before me this _____ day of [*month*], [*year*].

_____ [*signature of officer*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
1. Preliminary Notices

15-31 California Legal Forms--Transaction Guide §§ 31.205-31.209

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.205[Reserved]



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2. Other Notices

15-31 California Legal Forms--Transaction Guide § 31.210

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.210 Notice of Completion of Project--Private Work

[1] Comment

[a] Use of Form

The form in [2], *below*, is the notice of completion that a property owner may record to limit the time in which mechanics' liens may be recorded against a construction project [*see Civ. Code § 3093*]. For this purpose, an "owner" is the person who causes a building, improvement, or structure to be constructed, altered, or repaired, whether the interest or estate is in fee, as a vendee under a contract of purchase, as lessee, or other interest or estate less than fee. If the interest is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the owner [*Civ. Code §§ 3092(g), 3093*].

This form is for use in connection with a private work of improvement. For a notice of completion and acceptance by a public entity, see *§ 31.212*.

[b] "Completion" Defined

Although "completion" of a nonpublic work of improvement means actual completion, the following will be deemed equivalent to completion for purposes of this notice: (1) the occupation or use of a work of improvement by the owner or the owner's agent, accompanied by a cessation of labor; or (2) the acceptance by the owner or the owner's agent of the work of improvement [*see Civ. Code § 3086*]. The owner should file a notice of cessation [*see § 31.211[2]*] rather than a notice of completion if there has been a cessation of labor [*Civ. Code § 3093(a)*; *see Civ. Code § 3092*].

A contract is complete for purposes of commencing the recordation period under *Civ. Code § 3115* when all work under the contract has been performed, excused, or otherwise discharged. Thus, a contractor's recording of a mechanic's lien was not premature when the contract was "complete" on the anticipatory breach of the other contracting party [

Howard S. Wright Construction Co. v. BBIC Investors (2006) 136 Cal. App. 4th 228, 241, 38 Cal. Rptr. 3d 769] .

[c] Purpose of Notice

The purpose of filing a notice of completion is to obtain the benefit of a shorter lien-filing period [*Fontana Paving, Inc. v. Hedley Brothers, Inc. (1995) 38 Cal. App. 4th 146, 154, 45 Cal. Rptr. 2d 295]* .

If the owner records the notice within the applicable time period [*see* [e], *below*] and notifies the original contractor that the notice has been recorded, the contractor has 60 days from the date the notice is recorded to record a claim of lien against the project [*Civ. Code §§ 3115, 3259.5(a)*]. If the owner occupies the property as a personal residence and the dwelling contains not more than four residential units, the 60-day period applies and the owner is not required to give notice that a notice of completion or cessation has been recorded; provided such a notice has, in fact, been recorded [*Civ. Code § 3259.5*]. If a notice of completion or cessation is not recorded, or if the owner fails to notify the original contractor or a claimant who filed a preliminary 20-day notice, the contractor and claimant have 90 days to file a lien claim [*see Civ. Code §§ 3115, 3116, 3259.5*].

[d] Contents of Notice

The notice must be written, signed, and verified by the owner or the owner's agent, and contain all of the following [*Civ. Code § 3093*]:

- The date of completion (other than a cessation of labor). An erroneous date will not affect the validity of the notice if the correct date of completion is within 10 days preceding the date of recording.

- The name and address of the owner.

- The nature of the interest or estate of the owner.

- A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice will not be affected by the absence or erroneous street address.

- The name of the original contractor, if any. If the notice covers only completion of a contract for a particular portion of the work [*see Civ. Code § 3117*], it must include the name of the original contractor under that contract and a general statement of the type of work done or the materials furnished under the contract.

- If there is more than one owner and the notice is signed by less than half of all co-owners, the names and addresses of all the co-owners.

- If the notice is signed by a successor in interest, the names and addresses of the transferors.

[e] Recording and Fees

The owner must record the notice in the office of the county recorder of the county where the site is located within 10 days after the work of improvement is completed [*Civ. Code § 3093*]. If all or part of the work of improvement is made in accordance with two or more original contracts, each covering a particular portion of the work of improvement, the owner may record a notice of completion within 10 days after completion of a contract for a particular portion of the work of improvement [*Civ. Code § 3117*]. A notice of completion that is not filed within 10 days of completion of the work of improvement will not serve to shorten the statutory 90-day lien-filing period [*Fontana Paving, Inc. v. Hedley*

Brothers, Inc. (1995) 38 Cal. App. 4th 146, 154, 45 Cal. Rptr. 2d 295] .

[2] FORM

Notice of Completion of Project--Private Work

)
Recording requested by)
_____ [*name*])
When recorded mail to)
_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____
Space above this line for recorder's use

NOTICE OF COMPLETION

NOTICE IS HEREBY GIVEN THAT:

1. The undersigned is the owner of the interest or estate stated below in the property hereinafter described.

2. The full name of the undersigned is _____[*name*].

3. The full address of the undersigned is _____[*number and street, city, state, zip*].

4. The nature of the title of the undersigned is [*e.g.*, owner in fee *or* vendee under contract of purchase *or* lessee *or other appropriate designation*].

5. The full names and full addresses of all persons, if any, who hold title with the undersigned as joint tenants or as tenants in common are:

Names	Addresses
_____	_____
_	
_____	_____
_	

6. The names of the predecessors in interest of the undersigned, if the property was transferred subsequent to the commencement of the work of improvement herein referred to are [*or if no transfer was made, insert the word* "none"]:

Names	Addresses
_____	_____
_	
_____	_____
_	

7. A work of improvement on the property hereinafter described was completed on _____[*date*].

8. The name of the original contractor, if any, for the work of improvement was [*name of contractor, or if no contractor for the work of improvement as a whole, insert the word* "none"]. [*If notice covers completion of contract for only part of the work of improvement, add*: The kind or work done or material furnished was _____ (*give general statement, e.g.*, furnishing of concrete for sidewalks)].

9. The property on which the work of improvement was completed is in the City of _____, County of _____, State of California, and is described as follows: [*set forth description of jobsite sufficient for identification, using legal description if possible*].

10. The street address of the said property is _____[*number and street, or, if there is no official street address, insert the word* "none"].
Dated: _____.

_____ [*signature*]
[*typed name*]

VERIFICATION

I, the undersigned, say:

I am the person who signed the foregoing notice. I have read the above notice and know its contents, and the facts stated therein are true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, this _____ day of _____, _____.

_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.211

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.211 Notice of Cessation of Labor

[1] Comment

[a] Use of Form

The form in [2], *below*, is the notice of cessation of labor that a property owner may record after work on a construction project has ceased, to limit the time in which mechanics' liens may be recorded against the project. For this purpose, an "owner" is the person (or that person's successor in interest at the date the notice is filed) who causes a building, improvement, or structure to be constructed, altered, or repaired, whether the interest or estate is in fee, as a vendee under a contract of purchase, as lessee, or other interest or estate less than fee. If the interest is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the owner [*Civ. Code § 3092(g)*].

For a notice to be used on completion rather than cessation of the project, see *§ 31.210[2]*.

[b] Purpose of Notice

If the owner records the notice within the applicable time period [*see* [d], *below*] and notifies the original contractor that the notice has been recorded, the contractor has 60 days from the date the notice is recorded to record a claim of lien against the project [*Civ. Code § 3259.5(a)*]. If the owner occupies the property as a personal residence and the dwelling contains not more than four residential units, the 60-day period applies and the owner is not required to give notice that a notice of completion or cessation has been recorded; provided such a notice has, in fact, been recorded [*Civ. Code §§ 3115, 3259.5*]. If a notice of completion or cessation is not recorded, or if the owner fails to notify the original contractor or a claimant who filed a preliminary 20-day notice, the contractor and claimant have 90 days to file a lien claim [*see Civ. Code §§ 3115, 3116, 3259.5*].

[c] Contents of Notice

A notice of cessation must be written, signed, and verified by the owner or the owner's agent, and contain all of the following [*Civ. Code § 3092*]:

- The approximate date on which the cessation of labor commenced.
- A statement that the cessation has continued until the recording of the notice of cessation.
- The name and address of the owner.
- The nature of the interest or estate of the owner.
- A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice will not be affected by the fact that the street address is erroneous or omitted.
- The name of the original contractor, if any, for the work of improvement as a whole.
- If the notice is signed by less than all of the cotenants, the names and addresses of all cotenants.

[d] Recording and Fees

The owner must record the notice in the office of the county recorder of the county where the site is located. The notice will be effective only if there has been a continuous cessation of labor for at least 30 days before recording [*Civ. Code § 3092*].

[2] FORM

Notice of Cessation of Labor

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

NOTICE OF CESSATION

NOTICE IS HEREBY GIVEN THAT:

1. The undersigned is the owner of the interest or estate stated below in the property hereinafter described.

2. The full name of the undersigned is _____[*name*].

3. The full address of the undersigned is _____[*number and street, city, state, zip*].

4. The nature of the interest or estate of the undersigned is owner in fee [*or* vendee under contract of purchase *or* lessee *or other appropriate designation*].

5. The full names and full addresses of all persons, if any, who hold title with the undersigned as joint tenants or as tenants in common are:

Names	Addresses
_____	_____
_____	_____

6. After the commencement of a work of improvement on the property hereinafter described, there has been a cessation from labor thereon commencing on _____[*date*]; and that cessation has continued until the recording of this notice of cessation.

7. The name of the original contractor, if any, for the work of improvement was _____[*name, or if none, insert the word* "none"].

8. The property on which the work of improvement was commenced is in the City of _____, County of _____, State of California, and is described as follows: [*set forth description of jobsite sufficient for identification, using legal description if possible*].

9. The street address of the property is _____[*number and street, or, if there is no official street address, insert the word* "none"].
Dated: _____.

_____ [*signature*]
[*typed name*]

VERIFICATION

I, the undersigned, say:

I am the person who signed the foregoing notice. I have read that notice and know its contents, and the facts stated therein are true of my own knowledge.

I declare under penalty that the foregoing is true and correct.

Executed at _____, California, this _____ day of _____, _____.

_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.211A

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.211A Owner's Notice That Notice of Completion or Cessation Has Been Recorded

[1] Comment--Use of Form

The form in [2], *below*, is the notice that a property owner must give to the original contractor and any claimant who has provided a preliminary 20-day notice informing them that a notice of completion or notice of cessation has been recorded. If the owner gives proper notice, the time within which a claim of lien must be recorded is 60 days from the recording of the notice of completion or cessation for the contractor and 30 days for a claimant who has provided a preliminary 20-day notice [*Civ. Code §§ 3115, 3116, 3259(a)*]. If the owner fails to give notice, this period expands to 90 days [*Civ. Code § 3259(a)*].

The notice must be sent by registered or certified mail, or first class mail evidenced by a certificate of mailing, within 10 days after the notice of completion or cessation was recorded [*Civ. Code § 3259.5(a)*].

For these purposes, "owner" means a person who has an interest in real property, or the person's successor in interest on the date of notice of completion or cessation from labor is recorded, who causes a building, improvement, or structure, to be constructed, altered, or repaired on the property. If the property is owned by two or more persons as joint tenants or tenants in common, any one of the cotenants may be deemed to be the owner. "Owner" does not include a person who occupies the property as a personal residence and the dwelling contains not more than four residential units. "Owner" also does not include a person who has a security interest in the property or obtains an interest by virtue of a court order, a default on a mortgage, or a transfer by a fiduciary in the course of administering a decedent's estate, guardianship, conservatorship, or trust [*Civ. Code § 3259.5(b)*; *see Civ. Code § 1102.2(b)-(d)*].

[2] FORM

Owner's Notice That Notice of Completion or Cessation Has Been Recorded

NOTIFICATION THAT NOTICE OF [COMPLETION *or* CESSATION]
HAS BEEN RECORDED

NOTICE IS HEREBY GIVEN THAT:

1. The undersigned is the owner of the interest or estate stated below in the property hereinafter described.

2. The full name of the undersigned is _____[*name*].

3. The full address of the undersigned is _____[*address, including number, street, city, state, and zip code*].

4. The full names and full addresses of all persons, if any, who hold title with the undersigned as joint tenants or as tenants in common are:

Names	Addresses
_____	_____
_____	_____

5. The property on which the work of improvement was commenced is in the City of _____, County of _____, State of California, and is described as follows: [*set forth description of jobsite sufficient for identification, using legal description if possible*].

6. The street address of the property is _____[*address, including number and street, or, if there is no official street address, insert the word* "none"].

7. A Notice of [Completion *or* Cessation] related to the work of improvement on the above-described property was recorded on _____[*insert date of recording, which must be no more than 10 days before date of this notification*] in the records of the City of _____, County of _____, State of California.
Dated: _____

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.212

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.212 Notice of Completion and Acceptance of Public Works Project

[1] Comment--Use of Form

The form in [2], *below*, is a notice of completion and acceptance that may be recorded by a public agency after it accepts a completed public works project. "Completion" for this purpose means the date of acceptance by the public agency responsible for the project, rather than the date of actual completion as in the case of private works projects [*Civ. Code § 3086*].

The filing of a notice of completion and acceptance triggers the commencement of the 30-day period within which a subcontractor, materialman, laborer, or other eligible claimant may file a stop notice [*Civ. Code § 3184(a)*]. If such a notice is not recorded, that 30-day period is extended to 90 days after completion (acceptance) of the project [*Civ. Code § 3184(b)*].

For all public works projects except those awarded under the State Contract Act [*Pub. Contract Code §§ 10100-10285.5*], a cessation of labor for 30 consecutive days will also constitute a completion. Following such a cessation, the public agency may record a notice of cessation to shorten the applicable 90-day stop notice period to 30 days from the date of recordation of the notice of cessation [*Civ. Code §§ 3086(c), 3184*; *see Civ. Code § 3092* (notice of cessation); *see also § 31.211[2]*].

[2] FORM

Notice of Completion and Acceptance of Public Works Project

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)

_____ [*name*])
_____ [*address*])
_____ [*city, state, zip*])
)

_____

Space above this line for recorder's use

NOTICE OF COMPLETION AND ACCEPTANCE OF PUBLIC WORKS PROJECT

NOTICE IS HEREBY GIVEN by _____[*name of public agency, e.g.*, the City of _____, California] that a certain project for public works improvements and structures located _____[*state location, e.g.*, at _____ (*address*), City of _____, California *or* on the streets of _____ (*list streets affected by improvement*) in the City of _____, California], the contract for the construction of which was let to [*name of contractor*] of _____[*address*], as contractor, was actually completed on _____[*date*], and was accepted by _____[*public agency, e.g.*, the City Council of the City of _____] on _____[*date*]. The name and address of the owner of the property referred to above is _____[*e.g.*, the City of _____], _____[*street address*], _____[*city, state, zip*], and the nature of the interest of the owner in that property is _____[*specify, e.g.*, that of owner in fee simple *or* easement for street purposes]. The above project for public works improvements and structures, and the property on which the improvements and structures are situated, referred to above, are in the City of _____, County of _____, State of California, and more particularly described as follows: [*insert legal description*]. The name of the contractor's surety is _____[*name of surety*].

VERIFICATION

I, the undersigned, declare that I am the _____[*title, e.g.*, Director of Public Works *or* City Clerk] of _____[*e.g.*, the City of _____, California] and that I have read the foregoing notice and know its contents, and that the same is true to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, this _____ day of _____, _____.

_____ [*public agency*]
By _____ [*signature of official*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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2. Other Notices

15-31 California Legal Forms--Transaction Guide § 31.213

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.213 Notice of Delinquent Compensation

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice that every contractor or subcontractor who employs laborers [*see Civ. Code § 3089(a)*] must give to those laborers, their bargaining representatives (if any), and any construction lender or reputed construction lender when the contractor or subcontractor has failed to pay those laborers their full compensation when it became due, including any employer payments described in *Lab. Code § 1773.1*. The notice is required regardless of whether the work was performed on a private or public work project. It must be given no later than the date the compensation became delinquent. Failure to do so constitutes grounds for disciplinary action by the Registrar of Contractors [*Civ. Code § 3097(k)*].

[b] Rights of Express Trust Funds

For purposes of the mechanics' lien law, an express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, any employer payments described in *Lab. Code § 1773.1*), is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code § 3111* is intended to reinstate the ability of laborers and employee trust funds to use mechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Before this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53*

Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296] . The Ninth Circuit has subsequently held that ERISA does not preempt California's stop notice and payment bond remedies [*Southern Cal. IBEW-NECA Trust Funds v. Standard Industrial Electric. Co. (9th Cir. 2001) 247 F.3d 920, 925]* .

[c] Contents of Notice

The notice must be written and contain all of the following [*Civ. Code § 3097(k)*]:

- The name of the owner and the contractor.
- A description of the jobsite sufficient for identification.
- The identity and address of any express trust fund to which a portion of a laborer's total compensation is paid pursuant to an applicable employment or collective bargaining agreement for the provision of benefits, including any employer payments described in *Lab. Code § 1773.1* [*see Civ. Code § 3111*].
- The total number of straight-time and overtime hours on each job.
- The amount then past due and owing.

[2] FORM

Notice of Delinquent Compensation

NOTICE OF DELINQUENT COMPENSATION

YOU ARE HEREBY NOTIFIED:

1. The undersigned is the [contractor *or* subcontractor] on a work of improvement ("the project") at [*give description of jobsite sufficient for identification*]. The undersigned has employed laborers to work on the project, and has failed to pay [one of] those laborers [their/his/her] full compensation when it became due [, including employer payments described in *Labor Code Section 1773.1*]. As of the date of this notice, the amount past due and owing is $_____.

2. The name of the owner of the project is [*specify*] [*add if claimant is subcontractor*:, and the name of the project contractor is _____].

3. Employer payments are owed for the project, pursuant to *Civil Code Section 3111*, to the following express trust fund(s): _____[*name and address of every such fund*].

4. As of the date of this notice, the total number of straight time and overtime hours on the project are as follows:

Straight-time hours: _____
Overtime hours: _____
Dated: _____.

_____ [*name of contractor or subcontractor*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.214

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.214 Ten-Day Stop Work Order

[1] Comment

[a] Use of Form

The form in [2], *below*, is for use by an original contractor under a private construction project contract entered into on or after January 1, 1999, when (1) there is no dispute over the contractor's performance, and (2) a payment under the contract is at least 35 days overdue. If payment is not made within 10 days from the date the notice is served, the original contractor may stop work, and the contractor or his or her surety may seek a judicial determination of liability for the unpaid amount in an expedited proceeding in the superior court in the county in which the work of improvement is located [*Civ. Code § 3260.2(a), (d)*]. The right to stop work does not apply to retentions withheld by a lender in accordance with the construction loan agreement [*Civ. Code § 3260.2(f)*].

[b] Prior Posting of Notice of Intention to File Stop Work Order

At least five days before the owner is served with a 10-day stop work order, the contractor must post in a conspicuous place at the job site and the job site main office, if any, a notice that he or she intends to file the stop work order [*Civ. Code § 3260.2(a)*].

[c] Service of Stop Work Order; Copy to Lender

The stop work order must be served on the owner and on all subcontractors with whom the original contractor has a direct contractual relationship [*Civ. Code § 3260.2(a)*]. If the person to be served resides in California, service must be by (1) personal delivery; (2) leaving notice at the person's residence or place of business with a person in charge; or (3) first-class registered or certified mail, addressed to the recipient at the recipient's residence or business address, the address shown on building permit on file with authority issuing permit, or the address recorded on the mortgage, deed

of trust, or other instrument securing the construction loan [*Civ. Code § 3260.2(g)(1)*; *see Civ. Code § 3097(j)*].

If the person to be served resides outside California and cannot be served in a manner prescribed for residents, service must be by first class certified or registered mail addressed to the construction lender [*Civ. Code § 3260.2(g)(2)*]. Service by certified mail is effective on receipt. Service by registered mail is effective five days after mailing [*Civ. Code § 3260.2(g)(3)*].

Within five days of receiving the notice, the owner must forward a copy by first class mail to the construction lender, if any, at the address on the construction loan agreement [*Civ. Code § 3260.2(a)*].

[d] Liability to Others; Relationship to Other Laws; Waiver

If all procedural requirements are met, the original contractor or his or her surety, or a subcontractor or his or her surety, will not be liable for any delays or damages that the owner or contractor of a subcontractor may suffer as a result of the original contractor serving the owner with a 10-day stop work order and subsequently stopping work for nonpayment [*Civ. Code § 3260.2(c)*].

An original contractor's or original subcontractor's liability to a subcontractor or material supplier resulting from the cessation of work is limited to the amount of monetary damages the subcontractor or material supplier could recover under the mechanics' lien law for goods and services provided up to the date the "subcontractor" [*see Civ. Code § 3260.2(c)* (statute refers to "subcontractor" here, but it appears that "contractor" was intended)] ceases work, provided that both of the following conditions are satisfied [*Civ. Code § 3260.2(c)*]:

- Liability continues for work performed and materials supplied up to and including the 10-day notice period and not beyond; and

- There is no limitation on monetary damages for custom work, including materials that have been fabricated, manufactured, or ordered to unique specifications.

The right to stop work by serving a 10-day notice is in addition to any and all other rights the contractor may have under the law [*Civ. Code § 3260.2(b)*]. Any contractual waiver of this right to stop work is against public policy [*Civ. Code § 3260.2(e)*].

[2] FORM

Ten-Day Stop Work Order

TEN-DAY STOP WORK ORDER

I, [*name of original contractor or authorized representative*], state:

1. I [am *or* represent] the original contractor on the construction project located at [*location of jobsite*] pursuant to a construction contract between _____[*name of owner*] and _____[*contractor's name*] dated [*date of contract*].

2. A payment under the contract in the amount of $_____ was scheduled to be made [*enter date payment was due or circumstances giving rise to liability for payment, such as completion of a designated portion of the project*].

3. At least 35 days have passed since this payment was due to be made and _____[the entire amount *or* $_____] remains due and owing.

4. There is no dispute as to my satisfactory performance under the construction contract.

I hereby give notice that, unless all amounts now due under the construction contract are not paid within 10 days from the date this order is served, _____[I *or contractor's name*] will stop work on the work of improvement pursuant to *Civil Code Section 3260.2*.

Date: _____.

_____ [*original contractor's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
A. Preliminary and Other Notices
2. Other Notices

15-31 California Legal Forms--Transaction Guide §§ 31.215-31.219

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.215[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
B. Mechanics' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.220

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.220 Claim of Mechanics' Lien

[1] Comment

[a] Use of Form

The form in [2], *below*, is a mechanics' lien claim that may be used in connection with a private work of improvement [*see Civ. Code § 3109* (mechanics' liens not available on public works)]. To enforce a mechanics' lien, the claimant must take the following actions: give a preliminary 20-day notice, if required [*see Civ. Code § 3097*; *see also § 31.202[2]*], and then record a written claim of lien (this form) with the recorder of the county in which the subject property is located [*Civ. Code § 3115*; *see* [d], *below*].

For a preprinted claim of lien, see *§ 31.221[2]*.

[b] Required Contents

The claim of lien must be written, signed, and verified, and must contain all of the following [*Civ. Code § 3084*]:

- A statement of the claimant's demand (after deducting all just credits and offsets).
- The name of the owner or reputed owner, if known.
- A general statement of the kind of labor, services, equipment, or materials furnished by the claimant.
- The name of the person by whom the claimant was employed or to whom the claimant furnished the labor, services, equipment, or materials.
- A description of the site sufficient for identification.

No acknowledgment is required as a prerequisite to recording the claim of lien [*Civ. Code § 3084*].

[c] Amount of Lien

A mechanics' lien is a direct lien for the lesser of (1) the reasonable value of the labor, services, equipment, or materials furnished, or (2) the price agreed on by the claimant and the person with whom he or she contracted. As a general rule, the lien will not be limited in amount by the contract price [*Civ. Code § 3123(a)*; *see Civ. Code § 3140*]. However, if the property owner records the contract and the original contractor's payment bond, the owner's liability to claimants will be limited to the contract price [*Civ. Code §§ 3235, 3236*; *see § 31.22[3]*]. The claimant may include in the lien any amount due for labor, services, equipment, or materials furnished pursuant to a written modification of the contract or as a result of the rescission, abandonment, or breach of the contract. However, in the event of rescission, abandonment, or breach of the contract, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, and materials furnished by the claimant [*Civ. Code § 3123(b)*]. The above provisions of *Civ. Code § 3123(b)* permit a claimant to include in the lien an amount for the reasonable value of the labor, services, equipment, or materials furnished based on the owner's breach of contract, even if based on oral modifications to the contract [*Basic Modular Facilities, Inc. v. Ehsanipour (1999) 70 Cal. App. 4th 1480, 1485, 83 Cal. Rptr. 2d 462]* .

[d] Recordation of Claim

If the owner records a notice of completion or notice of cessation, and notifies the original contractor and any claimants who provided a preliminary 20-day lien notice that the notice of completion or cessation has been recorded, the contractor has 60 days and the claimants have 30 days from the date the notice is recorded to record a claim of lien against the project [*Civ. Code §§ 3115, 3116, 3259.5(a)*]. If the owner occupies the property as a personal residence and the dwelling contains not more than four residential units, the 60- and 30-day periods apply and the owner is not required to give notice that a notice of completion or cessation has been recorded; provided such a notice has, in fact, been recorded [*Civ. Code § 3259.5*]. If a notice of completion or cessation is not recorded, or if the owner fails to notify the original contractor or a claimant who filed a preliminary 20-day notice, the contractor and claimant have 90 days to file a lien claim [*see Civ. Code §§ 3115, 3116, 3259.5*].

For a procedural guide to filing a mechanics' lien on a private project, see *§§ 31.130-31.138*.

[2] FORM

Claim of Mechanics' Lien

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

CLAIM OF MECHANICS' LIEN

_____[*name*], a mechanics' lien claimant doing business as [*specify*] (hereafter referred to as "Claimant"), claims a mechanics' lien on the real property situated in _____[the City of _____, *or* an unincorporated area of] _____ County, California (hereafter referred to as "the Property"), and more particularly described as follows: [*describe property sufficiently for identification; a legal description is recommended*].

The sum of $_____, with interest at the rate of _____ percent per annum from _____[*date amount became due*], is now due Claimant, after deducting all just credits and offsets, for the following [labor *or* services *or* equipment *or* materials] furnished by Claimant: [*describe*]. Claimant furnished the foregoing in connection with the following work of improvement, which is located on the real property described above: [*describe, e.g.*, the construction of a detached single-family dwelling]. The owner or reputed owner of the work of improvement and the real property is _____[*name*].

Claimant furnished the above [labor *or* services *or* equipment *or* materials] _____[while employed by, and at the request of, _____ (*name of contractor*) *or* to _____ (*name of contractor*) (hereafter referred to as "Contractor") pursuant to a written contract between Claimant and Contractor dated _____ (and a written extension of that contract dated _____) *or* as a result of the _____ (rescission *or* abandonment *or* breach) by Contractor of a written contract between Claimant and Contractor dated _____].

[*Continue with the following*:]

_____ [*signature of claimant*]
[*typed name*]

I, _____[*name*], declare that:

[*EITHER*]

I am the [*title*] of [*corporation*], named as Claimant in the foregoing claim of lien; I am authorized to make this verification for the corporation.

[*OR*]

I am the person named as Claimant in the foregoing claim of lien.

I have read it and know its contents; it is true to my own knowledge and contains, among other things, a correct statement of my demand after deducting all just credits and offsets.

Executed at _____, California, on _____[*date*].

I declare under penalty of perjury that the foregoing is true and correct.

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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B. Mechanics' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.221

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.221 Claim of Mechanics' Lien--Alternative Printed Form

[1] Comment--Use of Form

The form in [2], *below*, is a standard printed form for a mechanics' lien claim that may be used as an alternative to the *form in § 31.220[2]*. This form is available from Building News, Inc. Bookstore, 1612 S. Clementine Street, Anaheim, California 92802, 1-888-264-2665, http://bnibooks.com. Publications available from Building News, Inc. include materials on building codes, legal references, and forms. For a discussion of the use of this form, see *§ 31.220[1]*.

[2] FORM

Claim of Mechanics' Lien--Alternative Printed Form

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
B. Mechanics' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.222

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.222 Notice of Extension of Credit

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of extension of credit that a claimant may use to extend the time that a mechanics' lien will bind property. No recorded mechanics' lien will bind any property for longer than 90 days after recording, unless within that time either an action to foreclose the lien is commenced in the proper court or the lien claimant gives an extension of credit to the claimant's debtor and records notice of that fact and the terms of the extension before expiration of the 90-day period. If a notice of extension of credit is recorded, the mechanics' lien will continue in force for a period of 90 days after the expiration of the credit, but no more than one year after the original date of the completion of the work of improvement [*Civ. Code § 3144*]. In computing time periods, the first day is excluded and the last day is included [*see Ziganto v. Taylor (1961) 198 Cal. App. 2d 603, 605, 609, 18 Cal. Rptr. 229]* .

[b] Necessity of Recording Extension of Credit

The notice of extension of credit must be recorded in order to be effective against any purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to the expiration of the 90-day period following the recording of the claim of lien [*Civ. Code § 3145*]. If the notice is not recorded within that period and the lien expires, it may be revived by the subsequent recording of a notice of extension of credit, but only as against persons who are not bona fide purchasers or encumbrancers for value subsequent to the expiration of the 90-day period [*Richards v. Hillside Development Co. (1960) 177 Cal. App. 2d 776, 781, 2 Cal. Rptr. 693]* .

[c] Multiple Extensions of Credit

Since there is no restriction to a single extension of credit, multiple extensions of credit may be given and will successively extend the period during which a mechanics' lien may be foreclosed [*Richards v. Hillside Development*

Co. (1960) 177 Cal. App. 2d 776, 780-781, 2 Cal. Rptr. 693] . However, the lien may not be extended beyond one year from the time of the completion of the work of improvement [*Civ. Code § 3144*].

[2] FORM

Notice of Extension of Credit

Notice of Extension of Credit

NOTICE IS HEREBY GIVEN that _____[*name of claimant*], as a mechanics' lien claimant, claiming under a claim of lien recorded on _____[*date*], in Book _____, Page _____, of the Official Records in the office of the county recorder of _____[*name of county*] County, California, a lien against a work of improvement and real property of the following description [*give legal description*], has agreed with _____[*name of owner*], owner of the above-described real property, that a credit of [*number*] of days after the date of this instrument shall be given.

Pursuant to *Civil Code Section 3144*, the above-described claim of lien shall continue in force for 90 days after expiration of the credit. The owner will not object to any action to foreclose the claimed lien which may be brought within this 90-day period on the ground that the action is barred by the limitation period specified in *Civil Code Section 3144*.
Dated: _____.

_____ [*signature of claimant*]
[*typed name*]
_____ [*signature of owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
B. Mechanics' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.223

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.223 Notice of Lis Pendens

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of lis pendens that a lien claimant may record after filing a complaint to foreclose a mechanics' lien. A lis pendens is a notice that an action that affects the title or right of possession of designated real property is pending. After the claimant has recorded a lis pendens, potential purchasers or encumbrancers of the property are deemed to have constructive notice of the pendency of the action [*Civ. Code § 3146*]. If those persons ultimately acquire an interest in the property, they will take their interest subject to any judgment rendered in the action [*see Code Civ. Proc. § 1908(a)(2)*].

[b] Commencement of Action

Within 90 days after recording a claim of lien, a claimant must either give an extension of credit [*see § 31.222[2]*] or file a complaint to foreclose the mechanics' lien. For an example of a complaint to foreclose the lien, see California Forms of Pleading & Practice, Ch. 361, *Mechanics' Liens* (Matthew Bender). After the complaint is filed in the proper court, the claimant may record the notice of lis pendens [*Civ. Code § 3146*].

[c] Content and Filing Requirements

The notice of lis pendens must contain the names of the parties, the object of the action, and a description of the property affected. It may be filed in the office of the county recorder of the county or counties in which the property is situated [*Civ. Code § 3146*; *Code Civ. Proc. § 405.20*].

[2] FORM

Notice of Lis Pendens

NOTICE OF LIS PENDENS

NOTICE IS HEREBY GIVEN THAT action number _____ entitled _____[*name of plaintiff*] v. _____[*name of defendant*] was filed in the _____[*name of court*] Court on _____[*date of filing*]. The action concerns real property located at _____[*street address*] in _____[*city*], in the county of _____[*name of county*], California, more particularly described as follows: [*give legal description of property*].

The object of the action is to foreclose and enforce the mechanics' lien on the above-described property, which is evidenced by a duly recorded, verified claim of lien that appears in Book _____, Page _____, of the official records of the Recorder of _____[*name of county*] County. Dated: _____.

_____ [*signature of claimant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts



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B. Mechanics' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide §§ 31.224-31.229

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.224[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
C. Stop Notices and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.230

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.230 Stop Notice

[1] Comment

[a] Use of Form

The form in [2], *below*, is a stop notice for use on either a public or private work of improvement. Printed versions of stop notices are also available from commercial form publishers. Various public entities may require claimants to give stop notices on particular forms used by each entity. For an example of the printed stop notice form used by the state Department of Transportation, see *§ 31.231[2]*.

[b] Nature of Remedy

A stop notice, also known as a notice to withhold, is a written notice to a property owner, public entity, or construction lender from a claimant who has furnished labor, services, materials, or equipment to the work of improvement but has not been paid, demanding that sufficient funds be withheld from the construction fund for payment of the claim. "Public entity" means the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*Civ. Code § 3099*]. A "construction lender" is any mortgagee or beneficiary under a deed of trust lending funds with which the cost of the work of improvement is to be wholly or partially defrayed; any assignee or successor in interest of either; or any escrow holder or other party holding any funds furnished or to be furnished by the owner, lender, or any other person as a fund from which to pay construction costs [*Civ. Code § 3087*].

[c] Persons Entitled to Serve Notice

[i] Private Works

Any person entitled to a mechanics' lien claim [*Civ. Code §§ 3110-3112*; *see § 31.13[2]*], other than the original

contractor, may give the property owner a stop notice. Any person who fails to serve a stop notice after a written demand by the owner [*see § 31.234*] will forfeit any right to a mechanics' lien [*Civ. Code § 3158*].

Any person entitled to a mechanics' lien claim (including the original contractor) may also give a construction lender a stop notice or bonded stop notice [*Civ. Code § 3159*; *see* [e][i], *below*]. The notice may be given only for materials, equipment, or services furnished or labor performed. In the case of a stop notice or bonded stop notice filed by the original contractor or by a subcontractor contracting directly with an owner, the claimant will be entitled to recover on his or her notice only the net amount due the claimant after deducting the stop notice claims of all subcontractors or material suppliers who have filed bonded stop notices on account of work done on behalf of the claimant contractor or subcontractor [*Civ. Code § 3159*].

An express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, any employer payments described in *Lab. Code § 1773.1*), is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code § 3111* is intended to reinstate the ability of laborers and employee trust funds to use mechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Before this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53 Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296]* . The Ninth Circuit has subsequently held that ERISA does not preempt California's stop notice and payment bond remedies [*Southern Cal. IBEW-NECA Trust Funds v. Standard Industrial Electric. Co. (9th Cir. 2001) 247 F.3d 920, 925]* .

[ii] Public Works

Any person who contributes labor, services, or materials to a work of improvement [*see Civ. Code § 3110*], who is an express trust fund [*see Civ. Code § 3111*], who has made site improvements at the request of the owner [*see Civ. Code § 3112*], who is a registered hazardous waste hauler [*see Health & Safety Code § 25163*; *Pub. Contract Code § 4107.7*], or who furnishes provisions, provender, or other supplies to a public work of improvement may serve a stop notice on the public entity responsible for the public work [*Civ. Code § 3181*]. The stop notice and payment bond [*see § 31.240[2]*] are the exclusive remedies for persons contributing labor or materials to a public work of improvement, since mechanics' liens do not apply to public works [*see Civ. Code § 3109*].

ERISA [*see 29 U.S.C. § 1001 et seq.*] preempts state laws relating to enforcement of public works employee benefit plans. However, the Ninth Circuit has held that ERISA does not preempt California's stop notice and payment bond remedies because they do not require the establishment of a separate benefit plan, impose no new reporting, disclosure, funding, or vesting requirements for ERISA plans, do not tell employers how to write ERISA benefit plans or how to determine ERISA beneficiary status, and do not condition requirements on how ERISA benefit plans are written [*Southern Cal. IBEW-NECA Trust Funds v. Standard Industrial Electric. Co. (9th Cir. 2001) 247 F.3d 920, 925]* .

[d] Contents of Notice

The stop notice for a public or private work of improvement must state in general terms all of the following [*Civ. Code § 3103*]:

- The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;

- The name of the person to or for whom the labor, service, equipment, or materials were furnished;

- The amount in value, as accurately as possible, of that already done or furnished, and of the whole agreed to be done or furnished; and

- The claimant's name and address.

No notice will be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information required [*Civ. Code § 3103*].

[e] Effect of Stop Notice

[i] Private Works

On receipt of a stop notice, a property owner must withhold from the original contractor or from any person acting under the contractor's authority and to whom labor or materials (or both) have been furnished or agreed to be furnished, sufficient money due or to become due to answer the claim and any claim of lien that may be recorded. The only time this duty to withhold is not imposed is when the owner has recorded a payment bond [*see § 31.22[1]*] provided by the original contractor [*Civ. Code § 3161*; *see Civ. Code § 3235*]. In that event, the owner may withhold the money, but is not obligated to do so. If the owner does not withhold, he or she must, within 30 days after receipt of the stop notice, (1) send the claimant, at the address shown in the stop notice, a written notice that the bond has been recorded, and (2) give the claimant a copy of the bond [*Civ. Code § 3161*].

A construction lender's responsibilities on receiving a stop notice depend on whether a payment bond has been previously recorded and whether the stop notice itself is bonded. A bonded stop notice is a stop notice accompanied by the claimant's bond in a penal sum equal to one and one-quarter times the amount of the claim, conditioned that if the defendant recovers judgment in an action brought on the claim or on the lien filed by the claimant, the claimant will pay all costs and damages that may be awarded to the owner, original contractor, construction lender, or any of them, up to the sum specified in the bond [*Civ. Code § 3083*; *see § 31.232*].

A construction lender is required to withhold funds when (1) the stop notice is a bonded stop notice filed by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code §§ 3159(a)(1), 3162(a)(1)*]; or (2) the stop notice is a bonded stop notice filed by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was not recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

A construction lender may, but is not required to, withhold funds on receipt of a stop notice when (1) the stop notice is not bonded, regardless of who gives it [*Civ. Code § 3161(a)*]; (2) the stop notice is a bonded stop notice filed by any person entitled to do so, other than an original contractor; and (3) a payment bond was recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

If the lender elects not to withhold funds, it must furnish the claimant with notice of its election within 30 days after it so elects; provided that, at the time it gives the lender the stop notice or bonded stop notice, the claimant includes a written request for notice of the election accompanied by a pre-addressed, stamped envelope. The lender will not be liable for failing to furnish a copy of the bond if (1) the failure was not intentional and resulted from a bona fide error; (2) the lender maintains reasonable procedures to avoid such errors; and (3) the error was corrected not more than 20 days from the date the violation was discovered [*Civ. Code §§ 3159(a)(3), 3162(a)(3)*].

When a stop notice or bonded stop notice is filed by the original contractor or by a subcontractor, the recovery is limited

to the net amount due the claimant after deducting the stop notice claims of all subcontractors or material suppliers who have filed bonded stop notices for work done on behalf of the original contractor or subcontractor [*Civ. Code §§ 3159(b), 3162(b)*]. In no event is a construction lender required to withhold more than this net amount on receipt of a bonded stop notice. This amount represents the limit of the lender's liability [*Civ. Code §§ 3159(c), 3162(c)*].

[ii] Public Works

On receipt of a stop notice, the public entity has a duty to withhold from the original contractor, or from any person acting under the contractor's authority, money or bonds (when bonds are to be issued as payment for the work of improvement) due or to become due to the contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the reasonable cost of any litigation thereunder [*Civ. Code § 3186*]. However, this does not prohibit (1) the payment of any money or bonds to the original contractor or contractor's assignee unless a stop notice is on file before the disbursing officer has actually surrendered possession of either the warrant, check, bonds, or money, or (2) the payment to the original contractor or the contractor's assignee of any money due in excess of an amount sufficient to answer the total amount of the claims stated in stop notices on file at the time of payment, plus interest and court costs that might be reasonably anticipated in connection with the claims [*Civ. Code § 3187*].

[f] Time for Giving Notice

[i] Private Works

If the owner records a notice of completion or notice of cessation, and notifies the original contractor and any claimants who provided a preliminary 20-day lien notice that the notice of completion or cessation has been recorded, the contractor has 60 days, and a claimant has 30 days from the date the notice is recorded to record a stop notice [*Civ. Code § 3259.5(a)*; *see Civ. Code § 3160(b)*]. If the owner occupies the property as a personal residence and the dwelling contains not more than four residential units, the 60- and 30-day periods apply and the owner is not required to give notice that a notice of completion or cessation has been recorded; provided such a notice has, in fact, been recorded [*Civ. Code § 3259.5*]. If a notice of completion or cessation is not recorded, or if the owner fails to notify the original contractor or a claimant who filed a preliminary 20-day notice, the contractor and claimant have 90 days to file a lien claim [*see Civ. Code §§ 3160(b), 3259.5*].

[ii] Public Works

The service of a stop notice or a bonded stop notice will be effective only if a claimant who is required to do so has given a preliminary 20-day notice [*Civ. Code § 3183(a)*; *see § 31.202*]. The stop notice must be served before the expiration of 30 days after the recording of any notice of completion or cessation [*Civ. Code § 3184(a)*; *see §§ 31.210[2], 31.211[2]*]. If no notice of completion or cessation is recorded, the notice must be served before the expiration of 90 days after cessation [*Civ. Code § 3184(b)*].

A public entity must give notice to the claimant of the expiration of the period for filing stop notices no later than 10 days after the filing of a notice of completion, after the cessation of labor has been deemed a completion of the public work, or after the acceptance of completion, whichever is later. However, the notice is only required if the claimant has paid the public entity a sum of $2 at the time of filing the stop notice [*Civ. Code § 3185*].

[g] Service of Notice

A stop notice must be delivered to a property owner personally, left at the owner's residence or place of business with some person in charge, or delivered to the owner's architect, if any. A stop notice served on a construction lender must be given to or served on the manager or other responsible officer or person at the office or branch office administering or holding the construction funds [*Civ. Code § 3103*].

If the public work is for the state, the notice must be filed with the director of the department that let the contract. In the case of other public works, the notice must be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract, or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded [*Civ. Code § 3103*].

Any stop notice may be served by registered or certified mail with the same effect as personal service [*Civ. Code § 3103*].

[g.1] Voluntary Release

A stop notice claimant may reduce the amount of, or release in its entirety, a properly served public or private work stop notice without prejudicing the claimant's right to serve a subsequent timely and proper stop notice. The reduction or release must be in writing, but is not required to conform to the statutory forms of release required by Civ. Code § 3262(d) for use in a mechanics' lien context [*Civ. Code § 3262(b)(2)*]. To the extent of the reduction or release, it [*Civ. Code § 3262(b)(2)(A)-(D)*]:

- Releases the owner from any obligation to withhold money on account of the stop notice;
- Is effective to release the claimant's right to enforce the stop notice; and
- Does not operate as a release of any right that the claimant may have, other than the claimant's right to enforce the stop notice.

[h] Release by Bond

[i] Private Works

When a property owner, construction lender, or any original contractor or subcontractor for a private work disputes the correctness or validity of a stop notice or bonded stop notice, that person may file a release bond with the person on whom the notice was served. When the bond is filed, the funds withheld to respond to the stop notice or bonded stop notice will be released [*Civ. Code § 3171*].

For an example and discussion of release bonds, see *§ 31.251*.

[ii] Public Works

When the original contractor or subcontractor for a public work disputes the correctness, validity, or enforceability of any stop notice, the public entity may permit the original contractor to file a release bond with the public entity. Once such a bond is filed with the public entity, the entity will not withhold any money or bonds from the original contractor on account of the stop notice. The sureties on the bond will be jointly and severally liable to the stop notice claimant with the sureties on any payment bond [*Civ. Code § 3196*].

[i] Release by Summary Proceedings

The original contractor on a public work may bring summary court proceedings to contest a stop notice and release the funds held by serving on the public entity an affidavit alleging the legal grounds on which the claim is based, and demanding the release of any money alleged to be improperly withheld or excessive [*Civ. Code §§ 3197, 3198*]. For a discussion of this procedure, see *§ 31.235*.

[j] Enforcement of Stop Notice

To enforce payment of the stop notice claim, a court action against the property owner or construction lender for a private work, or the original contractor and the public entity for a public work, must be commenced any time after 10 days from the date of service of the stop notice but not later than 90 days after the expiration of the period for recording a claim of lien (for private works) or filing a stop notice (for public works) [*Civ. Code §§ 3172, 3210*; *see Civ. Code § 3184*]. If timely proceedings are not initiated, the stop notice will cease to be effective and the money or bonds withheld will be paid or delivered to the contractor or other person to whom they are due [*Civ. Code §§ 3172, 3210*]. For a discussion of the action to enforce a stop notice, see *§ 31.237[1]*.

[2] FORM

Stop Notice

Stop Notice

To: _____[*name and address of owner, public entity, or construction lender*]

PLEASE TAKE NOTICE THAT _____[*name of claimant*], the undersigned, whose address is _____[*address*], _____[performed *or* agreed to perform *or* furnished *or* agreed to furnish] _____[labor *or* services *or* materials *or* equipment] _____[for *or* to] _____[*name of contractor or subcontractor for or to whom the labor, materials, services, or equipment was performed or furnished*] for use in the work of improvement located at _____[*address*]. This work is being constructed pursuant to the original contract entered into between _____[*name of property owner or public entity*] and _____[*name of original contractor*], the original contractor for the work of improvement.

_____[Labor *or* Materials *or* Services *or* Equipment] consisting of _____[*describe generally, e.g.*, concrete for sidewalks] was [*or* were] furnished on the following date(s): _____[*specify date(s)*].

The total value of _____[labor *or* services *or* equipment *or* materials] agreed to be done [*or* furnished] by claimant is $ _____. The value of the _____[labor *or* services *or* equipment *or* materials] furnished as of the date of this notice is $ _____, of which $ _____ has not been paid.

Therefore, the undersigned hereby demands that _____[*name of owner, public entity, or construction lender*] withhold sufficient funds to satisfy this claim.

[*Consider adding the following if stop notice is being given to construction lender (see Civ. Code §§ 3159, 3162)*: The undersigned further requests that you notify the undersigned if, because of the proper and timely recordation of a payment bond, you elect not to withhold the funds pursuant to *California Civil Code Sections 3159* and *3162*. Any such notice, and a copy of the recorded payment bond, may be mailed in the attached pre-addressed, stamped envelope.]

Dated _____.

_____ [*signature of claimant or agent*]
[*typed name*]

Verification

I, _____[*name*] declare that I am the [claimant *or* agent of the claimant] in the foregoing stop notice. I have read the foregoing stop notice and know the contents thereof, and it is true of my own knowledge. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____[*date*], at _____[*city*], California.

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Stop Notices and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.231

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.231 Stop Notice on Public Work--Department of Transportation

[1] Comment--Use of Form

The form in [2], *below*, is the California Department of Transportation's printed stop notice form. It is available online at http://www.dot.ca.gov/hq/asc/oap/payments/snotep1.pdf. Various public entities may require claimants to give stop notices on particular forms used by each entity. For a discussion of the use of this form, and a drafted version of a stop notice, see *§ 31.230*.

[2] FORM

Stop Notice on Public Work--Department of Transportation

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.232

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.232 Stop Notice Bond--Printed Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a standard printed stop notice bond. It is available from Building News, Inc. Bookstore, 1612 S. Clementine Street, Anaheim, California 92802, 1-888-264-2665, http://bnibooks.com. It is to be used by a lien claimant, together with the stop notice form [*see § 31.230[2]*], to give a bonded stop notice to a construction lender on a private project.

A bonded stop notice is a stop notice given to any construction lender, accompanied by a bond with good and sufficient sureties in a penal sum equal to one and one-quarter times the amount of the claim [*Civ. Code § 3083*]. The purpose of a bond on a stop notice is to provide that if the defendant recovers judgment in an action brought on the claim or lien filed by the claimant, then the claimant will pay all costs that may be awarded against the owner, original contractor, or construction lender and all damages that the owner, original contractor, or construction lender may sustain by reason of the equitable garnishment effected by the claim or by reason of the lien, not exceeding the sum specified in the bond [*Civ. Code § 3083*].

[b] Effect of Bonded Stop Notice

A construction lender is required to withhold funds on receiving a bonded stop notice when the stop notice is filed either by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code § 3162(a)(1)*], or by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was not recorded before the first stop notice was served [*Civ. Code § 3162(a)(2)*; *see Civ. Code § 3235* (payment bonds)]. A lender may, but is not required to, withhold funds on receipt of a bonded stop notice when the notice is filed by any person entitled to do so, other than an original contractor, and a payment bond was recorded before the first stop notice was served [*Civ. Code § 3162(a)(2)*].

[c] Service of Notice

To be effective, a bonded stop notice must either be delivered to the manager or other responsible officer or person at the office of the construction lender, or sent to that office by registered or certified mail. If the construction lender maintains branch offices, the bonded notice must be delivered or sent to the office or branch administering or holding the construction funds [*Civ. Code § 3083*].

[d] Objection to Sufficiency of Sureties

If a construction lender objects to the sufficiency of the sureties on the bond accompanying the bonded stop notice, the lender must give the claimant written notice of the objection. For a discussion of the objection procedure, see *§ 31.233[1]*.

[2] FORM

Stop Notice Bond--Printed Form

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.233

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.233 Notice of Construction Lender's Objection to Sureties of Bonded Stop Notice

[1] Comment--Use of Form

The form in [2], *below*, is the notice of objection that a construction lender may use to object to the sufficiency of the sureties on the bond accompanying a bonded stop notice [*see § 31.232*]. The written notice must be given to the claimant within 20 days after service of the bonded stop notice. The claimant has 10 days after receiving the notice of objection to substitute another bond executed by a corporate surety licensed to write bonds in California. If the claimant fails to substitute bonds, the construction lender may disregard the bonded stop notice and release all funds held thereunder [*Civ. Code § 3163*].

[2] FORM

Notice of Construction Lender's Objection to Sureties of Bonded Stop Notice

_____[*name of claimant*]
_____[*street address*]
_____[*city, state, zip*]

NOTICE OF OBJECTION TO SURETIES ON STOP NOTICE BOND

You are hereby notified pursuant to *California Civil Code Section 3163* that the undersigned hereby objects to the sureties on that certain stop notice bond dated _____, executed by _____[*name of claimant*] as principal and _____[*name of surety*] as surety, in the sum of $_____ covering funds due on _____[*name of construction project*] with _____[*name of owner*] as owner and [*name of prime contractor*] as prime contractor.

You are therefore requested to substitute a bond in like amount executed by a corporate surety licensed to write such bonds in the State of California within 10 days after receipt of this notice.
Dated: _____.

_____ [*name of construction lender*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.234

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.234 Owner's Demand for Stop Notice

[1] Comment--Use of Form

The form in [2], *below*, is an owner's demand for a stop notice on potential lien claimants who have not been paid by the general contractor. If any lien claimant fails to serve a stop notice after receipt of a written demand from the owner, that claimant forfeits any right to a mechanic's lien [*Civ. Code § 3158*]. The owner may wish to use this device on projects when the general contractor has not filed a payment (also known as a labor and materials) bond [*see* Ch. 79, *Suretyship, Guaranty, and Indemnity*] which would protect the owner against the necessity of having to make a double payment to unpaid subcontractors or materialmen after making payment in full to the general contractor. By demanding a stop notice from unpaid subcontractors and materialmen, the owner will be able to withhold sufficient funds from the payments due to the general contractor to cover the claims of the subcontractors and materialmen. For a discussion of stop notices on private works, see *§ 31.230[1]*.

[2] FORM

Owner's Demand for Stop Notice

_____[*name of claimant*]
_____[*street address*]
_____[*city, state, zip*]

DEMAND FOR STOP NOTICE

You are hereby notified that the undersigned is the owner of real property located at _____[*address*], on which a work of improvement is being constructed. The undersigned is informed that you have furnished labor and/or services, equipment, material in connection with the work of improvement. Demand is hereby made on you to

serve the undersigned with a stop notice as prescribed by *California Civil Code Sections 3103* and *3158*, and you are informed that your failure to do so will result in a forfeiture of your right to a mechanic's lien on the above-described property.
Dated: _____.

_____ [*name of owner*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.235

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.235 Declaration of Original Contractor on Public Work Demanding Release of Funds

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration of an original contractor on public works demanding the release of funds. The original contractor may bring summary proceedings by asserting that (1) the claim on which the stop notice is based is not included within the types or classifications of claims under the mechanics' lien law; (2) the claimant is not one of the persons authorized to serve a stop notice [*see Civ. Code § 3181*]; (3) the amount of the claim as specified in the stop notice is excessive; or (4) there is no basis in law for the claim as referred to and set out in the stop notice [*Civ. Code § 3197*].

[b] Service of Affidavit

The contractor must serve on the public entity an affidavit (and a copy of the affidavit) that alleges the legal grounds on which the claim is based, states the facts in support of the claim, and demands the release of any money alleged to be improperly withheld or excessive. The affidavit must also state the original contractor's address in California, for purposes of service by mail of any notices or legal documents [*Civ. Code § 3198*].

After the public entity has been served, it must then serve on the claimant, either personally or by registered or certified mail addressed to the last known address of the claimant, a copy of the original contractor's affidavit and demand for release. The public entity must also serve a written notice that it will release the demanded money or bonds unless the claimant files a counteraffidavit with the public entity on or before a time designated in the notice, which must be no less than 10 or more than 20 days after service on the claimant. Proof of service must be made by affidavit [*Civ. Code § 3199*]. If the claimant wishes to contest the affidavit, the claimant must serve a counteraffidavit alleging the details of the claim and the basis on which the affidavit is contested [*Civ. Code § 3200*; *see § 31.236*].

[2] FORM

Declaration of Original Contractor on Public Work Demanding Release of Funds

DECLARATION AND DEMAND FOR RELEASE OF FUNDS

I, [*name of original contractor*], state:

That I am the original contractor on that certain work of improvement located at _____[*address of jobsite*] pursuant to a construction contract dated _____, between myself and _____[*name of public entity*].

That the claim by _____[*name of stop notice claimant*] in the amount of $_____ on which that certain stop notice dated _____, and filed with _____[*name of public entity*] is based is improper [*or* excessive] for the following reasons: [*set forth legal grounds on which original contractor bases assertion that the claim of the stop notice claimant is improper or excessive, and the supporting facts*].

I therefore demand that _____[*name of public entity*] release funds [*or* bonds] in the amount of $_____ which have been withheld improperly [*or* in an excessive amount] pursuant to the above-described stop notice.

I further state that my address within California for the purpose of service by mail upon me of any notice or legal document is _____[*address*].

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____[*date*], at _____, California.

_____ [*signature of original contractor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.236

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.236 Counterdeclaration by Claimant Contesting Original Contractor's Declaration and Demand for Release of Funds

[1] Comment

[a] Use of Form

The form in [2], *below*, is a counteraffidavit that a stop notice claimant may use to contest the affidavit and demand for release filed by the original contractor on a public works project with the public entity holding money or bonds [*see § 31.235[2]*]. It is in the form of a declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*].

[b] Purpose and Contents of Counteraffidavit

If the claimant wishes to contest the original contractor's affidavit and demand for release, the claimant must serve a counteraffidavit on the public entity within the time specified in the public entity's notice [*Civ. Code § 3200*]. That time period may not be less than 10 or more than 20 days after service on the claimant of copy of the original contractor's affidavit [*Civ. Code § 3199*]. The counteraffidavit must allege the details of the claim and set forth in detail the specific basis on which the claimant contests or rebuts the allegations of the original contractor's affidavit. The claimant must include proof of service of a copy of the counteraffidavit on the original contractor [*Civ. Code § 3200*]. If no counteraffidavit with proof of service is served on the public entity within the time allowed, the public entity may release the money or bonds or the portion that was demanded in the original contractor's affidavit, without liability in any manner for making the release [*Civ. Code § 3200*].

[c] Determination of Rights by Court Action

If both an affidavit and counteraffidavit have been filed with the public entity, either the original contractor or the stop notice claimant may file an action in the appropriate superior court for a declaration of the respective rights of the parties [*Civ. Code § 3201*]. After the filing of an action, either party is entitled to a hearing by the court for the purpose

of determining their rights under the affidavit and demand for release and the counteraffidavit [*Civ. Code § 3201*].

At the conclusion of the hearing, the court must make and enter its order determining whether the demand for release will be allowed or not, and that order will be determinative as to the right of the stop notice claimant to have the money or bonds further withheld by the public entity [*Civ. Code § 3203*].

[2] FORM

Counterdeclaration by Claimant Contesting Original Contractor's Declaration and Demand for Release of Funds

COUNTERDECLARATION BY STOP NOTICE CLAIMANT

I, _____[*name of claimant*] state:

That I furnished [*describe labor or materials*] on _____[*date*], in the amount of $_____ to _____[*name of person to whom labor or materials was furnished*] as [*specify capacity of person to whom labor or materials were furnished, e.g.*, owner *or* contractor *or* subcontractor *or* sub-subcontractor *or* architect *or* builder *or other person having charge of the work of improvement*] located at _____[*address of jobsite*].

That I gave a preliminary 20-day notice (public work) to _____[*name of public entity*] on _____[*date*], in accordance with *California Civil Code Section 3098*.

That I filed a stop notice with _____[*name of public entity*] on _____[*date*], in accordance with *California Civil Code Section 3184*.

That the amount of $_____ which is due and owing for the above described [*describe labor or materials*] remains unpaid.

That I contest [*or* rebut] the allegations of the affidavit [*or* declaration] dated _____, filed by [*name of original contractor*] as original contractor on the above-described work of improvement for the following reasons: [*set forth in detail the specific basis on which the claimant contests or rebuts the allegations of the original contractor's affidavit*].

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____[*date*], at _____, California.

_____ [*signature of claimant*]
[*typed name*]

[*Attach proof of service of copy of counterdeclaration on original contractor*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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C. Stop Notices and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.237

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.237 Notice of Commencement of Action on Stop Notice Claim

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of the commencement of an action by a stop notice claimant to enforce payment of the claim stated in the stop notice. It may be used for both public and private works of improvement.

[b] Time for Filing Action

[i] Private Works

An action against the owner or construction lender to enforce payment of the claim stated in a private work stop notice or bonded stop notice may be commenced at any time after 10 days from the date of service of the stop notice on either the owner or construction lender, and must be commenced within 90 days following the expiration of the period within which stop notices are required to be filed [*Civ. Code § 3172*]. The applicable period is the same as that for recording a claim of lien [*see Civ. Code §§ 3115, 3116*]. If no action is commenced, the stop notice will cease to be effective and the money paid or delivered to the contractor or other person to whom they are due [*Civ. Code § 3172*].

[ii] Public Works

An action against the original contractor and the public entity to enforce payment of the claim may be commenced at any time after 10 days from the date of service of the stop notice but before 90 days following the expiration of the period within which stop notices must be filed [*Civ. Code § 3210*]. The filing period for stop notices on public works is 30 days after the recording of a notice of completion or cessation, or, if neither was recorded, 90 days after completion or cessation of the work of improvement [*Civ. Code § 3184*]. If no action is brought within the appropriate period, the stop notice will cease to be effective and the money or money withheld must be paid to the contractor or other person to

whom they are due [*Civ. Code § 3210*].

[c] Service of Notice

[i] Private Works

The notice of commencement must be given to the owner or construction lender within five days after commencement of the action [*Civ. Code § 3172*]. If the notice is served on the owner, it may be delivered personally, left at the owner's residence or place of business with some person in charge, or delivered to the owner's architect, if any [*Civ. Code § 3103*; *see Civ. Code § 3172*]. If it is served on a construction lender holding construction funds and maintaining branch offices, it must be served on the manager or other responsible officer or person at the office or branch administering or holding the construction funds [*Civ. Code § 3103*; *see Civ. Code § 3172*]. The notice of commencement may be served by registered or certified mail with the same effect as by personal service [*Civ. Code § 3103*; *see Civ. Code § 3172*].

[ii] Public Works

Notice of the commencement of the action must be given to the public entity within five days after commencement of the action. The notice must be served in the same manner as a stop notice [*Civ. Code § 3211*]. In the case of any public work for the state, the notice must be filed with the director of the department that let the contract. In the case of other public works, the notice must be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract; or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body that awarded the contract [*Civ. Code § 3103*].

[d] Attorneys' Fees in Action Relating to Private Work

In any action against an owner or construction lender to enforce payment of a claim stated in a bonded stop notice on a private work, the prevailing party will be entitled to collect from the party held liable by the court for payment of the claim, reasonable attorneys' fees in addition to other costs and to any liability for damages [*Civ. Code § 3176*]. If the plaintiff is the prevailing party, any amount awarded on the claim will include interest at the legal rate, calculated from the date the bonded stop notice was served on the owner or construction lender [*Civ. Code § 3176.5*]. The court, on notice and motion by a party, will determine who is the prevailing party for these purposes [*see Civ. Code § 3176*].

[2] FORM

Notice of Commencement of Action on Stop Notice Claim

_____[*name of owner, construction lender, or public entity*]
_____[*address*]

NOTICE OF ACTION TO ENFORCE STOP NOTICE CLAIM

NOTICE IS HEREBY GIVEN that the undersigned, on _____[*date*] commenced a civil action in the _____[*name of court*], Action Number _____, against _____[*name of defendants*] to enforce a stop notice filed by the undersigned on _____[*date*].

The action is to enforce the payment of a claim in the amount of $_____ for [*describe labor or materials*] furnished to _____[*name of person to whom labor or materials were furnished*] for [*describe work of improvement*] being constructed under an agreement between _____[*name of property owner or public entity*] and [*name of original contractor*] dated _____.

Dated: _____.

_____ [*name of claimant*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide §§ 31.238-31.239

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.238[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
D. Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.240

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.240 Public Work Payment Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is the payment bond that an original contractor files with the public entity on a public work. Every original contractor who is awarded a contract by a public entity involving an expenditure exceeding $25,000 ($5,000 for a contract with a "state entity") [*see Pub. Contract Code § 7103(d)* (definition)] must file a payment bond with the officer or public entity by whom the contract was awarded [*Civ. Code § 3247(a)*]. A deposit will not be accepted in lieu of a bond [*Civ. Code § 3248(d)*]. However, the Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] permits an undertaking to be substituted for the payment bond [*see Code Civ. Proc. § 995.210*; for discussion of the Bond and Undertaking Law requirements generally, see Ch. 79, *Suretyship, Guaranty, and Indemnity*].

The public entity must state in its call for bids for any such contract that a payment bond is required in the case of an expenditure exceeding $25,000 [*Civ. Code § 3247(a)*]. For a discussion and a form for a payment bond on a private work of improvement, see *Ch. 79, Suretyship, Guaranty, and Indemnity, §§ 79.244, 79.245*.

[b] Approval and Amount of Bond

The payment bond must be approved by the public entity that awarded the contract [*Civ. Code § 3247*]. To be approved, the bond must be in a sum not less than 100 percent of the total amount payable by the terms of the contract [*Civ. Code § 3248(a)*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] requires that the payment bond be executed by two or more sufficient personal sureties [*see Code Civ. Proc. §§ 995.510, 995.520*], or one sufficient admitted surety insurer, or any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. An "admitted surety insurer" is a corporate insurer or a reciprocal or interinsurance exchange that has been certified by the

Insurance Commissioner to transact surety insurance in California [*Code Civ. Proc. § 995.120(a)*; *see Ins. Code § 105*; *see also Code Civ. Proc. §§ 995.610-995.650*].

[c] Contents of Bond

The payment bond must provide that the surety or sureties will pay any of the following if the original contractor fails to pay them [*Civ. Code § 3248(b)*]:

- Any of the persons entitled to give a public works stop notice under *Civ. Code § 3181*.

- Amounts due under the Unemployment Insurance Code with respect to work or labor performed by a claimant.

- Any amount required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the contractor or subcontractors pursuant to *Rev. & Tax. Code § 18663* with respect to the work or labor.

The bond must also provide for reasonable attorneys' fees to be fixed by the court in case suit is brought on the bond [*Civ. Code § 3248(b)*]. Another litigation-related requirement is that the bond must, by its terms, inure to the benefit of any persons entitled to give a public works stop notice under *Civ. Code § 3181* so as to give a right of action to those persons or their assigns in any suit brought on the bond [*Civ. Code § 3248(c)*]. As a prerequisite to enforcing a claim on a public works payment bond, any claimant other than a person who performs actual labor for wages, an express trust fund, or a person who has a direct contractual relationship with the original contractor must give the public entity a preliminary 20-day notice [*see Civ. Code § 3098*; *see also § 31.202[2]*].

[d] Exemption From Bond Requirements

For purposes of the payment bond requirements of *Civ. Code § 3247(a)*, providers of architectural, engineering, and land surveying services pursuant to a contract with a public entity for any public work are not original contractors and are not required to post or file a payment bond [*Civ. Code § 3247(c)*].

[e] Recovery on Payment Bond

To enforce a claim on a public work payment bond, a claimant (other than one who performs actual labor for wages, is under direct contract with the original contractor, or an express trust fund) must give a preliminary 20-day notice [*Civ. Code § 3098*; *see § 31.202[2]*]. An action against the surety must be brought after the claimant has last furnished labor or materials or both, but before the expiration of six months after the period in which stop notices must be filed [*Civ. Code § 3184*]. For an example of a complaint against the surety on a payment bond, see California Forms of Pleading & Practice, Ch. 481, *Public Works* (Matthew Bender).

[2] FORM

Public Work Payment Bond

PAYMENT BOND FOR PUBLIC WORKS

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, the _____[*name of public entity*], and [*name of contractor*] (hereafter designated as "Principal") have entered into a written agreement, dated _____, for the furnishing of all materials, labor, services and transportation, necessary, convenient, and proper to [*specify*], which Agreement, and all of the

Contract Documents attached to or forming a part of that Agreement, are hereby referred incorporated by reference;

WHEREAS, the Principal is required by Chapter 5 (commencing at Section 3225) and Chapter 7 (commencing at *Section 3247), Title 15, Part 4, Division 3 of the California Civil Code* to furnish a bond in connection with the contract;

NOW THEREFORE, we, the Principal and _____ and _____ as Sureties, are held and firmly bound unto the Public Entity under the above statutory obligations in the penal sum of $_____, lawful money of the United States of America for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, the Principal's heirs, executors, administrators, successors or assigns, or subcontractors, fails to pay any of the persons named in *Civil Code Section 3181*, or any amounts due under the Unemployment Insurance Code with respect to work or labor performed by any such claimant, or any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Contractor and the Contractor's subcontractors pursuant to *Unemployment Insurance Code Section 13020*, with respect to this work and labor, that the Sureties will pay for the work and labor, otherwise the above obligation shall be void. If suit is brought on this bond, the Sureties will pay a reasonable attorneys' fee to be fixed by the Court.

This bond shall inure to the benefit of any of the persons named in *Civil Code Section 3181* to give a right of action to these persons or their assigns in any suit brought on this bond. It is further stipulated and agreed that the Sureties on this bond shall not be exonerated or released from the obligation of this bond by any of the following: (1) any change, extension of time for performance, addition, alteration, or modification affecting any contract, plans, specifications, or agreement pertaining or relating to any scheme or improvement work described above or pertaining to or relating to the furnishing of labor, materials, or equipment therefor; (2) any change or modification of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or improvement work described above; (3) by any rescission or attempted rescission of the contract, agreement, or bond; (4) any conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under any such contract or agreement or under the bond; or (5) any fraud by any person other than the claimant seeking to recover on the bond. This bond shall be construed most strongly against the Sureties and in favor of all persons for whose benefit this bond is given, and under no circumstances shall the Sureties be released from liability to those for whose benefit this bond has been given, by reason of any breach of contract between the owner or Public Entity and original contractor or on the part of any obligee named in this bond. The sole conditions of recovery shall be that the claimant is a person described in *Civil Code Section 3110* or *3112*, and has not been paid the full amount of his or her claim. The Sureties hereby waive notice of any change, extension of time, addition, alteration, or modification herein mentioned.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and Sureties on _____[*date*].

_____ (seal)

Principal

_____

Address

_____ (seal)

Principal

_____

Address

_____

Surety

_____

Address

_____

Surety

_____

Address

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Payment Bonds

15-31 California Legal Forms--Transaction Guide § 31.241

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.241 Notice to Surety and Bond Principal on Private or Public Work Payment Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is a claimant's notice of his or her claim to be served on the surety and bond principal on a private or public work payment bond. It is to be used if the claimant has not previously given a preliminary 20-day notice, as required for contracts entered into on or after January 1, 1995 [*Civ. Code §§ 3242(a)* (private work), *3252(a)* (public work); *see Civ. Code §§ 3097* (private work), *3098* (public work)]. If preliminary notice is not given, this form must be served on the surety and bond principal within 15 days after a notice of completion has been recorded. If a notice of completion is not recorded, the time for giving this notice to the surety and bond principal is extended to 75 days after completion of the work of improvement [*Civ. Code §§ 3242(b)* (private work), *3252(b)* (public work)].

[b] Contents of Notice

The written notice given to the surety or bond principal when no 20-day preliminary notice was given must include all of the following [*Civ. Code § 3227(b)*]:

- The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;

- The name of the person to or for whom the labor, services, equipment, or materials were furnished; and

- The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

[c] Service of Notice

The notice may be personally delivered or deposited in the mail, postage prepaid, certified or registered, and addressed in any of the following ways that apply [*Civ. Code § 3227(a)*]:

- If the surety is an individual, it may be addressed to the surety's residence or place of business, if known. If the surety's residence address is unknown, the notice should be addressed to the clerk of the county in which the bond has been recorded.

- If the surety is a corporation, it may be addressed to the office of or in care of the agent designated on the bond, to the office of or in care of any of the surety's officers who are located in California, or to the office of or in care of the surety's statutory agent in California.

- To the bond principal at the last known address.

- In the same manner provided for service of summons in civil actions [*see Code Civ. Proc. §§ 415.10-415.50*].

[2] FORM

Notice to Surety and Bond Principal on Private or Public Work Payment Bond

_____[*name of surety*]
_____[*street address*]
_____[*city, state, and zip*]

_____[*name of bond principal*]
_____[*street address*]
_____[*city, state, and zip*]

NOTICE OF MECHANICS' LIEN CLAIM

YOU ARE HEREBY NOTIFIED that _____[*name of claimant*], the undersigned, whose address is _____, _____[performed *or* agreed to perform *or* furnished *or* agreed to furnish] [labor *or* services *or* materials *or* equipment] [for *or* to] _____[*name of contractor or subcontractor for or to whom the labor, materials, services, or equipment was performed or furnished*] for use in the [private *or* public] work of improvement located at _____[*address*]. This work is being constructed pursuant to the original contract entered into between _____[*name of public entity*] and [*name of original contractor*], the original contractor for the work of improvement.

[Labor *or* Materials *or* Services *or* Equipment] consisting of [*describe generally, e.g.*, concrete for sidewalks] was [were] furnished on the following date(s) _____. The total value of [labor *or* services *or* equipment *or* materials] agreed to be done [*or* furnished] by claimant is $_____. The value of the [labor *or* services *or* equipment *or* materials] furnished as of the date of this notice is $_____, of which $_____ has not been paid.

Dated _____.

_____ [*name of contractor*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide §§ 31.242-31.249

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§§ 31.242[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
E. Waivers, Releases, and Release Bonds

15-31 California Legal Forms--Transaction Guide § 31.250

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.250 Mechanics' Lien Release Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is a release bond used to release real property from a mechanics' lien. If the owner of the property, the owner of any interest in the property, or any original contractor or subcontractor disputes the correctness or validity of any claim of lien, that person may record a surety bond in the office of the county recorder where the claim of lien was recorded, either before or after commencement of an action to enforce the lien. When the bond is recorded, the real property is released from the lien and from any action brought to foreclose the lien [*Civ. Code § 3143*].

[b] Bond Requirements

The bond must be executed by a corporation authorized to issue surety bonds in California. It must be in a penal sum equal to one and one-half times the amount of the claim or one and one-half times the amount allocated in the claim of lien to the parcel of property sought to be released, and conditioned for the payment of any sum that the claimant may recover on the claim, together with any costs of suit in the action. The principal on the bond may be either the owner of the property, the owner of any interest in the property, any original contractor, subcontractor, or sub-subcontractor affected by the claim of lien [*Civ. Code § 3143*].

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of the bond [*see Code Civ. Proc. § 995.210 et seq.*]. For a discussion of this alternative, see *§ 31.15[3]*.

[c] Notice to Lienholder

Any person who obtains and records a lien release bond must give notice of the recording to the lienholder by mailing a

copy of the bond to the lienholder at the address appearing on the lien. Service of the notice may be by certified or registered mail, return receipt requested. Failure to give notice will not affect the validity of the lien release bond, but the statute of limitations on any action on the bond will be tolled until notice is given. The claimant must commence any action on the lien release bond within six months after the bond is recorded [*Civ. Code § 3144.5*].

[2] FORM

Mechanics' Lien Release Bond

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

The fee charged for this bond is $_____ per annum.

MECHANICS' LIEN RELEASE BOND

KNOW ALL PERSONS BY THESE PRESENTS:

That we, _____[*name of principal*] and _____[*name of surety*], organized under the laws of the State of California and authorized to transact surety business in the State of California as Surety, are held and firmly bound unto _____[*name of mechanics' lien claimant*] doing business as _____[*name*], hereafter known as Claimant, in the sum of $_____ lawful money of the United States of America for the payment of which well and truly to be made we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally firmly by these presents;

Whereas, the Principal entered into a contract with Claimant under which Claimant agreed [*state terms of contract*];

Whereas, Claimant has filed a mechanics' lien in the amount of $_____ against that property as security for alleged labor and materials in connection with [*nature of claimant's job*] and that claim was recorded at Book [*or* Reel] _____, Page [*or* Image] _____, Official Records of _____ County, California;

Whereas, the principals dispute the correctness of this claim; and

Whereas, that lien is released in accordance with *Civil Code Section 3143* of the State of California;

Now, therefore, if the Principal shall pay or cause to be paid any sum which the Claimant may recover on the claim together with claimant's costs of suit in the action in the event of recovery on the suit, then this obligation shall be voided; otherwise it shall remain in full force and effect.

Executed on _____[*date*].

PRINCIPAL
_____ [*name of principal*]
By _____ [*signature*]
[*typed name and title*]
SURETY
_____ [*name of surety*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-31 California Legal Forms--Transaction Guide § 31.251

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.251 Stop Notice Release Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is the stop notice release bond used in connection with public work projects handled by the State of California Department of Transportation. The form is available on the Internet at http://www.dot.ca.gov/hq/asc/oap/payments/release.pdf. It is illustrative of the type of release bond that may be used on a public or private project on which a stop notice has been filed.

[b] Use of Stop Notice Release Bond for Private Work

Any owner, construction lender, original contractor, or subcontractor who disputes the correctness or validity of any stop notice or bonded stop notice may file a release bond with the person on whom the stop notice was served. Once such a bond has been filed, the funds withheld in response to the stop notice or bonded stop notice must be released [*Civ. Code § 3171*]. The release bond filed on a private work must be executed by good and sufficient sureties in a penal sum equal to one and one-quarter times the amount stated in the stop notice or bonded stop notice and must be conditioned for the payment of any sum not exceeding the penal obligation of the bond which the claimant may recover on the claim, together with his or her costs of suit in an action, if he or she recovers in the action [*Civ. Code § 3171*].

[c] Use of Stop Notice Release Bond for Public Work

If a stop notice has been served on a public entity that contracted for a public work and the original contractor or subcontractor disputes the correctness, validity, or enforceability of the stop notice, the public entity may, in its discretion, permit the original contractor to file a release bond [*see Civ. Code § 3196*]. Once a release bond has been filed with the public entity, the public entity will not withhold any money or bonds (if bonds are to be issued in payment for the work of improvement) from the original contractor on account of the stop notice [*Civ. Code § 3196*].

The release bond must be executed by a corporate surety in an amount equal to 125 percent of the claim stated in the stop notice, conditioned for the payment of any sum that the stop notice claimant may recover on the claim together with any costs of suit in the action, if the claimant recovers in the action [*Civ. Code § 3196*]. The surety or sureties on the release bond will be jointly and severally liable to the stop notice claimant with the surety or sureties on any payment bond [*Civ. Code § 3196*; *see § 31.240[2]*].

[d] Application of Bond and Undertaking Law

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] allows an undertaking to be given in lieu of a stop notice release bond on both public and private works [*see Code Civ. Proc. § 995.210 et seq.*]. For a discussion of this alternative, see *§ 31.15[3]*.

[2] FORM

Stop Notice Release Bond

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawPerformanceSubcontracts & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.252

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.252 Legal Release of Claim of Mechanics' Lien

[1] Comment--Use of Form

The form in [2], *below*, is a printed release of claim of mechanics' lien. It is available from Building News, Inc. Bookstore, 1612 S. Clementine Street, Anaheim, California 92802, 1-888-264-2665, http://bnibooks.com. Publications available from Building News, Inc. include materials on building codes, legal references, and forms.

To remove any cloud on the title of the property that was created by recordation of the mechanics' lien, a written release by the lien claimant must be recorded [*see Civ. Code § 1541* (obligation is extinguished by a written release given by creditor to debtor)]. The release should contain the legal description and address of the property on which the lien was recorded, and the signature of the lien claimant. This form must be recorded in the same county recorder's office in which the lien was recorded. For other examples and discussion of the release, see California Forms of Pleading & Practice, Ch. 361, *Mechanics' Liens* (Matthew Bender).

[2] FORM

Legal Release of Claim of Mechanics' Lien

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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15-31 California Legal Forms--Transaction Guide § 31.253

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.253 Contractor's Declaration to Procure Payment

[1] Comment

[a] Use of Form

The form in [2], *below*, is a printed contractor's declaration to procure payment. It is available from Building News, Inc. Bookstore, 1612 S. Clementine Street, Anaheim, California 92802, 1-888-264-2665, http://bnibooks.com. The person holding construction funds may require the contractor to execute a declaration such as this before disbursing any construction funds, to ascertain which persons contributing labor or materials to the work of improvement have been paid and thus minimize exposure to any unknown lien claims. The contractor must state in the declaration, under penalty of perjury, the names of all persons or firms that have done work on or supplied materials to the project, and the amount of money that has not yet been paid to each. Before disbursing any funds, the person holding the construction funds may require the contractor to obtain a full or conditional release [*see §§ 31.255-31.258*] from each person listed in the declaration, and submit any such releases along with the declaration to procure payment.

[b] Criminal Liability for Wrongful Use of Construction Funds

Various Penal Code provisions are applicable to the acts of wrongfully obtaining or using construction funds. Any person who receives money for the purpose of obtaining or paying for services, labor, materials, or equipment and willfully fails to apply that money for that purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials, or equipment provided incident to the construction, and wrongfully diverts the funds to a use other than that for which the funds were received may be subject to fine and/or imprisonment [*Penal Code § 484b*].

Any person who submits a false voucher to obtain construction loan funds and does not use the funds for the purpose for which the claim was submitted is guilty of embezzlement [*Penal Code § 484c*].

Any person who receives money for the purpose of obtaining or paying for services, labor, materials, or equipment incident to constructing improvements on real property and willfully rebates any part of the money to or on behalf of anyone contracting with that person, for provision of the services, labor, materials, or equipment for which the money was given, is guilty of a misdemeanor. However, a normal trade discount for prompt payment is not considered a violation of this section [*Penal Code § 532e*].

[2] FORM

Contractor's Declaration to Procure Payment

Please see Original Source or contact Editorial Support for assistance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.254

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.254 Waiver of Lien by General Contractor

[1] Comment

[a] Use of Form

The form in [2], *below*, is a waiver by an original contractor of any mechanics' lien rights that the contractor may have against a construction project. It should be used only for a waiver made by an original contractor. If the waiver is made by any other person, such as a subcontractor or supplier of materials, this form will be ineffective and cannot be used. When a waiver is made by a person other than a general contractor, the person making the waiver must do so by executing the appropriate statutory form [*Civ. Code § 3262(d)*; *see §§ 31.255-31.258*].

[b] Who May Waive Rights

Mechanics' lien rights may be waived by the party entitled to those rights, except as otherwise provided by law or when the waiver would be against public policy [*see Civ. Code § 3268*]. Neither the owner nor the original contractor, by any term of their contract or otherwise, may waive or impair the claims or liens of any other party without the consent of that party, and any contract term to that effect is void [*Civ. Code § 3262(a)*; for additional discussion, see *§ 31.255[1][b]*].

[c] Reasons for Waiver

An original contractor has 60 days after a notice of completion is recorded within which to record a claim of lien, provided the owner timely notifies the contractor that a notice of completion has, in fact, been recorded. If the owner fails to notify the contractor that a notice of completion has been recorded, the time to record a claim of lien increases to 90 days [*see Civ. Code § 3259.5*]. One reason why this time period is significant is that most construction contracts permit the owner to retain a specified portion of the contract price until 35 days after the notice of completion has been recorded or until the real property on which the project is located has been freed from all mechanics' liens recorded

against the project, whichever occurs last. Thus, in paying the retained portion or final portion of the contract price to the original contractor before expiration of the 30- or 90-day lien period, the owner should insist on the execution of this form or take other steps to guarantee that the original contractor will not exercise mechanics' lien rights during the remainder of the lien period.

[d] Waiver Procedure

Mechanics' lien rights may be waived either by a formal contract or by the actions of the parties [*E.K. Wood Lumber Co. v. Higgins (1960) 54 Cal. 2d 91, 94, 4 Cal. Rptr. 523, 351 P.2d 795]* . An original contractor will usually refuse to waive these rights in the prime contract, unless the owner's financial security indicates that all amounts can be paid and/or the waiver is conditioned on the receipt of progress payments [*see* California Mechanics Liens and Related Construction Remedies, Ch. 8, *Representing the Owner*, § 8.27 (Cal. C.E.B. 3d ed. 1998)]. It is more likely that the original contractor will deliver a formal, duly executed waiver of lien at the time (within the contractor's 60-day lien period) [*see* [c], *above*] that the owner makes the final payment. This form includes such a waiver.

[2] FORM

Waiver of Lien by General Contractor

WAIVER OF LIEN

For a valuable consideration, receipt of which is hereby acknowledged, I hereby waive any and all rights or claims of lien I now have or may acquire for the value of any labor performed or materials furnished under the certain contract between [*owner*] as Owner and myself, [*name as it appears in contract*], as Contractor dated _____. That contract is for the construction of a work of improvement on the real property in _____ County, California bearing a street address of _____ Street, _____, California.

Executed _____[*date*], at _____ County, California.

_____
[*contractor's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.255

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.255 Conditional Waiver and Release of Mechanics' Lien Claims on Progress Payment--Claimant Other Than Original Contractor

[1] Comment

[a] Use of Form

The form in [2], *below*, is a statutory waiver and release of mechanics' lien claims. It must be used when a claimant other than the original contractor (1) is required to execute a waiver and release in exchange for, or to induce the payment of, a progress payment; and (2) is not, in fact, paid in exchange for the waiver and release, or a single payee check or joint payee check is given in exchange for the waiver and release [*Civ. Code § 3262(d)(1)*].

A potential claimant other than an original contractor can waive or impair its mechanics' lien claims only by completing the appropriate statutory waiver and release form [*Civ. Code § 3262(a)*; *see* [b], *below*]. There are four different statutory forms, each of which applies to a different set of circumstances. This statutory form must be used only under the conditions discussed in the preceding paragraph. For an unconditional waiver and release on receipt of a progress payment, § 31.256[2] must be used in place of this form. For waivers and releases that are effective on receipt of a final payment, see *§§ 31.257[2]* (conditional waiver) and *31.258[2]* (unconditional waiver). For a waiver of lien executed by an original contractor (and therefore not subject to the requirements discussed in the comment to this form [*see Civ. Code § 3262(a)*]), see *§ 31.254[2]*.

A conditional lien waiver and release under *Civ. Code § 3262(d)(1)* waives mechanic's lien rights, bond rights, and stop notice rights for services rendered and materials provided up to the date stated on the receipt, even if those services and materials were not compensated by the progress payment. However, waiver is limited only to those express lien rights. By executing the release, the subcontractor or materialman does not waive his or her rights to pursue compensation for unpaid services and materials under the terms of the contract or as otherwise provided by law or equity [*Tesco Controls, Inc. v. Monterey Mechanical Co. (2004) 124 Cal. App. 4th 780, 797, 21 Cal. Rptr. 3d 751]* .

[b] Waiver of Mechanics' Lien Claims by Owner or Original Contractor

An owner or original contractor cannot, by any term of their contract or otherwise, waive, affect, or impair the claims and liens of other persons except with their written consent. Any term of a contract violating that requirement will be null and void [*Civ. Code § 3262(a)*].

Any written consent given by a claimant will be null, void, and unenforceable unless and until the claimant executes and delivers a waiver and release. The waiver and release will be binding and effective to release the owner, construction lender, and surety on a payment bond from claims and liens only if the waiver and release follows substantially one of the forms specified by statute [*see Civ. Code § 3262(d)(1)-(4)*; *see also* [a], *above*] and is signed by the claimant or the claimant's authorized agent. Further, in the case of a conditional release, there must be evidence of payment to the claimant. Evidence of payment may consist of the claimant's endorsement on a single or joint payee check that has been paid by the bank on which it was drawn or by written acknowledgment of payment given by the claimant [*Civ. Code § 3262(a)*].

The statutory restrictions on waivers and releases discussed throughout this comment do not affect the enforceability of either an accord and satisfaction regarding a bona fide dispute, or any agreement made in settlement of an action pending in any court, provided the accord and satisfaction or agreement and settlement specifically refer to the mechanics' lien, stop notice, or bond claims [*Civ. Code § 3262(c)*].

An oral or written statement purporting to waive, release, impair, or otherwise adversely affect a mechanics' lien claim that does not comply with the waiver and release procedures discussed in this comment will still be enforceable or create an estoppel or impairment of the claim if the claimant had actually received payment in full for the claim [*Civ. Code § 3262(b)(1)(B)*].

[2] FORM

Conditional Waiver and Release of Mechanics' Lien Claims on Progress Payment--Claimant Other Than Original Contractor

CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

On receipt by the undersigned of a check from _____[*maker of check*] in the sum of $ _____ payable to _____[*payee or payees of check*] and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document shall become effective to release any mechanics' lien, stop notice, or bond right the undersigned has on the job of _____[*owner*] located at _____[*job description*] to the following extent. This release covers a progress payment for labor, services, equipment, or material furnished to _____[*your customer*] through _____[*date*] only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based on work performed or items furnished under a written change order which has been fully executed by the parties before the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanics' lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based on a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.
Dated: _____.

_____
[*Company Name*]

By _____
[*Title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
E. Waivers, Releases, and Release Bonds

15-31 California Legal Forms--Transaction Guide § 31.256

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.256 Unconditional Waiver and Release on Progress Payment--Claimant Other Than Original Contractor

[1] Comment--Use of Form

The form in [2], *below*, is a statutory waiver and release that must be completed by any claimant (other than an original contractor) who is required to execute a waiver and release of mechanics' lien claims in exchange for or to induce payment of a progress payment. Unlike the *form in § 31.255[2]*, this form asserts that the claimant has, in fact, received the progress payment [*Civ. Code § 3262(d)(2)*]. If this form is not used, any such waiver or release is null, void, and unenforceable [*Civ. Code § 3262(d)*]. For a discussion of other requirements applicable to any waiver and release of mechanics' lien claims, see *§ 31.255[1]*.

For a waiver of lien executed by an original contractor (and therefore not subject to the requirements discussed in the comment to this form [*see Civ. Code § 3262(a)*]), see *§ 31.254[2]*.

[2] FORM

Unconditional Waiver and Release on Progress Payment--Claimant Other Than Original Contractor

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

[*Print the following notice in at least as large a type as the largest type otherwise used in the document*:]

NOTICE:
THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

The undersigned has been paid and has received a progress payment in the sum of $_____ for labor, services, equipment, or material furnished to [*your customer*] on the job of [*owner*] located at [*job description*] and does hereby release any mechanics' lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment, or materials furnished to [*your customer*] through _____[*date*] only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based on work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanics' lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based on a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment.
Dated: _____.

_____
[*Company Name*]
By _____
[*Title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.257

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.257 Conditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

[1] Comment--Use of Form

The form in [2], *below*, is a statutory waiver and release that must be completed by a claimant (other than an original contractor) who is required by an owner or original contractor to execute a waiver and release in exchange for, or to induce the payment of, a final payment. It must only be used when the claimant is not in fact paid in exchange for the waiver and release, or a single payee check or joint payee check is given in exchange for the waiver and release [*Civ. Code § 3262(d)(3)*].

The fact that this waiver and release will not become effective until the claimant receives the final payment makes this a conditional waiver and release. For an unconditional waiver and release that should be used when the claimant has in fact received the final payment, see *§ 31.258[2]*.

A waiver or release that is subject to but does not comply with the above requirements is null, void, and unenforceable [*Civ. Code § 3262(d)*]. For a discussion of additional requirements governing the use of this form, see *§ 31.255[1]*.

[2] FORM

Conditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

On receipt by the undersigned of a check from _____ in the sum of $_____ payable to _____ and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document shall become effective to release any mechanics' lien, stop notice, or bond right the undersigned has on the job of [*owner*] located at [*job description*]. This release covers the final payment to the undersigned for all labor, services, equipment or material furnished on the job, except for disputed claims for additional work in the amount

of $_____. Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned.
Dated: _____.

_____
[*Company Name*]
By _____
[*Title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
E. Waivers, Releases, and Release Bonds

15-31 California Legal Forms--Transaction Guide § 31.258

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.258 Unconditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

[1] Comment--Use of Form

The form in [2], *below*, is a statutory waiver and release that must be completed by any claimant (other than an original contractor) who is required to execute a waiver and release in exchange for or to induce payment of a final payment and who is to assert in the waiver that he or she has been paid the final payment [*Civ. Code § 3262(d)(4)*]. If this form is not used, any such waiver or release is null, void, and unenforceable [*Civ. Code § 3262(d)*]. For additional requirements governing the use of this form, see *§ 31.255[1]*.

For a waiver of lien executed by an original contractor (and therefore not subject to the requirements discussed in the comment to this form [*see Civ. Code § 3262(a)*]), see *§ 31.254[2]*.

[2] FORM

Unconditional Waiver and Release on Final Payment--Claimant Other Than Original Contractor

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

[*Print the following notice in at least as large a type as the largest type otherwise used in the document*:]

NOTICE:
THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

The undersigned has been paid in full for all labor, services, equipment or material furnished to [*customer*] on the job of

[*owner*] located at [*job description*] and does hereby waive and release any right to a mechanics' lien, stop notice, or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of $_____.
Dated: _____

_____
[*Company Name*]
By _____
[*Title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens



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15-31 California Legal Forms--Transaction Guide § 31.259

AUTHOR: Timothy F. O'Leary Practice Consultant

[Reserved]

§ 31.259[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
F. Design Professionals' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.260

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.260 Demand for Payment [Civ. Code § 3081.3(b)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a demand by a design professional for the payment by a landowner of amounts owed the design professional under the terms of a contract between these two parties. A design professional must make such a demand as a prerequisite to the creation and enforcement of a design professionals' lien [*see* [b]-[f], *below*]. For these purposes, "design professional" means any certificated architect, registered professional engineer, or licensed land surveyor who furnishes services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement [*Civ. Code § 3081.1*].

For comprehensive coverage of agreements for the performance of professional design services in connection with a construction project, see Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .

[b] Design Professionals' Lien

A design professional is entitled to a lien on the real property that is subject to the contract between the design professional and the landowner, if construction of the planned work of improvement has not commenced [*see Civ. Code §§ 3081.2, 3081.4(b)(1), 3081.7*] and all of the following occur or have occurred:

- A building permit or other governmental approval for the work of improvement has been obtained in connection with or by utilizing the services rendered by the design professional [*Civ. Code § 3081.2*].

- The landowner has defaulted in any payment required pursuant to the terms of the contract, or refuses to comply with a demand for payment made by the design professional in accordance with the written contract [*Civ. Code § 3081.3(a)*].

- The design professional mails (by first-class registered or certified mail, postage prepaid) a written demand for payment (this form) that is addressed to the landowner and that states (1) that a default has occurred under the contract, and (2) the amount of the default [*Civ. Code § 3081.3(b)*].

- At least 10 days after the design professional mails the foregoing demand, and no later than 90 days after the design professional learns or has reason to know that the landowner is not commencing the work of improvement, the design professional records, in the recorder's office for the county in which all or some portion of the real property is located, a notice of lien [*Civ. Code §§ 3081.3(c), 3081.7*; *see § 31.261*; *see also Civ. Code §§ 3081.2* (landowner must be owner of subject real property at time of recordation of lien), 3081.4(a) (lien is created in favor of named design professional on recordation of notice of lien)].

A design professionals' lien will not apply to a work of improvement relating to a single-family, owner-occupied residence when the construction costs are less than $100,000 in value [*Civ. Code § 3081.10*].

[c] Amount of Lien

The lien will be for the amount of the design professional's fee for any services rendered before commencement of the work of improvement or the reasonable value of those services, whichever is less. The amount of the lien must be reduced by the amount of any deposit or prior payments made pursuant to a written contract entered into by the design professional and by the landowner or his or her agent [*Civ. Code § 3081.2*].

[d] Expiration of Lien

The lien will automatically expire and will be null and void and of no further force or effect on the occurrence of either of the following [*Civ. Code § 3081.4(b)*]:

- The commencement of the work of improvement for which the design professional furnished services at the request of the landowner.

- The expiration of 90 days after the recordation of the notice of lien, unless the design professional files suit to enforce the lien within that 90-day period [*see* [e], *below*].

[e] Enforcement or Satisfaction of Lien

As discussed in [d], *above*, the lien will automatically expire 90 days after the recordation of the notice of lien unless the design professional files suit to enforce the lien within this 90-day period [*Civ. Code § 3081.4(b)(2)*]. Thereafter, the lien must be enforced pursuant to the enforcement provisions of the mechanics' lien law [*Civ. Code § 3081.5*; *see Civ. Code § 3082 et seq.* (mechanics' lien law); *see also Civ. Code §§ 3143-3154* (enforcement provisions)]. For discussion of those enforcement provisions, see *§ 31.16*.

If the landowner partially or fully satisfies the design professional's lien, the design professional must execute and record a document that evidences a partial or full satisfaction and release of the lien, as appropriate [*Civ. Code § 3081.4(c)*; *see § 31.262[2]*].

[f] Effect on Other Laws

The statutes governing design professionals' liens do not affect the ability of a design professional to obtain a mechanics' lien [*Civ. Code § 3081.6*]. Further, a design professionals' lien perfected pursuant to the foregoing statutes will not affect the ability of the design professional to pursue other remedies [*Civ. Code § 3081.8*].

No design professionals' lien will affect or take priority over [*Civ. Code § 3081.9*]:

- The interest of record of a purchaser, lessee, or encumbrancer in the real property that is subject to the lien, if the interest of the purchaser, lessee, or encumbrancer was duly recorded before recordation of the design professionals' lien.

- An encumbrance of a construction lender, when the construction loan is used to commence the work of improvement for which the design professional furnished services.

[2] FORM

Demand for Payment [Civ. Code § 3081.3(b)]

_____[*Name of landowner*]
_____[*Street address*]
_____[*City, state, zip*]

DEMAND FOR PAYMENT

This demand relates to a contract entered into between the undersigned and you on _____[*date*], for the performance by the undersigned of certain professional design services in connection with a planned work of improvement [*or describe services*]. As you are aware, [you have defaulted in the payment of $_____ that was due on _____ (*date*) under _____ (*specify appropriate provision*) of the above contract *or* you have refused to pay the amount of $_____ following your receipt of a demand for that payment made by the undersigned pursuant to _____ (*identify appropriate provision*) of the above contract]. Consequently, the undersigned hereby demands that you immediately pay the foregoing amount. If you fail to do so, the undersigned will record a notice of lien, thereby creating a design professionals' lien in favor of the undersigned.

Date: _____.

_____ [*signature of design professional*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractsReal Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' Liens



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
F. Design Professionals' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.261

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.261 Notice of Design Professionals' Lien [Civ. Code § 3081.3(c)]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of lien which, when recorded, will create a design professionals' lien [for coverage of design professionals' liens, see *§ 31.260[1]*]. The notice must be recorded in the recorder's office for the county in which all or some portion of the real property is located [*Civ. Code § 3081.3(c)*]. Recordation must occur (1) at least 10 days after the design professional has mailed a written demand for payment to the landowner [*Civ. Code § 3081.3(c)*; *see § 31.260[2]* (demand for payment)], and (2) no later than 90 days after he or she learns or has reason to know that the landowner is not commencing the work of improvement [*Civ. Code § 3081.7*].

[b] Related Requirements

A design professional may not record a notice of lien, and no design professionals' lien will arise, unless a building permit or other governmental approval has been obtained for the work of improvement in connection with, or by utilizing, the services rendered by the design professional [*Civ. Code § 3081.2*].

At the time of recordation of the lien, the landowner who entered into the contract with the design professional must also be the owner of the subject real property [*Civ. Code § 3081.2*].

[c] Required Contents

The notice of lien must do all of the following [*Civ. Code § 3081.3(c)*]:

- State that a lien is created in favor of the named design professional.

- Specify the amount of the lien [*see § 31.260[1][c]*].
- Identify the current owner of record of the real property that is to be improved [*see* [b], *above*].
- Provide a legal description of the real property.
- Specify the building permit or other governmental approval that has been obtained for the work of improvement [*see Civ. Code § 3081.2*; *see also* [b], *above*].

[2] FORM

Notice of Design Professionals' Lien [Civ. Code § 3081.3(c)]

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

NOTICE OF LIEN

[*Name of design professional*], a [certificated architect/registered professional engineer/licensed land surveyor] (hereafter referred to as the "Claimant"), hereby claims and creates a design professionals' lien for $_____ in favor of the Claimant on the real property located in the [City of _____, *or* an unincorporated area of] _____ County, California (hereafter referred to as "the Property"), and more particularly described as follows: [*insert legal description*]. The current owner of record of the Property is _____.

This lien is claimed for certain services furnished by Claimant in connection with a work of improvement on the Property pursuant to a written contract between Claimant and _____[*name of landowner*]. [A building permit for that work of improvement was issued by _____ (*specify governmental entity*) on _____ (*date*) or describe other governmental approval obtained for work of improvement].

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of design professional*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in substantially the following form (Civ. Code § 1189(a)(1))*:]

State of California
County of _____

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.
Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 31 MECHANICS' LIENS
PART IV. FORMS
F. Design Professionals' Liens and Related Forms

15-31 California Legal Forms--Transaction Guide § 31.262

AUTHOR: Timothy F. O'Leary Practice Consultant

§ 31.262 Satisfaction and Release of Design Professionals' Lien [Civ. Code § 3081.4(c)]

[1] Comment--Use of Form

The form in [2], *below*, is a satisfaction and release of a design professionals' lien. If a landowner partially or fully satisfies such a lien, the design professional must execute and record a document that evidences a partial or full satisfaction and release of the lien, as appropriate [*Civ. Code § 3081.4(c)*]. For further discussion of design professionals' liens, see *§ 31.260[1]*.

[2] FORM

Satisfaction and Release of Design Professionals' Lien [Civ. Code § 3081.4(c)]

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____
Space above this line for recorder's use

SATISFACTION AND RELEASE OF DESIGN PROFESSIONALS' LIEN

This satisfaction and release relates to the design professionals' lien claimed by the undersigned against _____[*name of landowner*] on the real property located in the [City of _____, *or* an unincorporated area of] _____ County, California (hereafter referred to as "the Property"), and more particularly described as follows: [*insert legal description*]. The notice of that lien was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California. Because _____[*name of landowner*] has _____[fully satisfied that lien, the lien is hereby released *or* partially satisfied that lien, the following portion of the lien is hereby released: _____ (*specify*)].

[*Continue with the following*:]

Executed on _____[*date*], at _____[*city and state*].

_____ [*signature of design professional*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
Chapter 32 [Reserved]

15-32 California Legal Forms--Transaction Guide Chapter 32

[Reserved]

Chapter 32[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS

15-33 California Legal Forms--Transaction Guide 33.syn

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.syn Synopsis to Chapter 33: CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS

§ 33.01 California Sources

[1] Statutes

[2] Regulations

§ 33.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 33.03-33.04 [Reserved]

§ 33.05 Law Reviews and Periodicals

§ 33.06 Annotations

§ 33.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 33.08-33.09 [Reserved]

§ 33.10 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or Superfund

[1] Purpose of CERCLA

[2] Strict, Joint and Several Liability

[3] Retroactive Application of CERCLA

[4] Judicial Interpretation of CERCLA

[5] Elements of CERCLA Liability

[a] Four Elements

[b] "Facility"

[c] "Release"

[d] "Hazardous Substance"

[i] Broadly Defined

[ii] Petroleum Exclusion

[e] "Potentially Responsible Parties"

[i] Four Classes of Persons

[ii] Liability of Landlords and Tenants

[iii] Extent of Liability

[6] Lender Liability

[a] Statutory Secured Creditor Exemption

[b] Asset Conservation, Lender Liability, and Deposit Insurance Protection Act

[7] Statutory Defenses to CERCLA Liability

[a] Limited and Narrow Defenses

[b] Due Care Requirement for Third-Party Defense

[c] Contractual Relationships and Third-Party Defense

[d] Innocent Landowner Defense

[i] Subset of Third-Party Defense

[ii] "All Appropriate Inquiry" Requirement

[iii] Judicial Application

[e] Environmental Assessment: Practical Due Diligence Challenge

[f] Small Business Liability Protection and Brownfields Revitalization Act

[g] Owner's Duty to Disclose Contamination

§ 33.11 Resource Conservation and Recovery Act ("RCRA")

§ 33.12 Hazardous Substance Account Act ("HSAA")

[1] State Superfund Law Generally Parallels CERCLA

[2] Strict, but Not Joint and Several, Liability

[3] No Retroactive HSAA Liability

[4] Defenses to HSAA Liability

[5] Remedies Under HSAA

§ 33.13 Porter-Cologne Water Quality Control Act

§ 33.14 Common Law Theories of Liability

[1] Continuing Importance

[2] Nuisance

[3] Trespass

[4] Strict Liability for Abnormally Dangerous Activity

[5] Negligence

[6] Fraud or Misrepresentation

[7] Contractual Obligations

[a] Indemnity Provisions

[b] Compliance-With-Laws Provisions

[c] Attorneys' Fee Provisions

§ 33.15 Restrictive Covenants

[1] Covenants Running With the Land

[2] Special Rule for Restrictions Addressing Hazardous Materials

[3] Deed Restrictions Imposed by DTSC

§ 33.16 California's Regulatory Restrictions on Use of Hazardous Waste Property and Border Zone Property

[1] "Border Zone Statute"

[2] Application Requirement

[3] Restrictions on Designated Property

[4] Practical Impact of Statute

§§ 33.17-33.29 [Reserved]

§ 33.30 Effect of Contractual Provisions on Liability for Environmental Contamination

[1] Contractual Allocation of Liability

[2] Permitted Under CERCLA

[3] Role of State Law

[4] "As Is" Provisions

[5] Clear Expression of Intent to Cover Environmental Liabilities

§ 33.31 Use of De Minimis Settlement Agreements With Federal EPA in Proposed Real Estate Transactions

§ 33.32 Settlements With California Agencies

§ 33.33 Insurance Coverage for Damages From Environmental Contamination

[1] Insurance Coverage for Potential Future Pollution

[2] Insurance Coverage for Past Pollution

§§ 33.34-33.99 [Reserved]

§ 33.100 Real Property Transactions

[1] Facts

Scope

[2] Documents

Scope

§§ 33.101-33.109 [Reserved]

§ 33.110 Real Estate Transactions

Scope

§ 33.111 Eligibility for De Minimis Landowner Settlement Agreements

Scope

§ 33.112 Exemption from Liability for Contiguous Property Owner

Scope

§§ 33.113-33.119 [Reserved]

§ 33.120 Environmental Assessments

Scope

§ 33.121 Sales of Real Property

Scope

§ 33.122 Loans Secured by Real Estate

Scope

§ 33.123 Leases of Real Property

Scope

§ 33.124 De Minimis Landowner Settlement Agreements With EPA

Scope

§§ 33.125-33.199 [Reserved]

§ 33.200 Environmental Assessment Contract

[1] Comment

[a] Use of Form

[b] Purpose of Environmental Assessment

[c] Scope of Environmental Assessment

[d] Need for Confidentiality and Preserving Privilege

[i] Environmental Assessment Contract Attorney-Client Privilege and Attorney Work Product Privilege

[ii] Application of Privilege With Environmental Consultant

[e] Consultant's Demand for Indemnity

[2] FORM

Environmental Assessment Contract

§ 33.201 Client's Letter to Counsel Requesting Legal Opinion and Environmental Assessment and Giving Indemnity

[1] Comment--Use of Form

[2] FORM

Client's Letter to Counsel Requesting Legal Opinion and Environmental Assessment and Giving Indemnity

§§ 33.202-33.209 [Reserved]

§ 33.210 Sales Contract With Environmental Provisions

[1] Comment

[a] Use of Form

[b] Definition of Hazardous Substances

[c] Warranty of Compliance With Law

[d] Right to Cancel Based on Projected Cleanup Costs

[2] FORM

Sales Contract With Environmental Provisions

§ 33.211 Seller's Disclosure of Release or Threatened Release on Commercial Real Property

[1] Comment

[a] Use of Form

[b] Reasons for Seller to Disclose

[2] FORM

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[2] FORM

Environmental Indemnity Agreement

§§ 33.213-33.219 [Reserved]

§ 33.220 Environmental Disclosures to Lender

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[2] FORM

Environmental Disclosures to Lender

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[1] Comment--Use of Form

[2] FORM

Deed of Trust Provision Regarding Hazardous Substances

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[2] FORM

Representations of Trustor Concerning Compliance With Environmental Laws

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[2] FORM

Deed of Trust Provision Giving Beneficiary Power to Conduct Environmental Assessment

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[2] FORM

Monitoring Requirements Provision

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[1] Comment--Use of Form

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Allocation of Cleanup Costs Between Landlord and Tenant

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[1] Comment--Use of Form

[2] FORM

Compliance With Environmental Laws Provision

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[1] Comment

[a] Use of Form

[b] Reasons for Landlord to Disclose

[c] Tenant's Obligations

[2] FORM

Landlord's Disclosure of Release or Threatened Release on Commercial Real Property

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§ 33.240 Model Administrative Order on Consent for Settlement With Landowners

[1] Comment--Use of Form

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Model Administrative Order on Consent for Settlement With Landowners

§ 33.241 Model CERCLA Judicial Consent Decree for Settlement With Landowners

[1] Comment--Use of Form

[2] FORM

Model CERCLA Judicial Consent Decree for Settlement With Landowners

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FOOTNOTES:

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS

15-33 California Legal Forms--Transaction Guide Scope

AUTHOR: Reviewed by Joel S. Moskowitz

Scope

Reviewed by Joel S. Moskowitzn* Scope

This chapter covers environmental investigation and cleanup liabilities and their effect on real estate transactions. The focus is on potential liability to private parties and the federal and state governments under federal and state statutes and the common law.

The chapter explains how strict, joint and several liability may be imposed, without regard to fault, causation, or fairness, on real property sellers, purchasers, landlords, tenants, and lenders. The chapter covers environmental assessments by which the parties to a real estate transaction can prudently estimate the level of risk. It also suggests ways that the parties to a real estate sales or lease transaction, including lenders, can contractually allocate environmental liabilities and responsibilities among themselves.

This chapter is designed to be used in concert with, and as a supplement to, other chapters that deal with real estate transactions, especially, Ch. 22, *Options to Purchase Real Property* and Ch. 23, *Real Property Sales Agreements* ; Ch. 25, *Real Estate Loans* and Ch. 25A, *Security Instruments for Real Estate Financing* ; Ch. 27, *Deeds and Recording* ; Ch. 34B, *Residential Leases* , Ch. 34C, *Commercial , Industrial, and Office Leases* , Ch. 34D, *Ground Leases* , and Ch. 34E, *Shopping Centers: Leasing and Operation* ; and Ch. 36, *Oil and Gas Rights and Leases* and Ch. 37, *Farm Leases* .

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§ 33.01 California Sources

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Liability. *Health & Safety Code § 25363*.

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Transfer of liability ineffective. *Health & Safety Code § 25364*.

Written notice of release by owners to buyers and tenants, and by tenants to landlords. *Health & Safety Code § 25359.7*.

Environmental Responsibility Acceptance Act. *Civ. Code § 850 et seq.*

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Definition of waste. *Water Code § 13050(d).*

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Hazardous Waste Control Law regulations. *22 Cal. Code Reg. § 66260.1 et seq.*

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Asset Conservation, Lender Liability, and Deposit Insurance Protection Act. *42 U.S.C. § 9601(20)(E)-(G)*; *42 U.S.C. §§ 6991(h), 9007(n).*

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Covenants not to sue. *42 U.S.C. § 9622(f).*

De minimis settlements. *42 U.S.C. § 9622(g).*

Facility defined. *42 U.S.C. § 9601(9).*

Federally permitted release defined. *42 U.S.C. § 9601(10).*

Hazardous substance defined. *42 U.S.C. § 9601(14).*

Liability of potentially responsible parties. *42 U.S.C. § 9607(a).*

Owner or operator defined. *42 U.S.C. § 9601(20)*.

Release defined. *42 U.S.C. § 9601(22)*.

Emergency Planning and Community Right-to-Know Act. *42 U.S.C. § 11001 et seq.*

Environmental Pesticide Control Act. *7 U.S.C. § 136*.

Hazardous Materials Transportation Act. 49 U.S.C. § 1801 et seq.

Hazardous Substances Act. *15 U.S.C. § 1261 et seq.*

Resource Conservation and Recovery Act. *42 U.S.C. § 6901 et seq.*

Oil Pollution Act. *33 U.S.C. § 2701 et seq.*

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§§ 33.03[Reserved]



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15-33 California Legal Forms--Transaction Guide § 33.07

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[Reserved]

§§ 33.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART II. LEGAL BACKGROUND
A. Sources of Environmental Liability

15-33 California Legal Forms--Transaction Guide § 33.10

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.10 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or Superfund

[1] Purpose of CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") [*42 U.S.C. § 9601 et seq.*] was enacted by Congress to provide a comprehensive response to the problem of hazardous substance releases into the environment. CERCLA creates broad and very powerful legal remedies designed to ameliorate the environmental crisis created by past practices of improperly handling and disposing of hazardous and toxic wastes [*see* Wickland Oil Terminals v. Asarco, Inc. (9th Cir. [Cal.] 1986) *792 F.2d 887, 890* ; *see generally* Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 45 Bus. Law. 923, 924- 925 (1990)*].

Under CERCLA, the Environmental Protection Agency ("EPA") can order the responsible persons to clean up a release of a hazardous substance or abate the threat of a release [*42 U.S.C. §§ 9604(a), 9606(a)*]. In the alternative, the EPA itself can undertake to clean up the site with funding provided by the Hazardous Substance Response Trust Fund, which is commonly known as the "Superfund" [*I.R.C. § 9507*], and then recover its cleanup costs from any one or more of a host of potentially responsible parties ("PRPs") [*42 U.S.C. § 9607*; *see* [5][e], *below*]. In addition, private persons can sue the PRPs to recover environmental investigation and cleanup costs [*42 U.S.C. § 9607(a)(4)(B)*].

[2] Strict, Joint and Several Liability

Liability under CERCLA is strict and without regard to causation or fault [*see 42 U.S.C. § 9607(a)*; *Farmland Industries v. Morrison-Quirk Grain (8th Cir. 1993) 987 F.2d 1335, 1339]* . In addition, CERCLA imposes joint and several liability [*see 42 U.S.C. § 9607*; *O'Neil v. Picillo (1st Cir. 1989) 883 F.2d 176, 183]* . Joint and several liability is imposed on all potentially responsible parties unless the harm involved is divisible. Responsibility is only apportioned among multiple parties if the extent of harm caused by each party can be established [*see Matter of Bell Petroleum Services, Inc. (5th Cir. 1993) 3 F.3d 889, 897-904* (former owner showed reasonable basis for apportioning liability among former owners based on proportionate volume of chromium-contaminated water discharged by each into

environment)]. If the harm is indivisible, then each responsible party is subject to liability for the entire harm, even though its role in creating the hazardous contamination was small [*U.S. v. Monsanto Co. (4th Cir. 1988) 858 F.2d 160, 171-173]* . The responsible party may then seek contribution from other liable parties [*see Pinal Creek Group v. Newmont Mining Corp. (9th Cir. 1997) 118 F.3d 1298, 1301* (claim by potentially responsible party (PRP) against another PRP under CERCLA is limited to one for contribution under *42 U.S.C. §§ 9607(a)* and *9613(f)*); *Anspec Co., Inc. v. Johnson Controls, Inc. (6th Cir. 1991) 922 F.2d 1240, 1241-1244* (owner and operator subject to EPA cleanup order sued predecessors in interest to recover response costs); *but see City of Merced v. R.A. Fields, Inc. (E.D. Cal. 1998) 997 F. Supp. 1326, 1332* (defendants in CERCLA contribution action cannot themselves maintain contribution actions of their own)].

Out of concern that a responsible party may be unfairly required to pay for the share of liability for cleanup costs that is attributable to persons who are "defunct or insolvent" ("orphan shares"), the California Legislature in 1999 enacted the Orphan Share Reimbursement Trust Fund [*Health & Safety Code § 25390 et seq.*] as part of the Hazardous Substance Account Act [*Health & Safety Code § 25300 et seq.*; *see § 33.12*]. When the Fund becomes operative, a responsible party may, under certain circumstances, file a claim for reimbursement of any part of an orphan share that party has paid [*see Health & Safety Code §§ 25390.4, 25390.7*]. However, the article creating the program does not become operative until the operative date of a statute that either appropriates the necessary money to the Fund or establishes a revenue source for the Fund [*Health & Safety Code § 25390.9*].

Since CERCLA imposes strict liability for environmental cleanups based on the mere status of the defendant [*see* [5][e], *below*] rather than on fault or causation, the Act is of major concern in all types of real estate transactions. Parties who fail to account for environmental liabilities in their real estate transactions and other agreements may find themselves subject to considerable, unanticipated liability. Cleanup cost liabilities may greatly exceed the value of the underlying property [*see, e.g., U.S. v. Monsanto Co. (4th Cir. 1988) 858 F.2d 160, 164-166* (landlord jointly and severally liable for $1.8 million in cleanup costs, though only received maximum of $350 per month rent)].

[3] Retroactive Application of CERCLA

Unlike the Hazardous Substances Account Act in California [*Health & Safety Code § 25300 et seq.*; *see § 33.12[3]*], several older cases held that CERCLA may be applied retroactively to establish liability for remedial costs incurred that were caused by releases of hazardous substances that occurred before the statute's enactment [*see, e.g., O'Neil v. Picillo (1st Cir. 1989) 883 F.2d 176, 183 n.12 , cert. denied, 493 U.S. 1071 (1990)* ; *United States v. Hooker Chemicals & Plastics Corp. (W.D.N.Y. 1988) 680 F. Supp. 546, 556* (although language of CERCLA does not provide for retroactive application, legislative history suggests that its purpose includes correction of past mistakes and therefore supports retroactive effect); *United States v. South Carolina Recycling and Disposal, Inc. (D.S.C. 1984) 653 F. Supp. 984, 996* (statute that attaches liability to present conditions stemming from past acts does not necessarily have retroactive effects that are subject to due process limitations)].

PRACTICE TIP:

Applying CERCLA Retroactively. Look for renewed developments on this question, as lawyers ponder a recent case that held CERCLA not to be retroactive [*United States v. Olin Corp. (S.D. Ala. 1996) 927 F. Supp. 1502]* and as industry seeks to amend CERCLA to preclude retroactivity when CERCLA is reauthorized. *By Joel Moskowitz*

[4] Judicial Interpretation of CERCLA

CERCLA is a broad remedial statute designed to enhance the EPA's authority to respond effectively and promptly to toxic pollutant spills that threaten the environment and human health. Because it is a remedial statute, CERCLA must be construed liberally to effectuate its primary goals of (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup [*B.F. Goodrich*

Co. v. Murtha (2nd Cir. 1992) 958 F.2d 1192, 1197-1198] .

[5] Elements of CERCLA Liability

[a] Four Elements

To establish a prima facie case of liability in a CERCLA cost recovery action, a plaintiff must prove the following [*see 42 U.S.C. § 9607(a)*; *Amoco Oil Co. v. Borden, Inc. (5th Cir. 1989) 889 F.2d 664, 668-669* ; *Dartron Corp. v. Uniroyal Chemical Co., Inc. (N.D. Ohio 1995) 893 F. Supp. 730, 735* ; *Anschutz Min. Corp. v. NL Industries, Inc. (E.D. Mo. 1995) 891 F. Supp. 492, 494]* :

- The site in question is a "facility" as defined under the Act [*see* [b], *below*];
- A "release" or threatened release of a "hazardous substance" "into the environment" has occurred [*see* [c] and [d], *below*];
- The release or threatened release has caused the plaintiff to incur response costs; and
- The defendant falls within one of the four classes of "responsible persons" who are liable under the Act [*see* [e][i], *below*].

[b] "Facility"

Every location where a hazardous substance has come to be located is a "facility" [*see 42 U.S.C. § 9601(9)*; *United States v. Conservation Chemical Co. (D.C. Mo. 1985) 619 F. Supp. 162, 185]* . Under CERCLA, a facility encompasses far more than traditional dumpsites [*U.S. v. Bliss (E.D. Mo. 1987) 667 F. Supp. 1298, 1305* ; *see Knox v. AC & S, Inc. (S.D. Ind. 1988) 690 F. Supp. 752, 755-756* (workplace built with asbestos-containing materials is facility within meaning of CERCLA)]. To prove that a site is a "facility," a plaintiff need only show that a hazardous substance, as defined by CERCLA [*see* [d][i], *below*], has been placed there or has "otherwise come to be located there" [*United States v. Conservation Chemical Co. (D.C. Mo. 1985) 619 F. Supp. 162, 185* (in defining "facility," Congress sought to deal with every conceivable area where hazardous substances may come to be located)].

[c] "Release"

"Release" is likewise broadly defined. Release means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment," including the discarding of closed receptacles containing any hazardous substance [*42 U.S.C. § 9601(22)*]. For purposes of liability for contamination, no minimum quantity of substance is required to have a "release" under CERCLA [*Amoco Oil Co. v. Borden, Inc. (5th Cir. 1989) 889 F.2d 664, 669]* .

CERCLA also defines "environment" broadly to include navigable waters, ocean waters, surface water, ground water, the land surface, subsurface strata, and ambient air [*42 U.S.C. § 9601(8)*].

CERCLA excludes from the definition of "release" several types of discharges including any release that results in exposure to persons solely within a workplace with regard to a claim that may be asserted against the person's employer and emissions from the engine exhaust of a motor vehicle [*see 42 U.S.C. § 9601(22)(A)-(D)*].

[d] "Hazardous Substance"

[i] Broadly Defined

Hazardous substance is broadly defined to include all toxic substances or hazardous materials or wastes regulated under the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, as well as other materials designated by the U.S. Environmental Protection Agency ("EPA") [*42 U.S.C. §§ 9601(14), 9602*; *see 40 C.F.R. § 302.4* ("List of Hazardous Substances and Reportable Quantities")].

As under California's Hazardous Substances Account Act (HSAA) [*Health & Safety Code § 25300 et seq.*; *see § 33.12*], no threshold level has to be met before the substance can be classified as "hazardous" and give rise to liability [*A&W Smelters & Refiners, Inc. v. Clinton (9th Cir. 1998) 146 F.3d 1107, 1110]* .

[ii] Petroleum Exclusion

CERCLA expressly excludes petroleum and its fractions, unless expressly listed, from its definition of "hazardous substance" [*42 U.S.C. § 9601(14)*]. This is a very important exclusion, since a frequent cause of pollution is gasoline leaking from corroded tanks or lines.

The petroleum exclusion applies to both unrefined and refined gasoline, even though certain indigenous components as well as chemicals added during the refining process, have themselves been designated as hazardous substances under CERCLA [*Wilshire Westwood Assocs. v. Atlantic Richfield Corp. (9th Cir. 1989) 881 F.2d 801, 804-810* (release of hazardous substances contained in refined, leaded gasoline does not give rise to CERCLA liability)]. If a specifically listed hazardous substance is indigenous to petroleum and is present as the result of a petroleum release, that substance will fall within the petroleum exclusion unless it is present at a concentration level that exceeds the concentration level that naturally occurs in the petroleum product. However, petroleum-related waste products do not fall within the petroleum exclusion [*Cose v. Getty Oil Co. (9th Cir. 1993) 4 F.3d 700, 703-707* (crude oil tank bottom waste, consisting of sediment and water, not within petroleum exclusion)].

[e] "Potentially Responsible Parties"

[i] Four Classes of Persons

CERCLA imposes liability on four classes of persons, who are commonly referred to as "potentially responsible parties" or "PRPs." These classes of persons are as follows [*42 U.S.C. § 9607(a)(1)-(4)*]:

- The current owners or operators of a vessel or a facility where an actual or threatened release is present [*see 42 U.S.C. § 9601(9), (20)*; *see also 42 U.S.C. § 9607(h)* (owner or operator of vessel also liable under maritime tort law)].

- The past owners or operators of a facility as of the time of disposal of the hazardous substances [*see 42 U.S.C. §§ 9601(9), (14), (29), 9603*].

- Arrangers for disposal of hazardous substances; that is, persons who own or possess hazardous substances for which they contract or arrange transportation, disposal, or treatment at any facility or incineration vessel that is owned or operated by another party [*see 42 U.S.C. § 9601(9), (21), (29), (35)*].

- Transporters of hazardous substances, that is, persons who transport hazardous substances to a facility, incineration vessel, or site at which a release or threatened release occurs [*see 42 U.S.C. §§ 9601(9), (21), (29), (35)(A), 9603*].

A party may be burdened with liability in more than one PRP capacity. For example, a party can be liable both as an owner and as an arranger, which can increase that party's share of cleanup liability [*see, e.g., FMC Corp. v. United States Dep't of Commerce (3d Cir. 1994) 29 F.3d 833, 839-846* (government's share of cleanup cost consisted of 8

percent as owner, which it did not contest, and 18 percent as operator and arranger, which it contested)].

In addition, a parent corporation may have derivative CERCLA liability arising from a subsidiary's operations when the corporate veil may be pierced, and it may be directly liable as an "operator" if it actively participated in and exercised control over the subsidiary's operations. To be liable as an "operator," a person must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leaking or disposal of hazardous waste, or decisions about compliance with environmental regulations. The test is not whether the parent corporation operated the subsidiary, but rather whether it operated the facility [*see United States v. Bestfoods (1998) 524 U.S. 51, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43]* .

[ii] Liability of Landlords and Tenants

A tenant may be held liable under CERCLA for contamination of the leased property caused by his or her activities. Generally, tenants will be "operators" for purposes of CERCLA [*see 42 U.S.C. § 9601(20)*; *U.S. v. Northernaire Plating Co. (W.D. Mich. 1987) 670 F. Supp. 742, 748* ; *see also* [i], *above*]. If the tenant is the current operator, it will be liable irrespective of whether the contamination of the leased property resulted from its own activities, past or present, or activities of the landlord, prior tenants, or co-tenants [*see 42 U.S.C. § 9601(20)*; *U.S. v. Northernaire Plating Co. (W.D. Mich. 1987) 670 F. Supp. 742, 748* (corporate officer in his personal capacity, landlord in its capacity as owner, and corporate tenant in its capacity as operator, were jointly and severally liable under CERCLA); *see also* [2], *above*]. However, a tenant's liability only extends to those areas or activities where the hazardous substances are located that the tenant has authority to control under the lease agreement [*Nurad, Inc. v. William E. Hooper & Sons Co. (4th Cir. 1992) 966 F.2d 837, 842-844* ; *see Kaiser Aluminum v. Catellus Dev. (9th Cir. 1992) 976 F.2d 1338, 1341* (following *Nurad* and adopting authority to control standard)].

The landlord is also subject to CERCLA liability [*see, e.g., U.S. v. Monsanto Co. (4th Cir. 1988) 858 F.2d 160, 164-166* (landlord liable for tenant's release of hazardous substances on premises in 1970s, which resulted from tenant's unauthorized storage of chemical wastes on premises)]. Moreover, because of the contractual nature of the landlord-tenant relationship, landlords do not enjoy any CERCLA third-party defense against the contaminating activities of their tenants [*see 42 U.S.C. § 9607(b)(3)*; *United States v. South Carolina Recycling and Disposal, Inc. (D.S.C. 1984) 653 F. Supp. 984, 993]* . A landlord is precluded from asserting any third-party defenses to avoid liability for releases of hazardous substances that occur while the landlord holds title to the property [*see State of Wash. v. Time Oil Co. (W.D. Wash. 1988) 687 F. Supp. 529, 532* ; *see also* [7][b], [c], *below* (third party defenses)].

If the tenant subleases the premises, its liability is directly analogous to that of an owner or landlord. A sublessor essentially stands in the shoes of an owner if he or she maintains control over and responsibility for the use of the property [*see United States v. South Carolina Recycling and Disposal, Inc. (D.S.C. 1984) 653 F. Supp. 984, 993, 1003]* .

[iii] Extent of Liability

Potentially responsible parties under CERCLA are liable for the following [*42 U.S.C. § 9607(a)(4)(A)-(D)*]:

- All costs of removal or remedial action incurred by the federal government, a state, or an Indian tribe not inconsistent with the National Contingency Plan [*see 42 U.S.C. § 9605* (National Contingency Plan)].

- Any other necessary costs of response incurred by any other person that are consistent with the national contingency plan.

- Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.

- The costs of any health assessment or health effects study carried out under the response provisions of CERCLA [*see 42 U.S.C. § 9604(i)* (establishes Agency for Toxic Substances and Disease Registry)].

In addition, a successful CERCLA plaintiff can recover interest, which accrues from the later of (1) the date on which payment of a specified sum is demanded in writing or (2) the date on which the expenditure is made [*42 U.S.C. § 9607(a)*]. Moreover, the government is entitled to reasonable attorneys' fees in an action to recover response costs under CERCLA [*United States v. Chapman (9th Cir. 1998) 146 F.3d 1166, 1176]* . However, a private litigant who brings a cost recovery action is not entitled to recover attorney's fees incurred in litigation [*Key Tronic Corp. v. U.S. (1994) 511 U.S. 809, 819, 114 S. Ct. 1960, 128 L. Ed. 2d 797]* . Neither are punitive damages recoverable by a private litigant under CERCLA [*Hatco Corp. v. W.R. Grace & Co. (D.N.J. 1994) 849 F. Supp. 931, 980* ; *c.f. 42 U.S.C. § 9607(c)(3)* (if PRP in bad faith does not comply with EPA administrative cleanup order, PRP may be liable to federal government for punitive damages equal to three times response costs incurred due to failure to obey order)].

[6] Lender Liability

[a] Statutory Secured Creditor Exemption

Secured creditors enjoy special protection from CERCLA liability. Under the secured creditor exemption, CERCLA's definition of "owner or operator" [*see* [5][e], *above*] specifically excludes persons who *without participating in the management of a vessel or facility*, holds indicia of ownership *primarily to protect their security interest* [*42 U.S.C. § 9601(20)(A)* (emphasis added)]. The purpose of this statutory exemption is to shield from liability those "owners" who are in essence lenders holding title to the property as security for the debt [*Waterville Industries v. Finance Authority of Maine (1st Cir. 1993) 984 F.2d 549, 552]* . The difficulty arises when the creditor forecloses on its security interest after the debtor's default or controls activities at the facility.

The EPA originally adopted lender liability regulations, which gave foreclosing lenders clear guidelines on the range of activities that they could undertake without "participating in the management" of the facility and losing the protection of the exemption. However, the regulations were vacated as being beyond the EPA's authority [*Kelley v. E.P.A. (D.C. Cir. 1994) 15 F.3d 1100, 1103 , cert. denied, -- U.S. --, 115 S. Ct. 900, 130 L. Ed. 2d 784* (Congress did not delegate EPA with authority to issue either legislative or interpretive rules on scope of CERCLA liability)].

[b] Asset Conservation, Lender Liability, and Deposit Insurance Protection Act

The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act [Pub. L. No. 104-208, §§ 2501-2505, codified at *42 U.S.C. §§ 6991(h), 9007(n), 9601(20)(E)-(G)*] specifically reinstates the EPA lender liability rule, overturning the *Kelley* decision [Pub. L. No. 104-208, § 2504; *see* [a], *above*]. It provides that to "participate in management" a lender must "actually participate in the management or operational affairs of a vessel or facility" [*42 U.S.C. § 9601(20)(F)(i)(I)*]. The term does not include "merely having the capacity to influence, or unexercised right to control, vessel or facility operations" [*42 U.S.C. § 9601(20)(F)(i)(II)*]. Under the Act, a lender participates in the management of a facility or vessel only if it exercises decision-making control over the facility or vessel's environmental compliance and hazardous substance handling and disposal practices, or has assumed day-to-day management of all operational functions at the facility or vessel [*42 U.S.C. § 9601(20)(F)(ii)*]. The Act specifies that many activities lenders routinely perform in administering a loan do not constitute "participation in management," and thus do not trigger liability [*see 42 U.S.C. § 9601(20)(F)(iv)* (listing activities that do not constitute "participating in management")].

The Act provides even greater leeway to a lender who forecloses on a facility or vessel. After foreclosure, a lender may wind down operations or maintain business activities at a facility or vessel that it seeks to sell, re-lease (in the case of property subject to a lease financing arrangement), or otherwise divest at the "earliest practicable, commercially

reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements" [*42 U.S.C. § 9601(20)(E)(ii)*]. Thus, a lender intending to divest collateral property may take over a facility and continue its operations in preparation for sale or other divestiture of the property [*42 U.S.C. § 9601(20)(E)(ii)(II)*]. Although this provision is beneficial, it may be of limited value to the lender who does not have a marketable facility. The lender may not keep the facility itself, and may have difficulty selling a contaminated site because Congress has not, as yet, adopted liability protection for bona fide purchasers who buy contaminated property.

The Asset Conservation Act also amends CERCLA to provide liability protection for fiduciaries, such as trustees, executors, administrators, custodians, receivers, conservators, or guardians ad litem [*see 42 U.S.C. § 9607(n)(5)(A)* (fiduciary defined as someone who is acting for the benefit of another party)]. The Act provides that the liability of a fiduciary under CERCLA is limited to the assets held in the fiduciary capacity [*42 U.S.C. § 9607(n)(1)*] and specifically identifies certain activities a fiduciary may undertake without incurring Superfund liability [*see 42 U.S.C. § 9607(n)(4)*; *see also 42 U.S.C. § 9607(n)(7)* (circumstances where fiduciary is not protected from liability)].

[7] Statutory Defenses to CERCLA Liability

[a] Limited and Narrow Defenses

Potential affirmative defenses are limited to those listed in *42 U.S.C. § 9607(b)* [B.F. Goodrich Co. v. Murtha (2nd Cir. [Conn.] 1992) *958 F.2d 1192, 1198]* . A potentially responsible party may avoid liability under CERCLA by establishing that the damaging release of hazardous substance was caused *solely* by [*42 U.S.C. § 9607(b)* (emphasis added)]:

- An act of God [*see* U.S. v. Stringfellow (C.D. Cal. 1987) 661 F. Supp. 1053, 1061 (heavy rainfall is not act of God, since not exceptional natural phenomenon, and storms were not sole cause of harm)];

- An act of war [*see U.S. v. Shell Oil Co. (C.D. Cal. 1993) 841 F. Supp. 962, 972* (act of war defined and defense rejected)]; or

- A third party other than (1) an employee or agent of the defendant, or (2) one whose act or omission occurred in connection with a direct or indirect "contractual relationship" with the defendant [*see* [c], *below*].

For all of these affirmative defenses, the defendant must show that the claimed excuse was the *sole* cause [*42 U.S.C. § 9607(b)*]. For example, in one case, the defendant-tenant had deposited filter cake containing hazardous substances on the property. Even though the landlord had previously caused a hazardous release on the property, the defendant's third party defense was barred because it could not show that the landlord's release had *solely* caused the contamination [*State of Wash. v. Time Oil Co. (W.D. Wash. 1988) 687 F. Supp. 529, 532-533* ; *see* U.S. v. Stringfellow (C.D. Cal. 1987) 661 F. Supp. 1053, 1061 (because of multiple causes of release, sole cause requirement not met)].

[b] Due Care Requirement for Third-Party Defense

To take advantage of the third-party defense [*see* [a], third bulleted item, *above*], the defendant must show that he or she (1) exercised due care with regard to the hazardous substance concerned, taking into consideration the characteristics of the hazardous substance in light of all relevant facts and circumstances, and (2) took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from those acts or omissions [*42 U.S.C. § 9607(b)(3)*]. Even absentee landlords are held to these due diligence standards [*see U.S. v. Monsanto Co. (4th Cir. 1988) 858 F.2d 160, 169 , cert. denied, 490 U.S. 1106 (1989)* (site-owners, who verbally leased land used by tenant for storage of hazardous waste, had no third-party defense as matter of law, since they claimed they neither knew of tenant's activities nor even inspected site)].

[c] Contractual Relationships and Third-Party Defense

A "contractual relationship" with a third party that precludes use of the third-party defense [*see* [a], third bulleted item, *above*], includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession [*42 U.S.C. § 9601(35)(A)*]. However, such contracts are excluded from this definition (and, therefore, the third-party defense is still available), if the real property was acquired by the defendant *after* the hazardous substance was disposed of or placed at the facility, and the defendant establishes any of the following [*42 U.S.C. § 9601(35)(A)(i)-(iii)*]:

- It is a government entity that acquired the facility by escheat or through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

- It acquired the facility by inheritance or bequest.

- It was an "innocent landowner" at the time the party acquired the facility [*see* [d], *below*].

Moreover, the third party defense is still available, despite the existence of a contractual relationship between the claimant and the third party, if there is no relationship between the disposal/releasing activity and the contract. In other words, the contract between the claimant and the third party must either relate to the hazardous substances or allow the claimant to exert some element of control over the third party's activities [*Westwood Pharmaceuticals v. Nat. Fuel Gas Dist. (2d Cir. 1992) 964 F.2d 85, 88* (though plaintiff had purchased property from defendant, third-party defense still available, since plaintiff's demolition and construction activities, which defendant claimed was sole cause of contamination, were not done in connection with real estate purchase contract)].

Since landlords are in a contractual relationship with their tenants, they do not enjoy any third-party defense to CERCLA cost-recovery actions arising from their tenants' releases of hazardous substances [*see 42 U.S.C. § 9607(b)(3)*; *U.S. v. Northernaire Plating Co. (W.D. Mich. 1987) 670 F. Supp. 742, 748]* . Furthermore, persons acquiring an ownership, leasehold, or security interest in a facility would not have a third-party defense against previous acts or omissions of predecessors-in-interest that resulted in a release, because of their "contractual relationship" with them, except for the "innocent landowner" defense [*see U.S. v. Pacific Hide & Fur Depot, Inc. (D. Idaho 1989) 716 F. Supp. 1341, 1347-1348* (by adopting rule that any instrument transferring title or possession of facility would be "contractual relationship," Congress barred use of innocent landowner defense unless certain conditions were met); *see also* [d], *below*].

[d] Innocent Landowner Defense

[i] Subset of Third-Party Defense

Under the innocent landowner defense, a PRP may avoid liability for preexisting contamination if it can prove, by a preponderance of the evidence, that it did not know and had no reason to know that hazardous substances were disposed of on its land at the time it acquired title or possession [*42 U.S.C. § 9601(35)(A)(i)*]. This "innocent landowner" or "innocent purchaser" defense is a variation or subset of the third-party defense [*see, e.g., State of Wash. v. Time Oil Co. (W.D. Wash. 1988) 687 F. Supp. 529, 532* ; *see also* [a]-[c], *above*]. Accordingly, the PRP must also show that due diligence was exercised and that precautions were taken against foreseeable acts of third parties [*42 U.S.C. § 9607(b)(3)*; *see* [b], *above*].

The innocent landowner defense is potentially available to both the current and previous owners [*Westwood Pharmaceuticals v. Nat. Fuel Gas Dist. (2d Cir. 1992) 964 F.2d 85, 91-92]* . However, previous owners are barred from using the defense if they obtained actual knowledge of a release or threatened release of hazardous substance on the property and then transferred ownership without disclosing their knowledge [*42 U.S.C. § 9601(35)(C)*; *see* [e], *below*; *see also § 33.14[6]* (common-law fraud liability)].

A tenant may also take advantage of the innocent landowner defense to avoid CERCLA liability by establishing all of the statutory elements [*see National R.R. Passenger Corp. v. NYC Housing Auth. (S.D. N.Y. 1993) 819 F. Supp. 1271, 1281]* . However, if the tenant creates contamination, the landlord will be precluded from asserting the innocent-purchaser defense, since by definition, the landlord cannot be an innocent purchaser [*see State of Wash. v. Time Oil Co. (W.D. Wash. 1988) 687 F. Supp. 529, 532]* .

Similarly, a secured lender that forecloses and takes title to contaminated property may find a problem in asserting the innocent purchaser defense with regard to any contamination that occurred after the loan was funded. To maximize protection under the defense, the lender would need to conduct appropriate due diligence before it forecloses and acquires the property [*see 42 U.S.C. § 9601(35)(B)*; *see also § 33.223[2]* (form of mortgage provision giving trustee power to conduct environmental audit after grantor's default)]. However, the lender who fails to conduct such an inquiry might still enjoy protection under CERCLA's secured creditor exemption [*see* [6], *above*].

De minimis landowner settlements with the EPA may be available for innocent purchasers of contaminated property that bar contribution suits brought by third parties. For further discussion, see *§ 33.31*.

[ii] "All Appropriate Inquiry" Requirement

To establish that the potentially responsible party had no reason to know of the presence of hazardous substances, the party must have undertaken, at the time of the acquisition, "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability" [*42 U.S.C. § 9601(35)(B)*]. The duty to inquire and the standards of "good commercial and customary practice" are judged as of the time of the transaction [*see U.S. v. Serafini (M.D. Pa. 1988) 711 F. Supp. 197, 198]* . Whether an "appropriate inquiry" has been made is determined on a case-by-case basis. However, certain statutory factors must be considered when determining whether all appropriate inquiry was made in a given case. These factors are [*42 U.S.C. § 9601(35)(B)*]:

- Any specialized knowledge or experience that the party may have.
- The relationship of the purchase price to the value of the property if uncontaminated.
- Commonly known or reasonably ascertainable information about the property.
- The obviousness of the presence or likely presence of contamination at the property.
- The ability to detect the contamination by appropriate inspection.

[iii] Judicial Application

Applying the factors in [ii], *above*, courts have held persons engaged in commercial transactions to the highest and strictest standard of inquiry [*see, e.g., In re Hemingway Transport, Inc. (1st Cir. 1993) 993 F.2d 915, 932-933 , cert. denied, 510 U.S. 914* (purchaser from bankruptcy proceeding held to specially stringent level of preacquisition inquiry since it acquired property during period when containers were leaking hazardous waste); *U.S. v. Pacific Hide & Fur Depot, Inc. (D. Idaho 1989) 716 F. Supp. 1341, 1348]* . On the other hand, persons who acquire property through inheritance are held to a much more lenient standard [*U.S. v. Pacific Hide & Fur Depot, Inc. (D. Idaho 1989) 716 F. Supp. 1341, 1348-1349* (children, who had made no inquiry whatsoever into hazardous substances on PCB-contaminated property that they received as inheritances, were still innocent landowners, even though presence of hazardous substances was visible on property)]. Obviously, actual knowledge of the presence of hazardous substances bars the innocent landowner defense [*see Kerr-McGee Chemical v. Lefton Iron & Metal (7th Cir. 1994) 14 F. 3d 321, 325]* .

[e] Environmental Assessment: Practical Due Diligence Challenge

To establish the innocent landowner defense, a real property purchaser, tenant, or lender must show that he or she neither knew nor had any reason to know that the property was contaminated at the time of the acquisition [*see 42 U.S.C. § 9607(b)(3)*; *see also* [d][i], *above*]. This requires that the claimant conduct "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability" [*42 U.S.C. § 9601(35)(B)*; *see* [d][ii], *above*].

Unfortunately, Congress, the EPA, or the courts have not articulated definitive standards for establishing such due diligence. The statutory factors [*see* [d][ii], *above*] fail to specify exactly what constitutes "all appropriate inquiry" or to create a "safe harbor" for prospective purchasers, tenants, or lenders. Therefore, counsel representing a potential purchaser, tenant, or lender is faced with the practical challenge of taking steps that will show that his or her client conducted a sufficient investigation, "consistent with good commercial or customary practice" [*see 42 U.S.C. § 9601(35)(B)*] without having clear guidance on what steps constitute such practice.

The American Society of Testing and Material ("ASTM") publishes consensus standards on good commercial practice for initial inquiries into the environmental condition of property. The standards set forth a "transactional screen," consisting of a questionnaire, a site inspection, and a records check, all of which may be performed by a person without environmental training or experience. If the property fails the transactional screen, then a professional performs a more thorough, but still noninvasive, investigation of the property [*see* American Society of Testing and Materials, ASTM Standards on Environmental Site Assessments for Commercial Real Estate, available from ASTM Customer Service, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, Pennsylvania, 19428-2959, (610) 832-9585, fax: (610) 832-9555, website: http://www.astm.org/]. According to at least one source, the ASTM standards have gained widespread acceptance as minimum standards for conducting environmental due diligence [Site Auditing: Environmental Assessment of Property, 3-9 (Specialty Technical Publishers 1991)].

The Small Business Liability Protection and Brownfields Revitalization Act [P.L. 107-118, 115 Stat. 2356; *see* [f], *below*], enacted in 2002, deems "all appropriate inquiry" for the "innocent purchaser" defense to include compliance with the ASTM standards for property bought after May 31, 1997 (including for residential property a facility inspection and a title search with clean results) [*42 U.S.C. § 9601(35)(B)(iv)(II)*]. However, this chapter suggests a more intensive (and more conservative) level of initial inquiry, one requiring that an environmental professional be engaged [*see §§ 33.120* (environmental assessment procedures), *33.200[2]* (environmental assessment contract)].

PRACTICE TIP:

Due Diligence. The EPA is very reluctant to recognize as a defense the adequacy of any course of investigation that failed to disclose the contamination. Due diligence should be performed to the level adequate to satisfy the party's concern, not in the highly uncertain hope of establishing this defense. In this regard, care should be taken in applying uncritically the preliminary screening scope of work of the ASTM standard, which was designed for economy of time and money by avoiding employment of environmental professionals. *By Joel Moskowitz*

[f] Small Business Liability Protection and Brownfields Revitalization Act

On January 11, 2002, the President signed into law the Small Business Liability Protection and Brownfields Revitalization Act [P.L. 107-118, 115 Stat. 2356]. Title II of the Act is the Brownfields Revitalization and Environmental Restoration Act (Brownfield Amendments). Although the Amendments do not make any major revisions in the liability scheme of CERCLA, they establish new defenses to CERCLA liability and include incentives to promote brownfields redevelopment. The Amendments exempt some owners and developers of some properties from certain liabilities.

The Brownfields Amendments include provisions covering all of the following:

- Authorizing grants for brownfields inventorying, characterizing, cleaning up, and related planning [*see 42 U.S.C. § 9604(k)*].

- Defining brownfields to include hazardous wastes sites, mine-scarred land, and petroleum spill sites (if low risk, no PRP, and third party will clean up) [*see 42 U.S.C. § 9601(39)(D)*].

- Codifying the 1995 US EPA Policy exempting owners of property with contaminated aquifers, and exempting contiguous property owners [*see 42 U.S.C. § 9607(q)* (owner of real property contiguous to or otherwise similarly situated with regard to, and that is or may be contaminated by release or threatened release of hazardous substance from, real property that is not owned by that person will not be considered to be owner or operator of vessel or facility for purposes of CERCLA liability solely by reason of contamination, if specified conditions are met)].

- Creating a new bona fide prospective purchaser (BFPP) defense based on ownership or operation of the facility [*see 42 U.S.C. § 9601(40)* (BFPP whose potential liability for release or threatened release is based solely on purchaser's being considered to be owner or operator of facility will not be liable as long as BFPP does not impede performance of response action or natural resource restoration)] and giving a lien to the United States for unrecovered response costs when the BFPP is not liable and the property value has increased since response action was taken [*see 42 U.S.C. § 9607(r)*].

- Deeming "all appropriate inquiry" for the "innocent purchaser" defense to include compliance with standards of the American Society for Testing and Materials (ASTM) for property bought after May 31, 1997 (and including for residential property facility inspection and title search with clean results) [*42 U.S.C. § 9601(35)(B)(iv)(II)*].

- Authorizing grants to states or indian tribes for response programs and related activities [*see 42 U.S.C. §§ 9601(41), 9628(a)*].

- Limiting US EPA "overfiling" when hazardous waste releases are already addressed by a state cleanup plan [*see 42 U.S.C. § 9628(b)(1)(A)*]. Exceptions include migration onto United States property or imminent and substantial endangerment [*see 42 U.S.C. § 9628(b)(1)(B)(ii), (iii)*]. There is an additional exception for states that do not keep public records of sites cleaned up according to state law [*see 42 U.S.C. § 9628(b)(1)(C)*].

- Requiring deferral of NPL listing when the state is conducting a response action or is contracting with a private person to do so, with some exceptions [*see 42 U.S.C. § 9605(h)*].

For further discussion of the Brownfields Revitalization Act and brownfields redevelopment, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 72, *Hazardous Waste Cleanup and Land Use* (Matthew Bender).

[g] Owner's Duty to Disclose Contamination

If an owner obtains actual knowledge of the release or threatened release of a hazardous substance at a facility while owning the real property where the facility is located, but subsequently transfers ownership to another person without disclosing that knowledge, the transferor will be precluded from asserting *any* of these CERCLA defenses, including and most importantly, the innocent landowner defense [*42 U.S.C. § 9601(35)(C)*; *see* [d], *above*]. In addition, the owner likely will be liable for fraud under state law, including exposure to punitive damages [*see § 33.14[6]*].

Therefore, counsel representing the prospective seller of contaminated property must ensure that the existence of any contamination is disclosed to the prospective buyer to preserve the innocent purchaser and other defenses, if any of them is otherwise applicable. This advice most likely also applies to landlords, who are eligible for the innocent landowner defense, and who seek to lease property. Of course, whatever the form of the transaction, disclosure by the transferor disqualifies the prospective transferee from asserting the innocent landowner defense [*see 42 U.S.C. § 9601(35)(B)*; *see also* [d], *above*].

For a form setting forth a seller's environmental disclosures to a potential buyer, see *§ 33.211[2]*. For a borrower's environmental disclosure form to a lender, see *§ 33.220[2]*. For a landlord's environmental disclosure form to a potential tenant, see *§ 33.234[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawEnvironmental RegulationLiabilities & RisksLender Liabilities



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.11

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.11 Resource Conservation and Recovery Act ("RCRA")

The Resource Conservation and Recovery Act ("RCRA") [*42 U.S.C. § 6901 et seq.*] subjects hazardous wastes to a mandatory regulatory program, which controls how these wastes are managed from when they are generated until their final disposition. In other words, RCRA provides for cradle-to-grave management of hazardous wastes and is intended to mainly apply to the problems of current and future disposal of hazardous wastes [*see 42 U.S.C. § 6901 et seq.*; 40 C.F.R. pts. 260, 264]. In contrast, CERCLA is concerned primarily with the cleanup of hazardous substances, such as toxic wastes, that have been already released into the environment [*see § 33.10[1]*].

The liabilities imposed for violating RCRA are of particular concern because (1) they are based on the condition of the affected real property and (2) they can be retrospective. RCRA enforcement actions can be brought against any *past or present* generator, transporter, owner, or operator who has contributed to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste, which may present an imminent and substantial danger to health or the environment. The EPA can order abatement of imminent hazards or sue for a court injunction. Private parties also can sue for injunctive relief [*42 U.S.C. § 6972(a)* (citizen suits); *42 U.S.C. § 6973(a)* (EPA enforcement actions)].

RCRA permits injunctive relief for the present and future conditions resulting from past acts [United States v. Northeastern Pharmaceutical (8th Cir. [Mo.] 1986) *810 F.2d 726, 740]* . RCRA does not authorize recovery of cleanup costs for past contamination [*Meghrig v. KFC Western, Inc. (1996) 516 U.S. 479, 116 S. Ct. 1251, 1253, 134 L. Ed. 2d 121]* .

The major difference between CERCLA and RCRA in terms of liability is that RCRA does not recognize liability based on mere status, that is, merely being an owner or operator. Under RCRA, to be liable the defendant must have been "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" [*42 U.S.C. § 6972(a)(1)(B)*; *c.f., § 33.10[1]* (status liability under CERCLA)]. In addition, RCRA has a more limited range and number of hazardous materials under its jurisdiction than CERCLA [*compare* 40 C.F.R. pt. 261, app.

VIII (list of RCRA hazardous constituents) *with* 40 C.F.R. pt. 302 (list of CERCLA hazardous substances)]. Therefore, with regard to real estate transactions, CERCLA is far more significant than RCRA from a liability point of view [*see generally* Stoll, *The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA, 44 Sw. L.J. 1299 (1991)*].

For a detailed discussion of RCRA and its state law parallel, the California Hazardous Waste Control Law ("HWCL") [*Health & Safety Code § 25100 et seq.*; *22 Cal. Code Reg. § 66260.1 et seq.*], see California Environmental Law and Land Use Practice, Chapters 50, *Administration of Hazardous Waste Laws: Federal /State Interrelationship*, 51, *Regulation of Hazardous Waste Generators* , 52, *Regulation of Transporters of Hazardous Waste and Materials* , 53, *Regulation of Hazardous Waste Treatment, Storage, and Disposal Facilities* , and 54, *Enforcement of Hazardous Waste Management Requirements* (Matthew Bender). RCRA is also covered in Environmental Law in Real Estate and Business Transactions,Chapters 2, *RCRA Section 7003-Imminent Hazards* and 7, *The Resource Conservation and Recovery Act* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesResource Conservation & Recovery ActGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesResource Conservation & Recovery ActEnforcementGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesResource Conservation & Recovery ActFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.12

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.12 Hazardous Substance Account Act ("HSAA")

NOTE:

Reauthorization of Carpenter-Presley-Tanner Hazardous Substance Account Act. Most provisions of the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) [*Health & Safety Code § 25300 et seq.*] were repealed by operation of law on January 1, 1999, when the Legislature failed to pass reauthorizing legislation in the 1998 legislative session. In May 1999, the Legislature reinstated the former statutory provisions, with some new additions [Stats. 1999, ch. 23]. An uncodified portion of Chapter 23 provides that the January 1, 1999, repeal of portions of the HSAA "shall not terminate, affect, or modify any proceeding, order, or agreement issued or entered into by any" regulatory agency [Stats. 1999, ch. 23, § 3(b)]. This provision also provides that the new law "shall apply retroactively, on and after January 1, 1999, to those proceedings, orders [and] agreements." Therefore, potentially responsible parties should expect prior arbitration proceedings to be reinstated and that the California Department of Toxic Substances Control (DTSC) will treat prior orders and agreements as having been continuously in effect during the Act's hiatus. The reauthorized Act no longer contains a sunset provision.

[1] State Superfund Law Generally Parallels CERCLA

The Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA") [*Health & Safety Code § 25300 et seq.*] is California's own superfund law. With regard to liability issues, the HSAA parallels CERCLA in many respects. The HSAA even incorporates key CERCLA definitions by reference. For example, the HSAA simply adopts CERCLA's definition of the concept of responsible party [*see, e.g., Health & Safety Code §§ 25310, 25323.5(a)(1), 25325*; *see also § 33.10[5][e]*]. In other places, the state statute repeats the CERCLA definition verbatim or near verbatim [*compare, e.g., Health & Safety Code § 25316* ("hazardous substance" defined) *with 42 U.S.C. § 9601(14)* (CERCLA's definition of term)].

Unlike some other states' superfund laws, which have eliminated CERCLA's petroleum exclusion, the HSAA basically shares CERCLA's definition of "hazardous substances" including the petroleum exclusion [*compare Health & Safety*

Code § 25317(a) with 42 U.S.C. § 9601(14); *see also § 33.10[5][d][ii]*]. Similarly, like CERCLA, the HSAA does not set a minimum amount of hazardous substance that must be dumped for a "release" to occur, triggering liability under the Act [*compare Health & Safety Code § 25320* ("release" defined) *with 42 U.S.C. § 9601(22)* (meaning of "release" under CERCLA); *see also Analytical Measurements v. Keuffel & Esser Co. (D.N.J. 1993) 843 F. Supp. 920, 931* and *§ 33.10[5][c]*] (comparing CERCLA with New Jersey's superfund law). However, the HSAA does exclude from its definition of "release" not only "the normal application of fertilizer," like CERCLA, but also the normal application of "plant growth regulants, and pesticides" [*compare 42 U.S.C. § 9601(22)(D) with Health & Safety Code § 25321(d)*].

For a detailed discussion of the HSAA, see California Environmental Law and Land Use Practice, ch. 50, *Administration of Hazardous Waste Laws: Federal /State Interrelationship*, ch. 55, *Cleanup of Hazardous Substance* , and ch. 56, *Cleanup Liability and Cost Recovery* (Matthew Bender).

[2] Strict, but Not Joint and Several, Liability

Like CERCLA, the HSAA imposes strict liability without regard to fault on all parties responsible for discharging hazardous substances [*compare Health & Safety Code §§ 25323.5, 25360, 25363 with 42 U.S.C. § 9607*; *see also § 33.10[2]*]. However, in contrast with CERCLA, liability under the HSAA is not joint and several. Liable parties are only liable for that amount that represents their proportional contribution to the hazardous substances present at the site [*Health & Safety Code § 25363*]. Even the failure of other PRPs to pay their proportional share does not increase liability, at least in governmental enforcement actions regarding sites on the California Superfund List [*see Health & Safety Code § 25363(c)* (State Superfund must pay amount in excess of that apportioned by equitable principles among PRPs)]. Therefore, as a practical matter, the Department of Toxic Substances Control (DTSC) generally seeks cost-recovery for state-listed sites in federal court under CERCLA, instead of the HSAA, to take advantage of CERCLA's clear joint and several liability standard [*see, e.g., BKHN, Inc. v. Department of Health Services (1992) 3 Cal. App. 4th 301, 306, 4 Cal. Rptr. 2d 188* (invoking CERCLA, Department of Health Services sent demand letter to PRP demanding full payment of interim cleanup costs)].

[3] No Retroactive HSAA Liability

Regardless of the doubts about CERCLA's retroactivity [*see § 33.10[3]*], liability under the HSAA is not retroactive, as long as the acts that resulted in releases of hazardous substances occurred on or before January 1, 1982 and were not in violation of existing state and federal laws at the time they occurred [*Health & Safety Code § 25366(a)*]. However, the HSAA does not affect or modify a person's liability under other federal, state, or common law for damages resulting from a release of a hazardous substance or the costs of remedial action [*Health & Safety Code § 25366(c)*].

PRACTICE TIP:

Suing Under HSAA. Both because of its lack of joint and several liability [*see* [2], *above*] and its lack of retroactive liability [*see above*], suits are rarely brought under the HSAA alone. Rather, actions under the HSAA are usually brought in federal court as supplemental to CERCLA actions. *By Joel Moskowitz*

[4] Defenses to HSAA Liability

The HSAA incorporates by reference CERCLA's limited defenses against liability [*Health & Safety Code § 25323.5(b)*]. Therefore, under the HSAA, just as under CERCLA, the defendant must prove that the release was caused by an act of God, war, or a third party with whom the defendant had no contractual relationship. Similarly, the HSAA embodies by reference CERCLA's "innocent landowner" defense and exempts the secured creditor, who does not participate in the management of the facility, from liability as an "owner or operator" [*see Health & Safety Code § 25323.5(b)*; *see also §§ 33.10[6], [7][d]*].

However, the HSAA also recognizes special "innocent landowner" defenses to (1) innocent owners of single-family residences or halves of duplexes constructed on the property and the owners of common areas within residential

common interest developments [*see Health & Safety Code § 25360.2*], and (2) special districts in general and entities holding conservation easements with regard to property acquired on or after January 1, 1995, if an environmental assessment was performed that disclosed no contamination [*see Health & Safety Code § 25360.3*]. In addition, persons who develop or implement innovative investigative or remedial technology, which is approved by the DTSC to remedy a contaminated facility, are only liable under the HSAA for a release stemming from that technology if they were negligent, misrepresented the technology, or disregarded the DTSC-approved remediation plan [*Health & Safety Code § 25323.5(a)(2)*].

Indemnity and hold-harmless provisions in contracts may cover any costs or expenditures imposed by the HSAA. However, as under CERCLA, no agreement can transfer ultimate liability under the state statute [*Health & Safety Code § 25364*; *see § 33.30* (effect of contractual provisions on CERCLA liability)].

[5] Remedies Under HSAA

The HSAA gives a cause of action for enforcement, including damages, in favor of the California Department of Toxic Substances Control ("DTSC"), within the California Environmental Protection Agency ("CalEPA") [*Health & Safety Code § 25360*]. In addition, persons who have incurred remediation costs may seek contribution or indemnity under the HSAA from any person liable under the Act [*Health & Safety Code § 25363(e)*]. This is similar to CERCLA, which also allows both public and private enforcement [*see § 33.10[1]*]. Further, a defendant PRP may join other PRPs in a DTSC cost-recovery action [*Health & Safety Code § 25362*].

Under the HSAA, the DTSC can recover treble damages against any PRP (except an innocent landowner) who fails, without sufficient cause, to remediate the contaminated property after receiving a DTSC or court order to do so [*Health & Safety Code § 25359*]. In addition, one PRP who is in compliance with a DTSC agreement or order may recover treble damages, in addition to cleanup costs, against another PRP who has failed or refused to comply with that DTSC order or agreement [*Health & Safety Code § 25359.4.5*]. Under CERCLA, by contrast, a private plaintiff may not recover punitive or enhanced damages [*see 42 U.S.C. § 9607(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksInnocent Landowner DefenseReal Property LawEnvironmental RegulationLiabilities & RisksLender Liabilities



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15-33 California Legal Forms--Transaction Guide § 33.13

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.13 Porter-Cologne Water Quality Control Act

The Porter-Cologne Water Quality Control Act [*Water Code § 13000 et seq.*] regulates the discharge, or threatened discharge, of waste into the waters of California. The Act authorizes California's regional water quality control boards to issue cleanup orders to any person who discharges waste into state waters, or discharges waste that probably will find its way into state waters, where it will create, or threatens to create, a condition of pollution or nuisance [*Water Code § 13304(a)*].

The Porter-Cologne Act's definition of "waste" reaches much farther than the statutory definitions of "hazardous substance" under CERCLA or the HSAA. The Act applies to *any* waste, whether it is hazardous or not [*Water Code § 13050(d)*; *see Lake Madrone Water Dist. v. State Water Resources Control Bd. (1989) 209 Cal. App. 3d 163, 169, 256 Cal. Rptr. 894* (silt released by dam into downstream creek was "waste")]. Similarly, unlike CERCLA or the HSAA, the Porter-Cologne Act does not exclude petroleum [*compare Water Code § 13050(d) with 42 U.S.C. § 9601(14) and Health & Safety Code § 25317(a)*; *see also §§ 33.10[5][d][ii], 33.12[1]*].

However, like both CERCLA and the HSAA [*see §§ 33.10, 33.12*], the Porter-Cologne Act throws a wide net over the potentially responsible parties, and the State Water Resources Control Board has interpreted the scope of liability under the Act quite broadly. Not only is liability imposed on a prior owner who first caused the discharge, but also on any person who owned or owns the property while the pollution persists. In addition, down-gradient owners, lessees, suppliers of leaking equipment, successor and dissolved corporations, secured lenders, and directors and even shareholders may be liable under the Act [*see California Environmental Law and Land Use Practice, ch. 32, Regional Water Board Ground Water Investigations and Cleanups, § 32.30* (Matthew Bender)]. Similarly, the State Water Board interprets the Act to impose strict, joint, and several liability, like CERCLA [*see California Environmental Law and Land Use Practice, ch. 32, Regional Water Board Ground Water Investigations and Cleanups, §§ 32.30[2], 32.34* (Matthew Bender)].

If the condition is not abated, the regional water boards may perform the cleanup and attempt to recover all reasonable

costs from the liable parties by means of a civil action [*Water Code § 13304(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawWater QualityGeneral OverviewReal Property LawEnvironmental RegulationIndoor Air & Water QualityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawEnvironmental RegulationLiabilities & RisksSuccessor Corporations



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15-33 California Legal Forms--Transaction Guide § 33.14

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.14 Common Law Theories of Liability

[1] Continuing Importance

Despite the broad imposition of environmental liability under CERCLA and the HSAA, the statutory defenses and certain statutory exclusions, such as the petroleum exclusion, make CERCLA and the HSAA unavailable as a theory of liability in some circumstances [*see §§ 33.10[5][d][ii]* (petroleum exclusion), *33.10[7]* (statutory defenses to CERCLA liability), *33.12[1]*]. Therefore, plaintiffs may need to rely on common-law tort theories to address oil and gas pollution [*see, e.g., Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 347-351, 23 Cal. Rptr. 2d 377* (property owner has negligence action against former owner who operated natural gas plant and allegedly contaminated property); *Marshall v. El Paso Natural Gas Co. (10th Cir. 1989) 874 F.2d 1373, 1376, 1380* (defendant liable for $350,000 diminished value of property, $50,000 nuisance damages, and $5 million in punitive damages for negligently plugging oil and gas well)].

In addition, common-law tort theories offer the potential of damages, such as consequential damages for diminution in the value of property and personal injury and punitive damages, which are not generally available under CERCLA or the HSAA [*compare Civ. Code § 3294 with Hatco Corp. v. W.R. Grace & Co. (D. N.J. 1994) 849 F. Supp. 931, 980* ; *see also § 33.12[5]* (narrow circumstances for treble damages under HSAA)]. Common-law tort doctrines may also reach environmentally harmful conduct that was not prohibited by statute or regulation at the time of occurrence [*see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 976, 25 Cal. Rptr. 2d 550, 863 P.2d 795* (trial court sitting as trier of fact concluded that defendant's waste disposal practices from 1967 to 1974 constituted actionable negligence)].

Consequently, plaintiffs in federal cost-recovery cases commonly combine CERCLA with a variety of common-law (and also state statutory causes of action) [*see, e.g., Amoco Oil Co. v. Borden, Inc. (5th Cir. [Tex.] 1989)889 F.2d 664, 666* . Even in state court, which lacks jurisdiction under CERCLA, environmental plaintiffs often combine common law theories of liability with state statutory causes of action [*see, e.g., Mangini v. Aerojet-General Corp. (1991) 230 Cal.*

App. 3d 1125, 1149-1150, 281 Cal. Rptr. 827 (property owner brought many causes of action against former tenant's disposal of hazardous waste on premises)]. Therefore, common-law theories of liability for environmental contamination [*see* [2]-[7], *below*] remain important.

For further discussion of common-law theories as applied in the context of environmental law, see California Environmental Law and Land Use Practice, Chs. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* , 3, *Toxic Torts and Environmental Litigation* , and 56, *Cleanup Liability and Cost Recovery* (Matthew Bender).

[2] Nuisance

Nuisance is probably the most important common-law theory of liability for contamination of real property. A nuisance is anything that interferes with the enjoyment or use of land or property [*Civ. Code § 3479*]. A nuisance may be either a public or private nuisance, and the remedies available include both the recovery of damages and an injunction ordering a cleanup [*Civ. Code §§ 3480, 3481, 3491, 3501*]. In general, courts have applied a balancing of factors, weighing the benefits of the activity against its severity, to determine whether a nuisance exists [*see, e.g., Farmy v. College Housing, Inc. (1975) 48 Cal. App. 3d 166, 174-175, 121 Cal. Rptr. 658]* . However, if a legislative body has expressly declared an activity to be a nuisance, it is a nuisance per se, and the courts do not engage in any balancing process [*City of Bakersfield v. Miller (1966) 64 Cal. 2d 93, 100, 48 Cal. Rptr. 889, 410 P.2d 393 , cert. denied, 384 U.S. 988* ; *see Restatement (Second) of Torts §§ 821-840*].

[3] Trespass

Trespass is an invasion of another person's interest in the exclusive possession of land. Therefore, a polluter who allows hazardous waste to seep onto adjacent land may be liable in trespass to the adjacent landowner. Liability is only imposed when the trespass is intentional; however, the general intent to perform the act that causes the invasion is sufficient [*see Restatement (Second) of Torts §§ 158, 159, 165, 196-199, 201(1)*].

Noise or other intangible intrusions such as odor or light that do not cause physical damage do not constitute a trespass and must be dealt with as nuisances [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-234, 185 Cal. Rptr. 280, 649 P.2d 922* (plaintiffs could not recover based on trespass for damages caused by noise from an adjacent steel fabricating plant that did not cause physical damage to their property); *San Diego Gas and Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 936, 55 Cal. Rptr. 2d 724, 920 P.2d 669* (electric and magnetic fields arising from power lines are intangible intrusions that do not constitute actionable trespass absent physical damage to property)].

[4] Strict Liability for Abnormally Dangerous Activity

A landowner is strictly liable in tort to others for harm caused by toxic wastes, if they are abnormally dangerous, that are stored on the landowner's property and flow onto the property of others. Whether an activity is abnormally dangerous is a factual determination based on a case-by-case consideration of the following factors [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 500, 190 P.2d 1* (leading case adopting doctrine of Restatement); *Restatement (Second) of Torts §§ 519, 520*]:

- The existence of a high degree of risk of harm to the person, land, or chattel of others;
- The likelihood that the harm that results from it will be great;
- The inability to eliminate the risk by the exercise of reasonable care;
- The extent to which the activity is not a matter of common usage;

- The inappropriateness of the activity to the place where it is carried on; and
- The extent to which its value to the community is outweighed by its dangerous attributes.

[5] Negligence

Unlike CERCLA, RCRA, and the HSAA [*see §§ 33.10-33.12*], the negligence cause of action requires proof that the defendant was at fault and that the defendant's acts or omissions caused the harm. This proof often can be difficult in contamination cases, since it requires an examination of the ordinary standard of care in the management of property and hazardous substances, which was much lower even in the recent past. The further back in time the contamination occurred, the greater the difficulty in finding witnesses and reconstructing events [*see, e.g., Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 347-351, 23 Cal. Rptr. 2d 377* (property owner had negligence action against former owner who operated natural gas plant and allegedly contaminated property); *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 905, 200 Cal. Rptr. 497* (lettuce grower pleaded negligence, among other causes of action, against defendants who allegedly caused herbicide designed for wheat crops to drift onto plaintiff's land)].

The doctrine of "negligence per se" has great applicability to contaminated property cases because of the complex web of laws and regulations that regulate hazardous substances, chemicals, and waste. A defendant is negligent per se (or is presumed to have breached the common-law standard of due care) if he or she violated a legislatively-adopted law that resulted in damages of a type that the law was designed to protect the plaintiff's class from [*see Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 349-351, 23 Cal. Rptr. 2d 377* (property owner sued predecessors-in-interest for negligence per se, based on alleged discharge of hazardous substances in violation of *Health & Safety Code § 5410 et seq.* and *Water Code § 13000 et seq.*); *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1132, 281 Cal. Rptr. 827* (landlord sued former tenant for negligent per se disposal of waste rocket fuel and other hazardous substances in violation of *Health & Safety Code § 25601, Water Code §§ 13304, 13264, 13265,* and Regional Water Quality Control Board's administrative order)].

[6] Fraud or Misrepresentation

In the environmental context, the tort of fraud or deceit is most likely to arise with regard to the transfer of contaminated real property [*see, e.g., Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 347-351, 23 Cal. Rptr. 2d 377* (purchaser alleged cause of action for negligent misrepresentation against former owner who operated natural gas plant, contaminated property, and did not disclose contamination)]. The five essential elements of a cause of action for fraudulent misrepresentation are [*Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 200, 227 Cal. Rptr. 887* ; *see Civ. Code § 1709*]:

- Misrepresentation, consisting of either a false representation, concealment, or nondisclosure.
- Knowledge of falsity.
- Intent to induce reliance.
- Justifiable reliance.
- Resulting damages.

Thus, a seller would commit fraud by selling property with knowledge that it is contaminated, if the seller either affirmatively claimed that the property is not contaminated or failed to disclose the fact of contamination to the buyer [

see, e.g., Amoco Oil Co. v. Borden, Inc. (5th Cir. [Tex.] 1989) 889 F.2d 664, 666 (fraud claim rejected by jury, but defendant violated warranty by not delivering property in clean condition)].

One California statute goes even further and obligates the owner of nonresidential real property to give written notice to any buyer or tenant of any release of hazardous substance that the owner either knows about, or has reasonable cause to know about, which has come to be located on or beneath the property. Violation of this statutory requirement subjects the owner to actual damages and any other available remedies [*Health & Safety Code § 25359.7(a)*]. Nonresidential tenants have a similar obligation to inform their landlords [*Health & Safety Code § 25359.7(b)*; *see § 33.231[2]* (monitoring requirements provision for lease)].

Fraud expands the scope of a seller's liability under CERCLA. A real property owner who obtains actual knowledge of a release or threatened release of a hazardous substance on the property but fails to disclose that knowledge to a transferee loses all statutory defenses to liability under CERCLA [*42 U.S.C. § 9601(35)(C)*; *see § 33.10[7]*].

This chapter offers three environmental disclosure forms to vitiate any claims of misrepresentation [*see §§ 33.211[2]* (seller's disclosures to purchaser), *33.220[2]* (borrower's disclosures to lender), *33.234[2]* (landlord's disclosure to tenant)].

[7] Contractual Obligations

[a] Indemnity Provisions

Contract rights created by agreement can afford a basis for liability for environmental damages. For example, a person can by contract agree to assume the risk of injuries to real property or personal injury damages caused by exposure to toxic substances [*see, e.g., Joslyn Mfg. Co. v. Koppers Co., Inc. (5th Cir. 1994) 40 F.3d 750, 754* (broad language of indemnification agreements evidenced strong intent by tenant to indemnify landlord for all environmental liability arising in connection with occupancy or use of land, even subsequent liability created under CERCLA); *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal. App. 3d 1601, 1611, 271 Cal. Rptr. 596]* .

Even CERCLA liability may be allocated by agreement among liable parties, although their ultimate liability to the government may not be contracted away [*see § 33.30[1]*]. This chapter offers several contract forms and provisions allocating environmental duties and liabilities by agreement [*see §§ 33.210[2]* (real estate sales contract), *33.212[2]* (environmental indemnity agreement), *33.230[2]* (tenant's warranty concerning use), *33.231[2]* (lease's environmental monitoring requirements), *33.232[2]* (lease's allocation of cleanup costs)].

[b] Compliance-With-Laws Provisions

Many agreements, particularly leases, require the tenant to comply with all relevant laws. Therefore, any failure of a tenant to comply with environmental laws and regulations constitutes not only a statutory violation and negligence per se, but also a breach of the lease [*see* Ch. 34B, *Residential Leases* ; Ch. 34C, *Retail, Industrial, and Office Leases* ; Ch. 34D, *Ground Leases* ; Ch. 37, *Farm Leases* ; *see also SDC/Pullman Partners v. Tolo Inc. (1998) 60 Cal. App. 4th 37, 53, 70 Cal. Rptr. 2d 62* (mere presence of de minimis amounts of certain substances otherwise toxic in larger quantities did not trigger a toxic substances clause in lease; only real CERCLA liability or at least a "realistic threat" of it could reasonably trigger tenant's cleanup duty)]. A lease's express compliance-with-laws provision, when read in concert with the covenant of good faith and fair dealing that is implied in all contracts, gives the landlord an implied right to inspect the premises for soil and groundwater contamination, especially if the landlord reasonably suspects contamination in breach of the lease provision [*Sachs v. Exxon Co., U.S.A. (1992) 9 Cal. App. 4th 1491, 1498, 12 Cal. Rptr. 2d 237* (premises was gas station subject to old, long-term commercial lease)].

[c] Attorneys' Fee Provisions

Many written agreements include attorneys' fee provisions. These express provisions allow a party to recover attorney's fees as damages, and attorneys' fees are a very significant cost associated with remedying an environmental injury that otherwise may not be recoverable in litigation. Under California law and the "American rule," attorneys' fees are not recoverable unless authorized by contract or statute [*Code Civ. Proc. § 1021*; *Jacobson v. Simmons Real Estate (1994) 23 Cal. App. 4th 1285, 1291, 28 Cal. Rptr. 2d 699* ; *see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. Under California's "reciprocity doctrine," any successful litigant, not just the party named in the contract, can recover attorneys' fees [*Civ. Code § 1717*].

For a detailed discussion of attorneys' fees in an environmental context, see California Environmental Law and Land Use Practice, Ch. 13, *Attorneys' Fees and Other Costs* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawTortsInherently Dangerous ActivitiesReal Property LawTortsNuisanceElementsReal Property LawTortsTrespass to Real PropertyTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureElementsTortsNegligenceActionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART II. LEGAL BACKGROUND
A. Sources of Environmental Liability

15-33 California Legal Forms--Transaction Guide § 33.15

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.15 Restrictive Covenants

[1] Covenants Running With the Land

Covenants, restrictions, or servitudes contained in recorded instruments may establish a basis for liability for environmental contamination. Restrictive covenants are promises to do or refrain from doing certain things in regard to the use of land [*Sackett v. Los Angeles City School Dist. (1931) 118 Cal. App. 254, 257, 5 P.2d 23* ; *see* Ch. 28C, *Covenants, Conditions, and Restrictions*]. Restrictive covenants assume an importance beyond contractual liability [*see § 33.14[7]*] when they "run with the land," which means they bind the covenantor's successors and are enforceable by the covenantee and its successors [*Civ. Code § 1460*].

In general, a covenant that is not just personal, but burdens and benefits the land through subsequent transfers, is a covenant that "runs with the land" if the instrument meets four requirements [*Civ. Code § 1468*]:

- Both the land of the covenantor that is to be affected by the covenants, and the land of the covenatee to be be benefitted, must be particularly described.

- The successive owners of the land must be expressly bound by the the covenants for the benefit of the land owned by, granted by, or granted to the covenantee.

- Each act required by the covenant must relate to (1) the use, repair, maintenance, or improvement of the land, or (2) the payment of taxes and assessments on the the land.

- The instrument must be recorded in the office of the recorder for each county in which at least part of the land is situated.

[2] Special Rule for Restrictions Addressing Hazardous Materials

Effective January 1, 1996, the requirements for a covenant to run with the land were relaxed with regard to environmental restrictions dealing with hazardous materials [*see Civ. Code § 1471*]. Essentially, the relaxed requirements allow a private party (such as an environmental advocacy group) to enter into an agreement with a landowner (such as the developer of a proposed industrial park) that runs with the land and binds the owner's successors even though the covenantee (the group) does not own any land that would be benefitted by the environmental restrictions [*c.f. McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252* (without description of benefited land, covenant is merely personal between covenantor and covenantee)]. Therefore, in the case of covenants addressing the presence on the land of hazardous materials, the instrument must meet the following four requirements to run with the land [*Civ. Code § 1471*]:

- The covenantor's land needs to be particularly described.

- The successive owners of the covenantor's land must expressly be bound for the benefit of the covenantee.

- Each act that the owner or grantee will do or refrain from doing must (1) relate to the use of land and (2) be reasonably necessary to protect present or future human health or safety or the environment because of the presence of hazardous materials on the land.

- The instrument must include in its title "Environmental Restrictions" and be recorded in the office of the recorder of each county in which at least part of the land is situated.

[3] Deed Restrictions Imposed by DTSC

The California Department of Toxic Substances Control ("DTSC") is authorized to either (1) enter into an agreement with the owner of a hazardous waste facility, or (2) impose conditions on a hazardous waste facility permit that require the owner to execute and record an instrument imposing easements, covenants, restrictions, or servitudes on the present and future uses of the land [*Health & Safety Code § 25202.5(a)*]. This instrument may impose use restrictions on not only the land itself but also a 2,000 foot buffer zone necessary to protect the present or future public health. Activities that can be restricted include building, filling, grading, excavating, or mining, unless the DTSC has given its written permission. However, the recorded restrictions must not limit the use, modification, or expansion of an existing industrial facility. The restrictions run with the land and bind all of its owners and their successors. They are also enforceable by the DTSC [*Health & Safety Code § 25202.5(b), (c)*].

In addition, DTSC is authorized under California's border zone statute to either enter into an agreement with the owner of hazardous waste property or border zone property or simply issue an order requiring that the owner execute and record easements, covenants, or restrictions limiting new uses on the property [*Health & Safety Code §§ 25230, 25232*; *see § 33.16[1]* (border zone statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcement



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AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.16 California's Regulatory Restrictions on Use of Hazardous Waste Property and Border Zone Property

[1] "Border Zone Statute"

California has adopted special state-level land-use requirements for real estate that is designated either "hazardous waste property" or "border zone property" [*Health & Safety Code §§ 25220-25241*]. "Hazardous waste property" is either (1) a permitted or applied-for hazardous waste facility, or (2) land on or under which has been deposited hazardous waste that creates a significant hazard to public health or safety [*Health & Safety Code § 25117.3*]. "Border zone property" is land that is located within 2,000 feet of a significant disposal of hazardous waste, if those wastes are located in such a fashion that they pose a significant public health or safety hazard on the border zone property [*Health & Safety Code § 25117.4*]. The statute is commonly referred to as the "border zone statute," because it extends state land-use regulation from the hazardous waste site itself to land within a 2,000 foot circumference.

For a more detailed discussion, see California Environmental Law and Land Use Practice, Ch. 53, *Regulation of Hazardous Waste Treatment, Storage, and Disposal Facilities* (Matthew Bender).

[2] Application Requirement

No landowner or tenant may construct designated improvements on land known or believed to be hazardous waste property or border zone property without first filing an application with DTSC seeking a formal determination of the property's status [*Health & Safety Code § 25221(a)*]. In addition, a local government may apply for, or DTSC itself may initiate, the formal determination process [*Health & Safety Code §§ 25221(c), 25222(a)*]. After the application has been accepted, DTSC follows an information-gathering and public notice and hearing process to determine whether the property in question should be formally designated as hazardous waste property or border zone property [*see Health & Safety Code §§ 25221-25229*].

[3] Restrictions on Designated Property

If DTSC officially designates the land either "hazardous waste property" or "border zone property," the owner must execute and record easements, servitudes, covenants, or restrictions limiting new uses on the property [*Health & Safety Code § 25230*]. On hazardous waste property, all new uses are prohibited except for the use, modification, or expansion of land used beneficially for industrial purposes as of January 1, 1981. Uses prohibited on border zone property include residences, hospitals, day care centers, schools, and "permanently occupied human habitations" other than those used for industrial purposes. However, DTSC has discretion to grant a variance to the use prohibitions for either hazardous waste property or border zone property [*Health & Safety Code § 25232*].

Once recorded, the restrictions on hazardous waste property and border zone property run with the land and bind all successors-in-interest. Written notice of these restrictions must accompany all purchase and lease agreements involving the property [*Health & Safety Code § 25230*; *see § 33.15*].

[4] Practical Impact of Statute

In practice, the statutory provisions for establishing "hazardous waste" and "border zone" property have been largely ignored. The DTSC has not tried to enforce the statute and the public has consequently largely ignored it despite significant potential civil and criminal penalties [*see Health & Safety Code § 25236*]. Administration of the border zone statute has taken a very low priority (and the DTSC has made no formal determinations) since the statute was enacted in 1981. When determination applications have been submitted, they have been resolved by voluntary agreement between the DTSC and the landowner [*see Health & Safety Code § 25221.1(e)*].

Moreover, the statute does not prohibit construction within the 2,000 foot circle of a known or likely significant deposit of hazardous waste; it merely requires the filing of an application. A developer can proceed with construction while the application is pending, accepting the risk that the DTSC may subsequently make an adverse determination and come back and interfere with the development. Even this risk is averted if the developer avoids construction of the listed prohibited uses. Industrial uses are flatly permitted on designated border zone property, and expansion or modification of industrial uses existing as of January 1, 1991 are permitted on hazardous waste property. In addition, subdivision of hazardous waste property is allowed to separate the contaminated portion from the noncontaminated [*see Health & Safety Code § 25232*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesTreatment, Storage & DisposalEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawZoning & Land UseState & Regional Planning



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15-33 California Legal Forms--Transaction Guide §§ 33.17-33.29

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[Reserved]

§§ 33.17[Reserved]



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B. Shifting Environmental Liability Through Contracts, Settlement Agreements, and Insurance

15-33 California Legal Forms--Transaction Guide § 33.30

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.30 Effect of Contractual Provisions on Liability for Environmental Contamination

[1] Contractual Allocation of Liability

Parties to real estate and business transactions have attempted to rely on contractual provisions, including indemnity clauses, releases, and "as is" provisions, to preclude or limit their liability for hazardous substance cleanup costs [*see, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd. (9th Cir. [Az.] 1986) *804 F.2d 1454, 1459* (broad language of general release and settlement indicated that parties intended to encompass environmental liabilities, especially since parties knew of existence of hazardous waste settling pond); *see generally* Henderson, *Environmental Liability and the Law of Contracts, 50 Bus. Law. 183 (1994)*]. The validity and interpretation of these agreements are determined by state law, even when liability under CERCLA is in issue. For maximum enforceability, these agreements must be clear and specific. However, "as is" provisions should not be relied on to allocate liability [*see* [4], *below*].

[2] Permitted Under CERCLA

One clause of a CERCLA statutory provision expressly allows parties to agree to insure, hold harmless, indemnify, or otherwise allocate the responsibility for CERCLA costs among themselves. However, another clause of the same statutory provision forbids any indemnification, hold harmless, or similar agreement from being effective to transfer liability under CERCLA from one potentially responsible party to any other person [*42 U.S.C. § 9607(e)(1)*].

Most courts have resolved this apparent inconsistency by interpreting CERCLA to mean that contractual arrangements are ineffective with regard to cost-recovery suits by the government, even though they can be effective with regard to suits between private parties for contribution. This approach gives literal meaning to the statutory provision, while not frustrating CERCLA's key purpose of allowing the government to recover its response costs in cleaning up environmental contamination. In other words, any private agreements allocating liability are essentially tangential to the enforcement of CERCLA's liability provisions [Mardan Corp. v. C.G.C. Music, Ltd. (9th Cir. [Az.] 1986) *804 F.2d 1454, 1459* (leading case on issue); *Southland Corp. v. Ashland Oil, Inc. (D. N.J. 1988) 696 F. Supp. 994, 1000* ; *see* Kerr-McGee Chemical v. Lefton Iron & Metal (7th Cir. [Ill.] 1994) *14 F.3d 321, 327]* .

Other courts have focused on the inconsistent clauses in the statutory provision and held that they negate each other. Under this approach, private parties are also free to allocate environmental liabilities between themselves [*Versatile Metals, Inc. v. Union Corp (E.D. Pa. 1988) 693 F. Supp. 1563, 1573* ; *Chemical Waste Mgt. v. Armstrong World Industries (E.D. Pa. 1987) 669 F. Supp. 1285, 1289]* .

Thus, regardless of which theory of statutory interpretation is applied, CERCLA permits private parties to contractually allocate among themselves any loss they may suffer due to CERCLA liability [*Keywell Corp. v. Weinstein (2d Cir. [N.Y.] 1994) 33 F.3d 159, 165]* . For example, no public policy in CERCLA is violated by allowing an indemnity provision in a corporation's bylaws to cover a director or officer who is personally liable for actual, personal participation in his or her company's release of hazardous substances [U.S. v. Lowe (5th Cir. [Tex.] 1994) *29 F.3d 1005, 1008-1010]* .

Furthermore, contracts between the parties allocating liability costs are supposed to be considered by the courts in their equitable determination of contribution shares in cost-recovery cases [Kerr-McGee Chemical v. Lefton Iron & Metal (7th Cir. [Ill.] 1994) *14 F.3d 321, 326* (reversal since district court failed to examine indemnity agreement when allocating)].

[3] Role of State Law

State law, rather than federal law, governs the validity of an indemnity agreement between private, potentially responsible parties. For example, state law determines whether this type of contract violates public policy. Similarly, interpretation of an indemnity agreement, such as whether a particular liability is covered by the agreement, is also determined by state law [Mardan Corp. v. C.G.C. Music, Ltd. (9th Cir. [Az.] 1986) *804 F.2d 1454, 1458* (rejected proposed federal common-law rule that releases must explicitly refer to *CERCLA); Hudson Ins. Co. v. American Elec. Corp. (M.D. Fla. 1990) 748 F. Supp. 837, 842* ; *see* U.S. v. Lowe (5th Cir. [Tex.] 1994) *29 F.3d 1005, 1008-1010* (applying Texas law to interpret whether indemnity provision covered director's personal liability under CERCLA)].

[4] "As Is" Provisions

"As is" provisions generally are ineffective in apportioning liability under CERCLA. The courts have usually treated "as is" clauses as merely warranty disclaimers, which only suffice to preclude claims based on a breach of warranty, and not claims based on other theories, such as CERCLA [*see, e.g., Mardan Corp. v. C.G.C. Music, Ltd. (D. Ariz. 1984) 600 F. Supp. 1049, 1055* , *aff'd on other grounds, (9th Cir. 1986) 804 F.2d 1454* ("as is" clause of purchase agreement does not defeat recovery under statutory CERCLA action); *Wiegmann & Rose Intern. Corp. v. NL Industries (N.D. Cal. 1990) 735 F. Supp. 957, 962* ; *Southland Corp. v. Ashland Oil, Inc. (D. N.J. 1988) 696 F. Supp. 994, 1001* (sale of chemical plant "as is" insufficient to insulate seller from liability under *CERCLA); Channel Master Satellite Sys. v. JFD Electronics (E.D. N.C. 1988) 702 F. Supp. 1229, 1231-1232]* . Other courts have left open the possibility that an "as is" clause may be effective in releasing a seller from liability for hazardous conditions under other, non-CERCLA theories of environmental liability, but only if the "as is" provision expressly mentions the environmental problem [*see, e.g., Amland Properties Corp. v. Aluminum Co. of America (D. N.J. 1989) 711 F. Supp. 784, 802* ("as is" clause did not function as assumption of risk when buyer did not know of contamination at time of purchase)]. Moreover, an "as is" clause may be effective as a potential defense against an action by a buyer based on breaches of a seller's alleged environmental warranties [*see, e.g., International Clinical Laboratories v. Stevens (E.D. N.Y. 1989) 710 F. Supp. 466, 469-470]* .

[5] Clear Expression of Intent to Cover Environmental Liabilities

Courts have refused to enforce implied, narrow, or nonspecific contractual provisions allocating CERCLA response costs between the parties [*see, e.g., Channel Master Satellite Sys. v. JFD Electronics (E.D. N.C. 1988) 702 F. Supp.*

1229, 1232 (indemnity clause that referred to specific local ordinances but not to CERCLA held, by its language, inapplicable to federal law); *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc. (E.D. Pa. 1987) 669 F. Supp. 1285, 1294* (implied warranty in waste disposal contract barred contract claims but did not bar owner-operator from seeking to recover CERCLA response costs from waste generator)]. The crucial question is whether the contractual language is clear or broad enough to encompass the environmental liability. An indemnity agreement can even cover liability under subsequently enacted laws if the document's language is sufficiently broad [*Joslyn Mfg. Co. v. Koppers Co., (5th Cir. [La.] 1994) 40 F.3d 750, 754* (broad language of indemnification agreements evidenced strong intent by tenant to indemnify landlord for all liability arising in connection with occupancy or use of land, even subsequently created liability under CERCLA); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co. (7th Cir. [Ill.] 1994) 14 F.3d 321, 327* (pre-CERCLA indemnity provision could be interpreted to cover costs imposed by Act)].

Therefore, for maximum enforceability, parties to a real estate transaction who want to allocate CERCLA and other environmental liabilities among themselves should evince a clear and unmistakable intent to do so in a written agreement. Broad, global expressions of indemnity do show that intent [*see* Mardan Corp. v. C.G.C. Music, Ltd. (9th Cir. [Az.] 1986) *804 F.2d 1454, 1459* (broad language of general release and settlement indicated that parties intended to encompass environmental liabilities, especially since parties knew of existence of hazardous waste settling pond); *FMC Corp. v. Northern Pump Co. (D. Minn. 1987) 668 F. Supp. 1285, 1292* (general release in sales contract barred purchaser from recovering CERCLA response costs from seller and its parent corporation)]. Any conditions or limitations on the indemnity or release should be clearly set forth [*see, e.g., Pierson Sand & Gravel, Inc. v. Pierson Twp. (W.D. Mich. 1994) 851 F. Supp. 850, 858* (three-year time limit on indemnity); *Versatile Metals, Inc. v. Union Corp. (E.D. Pa. 1988) 693 F. Supp. 1563, 1573* (indemnity clause in asset sales agreement covering liabilities from hazardous waste in inventory was not enforceable, since buyer failed to fulfill condition of keeping purchased inventory separate from other inventory)].

For a separate, stand-alone indemnity agreement especially for purchases and sales of commercial and industrial real estate, see *§ 33.212[2]*. That indemnity form can be readily adapted for use in a lease or loan transaction. For an indemnity provision for integration into a comprehensive commercial lease form, see *§ 33.230[2]*, 3. For additional guidance on contractual allocation of environmental liabilities, see Henderson, *Environmental Liability and the Law of Contracts, 50 Bus. Law. 183 (1994)* and Avery, *Enforcing Environmental Indemnification Against a Settling Party Under CERCLA, 23 Seton Hall L. Rev. 872 (1993)*; see generally Moskowitz, *Environmental Liability and Real Property Transactions*, ch. 24 (2d ed. 1995).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityContracts LawDefensesPublic Policy ViolationsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual Relationships



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AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.31 Use of De Minimis Settlement Agreements With Federal EPA in Proposed Real Estate Transactions

Despite the clear liability that attaches to landowners who purchase contaminated property with knowledge of the contamination [*see 42 U.S.C. § 9601(35)(A)(i)*], parties sometimes still desire to enter into these transactions. Although the U.S. Environmental Protection Agency's (EPA) policy is not to involve itself in purely private real estate transactions, the agency will consider giving a prospective purchaser a covenant not to sue in very limited circumstances, such as sites when (1) enforcement action is ongoing or anticipated and (2) performance of cleanup or payment for cleanup would not otherwise be available *[54 Fed. Reg. 34,241, 34,242 (Aug. 18, 1989)]* . Depending on the circumstances of the proposed transaction, counsel who is able to obtain a covenant not to sue from the EPA may be able to facilitate the sale and/or financing of contaminated property. Likewise, a de minimis settlement may be viewed as desirable by a potential lender, since it will place a definite limit on the potential purchaser's CERCLA liability [*see* Corash & Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor, 43 Sw. L.J. 863, 880 (1990)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesSuccessorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial Responsibility



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AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.32 Settlements With California Agencies

When it reauthorized the California Hazardous Substance Account Act in 1999 [*see § 33.12*], the Legislature added a de minimis settlement program modeled on the federal program authorized under CERCLA [*Health & Safety Code § 25360.6*; *see 42 U.S.C. § 9622(g)*]. Like its federal analog, the program allows a so-called de minimis potentially responsible party (PRP) to enter into a settlement with the Department of Toxic Substances Control (DTSC) that protects the settling PRP against non-settling PRPs' contribution claims. Such a settlement may only involve "a minor portion of the response costs at a facility" and is only available if the settling PRP falls into one of two categories [*Health & Safety Code § 25360.6(a)*]. The first category covers a PRP whose hazardous substances contributed only a "minimal" portion of the entire environmental problem at the site [*Health & Safety Code § 25360.6(a)(1)*]. The second category includes the owner of the contaminated facility so long as the owner did not cause or contribute to the environmental problem and did not know or have reason to know of the problem at the time of the facility's acquisition [*Health & Safety Code § 25360.6(a)(2)*].

In addition, the HSAA has an arbitration mechanism that may provide a means for an innocent seller to limit liability for future successors in interest [*see Health & Safety Code §§ 25356-25356.10*; *see also* Hingerty, *Property Owner Liability for Environmental Contamination in California, 22 U.S.F. L. Rev. 31, 71-72 (1987)*]. The state criteria for apportioning liability strongly favors passive, cooperating landowners over active polluters [*see Health & Safety Code § 25356.3(c)*]. But this mechanism applies only to property listed by the DTSC on the State Priorities List, and it appears to require state government to initiate enforcement action to trigger the process [*see Health & Safety Code § 25356*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral Overview



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AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.33 Insurance Coverage for Damages From Environmental Contamination

[1] Insurance Coverage for Potential Future Pollution

Since 1986, most comprehensive general liability insurance policies have included an absolute exclusion of pollution from coverage. These absolute exclusions have been held to be effective [*Titan Corp. v. Aetna Casualty & Surety Co. (1994) 22 Cal. App. 4th 457, 469-470, 27 Cal. Rptr. 2d 476]* . Therefore, if insurance coverage is desired to protect against the risks of liability for damages resulting from possible future releases of hazardous substances, the best practice is to obtain either a pollution endorsement to a general liability policy or a separate pollution liability policy [*see, e.g., Masonite Corp. v. Great American Surplus Lines Ins. Co. (1990) 224 Cal. App. 3d 912, 917, 274 Cal. Rptr. 206* (interpreting "environmental impairment policy")].

[2] Insurance Coverage for Past Pollution

With regard to existing contamination, California courts have generally construed pre-1986 general liability policies in favor of the insured. For example, an insurer's duty to defend an insured PRP under most pre-1986 liability policies may be triggered by a governmental environmental enforcement action [*see Montrose Chemical Corp. v. Superior Court (1993) 6 Cal. 4th 287, 295-305, 24 Cal. Rptr. 2d 467, 861 P.2d 1153]* . Similarly, under most pre-1986 policies, the insurer has an obligation to provide coverage to an insured PRP for cleanup and other response costs incurred in accordance with governmental enforcement actions under CERCLA, even though that statute created a new form of liability not contemplated by the insurance contract [*see AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 821-843, 274 Cal. Rptr. 820, 799 P.2d 1253]* . Nevertheless, coverage for pollution claims is barred even under pre-1986 policies if the pollution arose from the insured's deliberate acts, which the insured expected to cause harm [*Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 742-743, 15 Cal. Rptr. 2d 815]* .

Whether insurance policies will cover all or a portion of the cost of remediating specific property, which was contaminated in the past, depends on the language of the particular policies and the facts surrounding the release of hazardous substance on the property. For a detailed discussion of insurance coverage for environmental liabilities, see

California Environmental Law and Land Use Practice, ch. 59, *Insurance Coverage for Environmental Claims, Losses, and Liabilities* (Matthew Bender). This topic is also covered in California Insurance Law and Practice, ch. 41 *Liability Insurance in General* , and ch. 49, *Business General Liability Policies* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsInsurance LawGeneral Liability InsuranceCoverageGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsPollutionReal Property LawEnvironmental RegulationLiabilities & RisksGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART II. LEGAL BACKGROUND
B. Shifting Environmental Liability Through Contracts, Settlement Agreements, and Insurance

15-33 California Legal Forms--Transaction Guide §§ 33.34-33.99

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.34[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

15-33 California Legal Forms--Transaction Guide § 33.100

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.100 Real Property Transactions

NOTE:

The facts and documents identified in this section relate to the environmental contamination issues found in all types of real property transactions. Therefore, this section is designed to be used in concert with, and as a supplement to, the Transaction Guide/Client Interview components of other chapters that deal with specific types of real estate transactions [***see, e.g.,*** Ch. 22, ***Options to Purchase Real Property*** ; Ch. 23, ***Real Property Sales Agreements*** ; Ch. 24, ***Exchanges of Real Property*** ; Ch. 25, ***Real Estate Loans*** ; Ch. 25A, ***Security Instruments for Real Estate Financing*** ; Ch. 27, ***Deeds and Recording*** ; Ch. 30D, ***Construction Contracts and Subcontracts*** ; Ch. 34B, ***Residential Leases*** ; Ch. 34C, ***Commercial, Industrial, and Office Leases*** ; Ch. 34D, ***Ground Leases*** ; Ch. 34E, ***Shopping Centers: Leasing and Operation*** ; and Ch. 37, ***Farm Leases***].

[1] Facts

1. Type of transaction contemplated, such as:

a. Acquisition:
(1) Purchase.

(2) Exchange.

b. Lease or sublease.

c. Loan secured by real property.

2. Form of client's business organization.

3. Purpose for which property is currently used, such as:

a. Manufacturing.

b. Agriculture.

c. Waste processing.

d. Gas station.

e. Dry-cleaning plant.

f. Other industrial use.

4. Purposes for which property was used in past.

5. Purpose for which adjacent parcels and parcels within 2,000 feet are presently used.

6. Purpose for which adjacent parcels and parcels within 2,000 feet of property were used in past.

NOTE:

Contamination lying on adjacent parcels may have flowed onto the property, creating liability under CERCLA for both current and future owners or operators [***see, e.g.,*** *Guidice v. BFG Electroplating and Mfg. Co., Inc., 732 F. Supp. 556, 563 (W.D. Pa. 1989)* (CERCLA cost recovery suit by property owners against present and past owners of adjacent contaminated parcels); ***see also*** *§ 33.10[5]* (elements of CERCLA liability)]. If the property is located within 2,000 feet of a significantly contaminated site, the property may be subject to use restrictions under California's border zone property statute [*Health & Safety Code § 25220 et seq.*; ***see*** *§ 33.16*].

7. Exact location of any site at which hazardous substances were used or disposed of within close proximity of subject property.

8. If improvements were constructed on property:

a. Date on which construction took place.

b. Materials used in constructions, such as:
(1) Asbestos in insulation material.

(2) PCBs in electrical transformers.

9. Existence and contents of any storage tanks or drums located on property.

10. Existence and type of any chemicals stored on property, other than consumer products such as cleansers and office supplies.

11. Location and condition of pipelines on property.

12. Nature and scope of any required or voluntary efforts to remediate environmental contamination on property.

[2] Documents

1. Copies of all lists compiled by local, state, regional, or federal agencies:

a. Designating hazardous waste sites.

b. Identifying properties where cleanup and abatement orders have been issued.

c. Identifying properties for which spills or releases of hazardous substances have been reported.

2. Copies of reports, if any, of past releases of hazardous substances on property [*see, e.g., 42 U.S.C. § 9603(a)*].

3. Copies of reports, if any, to EPA or state or local agencies indicating property is contaminated [*see, e.g., 42 U.S.C. § 9603(c)*].

4. Dated copies of all environmental assessments or audits conducted on subject property, including specific findings with regard to:

a. Asbestos.

b. PCBs.

c. Leakage from storage tanks.

d. Reports, if any, concerning monitoring of:
(1) Emissions into air and water.

(2) Quality of ambient air, soil, and groundwater.

5. Past and present aerial photographs, if any, of property and adjacent parcels.

6. Title reports.

7. If client is business, following company files:

a. Correspondence with federal and state environmental agencies.

b. Records of any administrative or judicial proceedings relating to environmental matters.

c. Property insurance policies, including all endorsements and declaration pages.

d. Waste disposal records.

e. Waste operations plans.

8. Copies of any permits or licenses pertaining to use, storage, handling, or disposal of hazardous substances on property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundRecordkeeping & ReportingReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

15-33 California Legal Forms--Transaction Guide §§ 33.101-33.109

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.101[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

15-33 California Legal Forms--Transaction Guide § 33.110

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.110 Real Estate Transactions

NOTE:

The preliminary determinations identified in this section relate to environmental contamination issues found in all types of real property transactions. Therefore, this section is designed to be used in concert with, and as a supplement to, the Transaction Guide/Preliminary Determination components of other chapters that deal with specific types of real estate transactions [***see, e.g.,*** Ch. 22, ***Options to Purchase Real Property*** ; Ch. 23, ***Real Property Sales Agreements*** ; Ch. 24, ***Exchanges of Real Property*** ; Ch. 25, ***Real Estate Loans*** ; Ch. 25A, ***Security Instruments for Real Estate Financing*** ; Ch. 27, ***Deeds and Recording*** ; Ch. 30D, ***Construction Contracts and Subcontracts*** ; Ch. 34B, ***Residential Leases*** ; Ch. 34C, ***Commercial, Industrial, and Office Leases*** , Ch. 34D, ***Ground Leases*** , Ch. 34E, ***Shopping Centers: Leasing and Operation*** ; and Ch. 37, ***Farm Leases***].

1. Determine risk that property subject to transaction is contaminated with hazardous substance [*see § 33.120* (procedure for environmental assessments)], including:

a. Likelihood of contamination.

b. Cost of cleanup.

2. If property has signficant risk of existing environmental contamination, ascertain whether parties want to proceed with transaction.

3. Ascertain risk that property subject to transaction is "border zone property" because it is located within 2,000 feet of another site that is significantly contaminated with hazardous substance [*see § 33.16[1]*

(California's border zone property statute)].

4. If property has signficant risk of being designated border zone property, ascertain whether parties want to proceed with transaction.

NOTE:

The border zone property statute does not prohibit industrial uses on border zone property. Therefore, there is little risk for a transferee under the border zone statute if the property is to be devoted for industrial uses [***see*** *§ 33.16[4]*].

5. If property is likely hazardous waste property or border zone property and parties want to proceed with transaction, ascertain whether parties want to make application to Department of Toxic Substances Control for a formal determination [*see § 33.16[2]*].

6. If parties want to proceed with transaction, ascertain how they wish to allocate potential environmental liabilities between themselves [*see, e.g., §§ 33.121* (environmental steps in sales transaction), *33.122* (environmental steps in real estate loan transaction), 33.123 (environmental steps in lease transaction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawFederal & State InterrelationshipsGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.111

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.111 Eligibility for De Minimis Landowner Settlement Agreements

1. If client purchased contaminated property (including lender taking title by foreclosure), determine feasibility of seeking de minimis landowner settlement by ascertaining whether client [*see 42 U.S.C. §§ 9601(35), 9607(b)(3)(A), (B), 9622(g)(1)(B); see also § 33.31*]:

a. Is owner of real property on which facility is located.

b. Did not conduct or permit generation, transportation, storage, treatment, or disposal of any hazardous substance at facility.

c. Did not contribute, through act or omission, to release or threat of release of hazardous substance at facility.

d. Did not have actual or constructive knowledge at time of purchase that property was used for hazardous substance [*see* Paragraph 3, *below*]:
(1) Generation.

(2) Transportation.

(3) Storage.

(4) Treatment.

(5) Disposal.

e. Exercised due care after acquisition with regard to hazardous substance, in light of all relevant facts and circumstances.

f. Took precautions after acquisition against foreseeable acts or omissions of third parties and their consequences.

2. Determine whether manner in which client obtained property shows threshold eligibility for de minimis landowner settlement *[54 Fed. Reg. 34,238, 34,239 (Aug. 18, 1989)]* :

a. Ascertain whether client acquired property without actual or constructive knowledge that property was used for generation, transportation, storage, treatment, or disposal of hazardous substance [*see* Paragraph 3, *below*].

b. If client is governmental entity, determine whether it acquired property either:

(1) Involuntarily; or

(2) Through eminent domain proceedings.

c. If client is individual, ascertain whether he or she acquired property through inheritance or bequest without knowledge of contamination.

d. Determine whether property was contaminated by third parties who are outside chain of title, such as:

(1) "Midnight dumpers."

(2) Adjacent landowners.

3. If client purchased property (or foreclosed on property and took title) and had no actual knowledge that property was contaminated, determine whether, before acquisition, client conducted all appropriate inquiry into previous ownership and uses consistent with good commercial or customary practice, considering [*42 U.S.C. § 9601(35)(B)*; *54 Fed. Reg. 34,238 (Aug. 18, 1989)]* :

a. Client's specialized knowledge or experience.

b. Relationship of purchase price to property's value if uncontaminated.

c. Commonly known or reasonably ascertainable information about property.

d. Obviousness of presence or likely presence of contamination.

e. Ability to detect contamination by appropriate inspection.

f. Commercial business transaction versus personal residential transaction.

g. Standard of reasonable inquiry at time of acquisition.

4. Determine whether client is able to provide adequate consideration for settlement with EPA, such as:

a. Contributing cash to cleanup effort.

b. Permitting access to facility.

c. Cooperating with environmental contractors in conducting remediation activities.

d. Providing adequate assurances that due care will be exercised in future with regard to hazardous substances at site.

e. Releases government from liability.

5. If client is prospective purchaser of contaminated property, determine whether following criteria for entering into settlement agreement with federal government are met [*see 42 U.S.C. § 9622(f)*; *see also 54 Fed. Reg. 34,241, 34,242 (Aug. 18, 1989)]* :

a. Enforcement action at facility is anticipated by EPA.

b. Substantial benefit not otherwise available (either monetary payment or agreement to conduct cleanup activities), will be received by EPA for cleanup at facility.

c. EPA believes that continued operation of facility or new site development, with exercise of due care, will not aggravate or contribute to existing contamination or interfere with remedy.

d. Due consideration has been given to effect of continued operations or new development on health risks to those persons likely to be present at site.

6. Ascertain whether covenant not to sue would be in public interest by considering [*42 U.S.C. § 9622(f)(4)*]:

a. Effectiveness and reliability of remedy in light of other alternative remedies considered for facility concerned.

b. Nature of risks remaining at facility.

c. Extent to which performance standards are included in order or decree.

d. Extent to which response action provides complete remedy for facility, including reduction in hazardous nature of substances at facility.

e. Extent to which technology used in response action is demonstrated to be effective.

f. Whether Superfund or other sources of funding would be available for additional remedial actions that might eventually be necessary at facility.

g. Whether remedial action will be carried out in whole or in significant part by responsible parties themselves.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup

CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesSuccessorsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response Costs



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.112

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.112 Exemption from Liability for Contiguous Property Owner

1. If client owns contaminated property that is contiguous to or otherwise similarly situated with regard to, and that is or may be contaminated by release or threatened release of hazardous substance from, real property that is not owned by that person, determine feasibility of raising defense to liability by ascertaining that client [*see 42 U.S.C. § 9607(q)*; *see also § 33.10[7][f]*]:

a. Did not cause, contribute, or consent to release or threatened release.

b. Is not potentially liable, or affiliated with any other person that is potentially liable, for response costs at contaminating facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than contractual, corporate, or financial relationship that is created by contract for sale of goods or services).

c. Is not result of reorganization of business entity that was potentially liable.

d. Has taken reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property.

e. Has provided full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration at vessel or facility from which there has been release or threatened release.

f. Is in compliance with any land use restrictions established or relied on in connection

with response action at facility and does not impede effectiveness or integrity of any institutional control employed in connection with response action.

g. Is in compliance with any request for information or administrative subpoena issued under CERCLA.

h. Has provided all legally required notices with regard to discovery or release of any hazardous substances at facility.

i. At time client acquired property, conducted all appropriate inquiry within meaning of "innocent purchaser" defense [*see 42 U.S.C. § 9601(35)(B)*; *see also § 33.111*] with regard to property and did not know or have reason to know that property was or could be contaminated by release or threatened release of one or more hazardous substances from other real property not owned or operated by person.

NOTE:
To qualify for this exemption, the client must establish by a preponderance of the evidence that all of the conditions listed above have been met [*42 U.S.C. § 9607(q)(1)(B)*]. A client who does not qualify for the exemption because he or she has or had reason to have knowledge of the contamination at the time of purchase may qualify as a bona fide prospective purchaser (BFPP) under *42 U.S.C. § 9601(40)* [*42 U.S.C. § 9607(q)(1)(B)*]. A BFPP whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility will not be liable as long as the BFPP does not impede the performance of a response action or natural resource restoration [*42 U.S.C. § 9607(r)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksInnocent Landowner Defense



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15-33 California Legal Forms--Transaction Guide §§ 33.113-33.119

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.113[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.120

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.120 Environmental Assessments

1. Require environmental assessment if property subject to transaction falls within any of following categories:

NOTE:
The following are examples of properties for which environmental assessments should be conducted. Normally, any lender involved will almost certainly require an assessment for any of these types of properties. If, however, a lender is not involved or fails to require the assessment, counsel representing the purchaser should require the assessment.

a. Construction is proposed on property, other than one-to-four unit family residential property.

b. Industrial use or industrial zoning.

c. Location close to industrial areas.

d. Existing or former gas station on property or in close proximity.

e. Former or present automotive repair facility or dry cleaning establishment where work is done on premises.

f. Location adjacent to railroad tracks or underground pipelines.

g. Service as, or close proximity to, refuse or waste disposal site.

h. Past uses or surrounding uses involving storage of or usage of hazardous or toxic substances, such as pesticides.

i. Presence of asbestos material that is or may be easily crumbled or crushed into powder and is capable of being absorbed into environment.

j. Emanation of radon gas from soil.

k. Located within one-mile radius of property that EPA has placed on National Priorities List, that is, designated as "Superfund Site" [*see 42 U.S.C. § 9605*].

l. Oil and gas production occurs in close proximity.

PRACTICE TIP:

Past uses of a property can rarely be determined by its present appearance. Except in those rare cases when a property and surrounding properties are positively known ***not*** to have had an industrial or commercial use, an environmental assessment is called for before purchasing, leasing, or loaning on the property. ***By Joel Moskowitz***

2. If environmental assessment will be required, have client make written request that attorney prepare opinion concerning matters to be addressed in environmental assessment [*see §§ 33.200[1][d]* (preserving confidentiality), *33.201[2]* (form of client's request)].

3. Develop evidentiary record of exact nature of anticipated litigation for which environmental assessment is being prepared [*see §§ 33.200[1][c]* (scope of environmental assessment), *33.201[2]* (optional request by client)].

4. Directly retain environmental consulting firm on behalf of client [*see § 33.200[2]* (form of agreement)].

5. Make sure that agreement for environmental assessment services has provisions to maintain confidentiality under attorney-client privileged and attorney work product doctrine, including [*see § 33.200[1][d]*]:

a. Attorney, not client, engages consultant.

b. Purpose of agreement is to enable attorney to render opinion to client.

c. All instructions come from attorney.

d. Reports are property of attorney.

e. Consultant will be paid by attorney.

f. Consultant will maintain confidentiality of all information.

6. Obtain indemnity from client for all liabilities associated with consultant's contract and environmental

assessment itself [*see § 33.201[2]* (letter from client containing indemnity)].

NOTE:
This is necessary because environmental consultants often require that their clients indemnify them against claims relating to the environmental assessment [***see*** *§ 33.200[1][e]*].

7. Specify that environmental consulting firm will do any of following, as appropriate, and issue written findings:

a. Phase I environmental assessment, including:
(1) Historical review of use and improvements made to property.

(2) Review of records of building, zoning, planning, sewer, water, environmental, and other departments concerning property and adjacent parcels.

(3) Review of state or federal agency records and files affecting property or adjacent parcels.

(4) Review of reports filed under CERCLA and other statutes concerning environmental conditions and events, such as releases or threatened releases of hazardous substances, on property and adjacent parcels [*see, e.g., 42 U.S.C. § 9603(a), (c)* (CERCLA's release reporting requirements); *Health & Safety Code § 25359.4*].

(5) Inspection of property and all improvements.

(6) Verification of whether present or past owners or tenants stored, created, or discharged hazardous materials or wastes.

(7) Review of whether appropriate procedures, safeguards, permits, and notices with regard to hazardous substances are in place on property.

(8) Analysis of old aerial photographs to determine construction or destruction of buildings and existence of ponds and disposal areas on property over time.

(9) Interviews with neighbors to determine prior uses of property.

NOTE:
Counsel probably should not require neighbor interviews if there are any concerns about keeping the proposed transaction confidential.

(10) Review of building records and visual inspection of buildings to determine whether materials containing asbestos are present.

(11) Review of scientific literature to determine potential existence of radon in soil.

b. Phase II environmental risk report, including:

(1) Testing of underground storage tanks for content and integrity.

(2) Soil and gas analysis to identify potential for petroleum hydrocarbons and volatile organic compounds such as industrial solvents and dry cleaning chemicals.

(3) Bulk soil sampling.

(4) Groundwater sampling if groundwater may be affected by activities on property.

(5) Limited surface water sampling if pond, lagoon, or stream exists on property.

(6) Comprehensive review of regional and local geology to determine pathways that hazardous substances would follow in event of spill or leak.

(7) List of individual groundwater wells or subsurface water bodies that may be affected by spill or leak.

(8) Comprehensive inspection of buildings for asbestos-containing materials, including collecting and analyzing building material for friable asbestos.

8. If counsel represents party who does not have ownership or possessory rights in property, arrange for consulting firm to have access to property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawPurchase & SaleRemediesDuty to Disclose



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15-33 California Legal Forms--Transaction Guide § 33.121

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.121 Sales of Real Property

NOTE:

This section is designed to be used together with, and as a supplement to, Ch. 23, ***Real Property Sales Agreements***, which includes a detailed discussion of the non-environmental steps involved in real estate sales transactions. For preliminary determinations regarding contamination issues, see *§ 33.110*.

1. If representing seller, have client disclose in writing to potential purchaser existence of any release or threatened release of hazardous substance on property [*see 42 U.S.C. § 9601(35)(C)*; *see also § 33.211[2]* (disclosure form)].

NOTE:

If the seller fails to disclose any release or threatened release of which he or she had actual knowledge, the seller will be barred from using any statutory defenses in any subsequent CERCLA cost-recovery action concerning the property [***see*** *42 U.S.C. § 9601(35)(C)*]. California law also requires a written disclosure for the seller to avoid liability for fraud [*Health & Safety Code § 25359.7(a)*].

2. If representing purchaser seeking financing for real estate acquisition:

NOTE:

For a detailed discussion of the steps involved in financing real estate transactions, see Volume 5A, Chapter 25, ***Real Estate Loans***.

a. Contact potential lender and ascertain whether client will be required to conduct environmental assessment as condition to obtaining loan [*see §§ 33.10[7][d]* (innocent landowner defense), *33.120* (steps in environmental assessment)].

NOTE:
If the client wants to acquire property that has been used for commercial or industrial purposes, most lending institutions will require performance of an environmental assessment that meets their internal guidelines.

b. Take steps necessary to ensure that innocent purchaser defense will be available to client in event contamination is discovered on property following sale by [*see § 33.10[7][d]*]:

(1) Making all appropriate inquiry by means of environmental assessment into previous ownership and uses of property [*see 42 U.S.C. § 9601(35)(B)*; *see also § 33.120*].

(2) Exercising care with regard to any hazardous substance, taking into account characteristics of that substance in light of all relevant facts and circumstances [*see 42 U.S.C. § 9607(b)(3)(A)*].

(3) Taking precautions against foreseeable acts or omissions of third party and consequences that can foreseeably result from these acts or omissions [*see 42 U.S.C. § 9607(b)(3)(B)*].

3. Consider formation of corporation, subsidiary corporation, or limited liability company to buy, own, and operate property as shield to help protect parent from environmental liability [*see* vol. 1A, ch. 2, *Formation of Corporations*].

4. Advise client to consider purchase of pollution endorsement to a comprehensive general liability policy or a separate pollution liability policy to cover risk of future contamination [*see § 33.33[1]*].

5. If property is presently contaminated:

a. Evaluate whether de minimis landowner settlement agreement with EPA would be available to limit purchaser's liability [*see §§ 33.111* (eligibility analysis), *33.120* (procedure), *33.240[2]* (administrative settlement agreement form), *33.241[2]* (consent decree settlement agreement form)].

b. Advise client to consider cost of cleanup in determining reasonable purchase price.

c. Evaluate availability of insurance funds under prior or existing policies to pay for cleanup [*see § 33.33[2]*].

6. If parties want to undertake transaction, draft real property sales agreement with environmental provisions considering inclusion of following [*see § 33.210[2]* (form)]:

a. Provision requiring either party to arrange for environmental assessment.

b. Provision defining hazardous substances.

c. Provisions allocating cleanup responsibilities between parties and specifying how remediation is to be done.

d. Provision allowing party charged with cleanup of contaminated property that is to be subject of sale to terminate contract if cleanup proves to be too expensive or impractical.

7. Whether or not environmental assessment reveals contamination, consider allocating responsibilities under CERCLA and other environmental laws through indemnity agreement [*see §§ 33.30* (legal background), *33.212[2]* (form of indemnity agreement)].

8. Draft environmental indemnity agreement [*see § 33.212[2]* (form)].

9. Have buyer and seller sign real property sales agreement and indemnity agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawEnvironmental RegulationLiabilities & RisksInnocent Landowner DefenseReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.122

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.122 Loans Secured by Real Estate

NOTE:

This section is designed to be used in concert with, and as a supplement to, other chapters dealing with secured real estate loans [***see, e.g.,*** Ch. 25, ***Real Estate Loans*** ; Ch. 25A, ***Secured Instruments for Real Estate Financing*** ; and Ch. 30A, ***Construction Financing***]. This section is written from the point of view of the lender, though a prospective borrower will find it useful on what to expect. For preliminary determinations regarding contamination issues, see *§ 33.110*.

1. Advise client to have prospective borrower complete lender's own form disclosing environmental risks on property, which is going to be security for loan [*see § 33.220[2]* (disclosure form)].

2. Advise client that prospective borrower should be required to submit copies of all environmental liability-related documentation involved in transaction, including:

a. Sales contract with environmental provisions [*see § 33.210[2]* (form)].

b. Previously prepared environmental assessment reports [*see § 33.120* (procedural guide for preparing environmental assessment)].

c. Disclosures made by seller to borrower [*see, e.g., § 33.211[2]* (seller's disclosure form)].

NOTE:

If either the borrower or the seller fails to disclose any release or threatened release of which he or she

had actual knowledge, the borrower or the seller, as the case may be, will be barred from using any statutory defenses in any subsequent CERCLA cost-recovery action concerning the property [***see*** *42 U.S.C. § 9601(35)(C)*; ***see also*** *§ 33.10[7][f]*]. California law also requires sellers of real property to make this disclosure to buyers to avoid liability for fraud [*Health & Safety Code § 25359.7(a)*; ***see*** *§ 33.211[1][b]*].

3. If property falls into any category listed in *33.120* Paragraph 1, above, have environmental assessment done.

NOTE:

The secured lender should have an environmental assessment done for purposes of both (1) preserving the innocent purchaser defense and (2) establishing an evidentiary record for the baseline conditions on the leased property [***see*** *§ 33.10[7][d]*; ***see also*** *§ 33.120* (steps in environmental assessment)]. If property has been used for commercial or industrial purposes in the past, most lending institutions will require performance of an environmental assessment.

4. To cover risk of future contamination, advise client to consider requiring borrower to name beneficiary as co-insured and purchase either [*see § 33.33[1]*]:

a. Pollution endorsement to a comprehensive general liability policy; or

b. Separate pollution liability policy.

5. If parties want to undertake transaction, draft deed of trust that includes environmental provisions, such as:

a. Provision that gives beneficiary (lender) all trustor's rights of action relating to hazardous substances on property [*see § 33.221*].

b. Provisions defining hazardous substances [*see § 33.221*].

c. Provision requiring trustor to comply with all environmental laws [*see § 33.222*].

d. Provision giving beneficiary expanded power to conduct future environmental assessment [*see § 33.223*].

e. Monitoring requirements provision [*see § 33.231[2]* (form designed for lease easily adaptable for deed of trust)].

6. Whether or not environmental assessment reveals present contamination, consider allocating responsibilities under CERCLA and other environmental laws through indemnity agreement [*see §§ 33.30* (legal background), *33.212[2]* (indemnity agreement)].

7. Advise client to consider requiring additional collateral to secure loan, such as:

a. Letter of credit [*see* vol. 10A, ch. 56, *Letters of Credit and Electronic Fund Transfers*].

b. Guaranty of third parties [*see* Ch. 25A, *Security Instruments for Real Estate Financing*

].

c. Bond.

d. Additional real property.

8. Draft environmental indemnity agreement [*see § 33.212[2]* (form)].

9. Have borrower and beneficiary sign environmental indemnity agreement, along with other real estate loan documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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15-33 California Legal Forms--Transaction Guide § 33.123

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.123 Leases of Real Property

NOTE:

This section is designed to be used together with, and as a supplement to, other chapters that cover commercial real estate lease transactions [***see, e.g.,*** Ch. 34C, ***Commercial, Industrial, and Office Leases*** ; Ch. 34D, ***Ground Leases***; Ch. 34E, ***Shopping Centers: Leasing and Operation*** ; and Ch. 37, ***Farm Leases***]. For preliminary determinations regarding contamination issues, see *§ 33.110*.

1. If client is landlord, determine purpose for which tenant wants to use property.

2. If representing landlord, have client disclose in writing to potential tenant existence of any release or threatened release of hazardous substance on property [*see 42 U.S.C. § 9601(35)(C)*; *see also § 33.234[2]* (disclosure form)].

NOTE:

California law requires this written disclosure for the landlord [*Health & Safety Code § 25359.7(a)*; ***see*** *§ 33.234[1][b]*].

3. If client is tenant, consider formation of corporation, subsidiary corporation, or limited liability company to lease and operate property as shield to help protect parent from environmental liability [*see* Ch. 2, *Formation of Corporations*].

4. Identify environmental and other permits that may be necessary to legally operate leased premise [*see* Ch. 30B, *Zoning, Building, and Environmental Permits*].

5. If property falls into any category listed in *§ 33.120,* P 1, above (examples of properties for which environmental assessments should be conducted), consider conducting environmental assessment.

NOTE:
Either the landlord or the prospective tenant may want to conduct an environmental assessment for purposes of (1) preserving the innocent purchaser defense [***see** § 33.10[7][d]*],(2) establishing an evidentiary record of the baseline conditions on the leased property, and (3), in the case of the tenant, avoiding the consummation of a liability-producing transaction.

6. Draft lease agreement that includes environmental provisions, such as:

a. Representations and warranties to be given by landlord regarding present environmental status of property [*c.f., §§ 33.210[1][c]* (warranties in sales contract), *33.211[2]* (seller's disclosure form)].

b. Warranties by tenant concerning use to which property is to be put [*see, e.g., § 33.230[2]* (form of warranty provision)].

NOTE:
A landlord may not avoid potential CERCLA liability arising from a tenant's release of hazardous substances on the property [***see** § 33.10[5][e][ii]*]. However, the landlord may be able to minimize exposure to cleanup cost liability by being vigilant in controlling and monitoring the activities on the leased property.

c. Provision requiring tenant to comply with environmental laws as covenant in lease [*see § 33.233[2]* (form provision)].

d. Provision giving landlord right to monitor activities or conduct environmental audits on property [*see, e.g., § 33.231[2]* (form)].

e. Provisions specifying safe practices for use or generation of hazardous substances that may be in excess of other legal requirements.

NOTE:
An environmental consultant can help a landlord learn about whether a tenant's particular activities, uses, or processes pose a significant risk. In addition, the consultant can help the landlord determine the safe practices that may be incorporated as requirements under the lease.

f. Provision allocating responsibility under lease to tenant for reporting releases of hazardous materials to government [*see, e.g., § 33.231[2]* (provision for lease)].

g. Provision requiring tenant to give notice to landlord of spills of hazardous substances, as covenant in lease [*see, e.g., § 33.234[2]*].

h. Provision allocating cleanup costs between landlord and tenant and whether these obligations survive lease's term [*see, e.g., § 33.232[2]* (form)], considering:

(1) Scope of environmental indemnity from tenant to landlord.

(2) Scope of any environmental indemnity from landlord to tenant.

i. Provision limiting remedies to those set forth in lease agreement and excluding statutory remedies, such as cost-recovery actions under CERCLA, the HSAA, or other environmental statutes [*see § 33.30* (effect of contractual provisions)].

j. Provision requiring tenant to notify landlord when new processes or activities are introduced to site.

k. Provision defining default to include either:

(1) Release or discharge of hazardous substance on property in violation of law; or

(2) Release or discharge in excess of various state or federal standards or permit requirements.

7. If client is landlord who has retained right to monitor activities of tenant, advise client to institute immediate procedures to ensure periodic monitoring.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.124

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.124 De Minimis Landowner Settlement Agreements With EPA

1. If client is eligible for de minimis landowner settlement [*see § 33.111* (steps for determining eligibility)], contact EPA and establish eligibility [*see § 33.31*].

2. If EPA proposes de minimis settlement, review proposal in light of established EPA guidelines and ensure that it contains provisions covering [*see 54 Fed. Reg. 34,235 (Aug. 18, 1989)* ; *see also §§ 33.240[2]* (settlement by administrative order), 33.241[2] (settlement by decree)]:

a. Consideration.

b. Reservation of rights.

c. Scope of response actions, such as:
(1) Cash payment.

NOTE:
Be certain that the EPA has obtained the Attorney General's approval for any settlement involving response costs in excess of $500,000 [***see*** *42 U.S.C. § 9622(h)(1)*].

(2) Work to be performed at site.

d. Compliance with applicable laws and duty to exercise due care.

e. Disclaimer.

f. Procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response Costs



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15-33 California Legal Forms--Transaction Guide §§ 33.125-33.199

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.125[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Environmental Assessments

15-33 California Legal Forms--Transaction Guide § 33.200

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.200 Environmental Assessment Contract

[1] Comment

[a] Use of Form

This form is an agreement for the retention of an environmental consulting firm to conduct an environmental assessment on property that is the subject of a proposed sale, lease, or secured loan. To maximize confidentiality, this form is designed to be entered into between the consultant and counsel representing the prospective purchaser, tenant, or lender [*see* [d], *below*].

Counsel representing a prospective purchaser or tenant should consult with all lenders involved in the transaction to ascertain their requirements concerning environmental assessments, so that any particular requirements not reflected in the following form may be incorporated.

For a list of matters that should be considered in an environmental assessment, see *§ 33.120*. For a general discussion of the law relating to contracts for professional services, see Volume 7, Chapter 30C, *Agreements with Architects, Engineers, and Other Design Professionals* and Volume 15, Chapter 86, *Agreements for Professional Services*.

[b] Purpose of Environmental Assessment

No counsel representing a potential purchaser, tenant, or lender involved in a significant commercial or industrial real estate acquisition or lease should consummate the proposed deal without first retaining an environmental consultant to conduct an environmental assessment of the property. For several reasons, an environmental assessment is in the best interests of the prospective purchaser, tenant, and lender.

Basically, an assessment will give information on the level of environmental liability risk at stake in the transaction for the potential purchaser, tenant, or lender. If the assessment uncovers contamination on the property, the parties may use

its results in further negotiations to allocate cleanup responsibility, otherwise agree with regard to indemnity [*see § 33.212[2]* (form of indemnity agreement)], or even modify the price or rent. Moreover, the environmental assessment will be crucial in preserving the purchaser's, tenant's, or lender's ability to assert the innocent landowner defense with regard to hazardous substance contamination not discovered in the assessment [*see 42 U.S.C. § 9601(35)(B)*; *see also § 33.10[7][d]*]. Although neither Congress, the EPA, or the courts have established clear standards for environmental assessments, willful or negligent blindness will certainly negate the innocent landowner defense [*see U.S. v. Monsanto Co. (4th Cir. [S.C.] 1988) 858 F.2d 160, 169]* . The results of the environmental assessment may also be used to support a prospective purchaser's or tenant's exercise of an option to cancel the proposed sale or lease [*see, e.g.,* Greer Properties, Inc. v. LaSalle Nat. Bank (7th Cir. [Ill.] 1989) *874 F.2d 457, 458* ; *see § 33.210[1][d]* (discussion of cancellation provision in real estate sales contract form)].

In addition, for sellers, landlords, appraisers, and brokers, an environmental assessment helps reduce exposure to liability for breach of a common law duty to either discover or disclose the existence of contamination on the property. This liability exposure includes the possible imposition of punitive damages [*see § 33.14[1], [6]*]. For landlords and tenants, an environmental assessment can determine the "baseline" condition of the property and, therefore, reduce subsequent controversy about who caused or contributed to onsite contamination.

[c] Scope of Environmental Assessment

Paragraph 2.01 of this form allows the drafter to either specify the types of inquiries that the consultant will be required to conduct or, alternatively, to incorporate assessment guidelines established by the lending institution with which the parties are working. Many financial institutions, including banks, thrift associations, and various federal agencies involved in real estate transactions, such as the Federal Home Loan Association and the Federal National Mortgage Association, have developed due diligence guidelines. Generally, these institutions require that an environmental assessment or audit be conducted before they will consider making loans for the purchase of any real estate used for commercial or industrial purposes.

Environmental assessments are generally divided into two phases performed in a step-by-step fashion. To glean the maximum amount of required information with minimum expenditure in time and money, sampling and testing should only be conducted after background research has been done. It would be a waste of time and money, for example, to take soil samples from all over the property and test for all possible substances if research into past operations and practices makes it unlikely that such testing would be fruitful.

Therefore, Phase I of an environmental assessment involves an onsite inspection and includes a review of relevant documents, such as any prior surveys conducted. If Phase I triggers any findings that require further investigation, Phase II of the assessment is conducted. Phase II consists mainly of sampling and testing appropriate subjects, such as soil, groundwater, surface water, building components, or air quality. In rare cases, when the first two phases of the assessment have rendered inconclusive results, a Phase III assessment may be necessary. Generally, the parties will be unable to specify the inquiries to be conducted in a Phase III assessment until Phase II has been completed. However, these inquiries will usually involve more extensive or focused sampling and testing on the property [Halloran, *Environmental Site Assessments, 41 Prac. Law 61 (July 1995)*; Cogen, et al., *What You Need to Know About Environmental Audits, 35 Prac. Law. 17 (Oct. 1989)*; *see* Slater and Krentzman, *Environmental Self-Auditing: Divided We Stand*, Environmental Law in New York Newsletter(December 1995) (Matthew Bender); *see also* Gerrard, Environmental Law Practice Guide, Ch. 6 (Matthew Bender)]. For a list of procedures that should be conducted in Phases I and II, see *§ 33.120*.

[d] Need for Confidentiality and Preserving Privilege

[i] Environmental Assessment Contract Attorney-Client Privilege and Attorney Work Product Privilege

Under the attorney-client privilege, communications between an expert and the attorney are not subject to discovery if they are made in confidence and for the purpose of assisting the attorney in rendering legal advice [*see, e.g., United States v. Kovel (2d Cir. 1961) 296 F.2d 918, 922* ; *see also Evid. Code §§ 952, 954*]. The attorney-client privilege only applies when the attorney is engaged to give legal advice on the matter being communicated [*Diversified Industries, Inc. v. Meredith (8th Cir. 1977) 572 F.2d 596, 602* (en banc); *People v. Gionis (1995) 9 Cal. 4th 1196, 1210, 40 Cal. Rptr. 2d 456, 892 P.2d 1199]* .

Similarly, the attorney work product doctrine provides qualified protection for information and documents that are generated at the direction of counsel in anticipation of litigation [*see, e.g., Fed. R. Civ. P. 26(b)(3)*; *Code Civ. Proc. § 2018* (*Code Civ. Proc. § 2018.030*, effective July 1, 2005)]. A remote possibility of litigation is insufficient to trigger protection of the doctrine [*Diversified Indus. v. Meredith (8th Cir. 1977) 572 F.2d 596, 604* (en banc)]. By contrast, there is no privilege for direct communications between the consultant and the client [*see Bank of the Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 598, 136 Cal. Rptr. 741]* .

[ii] Application of Privilege With Environmental Consultant

In most cases, an environmental investigation is performed to learn whether the property is contaminated, not counsel's legal opinion concerning the property's condition, so the attorney-client privilege is inapplicable. Still, to maximize protection from discovery in possible future litigation of potentially damaging information and documents developed by the consultant, the environmental consultant should be retained by counsel, and not directly by the client. However, before the consultant is even engaged, the client could consider requesting in writing that the attorney prepare an opinion addressing whether the affected property is in compliance with applicable environmental laws and authorizing the attorney to have an environmental assessment performed [*see § 33.201[2]* (letter form of request)]. To increase the likelihood that a court would apply the attorney work product privilege to the consultant's work, the attorney should develop an evidentiary record before the assessment that documents the nature of the anticipated litigation for which the work is being done [*see § 33.201[2]* (letter includes optional provision)].

Therefore, this form not only is an agreement between counsel and the consultant; it also states that information gathered by the consultant will be kept strictly confidential unless legal counsel approves of its disclosure. In addition, it makes clear that the purpose of the agreement is to give the attorney technical information so that he or she can render an opinion to the client. Furthermore, the agreement makes clear that all instructions come from the attorney and that all reports are the attorney's property.

Many consultants are used to liberally communicating with agency staff and do not appreciate the need to maintain secrecy about site conditions. Some consultants feel morally or professionally compelled to share with public agencies all of the information they collect. Therefore, a strong confidentiality provision, such as Paragraph 1.04, is important.

[e] Consultant's Demand for Indemnity

Environmental consulting firms, particularly the larger companies, usually have their own preprinted professional service agreements. The typical focus of these form agreements is on limiting the liabilities of the consulting firms for their errors and omissions in failing to discover or accurately characterize contamination problems on the property. They rarely pay sufficient attention to safeguarding the confidentiality of the information generated by the consultant. Therefore, it is advisable for counsel to prepare and use their own consulting agreements.

[2] FORM

Environmental Assessment Contract

AGREEMENT FOR ENVIRONMENTAL CONSULTING SERVICES

ARTICLE 1 GENERAL PROVISIONS

Parties

1.01. _____[*Name of party arranging for assessment*], of _____[*address*], referred to as "Counsel," the _____[*specify status, e.g.*, attorney for the owner *or* prospective purchaser under a real estate sales contract dated _____] of the property, referred to as the "Site," agrees to retain the services of _____[*name of environmental consulting firm*], located at _____[*address*], and referred to as "Consultant," under the terms and conditions set forth in this Agreement.

Purpose

1.02. Consultant shall conduct an environmental assessment of the Site to establish _____[*specify, e.g.*, whether or not any hazardous substance exists on, under, or in proximity to the Site] as specified in Article 2 of this Agreement. The purpose of this environmental assessment is to develop the technical information that Counsel needs to formulate a legal opinion.

Warranty of Expertise

1.03. (a) Consultant warrants that it possesses the degree of skill necessary to conduct the assessment and tests required under this Agreement. Consultant shall perform all work required under this Agreement and shall not contract with any third party for the performance of this work without the express written permission of Counsel. In the event that Counsel agrees to Consultant's use of a subcontractor for the performance of any services required under this Agreement, any Agreement between Consultant and the subcontractor shall contain provisions requiring that the work of the subcontractor be kept strictly confidential, in accordance with the requirements of Paragraph 1.04 of this Agreement.

(b) Consultant warrants that the assessment will be conducted by an individual with a minimum of _____[*specify time period, e.g.*, three years] of full-time work in the field of Environmental Quality Assessment. Consultant further warrants that members of its staff have been educated and trained [*add if desired:* and certified by the EPA] in the following areas: _____[*specify, e.g.*, asbestos inspections].

Confidentiality

1.04. (a) Consultant, its agents, and subcontractors have been and will be granted access to the Site and to certain confidential information contained in the records of _____[Counsel *or specify other entity having records concerning property*] in the course of performing services required under this Agreement. Consultant warrants that it shall keep all such information strictly confidential.

(b) Consultant further understands that all communications between Consultant and Counsel, including any written reports and evaluations of environmental risk, shall be strictly confidential. The word "CONFIDENTIAL" shall be prominently marked on both the envelope containing correspondence between Counsel and Consultant and on the correspondence itself. Consultant shall not disclose to any third party any matter whatsoever related to its work for Counsel without the express written permission of Counsel.

(c) Consultant shall only follow instructions given by Counsel in providing its services under this Agreement. All reports, drafts of reports, and any other documents generated by Consultant's work are the property of Counsel.

(d) Consultant's obligation to maintain confidentiality concerning all matters covered by this Agreement shall not terminate on completion of the services required, but rather shall survive the termination of this Agreement, regardless

of the manner of termination.

Compensation

1.05. Counsel shall pay Consultant a fee of $ _____ for the services to be performed under this Agreement. In addition, Counsel shall reimburse Consultant for all reasonable costs and expenses incurred in connection with the performance of the services required under this Agreement, provided that Consultant provides documentation and receipts for those costs and expenses. However, Consultant shall not incur any cost or expense in an amount exceeding $ _____ without first obtaining Counsel's written approval.

ARTICLE 2 INVESTIGATION

Scope

[*First alternative; use when investigation is specified by counsel:*]

2.01. (a) Consultant shall conduct a Phase I environmental risk assessment composed of the following inquiries and examinations: _____ [*list requirements, e.g.:*

(1) A thorough inspection of the Site and all improvements constructed on the Site.

(2) A complete review of all state or federal agency records and files affecting the Site.

(3) A complete review of all state or federal agency records and files affecting any parcels of property adjacent to the Site.

(4) A review of historic aerial photographs of the Site.]

(b) Consultant shall provide Counsel with a full written report containing the results of the Phase I environmental risk assessment within _____ days after completion of that assessment.

(c) If the Phase I environmental risk assessment _____[*specify triggering factor for Phase II, e.g.,* indicates the presence of hazardous substances at, on, or under the Site], Consultant shall conduct a Phase II environmental risk assessment composed of the following inquiries and examinations: _____ [*list requirements, e.g.:*

(1) Bulk soil sampling.

(2) _____ (***Continue as necessary***).]

(d) Consultant shall provide Counsel with a full written report containing the results of the Phase II environmental assessment within _____ days after completion of that assessment.

[*Second alternative; use when lender's or other's guidelines are used:*]

2.01. Consultant shall conduct an environmental assessment in accordance with the guidelines established by the _____[*specify, e.g.,* Federal National Mortgage Association *or* ASTM Standard E-1527, Standard Practice for Environmental Site Assessment], a copy of which is attached as Exhibit A and incorporated by reference into this agreement.

[*Continue with the following:*]

Records

2.02. Consultant shall maintain full and accurate records, which shall be made available to Counsel on request, with regard to all charges, expenses, and disbursements incurred or made by Consultant, its agents, or subcontractors.

Compliance With Law

2.03. In performing the investigation required under this Agreement, Consultant shall comply with all applicable federal, state, and local laws, regulations, and ordinances.

ARTICLE 3 MISCELLANEOUS PROVISIONS

Assignment

3.01. Consultant shall not assign this Agreement without Counsel's prior written consent. The valid assignment of this Agreement shall not relieve Consultant of liability under this Agreement.

Notices

3.02. Any notice, tender, delivery, or other communication made in accordance with this Agreement shall be in writing and shall be addressed to the recipient party at the address indicated for that party in Paragraph 1.01 of this Agreement.

Entire Agreement

3.03. This Agreement [*add if second alternative Paragraph 2.01 is used:* and the attached Exhibit] constitute[s] the entire agreement between the parties relating to the services to be provided by Consultant for Counsel. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by Consultant and Counsel.

Attorneys' Fees

3.04. If any action, proceeding, or arbitration arising out of or relating to this Agreement is commenced by either party to this Agreement, then as between Counsel and Consultant, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

Binding Effect

3.05. This Agreement shall be binding on and inure to the benefit of the parties to this Agreement and their heirs, personal representatives, successors, and assigns, except as otherwise provided in this Agreement.

Governing Law

3.06. This Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

Waiver

3.07. The waiver by any party to this Agreement of a breach of any provision of this Agreement shall not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other duty provision of this Agreement.

Executed as of _____[*date*].

COUNSEL
_____ [*name of Counsel*]
By: _____ [*signature*]
_____ [*typed name and title*]

CONSULTANT
_____ [*name of consulting firm*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
A. Environmental Assessments

15-33 California Legal Forms--Transaction Guide § 33.201

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.201 Client's Letter to Counsel Requesting Legal Opinion and Environmental Assessment and Giving Indemnity

[1] Comment--Use of Form

This form is a client letter requesting that the attorney prepare a legal opinion addressing whether specific property, which is the subject of a proposed transaction, is in compliance with applicable environmental laws. For this purpose, the letter authorizes the attorney to engage an environmental consultant to perform an environmental assessment on the property. The purpose of structuring the engagement of the consultant in this way is to maximize the confidentiality and privileged character of the results of an investigation [*see § 33.200[1][d]* (confidentiality and privileges discussed)].

For a list of matters that should be considered in an environmental assessment, see *§§ 33.120* and *33.200[1][b]-[c]*. For an agreement with an environmental consultant, see *§ 33.200[2]*.

[2] FORM

Client's Letter to Counsel Requesting Legal Opinion and Environmental Assessment and Giving Indemnity

REQUEST FOR LEGAL OPINION

_____ [*date*]

_____[*name of attorney*]
_____[*name of law firm*]
_____[*address*]

Re: Request for Legal Opinion

Dear _____[*name*]:

As we discussed, I am writing on behalf of _____[*name of client*] to request that _____[*name of law firm or you*] prepare a legal opinion addressing whether that real property ("the Site") located at _____[*address, city, county, state*] and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this letter and incorporated by reference], which is the subject of a proposed _____[purchase *or* lease *or* transaction], is in compliance with applicable environmental laws.

For the purpose of preparing your legal opinion, we realize that you will need to develop a technical data base on the Site and engage the expert services of an environmental consultant to perform an environmental assessment of the Site. Therefore, we authorize you to engage a qualified environmental consultant on our behalf for that purpose. We are prepared to authorize the expenditure of up to $ _____ on the engagement of the consultant [, subject to the following conditions: *specify, if any*]. We will reimburse you for all amounts paid on our behalf to the environmental consultant.

[*Optional*]

As we discussed, we also request that _____[*name of law firm or you*] prepare a memorandum detailing the nature of the litigation that we are anticipating and for which the environmental assessment and consulting work is being done.

Sincerely yours, _____ [*name of client*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawPurchase & SaleGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
A. Environmental Assessments

15-33 California Legal Forms--Transaction Guide §§ 33.202-33.209

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.202[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
B. Sales of Real Estate

15-33 California Legal Forms--Transaction Guide § 33.210

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.210 Sales Contract With Environmental Provisions

[1] Comment

[a] Use of Form

This form is a general sales contract for real estate that has been used as an industrial or commercial site on which hazardous substances may have been handled, treated, or stored. It includes provisions that specifically address possible contamination of the property by hazardous substances, including specifying the rights and obligations of the parties if contamination is discovered by an environmental assessment, which is required under Paragraph 3.02. Any of the environmental provisions in the following form may be adapted for use in other real estate sales contracts.

For discussion of the importance of environmental assessments for preserving the "innocent landowner" defense, see *§ 33.10[7][d]*. For discussion of CERCLA and other sources of environmental liability in real property transactions, see *§§ 33.10-33.16*. For a list of specific types of properties on which assessments should be performed before any sale, see *§ 33.120*, Paragraph 1. For a detailed discussion of the law governing sales of real estate and for additional sales contracts drafted for particular types of sales, such as sales of unimproved property, see Volume 5, Chapter 23, *Real Property Sales Agreements*.

[b] Definition of Hazardous Substances

Paragraph 5.01 of the following form defines the term "hazardous substances." The definition of this term is crucial, since it will dictate the rights of the purchaser to cancel the contract under certain circumstances [*see* [d], *below*]. The definition states that the term includes those substances listed as "hazardous substances" under a number of specified statutes, such as CERCLA [*see 42 U.S.C. § 9601(14)*], and thus incorporates the statutory definitions by reference. In subparagraph (a) of Paragraph 5.01, the drafter must specify whether the term will mean all substances listed at the time the contract is entered into or, alternatively, all substances that ever become listed under the laws specified in the subparagraph. Subparagraph (b) of Paragraph 5.01 expands the contract definition of hazardous substances by including

all types of substances that give rise to statutory or common law liability even if not listed in the specified statutes. Paragraph 5.01 mentions specific substances, such as petroleum. However, petroleum, for example, may be excluded by some statutory or regulatory scheme [*see §§ 33.10[5][d][ii], 33.12[1]*].

The services of an environmental consulting firm will be necessary to determine the nature and concentration of any hazardous substances actually on or in the subject property. For an environmental consulting firm service agreement, see *§ 33.200[2]*.

[c] Warranty of Compliance With Law

Paragraph 4.02 of the following form contains two alternative provisions under which the seller warrants that he or she has complied with federal, state, and local laws, regulations, and ordinances. Broad compliance-with-laws warranties may be effective with regard to compliance with CERCLA, RCRA, and other environmental laws, even if the warranty does not expressly mention these statutes [*see* Nunn v. Chemical Waste Management, Inc. (10th Cir. [Kan.] 1988) *856 F.2d 1464, 1469]* . The first alternative provision in this form contains a broad, general warranty. The second alternative provision allows the drafter to be more specific by limiting the warranty of compliance to certain laws only, which must be specified by the drafter.

For a general discussion of warranties in real estate sales contracts, see Volume 5, Chapter 23, *Real Property Sales Agreements*. For a discussion of the limited effectiveness of "as is" clauses to allocate CERCLA liability, see *§ 33.30[4]*. For a general discussion of warranties in real estate transactions, see Volume 6,Chapter 27, *Deeds and Recording*.

[d] Right to Cancel Based on Projected Cleanup Costs

Optional Paragraph 4.04 of this form allows the purchaser to terminate the contract if (1) the property is determined to be contaminated by a hazardous substance, or (2) the property is known to be contaminated and the costs of cleanup are economically impracticable.

[2] FORM

Sales Contract With Environmental Provisions

REAL ESTATE SALES CONTRACT

Preamble

This Real Estate Sales Contract is entered into on _____[*date*], by and between _____[*name*(*s*) *of seller*(*s*)], _____[*seller's business status, e.g.,* a California corporation], referred to in this Contract as "Seller," and _____[*name(s) of purchaser(s)*], _____[*purchaser's business status, e.g.,* a California corporation], referred to in this Contract as "Purchaser."

Seller agrees to sell and Purchaser agrees to buy, the real property situated in the City of _____[*name*], County of _____[*county name*], State of California, referred to in this Contract as the "Property," and more particularly described _____[as follows: _____ (*insert legal description*) *or* in Exhibit A, which is attached to this Contract and incorporated by reference as if fully copied and set forth at length], on the terms and conditions set forth below.

ARTICLE 1 PURCHASE PRICE

Amount and Terms of Payment

1.01. The total purchase price of the Property is $ _____, payable by Purchaser to Seller as follows: (a) The sum of $ _____ on execution of this Contract, as a deposit to be applied to the purchase price at the close of escrow. This amount shall be payable _____[*specify, e.g.*, by certified or cashier's check drawn to the order of _____ (***name of escrow holder***)].

(b) The balance of the purchaser price shall be paid _____[at the close of escrow *or* into escrow during business hours at least _____ days before the close of escrow]. This amount shall be payable _____[*specify, e.g.*, in cash *or* by certified or cashier's check drawn to the order of Seller].

Consequences of Default

1.02. If Purchaser defaults in the performance of this Contract, the deposit described in Paragraph 1.01 shall be forfeited by Purchaser as provided in Paragraph 5.02. [*Add if optional Paragraph 4.04 included:* If this Contract is terminated in accordance with Paragraph 4.04, the deposit shall be _____ (forfeited by Purchaser as provided in Paragraph 5.02 *or* refunded to Purchaser in accordance with Paragraph 3.03).] If this Contract is terminated [*add if optional Paragraph 4.04 included:* for any other reason], the deposit shall be refunded to Purchaser in accordance with Paragraph 3.03.

ARTICLE 2 ESCROW

Opening of Escrow

2.01. An escrow shall be opened to consummate the sale of the Property according to the terms of this Contract at the office of _____[_____ (*name and title of escrow holder*), referred to in this Contract as "escrow holder," at _____ (*address*), California *or* an escrow holder to be selected by _____ (Seller *or* Purchaser *or identify third party to make selection*)]. The escrow shall be opened within _____ days after the execution of this Contract. Written escrow instructions in accordance with the terms of this Contract shall be prepared _____[by each party *or* jointly], and the instructions shall be signed by the parties and delivered to the escrow holder within _____ days of the execution of this Contract. Purchaser and Seller shall also deposit with the escrow holder all instruments, documents, and other items (a) identified in the escrow instructions, or (b) reasonably required by the escrow holder to close the sale on the closing date specified below.

Closing Date

2.02. The escrow shall be closed on the date on which the deed is recorded. [*Add if desired:* The escrow shall be considered to be in a condition to close when the escrow holder is authorized under the escrow instructions, and when the escrow holder is otherwise able, to record the grant deed.] The escrow must be _____[in a condition to close *or* closed] no later than _____[*date*], unless the closing date is extended in accordance with the terms of this Contract; provided, however, that this closing date shall not be extended beyond _____[*date*].

Prorations

2.03. The following shall be prorated between Seller and Purchaser, on the basis of a 30-day month, as of the date on which escrow closes: _____[*specify, e.g.*, real property taxes, special assessments, _____ (*name of common-interest development owners' association*) dues].

Broker Commission(s)

2.04. At the close of escrow, Seller shall pay a sum equal to _____[*specify, e.g.,* six (6) percent of the selling price of the Property *or* specify other method of compensation] as a real estate broker's commission. [*Add if more than one broker is involved:* The commission shall be divided equally between Seller's broker and Purchaser's broker.]

Closing Costs

2.05. Seller shall pay _____[*specify, e.g.,* the real estate broker's commission described in Paragraph 2.04, any transfer taxes, the costs of the preliminary report and title insurance policy required by this Contract, and the fees charged for removing the mortgage shown as _____ (*specify, e.g.,* Item 2) on the preliminary report required by this Contract, and the cost of preparing, executing, and acknowledging that grant deed and all other instruments necessary to convey title to the Purchaser]. Purchaser shall pay _____[*specify, e.g.,* the cost of recording the grant deed and any other instruments required to convey title to the Purchaser]. [*Add arrangements, if any, for splitting costs, e.g.,* The escrow fees, other than the cost of the title insurance policy, shall be paid _____ percent by Seller and _____ percent by Purchaser.]

Vesting of Title

[*First alternative; use when purchaser will advise escrow holder of manner of vesting:*]

2.06. Purchaser shall advise the escrow holder before the close of escrow of the manner in which title shall vest.

[*Second alternative; use when contract states how title is to vest:*]

2.06. On the close of escrow, title shall be vested in _____[*specify each purchaser's name and capacity*] as _____[*specify manner of vesting, e.g.,* tenants in common].

[*Continue with the following:*]

ARTICLE 3 ADDITIONAL TERMS AND CONDITIONS

Preliminary Title Report

3.01. Within _____ days after the execution of this Contract, _____[Purchaser shall obtain *or* Seller shall furnish Purchaser with] a preliminary report of the title to the Property from _____[*name of title association*] and each document shown as an exception or encumbrance in the report. This shall be done at the expense of _____[Purchaser *or* Seller]. Within _____ days after the delivery of the report and related documents to Purchaser, Purchaser shall notify Seller in writing of any objection to any exception in the report. If the Purchaser makes a timely objection to any exception or encumbrance and the exception or encumbrance is not eliminated within _____ days of the Seller's receipt of the objection, this Contract shall be terminated in accordance with Paragraph 3.04. The Purchaser's failure to object in this manner to any exception or encumbrance shall be an approval by Purchaser of that exception or encumbrance.

Environmental Assessment

3.02. Within _____ days after the execution of this Contract, _____[Purchaser *or* Seller] shall arrange for an environmental assessment to be conducted on the Property by a qualified environmental consultant to be chosen by _____[*e.g.*, agreement between Purchaser and Seller, subject to the approval of Purchaser's lender]. The assessment shall be conducted according to the following minimum standards:

(a) Phase I of the assessment shall include _____[*specify, e.g.*, (1) a review of available documents, (2) interviews with people aware of operations that have been conducted on the Property, and (3) a physical inspection of the Property].

(b) Phase II of the assessment shall be conducted if the results of Phase I are inconclusive to show the presence or absence of any hazardous substances on the Property. If Phase II of the assessment is required, it shall include _____[*specify, e.g.*, (1) a more detailed review of the Property, and (2) specialized physical sampling as indicated necessary from the results of Phase I]. [*Add if desired:* The assessment shall be conducted in accordance with the standards established by _____ (*designate lender with whom parties are dealing and that has implemented guidelines for assessments*).]

(c) If the results of the Phase II assessment are inconclusive to show the presence or absence of any hazardous substances on the Property, a Phase III assessment shall be conducted. The nature of the inquiries to be made in the Phase III assessment, if any, shall be determined by the Purchaser and the environmental consultant retained to conduct the assessment following the Purchaser's analysis of the report on the Phase II assessment.

(d) The cost of the environmental assessment required under this Paragraph shall be paid _____[*specify, e.g.*, solely by the Purchaser *or* one half by the Purchaser and one half by the Seller].

(e) Seller shall cooperate fully with all inquiries made by the environmental consultant, including but not limited to:

(1) Giving the environmental consultant access to the Property within _____ [*time period, e.g.,* 24 hours] following requests for access.

(2) Giving the environmental consultant express authorization to inspect and copy federal, state, and local public agency files and records pertaining to the Property.

(3) Giving the environmental consultant access to inspect, but not copy, Seller's documents, which are relevant to the use of hazardous substances on the Property, that are located at Seller's offices at _____ [*specify address or addresses at which documents may be found, such as facility subject to purchase contract or company's headquarters*]. All information disclosed on Seller's documents shall remain confidential and shall not be disclosed by the environmental consultant, Purchaser, or their agents to any third-party without Seller's express written authorization.

Miscellaneous Conditions

3.03. The close of escrow opened under Paragraph 2.01, and the Purchaser's obligation to purchase the Property in accordance with this Contract, are subject to the satisfaction of the following conditions, which are solely for the Purchaser's benefit unless otherwise noted:

(a) The conveyance to Purchaser of good and marketable title to the Property, as evidenced by _____[*specify form of title insurance policy*] title insurance policy issued by _____[*name of title company*] in the _____[amount of $ _____ *or* full amount of the purchase price] insuring that title to the Property is vested in Purchaser free and clear of all title defects, liens, encumbrances, conditions, restrictions, covenants, and other adverse interests of record known to the Seller, subject only to those exceptions approved by the Purchaser in writing and the following: A lien for current real property taxes and any exceptions shown on the preliminary title report described in Paragraph 3.01 that are not

disapproved by the Purchaser under that Paragraph. _____[*add additional exceptions, if any*].

(b) The delivery of possession of the Property, with all keys to all locks, to Purchaser immediately _____[on the close of escrow *or specify other deadline*] free and clear of all uses and occupancies unless otherwise approved in writing by Purchaser. [*Add if desired:* If Seller is unable to deliver possession at that time, Seller shall pay to Purchaser the sum of $ _____ per day from the close of escrow to the date on which Purchaser obtains possession. In no event shall delivery of possession occur later than _____[*date*].

(c) The approval by Purchaser and Purchaser's lender of the results of the environmental assessment conducted in accordance with Paragraph 3.02.

Failure of Condition and Seller's Breach of Warranty

3.04. Except as provided in Paragraph 3.05, if any of the conditions set forth in this Contract fails to occur, or if Purchaser notifies Seller in writing before the close of escrow of Seller's breach of any of Seller's warranties set forth in this Contract, then Purchaser may cancel the escrow, terminate this Contract, and recover the amounts paid by Purchaser to the escrow holder toward the purchase price of the Property [*add if Purchaser is to pay escrow charges:* less the costs and expenses of escrow]. The Purchaser shall exercise this power to terminate by complying with any applicable notice requirements specified in the relevant condition and, in all other cases, by providing written notice to the Seller and the escrow holder within _____ days of the failure or breach. The exercise of this power shall not constitute a waiver of any other rights that Purchaser may have against Seller for breach of this Contract. Seller shall instruct the escrow holder, in the escrow instructions delivered in accordance with Paragraph 2.01, to refund to Purchaser all money and instruments deposited in escrow by Purchaser under this Contract on the failure of any condition or conditions or breach of a warranty or warranties and receipt of a termination notice. This instruction shall be irrevocable. [*Add if seller is to pay escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of escrow.]

Seller's Election to Remedy Defects

3.05. Notwithstanding any provision of this Contract to the contrary, Seller shall have the right to remedy certain violations of this Contract before the close of escrow. The right to remedy shall be subject to the following requirements and restrictions:

(a) Purchaser shall immediately notify Seller in writing of Purchaser's discovery, before the close of escrow, of a violation of any of the following provisions of this Contract: _____[*list paragraph numbers of any conditions or warranties that are to be subject to this provision*]. For these purposes, the above violations shall be referred to as "defects."

(b) If Purchaser fails to give notice, Purchaser shall waive the defect and the defect shall not be a violation of this Contract. If Purchaser gives notice, Seller may elect to remedy the defect by giving Purchaser written notice of this election within _____ days of receiving Purchaser's notice. Seller's notice of election to remedy shall specify the number of days, if any, up to a maximum of _____, that escrow shall be postponed so that Seller may remedy the defect. If Seller fails to provide a timely notice of election or fails to remedy the defect before the close of escrow, including any extensions of escrow under this Paragraph, then Purchaser may elect to do either of the following: (1) terminate the Contract without any liability on the part of either party; or (2) purchase the Property without a reduction in the purchaser price and without any liability for the unremedied defect or defects on the part of the Seller. The Purchaser's failure to make this election shall be deemed an election of option _____[*specify:* (1) *or* (2)] under this Paragraph.

(c) Seller shall instruct the escrow holder, in the escrow instructions delivered in accordance with Paragraph 2.01,

to immediately refund to Purchaser all money [*add if Purchaser is paying escrow charges:*, less costs and expenses of escrow,] and instruments deposited in escrow by Purchaser under this Contract on termination of this Contract under this Paragraph, and on receipt of notice of that termination from Purchaser. [*Add if Seller is paying escrow charges:* In the event of such a termination, Seller shall bear any costs and expenses of the escrow.] [*Add if Purchaser is paying escrow charges:* In the event of such a termination, Purchaser shall bear any costs and expenses of the escrow.]

ARTICLE 4 RIGHTS AND WARRANTIES

Right of Purchaser to Enter Property

4.01. Seller grants to Purchaser, or Purchaser's agents, the right, at any time and from time to time within _____ days after the opening of the escrow for this transaction, to enter onto the Property to conduct tests or investigations, provided that:

(a) The acts shall be conducted at the sole cost and expense of Purchaser;

(b) The acts do not unreasonably interfere with Sellers possession;

(c) Purchaser shall indemnify and hold Seller harmless from any costs and liabilities resulting from the acts and, if the escrow is canceled for a reason that is not the fault of the Seller, for any damage to the Property resulting from the acts; and

(d) Purchaser shall give Seller written notice of the intention to enter _____ days before the date of the planned entry.

(e) Nothing in this Paragraph shall be construed to allow the Seller in any way to interfere with the conduct of the environmental assessment required under Paragraph 3.02 of this Contract or to obligate the Purchaser in any way to compensate the Seller for any loss or damage to the property resulting from the conduct of that environmental assessment.

Warranties of Seller

4.02. Seller warrants that:

(a) Seller owns the Property free and clear of all liens, licenses, claims, encumbrances, easements, encroachments on the Property from adjacent properties, encroachments by improvements on the Property onto adjacent properties, and rights of way of any nature, not disclosed by the public record, other than: _____[*specify exceptions, including any off-record items such as leases*].

(b) Seller has no knowledge of any pending litigation involving the Property.

(c) Seller is not in default under any contract, note, or encumbrance relating to the Property.

(d) Seller will maintain the Property in good repair and in the same condition it was in, reasonable wear and tear excepted, when it was inspected by Purchaser on _____[*date*].

[*First alternative: include (e)-(g), below, for general warranty:*]

(e) Seller is not in default under any law or ordinance, or under any order of any court or federal, state, municipal, or other governmental department, commission, board, bureau, agency, or instrumentality, wherever located; its operations are in compliance with all applicable laws, permits, and ordinances, and there are no claims, actions, suits or proceedings pending or threatened against or affecting the Seller, at law or equity or before or by any federal, state,

municipal, or other governmental department, commission, board, bureau, agency, or instrumentality, wherever located, that might result in any material adverse change in the financial condition or business of the Seller or that would bring into question the validity or propriety of this Contract or of any action taken or to be taken in accordance with or in connection with this Contract.

(f) Seller, from the inception of operation at the site, has been and is in compliance with the terms, conditions, and requirements of all licenses, permits, and authorizations it holds and the laws, ordinances, and regulations under which these licenses, permits, and authorizations are granted.

(g) The Property does not require investigation or remediation of hazardous substances under any federal, state, or local statute, regulation, or order.

[*Secobd alternative: include (e), below, for specific warranty:*]

(e) Seller is not in default under any law or ordinance, or under any order of any court or federal, state, municipal, or other governmental department, commission, board, bureau, agency, or instrumentality wherever located; its operations are in compliance with _____[*specify laws, regulations, or ordinances with regard to which Seller is prepared to warrant compliance, e.g.,* The Resource Conservation and Recovery Act, referred to as "RCRA," in *42 U.S.C. § 6901 et seq.* and the regulations promulgated under RCRA].

[*Continue with the following:*]

Survival of Warranties

4.03. All warranties, covenants, and other obligations described in this Article and elsewhere in this Contract shall survive delivery of the deed.

[*Optional*]

Right of Cancellation

[*First alternative; use when other environmental study is pending:*]

4.04. _____[Seller *or* Purchaser] is currently conducting a study of _____[*specify aspect of property under study, e.g.,* the soil on the Property *or* the Property] to determine its existing condition. Seller agrees to take all action recommended by the _____[*indicate appropriate agency, e.g.,* California Environmental Protection Agency *and/or* U.S. Environmental Protection Agency] to remedy or remove any hazardous substances found and bring the _____[*specify aspect of property under study, e.g.,* soil *or* Property] into compliance with all local, state, and federal ordinances, laws, or regulations, and shall use its best efforts to have all such removal or remedial work completed before closing. However, if the cost of any such cleanup work will, in _____[Seller's *or* Purchaser's] best business judgment, be economically impracticable, then _____[Seller *or* Purchaser] shall have the option to terminate this Contract.

[*Second alternative; use when environmental assessment is pending:*]

4.04. If the environmental assessment conducted in accordance with Paragraph 3.02 of this Contract indicates that action is necessary to remove or remediate hazardous substances and bring the Property into compliance with any and all local, state, and federal ordinances, laws, or regulations, Seller shall be responsible for undertaking all remedial action recommended by the _____[*indicate appropriate agency, e.g.,* California Deptartment of Toxic

Substances Control *and/or* the U.S. Environmental Protection Agency]. However, if the projected cost of any such remedial action exceeds $ _____, then Seller shall have the option to terminate this Contract.

[*Continue with the following:*]

ARTICLE 5 MISCELLANEOUS PROVISIONS

Hazardous Substances

5.01. For purposes of this Contract, the term "hazardous substances" shall mean:

(a) Any substance, product, waste, or other material of any nature that is or becomes listed, regulated, or addressed under one or more of the following:

(1) The Comprehensive Environmental Response, Compensation, and Liability Act, referred to as "CERCLA," in *42 U.S.C. § 9601 et seq.*

(2) The Hazardous Materials Transportation Act, in 49 U.S.C. § 1801 et seq.

(3) The Resource Conservation and Recovery Act, referred to as "RCRA," in *42 U.S.C. § 6901 et seq.*.

(4) The Clean Water Act in *33 U.S.C. § 1251 et seq.*.

(5) The Toxic Substances Control Act, in *15 U.S.C. § 2601 et seq.*.

(6) The California Carpenter-Presley-Tanner Hazardous Substance Account Act, referred to as the "HSAA," in *Health & Safety Code § 25300 et seq.*

(7) The California Porter-Cologne Water Quality Control Act, in *Water Code § 13000 et seq.*

(8) The California Hazardous Waste Control Act, in *Health & Safety Code § 25100 et seq.*

(9) The California Safe Drinking Water and Toxic Enforcement Act, in *Health & Safety Code § 25249.5 et seq.*

(10) The California Hazardous Waste Management Act, in Health & Safety Code § 25170.1 et seq.

(11) Any other federal or state law or local ordinance or other rule concerning hazardous, toxic, or dangerous substances, wastes, or materials.

(b) Any substance, product, waste, or other material that may give rise to liability under any of the laws designated in subparagraph (a) or under any other statutory or common-law tort theory.

(c) Crude oil products, including petroleum.

(d) Asbestos.

(e) Polychlorinated biphenyl.

(f) Fossil fuel combustion wastes, including fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste.

(g) Solid wastes resulting from the extraction and processing of ore.

(h) Cement kiln dust wastes.

Loss, Destruction, and Condemnation

5.02. The parties agree that the following provisions shall govern the risk of loss:

(a) If, before Seller transfers legal title or possession of the Property to Purchaser, all or a material part of the Property is destroyed without fault of the Purchaser, or is taken by eminent domain by any government entity, Purchaser shall be entitled to recover any portion of the price Purchaser has paid, and Seller shall not have the right to enforce this Contract. [*Add if desired:* For these purposes, the term "material part of the Property" means _____ (*specify, e.g.*, an improvement or improvements on the Property that would cost $ _____ or more to replace or to restore to their condition as of the date of execution of this Contract)].

(b) If, after Seller transfers legal title or possession of the Property to the Purchaser, all or any part of the Property is destroyed without fault of the Seller, or is taken by eminent domain by any governmental entity, Purchaser shall not be relieved of Purchaser's obligation under this Contract to pay the full price for the Property, nor is Purchaser entitled to recover any portion of the price that Purchaser has paid.

(c) If, at any time before the close of escrow, damage, destruction, or condemnation occurs and the loss is not covered by subparagraphs (a) or (b) of this Paragraph, _____[*describe allocation of risk, e.g.*, Purchaser shall not have the right to terminate this Contract, but shall be entitled to offset the cost of repair or replacement against the purchase price of the Property].

Insurance

5.03. Seller shall cancel all policies of insurance on the Property as of the close of escrow. Purchaser shall be responsible for obtaining insurance on the Property as of the close of escrow.

Assignment

5.04. Purchaser may not assign this Contract without Seller's prior written consent. The valid assignment of this Contract shall not relieve the Purchaser of liability under this Contract.

Time of Essence

5.05. Time is of the essence of this Contract.

Notices

5.06. Any notice, tender, delivery, or other communication under this Contract shall be in writing and shall be deemed to be properly given if delivered, mailed, or sent by wire or other telegraphic communication in the manner provided in this Paragraph to the following persons:

(a) If to Purchaser: _____[*name of addressee*], _____[*street address*], _____[*city, state, and zip code*].

(b) If to Seller: _____[*name of addressee*], _____[*street address*], _____[*city, state, and zip code*].

Either party may change that party's address for these purposes by giving written notice of the change to the other party in the manner provided in this Paragraph.

If sent by mail, any notice, delivery, or other communication shall be effective or deemed to have been given _____[*specify time period, e.g.,* 48 hours] after it has been deposited in the United States mail, duly registered or certified, with postage prepaid, and addressed as set forth above. If sent by wire or other form of telegraphic communication, any notice, delivery, or other communication shall be effective or deemed to have been given _____[*specify time period, e.g.,* eight hours] after it has been deposited with Western Union or other carrier, prepaid and addressed as set forth above.

Entire Agreement

5.07. This Contract and the attached Exhibits constitute the entire agreement between the parties relating to the sale of the Property. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force and effect. Any amendment to this Contract shall be of no force and effect unless it is in writing and signed by the Purchaser and Seller.

Attorneys' Fees

5.08. If any action, proceeding, or arbitration arising out of or relating to this Contract is commenced by either party to this Contract or by the escrow holder, then as between the Purchaser and the Seller, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

Binding Effect

5.09. This Contract shall be binding on and inure to the benefit of the parties to this Contract and their heirs, personal representatives, successors, and assigns, except as otherwise provided in this Contract.

Governing Law

5.10. This Contract and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

Waiver

5.11. The waiver by any party to this Contract of a breach of any provision of this Contract shall not be deemed a continuing waiver or a waiver of any subsequent breach of that or any other duty provision of this Contract.

Executed on _____[*date*].

PURCHASER
_____ [*name of purchaser*]
By: _____ [*signature*]
_____ [*typed name and title*]
SELLER
_____ [*name of seller*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes

& Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
B. Sales of Real Estate

15-33 California Legal Forms--Transaction Guide § 33.211

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.211 Seller's Disclosure of Release or Threatened Release on Commercial Real Property

[1] Comment

[a] Use of Form

This form is for use by the seller of commercial real property contaminated by hazardous substances. It is designed to document the fact that the seller disclosed the presence of the contamination to the prospective purchaser of the property. This form may be attached as an exhibit to any commercial real property sales contract entered into between the parties [*see § 33.210[2]*].

In the first paragraph of this form, the drafter specifies where the release or threatened release occurred. In the second paragraph, the drafter designates the hazardous substance concerning which the disclosure is made. In preparing the disclosure, the drafter should review the seller's reports of any releases of hazardous substances made to the National Response Center, the EPA, or any other federal, state, or local agency [*see, e.g., 42 U.S.C. § 9606(a), (c)* (CERCLA's release reporting requirements; *Health & Safety Code § 25359.4* (HSAA's release reporting requirements)].

This form is not sufficient for residential real property. When residential property is involved, the seller must furnish information to the buyer on a "Real Estate Transfer Disclosure Statement" prescribed by statute. This standard disclosure form covers a host of potentially significant defects in the house and property, including the presence of substances posing environmental hazards [*see Civ. Code § 1102.6*; *Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 976, 9 Cal. Rptr. 2d 453]* . For detailed discussion, and a copy of the statutory residential real property transfer disclosure form, see Ch. 23, *Real Property Sales Agreements* .

[b] Reasons for Seller to Disclose

Under federal law, a prospective seller who has actual knowledge of the release or threatened release of a hazardous substance will be liable for cleanup costs and damages under CERCLA and will be precluded from asserting the

innocent landowner defense, or any other statutory defense, if he or she fails to disclose that knowledge before the sale of the property [*see 42 U.S.C. § 9601(35)(C)*; *see also § 33.10[7][g]*].

Under the HSAA, owners of nonresidential real property who know, or have reasonable cause to believe, that a release of hazardous substance has come to be located on or beneath the property, have a statutory obligation to give written notice of that condition to any buyer or tenant of the property. Violation of this statutory requirement subjects the owner to the following [*Health & Safety Code § 25359.7(a)*]:

- Actual damages;
- Any other available remedy (such as restitution); and
- Civil penalties of up to $5,000, if the owner has actual knowledge of a release and knowingly and willfully fails to give notice.

These disclosures also guard against possible subsequent common law claims brought by the purchaser against the seller for fraudulent concealment or misrepresentations concerning contamination on the property, including exposure to punitive damages [*see § 33.14[6]*].

[2] FORM

Seller's Disclosure of Release or Threatened Release on Commercial Real Property

SELLER'S DISCLOSURE

TO: _____[*prospective purchasers*]

1. Seller is aware that on _____[*date*], the _____[release *or* threatened release] of the hazardous substance identified in Paragraph 2 of this Disclosure _____[occurred *or* is believed to have occurred] on the following property: _____[*identify location*]. This property is currently the subject of a proposed sale between _____[*prospective purchaser's name*] and _____[*prospective seller's name*] under a Real Estate Sales Contract entered into on _____[*date*].

2. The material that was _____[released *or* threatened to be released] on the specified date and location was _____[*specify, e.g.*, electrical transformer fluid containing PCBs].

3. The material _____[was *or* is believed to have been] released from _____[*specify, e.g.*, an electric transformer located at _____ (*specify location*)].

4. This disclosure is made in compliance with the requirements of *42 U.S.C. § 9601(35)(C)* and *California Health & Safety Code § 25359.7(a)*.

_____ [*name of seller*]
By: _____ [*signature*]
_____ [*typed name and title*]

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)
COUNTY OF _____)

On _____[*date*], before me, _____[*name and title of officer* taking acknowledgment], personally appeared _____[*name of seller*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature: _____ .....(Seal)
Notary Public

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
B. Sales of Real Estate

15-33 California Legal Forms--Transaction Guide § 33.212

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.212 Environmental Indemnity Agreement

[1] Comment--Use of Form

This form is for use as an agreement between the purchaser and seller of industrial or commercial property for indemnity with regard to CERCLA cleanup costs and damages. The form may be adapted for use in a lease transaction or in a real estate loan transaction.

Paragraph 1.04 states that the indemnity agreement is made in accordance with *42 U.S.C. § 9607(e)*, which is the CERCLA provision that expressly allows potentially responsible parties to allocate liability among themselves [*see 42 U.S.C. § 9607(e)*]. The federal courts have recognized the effectiveness of indemnity agreements in allocating liabilities under CERCLA, provided that their terms are clear and unequivocal [*see, e.g., Keywell Corp. v. Weinstein (2d Cir. [N.Y.] 1994) 33 F.3d 159, 165* ; U.S. v. Lowe (5th Cir. [Tex.] 1994) *29 F.3d 1005, 1008-1010]* . Similarly, these agreements are also effective under California's own Superfund law, the HSAA [*Health & Safety Code § 25364; see § 33.12*], and Paragraph 4.01 also refers to that state statute. For a general discussion of indemnity agreements and other contractual devices for allocating CERCLA liability, see *§ 33.30*.

Paragraph 2.01 contains a provision in which the indemnitor warrants the condition of the property to be sold. This warranty relates to "hazardous substances" as defined in the form and the breach of this warranty is the event that triggers the indemnity obligation. For a discussion of the significance of the provision defining hazardous substances, see *§ 33.210[1][b]*.

Drafting provisions concerning the presence of hazardous substances and the allocation of liability regarding those substances may be the subject of intense negotiation between the parties. For example, a purchaser or tenant may want the seller or landlord to include a warranty with regard to the condition of the subject property. On the other hand, most sellers or landlords would be strongly disinclined to provide a warranty and would prefer that the purchaser or tenant conduct his or her own environmental assessment or audit to determine the condition of the property.

[2] FORM

Environmental Indemnity Agreement

INDEMNITY AGREEMENT

This Agreement is entered into on _____[*date*], by and between _____[*name(s) of seller(s)*], _____[*seller's business status, e.g.,* a California corporation], referred to in this Contract as "Indemnitor," and _____[*name(s) of purchaser(s)*], _____[*purchaser's business status, e.g.,* a California corporation], referred to in this Contract as "Indemnitee."

ARTICLE 1 RECITALS

Purchase of Property

1.01. Indemnitee _____[has purchased *or* intends to purchase] from Indemnitor the real property situated in _____[the City of _____, _____ County *or* an unincorporated area of _____ County], California, referred to in this Agreement as the "Property," and more particularly described in the Real Estate Sales Contract dated _____[*date*], which is attached to and incorporated by reference into this Agreement, and which is referred to as the "Sales Contract."

Intent of Parties

1.02. Indemnitor and Indemnitee intend that this Agreement govern their respective potential liabilities that are not otherwise governed by any of the provisions of the Sales Contract. The parties further intend that this Agreement constitute an independent obligation between them and that it be separate from the parties' mutual rights and obligations as described in the Sales Contract. [*Add if transfer of ownership has not occurred:* This Agreement shall be effective when and only when title to the Property is transferred from Indemnitor to Indemnitee. If the transfer of title does not occur, this Agreement shall have no force or effect and the respective rights and obligations of Indemnitor and Indemnitee shall be governed exclusively by the Sales Contract.]

Consideration

1.03. This Agreement is supported by the following consideration, which is separate from the Sales Contract: _____[*describe consideration*]. Indemnitor acknowledges the receipt and sufficiency of this consideration.

Construction Under CERCLA

1.04. It is the intent of the parties that this Agreement be construed as an agreement made in accordance with *42 U.S.C. § 9607(e)* and *California Health & Safety Code § 25364*.

ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF INDEMNITOR

Warranty of Status of Property

2.01. Indemnitor warrants that as of the date of this Agreement:

(a) No hazardous substances are present or contained on, in, or under the Property [*add if appropriate:* except those that have been previously disclosed to the Indemnitee in the Seller's Disclosure dated _____[*date*], which is attached to and incorporated by reference into this Agreement as if fully copied and set forth at length].

(b) Indemnitor does not know and has no reason to know that any hazardous substance is used, manufactured, handled, created, stored, treated, discharged, released, buried, or transported to or from the Property [*add if appropriate:* except to the following extent: _____ (*specify*)].

(c) At no time during the period that Indemnitor has owned the Property has Indemnitor allowed any hazardous substance to be present, contained, used, manufactured, handled, created, stored, treated, discharged, released, or buried on the Property or transported to or from the Property [*add if appropriate:* except to the following extent: _____ (*specify*)].

(d) The Property is in compliance with the terms, conditions, and requirements of all applicable federal, state, and local laws, ordinances, and regulations concerning hazardous substances.

Pending or Threatened Environmental Proceedings

2.02. As of the date of this Agreement:

(a) Indemnitor is not aware of any pending or threatened proceedings, including lawsuits, arbitrations, and administrative hearings, instituted by a private party or by a governmental entity concerning any hazardous substance alleged to be or to have been present, contained, used, manufactured, handled, created, stored, treated, discharged, released, or buried on the Property or transported to or from the Property [*add if appropriate:* except as follows: _____ (*specify*)].

(b) Indemnitor has not been contacted, and has no reason to believe that any contact will be made, by any representative of a federal, state, or local governmental agency concerning any matter having to do with a hazardous substance on the Property, including, but not limited to, the presence, containment, use, manufacture, handling, creation, storage, treatment, discharge, release, or burial on the Property or the transportation to or from the Property [*add if appropriate:* except as follows: _____ (*specify*)].

Prior Environmental Proceedings

2.03. At no time during the period that Indemnitor has owned the Property, and to the best of Indemnitor's knowledge, at no earlier time, were any agreements, stipulations, or settlements of any kind entered into between the owner of the Property and any private or public entity relating to any hazardous substance on the Property, including, but not limited to, the presence, containment, use, manufacture, handling, creation, storage, treatment, discharge, release, or burial on the Property or the transportation to or from the Property of any hazardous substance [*add if appropriate:* except as follows: _____ (*specify*)].

ARTICLE 3 INDEMNITY

Obligation of Indemnitor

3.01. Indemnitor agrees to indemnify, defend, and hold Indemnitee harmless against all claims, damages, and liabilities of whatever nature, foreseen or unforeseen, under any Hazardous Substance Laws, including but not limited to the following:

(a) All fees incurred in defending any action or proceeding brought by a public or private entity and arising from the presence, containment, use, manufacture, handling, creation, storage, treatment, discharge, release, or burial on the Property or the transportation to or from the Property of any hazardous substance. The fees for which the Indemnitor shall be responsible under this subparagraph shall include, but shall not be limited to, the fees charged by (1) attorneys, (2) environmental consultants, (3) engineers, (4) surveyors, and (5) expert witnesses.

(b) Any diminution in the value of the Property attributable to (1) the breach or failure of any warranty or

representation made by Indemnitor in this Agreement, or (2) any cleanup, detoxification, remediation, or other type of response action taken with regard to any hazardous substance on or under the property regardless of whether or not that action was mandated by the federal, state, or local government.

Limitation With Regard to Disclosed Matters

3.02. Notwithstanding any other provision of this Agreement, the Indemnitor shall have no obligation whatsoever to the Indemnitee under Paragraph 3.01 for any matter with regard to which a written disclosure was made by the Indemnitor either before or contemporaneously with the execution of this Agreement.

ARTICLE 4 MISCELLANEOUS PROVISIONS

Definition of Hazardous Substance

4.01. For purposes of this Contract, the term "hazardous substance" shall be interpreted to mean:

(a) Any substance, product, waste, or other material of any nature that is or becomes listed, regulated, or addressed under one or more of the following "Hazardous Substance Laws":

(1) The Comprehensive Environmental Response, Compensation, and Liability Act, referred to as "CERCLA," in *42 U.S.C. § 9601 et seq.*.

(2) The Hazardous Materials Transportation Act, in 49 U.S.C. § 1801 et seq..

(3) The Resource Conservation and Recovery Act, referred to as "RCRA," in *42 U.S.C. § 6901 et seq.*.

(4) The Clean Water Act in *33 U.S.C. § 1251 et seq.*.

(5) The Toxic Substances Control Act, in *15 U.S.C. § 2601 et seq.*.

(6) The California Carpenter-Presley-Tanner Hazardous Substance Account Act, referred to as the "HSAA," in *Health & Safety Code § 25300 et seq.*

(7) The California Porter-Cologne Water Quality Control Act, in *Water Code § 13000 et seq.*

(8) The California Hazardous Waste Control Act, in *Health & Safety Code § 25100 et seq.*

(9) The California Safe Drinking Water and Toxic Enforcement Act, in *Health & Safety Code § 25249.5 et seq.*

(10) The California Hazardous Waste Management Act, in Health & Safety Code § 25170.1 et seq.

(11) Any other federal or state law or local ordinance or other rule concerning hazardous, toxic, or dangerous substances, wastes, or materials.

(b) Any substance, product, waste, or other material that may give rise to liability under any of the laws designated in subparagraph (a) or under any other statutory or common-law tort theory.

(c) Crude oil products, including petroleum.

(d) Asbestos.

(e) Polychlorinated biphenyl.

(f) Fossil fuel combustion wastes, including fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste.

(g) Solid wastes resulting from the extraction and processing of ore.

(h) Cement kiln dust wastes.

Attorneys' Fees

4.02. If any action, proceeding, or arbitration arising out of or relating to this Agreement is commenced by either Indemnitor or Indemnitee, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

Governing Law

4.03. This Indemnity Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

Executed on _____[*date*].

INDEMNITOR
_____ [*name of indemnitor*]
By: _____ [*signature*]
_____ [*typed name and title*]
INDEMNITEE
_____ [*name of indemnitee*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsElementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
B. Sales of Real Estate

15-33 California Legal Forms--Transaction Guide §§ 33.213-33.219

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.213[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
C. Secured Transaction Provisions and Loan Documentation

15-33 California Legal Forms--Transaction Guide § 33.220

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.220 Environmental Disclosures to Lender

[1] Comment--Use of Form

This form is a disclosure concerning environmental matters. It is included to illustrate the type of disclosures that lenders may require from prospective purchasers of property that has been used for industrial or commercial purposes. Lenders generally will have their own preprinted forms that the prospective borrower will be asked to complete. This form may be used as a guideline for counsel representing a lender in preparing documentation regarding loans for the purchase of industrial or commercial property.

This form requires the drafter to specify all current and past uses to which adjoining parcels of property have been put. The property for which the loan is sought may be adjacent to several parcels or, in other cases, may be completely surrounded by a single parcel. The drafter should be careful to identify all adjoining parcels.

For a discussion of lender liability under CERCLA, see *§ 33.10[6]*. For detailed discussions of other considerations applicable to secured real estate transactions, as well as other applicable forms, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Environmental Disclosures to Lender

ENVIRONMENTAL DISCLOSURES

RE: _____[*loan application number*]
_____[*loan amount*]
_____[*applicant's name*]

Ownership

1. The property described as _____[*specify full address, location, or legal description sufficient to identify property*], which is the subject of the above-referenced loan application, is owned by _____[*name of present owner*] and occupied by _____[*occupant's name*]. [*Add if there were previous owners:* The previous owners and the dates during which they owned the property are as follows:

Name	Date Acquired	Date Sold
_____	_____	_____
_____	(*date*)	(*date*)
	_____	_____
	(*date*)	(*date*)]

Improvements

2. The construction of the _____[*specify improvement, e.g.,* manufacturing plant] located on the property was completed on _____[*date*]. [*Add if there were any renovations to the improvement:* The following renovations of the improvement were completed on the dates specified:

Renovation	Date Completed
_____ (*describe*)	_____ (*date*)
_____ (*describe*)	_____ (*date*)]

Present Use of Property

3. The property is presently used as _____[*describe use, e.g.,* a plant for the manufacture of plastic utensils]. The previous uses to which the property has been put, and the dates of those uses, are as follows:

Use	Beginning Date	Ending Date
_____	_____	_____
__ [*describe*]	[*date*]	[*date*]
_____	_____	_____
__ [*describe*]	[*date*]	[*date*]

Use of Adjoining Parcels

4. The following parcel[s] of property adjoining the property identified in Paragraph 1 are presently used and have been used in the past as follows:

Parcel	Use	Beginning Date	Ending Date
_____	_____	_____	_____
_____	___ [*describe*]	___ [*date*]	___ [*date*]
	_____	_____	_____
	___ [*describe*]	___ [*date*]	___ [*date*]

Use of Property

5. The property _____[has *or* has not] been used for the purpose of _____[

specify, e.g., manufacturing *and/or* industrial *and/or* refining *and/or* processing *and/or* disposal] of waste products. [*Add if property was used for waste treatment:* Specifically, the waste treatment conducted on the property _____ (is *or* was) _____ (*describe process in detail*)].

Hazardous Disposal Facilities

6. There _____[are *or* are not] now hazardous substance disposal facilities within a _____[*specify distance*] radius of the property.

Environmental Permits

7. The following permits, regulating discharges from the property into the environment, have been issued with regard to the property: _____ [*specify, e.g.,* permits issued in accordance with the National Pollution Discharge Elimination System: _____ (*specify types, numbers, and expiration dates*)]. With regard to each of these permits, governmental enforcement agencies have issued the following citations, notices of violation, or penalties: _____[*specify, e.g.,* citations issued in accordance with the National Pollution Discharge Elimination System: _____ (*specify types, numbers, and dates*)].

Releases of Hazardous Substance

8. (a) On _____[*date*], the _____[release *or* threatened release] of a hazardous substance _____[occurred *or* is believed to have occurred] on the property in the vicinity of: _____[*identify specific portion of property*].

(b) The material that was _____[released *or* threatened to be released] on the specified date and location was _____[*specify, e.g.,* electrical transformer fluid containing PCBs].

(c) The material _____[was *or* is believed to have been] released from _____[*specify, e.g.,* an electric transformer located at _____ (*specify location*)].

(d) Notice of the _____[release *or* threatened release] was given to the following governmental agencies: _____[*specify, e.g.,* National Response Center *and* California Office of Emergency Services] on _____[*date*].

(e) The _____[release *or* threatened release] was responded to as follows: _____[*specify, e.g.,* the electrical transformer fluid was first contained and then removed by _____ (*name*), an environmental contractor licensed to do this kind of cleanup work].

(f) As a consequence of the response action, _____[*name of environmental contractor*] measured the level of _____[*specify, e.g.,* PCBs] as follows: _____[*specify, e.g.,* negligible].

Enforcement Actions

9. The property has been subject to the following governmental and private actions and proceedings to enforce compliance with environmental laws: _____[*specify enforcement agent, forum, name and number of proceeding, and dates commenced and resolved*].

Environmental Assessments

10. The following environmental assessments or investigations have been conducted on the property: _____[*specify author, date, scope of investigation, and conclusions*]. Copies of each of the reports from these assessments are attached to this form.

Executed on _____[*date*].

APPLICANT
_____ [*name of applicant*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
C. Secured Transaction Provisions and Loan Documentation

15-33 California Legal Forms--Transaction Guide § 33.221

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.221 Deed of Trust Provision Regarding Hazardous Substances

[1] Comment--Use of Form

This form is a provision that assigns the trustors' environmental claims to the beneficiary, and that may be inserted in a deed of trust securing an interest in real property. This provision is designed to be incorporated into one of the complete deed of trust forms included in Ch. 25A, *Security Instruments for Real Estate Financing*.

Under this provision, the trustor, who is the purchaser of the real property, gives the beneficiary, who is the lender, all of the trustor's rights of action relating to hazardous substances on the property. The purpose of this provision is to insure that the beneficiary is able to seek damages for the acts or omissions of third parties, such as environmental consultants whose services were relied on in the negotiation of the transaction, or other potentially responsible parties.

Any deed of trust for which the following form is used should also contain a definition of the term "hazardous substance." For a discussion of the importance of defining this key term, see *§ 33.210[1][d]*. For a provision providing a comprehensive definition of "hazardous substance," see *§ 33.210[2]*.

See Ch. 25A, *Security Instruments for Real Estate Financing* , for both (1) discussion of the law governing deeds of trust and other instruments for securing a loan on real property and (2) complete deed of trust forms into which this provision may be inserted.

[2] FORM

Deed of Trust Provision Regarding Hazardous Substances

Environmental Claims

_____. Trustor grants to Lender all present and future common-law or statutory (including federal,

state, or local) claims, causes of action, and rights of recovery, indemnity, or contribution concerning the Property that Trustor is entitled, either at present or in the future, to assert against any individual or business entity that has done any of the following:

(a) Conducted an environmental audit of the Property.

(b) Issued any survey report or other type of study with regard to the condition of the property.

(c) Used, generated, manufactured, handled, stored, treated, discharged, released, or buried any hazardous substance, as defined in _____[*specify, e.g.,* Paragraph _____ of this instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*] on or under the Property.

(d) Transported any hazardous substance, as defined in _____[*specify, e.g.,* Paragraph _____ of this instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*] onto or from the Property.

(e) Arranged for disposal, treatment, or transport of any hazardous substance, as defined in _____[*specify, e.g.,* Paragraph _____ of this instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*] onto or from the Property.

(f) Took any other act whatsoever having to do with any hazardous substance, as defined in _____[*specify, e.g.,* Paragraph _____ of this instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*] onto or from the Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
C. Secured Transaction Provisions and Loan Documentation

15-33 California Legal Forms--Transaction Guide § 33.222

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.222 Representations of Trustor Concerning Compliance With Environmental Laws

[1] Comment--Use of Form

This form is a provision that may be inserted in a deed of trust securing an interest in real property. This provision is designed to be incorporated into one of the complete deed of trust forms included in Ch. 25A, *Security Instruments for Real Estate Financing* .

Under this provision, the trustor agrees to comply with all applicable environmental laws. More specifically, the trustor, who is the purchaser of the real property, is required to maintain the property in a manner that will, to the extent possible, avoid diminution of value due to the presence or release of hazardous substances. For the legal background on compliance-with-law provisions, see *§ 33.14[7][b]*.

Subparagraph (c) of the provision allows the beneficiary to inspect and make and retain copies of all types of documents that are relevant to the trustor's business. Although this subparagraph does not grant the lender any rights with regard to the operation of the trustor's business, counsel should note the potential that any provision in the trust deed that may be interpreted as giving the beneficiary monitoring rights may expose the lender to potential liability under CERCLA as an "operator" [*see § 33.10[5][e], [6]*].

For a discussion of the general law governing deeds of trust, as well as complete deed of trust forms, see Ch. 25A, *Security Instruments for Real Estate Financing* .

[2] FORM

Representations of Trustor Concerning Compliance With Environmental Laws

Compliance With Environmental Laws

_____. (a) Trustor shall comply with all valid laws, ordinances, and regulations, whether state, federal, or municipal, applicable to the Property and its ownership, use, and operation, specifically, but not limited to: _____[*specify law concerning which compliance is required, e.g.*, (1) restrictions on the use of the property; (2) the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. § 9601 et seq*; *(3)* the Resource Conservation and Recovery Act, *42 U.S.C. § 6901 et seq.*; *(4)* the Hazardous Substance Account Act, *California Health & Safety Code § 25300 et seq.*; and *(5)* the California Porter-Cologne Water Quality Control Act, *Water Code § 13000 et seq.*].

(b) Trustor shall preserve and keep the Property in good repair at all times and shall make all repairs, and otherwise take all necessary steps to maintain the Property in a manner that will prevent any impairment in the value of the Property. Trustor will ensure that no waste remains on, in, or in the vicinity of the Property and that all waste is properly transported from the Property and appropriately disposed of.

(c) Trustor shall maintain complete books, records, and accounts for the Property, and shall allow Lender at all reasonable times to inspect the Property and all relevant books, records, notices, contracts, statements, invoices, bills, claims, or other documents relating to the Property and the Trustor's obligations under this Paragraph _____ and shall allow Lender to make and retain copies of these documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawTortsWasteGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.223

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.223 Deed of Trust Provision Giving Beneficiary Power to Conduct Environmental Assessment

[1] Comment--Use of Form

This form is a provision allowing future environmental assessment. It may be inserted in a deed of trust securing an interest in real property. Under this provision, the trustor, who is the purchaser of the real property, gives the beneficiary, who is the lender, the right to conduct an environmental assessment on the property if (1) the trustor defaults on the underlying obligation, (2) foreclosure proceedings are commenced on the property, or (3) the beneficiary has reason to believe that hazardous substances have been released that were not disclosed in conjunction with the loan. This provision is designed to be incorporated into one of the complete deed of trust forms included in Ch. 25A, *Security Instruments for Real Estate Financing*.

The purpose of this provision is to allow the beneficiary to conduct an environmental assessment *before* foreclosing on the property. This provision expands on the statutory power that any secured lender has to conduct an inspection of the real property security for contamination by hazardous substances [*see Civ. Code § 2929.5*]. In particular, this provision goes beyond the statute by (1) allowing a default to trigger the power of inspection and (2) making the trustor liable for the environmental assessment costs.

Performing an environmental assessment before foreclosure gives the lender some information on the likelihood of potential problems and hidden risks inherent in the property. From a purely economic point of view, a contaminated property may have negative value and be unmarketable [*see, e.g., SCA Services of Indiana, Inc. v. Thomas (N.D. Ind. 1986) 634 F. Supp. 1355, 1364]* . From a legal point of view, an environmental assessment is essential if the lender is to be able to take advantage of the "innocent purchaser" defense to CERCLA liability. For discussion of the innocent-purchaser defense, see *§ 33.10[7][d]*. For discussion of environmental assessments, see *§§ 33.10[7][e], 33.200[1]*. For a sample form to be used in engaging a consultant to conduct an environmental assessment, see *§ 33.200[2]*.

Any deed of trust containing the following provision should also contain a definition of the key term "hazardous substance." For a discussion of the importance of this definition, see *§ 33.210[1][b]*. For a provision providing a comprehensive definition of "hazardous substance", see *§ 33.210[2]*.

For a discussion of the law governing deeds of trust, as well as complete forms into which this provision can be inserted, see Volume 5A, Ch. 25A, *Security Instruments for Real Estate Financing*.

[2] FORM

Deed of Trust Provision Giving Beneficiary Power to Conduct Environmental Assessment

Beneficiary's Power to Conduct Environmental Assessment

_____. Beneficiary shall have the power, in its sole discretion, to have an environmental assessment conducted on the Property, as follows:

(a) Beneficiary's power to enter and inspect the Property shall be for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of hazardous substance as defined in _____[*specify, e.g.*, Paragraph _____ of this instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*].

(b) Beneficiary's power of inspection and environmental assessment shall be triggered by the occurrence of any one of the following:

(1) Beneficiary has a reasonable belief in the existence of a past or present release or threatened release of any hazardous substance into, onto, beneath, or from the Property that was not previously disclosed in writing to Beneficiary in conjunction with the making of the Promissory Note.

(2) Nonjudicial or judicial foreclosure proceeding have been commenced against the Property.

(3) Trustor is in default under this Deed of Trust or the Note.

(c) Unless the Property has been abandoned or there is an emergency, Beneficiary shall give Trustor and any occupant of the Property reasonable notice of Beneficiary's intent to enter the Property. Twenty-four hour notice shall be presumed to be reasonable.

(d) Beneficiary may have its inspection and environmental assessment conducted by a qualified environmental consultant chosen by Beneficiary.

(e) The scope of the inquiries to be made in the environmental assessment, if any, shall be determined by Beneficiary and the environmental consultant retained to conduct the assessment.

(f) The cost of any environmental assessment required under this Paragraph shall be paid by Trustor within _____[*specify, e.g.,* 30] days after Beneficiary submits the invoice, and any unpaid portion of these cost shall be added to the balance owed on the _____[*name of underlying obligation as referred to elsewhere in the deed of trust, e.g.*, Promissory Note].

(g) Trustor shall cooperate fully with all inquiries made by Beneficiary and its environmental consultant, including, but not limited to _____[*specify as appropriate, e.g.,* (1) giving access to the property within _____ (*time period, e.g.*, 24 hours) following requests for access; (2) giving access to interview persons aware of operations that have been conducted on the Property; (3) giving a description and quantification of all hazardous substances, as defined in _____ (*specify, e.g.,* Paragraph _____ of this

instrument *or specify statutory or regulatory definition, e.g., 42 U.S.C. § 9601(14)*) generated, manufactured, refined, transported, treated, stored, handled, or disposed on the Property since the date of this instrument; (4) making all environmental permits and approvals, including but not limited to, _____ (*specify, e.g.*, air pollution control permits and pollution discharge elimination system permits), from all governmental or public agencies having jurisdiction of the Property or Trustor's operations on the Property, available _____ (for copying *or* for inspection at Trustor's offices); (5) making all records kept by Trustor concerning releases of hazardous substances on the Property available _____ (for copying *or* for inspection at Trustor's offices); and (6) allowing the Beneficiary or its environmental consultant to take physical samples from the air, water, groundwater, soil, or subsoil on the Property for purposes of environmental testing].

(h) Nothing in this Paragraph shall be construed as limiting in any way the acts that may be performed by Beneficiary or its environmental consultant in the conduct of the assessment. This Paragraph only expands, and shall not limit, Beneficiary's statutory power under *California Civil Code § 2929.5* to make a hazardous substance inspection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawEnvironmental RegulationLiabilities & RisksLender LiabilitiesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests



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15-33 California Legal Forms--Transaction Guide §§ 33.224-33.229

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.224[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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15-33 California Legal Forms--Transaction Guide § 33.230

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.230 Tenant's Warranty Concerning Use

[1] Comment--Use of Form

This form is a lease provision in which the tenant warrants to the landlord that the leased property will be used only for specified purposes. It is designed to be included in a lease for property that will be used for industrial or commercial purposes. The provision specifies the anticipated use of the property and requires an officer of the tenant to provide yearly affidavits concerning operations. It allows the landlord access to the leased premises for purposes of environmental sampling. The landlord may also want to require a higher security deposit or even a performance bond from any tenant whose conduct might involve hazardous releases.

This form is designed to preserve a breach of warranty action for the landlord in the event of the tenant's breach. However, the inclusion of this provision in a lease will not insulate the landlord from environmental liability in the event that the tenant's operations contaminate the property. In that event, the landlord would still be strictly liable for the contamination under CERCLA and the HSAA [*see 42 U.S.C. § 9607(a)*; *see also §§ 33.10[2], 33.12[2]*].

Paragraph 3 of the form contains a general provision under which the tenant agrees to indemnify and hold the landlord harmless for damages and claims that result from the breach of the tenant's warranty. Counsel representing a landlord whose tenant will agree to provide indemnity against all environmental liability may adapt the indemnity agreement in § 33.212[2] for use in, or in addition to, a lease agreement [*see §§ 33.14[7][a]* (indemnity provisions), *33.30* (effect of contractual provisions on environmental liability)].

For various lease forms into which this provision could be inserted, see Volume 8, Chapters 34B, *Residential Leases*, 34C, *Commercial , Industrial, and Office Leases*, 34D, *Ground Leases*, and 34E, *Shopping Centers: Leasing and Operation*, and Volume 8A, Chapter 37, *Farm Leases*.

[2] FORM

Tenant's Warranty Concerning Use

ARTICLE _____

TENANT'S WARRANTY

Use of Premises

_____.01. Tenant represents and warrants to Landlord that Tenant intends to use the premises for _____[*describe purposes*] [*add if tenant's activities are conducted under any type of permit or authorization:*], and that Tenant has the following current _____ (*specify, e.g.*, permits issued under the National Pollution Discharge Elimination System: _____[*specify types, numbers, and expiration dates*])]. Tenant's use of the property shall be restricted to those purposes specified in this Paragraph unless the Tenant obtains Landlord's prior written consent to any change in use. Before the commencement date of the lease term, Tenant shall supply to Landlord an affidavit of an officer of Tenant, referred to as the "Officer's Affidavit," setting forth a detailed description of the operations that Tenant will conduct on the premises and stating any applicable permit numbers. The Officer's Report shall be organized and prepared in a narrative form, including a description and quantification of all hazardous substances and wastes to be generated, manufactured, refined, transported, treated, stored, handled, or disposed of on the property. Following commencement of the lease term, Tenant shall notify Landlord by way of the Officer's Affidavit as to any changes in Tenant's operation or use or generation of hazardous substances and wastes by way of a supplemental Officer's Affidavit. Tenant shall also supplement and update the Officer's Affidavit on each anniversary of the commencement of the lease term. Tenant shall not commence or alter any operations on the property before (a) obtaining all required operating and discharge permits or approvals, including but not limited to air pollution control permits and pollution discharge elimination system permits, from all governmental or public authorities having jurisdiction over the Tenant's operations or the property, and (b) providing copies of these permits and approvals to the Landlord.

Rights of Inspection

_____.02. Tenant shall permit Landlord and Landlord's agents, servants, and employees, including but not limited to legal counsel and environmental consultants and engineers, access to the property for the purpose of conducting environmental inspections and sampling during regular business hours, and during other hours either by agreement of the parties or in the event of an environmental emergency. Tenant shall not restrict access to any part of the property and Tenant shall not impose any conditions to access. In the event that Landlord's environmental inspection includes sampling and testing of the premises, Landlord shall use its best efforts to avoid interfering with Tenant's use of the premises, and on completion of sampling and testing shall repair and restore the affected areas of the property as made necessary by any sampling and testing.

Indemnity

_____.03. Tenant shall indemnify, defend, and hold harmless Landlord from and against all claims, liabilities, losses, damages, and costs, foreseen or unforeseen, including without limitation counsel, engineering, and other professional or expert fees, that Landlord may incur by reason of Tenant's action or inaction with regard to Tenant's obligations under Paragraph _____ of this lease.

Survival

_____.04. This Article shall survive the expiration or earlier termination of this lease. Tenant's obligations under this Article shall be subject to enforcement in equity.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessAudits & Site AssessmentsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.231

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.231 Monitoring Requirements Provision

[1] Comment--Use of Form

This form is a provision allowing a landlord to monitor the environmental conditions on leased property. It also imposes notice requirements on the tenant. This provision would normally be used in association with a provision requiring the tenant to comply with all environmental laws [*see § 33.233[2]* (form)].

This monitoring provision requires the tenant to notify the landlord of environmental events governed by laws that require notices or submissions of reports to governmental agencies concerning hazardous substance releases, such as CERCLA [*see 42 U.S.C. § 9603*] and state superfund laws [*see Health & Safety Code § 25359.4*; *see also § 33.12[1]-[3]*].

This lease covenant parallels a statutory obligation of the tenant. Under California law, nonresidential tenants who know, or have reasonable cause to believe, that a release of hazardous substance has come to be located on or beneath the leased property, must give written notice of that condition to their landlords. Failure to do so is tortious, and subjects the tenant to risk of civil penalties of up to $5,000 per incident [*Health & Safety Code § 25359.7(a)*].

In addition, this provision requires the tenant to provide notice of any environmental liens [*see, e.g., 42 U.S.C. § 9607(l)* (federal lien for CERCLA liability); *Health & Safety Code § 25365.6* (state lien for amounts paid from state Superfund)]. It also requires fulfillment of all of the tenant's environmental obligations as a condition to the landlord's consent to a sublease or assignment.

A commercial or industrial landlord must decide how closely it will monitor a tenant's ongoing operations. As the potential liabilities of landowners expand [*see § 33.10[5][e]*], it is increasingly important for the landlord to protect the environmental integrity of his or her investment. The landlord's retention of a right to periodically monitor the tenant's operations may, depending on the circumstances of the particular transaction, be advisable in addition to requiring an

annual officer's affidavit [*see § 33.230[2]*].

For various lease forms into which this provision could be inserted, see Volume 8, Chapters 34C, *Commercial, Industrial, and Office Leases*, 34D *Ground Leases*, and 34E *Shopping Centers: Leasing and Operation*, and Volume 8A, Chapter 37, *Farm Leases*.

[2] FORM

Monitoring Requirements Provision

ARTICLE _____

LANDLORD'S RIGHT TO MONITOR

Reporting Requirements

_____.01. (a) Tenant shall promptly supply Landlord with copies of all notices, reports, correspondence, and submissions made by Tenant to the U.S. Environmental Protection Agency, the California Environmental Protection Agency, the United States Occupational Safety and Health Administration, or any other local, state, or federal authority that requires submission of any information concerning environmental matters or hazardous wastes or substances in accordance with _____ [*specify acts applicable to tenant's industry, e.g.*, the Resource Conservation and Recovery Act, *42 U.S.C. § 6901 et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. § 9601 et seq.*; the Hazardous Substance Account Act, *California Health & Safety Code § 25300 et seq.*] and all applicable regulations. Tenant shall also supply Landlord with written confirmation of any notices or reports regarding releases of hazardous wastes or substances that Tenant makes orally or by telephone to any such governmental agency.

(b) Tenant shall promptly notify Landlord in advance of any scheduled meeting between Tenant and any of the agencies specified in subparagraph (a).

Environmental Liens

_____.02. Tenant shall promptly notify Landlord as to any liens threatened or attached against the premises under any environmental law. In the event that an environmental lien is filed against the premises, the Tenant shall, within 30 days from the date on which the lien is placed against the property, and at any rate before the date on which any governmental authority commences proceedings to sell the premises in accordance with a lien, either: (a) pay the claim and remove the lien from the premises; or (b) furnish either (1) a bond satisfactory to the Landlord in the amount of the claim on which the lien is based, or (2) other security satisfactory to the Landlord in an amount sufficient to discharge the claim on which the lien is based.

Condition Precedent to Assignment and Sublease

_____.03. As a condition precedent to the Tenant's right to sublease the property or to assign this lease, the Tenant shall, at the Tenant's own expense, fulfill all of Tenant's environmental obligations under Paragraph _____ of this lease. If this condition is not satisfied, the Landlord shall have the right to withhold consent to any proposed sublease or assignment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesResource Conservation & Recovery ActFinancial ResponsibilityReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawNonmortgage LiensEnvironmental Liens



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15-33 California Legal Forms--Transaction Guide § 33.232

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.232 Allocation of Cleanup Costs Between Landlord and Tenant

[1] Comment--Use of Form

This form is a provision for use in a commercial real property lease agreement under which the landlord and tenant allocate responsibility for any cleanup costs arising from discharges of hazardous substances on the leased property [*see 42 U.S.C. § 9607(e)*; *see also § 33.10[2]*]. Counsel representing the tenant should attempt to ensure that his or her client will not be responsible for cleanup costs incurred by reason of any prior operations of the property or for any spills or discharges by others on the property or on adjoining parcels. Consequently, counsel for the tenant should require a provision specifically limiting its costs to those resulting from discharges of hazardous substances or wastes by the tenant during its occupancy of the property.

Agreements allocating liability for costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*] and California's equivalent, the Hazardouse Substances Account Act (HSAA) [*Health & Safety Code § 25300 et seq.*] are enforceable between the parties but not with regard to the government [*see §§ 33.12[4], 33.30*]. In fact, at least one case has enforced an indemnity agreement made between a landlord and tenant [*see* Caldwell v. Gurley Refining Co. (8th Cir. [Ark.] 1985) *755 F.2d 645, 651-652]* .

For various lease forms into which this provision could be inserted, see Volume 8, Chs. 34B, *Residential Leases*, 34C, *Commercial, Industrial, and Office Leases*, 34D *Ground Leases*, and 34E *Shopping Centers: Leasing and Operation*, and Volume 8A, Ch. 37, *Farm Leases*.

[2] FORM

Allocation of Cleanup Costs Between Landlord and Tenant

ARTICLE _____

ALLOCATION OF CLEANUP COSTS

Cleanup Costs

_____.01. Tenant shall be responsible only for the payment of that portion of cleanup costs necessary for compliance with _____[*specify acts applicable to tenant's industry, e.g.*, the Resource Conservation and Recovery Act, *42 U.S.C. § 6901 et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. § 9601 et seq.*; the Hazardous Substance Account Act, *California Health & Safety Code § 25300 et seq.*; the California Porter-Cologne Water Quality Control Act, *Water Code § 13000 et seq.*] and all applicable regulations that arise as a result of Tenant's discharge of a hazardous substance on or from the property during the Tenant's occupancy of the property. The Landlord shall be responsible for all other cleanup costs or for ensuring that any other responsible party participate in the cleanup to the extent of its responsibility for a release.

Landlord's Environmental Indemnity

_____.02. Landlord shall indemnify, defend, and hold Tenant harmless from and against all claims, liabilities, losses, damages, and costs, foreseen and unforeseen, including without limitation counsel, engineering, and other professional or expert fees that Tenant may incur by reason of Landlord's action or inaction with regard to Landlord's obligations under _____[*e.g.*, paragraph _____.01].

Tenant's Environmental Indemnity

_____.03. Tenant shall indemnify, defend, and hold harmless Landlord from and against all claims, liabilities, losses, damages, and costs, foreseen or unforeseen, including without limitation counsel, engineering, and other professional or expert fees, that Landlord may incur by reason of Tenant's action or inaction with regard to Tenant's obligations under _____[*e.g.*, Articles _____ and _____] of this lease.

Survival

_____.04. The rights and obligations set forth under this Article shall survive the expiration or earlier termination of this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.233

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.233 Compliance With Environmental Laws Provision

[1] Comment--Use of Form

This form is a provision that may be inserted in a commercial real estate lease agreement to require the tenant, as a covenant of the lease, to comply with all applicable environmental laws. In addition, the tenant is required to maintain the property in a manner that will, to the extent possible, avoid diminution of value due to the presence or release of hazardous substances. Finally, the provision allows the landlord to inspect and make and retain copies of all types of documents that are relevant to the tenant's business. This subparagraph complements the monitoring requirement provision set forth in*§ 33.231*.

For discussion of compliance-with-law provisions, see *§ 33.14[7][b]*. For various lease forms into which this provision could be inserted, see Volume 8, Chs. 34B, *Residential Leases*, 34C, *Commercial, Industrial, and Office Leases*, 34D *Ground Leases*, and 34E *Shopping Centers: Leasing and Operation*, and Volume 8A, Ch. 37, *Farm Leases*.

[2] FORM

Compliance With Environmental Laws Provision

Compliance With Environmental Laws

_____. (a) Tenant shall comply with all valid laws, ordinances, and regulations, whether state, federal, or municipal, applicable to the premises and its ownership, use, and operation, specifically, but not limited to: _____[*specify law concerning which compliance is required, e.g.*, (1) restrictions on the use of the property; (2) the Resource Conservation and Recovery Act, *42 U.S.C. § 6901 et seq.*; *(3)* the Hazardous Substance Account Act, *California Health & Safety Code § 25300 et seq.*; and *(4)* the California Porter-Cologne Water Quality Control Act, *Water Code § 13000 et seq.*].

(b) Tenant shall preserve and keep the premises in good repair at all times and shall make all repairs, and otherwise take all necessary steps to maintain the premises in a manner that will prevent any impairment in the value of the premises. Tenant will ensure that no waste remains on, in, or in the vicinity of the premises and that all waste is properly transported from the premises and appropriately disposed of.

(c) Tenant shall maintain complete books, records, and accounts for the premises, and shall allow Landlord at all reasonable times to inspect the premises and all relevant books, records, notices, contracts, statements, invoices, bills, claims, or other documents relating to the premises and the Tenant's obligations under this Paragraph _____ and shall allow Landlords to make and retain copies of such documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview



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15-33 California Legal Forms--Transaction Guide § 33.234

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.234 Landlord's Disclosure of Release or Threatened Release on Commercial Real Property

[1] Comment

[a] Use of Form

This form is for use by the landlord of commercial real property contaminated by hazardous substances. This form documents the fact that the landlord disclosed the presence of the contamination to the prospective tenant of the commercial property.

In preparing the disclosure, the drafter should review the seller's reports of any releases of hazardous substances made to the National Response Center, the U.S. or California Environmental Protection Agencies, or any other federal or state agency [*see, e.g., 42 U.S.C. § 9606(a), (c)* (CERCLA's release reporting requirements); *Health & Safety Code § 25359.4* (HSAA's release reporting requirements)].

This form may be attached as an exhibit to any commercial real property lease entered into between the parties. This form could be adapted to be a notice from a commercial tenant to his or her landlord of any such release [*see* [c], *below*].

[b] Reasons for Landlord to Disclose

Under federal law, a prospective transferor who has actual knowledge of the release or threatened release of a hazardous substance will be liable for cleanup costs and damages under CERCLA and will be precluded from asserting the innocent landowner defense, or any other statutory defense, if he or she fails to disclose that knowledge before the transfer of the property [*see 42 U.S.C. § 9601(35)(C)*; *see also § 33.10[7][g]*]. Therefore, the landlord needs to make this disclosure to the prospective tenant to maintain any CERCLA defenses that may be available.

In addition, under California law, owners of nonresidential real property who know, or have reasonable cause to believe,

that a release of hazardous substance has come to be located on or beneath the property, have a statutory obligation to give written notice of that condition to any tenant of the property before entering the lease agreement. Violation of this statutory requirement subjects the owner to liability for (1) actual damages and (2) any other available remedies, such as restitution. If the violation was knowing or willful, the owner is also subject to civil liability of $5,000 for each separate violation [*Health & Safety Code § 25359.7(a)*]. These written disclosures also guard against possible subsequent common-law claims brought by the purchaser against the landlord for fraudulent concealment or misrepresentations concerning contamination on the property, including exposure to punitive damages [*see § 33.14[6]*].

[c] Tenant's Obligations

Both commercial and residential tenants are obligated to give written notice to their landlords within a reasonable time if hazardous substances have been released on the leased property [*Health & Safety Code § 25359.7(b)*; *see § 33.231[2]* (monitoring requirements provision for lease)]. This form could be easily modified to serve as a tenant's notice to its landlord of a release.

[2] FORM

Landlord's Disclosure of Release or Threatened Release on Commercial Real Property

LANDLORD'S DISCLOSURE

TO: _____ [*prospective tenant's name*]

1. Landlord is aware that on _____ [*date*], the _____ [release *or* threatened release] of the hazardous substance identified in Paragraph 2 of this Disclosure _____ [occurred *or* is believed to have occurred] on the following property: _____ [*identify location*]. This property is currently the subject of a proposed lease between _____ [*prospective tenant's name*] and _____ [*prospective landlord's name*] under a Commercial Real Estate Lease Agreement entered into on _____ [*date*].

2. The material that was _____ [released *or* threatened to be released] on the specified date and location was _____ [*specify, e.g.*, electrical transformer fluid containing PCBs].

3. The material _____ [was *or* is believed to have been] released from _____ [*specify, e.g.*, an electric transformer located at _____ (*specify location*)].

4. This disclosure is made in compliance with the requirements of *42 U.S.C. § 9601(35)(C)* ("CERCLA") and *Health & Safety Code § 25359.7*.

_____ [*name of landlord*]
By: _____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundRecordkeeping & ReportingReal Property LawEnvironmental RegulationLiabilities & RisksInnocent Landowner DefenseReal Property LawLandlord &

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
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15-33 California Legal Forms--Transaction Guide §§ 33.235-33.239

AUTHOR: Reviewed by Joel S. Moskowitz

[Reserved]

§§ 33.235[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
E. De Minimis Landowner Settlements

15-33 California Legal Forms--Transaction Guide § 33.240

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.240 Model Administrative Order on Consent for Settlement With Landowners

[1] Comment--Use of Form

This form is an example of an administrative consent order between the U.S. Environmental Protection Agency (EPA) and the owner or prospective owner of contaminated land. It is based on a form promulgated by the EPA to be used as a guide to its staff [*see 54 Fed. Reg. 34,243-34,245 (Aug. 18, 1989)*] . It is included here to illustrate possible settlement provisions for counsel whose clients may be eligible for de minimis landowner settlements. For a discussion of de minimis landowner settlements, see *§ 33.31*. For a list of the factors that will be taken into account by the EPA in determining whether a landowner will be eligible for a de minimis landowner settlement, see *§ 33.111*.

Paragraph 3.03(c) need not be included in the consent order if the client's evidence in support of de minimis landowner status is strong and the EPA is settling only for access and due care assurances. The dollar figure specified in that paragraph should include the total response costs incurred as of the date of the order as well as the EPA's projection of the total response costs to be incurred during completion of the remedial action at the site *[54 Fed. Reg. 34,244 (Aug. 18, 1989)]* .

Paragraph 5.05 of this form specifies monetary civil penalties to which the landowner will be subject if he or she fails to comply with the terms and conditions of the consent order. This provision is actually optional. If the landowner is required to perform removal actions, the EPA may consider including other stipulated penalties *[54 Fed. Reg. 34,244 (Aug. 18, 1989)* ; *c.f., 42 U.S.C. § 9621(e)(2)* (penalties required for consent decrees under which landowners will perform remedial actions)]. The EPA representative may omit paragraph 5.06 if the EPA determines that the risk of discovering information that would disqualify the landowner from a de minimis settlement is negligible *[54 Fed. Reg. 34244 (August 18, 1989)]* .

The reservation of rights with regard to natural resource damage under paragraph 5.08(a)(6) must be included in the consent order unless the federal natural resource trustee has agreed to a covenant not to sue under CERCLA [*see 42*

U.S.C. § 9622(j)(2)].

The first alternative paragraph 5.12 provides that the consent order has been approved by the Attorney General of the United States. Attorney General approval is required for de minimis consent orders if the total past and projected response costs at the site will exceed $500,000, excluding interest [*see 42 U.S.C. § 9622(h)(1)*]. For those few cases for which Attorney General approval is not required, the second alternative paragraph 5.12 should be used instead *[54 Fed. Reg. 34,245 (Aug. 18, 1989)]* .

[2] FORM

Model Administrative Order on Consent for Settlement With Landowners

ADMINISTRATIVE ORDER ON CONSENT

U.S. EPA Docket No. _____

In the Matter of: _____[*insert site name and location*]

Proceeding under Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, *42 U.S.C. § 9622(g)(4)*.

ARTICLE 1 JURISDICTION

Delegation of Authority to Administrator of EPA

1.01. This Administrative Order on Consent ("Consent Order") is issued under the authority vested in the President of the United States by Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), *42 U.S.C. § 9622(g)(4)*, to reach settlements in actions under Section 106 or 107(a) of CERCLA, *42 U.S.C. §§ 9606* or *9607(a)*. The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order 12580, *52 Fed. Reg. 2923 (Jan. 29, 1987)* and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E (Sept. 13, 1987).

Respondent's Agreement

1.02. This Administrative Order on Consent is issued to _____ [*landowner's name*] ("Respondent"). Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order. Respondent further consents to, and will not contest, the EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

ARTICLE 2 DEFINITIONS

Site

"Site" shall mean that parcel or property located at _____ [*insert address and general description*], more particularly described as _____ [*insert legal description*].

[*Add any other definitions necessary under facts*]

ARTICLE 3 STATEMENT OF FACTS

Status of Site

3.01. (a) _____ [*Describe status of site and briefly describe historical hazardous substance activity at site, including date on which hazardous substance activities were terminated*].

(b) Hazardous substances within the definition of Section 101(14) of CERCLA, *42 U.S.C. § 9601(14)*, have been or are threatened to be released into the environment at or from the Site. [*Add, if appropriate, additional information about specific hazardous substances present on or off site*].

EPA Action

3.02. (a) As a result of the release or threatened release of hazardous substances into the environment, EPA has undertaken response action at the Site under Section 104 of CERCLA, *42 U.S.C. § 9604* _____ [*add if total response costs, excluding interest, will exceed $500,000* and will undertake response action in the future]. The response action already undertaken consists of _____ [*specify, e.g.*, preparation of a remedial investigation and feasibility study] _____ [*add if total response costs, excluding interest, will exceed $500,000* and the response action planned for the future consists of _____ (*briefly describe*)].

(b) In performing this response action, the EPA has incurred _____ [*add if total response costs, excluding interest, will exceed $500,000* and will continue to incur response costs at or in connection with the Site]. As of _____ [*date*], these costs have amounted to $ _____ [*specify amount as of stated date*], which have been spent on [*describe, e.g.*, preparation of a remedial investigation and feasibility study].

Status and Representations of Respondent

3.03. (a) Respondent, _____ [*name*] is the _____ [*specify nature of respondent's ownership interest, e.g.*, sole] owner of the site. Respondent acquired the site by _____ [*specify, e.g.*, purchase *or* inheritance *or* eminent domain *or* purchase at foreclosure sale] on _____ [*date*].

(b) Respondent represents, and for the purposes of this order the EPA accepts, that Respondent's involvement with the site is limited to the following: _____ [*specify each fact showing respondent's involvement addressing each of factors set forth in § 33.111, Paragraphs 1 and 3*].

[*Add unless EPA is settling only for access and due care assurances*]

(c) Payments required to be made by Respondent under this Consent Order are a minor portion of the total response costs at the Site, which the EPA, based on currently available information, estimates to be between $ _____ and $ _____.

ARTICLE 4 DETERMINATIONS

EPA Conclusions

Based on the Findings of Fact set forth above and on the administrative record for this Site, the EPA has determined that:

(a) The Site as described in Article 2 of this Consent Order is a "facility" as that term is defined in Section 101(9) of CERCLA, *42 U.S.C. § 9601(9)*.

(b) Respondent is a "person" as that term is defined in Section 101(21) of CERCLA, *42 U.S.C. § 9601(21)*.

(c) Respondent is an "owner" of a facility within the meaning of Section 107(a)(1) of CERCLA, *42 U.S.C. § 9607(a)(1)*, and a "potentially responsible party" within the meaning of Section 122(g)(1) of CERCLA, *42 U.S.C. § 9622(g)(1)*.

(d) The past, present, and future migration of hazardous substances from the Site constitutes an actual or threatened "release" as that term is defined in Section 101(22) of CERCLA, *42 U.S.C. § 9601(22)*.

(e) Prompt settlement with Respondent is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, *42 U.S.C. § 9622(g)(1)*.

(f) Respondent is eligible for a de minimis settlement under Section 122(g)(1)(B) of CERCLA, *42 U.S.C. § 9622(g)(1)(B)*.

[*Add unless settlement only for access and due care assurances*]

(g) This Consent Order involves at most only a minor portion of the response costs at the Site under Section 122(g)(1) of CERCLA, *42 U.S.C. § 9622(g)(1)*.

ARTICLE 5 ORDER

Basis

5.01. Based on the administrative record for this Site and the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth here, it is AGREED TO AND ORDERED:

Access and Notice

5.02. (a) Respondent grants to the EPA, its representatives, contractors, agents, and all other persons performing response actions under the EPA's oversight, an irrevocable right of access to the Site for the purposes of monitoring the terms of this Consent Order and performing response actions at the Site. Respondent shall file in the land records of _____ County a notice, approved by the EPA, to subsequent purchasers of the land, that hazardous substances were disposed of on the site and that the EPA makes no representations as to the appropriate use of the property. Nothing in this Consent Order shall limit the EPA's right of access under applicable law.

(b) Nothing in this Consent Order shall in any manner constrict or limit the nature or scope of response actions that may be taken by the EPA in fulfilling its responsibilities under federal law. Respondent recognizes that the implementation of response actions at the Site may interfere with the use of _____ [his *or* her] property. Respondent agrees to cooperate with the EPA in the implementation of response actions at the Site and further agrees not to interfere with these actions.

Due Care

5.03. Nothing in this Consent Order shall be construed to relieve Respondent of _____ [his *or* her] duty to exercise due care with regard to the hazardous substances at the Site or of _____ [his *or* her] duty to comply with all applicable laws and regulations.

[*First alternative for use when EPA is settling for cash payment rather than for access, notice, and due assurances:*]

Payment

5.04. (a) Respondent shall pay the sum of $ _____ to the Hazardous Substance Superfund within

_____ [*specify brief time period, e.g.*, 10 *or* 30 *or* 45] days of the effective date of this Consent Order.

(b) The payment specified in subparagraph (a), above, shall be made by certified or cashier's check payable to "EPA Hazardous Substance Superfund." Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action, and shall be sent to _____ [*address for regional Superfund lock box*].

(c) Respondent shall simultaneously send a copy of its check to: _____ [*name and address of Regional Attorney or Remedial Project Manager*].

[*Second alternative for use when EPA is settling for work to be performed by owner rather than for access, notice, due assurances, or cash payment:*]

Work to be Performed

5.04. Respondent agrees to perform _____ [*generally describe activities to be performed*], as more fully described in the Scope of Work and schedules attached to this Consent Order as Exhibit A and incorporated by reference the same as if fully copied and set forth at length. Based on information provided by the Respondent, the EPA estimates the present value of this work to be approximately $ _____.

[*Optional provision for inclusion if landowner performs remedial action:*]

Civil Penalties

5.05. In addition to any other remedies or sanctions available to the EPA, Respondent shall be subject to a civil penalty of up to $25,000 per day for each failure or refusal to comply with any term or condition of this Consent Order in accordance with Section 122(l) of CERCLA, *42 U.S.C. § 9622(l)*.

Certification of Respondent

5.06. Respondent certifies that, to the best of _____ [his *or* her] knowledge and belief, _____ [he *or* she] has fully and accurately disclosed to the EPA and stated in Paragraph 3.01(f), above, all information currently in Respondent's possession and in the possession of Respondent's _____ [agents *or* officers, directors, employees, contractors, or agents] that relates in any way to Respondent's qualifications for de minimis settlement under Section 122(g)(1)(B) of CERCLA.

Covenant Not to Sue

5.07. (a) Subject to the reservation of rights in Paragraph 5.08(a) and (b) of this Consent Order, _____ [*specify, as appropriate, either:* on payment of the amounts specified in Paragraph 5.04(a) *or* on satisfactory completion of the work specified in Paragraph 5.04 *or* on the effective date of this Consent Order], the EPA covenants not to sue or take any other civil or administrative action against Respondent for any and all civil liability, for injunctive relief, or for reimbursement of response costs under Sections 106 or 107(a) of CERCLA, *42 U.S.C. § 9606* or *9607(a)*, or *Section 7003* of the Resource Conservation and Recovery Act, as amended, *42 U.S.C. § 6973*, with regard to the Site.

(b) In consideration of the EPA's covenant not to sue in subparagraph (a), above, Respondent agrees not to assert any claims or causes of action against the United States or its contractors or its employees, or the Hazardous Substance Superfund arising out of expenses incurred or _____ [payments made *or* work performed] under this Consent Order, or to seek any other costs, damages, or attorney's fees from the United States or its contractors or

employees arising out of response activities at the Site.

Reservation of Rights

5.08. (a) Nothing in this Consent Order is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, that the United States, including the EPA, may have against Respondent for:

(1) Any liability as a result of failure to provide access, notice, or otherwise comply with Paragraph 5.02(a) and (b) of this Consent Order.

(2) Any liability as a result of failure to exercise due care with regard to hazardous substances at the Site.

(3) Any liability as a result of failure to _____ [make the payments *or* perform the work] required by Paragraph 5.03 of this Consent Order.

(4) Any liability resulting from exacerbation by the Respondent of the release or threat of release of hazardous substances from the Site.

(5) Any and all criminal liability.

(6) Any matters not expressly included in the covenant not to sue set forth in Paragraph 5.07 of this Consent Order _____ [*add unless federal natural resource trustee has agreed to covenant not to sue*, including, without limitation, any liability for damages to natural resources].

(b) Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including the EPA, to seek or obtain further relief from Respondent, and the covenant not to sue in Paragraph 5.07 of this Consent Order is null and void if information different from that specified in Paragraph 3.06 is discovered that indicates that Respondent fails to meet any of the criteria specified in Section 122(g)(1)(B) of CERCLA, *42 U.S.C. § 9622(g)(1)(B)*.

(c) Nothing in this Consent Order is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, that the United States, including the EPA, may have against any person, firm, or corporation or other entity not a signatory to this Consent Order.

(d) The EPA and Respondent agree that the actions undertaken by Respondent in accordance with this Consent Order do not constitute an admission of any liability by Respondent. Respondent does not admit and retains the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations contained in this Consent Order.

Contribution Protection

5.09. Subject to the reservation of rights in Paragraph 5.08 of this Consent Order, the EPA agrees that by entering into and on carrying out the terms of this Consent Order, Respondent will have resolved _____ [his *or* her] liability to the United States for those matters set forth in the covenant not to sue in Paragraph 5.07, as provided by Section 122(g)(5) of CERCLA, *42 U.S.C. § 9622(g)(5)*, and shall have satisfied _____ [his *or* her] liability for those matters within the meaning of Section 107(a) of CERCLA, *42 U.S.C. § 9607(a)*.

Parties Bound

5.10. This Consent Order shall apply to and be binding on Respondent and Respondent's _____

[heirs and assigns *or* officers, directors, employees, agents, successors, and assigns]. [*Add if respondent is corporation or other than natural person:* The signatory represents that _____ (he *or* she) is fully authorized to enter into the terms and conditions of this Consent Order and to legally bind Respondent.] In the event that Respondent transfers title or possession of the Site, Respondent shall notify the United States EPA at the address in Paragraph 5.04 before any such transfer and shall continue to be bound by all of the terms and conditions of this Consent Order unless the EPA agrees otherwise and modifies this Consent Order accordingly.

Public Comment 1.

5.11. This Consent Order shall be subject to a 30-day public comment period in accordance with Section 122(i) of CERCLA, *42 U.S.C. § 9622(i)(3)*. In accordance with Section 122(i) of CERCLA, *42 U.S.C. § 9622(i)(3)*, the EPA may withdraw or modify consent to this Consent Order if comments received disclose facts or considerations that indicate that this Consent Order is inappropriate, improper, or inadequate.

[*First alternative for use when costs at site exceed $500,000:*]

Attorney General Approval

5.12. The Attorney General or the Attorney General's designee has issued prior written approval of the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA, *42 U.S.C. § 9622(g)(4)*.

[*Second alternative when costs at site are under $500,000:*]

5.12. The Regional Administrator of the EPA, Region _____ [*identify region*], has determined that the total response costs incurred to date at or in connection with the Site do not exceed $500,000, excluding interest, and that, based on information currently known to the EPA, total response costs at or in connection with the Site are not anticipated to exceed $500,000, excluding interest, in the future.

Effective Date

5.13. The effective date of this Consent Order shall be the date on which the EPA issues written notice to the Respondent that the public comment period under Paragraph 5.11 of this Consent Order has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED

RESPONDENT
_____ [*name of respondent*]
By: _____ [*signature*]
_____ [*date*]
U.S. Environmental Protection Agency
By: _____ [*signature*]
_____ [*typed name and title*]
_____ [*date*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost

Recovery ActionsPotentially Responsible PartiesOwners & OperatorsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response Costs



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33 CONTAMINATION CONSIDERATIONS IN REAL PROPERTY TRANSACTIONS
PART IV. FORMS
E. De Minimis Landowner Settlements

15-33 California Legal Forms--Transaction Guide § 33.241

AUTHOR: Reviewed by Joel S. Moskowitz

§ 33.241 Model CERCLA Judicial Consent Decree for Settlement With Landowners

[1] Comment--Use of Form

This form is an example of a consent decree between the U.S. Environmental Protection Agency (EPA) and the owner or prospective owner of contaminated land [*see 42 U.S.C. § 9622(g)(1)(B)*]. It is a form promulgated by the EPA to be used as a guide to its staff [*see 54 Fed. Reg. 34,245 (Aug. 18, 1989)*] . It is included here to illustrate possible settlement provisions for counsel whose clients may be eligible for de minimis settlements. For a discussion of de minimis settlements, see *§ 33.31*. For a discussion of the factors that will be taken into account by the EPA in determining whether a landowner will be eligible for a de minimis settlement, see *§ 33.111*.

If the complaint concerns causes of action that are not resolved by the consent decree, or names defendants who are not signatories to the consent decree, the title of the following form should be changed to " *Partial Consent Decree" [54 Fed. Reg. 34,245 (Aug. 18, 1989)]* .

Paragraph 5.03 of the following form specifies monetary civil penalties to which the landowner will be subject if he or she fails to comply with the terms and conditions of the consent order. This is required for consent decrees under which landowners will perform remedial actions [*42 U.S.C. § 9621(e)(2)*; 54 Fed. Reg. 34,246 (Aug. 18, 1989)]. Paragraph 5.04, concerning the certification of the defendant, may be omitted when the EPA determines that the risk of discovering information that would disqualify the landowner from a de minimis settlement is negligible *[54 Fed. Reg. 34,246 (Aug. 18, 1989)]* .

The reservation of rights with regard to natural resource damage, under Paragraph 6.02(a)(5), must be included in the consent decree unless the federal natural resource trustee has agreed to a covenant not to sue [*see 42 U.S.C. § 9622(j)(2)*; *see also § 33.31*]. When the release or threatened release of any hazardous substances at the site may have resulted in damages to natural resources under the trusteeship of the United States, the EPA representative may notify the federal natural resource trustee that negotiations are being conducted and the trustee may become involved in those

negotiations [*see 42 U.S.C. § 9622(j)(1)*].

[2] FORM

Model CERCLA Judicial Consent Decree for Settlement With Landowners

CONSENT DECREE

United States of America, Plaintiff v. _____ [*defendants' names*], Civil Action No. _____

Judge _____

ARTICLE 1 RECITATIONS

Parties and Subject Matter

1.01. The United States of America, on behalf of the Administrator of the United States Environmental Protection Agency ("Plaintiff" or "United States"), filed a complaint on _____ [*date*], against _____ [*defendant's name*] ("Defendant") under _____ [*specify causes of action and relief sought, e.g.,* Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), *42 U.S.C. §§ 9606*, *9607(a)*, and *Section 7003* of the Resource Conservation and Recovery Act as amended ("RCRA"), *42 U.S.C. § 6973*], seeking injunctive relief regarding the cleanup of the _____ [*site name*] ("Site"), and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site.

Determinations

1.02. (a) The United States has incurred and continues to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site.

(b) The Regional Administrator of the United States Environmental Protection Agency, Region _____ [*specify region*], ("Regional Administrator"), has determined that prompt settlement of this case is practicable and in the public interest.

(c) Based on information currently available to the United States Environmental Protection Agency ("EPA"), the Regional Administrator has determined that the Defendant qualifies for a de minimis settlement under Section 122(g)(1)(B) of CERCLA, *42 U.S.C. § 9622(g)(1)*.

(d) The United States and the Defendant agree that settlement of this case without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action.

[*Add if defendant is not required to make a cash payment:*]

(e) This settlement does not involve the payment of response costs.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED as follows:

ARTICLE 2 JURISDICTION

Parties and Subject Matter

2.01. This Court has jurisdiction over the subject matter and the parties to this action. The parties agree to be bound by the terms of this Consent Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

Parties Bound

2.02. This Consent Decree shall apply to and be binding on the United States and the Defendant, the Defendant's _____ [heirs, agents, and assigns *or* officers, directors, employees, agents, successors, and assigns]. The signatory represents that _____ [he *or* she] is fully authorized to enter into the terms and conditions of this Consent Decree and to legally bind the Defendant.

ARTICLE 3 DEFINITIONS

"Site" shall mean that parcel or property located at _____ [*address and general description*], more particularly described as _____ [*legal description*].

[*Add any other definitions necessary under facts*]

ARTICLE 4 ACCESS AND NOTICE

EPA's Right of Access

4.01. The Defendant grants to the EPA, its representatives, contractors, agents, and all other persons performing response actions under the EPA's oversight, an irrevocable right of access to the site for the purposes of monitoring the terms of this Consent Decree and performing or monitoring performance of response actions at the site. The Defendant shall file in the land records of _____ County a notice, approved by the EPA, to subsequent purchasers of the land that hazardous substances were disposed of on the site and that the EPA makes no representation as to the appropriate use of the property. Nothing in this Consent Decree shall limit the EPA's right of access under applicable law. In the event that the Defendant transfers title or possession of the site, the Defendant shall notify the EPA before any such transfer.

No Interference

4.02. Nothing in this Consent Decree shall in any manner restrict or limit the nature or scope of response actions that may be taken by the EPA in exercising its authority under federal law. The Defendant recognizes that the implementation of response actions at the Site may interfere with the use of the Defendant's property. The Defendant agrees to cooperate with the EPA in the implementation of response actions at the Site and further agrees not to interfere with these response actions.

ARTICLE 5 PAYMENT

[*First alternative for use when EPA is settling for cash payment rather than for access, notice, and due assurances:*]

Payment

5.01 (a) The Defendant shall pay the sum of $ _____ to the Hazardous Substance Superfund within _____ [*specify brief time period, e.g.,* 10 *or* 30 *or* 45] days of the effective date of this Consent Decree.

(b) The payment specified in subparagraph (a), above, shall be made by certified or cashier's check payable to "EPA Hazardous Substance Superfund." Each check shall reference the site name, the name and address of the Defendant, and the EPA docket number for this action, and shall be sent to _____ [*address for regional Superfund lock box*].

(c) The Defendant shall simultaneously send a copy of its check to: _____ [*name and address of Regional Attorney or Remedial Project Manager*].

[*Second alternative for use when EPA is settling for work to be performed by owner rather than for access, notice, due assurances, or cash payment:*]

Work to be Performed

5.01. The Defendant agrees to perform _____ [*generally describe activities to be performed*], as more fully described in the Scope of Work and schedules attached to this Consent Decree as Exhibit A and incorporated by reference the same as if fully copied and set forth at length. Based on information provided by the Defendant, the EPA estimates the present value of this work to be approximately $ _____.

Due Care

5.02. Nothing in this Consent Decree shall be construed to relieve the Defendant of _____ [his *or* her] duty to exercise due care with regard to the hazardous substances at the Site or of _____ [his *or* her] duty to comply with all applicable laws and regulations.

[*Add the following if landowner is to perform remedial action:*]

Civil Penalties

5.03. In addition to any other remedies or sanctions available to the EPA, the Defendant shall be subject to a civil penalty of up to $25,000 per day for each failure or refusal to comply with any term or condition of this Consent Decree in accordance with Section 122(l) of CERCLA, *42 U.S.C. § 9622(l)*.

Certification of Defendant

5.04. The Defendant certifies that to the best of _____ [his *or* her *or* its] knowledge and belief, _____ [he *or* she *or* it] has fully and accurately disclosed to the EPA all information currently in the Defendant's possession and in the possession of the Defendant's _____ [agents *or* officers, directors, employees, contractors, or agents] that relates in any way to the Defendant's qualifications for de minimis settlement under Section 122(g)(1)(B) of CERCLA.

ARTICLE 6 COVENANTS AND RESERVATIONS

Covenant Not to Sue

6.01. (a) Subject to the reservation of rights in Paragraph 6.02(a) and (b) of this Consent Decree, the United States covenants not to sue or take any other civil or administrative action against the Defendant for any and all civil liability for reimbursement of response costs or for injunctive relief under Section 106 or 107(a) of CERCLA, *42 U.S.C. § 9606, 9607(a)*, or *Section 7003* of RCRA, *42 U.S.C. § 6973*, arising from conditions existing at the Site as of the date of entry of this Consent Decree.

(b) In consideration of the United States' covenant not to sue in subparagraph (a), above, the Defendant agrees not to assert any claims or causes of action against the United States or its contractors or its employees, or the Hazardous Substance Superfund arising out of expenses incurred or _____ [payments made *or* work performed] under this Consent Decree, or to seek any other costs, damages, or attorney's fees from the United States or its contractors or employees arising out of response activities at the Site.

Reservation of Rights

6.02. (a) Nothing in this Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, that the United States, including the EPA, may have against the Defendant for:

(1) Failure to provide access, notice, or otherwise comply with Paragraph 5.01 of this Consent Decree.

(2) Failure to exercise due care with regard to hazardous substances at the Site.

(3) Any liability as a result of failure to _____ [make the payments *or* perform the work] required by Paragraph 5.01 of this Consent Decree.

(4) Any criminal liability.

(5) Any matters not expressly included in the covenant not to sue set forth in Paragraph 6.01 of this Consent Decree _____ [*add following unless federal natural resources trustee has agreed to covenant not to sue*, including, without limitation, any liability for damages to natural resources].

(b) In the event that the United States asserts any claim or cause of action against the Defendant under Paragraph 6.01 of this Consent Decree, the Defendant shall bear the burden of proving that any release or threat of release that is the subject of the claim or cause of action is attributable solely to conditions existing at the Site as of the date of entry of this Consent Decree.

(c) Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including the EPA, to seek or obtain further relief from the Defendant, and the covenant not to sue in Paragraph 6.01 of this Consent Decree is null and void, if information different from that specified in this Consent Decree is discovered that indicates that the Defendant fails to meet any of the criteria specified in Section 122(g)(1)(B) of CERCLA.

(d) Nothing in this Consent Decree is intended as a release from or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, that the United States, including the EPA, may have against any person, firm, or corporation or other entity that is not a signatory to this Consent Decree.

(e) The United States and Defendant agree that the actions undertaken by the Defendant in accordance with this Consent Decree do not constitute an admission of any liability by the Defendant.

ARTICLE 7 MISCELLANEOUS

Contribution Protection

7.01. Subject to the reservation of rights in Paragraph 6.02 of this Consent Decree, the United States agrees that by entering into and on carrying out the terms of this Consent Decree, the Defendant will have resolved _____ [his *or* her *or* its] liability to the United States for those matters set forth in the covenant not to sue, in Paragraph 6.01, as provided by Section 122(g)(5) of CERCLA, *42 U.S.C. § 9622(g)(5)*, and shall have satisfied

_____ [his *or* her *or* its] liability for those matters within the meaning of Section 107(a) of CERCLA, *42 U.S.C. § 9607(a)*.

Public Comment

7.02. This Consent Decree shall be subject to a 30-day public comment period. The United States may withdraw consent to this Consent Decree if comments received disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate.

Effective Date

7.03. The effective date of this Consent Decree shall be the date of entry by this Court following public comment under Paragraph 7.02 of this Consent Decree.

The United States of America
_____ [*defendant*]
By: _____ [*signature*]

SO ORDERED this _____ day of _____ [*month and year*].

_____ [*signature of judge*]
_____ [*typed name of judge*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsSettlementsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesSuccessorsReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response Costs



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§ 33A.syn Synopsis to Chapter 33A: TIME-SHARE PROJECTS

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§ 33A.02 Federal Statutes

§ 33A.03 California Regulations

§ 33A.04 Federal Regulations

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§ 33A.26 Investigation of Violations and Enforcement of VOTSA

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§ 33A.200 Time-Share Plan Instructions [RE 668; Rev. 5/05]

[1] Comment--Use of Form

[2] FORM

Time-Share Plan Instructions [RE 668; Rev. 5/05]

§ 33A.201 Notice of Intention (Time-Share) [RE 668A; Rev. 6/05]

[1] Comment--Use of Form

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§ 33A.202 Notice of Intention (Non-Specific Time-Share) [RE 668B; Rev. 6/05]

[1] Comment--Use of Form

[2] FORM

Notice of Intention (Non-Specific Time-Share) [RE 668B; Rev. 6/05]

§ 33A.203 Time-Share Public Report Preparation [RE 622H; New 6/05]

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[2] FORM

Time-Share Public Report Preparation [RE 622H; New 6/05]

§ 33A.204 Time-Share Plan Disclosures (Part I) [RE 622I; New 6/05]

[1] Comment--Use of Form

[2] FORM

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§ 33A.205 Time-Share Plan Disclosures (Part II-1) [RE 622J-1; New 6/05]

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[2] FORM

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§ 33A.206 Time-Share Plan Disclosures (Part II-2) [RE 622J-2; New 6/05]

[1] Comment--Use of Form

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Time-Share Plan Disclosures (Part II-2) [RE 622J-2; New 6/05]

§ 33A.207 Time-Share Plan Disclosures (Part II-3) [RE 622J-3; New 6/05]

[1] Comment--Use of Form

[2] FORM

Time-Share Plan Disclosures (Part II-3) [RE 622J-3; New 6/05]

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§ 33A.209 Receipt for Public Report

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Receipt for Public Report

§ 33A.210 Public Report Amendment/Renewal Application (Time-Share) [RE 635C Part II; Rev. 6/05]

[1] Comment--Use of Form

[2] FORM

Public Report Amendment/Renewal Application (Time-Share) [RE 635C Part II; Rev. 6/05]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS

16-33A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the statutory and regulatory requirements applicable to time-share projects, as defined under and governed by the Vacation Ownership and Time-Share Act of 2004 (VOTSA) [*see Bus. & Prof. Code § 11210 et seq.*]. VOTSA went into effect on July 1, 2005 [*Bus. & Prof. Code § 11288*]. This chapter includes a detailed description of, and procedural guide for, the registration process as well as coverage of the requirements of VOTSA related to the management and governance of an approved time-share plan. This chapter also includes the forms required to register a time-share plan and obtain approval of the required public report.

This chapter does not include coverage of the sales and marketing of time-share interests beyond what is required by VOTSA. It also does not discuss local building, zoning, and subdivision ordinances. The attorney should consult these ordinances, as well as the governing instruments for any common-interest subdivisions in which any dwelling units in the proposed project will be located.

This chapter also generally describes the regulation in California of out-of-state time-share projects. However, because these projects are, by definition, located outside of California, detailed coverage is not within the scope of this publication.

Condominiums, planned unit developments, and stock cooperatives are discussed respectively in Chs. 33C, *Stock Cooperatives*, 33D, *Planned Developments*, and 34, *Condominiums*.



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A. Primary Sources

16-33A California Legal Forms--Transaction Guide § 33A.01

§ 33A.01 California Statutes

Inapplicability of Subdivided Lands Act to time-share plans, exchange programs, incidental benefits, and short term products. *Bus. & Prof. Code § 11004.5(g)*.

Vacation Ownership and Time-Share Act of 2004 (VOTSA). *Bus. & Prof. Code § 11210 et seq.*
General provisions. *Bus. & Prof. Code §§ 11210-11219*.
Registration, sale requirements, and fees. *Bus. & Prof. Code §§ 11225-11246*.
Time-share plan requirements. *Bus. & Prof. Code §§ 11250-11256*.
Management and governance. *Bus. & Prof. Code §§ 11265-11275*.
Powers, investigation, and enforcement. *Bus. & Prof. Code §§ 11280-11288*.

Nonprofit Mutual Benefit Corporation Law. *Corp. Code §§ 7110-8910*.

Exclusion of time-share in real estate development from Corporate Securities Law. *Corp. Code § 25100(f)*.

California Environmental Quality Act of 1970 (CEQA). *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

Exemption of owners of most time-share estates from local transient occupancy taxes. *Rev. & Tax. Code § 7280*.

Taxation of homeowners' associations. *Rev. & Tax. Code § 23701t*.



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§ 33A.02 Federal Statutes

Interstate Land Sales Full Disclosure Act. *15 U.S.C. § 1701 et seq.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*

Taxation of homeowners' association. *I.R.C. § 528.*



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§ 33A.03 California Regulations

Regulations of the Real Estate Commissioner. *10 Cal. Code Reg. §§ 2805-2810.5*.

California Environmental Quality Act of 1970 (CEQA) regulations. *14 Cal. Code Reg. § 15000 et seq.*

California Coastal Act regulations. *14 Cal. Code Reg. § 13001 et seq.*



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§ 33A.04 Federal Regulations

Interstate Land Sales Full Disclosure Act regulations. *24 C.F.R. § 1710.1 et seq.*

National Environmental Policy Act of 1969 (NEPA) regulations. *40 C.F.R. § 6.100 et seq.*



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B. Secondary Sources

16-33A California Legal Forms--Transaction Guide § 33A.05

§ 33A.05 Law Reviews

Pollack, *Time-Sharing, or Time Is Money but Will It Sell?* 10 Real Est. L.J. 281 (1982).

Rosen, *Structure That Time-Share Conversion as a Cooperative!* 10 Real Est. Rev. 35 (1980).

Hart, *A Method for Valuing Time-Share Intervals*, 10 Real Est. Rev. 107 (1980).

Ellsworth & Prendergast, *Securities Maze Awaits Resort Time-Share Offerings*, 10 Real Est. Rev. 59 (1980).

Byrne, *Securities Regulation of Time-Sharing Resort Condominiums*, 7 Real Est. L.J. 3 (1978).

Davis, *Time-Sharing Exchange Networks*, 8 Real Est. Rev. 42 (1978).

Malleris, *Five Legal Hurdles in Time-Share Ownership*, 8 Real Est Rev. 97 (1978).

Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums*, 4 Real Est. L.J. 35 (1975).

Ellsworth, *Condominiums Are Securities?* 2 Real Est. L.J. 694 (1974).

Cochran & Cochran, *Time-Sharing Ownership of Condominiums*, 8 Beverly Hills L.J. 41 (1974).

Liebman, *Can Condominium Time-Sharing Work?* 3 Real Est. Rev. 40 (1973).



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§ 33A.06 Text References

Rohan & Reskin, Condominium Law and Practice (Matthew Bender)
Ch. 14, *Income Tax Consequences of Condominiums*, § 14.01[9] (special problems of resort condominiums).
Ch. 17C, *Time Sharing and Interval Ownership Arrangements*.
Ch. 18, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool*, § 18.05 (exemptions from registration).

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 5, Problems Relating to Special Types of Issuers Securities, § 5.17[4]* (Matthew Bender).

California Real Estate Law and Practice, Ch. 421, *Tax Factors in Construction and Development* , Ch. 425, *Regulation of Time-Share Developments* (Matthew Bender).

Ballantine & Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* , §§ 404-416 (nonprofit public benefit and mutual benefit corporations) (Matthew Bender).

Kessler, Simon & Winbert, Time Sharing in Resort Properties (Cal. C.E.B. Program Material 1981).

Merrit, Jr. & Smith, Condominiums in the 1980s (Cal. C.E.B. Program Material 1981).

Merritt, Jr., Guide to California Subdivision Sales Law, Ch. 4, *Additional Requirements for Common Interest and Other Special Subdivisions*, § 4.22 (Cal. CEB 1974).

Miller & Starr, Current Law of California Real Estate, Ch. 24, *Subdivisions and Condominiums*, § 24:5 (Bancroft-Whitney 1977).

Hanna, California Condominium Handbook With Forms, Ch. 12, *Resort Condominiums*, § 158 (Bancroft-Whitney

1975).



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[Reserved]

§§ 33A.07[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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§ 33A.10 General Description of Time-Share Projects

The concept of time-sharing basically involves the creation of long-term, exclusive rights to use and occupy real property for short-term, recurrent use periods. Units in time-share projects are almost always used as vacation dwellings. These projects are particularly popular in resort locations where real estate prices are high and visitors stay for brief, recurrent vacation periods, although the same conditions are making urban time-share projects increasingly attractive to rural residents and businesses. The types of facilities housing these projects vary considerably, and include condominiums, hotels, lodges, motels, apartment buildings, single-family residences, campgrounds, boats, and recreational vehicle parks.

Purchasers of time-share interests initially pay a one-time purchase price that is based on the length of their recurrent use periods. Because the terms of time-share projects are often 30 years or more, this purchase price pays for future vacations at today's rates. Thereafter, purchasers only pay a proportionate share of regular and special assessments for maintenance. Purchasers are free to sell or lease their interests, and exchange programs permit purchasers of interests in participating projects to exchange their use periods for the use of comparable projects in other locations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimeshares



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§ 33A.11 Scope and Application of VOTSA

[1] Projects That Must Be Registered

The Vacation Ownership and Time-Share Act of 2004 (VOTSA) [*Bus & Prof. Code § 11210 et seq.*] applies to all of the following [*Bus. & Prof. Code § 11211.5(a)*]:

- Time-share plans with an accommodation or component site in California [*see Bus. & Prof. Code § 11212(a), (f), (z)* (definitions)];
- Time-share plans without an accommodation or component site in California, if those plans are sold or offered for sale to any individual located in California;
- Exchange programs [*see Bus. & Prof. Code § 11212*(*l*) ("exchange program" defined)]; and
- Short term products [*see Bus. & Prof. Code § 11212(v)* ("short term product" defined)].

The application of VOTSA to single site time-share plans and component sites of multisite plans that are located outside California but offered for sale or sold in California is somewhat limited [*see Bus. & Prof. Code § 11211.5(d)*].

[2] Exempt Projects

VOTSA does not apply to any of the following [*Bus. & Prof. Code § 11211.5(b)*]:

- Time-share plans, whether or not an accommodation is located in California, consisting of 10 or fewer time-share interests.
- Time-share plans, whether or not an accommodation is located in California, the use of which extends over any period of three years or less.
- Time-share plans, whether or not an accommodation is located in California, under which the

prospective purchaser's total financial obligation will be equal to or less than $3,000 during the entire term of the time-share plan.

Use of an exchange program by owners of time-share interests to secure access to other accommodations does not affect the exemption described in the first bulleted item, *above* [*Bus. & Prof. Code § 11211.5(b)(1)*].

[3] Effect of VOTSA on Time-Share Plans Registered Before July 1, 2005

All registrations of time-share plans that were in effect on July 1, 2005, remain in full force and effect and will be considered registered pursuant to VOTSA [*Bus. & Prof. Code § 11219(b)(1)*]. These plans must fully comply with VOTSA when they seek amendment or renewal of their existing registrations. While an amendment or renewal is pending, the existing registration will continue in full force and effect [*Bus. & Prof. Code § 11219(b)(2)*].

Any existing injunction or temporary restraining order that prohibits unregistered practice of time-share developers, time-share plans, or their agents is not invalidated by the enactment of VOTSA and will continue to have full force and effect on and after July 1, 2005 [*Bus. & Prof. Code § 11219(c)*].

Time-share plans that are registered as Qualified Resort Vacation Club Projects under prior law will continue to operate under that law notwithstanding VOTSA [*Bus. & Prof. Code § 11219(a)*; *see* former *Bus. & Prof. Code §§ 10260-10265*].

[4] Applicability of Other Statutes to Time-Share Plans and Exchange Programs

[a] Davis-Stirling Common Interest Development Act

With specified exceptions, any time-share plan that is registered under VOTSA to which the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] might otherwise apply is exempt from the Davis-Stirling Act. The exceptions are related to, among other things, enforcing and amending governing documents, and operating of the association [*Bus. & Prof. Code § 11211.7(a)*; *see Civ. Code §§ 1354, 1355, 1355.5, 1356, 1357, 1358, 1361, 1361.5, 1362, 1363.05, 1364, 1365.5, 1370, 1371*; *see also* Ch. 33, *Contamination Considerations in Real Property Transactions*].

To the extent that a single site time-share plan or component site of a multisite time-share plan located in California is structured as a condominium or other common interest development, and there is any inconsistency between the applicable provisions of VOTSA and the Davis-Stirling Act, the applicable provisions of VOTSA will control [*Bus. & Prof. Code § 11211.7(b)(1)*].

To the extent that a time-share plan is part of a mixed use project where the time-share plan comprises a portion of a condominium or other common interest development, the applicable provisions of VOTSA will apply to that portion of the project uniquely comprising the time-share plan, and the Davis-Stirling Act will apply to the project as a whole [*Bus. & Prof. Code § 11211.7(b)(2)*].

[b] Statutes Governing Sales and Marketing Practices

The offering of any time-share plan, exchange program, incidental benefit, or short term product in California that is subject to VOTSA is exempt from all of the following [*Bus. & Prof. Code § 11211.7(c)(1)*]:

- Provisions of the Civil Code governing home solicitation sales [*see Civ. Code §§ 1689.5-1689.14*].
- Seminar sales [*see Civ. Code §§ 1689.20-1689.24*].

- Contracts for discount buying services [*see Civ. Code §§ 1812.100-1812.129*].

A developer or exchange company that, in connection with a time-share sales presentation or offer to arrange an exchange, offers a purchaser the opportunity to utilize the services of an affiliate, subsidiary, or third-party entity in connection with wholesale or retail air or sea transportation, must not, in and of itself, cause the developer or exchange company to be considered a seller of travel, so long as the entity that actually provides or arranges the air or sea transportation is registered as a seller of travel with the California Attorney General's office or is otherwise exempt from VOTSA [*Bus. & Prof. Code § 11211.7(c)(2)*; *see Bus. & Prof. Code §§ 17550-17550.34* (governing sellers of travel)].

[c] Subdivided Lands Act

Time-share plans, exchange programs, incidental benefits, and short term products that are subject to VOTSA are not "subdivisions" or "subdivided lands" subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11004.5(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsSecurities Registration



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§ 33A.12 Regulations Implementing VOTSA

The California Real Estate Commissioner has promulgated implementing regulations for VOTSA. These are set forth in *10 Cal. Code Reg. § 2805 et seq.* and are cited throughout this chapter when relevant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesSecurities LawBlue Sky LawsGeneral OverviewSecurities LawBlue Sky LawsOffer & Sale



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16-33A California Legal Forms--Transaction Guide § 33A.13

§ 33A.13 Definitions of Commonly Used VOTSA Terms

[1] "Accommodation"

An "accommodation" is any apartment, condominium or cooperative unit, cabin, lodge, hotel or motel room, or other private or commercial structure containing toilet facilities that is designed and available for residential use and occupancy by one or more individuals, or any unit or berth on a commercial passenger ship, that is included in the offering of a time-share plan [*Bus. & Prof. Code § 11212(a)*].

[2] "Component Site"

A "component site" is a specific geographic location where accommodations that are part of a multisite time-share plan are located. Separate phases of a time-share property in a specific geographic location and under common management are not deemed a component site [*Bus. & Prof. Code § 11212(f)*].

[3] "Developer"

"Developer" means and includes any person who creates a time-share plan or who offers time-share interests for disposition in the ordinary course of business [*Bus. & Prof. Code § 11212(i)*]. It includes any person, who at any point in time, owns or has an option or contract to acquire 11 or more time-share interests for purposes of sale in the ordinary course of business if the time-share interests were acquired or are to be acquired (1) from the original recipient of a public report for the time-share plan, or (2) from a person who succeeded to the interest of the original recipient in 11 or more time-share interests in a time-share plan [*10 Cal. Code Reg. § 2805*]. However, the term does not include either of the following [*Bus. & Prof. Code § 11212(i)*]:

- The developer's employees or agents who sell time-share interests on the developer's behalf, or employs agents to do the same; or

- Any person who succeeds to the interest of a developer by sale, lease, assignment, mortgage, or other transfer.

The developer must supervise, manage, and control all aspects of the offering of the time-share plan including, but not limited to, promotion, advertising, contracting, and closing. He or she is responsible for each plan registered with the Real Estate Commissioner and for the actions of any sales or marketing entity the developer utilizes in offering or selling a registered plan [*Bus. & Prof. Code § 11214(a)*].

[4] "Exchange Program"

An "exchange program" is any method, arrangement, or procedure for the voluntary exchange of time-share interests or other property interests. It does not include the assignment of the right to use and occupy accommodations to owners of time-share interests within a single site time-share plan [*Bus. & Prof. Code § 11212*(*l*)]. Any method, arrangement, or procedure that otherwise meets this definition in which the purchaser's total contractual financial obligation exceeds $3,000 per any individual, recurring time-share period, will be regulated as a time-share plan under VOTSA [*Bus. & Prof. Code § 11212*(*l*)]. For purposes of determining the purchaser's total contractual financial obligation, amounts to be paid as a result of renewals and options to renew will be included, except for the following [*Bus. & Prof. Code § 11212*(*l*)]:

- Amounts to be paid as a result of any optional renewal that a purchaser, in his or her sole discretion, may elect to exercise;

- Amounts to be paid as a result of any automatic renewal in which the purchaser has a right to terminate during the renewal period at any time and receive a pro rata refund for the remaining unexpired renewal term; or

- Amounts to be paid as a result of an automatic renewal in which the purchaser receives a written notice no less than 30 nor more than 90 days before the renewal date informing the purchaser of the right to terminate before the renewal date.

Notwithstanding these exceptions, if the purchaser's contractual financial obligation exceeds $3,000 for any three-year period of any renewal term, amounts to be paid as a result of that renewal will be included in determining the purchaser's total contractual financial obligation [*Bus. & Prof. Code § 11212*(*l*)].

An exchange program is not part of a time-share plan offering and, except with limited exceptions, is not subject to VOTSA or its implementing regulations [*Bus. & Prof. Code § 11216(a)*; *but see Bus. & Prof. Code §§ 11216(b)-(e), 11238(a)* (limited applicability)].

[5] "Incidental Benefit"

An "incidental benefit" is an accommodation, product, service, discount, or other benefit, other than an exchange program, that is offered to a prospective purchaser of a time-share interest before the rescission period ends the continuing availability of which for the use and enjoyment of owners of time-share interests in the time-share plan is limited to a term of not more than three years, subject torenewal or extension. An offer of the use of the accommodation, product, service, discount, or other benefit on a free or discounted one-time basis is not an incidental benefit [*Bus. & Prof. Code § 11212(m)*; *see Bus. & Prof. Code § 11238* (rescission period)].

[6] "Reservation System"

A "reservation system" is the method, arrangement, or procedure by which a purchaser, to reserve the use or occupancy of any accommodation of a multisite time-share plan for one or more time-share periods, is required to compete with other purchasers in the same multisite time-share plan, regardless of whether the reservation system is operated and maintained by the multisite time-share plan managing entity, an exchange company, or any other person. If a purchaser

is required to use an exchange program as the principal means of obtaining the right to use and occupy accommodations in a multisite time-share plan, that arrangement will be deemed a reservation system. When an exchange company utilizes a mechanism for the exchange of use o f time-share periods among members of an exchange program, that utilization is not a reservation system of a multisite time-share plan [*Bus. & Prof. Code § 11212(u)*].

[7] "Time-Share Instrument"

"Time-share instrument" refers to one or more documents, by whatever name denominated, creating or governing the operation of a time-share plan, including the declaration dedicating accommodations to the time-share plan [*Bus. & Prof. Code § 11212(w)*].

The time-share instrument cannot prohibit a person from seeking or obtaining, through any legal procedures, judicial partition of the time-share interest or sale of the time-share interest, in lieu of partition and must subordinate all rights that a time-share interest owner might otherwise have as a tenant-in-common in real property to the terms of the time-share instrument [*Bus. & Prof. Code § 11215(a)*]. However, this does not prohibit a sale of an accommodation on termination of a time-share plan or removal of an accommodation from the time-share plan in accordance with provisions of the time-share instrument [*Bus. & Prof. Code § 11215(b)*].

[8] "Time-Share Interest"

"Time-share interest" means and includes both of the following [*Bus. & Prof. Code § 11212(x)*]:

- A "time-share estate," which is the right to occupy a time-share property, coupled with a freehold estate or an estate for years with a future interest in a time-share property or a specified portion thereof; and

- A "time-share use," which is the right to occupy a time-share property, which right is neither coupled with a freehold interest, nor coupled with an estate for years with a future interest, in a time-share property.

For title purposes, each time-share estate, as described in the first bulleted item, *above*, constitutes a separate estate or interest in real property including ownership in real property for tax purposes [*Bus. & Prof. Code § 11213*].

[9] "Time-Share Period"

A "time-share period" is the period or periods of time when the purchaser of a time-share plan is afforded the opportunity to use the accommodations of a time-share plan [*Bus. & Prof. Code § 11212(y)*].

[10] "Time-Share Plan"

A "time-share plan" is any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership agreement, sale, lease, deed, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives ownership rights in or the right to use accommodations for a period of time less than a full year during any given year, on a recurring basis for more than one year, but not necessarily for consecutive years. A time-share plan may be either of the following [*Bus. & Prof. Code § 11212(z)*]:

- A "single site time-share plan," which is the right to use accommodations at a single time-share property; or

- A "multisite time-share plan," which includes either:

(1) A "specific time-share interest," which is the right to use accommodations at a specific time-share property, together with use rights in accommodations at one or more other component sites created by or acquired through the time-share plan's reservation system [*see 10 Cal. Code Reg. § 2805.9*]; or

(2) A "nonspecific time-share interest," which is the right to use accommodations at more than one component site created by or acquired through the time-share plan's reservation system, but including no specific right to use any particular accommodations.

[11] "Time-Share Property"

A "time-share property" is one or more accommodations subject to the same time-share instrument, together with any other property or rights to property appurtenant to those accommodations [*Bus. & Prof. Code § 11212(aa)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimeshares



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DIVISION II: REAL ESTATE TRANSACTIONS
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§ 33A.14 Registration of Time-Share Plans

[1] Registration Requirements

Any person who, to any individual located in California, sells, offers to sell, or attempts to solicit prospective purchasers to purchase a time-share interest, or any person who creates a time-share plan with an accommodation in California, must register the plan with the Real Estate Commissioner, unless the plan is otherwise exempt [*Bus. & Prof. Code § 11226(a)*; *see Bus. & Prof. Code § 11225* (exemptions)]. A developer, or any of its agents, may not sell, offer, or dispose of a time-share interest in the state [*Bus. & Prof. Code § 11226(b)*]:

- Unless all necessary registration requirements are provided and approved by the Real Estate Commissioner;
- Unless the sale, offer, or disposition is otherwise permitted by VOTSA; or
- While an order revoking or suspending a registration is in effect.

"Sells," "offers to sell," and "attempts to solicit prospective purchasers" include any written or oral communication that is disseminated or otherwise used in California for the purpose of inducing a resident to travel outside California for a required presentation with the primary intention of causing the person to purchase time-share interests located outside California [*10 Cal. Code Reg. § 2805.5*].

In registering a time-share plan, the developer must provide all of the following information [*Bus. & Prof. Code § 11226(c)*]:

- The developer's legal name, any assumed names, principal office street address, mailing address, primary contact person, and telephone number.
- The name of the developer's authorized or registered agent in California on whom claims can be served or service of process be had, the agent's street address in California, and the agent's telephone

number.

- The name, street address, mailing address, primary contact person, and telephone number of any time-share plan being registered.

- The name, street address, mailing address, and telephone number of any managing entity of the time-share plan.

- A public report that complies with the statutory requirements [*see Bus. & Prof. Code § 11234*], or, for a time-share plan located outside California, a public report that has been authorized for use by the appropriate regulatory agency in the state in which the plan is located and that contains disclosures (as determined by the Real Estate Commissioner) to be substantially equivalent to or greater than the information required to be disclosed under California law [*see Bus. & Prof. Code § 11234*].

- A description of the inventory control system that will ensure compliance with statutory requirements [*see Bus. & Prof. Code § 11250*].

- Any other information regarding the developer, time-share plan, or managing entities as established by regulation [*see 10 Cal. Code Reg. § 2805 et seq.*].

Other information that must be included and filed with the registration materials include (1) an estimated operating budget for the time-share plan [*see Bus. & Prof. Code § 11240*], and (2) a description of any incidental benefits that may be used by the developer [*Bus. & Prof. Code § 11237(b)*].

In addition, for each accommodation of the time-share plan, an applicant for a public report must present evidence of both of the following for each accommodation in each time-share property that is, or will be, offered for sale in California pursuant to the registration [*Bus. & Prof. Code § 11226(d)*]:

- That the accommodation is presently suitable for human occupancy or that financial arrangements have been made to complete construction or renovation of the accommodation to make it suitable for human occupancy on or before the first date for occupancy by a time-share interest owner; and

- That the accommodation is owned or leased by the developer of the time-share plan or is the subject of an enforceable option or contract under which the developer will build, purchase, or lease the accommodation.

The requirement in the second bulleted item notwithstanding, before receipt of the final public report, the developer must present evidence that the accommodation to be sold is owned or leased by the developer and that it is free and clear of encumbrances [*Bus. & Prof. Code § 11226(d)(2)*; *see Bus. & Prof. Code §§ 11244, 11255*].

If an accommodation in a time-share plan is located within a local governmental jurisdiction or subdivision of real property in which the dedication of accommodations to time-sharing is expressly prohibited by ordinance or recorded restriction, either absolutely or without a permit or other entitlement from the governing body, the applicant for a public report must present evidence of a permit or other entitlement issued by the appropriate authority [*Bus. & Prof. Code § 11226(e)*].

Registration will be effective only when the Real Estate Commissioner issued a public report. The issuance must occur no later than 60 calendar days after the Commissioner has received a properly completed registration application. If the application is deficient, a list of the deficiencies must be provided to the applicant within the same 60-day period [*Bus. & Prof. Code § 11231(a)*; *see § 33A.14[2]*].

[2] Public Report

[a] Preparation and Submission of Application

As part of the registration process, a developer must prepare a public report that fully and accurately discloses the facts concerning the developer and time-share plan that are required by VOTSA and its implementing regulations. The report must be provided to each purchaser of a time-share interest in any time-share plan at the time of purchase. It must be written and dated, and the purchaser must certify its receipt in writing [*Bus. & Prof. Code § 11234*].

There are different content requirements for the report depending on whether it is for (1) a single site time-share plan [*see Bus. & Prof. Code § 11234(a)*; *10 Cal. Code Reg. § 2809.1*; *see also Bus. & Prof. Code §§ 11226(g), 11274(f), 11275(b)*], (2) a specific time-share interest multisite time-share plan [*see Bus. & Prof. Code § 11234(a), (b)*; *10 Cal. Code Reg. §§ 2809.1, 2809.2*; *see also Bus. & Prof. Code §§ 11226(g), 11274(f), 11275(b)*], or (3) a nonspecific time-share interest multisite time-share plan [*see Bus. & Prof. Code § 11234(c)*; *10 Cal. Code Reg. § 2809.3*; *see also Bus. & Prof. Code §§ 11226(g), 11274(f), 11275(b)*]. An application for a time-share plan in which the use and occupancy of the time-share interest purchased is determined according to a point system must include additional information [*see Bus. & Prof. Code § 11233*].

For time-share plans located outside California, a public report may be used if the report (1) has been authorized for use by the situs state regulatory agency, and (2) contains disclosures as determined by the Real Estate Commissioner on review to be substantially equivalent to or greater than the information required to be disclosed pursuant to California law. When appropriate for the proposed development and with the commissioner's approval, a developer also may submit a public report that combines the information required by California statute with the information required for a public report issued by a regulatory agency in one or more other states [*Bus. & Prof. Code § 11234*]. On finding that the subject matter is otherwise adequately covered or the information is unnecessary or inapplicable, the Commissioner may waive any of the requirements for a public report application [*Bus. & Prof. Code § 11234(e)*].

Once the application for a public report has been completed, it must be signed by or on behalf of the person to whom the permit is to be issued or by an agent with appropriate written authorization on behalf of the person to whom the permit is to be issued. If executed within California, the information in the application and in accompanying documents submitted with it must be certified to be true under penalty of perjury or verified by a notary public. If executed outside California, the information in the application and accompanying documents must be verified before a person qualified to administer oaths in the jurisdiction where it is executed or certified under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5(b)* [*10 Cal. Code Reg. § 2809(b)*].

The properly prepared and executed application must be filed with the Department of Real Estate at its principal office in Sacramento along with the applicable fees [*10 Cal. Code Reg. § 2809(a)*; *see Bus. & Prof. Code § 11232*; *10 Cal. Code Reg. § 2810.5* (fees)].

The Real Estate Commissioner must issue a final public report if all registration requirements have been met and if all deficiencies and substantive inadequacies in the application for final public report have been corrected [*Bus. & Prof. Code § 11227(a)*]. Under some circumstances, the Commissioner may issue a conditional or preliminary public report before issuing a final report [*see Bus. & Prof. Code § 11227(b), (j)*].

The term of a final public report is five years, but may be renewed on application and submission of any additional information the Commissioner may require [*Bus. & Prof. Code § 11228*].

The Commissioner may refuse to issue a public report if the applicant fails to comply with any provisions of VOTSA and its implementing regulations [*Bus. & Prof. Code § 11229(b)*]. The developer may object to a refusal by filing a written request for a hearing within 30 days after receiving the order of denial. The hearing must be held within 20 days

after the request is received. If the hearing is not held within that time, or if a proposed decision is not rendered within 45 days after submission and an order adopting or rejecting the proposed decision is not issued within 15 days thereafter, the order of denial must be rescinded and a public report must be issued [*Bus. & Prof. Code § 11229(c)*].

[b] Conditional Public Report

A conditional public report may be issued before a final public report if (1) all deficiencies and substantive inadequacies in the substantially complete application for a final public report for the time-share plan have been corrected, (2) the material elements of the offering to be made under the authority of the conditional public report have been established, and (3) all requirements for issuing the conditional public report have been met, except for one or more of the following, as applicable [*Bus. & Prof. Code § 11227(b)*]:

- A final map has not been recorded.
- A condominium plan has not been recorded.
- A declaration of covenants, conditions, and restrictions has not been recorded.
- A declaration of annexation has not been recorded.
- A recorded subordination of existing liens to the time-share instruments or declaration of annexation or escrow instructions to effect recording before the first sale, are lacking.
- Filed articles of incorporation are lacking.
- A current preliminary report of a licensed title insurance company has not been provided, which reflects the filing of the final map and recording of the time-share instrument covering all time-share interests to be included in the public report.
- Other requirements the Commissioner determines are likely to be timely satisfied by the applicant.

The issuance of a conditional public report will enable the developer to market the time-share interests covered by the report, but no escrow can close until the final report has been issued [*see Bus. & Prof. Code § 11227(c), (e)*].

A prospective purchaser must be provided with a copy of the conditional public report and a written statement that includes all of the following information [*see Bus. & Prof. Code § 11227(f)*]:

- Specification of the information required for issuance of a final public report;
- Specification of the information required in the final public report that is not available in the conditional public report, along with a statement of the reasons why that information is not available when the conditional public report is issued;
- A statement that no person acting as a principal or agent will sell or lease, or offer for sale or lease, time-share interests in a time-share plan for which a conditional public report has been issued except as provided in VOTSA; and
- Specification that no escrow can close until a final public report has been issued [*see Bus. & Prof. Code § 11227(e)*].

[c] Preliminary Public Report

The Real Estate Commissioner may grant a 12-month preliminary public report allowing the developer to begin offering and selling time-share interests, in a time-share plan regardless of whether the accommodations of the time-share plan are located inside or outside California, while the registration is pending. One additional 12-month period may be granted if the developer is actively and diligently pursuing registration. The preliminary public report will automatically terminate with regard to those time-share interests covered by a final public report that is issued before the scheduled termination date of the preliminary report [*Bus. & Prof. Code § 11227(j)*].

[d] Abandonment of Application for Public Report

The Real Estate Commissioner may abandon an application for a final, conditional, amended, or renewed public report if [*10 Cal. Code Reg. § 2809.5(a)*]:

- The information required for a properly completed application for registration and public report has not been furnished within three years from the date a notice of intention was filed for the public report [*see Bus. & Prof. Code §§ 11226, 11234*];

- Six months have elapsed, without communication from the developer, since the Commissioner gave notice of deficiencies or substantive inadequacies contained in the documents that are required to make the filing substantially complete and the deficiencies and inadequacies have not been corrected by the applicant; and

- The term of any one-year extension of time to complete the application has elapsed [*see 10 Cal. Code Reg. § 2809.5(d)*].

Ninety days before abandoning an application the Commissioner must mail to the developer and the developer's designated representative, notice of the Commissioner's intent to abandon the application. The notice must include a statement that the developer may file a petition to keep the application open [*10 Cal. Code Reg. § 2809.5(b)*]. Sixty days or more after the notice is mailed, the Commissioner may issue a final notice of intention to abandon the application. The application will be deemed abandoned 30 days after the final notice is mailed to the developer and the developer's designated representative unless, before the 30-day period expires, a one-year extension is granted [*10 Cal. Code Reg. § 2809.5(c)*].

The Commissioner, on his or her own motion, or after receiving a petition from the developer or the developer's designated representative, may, under the following terms and conditions, grant a one-year extension to allow the developer to complete the application [*10 Cal. Code Reg. § 2809.5(d)*]:

- The petition is received before the 30-day notice "deemed abandoned" period expires; and

- The petition sets forth reasons of hardship or justifiable extenuating circumstances explaining why the file has been inactive.

Hardship and justifiable extenuating circumstances include mistake, inadvertence, surprise, excusable neglect, or circumstances beyond the developer's control.

Written notice of the decision to grant or deny the petition will be mailed or delivered to the developer and the developer's designated representative, within 30 calendar days after receipt of the petition [*10 Cal. Code Reg. § 2809.5(d)*].

The Commissioner may grant one or more one-year extensions, provided that the application has not been abandoned [*10 Cal. Code Reg. § 2809.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsSecurities Registration



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§ 33A.15 Prohibited Marketing Practices

VOTSA includes numerous, specific prohibitions on marketing practices related to misrepresentation of information and failure to give disclosures required to be made to prospective purchasers [*see Bus. & Prof. Code § 11245(a)*; *but see Bus. & Prof. Code § 11217* (types of communications that are exempt from VOTSA)]. A violation constitutes a public offense punishable by fine, imprisonment, or both [*see Bus. & Prof. Code § 11287*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleGeneral OverviewSecurities LawBlue Sky LawsOffer & Sale



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§ 33A.16 Sale of Time-Share Interests

VOTSA imposes requirements for contracts pertaining to the sale of time share interests. The requirements relate to obvious information such as price, estimated completion date, and a description of the interest being sold [*see Bus. & Prof. Code § 11238(d)*]. Also required is a statutorily-prescribed notice of the purchaser's seven-day right to cancel the contract [*see Bus. & Prof. Code § 11238(d)(7)*; *see also Bus. & Prof. Code § 11238(a)*], and provisions related to disbursements or charges to be made against purchase money for payments to third parties for such things as credit reports, escrow services, preliminary title reports, appraisals, and loan processing services [*see Bus. & Prof. Code § 11256(b)*].

Any person offering to sell or lease any interest that is subject to registration under VOTSA must make a copy of the following documents available for examination by a prospective purchaser or lessee before an offer to purchase or lease is executed [Bus. & Prof. Code § 11226.1]:

- The declaration of covenants, conditions, and restrictions for the time-share plan;
- The owners' association's articles of incorporation or association;
- The association's bylaws; and
- Any other instrument that establishes or defines the common, mutual, and reciprocal rights and responsibilities of the owners or lessees in the time-share plan as members of the owners' association or otherwise.

A copy of these documents must also be given to each purchaser or lessee as soon as practicable before the interest being acquired is transferred [Bus. & Prof. Code § 11226.1].

If a purchaser of a time-share interest is offered the opportunity to acquire an incidental benefit, the developer must provide the purchaser with a disclosure statement containing information about that benefit [*see Bus. & Prof. Code § 11237(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleGeneral Overview



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§ 33A.17 Time-Share Plan Requirements

[1] One-to-One Purchaser to Accommodation Ratio

A time-share plan may be created in any accommodation unless otherwise prohibited. All time-share plans must maintain a one-to-one purchaser to accommodation ratio, which means the ratio of the number of purchasers eligible to use the accommodations of a time-share plan on a given night to the number of accommodations available for use within the plan on that night, such that the total number of purchasers eligible to use the accommodations of the time-share plan during a given calendar year never exceeds the total number of accommodations available for use in the time-share plan during that year [*Bus. & Prof. Code § 11250*]. For purposes of this calculation, each purchaser must be counted at least once, and no individual accommodation may be counted more than 365 times per calendar year or more than 366 times per leap year. A purchaser who is delinquent in paying time-share plan assessments will continue to be considered eligible to use the accommodations for purposes of calculating the ratio [*Bus. & Prof. Code § 11250*].

[2] Documents Required to Be Recorded Before Closing of First Sale

In the case of a single site time-share plan and component sites of a multisite time-share plan located in California, covenants dedicating the accommodations to the time-share plan and incorporating all covenants of the grantor or lessor of the time-share interests, and including provisions as specified by statute, must be recorded before closure of the first sale of a time-share interest in each accommodation in the plan [*Bus. & Prof. Code § 11251(a)*]. The statutorily-required provisions include the following [*Bus. & Prof. Code § 11251(a)*]:

- The organization of an association of time-share interest owners.

- A description of the real property for the common ownership or use of the time-share interest owners.

- A description of the method for calculating and collecting regular and special assessments from time-share interest owners to defray expenses of the time-share property and for related purposes.

- A description of the method for terminating the membership and selling the interest of a time-share

interest owner for failure to pay regular or special assessments.

- A description of the method for disciplining time-share interest owners for late payment of assessments.

- Provisions requiring comprehensive general liability insurance and adequate property and casualty insurance covering the time-share property.

- Restrictions on partitioning an accommodation of the time-share plan.

- A description of the method for amending the covenants affecting the time-share plan.

- When applicable, a description of the method related to annexing or de-annexing additional accommodations, phases, or properties to the time-share plan.

- A description of the procedures to be used in the event of condemnation, destruction, or extensive damage to an accommodation, including provisions for the disposition of insurance proceeds or damages payable on account of damage or condemnation.

- The procedures to be employed on regular termination of the time-share plan.

- When applicable, allocation of the cost of maintenance and operation between different elements or mixed uses within the portions of a project or related to reciprocal rights and obligations between the time-share project and other property.

- A description of the method for entering accommodations of the time-share plan under authority granted by the association to clean, service, maintain, and repair (including emergency repairs) and to abate a nuisance or a known or suspected dangerous or unlawful activity.

- Delineation of all of the developer's reserved rights.

Insofar as reasonably possible, the covenants must be binding on subsequent owners [*Bus. & Prof. Code § 11251(a)(15)*; *see Civ. Code §§ 1468-1470*].

[3] Provisions Required in Time-Share Documents

In the case of a single site time-share plan and component sites of a multisite time-share plan located in California, the time-share instruments must describe, among other things, all of the following [*Bus. & Prof. Code § 11251(c)*]:

- The services to be made available to time-share interest owners under the time-share plan.

- The procedures regarding transfer to the association of control over the time-share property and services comprising the time-share plan.

- The preparation method and the means of making available to interest owners of the budget, financial statements, and other information related to the time-share plan.

- The methods for employing and for terminating the employment of the plan's managing entity.

- The method for adopting standards and rules of conduct for the accommodations by interest owners.

- The method for establishing the rights of time-share interest owners to the use of an accommodation according to schedule or under a first-reserved, first-served priority system.

- The method for compensating use periods or monetary compensation for an owner of a time-share estate if an accommodation cannot be made available for the period of use to which the owner is entitled by schedule or under a reservation system because of an error by the association or managing entity.

- The method for the use of accommodations for transient accommodations or other income-producing purpose during periods of nonuse by interest owners.

- The method for the inspection of the books and records of the association by interest owners.

- The method for collective decisionmaking and the undertaking of action by or in the name of the association including, when applicable, representation of time-share accommodations in an association for the time-share in which the accommodations are located.

The instruments must also require that insurance against property damage and third party liability that meets statutory specifications be maintained and in force to protect the interest owners [*see Bus. & Prof. Code § 11253*].

[4] Plans Offering Time-Share Use Interests

Each of the accommodations in a time-share plan offering time-share use interests must be conveyed to a trustee or to an association that is acceptable to the Real Estate Commissioner before escrow for the closing of the first sale of a time-share use interest that entitles the purchaser to occupy the accommodation in question [*Bus. & Prof. Code § 11255(a)*]. A "time-share use" is the right to occupy a time-share property, which right is neither coupled with a freehold interest, nor coupled with an estate for years with a future interest [*Bus. & Prof. Code § 11212(x)(2)*].

If the accommodation offering time-share use interests in a time-share plan that is free and clear of blanket encumbrances, other than a current property tax lien, is conveyed to a trustee or an association, the trust or association instruments must include specified provisions, and the plan must comply with other requirements [*see Bus. & Prof. Code § 11255(b)-(g)*].

[5] Voting Requirements to Amend Time-Share Instruments

The declaration or another document that establishes the time-share plan may not be amended without the vote or written assent of at least 25 percent of the voting power of the association residing in members other than the developer [*Bus. & Prof. Code § 11266(a)*].

Amending the articles of incorporation or association requires the vote or written assent of at least 25 percent of the governing body and 25 percent of the voting power of the association residing in members other than the developer [*Bus. & Prof. Code § 11266(b)*].

Amending the association's bylaws requires the vote or written assent of at least 10 percent of the voting power of the association residing in members other than the developer [*Bus. & Prof. Code § 11266(c)*].

The association's rules and regulations may not be amended without the vote or written assent of at least a majority of the governing body of the association [*Bus. & Prof. Code § 11266(d)*].

The percentage of the voting power necessary to amend a specific clause or provision in the time-share instrument,

articles, or bylaws cannot be less than the prescribed percentage of affirmative votes or written assents required for action to be taken under that clause [*Bus. & Prof. Code § 11266(e)*].

In addition to the above restrictions on enacting amendments of the governing instruments, the governing instruments may include provisions consistent with *Bus. & Prof. Code § 11269(c)*, whereby the vote of the developer must be given effect [*Bus. & Prof. Code § 11266(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral Overview



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§ 33A.18 Association of Time-Share Interest Owners

[1] Members and Voting

The time-share interest owners are members of an association. A member of an association, including associations that provide for unequal assessments against members, is entitled to one vote for each time-share interest owned [*Bus. & Prof. Code § 11269(a)*]. In the initial stages of a time-share plan, there may be two classes of members for voting purposes. Each time-share interest owner other than the developer of the plan is a class "A" member. If a time-share interest is owned by more than one person, each interest owner is a class "A" member, but only one vote may be cast for each interest. The developer is the class "B" member and has one vote for each time-share interest he or she owns that has been authorized to be offered for sale by the public report. Class "B" membership will be automatically converted to class "A" membership, and (and therefore cease to exist) when the total outstanding votes held by the class "B" member falls below 20 percent of the association's total voting power [*Bus. & Prof. Code § 11269(b)*].

A form of proxy may be distributed to each member to afford him or her the opportunity to vote in absentia at a membership meeting provided that it meets the requirements for a written ballot and includes the name or names of members who expect to be in attendance in person at the meeting to whom the proxy is to be given [*Bus. & Prof. Code § 11268(h)*; *see Bus. & Prof. Code § 11268(f)(4)* (written ballot requirements)].

[2] Membership Meetings

[a] Regular Meetings

Time-share instruments must provide for regular membership meetings unless it is impracticable because of the number of association members, their places of residence in relation to each other, the international nature of the offering, or other factors. The first regular meeting must be scheduled not later than one year after the closing of the escrow for the first sale of a time-share interest or completion of construction, whichever occurs first. Thereafter, regular membership meetings should be scheduled at least once a calendar year at a time and place to be fixed by the bylaws or by resolution of the governing body [*Bus. & Prof. Code § 11268(a)*].

[b] Special Meetings

The time-share plan instruments must provide for special meetings of the association to be promptly called by the governing body on either [*Bus. & Prof. Code § 11268(b)*]:

- The vote of a majority of the governing body; or

- Receipt of a written request signed by members representing at least 5 percent of the voting power of the association residing in members other than the developer.

[c] Location of Meetings

Meetings must be held in a place that is readily accessible at reasonable cost to the largest possible number of members [*Bus. & Prof. Code § 11268(c)*].

[d] Notice of Meetings

Written notice of regular and special meetings must be given by first-class mail not less than 14 and not more than 90 days before the scheduled meeting date. The notice, whether for a regular or special meeting, must specify the meeting time and place and a brief statement of the matters that the governing body intends to present, or believes that others will present, for action by the members [*Bus. & Prof. Code § 11268(d)*].

[e] Quorum Requirements

The association bylaws must establish the quorum for a meeting of members at not less than five percent nor more than 33 1/3 percent, of the voting power of the association residing in members other than the developer, represented in person or by proxy. In the absence of a quorum, no business can be conducted and the presiding officer must adjourn the meeting *sine die* [*Bus. & Prof. Code § 11268(e)(1), (2)*]. If less than one-third of the total voting power of the association is in attendance, in person or by proxy, at a regular or special meeting of the association, only those matters included in the notice of meeting may be voted on [*Bus. & Prof. Code § 11268(e)(3)*].

[3] Action Without Meeting

Any action that may be taken at any regular or special meeting of members may be taken without a meeting provided [*Bus. & Prof. Code § 11268(f)*]:

- A written ballot is distributed to every member entitled to vote setting forth the proposed action, providing an opportunity to signify approval or disapproval of the proposal, and providing a reasonable time for the members to return the ballot to the association;

- The number of votes cast by ballot within the specified time period equals or exceeds the quorum required to be present at a meeting authorizing the action;

- The number of approvals of the action equals or exceeds the number of votes required to approve the action at a meeting at which the total number of votes cast was the same as the number of votes cast by written ballot; and

- The written ballot distributed to members affords an opportunity to specify a choice between approval and disapproval of each order of business proposed for action, and provides that the vote of the members will be cast in accordance with the choice specified.

Legal Topics:

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§ 33A.19 Governing Body

[1] Election of Directors

The governing body of the association must consist of three directors for an association that does not contemplate more than 100 members, and either five or seven directors for an association that contemplates more than 100 members [*Bus. & Prof. Code § 11270(a)*].

The first governing body must consist of directors appointed by the developer. The developer may change the designated board member without the need of any further consent by the association. However, the term of the applicable director's seat on the governing body will not be affected by that change. These directors will serve until the first association meeting at which time there will be an election of all of the directors [*Bus. & Prof. Code § 11270(b)(1), (d)*]. The bylaws of the association may provide that governing body members may be elected by written ballot [*Bus. & Prof. Code § 11268(g)*].

The governing instruments must establish a procedure to assure that at the first election of the governing body, and at all times thereafter, at least one of the incumbent directors has been elected solely by the votes of members other than the developer [*Bus. & Prof. Code § 11270(b)(2)*]. The terms of office of governing body members may be staggered provided that no person may serve a term of more than three years without standing for reelection [*Bus. & Prof. Code § 11270(c)*].

[2] Meetings

[a] Regular Meetings

Regular meetings of the governing body must be held as prescribed in the bylaws, but not less frequently than annually [*Bus. & Prof. Code § 11271(a)*].

[b] Special Meetings

A special meeting of the governing body may be called by written notice signed by any two directors. The notice must

specify the time and place of the meeting and the nature of any special business to be considered. The notice must be in writing, which includes facsimile, email, and other forms of written or electronic communication, to directors not less than 14 days before the meeting. However, notice of the meeting is not required to be given to any director who signed a waiver of notice or a written consent to the holding of the meeting [*Bus. & Prof. Code § 11271(c)*].

[c] Time, Place, and Conduct of Meetings

Both regular and special meetings must be held in or near the time-share location unless a meeting at another location would significantly reduce the cost to the association or the inconvenience to directors. If the time and place of the regular meeting is not fixed by the governing instruments, notice of the time and place must be communicated in writing, which includes facsimile, email, and other forms of written or electronic communication, to directors not less than 14 days before the meeting. However, notice of a meeting is not required to be given to any director who has signed a waiver of notice or a written consent to the holding of the meeting [*Bus. & Prof. Code § 11271(b)*]. A bare majority of the total number of authorized directors will constitute a quorum [*Bus. & Prof. Code § 11271(e)*].

Regular and special meetings of the governing body must be open to all association members, but only directors may participate in any deliberations or discussions, unless the directors expressly authorize otherwise. With the approval of a majority of a quorum of its members, the governing body may adjourn a meeting and reconvene in executive session to discuss and vote on personnel matters, litigation in which the association is or may become involved, and orders of business of a similar nature. The nature of any and all business to be considered in executive session must first be announced in open session [*Bus. & Prof. Code § 11271(d)*].

The governing instruments must provide for reimbursement by the association for transportation expenses incurred and reasonable per diem payments to directors for attending regular and special meetings of the governing body [*Bus. & Prof. Code § 11271(f)*].

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§ 33A.20 Members' Access to Association Records

[1] Information That Must Be Provided to Members

The following information concerning the time-share plan must be made available to all members [*Bus. & Prof. Code § 11272(a)*]:

- Proposed budget, or a summary of the proposed budget with a notice that the full budget will be made available on request [*see Bus. & Prof. Code § 11272(b)*; *see also Bus. & Prof. Code § 11240* (required contents of proposed budget)].

- Annual audited financial statement, which must include specified information [*see Bus. & Prof. Code § 11272(a)(2)(A)-(E)*].

- Annual meeting agenda.

[2] Availability of Other Association Records

The books of account, minutes of members and governing body meetings, and all other records of the time-share plan maintained by the association or the managing entity must be made available for inspection and copying by any member, or by his or her duly appointed representative, at any reasonable time for a purpose reasonably related to membership in the association [*Bus. & Prof. Code § 11273(a)*]. Every director has an absolute right at any time to inspect all association books, records, and documents, and all real and personal properties owned and controlled by the association [*Bus. & Prof. Code § 11273(d)*].

The records must be made available at the office where they are maintained. However, on written request from a member along with the fee prescribed by the governing body to defray the costs of reproduction, the managing entity or other custodian of association records or the time-share plan must transmit to the member a copy of any and all records requested [*Bus. & Prof. Code § 11273(b)*].

The association is required to maintain a complete list of the names and addresses of all owners of time-share interests.

The list must be updated no less frequently than every six months. Unless otherwise provided in the time-share instruments, the association may not publish the owner's list or provide a copy of it to any time-share interest owner or third party, or use or sell the list for commercial purposes [*Bus. & Prof. Code § 11273(e)*].

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§ 33A.21 Assessments

[1] Regular Assessments

For single site time-share plans and component sites of a specific time-share interest multisite time-share plan, regular assessments to defray the expenses of maintaining the time-share property and operating the time-share plan will be levied against each time-share interest owner. The assessment's amount is based on the ratio that the number of time-share interests owned by a time-share interest owner assessed bears to the total number of time-share interests subject to assessment. Regular assessments, however, cannot exceed the amount necessary to defray the estimated expenses for which the assessments are levied [*Bus. & Prof. Code § 11265(a)(1)*]. Alternatively, the assessment against each owner may be determined according to a formula or schedule under which assessments against each time-share interest owner are equitably apportioned in accordance with operational and maintenance costs attributable to each time-share interest owner [*Bus. & Prof. Code § 11265(a)(2)*].

All time-share interests in the time-share plan for which a public report has been issued including those time-share interests held by the developer are subject to regular and special assessments [*Bus. & Prof. Code § 11265(a)(4)*].

The governing body may be authorized to impose, without the vote or written assent of the association, a regular annual assessment per time-share interest that is as much as 20 percent greater than the regular annual assessment for the preceding fiscal year. An increase of more than 20 percent requires the vote or written assent of a majority of the voting power of the association residing in members other than the developer. An increase in the annual property tax assessment against accommodations of the time-share property must be excluded in determining the 20 percent threshold [*Bus. & Prof. Code § 11265(a)(5)*].

Regular assessments against all of the time-share interests must commence on the same date, which is the first day of the month following the closing of the escrow of the first sale of a time-share interest in the plan. However, commencement may be delayed to the later of (1) the date of commencement of time-share interest owners' occupancy rights in the accommodation, or (2) a date that is not more than six months later than the date of closing of the first sale that involved a right to use the accommodation [*Bus. & Prof. Code § 11265(a)(7)*].

Regular assessments are exempt from execution by a judgment creditor of the association only to the extent necessary for the association to perform essential services, such as paying for utilities and insurance. In determining the appropriateness of an exemption, a court must ensure that only essential services are protected. The exemption does not apply to any consensual pledges, liens, or encumbrances that have been approved by the owners of the association, constituting a quorum, casting a majority of the votes at an association meeting or election, or to any state tax lien, or any lien for labor or materials supplied to the common area [Bus. & Prof. Code § 11265.1(b)].

The association must provide notice, by first class mail, to the time-share interest owners of any increase in regular assessments, not less than 30 days nor more than 60 days before the increased assessment becomes due [Bus. & Prof. Code § 11265.1(c)].

[2] Special Assessments

A special assessment is levied on the same basis as that prescribed for a regular assessment, except when the special assessment is levied against a time-share interest owner to reimburse the association for costs incurred in bringing the owner into compliance with the governing instruments [*Bus. & Prof. Code § 11265(a)(3)*; *see Bus. & Prof. Code § 11265(a)(6)(C)*].

With limited exceptions, special assessments may not be imposed without the vote or written assent of a majority of the voting power of the association residing in members other than the developer [*Bus. & Prof. Code § 11265(a)(6)*].

The association must provide notice, by first class mail, to the time-share interest owners of any increase in special assessments, not less than 30 days nor more than 60 days before the increased assessment becomes due [Bus. & Prof. Code § 11265.1(c)].

Legal Topics:

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§ 33A.22 Association's Authority to Enforce Time-Share Instruments, Rules, and Regulations

[1] Discipline Short of Forfeiture

If the owner or the owner's guests or persons under his or her control violate the time-share instrument or operating rules and regulations, the association itself may be authorized to impose a monetary penalty, suspend a time-share interest owner's right to use an accommodation or other facility that is part of the time-share plan, or take other appropriate disciplinary action, short of the forfeiture of the time-share interest owner's right, title, and interest plan [*Bus. & Prof. Code § 11274(c)*]. Violations include, but are not limited to, the following [*Bus. & Prof. Code § 11274(c)(1)-(4)*]:

- Failing to vacate an accommodation at the end of the owner's use period.
- Damaging an accommodation or any other real or personal property that is part of the time-share plan.
- Permitting a time-share interest to be subject to a lien (other than the lien of nondelinquent real property taxes or assessments), claim, or charge that could result in the sale of time-share interests of other owners.
- Creating a disturbance that interferes with other owners' use and enjoyment of the time-share plan's facilities.

Before the association can impose disciplinary action, the owner against whom the action is proposed to be taken must be given 30-days' prior written notice and the opportunity to present a written or oral defense to the charges. The association's governing body will decide whether the owner's defense must be oral or written, and the owner must be notified of the decision of the association's governing body before disciplinary action is taken [*Bus. & Prof. Code § 11274(d)*].

The association may delegate to the managing entity the power and authority to carry out disciplinary actions duly

imposed by the governing body [*Bus. & Prof. Code § 11274(e)*].

[2] Forfeiture of Owner's Right, Title, or Interest in Time-Share Plan

An association is not authorized to cause the absolute forfeiture of a time-share interest owner's right, title, or interest in the time-share plan due to the owner's failure to comply with provisions of the time-share instruments or the rules and regulations for the time-share plan except pursuant to either of the following [*Bus. & Prof. Code § 11274(a)*]:

- The judgment of a court or the decision of an arbitrator as provided in the time-share instrument; or
- A foreclosure or sale under a power of sale for the failure of a time-share interest owner to pay assessments duly levied by the association.

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§ 33A.23 Delinquent Assessments

[1] Governing Body's Power to Suspend Rights and Privileges

The governing body may be authorized to suspend an owner's right to occupy the accommodation, and all related rights and privileges as an owner, during the period of time that the owner is delinquent in the payment of regular or special assessments [*see § 33A.21*] or other charges duly levied by the association. The owner must be given written notice of the suspension of his or her rights and privileges immediately after the decision to suspend has been made [Bus. & Prof. Code § 11274(b)].

[2] Collecting Delinquent Assessments

Regular and special assessments are delinquent 30 days after they become due unless the time-share instrument provides a longer time period. If an assessment is delinquent, the association may recover the following [Bus. & Prof. Code § 11265.1(a)]:

- Reasonable costs incurred in collecting the delinquent assessment, including attorneys' fees;
- A late charge not exceeding 10 percent of the assessment or $10, whichever is greater, unless the time-share instrument specifies a smaller amount; and
- Interest on the delinquent assessment, reasonable fees and costs of collection, and reasonable attorneys' fees.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 33A.24 Managing Entity

The association is required to employ a managing entity for the time-share plan or component site pursuant to a written agreement that includes provisions required by statute [*see Bus. & Prof. Code § 11267(a)*].

Legal Topics:

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§ 33A.25 Resolution of Disputes Between Time-Share Interest Owners or Association and Developer

Any procedure provided for in a sales contract implemented on or after July 1, 2005, or in the time-share instruments implemented on or after July 1, 2005, for resolving a dispute or claim between a time-share interest owner and a developer, or any provision in the time-share instruments implemented on or after July 1, 2005, setting forth terms, conditions, and procedures for resolving a dispute of a claim between an association and the developer, must, at a minimum, provide that the dispute or claim resolution process be conducted in accordance with the following statutorily-prescribed rules [*Bus. & Prof. Code § 11275(a)*]:

- The developer must advance the fees necessary to initiate the dispute or claim resolution process, with the costs and fees, including ongoing costs and fees, if any, to be paid as agreed by the parties. If they cannot agree, then the costs and fees are to be paid as determined by the person or persons presiding at the dispute or claim resolution proceeding or hearing.

- There must be a neutral or impartial person to administer and preside over the claim or dispute resolution process.

- The selection of the person who will administer and preside over the claim or dispute resolution process must be made within a specified period of time, which in no event must be more than 60 days from initiation of the claim or dispute resolution process. The person selected may be challenged for bias.

- The venue of the claim or dispute resolution process must be in the county where the time-share is located unless the parties agree to some other location.

- The claim or dispute resolution process must be commenced in a prompt and timely manner.

- The claim or dispute resolution process must be conducted in accordance with rules and procedures that are reasonable and fair to the parties.

- The claim or dispute resolution process must conclude in a prompt and timely manner, including the issuance of any decision or ruling.

- The person presiding at the claim or dispute resolution process must be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the proceeding or hearing. The parties may authorize the limitation or prohibition of punitive damages.

If the claim or dispute resolution process provides or allows for a judicial remedy in accordance with California law, it will be presumed that the proceeding or hearing satisfies the provisions listed above [*Bus. & Prof. Code § 11275(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsReal Property LawCommon Interest CommunitiesTimeshares



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§ 33A.26 Investigation of Violations and Enforcement of VOTSA

The Real Estate Commissioner is responsibility for investigating violations of VOTSA and enforcing its provisions [*see Bus. & Prof. Code §§ 11282-11284*].

Violations of specified provisions of VOTSA are public offenses punishable by fine and/or imprisonment [*see Bus. & Prof. Code §§ 11286, 11287*].

Legal Topics:

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§ 33A.27 Owners' and Association's Right to Relief

Any time-share interest owner or association may bring an action for damages or injunctive or declaratory relief for a violation of VOTSA. The action may be brought against a developer, seller, or marketer of time-share interests, or an escrow holder, or the managing entity. This right to relief does not exclude other remedies provided by law [*Bus. & Prof. Code § 11285*].

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§ 33A.28 Securities Regulation

[1] Federal Requirements

Although a detailed discussion of federal securities regulation is beyond the scope of this chapter, the attorney should be aware that time-share interests may be considered securities and therefore subject to registration under the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*]. In general, federal securities registration will be required when the time-share project offers some type of investment contract, which is basically a scheme whereby a purchaser invests money in a common enterprise with the expectation that profits will result solely from the efforts of others [*see SEC v. W. J. Howey Co. (1946) 328 U.S. 293, 90 L. Ed. 244, 66 S. Ct. 1100* ; *see also United States Housing Foundation v. Forman (1975) 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621]* . Investment contracts entered into in connection with the purchase of a time-share interest commonly involve a rental pool or similar arrangement under which a managing agent leases the owners' units to third parties for the benefit of the owners. However, most time-share offerings do not include investment contracts, because the time-share interests are purchased primarily for the personal use and enjoyment of the purchasers, and not for profit or investment; thus, federal securities registration is usually not required.

For a detailed discussion of this subject, see Rohan & Reskin, Condominium Law & Practice, Ch. 18, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool* (Matthew Bender).

[2] State Requirements

A time-share interest in a time-share plan is an interest in subdivided lands or a subdivision. Therefore, the interest is exempt from registration provisions of the Corporate Securities Law of 1968 [*Bus. & Prof. Code § 11218*], unless an investment contract is sold or offered for sale with, or as part of, the time-share interest [*see Corp. Code § 25100(f)*]. An investment contract for purposes of the Securities Law is one that contemplates the entrusting of money or other capital to another, with the expectation that a profit or income will be derived from the capital through the efforts of other persons [*see* Corp. Code § 25109; *Oil Lease Service, Inc. v. Stephenson (1958) 162 Cal. App. 2d 100, 109, 327 P.2d 628]* .

In considering whether state securities registration is required, the attorney should apply the risk capital analysis set

forth by the *California Supreme Court in Silver Hills Country Club v. SobieskiSilver Hills Country Club v. Sobieski [(1960) 55 Cal. 2d 811, 815, 361 P.2d 906]* . In that case, memberships in a proposed country club were considered securities because the purchasers were contributing "risk capital" that would be used to construct the facilities of the project, in the hope that the project would be completed and that a future benefit would arise. Note that the benefit was a mere right to use the facilities, rather than the receipt of profit or income. For further discussion of this case, see Marsh & Volk, *Practice Under the California Securities Laws, Ch. 5, Problems Relating to Special Types of Issuers Securities, § 5.19[1][c], [4]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawSubdivisionsState RegulationSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsSecurities RegistrationSecurities LawExemptions From RegistrationGeneral Overview



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§ 33A.29 Taxation

[1] Owners' Association

An owners' association for a time-share project may qualify for tax-exempt status under either or both *I.R.C. § 528* and *Rev. & Tax. Code § 23701t*. For a discussion of these statutes, see *Ch. 34, Condominiums, § 34.46*.

[2] Purchasers

Because a time-share estate consists in part of an actual fee interest in the project, an owner of this type of interest must pay a proportionate share of federal income taxes and state and local property taxes, and is entitled to a proportionate share of all applicable deductions. The amount of these taxes and deductions will depend on the type of real property involved [*see, e.g. Ch. 34, Condominiums, § 34.47*]. Obviously, purchasers of time-share uses will not pay these taxes because they do not acquire ownership interests in the units or projects.

The owner of a time-share estate in a room or rooms in a time-share project, and the owner's guests, are exempt from any tax levied by the local legislative body on the privilege of occupying a room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging [*Rev. & Tax. Code § 7280(b)*; *see Rev. & Tax. Code § 7280(a)*; *see also Rev. & Tax. Code § 7280(b)(1)-(3)* (definitions)]. However, a city or county may collect a transient occupancy tax from time-share projects that were in existence as of May 1, 1985, provided the projects were then subject to such a tax imposed by a local ordinance duly enacted prior to that date [*Rev. & Tax. Code § 7280(d)*].

[3] Developers

A detailed discussion of the federal income tax liabilities of developers of time-share projects is beyond the scope of this chapter. However, the attorney/advisor should be aware that the developer of a time-share use project will probably be required to include the entire purchase price of each interest in the year of receipt or accrual, while most expenses will not be deductible until they are paid or incurred [*see Treas. Reg. § 1.61-8(b)*; *see also Schlude v. Comm'r (1963) 372 U.S. 128, 136-137, 83 S. Ct. 601, 9 L. Ed. 2d 633]* . For a detailed discussion of the income tax aspects of the development and construction of real property, see California Real Estate Law & Practice, Ch. 421, *Tax Factors in Construction and Development* (Matthew Bender).

Legal Topics:

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[Reserved]

§§ 33A.30[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview

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§ 33A.100 Facts

1. Name, address, and telephone number of developer and of any consultants, engineers, or others employed by developer for project.

2. Legal status of developer--whether California resident, and whether individual, corporation, partnership, or other.

3. Whether project involves new construction or conversion of existing building.

4. Whether project will be housed within one or more subdivisions.

5. Whether project is to be developed in phases or stages.

6. Description of project, including:

a. Whether project will consist of time-share estates or time-share uses.

b. Number and term of time-share interests.

c. Number and duration of use periods, including periods to be reserved for maintenance.

d. Type of facility or facilities (e.g., apartment house, hotel, condominium, motel, lodge, detached single-family residence).

e. Number and types of dwelling units in project.

f. Location or location of units and facilities (for each separate location, obtain street address, including nearest cross streets, city, county, and state).

g. Method of allocation of dwelling units and use periods.

h. Legal description.

i. Type of facilities in common areas of project.

j. Zoning classification(s).

k. Description of surrounding areas, including proximity to airports, hazards, fire stations, etc.

l. Plans for water supply and utilities and access to existing facilities.

7. Sources of financing for the project.

8. Proposed method of sale or lease of units--whether installment payments, blanket encumbrance, etc., will be used.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimeshares



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
A. Client Interview

16-33A California Legal Forms--Transaction Guide § 33A.101

§ 33A.101 Documents

1. Preliminary title report covering project.

2. Copies of any preliminary maps which have been prepared for project.

3. Copy of any contracts developer has entered into with city or county with respect to project.

4. Copy of any local building permits which have been obtained for project.

5. Copy of any environmental impact report (EIR) or draft EIR that has been prepared for project.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimeshares



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
A. Client Interview

16-33A California Legal Forms--Transaction Guide §§ 33A.102-33A.119

[Reserved]

§§ 33A.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-33A California Legal Forms--Transaction Guide § 33A.120

§ 33A.120 Applicability of State Statutes

1. Determine whether project is one of following, in which case it is subject to Vacation Ownership and Time-Share Act of 2004 (VOTSA) [*Bus. & Prof. Code § 11211.5(a)*; *see Bus. & Prof. Code § 11210 et seq.* (VOTSA)]:

a. Time-share plans with accommodation or component site in California [*see Bus. & Prof. Code § 11212(a), (f), (z)* (definitions)];

b. Time-share plans without accommodation or component site in California, if those plans are sold or offered for sale to any individual located in California;

c. Exchange programs [*see Bus. & Prof. Code § 11212*(*l*) ("exchange program" defined)]; or

d. Short term products [*see Bus. & Prof. Code § 11212(v)* ("short term product" defined)].

NOTE:
VOTSA does not apply to a time-share plan (1) that consists of 10 or fewer time-share interests, (2) the use of which extends over any period of three years or less, or (3) under which the prospective purchaser's total financial obligation will be equal to or less than $3,000 during the entire term of the plan [*Bus. & Prof. Code § 11211.5(b)*].

2. Determine whether project is subject to California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*; *14 Cal. Code Reg. § 15000 et seq.*; *see* California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender), and California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender)].

3. If project is located in coastal zone [*see Pub. Res. Code § 30103*], determine applicability of California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*].

NOTE:

A coastal development permit is not required under the Coastal Act for (1) converting an existing multiple-unit residential structure in the coastal zone to a time-share interest, or (2) any improvement that is otherwise exempt from the permit requirements that is made to an existing structure in connection with an exempt conversion described in (1) [*Pub. Res. Code § 30610(h)*].

4. Determine applicability of Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], which treats time-share plan offerings as security that must be registered [*see § 33A.28[2]*].

5. Determine applicability of other California statutes that may have some application to time-share plans.

NOTE:

For coverage of other California statutes that may have some application to time-share plans, including the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], see *§ 33A.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleGeneral OverviewSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsSecurities Registration



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-33A California Legal Forms--Transaction Guide § 33A.121

§ 33A.121 Applicability of Federal Statutes

1. Determine whether proposed time-share plan is subject to Interstate Land Sales Full Disclosure Act [*see 15 U.S.C. § 1701 et seq.*] requiring registration with Office of Interstate Land Sales Registration (OILSR) [*see* California Real Estate Law and Practice, Ch. 424, *Regulation of Subdivided Land Sales* , Pt. B. "Interstate Land Sales Full Disclosure Act" (Matthew Bender)].

2. Determine applicability of National Environmental Policy Act (NEPA) [*42 U.S.C. § 4321 et seq.*; *40 C.F.R. § 6.100 et seq.*], which could require preparation of an environmental impact statement [*see* Environmental Law Practice Guide, Ch. 1, *Environmental Impact Statements* (Matthew Bender)].

3. Determine whether Securities Law of 1933 [*15 U.S.C. § 77a et seq.*] treats time-share plan offering as security that must be registered [*see § 33A.28[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNational Environmental Policy ActEnvironmental Impact StatementsReal Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActSecurities LawExemptions From RegistrationGeneral OverviewSecurities LawInitial Public Offerings & the Securities Act of 1933Registration of SecuritiesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-33A California Legal Forms--Transaction Guide §§ 33A.122-33A.139

[Reserved]

§§ 33A.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Compliance with Vacation Ownership and Time-Share Act of 2004 (VOTSA)

16-33A California Legal Forms--Transaction Guide § 33A.140

§ 33A.140 Registration of Time-Share Plan

NOTE:

Any person who, to any individual located in California, sells, offers to sell, or attempts to solicit prospective purchasers to purchase a time-share interest, or any person who creates a time-share plan with an accommodation in California, must register the plan with the California Real Estate Commissioner, unless the plan is otherwise exempt [*Bus. & Prof. Code § 11226(a)*]. A developer, or any of its agents, may not sell, offer, or dispose of a time-share interest in California unless all necessary registration requirements are provided and approved by the Commissioner, or the sale, offer, or disposition is otherwise permitted by VOTSA, or while an order revoking or suspending a registration is in effect [*Bus. & Prof. Code § 11226(b)*]. "Sells," "offers to sell," and "attempts to solicit prospective purchasers" include any written or oral communication that is disseminated or otherwise used in California for the purpose of inducing a resident to travel outside California for a required presentation with the primary intention of causing the person to purchase time-share interests located outside California [*10 Cal. Code Reg. § 2805.5*].

1. Determine whether client's project is exempt from registration requirements by ascertaining [*Bus. & Prof. Code § 11225*]:

a. If person acquired time-share interest for his or her own use and occupancy and later offers it for resale.

b. If person is association that is not otherwise a time-share developer, solely while acting as association to offer or sell time-share interest transferred to association through foreclosure, deed in lieu of foreclosure, or gratuitous transfer in regular course of managing association for its own account.

NOTE:

This exemption also applies to a managing entity acting on an association's behalf. Notwithstanding the exemption, the association or managing entity must provide each purchaser of a time-share interest transferred under these circumstances with a copy of the time-share instruments, the then-current budget, and a written statement of the then-current assessment amounts. The purchaser may rescind the purchaser within seven days after receiving these documents. In addition, immediately before the purchaser's signature line in the contract, there must be a conspicuous notice of the purchaser's seven-day right to cancel. The wording of this right to cancel is required by statute [*Bus. & Prof. Code § 11225(b)*].

c. If person conveyed, assigned, or transferred more than seven time-share interests from developer in single voluntary or involuntary transaction and subsequently conveys, assigns, or transfers all interests received from developer to single purchaser in a single transaction.

d. If person is offering or disposing of time-share interest to purchaser who has previously acquired another time-share interest from same developer if time-share plan was properly-approved within preceding seven years, and developer complies in all regards with VOTSA's prohibitions on material misrepresentations [*see Bus. & Prof. Code § 11245*].

NOTE:

The developer must provide the purchaser with (1) a cancellation period of at least seven days, (2) all the time-share disclosure documents that are required to be provided to purchasers as if the sale occurred in the state or jurisdiction where the time-share property is located, and (3) a statutory disclaimer informing the purchaser that the Department of Real Estate has not examined the offering for, among other things, compliance with California law, and advising the purchaser to consult an attorney or other knowledgeable professional who is familiar with time-share development in the area in which the development is located [*Bus. & Prof. Code § 11225(d)*].

e. If time-share plan is located outside United States [*Bus. & Prof. Code § 11225(e)*].

NOTE:

The exemption notwithstanding, a person in California who sells, leases, or offers to sell or lease a time-share interest in a plan located outside the United States must nonetheless comply with disclosure and disclaimer requirements [*see Bus. & Prof. Code § 11225(e)*].

2. Assemble all documents and information for completing application for registration, which should include [*see 10 Cal. Code Reg. §§ 2809.1-2809.3*; *see also Bus. & Prof. Code § 11226(c)*]:

NOTE:

Time-share registration will be effective only on the issuance of a public report, which requires that the Real Estate Commissioner has received, reviewed, and approved a "properly completed" application [*see Bus. & Prof. Code § 11231(a)*]. The documents and information listed in a.-c., *below*, are required for an application to be "properly completed" [*see 10 Cal. Code Reg. §§ 2809.1-2809.3*].

a. For every single-site time-share plan [*10 Cal. Code Reg. § 2809.1(a)*]:

(1) Developer's legal name, any assumed names used by developer, principal office street address, mailing address, primary contact person, and telephone number.

(2) Name of developer's authorized or registered agent in California on whom claims can be served or service of process be had, agent's street address in California, and telephone number.

(3) Name, street address, mailing address, primary contact person, and telephone number of any time-share plan being registered.

(4) Name, street address, mailing address, and telephone number of any managing entity of time-share plan.

(5) Consent to service of process on Department of Real Estate if applicant is nonresident of California.

(6) Description of inventory control system that will ensure compliance with requirement that time-share plan maintain one-to-one purchaser to accommodation ratio [*see Bus. & Prof. Code § 11250*].

(7) Evidence that accommodation is presently suitable for human occupancy or that financial arrangements have been made to complete construction or renovation of accommodation to make it suitable for human occupancy on or before first date for occupancy by time-share interest owner [*see Bus. & Prof. Code § 11226(d)(1)*].

(8) Evidence that accommodations are owned or leased by developer of time-share plan or is subject of enforceable option or contract under which developer will build, purchase, or lease accommodations [*see Bus. & Prof. Code § 11226(d)(2)*].

NOTE:
Notwithstanding this requirement, before receipt of the final public report, the developer must present evidence that the accommodation to be sold is owned or leased by the developer and that it is free and clear of encumbrances [*Bus. & Prof. Code § 11226(d)(2)*; *see* ***Bus. & Prof. Code §§ 11244, 11255***].

(9) If accommodation in time-share plan is located within local governmental jurisdiction or subdivision in which dedication of accommodations to time-sharing is expressly prohibited by ordinance or recorded restriction, either absolutely or without permit or other entitlement from governing body, applicant for public report must present evidence of permit or other entitlement by appropriate authority for local government or subdivision [*see Bus. & Prof. Code § 11226(e)*].

(10) Description of existing or proposed accommodations, including type and number of time-share interests in accommodations.

(11) Number of accommodations and time-share interests expressed in periods of seven-day use availability or other time increments applicable to time-share plan, and available for use by purchasers and representation about percentage of useable time authorized for sale.

(12) Description of any existing or proposed amenities that will be part of time-share plan.

(13) Description of financial arrangements that have been made for completion of any incomplete, promised amenities [*see Bus. & Prof. Code § 11230*].

(14) Description of duration, phases, and operation of time-share plan.

(15) Copy of budget [*see Bus. & Prof. Code § 11240*], along with budget certification or request that budget be certified by Budget Review Section of Department of Real Estate, and description of method for calculating and apportioning assessments among purchasers.

NOTE:
If applicant is requesting the Department of Real Estate to review the budget, a complete duplicate budget package must be submitted, including a completed Form RE 681, "Budget Review Request," which is available at http://www.dre.cahwnet.gov/subsform.htm. For instructions on assembling and submitting the duplicate budget package for review, see Form RE 668, "Time-Share Plan Instructions," P XII, which is also available at http://www.dre.cahwnet.gov/subsform.htm [*see § 33A.200[2]*].

(16) Description of any initial or special fee due from purchaser at closing together with description of purpose and method of calculating fee.

(17) Description of any financing available through developer.

(18) Description of any liens, defects, or encumbrances on or affecting title to time-share interests.

(19) Description of any bankruptcies, pending civil or criminal suits, adjudications, or disciplinary actions of which developer has knowledge, that would have material effect on developer's ability to perform its obligations.

(20) Description of any fees or charges to be paid by time-share purchasers for use of any amenities related to time-share plan.

(21) Description and amount of insurance coverage provided for protection of purchaser.

(22) If applicable, description of any right of first refusal or other restraint on transfer of all or any portion of time-share interest.

(23) Copy of instructions to escrow depository, including [*see Bus. & Prof. Code § 11243*]:

(A) Name and address of escrow depository.

(B) Description of nature of transaction.

(C) Conditions that must be satisfied before escrow can be closed.

(D) Provision for return to prospective purchaser of funds deposited toward purchase of time-share interest if escrow has not closed on or before a given date.

(24) Evidence of financial arrangements to assure fulfillment of developers obligation to pay assessments for unsold timeshare interests [*see Bus. & Prof. Code § 11241*].

(25) Copy of contract utilized between exchange company and purchaser of time-share interest and all promotional and informational material delivered to purchasers pertaining to any offered exchange program.

(26) Filing fee, including fee for preliminary public report, if applicable [*see 10 Cal. Code Reg. §§ 2810, 2810.5*; *see also Bus. & Prof. Code § 11232*].

(27) Certificate of qualification from Secretary of State if applicant is foreign corporation.

(28) Preliminary title report for all accommodations comprising time-share plan, dated not more than 90 days before date of submission of application or, if preliminary title report is dated more than 90 days earlier, with accompanying letter from title officer, dated not more than 90 days before submission of application, indicating that state of title has not changed from that set forth in submitted preliminary title report.

(29) If offering is a security, Department of Corporations permit or interpretive opinion or copy of application for permit or request for interpretive opinion submitted to Department of Corporations [*see Corp. Code § 25100(f)* (exclusions from Corporate Securities Law)].

(30) State or local assessment and improvement bond information if applicable to accommodations in project.

(31) Copies of all contracts, deeds, fact sheets, and other instruments to be used in marketing, financing, and conveyancing of time-share interests [*see Bus. & Prof. Code §§ 11238(d), 11256* (sales contract requirements)].

(32) Copy of covenants to be recorded for time-share plan [*see Bus. & Prof. Code § 11251*].

(33) Copy of trust agreement for time-share plan if applicable.

(34) Copy of proposed or existing agreements for management of time-share plan [*see Bus. & Prof. Code § 11267*].

(35) Format of fidelity insurance or bond to be obtained for managing agent of time-share plan and other employees who will have custody or control of Association funds [*see Bus. & Prof. Code § 11267(a)(9)*].

(36) Copy of letter or other evidence giving notice of proposed dedication of timeshare project to local governments in which accommodations of time-share plan will be located.

(37) Completed documents for reservations and reservation deposits if preliminary public report is requested [*see Bus. & Prof. Code § 11227(j)*].

(38) Evidence of financial arrangements for any repurchase guarantee included in offering.

(39) Description of furnishings and other personal property to be included in time-share offering.

(40) In time-share plan that comprises less than all accommodations in hotel, motel, or similar commercial lodging establishment, and in which accommodations that are not part of time-share plan are concurrently used for transient accommodations, copy of proposed contract for:

(A) Arrangements for temporary use for transient occupancy of accommodations comprising time-share plan and temporary use by time-share plan of accommodations regularly used for transient occupancy.

(B) Apportionment of costs of operation of hotel/motel that are for joint benefit of accommodations in time-share plan and accommodations for transient occupancy.

(41) Agreement of developer to subsidize maintenance and operation of single-site time-share plan when applicable.

(42) Description of each incidental benefit [*see Bus. & Prof. Code § 11237(b)*; *see also Bus. & Prof. Code § 11212(m)*

("incidental benefit" defined)].

(43) If applicable, required information related to point system used to determine use and occupancy of time-share interest purchased in time-share plan [*see Bus. & Prof. Code § 11233*].

(44) If applicable, certification stating that inventory control system functions in accordance with statutory requirements [*see Bus. & Prof. Code § 11246*; *see also Bus. & Prof. Code §§ 11226(c)(6), 11250*].

(45) Audited financial statements of Association, if applicable.

(46) For every single-site time-share plan involving newly-built or as yet unbuilt accommodations, or accommodations that will be renovated or reconstructed before occupancy, evidence of availability of domestic utilities and services to project.

(47) Draft public report [*see Bus. & Prof. Code § 11234*; *see also* P 4, *below*].

b. For sole purpose of determining effect on time-share plan, for every single-site time-share plan with accommodations in condominium development or other common-interest subdivision [*10 Cal. Code Reg. § 2809.1(b)*]:

(1) Proposed or existing governing instruments for common-interest subdivision.

(2) Copies of all contracts or proposed contracts obligating owners' association of common-interest subdivision if subdivision is one for which public report has not been issued.

(3) If included in subdivision offering, copy of developer's agreement to subsidize maintenance and operations of common interest subdivision if public report has not been issued for subdivision.

(4) Financial arrangements to assure performance of subsidization agreement referred to in (3), *above*, if applicable.

(5) Latest balance sheet and annual operating statement for owners' association for common interest subdivision.

(6) Pro-forma budget reflecting estimated ownership, maintenance, and operational expenses and reserves for subdivision.

(7) Financial arrangements to assure fulfillment of developer's obligation to pay assessments for unsold time-share interests if public report has not been issued for subdivision.

(8) Copy of letters by which developer has given notice of proposed dedication of accommodation to time-share project to owners' association of each common-interest subdivision in which accommodation of time-share project is located.

(9) Evidence of financial arrangements for completion of common areas and facilities in subdivision.

c. For specific time-share interest multisite time-share plan [*10 Cal. Code Reg. § 2809.2*]:

(1) With regard to component site(s) in which purchaser will receive specific time-share interest along with reservation priority right at that specific timeshare property, all of applicable information related to that component site as required under *10 Cal. Code Reg. § 2809.1* [*see* PP a., b., *above*].

(2) With regard to component site(s) in which purchaser does not receive a specific time-share interest, information required for public reports for specific time-share interest multisite time-share plans [*see Bus. & Prof. Code § 11234(b)*; *see also* P 4.b., *below*] and evidence that:

(A) Accommodation is presently suitable for human occupancy or that financial arrangements have been made to complete construction or renovation of accommodation to make it suitable for human occupancy on or before first date for occupancy by time-share owner [*see Bus. & Prof. Code § 11226(d)(1)*]; and

(B) There is enforceable use right assuring occupancy of accommodation by time-share owner.

d. For nonspecific time-share interest multisite time-share plan [*see 10 Cal. Code Reg. § 2809.3(a)*]:

(1) Developer's legal name, any assumed names used by developer, principal office street address, mailing address, primary contact person, and telephone number.

(2) Name of developer's authorized or registered agent in California on whom claims can be served or service of process be had, agent's street address in California, and telephone number.

(3) Name, street address, mailing address, and telephone number of any managing entity of multisite time-share plan.

(4) Consent to service of process on Department of Real Estate if applicant is nonresident of California.

(5) Description of inventory control system that will ensure compliance with requirement that time-share plan maintain one-to-one purchaser to accommodation ratio [*see Bus. & Prof. Code § 11250*].

(6) Evidence that accommodation is presently suitable for human occupancy or that financial arrangements have been made to complete construction or renovation of accommodation to make it suitable for human occupancy on or before first date for occupancy by time-share interest owner [*see Bus. & Prof. Code § 11226(d)(1)*].

(7) Evidence that accommodations are owned or leased by developer of time-share plan or is subject of enforceable option or contract under which developer will build, purchase, or lease accommodations [*see Bus. & Prof. Code § 11226(d)(2)*].

(8) If accommodation in time-share plan is located within local governmental jurisdiction or subdivision in which dedication of accommodations to time-sharing is expressly prohibited by ordinance or recorded restriction, either absolutely or without permit or other entitlement from governing body, applicant for public report must present evidence of permit or other entitlement by appropriate authority for local government or subdivision [*see Bus. & Prof. Code § 11226(e)*].

(9) Description of type of interest and usage rights purchaser will receive.

(10) Description of duration and operation of time-share plan.

(11) Description of type of insurance coverage provided for each component site.

(12) Explanation of who holds title to accommodations of each component site.

(13) Description of each component site, including name and address of each component site.

(14) Number of accommodations and time-share interests, expressed in periods of seven-day use availability or other time increments applicable to multisite time-share plan for each component site committed to multisite time-share plan and available for use by purchasers, and representation about percentage of useable time authorized for sale.

NOTE:

If that percentage is 100 percent, then a statement describing how adequate periods of time for maintenance and repair will be provided [*10 Cal. Code Reg. § 2809.3(a)(14)*].

(15) Description of each type of accommodation in terms of number of bedrooms, bathrooms, and sleeping capacity, and statement of whether or not accommodation contains a full kitchen.

NOTE:

For purposes of this description, a "full kitchen" means a kitchen having a minimum of a dishwasher, range, sink, oven, and refrigerator [*10 Cal. Code Reg. § 2809.3(a)(15)*].

(16) Description of amenities available for use by purchaser at each component site.

(17) Description of any incomplete amenities at any component sites along with statement as to any assurance for completion and estimated date amenities will be available [*see Bus. & Prof. Code § 11230*].

(18) Historical occupancy of each component site for prior 12-month period, if component site was part of multisite time-share plan during that 12-month period, as well as any periodic adjustment or amendment to reservation system that may be needed to respond to actual purchaser use patterns and changes in purchaser use demand for accommodations existing at that time within multisite time-share plan.

(19) Description of any right to make any additions, substitutions, or deletions of accommodations, amenities, or component sites, and description of basis on which accommodations, amenities, or component sites may be added to, substituted in, or deleted from multisite time-share plan.

(20) Description of reservation system that must include:

(A) Entity responsible for operating reservation system, its relationship to developer, and duration of any agreement for operation of reservation system.

(B) Summary of rules and regulations governing access to and use of reservation system.

(C) Existence of and explanation regarding any priority reservation features that affect purchaser's ability to make reservations for use of given accommodation on first-come, first-served basis.

(21) Description of any liens, defects, or encumbrances that materially affect purchaser's use rights.

(22) Description of relationship between multisite time-share plan managing entity and managing entity of component sites of multisite time-share plan, if different from multisite time-share plan managing entity.

(23) Copy of budget [*see Bus. & Prof. Code § 11240*], along with budget certification or request that budget be certified by Budget Review Section of Department of Real Estate and description of method for calculating and apportioning assessments among purchasers.

NOTE:

If an applicant is requesting the Department to review the budget, a complete duplicate budget package must be submitted, including a completed Form RE 681, "Budget Review Request," which is available at http://www.dre.cahwnet.gov/subsform.htm. For instructions on assembling and submitting the duplicate budget package for review, see Form RE 668, "Time-Share Plan Instructions," P XII, which is also available at http://www.dre.cahwnet.gov/subsform.htm [*see § 33A.200[2]*].

(24) Any current fees or charges to be paid by time-share purchasers for use of any amenities related to time-share plan and statement that fees or charges are subject to change.

(25) Any initial or special fee due from purchaser at closing with description of purpose and method of calculating fee.

(26) Description of any financing offered by or available through developer.

(27) Description of any bankruptcies, pending civil or criminal suits, adjudications, or disciplinary actions of which developer has knowledge, which would have material effect on developer's ability to perform its obligations.

(28) Statement disclosing any right of first refusal or other restraint on transfer of all or any portion of time-share interest.

(29) Copy of instructions to escrow depository including [*see Bus. & Prof. Code § 11241*]:

(A) Name and address of escrow depository.

(B) Description of nature of transaction.

(C) Conditions that must be satisfied before escrow can be closed.

(D) Provision for return to prospective purchaser of funds deposited toward purchase of time-share interest if escrow for transaction has not closed on or before given date.

(30) Evidence of financial arrangements to assure fulfillment of developer obligation to pay assessments for unsold time-share interests [*see Bus. & Prof. Code § 11241*].

(31) Copy of contract utilized between exchange company and purchaser of time-share interest and all promotional and informational material delivered to purchasers pertaining to any offered exchange program.

(32) Filing fee, including fee for preliminary public report, if applicable [*see 10 Cal. Code Reg. §*

2810.5; *see also Bus. & Prof. Code § 11232*].

(33) Certificate of qualification from Secretary of State if applicant is foreign corporation [*see* Ch. 12B, *Foreign Corporations and Associations*].

(34) Preliminary title report for all accommodations comprising time-share plan, dated not more than 90 days before date application is submitted or, if preliminary title report is dated more than 90 days earlier, with accompanying letter from title officer, dated not more than 90 days before submission, indicating state of title has not changed from that set forth in submitted preliminary title report.

(35) If offering is a security, Department of Corporations permit or interpretive opinion or copy of application for permit or request for interpretive opinion submitted to Department of Corporations [*see Corp. Code § 25100(f)* (exclusions from Corporate Securities Law)].

(36) State or local assessment and improvement bond information if applicable to accommodations in project.

(37) Copies of all contracts, deeds, fact sheets, and other instruments to be used in marketing, financing, and conveyancing of time-share interests.

(38) Copy of covenants for component sites of the multisite time-share plan [*see Bus. & Prof. Code § 11251*].

(39) Copy of trust agreement for multisite time-share plan, if applicable.

(40) Copy of proposed or existing agreements for management of multisite time-share plan.

(41) Format of fidelity insurance or bond to be obtained for managing agent of multisite time-share plan and other employees who will have custody or control of funds of multisite time-share plan association [*see Bus. & Prof. Code § 11267(a)(9)*].

(42) Copy of letter or other evidence giving notice of proposed dedication of time-share project to local governments in which accommodations of multisite time-share plan will be located.

(43) Completed documents for reservations and reservation deposits if preliminary public report is requested [*see Bus. & Prof. Code § 11227(j)*].

(44) Evidence of financial arrangements for any repurchase guarantee included in offering.

(45) Description of furnishings and other personal property to be included in time-share offering.

(46) In time-share plan that comprises less than all accommodations in hotel, motel, or similar commercial lodging establishment and in which accommodations that are not part of time-share plan are concurrently used for transient accommodations, copy of proposed contract for:

(A) Arrangements for temporary use for transient occupancy of accommodations comprising time-share plan and temporary use by time-share plan of accommodations regularly used for transient occupancy.

(B) Apportionment of operating costs of hotel/motel that are for joint benefit of

accommodations in time-share plan and accommodations for transient occupancy.

(47) Agreement of developer to subsidize maintenance and operation of multisite time-share plan, when applicable.

(48) Description of each incidental benefit [*see Bus. & Prof. Code § 11237(b)*; *see also Bus. & Prof. Code § 11212(m)* ("incidental benefit" defined)].

(49) If applicable, required information related to point system used to determine use and occupancy of time-share interest purchased in time-share plan [*see Bus. & Prof. Code § 11233*].

(50) If applicable, certification stating that inventory control system functions in accordance with statutory requirements [*see Bus. & Prof. Code § 11246*; *see also Bus. & Prof. Code §§ 11226(c)(6), 11250*].

(51) Audited financial statements of multisite time-share plan association, if applicable.

(52) For every component involving newly-built or as yet unbuilt accommodations, or accommodations that will be renovated or reconstructed before occupancy, evidence of availability of domestic utilities and services to component site.

(53) Draft public report.

e. For sole purpose of determining effect on time-share plan, for every multisite time-share plan with accommodations in condominium development or other common-interest subdivision [*10 Cal. Code Reg. § 2809.3(b)*]:

(1) Proposed or existing governing instruments for common-interest subdivision.

(2) Copies of all contracts or proposed contracts obligating owners' association of common-interest subdivision if subdivision is one for which public report has not been issued.

(3) If included in subdivision offering, copy of developer's agreement to subsidize maintenance and operations of common interest subdivision if public report has not been issued for subdivision.

(4) Financial arrangements to assure performance of subsidization agreement referred to in (3), *above*, if applicable.

(5) Latest balance sheet and annual operating statement for owners' association for common interest subdivision.

(6) Pro-forma budget reflecting estimated ownership, maintenance, and operational expenses and reserves for subdivision.

(7) Financial arrangements to assure fulfillment of developer's obligation to pay assessments for unsold time-share interests if public report has not been issued for subdivision.

(8) Copy of letters by which developer has given notice of proposed dedication of an accommodation to time-share project to owners' association of each common-interest subdivision in which accommodation of time-share project is located.

(9) Evidence of financial arrangements for completion of any promised and not yet completed amenities in subdivision.

3. Obtain and complete appropriate application form for type of time-share plan to be registered.

NOTE:

Form RE 668, "Time-Share Plan Instructions" [*see § 33A.200[2]*], provides guidelines for preparing and submitting an application for registering a time-share.

Form RE 668A, "Notice of Intention (Time-Share)" [*see § 33A.201*], is the application for registering for (1) a single-site time-share plan and (2) specific time-share interests in a multisite time-share plan [*see Bus. & Prof. Code § 11212(z)(1), (2)(A)*; *see also § 33A.13[10]*].

Form RE 668B [*see § 33A.202*] is the application for registering non-specific time-share interests in a multisite time-share plan [*see Bus. & Prof. Code § 11212(z)(2)(B)*; *see also § 33A.13[10]*]. A separate RE 668B must be completed and fee paid for each location of a multisite plan that includes a non-specific time-share interest and that is not currently covered by a California public report.

4. Prepare public report to include:

NOTE:

All applications for registration must include a public report prepared by the developer for issuance by the Real Estate Commissioner. The developer must provide the public report to each purchaser of a time-share interest at the time of purchase. The report must be in writing and dated and must require the purchaser to certify in writing that he or she has received it [*Bus. & Prof. Code § 11234*]. As indicated in PP a.-c., *below*, the information required in the report will vary depending on the nature of the time-share plan involved. Counsel should refer to Form RE 622H, "Time-Share Public Report Preparation," for general information [*see § 33A.203[2]*], and Form RE 622I, "Time-Share Plan Disclosures (Part I)," for the standard time-share plan disclosures, which must be included in public reports for all time-share plans [*see § 33A.204[2]*]. Both forms can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

Under specified circumstances, such as when the application for public report has been substantially completed but the CC&Rs have not yet been recorded, the Commissioner may issue a conditional public report, which will enable the developer to market the time-share interests covered by the report, but no escrow can close until the final report has been issued [*see Bus. & Prof. Code § 11227*; *see also § 33A.14[2][b]*].

While the registration is pending, the Real Estate Commissioner may also grant a 12-month preliminary public report allowing the developer to begin offering and selling time-share interests in a time-share plan, regardless of whether the accommodations of the time-share plan are located inside or outside California. One additional 12-month period may be granted if the developer is actively and diligently pursuing registration. The preliminary public report will automatically terminate with regard to those time-share interests covered by a final public report that is issued before the scheduled termination date of the preliminary report [*Bus. & Prof. Code § 11227(j)*].

The Commissioner may, on finding that the subject matter is otherwise adequately covered or the information is unnecessary or inapplicable, waive any requirement listed in PP a.-c., *below* [*Bus. & Prof. Code § 11234(e)*].

a. For single site and component sites of specific time-share interest multisite time-share plan offered for sale in California [*Bus. & Prof. Code § 11234(a)*]:

NOTE:
Form RE 622J-1, "Time-Share Plan Disclosures (Part II-1)" [*see § 33A.205[2]*], is designed to be a guide for developing disclosures required for public reports for single-site time-share plans and for public reports for component sites of a multisite/specific time-share plans. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

(1) Developer's name and address, type of time-share plan being offered, and name and address of time-share project.

(2) Description of existing or proposed accommodations, including type and number of time-share interests in accommodations, and if accommodations are proposed or not yet complete or fully functional, estimated date of completion.

(3) Number of accommodations and time-share interests, expressed in periods of seven-day use availability or other time increments applicable to time-share plan committed to multisite time-share plan, and available for use by purchasers, and representation about percentage of useable time authorized for sale.

NOTE:
If percentage is 100 percent, a statement describing how adequate periods of time for maintenance and repair will be provided is also required [*Bus. & Prof. Code § 11234(a)(3)*].

(4) Description of any existing or proposed amenities of the time-share plan and, if amenities are proposed or not yet complete or fully functional, estimated date of completion.

(5) Extent to which financial arrangements have been made for completion of any incomplete, promised improvements.

(6) Description of time-share plan's duration, phases, and operation.

(7) Managing entity's name and principal address, and description of any procedures for altering entity's powers and responsibilities and for removing or replacing it.

(8) Current annual budget as required by *Bus. & Prof. Code § 11240*, along with projected assessments and description of method for calculating and apportioning assessments among purchasers, all of which must be attached as exhibit to public report.

(9) Any initial or special fee due from purchaser at closing together with description of purpose and method of calculating it.

(10) Description of any financing offered by or available through developer.

(11) Description of any liens, defects, or encumbrances on or affecting title to time-share interests.

(12) Description of any bankruptcies, pending civil or criminal suits, adjudications, or disciplinary actions of which developer has knowledge, that would have material effect on developer's ability to perform its obligations.

(13) Any current or expected fees or charges to be paid by time-share purchasers for use of any amenities.

(14) Description and amount of insurance coverage provided for purchaser's protection.

(15) Extent to which time-share interest may become subject to tax lien or other lien arising out of claims against purchasers of different time-share interests.

(16) Statement disclosing any right of first refusal or other restraint on transfer of all or any portion of time-share interest.

(17) Statement disclosing that any deposit made in connection with purchase of time-share interest will be held by escrow agent until expiration of any right to cancel contract and that any deposit must be returned to purchaser if he or she elects to exercise right of cancellation.

NOTE:

If the Real Estate Commissioner has accepted from the developer a surety bond, irrevocable letter of credit, or other financial assurance, each of which is enforceable by the association, in lieu of placing deposits in an escrow account the public report must include (1) a statement disclosing that the developer has provided a surety bond, irrevocable letter of credit, or other financial assurance in an amount equal to or in excess of the funds that would otherwise be placed in an escrow account, (2) a description of the type of financial assurance that has been obtained, (3) a statement that if the purchaser elects to exercise his or her right of cancellation as provided in the contract, the developer must return the deposit, and (4) a description of the person or entity to whom the purchaser should apply for payment [*Bus. & Prof. Code § 11234(a)(17)*].

(18) Statement that assessments collected from purchasers will be kept in segregated account separate from assessments collected from purchasers of other time-share plans managed by same managing entity, along with statement identifying location of account and disclosure of owners' rights to inspect records pertaining to their accounts.

(19) If time-share plan provides purchasers with opportunity to participate in exchange program, name and address of exchange company and description of method by which purchaser accesses that program.

(20) Any other information that developer, with Real Estate Commissioner's approval, desires to include in public report.

(21) Any other information reasonably requested by Commissioner.

b. In addition, public reports for specific time-share interest multisite time-share plans must include [*Bus. & Prof. Code § 11234(b)*]:

NOTE:

Form RE 622J-2, "Time-Share Plan Disclosures (Part II-2)" [*see § 33A.206[2]*], is designed to be a guide for developing disclosures required for public reports for multisite/specific time-share interest plans. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

(1) Description of each component site, including site's name and address.

(2) Number of accommodations and time-share interests, expressed in periods of seven-day use availability or other time increments applicable to each component site, committed to multisite time-share plan and available for use by purchasers, and representation about percentage of useable time authorized for sale.

NOTE:

If the percentage is 100 percent, then a statement describing how adequate periods of time for maintenance and repair will be provided is also required [*Bus. & Prof. Code § 11234(b)(2)*].

(3) Each type of accommodation in terms of number of bedrooms, bathrooms, and sleeping capacity, and statement of whether or not accommodation contains full kitchen.

NOTE:

For purposes of this description, a "full kitchen" means a kitchen having a minimum of a dishwasher, range, sink, oven, and refrigerator [*Bus. & Prof. Code § 11234(b)(3)*].

(4) Description of amenities available for purchaser's use at each component site.

(5) Description of reservation system, to include:

(A) Entity responsible for operating reservation system, its relationship to developer, and duration of any agreement for operation of system.

(B) Summary of rules and regulations governing access to and use of reservation system.

(C) Existence of and explanation regarding any priority reservation features that affect purchaser's ability to make reservations for use of given accommodation on first-come, first-served basis.

(6) Name and principal address of managing entity for multisite time-share plan and description of any procedures for altering entity's powers and responsibilities, and for removing or replacing it.

(7) Description of any right to make any additions, substitutions, or deletions of accommodations, amenities, or component sites, and description of basis on which accommodations, amenities, or component sites may be added to, substituted in, or deleted from multisite time-share plan.

(8) Description of purchaser's liability for any fees associated with multisite plan.

(9) Location of each component site of multisite time-share plan, historical occupancy of each component site for prior 12-month period, as well as any periodic adjustment or amendment to

reservation system that may be needed to respond to actual purchaser use patterns and changes in purchaser use demand for accommodations existing at that time within plan.

(10) Any other information that developer, with Real Estate Commissioner's approval, desires to include in time-share disclosure statement.

c. Public reports for nonspecific time-share interest multisite time-share plans must include [*Bus. & Prof. Code § 11234(c)*]:

NOTE:

Form RE 622J-3, "Time-Share Plan Disclosures (Part II-3)" [*see § 33A.207[2]*] is designed to be a guide for developing disclosures required for public reports for multisite/non-specific time-share interest plans. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

(1) Developer's name and address.

(2) Description of type of interest and usage rights purchaser will receive.

(3) Description of duration and operation of time-share plan.

(4) Description of type of insurance coverage provided for each component site.

(5) Explanation of who holds title to accommodations of each component site.

(6) Description, including name and address, of each component site.

(7) Number of accommodations and time-share interests, expressed in periods of seven-day use availability or other time increments applicable to multisite time-share plan for each component site committed to multisite time-share plan and available for use by purchasers, and representation about percentage of useable time authorized for sale.

NOTE:

If that percentage is 100 percent, a statement describing how adequate periods of time for maintenance and repair will be provided must also be included [*Bus. & Prof. Code § 11234(c)(7)*].

(8) Each type of accommodation in terms of number of bedrooms, bathrooms, and sleeping capacity, and statement of whether or not accommodation contains full kitchen.

NOTE:

For purposes of this description, a "full kitchen" means a kitchen having a minimum of a dishwasher, range, sink, oven, and refrigerator [*Bus. & Prof. Code § 11234(c)(8)*].

(9) Description of amenities available for use by purchaser at each component site.

(10) Description of any incomplete amenities at any component sites along with statement as to any assurance for completion and estimated date amenities will be available.

(11) Location of each component site of multisite time-share plan, historical occupancy of each component site for prior 12-month period, as well as any periodic adjustment or amendment to reservation system needed to respond to actual purchaser use patterns and changes in purchaser use demand for accommodations existing at that time within multisite time-share plan.

(12) Description of any right to make any additions, substitutions, or deletions of accommodations, amenities, or component sites, and description of basis on which accommodations, amenities, or component sites may be added to, substituted in, or deleted from multisite time-share plan.

(13) Description of reservation system that must include all of following:

(A) Entity responsible for operating reservation system, its relationship to developer, and duration of any agreement for operation of reservation system.

(B) Summary of rules and regulations governing access to and use of reservation system.

(C) Existence of and explanation regarding any priority reservation features that affect purchaser's ability to make reservations for use of given accommodation on first-come, first-served basis.

(14) Description of any liens, defects, or encumbrances that materially affect purchaser's use rights.

(15) Managing entity's name and principal address, description of any procedures for altering entity's powers and responsibilities and for removing or replacing it, and description of relationship between multisite time-share plan managing entity and managing entity of component sites of multisite time-share plan.

(16) Current annual budget as provided in *Bus. & Prof. Code § 11240*, along with projected assessments and description of method for calculating and apportioning assessments among purchasers, all of which must be attached as exhibit.

(17) Any current fees or charges to be paid by time-share purchasers for use of any amenities, and statement that fees or charges are subject to change.

(18) Any initial or special fee due from purchaser at closing, together with description of purpose and method of calculating fee.

(19) Description of any financing offered by or available through developer.

(20) Description of any bankruptcies, pending civil or criminal suits, adjudications, or disciplinary actions of which developer has knowledge, which would have material effect on developer's ability to perform its obligations.

(21) Statement disclosing any right of first refusal or other restraint on transfer of all or any portion of time-share interest.

(22) Statement disclosing that any deposit made in connection with purchase of time-share interest will be held by escrow agent until expiration of any right to cancel contract and that any deposit must be returned if purchaser elects to exercise right of cancellation.

NOTE:

If the Real Estate Commissioner has accepted from the developer a surety bond, irrevocable letter of credit, or other financial assurance, each of which is enforceable by the association, in lieu of placing deposits in an escrow account the public report must include (1) a statement disclosing that the developer has provided a surety bond, irrevocable letter of credit, or other financial assurance in an amount equal to or in excess of the funds that would otherwise be placed in an escrow account, (2) a description of the type of financial assurance that has been obtained, (3) a statement that if the purchaser elects to exercise his or her right of cancellation as provided in the contract, the developer must return the deposit, and (4) a description of the person or entity to whom the purchaser should apply for payment [*Bus. & Prof. Code § 11234(c)(22)*].

(23) If time-share plan provides purchasers with opportunity to participate in exchange program, name and address of exchange company and method by which purchaser accesses it.

(24) Any other information that developer, with Real Estate Commissioner's approval, desires to include in time-share disclosure statement.

5. Assemble application file for submission to Department of Real Estate.

NOTE:

The application must be signed by or on behalf of the person to whom the permit is to be issued or by an agent with written authorization to sign. The information in the application and the document submitted must be certified, if executed in California, or verified or certified under penalty of perjury if executed outside California [***10 Cal. Code Reg. § 2809(b);*** *see* ***Code Civ. Proc. § 2015.5***].

All incoming documents, including those submitted after the original submission, must be tabbed, using heavy stock or fabric tabs staggered on the right side of the documents, with the item numbers corresponding to the item numbers in Forms RE 668A and 668B. With the exception of original public report drafts or maps, the entire submittal package must be hole-punched [*see* Form RE 668, "Time-Share Plan Instructions," Pt. III, set forth in *§ 33A.200[2]*].

6. Check that application is "properly completed" within meaning of *Bus. & Prof. Code § 11231(a)* by ensuring it includes all documents and information listed in appropriate subparagraph of P 2, *above* [*see 10 Cal. Code Reg. §§ 2809.1-2809.3*].

7. Submit properly completed application for registration with appropriate filing fee to [*see 10 Cal. Code. Reg. §§ 2809(a), 2810.5*]:

Department of Real Estate
Subdivisions Office--Technical
2201 Broadway
P.O. Box 187005
Sacramento, CA 95818-7005
Telephone: (916) 227-0810

Normally, applications are processed on a first-come, first-served basis. Registration will be effective when the Real Estate Commissioner issues a public report, which must be forthcoming no later than 60 calendar days after the Commissioner receives the properly completed application. The Commissioner will provide a list of any deficiencies in the application within the same 60-day period. If sought, a

preliminary public report will be issued within 15 calendar days of receipt, unless the Commissioner provides the applicant with a written list of deficiencies within the same 15-day period [*Bus. & Prof. Code § 11231(a), (b)*]. The term of a final public report is five years with the possibility of renewal on application and submittal of any further information required [*Bus. & Prof. Code § 11228*].

8. Distribute approved final, conditional, or preliminary public report to each prospective purchaser of a time-share interest at the time of purchase [*Bus. & Prof. Code § 11234*].

NOTE:

The developer must attach a statutory cancellation notice printed in conspicuous type to the face of every copy of a public report given to a prospective purchaser [*Bus. & Prof. Code § 11239*; ***see*** *§ 33A.208*]. In addition, each person executing a reservation agreement under authority if a preliminary public report and each person who has made a written offer to purchase or lease a time-share interest under authority of a preliminary, conditional, or final public report, must acknowledge in writing that he or she has received the report. The developer must retain each receipt for three years and make them available for inspection [*Bus. & Prof. Code § 11236*; ***see*** *§ 33A.209*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleGeneral OverviewSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsSecurities Registration



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Compliance with Vacation Ownership and Time-Share Act of 2004 (VOTSA)

16-33A California Legal Forms--Transaction Guide § 33A.141

§ 33A.141 Complying With Other Requirements of VOTSA

NOTE:
For coverage of the requirements governing the responsibility of a time-share plan's association once control of the plan has been transferred from the developer to the association, see *§§ 33A.18-33A.22*.

1. For single site time-share plans and component sites of multisite time-share plans, maintain required insurance at all times as follows [*Bus. & Prof. Code § 11253*]:

a. Property damage coverage for all real and personal property in time-share plan covering fire and other hazards commonly insured against in amount not less than 80 percent of full replacement value.

NOTE:
In a time-share use offering, the trustee must be a named coinsured, and if for any reason, title to the accommodation is not held in trust, the association must be named as coinsured as the agent for each interest owner [*Bus. & Prof. Code § 11253(a)(1)*]. In a time-share estate offering, the association must be named as a coinsured if it has title to the property or as a coinsured as agent for each interest owner if title is held by the owners as tenants in common [*Bus. & Prof. Code § 11253(a)(2)*]. If, after control of the association's governing body has passed to the owners, and the association amends the time-share instruments to reduce the percentage below 80 percent, the failure of the association to maintain 80 percent coverage will not be grounds for denial of a public report [*Bus. & Prof. Code § 11253(a)(3)*].

b. Liability coverage against death, bodily injury, and property damage resulting from use, ownership, or maintenance of accommodations in amounts determined by association, but not less than [*Bus. & Prof. Code § 11253(b)(1)*]:

(1) $500,000 to $1,000,000 for personal injury; and

(2) $100,000 for property damage.

NOTE:
The liability insurance policy must (1) name the class of all time-share interest owners as additional insureds in a policy issued to the association; (2) provide that the insurer waives its right to subrogation under the policy against any time-share interest owner or member of his or her household; and (3) provide that no act or omission by an interest owner, unless acting within the scope of his or her authority on the association's behalf, will void the policy or operate as a condition to recovery under the policy by any other person [*Bus. & Prof. Code § 11253(b)(2)*].

2. Employ managing entity for time-share plan or component site pursuant to written management agreement that complies with statutory requirements [*see Bus. & Prof. Code § 11267(a)*].

3. Arrange for developer to fulfill obligation for expenses associated with unsold inventory held by developer by securing developer's written agreement to either [*Bus. & Prof. Code § 11241(a)*]:

a. Pay full maintenance fee for each interest it owns; or

b. Subsidize association's budget by covering any shortfall from expenses incurred and assessments collected from other owners.

NOTE:
To assure the fulfillment of the developer's obligation for expenses associated with unsold inventory, the developer is required to furnish a surety bond, cash deposit, letter of credit, or other alternate assurance enforceable by the association [*Bus. & Prof. Code § 11241(b)*; ***see*** *Bus. & Prof. Code § 11241(c)* (amount of required assurance)].

The assurance must be delivered to the trustee or an escrow depository acceptable to DRE along with an executed copy of the subsidization contract and instructions to the escrow depository signed by the developer an on behalf of the association [Bus. & Prof. Code § 11242.1(a)].

4. If developer undertakes to pay a portion of assessments otherwise payable by each purchaser ("buy down subsidy"), arrange for developer to do all of following [Bus. & Prof. Code § 11242(a), (b)]:

a. Enter into contract with association that specifies in detail developer's obligations and methods to be used in valuing goods and services furnished under time-share plan.

NOTE:
The Department of Real Estate will not approve a subsidization program unless provisions are made for the accumulation of reserves for replacement and major maintenance of the time-share property in accordance with accepted property management practices and the transfer of the reserve fund to the association on the program's termination.

b. Furnish association with executed copy of subsidization contract within 10 days after closing of escrow of first sale or lease of time-share interest.

c. Furnish assurance for buy down subsidy obligation.

NOTE:

The assurance must be in an amount that is acceptable to the commissioner, but not more than the aggregate amount by which annual assessments are to be reduced, e.g., the number of interests to be sold in each unit type multiplied by the amount by which the annual assessment for each unit type is to be reduced, multiplied by the number of years in the term of the subsidy [Bus. & Prof. Code § 11242(b)].

The assurance must be delivered to the trustee or an escrow depository acceptable to DRE along with an executed copy of the subsidization contract and instructions to the escrow depository signed by the developer on the association's behalf [Bus. & Prof. Code § 11242.1(a)].

5. Facilitate developer's compliance with regard to escrow requirements for funds received from purchasers under following conditions [*Bus. & Prof. Code § 11243(a), (b)*; *see 10 Cal. Code Reg. § 2807.2* (acceptable escrow depositories)]:

NOTE:

In lieu of establishing an escrow account, the developer may furnish a surety bond, escrow bond, irrevocable letter of credit, or other acceptable form of financial assurance [*see Bus. & Prof. Code § 11243(c)*].

a. During purchaser's seven-day rescission period [*see 10 Cal. Code Reg. § 2807*]; and

NOTE:

100 percent of funds received during rescission period must be escrowed. They may be disbursed after that period has expired and in accordance with the purchase contract. If the purchaser cancels the contract pursuant to its terms, the funds must be returned to the purchaser [*Bus. & Prof. Code § 11243(a)(1), (2)*].

b. When property in which time-share interest is located has not been completed.

NOTE:

Excluding any encumbrance against a purchaser's time-share interest securing the purchaser's payment of purchaser money financing, the developer is not entitled to the release of any of the escrowed funds described in PP a. and b., *above*, until the developer has provided satisfactory evidence approved by the Real Estate Commissioner that arrangements have been made to protect the purchaser's rights [*see* ***Bus. & Prof. Code § 11244*****].**

6. Ensure that covenants dedicating accommodations to time-share plan are recorded before closing of first sale of time-share interest in any accommodation in time-share plan [*Bus. & Prof. Code § 11251(a)*].

NOTE:

The covenants must incorporate all covenants of the grantor or lessor of the time-share interests and other provisions required by statute [*Bus. & Prof. Code § 11251(a)*]. For more complete coverage of the required covenants and provisions, see *§ 33A.201*.

7. Ensure that time share instruments include provisions describing all of following [*Bus. & Prof. Code § 11251(c)*]:

a. Services to be made available to time-share interest owners under time-share plan.

b. Procedures regarding transfer to association of control over time-share property and services comprising time-share plan.

NOTE:
The description of these procedures should be in either the declaration or the association's bylaws [*Bus. & Prof. Code § 11251(a)(2)*].

c. Method for preparation and availability to time-share interest owners of budgets, financial statements, and other information related to time-share plan.

d. Methods for employing and terminating employment of managing entity for time-share plan.

e. Method for adoption of standards and rules of conduct for use of accommodations by time-share interest owners.

f. Method for establishing time-share interest owners' rights to accommodation according to schedule or under first-reserved, first-served priority system.

g. Method for compensating use periods or monetary compensation for owner of time-share estate if accommodation cannot be made available for period of use to which owner is entitled by schedule or under reservation system because of error by association or managing entity.

h. Method using accommodations for transient accommodations or other income-producing purpose during periods of nonuse by time-share interest owners.

i. Method for time-share interest owners to inspect association books and records.

j. Method for collective decisionmaking and undertaking of action by or in association's name including, when applicable, representation of time-share accommodations in association for time-share in which accommodations are located.

8. If fee or long-term leasehold interest in all or some of accommodations and in appurtenant real and personal property is to be transferred either to association or to corporate trustee under trust agreement, ensure that conveyance is made before escrow closes for first sale of time-share interest in accommodation [*Bus. & Prof. Code § 11254(a)*; *see Bus. & Prof. Code § 11255* (rules for conveyance to trustee of association)].

NOTE:
The developer may reserve easements in the real property conveyed for purposes that are reasonably related to conducting commercial activities in the time-share property; provided the developer covenants to use the easements in a manner that will minimize any adverse impact on the use and enjoyment of the accommodation by any time-share interest owner occupying it [*Bus. & Prof. Code § 11254(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest

CommunitiesTimeshares



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide to Compliance with Vacation Ownership and Time-Share Act of 2004 (VOTSA)

16-33A California Legal Forms--Transaction Guide §§ 33A.142-33A.159

[Reserved]

§§ 33A.142[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

16-33A California Legal Forms--Transaction Guide § 33A.160

§ 33A.160 Reporting Material Changes in Project to Real Estate Commissioner

1. Determine whether it is necessary to apply to Real Estate Commissioner for approval to amend or supplement registration file due to any material change, which includes, but is not limited to [*see Bus. & Prof. Code § 11226(f)(1)*; *10 Cal. Code Reg. § 2806*]:

NOTE:
The developer must apply to the Commissioner for approval to amend or supplement its registration file due to any material change before the change is implemented, unless the change is beyond the developer's control, in which case the developer must notify the Commissioner in writing as soon as reasonably practicable after the event necessitating the change has occurred [*Bus. & Prof. Code § 11226(f)(1)*].

The developer may continue to sell time-share interests in the plan so long as, before closing, he or she provides to each purchaser the previously approved public report along with a written notice describing the change. However, if the change is material and adverse to a purchaser, all of the purchaser's funds will be held in escrow and no closing can occur until the Real Estate Commissioner has approved the amendment. Once the purchaser has received an amended public report, he or she will have an additional seven-day rescission period. If the Commissioner does not approve the amendment, all sales made using the notice of the amendment will be subject to rescission and all funds returned [*Bus. & Prof. Code § 11226(f)(2)*].

a. Deletion of accommodation from time-share plan or addition of accommodation not authorized under existing time-share public report for time-share plan.

b. Change in name or form of developer's organization, such as incorporation, dissolution

of corporation, or change in corporate or fictitious business name.

c. Change in methods of conveyancing of time-share interests, such as use of real property sales contracts.

d. Change in purchase money handling procedures previously submitted to Department of Real Estate, including but not limited to, change in escrow depository or creation of encumbrance affecting more than one time-share interest in time-share plan.

e. Resignation of trustee or other change in any terms of trust agreement for time-share plan.

f. Existence of either of following conditions with regard to trust corpus:
(1) Insufficient funds in trust to satisfy trust fund provision for payment of debt service, property taxes, assessments, and/or insurance premiums for trust property.

(2) Insufficient non-delinquent installment sales contracts and/or promissory notes to satisfy provision of trust agreement for payment of aggregate principal balance owing under blanket encumbrance against trust properties.

g. Any legal or physical condition rendering accommodation of time-share plan unusable by time-share owners for one year or more.

h. Litigation undertaken by governmental entity or time-share owners' association seeking to prohibit or restrict dedication of accommodation to time-share plan.

i. Annual budget for time-share project that will necessitate regular annual assessment that is more than 20 percent greater than regular annual assessment in certified budget for immediately preceding year.

j. Amendment to any provision of recorded time-share plan or declaration.

k. Change in any aspect of offering for time-share plan that will cause information in current public report for project to be incorrect or misleading.

2. Update public report to reflect changes that are not material and adverse, including addition of component sites, within reasonable time [*see Bus. & Prof. Code § 11226(f)(3)*].

NOTE:
The developer may continue to sell and close time-share interest pending approval of the updated public report [*Bus. & Prof. Code § 11226(f)(3)*].

3. If Real Estate Commissioner's approval is required, obtain and complete Form RE 635C Pt. II, "Public Report Amendment/Renewal Application (*Time-Share*)."

NOTE:
Form RE 635C Pt II is reproduced in § 33A.210[2]. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

4. Submit completed form and appropriate filing fee to address designated on form within 20 days of material change [*Bus. & Prof. Code § 11226(f)(1)*; *see 10 Cal. Code. Reg. § 2810.5(a)(3), (b)* (filing fee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33A TIME-SHARE PROJECTS
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16-33A California Legal Forms--Transaction Guide § 33A.161

§ 33A.161 Renewing Public Report

NOTE:
The term of a final public report is limited to five years. It may be renewed if the developer, owner, or agent files an application for renewal and submits whatever additional material the Real Estate Commissioner may require [*Bus. & Prof. Code § 11228*].

1. If renewal of public report is desired or necessary, obtain and complete Form RE 635C Pt. II, "Public Report Amendment/Renewal Application (*Time-Share*)."

NOTE:
Form RE 635C II is reproduced in § 33A.210[2]. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

2. Submit completed form and appropriate filing fee to address designated on form [*see 10 Cal. Code. Reg. § 2810.5(a)(3), (b)* (filing fee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33A California Legal Forms--Transaction Guide §§ 33A.162-33A.199

[Reserved]

§§ 33A.162[Reserved]



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16-33A California Legal Forms--Transaction Guide § 33A.200

§ 33A.200 Time-Share Plan Instructions [RE 668; Rev. 5/05]

[1] Comment--Use of Form

This official form presents the general instructions and outlines the application process for obtaining a public report and registering a time-share plan with the Department of Real Estate. It should be used in conjunction with completing and submitting RE 668A, "Notice of Intention (Time-Share)" or RE 668B, "Notice of Intention (*Non-Specific Time-Share*) [*see §§ 33A.201[2]* and *33A.202[2]*, respectively]. Form 668 can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Plan Instructions [RE 668; Rev. 5/05]

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Legal Topics:

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16-33A California Legal Forms--Transaction Guide § 33A.201

§ 33A.201 Notice of Intention (Time-Share) [RE 668A; Rev. 6/05]

[1] Comment--Use of Form

This form is a required part of the application process for a public report and registration of a single-site time-share plan [*see Bus. & Prof. Code § 11212(z)(1)*] and a specific time-share interest in a multisite time-share plan [*see Bus. & Prof. Code § 11212(z)(2)(A)*]. It contains questions about the plan and requests that various kinds of supporting documentation, as applicable, be submitted along with it. The form can be completed online and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm. RE 668 should be read before completing this form [*see § 33A.200*].

The completed form must be submitted with all other required information and documents, including a draft public report, to:

Department of Real Estate
Subdivisions Office--Technical
2201 Broadway
P.O. Box 187005
Sacramento, CA 95818-7005
Telephone: (916) 227-0810

The form should be accompanied by the appropriate filing fee [*see 10 Cal. Code Reg. § 2810.5(a)(1), (b)*].

[2] FORM

Notice of Intention (Time-Share) [RE 668A; Rev. 6/05]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33A California Legal Forms--Transaction Guide § 33A.202

§ 33A.202 Notice of Intention (*Non-Specific Time-Share*) [RE 668B; Rev. 6/05]

[1] Comment--Use of Form

This form is a required part of the application process for a public report and registration of non-specific time-share interests in a multisite time-share plan [*see Bus. & Prof. Code § 11212(z)(2)(B)*]. It contains questions about the plan and requests that various kinds of supporting documentation, as applicable, be submitted along with it. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm. RE 668 should be read before completing this form [*see § 33A.200*].

The completed form must be submitted with all other required information and documents, including a draft public report, to:

Department of Real Estate
Subdivisions Office--Technical
2201 Broadway
P.O. Box 187005
Sacramento, CA 95818-7005
Telephone: (916) 227-0810

The form should be accompanied by the appropriate filing fee [*see 10 Cal. Code Reg. § 2810.5(a)(1), (b)*].

[2] FORM

Notice of Intention (Non-Specific Time-Share) [RE 668B; Rev. 6/05]

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Legal Topics:

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16-33A California Legal Forms--Transaction Guide § 33A.203

§ 33A.203 Time-Share Public Report Preparation [RE 622H; New 6/05]

[1] Comment--Use of Form

This form consists of information, including references to Department of Real Estate forms, that has been developed as a guide to preparing the public report required to be submitted as part of the time-share registration application. It can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Public Report Preparation [RE 622H; New 6/05]

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Legal Topics:

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16-33A California Legal Forms--Transaction Guide § 33A.204

§ 33A.204 Time-Share Plan Disclosures (Part I) [RE 622I; New 6/05]

[1] Comment--Use of Form

This form consists of the standard time-share plan disclosures for California public reports. The general disclosures listed in Section 1 of the form must be included in all time-share public reports. The remaining disclosures should be reviewed and included in the public report if applicable to the particular time-share plan to be registered. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Plan Disclosures (Part I) [RE 622I; New 6/05]

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Legal Topics:

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16-33A California Legal Forms--Transaction Guide § 33A.205

§ 33A.205 Time-Share Plan Disclosures (Part II-1) [RE 622J-1; New 6/05]

[1] Comment--Use of Form

This form, which is basically a checklist, is designed as a guide to developing disclosures that are required for a public report for a single-site time-share plan or for a public report for those component sites of a multisite/specific time-share interest plan that are offered for sale in California [*see Bus. & Prof. Code § 11234(a)*]. Developers are instructed to submit complete and exact information under each item in the form to provide prospective purchasers with a clear understanding of the subject matter. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Plan Disclosures (Part II-1) [RE 622J-1; New 6/05]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33A California Legal Forms--Transaction Guide § 33A.206

§ 33A.206 Time-Share Plan Disclosures (Part II-2) [RE 622J-2; New 6/05]

[1] Comment--Use of Form

This form, which is essentially a checklist, is designed as a guide to developing disclosures that are required for a public report for a multisite/specific time-share interest plan [*see Bus. & Prof. Code § 11234(b)*]. Developers are instructed to submit complete and exact information under each item in the form to provide prospective purchasers with a clear understanding of the subject matter. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Plan Disclosures (Part II-2) [RE 622J-2; New 6/05]

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Legal Topics:

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§ 33A.207 Time-Share Plan Disclosures (Part II-3) [RE 622J-3; New 6/05]

[1] Comment--Use of Form

This form, which is essentially a checklist, is designed as a guide to developing disclosures that are required for a public report for a non-specific time-share interest multisite time-share plan [*see Bus. & Prof. Code § 11234(c)*]. Developers are instructed to submit complete and exact information under each item in the form to provide prospective purchasers with a clear understanding of the subject matter. The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

[2] FORM

Time-Share Plan Disclosures (Part II-3) [RE 622J-3; New 6/05]

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Legal Topics:

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16-33A California Legal Forms--Transaction Guide § 33A.208

§ 33A.208 Notice of Cancellation Rights

[1] Comment--Use of Form

The purpose of this form is to inform a purchaser of a time-share interest of his or her seven-day right to cancel the purchase. The developer must attach this notice, printed in conspicuous type, to the face page of every copy of a public report given to a prospective purchaser [*Bus. & Prof. Code § 11239(a), (b)*; *see Bus. & Prof. Code § 11238* (right to cancel); *see also § 33A.203*]. The developer-related information must be completed by the developer [*Bus. & Prof. Code § 11239(c)*].

[2] FORM

Notice of Cancellation Rights

NOTICE OF CANCELLATION RIGHTS

You may cancel the purchase of the time-share interest(s) in the time-share plan identified below without any penalty or obligation and are legally entitled to the return of all money and other considerations that you have given toward the purchase. If you decide to cancel your purchase, you must notify the developer in writing of your intent to cancel within seven calendar days of receipt of the public report or the date you sign the purchase contract, whichever date is later. Your notice of cancellation shall be effective upon the date sent and shall be sent to the developer at the address or facsimile number provided in your purchase contract. Any attempt to obtain a waiver of your cancellation right is void and of no effect.

_____ [*Developer's Name*]
_____ [*Developer's Address*]
_____ [*Developer's Facsimile Number*]
_____ [*Name of Time-share Plan*]
_____ [*DRE Registration File Number*]

RE: ELECTION TO CANCEL THE SALE OF A TIME-SHARE INTEREST(S)

I hereby elect to cancel my purchase of the time-share interest(s) in the above-name time-share plan.

_____ [*Purchaser's Signature and Date*]
[*Print Name*]
_____ [*Additional Purchaser's Signature and Date*]
[*Print Name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33A California Legal Forms--Transaction Guide § 33A.209

§ 33A.209 Receipt for Public Report

[1] Comment--Use of Form

This statutory form must be taken by or on behalf of a time-share plan developer from each person who executes a reservation agreement under authority of a preliminary public report and each person who has made a written offer to purchase or lease a time-share interest under authority of a preliminary, conditional, or final public report [*Bus. & Prof. Code § 11236(a), (c)*; *see § 33A.203*]. The developer, or his or her agent, must retain each receipt for a final public report for three years, and must make the receipts available for inspection by the department during regular business hours [*Bus. & Prof. Code § 11236(b)*].

[2] FORM

Receipt for Public Report

RECEIPT FOR PUBLIC REPORT

The Law and Regulations of the commissioner require that you as a prospective purchaser or lessee be afforded an opportunity to read the public report for this time-share before you execute a contract to purchase or lease a time-share interest or before any money or other consideration toward purchase or lease of a time-share interest is accepted from you.

You must be afforded an opportunity to read the report before a written reservation or any deposit in connection therewith is accepted from you.

DO NOT SIGN THIS RECEIPT UNTIL YOU HAVE RECEIVED A COPY OF THE REPORT AND HAVE READ IT.

I have read the commissioner's public report on _____ (File No., Tract No., *or* Name). I understand the report is not a recommendation or endorsement of the time-share, but is for information only. The date of the public report which I received and read is _____.

Developer Is Required to Retain This Receipt for Three Years.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33A California Legal Forms--Transaction Guide § 33A.210

§ 33A.210 Public Report Amendment/Renewal Application (*Time-Share*) [RE 635C Part II; Rev. 6/05]

[1] Comment--Use of Form

This form is for use in either of the following circumstances:

- When the developer, owner, or agent wants to renew a final public report when the report's original 5-year term is to expire [*see Bus. & Prof. Code § 11228*]; or

- When it is necessary to amend an existing public report due to some change in circumstances that causes the original public report to become inaccurate or misleading [*see Bus. & Prof. Code § 11226(f)*; *see also § 33A.160*].

The form can be downloaded and printed out from the Department of Real Estate's website at http://www.dre.cahwnet.gov/subsform.htm.

The completed form must be submitted to:

Department of Real Estate
Subdivisions Office--Technical
2201 Broadway
P.O. Box 187005
Sacramento, CA 95818-7005

The form should be accompanied by the appropriate filing fee [*see 10 Cal. Code Reg. § 2810.5(a)(2), (3), (b), (c)*].

A separate RE 635C must be completed and fee paid for each single-site time-share plan or each location of a multisite time-share plan that includes nonspecific time-share interests subject to amendment or renewal.

[2] FORM

Public Report Amendment/Renewal Application (*Time-Share*) [RE 635C Part II; Rev. 6/05]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimeshares



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS

16-33B California Legal Forms--Transaction Guide 33B.syn

§ 33B.syn Synopsis to Chapter 33B: MEMBERSHIP CAMPING CONTRACTS

§ 33B.01 California Statutes

§ 33B.02 Federal Statutes

§ 33B.03 Federal Regulations

§§ 33B.04-33B.19 [Reserved]

§ 33B.20 Related California Forms

§§ 33B.21-33B.29 [Reserved]

§ 33B.30 Applicable Laws

[1] Overview

[2] Unruh Act

[3] Truth in Lending Act

[4] False Advertising and Unfair Competition

§ 33B.31 Statutory Definitions

[1] Membership Camping Operator

[2] Other Important Terms

§ 33B.32 Requirements Governing Contract

[1] In General

[2] Membership Camping Disclosures

§ 33B.33 Blanket Encumbrances

§ 33B.34 Purchaser's Right of Cancellation

[1] In General

[2] Method of Cancellation

[3] Failure to Inspect

§ 33B.35 Violations of Statutory Requirements

[1] Purchaser's Remedies

[2] Correction of Errors

§ 33B.36 Membership Camping Contract Broker

[1] In General

[2] Purchase Money Handling Requirements

§ 33B.37 Withdrawal of Campground From Use

§ 33B.38 Transfer of Interest in Campground

§ 33B.39 Attorney's Role in Advising Prospective Purchaser

§§ 33B.40-33B.99 [Reserved]

§ 33B.100 Facts

Scope

§ 33B.101 Documents

Scope

§§ 33B.102-33B.119 [Reserved]

§ 33B.120 Applicability of Membership Camping Contract Legislation

Scope

§ 33B.121 Applicability of Special Statutory Requirements

Scope

§§ 33B.122-33B.139 [Reserved]

§ 33B.140 Restrictions on Sales Activities

Scope

§ 33B.141 Contract and Related Documents

Scope

§§ 33B.142-33B.159 [Reserved]

§ 33B.160 Required Disclosures

Scope

§§ 33B.161-33B.179 [Reserved]

§ 33B.180 Cancelling Purchase Contract

Scope

§ 33B.181 Handling Errors and Violations in Membership Camping Contract

Scope

§ 33B.182 Complying With Requirements Governing Resales

Scope

§ 33B.183 Complying With Miscellaneous Requirements

Scope

§§ 33B.184-33B.299 [Reserved]

§ 33B.300 Membership Camping Contract

[1] Comment

[a] Use of Form

[b] Required Contents and Format--Membership Camping Contract Legislation

[c] Unruh Act and Federal Regulation Z

[d] Interstate Commerce and Consumers' Rights

[e] Term of Agreement

[2] FORM

Membership Camping Contract

§ 33B.301 Membership Camping Operator Disclosure Statement [Civ. Code § 1812.302]

[1] Comment--Use of Form

[2] FORM

Membership Camping Operator Disclosure Statement [Civ. Code § 1812.302]

§ 33B.302 Notice of Cancellation of Membership Camping Contract [Civ. Code § 1812.303(b)]

[1] Comment

[a] Use of Form

[b] Cancellation Period

[c] Additional Requirements--Failure to Inspect

[d] Statutory Statement in Contract

[2] FORM

Notice of Cancellation of Membership Camping Contract [Civ. Code § 1812.303(b)]

§ 33B.303 Membership Camping Contract Broker Disclosure Statement [Civ. Code § 1812.314(b)]

[1] Comment

[a] Use of Form

[b] Disclosure Requirements

[2] FORM

Membership Camping Contract Broker Disclosure Statement [Civ. Code § 1812.314(b)]

§ 33B.304 Broker's Notice of Cancellation [Civ. Code § 1812.314(c)]

[1] Comment

[a] Use of Form

[b] Exercise of Right to Cancel

[c] Escrow Company

[2] FORM

Broker's Notice of Cancellation [Civ. Code § 1812.314(c)]

§ 33B.305 Provisions Protecting Purchasers on Transfer of Interest in Campground [Civ. Code § 1812.308]

[1] Comment

[a] Use of Form

[b] Exceptions

[c] Violations

[d] Required Contents

[2] FORM

Provisions Protecting Purchasers Upon Transfer of Interest in Campground [Civ. Code § 1812.308]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS

16-33B California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses membership camping contracts. A membership camping contract is an agreement that (1) is offered or sold in California by a membership camping operator or membership camping broker, (2) evidences a purchaser's right or license to use, for more than 14 days in a year, the campgrounds of a membership camping operator, and (3) includes a membership that provides for this use [*Civ. Code § 1812.300(b)*]. Contracts that grant similar rights to use camping facilities but that do not meet the above definition are not regulated by California's membership camping contract legislation [*see Civ. Code §§ 1812.300-1812.315*] and are not considered in this chapter.

The Legal Background defines important terms, presents an overview of applicable disclosure requirements, and discusses membership camping operators and membership camping brokers. The Transaction Guide lists exemptions to the membership camping contract legislation and contains a step-by-step guide to the drafting of the basic contract and related disclosure forms. The Forms section includes a membership camping contract, disclosure forms, and notices of cancellation.



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CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS
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A. Primary Sources

16-33B California Legal Forms--Transaction Guide § 33B.01

§ 33B.01 California Statutes

Actions for unfair competition. *Bus. & Prof. Code §§ 17200-17209*.

False advertising. *Bus. & Prof. Code §§ 17500-17509*.

Unruh Act. *Civ. Code §§ 1801-1812.20*.

Membership camping contracts. *Civ. Code §§ 1812.300-1812.316*.
Definitions. *Civ. Code § 1812.300*.
Operator disclosures. *Civ. Code § 1812.302*.
Notices of cancellation. *Civ. Code §§ 1812.303(b), 1812.304*.
Exemptions. *Civ. Code § 1812.305*.
Purchaser's remedies. *Civ. Code § 1812.306*.
Withdrawal of campground from use. *Civ. Code § 1812.307*.
Transfer of operator's interest in campground. *Civ. Code § 1812.308*.
Blanket encumbrances. *Civ. Code § 1812.309*.
Handling of money by broker. *Civ. Code § 1812.314*.
Waiver of provisions is void. *Civ. Code § 1812.316*.



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§ 33B.02 Federal Statutes

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*



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§ 33B.03 Federal Regulations

Regulation Z. 12 C.F.R. pt. 226.



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16-33B California Legal Forms--Transaction Guide §§ 33B.04-33B.19

[Reserved]

§§ 33B.04[Reserved]



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B. Secondary Sources

16-33B California Legal Forms--Transaction Guide § 33B.20

§ 33B.20 Related California Forms

California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender)
Ch. 14, *Advertising and Promotion*.
Ch. 565, *Unfair Competition*.



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[Reserved]

§§ 33B.21[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS
PART II. LEGAL BACKGROUND

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§ 33B.30 Applicable Laws

[1] Overview

The membership camping contract legislation [*see Civ. Code §§ 1812.300-1812.316*] regulates the contents of membership camping contracts and the activities of membership camping operators and brokers. It also provides purchasers with the right to cancel these contracts, and imposes other requirements designed to protect purchasers. A few membership camping contract transactions are exempt from the legislation, including an offer, sale, or transfer by any one person of not more than one membership camping contract for any given membership camping operator in any 12-month period [*Civ. Code § 1812.305(a)*; *see Civ. Code § 1812.305(b), (c)*; *see also § 33B.120*, P 1(b)].

Membership camping contracts are also subject to the following sets of consumer protection laws:

(1) The Unruh Act [*Civ. Code § 1812.301*; *see Civ. Code §§ 1801-1812.20*; *see also § 33B.30[2]*];

(2) Statutes prohibiting unfair competition [*Civ. Code § 1812.301*; *see Bus. & Prof. Code §§ 17200-17209*; *see also § 33B.30[4]*];

(3) Statutes relating to false advertising [*Civ. Code § 1812.301*; *see Bus. & Prof. Code §§ 17500-17509*; *see also § 33B.30[4]*]; and

(4) Regulation Z [12 C.F.R. pt. 226], which is the implementing regulation of the federal Truth in Lending Act [*Civ. Code § 1803.3(b)*; *see 15 U.S.C. § 1601 et seq.*; *see also § 33B.30[3]*].

[2] Unruh Act

Membership camping contracts are subject to the Unruh Act [*Civ. Code § 1812.301*; *see Civ. Code §§ 1801-1812.20*]. The Act applies to retail installment contracts for the sale of consumer goods or services. It protects consumers from abusive credit practices by requiring a variety of detailed disclosures. These disclosures, to the extent applicable, have been incorporated into the membership camping contract included in this chapter [*see § 33B.300*]. For a detailed discussion of the Unruh Act disclosures, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[3] Truth in Lending Act

All contracts subject to the Unruh Act, including all membership camping contracts [*see § 33B.30[2]*], must contain the disclosures required by Regulation Z [12 C.F.R. pt. 226], whether or not Regulation Z is applicable to the transaction [*Civ. Code § 1803.3(b)*]. Regulation Z is the implementing regulation of the federal Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*]. TILA requires disclosure of credit terms and cost. It applies to consumer credit transactions, which are transactions in which the credit extended, or goods purchased, are primarily for personal, family, or household purposes [*15 U.S.C. § 1602(h)*; *12 C.F.R. § 226.2(a)*]. For the TILA disclosures applicable to membership camping contracts, see *§ 33B.300*. Comprehensive coverage of TILA and Regulation Z is set forth in Ch. 45, *Consumer Installment Loans and Credit Sales* .

[4] False Advertising and Unfair Competition

Membership camping contracts are subject to statutes governing false advertising in general [*Civ. Code § 1812.301*; *see Bus. & Prof. Code §§ 17500-17509*]. Under these statutes, untrue or misleading statements contained in advertising for the sale of goods, services, or real estate are illegal [*Bus. & Prof. Code § 17500*]. For further discussion, see *Ch. 50, Advertising and Promotion, § 50.11[1][a]*.

Membership camping contracts are also subject to the statutes governing actions for unfair competition [*Civ. Code § 1812.302*; *see Bus. & Prof. Code §§ 17200-17209*]. For these purposes, "unfair competition" means (1) any act prohibited by the above false advertising statutes, (2) any unlawful, unfair, or fraudulent business act or practice, and (3) unfair, deceptive, untrue, or misleading advertising [*Bus. & Prof. Code § 17200*]. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined [*Bus. & Prof. Code § 17203*]. Further, that person may be liable for civil penalties [*Bus. & Prof. Code §§ 17206, 17206.1, 17207*]. For further discussion of these statutes, see California Forms of Pleading and Practice, Ch. 565, *Unfair Competition* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionUnfair & Deceptive Credit PracticesContracts LawTypes of ContractsInstallment Contracts



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§ 33B.31 Statutory Definitions

[1] Membership Camping Operator

For purposes of the membership camping contract legislation, "membership camping operator" means any enterprise (1) that has as one of its purposes the ownership or operation of campgrounds that include or may include camping sites, and (2) that solicits memberships from purchasers who will be the primary intended users of the facilities and who must pay a fee or make periodic payments (such as annual dues) for the membership [*Civ. Code § 1812.300(a)*; *see § 33B.31[2]*]. The following are not considered membership camping operators: nonprofit organizations that are tax exempt under *Internal Revenue Code Section 501(c)(3)* [*see Ch. 13B, Tax-Exempt Status for Nonprofit Entities, § 13B.20*] and mobilehome parks [*see Civ. Code § 798.4*; *Health & Safety Code § 18214* (defined); *see also* Ch. 39, *Mobilehome Parks* , and Ch. 40, *Mobilehomes*] that are open to the general public and that contain camping sites rented for a per use fee [*Civ. Code § 1812.300(a)*].

Membership camping operators need not obtain any type of license or permit to operate as such. However, the construction and operation of a campground [*see* discussion in *§ 33B.31[2]*] will ordinarily require other state and/or local permits [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*].

[2] Other Important Terms

Under the membership camping contract statutes, a "campground" is real property in California that is owned or operated by a membership camping operator and that is designated in whole or in part by the operator as being available for camping or outdoor recreation by purchasers of membership camping contracts [*Civ. Code § 1812.300(h)*]. A "camping site" is a space designed and promoted as a location for a trailer, tent, tent trailer, pickup camper, or other similar device used for camping [*Civ. Code § 1812.300(c)*]. A "purchaser" is any individual, corporation, partnership, limited liability company, trust, association, or nongovernmental entity who enters into a membership camping contract and thereby obtains the right to use the campgrounds of a membership camping operator [*Civ. Code § 1812.300(f)*; *see Civ. Code § 1812.300(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment ContractsReal Property LawZoning & Land UseGeneral Overview



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§ 33B.32 Requirements Governing Contract

[1] In General

A membership camping contract must be written in the same language as that principally used in any oral sales presentation. It must be dated, signed by the purchaser, and contain an official notice of cancellation [*Civ. Code § 1812.303(a)*; *see § 33B.34*]. On the date of purchase, the operator must provide the purchaser with a copy of the contract [*Civ. Code § 1812.303(c)*].

[2] Membership Camping Disclosures

An operator must make specified disclosures to purchasers concerning the operator's experience, the provisions of the membership camping contract, the operator's existing and planned campgrounds and facilities, and related matters. These disclosures must be in writing in any format that clearly communicates the required information. The operator must make the disclosures before the purchaser signs the contract or gives any money or thing of value for the purchase, and must include them in or attach them to the contract before it is signed. Further, the disclosures must be updated once a year [*Civ. Code § 1812.302*; *see Civ. Code § 1812.302(a)-(k)* (required disclosures); *see also § 33B.301*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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§ 33B.33 Blanket Encumbrances

If a campground is subject to a blanket encumbrance [*see Civ. Code § 1812.300(i)* ("blanket encumbrance" defined); *see also Civ. Code § 1812.309(a)* (requirements apply only if campground is offered or made available by operator for first time after January 1, 1991, or campground becomes subject to new or refinanced blanket encumbrance after that date)], one of four conditions relating to the encumbrance must be satisfied before the operator can offer contracts for sale or represent that the campground is available for use by the purchasers of its camping contracts [*see Civ. Code § 1812.309(a)*; *see also Civ. Code § 1812.309(b)*]. Basically, the complex alternative conditions require the execution of a nondisturbance agreement [*see Civ. Code § 1812.300(j)* ("nondisturbance agreement" defined)] or an encumbrance trust agreement, or the posting of a surety bond or irrevocable letter of credit, to protect the purchasers and assure the continuance of payments on the blanket encumbrance [*see Civ. Code § 1812.309(a)(1)-(4)*]. For discussion of the conditions, see *§ 33B.140*, P 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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§ 33B.34 Purchaser's Right of Cancellation

[1] In General

A purchaser may cancel a membership camping contract, without any penalty or obligation, within three business days from the date the contract is executed [*Civ. Code § 1812.303(b)*; *see Civ. Code § 1812.303(f)* ("business day" defined)]. This cancellation period will be extended if the operator fails to comply with its statutory obligations relating to a cancellation [*see Civ. Code § 1812.303(e)*; *see also § 33B.34[2]*], or if the purchaser did not inspect at least one of the operator's campgrounds before purchasing the contract [*see Civ. Code § 1812.304(a)*; *see also § 33B.34[3]*].

A statutory notice of cancellation describing the purchaser's right to cancel and the required cancellation procedure must be attached to or appear in the membership camping contract [*see Civ. Code § 1812.303(b)*; *see also Civ. Code § 1812.303(c)*; § 33B.302]. Further, the operator must inform the purchaser orally of the right to cancel at the time the contract is executed [*Civ. Code § 1812.303(c)*].

[2] Method of Cancellation

To cancel the contract, the purchaser must mail or deliver any of the following to the operator: a signed and dated copy of the notice of cancellation; a copy of the contract, if it contains the cancellation instructions; any other written notice; or a telegram. With the notice of cancellation, or separately if a telegram is sent, the purchaser must return the original contract, the membership card, and all other evidence of membership [*Civ. Code § 1812.303(b)*]. Within 20 days after receiving the foregoing materials, the operator must refund to the purchaser any deposit, downpayment, or other contractual payment [*Civ. Code § 1812.303(d)*].

Notwithstanding the statutory provision giving the purchaser three business days to cancel the contract [*see Civ. Code § 1812.303(b)*; *see also § 33B.34[1]*], the purchaser has the right to cancel the contract until the operator complies with the cancellation obligations imposed by *Civ. Code § 1812.303* [*Civ. Code § 1812.303(e)*].

[3] Failure to Inspect

If the purchaser has not inspected at least one of the operator's campgrounds prior to the purchase of the contract, the

notice of cancellation must contain additional statutory language (1) extending the right of cancellation to midnight of the tenth business day after the date of purchase, and (2) informing the purchaser of the procedure for cancelling the contract [*Civ. Code § 1812.304(a)*]. The only difference between this procedure and the standard cancellation procedure [*see* discussion in *§ 33B.34[2]*] concerns the written notice of cancellation the purchaser must give the operator; in this case, the purchaser must use the notice of cancellation or a copy of the contract (if the copy contains the cancellation instructions), and cannot use any other written notice or a telegram [*see Civ. Code § 1812.304(a)*]. Within 10 days of the cancellation of the contract and the return of the evidence of membership, the operator must return any payment made by the purchaser under the contract or offer to purchase, and any negotiable instrument executed by the purchaser [*Civ. Code § 1812.304(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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§ 33B.35 Violations of Statutory Requirements

[1] Purchaser's Remedies

If, due to an error or omission, a membership camping contract does not comply with any of the requirements of *Civ. Code §§ 1812.302-1812.304* (governing the contents of the contract and the notice of cancellation), the purchaser's remedies are limited to a right of rescission and refund [*Civ. Code § 1812.306(a)*; *but see Civ. Code § 1812.306(b)*; § 33B.35[2]]. However, this limitation does not apply to any error in, or omission from, a membership camping contract that violates the foregoing statutes and that is a part of a scheme to willfully misstate or omit (1) the information required by those statutes, or (2) the other requirements imposed by the membership camping contract legislation. In any action under the membership camping contract legislation, reasonable attorneys' fees will be awarded to the prevailing party [*Civ. Code § 1812.306(a)*].

Remedies for violations of the Unruh Act are not subject to the above limitations. Unruh Act remedies are beyond the scope of this chapter, but are discussed in detail in California Forms of Pleading and Practice, Ch. 501, *Sales: Retail Installment Sales* (Matthew Bender).

[2] Correction of Errors

Any failure to comply with the requirements of *Civil Code Sections 1812.302-1812.304* (governing the contents of the contract and the notice of cancellation) may be corrected within 30 days after the operator's receipt of a written notice from the purchaser, provided the failure was not willful or material [*Civ. Code § 1812.306(b)*]. The statute does not set forth any requirements regarding the contents of the purchaser's written notice. If the operator corrects the failure within that 30-day period, the purchaser will not have a right of rescission and the operator will not be subject to any penalty. However, the correction cannot increase any monthly payment, the number of payments, or the total amount due, unless the purchaser agrees in writing [*Civ. Code § 1812.306(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitutionContracts

LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



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§ 33B.36 Membership Camping Contract Broker

[1] In General

A membership camping contract broker is a person who, for compensation, resells or offers to resell a membership camping contract to a new purchaser on behalf of a prior purchaser. This definition does not include a membership camping operator or its employees or agents [*Civ. Code § 1812.300(k)*; *see § 33B.31[1]*].

A broker must provide a new purchaser of a membership camping contract with (1) a written disclosure statement of certain risks associated with the potential purchase [*Civ. Code § 1812.314(b)*; *see § 33B.303*], and (2) an official notice of cancellation [*Civ. Code § 1812.314(c)*; *see Civ. Code § 1812.314(c)(2)*; § 33B.304]. The notice explains that the purchaser may cancel the contract within 10 business days from the date of purchase [*see Civ. Code § 1812.314(c)*].

[2] Purchase Money Handling Requirements

If a broker receives money from the owner of a membership camping contract or the prospective purchaser of such a contract in advance of the completion of the resale of the contract, the broker must deposit the money into an escrow account [*Civ. Code § 1812.314(a)*]. Amounts subject to this requirement specifically include listing fees and fees for services. The deposited money must not be disbursed until the transaction is complete, or until the escrow agent has received written instructions to disburse the funds signed by the broker and the owner of the contract or the prospective purchaser. For these purposes, a transaction is complete when: ownership of the contract has been transferred from the prior purchaser to the new purchaser in the manner required by the terms of the contract; all documents necessary to complete the transfer have been fully executed; and the 10-day time period for the exercise of the purchaser's right to cancel [*see § 33B.36[1]*] has expired [*Civ. Code § 1812.314(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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§ 33B.37 Withdrawal of Campground From Use

A membership camping operator cannot "withdraw" a campground from use by purchasers of membership camping contracts unless one of the following conditions is applicable or satisfied, as the case may be [*Civ. Code § 1812.307*]:

(1) Adequate arrangements are made to provide, within a reasonable time, a substitute campground in the same general area that is as desirable as the withdrawn campground for the purposes of camping and outdoor recreation.

(2) The campground is withdrawn from use because, despite good faith efforts by the operator, a person not affiliated with the operator has exercised a superior right to possession, and the operator disclosed the terms and date of the withdrawal in writing to the purchasers at or prior to the time of sale of the contracts [*see Civ. Code § 1812.307(b)*; *see also § 33B.183*, P 2(b)].

(3) The rights of all purchasers of membership camping contracts who were entitled to use the campground have expired or have been lawfully terminated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide § 33B.38

§ 33B.38 Transfer of Interest in Campground

An operator or owner of the underlying fee in a campground must comply with two requirements when selling, leasing, assigning, or otherwise transferring his or her interest in a campground. First, the transfer must be evidenced by an instrument that (1) contains certain information [*see Civ. Code § 1812.308(a)(1)-(5)*; § 33B.305]; (2) is executed by both the transferor and transferee [*see Civ. Code § 1812.308(b)* (persons who hold blanket encumbrances on a campground are not considered transferees)]; and (3) is recorded in the office of the recorder for the county in which the campground is located [*Civ. Code § 1812.308(a)*]. Second, the owner or operator must mail notice of the transfer to each purchaser within 30 days of the transfer [*Civ. Code § 1812.308(b)*]. If a transfer does not comply with these requirements, the statutory terms and requirements governing these transfers will be presumed to be a part of the transfer and will be deemed to be included in the instrument of transfer [*Civ. Code § 1812.308(b)*]. These transfer restrictions do not apply to a substitution of one campground for another in accordance with *Civ. Code § 1812.307(a)* [*Civ. Code § 1812.308(a)*; *see § 33B.37*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral Overview



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16-33B California Legal Forms--Transaction Guide § 33B.39

§ 33B.39 Attorney's Role in Advising Prospective Purchaser

Prospective purchasers of membership camping contracts may be subjected to high-pressured sales tactics and the prospect of paying several thousand dollars for the contract. Consequently, consumers may consult an attorney before entering into such an agreement, or in an attempt to cancel or rescind a signed contract. Before making any recommendations, the attorney should carefully review the contract, all sales solicitations (including literature and the client's accounts of any oral sales presentations), and any available financial statements for the operator. This review will enable the attorney to check for compliance with applicable laws, to evaluate the financial solvency of the operator, to insist on necessary amendments to the preprinted contracts that operators typically use, and to assist the purchaser in exercising his or her right to rescission and refund under the proper circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsEffective Representation



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[Reserved]

§§ 33B.40[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

16-33B California Legal Forms--Transaction Guide § 33B.100

§ 33B.100 Facts

1. Name, address, and telephone number of following, as appropriate:

    a. Membership camping operator (operator).

    b. Any material affiliate operator.

    c. Membership camping broker (broker).

    d. Prospective purchaser.

    e. Holder of any blanket encumbrance on campground [*see § 33B.140,* P 1].

2. Legal status of any prospective purchaser [*see Civ. Code § 1812.300(e), (f)*]:

    a. Individual.

    b. Corporation.

    c. Partnership.

    d. Limited liability company.

    e. Trust.

    f. Association.

g. Other organization.

3. Legal status of operator and/or broker.

4. Location of each of operator's campgrounds [*see Civ. Code § 1812.300(h)* ("campground" defined)].

5. For each campground, brief description of significant facilities [*see Civ. Code § 1812.302(d)* ("significant facilities" defined); § 33B.160, P 6(b)]:

a. That are currently available for use by purchasers.

b. That are or will be represented to purchasers as being planned.

c. That are or will be available to nonpurchasers or nonmembers.

6. If representing new operator, other information needed to complete basic membership camping contract and required disclosures [*see §§ 33B.140* and *33B.160*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide § 33B.101

§ 33B.101 Documents

1. Copy of any existing or proposed rules, restrictions, covenants, membership handbook, or other materials regulating purchaser's use of facilities.

2. Copy of any existing or proposed membership camping contract.

3. Copy of any existing or proposed disclosure statements for operator and/or broker.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide §§ 33B.102-33B.119

[Reserved]

§§ 33B.102[Reserved]



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B. Preliminary Determinations

16-33B California Legal Forms--Transaction Guide § 33B.120

§ 33B.120 Applicability of Membership Camping Contract Legislation

1. Does enterprise owning or operating campgrounds fall within statutory definition of "membership camping operator"?

a. Does enterprise satisfy both of following criteria [*Civ. Code § 1812.300(a)*]:
(1) Has, as one of its purposes, ownership or operation of campgrounds that include or may include camping sites; and

(2) Solicits memberships, paid for by fee or periodic payments (such as annual dues), from contractual members who will be primary intended users of campgrounds.

b. Is enterprise one of the following, which are excluded from definition [*Civ. Code § 1812.300(a)*]:

(1) Enterprise that is tax exempt under *Internal Revenue Code Section 501(c)(3)* [*see Ch. 13B, Tax-Exempt Status for Nonprofit Entities, § 13B.20*].

(2) Mobilehome park [*see Civ. Code § 798.4*; *Health & Safety Code § 18214* (applicable definitions); *see also* Ch. 39, *Mobilehome Parks* , and Ch. 40, *Mobilehomes*].

2. Is proposed transaction any one of the following, which are excluded from scope of membership camping contract legislation [*Civ. Code § 1812.305*]:

a. Offer, sale, or transfer by any one person of not more than one membership camping contract for any given operator in any 12-month period;

b. Offer or sale by government or governmental agency; or

c. Bona fide pledge of membership camping contract?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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16-33B California Legal Forms--Transaction Guide § 33B.121

§ 33B.121 Applicability of Special Statutory Requirements

1. Has potential purchaser inspected at least one of operator's campgrounds [*see Civ. Code § 1812.304(a)*; *see also § 33B.141*, P 2(a)(4); § 33B.302[1][c]]?

2. What language was or will be principally used in any oral sales presentation [*see Civ. Code § 1812.303(a)* (membership camping contract must be written in same language as that principally used in any oral sales presentation)]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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[Reserved]

§§ 33B.122[Reserved]



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C. Procedural Guide to Sales Transaction

16-33B California Legal Forms--Transaction Guide § 33B.140

§ 33B.140 Restrictions on Sales Activities

1. If there is a blanket encumbrance on any of operator's campgrounds, advise operator to refrain from offering contracts for sale or representing that campground is available for use by purchasers of operator's camping contracts until one of following conditions has been satisfied:

NOTE:

The requirements discussed in this paragraph apply to a campground that (1) is offered or made available by an operator for the first time after January 1, 1991, or (2) becomes subject to a new or refinanced blanket encumbrance after that date [*Civ. Code § 1812.309(a)*]. A "blanket encumbrance" is any mortgage, trust deed, option to purchase, vendor's lien or interest under a contract or agreement of sale, or other financing lien or encumbrance granted by the operator or affiliate that (1) secures or evidences the obligation to pay money or to sell or convey any campgrounds (or portion of campgrounds) made available to purchasers by the operator, and (2) authorizes, permits, or requires the foreclosure or other disposition of the campground [*Civ. Code § 1812.300(i)*].

Any operator that does not comply at all times with the requirements discussed in this paragraph is prohibited from offering any membership camping contracts for sale during the period of noncompliance [*Civ. Code § 1812.309(b)*].

a. Operator obtains nondisturbance agreement from each holder of blanket encumbrance and records agreement(s) [*Civ. Code § 1812.309(a)(1)*; *see Civ. Code § 1812.300(i)* ("blanket encumbrance" defined); *see also Civ. Code §§ 1812.300(j), 1812.309(a)(1)(A)-(D)* (required contents of agreement)].

b. Operator posts surety bond or irrevocable letter of credit with a trustee in favor of purchasers, and bond or letter of credit guarantees that payments on blanket encumbrance will be made as they become due [*Civ. Code § 1812.309(a)(2)*].

NOTE:
The trustee must be either a corporate trustee or an attorney licensed to practice law in California [*Civ. Code § 1812.309(a)(2)*].

c. Operator delivers encumbrance trust agreement to a trustee [*Civ. Code § 1812.309(a)(3)*; *see Civ. Code § 1812.309(a)(3)(A)-(D)* (required contents)].

d. Any financial institution that has made hypothecation loan to operator ("hypothecation lender") [*Civ. Code § 1812.309(a)(4)*]:

(1) Possesses a lien on, or security interest in, operator's interest in campground; and

(2) Executes nondisturbance agreement and records it in recorder's office for county in which campground is located [*Civ. Code § 1812.309(a)(4)*].

NOTE:
Each person holding an interest in a blanket encumbrance that is superior to the interest held by the hypothecation lender must execute and record an instrument stating that the person will give the hypothecation lender notice of, and at least 30 days to cure, any default under the blanket encumbrance before the person commences any foreclosure action affecting the campground. For these purposes, a "hypothecation loan to a membership camping operator" means a loan or line of credit secured by membership camping contracts receivable arising from the sale of membership camping contracts by the operator, which exceeds in the aggregate all outstanding indebtedness secured by blanket encumbrances superior to the hypothecation lender's interest [*Civ. Code § 1812.309(a)(4)*].

A hypothecation lender who obtains or causes a change in title or possession of a campground, by foreclosure or otherwise, and who does not continue to operate the campground on conditions no less favorable to purchasers than existed prior to the change of title or possession, must either (1) offer the title or possession to an association of members to operate the campground, or (2) obtain a commitment from another entity that has obtained title to, or possession of, the campground to undertake the responsibility of operating the campground [*Civ. Code § 1812.309(a)(4)*].

2. Review any advertising relating to transaction to confirm that it does not violate statutes prohibiting false advertising in general [*Civ. Code § 1812.302*; *see Bus. & Prof. Code §§ 17500-17509*; *see also Ch. 50, Advertising and Promotion, § 50.120*].

3. Confirm that operator and other participants in transaction are not performing or proposing to perform an act of unfair competition [*see Civ. Code § 1812.302*; *see also Bus. & Prof. Code §§ 17200-17209*].

NOTE:
For these purposes, "unfair competition" means (1) any act prohibited by the above false advertising statutes, (2) any unlawful, unfair, or fraudulent business act or practice, and (3) unfair, deceptive, untrue, or misleading advertising [*Bus. & Prof. Code § 17200*; ***see*** *Bus. & Prof. Code §§ 17500-17509*; ***see also***

P 2, ***above***]. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined [*Bus. & Prof. Code § 17203*]. Further, that person may be liable for civil penalties [*Bus. & Prof. Code §§ 17206*, *17206.1*, *17207*] and may be subject to any other remedies provided under California law [*Bus. & Prof. Code § 17205*]. For further discussion of these statutes, see California Forms of Pleading and Practice, Ch. 565, ***Unfair Competition*** (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide to Sales Transaction

16-33B California Legal Forms--Transaction Guide § 33B.141

§ 33B.141 Contract and Related Documents

1. Draft contract that includes [*see § 33B.300*]:

NOTE:
The contract must be written in the same language as that principally used in any oral sales presentation [*Civ. Code § 1812.303(a)*].

a. Clause granting purchaser right or license to use operator's campgrounds for more than 14 days in a year [*Civ. Code § 1812.300(b)*].

b. Date [*Civ. Code § 1812.303(a)*].

c. Applicable Unruh Act and Truth in Lending Act disclosures [*see Civ. Code § 1812.301*; *Civ. Code §§ 1803.1, 1803.2, 1803.3*; *see also § 33B.300[1][c]*].

d. Cancellation information [*see* (2), *below*].

e. Operator's disclosure statement, unless statement is to be attached to contract [*see* (3), *below*].

2. Comply with following requirements governing notice of cancellation:

a. Prepare statutory notice of cancellation that satisfies following requirements [*Civ. Code § 1812.303(b)*; *see § 33B.302*]:
(1) Is captioned "Notice of Cancellation."

(2) Is in at least 10-point type.

(3) Is written in same language as used in contract.

(4) Contains additional notice of cancellation extending cancellation period, if purchaser has not inspected at least one of operator's campgrounds [*see Civ. Code § 1812.304(a)*].

(5) Is either:
(a) Prepared in duplicate as separate, easily detachable form; or

(b) Included in contract.

b. If notice is prepared as separate form:

(1) Include two-sentence statutory statement regarding right to cancel, in at least 10-point boldface type, in immediate proximity to purchaser's signature block [*Civ. Code § 1812.303(a)*].

(2) Attach notice to contract [*Civ. Code § 1812.303(b)*].

c. If notice is included in contract:

(1) Place notice in immediate proximity to signature line of contract [*see Civ. Code § 1812.303(a)*].

NOTE:
If the notice appears elsewhere in the contract, the contract must include the two-sentence statutory statement described in (2)(b)(1), ***above*** [***see*** *Civ. Code § 1812.303(a)*].

(2) Have operator provide purchaser with carbon copy of contract [*Civ. Code § 1812.303(b)*].

NOTE:
The purchaser may retain this copy if he or she cancels the contract [*Civ. Code § 1812.303(b)*].

3. Prepare operator's disclosure statement [*see § 33B.160, § 33B.301*] and then do the following [*Civ. Code § 1812.302*]:

a. Include it in or attach it to contract; and

b. Confirm that purchaser receives statement before he or she:

(1) Signs contract; or

(2) Gives any money or thing of value for purchase of contract.

4. Have purchaser and operator sign contract and, at same time, advise operator to do the following [*Civ. Code § 1812.303(a), (c)*]:

a. Provide purchaser with:

(1) Copy of contract; and

(2) Duplicate of notice of cancellation.

b. Inform purchaser orally of right to cancel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide §§ 33B.142-33B.159

[Reserved]

§§ 33B.142[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS
PART III. TRANSACTION GUIDE
D. Drafting Guide for Operator's Disclosure Statement

16-33B California Legal Forms--Transaction Guide § 33B.160

§ 33B.160 Required Disclosures

NOTE:
The following disclosures must be included in or attached to the membership camping contract before the contract is signed [*Civ. Code § 1812.302*]. For an illustrative operator's disclosure statement, see *§ 33B.301*.

1. State name and address of [*Civ. Code § 1812.302(a)*]:

a. Operator; and

b. Any material affiliate membership camping operator.

2. Provide brief description of operator's experience in membership camping business, including number of years in business [*Civ. Code § 1812.302(b)*].

3. Include brief description of past five years' business experience of [*Civ. Code § 1812.302(b)*]:

a. The following, if operator is a corporation:
(1) Chairman.

(2) President.

(3) Chief executive officer.

(4) Person in charge of marketing of operator, if other than foregoing.

b. Persons in positions comparable to those listed in (3)(a), *above*, if operator is not a corporation.

4. Concerning executives listed in (3), *above*, indicate [*Civ. Code § 1812.302(b)*]:

a. Number of other membership camping operators with which each executive has been associated; and

b. Length of time of each association.

5. Briefly describe nature of purchaser's right or license to use operator's property or facilities [*Civ. Code § 1812.302(c)*].

NOTE:
In most cases, the membership camping contract will simply give the purchaser the right to use all of the operator's facilities, in a manner consistent with other provisions of the contract and with any rules and regulations.

6. Concerning each of operator's campgrounds, provide [*Civ. Code § 1812.302(d)*]:

a. Location.

b. Brief description of significant facilities that are:

NOTE:
"Significant facilities" include each of the following: the number of campsites in each campground; the number of campsites in each campground with full or partial hookups; swimming pools; tennis courts; recreation buildings; restrooms and showers; laundry rooms; trading posts; and grocery stores. "Partial hookups" are those hookups with at least one of the following connections: electricity, water, or sewer connections [*Civ. Code § 1812.302(d)*].

(1) Then available for use by purchasers.

(2) Represented to purchasers as being planned.

(3) Available (or to be available) to nonpurchasers or nonmembers.

7. Following description discussed in (6), *above*, include following disclosure in 10-point boldface type [*Civ. Code § 1812.302(d)*]:

NOTICE:
PURCHASE A MEMBERSHIP CAMPING CONTRACT ONLY ON THE BASIS OF EXISTING FACILITIES. CONSTRUCTION OF PLANNED FACILITIES IS SOMETIMES DEFERRED OR REVISED FOR A VARIETY OF REASONS. SHOULD THE SALESPERSON DESCRIBE A SIGNIFICANT FACILITY WHICH IS NEITHER LISTED AS EXISTING NOR PLANNED, TELEPHONE COLLECT OR TOLL FREE DURING WEEKDAY BUSINESS HOURS TO _____ [*insert headquarters' telephone number*] TO VERIFY THE OPERATOR'S PLAN FOR SUCH A FACILITY.

8. Briefly describe operator's ownership of, or other right to use, campgrounds represented to be available for use by purchasers, including [*Civ. Code § 1812.302(e)*]:

a. Duration and expiration date of any lease, license, franchise, or reciprocal agreement entitling operator to use campgrounds; and

b. Any material provisions of any agreements, land use permits, or operating licenses that could materially restrict purchaser's use of campgrounds under terms of purchaser's camping contract.

9. Include summary or copy of rules, restrictions, or covenants regulating purchaser's use of operator's properties, including statement of whether and how rules, restrictions, or covenants may be changed [*Civ. Code § 1812.302(f)*].

10. Provide brief description of all payments by purchaser under contract, including [*Civ. Code § 1812.302(g)*]:

a. Initial fees.

b. Any further fees, charges, or assessments.

c. Any provisions for changing above payments.

11. Describe any restraints on transfer of contract [*Civ. Code § 1812.302(h)*].

12. Briefly describe policies relating to availability of camping sites and whether reservations are required [*Civ. Code § 1812.302(i)*].

13. Include brief description of any grounds for forfeiture of purchaser's contract [*Civ. Code § 1812.302(j)*].

14. Attach copy of contract [*Civ. Code § 1812.302(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Drafting Guide for Operator's Disclosure Statement

16-33B California Legal Forms--Transaction Guide §§ 33B.161-33B.179

[Reserved]

§§ 33B.161[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.180

§ 33B.180 Cancelling Purchase Contract

1. If purchaser desires to cancel contract and he or she inspected at least one of operator's campgrounds before executing contract, advise purchaser to take following steps within three business days from date contract was executed [*Civ. Code § 1812.303(b)*]:

NOTE:
"Business day" means any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day [*Civ. Code § 1812.303(f)*].

a. Notify seller (operator) by one of following methods:

NOTE:
For purposes of these procedural requirements, mailing by ordinary mail is adequate but certified mail is recommended [*Civ. Code § 1812.303(b)*].

(1) Mailing or delivering signed and dated copy of:
(a) Cancellation notice;

(b) Contract, if it contains cancellation instructions; or

(c) Any other written notice.

(2) Sending telegram to seller at address set forth in notice.

b. Return following documents to seller with written cancellation notice (or separately if telegram is sent):

(1) Original membership camping contract.

(2) Membership card.

(3) All other evidence of membership.

c. Retain one copy of cancellation notice, or carbon of contract if it contains cancellation information, or other writing showing intent to cancel.

2. If client/purchaser did not inspect any of operator's campgrounds before executing contract, notify client that contract may be cancelled by [*Civ. Code § 1812.304(a)*]:

a. Mailing or delivering following at any time prior to midnight of tenth business day after date of purchase:

NOTE:
For the definition of "business day" [*Civ. Code § 1812.303(f)*], see the NOTE to (1), ***above***.

(1) Signed and dated notice of cancellation or copy of contract when latter contains cancellation instructions.

(2) All evidence of membership, including original contract and membership card.

b. Alternatively, by following procedure discussed in (1), *above*.

3. If client is operator, advise operator to refund to purchaser:

a. Any deposit, down payment, or similar payment within 20 days after receipt of materials listed in (1), *above* [*Civ. Code § 1812.303(d)*]; or

NOTE:
If the purchaser does not promptly return the membership card and all other evidence of membership, this 20-day period will be extended until the evidence of membership is returned [*Civ. Code § 1812.303(d)*].

b. Any payment and negotiable instrument within 10 days of receipt of materials listed in (2), *above* [*Civ. Code § 1812.304(b)*].

NOTE:
The operator is subject to this 10-day deadline if the purchaser did not inspect any of the operator's campgrounds before executing the contract [***see*** *Civ. Code § 1812.304(b)*; *see also* (2), ***above***]. If the purchaser does not promptly return the evidence of membership [***see*** (2)(a)(2), ***above***], this 10-day period will be extended until the evidence of membership is returned [*Civ. Code § 1812.304(b)*].

4. Inform client that purchaser has right to cancel contract until operator complies with statutory cancellation requirements [*Civ. Code § 1812.303(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.181

§ 33B.181 Handling Errors and Violations in Membership Camping Contract

NOTE:
This chapter discusses procedures contained in the membership camping contract legislation. Violations of the Unruh Act are beyond the scope of this chapter, but are discussed in California Forms of Pleading and Practice, Ch. 501, ***Sales: Retail Installment Sales*** (Matthew Bender).

1. If contract violates membership camping contract legislation, and violation does not appear to be part of scheme to willfully misstate or omit required information, notify client of following procedure [*Civ. Code § 1812.306(b)*]:

a. Purchaser must submit written notice of violation to operator.

b. Operator must make correction within 30 days after receipt of notice.

c. In making correction, operator must not increase monthly payment, number of payments, or total amount due, without purchaser's written consent.

d. If operator makes proper correction:
(1) Purchaser will not have right of rescission; and

(2) Operator and any holder will not be subject to any penalty.

NOTE:
A "holder" is a seller who acquires the contract, or if the contract is purchased, a financing agency or other assignee who purchases the contract [*Civ. Code § 1812.306(b)*].

e. If violation is not corrected, purchaser has right to rescission and refund.

2. If contract contains violations of camping legislation that appear to be part of scheme to willfully misstate or omit required information, advise client that limitations in (1), *above*, do not apply [*Civ. Code § 1812.306(a)*].

3. Notify client that prevailing party in any action under camping legislation will be awarded reasonable attorneys' fees [*Civ. Code § 1812.306(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide § 33B.182

§ 33B.182 Complying With Requirements Governing Resales

1. If membership camping contract broker receives money from owner or prospective ("new") purchaser of membership camping contract in advance of completion of a resale of contract, instruct broker to:

NOTE:
For these purposes, "money" includes listing fees and fees for services [*Civ. Code § 1812.314(a)*].

a. Deposit fees into escrow account [*Civ. Code § 1812.314(a)*].

b. Provide broker's statutory notice of cancellation to new purchaser [*Civ. Code § 1812.314(c)(1)*; § 33B.304 (statutory notice)].

c. Inform new purchaser in writing of the following [*Civ. Code § 1812.314(b)*]:
(1) Risks of purchasing contract without visiting at least one of operator's campgrounds.

(2) That operator may have valid reason for not transferring contract to new purchaser, *e.g.:*
(a) Default in payment of contractual sums or annual dues; or

(b) Failure of new purchaser to meet same credit standards applied to other new purchasers.

(3) That there may have been changes in rules or regulations concerning rights and obligations of operator or its members, including changes with respect to annual dues, fees, assessments, or use restrictions.

(4) That some campgrounds may have been withdrawn.

(5) Any material changes or risks to purchaser known to broker.

d. Confirm that money is not disbursed until [*Civ. Code § 1812.314(a)*]:

(1) Transaction is complete; or

NOTE:
For these purposes, a transaction is complete when (1) ownership of the contract has been transferred from the prior purchaser to the new purchaser in the manner required by the terms of the contract, (2) all documents necessary to complete the transfer have been fully executed, and (3) the new purchaser has not exercised the right to cancel [*Civ. Code § 1812.314(a)*; ***see*** (2), ***below*** (right to cancel)].

(2) Escrow agent has received written instructions, signed by owner of contract or prospective purchaser and broker, to disburse funds.

2. If new purchaser wishes to cancel contract, instruct him or her to mail following materials to broker, operator, and escrow company within 10 business days from date of purchase [*see Civ. Code § 1812.314(c)(1)*]:

NOTE:
Although the purchaser may use ordinary mail, certified mail (return receipt requested) is recommended [***see*** *Civ. Code § 1812.314(c)(1)*].

a. Notice of cancellation.

NOTE:
The notice of cancellation provided by the broker [***see*** *§ 33B.304*] may be used for this purpose [***see*** *Civ. Code § 1812.314*].

b. Membership camping contract, if any.

c. Any other contract governing transfer of membership camping contract.

d. Membership card or other evidence of membership.

3. If escrow company receives notice of cancellation of resale agreement [*see* (2)(a), *above*], confirm that escrow company takes following steps [*Civ. Code § 1812.314(c)(2)*]:

NOTE:
The escrow company will incur no liability to the seller, purchaser, or broker as a result of its compliance with these obligations [*Civ. Code § 1812.314(c)(2)*].

a. Notifies operator of cancellation within 72 hours of receipt of notice; and

b. Refunds any sums paid by purchaser of contract within 10 days of receipt of notice of cancellation

and other documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.183

§ 33B.183 Complying With Miscellaneous Requirements

1. Instruct operator to update written disclosure statement [*see § 33B.160*] once a year [*Civ. Code § 1812.302*].

NOTE:
These updated statements must be distributed to prospective (but not existing) purchasers [***see*** *Civ. Code § 1812.302*].

2. If operator wishes to withdraw any campground from use by purchasers of membership camping contracts, notify operator that withdrawal is not permitted unless one of following conditions exists or is satisfied [*Civ. Code § 1812.307*]:

a. Operator makes adequate arrangements to provide, within a reasonable time, a substitute campground in same general area that is as desirable for purposes of camping and outdoor recreation as withdrawn campground.

b. Despite operator's good faith efforts, a person not affiliated with operator has exercised superior right to possession, after:

NOTE:
An example of the exercise of a superior right to possession is a lessor's decision to take possession following the expiration of a lease of a campground [*Civ. Code § 1812.307(b)*].

(1) Operator represented to purchasers that campground would be available for camping or recreation purposes; and

(2) Operator disclosed terms and date of withdrawal in writing to all purchasers at or prior to time of any sale of contract.

c. Rights of all purchasers of contracts who were entitled to use campground have expired or have been lawfully terminated.

3. If operator or owner of underlying fee in campground wishes to sell, lease, assign, or otherwise transfer his or her interest in campground, instruct him or her to take following steps:

NOTE:

If any transfer of the interest of the operator or fee owner violates the following requirements, the terms set forth in *Civ. Code § 1812.308* [***see*** (3)(a), ***below***] will be presumed to be a part of the transfer and will be deemed to be included in the instrument of transfer [*Civ. Code § 1812.308(b)*].

For these purposes, persons who hold blanket encumbrances on a campground will not be considered transferees [*Civ. Code § 1812.308(b)*]. Further, the following procedure does not apply to an operator who is substituting a campground in accordance with *Civ. Code § 1812.307* [*Civ. Code § 1812.308(a)*; ***see*** (2)(a), ***above***].

a. Prepare instrument evidencing transfer and stating that [*Civ. Code § 1812.308(a)*]:

(1) It is intended to protect rights of all purchasers of membership camping contracts.

(2) Its terms may be enforced by any prior or subsequent purchaser, so long as that purchaser is not in default on his or her obligations under contract.

(3) Transferee must fully honor rights of purchasers to occupy and use campground as provided in purchasers' original contracts.

(4) Transferee must fully honor all rights of purchasers to cancel their contracts and receive appropriate refunds.

(5) Transferee's obligations under instrument will continue to exist despite any cancellation or rejection of contract between operator and purchaser arising out of bankruptcy proceedings.

b. Have transferor and transferee execute instrument [*Civ. Code § 1812.308(a)*].

c. Record instrument in office of recorder for county in which campground is located [*Civ. Code § 1812.308(a)*].

d. Have operator or owner mail notice of transfer to each purchaser within 30 days of transfer [*Civ. Code § 1812.308(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal

Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide §§ 33B.184-33B.299

[Reserved]

§§ 33B.184[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS
PART IV. FORMS

16-33B California Legal Forms--Transaction Guide § 33B.300

§ 33B.300 Membership Camping Contract

[1] Comment

[a] Use of Form

This form is a membership camping contract. A membership camping contract is an agreement offered or sold in California by a membership camping operator or membership camping broker under which a purchaser acquires (1) a right or license to use, for more than 14 days in a year, the campgrounds of a membership camping operator, and (2) a membership that provides for the foregoing use [*Civ. Code § 1812.300(b)*]. If the operator uses a preprinted contract, as is often the case, counsel should compare it with this form to confirm that the standardized agreement complies with all applicable statutory requirements.

This form may be modified to incorporate the operator disclosures set forth in *§ 33B.301* [*see Civ. Code § 1812.302*], and the statutory notice of cancellation set forth as § 33B.302 [*see Civ. Code §§ 1812.303, 1812.304*; *see also § 33B.300[1][b]*].

[b] Required Contents and Format--Membership Camping Contract Legislation

The contract must be dated, written in the same language as that principally used in any oral sales presentation, and signed by the purchaser. Further, one of two official notices of cancellation must be placed in immediate proximity to the space reserved for the signature of the purchaser. This notice may consist of the complete notice of cancellation [*see § 33B.302*]. Alternatively, the attorney may include the two-sentence notice of cancellation that has been incorporated into this form. In that case, the complete notice of cancellation set forth in *§ 33B.302* must be attached to the contract [*Civ. Code § 1812.303(a), (b)*].

[c] Unruh Act and Federal Regulation Z

Membership camping contracts are subject to the Unruh Act [*Civ. Code § 1812.301*; *see Civ. Code § 1801 et seq.* (Unruh Act)]. The Unruh Act applies to retail installment contracts for the sale of consumer goods or services. It imposes requirements governing, among other things, disclosures, assignments, prepayments, finance charges, and

refunds of service charges.

A contract subject to the Unruh Act must be in writing [*see Civ. Code § 1803.1*]. Printed portions of the contract must be in at least 8-point type [*Civ. Code § 1803.1*]. However, the heading must be in 12-point boldface type and must read "Retail Installment Contract" unless the contract gives the seller a security interest in any goods or realty, in which case it must read "Security Agreement" [*Civ. Code § 1803.2(b)*]. Further, the contract must contain the Unruh Act disclosures [*see Civ. Code §§ 1803.2, 1803.3*]. These disclosures are incorporated into this form. For detailed discussion of the disclosures, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.124*.

A contract subject to the Unruh Act must also contain the disclosures required by Regulation Z [12 C.F.R. pt. 226], whether or not Regulation Z is applicable to the transaction [*Civ. Code § 1803.3(b)*]. Regulation Z is the implementing regulation of the federal Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*]. TILA requires disclosure of credit terms and cost. It applies to consumer credit transactions, which are transactions in which the credit extended, or goods purchased, are primarily for personal, family, or household purposes [*15 U.S.C. § 1602(h)*; *12 C.F.R. § 226.2(a)*]. Only those Regulation Z disclosures that are applicable to a particular transaction must be included [*12 C.F.R. § 226.18*]. Consequently, this form does not include the Regulation Z disclosures relating to balloon payments and insurance premiums, since it is highly unlikely that these features would be included in the typical membership camping contact. For a contract containing all Regulation Z disclosures, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.225*. Those disclosures are discussed in detail in *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.124*.

As a general rule, the Unruh Act disclosures may be set forth in terminology required or permitted by the Federal Reserve Board in the implementation of TILA and Regulation Z [*Civ. Code §§ 1801.5, 1802.18*]. However, while TILA permits the required disclosures to be made either in a separate document or in a clearly segregated portion of the contract, the Unruh Act disclosures must be made terms of the contract document itself, as mentioned above [*see Civ. Code §§ 1803.2, 1803.3, 1803.5*]. Therefore, as permitted by TILA, this form groups the TILA disclosures together and sets them apart from the Unruh Act disclosures and other terms and conditions of the contract [*see 15 U.S.C. § 1637(b)(1)*; *12 C.F.R. § 226.17(a)(1)*]. For a step-by-step guide to the inclusion in a single form of Unruh Act and Regulation Z disclosures, see Ch. 45, *Consumer Installment Loans and Credit Sales*, §§ 42.123, *45.124*, *45.225*.

[d] Interstate Commerce and Consumers' Rights

Unless the seller's business does not "affect interstate commerce," a term that is very broadly defined for purposes of the requirements discussed in this paragraph, an official notice of the consumer's rights against subsequent holders of the contract must be included in the agreement [*16 C.F.R. § 433.2*]. That notice has been included in this form and is discussed in detail in *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.226*.

[e] Term of Agreement

Most membership camping contracts offer lifetime memberships or a four- or five-year membership. This form is a lifetime contract. Because most lifetime membership camping contracts are transferable, they will usually provide that the membership rights will terminate at the death of a transferee (such as the second permanent transferee) or, if the contract is not transferred, upon the death of the purchaser's heir [*see* P 7 of Form].

[2] FORM

Membership Camping Contract

[*Print one of the following headings in at least 12-point boldface type, using "Security Agreement" only when contract gives operator a security interest in any goods or realty:*]

[SECURITY AGREEMENT *or* RETAIL INSTALLMENT CONTRACT]

_____ [*name of operator*]

_____ [*operator's address and phone number*]

_____

[*Print the appropriate choice from among the three alternatives that follow in at least 10-point boldface type.*]

[*If the finance charge is determined on the precomputed basis and the unearned portion of the finance charge to be refunded upon full prepayment is to be determined by a method other than actuarial:*]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount under this agreement at any time and obtain a partial refund of the finance charge if it is $1 or more. Because of the way the amount of this refund will be figured, the time when you prepay could increase the ultimate cost of credit under this agreement. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request.

[*Or, if the refund upon prepayment of the unearned portion of a precomputed finance charge will be computed by the actuarial method:*]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time and obtain a partial refund of the finance charge if it is $1 or more. (4) If you desire to pay off in advance the full amount due, the amount of the refund you are entitled to, if any, will be furnished upon request.

[*Or, if the finance charge is determined on the simple-interest basis:*]

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request. _____

Seller, _____[*name of operator*], _____[*business address*], hereby sells, and Buyer, _____[*name*], _____[*address of residence or place of business*], hereby buys, for the price stated in the payment schedule and subject to the terms and conditions set forth below and in the attached disclosure statement, membership rights entitling Buyer to use all campgrounds owned or operated by Seller _____ [*if desired, specify any geographical limitations on use, e.g.,* in the State of California].

FEDERAL DISCLOSURES

ANNUAL PERCENTAGE RATE _____ %

(the cost of your credit as a yearly rate)

FINANCE CHARGE $_____

(dollar amount the credit will cost you)

Amount Financed $_____

(the amount of credit provided to you or on your behalf)

Total of Payments $_____

(the amount you will have paid after you have made all payments as scheduled)

Total Sale Price $_____

(the total cost of your purchase on credit, including your down payment of $_____)

Payment Schedule

Your payment schedule will be:

Number of Payments	Payment Amount	When Payment Due
_____	$ _____	_____
_____	$ _____	_____
_____	$ _____	_____
_____	$ _____	_____
_____	$ _____	_____

Prepayment

If you pay off early, you will be entitled to a refund of part of the finance charge.

Late Charge

If a payment is more than nine days late, you will be charged 5% of the payment ($1 minimum, $5 maximum).

[*If operator retains a security interest in goods being purchased, add:*]

Security

You are giving a security interest in the membership rights being purchased.

[*Continue with the following:*]

See the text of this agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

ITEMIZATION OF THE AMOUNT FINANCED

1.	Cash Price of Membership	$
2.	Taxes Imposed on Sale	$
3.	TOTAL OF ITEMS 1 AND 2 ABOVE	$
4.	Official Fees: _____ [*itemize*]	$
5.	TOTAL OF ITEMS 3 AND 4	$
6.	TOTAL AMOUNT OF BUYER'S DOWN PAYMENT	$
7.	Net Value of Property Traded In	$
8.	Amount of Down Payment Deferred	$
9.	Manufacturer's Rebate Applied to Down Payment	$
10.	Net Cash Down Payment to Be Paid by Buyer (Item 6 less the total of items 7, 8, and 9)	$
11.	Prepaid Finance Charge	$
12.	AMOUNT FINANCED (Item 5 less the total of items 6 and 11)	$

A. PAYMENT SCHEDULES: Buyer promises to pay Seller or any assignee according to the payment schedule set out above.

[*If finance charge is determined on the precomputed basis, add:*]

If Buyer prepays this obligation in full, the unearned finance charge that will be refunded or credited to Buyer's account will be computed by the Rule of 78's [*or* the sum of the digits *or* the sum of the periodic time balances *or* the actuarial method].

[*Or, if finance charge is determined on the simple-interest basis, but provides for a minimum finance charge in the event of prepayment in full, add:*]

The finance charge shall be computed on the simple-interest basis. If Buyer prepays this obligation in full, there shall be a minimum finance charge of $ _____ [*specify amount of charge or, in the alternative, the method by which it will be calculated*].

[*Continue with the following:*]

B. DELINQUENCY CHARGE: Buyer promises to pay Seller on demand a delinquency charge on any payment in default for 10 days or more in an amount equal to 5% of that payment, except that the charge shall not exceed $5 or be less than $1.

C. OTHER TERMS AND CONDITIONS: Buyer promises to pay Seller all other amounts as provided in this contract and agrees to all other terms and conditions of this contract, which includes those additional terms and conditions set forth on the reverse side of this contract.

[*If contract affects interstate commerce, the following notice must be printed in at least 10-point boldface type:*]

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[*Print following statement in at least 10-point boldface type or insert entire statutory notice of cancellation (see Civ. Code § 1812.303(a); § 33B.302):*]

You, the purchaser, may cancel this contract at any time prior to midnight of the third business day after the date of the transaction. See an explanation of this right as set forth in this contract or on the attached notice of cancellation form.

[*Print following acknowledgement clause in at least 10-point boldface type:*]

BUYER ACKNOWLEDGES THAT, (1) PRIOR TO SIGNING THIS CONTRACT HE OR SHE READ AND RECEIVED A LEGIBLE, EXACT, AND COMPLETELY FILLED-IN COPY OF THIS CONTRACT, AND

THAT UPON SIGNING, SUCH COPY WAS ALSO SIGNED BY ALL THE PARTIES HERETO, AND (2) HE OR SHE HAS RECEIVED A COPY OF EVERY OTHER DOCUMENT HE OR SHE SIGNED DURING THE CONTRACT NEGOTIATIONS.

Dated _____

BUYER
_____ [*signature of buyer*]
[*typed name*]

SELLER
_____ [*name of seller/operator*]
By _____ [*signature*]
[*typed name and title*]

[*Reverse Side*]

TERMS AND CONDITIONS

Adherence to Financing Provisions

1. Buyer shall pay to Seller upon demand all actual costs of collection occasioned by failure of Buyer to notify Seller of any change of residence or to communicate with Seller for a period of 45 days after any default in making payments due under this contract. Time and exactitude of each of the payment terms in this Agreement are of the essence. Seller may accept past due payments without modifying the terms of this Agreement and without waiving any further rights Seller may have. The obligations of Buyer shall be joint and several.

Assignment

2. In the event of any assignment of Seller's interest under this contract, the Assignee shall be entitled to all the rights and privileges of Seller.

Defaults

3. If Buyer defaults in the payment of any installment when due, or if Buyer fails to perform or observe any of Buyer's agreements under this contract, Seller may at its option, without demand or notice to Buyer, declare the entire amount unpaid under this contract immediately due and payable.

Credit Warranty

4. BUYER WARRANTS THAT THERE HAS BEEN AND WILL BE NO EXTENSION OF CREDIT IN CONNECTION WITH THIS TRANSACTION OTHER THAN THAT REPRESENTED BY THIS CONTRACT AND THAT THERE EXISTS NO PROMISE TO COMPENSATE BUYER FOR REFERRING CUSTOMERS TO SELLER

OR REFERRING SELLER TO PROSPECTIVE CUSTOMERS.

Membership

5. Seller's membership shall be governed by the terms and conditions set forth in this contract and in the Membership Camping Operator Disclosure Statement that is attached to and hereby made a part of this contract. Further, Seller acknowledges that _____[he *or* she] has read that disclosure statement, and agrees to be bound by the Rules and Regulations [*or* Member Handbook *or similar document*] and any amendments thereto.

Indemnification and Notice of Risk

6. Buyer hereby acknowledges that the proper use of Seller's facilities involves some risk of injury to persons and damage to property. Accordingly, Buyer agrees to hold Seller harmless from all loss, liability, claims, and expense incurred by Buyer or Buyer's family and/or guests, resulting from the use by those persons of Seller's properties or facilities; provided, however, that this indemnity shall not apply to injuries or damages caused by Seller's negligence.

Term of Contract

7. The membership rights under this Agreement shall terminate upon the death of Purchaser's heir, or, if Purchaser transfers his or her rights under this Agreement, at the time set forth in the transferability provision of the attached Disclosure Statement.

Right of Cancellation

8. Purchaser shall have the right to cancel this Agreement at any time after payment of the one-time initiation fee by submitting written notice to Operator. A cancellation notice shall not release Purchaser from the obligation to pay any annual dues that became due prior to the date on which Operator received the notice.

Miscellaneous

9. Buyer represents that Buyer is purchasing this membership for the personal enjoyment of Buyer and his or her household and not for resale or profit. Buyer further represents that the membership has not been represented or sold to him or her as an investment opportunity. This membership is merely a contractual license to use any and all campgrounds owned or operated by Seller [in the region(s) specified above]. However, these facilities are subject to change. Therefore, this membership does not constitute an interest in, nor is it secured by, any of the real property or facilities belonging to Seller. Further, this Agreement does not entitle Buyer to participate in Seller's income, distributions, or facilities, to share in any merger, reorganization, liquidation, or dissolution of Seller, or to vote on any matters relating to Seller's business. Finally, Purchaser acknowledges that Seller will retain a security interest in Purchaser's membership rights until all sums owed under this Agreement have been paid in full.

[*Attach statutory notice of cancellation (see § 33B.302) unless it is placed in immediate proximity to signature blocks of membership camping contract (see Civ. Code § 1812.303(a)).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33B MEMBERSHIP CAMPING CONTRACTS
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16-33B California Legal Forms--Transaction Guide § 33B.301

§ 33B.301 Membership Camping Operator Disclosure Statement [Civ. Code § 1812.302]

[1] Comment--Use of Form

This form is a statement containing the written disclosures a membership camping operator must provide to a potential purchaser of a membership camping contract before the purchaser signs the contract or gives any money or thing of value for the purchase [*see Civ. Code § 1812.302*]. Because any operator disclosure statement must be highly customized, counsel should use this form as a general guide to the format and organization of these statements. For a checklist of the information that must be included in the statement, see *§ 33B.160*.

The disclosures may be provided in any format that clearly communicates the information. The information must be reasonably current, included in or attached to the contract before it is signed, and updated once a year [*Civ. Code § 1812.302*].

This form sets forth the disclosures as a separate statement to be attached to the contract, so that the membership camping contract need not be reprinted once a year when the disclosures are updated. However, the provisions of this form can be easily incorporated into the basic membership camping contract [*see § 33B.300*].

[2] FORM

Membership Camping Operator Disclosure Statement [Civ. Code § 1812.302]

_____ [*name of operator*]

Disclosure Statement

THE FOLLOWING DISCLOSURES AND INFORMATION ARE PROVIDED BY _____[*name of operator*], as the Seller and Membership Camping Operator (Operator) under the attached membership camping contract. These disclosures are made pursuant to *Section 1812.302 of the California Civil Code* and should be read before the attached contract is signed or any money or thing of value is given for the purchase of that contract.

1. Membership Camping Operator:
Name: _____
Address: _____

[*Add if applicable:*]

2. Material Affiliate Membership Camping Operator:
Name: _____
Address: _____

[*Continue with the following:*]

3. Experience of Operator and Officers:

a. _____[*Provide brief description of operator's experience in membership camping business, including number of years in business, e.g.,* Operator is a California corporation and has been in the membership camping business since _____, its year of incorporation. During that time, Operator has established and operated the facilities described in Paragraph 5 of this Statement].

[*If dealing with a noncorporate operator, replace the provisions in Subparagraphs (b)-(d), below, with similar descriptions of noncorporate persons in comparable positions.*]

b. _____[*Name*] is the President and Chief Executive Officer [*or provide for separate chief executive officer, or make the chairperson (see Subparagraph (c), below) the chief executive officer*] of Operator. _____[*Briefly describe past five years' business experience, number of other membership camping operators with which executive has been associated, and length of time with each, e.g.,* He has held this position since August of 1976. Prior to that date, he was associated with Marina Adventures, Inc., another membership camping operator, for three years].

c. _____[*Name*] is the Chairperson of the Board of Directors of Operator. _____[*Briefly describe past five years' business experience, number of other membership camping operators with which executive has been associated, and length of time with each, e.g.,* She has held this position since October of 1991. From 1988 to October of 1991 she was associated with Donner Heights Sites, Inc., another corporate membership camping operator].

[*Add if the following position is not held by one of the above executives:*]

d. _____[*Name*] is the person in charge of marketing for Operator. [*Briefly describe past five years' business experience, number of other membership camping operators with which person has been associated, and length of time with each, e.g.,* He has held that position for six years. Previously, he spent three years at the same position with another membership camping operator].

4. Purchaser's _____ [Right *or* License] to Use. Subject to all the terms and conditions contained in the attached membership camping contract, this Statement, and the Rules and Regulations [*or* Member Handbook *or similar document*], Purchaser shall have the right to use _____ [*briefly describe right or license, e.g.,* all

recreational facilities in Operator's campgrounds. There is no limitation placed on the total number of days per year that Purchaser can use the above facilities. However, Purchaser cannot stay at one campground for more than 14 days at any one time. Further, Purchaser shall reserve campsites in accordance with the requirements and procedures for the making of reservations set forth in the then-current Rules and Regulations. Purchaser shall also comply with the use restrictions set forth in the Rules and Regulations. No use by Purchaser will be permitted if Purchaser is delinquent in the payments of any amounts owed pursuant to the attached membership camping contract].

5. Operator's Campgrounds. The following is a list of each of the Operator's campgrounds, including a description of existing and proposed significant facilities:

[*State location of each campground and include brief description for each campground of the significant facilities then available for use by purchasers and those that are represented to purchasers as being planned, together with a brief description of any significant facilities that are or will be available to nonpurchasers or nonmembers (see Civ. Code § 1812.302(d)).*]

[*Print following notice in 10-point boldface type:*]
NOTICE: PURCHASE A MEMBERSHIP CAMPING CONTRACT ONLY ON THE BASIS OF EXISTING FACILITIES. CONSTRUCTION OF PLANNED FACILITIES IS SOMETIMES DEFERRED OR REVISED FOR A VARIETY OF REASONS. SHOULD THE SALESPERSON DESCRIBE A SIGNIFICANT FACILITY WHICH IS NEITHER LISTED AS EXISTING NOR PLANNED, TELEPHONE COLLECT OR TOLL FREE DURING WEEKDAY BUSINESS HOURS TO _____ [*insert headquarter's telephone number* **] TO VERIFY THE OPERATOR'S PLAN FOR SUCH A FACILITY.**

6. Ownership of Campgrounds. _____[*Briefly describe (1) operator's ownership of, or other right to use, campgrounds, (2) duration and expiration date of any lease, license, franchise, or reciprocal agreement entitling operator to use campgrounds, and (3) any material provisions of any agreements, land use permits, or operating licenses that could materially restrict purchaser's use of campgrounds under terms of purchaser's contract, e.g.,* Operator is the owner of the campgrounds described in Paragraph 5 of this Statement].

7. Use Restrictions. A copy of the _____ [*specify, e.g.,* Rules and Regulations *or* Membership Handbook] regulating Purchaser's use of the Operator's campgrounds is attached to this Statement [*or summarize rules, restrictions, or covenants regulating purchaser's use of operator's campgrounds*]. _____ [*State whether and how the foregoing may be changed, e.g.,* These use restrictions may be amended at any time by Operator. Any amendment to the restrictions shall be binding upon every Purchaser. No amendment shall require the consent or approval of any Purchaser].

8. Payments. As itemized and explained in the attached membership camping contract, Purchaser shall pay _____[*briefly describe payments, e.g.,* a one-time initiation fee of $2,000. Thereafter, for each year covered by the attached membership camping contract, Purchaser shall pay to the order of Operator dues of $1,000 per year. These dues shall be payable annually on or before June 30 of each year. They may be increased annually by an amount not exceeding 6 percent. These annual dues shall be nonrefundable and their application and use shall be in the sole discretion of Operator. Dues shall be waived for a 60-day period commencing with the date of execution of the attached contract, and new Purchasers will receive a prorated statement covering the balance of the first billable period. Failure to pay dues within 30 days of the due date shall result in the suspension of Purchaser's right to occupy Operator's campgrounds, and continued failure to pay dues beyond 90 days of the due date shall be grounds for termination of this membership].

_____ [*Specify any further fees, charges, or assessments, e.g.,* In addition to the above charges, Purchaser shall be charged a daily fee of $3.50 for each guest].

9. Transfer of Contract. _____ [*Describe any restraints on transfer of contract, e.g.,* Purchaser shall not sell, convey, hypothecate, transfer, or encumber less than all of Purchaser's interest under the membership camping contract. Any transfer by Purchaser of less than all of that interest shall be null, void, and of no effect.

No transfer may be made within two years of the date of execution of the contract, except that temporary transfers may be made to family members within that period in the manner specified in the Rules and Regulations, and permanent transfers may be made to any person with Operator's prior written consent, which shall not be unreasonably withheld; provided, however, that the membership is not permanently transferred on more than two occasions. Thus, except following succession, the membership shall terminate upon the death of a second permanent transferee.

The price for any transfer shall not exceed the sum of all dues, use fees, and reasonable costs of transfer. Permanent transfers shall be on forms provided by Operator, and shall not be effective until the transferee has entered into a new membership camping contract with Operator and agreed to accept all current dues, rules, regulations, and privileges.

A reasonable transfer fee, in an amount determined by Operator, shall be charged for any transfer. Operator does not provide resale services].

10. Reservations. Subject to all the terms and conditions contained in the attached membership camping contract and the Rules and Regulations, and as discussed in more detail in the Rules and Regulations, reservations are subject to the following requirements: _____ [*specify, e.g.:*

a. Reservations may be made not more than 90 days in advance of the desired commencement date.

b. Except as provided below, reservations shall be confirmed on a first-come, first-served basis.

c. Purchaser may cancel a reservation by giving notice at least 72 hours prior to check-in time. However, if Purchaser cancels a reservation, there is no guarantee that he or she will be able to secure another reservation at a different time during the year. Further, if cancellation occurs less than 72 hours prior to check-in time, or if Purchaser fails to use and occupy the reserved camping site and does not cancel the reservation, then Purchaser's next requested reservation shall be given a low priority by being held without confirmation until 10 days before the requested reservation period. Up until that time, any other reservation requests shall be given priority over Purchaser's request on a first-come, first-served basis. This policy is intended to discourage purchasers from cancelling reservations at such a late time that camping sites go unused].

11. Forfeiture. _____ [*Briefly describe any grounds for forfeiture of contract, e.g.,* If Purchaser fails to comply with any of the provisions of the attached membership camping contract, this Statement, or the Rules and Regulations, then Operator may enforce compliance with those provisions in the manner specified in the above documents. Thereafter, if the violation or violations continue, Operator may terminate the membership camping contract by giving written notice of termination to Purchaser without prejudice to any other remedy to which Operator may be entitled either at law, in equity, or under the membership camping contract].

ATTACHMENTS

SCHEDULE A

[*Attach copy of rules, restrictions, or covenants regulating purchaser's use of operator's properties if these matters are not summarized in Paragraph 7 of statement.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.302

§ 33B.302 Notice of Cancellation of Membership Camping Contract [Civ. Code § 1812.303(b)]

[1] Comment

[a] Use of Form

This form is the statutory notice of cancellation that must accompany or be a part of any membership camping contract. If it is to be a separate document (as is the case with this form), then it must be prepared in duplicate, attached to the contract, and easily detachable. If the notice is included in the contract, then the purchaser must be provided with a carbon copy that may be retained after cancellation. In either case, the notice must be exactly as set forth below, in at least 10-point type, and in the same language as used in the contract [*Civ. Code § 1812.303(b)*].

On the date of purchase the membership camping operator must provide the purchaser with a copy of the contract and a duplicate of the notice of cancellation. Further, the operator must inform the purchaser orally of the right to cancel at the time the contract is executed [*Civ. Code § 1812.303(c)*].

The procedure a purchaser must follow to cancel the membership camping contract is described in this form [*see Civ. Code § 1812.303(b)*]. For a step-by-step guide to that procedure, see *§ 33B.180*.

[b] Cancellation Period

As indicated in this form, the purchaser may cancel the membership camping contract within three business days from the date the contract is executed [*Civ. Code § 1812.303*; *see Civ. Code § 1812.304* (extending this period if purchaser has not inspected the operator's campgrounds); *see also § 33B.302[1][c][i]*]. For these purposes, "business day" means any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day [*Civ. Code § 1812.303(f)*].

[c] Additional Requirements--Failure to Inspect

If the purchaser has not inspected at least one of the operator's campgrounds prior to the purchase of the contract, the

notice of cancellation must contain additional statutory language extending the cancellation period to 10 business days after the date of purchase [*Civ. Code § 1812.304(a)*; *see § 33B.302[1][b]*]. The exact placement of the additional language is not specified by statute. The language has been added to this form, immediately preceding the space the purchaser may use to cancel the transaction.

[d] Statutory Statement in Contract

When the notice of cancellation is a separate document [*see § 33B.302[1][a]*], the membership camping contract must include a statutory statement describing the purchaser's right to cancel the agreement [*Civ. Code § 1812.303*; *see § 33B.300[1][b]*]. For the statutory statement, see *§ 33B.300*.

[2] FORM

Notice of Cancellation of Membership Camping Contract [Civ. Code § 1812.303(b)]

Notice of Cancellation

You may cancel this contract, without any penalty or obligation, within three business days from the date the contract is executed.

To cancel this contract, mail or deliver a signed and dated copy of this cancellation notice or a copy of this contract if it contains the cancellation instructions, or any other written notice, or send a telegram to _____[*name of operator*] at _____[*address of operator's place of business*] not later than midnight of _____[*date*].

[*Add if purchaser has not inspected at least one of operator's campgrounds (see Civ. Code § 1812.304(a)):*]

If you sign this contract without having first inspected one of the membership camping operator's campgrounds, you may also cancel this contract at any time prior to midnight of the tenth business day after date of purchase by mailing or delivering the signed and dated attached written notice of cancellation or a copy of the contract when that contains the cancellation instructions, together with the original camping club contract, membership card and any other evidence of membership.

[*Continue with the following:*]

I hereby cancel this transaction _____[*date*].

_____[*Purchaser's signature*]

With the notice of cancellation, or separately if a telegram is sent, you must return the original membership camping contract, membership card and all other evidence of membership to the seller. You should promptly return these documents with the notice of cancellation, or separately if a telegram is sent. Failure to send the documents promptly could delay your refund. You should retain for your records one copy of the cancellation notice, or a carbon of the contract when it provides the cancellation information, or other writing showing intent to cancel. Mailing by ordinary mail is adequate but certified mail return receipt requested is recommended.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.303

§ 33B.303 Membership Camping Contract Broker Disclosure Statement [Civ. Code § 1812.314(b)]

[1] Comment

[a] Use of Form

This form contains disclosures that a membership camping contract broker must make to a *new* purchaser of a membership camping contract upon the resale of the contract [*see Civ. Code § 1812.314*]. A membership camping contract broker is a person who, for compensation, resells or offers to resell a membership camping contract to a new purchaser on behalf of a prior purchaser. A membership camping contract operator, its employees, and its agents are not considered membership camping contract brokers [*Civ. Code § 1812.300(k)*].

In addition to this disclosure requirement, the broker must provide the new purchaser with a statutory notice of cancellation [*see Civ. Code § 1812.314(c)*; § 33B.304], and must comply with requirements governing the handling of money received from the new or prior owner of the contract in advance of the completion of the resale [*see Civ. Code § 1812.314(a)*]. For further discussion of these additional requirements, see *§ 33B.182*.

[b] Disclosure Requirements

A broker must inform a new purchaser in writing of all of the following [*Civ. Code § 1812.314(b)*]:

(1) The risks of purchasing a contract without visiting at least one of the operator's campgrounds.

(2) That the operator may have a valid reason for not transferring the contract to the new purchaser, for example, a default in the payment of contractual sums or annual dues, or a failure by the new purchaser to meet the same credit standards applied to other new purchasers.

(3) That there may have been changes in the rules or regulations concerning the rights and obligations of the operator or its members, including changes with respect to annual dues, fees, assessments, or use restrictions.

(4) That some campgrounds may have been withdrawn.

(5) Any material changes or risks to the purchaser known to the broker.

[2] FORM

Membership Camping Contract Broker Disclosure Statement [Civ. Code § 1812.314(b)]

Membership Camping Contract Broker's Disclosure Statement

The following disclosures are provided by _____[*name*], a membership camping contract broker ("Broker"), to _____[*name of new purchaser*] ("Purchaser"). These disclosures are made pursuant to *Section 1812.314 of the California Civil Code* in connection with the sale by Broker to Purchaser of the attached membership camping contract dated _____[*date*], between _____ [*name of membership camping operator under original contract*] ("Operator") and _____[*name of prior purchaser*].

Broker hereby informs Purchaser of the following:

1. If Purchaser signs a purchase contract for the above membership camping contract without visiting at least one of the above membership camping operator's campgrounds, Purchaser will be assuming the following risks: _____ [*specify, e.g.:* (1) that Operator's campgrounds are not appropriate for Purchaser's intended uses; and (2) that Operator's maintenance policies are not satisfactory to Purchaser].

2. Operator may have a valid reason for not transferring the above membership camping contract to Purchaser. As a general rule, these reasons could include defaults by the prior purchaser under the contract, or a failure by Purchaser to meet the same credit standards applied to other new purchasers.

3. Since the date of execution of the above contract, there may have been changes in the rules or regulations concerning the rights and obligations of Operator or its members, including changes with respect to annual dues, fees, assessments, or use restrictions.

4. Since the date of execution of the above contract, some campgrounds may have been withdrawn.

5. Broker is aware of the following material changes or risks to Purchaser: _____[*specify, e.g.:* (1) The local newspaper for the city of _____ has reported that the city council is considering exercising its power of eminent domain to acquire (condemn) _____, which is one of the campgrounds currently covered by the above contract; and (2) on _____ [*date*], Operator closed the campground that was formerly located at _____].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33B California Legal Forms--Transaction Guide § 33B.304

§ 33B.304 Broker's Notice of Cancellation [Civ. Code § 1812.314(c)]

[1] Comment

[a] Use of Form

This form is the statutory notice of cancellation that a membership camping contract broker must provide to a *new* purchaser of a membership camping contract when the contract is being resold [*Civ. Code § 1812.314(c)(1)*]. The new purchaser may use this form (or a suitable alternative) to exercise the right to cancel [*see § 33B.304[1][b]*].

For discussion of other responsibilities of a membership camping contract broker in connection with the resale of a membership camping contract, see *§ 33B.303[1]*.

[b] Exercise of Right to Cancel

This form provides that the purchaser may cancel the purchase transaction within 10 business days from the date of purchase by mailing a notice of cancellation and certain other materials to the broker, the operator, and the escrow company [*Civ. Code § 1812.314(c)(1)*; *see Civ. Code § 1812.314(a)* (requiring broker to deposit purchase money into an escrow account); *see also § 33B.182*]. The other materials consist of the membership camping contract (if any), any contract for transfer, and the membership card or other evidence of membership [*Civ. Code § 1812.314(c)(1)*]. The wording of this official form indicates that the broker, operator, and escrow company must each receive every one of the foregoing documents.

[c] Escrow Company

An escrow company that receives this notice from a purchaser must, within 72 hours of its receipt of the notice, notify the membership camping operator of the cancellation. Further, within 10 days of the receipt of the notice and other documents, the escrow company must refund any sums paid by the purchaser of the contract. The escrow company will incur no liability to the seller, purchaser, or broker as a result of its compliance with these statutory requirements [*Civ. Code § 1812.314(c)(2)*].

[2] FORM

Broker's Notice of Cancellation [Civ. Code § 1812.314(c)]

Notice of Cancellation

You may cancel your contract of purchase, without any penalty or obligation, within 10 business days from the above date of purchase by mailing this notice of cancellation together with the membership camping contract, if any, any contract for transfer, membership card or other evidence of membership to _____[*name of broker*], _____[*address of broker*], the membership camping operator _____[*name of operator*], _____[*address of operator*] and the escrow company _____[*name of escrow company*], _____[*address of escrow company*], if any, not later than midnight of _____[*date*].

I hereby cancel this transaction.

_____ [*signature of purchaser*]
Purchaser
Date: _____

Notice by ordinary mail is adequate but certified mail return receipt requested is recommended.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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16-33B California Legal Forms--Transaction Guide § 33B.305

§ 33B.305 Provisions Protecting Purchasers on Transfer of Interest in Campground [Civ. Code § 1812.308]

[1] Comment

[a] Use of Form

This form consists of provisions that may be inserted into an instrument evidencing the transfer of an interest in a campground, when the transferor is a membership camping operator or the owner of the underlying fee in the campground. As a general rule, an operator or the owner of the underlying fee in a campground must not sell, lease, assign, or otherwise transfer his or her interest in the campground except by an instrument evidencing the transfer that (1) contains certain provisions [*see § 33B.305[1][d]*], (2) is executed by both the transferor and the transferee, and (3) is recorded in the office of the recorder for the county in which the campground is located [*Civ. Code § 1812.308(a)*]. Further, notice of the transfer must be mailed to each purchaser within 30 days of the transfer [*Civ. Code § 1812.308(b)*].

Because any type of transfer of the operator's or owner's interest in the campgrounds is subject to this requirement, the entire transfer agreement is not included here. Instead, counsel should insert this form into the appropriate transfer agreement (for example, a real property sales agreement). The form uses the terms "instrument" and "transferee" because they are the ones used in *Civ. Code § 1812.308*. The attorney should change these terms if the underlying transfer agreement uses alternative language.

[b] Exceptions

Persons who hold blanket encumbrances on a campground are not considered transferees for the purposes of *Civ. Code § 1812.308* [*Civ. Code § 1812.308(b)*]. Further, § 1812.308 does not apply when a membership camping operator withdraws a campground from use by purchasers of membership camping contracts and replaces it, within a reasonable time, with a substitute campground in the same general area that is as desirable for the purpose of camping and outdoor recreation [*Civ. Code § 1812.308(a)*; *see Civ. Code § 1812.307(a)*].

[c] Violations

If any transfer violates these requirements, the terms set forth in *Civ. Code § 1812.308* [*see § 33B.305[1][d]*] will be presumed to be a part of the transfer and will be deemed to be included in the instrument of transfer [*Civ. Code § 1812.308(b)*].

[d] Required Contents

The instrument evidencing the transfer must state each of the following [*Civ. Code § 1812.308(a)*]:

(1) That the instrument is intended to protect the rights of all purchasers of membership camping contracts.

(2) That its terms may be enforced by any prior or subsequent purchaser so long as that purchaser is not in default on his or her obligations under the contract.

(3) That the transferee must fully honor the rights of the purchasers to occupy and use the campground as provided in the purchaser's original membership camping contracts.

(4) That the transferee must fully honor all rights of purchasers to cancel their contracts and receive appropriate refunds.

(5) That the obligations of the transferee under the instrument will continue to exist despite any cancellation or rejection of the contracts between the operator and purchaser arising out of bankruptcy proceedings.

[2] FORM

Provisions Protecting Purchasers Upon Transfer of Interest in Campground [Civ. Code § 1812.308]

Protection of Interests of Purchasers

Section _____. This Instrument is intended to protect the rights of every person who has acquired _____ [the right *or* a license] to use the campground described in Section _____ of this Instrument by purchasing a membership camping contract from _____[*name of membership camping operator*] (hereafter referred to as "Operator"). The terms of this Instrument may be enforced by any prior or subsequent purchaser of such a membership camping contract so long as that purchaser is not in default on his or her obligations under the contract. Transferee shall fully honor the rights of the purchasers to occupy and use the campground as provided in the purchasers' original membership camping contracts. Further, Transferee shall fully honor all rights of purchasers to cancel their contracts and receive appropriate refunds. Finally, the obligations of Transferee under this Instrument shall continue to exist de spite any cancellation or rejection of the contracts between Operator and the purchasers arising out of bankruptcy proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawLimited Use RightsLicensesReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleGeneral Overview



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§ 33C.syn Synopsis to Chapter 33C: STOCK COOPERATIVES

§ 33C.01 California Statutes

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§ 33C.03 California Regulations

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§§ 33C.05-33C.19 [Reserved]

§ 33C.20 Law Reviews

§ 33C.21 Annotations

§ 33C.22 Text References

[1] Related Forms With Tax Analysis

[2] Related California Forms

[3] Additional Text References

§§ 33C.23-33C.29 [Reserved]

§ 33C.30 Stock Cooperative Form of Ownership

[1] In General

[2] Statutory Definition

§ 33C.31 Davis-Stirling Common Interest Development Act

[1] In General

[2] Declaration

[3] Common Areas and Separate Interests

[4] Owners' Association

§ 33C.32 Subdivided Lands Act

[1] Applicability to Stock Cooperatives

[2] Public Report Requirement

[3] Implementing Regulations

[4] Impound of Funds

[5] Blanket Encumbrances

§ 33C.33 Subdivision Map Act

[1] New Projects

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§ 33C.34 Governing Documents

[1] In General

[2] Statutory Requirements

[3] For FHA-Financed Cooperatives

§ 33C.35 Financing

[1] Cooperative Real Property

[2] FHA Mortgage Insurance

[3] Individual Interests

§ 33C.36 Ownership Liabilities

[1] Contractual

[2] Tort

§ 33C.37 Income Taxation of Tenant-Stockholders

[1] In General

[2] "Cooperative Housing Corporation" Defined

[3] "Tenant-Stockholder" Defined

[4] Interest and Real Estate Tax Deduction

[5] Depreciation Deduction

[6] Nonrecognition of Gain on Sale of Cooperative Stock

[7] Losses

§ 33C.38 Income Taxation of Cooperative Corporation

[1] State Law

[2] Federal Law

§ 33C.39 Property Taxation

§ 33C.40 Securities Regulation of Stock Cooperatives

[1] In General

[2] Federal Securities Law

[3] State Securities Law

§§ 33C.41-33C.99 [Reserved]

§ 33C.100 Facts

Scope

§ 33C.101 Documents

Scope

§§ 33C.102-33C.119 [Reserved]

§ 33C.120 Formation Considerations

Scope

§ 33C.121 Applicability of State and Federal Law

Scope

§§ 33C.122-33C.139 [Reserved]

Scope

§ 33C.140 Recording Subdivision Maps

Scope

§ 33C.141 Drafting Governing Documents

Scope

§ 33C.142 Obtaining Public Report

Scope

Scope

§§ 33C.143-33C.199 [Reserved]

§ 33C.200 Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]

[1] Comment

[a] Use of Form

[b] Public Report Requirement

[c] Components of Application Form

[i] Instructions

[ii] Index/Quantitative Deficiency Notice

[iii] Questionnaire

[d] Filing

[i] Alternative Methods

[ii] Appropriate Regional Office

[iii] Fees

[e] Issuance of Public Report

[f] Preliminary Public Report

[g] Distribution of Final Public Report

[h] Renewal of Report

[i] Specific Form Provisions

[i] Required for All Common-Interest Subdivisions

[ii] Blanket Encumbrances

[iii] Terms and Conditions of Sale

[2] FORM

Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part I

Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part II

Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part III

§ 33C.201 Declaration

[1] Comment

[a] Use of Form

[b] Effect of Recording Declaration

[c] Filing With Real Estate Commissioner

[d] Resolution of Disputes Involving Enforcement of Declaration

[e] Amendment of Declaration

[f] Provisions Required in Declaration

[i] Davis-Stirling Common Interest Development Act

[ii] Subdivided Lands Act

[g] Rights of Mortgagees

[2] FORM

Declaration

§ 33C.202 Articles of Incorporation for Stock Cooperative

[1] Comment

[a] Use of Form

[b] Contents of Articles

[i] In General

[ii] Incorporation of Unincorporated Association

[c] Execution and Filing

[d] Amendment

[2] FORM

Articles of Incorporation for Stock Cooperative

§ 33C.203 Bylaws for Stock Cooperative

[1] Comment

[a] Use of Form

[b] Contents

[i] Nonprofit Mutual Benefit Corporation Law

[ii] Regulations of California Real Estate Commissioner

[c] Transfer of Interests

[d] Termination Procedures

[e] Certificate of Secretary

[f] Filing

[2] FORM

Bylaws for Stock Cooperative

§ 33C.204 Proprietary Lease for Stock Cooperative

[1] Comment

[a] Use of Form

[b] Contents of Form

[i] In General

[ii] Carrying Charges

[iii] Security Deposit

[iv] Repairs

[v] Right of Entry

[vi] Condemnation

[vii] Subletting and Assignment

[viii] Breach of Lease

[ix] Remedies for Breach of Lease

[x] Option to Renew Lease

[xi] Attorneys' Fees

[xii] Identity of Manager and Owner

[c] Filing

[2] FORM

Proprietary Lease for Stock Cooperative



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16-33C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the statutory and regulatory requirements governing the formation and sale of interests in stock cooperatives. These requirements are contained in the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see 10 Cal. Code Reg. § 2790 et seq.* (implementing regulations)], and the Subdivision Map Act [*Gov. Code § 66410 et seq.*]. For a general discussion of common interest developments under the Davis-Stirling Common Interest Development Act, see *Ch. 34, Condominiums, § 34.33*. For detailed coverage of other common interest developments and common interest subdivisions, see Ch. 33A, *Time-Share Projects* , Ch. 33D, *Planned Developments* , and Ch. 34, *Condominiums* . For a complete discussion of the regulation of subdivided lands and the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

This chapter also analyzes the financing, tax, and securities aspects of stock cooperatives. Although stock cooperatives are corporations, this chapter does not discuss the specific laws and regulations applicable to all California corporations. For a general discussion of the planning considerations involved in corporate formation, see Ch. 2, *Preincorporation Planning* . Nonprofit corporations are covered in Ch. 13, *Nonprofit Corporations* . For an examination of state and federal securities laws applicable to California corporations, see Ch. 6, *Securities Regulation Issues* .



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§ 33C.01 California Statutes

NOTE:
For additional California statutes, see *Ch. 34, Condominiums, § 34.01*.

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*
Stock cooperative defined. *Bus. & Prof. Code § 11003.2*.
Stock cooperative as subdivision. *Bus. & Prof. Code § 11004.5(d)*.
Applicability of Subdivided Lands Act to stock cooperatives. *Bus. & Prof. Code § 11004.5(d)*.

Davis-Stirling Common Interest Subdivision Act. *Civ. Code § 1350 et seq.*
Stock cooperative and limited equity housing cooperative defined. *Civ. Code § 1351(m)*.
Transfer of interest in stock cooperative. *Civ. Code § 1358(d)*.
Easements appurtenant to separate interests in stock cooperative. *Civ. Code § 1358(d)*.

Nonprofit Corporation Law. *Corp. Code § 5000 et seq.*

Exclusion of "subdivided lands" and "subdivision" from Corporate Securities Law. *Corp. Code § 25100(f)*].

Brokers selling shares in stock cooperatives exempt from broker-dealer certification requirements. *Corp. Code § 25004(f)*.

Authorization of loans to tenant-stockholders by commercial banks. *Fin. Code § 1236*.

Subdivision Map Act. *Gov. Code § 66410 et seq.*
Leasing of space in apartment building exempt from Subdivision Map Act. *Gov. Code § 66412(a)*.
Conversion of stock cooperative to condominium exempt from Subdivision Map Act. *Gov. Code § 66412(h)*.
Conversion of five or more existing dwelling units to stock cooperative subject to Subdivision Map Act. *Gov. Code § 66424*.

Exemption of stock cooperative conversions from certain requirements of Subdivision Map Act. *Gov. Code §§ 66427, 66427.2, 66477.*

California Environmental Quality Act of 1970 (CEQA). *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

Separate assessment of individual interests in stock cooperative. *Rev. & Tax. Code § 2188.7(a)-(c).*

Taxation of homeowners' association. *Rev. & Tax. Code § 23701t(a), (d), (e).*



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§ 33C.02 Federal Statutes

National Housing Act. *12 U.S.C. § 1701 et seq.*

Interstate Land Sales Full Disclosure Act. *15 U.S.C. § 1701 et seq.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*

Exclusion of gain on sale of principal residence applicable to tenant-stockholders of housing cooperative. *I.R.C. § 121(d)(4).*

Proportionate deduction of interest and real estate taxes by tenant-stockholder. *I.R.C. § 216(a).*

Depreciation deduction by tenant-stockholder if unit used in trade or business or for production of income. *I.R.C. § 216(c).*



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§ 33C.03 California Regulations

Regulations of the Real Estate Commissioner governing subdivisions. *10 Cal. Code Reg. §§ 2790 et seq.10 Cal. Code Reg. § 2792.2*.
Deposit of funds in escrow depository required for stock cooperative. *10 Cal. Code Reg. § 2792.13*.
Protection of investors required when stock cooperative subject to blanket encumbrance. *10 Cal. Code Reg. § 2792.14*.

California Environmental Quality Act (CEQA) regulations. *14 Cal. Code Reg. § 15000 et seq.*

California Coastal Act regulations. *14 Cal. Code Reg. §§ 13001 et seq., 13050 et seq.*



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§ 33C.04 Federal Regulations

Interstate Land Sales Full Disclosure Act regulations. 24 C.F.R. § 1700.1 et seq.

National Environmental Policy Act of 1969 (NEPA) regulations. *40 C.F.R. § 6.100 et seq.*

Shares in cooperative apartment houses exempt from Section 15a of the Securities Exchange Act of 1934 when sold by licensed broker. *17 C.F.R. § 240.15a-2.*



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[Reserved]

§§ 33C.05[Reserved]



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§ 33C.20 Law Reviews

Kishel, "The 'No-Buy' Pledge in Cooperative Conversions," 14 Real Estate L.J. 234 (1986).

Feuer, "Calculating Allowable Depreciation for Tenant-Stockholders of Cooperatives," 60 J. Tax. 288 (1984).

Goldberg, "Cooperative Tax Implications," 42 N.Y.U. Tax. Inst. 25-1 (1984).

Miller, "Impact of a Housing Cooperative's 'Bad' Income on Its Members Section 216(a) Deductions, Now and Under Proposed Legislation," 10 J. Real Estate Tax. 99 (1983).

Greenberger & Siegel, "Sale of Co-op Stock: Interaction of the Nonrecognition and Installment Sales Rules," 56 J. Tax. 244 (1982).

Boris, "Co-ops and Condominiums Capital Gain on Conversion and Other Problems," 40 N.Y.U. Tax. Inst. 22.1 (1982).

Kaster, "Residential Co-ops and Condominiums Development Projects and Conversions Promoter's Tax Techniques," 38 N.Y.U. Tax. Inst. 13.1 (1980).

Cowan & Miller, "Revenue Act of '78 Permits Non-Individuals to Qualify as 'Co-op' Tenant-Stockholders," 50 J. Tax. 220 (1978).

Note, "Securities Regulation--United Housing Foundation Inc. v. Forman (*95 Sup. Ct. 2051*)--The Applicability of Federal Securities Laws to Shares of Stock in Co-operative-Housing Corporations," *1 J. Corp. L. 639 (1976)*.



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§ 33C.21 Annotations

"Enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children," 100 A.L.R.3d 241 (1980) .

"Cooperative associations: validity and enforceability of bylaw amendment reducing benefits available to members," 61 A.L.R.3d 976 (1975) .



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16-33C California Legal Forms--Transaction Guide § 33C.22

§ 33C.22 Text References

[1] Related Forms With Tax Analysis

Rabkin & Johnson, Current Legal Forms (Matthew Bender).
Ch. 2A, *Joint Ventures, Business Trusts, and Associations*,2A.30-2A.44 (cooperatives).
Ch. 15A, *Not-for-Profit Corporations*.
Ch. 20, *Real Estate Entities*, 20.34-20.46 (cooperatives).

[2] Related California Forms

NOTE:
For references to California forms, see *Ch. 34, Condominiums, § 34.22[2]*.

[3] Additional Text References

NOTE:
For additional text references, see *Ch. 34, Condominiums, § 34.22[3]*.

California Real Estate Law & Practice (Matthew Bender).
Ch. 424, *Regulations of Subdivided Land Sales*.
Ch. 476, *Other Developments*, § 476.02 (cooperatives).

Rohan & Reskin, Cooperative Housing Law and Practice (Matthew Bender).

Miller & Starr, *Current Law of California Real Estate* (Bancroft-Whitney 1977), vol. 4, Ch. 24, "Subdivisions and Condominiums," § 24:90 (stock cooperatives).

Condominium and Cooperative Conversions, (PLI Real Estate Handbook No. 159, 1979).

Cooperatives and Condominiums (PLI Real Estate Law and Practice Transcript Series No. 4, 1969).

Bowler & McKenzie, "Invisible Kingdoms," *5 Calif. Law. 55 (1985)*.



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§§ 33C.23[Reserved]



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PART II. LEGAL BACKGROUND

16-33C California Legal Forms--Transaction Guide § 33C.30

§ 33C.30 Stock Cooperative Form of Ownership

[1] In General

A stock cooperative is a corporation formed to provide rental property to its shareholders, who are generally called "tenant-stockholders" [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 2, *Types of Cooperatives; Terminology and Definitions* (Matthew Bender)]. Unlike the investors in a condominium project [*see Ch. 34, Condominiums, § 34.30*], the tenant-stockholders do not acquire a fee interest in real property. Instead, they obtain ownership of stock, with appurtenant rights of exclusive occupancy of a specific unit and use of common areas of the corporate property [*see § 33C.31[3]*]. The corporation retains title to the real property [*see § 33C.30[2]*]. This ownership structure has various financing and property tax consequences to the investor [*see §§ 33C.35[1], 33C.39*].

The price of a unit is reflected by the number of shares attributed to it at a fixed value per share. If the values of all the units are approximately equal, each tenant-stockholder usually receives the same number of shares. However, when there are variances in the respective values of the units, the tenant-stockholders receive differing numbers of shares in ratio to the respective values of their units. A larger unit, for example, would have more shares allocated to it, and thus a higher price [*see* California Real Estate Law & Practice, Ch. 476, *Other Developments* (Matthew Bender)].

Stock cooperatives can be formed for a variety of uses, including professional offices, garages, or markets. However, most cooperatives are formed to provide housing for their tenant-stockholders. For purposes of federal financing [*see § 33C.35[2]*], exemption from federal securities laws [*see § 33C.40[2]*], and exemption from state taxation [*see § 33C.38[1]*], the stock cooperative must be formed for residential purposes. The forms in this chapter are designed for residential stock cooperatives.

For further discussion of the general nature of stock cooperatives, see California Real Estate Law & Practice, Ch. 476, *Other Developments* (Matthew Bender).

[2] Statutory Definition

A stock cooperative is defined by statute as a development in which (1) a corporation is formed or used primarily for the purpose of holding title to improved real property, either in fee simple or for a term of years; and (2) all or

substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property [*Civ. Code § 1351(m)* (Davis-Stirling Common Interest Development Act); *see Bus. & Prof. Code § 11003.2* (Subdivided Lands Act)].

A "limited-equity housing cooperative" is a related type of stock cooperative that meets the public benefit or charitable requirements of *Civ. Code § 817* [*Civ. Code § 1351(m)*; *Bus. & Prof. Code § 11003.4*]. For purposes of the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; *see § 33C.31[1]*], "stock cooperative" includes limited equity housing cooperatives [*Civ. Code § 1351(m)*]. However, for purposes of the Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.*; see *§ 33C.32[1]*], limited equity housing cooperatives are not included within the definition of "stock cooperative" [*Bus. & Prof. Code § 11003.2*]. Limited equity housing cooperatives are beyond the scope of this chapter and are not separately discussed [*see* California Real Estate Law & Practice, Ch. 424, *Regulation of Subdivided Land Sales* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property LawCommon Interest CommunitiesCooperativesLeases



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§ 33C.31 Davis-Stirling Common Interest Development Act

[1] In General

The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] ("Act") governs the creation and operation of all common interest developments [*see Ch. 34, Condominiums, § 34.33[1]*]. Under the Act, a stock cooperative is created whenever a separate interest (i.e., the exclusive right to occupy a portion of the real property) [*see § 33C.31[3]*] coupled with an interest in the common area or membership in the association is conveyed, provided that a "declaration" and a final or parcel map, if required [*see § 33C.33[2]*], are recorded [*Civ. Code § 1352*].

[2] Declaration

The "declaration" of a stock cooperative is a governing document [*see Civ. Code § 1352(j)*; *see also § 33C.34[1]*]. It must contain (1) a legal description of the development, (2) a statement that it is a stock cooperative, (3) the name of the association, and (4) restrictions on the use or enjoyment of any portion of the development that are intended to be enforceable equitable servitudes [*see § 33C.201*]. It may also contain any other matters that the original signatory of the declaration or the owners consider appropriate [*Civ. Code § 1353*]. The covenants and restrictions set forth are enforceable equitable servitudes, unless unreasonable, and will inure to the benefit of and bind all tenant-stockholders. Unless the declaration states otherwise, the servitudes may be enforced by any tenant-stockholder, by the association, or by both. In any action to enforce the declaration, the prevailing party will be awarded reasonable attorneys' fees and costs [*Civ. Code § 1354*].

The declaration may be amended pursuant to the governing documents orstatute [*see Civ. Code §§ 1355, 1355.5, 1356*]. For a discussion of those procedures, see *Ch. 34, Condominiums, § 34.33[3]*.

[3] Common Areas and Separate Interests

By virtue of their ownership in the corporation, the tenant-stockholders have two types of interests in a stock cooperative. First, they each have a "separate interest," which in the case of a stock cooperative consists of the exclusive right to occupy a portion of the real property [*Civ. Code § 1351*(*l*)(4)]. Both the separate interest and the correlative interest in the stock cooperative corporation, however designated, are interests in real property [*Civ. Code § 783.1*].

Unless the declaration provides otherwise, if walls, floors, or ceilings are designated as boundaries of a separate interest, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of that separate interest, and any other portions of the walls, floors, or ceilings are part of the common areas [*Civ. Code § 1351(l)*]. In addition, unless the declaration provides otherwise, there is an easement for ingress, egress, and support, if necessary, appurtenant to each separate interest. The common areas are subject to those easements [*Civ. Code § 1361(b)*].

Second, the tenant-stockholders have the right to use the "common area" [*see Civ. Code § 1351(c)(2)*], which consists of the entire development other than the separate interests [*Civ. Code § 1351(b)*]. An "exclusive use common area" is a portion of the common area that (1) is designated by the declaration for the exclusive use of one or more, but fewer than all, of the tenant-stockholders, and (2) is or will be appurtenant to the separate interests. Unless the declaration provides otherwise, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames, related hardware, screens, windows, or other fixtures designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest. Notwithstanding any provision of the declaration, internal and external telephone wiring designed to serve a single separate interest, but located outside the boundaries of that interest, are also exclusive use common areas allocated exclusively to that separate interest [*Civ. Code § 1351(i)*]. The separate interest owner is entitled to reasonable access to the common areas to maintain this wiring, notwithstanding any provision to the contrary in the declaration. This access, however is subject to the association's consent, which may not be unreasonably withheld, and to other reasonable conditions the association might impose, including that the association must approve external wiring in the common areas [*Civ. Code § 1364(f)*].

Unless the declaration provides otherwise, the association must repair, replace, and maintain the common areas, other than exclusive use common areas, while owners of separate interests must maintain their separate interests and appurtenant exclusive use common areas [*Civ. Code § 1364(a)*].

Any conveyance, judicial sale, or other voluntary or involuntary transfer of a separate interest includes the ownership interest in the corporation. Any conveyance, judicial sale, or other voluntary transfer of the owner's entire interest also includes the owner's membership interest in the association [*Civ. Code § 1358(d)*]. Exclusive use areas may be transferred independent of any other interest if the declaration authorizes such a transfer and the transfer is made in accordance with the terms set forth in the declaration [*Civ. Code § 1358*].

The estate in a separate interest or in the common area of a cooperative may be a fee, a life estate, an estate for years, or any combination of these [*Civ. Code § 1351(b)* (common area), (*l*), (m) (separate interest)].

[4] Owners' Association

All common interest developments must be managed by an incorporated or unincorporated association, commonly referred to as an "owners' association" [*Civ. Code § 1363(a)*; *see Civ. Code § 1351(a)* (definition of "association")]. In a stock cooperative, which is formed as a corporate entity, the corporation itself serves as the owners' association. A nonprofit corporation (organized under the Nonprofit Mutual Benefit Corporation Law) [*Corp. Code § 7110 et seq.*] is generally the preferred and most prevalent type of corporate entity [*see Ch. 34, Condominiums, § 34.38[1]*]. The forms in this chapter provide for the formation of such a corporation.

The association is responsible for (1) maintaining the common areas [*Civ. Code § 1364*; *see* discussion in *§ 33C.31[3]*], (2) preparing and distributing financial statements and insurance summaries [*Civ. Code §§ 1365, 1365.2*.5], and (3) levying regular and special assessments to pay for operating expenses [*see Civ. Code § 1366*; *see also* Ch. 34, *Condominiums* , 34.39[1]]. It has standing to sue or defend in certain litigation regarding the governing documents or damage to the common or separate interests [*see Civ. Code § 1368.3*; *see also Ch. 34, Condominiums, § 34.38[3]*]. For a complete discussion of owners' associations, see *Ch. 34, Condominiums, § 34.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & Sale



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§ 33C.32 Subdivided Lands Act

[1] Applicability to Stock Cooperatives

The Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], which applies to "subdivisions" and "subdivided lands" [*see Bus. & Prof. Code §§ 11000, 11004.5*], protects prospective purchasers from fraud and misrepresentation by requiring developers to furnish them with a disclosure document referred to as a public report [*see § 33C.32[2]*]. The definition of "subdivisions" and "subdivided lands" includes any stock cooperative that has or intends to have five or more shareholders, and any legal or beneficial interests in that cooperative [*Bus. & Prof. Code § 11004.5(d)*; *see Bus. & Prof. Code § 11003.2*; *Civ. Code § 1351(m)*]. Italso includes any accompanying memberships or other rights or privileges created in, or in connection with, a stock cooperative by deed, conveyance, lease, sublease, assignment, declaration of restriction, articles of incorporation, bylaws or contracts applicable thereto, and any interests or memberships in any owners' association created in connection with a stock cooperative [*Bus. & Prof. Code § 11004.5(f)*]. Therefore, if a stock cooperative does not meet the minimum size requirements, the Subdivided Lands Act will not apply and the following discussion of that Act should be disregarded.

For the sake of consistency, this chapter refers to the developer of a stock cooperative as a "developer," even though "subdivider" is the term used in the Subdivided Lands Act.

For a detailed discussion of the Subdivided Lands Act, see Ch. 30, *Subdivision Regulation* .

[2] Public Report Requirement

No person may sell or lease, or offer to sell or lease, any lot or parcel in a stock cooperative that has or intends to have five or more shareholders, without first obtaining a final public report from the Real Estate Commissioner [*Bus. & Prof. Code § 11018.2*; *see Bus. & Prof. Code § 11004.5(d)*]. The report discloses consumer information about the particular subdivision [*see Ch. 34, Condominiums, § 34.37[3]*]. To obtain the report, the seller or lessor must submit an application for a public report, consisting of a notice of intention and a completed questionnaire [*see § 33C.200[2]*], to the Real Estate Commissioner [*Bus. & Prof. Code § 11010(a)*].

Before issuing the final public report, the Commissioner may issue a preliminary public report on request if the

Commissioner considers it reasonable to expect that all of the requirements for issuance of a final public report will be satisfied in due course [*10 Cal. Code Reg. § 2795(a)*]. A preliminary public report permits the developer and the developer's agent to solicit and accept reservations to purchase or lease stock cooperative interests, if certain requirements are met [*10 Cal. Code Reg. § 2795(b)*; *see Ch. 34, Condominiums, § 34.200[1][i]*].

When the public report has been issued, the owner, developer, or agent must give a copy (together with a statutory statement describing common interest developments generally) to the prospective purchaser or lessee prior to the execution of a binding contract or agreement for sale or lease [*Bus. & Prof. Code § 11018.1(a)*]. The prospective purchaser or lessee must acknowledge receipt of that document [*see Bus. & Prof. Code § 11018.1(a)*; *see 10 Cal. Code Reg. § 2795.1* (receipt form)].

Special rules apply to public reports obtained for a housing development designed for senior citizens [*see Bus. & Prof. Code § 11010.05*; *see also Ch. 34, § 34.40[2]*]. For a discussion of those rules, see *Ch. 34, Condominiums, § 34.200[1][b][v]*.

[3] Implementing Regulations

The extensive implementing regulations for the Act [*see 10 Cal. Code Reg. § 2790 et seq.*] refer to stock cooperatives with five or more shareholders (along with certain planned developments, community apartment projects, condominium projects, and limited-equity housing cooperatives) as "common interest" subdivisions [*see 10 Cal. Code Reg. §§ 2705, 2792.8*; *Bus. & Prof. Code § 11004.5(d)*]. That term is distinct from the term "common interest development" used in the Davis-Stirling Common Interest Development Act [*see Civ. Code § 1350 et seq.*].

The common interest subdivision regulations contain requirements for governing instruments, owners' associations, and assessments, among other things. Some of these matters are also governed by the Davis-Stirling Common Interest Development Act [*see § 33C.31[1]*]. Therefore, an attorney must determine whether a proposed stock cooperative will be subject to both Acts.

Only those regulations that apply solely to stock cooperatives are discussed in this chapter [*see § 33C.32[4],[5]*]. The regulations that govern all common interest subdivisions are discussed in *Ch. 34, Condominiums § 34.38[7]* [*see 10 Cal. Code Reg. § 2792.15*]; § 34.38[8] [*see 10 Cal. Code Reg. § 2792.8*]; § 34.38[10] [*see 10 Cal. Code Reg. § 2792.17*]; § 34.38[11] [*see 10 Cal. Code Reg. § 2792.18*]; and § 34.39 [*see 10 Cal. Code Reg. § 2792.16*].

[4] Impound of Funds

Interests in stock cooperatives, as well as community apartment projects, limited equity housing cooperatives, and undivided interest subdivisions, must be presold [*10 Cal. Code Reg. § 2792.13*]. Although "undivided interest" subdivisions provide purchasers with nonexclusive rights to use property, and are therefore completely distinct from stock cooperatives and other common interest developments/subdivisions [*see Bus. & Prof. Code § 11000.1(a)* (undivided interest subdivisions); *Civ. Code § 1351(c)* (common interest developments)], the Real Estate Commissioner tends to group all four types of subdivisions together for regulatory purposes under that term [*see* Guide to California Subdivision Sales Law (Cal. CEB 1974), Ch. 4, *Additional Requirements for Common Interest and Other Special Subdivisions*].

All funds received from prospective investors in any of these subdivisions must be deposited and held intact in an escrow depository acceptable to the Commissioner until bona fide offers have been obtained for the purchase of a prescribed percentage of all of the interests offered for sale. If the prescribed percentage of offers have not been obtained within two years from the date of the issuance of thepublic report, or within another period approved by the Commissioner, all funds collected must be promptly returned by the escrow depository to the owners without deduction [*10 Cal. Code Reg. § 2792.13*; *see* Guide to California Subdivision Sales Law (Cal. CEB 1974), Ch. 4, *Additional*

Requirements for Common Interest and Other Special Subdivisions].

The prescribed percentage is determined by the Commissioner based on the facts and circumstances of each offering, and ordinarily must be at least 60 percent of the interests being offered for sale. However, the Commissioner may prescribe a lesser percentage if the plan of the offering includes other financial arrangements to lessen the possibility of foreclosure of a nondelinquent interest because of the delinquencies of other owners [*10 Cal. Code Reg. § 2792.13*].

[5] Blanket Encumbrances

Since fee title to a stock cooperative is in the name of the cooperative corporation (unless the corporation itself holds title only for a term of years) [*see Civ. Code § 1351(m)*], work done on the property, mortgages, or deeds of trust generally subject the entire project, and therefore all of the tenant-stockholders, to a "blanket encumbrance" [*see § 33C.35[1]*]. A blanket encumbrance is (1) a trust deed, mortgage, or any other lien or encumbrance (such as a mechanic's lien) that secures or evidences the payment of money, and affects land to be subdivided or two or more lots or units in a subdivision, or (2) an agreement that affects two or more parcels or units in a subdivision by which the owner or developer holds the subdivision under an option, contract to sell, or trust agreement [*Bus. & Prof. Code § 11013*].

If the real property to be owned by the stock cooperative corporation will be subject to a blanket encumbrance, a public report will not be issued unless legal or financial arrangements satisfactory to the Real Estate Commissioner have been made to (1) provide assurance that the blanket encumbrance will be paid, and (2) provide assurance that the ownership and possessory rights of a tenant-stockholder will not be adversely affected by foreclosure or acceleration of the blanket encumbrance by or on behalf of the beneficiary, unless the affected stockholder is delinquent in payments allocated by the stock cooperative to debt service on the blanket encumbrance [*10 Cal. Code Reg. § 2792.14(a)*]. However, this requirement is inapplicable to qualified federally insured or assisted stock cooperatives [*10 Cal. Code Reg. § 2792.14(b)*; *see 12 U.S.C. §§ 1715e, 1715l*; *see also § 33C.35[2]*].

Satisfactory arrangements may take the form of an unconditional release clause that provides for clear title upon compliance with the purchase terms [*see Bus. & Prof. Code § 11013.1*], or other financial arrangements [*see Bus. & Prof. Code § 11013.2*; *see also § 33C.200[1][i][ii]*]. If a unit of the subdivision is exempt from compliance with those financial arrangements, the developer may not sell, or lease for a term exceeding five years, the unit until the prospective purchaser has received a copy of a statutory warning regarding the blanket encumbrance [*see Civ. Code § 1133*]. For a complete discussion of the prerequisites for sale or lease of a subdivision interest subject to a blanket encumbrance, see Ch. 30, *Subdivision Regulation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSecurities RegulationPublic Offerings of Condominiums



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§ 33C.33 Subdivision Map Act

[1] New Projects

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] requires each city and county to enact ordinances regulating and controlling the initial design and improvement of "common interest developments" as defined by *Civ. Code § 1351* [*Gov. Code § 66411*; *see* discussion of *Civ. Code § 1351* in Ch. 34, *Condominiums*, § 34.33[1]].

However, the Act is specifically inapplicable to the financing or leasing of apartments, offices, stores, or similar space within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks [*Gov. Code § 66412(a)*]. Because stock cooperatives lease space to their tenant-stockholders, in the case of new projects they are excluded from regulation under the Act. As discussed below, different rules apply to conversions to or from a stock cooperative. However, local ordinances may regulate subdivisions not covered by the Act, subject to certain limitations [*see Gov. Code §§ 66411, 66411.1, 66426, 66428*].

For the sake of consistency, this chapter refers to the developer of a stock cooperative as a "developer," even though "subdivider" is the term used in the Subdivision Map Act.

For a complete discussion of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

[2] Conversions to Stock Cooperative

The conversion of five or more existing dwelling units to a stock cooperative constitutes a "subdivision" for purposes of the Subdivision Map Act [*Gov. Code § 66424*; *see Civ. Code § 1351(m)*]. A tentative and final or parcel map must therefore be prepared and approved under the Act for these conversions [*Gov. Code §§ 66426, 66428*]. However, stock cooperative conversions are exempt from some requirements of the Subdivision Map Act [*see Gov. Code §§ 66427, 66427.2, 66477*].

As a prerequisite for local approval of a final map, the tenants of existing dwelling units that are being converted to a stock cooperative must be given proper notice of the conversion and the exclusive right to purchase their unit fora limited time and on specified conditions [*Gov. Code § 66427.1*; *see* Ch. 34, *Condominiums*, §§ 34.135, P 5, 34.145, P

5]. Subject to certain exceptions, the conversion of an existing building to a stock cooperative must be approved by the city or county within 120 days following receipt of a completed application for approval of that conversion [*Gov. Code § 66427.2*].

For further discussion of conversions, see *Ch. 34, Condominiums, § 34.43[1]*.

[3] Conversions From Stock Cooperative to Condominium

Generally, a condominium project [*see Civ. Code § 1351(f)*] is a "subdivision" for purposes of the Subdivision Map Act [*see Gov. Code § 66424*], and requires a tentative and final map if it contains five or more condominiums [*Gov. Code § 66426*; *see Civ. Code §§ 783, 1351(f)* (condominium defined)]. However, unless a parcel or final map was approved by the legislative body of a local agency, the conversion of a stock cooperative to a condominium will be exempt from the requirements of the Subdivision Map Act when all of the following requirements are met [*Gov. Code § 66412(h)*]:

- The property was subdivided before January 1, 1982, as evidenced by a recorded deed creating the community apartment project.

- A person renting a unit in a cooperative is entitled to all tenant rights in state or local law, including but not limited to rights respecting first refusal, and displacement and relocation benefits at the time of the conversion.

- Subject to compliance with *Civ. Code § 1351(e)*, which specifies the requirements for the condominium plan, all conveyances and other documents necessary to effectuate the conversion must be executed by the required number of owners in the project as specified in the bylaws or other organizational documents. If the bylaws or other organizational documents do not expressly specify the number of owners necessary to execute the conveyances and other documents, a majority of owners in the project must execute the conveyances or other documents. The executed conveyances and other documents will be binding on and affect the interests of all parties in the project.

- If the property was subdivided after January 1, 1980, (1) a final or parcel map was approved and recorded with all conditions of that map remaining in effect after the conversion, and (2) no more than 49 percent of the units were owned by any one person, including an incorporator or director of the community apartment project, on January 1, 1982.

- The local agency certifies that the requirements above were satisfied if the local agency, by ordinance, provides for that certification.

A stock cooperative cannot be converted into a condominium project unless the required number of owners and trustees or beneficiaries of each recorded deed of trust and mortgagees of each recorded mortgage, as specified in the bylaws or other organizational documents, have voted in favor of the conversion. If the organizational documents do not expressly specify the number of votes necessary to execute the conveyances or other documents, a majority vote of the owners, trustees or beneficiaries, and mortgagees in favor of the conversion is required [*Gov. Code § 66452.10*].

Subject to the requirement that only those owners, trustees, beneficiaries, and mortgagees who approved the conversion are required to execute the condominium plan [*see Civ. Code § 1351(e)*], all conveyances and other documents necessary to effectuate the conversion must be executed by the required number of owners in the cooperative as specified in the bylaws or other organizational documents. If the organizational documents are silent on this matter, a majority of owners in the cooperative must execute the necessary documents. Once executed, the conveyances and other documents are binding on and affect the interests of all parties in the cooperative [*Gov. Code § 66452.10*].

Although a developer or record owner who violates the Subdivision Map Act is generally subject to imprisonment and/or fine not exceeding $10,000 [*see Gov. Code § 66499.31*], that general rule does not apply to violations of the above approval requirements [*Gov. Code § 66452.10*].

For further discussion of a conversion to condominiums, see *Ch. 34, Condominiums, § 34.43[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCooperativesManagement Duties & LiabilitiesReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSubdivisionsLocal Regulation



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§ 33C.34 Governing Documents

[1] In General

The governing documents of a stock cooperative include the declaration [*see § 33C.201*], the articles of incorporation [*see § 33C.202*], the bylaws [*see § 33C.203*], and any other documents that govern the operation of the development [*see Civ. Code § 1351(j)*; *see also 10 Cal. Code Reg. § 2792.8*]. The declaration sets forth the restrictions on the use of the development that are intended to be equitable servitudes [*Civ. Code § 1353*; see *§ 33C.31[2]*]. The articles set forth the basic organizational aspects of the corporate structure. The bylaws establish procedural guidelines for the operation of the project. The bylaws usually state the form of proprietary lease to be used by the cooperative, the allocation of decision-making power between management and shareholders, the margin of votes required to approve various changes or decisions, the methods of amending the bylaws and establishing house rules, and policies concerning the transfer of stock and subletting of apartments [*see* California Real Estate Law & Practice, Ch. 476, *Other Developments* (Matthew Bender)].

Larger organizations may also append a separate set of house rules to the bylaws of the corporation. These rules generally pertain to the specific use of the apartment structure and common areas, and govern such matters as noise, children, pets, signs, parking, common tenant facilities, and additions to or modification of the apartment structure. They should be tailored to the needs of the project, and a copy should be attached to or made part of the proprietary lease [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 2, *Types of Cooperatives; Terminology and Definitions* (Matthew Bender); *see also Ch. 34, Condominiums, § 34.208*].

The proprietary lease contains various covenants affecting ownership and occupancy in addition to the usual covenants found in a standard rental lease. For example, the lease is connected by covenant to stock ownership in the cooperative, and refers directly to the specific unit leased as inseparable from the ownership interest. Subletting and resale are subject to prior approval of the corporation [*see* California Real Estate Law & Practice, Ch. 476, *Other Developments* (Matthew Bender)].

[2] Statutory Requirements

If a public report is required for a stock cooperative under the Subdivided Lands Act [*see § 33C.32[2]*], copies of the

governing documents must be submitted as part of the application [*10 Cal. Code Reg. § 2792.2(a)*]. The Commissioner will not issue the report unless "reasonable arrangements" have been or will be made with respect to the purchasers' interests [*Bus. & Prof. Code § 11018.5(e)*]. Provisions in the governing instruments will be considered to be "reasonable arrangements" if they conform to minimum standards described in the regulations [*10 Cal. Code Reg. § 2792.8(b)*; *see 10 Cal. Code Reg. §§ 2792.4, 2792.8, 2792.15-2792.29*].

No amendment or modification of any provision in any of the governing documents that would materially change a tenant-stockholder's right to ownership, possession, or use of interests, is valid without the prior written consent of the Real Estate Commissioner during the period that the developer or the developer's successor in interest holds or directly controls as many as one-fourth of the votes necessary to effect that change [*Bus. & Prof. Code § 11018.7(a)*]. No official meeting of tenant-stockholders nor any written solicitation of them for the purpose of effecting such a material change may take place unless the proposed change is first submitted to the Commissioner for approval [*Bus. & Prof. Code § 11018.7(b)*].

[3] For FHA-Financed Cooperatives

Stock cooperatives that are financed by the Federal Housing Administration (FHA) [*see § 33C.35[2]*] must obtain approval of their organizational documents from the Department of Housing and Urban Development (HUD). HUD has issued model forms for all of the required organizational documents; if those forms are used (with any modifications or changes required by state law), they will meet HUD-FHA requirements. The legal adequacy of the organizational documents will be determined by the Area HUD counsel. The Director is responsible for their approval from an administrative standpoint [*Basic Cooperative Housing Insurance Handbook* (HUD Handbook, May 1973), p. 3-1]. For further discussion of the provisions of HUD model forms, see *§ 33C.141*, PP 2, 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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§ 33C.35 Financing

[1] Cooperative Real Property

Like condominium projects, stock cooperatives are initially financed by the developer through a loan secured by a blanket deed of trust on the project [*see Ch. 34, Condominiums, § 34.45[1]*]. However, when individual condominium units are sold, each individual purchaser receives a fee interest, and obtains his or her own financing independent of the financial arrangements of the other condominium unit owners. Since an individual's default on mortgage payments to his or her lender will not affect the other unit owners, the only financial interdependence of condominium owners is the pro rata share each must pay for the maintenance and operation costs of the common areas [Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 5, *Financing Cooperative Housing* (Matthew Bender); *see Ch. 34, Condominiums, § 34.45[2]*].

In contrast, ownership of stock cooperative real property remains in the cooperative corporation after tenant-stockholders purchase their interests in the cooperative [*see Civ. Code § 1351(m)*; see *§ 33C.30[2]*]. The entire property continues to be covered by a blanket loan and single mortgage or deed of trust [*see* Miller & Starr, *Current Law of California Real Estate*, vol. 4, Ch. 24, "Subdivisions and Condominiums," § 24:90]. Each tenant-stockholder initially pays the purchase price of the shares in the cooperative (equivalent to a certain percentage of the apartment's value), and then subsequently pays his or her pro rata share of the mortgage financing for the entire building, together with other operating costs assessed by the Board of Directors, directly to the cooperative by means of monthly "carrying charges" pursuant to a lease [*see § 33C.204[1][b][ii]*]. Although a tenant-stockholder may be able to finance the share purchase separately through a lending institution in a manner similar to a condominium purchase [*Fin. Code § 1236*; *see § 33C.35[3]*], he or she cannot individually vary the basic mortgage financing of the entire building, of which he or she bears a pro rata share. The blanket encumbrance therefore results in financial interdependence of the tenant-stockholders, since default by any tenant in the payment of his or her share to the cooperative forces the other tenant-stockholders to make up this loss in order to protect their investment [*see* Kaster,"Residential Co-ops and Condominiums Development Projects and Conversions Promoter's Tax Techniques," 38 N.Y.U. Tax. Inst. 13-1, 13-7 (1980)].

[2] FHA Mortgage Insurance

Although most stock cooperatives are financed through a conventional loan obtained from a bank or insurance company, financing through the Federal Housing Administration (FHA) is also available. Pursuant to authority under the National Housing Act ("Act") [*12 U.S.C. § 1701 et seq.*], the FHA insures loans on stock cooperatives made by approved private lenders. Section 213 of the Act [*12 U.S.C. § 1715e*] provides insurance on five types of middle income cooperative corporations: (1) management, (2) sales, (3) investor-sponsor, (4) existing project, and (5) supplementary loans to existing Section 213 projects. The principal obligation for which the FHA loan is sought must not exceed a certain amount per unit [*see 12 U.S.C. § 1715e(b)*]. Section 221 of the Act [*12 U.S.C. § 1715l*] authorizes mortgage insurance on projects intended for displaced families.

A stock cooperative financed with an FHA-insured loan is formed in the same general manner as other cooperatives. However, the governing documents of the cooperative must be based on FHA model forms and approved by the FHA [*see § 33C.34[3]*]. Furthermore, the loans involve control of sales, reserves, and operation of the project as a means of protecting the investor and reducing the insurable liability [*see* California Real Estate Law & Practice, Ch. 476, *Other Developments* (Matthew Bender)]. For a complete discussion of FHA financing for stock cooperatives and examples of FHA forms, see Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 5, *Financing Cooperative Housing* (Matthew Bender).

[3] Individual Interests

Prior to 1978, the blanket encumbrance on the cooperative property caused financing problems when an individual interest was resold. If the blanket loan had been proportionately reduced or paid off with respect to the unit being sold, and/or the value of the unit had increased, the purchase price of the stock for that unit would be increased. No financing was available for the stock purchase because the purchaser was not actually acquiring title to the individual unit, and the purchaser therefore was forced to pay a substantial amount of cash to acquire the unit [*see* Miller & Starr, *Current Law of California Real Estate*, vol. 4, Ch. 24, "Subdivisions and Condominiums," § 24:90].

The enactment of *Fin. Code § 1236* in 1978 was intended to put the resale of a cooperative interest on an equal marketing footing with condominiums and conventional homes by requiring the purchaser of cooperative stock to put down only the same percentage of cash required to purchase a condominium or a conventional home [*see Condominium and Cooperative Conversions*, (PLI Real Estate Handbook No. 159, 1979)]. A commercial bank (but not a savings and loan association or other lending entity) may now lend on the security of a first security interest on stock or a membership certificate issued to a tenant-stockholder by a completed fee simple cooperative housing corporation, as defined in *I.R.C. § 216* [*see § 33C.37[4]*], and the assignment by way of security of the borrower's interest in the proprietary lease or right of tenancy in property issued by that cooperative housing corporation, provided that [*Fin. Code § 1236*]:

(1) All of the real property owned by the corporation is located within California;

(2) The term of the loan does not exceed 30 years and is repayable in substantially equal installments (or any variation authorized under a loan executed pursuant to *Civ. Code § 1916.5* [*see Ch. 25, Real Estate Loans, § 25.15[7]*] or *Civ. Code § 1916.8*) not less often than monthly, with payments commencing no later than 60 days from the date of the loan;

(3) The amount of the loan does not exceed 80 percent of the sound market value of the stock or membership certificates;

(4) The proprietary lease or right of tenancy in the property provides that neither a sublease in excess of one year, nor an amendment or modification to the proprietary lease or right of tenancy in the property may be permitted or created without the lender's prior written consent; and

(5) The proprietary lease or right of tenancy in the property provides that, in the event of the borrower's default under

the loan, the lender will have the right (without the prior consent or approval of the cooperative housing corporation) (a) to sell the shares or membership certificates at a public or private sale after at least 30 days prior written notice to the borrower and the cooperative housing corporation at the address of the premises subject to the proprietary lease or right of tenancy in the property, and (b) to assign the proprietary lease or right of tenancy in the property to the purchaser who must agree to cure any defaults thereunder as a condition of assignment.

However, despite this statutory authorization for loans, investors may still be required to provide a large cash down payment in order to purchase shares in a resale. Because the risk of lending to stockholders in stock cooperatives is considered high, few commercial banks have been willing to finance the purchase of shares [*see Condominium and Cooperative Conversions*, (PLI Real Estate Handbook No. 159, 1979)], or to finance more than a very low amount of the share purchase price [*see Guide to California Subdivision Sales Law* (Cal. CEB 1974), Ch. 4, "Additional Requirements for Common Interest and Other Special Subdivisions," § 4.10]. Further, the stockholders are still at a disadvantage when they attempt to obtain financing from other types of lenders, such as savings and loans.

Although *Fin. Code § 1236* could also be read to allow a commercial bank to finance a tenant-stockholder's purchase of shares in a newly formed cooperative, the use of this type of financing is unlikely. The initial purchase price of the shares would be relatively low, since the major cost (the amounts due for the pro rata share of the mortgage) would be paid through monthly carrying charges [*see Condominium and Cooperative Conversions*, (PLI Real Estate Handbook No. 159, 1979); *see also § 33C.35[1]*].

For an extensive general discussion and historical background of the financing of interests in stock cooperatives, see Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 5, *Financing Cooperative Housing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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§ 33C.36 Ownership Liabilities

[1] Contractual

The individual tenant-stockholders of a stock cooperative are insulated from third-party claims on contracts with respect to the cooperative property, due to the fact that those contracts are negotiated by and in the name of the cooperative by its agents. Creditors are not adversely affected by this immunity, however, since the building, which is usually a sufficient asset to cover any debt, is owned by the corporation [*see* Comment, "Community Apartments: Condominium or Stock Cooperative," *50 Calif. L. Rev. 299, 312 (1962)*]. The price that tenant-stockholders pay for this shield from liability is that their equities are put at common risk, through a blanket mortgage [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 7, *Cooperative Apartment Transfers: Evaluation of Project Offerings and Purchaser Representation* (Matthew Bender); *see also § 33C.35[1]*].

[2] Tort

Since the property is owned by the cooperative corporation, tenant-stockholders are not responsible for negligent maintenance of the plant or actions of the corporation's employees that result in injury to third parties. The tenant-stockholders' only risk is that the corporate insurance might be insufficient to cover the claim and resort might be had to other corporate assets, such as the property itself, or to special assessments [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 8, *Contract and Tort Liability of Participating Cooperators* (Matthew Bender)]. The lessees are usually liable for tort liability within the confines of an individual apartment and, unless covered under a group insurance policy of the cooperative, should procure individual insurance [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 8, *Contract and Tort Liability of Participating Cooperators* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceHomeowners InsuranceGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsTortsPremises Liability & PropertyLessees & LessorsLiability of Lessees



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§ 33C.37 Income Taxation of Tenant-Stockholders

[1] In General

In recognition of the essential nature of ownership associated with the stock cooperative housing project, Congress has extended many of the federal income tax advantages enjoyed by individual homeowners to the tenant-stockholders of stock cooperatives. The provisions of the California Revenue and Taxation Code generally mirror those federal provisions.

[2] "Cooperative Housing Corporation" Defined

To receive the available tax benefits [*see § 33C.37[4]*], the stock cooperative must be classified as a "cooperative housing corporation" for tax purposes. For purposes of the Internal Revenue Code and the Revenue and Taxation Code [*see Rev. & Tax. Code § 17201*], a "cooperative housing corporation" is a corporation that meets four statutory criteria. First, it must have only one class of stock outstanding [*I.R.C. § 216(b)(1)(A)*]. However, a special classification of preferred stock in an amount of $100 or less that is issued to a governmental agency solely for the purpose of creating a security device on the mortgage indebtedness is not considered a "class of stock" [*Treas. Reg. § 1.216-1(e)(1)*]. Second, each shareholder must be entitled, solely because of his or her ownership of stock in the corporation, to occupy an apartment or other living unit owned or leased by the corporation [*I.R.C. § 216(b)(1)(B)*; *but see I.R.C. § 216(b)(5), (6)* (right to occupancy requirement does not apply to persons acquiring stock by operation of law, entities, and certain original promoters)]. However, he or she need not actually occupy the premises [*Treas. Reg. § 1.216-1(e)(2)*]. Third, no shareholder may be entitled, either conditionally or unconditionally, to receive any distributions from the corporation that are not from earnings and profits, except on partial or complete liquidation of the corporation [*I.R.C. § 216(b)(1)(C)*]. Fourth, 80 percent or more of the gross income of the corporation from the year in which it becomes liable for real estate taxes or mortgage payments must come from the tenant-stockholders [*I.R.C. § 216(b)(1)(D)*].

[3] "Tenant-Stockholder" Defined

For tax years beginning after 1986, individuals, trusts, estates, partnerships, associations, companies, and corporations are all eligible for treatment as tenant-stockholders [*I.R.C. § 216(b)(2)*; *Rev. & Tax. Code § 17201*; *see I.R.C. § 7701(a)(1)*]. Prior to 1987, only individuals could be tenant-stockholders [*see* former *I.R.C. § 216(b)(2)*].

To qualify for the deductions [*see § 33C.37[4]*], the tenant-stockholder's stock must be fully paid-up, at a price that bears a reasonable relationship to the portion of the value of the cooperative's equity in the apartment building that is attributable to the apartment that the tenant-stockholder is entitled to occupy[*I.R.C. § 216(b)(2)*; *Rev. & Tax. Code § 17201*].

[4] Interest and Real Estate Tax Deduction

A tenant-stockholder may deduct amounts paid or accrued to the cooperative, to the extent that those amounts represent his or her proportionate share of:

(1) Real estate taxes allowable as a deduction to, and paid or incurred with the tenant-stockholder's taxable year by, the cooperative on the residential buildings or land on which the residential buildings are located [*I.R.C. § 216(a)(1)*; *Rev. & Tax. Code § 17201*; *see I.R.C. § 164*].

(2) Interest allowable as a deduction to, and paid or incurred within the tenant-stockholder's taxable year by, the cooperative on indebtedness incurred to acquire, construct, alter, or maintain the residential buildings or to acquire the land [*I.R.C. § 216(a)(2)*; *Rev. & Tax. Code § 17201*; *see I.R.C. § 163*].

(3) Depreciation allowable to the cooperative, if the tenant-stockholder uses the right of tenancy in a trade or business or for the production of income. The amount of this deduction for depreciation must not exceed the adjusted basis of the tenant-stockholder's stock as of the close of the taxable year in which the deduction was incurred. Any excess depreciation deduction may be carried forward indefinitely [*I.R.C. § 216(c)*; *Rev. & Tax. Code § 17201*].

The tenant-stockholder may *not* deduct any amounts paid or accrued to the cooperative that are allocable to amounts that are chargeable to the cooperative's capital account [*I.R.C. § 216(d)*].

The tenant-stockholder's "proportionate share" of interest and real estate taxes normally is calculated by multiplying the corporate taxes and interest by the stock owned by the tenant-stockholder and dividing that result by the total outstanding stock of the cooperative [*I.R.C. § 216(a), (b)(3)*; *Rev. & Tax. Code § 17201*]. However, if the cooperative elects to separately charge each dwelling unit with a share of the cooperative's real estate taxes and/or interest, and those allocations reasonably reflect the cost to the cooperative of the taxes or interest attributable to each unit (and the unit's share of the common areas), then "proportionate share" means the shares determined in accordance with those allocations [*I.R.C. § 216(b)(3)*]. In other words, the tenant-stockholders may deduct the separately-allocated amounts.

The cooperative's accountant usually issues a statement to each tenant-stockholder that indicates the interest and tax deduction amounts for that person, who is then eligible to take the itemized deductions. This "pass-through" of corporate deductions puts tenant-stockholders on a par with other homeowners, who are entitled to deduct their own mortgage interest (for a first or second residence) and real estate taxes from personal income [*see I.R.C. §§ 163, 164*].

If the cooperative project leases, rather than owns, the land and the existing building, the tenant-stockholders cannot deduct any real estate taxes [*Rev. Rul. 62-177, 1962-2 C.B. 89*]. However, if the cooperative constructs the buildings on leased lands, the tenant-stockholders may deduct the taxes attributable to the building, even if the improvements are to become the property of the fee owners at the end of the lease term [*Rev. Rul. 62-178, 1962-2 C.B. 91*].

[5] Depreciation Deduction

A tenant-stockholder who uses his or her cooperative unit in trade or business or for the production of income may take a depreciation deduction for the stock allocated to that unit pursuant to *I.R.C. § 167(a)* [*I.R.C. § 216(c)*; *Rev. & Tax. Code § 17201*]. The amount of the depreciation deduction must not exceed the adjusted basis of the stock as of the close

of the taxable year of the tenant-stockholder in which the deduction was incurred [*I.R.C. § 216(c)(2)(A)*]. However, disallowed amounts may be carried forward to the succeeding taxable year [*I.R.C. § 216(c)(2)(B)*]. For further discussion of a tenant-stockholder's computation of depreciation, see Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 14, *The Tax Consequences of Tenant-Stockholder Status* (Matthew Bender).

[6] Nonrecognition of Gain on Sale of Cooperative Stock

A tenant-stockholder who sells his or her cooperative stock qualifies for the tax exemption on gain realized on the sale of a principal residence, which generally applies to sales and exchanges occurring after May 6, 1997, provided that, during the five-year period ending on the date the stock is sold, the house or apartment the tenant-stockholder was entitled to occupy as a stockholder was used as his or her principal residence for periods aggregating two years or more [*I.R.C. § 121(d)(4)*; *see generally I.R.C. § 121*]. For more further discussion of this exemption as applied to stock cooperatives, see Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 14, *Tax Consequences of Tenant-Stockholder Status* (Matthew Bender).

[7] Losses

Despite the similar tax treatment generally accorded tenant-stockholders and homeowners, as discussed above, a tenant-stockholder is not entitled to the tax benefits that other homeowners enjoy with respect to losses. If the housing project is destroyed and not subject to insurance compensation, the taxpayer would not be entitled to deduct the value of the securities as a "casualty loss," even if the property leased were used in the trade or business [*see I.R.C. § 165(c)(3)*; *Rev. & Tax. Code § 17201*; *see also* Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Ch. 4, *Deductions: Taxes & Losses* (Matthew Bender)]. The tenant's investment is in the stock, rather than the rental property [*see Peake v. Commissioner (1951) 10 T.C.M. 577]* . However, some deduction would probably be allowed under the "worthless securities" rule [*see I.R.C. § 165(g)*; *Rev. & Tax.Code § 17201*; *see also* Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Ch. 34, *Capital Transactions* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesTaxes Paid (IRC sec. 164)



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§ 33C.38 Income Taxation of Cooperative Corporation

[1] State Law

For purposes of state taxation, a "homeowners' association" will be treated as a tax-exempt organization if it meets certain criteria [*Rev. & Tax. Code § 23701t*]. A cooperative housing corporation is one of the entities included within the term "homeowners' association" [*Rev. & Tax. Code § 23701t(d)*; *see Rev. & Tax. Code § 23701t(e)* ("cooperative housing corporation" includes certain limited-equity housing cooperatives)]. To receive tax-exempt status, the cooperative must satisfy the following requirements [*Rev. & Tax. Code § 23701t(a)*]:

- It must be organized and operated to provide for the acquisition, construction, management, maintenance, and care of residential association property;

- Sixty percent or more of its gross income for the taxable year must consist solely of amounts received as membership dues, fees, and assessments from tenant-stockholders or owners of residential units, residences, or lots;

- Ninety percent or more of the expenditures of the organization for the taxable year must be for the acquisition, construction, management, maintenance, and care of association property;

- No part of the net earnings may inure (other than by providing management, maintenance, and care of association property or by a rebate of excess membership dues, fees, or assessments) to the benefit of any private shareholder or individual; and

- Amounts received as membership dues, fees, and assessments not expended for association purposes during the taxable year must be transferred to and held in trust to provide for the management, maintenance, and care of association property and common areas.

"Association property" is property held by the organization, property held in common by members of the organization, and property within the organization privately held by the members of the organization [*Rev. & Tax. Code § 23701t(b)*].

Only the "exempt function income" of a qualifying homeowners' association is exempt from tax. That term is defined as amounts received as membership fees, dues, and assessments from tenant-stockholders or owners of residential units, residences, or lots [*Rev. & Tax. Code § 23701t(c)(2)*]. All "homeowners' association taxable income" is subject to tax at the corporate rate [*Rev. & Tax. Code § 23701t(c)*; *see Rev. & Tax. Code §§ 23501, 23151*]. That term is defined as the association's gross income, excluding its "exempt function income," less all allowable deductions that are directly connected with the production of gross income (excluding exempt function income) [*Rev. & Tax. Code § 23701t(c)(1)*]. A $100 exclusion is allowed [*Rev. & Tax. Code § 23701t(c)(1)*; see California Taxation, Ch. 53, *Exempt Organizations* (Matthew Bender)].

[2] Federal Law

Under federal law, stock cooperatives are not considered to be tax-exempt organizations [*see* California Taxation, Ch. 53, *Exempt Organizations* (Matthew Bender)]. In contrast, the owners' association of a condominium project is specifically exempt [*see I.R.C. § 528*; *see also Ch. 34, Condominiums, § 34.46[1]*]. Exempt status is not generally important, however, due to the fact that few stock cooperatives consisting entirely of units leased by tenant-stockholders have taxable income. Tenant-stockholders generally are not assessed for more than projected operating costs. However, taxable income may result if assessments exceed actual expenses, or if cash reserves exceed deductible expenses. For example, cooperatives whose mortgages are insured by the FHA must set up reserves for contingent expenses [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 15, *Taxing the Cooperative Housing Corporation* (Matthew Bender)].

If a stock cooperative has any taxable income, it will be taxed at the usual corporate rates [*see I.R.C. §§ 11(b), 1381*; *Rev. & Tax. Code §§ 23151, 23501*]. For a discussion of the federal taxation of stock cooperatives, see Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 15, *Taxing the Cooperative Housing Corporation* (Matthew Bender). For a discussion of the state taxation of corporations generally, see California Taxation, Ch. 50, *Structure and Imposition of Bank and Corporate Tax* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewTax LawFederal Taxpayer GroupsC CorporationsGeneral OverviewTax LawFederal Taxpayer GroupsExempt OrganizationsGeneral OverviewTax LawFederal Taxpayer GroupsExempt OrganizationsConditions & Restrictions (IRC secs. 501-505, 521, 526-530)Tax LawState & Local TaxesIncome TaxGeneral Overview



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§ 33C.39 Property Taxation

While real property taxes on a condominium are separately assessed and constitute a lien only on each individual condominium unit [*Rev. & Tax. Code § 2188.3*; *see Ch. 34, Condominiums, § 34.47*], cooperatives are operated and taxed as a single parcel of property. A default by any tenant in payment of his or her proportionate share of the real property taxes, like a default in the payment of his or her proportionate share of the blanket mortgage [*see § 33C.35[1]*], requires the other tenants to make up the deficiency in order to protect their investment [*see* Miller & Starr, *Current Law of California Real Estate*, Ch. 24, "Subdivisions and Condominiums," § 24:90].

However, the assessor will be required to assess separately the individualinterests in a stock cooperative on receiving a written request that includes (1) a certification that the shareholders have been notified of the separate assessment and that it was approved by the corporation in the manner provided in the articles and bylaws, and (2) a copy of a recorded floor plan of the improvements and a survey plot map showing the location of the improvements [*Rev. & Tax. Code § 2188.7(a), (b), (c)(1), (2)*]. In addition, a separate valuation to divide an existing residential structure cannot be made until a subdivision final map or parcel map has been recorded [*Rev. & Tax. Code § 2188.7(c)(3)*; *see Gov. Code §§ 66434, 66445*]. If the parcel map requirement is waived, the assessor will not assign any parcel numbers or prepare a separate assessment unless the applicant provides a copy of the local government finding on the waiver [*Rev. & Tax. Code § 2188.7(c)(3)*]. The interest assessed is the value of the right of exclusive occupancy that is transferable only concurrently with the transfer of the shares of stock in the corporation held by the person having the right of occupancy, together with an interest in appurtenant common areas [*Rev. & Tax. Code § 2188.7(b)*]. The separate assessments become effective on the next lien date that is at least 60 days after the receipt of the request, and continues for all fiscal years thereafter [*Rev. & Tax. Code § 2188.7(a)*].

For further discussion of separate assessments, see Miller & Starr, *Current Law of California Real Estate*, Ch. 24, "Subdivisions and Condominiums," § 24:90 (1985 Supp).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawNonmortgage

LiensTax LiensTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionTax Liens



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§ 33C.40 Securities Regulation of Stock Cooperatives

[1] In General

Generally, the offer and sale of stock in a corporation is subject to federal and state securities laws designed to protect potential investors. The federal securities laws [*15 U.S.C. § 77a et seq.* (Securities Act of 1933); *15 U.S.C. § 78a et seq.* (Securities Act of 1934)] are designed to insure that prospective investors receive complete disclosure of material facts; the California Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] is designed to ensure that the offering and sale to prospective purchasers is fair, just, and equitable. The sale of shares in a stock cooperative would seem to merit regulation under those laws, as promoters of the project may perpetrate fraud on the prospective purchasers by presubscription self-dealing, understating the amount of monthly charges to be paid by tenants, or coercing tenants to purchase during a conversion of an apartment to a cooperative, among other things [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 3A, *Cooperative Housing Corporations and the Federal Securities Laws* (Matthew Bender)]. Nonetheless, the offer and sale of shares in stock cooperatives are exempt from regulation under both federal and state securities laws.

[2] Federal Securities Law

The United States Supreme Court has held that shares of stock sold by a nonprofit housing cooperative do not constitute "securities" under the federal securities laws [*United Housing Foundation, Inc. v. Forman (1975) 421 U.S. 837, 851, 95 S. Ct. 2051, 44 L. Ed. 2d 621]* . The shares considered by the Court had none of the characteristics that in the commercial world fall within the ordinary concept of a security, such as the right to receive dividends contingent on an apportionment of profits. Further, the shares did not fall under the definition of "investment contracts" defined by the Securities Acts as a scheme involving an investment of money in a common enterprise with the expectation that profits will result solely from the efforts of others [*see SEC v. W.J. Howey Co. (1946) 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244]* . As is generally the case, the sole purpose of investing in the stock cooperative under consideration was to obtain a place to live, and investors did not anticipate the financial returns traditionally associated with securities. Finally, none of the following activities and characteristics were found to constitute sources of income or profit that would bring a housing cooperative within the scope of the federal securities laws: (1) tax deductions of rental money that was applied to interest on the mortgage; (2) rent that was substantially below the going rental charges for comparable housing; and (3) the possibility of using net rental income from on-site commercial facilities, professional offices, parking spaces,

and community washing machines to reduce tenants' rents [*United Housing Foundation, Inc. v. Forman (1975) 421 U.S. 837, 851, 95 S. Ct. 2051, 44 L. Ed. 2d 621]* .

Similarly, shares in privately-owned and operated cooperative corporations do not constitute securities or investment contracts within the federal securities laws if (1) the shares are tied to lease of an apartment, cannot be transferred to a nontenant, are limited in number to each tenant by the offering plan, and are allocated in proportion to the size and location of the apartment leased; and (2) the tenant-stockholder's profit motive in purchasing the shares, if any, was purely incidental [*Grenader v. Spitz (2d Cir. 1976) 537 F.2d 612, 617-619]* .

In addition, real estate brokers licensed under California law need not be registered pursuant to Section 15a of the Securities Exchange Act of 1934 [*15 U.S.C. § 78o*] in order to sell shares in cooperative housing corporations [*17 C.F.R. § 240.15a-2*].

[3] State Securities Law

Any security offered or sold in California must be qualified unless it is exempt from qualification [*Corp. Code § 25110*]. A security consisting of an interest in either (1) real property that is "subdivided lands" or a "subdivision" [*see Corp. Code § 25021*; *Bus. & Prof. Code §§ 11000, 11004.5* (defined)] or (2) a "real estate development" [*see Corp. Code § 25015* (defined)] is exempt fromqualification [*Corp. Code § 25100(f)*]. A tenant-stockholder's interest in a stock cooperative, whether evidenced by a share of stock, a membership certificate, or otherwise, is deemed to be an interest in a common interest development and a real estate development for purposes of that exemption [*Civ. Code § 1351(m)*; *see Corp. Code § 25100(f)*].

Brokers who engage in transactions involving shares in stock cooperatives do not need to be certified as "broker-dealers" pursuant to *Corp. Code § 25210*. "Broker-dealer" does not include a broker licensed by the Real Estate Commissioner when engaged in transactions in securities that are exempt from the California Corporate Securities Law by *Corp. Code § 25100(f)* [*Corp. Code § 25004(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSecurities RegulationGeneral OverviewReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawAdditional Offerings & the Securities Exchange Act of 1934Registration RequirementsSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawExemptions From RegistrationGeneral OverviewSecurities LawInitial Public Offerings & the Securities Act of 1933DefinitionsSecurity



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART II. LEGAL BACKGROUND

16-33C California Legal Forms--Transaction Guide §§ 33C.41-33C.99

[Reserved]

§§ 33C.41[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

16-33C California Legal Forms--Transaction Guide § 33C.100

§ 33C.100 Facts

1. Name, address, and telephone number of:

    a. Developer.

    b. Any consultants, engineers, or others employed by developer for project.

2. Legal status of developer:

    a. Individual.

    b. Corporation.

    c. Partnership.

    d. Other.

3. Nature of project:

    a. Construction of new building;

    NOTE:
    Newly constructed stock cooperatives are not subject to the requirements of the Subdivision Map Act [***see*** *§ 33C.121,* P 3(a)].

b. Conversion of existing apartment building to cooperative; or

NOTE:
Certain stock cooperative conversions are subject to the requirements of the Subdivision Map Act [***see*** *§ 33C.121,* P 3(b)].

c. Conversion of stock cooperative to condominiums.

NOTE:
Certain conversions of stock cooperatives to condominiums are exempt from the requirements of the Subdivision Map Act [***see*** *§ 33C.121,* P 3(c)].

4. Description of project, including:

a. Location (including street address, nearest cross streets, city, county, and state).

b. Legal description.

c. Type of structure (e.g., residential, commercial, or combination).

NOTE:
Stock cooperatives are generally formed to provide residential housing units, but may contain offices or other commercial units instead [***see*** discussion in *§ 33C.30[1]*].

d. Type of units.

NOTE:
For example, the project may consist of one-, two-, and three-bedroom units.

e. Number of each type of unit.

f. Type of facilities in common areas of project.

NOTE:
Facilities may include, for example, a swimming pool and laundry room.

g. Zoning classification.

h. Description of surrounding area, including proximity to schools, airports, fire stations.

5. Whether project is intended to provide housing for senior citizens.

NOTE:
Specific formation requirements apply to senior citizen housing developments [***see*** discussion in *Ch. 34,* ***Condominiums****, § 34.40[2]*].

6. Proposed source of financing for project.

7. Whether stock cooperative corporation that will hold title to project has already been formed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33C California Legal Forms--Transaction Guide § 33C.101

§ 33C.101 Documents

1. If stock cooperative corporation is already in existence, all relevant documentation, including:

    a. Articles.

    b. Bylaws.

    c. Rules and regulations.

    d. Management agreement.

2. Copy of preliminary title report covering project.

3. Copy of any preliminary maps or sketches prepared for project.

4. Copy of any local building permits that have been obtained.

5. Copy of any contracts owner has entered into with city or county with respect to project.

6. Copy of any environmental impact report (EIR) or draft EIR that has been prepared for project.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesManagement



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DIVISION II: REAL ESTATE TRANSACTIONS
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[Reserved]

§§ 33C.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-33C California Legal Forms--Transaction Guide § 33C.120

§ 33C.120 Formation Considerations

1. Should project be developed in phases?

NOTE:
For a discussion of the various reasons for phased development, and the specific formation requirements that apply to phased developments, see *Ch. 34, **Condominiums**, § 34.44*.

2. Is stock cooperative eligible for Federal Housing Administration (FHA) mortgage insurance?

NOTE:
Application for FHA financing is made through a lending institution approved by the Housing and Urban Development Department (HUD) as a mortgagee. A cooperative project financed with an FHA-insured loan is subject to certain FHA control over the project [***see** § 33C.35[2]*], and must base its governing documents on FHA model forms [***see** § 33C.34[3]*; see also *§ 33C.142*, P 2].

a. Is project designed as middle-income housing cooperative, with its principal obligation below statutory ceiling [*see 12 U.S.C. § 1715e*]?

b. Is project designed to house displaced families [*see 12 U.S.C. § 1715 l*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest

CommunitiesCooperativesPurchase & SaleReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

16-33C California Legal Forms--Transaction Guide § 33C.121

§ 33C.121 Applicability of State and Federal Law

1. For purposes of Davis-Stirling Common Interest Development Act [*Civ. Code § 1351 et seq.*], will proposed project:

a. Be considered a "common interest development" and "stock cooperative" subject to the Act [*see Civ. Code § 1351(m)*; *see also § 33C.30[2]*]?
(1) Will corporation be formed or used primarily for purpose of holding title to improved real property, either in fee simple or for term of years?

(2) Will all or substantially all shareholders of corporation receive right of exclusive occupancy in portion of real property?

b. Be exempt from certain requirements of Act because [*Civ. Code § 1373*; *see Ch. 34, Condominiums, § 34.33[2]*]:

NOTE:
The inapplicable requirements pertain to [*Civ. Code § 1373*]: the amendment of the declaration [***see*** *Civ. Code § 1356*]; financial statements prepared by the owners' association [***see*** *Civ. Code §§ 1365, 1365.2*.5]; the duties of the board of directors [***see*** *Civ. Code § 1365.5*]; the imposition or collection of assessments, penalties, or fees [***see*** *Civ. Code §§ 1366(b), 1366.1*]; the sale or transfer of title to a separate interest in the development [***see*** *Civ.Code § 1368*]; the distribution of certain project documents to prospective purchasers [***see*** *Civ. Code §§ 1363(b), 1368*]; and the procedure for obtaining association approval of physical changes to an owner's separate interest or the common area [***see*** *Civ. Code § 1378*].

(1) Property is expressly zoned as an industrial or commercial development; and

(2) Project will be limited in use to industrial or commercial purposes?

NOTE:
Although stock cooperatives can be formed for nonresidential uses, including professional offices, garages, or markets, most are formed to provide housing for their tenant-stockholders. The forms in this chapter are designed for residential stock cooperatives.

2. Will cooperative have five or more shareholders and therefore be subject to Subdivided Lands Act [*Bus. & Prof. Code § 11004.5(d)*; *see Bus. & Prof. Code § 11000 et seq.*]?

NOTE:
A cooperative that is subject to the Subdivided Lands Act must comply with public report and various other disclosure requirements [***see** § 33C.142*].

3. Is cooperative required to file any subdivision maps pursuant to Subdivision Map Act [*Gov. Code § 66410 et seq.*] and applicable local subdivision ordinances?

a. Is stock cooperative new project?

NOTE:
New stock cooperatives are generally exempt from the requirements of the Subdivision Map Act [*Gov. Code § 66412(a)*; ***see** § 33C.33[1]*].

b. Is stock cooperative being converted from five or more existing dwelling units?

NOTE:
The conversion of five or more existing dwelling units to a stock cooperative is subject to the requirements of the Subdivision Map Act [*Gov. Code § 66424*; ***see** § 33C.33[2]*].

c. Is stock cooperative being converted to condominiums?

NOTE:
Although condominiums projects are generally subject to the Subdivision Map Act [***see** Ch. 34, **Condominiums**, § 34.36[1]*], certain conversions from stock cooperatives are exempt from the requirements of the Act [***see** § 33C.33[3]*].

4. Is project subject to additional regulation under any of following?

NOTE:
For a discussion of these laws, see *Ch. 34, **Condominiums**, § 34.121*, PP 4-9.

a. Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1701 et seq.*].

b. National Environmental Protection Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*].

c. California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*].

d. California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*].

e. Any regional environmental regulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-33C California Legal Forms--Transaction Guide §§ 33C.122-33C.139

[Reserved]

§§ 33C.122[Reserved]



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C. Procedural Guide to Formation and Sale of Stock Cooperatives

16-33C California Legal Forms--Transaction Guide

NOTE:

The procedures outlined in this chapter are generally applicable to both new stock cooperatives and those that are being converted from existing apartment buildings. Special requirements applicable to conversions are incorporated into the following discussion.



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16-33C California Legal Forms--Transaction Guide § 33C.140

§ 33C.140 Recording Subdivision Maps

NOTE:

A stock cooperative conversion subject to the provisions of the Subdivision Map Act [*Gov. Code § 66410 et seq.*; ***see*** *§ 33C.121*, P 3], requires preparation and approval of a tentative and final map [*Gov. Code § 66426*]. In addition, local ordinances may regulate subdivisions not covered by the Act [***see*** *Gov. Code §§ 66411, 66411.1, 66426, 66428*].

For general coverage of the requirements for preparing, processing, and recording subdivision maps under the Act, see Ch. 30, ***Subdivision Regulation*** . For a discussion of the special requirements applicable to condominium projects under the Act (which are for the most part equally applicable to stock cooperative conversions), see *Ch. 34,* ***Condominiums****, § 34.141*. A discussion of conversion requirements is *set forth in Ch. 34,* ***Condominiums****, § 34.145*.

Finally, for coverage of requirements that apply when a final map has been approved for a stock cooperative project and the subdivider or subsequent owner of the project wishes to lease a unit in the project [***see*** *Gov. Code § 66459*], see *Ch. 34,* ***Condominiums****, § 34.166*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-33C California Legal Forms--Transaction Guide § 33C.141

§ 33C.141 Drafting Governing Documents

NOTE:

The following guide assumes that the cooperative is subject to the Davis-Stirling Common Interest Development Act and the Subdivided Lands Act [***see*** *§ 33C.121,* PP 1, 2].

The "governing documents" are the declaration and any other documents that govern the operation of a common interest development, such as articles of incorporation, bylaws, and operating rules of the association [*Civ. Code § 1351(j)*; ***see*** *10 Cal. Code Reg. § 2792.8*]. The governing documents of every common interest subdivision must contain specified provisions [*10 Cal. Code Reg. § 2792.8*; ***see*** *10 Cal. Code Reg. §§ 2792.15-2792.29*]. For a discussion of those provisions, see *Ch. 34,* ***Condominiums****, § 34.202[1][d][ii]*.

The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] requires the articles of incorporation of any common interest development association filed with the Secretary of State on or after January 1, 1995, to include an additional statement that (1) identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act; (2) gives the business or corporate office of the association, if any; and, if the office is not on the development site, states the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the development; and (3) gives the name and address of the association's managing agent [*Civ. Code § 1363.5(a)*; ***see*** *Bus. & Prof. Code § 11502*].

1. If conventional financing is used, draft all of following:

NOTE:

Although most stock cooperatives are financed through a conventional loan obtained from a bank or insurance company, financing through the Federal Housing Administration

(FHA) is also available [***see*** *§ 33C.35[1]* et seq.]. For the procedures applicable to projects using FHA financing, see *§ 33C.141*, P 2.

a. Articles of incorporation [*see § 33C.202[1]*].

NOTE:

Stock cooperatives are generally formed pursuant to the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. For a general discussion of articles drafted pursuant to that law, see *Ch. 13,* ***Nonprofit Corporations****, § 13.20*.

Corporate existence begins on the filing of the articles with the Secretary of State [*Corp. Code § 7120(c)*].

b. Bylaws [*see § 33C.203[1]*].

NOTE:

For a general discussion of bylaws drafted pursuant to the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*], see *Ch. 13,* ***Nonprofit Corporations****, § 13.212*.

c. Proprietary lease [*see § 33C.204[1]*].

(1) Include standard provisions for residential lease.

NOTE:

For an example of a standard residential lease for an apartment in a multi-unit complex, see *Ch. 34B,* ***Residential Leases****, § 34B.200*.

(2) Include following provisions peculiar to lease for apartment in stock cooperative:

(a) Provision regarding carrying charges [*see § 33C.204*, P 2].

NOTE:

These periodic charges, used in lieu of a standard fixed-rent provision, cover a tenant-stockholder's proportionate share of the cooperative's mortgage, tax, maintenance, and operating expenses that are assessed by the Board of Directors each year [***see*** *§ 33C.204[1][b][ii]*].

(b) Provision regarding late charges and liens [*see § 33C.204*, P 3].

NOTE:

The lessor may recover late charges, interest, and costs of collection for delinquent assessments [*Civ. Code § 1366*]. The delinquent amount, plus those additional charges, will constitute a lien on the tenant-stockholder's interest in the cooperative when a notice of delinquent assessment is filed [*Civ. Code §§ 1367, 1367.1*; ***see*** *§ 33C.204[1][b][ii]*].

(c) Provision regarding repairs [*see § 33C.204*, P 8].

NOTE:

The lessor is responsible for maintaining the common areas, and the lessee is responsible

for maintaining separate interests and exclusive use common areas [*Civ. Code § 1364*; ***see*** *§ 33C.204[1][b][iv]*]. For discussion ofthe responsibility of the association to repair and maintain the common areas [***see*** *Civ. Code § 1364*], see *Ch. 34,* ***Condominiums*** *§ 34.202[1][e][ii]*.

(d) Provisions regarding subletting and assignment [*see § 33C.204*, PP 16, 17].

NOTE:

The lessee's right to sublet or assign a unit in a stock cooperative is generally made subject to approval by the Board of Directors, in order to ensure that new tenants are financially able to assume cooperative obligations. However, in order for a commercial bank to finance a lessee's purchase of stock in the cooperative, the lease must provide (1) that any sublease exceeding one year will be subject to the prior written consent of the lender, and (2) that if the lessee defaults on such a loan, the lender may sell the shares and assign the lease without the prior consent of the cooperative [*Fin. Code § 1236*; ***see*** *§ 33C.204[1][b][vii]*].

(e) Notice of termination of tenancy or disciplinary action [*see § 33C.204*, P 19].

NOTE:

In a stock cooperative organized as a nonprofit mutual benefit corporation, a tenant-stockholder's right of tenancy, and related rights as a member of the stock cooperative, may be terminated only in good faith and in a fair and reasonable manner [*Corp. Code § 7341(a)*; ***see*** *§ 33C.203[1][d]*]. Further, disciplinary actions imposed for a member's failure to comply with the governing instruments require the same notice provisions [***see*** *10 Cal. Code Reg. § 2792.26*].

(f) Provisions regarding tenant-stockholder's rights and duties on termination for breach [*see § 33C.204*, P 20].

NOTE:

The tenant-stockholder should receive the value of his or her interest in the cooperative, less liabilities owed to the cooperative as a result of the breach.

d. Subscription agreement, if one will be used.

NOTE:

Subscription agreements are often used in the formation of stock cooperatives, particularly when the stock and appurtenant right of tenancy are offered to individuals with no prior ties to the developer. They are mandatory for cooperatives formed with FHA financing [***see*** *§ 33C.141*, P 2(e)]. For a general discussion of subscription agreements, see *Ch. 2,* ***Formation of Corporations****, § 2.32*. For examples of subscription agreements, see *Ch. 2,* ***Formation of Corporations****, §§ 2.210-2.212*.

e. Management agreement, if project will be professionally managed.

NOTE:

For an example of a management agreement designed for a condominium project, which is substantially similar to that used for a stock cooperative, see *Ch. 34,* ***Condominiums****, § 34.207*.

f. If desired, rules and regulations for project.

NOTE:

For an example of rules and regulations designed for a condominium association, which are substantially similar to those used for a stock cooperative, see *Ch. 34, **Condominiums**, § 34.208*.

2. If FHA financing is used [*see § 33C.35[2]*], draft all of following:

NOTE:

All cooperative corporations using FHA financing, prior to solicitation of tenant-stockholders, must obtain HUD/FHA approval of the following organizational documents: articles, bylaws, regulatory agreements, information bulletins, subscription agreements, and occupancy agreements. Approval may be obtained by using FHA model forms that have been modified only as necessary to conform to state or local law or conditions peculiar to a specific project. The Area HUD Counsel determines the legal adequacy of the organizational documents, and the HUD/FHA Director is responsible for their approval from the administrative standpoint [HUD Handbook No. 4550.1, Basic Cooperative Housing Insurance Handbook 3-1 (May 1973)].

A complete list and examples of FHA model forms are set forth in Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 5, ***Financing Cooperative Housing***, § 5.02[1] (Matthew Bender).

a. Information bulletin [FHA Form No. 3241].

NOTE:

The information bulletin is not a formal legal document, but must be furnished to all prospective tenant-stockholders of the cooperative. It must accurately describe the proposed cooperative and the method in which it is being organized [HUD Handbook No. 4550.1, Basic Cooperative Housing Insurance Handbook 3-2 (May 1973)].

b. Articles of incorporation.

NOTE:

If a regulatory agreement is used [***see** § 33C.141*, P 2(f)], FHA Form No. 3234-B is applicable. Otherwise, FHA Form No. 3235 should be used.

c. Bylaws [FHA Form No. 3245].

d. Occupancy agreement.

NOTE:

If the cooperative is composed of one mortgage parcel, FHA Form No. 3237 should be used. Otherwise, FHA Form No. 3237-B is applicable.

e. Subscription agreement [FHA Form No. 3232; *see § 33C.141*, P 1(d)].

f. Regulatory agreement, if used [FHA Form No. 3225].

NOTE:

The FHA Commissioner may control the project by means of a regulatory agreement or preferred stock. However, the FHA prefers control to be based on a contract (i.e., regulatory agreement), unless some valid reason exists for the use of preferred stock

[HUD Handbook No. 4550.1, Basic Cooperative Housing Insurance Handbook 3-6 (May 1973)].

g. Management agreement, if project will be professionally managed [FHA Form No. 3238].

3. If FHA financing is used, submit following to local HUD office for approval:

a. Typed copies of model forms [*see § 33C.141*, P 2].

b. Marked-up drafts of model forms, including:

NOTE:
These drafts are used to expedite HUD/FHA examination of the organizational documents. Any change in the model forms that would have an adverse effect on HUD/FHA policies requires the prior approval of the Office of Underwriting Standards. This approval will be given only after submission of the proposed documents with the HUD/FHA Director's recommendations [HUD Handbook No. 4550.1, Basic Cooperative Housing Insurance Handbook 3-1 (May 1973)].

(1) Changes indicated by deletions and interlineations.

(2) Brief statement of the reason for each change and citation of state law, if relevant.

4. Prior to conveyance of separate interest coupled with interest in common area or membership in association, draft and record [*Civ. Code § 1352*]:

NOTE:
In a stock cooperative, a "separate interest" is the exclusive right to occupy a portion of the real property, conveyed pursuant to a proprietary lease [***see*** *Civ. Code § 1352(l)(4)*; ***see also*** *§ 33C.31[3]*].

a. Declaration [*see § 33C.201[1]*].

NOTE:
The declaration must contain certain provisions [*Civ. Code § 1353(a)*], and may contain any other matters that the signatories consider appropriate [*Civ. Code § 1353(b)*].

b. Final or parcel map, if required by Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see § 33C.121*, P 3].

c. Condominium plan, if any.

NOTE:
A condominium plan is required only if a stock cooperative is being converted to a condominium project [***see*** *Civ. Code § 1351(e)*; ***see also*** *Ch. 34,* ***Condominiums****, § 34.33[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesManagementReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview



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16-33C California Legal Forms--Transaction Guide § 33C.142

§ 33C.142 Obtaining Public Report

NOTE:

This section assumes that the cooperative has five or more shareholders [***see*** *Bus. & Prof. Code § 11004.5(d)*] and that a public report must therefore be obtained before any interests in the cooperative are offered, sold, or leased [***see*** *Bus. & Prof. Code § 11018.2*; *10 Cal. Code Reg. § 2801.5*; ***see also*** *§ 33C.121*, P 2].

For a list of the appropriate Department of Real Estate offices for filing public report applications and related subdivision documents, see the NOTE to Ch. 34, ***Condominiums***, § 34.143.

1. If reservations for purchase or lease of interest in cooperative will be taken from prospective purchasers prior to receipt of final public report, obtain preliminary public report [*see 10 Cal. Code Reg. § 2795*].

NOTE:

For a list of required procedures, see *Ch. 34, **Condominiums**, § 34.143*, P 1.

2. Complete official application for public report [*see § 33C.200[2]*; *see also Bus. & Prof. Code § 11010(a)*].

NOTE:

The Department of Real Estate form combines a notice of intention questionnaire with the application for a public report [***see*** *§ 33C.200[1]*; *see also Bus. & Prof. Code § 11010(a)*; *10 Cal. Code Reg. § 2790*].

3. Assemble following documents for inclusion in application package [*10 Cal. Code Reg. § 2792.2*; *see*

§ 33C.200[1]]:

NOTE:

An application for a final subdivision public report is "substantially complete" if it includes the following documents and information in addition to the notice of intention questionnaire and filing fee [*10 Cal. Code Reg. § 2792.2*; ***see*** *Bus. & Prof. Code § 11010.2*].

For a discussion of the alternative methods of filing this documentation, see *§ 33C.200[1][d]*.

a. Subdivision filing fee, including fee for preliminary public report, if any.

b. Completed subdivision questionnaire.

c. Approved tentative subdivision map, if applicable.

d. Plot plan delineating apartments within stock cooperative.

e. Certificate of qualification from Secretary of State if applicant is foreign corporation.

NOTE:

For a discussion of that certificate, see Ch. 12B, ***Foreign Corporations and Associations***.

f. Consent to service of process on Secretary of State if applicant is nonresident of California.

g. Current preliminary title report covering all subdivision interests for which public report is sought, including:

(1) Legal description of subdivided property;

(2) Nature of interest or estate covered by report;

(3) Record owner of interest or estate covered by report;

(4) All easements, liens, rights, interests, and claims disclosed by examination of indices in office of recorder of county in which property is located;

(5) Existence of encroachment of improvements over lines of record title;

(6) All mechanics' liens arising out of work completed or work inprogress; and

(7) Existence of assessments or potential assessments for public improvements completed or under construction.

h. Copy of declaration for stock cooperative [*see § 33C.201*].

i. Coastal Commission permit or exemption if stock cooperative is in coastal zone.

j. Evidence of availability of domestic utilities and services to stock cooperative.

k. Information concerning hazards and other unusual conditions within or in vicinity of stock cooperative.

l. Assessment and improvement bond information, if applicable.

m. Exemplars of all marketing, financing, and conveyancing instruments to be used in offering of stock cooperative interests.

n. Exemplar of escrow instructions for conveyance of subdivision to cooperative corporation.

o. Exemplar of escrow instructions for issuance of memberships and exclusive occupancy rights to purchasers, including at least following:

(1) Description of nature of transaction;

(2) Provision for return to buyers of funds deposited toward purchase of memberships if escrows are not closed on or before date prescribed in instructions;

(3) Name and address of escrow depository to be used; and

(4) If applicable, provision to ensure compliance with *Bus. & Prof. Code § 11018.5(c)*.

NOTE:
For a discussion of the requirements of that section, see *Ch. 34,* ***Condominiums****, § 34.200[1]*.

p. Bond or other device to be used as means of compliance with *Bus. & Prof. Code §§ 11013.2* and *11013.4*.

NOTE:
The Real Estate Commissioner will not issue a public report for a stock cooperative whose real property will be subject to a blanket encumbrance [*Bus. & Prof. Code § 11013*; ***see*** *§ 33C.32[5]*] unless satisfactory legal or financial arrangements have been made to ensure that members' rights will not be adversely affected by foreclosure or acceleration of the encumbrance, and that the encumbrance will be paid [*10 Cal. Code Reg. § 2792.14(a)*]. Satisfactory arrangements may take the form of an unconditional release clause [*Bus. & Prof. Code § 11013.1*] or a bond or other financial arrangement [*Bus. & Prof. Code § 11013.2*; ***see*** *§ 33C.32[5]*].

Other requirements designed to protect investors apply to subdivisions that are not subject to a blanket encumbrance [*Bus. & Prof. Code § 11013.4*; ***see*** Ch. 30, ***Subdivision Regulation***].

q. Narrative explanation of plan for financing sales of memberships in cooperative corporation.

r. Subordination agreement or other instrument to ensure compliance with *Bus. & Prof. Code § 11018.5(c)* [*see § 33C.142*, P 3(o)(4)].

s. Completed documents for reservations and reservation deposits if preliminary public report is requested.

t. Evidence of financial arrangements to assure completion or proposed renovation of offsite improvements included in offering.

u. Evidence of financial arrangements for completion or renovation of common areas in stock cooperative.

v. Evidence of financial arrangements for any guarantee or warranty included in offering.

w. Following proposed documents for cooperative:

(1) Articles of incorporation [*see § 33C.202*].

(2) Bylaws [*see § 33C.203*].

(3) Proprietary lease agreement and proposed lease assignment instrument, if applicable [*see § 33C.204*].

x. Copies of all contracts or proposed contracts obligating cooperative corporation.

y. Proposed preclosing rental agreements, if applicable.

z. Completed supplemental questionnaire if stock cooperative is conversion of existing structure.

aa. Detailed pro forma budget reflecting estimated costs of ownership, operation, and maintenance expenses and reserves for stock cooperative.

bb. Most recent balance sheet and annual operating statement for cooperative corporation, if applicable.

cc. Agreement of developer to subsidize common area maintenance and cooperative corporation operations, if applicable.

dd. Duplicate budget package for departmental analysis of proposed budget for common area maintenance and owners' association operations.

ee. Proposed schedule for allocation of assessments for property taxes and corporate debt service to members of corporation, if applicable.

ff. Exemplar of deed for conveyance of subdivision to cooperative corporation.

gg. Exemplar of membership certificate or stock certificate to be issued by cooperative corporation.

hh. Permit issued by Department of Corporations if applicable to offering.

NOTE:

For a discussion of the securities implications of offering and selling investments in a stock cooperative, see *§ 33C.40[1]*.

4. If project is to be developed in phases or stages, submit detailed plan of phased development to Real Estate Commissioner with application for public report [*see § 33C.200[2]*] for first phase of project [*see 10 Cal. Code Reg. § 2792.27(a)*].

NOTE:
For a list of the requirements for that plan, see *Ch. 34, **Condominiums**, § 34.143*, P 6.

5. Before filing application, review application and supporting documents for compliance with Commissioner's criteria for issuance of report [*Bus. & Prof. Code § 11018.5*].

NOTE:
For a list of those criteria, see *Ch. 34, **Condominiums**, § 34.143*, P 7.

6. Submit application package and filing fee [*see Bus. & Prof. Code § 11011(b)(2)*; *10 Cal. Code Reg. §§ 2790.1(a)(2), (b), 2790.1.5(a)(2), (b)*] to Department of Real Estate [*see Bus. & Prof. Code § 11010(a)*; *10 Cal. Code Reg. § 2790*].

7. After obtaining public report, and prior to execution of any contract or agreement for sale of stock or lease of any cooperative unit, have owner, developer, or agent provide prospective purchasers with report and statutory statement describing common interest developments in general [*Bus. & Prof. Code § 11018.1*; *see 10 Cal. Code Reg. § 2795.1*; *see also Ch. 34, Condominiums, § 34.201[1]*].

NOTE:
In addition, copies of the governing documents and other instruments must be available for examination by a prospective purchaser before the execution of an offer to purchase or lease [*Bus. & Prof. Code § 11018.6*]. For a list of procedures for compliance with these disclosure requirements, see *Ch. 34, **Condominiums**, § 34.143*, P 10(f).

8. Instruct developer to retain receipts for public reports given to prospective purchasers [*10 Cal. Code Reg. § 2795.1(b)*].

NOTE:
For a list of the requirements pertaining to receipts, see *Ch. 34, **Condominiums**, § 34.143*, PP 10, 11.

9. On receipt of funds from presale of stock, comply with impound requirements of Real Estate Commissioner [*see 10 Cal. Code Reg. § 2792.13*].

NOTE:
For a discussion of those requirements, see *§ 33C.32[4]*. For a discussion of the provisions in the application for public report related to these requirements, see *§ 33C.200[1][i][iii]*.

a. Deposit funds in escrow depository acceptable to Real Estate Commissioner until bona fide offers are obtained for 60 percent of all interests offered for sale.

b. If prescribed percentage is not obtained within two years of issuance of public report, return funds to owners without deduction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

16-33C California Legal Forms--Transaction Guide

NOTE:

The related and subsequent procedures for a stock cooperative are the same as those for a condominium project [***see*** Ch. 34, ***Condominiums***]. For the procedures for reporting material changes in a stock cooperative offering to the Real Estate Commissioner, see *Ch. 34,* ***Condominiums****, § 34.161*. For the procedures required to obtain the renewal of a public report, see *Ch. 34,* ***Condominiums****, § 34.163*. For a discussion of the requirements for obtaining approval to amend the governing instruments, see *Ch. 34,* ***Condominiums****, § 34.162*. For a discussion of the distribution of information to members, see *Ch. 34,* ***Condominiums****, § 34.164*.

For the requirements relating to correction or amendment of a recorded final or parcel map, see Ch. 30, ***Subdivision Regulation*** .



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
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D. Related and Subsequent Procedures

16-33C California Legal Forms--Transaction Guide §§ 33C.143-33C.199

[Reserved]

§§ 33C.143[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART IV. FORMS

16-33C California Legal Forms--Transaction Guide § 33C.200

§ 33C.200 Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]

[1] Comment

[a] Use of Form

This form is the official Department of Real Estate (DRE) application for a public report for a stock cooperative project. It may also be used for a limited-equity housing cooperative [*see Bus. & Prof. Code §§ 11003.4, 11004.5(e)*]. It consists of the following three parts: (1) Part I--Applicant Instructions, (2) Part II--Index/Quantitative Deficiency Notice, and (3) Part III--Questionnaire. These individual parts are discussed in *§ 33C.200[1][c][i]-[iii]*.

This form should be used only for stock cooperatives. The Real Estate Commissioner requires a different application form for "standard" subdivisions [*see* Ch. 30, *Subdivision Regulation*]; out-of-state subdivisions [*see* Ch. 30, *Subdivision Regulation*]; time-share projects [*see Ch. 33A, Time-Share Projects, § 33A.200*]; and condominium projects, planned developments, and community apartment projects [*see Ch. 34, Condominiums, § 34.200[2]*].

[b] Public Report Requirement

A person may not sell, lease, or offer any lots or parcels in a "subdivision" for sale or lease in California without first obtaining a public report from the Real Estate Commissioner [*Bus. & Prof. Code § 11018.2*; *see § 33C.32[2]*]. A "subdivision" includes a stock cooperative, and any legal or beneficial interests therein, that has or intends to have five or more shareholders [*Bus. & Prof. Code § 11004.5(d)*]. This public report requirement does not apply to nonbinding expressions of intent to purchase or lease that a developer or agent, either by ordinance or as a condition to the approval of a tentative or parcel map, is required to obtain from the tenants of units that are proposed to be converted to a stock cooperative project [*Bus. & Prof. Code § 11010.7*; *see Ch. 34, Condominiums, § 34.200[1][b][iii]*].

Special public report requirements apply to projects that will be developed in phases [*10 Cal. Code Reg. § 2798*; *see Ch. 34, Condominiums, § 34.200[1][b][iv]*], or that will be senior citizen housing developments [*see Civ. Code § 51.3(b)(4)*; *Bus. & Prof. Code § 11010.05*; *see also Ch. 34, Condominiums, § 34.200[1][b][v]*].

[c] Components of Application Form

[i] Instructions

The application is in three parts. Part I consists of instructions to the applicant on how to complete the application. Part I is not submitted with the application.

[ii] Index/Quantitative Deficiency Notice

Part II, the Index/Quantitative Deficiency Notice, is a list of the documents required for a substantially complete application. It has three functions and uses:

- The applicant uses Part II to determine which documents are required for a "minimum filing package" and for a "substantially complete application."

- The applicant also uses Part II as an index for tabbing documents that are being submitted with the application.

- Lastly, DRE uses Part II as a "quantitative deficiency notice" to communicate what further documentation, if any, is required of the applicant for a substantially completed application.

After an applicant receives a quantitative deficiency notice, any additional documents required to make the application substantially complete must be submitted together with the deficiency notice on top. If documentation is submitted piecemeal, it will be returned.

[iii] Questionnaire

Part III is the Questionnaire itself. It contains specific questions about the subdivision project and requests that various kinds of supporting documentation be submitted. All questions must be answered. The Questionnaire should not be submitted until all project plans have been finalized. If a question does not apply to the project at hand, it should be marked "NA."

[d] Filing

[i] Alternative Methods

The Department of Real Estate allows three methods of filing an application for a public report and its supporting documents. The basic method of filing consists of submitting a "minimum filing package" (MFP), which includes only a limited amount of supporting documentation [*see Ch. 34, Condominiums, § 34.200[1][e][ii]*]. An alternative method of filing involves the submission of a "substantially complete application" (SCA), composed of a MFP and most of the documentation required for issuance of a final public report [*see Ch. 34, Condominiums, § 34.200[1][e][iii]*; *see also § 33C.142*]. Every application must be substantially complete before the Commissioner will proceed with processing the application [*see Bus. & Prof. Code § 11010.2*]. Finally, the submission of a "substantially complete filing package" will receive priority processing [*see Ch. 34 Condominiums, § 34.200[1][c]-[g]*].

All documents submitted as part of the application must be numbered and tabbed. For a discussion of those requirements, see *Ch. 34, Condominiums, § 34.200[1][e][iv]*.

[ii] Appropriate Regional Office

Applications for public reports must be filed in the regional office of the Department of Real Estate that is responsible

for the county in which the subdivision is located. These offices are located in Los Angeles and Sacramento [*see Ch. 34, Condominiums, § 34.200[1][f]*].

[iii] Fees

The application must be accompanied by the appropriate filing fee [*see Bus. & Prof. Code § 11011(b)(2)*; *10 Cal. Code Reg. §§ 2790.1(a)(2), (b), 2790.1.5(a)(2), (b)*]. A different filing fee applies to an application for a preliminary public report [*see Bus. & Prof. Code § 11011(b)(6)*; *10 Cal. Code Reg. §§ 2790.1(a)(6), 2790.1.5(a)(6)*].

[e] Issuance of Public Report

After receipt of a substantially or totally complete application [*see § 33C.200[1][d][i]*], the Real Estate Commissioner will issue a public report only if certain criteria are met [*see Bus. & Prof. Code § 11018.5*]. For a list of those criteria, see *Ch. 34, Condominiums, § 34.143*, P 7.

[f] Preliminary Public Report

Although a developer or agent generally must obtain a final public report before selling, leasing, or offering any units in a stock cooperative [*Bus. & Prof. Code § 11018.2*; *see § 33C.200[1][b]*], he or she may accept nonbinding reservations to purchase or lease units in the cooperative prior to obtaining a final public report provided a preliminary public report has been obtained [*10 Cal. Code Reg. § 2795(b)*]. For a discussion of that type of report, see *Ch. 34, Condominiums, § 34.200[1][i]*.

[g] Distribution of Final Public Report

After the Department of Real Estate issues a final public report, the developer must provide prospective purchasers with a copy [*Bus. & Prof. Code § 11018.1(a)*]. In addition, any developer or agent who provides a copy of the public report must also provide the prospective purchaser with a statutory disclosure form [*Bus. & Prof. Code § 11018.1(c)*].

[h] Renewal of Report

The final public report has a five-year term, but may be renewed [*10 Cal. Code Reg. § 2795.3*; *see Ch. 34, Condominiums, § 34.200[1][n]*].

[i] Specific Form Provisions

[i] Required for All Common-Interest Subdivisions

Most of the provisions of this form reflect the requirements of the Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations [*see 10 Cal. Code Reg. § 2790 et seq.*]. Because the information required for a "substantially complete" public report application under the Act is substantially the same for any "common interest subdivision" [*see 10 Cal. Code Reg. §§ 2792.1* (requirements for condominiums, planned developments, community apartment projects), 2792.2 (requirements for stock cooperatives)], the discussion of specific form provisions in Ch. 34, *Condominiums*, § 34.200[1] [*see Ch. 34, Condominiums, § 34.200[1][k]*] is largely applicable to stock cooperatives. This comment does not repeat that discussion, but rather examines only those provisions that are exclusively applicable to stock cooperatives [*see 10 Cal. Code Reg. §§ 2792.13, 2792.14*; *see also § 33C.32[3]*].

[ii] Blanket Encumbrances

If the real property to be owned by the stock cooperative corporation will be subject to a blanket encumbrance [*Bus. &*

Prof. Code § 11013; *see § 33C.200[1][i][ii]*], a public report will not be issued unless legal or financial arrangements satisfactory to the Real Estate Commissioner have been made (1) to provide assurance that the blanket encumbrance will be paid and (2) to provide assurance that the ownership and possessory rights of a member of the stock cooperative will not be adversely affected by foreclosure or acceleration of the blanket encumbrance by or on behalf of the beneficiary, unless the affected member or shareholder is delinquent in payments allocated by the stock cooperative to debt service on the blanket encumbrance [*10 Cal. Code Reg. § 2792.14(a)*]. Satisfactory protection for investors will be deemed to exist if any of the following are in place:

- The blanket encumbrance contains an unconditional release clause that allows the lessee of an apartment to obtain the interest for which he or she contracted, free and clear of the blanket encumbrance, on compliance with the terms and conditions of the purchase lease [*Bus. & Prof. Code § 11013.1*];

- Money advanced by the lessee will be deposited in a neutral escrow depository until (1) a proper release from the blanket encumbrance is obtained; (2) the owner, developer, agent, or lessee defaults under the contract and there is a determination by the parties or a court as to the disposition of the money [*see* Ch. 30, *Subdivision Regulation*]; or (3) the owner, developer, or agent orders the return of the money to the lessee [*Bus. & Prof. Code § 11013.2(a)*];

- Title to the subdivision will be held in trust until a proper release is obtained [*Bus. & Prof. Code § 11013.2(b)*];

- A bond to the State of California is furnished to the Commissioner for the benefit and protection of the lessees, providing for the return of money advanced in the event a release from the blanket encumbrance is not obtained [*Bus. & Prof. Code § 11013.2(c)*];

- Other legal or financial arrangements satisfactory to the Real Estate Commissioner have been made (1) to provide assurance that the blanket encumbrance will be paid and (2) to provide assurance that the ownership and possessory rights of a member of the stock cooperative will not be adversely affected by foreclosure or acceleration of the blanket encumbrance by or on behalf of the beneficiary, unless the affected member or shareholder is delinquent in payments allocated by the stock cooperative to debt service on the blanket encumbrance [*see Bus. & Prof. Code § 11013.2(d)*; *10 Cal. Code Reg. § 2792.14(a)*]; or

- The encumbrance is insured by the FHA and the stock cooperative has issued preferred stock or entered into a regulatory agreement with the FHA that provides for establishing and maintaining a general operating reserve [*10 Cal. Code Reg. § 2792.14(b)*; *see § 33C.35[2]*].

[iii] Terms and Conditions of Sale

In addition to the statement of the proposed terms and conditions for the disposition of the land required for all common interest subdivisions [*see Bus. & Prof. Code § 11010(b)(5)*; Ch. 34, *Condominiums*, § 34.200[1][k][xii]], the application form for stock cooperatives seeks information relating to the potential liability of investors in the event all of the stock of the corporation is not purchased. As discussed in *§ 33C.32[4]*, all funds received from investors from the presale of stock in the cooperative must be held in escrow until a prescribed percentage of interests in the stock cooperative has been sold, and if the prescribed percentage has not been obtained within a specified time period, the funds must be returned to the investors [*see 10 Cal. Code Reg. § 2792.13*].

[2] FORM

Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part I

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Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part II

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Combined Notice of Intention Questionnaire and Application for Public Report for Stock Cooperative Project [DRE Form 658; Rev. 9/99]-Part III

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-33C California Legal Forms--Transaction Guide § 33C.201

§ 33C.201 Declaration

[1] Comment

[a] Use of Form

This form is a declaration for a stock cooperative. It is designed to comply with (1) the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], which establishes the basic requirements governing the contents and amendment of declarations, (2) the Subdivided Lands Act and its implementing regulations [*Bus. & Prof. Code § 11000 et seq.*; *10 Cal. Code Reg. § 2790 et seq.*], and (3) the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*].

With regard to creation and enforcement of assessment liens, this form conforms to the law applicable to assessment liens recorded on or after January 1, 2003 [*see Civ. Code § 1367.1*], rather than the law applicable to liens recorded before that date [*see Civ. Code § 1367*].

For examples of declarations for other common interest developments/subdivisions, see *Ch. 34, Condominiums, § 34.202[2]* and *Ch. 33D, Planned Developments, § 33D.200[2]*.

[b] Effect of Recording Declaration

A common interest development is created when the declaration (and subdivision map, if any) is recorded, and a separate interest coupled with an interest in the common area or membership in the association is conveyed [*Civ. Code § 1352*]. Ordinarily, the declaration should not be recorded until it has been reviewed by the Real Estate Commissioner [*see § 33C.201[1][c]*].

[c] Filing With Real Estate Commissioner

A "substantially complete" application for a final public report [*see Ch. 34, Condominiums, § 34.200[1][e][iii]*] must include proposed or existing covenants, conditions, and restrictions (in other words, the declaration) for the common-interest subdivision [*10 Cal. Code Reg. § 2792.2(a)(8)*]. The Department of Real Estate urges applicants to

refrain from recording the declaration until after it is reviewed by the DRE [*see § 33C.200[2]*, P 66.0]. Regardless of the timing of this submission, the applicant must submit a copy of the final declaration bearing evidence of its recordation [*see § 33C.200[2]*, PP 65.0, 67.0].

[d] Resolution of Disputes Involving Enforcement of Declaration

An association must provide a fair, reasonable, and expeditious procedure for resolving, inter alia, disputes related to the declaration [*Civ. Code § 1363.820(a)*; *see generally Civ. Code § 1363.810 et seq.*]. This relatively informal procedure supplements and does not replace the more formal alternative dispute resolution procedure described below and prescribed by *Civ. Code § 1369.510 et seq.* For further coverage of the statutory requirements for the intra-association dispute resolution procedure, see *Ch. 34, Condominiums, § 34.34*. For a procedure that meets these requirements, see *§ 33C.201[2]*, Section 3.10.

If neither party requests resort to the intra-association dispute resolution procedure or if that procedure fails to resolve dispute, parties must engage in the formal alternative dispute resolution (ADR) procedure prescribed by *Civ. Code § 1369.510 et seq.* before filing civil enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the small claims court jurisdictional limit. The formal ADR process is not a prerequisite for a small claims action, and does not apply to an assessment dispute [*Civ. Code § 1369.520*; *see* Code Civ. Proc. §§ 116.220, 116.221 (jurisdiction of small claims court)]. For further coverage, see *Ch. 34, Condominiums, § 34.35*.

[e] Amendment of Declaration

Under the Subdivided Lands Act, the Real Estate Commissioner must give his or her prior consent to a proposed amendment to a declaration if (1) the amendment would materially change the rights of the tenant-stockholders, and (2) it is proposed when the developer or the developer's successor in interest holds or directly controls a specified percentage of the voting power of the association [*see Bus. & Prof. Code § 11018.7*]. Whether or not the proposed amendment is subject to that consent requirement, the implementing regulations of the Subdivided Lands Act require amendments to be approved by a specified percentage of the members [*see 10 Cal. Code Reg. §§ 2792.8(a)(18), 2792.24(a)*].

The Davis-Stirling Act normally requires amendments to be approved by the percentage of owners specified in the declaration (or other governing document) [*see Civ. Code § 1355(a)*; *see also 10 Cal. Code Reg. § 2792.24*]. However, if that approval cannot be obtained, the association or any tenant-stockholder may, under certain circumstances, petition the superior court for an order approving the amendment [*see Civ. Code § 1356*]. An alternative amendment procedure must be used when the proposed amendment involves the deletion from any of the governing documents of a provision that relates to the construction or marketing of the development [*see Civ. Code § 1355.5*]. Finally, an additional statutory procedure may be used to amend a declaration that neither prohibits nor expressly permits amendments [*see Civ. Code § 1355(b)*].

For comprehensive coverage of the foregoing requirements, see *Ch. 34, Condominiums, § 34.162*.

[f] Provisions Required in Declaration

[i] Davis-Stirling Common Interest Development Act

Any declaration recorded on or after January 1, 1986, must contain all of the following [*Civ. Code § 1353(a)(1)*]:

- A legal description of the common interest development [*see § 33C.201[2]*, Recital A];
- A statement that the development is a stock cooperative [*see § 33C.201[2]*, Recital B];

- The name of the association;

- The restrictions on the use or enjoyment of any portion of the stock cooperative that are intended to be enforceable equitable servitudes [the restrictions are set forth throughout the form];

- If the property is located within an airport influence area and the declaration is recorded after January 1, 2004, a statutorily-prescribed statement informing potential buyers of the possible annoyances and inconveniences associated with living near an airport [*see Civ. Code § 1353(a)(2)* ("airport influence area" defined)]; and

- If the property is within the San Francisco Bay Conservation and Development Commission's jurisdiction and the declaration is recorded on or after January 1, 2006, it must contain a statutory notice regarding the possible impact on the use and development of the property of the Commission's regulations, restrictions, and permit requirements [*Civ. Code § 1353(a)(3)*].

The declaration may contain any other matters the original signatory of the declaration or the owners consider appropriate [*Civ. Code § 1353(b)*].

[ii] Subdivided Lands Act

The governing instruments of every common interest subdivision (the articles, bylaws, and declaration) must contain certain provisions [*10 Cal. Code Reg. § 2792.8(a)*]. Some of these provisions, including those describing the powers and duties of the Board of Directors, election of directors and officers, meetings of members and directors, and the inspection of books, records, and governing documents, are set forth in the bylaws [*see* discussion in *§ 33C.203[1][b][ii]*]. The following provisions are contained in this declaration:

- Creation of an organization (association) of tenant-stockholders [*10 Cal. Code Reg. § 2792.8(a)(1)*; *see § 33C.201[2]*, Section 3.01];

- A description of the common interests of the subdivision owners or lessees [*10 Cal. Code Reg. § 2792.8(a)(2)*; *see § 33C.201[2]*, Section 2.05];

- Transfer of title and/or control of common interests or of mutual and reciprocal rights of use to the owners in common or to the association [*10 Cal. Code Reg. § 2792.8(a)(3)*; *see 10 Cal. Code Reg. § 2792.15*; § 33C.201[2], Section 2.03];

- Procedures for calculating and collecting regular assessments from members to defray expenses attributable to the ownership, operation, or furnishing of common interests or to the enjoyment of mutual and reciprocal rights of use [*10 Cal. Code Reg. § 2792.8(a)(4)*; *see 10 Cal. Code Reg. § 2792.16*; § 33C.201[2], Section 4.04; *see also Civ. Code § 1366(b)*];

- Procedures for establishing and collecting special assessments for capital improvements or for other purposes [*10 Cal. Code Reg. § 2792.8(a)(5)*; *see 10 Cal. Code Reg. § 2792.16(e)*; § 33C.201[2], Section 4.05];

- Liens upon privately owned subdivision interests for assessments levied pursuant to the declaration and foreclosure thereof for nonpayment [*10 Cal. Code Reg. § 2792.8(a)(6)*; *see § 33C.201[2]*, Section 4.08];

- Policies and procedures relating to the disciplining of members for failure to comply with provisions of the governing instruments [*10 Cal. Code Reg. § 2792.8(a)(7)*; *see Civ. Code § 1363(g)*; *10 Cal. Code Reg. § 2792.26*; § 33C.201[2], Section 3.06(d)];

- Creation of a governing body for the association [*10 Cal. Code Reg. § 2792.8(a)(8)*; *see § 33C.201[2]*, Section 3.08];

- Preparation of the budgets and financial statements of the association and distribution to the association members [*10 Cal. Code Reg. § 2792.8(a)(12)*; *see § 33C.201[2]*, Section 3.07(d)];

- Amendment procedures for the provisions of the declaration that relate to the ownership, management, and control of the association or the common interests [*10 Cal. Code Reg. § 2792.8(a)(18)*; *see 10 Cal. Code Reg. § 2792.24(a)*; § 33C.201[2], Section 10.01];

- Prohibitions against or restrictions upon the severability of a separately owned portion from the common interest portion of a subdivision interest [*10 Cal. Code Reg. § 2792.8(a)(19)*; *see § 33C.201[2]*, Section 3.02];

- Action to be taken and procedures to be followed in the event of condemnation, destruction, or extensive damage to the subdivision interests, including provisions respecting the use and disposition ofinsurance proceeds or damages payable to the association or to a trustee on behalf of owners on account of those events [*10 Cal. Code Reg. § 2792.8(a)(21)*; *see § 33C.201[2]*, Art. VIII];

- Annexation of additional land to the existing development when appropriate [*10 Cal. Code Reg. § 2792.8(a)(22)*; *see 10 Cal. Code Reg. § 2792.27*; § 33C.201[2], Section 2.02];

- Architectural and/or design control [*10 Cal. Code Reg. § 2792.8(a)(23)*; *see 10 Cal. Code Reg. § 2792.28*; § 33C.201[2], Art. VI; *see also Civ. Code §§ 714, 714.1* (restrictions on solar energy systems); § 33C.201[2], Section 5.01(j)];

- Special provisions for enforcement of financial arrangements by the developer to secure performance of his or her commitment to complete common area improvements [*10 Cal. Code Reg. § 2792.8(a)(24)*; *see 10 Cal. Code Reg. § 2792.4*; § 33C.201[2], Section 3.07(c)]; and

- Granting of easements or use rights affecting the common areas [*10 Cal. Code Reg. § 2792.8(a)(25)*; *see § 33C.201[2]*, Sections 2.07,2.08].

If a stock cooperative is to be developed in phases and it qualifies as a "master planned community" [*see 10 Cal. Code Reg. § 2792.32(a)* (definition)], the stock cooperative may be exempt from some of the implementing regulations of the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2792.32*; *Bus. & Prof. Code § 11000 et seq.* (Act); *see also 10 Cal. Code Reg. §§ 2792.25-2792.29*]. For further discussion, see *Ch. 34, Condominiums, § 34.44[3]*.

[g] Rights of Mortgagees

Article IX of this Form lists several rights of mortgagees of stock in the cooperative. Lenders almost inevitably insist on the inclusion in the declaration of a set of lender-drafted mortgagee protections [*see Ch. 34, Condominiums, § 34.45[7]*]. Therefore, the provisions set forth in Article IX of this Form should only be used as a guide to the scope and complexity of the requirements typically imposed by lenders.

For further discussion of declaration provisions regarding mortgages, see *Ch. 34, Condominiums, § 34.202[1][e][xi]*.

[2] FORM

Declaration

Recording Requested By
_____[*name of declarant*]
When Recorded Mail To:
_____[*name of declarant*]
_____[*address*]
_____[*city, state, zip*]

DECLARATION FOR _____ [*name*],
A STOCK COOPERATIVE

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THIS DECLARATION is made this _____ day of _____, _____, by _____[*name of declarant*] ("Declarant"), [*describe legal status of declarant, e.g.,* a California

corporation].

RECITALS

A. _____[*name of declarant*], hereinafter referred to as "Declarant,"is the owner of real property located in the City of _____, County of _____, State of California, more particularly described as: [*insert legal description of property*].

B. It is Declarant's intention to develop the above-described property as a residential stock cooperative, subject to the provisions of the Davis-Stirling Common Interest Development Act contained in Division II, Part 4, Title 6 of the California Civil Code.

C. In furtherance of this intent, Declarant hereby declares that the development is held and shall be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the following covenants, conditions, and restrictions, for the purpose of enhancing and perfecting the value, desirability, and attractiveness of the development. All of the covenants, conditions, and restrictions shall run with and be for the benefit of the real property, shall be binding upon all parties having or acquiring any right, title, or interest in the real property and upon their successors in interest, and shall be for the benefit of those parties and successors in interest. This Declaration is made by Declarant pursuant to *Section 1352 of the California Civil Code.*

[*If property is located in airport influence area and declaration is recorded after January 1, 2004, include following statement. See Civ. Code § 1353(a).*]

NOTICE OF AIRPORT IN VICINITY

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

[*If property is located within San Francisco Bay Conservation and Development Commission's jurisdiction and declaration is recorded on or after January 1, 2006, include following statement. See Civ. Code § 1353(a)(3).*]

NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction.

ARTICLE I. DEFINITIONS

"Apartment"

Section 1.01. "Apartment" shall mean and refer to a portion of the real property in which a Member has a right of exclusive occupancy appurtenant to stock ownership in _____[*name of stock cooperative*].

"Articles"

Section 1.02. "Articles" shall mean the Articles of Incorporation of _____[*name of stock cooperative*] and amendments thereto which are or shall be filed in the Office of the Secretary of State of the State of California.

"Association"

Section 1.03. "Association" shall mean _____[*name of stock cooperative*], a California nonprofit mutual benefit corporation whose membership is composed of its tenant-stockholders.

"Board"

Section 1.04. "Board" shall mean the Board of Directors of the Association.

"Bylaws"

Section 1.05. "Bylaws" shall mean the Bylaws of the Association and amendments thereto which are or shall be adopted by the Board.

"Common Area"

Section 1.06. "Common Area" shall mean the entire Development except all Apartments as defined in this Declaration.

"Declarant"

Section 1.07. "Declarant" shall mean _____[*name of incorporator/developer*], its successors and assigns.

"Declaration"

Section 1.08. "Declaration" shall mean this Declaration.

"Development"

Section 1.09. "Development" shall mean the entire stock cooperative development, composed of the Common Area and Apartments.

"Governing Instruments"

Section 1.10. "Governing Instruments" shall mean the Declaration, Articles, and Bylaws of the Association.

"Manager"

Section 1.11. "Manager" shall mean the person or corporation, if any, appointed by the Board to manage the Development.

"Member"

Section 1.12. "Member" shall mean the owner of stock in the Association who is thereby entitled to exclusive occupancy of an Apartment and all of the rights of membership in the stock cooperative.

"Mortgage"

Section 1.13. "Mortgage" means a mortgage or deed of trust encumbering stock of the Association. "First Mortgage" means a mortgage that has priority over all other mortgages encumbering the same stock.

"Mortgagee"

Section 1.14. "Mortgagee" means a person to whom a Mortgage is made and includes the beneficiary of a deed of trust and any guarantor or insurer of a mortgage. "Institutional Mortgagee" means a mortgagee that is a financial intermediary or depository, such as a bank, savings and loan, or mortgage company, that is chartered under federal or state law and that lends money on the security of real property or invests in such loans, or any insurance company or governmental agency or instrumentality, including the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Government National Mortgage Association (GNMA). "First Mortgagee" means a mortgagee that has priority over all other mortgages or holders of mortgages encumbering the same stock. The term "Beneficiary" shall be synonymous with the term "Mortgagee."

"Mortgagor"

Section 1.15. "Mortgagor" means a person who mortgages his, her, or its property to another (i.e., the maker of a mortgage), and shall include the trustor of a deed of trust. The term "Trustor" shall be synonymous with the term "Mortgagor."

"Proprietary Lease"

Section 1.16. "Proprietary Lease" shall mean the agreement governing a Member's right of exclusive occupancy in an Apartment within the Development.

"Restricted Use Common Area"

Section 1.17. "Restricted Use Common Area" shall mean and refer to those portions of the Common Area, if any, set aside for the exclusive use of a Member.

ARTICLE II. THE PROPERTY

Property Subject to Declaration

Section 2.01. All the real property comprising the Development, and the improvements thereon, shall be subject to this Declaration.

Annexation of Additional Property

Section 2.02. (a) Additional property may be annexed to the Development upon the vote or written assent of 662/3 percent of the total votes residing in Association Members other than Declarant.

(b) Pursuant to a plan of phased development submitted to the California Real Estate Commissioner along with the application for the public report for the first phase of the Development, the Declarant may annex additional land within the area described in Exhibit [*specify number of exhibit containing legal description of property to be annexed*] without the approval of the Association, provided that the annexation is effected prior to the third anniversary of the issuance of the original public report for the immediately preceding phase of the Development.

(c) Annexation of property pursuant to Section 2.02(a) or Section 2.02(b), *above*, shall be effected by the following procedure:

(1) If applicable, recordation of a final subdivision map or maps, or final parcel map or maps for the real property to be annexed; and

(2) Recordation of a Declaration of Annexation covering the property to be annexed containing any modifications and additions to the terms of this Declaration that may be necessary to reflect the different character of the added property, and that are not inconsistent with the general scheme of this Declaration.

Title to Development

Section 2.03. Prior to the first transfer of a right of exclusive occupancy in an Apartment in the Development, Declarant, its successors or assigns, shall convey to the Association title and control of the Development, free of all liens and encumbrances, except current real property taxes and any reservations, easements, covenants, conditions, and restrictions of record, including those contained in this Declaration.

Exclusive Occupancy

Section 2.04. (a) Each Member shall be entitled to the exclusive occupancy of his or her Apartment. Each Member shall also have the exclusive right, subject to approval of the Association, to paint, repaint, tile, paper, or otherwise refinish and decorate the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets bounding or

located within his or her Apartment. Each Member shall maintain his or her Apartment and any Exclusive Use Common Areas in accordance with Section 5.02 of this Declaration. A Member shall be liable for any damage to the Apartment or Exclusive Use Common Areas caused by him or her in accordance with the provisions of the Proprietary Lease.

(b) The Association shall maintain all other Common Areas in accordance with Section 3.07(a) of this Declaration. A Member shall be liable for any damage to the Common Areas caused by him or her in accordance with Section 5.03 of this Declaration.

Common Area

Section 2.05. Each Member shall be entitled to use the Common Area in accordance with the purpose for which it is intended, without hindering or encroaching upon the lawful rights of the other Members.

Exclusive Use Common Areas

Section 2.06. The following portions of the Common Area are [*add if exclusive use common areas will be designated after project is operating:* or will be] for the exclusive use by the Members of the Apartments to which they are [or will be] appurtenant: _____ [*list areas, such as parking stalls or patios*]. [*Add if desired:* However, the following fixtures are not Exclusive Use Common Areas even though they may be located outside the boundaries of, and serve, a single Apartment: _____ (*select from the following, as appropriate:* shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames, and hardware incident thereto).]

Easements

Section 2.07. Subject to the provisions of this Declaration, there is an easement for ingress, egress, and support through the Common Area appurtenant to each Apartment. However, these easements shall be subordinate to the exclusive easements granted elsewhere in this Declaration, as well as to any rights reserved to the Association to regulate time and manner of use, to charge reasonable admission fees, and to perform its obligations under this Declaration.

Other Easements

Section 2.08. The Association may grant to third parties easements in, on, and over the Common Area for the purpose of constructing, installing, or maintaining necessary utilities and services, and each Member, in executing his or her Proprietary Lease, expressly consents to these easements. However, no such easement shall be granted if it would interfere with any exclusive easement, or with any Member's use, occupancy, or enjoyment of his or her Apartment.

ARTICLE III. OWNERS' ASSOCIATION

The Association

Section 3.01. The Association is a corporation organized under the Nonprofit Mutual Benefit Corporation Law, charged with the duties and invested with the powers prescribed by law and set forth in this Declaration, the Articles of Incorporation, and the Bylaws.

Membership

Section 3.02. (a) A person approved by the Association pursuant to the Bylaws shall become a Member of the Association upon the purchase of stock and execution of a Proprietary Lease for an Apartment in the Development. Membership in the Association shall be appurtenant to the right of exclusive occupancy in an Apartment.

(b) Upon transfer of a Member's stock in the Association pursuant to Section 3.05 of this Declaration, the membership of the transferor shall automatically cease, and the transferee shall become a Member of the Association. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the Member's entire interest shall also include his or her membership interest in the Association.

(c) Upon sublease of a Member's Apartment pursuant to the terms of the Proprietary Lease, the Member shall retain membership in the Association. The sublessee shall acquire only a temporary right of occupancy in the Member's Apartment and a right to use the Common Area or any Exclusive Use Common Area appurtenant to the Apartment for the period of the sublease.

Voting Rights

Section 3.03. The Association shall have two classes of voting membership, as set forth in Article _____ [*e.g.*, VII] of the Bylaws, which is hereby incorporated by reference.

Membership Meetings

Section 3.04. Article _____ of the Bylaws governing meetings of the Members is hereby incorporated by reference.

Transfer of Interest

Section 3.05. Except as provided in the Bylaws, a Member shall not transfer the stock in _____[*name of stock cooperative*] or Proprietary Lease appurtenant thereto.

General Powers and Authority

Section 3.06. The Association shall have all the powers of a nonprofit corporation under California law, as set forth in *Corporations Code Section 7140*, subject only to the limitations in this Declaration or in the other Governing Instruments of the Association. It may perform all acts that may be necessary for or incidental to the performance of the obligations and duties imposed on it by this Declaration or the other Governing Instruments. Its powers shall include, but not be limited to, the following:

(a) The Association shall have the power to establish, fix, and levy assessments against the Members in accordance with the procedures set out in Article IV of this Declaration and subject to the limitations therein.

(b) The Association shall have the power to adopt reasonable operating rules governing the use of the Common Area and any facilities located thereon, and of any other Association property. These rules may include, but are not limited

to, reasonable restrictions on use by the Members and their guests, rules of conduct, and the setting of reasonable fees for the use of recreational facilities. A copy of the current association rules shall be given to each Member and shall be posted at conspicuous places in the Common Area.

(c) The Association shall have the right to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining within it the Members, in matters pertaining to the following:

(1) Enforcement of this Declaration and the Articles, Bylaws, and Rules of the Association.

(2) Damage to the Common Area.

(3) Damage to the separate interests that the Association is obligated to maintain or repair.

(4) Damage to the separate interests that arises out of, or is integrally related to, damage to the Common Area or separate interests that the Association is obligated to maintain or repair.

The Association may enforce payment of assessments in accordance with the provisions of Article IV of this Declaration.

(d) The Association may discipline Members for violation of any of the provisions of the Governing Instruments or Association Rules by suspending the violator's voting rights, privileges for use of the Common Area, or by imposing monetary penalties for those violations, subject to the following limitations:

(1) The accused person must be given notice and an opportunity to be heard with regard to the alleged violation in accordance with the provisions of *Corporations Code Section 7341* and *Civil Code Section 1363.05(b)*.

(2) Any suspension of association privileges shall not exceed _____ [*insert number, e.g.*, 60] days for each violation.

(3) If the Association imposes a monetary penalty, the Board shall distribute to each Member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations. [*If desired, add:* No monetary penalty imposed for these purposes shall exceed $ _____ for each violation.]

(4) Except under the provisions of Article IV of this Declaration, relating to termination of membership for failure to pay assessments, the Association shall in no way abridge the right of any Member to the full use and enjoyment of his or her Apartment.

(e) The Association, acting through the Board, shall have the power to delegate its authority, duties, and responsibilities to the committees, officers, or employees allowed under the Governing Instruments to be retained.

(f) The Association's agents or employees shall have the right to enter any Apartment when necessary in connection with any maintenance, landscaping, or construction for which the Association is responsible. That entry shall be made only upon notice to the Member (except in the case of an emergency) and with as little inconvenience as is practicable, and any damage caused thereby shall be repaired by the Association at its own expense.

Duties of the Association

Section 3.07. In addition to the duties delegated to the Association or its agents and employees elsewhere in the Governing Instruments, the Association shall be responsible for the following:

(a) The Association, acting through the Board, shall operate and maintain the Common Areas, other than the Exclusive Use Common Areas, and the facilities located thereon. This duty shall include, but shall not be limited to exterior painting, maintenance, repair, and all landscaping of the Common Area, and any furnishings and equipment for the Common Area that the Board shall determine are necessary and proper. The Board shall have the exclusive right and duty to acquire the above for the Common Area. [*Add the following or an alternative allocation of responsibility for pest control work (see Civ. Code § 1364):* Further, the Association shall keep the Common Areas free of infestation by wood-destroying pests or organisms. If infestation is present, the Association shall have the right to cause the temporary, summary removal of any occupant of the Development while the Association has the infestation treated. The temporary relocation must be preceded by notice provided by the Association pursuant to *Civil Code Section 1364*.]

The interior surfaces of each Apartment (and the interior surfaces of Exclusive Use Common Areas) shall be painted, maintained, and repaired by, and at the sole cost and expense of, the Member entitled to exclusive occupancy of that Apartment, in accordance with the provisions of the Proprietary Lease. [*Add the following or an alternative allocation of responsibility for pest control costs (see Civ. Code § 1364):* Each Member shall also pay the costs of any temporary relocation of the Member or any occupant of the Member's Apartment occasioned by the presence of wood-destroying pests or organisms.]

(b) The Association shall provide for, through the maintenance fund described in Article IV, the following:

(1) All principal, interest, and mortgage insurance premiums, if any, on the Development real property;

(2) All _____ [*insert as applicable in accordance with provisions of Proprietary Lease:* water, sewer, garbage, electrical, gas, elevator, and other necessary utility service];

(3) The insurance policies described in Article VII of this Declaration;

(4) The services of any personnel that the Board shall determine to be necessary or proper for the operation of the Common Area; and

(5) Legal and accounting services necessary or proper in the operation of the Common Area or the enforcement of this Declaration.

(c) If the Association is obligee under a bond or other arrangement to secure the performance of Declarant as to any Common Area improvements that were not completed prior to the issuance of the final public report on the Development, the following provisions relative to the initiation of action to enforce such a bond shall be applicable:

(1) The Board of Directors of the Association shall consider and vote on the question of action by the Association to enforce the obligations under the bond with respect to any improvement for which a Notice of Completion has not been filed within 60 days after the completion date specified for the improvement in the Planned Construction Statement appended to the bond. If the Association has given an extension in writing for the completion of any Common Area improvement, the Board shall consider and vote on the question if a Notice of Completion has not been filed within 30 days after the expiration of the extension.

(2) If the Board votes not to initiate action to enforce the obligations under the bond, or if it fails to consider and vote on the matter as required, a special meeting of the Members of the Association shall be

called for the purpose of overriding the Board's decision or for taking action on the matter, on receipt of a petition calling for such a meeting signed by Members representing at least 5 percent of the total voting power of the Association. The meeting shall be held not less than 35 days or more than 45 days after receipt of the petition by the Board. At the special meeting, only the Members other than Declarant shall be allowed to vote on the matter. A vote by a majority of the voting power of the Association residing in Members other than Declarant to take action to enforce the obligations under the bond shall be deemed to be the decision of the Association and the Board shall thereafter implement this decision by initiating and pursuing appropriate action in the name of the Association.

(d) The Association shall prepare a pro forma operating budget for each fiscal year, and shall distribute a copy of the budget to each Owner not less than 45 and not more than 60 days before the beginning of the fiscal year. As an alternative to the foregoing distribution of the budget, the Association may elect to do all of the following in the manner required by statute: distribute a summary of the budget to each Owner; make the budget available for inspection at a designated location; and provide copies of the budget to Owners upon request and at the expense of the Association. The budget shall contain at least the following:

(1) The estimated revenue and expenses on an accrual basis;

(2) A summary (printed in bold type) of the Association's reserves that is based on the most recent review or study conducted pursuant to *Civil Code Section 1365.5*. This summary shall include the following: (i) the current estimated replacement cost, estimated remaining life, and estimated useful life of each major component that the Association is obligated to maintain (hereafter referred to as the "major components"); (ii) the current estimate, as of the end of the fiscal year for which the study is prepared, of the amount of cash reserves necessary to repair, replace, restore, or maintain the major components; (iii) the current amount, as of the end of the fiscal year for which the study is prepared, of accumulated cash reserves actually set aside to repair, replace, restore, or maintain the major components; and (iv) the percentage that the amount described in (iii), *above*, is of the amount determined for purposes of (ii), *above* (that is, the percentage obtained by dividing the amount described in (iii), *above*, by the amount described in (ii), *above*).

(3) A statement as to whether the Board has determined or anticipates that the levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves for such work.

(4) A general statement addressing the procedures used for the calculation and establishment of reserves to defray the future repair, replacement, or additions to those major components that the Association is obligated to maintain.

(e) Within 120 days after the close of each fiscal year, the Association shall prepare and distribute to the Members an annual report consisting of the following:

(1) A balance sheet as of the end of the fiscal year.

(2) An operating (income) statement for the fiscal year.

(3) A statement of changes in financial position for the fiscal year.

(4) For any fiscal year in which the gross income to the Association exceeds $75,000, a copy of the review of the annual report prepared in accordance with generally accepted accounting principles by a licensee of the California State Board of Accountancy. If this report is not prepared by an independent

accountant, it shall be accompanied by the certificate of an authorized officer of the Association that the statement was prepared without independent audit or review from the books and records of the Association.

(f) Within 60 days prior to the beginning of each fiscal year, the Association shall prepare and distribute to the Members a statement describing the Association's policies and practices in enforcing lien rights or other legal remedies for default in payment of assessments against Members.

(g) The Association shall prepare a balance sheet, as of an accounting date that is the last day of the month closest in time to six months from the date of closing of the first sale of a share of stock in the Development, and an operating statement for the period from the date of the first closing to the foregoing accounting date. The Association shall distribute this statement to the Members within 60 days after the accounting date. This operating statement shall include a schedule of assessments received and receivable identified by the number of the Apartment and the name of the Member assessed.

(h) Each year, the Association must provide the Members with a summary of the provisions of *Civil Code Sections 1369.510 through 1369.590*. These statutes require that alternative dispute resolution be pursued before a civil action may be filed in connection with certain disputes related to enforcement of the governing documents, the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*). The required summary must include a specific reference to *Civil Code Sections 1369.510 through 1369.590*, and the statutory language set forth in *Civil Code Section 1369.590(a)*. This summary must be provided either (1) at the time the pro forma operating budget described in Section 3.07(d) of this Declaration is distributed, or (2) in the manner specified in *Corporations Code Section 5016*.

(i) The Association shall provide any Member with the following documents within 10 days of the mailing or delivery of a written request therefor:

(1) A copy of the Governing Instruments.

(2) A copy of the most recent financial statement distributed pursuant to Paragraph (d), above, of this Declaration.

(3) A written statement from an authorized representative of the Association specifying (i) the amount of any assessments levied on the Member's stock that are unpaid on the date of the statement; and (ii) the amount of late charges, interest, and costs of collection that, as of the date of the statement, are or may be made a lien on the Member's stock.

Board of Directors

Section 3.08. The affairs of the Association shall be managed and its duties and obligations performed by an elected Board of Directors, in accordance with the provisions contained in Article _____ of the Bylaws, which are hereby incorporated by reference.

Inspection of Books and Records

Section 3.09. The Association's Governing Instruments and the Association's membership records, books of account, and minutes of the meeting of the Members, of the Board, and of committees of the Board shall be made available for inspection in accordance with Article _____ of the Bylaws, which is hereby incorporated by

reference.

Resolution of Disputes

Section 3.10. As required by *Civil Code Section 1363.820(a)*, the Association shall offer a fair, reasonable, and expeditious procedure for resolving any dispute between the Association and a member involving their rights, duties, or liabilities under the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*), or under the Association's governing documents. This dispute resolution procedure is supplementary to the alternative dispute resolution procedure prescribed by *Civil Code Section 1369.510 et seq.* as a prerequisite to commencing civil action. The dispute resolution procedure shall consist of the following:

(a) Either party may initiate the procedure by making a written request to the other party to meet and confer in an effort to resolve the dispute. If the request is by the Association, the member may refuse to participate. If the request is by a member, however, the Association may not refuse to participate.

(b) Within 5 days of the written request, the Board of Directors shall designate a member of the Board to meet and confer with the other party.

(c) Within 10 days of the Board member's designation, the parties shall meet at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

(d) If the parties reach agreement on a resolution of the dispute, that resolution shall be memorialized in writing and signed by the parties with the Board designee signing on behalf of the Association.

(e) An agreement reached by the parties is binding on them and may be judicially enforced provided the agreement is consistent with the authority granted by the Board of Directors to its designee, and further provided the agreement is not in conflict with law or the Association's governing documents.

(f) A member of the Association may not be charged a fee to participate in the dispute resolution procedure.

ARTICLE IV. ASSESSMENTS AND COLLECTION PROCEDURES

Covenant to Pay

Section 4.01. The Declarant covenants and agrees for each Apartment owned by it in the Development, and each Member by execution of the Proprietary Lease for an Apartment is deemed to covenant and agree, to pay to the Association the regular and special assessments levied pursuant to the provisions of this Declaration. All moneys collected shall be put into a maintenance fund to be used to defray expenses attributable to the ownership, operation, and maintenance of the Development by the Association. The Member may not waive or otherwise escape liability for these assessments by nonuse of the Common Area or abandonment of an Apartment.

Exemptions From Assessments

Section 4.02. The obligation to pay assessments shall be subject to the following exemptions:

(a) Declarant and any other Member with the right of exclusive occupancy in an Apartment that does not include a structural improvement for human occupancy shall be exempted from that portion of any assessment which is for the purpose of defraying expenses and reserves directly attributable to the existence and the use of the structural improvement. This exemption shall include, but not be limited to, the following:

(1) Roof replacement;

(2) Exterior maintenance;

(3) Walkway and carport lighting;

(4) Refuse disposal;

(5) Cable television; and

(6) Domestic water supplied to living units.

Such an exemption shall be in effect only until the occurrence of the earliest of the following events: (i) the recordation of a notice of completion of the structural improvement; (ii) the occupation or use of the structural improvement; or (iii) completion of all elements of the residential structures that the Association is obliged to maintain.

(b) Any Member (including Declarant) with the right of exclusive occupancy in an Apartment shall be exempted from that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and use of a common facility which is not complete at the time the assessment commences. This exemption shall be in effect only until a notice of completion of the common facility is recorded or the common facility is placed into use, whichever occurs first.

Assessment Period

Section 4.03. The fiscal year for the Association shall be a calendar year, unless the Board decides otherwise. The regular assessment period shall commence on January 1 and terminate on December 31 of each year; provided, however, that the first regular assessment period for all Apartments _____ [in the Development *or*, *if annexation is anticipated:* in a phase of development] shall commence on the _____ [date of the first conveyance of an Apartment in the _____ (Development *or* phase) *or* first day of the month following the conveyance of an Apartment in the _____ (Development *or* phase)], and shall terminate on December 31 of that year.

Regular Assessments

Section 4.04. Within 60 days prior to the beginning of each fiscal year of the Association, the Board shall estimate the cash requirements for that year, including a reasonable provision for contingencies and replacements with adjustments made for any expected income and surplus from the prior year's fund. The estimated cash requirement shall be assessed to each Member according to the ratio that the number of shares allocated to the Apartment in which he or she has a right of exclusive occupancy bears to the total number of shares issued and outstanding on the date of assessment. Each Member is obligated to pay regular assessments to the Board in the form of Carrying Charges pursuant to a Proprietary Lease in equal monthly installments on or before the first day of each month, in the manner set forth in _____ [*e.g.*, Paragraph 2] of the Proprietary Lease.

Special Assessments

Section 4.05. If the Board determines that the amount to be collected from regular assessments will be inadequate to defray the common expenses for the year due to the cost of any construction, unexpected repairs or replacements of capital improvements on the Common Area, or for any other reason, it shall make a special assessment for the additional amount needed. Special assessments shall be levied in the same manner as regular assessments.

Limitations on Assessments

Section 4.06. The Board shall comply with the following requirements governing the imposition and amounts of assessments:

(a) The Board may, for any fiscal year, impose a regular assessment per Apartment that is as much as 20 percent greater than the regular assessment for the preceding fiscal year, provided (1) the Board has distributed the pro forma operating budget described in Section 3.07(d) for the current fiscal year or (2) the increase is approved by Members constituting a majority of the votes at a meeting or in an election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(b) The Board may impose, for any fiscal year, a regular assessment per Apartment that is more than 20 percent greater than the regular assessment for the preceding fiscal year, or may levy special assessments that in the aggregate exceed 5 percent of the budgeted gross expenses of the Association for that fiscal year, provided the increase or levy is approved by Members constituting a majority of the Members of the Association and casting a majority of the votes at a meeting or election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(c) The Board may, without complying with the foregoing requirements, make an assessment increase that is necessary for an emergency situation. An emergency situation is an extraordinary expense that is:

(1) Required by a court order.

(2) Necessary to repair or maintain the Development or any part of it for which the Association is responsible when a threat to personal safety in the Development is discovered.

(3) Necessary to repair or maintain the Development or any part of it for which the Association is responsible that could not have been reasonably foreseen by the Board in preparing and distributing the pro forma operating budget pursuant to Section 3.07(d).

(4) Incurred in making the first payment of the earthquake insurance surcharge pursuant to *Insurance Code Section 5003*.

Before the Board may impose or collect an assessment in the type of emergency situation described in (3), *above*, it shall pass a resolution containing written findings as to the necessity of the extraordinary expense and why the expense was not or could not have been reasonably foreseen in the budgeting process, and shall distribute the resolution to the Members with the notice of assessment.

(d) The Board shall notify the Members in writing of any increase in the amount of a regular or special assessment. The

Board shall provide this notice by first-class mail not less than 30 nor more than 60 days prior to the due date of the increased assessment.

Late Charges

Section 4.07. Late charges may be levied by the Association against a Member for the delinquent payment of regular and special assessments. An assessment is delinquent 15 days after its due date. If an assessment is delinquent the Association may recover all of the following from the Member:

(a) Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorneys' fees.

(b) A late charge not exceeding _____ [10 percent of the delinquent assessment or $10, whichever is greater *or specify smaller amount*].

(c) Interest on the foregoing sums, at an annual percentage rate not to exceed 12 percent interest, commencing 30 days after the assessment becomes due.

No late charge may be imposed more than once for the delinquency of the same payment. However, the imposition of a late charge on any delinquent payment shall not eliminate or supersede charges imposed on prior delinquent payments.

Enforcement of Assessments and Late Charges

Section 4.08. Each regular and special assessment and any late charges, reasonable costs of collection, and interest, as assessed in accordance with Section 4.06, shall be a debt of the Member at the time the assessment or other sums are levied. At least 30 days before the Association can place a lien on a Member's stock for a past due debt for a regular or special assessment, the Association must notify the Member by certified mail of the following:

(a) A general description of the Association's collection and lien enforcement procedures.

(b) The method of calculation of the amount due.

(c) A statement that the Member has the right to inspect the Association records.

(d) A statement informing the Member that the Member's stock may be subject to foreclosure and sale without court action.

(e) An itemized statement of the charges owed by the Member, including items on the statement that indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, and any late charges and interest.

(f) A statement that the Member will not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment waspaid on time.

(g) The Member's right to request a meeting with the Board if the Member disputes the debt.

A Member may dispute the debt by submitting to the Board a written explanation within 15 days of the mailing of the Association's notice. The Board must respond to an Member's timely explanation within 15 days of the mailing of the Member's explanation.

A Member also may submit a written request to meet with the Board to discuss a payment plan for the debt. The request must be mailed within 15 days of the mailing of the Board's notice. The Board must then meet with the Member in executive session within 45 days of the mailing of the Member's request. If there is no regularly scheduled Board meeting within that time period, the Board may designate a committee of one or more members to meet with the Member.

Any partial payments made toward the debt will first be applied to the assessments owed, and only after the principal owed is paid in full will the payments be applied to the fees and costs of collection, attorneys' fees, late charges, or interest. When a Member makes a payment, the Member may request a receipt and the Association shall provide it. The receipt shall indicate the date of payment and the person who received it. The Association shall provide a mailing address for overnight payment of assessments.

A debt for a delinquent regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorneys' fees, and interest shall become a lien on the stock when a notice of delinquent assessment is duly recorded and mailed as provided in *Section 1367.1 of the California Civil Code*.

The amount of any such assessment or related amount shall become a lien on the Member's stock in the Association when a notice of delinquent assessment is duly recorded and mailed as provided in *Section 1367.1(d) of the California Civil Code*. This lien shall be prior to all other liens recorded subsequent to the notice of delinquent assessment.

Except as provided below regarding debts arising from delinquent assessments when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, any such lien may be enforced in any manner permitted by law, including sale by a court, sale by the trustee designated in the notice of delinquent assessment, or sale by a trustee substituted pursuant to *Section 2934a of the Civil Code*. Any sale by a trustee shall be conducted in accordance with the provisions of *Sections 2924, 2924b*, and *2924c of the California Civil Code* applicable to the exercise of powers of sale in mortgages and deeds of trust. The Association may enforce its lien against the Member's stock by commencing an unlawful detainer action against the Member. After obtaining a judgment against the Member in such an action, the Association may terminate his or her membership in accordance with _____ [*e.g.*, Article V] of the Bylaws.

Upon payment of the sums specified in the notice of delinquent assessment, a notice stating the satisfaction and release of the lien shall be recorded.

In accordance with *Section 1367.4 of the California Civil Code*, a lien securing a debt arising from a delinquent regular or special assessment when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, shall not be enforced by judicial or nonjudicial foreclosure unless and until either (1) the debt equals or exceeds $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, or (2) the debt secured by the lien is more than 12 months delinquent.

Statement Regarding Assessments

Section 4.09. The Association shall provide any Member, upon written request, with a statement specifying (1) the amounts of the Association's current regular and special assessments and fees, and (2) the amounts of any delinquent assessments and related late charges, interest, and costs levied against the Member's Stock, as provided in Section 4.07 of this Declaration.

ARTICLE V. RESTRICTIONS AND COVENANTS

General Restrictions on Use

Section 5.01. The right of a Member and his or her guests to occupy or use the Apartment, or to use the Common Area or any of the facilities thereon, is subject to the following restrictions:

(a) No Member shall occupy or use his or her Apartment, or permit it to be occupied or used, for any purpose other than as a private dwelling. [*Add if desired:* The provisions contained in _____ (*e.g.*, Paragraph 5) of the Proprietary Lease are hereby incorporated by reference.]

(b) The Member may sublease his or her Apartment only with the written consent of the Association. [*Add if desired:* The provisions contained in _____ (*e.g.*, Paragraph 16) of the Proprietary Lease are hereby incorporated by reference.]

[*For a list of additional restrictions that may be included, see Ch. 33D, Planned Developments, § 33D.200[2], Section 5.01*]

Maintenance and Repairs

Section 5.02. Except for those portions which the Association is required to maintain and repair, each Member shall, at his or her sole cost and expense,maintain and repair his or her Apartment, keeping it in good condition and repair. Each Member shall also maintain and repair any Exclusive Use Common Areas that are appurtenant to his or her Apartment. [*Add if desired*: The provisions contained in _____ (*e.g.*, Paragraph 8) of the Proprietary Lease are hereby incorporated by reference.]

Damage Liability

Section 5.03. Each Member shall be liable to the Association for all damage to the Common Area or other Association property that is sustained by reason of the negligence or willful misconduct of that Member or his or her family, guests, or tenants.

Equitable Servitudes

Section 5.04. The covenants and restrictions set forth in this Declaration shall be enforceable equitable servitudes and shall inure to the benefit of and bind all Members. These servitudes may be enforced by _____ [any Member *or* by the Association *or* by both].

ARTICLE VI. ARCHITECTURAL AND DESIGN CONTROL

Architectural and Design Approval

Section 6.01. No building, addition, wall, fence, or alteration shall be begun, constructed, maintained, or permitted to

remain on any lot or Apartment, or on the Common Area, until complete plans and specifications of the proposed work have been submitted to and approved by the Architectural Control Committee (hereinafter "Committee"). The Committee shall review all such proposals to judge whether they are compatible with the standards of design, construction, and quality of the Development and, if they are not, to require that changes be made before approval.

Architectural Control Committee

Section 6.02. (a) The Committee shall consist of _____ [*specify number which must be at least three but not more than five*] committee members, formed as provided in this Section.

(b) The Declarant shall appoint all of the original committee members and all replacements until the first anniversary of the issuance of the original final public report for the [*add if project is to be developed in phases:* first phase of the] Development and may reserve the power to appoint a majority of the Committee until 90 percent of all Apartments in the Development have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Development, whichever occurs first. After one year from the date of the issuance of the final public report for the [first phase of the] Development, the Board shall have the right to appoint one committee member, until 90 percent of the Apartments have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Development, whichever occurs first. Thereafter, the Board shall have the right to appoint all of the committee members.

(c) Committee members appointed by the Board shall be from the membership of the Association. Committee members appointed by the Declarant need not be Members of the Association.

(d) The term of the initial appointees shall be one year, and thereafter committee members will serve two-year terms unless it becomes necessary to remove members appointed by Declarant in order to comply with Section 6.02(a), in which case the terms of all committee members will end at that time, and the Board will appoint a new Committee. Notwithstanding the above, all committee members shall serve at the will of the party who appointed them, and may be removed by that party at any time with or without cause.

(e) The Committee shall meet as often as it deems necessary to carry out properly the obligations imposed on it, unless directed otherwise by the Board.

The Board of Directors

Section 6.03. All decisions of the Committee are subject to review by the Board of Directors and may be appealed to the Board. The Committee shall notify the Board of all violations of this Article and of any noncompliance with its rulings or with the plans and specifications submitted to and approved by it, after which the Board shall take any actions that it deems necessary in accordance with the provisions of this Declaration.

ARTICLE VII. INSURANCE

Fire and Casualty Insurance

Section 7.01. The Association shall obtain and maintain a policy or policies of fire and casualty insurance with an extended coverage endorsement for the full insurable replacement value of the improvements in the _____ [Common Area *or, if association will maintain blanket casualty insurance:* Development]. The

amount of coverage shall be determined by the Board. This insurance shall be maintained for the benefit of the Association, the Members, and their Mortgagees, as their interests may appear as named insured, subject, however, to any loss payment requirements set forth in this Declaration.

General Liability and Individual Liability Insurance

Section 7.02. The Association shall obtain and maintain one or more policies of insurance that must include coverage for (1) general liability of the Association and (2) individual liability of Officers and Directors of the Association for negligent acts or omissions in that capacity. Both of the above types of coverageshall not be less than _____ [*select the appropriate provision below (see Civ. Code §§ 1365.7, 1365.9, applicable to stock cooperative that is exclusively residential)*]

[*If cooperative consists of 100 or fewer apartments:*]

$1,000,000 covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*Or, if cooperative consists of more than 100 apartments:*]

$3,000,000 covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*Continue with the following:*]

The limits and coverage shall be reviewed at least annually by the Board and increased in its discretion.

Other Association Insurance

Section 7.03. The Association shall purchase and maintain workers' compensation insurance to the extent necessary to comply with any applicable laws. The Association also shall purchase and maintain fidelity bond coverage that names the Association as an obligee, for any person or entity handling funds of the Association, whether or not such persons or entities are compensated for their services. This coverage shall be in an amount that is at least equal to the estimated maximum of funds, including reserve funds, in the custody of the Association [or the Manager] at any given time during the term of each bond. However, the aggregate amount of these bonds must not be less than 150 percent of each year's estimated annual operating expenses and reserves. The Association also may purchase and maintain a blanket policy of flood insurance, and demolition insurance in an amount that is sufficient to cover any demolition that occurs following the total or partial destruction of the Development and a decision not to rebuild.

Trustee for Policies

Section 7.04. The Association, acting through its Board, is hereby appointed and shall be deemed trustee of the interests of all named insureds under all insurance policies purchased and maintained by the Association. All insurance proceeds under any of those policies shall be paid to the Board as trustee. The Board is also authorized to negotiate loss settlements with the appropriate insurance carriers, to compromise and settle any claim or enforce any claim by any lawful action, and to execute loss claim forms and release forms in connection with such settlements.

Individual Insurance

[*If association will maintain blanket casualty insurance:*]

Section 7.05. No Member shall obtain or maintain fire and casualty insurance for the improvements in the Member's Apartment. If any Member does so, he or she shall be liable to the Association for any resulting reduction in the insurance proceeds payable under the policy or policies of fire and casualty insurance maintained by the Association pursuant to Section 7.01. Notwithstanding the foregoing, a Member may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Apartment, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Members, the Association, Declarant, and the institutional First Mortgagee of the Member's stock.

[*Or, if association will not maintain blanket casualty insurance:*]

Section 7.05. Each Member shall provide fire and casualty insurance for the improvements in his or her Apartment. A Member may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Apartment, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Members, the Association, Declarant, and the institutional First Mortgagees of the Owner's stock.

[*Continue with the following:*]

Insurance Premiums

Section 7.06. Insurance premiums for any insurance coverage obtained by the Association shall be included in the regular assessments. That portion of the regular assessments necessary for the required insurance premiums shall be used solely for the payment of the premiums when due.

ARTICLE VIII. DESTRUCTION OR CONDEMNATION

Condemnation

Section 8.01. Should all or any portion of an Apartment or the building in which an Apartment is located be taken by any public or quasi-public agency or entity under the power of eminent domain, the Proprietary Lease of the Apartment shall terminate as of 12:01 A.M. on the date title to the portion taken by eminent domain vests, or the date actual physical possession of the portion taken by eminent domain is taken by the agency or entity exercising the eminent domain power. Any and all compensation or damages awarded for the taking by eminent domain, except that awarded to a Member for the moving of or damage to personal property owned by the Member on the premises, shall belong to the Association. A Member shall have no claim against the Association or the agency or entity exercising eminent domain for the value of the unexpired term of the Proprietary Lease.

Destruction of Premises

Section 8.02. If any part of an Apartment or the building in which an Apartmentis located is destroyed by fire, casualty, or other cause not the fault of the Association or the Member, the Association shall determine whether to restore the damaged premises. If the Association determines to undertake restoration, it shall promptly repair and restore the premises to their former condition at the Association's sole cost. During the making of the repairs and the restoration work, the Carrying Charges payable under the Proprietary Lease shall be abated for the time and to the extent that the Member is prevented from fully occupying the premises in his or her usual and normal manner; provided, however, that in lieu of making those repairs and performing that restoration work, the Association may terminate the lease if either (a) the necessary repair or restoration work cannot rea- sonably be completed under then-applicable governmental laws and regulations within _____ [*e.g.*, 30] working days after it is commenced, or (b) the loss is not covered by the Association's then-existing fire and extended coverage insurance policies.

In the event the Association decides not to restore the premises, the Carrying Charges shall cease from the date of the loss or damage. Further, the Association shall determine the amount that shall be paid to the Member to redeem the common stock of the Member to which the Proprietary Lease is appurtenant, and shall reimburse him or her for any loss as he or she may have sustained.

ARTICLE IX. RIGHTS OF MORTGAGEES

Warranty

Section 9.01. Declarant hereby warrants that Mortgagees of stock in the Association shall be entitled to the rights and guaranties set forth in this Article. No amendment of this Article shall affect the rights of the holder of any First Mortgage recorded prior to the recordation of the amendment who does not join in the execution of the amendment.

Subordination

Section 9.02. Notwithstanding any other provision of this Declaration, liens created under Section 4.08 of this Declaration upon any stock shall be subject and subordinate to, and shall not affect the rights of the holder of, the indebtedness secured by any recorded First Mortgage upon such an interest made in good faith and for value, provided that any transfer of stock as the result of a foreclosure or exercise of a power of sale shall not relieve the new Member from liability for any assessments that become due after the transfer. Such a transfer shall extinguish the lien of assessments that were due and payable prior to the transfer of the stock.

Inapplicability of Right of First Refusal

Section 9.03. Should any of the Association's Governing Instruments provide for a "right of first refusal," this right shall not impair the rights of a First Mortgagee to:

(a) Foreclose or take title to stock pursuant to the remedies provided in the Mortgage;

(b) Accept a deed (or assignment) in lieu of foreclosure in the event of default by a Mortgagor; or

(c) Interfere with a subsequent sale of stock so acquired by the Mortgagee.

Notice of Default

Section 9.04. A First Mortgagee, upon request, will be entitled to written notification from the Association of any default in the performance by the Mortgagor of any obligation under the Association's Governing Instruments that is not cured within 60 days.

Unpaid Assessments

Section 9.05. Any First Mortgagee who obtains title to stock pursuant to the remedies provided in the Mortgage or foreclosure of the Mortgage shall not be liable for unpaid assessments that accrue prior to the acquisition of title to the stock by the Mortgagee.

Mortgagee Approval of Material Amendments

Section 9.06. Notwithstanding Article X of this Declaration, any amendments governing any of the following shall require the prior written approval of at least 51 percent of the First Mortgagees and at least 67 percent of the total voting power of the Members:

(a) Voting;

(b) Rights to use the Common Area;

(c) Reserves and responsibility for maintenance, repair, and replacement of the Common Area;

(d) Boundaries of any Apartment;

(e) Members' interests in the Common Area;

(f) Convertibility of Apartments into a Common Area or a Common Area into Apartments;

(g) Leasing of Apartments;

(h) Establishment of self-management by the Association, when professional management has been previously required by any First Mortgagee or any insurer or governmental guarantor of a First Mortgage;

(i) Annexation, addition, or withdrawal of real property to or from the Development;

(j) Assessments, assessment liens, or the subordination of these liens;

(k) Casualty and liability insurance or fidelity bonds; or

(l) Any provisions expressly benefitting First Mortgagees or insurers or governmental guarantors of first mortgages.

Notwithstanding the foregoing, any first Mortgagee who receives a written request from the Board to approve a proposed amendment or amendments requiring consent under this Section who does not deliver a negative response to the Board within 30 days of the receipt of the request shall be deemed to have approved the proposed amendment or amendments.

Mortgagee Approval of Other Actions

Section 9.07. Unless at least 67 percent of the First Mortgagees (based upon one vote for each First Mortgage owned), or 67 percent of the Members other than Declarant, have given their prior written approval, the Association shall not be entitled to:

(a) By act or omission, seek to abandon or terminate the Development;

(b) Change the pro rata interest or obligations of any individual Apartment for either of the following purposes, unless the change is due to an annexation pursuant to Section 2.02 of this Declaration:

(1) Levying assessments or charges, or allocating distributions of hazard insurance proceeds or condemnation awards; or

(2) Determining the pro rata share of ownership of each Apartment in the Common Area and the improvements thereon.

(c) Partition or subdivide any Apartment;

(d) By act or omission, seek to abandon, partition, subdivide, encumber, sell, or transfer the Common Area unless due to an annexation pursuant to Section 2.02 of this Declaration (the granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Area shall not be deemed a transfer within the meaning of this clause); or

(e) Use hazard insurance proceeds for losses to any Development property (whether to Apartments or to the Common Area) for other than the repair, replacement, or reconstruction of that property, except as provided by statute in case of substantial loss to the Apartments and/or Common Area of the Development.

Liens

Section 9.08. All taxes, assessments, and charges that may become liens prior to the First Mortgage under local law, shall relate only to the individual stock and corresponding Apartment and not to the Development as a whole.

Priority

Section 9.09. No provision of the Governing Instruments of the Association gives any Member, or any other party, priority over any rights of the First Mortgagee of the stock pursuant to its Mortgage in the case of a distribution to the Member of insurance proceeds or condemnation awards for losses to, or a taking of, all or a portion of an Apartment and/or the Common Area.

Reserve Fund

Section 9.10. Association assessments shall be large enough to provide for an adequate reserve fund for maintenance, repairs, and replacement of those common elements that must be replaced on a periodic basis. The reserve fund shall be funded by the regular assessments rather than by special assessments.

Management

Section 9.11. Any agreement for professional management of the Development shall not exceed three years and shall provide that either party may terminate the agreement, with or without cause and without the imposition of a termination fee, on 90 days written notice. The approval of holders of at least 75 percent of First Mortgages shall be obtained before the Association terminates a professional management agreement.

Right to Inspect Books and Records

Section 9.12. Institutional First Mortgagees, upon written request, shall have the right to (1) examine the books and records of the Association during normal business hours, and (2) require the submission of any financial data furnished to the Members by the Association.

Payments by Mortgagees

Section 9.13. First Mortgagees may, jointly or severally, pay taxes or other charges that are in default and that may or have become a charge against the Common Area, and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for the Common Area, and First Mortgagees making these payments shall be entitled to immediate reimbursement from the Association.

Right to Furnish Mortgage Information

Section 9.14. Each Member hereby authorizes the First Mortgagee of a First Mortgage on the Member's stock to furnish information to the Board concerning the status of the First Mortgage and the loan that it secures.

ARTICLE X. GENERAL PROVISIONS

Amendment

Section 10.01. (a) This Declaration may be amended by the vote or writtenconsent of Members representing not less than _____ percent of the voting power of each class of Members of the Association. If only one class of membership exists at the time an amendment is proposed, then it must be approved by not less than _____ [*specify percentage which must be at least 51 percent but not more than 75 percent*] percent of the voting power of the Association, which shall include at least a majority of the votes residing in Members other than Declarant. Notwithstanding any contrary provision in this Section, the percentage of the voting power necessary to amend a specific clause or provision of this Declaration shall not be less than the percentage of affirmative votes prescribed for action to be taken under that clause or provision.

(b) An amendment becomes effective after (1) the approval of the required percentage of Members has been given, (2) that fact has been certified in a writing executed and acknowledged by _____[an officer designated by the Association for that purpose, or by the President of the Association if no such designation is made *or specify name of officer*], and (3) that writing has been recorded in _____ [*specify each county in which a portion of the development is located*].

(c) If a proposed amendment requires the affirmative vote (1) in a single-class voting structure, of more than 50 percent

of the votes in the Association, or (2) in a dual-class voting structure, of more than 50 percent of the votes in more than one class, and that total cannot be obtained, the Association or any Member may petition the Superior Court of _____[*set forth names of all counties in which development is located*], subject to the requirements, limitations, and exceptions set forth in *Civil Code Section 1356*, for an order reducing the percentage of the affirmative votes necessary for the amendment or approving the amendment. If such an order is issued, the amendment shall be acknowledged by _____ [any person designated by the Association for that purpose or by the President of the Association if no such designation is made *or specify other person*], and that person shall have the amendment and the court order recorded in _____[*name of all counties in which project is located*]. On recordation, the amended provision or provisions of this Declaration shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by this Declaration and the other governing documents. Within a reasonable time after recordation, the Association shall mail a copy of the amendment and a statement that it has been recorded to each Member.

(d) Notwithstanding any other provision of this Declaration, the Board may adopt an amendment deleting from this Declaration any provision that was unequivocally designed and intended, or that by its nature could only have been designed or intended, to facilitate Declarant in completing the construction or marketing of the Development. The adoption of any such amendment must comply with the requirements set forth in *Civil Code Section 1355.5*.

(e) When required under *Business and Professions Code Section 11018.7*, the written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to this Declaration to the vote of the Members.

Term of Declaration

Section 10.02. The provisions of this Declaration shall continue in effect for a term of _____ years from the date of execution, after which time it shall be automatically extended for successive periods of _____ years, until the membership of the Association decides to terminate it.

Nonwaiver of Remedies

Section 10.03. Each remedy provided for in this Declaration is separate, distinct, and nonexclusive. Failure to exercise a particular remedy shall not be construed as a waiver.

Attorneys' Fees

Section 10.04. In any action to enforce this Declaration, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs.

Severability

Section 10.05. The provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity or unenforceability of any one provision shall not affect the validity or enforceability of any other provision.

Binding

Section 10.06. This Declaration, any amendment to it, and any valid action or directive made pursuant to the Declaration, shall be binding on the Declarant and the Members and their heirs, grantees, tenants, successors, and assigns.

Limitation of Liability

Section 10.07. The liability of any Member for performance of any of the provisions of this Declaration shall terminate upon sale, transfer, assignment, or other divestment of the Member's entire interest in the stock cooperative with respect to obligations arising from and after the date of divestment.

Number and Headings

Section 10.08. As used in this Declaration, the singular shall include the plural, unless the context requires the contrary. The headings are not a part of this Declaration, and shall not affect the interpretation of any provision.

Executed on _____[*date*], at _____[*city*], _____ [*county*], California.

DECLARANT

[*If declarant is an individual:*]

_____ [*signature of declarant*]
[*typed name*]

[*Or, if declarant is an entity:*]

_____ [*name of declarant*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and

that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawSubdivisionsGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART IV. FORMS

16-33C California Legal Forms--Transaction Guide § 33C.202

§ 33C.202 Articles of Incorporation for Stock Cooperative

[1] Comment

[a] Use of Form

This form is a set of articles of incorporation for a stock cooperative corporation that will be incorporated as a nonprofit mutual benefit corporation under the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7110 et seq.*; *see also § 33C.31[4]*].

For a general discussion of articles of incorporation for nonprofit corporations, see Ch. 13, *Nonprofit Corporations* . For examples and discussion of the articles for a nonprofit mutual benefit corporation, see *§§ 13.210*, *13.211*. The form used for a condominium owners' association is set forth in *Ch. 34, Condominiums, § 34.204[2]*.

[b] Contents of Articles

[i] In General

The articles of incorporation for a corporation formed pursuant to the Nonprofit Mutual Benefit Corporation Law must contain (1) the name of the corporation, (2) the name of the corporation's initial agent for service of process (and, if the agent is a natural person, his or her complete business or residence street address), and (3) a statutory statement of corporate purpose [*Corp. Code §§ 7130(a), 8210(b)*; *see § 33C.202[2]*, Arts. I-IV]. The Nonprofit Mutual Benefit Corporation Law also lists a number of provisions that may be set forth in the articles of incorporation [*see Corp. Code § 7132*; *see also Ch. 13, Nonprofit Corporations, § 13.130*].

In addition to the requirements of the Nonprofit Mutual Benefit Corporation Law, the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] requires the articles of incorporation of any common interest development association filed with the Secretary of State on or after January 1, 1995, to include an additional statement that: (1) identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act; (2) gives the business or corporate office of the association, if any; and, if the office is not on the development site, states the nine-digit ZIP Code, front street, and nearest cross street for the physical

location of the development; and (3) gives the name and address of the association's managing agent, if any [*Civ. Code § 1363.5(a)*; *see Bus. & Prof. Code § 11502*].

The Real Estate Commissioner has listed several types of provisions that must be included in the governing instruments (declaration, articles, and bylaws) of any common-interest subdivision [*see 10 Cal. Code Reg. § 2792.8*]. Those provisions have been incorporated into the declaration [*see § 33C.201*] and the bylaws [*see § 33C.203*] included in this chapter, rather than in the following articles of incorporation.

[ii] Incorporation of Unincorporated Association

If the owners' association is an unincorporated association that is changing to corporate status, the articles must also state that an existing unincorporated association, identified by name, is being incorporated by the filing of the articles [*Corp. Code § 7121(b)*; *see § 33C.202[2]*, Arts. V, VI]. In addition, the articles must be accompanied by a verified statement of any two officers or governing board members of the association stating that the incorporation of the association by means of the articles to which the verified statement is attached has been approved by the association in accordance with its rules and procedures [*Corp. Code § 7121(c)*; *see Ch. 13, Nonprofit Corporations, § 13.210*].

[c] Execution and Filing

A nonprofit corporation is formed under the Nonprofit Mutual Benefit Corporation Law when its articles of incorporation are executed and filed with the Secretary of State [*Corp. Code § 7120(a)*]. Each incorporator and director named in the articles must sign and acknowledge them [*Corp. Code § 7120(b)*; *see Corp. Code § 7132(c)(1)* (articles may list names and addresses of initial directors); *Civ. Code § 1189(a)* (form for certificate of acknowledgment)]. Articles usually identify only the incorporator to avoid the need to obtain the signatures of initial directors.

A guide to the formation of a nonprofit mutual benefit corporation is set forth in *Ch. 13, Nonprofit Corporations, § 13.120*.

Because the developer must include the articles and other governing documents in the application package for a public report [*see 10 Cal. Code Reg. § 2792.2(a)(23)-(25)*; *see also § 33C.142*, P 3(w)], the applicant should postpone filing the articles until after the Department has had an opportunity to review them.

If an unincorporated association is being incorporated, a certified copy of the articles must be filed in the office of the county recorder of any county in California in which any real property of the association is located. This filing evidences record ownership in the corporation of all interests of the association in and to the real property located in that county [*Corp. Code § 7121(e)*].

[d] Amendment

Regulations promulgated pursuant to the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] set forth requirements for the amendment of declarations, articles, and bylaws of common interest subdivisions. Amendment of the articles requires the vote or written assent of members as follows [*10 Cal. Code Reg. § 2792.24(b)(1)(A)*; *see § 33C.202[2]*, Art. VII]:

- At least a majority of the governing body.
- At least a majority of the voting power of the owners' association.
- At least a majority of the votes of members other than the developer. This rule is subject to the following exceptions and qualifications. First, the percentage of a quorum or of the voting power of the

association or of members other than the developer necessary to amend a specific clause or provision in the articles must not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause [*10 Cal. Code Reg. § 2792.24(c)*]. Second, if a two-class voting system is in effect, the articles cannot be amended without the vote or written consent of a prescribed percentage of the voting power of each class of membership or a prescribed percentage of a quorum of members of each class [*10 Cal. Code Reg. § 2792.24(d)*]. Third, if the governing instruments originally provided for a two-class voting structure, but one of the classes has been converted so that a one-class system is in effect, the general rules set forth in the preceding paragraph [*see 10 Cal. Code Reg. § 2792.24(b)*] apply [*10 Cal. Code Reg. § 2792.24(e)*].

[2] FORM

Articles of Incorporation for Stock Cooperative

ARTICLES OF INCORPORATION
OF
_____ [*name of corporation*]

I. CORPORATE NAME

The name of the corporation is _____[*name of corporation*].

II. PURPOSE

This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity, other than credit union business, for which a corporation may be organized under that law. [*If desired, add the following as a further description of the purposes of the corporation:* This corporation is formed for the following further purposes:

(1) To provide housing on a cooperative basis to the shareholders of this corporation, through the purchase and lease of real property located at _____ (*address*), California;

(2) To serve as an owners' association for the management, maintenance, preservation, and architectural control of the cooperative housing project; and

(3) To exercise all of the powers and privileges, and to perform all of theduties and obligations of the corporation as set forth in the Declaration of this corporation, recorded or to be recorded in the Office of the Recorder of _____ County, California.]

III. SPECIFIC PURPOSE; CORPORATE OFFICE; MANAGING AGENT

This corporation is an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act. The Association's business and corporate office is located at _____[*specify address and, if office is not at development site, also include nine-digit ZIP code, front street, and nearest cross street for development's physical location*]. The Association's managing agent is _____[*specify agent's name*], whose address is _____[*specify agent's address*].

IV. INITIAL AGENT FOR SERVICE OF PROCESS

The corporation's initial agent for service of process in the State of California is _____[*name*] [*add only if agent is a natural person (see Corp. Code §§ 7130, 8210(b)):*, whose _____ (business *or* residence) street address is _____].

[*Add Articles V and VI if an unincorporated association is being incorporated (Corp. Code § 7121(b)):*]

V. NAME OF EXISTING ASSOCIATION

The name of the unincorporated association which is being incorporated is _____[*name of unincorporated association*].

VI. INCORPORATION OF ASSOCIATION

The unincorporated association whose name is set forth in Article V of these Articles of Incorporation is being incorporated by the filing of these Articles.

[*Continue with the following:*]

VII. AMENDMENTS

The classes of membership and the voting rights of Members shall be as stated in the Declaration. As long as a two-class voting system is in effect, any amendment of these Articles shall require the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, and (2) Members representing _____ [*specify percentage not below 51 percent*] of _____ [the voting power of each class of Members *or* a quorum of Members of each class]. After conversion of the Class B Membership to Class A Membership, these Articles may be amended by the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, (2) a bare majority [*or specify higher percentage*] of the voting power of the Members, and (3) a bare majority [*or specify higher percentage*] of the voting power of the Members other than the developer of the Development.

Executed on _____[*date*], at _____[*city*], _____ [*county*], California.

_____ [*signature*]
[*typed name*], Incorporator

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)
)
)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesManagementReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART IV. FORMS

16-33C California Legal Forms--Transaction Guide § 33C.203

§ 33C.203 Bylaws for Stock Cooperative

[1] Comment

[a] Use of Form

This form is an illustrative set of bylaws for a stock cooperative corporation formed pursuant to the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7110 et seq.*]. For an example and discussion of the bylaws for corporations formed under that law, see *Ch. 13, Nonprofit Corporations, § 13.212*. For bylaws for the owners' association of a condominium project, see *Ch. 34, Condominiums, § 34.205[2]*.

[b] Contents

[i] Nonprofit Mutual Benefit Corporation Law

The bylaws of a cooperative corporation organized pursuant to the Nonprofit Mutual Benefit Corporation Law must state either: (1) the number of directors of the corporation; (2) the method for determining the number of directors; or (3) that the number of directors will be not less than a stated minimum or more than a stated maximum, with the exact number to be fixed by approval of the board or members [*Corp. Code § 7151(a)*; *see § 33C.203[2]*, Section 8.01]. In any event, the number or minimum number of directors may be one or more [*Corp. Code § 7151(a)*].

The Nonprofit Mutual Benefit Corporation Law also provides that the bylaws may include any provision, not in conflict with law or the articles, for the management of the activities and for the conduct of the affairs of the corporation, including [*Corp. Code § 7151(c)-(f)*]:

- The names and addresses of persons appointed as initial directors [*see Corp. Code § 7132(c)(1)*].
- The transfer of memberships [*see Corp. Code §§ 7132(c)(2), 7320*; § 33C.203[2], Art. IV].
- The classes of members, and if there are two or more classes, the rights, privileges, preferences, restrictions, and conditions attaching to each class [*see Corp. Code § 7132(c)(3)*; § 33C.203[2], Art.

VII].

- A provision that would allow any member to have more or less than one vote in any election or other matter presented to the members for a vote [*see Corp. Code § 7132(c)(4)*].

- A provision that requires amending the bylaws, and any amendment or repeal of that amendment, to be approved in writing by a specified person or persons other than the board or the members [*see Corp. Code § 7132(c)(5)*; *but see Corp. Code § 7132(c)(5)(A)-(C)* (circumstances rendering approval requirement inapplicable)].

- Any other provision, not in conflict with law, for managing the activities and conducting the corporation's affairs, including any provision required or permitted by law to be stated in bylaws [*see Corp. Code § 7132(c)(6)*].

- The time, place, and manner of calling, conducting, and giving notice of members', directors', and committee meetings, or of conducting mail ballots [*see § 33C.203[2]*, Arts. VI, X].

- The qualifications, duties, and compensation of directors; the time of their election; and the requirements of a quorum for directors' and committee meetings [*see § 33C.203[2]*, Arts. VIII-X].

- The appointment of committees, composed of directors or nondirectors or both, by the board or any officer, and the authority of these committees.

- The appointment, duties, compensation, and tenure of officers [*see § 33C.203[2]*, Art. XI].

- The mode of determination of members of record [*see § 33C.203[2]*, Section 6.05].

- The making of reports and financial statements to members.

- Setting, imposing, and collecting dues, assessments, and admission and transfer fees.

- Manner of admission, withdrawal, suspension, and expulsion of members [*see Corp. Code § 7341*; § 33C.203[2], Arts. II, V].

- Voting requirements with regard to the members of any class, unit, or grouping, or the directors [*see § 33C.203[2]*, Arts. VII, X].

- A provision limiting the number of members, in total or of any class, that the corporation is authorized to admit.

[ii] Regulations of California Real Estate Commissioner

The governing instruments (the articles, bylaws, and declaration) of a common interest development must contain the provisions required by the Real Estate Commissioner's regulations [*see 10 Cal. Code Reg. § 2792.8*; *see also 10 Cal. Code Reg. §§ 2792.15-2792.28*] enacted under the Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.*]. Failure to include these provisions in any of the governing documents may result in the denial of the issuance of a public report [*Bus. & Prof. Code § 11018(a), (b)*]. Without such a report, no units in the cooperative may be leased or offered for lease [*see Bus. & Prof. Code § 11018.2*].

Most of these required provisions are contained in the declaration [*see § 33C.201[1][f][ii]*]. However, these bylaws

contain the following provisionsrequired by the Commissioner [*see 10 Cal. Code Reg. § 2792.8(a)*]:

- Procedures for the election and removal of governing body directors and officers of the association [*10 Cal. Code Reg. § 2792.8(a)(9)*; *see 10 Cal. Code Reg. § 2792.19*; § 33C.203[2], Arts. IX, XII-XVI];

- Enumeration of the powers and duties of the governing body and its officers, and of the limitations on the authority of the governing body to act without the prior approval of members representing a majority of the voting power of the association [*10 Cal. Code Reg. § 2792.8(a)(10)*; *see 10 Cal. Code Reg. § 2792.21*; *see also Civ. Code § 1365.5*; § 33C.203[2], Section 8.06];

- Allocation of voting rights to association members [*10 Cal. Code Reg. § 2792.8(a)(11)*; *see 10 Cal. Code Reg. § 2792.18*; § 33C.203[2], Art. VII];

- Regular and special meetings of association members with notice requirements [*10 Cal. Code Reg. § 2792.8(a)(13)*; *see 10 Cal. Code Reg. § 2792.17*; § 33C.203[2], Art. IV];

- Regular meetings of the governing body with provision for notice to association members [*10 Cal. Code Reg. § 2792.8(a)(14)*; *see 10 Cal. Code Reg. § 2792.20*; § 33C.203[2], Art. X];

- Quorum requirements for meetings of members of the association and of the governing body [*10 Cal. Code Reg. § 2792.8(a)(15)*; *see 10 Cal. Code Reg. § 2792.17*; § 33C.203[2], Sections 6.05, 10.03];

- Procedures for proxy voting at members' meetings [*10 Cal. Code Reg. § 2792.8(a)(16)*; *see § 33C.203[2]*, Section 7.02];

- Policies and procedures governing the inspection of books and records of the association by members [*10 Cal. Code Reg. § 2792.8(a)(17)*; *see 10 Cal. Code Reg. § 2792.23(c)-(e)*; § 33C.203[2], Art. XVII]; and

- Amendment procedures for those provisions of the bylaws that relate to the ownership, management, and control of the association and/or the common interests [*10 Cal. Code Reg. § 2792.8(a)(18)*; *see 10 Cal. Code Reg. § 2792.24*; § 33C.203[2], Art. XIX].

[c] Transfer of Interests

The memberships in a corporation formed under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] are not transferable unless the articles or bylaws provide for transfer [*Corp. Code § 7320(a)*]. In a stock cooperative, the stock and appurtenant rights to tenancy of a particular apartment are generally made transferable only under certain conditions, in order for the corporation to maintain control over the selection of financially responsible tenant-stockholders [*see § 33C.203[2]*, Section 4.01]. If a tenant-stockholder has an offer to purchase his or her interest in the cooperative, the corporation must repurchase that interest on the same terms within 15 days, or forfeit the right of control over the sale [*see 10 Cal. Code Reg. § 2792.26(b)*; *see also § 33C.203[2]*, Sections 4.02, 4.03].

However, to finance the purchase of an interest in the cooperative, a commercial bank must have the right to sell the shares of stock and to assign the proprietary lease of a tenant-stockholder without the prior consent or approval of the Association if the tenant-stockholder defaults on the loan [*Fin. Code § 1236*; *see § 33C.35[3]*; *see also § 33C.203[2]*, Section 4.04]. Other lenders usually insist on similar mortgagee protections [*see Ch. 34, Condominiums, § 34.202[1][e][xi]*; *see also § 33C.201[2]*, Art. IX].

[d] Termination Procedures

Several laws govern the termination of a tenant-stockholder's membership and tenancy in the stock cooperative. First, the association of a common interest development may only forfeit or abridge a member's right to the full use and enjoyment of his or her subdivision interest (i.e., right of tenancy) for failure to comply with the governing instruments or operating rules (1) by judgment of a court or a decision arising out of arbitration, or (2) on account of foreclosure or sale under a power of sale for failure to pay assessments [*10 Cal. Code Reg. § 2792.26(a)*; *see Civ. Code §§ 1366, 1367, 1367.1*; *see also § 33C.204[1][b][viii]*].

Second, a landlord may regain possession of leased premises after a tenant's nonpayment of rent only in accordance with an unlawful detainer action [*see Code Civ. Proc. § 1161 et seq.*; *see also § 33C.204[1][b][ix]*].

Finally, any termination of membership in a nonprofit mutual benefit corporation must be done in good faith and in a fair and reasonable manner [*Corp. Code § 7341(a)*]. A procedure is fair and reasonable if (1) the provisions of the procedure are set forth in the articles or bylaws, or sent annually to the members, (2) it provides the giving of 15 days' prior notice of the termination and the reasons for it, and (3) it provides an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the termination by a person or body authorized to decide that the proposed termination not take place [*Corp. Code § 7341(c)*]. Notice may be given by any method reasonably calculated to provide actual notice. If notice is mailed, it must be first-class or registered mail sent to the members' last address shown on the corporation's records [*Corp. Code § 7341(d)*; *see § 33C.203[2]*, Section 5.02].

This form authorizes the stock cooperative to terminate a tenant-stockholder's membership, and appurtenant right of tenancy, after obtaining a judgment againstthat person in an unlawful detainer action for nonpayment of carrying charges [*see § 33C.203[2]*, Section 5.02(a)]. As a prerequisite to such an action, the cooperative must record a notice of delinquent assessment against the tenant-stockholder [*see Civ. Code §§ 1366, 1367, 1367.1*; *see also § 33C.201[2]*, Art. IV]. This form also provides for termination of membership on a tenant-stockholder's voluntary or involuntary transfer of shares [*see § 33C.203[2]*, Sections 5.01(b)-(e)], since such a person is no longer an "owner" entitled to a right of tenancy in an apartment [*see 10 Cal. Code Reg. § 2792.26(a)*; *Civ. Code § 1358(d)*].

[e] Certificate of Secretary

The original or a copy of the bylaws certified to be a true copy by a person purporting to be the secretary or assistant secretary of the corporation is prima facie evidence of the adoption of those bylaws and the matters stated therein [*Corp. Code § 314*]. This form includes a secretary's certificate. For other certificate forms, see *Ch. 4, Bylaws, §§ 4.200, 4.201*.

[f] Filing

A copy of the bylaws must be filed with the Real Estate Commissioner as part of an application for a final public report [*10 Cal. Code Reg. § 2792.2(a)(24)*; *see § 33C.200[2]* (application)]. Consequently, the applicant should postpone the adoption of the bylaws until after the Commissioner reviews them. For a discussion and example of minutes adopting the bylaws, see *Ch. 34, Condominiums, § 34.205[1]*.

[2] FORM

Bylaws for Stock Cooperative

BYLAWS OF
_____ [*name of stock cooperative*]

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ARTICLE I. GENERAL PROVISIONS

Name

Section 1.01. The name of the corporation is _____ ("Association").

Principal Office

Section 1.02. The principal office of the Association is located at _____[*street address*], _____[*city*], California. The Board of Directors is hereby granted full power and authority to change

the principal office of the Association from one location to another in [the County of _____,] California. Any such change shall be noted by the Secretary in these Bylaws, but shall not be considered an amendment of these Bylaws.

Application

Section 1.03. These Bylaws are applicable to the stock cooperative housing development known as _____ ("Development"), located at _____[*address and city*] in _____ County, California. These Bylaws are also applicable to all Members of the Association and all tenants, employees, and other persons who use the facilities of the Development in any manner.

Definitions

Section 1.04. Unless otherwise specified in these Bylaws, the definitions set forth in Article I of the Declaration for _____[*name of development*] ("Declaration") recorded or to be recorded in the Office of the Recorder of _____ County, California, apply to these Bylaws.

ARTICLE II. QUALIFICATIONS FOR MEMBERSHIP

Proof of and Qualification for Membership

Section 2.01. Any natural person approved by the Board of Directors shall be eligible for membership. Except as provided in Section 2.04, no person or persons shall exercise the rights of membership until satisfactory proof has been furnished to the Secretary of the Association of qualification as a Member. A copy of a duly executed and acknowledged Proprietary Lease for an Apartment in the Development shall constitute satisfactory proof of qualification.

Assessments

Section 2.02. No initiation fees, costs, or dues shall be assessed against any person as a condition upon his or her exercise of the rights of membership except any assessments, levies, and charges specifically authorized under the Governing Instruments.

Certificates of Membership

Section 2.03. The Board of Directors may provide for the issuance of certificates evidencing membership in the Association which shall be in the form determined by the Board and which shall set forth the statements required by *Section 7313(b) of the California Corporations Code*. All certificates evidencing membership shall be consecutively numbered. The name and address of each Member and the date of issuance of the certificate shall be entered on the records of the Association maintained by the Secretary. If any certificate is lost, mutilated, or destroyed, a new certificate may be issued therefor upon such terms and conditions as the Board may direct.

Status of Declarant

Section 2.04. The Declarant shall be a Member of the Association; provided, however, that his or her status as a Member shall terminate at the time specified in Section 7.01(b) of these Bylaws, unless he or she has executed a Proprietary Lease in accordance with this Article.

ARTICLE III. PROPRIETARY LEASE

Form of Lease

Section 3.01. The Board of Directors shall adopt a form of Proprietary Lease to be used by the Association for the leasing of all Apartments in the Development. The leases shall contain any restrictions, limitations, and provisions with respect to assignment, subletting, and the sale or transfer of the stock appurtenant thereto, and any other terms and provisions that the Board of Directors may determine.

After a Proprietary Lease in the form adopted by the Board of Directors has been executed and delivered to the Association, all Proprietary Leases subsequently executed and delivered shall be in the same form, unless a change or alteration is approved pursuant to a vote of the Members.

Allocation of Shares

Section 3.02. The Board of Directors shall allocate to each Apartment to be leased the number of shares of stock that must be purchased by a prospective occupant for execution of a Proprietary Lease of that Apartment.

Loss or Destruction of Proprietary Lease

Section 3.03. In the event that any Proprietary Lease is lost, stolen, destroyed, or mutilated, the Board of Directors may authorize the issuance of a new Proprietary Lease in lieu thereof, in the same form and with the same provisions. The Association may require the Lessee, or his or her legal representative, to give the Association a bond or other adequate security sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft, destruction, or mutilation of the Proprietary Lease.

ARTICLE IV. TRANSFER OF MEMBERSHIPS

General Provisions

Section 4.01. Except as provided herein, a Member may not transfer his or herstock in _____[*name of stock cooperative*] or assign the Proprietary Lease appurtenant thereto. In any event, no transfers shall be made on the books of the Association within _____ days next preceding the annual meeting of Members. The Association shall be entitled to a reasonable fee for processing any transfer.

Association's Option to Purchase

Section 4.02. If a Member desires to sell his or her stock and assign the appurtenant Proprietary Lease to a purchaser

who has made a bona fide offer, he or she shall give written notification of that intention to the Association. The Association shall have an option for 15 days after receipt of notice to repurchase the stock and the right to exclusive occupancy appurtenant thereto at terms not less favorable than the terms of the original offer. The purchase by the Association of the stock and the appurtenant Proprietary Lease shall immediately terminate the Members' rights in the Association. The Member shall be released from all obligations under the Proprietary Lease upon compliance with the procedures described in Section 4.03 of these Bylaws.

Failure to Exercise Option

Section 4.03. If the Association fails to exercise the option set forth inSection 4.02within the 15-day period, the Member may sell his or her stock in the Association, and assign the Proprietary Lease appurtenant thereto, to any person provided that the terms of sale are not less favorable than the terms of the original offer. Upon execution of the Proprietary Lease by the transferee, the retiring Member shall be released from the obligations under the Proprietary Lease, provided that he or she has done all of the following:

(a) Endorsed his or her stock certificates for transfer in blank and deposited them with the Association;

(b) Met all of his or her obligations and paid all amounts due under the Proprietary Lease up to the date of transfer; and

(c) Vacated the Apartment, leaving it in good state of repair.

Rights of Commercial Bank

Section 4.04. Notwithstanding the provisions set forth inSections 4.01 -4.03, if a Member defaults on a loan made by a commercial bank on the security of a first security interest on stock and the assignment by way of security of the Member's interest in the Proprietary Lease or right of tenancy in the Apartment, the lender shall have the right, in accordance with *Section 1236 of the Financial Code*, without the prior consent or approval of the Association, to sell the shares of stock in _____[*name of cooperative corporation*] at a public or private sale following at least 30 days' prior written notice to both the Member and the Association at the address of the Member's Apartment, and to assign the Proprietary Lease to a purchaser who agrees to cure any defaults thereunder as a condition of assignment.

ARTICLE V. TERMINATION OF MEMBERSHIP

Basis

Section 5.01. The Board may terminate the membership of a Member if any of the following occurs:

(a) The Association prevails in an unlawful detainer action against the Member for default in the failure to pay Carrying Charges, after having recorded a notice of delinquent assessment pursuant to *Section 1367.1(b) of the Civil Code*;

(b) The Member ceases to be the owner of the shares of stock to which the Proprietary Lease is appurtenant;

(c) A receiver of the Member's stock is appointed under any of the laws of the United States or of any state;

(d) Any of the shares of stock to which the Proprietary Lease is appurtenant are levied upon and sold under the process

of any court; or

(e) The Member makes a general assignment for the benefit of creditors.

The Association may not otherwise abridge the right of any Member to the full use and enjoyment of his or her Apartment on account of failure by the Member to comply with the provisions of the governing instruments or rules, except by judgment of a court or a decision arising out of arbitration.

Notice of Termination

Section 5.02. No membership may be terminated except in accordance with the following procedure:

(a) The Association shall send written notice, postage prepaid, by first-class or registered mail addressed to the last address of the Member shown on the Association's records, stating that membership in the Association and all rights appurtenant to membership will expire on a date not less than 15 days after the date of mailing the notice, and the reasons for termination; and

(b) The notice shall inform the Member that he or she has the opportunity to show cause to the Board of Directors, orally or in writing, not less than five days before the effective date of termination, why the termination should not take place.

Surrender of Stock and Lease

Section 5.03. Upon termination, the Member shall be required to deliver promptly to the Association his or her stock certificates, and his or her ProprietaryLease, endorsed in the manner required by the Association. The Association shall thereupon at its election either (1) repurchase that stock at its present transfer value or the amount the retiring Member originally paid for the acquisition of the stock, whichever is the lesser, or (2) proceed with reasonable diligence to effect a sale of the stock to a purchaser and at a sales price acceptable to the Association. The retiring Member shall be entitled to receive the amount so determined, less the following amounts:

(a) Any amounts due to the Association from the Member under the Proprietary Lease;

(b) The cost or estimated cost of all deferred maintenance, including painting, redecorating, floor finishing, and any repairs and replacements that are deemed necessary by the Association to place the Apartment in suitable condition for another occupant; and

(c) Legal and other expenses incurred by the Association in connection with the default of that Member and the resale of the stock. In the event the retiring Member, for any reason, should fail for a period of 10 days after demand to deliver to the Association his or her endorsed stock certificate, if any, that certificate shall forthwith be deemed to be cancelled and may be reissued by the Association to a new purchaser.

ARTICLE VI. MEETINGS OF MEMBERS

Place of Meetings

Section 6.01. All meetings of the Members shall be held within the Development at the principal office of the

Association, or at a meeting place specified in writing by the Board as close to the Development as possible. No meeting of the Members shall, unless unusual conditions exist, be held outside of _____ County, in which the Development is located.

Annual Meetings

Section 6.02. The first annual meeting of the Members shall be held on a date, selected by the initial Directors appointed by the Declarant, that is within _____ [*select the appropriate provision below*]

[*if public report authorizes sale of at least 50 subdivision interests in development (see 10 Cal. Code Reg. § 2792.17(a)), use:*] 45 days after the close of escrow for the sale of the subdivision interest that represents the fifty-first percentile interest authorized for sale under the first final subdivision public report issued for the Development by the California Real Estate Commissioner, or within six months after the closing of the sale of the first subdivision interest within the Development, whichever is earlier.

[*OR*]

[*if public report authorizes sale of fewer than 50 subdivision interests in development, use:*] six months after the closing of the sale of the first subdivision interest within the Development.

[*Continue with the following:*]

Thereafter, the annual meetings of the Members shall be held on the _____ [*specify day and week, e.g.,* second Tuesday] of _____ [*month*] each succeeding year, at _____ [*time*]. If the day designated for the annual meeting is a legal holiday, the meeting shall be held at the same hour on the first day following that day, excluding Saturday and Sunday, that is not a legal holiday.

Special Meetings

Section 6.03. Special meetings of the Members may be called by a majority of a quorum of the Board or by the President of the Association. In addition, special meetings of the Members for any lawful purpose must be promptly scheduled by the Board in response to a written request therefor signed by Members representing at least 5 percent of the total voting power of the Association. The special meeting shall be held not less than 35 or more than 90 days after adoption of the resolution or receipt of the request. Only that business stated in the notice of meeting given pursuant to Section 6.04 of these Bylaws shall be transacted at the special meeting. The right of Members to call a special meeting pursuant to this Section shall be enforceable as provided in *Section 7511(c) of the California Corporations Code.*

Notice of Meetings

Section 6.04. The Secretary of the Association shall give written notice of any Members' meeting to each Member of record. Except as provided below, the notice shall be given at least 10 but not more than 90 days before the meeting, by first class [*or* registered *or* certified] mail or by personal delivery. If a special meeting is called by Members pursuant to Section 6.03 of these Bylaws, the notice shall be given within 20 days after receipt of the request for the meeting. If that 20-day requirement is not satisfied, the Members who called the meeting may give the notice. Any notice of meeting shall be addressed to the Member at the address appearing on the books of the Association, or the address supplied by

the Member to the Association for this purpose. If there is no such address, notice shall be given at the principal office of the Association or by publication at least once in a newspaper of general circulation in the county in which the principal office is located. The notice shall state the place, date, and time of the meeting. The notice shall also specify those matters the Board intends to present for action by the Members. In the case of a special meeting, the only matters that may be voted on are those matters that were mentioned in the notice of meeting. In the case of an annual meeting, any proper matter may be presented at the meeting for action [*add if bylaws authorize a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):*, except as provided in Section 6.06 of these Bylaws.] IfDirectors are to be elected at the meeting, the notice shall include the names of all those who are nominees at the time the notice is given.

Record Date of Membership

Section 6.05. The Board shall fix, in advance, a record date or dates for the purpose of determining the Members entitled to notice of and to vote at any meeting of Members. The record date for notice of a meeting shall not be more than 90 nor less than 10 days before the date of the meeting. The record date for voting shall not be more than 60 days before the date of the meeting or before the date on which the first written ballot is mailed or solicited. The Board may also fix, in advance, a record date for the purpose of determining the Members entitled to exercise any rights in connection with any other action. Any such date shall not be more than 60 days prior to the action.

Quorum

Section 6.06. At any meeting, the presence either in person or by proxy of Members entitled to cast at least 51 percent [*or specify other percentage which must be at least 25 percent and not more than 66 2/3 percent of the total voting power of the association*] of the total voting power of the association shall constitute a quorum for any action except as otherwise provided in the Articles, Bylaws, or this Declaration. The Members present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough Members to leave less than a quorum, if the action taken, other than adjournment, is approved by at least a majority of Members required to constitute a quorum. [*Add if this provision authorizes a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):* Notwithstanding the foregoing, whenever the quorum present at an annual meeting of Members consists of less than one third of the voting power of the Association (present in person or by proxy), then the only matters that may be voted on are those matters that were mentioned in the notice of meeting given pursuant to Section 6.04 of these Bylaws.] If a quorum is not present at any time at a duly called meeting, a majority of those Members present in person or by proxy may adjourn the meeting to a time not less than 5 days or more than 30 days from the meeting date, but no other business may be transacted. An adjourned meeting may be held without written notice, provided that notice is given by announcement at the original meeting. If no such announcement is made, or if the selected date is changed after adjournment, notice of the time and place shall be given to Members in the manner provided in Section 6.04 of these Bylaws. The quorum for the adjourned meeting shall be _____ percent.

Parliamentary Procedure

Section 6.07. All meetings of the Members shall be conducted in accordance with (1) a recognized system of parliamentary procedure or (2) any parliamentary procedures adopted by the Association.

Action Taken Without a Meeting

Section 6.08. Any action that may be taken at a meeting of the Members, except for the election of Directors, may be taken without a meeting provided the following ballot requirements are satisfied:

(a) The Association shall distribute a written ballot to every Member entitled to vote on the matter. The ballot shall be solicited in the same manner as provided in Section 6.04 of these Bylaws for the giving of notice of meetings of Members. If the Association has 100 or more Members and the ballots are distributed to 10 or more Members, the ballot shall comply with the additional requirements set forth in *Section 7514 of the California Corporations Code*.

(b) The ballot shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any proposal, provide a reasonable time within which to return the ballot, indicate the number of responses needed to meet the quorum requirement, and state the percentage of approvals necessary to pass the measure submitted.

(c) The proposed action shall be considered approved if:

(1) The number of votes cast by ballot within the specified time period equals or exceeds the quorum required to be present at a meeting authorizing the action; and

(2) The number of approvals equals or exceeds the number of votes that would be required for approval at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) No written ballot shall be revoked.

Approval by Members Required by Statute

Section 6.09. Any approval by the Members of the following proposals, other than unanimous approval by those entitled to vote, shall be valid only if the general nature of the approved proposal was stated in the notice of meeting or any waiver of notice of meeting:

(a) Removing a Director without cause pursuant to Section 8.03(b) of these Bylaws;

(b) Filling vacancies on the Board pursuant to Section 8.04 of these Bylaws;

(c) Entering into or approving a contract or transaction between the Association and one or more of the Directors, or between the Association and any entity in which one or more of the Directors has a material financial interest, when the material facts of the contract or transaction are fully disclosed pursuant to *Section 7233 of the California Corporations Code*;

(d) Amending the Articles after approval by the Board, in accordance with*Section 7812 of the California Corporations Code*;

(e) Electing to dissolve the Association, by approval of a majority of all Members or by approval of both the Board and Members pursuant to *Section 8610 of the California Corporations Code*; or

(f) If the corporation has more than one class of memberships outstanding upon dissolution, approving a plan of distribution of assets which is not in accordance with the liquidation rights of those classes, pursuant to *Section 8719 of the California Corporations Code.*

Waiver of Notice or Consent of Absentees

Section 6.10. The transactions of any meeting of Members, however called and noticed, shall be as valid as though

taken at a duly called, noticed, and held meeting, if: (1) a quorum is present either in person or by proxy and (2) either before or after the meeting, each of the Members not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the Minutes of the meeting. Any such wavier, consent, or approval shall be filed with the corporate records or made a part of the Minutes of the Meeting.

ARTICLE VII. VOTING RIGHTS

Voting Structure

Section 7.01. The Association shall have two classes of voting membership, as follows:

(a) All Members, other than the Declarant, shall be Class A Members. Class A membership entitles the holder to one vote for each Apartment for which the Member has a right of exclusive occupancy.

(b) The Declarant, and _____[his *or* her *or* its] successors or assigns, shall be the sole Class B Member. The Class B Member shall be entitled to three votes for each Apartment for which he or she has a right of exclusive occupancy. Class B membership shall cease and be converted to Class A membership upon the occurrence of whichever of the following is first in time:

[*Choose one of the following alternatives:*]

[*For a single-phase development, use:*]

(1) The total outstanding votes of the Class A Members equals or exceeds the total outstanding votes of the Class B member; or

(2) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a subdivision interest following the original issuance of the final subdivision public report for the Development.

[*OR*]

[*For a multi-phase development, use:*]

(1) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a subdivision interest following the original issuance of the final subdivision public report for the most recent phase of the Development; or

(2) On a prescribed date to be established by the Board, which must not be later than the fourth anniversary of the first conveyance of a subdivision interest following the issuance of the final subdivision public report for the first phase of the Development.

[*Continue with the following:*]

If two classes of membership exist, any action by the Association that must have the approval of the Members before being undertaken shall require the vote or written assent of a majority of the Class B voting power as well as the vote or written assent of a prescribed majority of the Class A voting power. If one class of membership exists, any action by the Association that must have the approval of the Members before being undertaken shall require the vote or written assent of a majority of the total voting power of the Association as well as the vote or written assent of a prescribed majority of the total voting power of Members other than the Declarant.

Proxies

Section 7.02. At all meetings of Members, each Member may vote in person or by proxy. All proxies shall be in writing and filed with the Secretary of the Association. Every proxy shall be revocable and shall automatically cease upon conveyance of its maker's membership, or upon receipt of written notice by the Secretary of the maker's death or judicially declared incapacity. No proxy shall be valid after the expiration of 11 months from its date of execution, unless otherwise provided in the proxy. However, the maximum term of any proxy shall be three years from its date of execution. The maker of a proxy may revoke it by delivering a written revocation to the Association, by executing a subsequent proxy and presenting it to the meeting, or by attending any meeting and voting in person.

Any revocable proxy covering any of the following matters that require a vote of the Members is not valid as to those matters unless it sets forth the general nature of the matter to be voted on:

(a) Removing a Director without cause, pursuant to Section 8.03(b) of these Bylaws;

(b) Filling Director vacancies pursuant to Section 8.04 of these Bylaws;

(c) Entering into or approving a contract or transaction between the Association and one or more of the Directors, or between the Association and any entity in which one or more of the Directors has a material financial interest, when the material facts of the contract or transaction are fully disclosed pursuant to *Section 7233 of the California Corporations Code*;

(d) Amending the articles or bylaws to repeal, restrict, create, or expand proxy rights;

(e) Amending the Articles after approval by the Board, in accordance with *Section 7812 of the California Corporations Code*;

(f) Disposing of assets other than in the usual and regular course of corporate activities pursuant to *Section 7911(a)(2) of the Corporations Code*;

(g) Approving merger terms pursuant to *Section 8012 of the Corporations Code*;

(h) Adopting an amendment to a merger agreement that changes any of the principal terms pursuant to *Section 8015(a) of the Corporations Code*;

(i) Electing to dissolve the Association, by approval of a majority of all Members or by approval of both the Board and Members pursuant to *Section 8610 of the California Corporations Code*; or

(j) If the corporation has more than one class of memberships outstanding upon dissolution, approving a plan of distribution of assets which is not in accordance with the liquidation rights of those classes, pursuant to *Section 8719(a) of the California Corporations Code.*

ARTICLE VIII. DIRECTORS

Number and Qualification

Section 8.01. The affairs of this Association shall be managed and its duties and obligations performed by an elected Board of Directors, consisting of _____ [*insert odd number of three or more*] persons, who need not be Members of the Association, until conversion of Class B memberships to Class A, after which time all Directors must be Members of the Association [*or* who shall, with the exception of the Initial Directors appointed by the Declarant, be Members of the Association].

Term

Section 8.02. At the first meeting of the Association, the Members shall elect _____ [*insert total number of directors*] Directors for a term of one year; and at each annual meeting thereafter, the Members shall elect _____ [*insert total number of directors*] Directors for a term of one year [*or provide for staggered terms*]. The Members shall nominate and elect Directors in accordance with Article IX of these Bylaws.

Removal

Section 8.03. Directors may be removed as follows:

(a) The Board may declare vacant the office of a Director for any of the following causes:

(1) The Director has been declared of unsound mind by a final order of court;

(2) The Director has been convicted of a felony;

[*Add if association holds assets in charitable trust:*]

(3) The Director has been found by a final order or judgment of any court to have breached duties imposed by *Section 7238 of the California Corporations Code* on Directors who perform functions with respect to assets held in charitable trust; or

[*Add if minimum attendance will be required:*]

(4) The Director has failed to attend _____ [*number*] meetings of the Board.

(b) One or more Directors may be removed prior to the expiration of their terms, without cause, at an annual or special meeting of the Members. Any removal without cause shall be approved (1) by a majority of the total voting power of the Association for so long as the Development consists of fewer than 50 Apartments, and (2) by the vote of Members representing a majority of a quorum of Members if the Development consists of 50 or more Apartments.

Notwithstanding the foregoing, unless the entire Board is removed from office by the vote of the Members, an individual Director shall not be removed prior to the expiration of his or her term of office if the number of votes cast against the removal, or not consenting in writing to the removal, would be sufficient to elect the Director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of Directors authorized at the time of the Director's most recent election were then being elected. A Director who has been elected to office solely by the votes of Members other than Declarant, may be removed from office before the expiration of his or her term of office only by the vote of at least 51 percent of the voting power of Members other than Declarant. If a Director is removed at a meeting, a new Director may be elected at the same meeting.

Vacancies

Section 8.04. In the event of a vacancy on the Board caused by the death or resignation of a Director, the remaining Directors shall elect a successor who shallserve for the unexpired term of his or her predecessor. The Board shall not fill a vacancy on the Board created by the removal of a Director, except with the vote or written assent of a majority of each class of Members.

Compensation

Section 8.05. No Director shall receive any compensation for any service he or she may render to the Association; provided, however, that any Director may be reimbursed for actual out-of-pocket expenses incurred by the Director in the performance of his or her duties.

Powers and Duties

Section 8.06. The Board's powers and duties shall include, but shall not be limited to, the following:

(a) Enforcing the applicable provisions of the Declaration, Articles, Bylaws, and any Rules of the Association.

(b) Paying taxes and assessments that are, or could become, a lien on the Common Area or a portion thereof.

(c) Contracting for casualty, liability, and other insurance on behalf of the Association.

(d) Contracting for goods and services for the Common Area, facilities, and interests of the Association.

(e) Delegating its powers to any committees, officers, or employees of the Association that are expressly authorized by the Governing Instruments.

(f) Preparing budgets and financial statements for the Association as prescribed in the Governing Instruments.

(g) Formulating rules of operation for the Common Area and facilities owned or controlled by the Association.

(h) Initiating and executing disciplinary and termination proceedings against Members for violations of provisions of the Governing Instruments in accordance with procedures set forth in the Governing Instruments.

(i) Entering any Apartment as necessary in connection with construction, maintenance, or emergency repair for the benefit of the Common Area or the Members in the aggregate.

(j) Electing the officers of the Board of Directors.

(k) Filling vacancies on the Board of Directors, except for a vacancy created by the removal of a Director.

(l) Reviewing the following on at least a quarterly basis:

(1) A current reconciliation of the operating accounts of the Association.

(2) A current reconciliation of the reserve accounts of the Association.

(3) The actual reserve revenues and expenses for the current year compared with the budget for the current year.

(4) The most current account statements prepared by the financial institution where the Association has its operating and reserve accounts.

(5) An income and expense statement for the operating and reserve accounts of the Association.

(m) Withdrawing moneys from the Association's reserve accounts.

(n) Causing studies of the reserve account requirements of the Development to be conducted, when necessary, and reviewing those studies in accordance with *Civil Code Section 1365.5(e)*.

(o) Performing any act reasonably necessary to resolve any dispute involving the Declaration or any other governing documents, such as Articles, Bylaws, or Operating Rules, which govern the operation of the Project or the Association, the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*) by the Association's dispute resolution procedure required by *Civil Code Sections 1363.810 through 1363.850* as manifested in Section 3.10 of the Declaration, and the alternative dispute resolution procedure prescribed by *Civil Code Sections 1369.510 through 1369.590* as a prerequisite to any party filing a civil enforcement action.

(p) The authorization detailed in (o) does not require the Board to do any of the following:

(1) As a prerequisite to initiating any civil action, to conduct inspections, maintain inspection records, exhaust applicable casualty insurance coverage maintained by the Association, provide an opportunity to cure, meet with members, or obtain the consent of the members.

(2) Except in compliance with *Civil Code Sections 1369.510 through 1369.590*, to submit civil claims of any kind to binding or non-binding alternative dispute resolution procedures.

Limitations on Powers

Section 8.07. Notwithstanding the powers set out inSection 8.06, the Board shall be prohibited from taking any of the following actions, except with the vote or written assent of a majority of each class of Members, or when Class B membership no longer exists, with the approval of a majority of the voting power of the Association residing in Members other than Declarant:

(a) Entering into a contract with a third person whereby the third person will furnish goods or services for the Common

Area or the Association for a term longer than one year, with the following exceptions:

(1) A management contract approved by the Federal Housing Administration or Veterans Administration;

(2) A contract with a public utility if the rates charged are regulated by the Public Utilities Commission, provided that the term shall not exceed the shortest term for which the utility will contract at the regulated rate;

(3) Prepaid casualty and/or liability insurance of not more than three years duration, provided that the policy provides for short-rate cancellation by the insured;

(4) Lease agreements for laundry room fixtures and equipment of not more than five years' duration, provided that the lessor under the agreement is not an entity in which the Declarant subdivider has a direct or indirect ownership interest of 10 percent or more;

(5) Agreements for cable television services and equipment or satellite dish television services and equipment of not to exceed five years' duration, provided that the supplier is not an entity in which the Declarant has a direct or indirect ownership interest of 10 percent or more; and

(6) Agreements for the sale or lease of burglar alarm and fire alarm equipment, installation, and services for a term of up to five years, provided that the supplier or suppliers are not entities in which the Declarant has a direct or indirect ownership interest of 10 percent or more.

(b) Incurring aggregate expenditures for capital improvements to the Common Area in any fiscal year in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(c) Selling during any fiscal year property of the Association having an aggregate fair market value in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(d) Paying compensation to Directors or to officers of the Association for services rendered in the conduct of the Association's business; provided, however, that the Board may cause a Director or officer to be reimbursed for expenses incurred in carrying on the business of the Association.

(e) Filling a vacancy on the Board of Directors created by the removal of a Director.

ARTICLE IX. NOMINATION AND ELECTION OF DIRECTORS

Nomination

Section 9.01. Nominations for election to the Board of Directors may be made by any of the following:

(a) A nominating committee appointed by the Board at least 90 days before an annual meeting of Members provided the report of the committee is received by the Board at least 30 days before the annual meeting of Members.

(b) A written petition containing the consent to serve as a Director of the person sought to be nominated, delivered to the Secretary of the Association at least 30 days before an annual meeting and signed within 11 months preceding the annual meeting by Members representing _____ percent of the "voting power" of the Association as

the term "voting power" is defined in the Nonprofit Corporation Law of the State of California. [*Add if applicable:* If the Association has more than 500 Members, then the additional petition requirements set forth in *Corporations Code Section 7521* shall be satisfied.]

(c) Any Member who is present in person, or by the proxy of any Member who is present by proxy, at the annual meeting of Members at which the Director is to be elected.

Election

Section 9.02. (a) As soon as possible after the filing of Articles of Incorporation for the Association, Declarant shall elect Initial Directors who shall serve until the first annual meeting of the Members. At the first annual meeting of the Association, the Members shall fill, by election, all positions on the Board of Directors. Subsequent elections shall also be held at the annual meetings. However, if an annual meeting is not held or does not include an election, the election may be held at a special meeting of Members called for that purpose.

(b) Voting for Directors shall be by secret written ballot. At an election, the Members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of these Bylaws. The persons receiving the highest number of votes shall be elected. Each Member may cumulate his or her votes and give one candidate a number of votes equal to the number of Directors to be elected multiplied by the number of votes to which such Member is entitled, or distribute the votes on the same principle among as many candidates as that Member thinks fit. No Member shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination before voting and a Member has given notice at the meeting before the voting of the Member's intention to cumulate votes. If any one Member has given this notice, all Members may cumulate their votes for candidates in nomination. The persons receiving the highest number of votes shall be elected.

Special Procedure

Section 9.03. Notwithstanding the provisions of Section 9.02 of this Article, for so long as a majority of the voting power of the Association resides in Declarant, or so long as there are two classes of membership in the Association, at least _____ [*specify number that must equal at least 20 percent of total number of directors; e.g., one in the case of five directors (see 10 Cal. Code Reg. § 2792.19(c)(1))*] Director[s] shall have been elected solely by the votes of Members other than Declarant. If, at any election, Members other than Declarant do not have a sufficient percentage of the voting power to satisfy that requirement, [the one position on the Board *or* the number of positions on the Board necessary to satisfy that requirement] shall be filled by the candidate[s] who receive[s] the highest number of votes cast by Members other than Declarant. Any remaining positions on the Board shall be filled in accordance with normal voting procedures.

ARTICLE X. MEETINGS OF DIRECTORS

Regular Meetings

Section 10.01. Regular meetings of the Board of Directors shall be held monthly [*or* quarterly *or other period not more infrequent than semiannually*] at the place within the Project, and at the time that is fixed from time to time by resolution of the Board. Notice of the time and place of a meeting shall be communicated to the Directors not less than four days before the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. Notice of the time and place of the meeting shall also be posted

in a prominent place or places within the Common Area. However, if the Common Area is unsuitable for such a posting, the Board shall communicate the notice of the time and place by any means it deems appropriate.

Special Meetings

Section 10.02. Special meetings of the Board of Directors shall be held when called by written notice signed by the President of the Association or by any two Directors other than the President. The notice shall specify the time and place of the meeting and the nature of any special business to be considered. Notice of any special meeting must be given to each Director not less than _____ [*specify time not less than three days*] or more than _____ [*specify maximum number of days, e.g.*, 15] days before the date fixed for the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. A copy of that notice shall also be posted in a prominent place or places in the Common Area of the Project.

Emergency Meetings

Section 10.03. Emergency meetings of the Board of Directors may be called by the President of the Association, or by any two members of the Board other than the President, if there are circumstances that could not have been reasonably foreseen that require immediate attention and possible action by the Board, and that of necessity make it impracticable to provide notice as otherwise required for meetings of the Board.

Quorum

Section 10.04. A majority of the Board shall constitute a quorum and, if a quorum is present, the decision of a majority of the Directors present shall be the act of the Board.

Open Meetings

Section 10.05. Regular and special meetings of the Board shall be open to all Members of the Association. The Board must permit any Member to speak at any of the Board's meetings, except for meetings held in executive session. To this end, the Board must establish a reasonable time to allow Members to speak to the Board at its meetings.

Notice of regular and special meetings of the Board must be given to Members at least four days before the meeting. Notice may be given by posting in a prominent place or places within the Common Area, by mail or delivery to each Unit, or by Association newsletter.

Executive Session

Section 10.06. The Board may, with the approval of a majority of the Directors present at a meeting at which a quorum for the transaction of business has been established, adjourn a meeting and reconvene in executive session to discuss and vote on (1) litigation in which the Association is or may become involved, (2) matters that relate to the formation of contracts with third parties, (3) personnel matters, (4) member discipline matters, and (5) orders of business of a similar nature. In any matter relating to the disciplining of a Member, the Board shall meet in executive session if requested to do so by that Member, and the Member shall be entitled to attend the executive session. In all other cases, Members who are not on the Board may not attend an executive session. The nature of any business to be considered in executive

session shall first be announced in open session. Further, any matter discussed in executive session shall be generally noted in the minutes of the Board.

Adjournment

Section 10.07. A majority of the Directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting isadjourned for more than 24 hours, notice of the adjournment shall be given, before the time of the adjourned meeting, to the Directors who were not present at the time of the adjournment.

Minutes

Section 10.08. Written minutes shall be kept of all meetings of the Board. The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any meeting of the Board, other than an executive session, shall be made available to Members within 30 days of the meeting. Further, the minutes, proposed minutes, or summary minutes shall be distributed to any Member on request. Any Member making such a request shall reimburse the Association for its costs in making that distribution. Members shall be notified in writing at the time that the pro forma budget required by *Civil Code Section 1365* is distributed, or at the time of any general mailing to the entire membership of the Association, of their right to have copies of the minutes of meetings of the Board and of how and where those minutes may be obtained.

Action Taken Without a Meeting

Section 10.09. The Board may take actions without a meeting if all of the Directors consent in writing to the action to be taken. If the Board resolves by unanimous written consent to take action, an explanation of the action taken shall be posted at a prominent place or places within the Common Area within three days after the written consents of all Directors have been obtained. However, if the Common Area is unsuitable for such a posting, the Board shall communicate the explanation of the action taken by any means it deems appropriate. The written consents shall be filed with the minutes of the proceedings of the Board.

ARTICLE XI. OFFICERS

Enumeration

Section 11.01. The Officers of this Association shall be a President and Vice-President, who shall at all times be Members of the Board of Directors, and a Secretary and Chief Financial Officer, and any other Officers that the Board may from time to time appoint pursuant to Section 11.03 of these Bylaws.

Term

Section 11.02. The Officers of this Association, except those Officers appointed in accordance with Section 11.03 of this Article, shall be elected annually by the Board, and each shall hold office for one year unless he or she shall sooner resign or shall be removed, or otherwise become disqualified to serve.

Special Appointments

Section 11.03. The Board may appoint any other Officers that the affairs of the Association may require, each of whom shall hold office for the period, have the authority, and perform the duties that the Board may from time to time determine.

Resignation and Removal

Section 11.04. Any Officer may be removed from office either with or without cause by the Board. Any Officer may resign at any time by giving written notice to the Board, the President, or the Secretary. Resignation shall take effect at the date of receipt of notice or at any later time specified therein, and, unless otherwise specified therein, the acceptance of a resignation shall not be necessary to make it effective.

Upon resignation or removal of an Officer, the position shall be filled in the manner prescribed in these Bylaws for regular appointment to that office. The appointee to a vacated office shall serve the remainder of the term of the Officer that he or she replaces.

Multiple Offices

Section 11.05. The offices of Secretary or Assistant Secretary and Chief Financial Officer may be held by the same person. No person shall be appointed to more than one of any of the other offices except in the case of special offices created pursuant to Section 11.03 of this Article.

Compensation

Section 11.06. An Officer shall not receive any compensation for any service he or she may render to the Association; provided, however, that any Officer may be reimbursed for actual out-of-pocket expenses incurred in the performance of his or her duties.

ARTICLE XII. PRESIDENT

Election

Section 12.01. At the first meeting of the Board immediately following the annual meeting of the Members, the Board shall elect one of their number to act as President.

Duties

Section 12.02. The President shall:

(a) Preside over all meetings of the Members and of the Board;

(b) Sign as President all deeds, contracts, and other instruments in writing which have been first approved by the Board, unless the Board, by duly adopted resolution, has authorized the signature of a lesser Officer;

(c) Call meetings of the Board whenever he or she deems it necessary in accordance with rules and upon notice agreed upon by the Board. The notice period shall, with the exception of emergencies, in no event be less than three days;

(d) Have, subject to the advice of the Board, general supervision, direction, and control of the affairs of the Association; and

(e) Discharge any other duties required of him or her by the Board.

ARTICLE XIII. VICE-PRESIDENT

Election

Section 13.01. At the first meeting of the Board immediately following the annual meeting of the Members, the Board shall elect one of their number to act as Vice-President.

Duties

Section 13.02. The Vice-President shall:

(a) Act in the place and in the stead of the President in the event of his or her absence, inability, or refusal to act; and

(b) Exercise and discharge any other duties that are required of him or her by the Board. In connection with any such additional duties, the Vice-President shall be responsible to the President.

ARTICLE XIV. SECRETARY

Election

Section 14.01. At the first meeting of the Board immediately following the annual meeting of the Members, the Board shall elect a Secretary.

Duties

Section 14.02. The Secretary shall:

(a) Keep a record of all meetings and proceedings of the Board and of the Members;

(b) Keep the seal of the Association, if any, and affix it on all papers requiring a seal;

(c) Serve notices of meetings of the Board and the Members required either by law or by these Bylaws;

(d) Keep appropriate current records showing the Members of this Association together with their addresses; and

(e) Sign as Secretary all deeds, contracts, and other instruments in writing that have been first approved by the Board if those instruments require a second Association signature unless the Board has authorized another Officer to sign in the place and stead of the Secretary by duly adopted resolution.

ARTICLE XV. CHIEF FINANCIAL OFFICER

Election

Section 15.01. At the first meeting of the Board immediately following the annual meeting of the Members, the Board shall elect a Chief Financial Officer.

Duties

Section 15.02. The Chief Financial Officer shall:

(a) Receive and deposit in the bank or banks that the Board may from time to time direct, all of the funds of the Association;

(b) Be responsible for and supervise the maintenance of books and records to account for those funds and other Association assets;

(c) Disburse and withdraw the funds that the Board may from time to time direct, and in accordance with prescribed procedures; and

(d) Prepare and distribute the financial statements for the Association required by the Declaration.

ARTICLE XVI. SUBORDINATE OFFICERS

Appointment

Section 16.01. The Board may appoint any subordinate Officers that it deems desirable from time to time.

Duties

Section 16.02. Subordinate Officers shall have the duties that the Board may from time to time prescribe, including the right to act in the place and stead of any Officers, other than the President, that the Board may designate.

ARTICLE XVII. BOOKS AND RECORDS

Required Records

Section 17.01. The Association shall maintain at its principal office:

(a) Copies of its Governing Instruments as last amended;

(b) Adequate and correct books and records of account;

(c) Written minutes of the proceedings of its Members, of its Board, and of committees of its Board; and

(d) A Membership Register containing the following information about each Member: name, mailing address, telephone number, and class of membership.

Right to Membership Records

Section 17.02. Any Member shall have the right to inspect the books and records listed in Section 17.01, and to copy them at any reasonable time during office hours and for a purpose reasonably related to his or her interest as a Member. This right is subject to the power of the Board to set reasonable times for inspection, notice requirements, and fees to cover the cost of making copies of the documents requested by a Member.

Inspection of Minutes and Accounts by Members

Section 17.03. The accounting books and records of the Association as well as the minutes of proceedings of its Members, of its Board, and of committees of its Board, shall be open to inspection and copying at any reasonable time by any Member, or by any Member's duly appointed representative, for any purpose reasonably related to the Member's interests as a Member of the Association on written demand made to the Association. The Board shall establish reasonable rules with respect to:

(a) The notice to be given to the custodian of the records by Members desiring to make such an inspection or copying;

(b) The hours and days of the week when such an inspection may be made; and

(c) Payment of the cost of reproducing copies of documents requested by a Member.

Inspection by Directors

Section 17.04. Every Director shall have the absolute right at any reasonable time to inspect all books, records, and documents of the Association and the physical properties owned or controlled by the Association. The right of inspection by a Director includes the right to make extracts and copies of documents.

ARTICLE XVIII. NOTICES

Method for Giving Notice

Section 18.01. Any notice permitted or required to be delivered as provided herein may be delivered either personally or by mail. If delivery is by mail, it shall be deemed to have been delivered 72 hours after a copy of the notice has been deposited in the United States mail, postage prepaid, addressed to a Member at the address given by that person to the Secretary of the governing body for the purpose of service of notice or to the Apartment of that person if no address has

been given to the Secretary. An address may be changed from time to time by notice in writing to the Secretary.

Consent to Waiver of Notice

Section 18.02. The transactions of any meeting of the Members, however called or noticed, shall be as valid as though made at a meeting duly held after regular call and notice if a quorum is present, in person or by proxy, if either before or after the meeting each Member entitled to vote but not present thereat signs a written waiver of notice, or a consent to the holding of such meeting, or approval of the true and correct minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records and made a part of the minutes of the meeting.

ARTICLE XIX. AMENDMENTS

Amendment of Bylaws

Section 19.01. These Bylaws may be amended, at a regular or special meeting of the Members, by the affirmative vote (in person or by proxy) or written consent of Members representing a majority of a quorum of the Association which shall include a majority of the votes of Members other than Declarant, or if the two-class voting structure is still in effect, shall include a majority of a quorum of each class of Members. Notwithstanding the above, the percentage of voting power necessary to amend a specific clause or provision shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause or provision.

Prior Approval of Commissioner

Section 19.02. In accordance with *Section 11018.7 of the California Business and Professions Code*, the prior written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to these Bylaws to the vote of the Members if that amendment would materially change the rights of Members, and the Developer or its successor in interest holds or directly controls as many as one-fourth of the votes that may be cast to effect that change.

[*Optional*]

ARTICLE XX. TAX-EXEMPT STATUS

Tax-Exempt Status

Section 20.01. The Board and Members of the Association shall conduct the business of the Association in a manner that allows the Association to qualify as an organization exempt from state income taxes pursuant to *California Revenue and Taxation Code Section 23701t*, as amended.

Filing

Section 20.02. The Board shall cause to be timely filed any election fortax-exempt status that may be required under state or federal law, and shall undertake to cause the Association to comply with the statutes, rules, and regulations

which have been or shall be adopted by state agencies pertaining to those exemptions.

[*Continue with the following:*]

CERTIFICATE OF SECRETARY

I hereby certify that I am the duly elected and acting Secretary of this corporation, and that the foregoing Bylaws constitute the Bylaws of this corporation, as duly adopted by the Board of Directors on _____, 20 _____.
Dated: _____.

_____ [*signature*]
[*typed name*], Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesManagementReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawSubdivisionsGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33C STOCK COOPERATIVES
PART IV. FORMS

16-33C California Legal Forms--Transaction Guide § 33C.204

§ 33C.204 Proprietary Lease for Stock Cooperative

[1] Comment

[a] Use of Form

This form is a proprietary lease for use by a tenant-stockholder of a stock cooperative. The investors in a stock cooperative, unlike those in a condominium project, do not acquire a fee interest in real property. Instead, their ownership interest in the cooperative corporation consists of stock which is tied to a proprietary lease of a specific unit of the real property [*see* § 33C.301[1]].

For a detailed discussion of residential leases, see Ch. 34B, *Residential Leases* . For an example and discussion of a residential lease for an apartment in a multi-unit building or complex, see *§ 34B.200* in that chapter.

[b] Contents of Form

[i] In General

All leases in California must contain four "necessary elements": (1) a definite agreement as to the extent and boundary of the property leased, (2) a definite and agreed term, (3) a definite and agreed price of rental, including the time and manner of payment, and (4) the parties to the lease [*see Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727* ; *Losson v. Blodgett (1934) 1 Cal. App. 2d 13, 16, 36 P.2d 147]* . Those elements are discussed in *Ch. 34B, Residential Leases, § 34B.10*. Various other provisions applicable to leases of stock cooperative units are discussed below.

[ii] Carrying Charges

Unlike a condominium development, a stock cooperative is subject to a blanket mortgage [*see § 33C.35[1]*] and real estate tax liability [*see § 33C.39*]. In addition, it has maintenance and operating expenses. Each tenant-stockholder is required to pay a proportionate share of those amounts, based on stock ownership, in the form of monthly "carrying charges," also called rent or maintenance. Unlike a regular lease arrangement for a fixed rental amount, the proprietary

lease for a stock cooperative provides that the monthly charges will be a proportionate share of the expenses assessed by the Board of Directors [*see* Rohan & Reskin, Cooperative Housing Law and Practice, Ch. 2, *Types of Cooperatives; Terminology and Definitions* (Matthew Bender)]. The total amount paid by a tenant-stockholder may thus vary from year to year, depending on the size of the mortgage and current maintenance and preservation costs [*see § 33C.204[2]*, P 2].

The lessor is also entitled to the costs of collecting any delinquent amount, late charges, and interest [*Civ. Code § 1366(e)*]. Any amounts due from thetenant-stockholder as regular or special assessments, late charges, reasonable costs of collection, and interest are debts of the tenant-stockholder at the time the sums are levied [*Civ. Code § 1367.1(a)*]. Those amounts constitute a lien on his or her interest in the stock cooperative from and after the time the association records a notice of delinquent assessment with the county recorder [*Civ. Code § 1367.1(d)*; *see § 33C.204[2]*, P 3].

The lease should include the name, telephone number, and usual street address of the person or entity to whom carrying charges are to be paid. It should also disclose the form or forms in which payments may be made [*see Civ. Code §§ 1961, 1962(a)(2), (3)*].

For a complete discussion of the rules governing assessments contained in the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] and in regulations of the Real Estate Commissioner [*10 Cal. Code Reg. § 2792.16*], see *Ch. 34, Condominiums, § 34.39[1]*.

[iii] Security Deposit

Security deposits required by a residential lease may be used for any purpose, including the following [*Civ. Code § 1950.5(b)*]:

- The compensation of a landlord for a tenant's default in the payment of rent;
- The repair of damages to the premises caused by the tenant or by a guest or licensee of the tenant;
- The cleaning of the premises on termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy; or
- To remedy future defaults by the tenant in any obligation under the lease to restore, replace, or return personal property or appurtenances, if the security deposit is authorized to be applied thereto by the rental agreement.

The deposit must be returned no later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy, or not earlier than 60 calendar days before expiration of a fixed-term lease. The landlord also must furnish the tenant with a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security. Further, along with the itemized statement, the landlord must also include copies of documents showing charges incurred and deducted from the deposit to repair and clean the premises [*Civ. Code § 1950.5(g)*; *see § 33C.204[2]*, P 4].

The landlord may not deduct any amount from the security deposit for damages to the premises or any defective conditions that preexisted the tenancy, or for ordinary wear and tear [*Civ. Code § 1950.5(e)*]. This form contains a statement by the lessee that he or she has examined the premises and will give notice of any defects [*see § 33C.204[2]*, P 7].

For further discussion of the above requirements, see Ch. 34B, *Residential Leases* .

[iv] Repairs

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], the tenant-stockholder is responsible for maintaining (1) his or her separate interest (apartment unit) [*see Civ. Code § 1351(l)*(4)] and (2) exclusive use common areas [*see Civ. Code § 1351(i)*] that are appurtenant to that separate interest [*Civ. Code § 1364*; *see also § 33C.31[3]*]. The corporation is responsible for maintaining the common areas other than exclusive use common areas [*Civ. Code § 1364*; *see § 33C.204[2]*, P 8].

[v] Right of Entry

A landlord may enter a leased dwelling unit only for specified purposes. In addition, he or she may enter only upon reasonable notice and during normal business hours, except in cases of emergency [*Civ. Code § 1954*; *see § 33C.204[2]*, P 10].

[vi] Condemnation

Unless a lease provides for the rights and obligations of the parties in the event of the acquisition of all or a portion of the property for public use, the provisions of the Eminent Domain Law [*Code Civ. Proc. § 1230.010 et seq.*] apply [Code Civ. Proc. § 1265.161; *see § 33C.204[2]*, P 14]. For a complete discussion of that law, see California Real Estate Law and Practice, Ch. 500, *Introduction to the Eminent Domain Law* (Matthew Bender).

[vii] Subletting and Assignment

Because the proprietary lease is connected to stock ownership in the corporation, it contains certain provisions concerning ownership and occupancy that do not appear in a standard rental lease [*see* California Real Estate Law and Practice, Ch. 476, *Other Developments* (Matthew Bender)]. Subletting and assignment are made subject to bylaw restrictions, to insure that any transferee is financially able to assume costs and other cooperative tenant obligations [*see § 33C.204[2]*, PP 16(a), 17(a)].

However, for a commercial bank to lend the lessee the amount necessary to purchase his or her stock in the cooperative on the security of a first security interest on stock and the assignment by way of security of the lessee's interest inthe proprietary lease or right of tenancy in the apartment [*see § 33C.35[3]*], the proprietary lease must provide that no sublease in excess of one year will be permitted without the prior written consent of that lender [*Fin. Code § 1236*; *see § 33C.204[2]*, P 16(b)]. In addition, the lease must provide that if the lessee defaults on such a loan, the lender will have the right, without the prior consent or approval of the lessor, to sell the shares to which the lease is appurtenant upon 30-days' written notice to lessee and lessor, and to assign the lease to a purchaser who agrees to cure any defaults thereunder [*Fin. Code § 1236*; *see § 33C.204[2]*, P 17(b)].

[viii] Breach of Lease

The association of a common interest subdivision may not terminate an owner's right to the full use and enjoyment of his or her interest (i.e., right of occupancy) on account of failure to comply with the governing instruments or rules, except (1) by judgment of a court or a decision arising out of arbitration, or (2) on account of a foreclosure or sale under a power of sale for failure to pay assessments [*10 Cal. Code Reg. § 2792.26(a)*; *see § 33C.203[1][d]*]. Therefore, this form provides that a tenant-stockholder will commit a material breach of lease, and therefore become subject to loss of his or her rights as a member of the cooperative, only when he or she defaults in the payment of carrying charges or fails to own a requisite interest in the cooperative [*see § 33C.204[2]*, P 18(a)]. Other violations of the terms of the lease or the governing instruments will be subject to disciplinary action in the form of monetary penalties or temporary suspension of rights [*see 10 Cal. Code Reg. § 2792.26*; *see also § 33C.204[2]*, P 18(b)].

Any termination of membership or disciplinary action must provide 15 days' prior notice [*Corp. Code § 7341(a)*; *10*

Cal. Code Reg. § 2792.26(b); *see § 33C.203[1][d]*; *see also § 33C.204[2]*, P 19].

[ix] Remedies for Breach of Lease

If a lessee breaches the lease [*see § 33C.204[2]*, P 18], the lessor may pursue monetary remedies [*Civ. Code § 1951.2*; *see § 33C.204[2]*, P 21(b)]. For illustrative provisions and discussion of these various rights and remedies of a landlord, see Ch. 34B, *Residential Leases* .

In addition, the corporate lessor of an apartment in a stock cooperative development is also a "landlord" for purposes of bringing an unlawful detainer action against a tenant-stockholder in breach of the lease [*see Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, 744, 108 Cal. Rptr. 307* ; *Code Civ. Proc. §§ 1159-1179a*; *see also § 33C.204[2]*, P 21(c)]. For a discussion of unlawful detainer proceedings, see *§ 35B.44* in Ch. 35B, *Modification and Termination of Leases*.

For a complete discussion of the termination of leases in general, see Ch. 35B, *Modification and Termination of Leases* .

[x] Option to Renew Lease

This form grants the tenant-stockholder the option to renew his or her lease for an additional period under the same terms and conditions as the original lease [*see § 33C.204[2]*, P 22(b)]. For discussion and a form for a renewal provision, see Ch. 34B, *Residential Leases* .

A residential lease may contain an automatic renewal provision rather than an option, but such a provision is subject to several statutory requirements [*see Civ. Code § 1945.5*; *see also* Ch. 34B, *Residential Leases*].

[xi] Attorneys' Fees

Leases, like other contracts, frequently provide for recovery of attorneys' fees in the event of litigation between the parties [*see Civ. Code § 1717*; § 33C.204[2], P 26]. For a complete discussion of attorney fee provisions in leases, see Ch. 34C, *Retail, Industrial, and Office Leases* .

[xii] Identity of Manager and Owner

Any tenant or tenants in a dwelling structure containing one or more units and offered to the public for rent for residential purposes must be provided with the name, telephone number, and usual street address (for personal service purposes) of both of the following persons [*Civ. Code §§ 1961, 1962(a)(1)*]:

- Each person authorized to manage the premises; and
- The owner or person who is authorized to act on the owner's behalf.

[c] Filing

The Real Estate Commissioner requires a copy of a proposed lease or occupancy agreement to be submitted to the Commissioner with the application for a public report [*see § 33C.200[2]*], in order for the application to be "substantially complete" [*see Bus. & Prof. Code § 11010.2*; *10 Cal. Code Reg. § 2792.2(a)(25)*]. For a discussion of the requirements for issuance of a public report, see *§ 33C.200[1]*.

[2] FORM

Proprietary Lease for Stock Cooperative

PROPRIETARY LEASE

This PROPRIETARY LEASE is made and entered into this _____ day of _____[*date*], by and between _____[*name of stock cooperative*] (hereafter "Lessor"), a nonprofit mutual benefit corporation having its principal office and place of business at _____[*street address, city, state, zip*] and _____[*name of tenant-stockholder*] (hereafter "Lessee").

WHEREAS, the Lessor has been formed for the purpose of acquiring, owning, and operating a cooperative housing development ("cooperative") to be located at _____[*street address, city, state, zip*], with the intent that its stockholders shall have the right to occupy the apartments therein as tenants under the terms and conditions hereafter set forth; and

WHEREAS, the Lessee is the owner and holder of _____ shares of stock of the Lessor, to which this lease is appurtenant and which have been allocated to Apartment _____ [*number or other identification*], located at _____[*address*] (hereafter "Apartment");

NOW, THEREFORE, the Lessor hereby leases to Lessee, and Lessee hereby hires and takes from Lessor, Apartment _____ [*number or other identification*], which includes the exclusive use of [*list areas designated as exclusive use common areas in the declaration*], on the following terms and conditions:

Term of Lease

1. The term of the lease shall be _____ [*describe term, e.g.,* 3 years] commencing at 12:01 A.M. on _____[*date*], and ending on _____[*date*], unless terminated earlier as herein provided. The term is renewable thereafter for successive periods under the conditions set forth in Paragraph 22(b) of this Lease.

Carrying Charges

2. (a) Commencing at the time stated in Paragraph 2(b), Lessee agrees to pay to Lessor a yearly rental sum, referred to herein as "Carrying Charges," equal to that proportion of Lessor's cash requirements for each calendar year that the number of shares of Lessor allocated to the Apartment bears to the total number of shares of Lessor issued and outstanding on the date of the assessment. The yearly carrying charges shall be payable in 12 equal monthly installments. For the calendar year beginning on January 1, _____ [*year*], the total Carrying Charges for the Apartment shall be $_____, or $_____ per month.

(b) After 30 days notice by Lessor to the effect that the Apartment is or will be available for occupancy, or upon acceptance of occupancy, whichever is earlier, Lessee shall make a payment for Carrying Charges covering the unexpired balance of the month. Thereafter, Lessee shall pay Carrying Charges in advance on the first day of each month.

(c) "Cash requirements" as used herein shall mean the amount that the Board of Directors determine to be necessary for the operation of the cooperative, including:

(1) The amount of principal, interest, and mortgage insurance premiums, if any, on the mortgage of the cooperative real property.

(2) The cost of all operating expenses of the cooperative, and services furnished.

(3) The cost of necessary management and administration.

(4) The amount of all taxes and assessments levied against the real property, and ground rent, if any.

(5) The cost of fire and extended coverage insurance for the cooperative, and any other insurance required by any mortgage on the cooperative property.

(6) The cost of furnishing the utilities specified in Paragraph 13 of this Lease.

(7) The estimated cost of repairs, maintenance, and replacements of the cooperative property to be made by the Lessor.

(8) Any other expenses of the Lessor approved by the Board of Directors, including operating deficiencies, if any, for prior periods.

(d) The Board shall determine Lessor's cash requirements for the next year on or before [_____ *date, e.g.,* November 1] of the current year. However, the failure of the Board of Directors to determine Lessor's cash requirements for any year shall not be deemed a waiver or modification of the covenants and provisions hereof, or a release of Lessee from the obligation to pay Carrying Charges, but the Carrying Charges computed for the previous year shall continue until a new determination of cash requirements has been made, and written notification of that amount provided to Lessee.

(e) Payment of Carrying Charges, in the form of _____ [*specify form of payment, e.g.,* a check], shall be paid to _____[*specify name, telephone number, and address to whom payments are to be made*].

Delinquent Payments

3. (a) In addition to other sums that have become or will become due pursuant to the terms of this Lease, Lessee shall pay to Lessor all of the following with respect to any Carrying Charges due from Lessee that are more than 15 days in arrears:

(1) Reasonable costs incurred in collecting the delinquent amount, including reasonable attorneys' fees;

(2) A late charge of 10 percent of the delinquent amount or $10, whichever is greater [*or specify smaller amount*]; and

(3) Interest on any delinquent amount, reasonable costs of collection, and late charges, at an annual percentage rate not to exceed 12 percent interest, commencing 30 days after the Carrying Charges become due.

(b) The delinquent amount plus the amount set forth in (a) shall constitute a lien on Lessee's stock in Lessor from and after the time Lessor records a notice of delinquent assessment with the county recorder. That lien shall be prior to all other liens recorded subsequent to the notice of assessment. However, if Lessee pays the sums specified in that notice, Lessor shall record a further notice stating the satisfaction and release of the lien.

Security Deposit

4. Before Lessee may take possession of the premises, Lessee shall deposit with Lessor the sum of $_____ to be held by Lessor for the faithful performance by Lessee of this Lease and for the cleaning and repairing of the premises after surrender by Lessee. The deposit shall be returned to Lessee within 21 calendar days after Lessee vacates the Apartment, less only amounts that are reasonably necessary to (a) remedy any defaults in the payment of rent by Lessee, (b) repair damages to the Apartment (exclusive of ordinary wear and tear) caused by Lessee or by any guest or licensee of Lessee, (c) clean the Apartment as necessary to return it to the same level of cleanliness it was in at the inception of the lease, or (d) remedy any defaults in the restoration, replacement, or return of personal property or appurtenances by Lessee not attributable to ordinary wear and tear. In the event that the full amount of the security deposit is not returned, Lessor shall provide Lessee with an itemized written statement of the basis for, and the amount of, any security received and the disposition of the security. Lessor shall also include copies of documents showing charges incurred and deducted from the security deposit to repair or clean the premises.

Use of Premises

5. Lessee, and any Sublessee authorized pursuant to Paragraph 16 of this Lease, shall occupy the Apartment covered by this Lease as a private dwelling unit for himself or herself, his or her immediate family, and any guests, and for no other purpose. Lessee shall not permit anything to be done or kept upon the Apartment premises which will (1) increase the rate of insurance on the building or on the contents thereof, (2) obstruct or interfere with the rights of other occupants or annoy them by unreasonable noises or otherwise, or (3) constitute a nuisance or illegal act. Lessee shall comply with all statutes, ordinances, and requirements of any governmental authorities having jurisdiction over the premises. If, by reason of the occupancy or use of the Apartment by Lessee, the rate of insurance on the building shall be increased, Lessee shall become personally liable for the additional insurance premiums.

Quiet Enjoyment

6. Lessee shall be entitled to the quiet enjoyment of the Apartment and any exclusive use common areas appurtenant to it, the use of all common areas and facilities of the cooperative, as defined in the Declaration for _____[*name of cooperative*] (hereafter "Declaration") recorded or to be recorded in the Office of the Recorder of _____ County, California, and an easement for ingress, egress, and support through the common areas, as defined in the Declaration.

Condition of Premises

7. Lessee acknowledges that he or she has examined the Apartment and all equipment and personal property subject to this Lease, and has accepted them in good, safe, and clean condition and repair. Lessee agrees to notify Lessor immediately of any defects, dilapidations, or dangerous conditions.

Repairs

8. (a) Lessee agrees to repair and maintain the Apartment (including its interior walls, floors, ceilings, windows, doors, and outlets), and its exclusive use common areas, at his or her own expense as follows:

(1) Any repairs or maintenance necessitated by the negligence or misuse of Lessee or Lessee's family members or guests;

(2) Any redecoration of the Apartment in accordance with Paragraph 9 of this Lease.

(b) Lessor shall provide and pay for all necessary repairs, maintenance, and replacements, except as specified in Paragraph 8(a), above. The officers and employees of Lessor shall have the right to enter the dwelling unit of Lessee only upon notice, in accordance with the provisions of Paragraph 10 of this Lease, in order to effect necessary repairs, maintenance, and replacements, and to authorize entrance for such purposes by employees of any contractor, utility company, municipal agency, or others upon notice given in accordance with the provisions of Paragraph 10. However, in the event of an emergency repair, entry may be made at any time without notice.

(c) [*Add the following or an alternative allocation of responsibility for pest control costs (see Civ. Code § 1364):* Lessee acknowledges that he or she is responsible for the cost of any temporary relocation of Lessee or any other occupants of Lessee's Apartment occasioned by any structural pest control work performed by or at the request of the Association for the purpose of keeping the Common Areas free of infestation by wood-destroying pests or organisms.]

(d) If Lessee fails to effect and pay for the repairs, maintenance, or replacements specified in Paragraph 8(a), above in a manner satisfactory to Lessor, Lessor may do so and add the cost thereof to Lessee's next Carrying Charge payment.

Alterations and Additions

9. Lessee shall not, without the written consent of Lessor, paint or redecorate,make any structural alterations, or install or use in his or her Apartment any _____ [*insert as applicable:* air conditioning equipment, washing machine, clothes drier, electric heater, power tools]. Should Lessee make any alterations or additions to the Apartment without the express written consent of Lessor, the full cost of restoring the premises to their prior condition shall be borne by Lessee and promptly paid, on written demand, to Lessor.

Lessor's Right of Entry

10. (a) Lessor and Lessor's agents may enter the Apartment only under the following circumstances:

(1) In case of emergency.

(2) To make necessary or agreed repairs, decorations, alterations, or improvements.

(3) To make an initial inspection pursuant to *Section 1950.5(f) of the California Civil Code* after notification of either party's intention to terminate the lease.

(4) To supply necessary or agreed services.

(5) To exhibit the Apartment to prospective or actual purchasers, mortgagees, tenants, repair personnel, or contractors.

(6) After Lessee has abandoned or surrendered the Apartment.

(7) Pursuant to court order.

(b) Except under the circumstances described in paragraph (c), below, Lessor shall give Lessee at least 24 hours written notice of Lessor's intent to enter the Apartment. Lessor and Lessor's agents and employees shall enter the Apartment

only during normal business hours. Notice may be:

(1) Mailed or personally delivered to Lessee;

(2) Left with someone of suitable age and discretion at the premises; or

(3) Left on, near, or under the usual entry door of the Apartment in a manner in which a reasonable person would discover it.

(c) Twenty-four (24) hour written notice is not required:

(1) In cases of emergency.

(2) If Lessee has abandoned or surrendered the Apartment.

(3) If it is impractical to do so.

(4) If entry is for purposes of exhibiting the Apartment to prospective or actual purchasers, in which case notice is governed by paragraph (d).

(d) If entry is for purposes of exhibiting the Apartment to prospective or actual purchasers, notice may be given orally, in person or by telephone, if Lessor or Lessor's agent has notified Lessee in writing within 120 days of the oral notice that the Apartment is for sale and that Lessor or Lessor's agent may contact Lessee orally for purposes of exhibiting the Apartment to prospective or actual purchasers.

Rules and Regulations

11. Lessee's occupancy of the Apartment shall be subject to any rules and regulations now or hereafter adopted by the Board of Directors for the cooperative housing project, including rules regarding noise, odors, pets, parking, and use of common areas.

Management, Taxes, and Insurance

12. Lessor shall provide and pay for all of the following:

(a) The costs of necessary management, operation, and administration of the cooperative;

(b) All taxes or assessments levied against the cooperative; and

(c) Fire insurance and extended coverage, other insurance as required by any mortgage on the property, and any other insurance that Lessor may deem advisable on the property.

Lessor will not, however, provide insurance on Lessee's interest in the Apartment or on his or her personal property.

Utilities

13. Lessor shall provide _____[*specify as applicable:* water, sewer service, garbage service,

electricity, gas, elevator service] to the premises. Lessee shall pay all charges and any required deposits for all other utilities directly to the supplier.

Condemnation

14. Should all or any portion of the Apartment or the building in which the premises are located be taken by any public or quasi-public agency or entity under the power of eminent domain, this lease shall terminate as of 12:01 A.M. on the date title to the portion taken by eminent domain vests, or the date actual physical possession of the portion taken by eminent domain is taken by the agency or entity exercising the eminent domain power. Any and all compensation or damages awarded for the taking by eminent domain, except that awarded Lessee for the moving of or damage to personal property owned by Lessee on the premises, shall belong to Lessor and Lessee shall have no claim against Lessor or the agency or entity exercising eminent domain for the value of the unexpired term of the lease.

Destruction of Premises

15. If any part of the Apartment or the building in which the Apartment is located is destroyed by fire, casualty, or other cause not the fault of Lessee, Lessor shall determine whether to restore the damaged premises. If Lessor determines to undertake restoration, Lessor shall promptly repair and restore the premises to their former condition at Lessor's sole cost. While the repairs and restoration work are in progress, the Carrying Charges payable under the lease shall be abated for the time and to the extent that Lessee is prevented from fully occupying the premises in Lessee's usual and normal manner; provided, however, that in lieu of making those repairs and performing that restoration work, Lessor may terminate the lease if either (a) the necessary re- pair or restoration work cannot reasonably be completed under then-applicable governmental laws and regulations within _____ [*e.g.*, 30] working days after it is commenced, or (b) the loss is not covered by Lessor's then-existing fire and extended coverage insurance policies.

In the event Lessor decides not to restore the premises, the Carrying Charges shall cease from the date of the loss or damage. Further, Lessor shall determine the amount that shall be paid to the Lessee to redeem the common stock of the Lessee to which this Lease is appurtenant, and shall reimburse him or her for any loss as he or she may have sustained.

Subletting

16. (a) Lessee hereby agrees not to sublet his or her Apartment without the written consent of Lessor. Lessor's consent to subletting of the Apartment shall not be unreasonably withheld. However, consent to any one subletting shall not be deemed a consent by Lessor to any subsequent subletting. The liability of Lessee under this Lease shall continue, notwithstanding the fact that he or she may have sublet the Apartment with the approval of Lessor, and Lessee shall be responsible to Lessor for the conduct of his or her sublessee.

[*Add if commercial bank will finance share purchase:*]

(b) In accordance with *Section 1236 of the Financial Code*, no sublease in excess of one year may be permitted without the prior written consent of _____[*name of commercial bank*], which has loaned funds to Lessee to finance Lessee's purchase of the shares of stock of the Lessor to which this lease is appurtenant, and which holds a first security interest on that stock and an assignment, by way of security, of Lessee's interest in this Lease or the right of tenancy in the Apartment.

Assignment

17. (a) Lessee may only assign this lease, or transfer the shares to which it is appurtenant, in accordance with the provisions set forth in the Bylaws.

[*Add if commercial bank will finance share purchase:*]

(b) Notwithstanding the restrictions set forth in Paragraph 17(a) above, if Lessee defaults on that loan made by _____[*name of commercial bank*], described in Paragraph 16(b) of this Agreement, _____[*name of commercial bank*] shall have the right, in accordance with *Section 1236 of the Financial Code*, without the prior consent or approval of the Lessor, to sell the shares to which this lease is appurtenant at a public or private sale following at least 30 days' prior written notice to both Lessee and Lessor at the address of Lessee's Apartment, and to assign the Lease to a purchaser who agrees to cure any defaults thereunder as a condition of assignment.

Acts Constituting Breach of Lease

18. (a) Lessee shall commit a material breach of this Lease, and shall be subject to termination of his or her membership in the stock cooperative in accordance with the Bylaws, upon the occurrence of any of the following events:

(1) Lessee is in default for 15 days in the payment of Carrying Charges, as provided in Paragraph 3 of this Lease;

(2) Lessee ceases to be the owner of the shares of stock to which this Lease is appurtenant;

(3) A receiver of Lessee's property is appointed under any of the laws of the United States or of any state;

(4) Any of the shares of stock to which this Lease is appurtenant are levied upon and sold under the process of any court; or

(5) Lessee makes a general assignment for the benefit of creditors.

(b) Lessee shall be subject to disciplinary action by the Board, including suspension of voting rights or privileges for use of the Common Area, or monetary penalties, in accordance with the provisions of the Declaration, if either:

(1) Lessee defaults on the performance of any covenant herein, other than the covenant to pay Carrying Charges, and fails to cure the default within _____ days after written notice from Lessor;

(2) If Lessor determines, pursuant to an affirmative vote of 2/3 of its Board of Directors at a meeting called for that purpose, that Lessee's tenancy is undesirable due to objectionable conduct on the part of Lessee or a person dwelling or visiting at Lessee's premises; or

(3) Lessee allows any person not authorized by Paragraph 5 of this Lease to use or occupy the Apartment, and fails to cause that person to vacate the premises within 10 days after written notice from Lessor.

Notice of Termination or Disciplinary Action

19. If Lessor intends to terminate Lessee's rights as a tenant-stockholder in thecooperative housing project, or to take other disciplinary action, as a result of Lessee's breach of this Lease pursuant to Paragraph 18 of this Lease, Lessor shall first send written notice, postage prepaid, by first-class or registered mail addressed to the last address of Lessee shown on Lessor's records, stating (1) that the term of this Lease will expire, or other disciplinary action will be effective, on a date not less than 15 days after the date of mailing the notice, and (2) the reason for termination or disciplinary action. Provided, however, that upon request of Lessee delivered to Lessor at least 10 days prior to the date specified in the notice, Lessee shall have an opportunity to show cause both orally and in writing not less than five days before the date specified in the notice before the Board of Directors of Lessor why the termination or disciplinary action should not take place.

Surrender of Stock Upon Termination

20. On or before the effective termination date of Lessee's rights under this Lease pursuant to Paragraph 21 of this Lease, Lessee shall surrender to Lessor his or her stock certificates and Lease, endorsed in any manner that may be required by the Association. Whether or not the instruments are surrendered, the Lessor may thereupon at its election cancel the stock and treat the cancellation as a purchase of the retiring member's interest in the cooperative or sell the interest to a new purchaser, and pay the purchase amount less authorized deductions to the former Lessee in accordance with the Bylaws.

Lessor's Remedies for Breach of Lease

21. Lessee agrees that a landlord-tenant relationship exists between the parties to this Lease, and that in the event of a breach or threatened breach by Lessee, as provided in Paragraph 18 of this Lease, Lessor shall have the right to pursue any remedies generally available to a landlord for the breach or threatened breach of a rental agreement by a tenant, including the right to:

(a) Exercise the remedy described in *California Civil Code Section 1951.4* (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations).

(b) Commence, in lieu of or in addition to the action provided for in (c), an action against Lessee to recover all amounts specified in *Section 1951.2 of the Civil Code*.

(c) Commence, in lieu of or in addition to the action described in (b), an action to reenter and regain possession of the premises in the manner provided by the laws of California governing unlawful detainer.

Expiration and Renewal

22. (a) If the option to renew set forth in (b) is not exercised, this Lease will expire on the date set forth in Paragraph 1 of this Lease. Lessee shall thereafter have no further liability under this Lease if, on or before the expiration date, he or she has taken the following actions:

(1) Endorsed his or her stock certificates for transfer in blank and deposited them with Lessor;

(2) Met all of his or her obligations and paid all amounts due under this Lease up to the time of

expiration; and

(3) Vacated the Apartment, leaving it in a good state of repair.

(b) Lessee is hereby granted an option to renew this Lease for successive periods of _____ [*specify period, e.g.,* three years] from the expiration of the term herein granted, under the same terms, covenants, and conditions as herein contained. This option shall be exercised by written notice of Lessee's election to renew delivered to Lessor at least _____ [*specify period, e.g.,* 60 days] prior to the expiration of the then-current term.

Cooperation

23. Lessee shall preserve and promote the cooperative ownership principles on which the Lessor has been founded, abide by the Articles of Incorporation, Bylaws, rules and regulations of the Lessor, and any amendments thereto, and by his or her acts of cooperation with its other members bring about for himself or herself, and his or her co-members, a high standard in home and community conditions.

Waiver of Damages

24. Lessee hereby expressly releases Lessor from any and all liability for loss or damage to Lessee or any property of Lessee caused by water leakage, breaking pipes, theft, vandalism, or any other cause beyond the reasonable control of Lessor.

Notices

25. Except as otherwise expressly provided herein or by law, any notice to be served on either party by the other shall be in writing, and shall be deemed given when it is personally delivered to the party to whom it is directed, or when it is deposited in the mail, first-class postage prepaid, addressed to Lessee at the address of the Apartment, or to Lessor at _____[*address or location*]. Either party may change his or her address for purposes of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

26. Should any litigation be commenced between the parties to this Leaseconcerning the Apartment, this Lease, or the rights and duties of either in relation thereto, the party prevailing in that litigation shall be entitled, in addition to any other relief granted, a reasonable sum as and for attorneys' fees, which shall be determined by the court or in a separate action brought for that purpose.

Identity of Apartment Manager and Owner

27. Pursuant to *Civil Code Section 1962*:

(a) The name, telephone number, and usual street address of the person authorized to manage the premises is _____.

(b) The name, telephone number, and usual street address of the owner of the premises [*or* person authorized to act for

and on behalf of the owner for the purposes of service of process and receipt of all notice and demands] is _____.

Executed on _____[*date*], at _____ California.

LESSOR
_____ [*name of stock cooperative*]
By _____ [*signature*]
[*typed name and title*]

LESSEE
_____ [*signature of tenant-shareholder*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesManagement



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§ 33D.syn Synopsis to Chapter 33D: PLANNED DEVELOPMENTS

§ 33D.01 California Statutes

§ 33D.02 Federal Statutes

§ 33D.03 California Regulations

§ 33D.04 Federal Regulations

§ 33D.05 California Attorney General Opinions

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§§ 33D.08-33D.09 [Reserved]

§ 33D.10 Overview of Planned Developments

[1] General Description

[2] Use of Term "Planned Unit Development"

§ 33D.11 Davis-Stirling Act

[1] Applicability and Major Requirements

[2] Comparison With Condominium Projects

[3] Formation and Declaration

[4] Owners' Association

[5] Assessments

[6] Restrictions on Transfer of Separate Interest

[7] Title to Common Areas

[8] Exclusive Use Common Areas

§ 33D.12 Subdivided Lands Act

[1] Applicability and Public Report Requirement

[2] Regulations Applicable to "Common-Interest Subdivisions"

§ 33D.13 Subdivision Map Act

§ 33D.14 Property Taxation of Planned Developments

§ 33D.15 Taxation of Association

§ 33D.16 Taxation of Lot Owners

§ 33D.17 Miscellaneous Laws and Considerations

[1] Occupancy Control

[2] Phased Developments

[3] Financing of Development

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§ 33D.100 Facts

Scope

§ 33D.101 Documents

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§§ 33D.102-33D.119 [Reserved]

§ 33D.120 Development and Formation Considerations

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§ 33D.121 Applicability of State, Federal, and Local Laws

Scope

§§ 33D.122-33D.139 [Reserved]

§ 33D.140 Obtaining Construction Permits

§ 33D.141 Preparing, Processing, and Recording Subdivision Map

§ 33D.142 Drafting and Submitting Governing Documents

Scope

§ 33D.143 Obtaining Public Report

Scope

§§ 33D.144-33D.159 [Reserved]

§ 33D.160 Correction or Amendment of Recorded Final or Parcel Map

§ 33D.161 Reporting Material Changes

Scope

§ 33D.162 Amending Governing Instruments

§ 33D.163 Renewing Public Report

Scope

§ 33D.164 Distributing Information to Members and Prospective Purchasers

Scope

§ 33D.165 Retaining Managing Agent

§§ 33D.166-33D.199 [Reserved]

§ 33D.200 Declaration for Planned Development

[1] Comment

[a] Use of Form

[b] Coordination With Bylaws

[c] Required Contents

[i] Davis-Stirling Act

[ii] Subdivided Lands Act and Its Implementing Regulations

[iii] Nonprofit Mutual Benefit Corporation Law

[d] Particular Provisions of Form

[i] Easements of Ingress, Egress, and Support

[ii] Damage, Destruction, and Condemnation

[iii] Insurance

[iv] Parking Spaces as Exclusive Use Common Areas

[v] Rights of Mortgagees

[2] FORM

Declaration for Planned Development

§ 33D.201 Articles of Incorporation for Planned Development

[1] Comment

[a] Use of Form

[b] Incorporation of Unincorporated Association

[2] FORM

Articles of Incorporation for Planned Development

§ 33D.202 Bylaws for Planned Development

[1] Comment

[a] Use of Form

[b] Contents of Bylaws

[i] Real Estate Commissioner's Regulations

[ii] Nonprofit Mutual Benefit Corporation Law

[c] Filing

[2] FORM

Bylaws for Planned Development



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16-33D California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the statutory and regulatory requirements governing the formation and operation of residential planned developments. The Legal Background presents an overview of applicable laws and describes the unique features of these developments. The Transaction Guide includes step-by-step procedures for compliance with planning, creation, and post-formation requirements. The forms section contains illustrative governing instruments--a declaration for the development and bylaws and articles of incorporation for the owners' association.

This chapter is designed to be used in conjunction with Ch. 34, *Condominiums* , which covers condominium projects. A large portion of the Legal Background and Transaction Guide in Chapter 34 is applicable to planned developments because both types of developments are generally considered "subdivisions" under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and the Subdivision Map Act [*Gov. Code § 66410 et seq.*]. In addition, they both qualify as "common interest developments" under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*]. To avoid unnecessary repetition, this chapter contains numerous cross-references to the applicable discussions and forms in Chapter 34 that can be easily modified for use with planned developments.

This chapter also identifies relevant portions of Ch. 30, *Subdivision Regulation* . Chapter 30 examines "standard" subdivisions, that is, those that do not contain commonly owned areas or interests.



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§ 33D.01 California Statutes

NOTE:
For additional California statutes, see the listings in Ch. 34, *Condominiums*, § 34.01.

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*
Planned development defined. *Bus. & Prof. Code § 11003.*
Planned development as subdivision. *Bus. & Prof. Code § 11004.5(a).*

Davis-Stirling Common Interest Development Act. *Civ. Code § 1350 et seq.*
Planned development defined. *Civ. Code § 1351(k).*
Separate interest defined. *Civ. Code § 1351(l)(3).*
Interests included in conveyance of separate interest. *Civ. Code § 1358(c).*
Owners' association standing to sue. *Civ. Code § 1368.3.*

Nonprofit Mutual Benefit Corporation Law. *Corp. Code § 7110 et seq.*

Exclusion of "subdivided lands" and "subdivision" from Corporate Securities Law. *Corp. Code § 25100(f).*

Subdivision Map Act. *Gov. Code § 66410 et seq.*

Definition of "subdivision." *Gov. Code § 66424.*

California Environmental Quality Act of 1970 (CEQA). *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

Property tax assessments. *Rev. & Tax. Code § 188.5.*

Taxation of owners' association. *Rev. & Tax. Code § 23701t.*



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§ 33D.02 Federal Statutes

Interstate Land Sales Full Disclosure Act. *15 U.S.C. § 1701 et seq.*

Taxation of owners' association. *I.R.C. § 528.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*



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§ 33D.03 California Regulations

Regulations of the Real Estate Commissioner governing subdivisions. *10 Cal. Code Reg. § 2790 et seq.*
Requirements for "substantially complete" planned development application for public report. *10 Cal. Code Reg. § 2792.1(a).*
Required contents of governing instruments. *10 Cal. Code Reg. § 2792.8.*
Reasonable arrangement regulations. *10 Cal. Code Reg. §§ 2792.15-2792.29.*

California Environmental Quality Act (CEQA) regulations. *14 Cal. Code Reg. § 15000 et seq.*

California Coastal Act regulations. *14 Cal. Code Reg. §§ 13001-13013.5, 13050 et seq.*



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§ 33D.04 Federal Regulations

Interstate Land Sales Full Disclosure Act regulations. 24 C.F.R. § 1700.1 et seq.

National Environmental Policy Act of 1969 (NEPA) regulations. *40 C.F.R. § 6.100 et seq.*



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§ 33D.05 California Attorney General Opinions

Assessment of planned development spanning two tax code areas. *55 Ops. Cal. Atty. Gen. 132 (1972)* .



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§ 33D.06 Law Reviews

NOTE:
For additional law review articles, see the listings in Ch. 34, *Condominiums* , § 34.20.

Brookman & Frank, *Taxation in PUD and Condominium Developments: Is There Cause for a New Revolution?* 5 Real Estate L.J. 50 (1976).

Lowell, et al., *Land Use and Operational Controls in the Planned Development, 9 San Diego L. Rev. 28 (1971).*

Leavy & Ross, *Real Estate Developers' Liability, Recent Legislation on Condominiums, Cooperatives and Planned Developments*, 41 Cal. St. B.J. 318 (1966).



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§ 33D.07 Text References

NOTE:
For additional text references, see the listings in Ch. 34, *Condominiums* , § 34.22.

California Real Estate Law and Practice (Matthew Bender).
Ch. 385, *Homeowners' Associations*.
Ch. 424, *Regulation of Subdivided Land Sales*.
Ch. 470, *Subdivisions*.
Ch. 471, *Condominiums*.

Rohan & Reskin, Home Owner Associations and PUDs (Matthew Bender).



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[Reserved]

§§ 33D.08[Reserved]



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PART II. LEGAL BACKGROUND

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§ 33D.10 Overview of Planned Developments

[1] General Description

A planned development is a real estate development that contains both commonly owned property (a common area) and lots or parcels which, along with their improvements, are separately owned. Although planned developments may be devoted in whole or in part to commercial or industrial uses, they are usually exclusively residential. Consequently, this chapter covers only residential planned developments.

The separately owned lots in planned developments frequently contain detached single-family dwellings. However, in the case of "cluster" planned developments, some or all of the residential improvements consist of duplexes, town houses, or similar buildings with multiple units and shared features, such as party walls and common roofs and foundations. These common elements will be considered part of the common area or designated as exclusive use common areas [*see § 33D.11[7], [8]*].

The separately owned lots and residences in a planned development tend to be grouped around the common area. This area consists of open space and, in most cases, recreational facilities. In cluster planned developments, a substantial amount of open space typically is set aside to compensate for the increased density caused by the grouping of the residential structures. The open area may contain a creek, hillside, grove of mature trees, or other area or topographical feature that would be difficult, inordinately expensive, or otherwise undesirable to develop.

The owners' association [*see § 33D.11[4]*] usually holds title to the common area and its improvements. However, the lot owners may hold the title as tenants in common [*Civ. Code § 1362*; *see § 33D.11[7]*]. Whether or not the association owns the common area, it must either maintain and operate that area or retain a professional manager to perform these tasks [*see Civ. Code § 1363(a)*]. Most planned developments are professionally managed [*see Ch. 34, Condominiums, § 34.207*].

For the statutory definition of planned developments, see *§ 33D.11[1]*.

[2] Use of Term "Planned Unit Development"

The term "planned development" must not be confused with the term "planned unit development." As discussed throughout this chapter, "planned development" is a statutory term referring to a specific type of real estate development. Under many local zoning ordinances in California, "planned unit development" (PUD)refers to a type of zoning district or form of zoning relief. The characteristics of PUDs vary considerably from jurisdiction to jurisdiction, but generally permit the clustering of residential, commercial, and/or industrial structures in specified areas or under special circumstances (e.g., in the case of large scale developments) [*see Orinda Homeowners Committee v. Board of Sup'rs, Contra Costa County (1970) 11 Cal. App. 3d 768, 773, 90 Cal. Rptr. 88* (upholding validity of *PUDs); City of Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779-780, 122 Cal. Rptr. 543, 537 P.2d 375]* . It is essential that counsel consult the local zoning ordinance as early as possible to determine whether or not the client's proposed planned development will be considered a PUD under local law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawZoning & Land UsePlanned Unit Developments



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§ 33D.11 Davis-Stirling Act

[1] Applicability and Major Requirements

The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] ("Act") regulates the creation and essential attributes of common interest developments. For these purposes, "common interest development" means any of the following: a planned development [*see* definition, *below*], a community apartment project [*see Civ. Code § 1351(d)*], a condominium project [*see Civ. Code § 1351(f)*; *see also* Ch. 34, *Condominiums*], or a stock cooperative [*Civ. Code § 1351(c)*; *see Civ. Code § 1351(m)*; *see also* Ch. 33C, *Stock Cooperatives*]. The term "common interest development" should not be confused with "common interest subdivision" as that term is used under the Subdivided Lands Act [*see § 33D.12[2]*].

Under the Act, a planned development is a development (other than a condominium project, stock cooperative, or community apartment project) that has either or both of the following features:

> (1) The common area [*see* definition, *below*] is owned either (a) by the owners' association [*see § 33D.11[4]*], or (b) in common by the owners of the separate interests [*see* definition, *below*], who possess appurtenant rights to the beneficial use and enjoyment of the common area.
>
> (2) The owners' association has the power to enforce any obligation of an owner of a separate interest relating to the beneficial use and enjoyment of the common area by means of an assessment that may become a lien on the owner's separate interest [*Civ. Code § 1351(k)*; *see Civ. Code §§ 1367, 1367.1, 1367.4*; *see also § 33D.11[5]*].

A "separate interest" in a planned development is a separately owned lot, parcel, area, or space (hereafter collectively referred to as the "separately owned lots") [*Civ. Code § 1351(l)*(3)]. The "common area" is the entire planned development other than the separately owned lots [*Civ. Code § 1351(b)*; *see § 33D.11[7], [8]*]. Alternatively, if the owners' association has the power to levy an assessment against a separately owned lot to enforce an obligation of the lot's owner relating to the beneficial use and enjoyment of the common area [*see* (2), *above*], the common area may consist of mutual or reciprocal easement rights appurtenant to the separately owned lots [*Civ. Code § 1351(b)*]. An

estate in a separately owned lot or in the common area may be a fee, a life estate, an estate for years, or any combination of these [*Civ. Code § 1351(b)* (common area), (*l*) (separately owned lots)]. However, as a practical matter, the developer typically conveys fee simple estates in the lots (to individual owners) and the common area (to the owners' association).

This chapter summarizes many of the most important requirements of the Davis-Stirling Act. For further discussion of its provisions, see the detailed analysis of the statute in Ch. 34, *Condominiums*.

[2] Comparison With Condominium Projects

Although condominium projects and planned developments subject to the Davis-Stirling Act are similar in that they both contain separately owned areas and common areas [*see Civ. Code § 1351(f), (k)*; *see also § 33D.11[1]*], there are two significant differences between these types of developments. First, ownership in a planned development typically includes not only a residential improvement, but also title to the land on which the unit sits [*see Civ. Code § 1351(k)*, (*l*)(3)]. Condominium owners usually own their individual units in fee but acquire only an undivided interest in common in the land. Second, condominium projects almost always contain multi-story, multi-unit structures, while the typical planned development contains one- and two-story buildings.

Under the Davis-Stirling Act, a developer could probably change the designation of a proposed project from "planned development" to "condominium project" without altering the original plans. This classification option exists because of the similarity of the "separate interests" present in those two common interest developments under the Act. In a planned development, the separately owned interest is always a lot, parcel, area, or space [*Civ. Code § 1351*(*l*)(3)]. In a condominium project, the separate interests (called "units") are described by reference to boundaries which may be "filled" with air, earth, or water, or any combination of these elements [*Civ. Code § 1351(f)*; *see Ch. 34, Condominiums, § 34.32*]. Thus, either type of separate interest may consist of a lot, parcel, or area of real property, and/or may include airspace.

To take advantage of the above classification option, the attorney for the developer, immediately after the initial client interview, should determine whether or not the local ordinances (zoning, subdivision, or other) subject one of those two common interest developments to more stringent requirements. The Davis-Stirling Act need not be taken into account for these purposes of comparison because the additional requirements it imposes on condominium projects do notimpose substantial additional burdens on the development, developer, or individual owners [*see Civ. Code §§ 1359, 1360(a), 1369, 1371*; *see also Ch. 34, Condominiums, § 34.33*]. If local law favors either form of development, the attorney should recommend selection of that form prior to drafting the development documents. The Act prohibits a development from being both a condominium project and a planned development [*Civ. Code § 1351(k)* (" 'Planned development' means a development other than a community apartment project, a condominium project, or a stock cooperative...")].

[3] Formation and Declaration

A planned development is created on (1) the conveyance of a separate interest in a lot and an interest in the common area or membership in the owners' association; and (2) the recordation of a final or parcel subdivision map (if required) [*see § 33D.13*] and a declaration [*Civ. Code § 1352*]. The declaration is the basic governing document for the development. It must contain specified information, including any restrictions on the use or enjoyment of any portion of the planned development that are intended to be enforceable equitable servitudes that will inure to the benefit and bind all owners of lots, parcels, or areas in the development [*Civ. Code §§ 1353, 1354*; *see § 33D.200*; *see also Ch. 34, Condominiums, § 34.33[3]*].

[4] Owners' Association

A planned development must be managed by an association (commonly referred to as an owners' or homeowners'

association) which may be either a nonprofit corporation or unincorporated association [*Civ. Code § 1363(a)*; *see Civ. Code § 1351(a)*]. Whether or not it is incorporated, the association may exercise most of the powers granted to a nonprofit mutual benefit corporation unless the declaration provides otherwise [*see Civ. Code § 1363(c)*; *see also Corp. Code § 7140* (powers)]. As a practical matter, most associations are organized under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. That law imposes a number of requirements governing the operation of the owners' association which must be incorporated into the articles [*see § 33D.201*] and bylaws [*see § 33D.202*] for the association.

For a detailed discussion of the powers and duties of these associations, see *Ch. 34, Condominiums, § 34.38*.

[5] Assessments

The association must levy regular and special assessments unless the declaration provides otherwise [*Civ. Code § 1366(a)*]. The Act places limitations on the imposition and amounts of assessments [*see Civ. Code §§ 1366, 1367, 1367.1*] and sets forth the procedures for handling delinquencies [*see Civ. Code §§ 1366(e), 1367, 1367.1, 1367.4*; *see also Ch. 34, Condominiums, § 34.39[7]*]. The implementing regulations of the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2792.16*; *see also Ch. 34, Condominiums, § 34.37*] impose additional requirements. For further discussion, see *Ch. 34, Condominiums, § 34.39*.

[6] Restrictions on Transfer of Separate Interest

As mentioned above, a "separate interest" in a planned development is a separately owned lot, parcel, area, or space ("lot") [*Civ. Code § 1351*(*l*)(3)]. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the separately owned lot must also include the undivided interest in the common areas, if any. Similarly, any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's entire estate also includes the owner's membership interest in the association [*Civ. Code § 1358(c)*]. However, the owner may separately transfer any exclusive use common area appurtenant to his or her separate interest [*see § 33D.11[8]*] if the declaration authorizes such a transfer and the transfer complies with the terms of the declaration [*Civ. Code § 1358*].

Restrictions on the severability of the component interests in a planned development set forth in the declaration will not be deemed conditions repugnant to the interest created, and thus will not be rendered void under *Civ. Code § 711* [*Civ. Code § 1358*].

[7] Title to Common Areas

In the typical planned development, the common area is owned by the owners' association. It is subject to easements for ingress, egress, and support that are appurtenant to each separately owned lot, if necessary [*Civ. Code § 1361(b)*]. If all or a portion of the common area is owned by the owners of the separate lots, the owners hold title to that commonly owned area as tenants in common, in equal shares, one for each lot [*Civ. Code § 1362*]. This commonly owned area is subject to nonexclusive rights of ingress, egress, and support, if necessary, which are appurtenant to each lot [*Civ. Code § 1361(a)*]. Thus, all lot owners are guaranteed ingress, egress, and support to and from the common areas, when needed. Although that statutory entitlement is referred to as a "right" when the common area is owned by the lot owners and as an "easement" when the association owns the common area, this difference in terminology apparently has no significance or purpose other than to reflect the fact that lot owners cannot have an easement over land that they own in common (the common area) because an easement is an interest in the land of another [*see Goble v. Dotson (1962) 203 Cal. App. 2d 272, 277, 21 Cal. Rptr. 769* ; *see also* Ch. 28A, *Easements and Licenses*].

[8] Exclusive Use Common Areas

An "exclusive use common area" is a portion of the common area that (1) is designated by the declaration for the exclusive use of one or more, but fewer thanall, of the owners of the lots, and (2) is or will be appurtenant to the

designated lot or lots [*Civ. Code § 1351(i)*]. The phrase "will be appurtenant" authorizes the future allocation of exclusive use common areas. The declaration should provide for such allocations when it would be impractical to make them prior to the recordation of the declaration. For example, the developer or the owners' association may wish to allocate parking or storage spaces after lots are purchased, taking into account the number of occupants and types of improvements on each lot and the actual demand for those spaces. Obviously, the developer or association cannot take these factors into account at the time of preparation and recordation of the declaration because none of the lots will have been sold at that time.

Unless the declaration provides otherwise, the owners' association must repair, replace, and maintain the common areas, other than exclusive use common areas, while owners of lots must maintain their separate interests and exclusive use common areas [*Civ. Code § 1364(a)*]. Each owner of a lot is also responsible for any repairs to or maintenance of that lot occasioned by the presence of wood-destroying pests or organisms. However, on approval of the majority of all members of the association, the responsibility for pest control work may be delegated to the association, which will be entitled to recover the resulting costs as a special assessment [*Civ. Code § 1364(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawEstatesConcurrent OwnershipTenancies in Common



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16-33D California Legal Forms--Transaction Guide § 33D.12

§ 33D.12 Subdivided Lands Act

[1] Applicability and Public Report Requirement

Under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], no person may sell or lease, or offer to sell or lease, subdivided lands unless the Real Estate Commissioner issues a consumer-oriented disclosure document (a final public report) for the subdivision [*see Bus. & Prof. Code §§ 11018.2, 11004.5*; *see also Ch. 34, Condominiums, § 34.200*]. That Act defines "subdivided lands" and "subdivision" to include a planned development [*see Bus. & Prof. Code § 11003* (incorporating definition of "planned development" set forth in the Davis-Stirling Act); *see also Civ. Code § 1351(k)*; § 33D.11[1]] containing five or more lots [*Bus. & Prof. Code § 11004.5(a)*; *see Civ. Code § 1351(k)*].

The developer must provide every prospective purchaser or lessee with a copy of the public report (and certain other documents) and obtain an executed receipt for the report [*Bus. & Prof. Code § 11018.1*; *10 Cal. Code Reg. § 2795.1(a)*; *see Bus. & Prof. Code § 11018.6*]. Moreover, the developer must give a copy of the public report, upon oral or written request, to any member of the public, and must post both a notice of the right to make such a request and a copy of the report [*Bus. & Prof. Code § 11018.1(b)*].

A preliminary public report permits a developer to solicit and accept reservations to purchase or lease lots in a proposed planned development before obtaining a final public report. The Real Estate Commissioner will issue a preliminary report if, in the Commissioner's judgment, it is reasonable to expect that the applicant will satisfy all of the requirements for issuance of a final public report in due course [*10 Cal. Code Reg. § 2795(a)*; *see Ch. 34, Condominiums, § 34.200[1][i]*].

For further discussion of the impact of the Subdivided Lands Act on common interest subdivisions, see *Ch. 34, Condominiums, § 34.37*. For additional discussion of that Act, see Ch. 30, *Subdivision Regulation* .

[2] Regulations Applicable to "Common-Interest Subdivisions"

Under the implementing regulations of the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2790 et seq.*], planned developments containing five or more lots are among the developments referred to as "common-interest subdivisions" [*see 10 Cal. Code Reg. §§ 2792.8, 2705(m)*; *see also Bus. & Prof. Code § 11004.5*; *10 Cal. Code Reg. §§ 2792.3-2793*

(regulations directly applicable to common-interest subdivisions)]. That regulatory term should not be confused with the term "common interest development," which is used in the Davis-Stirling Act [*see Civ. Code § 1351(c)*; *see also § 33D.11[1]*]. The Commissioner's common interest subdivision regulations govern many of the more important aspects of common-interest subdivisions, such as the establishment of the owners' association and the contents of governing instruments for the development.

For further discussion of the Commissioner's regulations, see *Ch. 34, Condominiums, § 34.37[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsState Regulation



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16-33D California Legal Forms--Transaction Guide § 33D.13

§ 33D.13 Subdivision Map Act

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] specifically requires local agencies to enact ordinances regulating and controlling the initial design and improvement of "common-interest developments" as defined in *Civ. Code § 1351* [*Gov. Code § 66411*; *see* discussion of *Civ. Code § 1351* in Ch. 34, *Condominiums,* § 34.33[1]].

For the primary discussion of the Subdivision Map Act, see Ch. 30, *Subdivision Regulation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsLocal Regulation



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16-33D California Legal Forms--Transaction Guide § 33D.14

§ 33D.14 Property Taxation of Planned Developments

If, as is usually the case, a planned development is located entirely within a single tax code area and the entire common area (*see* definition *below*) is reserved as an appurtenance to the separately owned lots, parcels, or areas ("lots"), the county assessor will separately assess each separately owned lot for purposes of real property taxes [*Rev. & Tax. Code § 2188.5(b)*]. Each assessment will includethe value of the lot, its improvements, and the owner's share of the value of the common area. It will also reflect the new base year value of the common area resulting from any change in ownership [*see Rev. & Tax. Code §§ 60-68*; *see also* Ch. 23, *Agreements to Sell Real Property*] or new construction [*see Rev. & Tax. Code §§ 70-74*] attributable to the owner's share of the value of the common area [*Rev. & Tax. Code § 2188.5(a)(1)*].

If the planned development spans two or more tax code areas, the separately owned lots will be separately assessed, but the common area will be assessed as a unit. In that case, the owners of the common area will be separately assessed as joint owners [*55 Ops. Cal. Atty. Gen. 132, 133]* .

The tax on each separately owned lot constitutes a lien solely on that lot and its proportionate interest in the appurtenant common area [*Rev. & Tax. Code § 2188.5(a)*]. The lien is not on the common area itself. For purposes of property taxation, "common area" means the land and improvements within a lot, the beneficial use and enjoyment of which is reserved in whole or in part as an appurtenance to the separately owned lots, whether the common area is held in common or through ownership of shares of stock or membership in an owners' association [*Rev. & Tax. Code § 2188.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxCollectionTax Liens



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§ 33D.15 Taxation of Association

A qualified owners' association for a planned development, like that for a condominium project, may elect for income tax purposes to be treated as a tax-exempt organization under either or both *I.R.C. § 528* and *Rev. & Tax. Code § 23701t*. For a discussion of the relevant requirements and the effect of making that election, see *Ch. 34, Condominiums, § 34.46[1], [2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewTax LawFederal Taxpayer GroupsExempt OrganizationsGeneral OverviewTax LawFederal Taxpayer GroupsExempt OrganizationsConditions & Restrictions (IRC secs. 501-505, 521, 526-530)Tax LawState & Local TaxesIncome TaxGeneral Overview



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§ 33D.16 Taxation of Lot Owners

Owners of separate interests in common interest developments/subdivisions are essentially treated like owners of single-family residences for federal and state income tax purposes. For further discussion, see *Ch. 34, Condominiums, § 34.47*.

For a discussion of the separate assessment of lots in planned developments for property taxation purposes [*see Rev. & Tax. Code § 2188.5*], see *§ 33D.14*.



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§ 33D.17 Miscellaneous Laws and Considerations

[1] Occupancy Control

Developers who discriminate in the sale of lots in planned developments may violate the federal Civil Rights Act of 1968 [*42 U.S.C. § 2601 et seq.*] and numerous California laws, including the Unruh Civil Rights Act [*Civ. Code § 51*]. One of the few permissible forms of discrimination is the establishment in California of housing developments for senior citizens [*see Civ. Code § 51.3*]. For further discussion, see *Ch. 34, Condominiums, § 34.40*.

[2] Phased Developments

A planned development may be developed in phases, provided the developer obtains a final public report for each phase [*see 10 Cal. Code Reg. § 2798*]. Further, the annexation of real property to the development in subsequent phases must (1) substantially conform to a detailed plan of phased development submitted to the Real Estate Commissioner with the application for the public report for the first phase of the development; or (2) be approved by at least two-thirds of the total voting power of the owners' association (excluding the developer) [*10 Cal. Code Reg. § 2792.27(a)(1)*]. For further discussion, see *Ch. 34, Condominiums, § 34.44*.

If a multi-phased planned development qualifies as a "master planned development" [*see 10 Cal. Code Reg. § 2792.32(a)* (definition)], the development may be exempt from some or all of the "reasonable arrangement regulations" [*see 10 Cal. Code Reg. §§ 2792.15-2792.28*; § 33D.200[1][c][ii]] normally applicable to developments that are subject to the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2792.32*; Ch. 34, *Condominiums*, § 34.44[3]; *see also Bus. & Prof. Code § 11000 et seq.* (Act)].

[3] Financing of Development

Condominium projects and planned developments are usually financed in the same way; that is, with short-term construction financing that is secured by a blanket deed of trust on the entire project/development, and long-term financing on the individual units/lots. For discussion of this method of financing, see *Ch. 34, Condominiums, § 34.45*.

[4] Securities Regulation

Offers or sales of securities in California must be qualified with the Department of Corporations under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] unless otherwise exempted [*Corp. Code § 25100*]. A security consisting of an interest in subdivided lands or a subdivision or in a real estate development is normally exempt from qualification [*see Corp. Code § 25100(f)*]. Planned developments, condominium projects, and other common interest developments/subdivisions usually qualify for that exemption. For further discussion, see *Ch. 34, Condominiums, § 34.41[3]*.

Membership in the owners' association of a planned development probably will not be considered a security subject to the federal registration requirements of the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*] unless the offering of lots in thedevelopment emphasizes economic benefits to the purchaser to be derived at leastin part from the efforts of others [*see* SEC Release No. 33-5347 (January 4, 1973)]. The factors to consider are identical to those applicable to condominium projects. For discussion of those factors, see *Ch. 34, Condominiums, § 34.41[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawSecurities RegulationGeneral OverviewReal Property LawSubdivisionsGeneral Overview



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[Reserved]

§§ 33D.18[Reserved]



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§ 33D.100 Facts

1. Names, addresses, and telephone numbers of owner and of any consultants, engineers, or others employed by owner for development.

2. Legal status of owner:

a. Individual person;

b. Corporation;

c. Partnership; or

d. Other.

3. Description of development, including:

a. Location (including street address, nearest cross streets, city, county, and state).

b. Legal description.

c. Zoning classification.

d. Number of proposed lots in development.

e. Nature of proposed estates in lots and in common area [*see Civ. Code § 1351(b), (l)*; *see also § 33D.11[1]*]:

(1) Fee;

(2) Life estate;

(3) Estate for years; or

(4) Any combination of (1)-(3), *above*.

f. Description of improvements to be erected on lots, e.g.:

(1) Detached single-family dwellings.

(2) Buildings with shared features, e.g.:
(a) Townhouses.

(b) Duplexes, triplexes, etc.

g. Description of common area, including any improvements, e.g.:

(1) Open space.

(2) Clubhouse or other structures.

(3) Recreational facilities, e.g.:

(a) Swimming pools.

(b) Tennis courts.

(c) Golf course.

(4) Mutual or reciprocal easement rights appurtenant to the separately owned lots.

NOTE:
The common area may consist of these rights if the owners' association is to have the power to levy an assessment against a separately owned lot to enforce an obligation of the lot's owner relating to the beneficial use and enjoyment of the common area [*Civ. Code § 1351(b)*; ***see*** *§ 33D.121*, P 1(b)].

h. Description of any proposed exclusive use common areas, such as parking spaces.

i. Description of surrounding area, including proximity to elementary and secondary schools, airports, and fire stations.

4. Proposed method of financing, including:

NOTE:
For a detailed discussion of the financing of planned developments, condominium projects, and other common interest developments, see *Ch. 34, **Condominiums**, § 34.45*.

a. Source(s).

b. Loan commitments already obtained.

c. Financial assistance to be offered to purchasers of lots.

d. Presale requirements imposed by lender.

5. Proposed manager of development:

a. Professional management agent;

b. Owners' association; or

c. Other.

6. Targeted owners of lots, e.g.:

a. General public.

b. Senior citizens [*see Ch. 34, Condominiums, § 34.40*].

7. Desired voting system [*see Ch. 34, Condominiums, § 34.38[11]*]:

a. Single class.

b. Two-class.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UsePlanned Unit Developments



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16-33D California Legal Forms--Transaction Guide § 33D.101

§ 33D.101 Documents

1. Copy of preliminary title report covering development.

2. Copy of any local building permits already issued.

3. Copy of any contracts owner has entered into with city or county with respect to development.

4. Copy of any subdivision maps that have been prepared for development.

5. Copy of any environmental impact report (EIR) or draft EIR that has been prepared for project.

6. Copies of any existing loan documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

16-33D California Legal Forms--Transaction Guide §§ 33D.102-33D.119

[Reserved]

§§ 33D.102[Reserved]



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16-33D California Legal Forms--Transaction Guide § 33D.120

§ 33D.120 Development and Formation Considerations

1. Will owners' association:

a. Be incorporated [*see § 33D.11[4]*]?

b. Hold title to all or portion of common area [*see § 33D.11[7]*]?

2. What local requirements govern proposed development [*see* Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*]?

3. According to local governmental officials and utility company, are adequate utilities and other necessary services available?

4. Should developer characterize development as condominium project instead of planned development [*see § 33D.11[2]*]?

5. Should development be constructed in phases or stages [*see Ch. 34, Condominiums, § 34.44[1]*; *see also § 33D.143*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawEstatesConcurrent OwnershipGeneral Overview

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16-33D California Legal Forms--Transaction Guide § 33D.121

§ 33D.121 Applicability of State, Federal, and Local Laws

1. For purposes of Davis-Stirling Common Interest Development Act [*Civ. Code § 1351 et seq.*], will proposed project have either or both of following features and therefore be considered a "common interest development" and "planned development" [*see Civ. Code § 1351(c), (k)*; *see also § 33D.11[1]*]?

a. Will common area be owned by [*Civ. Code § 1351(k)(1)*]:
(1) Owners' association; or

(2) Owners of separately owned lots, parcels, areas, or spaces ("lots"), who also possess appurtenant rights to beneficial use and enjoyment of common area?

b. Will owners' association have authority to levy assessment against separately owned lot to enforce any obligation of lot's owner relating to beneficial use and enjoyment of common area [*Civ. Code § 1351(k)(2)*; *see Civ. Code §§ 1367, 1367.1*]?

2. Will development consist of at least five lots and therefore be subject to public report and other requirements of Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see Bus. & Prof. Code § 11004.5(a)*]?

NOTE:
The Subdivided Lands Act incorporates the definition of "planned development" set forth in the Davis-Stirling Act [*Bus. & Prof. Code § 11003*; ***see*** *Civ. Code § 1351(k)*; ***see also*** P (1)(b), ***above***].

3. What, if any, subdivision maps must (or may) be prepared under Subdivision Map Act [*Gov. Code § 66410 et seq.*] and applicable local subdivision ordinance [*see § 33D.13*]?

NOTE:
For a discussion of limited exceptions to the general requirements of the Act [***see*** *Gov. Code §§ 66412,*

66412.2, 66412.5], see Ch. 30, ***Subdivision Regulation*** .

a. Tentative map and final map if development contains five or more lots [*Gov. Code §§ 66426, 66428*; *see* Ch. 30, *Subdivision Regulation*].

NOTE:

Local coastal development permits issued by a local agency in conjunction with a tentative subdivision map for a planned unit development will expire no sooner than the approved tentative map, and any extension of the map must comply with any applicable local coastal program [***see*** Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits***]. Any other permit that is issued by a local agency in conjunction with a tentative subdivision map for a planned unit development will expire no sooner than the approved tentative map, or any extension of the effective period of that map, whichever occurs later, unless an earlier expiration date appears on the face of the permit [*Gov. Code § 65863.9*]. This statute refers to planned unit developments rather than to planned developments and therefore presumably applies to only those planned developments that are considered planned unit developments under the applicable local zoning ordinance [***see*** *§ 33D.121,* P 5; ***see also*** *§ 33D.10[2]*]. For a discussion of the expiration dates of tentative maps [***see*** *Gov. Code § 66452.6(a)*], see Ch. 30, ***Subdivision Regulation*** .

b. Parcel map if development will contain four or fewer lots, unless local ordinance waives requirement of parcel map [*Gov. Code § 66428*; *see* Ch. 30, *Subdivision Regulation*].

NOTE:

When the Act requires the filing of a parcel map for a particular project, then a final map [***see*** (3)(a), ***above***] will not be required (and vice versa) [***see*** *Gov. Code §§ 66426, 66428*]. If the Act requires a parcel map for a particular development, the local ordinance may waive the requirement and/or require that a tentative map be filed. If the local ordinance does not require a tentative map when a parcel map is required under the Act, the developer has the option of submitting a tentative map or a vesting tentative map in addition to the required parcel map [*Gov. Code § 66428*].

c. Vesting tentative map in lieu of any tentative map required by Act, if developer wishes to obtain vested right to proceed with development in substantial compliance with existing local requirements [*see Gov. Code §§ 66498.1-66498.7*; *see also* Ch. 30, *Subdivision Regulation*].

4. Is development subject to additional regulation under any of following?

NOTE:

For a discussion of these laws, see *Ch. 34, Condominiums, § 34.121*, PP 4-9.

a. Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1701 et seq.*].

b. National Environmental Protection Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*].

c. California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*].

d. California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*].

e. Any regional environmental regulations.

5. Will client's proposed planned development be considered "planned unit development" under local zoning ordinance [*see § 33D.10[2]*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationReal Property LawZoning & Land UsePlanned Unit Developments



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16-33D California Legal Forms--Transaction Guide §§ 33D.122-33D.139

[Reserved]

§§ 33D.122[Reserved]



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16-33D California Legal Forms--Transaction Guide § 33D.140

§ 33D.140 Obtaining Construction Permits

NOTE:

For the procedure required to procure local, state, and regional construction permits, see *Ch. 30B, **Zoning, Building, and Environmental Entitlements and Permits**, § 30B.100* et seq.



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16-33D California Legal Forms--Transaction Guide § 33D.141

§ 33D.141 Preparing, Processing, and Recording Subdivision Map

NOTE:

The Davis-Stirling Act [*Civ. Code § 1350 et seq.*] requires the recordation of any final or parcel map required by the Subdivision Map Act [*Civ. Code § 1352*]. For general coverage of the requirements for preparing, processing, and recording subdivision maps under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], see *Ch. 30, **Subdivision Regulation**, § 30.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-33D California Legal Forms--Transaction Guide § 33D.142

§ 33D.142 Drafting and Submitting Governing Documents

NOTE:

The governing documents for a planned development consist of the declaration, bylaws, articles of incorporation or association, and operating rules of the owners' association [***see*** *Civ. Code § 1351(j)*]. These documents must reflect the requirements of any of the following laws that are applicable to the proposed development: the Davis-Stirling Act [*Civ. Code § 1350 et seq.*; ***see*** *§ 33D.11[1]*]; the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations [***see*** *10 Cal. Code Reg. §§ 2792.8, 2792.15-2792.29*]; and the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. The comments to the forms identified below discuss the applicable requirements.

1. Draft declaration [*see § 33D.200*].

2. If owners' association is to be incorporated, draft articles of incorporation [*see § 33D.201*].

3. If owners' association will not be incorporated, draft articles of association [*see* Ch. 13A, *Nonprofit Unincorporated Associations*].

4. Draft bylaws [*see § 33D.202*].

5. If project is to be professionally managed, draft management agreement [*see Ch. 34, Condominiums, § 34.207*].

6. Consider drafting rules and regulations for development [*see Ch. 34, Condominiums, § 34.208*].

7. After drafting foregoing documents, confirm that they are internally consistent.

8. Record declaration [*see Civ. Code § 1352*; *see also Ch. 34, Condominiums, § 34.202[1][j]*].

9. File articles of incorporation (if any) with Secretary of State [*see Corp.Code § 7120*; *see also* Ch. 34, *Condominiums*, § 34.304[1][d]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsGeneral Overview



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16-33D California Legal Forms--Transaction Guide § 33D.143

§ 33D.143 Obtaining Public Report

NOTE:

A subdivider/developer must obtain a public report from the Real Estate Commissioner prior to selling or leasing, or offering to sell or lease, any lots or parcels in a planned development containing five or more lots [*Bus. & Prof. Code §§ 11018.2*, *11004.5*; ***see*** *§ 33D.12[1]*].

1. If client wishes to take reservations for purchase or lease of lots in planned development prior to receipt of final public report, obtain preliminary public report and comply with regulatory requirements governing its use [*see 10 Cal. Code Reg. § 2795*; *see also § 33D.143*, P 1].

2. Complete official application for public report [*Bus. & Prof. Code § 11010(a), (b)*; *10 Cal. Code Reg. § 2790.4(d)*; *see Ch. 34, Condominiums, § 34.200[1]*].

3. Assemble supporting documents for inclusion in application package [*see 10 Cal. Code Reg. §§ 2792.1(a), 2792(a)*; *see also Ch. 34, Condominiums, § 34.143*, P 3].

4. If project is to be developed in phases or stages, prepare detailed plan of phased development for submission to Real Estate Commissioner with application for first phase [*10 Cal. Code Reg. § 2792.27*; *see Ch. 34, Condominiums, § 34.143*, P 6].

5. Review application package to confirm, to extent feasible, that it will be acceptable to Commissioner [*see Bus. & Prof. Code § 11018.5* (required findings of Commissioner); *see also Ch. 34, Condominiums, § 34.143*, P 6].

6. Submit application package and filing fee [*see Bus. & Prof. Code § 11011(b)(2)*; *10 Cal. Code Reg. §§ 2790.1(a)(2), (b), 2790.1.5(a)(2), (b)*] to Department of Real Estate [*see Bus. & Prof. Code § 11010*; *10 Cal. Code Reg. § 2790*].

NOTE:

These application materials should be submitted to the appropriate subdivision district office of the Department of Real Estate. The Los Angeles district office (320 W. 4th Street, Suite 350, Los Angeles, CA 90013-1105; (213) 897-3908) has jurisdiction over subdivisions located in the following counties: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura. The Sacramento Office (2201 Broadway, P.O. Box 187005, Sacramento CA 95818-7005; (916) 227-0813) processes applications for projects in all other counties.

7. After obtaining public report and prior to entering into any contract or agreement for sale or lease of any lot in development, have developer [*see Bus. & Prof. Code § 11018.1*; *10 Cal. Code Reg. § 2794*]:

a. Satisfy statutory duty to distribute copies of report and other project documents to prospective purchasers and lessees [*see Ch. 34, Condominiums, § 34.143*, PP 10, 11]; and

b. Obtain and retain receipts for final or preliminary public reports [*see Ch. 34, Condominiums, § 34.143*, P 12].

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 33D.144[Reserved]



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16-33D California Legal Forms--Transaction Guide § 33D.160

§ 33D.160 Correction or Amendment of Recorded Final or Parcel Map

NOTE:

When a recorded final or parcel map contains certain errors, omissions, or outdated information, the subdivider/developer must file a certificate of correction or an amending map [***see*** *Gov. Code §§ 66469-66472.1*]. For the specific circumstances under which a recorded final or parcel map must be corrected or amended and the procedure for accomplishing this, see *Ch. 30,* ***Subdivision Regulation****, § 30.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-33D California Legal Forms--Transaction Guide § 33D.161

§ 33D.161 Reporting Material Changes

1. Report any proposed material change in development itself or in program for marketing development to Department of Real Estate on one of its official forms [*Bus. & Prof. Code § 11012*; *10 Cal. Code Reg. § 2800*; *see* Ch. 30, *Subdivision Regulation*].

NOTE:

It is unlawful for an owner, the owner's agent, or a developer to change materially the setup of a planned development after it has been submitted to the Department (i.e., at any time after submission of the application for the public report) without first notifying the Department in writing of the intended change. This requirement applies only if the developer or the developer's agent has actual or constructive knowledge of the change [*Bus. & Prof. Code § 11012*]. Although the Act and its implementing regulations do not define "material change," the Commissioner, by regulation, has specified numerous types of changes that are considered to be material [*see 10 Cal. Code Reg. § 2800*; ***see also*** Ch. 30, ***Subdivision Regulation***].

If the material change affects the governing instruments of the development (i.e., the declaration, articles, bylaws, and any operating rules of the association) [*Civ. Code § 1351(j)*], the developer must comply with additional requirements [***see*** *Bus. & Prof. Code § 11018.7*; ***see also*** *Ch. 34,* ***Condominiums****, § 34.162*, P 1].

2. If Department of Real Estate finds that reported change is material, submit required fee and await issuance of amended public report [*Bus. & Prof. Code § 11011(b)(10)*; *10 Cal. Code Reg. §§ 2790.1(a)(10), (b), 2790.1.5(a)(10), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33D California Legal Forms--Transaction Guide § 33D.162

§ 33D.162 Amending Governing Instruments

NOTE:

For the statutory and regulatory procedures governing the amendment of the governing instruments for a planned development or other type of common interest development/subdivision [***see*** *Bus. & Prof. Code § 11018.7*; *Civ. Code §§ 1355, 1355.5, 1356*; *10 Cal. Code Reg. §§ 2792.24, 2793*]; ***see also*** *Ch. 34,* ***Condominiums****, § 34.162*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33D California Legal Forms--Transaction Guide § 33D.163

§ 33D.163 Renewing Public Report

1. If client wishes to renew public report, submit application for renewal [*10 Cal. Code Reg. § 2795.3*; *see* Ch. 30, *Subdivision Regulation*] and appropriate filing fee [*see Bus. & Prof. Code § 11011(b)(8)*; *10 Cal. Code Reg. §§ 2790.1(a)(8), 2790.1.5(a)(8)*] to Department of Real Estate prior to expiration of report's five-year term.

2. Submit any additional information required by Commissioner [*10 Cal. Code Reg. § 2795.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners Associations



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16-33D California Legal Forms--Transaction Guide § 33D.164

§ 33D.164 Distributing Information to Members and Prospective Purchasers

1. Instruct board of directors of owners' association to prepare and distribute financial statements and summary of association's insurance coverage to all members as required by statute [*see Civ. Code §§ 1365, 1365.2*.5; *see also Ch. 34, Condominiums, § 34.164*, P 1].

2. Notify client of association's duty to provide owner of lot with copies of certain project documents within 10 days of mailing or delivery of written request therefor [*see Civ. Code § 1368*; *see also Ch. 34, Condominiums, § 34.164*, P 2].

3. If client owns and wishes to sell or lease lot in planned development subject to public report requirement of Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see Bus. & Prof. Code § 11018.1(a)*], instruct client to provide prospective purchasers or lessees with certain project documents [*see Bus. & Prof. Code § 11018.6*; *Civ. Code § 1368(a)*; *see also Ch. 34, Condominiums, § 34.164*, PP 5, 6].

4. Have board of directors satisfy duty to review certain financial statements [*see Civ. Code § 1365.5(a)*; *see also Ch. 34, Condominiums, § 34.165*].

5. Concerning association's reserve accounts, notify board of its obligation to do following:

a. Comply with requirements governing withdrawal and expenditure of reserve funds [*see Civ. Code § 1365.5(b), (c)*; *see also Ch. 34, Condominiums, § 34.165*, P 2]; and

b. Have study conducted of reserve account requirements of development under certain circumstances [*see Civ. Code § 1365.5(d)*; *see also Ch. 34, Condominiums, § 34.165*, P 3].

6. Have developer or developer's agent or representative furnish each prospective seller or lessee with statutory "Notice of Special Tax" if development is subject to special tax assessed under Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 53341.5(a)*; *see Gov. Code § 53311 et seq.* (Mello-Roos Act); *see also* Ch. 30, *Subdivision Regulation*].

NOTE:

The developer must comply with this disclosure requirement when he or she sells, or leases for a term exceeding five years, a lot in the development [*Gov. Code § 53341.5(a)*].

7. If association adopts or has adopted policy imposing monetary penalties on members for violations of governing documents or rules of association, have board adopt and distribute to each member, by personal delivery or first-class mail, a schedule of these monetary penalties [*Civ. Code § 1363(g)*; *see Ch. 34, Condominiums, § 34.164*, P 9].

8. Each year, have board or developer provide members with summary of provisions of *Civ. Code §§ 1369.510-1369.590* [*Civ. Code § 1369.590*; *see Ch. 34, Condominiums, § 34.164*, P 10].

NOTE:

Civ. Code §§ 1369.510-1369.590 require that alternative dispute resolution (ADR) be pursued before a civil action may be filed in connection with certain disputes related to enforcement of the governing documents, the Davis-Stirling Common Interest Development Act (*Civ. Code § 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*). The required summary must include a specific reference to *Civ. Code §§ 1369.510-1369.590*, and the statutory language set forth in *Civ. Code § 1369.590(a)*. For further coverage, ***see*** *Ch. 34,* ***Condominiums****, § 34.35*.

9. Periodically, as required by statute, prepare incorporated or unincorporated owners' association's biennial registration form and file with Secretary of State [*Civ. Code § 1363.6*; *see Ch. 34, Condominiums, § 34.166*, P 10].

10. Distribute written Notice of Owners' Rights and Responsibilities to each association member during 60-day period immediately preceding beginning of association's fiscal year [*Civ. Code § 1365.1*; *see Ch. 34, Condominiums, § 34.166*, P 12; *see also Ch. 34, Condominiums, § 34.246[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-33D California Legal Forms--Transaction Guide § 33D.165

§ 33D.165 Retaining Managing Agent

NOTE:

For the statutory and regulatory procedures governing the retention by an owners' association of a managing agent [***see*** *Civ. Code §§ 1363.1*, 1361.2; *10 Cal. Code Reg. § 2792.21(b)*], see *Ch. 34, **Condominiums**, § 34.166*, PP 4, 5.



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16-33D California Legal Forms--Transaction Guide §§ 33D.166-33D.199

[Reserved]

§§ 33D.166[Reserved]



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16-33D California Legal Forms--Transaction Guide § 33D.200

§ 33D.200 Declaration for Planned Development

[1] Comment

[a] Use of Form

This form is a declaration for a planned development that has its owners' association organized as a nonprofit mutual benefit corporation. The declaration is the most important governing document for any common interest development [*see § 33D.11[3]*].

With regard to creation and enforcement of assessment liens, this form conforms to the law applicable to assessment liens recorded on or after January 1, 2003 [*see Civ. Code § 1367.1*], rather than the law applicable to liens recorded before that date [*see Civ. Code § 1367*].

This comment lists all of the statutory and regulatory requirements that have been incorporated into this form. As a general rule, most of those requirements also apply to other types of common interest developments, including condominium projects. For a discussion of those requirements of general applicability, see *Ch. 34, Condominiums, § 34.202[1]* (declaration for condominium project). The only requirements discussed in detail in this comment are those that apply solely to planned developments.

[b] Coordination With Bylaws

The provisions of this form govern all regulated aspects of a planned development except the internal operation of the owners' association and its board of directors. Those topics are covered in the bylaws contained in § 33D.202. This method of allocation is quite common [*see Ch. 34, Condominiums, § 34.202[1][c]*].

This form and § 33D.201[2] (articles) and § 33D.202[2] (bylaws) are compatible. Thus, the cross-references in this form to specific bylaw provisions are to the provisions of § 33D.202.

[c] Required Contents

[i] Davis-Stirling Act

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], a declaration must contain [*Civ. Code § 1353(a)(1)*]:

- A legal description of the planned development [*see § 33D.200[2],* Recital A].

- A statement that the development is a planned development [*see § 33D.200[2],* Recital B].

- The name of the owners' association [*see § 33D.200[2]*, Sections 1.02, 3.01].

- The restrictions on the use or enjoyment of any portion of the development that are intended to be enforceable equitable servitudes [*see Civ. Code § 1354*; *see also Ch. 34, Condominiums, § 34.202[1][g]*]. These restrictions are set forth throughout this form.

- If the property is located within an airport influence area and the declaration is recorded after January 1, 2004, a statutorily-prescribed statement informing potential buyers of the possible annoyances and inconveniences associated with living near an airport [*see Civ. Code § 1353(a)(2)* ("airport influence area" defined)].

- If the property is within the San Francisco Bay Conservation and Development Commission's jurisdiction and the declaration is recorded on or after January 1, 2006, it must contain a statutory notice regarding the possible impact on the use and development of the property of the Commission's regulations, restrictions, and permit requirements [*Civ. Code § 1353(a)(3)*].

In addition, this form adopts many of the definitions contained in the Davis-Stirling Act [*see Civ. Code § 1351*; § 33D.200[2], Art. I], the requirements of the Act governing assessments [*see Civ. Code §§ 1366, 1367, 1367.1, 1367.4*; § 33D.200[2], Art. IV; *see also 10 Cal. Code Reg. § 2792.16*], the conveyance of separate interests [*see Civ. Code § 1358*; § 33D.200[2], Section 2.08], and statements of delinquent assessments [*see Civ. Code § 1368(b)*; § 33D.200[2], Section 4.10].

For discussion of these requirements, Ch. 34, *Condominiums*, § 34.202[1][d][i].

[ii] Subdivided Lands Act and Its Implementing Regulations

Several of the requirements imposed by the implementing regulations of the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] must be incorporated into the governing instruments of planned developments [*see 10 Cal. Code Reg. §§ 2792.4, 2792.8, 2792.15-2792.29*; *see also Ch. 34, Condominiums, § 34.202[1][d][ii]*]. Drafters typically place the vast majority of these regulation-based provisions in the declaration, and the remainder in the bylaws [*see § 33D.202[1][b][i]*]. The following is a list of the regulatory topics and requirements covered in this form (including, for the attorney's convenience, citations to relevant statutory provisions) [*see § 33D.200[1][c][i], [iii]*]:

- Creation of the owners' association [*see § 33D.200[2],* Art. III];

- A description of the common interests of the lot owners or lessees [*see § 33D.200[2],* Sections 2.03 -2.07; *see also Civ. Code §§ 1351(b), (c), (i), 1358, 1361, 1362*];

- Transfer of title and/or control of common interests or of mutual and reciprocal rights of use to the owners in common or to the association [*see 10 Cal. Code Reg. § 2792.15*; § 33D.200[2], Section 2.03; *see also Civ. Code § 1362*];

- Procedures for calculating and collecting regular assessments from owners to defray expenses attributable to the ownership, operation, or furnishing of common interests or to the enjoyment of mutual and reciprocal rights of use [*see 10 Cal. Code Reg. § 2792.16*; § 33D.200[2], Art. IV; *see also Civ. Code § 1366*];

- Procedures for establishing and collecting special assessments for capital improvements or for other purposes [*see 10 Cal. Code Reg. § 2792.16(e)*; § 33D.200[2], Art. IV; *see also Civ. Code § 1366*];

- Liens upon privately owned lots for assessments levied pursuant to the declaration and foreclosures for nonpayment [*see 10 Cal. Code Reg. § 2792.16(g)*; § 33D.200[2], Section 4.09; *see also Civ. Code §§ 1367, 1367.1*];

- Policies and procedures relating to the disciplining of members for failure to comply with provisions of the governing instruments [*see 10 Cal. Code Reg. § 2792.26*; § 33D.200[2], Section 3.06(d); *see also Civ. Code § 1363(g)*];

- Creation of the board of directors for the association [*see § 33D.200[2]*, Section 3.08];

- Policies and procedures governing the inspection of books and records of the association by members [*see 10 Cal. Code Reg. § 2792.23(c)-(e)*; § 33D.200[2], Section 3.09; *see also Corp. Code §§ 8320, 8330-8338*];

- Amendment procedures [*see 10 Cal. Code Reg. § 2792.24*; §33D.200[2], Art. XII; *see also Civ. Code §§ 1355, 1355.5, 1356*];

- Action to be taken and procedures to be followed in the event of condemnation, destruction, or extensive damage to the planned development [*see 10 Cal. Code Reg. § 2792.8(a)(21)*; § 33D.200[2], Art. VIII (damage or destruction), IX (eminent domain); *see also § 33D.200[1][d][ii]*];

- Annexation of additional land to the existing development when appropriate [*see 10 Cal. Code Reg. § 2792.27*; § 33D.200[2], Section 2.02, Art. XI];

- Architectural and/or design control [*see 10 Cal. Code Reg. § 2792.28*; § 33D.200[2], Art. VI; *see also Civ. Code §§ 714, 714.1* (restrictions on solar energy systems); § 33D.200[2], Section 5.01(j)];

- Special provisions for enforcement of financial arrangements by the developer to secure performance of his or her commitment to complete common-area improvements [*see 10 Cal. Code Reg. § 2792.4*; § 33D.200[2], Section 3.07(c)]; and

- Granting of easements or use rights affecting the common areas [*see § 33D.200[2]*, Art. II ; *see also Civ. Code §§ 1351(i), 1361*].

[iii] Nonprofit Mutual Benefit Corporation Law

The vast majority of owners' associations for planned developments are organized as nonprofit mutual benefit corporations [*see § 33D.11[4]*]. Therefore, the articles and bylaws of the association must comply with the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. The declaration is not significantly affected by that law because it focuses on the development itself rather than on the internal operation of the association [*see § 33D.200[1][b]*]. However, the provisions of the declaration regarding membership and voting rights, and a few other

miscellaneous provisions, are subject to the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code §§ 7310-7354* (members), 7610-7616 (voting of memberships)]. The provisions of that law that have been incorporated into this form are included in the list set forth in *§ 33D.200[1][c][ii]*. For further discussion, see *§ 33D.202[1][b][ii]*.

[d] Particular Provisions of Form

[i] Easements of Ingress, Egress, and Support

If, as is usually the case, the common areas of a planned development are owned by the owners' association, there are easements for ingress, egress, and support through those areas [*Civ. Code § 1361(b)*]. Section 2.03(c) of this Form describes these easements. Similarly, if any portion of the common areas are owned in common by the owners of the lots, nonexclusive rights of ingress, egress, and support through the commonly owned areas are appurtenant to each lot [*Civ. Code § 1361(a)*; *see also § 33D.11[7]*]. In that case, the drafter should describe the commonly owned areas and the foregoing common rights in the appropriate provisions of Article II of this Form [*see § 33D.200[2],* Sections 2.03, 2.04]. For an example of such provisions, see *Ch. 34, Condominiums, § 34.202[2],* Art. II.

[ii] Damage, Destruction, and Condemnation

The required provisions regarding condemnation, destruction, or extensive damage to the planned development [*see 10 Cal. Code Reg. § 2792.8(a)(21)*; *see also § 33D.200[1][c][ii]*] must include procedures governing the use and disposition of insurance proceeds or damages payable to the association or to a trustee on behalf of the owners as a result of the condemnation, destruction, or damage [*10 Cal. Code Reg. § 2792.8(a)(21)*]. There are no other requirements governing the specifics of the procedures selected by the developer and drafter [*see § 33D.200[2],* Art. VIII (damage and destruction), IX (eminent domain) for illustrative provisions].

[iii] Insurance

The owners' association of a planned development should obtain fire and casualty insurance, blanket public liability insurance, and other insurance protecting the development and its owners. The developer and attorney should discuss the specifics of such coverage with an insurance adviser.

Because lenders and carriers play a vital role in determining what insurance will be maintained by an owners' association, declarations typically set forth very general minimum requirements governing insurance coverage. This form reflects two common approaches to fire and casualty insurance. Under the first approach, which is usually used when the separately owned lots contain detached, single-family dwellings, each owner is responsible for obtaining fire and casualty insurance for his or her improvements, while the owners' association insures its improvements. The second method requires the owners' association to obtain blanket fire and casualty insurance for all improvements in the planned development and prohibits owners from obtaining their own fire and casualty insurance. This method is often used when the lots contain multi-unit structures with shared features [*see § 33D.200[2],* Art. VII; *see also § 33D.10[1]*].

The general liability insurance (also referred to as "public liability insurance") provision of the form [*see* [2], Section 7.02] reflects the requirements of *Civ. Code § 1365.7,* which places limits on the potential personal liability of volunteer officers or directors. For discussion of Section 1365.7, see *Ch. 34, Condominiums, § 34.202[1][e][viii]*.

[iv] Parking Spaces as Exclusive Use Common Areas

An exclusive use common area is a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate lots and which is or will be appurtenant to the designated owners' lots [*Civ. Code § 1351(i)*]. These areas are important in condominium projects where fixtures (e.g., porches and balconies) and yards are often designed to serve a particular unit [*see Ch. 34, Condominiums, § 34.202[2],* Section 2.05

; *see also § 34.202[2]*, Section 1.10]. Obviously, the same concerns are not present in a planned development due to the separate ownership of lots and their improvements. This form does contain a provision designating parking spaces as exclusive use common areas [*see § 33D.200[2]*, Section 2.05] because the lots may not be large enough to accommodate cars, particularly in the case of cluster planned developments.

[v] Rights of Mortgagees

Article X of this Form lists several rights of mortgagees of lots in the planned development. Government lenders and insurers usually insist on the inclusion of mortgagee protections and dictate the contents of the provisions. Thus, rather than copying the provisions set forth in Article X of this Form, counsel should use them as a guide to the scope and complexity of the requirements typically imposed by lenders. For further discussion, see *Ch. 34, Condominiums, § 34.202[1][e][xi]*.

[2] FORM

Declaration for Planned Development

Recording Requested By
_____[*name of declarant*]
When Recorded Mail To:
_____[*name of declarant*]
_____[*address*]
_____[*city, state, zip*]

DECLARATION FOR
_____ [*name of development*],
A PLANNED DEVELOPMENT

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THIS DECLARATION is made on _____[*date*], by _____[*name of declarant*] ("Declarant"), _____ [*describe legal status of declarant, e.g.*, a California Corporation].

RECITALS

A. Declarant is the owner of that certain real property located in the City of _____, County of _____, State of California, and more particularly described _____[as Lots _____ through _____ and Lot _____ of Tract No. _____, on the Subdivision Map recorded in the Office of the Recorder of _____ County, State of California, on _____ [*date*], in Book _____ of Maps at Pages _____ through _____ *or* on Exhibit "_____" attached to and made a part of this Declaration] ("Property").

B. Pursuant to the general plan set forth in this Declaration, Declarant intends to subdivide the Property into Lots and parcels, to improve the Lots and parcels, [and] to create a planned development subject to the provisions of the Davis-Stirling Common Interest Development Act contained in Division II, Pt. 4, Title 6 of the California Civil Code [, and to provide for the annexation of additional real property to the Property].

C. In furtherance of this intent, Declarant hereby declares that all of the Property is and shall continue to be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the declarations, limitations, covenants, conditions, restrictions, reservations, rights, and easements set forth in this Declaration, as this Declaration may be amended from time to time, all of which are declared and agreed to be in furtherance of a general plan established for the purpose of enhancing and perfecting the value, desirability, and attractiveness of the Property. All covenants and restrictions set forth in this Declaration shall constitute covenants running with the land and enforceable equitable servitudes upon the Property, and shall be binding on and for the benefit of all of the Property and all parties having or acquiring any right, title, or interest in all or any part of the Property, including the heirs, executors, administrators, and assigns of these parties and all subsequent owners and lessees of all or any part of any Lot in the Development.

[*If property is located in airport influence area and declaration is recorded after January 1, 2004, include following statement. See Civ. Code § 1353(a).*]

NOTICE OF AIRPORT IN VICINITY

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example, noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

[*If property is located within jurisdiction of San Francisco Bay Conservation and Development Commission and declaration is recorded on or after January 1, 2006, include following statement. See Civ. Code § 1353(a)(3).*]

NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction.

ARTICLE I. DEFINITIONS

"Articles"

Section 1.01. "Articles" means the Articles of Incorporation of _____[*name of owners' association*] and any amendments to the Articles that are or shall be filed in the Office of the Secretary of State of the State of California.

"Association"

Section 1.02. "Association" means _____[*name of owners' association*], a California nonprofit mutual benefit corporation.

"Board"

Section 1.03. "Board" means the Board of Directors of the Association.

"Bylaws"

Section 1.04. "Bylaws" means the Bylaws of the Association and any amendments to the Bylaws that are or shall be adopted by the Board.

"Common Area"

Section 1.05. "Common Area" means those portions of the Developmentowned by the Association for the common use and enjoyment of the Owners. This Common Area includes Lots _____ on the Subdivision Map [and any other parcels designated as "Common Area" in any Supplemental Declaration recorded pursuant to the annexation provisions of Article XI of this Declaration].

"Declarant"

Section 1.06. "Declarant" means _____[*name of developer*] and its successors and assigns.

"Declaration"

Section 1.07. "Declaration" means this Declaration and any amendments thereto.

"Development"

Section 1.08. "Development" means the Property, [any additional real property annexed to the Property pursuant to Article XI of this Declaration,] and all improvements on the Property.

"Exclusive Use Common Area"

Section 1.09. "Exclusive Use Common Area" means those portions of the Common Area reserved for the exclusive use of one or more of the Owners pursuant to Section 2.05 of this Declaration.

"Governing Instruments"

Section 1.10. "Governing Instruments" means this Declaration, the Articles and Bylaws of the Association, and any Rules and Regulations of the Development.

"Lot"

Section 1.11. "Lot" means any plot of land or parcel in the Development that is not a part of the Common Area, as shown on any recorded Subdivision Map for the Development [*add if declaration will contain annexation provisions:* or any Supplemental Declaration recorded pursuant to Article XI of this Declaration].

"Manager"

Section 1.12. "Manager" means any person or entity appointed by the Board to manage the Development.

"Member"

Section 1.13. "Member" means every person or entity entitled to membership in the Association as provided in this Declaration.

"Mortgage" and "First Mortgage"

Section 1.14. "Mortgage" means a mortgage or deed of trust encumbering a Lot or any other portion of the Development. "First Mortgage" means a mortgage that has priority over all other mortgages encumbering the same Lot

or other portion of the Development.

"Mortgagee," "Institutional Mortgagee," and "First Mortgagee"

Section 1.15. "Mortgagee" means a Person to whom a Mortgage is made and includes the beneficiary of a deed of trust and any guarantor or insurer of a mortgage. "Institutional Mortgagee" means a mortgagee that is a financial intermediary or depository, such as a bank, savings and loan, or mortgage company, that is chartered under federal or state law and that lends money on the security of real property or invests in such loans, or any insurance company or governmental agency or instrumentality, including the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Government National Mortgage Association (GNMA). "First Mortgagee" means a Mortgagee that has priority over all other mortgages or holders of mortgages encumbering the same Lot or other portion of the Development. The term "Beneficiary" shall be synonymous with the term "Mortgagee."

"Mortgagor"

Section 1.16. "Mortgagor" means a Person who mortgages his, her, or its property to another (i.e., the maker of a mortgage), and shall include the trustor of a deed of trust. The term "Trustor" shall be synonymous with the term "Mortgagor."

"Owner"

Section 1.17. "Owner" means the record holder or holders of record fee title to a Lot, including Declarant, and any contract sellers under recorded contracts of sale. "Owner" shall not include any persons or entities who hold an interest in a Lot merely as security for performance of an obligation.

"Person"

Section 1.18. "Person" means a natural individual, a corporation, or any other entity with the legal right to hold title to real property.

"Property"

Section 1.19. "Property" means the real property described in the Recitals.

"Rules and Regulations"

Section 1.20. "Rules and Regulations" means any Rules and Regulations for _____[*name of development*] regulating the use of the Common Area and adopted by the Association pursuant to Section 3.06(b) of this Declaration.

"Subdivision Map"

Section 1.21. "Subdivision Map" means the recorded map described in _____ [the Recitals *or* Exhibit _____] [and any subdivision map recorded in connection with the annexation of additional real property to the Development pursuant to Article XI of this Declaration].

ARTICLE II. THE PROPERTY

Property Subject to Declaration

Section 2.01. All the Property in the Development shall be subject to this Declaration.

Annexation of Additional Property

Section 2.02. Additional property may be annexed to the Development, but only as provided in Article XI of this Declaration.

Title to Common Areas

Section 2.03. Prior to the final closing of the first sale of a Lot in the Development, Declarant or its successors or assigns shall convey to the Association title and control of the Common Area, free of all liens and encumbrances, except current real property taxes and any reservations, easements, covenants, conditions, and restrictions of record, including those contained in this Declaration.

Use and Enjoyment of Common Area

Section 2.04. The following provisions govern the use and enjoyment of the Common Area:

(a) Subject to the provisions of this Declaration, there is an easement for ingress, egress, and support through the Common Area appurtenant to each Lot. These easements shall pass with title to the Lot.

(b) The Owners' easements over, and rights of use and enjoyment of, the Common Area shall be subject to the restrictions set forth in the Governing Instruments, including the following:

(1) The right of the Association to adopt and enforce Rules and Regulations for the use of the Common Area.

(2) The right of the Association to reasonably limit the number of guests and tenants using the Common Area.

(3) The right of the Association to assign or otherwise control the use of any unassigned parking spaces within the Common Area.

(4) The right of the Association to suspend the right of any Owner, and the Persons deriving rights from any Owner, to use and enjoy the Common Area for any period during which the Owner is delinquent in the payment of any assessment.

(5) The right of the Association to cause the construction of additional improvements in the Common Area, or to cause the alteration or removal of existing improvements in the Common Area.

(6) The right of the Association to grant, consent to, or join in the grant or conveyance of easements, licenses, or rights-of-way in, on, or over the Common Area.

(7) The right of each Owner to the exclusive use of any Exclusive Use Common Area appurtenant to the Owner's Lot.

(8) The rights of Declarant as described in this Declaration.

(9) The right of the Association to reasonably restrict access to roofs, maintenance facilities or areas, landscaped areas, and similar areas of the Development.

(10) The right of the Architectural Control Committee to approve any proposed alteration or modification to the Common Area or any Lot.

(c) Declarant hereby reserves easements for common driveway purposes, for drainage and encroachment purposes, and for ingress to and egress from the Common Area. These easements may be used to complete improvements on the Common Area [and] to perform necessary repair work [*add in the case of a phased development:*, and for entry onto adjacent property in connection with the development of additional phases of the overall Development]. These easements shall remain in effect _____[*specify reasonable limit, e.g.*, for three years from the date of closing of the first sale of a Lot in the Development].

(d) The Association may grant to third parties easements in, on, and over the Common Area for the purpose of constructing, installing, or maintaining necessary utilities and services, and each Owner, in accepting his or her deed to the Lot, expressly consents to these easements. However, no such easement can be granted if it would interfere with any exclusive easement, or with any Owner's use, occupancy, or enjoyment of his or her Lot or any Exclusive Use Common Area appurtenant to the Lot.

(e) A Class A Owner who has sold his or her Lot to a contract purchaser or who has leased or rented the Lot shall be entitled to delegate his or her rights to use and enjoy the Common Area to any contract purchaser, tenant, or subtenant who resides in the Owner's Lot, subject to reasonable regulation by the Board. If the Owner makes such a delegation of rights, the Owner and the Owner's family, guests, employees, and invitees shall not be entitled to use and enjoy the CommonArea for so long as the delegation remains effective.

(f) Each Owner shall be liable to the Association for any damage to the Common Area or to Association-owned property, to the extent that the damage is not covered by insurance, if the damage is sustained because of the negligence, willful misconduct, or unauthorized or improper installment or maintenance of any improvement by the Owner or the Owner's family, guests, tenants, contract purchasers, tenants, or invitees. In the case of joint ownership of a Lot, the liability of the co-owners shall be joint and several, unless the co-owners and the Association have agreed in writing to an alternative allocation of liability.

Parking Spaces to Be Exclusive Use Common Areas

Section 2.05. Each Owner shall have the exclusive right to use, for parking purposes only, any parking space or spaces that _____[have been allocated to the Owner's Lot on Exhibit _____ attached to this Declaration *or* will be allocated to the Owner's Lot in the future]. Each parking space shall be an Exclusive Use Common Area. Additional Exclusive Use Common Areas may be designated in the future by the Association, provided that the

designation is not inconsistent with the rights of any Owner. The parking lots and any other Exclusive Use Common Areas shall be for the exclusive use of the Owner of the designated Lot and shall be appurtenant to that Lot. An Exclusive Use Common Area may [not] be transferred independently of any other interest of the Owner [*consider adding if exclusive use common area may be transferred independently:*, but only to other Owners].

Maintenance by Owners

Section 2.06. Each Owner shall maintain his or her Lot and the improvements located on it in a clean, sanitary, and attractive condition. [*Add the following or an alternative pest control maintenance scheme (see Civ. Code § 1364):* This duty to maintain includes a responsibility to repair any damage to the improvements located on the Owner's Lot occasioned by the presence of wood-destroying pests or organisms, provided that a majority of the Owners do not vote to have the Association:

(a) Arrange for the necessary repairs; and

(b) Levy a special assessment to recover the resulting costs.]

In addition, each owner shall maintain those portions of any heating and cooling equipment and all plumbing, electrical, and gas lines, apparatus, and other equipment that are located within or that exclusively serve his or her Lot. This maintenance shall be at the Owner's expense. However, the Owner shall not take any actions that would impair or otherwise alter the structural integrity or mechanical systems or lessen the support of any structural member, without the prior written approval of the Architectural Control Committee, as provided in Article VI of this Declaration. _____[The Association rather than the Owner shall be responsible for maintaining any Exclusive Use Common Area appurtenant to the Owner's Lot *or* The Owner shall also, at his or her sole expense, maintain and keep in a reasonably good state of repair any Exclusive Use Common Area appurtenant to the Owner's Lot].

Easements for Maintenance of Encroachments

Section 2.07. None of the rights and obligations of the Owners described in this Declaration or created by deed shall be altered in any way by encroachments due to settlement or shifting of structures or any other cause. There shall be valid easements for the maintenance of such encroachments so long as the encroachments exist. However, in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if the encroachment occurred due to the willful conduct of the Owner or Owners.

Prohibition Against Severance of Elements of Lot

Section 2.08. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the Owner's entire estate shall also include the Owner's Membership interest in the Association, as provided in Section 3.02 of this Declaration. Any transfer that attempts to sever those component interests shall be void.

ARTICLE III. OWNERS' ASSOCIATION

Organization of the Association

Section 3.01. The Association is or shall be incorporated under the name of _____, as a nonprofit

corporation organized under the California Nonprofit Mutual Benefit Corporation Law. From the closing of the escrow for the first sale of a Lot, the Association shall be charged with the duties and invested with the powers prescribed by law and set forth in this Declaration, the Articles of Incorporation, and the Bylaws.

Membership

Section 3.02. Every Owner, upon becoming an Owner, shall automatically become a Member of the Association. Ownership of a Lot is the sole qualification for membership. Each Member shall have the rights, duties, privileges, and obligations set forth in the Governing Instruments. Membership shall automatically cease when the Owner no longer holds an ownership interest in a Lot. All memberships shall be appurtenant to the Lot conveyed, and cannot be transferred, assigned, conveyed, hypothecated, pledged, or alienated except as part of a transfer of the Owner's entire ownership interest, and then only to the transferee. Any transfer of the Owner's title to his or her Lot shall automatically transfer the appurtenant membership to the transferee.

Classes of Membership

Section 3.03. The Association shall have two classes of voting membership, as follows:

(a) All Owners, other than the Declarant, shall be Class A members. Class A membership entitles the holder to one vote for each Lot owned. When a Lot is owned by more than one person, only one vote may be cast for the Lot, as provided in Section 3.04(b) of this Declaration.

(b) The Declarant shall be the sole Class B member. The Class B member shall be entitled to three votes for each Lot owned. Class B membership shall cease and be converted to Class A membership upon the occurrence of whichever of the following is first in time:

[*Choose one of the following alternatives:*]

[*For a single-phase development, use:*]

(1) The total outstanding votes of the Class A Owners equals or exceeds the total outstanding votes of the Class B member; or

(2) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a Lot following the original issuance of the final subdivision public report for the Development.

[*OR*]

[*For a multi-phase development, use:*]

(1) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a Lot following the original issuance of the final subdivision

public report for the most recent phase of the Development; or

(2) On a prescribed date to be established by the Board, which must not be later than the fourth anniversary of the first conveyance of a Lot following the issuance of the final subdivision public report for the first phase of the Development.

[*Continue with the following:*]

Voting Rights

Section 3.04. All voting rights of the Owners shall be subject to the following restrictions, limitations, and requirements:

(a) Except as provided in this Article, on each matter submitted to a vote of the Owners, each Owner shall be entitled to cast one vote for each Lot owned.

(b) Fractional votes shall not be allowed. When there is more than one record Owner of a Lot ("co-owners"), all of the co-owners shall be Members, but only one of them shall be entitled to cast the single vote attributable to the Lot. Co-owners should designate in writing one of their number to vote. If no such designation is made or if it is revoked, the co-owners shall decide among themselves, by majority vote, how that Lot's vote is to be cast. Unless the Board receives a written objection in advance from a co-owner, it shall be conclusively presumed that the voting co-owner is acting with the consent of his or her co-owners. No vote shall be cast for the Lot on a particular matter if a majority of the co-owners present in person or by proxy cannot agree on a vote.

(c) Except as provided in Section 3.07(c) of this Declaration, governing the enforcement of certain bonded obligations, and Section 3.06 of the Bylaws, governing the removal of directors, as long as two classes of voting memberships exist, any provision of this Declaration, the Articles, or the Bylaws that requires the approval of a specified percentage of the voting power of the Association (rather than simply requiring the vote or written consent of a majority of a quorum) shall require the approval of the specified percentage of the voting power of each class of membership. Except as provided in Section 3.07(c) of this Declaration and Section 3.06 of the Bylaws, when the Class B membership has terminated, any provision of this Declaration, the Articles, or the Bylaws that requires the approval of a specified percentage of the voting power of the Association shall require the vote or written consent of Owners representing the specified percentage of both the total voting power of the Association and the voting power of the Association residing in Owners other than Declarant.

(d) The Board shall fix, in advance, a record date or dates for the purpose of determining the Owners entitled to notice of and to vote at any meeting of Members. The record date for notice of a meeting shall not be more than 90 or less than 10 days before the date of the meeting. The record date for voting shall not be more than 60 days before the date of the meeting or before the date on which the first written ballot is mailed or solicited. The Board may also fix, in advance, a record date for the purpose of determining the Owners entitled to exercise any rights in connection with any other action. Any such date shall not be more than 60 days prior to the action.

(e) Every Owner entitled to vote at any election of the Directors may cumulate the Owner's votes and give one candidate a number of votes equal to the number of Directors to be elected multiplied by the number of votes to which the Owner is entitled, or distribute the Owner's votes on the same principle among as many candidates as the Owner thinks fit. No Owner shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination prior to voting and an Owner has given notice at the meeting prior to

the voting of the Owner's intention to cumulate votes. If any one Owner has given this notice, all Owners may cumulate their votes for candidates in nomination.

Membership Meetings

Section 3.05. Article II of the Bylaws governing meetings of the Members is hereby incorporated by reference.

General Powers and Authority

Section 3.06. The Association shall have all the powers of a nonprofit mutual benefit corporation organized under the California Nonprofit Mutual Benefit Corporation Law, subject to any limitations set forth in this Declaration or in the Articles and Bylaws of the Association. It may perform all acts that may be necessary for or incidental to the performance of the obligations and duties imposed upon it by this Declaration or the other Governing Instruments. Its powers shall include, but are not limited to, the following:

(a) The Association shall have the power to establish, fix, levy, collect, and enforce the payment of assessments against the Owners in accordance with the procedures set out in Article IV of this Declaration.

(b) The Association shall have the power to adopt reasonable Rules and Regulations governing the use of the Common Area and its facilities, and of any other Association property. These Rules and Regulations may include, but are not limited to: reasonable restrictions on use by the Owners and their family, guests, employees, tenants, and invitees; rules of conduct; and the setting of reasonable fees for the use of recreational facilities. A copy of the current Rules and Regulations, if any, shall be given to each Owner and shall be posted at conspicuous places in the Common Area. If any provision of the Rules and Regulations conflicts with any provision of this Declaration, the Articles, or the Bylaws, the Declaration, Articles, or Bylaws shall control to the extent of the inconsistency.

(c) The Association shall have the right to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the Owners, in matters pertaining to the following:

(1) Enforcement of this Declaration, the Articles, Bylaws, and Rules and Regulations.

(2) Damage to the Common Area.

(3) Damage to the Lots that the Association is obligated to maintain or repair.

(4) Damage to the Lots that arises out of, or is integrally related to, damage to the Common Area or Lots that the Association is obligated to maintain or repair.

The Association shall enforce payment of assessments in accordance with the provisions of Article IV of this Declaration.

(d) In addition to the general power of enforcement described above, the Association may discipline its Owners for violation of any of the provisions of the Governing Instruments or Rules and Regulations by suspending the violator's voting rights and privileges for use of the Common Area, or by imposing monetary penalties, subject to the following limitations:

(1) The accused Owner shall be given notice and an opportunity to be heard with regard to the alleged

violation in accordance with the provisions of *Corporations Code Section 7341* and *Civil Code Section 1363(b).*

(2) Any suspension of an Owner's association privileges shall not exceed _____ [*insert number, e.g.*, 60] days for each violation.

(3) If the Association imposes a monetary penalty, the Board shall distribute to each Owner, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations. [*If desired, add:* No monetary penalty imposed for these purposes shall exceed $ _____ for each violation.]

(4) Except as provided in Article IV of this Declaration, relating to foreclosure for failure to pay assessments, or as a result of the judgment of a court or a decision arising out of arbitration, the Association shall in no way abridge the right of any Owner to the full use and enjoyment of his or her Lot.

(e) The Association, acting through the Board, shall have the power to delegate its authority, duties, and responsibilities to its officers, employees, committees, or agents, including a professional management agent. The term of any agreement with a manager or the Declarant for the furnishing of maintenance, repair, and related services shall not exceed one year, renewable by agreement of the parties for successive one-year periods. Such an agreement shall be terminable by either party (1) for cause on 30 days' written notice, and (2) without cause or the payment of a termination fee on 90 days' written notice.

(f) The Association's agents or employees shall have the right to enter any Lot when necessary in connection with any maintenance, landscaping, or construction work for which the Association is responsible. This entry shall be made only upon notice to the Owner (except in the case of an emergency) and with as little inconvenience to the Owner as is practicable, and the Association shall repair any resulting damage at its own expense.

Duties of the Association

Section 3.07. In addition to the duties delegated to the Association or its agents and employees elsewhere in these Governing Instruments, the Association shall be responsible for the following:

(a) The Association, acting through the Board, shall operate, maintain, repair, and replace the Common Area and its improvements, [all landscaping, and the exterior surfaces of all structures in the Development,] or contract for the performance of that work, subject to the provisions of Article VIII of this Declaration relating to destruction of improvements, Article IX of this Declaration pertaining to eminent domain, [Section 2.06 of this Declaration governing damages caused by wood-destroying pests or organisms,] and Section 2.04(f) of this Declaration relating to damage caused by Owners. The foregoing areas and improvements shall be kept in a clean, sanitary, and attractive condition. The Association shall [also *or* not] be responsible for maintaining Exclusive Use Common Areas. The Association shall also have the exclusive right and duty to acquire and maintain any furnishings and equipment for the Common Area that it determines are necessary and proper. As a general rule, maintenance costs shall be included in the regular assessments. However, if additional work is required for a particular Lot, the expenses of that additional work shall be charged solely to the Owner of the Lot in the month in which the work is performed. [*Add the following or an alternative allocation of responsibility for pest control costs (see Civ. Code § 1364):* Further, the Owner of a Unit shall pay the costs of any temporary relocation of any occupant of the Unit occasioned by the presence of wood-destroying pests or organisms.] If the Owner does not pay for the additional work within _____ calendar days after receiving the bill, the Association shall institute appropriate collection actions and shall recover the reasonable costs of collection, including attorneys' fees and interest from the due date until paid at the rate of _____ percent per annum.

(b) The Association shall use the maintenance fund described in Section 4.01 of this Declaration to, among other things, acquire and pay for the following:

(1) Water, sewer, garbage, electrical, telephone, gas, elevator, and other necessary utility service for the Common Area and, to the extent not separately metered and charged, for the Lots;

(2) The insurance policies described in Article VII of this Declaration;

(3) The services of any personnel that the Board determines are necessary or proper for the operation of the Common Area; and

(4) Legal and accounting services necessary or proper in the operation of the Common Area or the enforcement of this Declaration.

(c) If the Association is obligee under a bond or other arrangement to secure the performance of Declarant as to any Common Area improvements that were not completed prior to the issuance of the final public report on the Development, the following procedures shall govern the initiation of action to enforce the bond:

(1) The Board of Directors of the Association shall consider and vote on the question of action by the Association to enforce the obligations under the bond with respect to any improvement for which a Notice of Completion has not been filed within 60 days after the completion date specified for the improvement in the Planned Construction Statement appended to the bond. If the Association has given an extension in writing for the completion of any Common Area improvement, the Board shall consider and vote on the above question if a Notice of Completion has not been filed within 30 days after the expiration of the extension.

(2) If the Board votes not to initiate action to enforce the obligations under the bond, or if it fails to consider and vote on the matter as required, a special meeting of the Owners of the Association shall be called for the purpose of overriding the Board's decision or for taking action on the matter, upon receipt of a petition calling for such a meeting signed by Owners representing at least 5 percent of the total voting power of the Association. The meeting shall be held not less than 35 days or more than 45 days after receipt of the petition by the Board. At the special meeting, only the Owners other than Declarant shall be allowed to vote on the matter. A vote by a majority of the voting power of the Association residing in Owners other than Declarant to take action to enforce the obligations under the bond shall be deemed to be the decision of the Association, and the Board shall implement this decision by initiating and pursuing appropriate action in the name of the Association.

(d) The Association shall prepare a pro forma operating budget for each fiscal year, and shall distribute a copy of the budget to each Owner not less than 45 and not more than 60 days before the beginning of the fiscal year. As an alternative to the foregoing distribution of the budget, the Association may elect to do all of the following in the manner required by statute: distribute a summary of the budget to each Owner, make the budget available for inspection at a designated location, and provide copies of the budget to Owners on request and at the expense of the Association. The budget shall contain at least the following:

(1) The estimated revenue and expenses on an accrual basis.

(2) A summary (printed in bold type) of the Association's reserves that is based on the most recent review or study conducted pursuant to *Civil Code Section 1365.5*. This summary shall include the following:

(i) the current estimated replacement cost, estimated remaining life, and estimated useful life of each major component that the Association is obligated to maintain (hereafter referred to as the "major components");

(ii) the current estimate, as of the end of the fiscal year for which the study is prepared, of the amount of cash reserves necessary to repair, replace, restore, or maintain the major components;

(iii) the current amount, as of the end of the fiscal year for which the study is prepared, of accumulated cash reserves actually set aside to repair, replace, restore, or maintain the major components; and

(iv) the percentage that the amount described in (iii), *above*, is of the amount determined for purposes of (ii), *above* (that is, the percentage obtained by dividing the amount described in (iii), *above*, by the amount described in (ii), *above*).

(3) A statement as to whether the Board has determined or anticipates that the levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves for such work.

(4) A general statement addressing the procedures used for the calculation and establishment of reserves to defray the future repair, replacement, or additions to the major components.

(e) Within 120 days after the close of each fiscal year, the Association shall prepare and distribute to the Owners an annual report consisting of the following:

(1) A balance sheet as of the end of the fiscal year.

(2) An operating (income) statement for the fiscal year.

(3) A statement of changes in financial position for the fiscal year.

(4) For any fiscal year in which the gross income to the Association exceeds $75,000, a copy of the review of the annual report prepared in accordance with generally accepted accounting principles by a licensee of the California State Board of Accountancy. If this report is not prepared by an independent accountant, it shall be accompanied by the certificate of an authorized officer of the Association that the statement was prepared without independent audit or review from the books and records of the Association.

(f) Within 60 days before the beginning of each fiscal year, the Association shall prepare and distribute to the Owners a statement describing the Association's policies and practices in enforcing lien rights or other legal remedies for default in payment of assessments against Owners.

(g) The Association shall prepare a balance sheet, as of an accounting date that is the last day of the month closest in time to six months from the date of closing of the first sale of a Lot in the Development, and an operating statement for the period from the date of the first closing to the foregoing accounting date. The Association shall distribute this statement to the Owners within 60 days after the accounting date. This operating statement shall include a schedule of assessments received and receivable identified by the number of the Lot and the name of the Owner assessed.

(h) Each year, the Association must provide the Owners with a summary of the provisions of *Civil Code Sections 1369.510 through 1369.590*. These statutes require that alternative dispute resolution be pursued before a civil action may be filed in connection with certain disputes related to enforcement of the governing documents, the Davis-Stirling Common Interest Development Act (*Civ. Code § 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*). The required summary must include a specific reference to *Civil Code Sections 1369.510 through 1369.590*, and the statutory language set forth in *Civil Code Section 1369.590(a)*. This summary must be provided either (1) at the time the pro forma operating budget described in Section 3.07(d) of this Declaration is distributed, or (2) in the manner specified in *Corporations Code Section 5016*.

(i) The Association shall provide any Owner with the following documents within 10 days of the mailing or delivery of a written request therefor:

(1) A copy of the Governing Instruments.

(2) A copy of the most recent financial statement distributed pursuant to Section 3.07(d) of this Declaration.

(3) A written statement from an authorized representative of the Association specifying (i) the amount of any assessments levied on the Owner's Lot that are unpaid on the date of the statement; and (ii) the amount of late charges, interest, and costs of collection that, as of the date of the statement, are or may be made a lien on the Owner's Lot pursuant to Section 4.09 of this Declaration. The Association may charge the Owner a reasonable fee to cover its cost to prepare and reproduce those requested items.

(j) The Association shall pay all real and personal property taxes and assessments levied against it, its personal property, the Common Area, and Exclusive Use Common Areas.

Board of Directors

Section 3.08. The affairs of the Association shall be managed and its duties and obligations performed by an elected Board of Directors, as provided in Article III of the Bylaws, which is hereby incorporated by reference.

Inspection of Books and Records

Section 3.09. Article XI of the Bylaws, governing the duty of the Associationto maintain certain books and records and the rights of Owners and Directors to obtain and inspect those books and records, is hereby incorporated by reference.

Resolution of Disputes

Section 3.10. As required by *Civil Code Section 1363.820(a)*, the Association shall offer a fair, reasonable, and expeditious procedure for resolving any dispute between the Association and a member involving their rights, duties, or liabilities under the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*), or under the Association's governing documents. This dispute resolution procedure is supplementary to the alternative dispute resolution procedure prescribed by *Civil Code Section 1369.510 et seq.* as a prerequisite to commencing civil action. The dispute resolution procedure shall consist of the following:

(a) Either party may initiate the procedure by making a written request to the other party to meet and

confer in an effort to resolve the dispute. If the request is by the Association, the member may refuse to participate. If the request is by a member, however, the Association may not refuse to participate.

(b) Within 5 days of the written request, the Board of Directors shall designate a member of the Board to meet and confer with the other party.

(c) Within 10 days of the Board member's designation, the parties shall meet at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

(d) If the parties reach agreement on a resolution of the dispute, that resolution shall be memorialized in writing and signed by the parties with the Board designee signing on behalf of the Association.

(e) An agreement reached by the parties is binding on them and may be judicially enforced provided the agreement is consistent with the authority granted by the Board of Directors to its designee, and further provided the agreement is not in conflict with law or the Association's governing documents.

(f) A member of the Association may not be charged a fee to participate in the dispute resolution procedure.

ARTICLE IV. ASSESSMENTS AND COLLECTION PROCEDURES

Covenant to Pay

Section 4.01. The Declarant covenants and agrees, for each Lot owned by it in the Development, and each Owner by acceptance of the deed to the Owner's Lot is deemed to covenant and agree, to pay to the Association the regular and special assessments levied pursuant to the provisions of this Declaration. A regular or special assessment and any late charges, reasonable costs of collection, and interest, as assessed in accordance with the provisions of this Article, shall be a debt of the Owner of the Lot at the time the assessment or other sums are levied. The Owner may not waive or otherwise escape liability for these assessments by nonuse of the Common Area or abandonment of the Owner's Lot.

Exemptions From Assessments

Section 4.02. The obligation to pay assessments shall be subject to the following exemptions:

(a) Any Owner (including Declarant) of a Lot in the Development that does not include a structural improvement for human occupancy shall be exempted from that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and the use of those structural improvements. This exemption shall include, but is not limited to, the following:

(1) Roof replacement;

(2) Exterior maintenance;

(3) Walkway and carport lighting;

(4) Refuse disposal;

(5) Cable television; and

(6) Domestic water supplied to living units.

Any such exemption shall be in effect only until the occurrence of the earliest of the following events: (1) the recordation of a notice of completion of the structural improvement; (2) the occupation or use of the structural improvement; or (3) completion of all elements of the residential structures that the Association is obliged to maintain.

(b) Any Owner (including Declarant) of a Lot in the Development shall be exempted from that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and use of a common facility that is not complete at the time the assessment commences. This exemption shall be in effect only until a notice of completion of the common facility is recorded or the common facility is placed into use, whichever occurs first.

Purpose of Assessments

Section 4.03. The assessments levied by the Association shall be usedexclusively to promote the recreation, health, safety, and welfare of the Owners, for the operation, replacement, improvement, and maintenance of the Property, and to discharge any other obligations of the Association under this Declaration. All assessment payments shall be put into a maintenance fund to be used for the foregoing purposes.

Assessment Period

Section 4.04. The fiscal year for the Association shall be a calendar year, unless the Board decides otherwise. The regular assessment period shall commence on January 1 and terminate on December 31 of each year; provided, however, that the first regular assessment period for all Lots _____ [in the Development *or*, *if annexation is anticipated:* in a phase of development] shall commence on the _____ [date of the first conveyance of a Lot in the _____ (Development *or* phase) *or* first day of the month following the conveyance of a Lot in the _____ (Development *or* phase)], and shall terminate on December 31 of that year.

Regular Assessments

Section 4.05. Within 60 days prior to the beginning of each fiscal year of the Association, the Board shall estimate the net charges to be paid during that year, including a reasonable provision for contingencies and replacements, with adjustments made for any expected income and surplus from the prior year's fund. The estimated cash requirement shall be assessed to each Owner according to the ratio of the number of Lots owned by the Owner assessed to the total number of Lots in the Development subject to assessment. Regular assessments for fractions of any month shall be prorated. Each Owner is obligated to pay assessments to the Board in equal monthly installments on or before the first day of each month unless the Board adopts an alternative method for payment. Declarant shall pay its full prorated share of the regular assessments on any unsold Lots subject to regular assessments.

Special Assessments

Section 4.06. If the Board determines that the amount to be collected from regular assessments will be inadequate to defray the common expenses for the year due to the cost of any construction, unexpected repairs or replacements of

capital improvements upon the Common Area, or any other reason, it shall make a special assessment for the additional amount needed. [The Board shall also levy a special assessment for any pest-control work necessary to repair any damage to improvements located on a Lot in the Development occasioned by the presence on that Lot of wood-destroying organisms, as provided in Section 2.06 of this Declaration.] Special assessments shall be levied and collected in the same manner as regular assessments.

Limitations on Assessments

Section 4.07. The Board shall comply with the following requirements governing the imposition and amounts of assessments:

(a) For any fiscal year, the Board may impose a regular assessment per Lot that is as much as 20 percent greater than the regular assessment for the preceding fiscal year, provided (1) the Board has distributed the pro forma operating budget described in Section 3.07(d) for the current fiscal year or (2) the increase is approved by Owners constituting a majority of the votes at a meeting or in an election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(b) The Board may impose, for any fiscal year, a regular assessment per Lot that is more than 20 percent greater than the regular assessment for the preceding fiscal year, or may levy special assessments that in the aggregate exceed 5 percent of the budgeted gross expenses of the Association for that fiscal year, provided the increase or levy is approved by Owners constituting a majority of the Owners of the Association and casting a majority of the votes at a meeting or election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(c) The Board may, without complying with the foregoing requirements, make an assessment increase that is necessary for an emergency situation. An emergency situation is an extraordinary expense that is:

(1) Required by a court order.

(2) Necessary to repair or maintain the Development or any part of it for which the Association is responsible when a threat to personal safety in the Development is discovered.

(3) Necessary to repair or maintain the Development or any part of it for which the Association is responsible that could not have been reasonably foreseen by the Board in preparing and distributing the pro forma operating budget pursuant to Section 3.07(d).

(4) Incurred in making the first payment of the earthquake insurance surcharge pursuant to *Insurance Code Section 5003*.

Before the Board may impose or collect an assessment in the type of emergency situation described in (3), *above*, it shall pass a resolution containing written findings as to the necessity of the extraordinary expense and why the expense was not or could not have been reasonably foreseen in the budgeting process, and shall distribute the resolution to the Owners with the notice of assessment.

(d) The Board shall notify the Owners in writing of any increase in the amount of a regular or special assessment. The Board shall provide this notice byfirst-class mail not less than 30 or more than 60 days prior to the due date of the increased assessment.

Late Charges

4.08. Late charges may be levied by the Association against an Owner for the delinquent payment of regular or special assessments. An assessment is delinquent 15 days after its due date. If an assessment is delinquent the Association may recover all of the following from the Owner:

(a) Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorneys' fees.

(b) A late charge not exceeding 10 percent [*or specify lower rate*] of the delinquent assessment or $10, whichever is greater [*or specify lower charge*].

(c) Interest on the foregoing sums, at an annual percentage rate of 12 percent [*or specify lower rate*], commencing 30 days after the assessment becomes due.

No late charge may be imposed more than once for the delinquency of the same payment. However, the imposition of a late charge on any delinquent payment shall not eliminate or supersede charges imposed on prior delinquent payments.

Enforcement of Assessments and Late Charges

Section 4.09. At least 30 days before the Association can place a lien on a Lot for a past due debt for a regular or special assessment, the Association must notify the Owner by certified mail of the following:

(a) A general description of the Association's collection and lien enforcement procedures.

(b) The method of calculation of the amount due.

(c) A statement that the Owner has the right to inspect the Association records.

(d) A statement informing the Owner that the Owner's Lot may be subject to foreclosure and sale without court action.

(e) An itemized statement of the charges owed by the Owner, including items on the statement that indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, and any late charges and interest.

(f) A statement that the Owner will not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid on time.

(g) The Owner's right to request a meeting with the Board if the Owner disputes the debt.

An Owner may dispute the debt by submitting to the Board a written explanation within 15 days of the mailing of the Association's notice. The Board must respond to an Owner's timely explanation within 15 days of the mailing of the Owner's explanation.

An Owner also may submit a written request to meet with the Board to discuss a payment plan for the debt. The request must be mailed within 15 days of the mailing of the Board's notice. The Board must then meet with the Owner in executive session within 45 days of the mailing of the Owner's request. If there is no regularly scheduled Board meeting within that time period, the Board may designate a committee of one or more members to meet with the Owner.

Any partial payments made toward the debt will first be applied to the assessments owed, and only after the principal

owed is paid in full will the payments be applied to the fees and costs of collection, attorneys' fees, late charges, or interest. When an Owner makes a payment, the Owner may request a receipt and the Association shall provide it. The receipt shall indicate the date of payment and the person who received it. The Association shall provide a mailing address for overnight payment of assessments.

A debt for a delinquent regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorneys' fees, and interest shall become a lien on the Lot when a notice of delinquent assessment is duly recorded and mailed as provided in *Section 1367.1 of the California Civil Code*.

Except as provided below regarding debts arising from delinquent assessments when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, any such lien may be enforced in any manner permitted by law, including judicial foreclosure or nonjudicial foreclosure. Any nonjudicial foreclosure shall be conducted by the trustee named in the notice of delinquent assessment or by a trustee substituted pursuant to *Section 2934a of the California Civil Code*, in accordance with the provisions of *Sections 2924*, *2924b*, and *2924c of the California Civil Code*.

If the sums specified in the notice of delinquent assessment are paid before the completion of any judicial or nonjudicial foreclosure, the Association shall record a notice of satisfaction and release of the lien. On receipt of a written request by the Owner, the Association shall also record a notice of rescission of any declaration of default and demand for sale.

In accordance with *Section 1367.4 of the California Civil Code*, a lien securing a debt arising from a delinquent regular or special assessment when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, shall not be enforced by judicial or nonjudicial foreclosure unless and until either (1) the debt equals or exceeds $1,800,excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, or (2) the debt secured by the lien is more than 12 months delinquent.

Statement Regarding Assessments

Section 4.10. The Association shall provide any Owner, upon written request, with a statement specifying (1) the amounts of the Association's current regular and special assessments and fees, and (2) the amounts of any delinquent assessments and related late charges, interest, and costs levied against the Owner's Lot, as provided in Section 4.08 of this Declaration.

ARTICLE V. USE RESTRICTIONS AND COVENANTS

General Restrictions on Use

Section 5.01. In exercising the right to occupy or use a Lot or the Common Area and its improvements, the Owner and the Owner's family, guests, employees, tenants, and invitees shall not do any of the following:

(a) Attempt to further subdivide a Lot without obtaining the prior approval of the Association.

(b) Occupy or use a Lot, or permit all or any part of a Lot to be occupied or used, for any purpose other than as a private residence. Nothing in this Declaration shall prevent an Owner from leasing or renting out his or her Lot, provided that it is not for transient or hotel purposes, is for a period of at least 60 days, and is subject to the Governing Instruments.

(c) Permit anything to obstruct the Common Area or store anything in the Common Area without the prior consent of

the Board, except as otherwise provided in the Governing Instruments.

(d) Perform any act or keep anything on or in any Lot or Exclusive Use Common Area or in the Common Area that will increase the rate of insurance on the Common Area without the Board's prior written consent. Further, no Owner shall permit anything to be done or kept in his or her Lot, in any Exclusive Use Common Area appurtenant to the Lot, or in the Common Area that would result in the cancellation of insurance on any Lot or Exclusive Use Common Area or on any part of the Common Area or that would violate any law.

(e) Store gasoline, kerosene, cleaning solvents, or other flammable liquids in the Common Area or on any Lot; provided, however, that reasonable amounts of these liquids may be placed in metal containers and stored in the storage spaces.

(f) Display any sign to the public view on or from any Lot or the Common Area without the prior written consent of the Board, except a sign advertising the property for sale, lease, or exchange, or advertising directions to the property, as provided in *Section 712 of the California Civil Code*.

(g) Raise, breed, or keep animals, livestock, or poultry of any kind on a Lot or in the Common Area, except dogs, cats, or other household pets, which may be kept on Lots, subject to the Rules and Regulations.

(h) Engage in any noxious or offensive activity in any part of the Development.

(i) Alter or modify the exterior of any improvements located on a Lot without first obtaining the written consent of the Architectural Control Committee.

(j) Install a solar energy system in a Unit owned by another without first obtaining the written consent of the Architectural Control Committee.

(k) Alter, construct, or remove anything on or from the Common Area, except upon the written consent of the Board.

(l) Park any automobile or other motor vehicle in the Common Area or in any Exclusive Use Common Area except in a space designated for the Owner by the Board or the Governing Instruments.

Damage Liability

Section 5.02. Each Owner shall be liable to the Association for all damage to the Common Area or other Association property that is sustained by reason of the negligence or willful misconduct of that Owner or his or her family, guests, employees, tenants, and invitees [*add if applicable:*, to the extent that the damage is not covered by the casualty insurance obtained and maintained by the Association pursuant to Section 7.01 of this Declaration. Each Owner, by accepting his or her deed, agrees to provide insurance to the extent required by Section 7.05 of this Declaration].

Exemption

Section 5.03. Declarant shall be exempt from the restrictions of Section 5.01 to the extent necessary to complete any construction work, sales activities, or additions to or affecting the Development. This exemption includes, but is not limited to, maintaining Lots as model homes, placing advertising signs on Development property, and generally using Lots and the Common Area to carry on construction activity.

Equitable Servitudes

Section 5.04. The covenants and restrictions set forth in this Declaration shall be enforceable equitable servitudes and shall inure to the benefit of and bind all Owners. These servitudes may be enforced by _____ [any Owner or by the Association or by both *or set forth alternative enforcement provision*].

ARTICLE VI. ARCHITECTURAL AND DESIGN CONTROL

Architectural and Design Approval

Section 6.01. No building, addition, wall, fence, or alteration shall be begun,constructed, maintained, or permitted to remain on any Lot, or on the Common Area, until complete plans and specifications of the proposed work have been submitted to and approved by the Architectural Control Committee. The Committee shall review the plans and specifications to determine whether they are compatible with the standards of design, construction, and quality of the Development and, if they are not, shall require that changes be made before approval.

Architectural Control Committee

Section 6.02. The Architectural Control Committee shall consist of [*specify number, which must be at least three but not more than five*] members, formed as follows:

(a) The Declarant shall appoint all of the original members and all replacements until the first anniversary of the issuance of the original final public report for the [*add if development is to be developed in phases:* first phase of the] Development. Further, Declarant may reserve the power to appoint a majority of the Committee until 90 percent of all Lots have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Development, whichever occurs first. After one year from the date of the issuance of the final public report for the [first phase of the] Development, the Board shall have the right to appoint one member to the Committee, until 90 percent of the Lots have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Development, whichever occurs first. Thereafter, the Board shall have the right to appoint all of the members of the Committee.

(b) Members appointed to the Committee by the Board shall be Members of the Association. Members appointed to the Committee by the Declarant need not be Members of the Association.

(c) The term of the initial appointees shall be one year. Thereafter, members shall serve two-year terms unless it becomes necessary to remove members appointed by Declarant in order to comply with Section 6.02(a), in which case the terms of all members shall end at that time, and the Board shall appoint a new Committee. Notwithstanding the above, all members of the Committee shall serve at the will of the party that appointed them, and may be removed by that party at any time with or without cause.

(d) The Committee shall meet as often as it deems necessary to carry out the obligations imposed on it properly, unless otherwise directed by the Board.

The Board of Directors

Section 6.03. All decisions of the Architectural Control Committee are subject to review by the Board of Directors and

may be appealed to the Board. The Committee shall notify the Board of all violations of this Article and of any noncompliance with its rulings or with the plans and specifications submitted to and approved by it. Thereafter, the Board shall take any actions it deems necessary, in accordance with the provisions of this Declaration.

ARTICLE VII. INSURANCE

Fire and Casualty Insurance

Section 7.01. The Association shall obtain and maintain a policy or policies of fire and casualty insurance with an extended coverage endorsement for the full insurable replacement value of the improvements in the _____ [Common Area *or, if association will maintain blanket casualty insurance:* Development]. The amount of coverage shall be determined by the Board. This insurance shall be maintained for the benefit of the Association, the Owners, and their Mortgagees, as their interests may appear as named insured, subject, however, to any loss payment requirements set forth in this Declaration.

General Liability and Individual Liability Insurance

Section 7.02. The Association shall obtain and maintain one or more policies of insurance that must include coverage for (1) general liability of the Association and (2) individual liability of Officers and Directors of the Association for negligent acts or omissions in that capacity. Both of the above types of coverage shall not be less than _____ [*select the appropriate provision below (see Civ. Code §§ 1365.7, 1365.9, applicable to development that is exclusively residential)*]

[*If development consists of 100 or fewer lots:*]

$1,000,000 covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*Or, if development consists of more than 100 lots:*]

$3,000,000 covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*Continue with the following:*]

The limits and coverage shall be reviewed at least annually by the Board and increased in its discretion.

Other Association Insurance

Section 7.03. The Association shall purchase and maintain workers' compensation insurance to the extent necessary to comply with any applicable laws. The Association also shall purchase and maintain fidelity bond coverage that names the Association as an obligee, for any person or entity handling funds of theAssociation, whether or not such persons or entities are compensated for their services. This coverage shall be in an amount that is at least equal to the estimated maximum of funds, including reserve funds, in the custody of the Association [or the Manager] at any given time during the term of each bond. However, the aggregate amount of these bonds must not be less than 150 percent of each year's

estimated annual operating expenses and reserves. The Association also may purchase and maintain a blanket policy of flood insurance, and demolition insurance in an amount that is sufficient to cover any demolition that occurs following the total or partial destruction of the Development and a decision not to rebuild.

Trustee for Policies

Section 7.04. The Association, acting through its Board, is hereby appointed and shall be deemed trustee of the interests of all named insureds under all insurance policies purchased and maintained by the Association. All insurance proceeds under any of those policies shall be paid to the Board as trustee. The Board shall use the proceeds for any of the purposes specified in Article VIII of this Declaration. The Board also is authorized to negotiate loss settlements with the appropriate insurance carriers, to compromise and settle any claim or enforce any claim by any lawful action, and to execute loss claim forms and release forms in connection with such settlements.

[*Choose one of the following paragraphs:*]

[*If association will maintain blanket casualty insurance, use:*]

Individual Insurance

Section 7.05. No Owner shall obtain or maintain fire and casualty insurance for the improvements on the Owner's Lot. If an Owner does so, he or she shall be liable to the Association for any resulting reduction in the insurance proceeds payable under the policy or policies of fire and casualty insurance maintained by the Association pursuant to Section 7.01. Notwithstanding the above, an Owner may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Lot, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Owners, the Association, Declarant, and the institutional First Mortgagee of the Owner's Lot.

[*OR*]

[*If association will not maintain blanket casualty insurance, use:*]

Individual Insurance

Section 7.05. Each Owner shall provide fire and casualty insurance for the improvements on his or her Lot. An Owner may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Lot, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Owners, the Association, Declarant, and the institutional First Mortgagees of the Owner's Lot.

[*Continue with the following:*]

Insurance Premiums

Section 7.06. Insurance premiums for any insurance coverage obtained by the Association shall be included in the regular assessments. That portion of the regular assessments necessary for the required insurance premiums shall be used solely for the payment of the premiums when due.

ARTICLE VIII. DAMAGE OR DESTRUCTION

Duty to Restore and Replace

Section 8.01. If any of the improvements in the _____ [Common Area *or, if the association will maintain blanket casualty insurance over all improvements,* Development] are destroyed or damaged, the Association shall restore and replace the improvements, using the proceeds of insurance maintained pursuant to Article VII of this Declaration, subject to the provisions of this Article.

Proceeds Justifying Automatic Restoration and Repair

Section 8.02. If the proceeds of any insurance maintained pursuant to Article VII of this Declaration for reconstruction or repair of the Property are equal to at least _____ [*specify, e.g.,* 85] percent of the estimated cost of restoration and repair, the Board shall use the insurance proceeds for that purpose, shall levy a special assessment to provide the necessary additional funds, and shall have the improvements promptly rebuilt, unless the Owners by the vote or written consent of not less than _____ [*specify, e.g.,* 75] percent of the total voting power of each class of Owners object to the restoration or repair work within _____ [*specify, e.g.,* 60] days of the damage or destruction.

Approval by Owners of Special Assessment for Certain Restorations and Repairs

Section 8.03. If the proceeds of any insurance maintained pursuant to Article VII of this Declaration for reconstruction or repair of the Property are less than _____ [*repeat percentage set forth in (a), above, e.g.,* 85] percent of the estimated cost of restoration and repair, any restoration and repair work must be authorized by the vote or written consent of Owners representing at least _____ [*specify, e.g.,* 75] percent of the total voting power of each class of Owners and beneficiaries of at least _____ [*specify, e.g.,* 75] percent of the First Mortgages on Lots in the Development. This authorization must be given within _____ [*specify, e.g.,* 60] days of the damage or destruction and must authorizethe Board to levy a special assessment to provide the necessary funds over and above the amount of any insurance proceeds available for the work.

Ordering Reconstruction or Repair

Section 8.04. If reconstruction or repair work is to take place pursuant to this Article, the Board shall take the following steps:

(a) Prepare the necessary documents, including an executed and acknowledged certificate stating that damage has occurred, describing it, identifying the improvement suffering the damage, the name of any insurer against whom claim is made, and the name of any insurance trustee, stating (if applicable) that the consent described in Section 8.03 has been obtained, and reciting that the certificate is recorded pursuant to this paragraph. That declaration shall be recorded with the Recorder of _____ County within _____ [*specify, e.g.,* 90 days] from the date of the damage or destruction.

(b) Obtain firm bids (including the obligation to obtain a performance bond) from two or more responsible contractors to rebuild the Development in accordance with its original plans and specifications and, as soon as possible thereafter, call a special meeting of the voting Owners to consider the bids. If the Board fails to do so within 60 days after the casualty occurs, any Owner may obtain the bids and call and conduct the special meeting in the manner required by this paragraph. At the meeting, Owners representing at least 67 percent of the total voting power may elect to reject all of the bids and thus not to rebuild, or Owners representing at least 51 percent of the total voting power may elect to reject all bids requiring amounts exceeding the available insurance proceeds by more than $500. Failure to reject all bids shall authorize the Board to accept the unrejected bid it considers most favorable. Failure to call the special meeting or to repair the casualty damage within 12 months from the date the damage occurred shall be deemed for all purposes to be a decision not to rebuild.

(c) If a bid is accepted, the Board shall let the contract to the successful bidder and distribute the insurance proceeds to the contractor as required by the contract.

(d) Levy a special assessment to make up any deficiency between the total insurance proceeds and the contract price for the repair or rebuilding, with the assessment and all insurance proceeds, whether or not subject to liens of mortgagees, to be used solely for the rebuilding. This assessment shall be apportioned _____ [equally to each Lot *or, if association will maintain blanket casualty insurance:* equally to each Lot for any damage or destruction to the Common Area. For any damage or destruction to improvements on one or more Lots, every Owner shall pay a proportionate share based on the relative square footage of the living area]. If any Owner fails to pay the special assessment within 15 days after it is levied, the Board shall enforce the assessment in the manner described in Section 4.09 of this Declaration.

Election Not to Rebuild

Section 8.05. Upon an election not to rebuild, the Board, as soon as reasonably possible and as agent for the Owners, shall execute and record a certificate stating that the Association shall not rebuild. The Board shall also sell the entire Development on terms acceptable to the Board and free from the effect of this Declaration, which shall terminate upon the sale. The net proceeds shall then be distributed to the Owners and their respective Mortgagees proportionately according to the respective fair market values of the Lots at the time of the destruction as determined by an independent appraisal. That appraisal shall be performed by an independent appraiser who shall be selected by the Association and who shall be a member of, and apply the standards of, a nationally recognized appraiser organization.

All insurance proceeds available for restoration or repair shall be distributed to the Owners _____ [equally *or, if association will maintain blanket casualty insurance,* as follows: proceeds for damage or destruction to Lots shall be distributed to the Owners of the damaged Lots according to the relative fair market value of the Lots. This value shall be as of the date immediately preceding the damage or destruction, and shall be determined by an appraisal by an independent appraiser who shall be selected in the manner described above. Any proceeds from damage or destruction to the Common Area shall be distributed to the Owners equally].

Minor Restoration and Repair Work

Section 8.06. The Association shall order restoration or repair work without complying with the other provisions of this Article whenever the estimated cost of the work does not exceed _____ [$_____ (*e.g.,* 18,000) *or, if association will maintain blanket casualty insurance:* $_____ (*e.g.,* 15,000) for the Common Area and $_____ (*e.g.,* 3,000) for one or more Lots]. If insurance proceeds are unavailable or insufficient, the Association shall levy a special assessment for the cost of the work. The Assessment shall be levied in the manner described in Section 4.05 of

this Declaration.

ARTICLE IX. EMINENT DOMAIN

Sale to Condemning Authority

Section 9.01. If a governmental agency proposes to condemn all or a portion of the Common Area, the Association may sell all or any portion of the Common Area to the condemning authority if _____ percent of the Owners and _____ percent of all institutional First Mortgagees approve the sale in advance. Any such sale shall be made by the Association in the capacity of attorney-in-fact for the Owners, acting under an irrevocable power of attorney which each Owner grants to the Association by accepting a deed to a Lot. The sales price shall be anyamount deemed reasonable by the Board.

Distribution of Sales Proceeds

Section 9.02. The proceeds of a sale conducted pursuant to Section 9.01 shall be distributed equally to the Owners and their Mortgagees, as their interests may appear.

Taking and Condemnation Awards

Section 9.03. If there is a taking by a governmental agency of all or any portion of the Common Areas, the condemnation award shall be distributed to all Owners and their respective Mortgagees in accordance with the court judgment, if any such judgment exists. In all other cases, the proceeds shall be distributed among the Owners and their respective Mortgagees as their interests may appear.

ARTICLE X. RIGHTS OF MORTGAGEES

Warranty

Section 10.01. Declarant hereby warrants that Mortgagees of Lots in the Development shall be entitled to the rights and guaranties set forth in this Article. No amendment of this Article shall affect the rights of the holder of any First Mortgage recorded prior to the recordation of the amendment who does not join in the execution of the amendment.

Subordination

Section 10.02. Notwithstanding any other provision of this Declaration, liens created under Section 4.09 of this Declaration upon any Lot shall be subject and subordinate to, and shall not affect the rights of the holder of, the indebtedness secured by any recorded First Mortgage upon such an interest made in good faith and for value, provided that any transfer of a Lot as the result of a foreclosure or exercise of a power of sale shall not relieve the new Owner from liability for assessments that become due after the transfer. Such a transfer shall extinguish the lien of assessments that were due and payable prior to the transfer of the Lot.

Inapplicability of Right of First Refusal

Section 10.03. Should any of the Association's Governing Instruments provide for a "right of first refusal," this right shall not impair the rights of a First Mortgagee to:

(a) Foreclose or take title to a Lot pursuant to the remedies provided in the Mortgage;

(b) Accept a deed (or assignment) in lieu of foreclosure in the event of default by a Mortgagor; or

(c) Interfere with a subsequent sale or lease of a Lot so acquired by the Mortgagee.

Notice of Default

Section 10.04. A First Mortgagee, upon request, shall be entitled to written notification from the Association of any default in the performance by the Mortgagor of any obligation under the Association's Governing Instruments that is not cured within 60 days.

Unpaid Assessments

Section 10.05. Any First Mortgagee who obtains title to a Lot pursuant to the remedies provided in the Mortgage or foreclosure of the Mortgage shall not be liable for the Lot's unpaid assessments that accrue prior to the acquisition of title to the Lot by the Mortgagee.

Mortgagee Approval of Material Amendments

Section 10.06. Notwithstanding Article XII of this Declaration, any amendments governing any of the following shall require the prior written approval of at least 51 percent of the First Mortgagees and at least 67 percent of the total voting power of the Owners:

(a) Voting;

(b) Rights to use the Common Area;

(c) Reserves and responsibility for maintenance, repair, and replacement of the Common Area;

(d) Boundaries of any Lot;

(e) Owners' interests in the Common Area;

(f) Convertibility of Lots into Common Area or Common Area into Lots;

(g) Leasing of Lots;

(h) Establishment of self-management by the Association, when professional management has been previously required by any First Mortgagee or any insurer or governmental guarantor of a First Mortgage;

(i) Annexation, addition, or withdrawal of real property to or from the Development;

(j) Assessments, assessment liens, or the subordination of these liens;

(k) Casualty and liability insurance or fidelity bonds; or

(l) Any provisions expressly benefitting First Mortgagees or insurers or governmental guarantors of First Mortgages.

Notwithstanding the above, any First Mortgagee who receives a written request from the Board to approve a proposed amendment or amendments requiringconsent under this Section who does not deliver a negative response to the Board within 30 days of the receipt of the request shall be deemed to have approved the proposed amendment or amendments.

Mortgagee Approval of Other Actions

Section 10.07. Unless at least 67 percent of the First Mortgagees (based upon one vote for each First Mortgage owned), or 67 percent of the Lot Owners other than Declarant, have given their prior written approval, the Association shall not be entitled to:

(a) By act or omission, seek to abandon or terminate the Development;

(b) Change the pro rata interest or obligations of any individual Lot for either of the following purposes, unless the change is due to an annexation pursuant to Article XI of this Declaration:

(1) Levying assessments or charges, or allocating distributions of hazard insurance proceeds or condemnation awards; or

(2) Determining the pro rata share of ownership of each Lot in the Common Area and the improvements thereon.

(c) Partition or subdivide any Lot;

(d) By act or omission, seek to abandon, partition, subdivide, encumber, sell, or transfer the Common Area unless due to an annexation pursuant to Article XI of this Declaration (the granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Area shall not be deemed a transfer within the meaning of this clause);

(e) Use hazard insurance proceeds for losses to any Development property (whether to Lots or to the Common Area) for other than the repair, replacement, or reconstruction of that property, except as provided by statute in case of substantial loss to the Lots and/or Common Area of the Development.

Liens

Section 10.08. All taxes, assessments, and charges that may become liens prior to the First Mortgage under local law, shall relate only to the individual Lots and not to the Development as a whole.

Priority

Section 10.09. No provision of the Governing Instruments gives any Owner, or any other party, priority over any rights

of the First Mortgagee of the Lot pursuant to its Mortgage in the case of a distribution to the Lot Owner of insurance proceeds or condemnation awards for losses to, or a taking of, all or a portion of a Lot or Lots and/or the Common Area.

Reserve Fund

Section 10.10. Association assessments shall be large enough to provide for an adequate reserve fund for maintenance, repairs, and replacement of those common elements that must be replaced on a periodic basis. The reserve fund shall be funded by the regular assessments rather than by special assessments.

Management

Section 10.11. Any agreement for professional management of the Development shall not exceed three years and shall provide that either party may terminate the agreement, with or without cause and without the imposition of a termination fee, on 90 days written notice. The approval of holders of at least 75 percent of First Mortgages shall be obtained before the Association terminates a professional management agreement.

Right to Inspect Books and Records

Section 10.12. Institutional First Mortgagees, upon written request, shall have the right to (1) examine the books and records of the Association during normal business hours; and (2) require the submission of any financial data furnished to the Owners by the Association.

[*Include the following provision if any part of the common area is owned by the owners' association:*]

Payments by Mortgagees

Section 10.13. First Mortgagees may, jointly or severally, pay taxes or other charges that are in default and that may or have become a charge against the Common Area, and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage upon the lapse of a policy, for the Common Area, and First Mortgagees making these payments shall be entitled to immediate reimbursement from the Association.

[*Continue with the following:*]

Right to Furnish Mortgage Information

Section 10.14. Each Owner hereby authorizes the First Mortgagee of a First Mortgage on the Owner's Lot to furnish information to the Board concerning the status of the First Mortgage and the loan that it secures.

ARTICLE XI. ANNEXATION OF ADDITIONAL PROPERTY

Additions by Declarant

Section 11.01. Declarant shall have the right to add all or any portion of the real property described in Exhibit [*specify number of exhibit containing legal description of property to be annexed*] to the Development, pursuant to a plan ofphased development submitted to the California Real Estate Commissioner along with the application for the public report for the first phase of the Development, at any time before the third anniversary of the original issuance of the most recently issued final subdivision public report for the most recent phase of the Development. This election shall be made by the recordation of a supplemental declaration ("Supplemental Declaration"). The Supplemental Declaration shall describe the real property to be annexed, and shall state that the property described in it is being annexed to the Development pursuant to Article XI of this Declaration. The Supplemental Declaration may also set forth any additional covenants, conditions, restrictions, reservations, and easements that Declarant deems appropriate for that phase of development.

Other Additions

Section 11.02. In addition to real property annexed by the Declarant, real property may be annexed to the Development and brought within the general plan and scheme of this Declaration by the approval by vote or written consent of at least 67 percent of the total voting power of the Association [; provided, however, that no such annexation may take place after the _____ (*specify, e.g.*, seventh) anniversary of the recordation of this Declaration].

Rights and Obligations of Owners of Annexed Property

Section 11.03. Upon the recordation of the Supplemental Declaration, the real property described in it shall be part of the Development and subject to the provisions of this Declaration in the same manner as if it were originally covered by this Declaration. Thereafter, the rights, powers, and responsibilities of Owners of Lots within the annexed property shall be the same as if the annexed property were originally covered by this Declaration; provided, however, that their voting rights shall not commence until the date of commencement of the regular assessments for their Lots. The commencement of assessments on the annexed real property shall be governed by Section 4.07 of this Declaration.

Reciprocal Easements

Section 11.04. Declarant hereby reserves, for the benefit of and appurtenant to the Lots located in any phase of development annexed to the first phase of this Development and their respective Owners, reciprocal easements to use the Common Area (other than any buildings or Exclusive Use Common Areas) in the first phase pursuant to and in the manner set forth in this Declaration. Declarant hereby grants, for the benefit of and appurtenant to the Lots in the first phase of this Development and their Owners, a nonexclusive easement to use the Common Area (other than any buildings or Exclusive Use Common Areas) in each phase of development annexed to the first phase, pursuant to and in the manner set forth in this Declaration. These reciprocal easements shall be effective as to any annexed real property upon the first close of escrow for the sale of a Lot in the annexed property.

ARTICLE XII. AMENDMENTS

Amendment or Revocation Before Close of First Sale

Section 12.01. At any time before the close of the first sale of a Lot to a purchaser other than Declarant, Declarant and any Mortgagee of record may, by executing an appropriate instrument, amend or revoke this Declaration. [*Add in the*

case of a phased development: Further, before the close of the first sale of a Lot in any subsequent phase of the Project to a purchaser other than Declarant, the Declarant and any Mortgagee of record may, by following the above procedure, amend or revoke any Supplemental Declaration recorded pursuant to Article XI of this Declaration for that subsequent phase.] The executed instrument shall be acknowledged and recorded in the Office of the Recorder of _____ County.

Amendments by Owners After Close of First Sale

Section 12.02. At any time after the close of the first sale of a Lot to a purchaser other than Declarant, this Declaration may be amended by the vote or written consent of Owners representing not less than _____ percent of the voting power of each class of Owners of the Association. If only one class of membership exists at the time an amendment is proposed, then it must be approved by not less than _____ [*specify percentage, which must be at least 51 percent but not more than 75 percent*] percent of the voting power of the Association, which shall include at least a majority of the votes residing in Owners other than Declarant. Notwithstanding any contrary provision in this Section, the percentage of the voting power necessary to amend a specific clause or provision of this Declaration shall not be less than the percentage of affirmative votes prescribed for action to be taken under that clause or provision.

An amendment becomes effective after (1) the approval of the required percentage of Owners has been given, (2) that fact has been certified in a writing executed and acknowledged by _____[an officer designated by the Association for that purpose or, if no such designation is made, by the President of the Association *or set forth name and title of officer here*], and (3) that writing has been recorded in _____[the county in which this Development is located *or* both (*or* each) counties (*or* county) in which a portion of this Development is located].

Amendments Pursuant to Court Order

Section 12.03. If this Declaration requires a proposed amendment to be approved by the affirmative vote of a specified percentage (exceeding 50 percent) of the votes in the Association or of Owners having a specified percentage (exceeding 50 percent) of the votes in more than one class (a "supermajority"), and more than 50 percent but less than the required supermajority of the votesapprove the amendment, the Association or any Owner may petition the _____[Superior Court of _____ (*name of sole county in which development is located*) *or* superior court of both (*or* any) of the counties in which the Development is located], subject to the requirements, limitations, and exceptions set forth in *Civil Code Section 1356*, for an order reducing the percentage of the affirmative votes necessary for the amendment or approving the amendment. If such an order is issued, the amendment shall be acknowledged by _____ [any person designated by the Association for that purpose or, if no such designation is made, by the President of the Association *or specify other person*], and that person shall have the amendment and the court order recorded in _____[*name of sole county in which development is located or* both (*or* every) counties (*or* county) in which the Development is located]. Upon recordation, the amended provision or provisions of this Declaration shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by this Declaration and the other governing documents. Within a reasonable time after recordation, the Association shall mail a copy of the amendment and a statement regarding the amendment to each Owner.

Deletion of Construction or Marketing Provisions

Section 12.04. Notwithstanding any other provision of this Declaration, the Board may, under the circumstances described in this Section, adopt an amendment deleting from this Declaration any provision that was unequivocally designed and intended, or that by its nature could only have been designed or intended, to facilitate Declarant in

completing the construction or marketing of the Development. To be subject to this amendment procedure, the provision must provide for access by Declarant over or across the Common Area for the purposes of (1) completion of construction of the Development and (2) the erection, construction, or maintenance of structures or other facilities designed to facilitate the completion of construction or marketing of Lots or improvements on them. Such an amendment may be adopted only after Declarant has completed construction of the Development, has terminated construction activities, and has terminated _____[his *or* her *or* its] marketing activities for the sale [*or other authorized disposition of units*] of the Lots. [*Add if applicable:* In the case of a provision relating to a particular construction or marketing phase of the Development, the provision may not be deleted until that construction or marketing phase has been completed.] At least 30 days prior to taking action to adopt such an amendment, the Board must mail to all Owners, by first-class mail, the following: a copy of the proposed amendment; and a notice of the time, date, and place of the meeting at which the Board will consider adoption of the amendment. All deliberations of the Board on the proposed amendment must be conducted at that meeting. The meeting must be open to all Owners, and the Owners must be given an opportunity at the meeting to comment on the proposed amendment. The Board may not adopt the amendment unless (1) a quorum is present at the meeting, (2) the meeting is conducted in accordance with certain provisions (identified in *Civil Code Section 1355.5*) of the Nonprofit Mutual Benefit Corporation Law, and (3) Owners casting a majority of the votes at the meeting approve the amendment. For these purposes, "quorum" means more than 50 percent of the Owners who own no more than two Lots in the Development.

Prior Approval of Commissioner

Section 12.05. When required under *Business and Professions Code Section 11018.7*, the written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to this Declaration to the vote of the Owners.

ARTICLE XIII. GENERAL PROVISIONS

Term

Section 13.01. The provisions of this Declaration shall continue in effect for a term of _____ years from the date of execution. Thereafter, it shall be automatically extended for successive periods of _____ years, until the membership of the Association decides to terminate it.

Nonwaiver of Remedies

Section 13.02. Each remedy provided for in this Declaration is separate, distinct, and nonexclusive. Failure to exercise a particular remedy shall not be construed as a waiver of the remedy.

Attorneys' Fees

Section 13.03. In any action to enforce this Declaration, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs.

Severability

Section 13.04. The provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity or unenforceability of any one provision shall not affect the validity or enforceability of any other provision.

Binding

Section 13.05. This Declaration, as well as any amendment to it and any valid action or directive made pursuant to it, shall be binding on the Declarant and the Owners and their heirs, grantees, tenants, successors, and assigns.

Interpretation

Section 13.06. The provisions of this Declaration shall be liberally construed and interpreted to effectuate its purpose of creating a uniform plan for the development and operation of a planned development. Failure to enforce anyprovision of this Declaration shall not constitute a waiver of the right to enforce that provision or any other provision of this Declaration.

Limitation of Liability

Section 13.07. The liability of any Owner for performance of any of the provisions of this Declaration shall terminate upon sale, transfer, assignment, or other divestment of the Owner's entire interest in his or her Lot with respect to obligations arising from and after the date of the divestment.

Fair Housing

Section 13.08. Neither Declarant nor any Owner shall, either directly or indirectly, forbid the conveyance, encumbrance, renting, leasing, or occupancy of the Owner's Lot to any person on the basis of race, color, sex, religion, ancestry, or national origin.

Number and Headings

Section 13.09. As used in this Declaration, the singular shall include the plural, unless the context requires the contrary. The headings are not a part of this Declaration, and shall not affect the interpretation of any provision.

Executed on _____[*date*] at _____[*city*], _____ [*county*], California.

DECLARANT

[*If declarant is an individual:*]

_____ [*signature of declarant*]
[*typed name*]

[*OR*]

[*If declarant is an entity:*]

_____ [*name of declarant*]
A California _____ [Corporation *or* General partnership *or* Limited partnership]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

)
State of California)
County of _____)
)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawPurchase & SaleGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33D PLANNED DEVELOPMENTS
PART IV. FORMS

16-33D California Legal Forms--Transaction Guide § 33D.201

§ 33D.201 Articles of Incorporation for Planned Development

[1] Comment

[a] Use of Form

This form consists of articles of incorporation for the owners' association of a planned development that will be organized as a nonprofit mutual benefit corporation under the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7110 et seq.*]. Most owners' associations are incorporated under that law [*see § 33D.11[4]*].

In addition to containing provisions required by the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code §§ 7130, 7132*], this form contains an amendment provision [*see* § 330.201[2], Art. V] that complies with the implementing regulations of the Subdivided Lands Act [*see 10 Cal. Code Reg. §§ 2792.8(a)(18), 2792.24(b)(1)(A)*; *see also Corp. Code § 7132(c)(5)*]. For discussion of these provisions, and the applicable execution and filing requirements [*see Corp. Code § 7120*], see *Ch. 34, Condominiums, § 34.204[1]*. For a detailed discussion of the articles of incorporation of nonprofit mutual benefit corporations in general, see *Ch. 13, Nonprofit Corporations, § 13.210*.

In addition to the requirements of the Nonprofit Mutual Benefit Corporation Law, the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] requires the articles of incorporation of any common interest development association filed with the Secretary of State on or after January 1, 1995, to include an additional statement that: (1) identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act; (2) gives the business or corporate office of the association, if any; and, if the office is not on the development site, states the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the development; and (3) gives the name and address of the association's managing agent, if any [*Civ. Code § 1363.5(a)*; *see Bus. & Prof. Code § 11502*].

If the owners' association will be an unincorporated (nonprofit) association, the attorney should draft articles of association instead [*see Ch. 13A, Nonprofit Unincorporated Associations, § 13A.200*].

[b] Incorporation of Unincorporated Association

If the owners' association is an unincorporated association that is changing to corporate status, the articles must state that an existing unincorporated association, identified by name, is being incorporated by the filing of the articles [*Corp. Code § 7121(b)*]. For provisions satisfying that requirement, see *Ch. 13, Nonprofit Corporations, § 13.242*. For further discussion, see *Ch. 34, Condominiums, § 34.204[1][c][ii]*.

[2] FORM

Articles of Incorporation for Planned Development

ARTICLES OF INCORPORATION
OF
_____ [*name of corporation*]

I. NAME

The name of the corporation is _____[*name*] Owners' Association.

II. PURPOSE

This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity, other than credit union business, for which a corporation may be organized under such law. [*If desired, insert further description of corporation's purposes, e.g.:* This corporation is formed for the following additional purposes:

(1) To provide an owners' association for the management, maintenance, preservation, and architectural control of the planned development known as _____ ("Development"), located in the City of _____, County of _____, State of California.

(2) To promote the health, safety, and welfare of the residents of the Development.

(3) To exercise all of the powers and privileges and to perform all of the duties and obligations of the corporation as set forth in the Declaration for the Development recorded or to be recorded in the Office of the Recorder of _____ County, California ("Declaration"), as the Declaration may be amended from time to time.]

III. SPECIFIC PURPOSE; CORPORATE OFFICE; MANAGING AGENT

This corporation is an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act. The Association's business and corporate office is located at _____[*specify address and, if office is not at development site, also include nine-digit ZIP code, front street, and nearest cross street for development's physical location*]. The Association's managing agent is _____[*specify agent's name*], whose address is _____[*specify agent's address*].

IV. INITIAL AGENT FOR SERVICE OF PROCESS

The corporation's initial agent for service of process in the State of California is _____[*name*] [*add if*

agent is a natural person:, whose _____ (business *or* residence) address is _____].

V. AMENDMENTS

The classes of membership and the voting rights of Members shall be as stated in the Declaration. So long as a two-class voting system is in effect, any amendment of these Articles shall require the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, and (2) Members representing _____ [*specify percentage not below 51 percent*] of _____ [the voting power of each class of Members *or* a quorum of Members of each class]. After conversion of the Class B Membership to Class A Membership, these Articles may be amended by the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, (2) a bare majority [*or specify higher percentage*] of the voting power of the Members, and (3) a bare majority [*or specify higher percentage*] of the voting power of the Members other than the developer of the Development.

The undersigned, who is the Incorporator of this corporation, has executed these Articles of Incorporation on _____[*date*].

_____ [*signature*]
[*typed name*], Incorporator

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

)
State of California)
County of _____)
)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____[he *or* she *or* they] executed the same in _____[his *or* her *or* their] authorized _____[capacity *or* capacities], and that by _____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 33D PLANNED DEVELOPMENTS
PART IV. FORMS

16-33D California Legal Forms--Transaction Guide § 33D.202

§ 33D.202 Bylaws for Planned Development

[1] Comment

[a] Use of Form

This form is a set of bylaws for the owners' association of a planned development. Its provisions govern the internal operation of the association, the functions and composition of its board of directors, and numerous aspects of the development itself. For provisions describing the property rights in the development and the membership and voting rights of members of the association, see the declaration set forth in *§ 33D.200*. Although most corporations include membership and voting rights provisions in their bylaws, owners' associations for planned developments and other common interest developments usually place those provisions in their declaration instead. This form and the declaration set forth in *§ 33D.200* follow that practice.

This form is compatible with the forms in *§ 33D.200[2]* (declaration) and § 33D.201[2] (articles). Consequently, the numerous cross-references in this form to particular declaration provisions are keyed to § 33D.200.

[b] Contents of Bylaws

[i] Real Estate Commissioner's Regulations

Numerous regulatory requirements promulgated by the Real Estate Commissioner must be incorporated into the bylaws, articles, or declaration of an owners' association for a planned development [*see 10 Cal. Code Reg. §§ 2792.4, 2792.8, 2792.15-2792.29*]. Most of these requirements are embodied in the declaration set forth as § 33D.200 [*see § 33D.200[1][c][ii]*]. However, this form reflects the regulations governing the following matters [*10 Cal. Code Reg. § 2792.8*]:

(1) Regular (annual) and special meetings of association members [*see 10 Cal. Code Reg. § 2792.17*; § 33D.202[2], Sections 2.01-2.04, 2.08, 2.10].

(2) Procedures for the election and removal of directors and officers of the association [*see 10 Cal. Code Reg. § 2792.19*

; § 33D.202[2], Sections 3.02-3.07, 5.02-5.03].

(3) Regular meetings of the board of directors [*see 10 Cal. Code Reg. § 2792.20*; § 33D.202[2], Sections 4.01, 4.02, 4.04, 4.05, 4.07].

(4) Enumeration of the powers and duties of the directors and officers and of the limitations upon the authority of the board to act without the prior approval of members representing a majority of the voting power of the association [*see 10 Cal. Code Reg. § 2792.21*; § 33D.202[2], Section 3.09, 3.10, Art. VI-X].

(5) Quorum requirements for meetings of members and of the board of directors [*see 10 Cal. Code Reg. § 2792.17*; *see also § 33D.202[2]*, Section 2.08].

(6) Procedures for proxy voting at members' meetings [*see 10 Cal. Code Reg. § 2792.8(a)(16)*; § 33D.202[2], Section 2.09].

(7) Amendment of bylaws [*see 10 Cal. Code Reg. § 2792.24*; § 33D.202[2], Section 13.01].

Because this form basically tracks the regulations exactly, the attorney should not vary its provisions without consulting the relevant regulations to determine whether or not they permit the desired change. For further discussion of these regulations, see *Ch. 34, Condominiums, § 34.206[1]* (bylaws for a condominium project).

[ii] Nonprofit Mutual Benefit Corporation Law

The articles of incorporation and bylaws for an owners' association that is organized as a nonprofit mutual benefit corporation must also comply with the requirements of the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7110 et seq.*]. Under that law, the bylaws (or articles) must state either: (1) the number of directors of the corporation; (2) the method for determining the number of directors; or (3) that the number of directors will be not less than a stated minimum or more than a stated maximum, with the exact number to be fixed by approval of the board or members [*Corp. Code § 7151(a)*; *see § 33D.202[2], Section 3.01*]. In any event, the number or minimum number of directors may be one or more [*Corp. Code § 7151(a)*; *see Corp. Code § 7151(b)*; *see also* Ch. 13, *Nonprofit Corporations*].

The bylaws may include provisions governing the management of the activities and the conduct of the affairs of the corporation, provided that the provisions do not conflict with the law or the articles [*see Corp. Code § 7151(c)*]. For the statutory list of potential optional provisions, see *Ch. 13, Nonprofit Corporations, § 13.131*, P 3. When they are included in the bylaws, they must conform to the requirements of the Nonprofit Mutual Benefit Corporation Law. For a complete discussion of the requirements applicable to the optional provisions, see *§ 13.212* in Ch. 13. The following is a list of the optional provisions incorporated into this form [*see Corp. Code § 7151(c)*]:

(1) Meetings of members [*Corp. Code §§ 7510-7514, 7611, 7613*; § 33D.202[2], Art. II; *see 10 Cal. Code Reg. § 2792.17*].

(2) Election, term, and removal of board of directors [*Corp. Code §§ 7220-7224, 7520, 7521, 7615*; § 33d.202[2], Art. III; *see 10 Cal. Code Reg. § 2792.19*].

(3) Meetings of directors [*Corp. Code § 7211*; § 33D.202[2], Art. IVm; *see 10 Cal. Code Reg. § 2792.20*].

(4) Selection of officers of association [*Corp. Code § 7213*; § 33D.202[2], Art. V].

(5) Maintaining and inspecting project records [*Corp. Code §§ 7160, 8320, 8330-8334*; § 33D.202[2], Art. XI; *see 10 Cal. Code Reg. § 2792.23(c)-(e)*].

Some of the foregoing provisions are subject to mandatory regulatory requirements imposed by the Real Estate Commissioner [*see § 33D.202[1][b]*]. Fortunately, there are no conflicts between the Commissioner's regulations and the Nonprofit Mutual Benefit Corporation Law. Indeed, many of the Commissioner's regulations either expressly incorporate the requirements of that law [*see, e.g., 10 Cal. Code Reg. § 2792.19(b)(1)* (cumulative voting requirements); *Corp. Code § 7615*; *see also § 33D.200[2]*, Section 3.04(e)] or adopt requirements that are quite similar to their statutory counterparts [*see, e.g., 10 Cal. Code Reg. § 2792.23* (inspection of books and records); *Corp. Code §§ 7160, 8320, 8330-8334*; see also *§ 33D.202[2]*, Art. XI]. The applicable regulations have been included in the above list.

[c] Filing

A copy of the bylaws must be filed with the Real Estate Commissioner as part of an application for a final public report [*10 Cal. Code Reg. § 2792.1(a)(2)*].

[2] FORM

Bylaws for Planned Development

BYLAWS OF _____ [*name of association*]

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BYLAWS OF
_____ [*name of association*],
A California Nonprofit Mutual
Benefit Corporation

ARTICLE I. PLAN OF OWNERSHIP

Name

Section 1.01. The name of the corporation is _____ Owners' Association ("Association").

Principal Office

Section 1.02. The principal office of the Association is located at _____[*street address*], _____[*city*], California. The Board of Directors is hereby granted full power and authority to change the principal office of the Association from one location to another in [the County of _____,] California. Any such change shall be noted by the Secretary in these Bylaws, but shall not be considered an amendment of these Bylaws.

Application

Section 1.03. These Bylaws are applicable to the residential planned development known as _____ ("Development"), located at _____[*address and city*] in _____ County, California. These Bylaws are also applicable to all Members of the Association and all tenants, employees, and other persons who use the facilities of the Development in any manner.

Definitions

Section 1.04. Unless otherwise specified in these Bylaws, the definitions set forth in Article I of the Declaration for _____[*name of development*] ("Declaration") recorded or to be recorded in the Office of the Recorder of _____ County, California, apply to these Bylaws.

Membership Rights

Section 1.05. The qualification for membership provisions of Section 3.02 of the Declaration are hereby incorporated by reference.

ARTICLE II. MEETINGS OF MEMBERS

Place of Meetings

Section 2.01. All meetings of the Members shall be held at a place designated by the Board. This meeting place shall be within the Development or as close to it as possible. If no meeting place is designated, the meetings shall be held at the principal office of the Association. No meeting of the Members shall, unless unusual conditions exist, be held outside of _____ [*specify county in which development is located*] County, California.

Annual Meetings

Section 2.02. The first meeting of the Members of the Association shall be held within _____ [*select the appropriate provision below*]

[*if public report authorizes sale of at least 50 lots in development (see 10 Cal. Code Reg. § 2792.17(a)), use:*] 45 days after the close of escrow for the sale of the Lot that represents the fifty-first percentile interest authorized for sale under the first final subdivision public report issued for the Development by the California Real Estate Commissioner, or within six months after the closing of the sale of the first Lot within the Development, whichever is earlier.

[*OR*]

[*if public report authorizes sale of fewer than 50 lots in development, use:*] six months after the closing of the sale of the first Lot within the Development.

[*Continue with the following:*]

Thereafter, the annual meeting of the Members shall be held on _____ [*specify day of week, e.g.*, the second Tuesday] of _____ [*month*] of each succeeding calendar year at the hour of _____ P.M. If the day for the annual meeting of the Members is a legal holiday, the meeting shall be held at the same hour on the next day that is not a Saturday, Sunday, or legal holiday.

Special Meetings

Section 2.03. Special meetings of the Members may be called for any lawful purpose by a majority of a quorum of the Board, the President of the Association, or by a written request signed by Members representing at least 5 percent of the total voting power of the Association. The special meeting shall be held not less than 35 nor more than 90 days after adoption of the resolution or receipt of the request. Only that business stated in the notice of meeting given pursuant to Section 2.04 of these Bylaws shall be transacted at the special meeting.

Notice of Meetings

Section 2.04. The Secretary of the Association shall give written notice of anyMembers' meeting to each Member of record. Except as provided below, the notice shall be given at least 10 but not more than 90 days before the meeting, by first class [*or* registered *or* certified] mail or by personal delivery. If a special meeting is called by Members pursuant to Section 2.03 of these Bylaws, the notice shall be given within 20 days after receipt of the request for the meeting. If that 20-day requirement is not satisfied, the Members who called the meeting may give the notice. Any notice of meeting shall be addressed to the Member at the address appearing on the books of the Association, or the address supplied by the Member to the Association for this purpose. If there is no such address, notice shall be given at the principal office of the Association or by publication at least once in a newspaper of general circulation in the county in which the principal office is located. The notice shall state the place, date, and time of the meeting. The notice shall also specify those matters the Board intends to present for action by the Members. In the case of a special meeting, the only matters that may be voted on are those matters that were mentioned in the notice of meeting. In the case of an annual meeting, any proper matter may be presented at the meeting for action [*add if bylaws authorize a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):*, except as provided in Section 2.08 of these Bylaws.] If Directors are to be elected at the meeting, the notice shall include the names of all those who are nominees at the time the notice is given.

Waiver of Notice or Consent of Absentees

Section 2.05. The transactions of any meeting of Members, however called and noticed, shall be as valid as though taken at a duly called, noticed, and held meeting, if: (1) a quorum is present either in person or by proxy; and (2) either before or after the meeting, each of the Members not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the Minutes of the meeting. Any such waiver, consent, or approval shall be filed with the corporate records or made a part of the Minutes of the Meeting.

Voting Rights

Section 2.06. The voting of membership provision set forth inSection 3.04of the Declaration is hereby incorporated by reference.

Record Date of Membership

Section 2.07. The Board shall fix, in advance, a record date or dates for the purpose of determining the Members entitled to notice of and to vote at any meeting of Members. The record date for notice of a meeting shall not be more than 90 nor less than 10 days before the date of the meeting. The record date for voting shall not be more than 60 days before the date of the meeting or before the date on which the first written ballot is mailed or solicited. The Board may also fix, in advance, a record date for the purpose of determining the Members entitled to exercise any rights in

connection with any other action. Any such date shall not be more than 60 days prior to the action.

Quorum

Section 2.08. At any meeting, the presence either in person or by proxy of Members entitled to cast at least 51 percent [*or specify other percentage which must be at least 25 percent and not more than 66 2/3 percent of the total voting power of the Association*] of the total voting power of the Association shall constitute a quorum for any action except as otherwise provided in the Articles, Bylaws, or this Declaration. The Members present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough Members to leave less than a quorum, if the action taken, other than adjournment, is approved by at least a majority of members required to constitute a quorum. [*Add if this provision authorizes a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):* Notwithstanding the above, whenever the quorum present at an annual meeting of Members consists of less than one third of the voting power of the Association (present in person or by proxy), then the only matters that may be voted on are those matters that were mentioned in the notice of meeting given pursuant to Section 2.04 of these Bylaws.] If a quorum is not present at any time at a duly called meeting, a majority of those Members present in person or by proxy may adjourn the meeting to a time not less than five days nor more than 30 days from the meeting date, but no other business may be transacted. An adjourned meeting may be held without written notice, provided that notice is given by announcement at the original meeting. If no such announcement is made, or if the selected date is changed after adjournment, notice of the time and place shall be given to Members in the manner provided in Section 2.04 of these Bylaws. The quorum for the adjourned meeting shall be _____ percent.

Parliamentary Procedure

Section 2.09. All meetings of the Members shall be conducted in accordance with (1) a recognized system of parliamentary procedure, or (2) any parliamentary procedures adopted by the Association.

Proxies

Section 2.10. At any meeting of Members, each Member may vote in person or by proxy. All proxies shall be in writing and filed with the Secretary of the Association. Every proxy shall be revocable and shall automatically cease upon conveyance by the Member of his or her Lot, or upon receipt of notice by the Secretary of the death or judicially declared incompetence of the Member. No proxy shall be valid after 11 months from the date of its execution unless otherwise specifically provided in the proxy. The maximum term of any proxy shall be three years from the date of its execution.

Action Taken Without a Meeting

Section 2.11. Any action that may be taken at a meeting of the Members, except for the election of Directors, may be taken without a meeting provided the following ballot requirements are satisfied:

(a) The Corporation shall distribute a written ballot to every member entitled to vote on the matter. The ballot shall be solicited in the same manner as provided in Section 2.04 of these Bylaws for the giving of notice of meetings of Members. If the Association has 100 or more Members and the ballots are distributed to 10 or more Members, the ballot shall comply with the additional requirements set forth in *Section 7514 of the California Corporations Code*.

(b) The ballot shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any

proposal, provide a reasonable time within which to return the ballot, indicate the number of responses needed to meet the quorum requirement, and state the percentage of approvals necessary to pass the measure submitted.

(c) The proposed action shall be considered approved if:

(1) The number of votes cast by ballot within the specified time period equals or exceeds the quorum required to be present at a meeting authorizing the action; and

(2) The number of approvals equals or exceeds the number of votes that would be required for approval at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) No written ballot shall be revoked.

Approval by Members Required by Statute

Section 2.12. Any approval by the Members of the following proposals, other than unanimous approval by those entitled to vote, shall be valid only if the general nature of the approved proposal was stated in the notice of meeting or any waiver of notice of meeting:

(a) Removing a director without cause pursuant to *Section 7222 of the California Corporations Code*;

(b) Filling vacancies on the Board pursuant to *Section 7224 of the California Corporations Code*;

(c) Entering into or approving a contract or transaction between the Association and one or more of the Directors, or between the Association and any entity in which one or more of the Directors has a material financial interest, pursuant to *Section 7233 of the California Corporations Code*;

(d) Amending the Articles pursuant to *Section 7812 of the California Corporations Code*;

(e) Electing to dissolve the Association pursuant to *Section 8610 of the California Corporations Code*; or

(f) Approving a plan of distribution in connection with the dissolution of the Association pursuant to *Section 8719 of the California Corporations Code.*

ARTICLE III. BOARD OF DIRECTORS

Number

Section 3.01. The affairs of this Association shall be managed and its duties and obligations performed by an elected Board of Directors, consisting of _____ [*insert number*] persons [*add if desired:* who shall be Members of the Association].

Nomination

Section 3.02. Nominations for election to the Board of Directors may be made by any of the following:

(a) A nominating committee appointed by the Board at least 90 days prior to an annual meeting of Members, provided the Board receives the committee's nomination or nominations at least 30 days prior to the annual meeting of Members.

(b) A written petition signed within 11 months preceding the annual meeting by Members representing _____ percent of the "voting power" of the Association as that term is defined in the Nonprofit Mutual Benefit Corporation Law of the State of California. The petition shall identify the nominee, contain that person's written consent to serve as a Director, and be delivered to the Secretary of the Association at least 30 days prior to the annual meeting. [*Add if potentially applicable:* If the Association has more than 500 members, then the additional petition requirements set forth in *Section 7521 of the California Corporations Code* shall be satisfied.]

(c) Any Member who is present in person, or by the proxy of any Member who is present by proxy, at the annual meeting of Members at which the Director is to be elected.

Election

Section 3.03. Voting for Directors shall be by secret written ballot. At the first annual meeting of the Association, the Members shall fill, by election, all positions on the Board of Directors. Subsequent elections shall also be held at the annual meetings. However, if an annual meeting is not held or does not include an election, the election may be held at a special meeting of members called for that purpose. At an election the Members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions ofthese Bylaws. Each Member entitled to vote on the election may cumulate his or her votes and give one candidate a number of votes equal to the number of Directors to be elected multiplied by the number of votes to which the Member is entitled, or distribute the Member's votes on the same principle among as many candidates as the Member thinks fit. No Member shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination prior to voting and a Member has given notice at the meeting prior to the voting of the Member's intention to cumulate votes. If any one Member has given this notice, all Members may cumulate their votes for candidates in nomination. The persons receiving the highest number of votes shall be elected.

Special Election Procedure

Section 3.04. Notwithstanding any other provision of these Bylaws, for so long as a majority of the voting power of the Association resides in Declarant, or so long as there are two classes of membership in the Association, at least _____ [*specify number, which must equal at least 20 percent of total number of directors; e.g.,* one *in the case of five directors (see 10 Cal. Code Reg. § 2792.19(c)(1))*] Director(s) shall have been elected solely by the votes of Members other than Declarant. If, at any election, Members other than Declarant do not have a sufficient percentage of the voting power to satisfy that requirement, _____ [the one position on the Board *or* the number of positions on the Board necessary to satisfy that requirement] shall be filled by the candidate(s) who receive(s) the highest number of votes cast by Members other than Declarant. Any remaining positions on the Board shall be filled in accordance with normal voting procedures.

Term

Section 3.05. Each Director shall hold office until the election of his or her successor or until the Director's death, removal, or judicial adjudication of mental incompetence.
_____ [*Provide for either concurrent or staggered terms, e.g.:*

[*If terms are to run concurrently*: The term of office of each Director shall be _____ (*specify number*

not exceeding four) year(s).]

[*If terms are to be staggered*: The term of office of the _____ (*e.g.*, three) Directors receiving the highest number of votes at the first annual meeting shall be _____ years and the term of office of the remaining Directors shall be _____ years.]

[*Continue with the following:*]

Thereafter, at each annual meeting, any vacancies on the Board created by death, resignation, removal, judicial adjudication of mental incompetence, or expiration of term shall be filled. The term of office of each Director elected to fill a vacancy created by the expiration of the term of office of the preceding Director shall be the same length as his or her predecessor's term. The term of office of any Director elected or appointed to fill a vacancy created by any event other than the expiration of the predecessor Director's term shall be the balance of the unserved term of the predecessor. Any person serving as a Director may be re-elected, and there shall be no limitation on the number of terms a Director may serve.

Removal of Directors

Section 3.06. Directors may be removed as follows:

(a) The Board may declare vacant the office of a Director on the occurrence of any of the following events:

(1) The Director has been declared of unsound mind by a final order of court;

(2) The Director has been convicted of a felony;

[*Add if association holds assets in charitable trust:*]

(3) The Director has been found by a final order or judgment of any court to have breached duties imposed by *Corporations Code Section 7238* on directors who perform functions with respect to assets held in charitable trust; or

[*Add if minimum attendance will be required:*]

(4) The Director has failed to attend _____ [*number*] meetings of the Board.

[*Continue with the following:*]

(b) One or more Directors may be removed prior to the expiration of their terms, without cause, at an annual or special meeting of the Members. Any removal without cause shall be approved (1) by a majority of the total voting power of the Association for so long as the Development consists of fewer than 50 Lots, and (2) by the vote of Members representing a majority of a quorum of Members if the Development consists of 50 or more Lots. Notwithstanding the foregoing, unless the entire Board is removed from office by the vote of the Members, an individual Director shall not

be removed prior to the expiration of his or her term of office if the number of votes cast against the removal, or not consenting in writing to the removal, would be sufficient to elect the Director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of Directors authorized at the time of the Director's most recent election were then being elected. A Director who has beenelected to office solely by the votes of Members other than Declarant as required by Section 3.04 of these Bylaws, may be removed from office prior to the expiration of his or her term of office only by the vote of at least 51 percent of the voting power of Members other than Declarant. If a Director is removed at a meeting, a new Director may be elected at the same meeting.

Vacancies

Section 3.07. Any vacancy on the Board caused by the death or resignation of a Director shall be filled by the remaining Directors. The successor shall serve for the unexpired term of his or her predecessor. The Board shall not fill a vacancy on the Board created by the removal of a Director, except with the vote or written assent of a majority of each class of Members.

Compensation

Section 3.08. A Director shall not receive any compensation for any service he or she may render to the Association; provided, however, that a Director may be reimbursed for actual out-of-pocket expenses incurred by the Director in the performance of his or her duties.

Powers and Duties

Section 3.09. The Board's powers and duties shall include, but shall not be limited to, the following:

(a) Enforcement of the applicable provisions of this Declaration, the Articles, Bylaws, and any other instruments governing the ownership, management, and control of the Development.

(b) Payment of taxes and assessments that are, or could become, a lien on all or a portion of the Common Area.

(c) Contracting for casualty, liability, and other insurance on behalf of the Association.

(d) Contracting for goods and services for the Common Area, facilities, and interests of the Association, subject to the limitations *set forth in Section 3.10*(a) of these Bylaws.

(e) Delegation of its powers to any committees, Officers, or employees of the Association expressly authorized by the Governing Instruments.

(f) Preparation of budgets and financial statements for the Association as prescribed in the Governing Instruments.

(g) Formulating Rules and Regulations for the use and operation of the Common Area and facilities owned or controlled by the Association.

(h) Initiating and executing of disciplinary proceedings against Members for violations of provisions of the Governing Instruments in accordance with procedures set forth in the Governing Instruments.

(i) Entering any Lot or improvement on a Lot to perform necessary construction, maintenance, or emergency repair work for the benefit of the Common Area or the Members in the aggregate.

(j) Electing the Officers of the Association.

(k) Filling vacancies on the Board of Directors, except for a vacancy created by the removal of a Director.

(l) Reviewing the following on at least a quarterly basis:

(1) A current reconciliation of the operating accounts of the Association.

(2) A current reconciliation of the reserve accounts of the Association.

(3) The actual reserve revenues and expenses for the current year compared with the budget for the current year.

(4) The most current account statements prepared by the financial institution where the Association has its operating and reserve accounts.

(5) An income and expense statement for the operating and reserve accounts of the Association.

(m) Withdrawing moneys from the Association's reserve accounts.

(n) Causing studies of the reserve account requirements of the Development to be conducted, when necessary, and reviewing those studies in accordance with *Civil Code Section 1365.5(e)*.

(o) Performing any act reasonably necessary to resolve any dispute involving the Declaration or any other governing documents, such as Articles, Bylaws, or Operating Rules, which govern the operation of the Project or the Association, the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*) by the Association's dispute resolution procedure required by *Civil Code Sections 1363.810 through 1363.850* as manifested in Section 3.10 of the Declaration, and the alternative dispute resolution procedure prescribed by *Civil Code Sections 1369.510 through 1369.590* as a prerequisite to any party filing a civil enforcement action.

(p) The authorization detailed in (o) does not require the Board to do any of the following:

(1) As a prerequisite to initiating any civil action, to conduct inspections, maintain inspection records, exhaust applicable casualty insurance coverage maintained by the Association, provide an opportunity to cure,meet with members, or obtain the consent of the members.

(2) Except in compliance with *Civil Code Sections 1369.510 through 1369.590,* to submit civil claims of any kind to binding or non-binding alternative dispute resolution procedures.

Limitations on Powers

Section 3.10. Notwithstanding the provisions of Section 3.09, the Board shall be prohibited from taking any of the following actions, except with the vote or written assent of a majority of each class of Members, or when Class B membership no longer exists, with the approval of a majority of the total voting power of the Association as well as the approval of a majority of the total voting power residing in Members other than Declarant:

(a) Entering into a contract with a third person under which the third person will furnish goods or services for the Common Area or the Association for a term longer than one year, with the following exceptions:

(1) A management contract approved by the Federal Housing Administration or Veterans Administration;

(2) A contract with a public utility if the rates charged are regulated by the Public Utilities Commission, provided that the term shall not exceed the shortest term for which the utility will contract at the regulated rate;

(3) Prepaid casualty and/or liability insurance of not more than three years duration, provided that the policy provides for short-rate cancellation by the insured;

(4) Lease agreements for laundry room fixtures and equipment of not more than five years duration, provided that the lessor under the agreement is not an entity in which the Declarant has a direct or indirect ownership interest of 10 percent or more;

(5) Agreements for cable television services and equipment or satellite dish television services and equipment of not to exceed five years duration, provided that the supplier is not an entity in which the Declarant has a direct or indirect ownership interest of 10 percent or more; and

(6) Agreements for the sale or lease of burglar alarm and fire alarm equipment, installation, and services for a term of up to five years, provided that the supplier or suppliers are not entities in which the Declarant has a direct or indirect ownership interest of 10 percent or more.

(b) Incurring aggregate expenditures for capital improvements to the Common Area in any fiscal year in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(c) Selling during any fiscal year property of the Association having an aggregate fair market value in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(d) Paying compensation to Directors or to Officers of the Association for services rendered in the conduct of the Association's business; provided, however, that the Board may reimburse a Director or Officer for expenses incurred in carrying on the business of the Association.

(e) Filling a vacancy on the Board of Directors created by the removal of a Director.

ARTICLE IV. MEETINGS OF DIRECTORS

Regular Meetings

Section 4.01. Regular meetings of the Board of Directors shall be held monthly [*or* quarterly *or other period not more infrequent than semiannually*] at a time and place within the Development fixed by resolution of the Board. Notice of the time and place of the meeting shall be communicated to the Directors not less than four days before the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. Notice of the time and place of the meeting shall also be posted in a prominent place or places within the Common Area. However, if the Common Area is unsuitable for such a posting, the Board shall

communicate the notice of the time and place by any means it deems appropriate.

Special Meetings

Section 4.02. Special meetings of the Board shall be held when called by written notice signed by the President of the Association or by any two Directors other than the President. The notice shall specify the time and place of the meeting and the nature of any special business to be considered. Notice of any special meeting must be given to each Director not less than [*specify number not less than three*] days or more than [*e.g.*, 15] days before the date fixed for the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. A copy of the notice shall also be posted in a prominent place or places in the Common Area of the Development.

Emergency Meetings

Section 4.03. Emergency meetings of the Board of Directors may be called by the President of the Association, or by any two members of the Board other than the President, if there are circumstances that could not have been reasonably foreseen that require immediate attention and possible action by the Board, and that of necessity make it impracticable to provide notice as otherwise required for meetings of the Board.

Quorum

Section 4.04. A majority of the Board shall constitute a quorum and, if a quorum is present, the decision of a majority of the Directors present shall be the act of the Board.

Open Meetings

Section 4.05. Regular and special meetings of the Board shall be open to all Members of the Association. The Board must permit any Member to speak at any of the Board's meetings, except for meetings held in executive session. To this end, the Board must establish a reasonable time to allow Members to speak to the Board at its meetings.

Notice of regular and special meetings of the Board must be given to Members at least four days before the meeting. Notice may be given by posting in a prominent place or places within the Common Area, by mail or delivery to each Unit, or by Association newsletter.

Executive Session

Section 4.06. The Board may, with the approval of a majority of the Directors present at a meeting at which a quorum for the transaction of business has been established, adjourn a meeting and reconvene in executive session to discuss and vote upon (1) litigation in which the Association is or may become involved, (2) matters that relate to the formation of contracts with third parties, (3) personnel matters, (4) member discipline matters, and (5) orders of business of a similar nature. In any matter relating to the disciplining of a Member, the Board shall meet in executive session if requested to do so by that Member, and the Member shall be entitled to attend the executive session. In all other cases, Members who are not on the Board may not attend an executive session. The nature of any business to be considered in executive session shall first be announced in open session. Further, any matter discussed in executive session shall be generally noted in the minutes of the Board.

Adjournment

Section 4.07. A majority of the Directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of the adjournment shall be given, before the time of the adjourned meeting, to the Directors who were not present at the time of the adjournment.

Minutes

Section 4.08. Written minutes shall be kept of all meetings of the Board. The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any meeting of the Board, other than an executive session, shall be made available to Members within 30 days of the meeting. Further, the minutes, proposed minutes, or summary minutes shall be distributed to any Member on request. Any Member making such a request shall reimburse the Association for its costs in making that distribution. Members shall be notified in writing at the time that the pro forma budget required by *Civil Code Section 1365* is distributed, or at the time of any general mailing to the entire membership of the Association, of their right to have copies of the minutes of meetings of the Board and of how and where those minutes may be obtained.

Action Taken Without a Meeting

Section 4.09. The Board may take actions without a meeting if all of the Directors consent in writing to the action to be taken. If the Board resolves by unanimous written consent to take action, an explanation of the action taken shall be posted at a prominent place or places within the Common Area within three days after the written consents of all Directors have been obtained. However, if the Common Area is unsuitable for such a posting, the Board shall communicate the explanation of the action taken by any means it deems appropriate.

ARTICLE V. OFFICERS

Enumeration of Officers

Section 5.01. The Officers of this Association shall be a President, a Vice-President, a Secretary, and a Chief Financial Officer. The Board may appoint additional officers pursuant to Article X of these Bylaws. Any number of offices may be held by the same person.

Appointment and Term

Section 5.02. The Officers of this Association, except those Officers appointed in accordance with Article X of these Bylaws, shall be elected annually by the Board. Any vacancies shall be filled by the Board at any time, not necessarily on an annual basis, that it deems proper. Each Officer shall hold his or her office at the pleasure of the Board.

Resignation and Removal

Section 5.03. The Board may remove any Officer from office either with or without cause. Any Officer may resign at

any time by giving written notice to the Board, the President, or the Secretary. The resignation shall take effect at the date of receipt of the notice or at any later time specified in the notice. Unless otherwise specified in the notice, acceptance of the resignation by the Board shall not be necessary to make it effective.

Compensation

Section 5.04. An Officer shall not receive any compensation for any servicehe or she may render to the Association; provided, however, that an Officer may be reimbursed for actual out-of-pocket expenses incurred by the Officer in the performance of his or her duties.

ARTICLE VI. PRESIDENT

Election

Section 6.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] President.

Duties

Section 6.02. The President shall:

(a) Preside over all meetings of the Members and of the Board.

(b) Sign as President all deeds, contracts, and other written instruments that have been approved by the Board, unless the Board, by duly adopted resolution, authorizes the signature of a lesser Officer.

(c) Call meetings of the Board whenever he or she deems it necessary, in accordance with any rules and notice requirements imposed by the Board and the Governing Instruments. The notice period shall not be less than three days except in the case of emergencies.

(d) Have, subject to the advice of the Board, general supervision, direction, and control of the affairs of the Association.

(e) Discharge any other duties required of him or her by the Board.

ARTICLE VII. VICE-PRESIDENT

Election

Section 7.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] Vice-President.

Duties

Section 7.02. The Vice-President shall:

(a) Act in the place and in the stead of the President in the event of his or her absence, inability, or refusal to act; and

(b) Exercise and discharge any other duties required of him or her by the Board. In connection with any such additional duties, the Vice-President shall be responsible to the President.

ARTICLE VIII. SECRETARY

Election

Section 8.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect [one of its Members to act as *or* a] Secretary.

Duties

Section 8.02. The Secretary shall:

(a) Keep a record of all meetings and proceedings of the Board and of the Members;

(b) Keep the seal of the Association, if any, and affix it on all papers requiring the seal;

(c) Serve all required notices of meetings of the Board and the Members;

(d) Keep current records showing the names and addresses of all Members; and

(e) Sign as Secretary all deeds, contracts, and other written instruments that have been approved by the Board, if the instruments require a second Association signature and the Board has not passed a resolution authorizing another Officer to sign in the place and stead of the Secretary.

ARTICLE IX. CHIEF FINANCIAL OFFICER

Election

Section 9.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] Chief Financial Officer.

Duties

Section 9.02. The Chief Financial Officer shall:

(a) Receive and deposit all of the funds of the Association in any bank or banks selected by the Board;

(b) Be responsible for and supervise the maintenance of books and records to account for Association funds and other

Association assets;

(c) Disburse and withdraw Association funds in the manner specified by the Board; and

(d) Prepare and distribute the financial statements for the Association required by the Declaration.

ARTICLE X. SUBORDINATE OFFICERS

Appointment

Section 10.01. The Board may appoint, at any time, any subordinate Officers that the Association may require.

Duties

Section 10.02. The Board shall prescribe the term of office, authority, and duties of subordinate Officers. These duties may include the right to act in the place and stead of any Officer other than the President.

ARTICLE XI. BOOKS AND RECORDS

Required Books and Records

Section 11.01. The Association shall maintain at its principal office:

(a) Copies of the Governing Instruments as last amended;

(b) Adequate and correct books and records of account;

(c) Written minutes of the proceedings of its Members, of its Board, and of committees of its Board; and

(d) A Membership Register containing the following information about each Member: name, mailing address, telephone number, and class of membership.

Inspection Rights

Section 11.02. The books and records referred to in Section 11.01 shall be made available for inspection as follows:

(a) Any Member shall have the right to inspect the above books and records and copy them at any reasonable time during office hours and for a purpose reasonably related to his or her interest as a Member. This right is subject to the power of the Board to set reasonable times for inspection, notice requirements, and fees to cover the cost of making copies of the documents requested by a Member.

(b) Every Director shall have the absolute right to inspect all books, records, and documents of the Association and the physical properties owned or controlled by the Association at any reasonable time. The right of inspection by a Director includes the right to make extracts and copies of documents.

ARTICLE XII. NONLIABILITY AND INDEMNIFICATION

Definition of Agent

Section 12.01. For purposes of this Article, "Agent" means any present or former Director or Officer or any other employee or agent of the Association.

Nonliability

Section 12.02. Except as provided by law, no right, power, or responsibility conferred on the Board or the Architectural Committee by the Governing Instruments shall be construed as a duty, obligation, or disability charged upon any Agent. No Agent shall be liable to any party (other than the Association or a party claiming in the name of the Association) for injuries or damage resulting from the Agent's acts or omissions within what the Agent reasonably believed to be the scope of his or her Association duties ("Official Acts"), except to the extent that the injuries or damage result from the Agent's willful or malicious misconduct. No Agent shall be liable to the Association (or to any party claiming in the name of the Association) for injuries or damage resulting from the Agent's Official Acts, except to the extent that the injuries or damage result from the Agent's negligence or willful or malicious misconduct.

Indemnification

Section 12.03. The Association shall pay all expenses actually and reasonably incurred by, and satisfy any judgment or fine levied against, any Agent as a result of any action or threatened action against the Agent to impose liability on the Agent for his or her Official Acts, provided that:

(a) The Board determines that the Agent acted in good faith and in a manner the Agent reasonably believed to be in the best interests of the Association;

(b) In the case of a criminal proceeding, the Board determines that the Agent had no reasonable cause to believe his or her conduct was unlawful; and

(c) In the case of an action or threatened action by or in the right of the Association, the Board determines that the Agent acted with the care (including reasonable inquiry) that an ordinarily prudent person in a like position would use under similar circumstances.

Approval by Board

Section 12.04. Any determination of the Board required under this Article must be approved by a majority vote of a quorum consisting of Directors who are not parties to the action or threatened action giving rise to the indemnification. If the Board fails or refuses to make any such determination, the determination may be made by the vote or written consent of a majority of a quorum of the Members, provided that the Agent to be indemnified shall not be entitled to vote.

Payments

Section 12.05. Payments made pursuant to this Article shall include amounts paid and expenses incurred in settling the action or threatened action. This Article shall be construed to authorize payments and indemnification to the fullest extent now or hereafter permitted by applicable law.

Insurance

Section 12.06. The Association may purchase and maintain insurance on behalf of its Agents to the extent and under the circumstances provided in the Declaration.

ARTICLE XIII. AMENDMENTS

Amendment of Bylaws

Section 13.01. The classes of membership and the voting rights of Members shall be as stated in the Declaration. So long as a two-class voting system is in effect, any amendment of these Bylaws shall require the vote or written consent of Members representing _____ [*specify percentage not below 51 percent*] of _____ [the voting power of each class of Members *or* a quorum of Members of each class]. After conversion of the Class B Membership to Class A Membership, these Bylaws may be amended by the vote or written consent of (1) 51 percent [*or specify higher percentage, but not one that would require the vote of more than a bare majority of the total voting power of the association (see 10 Cal. Code Reg. § 2792.24(b)(1)(B))*] of a quorum, and (2) 51 percent [*or specify higher percentage*] of the votes of Members other than the Declarant. Notwithstanding the foregoing, the percentage of a quorum or of the voting power of the Association or of Members other than Declarant necessary to amend a specific clause or provision in these Bylaws shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause or provision.

Prior Approval of Commissioner

Section 13.02. When required under *Section 11018.7 of the California Business and Professions Code*, the prior written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to these Bylaws to the vote of the Members.

[*Optional*]

ARTICLE XIV. TAX-EXEMPT STATUS

Tax-Exempt Status

Section 14.01. The Board and Members of the Association shall conduct the business of the Association in such a manner that the Association shall qualify and be considered an organization exempt from federal and state income taxes pursuant to *Internal Revenue Code Section 528* and *California Revenue and Taxation Code Section 23701t*, as amended.

Filing

Section 14.02. The Board shall file or have filed any annual election for tax-exempt status that is required under federal or state law, and shall cause the Association to comply with the federal and state statutes, rules, and regulations pertaining to those exemptions.

[*Continue with the following:*]

CERTIFICATE OF SECRETARY
OF
_____ [*name of association*]
A California Nonprofit
Mutual Benefit Corporation

I hereby certify that I am the duly elected and acting Secretary of the above Corporation and that the foregoing Bylaws, comprising _____ [*number*] pages, constitute the Bylaws of the Corporation as duly adopted at a meeting of the Board of Directors of the Corporation held on _____[*date*].
Dated: _____.

_____ [*signature*]
[*typed name*], Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS

16-34 California Legal Forms--Transaction Guide 34.syn

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

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[d] Maintenance Obligations and Schedules

[5] Prelitigation Procedures

[a] Introduction

[b] Notice of Claim

[c] Builder

[d] Provision of Documents and Agent for Notice

[e] Acknowledgment of Receipt of Claim

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[g] Inspections

[h] Builder's Offer to Repair

[i] Homeowner Response to Offer of Repair

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[k] Failure to Make Timely Offer to Repair or Actual Repair

[l] Timing and Execution of Repair

[m] Availability of Releases

[n] Statute of Limitations and Extensions of Time

[o] Request for Mediation

[p] Compliance with Timelines Throughout

[q] Treatment of Non-Title 7 Claims Brought Simultaneously with Title 7 Claims

[r] Subsequently Discovered Claims

[s] Admissibility of Repair Efforts and Parties' Conduct

[t] Interaction with Calderon Act

[u] Application to Other Parties

[v] Certificate of Merit Still Required

[w] Application of Title

[6] Procedure

[a] Application of Chapter 5 Provisions

[b] Statute of Limitations: Time Limit for Bringing Action

[c] Evidentiary Standard for Proving Actionable Damage

[d] Inapplicability of Title 7 to Other Causes of Action

[e] Measure of Damages

[f] Parties Bound by Title 7

[g] Affirmative Defenses

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§ 34.165 Handling Association Accounts

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§ 34.166 Miscellaneous Procedures

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§ 34.200 Application for Public Report for Common Interest Subdivision [DRE Form 624; Revised 6/05]

[1] Comment

[a] Use of Form

[b] Public Report Requirement

[i] Applicability to Common Interest Subdivisions

[ii] Selecting and Obtaining Appropriate Application Form

[iii] Exception for Conversions

[iv] Phased Developments

[v] Senior Citizen Housing Developments

[c] Components of Application Form

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[ii] Index/Quantitative Deficiency Notice

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[d] Filing Fees

[e] Alternative Methods of Filing Application

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[iii] Substantially Complete Application

[iv] Requirements for Supporting Documentation

[f] Where to File Application

[g] Application Processing

[h] Deadline for Submission of Supporting Documentation

[i] Preliminary Public Report

[j] Conditional Public Report

[i] In General

[ii] Criteria for Issuance

[iii] Distribution of Report and Related Statement

[iv] Term

[k] Particular Provisions of Form

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[ii] Names and Addresses

[iii] Uses

[iv] Common Area Interest to Be Conveyed

[v] Completion of Improvements In General

[vi] On-Site Improvements

[vii] Off-Site Improvements

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[ix] Suitability of Land

[x] Management Documents

[xi] Title

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[xiii] Location of Schools

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[xv] San Francisco Bay Conservation and Development Commission Jurisdiction

[xvi] Notice of Supplemental Property Tax Bill

[xvii] Notice of Right to Farm

[xviii] Advertising/Sales Program

[l] Execution and Verification of Application

[m] Distribution of Copies of Final Public Report

[n] Term of Final Public Report and Renewal

[2] FORM

Application for Public Report for Condominiums, Planned Developments, and Community Apartment Projects [DRE Form 624; Revised 9/30/84]

§ 34.201 Common Interest Development Information Form [Bus. & Prof. Code § 11018.1(c)]

[1] Comment--Use of Form

[2] FORM

Common Interest Development Information Form [Bus. & Prof. Code § 11018.1(c)]

§ 34.202 Declaration

[1] Comment

[a] Use of Form

[b] Applicability of Comment to Other Types of Developments

[c] Coordination With Bylaws

[d] Required Contents

[i] Davis-Stirling Act

[ii] Subdivided Lands Act and Its Implementing Regulations

[iii] Regulatory Exception for Master Planned Developments

[iv] Nonprofit Mutual Benefit Corporation Law

[e] Particular Provisions of Form

[i] Boundaries of Unit

[ii] Pest Control

[iii] Condemnation, Damage, and Destruction

[iv] Transfer of Common Area and Facilities to Association

[v] Disciplining of Members by Association

[vi] Use Restrictions and Covenants

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[viii] Solar Energy Systems

[ix] Controls Related to Video and Television Antennas, Including Satellite Dishes

[x] Controls Related to Keeping Pets

[xi] Rights of Mortgagees

[xii] General Requirements Regarding Insurance

[xiii] Liability Insurance and Limitations on Liability of Volunteer Directors and Officers

[f] Limiting Tort Liability of Individual Owners of Separate Interests

[g] Covenants and Restrictions in Declaration

[h] Liberal Construction of Declaration

[i] Amendment of Declaration

[j] Recordation

[k] Filing With Real Estate Commissioner

[l] Statutory Extension of Term of Declaration

[m] Disputes Relating to Enforcement of Declaration

[2] FORM

Declaration

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[1] Comment

[a] Use of Form

[b] Consent of Lenders

[2] FORM

Subordination Agreement

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[1] Comment

[a] Use of Form

[b] Applicable Law

[c] Contents of Articles

[i] In General

[ii] Incorporation of Unincorporated Association

[d] Execution and Filing

[e] Amendment of Articles

[2] FORM

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§ 34.205 Bylaws

[1] Comment

[a] Use of Form

[b] Contents of Bylaws

[i] Nonprofit Mutual Benefit Corporation Law

[ii] Real Estate Commissioner's Regulations

[c] Fiscal Responsibilities of Board

[d] Adoption

[e] Filing

[f] Amendment of Bylaws

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Minutes Adopting Bylaws

§ 34.207 Management Agreement

[1] Comment

[a] Use of Form

[b] Prospective Agent's Statement of Qualifications

[c] Miscellaneous Limitations

[i] Term of Agreement

[ii] Interested Director

[2] FORM

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§ 34.208 Rules and Regulations Governing Use of Common Areas

[1] Comment--Use of Form

[2] FORM

Rules and Regulations Governing Use of Common Areas

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§ 34.220 60-Day Notice to Existing Tenants of Intention to Convert [Gov. Code §§ 66427.1(a)(2)(A), 66452.18].

[1] Comment

[a] Use of Form

[b] Projects Subject to Notice Requirements

[c] Exemptions From Statutory Conversion Requirements

[i] Stock Cooperatives

[ii] Community Apartment Projects

[d] Approval by Owners in Stock Cooperative or Community Apartment Project

[2] FORM

60-Day Notice of Intention to Convert [Gov. Code §§ 66427.1(a)(2)(A), 66452.18].

§ 34.221 Notice to Prospective Tenants of Intention to Convert [Gov. Code § 66452.8]

[1] Comment

[a] Use of Form

[b] Effect of Failure to Give Notice

[2] FORM

Notice to Prospective Tenants of Intention to Convert [Gov. Code § 66452.17].

§ 34.222 Notice of Approval of Final Map [Gov. Code § 66427.1(a)(2)(D)]

[1] Comment--Use of Form

[2] FORM

Notice of Approval of Final Map [Gov. Code § 66427.1(b)]

§ 34.223 Notice of Submission of Application for Public Report [Gov. Code § 66427.1(a)(2)(B)]

[1] Comment--Use of Form

[2] FORM

Notice of Submission of Application for Public Report [Gov. Code § 66427.1(a)]

§ 34.223A Notice of Receipt of Public Report [Gov. Code § 66427.1(a)(2)C)]

[1] Comment--Use of Form

[2] FORM

Notice of Receipt of Final Public Report

§ 34.224 Notice of Exclusive Right to Contract for Purchase of Unit [Gov. Code §§ 66427.1(a)(2)(F), 66427.12]

[1] Comment--Use of Form

[2] FORM

Notice of Exclusive Right to Contract for Purchase of Unit

§ 34.225 Tenant's Waiver of Right to Purchase Converted Unit [Gov. Code §§ 66427.1(a)(2)(E), 66427.14]

[1] Comment--Use of Form

[2] FORM

Tenant's Waiver of Right to Purchase Converted Unit [Gov. Code § 66427.1(d)]

§ 34.226 180-Day Notice of Intention to Convert Property Prior to Termination of Tenancy [Gov. Code §§ 66427.1(a)(2)(E), 66427.14]

[1] Comment--Use of Form

[2] FORM

180-Day Notice of Intention to Convert Property

§ 34.227 Disclosure Regarding Condition of Newly Converted Condominium

[1] Comment

[a] Use of Form

[b] Contents of Statement

[c] Delivery

[d] Right to Rescind

[e] Violation of Disclosure Requirement

[2] FORM

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§ 34.240 Grant Deed

[1] Comment

[a] Use of Form

[b] Provisions of Form

[i] Ownership of Unit (Parcel A)

[ii] Undivided Interest in Common Area (Parcel D)

[iii] Exclusive Use Common Areas (Parcels B and C)

[c] Recordation of Deed

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[2] FORM

Grant Deed

§ 34.241 Notice of Owner's Rights and Responsibilities Regarding Delinquent Assessment

[1] Comment

[a] Use of Form

[b] Contents of Form

[2] FORM

Notice of Owner's Rights and Responsibilities Regarding Delinquent Assessment

§ 34.242 Notice of Delinquent Assessment

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Related Costs

[d] Enforcement of Lien

[2] FORM

Notice of Delinquent Assessment

§ 34.243 Notice of Satisfaction and Release of Condominium Assessment Lien

[1] Comment--Use of Form

[2] FORM

Notice of Satisfaction and Release of

§ 34.244 Notice to Prospective Tenant of Approval of Final Map

[1] Comment

[a] Use of Form

[b] Related Requirements

[i] References to Project

[ii] Notice of Intention to Sell Unit

[iii] Right of First Refusal

[iv] Exceptions and Violations

[2] FORM

Notice to Prospective Tenant of Approval of Final Map

§ 34.245 Recorded Statement of Association Information

[1] Comment--Use of Form

[2] FORM

Recorded Statement of Association Information

§ 34.246 Notice to All Owners of Owners' Rights and Responsibilities Regarding Assessments and Foreclosure

[1] Comment--Use of Form

[2] FORM

Notice to All Owners of Owners' Rights and Responsibilities Regarding Assessments and Foreclosure

§ 34.247 Assessment and Reserve Funding Disclosure Summary [Civ. Code § 1365.2.5]

[1] Comment--Use of Form

[2] FORM

Assessment and Reserve Funding Disclosure Summary [Civ. Code § 1365.2.5]

§ 34.248 Association Request for Copy of Trustee's Deed on Sale of Separate Interest

[1] Comment--Use of Form

[2] FORM

34.248 Association Request for Copy of Trustee's Deed on Sale of Separate Interest

§ 34.249 Disclosure Documents Index for Distribution to Members

[1] Comment--Use of Form

[2] FORM

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16-34 California Legal Forms--Transaction Guide Scope

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This chapter covers the statutory and regulatory requirements governing the formation and operation of condominium projects and the sale of condominiums in California. Among other things, this chapter discusses the following aspects of the formation-sale process: financing the project, developing the project in phases, converting an apartment building to condominiums, obtaining a public report for the project, and establishing and operating an owners' association. Because local building, zoning, and subdivision ordinances typically include additional condominium requirements, counsel should use this chapter in conjunction with any applicable ordinances of the city or county in which the condominium project is or will be located.

Condominium projects are only one of several types of real estate developments that are considered "common interest developments" or "common interest subdivisions" under California law [*see § 34.33[1]* and *§ 34.37[1]*]. The other common interest developments/subdivisions discussed in this treatise are planned developments [*see* Ch. 33D, *Planned Developments*], stock cooperatives [*see* Ch. 33C, *Stock Cooperatives*], and time-share projects [*see* Ch. 33A, *Time-Share Projects*]. Membership camping contracts are also covered [*see* Ch. 33B, *Membership Camping Contracts*].

This chapter does not cover two common interest developments that are found in California: (1) community apartment projects [*see Civ. Code § 1351(d)*; *see also Bus. & Prof. Code §§ 11004, 11004.5(b)*; California Real Estate Law and Practice, Ch. 424, *Regulation of Subdivided Land Sales* , Pt. A (Matthew Bender)] and (2) limited-equity housing cooperatives [*see Bus. & Prof. Code §§ 11003.4, 11004.5(e)*; *see also* Ch. 33C, *Stock Cooperatives*].

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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.01 California Statutes

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*
Condominium project containing five or more units as subdivision. *Bus. & Prof. Code § 11004.5(c).*
Public report requirement. *Bus. & Prof. Code § 11018.2.*
Issuance of public report for common interest subdivisions. *Bus. & Prof. Code § 11018.5.*

Unruh Civil Rights Act. *Civ. Code § 51.*

Senior citizen housing developments. *Civ. Code §§ 51.3, 51.4.*

Definition of condominium. *Civ. Code § 783*; *see also Civ. Code § 1351(f).*

Requirements for actions for construction defects ("Right to Repair Act"). *Civ. Code §§ 895-945.5.*

Davis-Stirling Common Interest Development Act. *Civ. Code § 1350 et seq.*
Association defined. *Civ. Code § 1351(a).*
Common area defined. *Civ. Code § 1351(b).*
Common interest development defined. *Civ. Code § 1351(c).*
Condominium plan defined. *Civ. Code § 1351(e).*
Condominium defined. *Civ. Code § 1351(f).*
Condominium project defined. *Civ. Code § 1351(f).*
Exclusive use common area defined. *Civ. Code § 1351(i).*
Separate interest defined. *Civ. Code § 1351(l)(3).*
Creation of common interest development. *Civ. Code § 1352.*
Prohibition on restrictive covenants that promote unlawful fair housing practices. *Civ. Code § 1352.5.*

Board of Directors' power to adopt and change operating rules. *Civ. Code §§ 1357.100-1357.150*.
Interests included in conveyance of separate interest. *Civ. Code § 1358(b)*.
Restrictions on partition in condominium project. *Civ. Code § 1359*.
Ownership of common areas. *Civ. Code § 1362*.
Association elections and meetings. *Civ. Code §§ 1363.03-1363.09*.
Owners' association standing to sue. *Civ. Code § 1368.3*.
Prospective managing agent's disclosure statement. *Civ. Code § 1363.1*.
Biennial registration with Secretary of State. *Civ. Code § 1363.6*.
Member's right to inspect and copy accounting books and records, and minutes of proceedings. *Civ. Code § 1365.2*.
Assessment and reserve funding disclosure summary. *Civ. Code § 1365.2*.5.
Community service organization's obligation to prepare and distribute to association report describing administrative costs and related matters. *Civ. Code § 1365.3*.
Applicability of Corp. Code § 310 to contracts and other transactions authorized, approved, or ratified by board or board committee. Civ. Code § 1365.6.
Limitations on personal liability of volunteer directors and officers of residential developments. *Civ. Code § 1365.7*.
Assessments. *Civ. Code § 1366*.
Recorded statement facilitating assessment collection. *Civ. Code § 1366.2*.
Assessment liens recorded before January 1, 2003. *Civ. Code § 1367*.
Assessment liens recorded on or after January 1, 2003. *Civ. Code § 1367.1*.
Collecting or securing debts for delinquent assessments arising on or after January 1, 2006. *Civ. Code § 1367.4*.
Owner's Right to Pay Disputed Assessment Under Protest and File Suit in Small Claims Court. *Civ. Code § 1367.6*.
Prohibition on restriction of owner's ability to market separate interest. *Civ. Code § 1368.1*.
Mechanics' liens. *Civ. Code § 1369*.
Alternative dispute resolution; definitions, procedures. *Civ. Code §§ 1369.510-1369.590*.
Presumption regarding boundaries of condominium units. *Civ. Code § 1371*.
Construction defect litigation. *Civ. Code §§ 1375-1375.01*.
Improvements. *Civ. Code §§ 1376, 1378*.
Association's recorded request for copy of trustee's deed on sale of separate interest. *Civ. Code § 2924b(f)*.

Nonprofit Mutual Benefit Corporation Law. *Corp. Code § 7110 et seq.*

Exclusion of "subdivided lands" and "subdivision" from Corporate Securities Law. *Corp. Code § 25100(f)*.

Notice of community facilities district tax. *Gov. Code § 53341.5*.

Subdivision Map Act. *Gov. Code § 66410 et seq.*
Subdivision defined. *Gov. Code § 66424*.
Prerequisites to approval of conversion. *Gov. Code § 66427.1*.
Requirement of approved map. *Gov. Code § 66499.30*.

California Environmental Quality Act of 1970 (CEQA). *Pub. Res. Code § 21000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

Property tax assessments. *Rev. & Tax. Code § 2188.3*.

Taxation of owners' association. *Rev. & Tax. Code § 23701t*.



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.02 Federal Statutes

Taxation of owners' association. *I.R.C. § 528.*

Interstate Land Sales Full Disclosure Act. *15 U.S.C. § 1701 et seq.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.03 California Regulations

Real Estate Commissioner's subdivision regulations. *10 Cal. Code Reg. § 2790 et seq.*
Requirements for "substantially complete" planned development application for public report. *10 Cal. Code Reg. § 2792.1(a).*
Required contents of governing instruments. *10 Cal. Code Reg. § 2792.8.*
Reasonable arrangement regulations. *10 Cal. Code Reg. §§ 2792.15-2792.29.*
Preliminary public report. *10 Cal. Code Reg. § 2795.*

California Coastal Act regulations. *14 Cal. Code Reg. § 13001 et seq.*

California Environmental Quality Act regulations ("CEQA Guidelines"). *14 Cal. Code Reg. § 15000 et seq.*



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§ 34.04 Federal Regulations

Interstate Land Sales Full Disclosure Act regulations. 24 C.F.R. § 1700.1 et seq.

National Environmental Policy Act of 1969 (NEPA) regulations. *40 C.F.R. § 6.100 et seq.*



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§ 34.05 California Attorney General Opinions

Power of local governments under Subdivision Map Act to set up condominium conversion restrictions. *58 Ops. Cal. Atty. Gen. 41 (1975)* .

Regulation by State Fire Marshal of condominiums containing dry-cleaning equipment. *46 Ops. Cal. Atty. Gen. 92 (1965)* .

Applicability of health and safety regulations to swimming pools owned in common by individual members of condominium apartment building. *43 Ops. Cal. Atty. Gen. 256 (1964)* .

Applicability of Subdivision Map Act to horizontal condominiums. *39 Ops. Cal. Atty. Gen. 82 (1962)* .



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§§ 34.06[Reserved]



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.21 Annotations

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§ 34.22 Text References

[1] Related Forms With Tax Analysis

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Ch. 22B, *Real Estate Securities*, 22B.01-22B.04 (condominium unit offerings as securities), 22B.07-22B.09 (registration of condominium offering).

[2] Related California Forms

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Ch. 13, Nonprofit Corporations, §§ 13.210 (articles of incorporation of mutual benefit corporation), 13.211 (articles of incorporation of common interest development), 13.212 (bylaws of mutual benefit corporation).
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Ch. 25A, *Security Instruments for Real Estate Financing.*
Ch. 26, *Real Property Escrows.*
Ch. 27, *Deeds and Recording.*
Ch. 30, *Subdivision Regulation.*
Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits.*
Ch. 33A, *Time-Share Projects.*
Ch. 33B, *Membership Camping Contracts.*
Ch. 33C, *Stock Cooperatives.*
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Ch. 124, *Condominiums and Other Common Interest Developments* .
Ch. 397, *Partition* .
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Ch. 385, *Homeowners' Associations*.
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Ch. 420, *Financing Construction and Development.*
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Ch. 20, *Background and Implementation of CEQA.*
Ch. 21, *Preliminary Review, Exemptions, and Negative Declarations*.
Ch. 22, *Environmental Impact Reports*.
Ch. 23, *CEQA Litigation*.
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§§ 34.23[Reserved]



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16-34 California Legal Forms--Transaction Guide § 34.30

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.30 General Description of Condominium Form of Ownership

The statutory definition of condominium is broad enough to cover a variety of forms of ownership [*see § 34.32*]. However, under the most common form, the purchaser of a condominium owns in fee simple the airspace in which his or her particular unit is situated, has a deed to that space, gets a separate tax assessment, may apply for and acquire a title insurance policy on the property, acquires an undivided interest in common in other portions of the project, and must pay monthly assessments for the upkeep and maintenance of the common area [*see* California Department of Real Estate Reference Book, Ch. 20, *Subdivisions and Other Public Controls*, p. 531 (1984-1985 ed.)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.31 Overview of Governing Statutes

The three most important sources of California law regulating the formation, operation, and sale of condominiums and condominium projects are (1) the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], (2) the Subdivision Map Act [*Gov. Code § 66410 et seq.*], and (3) the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see 10 Cal. Code Reg. § 2790 et seq.* (implementing regulations)]. This chapter discusses those Acts in detail.

From a litigation and risk management perspective, the so-called "Right to Repair Act" or "Title 7" [*Civ. Code § 895 et seq.*] must also bear heavily on the preparation of formation documents for condominium projects. This chapter likewise discusses Title 7 [*see § 34.49*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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§ 34.32 Statutory Definition of "Condominium" and "Condominium Project"

A "condominium project" is a development consisting of condominiums [*Civ. Code § 1351(f)*]. A "condominium" is an estate in real property, which consists of two types of ownership interests: (1) a "separate interest in space" (called a unit), the boundaries of which must be accurately described in a recorded final map, parcel map, or condominium plan [*see Civ. Code §§ 783, 1351(f)*; *see also §§ 34.33[4], [5],* and *34.36*], and (2) an undivided interest in common in a portion of the real property in the project. The commonly owned real property may be all of the real property in the project except for the units, or may include a particular three-dimensional portion of the property, the boundaries of which are described on a recorded final map, parcel map, or condominium plan [*Civ. Code § 1351(f)*; *see § 34.33[7]*].

The area or space within the boundaries of the units (and within the boundaries of any "three-dimensional" common area described in the above manner) may be filled with air (e.g., enclosed within walls), earth (e.g., a parcel of real property) [*see Bear Creek Master Assn. v. Edwards (2005) 130 Cal. App. 4th 1470, 1480, 31 Cal. Rptr. 3d 337* (definition of "condominium" does not require presence of structure or building)], water (e.g., a boat slip in a marina), or any combination of the these. It need not be physically attached to land except by easements for access and, if necessary, support [*Civ. Code § 1351(f)*; *see Civ. Code § 783*]. The unit will usually consist of airspace. If the unit consists of a parcel of real property, the developer and attorney should consider the possibility of forming a planned development instead [*see Ch. 33D, Planned Developments, § 33D.11[2]*].

An individual condominium within a condominium project may include a separate interest in other portions of the real property [*Civ. Code § 1351(f)*].

A condominium may be either an estate of inheritance or perpetual estate, a life estate, an estate for years (e.g., a leasehold or a subleasehold), or any combination of those estates [*Civ. Code § 783*]. This comports with the Davis-Stirling Act's definition of "separate interest," which provides, in part, that an estate in a unit (or comparable separate interest in another type of common interest development) may be a fee, a life estate, an estate for years, or any combination of the these [*Civ. Code § 1351(l)*; *see § 34.33[1]*]. Thus, a condominium purchaser may hold different types of interests in the project, such as a fee interest in his or her condominium unit and certain portions of the

common area, plus a leasehold interest in the land.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawEstatesPresent EstatesLife Estates



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§ 34.33 Davis-Stirling Common Interest Development Act

[1] In General

The Davis-Stirling Common Interest Development Act ("Act") [*Civ. Code § 1350 et seq.*] contains the basic requirements governing the creation and essential attributes of common interest developments. The term "common interest development" should not be confused with "common interest subdivision" as that term is used in the regulations of the Real Estate Commissioner [*see 10 Cal. Code Reg. §§ 2792.8, 2705(m)*; *see also § 34.37[2]*]. A "common interest development" is any of the following [*Civ. Code § 1351(c)*]:

- A condominium project [*see Civ. Code § 1351(f)*; *see also § 34.32*];
- A community apartment project [*see Civ. Code § 1351(d)*];
- A planned development [*see Civ. Code § 1351(k)*; *see also* Ch. 33D, *Planned Developments*]; or
- A stock cooperative [*see Civ. Code § 1351(m)*; *see also* Ch. 33C, *Stock Cooperatives*].

Each of these developments consists of common areas [*see Civ. Code § 1351(b)*; *see also § 34.33[7]*] and separate interests [*see Civ. Code § 1351(l)*; *see also § 34.33[5]*]. The Act applies only to developments that have a "common area," as that term is defined in the Act [*Civ. Code § 1374*; *see Civ. Code § 1351(b)* (definition of "common area")].

A common interest development is created on the recordation of certain project documents [*see § 34.144*] and the conveyance of a separate interest (coupled with an interest in the common area or membership in the association) to a purchaser [*Civ. Code § 1352*]. The development must be managed by an association of owners of the separate interests [*Civ. Code § 1363(a)*; *see § 34.38[1]*].

[2] Applicability to Various Types of Common Interest Developments

Most of the provisions of the Davis-Stirling Act uniformly apply to all common interest developments. To avoid unnecessary repetition, this chapter contains the principal discussion of those provisions of general applicability, and the other Parts in this chapter refer extensively to this discussion. Consequently, unless otherwise indicated, the discussions in this chapter of the Davis-Stirling Act are applicable to all types of common interest developments [*see also* Ch. 33A, *Time-Share Projects* , Ch. 33B, *Membership Camping Contracts* , Ch. 33C, *Stock Cooperatives* , Ch. 33D, *Planned Developments*].

The Act does contain a few provisions that apply to only one type of development. For example, only condominium projects are subject to the provisions of the Act governing partition actions [*see Civ. Code § 1359*; *see also § 34.33[8]*], modifications of units for handicapped occupants [*see Civ. Code § 1360(a)(2)*; *see also § 34.33[6]*], mechanics' liens [*see Civ. Code § 1369*; *see also § 34.33[10]*], and presumptions regarding the boundaries of units [*see Civ. Code § 1371*; *see also § 34.33[5]*].

Certain requirements of the Act do not apply to common interest developments that are (1) expressly zoned as industrial or commercial developments and (2) limited in use to industrial or commercial purposes [*Civ. Code § 1373*; *see § 34.121*, P 1(b) NOTE (list of inapplicable requirements)]. The Legislature created these exceptions after finding that the specified requirements protect purchasers in residential common interest developments, but that they are not necessary to protect purchasers in commercial or industrial developments and would result in unnecessary burdens and costs for those types of developments [*Civ. Code § 1373*]. Although condominium projects may be devoted to industrial or commercial uses, they are usually exclusively residential. Consequently, this chapter focuses on residential condominium projects.

[3] Declaration and Other Governing Documents

The instruments that govern the operation of a common interest development and its owners' association (collectively termed the "governing documents") are the declaration, bylaws, operating rules of the association, and articles of incorporation or association [*see Civ. Code § 1351(j)*]. The declaration is the basic governing document for any common interest development [*see Civ. Code § 1351(h)*; *see also § 34.202[1][c]*]. It must include (1) a legal description of the development, (2) a statement that the development is a condominium project (or community apartment project, planned development, stock cooperative, or combination thereof), (3) the name of the owners' association, and (4) any restrictions on the use or enjoyment of the development that are intended to be enforceable equitable servitudes. The declaration may also contain any other matters the developer or the condominium owners consider appropriate [*Civ. Code § 1353*; *see § 34.202[1][g]*; *see also* former *Civ. Code §§ 1350-1370* (former Condominium Act, which governed declarations for condominium projects before 1986)]. The inclusion of restrictions and covenants in a declaration is a way of protecting the common plan of the project and providing for the upkeep of common areas [*see Civ. Code § 1357*].

Four sets of requirements may apply to the amendment of a declaration. First, the Real Estate Commissioner must approve a proposed amendment if the following apply: (1) it would materially change the rights of any condominium owner; and (2) it is submitted for approval while the developer or the developer's successor in interest holds or directly controls as many as 1/4th of the votes that may be cast to affect the change [*see Bus. & Prof. Code § 11018.7(a)*]. Second, an amendment normally must be approved by the percentage of owners specified in the declaration (or other governing documents) [*see Civ. Code § 1355(a)*; *10 Cal. Code Reg. § 2792.24*; *but see Civ. Code § 1355(b)* (amendment procedure when declaration is silent regarding amendments)]. Third, if the owners reject an amendment, the association or any owner of a condominium may, under certain circumstances, petition the superior court for an order approving the amendment [*see Civ. Code § 1356*]. Fourth, the board of directors of the owners' association may utilize a special statutory procedure to adopt an amendment deleting from the declaration certain provisions relating to the construction or marketing of the development [*Civ. Code § 1355.5*; *see Civ. Code § 1355.5(d)* (requiring approval by owners)]. For further discussion of these amendment procedures, see *§ 34.162*.

For a discussion of statutory extensions of the term of a declaration [*see Civ. Code § 1357*], see *§ 34.202[1][l]*.

If a dispute arises relating to the enforcement of the declaration or the other governing documents, a related civil action for declaratory or injunctive relief cannot be filed unless at least one of the parties to the dispute has endeavored to submit the dispute to a form of alternative dispute resolution by following the procedure specified in *Civ. Code §§ 1369.510-1369.590*. Any party to the dispute may initiate this process by serving a Request for Resolution, containing specified information, on another party to the dispute [*Civ. Code § 1355(b)*]. For further discussion, see *§ 34.166*, P 7.

[4] Condominium Plan

A condominium plan is a plan consisting of (1) a description or survey map of a condominium project that refers to or shows monumentation on the ground [*see Goss v. Golinsky (1909) 12 Cal. App. 71, 74-75, 106 P. 604* (monument is natural or artificial object used to mark location on ground of boundary line or corner); *see also* California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions* (Matthew Bender)], (2) a three-dimensional description of the project that identifies the common areas and each condominium unit, and (3) a certificate consenting to the recordation of the plan, which must be signed and acknowledged by specified persons [*see Civ. Code § 1351(e)*; *see also § 34.142*, P 2]. Although the Davis-Stirling Act requires the recordation of a condominium plan as a condition to the creation of a condominium project only "if any exists" [*see Civ. Code § 1352(b)*], local subdivision ordinances usually require the preparation of such a plan. Obviously, condominium plans are not prepared for other types of common interest developments.

PRACTICE TIP:

Attorney's Role. An engineer or surveyor should prepare the plan since it will contain detailed descriptions of the project, its units, common area, and exclusive use common areas. The attorney should verify that these descriptions are consistent with those set forth in the declaration and the deeds.

A condominium plan will be liberally construed to facilitate the operation of the condominium project, and its provisions will be presumed to be independent and severable [*Civ. Code § 1370*].

[5] Separate Interests

Each of the four types of common interest developments governed by the Act has a different term for the separately owned areas, spaces, or interests in the development [*see Civ. Code § 1351(l)*]. "Separate interest," when used in the context of condominiums and condominium projects, means an individual unit [*Civ. Code § 1351(l)(2)*; *see Civ. Code § 1351(f)* (definition of "unit"); *see also § 34.32*]. The estate in a separate interest may be a fee, a life estate, an estate for years, or any combination of the three [*Civ. Code § 1351(l)*].

Unless the declaration or condominium plan provides otherwise, if walls, floors, or ceilings are designated as the boundaries of a condominium unit (or comparable separate interest), the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the unit are part of the separate interest and any other portions of the walls, floors, or ceilings are part of the common area [*Civ. Code § 1351(l)*]. For a discussion of problems potentially arising from reliance on these statutory boundaries, see *§ 34.202[1][e][i]*.

In interpreting deeds and condominium plans, the existing physical boundaries of a condominium unit, rather than the metes and bounds expressed in the deed or condominium plan, will be conclusively presumed to be its boundaries, if those boundaries are contained within a building or the unit has been reconstructed in substantial accordance with its original plans. This presumption applies regardless of (1) settling or lateral movement of the building, or (2) minor variances between the boundaries shown on the plan or in the deed and those of the building. The presumption applies only to units in condominium projects [*Civ. Code § 1371*].

Owners of units must maintain their units unless the declaration provides otherwise [*Civ. Code § 1364(a)*; *see § 34.33[9]*]. If the boundaries of the unit are contained within a building, the owner must observe statutory limitations when making any improvements or alterations within the boundaries [*Civ. Code § 1360*; *see § 34.33[6]*].

Any conveyance, judicial sale, or other voluntary or involuntary transfer of a condominium unit includes the undivided interest in the common area. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's entire estate also includes the owner's membership interest in the owners' association [*Civ. Code § 1358(b)*; *see § 34.38*]. Slightly different transfer restrictions apply to other types of common interest developments [*see Civ. Code § 1358(a), (c), (d)*].

Any restrictions on the severability of the component interests in real property in a condominium project that are set forth in the declaration will not be deemed conditions repugnant to the interest created, and thus rendered void, under *Civ. Code § 711* [*Civ. Code § 1358*]. However, these restrictions cannot extend beyond the period in which the right to partition a project is suspended under *Civ. Code § 1359* [*Civ. Code § 1358*; *see § 34.33[8]*].

[6] Modification of Condominiums

Subject to the provisions of the governing documents and other applicable provisions of law, if the boundaries of a condominium unit (or other type of separate interest) are contained within a building, the owner of the unit may make any improvements or alterations within the boundaries of the unit that do not impair the structural integrity or mechanical systems or lessen the support of any portions of the condominium project [*Civ. Code § 1360(a)(1)*].

In condominium projects only, the owner of a unit within a building may make modifications to his or her unit, at the owner's expense, to facilitate access for persons who are blind, visually handicapped, deaf, or physically disabled, or to alter conditions that could be hazardous to these persons. If the condominium is on the ground floor or already accessible by an existing ramp or elevator, the owner may also modify the route from the public way to the door of the unit. However, the modifications must comply with certain limitations [*Civ. Code § 1360(a)(2)*; *see § 34.165*, P 2].

[7] Common Areas and Exclusive Use Common Areas

"Common area" means an entire common interest development except the separate interests (e.g., condominium units) in the development. The estate in the common area may be a fee, a life estate, an estate for years, or any combination of the three [*Civ. Code § 1351(b)*]. The common area of a condominium project has two features not found in the common areas of most other common interest developments. First, unless the declaration provides otherwise, the owners of units in a condominium project own the common area as tenants in common, in equal shares, one for each unit or lot [*Civ. Code § 1362*; *see Civ. Code § 1351(f)*]. Second, the common area may be all of the real property in the project, except for the units, or may include a particular three-dimensional portion of the project, the boundaries of which are described on a recorded final or parcel map or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination, and need not be physically attached to land except by easements for access and, if necessary, support [*Civ. Code § 1351(f)*].

Unless the declaration provides otherwise, appurtenant to each unit in a condominium project are nonexclusive rights of ingress, egress, and support, if necessary, through the common area [*Civ. Code § 1361(a)*]. Slightly different access and support entitlements are present in certain other common interest developments [*see Civ. Code § 1361*].

An exclusive use common area is a portion of the common area that (1) is designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the condominium units (or comparable separate interests), and (2) is or will be (*see* discussion, *below*) appurtenant to the designated unit(s) [*Civ. Code § 1351(i)*]. In other words, an exclusive use common area is an exclusive right (or a right shared with some but not all of the other owners) to use a designated portion of the common area. The phrase "will be appurtenant" in the above definition

authorizes the allocation of exclusive use common areas after the recordation of the declaration. The developer should provide in the declaration for the future exercise of this option when allocation would be impractical prior to recordation. For example, the developer or the owners' association may wish to wait until condominiums are sold before allocating parking and storage spaces, in order to base the allocations on actual demand, size of household, or other factors.

Unless the declaration provides otherwise, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames, related hardware, screens, windows, or other fixtures designed to serve a single unit, but located outside the boundaries of the unit, are exclusive use common areas allocated exclusively to that separate interest [*Civ. Code § 1351(i)(1)*].

Notwithstanding the provisions of the declaration, internal and external telephone wiring designed to serve a single condominium unit (or comparable separate interest in another type of common-interest development), but located outside the boundaries of the unit, are exclusive use common areas allocated exclusively to that unit [*Civ. Code § 1351(i)(2)*]. The owner of the unit is entitled to reasonable access to the common areas to maintain the wiring, but access is subject to the association's consent and to other conditions the association deems reasonable. The association's right of approval may include approval of telephone wiring on the exterior of the common areas; this approval cannot be unreasonably withheld [*Civ. Code § 1364(f)*].

Owners may transfer exclusive use common areas, independent of any other interest in the condominium project, if the declaration expressly authorizes such separate transfers and the transfer complies with the terms of the declaration [*Civ. Code § 1358*; *see § 34.202[2]*, Section 2.05]. Under no circumstances may an owner separately transfer his or her undivided interest in the common area or membership interest in the association [*Civ. Code § 1358(b)*; *see § 34.33[5]*].

[8] Partition

The common areas in a condominium project are undivided and may not be nonjudicially partitioned [*14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1406-1407, 74 Cal. Rptr. 2d 712]* . They may only be judicially partitioned if the owner of a separate interest maintains a partition action as to the entire project as if the owners of all the separate interests in the project were tenants in common in the entire project in the same proportion as their interests in the common areas [*Civ. Code §§ 1358(b), 1359(a), (b)*; *see 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 74 Cal. Rptr. 2d 712]* . A court will order partition only by sale of the entire condominium project and only on a showing of one of the following [*Civ. Code § 1359(b)*]:

- The conditions for the sale set forth in the declaration have been met.

- More than three years before the filing of the action, the project was damaged or destroyed, so that a material part was rendered unfit for its prior use, and the project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

- Three-fourths or more of the project was destroyed or substantially damaged and owners of units holding in the aggregate more than a 50 percent interest in the common area oppose repair or restoration of the project.

- The project has been in existence more than 50 years and is obsolete and uneconomical, and owners of units holding in the aggregate more than a 50 percent interest in the common area oppose repair or restoration of the project.

The above restrictions on partition do not apply to the partition of a cotenancy in a condominium or to other types of common interest developments [*Civ. Code § 1359*].

[9] Maintenance of Components of Project

Unless the declaration provides otherwise, the owners' association [*see § 34.38[1]*] must repair, replace, and maintain the common areas, other than exclusive use common areas [*Civ. Code § 1364(a)*]. The association's responsibilities specifically include the duty to make any repairs to the common area occasioned by the presence of wood-destroying pests or organisms, unless the declaration provides otherwise [*Civ. Code § 1364(b)(1)*]. The association may cause the temporary, summary removal of any occupant of the condominium project for any periods and at any times that are necessary for the prompt, effective treatment of the infestation [*Civ. Code § 1364(d)(1)*]. For these purposes, "occupant" means an owner, resident, guest, invitee, tenant, lessee, sublessee, or other person in possession of the unit [*Civ. Code § 1364(e)*]. The association must give each affected occupant and owner notice of the temporary relocation not less than 15 days nor more than 30 days before the date of the relocation. The notice must contain specified information [*see Civ. Code § 1364(d)(2)*] and be delivered in the required manner [*see Civ. Code § 1364(d)(3)*]. Finally, the costs of the relocation must be borne by the affected unit owner(s) [*Civ. Code § 1364(c)*].

The owner of each unit (or other separate interest) remains responsible for maintaining the unit and any exclusive use common areas appurtenant to it [*Civ. Code § 1364(a)*].

[10] Mechanics' Liens

In a condominium project, labor performed or services or materials furnished with the consent or at the request of an owner in the project or an owner's agent or contractor cannot be the basis for the filing of a lien against any other property of any other owner in the project, unless that other owner expressly consented to or requested the performance of the labor or furnishing of the materials or services. However, express consent will be deemed to have been given by the owner of a condominium in the case of emergency repairs to that condominium. Labor performed or services or materials furnished for the common area, if duly authorized by the association, will be deemed to be performed or furnished with the express consent of each condominium owner. The owner of any condominium may remove his or her condominium from a lien against two or more condominiums by paying the holder of the lien an amount equal to the fraction of the total sum secured by the lien that is attributable to the owner's condominium [*Civ. Code § 1369*].

The above limitations on mechanics' liens do not apply to common interest developments other than condominium projects [*see Civ. Code § 1369*].

For coverage of mechanics' liens generally, see Ch. 31, *Mechanics' Liens* .

[11] Inapplicability of Rule Against Perpetuities

The governing documents of a common interest development will not be invalidated by the rule against perpetuities [*see Civ. Code § 1370*; *see also Prob. Code § 21200 et seq.* (Uniform Statutory Rule Against Perpetuities); Ch. 67, *Future Interests and Perpetuities*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawNonmortgage LiensMechanics' Liens



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16-34 California Legal Forms--Transaction Guide § 34.34

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.34 Intra-Association Dispute Resolution Procedure

[1] Rationale

The formal alternative dispute resolution (ADR) process [*see § 34.35*], which is a prerequisite to litigation, contemplates use of a neutral party, such as a mediator or arbitrator [*see Civ. Code § 1369.510 et seq.*]. Although mediation or arbitration may be effective to avert litigation, they are costly remedies in the context of the nonmonetary types of disputes that frequently arise in daily interactions in a common interest development. Believing that people should be able to resolve a dispute involving ordinary living arrangements without having to engage in a formal dispute resolution process, the Law Revision Commission proposed, and the Legislature enacted, a requirement that every homeowners' association must make available a fair, reasonable, and expeditious internal dispute resolution mechanism at no cost to the membership [*see Civ. Code § 1363.820(a)*; *see also Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 703-704 (2003)]. This supplements, and does not replace, the formal ADR process that is required as a prerequisite to an enforcement action [*Civ. Code § 1363.810(b)*]. If an association fails to provide for an internal dispute resolution procedure, a statutorily-prescribed default procedure applies [*Civ. Code § 1363.820(c)*; *see Civ. Code § 1363.840*].

[2] Disputes to Which Intra-Association Procedure Applies

The intra-association dispute resolution procedure applies to any dispute between an association and a member that involves their respective rights, duties, or liabilities under any of the following [*Civ. Code § 1363.810(a)*]:

- The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*];
- The Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]; or
- The common interest development's or association's governing documents, which consist of the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, that govern the operation of the common interest development or

association [*see Civ. Code § 1351(j)*].

[3] Requirements for Valid Intra-Association Procedure

The intra-association dispute resolution procedure must be fair, reasonable, and expeditious. There is a presumption affecting the burden or proof in favor of any procedure adopted by an association [*Civ. Code § 1363.820(a), (b)*]. To be considered "fair, reasonable, and expeditious," a dispute procedure must satisfy specified minimum requirements [*see Civ. Code § 1363.830*]. The "fair, reasonable, and expeditious" standard is not an objective one. It will vary from association to association, depending on such factors as size and involvement of membership. The statutory presumption is intended to avoid squabbles over procedural details and instead focus on the substance of the dispute to be resolved. If an association has a procedure in place, that procedure need not be re-adopted. The existing procedure has the benefit of the presumption [*see* 33 Cal. L. Revision Comm'n Comment to 2003 enactment of *Civ. Code § 1363.820*].

Provision for an intra-association dispute resolution procedure is included in § 34.202[2], Section 3.10 (sample form of declaration for condominium project). For further coverage, see California Real Estate Law and Practice, Ch. 385, *Homeowners' Associations* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.35 Formal Alternative Dispute Resolution (ADR) Procedure

An association or an owner or a member of a common interest development may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to some form of ADR, which may consist of mediation, arbitration, conciliation, or some other nonjudicial procedure that involves a neutral party in the decision making process. With the parties' consent, the form of ADR chosen may be binding or nonbinding [*Civ. Code §§ 1369.510(a), 1369.520(a), (d)*].

In the context of the ADR requirement, an "enforcement action" is a civil action or proceeding, other than a cross-complaint, to enforce any of the following [*Civ. Code § 1369.510(b)*]:

- The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*];
- The Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]; or
- The common interest development's governing documents, which consist of the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, that govern the operation of the common interest development or association [*see Civ. Code § 1351(j)*].

The ADR requirement applies only if the enforcement action is for declaratory, injunctive, or writ relief, or for one of those forms of relief in conjunction with a claim for monetary damages not in excess of the small claims court jurisdictional limit. It does not apply to a small claims action, and, except at otherwise provided by law, it also does not apply to an assessment dispute [*Civ. Code § 1369.520(b)-(d)*; *see* Code Civ. Proc. §§ 116.220, 116.221 (jurisdiction of small claims court)].

In addition to entering into formal ADR process, the owner of a separate interest who is disputing any charge or sum levied by the association, including when the disputed amount does not exceed the jurisdictional limits of small claims

court, may pay the disputed amount and any other amounts levied under protest and commence an action in small claims court [*Civ. Code § 1367.6(a)*].

For further detailed coverage of the formal ADR process and relevant forms, see respectively California Real Estate Law and Practice, Ch. 385, *Homeowners' Associations* (Matthew Bender) and California Forms of Pleading and Practice, Ch. 124, *Condominiums and Other Common Interest Developments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.36 Subdivision Map Act

[1] Overview and Applicability to Condominiums

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] specifically requires local agencies to enact ordinances regulating and controlling the initial design and improvement of "common interest developments" as defined in *Civ. Code § 1351* [*Gov. Code § 66411*; *see* discussion of *Civ. Code § 1351* in § 34.33].

A condominium project [*see Civ. Code § 1351(f)*] is a "subdivision" for purposes of the Subdivision Map Act [*see Gov. Code § 66424*]. However, the conversion of a community apartment project [*see Bus. & Prof. Code § 11004* (defined)] or stock cooperative [*see Bus. & Prof. Code § 11003.2* (defined)] to a condominium is exempt from the requirements of the Act if the conversion meets specified requirements [*see Gov. Code § 66412(g), (h)*; *see also § 34.220[1][c][i], [ii]*].

For the sake of consistency, this chapter refers to the developer of a condominium project as a "developer," even though "subdivider" is the term used in the Subdivision Map Act.

This chapter discusses the requirements of the Act that apply specifically to condominium projects. For a discussion of the Act as it relates to subdivisions in general, see Ch. 30, *Subdivision Regulation* .

[2] Maps Required

A condominium project containing five or more condominiums must have both a tentative map and a final map approved by the local legislative body (with certain limited exceptions) [*Gov. Code § 66426*; *see Ch. 30, Subdivision Regulation, § 30.110[1]*]. The tentative map must be approved first. It is essentially a rough draft which shows the design and improvement of the proposed subdivision and the existing conditions in and around the subdivision. It need not be based on an accurate or detailed final survey [*Gov. Code § 66424.5(a)*]. The local legislative body uses the tentative map to determine whether or not the proposed project should be approved and what changes (if any) must be made to the project. If it is approved, the final map is prepared by a registered civil engineer or licensed land surveyor, is based on a survey, and incorporates the changes demanded by the local entity [*see Gov. Code §§ 66433, 66434,*

66456]. After the final map is approved, the developer must record it in the office of the county recorder of the county in which the project is located [*see Gov. Code § 66429*].

Condominium projects that are not subject to the final map requirement (those containing four or fewer condominiums) must have a parcel map approved by the local legislative body unless the local ordinance waives the statutory parcel map requirement. When a parcel map is required, the local ordinance may also require the filing of a tentative map. If it does not do so, the developer has the option of filing a tentative map in order to take advantage of the review process discussed in the preceding paragraph [*Gov. Code § 66428*]. Parcel maps, like final maps, must be recorded [*Gov. Code § 66429*].

A developer may file a "vesting tentative map" in lieu of a "standard" tentative map [*Gov. Code § 66498.1(a)*]. A vesting tentative map essentially serves as a guarantee to the developer that only those local requirements in effect at the time the map is approved will apply to the development of the project [*Gov. Code § 66424.5(b)*; *see Gov. Code § 66452*].

PRACTICE TIP:

Consult Local Ordinance. Because local ordinances implement and supplement the statutory requirements, it is essential that counsel consult the local subdivision ordinance before ordering the preparation of a subdivision map or taking any related steps.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.37 Subdivided Lands Act

[1] Applicability to Condominiums

The Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] regulates the sale of subdivided lands (*see* definition, *below*) by requiring developers to provide prospective purchasers with a state-issued disclosure document referred to as a public report [*see § 34.37[3]*]. The Act defines "subdivisions" and "subdivided lands" to include condominium projects containing five or more condominiums [*Bus. & Prof. Code § 11004.5(c)*; *see § 34.37[2]* (listing other types of developments falling within these definitions)], and incorporates by reference the definition of "condominium" set forth in the Davis-Stirling Common Interest Development Act [*see Bus. & Prof. Code § 11004.5(c)*; *Civ. Code §§ 783, 1351(f)*; *see also § 34.32*].

The terms "subdivided lands" and "subdivision" also include any interests or memberships in any owners' association created in connection with a condominium project (or other subdivision) and any accompanying memberships or other rights or privileges created in or in connection with a condominium project by any deeds, conveyances, leases, assignments, declarations, articles of incorporation, bylaws, or contracts applicable to these items [*Bus. & Prof. Code § 11004.5(f)*].

This chapter refers to the developer of a condominium project as a "developer" even though such a person or entity is referred to as a "subdivider" under the Subdivided Lands Act.

[2] Implementing Regulations

The implementing regulations of the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2790 et seq.*] refer to condominium projects containing five or more condominiums and certain other types of "subdivisions" (certain planned developments, community apartment projects, stock cooperatives, and limited-equity housing cooperatives) as "common-interest" subdivisions [*see 10 Cal. Code Reg. §§ 2792.8, 2705(m)*; *see also Bus. & Prof. Code § 11004.5*; *10 Cal. Code Reg. §§ 2792.3-2793* (regulations directly applicable to common-interest subdivisions)]. The term "common interest subdivision" should not be confused with "common interest development" as that term is used in the

Davis-Stirling Common Interest Development Act [*Civ. Code §§ 1350-1378*; *see § 34.33[1]*].

The common interest subdivision regulations are important because they regulate, among other things, the contents of governing instruments [*see § 34.37[4]*], the establishment of owners' associations, and the permissible methods of levying assessments against condominium owners. The requirements of many of these regulations must be incorporated into the governing instruments [*see 10 Cal. Code Reg. § 2792.8*; *see also 10 Cal. Code Reg. §§ 2792.15-2792.29*; § 34.202[1][d][ii]]. Many of these matters are also governed by the Davis-Stirling Act [*see § 34.202[1][d][i]*].

[3] Public Report Requirement

The Department of Real Estate and the Real Estate Commissioner implement the regulatory objectives of the Subdivided Lands Act through the use of public reports. A public report discloses important consumer information concerning a particular condominium project, including basic project information (the developer's name, the location, size, and name of the project, the nature of the interest offered, and procedures for handling monies and operating the project) and descriptions of any unusual features of the project, such as hazards, land or other use restrictions, and out-of-the-ordinary financial requirements or arrangements [*see* California Department of Real Estate Reference Book, Ch. 20, *Subdivisions and Other Public Controls*, p. 523 (1984-1985 ed.)].

Under the Subdivided Lands Act, no person may sell or lease, or offer to sell or lease, any lots or parcels in a condominium project until the Real Estate Commissioner issues a final public report for the project [*see Bus. & Prof. Code §§ 11018.2, 11004.5*]. The developer must distribute copies of the report (and certain other documents) to every prospective purchaser or lessee, and obtain written receipts for the distributed reports [*Bus. & Prof. Code §§ 11018-11018.2, 11018.6*; *10 Cal. Code Reg. §§ 2795, 2795.1(a)*].

Before issuing a final public report, the Commissioner may, on request, issue a preliminary public report or a conditional public report covering the project. A preliminary public report permits the developer and the developer's agent to solicit and accept reservations to purchase or lease condominiums, provided certain other requirements are satisfied [*10 Cal. Code Reg. § 2795(b)*]. The Commissioner will issue such a report if, in his or her judgment, it is reasonable to expect that the applicant will satisfy all of the requirements for the issuance of a final public report in due course [*10 Cal. Code Reg. § 2795(a)*]. A conditional public report permits the developer to sell, lease, or offer for sale or lease condominiums in the project, provided delivery of legal title will not take place until a final public report is issued, and certain other requirements are satisfied [*Bus. & Prof. Code § 11018.12(d)*]. The Commissioner may issue this type of report if the developer has (among other things) submitted a "qualitatively complete" application for a final public report [*see Bus. & Prof. Code § 11010.2*], but is unable to satisfy certain additional requirements for the issuance of the final public report. These additional requirements generally involve recordation, filing, or submission of certain supporting documentation [*see Bus. & Prof. Code § 11018.12(a)*].

Any person who has purchased five or more condominiums in a condominium project from the original recipient of a public report or from a person who succeeded to the original recipient's interest in the units, may not offer those units for sale or lease until the purchaser obtains a public report expressly authorizing the sale of the units [*see 10 Cal. Code Reg. § 2801.5*].

For the requirements and procedure for obtaining preliminary and final public reports, see *§§ 34.143* and *34.200[1]*.

[4] Governing Instruments

An applicant for a final public report must submit copies of the governing instruments as part of the application [*see 10 Cal. Code Reg. § 2792.1(a)(2), (3)*; *see also § 34.143*, P 4]. The governing instruments are the declaration, articles, bylaws [*10 Cal. Code Reg. § 2792.8*], and, presumably, any operating rules of the association [*see § 34.33[3]*]. The Commissioner will not issue a public report for the project unless he or she finds that the governing instruments contain

"reasonable arrangements" that protect the interests of condominium purchasers with respect to the management, maintenance, preservation, operation, use, right of resale, and control of the condominium units and any other areas or interests that are or will be included in the project [*see Bus. & Prof. Code § 11018.5(e)*]. These reasonable arrangements must comply with numerous regulatory requirements (the "reasonable arrangement regulations") promulgated by the Real Estate Commissioner [*see 10 Cal. Code Reg. §§ 2792.8, 2792.15-2792.29*; *see also § 34.202[1]*]. The only exception to these reasonable arrangement requirements applies to certain "master planned developments" [*see 10 Cal. Code Reg. § 2792.32*; *see also § 34.44[3]*].

In addition to complying with the Commissioner's regulations, the attorney and developer must comply with any lender requirements for the governing instruments [*see § 34.45*; *see also* Rohan & Reskin, Condominium Law and Practice, Ch. 8C, *Financing the Residential Condominium* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsState Regulation



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.38 Owners' Association

[1] In General

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; *see § 34.33*], every condominium project (or other common interest development) must be managed by an association, which may be incorporated or unincorporated [*Civ. Code § 1363(a)*; *see Civ. Code § 1351(a)* ("association" means a nonprofit corporation or unincorporated association created to manage a common interest development)]. Although these entities may be referred to as community associations [*Civ. Code § 1363(a)*], they are commonly referred to as owners' (or homeowners') associations. The members of the association are the owners of the condominiums (or comparable separate interests).

Whether or not it is incorporated, the association may exercise the powers granted to the association by the Act. Further, an incorporated or unincorporated association may (unless the governing documents provide otherwise) exercise the powers granted to a nonprofit mutual benefit corporation [*see Corp. Code § 7140*], except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with *Corp. Code § 7313* [*Civ. Code § 1363(c)*].

The nonprofit corporation organized under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] is the preferred and most prevalent type of owners' association, except perhaps in the case of a very small project. Among other things, incorporation offers the advantages of centralized management [*see Corp. Code § 7210*], indemnification of directors, officers, and employees [*see Corp. Code § 7237*], and limited liability of members [*see Corp. Code § 7350*].

For further discussion of the advantages of an incorporated owners' association, see California Real Estate Law and Practice, Ch. 385, *Homeowners' Associations* , Pt. A (Matthew Bender). For a detailed discussion of nonprofit mutual benefit corporations and unincorporated nonprofit associations, see Ch. 13, *Nonprofit Corporations* , and Ch. 13A, *Nonprofit Unincorporated Associations* , respectively.

[2] Time of Formation

The formation of an owners' association does not occur, as is commonly believed, after all of the units in a project have been sold and when the new owners of the units assemble together for the first time. Instead, the formation process takes place roughly after the recordation of the condominium plan and subdivision map for the project and before the issuance of the project's final public report. The developer generally forms the association by filing the articles and adopting the bylaws for the association after they have been reviewed by the Department of Real Estate [*see § 34.205[1]*].

[3] Standing to Sue

An owners' association established to manage a condominium project or other common interest development has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the project, in matters pertaining to the following [*Civ. Code § 1368.3*; *see Civ. Code § 1363(c)* (association has these powers whether or not it is incorporated)]:

- Enforcement of the governing documents.
- Damage to the common areas.
- Damage to the separate interests that the association is obligated to maintain or repair.
- Damage to the separate interests that arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

For further discussion of actions maintained by owners' associations, including coverage of applicable comparative fault provisions [*see Civ. Code §§ 1368.3*, *1368.4*; *see also Standard Fire Ins. Co. v. Spectrum Community Assn. (2006) 141 Cal. App. 4th 1117, 1146-1148, 46 Cal. Rptr. 3d 804* (homeowners association sued for construction defect damages arising before association came into existence; court reasoned that homeowners association was first entity capable of maintaining legal claim against developers and if it did not have right court would have to conclude that no one at all held cause of action for construction defects)], see California Forms of Pleading and Practice, Ch. 124, *Condominiums and Other Common Interest Developments* (Matthew Bender).

[4] Mandatory Alternative Dispute Resolution Process for Construction Defect Disputes

Beginning July 1, 2002, and continuing until July 1, 2017 [*see Civ. Code § 1375(r), (s)*], before an association representing a common interest development that includes 20 or more units can file a complaint for damages against a builder, developer, or general contractor based on a claim for design or construction defects in the development, the association must initiate a statutory procedure that requires the parties either to settle the matter or submit it to alternative dispute resolution [*Civ. Code § 1375(a)*; *see Civ. Code § 1375(p)(3)*].

Title 7 of Part 2 of Division 2 of the Civil Code, "Requirements for Actions for Construction Defects" generally applies to litigation involving construction defects in new residences (excluding condominium conversions) that are originally sold on or after January 1, 2003 [*see generally Civ. Code § 895 et seq.*; *see also § 34.49*]. Title 7 includes owners' associations that govern common interest developments under the Davis-Stirling Common Interest Development Act as potential claimants [*see Civ. Code § 895(f)*; *see also § 34.49[2]*]. Like *Civ. Code § 1375*, Title 7 provides for a mandatory pre-litigation procedure. Title 7's pre-litigation procedure gives the potential defendant/builder a right to attempt a repair of any alleged defect prior to litigation [*see Civ. Code §§ 910-938*; *see also § 34.49[5]*]. If an association represents a common interest development that includes 20 or more units and the parties comply with the

statutory pre-litigation process for actions involving defective construction in new residential condominiums sold on or after January 1, 2003, the parties will be excused from performing this substantially similar pre-litigation dispute resolution process required by *Civ. Code § 1375* [*Civ. Code § 935*; *see § 34.49[5]*].

For additional coverage of construction defect litigation generally and as it relates to associations governing common interest developments, see California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender), and California Real Estate Law and Practice, Chs. 385, *Homeowners' Associations* , and 441, *Consumers' Remedies* (Matthew Bender).

[5] Limiting Tort Liability of Individual Owners, Officers, and Directors

Personal liability of individual owners for torts that occur on common areas, and of association volunteer officers and directors for injuries and property damage resulting from their tortious acts or omissions, is virtually eliminated if the association acquires and maintains specified insurance coverage at statutorily prescribed minimum levels [*see Civ. Code §§ 1365.7, 1365.9*].

To limit the liability of individual owners, the association must maintain and have in effect for a specific cause of action, one or more policies covering the association's general liability for at least $2 million if the development consists of 100 or fewer separate interests, and at least $3 million if the development is larger than 100 separate interests [*Civ. Code § 1365.9(b)*].

To limit the liability of volunteer officers and directors for their tortious acts and omissions, the association must maintain and have in effect at the time a claim is made the following: (1) general liability coverage for the association, and (2) individual liability coverage for association officers and directors for their negligent acts or omissions that occur when they are acting in that capacity [*Civ. Code § 1365.7(a)(4)*]. The minimum coverages required are less than those required to limit individual owner liability. If the development consists of 100 or fewer units, the minimum for both types of coverage is $500,000. If the development consists of more than 100 units, the minimum for both types of coverage is $1 million [*Civ. Code § 1365.7(a)(4)(A), (B)*]. For further discussion, see *§ 34.202[1][e][xiii]*.

[6] Status as "Business Establishment" Under Unruh Civil Rights Act

The Unruh Civil Rights Act [*Civ. Code § 51*] declares that all persons within the jurisdiction of California are free and equal and, regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever [*Civ. Code § 51(b)*]. An association of a condominium project possesses sufficient business like attributes to be considered a "business establishment" for purposes of the Unruh Act when the association, through a board of directors, is charged with the following: (1) employing a professional property management firm, (2) obtaining insurance for the benefit of all owners, (3) maintaining and repairing all common areas and facilities, (4) establishing and collecting assessments from owners, and (5) adopting and enforcing rules and regulations for the common good. These characteristics are typical of virtually all associations [*O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 796-797, 191 Cal. Rptr. 320, 662 P.2d 427]* .

The Unruh Civil Rights Act must be construed to prohibit a business establishment from discriminating in the sale or rental of housing based on age. However, when accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may, with certain exceptions, establish and preserve the housing for senior citizens in accordance with *Civ. Code § 51.3* [*Civ. Code § 51.2(a)*; *see Civ. Code § 51.2(b)*]. A housing development for senior citizens constructed after 2002 is presumed to be designed to meet the physical and social needs of senior citizens if it includes elements specified by statute [*see Civ. Code § 51.2(d)*]. A housing development constructed before February 8, 1982, that meets all criteria for senior citizen housing specified by statute [*see Civ. Code § 51.3*] may continue to serve as senior citizen housing without being designed to meet physical and social needs of senior citizens [

Civ. Code § 51.2(a)]. For further discussion, see *§ 34.40[2]*.

For detailed coverage of the Unruh Civil Rights Act, including a complaint for violation of the Act and affirmative defenses, see California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments* (Matthew Bender).

[7] Title to Common Area

The owners of condominiums in a condominium project usually own the common area as tenants in common [*see Civ. Code § 1362*; *see also § 34.33[7]*]. However, if all or a portion of the common area and facilities in a condominium project or other type of common interest subdivision [*see Bus. & Prof. Code § 11004.5*; *see also 10 Cal. Code Reg. § 2792.8*] are to be owned by the owners' association, those areas and facilities must be transferred to the association or to a corporate trustee under a trust agreement acceptable to the Real Estate Commissioner before or coincident with the first transfer or conveyance of a subdivision interest by the developer [*10 Cal. Code Reg. § 2792.15(a)*]. However, the developer may create a contractual right in himself or herself, or may reserve easements of limited duration, for any of the following: (1) common driveway purposes, (2) drainage and encroachment purposes, (3) ingress to and egress from the common areas for the purpose of completing improvements thereon or for the performance of necessary repair work, and (4) in the case of phased projects, for entry onto adjacent property in connection with the development of additional phases of the overall project [*10 Cal. Code Reg. § 2792.15(b)*].

[8] Governing Body

The governing instruments must provide for the creation of a governing body for the owners' association [*10 Cal. Code Reg. § 2792.8(a)(8)*]. Because most owners' associations are nonprofit corporations, the governing body is usually a board of directors elected by members of the association. The governing instruments must also contain provisions relating to the election and removal of governing body members and officers of the association; the powers, duties, and limitations, if any, on the authority of the governing body; and regular meetings and quorum requirements of the governing body [*see 10 Cal. Code Reg. § 2792.8(a)(9), (10), (14), (15)*]. The Commissioner's "reasonable arrangement" regulations set forth requirements relating to all of the above [*see 10 Cal. Code Reg. §§ 2792.19-2792.21*; *see also § 34.37[4]*].

[9] Managing Agent

Owners' associations frequently delegate some of their maintenance, management, and related responsibilities to a professional managing agent or management firm [*see Civ. Code § 1363(a)* (common interest development must be managed by its owners' association); *see also Civ. Code § 1364(a)* (unless declaration provides otherwise, association is responsible for repairing, replacing, and maintaining common areas)]. A prospective managing agent must provide the association board of directors with prescribed background information related to its qualifications before entering into a management agreement [*see Civ. Code § 1363.1*; *see also § 34.166*, P 4]. Once the parties have entered into an agreement, the managing agent is subject to statutory requirements governing the deposit and handling of association funds [*see Civ. Code § 1363.2*; *see also § 34.166*, P 5]. However, the amount of document and transfer fees charged by a managing agent in connection with the transfer of title is not limited by statute [*Berryman v. Merit Property Management, Inc. (2007) 152 Cal. App. 4th 1544, 1552, 62 Cal. Rptr. 3d 177* (although *Civ. Code § 1368* prevents homeowners associations from charging inflated fees for documents and for transfer of title, the statute does not constrain the amount that a managing agent can charge)]. For coverage of various management arrangements, see California Real Estate Law and Practice, Ch. 385, *Homeowners' Associations* (Matthew Bender).

[10] Members' Meetings

Regular meetings of members of the association must be held at least once each calendar year at a time and place prescribed by the bylaws of the association [*10 Cal. Code Reg. § 2792.17(a)*]. Further, the board of directors (or other

governing body) must promptly schedule a special meeting of the members if the board votes to hold such a meeting or receives a written request for such a meeting signed by members representing at least 5 percent of the total voting power of the association [*10 Cal. Code Reg. § 2792.17(c)*]. A special meeting must also be called as a prerequisite to filing a civil suit against the developer for alleged damage to the common areas, or to specified separate interests in the development [*see Civ. Code § 1368.4*].

The meetings must be conducted in accordance with (1) a recognized system of parliamentary procedure, or (2) any parliamentary procedures adopted by the association [*Civ. Code § 1363(d)*]. Additional statutory and regulatory requirements govern meeting notices, quorum requirements, and related matters [*see Civ. Code § 1363*; *10 Cal. Code Reg. § 2792.17*].

If two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association must be (1) entitled to attend all meetings of the joint association other than executive sessions, (2) given reasonable opportunity for participation in those meetings, and (3) entitled to the same access to the joint association's records as they are to the participating association's records [*Civ. Code § 1363(i)*].

[11] Members' Voting Rights

The governing documents must specify one of two types of voting systems for the condominium project. Under the single class system, each member of the association is entitled to one vote for each unit owned. If a unit is owned by more than one person ("co-owners"), each co-owner must be a member of the association, but only one vote may be cast for the unit. This system may be used even when the assessments against owners are unequal [*10 Cal. Code Reg. § 2792.18(a)*; *see § 34.39[3]*].

The more common voting system provides, at least for a limited time, for a two-class (Class A-Class B) voting system. Initially, all unit owners except the developer are Class A members and the developer is the sole Class B member. Each Class A member is entitled to one vote for each unit owned. The Class B member is entitled to a maximum of three votes for each unit owned by him or her [*10 Cal. Code Reg. § 2792.18(b)(1), (2)*].

If the two-class voting system is utilized in a single-phase project, the Class B membership must be irreversibly converted to Class A membership when the total outstanding votes held by Class A members equal the total outstanding votes held by the Class B member, or on a prescribed date that cannot be later than the second anniversary of the first conveyance of a unit authorized by the original issuance of the public report for the development, whichever is earlier. In a multiphase development [*see 10 Cal. Code Reg. § 2792.27* (applicable annexation requirements); *see also § 34.44*], the Class B membership must be irreversibly converted to Class A membership on a prescribed date that must not be later than the second anniversary of the first conveyance of a unit authorized by the issuance of the original public report for the most recent phase of the development or the fourth anniversary of the first conveyance of a unit authorized by the issuance of the original public report for the first phase of the development, whichever is earlier [*10 Cal. Code Reg. § 2792.18(b)*].

Whenever one of the Commissioner's regulations requires the approval of a prescribed majority of the voting power of members of an association other than the developer, the governing instruments must nevertheless permit the developer to cast votes for his or her units unless the proposed action relates to the enforcement of certain bonded obligations of the developer [*see 10 Cal. Code Reg. § 2792.4*; *see also § 34.202[2]*, Section 3.07(c)]. To assure the developer of this right, the governing instruments may specify either or both of the following for approval of action: (1) if a two-class voting system is in effect, the vote or written assent of a bare majority of the Class B voting power and the vote or written assent of a prescribed majority of the Class A voting power; and/or (2) if a single class of voting membership exists, either as originally established or after the conversion of Class B to Class A shares, the vote or written assent of a bare majority of the total voting power of the association and of a prescribed majority of the total voting power of

members other than the developer [*10 Cal. Code Reg. § 2792.18(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagement



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART II. LEGAL BACKGROUND

16-34 California Legal Forms--Transaction Guide § 34.39

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§ 34.39 Assessments

[1] In General

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], an owners' association must levy regular and special assessments [*Civ. Code § 1366(a)*]. Further, the association must comply with statutory limitations when increasing or enforcing the assessments, as discussed below [*see Civ. Code §§ 1366(b)-(d), 1367, 1367.1*]. The regulations of the Real Estate Commissioner also contain requirements for assessments levied against interests in condominium projects (or other common interest subdivisions) [*see 10 Cal. Code Reg. § 2792.16*]. Most condominium projects are subject to both sets of requirements [*see §§ 34.33[1], 34.37[1], 34.39[3]*].

[2] Commencement of Assessments and Vesting of Voting Rights

The Commissioner requires that regular assessments against the units in a phase of a multiphase condominium project, or against all units in a single phase project, begin either on (1) the date of the first conveyance of a unit in that phase under authority of a public report, or (2) on the first day of the month following the first conveyance of a unit in the phase [*10 Cal. Code Reg. § 2792.16(f)(1)*]. Except when there is an approved subsidization plan that provides otherwise, voting rights attributable to units must not vest until the association has levied assessments against those units [*10 Cal. Code Reg. § 2792.16(f)(2)*].

[3] Calculating Amount of Regular Assessments

Assessments imposed under the Davis-Stirling Act may not exceed the amount necessary to defray the costs for which they are levied [*Civ. Code § 1366.1*]. Regular assessments to defray the expenses attributable to the ownership, operation, and furnishing of common interests by an association must ordinarily be levied against each owner according to the ratio of the number of units owned by the owner assessed to the total number of units subject to assessments [*10 Cal. Code Reg. § 2792.16(a)*]. However, in the case of a condominium offering in which it is reasonable to anticipate that any owner will derive as much as 10 percent more than any other owner in the value of common services supplied by the association, the assessment against each owner may be determined according to a formula or schedule under

which the assessments against the various units bear a relationship that is equitably proportionate to the value of the common services furnished to the respective units [*10 Cal. Code Reg. § 2792.16(b)*].

Provisions in a condominium association's declarations and bylaws under which some owners had more voting shares than others and the amount of assessments for common areas and other purposes was tied to the number of voting shares held did not violate California law, including the Davis Stirling Common Interest Development Act [Cebular v. Cooper Arms Homeowners Ass'n (2006) 142 Cal. App. 4th 106, 122, 47 Cal. Rptr. 3d 666]. In *Cebular*, apartment owners owned and operated their apartment building as a stock cooperative. The cooperative operated as a corporation and unit owners in the stock cooperative owned shares in the corporation. Some residents owned more shares than others. The residents voted on operating issues, and the greater the number of shares owned by a resident, the greater his or her vote mattered. When the residents converted the property to condominiums, the residents' shares in the cooperative were converted to votes per unit. Each owner paid assessments commensurate with his or her votes per unit. When a new resident sued the homeowners association alleging violations of the Davis-Stirling Act, the court upheld the association's allocation of voting rights and assessment obligations. The court found that the allocation of assessment obligations need not be tied to the value, square footage, elevation, or views of each condominium unit and was not arbitrary since it was tied to voting rights [*Cebular v. Cooper Arms Homeowners Assn. (2006) 142 Cal. App. 4th 106, 121-123, 47 Cal. Rptr. 3d 666]* . Both Civ. Code § 1362 and 10 Cal. Code Reg. § 2792.16(a) and (b) contemplate that the declaration may provide for unequal ownership by condominium owners of common areas as tenants in common. As a result, neither § 1362 nor any regulation prohibit unequal assessments based on greater voting power [Cebular v. Cooper Arms Homeowners Ass'n (2006) 142 Cal. App. 4th 106, 122, 47 Cal. Rptr. 3d 666].

The developer and his or her successor in interest (if any) are owners subject to the payment of regular and special assessments against subdivision interests that they own [*10 Cal. Code Reg. § 2792.16(c)*].

[4] Exemptions From Payment of Assessments

The governing instruments may exempt the developer and any owner of a subdivision interest that does not include a structural improvement for human occupancy from the payment of that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and the use of structural improvements. In the case of a condominium project, that separately owned unit would have to be a parcel of real property for this exemption to be relevant [*see § 34.33[5]*]. The exemption may include, but need not be limited to, roof replacement, exterior maintenance, walkway and carport lighting, refuse disposal, cable television, and domestic water supplied to living units [*10 Cal. Code Reg. § 2792.16(c)*]. Any such exemption from the payment of assessments must end on the occurrence of the earliest of the following events: (1) the recordation of a notice of completion of the structural improvement; (2) occupation or use of the dwelling unit; or (3) completion of all elements of the residential structures that the owners' association is obliged to maintain [*10 Cal. Code Reg. § 2792.16(c)(1)*].

The governing instruments may also exempt the developer and any other owner of a subdivision interest from the payment of that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and use of a common facility that is not complete at the time assessments commence. This exemption must terminate when a notice of completion of the common facility is recorded or the common facility is placed into use, whichever occurs first [*10 Cal. Code Reg. § 2792.16(c)(2)*].

[5] Increases in Amount of Regular Assessments

The Davis-Stirling Act authorizes annual increases in the amount of regular assessments, subject to the following restrictions. An association may impose a regular assessment that is as much as 20 percent greater than the regular assessment for the association's preceding fiscal year, provided (1) the board of directors of the association has distributed a pro forma operating budget for that fiscal year [*see Civ. Code § 1365(a)*; *see also § 34.164*, P 1(a)], or (2) the increase is approved by owners constituting a quorum and casting a majority of the votes at a meeting or in an

election [*Civ. Code § 1366(a), (b)*; *see Corp. Code §§ 7510-7527, 7613* (relevant voting requirements)]. For these purposes, "quorum" means more than 50 percent of the owners of an association [*Civ. Code § 1366(a)*].

Regular assessments may not be increased more than 20 percent per year without the approval of owners constituting a quorum and casting a majority of the votes at a meeting or in an election [*Civ. Code § 1366(b)*; *see also Corp. Code §§ 7510-7527, 7613*]. The applicable definition of "quorum" [*see Civ. Code § 1366(b)*; *10 Cal. Code Reg. § 2792.16(h)(1)*] is identical to the one governing assessment increases of 20 percent or less (discussed *above*). This approval requirement applies notwithstanding more restrictive limitations imposed by the governing documents [*Civ. Code § 1366(b)*].

The above restrictions do not apply to assessment increases necessary for emergency situations. An emergency situation is any extraordinary expense that is any of the following [*Civ. Code § 1366(b)*]:

- Required by a court order.

- Necessary to repair or maintain the condominium project (or other type of common-interest development) or any part of it for which the association is responsible when a threat to personal safety on the property is discovered.

- Necessary to repair or maintain the condominium project or any part of it for which the association is responsible, and that could not have been reasonably foreseen by the board in preparing and distributing the pro forma operating budget [*see Civ. Code § 1365*; *see also § 34.164,* P 1(a)].

Before imposing or collecting an assessment in the type of emergency situation described in the third item, *above*, the board of directors must pass a resolution containing written findings with regard to (1) the necessity of the applicable extraordinary expense, and (2) the reasons the expense was not or could not have been reasonably foreseen in the budgeting process. The resolution must be distributed to the members with the notice of assessment [*Civ. Code § 1366(b)*].

[6] Limitations on Special Assessments

Special assessments may not exceed the amount necessary to defray the costs for which they are levied [*Civ. Code § 1366.1*]. Generally, in any fiscal year, they may not exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners constituting a quorum and casting a majority of the votes at a meeting or in an election [*Civ. Code § 1366(b)*; *see Corp. Code §§ 7510 et seq., 7520 et seq., 7613* (relevant voting requirements)]. A special assessment that was approved by an overwhelming majority of owners to replenish reserve funds that were depleted to pay for unanticipated repairs, as a matter of law, did not violate *Civ. Code § 1366.1* merely because the costs could have been recouped incrementally over time rather than as a lump sum [*Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 693-694, 76 Cal. Rptr. 2d 516 , disapproved on other grounds in Equilon Enterprises v. Consumer Cause, Inc. (2002) 124 Cal. Rptr. 2d 507*].

Every special assessment must be levied on the same basis as that prescribed for the levying of regular assessments [*see Civ. Code § 1366(b)*; *see also § 34.39[5]*]. The emergency exceptions listed above also apply to the limits on special assessments [*Civ. Code § 1366(b)(1)*]. Thus, in one case the trial court properly ordered a homeowners' association to levy a special assessment to pay a civil judgment arising out of an extraordinary and unforeseeable expense necessarily incurred to repair common areas following the Northridge earthquake [*James O'Toole Co. v. Los Angeles Kingsbury Court Owners Assn. (2005) 126 Cal. App. 4th 549, 555, 23 Cal. Rptr. 3d 894]* .

The association must provide the owners of condominiums in the project with written notice of any increase in the amount of a special assessment. The notice must be provided by first-class mail not less than 30 or more than 60 days

before the due date of the increased assessment [*Civ. Code § 1366(d)*].

[7] Delinquencies

Regular and special assessments are delinquent 15 days after they become due, unless the declaration provides a longer time period in which case the longer time period applies [*Civ. Code § 1366(e)*]. If an assessment is delinquent, the association may recover all of the following [*Civ. Code § 1366(e)(1)-(3)*]:

- Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorney's fees;

- A late charge not exceeding 10 percent of the delinquent assessment or $10, whichever is greater, unless the declaration specifies a late charge in a smaller amount, in which case any late charge imposed cannot exceed the amount specified in the declaration; and

- Interest on all sums imposed at an annual rate not exceeding 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies a lesser rate, in which case the lesser rate applies.

[8] Collecting or Securing Debts for Delinquent Assessments Arising On or After January 1, 2006

An association is precluded from resorting to judicial or nonjudicial foreclosure proceedings to collect on a debt arising from delinquent regular or special assessments when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest [*Civ. Code § 1367.4(a), (b)*]. Instead, the association has the following options [*Civ. Code § 1367.4(b)(1)-(3)*]:

- File a civil action in small claims court;

- Record a lien on the owner's separate interest and delay foreclosure until the amount of delinquent assessments, exclusive of accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, equals or exceeds $1,800 or the delinquent assessments secured by the lien are more than 12 months delinquent; or

- Any other manner provided by law, except for judicial or nonjudicial foreclosure.

If an association chooses to record a lien and delay foreclosure, it must, before recording the lien, offer the owner and, if the offer is accepted, participate in the association's dispute resolution process [*Civ. Code § 1367.4(b)(2)*; *see* Civ. Code § 1368.810 et seq.].

An association that seeks to collect on a debt arising from delinquent regular or special assessments when the debt arose on or after January 1, 2006, and the delinquent amount is at least $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, may use any option provided by law, including judicial and nonjudicial foreclosure [*Civ. Code § 1367.4(c)*; *see § 34.39[9]*].

[9] Liens Recorded On or After January 1, 2003

This discussion applies to assessment liens recorded on or after January 1, 2003 [*see Civ. Code § 1367.1(m)*].

A regular or special assessment and any late charges, reasonable fees, and costs of collection, and any reasonable

attorney's fees and interest, becomes a debt of a separate interest owner at the time the assessment or other sums are levied [*Civ. Code § 1367.1(a)*]. If the governing documents so provide, a monetary charge imposed by the association as a means of reimbursing itself for costs incurred in repairing damage to common areas and facilities for which a member or the member's guests or tenants were responsible may also become a lien on the owner's unit [*Civ. Code § 1367.1(d)*; *but see Civ. Code § 1367.1(e)* (excludes monetary penalty imposed as disciplinary measure)].

At least 30 days before recording a lien on the owner's separate interest to collect a past due debt, the association must notify the owner of record in writing by certified mail. The contents of the notice are prescribed by statute [*Civ. Code § 1367.1(a)*; *see Civ. Code § 1367.1(k)* (owner's right to request mailing to secondary address)].

Before recording a lien for delinquent assessments, the association must offer the owner and, if the owner accepts, participate in dispute resolution pursuant to the association's "meet and confer" program [*Civ. Code § 1367.1(c)(1)(A)*; *see Civ. Code § 1363.810 et seq.*]. Before initiating an action to foreclose an assessment lien, the association must once again offer the owner, and if the owner accepts, participate in dispute resolution pursuant either to the association's "meet and confer" program, or alternative dispute resolution with a neutral third party [*Civ. Code §§ 1367.1(c)(1)(B), 1367.4(c)(1)*; *see* Civ. Code § 1363.510 et seq.]. The decision to pursue either resolution process is the owner's, except that binding arbitration is not available if the association intends to judicially foreclose the lien [*Civ. Code §§ 1367.1(c)(1)(B), 1367.4(c)(1)*].

For liens recorded on or after January 1, 2006, the decision to record a delinquent assessment lien can only be made by the board of directors, who may not delegate the decision to an agent of the association. Approval of the decision to record must be approved by a majority of the board members at an open meeting, and the vote must be recorded in the minutes [*Civ. Code § 1367.1(c)(2)*].

To establish the lien, the association must record a notice of delinquent assessment in the county where the owner's unit is located. A copy of the recorded notice must be mailed to every person whose name is shown as an owner of the separate interest in the association's records [*Civ. Code § 1367.1(d)*].

An association may not voluntarily assign or pledge its right to collect payments or assessments, or to enforce or foreclose a lien to a third party, except when the assignment or pledge is made to a federally or state chartered or licensed financial institution as security for a loan obtained by the association. However, this does not affect the association's right or ability to assign any unpaid obligations of a former member to a third party for collection purposes [*Civ. Code § 1367.1(g)*].

[10] Liens Recorded Before January 1, 2003

Assessment liens recorded before January 1, 2003, are governed by a different statute than those recorded on or after that date [*see Civ. Code § 1367(g)*]. However, the law governing recording and foreclosing assessment liens recorded before January 1, 2003, is essentially the same as that for liens recorded on or after that date except in the case of a lien recorded before January 1, 2003. For these liens there is no formalized procedure for resolving the problem before recording a lien on an owner's unit [*compare Civ. Code § 1367* (governing liens recorded before January 1, 2003) *with Civ. Code § 1367.1* (governing liens recorded on or after January 1, 2003)].

[11] Exemption From Execution by Judgment Creditors

Regular assessments that are imposed or collected to perform an association's obligations imposed by either the governing documents or the Condominium Law are exempt from execution by the association's judgment creditors, but only to the extent necessary for the association to perform essential services, such as paying for utilities and insurance. In determining the appropriateness of an exemption, a court must ensure that only essential services are protected [*Civ. Code § 1366(c)*]. The exemption does not apply to the following [*Civ. Code § 1366(c)*]:

- Consensual pledges, liens, or encumbrances that have been approved by the association owners, constituting a quorum, casting a majority of the votes at meeting or association election.

- Any state tax lien.

- Any lien for labor or materials supplied to the common area.

[12] Restrictions on Transfer Fees

Neither an association nor a "community service organization or similar entity," defined below, may impose or collect any assessment, penalty, or fee in connection with a transfer of title or any other interest except for an amount to cover (1) the association's actual costs to change its records, and (2) the reasonable cost of furnishing documents and assessment statements required by *Civ. Code § 1368(a)* and *(b)* [*Civ. Code § 1368(c)(1)*].

For these purposes, a "community service organization or similar entity" is a nonprofit entity, other than an association, that is organized to provide services to residents of the common interest development or to the public in addition to the residents, to the extent community common areas or facilities are available to the public. The term does not include an entity that has been organized solely to raise money and contribute to other nonprofit organizations that are tax exempt under *I.R.C. § 501(c)(3)* and that provide housing or housing assistance [*Civ. Code § 1368(c)(3)*].

The limitation on transfer fees does not apply to a community service organization or similar entity that was established before February 20, 2003, and that exists and operates to fund or perform environmental mitigation or to restore or maintain wetlands or native habitat, as required by the state or local government as a condition of development [*Civ. Code § 1368(c)(2)(A)*]. The limitation also does not apply to a community service organization or similar entity that satisfies all of the following requirements [*Civ. Code § 1368(c)(2)(B)*]:

- The organization or entity is not one to which *Civ. Code § 1368(c)(2)(A)* applies;

- The organization or entity was established and received a transfer fee before January 1, 2004; and

- On and after January 1, 2006, the organization or entity offers a purchaser the option of paying the transfer fee or charge either at the time of transfer or on an installment basis for a period of not less than seven years.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawNonmortgage LiensGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART II. LEGAL BACKGROUND

16-34 California Legal Forms--Transaction Guide § 34.40

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§ 34.40 Occupancy Control

[1] Overview of Statutory Restrictions

To assure a community of compatible residents, the unit owners in a condominium project may establish minimum qualifications for prospective unit purchasers, provided that the standards satisfy federal and state requirements. On the federal level, discriminatory restrictions on the sale of condominium units could violate a number of statutes, the most important of which are Title II of the Civil Rights Act of 1964 [*42 U.S.C. § 2000a et seq.*] and the Fair Housing Act [*42 U.S.C. § 3601 et seq.*]. For further discussion of the federal laws prohibiting discrimination in housing, see California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination* (Matthew Bender).

In California, any restrictions on the ownership or use of real property that are based on sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are void [*see Civ. Code § 53*]. Further, the antidiscrimination provisions of the Unruh Civil Rights Act [*Civ. Code § 51*] apply to the owners' association of a condominium project [*see Civ. Code § 51*; *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 796-797, 191 Cal. Rptr. 320, 662 P.2d 427* ; *see also § 34.40[2]*]. Two additional statutory restrictions apply to deeds. First, a provision in a deed in California is void if it purports to restrict the right of any person to sell, lease, rent, use, or occupy the real property to persons because of their race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability, by providing for payment of a penalty, forfeiture, reverter, or otherwise [Civ. Code § 782(a); *see* Gov. Code § 12955(a), (d)]. Second, any deed or other written instrument that relates to title to real property, or any written covenant, condition, or restriction annexed to or made a part of any such deed or instrument, that contains any provision that purports to forbid, restrict, or condition the right of any person or persons to sell, buy, lease, rent, use, or occupy the property because of these same categories, will be deemed to be revised to omit that provision [Civ. Code § 782.5(a); *see* Gov. Code § 12955(a), (d)]. Certain housing for older persons and senior citizens is exempt from these provisions [*see* Civ. Code §§ 782(b), 782.5(b)].

The Davis-Stirling Common Interest Development Act provides that the covenants and restrictions in a declaration are enforceable servitudes unless unreasonable, and inure to the benefit of and bind all owners of separate interests in the

development [*Civ. Code § 1354(a)*]. Use and occupancy restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangements [*Colony Hill v. Masood Ghamaty (2006) 143 Cal. App. 4th 1156, 1164, 50 Cal. Rptr. 3d 247 , citing Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal. 4th 361, 372, 33 Cal. Rptr. 2d 63, 878 P.2d 1275]* .

PRACTICE TIP:

Association Has Latitude in Regulating Use of Units. Unless a homeowners associations practice with regard to the occupancy and use of its members units violates the above federal and state anti-discrimination limitations, the association is given a great deal of latitude in regulating the use of residential units in its development. For example, in *Colony Hill*, the covenants and restrictions prohibited any use of the residential units other than for purposes of a single-family dwelling. The homeowner's association successfully defended its enforcement of the restrictions when one of its homeowners engaged in serial rental of rooms in his unit to multiple renters. The court held that the association's use restrictions were not unreasonable and therefore enforceable [*Colony Hill v. Masood Ghamaty (2006) 143 Cal. App. 4th 1156, 1164-1166, 50 Cal. Rptr. 3d 247]* .

[2] Senior Citizen Housing in General

When housing accommodations are designed to meet the physical and social needs of senior citizens, a business establishment (such as the owners' association of a condominium project) may establish and preserve the housing for senior citizens, under *Civ. Code § 51.3* [*Civ. Code § 51.2(a)*; *see Civ. Code § 51.3(a)* (legislative intent)]. This is an exception to the prohibition against age discrimination contained in the Unruh Civil Rights Act [*see Civ. Code §§ 51, 51.2(a)*]. The exception does not apply, however, to the extent that it is preempted by certain federal prohibitions against discrimination on the basis of familial status [*see Civ. Code § 51.2(a)*; Pub. L. No. 100-430; *see also* California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination* (Matthew Bender)].

Under the senior citizen housing provisions of *Civ. Code § 51.3*, "housing" or "dwelling unit" means any residential accommodation other than a mobilehome [*Civ. Code § 51.3(b)(5)*]. The interchangeable terms "qualifying resident" and "senior citizen" mean a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development [*Civ. Code § 51.3(b)(1)*]. A "senior citizen housing development" is a residential development consisting of at least 35 dwelling units that is developed, substantially rehabilitated, or substantially renovated for senior citizens. No housing development constructed before 1985 will fail to qualify as a senior citizen housing development merely because it was not originally developed or put to use for occupancy by senior citizens [*Civ. Code § 51.3(b)(4)*; *see Civ. Code § 51.3(f)*]. Any senior citizen housing development that is required to obtain a public report must include in the application, if submitted after July 1, 2001, a complete statement of the occupancy restrictions that apply in the development. A statement of those restrictions must also be included in the public report itself [*Bus. & Prof. Code § 11010.05*; *Civ. Code § 51.3(b)(4)*].

No housing development constructed before 1985 will fail to qualify as a senior citizen housing development merely because it was not originally developed for or originally put to use for occupancy by senior citizens. To qualify as a senior citizen housing development constructed after 1984, a condominium (or stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential rental property) either (1) must have been developed for, and initially been put to use as, housing for senior citizens or (2) must have been substantially rehabilitated or renovated for, and immediately afterward put to use as, housing for senior citizens [*Civ. Code § 51.3(f)*].

The CC&Rs and other documents or written policy of a senior citizen housing development must set forth the limitations on occupancy, residency, or use on the basis of age. The limitations may not be more exclusive than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same unit may be required to be a qualified permanent resident, a permitted health care resident (both of which are defined below), or a person under age 55 who otherwise qualifies to live there [*Civ. Code § 51.3(c)*; *see Civ.*

Code §§ 51.3(h), 51.4(b) (qualifying persons under 55)]. The limitations may be less exclusive but must at least require that the persons commencing any occupancy of a dwelling unit shall include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis [*Civ. Code § 51.3(c)*]. The CC&Rs and other documents or written policy must permit temporary residency, whether as a guest of a senior citizen or a qualified permanent resident, by a person under 55 for periods of time, not less than 60 days in any year, that are specified in the CC&Rs or other documents or written policy [*Civ. Code § 51.3(d)*].

A "qualified permanent resident" is a person who both [*Civ. Code § 51.3(b)(2)*]:

- Was residing with the qualifying resident or senior citizen before the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.

- Was at least 45 years of age, or was the spouse, cohabitant [*see Civ. Code § 51.3(b)(6)* ("cohabitants" are persons who live together either as husband and wife or as domestic partners within meaning of *Fam. Code § 297*)], or person providing primary physical or economic support to the qualifying resident or senior citizen.

"Qualified permanent resident" also includes a disabled person or person with a disabling illness or injury who is a child or grandchild of the senior citizen or a qualified permanent resident who needs to live in the dwelling unit because of the disability [*Civ. Code § 51.3(b)(3)*; *see Civ. Code § 54(b)* ("disability" defined)]. A person residing in a senior citizen housing development as a qualified permanent resident because of disability may be required by the board of directors, on six months' notice, to cease his or her residency if the disabling condition ends [*Civ. Code § 51.3(b)(3)(A)*]. The board may also take action to prohibit or terminate a qualified permanent resident's occupancy based on a finding that the person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated, provided the due process rights of the disabled person whose occupancy is being challenged are protected [*Civ. Code § 51.3(b)(3)(B)*].

A "permitted health care resident" is a person hired to provide live-in, long-term, or terminal health care to a qualifying resident, or a family member of the qualifying resident providing that care. The care provided must be substantial in nature and must provide either assistance with necessary daily activities or medical treatment, or both. A permitted health care resident is allowed to continue his or her occupancy in the senior citizen's absence, provided a written request is submitted to the board, or the absence is due to hospitalization or medical treatment and the senior citizen expects to return to the unit [*Civ. Code § 51.3(b)(7), (i)*].

On the death, dissolution of marriage, hospitalization, or other prolonged absence of the qualifying resident, any qualified permanent resident (but not a permitted health care resident) will be entitled to continue his or her occupancy of the dwelling unit as a permitted resident [*Civ. Code § 51.3(e)*].

Any declaration or other document of a condominium project (or stock cooperative, limited equity housing cooperative, planned development, or multiple family residential property) that contained age restrictions on January 1, 1984, is enforceable only to the extent permitted by *Civ. Code § 51.3*, notwithstanding the January 1, 1985, effective date of *Civ. Code § 51.3* or lower age restrictions contained in the declaration or other document [*Civ. Code § 51.3(g)*]. Further, any person who had the right, on January 1, 1985, to reside in, occupy, or use housing or an unimproved lot subject to § 51.3, will not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of § 51.3 [*Civ. Code § 51.3(h)*].

Because of the unusually large concentration of senior communities in Riverside County, and the fact that those communities have been subjected to an unusually large number of civil enforcement actions and litigation by private parties, notwithstanding the senior communities' good faith belief that they were in compliance with the law, the legislature has exempted Riverside County from the general requirements imposed on senior-only housing, and enacted

special statutes, which impose less-stringent requirements [*see Civ. Code §§ 51.2(c), 51.3(j), 51.4(c), 51.10-51.12*; *see also* 1996 Stats., ch. 1147, § 8 (explanation of legislative intent)].

[3] Senior Citizen Housing Constructed After 2000

A housing development for senior citizens constructed after 2000 is presumed to be designed to meet the physical and social needs of senior citizens if it meets all of the following requirements [*Civ. Code § 51.2(d)*]:

- Entryways, walkways, and hallways in the common areas, and doorways and paths of access to and within the housing units, must meet current legal requirements for wheelchair access in new multifamily housing construction.

- Walkways and hallways in the common areas must be equipped with standard-height railings or grab bars.

- Walkways and hallways in the common areas must be sufficiently well-lighted to assist persons who have difficulty seeing.

- All common areas and housing units must be accessible by elevator or sloped walking ramps.

- The development must be designed to encourage social contact by providing at least one common room and at least some common open space.

- Refuse collection must be provided in a manner that requires minimum physical exertion by residents.

- The development must comply with all other applicable requirements for access and design imposed by law, including the Fair Housing Act [*42 U.S.C. § 3601 et seq.*], the Americans with Disabilities Act [*42 U.S.C. § 12101 et seq.*], and California regulations related to access for persons with disabilities and handicaps.

[4] Senior Housing Constructed Before 1982

A housing development constructed before February 8, 1982, that meets all criteria for senior citizen housing specified by statute [*see Civ. Code § 51.3*] may continue to serve as senior citizen housing without being designed to meet physical and social needs of senior citizens [*Civ. Code § 51.2(a)*]. Any person who, before 1990, resided in, occupied, or used a dwelling in a senior citizen housing development that relied on this exception to the special design requirements cannot be deprived of the right to continue that residency, occupancy, or use as the result of subsequent legislative changes in those requirements [*Civ. Code § 51.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingFair Housing RightsProhibited ActsReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsManagement



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16-34 California Legal Forms--Transaction Guide § 34.41

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.41 Securities Regulation

[1] In General

The sale of condominiums is generally exempt from federal and state securities laws, particularly if the purchaser will occupy the unit. However, the sale of certain types of condominiums may be considered the sale of securities and therefore require qualification and/or registration under the securities laws when the purchaser expects a speculative return on the condominium through the efforts of another person. This is most likely to occur in the case of resort condominiums that are maintained and rented by a management agent on the owner's behalf. Although a detailed discussion of securities laws is beyond the scope of this chapter, the following discussion covers the requirements and exemptions that are most likely to apply to the sale of condominium units in California.

[2] Federal Regulation

The sale of condominiums may be subject to the registration requirements of the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*] when the offering includes investment contracts or interests in a profit sharing agreement. An investment contract is a scheme whereby a purchaser invests money in a common enterprise with the expectation that profits will result solely from the efforts of others [*see SEC v. W.J. Howey Co. (1946) 328 U.S. 293, 298-299, 66 S. Ct. 1100, 90 L. Ed. 1244* ; *see also United Housing Foundation v. Forman (1975) 421 U.S. 837, 853, 95 S. Ct. 2051, 44 L. Ed. 2d 621]* . Thus, an offering of condominium units will be an offering of an investment contract if any of the following arrangements are present: (1) the condominiums, with any rental arrangement or other similar service, are offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, from rental of the units; (2) participation in a rental pool arrangement is offered; or (3) the purchaser is offered a rental or similar arrangement whereby the purchaser must hold his or her unit available for rental for any part of the year, must use an exclusive rental agent, or is otherwise materially restricted in his or her occupancy or rental of the unit [SEC Release No. 33-5347 (January 4, 1973); *see Hocking v. Dubois (9th Cir. 1989) 885 F.2d 1449* (rental pool arrangement)]. In *Hocking*, the court determined whether the purchase of a condominium at the heart of the case involved a "security" within the means of the Federal Security Laws by determining whether the buyer's purchase of the condominium and rental pool was (1) an investment of money, (2) in a common enterprise, (3) with an expectation of

profits produced by the efforts of others [*Hocking v. Dubois (9th Cir. 1989) 885 F.2d 1449, 1455-1457]* .

The Securities and Exchange Commission will not issue a no-action letter concerning the possible applicability of the federal securities laws to a particular condominium offering [*see* Rohan & Reskin, Condominium Law and Practice, Ch. 18, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool* (Matthew Bender)]. Thus, the developer and his or her attorney must make their own determination concerning this matter. For further discussion of the applicability of the federal securities laws to the sale of condominiums, see Rohan & Reskin, Condominium Law and Practice, Ch. 18, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool* (Matthew Bender), and California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender).

[3] State Law

Offers or sales of securities in California must be qualified with the Department of Corporations under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*] unless they are otherwise exempted [*see Corp. Code § 25100*]. A security consisting of an interest in subdivided lands or a subdivision or in a real estate development is specifically exempt from qualification unless an investment contract is sold or offered for sale with or as part of that interest [*Corp. Code § 25100(f)*]. Condominiums fall within the definition of "real estate development" [*see Corp. Code § 25015*; *see also* Marsh & Volk, Practice Under the California Securities Laws, Ch. 5, *Problems Relating to Special Types of Issuers and Securities* (Matthew Bender)]. Further, "subdivided lands" and "subdivision" are defined by reference to their definitions in the Subdivided Lands Act [*Corp. Code § 25021*; *see Bus. & Prof. Code §§ 11000, 11004.5*], and therefore include condominium projects containing five or more condominiums and the other common interest subdivisions regulated by that Act [*see § 34.37[1]*].

This exemption has been applied to the offer and sale of memberships in a California nonprofit corporation that was to build a condominium project [Calif. Corp. Comm. Op. No. 73/58C] and to one that was to manage and operate a condominium project in which the memberships would be appurtenant to the condominium units [Calif. Corp. Comm. Op. No. 73/116C].

As mentioned above, the exemption set forth in *Corp. Code § 25100(f)* does not apply when an investment contract is involved. An "investment contract" is a security [*Corp. Code § 25019* ("security" defined)] consisting of any scheme in which a person invests money with the expectation of realizing profits solely, or at least primarily, from the efforts of a third party [*see* Calif. Corp. Comm. Ops. Nos. 73/124C, 72/138C]. An example of such a scheme would be a rental pool agreement between unit owners and a management entity under which the latter assumes responsibility for maintaining and renting participating units, with the resulting profits divided among the nonresident owners [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender)]. Thus, the offer and sale of condominium units when offered with the opportunity of joining a rental pool is an investment contract (and therefore subject to the state qualification requirements) because membership in the rental pool would result in prospective profit or income to the owners through the efforts of a management corporation [Calif. Corp. Comm. Op. No. 72/87C].

For a detailed discussion of the qualification of securities under the Corporate Securities Law of 1968, see Ch. 6H, *Qualification of Securities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSecurities RegulationPublic Offerings of CondominiumsReal Property LawSecurities RegulationTransactions Subject to RegulationSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsExempted Issuers



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§ 34.42 Environmental Regulation

The principal federal and state environmental laws that may affect the development of condominium projects in California include the following:

- The National Environmental Policy Act of 1969 (NEPA) [*42 U.S.C. § 4321 et seq.*; *see 40 C.F.R. § 6.100 et seq.*].

- The California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see 14 Cal. Code Reg. § 15000 et seq.*].

- The California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*; *see 14 Cal. Code Reg. § 13001 et seq.*].

Condominium projects located in certain geographical areas may also be subject to further regulation by regional agencies, such as the San Francisco Bay Conservation and Development Commission [*see Gov. Code § 66600 et seq.*; *14 Cal. Code Reg. § 10110 et seq.*] and the California Tahoe Regional Planning Agency [*Gov. Code § 67000 et seq.*].

For discussion of the impact of environmental laws on construction projects in general, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationIndoor Air & Water Quality



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§ 34.43 Converting Apartment Building to Condominiums

[1] In General

The owner of an apartment building or other multiunit residential structure may desire to convert the building to condominiums for a variety of reasons. However, the goal of most "converters" is to receive greater sales receipts from the sale of individual condominium units than they would receive from the sale of the building or complex as a whole [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender)]. From a practical standpoint, the likelihood of successfully converting a residential building to condominiums is influenced by several factors, including the conversion requirements of the local ordinance [*see § 34.43[3]*], the quality of construction of the existing building, the degree of renovation required for conversion, whether amenities such as parking and recreational facilities will have to be added, the location of the building, and the vacancy and tenant turnover history of the building. For further discussion, see Rohan & Reskin, Condominium Law and Practice, Ch. 3A, *Conversion of Existing Buildings to Condominium Status* (Matthew Bender).

[2] Statutory Requirements

The statutory requirements regulating the formation and sale of a converted condominium project are essentially the same as those applicable to a newly constructed condominium project. The vast majority of these requirements are set forth in three acts. First, the public report requirements of the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations [*see 10 Cal. Code Reg. § 2790 et seq.*] apply to conversions or new construction creating condominium projects containing five or more condominium units [*see Bus. & Prof. Code §§ 11004.5(c), 11018.2*; *see also § 34.37[1]*]. To obtain the public report, the converter must submit the standard application plus a supplemental conversion questionnaire [*see* DRE Form 639, available at http://www.dre.ca.gov/form500.htm.].

Second, a condominium conversion is subject to the requirements of the Subdivision Map Act [*Gov. Code § 66410 et seq.*] unless (1) it involves the conversion of a community apartment project [*see Bus. & Prof. Code § 11004*] or stock cooperative [*see Bus. & Prof. Code § 11003.2*], and (2) the conversion meets certain specified requirements [*see Gov. Code § 66412(g), (h)*; *see also § 34.220[1]*]. The Subdivision Map Act requires, depending on the number of

condominiums in the project, the preparation and recording of either a final or parcel map [*see § 34.36[2]*]. That Act also requires converters to give existing tenants a series of notices regarding the proposed conversion and the tenants' exclusive 90-day right to purchase their units [*see Gov. Code § 66427.1*; *see also § 34.145*; *§§ 34.220-34.226*].

The third major law applicable to condominium projects, the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], applies to any converted project that falls within the broad definition of "common interest development" [*see Civ. Code § 1351(c)*; *see also § 34.33[1]*].

[3] Local Ordinances

Pursuant to their authority under the Subdivision Map Act, local governments may enact ordinances regulating condominium conversions [*see 58 Ops. Cal. Atty. Gen. 41]* . These ordinances are extremely important because they may effectively prohibit conversions in any given area. While such ordinances vary in terms of restrictiveness, they usually deal with all or at least one of the following areas: tenant approval and notice requirements, the converter's relocation obligations, and social housing policy. For example, some ordinances require tenant approval of conversions. Local relocation assistance obligations may require the developer to help tenants find new apartments, subsidize the amount of any increased rent, and pay moving expenses. Finally, some ordinances prohibit conversions if the apartment vacancy rate in the area is less than a specified percentage or if it is determined that the project would have a significant effect on the overall rental housing market in the area [*see* Rohan & Reskin, Condominium Law and Practice, Ch. 3A, *Conversion of Existing Buildings to Condominium Status* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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§ 34.44 Developing Project in Phases

[1] In General

A developer may elect to develop a condominium project or similar development in separate stages or "phases," particularly when the project involves the construction of a large number of units over a substantial period of time. Reasons for phased development include, but are not limited to: (1) insuring that there is a sufficient market demand for the units; (2) avoiding the payment of assessments on units constructed but not sold; (3) reducing financing costs by securing a separate construction loan for each phase; and (4) greater ease in satisfying the common lender requirement that at least 51 percent of the units in the project be sold before escrow can be closed on any of the units [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender); *see also § 34.45[2]*].

Further, by phasing a project, "the developer may also want to test the market initially and then change the design or the mix of the units based on the experience gained from selling the first phase of the project. If the project is not phased, once the developer has recorded the map and plan for a condominium project, he or she will not be able to go back and change the design of the units by resubdividing the airspace units without the consent of the purchasers. By phasing the project, the developer can change the design and mix in the later phases of the project without having to get the consent of owners in an earlier phase" [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 11.4, p. 420].

In addition, since "the Department of Real Estate requires a bond or other security for the estimated cost of completing common area facilities" and since bonding costs can be substantial, if the project is divided into phases, each one having a separate final map, the developer may be able to reduce the common area improvements that must be bonded, and therefore, reduce the bond costs. In addition, "the Department of Real Estate also requires a bond to be put up for six months' worth of association assessments." Therefore, by phasing the project, the size of the bond can be reduced, with each phase having its own separate six month bond [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 11.6, p. 421].

Phasing a project can also create unique problems that require careful attention to detail in drafting the condominium documents. For example, problems may arise because of lender reluctance to accept mortgages on units whose percentage share in the common areas may decrease with the annexation of each new phase, and because of the complexity of transferring title to the common elements from one phase to another after the annexation of each new phase. For a discussion of these problems and some suggested solutions, see Rohan & Reskin, Condominium Law and Practice, Ch. 16, *Construction of Enabling Legislation and Project Documentation* (Matthew Bender).

[2] Commissioner's Annexation Requirements

Provisions in the declaration providing for the annexation of real property to an existing condominium project or other common interest subdivision must require the vote or written assent of at least two-thirds of the total voting power of the owners' association (excluding the developer), unless the proposed annexation substantially conforms to a detailed plan of phased development submitted to the Real Estate Commissioner with the application for a public report [*see § 34.200[2]*] for the first phase of the subdivision [*10 Cal. Code Reg. § 2792.27(a)*]. For a list of the required contents of the plan of phased development [*see 10 Cal. Code Reg. § 2792.27(b)*], see *§ 34.143*, P 6.

For the Real Estate Commissioner to approve the phasing of a project, a phasing schedule must be prepared by the developer and submitted to the Real Estate Commissioner. Such phasing plan should include language that affords the developer the greatest "flexibility with respect to the future phases. This can be done by specifically reserving the right to change the number of phases, the order of the phases, or the number of subdivision interests in any phase, or, in the alternative, it can be done by describing the property to be annexed in the future in general terms, and providing that it may be divided into any number of individual phases. The latter approach poses some difficulties in predicting the changes in the budget for the project that will result from subsequent annexations" [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 11.24, p. 433].

The developer of a phased common interest subdivision must obtain a public report from the Real Estate Commissioner for each phase. A complete application package and filing fee is required for each public report [*10 Cal. Code Reg. § 2798*; *see § 34.200[2]*].

Regular assessments against the subdivision interests in a phase of a multi-phase subdivision or against all subdivision interests in a single-phase subdivision must commence (1) on the date of the first conveyance of a subdivision interest in that phase under the authority of a public report, or (2) on the first day of the month following the first conveyance of a subdivision interest in the phase [*10 Cal. Code Reg. § 2792.16(f)(1)*]. In addition, if the annexed property has been rented for at least one year before the closing of the first unit or lot in the annexed phase, the declarant must pay to the association appropriate amounts for reserves for replacement or deferred maintenance of common area improvements in the annexed phase [*10 Cal. Code Reg. § 2792.27(b)(4)*].

Voting rights attributable to subdivision interests in a phase will not vest until assessments against those interests have been levied by the association, except in subdivision offerings where there is an approved subsidization plan that provides otherwise [*10 Cal. Code Reg. § 2792.16(f)(2)*].

[3] Master Planned Developments

There are special regulations for master planned developments. A "master planned development" is (1) a "planned development" as defined by *Civ. Code § 1351(k)* [*see* Ch. 33D, *Planned Developments*], (2) consisting of 500 or more separate residential interests and one or more subdivisions, (3) developed in two or more phases, and (4) managed by a community association that is responsible for maintaining and operating areas and/or facilities affecting the master planned development and enforcing the development's use restrictions. If the development meets these criteria, it will be treated differently from the smaller common interest developments. A development that does not satisfy all of these criteria may nonetheless be treated as a master planned development if the developer can demonstrate from specific

facts and circumstances that it should be so treated [*10 Cal. Code Reg. § 2792.32(a)*].

The special regulations that apply to master planned developments recognize that control by the developer over the development's governing body and architectural control committee is ordinarily necessary on a master planned development project until a reasonable portion of the project has been completed. As such, the regulations provide the developer with more latitude over association governance and architectural committees than is generally applied to other types of common interest developments. More specifically, the Department of Real Estate only requires that the governing instruments of a master planned development substantially conform to the applicable standards set forth in *10 Cal. Code Reg. § 2792.32(c)-(g)*, which provide for [*10 Cal. Code Reg. § 2792.32(b)*]:

- The transition of voting power from the developer to the transferors of separate interests as more and more separate interests are transferred [*10 Cal. Code Reg. § 2792.32(c)*];

- Division of the project into geographical districts each of which is individually represented by delegates to a Master Association [*10 Cal. Code Reg. § 2792.32(d)*];

- Relaxed quorum requirements for adjourned meetings of the Master Association [*10 Cal. Code Reg. § 2792.32(e)*];

- Ensuring that the developer has a majority of the voting power on the Master Association in the early stages of development with that power phased out over time and ultimately ceasing to exist on the occurrence of specified events [*10 Cal. Code Reg. § 2792.32(f)*]; and

- During the initial stages of development, the appointment of members of the Architectural Control committee, who need not be members of the Master Association [*10 Cal. Code Reg. § 2792.32(g)*].

In addition, if the development will include any residential structure or other major special benefit facility or amenity that is to be commonly maintained or operated for the use or benefit of some but not all of the homeowners within the Master Planned Development, ordinarily one or more separate homeowners associations must be established to maintain that structure or to maintain and operate the facility or amenity under arrangements that are substantially similar to the Department of Real Estate regulations for smaller common interest developments [*10 Cal. Code Reg. § 2792.32(h)*; *see 10 Cal. Code Reg. §§ 2792.4* (Enforcement of Bonded Obligations), 2792.8(a) (Governing Instruments), 2792.15 (Transfer of Common Areas and Facilities to Association), 2792.26 (Member Discipline)].

The subdivider of a Master Planned Development may enter into an arrangement with the Master Association to sell or to convey common area amenities under a lease purchase arrangement to the Master Association [*10 Cal. Code Reg. § 2792.32(j)*]. All common area amenities subject to this arrangement must be (1) specifically identified and defined as "common area" or "future common areas" in the CC&Rs, (2) a part of the proposed Master Planned Development, (3) accessible to all homeowners who will be charged an assessment to pay for the amenity, and (4) located on a separate lot or parcel [*10 Cal. Code Reg. § 2792.32(j)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawZoning & Land UsePlanned Unit Developments



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CHAPTER 34 CONDOMINIUMS
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16-34 California Legal Forms--Transaction Guide § 34.45

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.45 Financing

[1] Construction Financing

The developer of a condominium project or other type of common interest subdivision/development normally obtains construction financing to pay for the proposed improvements and related expenses. Construction financing almost invariably takes the form of a short-term loan secured by a blanket deed of trust on the project. The lender charges a relatively high interest rate, which is based on the lender's expenses and risks, and disburses the loan proceeds on the completion of specified stages or percentages of construction [*see generally* Ch. 30A, *Construction Financing*].

Lending institutions usually insist that a specified percentage (such as 50 percent) of the units in the project be sold and in escrow before (1) any of them may be conveyed to individual owners, and (2) the lender will issue concurrent releases from the blanket lien. If this presale requirement is not satisfied, the lender can foreclose against the entire project [*see* California Real Estate Law & Practice, Ch. 471, *Condominiums* (Matthew Bender)].

As a further condition to making a construction loan, the lender may insist that the developer obtain a written commitment for permanent financing [*see § 34.45[3]*].

If the proposed project is subject to the requirements of the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], the construction loan agreement and deed of trust must be subordinated to the requirements of the declaration [*see Bus. & Prof. Code § 11018.5(c)*; *see also § 34.203*]. In addition, if a portion of the common area is to be conveyed to the homeowners association, "the loan documentation also must provide for releases of the common areas of the project from the lien of the construction loan, so that such common area can be conveyed free of encumbrances to the homeowners association prior to the conveyance of the first subdivision interest in the project" [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 13.3, p. 716].

"A typical construction loan commitment letter includes the promise of the lender to make a loan for a certain percentage, usually 80 percent, of the appraised value of the completed project." Further, the loan commitment letter

will typically specify (1) the term of the commitment, which is generally long enough to allow for completion of construction; (2) the term of the loan; (3) the interest rate; (4) the loan fees; and (5) a list of conditions precedent to making the loan. Counsel for the developer should assure that the commitment letter include a release clause that will allow the lien of the deed of trust to be removed from title to the individual on the payment of a prorate portion of the principal, plus accrued interest, to the lender [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 13.6, pp. 717, 719].

For further discussion of construction financing, see Ch. 30A, *Construction Financing* , and California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender).

[2] Overview of Long-Term Financing

A "permanent" or "take-out" loan is a long term loan, payable in installments over a period of several years, which is used to "take out" or pay off an interim construction loan within a short time after completion of construction. In the case of a condominium project, each purchaser of an individual condominium unit obtains financing (or makes alternative arrangements for payment) for his or her unit, independently of the other owners in the project. This financing is similar to permanent financing for single family residences, with the characteristics of the financing dependent on the lender and the liquidity of the mortgage market at the time of the mortgage contract.

The long term or permanent lender has a lien on the purchaser's unit and can foreclose only on that unit following a default. These loans are attractive to lenders because the lender does not have to assume the risk of a blanket mortgage. Further, the only financial interdependence among the unit owners is the sharing of the costs of maintaining the common area of the project. Finally, foreclosure and resale are relatively simple because each unit is a separately marketable piece of realty [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender)].

[3] Permanent Commitments

Construction lenders typically insist on a written guarantee that purchasers of condominiums in the project will be able to obtain the permanent financing they need to pay for the units and to "take out" the construction loan. A developer will usually obtain such a guarantee from a single permanent lender. The lender may agree to provide permanent financing for a large minimum number of the unsold units, or may make a standby commitment to provide permanent financing to qualified applicants who are unable to obtain alternative financing. Although required by the construction lender, the permanent commitment also benefits the developer because the availability of financing makes it easier to market the units [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender)].

In some cases, one lender will provide both the construction financing and the permanent financing (as separate loans or as a combination loan). Under that arrangement, the blanket lien on the project is converted into a lien on the individual condominiums as each unit is purchased, and the developer is released from further liability on the portion assumed by the purchaser. The purchaser of each unit may assume a proportionate share of the promissory note executed by the developer, or the parties may choose to use a new note [*see* California Real Estate Law and Practice, Ch. 471, *Condominiums* (Matthew Bender)].

In other cases, a construction lender may require that another financing arrangement be established, such as a bridge loan, before it will fund its loan, or it may allow the developer to proceed without a permanent loan or a bridge loan in place [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 13.5, pp. 717-718].

[4] Overview of Lending Institutions

Institutional lenders are the principal sources of financing for construction and development projects. The entities that

are most likely to make loans secured by real estate are savings and loan associations, banks, life insurance companies, mortgage companies, industrial loan companies, and real estate investment trusts. For discussion of the regulation of these entities, see Ch. 25, *Real Estate Loans* , and California Real Estate Law and Practice, Ch. 420, *Financing Construction and Development* (Matthew Bender).

The institutions that make long term loans usually fall into one of the three following categories: (1) conventional portfolio lenders, (2) conventional "pass-through" lenders, (3) and government lenders.

[5] Conventional Portfolio and Conventional "Pass Through" Lenders

Conventional portfolio lenders originate loans secured by a first deed of trust with the intent of retaining the loans as a long term investment. They are generally active in the secondary mortgage market both as buyers and sellers. These lenders are usually large institutional lenders, such as savings and loan associations and banks [*see* California Condominium and Planned Development Practice (Cal. CEB 1984), Ch. 5, *Financing Condominiums and Planned Developments*].

Conventional "pass-through" lenders originate loans secured by first deeds of trust and then sell them in the secondary market within a short period of time. Mortgage companies and small banks and savings and loans fall within this category [*see* California Condominium and Planned Development Practice (Cal. CEB 1984), Ch. 5, *Financing Condominiums and Planned Developments*].

[6] Government Lenders

Government lenders advance loans that are secured by first deeds of trust and insured or guaranteed by a federal agency. The most active agencies in this area are the Federal Housing Administration (FHA) and the Department of Veterans Affairs (VA) [*see* California Condominium and Planned Development Practice (Cal. CEB 1984), Ch. 5, *Financing Condominiums and Planned Developments*].

This type of financing has not played a major role in the financing of the construction of condominium projects and the purchase of condominium units, for several reasons. First, the loans have relatively low limits. Second, those who can afford to purchase residential units are often eligible for conventional financing. Third, satisfying the requirements for these loans is difficult, expensive, and time-consuming [*see* Rohan & Reskin, Condominium Law and Practice, Ch. 9, *Financing the Condominium* (Matthew Bender)].

The requirements include prior FHA or VA approval of the organizational documents for the project. The FHA has prepared governing documents that must be used and modified, to the extent necessary, to comply with California law. The documents and relevant policies are described in FHA Handbooks 4265.1 and 4580.1 [*see* FHA Handbook 4135.1 (planned developments)]. The guidelines for obtaining VA approval are found in DVB Circular 26-85-27 (6/25/85). The VA regional offices in southern California have prepared model condominium documents. However, these documents are not used in northern California, and they do not include many requirements imposed by conventional lenders and the FHLMC and FNMA [*see § 34.45[7]*]. The Department of Real Estate has indicated that as a practical matter the FHA and VA forms are never submitted to it as the governing documents for condominium projects that are subject to the public report requirement of the Subdivided Lands Act [*see § 34.37[3]*].

An attorney who is attempting to satisfy FHA or VA requirements and has no prior experience in this area should initially contact the nearest regional office of the appropriate agency for information and assistance, and consider retaining someone who has experience in preparing FHA and VA loan application packages [*see* California Condominium and Planned Development Practice (Cal. CEB 1984), Ch. 5, *Financing Condominiums and Planned Developments*].

For a detailed discussion of FHA and VA requirements, see Rohan & Reskin, Condominium Law and Practice, Ch. 9, *Financing the Condominium* (Matthew Bender).

[7] Secondary Mortgage Market

The secondary mortgage market is heavily influenced by two federally chartered private mortgage associations, the Federal National Mortgage Association (FNMA or "Fannie Mae") and the Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac"). Both FNMA and FHLMC have established guidelines that must be followed before they will approve mortgages for purchase from primary lenders.

In the case of FHLMC, the lender offering the mortgage or deed of trust for sale must ensure that the management documents of the owners' association contain certain warranties designed to protect the interests of the holder of the first mortgage on the unit or project. The requirements for these warranties are set forth in the *FHLMC Sellers' and Servicers' Guide* published by FHLMC. The seller, through counsel approved by the FHLMC, must, in the case of new projects, be able to provide FHLMC with an attorney's opinion letter that warrants that all of the FHLMC requirements have been met. Because FHLMC purchases mortgages only from strictly regulated lending institutions, such as savings and loan associations, its attitude towards the purchase of mortgages is relatively liberal. On proper application to FHLMC, some of the warranties may be waived.

The Federal National Mortgage Association (FNMA) participates in the secondary mortgage market in much the same fashion as FHLMC; however, because FNMA purchases mortgages from institutions that are not strictly regulated by the federal government, such as mortgage banks, its requirements are much more demanding and less subject to waiver than those of FHLMC. Most of the FNMA requirements are set forth in the *FNMA Lending Guide*. Like FHLMC, FNMA requires that an approved attorney draft an opinion letter which warrants that the project documents and the condominium structure itself meet all FNMA requirements. The attorney's opinion letter must be submitted to FNMA for review and approval along with all project documents before FNMA will approve the mortgage for purchase.

Many conventional lenders, particularly conventional "pass-through" lenders, supplement their own requirements with those of the FHLMC and/or FNMA.

For further discussion of FHLMC and FNMA requirements, see Rohan & Reskin, Condominium Law and Practice, Ch. 9, *Financing the Condominium* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary Mortgage MarketFederal Home Loan Mortgage CorporationReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage Association



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.46 Taxation of Owners' Association

[1] Criteria for Tax-Exempt Status

An owners' association will, as a general rule, be treated as a tax-exempt organization under state and federal law if it satisfies the following criteria:

- It takes the form of a condominium management association, a residential real estate management association, a timeshare association [*I.R.C. § 528(c)(1)*; *Rev. & Tax. Code § 23701t*; *Treas. Reg. § 1.528-1(a)*; *see I.R.C. § 528(c)(2)-(4)*], or, for state taxation purposes only, a cooperative housing corporation [*Rev. & Tax. Code § 23701t*; *see Rev. & Tax. Code § 23701t(e)* ("cooperative housing corporation" includes certain limited-equity housing cooperatives)].

- Substantially all of the units, lots, and buildings are used by individuals as residences, or, in the case of a timeshare, members hold a timeshare right to use, or a timeshare ownership interest in, real property constituting association property [*I.R.C. § 528(c)(2), (3), (4)*; *Rev. & Tax. Code § 23701t(a)*; *see Treas. Reg. § 1.528-4(a)*].

- It is organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property [*I.R.C. § 528(c)(1)(A)*; *Rev. & Tax. Code § 23701t(a)*].

- At least 60 percent of its gross income for the taxable year is derived from membership dues, fees, or assessments [*I.R.C. § 528(c)(1)(B)*; *Rev. & Tax. Code § 23701t(a)(1)*].

- Ninety percent or more of its expenditures for the taxable year are made for the acquisition, construction, management, and maintenance of association property [*I.R.C. § 528(c)(1)(C)*; *Rev. & Tax. Code § 23701(a)(2)*].

- No part of its net earnings inures to the benefit of any private shareholder or individual, except through the acquisition, construction, management, maintenance, or care of association property or through the rebate of excess membership dues, fees, or assessments [*I.R.C. § 528(c)(1)(D)*; *Rev. & Tax. Code § 23701t(a)(3)*].

"Association property" is (1) property held by the organization, (2) property commonly held by the members of the organization, (3) property within the organization privately held by the members of the organization [*I.R.C. § 528(c)(5)(A)-(C)*; *Rev. & Tax. Code § 23701t(b)(1)-(3)*], or (4) for federal taxation purposes only, property owned by a governmental unit and used for the benefit of residents of the unit [*I.R.C. § 528(c)(4)(D)*]. In the case of a timeshare association, "association property" includes property in which the timeshare association, or members of the association, have rights arising out of recorded easements, covenants, or other recorded instruments to use property related to the timeshare project [*I.R.C. § 528(c)(5)*; *Rev. & Tax. Code § 23701t(b)*].

Under California law, the tax-exempt association must transfer to and hold in trust any amounts received as membership dues, fees, and assessments that are not expended for association purposes during the taxable year, in order to provide for the management, maintenance, and care of association property and common areas [*Rev. & Tax. Code § 23701t(a)(4)*].

Both state and federal law require the owners' association to make an election to be treated as a tax-exempt organization [*see Rev. & Tax. Code § 23701t* (one-time election); *I.R.C. § 528(c)(1)(E)* (annual election)].

[2] Exempt and Taxable Income

A qualifying owners' association is taxed on gross income, less (1) a $100 exclusion (under both state and federal law) [*I.R.C. § 528(d)(2)(A)*; *Rev. & Tax. Code § 23701t(c)(1)*]; (2) all allowable deductions directly connected with the production of gross income; and (3) its exempt function income [*I.R.C. § 528(d)(1)*; *Rev. & Tax. Code § 23701t(c)(1)(A), (B)*]. "Exempt function income" is defined under federal law as any amount received as membership dues, fees, or assessments from the owners of condominium housing units in the case of a condominium management association, from the owners of real property in the case of a residential real estate management association, or owners of timeshare rights to use or timeshare ownership interests in, real property in the case of a timeshare association [*I.R.C. § 528(d)(3)*]. California law defines that term to include all amounts received as membership fees, dues, and assessments from tenant-shareholders or owners of residential units, residences, or lots, or, in the case of a timeshare association, owners of timeshare rights to use, or timeshare ownership interests in, association property [*Rev. & Tax. Code § 23701t(c)(2)*]. Thus, an owners' association that elects to be treated as a tax-exempt organization will be taxed only on its net income from investments and business with nonmembers [*see* Federal Taxes Affecting Real Estate, Ch. 16, *Special Forms of Holding Real Estate* (Matthew Bender)]. Federal law applies a flat rate of 30 percent to this taxable income (32 percent in the case of a timeshare association) [*I.R.C. § 528(b)*], while California taxes it at the corporate tax rate [*Rev. & Tax. Code § 23701t(c)*].

Federal law prohibits an electing owners' association from claiming a net operating loss deduction [*I.R.C. § 528(d)(2)(B)*]. As a result, if the electing association's allowable deductions for membership income, plus any operating losses carried over from previous years, exceeds the membership income, the association could pay more federal tax than if it had not made the election [*see* Federal Taxes Affecting Real Estate, Ch. 16, *Special Forms of Holding Real Estate* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesTimesharesTax LawFederal Taxpayer GroupsExempt OrganizationsGeneral

OverviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsLimitations



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.47 Taxation of Condominium Unit Owner

For federal income tax purposes, a condominium is treated as any other single family residence [*see Rev. Rul. 64-31, 1964-1 C.B. 300*]. Therefore, a condominium unit owner, like any other homeowner, may deduct interest paid or accrued on his or her deed of trust, provided the condominium is the owner's principal residence or a second residence [*I.R.C. § 163(a)*]. Further, the unit owner may deduct state and local real property taxes [*I.R.C. § 164(a)*], and qualify for the exemption from tax on gain realized on the sale of a principal residence, which generally applies to sales and exchanges occurring after May 6, 1997 [*see I.R.C. § 121*]. For a more detailed discussion of the federal income taxation treatment of a condominium unit owner, see Rohan & Reskin, Condominium Law and Practice, Ch. 14, *Income Tax Consequences of Condominiums*, and Ch. 15, *The Taxable Income of the Condominium as an Organization* (Matthew Bender).

For purposes of California income tax, a condominium unit owner is treated essentially the same as under the federal income taxation system. Hence, the unit owner may deduct payments of interest and real property taxes [*see Rev. & Tax. Code §§ 17201, 24344, 24345*], and may be eligible for the limited exclusion from gross income available following the sale or exchange of the owner's principal residence [*see Rev. & Tax. Code § 17131*].

For purposes of California real property tax, condominiums [*see Civ. Code § 783* (relevant definition)] are separately assessed to each owner in fee. If a condominium is not owned in fee, it will still be separately assessed to either the owner of the condominium or the owner in fee or both, if the assessor agrees in writing. Any such agreement will be binding as long as the project remains divided into condominiums [*Rev. & Tax. Code § 2188.3*]. The tax on a particular unit constitutes a lien on that unit but not on any other units [*Rev. & Tax. Code § 2188.3*]. Before each unit can be separately assessed, the title to at least one unit must be conveyed, because a condominium, by definition, involves ownership of undivided interests by two or more persons [*County of Los Angeles v. Hartford Acc. & Indem. Co. (1970) 3 Cal. App. 3d 809, 814-815, 83 Cal. Rptr. 740]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesGeneral OverviewTax LawFederal Taxpayer GroupsIndividualsGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.48 Interstate Land Sales Full Disclosure Act

[1] Filing Requirement, Generally

If a developer intends to offer for sale or lease any lot by means of (1) instruments of transportation or communication in interstate commerce, or (2) by mail, then the developer must file documents with the Secretary of Housing and Urban Development under the Interstate Land Sales Full Disclosure Act (the "ILSFDA") [*15 U.S.C. § 1702 et seq.*)]. The ILSFDA includes a condominium as a "lot" [*see 24 C.F.R. § 1710.1*].

[2] Exceptions

The ILSFDA includes a number of exceptions, including, but not limited to, the following:

- Developments of fewer than 25 lots or units [*see 15 U.S.C. § 1702(a)(1)*].

- The sale or lease of lots on which there is a residential, commercial, or industrial building, or on which the seller is under a contractual obligation to erect such a building within a period of two years. This is the so-called "completed building exception," which is the one most likely to provide a residential builder with an exception. However, for the completed building exception to apply, there must be an unrestricted right to specific performance in the sales agreements with the buyers, and the sales agreement must not allow non-performance by the seller at the seller's discretion [*see 15 U.S.C. § 1702(a)(2)*].

- The sale or lease of lots to any person who acquires the lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings for the purpose of resale or lease to persons engaged in such business [*see 15 U.S.C. § 1702(a)(7)*].

- The sale or lease of real estate that is zoned for industrial or commercial development or that is restricted to this use by a recorded declaration, if certain conditions are met [*see 15 U.S.C. § 1702(a)(8)*].

However, if a developer is unable to take advantage of one of the ILSFDA exceptions, then before the developer can offer a condominium unit for sale or lease, the developer must furnish each buyer with a property report meeting the requirements of the ILSFDA prior to signing any purchase agreement.

[3] Reliance on Public Report

The Secretary of Housing and Urban Development (HUD) has determined that if a public report is issued for a project by the California Department of Real Estate, that public report may be accepted as meeting the minimum filing requirements of the ILSFDA [*see 24 C.F.R § 1710.500 et seq.*]. However, to rely on the final public report as satisfying the ILSFDA requirements, the developer must indicate on DRE Form 624 (which is submitted to the California Department of Real Estate as part of the filing requirements for a public report) that the developer will file with HUD [*see § 34.200* for DRE Form 624]. The developer then files a DRE Form 614D (HUD/Interstate Land Sales Fact Sheet) with the California Department of Real Estate, and mails a copy to HUD, certified mail, return receipt requested [*see* SPRAG Manual, §§ IV C, V, question 1M (HUD-ILSRD question)].

[4] Penalties

Penalties for failure to register a non-exempt sale include an automatic right of rescission and the right of the purchaser to sue for damages, with a three-year statute of limitations. In addition, HUD may impose a penalty of up to $1,000 per violation, with a maximum of $1 million in any one year for a knowing and material violation of ILSFDA [*see 15 U.S.C. § 1717a(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act



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§ 34.49 Title 7: "Right to Repair Act"

[1] Introduction to Title 7

A significant development in the realm of California condominium law was the 2002 passage of the so-called "Right to Repair Act," commonly referred to as either "SB 800" or "Title 7," for its location in Title 7 of Part 2 of Division 2 of the Civil Code [*Civ. Code § 895 et seq.*]. As with its conceptual predecessor, the Calderon Act [*Civ. Code § 1375 et seq.*], Title 7 pertains to the requirements for the handling of construction defects. However, substantial differences exist between the Calderon Act and Title 7, and care must be taken in the preparation of Title 7 documentation for any condominium project.

Generally, Title 7 is a consumer protection and right to repair law that establishes a framework in which builders [*see Civ. Code § 911* ("builder" defined); *see also § 34.49[2]*], owners, and homeowners associations can attempt to resolve disputes regarding alleged construction defects outside of litigation. Title 7 applies to new residential construction, including new condominiums, when the purchase agreement with the owner was entered into on or after January 1, 2003 [*Civ. Code § 938*]. It does not apply to condominium conversions [*Civ. Code § 896*].

Title 7 is organized into five chapters:

- Chapter 1, Definitions [*Civ. Code § 895*; *see § 34.49[2]*].
- Chapter 2, Actionable Defects [*Civ. Code §§ 896-897*; *see § 34.49[3]*].
- Chapter 3, Obligations [*Civ. Code §§ 900-907*; *see § 34.49[4]*].
- Chapter 4, Prelitigation Procedures [*Civ. Code §§ 910-938*; *see § 34.49[5]*].
- Chapter 5, Procedure [*Civ. Code §§ 941-945.5*; *see § 34.49[6]*; *see generally* Hanna & Van Atta,

Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 21:75, p. 1430].

PRACTICE TIP:

Thoroughly Read Title 7 Before Drafting Formation Documents. For purposes of the preparation of formation documents for condominium projects, Title 7 offers builders significant flexibility to comply with the law while still crafting individualized risk management procedures that will affect the rights of owners and homeowners associations. Given the prevalence of condominium-related construction defect litigation in California, a thorough reading of Title 7, in conjunction with detailed conversations with the client, is a crucial step in drafting formation documents.

[2] Definitions

As with most statutes, the "Definitions" chapter [*Civ. Code § 895*] is not exhaustive, but provides meanings for only a handful of the defined terms used throughout Title 7. Befitting Title 7's focus on water intrusion issues, three of the six definitions given pertain to this topic [*see Civ. Code § 895(b)* ("designed moisture barrier"), (c) ("actual moisture barrier"), and (d) ("unintended water")]. Also defined are the meaning of a "structure" [*Civ. Code § 895(a)*] and "close of escrow" [*Civ. Code § 895(e)*]. Finally, Title 7 provides that " '[c]laimant' or 'homeowner' includes the individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association as defined in [*Civ. Code § 1351(a)*]" [*Civ. Code § 895(f)*].

Though Title 7 does assign a special definition to the term "builder," the definition is actually included in another chapter of Title 7 [*Civ. Code § 911*] and, as such, is addressed below [*see § 34.49[5][c]*].

[3] Actionable Defects

Before passage of SB 800, damages for construction defects under tort theories of negligence and strict liability were only available on a showing of "appreciable, non-speculative, present injury" [Aas v. Superior Court (2000) 24 Cal. 4th 627, 646, 101 Cal. Rptr. 2d 718, 12 P.3d 1125] . In *Aas*, plaintiffs sought to recover damages for a variety of alleged construction defects, including many that had not yet resulted in any property damage [Aas v. Superior Court (2000) 24 Cal. 4th 627, 634, 101 Cal. Rptr. 2d 718, 12 P.3d 1125] . In disallowing this category of plaintiffs' claims under a negligence theory, the California Supreme Court found that "[c]onstruction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses, do not comfortably fit the definition of 'appreciable harm'--an essential element of a negligence claim" [Aas v. Superior Court (2000) 24 Cal. 4th 627, 646, 101 Cal. Rptr. 2d 718, 12 P.3d 1125] . Similarly, when pleading strict liability, a remedy is available "only when the defective product causes property damage or personal injury" [Aas v. Superior Court (2000) 24 Cal. 4th 627, 639, 101 Cal. Rptr. 2d 718, 12 P.3d 1125] . In recognition of the social policy implications of the ruling, however, the Court concluded the lengthy opinion with a note that some the issues raised in the decision might be "better left to the Legislature" [Aas v. Superior Court (2000) 24 Cal. 4th 627, 652, 101 Cal. Rptr. 2d 718, 12 P.3d 1125] .

Two years later, the California Assembly added Title 7 via passage of SB 800, and substantially revised the treatment of construction defects in the context of residential construction. In actions governed by Title 7, construction defect damages may now be sought for the violation of any of 45 enumerated "functionality standards" in Chapter 2 of Title 7 [*Civ. Code § 896*]. Thus, "[i]n any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 ..., a general contractor, subcontractor material supplier, individual product manufacturer, or design professional, shall, except as specifically set forth in this article, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title" [*Civ. Code § 896*]. A species of statutory strict liability therefore attaches to the functionality standards.

The standards are broken into six broad categories:

- Water issues [*Civ. Code § 896(a)*];
- Structural issues [*Civ. Code § 896(b)*];
- Soil issues [*Civ. Code § 896(c)*];
- Fire protection issues [*Civ. Code § 896(d)*];
- Plumbing and sewer issues [*Civ. Code § 896(e)*]; and
- Electrical system issues [*Civ. Code § 896(f)*].

There is also a "catch all" category that includes items ranging from hardscape to ceramic tiling [*Civ. Code § 896(g)*].

Of these, fully half of the body of the functionality standards is devoted to water issues [*Civ. Code § 896(a)(1)-(18)*], a reflection, perhaps, of the prevalence of water intrusion claims in construction defect actions.

In addition to the specifically enumerated functionality standards, Chapter 2 also includes a "catch all" provision, whereby "[t]he standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage" [*Civ. Code § 897*]. Arguably, the *Aas* evidentiary standard for proving damage would still apply to claims brought under this catch all § 897, as no new functionality standard is assigned. However, with regard to any of the actionable defects listed in *Civ. Code § 896*, no such *Aas* showing is required [*Civ. Code §§ 896, 943(b), 944*; *see § 34.49[6]*].

Chapter 2 likewise establishes discrete statutes of limitation for certain claims brought under its purview [*Civ. Code § 896*]. For example, actions brought with regard to plumbing and sewer system issues must be brought no more than four years from close of escrow [*Civ. Code § 896(f)*], while inter-unit noise transmission claims must be brought within one year from the original occupancy of the adjacent unit [*Civ. Code § 896(g)(6)*].

PRACTICE TIP:

Statutes of Limitation. In the typical construction defect case when a number of claims are asserted, the claims may be subject to various statutes of limitation.

Though not addressed until later in Title 7, a builder may elect to provide protections greater than those codified in Chapter 2 [*Civ. Code § 901*; *see § 34.49[4][b]*].

[4] Obligations

[a] Issues of Concern, Generally

Chapter 3 of Title 7 ("Obligations") presents three particular issues of interest to drafters of condominium project documents, insomuch as it:

- Provides for a mandatory one year limited fit and finish warranty [*Civ. Code § 900*];
- Allows for the option of offering an "enhanced protection agreement" in lieu of the Chapter 2

functionality standards [*Civ. Code § 901 et seq.*]; and

- Addresses the role of maintenance obligations and recommendations [*Civ. Code § 907 et seq.*].

Each of these issues is addressed below.

[b] One Year Limited Fit and Finish Warranty

Per *Civ. Code § 900*, a builder under Title 7 must provide homebuyers with a minimum one year express written limited warranty that covers the "fit and finish" of seven building components: mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim. These components are not subject to the provisions of Title 7, including the Actionable Defects, Prelitigation Procedures, and Procedure provisos [*Civ. Code § 900*]. In the event a builder fails to supply a written warranty covering these items, the statute provides that "the warranty for these items shall be for a period of one year" [*Civ. Code § 900*].

PRACTICE TIP:

Builder Has Decision. As a matter of drafting formation documents, the builder will need to decide whether to craft its own one year limited fit and finish warranty to provide to homebuyers, or to opt instead to rely on the statutory default. Builders desiring to combine the warranty required by statute with an existing warranty program are advised to carefully review the existing warranty to ensure that it offers the same level of protection--for the same building components--as the statute.

[c] Enhanced Protection Agreements

If the builder chooses, he or she may offer homebuyers an express written contract that "offers greater protection or protection for longer time periods" than those contemplated by the functionality standards set forth in Chapter 2 [*Civ. Code § 901*]. Any such alternative set of functionality standards is denominated an "enhanced protection agreement" [*Civ. Code § 901*] under the statute. An election to use an enhanced protection agreement renders the functionality standards of Chapter 2 operable only insomuch as they will be the minimum bar by which the provisions of the enhanced protection agreement will be judged [*Civ. Code § 902*].

A builder who opts to provide an enhanced protection agreement must provide a written copy of the agreement to the homebuyer by no later than the close of escrow [*Civ. Code § 903*]. In the event any provision within the enhanced protection agreement is deemed unenforceable for its failure to meet the minimum standards set forth in Chapter 2, the statute allows a builder to "use this chapter [this should assumedly read "Chapter 2"] in lieu of those provisions found to be unenforceable" [*Civ. Code § 903*].

Builders using enhanced protection agreements must also provide buyers with a full copy of the Chapter 2 functionality standards and inform buyers that it has chosen to provide an enhanced protection agreement in lieu of the Chapter 2 standards [*Civ. Code § 903*]. The builder's enhanced protection agreement is subject to challenge by buyers [*Civ. Code §§ 904, 905*]. In the event of a successful challenge, the Chapter 2 functionality standards would govern.

PRACTICE TIP:

Preparing and Recording Enhanced Protection Agreements. In terms of document preparation and recordation, two items arise with regard to enhanced protection agreements. First, if a builder desires its enhanced protection agreement to be enforceable with regard to any nonoriginal homeowner, the builder must either (1) record the enhanced protection agreement against title, or (2) actually provide notice of the enhanced protection agreement to the nonoriginal homeowner [*Civ. Code § 905*]. As a matter of course, the simpler of these two options is to record the document against title. Failure to take one of these two steps will result in the Chapter 2 functionality standards controlling with regard to any nonoriginal homeowner [*Civ. Code § 905*]. Second, when crafting an enhanced protection agreement,

care must be taken to ensure conformance between the enhanced protection agreement and any warranty program the builder may also be offering.

For a discussion regarding the potential for exposure to contractual liability that arises through use of an Enhanced Protection Agreement, see Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 2175[8], pp. 1433-1434.

[d] Maintenance Obligations and Schedules

Under Title 7, "[a] homeowner is obligated to follow all reasonable maintenance obligations and schedules communicated in writing to the homeowner by the builder and product manufacturers, as well as commonly accepted maintenance practices" [*Civ. Code § 907*; *see Civ. Code § 912(b)* (builder's duty to provide copies of maintenance recommendations)]. Having done so, the builder may cite the homeowner's failure to follow the obligations and schedules as an affirmative defense in the event the homeowner later brings a Title 7 claim [*Civ. Code § 907*].

PRACTICE TIP:

Provide Obligations and Schedules. Given that this requirement turns on the builder's provision of these materials to homeowners, it is to the builder's advantage to provide such materials. Unlike the enhanced protection agreement, the maintenance obligations make no express distinction between enforceability issues with regard to original and nonoriginal homeowners. It seems unlikely, however, that a court would require a nonoriginal homeowner to be bound by maintenance obligations and schedules with which it had not been provided. In addition, although this section of Title 7 fails to mention homeowners associations by name, focusing instead on the "homeowner," it would presumably apply to homeowners associations, as well. Under *Civ. Code § 895(f)*, the definition of "homeowner" includes both individuals and "any association as defined in [*Civ. Code § 1351(a)*]." To the extent that a homeowners association may be responsible for maintaining improvements that differ in type from those that will be maintained by homeowners, a builder will need to provide the homeowners association with maintenance obligations and schedules pertinent to association-maintained improvements in order to take advantage of this section.

[5] Prelitigation Procedures

[a] Introduction

Chapter 4 of Title 7 ("Prelitigation Procedures") "establishes a nonadversarial procedure, including the remedies available under [the chapter], which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters" of the Title [*Civ. Code § 914(a)*]. However, a number of circumstances may either derail the Chapter 4 procedures or render them inapplicable. For example, if a builder fails to comply with the prelitigation requirements within the specified time deadlines, that builder automatically loses the protection of Chapter 4, including the right to repair [*Civ. Code § 912(i)*]. Of the many provisions within the chapter, perhaps the most salient for those preparing condominium documents are those pertaining to timelines to be followed in order to keep the procedures in place, and those allowing the builder to opt out of the Chapter 4 provisions entirely and replace them with "alternative non-adversarial procedures" of the builder's own [*Civ. Code § 914*].

[b] Notice of Claim

Under Title 7, before filing an action against a party that has allegedly violated the Chapter 2 standards, or presumably, the standards established by the builder's enhanced protection agreement, the claimant is required to follow very specific prelitigation procedures, beginning with notice of the claim to the builder [*Civ. Code § 910*]. The required manner of service and content of the notice is set forth in *Civ. Code § 910(a)*. These notice requirements do not preclude a homeowner from pursuing redress through any applicable customer service procedures, warranties, or

contractual obligations [*Civ. Code § 910(b)*]. If a homeowner elects to seek redress through such customer service measures, any such request "shall not satisfy the notice requirements of this section" [*Civ. Code § 910(b)*].

PRACTICE TIP:

Builder Should Provide Customer Service Request Form. Because a customer service claim does not satisfy the notice requirements of *Civ. Code § 910*, in preparing sales documents for a condominium project, a builder would be well advised to include a clearly titled "Customer Service Request" form in its documentation to homeowners and the homeowners association.

[c] Builder

Generally, under Title 7 "builder" includes "any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or originally seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim" [*Civ. Code § 911(a)*].

However, "builder" expressly does not include "any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder" [*Civ. Code § 911(b)*]. These "nonaffiliated general contractors and nonaffiliated contractors" are instead subject to the same treatment under the statute as subcontractors, material suppliers, individual product manufacturers, and design professionals [*Civ. Code § 911(b)*; *see Civ. Code § 936* (application of Title 7 to entities involved in construction process)].

PRACTICE TIP:

Definition of "Builder." As a matter of drafting, the definition given to the "builder" in any sales documents, Title 7 documents, project documents, etc., should be made advisedly and consistently.

[d] Provision of Documents and Agent for Notice

Within 30 days of receiving a written request from a claimant, the builder must supply copies of all "relevant plans, specifications, mass or rough grading plans, final soils reports, Department of Real Estate public reports, and available engineering calculations, that pertain to a homeowner's residence specifically or as part of a larger development tract" [*Civ. Code § 912(a)*].

The builder is required to maintain the name and address of an agent for notice specified under Chapter 4 with the Secretary of State [*Civ. Code § 912(e)*]. If the builder has contracted with a third party to accept claims and act on the builder's behalf, the named individual or entity may be a third party, if the builder has provided the homeowner with written notice of the third party's name and address [*Civ. Code § 912(e)*]. In either instance, the builder must include the name and address of the agent for notice or third party with the original sales documentation, which must be initialed and acknowledged by the purchaser and the builder's sales representative [*Civ. Code § 912(e)*].

The builder is required to record notice of the existence of these Chapter 4 procedures against title to the affected property, along with a notice that "these procedures impact the legal rights of the homeowner" [*Civ. Code § 912(f)*]. This information, along with a full copy of Title 7, must also be (1) included with the original sales documentation and (2) initialed and acknowledged by the purchaser and the builder's sales representative [*Civ. Code § 912(f), (g)*]. Further, "[a]s to any documents provided in conjunction with the original sale, the builder shall instruct the original purchaser to provide those documents to any subsequent purchaser" [*Civ. Code § 912(h)*].

The builder's failure to timely comply with any of the requirements set forth in *Civ. Code § 912* releases the homeowner, or presumably any homeowners association, as the case may be, from the prelitigation procedural

requirements of Chapter 4, and allows the claimant to proceed with litigation [*Civ. Code § 912(i)*]. However, in these cases, the "remaining chapters of this part [this should presumably read "Title"] shall continue to apply to the action" [*Civ. Code § 912(i)*].

PRACTICE TIP:

Builder Must Establish and Follow In-House Procedures. As important as the drafting of condominium documents is, it is equally important to emphasize to the builder client the importance of establishing and following in-house procedures that will ensure compliance with the timelines established by Title 7. *Civ. Code § 912(i)* is the first of many "drop dead" provisions in Title 7 under which the builder's failure to meet strict deadlines will release the claimant from further compliance with the prelitigation procedures and allow litigation to ensue immediately.

[e] Acknowledgment of Receipt of Claim

Within 14 days of receiving a written Title 7 claim, the builder, or its representative, must acknowledge receipt of that notice in writing [*Civ. Code § 913*].

PRACTICE TIP:

Failure to Follow Claim Will Result in Release. Although *Civ. Code § 913* does not say so, *Civ. Code § 915* makes it clear that the builder's failure to acknowledge a claim within the timeline provided will release the claimant from further compliance with Chapter 4.

[f] Alternative Non-Adversarial Procedures

Buried in the middle of Chapter 4 is one of the most significant sections of Title 7, at least from the perspective of the drafter of condominium documents. Under *Civ. Code § 914(a)*, a builder may create and "attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter" that a homeowner or homeowner's association must follow before filing an action to recover damages for construction defects under Title 7. The nonadversarial procedures of Title 7, whether as set forth in Title 7 itself or in a builder's alternative nonadversarial procedures, apply to all construction defect claims covered by Title 7, but do not apply to any "fit and finish matters" covered by Title 7's mandatory one year fit and finish warranty [*Civ. Code § 900*].

If a builder chooses to develop and use its own alternative nonadversarial procedures, the builder cannot additionally require a homeowner or homeowners' association to follow the Chapter 4 "nonadversarial procedures and remedies ... regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable" [*Civ. Code § 914(a)*]. Chapter 4 does not prevent a builder from incorporating any or all of the statutory prelitigation procedures and remedies into its own alternative nonadversarial procedures, but does not allow a builder to require a homeowner or homeowners' association to comply with duplicative procedures.

PRACTICE TIP:

What Constitutes "Nonadversarial Procedure?" Title 7 does not specifically identify which of the provisions in Chapter 4 constitute its "nonadversarial procedure," and does not offer any direction as to the rights and/or processes a builder must include in its alternative nonadversarial procedures to ensure that they are enforceable. The void left by Title 7 as to the scope necessary to ensure enforceability of a builder's alternative nonadversarial procedures exposes a builder to the risk of having its alternative nonadversarial procedures held unenforceable, at which point a builder would lose all of its rights under Chapter 4 of Title 7, including its right to inspect and repair an alleged construction defect. However, this may be a risk well worth taking.

Whether a builder opts to provide its own alternative nonadversarial procedures or to follow the statutory prelitigation

procedures set forth in Chapter 4, the builder must notify the homeowner of its election one way or the other at the time that the sales agreement is executed [*Civ. Code § 914(a)*]. If the builder elects to provide its own alternative nonadversarial procedures in lieu of the nonadversarial procedures and remedies contained in Chapter 4, that election is binding and effectively irreversible [*Civ. Code § 914(a)*]. Unlike the interplay between the optional use of a builder-created enhanced protection agreement and the Chapter 2 functionality standards, if the builder opts to use its own alternative nonadversarial procedures rather than the nonadversarial procedures and remedies contained in Chapter 4, any subsequent finding by a court, arbitrator, or other valid authority that the builder's alternative nonadversarial procedures are unenforceable will not result in the builder being able to fall back on the prelitigation procedures and remedies of Chapter 4 [*Civ. Code § 914(a)*].

PRACTICE TIP:

Use Care When Drafting Alternative Nonadversarial Procedures. If the builder's alternative nonadversarial procedures are found to be unenforceable, the builder cannot thereafter require a homeowner or homeowners' association to comply with the Chapter 4 prelitigation procedures, and forever loses its rights to pursue the statutory nonadversarial procedures and remedies, including the Chapter 4 rights to inspect and repair the alleged construction defect. Given the drastic consequences of a finding that a builder's alternative nonadversarial procedures are unenforceable, a builder needs to be very careful when drafting its alternative nonadversarial procedures to maximize the chances that they will be enforceable.

PRACTICE TIP:

Nonadversarial Procedures and Condominium Projects. Builders face the above risk in light of the fact that, for a number of reasons, the statutory nonadversarial procedures and rigid time deadlines are often unworkable in the context of a condominium project. Unlike single-family residential developments where a building component's functionality problem is frequently limited to a single home, in condominiums such problems can affect large portions of buildings and affect a significant number of or all units in the project. If a builder does not "strictly comply" with the exacting rules and rigid time deadlines set forth in Chapter 4, the builder forever loses its rights under Chapter 4, and the construction defect "claimant is released from the requirements of this chapter and may proceed with the filing an action" [*Civ. Code § 920*].

PRACTICE TIP:

Nonadversarial Procedures and Homeowners' Associations. This problem is especially acute with regard to issues in which the homeowners' association is involved. As the party in charge of discovering and pursuing construction defect issues with respect to the common areas and building components under its management and responsibility, which are often the most prevalent and important construction defects for a condominium project, the homeowners' association must carefully review the nonadversarial procedures that the builder has elected to use for their particular condominium project and, whether the builder elected to use the nonadversarial procedures contained in Chapter 4 or in the builder's own alternative nonadversarial procedures, the homeowners' association must become very familiar with and follow the processes in place for their condominium project to ensure the greatest benefits will be achieved from Title 7. Both Chapter 4's nonadversarial procedures and any enforceable builder-created alternative nonadversarial procedures should have written notice, inspection, offer to repair, response to repair offer, mediation, and a right to repair the construction defect before an action can be filed [*see Civ. Code §§ 910*, *916*, *917*, *918*, *919*, *921*], as well as other helpful provisions, all of which inure to the benefit of the homeowners' association because they all focus on assessing and fixing an alleged construction defect. By knowing and following its rights and obligations under the nonadversarial procedures and remedies set forth in Title 7 or builder-created alternative nonadversarial procedures, whichever is applicable, a homeowners' association will serve its members well if and when a construction defect claim arises.

PRACTICE TIP:

Benefit of Electing Own Alternative Nonadversarial Procedures. From a builder's perspective, the opportunity to elect to create and commence its own alternative nonadversarial procedures in lieu of the statutory nonadversarial procedure can be a significant benefit. Rather than being stuck with the rigid and often too-short time deadlines set out in Chapter 4 of Title 7, a builder can create fair and balanced alternative nonadversarial procedures specifically tailored to the condominium project to which they will apply. Many suggest that a builder's alternative nonadversarial procedures borrow extensively from the prelitigation procedures and remedies established in Chapter 4 to increase the chances that the builder's alternative nonadversarial procedures will be held to be enforceable and will achieve the goals of Title 7. For example, a builder's alternative nonadversarial procedures may want to include a written notice of claim provision that includes the same specific language used in Chapter 4 stating that such written notice "shall have the same force and effect as a notice of commencement of a legal proceeding" [*Civ. Code § 910(a)*]. The inclusion of this language will help trigger insurance coverage for such a claim and, possibly, for the costs and fees incurred in connection with the nonadversarial process itself. Also, if a builder tailors its alternative nonadversarial procedures in consideration of the type of condominium project to which it will apply, that builder will be in a better position to justify the provisions of that alternative nonadversarial procedures if the enforceability of those procedures is ever challenged, as it will have specific reasons why those procedures differ from Chapter 4 and are necessary for the particular condominium project at issue.

Whether a builder elects to use the nonadversarial procedures of Chapter 4 or create and use its own alternative nonadversarial procedures, nothing in Title 7 is intended to affect existing statutory or case law pertaining to the applicability, viability, or enforceability of alternative dispute resolution (ADR) methods, contractual arbitration, judicial reference, or similar such procedures after the applicable nonadversarial procedures have been completed [*Civ. Code § 914(b)*].

PRACTICE TIP:

Coordinate ADR Provisions With Statutory Provisions or With Own Procedures. Nonetheless, a builder will be well-served to coordinate any ADR provisions it has in place with either the nonadversarial procedures and remedies established by Chapter 4 or its own alternative nonadversarial procedures. Those ADR provisions should not be directly impacted, positively or negatively, by Title 7, but coordinating the two will benefit all concerned.

PRACTICE TIP:

Check Annotations to Chapter 7. As of April 2007, no reported case has ruled on any aspect of Title 7. As such, when assessing an issue involving statutory nonadversarial procedures, the attorney should consider checking the annotations to Title 7 to determine if a reported case has interpreted (1) the nonadversarial procedures of Chapter 4, (2) the enforceability of any builder-created alternative nonadversarial procedures allowed thereby, or (3) any related issues.

[g] Inspections

Title 7 gives builders the right to inspect and test any "claimed unmet standards" within 14 days of the builder's acknowledgement of receipt of a Title 7 claim [*Civ. Code § 916(a)*]. Any costs associated with the test or inspection are to be born by the builder, who must also return the property to its pre-testing condition within 48 hours of the testing [*Civ. Code § 916(a)*]. Thereafter, if the builder believes a second inspection or test will be required, and documents the reasons for this inspection or test within three days following the initial inspection, the builder must be allowed to conduct a second test or inspection [*Civ. Code § 916(c)*]. The second test or inspection, if undertaken, must be completed within 40 days of the initial test or inspection, and all of the same requirements regarding returning the property to its pre-testing condition and allocation of costs will again apply [*Civ. Code § 916(c)*].

As with many of the Title 7 timelines to which the builder must adhere, failure to meet the timelines established in *Civ. Code § 916* will release the claimant from compliance with the Chapter 4 requirements, leaving him or her free to proceed with litigation [*Civ. Code § 916(d)*]. The standards established in Chapter 2 would still apply to any such action [*Civ. Code § 916(d)*].

The builder must provide notice of the inspections to any subcontractor, design professional, individual product manufacturer, or material supplier that the builder intends to "hold ... responsible for its contribution to the unmet standard[s]" [*Civ. Code § 916(e)*]. The builder must likewise allow any such party to participate in any repair undertaken [*Civ. Code § 916(e)*]. This requirement is expressly inapplicable to the builder's own insurance carrier [*Civ. Code § 916(e)*]. If a claim is brought with regard to any repair made under this procedure, "nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability" [*Civ. Code § 916(e)*].

[h] Builder's Offer to Repair

Although not obligated to do so, the builder may provide the homeowner with a written offer of repair within 30 days of the initial or secondary testing or inspection [*Civ. Code § 917*; *see § 34.49[5][g]*]. To meet the requirements of Chapter 4, any such offer must include all of the following [*Civ. Code § 917*]:

- A detailed identification of the standard that is claimed to have been violated and is the subject of the proposed repair;
- An explanation of the "nature, scope, and location" of the repair;
- A "reasonable" completion date for the repair;
- The names, telephone numbers, addresses, and license numbers of the contractor or contractors that the builder proposes complete the repair;
- A notice that the homeowner has the right to request that the builder provide "up to three additional contractors from which to select to do the repair" [*see Civ. Code § 918* (authorization to proceed with repair)]; and
- An offer to mediate the dispute, should the homeowner choose to mediate [*see Civ. Code § 919*; *see also § 34.49[5][j]*].

Furthermore, the builder must provide "any available technical documentation, including, without limitation, plans and specifications pertaining to the claimed violation within the particular home or development tract" if the homeowner makes a written request for the same [*Civ. Code § 917*].

If issued, the builder's offer to repair must compensate the homeowner for all applicable damages available under *Civ. Code § 944* [*Civ. Code § 917*; *see § 34.49[6][d], [e]* for discussion of damages].

[i] Homeowner Response to Offer of Repair

On receiving the builder's offer to repair, the homeowner has 30 days to either (1) authorize the builder to undertake the repair, or (2) request that the builder provide the contact and license information for "up to three alternative contractors who are not owned or financially controlled by the builder and who regularly conduct business in the county where the structure is located" [*Civ. Code § 918*].

The claimant's request for a list of alternate contractors will entitle the builder to a further inspection of the claimed unmet standard or standards [*Civ. Code § 918*]. Unlike the initial, and if, applicable, secondary inspection that preceded it, this inspection is explicitly required to be "noninvasive" [*Civ. Code § 918*]. Any such further inspection must take place within 20 days of homeowner's election, and the builder must provide the list of alternate contractors to the homeowner within 35 days after the request is made [*Civ. Code § 918*]. The claimant, in turn, has 20 days after the presentation of the alternate contractors to authorize either the builder or one of the contractors to perform the repair [*Civ. Code § 918*].

[j] Offer to Mediate Dispute

Along with any offer of repair, the builder must notify the homeowner that the homeowner may opt to mediate the dispute [*Civ. Code § 919*]. The manner of selection and payment of the mediator is set forth in detail in Title 7 [*Civ. Code § 919*]. However, "[i]f a builder has made an offer to repair a violation, and the mediation has failed to resolve the dispute, the homeowner shall allow the repair to be performed either by the builder, its contractor, or the selected contractor" [*Civ. Code § 919*].

[k] Failure to Make Timely Offer to Repair or Actual Repair

The claimant is released from compliance with the Chapter 4 requirements and may proceed with litigation if the builder either "fails to make an offer to repair or otherwise strictly comply with [Chapter 4] within the times specified," or "the contractor performing the repair does not complete the repair in the time or manner specified" [*Civ. Code § 920*]. In either instance, the "standards set forth in the other chapters of this part" (ostensibly, the Chapter 2 standards or the enhanced protection agreement, whichever applied) would still apply to the subsequent litigation [*Civ. Code § 920*].

[l] Timing and Execution of Repair

If a repair effort is made, the builder must make arrangements with the claimant to carry out the repairs to the unmet standard or standards and must "compensate the homeowner for all damages resulting therefrom free of charge to the claimant" [*Civ. Code § 921(a)*]. Under *Civ. Code § 921(a)*, any such repair must begin according to the following schedule:

- Within 14 days of acceptance of the contractor;
- Within 14 days of the claimant's selection of an alternate contractor;
- Within seven days of the mediation, if a mediation takes place; or
- Within five days after a permit is obtained, if one is required.

Title 7 is explicit that any repair work be carried out "with the utmost diligence," and be "completed as soon as reasonably possible," with "[e]very effort" being made to see the work completed within 120 days of commencement [*Civ. Code § 921(b)*]. The builder's failure to complete the repair within the time set forth in the repair plan will release the claimant from further compliance with Chapter 4, although, once again, the provisions of Chapter 2 would still apply [*Civ. Code § 925*].

PRACTICE TIP:

Terms Used Interchangeably. As with many provisions in Title 7, *Civ. Code § 921* seems to use "homeowner" and "claimant" interchangeably, perhaps in recognition of the definition of "homeowner" given in *Civ. Code § 895(f)*, which includes "any association as defined in [*Civ. Code § 1351(a)*]."

The builder must allow the repair to be electronically recorded, video recorded, or photographed if such a request is made, and "[n]othing that occurs during the repair process may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation" [*Civ. Code § 922*]. Similarly, the builder must provide the claimant with copies of "all correspondence, photographs, and other materials pertaining or relating in any manner to the repairs" if asked for the same [*Civ. Code § 923*].

In the event that the builder opts to repair less than all of the claimed unmet standards, the builder must provide the claimant with a written explanation and rationale for the builder's decision in this regard at the time the offer to repair is made [*Civ. Code § 924*].

[m] Availability of Releases

The builder is precluded from obtaining any release or waiver in exchange for repair work mandated by Chapter 4 [*Civ. Code § 926*]. A claimant is free to proceed with an action for violation of the Chapter 2 standards and/or for the inadequacy of any repair made on the completion of any such repair [*Civ. Code § 926*]. However, if the builder makes only a cash offer and no repair, the builder may then obtain a "reasonable" release in exchange for any cash payment accepted by the claimant [*Civ. Code § 929*]. If a claimant rejects a cash offer, he or she may proceed with filing an action and the "standards of the other chapters of [Title 7] shall continue to apply" [*Civ. Code § 929(a)*].

[n] Statute of Limitations and Extensions of Time

Title 7 extends the applicable statute of limitations for bringing a claim based on numerous scenarios. Under *Civ. Code § 927*, the time to file a complaint or seek another legal remedy for a Title 7 violation, or for a claim of inadequate repair, is extended from the time of the original claim by the claimant to 100 days after the repair is completed, whether or not the particular violation is the one being repaired.

Moreover, *Civ. Code § 927* provides that the deadline for filing a Title 7 action is extended from the time of the original claim by the claimant to 45 days after the time for responding to the notice of claim has expired if the builder:

- Fails to acknowledge the claim within the time specified in *Civ. Code § 913*;
- Chooses not to follow the statutory process; or
- Fails to request an inspection within the timelines set forth in *Civ. Code § 916*.

Finally, if the builder "attempts to enforce" an alternative nonadversarial procedure of its own creation, rather than follow the Chapter 4 prelitigation procedure [*see § 34.49[5][f]*], the statute of limitations is extended to 100 days after either the latter of [*Civ. Code § 927*]:

- The completion of builder's alternative nonadversarial procedure; or
- One hundred days after the builder's alternative nonadversarial procedure is deemed unenforceable.

PRACTICE TIP:

Challenge to Builder's Alternative Nonadversarial Procedure. If a claimant challenges the builder's alternative nonadversarial procedure as unenforceable, the ensuing litigation to determine enforceability can be protracted, depending on the procedural methods used by each side. If the alternative nonadversarial procedure is ultimately found to be unenforceable, the claimant will still be entitled to a further 100 days to bring a claim. This can substantially add to the duration of the builder's exposure on the project, a factor to be considered when deciding whether to use an alternative nonadversarial

procedure or follow the Chapter 4 process.

[o] Request for Mediation

Before filing an action, the homeowner must make a written mediation request to the builder if the builder has invoked the Chapter 4 prelitigation procedures and has completed a repair [*Civ. Code § 928*]. Title 7 makes provisions for the manner in which any such mediation is to be scheduled and by whom any related costs must be born [*Civ. Code § 928*]. In addition, if the parties attend mediation at this point, any applicable statutes of limitations are tolled from the latter of (1) the date of the request to mediate until the next court day after the mediation is completed, or (2) 100 days [*Civ. Code § 928*].

[p] Compliance with Timelines Throughout

At various stages in the Chapter 4 prelitigation procedure, the builder's failure to strictly comply with the statutory deadlines frees the claimant to abandon the Chapter 4 process and move to litigation [*see, e.g., Civ. Code §§ 912(i), 915, 916(d), 920, 925*]. This is reaffirmed in *Civ. Code § 930(a)*, which clarifies that "[t]he time periods and all other requirements in this chapter are to be strictly construed," and allows a claimant to move forward with an action "[i]f a builder fails to act in accordance with this section within the timeframes mandated, unless extended by the mutual agreement of the parties as evidenced by a postclaim written confirmation by the affected homeowner demonstrating that he or she has knowingly and voluntarily extended the statutory timeframe..."

Civ. Code § 930 also addresses, for the first time, the consequences of the claimant's failure to meet the Chapter 4 requirements [*Civ. Code § 930(b)*]. A builder faced with a noncompliant claimant may seek a stay of any court proceeding initiated by such a claimant and the court, in its discretion, is free to award the prevailing party its attorneys' fees and costs incurred in connection therewith [*Civ. Code § 930(b)*].

[q] Treatment of Non-Title 7 Claims Brought Simultaneously with Title 7 Claims

If a claim includes causes of action outside of "this part" (presumably, Title 7), the claimed Title 7 violations are to be administered according to "this part" (again, presumably Title 7), but "evidence of the property in its unrepaired condition may be introduced to support the respective elements of any such cause of action" [*Civ. Code § 931*]. Fraud claims are called out for special attention in this regard, with the proviso that, if the fact of any repair effort is deemed admissible, "the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner" [*Civ. Code § 931*].

With regard to class action claims addressing solely the incorporation of a defective component into a residence, none of the class members are bound by the Chapter 4 prelitigation procedures [*Civ. Code § 931*].

PRACTICE TIP:

Address Resolution of Claims. Given the likelihood of a party asserting both Title 7 and non-Title 7 claims in an action, a builder that elects to create and attempt to enforce its own alternative nonadversarial procedure may wish to take the opportunity to address the manner in which all claims are to be resolved between the parties.

[r] Subsequently Discovered Claims

Unless the parties agree otherwise, all subsequently discovered claims of unmet standards are administered separately under Title 7 [*Civ. Code § 932*]. There are two exceptions to this general rule:

- First, if the subsequently discovered claim is for a violation of the same standard as that already initiated by the same claimant and the subject of a currently pending action, the claimant does not need

to reinitiate the process as to that standard if the residence in question is a detached single family residence [*Civ. Code § 932*].

- Second, with regard to attached projects, the claimant likewise need not reinitiate the process if the subsequently discovered claim (1) is for a violation of the same standard for a connected component system in the same building as has already been initiated by the same claimant and (2) is the subject of a currently pending action [*Civ. Code § 932*].

[s] Admissibility of Repair Efforts and Parties' Conduct

The fact of any repair effort may be introduced to the trier of fact if any enforcement of the Title 7 standards is commenced [*Civ. Code § 933*]. The claimant is free to introduce and argue the condition of the property before the repair to attempt to show that the repair was inappropriate, inadequate, incomplete, or that a violation still exists, and need not show that the repair caused further damage or that damage has continued to occur as a result of the violation [*Civ. Code § 933*].

With the exception of a mediation, in any subsequent enforcement action, evidence of the parties' conduct during the Chapter 4 prelitigation process, including any repair efforts made by the builder, may be introduced into evidence [*Civ. Code § 934*].

[t] Interaction with Calderon Act

SB 800 was not the California Assembly's first attempt to bring order to the unruly world of construction defect litigation. In 1995, the Assembly passed SB 1029, adding *Civ. Code § 1375 et seq.*, commonly referred to as "the Calderon Act" for its author, Senator Charles Calderon. Unlike Title 7, the Calderon Act applies only to homeowners associations within common interest developments [*see, e.g., Civ. Code § 1375(a)*]. Like Title 7, it includes various prelitigation procedures that must be followed before an association may bring a lawsuit against a builder, developer, or general contractor based on a claim for alleged construction defects [*see, e.g., Civ. Code § 1375(b)* (association's service of "Notice of Commencement of Legal Proceedings")].

Under Title 7, "[t]o the extent that provisions of this chapter are enforced and those provisions are substantially similar to provisions in *Section 1375 of the Civil Code*, but an action is subsequently commenced under *Section 1375 of the Civil Code*, the parties are excused from performing the substantially similar requirements under *Section 1375 of the Civil Code*" [*Civ. Code § 935*]. Title 7 provides no guidelines as to which of its requirements will be considered "substantially similar" to those of the Calderon Act.

PRACTICE TIP:

Compliance with Calderon Act. Title 7 is still new enough that, as of November 2009, no appellate decisions have come down to assist in understanding otherwise murky portions of the statute. While other areas of Title 7 will doubtlessly be subject to appellate review, this particular section may escape such a fate, as the Calderon Act is currently scheduled to expire on July 1, 2017, and be repealed January 1, 2018 [*Civ. Code § 1375(s)*]. Furthermore, to the extent the builder misses any of the deadlines set forth in Title 7, thus freeing the claimant to pursue litigation, if the claimant is a homeowners' association, the homeowners' association will still need to comply with any and all Calderon Act requirements that are not "substantially similar" to steps previously taken under Title 7.

[u] Application to Other Parties

To the extent a general contractor, subcontractor, material supplier, individual product manufacturer, and/or design profession causes, in whole or in part, a violation of a particular functionality standard as a result of "a negligent act or omission or breach of contract," that party will be subject to "each and every provision of the other chapters" of Title 7 [

Civ. Code § 936]. In other words, none of these parties will be subject to the provisions of Chapter 4. Each of these parties may thus avail themselves of the affirmative defenses provided in Chapter 5 [*see Civ. Code § 945.5*]. Furthermore, all actions by either a claimant or the builder to enforce an express contract or contract provision against any of said parties are preserved [*Civ. Code § 936*].

Civ. Code § 936 also provides that nothing in Title 7 modifies the law pertaining to joint and several liability with regard to these parties that contributes to any specific Title 7 violation. "However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply" [*Civ. Code § 936*].

[v] Certificate of Merit Still Required

Title 7 does not affect the requirement to procure a Certificate of Merit, if one is required by Civ. Code § 411.35 for a claim against a design professional, nor does Title 7 affect the liability of design professionals for claims and damages not covered by Title 7 [*Civ. Code § 937*].

[w] Application of Title

Title 7 "applies only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003" [*Civ. Code § 938*].

PRACTICE TIP:

Dilemma for Builders. This poses an interesting dilemma for builders who have projects wherein some units were sold before the effective date of Title 7. Some builders faced with this situation have attempted to put in place alternative nonadversarial procedures [*see § 34.49[5][f]*] to more smoothly address the competing procedural and statutory requirements bearing on their projects.

[6] Procedure

[a] Application of Chapter 5 Provisions

Chapter 5 of Title 7 addresses both procedural and substantive measures that will apply if the parties fail to resolve any Title 7 dispute through either the Chapter 4 prelitigation procedures or the builder's alternative nonadversarial procedure.

[b] Statute of Limitations: Time Limit for Bringing Action

Neither Civ. Code § 337.1 nor Civ. Code § 337.15 apply to actions brought under Title 7 [*Civ. Code § 941(d)*]. However, except as otherwise set forth in Title 7, no action for Title 7 violations may be brought more than 10 years after substantial completion of the improvement and in no event later than the date of recordation of a valid notice of completion [*Civ. Code § 941(a)*]. In addition, *Civ. Code § 941* goes to some length to address:

- Indemnity claims [*see Civ. Code § 941(b)*];
- The unavailability of a statute of limitations defense to any party in actual possession or control of the improvement in question [*see Civ. Code § 941(c)*]; and
- The effect of Title 7 on existing statutory and decisional law regarding statutes of limitations [*see Civ. Code § 941(e)*].

Lastly, the Title 7 time limitations do not apply to any action regarding a contract or express contractual provision, and

causes of action and damages to which "this chapter" (presumably, Title 7) does not apply are not limited by this section [*Civ. Code § 941(e)*].

[c] Evidentiary Standard for Proving Actionable Damage

Subject to the affirmative defenses set forth in *Civ. Code § 945.5* [*see § 34.49[6][g]*], to make a claim for violation of the Chapter 2 standards, a claimant need only show that the improvement does not meet the applicable standard [*Civ. Code § 942*]. Thereafter, "no further showing of causation or damages is required to meet the burden of proof" for any alleged Chapter 2 violation, "provided that the violation arises out of, pertains to, or is related to, the original construction" [*Civ. Code § 942*].

PRACTICE TIP:

Evidentiary Standard. This legislative rejection of the *Aas* evidentiary standard for proving the existence of actionable damage is one of the most significant features of Title 7 [for discussion of Aas v. Superior Court (2000) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 , *see § 34.49[3]*]. Four years after the passage of SB 800, which enacted Title 7, its effect on the volume of construction defect litigation is still unclear.

[d] Inapplicability of Title 7 to Other Causes of Action

Except as provided in Title 7, no other cause of action for a claim covered by this title or for damages recoverable under *Civ. Code § 944* is allowed [*Civ. Code § 943(a)*]. Furthermore, in addition to the rights under Title 7, the "title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute" [*Civ. Code § 943(a)*]. Damages awarded for the items set forth in *Civ. Code § 944* in such other cause of action are to be offset by the amounts recovered under that section for violation of the Chapter 2 standards [*Civ. Code § 943(a)*]

[e] Measure of Damages

With regard to detached single family homes, the applicable measure of damages is the lesser of either the repair costs or the diminution in current value of the home attributable to the violation of Title 7, subject to the common law personal use exception [*Civ. Code § 943(b)*].

Generally, a Title 7 claimant will only be entitled to seek recovery of the following damages [*Civ. Code § 944*]:

- The reasonable value of repairing any Chapter 2 violation.
- The reasonable cost of repairing any damages caused by any repair that is undertaken.
- The reasonable cost of repairing and rectifying any damages resulting from the Chapter 2 violation or violations.
- The reasonable cost of removing and replacing any improper repair attempted by the builder.
- Reasonable relocation and storage expenses.
- Lost business income (if the home was used as a principal place of business licensed to be operated from the home).
- Reasonable investigative costs for each established violation.

- All other costs or fees recoverable by contract or statute.

PRACTICE TIP:

Interaction Between *Civ. Code § 943(b)* and *Civ. Code § 944*. The interaction between *Civ. Code § 943(b)* and *Civ. Code § 944* is not entirely clear. Section 944 is not expressly limited to residences other than detached single family homes, but § 943(b) would seem to indicate that owners of such residences are restricted to seeking only the cost of repair or the diminution in value. As of April 2007, no appellate decision has been published that addresses this issue.

[f] Parties Bound by Title 7

Title 7 binds both original and subsequent purchasers [*Civ. Code § 945*]. Homeowners' associations and entities with the rights enumerated in *Civ. Code §§ 1368.3* and *1368.4* are likewise considered "original purchasers" for purposes of Title 7, and thus have standing to enforce all Title 7 provisions [*Civ. Code § 945*].

[g] Affirmative Defenses

The following seven specific categories of affirmative defenses are available to builders under Title 7 [*Civ. Code § 945.5*]:

- Unforeseen acts of nature [*Civ. Code § 945.5(a)*].
- Claimant's failure to mitigate or prevent damage [*Civ. Code § 945.5(b)*].
- Claimant's failure to follow the builder's or manufacturer's maintenance recommendations or commonly accepted homeowner maintenance obligations [*Civ. Code § 945.5(c)*].
- Claimant's or third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or use of the structure for something other than its intended purpose [*Civ. Code § 945.5(d)*].
- Applicable statutes of limitation [*Civ. Code § 945.5(e)*].
- Builder's procurement of a valid release [*Civ. Code § 945.5(f)*].
- Builder's successful repair of a given violation [*Civ. Code § 945.5(g)*].

Finally, all applicable affirmative defenses are preserved with regard to causes of action to which Title 7 does not apply [*Civ. Code § 945.5(h)*].

[7] Planning Considerations for Title 7 Issues

Title 7 questions to consider when preparing condominium project documents include the following:

- Does the builder want to offer a customized one year fit and finish warranty or rely on the statutory default language?
- Does the builder want to use the Chapter 2 functionality standards or prepare and provide its own enhanced protection agreement?
- Does the builder want to provide written maintenance schedules and obligations to homebuyers and the homeowners association?

- Is an affiliated general contractor involved in the building, development, construction, or sale of the property?

- Does the builder want to follow the Chapter 4 prelitigation procedures or prepare and provide its own alternative nonadversarial procedures?

- Do any documents prepared with regard to Title 7 make sufficient provision for both homeowners and the homeowners association?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawConstruction LawDefects



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART II. LEGAL BACKGROUND

16-34 California Legal Forms--Transaction Guide §§ 34.50-34.99

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

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§§ 34.50[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

16-34 California Legal Forms--Transaction Guide § 34.100

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.100 Facts

1. Name, address, and telephone number of owner and of any consultants, engineers, or others employed by owner for project.

2. Legal status of owner:

a. Individual.

b. Corporation.

c. Partnership.

d. Other.

3. Description of project, including:

a. Location (including street address, nearest cross streets, city, county, and state).

b. Legal description.

c. Zoning classification of project.

d. Nature of proposed construction work, i.e.:
(1) New construction.

(2) Conversion of existing building to condominiums [*see § 34.43*].

(3) Phased development [*see § 34.44*].

e. In case of conversion, condition and current use of existing building.

f. Number of condominium units in project.

g. Description of condominiums to be separately owned by purchasers, e.g.:

(1) Units consisting of:
(a) Airspace only; or

(b) Airspace plus physical boundaries (e.g., walls, floors, and ceilings).

(2) Units and parcel of real property.

(3) Boat slip or other space on water.

(4) Other.

h. Nature of proposed estates in condominiums and in common area [*see Civ. Code § 1351(b), (l)*; *see also § 34.33[5], [7]*]:

(1) Fee;

(2) Life estate;

(3) Estate for years; or

(4) Any combination of above estates.

i. Description of common area, including any improvements.

j. Description of any exclusive use common areas [*see § 34.33[7]*], e.g.:

(1) Parking spaces.

(2) Yards.

(3) Fixtures designed to serve, but located outside boundaries of, particular unit or units, e.g.:

NOTE:
Unless the declaration provides otherwise, any fixtures (specifically including those listed below) designed to serve a single condominium unit, but located outside that unit, will be exclusive use common areas allocated exclusively to the unit [*Civ. Code § 1351(i)(1)*].

Notwithstanding the provisions of the declaration, internal and external telephone wiring designed to serve a single condominium unit (or comparable separate interest), but located

outside the boundaries of the unit, are exclusive use common areas allocated exclusively to that unit [*Civ. Code § 1351(i)(2)*; ***see*** *Civ. Code § 1364(f)*; ***see also*** *§ 34.33[7]*].

(a) Shutters.

(b) Awnings.

(c) Window boxes.

(d) Doorsteps.

(e) Stoops.

(f) Porches.

(g) Balconies.

(h) Patios.

(i) Exterior doors.

(j) Door frames.

(k) Related hardware.

(l) Screens.

(m) Windows.

k. Description of surrounding area, including proximity to elementary schools, airports, fire stations, etc.

4. Proposed financing for project, including description of following [*see § 34.45*]:

a. Loan commitments already obtained.

b. Proposed financial assistance for purchasers of condominiums.

c. Presale requirement imposed by lender.

5. Proposed method(s) of sale or lease of condominiums.

6. Proposed manager of project:

a. Professional management agent.

b. Owners' association.

c. Other.

7. Targeted owners of condominiums, e.g.:

a. General public.

b. Senior citizens [*see § 34.40[2]*].

8. Voting system for members of owners' association [*see § 34.38[11]*]:

a. Single class.

b. Two-class.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsLeasesReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

16-34 California Legal Forms--Transaction Guide § 34.101

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.101 Documents

1. Preliminary title report covering project.

2. Any subdivision maps prepared for project, along with any conditions of approval associated therewith.

3. Any local building permits obtained for project.

4. Any contracts between owner and city or county with respect to project.

5. Any environmental impact report (EIR) or draft EIR prepared for project.

6. Any loan documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawSubdivisionsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

16-34 California Legal Forms--Transaction Guide §§ 34.102-34.119

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

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§§ 34.102[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-34 California Legal Forms--Transaction Guide § 34.120

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.120 General Development and Formation Considerations

1. Will owners' association be incorporated [*see § 34.38[1]*]?

NOTE:
Most condominium owners' associations are incorporated under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*; ***see*** *§ 34.38[1]*].

2. Will owners of condominiums own common area as tenants in common [*see Civ. Code § 1362*]?

NOTE:
To be a condominium, at least a portion of the real property must be owned by the owners as tenants in common [*Civ. Code § 1351(f)*]. Unless the declaration provides otherwise, the condominium owners own the common area as tenants in common, in equal shares, one for each unit or lot [*Civ. Code § 1362*; ***see*** *Civ. Code § 1351(f)*].

3. What local requirements govern proposed project [*see Ch. 30B, Zoning, Building, and Environmental Entitlements and Permits, § 30B.110*]?

4. If proposed project involves conversion of existing residential structure, do local requirements make conversion impractical [*see § 34.43[3]*]?

5. According to local governmental officials and utility companies, are adequate utilities and other necessary services available?

6. If separately owned units will consist of improved parcels of real property, should developer form

development as a planned development [*see § 34.32*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagement



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-34 California Legal Forms--Transaction Guide § 34.121

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.121 Applicability of State and Federal Laws

1. For purposes of Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], will proposed project:

a. Be subject to Act because it consists of "condominiums," which are estates in real property consisting of following types of ownership interests [*Civ. Code §§ 783, 1351(f)*]:

NOTE:
Under the Act, a common interest development is any of the following: a condominium project; a community apartment project; a planned development; or a stock cooperative [*Civ. Code § 1351(c)*]. For these purposes, "condominium project" means a development consisting of "condominiums," as that term is defined in this Paragraph 1(a) [*Civ. Code § 1351(f)*]. Virtually all condominium projects in California will fall within this statutory definition [***see*** *§§ 34.32* and *34.33[1]*].

(1) Separate interest in "space" (called a unit), the boundaries of which are accurately described in recorded final map, parcel map, or condominium plan; and

(2) Undivided interest in common in portion of real property in project?

b. Be exempt from certain requirements of Davis-Sterling Common Interest Development Act because [*Civ. Code § 1373*; *see § 34.33[2]*]:

(1) Property is expressly zoned as industrial or commercial development; or

(2) Project will be limited in use to industrial or commercial purposes pursuant to declaration of covenants, conditions, and restrictions that has been recorded in official records of each county in which common interest development is located?

NOTE:

The requirements of the Davis-Sterling Common Interest Development Act that do not apply to those projects within the scope of *Civ. Code § 1373* consist of the following: (1) the amendment of the declaration [***see*** *Civ. Code § 1356*]; (2) operating rules [***see*** *Civ. Code § 1357.100 et seq.*]; (3) preparation of a budget by the association [***see*** *Civ. Code § 1363(b)*]; (4) financial statements prepared by the owners' association [***see*** *Civ. Code § 1365*]; (5) the duties of the board of directors [***see*** *Civ. Code § 1365.5*]; (6) the imposition or collection of assessments or fees [***see*** *Civ. Code §§ 1366(b), 1366.1*]; (7) the sale or transfer of title to a separate interest in the development [***see*** *Civ. Code § 1368*]; (8) the distribution of certain project documents to prospective purchasers [***see*** *Civ. Code §§ 1363(b), 1368*]; and (9) the procedure for obtaining association approval of physical changes to an owner's separate interest or the common area [***see*** *Civ. Code § 1378*].

2. Will project consist of at least five condominiums and therefore be subject to public report and other requirements of Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see Bus. & Prof. Code § 11004.5(c)*]?

NOTE:

The Act incorporates by reference the definition of condominium set forth in the Davis-Stirling Common Interest Development Act [*Bus. & Prof. Code § 11004.5(c)*; ***see*** *Civ. Code §§ 783, 1351(f)*; ***see also*** *§ 34.37*].

The notice and public report requirements of the Act do not apply to nonbinding expressions of intent to purchase or lease that a converter must obtain from tenants in connection with a conversion of a building to a condominium project, community apartment project, or stock cooperative [*Bus. & Prof. Code § 11010.7*; ***see*** *§ 34.200[1][b][iii]*].

For a discussion of the Subdivided Lands Act in general, see *§ 34.37*. For the procedures involved in obtaining a public report under that Act, see *§§ 34.143* and *34.200[1]*.

In addition, a subdivider must furnish a prospective purchaser of a lot, parcel, or unit in the subdivision (or a prospective lessee, if the lease term is to exceed five years) with a "notice of special tax" if the subdivision is subject to a special tax assessed under the Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 53341.5(a)*; ***see*** *Gov. Code § 53311 et seq.* (Mello-Roos Act)]. For further discussion, see Ch. 30, ***Subdivision Regulation*** .

3. Which of following subdivision maps (if any) must or may be prepared under Subdivision Map Act [*Gov. Code § 66410 et seq.*] and applicable local subdivision ordinance [*see § 34.36[2]*]:

NOTE:

Although the Subdivision Map Act applies to condominium projects in general [***see*** *Gov. Code § 66424*], it does not apply to the conversion of a community apartment project [***see*** *Bus. & Prof. Code § 11004*] or stock cooperative [***see*** *Bus. & Prof. Code § 11003.2*] to condominiums, if the conversion meets specified requirements [***see*** *Gov. Code § 66412(g), (h)*; ***see also*** *§ 34.220[1]*]. For a discussion of other limited exceptions to the Act [***see*** *Gov. Code §§ 66412, 66412.2, 66412.5*], see Ch. 30, ***Subdivision Regulation*** .

a. Tentative and final map, if project will contain five or more condominiums [*Gov. Code §§ 66426, 66428*; *see Ch. 30, Subdivision Regulation, § 30.120*].

b. Parcel map, if project will contain four or fewer condominiums, unless local ordinance waives requirement of parcel map [*Gov. Code § 66428*; *see Ch. 30, Subdivision Regulation, § 30.120[7], [8]*].

NOTE:

If the Act requires a parcel map for a particular project, the local ordinance may require a tentative map, whether or not the local ordinance waives the requirement for a parcel map. If the local ordinance does not require a tentative map when a parcel map is required under the Act, the developer has the option of submitting a tentative map or a vesting tentative map [*Gov. Code § 66428*].

c. Vesting tentative map in lieu of any tentative or parcel map required by Act, if developer wishes to obtain vested right to proceed with development in substantial compliance with existing local requirements [*see Gov. Code §§ 66498.1-66498.8*; *see also Ch. 30, Subdivision Regulation, § 30.120[1]-[4]*].

4. Will sale of condominium units within project be exempt from:

NOTE:

The sale of condominiums will usually be exempt from the securities laws, particularly if the purchaser will occupy the unit and does not expect a speculative return on the condominium through the efforts of another person. For further discussion, see *§ 34.41*.

a. Registration requirements of federal Securities Act of 1933 [*15 U.S.C. § 77 et seq.*]; and

b. Qualification requirements of California Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*]?

5. Must project be registered with Office of Interstate Land Sales Registration under Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1701 et seq.*]?

NOTE:

This Act applies to developers who utilize the mails or any means of transportation or communication in interstate commerce to sell or lease subdivided lots [***see** 15 U.S.C. § 1703(a)(1)*].

6. Will National Environmental Protection Act of 1969 (NEPA) apply to project [*42 U.S.C. § 4321 et seq.*; *see generally Ch. 30B, Zoning, Building, and Environmental Entitlements and Permits, §§ 30B.31, 30B.112*]?

7. Is proposed project subject to California Environmental Quality Act of 1970 (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see generally Ch. 30B, Zoning, Building, and Environmental Entitlements and Permits, §§ 30B.32, 30B.112*]?

8. Will project be located in coastal zone [*see Pub. Res. Code § 30103*] and therefore subject to California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*]?

NOTE:

Anyone seeking to subdivide land in the coastal zone pursuant to the Subdivision Map Act must first obtain a coastal development permit [*Pub. Res. Code § 30600(a)*]. For a detailed discussion of this permit requirement, see *Ch. 30B, **Zoning, Building, and Environmental Entitlements and Permits**, §*

30B.222.

9. Is project subject to any regional environmental regulations [*see Ch. 30B, Zoning, Building, and Environmental Entitlements and Permits, § 30B.30*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawSecurities RegulationPublic Offerings of CondominiumsReal Property LawSecurities RegulationTransactions Subject to RegulationReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

16-34 California Legal Forms--Transaction Guide §§ 34.122-34.139

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

[Reserved]

§§ 34.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Formation of Condominium Project

16-34 California Legal Forms--Transaction Guide § 34.140

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.140 Obtaining Construction Permits

NOTE:

For the procedures required to procure local, state, and regional construction permits, see *Ch. 30B, **Zoning, Building, and Environmental Entitlements and Permits**, §§ 30B.120-30B.127*.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Formation of Condominium Project

16-34 California Legal Forms--Transaction Guide § 34.141

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.141 Preparation, Processing, and Recording of Subdivision Maps

NOTE:

To determine whether a tentative, vesting tentative, final, or parcel map must or may be prepared for the project under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], see *§ 34.121*, P 3. For the procedures for preparing, processing, and recording subdivision maps, see *Ch. 30, **Subdivision Regulation**, § 30.120*. The following discussion summarizes this material and describes the additional requirements and restrictions of the Subdivision Map Act that apply solely to condominium projects.

1. To extent required by Subdivision Map Act, have following map(s) prepared in conformance with statutory and local requirements governing form, content, and number of copies:

NOTE:

A map of a condominium project need not show the buildings or the manner in which the buildings or the airspace above the property are to be divided. The local governing body cannot refuse approval of the parcel, tentative, or final map on account of (1) the design or location of the buildings if these details do not violate local ordinances, or (2) the manner in which airspace is to be divided in conveying the condominiums. These requirements also apply to any map of a community apartment project or of the conversion of five or more existing dwelling units to a stock cooperative project [*Gov. Code § 66427(a)*]. A map need not include a condominium plan or plans, and the governing body may not refuse to approve a parcel, tentative, or final map on account of the absence of a condominium plan [*Gov. Code § 66427(b)*]. If the governing body has approved a parcel map to establish condominiums pursuant to *Gov. Code § 66427*, the separation of a three-dimensional portion or portions of the property from the remainder of the property or the division of that three-dimensional portion or portions into condominiums will not

constitute a further subdivision under the Act, provided (1) the total number of condominiums established is not increased above the number authorized by the local agency in approving the parcel map or final map; (2) a perpetual estate or an estate for years in the remainder of the property is held by the condominium owners in undivided interests in common, or by an association, and the duration of the estate in the remainder of the property is the same as the duration of the estate in the condominiums; and (3) the three-dimensional portion or portions of the property are described on a condominium plan or plans [***see*** *Gov. Code § 66427(e)*]. Unlike the remainder of *Gov. Code § 66427*, this provision does not apply to community apartment projects or stock cooperatives.

a. Tentative or vesting tentative map [*see Ch. 30, Subdivision Regulation, § 30.120[1]-[4]*].

NOTE:
If a project involves the subdivision of airspace in an existing structure but not the construction or addition of new units, as in the case of a conversion, any required tentative map (or parcel map for which a tentative map was not required) need not comply with the statutory provisions requiring consistency with applicable general or specific plans [***see*** *Gov. Code §§ 66473.5*, *66474*, *66474.61*] unless the general or specific plans contain definite objectives and policies specifically directed to the conversion of existing buildings into condominium projects or stock cooperatives [*Gov. Code § 66427.2*].

b. Final map [*see Ch. 30, Subdivision Regulation, § 30.120[5], [6]*].

c. Parcel map [*see Ch. 30, Subdivision Regulation, § 30.120[7], [8]*].

2. Satisfy any prefiling requirements imposed by local ordinance.

3. If proposed project involves conversion of existing structure [*see § 34.120*, § 4], satisfy statutory notice requirements [*see § 34.145*, § 5].

4. File map with city or county.

NOTE:
If a project involves converting an existing apartment building into a condominium project, stock cooperative, or community apartment project, the local government can require the payment of fees in lieu of dedication, but cannot require dedication of land for local transit facilities [*Gov. Code § 66475.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
C. Procedural Guide to Formation of Condominium Project

16-34 California Legal Forms--Transaction Guide § 34.142

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.142 Drafting Project Documents

NOTE:

The following project documents must reflect the requirements of the following laws that are applicable to the proposed development: the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; ***see*** *§ 34.121*, P 1]; the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations [***see*** *10 Cal. Code Reg. §§ 2792.8, 2792.15-2792.29*; ***see*** *§ 34.121*, P 2]; and the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*; ***see*** the NOTE to § 34.120, P 1]. The comments to the forms identified below discuss the applicable requirements.

1. Draft declaration [*see § 34.202*; *see also Civ. Code §§ 1352, 1353*].

NOTE:

Recordation of a declaration and a final or parcel map (if otherwise required for development) [***see*** *§ 34.141*, P 3] is one of the requirements for the creation of a common interest development under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1352*; ***see*** *Civ. Code § 1350 et seq.*].

2. If desired or required by local ordinance, have engineer or surveyor draft condominium plan and confirm that [*Civ. Code § 1351(e)*]:

NOTE:

Although the Davis-Stirling Act does not specifically require the preparation of a condominium plan [***see*** *Civ. Code § 1352(b)*], local subdivision ordinances usually do so. An engineer or surveyor should prepare the plan since it must contain detailed descriptions of the project, its units, common area, and exclusive use common areas. The

Act requires the recordation of the condominium plan "if any exists" as a condition to the creation of a common interest development [*Civ. Code § 1352(b)*].

a. Plan contains the following:

(1) Description or survey map of project that refers to or shows monumentation on the ground;

NOTE:

A monument is a natural or artificial object used to mark the location on the ground of a boundary line or corner [***see*** *Goss v. Golinsky (1909) 12 Cal. App. 71, 74-75, 106 P. 604* ; ***see also*** California Real Estate Law and Practice, Ch. 81, ***Boundaries and Descriptions*** (Matthew Bender)].

(2) Three-dimensional description of project that identifies common areas and each separate interest; and

(3) Certificate consenting to recordation of plan signed and acknowledged by required persons [*Civ. Code § 1351(e)(3)*; *see* P b, *below*].

b. Consent certificate has been signed by:

NOTE:

Owners of mineral rights, easements, rights-of-way, and other nonpossessory interests are not required to sign the condominium plan [*Civ. Code § 1351(e)*].

(1) Record owner of fee title to property included in plan.

(2) If project will terminate on termination of estate for years: all lessors and lessees of estate for years.

(3) If project is subject to life estate: all life tenants and holders of remainder interests.

(4) Either trustee or beneficiary of each recorded deed of trust, and mortgagee of each recorded mortgage, encumbering property.

(5) If condominium is result of conversion from community apartment project or stock cooperative: those owners, trustees, beneficiaries, and mortgagees who approved conversion.

3. Prepare either of following:

a. Articles of incorporation, if owners' association will be incorporated [*see § 34.204*].

b. Articles of association, if owners' association will not be incorporated.

NOTE:

For a discussion of unincorporated associations, see Ch. 13A, ***Nonprofit Unincorporated Associations*** . For a form of articles of association, see *Ch. 13A,* ***Nonprofit Unincorporated Associations****, § 13A.200*.

4. Draft bylaws for owners' association [*see § 34.205*].

5. If project will be professionally managed, draft management agreement [*see § 34.207*].

6. Consider drafting rules and regulations for project [*see, e.g., § 34.208* (sample rules and regulations governing use of common areas).].

7. Review above documents to confirm that they are internally consistent.

8. If public report must be obtained for project, prepare copies of all of above documents for inclusion with application for report [*see 10 Cal. Code Reg. §§ 2792.1(a), 2792(a)*; *see also § 34.143*, P 4(h), (i), (u)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-34 California Legal Forms--Transaction Guide § 34.143

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.143 Obtaining and Distributing Public Report for Project

NOTE:

An applicant for a public report must file the documents described below with the appropriate Subdivision District Office of the Department of Real Estate. The Los Angeles District Office (107 S. Broadway, Room 7001, Los Angeles, CA 90012; (213) 620-2700) processes applications for subdivisions located in Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura counties. The Sacramento District Office (4433 Florin Road, Room 250, Sacramento, CA 95823; (916) 322-2505) has jurisdiction over all other counties. For additional information on the public report process, including links to forms and regulations, the Department of Real Estate maintains a useful website at http://www.dre.ca.gov.

1. If developer wishes to take reservations for purchase or lease of condominiums from prospective purchasers prior to receipt of final public report [*10 Cal. Code Reg. § 2795*]:

a. Apply for preliminary public report by submitting appropriate filing fee [*see 10 Cal. Code Reg. § 2790.1.5*]; *see also § 34.200[1][i]*] along with standard application for public report [*see § 34.200*].

b. After obtaining preliminary public report:
(1) Provide copy of it to each prospective purchaser.

(2) Have prospective purchaser execute each of following [*10 Cal. Code Reg. §§ 2795(b), 2795.1*]:
(a) Reservation agreement [*see* Ch. 30, *Subdivision Regulation*]; and

NOTE:
This agreement must also be signed by or on behalf of the developer [*10 Cal. Code Reg. § 2795(b)(2)*].

(b) Official receipt for preliminary public report [*see* Ch. 30, *Subdivision Regulation*].

NOTE:
The prospective purchaser must execute this receipt before the developer can accept any money or other thing of value in connection with the reservation [*10 Cal. Code Reg. § 2795.1(b)(1)*]. The developer or developer's agent must retain each receipt for three years and must make the receipts available for inspection by the Commissioner or his or her designated representative during regular business hours [*10 Cal. Code Reg. § 2795.1(b)*].

c. Prepare and execute official escrow agreement and place executed reservation instrument and any deposit taken from potential buyer into escrow depository [*10 Cal. Code Reg. § 2795(b)(2)*].

2. Complete official application for public report [*see § 34.200[2]*; *see also Bus. & Prof. Code § 11010*; *10 Cal. Code Reg. § 2790*].

NOTE:
One of the supporting documents that must be included in the application package [***see** § 34.143*, P 4] is a completed subdivision questionnaire [*10 Cal. Code Reg. § 2792(a)(2)*]. The subdivision questionnaire is incorporated into the official application form [***see** § 34.200[1][c]*].

3. Have application executed by or on behalf of developer (or other person to whom public report is to be issued), and [*10 Cal. Code Reg. § 2790*]:

a. If executed within California, have developer either:

(1) Verify information in application and supporting documents, before notary public or other person qualified to administer oaths; or

(2) Execute written certificate that [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(a)* (model certification)]:

NOTE:
The official application for a public report contains a certification provision [***see** § 34.200[2]*, P 72].

(a) Recites that this information is certified to be true under penalty of perjury; and

(b) States date and place of execution and that it is certified under California law.

b. If executed outside of California, have developer either:

(1) Verify information in application and supporting documents, before person qualified to administer oaths within jurisdiction where executed; or

(2) Execute written certificate that [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(b)* (model

certification)].

NOTE:

The official application for a public report contains a certification provision [***see § 34.200[2]***, P 72].

(a) Recites that it is certified to be true under penalty of perjury; and

(b) States date of execution and that it is certified under California laws.

4. Assemble following documents for inclusion in application package [*10 Cal. Code Reg. §§ 2792.1(a), 2792(a)*]:

NOTE:

Most of the documents listed below are described in greater detail in the official application for a public report [***see*** *§ 34.200*].

The Department of Real Estate has developed alternative methods of filing the application materials required for a final public report. Two of these alternatives permit the applicant to submit the required materials in specified stages rather than all at once. For further discussion, see *§ 34.200[1][e]*. et seq.

a. Subdivision filing fee, including fee for preliminary public report if applicable.

b. Completed subdivision questionnaire.

c. Approved tentative subdivision map, unless Commissioner found that because of processing delays, tentative subdivision map has not been approved but will be approved within reasonable time.

d. Certificate of qualification from Secretary of State if applicant is a foreign corporation.

e. Consent to service of process on Secretary of State, if applicant is a nonresident of California.

f. Current preliminary title report covering all subdivision interests for which public report is sought, which must include:

(1) Legal description of subdivided property;

(2) Nature of interest or estate covered by report;

(3) Record owner of interest or estate covered by report;

(4) All easements, liens, rights, interests, and claims disclosed by examination of indices in office or recorder of county in which property is located;

(5) Existence of encroachment of improvements over lines of record title;

(6) All mechanics' liens arising out of work completed or work in progress; and

(7) Existence of assessments or potential assessments for public improvements completed or under construction.

g. Copy of declaration [*see § 34.202*; *see also §§ 34.142*, P 1 and 34.144, P 2].

h. Coastal Commissioner permit or exemption if project is in coastal zone.

i. Evidence of availability of domestic utilities and services to project.

j. Information concerning hazards and other unusual conditions within or in vicinity of project.

k. Assessment and improvement bond information, if applicable.

l. Exemplars of all marketing, financing, and conveyancing instruments to be used in offering of condominiums.

m. Exemplar escrow instructions including at least the following:

NOTE:

Applications for final subdivision public reports must contain specified information. The regulation that lists the required information for condominium projects and other common interest subdivisions [***see*** *10 Cal. Code Reg. § 2792.1*] requires, among other things, all of the applicable documents and information required for "standard" (non-common interest) subdivisions under *10 Cal. Code Reg. § 2792(a)*. The list for common interest projects and the list for standard subdivisions conflict only in their requirements for the contents of the exemplar escrow instructions [***see*** *10 Cal. Code Reg. §§ 2792(a)(13)* (standard subdivisions), 2792.1(a)(15) (common interest subdivisions)]. The description below sets forth the requirements applicable to common interest subdivisions because the Department of Real Estate presumably intends them to prevail over their standard subdivision counterparts when conflicts exist.

(1) Description of nature of transaction.

(2) Provision for return to buyers of funds deposited toward purchase of condominiums if escrows are not closed by date prescribed in instructions.

(3) Name and address of escrow depository to be utilized.

(4) When applicable, provision assuring compliance with *Bus. & Prof. Code § 11018.5(c)* [*see § 34.203*].

(5) Provision for conveyance of common area to owners' association, if applicable.

n. Bond or other device to be used as a means of compliance with *Bus. and Prof. Code §§ 11013.2* and *11013.4*.

NOTE:

For discussion of those statutory provisions, see Ch. 30, ***Subdivision Regulation*** .

o. Completed documents for reservations and reservation deposits if preliminary public report is requested.

p. Evidence of financial arrangements to assure completion of all off-site improvements included in offering.

q. Evidence of financial arrangements for any guarantee or warranty included in offering.

r. Evidence of all arrangements to assure completion, maintenance, and availability for use of any privately owned facility that will be offered as an inducement to purchase of condominiums.

s. Copy of all proposed or existing governing instruments for owners' association, including (as applicable) [*see §§ 34.142*, PP 3-7 and 34.144]:

(1) Articles of incorporation [*see § 34.203*] or association;

(2) Bylaws [*see § 34.206*];

(3) Management agreement [*see § 34.207*]; and

(4) Rules for use of common areas and recreational facilities [*see § 34.208*].

t. Copy of condominium plan, if any [*see § 34.142*, P 2].

u. Overall development plan if project is part of phased development.

v. Evidence of financial arrangements for completion of common areas and facilities.

w. Copies of all contracts or proposed contracts obligating owners' association.

x. Agreement of developer to subsidize common area maintenance and owners' association operation (when applicable).

y. Financial arrangements to assure performance of subsidization agreement as noted in Paragraph (x), *above*.

z. Detailed pro forma budget reflecting estimated costs of ownership, operation, and maintenance expenses and reserves for condominium project.

aa. Most recent balance sheet and annual operating statement for owners' association, if applicable.

bb. Duplicate budget package for departmental analysis of proposed budget for common area maintenance and owners' association operations.

cc. Subdivision trust agreement, if applicable.

dd. Exemplar of deed for conveyance of common area to owners' association.

ee. Permit issued by Department of Corporations if applicable to the offering.

5. If project involves conversion of existing residential building to condominiums, include supplemental questionnaire [*see* DRE Form 639, available at http://www.dre.ca.gov/form500.htm] in application [*10 Cal. Code Reg. § 2792.1(a)(16)*; *see § 34.43*].

6. If project is to be developed in phases or stages, enclose a detailed plan of phased development, which must include [*10 Cal. Code Reg. § 2792.27*; *see § 34.44[1]*]:

NOTE:

If a multi-phased development qualifies as a "master planned development" [***see*** *10 Cal. Code Reg. § 2792.32(a)* (definition), the development may be exempt from some or all of the "reasonable arrangement regulations" [***see*** *10 Cal. Code Reg. §§ 2792.15-2792.28*] normally applicable to developments that are subject to the Subdivided Lands Act [***see*** *10 Cal. Code Reg. § 2792.32*; § 34.44[3]; ***see also*** *Bus. & Prof. Code § 11000 et seq.* (Act)].

a. Proof satisfactory to Commissioner that no proposed annexation will:

(1) Result in overburdening of common facilities; or

(2) Cause substantial increase in assessments against existing owners that was not disclosed in public reports under which pre-existing owners purchased their interests.

b. Identification of land proposed to be annexed and total number of residential units currently contemplated by developer for overall project.

c. Written commitment by developer to pay to association, concurrently with closing of escrow for first sale of a condominium in an annexed phase, appropriate amounts for specified maintenance reserves.

NOTE:

These "reserves" must be for replacement or deferred maintenance of common area improvements in the annexed phase necessitated by or arising out of the use and occupancy of condominiums under any rental program conducted by the developer that has been in effect for a period of at least one year as of the date of closing of the escrow for the first sale of a condominium in the annexed phase [*10 Cal. Code Reg. § 2792.27(b)(4)*].

If the phased development is or will be a senior citizen housing development [***see*** *Civ. Code § 51.3*; ***see also*** *§ 34.40[2]*], the applicant must include in the application for the public report a complete statement of the restrictions on occupancy that are to apply in the development [***see*** *Bus. & Prof. Code § 11010.05*; ***see also*** *§ 34.200[1][b][v]*].

"Although rarely utilized, if certain requirements are met, the Department of Real Estate will issue a flexible phase public report. For example, assume a 100-unit project, divided into five (5) phases of 20 units each. Under standard phasing techniques, each phase would consist of 20 numbered units. Phase 1, for example, would include units 1 through 20, phase 2, units 21 through 40, and so on. Under the flexible phase public report requirements, the same five public reports could be issued, however, phase 1 would not necessarily consist of units 1 though 20. When the report is issued, it would cover 20 units, but they would be specifically identified in the report. When the subdivider is ready to close escrow on the units in his or her first phase, he or she will then identify the 20 units in phase 1. The units are identified by preparing a Notice of Designation and forwarding it to the Department of Real Estate. The advantage of the flexible phase public report is that the developer is not locked into offering units 1 through 20 in the first phase, but can offer any of units 1 through 100 in the first phase" [Hanna & Van Atta, Hanna and Van Atta on California Common Interest Developments (Thomson West 2006) § 11.32, p. 442].

7. Before submitting application, review application and supporting documents, keeping in mind that Commissioner, to issue public report for project, must find that [*Bus. & Prof. Code § 11018.5*]:

NOTE:

The Real Estate Commissioner will ordinarily consider provisions of the proposed governing instruments to satisfy the "reasonable arrangements" requirements of *Bus. & Prof. Code § 11018.5* [***see** § 34.143*, P 7(a), (e), and (f)] if the provisions substantially conform to the applicable standards prescribed in the Commissioner's regulations [*10 Cal. Code Reg. §§ 2792.4, 2792.15-2792.29*] and if they do not otherwise arbitrarily deny, limit, or abridge the right of owners with regard to management, maintenance, preservation, operation, or control of their condominiums and other interests in the project [*10 Cal. Code Reg. § 2792.8(b)*; ***see** § 34.202[1]*].

a. Reasonable arrangements have been made to assure completion of project and all off-site improvements included in offering.

b. If condominium or premises or facilities within common area will not be completed before to issuance of final report, developer has:

(1) Specified reasonable date for completion; and

(2) Has complied with one of following financial plans prescribed by *Bus. & Prof. Code § 11018.5(a)(2)* [*see § 34.200[1]*]:

(a) Arranges for lien and completion bond or bonds in an amount and subject to such terms, conditions, and coverage as Commissioner may approve to assure completion of improvements lien free.

(b) All funds from sale of lots or parcels or such portions thereof as Commissioner determines are sufficient to assure construction of improvement or improvements, must be impounded in neutral escrow depository acceptable to Commissioner until improvements have been completed and all applicable lien periods have expired; provided, however, Commissioner determines time for completion is reasonable.

(c) Amount sufficient to cover costs of construction must be deposited in neutral escrow depository acceptable to Commissioner under written agreement providing for disbursements from that escrow as work is completed.

(d) If project is condominium situated on single parcel as shown on approved final subdivision map, arrange for (i) lien and completion bond or bonds in amount sufficient to assure lien-free completion of all common area improvements not located in residential structure, and (ii) placement of all funds, or such portions thereof as Commissioner determines are sufficient, from sales of condominium interests in neutral escrow depository acceptable to Commissioner. Funds for purchase or lease of condominium interest must remain in escrow account until residential structure in which purchaser's separate unit is located has been completed, and all lien periods applicable to purchaser's separate and undivided interests in entire project arising out of work of improvement performed by either subdivider or any successor in interest to subdivider have expired or have been insured against in manner satisfactory to Commissioner.

(e) Such other alternative plan as may be approved by Commissioner.

c. Proposed deeds, conveyances, leases, subleases, or instruments of assignment are adequate to transfer to purchasers the legal interests and uses represented by owner.

d. After transfer of title to first condominium to any purchaser, provisions of project documents as last submitted to Commissioner will be binding on every purchaser and occupant of every other condominium in project.

NOTE:

These purchasers and occupants include, except with regard to a limited-equity housing cooperative, purchasers acquiring title by judicial or nonjudicial foreclosure or by deed in lieu of foreclosure, under any mortgage or deed of trust, whether or not the mortgage or deed of trust was recorded before recordation of the declaration applicable to the first condominium transferred to a purchaser [*Bus. & Prof. Code § 11018.5(c)*].

e. Reasonable arrangements have been made for delivery to purchasers of control over project and all off-site land and improvements included in offering.

f. Reasonable arrangements have been or will be made as to interest of each purchaser with regard to management, maintenance, preservation, operation, use, right of resale, and control of:

(1) Purchaser's condominium; and

(2) Any other areas or interests, whether or not within, or pertaining to, areas within boundaries of project, that:

(a) Have been or will be made subject to plan of control proposed by owner; and

(b) Are included in offering.

8. Submit application package and filing fee [*see Bus. & Prof. Code § 11011(b)(2)*; *10 Cal. Code Reg. § 2790.1.5(a)*] to Department of Real Estate [*see Bus. & Prof. Code § 11010*; *10 Cal. Code Reg. § 2790*].

NOTE:

If the developer does not furnish the data required by *Bus. & Prof. Code § 11010* [***see** § 34.143*; ***see also** § 34.200[2]*] within three years from the date a notice of intention is filed, the Real Estate Commissioner may, after written notice to the developer or the developer's representative, abandon the application, provided, however, that (1) six months have elapsed since the Commissioner has given notice of deficiencies or substantive inadequacies contained in the documents that are required to make the filing substantially complete and the deficiencies and inadequacies have not been corrected by the applicant, and (2) the term of any one year extension of time in which to complete the application has elapsed [*Bus. & Prof. Code § 11018.13(a)*; *10 Cal. Code Reg. § 2804(a)(1)*]. Under specified conditions, the Commissioner may grant the developer a one-year extension to complete the application [***see** 10 Cal. Code Reg. § 2804(d)*].

9. On receipt of notice of intention and application for issuance of a public report, ensure that Department of Real Estate (DRE) reviews notice and application and notifies applicant, within 10 days after receiving notice and application, of whether notice and application are substantially complete with regard to quantitative requirements, i.e., that number and type of documents required to make filing substantially complete without regard to content of those requirements [*Bus. & Prof. Code § 11010.2(a)(1), (b)*].

NOTE:

If notice and application are not substantially complete with regard to quantitative requirements, notification from DRE must specify information needed to make notice and application substantially complete [*Bus. & Prof. Code § 11010.2(b)(1)*]. On receipt of any resubmittal of notice and application,

DRE must notify applicant, in writing, of that determination within 10 days after receiving notice and application [*Bus. & Prof. Code § 11010.2(b)(1)*].

If DRE determines that notice and application are substantially complete with regard to quantitative requirements, DRE must provide applicant with list of all deficiencies and substantive inadequacies necessary for notice and application to be "qualitatively" complete, within 60 days after DRE determines that notice and application are substantially complete with regard to quantitative requirements [*Bus. & Prof. Code § 11010.2(b)(2)*].

Qualitatively complete, for purposes of *Bus. & Prof. Code § 11010.2*, means that all deficiencies and substantive inadequacies contained in the documents that were required to make the filing substantially complete have been corrected [*Bus. & Prof. Code § 11010.2(a)(2)*].

10. On receipt of all documents, materials, writings, and other information submitted in response to DRE's "qualitative" deficiency notice, ensure that DRE notifies applicant of whether notice and application are qualitatively complete within 30 days [*Bus. & Prof. Code § 11010.2(c)*].

NOTE:

If application and notice are not qualitatively complete, notice must include list of any remaining deficiencies and substantive inadequacies [*Bus. & Prof. Code § 11010.2(c)*]. On receipt of any resubmittal of documents, materials, writings, and other information in response to list of any remaining deficiencies and substantive inadequacies, DRE must provide notification within 30 days [*Bus. & Prof. Code § 11010.2(c)*].

11. After receipt of any qualitative deficiency notice from DRE, make any changes to declaration, condominium plan, articles, and bylaws demanded by DRE.

NOTE:

DRE must issue a public report within 15 days after the notice and application are determined to be qualitatively and substantially complete, and evidence of the recording and filing of all corresponding documents are submitted to DRE [*see § 34.144*], along with evidence of financial arrangements required by DRE [*Bus. & Prof. Code § 11010.2(d)*].

12. If, after DRE determines that application is qualitatively complete [*see Bus. & Prof. Code § 11010.2*; § 34.200[1]], developer is unable to satisfy certain remaining conditions for issuance of public report [*see* NOTE, *below*] but wishes to commence sale or leasing of condominiums, take following steps:

NOTE:

The Commissioner may issue a conditional public report if the material elements of the setup of the offering to be made under the authority of the conditional public report have been established, and all requirements for issuance of a public report have been met except for one or more of the following: (1) a final map has not yet been recorded, (2) a condominium plan has not been recorded, (3) the CC&Rs have not been recorded, (4) a declaration of annexation has not been recorded, (5) a recorded subordination of existing liens to the CC&Rs or the declaration of annexation, or escrow instructions to effect recordation of the same prior to the first sale, are lacking, (6) filed articles of incorporation are lacking, (7) a current preliminary report of a licensed title insurance company issued after filing of the final map and recording of the declaration covering all subdivision interests to be included in the public report has not been provided, or (8) other requirements the Commissioner determines are likely to be timely satisfied by the applicant, notwithstanding the fact that the failure to meet these requirements makes the application qualitatively incomplete [*see Bus. & Prof. Code § 11018.12(a)(1)-(8)*].

a. Apply for conditional public report by satisfying following requirements:

(1) Supply evidence that all purchase money will be deposited in compliance with *Bus. & Prof. Code § 11013.2(a)* or *11013.4(a)* [*Bus. & Prof. Code § 11018.12(e)(1)*; *see* Ch. 30, *Subdivision Regulation*].

(2) Provide evidence of compliance with *Bus. & Prof. Code § 11018.5(a)(1), (2)* (governing completion of project and offsite improvements) [*Bus. & Prof. Code § 11018.12(e)(1)*; *see § 34.200[1]*].

(3) Supply description of nature of transaction [*Bus. & Prof. Code § 11018.12(e)(2)*].

(4) Provide for return of entire sum of money paid or advanced by purchaser if [*Bus. & Prof. Code § 11018.12(e)(3)*]:
(a) Public report is not issued during term of conditional public report, or during extended term of conditional public report; or

(b) Purchaser is dissatisfied with public report because of material change in setup of offering [*see Bus. & Prof. Code § 11012* (material changes); *see also § 34.161*].

b. If Commissioner issues conditional public report, notify developer of his or her right to sell or lease, or offer for sale or lease, condominiums in project pursuant to report, provided following requirements are satisfied:

(1) As condition of sale, lease, or offer, delivery of legal title or other interest contracted for will not take place until issuance of final public report [*Bus. & Prof. Code § 11018.12(d)*].

(2) Requirements of *Bus. & Prof. Code § 11018.12(e)* are met [*see § 34.143*, P 9(a)].

(3) Each prospective purchaser is provided with copy of conditional public report and written statement that includes all of the following [*Bus. & Prof. Code § 11018.12(f)*]:

(a) Specification of information required for issuance of public report.

(b) Specification of information required in public report that is not available in conditional public report, along with statement of reasons why that information is not available at time of issuance of conditional public report.

(c) Statement that no person acting as principal or agent may sell, lease, or offer for sale or lease condominiums in project for which conditional public report has been issued except as provided in applicable provisions of Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.* (Act); *Bus. & Prof. Code §§ 11010-11023* (applicable provisions)].

(d) Specification of requirements of *Bus. & Prof. Code § 11018.12(e)* [*see § 34.143*, P 9(a)].

(4) Prospective purchaser signs receipt indicating that he or she has received and read conditional public report and written statement accompanying report [*Bus. & Prof. Code § 11018.12(g)*; *see § 34.143*, P 3].

c. If term of conditional public report is about to expire, apply (if desired) for six-month renewal [*see Bus. & Prof. Code § 11018.12(h), (i)*].

NOTE:

The term of a conditional public report must not exceed six months, and may be renewed for one additional term of six months if the commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h)*]. However, the term of a conditional public report for attached residential condominium units consisting of 25 units or more as specified on the approved tentative tract map, must not exceed 30 months and may be renewed for one additional term of six months if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h)*].

13. Create project and association [*see § 34.144*].

14. After obtaining final public report, and before entering into any contract or agreement for sale or lease of any condominium in project, have developer [*Bus. & Prof. Code § 11018.1*]:

a. Give each prospective purchaser or lessee a copy of report and statutory statement describing common interest developments [*see Bus. & Prof. Code § 11018.1(c)*; *see also § 34.201*].

b. Have prospective purchaser or lessee execute official receipt for report [*see 10 Cal. Code Reg. § 2795.1*; *see also* Ch. 30, *Subdivision Regulation*].

c. Have developer, on oral or written request, give copy of public report to any member of public.

d. Have developer post in conspicuous place at any office at which sales or leases (or offers to sell or lease) are regularly made, the following documents:

(1) Copy of public report; and

(2) Statement advising that developer will provide copy of public report at any time, on oral or written request.

e. Make copies of following documents available for examination by prospective purchasers or lessees before execution of offers to purchase or lease [*Bus. & Prof. Code § 11018.6*]:

(1) Declaration.

(2) Articles of incorporation or association for owners' association.

(3) Bylaws for owners' association.

(4) Any other instrument that establishes or defines common, mutual, and reciprocal rights and responsibilities of owners or lessees of condominiums in project as members of owners' association, or otherwise.

(5) To extent available and applicable, current pro forma operating budget prepared in

accordance with *Civ. Code § 1365(a)* [*see § 34.164*, P 1(a)].

(6) Statement prepared by governing body of association setting forth outstanding delinquent assessments and related charges levied by association against condominiums in project under authority of governing instruments.

15. Instruct developer or developer's agent to [*10 Cal. Code Reg. § 2795.1(b)*]:

a. Retain each receipt for final or preliminary public report for three years; and

b. Make receipts available for inspection by Commissioner or Commissioner's designated representative during regular business hours.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-34 California Legal Forms--Transaction Guide § 34.144

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.144 Creating Project and Association

1. Create condominium project by [*Civ. Code § 1353*]:

NOTE:
The Davis-Stirling Common Interest Development Act applies and a common-interest development is created as soon as the following steps are taken [*Civ. Code § 1352*].

a. Recording following:
(1) Declaration [*see § 34.202*].

NOTE:
If a declaration for a condominium is (1) recorded before the execution of a contract of sale of any interests in the development, (2) describes the property it is to govern, and (3) states that it is to bind all purchasers and their successors, a subsequent purchaser who has constructive notice of the recorded declaration is deemed to intend and agree to be bound by, and to accept the benefits of, the common plan established by the declaration notwithstanding that the declaration is not additionally cited in a deed or other document at the time of sale to the subsequent purchaser [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

(2) Condominium plan, if required by local jurisdiction.

(3) Final map or parcel map, if required by Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see § 34.141*].

b. Conveying following to purchaser [*see § 34.240*]:

(1) Condominium unit; and

(2) Interest in common area or membership in owners' association.

2. Assuming owners' association will be a nonprofit mutual benefit corporation [*see* NOTE to § 34.120, P 1], create association by:

a. Obtaining clearance of proposed name from Secretary of State [*see Corp. Code § 7122*; *see* also *Ch. 13, Nonprofit Corporations, § 13.111*].

b. Reserving proposed name [*see Corp. Code § 7122(d)*; *see* also *Ch. 13, Nonprofit Corporations, § 13.120*, P 1].

c. Filing articles [*see § 34.204*] with Secretary of State [*see Corp. Code § 7120(a)*; *see also Ch. 13, Nonprofit Corporations, § 13.120*].

d. Having developer adopt bylaws [*see § 34.142*, P 4] and appoint initial directors [*see § 34.205*].

e. Holding initial meeting of directors, at which they should take any acts necessary to complete organization of association [*see Corp. Code §§ 7211, 7213*; *see also Ch. 13, Nonprofit Corporations, § 13.121*].

f. Filing annual statement within 90 days after filing original articles [*see Corp. Code § 8210(a)*; *see also Ch. 13, Nonprofit Corporations, § 13.120*].

g. If sale of condominiums does not qualify for exemption from state and/or federal securities laws [*see § 34.121*, P 4]:

NOTE:
For discussion of the general scope and application of the California and federal securities laws, and a list of the exemptions available under those laws, see Ch. 6, *Securities Regulation Issues* . Federal exemptions are covered in greater detail in Ch. 6A, *Federal Securities Exemptions for California Nonpublic Corporations*. For a detailed discussion of the federal securities laws in the context of condominium development, see Rohan & Reskin, Condominium Law and Practice, Ch. 18, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool* (Matthew Bender).

(1) File application for qualification of securities with Commissioner of Corporations [*see* Ch. 6H, *Qualification of Securities*]; and/or

(2) If necessary, comply with registration requirements of Securities Act of 1933 [*15 U.S.C. § 77a et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-34 California Legal Forms--Transaction Guide § 34.145

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.145 Converting Existing Building to Condominium Project

NOTE:
With the exception of the detailed notice requirements discussed in *§ 34.145*, P 5, the requirements governing the conversion of a building to a condominium project are basically the same as those applicable to a newly constructed condominium project [***see*** *§ 34.43[2]*]. Consequently, this section cross-refers to other relevant sections and focuses on the unique conversion notice requirements.

1. If local conversion ordinance exists [*see § 34.120*, P 3], obtain copy and satisfy its requirements.

2. Obtain required construction permits [*see § 34.140*].

3. Draft project documents [*see § 34.142*].

4. If conversion will create condominium project containing five or more condominiums, apply for public report [*see Bus. & Prof. Code § 11004.5(c)*; *see also § 34.143*].

5. If proposed project is subject to Subdivision Map Act [*see Gov. Code §§ 66412(g), (h), 66424*; *see also § 34.121*, P 3], satisfy non-conversion requirements of Act [*see § 34.141*] and provide each tenant of proposed condominium, community apartment project, or stock cooperative project with following written notices [*Gov. Code § 66427.1(a)(2)*]:

NOTE:
A local legislative body may not approve a final map for a subdivision to be created from the conversion of residential rental property into a condominium project, a community apartment project, or a stock cooperative unless that body finds that each tenant of the

proposed conversion project and each person applying to rent a unit in the residential property to be converted has received or will have received all applicable notices and rights required under the Subdivision Map Act [*Gov. Code § 66427.1(a)(1)*]. If a rental agreement was negotiated in Spanish, Chinese, Tagalog, Vietnamese, or Korean, all required written notices regarding the conversion project must be issued in the same language [*Gov. Code § 66427.1(d)*].

The notice requirements are deemed satisfied if service is in accordance with the legal requirements for service by mail [*Gov. Code § 66427.1(b)*; *see* Code Civ. Proc. § 1013]. They do not diminish, limit, or expand the authority of any city, county, or city and county to approve or disapprove condominium projects [Gov. Code § 66427.1(c)].

a. Sixty day notice to existing tenants of intention to convert [*see Gov. Code § 66452.18*; *see also § 34.220* (form)].

NOTE:
The notice must be provided at least 60 days before tentative map is filed in accordance with *Gov. Code § 66452* [*Gov. Code § 66427.1(a)(2)(A)*].

b. Ten days' notice that [*see § 34.223* (form)]:

(1) Application for public report will be, or has been, submitted to DRE;

(2) Period for each tenant's right to purchase begins with issuance of the final public report; and

(3) Final public report will be available on request.

c. Notice that subdivider has received public report from DRE [*see § 34.223A* (form)].

NOTE:
This notice must be provided within five days after the date that the subdivider receives the public report from DRE [*Gov. Code § 66427.1(a)(2)(C)*].

d. Written notice of approval of final map [*see § 34.222* (form)].

NOTE:
This notice must be provided within 10 days after the map has been approved [*Gov. Code § 66427.1(a)(2)(D)*].

e. Notice of intention to convert prior to termination of tenancy [*see § 34.226* (form)].

NOTE:
This notice must be provided 180 days prior to termination of the tenancy due to conversion or proposed conversion, but not before the local authority has approved a tentative map for the conversion [*see Gov. Code § 66452.14*]. The notice will not alter or abridge the parties' rights or obligations in performing their covenants, including, but not limited to, providing services, paying rent, or the mutual statutory obligations to maintain the premises in a fit and habitable condition [*see Civ. Code §§ 1941, 1941.1, 1941.2*].

f. Notice of exclusive right to contract for purchase of tenant's respective unit on same or more favorable terms and conditions that unit will be initially offered to general public [*see § 34.224* (form)].

NOTE:
The exclusive right to purchase must commence on the date the public report is issued [*see Bus. & Prof. Code § 11018.2*] and must run for at least 90 days, unless the tenant gives prior written notice of his or her intention not to exercise the right [*see Gov. Code § 66452.15*].

6. Commencing at date not less than 60 days prior to filing of tentative map [*see Gov. Code § 66452*], give notice of filing to each *prospective* tenant applying for rental after than date and immediately before accepting any rent or deposit [*Gov. Code § 66452.17(a)*; *see Gov. Code § 66452.17(b)*; *see also § 34.221* (form)].

7. Create condominium project and owners' association [*see § 34.144*].

8. To terminate tenancies so that former rental units may be sold as condominiums:

a. Comply with eviction requirements (if any) of local ordinances.

b. Thirty or 60 days before termination, serve written termination notice on tenant [*see Civ. Code §§ 1946, 1946.1*]:

NOTE:
A separate termination notice will not be required if the 180-day notice of intention to convert [***see*** *§ 34.145*, P 2(f); ***see also*** *§ 34.226*] sets forth the termination date.

(1) By mailing it (certified or registered mail) to tenant; or

(2) In manner prescribed in *Code Civ. Proc. § 1162* for unlawful detainer notices [*see* Ch. 35B, *Modification and Termination of Leases*].

c. Comply with any additional termination provisions set forth in lease.

9. Advise developer (or other owner/seller of condominium unit) of statutory obligation to provide prospective purchasers with written disclosure of certain defects or malfunctions in condominium or common areas [*see Civ. Code § 1134*; § 34.164, P 7].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawPriorities & RecordingRecording ActsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-34 California Legal Forms--Transaction Guide §§ 34.146-34.159

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

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§§ 34.146[Reserved]



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16-34 California Legal Forms--Transaction Guide § 34.160

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.160 Correction or Amendment of Recorded Final or Parcel Map

NOTE:

When a recorded final or parcel map contains certain errors, omissions, or outdated information, the developer must file a certificate of correction or an amending map [***see*** *Gov. Code §§ 66469-66472.1*]. For the specific circumstances under which a recorded final or parcel map must be corrected or amended and the procedure for accomplishing this, see Ch. 30, ***Subdivision Regulation*** .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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16-34 California Legal Forms--Transaction Guide § 34.161

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.161 Reporting Material Changes in Project to Commissioner

1. If project is subject to outstanding public report, report any relevant details of proposed "material" change in project itself or in program for marketing project to Department of Real Estate (DRE) on one of its official forms [*Bus. & Prof. Code § 11012*; *10* Cal. Code Reg. § 2800; *see* Ch. 30, *Subdivision Regulation*], including, but not limited to:

NOTE:

Although the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and its implementing regulations do not define "material change," the Commissioner, by regulation, has specified numerous types of changes that are considered to be material [***see*** *10 Cal. Code Reg. § 2800*; ***see also*** Ch. 30, ***Subdivision Regulation*** (Commissioner's list)]. It is unlawful for an owner, the owner's agent, or a developer to materially change the setup of a condominium project after it has been submitted to DRE (i.e., at any time after submission of the application for the public report) without first notifying DRE in writing of the intended change. This requirement applies only if the developer or the developer's agent has actual or constructive knowledge of the change [*Bus. & Prof. Code § 11012*].

If the material change affects the governing instruments of the project (the declaration, articles, bylaws, and any operating rules of the association) [***see*** *Civ. Code § 1351(j)*], the developer must obtain the prior written consent of DRE during the period when the developer controls as many as one-fourth of the votes that may be cast to effect that change [***see*** *Bus. & Prof. Code § 11018.7*; ***see also*** the NOTE to § 34.162]. DRE will not consent to the submission of the proposed change to a vote of the owners if it finds that the change, if effected, would create a new condition or circumstance that would form the

basis for denial of a public report [***see*** *Bus. & Prof. Code § 11018.7*]. An application for consent may be filed by any interested person on a form prescribed by the DRE. A filing fee to be fixed by regulation, but not to exceed $25, must accompany each application [***see*** *Bus. & Prof. Code § 11018.7*]. There shall be no official meeting of owners or members nor any written solicitation of them for the purpose of effectuating a change except in accordance with a procedure approved by DRE after the application for consent has been filed with DRE; provided, however, that the governing body of the owners association may meet and vote on the question of submission of the proposed change to the DRE [***see*** *Bus. & Prof. Code § 11018.7*].

a. Sale, conveyance, including transfer of title in trust, or granting of option to another to acquire, five or more subdivision interests in subdivision other than time-share project or 12 or more time-share estates or time-share uses in time-share project.

b. Change in name or organization of subdividing entity such as incorporation, dissolution of corporation, or change in corporate or fictitious business name.

c. Change in purchase money handling procedures under *Bus. & Prof. Code § 11013.2* or *11013.4*, including, but not limited to, change in name or location of escrow or trust account depository or creation of blanket lien or encumbrance affecting lot, parcel, or unit of subdivided land being offered for sale.

d. Change in methods of marketing or conveyance of subdivision interests, including, but not limited to:

(1) Use of real property sales contracts, lease-option agreements, or similar marketing instruments.

(2) Special sales inducements involving financial commitment to purchasers by or on behalf of subdivider such as buy-back agreements, special interest rates or short-term basis and prizes, gifts, or premiums.

e. Inability of subdivider to fulfill agreements and assurances to purchasers of subdivision interests given by subdivider to commissioner in application for public report.

f. Creation or discovery of latent hazards affecting subdivisions such as adverse geologic conditions not apparent at time of issuance of subdivision's current public report.

g. Addition of common areas or common facilities for use and enjoyment of owners in subdivision that were not contemplated at time of issuance of current public report for subdivision.

h. Relocation of easements affecting unsold subdivision interests.

i. Creation of district, or annexation of subdivision into district, having power to tax or levy assessments against real property interests within subdivision.

j. Increase of 20 percent or more or decrease of 10 percent or more in regular assessment charged by association against owners in common-interest subdivision over amount of regular assessment reflected in subdivision's current public report.

k. Delinquencies in payment of regular assessments by owners within common-interest subdivision resulting in receipt by association of income that is more than 10 percent less than scheduled income from assessments.

l. Proposed change in use for which subdivision is offered as, e.g., from residential to investment or proposed change from offering of sole and exclusive use of unit in common-interest subdivision to program involving sharing of ownership or use with others as, e.g., time sharing program.

m. Changes in means for furnishing potable water, sewage disposal, and other public services to lots, parcels, or units within subdivision.

n. Any change in configuration of subdivision interest being offered for sale from configuration according to subdivision map or parcel map on which subdivision's current public report was based.

o. Amendment to CC&Rs or other governing instruments for subdivision or for association of owners of subdivision interests.

p. Failure by subdivider as owner of interests in common interest subdivision to pay regular assessments when:

(1) Assessments are payable on monthly basis and subdivider has failed to pay three or more months of assessments.

(2) Assessments are not payable on monthly basis and subdivider has failed to pay assessments within three months after assessments become due and payable.

q. Program that does not comply with *10 Cal. Code Reg. § 2792.10* in which subdivider undertakes to subsidize cost of operating and maintaining common areas and of providing services in lieu of payment of regular assessments by subdivider.

r. Affiliation by single-site time-share project as defined in *Bus. & Prof. Code § 11003.5* with:

(1) Other time-share projects or accommodations under contractual or membership program through mandatory reservation system; or

(2) Mandatory reservation system.

2. If Department of Real Estate finds that reported change is material, submit required fee and await issuance of amended public report [*10 Cal. Code Reg. § 2790.1.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormation



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16-34 California Legal Forms--Transaction Guide § 34.162

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.162 Obtaining Approval of Commissioner to Amend Governing Instruments

NOTE:

This section of the Transaction Guide covers procedures set forth in both the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] and the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*]. The requirements of the Subdivided Lands Act discussed in this chapter apply to condominium projects containing five or more condominiums and to other types of "common interest subdivisions" [***see** Bus. & Prof. Code § 11004.5*; ***see** § 34.37[1]*]. The Davis-Stirling Common Interest Development Act applies to "common interest developments" [***see** Civ. Code § 1351(c)*; ***see** § 34.33[1]*]. The vast majority of condominium projects and similar real estate developments (e.g., planned developments and stock cooperatives) are subject to both sets of requirements.

1. Ascertain whether proposed amendment to or modification of governing instrument or other project document requires prior written consent of Real Estate Commissioner because it would materially change those rights of owner, either directly or as member of owners' association, during period of time when developer or developer's successor in interest holds or directly controls as many as one-fourth of votes that may be cast to effect that change [*Bus. & Prof. Code § 11018.7(a)*].

2. If Commissioner's prior written consent is required:

a. File official application for consent [*10 Cal. Code Reg. § 2793(a)*].

NOTE:

The application form must be accompanied by (1) copies of the instrument to be amended in its present and amended forms, (2) a copy of the resolution or other authority for submitting the application if the applicant is a corporation or association, (3) a copy of the

letter or notice to be given to all persons eligible to vote on the proposed change, and (4) the prescribed application fee in the form of a check or money order [*10 Cal. Code Reg. § 2793(b)*].

The governing body of the owners' association may meet and vote on the question of whether to submit the proposed change to the Commissioner [*Bus. & Prof. Code § 11018.7(b)*].

b. Await Commissioner's findings on application for consent and take appropriate action as follows [*see 10 Cal. Code Reg. § 2793(c), (d)*]:

(1) Submit proposed change to vote of owners or members if Commissioner finds that it will not materially change rights of any owner or member to ownership, possession, or use of interests.

(2) Give Commissioner-approved notice describing substance of proposed change to eligible voters and conduct vote at least 15 days after notice if Commissioner finds that proposed change will materially change rights of any owner or member to ownership, possession, or use of interests.

NOTE:
If an applicant fails to take the steps necessary to obtain the Commissioner's consent within 90 days after the application is filed, the application may be deemed abandoned, in which case a new application must be filed if the applicant wishes to pursue the matter [*10 Cal. Code Reg. § 2793(e)*].

(3) Consider reapplication with modified proposal if Commissioner formally denies consent based on finding that proposed change would create new condition or circumstance that would be basis for denial of public report under *Bus. & Prof. Code § 11018* or *Bus. & Prof. Code § 11018.5* [*see* Ch. 30, *Subdivision Regulation*].

3. If proposal involves amending declaration, take following steps:

NOTE:
For discussion of an alternative amendment procedure that must be followed when the proposed amendment involves the deletion, from any of the governing documents, of a provision that relates to the construction or marketing of the development [***see*** *Civ. Code § 1355.5*], see *§ 34.162*, P 5.

a. If governing documents contain provision(s) authorizing amendments, attempt to obtain approval (by vote or written assent) of percentage of owners specified in governing documents [*Civ. Code § 1355(a)*], which must be:

(1) In single-class voting structure [*10 Cal. Code Reg. § 2792.24(a)*]:
(a) At least 51 percent and at most 75 percent of total voting power of association;

(b) At least bare majority of votes of members other than developer; and

(c) With respect to amendment of specific clause or provision, at least percentage of

affirmative votes prescribed for action to be taken under clause or provision.

NOTE:
Under this last requirement if, for example, the declaration provides that 75 percent of the voting power must agree to an increase in the maximum annual assessment, then 75 percent of the voting power must approve an amendment to that assessment provision regardless of the percentage prescribed in the general provision pertaining to amendments of the declaration [*10 Cal. Code Reg. § 2792.24(a)*].

NOTE:
When not specifically prohibited by the governing documents, a vote on proposed amendments to a declaration may be conducted by mail ballot in accordance with *Corp. Code § 7513(a)* (unless prohibited in the articles or bylaws, any action which may be taken at any regular or special meeting of members may be taken without a meeting if the corporation distributes a written ballot to every member entitled to vote on the matter). *Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal. App. 4th 563, 569-570, 71 Cal. Rptr. 3d 299* ; *see Corp. Code § 7513*.

(2) In two-class voting structure [*10 Cal. Code Reg. § 2792.24(d)*]:

(a) Prescribed percentage of voting power of each class of membership; or

(b) Prescribed percentage of quorum of members of each class.

NOTE:
If a two-class voting structure is no longer in effect because of the conversion of one class to the other, the provisions applicable to single-class structures (discussed in *§ 34.162*, P 3(a)(1)) must be followed [*10 Cal. Code Reg. § 2792.24(e)*].

b. If owner approval mentioned in § 34.162, P 3(a), is obtained [*Civ. Code § 1355(a)*]:

(1) Prepare document certifying that fact and have it executed and acknowledged by:

(a) Officer designated in declaration or by association for that purpose; or

(b) If no one is designated, by president of association.

(2) Have writing recorded in each county in which portion of project is located.

c. If declaration requires approval of "supermajority" of owners, and a majority less than required supermajority approve the amendment [*Civ. Code § 1356*]:

NOTE:
The term "supermajority" is not used in the statute. As used here, it refers to more than 51 percent of the votes in an association with a single-class voting structure, and to owners having more than 51 percent of the votes in more than one class in a voting structure with more than one class [***see*** *Civ. Code § 1356(a), (c)(4)*].

(1) Prepare petition for court order reducing percentage of affirmative votes necessary for amendment [*see Civ. Code § 1356(a)*; *see also* California Forms of Pleading and Practice, Ch. 124, *Condominiums*

and Other Common Interest Developments (Matthew Bender) (illustrative petition and related forms)].

NOTE:
The petition must be made by the association or any owner of a separate interest, and must be filed with the superior court of the county in which the project is located [*Civ. Code § 1356(a)*].

NOTE:
When a vote on the proposed amendment of a declaration has been conducted by mail ballot, *Corp. Code § 7513(b)* ("approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot ... equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot") does not prohibit a homeowners' association or member from seeking judicial intervention under *Civ. Code § 1356*. There is no indication in the statute that the Legislature intended to limit the reach of section 1356 to votes taken at a regular or special meeting. If an election is held at a meeting, the governing documents may be amended only if the percentage of affirmative votes required by the governing documents is cast, or the association obtains relief under section 1356. Because there is no evidence of legislative intent to the contrary, the same rule applies to votes by mail ballot [*Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal. App. 4th 563, 571, 71 Cal. Rptr. 3d 299]* .

(2) If court makes required findings [*see Civ. Code § 1356(c)*] and grants petition, have amendment acknowledged by [*Civ. Code § 1356(f)*]:

(a) Any person designated in declaration or by association for that purpose; or

(b) If no one is so designated, by president of association.

(3) Have amendment and court order recorded in every county in which portion of project is located, by person described in § 34.162, P 3(c)(2) [*Civ. Code § 1356(f)*].

(4) Within reasonable time after amendment is recorded, have association mail the following to each member of association [*Civ. Code § 1356(g)*]:

(a) Copy of amendment; and

(b) Statement that amendment has been recorded.

d. If declaration does not contain provision governing amendments [*Civ. Code § 1355(b)*]:

NOTE:
This procedure applies if the declaration does not (1) prohibit amendments, or (2) include provisions permitting its amendment at all times during its existence [*Civ. Code § 1355(b)*].

(1) Distribute proposed amendment to all owners by first-class mail (postage prepaid) or personal delivery not less than 15 days nor more than 60 days prior to solicitation of any approval;

(2) Obtain approval of owners representing more than 50 percent of condominiums (or comparable separate interests);

NOTE:

Civ. Code § 1355(b) requires the approval of the above percentage or of any higher percentage required by the declaration for the approval of an amendment to the declaration [*Civ. Code § 1355(b)*]. However, it is unlikely that the declaration will require a higher percentage, since this procedure is designed to be used when the declaration is silent regarding amendments [***see*** the NOTE to § 34.162, P 3(d)].

(3) Prepare document certifying owners approval of amendment, and have it executed and acknowledged by officer of association;

(4) Have amendment recorded in each county in which portion of project is located; and

(5) Have copy of amendment distributed by first-class mail (postage prepaid) or personal delivery to all owners immediately on its recordation.

4. If articles or bylaws are to be amended, attempt to satisfy applicable amendment provisions of governing instruments.

NOTE:

The amendment provisions for the articles must require the approval of at least a bare majority of each of the following: the governing body; the voting power of the association; and the votes of members other than the developer [*10 Cal. Code Reg. § 2792.24(b)(1)(A)*]. The amendment provisions for bylaws must require the approval of (1) at least a bare majority of a quorum, but not more than a bare majority of the voting power of the association; and (2) at least a bare majority of the votes of members other than the developer [*10 Cal. Code Reg. § 2792.24(b)(1)(B)*].

Notwithstanding these minimum requirements, the percentage of a quorum or of the voting power of the association or of members other than the developer necessary to amend a specific clause or provision in the articles or bylaws must not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause [*10 Cal. Code Reg. § 2792.24(c)*]. Further, if a two-class voting structure is in effect, none of the governing instruments may be amended without the vote or written assent of a prescribed percentage of the voting power of each class of membership or a prescribed percentage of a quorum of members of each class [*10 Cal. Code Reg. § 2792.24(d)*]. If the two-class voting structure becomes a single-class structure because of the conversion of one class to the other, the minimum requirements discussed above must be followed [*10 Cal. Code Reg. § 2792.24(e)*].

For discussion of an alternative amendment procedure that must be followed when the proposed amendment involves the deletion from any of the governing documents of a provision that relates to the construction or marketing of the development [***see*** *Civ. Code § 1355.5*], see *§ 34.162*, P 5.

5. If proposed amendment involves deletion from governing document of provision relating to construction or marketing of development, take following steps [*see Civ. Code § 1355.5*]:

NOTE:

The amendment procedure discussed in this Paragraph 5 applies notwithstanding any provision of the governing documents to the contrary [*Civ. Code § 1355.5(a)*].

a. Confirm that following apply:

(1) Provision was unequivocally designed and intended, or by its nature could only have been designed or intended, to facilitate developer in completing construction or marketing of development [*Civ. Code § 1355.5(a)*].

(2) Provision provides for access by developer over or across common area for following purposes [*Civ. Code § 1355.5(b)*]:
(a) Completion of construction of development; and

(b) Erection, construction, or maintenance of structures or other facilities designed to facilitate completion of construction or marketing of separate interests.

(3) Developer has done all of the following:

(a) Completed construction of development;

(b) Terminated construction activities; and

(c) Terminated his or her marketing activities for sale, lease, or other disposition of separate interests within development.

NOTE:
A provision of the governing documents relating to a particular construction or marketing phase of the development may not be deleted under the authorization of *Civ. Code § 1355.5* until that construction or marketing phase has been completed [*Civ. Code § 1355.5(a)*].

b. Instruct board to mail, at least 30 days before taking action on proposed amendment, the following documents to all owners of separate interests in development [*Civ. Code § 1355.5(c)*]:

NOTE:
These documents must be sent by first-class mail [*Civ. Code § 1355.5(c)*].

(1) Copy of proposed amendment; and

(2) Notice of time, date, and place board will consider adoption of amendment [*see § 34.162*, P 5(c)].

c. Instruct board to consider adoption of amendment at meeting that is open to all owners of separate interests, and to give those owners opportunity to comment on and vote on proposed amendment [*Civ. Code § 1355.5(c)*; *see Civ. Code § 1355.5(d)*; *see also § 34.162*, P 5(d)].

NOTE:
All deliberations of the board on the proposed amendment must be conducted in such an open meeting [*Civ. Code § 1355.5(c)*].

d. Have board adopt amendment only if it is approved by owners casting majority of votes at meeting or election of association at which quorum is present [*Civ. Code § 1355.5(d)*].

NOTE:

For these purposes, "quorum" means more than 50 percent of the owners who own no more than two separate interests in the development [*Civ. Code § 1355.5(d)*]. The meeting must be conducted in accordance with the provisions of the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] governing meetings, voting, and proxies [*Civ. Code § 1355.5(d)*; ***see*** *Corp. Code §§ 7510-7527, 7613*; ***see also*** *§§ 34.202[1]* and *34.205[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

16-34 California Legal Forms--Transaction Guide § 34.163

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.163 Renewing Public Report

1. Before end of five-year period following issuance of public report, submit following to Department of Real Estate:

a. Application for renewal [*10 Cal. Code Reg. § 2795.3*; *see* Ch. 30, *Subdivision Regulation*]; and

b. Appropriate filing fee [*see Bus. & Prof. Code § 11011(b)(8)*; *10 Cal. Code Reg. § 2790.1.5*].

2. Along with official application, submit any additional information required by Commissioner [*10 Cal. Code Reg. § 2795.3*].

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16-34 California Legal Forms--Transaction Guide § 34.164

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.164 Providing Project Information to Members and Prospective Purchasers

1. Have board of association prepare and distribute financial and insurance statements to all members as follows:

NOTE:

The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] requires the owners' association of a common interest development to prepare and distribute certain budgets and financial statements to its members [***see*** *Civ. Code § 1365*]. However, those statutory requirements only apply if the governing documents do not impose more stringent standards [*Civ. Code § 1365*]. The following discussion sets forth the applicable statutory and regulatory requirements.

a. Notwithstanding any contrary provision in governing documents, not less than 30 nor more than 90 days before beginning of association's fiscal year, pro forma operating budget for immediately ensuing fiscal year containing [*Civ. Code § 1365(a)*]:

NOTE:

If any member requests that a copy of this budget be mailed to him or her, the association must mail a copy (by first-class United States mail) to the member, at the association's expense, within five days [*Civ. Code § 1365(d)*].

The board may elect to distribute the following to the members in lieu of the above budget: (1) a summary of the budget; and (2) a written notice that the budget is available at the business office of the association or at another suitable location within the

boundaries of the project, and that copies will be provided on request and at the association's expense. The notice accompanying the summary must be in at least 10-point bold type and appear on the front page of the summary [*Civ. Code § 1365(d)*]. Although no deadline is specified for the distribution of this summary [***see** Civ. Code § 1365(d)*], counsel should instruct the board to provide the summary within the time period applicable to the distribution of the pro forma operating budget [***see** § 34.164*, P 1(a)].

In addition to the pro forma operating budget, the board must also distribute an "Assessment and Reserve Funding Disclosure Summary," the form for which is prescribed by statute [***see** Civ. Code § 1365.2*.5; ***see also** § 34.247*].

If an association or its membership contributes more than 10 percent of the annual budget of a community service organization [***see** Civ. Code § 1368(c)(3)* ("community service organization" defined)], the organization must prepare and distribute to the association a report that sets forth the organization's assets, liabilities, income and expenses as required by *Corp. Code § 5012*, and that describes in detail administrative costs and identifies the payees of those costs. If the community service organization is responsible for maintaining major components for which the association would otherwise be responsible, the organization must supply the association with the information regarding those components that the association would use to complete its disclosures and reserve reports to members [*Civ. Code § 1365.3*].

(1) Estimated revenue and expenses on accrual basis.

(2) Summary of association's reserves that is based on most recent review or study conducted in accordance with *Civ. Code § 1365.5*, based only on assets held in cash or cash equivalents [*see § 34.165*, PP 1 and 3] and that includes all of following:

NOTE:
This summary must be printed in bold type [*Civ. Code § 1365(a)(2)*]. The summary will not be admissible in evidence to show improper financial management of the association, provided that other relevant and competent evidence of the financial condition of the association is not made inadmissible by this statutory provision [*Civ. Code § 1365(a)*].

(a) Current estimated replacement cost, estimated remaining life, and estimated useful life of each major component.

NOTE:
Civ. Code § 1365(a)(2)(A), which requires the inclusion of the above information in the summary of the association's reserves, does not define "major component." However, *Civ. Code § 1365(a)(4)* [***see** § 34.164*, P 1(a)(4)] refers to "those major components that the association is obligated to maintain." Similarly, *Civ. Code § 1365.5(f)(1)* refers to "major components which the association is obligated to repair, restore, replace, or maintain" and "major components which the association is obligated to maintain" [***see** § 34.165*]. Clearly, § 1365(a)(2) is referring to the same types of components.

(b) As of end of fiscal year for which study is prepared, current estimate of amount of cash reserves necessary to repair, replace, restore, or maintain major components.

(c) As of end of fiscal year for which study is prepared, current amount of accumulated cash reserves actually set aside to repair, replace, restore, or maintain major components.

(d) Amount of any funds, as of end of fiscal year, received from either compensatory damage award or settlement to association from any person or entity for injuries to real or personal property, arising out of any construction or design defects, and expenditure or disposition of funds, including amounts expended for direct and indirect costs of repair of construction or design defects.

NOTE:

These items should be reported as separate line items under cash reserves. In lieu of including this information in the pro forma budget, an association that is obligated to issue a review of its financial statement as described in § 34.164, P 1(b), may include in the review a statement containing the same information related to funds received from either a compensatory damage award or settlement for real or personal property injuries arising out of construction or design defects [*Civ. Code § 1365(a)(2)(A)(iii)*].

(e) Percentage that amount described in § 34.164, P 1(a)(2)(c), equals of amount determined for purposes of § 34.164, P 1(a)(2)(b).

NOTE:

In other words, this amount is obtained by dividing the current amount of accumulated cash reserves actually set aside by the current estimate of the amount of necessary cash reserves.

(f) Current deficiency in reserve funding expressed on per unit basis.

NOTE:

This figure must be calculated by subtracting amount determined in § 34.164, P 1(a)(2)(c) from the amount determined in § 34.164, P 1(a)(2)(b), and then dividing the result by the number of separate interests within the association, except that if assessments vary by size or type of ownership interest, then the association must calculate the current deficiency in a manner that reflects the variation [***see*** *Civ. Code § 1365(a)(2)(D)*]. In other words, this amount is obtained by dividing the current amount of accumulated cash reserves actually set aside by the current estimate of the amount of necessary cash reserves, and dividing the difference by the number of ownership interests within the association.

(3) A statement as to all of the following:

(a) Whether board has determined to defer or not undertake repairs or replacement of any major component with remaining life of 30 years or less, including justification for deferral or decision not to undertake repairs or replacement;

(b) Whether board, consistent with reserve funding plan adopted pursuant to Civ. Code § 1365.5(e), has determined or anticipates that levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves for repairs, replacements, or restoration;

NOTE:

If so, the statement must also set out the estimated amount, commencement date, and duration of the assessment [Civ. Code § 1365(a)(3)(A)].

(c) Mechanism or mechanisms by which board will fund reserves to repair, or replace major components, including assessments, borrowing, use of other assets, deferral of selected replacement or repairs, or alternative mechanisms; and

(d) Whether association has any outstanding loans with original term of more than one year, including payee, interest rate, amount outstanding, annual payment, and when loan is scheduled to be retired.

(4) General statement addressing procedures used for calculating and establishing those reserves to defray future repair, replacement, or additions to those major components that association is obligated to maintain.

NOTE:

The report must include, but need not be limited to, reserve calculations made using the formula described in *Civ. Code § 1365.2*.5(b)(4), and may not assume a rate of return on cash reserves in excess of two percentabove the discount rate published by the Federal Reserve Bank of San Francisco at the time the calculation was made [*Civ. Code § 1365(a)(4)*].

b. Commencing January 1, 2009, summary of reserve funding plan adopted by association's board of directors, as specified in *Civ. Code § 1365.5(e)(4)*.

NOTE:

The summary must include notice to members that the full reserve study plan is available on request, and the association must provide the full reserve plan to any member on request [*Civ. Code § 1365(b)*].

c. Within 120 days after close of any fiscal year in which association's gross income exceeds $75,000, copy of review of annual financial statement prepared in accordance with generally accepted accounting principles by licensee of California Board of Accountancy [*Civ. Code § 1365(c)*].

NOTE:

In lieu of complying with the reserve summary requirement for the pro forma budget described in § 34.164, P 1(a)(2)(d), which is related to funds received from either a compensatory damage award or settlement for real or personal property injuries arising out of construction or design defects, the same information may be included in the financial statement review [*Civ. Code § 1365(a)(2)(A)(iii)*].

d. Not less than 30 nor more than 60 days before beginning of each fiscal year, statement describing association's policies and practices in enforcing lien rights or other legal remedies for delinquent assessments [*Civ. Code § 1365(e)*].

NOTE:

The declaration for a common-interest development will ordinarily contain provisions governing assessments, including the methods of enforcement of assessments [***see*** *Civ. Code §§ 1367, 1367.1, 1367.4*; *10 Cal. Code Reg. §§ 2792.16, 2792.26*; ***see also*** *§ 34.202*, art. IV]. Thus, the statement described above should simply be a restatement of the relevant provisions of the declaration.

e. Summary of association's property, general liability, fidelity, earthquake, and flood insurance policies, including following information [*Civ. Code § 1365(f)(1)-(4)*]:

NOTE:

The summary must be distributed not less than 30 nor more than 60 days preceding the beginning of the association's fiscal year [*Civ. Code § 1365(f)(1)*]. To the extent that any of this information is specified in the insurance policy declaration page, the association may meet its obligation to provide a summary by

distributing copies of that page to the members [*Civ. Code § 1365(f)(3)*].

(1) Name of insurer;

(2) Type of insurance;

(3) Policy limits;

(4) Amount of any deductibles; and

(5) Following statement in 10-point boldface type:

This summary of the association's policies of insurance provides only certain information, as required by subdivision (f) of *Section 1365 of the Civil Code,* and should not be considered a substitute for the complete policy terms and conditions contained in the actual policies of insurance. Any association member may, upon request and provision of reasonable notice, review the association's insurance policies and, upon request and payment of reasonable duplication charges, obtain copies of those policies. Although the association maintains the policies of insurance specified in this summary, the association's policies of insurance may not cover your property, including personal property or real property improvements to or around your dwelling, or personal injuries or other losses that occur within or around your dwelling. Even if a loss is covered, you may nevertheless be responsible for paying all or a portion of any deductible that applies. Association members should consult with their individual insurance broker or agent for appropriate additional coverage.

NOTE:

The association must also, as soon as reasonably practicable, notify the members by first class mail if (1) there is a significant change, such as a reduction in coverage or limits, or an increase in deductible, for any of the policies; or (2) any of the policies have lapsed or been canceled, and not immediately renewed, restored, or replaced. If the association receives a notice of nonrenewal on any of these policies, it must immediately notify the members if replacement coverage will not be in effect by the date the existing coverage will lapse [*Civ. Code § 1365(f)(2)*].

2. Have association, within 10 days of mailing or delivery of written request, provide owner of condominium with [*Civ. Code § 1368(b)*; *see Civ. Code § 1368(a)*; *see also § 34.164*, P 4]:

NOTE:

The information may be maintained in electronic form and, if such is the case, requesting parties have the option of receiving it by electronic transmission or machine readable storage media. The association may charge a reasonable fee for providing the requested items based on the actual cost to procure, prepare, and reproduce them [*Civ. Code § 1368(b)*].

a. Copy of governing documents of project.

NOTE:

If the association is not incorporated, the documents provided must include a written statement from an authorized representative of the association that the association is not

incorporated [***see*** *Civ. Code § 1368(a)(1)*].

b. If governing documents contain restriction limiting occupancy, residency, or use of unit on basis of age, and restriction violates statutory senior citizen housing requirements [*see Civ. Code § 51.3*], statement that:

(1) Restriction is enforceable only to extent permitted by *Civ. Code § 51.3* [*see § 34.40[2]*]; and

(2) Specifies applicable provisions of that section.

c. Copy of most recent documents distributed in accordance with *Civ. Code § 1365* [*see § 34.164*, P 1].

d. Written statement obtained from authorized representative of association specifying:

(1) Amount of following:
(a) Association's current regular and special assessments and fees;

(b) Any assessments levied on owner's interest in project that are unpaid on date of statement; and

(c) Any monetary fines or penalties levied on owner's interest and unpaid as of statement date.

(2) Late charges, interest, and costs of collection that, as of date of statement, are or may be made a lien on owner's interest under *Civ. Code §§ 1367*, *1367.1*, *1367.4*.

e. Any change in association's current regular and special assessments and fees that have been approved by board of directors, but are not yet due and payable.

f. Copy or summary of any notice previously sent to owner that sets forth any alleged violation of governing documents that remains unresolved at time of request [*see Civ. Code § 1363(h)*].

NOTE:
The notice will not be deemed a waiver of the association's right to enforce the governing documents against the owner or prospective purchaser with respect to any violation. The obligation to supply a copy of the notice does not require the association to inspect an owner's separate interest [*Civ. Code § 1368(a)(5)*].

g. Regarding any dispute between association and developer involving design or construction defects, unless association and builder subsequently entered into settlement agreement or otherwise resolved matter and association complies with *Civ. Code § 1375.1*, copy of preliminary list of defects provided to each member of association pursuant to *Civ. Code § 1375*.

NOTE:
Disclosure of the preliminary list of defects does not waive any privilege attached to the information [*Civ. Code §§ 1368(a)(6)*, *1375.1(c)*].

h. Regarding any dispute between association and developer involving design or construction defects, if dispute has been settled or otherwise resolved, copy of following information [*see Civ. Code § 1375.1(a)*]:

(1) General description of defects that association reasonably believes, as of date of disclosure, will be corrected or replaced;

(2) Good faith estimate, as of date of disclosure, of when association believes that defects identified in (1), *above*, will be corrected or replaced; and

NOTE:
The association may state that the estimate may be modified [*Civ. Code § 1375.1(a)(2)*]:

(3) Status of claims for defects in design or construction that were not identified in (1), *above*.

NOTE:
The status of the claims that were not identified in clause (1), ***above***, are required to be disclosed, whether or not they are expressed in a preliminary list of defects sent to each member of the association or otherwise claimed and disclosed to the members of the association.

Further, nothing precludes the association from amending the disclosures required in clauses (1) through (3), ***above***, and any amendments supersede any prior conflicting information disclosed to the members of the association and retain any privilege attached to the original disclosures.

3. Apprise client of association's obligation to:

a. Beginning July 1, 2006, make "association records" and "enhanced association records" available for inspection and copying by association member or member's designated representative [*Civ. Code § 1365.2(b)(1), (n)*].

NOTE:
In general, association members are entitled to the same rights to access association records as those afforded to members of other nonprofit mutual benefit corporations by *Corp. Code §§ 8330-8338* [*Civ. Code § 1363(f)*; ***see*** *10 Cal. Code Reg. § 2792.23*]. Beginning July 1, 2006 [***see*** *Civ. Code § 1365.2(n)*], however, the association must make available "association records" and "enhanced association records" for inspection and copying by a member, or his or her designated representative, in accordance with statutory timeframes [*Civ. Code § 1365.2(b)(1)*; ***see*** *Civ. Code § 1365.2(i), (j), (n)*]. As of that date, *Corp. Code §§ 8330* and *8333* do not apply to the extent those sections are inconsistent with *Civ. Code § 1365.2* [*Civ. Code § 1365.2*(***l***)].

(1) "Association records" includes [*Civ. Code § 1365.2(a)(1)*]:
(a) Any financial document required to be provided by *Civ. Code § 1365*.

(b) Any financial document or statement required to be provided by *Civ. Code § 1368*.

(c) Interim financial statements, interim or compiled, containing balance sheet, income and expense statement, budget comparison, or general ledger.

NOTE:

These financial statements must be prepared in accordance with an accrual or modified accrual basis of accounting [*Civ. Code § 1365.2(a)(1)(C)*].

(d) Executed contracts not otherwise privileged under law.

(e) Written board approval of vendor or contractor proposals or invoices.

(f) State and federal tax returns.

(g) Reserve account balances and records of payments made from reserve accounts.

(h) Agendas and minutes of meetings of members, board of directors, and board committees, excluding agendas, minutes, and other information from executive sessions of board [*see Civ. Code § 1363.05(b)*].

(i) Membership lists, including name, property address, and mailing address, provided member requesting list states purpose for requesting list, which must be reasonably related to requester's interest as member.

NOTE:

If the association reasonably believes that the information in the list will be used for another purpose, it may deny the member access to the list. If the request is denied, in any subsequent action brought by the member to enforce the member's right to inspect and copy the association's documents, the association has the burden of proving that the member would have allowed use of the information for purposes unrelated to his or her interest as a member [***see*** *Civ. Code § 1365.2(a)(1)(I)(ii)*].

A member may opt out of appearing on the membership list by notifying the association in writing that he or she prefers to be contacted via an alternative process described in *Corp. Code § 8330(c)*. The opt-out will remain in effect until changed by the member [*Civ. Code § 1365.2(a)(1)(I)(iii)*].

(j) Check registers.

(2) "Enhanced association records" are [*Civ. Code § 1365.2(a)(2)*]:

(a) Invoices, receipts, and canceled checks for association payments.

(b) Approved purchase orders.

(c) Statements for credit cards issued in association's name.

(d) Statements for services rendered.

(e) Reimbursement requests submitted to association.

NOTE:

The person submitting the reimbursement request is responsible for removing all personal identification information from the request [*Civ. Code § 1365.2(a)(2)*].

The association may bill the requesting member for the direct and actual cost of copying

requested documents, and must inform the member of the amount of the copying costs before copying the documents [*Civ. Code § 1365.2(b)(1)*].

(3) Details of where inspection and copying will take place, and assessment of costs, are as follows [*see Civ. Code § 1365.2(c)*]:

(a) Association must make specified association records available for inspection and copying in association's business office within common interest development.

(b) Association must make specified association records available for inspection and copying at place that requesting member and association agree upon.

(c) If association and requesting member cannot agree on place for inspection and copying, or if requesting member submits written request directly to association for copies of specifically identified records, association may satisfy requirement to make association records available for inspection and copying by mailing copies of specifically identified records to member by first-class mail within timeframes set forth in *Civ. Code § 1365.2(j)*.

(d) Association may bill requesting member for direct and actual cost of copying and mailing requested documents. Association must inform member of amount of copying and mailing costs, and member must agree to pay those costs, before copying and sending requested documents.

(e) In addition to direct and actual costs of copying and mailing, association may bill requesting member amount not in excess of $10 per hour, and not to exceed $200 total per written request, for time actually and reasonably involved in redacting enhanced association records. Association must inform member of estimated costs, and member must agree to pay those costs, before retrieving requested documents.

NOTE:

Requesting parties have the option of receiving specifically identified records by electronic transmission or machine-readable storage media as long as those records can be transmitted in a redacted format that does not allow the records to be altered. The cost of duplication is limited to the direct cost of producing the copy of a record in that electronic format. The association may deliver specifically identified records by electronic transmission or machine-readable storage media as long as those records can be transmitted in a redacted format that prevents the records from being altered [*Civ. Code § 1365.2(h)*].

The association may withhold or redact information from association records if (1) the information is reasonably likely to lead to identity theft or fraud; (2) the release would violate a privilege afforded by law, such as the attorney-client privilege, the privilege relating to ongoing or potential litigation, or the privilege afforded confidential settlement agreements; or (3) releasing the information is reasonably likely to compromise an individual member's privacy [*Civ. Code § 1365.2(d)(1)(A)-(D)*].

In addition, the association may withhold or redact information from association records if that information contains (1) records of a-la-carte goods or services provided to individual members of the association for which the association received monetary consideration other than assessments; (2) records of disciplinary actions, collection activities, or payment plans of members other than the member requesting the records; (3)

any person's personal identification information, including without limitation, social security number, tax identification number, driver's license number, credit card account numbers, bank account number, and bank routing number; (4) agendas, minutes, and other information from executive sessions of the board of directors as described in *Civ. Code § 1363.05*, except for executed contracts not otherwise privileged; (5) personal records other than the payroll records concerning compensation paid to any employees, vendors, or contractors that are not subject to the attorney-client privilege; or (6) interior architectural plans, including security features, for individual homes [*Civ. Code § 1365.2(d)(1)(E)*].

Moreover, if requested by the requesting member, an association that denies or redacts records must provide a written explanation specifying the legal basis for withholding or redacting the requested records [*Civ. Code § 1365.2(d)(4)*].

(4) Make requested records available in accordance with following timeframes [*Civ. Code § 1365.2(j)*]:

NOTE:

Association records must be made available for the current fiscal year and for each of the previous two fiscal years [*Civ. Code § 1365.2(i)(1)*]. Minutes of member and board meetings must be permanently made available [*Civ. Code § 1365.2(i)(2)*]. If a committee has decision-making authority, the minutes of its meetings must be made available beginning January 1, 2007 [*Civ. Code § 1365.2(i)(2)*]. Thereafter, they must be made permanently available [*Civ. Code § 1365.2(i)(2)*]. The association is not liable for failing to retain records that were created before January 1, 2006 [*Civ. Code § 1365.2(k)*].

(a) Association records prepared during current fiscal year, within 10 business days following receipt of request.

(b) Association records prepared during previous two fiscal years, within 30 calendar days following receipt of request.

(c) Any record or statement available pursuant to *Civ. Code § 1365* or *1368*, within timeframe specified in those statutes.

(d) Minutes of member and board meetings, within 30 days of meeting [*see Civ. Code § 1363.05(d)*].

(e) Minutes of meetings of committees with decision-making authority for meetings commencing on or after January 1, 2007, within 15 calendar days following approval.

(f) Membership list, within five business days, unless association provides reasonable alternative [*see Corp. Code § 8330*].

NOTE:

The association has the right to injunctive relief and actual damages for misuse of requested information, including the right to attorney's fees if successful [*Civ. Code § 1365.2(e)*].

A member may bring an action to enforce his or her right to inspect and copy association records. If the court finds that access was unreasonably withheld, the member is entitled to reasonable costs and expenses, including attorney's fees, and the court may assess a

civil penalty of up to $500 for the denial of each separate written request [*Civ. Code § 1365.2(f)*].

b. Permit members to inspect current version of articles and bylaws, during office hours, at principal office of association [*Corp. Code § 7160*].

c. Permit any director to inspect and copy the following at any reasonable time [*10 Cal. Code Reg. § 2792.23(f)*]:

(1) All books, records, and documents of association; and

(2) All physical properties owned or controlled by association.

NOTE:
The right to inspection by a member of the board includes the right to make extracts and copies of documents [*10 Cal. Code Reg. § 2792.23(f)*].

d. Take following steps with regard to minutes of board meetings [*Civ. Code § 1363.05(d)*; *10* Cal. Code Reg. § 2792.23(d)(1)]:

(1) Make the following available within 30 days of board meeting other than executive session:

(a) Minutes of board meeting;

(b) Minutes of board meeting that are proposed for adoption and marked to indicate draft status; or

(c) Summary of meeting minutes.

(2) Distribute minutes to any member on request and on reimbursement by requesting member of association's costs in making distribution.

(3) Notify members in writing at time that pro forma budget is distributed [*10 Cal. Code Reg. § 2792.23(d)(2)*; *see Civ. Code § 1365*; *see also § 34.164*, P 1(a)] or at time of any general mailing to entire membership of association, of:

(a) Members' right to obtain copies of minutes; and

(b) How and where minutes may be obtained and cost of obtaining copies.

4. If client owns and wishes to sell or lease single condominium in project that is not subject to public report requirement of Subdivided Lands Act [*see § 34.121*, P 2], have client, as soon as practicable before transfer of title to condominium or execution of real property sales contract, provide prospective purchaser with documents described in § 34.164, P 2 [*Civ. Code § 1368(a)*; *see Civ. Code § 2985* ("real property sales contract" defined)].

5. If client owns and wishes to sell or lease single condominium in project that is subject to public report requirement of Subdivided Lands Act [*see Bus. & Prof. Code § 11018.6*; *see also § 34B.121*, P 2]:

NOTE:
For another distribution requirement that applies to some condominium projects that are subject to the

Subdivided Lands Act [***see*** *Civ. Code §§ 1133, 1368(e)*], see *§ 34.164*, P 6.

a. Have client make copies of following documents:

(1) Declaration.

(2) Articles of incorporation or association for owners' association.

(3) Bylaws for owners' association.

(4) Any other instrument that establishes or defines common, mutual, and reciprocal rights and responsibilities of owners or lessees of interests in project.

(5) To extent available and applicable, current pro forma operating budget prepared in accordance with *Civ. Code § 1365(a)* [*see § 34.164*, P 1(a)].

(6) Statement by governing body of association setting forth outstanding delinquent assessments and related charges levied against interest in question.

b. Instruct client to:

(1) Make copies of above documents available for examination by prospective purchaser or lessee before execution of offer to purchase or lease; and

(2) Give copy of each document to each purchaser or lessee as soon as practicable before transfer of interest being conveyed.

6. If client owns and wishes to sell, or to lease for more than five years, a single condominium, advise client to have each prospective purchaser or lessee sign statutory notice of blanket encumbrance if [*Civ. Code §§ 1133, 1368(f)*]:

NOTE:

For the statutory notice and a detailed discussion of this requirement, see Ch. 30, ***Subdivision Regulation***.

a. Condominium is in condominium project that is subject to:

(1) Subdivided Lands Act [*see § 34.121*, P 2]; and

(2) Blanket encumbrance that does not contain unconditional release clause [*see Bus. & Prof. Code §§ 11013* ("blanket encumbrance" defined), 11013.1 (description of unconditional release clauses)].

b. Lease (if applicable) will be for term exceeding five years.

NOTE:

The failure of a buyer or lessee to sign the notice does not invalidate any grant, conveyance lease, or encumbrance [*Civ. Code § 1133(c)*]. However, any person or entity who willfully fails to deliver the notice to such buyer or lessee is liable to the buyer or lessee for actual damages, and in addition, is guilty

of a public offense punishable by a fine in an amount not to exceed $500. Moreover, in any action to enforce such liability or fine, the prevailing party will be awarded reasonable attorney's fees [*Civ. Code § 1133(d)*].

7. If client owns condominium in project that was converted from existing structure to condominium project, have owner provide prospective purchaser with written statement that [*Civ. Code §§ 1134, 1368(f)*; *see § 34.227*]:

NOTE:

For these purposes, "prospective purchaser" includes any person who makes an offer to purchase the condominium [*Civ. Code § 1134(c)(3)*] and any person who makes a written request for the statement [*Civ. Code § 1134(c)(2)*].

The owner should deliver this statement as soon as practicable before the transfer [***see*** *Civ. Code §§ 1134(a), 1368(f)*]. Delivery will be deemed effected when it is delivered personally or by mail to the prospective buyer, the buyer's agent, or, unless the purchase agreement for the unit provides otherwise, to the buyer's spouse [*Civ. Code § 1134(c)(2)*]. If the statement is delivered after the execution of the purchase agreement, the buyer will have a limited right to rescind the agreement [***see*** *§ 34.164*, P 7(b)].

a. Contains either of following:

(1) List of all substantial defects or malfunctions in major systems in unit and common areas of project; or

(2) Disclaimer of knowledge of any such substantial defects or malfunctions.

NOTE:

This disclaimer cannot be delivered unless the owner has inspected the unit and common areas and has not discovered a substantial defect or malfunction that a reasonable inspection would have disclosed [*Civ. Code § 1134(a)*].

b. If delivered after execution of purchase agreement, notifies purchaser of right to terminate agreement, by delivery of written termination notice to owner, within:

(1) Three days after delivery of statement to person in person; or

(2) Five days after delivery of statement by deposit in mail.

8. Have developer or developer's agent or representative furnish each prospective seller or lessee with "Notice of Special Tax" if project is subject to special tax assessed under Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 53341.5(a)*; *see Gov. Code § 53311 et seq.* (Act); *see also* Ch. 30, *Subdivision Regulation*].

NOTE:

This requirement applies to a "subdivision," that is, improved or unimproved land that is divided or proposed to be divided for the purpose of immediate or future sale, lease, or financing, into two or more lots, parcels, or units. This statutory definition specifically includes condominium projects, community apartment projects, stock cooperatives, and limited equity housing cooperatives [***see*** *Gov. Code § 53341.5(b)*].

The developer must comply with this disclosure requirement when he or she sells, or leases for a term

exceeding five years, a lot, parcel, or unit in the project [*Gov. Code § 53341.5(a)*].

9. If association adopts or has adopted policy imposing monetary penalties on members for violations of governing documents or rules of association, have board adopt and distribute to each member, by personal delivery or first-class mail, schedule of these monetary penalties [*Civ. Code § 1363(g)*].

NOTE:

Monetary penalties subject to this requirement include (1) fees, and (2) penalties relating to the activities of guests or invitees of the members. The schedule must be in accordance with the provisions in the governing documents that authorize member discipline [*Civ. Code § 1363(g)*; ***see*** *§ 34.202*].

The board need not distribute any additional schedules unless the adopted and distributed schedule is changed [*Civ. Code § 1363(g)*].

10. Each year, have board or developer provide members with summary of statutory provisions governing formal alternative dispute resolution (ADR) procedure prescribed by *Civ. Code § 1369.510 et seq.*, either [*Civ. Code § 1369.590*]:

NOTE:

The formal ADR procedure requires the parties to disputes involving enforcement of the governing documents, the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], or the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] to endeavor to submit their dispute to a form of ADR as a prerequisite to seeking judicial relief [*Civ. Code § 1369.520(a)*]. Such formal ADR requirement only applies to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits stated in *Code Civ. Proc. §§ 116.220* and *116.221*. Moreover, such formal ADR requirement does not apply to small claims actions [*Civ. Code § 1369.520(b)*]. The required summary must specifically reference *Civ. Code § 1369.510 et seq.* In addition, it must include the following language: "Failure of a member of the association to comply with the alternative dispute resolution requirements of *Section 1369.520 of the Civil Code* may result in the loss of your right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law" [*Civ. Code § 1369.590(a)*].

a. At time pro forma budget is distributed [*see Civ. Code § 1365*; *see also § 34.164*, P 1(a)]; or

b. In manner specified in *Corp. Code § 5016*.

NOTE:

Corp. Code § 5016 requires such a notice to be addressed and mailed or delivered to the members. In the case of members who are residents of the same household and who have the same address on the books of the nonprofit corporation [***see*** *§ 34.38[1]* (associations organized under Nonprofit Mutual Benefit Corporation Law)], the notice must be addressed and mailed or delivered to one of these members, at the address appearing on the books of the corporation [*Corp. Code § 5016*].

11. Beginning no later than 90 days after escrow closes on first interest in development, have client deliver copies of following documents to board at association's office or at such other place as board may prescribe [*10 Cal. Code Reg. § 2792.23(a)*]:

NOTE:

The documents must be delivered as soon as the developer can obtain them [*10 Cal. Code Reg. § 2792.23(a)*]. The obligation to deliver these documents applies to any documents the developer obtains regardless of when they are obtained; however, the obligation terminates when either the last subdivision interest covered by a subdivision public report is conveyed or three years after the expiration of the most recent public report on the subdivision [*10 Cal. Code Reg. § 2792.23(a)*].

Similarly, beginning no later than 90 days after the annexation of additional phases to the development, copies of the following documents applicable to those phases also must be delivered by the developer to the board at the association's office or at such other place as the board may prescribe as soon as they are readily obtainable [*10 Cal. Code Reg. § 2792.23(b)*]. In addition, the obligation to deliver these documents applies to any documents the developer obtains regardless of when they are obtained; however, the obligation terminates when either the last subdivision interest covered by a subdivision public report is conveyed or three years after the expiration of the most recent public report on the subdivision [*10 Cal. Code Reg. § 2792.23(b)*].

a. Recorded subdivision map or maps for project.

b. Recorded condominium plan, if any, and all amendments to plan.

c. Deeds and easements executed by subdivider conveying common area or other interest to association, to extent applicable.

d. Recorded covenants, conditions, and restrictions for subdivision, including amendments and annexations.

e. Association's filed articles of incorporation, if any, and all amendments to articles of incorporation.

f. Association's bylaws and all amendments to bylaws.

g. All architectural guidelines and all other rules that association has promulgated regulating use of owner's interest in development or use of common area.

h. Plans approved by local agency or county where development is located for construction or improvement of facilities that association is obligated to maintain or repair. They need not be as-built plans; they may bear appropriate restrictions on commercial exploitation or use; and they may contain appropriate disclaimers regarding accuracy.

i. All notice of completion certificates issued for common area improvements, other than residential structures.

j. Any bond or other security device in which association is beneficiary.

k. Any written warranty being transferred to association for common area equipment, fixtures, or improvements.

l. Any insurance policy obtained for association's benefit or for benefit of its governing board or common area.

m. Any lease or contract to which association is party.

n. Association membership register, including mailing addresses and telephone numbers, books of account, and minutes of meetings of members, board, and board committees.

o. Any instrument referred to in *Bus. & Prof. Code § 11018.6(d)* but not described above that establishes or defines common, mutual, or reciprocal rights or responsibilities of association members [*see § 34.143*, P 11(f)]

12. Distribute written Notice of Owners' Rights and Responsibilities Regarding Assessments and Foreclosure to each association member during 60-day period immediately preceding beginning of association's fiscal year [*see Civ. Code § 1365.1*]

NOTE:

The text of the form is prescribed by statute [***see*** *Civ. Code § 1365.1(b)*; ***see also*** *§ 34.246*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

16-34 California Legal Forms--Transaction Guide § 34.165

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§ 34.165 Handling Association Accounts

1. Have board of directors do the following no less frequently than quarterly [*Civ. Code § 1365.5(a)*]:

NOTE:
The following requirements apply unless the governing documents impose more stringent standards [*Civ. Code § 1365.5(a)*].

a. Cause current reconciliation of operating accounts of association to be made, and review reconciliation.

b. Cause current reconciliation of reserve accounts of association to be made, and review reconciliation.

NOTE:
For these purposes, "reserve accounts" means both (1) moneys that the board of directors of the association has identified for use to defray the future repair or replacement of, or additions to, the major components the association is obligated to maintain; and (2) the funds received and not yet expended or dispensed from either a compensatory damage award or settlement to an association from any person or entity for injuries to real or personal property arising from any construction or design defects. The funds described in clause (1) of the preceding sentence must be separately itemized from those described in clause (2) of the preceding sentence [*Civ. Code § 1365.5(f)*].

c. Review actual reserve revenues and expenses for current year compared with budget for current year.

d. Review most current account statements prepared by financial institution where association has its operating and reserve accounts.

NOTE:
Civ. Code § 1365.5(a)(4) does not specify that the most current account statements, prepared by the financial institution where the association has its operating and reserve accounts, must be reviewed at least quarterly. Nevertheless, to comply with *Civ. Code § 1365.5(a)(4)*, the board should review such statements at least quarterly.

e. Review income and expense statement for operating and reserve accounts of association.

2. If money is to be withdrawn from association's reserve accounts [*see Civ. Code § 1365.5(f)* (definition of reserve accounts); *see also § 34.165*, P 1(b), NOTE], take following steps:

a. Confirm that withdrawn funds will be used as follows [*Civ. Code § 1365.5(c)*]:

(1) For repair, restoration, replacement, or maintenance of, or litigation involving repair, restoration, replacement, or maintenance of, major components that association is obligated to repair, replace, or maintain and for which reserve fund was established; or

(2) Temporarily transferred to association's general operating fund to meet short-term cash-flow requirements or other expenses.

NOTE:
The board must provide notice of its intent to consider the transfer in a notice of meeting. The notice must include the reasons the transfer is needed, some of the options for repayment, and whether a special assessment may be considered. If the board authorizes the transfer, it must make a written finding, which must be recorded in the minutes, explaining the reasons for the transfer and describing when and how the money will be repaid to the reserve fund [*Civ. Code § 1365.5(c)(2)*].

b. In case of temporary transfer to general operating fund, confirm that either of following actions is taken [*Civ. Code § 1365.5(c)*]:

(1) Transferred funds are restored to reserve fund within one year of date of initial transfer; or

(2) Board, after giving the same notice required for considering the transfer and making a finding supported by documentation that a temporary delay would be in best interests of project, temporarily delays restoration for period board reasonably determines to be necessary.

NOTE:
The board must exercise prudent fiscal management in maintaining the integrity of the reserve account. If necessary, the board must levy a special assessment to recover the full amount of the expended funds within the statutory time limits described ***above.*** Such a special assessment is subject to the five percent limitation specified in *Civ. Code § 1366(b)* [***see*** *§ 34.39[6]*]. The board has discretion to extend the due date for payment of any special assessment; but any extension will not prevent the board from pursuing its legal remedies to enforce and collect unpaid special assessments [*Civ. Code §*

1365.5(c)(2)].

c. For each withdrawal, obtain signatures of [*Civ. Code § 1365.5(b)*]:

(1) Two directors; or

(2) One director and one officer who is not a director.

d. If withdrawal is result of decision to temporarily transfer reserve funds to fund litigation, ensure that association notifies members of that decision in next available mailing to all members [*Civ. Code § 1365.5(d)*; *see Corp. Code § 5016*].

NOTE:

The notice must inform the members of the availability of an accounting of the litigation expenses; the accounting must be updated on at least a quarterly basis and made available for inspection by members in the association's office [*Civ. Code § 1365.5(d)*].

3. If current replacement value of major components excluding amounts allocated to reserve account, is equal to or greater than one-half of association's gross budget for any fiscal year, take following steps [*Civ. Code § 1365.5(e)*]:

NOTE:

For these purposes, "reserve account requirements" means the estimated funds that the association's board of directors has determined are required to be available at a specified point in time to repair, replace, or restore those major components that the association is obligated to maintain [*Civ. Code § 1365.5(g)*].

a. At least once every three years, have board cause study of reserve account requirements of project to be conducted, and confirm that study includes [*Civ. Code § 1365.5(e)*]:

(1) Identification of major components that association is obligated to repair, replace, restore, or maintain and that, as of date of study, have remaining useful life of less than 30 years.

(2) Identification of probable remaining useful life of components described in § 34.165, P 3(a)(1), as of date of study.

(3) Estimate of cost of repair, replacement, restoration, or maintenance of components described in § 34.165, P 3(a)(1).

(4) Estimate of total annual contribution necessary to defray cost to repair, replace, restore, or maintain components described in § 34.165, P 3(a)(1), during and at end of their useful life, after subtracting total reserve funds as of date of study.

(5) Reserve funding plan that indicates how association plans to fund contribution identified in § 34.165, P 3(a)(4) to meet association's obligation for repair and replacement of major components with expected remaining life of 30 years or less, not including those components that board has determined will not be replaced or repaired. Plan must include schedule of date and amount of any change in regular or special

assessments that would be needed to sufficiently fund reserve funding plan.

NOTE:
The plan must be adopted by the board of directors at an open meeting before the membership of the association. In addition, if the board determines that an assessment increase is necessary to fund the reserve funding plan, any increase must be approved in a separate action of the board [*Civ. Code § 1365.5(e)(5)*]

(6) Reasonably competent and diligent visual inspection of accessible areas of major components that association is obligated to repair, replace, restore, or maintain, in order to identify unusual wear and tear that may require earlier than anticipated repair or replacement.

b. Instruct board to review study annually and to consider and implement necessary adjustments to board's analysis of reserve account requirements as a result of that review [*Civ. Code § 1365.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
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D. Related and Subsequent Procedures

16-34 California Legal Forms--Transaction Guide § 34.166

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.166 Miscellaneous Procedures

1. If declaration specifies termination date and contains no provision for extension of that date, notify client that:

a. Term of declaration may be extended by approval of owners having [*Civ. Code § 1357(b)*]:
(1) More than 50 percent of votes in association; or

(2) Any greater percentage specified in declaration for amendments to declaration.

NOTE:
Under these circumstances, the term of the declaration may be extended in accordance with *Civ. Code § 1356* [*Civ. Code § 1357(b)*; ***see*** *§ 34.162*, P 3(c)]. Any such amendment will become effective when it is recorded in accordance with *Civ. Code § 1355* [*Civ. Code § 1357(c)*; ***see*** *§ 34.162*, P 3(b)].

b. No single extension made in above manner may exceed declaration's initial term or 20 years, whichever is less [*Civ. Code § 1357(d)*].

NOTE:
There is no limit on the number of extensions that may occur pursuant to *Civ. Code § 1357* [*Civ. Code § 1357(d)*].

2. If client wishes to modify his or her condominium unit, and if boundaries of condominium unit are contained within a

building, notify client of his or her right to do following (subject to provisions of governing instruments and other applicable provisions of law) [*Civ. Code § 1360(a)*]:

a. Make any improvements or alterations within condominium unit that do not impair structural integrity or mechanical systems or lessen support of any portions of project.

b. Modify condominium, at owner's expense, to facilitate access for handicapped persons or to alter conditions that could be hazardous to those persons, provided that:

NOTE:
The modifications may include modifications of the route from the public way to the door of the unit for the above purposes if the condominium is on the ground floor or already accessible by an existing ramp or elevator [*Civ. Code § 1360(a)(2)*].

(1) Modifications are consistent with applicable building code requirements.

(2) Modifications are consistent with intent of applicable provisions of governing documents pertaining to safety or aesthetics.

(3) If modifications are external to unit, such modifications:
(a) Do not prevent reasonable passage by other residents; and

(b) Are removed by owner when condominium is no longer occupied by handicapped persons.

(4) Owner submits modification plans and specifications to association for review for compliance with above requirements.

NOTE:
The association may not deny approval of the proposed modifications without good cause [*Civ. Code § 1360(a)(2)(D)*].

3. If client wishes to amend or revoke condominium plan, prepare (or have engineer or surveyor prepare) instrument accomplishing this and [*Civ. Code § 1351(e)*]:

a. Have instrument executed and acknowledged by all persons whose signatures would be required to record condominium plan [*see § 34.142*, P 2(b)]; and

b. Record instrument in every county in which project is located [*Civ. Code § 1169*].

4. If association wishes to hire managing agent for project:

NOTE:
Any prospective managing agent who is neither a full-time association employee nor a regulated financial institution, but who will be compensated for exercising control over the association's assets, must provide the association's board of directors with a written statement of the agent's qualifications, as prescribed by statute. The statement should be provided as soon as practicable, but in no event more than 90 days, before entering into a management agreement [***see** Civ. Code § 1363.1*].

a. And term of agreement will be longer than one year, have board first obtain vote or written assent of majority of voting power of association residing in members other than developer [*10 Cal. Code Reg. § 2792.21(b)(1)*; *but see 10 Cal. Code Reg. § 2792.21(b)(1)(A)-(G)* (exceptions to this approval requirement); *see also § 34.207[1]*].

NOTE:

A contract for a term not to exceed three years that is terminable by the association after no longer than one year without cause, penalty, or other obligation on 90 days written notice of termination to the other party does not require that the board first obtain the vote or written assent of the association's members [*10 Cal. Code Reg. § 2792.21(b)(1)(G)*].

b. If association is incorporated under Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*; *see* Ch. 13, *Nonprofit Corporations*] and member of its board wishes to enter into management agreement or has material financial interest in proposed management entity, observe notice and approval requirements of Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7233(a)*; *see also Corp. Code § 7110 et seq.* (Nonprofit Mutual Benefit Corporation Law)].

NOTE:

Because it is unlikely that these requirements will apply, they are not discussed in this Transaction Guide. For further discussion, see *§ 34.207[1][c][ii]*.

c. Have association and manager enter into management agreement [*see § 34.207*].

5. If association hires managing agent, take following steps to ensure that statutory requirements governing handling of association funds are satisfied [*Civ. Code § 1363.2*]:

NOTE:

For these purposes, "managing agent" means a person or entity who, for compensation or in the expectation of compensation, exercises control over the assets of the association. However, the following are not managing agents: (1) a full-time employee of the association or a regulated financial institution operating within the normal course of business, or (2) an attorney acting within the scope of his or her license [*Civ. Code § 1363.2(f)*].

The prevailing party in an action to enforce *Civ. Code § 1363.2* will be entitled to recover reasonable legal fees and court costs [*Civ. Code § 1363.2(e)*].

a. Instruct managing agent to deposit funds into:

(1) Interest-bearing account in bank, savings association, or credit union in California, pursuant to written request made by board of directors of association [*see Civ. Code § 1363.2(b)*; *see also § 34.166*, P 5(b)];

(2) Escrow account with bank, savings association, or credit union;

(3) Account under control of association; or

(4) Trust fund account maintained by managing agent in a bank, savings association, or

credit union in California.

NOTE:
The managing agent must deposit association funds into such a trust fund account unless (1) they are placed into either of the accounts described in § 34.166, P 5(a)(2) or (3) [*Civ. Code § 1363.2(a)*], or (2) the association has requested that they be placed in an interest-bearing account [*Civ. Code § 1363.2(a)*; ***see*** *§ 34.166*, P 5(a)(1)]. All funds placed in such an account must be kept in a financial institution in California [***see*** *Fin. Code § 31041* ("financial institution" defined)] that is insured by the federal govenment, and must be maintained there until disbursed in accordance with written instructions from the association [*Civ. Code § 1363.2(a)*].

b. If board instructs managing agent, in writing, to deposit funds into interest-bearing account [*see § 34.166*, P 5(a)(1)], confirm that [*Civ. Code § 1363.2(b)*]:

(1) Account is in name of:

(a) Association; or

(b) Managing agent as trustee for association.

(2) All funds in account are covered by insurance provided by agency of federal government.

(3) Funds in account are kept separate, distinct, and apart from funds belonging to managing agent or to any other person or entity for whom managing agent holds funds in trust.

NOTE:
Notwithstanding the above, the managing agent may commingle the funds of various associations under certain limited circumstances [*Civ. Code § 1363.2(b)(3)*; ***see*** *Civ. Code § 1363.2(d)*; ***see also*** *§ 34.166*, P 5(d)].

(4) Managing agent discloses to board:

(a) Nature of account;

(b) How interest will be calculated and paid;

(c) Whether service charges will be paid to depository and by whom; and

(d) Any notice requirements or penalties for withdrawal of funds.

(5) Interest earned on funds does not inure directly or indirectly to benefit of managing agent or his or her employees.

c. Have managing agent maintain separate record of receipt and disposition of all association funds, including any interest earned on funds [*Civ. Code § 1363.2(c)*].

d. Notify managing agent that he or she must not commingle association funds with his or her own money or with money of others, unless all of following requirements are met [*Civ. Code § 1363.2(d)*]:

(1) Managing agent commingled funds of various associations on or before February 26, 1990, and has

entered into written agreement with board of each of those associations obligating managing agent to maintain fidelity and surety bonds ("written agreement").

NOTE:
The bonds must be in an amount that provides adequate protection to the affected associations as agreed upon by the managing agent and the board of directors of each association [*Civ. Code § 1363.2(d)(1)*].

(2) Managing agent discloses in written agreement whether he or she is deriving benefits from:

(a) Commingled account; or

(b) Bank, credit union, or savings institution where moneys will be on deposit.

(3) Written agreement includes name and address of bonding companies, amount of bonds, and expiration dates of bonds.

(4) If there are any changes in bond coverage or companies providing coverage, managing agent discloses that fact to board of each affected association as soon as practical, but in no event more than 10 days after change.

(5) Bonds assure protection of association and provide for at least 10 days' notice to association prior to cancellation.

(6) Completed payments on behalf of association are deposited within 24 hours or next business day and do not remain commingled for more than 10 calendar days.

NOTE:
For these purposes, "completed payment" means funds that have been received and that clearly identify the account to which the funds are to be credited [*Civ. Code § 1363.2(g)*].

6. If final map has been approved for project and subdivider or subsequent owner wishes to rent condominium in project to prospective tenant, instruct subdivider or subsequent owner to take following steps:

NOTE:
The following requirements apply to rentals on or after January 1, 1993, of dwellings in condominium projects, community apartment projects, and stock cooperative projects [*Gov. Code § 66459(a)*]. They do not apply to an owner of four dwelling units or fewer, to certain transfers pursuant to court order, and to certain transfers by a fiduciary [***see*** *Gov. Code § 66459(g)*]. For comprehensive coverage of these requirements, see *§ 34.244[1]*.

a. Deliver statutory notice regarding possible sale of condominium [*see § 34.244*] to prospective tenant prior to [*Gov. Code § 66459(a)*]:

(1) Offering condominium for sale to general public; and

(2) Execution of rental agreement.

b. Give tenant at least 90 days' written notice of intention to sell condominium to general public [*Gov.*

Code § 66459(c)].

c. Give tenant right of first refusal to purchase condominium on [*Gov. Code § 66459(d)*]:

NOTE:
The right to purchase must run for a period of 90 days from the date of the notice, unless the tenant gives written notice within the 90-day period of his or her intention not to exercise that right [*Gov. Code § 66459(d)*].

(1) Same terms and conditions on which condominium will be initially offered to general public; or

(2) Terms and conditions more favorable to tenant.

7. If client is party to dispute relating to enforcement of governing documents, Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], or Nonprofit Mutual Corporation Law [Corp. Code § 3110 et seq.], notify client of parties' obligations to take following steps to endeavor to resolve dispute before filing civil action:

a. Utilize intra-association dispute resolution procedure [*see Civ. Code § 1363.810 et seq.*].

NOTE:
The intra-association procedure supplements, and does not replace the formal alternative dispute resolution procedure prescribed by *Civ. Code § 1369.510 et seq.*, which is a prerequisite to filing a civil enforcement action [*Civ. Code §§ 1363.810(b), 1369.520(a)*; ***see*** *§ 34.166*, P 7(b)]. The intra-association procedure may be invoked by either party to the dispute. If it is invoked by the association a member may elect not to participate. However, if the procedure is invoked by a member, the association must participate. A member may not be charged a fee for participating [*Civ. Code § 1363.830*]. For further coverage, see *§ 34.34*. For sample provisions to be included in the Declaration setting forth the requirements for an intra-association dispute resolution procedure, see *§ 34.202*.

b. If neither party requests resort to intra-association dispute resolution procedure or if that procedure fails to resolve dispute, parties must engage in formal alternative dispute resolution (ADR) procedure prescribed by *Civ. Code § 1369.510 et seq.* before filing civil enforcement action [*Civ. Code § 1369.520(a)*].

NOTE:
ADR is a prerequisite to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the small claims court jurisdictional limit. It is not a prerequisite for a small claims action, and does not apply to an assessment dispute [*Civ. Code § 1369.520(b)-(d)*; *see* Code Civ. Proc. §§ 116.220, 116.221 (jurisdiction of small claims court)]. For further coverage, see *§ 34.35*.

8. To facilitate collection of assessments and fees on transfer of separate interests, have board of directors consider recording statement including any or all of following information [*Civ. Code § 1366.2(a)*; *see § 34.245*]:

NOTE:
This type of recorded statement will assist escrow companies in collecting and prorating regular and special assessments that are due and payable when seperate interests are transferred. In particular it will alleviate the problems those companies encounter in locating the party responsible for collecting

assessments when an association has changed its name or is operating under a "doing business as" designation. The county recorder is authorized to charge a recording fee based on the recorder's normal per-page recording fee [*Civ. Code § 1366.2(b)*].

a. Name of association as shown on conditions, covenants, and restrictions or current name of association, if different.

b. Name, address, and daytime telephone number, if any, of managing agent, association treasurer, or other person authorized to receive association assessments and fees.

c. List of separate interests subject to assessment by association, showing assessor's parcel number or legal description, or both.

d. Recording information identifying declaration or declarations of covenants, conditions, and restrictions governing association.

e. If amended statement is being recorded, include recording information identifying prior statement or statements that amendment is superseding.

8A. To facilitate collection of information on purchasers of separate interests at foreclosure sale, have board of directors consider recording request for copy of trustee's deed on foreclosure sale [*see Civ. Code § 2924b(f)*; *see also § 34.248* (form)].

9. Periodically, as required by statute, prepare incorporated or unincorporated owners' association's biennial registration form to include all of following information, and file with Secretary of State [*see Civ. Code § 1363.6(a)*]:

NOTE:

All owners' associations, whether or not they are incorporated, are required to file specified information with the Secretary of State. The information must to be submitted on a prescribed form with a fee, not to exceed $30 [*Civ. Code § 1363.6(a)*]. An incorporated association must file the form within 90 days of filing its articles of incorporation and thereafter at the same time the association files its biennial statement with the Secretary of State pursuant to *Corp. Code § 8210* [*Civ. Code § 1363.6(b)(1)*; ***see*** *Corp. Code § 8810* (penalty for failure to file)]. An unincorporated association must file the form in July of 2003, and biennially in July thereafter [*Civ. Code § 1363.6(b)(2)*]. On and after January 1, 2006, an incorporated association that does not comply with the statement filing requirement faces the possibility of suspension and monetary penalties [***see*** *Civ. Code § 1363.6(d)*; ***see also*** *Corp. Code § 8810*]. All information in the form is available for public inspection under the Public Records Act except for the association president's daytime telephone number and e-mail address [*Civ. Code § 1363.6(e)*; ***see*** *Gov. Code § 6250 et seq.*].

a. Statement that association is formed to manage common interest development under Davis-Stirling Common Interest Development Act;

b. Association's name;

c. Street address of association's onsite office, or if none, of responsible officer or managing agent;

d. Association president's name, address, and either his or her daytime telephone number or e-mail

address, other than address, telephone number, or e-mail address of association's onsite office or managing agent;

e. If association has managing agent, agent's name, street address, and daytime telephone number;

f. County, and if development is in incorporated area, city in which development is located;

NOTE:
If the development's boundaries fall into more than one county, each county must be identified [*Civ. Code § 1363.6(a)(6)*].

g. If development is in unincorporated area, closest city;

h. Nine-digit ZIP Code, front street, and nearest cross street of development's physical location;

i. Type of common interest development managed by association, i.e., community apartment project, condominium project, planned development, or stock cooperative [*see Civ. Code § 1351(c)*]; and

j. Number of separate interests in development [*see Civ. Code § 1351*(*l*)].

10. Notify Secretary of State of any change in street address of onsite office or office of responsible officer or managing agent within 60 days of change [*Civ. Code § 1363.6(c)*].

NOTE:
The notification must be made on an official form and must be accompanied by a prescribed fee [*Civ. Code § 1353.6(c)*].

11. Ensure that board of directors complies with statutory procedures when adopting or changing operating rules dealing with board actions related to following [*Civ. Code § 1357.120(a)*; *see Civ. Code § 1357.120(b)* (board actions to which procedure does not apply)]:

NOTE:
The procedure is required for operating rule changes commenced on or after January 1, 2004 [***see*** *Civ. Code § 1357.150*]. To be valid and enforceable, an operating rule must be (1) in writing, (2) within the board's authority, (3) not inconsistent with governing law and the association's governing documents, (4) adopted, amended, or repealed in good faith in substantial compliance with statutory requirements, and (5) reasonable [*Civ. Code § 1357.110*]. Except when a rule change is proposed to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association [***see*** *Civ. Code § 1357.130(c), (d)*], the board must provide written notice of a proposed rule change to the members at least 30 days before making the change. The notice must include the text of the proposed rule change and a description of its purpose and effect [*Civ. Code § 1357.130(a)*]. The board's decision must be made at a board meeting after the board has considered any comments made by association members [*Civ. Code § 1357.130(b)*]. As soon as possible but not more than 15 days after a non-emergency rule change is made, the board must deliver notice of the change to every member [*Civ. Code § 1357.130(c)*].

A special meeting may be called by association members representing at least five percent of the separate interests to reverse a non-emergency rule change [***see*** *Civ. Code § 1357.140*].

a. Use of common area or exclusive use common area.

b. Use of separate interest, including aesthetic or architectural standards that govern alteration of separate interest.

c. Member discipline, including any schedule of monetary penalties for violating governing documents or procedure for imposing penalties.

d. Standards for delinquent assessment payment plans.

e. Procedures adopted for resolving disputes.

f. Procedures for reviewing and approving or disapproving proposed physical change to member's separate interest or to common area.

g. Procedures for elections adopted on or after July 1, 2006 [*see Civ. Code §§ 1363.03, 1363.04*; *see also* 2005 Stats., ch. 450, § 7].

12. Assure that association provides its members with annual notice of requirements for association approval of physical changes to member's property.

NOTE:

The notice should describe the types of changes that require association approval and must include a copy of the procedure used to review and approve or disapprove of proposed changes [*see Civ. Code § 1378(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsTermination



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

16-34 California Legal Forms--Transaction Guide §§ 34.167-34.199

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

[Reserved]

§§ 34.167[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.200

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.200 Application for Public Report for Common Interest Subdivision [DRE Form 624; Revised 6/05]

[1] Comment

[a] Use of Form

This form is the official Department of Real Estate (DRE) application for a public report for a condominium project, planned development, community apartment project, or undivided interest. Consequently, unless otherwise specified, "subdivision" as used in this comment refers to those four types of developments.

Under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], any person who intends to offer subdivided lands (as defined) [*see § 34.200[1][b][i]*] within California for sale or lease must file this application form with the DRE [*see Bus. & Prof. Code § 11010(a)*] and obtain a public report covering the subdivision from the Real Estate Commissioner [*Bus. & Prof. Code § 11018.2*]. A public report contains detailed consumer information relating to a particular subdivision [*see § 34.37[3]*].

For a discussion of the criteria used by the Commissioner in determining whether or not to issue a final public report [*see Bus. & Prof. Code § 11018.5*], see *§ 34.143*, P 7.

Even though the Subdivided Lands Act refers to the developer of a condominium project or other common interest subdivision as a "subdivider," this chapter uses the term "developer" because it is relevant to all aspects of the condominium development and operation processes, whereas "subdivider" only applies to matters relating to the regulation of subdivisions.

DRE forms may be printed out by visiting the forms page at DRE's website at www.dre.ca.gov/forms_sub.htm.

[b] Public Report Requirement

[i] Applicability to Common Interest Subdivisions

The Subdivided Lands Act applies to all "subdivisions" and "subdivided lands." Included within the Act's definitions of those terms are the following real estate developments, which are collectively referred to in the Real Estate Commissioner's regulations as "common interest developments" [*Bus. & Prof. Code § 11004.5*; *see 10 Cal. Code Reg. §§ 2705(m), 2792.8*]:

- Condominium projects [*see Civ. Code § 783*] containing five or more condominiums.
- Community apartment projects [*see Bus. & Prof. Code § 11004*] containing five or more apartments.
- Planned developments [*see Bus. & Prof. Code § 11003*; *see also* Ch. 33D, *Planned Developments*] containing five or more lots.
- Stock cooperatives [*see Bus. & Prof. Code § 11003.2*; *see also* Ch. 33C, *Stock Cooperatives*] having or intended to have five or more shareholders.
- Limited equity housing cooperatives [*see Bus. & Prof. Code § 11003.4*].

For a discussion of the standard (i.e., not common interest) subdivisions that are also governed by the Subdivided Lands Act, see Ch. 30, *Subdivision Regulation* .

[ii] Selecting and Obtaining Appropriate Application Form

The following form is for use in connection with common interest subdivisions that are subject to the Subdivided Lands Act--that is, condominium projects, community apartment projects, planned developments, and undivided interests. The Real Estate Commissioner has prepared different application forms for stock cooperatives [*see Ch. 33C, Stock Cooperatives, § 33C.200*], time-share projects [*see Ch. 33A, Time-Share Projects, § 33A.200*], standard subdivisions [*see* Ch. 30, *Subdivision Regulation*], and out-of-state subdivisions [*see* Ch. 30, *Subdivision Regulation*].

Subdivision applications and forms are distributed and processed by Department of Real Estate subdivision district offices located in Los Angeles and Sacramento. Each office has jurisdiction over applications originating in specified counties [*see* NOTE to § 34.143].

[iii] Exception for Conversions

The notice and public report requirements of the Subdivided Lands Act do not apply to nonbinding expressions of intent to purchase or lease that an owner, agent, or developer is required, either by ordinance or as a condition to the approval of a tentative or parcel map pursuant to the Subdivision Map Act [*Gov. Code § 66410 et seq.*], to obtain from the tenants of units that are proposed to be converted to a condominium, community apartment project, or stock cooperative project [*Bus. & Prof. Code § 11010.7*].

For a discussion of subdivisions that are exempt from the notice and public report requirements [*see Bus. & Prof. Code §§ 11010.3, 11010.4, 11010.6, 11010.10, 11010.35*], see Ch. 30, *Subdivision Regulation* . That discussion is not repeated here because it is extremely unlikely that a common interest subdivision would qualify for one of those exemptions.

[iv] Phased Developments

If a project is to be developed in phases, the developer must obtain a public report for each phase of the project [*10 Cal.*

Code Reg. § 2798]. Before additional land may be annexed for a subsequent phase of a project, the developer must comply with the Real Estate Commissioner's regulation regarding annexation [*see 10 Cal. Code Reg. § 2792.27*; *see also* 34.44[2]].

If a multi-phased development qualifies as a "master planned development" [*see 10 Cal. Code Reg. § 2792.32(a)* (definition)], the development may be exempt from some or all of the "reasonable arrangement regulations" [*see 10 Cal. Code Reg. §§ 2792.15-2792.28*] that normally apply to developments that are subject to the Subdivided Lands Act [*see 10 Cal. Code Reg. § 2792.32*; § 34.44[3]; *see also Bus. & Prof. Code § 11000 et seq.* (Act)].

[v] Senior Citizen Housing Developments

A "senior citizen housing development" is a residential development consisting of at least 35 dwelling units that is developed, substantially rehabilitated, or substantially renovated for senior citizens. No housing development constructed before 1985 will fail to qualify as a senior citizen housing development merely because it was not originally developed or put to use for occupancy by senior citizens [*Civ. Code § 51.3(b)(4)*; *see Civ. Code § 51.3(b)(1)* ("senior citizen" is person who is at least 55 years old)]. As discussed in the Legal Background, these developments are exempted from the Unruh Act's prohibition against age discrimination [*see Civ. Code §§ 51, 51.2(a)*].

Any senior citizen housing development that is required to obtain a public report must include in the application, if submitted after July 1, 2001, a complete statement of the occupancy restrictions that apply in the development. A statement of those restrictions must also be included in the public report itself [*Bus. & Prof. Code § 11010.05*; *Civ. Code § 51.3(b)(4)*].

Because of the unusually large concentration of senior communities in Riverside County, and the fact that those communities have been subjected to a large number of civil enforcement actions and litigation by private parties, notwithstanding the senior communities' good faith belief that they were in compliance with the law, the legislature has exempted Riverside County from the general requirements imposed on senior-only housing, and enacted special statutes, which impose less-stringent requirements [*see Civ. Code §§ 51.10-51.12*; *see also* 1996 Stats., ch. 1147, § 8 (explanation of legislative intent)].

[c] Components of Application Form

[i] Instructions

The application is in three parts. Part I consists of instructions to the applicant on how to complete the application. Part I is not submitted with the application and is not reproduced here. When relevant, the contents of the instructions are discussed in this comment. The instructions can be viewed and printed out at http://www.dre.ca.gov/forms_sub.htm.

The DRE also publishes the Subdivision Public Report Application Guide (SPRAG), which is a compilation of detailed instructions on how to apply for a public report plus and item-by-item analysis of the application form itself and the documentation that must be submitted with it. SPRAG can be ordered from the DRE. In addition, a copy of the SPRAG manual can be downloaded from DRE's website, or by visiting http://www.dre.ca.gov/pdf_docs/sprag.pdf.

PRACTICE TIP:

Including a Cover Letter. If the project for which a Notice of Intention is being submitted has unusual or noteworthy aspects, processing of the submittal may be considerably simplified, and processing time thus shortened, if a cover letter is included that describes the offering and highlights its unusual or noteworthy aspects.

[ii] Index/Quantitative Deficiency Notice

Part II, the Index/Quantitative Deficiency Notice is a list of the documents required for a substantially complete application. It is reproduced *below*. Part II has three functions and uses:

- The applicant uses Part II to determine which documents are required for a "minimum filing package" and for a "substantially complete application."

- The applicant also uses Part II as an index for tabbing documents that are being submitted with the application.

- DRE uses Part II as a "quantitative deficiency notice" to communicate what further documentation, if any, is required of the applicant for a substantially completed application.

After an applicant receives a quantitative deficiency notice, any additional documents required to make the application substantially complete must be submitted together with the deficiency notice on top. If documentation is submitted piecemeal, it will be returned.

[iii] Questionnaire

Part III, the Questionnaire, is reproduced *below*. It contains specific questions about the subdivision project and requests that various kinds of supporting documentation be submitted. All questions must be answered. The Questionnaire should not be submitted until all project plans have been finalized. If a question does not apply to the project at hand, it should be marked "NA."

[d] Filing Fees

This form must be accompanied by the appropriate filing fee [*see*; *10 Cal. Code Reg. § 2790.1.5(a)(2), (b)*]. A different filing fee applies when this form is used as an application for a preliminary public report [*see*; *10 Cal. Code Reg. § 2790.1.5(a)(2), (b)*]; *see also § 34.200[1][i]*].

[e] Alternative Methods of Filing Application

[i] In General

There are two methods available for filing an application for a final public report. The applicant can submit either:

- A Minimum Filing Package; or

- A Substantially Complete Application.

Both of these methods is discussed below.

[ii] Minimum Filing Package

A Minimum Filing Package (MFP) consists of all of the following:

- A completed Index (Part II);

- A completed Questionnaire (Part III);

- All supporting documentation marked with an asterisk in Parts II and III; and

- The appropriate filing fee.

In addition, all documents submitted must be legible, tabbed with the appropriate item number, and hole-punched.

If the MFP requirements are not met, the application and filing fees will be returned. If MFP requirements are met, the DRE will accept the filing as a Notice of Intention and will continue processing to determine whether the filing is substantially complete.

A preliminary public report can also be processed, if requested, after a minimum filing package is submitted. There is no statutory time limit regarding issuance of a preliminary public report. However, no further processing of a MFP for a final public report will take place until the filing is substantially complete.

[iii] Substantially Complete Application

A Substantially Complete Application (SCA) consists of all of the following:

- A MFP;

- Most other documentation required for the issuance of a final public report (matching answers in columns 2 and 3 of Pt. III will indicate what is to be included in the substantially complete application); and

- A duplicate budget package with duplicate copies of materials related to the homeowners' association budget [*see 10 Cal. Code Reg. § 2792.1(a)(12)*].

[iv] Requirements for Supporting Documentation

The DRE requires that all incoming documents, including those submitted after the original submittal, be tabbed with the item numbers shown in the Index (Pt. II), column one. Use heavy stock or fabric tabs, not plastic or paper tabs. Each tab must show the document's precise item number. The entire package must be hole-punched as shown in the Instructions (Pt. I).

[f] Where to File Application

There are two DRE Subdivision Offices. Applications for projects in Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura counties must be filed at:

Subdivision Office--South
320 W. 4th Street, Suite 350
Los Angeles, CA 90013-1105
Telephone: (213) 576-6983

Applications for projects in all other counties must be filed at:

Subdivisions Office--North
2201 Broadway, Sacramento CA
Mailing address: P.O. Box 187005
Sacramento, CA 95818-7005
Telephone: (916) 227-0813

[g] Application Processing

Regardless of whether the applicant submits a MFP or SCA, the Commissioner has 10 days to determine whether the application is substantially complete and to notify the applicant in writing of this determination [*Bus. & Prof. Code § 11010.2(b)*]. If it is not complete, the notification will consist of a "quantitative deficiency notice" that will identify the missing or incomplete information. If the application is then resubmitted, the Commissioner will, within 10 days, make and submit another written determination regarding the "substantially complete" status of the application [*Bus. & Prof. Code § 11010.2(b)(1)*].

If the Commissioner determines that the application is substantially complete with respect to quantitative requirements, he or she will take the following steps:

(1) Provide the applicant, within 60 days of the above determination, with a list of any deficiencies and substantive inadequacies that prevent the application from being qualitatively complete [*Bus. & Prof. Code § 11010.2(b)(2)*; *see Bus. & Prof. Code § 11010.2(a)(2)* ("qualitatively complete" defined)].

(2) Notify the applicant, within 30 days of the receipt of the information submitted in response to the list described above, whether the application is qualitatively complete. If it is not, the notification will identify the remaining deficiencies and substantive inadequacies. On receipt of any resulting resubmittal, the Commissioner will, within 30 days, determine whether the resubmittal is qualitatively complete and notify the applicant of the decision [*Bus. & Prof. Code § 11010.2(c)*].

(3) Issue a public report within 15 days after (a) the determination that the application is qualitatively and substantially complete, and (b) the applicant has submitted all recorded or filed instruments and evidence of financial arrangements required by the Commissioner [*Bus. & Prof. Code § 11010.2(d)*].

The Commissioner may adopt emergency regulations providing for the extension of the above deadlines if the number of applications for subdivision public reports filed with the Department during the preceding six months has increased by more than 15 percent over the average monthly number of applications filed for the base period commencing July 1, 1983, and ending June 30, 1986 [*see Bus. & Prof. Code § 11010.2(g)*].

[h] Deadline for Submission of Supporting Documentation

If the applicant does not furnish the data required by *Bus. & Prof. Code § 11010* [*see § 34.200[1][k]*] within three years from the date the notice of intention is filed, the Real Estate Commissioner may, after written notice to the applicant or the applicant's representative, abandon the application for the public report [*Bus. & Prof. Code § 11018.13(a)*; *10 Cal. Code Reg. § 2804(a)(1)*]. Under specified conditions, the Commissioner may grant the developer a one-year extension to complete the application [*see 10 Cal. Code Reg. § 2804(d)*].

[i] Preliminary Public Report

Before the issuance of a final public report, an owner, developer, or agent may accept nonbinding reservations to purchase or lease units in the subdivision if he or she obtains a preliminary public report from the Real Estate Commissioner and satisfies certain other conditions [*10 Cal. Code Reg. § 2795(b)*; for a list of those conditions, *see § 34.143*, P 1]. This is an exception to the general prohibition against selling, leasing, or offering to sell or lease subdivided lots or parcels without first obtaining a final public report [*see Bus. & Prof. Code § 11018.2*]. Because the processing of an application for a final public report typically takes several months, this is an attractive option to many developers.

There are two types of preliminary public reports, referred to as the "normal" and the "short form" versions. The short form report is usually issued more quickly than its counterpart (usually within two weeks of the filing of the

application). However, a short form preliminary public report requires a special application [*see* Ch. 30, *Subdivision Regulation*] that cannot be used to obtain a final public report. In other words, after submitting the special application and obtaining the short form report, the developer must complete this form to obtain the final public report. In contrast, this form may be used to apply for a normal preliminary public report, and then may serve as the basic application for the final public report.

One disadvantage to using a preliminary public report is that any recipient who eventually purchases a unit in the subdivision will have five days after entering into the purchase contract to cancel the contract and to receive a full refund of any deposit [*see* Ch. 30, *Subdivision Regulation*]. This right of rescission does not apply to normal public reports.

A preliminary public report expires and may not be used after the earlier of (1) issuance of a final subdivision public report covering the same subdivision, or (2) one year from the date of issuance of the preliminary public report [*10 Cal. Code Reg. § 2795(c)*].

[j] Conditional Public Report

[i] In General

If an application for the public report has been determined to be qualitatively complete [*see Bus. & Prof. Code § 11010.2*; § 34.200[1][e][iii]] but the applicant has not satisfied certain other requirements for the issuance of the final report [*see Bus. & Prof. Code § 11018.12*], the Real Estate Commissioner may, under certain circumstances, issue a conditional public report for the subdivision. A conditional public report permits the applicant to sell or lease, or offer for sale or lease, lots or parcels in the subdivision, provided the following conditions are met: (1) as a condition of the sale, lease, or offer, delivery of legal title or other interest contracted for will not take place until issuance of the final public report; and (2) the requirements of *Bus. & Prof. Code § 11018.12(e)* (discussed *below*) are satisfied [*Bus. & Prof. Code § 11018.12(d)*].

[ii] Criteria for Issuance

The Commissioner may issue a conditional public report if the application for the public report has been determined to be qualitatively complete, the requirements of *Bus. & Prof. Code § 11018.12(e)* (discussed *below*) are satisfied, all deficiencies and substantive inadequacies in the documents that are required to make an application for a final public report for the subdivision substantially complete have been corrected, the material elements of the setup of the offering to be made under the authority of the conditional public report have been established, and all requirements for issuance of a public report have been met except for one or more of the following, as applicable [*Bus. & Prof. Code § 11018.12(a)*]:

- A final map has been approved under *Gov. Code § 66458*, but has not been recorded under *Gov. Code § 66466(c)* [*see* Ch. 30, *Subdivision Regulation*].

- A condominium plan [*see Civ. Code § 1351(e)*; § 34.33[4]] has not been recorded.

- A declaration of covenants, conditions, and restrictions [*see Civ. Code § 1353*; § 34.33[3]] has not been recorded.

- A declaration of annexation has not been recorded.

- A recorded subordination of existing liens to the declaration of covenants, conditions, and restrictions or declaration of annexation or escrow instruments to effect recordation before the first sale

are lacking.

- Filed articles of incorporation are lacking.

- A current preliminary report of a licensed title insurance company issued after filing of the final map and recording of the declaration covering all subdivision interests to be included in the public report has not been provided.

- Other requirements the Commissioner determines are likely to be timely satisfied by the applicant, notwithstanding the fact that the failure to meet these requirements makes the application qualitatively incomplete.

As discussed above, the Commissioner will not issue a conditional public report, and such a report may not be used, unless the requirements of *Bus. & Prof. Code § 11018.12(e)* are satisfied [*Bus. & Prof. Code § 11018.12(a), (d)*]. Section 11018.12(e) provides that the applicant must supply evidence that (1) all purchase money will be deposited in compliance with *Bus. & Prof. Code § 11013.2(a)* or *11013.4(a)* [*see* Ch. 30, *Subdivision Regulation*], and (2) the requirements of *Bus. & Prof. Code § 11018.5(a)(1), (2)* (governing completion of subdivision and offsite improvements) have been satisfied [*Bus. & Prof. Code § 11018.12(e)(1)*; *see § 34.200[1][k][v], [vi]*]. Further, the applicant must supply a description of the nature of the transaction [*Bus. & Prof. Code § 11018.12(e)(2)*]. Finally, provision must be made for the return of the entire sum of money paid or advanced by the purchaser if (1) a subdivision public report has not been issued within six months of the date of issuance of the conditional public report, or (2) the purchaser is dissatisfied with the public report because of a material change in the setup of the offering [*Bus. & Prof. Code § 11018.12(e)(3)*; *see Bus. & Prof. Code § 11012* (material changes); *see also § 34.161*].

If the Commissioner decides to not issue a conditional public report, he or she must notify the applicant in writing of the decision within five business days. That notice must specifically state the reasons why the report is not being issued [*Bus. & Prof. Code § 11018.2(c)*].

[iii] Distribution of Report and Related Statement

The subdivider, principal, or his or her agent must provide a prospective purchaser with a copy of the conditional public report and a written statement including all of the following [*Bus. & Prof. Code § 11018.12(f)*]:

- Specification of the information required for issuance of a public report.

- Specification of the information required in the public report that is not available in the conditional public report, along with a statement of the reasons why that information is not available at the time of issuance of the conditional public report. The above references to unavailable information appear to refer to the required supporting documentation listed in *Bus. & Prof. Code § 11018.12(a)* (discussed *above*).

- A statement that no person acting as a principal or agent may sell or lease or offer for sale or lease lots or parcels in a subdivision for which a conditional public report has been issued except as provided in the applicable provisions of the Subdivided Lands Act [*see Bus. & Prof. Code §§ 11010-11023*].

- Specification of the requirements of *Bus. & Prof. Code § 11018.12(e)* (discussed *above*).

The prospective purchaser must sign a receipt indicating that he or she has received and has read the conditional public report and the written statement described above [*Bus. & Prof. Code § 11018.12(g)*].

[iv] Term

The term of a conditional public report will not exceed six months. However, it may be renewed for one additional six-month term if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(h)*].

Notwithstanding the above, the term of a conditional public report for attached residential condominium units [*see Civ. Code § 783*], consisting of 25 units or more as specified on the approved tentative tract map, may not exceed 30 months and may be renewed for one additional term of six months if the Commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term [*Bus. & Prof. Code § 11018.12(i)*].

[k] Particular Provisions of Form

[i] In General

Much of the information requested by this form is the same as that requested by the *form in Ch. 30, Subdivision Regulation, § 30.220* (application for public report for "standard" subdivision). This comment primarily discusses requirements applicable solely to common interest subdivisions, and does not repeat the discussions in *§ 30.220[1]* of requirements applicable to all types of subdivisions.

[ii] Names and Addresses

If the owner and developer (subdivider) are different people or entities, this form must set forth both names [*Bus. & Prof. Code § 11010(b)(1), (2)*].

[iii] Uses

The notice of intention must identify the use or uses to which the proposed subdivision will be put [*Bus. & Prof. Code § 11010(b)(7)*]. In addition, the applicant must indicate the zoning of the affected lands because a failure to show that the parcels may be used for the purpose for which they are offered is grounds for the denial of a public report [*see Bus. & Prof. Code § 11018(f)*].

[iv] Common Area Interest to Be Conveyed

If all or a portion of the common areas and facilities will be transferred to the association, those areas and facilities must be transferred to the association or to a corporate trustee under a trust agreement acceptable to the Commissioner before or coincident with the first transfer or conveyance of a subdivision interest by the developer [*10 Cal. Code Reg. § 2792.15(a)*]. The developer may reserve limited easements for certain purposes, such as for completing improvements [*see 10 Cal. Code Reg. § 2792.15(b)*]. The developer must provide for the conveyance in the escrow instructions submitted with this form [*10 Cal. Code Reg. § 2792.1(a)(15)(E)*], and must submit an exemplar of the deed for conveyance [*10 Cal. Code Reg. § 2792.1(a)(14)*].

[v] Completion of Improvements In General

The Commissioner will issue a public report if reasonable arrangements have been made to assure completion of the subdivision and all off-site improvements included in the offering [*Bus. & Prof. Code § 11018.5(a)(1)*; *see 10 Cal. Code Reg. § 2792.1(a)(6)*], and will refuse to issue a report if the applicant cannot demonstrate that adequate financial arrangements have been made for all off-site improvements and community, recreational, or other facilities included in the offering [*Bus. & Prof. Code § 11018(d), (e)*].

[vi] On-Site Improvements

If the on-site improvements are to be completed after the issuance of the final public report, the developer must submit a reasonable date for the completion of the improvements. The developer must also provide evidence of compliance with one of the following methods of assuring completion [*Bus. & Prof. Code § 11018.5(a)(2)*]:

- Arrangements for a lien and completion bond, in an amount and subject to any terms, conditions, and coverage approved by the Commissioner, to assure completion of the project free of any liens [*Bus. & Prof. Code § 11018.5(a)(2)(A)*].

- Impound of funds from the sale of units in the subdivision, in an amount which the Commissioner determines sufficient to assure the completion of the improvements, in a neutral escrow depository until the lien periods have expired and the improvements are completed [*Bus. & Prof. Code § 11018.5(a)(2)(B)*].

- Deposit of an amount sufficient to cover the cost of construction in a neutral escrow depository acceptable to the Commissioner under a written agreement providing for disbursements from the escrow as the work is completed [*Bus. & Prof. Code § 11018.5(a)(2)(C)*].

- If the project is a condominium situated on a single parcel as shown on an approved final subdivision map, arrangements for: (1) lien and completion bond(s) in an amount sufficient to assure lien-free completion of all common area improvements not located in a residential structure; and (2) placement of all funds (or any portion of the funds that the Commissioner determines are sufficient) from the sales of condominiums in a neutral escrow depository acceptable to the Commissioner. These funds must remain in the escrow account until the residential structure in which the purchaser's separate unit is located has been completed, and all lien periods applicable to the purchaser's separate and undivided interests in the entire project arising out of the improvements have expired or have been insured against in a manner satisfactory to the Commissioner [*Bus. & Prof. Code § 11018.5(a)(2)(D)*].

- Compliance by the developer with an alternative plan acceptable to the Commissioner [*Bus. & Prof. Code § 11018.5(a)(2)(E)*].

An undertaking may be substituted for any of the above bonds [*see Code Civ. Proc. §§ 995.190*, *995.210*; *see also Code Civ. Proc. § 995.010 et seq.* (Bond and Undertaking Law)].

[vii] Off-Site Improvements

A developer may demonstrate that reasonable arrangements have been made to assure completion of off-site improvements after the issuance of the public report [*see Bus. & Prof. Code § 11018.5(a)(1)*; *see also Bus. & Prof. Code § 11018(d)*; *10 Cal. Code Reg. §§ 2792.1(a)(1), 2792(a)(16)*] by submitting a clearance letter from the appropriate local governmental entity.

[viii] Special Tax or Assessment Districts

This form must contain a true statement or reasonable estimate of the amount of certain indebtedness that has been or is proposed to be incurred by an existing or proposed special district, entity, taxing area, community facilities district, or assessment district within the boundaries of which all or any portion of the subdivision is located. This requirement applies to any indebtedness that (1) will finance the construction or installation of any improvement or the acquisition of community or recreational facilities; and (2) will be obtained by taxes or special assessments [*Bus. & Prof. Code § 11010(b)(10)*; *see 10 Cal. Code Reg. §§ 2792.1(a)(1), 2792(a)(11)*]. Developers subject to this requirement must also submit a special district questionnaire prepared by the Department of Real Estate [*see* DRE Form 624C, available at http://www.dre.ca.gov/forms_sub.htm].

The public report is in part based on the above information and can be denied for failure to demonstrate, when applicable, that assessments will be used to finance improvements and community or recreational facilities [*see Bus. & Prof. Code § 11018(d), (e)*].

[ix] Suitability of Land

The developer must make a showing that the parcels can be used for the purpose for which they are offered; in the case of a residential subdivision, this includes a showing that there is or will be vehicular access and a source of potable domestic water. Failure to make such a showing is grounds for denial of a public report [*Bus. & Prof. Code § 11018(f)*].

Several statutory provisions require the applicant to submit a very thorough analysis of soil conditions, prepared by competent engineers. Thus, the notice of intention must identify, if applicable, any soils or geologic report or reports that have been prepared specifically for the subdivision [*Bus. & Prof. Code § 11010(b)(14)*]. Further, the notice must state whether or not fill is used, or is proposed to be used, in the subdivision and must give the name and the location of the public agency in which information concerning soil conditions in the subdivision is available [*Bus. & Prof. Code § 11010(b)(15)*].

The notice of intention must also describe the provisions that have been made for public utilities in the proposed subdivision, including water, electricity, gas, telephone, and sewerage facilities [*Bus. & Prof. Code § 11010(b)(6)*; *see 10 Cal. Code Reg. §§ 2792.1(a)(1), 2792(a)(9)*]. If the financing of these facilities or other off-site improvements requires the creation of special assessment districts, then the notice must also indicate the amount of indebtedness that the special district is likely to incur [*Bus. & Prof. Code § 11010(b)(10)*; *see § 34.200[1][k][viii]*].

[x] Management Documents

If a developer intends to use the same set of management documents (articles, bylaws, and declaration) for more than one common interest project, he or she may request pre-approval of a master set of those documents by submitting the appropriate Department of Real Estate form [*see* DRE Forms 616, 616A, 616B, available at http://www.dre.ca.gov/forms_sub.htm] to the DRE before applying for the public report. Approved master management documents (MMDs) may be used in subsequent filings without the need for a complete review by DRE. However, the MMDs may not be used for multiphase condominium conversions or single lot phased condominiums.

[xi] Title

The notice of intention must describe the condition of the title to the land, including all encumbrances [*Bus. & Prof. Code § 11010(b)(4)*]. An inability to deliver title or any other interest contracted for is grounds for the denial of a public report [*Bus. & Prof. Code § 11018(c)*]. Pursuant to this policy, the owner, developer, or agent of the subdivision must submit with the questionnaire a current preliminary title report covering all subdivision interests for which a public report is sought [*10 Cal. Code Reg. §§ 2792.1(a)(1), 2792(a)(6)*].

[xii] Conditions of Sale or Lease

The notice of intention must state the proposed terms and conditions for the disposition of the land. Further, the developer must submit copies of any contracts intended to be used [*Bus. & Prof. Code § 11010(b)(5)*]. It is essential that the Commissioner have copies of all documents used by the owner or developer that affect the rights of potential purchasers, because the Commissioner cannot issue a final public report if the sale or lease would constitute a misrepresentation to or a fraud or deceit on the purchasers or lessees [*Bus. & Prof. Code § 11018(b)*]. To properly police these sales and lease transactions, the Commissioner requires the applicant to submit, as part of a substantially complete application, exemplars of all marketing, financing, and conveyancing instruments to be used in the offering of subdivision interests [*10 Cal. Code Reg. § 2792(a)(12)*].

[xiii] Location of Schools

For each school district serving the area in which a proposed subdivision is located, the notice of intention must include a statement from the appropriate district that indicates the location of each high school, junior high school, and elementary school serving the subdivision, or documentation indicating that this statement has been requested from the appropriate school district [*Bus. & Prof. Code § 11010(b)(12)(A)*]. If, as of the date the notice of intention and application for a public report are otherwise deemed to be qualitatively and substantially complete, any school district serving the area has not provided the required statement, the subdivider or other person who filed the notice of intention and application must immediately provide DRE with the name, address, and telephone number of that district [*Bus. & Prof. Code § 11010(b)(12)(B)*].

[xiv] Nearby Airports

The notice of intention must disclose the location of all existing airports, and of all proposed airports shown on the local general plan, located within two statute miles of the subdivision. If the property is located within an airport influence area, the notice must also include a statutorily-prescribed statement informing potential buyers of the possible annoyances and inconveniences associated with living near an airport [*Bus. & Prof. Code § 11010(b)(13)(A)*; *see Bus. & Prof. Code § 11010(b)(13)(B)* ("airport influence area" defined)].

[xv] San Francisco Bay Conservation and Development Commission Jurisdiction

On or after July 1, 2005, if the property is located within the San Francisco Bay Conservation and Development Commission's jurisdiction, the notice of intention must include a statement that the property is so located and a statutory notice stating that the use and development of the property may be subject to special regulations, restrictions, and permit requirements [*Bus. & Prof. Code § 11010(b)(16)*].

[xvi] Notice of Supplemental Property Tax Bill

The notice of intention must include a "Notice of Your 'Supplemental' Property Tax Bill" informing the prospective purchaser that a reassessment of the property on the change of ownership may result in the issuance of one or two supplemental tax bills, payment of which will be the purchaser's responsibility, notwithstanding the fact that the purchaser has arranged with the lender to pay property taxes through an impound account [*Bus. & Prof. Code § 11010(b)(11)*; *see Civ. Code § 1102.6c* (text of notice); *see also Ch. 23, Real Property Sales Agreements, § 23.300A*].

[xvii] Notice of Right to Farm

If the property is located within one mile of a farm or ranch designated on the current county-level GIS "Important Farmland Map" issued by the Department of Conservation's Division of Land Resource Protection, the notice of intention must include a statutory Notice of Right to Farm. The notice basically warns of possible inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character [*Bus. & Prof. Code § 11010(b)(17)*].

[xviii] Advertising/Sales Program

The Commissioner will not issue a public report if the sale or lease of any units in the subdivision would constitute a deceit or fraud on the purchasers or lessees [*Bus. & Prof. Code § 11018(b)*]. Thus, the applicant must submit certain information concerning the statements he or she has used or will use in inducing prospective purchasers to buy into the project [*see 10 Cal. Code Reg. § 2799.1* (Commissioner's regulation pertaining to subdivision advertising)]. For further discussion of applicable advertising restrictions, see Ch. 30, *Subdivision Regulation* .

[l] Execution and Verification of Application

This application form must be executed by or on behalf of the person to whom the public report is to be issued (the developer). If executed within California, the developer must either:

- Verify the information in the application and the supporting documents before a notary public or other person qualified to administer oaths [*10 Cal. Code Reg. § 2790*]; or

- Execute a written certificate that (1) recites that this information is certified to be true under penalty of perjury, and (2) states the date and place of execution and that it is certified under the laws of California [*Code Civ. Proc. § 2015.5*; *10 Cal. Code Reg. § 2790*; *see Code Civ. Proc. § 2015.5(a)* (model certification)]. The official application for a public report contains a certification provision.

If this form is executed outside of California, the developer must either:

- Verify the above information, before a person qualified to administer oaths within the jurisdiction in which executed; or

- Execute a written certificate that (1) recites that this information is certified to be true under penalty of perjury, and (2) states the date of execution and that it is certified under the laws of the State of California [*Code Civ. Proc. § 2015.5*; *see Code Civ. Proc. § 2015.5(b)* (model certification)].

[m] Distribution of Copies of Final Public Report

For a discussion of the required methods of distribution of public reports and related project documents [*see Bus. & Prof. Code §§ 11018.1, 11018.6*; *10 Cal. Code Reg. §§ 2795, 2795.1*], see *§ 34.143*.

[n] Term of Final Public Report and Renewal

The initial term of a final subdivision public report is five years [*10 Cal. Code Reg. § 2795.3*]. However, the developer may renew the report by submitting an application for renewal [*see* Ch. 30, *Subdivision Regulation*] and any additional information required by the Commissioner [*10 Cal. Code Reg. § 2795.3*].

[2] FORM

Application for Public Report for Condominiums, Planned Developments, and Community Apartment Projects [DRE Form 624; Revised 9/30/84]

NOTE:

Part I of the following form, consisting of lengthy instructions to the applicant, has not been reproduced below. The contents of these instructions are discussed in detail in the comment above. The materials below begin with Part II of the form, the Index/Quantitative Deficiency Notice.

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.201

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.201 Common Interest Development Information Form [Bus. & Prof. Code § 11018.1(c)]

[1] Comment--Use of Form

This form is the statutory disclosure notice that an owner, developer, or agent must present to a prospective purchaser along with a copy of the public report [*Bus. & Prof. Code § 11018.1(c)*]. Among other things, the form describes (1) the rights and obligations of purchasers of lots or units in a common interest development, (2) the importance of the public report, (3) the significance and legal effect of the governing instruments for the project, (4) the assessment process, and (5) the role of the owners' association.

Failure to provide this statement will not be deemed a misdemeanor under the Real Estate Law [*Bus. & Prof. Code § 11018.1(c)*; *see Bus. & Prof. Code § 10185*; *see also Bus. & Prof. Code § 10000 et seq.*]. However, the Real Estate Commissioner may issue an order prohibiting further sales or leases until the owner or developer complies with this distribution requirement [*see Bus. & Prof. Code § 11019(a)(1)*].

For a discussion of the distribution of public reports [*see Bus. & Prof. Code § 11018.1(a)*], see *§ 34.143*.

[2] FORM

Common Interest Development Information Form [Bus. & Prof. Code § 11018.1(c)]

COMMON INTEREST DEVELOPMENT GENERAL INFORMATION

The project described in the attached Subdivision Public Report is known as a common interest development. Read the public report carefully for more information about the type of development. The development includes common areas and facilities which will be owned or operated by an owners' association. Purchase of a lot or unit automatically entitles and obligates you as a member of the association and, in most cases, includes a beneficial interest in the areas and facilities. Since membership in the association is mandatory, you should be aware of the following information before

you purchase:

Your ownership in this development and your rights and remedies as a member of its association will be controlled by governing instruments which generally include a Declaration of Restrictions (also known as CCandRs), Articles of Incorporation (or association) and bylaws. The provisions of these documents are intended to be, and in most cases are, enforceable in a court of law. Study these documents carefully before entering into a contract to purchase a subdivision interest.

In order to provide funds for operation and maintenance of the common facilities, the association will levy assessments against your lot or unit. If you are delinquent in the payment of assessments, the association may enforce payment through court proceedings or your lot or unit may be liened and sold through the exercise of a power of sale. The anticipated income and expenses of the association, including the amount that you may expect to pay through assessments, are outlined in the proposed budget. Ask to see a copy of the budget if the subdivider has not already made it available for your examination.

A homeowner association provides a vehicle for the ownership and use of recreational and other common facilities which were designed to attract you to buy in this development. The association also provides a means to accomplish architectural control and to provide a base for homeowner interaction on a variety of issues. The purchaser of an interest in a common interest development should contemplate active participation in the affairs of the association. He or she should be willing to serve on the board of directors or on committees created by the board. In short, "they" in a common interest development is "you." Unless you serve as a member of the governing board or on a committee appointed by the board, your control of the operation of the common areas and facilities is limited to your vote as a member of the association. There are actions that can be taken by the governing body without a vote of the members of the association which can have a significant impact upon the quality of life for association members.

Until there is a sufficient number of purchasers of lots or units in a common interest development to elect a majority of the governing body, it is likely that the subdivider will effectively control the affairs of the association. It is frequently necessary and equitable that the subdivider do so during the early stages of development. It is vitally important to the owners of individual subdivision interests that the transition from subdivider to resident-owner control be accomplished in an orderly manner and in a spirit of cooperation.

When contemplating the purchase of a dwelling in a common interest development, you should consider factors beyond the attractiveness of the dwelling units themselves. Study the governing instruments and give careful thought to whether you will be able to exist happily in an atmosphere of cooperative living where the interests of the group must be taken into account as well as the interests of the individual. Remember that managing a common interest development is very much like governing a small community ... the management can serve you well, but you will have to work for its success.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.202

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.202 Declaration

[1] Comment

[a] Use of Form

This form is a declaration for a condominium project. The declaration is the basic governing document for any type of common interest development/subdivision. Formerly, this document was referred to as a "declaration of covenants, conditions, and restrictions," or "CC&Rs." Because that term was somewhat deceiving (declarations rarely contain conditions and always include servitudes), the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] adopted the term "declaration" [*see* Rosenberry, "The Davis-Stirling Common Interest Development Act," Real Property Law Reporter, November 1985, p. 175]. However, the Act does not require the use of this term [*see Civ. Code § 1351(h)* (" 'Declaration' means the document, however denominated. ...")], and the regulations of the Real Estate Commissioner [*see § 34.202[1][d][ii]*] continue to use the term "CCandRs." Accordingly, the attorney may wish to accommodate a client who has a strong preference for the former wording.

After the first transfer of title to a condominium in the project to any purchaser, the provisions of the declaration (and all other documents establishing, in whole or in part, the plan for use, enjoyment, maintenance, and preservation of the project) must be made binding on the purchaser of every other condominium in the project [*see Bus. & Prof. Code § 11018.5(c)*; *see also* Recital C in this form].

With regard to creation and enforcement of assessment liens, this form conforms to the law applicable to assessment liens recorded on or after January 1, 2006 [*see Civ. Code § 1367.4*], rather than the law applicable to liens recorded before that date [*see Civ. Code § 1367*].

For compatible articles of incorporation and bylaws for the owners' association of a condominium project, see *§§ 34.204* and *34.205*, respectively.

[b] Applicability of Comment to Other Types of Developments

Ch. 33D, *Planned Developments*, and Ch. 33C, *Stock Cooperatives*, contain extensive cross references to Ch. 34, *Condominiums*, and to this comment in particular. Unless otherwise indicated, users of Ch. 33D and 33C should assume that any discussion of condominium projects in this comment also applies to other common interest developments [*see Civ. Code § 1351(c)*; *see also § 34.33[1]*] and other common interest subdivisions [*see 10 Cal. Code Reg. §§ 2792.8, 2705(m)*; *see also § 34.37[2]*].

[c] Coordination With Bylaws

The declaration (this form) and the bylaws [*see* § 31.205] are the two most important governing documents for a condominium project because they contain the most comprehensive and detailed provisions governing the operation of the project and the powers, rights, duties, and obligations of the owners' association and the condominium owners. With few exceptions, the requirements governing the contents of the governing documents do not specify which document must contain a particular provision [*see § 34.202[1][d][i], [ii]*]. As a result, the drafter has some discretion in allocating topics between the two documents. The two forms in this chapter reflect a common method of division which, among other things, limits the scope of the bylaws to matters affecting the organization and operation of the owners' association. The declaration governs all other aspects of the condominium project, including membership and voting rights. This is a rather unique arrangement in that the bylaws for other types of organizations typically contain the provisions governing membership and voting rights.

[d] Required Contents

[i] Davis-Stirling Act

Under the Davis-Stirling Act, a declaration must contain all of the following [*Civ. Code § 1353(a)(1)*; *see* former *Civ. Code §§ 1350-1370* (former Condominium Act, governing declarations recorded before 1986)]:

- A legal description of the condominium project [*see § 34.202[2]*, Recital A].

- A statement that the development is a condominium project (or community apartment project, planned development, stock cooperative, or any combination of these developments) [*see § 34.202[2]*, Title and Recital B].

- The name of the owners' association [*see § 34.202[2]*, Sections 1.02, 3.01].

- The restrictions on the use or enjoyment of any portion of the condominium project that are intended to be enforceable equitable servitudes [*see § 34.202[1][g]*].

- If the property is located within an airport influence area and the declaration is recorded after January 1, 2004, a statutorily-prescribed statement informing potential buyers of the possible annoyances and inconveniences associated with living near an airport [*see Civ. Code § 1353(a)(2)* ("airport influence area" defined)].

- If the property is within the San Francisco Bay Conservation and Development Commission's jurisdiction and the declaration is recorded on or after January 1, 2006, a statutory notice regarding the possible impact on the use and development of the property as a result of the Commission's regulations, restrictions, and permit requirements [*Civ. Code § 1353(a)(3)*].

The declaration may contain any other matters the original signatory of the declaration or the owners consider

appropriate [*Civ. Code § 1353(b)*].

This form also incorporates the requirements of the Davis-Stirling Act that govern the following matters:

- Definitions [*see Civ. Code § 1351*; art. I of form].
- Exclusive use common areas [*see Civ. Code § 1351(i)*; § 34.202[2], Sections 1.10, 2.05; *see also § 34.33[7]*].
- Transfers of separate interests [*see Civ. Code § 1358*; § 34.202[2], Section 2.08; *see also § 34.33[5]*].
- Partition [*see Civ. Code § 1359*; § 34.202[2], Section 2.04; *see also § 34.33[8]*].
- Rights and easements of ingress, egress, and support [*see Civ. Code § 1361(a)*; § 34.202[2], Section 2.03(c); *see also § 34.33[7]*].
- Statement of delinquent assessments [*see Civ. Code § 1368(b)*; § 34.202[2], Section 4.10].
- A statutory presumption regarding boundaries of units [*see Civ. Code § 1371*; § 34.202[2], Section 2.07; *see also § 34.33[5]*].

[ii] Subdivided Lands Act and Its Implementing Regulations

The Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] requires a developer to obtain a public report before selling or leasing (or offering to sell or lease) subdivided lots [*Bus. & Prof. Code § 11018.2*]. The numerous requirements for obtaining a public report are discussed in *§ 34.200[1]*. Some of those requirements affect the organization and operation of the project and its owners' association, and therefore must be incorporated into the governing instruments. In fact, the Commissioner cannot issue a public report for a project unless he or she finds that "reasonable arrangements" have been or will be made to protect the interests of purchasers of condominiums in the project with respect to the management, maintenance, preservation, operation, use, right of resale, and control of the condominiums and other areas or interests in the project [*Bus. & Prof. Code § 11018.5(e)*]. The Commissioner has implemented this requirement by promulgating (1) a regulation that specifies the required subject matter of the governing instruments [*see 10 Cal. Code Reg. § 2792.8(a)*; *see also* discussion *below*]; and (2) a set of "reasonable arrangement" regulations which, if substantially conformed to and reflected in the governing instruments, satisfy the "reasonable arrangement" requirement [*see 10 Cal. Code Reg. § 2792.8(b)*; *see also 10 Cal. Code Reg. §§ 2792.15-2792.28*; *but see 10 Cal. Code Reg. § 2792.32*, discussed in *§ 34.202[1][d][iii]*].

Drafters typically place the vast majority of the regulation-based provisions in the declaration, and the remainder in the bylaws [*see § 34.202[1][c]*]. Because the regulations are discussed throughout this chapter and have been incorporated into this form and the bylaws in § 34.205, they are not discussed at length in this comment. However, the following is a list of the required regulatory topics that are set forth in this form [*see § 34.205[1][b][ii]* (list of regulatory topics covered in compatible bylaws)], which includes citation to relevant regulations and, for the convenience of the attorney, relevant statutory provisions [*10 Cal. Code Reg. § 2792.8*; *see § 34.202[1][d][i], [iv]*]:

- Creation of an organization (association) of condominium owners [*see § 34.202[2]*, Art. III];
- A description of the common interests of the condominium owners or lessees [*see § 34.202[2]*, Sections 2.03-2.05; *see also Civ. Code §§ 1351(b), (c), (i), 1358, 1361, 1362*];

- Transfer of title and/or control of common interests or of mutual and reciprocal rights of use to the owners in common or to the association [*see 10 Cal. Code Reg. § 2792.15*; § 34.202[2], Section 2.03; *see also Civ. Code § 1362*; § 34.202[1][e][iv]];

- Procedures for calculating and collecting regular assessments from owners to defray expenses attributable to the ownership, operation, or furnishing of common interests or to the enjoyment of mutual and reciprocal rights of use [*see 10 Cal. Code Reg. § 2792.16*; § 34.202[2], Art. IV; *see also Civ. Code § 1366*; § 34.39];

- Procedures for establishing and collecting special assessments for capital improvements or for other purposes [*see 10 Cal. Code Reg. § 2792.16(e)*; § 34.202[2], Art. IV; *see also Civ. Code § 1366*; § 34.39[6]];

- Liens on privately owned condominiums for assessments levied pursuant to the declaration, and foreclosure of those liens for nonpayment [*see 10 Cal. Code Reg. § 2792.16(g)*; § 34.202[2], Section 4.09; *see also Civ. Code § 1367.1*; § 34.39[7]];

- Policies and procedures relating to the disciplining of members for failure to comply with provisions of the governing instruments [*see Civ. Code § 1363(g)*; *10 Cal. Code Reg. § 2792.26*; § 34.202[2], Section 3.06(d); *see also § 34.202[1][e][v]*];

- Creation of a governing body for the association, which will be a board of directors if the association is incorporated [*see § 34.202[2]*, Section 3.08; *§ 34.206[2]*, Art. III];

- Amendment procedures for those provisions of the governing instruments that relate to the ownership, management, and control of the association and/or the common interests [*see 10 Cal. Code Reg. § 2792.24*; § 34.202[2], Art. XII; § 34.204[2], Art. IV; § 34.205[2], Art. XIII; *see also Civ. Code §§ 1355*, *1355.5*, *1356*; § 34.162];

- Conditions under which the condominium project may be partitioned pursuant to *Civ. Code § 1359* [*see § 34.202[2]*, Section 2.04; *see also § 34.33[8]*];

- Annexation of additional land to the existing project when appropriate [*see 10 Cal. Code Reg. § 2792.27*; § 34.202[2], Art. XI; *see also § 34.44[2]*];

- Architectural and/or design control [*see 10 Cal. Code Reg. § 2792.28*; § 34.202[2], Art. VI; *see also § 34.202[1][e][vii]*];

- Special provisions for enforcement of financial arrangements by the developer to secure performance of his or her commitment to complete common area improvements [*see 10 Cal. Code Reg. § 2792.4*; § 34.202[2], Section 3.07(c) (which sets forth the regulatory requirements in their entirety)]; and

- Granting of easements or use rights affecting the common areas [*see § 34.202[2]*, Art. II; *see also Civ. Code §§ 1351(i)*, *1361*; § 34.33[7]].

[iii] Regulatory Exception for Master Planned Developments

Special regulatory requirements apply to master planned developments. A "master planned development" is (1) a "planned development" as defined by *Civ. Code § 1351(k)* [*see* Ch. 33D, *Planned Developments*], (2) consisting of 500 or more separate residential interests and one or more subdivisions, including planned developments, community

apartment projects, stock cooperatives, time share projects, or other residential, recreational, commercial, or mixed residential/non-residential projects, (3) developed in two or more phases, and (4) managed by a community association that is responsible for maintaining and operating areas and/or facilities affecting the master planned development and enforcing the development's use restrictions. A development that does not satisfy all of these criteria may nonetheless be treated as a master planned development if the developer can demonstrate from specific facts and circumstances that it should be so treated [*10 Cal. Code Reg. § 2792.32(a)*].

In recognition of the fact that control by the developer over the development's governing body and architectural control committee is ordinarily necessary until a reasonable portion of the project has been completed, the governing instruments of a Master Association must substantially conform to specified regulatory standards providing for the following [*10 Cal. Code Reg. § 2792.32(b)*]:

- The transition of voting power from the developer, as a Class B member, to the transferors of separate interests, as Class A members, as more and more separate interests are transferred [*10 Cal. Code Reg. § 2792.32(c)*];

- Division of the project into geographical districts each of which is individually represented by delegates to a Master Association [*10 Cal. Code Reg. § 2792.32(d)*];

- Relaxed quorum requirements for adjourned meetings of the Master Association [*10 Cal. Code Reg. § 2792.32(e)*];

- Ensuring that the developer has a majority of the voting power on the Master Association in the early stages of development with that power phased out over time and ultimately ceasing to exist on the occurrence of specified events [*10 Cal. Code Reg. § 2792.32(f)*]; and

- Provision that, during the initial stages of development, the members of the Architectural Control committee need not be members of the Master Association [*10 Cal. Code Reg. § 2792.32(g)*].

If the development will include any residential structure or other major special benefit facility or amenity that is to be commonly maintained or operated for the use or benefit of some but not all of the homeowners within the Master Planned Development, one or more separate homeowners' associations should be established within the development to maintain that structure or to maintain and operate the facility or amenity [*10 Cal. Code Reg. § 2792.32(h)*].

The subdivider of a Master Planned Development may enter into an arrangement with the Master Association to sell or to convey common area amenities under a lease purchase arrangement to the Master Association [*10 Cal. Code Reg. § 2792.32(j)*]. All common area amenities subject to this arrangement must be (1) specifically identified and defined as "common area" or "future common areas" in the CC&Rs, (2) a part of the proposed Master Planned Development, (3) accessible to all homeowners who will be charged an assessment to pay for the amenity, and (4) located on a separate lot or parcel [*10 Cal. Code Reg. § 2792.32(j)(1)*].

[iv] Nonprofit Mutual Benefit Corporation Law

The vast majority of owners' associations for condominium projects are organized as nonprofit mutual benefit corporations [*see § 34.38[1]*]. The articles and bylaws of these corporations must comply with the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. Some of the "reasonable arrangement" regulations of the Real Estate Commissioner have recognized this by expressly incorporating the requirements of the Law [*see, e.g., 10 Cal. Code Reg. § 2792.19(b)(1)* (cumulative voting requirements); *see also Corp. Code § 7615*; § 34.202[2], Section 3.04(e)] or by adopting requirements that are quite similar to their statutory counterparts [*see, e.g., 10 Cal. Code Reg. § 2792.23* (inspection of books and records); *see also Corp. Code §§ 8330-8338*; § 34.202[2], Section 3.09].

PRACTICE TIP:

Affect of Law on Declaration. As a practical matter, the declaration is not significantly affected by the Law because it focuses on the project itself rather than on the internal operation of the association [*see § 34.202[1][c]*]. However, the provisions of the declaration regarding membership and voting rights, and a few other miscellaneous provisions, are subject to the Law [*see Corp. Code §§ 7310-7354* (members), 7610-7616 (voting of memberships)]. The provisions of the Law that have been incorporated into this form are included in the list *set forth in § 34.202[1][d][ii]*; for further discussion of the Law, see *§ 34.205[1]*.

[e] Particular Provisions of Form

[i] Boundaries of Unit

A condominium consists of an undivided interest in the common areas of the project and a "separate interest in space" (called a unit). The boundaries of the unit must be accurately described in a recorded subdivision map or condominium plan [*Civ. Code § 1351(f)*; *see § 34.32*]. Unless the declaration or condominium plan provides otherwise, if walls, floors, or ceiling are designated as the boundaries, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of the separate interest and any other portions of the walls, floors, or ceilings are part of the common areas [*Civ. Code § 1351(l)*]. This form designates those interior surfaces as the boundaries of the condominium units [*see § 34.202[2]*, Section 1.24].

If interior surfaces are utilized as boundaries, any unapproved work or act by an owner that penetrates an interior surface (e.g., hammering a nail into or denting a wall) could damage the common area beyond that surface and trigger the owners' association's obligation to repair the common area [*see* Rosenberry, "The Davis-Stirling Common Interest Development Act," Real Property Law Reporter, November 1985, p. 175]. To avoid this result, the declaration should make the owners responsible for any damage they cause to the common areas [*see § 34.202[2]*, Section 2.03(h)].

The drafter should also make the owners responsible for maintaining the interior walls of their units, whether or not they are a part of the owners' separate interests [*see § 34.202[2]*, Section 2.06]. This provision is authorized by *Civ. Code § 1364*. Under Section 1364, unless the declaration provides otherwise, the owners' association must repair, replace, and maintain the common areas, other than exclusive use common areas, while owners of separate interests must maintain their separate interests and appurtenant exclusive use common areas [*Civ. Code § 1364(a)*; *see Civ. Code § 1364(e)*; *see also § 34.202[1][e][ii]*].

The declaration should incorporate the statutory provision prohibiting owners from making any improvements or alterations within the boundaries of their separate units that would impair the structural integrity or mechanical systems or lessen the support of any portion of the development [*see Civ. Code § 1360(a)(1)*; § 34.202[2], Section 2.06].

In interpreting condominium plans, the existing physical boundaries of a unit in a condominium project, when the boundaries of the unit are contained within a building, or of a unit reconstructed in substantial accordance with its original plans, must be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or condominium plan, if any exists, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building [*Civ. Code § 1371*].

[ii] Pest Control

The duty of an owners' association to repair, replace, or maintain the common areas [*see Civ. Code § 1364(a)*; *see also § 34.202[1][e][i]*] specifically includes responsibility for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms, unless the declaration provides otherwise [*Civ. Code § 1364(b)(1)*]. The association may cause the temporary, summary removal of any occupant of the condominium project

for any periods and at any times that are necessary for the prompt, effective treatment of the infestation [*Civ. Code § 1364(d)(1)*]. For these purposes, "occupant" means an owner, resident, guest, invitee, tenant, lessee, sublessee, or other person in possession of the unit [*Civ. Code § 1364(e)*].

The association must give each affected occupant and owner notice of the temporary relocation not less than 15 days nor more than 30 days before the date of the relocation. The notice must state (1) the reason for the temporary relocation, (2) the date and time of the beginning of treatment, (3) the anticipated date and time of termination of treatment, and (4) that the occupants will be responsible for their own accommodations during the temporary relocation [*Civ. Code § 1364(d)(2)*]. The notice must be transmitted in either of the following ways [*Civ. Code § 1364(d)(3)*]:

- By personal delivery of a copy of the notice to the occupants, and by sending a copy to the owners (if different than the occupants) by first-class mail (postage prepaid) at the most current address shown on the books of the association; or

- By sending a copy to the occupants at the separate interest address, and a copy to the owners (if different than the occupants) by first-class mail, postage prepaid, at the most current address shown on the books of the association.

[iii] Condemnation, Damage, and Destruction

The governing instruments must describe the action to be taken and procedures to be followed in the event of condemnation, destruction, or extensive damage to the interests in the condominium project [*see § 34.202[2],* Arts. VIII (damage or destruction) and IX (eminent domain)]. These procedures must include provisions governing the use and disposition of insurance proceeds or damages payable to the association or to a trustee on behalf of the owners due to the condemnation, destruction, or damage [*10 Cal. Code Reg. § 2792.8(a)(21)*].

[iv] Transfer of Common Area and Facilities to Association

In the vast majority of condominium projects, the owners of the condominiums own the common area as tenants in common [*see Civ. Code § 1362*; *see also § 34.33[7]*]. If all or a portion of the common area and facilities are to be transferred to the association, those areas and facilities must be transferred to the association or to a corporate trustee under a trust agreement acceptable to the Commissioner before or coincident with the first transfer or conveyance of an interest in the project by the developer [*10 Cal. Code Reg. § 2792.15(a)*].

The developer may create a contractual right in himself or herself or may reserve easements of limited duration, for common driveway purposes, for drainage and encroachment purposes, and for ingress to and egress from the common areas for the purpose of completing improvements on those areas, to perform necessary repair work, and, in the case of phased projects, for entry onto adjacent property in connection with the development of additional phases of the overall project [*10 Cal. Code Reg. § 2792.15(b)*; *see § 34.202[2]*, Section 2.03(e)].

[v] Disciplining of Members by Association

The governing instruments must provide for the disciplining of members by the association for failure of the members to comply with the governing instruments or the rules and regulations for the project. However, the discipline cannot consist of the forfeiture or abridgement of an owner's right to the full use and enjoyment of his or her separately owned condominium unless that disciplinary action is taken pursuant to a court judgment or an arbitrator's decision, or on account of a foreclosure or sale under a power of sale for failure to pay assessments [*10 Cal. Code Reg. § 2792.26(a)*].

The disciplinary provisions in the governing instruments must authorize the governing body to impose monetary penalties, temporary suspensions of an owner's rights as an association member, or other appropriate discipline [*10 Cal.*

Code Reg. § 2792.26(b)].

A monetary penalty imposed by the association as a disciplinary measure may not be characterized or treated in the governing instruments as an assessment that may become a lien against the member's interest enforceable by a sale of the interest under *Civ. Code §§ 2924*, *2924b*, and *2924c* [*Civ. Code § 1367.1(e)*; *10 Cal. Code Reg. § 2792.26(c)*]. This prohibition on nonjudicial foreclosure does not apply to reasonable late charges for delinquent assessments, and other costs incurred in collecting delinquent assessments, including attorney's fees [*10 Cal. Code Reg. § 2792.26(d)*]. Nor does it apply to monetary penalties assessed to reimburse the association for the cost of repairing damage to common areas and facilities for which the member or the member's guests or tenants is responsible [*Civ. Code § 1367.1(d)*].

If the association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for violating the governing documents or association rules, including any monetary penalty related to guest or invitee activities, the board of directors must adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the penalties that may be assessed. The schedule must be in accordance with the general authorization for member discipline contained in the governing documents [*Civ. Code § 1363(g)*].

When the board schedules a meeting to consider or impose discipline, the member must be notified in writing, by personal delivery or first-class mail, at least 10 days before the meeting. At a minimum, the notice must include (1) the date, time, and place of the meeting, (2) the nature of the alleged violation, and (3) a statement that the member has a right to attend and address the board at the meeting. The board must meet in executive session if the member so requests [*Civ. Code § 1363(h)*].

If the board imposes discipline on a member, the member must be notified of the disciplinary action in writing by personal delivery or first-class mail within 15 days following the action. Any disciplinary action will be ineffective unless the board complies with these notice and meeting requirements [*Civ. Code § 1363(h)*; *see § 34.202[2]*, Section 3.06(d); *see also Civ. Code § 1363(j)*].

[vi] Use Restrictions and Covenants

Owners' associations have the authority to formulate rules of operation of the common areas and facilities owned or controlled by the association [*10 Cal. Code Reg. § 2792.21(a)(7)*]. Rules and regulations governing the use of common areas are often prepared after the owners have assumed control of the association so that the owners may impose their own use restrictions [*see § 34.208[1]*].

PRACTICE TIP:

Declaration Should Include Appropriate Use Restrictions. Although developers usually recognize the importance to the owners of this form of self-government, the declaration should include any use restrictions that the developer deems to be essential to the desirability and marketability of the project. Obviously, these restrictions must be tailored to fit the circumstances of a particular project [*see § 34.202[2]*, Art. V].

[vii] Architectural and Design Control

A condominium project must have a committee for the control of structural and landscaping architecture and design [*see § 34.202[2]*, Art. VI]. These committees are referred to in the Commissioner's regulations as Architectural Control Committees. The committee must consist of not less than three or more than five members. The developer may appoint all of the original members of the committee and all replacements until the first anniversary of the issuance of the original public report for the first (or only) phase of the project. Further, the developer may reserve the power to appoint a majority of the members of the committee until 90 percent of the condominiums in the project have been sold or until the fifth anniversary date of the original issuance of the final public report for the first (or only) phase of the project,

whichever occurs first [*10 Cal. Code Reg. § 2792.28(a), (b)*; *see § 34.202[2]*, Section 6.02].

After one year from the date of issuance of the original public report for the first (or only) phase of the project, the board of directors of the association must have the power to appoint one member of the committee until 90 percent of all of the condominiums in the project have been sold or until the fifth anniversary date of the original issuance of the final public report for the first (or only) phase of the project, whichever occurs first. Thereafter, the board must have the power to appoint all of the members of the committee [*10 Cal. Code Reg. § 2792.28(c)*; *see § 34.202[2]*, Section 6.02].

If an association's governing documents require association approval before an owner of a separate interest may make a physical change to his or her interest or to the common area, then the governing documents must [*Civ. Code § 1378*]:

- Provide a fair, reasonable, and expeditious procedure for making its decision, which must (1) provide for prompt deadlines, and (2) state the maximum time for response to an application or a request for reconsideration by the board of directors;

- Provide that the decision on the proposed changes must be in writing and made in good faith, and may not be unreasonable, arbitrary, or capricious; and

- Provide that if a proposed change is disapproved, that (1) the written decision of disapproval include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board, and (2) the applicant is entitled to reconsideration by the board at an open meeting of the board (provided, however, that reconsideration of a decision that is made by the board or a body that has the same membership as the board will not be required if the decision was rendered at a meeting that satisfies the requirements of *Civ. Code § 1363.05*).

[viii] Solar Energy Systems

An association may impose reasonable provisions that accomplish the following [*Civ. Code § 714.1*; *see Civ. Code § 714*]:

- Restrict the installation of solar energy systems installed in the common area to those systems approved by the association.

- Require the owner of a condominium (or comparable separate interest) to obtain the approval of the association for the installation of a solar energy system in a condominium owned by another [*see § 34.202[2]*, Section 5.01(j); *see also Civ. Code § 714(e)* (discussed *below*)].

- Provide for the maintenance, repair, or replacement of roofs or other building components.

- Require the installer of a solar energy system to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of the solar energy system.

Additional and alternative statutory requirements relating to solar energy systems apply to any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property [*see Civ. Code § 714*; *see also Civ. Code § 714.1* (requirements discussed above governing provisions imposed by associations apply notwithstanding the general statutory requirements discussed below)]. Specifically, any covenant, restriction, or condition in any of these instruments, as well as any provision in a governing document [*see Civ. Code § 1351(j)*], that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable [*Civ. Code § 714(a)*; *see Civ. Code § 801.5* ("solar energy system" defined)]. This requirement does not apply to provisions that impose reasonable restrictions on solar energy systems. Reasonable restrictions are those that do not "significantly"

increase the cost of the system or "significantly" decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits [*Civ. Code § 714(b)*]; *see Civ. Code § 714(d)(1)* ("significantly" defined)].

Whenever approval is required for the installation or use of such a system, the application for approval must be processed and approved by the appropriate entity in the same manner as an application for approval of an architectural modification to the property [*see § 34.202[1][e][vii]*], and must not be willfully avoided or delayed [*Civ. Code § 714(e)(1)*]. If the approving entity is a homeowners' association, and not a public entity, the decision on an application must be in writing. If a written denial is not issued within 60 days, the application will be deemed approved, unless the delay is the result of a reasonable request for additional information [*Civ. Code § 714(e)(2)*].

For water heating solar energy systems, both the solar energy system and its installation must be certified by the Solar Rating Certification Corporation, which is a nonprofit third-party supported by the United States Department of Energy, or some other nationally-recognized certification agency [*Civ. Code § 714(c)*].

A solar energy system for producing electricity must also meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability [*Civ. Code § 714(c)*].

[ix] Controls Related to Video and Television Antennas, Including Satellite Dishes

A covenant, condition, or restriction is void and unenforceable if it effectively prohibits or restricts a separate interest owner from (1) installing or using a video or television antenna, including a satellite dish, that is 36 inches or less in diameter or measured diagonally; or (2) attaching that antenna or dish to a structure within the development when the antenna is not visible from any street or common area [*Civ. Code § 1376(a)*].

This does not preclude an association from imposing reasonable restrictions on the installation or use of an antenna or dish with a diameter or diagonal measurement of 36 inches or less [*Civ. Code § 1376(a)*]. "Reasonable restrictions" are restrictions that do not significantly increase the cost of the antenna or dish system or significantly decrease the efficiency and performance of the system [*Civ. Code § 1376(b)*]. All of the following are reasonable restrictions [*Civ. Code § 1376(b)*]:

- Requiring application and notice to the association before installation.

- Requiring a separate interest owner to obtain the association's approval before installing a system on a separate interest owned by another.

- Making adequate provision for maintaining, repairing, or replacing roofs or other building components necessitated by the installation and use of the system.

- Requiring the installers to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of the system.

Applications for approval to install or use an antenna or satellite dish must be processed in the same manner as an application for approval of an architectural modification. The architectural control committee may not willfully delay issuing its decision [*Civ. Code § 1376(c)*]. The prevailing party is entitled to attorneys' fees in any action related to enforcement of a covenant, condition, or restriction dealing with the installation or use of television antennas and satellite dishes [*Civ. Code § 1376(d)*].

[x] Controls Related to Keeping Pets

Neither the declaration nor any other governing document (including the development's CC&Rs and the association's bylaws and rules and regulations) entered into, amended, or otherwise modified after 2000 may prohibit an owner of a separate interest in a common interest development from keeping at least one pet within the development, subject to any reasonable rules and regulations of the association. For these purposes, "pet" means any domesticated bird, cat, dog, aquatic animal kept in an aquarium, or other animal as agreed-to between the association and the homeowner. If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation will not apply retroactively to prohibit an owner from continuing to keep any pet that he or she currently keeps, provided the pet otherwise conforms to any previous pet restrictions [*Civ. Code § 1360.5*].

[xi] Rights of Mortgagees

Article X of this form lists several rights of mortgagees of condominiums in the project. Lenders almost inevitably insist that the declaration include a set of lender-drafted mortgagee protections [*see § 34.45[7]*]. Thus, the attorney should not copy the provisions set forth in Article X of this form. Instead, those provisions should be used as a guide to the scope and complexity of the requirements typically imposed by lenders.

Because these mortgagee protection requirements may (and often do) conflict with the requirements of the Department of Real Estate (DRE), the developer may be forced to work out a compromise with the lender and the DRE. This should not be a particularly difficult process because most lenders have had sufficient dealings with California borrowers to know what will be acceptable to the DRE. In any event, the attorney should seek the permission of the DRE to include such provisions in the declaration before submitting the document to the Department for its approval.

[xii] General Requirements Regarding Insurance

The owners' association of a condominium project should obtain fire and casualty insurance, general liability insurance [*see § 34.202[1][e][xiii]*], and other insurance protecting the project and its owners. The developer and attorney should discuss the specifics of the coverage with an insurance adviser. Because lenders and carriers play a vital role in determining what insurance will be maintained by the association, declarations typically set forth very general, minimal requirements governing insurance coverage.

This form reflects two common approaches regarding the handling of fire and casualty insurance. Under the first approach, the association is required to obtain blanket fire and casualty insurance for all improvements in the project, and the owners are prohibited from obtaining their own fire and casualty insurance. This method is usually used when the project consists of a multiunit structure or structures. Under the second approach, each owner must obtain fire and casualty insurance for his or her improvements, while the owners' association insures its improvements [*see § 34.202[2]*, Art. VII]. The attorney should use those approaches and provisions simply as a guide to the structure and scope of the declaration insurance provisions commonly dictated by lenders and carriers.

For discussion of insurance maintained by an owners' association, see California Real Estate Law & Practice, Ch. 385, *Homeowners' Associations* , Pt. C (Matthew Bender).

[xiii] Liability Insurance and Limitations on Liability of Volunteer Directors and Officers

General liability insurance (also referred to as "public liability" insurance) includes all forms of liability insurance except workers' compensation or employer's liability insurance [*see § 34.202[2]*, Section 7.03 (providing for workers' compensation insurance)] and automobile liability insurance [*see* California Insurance Law & Practice, Ch. 41, *Liability Insurance in General* (Matthew Bender)]. Before drafting the general liability insurance provision, counsel should become familiar with the requirements of the Davis-Stirling Act regarding the potential personal liability of

volunteer officers or directors.

The Davis-Stirling Act provides limited immunity from personal liability for a volunteer officer or volunteer director of an owners' association that manages a condominium project or other common-interest development that is exclusively residential. Specifically, the officer or director will not be personally liable in excess of the insurance coverage specified in Civ. Code § 1356.7(a)(4) (discussed *below*) to any person who suffers injury (including bodily injury, emotional distress, wrongful death, or property damage or loss) as a result of the tortious act or omission of the officer or director if all of the following criteria are met [*Civ. Code § 1365.7(a)*]:

- The act or omission was performed within the scope of the officer's or director's association duties, which include, but are not limited to, (1) whether to investigate the development for latent defects before the applicable statute of limitations expires, and (2) whether to commence a civil action against the builder for design or construction defects [*Civ. Code § 1365.7(f)*; *see Code Civ. Proc. § 337.15* (statute of limitations for latent construction defects)].

- The act or omission was performed in good faith.

- The act or omission was not willful, wanton, or grossly negligent.

- The association maintained and had in effect at the time the act or omission occurred and at the time the claim was made one or more policies of insurance that included coverage for both of the following: (1) general liability of the association; and (2) individual liability of officers and directors of the association for negligent acts or omissions in that capacity. Both types of coverage must have been in the following minimum amount (as applicable): (a) at least $500,000 if the project consists of 100 or fewer condominium units (or comparable separate interests), and (b) at least $1,000,000 if the project consists of more than 100 condominiums [*see Civ. Code § 1365.7(a)(4)*; *see also § 34.202[2]*, Section 7.02 (provision incorporates above requirements)].

To qualify for this statutory limitation on liability, the volunteer officer or director must be (1) an owner of no more than two condominiums in the project, or (2) a tenant of a condominium in the project [*Civ. Code § 1365.7(e)*]. An officer or director is not a volunteer for these purposes if, at the time of the act or omission, he or she was a declarant (that is, developer) [*see Civ. Code § 1351(g)* ("declarant" defined)] or received either direct or indirect compensation as an employee from the declarant or from a financial institution that purchased a condominium at a judicial or nonjudicial foreclosure of a mortgage or trust deed on real property [*Civ. Code § 1365.7(c)*]. However, the payment of actual expenses incurred by a director or officer in the execution of the duties of that position does not affect the director's or officer's status as a volunteer for these purposes [*Civ. Code § 1365.7(b)*].

These requirements of *Civ. Code § 1365.7* do not limit the liability of the owners' association for its negligent acts or omissions or for negligent acts or omissions of the officers or directors of the association [*Civ. Code § 1365.7(d)*]. Further, *Civ. Code § 1365.6* does not provide immunity for individual owners of condominium units who are not volunteer officers or directors. By its unambiguous terms, the statute is applicable only to volunteer directors and officers [*Ruoff v. Harbor Creek Community Ass'n (1992) 10 Cal. App. 4th 1624, 1629, 13 Cal. Rptr. 2d 755]* . However, liability of individual owners of separate interests can be limited if the association acquires and maintains similar specified insurance coverage as discussed in *§ 34.202[1][f]*.

[f] Limiting Tort Liability of Individual Owners of Separate Interests

If the association is willing to meet specified requirements for general liability insurance coverage, owners of separate interests will be shielded from liability stemming from tort actions that arise solely by reason of the separate owners' interests as tenants in common in the common area of the development. Specifically, the association must maintain and

have in effect for a specific cause of action, one or more policies covering the association's general liability for at least $2 million if the development consists of 100 or fewer separate interests, and at least $3 million if the development is larger than 100 separate interests [*Civ. Code § 1365.9(b)*].

[g] Covenants and Restrictions in Declaration

The covenants and restrictions in the declaration will be enforceable equitable servitudes, unless unreasonable, and will inure to the benefit of and bind all owners of separate interests in the project [*Civ. Code § 1354(a)*]. The phrase "unless unreasonable" as used above places the burden of proof on any person who claims that the covenants and restrictions are unreasonable and unenforceable [*see also Civ. Code § 1352.5* (prohibiting restrictive covenants that promote unlawful fair housing practices detailed in *Gov. Code § 12955)*]. Unless the declaration states otherwise, its servitudes may be enforced by any owner of a condominium or by the association [*Civ. Code § 1354(a)*; *see § 34.202[2]*, Section 5.04; *see also § 34.202[1][m]*]. In any action to enforce the declaration, the prevailing party will be awarded reasonable attorneys' fees and costs [*Civ. Code § 1354*; *see § 34.202[2]*, Section 13.03].

If the declaration is (1) recorded before the execution of a contract of sale of any interests in the development, (2) describes the property it is to govern, and (3) states that it is to bind all purchasers and their successors, a subsequent purchaser who has constructive notice of the recorded declaration is deemed to intend and agree to be bound by, and to accept the benefits of, the common plan established by the declaration, including the covenants and restrictions, notwithstanding that the declaration is not additionally cited in a deed or other document at the time of sale to the subsequent purchaser [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

For a discussion of covenants, restrictions, and equitable servitudes, see Ch. 28C, *Covenants, Conditions, and Restrictions* .

[h] Liberal Construction of Declaration

Any declaration for a condominium project will be liberally construed to facilitate the operation of the project, and its provisions will be presumed to be independent and severable [*Civ. Code § 1370*; *see § 34.202[2]*, Section 13.04]. The rule against perpetuities [*Prob. Code § 21200 et seq.* (Uniform Statutory Rule Against Perpetuities); *see* Ch. 67, *Future Interests and Perpetuities*] will not invalidate any provision of the declaration or other governing documents of a condominium project [*see Civ. Code § 1370*].

[i] Amendment of Declaration

Under the Subdivided Lands Act, the Real Estate Commissioner must give his or her prior consent to a proposed amendment to a declaration if the following apply: (1) the amendment would materially change the rights of the condominium owners, and (2) it is proposed when the developer or the developer's successor in interest holds or directly controls as many as one-fourth of the votes that may be cast to effect that change [*see Bus. & Prof. Code § 11018.7*; *see also § 34.162*, PP 1, 2]. Whether or not the proposed amendment is subject to that consent requirement, the implementing regulations of the Subdivided Lands Act require amendments to be approved by a certain percentage of the members [*see 10 Cal. Code Reg. § 2792.24*; *see also § 34.162*, P 3].

The Davis-Stirling Act normally requires amendments to be approved by the percentage of owners specified in the declaration (or other governing documents) [*see Civ. Code § 1355(a)*; *see also 10 Cal. Code Reg. § 2792.24*]. However, if that approval cannot be obtained, the association or any owner of a condominium may, under certain circumstances, petition the superior court for an order approving the amendment [*see Civ. Code § 1356*; § 34.162, P 3]. An alternative amendment procedure must be used when the proposed amendment involves the deletion from any of the governing documents of a provision that relates to the construction or marketing of the development [*see Civ. Code § 1355.5*; *see*

also § 34.162, P 5; § 34.202[2], Section 12.04]. Finally, an additional statutory procedure may be used to amend a declaration that neither prohibits nor expressly permits amendments [*see Civ. Code § 1355(b)*; *see also § 34.162*, P 3].

[j] Recordation

The declaration is one of the documents that must be recorded as a prerequisite to the creation of a common interest development under the Davis-Stirling Act [*Civ. Code § 1352*; *see § 34.144*, P 2 (complete list of required documents)]. Ordinarily, the declaration should not be recorded until it has been reviewed by the Real Estate Commissioner [*see § 34.202[1][k]*].

[k] Filing With Real Estate Commissioner

A "substantially complete" application for a final public report [*see § 34.200[1][e][iii]*] must include proposed or existing covenants, conditions, and restrictions for the condominium project [*10 Cal. Code Reg. §§ 2792(a)(7), 2792.1(a)(1), (2)*]. The Department of Real Estate urges applicants to refrain from recording the declaration until after it is reviewed by DRE [*see § 34.200[2]*, P 66]. Regardless of the timing of this submission, the applicant must submit a copy of the final declaration bearing evidence of its recordation before DRE will issue a final public report [*see § 34.200[2]*, PP 65, 67].

[l] Statutory Extension of Term of Declaration

This form provides for automatic extensions of its expiration date until the membership decides to terminate it [*see § 34.202[2]*, Section 13.01]. If a declaration specifies a termination date but contains no provision for the extension of that date, the declaration may be extended by the approval of owners having more than 50 percent of the votes in the association or any greater percentage specified in the declaration for amendments. If the declaration requires that amendments be approved by owners having more than 50 percent of the votes, the term of the declaration may be extended, and the amended "term" provision of the declaration must be recorded, in accordance with the statutory provisions for amending the declaration [*Civ. Code § 1357(b), (c)*; *see Civ. Code § 1356*].

Any single extension of the term of the declaration made pursuant to the above statutory procedure cannot exceed the initial term of the declaration or 20 years, whichever is less. However, there is no limit on the number of such statutory extensions [*Civ. Code § 1357(d)*].

For a guide to the above procedures, see *§ 34.166*, P 1.

[m] Disputes Relating to Enforcement of Declaration

An association must provide a fair, reasonable, and expeditious procedure for resolving, inter alia, disputes related to the declaration [*Civ. Code § 1363.820(a)*; *see generally Civ. Code § 1363.810 et seq.*]. This relatively informal procedure supplements and does not replace the more formal alternative dispute resolution (ADR) procedure described below and prescribed by *Civ. Code § 1369.510 et seq.* For further coverage of the statutory requirements for the intra-association dispute resolution procedure, see *§ 34.34*. For a procedure that meets these requirements, see *§ 34.202[2]*, Section 3.10.

If neither party requests resort to the intra-association dispute resolution procedure or if that procedure fails to resolve dispute, parties must engage in the formal ADR procedure prescribed by *Civ. Code § 1369.510 et seq.* before filing civil enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the small claims court jurisdictional limit. The formal ADR process is not a prerequisite for a small claims action, and does not apply to an assessment dispute [*Civ. Code § 1369.520*; *see* Code Civ. Proc. §§ 116.220, 116.221 (jurisdiction of small claims court)]. For additional discussion, see *§ 34.35*.

[2] FORM

Declaration

Recording Requested by:
_____[*name of declarant*]
When Recorded Mail to:
_____[*name of declarant*]
_____[*address*]
_____[*city, state, zip*]

DECLARATION FOR
_____ [*name of project*],
A CONDOMINIUM PROJECT

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THIS DECLARATION is made on_____[*date*], by_____[*name of declarant*] ("Declarant"), _____ [*describe legal status of declarant, e.g.,* a California Corporation].

RECITALS

A. Declarant is the owner of that certain real property located in the City of _____, County of _____, State of California, and more particularly described on Exhibit "_____" attached to and made a part of this Declaration [*or* in that certain Condominium Plan entitled "_____," recorded in the Office of the Recorder of _____ County, State of California, on_____[*date*], in Book _____ of Maps at Pages _____ through _____ ("Plan") *or* as Tract No. _____, on the Subdivision Map recorded in the Office of the Recorder of _____ County, State of California, on_____[*date*], in Book _____ of Maps at Pages _____ through _____] ("Property").

B. Declarant intends to subdivide the Property into condominium estates subject to the provisions of the Davis-Stirling Common Interest Development Act contained in Division II, Part 4, Title 6 of the California Civil Code, [and] to establish a plan of condominium ownership for the benefit of all the condominium estates created [, and to provide for the annexation of additional real property to the Property].

C. In furtherance of this intent, Declarant hereby declares that all of the Property is and shall continue to be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the declarations, limitations, covenants, conditions, restrictions, reservations, rights, and easements set forth in this Declaration, as this Declaration may be amended from time to time, all of which are declared and agreed to be in furtherance of a plan established for the purpose of enhancing and perfecting the value, desirability, and attractiveness of the Property. All provisions of this Declaration shall constitute covenants running with the land and enforceable equitable servitudes upon the Property, and shall be binding on and for the benefit of all of the Property and all parties having or acquiring any right, title, or interest in all or any part of the Property, including the heirs, executors, administrators, and assigns of

these parties and all subsequent owners and lessees of all or any part of a Condominium.

[*If property is located in airport influence area and declaration is recorded after January 1, 2004, include following statement. See Civ. Code § 1353(a)* .]

NOTICE OF AIRPORT IN VICINITY

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

[*If property is located within San Francisco Bay Conservation and Development Commission's jurisdiction and declaration is recorded on or after January 1, 2006, include following statutory notice. See Civ. Code § 1353(a)(3).*]

NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction.

ARTICLE I. DEFINITIONS

"Articles"

Section 1.01. "Articles" means the Articles of Incorporation of_____[*name of owners' association*] and any amendments thereto that are or shall be filed in the Office of the Secretary of State of the State of California.

"Association"

Section 1.02. "Association" means_____[*name of owners' association*], a California nonprofit mutual benefit corporation.

"Board"

Section 1.03. "Board" means the Board of Directors of the Association.

"Bylaws"

Section 1.04. "Bylaws" means the Bylaws of the Association and amendments thereto that are or shall be adopted by the Board.

"Common Area"

Section 1.05. "Common Area" means the entire Project except all Units as defined in this Declaration or as shown on the Condominium Plan.

"Condominium"

Section 1.06. "Condominium" means an estate in real property consisting of a fee interest in a Unit, the boundaries of which are shown and described on the Condominium Plan, a fractional undivided interest as a tenant in common in the Common Area of the Project, a Membership in the Association, and any Exclusive Use Common Area appurtenant to the Unit. The fractional undivided interest appurtenant to each Unit shall be an undivided _____ [*specify percentage, which is commonly equal to the percent of the total living space in the project that is allocated to the owner's unit*] percent interest in the Common Area.

"Condominium Plan"

Section 1.07. "Condominium Plan" means that condominium plan_____[described in Recital A of this Declaration *or* attached to this Declaration as Exhibit _____] and any amendments thereto.

"Declarant"

Section 1.08. "Declarant" means_____[*name of developer*] and its successors and assigns.

"Declaration"

Section 1.09. "Declaration" means this Declaration and any amendments thereto.

"Exclusive Use Common Area"

Section 1.10. "Exclusive Use Common Area" means those portions of the Common Area reserved for the exclusive use of one or more of the Owners pursuant to Section 2.06 of this Declaration.

"Governing Instruments"

Section 1.11. "Governing Instruments" means this Declaration, the Articles and Bylaws of the Association, and any Rules and Regulations of the Project.

"Manager"

Section 1.12. "Manager" means any person or entity appointed by the Board to manage the Project.

"Member"

Section 1.13. "Member" means every person or entity entitled to membership in the Association as provided in this Declaration.

"Mortgage" and "First Mortgage"

Section 1.14. "Mortgage" means a mortgage or deed of trust encumbering a Condominium or any other portion of the Project. "First Mortgage" means a mortgage that has priority over all other mortgages encumbering the same Condominium or other portions of the Project.

"Mortgagee" and Related Terms

Section 1.15. "Mortgagee" means a Person to whom a Mortgage is made and includes the beneficiary of a deed of trust and any guarantor or insurer of a mortgage. "Institutional Mortgagee" means a mortgagee that is a financial intermediary or depository, such as a bank, savings and loan, or mortgage company, that is chartered under federal or state law and that lends money on the security of real property or invests in such loans, or any insurance company or governmental agency or instrumentality, including the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Government National Mortgage Association (GNMA). "First Mortgagee" means a mortgagee that has priority over all other mortgages or holders of mortgages encumbering the same Condominium or other portions of the Project. The term "Beneficiary" shall be synonymous with the term "Mortgagee."

"Mortgagor" and "Trustor"

Section 1.16. "Mortgagor" means a Person who mortgages his, her, or its property to another (i.e., the maker of a mortgage), and shall include the trustor of a deed of trust. The term "Trustor" shall be synonymous with the term "Mortgagor."

"Owner"

Section 1.17. "Owner" means the record holder or holders of record fee title to a Condominium, including Declarant, and any contract sellers under recorded contracts of sale. "Owner" shall not include any persons or entities who hold an interest in a Condominium merely as security for performance of an obligation.

"Person"

Section 1.18. "Person" means a natural individual, a corporation, or any other entity with the legal right to hold title to real property.

"Plan"

Section 1.19. "Plan" means the condominium plan entitled "_____" [*insert name shown on condominium plan*], filed in the records of _____ County, California, in Book _____ of Maps at Pages _____ through _____.

"Project"

Section 1.20. "Project" means the entire parcel of real property described on the Plan [*add if declaration will contain annexation provisions:* and in any Supplemental Declaration recorded pursuant to Article XI of this Declaration] and all improvements thereon.

"Property"

Section 1.21. "Property" means the real property described in the Recitals [and in any Supplemental Declaration recorded pursuant to Article XI of this Declaration].

"Rules and Regulations"

Section 1.22. "Rules and Regulations" means any Rules and Regulations for_____[*name of project*] regulating the use of the Common Area and adopted by the Association pursuant to Section 3.06(b) of this Declaration.

"Subdivision Map"

Section 1.23. "Subdivision Map" means the recorded map described in _____ [the Recitals *or* Exhibit _____] [and any subdivision map recorded in connection with the annexation of additional real property to the Project pursuant to Article XI of this Declaration].

"Unit"

Section 1.24. "Unit" means that portion of a Condominium that consists of a feeinterest in a Unit. "Unit" does not include the other elements of a Condominium. Each Unit shall be a separate freehold estate, as separately shown, numbered, and designated in the Condominium Plan [or any Supplemental Declaration recorded pursuant to Article XI of this Declaration]. Each Unit consists of a living area space or spaces bounded by and contained within the interior unfinished surfaces of the perimeter walls, floors, ceilings, windows, and doors (including the wall coverings and floor coverings), as shown on the Condominium Plan.

ARTICLE II. THE PROPERTY

Project Subject to Declaration

Section 2.01. The entire Project shall be subject to this Declaration.

Annexation of Additional Property

Section 2.02. Additional property may be annexed to the Project, but only as provided in Article XI of this Declaration.

Common Area

Section 2.03. The following provisions govern the use and enjoyment of the Common Area:

(a) The Association shall have an easement in, to, and throughout the Common Area and its improvements to perform its duties and exercise its powers.

(b) Except as provided in this Declaration, there shall be no judicial partition of the Common Area, nor shall Declarant or any person acquiring an interest in all or any part of the Project seek any judicial partition.

(c) Subject to the provisions of this Declaration, each Owner has nonexclusive rights of ingress, egress, and support through the Common Area. These rights shall be appurtenant to and shall pass with title to every Condominium. However, these rights shall not interfere with, and shall be subordinate to, any exclusive right to use an Exclusive Use Common Area.

(d) The Members' rights of use and enjoyment of the Common Area shall be subject to the restrictions set forth in the Governing Instruments, including the following:

(1) The right of the Association to adopt and enforce Rules and Regulations for the use of the Common Area.

(2) The right of the Association to reasonably limit the number of guests and tenants using the Common Area.

(3) The right of the Association to assign or otherwise control the use of any unassigned parking spaces within the Common Area.

(4) The right of the Association to suspend the right of any Owner, and the Persons deriving rights from any Owner, to use and enjoy the Common Area for any period during which the Owner is delinquent in the payment of any assessment.

(5) The right of the Association to cause the construction of additional improvements in the Common Area, or to cause the alteration or removal of existing improvements on the Common Area.

(6) The right of the Association to grant, consent to, or join in the grant or conveyance of easements, licenses, or rights-of-way in, on, or over the Common Area.

(7) The right of each Owner to the exclusive use of any Exclusive Use Common Area appurtenant to the Owner's Unit.

(8) The rights of Declarant as described in this Declaration.

(9) The right of the Association to reasonably restrict access to roofs, maintenance facilities or areas, landscaped areas, and similar areas of the Project.

(10) The right of the Architectural Control Committee to approve any proposed alteration or modification to the Common Area or any Unit.

(e) Declarant hereby reserves easements for common driveway purposes, for drainage and encroachment purposes, and for ingress to and egress from the Common Area. These easements may be used to complete improvements on the Common Area [and] to perform necessary repair work [*add in the case of a phased development:*, and for entry onto adjacent property in connection with the development of additional phases of the overall Project]. These easements shall remain in effect_____[*specify reasonable limit, e.g.,* for three years from the date of closing of the first sale of a Unit in the Project].

(f) The Association may grant to third parties easements in, on, and over the Common Area for the purpose of constructing, installing, or maintaining necessary utilities and services, and each Unit Owner, in accepting his or her deed to the Unit, expressly consents to these easements. However, no such easement can be granted if it would interfere with any exclusive easement, or with any Owner's use, occupancy, or enjoyment of his or her Unit or any Exclusive Use Common Area appurtenant to the Unit.

(g) A Class A Owner who has sold his or her Condominium to a contract purchaser or who has leased or rented the Condominium shall be entitled to delegate his or her rights to use and enjoy the Common Area to any contract purchaser, tenant, or subtenant who resides in the Owner's Condominium, subject to reasonable regulation by the Board. If the Owner makes such a delegation ofrights, the Owner and the Owner's family, guests, employees, and invitees shall not be entitled to use and enjoy the Common Area for so long as the delegation remains effective.

(h) Each Owner shall be liable to the Association for any damage to the Common Area or to Association-owned property, to the extent that the damage is not covered by insurance, if the damage is sustained because of the negligence, willful misconduct, or unauthorized or improper installment or maintenance of any improvement by the Owner or the Owner's family, guests, tenants, contract purchasers, or invitees. In the case of joint ownership of a Condominium, the liability of the co-owners shall be joint and several, unless the co-owners and the Association have agreed in writing to an alternative allocation of liability.

Partition

Section 2.04. There shall be no judicial partition of the Project or any part of it, nor shall Declarant or any person acquiring an interest in the Project or any part of it seek any judicial partition, except as follows:

(a) If two or more persons own any Condominium as tenants in common or as joint tenants they may maintain a partition action as to their cotenancy.

(b) The Owner of a Condominium may maintain a partition action as to the entire Project, as if all of the Owners in the Project were tenants in common in the Project in the same proportion as their interests in the Common Area, and an appropriate court shall order partition by sale of the entire Project, on a showing of any of the following:

(1) The Project has been in existence for more than 50 years and is obsolete and uneconomical, and owners holding (in the aggregate) more than a 50 percent interest in the common area oppose repair or restoration of the Project.

(2) The Project has been damaged or destroyed and the other criteria set forth in Section 8.03 of this Declaration have been satisfied.

Exclusive Use Common Areas

Section 2.05. The portions of the Common Area listed below are or shall be for the exclusive use of certain Owners of Units and shall be appurtenant to those Units. An Exclusive Use Common Area may [not] be transferred independently of any other interest of the Owner [*consider adding if exclusive use common area may be transferred independently:*, but only to other Owners]. Additional Exclusive Use Common Areas may be designated in the future by the Association, provided that the designation is not inconsistent with the rights of any Owner.

[*Describe exclusive use common areas and specify any such areas that are not to be maintained by the owner(s), e.g.:]*

(a) Each Owner shall have the exclusive right to use, for parking purposes only, any parking space or spaces that _____ (have been *and/or* will be) allocated to the Owner's Unit on _____ (the Condominium Plan *or* Exhibit _____) attached to this Declaration.

(b) Each Owner shall have the exclusive right to use, for any reasonable purpose, any backyard area that is designated as the backyard area for his or her Unit on _____ (the Condominium Plan *or* Exhibit _____) attached to this Declaration. The Owner shall be responsible for keeping that area in good condition and repair; provided, however, that the Association shall be responsible for maintaining any fence surrounding the area and shall add any costs of that maintenance to the Owner's regular monthly assessment.

(c) All of the following fixtures and items designed to serve a single Unit, but located outside the boundaries of the Unit, are Exclusive Use Common Areas allocated exclusively to that separate interest: _____ (*list any of the following that are to be exclusive use common areas:* shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames, and hardware incident thereto, screens, and windows). These items are to be maintained in good condition and repair by the _____ (Owner *or* Association). (*Add if owner is responsible for maintenance:* However, the Owner shall not be responsible for periodic structural repairs, including resurfacing, sealing, caulking, replacement, or painting of the Exclusive Use Common Area unless the repairs are necessitated by the willful or negligent acts of the Owner or the Owner's family or guests.) Any maintenance costs shall be the responsibility of the Owner and shall be added to the Owner's regular monthly assessment. (The following related fixtures and items designed to serve a single Unit are not Exclusive Use Common Areas: _____ (*list any of the items in the above list that are to be excluded*).)

(d) All internal and external telephone wiring designed to serve a single Unit, but located outside the boundaries of the Unit, are Exclusive Use Common Areas allocated exclusively to that Unit. The Owner of the Unit shall be entitled to reasonable access to the Common Area for the purpose of maintaining this wiring, subject to the consent of the Association and to any other conditions reasonably imposed by the Association. The Association's consent shall not be unreasonably withheld.

Maintenance by Owners

Section 2.06. Each Owner shall maintain the Owner's Unit, including the equipment and fixtures in the Unit and the interior surfaces of the walls, ceilings, floors, and doors, in a clean, sanitary, and attractive condition. This maintenance shall be at the Owner's expense. However, the Owner shall not take any actions that would impair or otherwise alter the structural integrity or mechanical systems or lessen the support of the Unit or any other portion of the Project, without theprior written approval of the Architectural Control Committee, as provided in Article VI of this Declaration._____[The Association rather than the Owner shall be responsible for maintaining any Exclusive Use Common Area appurtenant to the Owner's Lot *or* The Owner shall also, at his or her sole expense, maintain and keep in a reasonably good state of repair any Exclusive Use Common Area appurtenant to the Owner's

Unit].

Presumption Regarding Boundaries of Units

Section 2.07. In interpreting deeds, declarations, and plans, the existing physical boundaries of a Unit, including any Unit reconstructed in substantial accordance with the Condominium Plan and the original construction plans for the Project, shall be conclusively presumed to be its boundaries, rather than the description expressed in the deed, Condominium Plan, or Declaration. This presumption applies regardless of settling or lateral movement of the building and regardless of minor variances between boundaries, as shown on the Condominium Plan or described in the deed and Declaration, and the boundaries of the building as constructed or reconstructed.

Prohibition Against Severance of Elements

Section 2.08. Any conveyance, judicial sale, or other voluntary or involuntary transfer of a Unit shall include the undivided interest in the Common Area [and any Exclusive Use Common Areas appurtenant to the Unit]. Any conveyance, judicial sale, or other voluntary or involuntary transfer of the Owner's entire estate shall also include the Owner's Membership interest in the Association, as provided in Section 3.02 of this Declaration. Any transfer that attempts to sever those component interests [, except a transfer of an Exclusive Use Common Area pursuant to Section 2.05 of this Declaration,] shall be void.

ARTICLE III. OWNERS' ASSOCIATION

Organization of the Association

Section 3.01. The Association is or shall be incorporated under the name of _____, as a nonprofit corporation organized under the California Nonprofit Mutual Benefit Corporation Law. From the closing of the escrow for the first sale of a Unit, the Association shall be charged with the duties and invested with the powers prescribed by law and set forth in this Declaration, the Articles of Incorporation, and the Bylaws.

Membership

Section 3.02. Every Owner, on becoming an Owner, shall automatically become a Member of the Association. Ownership of a Unit is the sole qualification for membership. Each Member shall have the rights, duties, privileges, and obligations set forth in the Governing Instruments. Membership shall automatically cease when the Owner no longer holds an ownership interest in a Condominium. All memberships shall be appurtenant to the Condominium conveyed, and cannot be transferred, assigned, conveyed, hypothecated, pledged, or alienated except as part of a transfer of the Owner's entire ownership interest, and then only to the transferee. Any transfer of the Owner's title to his or her Condominium shall automatically transfer the appurtenant membership to the transferee.

Classes of Membership

Section 3.03. The Association shall have two classes of voting membership, as follows:

(a) All Owners, other than the Declarant, shall be Class A members. Class A membership entitles the holder to one vote

for each Condominium owned. When a Condominium is owned by more than one person, only one vote may be cast for the Condominium, as provided in Section 3.04(b) of this Declaration.

(b) The Declarant shall be the sole Class B member. The Class B member shall be entitled to three votes for each Unit owned. Class B membership shall cease and be converted to Class A membership on the occurrence of whichever of the following is first in time:

[*Choose one of the following alternatives:*]

[*For a single-phase project, use:*]

(1) The total outstanding votes of the Class A members equals or exceeds the total outstanding votes of the Class B member; or

(2) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a Unit following the original issuance of the final subdivision public report for the Project.

[*OR*]

[*For a multi-phase project, use:*]

(1) On a prescribed date to be established by the Board, which must not be later than the second anniversary of the first conveyance of a Unit following the original issuance of the final subdivision public report for the most recent phase of the Project; or

(2) On a prescribed date to be established by the Board, which must not be later than the fourth anniversary of the first conveyance of a Unit following the issuance of the final subdivision public report for the first phase of the Project.

[*Continue with the following:*]

Voting Rights

Section 3.04. All voting rights of the Owners shall be subject to the following restrictions, limitations, and requirements:

(a) Except as provided in this Article, on each matter submitted to a vote of the Owners, each Owner shall be entitled to cast one vote for each Condominium owned.

(b) Fractional votes shall not be allowed. When there is more than one record Owner of a condominium ("co-owners"), all of the co-owners shall be Members, but only one of them shall be entitled to cast the single vote attributable to the Condominium. Co-owners should designate in writing one of their number to vote. If no such designation is made or if

it is revoked, the co-owners shall decide among themselves, by majority vote, how that Condominium's vote is to be cast. Unless the Board receives a written objection in advance from a co-owner, it shall be conclusively presumed that the voting co-owner is acting with the consent of his or her co-owners. No vote shall be cast for the Condominium on a particular matter if a majority of the co-owners present in person or by proxy cannot agree on a vote.

(c) Except as provided in Section 3.06(c) of this Declaration, governing the enforcement of certain bonded obligations, and Section 3.06 of the Bylaws, governing the removal of directors, as long as two classes of voting memberships exist, any provision of this Declaration, the Articles, or the Bylaws that requires the approval of a specified percentage of the voting power of the Association (rather than simply requiring the vote or written consent of a majority of a quorum) shall require the approval of the specified percentage of the voting power of each class of membership. Except as provided in Section 3.06(c) of this Declaration and _____ [*specify bylaw provision governing removal of directors, e.g.*, Section 3.06] of the Bylaws, when the Class B Membership has terminated, any provision of this Declaration, the Articles, or the Bylaws that requires the approval of a specified percentage of the voting power of the Association shall require the vote or written consent of Owners representing the specified percentage of both the total voting power of the Association and the voting power of the Association residing in Owners other than Declarant.

(d) The Board shall fix, in advance, a record date or dates for the purpose of determining the Owners entitled to notice of, and to vote at, any meeting of Owners. The record date for notice of a meeting shall not be more than 90 or less than 10 days before the date of the meeting. The record date for voting shall not be more than 60 days before the date of the meeting or before the date on which the first written ballot is mailed or solicited. The Board may also fix, in advance, a record date for the purpose of determining the Owners entitled to exercise any rights in connection with any other action. Any such date shall not be more than 60 days prior to the action.

(e) Every Owner entitled to vote at any election of the Directors may cumulate the Owner's votes and give one candidate a number of votes equal to the number of Directors to be elected multiplied by the number of votes to which the Owner is entitled, or distribute the Owner's votes on the same principle among as many candidates as the Owner thinks fit. No Owner shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination prior to voting and a Owner has given notice at the meeting prior to the voting of the Owner's intention to cumulate votes. If any one Owner has given such notice, all Owners may cumulate their votes for candidates in nomination.

Membership Meetings

Section 3.05. Article II of the Bylaws governing meetings of the Members is hereby incorporated by reference.

General Powers and Authority

Section 3.06. The Association shall have all the powers of a nonprofit mutual benefit corporation organized under the California Nonprofit Mutual Benefit Corporation Law, subject to any limitations set forth in this Declaration or in the Articles and Bylaws of the Association. It may perform all acts that may be necessary for or incidental to the performance of the obligations and duties imposed on it by this Declaration or the other Governing Instruments. Its powers shall include, but are not limited to, the following:

(a) The Association shall have the power to establish, fix, levy, collect, and enforce the payment of assessments against the Owners in accordance with the procedures set out in Article IV of this Declaration.

(b) The Association shall have the power to adopt reasonable Rules and Regulations governing the use of the Common Area and its facilities, and of any other Association property. These Rules and Regulations may include, but are not

limited to: reasonable restrictions on use by the Owners and their families, guests, employees, tenants, and invitees; rules of conduct; and the setting of reasonable fees for the use of recreational facilities. A copy of the current Rules and Regulations, if any, shall be given to each Owner and shall be posted at conspicuous places in the Common Area. If any provision of the Rules and Regulations conflicts with any provision of this Declaration, the Articles, or the Bylaws, the Declaration, Articles, or Bylaws shall control to the extent of the inconsistency.

(c) The Association shall have the right to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the Owners, in matters pertaining to the following:

(1) Enforcement of this Declaration, the Articles, Bylaws, and Rules and Regulations.

(2) Damage to the Common Area.

(3) Damage to the Units that the Association is obligated to maintain or repair.

(4) Damage to the Units that arises out of, or is integrally related to, damage to the Common Area or Units that the Association is obligated to maintain or repair.

The Association may enforce payment of assessments in accordance with the provisions of Article IV of this Declaration.

(d) In addition to the general power of enforcement described above, the Association may discipline its Owners for violation of any of the provisions of the Governing Instruments or Rules and Regulations by suspending the violator's voting rights and privileges for use of the Common Area, or by imposing monetary penalties, subject to the following limitations:

(1) The accused Owner shall be given notice and an opportunity to be heard with respect to the alleged violation in accordance with the provisions of *Civil Code Section 1363(h)*.

(2) Any suspension of an Owner's association privileges shall not exceed _____ [*insert number, e.g.*, 60] days for each violation.

(3) If the Association imposes a monetary penalty, the Board shall distribute to each Owner, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations. [*If desired, add:* No monetary penalty imposed for these purposes shall exceed $_____ for each violation.]

(4) Except as provided in Article IV of this Declaration, relating to foreclosure for failure to pay assessments, or as a result of the judgment of a court or a decision arising out of arbitration, the Association shall in no way abridge the right of any Owner to the full use and enjoyment of his or her Unit.

(e) The Association, acting through the Board, shall have the power to delegate its authority, duties, and responsibilities to its officers, employees, committees, or agents, including a professional management agent. The term of any agreement with a manager or the Declarant for the furnishing of maintenance, repair, and related services shall not exceed one year, renewable by agreement of the parties for successive one-year periods. Such an agreement shall be terminable by either party (1) for cause on 30 days' written notice and (2) without cause or the payment of a termination fee on 90 days' written notice.

(f) The Association's agents or employees shall have the right to enter any Unit when necessary in connection with any maintenance, landscaping, or construction work for which the Association is responsible. This entry shall be made only on notice to the Owner (except in the case of an emergency) and with as little inconvenience to the Owner as is practicable, and the Association shall repair any resulting damage at its own expense.

Duties of the Association

Section 3.07. In addition to the duties delegated to the Association or its agents and employees elsewhere in the Governing Instruments, the Association shall be responsible for the following:

(a) The Association, acting through the Board, shall operate, maintain, repair, and replace the Common Area and its improvements, all landscaping, and the exterior surfaces of all structures and Units in the Project, or contract for the performance of that work, subject to the provisions of Article VIII of this Declaration relating to destruction of improvements, Article IX of this Declaration pertaining to eminent domain, and Section 2.03(h) of this Declaration relating to damage caused by Owners. These areas and improvements shall be kept in a clean, sanitary, and attractive condition. [*Add the following or an alternative arrangement (see Civ. Code § 1364):* Further, the Association shall keep the Common Areas free of infestation by wood-destroying pests or organisms. If infestation is present, the Association shall have the right to cause the temporary, summary removal of any occupant of the Project while the Association has the infestation treated. The temporary relocation must be preceded by notice provided by the Association pursuant to *Civil Code Section 1364*.] The Association shall _____ [also *or* not] be responsible for maintaining Exclusive Use Common Areas. The Association shall also have the exclusive right and duty to acquire and maintain any furnishings and equipment for the Common Area that it determines are necessary and proper. As a general rule, maintenance costs shall be included in the regular assessments. However, if additional work is required for a particular Unit, the expenses of that additional work shall be charged solely to the Owner of the Unit in the month in which the work is performed. [*Add the following or an alternative allocation of responsibility for pest control costs (see Civ. Code § 1364):* Further, the Owner of a Unit shall pay the costs of any temporary relocation of any occupant of the Unit occasioned by the presence of wood-destroying pests or organisms.] If the Owner does not pay for the additional work within _____ calendar days after receiving the bill, the Association shall institute appropriate collection actions and shall recover the reasonable costs of collection, including attorneys' fees and interest from the due date until paid at the rate of _____ percent per annum.

(b) The Association shall use the maintenance fund described in Section 4.03 of this Declaration to, among other things, acquire and pay for the following:

(1) Water, sewer, garbage, electrical, telephone, gas, elevator, and other necessary utility service for the Common Area and, to the extent not separately metered and charged, for the Units;

(2) The insurance policies described in Article VII of this Declaration;

(3) The services of any personnel that the Board determines are necessary or proper for the operation of the Common Area; and

(4) Legal and accounting services necessary or proper in the operation of the Common Area or the enforcement of this Declaration.

(c) If the Association is obligee under a bond or other arrangement to secure the performance of Declarant as to any Common Area improvements that were not completed prior to the issuance of the final public report on the Project, the following provisions shall govern the initiation of action to enforce the bond:

(1) The Board of Directors of the Association shall consider and vote on the question of action by the Association to enforce the obligations under the bond with respect to any improvement for which a Notice of Completion has not been filed within 60 days after the completion date specified for the improvement in the Planned Construction Statement appended to the bond. If the Association has given an extension in writing for the completion of any Common Area improvement, the Board shall consider and vote on the above question if a Notice of Completion has not been filed within 30 days after the expiration of the extension.

(2) If the Board votes not to initiate action to enforce the obligations under the bond, or if it fails to consider and vote on the matter as required, a special meeting of the Owners of the Association shall be called for the purpose of overriding the Board's decision or for taking action on the matter, on receipt of a petition calling for such a meeting signed by Owners representing at least 5 percent of the total voting power of the Association. The meeting shall be held not less than 35 days or more than 45 days after receipt of the petition by the Board. At the special meeting, only the Owners other than Declarant shall be allowed to vote on the matter. A vote by a majority of the voting power of the Association residing in Owners other than Declarant to take action to enforce the obligations under the bond shall be deemed to be the decision of the Association, and the Board shall implement this decision by initiating and pursuing appropriate action in the name of the Association.

(d) The Association shall prepare a pro forma operating budget for each fiscal year, and shall distribute a copy of the budget to each Owner not less than 45 and not more than 60 days before the beginning of the fiscal year. As an alternative to this distribution of the budget, the Association may elect to do all of the following in the manner required by statute: distribute a summary of the budget to each Owner, make the budget available for inspection at a designated location, and provide copies of the budget to Owners on request and at the expense of the Association. The budget shall contain at least the following:

(1) The estimated revenue and expenses on an accrual basis.

(2) A summary (printed in bold type) of the Association's reserves that is based on the most recent review or study conducted pursuant to *Civil Code Section 1365.5*. This summary shall include the following: (i) the current estimated replacement cost, estimated remaining life, and estimated useful life of each major component that the Association is obligated to maintain (hereafter referred to as the "major components"); (ii) the current estimate, as of the end of the fiscal year for which the study is prepared, of the amount of cash reserves necessary to repair, replace, restore, or maintain the major components; (iii) the current amount, as of the end of the fiscal year for which the study is prepared, of accumulated cash reserves actually set aside to repair, replace, restore, or maintain the major components; and (iv) the percentage that the amount described in (iii), *above*, is of the amount determined for purposes of (ii), *above* (that is, the percentage obtained by dividing the amount described in (iii), *above*, by the amount described in (ii), *above*).

(3) A statement as to whether the Board has determined or anticipates that the levy of one or more special assessments will be required to repair, replace, or restore any major component or to provide adequate reserves for such work.

(4) A general statement addressing the procedures used for the calculation and establishment of reserves to defray the future repair, replacement, or additions to the major components.

(e) Within 120 days after the close of each fiscal year, the Association shall prepare and distribute to the Owners an annual report consisting of the following:

(1) A balance sheet as of the end of the fiscal year;

(2) An operating (income) statement for the fiscal year;

(3) A statement of changes in financial position for the fiscal year; and,

(4) For any fiscal year in which the gross income to the Association exceeds $75,000, a copy of the review of the annual report prepared in accordance with generally accepted accounting principles by a licensee of the California State Board of Accountancy. If this report is not prepared by an independent accountant, it shall be accompanied by the certificate of an authorized officer of the Association that the statement was prepared without independent audit or review from the books and records of the Association.

(f) Within 60 days before the beginning of each fiscal year, the Association shall prepare and distribute to the Owners a statement describing the Association's policies and practices in enforcing lien rights or other legal remedies for default in payment of assessments against Owners.

(g) The Association shall prepare a balance sheet, as of an accounting date that is the last day of the month closest in time to six months from the date of closing of the first sale of a Unit in the Project, and an operating statement for the period from the date of the first closing to the above accounting date. The Association shall distribute this statement to the Owners within 60 days after the accounting date. This operating statement shall include a schedule of assessments received and receivable identified by the number of the Unit and the name of the Owner assessed.

(h) Each year, the Association must provide the Owners with a summary of the provisions of *Civil Code Sections 1369.510 through 1369.590*. These statutes require that alternative dispute resolution be pursued before a civil action may be filed in connection with certain disputes related to enforcement of the governing documents, the Davis-Stirling Common Interest Development Act (*Civ. Code § 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*). The required summary must include a specific reference to *Civil Code Sections 1369.510 through 1369.590*, and the statutory language set forth in *Civil Code Section 1369.590(a)*. This summary must be provided either (1) at the time the pro forma operating budget described in Section 3.07(d) of this Declaration is distributed, or (2) in the manner specified in *Corporations Code Section 5016*.

(i) The Association shall provide any Owner with the following documents within 10 days of the mailing or delivery of a written request for the documents:

(1) A copy of the Governing Instruments.

(2) A copy of the most recent financial statement distributed pursuant to Section 3.07(d) of this Declaration.

(3) A written statement from an authorized representative of the Association specifying (i) the amount of any assessments levied on the Owner's Unit that are unpaid on the date of the statement; and (ii) the amount of late charges, interest, and costs of collection that, as of the date of the statement, are or may be made a lien on the Owner's Unit pursuant to Section 4.09 of this Declaration. The Association may charge the Owner a reasonable fee to cover its cost to prepare and reproduce those requested items.

(j) The Association shall pay all real and personal property taxes and assessments levied against it, its personal property, the Common Area, and Exclusive Use Common Areas.

Board of Directors

Section 3.08. The affairs of the Association shall be managed and its duties and obligations performed by an elected Board of Directors, as provided in Article III of the Bylaws, which is hereby incorporated by reference.

Inspection of Books and Records

Section 3.09. Article XI of the Bylaws, governing the duty of the Association to maintain certain books and records and the rights of Owners and Directors to obtain and inspect those books and records, is hereby incorporated by reference.

Resolution of Disputes

Section 3.10. As required by *Civil Code Section 1363.820(a)*, the Association shall offer a fair, reasonable, and expeditious procedure for resolving any dispute between the Association and a member involving their rights, duties, or liabilities under the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*), or under the Association's governing documents. This dispute resolution procedure is supplementary to the alternative dispute resolution procedure prescribed by *Civil Code Section 1369.510 et seq.* as a prerequisite to commencing civil action. The dispute resolution procedure shall consist of the following:

(a) Either party may initiate the procedure by making a written request to the other party to meet and confer in an effort to resolve the dispute. If the request is by the Association, the member may refuse to participate. However, if the request is by a member, the Association may not refuse to participate.

(b) Within 5 days of the written request, the Board of Directors shall designate a member of the Board to meet and confer with the other party.

(c) Within 10 days of the Board member's designation, the parties shall meet at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

(d) If the parties reach agreement on a resolution of the dispute, that resolution shall be memorialized in writing and signed by the parties with the Board designee signing on behalf of the Association.

(e) An agreement reached by the parties is binding on them and may be judicially enforced provided the agreement is consistent with the authority granted by the Board of Directors to its designee, and further provided the agreement is not in conflict with law or the Association's governing documents.

(f) A member of the Association may not be charged a fee to participate in the dispute resolution procedure.

ARTICLE IV. ASSESSMENTS AND COLLECTION PROCEDURES

Covenant to Pay

Section 4.01. The Declarant covenants and agrees, for each Unit owned by it in the Project, and each Owner by

acceptance of the deed to the Owner's Unit is deemed to covenant and agree to pay to the Association the regular and special assessments levied pursuant to the provisions of this Declaration. A regular or special assessment and any late charges, reasonable costs of collection, and interest, as assessed in accordance with the provisions of this Article, shall be a debt of the Owner of the Unit at the time the assessment or other sums are levied. The Owner may not waive or otherwise escape liability for these assessments by nonuse of the Common Area or abandonment of the Owner's Unit.

Exemptions From Assessments

Section 4.02. The obligation to pay assessments shall be subject to the following exemptions:

(a) Any Owner (including Declarant) of a lot in the Project that does not include a structural improvement for human occupancy shall be exempted from that portion of any assessment which is for the purpose of defraying expenses and reserves directly attributable to the existence and the use of those structural improvements. This exemption shall include, but is not limited to, the following:

(1) Roof replacement;

(2) Exterior maintenance;

(3) Walkway and carport lighting;

(4) Refuse disposal;

(5) Cable television; and

(6) Domestic water supplied to living units.

Any such exemption shall be in effect only until the occurrence of the earliest of the following events: (i) the recordation of a notice of completion of the structural improvement; (ii) the occupation or use of the structural improvement; or (iii) completion of all elements of the residential structures that the Association is obliged to maintain.

(b) Any Owner (including Declarant) of a lot in the Project shall be exempted from that portion of any assessment that is for the purpose of defraying expenses and reserves directly attributable to the existence and use of a common facility that is not complete at the time the assessment commences. This exemption shall be in effect only until a notice of completion of the common facility is recorded or the common facility is placed into use, whichever occurs first.

Purpose of Assessments

Section 4.03. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the Owners, for the operation, replacement, improvement, and maintenance of the Property, and to discharge any other obligations of the Association under this Declaration. All assessment payments shall be put into a maintenance fund to be used for these purposes.

Assessment Period

Section 4.04. The fiscal year for the Association shall be a calendar year, unless the Board decides otherwise. The regular assessment period shall commence on January 1 and terminate on December 31 of each year; provided,

however, that the first regular assessment period for all Condominiums _____ [in the Project *or, if annexation is anticipated:* in a phase of development] shall commence on the _____ (Project *or* phase) *or* first day of the month following the conveyance of a Unit in the _____ (Project *or* phase)], _____ [date of the first conveyance of a Unit in the _____, and shall terminate on December 31 of that year.

Regular Assessments

Section 4.05. Within 60 days prior to the beginning of each fiscal year of the Association, the Board shall estimate the net charges to be paid during that year, including a reasonable provision for contingencies and replacements, with adjustments made for any expected income and surplus from the prior year's fund. The estimated cash requirement shall be assessed to each Owner according to the ratio of the number of Units owned by that owner to the total number of Units in the Project subject to assessment. Regular assessments for fractions of any month shall be prorated. Each Owner is obligated to pay assessments to the Board in equal monthly installments on or before the first day of each month unless the Board adopts an alternative method for payment. Declarant shall pay its full prorated share of the regular assessments on any unsold Condominiums subject to regular assessments.

Special Assessments

Section 4.06. If the Board determines that the amount to be collected from regular assessments will be inadequate to defray the common expenses for the year due to the cost of any construction, unexpected repairs or replacements of capital improvements on the Common Area, or any other reason, it shall make a special assessment for the additional amount needed. Special assessments shall be levied and collected in the same manner as regular assessments.

Limitations on Assessments

Section 4.07. The Board shall comply with the following requirements governing the imposition and amounts of assessments:

(a) For any fiscal year, the Board may impose a regular assessment per Unit that is as much as 20 percent greater than the regular assessment for the preceding fiscal year, provided (1) the Board has distributed the pro forma operating budget described in Section 3.07(d) for the current fiscal year or (2) the increase is approved by Owners constituting a majority of the votes at a meeting or in an election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(b) The Board may impose, for any fiscal year, a regular assessment per Unit that is more than 20 percent greater than the regular assessment for the preceding fiscal year, or may levy special assessments that in the aggregate exceed 5 percent of the budgeted gross expenses of the Association for that fiscal year, provided the increase or levy is approved by Owners constituting a majority of the Owners of the Association and casting a majority of the votes at a meeting or election of the Association conducted in accordance with *Corporations Code Sections 7510-7527* and *7613*.

(c) The Board may, without complying with the above requirements, make an assessment increase that is necessary for an emergency situation. An emergency situation is an extraordinary expense that is:

(1) Required by a court order.

(2) Necessary to repair or maintain the Project or any part of it for which the Association is responsible when a threat to personal safety in the Project is discovered.

(3) Necessary to repair or maintain the Project or any part of it for which the Association is responsible that could not have been reasonably foreseen by the Board in preparing and distributing the pro forma operating budget pursuant to Section 3.07(d).

(4) Incurred in making the first payment of the earthquake insurance surcharge pursuant to *Insurance Code Section 5003*.

Before the Board may impose or collect an assessment in the type of emergency situation described in (3), *above*, it shall pass a resolution containing written findings as to the necessity of the extraordinary expense and why the expense was not or could not have been reasonably foreseen in the budgeting process, and shall distribute the resolution to the Owners with the notice of assessment.

(d) The Board shall notify the Owners in writing of any increase in the amount of a regular or special assessment. The Board shall provide this notice by first-class mail not less than 30 or more than 60 days prior to the due date of the increased assessment.

Late Charges

Section 4.08. Late charges may be levied by the Association against an Owner for the delinquent payment of regular and special assessments. An assessment is delinquent 15 days after its due date. If an assessment is delinquent the Association may recover all of the following from the Owner:

(a) Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorneys' fees.

(b) A late charge not exceeding 10 percent [*or specify lower rate*] of the delinquent assessment or $10, whichever is greater [*or specify lower charge*].

(c) Interest on the above sums, at an annual percentage rate of 12 percent [*or specify lower rate*], commencing 30 days after the assessment becomes due.

No late charge may be imposed more than once for the delinquency of the same payment. However, the imposition of a late charge on any delinquent payment shall not eliminate or supersede charges imposed on prior delinquent payments.

Enforcement of Assessments and Late Charges

Section 4.09. At least 30 days before the Association can place a lien on a Unit for a past due debt for a regular or special assessment, the Association must notify the Owner by certified mail of the following:

(1) A general description of the Association's collection and lien enforcement procedures.

(2) The method of calculation of the amount due.

(3) A statement that the Owner has the right to inspect the Association records.

(4) A statement informing the Owner that the Owner's Unit may be subject to foreclosure and sale without court action.

(5) An itemized statement of the charges owed by the Owner, including items on the statement that indicate the amount of any delinquent assessments, the fees and reasonable costs of collection, reasonable attorney's fees, and any late charges and interest.

(6) A statement that the Owner will not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid on time.

(7) The Owner's right to request a meeting with the Board if the Owner disputes the debt.

An Owner may dispute the debt by submitting to the Board a written explanation within 15 days of the mailing of the Association's notice. The Board must respond to an Owner's timely explanation within 15 days of the mailing of the Owner's explanation.

An Owner also may submit a written request to meet with the Board to discuss a payment plan for the debt. The request must be mailed within 15 days of the mailing of the Board's notice. The Board must then meet with the Owner in executive session within 45 days of the mailing of the Owner's request. If there is no regularly scheduled Board meeting within that time period, the Board may designate a committee of one or more members to meet with the Owner.

Any partial payments made toward the debt will first be applied to the assessments owed, and only after the principal owed is paid in full will the payments be applied to the fees and costs of collection, attorneys' fees, late charges, or interest. When an Owner makes a payment, the Owner may request a receipt and the Association shall provide it. The receipt shall indicate the date of payment and the person who received it. The Association shall provide a mailing address for overnight payment of assessments.

A debt for a delinquent regular or special assessment and any late charges, reasonable fees and costs of collection, reasonable attorneys' fees, and interest shall become a lien on the Unit when a notice of delinquent assessment is duly recorded and mailed as provided in *Section 1367.1 of the California Civil Code*.

Except as provided below regarding debts arising from delinquent assessments when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, any such lien may be enforced in any manner permitted by law, including judicial foreclosure or nonjudicial foreclosure. Any nonjudicial foreclosure shall be conducted by the trustee named in the notice of delinquent assessment or by a trustee substituted pursuant to *Section 2934a of the California Civil Code*, in accordance with the provisions of *Sections 2924*, *2924b*, and *2924c of the California Civil Code*.

If the sums specified in the notice of delinquent assessment are paid before the completion of any judicial or nonjudicial foreclosure, the Association shall record a notice of satisfaction and release of the lien. On receipt of a written request by the Owner, the Association shall also record a notice of rescission of any declaration of default and demand for sale.

In accordance with *Section 1367.4 of the California Civil Code*, a lien securing a debt arising from a delinquent regular or special assessment when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, shall not be enforced by judicial or nonjudicial foreclosure unless and until either (1) the debt equals or exceeds $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, and interest, or (2) the debt secured by the lien is more than 12 months delinquent.

Statement Regarding Assessments

Section 4.10. The Association shall provide any Owner, on written request, with a statement specifying (1) the amounts of the Association's current regular and special assessments and fees, and (2) the amounts of any delinquent assessments and related late charges, interest, and costs levied against the Owner's Unit, as provided in Section 4.08 of this Declaration.

ARTICLE V. USE RESTRICTIONS AND COVENANTS

General Restrictions on Use

Section 5.01. In exercising the right to occupy or use a Unit or the Common Area and its improvements, the Owner and the Owner's family, guests, employees, tenants, and invitees shall not do any of the following:

(a) Attempt to further subdivide a Unit without obtaining the prior approval of the Association.

(b) Occupy or use a Unit, or permit all or any part of a Unit to be occupied or used, for any purpose other than as a private residence. Nothing in this Declaration shall prevent an Owner from leasing or renting out his or her Unit, provided that it is not for transient or hotel purposes, is for a period of at least 60 days, and is subject to the Governing Instruments.

(c) Permit anything to obstruct the Common Area or store anything in the Common Area without the prior consent of the Board, except as otherwise provided in the Governing Instruments.

(d) Perform any act or keep anything on or in any Unit or Exclusive Use Common Area or in the Common Area that will increase the rate of insurance on the Common Area without the Board's prior written consent. Further, no Owner shall permit anything to be done or kept in his or her Unit, in any Exclusive Use Common Area appurtenant to the Unit, or in the Common Area that would result in the cancellation of insurance on any Unit or Exclusive Use Common Area or on any part of the Common Area or that would violate any law.

(e) Store gasoline, kerosene, cleaning solvents, or other flammable liquids in the Common Area or in any Unit; provided, however, that reasonable amounts of these liquids may be placed in metal containers and stored in the storage spaces.

(f) Display any sign to the public view on or from any Unit or the Common Area without the prior written consent of the Board, except a sign advertising the property for sale, lease, or exchange, or advertising directions to the property, as provided in *Section 712 of the California Civil Code*.

(g) Raise, breed, or keep animals, livestock, or poultry of any kind in a Unit or in the Common Area, except dogs, cats, or other household pets, which may be kept in Units, subject to the Rules and Regulations (if any).

(h) Engage in any noxious or offensive activity in any part of the Project.

(i) Alter or modify the exterior of any improvements located in a Unit without first obtaining the written consent of the Architectural Control Committee.

(j) Install a solar energy system in a Unit owned by another without first obtaining the written consent of the Architectural Control Committee.

(k) Alter, construct, or remove anything on or from the Common Area, except on the written consent of the Board.

(l) Park any automobile or other motor vehicle in the Common Area or in any Exclusive Use Common Area except in a space designated for the Owner by the Board or the Governing Instruments.

(m) Install any video or television antenna, including a satellite dish, with a diameter or diagonal measurement greater than 36 inches. Association reserves the right to impose reasonable restrictions on the installation of any video or television antenna, including a satellite dish with a diameter or diagonal measurement of 36 inches or less.

[*Insert any alternative or additional restrictions that reflect the characteristics of client's project.*]

Damage Liability

Section 5.02. Each Owner shall be liable to the Association for all damage to the Common Area or other Association property that is sustained by reason of the negligence or willful misconduct of that Owner or his or her family, guests, employees, tenants, and invitees, to the extent that the damage is not covered by the casualty insurance obtained and maintained by the Association pursuant to Section 7.01 of this Declaration. [*Add if applicable:* Each Owner, by accepting his or her deed, agrees to provide insurance to the extent required by Section 7.05 of this Declaration].

Exemption

Section 5.03. Declarant shall be exempt from the restrictions of Section 5.01 to the extent necessary to complete any construction work, sales activities, or additions to or affecting the Project. This exemption includes, but is not limited to, maintaining Units as models, placing advertising signs on the Property, and generally using Project lots and the Common Area to carry on construction activity.

Equitable Servitudes

Section 5.04. The covenants and restrictions set forth in this Declaration shall be enforceable equitable servitudes and shall inure to the benefit of and bind all Owners. These servitudes may be enforced by _____ [any Owner or by the Association or by both *or set forth alternative enforcement provision*].

ARTICLE VI. ARCHITECTURAL AND DESIGN CONTROL

Architectural and Design Approval

Section 6.01. No building, addition, wall, fence, or alteration shall be commenced, constructed, maintained, or permitted to remain on any lot or Unit, or on the Common Area, until complete plans and specifications of the proposed work have been submitted to and approved by the Architectural Control Committee. The Committee shall review the plans and specifications to determine whether they are compatible with the standards of design, construction, and quality of the Project and, if they are not, shall require that changes be made before approval.

Architectural Control Committee

Section 6.02. The Architectural Control Committee shall consist of _____ [*specify number which must be at least three but not more than five*] members, formed as follows:

(a) The Declarant shall appoint all of the original members and all replacements until the first anniversary of the issuance of the original final public report for the [*add if project is to be developed in phases:* first phase of the] Project. Further, Declarant may reserve the power to appoint a majority of the Committee until 90 percent of all Units have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Project, whichever occurs first. After one year from the date of the issuance of the final public report for the [first phase of the] Project, the Board shall have the right to appoint one member to the Committee, until 90 percent of the Units have been sold or until the fifth anniversary date of the original issuance of the final public report for the [first phase of the] Project, whichever occurs first. Thereafter, the Board shall have the right to appoint all of the members of the Committee.

(b) The term of the initial appointees shall be one year. Thereafter, members shall serve two-year terms unless it becomes necessary to remove members appointed by Declarant in order to comply with Section 6.02(a), in which case the terms of all members shall end at that time, and the Board shall appoint a new Committee. Notwithstanding the above, all members of the Committee shall serve at the will of the party that appointed them, and may be removed by that party at any time with or without cause.

(c) The Committee shall meet as often as it deems necessary to properly carry out the obligations imposed on it, unless otherwise directed by the Board.

The Board of Directors

Section 6.03. All decisions of the Architectural Control Committee are subject to review by the Board of Directors and may be appealed to the Board. The Committee shall notify the Board of all violations of this Article and of any noncompliance with its rulings or with the plans and specifications submitted to and approved by it. Thereafter, the Board shall take any actions it deems necessary, in accordance with the provisions of this Declaration.

ARTICLE VII. INSURANCE

Fire and Casualty Insurance

Section 7.01. The Association shall obtain and maintain a policy or policies of fire and casualty insurance with an extended coverage endorsement for the full insurable replacement value of the improvements in the _____ [Common Area *or, if association will maintain blanket casualty insurance:* Project]. The amount of coverage shall be determined by the Board. This insurance shall be maintained for the benefit of the Association, the Owners, and their Mortgagees, as their interests may appear as named insured, subject, however, to any loss payment requirements set forth in this Declaration.

General Liability and Individual Liability Insurance

Section 7.02. The Association shall obtain and maintain one or more policies of insurance that must include coverage for (1) general liability of the Association, and (2) individual liability of Officers and Directors of the Association for negligent acts or omissions in that capacity. Both of the these types of coverage shall not be less than

_____ [*select the appropriate provision below (see Civ. Code §§ 1365.7, 1365.9, applicable to project that is exclusively residential)*]

[*for a project consisting of 100 or fewer condominiums use either:* $500,000 *or* $2,000,000] covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*OR*]

[*for a project consisting of more than 100 condominiums use either:* $1,000,000 *or* $3,000,000] covering all claims for death, personal injury, and property damage arising out of a single occurrence.

[*Continue with the following:*]

The limits and coverage shall be reviewed at least annually by the Board and increased in its discretion.

Other Association Insurance

Section 7.03. The Association shall purchase and maintain workers' compensation insurance to the extent necessary to comply with any applicable laws. The Association also shall purchase and maintain fidelity bond coverage which names the Association as an obligee, for any person or entity handling funds of the Association, whether or not such persons or entities are compensated for their services. This coverage shall be in an amount that is at least equal to the estimated maximum of funds, including reserve funds, in the custody of the Association [or the Manager] at any given time during the term of each bond. However, the aggregate amount of these bonds must not be less than 150 percent of each year's estimated annual operating expenses and reserves. The Association also may purchase and maintain a blanket policy of flood insurance, and demolition insurance in an amount that is sufficient to cover any demolition that occurs following the total or partial destruction of the Project and a decision not to rebuild.

Trustee for Policies

Section 7.04. The Association, acting through its Board, is hereby appointed and shall be deemed trustee of the interests of all named insureds under all insurance policies purchased and maintained by the Association. All insurance proceeds under any of those policies shall be paid to the Board as trustee. The Board shall use the proceeds for the repair or replacement of the property for which the insurance was carried or for the purposes described in Article VIII of this Declaration. The Board also is authorized to negotiate loss settlements with the appropriate insurance carriers, to compromise and settle any claim or enforce any claim by any lawful action, and to execute loss claim forms and release forms in connection with such settlements.

[*Choose one of the following paragraphs:*]

[*If association will maintain blanket casualty insurance, use:*]

Individual Insurance

Section 7.05. No Owner shall obtain or maintain fire and casualty insurance for the improvements in the Owner's Unit.

If any Owner does so, he or she shall be liable to the Association for any resulting reduction in the insurance proceeds payable under the policy or policies of fire and casualty insurance maintained by the Association pursuant to Section 7.01. Notwithstanding the above, an Owner may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Unit, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Owners, the Association, Declarant, and the institutional First Mortgagee of the Owner's Unit.

[*OR*]

[*If association will not maintain blanket casualty insurance, use:*]

Individual Insurance

Section 7.05. Each Owner shall provide fire and casualty insurance for the improvements in his or her Unit. An Owner may separately insure his or her personal property, and may obtain and maintain personal liability and property damage liability insurance for his or her Unit, provided that the insurance contains a waiver of subrogation rights by the carrier as to the other Owners, the Association, Declarant, and the institutional First Mortgagees of the Owner's Lot.

[*Continue with the following:*]

Insurance Premiums

Section 7.06. Insurance premiums for any insurance coverage obtained by the Association shall be included in the regular assessments. That portion of the regular assessments necessary for the required insurance premiums shall be used solely for the payment of the premiums when due.

ARTICLE VIII. DAMAGE OR DESTRUCTION

Duty to Restore and Replace

Section 8.01. If any of the improvements in the _____ [Common Area *or, if the association will maintain blanket casualty insurance over all improvements:* Project] are destroyed or damaged, the Association shall restore and replace the improvements, using the proceeds of insurance maintained pursuant to Article VII of this Declaration, subject to the provisions of this Article.

Proceeds Justifying Automatic Restoration and Repair

Section 8.02. If the proceeds of any insurance maintained pursuant to Article VII of this Declaration for reconstruction or repair of the Property are equal to at least _____ [*specify, e.g.,* 85] percent of the estimated cost of restoration and repair, the Board shall use the insurance proceeds for that purpose, shall levy a special assessment to provide the necessary additional funds, and shall have the improvements promptly rebuilt, unless the Owners by the vote or written consent of not less than _____ [*specify, e.g.,* 75] percent of the total voting power of each class of Owners object to the

restoration or repair work within _____ [*specify, e.g.,* 60] days of the damage or destruction.

Approval by Owners of Special Assessment for Certain Restorations and Repairs

Section 8.03. If the proceeds of any insurance maintained pursuant to Article VII of this Declaration for reconstruction or repair of the Property are less than _____ [*repeat percentage set forth in Section 8.02, above, e.g.,* 85] percent of the estimated cost of restoration and repair, any restoration and repair work must be authorized by the vote or written consent of Owners representing at least _____ [*specify, e.g.,* 75] percent of the total voting power of each class of Owners and beneficiaries of at least _____ [*specify, e.g.,* 75] percent of the First Mortgages on Units in the Project. This authorization must be given within _____ [*specify, e.g.,* 60] days of the damage or destruction, and must authorize the Board to levy a special assessment to provide the necessary funds over and above the amount of any insurance proceeds available for the work.

Ordering Reconstruction or Repair

Section 8.04. If reconstruction or repair work is to take place pursuant to this Article, the Board shall take the following steps:

(a) Prepare the necessary documents, including an executed and acknowledged certificate stating that damage has occurred, describing it, identifying the improvement suffering the damage, the name of any insurer against whom claim is made, and the name of any insurance trustee, stating (if applicable) that the consent described in Section 8.03 has been obtained, and reciting that the certificate is recorded pursuant to this paragraph. That declaration shall be recorded with the Recorder of _____ County within _____ [*specify, e.g.,* 90 days] from the date of the damage or destruction.

(b) Obtain firm bids (including the obligation to obtain a performance bond) from two or more responsible contractors to rebuild the Project in accordance with its original plans and specifications and, as soon as possible thereafter, call a special meeting of the voting Owners to consider the bids. If the Board fails to do so within 60 days after the casualty occurs, any Owner may obtain the bids and call and conduct the special meeting in the manner required by this paragraph. At the meeting, Owners representing at least 67 percent of the total voting power may elect to reject all of the bids and thus not to rebuild, or Owners representing at least 51 percent of the total voting power may elect to reject all bids requiring amounts exceeding the available insurance proceeds by more than $500. Failure to reject all bids shall authorize the Board to accept the unrejected bid it considers most favorable. Failure to call the special meeting or to repair the casualty damage within 12 months from the date the damage occurred shall be deemed for all purposes to be a decision not to rebuild.

(c) If a bid is accepted, the Board shall let the contract to the successful bidder and distribute the insurance proceeds to the contractor as required by the contract.

(d) Levy a special assessment to make up any deficiency between the total insurance proceeds and the contract price for the repair or rebuilding, with the assessment and all insurance proceeds, whether or not subject to liens of mortgagees, to be used solely for the rebuilding. This assessment shall be apportioned _____ [equally to each Unit *or, if association will maintain blanket casualty insurance:* equally to each Unit for any damage or destruction to the Common Area. For any damage or destruction to improvements on one or more Units, every Owner shall pay a proportionate share based on the relative square footage of the living area]. If any Owner fails to pay the special assessment within 15 days after it is levied, the Board shall enforce the assessment in the manner described in Section 4.09 of this Declaration.

Election Not to Rebuild

Section 8.05. On an election not to rebuild, the Board, as soon as reasonably possible and as agent for the Owners, shall execute and record a certificate stating that the Association shall not rebuild. The Board shall also sell the entire Project on terms acceptable to the Board and free from the effect of this Declaration, which shall terminate on the sale. The net proceeds shall then be distributed to the Owners and their respective Mortgagees proportionately according to the respective fair market values of the Units at the time of the destruction as determined by an independent appraisal. That appraisal shall be performed by an independent appraiser who shall be selected by the Association and who shall be a member of, and apply the standards of, a nationally recognized appraiser organization.

All insurance proceeds available for restoration or repair shall be distributed to the Owners _____ [equally *or, if association will maintain blanket casualty insurance, as follows:* proceeds for damage or destruction to Units shall be distributed to the Owners of the damaged Units according to the relative fair market value of the Units. This value shall be as of the date immediately preceding the damage or destruction, and shall be determined by an appraisal by an independent appraiser who shall be selected in the manner described above. Any proceeds from damage or destruction to the Common Area shall be distributed to the Owners equally].

Minor Restoration and Repair Work

Section 8.06. The Association shall order restoration or repair work without complying with the other provisions of this Article whenever the estimated cost of the work does not exceed _____ [$_____ (*e.g.*, 18,000) *or, if association will maintain blanket casualty insurance:* $_____ (*e.g.*, 15,000) for the Common Area and $_____ (*e.g.*, 3,000) for one or more Units]. If insurance proceeds are unavailable or insufficient, the Association shall levy a special assessment for the cost of the work. The Assessment shall be levied in the manner described in Section 4.05 of this Declaration.

ARTICLE IX. EMINENT DOMAIN

Definition of Taking

Section 9.01. As used in this Article, "taking" means condemnation by any governmental agency having the power of eminent domain or by sale under threat of the exercise of that power.

Sale to Condemning Authority

Section 9.02. If a governmental agency proposes to condemn all or a portion of the Project, the Association may sell all or any portion of the Project to the condemning authority if all Owners and institutional Mortgagees consent in writing to the sale. Any such sale shall be made by the Association in the capacity of attorney-in-fact for the Owners, acting under an irrevocable power of attorney which each Owner grants to the Association by accepting a Condominium. The sales price shall be any amount deemed reasonable by the Board.

Total Sale or Taking

Section 9.03. A total sale or taking occurs when (1) there is a permanent taking or a sale to a condemning authority by

the Association pursuant to Section 9.02 of an interest in all or part of the Common Area or of all or part of one or more Units, which substantially and adversely affects the ownership, operation, and use of the Project in accordance with the provisions of this Declaration; and (2) 120 days have passed since the effective date of the taking and the Owners whose Units remain habitable after the taking ("Remaining Units") have not by affirmative vote of a majority of their entire voting interest approved the continuation of the Project and the repair, restoration, and replacement to the extent feasible of the Common Area and the Remaining Units. Within 60 days after the effective date of any sale or taking which in the opinion of the Board would constitute a total sale or taking, the Board shall call a special meeting to determine whether or not the Owners of the remaining units will continue the Project as provided in this Section. If there is a total sale or taking, the Board shall distribute the proceeds of the total sale or taking and the proceeds of any sale pursuant to a partition action, after deducting all incidental fees and expenses related to the taking or partition, to all Owners and their Mortgagees in accordance with the court judgment or the agreement between the condemning authority and the Association, if any such judgment or agreement exists. In all other cases, the proceeds shall be distributed among the Owners and their respective Mortgagees according to the relative values of the Condominiums affected by the condemnation as determined by independent appraisal. That appraisal shall be performed by an independent appraiser who shall be selected by the Association and who shall be a member of, and apply the standards of, a nationally recognized appraiser organization.

Partial Sale or Taking

Section 9.04. A partial sale or taking occurs if there is a sale or taking that is not a total sale or taking as defined in Section 9.03. The proceeds from any sale or taking shall be disbursed in the following order of priority, which shall be incorporated into any court judgment of condemnation or agreement between a condemning authority and the Association:

(a) To the payment of related fees and expenses.

(b) To Owners of Condominiums that have been sold or taken and their respective Mortgagees, as their interests may appear, in an amount up to the fair market value of the Condominium as that value is determined by the court in the condemnation proceeding or, in the absence of such a determination, by an appraiser selected in the manner described in Section 9.03. Such a payment shall immediately terminate the recipient's status as an Owner, and the Board, acting as the attorney-in-fact of the remaining Owners, shall amend this Declaration and any other documents, as appropriate, to delete the sold or taken Condominiums from the Project and to allocate the former Owner's undivided interest in the Common Area to the remaining Owners, on the basis of their relative ownership of the Common Area. Each Owner whose interest is terminated pursuant to this Section shall, at the request of the Board and expense of the Association, execute and acknowledge any deed or other instrument that the Board deems necessary to evidence the termination.

(c) To the payment of severance damages to First Mortgagees of record of remaining units affected by the partial sale or taking, to the extent that the Mortgagees can prove that their security has been impaired by the taking.

(d) To the repair, restoration, and replacement of the Common Area and any portions of the Remaining Units that the Owners are not obligated to restore, to the extent feasible.

ARTICLE X. RIGHTS OF MORTGAGEES

Warranty

Section 10.01. Declarant hereby warrants that Mortgagees of Units in the Project shall be entitled to the rights and

guaranties set forth in this Article. No amendment of this Article shall affect the rights of the holder of any First mortgage recorded prior to the recordation of the amendment who does not join in the execution of the amendment.

Subordination

Section 10.02. Notwithstanding any other provision of this Declaration, liens created under Section 4.09 of this Declaration on any Unit shall be subject and subordinate to, and shall not affect the rights of the holder of, the indebtedness secured by any recorded First Mortgage on such an interest made in good faith and for value, provided that any transfer of a Unit as the result of a foreclosure or exercise of a power of sale shall not relieve the new Owner from liability for any assessments that become due after the transfer. Such a transfer shall extinguish the lien of assessments that were due and payable before the transfer of the Unit.

Inapplicability of Right of First Refusal

Section 10.03. Should any of the Association's Governing Instruments provide for a "right of first refusal," this right shall not impair the rights of a First Mortgagee to:

(a) Foreclose or take title to a Unit pursuant to the remedies provided in the Mortgage;

(b) Accept a deed (or assignment) in lieu of foreclosure in the event of default by a Mortgagor; or

(c) Interfere with a subsequent sale or lease of a Unit so acquired by the Mortgagee.

Notice of Default

Section 10.04. A First Mortgagee, on request, will be entitled to written notification from the Association of any default in the performance by the Mortgagor of any obligation under the Association's Governing Instruments that is not cured within 60 days.

Unpaid Assessments

Section 10.05. Any First Mortgagee who obtains title to a Unit pursuant to the remedies provided in the Mortgage or foreclosure of the Mortgage shall not be liable for the Unit's unpaid assessments that accrue before the acquisition of title to the Unit by the Mortgagee.

Mortgagee Approval of Material Amendments

Section 10.06. Notwithstanding Article XII of this Declaration, any amendments governing any of the following shall require the prior written approval of at least 51 percent of the First Mortgagees and at least 67 percent of the total voting power of the Owners:

(a) Voting;

(b) Rights to use the Common Area;

(c) Reserves and responsibility for maintenance, repair, and replacement of the Common Area;

(d) Boundaries of any Unit;

(e) Owners' interests in the Common Area;

(f) Conversion of Units into Common Area or Common Area into Units;

(g) Leasing of Units;

(h) Establishment of self-management by the Association, when professional management has been previously required by any First Mortgagee or any insurer or governmental guarantor of a First Mortgage;

(i) Annexation, addition, or withdrawal of real property to or from the Project;

(j) Assessments, assessment liens, or the subordination of these liens;

(k) Casualty and liability insurance or fidelity bonds; or

(l) Any provisions expressly benefiting First Mortgagees or insurers or governmental guarantors of first mortgages.

Notwithstanding the above, any first Mortgagee who receives a written request from the Board to approve a proposed amendment or amendments requiring consent under this Section who does not deliver a negative response to the Board within 30 days of the receipt of the request shall be deemed to have approved the proposed amendment or amendments.

Mortgagee Approval of Other Actions

Section 10.07. Unless at least 67 percent of the First Mortgagees (based on one vote for each First Mortgage owned), or 67 percent of the Owners other than Declarant, have given their prior written approval, the Association shall not be entitled to:

(a) By act or omission, seek to abandon or terminate the Project;

(b) Change the pro rata interest or obligations of any individual Unit for either of the following purposes, unless the change is due to an annexation pursuant to Article XI of this Declaration:

(1) Levying assessments or charges, or allocating distributions of hazard insurance proceeds or condemnation awards, or

(2) Determining the pro rata share of ownership of each Unit in the Common Area and the improvements thereon;

(c) Partition or subdivide any Unit;

(d) By act or omission, seek to abandon, partition, subdivide, encumber, sell, or transfer the Common Area unless due to an annexation pursuant to Article XI of this Declaration (the granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Area shall not be deemed a transfer within the meaning of this clause); or

(e) Use hazard insurance proceeds for losses to any Project property (whether to Units or to the Common Area) for other than the repair, replacement, or reconstruction of that property, except as provided by statute in case of substantial loss to the Units and/or Common Area of the Project.

Liens

Section 10.08. All taxes, assessments, and charges that may become liens prior to the First Mortgage under local law, shall relate only to the individual Units and not to the Project as a whole.

Priority

Section 10.09. No provision of the Governing Instruments of the Association gives any Owner, or any other party, priority over any rights of the First Mortgagee of the Unit pursuant to its Mortgage in the case of a distribution to the Owner of insurance proceeds or condemnation awards for losses to, or a taking of, all or a portion of a Unit or Units and/or the Common Area.

Reserve Fund

Section 10.10. Association assessments shall be large enough to provide for an adequate reserve fund for maintenance, repairs, and replacement of those common elements that must be replaced on a periodic basis. The reserve fund shall be funded by the regular assessments rather than by special assessments.

Management

Section 10.11. Any agreement for professional management of the Project shall not exceed three years and shall provide that either party may terminate the agreement, with or without cause and without the imposition of a termination fee, on 90 days' written notice. The approval of holders of at least 75 percent of First Mortgages shall be obtained before the Association terminates a professional management agreement.

Right to Inspect Books and Records

Section 10.12. Institutional First Mortgagees, on written request, shall have the right to (1) examine the books and records of the Association during normal business hours and (2) require the submission of any financial data furnished to the Owners by the Association.

[*Add if any part of the common area is owned by the owners' association:*]

Payments by Mortgagees

Section 10.13. First Mortgagees may, jointly or severally, pay taxes or other charges that are in default and that may or have become a charge against the Common Area, and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for the Common Area, and First Mortgagees making these payments shall be entitled to immediate reimbursement from the Association.

[*Continue with the following:*]

Right to Furnish Mortgage Information

Section 10.14. Each Owner hereby authorizes the First Mortgagee of a First Mortgage on the Owner's Condominium to furnish information to the Board concerning the status of the First Mortgage and the loan that it secures.

ARTICLE XI. ANNEXATION OF ADDITIONAL PROPERTY

Additions by Declarant

Section 11.01. Declarant shall have the right to add all or any portion of the real property described in Exhibit _____ [*specify number of exhibit containing legal description of property to be annexed*] to the Project, pursuant to a plan of phased development submitted to the California Real Estate Commissioner along with the application for the public report for the first phase of the Project, at any time before the third anniversary of the original issuance of the most recently issued final subdivision public report for the most recent phase of the Project. This election shall be made by the recordation of a supplemental declaration ("Supplemental Declaration"). The Supplemental Declaration shall describe the real property to be annexed, and shall state that the property described in it is being annexed to the Project pursuant to Article XI of this Declaration. The Supplemental Declaration may also set forth any additional covenants, conditions, restrictions, reservations, and easements that Declarant deems appropriate for that phase of development.

Other Additions

Section 11.02. In addition to real property annexed by the Declarant, real property may be annexed to the Project and brought within the general plan and scheme of this Declaration by the approval by vote or written consent of at least 67 percent of the total voting power of the Association [; provided, however, that no such annexation may take place after the _____ (*specify, e.g.,* seventh) anniversary of the recordation of this Declaration].

Rights and Obligations of Owners of Annexed Property

Section 11.03. On the recordation of the Supplemental Declaration, the real property described in it shall be part of the Project and subject to all provisions of this Declaration in the same manner as if it were originally covered by this Declaration. Thereafter, the rights, powers, and responsibilities of Owners of Condominiums within the annexed property shall be the same as if the annexed property were originally covered by this Declaration; provided, however, that their voting rights shall not commence until the date of commencement of the regular assessments for their Condominiums. The commencement of assessments on the annexed real property shall be governed by Section 4.07 of this Declaration.

Reciprocal Easements

Section 11.04. Declarant hereby reserves, for the benefit of and appurtenant to the Condominiums located in any phase

of development annexed to the first phase of this Project and their respective Owners, reciprocal easements to use the Common Area (other than any buildings or Exclusive Use Common Areas) in the first phase pursuant to and in the manner set forth in this Declaration. Declarant hereby grants, for the benefit of and appurtenant to the Condominiums in the first phase of this Project and their Owners, a nonexclusive easement to use the Common Area (other than any buildings or Exclusive Use Common Areas) in each phase of development annexed to the first phase, pursuant to and in the manner set forth in this Declaration. These reciprocal easements shall be effective as to any annexed real property on the first close of escrow for the sale of a Condominium in the annexed property.

ARTICLE XII. AMENDMENTS

Amendment or Revocation Before Close of First Sale

Section 12.01. At any time before the close of the first sale of a Condominium to a purchaser other than Declarant, Declarant and any Mortgagee of record may, by executing an appropriate instrument, amend or revoke this Declaration. [*Add if the case of a phased development:* Further, before the close of the first sale of a Condominium in any subsequent phase of the Project to a purchaser other than Declarant, the Declarant and any Mortgagee of record may, by following the above procedure, amend or revoke any Supplemental Declaration recorded pursuant to Article XI of this Declaration for that subsequent phase.] The executed instrument shall be acknowledged and recorded in the Office of the Recorder of _____ County.

Amendments by Owners After Close of First Sale

Section 12.02. At any time after the close of the first sale of a Condominium to a purchaser other than Declarant, this Declaration may be amended by the vote or written consent of Owners representing not less than _____ percent of the voting power of each class of Owners of the Association. If only one class of membership exists at the time an amendment is proposed, then it must be approved by not less than _____ percent [*specify percentage, which must be at least 51 percent but not more than 75 percent*] of the voting power of the Association, which shall include at least a majority of the votes residing in Owners other than Declarant. Notwithstanding any contrary provision in this Section, the percentage of the voting power necessary to amend a specific clause or provision of this Declaration shall not be less than the percentage of affirmative votes prescribed for action to be taken under that clause or provision.

An amendment becomes effective after (1) the approval of the required percentage of Owners has been given, (2) that fact has been certified in a writing executed and acknowledged by_____[an officer designated by the Association for that purpose or, if no such designation is made, by the President of the Association *or set forth name and title of officer here*], and (3) that writing has been recorded in_____[the county in which this Project is located *or* both (*or* each) counties (*or* county) in which a portion of this Project is located].

Amendments Pursuant to Court Order

Section 12.03. If this Declaration requires a proposed amendment to be approved by the affirmative vote of a specified percentage (exceeding 50 percent) of this votes in the Association or of Owners having a specified percentage (exceeding 50 percent) of the votes in more than one class (a "supermajority"), and more than 50 percent but less than the required supermajority of the votes approve the amendment, the Association or any Owner may petition the_____[Superior Court of _____ (*name of sole county in which project is located*) *or* superior court of both (*or* any) of the counties in which the Project is located], subject to the requirements,

limitations, and exceptions set forth in *Civil Code Section 1356,* for an order reducing the percentage of the affirmative votes necessary for the amendment or approving the amendment. If such an order is issued, the amendment shall be acknowledged by _____ [any person designated by the Association for that purpose or, if no such designation is made, by the President of the Association *or specify other person*], and that person shall have the amendment and the court order recorded in_____[*name of sole county in which development is located, or* both (*or* every) counties (*or* county) in which the Project is located]. On recordation, the amended provision or provisions of this Declaration shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by this Declaration and the other governing documents. Within a reasonable time after recordation, the Association shall mail a copy of the amendment and a statement regarding the amendment to each Owner.

Deletion of Construction or Marketing Provisions

Section 12.04. Notwithstanding any other provision of this Declaration, the Board may, under the circumstances described in this Section, adopt an amendment deleting from this Declaration any provision that was unequivocally designed and intended, or that by its nature could only have been designed or intended, to facilitate Declarant in completing the construction or marketing of the Project. To be subject to this amendment procedure, the provision must provide for access by Declarant over or across the Common Area for the purposes of (1) completion of construction of the Project and (2) the erection, construction, or maintenance of structures or other facilities designed to facilitate the completion of construction or marketing of Units. Such an amendment may be adopted only after Declarant has completed construction of the Project, has terminated construction activities, and has terminated_____[his *or* her *or* its] marketing activities for the sale [*or other authorized disposition of units*] of the Units. [*Add if applicable:* In the case of a provision relating to a particular construction or marketing phase of the Project, the provision may not be deleted until that construction or marketing phase has been completed.] At least 30 days prior to taking action to adopt such an amendment, the Board must mail to all Owners, by first-class mail, the following: a copy of the proposed amendment; and a notice of the time, date, and place of the meeting at which the Board will consider adoption of the amendment. All deliberations of the Board on the proposed amendment must be conducted at that meeting. The meeting must be open to all Owners, and the Owners must be given an opportunity at the meeting to comment on the proposed amendment. The Board may not adopt the amendment unless (1) a quorum is present at the meeting, (2) the meeting is conducted in accordance with certain provisions (identified in *Civil Code Section 1355.5*) of the Nonprofit Mutual Benefit Corporation Law, and (3) Owners casting a majority of the votes at the meeting approve the amendment. For these purposes, "quorum" means more than 50 percent of the Owners who own no more than two Units in the Project.

Prior Approval of Commissioner

Section 12.05. When required under *Business and Professions Code Section 11018.7*, the prior written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to this Declaration to the vote of the Owners.

ARTICLE XIII. GENERAL PROVISIONS

Term

Section 13.01. The provisions of this Declaration shall continue in effect for a term of _____ years from the date of execution. Thereafter, it shall be automatically extended for successive periods of

_____ years, until the membership of the Association decides to terminate it.

Nonwaiver of Remedies

Section 13.02. Each remedy provided for in this Declaration is separate, distinct, and nonexclusive. Failure to exercise a particular remedy shall not be construed as a waiver of the remedy.

Attorneys' Fees

Section 13.03. In any action to enforce this Declaration, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs.

Severability

Section 13.04. The provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity or unenforceability of any one provision shall not affect the validity or enforceability of any other provision.

Binding

Section 13.05. This Declaration, any amendment to it, and any valid action or directive made pursuant to the Declaration, shall be binding on the Declarant and the Owners and their heirs, grantees, tenants, successors, and assigns.

Interpretation

Section 13.06. The provisions of this Declaration shall be liberally construed and interpreted to effectuate its purpose of creating a uniform plan for the development and operation of a condominium project. Failure to enforce any provision of this Declaration shall not constitute a waiver of the right to enforce that provision or any other provision of this Declaration.

Limitation of Liability

Section 13.07. The liability of any Owner for performance of any of the provisions of this Declaration shall terminate on sale, transfer, assignment, or other divestment of the Owner's entire interest in his or her Unit with respect to obligations arising from and after the date of the divestment.

Fair Housing

Section 13.08. Neither Declarant nor any Owner shall, either directly or indirectly, forbid the conveyance, encumbrance, renting, leasing, or occupancy of the Owner's Unit to any person on the basis of race, color, sex, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.

Number and Headings

Section 13.09. As used in this Declaration, the singular shall include the plural, unless the context requires the contrary. The headings are not a part of this Declaration, and shall not affect the interpretation of any provision.

Executed on_____[*date*], at_____[*city*], _____ [*county*], California.

DECLARANT

[*If declarant is an individual:*]

_____ [*signature of declarant*]
[*typed name*]

[*Or, if declarant is an entity:*]

_____ [*name of declarant*]
A California _____ [Corporation *or* General Partnership *or* Limited Partnership]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment
[*Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCooperativesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.203

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.203 Subordination Agreement

[1] Comment

[a] Use of Form

This form is a consent by a lender to the subordination of its deed of trust to a declaration that was recorded after that deed of trust. Under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], any "preexisting lender" must subordinate its lien to the declaration [*see Bus. & Prof. Code § 11018.5(c)*].

The actual requirement is stated in rather indirect terms. The Real Estate Commissioner may not issue a final public report for a condominium project unless he or she finds that the declaration (and other governing instruments) will be binding on every purchaser and occupant of every condominium. For these purposes, "purchaser" includes purchasers acquiring title by judicial or nonjudicial foreclosure, or by deed in lieu of foreclosure, under any mortgage or deed of trust, whether or not the mortgage or deed of trust was recorded before recordation of the declaration [*Bus. & Prof. Code § 11018.5(c)*; *see § 34.200[2],* P 68].

The lender may agree to include its consent in the declaration (immediately after the acknowledgement of the declarant's signature). However, cautious lenders prefer to deposit the consent in escrow and to condition its recordation on the satisfaction of a presale requirement [*see § 34.203[1][b]*]. This form may be used in either way.

For a discussion of subordination agreements in general, see Ch. 25B, *Subordination, Assumption, and Assignment* .

[b] Consent of Lenders

In most cases, the only preexisting lenders will be construction lenders with blanket construction liens over the entire project. Some construction lenders agree to provide in their loan agreement and deed of trust for subordination to and recognition of the creation of the condominium project and the requirements of the declaration.

It is unlikely that any lender will agree to subordinate its lien without imposing a presale requirement on the project. The typical presale requirement prohibits the developer from conveying a unit in the project to a purchaser until a specified percentage (usually 50 percent or more) of the units have been sold [*see § 34.45[2]*].

[2] FORM

Subordination Agreement

Recording Requested by:
_____[*name of declarant*]
When Recorded Mail to:
_____[*name of declarant*]
_____[*address*]
_____[*city, state, zip*]

SUBORDINATION AGREEMENT

The undersigned, as Beneficiary under that certain Deed of Trust dated _____, and recorded as Instrument No. _____ in Book _____, Pages _____ and following, of the Official Records of the _____ County Recorder ("Deed of Trust"), hereby expressly subordinates the lien of the Deed of Trust to the Declaration executed by _____ as Declarant, dated _____, and recorded_____[*date*], as Instrument No. _____ in Book _____, Pages _____ and following, of the Official Records of the _____ County Recorder, and to all maintenance and other easements to be conveyed to_____[*name of owners' association*] in accordance with that Declaration.
Dated: _____

_____ [*name of lender*]
By _____
[*typed name*]
By _____
[*typed name*]

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawFinancingConstruction LoansReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.204

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.204 Articles of Incorporation

[1] Comment

[a] Use of Form

This form consists of articles of incorporation for an owners' association of a condominium project that will be incorporated as a nonprofit mutual benefit corporation under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. If the owners' association is to be an unincorporated (nonprofit) association, the attorney should draft articles of association instead [*see* Ch. 13A, *Nonprofit Unincorporated Associations*].

[b] Applicable Law

Owners' associations for condominium projects, planned developments, stock cooperatives, community associations, clubs, and similar organizations frequently are incorporated under the Nonprofit Mutual Benefit Corporation Law ("Law") [*Corp. Code § 7110 et seq.*; *see § 34.38[1]*]. This comment examines the specific requirements of the Law affecting the contents of articles of incorporation. For a general discussion of the Law, see Ch. 13, *Nonprofit Corporations* .

The Real Estate Commissioner has adopted regulations covering the contents of the governing instruments (declaration, articles, and bylaws) for a condominium project or other type of common-interest subdivision [*see Bus. & Prof. Code § 11004.5*; *10 Cal. Code Reg. § 2792.8*; *see also § 34.204[1][c][i]*].

[c] Contents of Articles

[i] In General

Under the Nonprofit Mutual Benefit Corporation Law, articles of incorporation must contain the name of the

corporation and the name and address in California of the corporation's initial agent for service of process [*Corp. Code § 7130(a), (c)*]. If the agent is a natural person, the statement must include the person's complete business or residence street address. If a corporate agent is designated, no address is required [*Corp. Code §§ 7130(b), 8210(b)*].

It is possible to reserve a name for the association by obtaining a certificate of reservation of any name not prohibited by *Corp. Code § 7122(c)*. To obtain the certificate, the applicable name reservation form and the corresponding fee must be submitted to the Secretary of State. On the certificate's issuance, the name stated in the certificate must be reserved for 60 days [*Corp. Code § 7122(d)*].

The articles must also contain a statutory statement identifying the corporation as a nonprofit mutual benefit corporation and stating in general terms the purpose of the corporation. In addition to that statement, the articles may include a further definition of the corporation's purposes [*Corp. Code § 7130(b)*]. For the statutory statement and an optional "further" description of a corporation's purposes, see *§ 34.204[2]*, Art. II.

In addition to the statement of purpose required by the Nonprofit Mutual Benefit Corporation Law, the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] requires the articles of incorporation of any common interest development association filed with the Secretary of State on or after January 1, 1995, to include an additional statement that: (1) identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act; (2) gives the business or corporate office of the association, if any; and, if the office is not on the development site, states the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the development; and (3) gives the name and address of the association's managing agent, if any [*Civ. Code § 1363.5(a)*; *see Bus. & Prof. Code § 11502*].

The Nonprofit Mutual Benefit Corporation Law also lists a number of provisions that may be set forth in the articles of incorporation [*see Corp. Code § 7132*]. For a complete list of those optional provisions, see Ch. 13, *Nonprofit Corporations* .

The Real Estate Commissioner has listed several types of provisions that must be included in one or more of the governing instruments (declaration, articles, and bylaws) for a condominium project or other type of common-interest subdivision [*see 10 Cal. Code Reg. § 2792.8*; *see also § 34.202[1][d][ii]*]. None of those provisions have been incorporated into this form because it is standard practice to include them in the declaration [*see § 34.202*] and the bylaws [*see § 34.206*], which are the two documents that describe the structure and operation of condominium projects in the greatest detail.

[ii] Incorporation of Unincorporated Association

If the owners' association is an unincorporated association that is changing to corporate status, the articles must contain the standard information discussed in *§ 34.204[1][c][i]*, and must comply with two additional requirements. First, the articles must also state that an existing unincorporated association, identified by name, is being incorporated by the filing of the articles [*Corp. Code § 7121(b)*; *see* Arts. IV and V of § 13.210[2] in Ch. 13, *Nonprofit Corporations*]. Second, the articles must be accompanied by a verified statement of any two officers or governing board members of the association stating that the incorporation of the association by means of the articles to which the verified statement is attached has been approved by the association in accordance with its rules and procedures [*Corp. Code § 7121(c)*]. For such a statement, see Ch. 13, *Nonprofit Corporations* . For further discussion of the incorporation of an unincorporated association, see Ch. 13, *Nonprofit Corporations* .

[d] Execution and Filing

Under the Nonprofit Mutual Benefit Corporation Law, a nonprofit corporation is formed when its articles of incorporation are executed and filed with the Secretary of State [*Corp. Code § 7120(a)*]. Each incorporator and director

named in the articles must sign and acknowledge them [*Corp. Code § 7120(b)*; *see Corp. Code § 7132(c)(1)* (articles may list names and addresses of initial directors)]. Articles usually identify only the incorporator to avoid the need to obtain the signatures of the initial directors.

Because the developer must include the articles and other governing documents in the application package for a public report [*see 10 Cal. Code Reg. § 2792.1(a)(2)*; *see also § 34.143*, P 4(g), (t)], the applicant should postpone filing the articles until after the Department has had an opportunity to review them [*see § 34.143*]. For the procedure for filing the articles of incorporation with the Secretary of State, see Ch. 13, *Nonprofit Corporations* . After the filing of articles that name an incorporator but not the initial directors, the incorporator adopts the bylaws and elects the initial directors, and may do whatever is necessary and proper to perfect the organization of the association, including the adoption and amendment of corporate bylaws [*see Corp. Code § 7134*; *see also Corp. Code § 7211(b)*; § 34.205[1]; § 34.144].

If an unincorporated association is being incorporated, a certified copy of the articles must be filed in the office of the county recorder of any county in California in which any real property of the association is located. This filing evidences record ownership in the corporation of all interests of the association in and to the real property located in that county [*Corp. Code § 7121(e)*].

[e] Amendment of Articles

Under the Subdivided Lands Act, a proposed amendment to articles will require the prior written consent of the Real Estate Commissioner if: (1) it would materially change the rights of the condominium owners; and (2) it is proposed when the developer or the developer's successor in interest holds or directly controls as many as one-fourth of the votes that may be cast to effect that change [*see Bus. & Prof. Code § 11018.7*]. For a guide to the complicated approval procedure, see *§ 34.162*, PP 1, 2. If approval is obtained or is not required, action on the proposed amendment must comply with detailed regulatory requirements [*see 10 Cal. Code Reg. § 2792.24(b)*]. For discussion of these requirements, see *§ 34.162*, P 4.

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], the board of directors of a common interest development may, by following a specified procedure, adopt an amendment deleting from any of the governing documents certain provisions relating to the construction or marketing of the development [*see Civ. Code § 1355.5*]. The amendment provision in this form does not mention that statutory procedure because this form does not contain construction or marketing provisions. For additional coverage of this statutory procedure, see *§ 34.162*, P 5.

[2] FORM

Articles of Incorporation

ARTICLES OF INCORPORATION
OF _____ [*name of corporation*]

I. NAME

The name of the corporation is_____[*name*] Owners' Association.

II. PURPOSE

This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity, other than credit union business, for which a corporation may be organized under such law. [*If desired, insert further description of corporation's purposes,*

e.g.: This corporation is formed for the following additional purposes:

(1) To provide an owners' association for the management, maintenance, preservation, and architectural control of the condominium project ("Project") located in the City of _____, County of _____, California.

(2) To promote the health, safety, and welfare of the residents of the Project.

(3) To exercise all of the powers and privileges and to perform all of the duties and obligations of the corporation as set forth in the Declaration for the Project recorded or to be recorded in the Office of the Recorder of _____ County, California, as that Declaration may be amended from time to time.]

III. SPECIFIC PURPOSE; CORPORATE OFFICE; MANAGING AGENT

This corporation is an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act. The Association's business and corporate office is located at_____[*specify address and, if office is not at development site, also include nine-digit ZIP code, front street, and nearest cross street for development's physical location*]. The Association's managing agent is_____[*specify agent's name*], whose address is_____[*specify agent's address*].

IV. INITIAL AGENT FOR SERVICE OF PROCESS

The corporation's initial agent for service of process in the State of California is_____[*name*] [*add if agent is a natural person:*, whose _____ (business *or* residence) address is _____].

V. NO FINANCIAL GAIN TO MEMBERS OF THE ASSOCIATION

Nothing contained herein shall be construed to authorize the Association to carry on any activities for the profit of its members or to distribute any gains, profits, or dividends to any of its members. It is intended that the Association shall qualify as a Homeowner's Association under the applicable provisions of *Section 528 of the United States Internal Revenue Code*, and of *California Revenue and Taxation Code Section 23701t*, each as amended from time to time.

VI. AMENDMENTS

The classes of membership and the voting rights of Members shall be as stated in the Declaration. So long as a two-class voting system is in effect, any amendment of these Articles shall require the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, and (2) Members representing _____ [*specify percentage not below 51 percent*] of [the voting power of each class of Members *or* a quorum of Members of each class]. After conversion of the Class B Membership to Class A Membership, these Articles may be amended by the vote or written consent of (1) a bare majority [*or specify higher percentage*] of the Board of Directors of the Association, (2) a bare majority [*or specify higher percentage*] of the voting power of the Members, and (3) a bare majority [*or specify higher percentage*] of the voting power of the Members other than the developer of the Project.

The undersigned, who is the Incorporator of this corporation, has executed these Articles of Incorporation

on_____[*date*].

_____ [*signature*]
[*typed name*], Incorporator

Acknowledgment
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):]

State of California)
County of _____)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.205

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.205 Bylaws

[1] Comment

[a] Use of Form

This form is a set of bylaws for the owners' association of a condominium project. These bylaws reflect the common practices of (1) organizing the owners' association as a nonprofit mutual benefit corporation, (2) utilizing the bylaws to regulate the internal operation of the association and project, and (3) placing provisions governing all other aspects of the condominium project, including property and membership rights, in the declaration rather than in the bylaws [*see § 34.202[1][c]*].

[b] Contents of Bylaws

[i] Nonprofit Mutual Benefit Corporation Law

If the owners' association for a condominium project is organized as a nonprofit mutual benefit corporation, as is usually the case [*see § 34.38[1]*], its articles of incorporation and bylaws are subject to the requirements of the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. Under that law, the bylaws (or articles) must state either: (1) the number of directors in the corporation [*see § 34.205[2], Section 3.01*]; (2) the method for determining the number of directors; or (3) that the number of directors will be not less than a stated minimum or more than a stated maximum, with the exact number to be fixed by approval of the board or members in the manner provided in the bylaws [*Corp. Code 7151(a)*; *see § 13.212*]. In any event, the number or minimum number of directors may be one or more [*Corp. Code § 7151(a)*; *see Corp. Code § 7151(b)*]. In addition, once members have been admitted, a bylaw specifying or changing a fixed number of directors or the maximum or minimum number or changing from a fixed to a variable board or vice versa may only be adopted by approval of the members [*see Corp. Code § 7151(b)*]. If the number of directors is set in the articles, it may only be changed by amending the articles.

The bylaws may also include any provision, not in conflict with law or the articles, for the management of the activities and for the conduct of the affairs of the corporation [*see Corp. Code § 7151(c)*]. The following is a list of the optional provisions that have been incorporated into this form [*see Corp. Code § 7151(c)*]:

(1) Meetings of members [*Corp. Code §§ 7510-7514, 7611, 7613*; § 34.205[2], Art. II; *see also 10 Cal. Code Reg. § 2792.17*].

(2) Election, term, and removal of board of directors [*Corp. Code §§ 7220-7224, 7520, 7521, 7615*; § 34.205[2], Art. III; *see 10 Cal. Code Reg. § 2792.19*].

(3) Meetings of directors [*Corp. Code § 7211*; § 34.205[2], Art. IV; *see 10 Cal. Code Reg. § 2792.20*].

(4) Selection of officers of association [*Corp. Code § 7213*; *Civ. Code § 1365.5*; § 34.205[2], Art. V].

(5) Maintenance and inspection of project records [*Corp. Code §§ 7160, 8320, 8330-8334*; § 34.205[2], Art. XI; *see 10 Cal. Code Reg. § 2792.23(c)-(e)*].

Some of these provisions are also subject to requirements imposed by the Real Estate Commissioner [*see § 34.205[1][b][ii]*].

[ii] Real Estate Commissioner's Regulations

Numerous regulatory requirements promulgated by the Real Estate Commissioner must be incorporated into the bylaws, articles, or declaration of a condominium owners' association [*see 10 Cal. Code Reg. §§ 2792.4, 2792.8, 2792.15-2792.29*]. Most of these requirements are embodied in the declaration *set forth in § 34.202* [*see § 34.202[1][d][ii]*]. However, this form reflects regulations governing the following matters:

- Regular (annual) and special meetings of association members (including notice requirements) [*see 10 Cal. Code Reg. § 2792.17*; § 34.205[2], Art. II; *see also § 34.38[10]]*.

- Procedures for the election and removal of governing body members and officers of the association [*see 10 Cal. Code Reg. § 2792.19*; § 34.205[2], Sections 3.02-3.07, 5.02-5.03].

- Regular meetings of the governing body (including notice requirements) [*see 10 Cal. Code Reg. § 2792.20*; § 34.205[2], Art. IV].

- Enumeration of the powers and duties of the governing body and officers and of the limitations on the authority of the governing body to act without the prior approval of members representing a majority of the voting power of the association [*see 10 Cal. Code Reg. §§ 2792.8(a)(26), 2792.21*; § 34.205[2], Sections 3.09 (complete regulatory list of powers of governing body), 3.10 (complete regulatory list of limitations on powers of governing body); § 34.205[2], Arts. VI-X].

- Amendment of bylaws [*see 10 Cal. Code Reg. § 2792.24*; § 34.205[2], Art. XIII; *see also* Bus. & Prof. Code § 11018.7, Civ. Code § 1355.5; § 34.205[1][f]].

- Quorum requirements for meetings of members of the association and of the governing body [*see 10 Cal. Code Reg. § 2792.17*; § 34.205[2], Section 2.08].

- Procedures for proxy voting at members' meetings [*see 10 Cal. Code Reg. § 2792.8(a)(16)*; § 34.205[2], Section 2.09]. Although one of the Commissioner's regulations requires that the governing

instruments contain such a proxy provision [*see 10 Cal. Code Reg. § 2792.8(a)(16)*], the regulations do not specify the contents of that provision or impose any other proxy requirements. Consequently, the only requirements that must be incorporated into the provision are the ones set forth in the Nonprofit Mutual Benefit Corporation Law [*see Corp. Code § 7613*; § 34.205[1][b]; *see also Corp. Code §§ 7510(d), 7514, 7612*].

[c] Fiscal Responsibilities of Board

The powers and duties of the board of directors set forth in this form include the board's obligation to perform the following tasks: (1) review certain financial statements [*see Civ. Code § 1365.5(a)*; § 34.205[2], Section 3.09(*l*)]; (2) comply with limitations governing the withdrawal of moneys from the association's reserve accounts [*see Civ. Code § 1365.5(b)-(d)*; § 34.205[2], Section 3.09(m)]; and, (3) under certain circumstances, study the reserve account requirements of the project [*see Civ. Code § 1365.5(e)*; § 34.205[2], Section 3.09(n); *see also Civ. Code § 1365.5(g)*]. These duties do not apply when the project does not have a common area [*Civ. Code § 1365.5(h)*].

[d] Adoption

If the articles do not name initial directors, the incorporator(s) (that is, the developer) may adopt and amend the bylaws until the directors are elected [*Corp. Code § 7134*]. Developers of condominium projects typically adopt the bylaws [*see § 34.206[1]*].

[e] Filing

A copy of the bylaws must be filed with the Real Estate Commissioner as part of an application for a final public report [*10 Cal. Code Reg. § 2792.1(a)(2)*]. Consequently, the applicant should postpone the adoption of the bylaws until after the Commissioner reviews them [*see § 34.144*].

[f] Amendment of Bylaws

Under the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*], a proposed amendment to bylaws will require the prior written consent of the Real Estate Commissioner if: (1) it would materially change the rights of the condominium owners; and (2) it is proposed when the developer or the developer's successor in interest holds or directly controls a specified percentage of the votes [*see Bus. & Prof. Code § 11018.7*]. For a guide to the complicated approval procedure, see *§ 34.162*, PP 1, 2. If approval is obtained or is not required, action on the proposed amendment must comply with detailed regulatory requirements [*see 10 Cal. Code Reg. § 2792.24(b)*]. For a discussion of these requirements, see *§ 34.162*, P 4.

The board of directors of a common interest development may utilize a special statutory procedure to adopt an amendment deleting from any of the governing documents any provision that is unequivocally designed and intended, or that by its nature could only have been designed or intended, to facilitate the developer in completing the construction or marketing of the development [*see Civ. Code § 1355.5(a)*]. This procedure applies only to provisions that provide for access by the developer over or across the common area for purposes of (1) completing construction of the development, and (2) erecting, constructing, or maintaining structures or other facilities designed to facilitate the completion of construction or marketing the separate interests in the development [*Civ. Code § 1355.5(b)*]. Because this form does not include these provisions, further coverage of the statutory procedure is beyond the scope of this comment. For additional discussion, see *§ 34.162*, P 5.

[2] FORM

Bylaws

BYLAWS OF
_____ [*name of association*]

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ARTICLE I. PLAN OF CONDOMINIUM OWNERSHIP

Name

Section 1.01. The name of the corporation is _____ OWNERS' ASSOCIATION ("Association").

Principal Office

Section 1.02. The principal office of the Association is located at_____[*street address*],_____[*city*], California. The Board of Directors is hereby granted full power and authority to change the principal office of the Association from one location to another in [the County of _____,] California. Any such change shall be noted by the Secretary in these Bylaws, but shall not be considered an amendment of these Bylaws.

Application

Section 1.03. These Bylaws are applicable to the residential condominium project known as _____ ("Project"), located at_____[*address and city*] in _____ County, California. These Bylaws are also applicable to all Members of the Association and all tenants, employees, and other persons who use the facilities of the Project in any manner.

Definitions

Section 1.04. Unless otherwise specified in these Bylaws, the definitions set forth in Article 1 of the Declaration for_____[*name of project*] ("Declaration") recorded or to be recorded in the Office of the Recorder of _____ County, California, apply to these Bylaws.

Membership Rights

Section 1.05. The qualification for membership provisions of Section 3.02 of the Declaration are hereby incorporated by reference.

ARTICLE II. MEETINGS OF MEMBERS

Place of Meetings

Section 2.01. All meetings of the Members shall be held at a place designated by the Board. This meeting place shall be within the Project or as close to it as possible. If no meeting place is designated, meetings shall be held at the principal office of the Association. No meeting of the Members shall, unless unusual conditions exist, be held outside of _____ [*specify county in which project is located*] County, California.

Annual Meetings

Section 2.02. The first meeting of the Members of the Association shall be held within _____ [*select the appropriate provision below*]

[*if public report authorizes sale of at least 50 units in project (see 10 Cal. Code Reg. § 2792.17(a)), use:*] 45 days after the close of escrow for the sale of the Unit that represents the fifty-first percentile interest authorized for sale under the first final subdivision public report issued for the Project by the California Real Estate Commissioner, or within six months after the closing of the sale of the first Unit within the Project, whichever is earlier.

[*OR*]

[*if public report authorizes sale of fewer than 50 units in project, use:*] six months after the closing of the sale of the first Unit within the Project.

[*Continue with the following:*]

Thereafter, the annual meeting of the Members shall be held on _____ [*specify day of week, e.g.*, the second Tuesday] of _____ [*month*] of each succeeding calendar year at the hour of _____ P.M. If the day for the annual meeting of the Members is a legal holiday, the meeting shall be held at the same hour on the next day that is not a Saturday, Sunday, or legal holiday.

Special Meetings

Section 2.03. Special meetings of the Members may be called for any lawful purpose by a majority of a quorum of the Board, the President of the Association, or by a written request signed by Members representing at least 5 percent of the total voting power of the Association. The special meeting shall be held not less than 35 or more than 90 days after adoption of the resolution or receipt of the request. Only that business stated in the notice of meeting given pursuant to Section 2.04 of these Bylaws shall be transacted at the special meeting.

Notice of Meetings

Section 2.04. The Secretary of the Association shall give written notice of any Members' meeting to each Member of record. Except as provided below, the notice shall be given at least 10 but not more than 90 days before the meeting, by first class [*or* registered *or* certified] mail or by personal delivery. If a special meeting is called by Members pursuant to Section 2.03 of these Bylaws, the notice shall be given within 20 days after receipt of the request for the meeting. If that 20-day requirement is not satisfied, the Members who called the meeting may give the notice. Any notice of meeting shall be addressed to the Member at the address appearing on the books of the Association, or the address supplied by the Member to the Association for this purpose. If there is no such address, notice shall be given at the principal office of the Association or by publication at least once in a newspaper of general circulation in the county in which the principal office is located. The notice shall state the place, date, and time of the meeting. The noticeshall also specify those matters the Board intends to present for action by the Members. In the case of a special meeting, the only matters that may be voted on are those matters that were mentioned in the notice of meeting. In the case of an annual meeting, any proper matter may be presented at the meeting for action [*add if bylaws authorize a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):*, except as provided in Section 2.08 of these Bylaws.] If Directors are to be elected at the meeting, the notice shall include the names of all those who are nominees at the time the notice is given.

Waiver of Notice or Consent of Absentees

Section 2.05. The transactions of any meeting of Members, however called and noticed, shall be as valid as though taken at a duly called, noticed, and held meeting, if: (1) a quorum is present either in person or by proxy; and (2) either before or after the meeting, each of the Members not present in person or by proxy signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the Minutes of the meeting. Any such waiver, consent, or approval shall be filed with the corporate records or made a part of the Minutes of the Meeting.

Voting Rights

Section 2.06. The voting of membership provision set forth in Section 3.04 of the Declaration is hereby incorporated by reference.

Record Date of Membership

Section 2.07. The Board shall fix, in advance, a record date or dates for the purpose of determining the Members entitled to notice of and to vote at any meeting of Members. The record date for notice of a meeting shall not be more than 90 nor less than 10 days before the date of the meeting. The record date for voting shall not be more than 60 days before the date of the meeting or before the date on which the first written ballot is mailed or solicited. The Board may also fix, in advance, a record date for the purpose of determining the Members entitled to exercise any rights in connection with any other action. Any such date shall not be more than 60 days prior to the action.

Quorum

Section 2.08. At any meeting, the presence either in person or by proxy of Members entitled to cast at least 51 percent [*or specify another percentage, which must be at least 25 percent and not more than 662/3 percent of the total voting*

power of the association] of the total voting power of the association shall constitute a quorum for any action except as otherwise provided in the Articles, Bylaws, or this Declaration. The Members present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough Members to leave less than a quorum, if the action taken, other than adjournment, is approved by at least a majority of members required to constitute a quorum. [*Add if this provision authorizes a quorum of less than one third of the voting power (see Corp. Code § 7512(b)):* Notwithstanding the above, whenever the quorum present at an annual meeting of Members consists of less than one third of the voting power of the Association (present in person or by proxy), then the only matters that may be voted on are those matters that were mentioned in the notice of meeting given pursuant to Section 2.04 of these Bylaws.] If a quorum is not present at any time at a duly called meeting, a majority of those Members present in person or by proxy may adjourn the meeting to a time not less than five days nor more than 30 days from the meeting date, but no other business may be transacted. An adjourned meeting may be held without written notice, provided that notice is given by announcement at the original meeting. If no such announcement is made, or if the selected date is changed after adjournment, notice of the time and place shall be given to Members in the manner provided in Section 2.04 of these Bylaws. The quorum for the adjourned meeting shall be _____ percent.

Parliamentary Procedure

Section 2.09. All meetings of the Members shall be conducted in accordance with (1) a recognized system of parliamentary procedure, or (2) any parliamentary procedures adopted by the Association.

Proxies

Section 2.10. At all meetings of Members, each Member may vote in person or by proxy. All proxies shall be in writing and filed with the Secretary of the Association. Every proxy shall be revocable and shall automatically cease on conveyance of its maker's membership, or on receipt of written notice by the Secretary of the maker's death or judicially declared incapacity. No proxy shall be valid after the expiration of 11 months from its date of execution, unless otherwise provided in the proxy. However, the maximum term of any proxy shall be three years from its date of execution. The maker of a proxy may revoke it by delivering a written revocation to the Association, by executing a subsequent proxy and presenting it to the meeting, or by attending any meeting and voting in person.

Any revocable proxy covering any of the following matters that require a vote of the members is not valid as to those matters unless it sets forth the general nature of the matter to be voted on:

(a) Removing a director without cause, pursuant to Section 3.06(b) of these Bylaws;

(b) Filling director vacancies pursuant to Section 3.07 of these Bylaws;

(c) Entering into or approving a contract or transaction between the Association and one or more of the Directors, or between the Association and any entityin which one or more of the Directors has a material financial interest, when the material facts of the contract or transaction are fully disclosed pursuant to *Section 7233 of the California Corporations Code*;

(d) Amending the articles or bylaws to repeal, restrict, create, or expand proxy rights;

(e) Amending the Articles after approval by the Board, in accordance with *Section 7812 of the California Corporations Code*;

(f) Disposing of assets other than in the usual and regular course of corporate activities pursuant to *Section 7911(a)(2) of the California Corporations Code*;

(g) Approving merger terms pursuant to *Section 8012 of the California Corporations Code*;

(h) Adopting an amendment to a merger agreement that changes any of the principal terms pursuant to *Section 8015(a) of the California Corporations Code*;

(i) Electing to dissolve the Association, by approval of a majority of all members or by approval of both the Board and Members pursuant to *Section 8610 of the California Corporations Code*; or

(j) If the corporation has more than one class of memberships outstanding on dissolution, approving a plan of distribution of assets which is not in accordance with the liquidation rights of those classes, pursuant to *Section 8719(a) of the California Corporations Code*.

Action Taken Without a Meeting

Section 2.11. Any action that may be taken at a meeting of the Members, except for the election of Directors, may be taken without a meeting provided the following ballot requirements are satisfied:

(a) The Corporation shall distribute a written ballot to every Member entitled to vote on the matter. The ballot shall be solicited in the same manner as provided in Section 2.04 of these Bylaws for the giving of notice of meetings of Members. If the Association has 100 or more Members and the ballots are distributed to 10 or more Members, the ballot shall comply with the additional requirements set forth in *Section 7514 of the California Corporations Code*.

(b) The ballot shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any proposal, provide a reasonable time within which to return the ballot, indicate the number of responses needed to meet the quorum requirement, and state the percentage of approvals necessary to pass the measure submitted.

(c) The proposed action shall be considered approved if:

> (1) The number of votes cast by ballot within the specified time period equals or exceeds the quorum required to be present at a meeting authorizing the action; and
>
> (2) The number of approvals equals or exceeds the number of votes that would be required for approval at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) No written ballot shall be revoked.

Approval by Members Required by Statute

Section 2.12. Any approval by the Members of the following proposals, other than unanimous approval by those entitled to vote, shall be valid only if the general nature of the approved proposal was stated in the notice of meeting or any waiver of notice of meeting:

(a) Removing a director without cause pursuant to Section 3.06(c) of these Bylaws;

(b) Filling vacancies on the Board pursuant to Section 3.07 of these Bylaws;

(c) Entering into or approving a contract or transaction between the Association and one or more of the Directors, or between the Association and any entity in which one or more of the Directors has a material financial interest, when the material facts of the contract or transaction are fully disclosed pursuant to *Section 7233 of the California Corporations Code*;

(d) Amending the Articles after approval by the Board, in accordance with *Section 7812 of the California Corporations Code*;

(e) Electing to dissolve the Association, by approval of a majority of all members or by approval of both the Board and Members pursuant to *Section 8610 of the California Corporations Code*; or

(f) If the corporation has more than one class of memberships outstanding on dissolution, approving a plan of distribution of assets which is not in accordance with the liquidation rights of those classes, pursuant to *Section 8719 of the California Corporations Code*.

Title 7 Decisions

Section 2.13. Declarant shall not cast any votes in any decision submitted to Members regarding (a) whether to file a claim against Declarant under Title 7, Part 2 of Division 2 of the California Civil Code (Section 895 et seq.), or (b) the prosecution or resolution of such a claim once it is filed, including any decision to institute mandatory binding arbitration relating to any alleged violation of the standards set forth in *California Civil Code Sections 895 through 897* (collectively, a "Title 7 Decision"). Any such decision may be approved only by Members other than Declarant.

ARTICLE III. BOARD OF DIRECTORS

Number

Section 3.01. The affairs of this Association shall be managed and its duties and obligations performed by an elected Board of Directors, consisting of _____ [*insert number*] persons [*add if desired:* who shall, with the exception of the Initial Directors elected pursuant to Section 3.03 of these Bylaws, be Members of the Association].

Nomination

Section 3.02. Except in the case of Initial Directors, nominations for election to the Board of Directors may be made by any of the following:

(a) A nominating committee appointed by the Board at least 90 days prior to an annual meeting of Members, provided the Board receives the committee's nomination or nominations at least 30 days before the annual meeting of Members.

(b) A written petition signed within 11 months preceding the annual meeting by Members representing _____ percent of the "voting power" of the Association as that term is defined in the Nonprofit Mutual Benefit Corporation Law of the State of California. The petition shall identify the nominee, contain that person's written consent to serve as a Director, and be delivered to the Secretary of the Association at least 30 days before the annual meeting. [*Add if potentially applicable:* If the Association has more than 500 Members, then the additional petition requirements set forth in *Corporations Code Section 7521* shall be satisfied.]

(c) Any Member who is present in person, or by the proxy of any Member who is present by proxy, at the annual meeting of Members at which the Director is to be elected.

Election

Section 3.03. As soon as possible after the filing of Articles of Incorporation for the Association, Declarant shall elect Initial Directors who shall serve until the first annual meeting of the Members. All such Initial Directors, as well as any subsequently elected Director who is a director, officer, employee, or agent of Declarant, shall also be referred to herein as "Declarant Related Directors," while a person elected to the Board who is not a Declarant Related Director shall be referred to as a "Homeowner Director." At the first annual meeting of the Association, the Members shall fill, by election, all positions on the Board of Directors. Subsequent elections shall also be held at the annual meetings. However, if an annual meeting is not held or does not include an election, the election may be held at a special meeting of members called for that purpose. Voting for Directors shall be by secret written ballot. At an election the Members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of these Bylaws. Each Member entitled to vote on the election may cumulate his or her votes and give one candidate a number of votes equal to the number of Directors to be elected multiplied by the number of votes to which the Member is entitled, or distribute the Member's votes on the same principle among as many candidates as the Member thinks fit. No Member shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination before voting and a Member has given notice at the meeting before the voting of the Member's intention to cumulate votes. If any one Member has given this notice, all Members may cumulate their votes for candidates in nomination. The persons receiving the highest number of votes shall be elected.

Special Election Procedure

Section 3.04. Notwithstanding any other provision of these Bylaws, for so long as a majority of the voting power of the Association resides in Declarant, or so long as there are two classes of membership in the Association, at least _____ [*specify number which must equal at least 20 percent of total number of directors; e.g.,* one *in the case of five directors (see 10 Cal. Code Reg. § 2792.19(c)(1))*] Director(s) shall have been elected solely by the votes of Members other than Declarant. If, at any election, Members other than Declarant do not have a sufficient percentage of the voting power to satisfy that requirement, _____ [the one position on the Board *or* the number of positions on the Board necessary to satisfy that requirement] shall be filled by the candidate[s] receiving the highest number of votes cast by Members other than Declarant. Any remaining positions on the Board shall be filled in accordance with normal voting procedures.

Term

Section 3.05. Each Director shall hold office until the election of his or her successor or until the Director's death, removal, or judicial adjudication of mental incompetence. _____ [*Provide for either concurrent or staggered terms, e.g.:*

[*If terms are to run concurrently*: The term of office of each Director shall be _____ (*specify number not exceeding four*) year(s).]

[*If terms are to be staggered*: The term of office of the _____ (*e.g.,* three) Directors receiving the highest number of votes at the first annual meeting shall be _____ years and the term of office of the remaining Directors shall be _____ years.]

[*Continue with the following:*]

Thereafter, at each annual meeting, any vacancies on the Board created bydeath, resignation, removal, judicial adjudication of mental incompetence, or expiration of term shall be filled. The term of office of each Director elected to fill a vacancy created by the expiration of the term of office of the preceding Director shall be the same length as his or her predecessor's term. The term of office of any Director elected or appointed to fill a vacancy created by any event other than the expiration of the predecessor Director's term shall be the balance of the unserved term of the predecessor. Any person serving as a Director may be re-elected, and there shall be no limitation on the number of terms a Director may serve.

Removal

Section 3.06. Directors may be removed as follows:

(a) The Board may declare vacant the office of a Director on the occurrence of any of the following events:

(1) The Director is declared of unsound mind by a final order of court;

(2) The Director is convicted of a felony;

[*Add if association holds assets in charitable trust:*]

(3) The Director is found by a final order or judgment of any court to have breached duties imposed by *Section 7238 of the California Corporations Code* on directors who perform functions with respect to assets held in charitable trust; or

[*Add if minimum attendance will be required:*]

(4) The Director has failed to attend _____ [*number*] meetings of the Board.

(b) One or more Directors may be removed before the expiration of their terms, without cause, at an annual or special meeting of the Members. Any removal without cause shall be approved (1) by a majority of the total voting power of the Association for so long as the Development consists of fewer than 50 Lots, or (2) by the vote of Members representing a majority of a quorum of Members if the Development consists of 50 or more Lots. Notwithstanding the above, unless the entire Board is removed from office by the vote of the Members, an individual Director shall not be removed prior to the expiration of his or her term of office if the number of votes cast against the removal, or not consenting in writing to the removal, would be sufficient to elect the Director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of Directors authorized at the time of the Director's most recent election were then being elected. A Director who has been elected to office solely by the votes of Members other than Declarant as required by Section 3.04 of these Bylaws may be removed from office before the expiration of his or her term of office only by the vote of at least 51 percent of the voting power of Members other than Declarant. If a Director is removed at a meeting, a new Director may be elected at the same meeting.

Vacancies

Section 3.07. Any vacancy on the Board caused by the death or resignation of a Director shall be filled by the remaining Directors. The successor shall serve for the unexpired term of his or her predecessor. The Board shall not fill a vacancy on the Board created by the removal of a Director, except with the vote or written assent of a majority of each class of Members.

Compensation

Section 3.08. No Director shall receive any compensation for any service he or she may render to the Association; provided, however, that a Director may be reimbursed for actual out of pocket expenses incurred by the Director in the performance of his or her duties.

Powers and Duties

Section 3.09. The Board's powers and duties shall include, but shall not be limited to, the following:

(a) Enforcing the applicable provisions of this Declaration, the Articles, Bylaws, and any other instruments governing the ownership, management, and control of the Project.

(b) Paying taxes and assessments that are, or could become, a lien on all or a portion of the Common Area.

(c) Contracting for casualty, liability, and other insurance on behalf of the Association.

(d) Contracting for goods and services for the Common Area, facilities, and interests of the Association, subject to the limitations *set forth in Section 3.10*(a) of these Bylaws.

(e) Delegating its powers to any committees, Officers, or employees of the Association expressly authorized by the Governing Instruments.

(f) Preparing budgets and financial statements for the Association as prescribed in the Governing Instruments.

(g) Formulating Rules and Regulations for the use and operation of the Common Area and facilities owned or controlled by the Association.

(h) Initiating and executing disciplinary proceedings against Members for violations of provisions of the Governing Instruments in accordance with procedures set forth in the Governing Instruments.

(i) Entering any Unit to perform necessary construction, maintenance, or emergency repair work for the benefit of the Common Area or the Members in the aggregate.

(j) Electing the Officers of the Association.

(k) Filling vacancies on the Board of Directors, except for a vacancy created by the removal of a Director.

(l) Reviewing the following on at least a quarterly basis:

(1) A current reconciliation of the operating accounts of the Association.

(2) A current reconciliation of the reserve accounts of the Association.

(3) The actual reserve revenues and expenses for the current year compared to the budget for the current year.

(4) The most current account statements prepared by the financial institution where the Association has its operating and reserve accounts.

(5) An income and expense statement for the operating and reserve accounts of the Association.

(m) Withdrawing moneys from the Association's reserve accounts.

(n) Causing studies of the reserve account requirements of the Project to be conducted, when necessary, and reviewing those studies in accordance with *Civil Code Section 1365.5(e)*.

(o) Performing any act reasonably necessary to resolve any dispute involving the Declaration or any other governing documents, such as Articles, Bylaws, or Operating Rules, which govern the operation of the Project or the Association, the Davis-Stirling Common Interest Development Act (*Civil Code Section 1350 et seq.*), or the Nonprofit Mutual Benefit Corporation Law (*Corporations Code Section 7110 et seq.*) by the Association's dispute resolution procedure required by *Civil Code Sections 1363.810 through 1363.850* as manifested in Section 3.10 of the Declaration, and the alternative dispute resolution procedure prescribed by *Civil Code Sections 1369.510 through 1369.590* as a prerequisite to any party filing a civil enforcement action.

(p) The authorization detailed in (o) does not require the Board to do any of the following:

(1) As a prerequisite to initiating any civil action, to conduct inspections, maintain inspection records, exhaust applicable casualty insurance coverage maintained by the Association, provide an opportunity to cure, meet with members, or obtain the consent of the members.

(2) Except in compliance with *Civil Code Sections 1369.510 through 1369.590*, to submit civil claims of any kind to binding or non-binding alternative dispute resolution procedures.

Limitations on Powers

Section 3.10. Notwithstanding the provisions of Section 3.09, the Board shall be prohibited from taking any of the following actions, except with the vote or written assent of a majority of each class of Members, or when Class B membership no longer exists, with the approval of a majority of the total voting power of the Association as well as the approval of a majority of the total voting power residing in Members other than Declarant:

(a) Entering into a contract with a third person under which the third person will furnish goods or services for the Common Area or the Association for a term longer than one year, with the following exceptions:

(1) A management contract approved by the Federal Housing Administration or Veterans Administration;

(2) A contract with a public utility if the rates charged are regulated by the Public Utilities Commission,

provided that the term shall not exceed the shortest term for which the utility will contract at the regulated rate;

(3) Prepaid casualty and/or liability insurance of not more than three years duration, provided that the policy provides for short rate cancellation by the insured;

(4) Lease agreements for laundry room fixtures and equipment of not more than five years duration, provided that the lessor under the agreement is not an entity in which the Declarant has a direct or indirect ownership interest of 10 percent or more;

(5) Agreements for cable television services and equipment or satellite dish television services and equipment for a term of up to five years, provided that the supplier is not an entity in which the Declarant has a direct or indirect ownership interest of 10 percent or more; and

(6) Agreements for the sale or lease of burglar alarm and fire alarm equipment, installation, and services for a term of up to five years, provided that the supplier or suppliers are not entities in which the Declarant has a direct or indirect ownership interest of 10 percent or more.

(b) Incurring aggregate expenditures for capital improvements to the Common Area in any fiscal year in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(c) Selling during any fiscal year property of the Association having anaggregate fair market value in excess of 5 percent of the budgeted gross expenses of the Association for that fiscal year.

(d) Paying compensation to Directors or to Officers of the Association for services rendered in the conduct of the Association's business; provided, however, that the Board may reimburse a Director or Officer for expenses incurred in carrying on the business of the Association.

(e) Filling a vacancy on the Board of Directors created by the removal of a Director.

In addition, the Board is prohibited from approving any decision to institute mandatory binding arbitration relating to any alleged violation of the standards set forth in *California Civil Code Sections 895 through 897*, except with the approval of a majority of the total voting power of the Association residing in Members other than the Declarant.

ARTICLE IV. MEETINGS OF DIRECTORS

Regular Meetings

Section 4.01. Regular meetings of the Board of Directors shall be held monthly [*or* quarterly *or other period not more infrequent than semiannually*] at a time and place within the Development fixed by resolution of the Board. Notice of the time and place of the meeting shall be communicated to the Directors not less than four days before the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. Notice of the time and place of the meeting shall also be posted at a prominent place or places within the Common Area. However, if the Common Area is unsuitable for such a posting, the Board shall communicate the notice of the time and place by any means it deems appropriate.

Special Meetings

Section 4.02. Special meetings of the Board shall be held when called by written notice signed by the President of the Association or by any two Directors other than the President. The notice shall specify the time and place of the meeting and the nature of any special business to be considered. Notice of any special meeting must be given to each Director not less than _____ [*specify number not less than three*] days or more than _____ [*e.g.,* 15] days before the date fixed for the meeting; provided, however, that notice need not be given to any Director who has signed a waiver of notice or a written consent to holding of the meeting. A copy of the notice shall also be posted in a prominent place or places in the Common Area of the Project.

Emergency Meetings

Section 4.03. Emergency meetings of the Board of Directors may be called by the President of the Association, or by any two members of the Board other than the President, if there are circumstances that could not have been reasonably foreseen that require immediate attention and possible action by the Board, and that of necessity make it impracticable to provide notice as otherwise required for meetings of the Board.

Quorum

Section 4.04. A majority of the Board shall constitute a quorum and, if a quorum is present, the decision of a majority of the Directors present shall be the act of the Board. It is expressly intended that after the Declarant Related Directors leave a meeting as required by Section 4.10:

(a) The Homeowner Directors shall have the right to transact business relating to Title 7 Decisions; and

(b) The decision of both Homeowner Directors if there are only two Homeowner Directors, or of a majority of the Homeowner Directors if there are more than two Homeowner Directors, shall constitute a proper and valid action of the Board.

Open Meetings

Section 4.05. Regular and special meetings of the Board shall be open to all Members of the Association. The Board must permit any Member to speak at any of the Board's meetings, except for meetings held in executive session. To this end, the Board must establish a reasonable time to allow Members to speak to the Board at its meetings.

Notice of regular and special meetings of the Board must be given to Members at least four days before the meeting. Notice may be given by posting in a prominent place or places within the Common Area, by mail or delivery to each Unit, or by Association newsletter.

Executive Session

Section 4.06. The Board may, with the approval of a majority of the Directors present at a meeting at which a quorum for the transaction of business has been established, adjourn a meeting and reconvene in executive session to discuss and vote on (1) litigation in which the Association is or may become involved, (2) matters that relate to the formation of contracts with third parties, (3) personnel matters, (4) member discipline matters, and (5) orders of business of a similar nature. In any matter relating to the disciplining of a Member, the Board shall meet in executive session if requested to do so by that Member, and the Member shall be entitled to attend the executive session. In all other cases, Members

who are not on the Board may not attend an executive session. The nature of any business to be considered in executive session shall first be announced in opensession. Further, any matter discussed in executive session shall be generally noted in the minutes of the Board.

Adjournment

Section 4.07. A majority of the Directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of the adjournment shall be given, prior to the time of the adjourned meeting, to the Directors who were not present at the time of the adjournment.

Minutes

Section 4.08. Written minutes shall be kept of all meetings of the Board. The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any meeting of the Board, other than an executive session, shall be made available to Members within 30 days of the meeting. Further, the minutes, proposed minutes, or summary minutes shall be distributed to any Member on request. Any Member making such a request shall reimburse the Association for its costs in making that distribution. Members shall be notified in writing at the time that the pro forma budget required by *Civil Code Section 1365* is distributed, or at the time of any general mailing to the entire membership of the Association, of their right to have copies of the minutes of meetings of the Board and of how and where those minutes may be obtained.

Action Taken Without a Meeting

Section 4.09. The Board may take actions without a meeting if all of the Directors consent in writing to the action to be taken. If the Board resolves by unanimous written consent to take action, an explanation of the action taken shall be posted at a prominent place or places within the Common Area within three days after the written consents of all Directors have been obtained. However, if the Common Area is unsuitable for such a posting, the Board shall communicate the explanation of the action taken by any means it deems appropriate.

Title 7 Decisions

Section 4.10. All Declarant Related Directors are hereby declared to have a conflict of interest and are hereby expressly prohibited from voting or participating in any discussions related to any Title 7 Decision. In addition, the Declarant Related Directors are required to leave any meeting in which a Homeowner Director announces that such Director would like to begin discussions or a vote on a Title 7 Decision. Any vote on any Title 7 Decision shall require the approval of a majority of the Homeowner Directors present at the meeting, but not less than two (a majority of a quorum). The discussion and voting on the Title 7 Decision shall be conducted after all other business either scheduled for that meeting or which any Director intends to present to the Board for discussion or decision (other than a Title 7 Decision) has been completed. After the Declarant Related Directors have left the meeting, the Homeowner Directors may discuss or decide Title 7 Decisions; however, no other business shall be transacted until the Declarant Related Directors are notified of their right to re-enter the meeting and participate in all discussions and voting on other than Title 7 Decisions.

ARTICLE V. OFFICERS

Enumeration of Officers

Section 5.01. The Officers of this Association shall be a President, a Vice-President, a Secretary, and a Chief Financial Officer. The Board may appoint additional officers pursuant to Article X of these Bylaws. Any number of offices may be held by the same person.

Appointment and Term

Section 5.02. The Officers of this Association, except those Officers appointed in accordance with Article X of this Article, shall be elected annually by the Board. Any vacancies shall be filled by the Board at any time, not necessarily on an annual basis, that it deems proper. Each Officer shall hold his or her office at the pleasure of the Board.

Resignation and Removal

Section 5.03. The Board may remove any Officer from office either with or without cause. An Officer may resign at any time by giving written notice to the Board, the President, or the Secretary. The resignation shall take effect at the date of receipt of the notice or at any later time specified in the notice. Unless otherwise specified in the notice, acceptance of the resignation by the Board shall not be necessary to make it effective.

Compensation

Section 5.04. An Officer shall not receive any compensation for any service he or she may render to the Association; provided, however, that any Officer may be reimbursed for actual out of pocket expenses incurred by the Officer in the performance of his or her duties.

ARTICLE VI. PRESIDENT

Election

Section 6.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] President.

Duties

Section 6.02. The President shall:

(a) Preside over all meetings of the Members and of the Board.

(b) Sign as President all deeds, contracts, and other written instruments that have been approved by the Board, un- less the Board, by duly adopted resolution, authorizes the signature of a lesser Officer.

(c) Call meetings of the Board whenever he or she deems it necessary, in accordance with rules and notice requirements imposed by the Board and the Governing Instruments. The notice period shall not be less than three days except in the

case of emergencies.

(d) Have, subject to the advice of the Board, general supervision, direction, and control of the affairs of the Association.

(e) Discharge any other duties required of him or her by the Board.

ARTICLE VII. VICE-PRESIDENT

Election

Section 7.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] Vice-President.

Duties

Section 7.02. The Vice-President shall:

(a) Act in the place and in the stead of the President in the event of his or her absence, inability, or refusal to act; and

(b) Exercise and discharge any other duties required of him or her by the Board. In connection with any such additional duties, the Vice-President shall be responsible to the President.

ARTICLE VIII. SECRETARY

Election

Section 8.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] Secretary.

Duties

Section 8.02. The Secretary shall:

(a) Keep a record of all meetings and proceedings of the Board and of the Members;

(b) Keep the seal of the Association, if any, and affix it on all papers requiring the seal;

(c) Serve all required notices of meetings of the Board and the Members;

(d) Keep current records showing the names and addresses of all Members; and

(e) Sign as Secretary all deeds, contracts, and other written instruments that have been approved by the Board, if the instruments require a second Association signature and the Board has not passed a resolution authorizing another Officer to sign in the place and stead of the Secretary.

ARTICLE IX. CHIEF FINANCIAL OFFICER

Election

Section 9.01. At the first meeting of the Board immediately following the first annual meeting of the Members, the Board shall elect _____ [one of its Members to act as *or* a] Chief Financial Officer.

Duties

Section 9.02. The Chief Financial Officer shall:

(a) Receive and deposit all of the funds of the Association in any bank or banks selected by the Board;

(b) Be responsible for and supervise the maintenance of books and records to account for Association funds and other Association assets;

(c) Disburse and withdraw Association funds in the manner specified by the Board; and

(d) Prepare and distribute the financial statements for the Association required by the Declaration.

ARTICLE X. SUBORDINATE OFFICERS

Appointment

Section 10.01. The Board may appoint, at any time, any subordinate Officers that the Association may require.

Duties

Section 10.02. The Board shall prescribe the term of office, authority, and duties of subordinate Officers. These duties may include the right to act in the place and stead of any Officer other than the President.

ARTICLE XI. BOOKS AND RECORDS

Required Books and Records

Section 11.01. The Association shall maintain at its principal office:

(a) Copies of the Governing Instruments as last amended;

(b) Adequate and correct books and records of account;

(c) Written minutes of the proceedings of its Members, of its Board, and of committees of its Board; and

(d) A Membership Register containing the following information about each Member: name, mailing address, telephone number, and class of membership.

Inspection Rights

Section 11.02. The above books and records shall be made available for inspection as follows:

(a) Any Member shall have the right to inspect the Governing Instruments at the principal office of the Association, at any reasonable time during office hours.

(b) Any Member shall have the right to inspect the books and records described in Section 11.01(b)-(d) and to copy them at any reasonable time and for a purpose reasonably related to his or her interest as a Member. This right is subject to the power of the Board to set reasonable times for inspection, notice requirements, and fees to cover the cost of making copies of the documents requested by a Member.

(c) Every Director shall have the absolute right to inspect all books, records, and documents of the Association and the physical properties owned or controlled by the Association at any reasonable time. The right of inspection by a Director includes the right to make extracts and copies of documents.

ARTICLE XII. NONLIABILITY AND INDEMNIFICATION

Definition of Agent

Section 12.01. For purposes of this Article, "Agent" means any present or former Director or Officer or any other employee or agent of the Association.

Nonliability

Section 12.02. Except as provided by law, no right, power, or responsibility conferred on the Board or the Architectural Committee by the Governing Instruments shall be construed as a duty, obligation, or disability charged upon any Agent. No Agent shall be liable to any party (other than the Association or a party claiming in the name of the Association) for injuries or damage resulting from the Agent's acts or omissions within what the Agent reasonably believed to be the scope of his or her Association duties ("Official Acts"), except to the extent that the injuries or damage result from the Agent's willful or malicious misconduct. No Agent shall be liable to the Association (or to any party claiming in the name of the Association) for injuries or damage resulting from the Agent's Official Acts, except to the extent that the injuries or damage result from the Agent's negligence or willful or malicious misconduct.

Indemnification

Section 12.03. The Association shall pay all expenses actually and reasonably incurred by, and satisfy any judgment or fine levied against, any Agent as a result of any action or threatened action against the Agent to impose liability on the Agent for his or her Official Acts, provided that:

(a) The Board determines that the Agent acted in good faith and in a manner the Agent reasonably believed to be in the best interests of the Association;

(b) In the case of a criminal proceeding, the Board determines that the Agent had no reasonable cause to believe his or her conduct was unlawful; and

(c) In the case of an action or threatened action by or in the right of the Association, the Board determines that the Agent acted with the care (including reasonable inquiry) that an ordinarily prudent person in a like position would use under similar circumstances.

Approval by Board

Section 12.04. Any determination of the Board required under this Article must be approved by a majority vote of a quorum consisting of Directors who are not parties to the action or threatened action giving rise to the indemnification. If the Board fails or refuses to make any such determination, the determination may be made by the vote or written consent of a majority of a quorum of the Members, provided that the Agent to be indemnified shall not be entitled to vote.

Payments

Section 12.05. Payments made pursuant to this Article shall include amounts paid and expenses incurred in settling the action or threatened action. This Article shall be construed to authorize payments and indemnification to the fullest extent now or hereafter permitted by applicable law.

Insurance

Section 12.06. The Association may purchase and maintain insurance on behalf of its Agents to the extent and under the circumstances provided in the Declaration.

ARTICLE XIII. AMENDMENTS

Amendment of Bylaws

Section 13.01. So long as a two-class voting system is in effect, any amendment of these Bylaws shall require the vote or written consent of Members representing _____ [*specify percentage not below 51 percent*] of_____ [the voting power of each class of Members *or* a quorum of Members of each class]. After conversion of the Class B Membership to Class A Membership, these Bylaws may be amended by the vote or written consent of (1) 51 percent [*or specify higher percentage, but not one that would require the vote of more than a bare majority of the total voting power of the association (see 10 Cal. Code Reg. § 2792.24(b)(1)(B))*] of a quorum, and (2) 51 percent [*or specify higher percentage*] of the votes of Members other than the Declarant. Notwithstanding the above, the percentage of a quorum or of the voting power of the Association or of Members other than Declarant necessary to amend a specific clause or provision in these Bylaws shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause or provision.

Prior Approval of Commissioner

Section 13.02. When required under *Section 11018.7 of the California Business and Professions Code*, the prior written consent of the Real Estate Commissioner shall be obtained prior to submitting a proposed amendment to these Bylaws to the vote of the Members.

[*Optional article:*]

ARTICLE XIV. TAX-EXEMPT STATUS

Tax-Exempt Status

Section 14.01. The Board and Members of the Association shall conduct the business of the Association in such a manner that the Association shall qualify and be considered an organization exempt from federal and state income taxes pursuant to *Section 528 of the Internal Revenue Code* and *Section 23701t of the California Revenue and Taxation Code*, as amended.

Filing

Section 14.02. The Board shall file or have filed any annual election for tax-exempt status that is required under federal or state law, and shall cause the Association to comply with the federal and state statutes, rules, and regulations pertaining to those exemptions.

[*Continue with the following:*]

CERTIFICATE OF SECRETARY
OF
_____ [*name of association*]
a California Nonprofit
Mutual Benefit Corporation

I hereby certify that I am the duly elected and acting Secretary of the above Corporation and that the foregoing Bylaws, comprising _____ [*number*] pages, constitute the Bylaws of the Corporation as duly adopted at a meeting of the Board of Directors of the Corporation held on_____[*date*].
Dated: _____

_____ [*signature*]
[*typed name*], Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawSubdivisionsLocal RegulationReal Property

LawSubdivisionsState Regulation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.206

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.206 Minutes Adopting Bylaws

[1] Comment--Use of Form

This form is a set of minutes that may be used by the developer of a condominium project to elect the initial directors of the owners' association and to adopt the bylaws of the association. If the developer has organized the association under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*] and has signed the articles of incorporation as the sole incorporator [*see § 34.204[1]*], he or she may adopt and amend the bylaws, elect the directors and officers, and do whatever else is necessary and proper to perfect the organization of the corporation [*Corp. Code § 7134*].

The developer should elect initial directors as soon as possible after the filing of the articles, so that those initial directors can perform various organizational tasks on behalf of the association (such as authorizing the payment of the expenses of corporate formation) that need to be carried out before the members meet for the first time and elect their own directors. For a list of such tasks, see *Ch. 13, Nonprofit Corporations, § 13.131*.

The initial directors and developer should hold an organizational meeting as soon as possible after the election of the directors and the adoption of the bylaws. Before the meeting is held, the initial directors should waive (in writing) the statutory notice requirements for the meeting [*see Corp. Code § 7211(a)(3)*; *see also Ch. 13, Nonprofit Corporations, § 13.245*]. The association must keep written minutes of that meeting [*see Corp. Code § 8320*; *see also Ch. 13, Nonprofit Corporations, § 13.247*].

For a procedural guide to incorporation of an owners' association, see *§ 34.144*, P 3.

[2] FORM

Minutes Adopting Bylaws

MINUTES OF ACTIONS TAKEN BY INCORPORATOR OF _____, A CALIFORNIA

NONPROFIT MUTUAL BENEFIT CORPORATION, PURSUANT TO CORPORATIONS CODE SECTION 7134

The undersigned, being the Incorporator of_____[*name of corporation*] ("Corporation"), a California nonprofit mutual benefit corporation, hereby exercises_____[his *or* her] authority under *Section 7134 of the California Corporations Code* to adopt the following preambles and resolutions:

WHEREAS, the Articles of Incorporation of the Corporation were filed in the office of the Secretary of State of California on _____ [*date*]; and

WHEREAS, the Incorporator possesses a form of Bylaws for the regulation of the affairs of the Corporation; and

WHEREAS, it is deemed to be necessary and proper for Initial Directors to be elected before the first meeting of the Members of the Corporation and for the above Bylaws to be adopted as and for the Bylaws of the Corporation;

NOW, THEREFORE, BE IT RESOLVED, that the above Bylaws are adopted as and for the Bylaws of the Corporation, and that a copy of those Bylaws shall be inserted in the book of minutes of the Corporation; and

RESOLVED, that the following persons be elected Initial Directors of the Corporation to hold office until their successors are duly elected at the first meeting of the Members of the Corporation:_____[*names*].
Dated: _____

_____ [*signature of developer*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.207

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.207 Management Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a condominium owners' association and a professional manager or management firm. The agreement delegates authority, within specified limits, to an agent/manager to carry on the day-to-day affairs of the condominium project. The board has authority to delegate the management of an association's activities to a management company; provided, however, that the activities and affairs of the association must be managed, and all corporate powers must be exercised under, the ultimate direction of the board [*Corp. Code § 7210*]. Developers and owners' associations of relatively large projects often elect to retain professional managers because the successful management of multiunit projects is time-consuming and difficult.

If the project will be professionally managed, the governing instruments for the project should authorize the board to delegate its project management duties to a professional manager or management firm [*see § 34.202[2]*, Section 3.06(e)].

A copy of any proposed or existing management agreement (or other contract obligating the owners' association) must be included in a "substantially complete" application for a public report [*see 10 Cal. Code Reg. § 2792.1(a)(7)*; *see § 34.200[1][e][iii]*].

For a discussion of real property management in general, see Ch. 38, *Real Property Management* .

[b] Prospective Agent's Statement of Qualifications

As a prerequisite to entering into a management agreement, any prospective managing agent who is neither a full-time association employee nor a regulated financial institution, but who will be compensated for exercising control over the

association's assets, must provide the association's board of directors with a written statement of the agent's qualifications, as prescribed by statute. The statement should be provided as soon as practicable, but in no event more than 90 days, before entering into a management agreement [*see Civ. Code § 1363.1*].

[c] Miscellaneous Limitations

[i] Term of Agreement

The governing body of an owners' association may not enter into a contract under which a third person will furnish goods or services for the common area or the owners' association for a term longer than one year, unless the board first obtains the vote or written assent of a majority of the voting power of the association residing in members other than the developer [*10 Cal. Code Reg. § 2792.21(b)(1)*]. However, that approval need not be obtained for the following agreements [*10 Cal. Code Reg. § 2792.21(b)(1)(A)-(G)*]:

- A management contract approved by the Federal Housing Administration or Veterans Administration;

- A contract with a public utility if the rates charged are regulated by the Public Utilities Commission, provided that the term does not exceed the shortest term for which the utility will contract at the regulated rate;

- Prepaid casualty and/or liability insurance with a term of up to three years, provided that the policy provides for short-rate cancellation by the insured;

- Lease agreements for laundry room fixtures and equipment for a term of up to five years, provided that the lessor under the agreement is not an entity in which the developer has a direct or indirect ownership interest of 10 percent or more;

- Agreements for cable television services and equipment or satellite dish television services and equipment for a term of up to five years, provided that the supplier is not an entity in which the developer has a direct or indirect ownership interest of 10 percent or more;

- Agreements for the sale or lease of burglar alarm and fire alarm equipment, installation, and services not to exceed five years duration, provided that the supplier or suppliers are not entities in which the subdivider has a direct or indirect ownership interest of 10 percent or more; and

- A contract for a term not to exceed three years that is terminable by the association after no longer than one year without cause, penalty, or other obligation on 90 days' written notice to the other party.

[ii] Interested Director

If a member of the board of directors of an owners association wishes to enter into a management agreement with the association or has a material financial interest in the proposed management entity [*see Corp. Code § 7233(a)* (mere common directorship does not constitute material financial interest); *see also* discussion of *Corp. Code § 7233(b)* (requirements applicable to common directorships), *below*], three sets of alternative requirements apply. The first set requires disclosure to the board of the material facts of the proposed transaction and the board's approval of that transaction [*Corp. Code § 7233(a)(2)*]. The second set requires disclosure to the members of the material facts regarding the transaction and the director's interest, and the members' approval of the contract or transaction [*Corp. Code § 7233(a)(1)*; *see Corp. Code § 5034* ("approval ofmembers" defined)]. The third set, which applies to transaction not otherwise approved, requires the person asserting the validity of the transaction, which is usually the association itself,

to sustain the burden of proving that the transaction was just and reasonable as to the association at the time it was authorized, approved, or ratified [*Corp. Code § 7233(a)(3)*].

If a director of the association is also the director of the entity that is to serve as the management entity and the director does not have a material financial interest in the proposed management entity, the requirements of *Corp. Code § 7233(b)* apply. That section requires:

- The disclosure of material facts and the approval of the board or a committee of the board (by a vote sufficient without counting the vote of the common director or directors);
- The approval of the members; or
- For transactions not otherwise approved, that the transaction be just and reasonable as to the association at the time it is authorized, approved, or ratified.

For comprehensive discussion of the approval required for transactions involving interested directors, see Ballantine & Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender).

[2] FORM

Management Agreement

MANAGEMENT AGREEMENT FOR
_____ [*name of project*]

This Agreement is made on_____[*date*], between the_____[*name of owner's association*] ("Association"), a nonprofit mutual benefit corporation [*or other description*], whose principal office is located at_____[*address*], and_____[*name of manager or management firm*] ("Manager"), whose principal office is located at_____[*address*].

In consideration of the terms, conditions, and covenants contained in this instrument, the parties to this Agreement mutually agree as follows:

ARTICLE I. GENERAL

Declaration and Definitions

Section 1.01. A copy of that certain declaration filed in the Office of the Recorder of the County of _____, on_____[*date*], in Book _____, at Pages _____ and following ("Declaration"), is attached to this Agreement as Exhibit A and hereby incorporated by reference. Unless otherwise indicated, all definitions set forth in the Declaration shall apply to this Agreement.

Appointment

Section 1.02. The Board of Directors, on behalf of the Association, hereby appoints the Manager, and the Manager hereby accepts appointment, on the terms and conditions set forth in this Agreement, as the exclusive manager of the condominium project known as _____ and located in the County of _____, State of

California ("Project").

Authority and Duties

Section 1.03. The Manager fully understands that the function of the Association is the operation and management of the Project. The Manager agrees, notwithstanding the authority given to the Manager in this Agreement, to confer fully and freely with the Directors of the Association in the performance of its duties under this Agreement and to attend membership or Directors' meetings at any time or times requested by the Association. It is further understood and agreed that the authority and duties conferred on the Manager by this Agreement are confined to the Common Areas and facilities and the Exclusive Use Common Areas and facilities. The Manager's authority and duties shall not include supervision or management of individual Condominiums except as directed by the Association.

Engagement

Section 1.04. This agreement is entered into pursuant to Section [*or* Article *or other*] _____ of the Declaration. The Manager agrees to be bound by the terms of the Declaration and the other governing instruments of the Project. [The Manager shall serve the Association solely in the capacity of an independent contractor. No other employment relationship is created by this Agreement.]

Indemnity

Section 1.05. The Association agrees to indemnify the Manager and hold it harmless for all contracts entered into on behalf of and on the instructions of the Association. The Association also agrees to indemnify the Manager for all legal and accounting fees contracted by the Manager on behalf of the Association. This includes reasonable attorneys' fees incurred in defending a suit brought against the Association.

Documents Furnished to Manager

Section 1.06. To facilitate efficient operation, the Association shall furnish the Manager with a complete set of the plans and specifications of the improvements for the Project and with copies of any guaranties and warranties pertinent to the construction of the Project. Further, the Association shall provide copies of the following Project and Association documents to the Manager at the time of execution of this Agreement: the Declaration attached as Exhibit A to this Agreement; the Articles of Incorporation; the Bylaws; a sample deed; [a sample ground lease agreement;] the current budget of the Association; and the tax records of the Association.

Hiring of Employees by Manager

Section 1.07. The Manager shall hire in its own name all managerial personnel necessary for the efficient discharge of the duties of the Manager under this Agreement. Compensation for the services of those employees shall be the responsibility of the Manager. _____ [Those employees of the Manager who handle or are responsible for the handling of the Association's monies shall, without expense to the Association, be bonded by a fidelity bond acceptable to both the Manager and the Association *or* The Association shall secure a fidelity bond to cover all persons who handle or are responsible for the handling of the Association's monies, and the Manager shall reimburse the Association for that portion of the cost of the bond covering the Manager and its employees.]

ARTICLE II. SERVICES AND DUTIES

Duties of Manager

Section 2.01. The Manager shall render services and perform duties as follows:

(a) Investigate, hire, pay, supervise, and discharge the personnel necessary to be employed in order to properly maintain and operate the Project. The Association shall have the right to approve job standards and wage rates and to approve or disapprove any personnel hired by the Manager. However, those employees shall in every instance be in the employ of the Manager and not the Association. Compensation for the services of those employees (as evidenced by certified payrolls) shall be considered an operating expense of the Project.

(b) Immediately ascertain the general condition of the property and take an inventory of all furniture, office equipment, maintenance tools, and supplies.

(c) Coordinate the plans of Owners of Condominiums in the Project for moving their personal effects into or out of the Project, in order to minimize any resulting inconveniences to other Owners.

(d) Maintain businesslike relations with the Owners [and assist the Board in developing Rules and Regulations for the Project]. Complaints of a serious nature shall, after thorough investigation, be reported to the Association with appropriate recommendations.

(e) Demand and collect all fees, regular and special assessments due from the Owners, all rents or payments due from users or lessees of facilities located in the Common Area, and any other charges that may at any time become due to the Association. The Manager shall take, in the name of the Association, any action necessary to enforce collection, except that before to taking any action against an Owner to collect fees or assessments, the Manager shall obtain the approval of the Board. The Manager shall furnish the Board with an itemized list of all delinquent accounts immediately following the tenth of each month.

(f) Inspect and maintain the grounds and facilities of the Common Area according to standards acceptable to the Association, including cleaning, painting, plumbing, wiring, carpentry, and any other normal maintenance and repair work that becomes necessary. Major repairs and other outlays costing in excess of $_____ shall require prior approval of the Board unless an emergency exists that involves manifest danger to life or property or that threatens to interrupt vital services to dwellings. In an emergency situation the Manager has discretion to act but should, if at all possible, first consult with the Board.

(g) Receive, consider, and record maintenance requests under a standard procedure acceptable to the Association, and take the necessary steps to resolve them.

(h) After obtaining the approval of the Board, take any action that may be necessary to comply promptly with any and all orders, notices, or requirements affecting the Project issued by any federal, state, county, or municipal authority, and orders of the Board of Fire Underwriters or similar bodies. However, the Manager shall not take any action under this Section as long as the Association is contesting or has affirmed its intention to contest any such order, notice, or requirement. The Manager shall promptly, and in no event later than 72 hours from the time of their receipt, notify the Association in writing of all such orders, notices, or requirements.

(i) After obtaining the approval of the Board, enter into contracts for water, electricity, gas, telephone, vermin extermination, and other necessary services. The Manager shall also place orders for any equipment, tools, appliances,

materials, and supplies that are necessary to properly maintain the Project. These contracts and orders shall be made in the name of the Association and shall be subject to the limitations set forth in the Declaration and in Section 2.01(f) of this Agreement. When taking bids or issuing purchase orders, the Manager shall act at all times under the direction of the Association, and shall be under a duty to secure for and credit to the latter any discounts, commissions, or rebates obtainable as a result of the purchases.

(j) Assist the Board in obtaining and maintaining all forms of insurance needed to adequately protect the Association, its Members, Directors, Officers, employees, and the Mortgagees, as their respective interests may appear (or as required by law), including workers' compensation insurance, public liability insurance, fidelity bond coverage, errors and omissions insurance, fire and extended coverage insurance, and burglary and theft insurance, in accordance with the requirements of the Declaration. The Manager shall promptly investigate and make a full written report as to all accidents or claims for damage relating to the management, operation, and maintenance of the Project, including any damage or destruction to the Project and the estimated cost of repair, and shall cooperate with and make any and all reports required by the insurance company.

(k) From the funds collected and deposited in the special account described in Section 2.01(r) of this Agreement, cause to be disbursed regularly and punctually: (1) salaries and any other compensation due and payable to the employees of the Association; (2) the taxes payable under Section 2.01(l) of this Agreement; (3) fire and other property insurance premiums payable under _____ [*e.g.*, Article VII] of the Declaration; (4) the amount specified in the annual budget for allocation to the appropriate maintenance fund of the Association; and (5) sums otherwise due and payable by the Association as operating expenses authorized to be incurred under the terms of this Agreement, including the Manager's Commission.

(l) Working in conjunction with an accountant, prepare for execution and filing by the Association all forms, reports, exemption requests, and returns required by law in connection with unemployment insurance, workers' compensation insurance, disability benefits, Social Security, franchise tax, income tax, and other similar taxes now in effect or hereafter imposed.

(m) Maintain a comprehensive system of office records, books, and accounts in a manner satisfactory to the Association. Those records shall be subject to examination by their authorized agents at all reasonable hours. As a standard practice, the Manager shall render to the Association by not later than the tenth of each succeeding month a statement of receipts and disbursements as of the end of every month. The Manager shall also cause an annual report to be prepared, pursuant to _____ [*e.g.*, Section 3.07(g)] of the Declaration, at the cost of the Association.

(n) Prepare or assist the Board in preparing a pro forma operating budget setting forth the information listed in _____ [*e.g.*, Section 3.07(d)] of the Declaration. Each such budget shall be submitted to the Board in final draft form at least 30 days prior to the commencement of the annual period for which it has been made. Following its adoption by the Association, copies of the approved budget shall be distributed in the manner required in Section _____ [*e.g.*, Section 3.07(g)] of the Declaration. The budget shall serve as a supporting document for the schedule of regular assessments proposed for the new fiscal year.

(o) On the request of the Owner of a Condominium, serve as a broker or agent in the sales or rentals of individual family units, and shall be entitled to compensation for such sales or rentals in an amount _____ [*specify, e.g.*, equal to 6 percent of the sales price *or* to be agreed on by the Manager and the Seller].

(p) Maintain a membership record from information supplied by the Association, and handle all ordinary correspondence of the Association.

(q) Inform all Members of record of all rules, regulations, and notices that may be promulgated by the Association from

time to time. The Manager shall refer all violations of the rules and regulations to the Board for appropriate action, and shall assist the Association in enforcing the rules and regulations.

(r) Establish and maintain, in a bank, savings association, or credit union located in this State, _____ [a trust fund account *or* an interest-bearing account *or other account authorized by Civ. Code § 1363.2*] for the deposit of the moneys of the Association. The Manager shall confirm that all funds in the account are covered by insurance provided by an agency of the federal government, and that the requirements of *Civil Code Section 1363.2* governing the account and the funds are satisfied. The Manager shall have the authority to draw on that account for any payments to be made by the Manager to discharge any liabilities or obligations incurred pursuant to this Agreement, and for the payment of the Manager's fee. All such payments shall be subject to the limitations in this Agreement.

(s) Perform any other acts and deeds that are reasonable, necessary, and proper in the discharge of the Manager's duties under this Agreement.

Standard of Performance

Section 2.02. It shall be the duty of the Manager at all times during the term of this Agreement to perform the above services and duties according to the highest standards achievable consistent with the overall plan of the Association.

ARTICLE III. COMPENSATION AND EXPENSES

Compensation to Manager

Section 3.01. The sole compensation that the Manager shall be entitled to receive for all services performed under this Agreement shall be a fee computed and payable monthly in an amount equivalent to _____ percent of gross collections, exclusive of all surcharges [*or specify dollar amount*]. The first payment of the Manager's fee shall be payable on_____[*date*]. Thereafter, the Manager's fee shall be payable in advance monthly on or before the _____ day of each month during the term of this Agreement.

Overhead and Expenses of Manager

Section 3.02. The Manager shall pay its overhead expenses, including the salaries, office expenses, and other expenses of the officers and employees of the Manager who do not work exclusively at the Project. The salaries of the staff (as evidenced by certified payrolls) of the Association, the Association office expenses, and other expenses of the Association shall be paid by the Association and shall not be considered the Manager's overhead expenses. The Association shall also pay legal fees, [independent contractor expenses,] and other expenses incurred for the exclusive benefit of the Association. Everything done by the Manager under the provisions of Article II of this Agreement shall be done as the Manager of the Association, and all obligations or expenses authorized and incurred under this Agreement, except as otherwise provided in this Article, shall be for the account, on behalf of, and at the expense of, the Association. The Association shall pay all postage for special mailings, all photocopy costs, all delivery costs, all travel costs, and any and all other reasonable and necessary expenses incurred by the Manager on behalf of the Association.

ARTICLE IV. TERM OF AGREEMENT

Term

Section 4.01. Unless canceled pursuant to the other Sections of this Article, this Agreement shall be in effect for a term of one year from the date of execution. At the end of the initial term, this Agreement may be amended by written agreement of the parties for successive one-year terms.

Termination

Section 4.02. This Agreement may be terminated _____ [by mutual consent of the parties *or* unilaterally by either party to this Agreement, without cause and without payment of a termination fee, on 30 days' prior written notice].

Bankruptcy

Section 4.03. In the event a petition in bankruptcy is filed by or against the Manager, or in the event that it makes an assignment for the benefit of creditors or takes advantage of any insolvency act, either party to this Agreement may terminate this Agreement without notice to the other.

Accounting on Termination

Section 4.04. On termination, the contracting parties shall account to each other with respect to all matters outstanding as of the date of termination.

ARTICLE V. MISCELLANEOUS

Entire Agreement

Section 5.01. This Agreement shall constitute the entire Agreement between the contracting parties, and hereby supersedes all prior agreements.

Modification

Section 5.02. No variance or modification of this Agreement shall be valid unless made pursuant to a written instrument executed and approved by both parties.

Governing Laws

Section 5.03. This Agreement shall be construed under the laws of the State of California.

Assignment

Section 5.04. This agreement shall not be assigned by either party without the written consent of the other party. The

successors and assigns of the parties to this Agreement shall be bound by the terms of this Agreement.

The parties to this Agreement have executed it in_____[*city*], California, effective the day and year first written above.

ASSOCIATION

_____ [*name of owners' association*]
By _____ [*signature*]
[*typed name and title*]

MANAGER

_____ [*name of manager or management firm*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide § 34.208

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.208 Rules and Regulations Governing Use of Common Areas

[1] Comment--Use of Form

This form is a set of rules and regulations governing the use of common areas in a condominium project. Under the Commissioner's regulations, owners' associations have the authority to formulate rules of operation of the common areas and facilities owned or controlled by the association [*10 Cal. Code Reg. § 2792.21(a)(7)*]. Rules and regulations are often prepared after the owners have assumed control of the association so that they may impose owner oriented regulations that supplement the declaration and other governing instruments prepared on the developer's behalf. If the use of rules and regulations is anticipated, they should be mentioned in the declaration [*see § 34.202[2]*, Section 3.06(b)].

The provisions of this form are not exhaustive and should be used selectively to fit the needs of a particular condominium project.

[2] FORM

Rules and Regulations Governing Use of Common Areas

RULES AND REGULATIONS FOR
_____ [*name of project*]

This set of Rules and Regulations applies to that condominium project ("Project") located in the City of _____, County of _____, State of California, and more particularly described in the declaration ("Declaration") filed in the Office of the Recorder of the County of _____, on_____[*date*], in Book _____, at Page _____ and following. All definitions set forth in that Declaration shall apply to these Rules and Regulations.

In order to provide for the protection of the value and environment of the Project and its individual Units, the use of the Project shall be restricted to, and in accordance with, the following provisions:

Obstructions

1. The sidewalks, entrances, passages, courts, public halls, elevators, vestibules, corridors, stairways, and fire exits of the Project shall not be obstructed or used for any other purpose than ingress to and egress from the Units in the Project.

Hanging Displays

2. No article shall be placed in any of the halls or on any of the staircase or tower landings. Nothing shall be hung or shaken from the doors, windows, or terraces, or placed on the window sills of the Project.

Use of Common Area by Children

3. Children shall not play in the halls, elevators, vestibules, stairways, fire towers, or any of the exterior landscaped areas.

Decorating Common Areas

4. No public hall or elevator vestibule of the Project shall be decorated or furnished by any Owner in any manner.

State of Maintenance

5. Each Owner shall keep his or her Unit and any Exclusive Use Common Areas appurtenant to the Unit in good condition. No Owner shall sweep or throw (or permit the sweeping or throwing of) any dirt or other substance from the windows, doors, or terraces of his or her Unit and appurtenant Exclusive Use Common Area or Areas.

Window Coverings

6. No shades, venetian blinds, awnings, or window guards shall be used in or about any Unit unless they have been approved in writing by the Board of Directors or Manager. This approval may be granted or refused in the sole discretion of the Board or Manager.

Signs and Exterior Attachments

7. No awning or radio or television aerial shall be attached to or hung from the exterior of the Project or terraces. Further, no sign, notice, advertisement, or illumination shall be displayed to the public view on or from any window, terrace, or other part of the Project without the prior written consent of the Board; provided, however, that a sign of reasonable dimensions and design advertising the property for sale, lease, or exchange, or advertising directions to the property, may be displayed as provided in *Section 712 of the California Civil Code*.

Ventilation and Air-Conditioning Systems

8. No ventilator or air-conditioning device shall be installed in any Unit without the prior written approval of the Board or Manager as to the type, location, and manner of installation of the device. This approval may be granted or refused in the sole discretion of the Board or Manager. Each Owner shall keep any ventilator or air-conditioning device that protrudes from the window of his or her Unit in good appearance and mechanical repair. Further, the Owner shall not permit a ventilator or air-conditioning device to leak condensation, or to make any noise that may unreasonably disturb or interfere with the rights, comforts, or conveniences of any other occupant of the Project. If the device becomes rusty or discolored, the Owner shall have it painted in a good and workmanlike manner in a standard color selected by the Board for the Project. If the Owner fails to keep the device in good order and repair and properly painted, the Board or Manager, in their discretion, may remove the device from the window. The Owner shall pay the cost of removal and shall not replace the device until it has been put in proper condition and the Board has consented in writing to the replacement.

Electric Equipment

9. All radio, television, or other electrical equipment of any kind or nature installed or used in each Unit shall fully comply with all the rules, regulations, requirements, and recommendations of the local fire authorities and the insurance underwriters. The Owner shall be liable for any damage or injury caused by any radio, television, or other electrical equipment in the Owner's Unit.

Lightweight Vehicles

10. No bicycles, scooters, motorcycles, or similar vehicles shall be taken into or from the Project through the main entrance or be allowed in any of the elevators other than the elevator designated by the Board or Manager for that purpose. No baby carriages or any of the above-mentioned vehicles shall be allowed to stand in the public halls, passageways, courts, or other public areas of the Project.

Noise

11. No Owner shall make or permit any disturbing noises in the Project, or do or permit anything to be done in the Project that will interfere with the rights, comforts, or conveniences of other Owners. No Owner shall play, or permit the playing of, any musical instrument, or operate or permit to be operated a phonograph, radio, television set, or similar device, in the Owner's Unit between the hours of 11:00 p.m. and 7:00 a.m., if that would disturb or annoy other occupants of the Project. In addition, no Owner shall practice or permit the practicing of either vocal or instrumental music for more than two hours in any day or between the hours of 6:00 p.m. and the following 9:00 a.m.

Animals

12. No bird, reptile, or animal shall be permitted, kept, or harbored in the Project unless it is expressly permitted in writing by the Board or Manager. That consent, if given, shall be revocable by the Board or Manager in their sole discretion and at any time. In no event shall any bird, reptile, or animal be permitted (1) in any elevators other than the elevator designated by the Board or Manager for that purpose; (2) in any of the public portions of the Project unless carried or on a leash; or (3) in any grass or garden plot under any circumstances. Large dogs shall be carried only in the elevator designated by the Board or Manager for that purpose.

Solicitors and Servants

13. Servants, messengers, and tradespeople shall use only the elevator designated by the Board or Manager for that purpose. Nurses employed by Owners or their guests or tenants are not subject to this restriction.

Deliveries

14. Supplies, goods, and packages of every kind are to be delivered to the Units only through the service entrance of the Project and by the elevator designated by the Board or Manager for that purpose. Trunks and heavy baggage shall be taken in or out of the Project by the elevator designated by the Board for that purpose and through the service entrance only.

Garbage

15. No refuse from the Units shall be sent to the basement of the Project except at the times and in the manner specified by the Board or Manager.

Water Outlets

16. Water closets and other water apparatus in the Project shall not be used for any purpose other than those for which they were designed. Sweepings, rubbish, rags, and other articles shall not be thrown into them. Any damage resulting from misuse of any water closets or other apparatus in a Unit shall be repaired and paid for by the Owner of the Unit.

Use of Project Employees

17. No occupant of the Project shall send any employee of the Board or Manager out of the Project on any private business.

Pest Inspection

18. The agents of the Board or Manager, and any contractor or other person authorized by the Board or Manager, may, on 24 hours' notice, enter any room or Unit in the Project at any reasonable hour of the day to inspect the room or Unit for the presence of any vermin, insects, or other pests and to take any measures necessary to control or exterminate vermin, insects, or other pests.

Cooking on Terraces or Balconies

19. No cooking shall be permitted on any terrace or balcony of the Project or in any Unit not specially constructed and equipped for that purpose.

Passkeys

20. The Board or Manager may retain a passkey to each Unit. The Owner shall not alter any lock or install a new lock on any door leading to his or her Unit without the written consent of the Board or Manager. If consent is given, the Owner shall give the Board or Manager a copy of the new key.

Parking

21. No vehicle belonging to an Owner or to a relative, guest, tenant, or employee of an Owner shall be parked in a manner that would impede or prevent ready access to any entrance to or exit from the Project by another vehicle.

Storage Space

22. The Board or Manager may from time to time curtail or relocate any space devoted to storage or service purposes in the basement of the Project.

Complaints

23. Complaints regarding the service of the Project shall be made in writing to the Board or Manager.

Amendments

24. Any consent or approval given under these Rules and Regulations may be added to, amended, or replaced at any time by resolution of the Board.

Laundry Room

25. The laundry and drying apparatus in the laundry room in the Project shall be used in the manner and at the times specified by the Board or Manager. Clothes and other articles shall not be dried or aired on the roof or on or from a terrace or any other part of the Common Area.

Unsightly Displays

26. No garbage cans, ice, milk bottles, mats, or other articles shall be placed in the halls or on the staircase landings. Nothing shall be hung from the windows, terraces, or balconies, or placed on the window sills. In addition, no linens, cloths, clothing, curtains, rugs, or mops shall be shaken or hung from or on any of the windows, doors, balconies, or terraces.

Garbage Chutes

27. Owners shall observe the following procedures when using the garbage chutes:

(a) Wrap dust, floor, and powdered waste in compact packages before depositing;

(b) Thoroughly drain and wrap in paper all garbage before depositing;

(c) Refrain from forcing large bundles into the chute;

(d) Crush into tight bundles all loose papers before depositing in the chute door;

(e) Cause all bundles of waste to slide out of the hopper into the chute; and

(f) Refrain from depositing waste of an explosive nature into the chute.

Use of Roof

28. Owners, their relatives, guests, servants, employees, agents, visitors, or licensees shall not at any time or for any reason whatsoever enter on or attempt to enter on the roof of the Project.

Decorating Exclusive Use Common Areas

29. No Exclusive Use Common Area shall be enclosed, decorated, landscaped, or covered by any awning or other device without the written consent of the Board or Manager.

Inflammables

30. No Owner or any of his or her agents, servants, employees, licensees, or visitors shall at any time bring into or keep in the Owner's Unit any flammable, combustible, or explosive fluid, material, chemical, or substance, unless it is intended for normal household use.

Entrusting Keys

31. If any key or keys are entrusted by an Owner or by his or her relative, agent, servant, employee, licensee, or visitor to an employee of the Board or Manager, whether for the Owner's Unit or an automobile, trunk, or other item of personal property, the entrusting of the key shall be at the sole risk of the Owner, and neither the Board or Manager shall be liable for injury, loss, or damage of any nature whatsoever, directly or indirectly resulting from or connected with that act.

Bathing Suits

32. Persons in bathing attire shall use only elevators and service entrances designated for that purpose by the Board or Manager. No persons in wet bathing suits shall use any of the corridors or elevators of the Project. Persons under 15 years of age shall not be permitted to use the swimming pool unless accompanied by an adult.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
A. Formation and Presale Documents

16-34 California Legal Forms--Transaction Guide §§ 34.209-34.219

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

[Reserved]

§§ 34.209[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
B. Conversion Notices and Related Documents

16-34 California Legal Forms--Transaction Guide § 34.220

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.220 60-Day Notice to Existing Tenants of Intention to Convert [Gov. Code §§ 66427.1(a)(2)(A), 66452.18].

[1] Comment

[a] Use of Form

This form is the statutory notice of intention to convert, which the converter must give to each tenant of residential real property that will be converted to a condominium, stock cooperative project of five or more units, or community apartment project, at least 60 days before the tentative map for the conversion is filed [*Gov. Code §§ 66427.1(a)(2)(A)*, 66427.18]. The notice should be served by mail [*see Gov. Code § 66427.1(b)*; *see Code Civ. Proc. § 1013*].

This is the first of a series of notices that the converter must give to his or her tenants and prospective tenants under the Subdivision Map Act [*see Gov. Code §§ 66427.1(a)(2)*, 66427.17-66427.20]. The others are *set forth in §§ 34.221-34.226*. For a step-by-step procedural guide to the conversion process, see *§ 34.145*. For an overview of condominium conversions, see *§ 34.43*.

[b] Projects Subject to Notice Requirements

The conversion notice requirements of the Subdivision Map Act discussed in this comment and in §§ 34.221[1]-34.226[1] only apply to the conversion of residential real property into a condominium project [*see § 34.36[1]*; *but see* discussion of *Gov. Code § 66412(g), (h)* in § 34.220[1][c][i], [ii]], community apartment project [*see Bus. & Prof. Code § 11004*], or stock cooperative project consisting of at least five units [*Gov. Code §§ 66424, 66427.1*; *see Gov. Code § 66426*; *Bus. & Prof. Code § 11003.2*]. Thus, conversions creating stock cooperative projects of fewer than five units, planned developments, limited equity housing cooperatives, and time-share projects are not subject to these requirements even though they are considered common interest developments and/or common interest subdivisions for other purposes.

[c] Exemptions From Statutory Conversion Requirements

[i] Stock Cooperatives

If a parcel or final map was approved by the legislative body of a local agency, the Subdivision Map Act [*Gov. Code § 66410 et seq.*] will apply to the conversion of a stock cooperative to a condominium project if all of the following requirements are met [*Gov. Code § 66412(h)*]:

- The property was subdivided before January 1, 1982, as evidenced by a recorded deed creating the community apartment project.

- A person renting a unit in a cooperative is entitled to all tenant rights in state or local law, including but not limited to rights respecting first refusal, and displacement and relocation benefits at the time of the conversion.

- Subject to compliance with *Civ. Code § 1351(e)*, which specifies the requirements for the condominium plan, all conveyances and other documents necessary to effectuate the conversion must be executed by the required number of owners in the project as specified in the bylaws or other organizational documents. If the bylaws or other organizational documents do not expressly specify the number of owners necessary to execute the conveyances and other documents, a majority of owners in the project must execute the conveyances or other documents. The executed conveyances and other documents will be binding on and affect the interests of all parties in the project.

- If the property was subdivided after January 1, 1980, (1) a final or parcel map was approved and recorded with all conditions of that map remaining in effect after the conversion, and (2) no more than 49 percent of the units were owned by any one person, including an incorporator or director of the community apartment project, on January 1, 1982.

- The local agency certifies that the requirements above were satisfied if the local agency, by ordinance, provides for that certification.

[ii] Community Apartment Projects

If a parcel or final map was approved by the legislative body of a local agency, the conversion of a community apartment project to a condominium project will be subject to the Subdivision Map Act if all of the following requirements are met [*Gov. Code § 66412(g)*]:

- The property was subdivided before January 1, 1982, as evidenced by a recorded deed creating the community apartment project.

- Subject to compliance with *Civ. Code § 1351(e)*, which specifies the requirements for the condominium plan, all conveyances and other documents necessary to effectuate the conversion must be executed by the required number of owners in the project as specified in the bylaws or other organizational documents. If the bylaws or other organizational documents do not expressly specify the number of owners necessary to execute the conveyances and other documents, a majority of owners in the project must execute the conveyances or other documents. The executed conveyances and other documents will be binding on and affect the interests of all parties in the project.

- If the property was subdivided after January 1, 1964, (1) a final or parcel map was approved and recorded with all conditions of that map remaining in effect after the conversion, and (2) no more than 49 percent of the units were owned by any one person, including an incorporator or director of the community apartment project, on January 1, 1982.

- The local agency certifies that the requirements above were satisfied if the local agency, by ordinance, provides for that certification.

[d] Approval by Owners in Stock Cooperative or Community Apartment Project

A stock cooperative or a community apartment project subject to the requirements of the Subdivision Map Act [*see Bus. & Prof. Code §§ 11003.2, 11004*] cannot be converted to a condominium project unless the required number of owners and trustees or beneficiaries of each recorded deed of trust and mortgagees of each recorded mortgage, as specified in the bylaws, or other organizational documents, have voted in favor of the conversion [*Gov. Code § 66412(g), (h)*]. If the organizational documents do not expressly specify the number of votes necessary to execute the conveyances or other documents, a majority vote of the owners, trustees or beneficiaries, and mortgagees in favor of the conversion is required [*Gov. Code § 66452.10*].

Subject to the requirement that only those owners, trustees, beneficiaries, and mortgagees who approved the conversion are required to execute the condominium plan [*see Civ. Code § 1351(e)*], all conveyances and other documents necessary to effectuate the conversion must be executed by the required number of owners in the cooperative or project as specified in the bylaws or other organizational documents. If the organizational documents are silent on this matter, a majority of owners in the cooperative or project must execute the necessary documents. Once executed, the conveyances and other documents are binding on and affect the interests of all parties in the cooperative or project [*Gov. Code § 66452.10*].

Each violation of the Subdivision Map Act [*Gov. Code § 66410 et seq.*] by a person who is the subdivider or a record owner, at the time of the violation, of property involved in the violation is punishable by imprisonment in the county jail for up to one year or in the state prison, by a fine not exceeding $10,000, or by both fine and imprisonment. Every other violation of the Act is a misdemeanor [*Gov. Code § 66499.31*]. However, *Gov. Code § 66499.31* does not apply to violations of the above approval requirements [*Gov. Code § 66452.10*].

[2] FORM

60-Day Notice of Intention to Convert [Gov. Code §§ 66427.1(a)(2)(A), 66452.18].

NOTICE OF INTENTION TO CONVERT

TO THE OCCUPANT[S] OF_____[*address*]:

The owner[s] of this building, at_____[*address*], plans [*or* plan] to file a tentative map with the_____[City *or* County *or* City and County] of _____ to convert this building to a condominium project [*or* community apartment project *or* stock cooperative project]. You shall be given notice of each hearing for which notice is required pursuant to *Sections 66451.3* and *66452.5 of the Government Code*, and you have the right to appear and the right to be heard at any such hearing.

_____ [*signature of converter or converter's agent*]
[*typed name*]
_____ [*date*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase &

Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
B. Conversion Notices and Related Documents

16-34 California Legal Forms--Transaction Guide § 34.221

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.221 Notice to Prospective Tenants of Intention to Convert [Gov. Code § 66452.8]

[1] Comment

[a] Use of Form

This form is a statutory notice to prospective tenants of a residential building that the owner of the building plans to file, or has filed, a tentative map to convert the building to either a condominium project, community apartment project, or stock cooperative project of at least five units [*see Gov. Code § 66424*]. The converter (or converter's agent) must give this notice immediately before accepting any rent or deposit from any prospective tenant who applies for a rental unit in the building at any time after the date that is 60 days before the filing of the tentative map for the conversion [*Gov. Code § 66452.17(a)*; *see Gov. Code § 66452.17(b)* (statutory form)].

[b] Effect of Failure to Give Notice

Failure by a converter to give this notice to prospective tenants is not a ground for denial of the conversion. However, following such a violation, if a person who was entitled to this notice becomes a tenant and decides not to purchase his or her unit pursuant to *Gov. Code § 66427.1(a)(2)(F)* [*see § 34.224[1]*], the converter must pay that person the following [*Gov. Code § 66452.17(c)*].

(1) Actual moving expenses, up to $1,100, incurred when moving from the subject property; and

(2) The first month's rent (up to $1,100) on the tenant's new rental unit, if any.

These penalties are a minimum standard imposed on the converter, and local governments may impose greater penalties [*Gov. Code § 66452.17(d)*].

[2] FORM

Notice to Prospective Tenants of Intention to Convert [Gov. Code § 66452.17].

NOTICE TO PROSPECTIVE TENANT OF INTENTION TO CONVERT

TO THE PROSPECTIVE OCCUPANT[S] OF_____[*address*]:

The owner[s] of this building, at_____[*address*], has [*or* have] filed [*or* plans to file] a tentative map with the_____[City *or* County *or* City and County] of _____ to convert this building to a condominium project [*or* community apartment project *or* stock cooperative project]. No units may be sold in this building unless the conversion is approved by the_____[City *or* County *or* City and County] and until after a public report is issued by the Department of Real Estate. If you become a tenant of this building, you shall be given notice of each hearing for which notice is required pursuant to *Sections 66451.3* and *66452.5 of the Government Code*, and you have the right to appear and the right to be heard at any such hearing.

_____ [*signature of converter or converter's agent*]
[*typed name*]

Dated: _____

I have received this notice on_____[*date*].

_____ [*signature of prospective tenant*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
B. Conversion Notices and Related Documents

16-34 California Legal Forms--Transaction Guide § 34.222

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.222 Notice of Approval of Final Map [Gov. Code § 66427.1(a)(2)(D)]

[1] Comment--Use of Form

This form is a notice of the final map for a proposed conversion. It must be given to every tenant of the affected building within 10 days after the approval [*Gov. Code § 66427.1(a)(2)(D)*]. It should be served by mail [*see Gov. Code § 66427.1(b)*; *see Code Civ. Proc. § 1013*].

[2] FORM

Notice of Approval of Final Map [Gov. Code § 66427.1(b)]

NOTICE OF APPROVAL OF FINAL MAP FOR CONVERSION

_____[*date*]
_____[*name of tenant*]
_____[*address*]
_____[*city, state, zip*]

Dear _____:

This is to inform you that the_____[City *or* County *or* City and County] of _____, on_____[*date*], approved a final subdivision map for the conversion of the building at_____[*address*] to a condominium project [*or* community apartment project *or* stock cooperative project]. This notice is given pursuant to *Section 66427.1(a)(2)(D) of the California Government Code*.

_____ [*signature of converter or converter's agent*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsLocal Regulation

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34 CONDOMINIUMS
PART IV. FORMS
B. Conversion Notices and Related Documents

16-34 California Legal Forms--Transaction Guide § 34.223

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.223 Notice of Submission of Application for Public Report [Gov. Code § 66427.1(a)(2)(B)]

[1] Comment--Use of Form

This form is a notice to tenants that an application for public report will be, or has been, submitted to the Department of Real Estate. The notice must be given within 10 days, i.e., within the period beginning 10 days before and ending 10 days after the application is submitted. In addition to notifying the tenant of the submission, the notice must also inform the tenant that his or her right to purchase their unit begins with the issuance of the final public report and that the report will be available on request [*Gov. Code § 66427.1(a)(2)(B)*]. Notifying the tenant of the future right to purchase is important because the issuance of the public report automatically triggers the 90-day right to purchase and tenants who wish to exercise that right may need more than 90 days to obtain financing and otherwise prepare to make the purchase [*see Gov. Code § 66427.1(a)(2)(F)*; *see also § 34.224[1]*]. The notice should be served by mail [*see Gov. Code § 66427.1(b)*; *see Code Civ. Proc. § 1013*].

For a discussion of the types of conversions subject to this and related notice requirements, see *§ 34.220[1]*.

[2] FORM

Notice of Submission of Application for Public Report [Gov. Code § 66427.1(a)]

NOTICE OF SUBMISSION OF APPLICATION FOR PUBLIC REPORT

_____[*date*]
_____[*name of tenant*]
_____[*address*]
_____[*city, state, zip*]

Dear _____:

This notice is to inform you that on_____[*date*],_____[*name(s) of converter*] submitted [*or* will submit] to the California Department of Real Estate an application for a public report for a subdivision to be created from the conversion of the building located at_____[*address*], to a condominium project [*or* community apartment project *or* stock cooperative project]. If a final public report is issued, you will be notified in writing of that fact and of your 90-day exclusive right to purchase your unit. You will also be informed that you will be given the opportunity to_____[inspect *or* obtain a copy of] the final public report on request.

_____ [*signature of converter or agent*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawSubdivisionsState Regulation



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DIVISION II: REAL ESTATE TRANSACTIONS
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16-34 California Legal Forms--Transaction Guide § 34.223A

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.223A Notice of Receipt of Public Report [Gov. Code § 66427.1(a)(2)C)]

[1] Comment--Use of Form

This form is a notice to tenants that the converter has received the final public report from the Department of Real Estate. It further informs the tenant that the report is available for inspection on request. The notice must be provided with five days after the date the converter receives the report from DRE [*Gov. Code § 66427.1(a)(2)*C)]. It should be served by mail [*see Gov. Code § 66427.1(b)*; *see Code Civ. Proc. § 1013*].

[2] FORM

Notice of Receipt of Final Public Report

NOTICE OF RECEIPT OF FINAL PUBLIC REPORT

_____[*date*]
_____[*tenant's name*]
_____[*address*]
_____[*city, state, zip*]

Dear _____:

You have previously been provided with a series of notices describing the proposed conversion of the property located at_____[*address*] to a [condominium *or* community apartment project *or* stock cooperative project]. One of those notices indicated that the owner[s] of that property_____[had filed *or* intended to file] with the Department of Real Estate an application for a public report for the subdivision to be created from the conversion. This notice is to inform you that the owner of the property has received the final report from the Department and that_____[*describe method by which report will be made available on request, e.g.,*

you may arrange to inspect the report by contacting _____ (*name of agent of owner(s)*) at _____ (*address*), _____ (*telephone number*)].

_____ [*signature of converter or converter's agent*]
[*typed name*]



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16-34 California Legal Forms--Transaction Guide § 34.224

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.224 Notice of Exclusive Right to Contract for Purchase of Unit [Gov. Code §§ 66427.1(a)(2)(F), 66427.12]

[1] Comment--Use of Form

This statutory form is a notice to a tenant of the exclusive right to contract for the purchase of his or her unit on the same, or more favorable, terms and conditions that the unit will be initially offered to the general public. The exclusive right to purchase commences on the date the final report is issued by the Department of Real Estate [*see Bus. & Prof. Code § 11018.2*], and runs for not less than 90 days, unless the tenant gives prior written notice of his or her intention to waive the right [*Gov. Code § 66427.1(a)(2)(F)*]. The statute requiring issuance of this notice does not specify when the notice must be given; nor does it require notice that the DRE has issued the final report. (Though it does require notice to the tenant that the converter has received the report and that it is available on request [*see Gov. Code § 66427.1(a)(2)(C)*; *see also § 34.223A*]).

The notice should be served by mail [*see Gov. Code §§ 66427.1(a)(2)(F)*, 66427.15].

[2] FORM

Notice of Exclusive Right to Contract for Purchase of Unit

NOTICE OF EXCLUSIVE RIGHT TO CONTRACT FOR PURCHASE OF UNIT

To the occupant(s) of
_____[*address*]:

The owner(s) of this building, at_____[*address*], have received the final subdivision report on the proposed conversion of this building to a_____[condominium *or* community apartment project *or* stock cooperative project]. Commencing on the date of issuance of the subdivision public report, you have the exclusive right for 90 days to contract for the purchase of your rental unit upon the same or more favorable terms and conditions

than the unit will initially be offered to the general public.

_____[*signature of owner or owner's agent*]
_____[*date*]

_____ [*signature of converter or converter's agent*]
[*typed name*]



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16-34 California Legal Forms--Transaction Guide § 34.225

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.225 Tenant's Waiver of Right to Purchase Converted Unit [Gov. Code §§ 66427.1(a)(2)(E), 66427.14]

[1] Comment--Use of Form

This form is a waiver by a tenant of the statutory right to purchase his or her unit for 90 days following the issuance of a public report for the conversion of the building in which the unit is located. As discussed in *§ 34.224[1]*, the unit must remain available for purchase by the tenant for those 90 days unless the tenant gives prior written notice of his or her intention not to exercise the right [*Gov. Code § 66427.1(a)(2)(F)*].

[2] FORM

Tenant's Waiver of Right to Purchase Converted Unit [Gov. Code § 66427.1(d)]

_____[*date*]
_____[*name of converter*]
_____[*address*]
_____[*city, state, zip*]

Dear _____:

In a notice dated _____, you notified me of the issuance of a final public report for the conversion of the building at_____[*address*] to a condominium project [*or* community apartment project *or* stock cooperative project]. That notice also informed me of my exclusive right to purchase the unit I presently occupy in that building, which is Unit No. _____, until_____[*date*]. This is to inform you that I am waiving my exclusive right to purchase that unit effective immediately.

Sincerely,
_____ [*signature of tenant*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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16-34 California Legal Forms--Transaction Guide § 34.226

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.226 180-Day Notice of Intention to Convert Property Prior to Termination of Tenancy [Gov. Code §§ 66427.1(a)(2)(E), 66427.14]

[1] Comment--Use of Form

This statutory form is a notice to tenants of intention to convert. A converter must give the notice to a tenant at least 180 days before terminating his or her tenancy due to conversion or proposed conversion [*Gov. Code §§ 66427.1(a)(2)(E),* 66427.14]. This notice is different from, and should not be confused with, the 60-day notice to existing tenants of intention to convert *set forth in § 34.220* [*see Gov. Code § 66427.1(a)(2)(A)*].

This notice does not alter or abridge the rights or obligations of the parties with respect to the performance of their covenants, including the provision of services, payment of rent, or the obligations imposed on landlords and tenants by *Civ. Code §§ 1941-1941.2* [*Gov. Code § 66427.1(a)(2)(E)*]. For coverage of those covenants, see *Ch. 34B, Residential Leases, § 34B.224[1]*.

[2] FORM

180-Day Notice of Intention to Convert Property

180-DAY NOTICE OF INTENTION TO CONVERT PROPERTY

To the occupant(s) of
_____[*address of property to be converted*]

The owner(s) of this building, at_____[address], plan(s) to convert this building to a_____[condominium *or* community apartment project *or* stock cooperative project]. This is a notice of the owner's intention to convert the building to a [condominium *or* community apartment project *or* stock cooperative project]. A tentative map to convert the building to a [condominium *or* community apartment project *or*

stock cooperative project] was approved by the City on_____[*date*]. If the City approves a final map, you may be required to vacate the premises, but that cannot happen for at least 180 days from the date this notice was served upon you. Any future notice given to you to terminate your tenancy because of the conversion cannot be effective for at least 180 days from the date this notice was served upon you. This present notice is not a notice to terminate your tenancy; it is not a notice that you must now vacate the premises.

_____[*signature of owner or owner's agent*]
_____ [*date*]



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16-34 California Legal Forms--Transaction Guide § 34.227

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.227 Disclosure Regarding Condition of Newly Converted Condominium

[1] Comment

[a] Use of Form

This form is a notice concerning the condition of a unit in a structure that has been converted to a condominium project, community apartment project, or stock cooperative. As explained in more detail below, the notice must either list substantial defects or malfunctions in the unit or appurtenant common areas or disclaim any knowledge of substantial defects or malfunctions. The notice must be given to every prospective buyer of the unit by the converter/developer/subdivider ("converter") [*Civ. Code § 1134*]. Further, an owner of a converted unit ("owner") must give this notice to any subsequent transferee [*Civ. Code § 1368(f)*].

For these purposes, "prospective buyer" includes any person who makes an offer to purchase the unit [*Civ. Code § 1134(c)(3)*] and any person who makes a written request for this notice [*see Civ. Code § 1134(c)(2)*]. "Project" as used throughout the remainder of this comment refers to condominium projects, community apartment projects, and stock cooperatives.

The use of this notice will not abridge or limit any other disclosure obligation that is either created by another law or required to avoid fraud, deceit, or misrepresentation in the transaction [*Civ. Code § 1134(g)*].

[b] Contents of Statement

This notice must list any substantial defects or malfunctions in the major systems in the unit and common areas of the project [*Civ. Code § 1134(b)*]. "Major systems" includes the roof, walls, floors, heating, air conditioning, plumbing, electrical systems or components of a similar or comparable nature, and recreational facilities [*Civ. Code § 1134(c)(1)*]. Alternatively, if the converter or owner has inspected the unit and the common areas and has not discovered any substantial defects or malfunctions that a reasonable inspection would have disclosed, this notice must contain a

statement disclaiming knowledge of any of the above substantial defects or malfunctions [*See Civ. Code § 1134(a)*].

If the notice is delivered after the execution of an agreement for the purchase of the unit, it must also contain a statement describing the buyer's right to rescind within specified time frames [*see Civ. Code § 1134(b)*; *see § 34.227[1][d]*].

[c] Delivery

The converter must deliver this notice to a prospective purchaser as soon as practicable before transfer of title for the first sale of the unit [*Civ. Code § 1134(a)*]. Apparently, an owner must deliver the notice as soon as practicable before any transfer of title to the unit [*see Civ. Code §§ 1134(a)*, 1368(f)]. As mentioned earlier, if the notice contains a disclaimer of knowledge of substantial defects or malfunctions, the converter or owner must inspect the unit before delivering the notice [*Civ. Code § 1134(a)*; *see § 34.227[1][b]*].

Delivery of this notice will be deemed effected when delivered personally or by mail to: (1) the prospective buyer/transferee; (2) his or her agent; or (3) unless the purchase agreement (if any) provides to the contrary, his or her spouse [*Civ. Code § 1134(c)(2)*]. Violation of the delivery requirements may create a right of rescission in the buyer, or allow other remedies available under other provisions of law [*see Civ. Code § 1134(b), (e)*; *see also § 34.227[1][d]*] and will make the converter or owner liable for actual damages suffered by the buyer [*see Civ. Code § 1134(d)*; *see also § 34.227[1][e]*].

[d] Right to Rescind

If this notice is delivered after the execution of a purchase agreement for the unit, the buyer will have the right to rescind the purchase agreement. The rescission period is triggered by the delivery of this notice [*see § 34.227[1][c]*] and lasts for three days in the case of personal delivery and five days if delivery is by mail. To rescind, the buyer must deliver a written termination notice to the converter or owner [*Civ. Code § 1134(b)*].

[e] Violation of Disclosure Requirement

Any person who willfully fails to comply with the disclosure requirements discussed in this comment will be liable in the amount of actual damages suffered by the buyer [*Civ. Code § 1134(d)*].

Any violation of this disclosure requirement will not, in and of itself, invalidate any transfer of title to the unit [*Civ. Code § 1134(f)*]. The injured party may pursue any remedy available under any other provision of law [*Civ. Code § 1134(e)*].

[2] FORM

Disclosure Regarding Condition of Newly Converted Condominium

DISCLOSURE OF CONDITION OF UNIT

TO:_____[*name of prospective transferee*]
_____[*address*]
_____[*city, state, zip*]

YOU ARE HEREBY NOTIFIED THAT:

1. The undersigned is the owner of:

a. That certain real property described as Unit _____ [*specify*] ("Unit") on the Condominium Plan for _____ [*name of project*] ("Project") recorded on _____ [*date*], as Instrument No. _____ of the Official Records of the County of _____, State of California [*or identify final or parcel map describing boundaries of unit*]; and

b. A fractional undivided _____ [*specify percentage set forth in declaration* (*see § 34.202[2], Section 1.06*)] interest as a tenant in common in the Common Areas of the Project.

[*EITHER*]

2. The undersigned has knowledge of the following substantial defects or malfunctions in the major systems of the _____ [Unit *and/or* the Common Areas of the Project]: _____ [*specify*].

[*OR*]

2. The undersigned has inspected the Unit and the Common Areas of the Project and has not discovered any substantial defects or malfunctions in the major systems of the Unit and the Common Areas that would be disclosed by a reasonable inspection.

[*Continue with the following:*]

3. As used above, "major systems" includes, but is not limited to, the roof, walls, floors, heating, air conditioning, plumbing, electrical systems or components of a similar or comparable nature, and recreational facilities.

[*Add if notice is delivered after execution of purchase agreement:*]

4. You have the right to terminate the purchase agreement you executed on _____ [*date*], for the Unit. To exercise this right, you must deliver a written notice of termination to the undersigned within [*if notice is delivered in person:* three days *or, if notice is delivered by mail:* five days] after delivery of this notice.

[*Continue with the following:*]

5. This notice is required by *Section 1134 of the California Civil Code*.

Dated: _____

_____ [*signature of transferor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleReal Property LawPurchase & SaleRemediesDuty to Disclose



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16-34 California Legal Forms--Transaction Guide §§ 34.228-34.239

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

[Reserved]

§§ 34.228[Reserved]



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CHAPTER 34 CONDOMINIUMS
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C. Miscellaneous Documents

16-34 California Legal Forms--Transaction Guide § 34.240

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.240 Grant Deed

[1] Comment

[a] Use of Form

This form is a grant deed for a condominium located in a project that is subject to the requirements of the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*; *see § 34.33[1]*].

For a discussion of grant deeds in general, see Ch. 27, *Deeds and Recording* .

[b] Provisions of Form

[i] Ownership of Unit (Parcel A)

The provision of this form labeled "Parcel A" grants a separate interest in a condominium unit, the boundaries of which are described elsewhere (in a recorded condominium plan or subdivision map). This ownership interest and method of description reflect the definition of "condominium" set forth in the Davis-Stirling Act [*see Civ. Code § 1351(f), (l)* ; *see also §§ 34.32, 34.33[5]*].

[ii] Undivided Interest in Common Area (Parcel D)

The provision of this form designated as "Parcel D" describes the undivided interest that the grantee will receive in the common area of the condominium project. A "condominium" consists of such an undivided interest plus a unit [*see Civ. Code § 1362*; *see also §§ 34.33[7], 34.240[1][b][i]*].

[iii] Exclusive Use Common Areas (Parcels B and C)

This form provides the drafter with the opportunity to describe any exclusive use common areas that are appurtenant to the conveyed unit [*see Civ. Code § 1351(i)*; Parcels B and C of Form; *see also § 34.33[7]*].

[c] Recordation of Deed

A deed should be recorded in order to provide the grantee with priority over subsequent purchasers or mortgagees of the same property [*see Civ. Code §§ 1107, 1214, 1215*; *see also* Ch. 27, *Deeds and Recording*]. Before a deed can be recorded, it must be acknowledged [*Civ. Code § 1170*]. Consequently, this form provides for the insertion of an acknowledgment.

[d] Filing With Real Estate Commissioner

The developer must submit exemplars of all conveyancing instruments to be used in the proposed offering, such as a model grant deed, along with the application for the public report [*see 10 Cal. Code Reg. §§ 2792.1(a)(1), 2792(a)(12)*].

[2] FORM

Grant Deed

Recording Requested by:
_____ [name]
When Recorded Mail to:
_____ [name]
_____ [address]
_____ [city, state, zip]

_____
..... Space above this line for recorder's use

Mail tax statements to:	Documentary Transfer Tax $_____
_____ [*name*]	_____ [*firm name, if any*]
_____ [*address*]	[*By*] _____ [*signature*]
_____ [*city, state, zip*]	_____ [*e.g., Party or Agent*]

GRANT DEED

I

For valuable consideration, receipt of which is hereby acknowledged,_____[*name of grantor*] ("Grantor"), grants to_____[*name of grantee*] ("Grantee"), that certain real property located in the city of _____, County of _____, State of California, and described as follows:

Parcel A:

Unit _____ [*specify*] as shown on the Condominium Plan for_____[*name of project*

] Condominium Project ("Project") recorded on_____[*date*], as Instrument No. _____ of the Official Records of the County of _____, State of California [*or identify final or parcel map describing boundaries of unit*]; excepting and reserving, however, the easements described in the Declaration for the Project ("Declaration") recorded on_____[*date*], as Instrument No. _____ in the Official Records of the County of _____, State of California.

Parcel B:

An exclusive right, appurtenant to Parcel A, to use _____ [*describe fixtures that are considered to be exclusive use common area, e.g.*, the porch, balcony, and all other fixtures designed to serve Parcel A that are located outside the boundaries of Parcel A but that are appurtenant to Parcel A], as designated by the Declaration.

Parcel C:

An exclusive right, appurtenant to Parcel A, _____ [*describe all other exclusive use common areas, e.g.*, to use the parking space that is designated as _____ (*describe*) on the Condominium Plan *or other location*] and described in the Declaration.

Parcel D:

A fractional undivided _____ [*specify percentage set forth in declaration (see § 34.202[2], Section 1.06*)] percent interest as a tenant in common in and to Lot _____ of Tract No. _____, as shown on the Subdivision Map ("Map") filed on_____[*date*], in Book _____, at Pages _____ to _____, inclusive, of Maps in the office of the County Recorder of _____ County, State of California; excepting and reserving, however, the following:

1. Units _____ though _____, as shown on the Map;

2. Nonexlusive rights appurtenant to all units for ingress, egress, and support, and all other purposes described in the Declaration; and

3. All "Exclusive Use Common Areas" described in the Declaration and reserved to particular Units.

II

Each of the above grants is subject to the lien of nondelinquent real property taxes and assessments, the Declaration (the provisions of which are hereby incorporated in this Deed), and all other covenants, conditions, restrictions, easements, rights and liens of record. The property granted in this deed is a condominium as defined in *Sections 783* and *1351(f) of the California Civil Code*.

The undersigned have executed this Deed on_____[*date*].

GRANTOR
_____ [*name*]
By _____ [*signature*]
[*typed name and title*]

ACCEPTED:

GRANTEE
_____ [*signature*]
[*typed name*]

ACKNOWLEDGMENT
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

)
State of California)
County of _____)
)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsProperty DescriptionsReal Property LawSubdivisionsLocal Regulation



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16-34 California Legal Forms--Transaction Guide § 34.241

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.241 Notice of Owner's Rights and Responsibilities Regarding Delinquent Assessment

[1] Comment

[a] Use of Form

This form is a notice of an owner's rights and responsibilities regarding a delinquent assessment. It is required to be sent by certified mail to an owner at least 30 days before the association records a Notice of Delinquent Assessment [*see § 34.242*], which will create a lien on the owner's separate interest to collect a debt that is past due for a regular or special assessment and any late charges, reasonable fees and collection costs, reasonable attorneys' fees, and interest due [*see Civ. Code § 1367.1(a)*].

[b] Contents of Form

The notice must include all of the following information [*Civ. Code § 1367.1(a)(1)-(6)*]:

- A general description of the association's collection and lien enforcement procedures;
- The method of calculation of the amount due;
- A statement that the separate interest owner has the right to inspect the association records pursuant to *Corp. Code § 8333*;
- A statement warning the owner that foreclosure of the lien may result in sale of the owner's separate interest without court action;
- An itemized statement of the charges owed by the owner, including items on the statement that indicate the amount of any delinquent assessments, the fees and reasonable costs of collection,

reasonable attorney's fees, and any late charges and interest;

- A statement that the owner will not be liable to pay the charges, interest, and costs of collection, if it is determined the assessment was paid to the association on time;

- The owner's right to request a meeting with the board to discuss a payment plan for the amount owed [*Civ. Code § 1367.1(c)(3)*];

- The owner's right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's "meet and confer" program [*see Civ. Code § 1363.810 et seq.*]; and

- The owner's right to request alternative dispute resolution with a neutral third party before the association initiates foreclosure proceedings, except that binding arbitration is not available if the association intends to foreclose judicially [*see Civ. Code § 1369.510 et seq.*].

[2] FORM

Notice of Owner's Rights and Responsibilities Regarding Delinquent Assessment

NOTICE OF RIGHTS AND RESPONSIBILITIES REGARDING DELINQUENT ASSESSMENT

IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION

This Notice is given to you as an Owner of Unit _____ [*number or other designation of Unit*] in_____[*name of project*] who is delinquent in payment of [special *and/or* general assessment(s)] levied by the_____[*name of Association*] (Association). The Notice is provided in accordance with *Section 1367.1(a) of the California Civil Code*, and Section [*or* Article *or similar heading*] _____ of the Declaration for_____[*name of project*] (Declaration). In accordance with the above, you are informed of the following:

(1) The Association maintains the following collection and lien enforcement procedures: _____ [*describe procedures*].

(2) The total amount you owe the Association is $_____. That amount was calculated by _____ [*method of calculation*], and consists of the following items: _____ [*itemize charges owed, including amount of delinquent assessment(s), and any fees and reasonable collection costs, reasonable attorneys' fees, late charges, and interest*].

(3) You have the right, on written request, to inspect the accounting books and records and minutes of proceedings of the Association at any reasonable time.

(4) You may submit to the Board of Directors a written request to meet to discuss a payment plan for the amount due. Your request must be mailed within 15 days of the postmark of this Notice. The Board shall then meet with you in executive session within 45 days of the postmark of your request. If there is no regularly scheduled Board meeting within that time, the Board may designate a committee of one or more members to meet with you.

(5) You may dispute the assessment debt by submitting a written request to resolve the dispute to the Association pursuant to the Association's "meet and confer" program required by *Section 1363.820(a) of the California Civil Code* and Section [*or* Article *or similar heading*] _____of the Declaration.

(6) You may request alternative dispute resolution with a neutral third party pursuant to *Section 1369.510 et seq. of the California Civil Code* before the Association may initiate foreclosure proceedings against your Unit, except that binding arbitration will not be available if the Association intends to initiate a judicial foreclosure.

(7) You will not be liable to pay the amount due if it is determined that the assessment was paid on time.

Dated: _____

Board of Directors of _____ [*name of project*]
Owners' Association
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawNonmortgage LiensGeneral Overview



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16-34 California Legal Forms--Transaction Guide § 34.242

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.242 Notice of Delinquent Assessment

[1] Comment

[a] Use of Form

This form is a notice of delinquent assessment to be used before recording an assessment lien on or after January 1, 2003 [*see Civ. Code § 1367.1(d), (m)*]. Regular and special assessments are delinquent 15 days after they become due, unless the declaration provides a longer time period, in which case the longer time period will apply [*Civ. Code § 1366(e)*]. The amount of the assessment, plus any costs of collection, late charges, and interest [*see § 34.242[1][c]*] become a lien on the owner's separate interest when the association records this form with the county recorder of the county in which the separate interest is located [*Civ. Code § 1367.1(d)*]. Before the association can record this notice, however, it must first notify the owner by certified mail of the delinquent assessment and related costs, and the association's settlement and enforcement procedures [*see Civ. Code § 1367.1(a)*; *see also § 34.241*].

For a discussion of the requirements of the Davis-Stirling Act governing assessments, see *§ 34.39[1]*.

[b] Required Contents

The notice of delinquent assessment must contain all of the following information [*Civ. Code § 1367.1(d)*]:

- The amount of the assessment and other sums imposed in accordance with *Civ. Code § 1366* [*see § 34.242[1][c]*];

- A legal description of the owner's separate interest in the condominium project against which the assessment and other sums are levied;

- The name of the record owner of the owner's separate interest in the project against which the lien is

imposed; and

- For the lien to be enforced by nonjudicial foreclosure [*see Civ. Code § 1367.1(g)*; *see also § 34.242[1][d]*], the name and address of the trustee authorized by the association to enforce the lien by sale.

The notice must be signed by the person designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association [*Civ. Code § 1367.1(d)*]. An itemized statement of the charges owed by the owner [*see Civ. Code § 1367.1(a)(2)*] must be recorded together with the notice [*Civ. Code § 1367.1(d)*].

No later than 10 days after recording, a copy of the recorded notice must be mailed by certified mail to every person whose name is shown in the association's records as an owner of the separate interest [*Civ. Code § 1367.1(d)*]. On receipt of the owner's written request identifying a secondary address for purposes of collection notices, the association must send additional copies of the notice to the secondary address provided [*Civ. Code § 1367.1(k)*].

Because an instrument must be acknowledged before it can be recorded [*see Civ. Code § 1170*], this form provides for the insertion of an acknowledgment.

[c] Related Costs

If an assessment is delinquent, the association may recover all of the following in addition to the amount of the assessment [*Civ. Code § 1366(e)*]:

- Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorneys' fees [*see Brown v. Professional Community Management, Inc. (2005) 127 Cal. App. 4th 532, 539, 25 Cal. Rptr. 3d 617* (homeowners' association properly passed on to delinquent homeowners charges assessed by association's management company for collection services)].

- A late charge not exceeding 10 percent of the delinquent assessment or $10, whichever is greater, or any smaller amount specified in the declaration.

- Interest on the above sums and on the delinquent assessment, at an annual rate not exceeding 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies that interest may be recovered at a lesser rate, in which case the lesser rate will apply [*see Civ. Code § 1366(f)* (exempting owners' associations from the interest rate (usury) limitations imposed by Cal. Const. art. XV)].

[d] Enforcement of Lien

A lien for a delinquent assessment will be prior to all other liens recorded after the notice of assessment unless the declaration provides otherwise [*Civ. Code § 1367.1(f)*]. Thirty days after the lien is recorded, it may be enforced in any manner permitted by law. Any sale by the trustee designated in the notice of delinquent assessment must comply with *Civ. Code §§ 2924*, *2924b*, and *2924c* applicable to the exercise of powers of sale in mortgages and deeds of trust [*Civ. Code § 1367.1(g)*; *see* Ch. 25D, *Foreclosure*]. The "one form of action rule" of *Code Civ. Proc. § 726* [*see Ch. 25D, Foreclosure, § 25D.13*] does not apply, and the association may take a deed in lieu of foreclosure [*Civ. Code § 1367.1(h)*].

On payment of the sums specified in the notice, the association must record a notice of satisfaction and release of the lien [*Civ. Code § 1367.1(d)*].

[2] FORM

Notice of Delinquent Assessment

Recording Requested by_____[*name*]

When Recorded Mail to_____[*name of project*]

Owners' Association
_____[*address*]
_____[*city, state, zip*]

NOTICE OF DELINQUENT ASSESSMENT

This Notice of Delinquent Assessment is given pursuant to *Section 1367.1 of the California Civil Code* and Section [*or* Article *or similar heading*] _____ of the Declaration executed on_____[*date*], and recorded on_____[*date*], in Book _____, Pages _____ through _____, Official Records of _____ County, California. In accordance with the above, from and after the date of recordation of this notice, the following amounts shall become a lien on the property described below:

1. The property against which the lien is imposed is Unit _____ [*specify*] as shown on the Condominium Plan for _____ [*name of project*] Condominium Project ("Project") recorded on _____ [*date*], as Instrument No. _____ of the Official Records of the County of _____, State of California [*or identify final or parcel map describing boundaries of unit*].

2. The record owner of that Unit is _____ [*name*].

3. The amount of the delinquent _____ [regular *or* annual *or* special] assessment for the period from _____ [*date*] to _____ [*date*] is $_____.

4. The costs incurred in collecting this delinquent assessment are

a. Attorneys' fees: $_____

b. Other costs: $_____

5. The late charge is $_____

TOTAL CHARGES $_____

Plus interest on those total charges at an annual percentage rate of _____ % [*specify rate not exceeding 12 percent*], commencing on _____ [*specify date of 30th day following assessment due date*].

6. In the event this lien is enforced by nonjudicial foreclosure in accordance with *Sections 2924, 2924b,* and *2924c of the California Civil Code* pursuant to *Section 1367.1(g) of the California Civil Code,* the

name and address of the trustee authorized to enforce the lien by sale are _____ [*name*], _____ [*address*].

Dated: _____.

Board of Directors of _____ [*name of project*]
Owners' Association
By _____ [*signature*]
[*typed name and title*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawNonmortgage LiensGeneral OverviewReal Property LawSubdivisionsState Regulation



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16-34 California Legal Forms--Transaction Guide § 34.243

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.243 Notice of Satisfaction and Release of Condominium Assessment Lien

[1] Comment--Use of Form

This form is a notice of satisfaction and release of a lien against a condominium for delinquent assessments and related costs. The owners' association of the condominium project (or other type of common interest development) must record such a notice on payment of the sums specified in the notice of delinquent assessment [*Civ. Code § 1367.1(d)*; *see § 34.242[1]*]. This notice, like the notice of assessment, must be recorded with the recorder of the county in which the condominium is located [*Civ. Code § 1367.1(d)*]. The recordation of this notice discharges the lien.

[2] FORM

Notice of Satisfaction and Release of

Recording Requested by:
_____[*name*]
When Recorded Mail to:
_____[*name of project*]
Owners' Association
_____[*address*]
_____[*city, state, zip*]

NOTICE OF SATISFACTION AND RELEASE OF LIEN

NOTICE IS HEREBY GIVEN that the assessment lien against _____ [*legal description of assessed condominium*] and_____[*name of owner*], the record owner of that Unit, created by the Notice of Delinquent Assessment executed by the undersigned on_____[*date*], and recorded in the Office of the

Recorder of _____ County, State of California, on_____[*date*], in Book _____ at Page _____, has been satisfied and is released, effective on the date of recordation of this Notice in the above office.

This Notice is given pursuant to *Section 1367.1 of the California Civil Code* and Section [*or* Article *or similar heading*] _____ of the Declaration executed on_____[*date*], and recorded on_____[*date*], in Book _____, Pages _____ through _____, Official Records of _____ County, California.
Dated: _____

Board of Directors of
_____ [*name of project*]
Owners' Association
By _____ [*signature*]
[*typed name and title*]

ACKNOWLEDGMENT
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)(1)):*]

State of California)
County of _____)

On_____[*date*], before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], _____, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that_____[he *or* she *or* they] executed the same in_____[his *or* her *or* their] authorized_____[capacity *or* capacities], and that by_____[his *or* her *or* their] signature[s] on the instrument the person[s], or the entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawNonmortgage LiensGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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16-34 California Legal Forms--Transaction Guide § 34.244

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.244 Notice to Prospective Tenant of Approval of Final Map

[1] Comment

[a] Use of Form

This form is a statutory notice that must be provided to a prospective tenant of a dwelling in a project covered by a final map. Specifically, if a final map has been approved for a condominium project, community apartment project, or stock cooperative project (hereafter collectively referred to as a "project"), and the subdivider or subsequent owner of the project wishes to rent a condominium (or comparable dwelling) in that project to a tenant, the subdivider or subsequent owner must deliver a statutory notice (this form) to the prospective tenant before (1) offering the condominium (or comparable separate interest) for sale to the general public and (2) the execution of the rental agreement. The notice must be printed in at least 14-point bold print [*Gov. Code § 66459(a)* (applicable to rentals occurring on or after January 1, 1993)].

[b] Related Requirements

[i] References to Project

The project must not be referred to in a lease or rental agreement as an "apartment" or "apartments" on or after the date of the approval by the local agency of the final map for the project [*Gov. Code § 66459(b)* (applicable when final map was approved on or after January 1, 1993)].

[ii] Notice of Intention to Sell Unit

Any tenant of the project must be given at least 90 days' written notice of the intention to sell the tenant's rental unit to the general public. This requirement will not alter or abridge the rights or obligations of the parties in the performance of their covenants, including the provision of services, payment of rent, or other obligations imposed by the following

statutes: *Civ. Code §§ 1941* (requiring landlord to keep building fit for occupancy), 1941.1 (specifying characteristics necessary for occupancy), and 1941.2 (governing violations by tenants of affirmative obligations relating to condition of premises) [*Gov. Code § 66459(c)*]. For coverage of these statutes, see Ch. 34B, *Residential Leases* .

[iii] Right of First Refusal

Any tenant who lawfully resides in the project must be given a right of first refusal by the subdivider or subsequent owner of the project for the purchase of his or her rental unit on (1) the same terms and conditions that the unit will be initially offered to the general public, or (2) terms and conditions more favorable to the tenant. This right to purchase must run for a period of 90 days from the date of the notice, unless the tenant gives written notice within the 90-day period of his or her intention not to exercise that right [*Gov. Code § 66459(d)*].

[iv] Exceptions and Violations

The requirements discussed in this comment do not apply to any of the following [*Gov. Code § 66459(g)*]:

- An owner of four dwelling units or less.

- Transfers pursuant to court order, including (a) transfers ordered by a probate court in the administration of an estate, (b) transfers by any foreclosure sale after default, (c) transfers by any foreclosure sale after default in an obligation secured by a mortgage, (d) transfers by a sale under a power of sale after a default in an obligation secured by a trust deed or by any other instrument containing a power of sale, and (e) any subsequent transfer by a mortgagor or beneficiary of a trust deed who accepts a deed in lieu of foreclosure or purchases the property at a foreclosure sale.

- Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust. For these purposes, a "fiduciary" is a state- or federally-chartered bank, trust company, savings association, savings bank, credit union, or industrial loan company.

A failure to comply with *Gov. Code § 66459* will not invalidate a transfer of title to real property [*Gov. Code § 66459(e)*]. Nor will a failure to give the notice be grounds to deny the conversion. However, such a failure will render the subdivider liable to each prospective tenant who becomes a tenant and entitled to notice but does not purchase his or her unit for up to $1,100 in moving expenses and up to an additional $1,100 toward the tenant's first month's rent in a new rental unit [*Gov. Code § 66459(f)*].

[2] FORM

Notice to Prospective Tenant of Approval of Final Map

TO THE PROSPECTIVE TENANTS OF _____ [*address*]

THE UNIT YOU MAY RENT HAS BEEN APPROVED FOR SALE TO THE PUBLIC AS A CONDOMINIUM PROJECT, COMMUNITY APARTMENT PROJECT, OR STOCK COOPERATIVE PROJECT (WHICHEVER APPLIES). THE RENTAL UNIT MAY BE SOLD TO THE PUBLIC, AND, IF IT IS OFFERED FOR SALE, YOUR LEASE MAY BE TERMINATED. YOU WILL BE NOTIFIED AT LEAST 90 DAYS PRIOR TO ANY OFFERING TO SELL. IF YOU STILL LAWFULLY RESIDE IN THE UNIT, YOU WILL BE GIVEN A RIGHT OF FIRST REFUSAL TO PURCHASE THE UNIT.

_____ [*signature of owner or owner's agent*]
_____ [*date*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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16-34 California Legal Forms--Transaction Guide § 34.245

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.245 Recorded Statement of Association Information

[1] Comment--Use of Form

This form identifies information about an association that is relevant to the collection of association assessments and fees. When recorded, it will assist escrow companies in collecting and prorating regular and special assessments that are due and payable when special interests are transferred. In particular, it will alleviate the problems those companies encounter in locating the party responsible for collecting assessments when an association has changed its name or is operating under a "doing business as" designation. The statement may include any or all of the following information [*Civ. Code § 1366.2(a)*]:

- The association's name as it appears in the declaration, or the association's current name, if different.
- The name and address of a managing agent, association treasurer, or other individual or entity authorized to receive assessments and fees imposed by the association.
- If available, a daytime telephone number of the person or entity identified in the second item, *above*.
- A list of separate interests subject to assessment by the association, showing the assessor's parcel number, legal description, or both, of each separate interest.
- The recording information identifying the association's declaration.
- If an amended statement is being recorded, the recording information identifying the prior statement or statements that the amendment is superseding.

The county recorder is authorized to charge a recording fee based on the recorder's normal per-page recording fee [*Civ.*

Code § 1366.2(b)].

[2] FORM

Recorded Statement of Association Information

_____ [*Name of association*]: STATEMENT OF INFORMATION

To facilitate the collection of regular assessments, special assessments, transfer fees, and similar charges, the Board of Directors of_____[*name of association*] (Association) authorizes that the following information regarding the Association be recorded with the County Recorder of _____ [*county in which association property is located*].

1. The name of the Association is: _____ [*name as shown in declaration, or current name if different*].

2. _____ [*Name of managing agent, treasurer, or other authorized person*] is the person authorized to receive assessments and fees imposed by the Association. [His *or* Her] address and daytime telephone number are: _____ [*address and telephone number*].

3. The following separate interests are subject to assessment by the Association: _____ [*list separate interests by parcel number, legal description, or both*].

4. The [Declaration *or* Declarations] governing the Association [is *or* are] recorded at: _____ [*recording information*].

[*If statement amends prior-recorded statement(s), add:*]

5. This statement supersedes the [statement *or* statements] previously recorded at _____ [*recording information for prior statement(s)*].

[*Continue with the following:*]

Date: _____

_____ [*signature of association officer or board member*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleEscrow



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16-34 California Legal Forms--Transaction Guide § 34.246

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.246 Notice to All Owners of Owners' Rights and Responsibilities Regarding Assessments and Foreclosure

[1] Comment--Use of Form

This statutory form outlines some of the rights and responsibilities of owners of property in common interest developments and the associations that manage them; in particular, the owners' responsibility for paying assessments and the association's procedures for dealing with delinquent payments. The notice must be printed in at least 12-point type. The association must distribute the notice to each member during the 60-day period immediately preceding the beginning of the association's fiscal year. If a member provides a secondary address, the association must send the notice to both the primary and the secondary addresses. Associations for time-share projects need not include the portion of the notice regarding meetings and payment plans [*see Civ. Code § 1365.1*].

[2] FORM

Notice to All Owners of Owners' Rights and Responsibilities Regarding Assessments and Foreclosure

NOTICE ASSESSMENTS AND FORECLOSURE

This notice outlines some of the rights and responsibilities of owners of property in common interest developments and the associations that manage them. Please refer to the sections of the Civil Code indicated for further information. A portion of the information in this notice applies only to liens recorded on or after January 1, 2003. You may wish to consult a lawyer if you dispute an assessment.

ASSESSMENTS AND FORECLOSURE

Assessments become delinquent 15 days after they are due, unless the governing documents provide for a longer time. The failure to pay association assessments may result in the loss of an owner's property through foreclosure. Foreclosure

may occur either as a result of a court action, known as judicial foreclosure or without court action, often referred to as nonjudicial foreclosure. For liens recorded on and after January 1, 2006, an association may not use judicial or nonjudicial foreclosure to enforce that lien if the amount of the delinquent assessments or dues, exclusive of any accelerated assessments, late charges, fees, attorney's fees, interest, and costs of collection, is less than one thousand eight hundred dollars ($1,800). For delinquent assessments or dues in excess of one thousand eight hundred dollars ($1,800) or more than 12 months delinquent, an association may use judicial or nonjudicial foreclosure subject to the conditions set forth in *Section 1367.4 of the Civil Code*. When using judicial or nonjudicial foreclosure, the association records a lien on the owner's property. The owner's property may be sold to satisfy the lien if the amounts secured by the lien are not paid. (*Sections 1366, 1367.1,* and *1367.4 of the Civil Code*)

In a judicial or nonjudicial foreclosure, the association may recover assessments, reasonable costs of collection, reasonable attorney's fees, late charges, and interest. The association may not use nonjudicial foreclosure to collect fines or penalties, except for costs to repair common areas damaged by a member or a member's guests, if the governing documents provide for this. (*Sections 1366* and *1367.1 of the Civil Code*)

The association must comply with the requirements of *Section 1367.1 of the Civil Code* when collecting delinquent assessments. If the association fails to follow these requirements, it may not record a lien on the owner's property until it has satisfied those requirements. Any additional costs that result from satisfying the requirements are the responsibility of the association. (*Section 1367.1 of the Civil Code*)

At least 30 days prior to recording a lien on an owner's separate interest, the association must provide the owner of record with certain documents by certified mail, including a description of its collection and lien enforcement procedures and the method of calculating the amount. It must also provide an itemized statement of the charges owed by the owner. An owner has a right to review the association's records to verify the debt. (*Section 1367.1 of the Civil Code*)

If a lien is recorded against an owner's property in error, the person who recorded the lien is required to record a lien release within 21 days, and to provide an owner certain documents in this regard. (*Section 1367.1 of the Civil Code*)

The collection practices of the association may be governed by state and federal laws regarding fair debt collection. Penalties can be imposed for debt collection practices that violate these laws.

PAYMENTS

When an owner makes a payment, he or she may request a receipt, and the association is required to provide it. On the receipt, the association must indicate the date of payment and the person who received it. The association must inform owners of a mailing address for overnight payments. (*Section 1367.1 of the Civil Code*)

An owner may, but is not obligated to, pay under protest any disputed charge or sum levied by the association, including, but not limited to, an assessment, fine, penalty, late fee, collection cost, or monetary penalty imposed as a disciplinary measure, and by so doing, specifically reserve the right to contest the disputed charge or sum in court or otherwise.

An owner may dispute an assessment debt by submitting a written request for dispute resolution to the association as set forth in Article 5 (commencing with Section 1368.810) of Chapter 4 of Title 6 of Division 2 of the Civil Code. In addition, an association may not initiate a foreclosure without participating in alternative dispute resolution with a neutral third party as set forth in Article 2 (commencing with *Section 1369.510) of Chapter 7 of Title 6 of Division 2 of the Civil Code*, if so requested by the owner. Binding arbitration shall not be available if the association intends to initiate a judicial foreclosure. An owner is not liable for charges, interest, and costs of collection, if it is established that the assessment was paid properly on time. (*Section 1367.1 of the Civil Code*)

[*The following may be omitted if the association governs a timeshare development*]

MEETINGS AND PAYMENT PLANS

An owner of a separate interest that is not a timeshare may request the association to consider a payment plan to satisfy a delinquent assessment. The association must inform owners of the standards for payment plans, if any exist. (*Section 1367.1 of the Civil Code*) The board of directors must meet with an owner who makes a proper written request for a meeting to discuss a payment plan when the owner has received a notice of a delinquent assessment. These payment plans must conform with the payment plan standards of the association, if they exist. (*Section 1367.1 of the Civil Code*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens



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16-34 California Legal Forms--Transaction Guide § 34.247

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.247 Assessment and Reserve Funding Disclosure Summary [Civ. Code § 1365.2.5]

[1] Comment--Use of Form

After July 1, 2005, each pro forma operating budget or budget summary that is delivered to members pursuant to *Civ. Code § 1365(a)* must be accompanied by the statutory Assessment and Reserve Funding Disclosure Summary in the form illustrated below [*Civ. Code § 1365.2*.5(a); *see* 2004 Stats., ch 766, § 6]. The summary may be supplemented or modified to clarify the information delivered so long as the minimum information set out in the form is provided [*Civ. Code § 1365.2*.5(b)(3)]. For purposes of the summary, the amount of reserves needed to be accumulated for a component to a given time is computed as the current repair or replacement cost multiplied by the number of years the component has been in service divided by the component's useful life. However, the board is not required to use this calculation to fund reserves [*Civ. Code § 1365.2*.5(b)(4)].

[2] FORM

Assessment and Reserve Funding Disclosure Summary [Civ. Code § 1365.2.5]

Assessment and Reserve Funding Disclosure Summary

(1) The current regular assessment per ownership interest is $_____ per _____.

Note: If assessments vary by the size or type of ownership interest, the assessment applicable to this ownership interest may be found on page _____ of the attached summary.

(2) Additional regular or special assessments that have already been scheduled to be imposed or charged, regardless of the purpose, if they have been approved by the board and/or members:

Date assessment is due:	Amount per ownership interest per month (If assessments are vari-	Purpose of the assessment:

able, see note immediately below):

Total:

Note: If assessments vary by the size or type of ownership interest, the assessment applicable to this ownership interest may be found on page _____ of the attached report.

(3) Based upon the most recent reserve study and other information available to the board of directors, will currently projected reserve account balances be sufficient at the end of each year to meet the association's obligation for repair and/or replacement of major components during the next 30 years?

Yes _____ No _____

(4) If the answer to (3) is no, what additional assessments or other contributions to reserves would be necessary to ensure that sufficient reserve funds will be available each year during the next 30 years that have not yet been approved by the board or the members?

Approximate date assessment will be due:	Amount per ownership interest per month:

Total:

(5) All major components are included in the reserve study and are included in its calculations.

(6) Based on the method of calculation in paragraph (4) of *subdivision (b) of Section 1365.2.5 of the Civil Code*, the estimated amount required in the reserve fund at the end of the current fiscal year is $_____, based in whole or in part on the last reserve study or update prepared by _____ as of _____ (month), _____ (year). The projected reserve fund cash balance at the end of the current fiscal year is $_____, resulting in reserves being _____ percent funded at this date. If an alternate, but generally accepted, method of calculation is also used, the required reserve amount is $_____. (See attached explanation.)

(7) Based on the method of calculation in paragraph (4) of *subdivision (b) of Section 1365.2.5 of the Civil Code*, the estimated amount required in the reserve fund at the end of each of the next five budget years is $_____, and the projected reserve fund case balance in each of those years, taking into account only assessments already approved and other known revenues, is $_____, leaving the reserve at _____ percent funding. If the reserve funding plan approved by the association is implemented, the projected reserve fund cash balance in each of those years will be $_____, leaving the reserve at _____ percent funding.

Note:

The financial representations set forth in this summary are based on the best estimates of the preparer at that time. The estimates are subject to change. At the time this summary was prepared, the assumed long-term before-tax interest rate earned on funds was _____ percent per year, and the assumed long-term inflation rate to be applied to major component repair and replacement costs was _____ percent per year.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
C. Miscellaneous Documents

16-34 California Legal Forms--Transaction Guide § 34.248

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.248 Association Request for Copy of Trustee's Deed on Sale of Separate Interest

[1] Comment--Use of Form

This form is a request by a homeowners' association that any mortgagee, trustee, or other person authorized to record a notice of default on any separate interest governed by the association mail to the association a copy of any trustee's deed concerning the sale of such a separate interest. To be effective, the completed form must be filed with the county recorder in any county in which the separate interests are located and recorded before the filing of a notice of default [*Civ. Code § 2924b(f)*].

The request must include a legal description or the assessor's parcel number of the separate interests as well as the association's name and address and a statement that it is a homeowners' association [*Civ. Code § 2924b(f)*].

The mortgagee, trustee, or other authorized person must mail the requested information to the association within 15 business days following the date the trustee's deed is recorded. Failure to mail the request will not affect title to the property, however [*Civ. Code § 2924b(f)*].

[2] FORM

34.248 Association Request for Copy of Trustee's Deed on Sale of Separate Interest

REQUEST FOR COPY OF TRUSTEE'S DEED

Recording requested by
_____ [*Association's name*])
)
When recorded mail to:)

)
_____ [*name*])
)
_____ [*address*])
)
_____ [*city, state, zip*])
_____
Space above this line for recorder's use

_____ [*name of Association*] (Association), a homeowners' association as defined by subdivision (a) of *Civil Code Section 1351*, is responsible for governing the separate interests of the condominium project known as _____ [*name of condominium project*] (Project), located at _____ [*address of condominium project*], and described as _____ [*legal description or assessor's parcel number of separate interests*].

In accordance with subsection (f) of *Civil Code Section 2924b*, the Association hereby requests that any mortgagee, trustee, or other person authorized to record a notice of default regarding any of the separate interests in the Project mail to the Association a copy of any trustee's deed upon sale of a separate interest in the Project within 15 business days following the date the trustee's deed is recorded. The copy of the trustee's deed should be mailed to:

_____ [*name of Association*]

_____ [*address*]

_____ [*city, state, zip*]

Dated: _____.

On Behalf of _____ [*name of Association*]

_____ [*signature of authorized person*]

[*typed name*]



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16-34 California Legal Forms--Transaction Guide § 34.249

AUTHOR: Chris Monahan Katherine Wisiniski Steven Holland Revision Authors

§ 34.249 Disclosure Documents Index for Distribution to Members

[1] Comment--Use of Form

This is a statutory form that indexes the many disclosures that the Davis-Stirling Common Interest Development Act requires an association to give to the owners of each separate interest. The index must be delivered to any owner on request [*Civ. Code § 1363.005*; *see Civ. Code § 1350.7* (delivery requirements)].

[2] FORM

SEC. 2.

Section 1363.005 is added to the Civil Code, to read:

1363.005.

The association shall, at the request of any member, distribute to the member, in the manner described in Section 1350.7, the following Disclosure Documents Index:

Disclosure Documents Index

Item	Description	Reference Code
1	Assessment and Reserve Funding Disclosure Summary (form)	Civil Code Sec. 1365.2.5
2	Pro Forma Operating Budget or Pro Forma Operating Budget Summary	Civil Code Sec. 1365(a)
3	Assessment Collection Policy	Civil Code Sec. 1365(e) and

		1367.1(a)
4	Notice/Assessments and Foreclosure (form)	Civil Code Sec. 1365.1
5	Insurance Coverage Summary	Civil Code Sec. 1365(f)
6	Board Minutes Access	Civil Code Sec. 1363.05(e)
7	Alternative Dispute Resolution (ADR) Rights (summary)	Civil Code Sec. 1369.590
8	Internal Dispute Resolution (IDR) Rights (summary)	Civil Code Sec. 1363.850
9	Architectural Changes Notice	Civil Code Sec.1378(c)
10	Secondary Address Notification Request	Civil Code Sec. 1367.1(k)
11	Monetary Penalties Schedule	Civil Code Sec. 1363(g)
12	Reserve Funding Plan (summary)	Civil Code Sec. 1365(b)
13	Review of Financial Statement	Civil Code Sec. 1365(c)
14	Annual Update of Reserve Study	Civil Code Sec. 1365(a)



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS

17-34A California Legal Forms--Transaction Guide 34A.syn

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.syn Synopsis to Chapter 34A: PRELEASE FORMS

§ 34A.01 California Statutes

[1] Resolutions Authorizing Lease

[2] Powers of Attorney

[3] Offers and Options

[4] Prepaid Rental Listing Services

§§ 34A.02-34A.04 [Reserved]

§ 34A.05 Law Reviews and Periodicals

§ 34A.06 Annotations

§ 34A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 34A.08-34A.09 [Reserved]

§ 34A.10 Resolutions Authorizing Lease

[1] Corporate Resolutions

[a] Corporation's Power to Lease

[b] Exercise of Corporation's Power

[c] Purpose of Lease

[i] Corporations Organized Under General Corporation Law

[ii] Corporations Organized Under Nonprofit Corporation Law

[2] Unincorporated Association Resolutions

[a] Association's Power to Lease

[b] Limitations on Power to Lease

[c] Liability of Association

§ 34A.11 Powers of Attorney to Lease

[1] Governing Law

[2] Definitions

[3] Formal Requirements

[4] Scope of Authority

[5] Revocation of Power of Attorney

§ 34A.12 Offers and Proposals to Lease

[1] Offer to Lease

[a] Contents of Offer

[b] Acceptance

[c] Revocation of Offer

[d] Offer to Lease Through Agent

[2] Proposal to Lease

§ 34A.13 Option Agreement to Lease

[1] Definitions

[2] Offer and Option Distinguished

[3] Consideration

[4] Writing Required

[5] Termination of Option

[6] Exercise of Option

[a] Manner of Exercise

[b] Time Period

[c] Exercise as Creating Lease

§ 34A.14 Prepaid Rental Listing Services

[1] Definitions and Governing Law

[2] License Requirements

[a] Separate License Required

[b] Application for License

[c] Duration of PRLS License

[d] Suspension, Denial, or Revocation of License

[3] Bond Requirements

[4] Operation of PRLS Business

[5] Written Contract

[a] Required Contents of Contract

[b] Filing and Retention of Contract

[6] Refund of Advance Fee

[a] Licensee's Obligation to Refund Fee

[b] Exception to Licensee's Duty to Refund Fee

[c] Damages for Failure to Refund Fee

[7] Violations of PRLS Statute

[a] Misdemeanor Actions

[b] Injunctive Relief

§§ 34A.15-34A.99 [Reserved]

§ 34A.100 Resolutions Authorizing Lease

Scope

§ 34A.101 Powers of Attorney

Scope

§ 34A.102 Offers, Proposals, and Options

Scope

§ 34A.103 Prepaid Rental Listing Services

Scope

§§ 34A.104-34A.109 [Reserved]

§ 34A.110 Resolutions Authorizing Lease

Scope

§ 34A.111 Powers of Attorney

Scope

§ 34A.112 Offers, Proposals, and Options

Scope

§ 34A.113 Prepaid Rental Listing Services

[1] PRLS Contract

Scope

[2] Refund of Advance Fee

Scope

§§ 34A.114-34A.119 [Reserved]

§ 34A.120 Prepaid Rental Listing Services

Scope

§§ 34A.121-34A.129 [Reserved]

§ 34A.130 Resolutions Authorizing Lease

Scope

§ 34A.131 Powers of Attorney

Scope

§ 34A.132 Offers, Proposals, and Options

Scope

§ 34A.133 Prepaid Rental Listing Services

Scope

§§ 34A.134-34A.199 [Reserved]

§ 34A.200 Corporate Resolution Authorizing Lease and Certificate of Secretary

[1] Comment

[a] Use of Form

[b] Certification

[2] FORM

Corporate Resolution Authorizing Lease and Certificate of Secretary

§ 34A.201 Resolution Authorizing Lease by Members of Unincorporated Association or Other Organization

[1] Comment--Use of Form

[2] FORM

Resolution Authorizing Lease by Members of Unincorporated Association or Other Organization

§ 34A.202 Resolution Authorizing Lease by Governing Board or Other Authorized Body of Unincorporated Association or Other Organization

[1] Comment--Use of Form

[2] FORM

Resolution Authorizing Lease by Governing Board or Other Authorized Body of Unincorporated Association or Other Organization

§ 34A.203 Resolution of Approval of Members of Unincorporated Association or Other Organization

[1] Comment--Use of Form

[2] FORM

Resolution of Approval of Members of Unincorporated Association or Other Organization

§§ 34A.204-34A.209 [Reserved]

§ 34A.210 Power of Attorney to Execute Lease for Landlord or Tenant

[1] Comment

[a] Use of Form

[b] Recording Practices

[2] FORM

Power of Attorney to Execute Lease for Landlord or Tenant

§ 34A.211 Power of Attorney to Execute Lease for Landlord Spouse of Community Real Property

[1] Comment

[a] Use of Form

[b] Leasing of Community Property

[2] FORM

Power of Attorney to Execute Lease for Landlord Spouse of Community Real Property

§§ 34A.212-34A.219 [Reserved]

§ 34A.220 Offer to Lease Real Property

[1] Comment--Use of Form

[2] FORM

Offer to Lease Real Property

§ 34A.221 Offer by Tenant to Lease Real Property Through Landlord's Agent

[1] Comment--Use of Form

[2] FORM

Offer by Tenant to Lease Real Property Through Landlord's Agent

§ 34A.222 Option Agreement for Lease of Real Property to Be Executed by Both Parties

[1] Comment

[a] Use of Form

[b] Execution of Option

[2] FORM

Option Agreement for Lease of Real Property to Be Executed by Both Parties

§ 34A.223 Option Agreement for Lease of Real Property to Be Executed by Landlord Only

[1] Comment--Use of Form

[2] FORM

Option Agreement for Lease of Real Property to Be Executed by Landlord Only

§ 34A.224 Abstract of Option Agreement

[1] Comment--Use of Form

[2] FORM

Abstract of Option Agreement

§ 34A.225 Letter of Intent to Lease

[1] Comment--Use of Form

[2] FORM

Letter of Intent to Lease

§§ 34A.226-34A.229 [Reserved]

§ 34A.230 Prepaid Rental Listing Service Contract

[1] Comment

[a] Use of Form

[b] Refund Provisions of Contract

[2] FORM

Prepaid Rental Listing Service Contract

§ 34A.231 Request for Partial Refund of Advance Fee

[1] Comment--Use of Form

[2] FORM

Request for Partial Refund of Advance Fee

§ 34A.231A Statement in Support of Refund Request

[1] Comment--Use of Form

[2] FORM

Statement in Support of Refund Request

§ 34A.232 Request for Full Refund of Advance Fee

[1] Comment--Use of Form

[2] FORM

Request for Full Refund of Advance Fee

by Linda Breen Piercen*
Myron Moskovitzn**
Benjamin Kaplann***
Practice Consultants

FOOTNOTES:

(n31)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California, at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multi-state retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

(n32)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.

(n33)Footnote ***. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real

Property Law Section.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS

17-34A California Legal Forms--Transaction Guide Scope

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

Scope

by Linda Breen Piercen*
Myron Moskovitzn**
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Practice Consultants Scope

This chapter discusses the legal requirements and provides forms relating to documents which may or must precede the drafting and execution of a real property lease. It includes discussion of the statutory requirements and forms pertaining to prepaid rental listing services. A prepaid rental listing service (PRLS) is a business in which a real estate broker or a person specifically licensed by the Department of Real Estate charges a fee for providing a prospective tenant with addresses of available rental property.

Specifically, this chapter covers all of the following issues:

- Corporate and unincorporated association resolutions authorizing lease;
- Powers of attorney (relating to the execution of a lease);
- Offers to lease real property;
- Options to lease real property; and
- Prepaid Rental Listing Services.

In contrast to corporations and unincorporated associations, partnerships and limited liability companies customarily do not engage in any formal prelease authorization procedures. The authority of a general partner or a member (or manager) of a limited liability company (LLC) to execute a lease, or an offer or option to lease, on behalf of the partnership or LLC, is granted in the organizational documents for the partnership or LLC [*see* Ch. 12C, *Limited Liability Companies* , Ch. 15, *General Partnerships* , and Ch. 15A, *Formation of Limited Partnerships*].

Contracts authorizing or employing a real estate broker or agent to lease real property are covered in Ch. 21, *Agreements With Real Estate Brokers and Agents* . Complete leases are contained in Ch. 34B, *Residential Leases*, Ch. 34C, *Retail, Industrial, and Office Leases*, Ch. 34D, *Ground Leases*, and Ch. 34E, *Shopping Centers: Leasing and Operation*. Options to purchase rather than lease real property are covered in Ch. 22, *Options to Purchase Real Property* .

FOOTNOTES:

(n34)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California, at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multi-state retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

(n35)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.

(n36)Footnote ***. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.



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A. Primary Sources

17-34A California Legal Forms--Transaction Guide § 34A.01

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.01 California Statutes

[1] Resolutions Authorizing Lease

General Corporation Law. *Corp. Code § 100 et seq.*

Nonprofit Corporation Law. *Corp. Code § 5000 et seq.*

Purpose of corporation. *Corp. Code §§ 206, 5111, 7111, 9111*.

Power of corporation to lease property. *Corp. Code §§ 207(g), 5140(i), 7140(i), 9140(i)*.

Power of corporation to lease exercised by board of directors. *Corp. Code §§ 300(a), 5210, 7210, 9210*.

School district property leasing. *Educ. Code § 17455 et seq.*

Unincorporated associations. *Corp. Code § 18000 et seq.*

Power of association to lease property. *Corp. Code § 18105*.

Liability of association. *Corp. Code § 18605 et seq.*

[2] Powers of Attorney

Power of Attorney Law. *Prob. Code § 4000 et seq.*

Attorney-in-fact defined. *Prob. Code § 4014*.

Principal defined. *Prob. Code § 4026*.

Requirements for valid power of attorney. *Prob. Code §§ 4121, 4122*.

Scope of authority of attorney-in-fact. *Prob. Code §§ 4123, 4261*.

Acknowledgments. *Civ. Code § 1180 et seq.*; *Gov. Code §§ 27287, 27288*.

Recording revocation of power of attorney. *Civ. Code § 1216*.

General provisions governing agents. *Civ. Code §§ 2019-2022, 2295 et seq.*

Instruments which may be recorded. *Gov. Code § 27280*.

[3] Offers and Options

Contracts. *Civ. Code § 1549 et seq.*

Contract defined. *Civ. Code §§ 1549, 1550*.

Offer, acceptance, and revocation. *Civ. Code §§ 1580-1590*.

Consideration. *Civ. Code §§ 1605-1615*.

Statute of frauds as applied to leases. *Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*.

[4] Prepaid Rental Listing Services

Advance fee. *Bus. & Prof. Code § 10026*.

Listing. *Bus. & Prof. Code § 10027*.

Real estate broker. *Bus. & Prof. Code §§ 10131, 10131.2*.

Prepaid rental listing services. *Bus. & Prof. Code § 10167 et seq.*

Licensee. *Bus. & Prof. Code § 10167(b)*.

Location. *Bus. & Prof. Code § 10167(c)*.

Designated agent. *Bus. & Prof. Code § 10167(d)*.

Licensing requirements. *Bus. & Prof. Code §§ 10167.2-10167.4*.

Operation of PRLS business. *Bus. & Prof. Code § 10167.5*.

Bond requirements. *Bus. & Prof. Code §§ 10167.7, 10167.8*.

Contract requirements. *Bus. & Prof. Code §§ 10167.9, 10167.10.*

Retention of documents requirement. *Bus. & Prof. Code § 10167.9(b).*

Refund of advance fee. *Bus. & Prof. Code § 10167.10.*

Grounds for suspension or revocation of license. *Bus. & Prof. Code § 10167.12.*

Violations of PRLS statutes. *Bus. & Prof. Code §§ 10167.11, 10167.14, 10167.15.*



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A. Primary Sources

17-34A California Legal Forms--Transaction Guide §§ 34A.02-34A.04

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.02[Reserved]



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B. Secondary Sources

17-34A California Legal Forms--Transaction Guide § 34A.05

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.05 Law Reviews and Periodicals

Goldman, *Drafting a Fair Right of First Offer Lease Option (With Form)*, 11 Prac. Real Est. Law 79 (1995).



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B. Secondary Sources

17-34A California Legal Forms--Transaction Guide § 34A.06

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.06 Annotations

Annot., Misrepresentation by Lessor, in Negotiations for Lease, as to Offers of Rental Received From Third Persons, as Actionable Fraud, 30 A.L.R.2d 923 (1953).



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17-34A California Legal Forms--Transaction Guide § 34A.07

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.07 Text References

[1] Matthew Bender Sources

California Legal Forms.

Ch. 3, *Articles of Incorporation*.

Ch. 4, *Bylaws*.

Ch. 5, *Directors' Meetings, Actions, and Resolutions*.

Ch. 8A, *Shareholders' Meetings, Voting, and Agreements*.

Ch. 12C, *Limited Liability Companies*.

Ch. 13, *Nonprofit Corporations*.

Ch. 13A, *Nonprofit Unincorporated Associations*.

Ch. 21, *Agreements With Real Estate Brokers and Agents*.

Ch. 22, *Options to Purchase Real Property*.

Ch. 34B, *Residential Leases*.

Ch. 34C, *Retail, Industrial, and Office Leases*.

Ch. 34D, *Ground Leases*.

Ch. 34E, *Shopping Centers: Leasing and Operation*.

Ch. 35A, *Assignment and Sublease of Leasehold Interests*.

Ch. 35B, *Modification and Termination of Leases*.

Ch. 36, *Oil and Gas Rights and Leases*.

Ch. 36A, *Mining Claims, Timber Interests, and Water Rights*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 98, *Powers of Attorney*.

California Real Estate Law and Practice.

Ch. 151, *Predrafting Legal Considerations*.

Ch. 152, *Drafting Basic Lease Provisions*.

Ch. 153, *Drafting Commercial Leases*.

Ch. 154, *Complete Commercial Leases*.

Ch. 155, *Drafting Residential Leases*.

California Forms of Pleading and Practice.

Ch. 140, *Contracts*.

Ch. 331, *Landlord and Tenant: Creating the Tenancy*.

Ch. 427, *Principal and Agent*.

Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation.

Ch. 1, *Representing Landlords and Tenants: Preliminary Considerations*.

Ch. 2, *Creation of Tenancy*.

Current Leasing, Ch. 4C, *Lease Options to Renew, Purchase and Expand*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 12, Real Property, pt. VII, *Landlord and Tenant* (10th ed. 2005).

Bowman, Ogden's Revised California Real Property Law, Ch. 12, *Leases* (Cal. C.E.B. 1974).

Friedman, Garcia & Hagarty, California Practice Guide: Landlord-Tenant (The Rutter Group 1989).

Miller & Starr, California Real Estate, Ch. 19, *Landlord and Tenant* (West 3d 2000 ed.).



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17-34A California Legal Forms--Transaction Guide §§ 34A.08-34A.09

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.08[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART II. LEGAL BACKGROUND

17-34A California Legal Forms--Transaction Guide § 34A.10

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.10 Resolutions Authorizing Lease

[1] Corporate Resolutions

[a] Corporation's Power to Lease

A California corporation organized under or subject to the General Corporation Law [*Corp. Code § 100 et seq.*], or organized under or subject to the Nonprofit Corporation Law [*Corp. Code § 5000 et seq.*], has all of the powers of a natural person in carrying out its activities, including the power, with certain limitations, to enter into contracts [*see Corp. Code §§ 207(g), 5140(i)* (nonprofit public benefit corporations), 7140(i) (nonprofit mutual benefit corporations), 9140(i) (nonprofit religious corporations)]. Implicit in these broad statutory corporate powers is the power of a corporation to lease real and personal property in that a lease is both a conveyance and a contract [*see Ellingson v. Walsh, O'Connor and Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507* ; *see also Sarmento v. Bay City Land & Cattle Co. (1949) 94 Cal. App. 2d 343, 347, 210 P.2d 754* (citing former Corp. Code §§ 802, 803, substantially reenacted as *Corp. Code §§ 207, 208*)].

If the lease contemplated by the corporation is all or substantially all of its assets, the principal terms of the lease must satisfy the following criteria [*Corp. Code § 1001(a)*]:

- It must be approved by the board; and

- Unless the transaction is in the usual and regular course of its business, it must be approved by the outstanding shares, either before or after approval by the board and before or after the transaction.

[b] Exercise of Corporation's Power

The powers of a corporation organized under or subject to the General Corporation Law must be exercised by or under the direction of the board of directors, subject to any limitation in the articles requiring that an action be approved by some or all of the shareholders [*Corp. Code § 300(a)*]. A statutory close corporation, however, may modify this

traditional pattern of corporate control and allocate the management of corporate affairs ordinarily exercised by the board to the shareholders or other corporate officials through use of a shareholders' agreement [*see Corp. Code § 300(d)*; *see also* Ch. 8C, *Close Corporation Shareholder Agreements*].

The powers of a nonprofit corporation organized under or subject to the Nonprofit Corporation Law must also be exercised by or under the direction of the board of directors, subject to any limitation in the articles or bylaws requiring approval of an action by the members or a majority of all of the members [*Corp. Code §§ 5210* (nonprofit public benefit corporation), 7210 (nonprofit mutual benefit corporation), 9210 (nonprofit religious corporation)].

Therefore, the board of directors usually is the body that must adopt the resolution authorizing the corporation to execute the lease, although corporate articles or bylaws may require that the members or shareholders initially adopt the resolution or approve the board's adoption of the resolution.

General resolutions by directors and shareholders of corporations organized under the General Corporation Law are covered respectively in Ch. 5, *Directors' Meetings, Actions, and Resolutions*, and Ch. 8A, *Shareholders' Meetings, Voting, and Agreements*. For full discussion of nonprofit corporations, see Ch. 13, *Nonprofit Corporations* .

[c] Purpose of Lease

[i] Corporations Organized Under General Corporation Law

Most corporations organized under or subject to the General Corporation Law may engage in any business activity, subject to any limitation contained in the articles and to compliance with any other applicable laws [*Corp. Code § 206*]. Corporations subject to the Banking Law [*Fin. Code § 99 et seq.*; *see Corp. Code § 163*] or professional corporations may engage in any business activity not prohibited by the respective statutes and regulations which govern it, subject to any limitation contained in their articles and to compliance with any other applicable laws [*Corp. Code § 206*].

Therefore, a corporation engaged in carrying on business authorized by its articles or the law under which it is organized may make all contracts which are essential to the transaction of its ordinary affairs, or which are an appropriate means by which it may reasonably expect that its business will be advanced, or which tend directly to promote its authorized business [*Simpson v. Bergmann (1932) 125 Cal. App. 1, 7, 13 P.2d 531]* . It follows then that the purpose of a lease entered into by a corporation should be within the scope of the corporation's purpose. Even if the articles limit the purposes or powers of the corporation, however, a lease made with a third party and which is not within the scope of the corporation's purposes or powers will bind the corporation if either of the following occurs [*see Corp. Code § 208(b)*]:

- It is authorized or ratified by the board of directors; or

- It is made within the actual or apparent authority conferred by the board or within the agency power of the executing officer, except as the board's authority is limited by law.

[ii] Corporations Organized Under Nonprofit Corporation Law

Corporations organized under or subject to the Nonprofit Corporation Law must have one of several purposes prescribed by statute [*see Corp. Code §§ 5111* (nonprofit public benefit corporation), 7111 (nonprofit mutual benefit corporation), 9111 (nonprofit religious corporation)]. The articles of incorporation may further limit these purposes [*Corp. Code §§ 5131* (nonprofit public benefit corporation), 7131 (nonprofit mutual benefit corporation), 9131 (nonprofit religious corporation)].

A lease with a third party should be within the scope of the corporation's purpose; however, even if the lease is not

within this scope, ordinarily it will bind the corporation if either of the following occurs [*Corp. Code §§ 5141* (nonprofit public benefit corporation), 7141 (nonprofit mutual benefit corporation), 9141 (nonprofit religious corporation)]:

- It is authorized or ratified by the board; or

- It is made within the scope of actual or apparent authority conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law.

An exception to this rule exists if a breach of a charitable trust (for nonprofit public benefit or nonprofit mutual benefit corporations) or a breach of a trust under which any of the assets of the corporation are held (for nonprofit religious corporations) is involved. In this event, certain specified persons having an interest in the corporation may obtain a rescission or injunction of the contract [*see Corp. Code §§ 5142* (nonprofit public benefit corporation), 7142 (nonprofit mutual benefit corporation), 9142 (nonprofit religious corporation)].

[2] Unincorporated Association Resolutions

[a] Association's Power to Lease

An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real property [*Corp. Code § 18105*]. The law formerly required a lease of real property owned or held by an unincorporated fraternal or benevolent association or a labor organization to be authorized by a resolution of the association or organization and then executed by the presiding officer and recording secretary under the seal of the association or organization [*see* former *Corp. Code § 20002*]. In 2004, amendments to the Corporations Code [2004 Stats., ch. 178] deleted the requirement of a resolution and made the provisions governing unincorporated associations inapplicable to labor organizations, labor federations, labor councils, or labor committees governed by a constitution or bylaws [*Corp. Code § 18055(e)*]. The law now provides that the acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers, (2) a person specifically designated by a resolution adopted by the association, or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

PRACTICE TIP:

Unincorporated Association as Tenant. Note that the statutory requirements discussed above pertain to *property owned or held by* the unincorporated association. In contrast, when an unincorporated association desires to lease real property as a tenant, there is no statute specifying the officers who must execute a lease. However, the articles or bylaws may contain a provision concerning either or both of these matters. *By Publisher's Editorial Staff.*

[b] Limitations on Power to Lease

The laws and regulations of the organization, such as the articles of association or the constitution, may impose limitations or restrictions on the organization's power to lease.

PRACTICE TIP:

Restrictions on Association's Power to Lease. Examples of restrictions contained in the articles of association include (1) a requirement that any lease approved by the governing body must also be approved by a certain percentage of the members, and (2) establishing maximum permissible lease terms and rent which may be paid or minimum rent which must be received for association property. *By Publisher's Editorial Staff.*

[c] Liability of Association

The Legislature has attempted to limit the potential tort and contractual liability of an unincorporated association and its members by enacting several statutory provisions concerning this matter [*see Corp. Code § 18605 et seq.*]. For discussion of this subject, see Ch. 13A, *Nonprofit Unincorporated Associations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesBusiness & Corporate LawProfessional Associations & CorporationsBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART II. LEGAL BACKGROUND

17-34A California Legal Forms--Transaction Guide § 34A.11

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§ 34A.11 Powers of Attorney to Lease

[1] Governing Law

Powers of attorney are governed by the Power of Attorney Law [*Prob. Code § 4000 et seq.*] to the extent provided in that law [*Civ. Code § 2400*]. Except when the Power of Attorney Law provides a specific rule, the general law of agency [*see Civ. Code §§ 2019-2022, 2295 et seq.*] also applies to powers of attorney [*Prob. Code § 4051*].

For extended coverage of powers of attorney, including circumstances under which a power is or may be terminated or revoked, and reasons for using a power of attorney, see Ch. 98, *Powers of Attorney* .

[2] Definitions

A "power of attorney" is a written instrument, however denominated, that is executed by a natural person having the power to contract and that grants authority to an attorney-in-fact [*Prob. Code § 4022*].

The "principal" is a natural person who executes a power of attorney [*Prob. Code § 4026*]. An "attorney-in-fact" is a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-fact or agent, or by some other term [*Prob. Code § 4014(a)*].

[3] Formal Requirements

A power of attorney is legally sufficient under the Power of Attorney Law if it meets all of the following requirements [*Prob. Code § 4121*]:

- It contains the date of its execution;

- It is signed either by the principal or in the principal's name by some other person in the principal's presence and at the principal's direction; and

- It is either acknowledged before a notary public or signed by a least two witnesses who satisfy the statutory requirements for witnesses [*see Prob. Code § 4122* for witness requirements].

PRACTICE TIP:

Power of Attorney May Be Recorded. Although there is no statutory requirement that a power of attorney affecting real property must be recorded to be effective, if a document (for example, a lease or memorandum of lease) executed by the attorney-in-fact is recorded, it is customary practice to also record the power of attorney. If a leasehold title insurance policy is being obtained at the inception of the lease, the title insurance company generally will require that the power of attorney be recorded with a memorandum of lease. For a sample memorandum of lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203. By Publisher's Editorial Staff.*

A natural person having the capacity to contract may execute a power of attorney [*Prob. Code § 4120*]. Similarly, only a person having the capacity to contract is qualified to act as an attorney-in-fact [*Prob. Code § 4200*].

For discussion and a form of a power of attorney to execute a lease for either a landlord or tenant, see *§ 34A.210*. For discussion and a form of a power of attorney to execute a lease for the landlord spouse of community property, see *§ 34A.211*.

[4] Scope of Authority

In a power of attorney, a principal may grant authority to an attorney-in-fact to act on the principal's behalf with regard to all lawful subjects and purposes or with regard to one or more express purposes [*Prob. Code § 4123(a)*]. If a power of attorney grants general authority to an attorney-in-fact and is not limited to one or more express actions, subjects, or purposes, the attorney-in-fact has all the authority to act as a person having the capacity to contract [*Prob. Code § 4261*].

With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the power of attorney's execution or thereafter acquired or whether located in California or elsewhere. The power of attorney need not contain a description of each item or parcel of property [*Prob. Code § 4123(b)*].

[5] Revocation of Power of Attorney

A principal may revoke a power of attorney in accordance with its terms or by a writing [*Prob. Code § 4151(a)*; *see* Ch. 98, *Powers of Attorney* , for discussion of the revocation of authority of the attorney-in-fact].

Furthermore, if a power of attorney affecting real property has been recorded, any instrument containing a revocation of the power must also be acknowledged or proved, certified, and recorded in the same office in which the instrument containing the power was recorded for the revocation to be effective [*Civ. Code § 1216*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyEstate, Gift & Trust LawPowers of AttorneyRevocation & TerminationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferPowers of Attorney



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17-34A California Legal Forms--Transaction Guide § 34A.12

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.12 Offers and Proposals to Lease

[1] Offer to Lease

[a] Contents of Offer

Since a lease is a contract as well as a conveyance [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507]* , an offer to lease real property is governed by general contract principles [*see Civ. Code §§ 1580-1589* (offer and acceptance rules) and Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. The offer should contain all the essential terms of the prospective lease [*see* Ch. 34B, *Residential Leases* , for discussion of essential terms] including the following:

- The names of the offeror and offeree;
- A description of the property to be leased;
- The term of the prospective lease and its commencement date;
- The amount of rent and manner of payment;
- All covenants and conditions the offeror wants included in the lease; and
- The offeror's signature.

For further discussion of the essential terms of a lease, see Chs. 34B, *Residential Leases* , 34C, *Retail, Industrial, and Office Leases* , 34D, *Ground Leases* , and 34E, *Shopping Centers: Leasing and Operation* .

PRACTICE TIP:

Offer to Lease a Precursor to Serious Negotiations. Most parties can expect to have many additional

terms in mind, other than the essential terms of the lease. In those circumstances, it may not make sense to proceed by way of an offer to lease, short of completely drafting the lease that one expects to sign. Essential terms should be nailed down early in the negotiations; the foregoing list is but a precursor to serious negotiations on a plethora of clauses. *By Benjamin Kaplan.*

[b] Acceptance

The manner in which the offer may be accepted, such as through the United States mail or by telephone, may be prescribed in the offer. Any conditions concerning the communication of an acceptance of the offer must be followed for the acceptance to be binding. If the offer does not specify a mode for acceptance, then any reasonable and usual mode may be used by the offeree [*Civ. Code § 1582*; *see Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 500, 113 Cal. Rptr. 705, 521 P.2d 1097* (ordinary mail is a "reasonable and usual mode" of acceptance)]. In this event, if the offer is not accepted within a reasonable time, it is deemed to be revoked [*Civ. Code § 1587(2)*; *see* [c], *below*].

PRACTICE TIP:

Receipt of Acceptance Should Be Required. To avoid expensive litigation over whether an offer was accepted by a "reasonable" mode within a "reasonable" time, the offer should specify that it may be accepted only on the offeror's receipt of a written acceptance at a specified place, no later than a specified date and time [*see §§ 34A.220[2], 34A.221[2]*]. *By Myron Moskovitz.*

Acceptance is deemed communicated when the offeree puts his or her acceptance in the course of transmission to the offeror in conformity with the provisions of *Civ. Code § 1582* [*Civ. Code § 1583*; *see Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097* (deposit of written notice in mail complies with requirements of *Civ. Code § 1583*)]. The acceptance must be absolute and unqualified [*Civ. Code § 1585*]. If the offeree makes his or her acceptance conditional on the offeror's changing or adding some term or condition in the offer, the acceptance is ineffective as such and constitutes a new offer [*Civ. Code § 1585*; *Panagotacos v. Bank of America (1998) 60 Cal. App. 4th 851, 855-856, 70 Cal. Rptr. 2d 595]* .

[c] Revocation of Offer

An offer unsupported by consideration [*see § 34A.13[2]* for discussion of the distinction between an offer and an option supported by consideration] may be revoked by the offeror at any time before its acceptance is communicated to the offeror [*Civ. Code §§ 1586, 1587(1)*; *T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 282, 204 Cal. Rptr. 143, 682 P.2d 338]* . In addition, such an offer is revoked by the death or insanity of the offeror [*Civ. Code § 1587(4)*]. An offer is also revoked by the lapse of the time prescribed in the offer for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time without communication of the acceptance [*Civ. Code § 1587(2)*], or by the failure of the offeree to fulfill a condition precedent to acceptance [*Civ. Code § 1587(3)*].

[d] Offer to Lease Through Agent

An agreement authorizing or employing an agent, broker, or other person to lease real estate for a longer period than one year, for compensation or a commission, is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by the party's agent [*Civ. Code § 1624(a)(4)*; *see Civ. Code § 2309*]. Agreements with brokers and agents, including those authorizing or employing a broker or agent to lease real property, are covered in Ch. 21, *Agreements With Real Estate Brokers and Agents* .

[2] Proposal to Lease

A prospective tenant may want to open negotiations for a lease without making a formal offer that will bind him or her if accepted by the landlord. In this instance, the tenant may submit a proposal to lease to the landlord, which is often

done in the form of a "letter of intent" [*see § 34A.225*].

A letter of intent or a proposal to lease does not bind either party since it is neither an formal offer [*see* [1], *above*], nor an option agreement [*see § 34A.13*]. Furthermore, parties entering negotiations for a lease are not subject to any implied covenant of good faith and fair dealing absent an existing contract [*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1031-1034, 14 Cal. Rptr. 2d 335]* . However, if the parties agree, by a letter of intent or otherwise, to negotiate in good faith, failure to do so is actionable [*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1034, 14 Cal. Rptr. 2d 335]* .

Finally, in the course of negotiations it is possible for a party to so mislead another by promises or representations, on which the second party detrimentally relies, as to bring into play the traditional concept of promissory estoppel [*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1035, 14 Cal. Rptr. 2d 335* ; *see* California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender)]. Absent the existence of these special circumstances or conditions, however, there is no obligation to bargain for a lease or a contract in good faith [*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1035, 14 Cal. Rptr. 2d 335]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationAcceptanceMethods of AcceptanceGeneral OverviewContracts LawFormationAcceptanceReasonable TimeContracts LawFormationOffersGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34A California Legal Forms--Transaction Guide § 34A.13

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.13 Option Agreement to Lease

[1] Definitions

An option agreement has a dual nature: on the one hand it is an irrevocable offer, which on acceptance ripens into a bilateral contract. On the other hand, it is a unilateral contract which binds the "optionor" (the person giving the option) to perform an underlying agreement on the "optionee's" (the person to whom an option is given) performance of a condition precedent. The creation of the final bilateral contract requires no promise or other action by the optionor. The contract is completed by the acceptance of the optionor's irrevocable offer by the optionee [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 502-503, 113 Cal. Rptr. 705, 521 P.2d 1097]* .

As a unilateral contract, an option agreement must satisfy all the requirements for a valid contract [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

[2] Offer and Option Distinguished

An option unsupported by consideration is not a contract [*see Civ. Code § 1550*], but simply an offer that is revocable at any time before its acceptance [*Thomas v. Birch (1918) 178 Cal. 483, 489, 173 P. 1102* ; *Henry v. Lake Mill Lumber Co. (1956) 139 Cal. App. 2d 620, 622, 293 P.2d 909* ; *Bard v. Kent (1942) 19 Cal. 2d 449, 451, 122 P.2d 8* (death of optionor as revoking option); *see Civ. Code § 1587(4)*]. It contemplates only one contract, the one that comes into existence after it is exercised [*Torlai v. Lee (1969) 270 Cal. App. 2d 854, 858, 76 Cal. Rptr. 239]* .

An option based on consideration, however, is itself a binding contract within the traditional and accepted sense [*Torlai v. Lee (1969) 270 Cal. App. 2d 854, 858, 76 Cal. Rptr. 239* ; *see Civ. Code §§ 1549, 1550*]. An option agreement is a contract distinct from the contract to which the option relates [*T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 282, 204 Cal. Rptr. 143, 682 P.2d 338* ; *see* [1], *above*]. As such, an option agreement relating to the lease of land is not a lease of property, but rather a sale of the right to lease [*see Warner Bros. Pictures v. Brodel (1948) 31 Cal. 2d 766, 772, 192 P.2d 949]* .

An option supported by consideration is irrevocable and may not be terminated without the consent of the optionee during the time for which it is given [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 499-500, 113 Cal. Rptr. 705, 521 P.2d 1097]* , and is binding on the successors in interest of the optionor after his or her death [*Bard v. Kent (1942) 19 Cal. 2d 449, 452, 122 P.2d 8]* .

For illustrative examples of the distinctions between an offer and an option, see the forms *set forth in §§ 34A.220[2]* and *34A.221[2]* (unilateral offers by the offeror, unsupported by consideration), and in §§ 34A.222[2] and 34A.223[2] (option agreements supported by consideration and binding on optionee).

[3] Consideration

A promise by the optionee to do something he or she is already bound to do for the optionor's benefit does not constitute consideration within the statutory meaning of good consideration [*Henry v. Lake Mill Lumber Co. (1956) 139 Cal. App. 2d 620, 622, 293 P.2d 909* ; *see Civ. Code § 1605*]. On the other hand, if the option is in writing, consideration is presumed [*see Civ. Code § 1614*; *Dawson v. Goff (1954) 43 Cal. 2d 310, 316, 273 P.2d 1]* , although the true consideration or lack of it may always be shown [*Spielberg v. Granz (1960) 185 Cal. App. 2d 283, 289, 8 Cal. Rptr. 190]* .

Statutory law governing consideration is set forth in *Civ. Code §§ 1605-1615*.

[4] Writing Required

An option to execute a contract which under the statute of frauds must be in writing, must also be in writing [*Pac. Etc. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 66, 301 P.2d 825* (option to purchase real property)]. It follows then that since a lease of real property for a period longer than one year must be in writing [*Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*], an option for such a lease must also be in writing.

[5] Termination of Option

Whether or not supported by consideration, an option is automatically revoked, that is, terminated, by the lapse of the time prescribed in the option for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time without communication of the acceptance [*see Civ. Code § 1587(2)*]. An option, therefore, is of no force for any purpose if not accepted within the time limit [*Wilson v. Ward (1957) 155 Cal. App. 2d 390, 394, 317 P.2d 1018* ; *Transamerica Corp. v. Parrington (1953) 115 Cal. App. 2d 346, 352, 252 P.2d 385*].

[6] Exercise of Option

[a] Manner of Exercise

The exercise of an option is the communicated election of the optionee to accept the option. The manner in which the election is communicated is subject to the provisions of *Civ. Code §§ 1582* and *1583* [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 501, 113 Cal. Rptr. 705, 521 P.2d 1097* ; *see § 34A.12[1][b]* for discussion of statutory requirements].

It is well settled that when the provisions of an option agreement prescribe the particular manner in which the option is to be exercised, they must be strictly followed [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 498, 113 Cal. Rptr. 705, 521 P.2d 1097]* . However, if the option agreement does not specify the mode of acceptance, any reasonable and usual mode may be adopted [*Civ. Code § 1582*], such as exercising the option by ordinary mail, in which case it is effective at the time that written notice of acceptance is deposited in the mail [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097]* .

Exercise of an option must be unconditional and in accordance with its terms. An attempt to exercise it on terms varying from those offered is tantamount to a rejection of the original offer and the making of a counteroffer [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 752, 101 Cal. Rptr. 335* ; *see Civ. Code § 1585*]. Disputes about whether the option has been validly exercised are decided by reference to the rules of offer and acceptance--which means the terms of the exercise must ordinarily be identical to terms of the offer [*Arden Group, Inc. v. Burk (1996) 45 Cal. App. 4th 1409, 1414, 53 Cal. Rptr. 2d 492]* .

PRACTICE TIP:

Consider Attaching Lease Document as Exhibit to Option Agreement. Because there are many material terms of a lease other than the essential terms of the identity of the parties, description of the premises, lease term, and rental rate, it may be wise to attach the proposed lease as an exhibit to the option agreement. That would reduce disputes relating to the terms of the lease that is the subject of the option agreement. *By Benjamin Kaplan.*

If not required by statute to be in writing, the acceptance may be oral [*Lawrence v. Settle (1960) 182 Cal. App. 2d 386, 388, 6 Cal. Rptr. 49* (involving option for sale of real property)] unless the option provides otherwise [*see Civ. Code § 1583*].

[b] Time Period

If the option agreement is silent as to the period of the option, it must be exercised within a reasonable time under the circumstances [*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 222, 281 Cal. Rptr. 216]* . The holder of a formal option loses the right to exercise it once it has communicated a formal rejection, and this is so even though the purported exercise occurs within the time specified in the option agreement [*Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 55, 276 Cal. Rptr. 240]* .

[c] Exercise as Creating Lease

Exercise of an option to lease real property may create either an executory contract to make a lease or a lease itself, depending on the intention of the parties. If a written option sets forth all the terms and conditions on which the optionor offers to lease the property, or includes an attached form of lease to be executed, written exercise of the option by the optionee may, without further action by either party, create a lease. In this event, the statute of frauds with regard to a lease for a period of more than one year is satisfied by the fact that the option agreement is in writing signed by the optionor and the exercise of the option is in writing signed by the optionee [*see Gavina v. Smith (1944) 25 Cal. 2d 501, 503-504, 154 P.2d 681]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersRevocable OffersContracts LawTypes of ContractsBilateral ContractsContracts LawTypes of ContractsBilateral ContractsContracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34A California Legal Forms--Transaction Guide § 34A.14

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.14 Prepaid Rental Listing Services

[1] Definitions and Governing Law

Prepaid rental listing services are governed by Article 2.3 of the Business and Professions Code (PRLS statute) [*Bus. & Prof. Code § 10167 et seq.*]. A "prepaid rental listing service" (PRLS) means the business of supplying prospective tenants with listings of residential real properties for tenancy under an arrangement whereby prospective tenants are required to pay a fee in advance of, or contemporaneously with, the supplying of the listings. A PRLS does not otherwise involve the negotiation of rentals by the person conducting the service [*Bus. & Prof. Code § 10167(a)*]. The listings may be supplied by publication or otherwise; however, a newspaper of general circulation is not a PRLS [*Bus. & Prof. Code §§ 10167(a), 10167.1*]. "Prepaid rental listing service" does not include the business of providing roommate referral information [*Bus. & Prof. Code § 10167(a)*].

A PRLS "licensee" is a person licensed to conduct a PRLS or a person engaged in the business of a PRLS under a real estate broker license [*Bus. & Prof. Code § 10167(b)*]. A "designated agent" is the person in charge of the business of a PRLS at a given location [*Bus. & Prof. Code § 10167(d)*]. A "location" means the place, other than the main or branch office of a real estate broker, where a PRLS is conducted [*Bus. & Prof. Code § 10167(c)*].

Furthermore, the provisions of Chapter 1 (General Provisions) of the Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*] and Chapter 2 (Administration) of the Real Estate Law [*Bus. & Prof. Code § 10050 et seq.*] apply to persons licensed under the PRLS statute [*Bus. & Prof. Code § 10167.16*]. Certain other provisions of the Real Estate Law relating to nonresident applicants, the issuance of restricted licenses, payment of application fees, and the renewal of licenses after the expiration date may apply to persons licensed under the PRLS statute [*see Bus. & Prof. Code § 10167.17*].

The PRLS statute applies only to the provision of listings of residential real properties for tenancy by prepaid rental listing services. Unless the statute expressly provides otherwise, its requirements do not apply to any other goods or services sold by a PRLS, if all of the following requirements are met [*Bus. & Prof. Code § 10167.2(b)*]:

- The purchase of those goods or services is not required to obtain the listings;
- The purchase is not included in the contract to provide the listings;
- The contract to provide those listings clearly specifies that the purchase of any other goods and services is optional; and
- The price charged for any other goods and services is fair and reasonable.

In an action alleging that the price charged for any other goods and services is not fair and reasonable, the burden is on the commissioner to demonstrate that the price charged unreasonably exceeds the fee customarily charged for the same or comparable goods or services in the community in which the prepaid rental listing service operates [*Bus. & Prof. Code § 10167.2(b)*].

[2] License Requirements

[a] Separate License Required

Any person engaged in the business of a PRLS must be licensed either in that capacity or as a real estate broker [*Bus. & Prof. Code § 10167.2(a)*]. A person who already has a real estate broker license and who wishes to operate a PRLS under that license is exempt from the separate PRLS licensing requirements; however, the business must be conducted under the immediate supervision of the broker or of a real estate salesperson licensed to, and acting on behalf of, the broker [*Bus. & Prof. Code § 10167.3(b)*].

[b] Application for License

A separate application for a license as a PRLS must be made in writing for each location to be operated by a licensee other than a real estate broker. Each application must be on forms supplied by the Department of Real Estate (DRE) and must be accompanied by a $100 application fee for the first location and a $25 application fee for each additional location [*Bus. & Prof. Code § 10167.3(a)*].

Before authorizing the issuance of a license for a location, the Commissioner of Real Estate may require proof as is deemed advisable concerning the honesty and truthfulness of the following persons [*Bus. & Prof. Code § 10167.4*]:

- Any applicant for a license as a prepaid rental listing service;
- The applicant's designated agents;
- The officers, directors, and any persons owning 25 percent or more of the shares of any corporation making the application; and
- Any person owning or controlling a beneficial ownership interest of 25 percent or more in the entity making application.

To assist in this determination, the fingerprinting of every original applicant including officers, directors, and persons owning 25 percent or more of the shares of the corporate applicant is required, and the Commissioner may also hold an adjudicatory hearing [*Bus. & Prof. Code § 10167.4*]. Additionally, the proposed PRLS contract form to be used by the licensee must be approved by the Commissioner before the license is issued [*Bus. & Prof. Code § 10167.9(c)*; *see* [5][b], *below*].

Every applicant for a PRLS license who is not a resident of California must file with the application an irrevocable consent that in any action commenced against the applicant in California arising out of the activities of the PRLS, the applicant may be served by delivering the process to the Secretary of State if personal service cannot be made in California in the exercise of due diligence [*Bus. & Prof. Code § 10167.6*].

[c] Duration of PRLS License

A prepaid rental listing service license issued by the Department of Real Estate is generally valid for a period of two years [*Bus. & Prof. Code § 10167.13*] unless suspended or revoked during that time [*see* [d], *below*] or unless the license expires due to the unavailability of the designated agent [*see* [4], *below*].

[d] Suspension, Denial, or Revocation of License

The Real Estate Commissioner, after an adjudicatory hearing, may suspend, deny, or revoke the license of a PRLS [*Bus. & Prof. Code § 10167.12*]. A license may be suspended, denied, or revoked for violation of the governing statute by a licensee or a licensee's employee, agent, or designated agent, or on conviction of the licensee, or an officer, director, or owner of 25 percent or more of the shares of a corporate licensee, of a crime that is substantially related to the qualifications, functions, or duties of a PRLS licensee [*Bus. & Prof. Code § 10167.12(a)*].

[3] Bond Requirements

A bond is required of each licensee except the following [*Bus. & Prof. Code § 10167.8*]:

- A person exempt from the payment of federal and state income taxes;
- An agency of the federal, state, or local government; and
- A real estate broker conducting a PRLS under a real estate license.

Every other licensee must provide to the Department of Real Estate, and at all times maintain in force, a bond of $10,000 for each location. This bond may be in the form of either a corporate surety bond or a cash deposit [*Bus. & Prof. Code § 10167.7*].

[4] Operation of PRLS Business

The PRLS business at a licensed location must be conducted under the immediate supervision of the licensee or a designated agent who is not a designated agent at any other location [*Bus. & Prof. Code § 10167.5*]. Whenever a designated agent ceases permanently to be a designated agent at any location because of death, termination of employment, or any other reason, the licensee must notify the Department of Real Estate of that fact in writing within five days [*Bus. & Prof. Code § 10167.5*].

A license issued for a particular location automatically expires 60 days after the time the business conducted at that location ceases for any reason to be under the charge of and managed by the designated agent of record with the Department of Real Estate, unless within the 60-day period the licensee submits written notice of the new designated agent to the Department of Real Estate [*Bus. & Prof. Code § 10167.5*]. A designated agent of the licensed service may serve as designated agent for the location in question as well as for the location for which he or she is the designated agent of record during the 60-day period [*Bus. & Prof. Code § 10167.5*].

[5] Written Contract

[a] Required Contents of Contract

Before accepting a fee from a prospective tenant, a licensee must provide the prospective tenant with a written contract. The contract must include all of the following [*Bus. & Prof. Code § 10167.9(a)*]:

- The name of the licensee and the addresses and telephone numbers of the principal office or location of the licensee;
- The location, or branch office of a real estate broker, providing the listing to the prospective tenant;
- Acknowledgment of receipt of the fee, including the amount;
- A description of the service to be performed by the licensee, including significant conditions, restrictions, and limitations if applicable;
- The prospective tenant's specifications for the rental property, including, but not limited to, (1) type of structure, (2) locations acceptable to the tenant, (3) furnished or unfurnished, (4) number of bedrooms required, and (5) maximum acceptable monthly rental;
- The contract expiration date, which must not be later than 90 days from the date of execution of the contract;
- A clause setting forth the right to a full or partial refund of the fee paid in advance as provided in *Bus. & Prof. Code § 10167.10* [*see Bus. & Prof. Code § 10167.10(c)* for exact language to be used, unless different language is approved by the Department of Real Estate];
- The signature and printed full name of the licensee or of the designated agent, real estate salesperson, or employee acting on behalf of the licensee (the signature of any person, including the prospective tenant, may be provided in any electronic form that provides a reasonable method of indicating that the individual whose signature is required authorized the contract to be signed in that form);
- A clause in bold type letters outlining the small claims court remedy available to the prospective tenant; and
- A clause in bold type letters clearly stating that the purchase of any goods and services other than the provision of listings of residential real properties for tenancy is optional.

The provisions of *Bus. & Prof. Code § 10167.10*, which grant the prospective tenant the right to a partial or full refund of the advance fee, do not apply to those persons who are purchasing rental information for purposes other than that of locating a rental unit for their personal use or the use of a designated person [*Bus. & Prof. Code § 10167.10(d)*].

A contract for prepaid rental listing services executed in electronic form, and signed in any electronic form that provides a reasonable method of indicating that the individual whose signature is required authorized the contract to be signed in electronic form, is valid to the same extent as an executed written contract. On request by the customer, the licensee must deliver an executed paper copy to the customer within five working days of receiving the request [*Bus. & Prof. Code § 10167.9(d)*].

[b] Filing and Retention of Contract

The form of the PRLS contract proposed to be used by a licensee must be filed with the Department of Real Estate for

approval before it is used by the licensee. Any modification of a previously filed form, including a change in the name or business address of the licensee, must also be filed before it is used by the licensee [*Bus. & Prof. Code § 10167.9(c)*]. The Department of Real Estate must withhold the issuance or renewal of a license until it has approved the contract. The Department must communicate disapproval of a proposed modification or contract provision to the licensee in writing within 15 working days of the filing of the contract provision or modification, accompanied by a written justification of why the modification or contract provision is contrary to the requirements of the PRLS statute. A proposed modification to a contract will be deemed approved if it has not been approved or disapproved within 15 working days of being filed with the Department [*Bus. & Prof. Code § 10167.9(c)*].

The original of each PRLS contract, any separate contracts for required goods or services, refund claims, receipts, and any other relevant documents must be retained by the licensee for at least three years from the date of termination of the contract. During this period, the contract is subject to examination by an authorized representative of the Real Estate Commissioner [*Bus. & Prof. Code § 10167.9(b)*]. Records that are stored in the ordinary course of business in digital media must, on request of a duly authorized representative of the commissioner, be provided on diskette, CD-ROM, or similar portable digital storage medium. For these purposes, the "original" of a contract executed in electronic form is either the copy of the contract stored in digital media or a paper printout of that contract [*Bus. & Prof. Code § 10167.9(b)(1)*]. Retained documents must be disposed of by shredding or other appropriate means so that the identity of the prospective tenant cannot be determined from the disposed information alone or in combination with other publicly available information [*Bus. & Prof. Code § 10167.9(b)(2)*].

[6] Refund of Advance Fee

[a] Licensee's Obligation to Refund Fee

A licensee must fully refund the advance fee paid by a prospective tenant if, within five days after the execution of the contract, the licensee does not supply at least three rental properties then available to the prospective tenant and meeting the specifications of the contract, unless the prospective tenant obtains a rental through the services of the licensee [*Bus. & Prof. Code § 10167.10(a)(1)*]. A demand for the return of the fee must be made by or on behalf of the prospective tenant within 10 days following the expiration of the five-day period. The demand must be delivered or mailed by registered or certified mail to the address of the location or branch office of a real estate broker set forth in the contract [*Bus. & Prof. Code § 10167.10(a)(2)*].

A licensee must refund any fee in excess of a $50 service charge to the prospective tenant if, during the term of the contract, the prospective tenant either obtains a rental other than through the licensee's services or does not obtain a rental, provided that the prospective tenant demands the refund within 10 days after the contract expires. The refund must be made within 10 days of receipt of the demand [*Bus. & Prof. Code § 10167.10(b)(1)*]. To obtain a refund, the prospective tenant must either [*Bus. & Prof. Code § 10167.10(b)(2)*]:

- Provide to the licensee reasonable documentation of the prospective tenant's new rental or of the fact that the prospective tenant did not move, such as a lease, rental agreement, or utility bill, with sufficient information to verify that the new rental was not obtained through the services of the licensee or that the prospective tenant did not move; or

- Fill out and sign a written statement on a form supplied by the licensee [*see § 34A.231A*].

[b] Exception to Licensee's Duty to Refund Fee

The obligation of a licensee to refund the advance fee, as discussed in [a], *above*, does not apply to a person purchasing rental information for a purpose other than that of locating a rental unit for personal use or the use of a designated person [*Bus. & Prof. Code § 10167.10(d)*].

[c] Damages for Failure to Refund Fee

If the licensee fails to make the refund and if the denial or delay in making the refund is found to have been done in bad faith, a court of appropriate jurisdiction, including a small claims court, may award damages to the plaintiff in an amount not to exceed $1000 in addition to actual damages sustained by the plaintiff [*Bus. & Prof. Code § 10167.10(e)*]. If the licensee refuses or is unable to pay the damages awarded by the court, the award may be satisfied out of the bond discussed in [3], *above* [*Bus. & Prof. Code § 10167.10(e)*].

[7] Violations of PRLS Statute

[a] Misdemeanor Actions

It is a misdemeanor for any licensee (or a licensee's employee or agent) to make, or cause to be made, any false, misleading, or deceptive advertisements or representations concerning the services that the licensee will provide to prospective tenants [*Bus. & Prof. Code §§ 10167.11(a), 10167.15*]. It is also a misdemeanor for any of those persons to refer a property to a prospective tenant knowing or having reason to know the following [*Bus. & Prof. Code §§ 10167.11(b), 10167.15*]:

- The property does not exist or is unavailable for tenancy;

- The property has been described or advertised by or on behalf of the licensee in a false, misleading, or deceptive manner;

- The licensee has not confirmed the availability of the property for tenancy during the four-day period immediately preceding dissemination of the listing information. However, property may be referred to a prospective tenant during a period of five to seven days after the most recent confirmation of the property's availability for rental if the licensee has made a good faith effort to confirm availability within the four-day period and the most recent date of confirmation is set forth in the referral; or

- The licensee has not obtained written or oral permission to list the property from the property owner, manager, or other authorized agent.

[b] Injunctive Relief

Whenever a person has engaged or threatens to engage in any acts or practices which constitute, or would constitute, a violation of the PRLS statute, the superior court of the county in which the acts or practices have taken place, or are about to take place, on complaint of the Real Estate Commissioner, the attorney general, district attorney, or city attorney, may enjoin these acts or practices by an appropriate order [*Bus. & Prof. Code § 10167.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART II. LEGAL BACKGROUND

17-34A California Legal Forms--Transaction Guide §§ 34A.15-34A.99

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34A.15[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

17-34A California Legal Forms--Transaction Guide § 34A.100

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.100 Resolutions Authorizing Lease

1. Name of corporation or unincorporated association.

2. Specific type of entity, such as:

    a. Corporation organized under General Corporation Law or nonprofit corporation.

    b. Unincorporated association or society (or branch or lodge of association or society).

    c. Labor organization.

    d. Other.

3. State of incorporation (if corporation) and principal office address.

4. Names, addresses, and telephone numbers of officers, including:

    a. President or other presiding officer.

    b. Vice-President.

    c. Secretary.

5. Whether corporation or association will be tenant or landlord.

6. Name(s) of other party or parties to proposed lease.

7. General or legal description of property to be leased.

8. Copy of articles of incorporation or association, or constitution of association.

9. Copy of bylaws.

10. Date, time, and place of meeting at which resolution will be on agenda, or article and paragraph number in bylaws or articles of incorporation or association permitting other method of adopting resolution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesBusiness & Corporate LawProfessional Associations & CorporationsBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

17-34A California Legal Forms--Transaction Guide § 34A.101

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.101 Powers of Attorney

1. Names, addresses, and telephone numbers of parties to the power of attorney, including:

    a. Principal(s).

    b. Attorney(s)-in-fact.

2. Relationship, if any, between principal and attorney-in-fact (for example, husband and wife).

3. Description (for example, apartment building), form of title (for example, individual, tenancy in common, community, or joint tenancy), and address of specific property, if any, which will be subject of power of attorney.

4. Description of specific powers to be given to attorney-in-fact, including whether attorney-in-fact will act as tenant or landlord, or both.

5. Effective period of power of attorney, if relevant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyLimited PowersEstate, Gift & Trust LawPowers of AttorneyRevocation & TerminationReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34A California Legal Forms--Transaction Guide § 34A.102

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.102 Offers, Proposals, and Options

1. Names, addresses, and telephone numbers of parties, including:

    a. Offeror(s) and offeree(s).

    b. Optionor(s) and optionee(s).

    c. Proposed tenant and landlord.

2. For any party who is not a natural person, type of entity, such as:

    a. Corporation.

    b. Partnership.

    c. Limited Liability Company.

    d. Other.

3. Description of property to be leased, including:

    a. Street address, city, county, and state.

    b. Legal description, if option agreement will be recorded [*see § 34A.224* for discussion

and form for recording Abstract of Option Agreement].

4. Terms of offer, proposal, or option, including:

a. If option agreement, amount of consideration.

b. If letter of intent is contemplated, time period for exclusive negotiations.

c. Expiration date.

d. Method by which acceptance or exercise must be communicated, if specific method is desired.

e. Terms of lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34A California Legal Forms--Transaction Guide § 34A.103

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.103 Prepaid Rental Listing Services

1. Names, addresses, and telephone numbers of principal office or branch location of:

    a. Licensee licensed to conduct only prepaid rental listing service (PRLS).

    b. Licensee licensed as real estate broker conducting PRLS.

    c. Designated agent or employee of licensee.

    d. PRLS business.

    e. Prospective Tenant.

2. License status of licensee, such as:

    a. PRLS licensee who is licensed real estate broker.

    b. PRLS licensee, other than real estate broker.

    c. Designated agent.

    d. Other person.

3. Copy of PRLS contract, including:

a. Sample of licensee's standard contract form submitted to Department of Real Estate.

b. Contract executed by prospective tenant and licensee.

4. If prospective tenant is seeking refund of advance fee, names, addresses, and telephone numbers of the following:

a. Person to whom refund demand should be directed, if not licensee.

b. Person to whom refund should be sent, if not prospective tenant.

5. List(s) of addresses furnished to prospective tenant.

6. Evidence of false, misleading, or deceptive information, if any, given by licensee.

7. Correspondence between prospective tenant and licensee, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34A California Legal Forms--Transaction Guide §§ 34A.104-34A.109

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
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B. Preliminary Determinations

17-34A California Legal Forms--Transaction Guide § 34A.110

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.110 Resolutions Authorizing Lease

1. Determine purpose of lease, including whether that purpose is within lawful purpose or scope of corporation or association [*see §§ 34A.10[1][c]* and *34A.10[2][a]* for discussion of lawful purpose].

2. Review corporation's articles of incorporation or association's articles of association to determine whether articles further limit purpose of corporation or association.

3. Ascertain corporation's or association's power to lease by reviewing articles of incorporation or of association and bylaws to determine whether they contain a provision limiting or restricting the power of corporation or association to enter the lease [*see § 34A.10[1][a], [2][a]* for discussion of corporation's and association's power to enter into lease].

4. Verify with Secretary of State that corporation is currently active and in good standing.

5. Review corporation's or associations articles and bylaws to determine if they require a certain group to adopt the resolution.

6. Determine which group(s) within corporation or association has authority to adopt resolution, for example:

a. Board of directors of corporation usually exercises powers of corporation [*see § 34A.10[1][b]*].

b. Shareholders of nonprofit corporation may be required by articles of incorporation to

approve lease [*see § 34A.10[1][b]*].

c. If unincorporated association owns or holds real property to be leased and governing documents require resolution authorizing lease, ascertain whether members or other authorized body must adopt resolution [*see § 34A.10[2][a]*].

7. Determine which persons or officials will be or are authorized to execute lease, for example:

a. For unincorporated association that owns or holds property to be leased [*Corp. Code § 18115*]:
(1) President, secretary, or other comparable officer.

(2) Person specifically designated by resolution adopted by association.

(3) Committee or other body or person authorized to act by association's governing principles.

b. For corporation:

(1) Bylaws may provide for either of the following [*see* Ch. 4, *Bylaws*]:
(a) Specify persons authorized to execute lease.

(b) Direct Board of Directors to authorize certain persons to execute lease in adopted resolution.

(2) Lease executed by the following corporate officials is not invalidated by lack of authority of signing officers if other party lacks actual knowledge of lack of authority [*Corp Code §§ 313, 5214* (nonprofit public benefit corporations), 7214 (nonprofit mutual benefit corporations), 9214 (nonprofit religious corporations)]:

(a) Chairman of the board, president, or any vice-president, and

(b) Secretary, any assistant secretary, chief financial officer, or any assistant treasurer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesBusiness & Corporate LawProfessional Associations & CorporationsBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34A California Legal Forms--Transaction Guide § 34A.111

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.111 Powers of Attorney

1. Determine whether parties have capacity to execute and act under a power of attorney, for example [*see § 34A.11[2]*]:

a. Any person having capacity to contract may appoint an agent.

NOTE:
Minors, persons of unsound minds, and persons deprived of civil rights do not have the capacity to contract [*Civ. Code §§ 1556, 1557*].

b. Any person may be an agent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyLimited PowersReal Property LawOwnership & TransferPowers of Attorney



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17-34A California Legal Forms--Transaction Guide § 34A.112

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.112 Offers, Proposals, and Options

1. For offer, determine how offer will be made, for example:

    a. Directly between offeror and offeree [*see § 34A.220[2]* for form].

    b. Through broker or agent [*see § 34A.221[2]* for form].

2. For option, determine who will execute option agreement, for example:

    a. Both parties [*see § 34A.222[2]* for form]; or

    b. Optionor only [*see § 34A.223[2]* for form].

3. For proposal to lease, or letter of intent, determine who will be handling negotiations for landlord.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawBrokersGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferAgents & Fiduciaries



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

17-34A California Legal Forms--Transaction Guide § 34A.113

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.113 Prepaid Rental Listing Services

[1] PRLS Contract

1. Determine factual information required to be included in PRLS contract (in addition to facts already obtained as *set forth in § 34A.103*), including [*see § 34A.14[5][a]* for required contents of contract]:

a. Services to be performed by licensee, including significant conditions, restrictions, and limitations, if applicable.

b. Prospective tenant's specifications for rental property, including, but not limited to:
(1) Type of structure.

(2) Locations acceptable to tenant.

(3) Furnished or unfurnished.

(4) Number of bedrooms required.

(5) Maximum acceptable monthly rental.

c. Contract expiration date, not to exceed 90 days from date of execution of contract.

2. Determine whether any information, in addition to that required by law, will be included in contract, for example:

a. Renewal provision.

b. Statement concerning PRLS's:

(1) Area(s) of specialization.

(2) Geographical territory.

c. Advance fee amount to be charged to prospective tenant.

d. Type of services to be performed by licensee, such as:

(1) List of rental addresses, including:
(a) Initial written list.

(b) Additional or updated lists.

(2) Telephone call-in service.

(3) Other.

e. If contract will be renewable:

(1) Period of renewal.

(2) Renewal fee.

f. Other.

[2] Refund of Advance Fee

1. Determine whether prospective tenant meets following requirements for partial refund (total amount of advance rental fee paid, less maximum allowable $50 service charge) [*Bus. & Prof. Code § 10167.10(b)*]:

a. Prospective tenant either:
(1) Obtains rental other than through licensee's services during term of contract; or

(2) Does not obtain a rental.

b. Prospective tenant has provided documentation or a written statement supporting request for partial refund.

c. Demand for refund is made within 10 days following expiration of contract.

2. Determine whether prospective tenant meets following requirements for full refund (total amount, including $50 service charge) of fee paid [*Bus. & Prof. Code § 10167.10(a)*]:

a. Licensee has not, within five days after execution of contract, supplied at least three rental properties

then available and meeting contract specifications.

b. Demand for refund is made within 10 days following expiration of five-day period, by delivery or registered or certified mail to address set forth in contract.

3. Verify that prospective tenant did not obtain rental through services of licensee.

a. Review list of addresses supplied to prospective tenant.

b. Question prospective tenant about whether subsequent addresses were furnished by licensee by telephone or otherwise.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34A California Legal Forms--Transaction Guide §§ 34A.114-34A.119

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34A.114[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Procedural Guide

17-34A California Legal Forms--Transaction Guide § 34A.120

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.120 Prepaid Rental Listing Services

1. Before using Prepaid Rental Listing Service (PRLS) contract, file proposed contract form with Department of Real Estate [*Bus. & Prof. Code § 10167.9(c)*].

NOTE:
Any contract which is modified after its original filing with and approval by the Real Estate Commissioner must also be filed with the Commissioner before it is used [*Bus. & Prof. Code § 10167.9(c)*].

2. If PRLS licensee is not a resident of California, file irrevocable consent for service of process on Secretary of State with Department of Real Estate [*Bus. & Prof. Code § 10167.6*].

3. Post bond with Department of Real Estate, if required, as follows:

a. Bond is not required if PRLS is operated by any of the following [*Bus. & Prof. Code § 10167.8*]:
(1) Person exempt from payment of state and federal income taxes.

(2) Agency of federal, state, or local government.

(3) Real estate broker conducting PRLS under a real estate license.

b. All other licensees must provide bond of $10,000 for each location in the form of corporate surety bond or cash deposit [*Bus. & Prof. Code § 10167.7*].

4. Advise client that original PRLS contract, any separate contracts for required goods or services, refund claims, receipts, and any other relevant documents must be retained by licensee for at least three years from date of termination of contract, subject to inspection of Real Estate Commissioner [*Bus. & Prof. Code § 10167.9(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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C. Procedural Guide

17-34A California Legal Forms--Transaction Guide §§ 34A.121-34A.129

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34A.121[Reserved]



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D. Drafting Guide

17-34A California Legal Forms--Transaction Guide § 34A.130

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.130 Resolutions Authorizing Lease

1. Draft resolution authorizing lease for corporation [*see § 34A.200[2]* for form] or unincorporated association [*see §§ 34A.201[2], 34A.202[2]* for forms] including appropriate certification.

2. For unincorporated association, draft resolution of approval by members, if required [*see § 34A.203* for discussion and form].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34A California Legal Forms--Transaction Guide § 34A.131

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.131 Powers of Attorney

1. Draft power of attorney, including:

   a. Authority to execute leases in general or a particular lease [*see § 34A.210[2]* for form].

   b. If appropriate, authority to execute lease of community real property [*see § 34A.211[2]* for form].

2. If power of attorney is to be recorded, arrange for the following [*Gov. Code § 27287*]:

   a. Power of attorney to be acknowledged or proved.

   b. Power of attorney to be certified.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferPowers of Attorney



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17-34A California Legal Forms--Transaction Guide § 34A.132

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.132 Offers, Proposals, and Options

1. Draft offer, including [*see § 34A.12[1][a]* for required contents of offer]:

a. Names of offeror and offeree.

b. Description of property to be leased.

c. Term and commencement date of prospective lease.

d. Amount of rent and manner of payment.

e. Covenants and conditions to be included in lease.

f. Expiration date of offer and manner of acceptance.

g. Signature of offeror.

2. Draft option agreement, including:

NOTE:
An option for the lease of real property for a period longer than one year must be in writing [*Civ. Code §§ 1091, 1624(a)(3)*].

a. Names of optionor and optionee.

b. Description of property to be leased (include legal description if option agreement will be recorded).

c. Term and commencement date of prospective lease.

d. Amount of rent and manner of payment.

e. Covenants and conditions to be included in lease.

NOTE:
If a written option agreement sets forth (either on its face or in an attached form of lease) all of the terms and conditions on which the optionor offers to lease the property, written exercise of the option by the optionee may, without further action by either party, constitute a lease [***see*** *§ 34A.13[6][c]*].

f. Consideration.

NOTE:
An option not supported by consideration is not a contract, but simply an offer that is revocable at any time before it is accepted [***see*** *§ 34A.13[2]* for discussion of distinction between offer and option agreement].

g. Term of option.

h. Manner of exercise.

NOTE:
Unless the contract specifies otherwise, the optionee may exercise the option by any usual and reasonable method [*Civ. Code § 1582*].

i. Signature of:

(1) Optionor.

(2) Optionor's spouse, if option proposes to lease community real property for period of more than one year.

(3) Optionee, if he or she is to perform any future acts as consideration for option.

3. Draft letter of intent and proposal of tenant, including:

a. Description of premises.

b. Agreement to enter into exclusive negotiations for lease in good faith.

c. Tenant's proposed terms, including:

(1) Initial and option term(s) of lease.

(2) Rental amounts.

(3) Improvements to be made by landlord.

(4) Alterations to be made by tenant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersRevocable OffersContracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds



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17-34A California Legal Forms--Transaction Guide § 34A.133

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.133 Prepaid Rental Listing Services

1. Draft letter for request for refund of advance fee, as follows:

a. For request for partial refund, see *§ 34A.231*.

NOTE:
A demand for a partial refund must be made within 10 days following the expiration of the contract [*Bus. & Prof. Code § 10167.10(b)*].

b. For a statement in support of refund request, see *§ 34A.231A*.

c. For request for full refund, see *§ 34A.232*.

NOTE:
A demand for a full refund must be made by registered or certified mail within 10 days of the five-day period following execution of the contract [*Bus. & Prof. Code § 10167.10(a)*].

2. Enclose appropriate documents, for example:

a. Copy of PRLS contract.

b. Copy of list(s) of addresses furnished to prospective tenant.

c. Copy of any evidence of false, misleading, or deceptive information.

d. Copies of documentation to support request for partial refund, such as documentation of prospective tenant's new rental or of fact that prospective tenant did not move, such as a lease, rental agreement, or utility bill.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34A California Legal Forms--Transaction Guide §§ 34A.134-34A.199

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.134[Reserved]



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17-34A California Legal Forms--Transaction Guide § 34A.200

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.200 Corporate Resolution Authorizing Lease and Certificate of Secretary

[1] Comment

[a] Use of Form

This form is a corporate resolution authorizing the corporation to enter into a lease of real property as either a tenant or a landlord. It is appropriate for use by the group authorized to adopt the resolution (board of directors, shareholders, or members) for a corporation organized under or subject to the General Corporation Law [*see Corp. Code § 100 et seq.*], or organized under or subject to the Nonprofit Corporation Law [*see Corp. Code § 5000 et seq.*]. For further discussion of the powers of a corporation to enter into a lease, see *§ 34A.10[1]*.

For forms of a resolution to enter into a lease to be used by an unincorporated association, see *§§ 34A.201* and *34A.202*.

[b] Certification

This form sets forth a Certificate to be executed by the secretary of the corporation. The original or a copy of any resolution adopted by the board of directors must be certified by the secretary or an assistant secretary of the corporation to be prima facie evidence of the resolution [*Corp. Code §§ 314, 5215* (nonprofit public benefit corporation), 7215 (nonprofit mutual benefit corporation), 9215 (nonprofit religious corporation)]. A certified copy may be in writing or in any other form capable of being converted into a clearly legible tangible form [*Corp. Code §§ 314, 5215* (nonprofit public benefit corporation), 7215 (nonprofit mutual benefit corporation), 9215 (nonprofit religious corporation)].

Furthermore, a board resolution certified by the appropriate officer and authenticated by the corporate seal is presumptively the act of the corporation [*Purser v. Eagle Lake L. & I. Co. (1896) 111 Cal. 139, 141-142, 43 P. 523]* . However, whereas the corporation has the power to use a corporate seal, the failure to affix a seal does not affect the instrument's validity [*Corp. Code §§ 207(a), 5140(a)* (nonprofit public benefit corporation), 7140(a) (nonprofit mutual benefit corporation), 9140(a) (nonprofit religious corporation)]. For further discussion of the use of a corporate seal, see

Ch. 5, *Directors' Meetings, Actions, and Resolutions* .

[2] FORM

Corporate Resolution Authorizing Lease and Certificate of Secretary

RESOLUTION OF BOARD OF DIRECTORS [*or* SHAREHOLDERS *or* MEMBERS] OF _____ [*name*], A CALIFORNIA CORPORATION, AUTHORIZING LEASE

Recitals

WHEREAS, Section 207(g) [*or* 5140(i) *or* 7140(i) *or* 9140(i)] of the California Corporations Code empowers corporations organized under the General Corporation Law [*or* Nonprofit Corporation Law] to lease real and personal property; and

WHEREAS, the Articles of Incorporation [*or* Bylaws] of this corporation [*or*Section 300 (*or* 5210 *or* 7210 *or* 9210) of the California Corporations Code] expressly provides that the powers of the corporation are to be exercised by its Board of Directors [subject to the limitations set forth therein (*or* in the Articles of Incorporation) of which there are none (*or*, which are as follows: _____ (*state*))]; and

[*OR, if shareholders or members of corporation will adopt the resolution:*]

WHEREAS, the Articles of Incorporation [*or* Bylaws] of this corporation provide that the power to lease real property shall be exercised only by resolution duly adopted by the vote or written assent of Shareholders [*or* Members entitled to exercise _____ (*e.g.*, a majority) of the voting power of the corporation (*or other limitation*)]; and

WHEREAS, the Board of Directors [*or* Shareholders *or* Members] deem[s] it to be in the best interests of the corporation for the economical transaction of its business [*or other provision*] to lease, as landlord [*or* tenant], the property hereinafter described, therefore be it:

Resolution

RESOLVED, that this corporation lease the property hereinafter described to [*or* from] _____[*name*] on the following terms, covenants, and conditions: [*specify terms, including any limiting or restrictive provisions*].

RESOLVED FURTHER, that the President [*or* Vice-President] and [Recording] Secretary [*or other officer*] of this corporation be, and they hereby are, authorized and directed to execute and deliver the lease and any other papers necessary in connection therewith [, and to affix the seal of the corporation thereto].

The property to be covered by the lease is as follows: _____[*insert legal description and street address, where appropriate*].

CERTIFICATE

I _____[*name*], hereby certify:

That I am the duly qualified and acting Secretary [*or* Assistant Secretary] of _____[*name of corporation*] a California corporation; and

That the above Resolution of the Board of Directors [*or* Shareholders *or* Members] of _____[*name of corporation*] a California Corporation, Authorizing Lease was duly adopted by the Board of Directors [*or* Shareholders *or* Members] of this corporation _____[*state manner of adoption, e.g.*, by their unanimous written consent without a meeting, as authorized in Article _____, Paragraph _____, of the Articles of Incorporation (*or* Bylaws) *or* at regular (*or* special) meeting duly called and held on _____, at the corporation's principal place of business in _____ County, California] and that the resolution has been neither modified nor rescinded and is, as of the date of this certificate, in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand [and affixed the seal of the corporation] this _____ day of [*month*], [*year*].

[*Corporate Seal*]

_____ [*signature*]
[*typed name*], [Assistant] Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34A California Legal Forms--Transaction Guide § 34A.201

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.201 Resolution Authorizing Lease by Members of Unincorporated Association or Other Organization

[1] Comment--Use of Form

This form is a resolution of the members of an unincorporated association or other organization authorizing the execution of a lease. The articles of association and bylaws should be reviewed to determine if all or a certain percentage of the members are required to adopt the resolution, or if the governing or other board of the association is authorized to adopt the resolution [*see § 34A.202* for form] with or without the accompanying approval resolution of the members [*see § 34A.203* for form]. This form may be modified to include any restrictions or limitations on the organization's power to lease [*see* discussion of limitations in § 34A.10[2][b]].

If the association is leasing property as a tenant, a resolution is not required by statute [*see § 34A.10[2][a]*], but the articles or bylaws may require a resolution. For further discussion of the power of an unincorporated association to lease property, see *§ 34A.10[2][a]*.

For discussion of unincorporated associations generally, see Ch. 13A, *Nonprofit Unincorporated Associations* .

[2] FORM

Resolution Authorizing Lease by Members of Unincorporated Association or Other Organization

RESOLUTION AUTHORIZING LEASE BY MEMBERS OF _____ [*name*], AN UNINCORPORATED ASSOCIATION [*or other organization*]

Recitals

[*If the association will be leasing property as a landlord:*]

WHEREAS, _____[*name*] is an unincorporated [nonprofit] association [*or* society *or other*], to wit, a [*specify, e.g.,* scientific organization], empowered by the provision of *Section 18105 of the California Corporations Code* to execute leases for the business purposes and objects of this association [*or other*]; and

WHEREAS, neither the Articles of Association [*or* Constitution] nor Bylaws of this association [*or other*] [*or* WHEREAS, the Bylaws of this association (*or other*) do not] place any limitation or restriction on such power; and

WHEREAS, the Members deem it to be in the best interests of the association [*or other*] as landlord to lease the property hereinafter described; therefore be it:

[*OR, if the association will be leasing property as a tenant:*]

WHEREAS, the Members deem that the property hereinafter described is necessary for use for the purposes of the association [*or other*]; therefore be it:

[*CONTINUE with the following:*]

Resolution

RESOLVED, that this association [*or other*] lease as landlord [*or* tenant] the property hereinafter described to [*or* from] _____[*name*] on the following terms, covenants, and conditions: [*specify terms and include any limitations or restrictive provisions*].

RESOLVED FURTHER, that the President [*or other presiding officer*] and [Recording] Secretary [*or other comparable officer*] of this association [*or other*] be, and hereby are, authorized and directed to execute on behalf of the association [*or other*] and deliver the lease and any other papers necessary in connection therewith.

The property to be covered by the lease is as follows: [*insert legal description and street address, or other appropriate description of property*].

CERTIFICATE

I, _____[*name*], hereby certify:

That I am the duly qualified and acting Secretary [*or other comparable officer*] of _____[*name of association or other*], an unincorporated association [*or other*]; and

That the above [*or* attached] Resolution Authorizing Lease by Members of _____[*name of association or other*], an Unincorporated Association [*or other*], was duly adopted by the Members of this association [*or other*] at a meeting duly called and held on [*month and day*], [*year*], at the association's [*or other*] principal office in _____ County, California, and that the resolution has been neither modified nor rescinded and is, as of the date of this certificate, in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of [*month*], [*year*].

_____ [*signature*]
[*typed name*], Secretary [*of other officer*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34A California Legal Forms--Transaction Guide § 34A.202

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.202 Resolution Authorizing Lease by Governing Board or Other Authorized Body of Unincorporated Association or Other Organization

[1] Comment--Use of Form

This form is a resolution of the board of directors or other body authorized by the articles of association or bylaws of an unincorporated association, authorizing the association to enter into a lease of real property. The articles of association and bylaws should be reviewed to determine if all or a certain percentage of the members are required to adopt the resolution [*see § 34A.201* for form], or if the governing or other board of the association is authorized to adopt the resolution with or without the accompanying approval resolution of the members [*see § 34A.203* for form]. This form may be modified to include any restrictions or limitations on the organization's power to lease [*see* discussion of limitations in § 34A.10[2][b]].

If the association is leasing property as a tenant the articles or bylaws may require a resolution. For further discussion of the power of an unincorporated association to lease property, see *§ 34A.10[2][a]*.

For discussion of unincorporated associations generally, see Ch. 13A, *Nonprofit Unincorporated Associations* .

[2] FORM

Resolution Authorizing Lease by Governing Board or Other Authorized Body of Unincorporated Association or Other Organization

RESOLUTION AUTHORIZING LEASE BY GOVERNING BOARD [*or other title*] OF _____[*name*], AN UNINCORPORATED ASSOCIATION [*or other*]

Recitals

[*If the association will be leasing property as a landlord:*]

WHEREAS _____[*name*] is an unincorporated [nonprofit] association [*or* society *or other*], to wit, a [*specify, e.g.,* scientific organization] empowered by the provision of *Section 18105 of the California Corporations Code* to execute leases for the business purposes and objects of this association [*or other*]; and

WHEREAS, neither the Articles of Association [*or* Constitution] nor Bylaws of this association [*or other*] [*or* WHEREAS, the Bylaws of this association do not] place any limitation or restriction on such power [*if appropriate, add:* other than to require that before any resolution adopted by the Board of _____ (*governing body*) authorizing a lease shall become effective it must first be approved by resolution adopted by the vote or written assent of a majority of the (voting) members of the association (*or other*)]; and

WHEREAS, the Board of [*governing body*] deems it to be in the best interests of the association [*or other*] as landlord to lease the property hereinafter described; therefore be it:

[*OR, if the association is leasing property as a tenant:*]

WHEREAS, the Board of [*governing body*] deems that the property hereinafter described is necessary for use for the purposes of the association [*or other*]; therefore be it:

[*CONTINUE with the following:*]

Resolution

RESOLVED, that this association [*or other*] lease as landlord [*or* tenant] the property hereinafter described to [*or* from] _____[*name*] on the following terms, covenants, and conditions: [*specify terms and include any limitations or restrictive provision*].

[*If appropriate, add:*]

RESOLVED FURTHER, that a copy of this Resolution be presented to the members of this association [*or other*] for their approval at their next regular [*or* special] meeting to be held on [*month and day*], [*year*].

RESOLVED FURTHER, that the President [*or other head*] and [Recording] Secretary [*or other comparable officer*] [*or* that _____ (*specify which other officers or persons are designated to execute the lease*)] of this association [*or other*] [*if appropriate add:*, on approval of this Resolution by the members of this association,] be, and hereby are, authorized and directed to execute on behalf of the association [*or other*] and deliver the lease and any other papers necessary in connection therewith.

The property to be covered by the lease is as follows: [*insert legal description and street address, or other appropriate description of property*].

CERTIFICATE

I, _____[*name*], hereby certify:

That I am the duly qualified and acting Secretary [*or other comparable officer*] of _____[*name of association or other*], an unincorporated association [*or other*]; and

That the above [*or* attached] Resolution of Board of [*governing body*] of _____[*name of association or other*], an Unincorporated Association [*or other*] Authorizing Lease was duly adopted by the Board of [*governing body*] of this association [*or other*] at a meeting duly called and held on [*month and day*], [*year*], at the association's [*or other*] principal office in _____ County, California [*if appropriate add:*, and approved by the above (*or* attached) Resolution of the Members, adopted by the members at a meeting duly called and held at the association's (*or other*) principal office in _____ County, California on _____ (*month and day*), _____ (*year*)], and that the resolution has been neither modified nor rescinded and is [*or* and that neither resolution has been modified or rescinded and that both resolutions are], as of the date of this certificate, in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of [*month*], [*year*].

_____ [*signature*]
[*typed name*], Secretary [*or other comparable officer*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34A California Legal Forms--Transaction Guide § 34A.203

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.203 Resolution of Approval of Members of Unincorporated Association or Other Organization

[1] Comment--Use of Form

This form is designed for use when a resolution of the governing body of an unincorporated association authorizing execution of a lease is required to be approved by the members of the association. For a form of resolution of the governing body, see *§ 34A.202*. A form of resolution of the members of an unincorporated association authorizing a lease is *set forth in § 34A.201*. The law concerning unincorporated association resolutions to lease is discussed in *§ 34A.10[2]*.

A Certificate is not required to be attached to this form because it is incorporated into the Certificate for the resolution of the governing body [*see § 34A.202[2]* for form].

[2] FORM

Resolution of Approval of Members of Unincorporated Association or Other Organization

RESOLUTION OF MEMBERS OF _____ [*name of association*], AN UNINCORPORATED ASSOCIATION [*or other*], APPROVING RESOLUTION OF BOARD OF _____ [*governing body*] AUTHORIZING LEASE

Recitals

WHEREAS, at a meeting of the Board of [*governing body*] of this association [*or other*] duly held on [*month and day*], [*year*], at _____, California, a resolution authorizing the association [*or other*] to execute a lease as landlord [*or* tenant] with _____[*name*] as tenant [*or* landlord] of [*describe property*], on the terms therein stated was duly adopted; therefore be it:

Resolution

RESOLVED, that said resolution be, and it hereby is, approved by the members of the association [*or other*].

RESOLVED FURTHER, that the officers named in said resolution [*or identify officers by title*] be, and they hereby are, authorized and directed to execute the lease on behalf of the association [*or other*] and to execute and deliver any other papers necessary in connection therewith.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34A California Legal Forms--Transaction Guide §§ 34A.204-34A.209

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.204[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART IV. FORMS
B. Powers of Attorney

17-34A California Legal Forms--Transaction Guide § 34A.210

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.210 Power of Attorney to Execute Lease for Landlord or Tenant

[1] Comment

[a] Use of Form

This form is a power of attorney to execute a lease that may be used to empower an attorney-in-fact to negotiate and execute a lease or leases of property in the landlord's or tenant's name and to collect or pay rent on the property. The powers granted by this form may be further expanded or limited as given situations require. For a power of attorney authorizing the execution of a lease of community real property, see *§ 34A.211*. For discussion of the statutory requirements for a valid power of attorney, see *§ 34A.11*.

[b] Recording Practices

In practice, powers of attorney to execute a lease are often presented for recording concurrently with the lease, especially when the lease is for a term exceeding one year. For an instrument to be recorded, it must be acknowledged or proved, and certified [*Gov. Code § 27287*; *see* discussion in the Legal Background in Ch. 98, *Powers of Attorney*].

[2] FORM

Power of Attorney to Execute Lease for Landlord or Tenant

POWER OF ATTORNEY

I [*or* We], _____[*name(s)*], [a married (*or* unmarried) man (*or* woman) *or* husband and wife *or other*], residing at _____[*street address and city*], _____ County, California[, jointly and severally], do hereby nominate and appoint _____[*name*], residing at _____[*street address and city*], _____ County, California, my [our] true and lawful attorney-in-fact, for me [us] and

in my [our] name[s], place[s], and stead, and for my [our] use and benefit, to [*set forth powers in as complete detail as may be necessary to assure that the attorney-in-fact has the powers that the principal intends him or her to have and no others, e.g.:*]

[*For landlord:*]

negotiate, make, execute, acknowledge, and deliver leases of my [*or* our] property located at _____[*street address and city*], _____ County, California to such person or persons and on such covenants, conditions, and terms as to my [*or* our] attorney-in-fact shall seem proper, and to receive and collect all rents and all other amounts due me [*or* us] as security for the faithful performance of any such lease or leases, and all rents that may thereafter become due and payable to me [*or* us] by virtue of such lease or leases, and in my [*or* our] name[s] to make, sign, give, and deliver receipts for such payments.

[*OR, for tenant:*]

negotiate, make, execute, acknowledge, and deliver in my [*or* our] name[s] as tenant[s] a lease of the real [*or* real and personal] property located at _____[*street address and city*], _____ County, California [*or other descriptions of property*], which lease shall contain such covenants, conditions, terms, and provisions as my [*or* our] attorney-in-fact shall deem proper and to pay the first month's [*or* first and last months'] rent of the property and such other amounts as may be required to be paid as security for the faithful performance by me [*or* us] of the covenants, conditions, terms, and provisions of the lease and, for that purpose, to make, execute, sign, and deliver to the landlord or to his or her duly authorized agent a check for the amount or amounts so required to be paid, drawn on my [*or* our] bank account, No. _____, in the [*identify bank*].

[*CONTINUE with the following:*]

I [*or* We] further give and grant to my [*or* our] attorney-in-fact full power and authority to do and perform every act necessary and proper to be done in the exercise of any of the above powers as fully as [I *or* we] could do if personally capable, with full power of substitution and revocation, and ratify every act that _____[he *or* she] may lawfully perform in exercising those powers.

Executed on _____[*date*], at _____[*city*], [*county*], California.

_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]

ACKNOWLEDGMENT
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)

_____

On _____[*date*] before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____[*signature*]

[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyLimited PowersReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferPowers of AttorneyReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART IV. FORMS
B. Powers of Attorney

17-34A California Legal Forms--Transaction Guide § 34A.211

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.211 Power of Attorney to Execute Lease for Landlord Spouse of Community Real Property

[1] Comment

[a] Use of Form

This form is a power of attorney that may be used when a married person wishes to authorize an attorney-in-fact to execute a lease of community real property in the married person's name. This type of power is usually given to the person's spouse, although it may be given to a third party. For a general power of attorney to lease, as tenant or landlord, see *§ 34A.210*. For discussion of general requirements for a power of attorney, see *§ 34A.11*. Powers of attorney are covered fully in Ch. 98, *Powers of Attorney*.

[b] Leasing of Community Property

Both spouses, either personally or through an agent, must execute any instrument by which community property or an interest in the property is leased for a period longer than one year. This joint execution requirement does not apply to a lease between the spouses [*Fam. Code § 1102(a), (b)*].

Notwithstanding the above, if record title to community property is held in the name of one spouse, and that spouse leases the property or any interest in it to a good faith tenant who has no knowledge of the marriage relation, the lease is presumed valid. This presumption applies to leases executed on or after January 1, 1975. A similar presumption applies to leases of community property executed by the husband before that date [*Fam. Code § 1102(c)*].

[2] FORM

Power of Attorney to Execute Lease for Landlord Spouse of Community Real Property

POWER OF ATTORNEY

I, _____[*name of principal*], a married [man *or* woman], residing at _____[*street address and city*], _____ County, California, do hereby appoint [my husband, *or* my wife,] _____[*name of attorney-in-fact*], of _____[*street address and city*], _____ County, California, as my attorney-in-fact to act in my place for the purpose of executing, as my duly authorized agent and on my behalf, any lease of any community real property or an interest in such property owned now or hereafter by myself and my [wife *or* husband] [*add if spouse is not named above*, _____ (*name of spouse*)].

I further give and grant to my attorney-in-fact full power and authority to do and perform every act necessary and proper to be done in the exercise of any of the above powers as fully as I could do if personally capable, with full power of substitution and revocation, and ratify every act that _____[he *or* she] may lawfully perform in exercising those powers.

Executed on _____[*date*], at _____[*city*], [*county*], California.

_____ [*signature*]
[*typed name*]

ACKNOWLEDGMENT
[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)*):]

)
State of California)
County of _____)
_____

On _____[*date*] before me,_____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____[*signature*]

[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyLimited PowersReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferPowers of Attorney



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Powers of Attorney

17-34A California Legal Forms--Transaction Guide §§ 34A.212-34A.219

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.212[Reserved]



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17-34A California Legal Forms--Transaction Guide § 34A.220

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.220 Offer to Lease Real Property

[1] Comment--Use of Form

This form is an offer to lease real property. It is intended for use by either a prospective landlord or tenant and is appropriate for use when the offeror and offeree deal with each other directly. For discussion of the legal requirements for a valid offer, see *§ 34A.12[1][a]*.

For a form of offer to lease which is to be made through the landlord's agent, see *§ 34A.221*.

[2] FORM

Offer to Lease Real Property

OFFER TO LEASE

[*Name and address of offeree*]

Dear _____:

This is to confirm that I am [*or* to confirm my understanding that you are] the owner of the property located at _____[*street address and city*], _____ County, California, more particularly described as follows: [*describe*].

I offer to lease this property to [*or* from] you for a period of [*number*] months [*or* years] commencing on _____ [*month and day*], [*year*], and ending on [*month and day*], [*year*], for a total rental of $_____ payable _____[*specify manner of payment, e.g.,* in 12 monthly installments of $_____ each in advance on the first day of each month, commencing on _____(*month and day*),

_____(*year*)], subject to the following terms and conditions:

[*Set forth each term and condition in a separate paragraph.*]

This offer shall remain in effect until [*time*], [*month and day*], [*year*], at which time it shall, if not accepted, automatically terminate without notice.

Should you agree to accept this offer, you may do so by signing and dating the acceptance form appearing at the end of this letter and returning it, together with this letter, to me personally or by United States mail, postage prepaid, sent to me at _____[*street address, city and state or* my address as set forth above]. This offer will be deemed to be accepted only on my receipt of the acceptance form below in the manner prescribed in this paragraph.

Very truly yours, _____ [*signature*]
[*typed name*]

ACCEPTANCE

I hereby accept the foregoing offer to lease the described property on all the terms and conditions set forth therein.
Dated: [*month and day*], [*year*],

_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34A California Legal Forms--Transaction Guide § 34A.221

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.221 Offer by Tenant to Lease Real Property Through Landlord's Agent

[1] Comment--Use of Form

This form is an offer by a prospective tenant to lease real property through a real estate agent or broker employed or authorized by a landlord to lease the property. The form is substantially identical to a form printed by, and used with the permission of, Hanford-Freund & Company, San Francisco Realtors, and illustrates an offer to lease form that many real estate companies devise for their own use. It may be modified to reflect the unique facts and circumstances of each situation and or an addendum may be added to set forth the proposed terms of the lease in more detail.

[2] FORM

Offer by Tenant to Lease Real Property Through Landlord's Agent

OFFER TO LEASE

[*Name and address of agent*]

The undersigned hereby offers and agrees to lease, through you as agent, those certain premises described as follows: [*set forth description*], for a term of [*number*] years and [*number*] months commencing on the _____ day of [*month and year*], at a monthly rental of $_____, payable monthly in advance.

The premises are to be used exclusively for the purpose(s) of conducting [*set forth uses of property*].

The undersigned herewith deposits with you the sum of $_____, which is to be applied on the first rental due under the terms of the lease, on execution of the lease.

You are to have [*number*] days from the date of this offer within which to obtain the acceptance of this proposal. If not

accepted within this time, then, at any time thereafter before acceptance, on written notice from the undersigned, this proposal and offer shall become null and void and of no effect, and the deposit made herewith shall be forthwith returned to the undersigned. The owner of the premises may accept this offer to lease by signing and dating the acceptance form appearing at the end of this letter and returning it, together with this letter, to the undersigned personally or by United States mail, postage prepaid, sent to the undersigned at _____[*street address, city and state or* my address as set forth above]. This offer will be deemed to be accepted only on receipt by the undersigned of the acceptance form below in the manner prescribed in this paragraph.

Within [*e.g.,* five] days from receipt of written notification of the acceptance of this offer, the undersigned does hereby agree to execute a lease, on the terms provided in this offer, on the general lease form used by you, and does further agree to pay the sum of $_____ as security for the full and faithful performance of the undersigned's obligation under the terms of the lease. In the event of the faithful performance of the terms and conditions of the lease by the undersigned, the amount of such security shall be applied by the landlord to the payment of the last month's rental due under the lease.

_____ [*signature of prospective tenant*]
Address: _____
Telephone: _____

ACKNOWLEDGMENT OF RECEIPT OF OFFER

Receipt is hereby acknowledged of a check in the sum of $_____ to be held and applied by [*name of agency or* the undersigned] in accordance with the terms of the above offer.
Dated: _____

_____ [*signature of broker*]
[*typed name*]

[*OR*]

_____ [*name of agency*]
By _____ [*signature*]
[*typed name and title*]

ACCEPTANCE OF OFFER

The foregoing Offer to Lease is hereby accepted, and the undersigned hereby appoints _____[*name of agency*] as the agent for the undersigned in connection with this lease, and agrees to pay to the agent the sum of $_____ as a commission for services rendered in obtaining this lease. The undersigned hereby further agrees to execute a lease in the form as mentioned above in accordance with the terms of the above Offer to Lease.

[*See Ch. 21, Agreements With Real Estate Brokers and Agents, for alternative and additional provisions relating to the agent's commission for leasing real property.*]

Dated: [*month and day*], [*year*]

_____ [*signature of property owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferAgents & Fiduciaries



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17-34A California Legal Forms--Transaction Guide § 34A.222

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.222 Option Agreement for Lease of Real Property to Be Executed by Both Parties

[1] Comment

[a] Use of Form

This form is an option agreement for a lease of real property. In this form, the option is given by a landlord of real property and the contract is to be executed by both the optionor and optionee. For an option agreement that is executed by the optionor-landlord only, see *§ 34A.223*. For discussion of the law pertaining to an option agreement to lease real property, see *§ 34A.13*.

To establish the terms and conditions of the lease that is the subject of the option, Paragraph 1 of this form refers to and incorporates by reference the lease that will be executed by the parties if the option is exercised. As an alternative, the terms and conditions of the lease may be set forth in the option agreement itself. For illustrative lease provisions, see Ch. 34B, *Residential Leases* , Ch. 34C, *Retail, Industrial, and Office Leases* , Ch. 34D, *Ground Leases* , and Ch. 34E, *Shopping Centers: Leasing and Operation* .

For discussion of options to purchase real property, and for forms for additional or alternative provisions that may be adapted for use in this form, see Ch. 22, *Options to Purchase Real Property* .

[b] Execution of Option

An option agreement supported by consideration is a unilateral contract in which the optionor makes a unilateral promise to perform the obligations of the contract, or execute the conveyance, to which the option relates [*see § 34A.13[1]* for discussion of the nature of an option agreement]. As a unilateral contract, the option may be contained in a writing executed solely by the optionor [*see § 34A.223* for form]. However, if the optionee undertakes to perform future acts in consideration of the option, such as to make periodic payments [*see, e.g., Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 328, 74 Cal. Rptr. 722, 450 P.2d 42* (option to purchase real property)], it is advisable for

both parties, as in this form, to execute the option agreement.

If the property to be leased is owned by a partnership, corporation, or limited liability company, the option agreement should be signed by the same persons who would a execute a lease [*see* the Transaction Guide to Ch. 34B, *Residential Leases*, for coverage of the execution requirements].

If the option is to lease community real property of the optionor and his or her spouse for a period of more than one year, the option must be signed by both spouses [*see Fam. Code § 1102(a)*], and the body of the following contract modified accordingly.

[2] FORM

Option Agreement for Lease of Real Property to Be Executed by Both Parties

OPTION AGREEMENT

Preamble

This agreement is made this _____ day of [*month*], _____ *year*], at _____, California, between _____[*name*], hereinafter called Optionor, and _____[*name*], hereinafter called Optionee.

Recitals

WHEREAS, Optionor is the owner of the following described real [and personal] property (the "property"), located at _____[*street address and city*], _____ County, California and described as follows: [*describe property to be leased, e.g.,* 3,000 square feet of office space, identified as Suite 104 on the map attached as Exhibit A hereto]; and

WHEREAS, Optionee desires to acquire the exclusive right to lease the property at an agreed rental and under specified terms and conditions without becoming obligated to do so;

NOW, THEREFORE, it is agreed as follows:

Grant of Option

1. Optionor hereby grants to Optionee the exclusive right to lease the property for the term of [*specify term, e.g.,* five years *or* 18 months *or other*], commencing on [*month and day*], [*year*], [*or* commencing on the exercise of this option], and ending on [*month and day*], [*year*] [*or other provision*], at the rental and under the terms and conditions set forth in the lease to be executed by the parties on exercise of this option, a copy of which lease is attached to this agreement and made a part of this agreement [*or* at the total rental of $_____, payable _____ (*specify*), and on the following terms and conditions: _____ (*set forth lease terms and conditions*)].

Exercise of Option

2. This option shall be exercised only by notice in writing signed and delivered by Optionee to Optionor in the manner

described in Paragraph 6, below, no later than [*time*], [*month and day*], [*year*], at which time, if not exercised, this option shall automatically terminate without notice.

Consideration

3. This option is granted in consideration of the sum of $_____, payable [*specify terms of payment, e.g.,* by a certified (*or* cashier's *or* personal) check drawn to the order of Optionor within _____ (*e.g.,* five) days after the date of this option agreement (*or* receipt of which[, subject to collection,] is hereby acknowledged), and the further sum of $_____ payable in [*number*] equal installments of $_____ on _____ (*set forth each date on which an installment is to be paid*). Time is of the essence and failure on the Optionee's part to make timely payments as herein provided shall result in the automatic termination of this option without notice (*or other provision if payments for option are not timely made*)].

Assignment

4. This option is nonassignable and any attempted assignment of it by Optionee is void [and shall cause this agreement automatically to terminate without notice].

[*OR*]

4. Optionee may assign _____[his *or* her] rights under this agreement [on condition that _____(*specify*)], and any such assignment shall become effective [*specify, e.g.,* on written notice to Optionor].

Retention of Consideration

5. In the event that this option is not exercised within the time specified in Paragraph 2, above[, *or* on other termination of this agreement as provided in this Option Agreement], all sums paid for this option shall be retained by Optionor as consideration for the granting of this option.

Notices

6. Notices required to be given to Optionor by Optionee shall be given either personally or by registered or certified mail, postage prepaid, addressed to Optionor at _____[his *or* her] address set forth below, and, if given by mail, shall be deemed to be delivered only on actual receipt by Optionor.

Entire Agreement

7. This agreement contains the entire agreement between the parties relating to the option granted in this agreement. Any oral representations or modifications made before or after this agreement concerning the option shall be of no force and effect, provided, however, that this agreement may be altered in the future by written agreement of the parties.

Attorneys' Fees

8. In any action that may be brought to enforce the provisions of this agreement, the prevailing party in such action shall be entitled to recover from the other reasonable attorneys' fees in addition to _____[his *or* her] costs and necessary disbursements.

Binding Effect

9. This agreement shall bind and inure to the benefit of the heirs, personal representatives, successors, and assigns of Optionor, but shall terminate on the death or legal incapacity of Optionee, on _____[his *or* her] insolvency, on the commencement of voluntary or involuntary bankruptcy proceedings against [him *or* her], or as otherwise provided in this agreement.

[*OR*]

9. This agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties to this agreement.

Execution of Lease

10. On the timely exercise of this option by Optionee as provided in this option agreement, Optionor shall cause the lease to be prepared in conformance with the terms and provisions of this agreement [*or* in conformance with the copy of the lease attached to this agreement], and said lease shall be executed and acknowledged by Optionor, as Landlord, and executed by Optionee, as Tenant, whenever required by either party after the date of the exercise of the option; and from that date, the parties agree to be bound by all the terms, covenants, and conditions contained in the lease.

Executed on _____[*date*], in _____ County, California.

OPTIONOR _____ [*signature*]
[*typed name*]
_____ [*address*]
OPTIONEE _____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsContracts LawTypes of ContractsUnilateral ContractsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34A California Legal Forms--Transaction Guide § 34A.223

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.223 Option Agreement for Lease of Real Property to Be Executed by Landlord Only

[1] Comment--Use of Form

This form sets forth an option agreement for a lease of real property. It is designed for use when the option is to be executed by the landlord-optionor alone and the tenant-optionee does not undertake to perform any future acts as consideration for the option.

For discussion of option agreements to lease real property, see *§ 34A.13*. For a form of an option agreement to be executed by both the optionor and the optionee, see *§ 34A.222*.

[2] FORM

Option Agreement for Lease of Real Property to Be Executed by Landlord Only

OPTION AGREEMENT

In consideration of the sum of $_____, receipt of which is hereby acknowledged, _____[*name*], hereinafter called Optionor, grants to _____[*name*], hereinafter called Optionee, the exclusive right to lease the real [and personal] property hereinbelow described for a period of [years *or* months], this term to commence on [*month and day*], [*year*], and end on [*month and day*], [*year*], for the total rental of $_____, payable [*specify*], on and subject to the following terms, covenants, and conditions: [*set forth lease terms and conditions*].

The property covered by this option is described as follows: _____[*insert legal description and street address, if appropriate*].

This option may be exercised at any time on or before [*month and day*], [*year*], by written notice signed by the Optionee

and delivered to Optionor personally or by United States mail, postage prepaid, at _____[*street address, city, and state*], and shall be deemed to be delivered only on actual receipt by Optionor; provided, however, that this option shall automatically terminate on the death or legal incapacity of Optionee, or on _____[his *or* her] insolvency, or on the commencement of voluntary or involuntary bankruptcy proceedings against [him *or* her].

The option herein granted is [non]assignable.

Executed on [*month and day*], [*year*], in _____ County, California.

OPTIONOR _____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34A California Legal Forms--Transaction Guide § 34A.224

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.224 Abstract of Option Agreement

[1] Comment--Use of Form

A person who holds an option to lease property may want to record his or her interest for the same reasons a tenant may want to record a lease. Recording an option agreement gives constructive notice of its contents to subsequent tenants, purchasers, and mortgages of the affected property from the time it is filed with the recorder [*see Civ. Code § 1213*; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*].

However, the parties may be reluctant to record the entire option agreement to avoid making all of the terms of the agreement public or because of the expense of recording a lengthy agreement (in the event the full lease is attached as an exhibit to the option agreement). If this is the case, they may prepare and record an abstract of the agreement. The essential requirements for recording an abstract of an option agreement are that it must affect title to real property [*Gov. Code § 27280*], be acknowledged or proved [*Gov. Code §§ 27287, 27288*], and contain the essentials of which parties to be put on constructive notice must be aware. Basically, this means that the instrument must describe the real property and the duration of the option to lease. For a complete discussion of the requirements for recording a document that affects title to property, see the Memorandum of Lease *form in Ch. 34C, Retail, Industrial, and Office Leases [§ 34C.203*].

This form is a sample that may be used in a simple option to lease transaction. It may be used for an option agreement that is executed by the optionor only [*see § 34A.223* for illustrative option agreement], or an agreement executed by both the optionor and optionee [*see § 34A.222* for illustrative option agreement]. This form may be modified to reflect the terms of an option agreement requiring additional payments by the optionee or other conditions affecting the length of the option.

[2] FORM

Abstract of Option Agreement

Recording requested by
_____[*name*]

When recorded mail to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Space above this line for recorder's use

ABSTRACT OF OPTION AGREEMENT

This Abstract of Option Agreement is executed [concurrently *or* in connection] with that certain Option Agreement, dated _____, between [*or* executed by] the undersigned Optionor [and _____ (*name of optionee*)] relating to the following property: [*legal description of property*].

Optionor hereby grants to _____[*name of optionee*], Optionee, the exclusive right to lease the above-described property at a rental, and under the terms and conditions, set forth in the Option Agreement. This option will expire on _____[*date*], and unless exercised before that date, Optionee will have no further interest in the property.

OPTIONOR _____ [*signature*]
[*typed name and title*]
[OPTIONEE _____ (*signature*)
(*typed name and title*)]

[*For acknowledgment, see § 34A.210[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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17-34A California Legal Forms--Transaction Guide § 34A.225

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.225 Letter of Intent to Lease

[1] Comment--Use of Form

This form sets forth a letter of intent to lease property. It includes a proposal of tenant which is designed to be attached to the letter of intent. The purpose of the letter of intent is to recite the parties' agreement to enter into exclusive negotiations to lease the property, and to negotiate the terms of the lease in good faith. The letter of intent does not bind either party to the lease [*see § 34A.12[2]*].

[2] FORM

Letter of Intent to Lease

LETTER OF INTENT TO LEASE

[*Name and address of owner, or owner's agent, or owner's attorney*]

This "Letter of Intent" sets forth the preliminary terms and conditions on which _____[*name of prospective tenant*] ("Tenant"), [*status of tenant, e.g.,* a sole proprietorship], will lease the herein referenced premises (the "Premises") from _____[*name of landlord*] ("Landlord"), [*status of landlord, e.g.,* California Limited Partnership].

Property

1. Tenant and Landlord hereby express their intent to enter into immediate negotiations to execute a [*describe type of*

lease, e.g., office building lease *or* retail shopping center lease] ("the Lease") for the leasing of the Premises, which Premises are located at _____[*street address and city*], California. [The Premises are in a building commonly known as _____ (*name of building or center*)].

Exclusivity

2. Landlord and Tenant agree to work exclusively and in good faith to negotiate and execute a Lease prior to _____[*date*]. Until such date, Landlord agrees not to actively solicit, accept, or consider any other offers for the Premises, nor to engage any Broker to list or to market the Premises. If a Broker has already been engaged, then the Broker shall be informed that during the period that Tenant and Landlord are in negotiations, that the Broker shall not solicit, consider, or entertain any other offers for the Premises. Tenant and Landlord agree not to disclose the contents of this Letter of Intent, the negotiations, and/or any resulting agreement to any unrelated third parties, including any Broker, now or in the future.

Binding Effect

3. Tenant and Landlord acknowledge that they do not intend this Letter of Intent to be construed as a Lease or to be bound by its terms except for the period while negotiations are taking place to implement this Letter of Intent. A Lease will not exist unless and until the parties have executed a formal written agreement containing all terms approved by their respective representatives and containing all essential items of the agreed-on transaction. The parties acknowledge that they have neither set forth herein nor agreed upon all essential terms relating to the Lease of the Premises, including without limitation, covenants, conditions, warranties and representations, conditions precedent, conditions subsequent, indemnities, insurance provisions, assignment and subletting, and other anticipated terms, and that all such essential terms will be the subject of further negotiations. Tenant and Landlord further acknowledge that it would be imprudent and unreasonable to rely upon the expectation of entering a Lease regarding the Premises. Further, efforts by either party to complete due diligence, negotiate, and obtain the services of design and construction consultants, computer installation specialists, or other associated experts and specialists on office design and improvements, or to prepare the Lease shall not be considered as evidence of intent by either party to be bound by the terms of this Letter of Intent.

Finally, the performance of either party, prior to execution of a formal written Lease, of any of the obligations which may be included in a Lease between the parties when negotiations are completed, shall not be considered as evidence of intent by either party to be bound by the terms of this Letter of Intent.

If the foregoing letter accurately reflects our present understanding with respect to the commencement of negotiations which may lead to the leasing of the Premises, please execute the duplicate original of this letter and return it to the undersigned at your earliest convenience.
Dated: _____

[*NAME OF TENANT*]
By _____
[*name and title*]

ACCEPTED AND AGREED SOLELY ON THE BASIS OF THE ENTERING INTO OF NEGOTIATIONS FOR A LEASE OF THE PREMISES AND NOT THE APPROVAL OF ANY TERMS OF THE PROPOSAL MADE BY TENANT.
Dated: _____

[*NAME OF LANDLORD*]

By _____
[*name and title*]

PROPOSAL OF TENANT

Tenant _____[*name of tenant*] proposes to enter into a Lease for a term of years for the Premises as above described upon the following terms and conditions:

1. The initial monthly lease payment (base rent) payable on the first day of each single calendar month shall be the sum of $_____ subject to a cost of living increase based upon an agreed index with a stipulated cap. The first cost of living increase in the base rent shall occur on the Third Year of the Lease and shall not be cumulative.

2. The term of the Lease shall be an initial five year term [*or specify other initial term*] with a five-year option period [*or specify other option period(s)*]. The base rent for the [first] option period shall be the last month's rent charged for the fifth year of the Lease, or the fair market value of the Premises less 15 percent, (whichever is less), and which amount shall be either agreed upon by the parties, or determined by an arbitrator, which arbitrator's decision shall be binding on the parties. [*If more than one option period, specify rental for subsequent option periods.*]

3. Tenant shall renovate and refurbish the premises at Tenant's sole expense except that [*describe contemplated improvements to be made by landlord, e.g.*, if in-house services are available to the management of the building that painting and minor repairs may be performed by Landlord as may be agreed in the Lease]. Tenant agrees to accept the Premises in its current configuration, subject to Tenant's right to change the configuration of the Premises in the future, subject only to Landlord's written approval which approval shall not be unreasonably withheld. _____[*Describe improvements tenant intends to make, e.g.,* Tenant currently contemplates moving no more than three walls, and/or installing no more than three walls, with the object of creating at least one fully enclosed, and/or partially enclosed, additional space, and to move such interior doors or interior entrance areas as are necessary to accomplish such purposes, all this (including, but without limitation, any fees, permit fees, expenses, plans, advice, or preparation) at the sole expense of Tenant].

4. As a sign of "good faith" prior to the execution of the Lease, Tenant tenders a check in the sum of $_____, which check may be negotiated by Landlord upon the execution of the agreed Lease. This $_____ represents both the first month's rent and the prepaid last month's rent under the proposed Lease.

5. There shall be no change permitted by the Landlord of the current configuration of the Premises by the current occupant thereof, nor shall the Landlord permit the current occupant to remove any fixtures, trade fixtures affixed to the Premises, or other appurtenances affixed to the Premises, unless such fixtures are movable without the removal of any screws, nuts, bolts, wires, or other affixing elements and then only if those fixtures were brought onto the Premises by the occupant. There shall be no tampering with the wiring, removal of the wiring, or other destruction of the infrastructure of the premises by the current occupants after the date of the Letter of Intent if a Lease is thereafter signed. Any failure of the current occupant to abide by those provisions is the sole responsibility of Landlord. Tenant acknowledges that Landlord may give to the current occupant of the premises, which current occupant is represented by Landlord to be on a month-to-month tenancy (and without any first right of refusal or similar right), as much as 60 days notice to vacate after the execution of the contemplated Lease with Tenant.

6. Tenant has not engaged the services of any real estate brokerage or other representative in connection with this Letter of Intent and/or proposed Lease, and agrees not to engage any such real estate brokerage during the course of the contemplated transaction in relation to the Premises.

Dated: _____

[*NAME OF TENANT*]
By _____
[*name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART IV. FORMS
C. Offers, Proposals, and Options

17-34A California Legal Forms--Transaction Guide §§ 34A.226-34A.229

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34A.226[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART IV. FORMS
D. Prepaid Rental Listing Services

17-34A California Legal Forms--Transaction Guide § 34A.230

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.230 Prepaid Rental Listing Service Contract

[1] Comment

[a] Use of Form

This form is a prepaid rental listing service (PRLS) contract. Before accepting a fee from a prospective tenant, any person who furnishes rental information to the prospective tenant for a fee must provide the prospective tenant with a written contract which discloses the services he or she will provide to the prospective tenant and the tenant's specifications for the desired rental [*see Bus. & Prof. Code § 10167.9(a)*; *see also § 34A.14[5][a]* for discussion of the specific required contents of contract].

PRACTICE TIP:

Length of Term of PRLS Contract. The term of a PRLS contract may not exceed 90 days [*Bus. & Prof. Code § 10167.9(a)(5)*], but is generally for a term of 30 days. If the prospective tenant is unable to find a suitable rental within the term of the contract, licensees generally permit a renewal period for a small portion of the initial fee. *By Publisher's Editorial Staff.*

This form may also be used as the proposed contract form to be submitted to the Department of Real Estate for approval before a license is issued [*see Bus. & Prof. Code § 10167.9(c)* and § 34A.14[5][b]].

[b] Refund Provisions of Contract

The contract must contain provisions setting forth the prospective tenant's right to a full or partial refund of the advance fee. The exact language prescribed by statute must be used, unless different language is approved in writing by the Real Estate Commissioner before the contract is used [*Bus. & Prof. Code § 10167.10(c)*]. A refund provision stating from whom and in what manner a refund may be obtained must appear in full caps, in 12-point type or greater, and in boldface or italics in the contract [*Bus. & Prof. Code § 10167.10(c)*; *see* form in [2], *below*].

[2] FORM

Prepaid Rental Listing Service Contract

PREPAID RENTAL LISTING SERVICE CONTRACT

Date: _____

Name of Licensee: _____

Address and Telephone Number of Principal Office or Location:
_____
_____

Address and Telephone Number of Location or Branch Office of Real Estate Broker (if any) Providing Listings:
_____
_____

Registrant (prospective tenant): _____
Address: _____
Telephone: _____

Type of Rental Desired (check one):
_____ Month to Month Tenancy
_____ Lease for Term of _____ (months or years)

Type of Structure Desired (check one):
_____ Single-family home
_____ Apartment or Condominium
_____ Duplex or Triplex
_____ Other _____ (describe type)
_____ Any of the above is Acceptable

Maximum Rent: _____ per month

Furnishings (check one):
_____ Furnished
_____ Unfurnished
_____ Either Furnished or Unfurnished is Acceptable

Number of Bedrooms Required: _____

Number and Type of Pets:
_____ Dog(s)
_____ Cat(s)
_____ Other(s)

Acceptable Locations (describe):
_____

Other conditions/restrictions (describe):

_____

Earliest Occupancy Date Desired: _____

Agreement

In consideration of the payment by Registrant (the prospective tenant) of the sum of $_____, receipt of which is hereby acknowledged, the undersigned Licensee agrees to use its reasonable best efforts to provide rental housing accommodations from rental housing listings compiled and to be compiled in Licensee's files.

Conditions of Service

Licensee agrees to furnish Registrant with listings of housing accommodations, which shall be available for viewing, renting, and ultimate occupancy as indicated by file listings; listings shall be of the type set forth above. Listings may be obtained from Licensee's office by telephone during telephone service hours.

File Information

Registrant is entitled to all listings meeting his or her general requirements as set forth above. It is understood that file information regarding listings, specifications, and availability is received from owners and managers and is not based on the personal knowledge of Licensee or its employees. Constant efforts are maintained to provide listings that are accurate and current.

Procedure for Obtaining Rentals

To avoid inconvenience and disappointment, Registrant is requested to contact the managers and/or owners before inspecting individual listings and to make and keep telephone appointments. Registrant is requested to notify Licensee immediately on acceptance of a rental. Registrant is requested to make regular and periodic calls for listings.

[*The following provision must be used by a licensee unless different language is approved in writing by the Department of Real Estate before the contract is used; the provision must appear in full caps, in 12-point type or greater, and in boldface or italics (Bus. & Prof. Code § 10167.10(c))*]

RIGHT TO REFUND

IF, WITHIN FIVE DAYS AFTER PAYMENT OF AN ADVANCE FEE, THE LICENSEE HAS NOT SUPPLIED THE PROSPECTIVE TENANT WITH AT LEAST THREE AVAILABLE RENTAL PROPERTIES MEETING THE SPECIFICATIONS OF THE CONTRACT AS TO (I) TYPE OF STRUCTURE; (II) DESIGNATED AREA; (III) FURNISHED OR UNFURNISHED; (IV) NUMBER OF BEDROOMS; (V) MAXIMUM RENTAL; AND (VI) ANY OTHER SPECIFICATION EXPRESSLY SET FORTH IN THE CONTRACT, THE FULL AMOUNT OF THE FEE PAID SHALL BE REFUNDED TO THE PROSPECTIVE TENANT UPON PRESENTATION OF EVIDENCE OF SUCH FAILURE WITHIN 10 DAYS AFTER THE EXPIRATION OF THE FIVE-DAY PERIOD.

IF THE PROSPECTIVE TENANT OBTAINS A RENTAL OTHER THAN THROUGH THE SERVICES OF THE LICENSEE DURING THE TERM OF THIS CONTRACT OR IF THE PROSPECTIVE TENANT DOES NOT OBTAIN A RENTAL THROUGH THE SERVICES OF THE LICENSEE DURING THE TERM OF THE CONTRACT, THE LICENSEE SHALL REFUND THE FEE RECEIVED IN EXCESS OF A FIFTY DOLLAR ($50) SERVICE CHARGE TO THE PROSPECTIVE TENANT WITHIN 10 DAYS AFTER RECEIPT BY THE LICENSEE OF THE DEMAND FOR REFUND.

TO BE ENTITLED TO A REFUND IN EXCESS OF THE SERVICE CHARGE, THE PROSPECTIVE TENANT MUST MAIL OR DELIVER THE DEMAND FOR REFUND NOT LATER THAN 10 DAYS AFTER EXPIRATION OF THIS CONTRACT.

[*The following provision must appear in bold type:*]

Court-Awarded Damages

If the Licensee fails to make a refund as provided in the RIGHT TO REFUND provision above and if the denial or delay in making the refund is found to have been done in bad faith, a court of appropriate jurisdiction, including a small claims court, shall be empowered to award damages to the Registrant in an amount not to exceed $1,000 in addition to actual damages sustained by the Registrant. If the Licensee refuses or is unable to pay the damages awarded by the court, the award may be satisfied out of the security required under *Business and Professions Code Section 10167.7*.

THIS CONTRACT EXPIRES ON _____[*specify date not later than 90 days after contract execution date*].

ACKNOWLEDGMENT OF AGREEMENT

Registrant hereby agrees that he or she has read and understood the above agreement and all the terms and conditions contained therein before paying the above fee, and that his or her entitlement hereunder is to a rental listing service on the terms set forth.

LICENSEE:
Lic. No. _____
By: _____ [*name of agent or employee*]
REGISTRANT: _____ [*name of prospective tenant*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34A PRELEASE FORMS
PART IV. FORMS
D. Prepaid Rental Listing Services

17-34A California Legal Forms--Transaction Guide § 34A.231

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.231 Request for Partial Refund of Advance Fee

[1] Comment--Use of Form

This form is a letter requesting a partial refund of an advance fee paid to a prepaid rental listing services licensee. A licensee receiving this request must refund the fee, minus a $50 service charge, to the prospective tenant if the prospective tenant has not obtained a rental or has obtained a rental other than through the licensee's services during the term of the contract, provided that the refund demand is made within 10 days after the contract expires. The refund must be made within 10 days of receipt of a timely demand [*Bus. & Prof. Code § 10167.10(b)*].

In lieu of documentation supporting the request for a partial refund, the client may submit a signed statement in statutorily-mandated form to be provided by the licensee [*see Bus. & Prof. Code § 10167.10(b)(2)(B)*]. A copy of this form is *set forth in § 34A.231A*.

For a request for a full refund of an advance fee, see *§ 34A.232*. For discussion of the statutory requirements pertaining to refunds of advance fees, see *§ 34A.14[6]*.

[2] FORM

Request for Partial Refund of Advance Fee

REQUEST FOR PARTIAL REFUND OF ADVANCE FEE

Date: _____

_____[*name of addressee*]
_____[*name of licensee*]
_____[*street address*]

_____[*city, state, zip*]

Dear _____:

This letter is written on behalf of _____[*name of prospective tenant and client*], who entered into a prepaid rental listing service contract with _____[*name of licensee, designated agent, real estate salesperson, or employee acting on behalf of licensee*], of your office, on [*date of contract*].

We [*or* I] request a return of $[*specify amount of fee minus $50*], which is the fee _____[*name of client*] paid to _____[*name of licensee*], minus the sum of $50 as a service charge. Our [*or* My] client _____[did not obtain a rental through the services of _____ (*name of licensee*) *or* obtained a rental other than through the services of _____ (*name of licensee*)] during the term of the contract.

This demand for refund is made within 10 days following [*expiration date of contract*], the expiration date of the contract. Therefore, _____[he *or* she] is entitled to a refund in the amount of $[*specify same amount as above*], within 10 days after you receive this demand, in accordance with *California Business and Professions Code Section 10167.10(b),* and as stated in _____[his *or* her] prepaid rental listing service contract[, a copy of which is enclosed].

[*OPTIONAL; to be used if client obtained rental from a source other than licensee:*]

Our [*or* My] client has obtained a rental at _____[*street address, city, state, zip*]. Enclosed is a copy [*or* are copies] of the list[s] of rental property which _____[*name of licensee, designated agent, real estate salesperson, or licensee's employee*] provided to _____[*name of client*]. Please note that the premises which _____[he *or* she] obtained is not on this list [or any of these lists].

[*Continue with the following:*]

We [*or* I] have enclosed the documentation [*or* the signed statement] required under *Business and Professions Code Section 10167.10(b)* to support our [*or* my] client's claim for a refund.

Please make the refund check payable to _____[*specify name of client or names of both attorney and client*] and send the refund to _____[*specify street address, city, state, and zip code where refund should be sent*].

Sincerely, _____ [*signature of attorney*]
[*typed name of attorney*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantGeneral Overview



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17-34A California Legal Forms--Transaction Guide § 34A.231A

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.231A Statement in Support of Refund Request

[1] Comment--Use of Form

This form is a statement in support of a request for a refund of an advance fee paid to a prepaid rental listing services licensee. In lieu of documentation supporting a request for a partial refund [*see § 34A.231*], the client may submit a signed statement in statutorily-mandated form to be provided by the licensee [*see Bus. & Prof. Code § 10167.10(b)(2)(B)*].

[2] FORM

Statement in Support of Refund Request

I, _____ (name of prospective tenant), do swear or affirm the following:

I currently live at _____ (street address).

The following statement is true (check one):

_____ I have rented a unit at the above address. I did not obtain this rental through the services of _____ (name of licensee) during the time of our contract.

_____ I did not find a new rental and did not move. I still live at the above address.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

_____
(date)

_____
(location)

_____
(signature)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantGeneral Overview



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17-34A California Legal Forms--Transaction Guide § 34A.232

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34A.232 Request for Full Refund of Advance Fee

[1] Comment--Use of Form

This form is a letter requesting a full refund of an advance fee, including the $50 service charge (which is the maximum charge permitted), paid by a prospective tenant to a prepaid rental listing services licensee. This refund must be paid by any licensee who does not provide a prospective tenant with at least three rental properties that are available and meet the specifications of the contract, within five days after the execution of the contract [*Bus. & Prof. Code § 10167.10(a)*]. The licensee is deemed to have supplied the required information if the information supplied meets the contract specifications with regard to the following [*Bus. & Prof. Code § 10167.10(a)(2)*]:

- Type of structure;
- Designated geographical area;
- Furnished or unfurnished rental;
- Number of bedrooms;
- Maximum rental amount; and
- Any other specification expressly set forth in the contract.

A demand for the return of the fee must be made by or on behalf of the prospective tenant within 10 days following the expiration of the five-day period after the execution of the contract. The demand may be delivered or mailed by registered or certified mail to the address of a location, or branch office of a real estate broker, set forth in the contract [*Bus. & Prof. Code § 10167.10(a)(2)*].

For a request for a partial refund of an advance fee, see *§ 34A.231*. A statement in support of a refund request is *set forth in § 34A.231A*. For discussion of the statutory requirements pertaining to refunds of advance fees, see *§ 34A.14[6]*.

[2] FORM

Request for Full Refund of Advance Fee

REQUEST FOR FULL REFUND OF ADVANCE FEE

Date: _____

_____[*name of addressee*]
_____[*name of licensee*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____:

This letter is written on behalf of _____[*name of prospective tenant and client*], who entered into a prepaid rental listing service contract with _____[*name of licensee, designated agent, real estate salesperson, or employee acting on behalf of licensee*], of your office, on [*date of contract*].

We [*or* I] request a return of $[*specify full amount of advance fee*], which is the full advance fee, including the $50 service charge, paid to _____[*name of licensee*], of your office by our [*or* my] client. [He *or* She] was not supplied, within five days after the execution of the contract, with at least three rental properties then available to _____[*name of prospective tenant/client*] and meeting the specifications of the contract. [*State or enclose a copy of the information supplied and specify why it does not meet the specifications of the contract*]. Therefore, _____[*name of client*] is entitled to a full refund of _____[his *or* her] advance fee of $[*specify same amount as above*], in accordance with *California Business and Professions Code Section 10167.10(a)*, and as provided in the prepaid rental listing service contract[, a copy of which is enclosed].

Please make the refund check payable to _____[*specify name of client or names of both attorney and client*] and send the refund to _____[*specify street address, city, state, and zip code where refund should be sent*].

Sincerely, _____ [*signature of attorney*]
[*typed name of attorney*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to CommissionsReal Property LawLandlord & TenantGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES

17-34B California Legal Forms--Transaction Guide 34B.syn

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.syn Synopsis to Chapter 34B: RESIDENTIAL LEASES

§ 34B.01 California Statutes

§ 34B.02 Federal Statutes

§§ 34B.03-34B.04 [Reserved]

§ 34B.05 Law Reviews and Periodicals

§ 34B.06 Annotations

§ 34B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 34B.08-34B.09 [Reserved]

§ 34B.10 Terminology

[1] "Landlord" and "Tenant"

[2] "Lease"

[3] "Nonresidential Lease"

§ 34B.11 Creation of Leasehold Interest

[1] By Written Agreement

[2] By Oral Agreement

[3] By Operation of Law

§ 34B.12 Lease of Real Property

[1] Definition of Leasehold Interest

[2] Dual Character of Lease

[a] Nature of Dual Character

[b] As a Conveyance

[c] As a Contract

[3] Interpretation and Construction of Leases

§ 34B.13 Lease Distinguished From License

§ 34B.14 Types of Tenancies

[1] Periodic Tenancy

[a] Term

[i] Duration

[ii] Termination

[iii] Tenant's Death

[b] Creation of Tenancy

[2] Tenancy for Years

[3] Tenancy at Will

[4] Tenancy at Sufferance

§ 34B.15 Formal Requirements for Lease

[1] Required Elements

[a] Dual Character

[b] As a Contract

[c] As a Conveyance

[d] Lease Terminology

[2] Parties to Lease

[a] Identification

[b] Capacity

[i] Capacity to Lease

[ii] Minors

[iii] Persons of Unsound Mind

[c] Married Persons

[d] Joint Tenants and Tenants in Common

[i] As Tenant Under Lease

[ii] As Landlord Under Lease

[e] Personal Representatives

[f] Corporations

[g] Partnerships

[h] Limited Liability Companies

[i] Unincorporated Associations

[j] Agents and Attorneys-in-Fact

[3] Requirement That Lease Be in Writing

[a] Statutory Provisions

[b] Part Performance Exception

[4] Delivery and Acceptance

[5] Recording a Residential Lease

§ 34B.16 Description of Premises

[1] Extent and Boundary of Property

[2] Appurtenances and Easements

§ 34B.17 Term of Lease

[1] Required Element of Lease

[2] Rule Against Perpetuities

[3] Other Statutory Restrictions

§ 34B.18 Consideration

[1] Required Element of Lease

[2] Rent

[3] Other Payments

§ 34B.19 Tenant/Application Screening Fees

[1] Application Screening Fee Defined

[2] Landlord's Right to Charge Screening Fee

[3] Amount of Fee

§ 34B.20 Covenants

[1] Nature of Covenants

[2] Covenant of Quiet Enjoyment

§ 34B.21 Use of Premises

[1] Permitted Uses

[2] Illegal Uses

[3] Nuisance and Waste

§ 34B.22 Agreement to Execute Lease

§ 34B.23 Rent Control

§ 34B.24 Disclosure Requirements

[1] Address for Personal Service

[a] Disclosure in Lease or Rental Agreement

[b] Posting Alternative

[c] Updating and Revising Information

[d] Violations

[2] Foreign Language Translation

[3] Real Estate Transfer Disclosure Statement

[4] Former Ordnance Locations

[a] Disclosure Requirements

[b] Definitions

[c] Legislative Intent

[5] Lead-Based Paint Disclosure

[6] Natural Hazards Disclosure

[7] Duty to Provide Notice of Pest Control Work

[8] Release of Illegal Controlled Substances

[9] Toxic Mold Protection Act

[a] Development of Exposure Limits and Guidelines

[b] Written Disclosure Requirements

[c] Enforcement

[10] Duty to Disclose Application for Permit to Demolish Residential Unit

§ 34B.25 Landlord's Right of Access to Leased Premises

[1] Circumstances Under Which Landlord May Enter

[2] Notice Requirement

[3] Waiver of Right Is Void

[4] Entry for Purpose of Providing Information Regarding Tenant's Rights

§ 34B.26 Repairs and Maintenance

[1] Governing Law for Landlord's Obligations

[2] Landlord's Statutory Duty to Repair and Maintain

[a] Tenantable Dwelling

[b] Excuse for Violation of Tenant's Statutory Duties

[c] Penalties for Collecting Rent on Untenantable Dwelling

[i] Conditions Justifying Penalties

[ii] Order to Abate Nuisance and to Make Repairs

[iii] Other Matters Pertaining to Court Action

[d] Locks and Keys

[i] Dead-Bolt Locks

[ii] Window Security

[iii] Exterior Doors

[iv] Tenant's Notice Obligations

[v] Tenant's Rights and Remedies

[vi] Additional Security Requirements

[vii] Buildings Exempted From Security Requirements

[e] Telephone Wiring

[f] Tenant's Right to Repair and Deduct or Vacate

[g] Arbitration of Disputes

[h] Waiver of Rights

[3] Implied Warranty of Habitability

[4] Lead-Safe Renovation

[5] Tenant's Duties to Repair and Maintain Premises

§ 34B.27 Alterations by Tenant

§ 34B.28 Antidiscrimination and Fair Housing Laws

§ 34B.29 State Building Requirements

§ 34B.30 Public Housing

§§ 34B.31-34B.99 [Reserved]

§ 34B.100 Basic Facts for All Parties

Scope

§ 34B.101 Additional Facts Relating to Landlord

Scope

§ 34B.102 Additional Facts Relating to Tenant

Scope

§ 34B.103 Facts Relating to Premises

Scope

§ 34B.104 Documents Pertaining to Landlord and Tenant

Scope

§§ 34B.105-34B.109 [Reserved]

§ 34B.110 Capacity and Authority of Parties

Scope

§ 34B.111 Terms of Lease

Scope

§ 34B.112 Condition of Dwelling

Scope

§§ 34B.113-34B.119 [Reserved]

§ 34B.120 Representation of Both Parties to Lease

Scope

§ 34B.121 Tenant's Actions Before Lease Commencement

Scope

§ 34B.122 Use of Standardized Lease Form

Scope

§ 34B.123 Use of Lease Drafted by Other Party

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§ 34B.126 Optional Recordation of Memorandum of Lease

§ 34B.127 Disclosures by Landlord

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§§ 34B.128-34B.129 [Reserved]

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§ 34B.131 Term of Lease

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§ 34B.136 Default and Termination

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§ 34B.138 Miscellaneous Provisions

Scope

§§ 34B.139-34B.199 [Reserved]

§ 34B.200 Apartment Lease

[1] Comment

[a] Use of Form

[b] Description of Premises

[c] Term of Lease

[d] Rent

[e] Security Deposit

[f] Utilities

[g] Occupancy by Tenant and Guests

[h] Use of Premises

[i] Rules and Regulations

[j] Condition of Leased Premises

[k] Inspection and Agreement to Repair

[l] Alterations and Repairs by Tenant

[m] Landlord's Right of Access

[n] Locks and Keys

[o] Assignment and Subletting

[p] Tenant's Default

[q] Disclosure Requirements

[i] Name and Address of Landlord

[ii] Lead-Based Paint Disclosure

[r] Waiver

[s] Estoppel Certificate

[t] Miscellaneous Provisions

[2] FORM

Apartment Lease

§ 34B.201 Lease of Single-Family Residence

[1] Comment

[a] Use of Form

[b] Distinguished From Apartment Lease

[c] Description of Leased Premises

[2] FORM

Lease of Single-Family Residence

§ 34B.202 Residential Lease or Month-to-Month Rental Agreement (CAR)

[1] Comment

[a] Use of Form

[b] Modifications to Form

[c] Security Deposit

[d] Parking and Storage

[e] Late Charges and "Non-Sufficient Fund" Checks

[f] Neighborhood Conditions

[g] Occupants

[h] Lead-Based Paint Disclosure

[i] Temporary Relocation

[j] Damages to Premises

[2] FORM

Residential Lease or Month-to-Month Rental Agreement (CAR)

§§ 34B.203-34B.209 [Reserved]

§ 34B.210 Names and Status of Parties

[1] Comment

[a] Use of Form

[b] Identifying Parties

[2] FORM

Names and Status of Parties

§ 34B.211 Landlord's Title in Name Other Than Landlord's Current Name

[1] Comment--Use of Form

[2] FORM

Landlord's Title in Name Other Than Landlord's Current Name

§§ 34B.212-34B.219 [Reserved]

§ 34B.220 Periodic Tenancy

[1] Comment

[a] Use of Form

[b] Termination of Month-to-Month Tenancy

[c] Termination of Other Periodic Tenancies

[2] FORM

Periodic Tenancy

§ 34B.221 Holdover Provision

[1] Comment

[a] Use of Form

[b] Effect of Clause

[c] Absence of Clause

[2] FORM

Holdover Provision

§ 34B.222 Automatic Renewal or Extension of Lease

[1] Comment

[a] Use of Form

[b] Distinction Between Renewal and Extension

[c] Automatic Renewal in Printed Lease Forms

[2] FORM

Automatic Renewal or Extension of Lease

§ 34B.223 Notice Regarding Inclusion of Automatic Renewal or Extension Clause in Lease

[1] Comment--Use of Form

[2] FORM

Notice Regarding Inclusion of Automatic Renewal or Extension Clause in Lease

§ 34B.224 Option to Renew or Extend Lease

[1] Comment

[a] Use of Form

[b] Effect of Option to Renew Lease

[c] Exercise of Option

[d] Increased Rent

[2] FORM

Option to Renew or Extend Lease

§§ 34B.225-34B.229 [Reserved]

§ 34B.230 Security Deposit

[1] Comment

[a] Use of Form

[b] Scope of Civ. Code § 1950.5

[i] Relationship to Local Laws

[ii] Persons Subject to Statutory Requirements

[c] Definitions

[d] Form of Security Deposit

[e] Maximum Amount

[f] Last Month's Rent

[g] Interest on Security Deposit

[h] Landlord's Handling of Deposit

[i] Deposit Held for Tenant's Benefit

[ii] Permissible Deductions From Deposit

[iii] Initial Inspection

[iv] Return of Deposit

[v] Alternative Remedy of Damages

[i] Transfer of Landlord's Interest

[i] Duties Before Transfer

[ii] Transfer or Return of Deposit

[iii] Effect of Noncompliance

[iv] Obligations of Landlord's Successor in Interest

[j] Prohibition Against Nonrefundable Deposits

[k] Damages for Bad Faith Claim or Retention of Deposit

[l] Relevant Litigation Matters

[i] Jurisdiction

[ii] Proof of Existence and Amount of Security Deposit

[m] Waiver of Tenant's Rights

[2] FORM

Security Deposit

§ 34B.231 Last Month's Rent and Security Deposit

[1] Comment

[a] Use of Form

[b] Applicability of Statutory Restrictions

[2] FORM

Last Month's Rent and Security Deposit

§ 34B.232 Security Deposit: Tenant Obligated to Replace Amounts Deducted During Tenancy

[1] Comment--Use of Form

[2] FORM

Security Deposit: Tenant Obligated to Replace Amounts Deducted During Tenancy

§ 34B.233 Late Charge

[1] Comment

[a] Use of Form

[b] Unlawful Detainer

[2] FORM

Late Charge

§ 34B.234 Right to Demand Special Form of Payment

[1] Comment

[a] Use of Form

[b] Payment in Cash

[2] FORM

Right to Demand Special Form of Payment

§§ 34B.235-34B.239 [Reserved]

§ 34B.240 Waterbed

[1] Comment

[a] Use of Form

[b] Statutory Requirements

[i] Landlord's Rights and Restrictions

[ii] Insurance

[iii] Floor Load Capacity

[iv] Installation, Maintenance, and Removal

[v] Inspection and Violations

[vi] Security Deposit and Fees

[2] FORM

Waterbed

§ 34B.241 Restrictions on Tenant's Parking Rights

[1] Comment--Use of Form

[2] FORM

Restrictions on Tenant's Parking Rights

§ 34B.242 Insurance Hazards

[1] Comment--Use of Form

[2] FORM

Insurance Hazards

§§ 34B.243-34B.249 [Reserved]

§ 34B.250 Liquidated Damages

[1] Comment

[a] Use of Form

[b] Statutory Requirements

[c] Reasonable Relationship to Actual Damages

[2] FORM

Liquidated Damages

§ 34B.251 Landlord's Damages on Termination of Lease

[1] Comment

[a] Use of Form

[b] Statutory Damages

[c] Effect of Unlawful Detainer Action or Tenant Remaining in Possession

[d] Landlord's Duty to Mitigate

[i] Nature of Duty

[ii] Notice of Reletting the Premises

[iii] Sale of Property

[e] Other Remedies

[2] FORM

Landlord's Damages on Termination of Lease

§ 34B.252 Landlord's Right to Continue Lease in Effect

[1] Comment

[a] Use of Form

[b] Provision for Remedy

[c] Tenant's Right to Assign or Sublet

[d] Continuation of Right of Possession

[e] Inconsistent Remedies as Not Incompatible

[f] Other Remedies

[2] FORM

Landlord's Right to Continue Lease in Effect

§ 34B.253 Cancellation of Lease

[1] Comment--Use of Form

[2] FORM

Cancellation of Lease

§§ 34B.254-34B.259 [Reserved]

§ 34B.260 Assignment and Subletting

[1] Comment

[a] Use of Form

[b] Prohibition Against Assignment or Subletting

[2] FORM

Assignment and Subletting

§ 34B.261 Arbitration Regarding Tenantable Condition of Dwelling

[1] Comment

[a] Use of Form

[b] Agreement to Arbitrate Disputes

[2] FORM

Arbitration Regarding Tenantable Condition of Dwelling

§ 34B.262 Arbitration Provision

[1] Comment

[a] Use of Form

[b] Content of Form

[c] Enforceability

[d] Waiver

[e] Statutory Requirements for Certain Leases

[2] FORM

Arbitration Provision

§ 34B.263 Payment of Utilities Under Joint Meters

[1] Comment

[a] Use of Form

[b] Statutory Requirements

[c] Remedies for Failure to Comply

[2] FORM

Payment of Utilities Under Joint Meters

§ 34B.264 Landlord's Repairs Before Tenant's Occupancy

[1] Comment--Use of Form

[2] FORM

Landlord's Repairs Before Tenant's Occupancy

§ 34B.265 Insurance for Tenant's Personal Property

[1] Comment--Use of Form

[2] FORM

Insurance for Tenant's Personal Property

§§ 34B.266-34B.279 [Reserved]

§ 34B.280 Application to Rent/Screening Fee (CAR)

[1] Comment--Use of Form

[2] FORM

Application to Rent/Screening Fee (CAR)

§ 34B.281 Move In/Move Out Inspection (CAR)

[1] Comment--Use of Form

[2] FORM

Move In/Move Out Inspection (CAR)

§ 34B.282 Notice of Existence of Former Ordnance Location

[1] Comment--Use of Form

[2] FORM

Notice of Existence of Former Ordnance Location

§ 34B.283 Statutory Provisions Relating to Tenantable Condition of Leased Premises

[1] Comment--Use of Form

[2] FORM

Statutory Provisions Relating to Tenantable Condition of Leased Premises

§ 34B.284 Lead-Based Paint and Lead-Based Paint Hazards Disclosure (CAR)

[1] Comment

[a] Use of Form

[b] Landlord's Obligations

[c] Lease Attachment

[2] FORM

Lead-Based Paint and Lead-Based Paint Hazards Disclosure (CAR)

§ 34B.285 Notice of Application for Permit to Demolish Residential Dwelling Unit

[1] Comment--Use of Form

[2] FORM

Notice of Application for Permit to Demolish Residential Dwelling Unit

§ 34B.286 Notice of Right to Request Inspection Before Termination of Tenancy

[1] Comment--Use of Form

[2] FORM

Notice of Right to Request Inspection Before Termination of Tenancy

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FOOTNOTES:

(n40)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California, at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multi-state retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

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Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.

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Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES

17-34B California Legal Forms--Transaction Guide Scope

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

Scope

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This chapter covers residential leases. It provides complete lease forms for an apartment lease, a lease of a single-family residence, and a residential lease or month-to-month rental agreement (prepared by the California Association of Realtors). Discussion of the law applicable to these leases is included in the Legal Background and in the comments to the forms.

This chapter also includes discussion and forms for alternative and additional provisions to be used in residential leases. Optional provisions are provided for the parties' names and status, variations in the term, including a lease renewal or extension, security deposits and other charges, repairs, utilities, assignment and subletting, use restrictions, damages, and termination.

Further, this chapter includes discussion and forms relating to residential leases, including a tenant's inspection sheet, a notice of a former ordnance location, and an application for rental.

The income tax implications of leasing real property from both the landlord's and the tenant's point of view are beyond the scope of this chapter. For a thorough discussion of these issues, see California Real Estate Law and Practice, Ch. 190, *Taxation of Landlords* , and Ch. 191, *Taxation of Tenants* (Matthew Bender).

Nonresidential leases are covered in Ch. 34C, *Retail, Industrial, and Office Leases* , and Ch. 34E, *Shopping Centers: Leasing and Operation* . Other types of leases are covered in Ch. 34D, *Ground Leases* , Ch. 36, *Oil and Gas Rights and Leases* , and Ch. 37, *Farm Leases* . For discussion and forms related to leases, see Ch. 34A, *Prelease Forms* , Ch. 35A, *Assignment and Sublease of Leasehold Interests* , Ch. 35B, *Modification and Termination of Leases* , and Ch. 38, *Real Property Management* . For discussion and forms relating to unlawful detainer proceedings, see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

This chapter does not cover the landlord-tenant relationship between a mobilehome park owner or the mobilehome park management and a mobilehome owner. For extensive coverage of that relationship, see Ch. 39, *Mobilehome Parks* .

FOOTNOTES:

(n43)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California, at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multi-state retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

(n44)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.

(n45)Footnote ***. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.



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PART I. RESEARCH GUIDE
A. Primary Sources

17-34B California Legal Forms--Transaction Guide § 34B.01

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.01 California Statutes

Unruh Civil Rights Act. *Civ. Code § 51 et seq.*

Restrictions against transfer of real property on basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or source of income is void. *Civ. Code §§ 782, 782.5*.

Possession under lease must commence within 30 years. *Civ. Code § 715*.

Lease of town or city lot may not exceed 99 years. *Civ. Code § 718*.

Property owned by municipality subject to 55-year term limitation. *Civ. Code § 718*; *Gov. Code § 37380*.

Estate for years. *Civ. Code § 761(3)*.

Termination of tenancy at will by landlord. *Civ. Code § 789*.

Landlord may not willfully interrupt or terminate any utility service furnished to tenant. *Civ. Code § 789.3*.

Rights of tenant for years. *Civ. Code §§ 819, 820*.

Rights of grantee of real property to rent. *Civ. Code § 821*.

Landlord's remedies against tenant's assignee. *Civ. Code § 822*.

Tenant's rights against landlord's assignee. *Civ. Code § 823*.

Change of terms of month-to-month or week-to-week lease. *Civ. Code § 827*.

Rights of landowner to fixtures attached by another. *Civ. Code § 1013*.

Delivery and acceptance of lease. *Civ. Code §§ 1054-1056*.

Writing necessary for transfer of estate, other than estate at will or for term not exceeding one year. *Civ. Code § 1091*.

Attorney-in-fact must sign both principal's name and his or her name when executing lease. *Civ. Code § 1095*.

Lease to set forth both current name and name landlord took title in, if different. *Civ. Code § 1096*.

Disclosures on transfer of residential property. *Civ. Code § 1102 et seq.*

Condition involving forfeiture to be strictly interpreted against party benefiting from forfeiture. *Civ. Code § 1442*.

Transfer of obligations. *Civ. Code §§ 1457-1471*.
Covenants appurtenant to land. *Civ. Code § 1460*.
Covenants running with land. *Civ. Code §§ 1461, 1462*.
Covenant to pay rent runs with land. *Civ. Code § 1463*.

Required elements of lease as contract. *Civ. Code § 1550 et seq.*
Parties capable of contracting. *Civ. Code §§ 1550(1), 1556* (incapacity).
Parties must be identifiable. *Civ. Code § 1558*.
Consent of parties. *Civ. Code §§ 1565-1590*.
Sufficient consideration. *Civ. Code §§ 1605-1615*.

Validity of oral contracts. *Civ. Code § 1622*.

Contracts that must be in writing (Statute of Frauds). *Civ. Code § 1624*.

Foreign language translation of leases and other documents. *Civ. Code § 1632*.

Interpretation of lease as contract. *Civ. Code §§ 1635-1662*.
Lease to give effect of mutual intention of parties. *Civ. Code § 1636*.
Lease to be read as a whole and to result in reasonable agreement not in violation of intent of parties. *Civ. Code § 1641*.
Ambiguity to be construed against party causing uncertainty. *Civ. Code § 1654*.

Liquidated damages provisions. *Civ. Code §§ 1671, 1951.5*.

Hiring of property. *Civ. Code §§ 1925-1936*.
Covenant of quiet enjoyment and possession. *Civ. Code § 1927*.
Tenant's duty to use ordinary care for preservation of property. *Civ. Code § 1928*.
Tenant's duty to repair. *Civ. Code § 1929*.
Tenant's use restricted to purpose stated in lease. *Civ. Code § 1930*.
Premature termination by landlord. *Civ. Code § 1931*.
Premature termination by tenant. *Civ. Code § 1932*.
Destruction of premises terminates lease. *Civ. Code § 1933(4)*.

Leasing land and dwellings. *Civ. Code § 1940 et seq.*
Tenant's possession of waterbed. *Civ. Code § 1940.5*.
Landlord's duty to provide notice of application for permit to demolish premises. *Civ. Code § 1940.6*.
Landlord's duty to disclose former ordnance location. *Civ. Code § 1940.7*.
Landlord's duty to provide new tenants with notice of periodic pest control service. *Civ. Code § 1940.8*.
Failure to provide separate gas and electric meters for each dwelling unit. *Civ. Code § 1940.9*.
Landlord's duty to put and keep premises in condition fit for human occupation. *Civ. Code § 1941*.
Standard characteristics necessary for habitation as dwellings. *Civ. Code § 1941.1*.
Violation by tenant of affirmative obligations. *Civ. Code § 1941.2*.
Locks and keys. *Civ. Code § 1941.3*.
Telephone jack and wiring. *Civ. Code § 1941.4*.
Tenant's right to repair and deduct or vacate. *Civ. Code § 1942*.
Waiver of tenant's rights contrary to public policy. *Civ. Code § 1942.1*.
Agreement to arbitrate dispute regarding tenantable premises. *Civ. Code § 1942.1*.
Penalties for demanding or collecting rent, issuing notice of rent increase, or issuing three-day notice to pay rent for untenantable dwelling. *Civ. Code § 1942.4*.
Presumed rental period for dwellings lease. *Civ. Code § 1944*.
Implied renewal of lease. *Civ. Code § 1945*.
Requirements for automatic renewal or extension provisions. *Civ. Code § 1945.5*.
Thirty-day notice required to terminate lease. *Civ. Code § 1946*.
Termination by tenant who is victim of domestic violence, sexual assault or stalking. *Civ. Code § 1946.7*.
Sixty-day notice required to terminate periodic tenancy when tenant has been living in dwelling for at least one year. *Civ. Code § 1946.1*.
Time for payment of rent in absence of contrary contract or usage. *Civ. Code § 1947*.
Payment of rent or security deposit in cash. *Civ. Code § 1947.3*.
Security deposits. *Civ. Code § 1950.5*.
Application screening fee. *Civ. Code § 1950.6*.
Landlord's recovery following termination of lease. *Civ. Code § 1951.2*.
Abandonment of leased property. *Civ. Code § 1951.3*.
Continuation of lease after tenant's breach and abandonment. *Civ. Code § 1951.4*.
Certain lease provisions void. *Civ. Code § 1953*.
Entry by landlord. *Civ. Code § 1954*.

Residential rent control; Costa-Hawkins Rental Housing Act. *Civ. Code §§ 1954.50-1954.535*.

Identification of property owners. *Civ. Code §§ 1961-1962.7*.
Disclosure to tenant of name of manager and owner or agent for purposes of service of process and receiving and receipting notices and demands. *Civ. Code § 1962(a)(1)*.
Disclosure to tenant of name, address, and telephone number of person or entity to whom rent payments must be made. *Civ. Code § 1962(a)(2)*.
Posting of information in elevator or conspicuous places. *Civ. Code § 1962.5*.

Return of tenant's personal property on written request. *Civ. Code § 1965*.

Disposition of personal property remaining on premises at termination of tenancy. *Civ. Code §§ 1980-1991*.
Notification of tenant. *Civ. Code § 1983*.
Form of notice to tenant. *Civ. Code § 1984*.
Storage of abandoned property. *Civ. Code § 1986*.
Release of personal property. *Civ. Code § 1987*.
Sale of abandoned property. *Civ. Code § 1988*.

Authority of agent to execute lease. *Civ. Code §§ 2304, 2305*.

"Nuisance" defined. *Civ. Code § 3479*.

Waste committed by tenant. *Code Civ. Proc. § 732*.

Unlawful detainer action. *Code Civ. Proc. § 1161 et seq.*
Unlawful detainer. *Code Civ. Proc. § 1161*.
Unlawful detainer as forfeiture of agreement. *Code Civ. Proc. § 1161.5*.

Service of notice to quit. *Code Civ. Proc. § 1162*.

Eminent Domain Law. *Code Civ. Proc. § 1230.010 et seq.*

California Arbitration Act. *Code Civ. Proc. § 1280 et seq.*

Writing required for grant of lease with term of one year or longer. *Code Civ. Proc. § 1971*.

Corporation's power to lease property. *Corp. Code §§ 207, 208*.

Partnership's power to lease property. *Corp. Code §§ 16302, 16303*.

Limited liability company's power to lease property. *Corp. Code §§ 17002, 17003*.

Unincorporated association's power to lease property. *Corp. Code § 18105*.

Spouses' signatures required for certain leases of community property. *Fam. Code § 1102*.

Definition of minor. *Fam. Code § 6500*.

Emancipated minor. *Fam. Code § 7002*.

California Fair Employment and Housing Act. *Gov. Code § 12900 et seq.*

Instruments affecting real estate title are recordable. *Gov. Code § 27280*.

State Housing Law. *Health & Safety Code § 17910 et seq.*

State Building Standards Law. *Health & Safety Code § 18901 et seq.*

Lease of property of unemancipated minor or incompetent person. *Prob. Code §§ 2550-2555*.

Authority of attorney-in-fact to execute lease. *Prob. Code §§ 4123(a), (b), 4261*.

Lease of decedent's property. *Prob. Code §§ 9940-9948*.

Uniform Statutory Rule Against Perpetuities. *Prob. Code § 21200 et seq.*



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17-34B California Legal Forms--Transaction Guide § 34B.02

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.02 Federal Statutes

United States Housing Act of 1937 (HUD). *42 U.S.C. § 1437 et seq.*

Civil Rights Act of 1866. *42 U.S.C. § 1981 et seq.*

Fair Housing Act of 1983. *42 U.S.C. § 3601 et seq.*

Lead-based paint disclosures. *42 U.S.C. § 4852d.*



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17-34B California Legal Forms--Transaction Guide §§ 34B.03-34B.04

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§§ 34B.03[Reserved]



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B. Secondary Sources

17-34B California Legal Forms--Transaction Guide § 34B.05

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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17-34B California Legal Forms--Transaction Guide § 34B.07

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.07 Text References

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Ch. 34D, *Ground Leases*.

Ch. 34E, *Shopping Centers: Leasing and Operation*.

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Ch. 35B, *Modification and Termination of Leases*.

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Ch. 37, *Farm Leases*.

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[Reserved]

§§ 34B.08[Reserved]



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.10 Terminology

[1] "Landlord" and "Tenant"

This chapter uses the terms "landlord" and "tenant," rather than "lessor" and "lessee," to refer to the parties to a lease. In a strict sense, the terms "lessor" and "lessee" should be used only to refer to the parties to a formal lease and not to the parties to a tenancy at will or oral rental agreement. However, the terms have come to be used almost interchangeably with "landlord" and "tenant" [*see Stone v. City of Los Angeles (1931) 114 Cal. App. 192, 199, 299 P. 838]* .

Some practitioners use "landlord" and "tenant" to avoid confusion and potential clerical error. Furthermore, there is a judicial preference to use the terms "landlord" and "tenant." As one court explained, "when there are only a few letters which differentiate key terms, it is generally better to use easily differentiated synonyms" [*SDC/Pullman Partners v. Tolo Inc. (1997) 60 Cal. App. 4th 37, 42 n.5, 70 Cal. Rptr. 2d 62]* .

[2] "Lease"

Although a statute enacted in 1872 uses the term "hiring" to refer to the contract by which one gives to another the temporary possession and use of property [*see Civ. Code § 1925*; *see also Civ. Code §§ 1926-1936* (other statutes governing hiring)], many California statutes use the term "lease" to refer to these agreements [*see, e.g., Civ. Code § 1945.5*]. Others refer to both leases and rental agreements, and appear to use the two terms interchangeably [*see, e.g., Civ. Code §§ 1632, 1953*].

Neither "lease" nor "rental agreement" is defined by statute. The courts have defined "lease" as an agreement whereby the relation of landlord and tenant is created. It imports the giving, for a consideration by the greater estate's owner, of the possession and use of a lesser estate in his or her property with a reversion to the greater estate's owner at the term's end [*Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316, 281 Cal. Rptr. 298* ; *see § 34B.12[1]*].

Because many cases provide that one of the essential elements of a lease is a definite and agreed term [*see § 34B.15[1]*

for discussion of required elements of lease], it can be argued that "lease" refers only to an agreement creating a tenancy for years, which is a tenancy for a fixed term [*see § 34B.14[2]* for discussion of tenancy for years]. Indeed, the term "rental agreement" is sometimes used to refer to agreements creating periodic tenancies [*see, e.g., § 34B.202* (form of Residential Lease or *Month-to-Month Rental Agreement* [emphasis added])], which have indefinite terms [*see, e.g., Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 17, 270 Cal. Rptr. 600* ; *see also § 34B.14[1]* for discussion of periodic tenancies]. However, most cases use the term "lease" to refer to all agreements creating the landlord-tenant relationship [*see, e.g., Green v. Superior Court (1974) 10 Cal. 3d 616, 622-629, 11 Cal. Rptr. 704, 517 P.2d 1168* (discussion of changes in concept of residential landlord-tenant relationship)], and this chapter adopts that definition.

PRACTICE TIP:

Use "Rental Agreement" for Heading of Month-to-Month Tenancy Agreements. Because many lay persons believe that a "lease" is for a fixed term, it is advisable to use the heading "Rental Agreement" (rather than "Lease") at the top of a month-to-month tenancy agreement. *By Myron Moskovitz.*

[3] "Nonresidential Lease"

The term "nonresidential lease," as used in this chapter, refers collectively to retail, industrial, and office leases. For detailed coverage of nonresidential leases, see Ch. 34C, *Retail, Industrial, and Office Leases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesTerm Tenancies



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.11 Creation of Leasehold Interest

[1] By Written Agreement

A tenancy in real property is usually created by a written lease. A lease need not contain particular legal terminology, provided it shows the intention to establish the relationship of landlord and tenant [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 636, 96 P.2d 122* ; *see Baranov v. Scudder (1918) 177 Cal. 458, 460, 170 P. 1122* (lease need not use any particular language or words, such as "let" or "demise")]. Likewise, the fact that the written agreement between the parties contains terms such as "lessor," "lessee," and "demise and lease" is not conclusive on the issue of whether the parties entered into a lease [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 31, 31 Cal. Rptr. 2d 378]* . For further coverage of the essential elements of a lease, see *§ 34B.15*.

[2] By Oral Agreement

The agreement may be oral, unless it is subject to the statute of frauds [*see § 34B.15[3]* for discussion of requirement that a lease be in writing]. However, the relationship of landlord and tenant is not created by an oral agreement when the parties intend that they not be bound until the oral agreement is reduced to writing and executed [Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 639-641, 198 P.2d 1 , *overruled on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 497, 15 Cal. Rptr. 87, 364 P.2d 263]* .

[3] By Operation of Law

The relationship of landlord and tenant may also come into existence by operation of law without an enforceable agreement between the parties [*Pacific Coast Etc. Land Bank v. Jones (1939) 14 Cal. 2d 8, 13-14, 92 P.2d 390]* . For example, one may become a tenant at will or a periodic tenant under an invalid lease, or without any lease at all, by occupying the premises with the owner's consent [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507* ; *see Parkmerced Co. v. San Francisco Rent Stabilization & Arbitration Bd. (1989) 215 Cal. App. 3d 490, 494, 263 Cal. Rptr. 617]* . Whether consent and acceptance of rent creates a landlord-tenant relationship depends on the particular circumstances of each case [*Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625,*

630, 284 Cal. Rptr. 631] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of FraudsReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at Will



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17-34B California Legal Forms--Transaction Guide § 34B.12

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.12 Lease of Real Property

[1] Definition of Leasehold Interest

A lease is an agreement by which the relationship of landlord and tenant is created [*Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316, 281 Cal. Rptr. 298* ; *Stone v. City of Los Angeles (1931) 114 Cal. App. 192, 198, 299 P. 838]* . A lease grants to the tenant the exclusive use and possession of the premises for a definite period of time, in return for consideration. The landlord retains the fee interest in the property. During the lease's term, the tenant's present possessory interest is good against the whole world, including the landowner [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 972, 269 Cal. Rptr. 807]* . For example, an agreement that grants only sporadic use of the premises, with shared control by the owner during each use, cannot be deemed possession and control "exclusive" of the owner's possession and is therefore not a lease [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 33, 31 Cal. Rptr. 2d 378* (baseball team owner's possession and control of stadium premises on approximately 81 dates, with city concurrently operating all concession and parking facilities and providing security did not create leasehold interest)]. When the tenancy created by the lease terminates, the right of use and possession reverts back to the landlord [*Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316, 281 Cal. Rptr. 298* ; *Stone v. City of Los Angeles (1931) 114 Cal. App. 192, 199, 299 P. 838]* .

[2] Dual Character of Lease

[a] Nature of Dual Character

A lease has a dual character. It is primarily a conveyance to the tenant of an interest in the real property, but it is also a contract between the landlord and tenant. Because of this dual character, a lease creates two distinct sets of rights and obligations. One set is based on "privity of estate" and arises out of the landlord-tenant relationship created by the conveyance, while the other is based on "privity of contract" and results from the express provisions of the lease [*Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457* ; *Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507]* . As a conveyance, the provisions of a lease "run with the land" and, therefore, are binding on successors to the original landlord and tenant. If the lease were only a contract,

the provisions would bind only the original parties [*see Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507]* .

[b] As a Conveyance

A lease is considered to be primarily a conveyance because it conveys an interest in land to the tenant [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 709-710, 42 Cal. Rptr. 133* ; *see Civ. Code § 761(3)* (estate for years is an estate in real property)]. The interest conveyed by the lease is called the "tenancy" or "leasehold" [*Stone v. City of Los Angeles (1931) 114 Cal. App. 192, 200, 299 P. 838]* . The term "estate for years" is another name for a leasehold estate [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 972, 269 Cal. Rptr. 807]* . It is a present interest and estate in the land owned by the landlord [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . The leasehold interest is carved out of the fee owner's greater estate, and belongs to the tenant subject to the covenants of the lease [*Kolstad v. Ghidotty (1963) 212 Cal. App. 2d 228, 231, 28 Cal. Rptr. 123]* . The leasehold gives the tenant the right to occupy the land and hold it in his or her own right against the landlord (subject to the landlord's rights) and all other persons [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 972, 269 Cal. Rptr. 807* ; *Kolstad v. Ghidotty (1963) 212 Cal. App. 2d 228, 231, 28 Cal. Rptr. 123]* .

Under California law an estate for years is not real property at all but rather a chattel real--a form of personalty--even though the substance of the estate, being land, is real property [*Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162, 2 Cal. Rptr. 2d 536, 820 P.2d 1046* ; *see Civ. Code § 765* (estates for years are chattels real)], regardless of the term's duration [*Bachenheimer v. Palm Springs Etc. Corp. (1953) 116 Cal. App. 2d 580, 592-593, 254 P.2d 153]* . For example, the sale or assignment by a tenant of his or her leasehold interest is the transfer of a personal property interest [*see Dabney v. Edwards (1935) 5 Cal. 2d 1, 9, 53 P.2d 962* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 118, 43 P.2d 788]* . Similarly, if a tenant assigns his or her leasehold interest as security for payment of a debt, the security interest created is one in personal property and subject to regulation under the Uniform Commercial Code [*see, e.g., Security Pacific Nat. Bank v. Casavant (1988) 205 Cal. App. 3d 127, 132, 252 Cal. Rptr. 175* (lease assignment as security not considered "purchase money" mortgage)].

As a conveyance, a lease is not effective until it is delivered unconditionally to the tenant [*see § 34B.15[4]*]. It also must be in writing if it is for a term longer than one year [*see § 34B.15[3]*].

[c] As a Contract

Because a lease is a contract, the basic rules of contract interpretation are applicable to the construction of leases [*Wu v. Interstate Consolidated Industries (1991) 226 Cal. App. 3d 1511, 1515, 277 Cal. Rptr. 546* ; *see* [3], *below*]. In addition, contract remedies are applicable by statute to specific lease situations [*see, e.g., Civ. Code § 1951.2* (recovery of damages by landlord on lease's termination)].

California courts have increasingly recognized the largely contractual nature of contemporary lease agreements and have frequently analyzed the terms of a lease in accordance with contractual principles [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 624, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The application of contract principles, including the mutual dependency of covenants [*see § 34B.20* for discussion of nature of covenants in leases], is particularly appropriate in dealing with residential leases of urban dwelling units. Consistent with this reasoning, the California Supreme Court has held the following [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see § 34B.26[3]*]:

- There is an implied warranty of habitability in residential leases in California;
- The landlord's implied warranty of habitability and the tenant's covenant to pay rent are dependent covenants; and

- A breach of the implied warranty of habitability excuses the tenant from his or her duty to pay rent.

[3] Interpretation and Construction of Leases

Because a lease is a contract as well as a conveyance [*see* [2][a], *above*], it is subject to the statutory rules for interpretation and construction of contracts [*Wu v. Interstate Consolidated Industries (1991) 226 Cal. App. 3d 1511, 1515, 277 Cal. Rptr. 546* ; *see Medico-Dental Etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-419, 132 P.2d 457* ; *see also Civ. Code §§ 1635-1662*]. For example, the following rules of interpretation and construction apply to leases:

- A lease must be interpreted so as to give effect to the parties' mutual intention as it existed when the lease was executed [*Civ. Code § 1636*; *Medico-Dental Etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-419, 132 P.2d 457]* ;

- A lease must receive an interpretation that would make it a reasonable agreement, so long as that interpretation does not violate the parties' intent [*Civ. Code § 1641*; *Wu v. Interstate Consolidated Industries (1991) 226 Cal. App. 3d 1511, 1515, 277 Cal. Rptr. 546]* ;

- A lease should be read as a whole so that each clause aids in the interpretation of the others [*Civ. Code § 1641*; *Wu v. Interstate Consolidated Industries (1991) 226 Cal. App. 3d 1511, 1515, 277 Cal. Rptr. 546]* ; and

- Any ambiguities in a lease must be interpreted most strongly against the party who caused the uncertainty to exist. This rule may be used only if the other rules of construction are not able to resolve the issue of interpretation [*Civ. Code § 1654*; *see Cooper v. Mart Associates (1964) 225 Cal. App. 2d 108, 116, 37 Cal. Rptr. 145]* .

Further, if a condition involves a forfeiture of the leasehold interest, it must be strictly interpreted against the party for whose benefit it was created [*Civ. Code § 1442*; *see McNeece v. Wood (1928) 204 Cal. 280, 283-284, 267 P. 877]* . The burden is on the party claiming the forfeiture to show that forfeiture was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid forfeiture, it should be [*Sanders v. East Bay Mun. Utility Dist. (1993) 16 Cal. App. 4th 125, 130, 20 Cal. Rptr. 2d 1]* .

For extensive coverage of the interpretation and construction of leases, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender). The statutory rules for the construction of contracts are discussed in Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

PRACTICE TIP:

Anticipate Disputes Which Could Lead to Litigation. To minimize the likelihood of expensive litigation down the road, the attorney must draft lease terms as clearly as possible, taking into account the particular needs of the parties and the issues which are most likely to lead to disputes. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord &

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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.13

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.13 Lease Distinguished From License

An agreement for the use and occupancy of land or other premises may be either a lease or a license. A lease gives exclusive possession of the premises against all other persons, including the owner, to the tenant [*Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879* ; *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc. (1995) 31 Cal. App. 4th 1323, 1330, 37 Cal. Rptr. 2d 552]* . Thus, the test for determining whether an agreement for the use of land is a lease or a license is as follows: if the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease; however, if it merely confers a privilege to occupy under the owner, it is a license [*O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 909, 159 Cal. Rptr. 125]* .

The question of whether an instrument is a lease or merely conveys a license is a question of law that must be determined from the instrument itself [*Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879]* . For further discussion of the distinctions between leases and licenses, see California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLimited Use RightsLicenses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.14

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§ 34B.14 Types of Tenancies

[1] Periodic Tenancy

[a] Term

[i] Duration

A periodic tenancy, also referred to as a week-to-week, month-to-month, or year-to-year tenancy, has an indefinite term, in contrast to a tenancy for years [*see § 34B.14[2]*], which has a fixed term. A rental of a dwelling for an unspecified term is presumed to be for the length of time that the parties adopt for the estimation of rent. For example, a rental at a monthly rate of rent is presumed to be for one month [*Civ. Code § 1944*].

[ii] Termination

A periodic tenancy continues for successive periods of time of the same length unless either party gives written notice of termination in the manner prescribed by statute [*Civ. Code §§ 1945, 1946, 1946.1*; *Renner v. Huntington Etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895]* . For example, a month-to-month tenancy can be terminated only by written notice given 30 days in advance [*Civ. Code § 1946*; *Wallace v. Daley (1990) 220 Cal. App. 3d 1028, 1039, 270 Cal. Rptr. 85* (tenant's acquisition of one-third interest in property did not terminate tenancy)]. A notice terminating a month-to-month tenancy may be served at any time during the monthly term to take effect 30 days thereafter. There is no need to serve a 30-day notice terminating a tenancy co-terminus with the tenancy itself. Rent would be owing from the date due to the date of the tenancy's termination [*see Civ. Code § 1946*].

In addition, special notice requirements apply to the termination of periodic tenancies when the tenant has lived in the dwelling for a year or more. In these cases, an owner must give notice at least 60 days (not 30 days) before the proposed date of termination [*Civ. Code § 1946.1(a)-(c)*]. Furthermore, in a rent control jurisdiction, the landlord may not be able to terminate a periodic (or other type) tenancy by simply complying with the statutory notice requirements since some of those jurisdictions permit evictions only for certain enumerated "grounds" [*see § 34B.23* for discussion of rent

control].

A tenant may notify the landlord that he or she or a household member was a victim of an act that constitutes an act of domestic violence [*see Fam. Code § 6211*], sexual assault [*see Pen. Code §§ 261, 261.5, 262, 286, 288a, 289*], or stalking [*Civ. Code § 1708.7*] and that the tenant intends to terminate the tenancy [Code Civ. Proc. § 1946.7(a)]. A tenant who provides a notice of termination under *Civ. Code § 1946.7* is responsible for payment of rent for 30 days following the giving of the notice, or within the appropriate period as described in *Civ. Code § 1946*, and thereafter is released from any rent payment obligation under the rental agreement without penalty [Code Civ. Proc. § 1946.7(d)].

A significant distinction between a periodic tenancy and a tenancy for years [*see § 34B.14[2]* for discussion of tenancy for years] is that the former requires notice to terminate while the latter does not [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* . For detailed coverage of the statutory requirements governing the termination of a periodic tenancy, see Ch. 35B, *Modification and Termination of Leases* .

[iii] Tenant's Death

In the event of a tenant's death, there is an exception to the rule requiring a specific notice of termination of a periodic tenancy [*see* [ii], *above*]. In this event, a periodic tenancy is terminated by a notice of the tenant's death under the provisions of *Civ. Code § 1934* (a "hiring" is terminated by the death of a party) and no further notice, such as the termination notice under *Civ. Code § 1946*, is required [*Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 18, 270 Cal. Rptr. 600]* . In the event of a tenant's death under a month-to-month tenancy, the tenancy is terminated as of the 30th day following the tenant's last payment of rent before the tenant's death [*Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 18, 270 Cal. Rptr. 600]* .

[b] Creation of Tenancy

A periodic tenancy may be created in several ways. In residential leases, it is often created by an express provision of the lease stating that the tenancy will be month-to-month or year-to-year. For a form to create a periodic tenancy, see *§ 34B.220*.

A periodic tenancy may also be created by a lease for an indefinite term that provides for monthly payments of rent [*Wallace v. Daley (1990) 220 Cal. App. 3d 1028, 1039, 270 Cal. Rptr. 85* (agreement for monthly rent created month-to-month tenancy)]. A periodic tenancy is also created when a tenant pays rent under a void lease [*Kingston v. Colburn (1956) 139 Cal. App. 2d 623, 625, 293 P.2d 805]* or when the tenant continues to pay rent after a lease has been extinguished by foreclosure proceedings [*Dover Mobile Estates v. Fiber Form Products, Inc. (1990) 220 Cal. App. 3d 1494, 1550-1551, 270 Cal. Rptr. 183]* .

For additional coverage, see California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

[2] Tenancy for Years

A tenancy for years, also referred to as a tenancy for a fixed term or an estate for years, is one for a definite period [*Chandler v. Hart (1911) 161 Cal. 405, 410, 119 P. 516]* , the duration of which must be capable of exact computation when it becomes possessory [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665-666, 197 P.2d 345]* . The term may be of any length [*Guy v. Brennan (1923) 60 Cal. App. 452, 456, 213 P. 265* ; *see Stoppelkamp v. Mangeot (1871) 42 Cal. 316, 323* (tenancy with specified term of one month was tenancy for years and not month-to-month tenancy)]. Unlike a periodic tenancy or a tenancy at will, a tenancy for years terminates at the end of the stated term without any requirement of notice [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665-666, 197 P.2d 345]* . However, if a tenant holds over after expiration of the lease's term and the landlord thereafter accepts rent from the tenant, the parties are presumed to have renewed the lease on the same terms and for the same length of time (not exceeding one month when

the rent is payable monthly, or one year in any case) [*Civ. Code § 1945*].

The complete lease *forms in § 34B.200[2]* (apartment lease) and § 34B.201[2] (lease of single-family residence) each provide for a tenancy for years. For additional discussion of tenancies for years, see California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

[3] Tenancy at Will

A tenancy at will is an estate that confers, with the landlord's consent, a right to possession of the premises leased for an indefinite period of time, with no express provision for rent [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 793-794, 284 P.2d 580* ; *Elias Blum v. J. R. Robertson (1864) 24 Cal. 127, 145]* . The tenancy may be created by an express or implied agreement [*see Carteri v. Roberts (1903) 140 Cal. 164, 167, 73 P. 818* (implied); *Elias Blum v. J. R. Robertson (1864) 24 Cal. 127, 145* (express)]. A tenancy at will may arise under a variety of circumstances, such as an entry on land with the owner's permission (1) under a void parol contract, (2) under a void lease, or (3) pending unexecuted negotiations for a written lease [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 793, 284 P.2d 580]* .

A tenancy at will may be terminated by either party "at will" [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 793-794, 284 P.2d 580]* . The landlord must comply with the statutory notice requirements for terminating a tenancy at will [*see Civ. Code § 789*; *Code Civ. Proc. §§ 1161, 1162*]. It appears from the wording of *Civ. Code § 789* that notice is required only when the landlord seeks to terminate the tenancy at will. The statute is silent as to any notice requirement when the tenant wishes to terminate the relationship [*Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 18, 270 Cal. Rptr. 600]* .

Furthermore, a tenancy at will is terminated when it is converted to a periodic tenancy by the tenant's payment, and the landlord's acceptance, of periodic rent payments [*see Civ. Code §§ 1943-1945*; *Redevelopment Agency v. Superior Court (1970) 13 Cal. App. 3d 561, 570, 91 Cal. Rptr. 886* ; *Palmer v. Zeis (1944) 65 Cal. App. 2d Supp. 859, 862, 151 P.2d 323]* .

For coverage of these termination requirements, see Ch. 35B, *Modification and Termination of Leases* . For additional coverage of tenancies at will, see California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

[4] Tenancy at Sufferance

A tenancy at sufferance arises when a person who entered the property lawfully holds over without any rightful title and without the landlord's consent [*see Hull v. Laugharn (1934) 3 Cal. App. 2d 310, 314, 39 P.2d 478* ; *Gartlan v. C. A. Hooper & Co. (1918) 177 Cal. 414, 425-426, 170 P. 1115]* . For example, a tenancy at sufferance arises when the tenant under a lease for a fixed term holds over on the expiration of the lease and the landlord does not reenter or give notice to quit [*Uridias v. Morrell (1864) 25 Cal. 31, 32, 35* ; *Kuhn v. Smith (1899) 125 Cal. 615, 617, 58 P. 204]* .

PRACTICE TIP:

Rent Control Ordinances or Lease Provisions May Change Tenancy at Sufferance. Although the common law result of a given situation may be a tenancy at sufferance, any controlling local rent control ordinance should always be consulted to determine the possibility of a different result. For example, a rent control provision may treat a tenant under this set of circumstances as a periodic tenant, rather than as a tenant at sufferance. Or, rent contol ordinances often define "tenant" to include "a person entitled *by sufferance* to occupy a residential dwelling unit" [*see, e.g.,* San Francisco Rent Stabilization and Arbitration Act § 37.2(t) (emphasis added)]. Also, some leases may provide that the tenant becomes a periodic tenant, subject to payment of a specified amount of rent, which may be an amount different

from or the same as the amount specified in the original lease. *By Benjamin Kaplan and Publisher's Editorial Staff.*

The feature that distinguishes a tenancy at sufferance from a tenancy at will is the absence of consent by the landlord; a tenancy at will is always by right and by permission of the landlord [*Hull v. Laugharn (1934) 3 Cal. App. 2d 310, 314, 39 P.2d 478]* . A tenancy at sufferance also differs from a tenancy at will or a periodic tenancy in that no notice to surrender possession is required to terminate a tenancy at sufferance [*Renner v. Huntington Etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895]* .

PRACTICE TIP:

Termination May Be Restricted by Local Rent Control Ordinance. Check your local rent control ordinances. If a tenancy at sufferance is subject to local eviction controls, then notice with appropriate "good cause to evict" may be required to terminate the lease. *By Benjamin Kaplan.*

A tenant at sufferance has only "naked possession" of the premises. The tenant does not stand in privity to the landlord and therefore is not liable for rent [*McLeran v. Benton (1887) 73 Cal. 329, 340, 14 P. 879]* . The tenant may be liable, however, for the reasonable value of the use of the premises without regard to previous rental rates [*Colyear v. Tobriner (1936) 7 Cal. 2d 735, 742, 62 P.2d 741]* .

A tenant at sufferance is guilty of unlawful detainer, and the landlord may commence an action against the tenant under *Code Civ. Proc. § 1161(1)* without serving a notice to quit [*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356]* . Further, the landlord may bring an ejectment action to remove the tenant without serving a notice to quit [*Moon v. Marker (1938) 26 Cal. App. 2d 33, 36-37, 78 P.2d 460]* .

PRACTICE TIP:

Local Rent Control Ordinances May Require a Notice to Quit. If there is a local rent control ordinance, a notice to quit may be required to evict a tenant at sufferance. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.15

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.15 Formal Requirements for Lease

[1] Required Elements

[a] Dual Character

Since a lease is both a contract and a conveyance [*Ellingson v. Walsh, O'Connor and Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507* ; *Medico-Dental Etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457* ; *see § 34B.12[2]*], it must, as a general rule, comply with the requirements applicable to both.

[b] As a Contract

As a contract, a valid lease requires all of the following:

- Parties capable of contracting [*Civ. Code §§ 1550(1), 1556* (incapacity), 1558 (identifiable parties); *see* [2][a], [b], *below*];

- Consent of the parties [*Civ. Code § 1550(2)*; *see Civ. Code §§ 1565-1590* (consent)];

- A lawful object [*Civ. Code § 1550(3)*; *see Civ. Code §§ 1595-1599* (object), 1667-1670.5 (unlawful contracts)]; and

- Sufficient cause or consideration [*Civ. Code § 1550(4)*; *see Civ. Code §§ 1614* (written instrument is presumptive evidence of consideration), 1605-1615 (consideration); *see also § 34B.18*].

For additional coverage of basic contract law, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[c] As a Conveyance

As a conveyance (or "grant," as it is called in the Civil Code [*Civ. Code § 1053*]), a lease is not effective until it is delivered unconditionally [*see* [4], *below*]. Further, it must be in writing if it is for a term longer than one year [*see* [3], *below*].

The necessary elements of a lease are as follows [*Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316, 281 Cal. Rptr. 298* ; *City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* :

- A designation of the parties [*see* [2][a], *below*];
- A description of the premises [*see § 34B.16*];
- The rent to be paid [*see § 34B.18[2]*];
- The time and manner of payment [*see § 34B.18[2]*]; and
- The term for which the tenant will rent the property [*see § 34B.17*].

Although the above elements are necessary to the existence of a lease, they are not sufficient alone to create a lease unless the parties so intend [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727* ; *see Back v. New York Merchandise Co. (1961) 196 Cal. App. 2d 434, 442, 16 Cal. Rptr. 591]* . A lease instrument must show an intention to establish the relationship of landlord and tenant [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 636, 96 P.2d 122* ; *Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316-317, 281 Cal. Rptr. 298]* . Whether or not the instrument shows this intention must be determined by a construction of the instrument in light of the circumstances surrounding its execution [*Back v. New York Merchandise Co. (1961) 196 Cal. App. 2d 434, 442, 16 Cal. Rptr. 591* ; *City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53-54, 2 Cal. Rptr. 727]* .

[d] Lease Terminology

No particular legal terminology is required in the making of a lease [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 636, 96 P.2d 122]* . The parties need not characterize the agreement as a lease, but such a characterization is some evidence that the parties intended that the instrument operate as a lease [*Sherwin v. Bogosian (1931) 112 Cal. App. 359, 364, 296 P. 641* ; *but see Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 31, 31 Cal. Rptr. 2d 378* (terms such as "lessor," "lessee," and "demise and lease" used in agreement did not prove that lease was created)].

[2] Parties to Lease

[a] Identification

A lease must set forth the parties' names [*Frey v. Corbin (1948) 84 Cal. App. 2d 536, 539, 191 P.2d 21* ; *see Civ. Code § 1558* (parties must be identifiable for valid contract)]. The full name of each party should be used, and counsel should verify the spelling. If the property is owned by more than one person or entity, each should be named as landlord under the lease [*see* [d][ii], *below*]. Likewise, if several tenants will be assuming possession of the property, each tenant should be named in the lease [*see* [d][i], *below*].

The legal status of each landlord and tenant should also be recited in the introductory paragraphs of the lease [*see § 34B.210* for a form illustrating recitals of names and status of various individuals and entities]. Additional descriptive information, such as an address or the nature of the party's interest in the property, should be included if necessary to

clearly identify the party. For further discussion of the legal status of the parties, see California Real Estate Law and Practice, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

A person who takes title in one name and then has his or her name changed must, in any subsequent lease or other conveyance of the real property, set forth the name under which he or she received title. If the lease does not comply with this requirement, it will be valid between the parties and those with notice, but the recordation of the instrument will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*]. See *§ 34B.211* for optional language to be used for this purpose.

[b] Capacity

[i] Capacity to Lease

The parties to the lease, as with any other contract, must be capable of contracting [*Civ. Code § 1550(1)*]. All persons are capable of contracting except the following [*Civ. Code § 1556*]:

- Minors [*see* [ii], *below*];
- Persons of unsound mind [*see* [iii], *below*]; and
- Persons deprived of civil rights.

[ii] Minors

A minor (that is, a person under 18 years of age) [*Fam. Code § 6500*] cannot make a contract relating to real property [*Civ. Code § 1556*; *Fam. Code § 6701(b)*; *Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 137, 225 P.2d 238* (contract is void)], unless he or she is an "emancipated minor" [*Fam. Code § 7050(e)(3)*]. An emancipated minor is a person under 18 years of age who meets one of the following criteria [*Fam. Code § 7002*]:

- He or she has entered into a valid marriage (whether or not the marriage has been dissolved);
- He or she is on active duty with the armed forces of the United States; or
- He or she has received a declaration of emancipation under *Fam. Code § 7122*.

An emancipated minor will be considered to be an adult for purposes of the minor's capacity to enter into a binding contract or to lease an interest in real property [*Fam. Code § 7050(e)(2), (3)*].

A court-appointed guardian may lease property owned by an unemancipated minor [*Prob. Code § 2550*]. A court order is required [*Prob. Code §§ 2550, 2553(a)*; *see Prob. Code § 2554* (terms of lease to be included in order)] unless the transaction is to the estate's advantage and either of the following conditions exist [*Prob. Code § 2555*]:

- The rental does not exceed $5,000 a month and the term does not exceed two years; or
- The lease is from month-to-month, regardless of the amount of the rental.

For further discussion, see Ch. 100B, *Contracts and Employment of Minors* .

[iii] Persons of Unsound Mind

A person of unsound mind who is entirely without understanding has no power to make a contract of any kind [*Civ.*

Code § 38]. If a person of unsound mind who is not entirely without understanding makes a contract before his or her incapacity has been judicially determined, the contract is subject to rescission [*Civ. Code §§ 39, 1689(b)(7)*]. After an adjudication of incapacity, a person of unsound mind cannot make any contract until restored to capacity [*Civ. Code § 40(a)*].

A court-appointed conservator may lease real property owned by an incompetent person [*Prob. Code § 2550*]. A court order is required [*Prob. Code §§ 2550, 2553(a)*; *see Prob. Code § 2554* (terms of lease to be included in order)] unless the transaction is to the estate's advantage and (1) the rental does not exceed $5,000 a month and the term does not exceed two years, or (2) the lease is from month-to-month, regardless of the amount of the rental [*Prob. Code § 2555*].

For further discussion, see Ch. 66, *Guardianship and Conservatorship Planning* .

[c] Married Persons

Both spouses, either personally or through an agent, must execute any instrument by which community property or any interest in the property is leased for a period longer than one year. This joint execution requirement does not apply to a lease between the spouses [*Fam. Code § 1102(a), (b)*].

If record title to community property is held in the name of one spouse, and that spouse leases the property or any interest in it to a good faith tenant who has no knowledge of the marriage relation, the lease is presumed valid. This presumption applies to leases executed on or after January 1, 1975. A similar presumption applies to leases of community property executed by the husband before that date [*Fam. Code § 1102(c)*].

For extensive coverage of community property, see Ch. 120, *Complete Marital Settlement Agreements* .

[d] Joint Tenants and Tenants in Common

[i] As Tenant Under Lease

When several tenants take possession of real property, they hold as tenants in common of the leasehold interest. The possession of one cotenant is possession for all of them [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 646, 321 P.2d 473]* . When several tenants sign a lease, their obligation is presumed to be joint and several unless the lease provides otherwise [*Wood v. Longyear (1925) 197 Cal. 723, 728-729, 242 P. 932* ; *see Civ. Code § 1659*].

[ii] As Landlord Under Lease

A single joint tenant or tenant in common, by executing a lease, may confer on a third party the same right of possession that the cotenant himself or herself has [*Atlantic Oil Co. v. County of Los Angeles (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006* ; *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123* ; *see* [c], *above*, for discussion of property owned by married persons]. Consequently, a cotenant has no right to oust a person who holds possession with the consent of another cotenant [*Lee Chuck v. Quan Wo Chong & Co. (1891) 91 Cal. 593, 598-599, 28 P. 45* ; *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123]* .

If only one joint tenant leases the joint tenancy property to a third party and the joint tenant dies during the lease's term, the lease expires on the landlord's death and the surviving joint tenant takes the property unencumbered by the lease [*Tenhet v. Boswell (1976) 18 Cal. 3d 150, 158-159, 133 Cal. Rptr. 10, 554 P.2d 330]* . During the existence of the joint tenancy, however, a lease to all of the joint property by one joint tenant is a valid and supportable contract insofar as the landlord's interest in the joint property is concerned [*Swartzbaugh v. Sampson (1936) 11 Cal. App. 2d 451, 458, 54 P.2d 73]* .

If one cotenant, as landlord, executes a lease with the knowledge of the other cotenants, and the other cotenants fail to

object, they have ratified the lease [*Halsey v. Robinson (1942) 19 Cal. 2d 476, 482, 122 P.2d 11]* . Acceptance of benefits under the lease also constitutes ratification [*Atlantic Oil Co. v. County of Los Angeles (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006]* .

[e] Personal Representatives

The executor or administrator of a decedent's estate may lease the decedent's real property [*Prob. Code §§ 9941, 9942*; *see Prob. Code §§ 9940-9948*]. A court order is required [*Prob. Code § 9942(a)*], unless the transaction is to the estate's advantage and either of the following conditions exist [*Prob. Code § 9941*]:

- The rental does not exceed $5,000 a month and the term does not exceed one year; or
- The lease is from month-to-month, regardless of the amount of the rental.

Similarly, the guardian of a minor [*see Prob. Code § 1500 et seq.*] or the conservator of an incompetent adult [*see Prob. Code § 1800 et seq.*] may lease real property of the minor [*see § 34B.15[2][b][ii]*] or incompetent adult [*see § 34B.15[2][b][iii]*].

Detailed coverage of executors and administrators is set forth in Ch. 65, *Executors* .

[f] Corporations

A corporation has all the powers of a natural person in carrying out its business activities, subject to any limitation in its articles of incorporation and in applicable statutes and regulations [*Corp. Code § 207*]. Specifically, it has the power to acquire and convey real property [*Corp. Code § 207(g)*]. Consequently, a corporation that is permitted to own real estate has the statutory right to lease property, even if its articles of incorporation do not expressly authorize leasing [*Stockton Harbor Indus. Co. v. Commissioner of Int. Rev. (9th Cir. 1954) 216 F.2d 638, 655* (citing former Corp. Code §§ 802, 803, which were substantially reenacted as *Corp. Code §§ 207, 208*), *cert. denied, 349 U.S. 904 (1955)* ; *see Sarmento v. Bay City Land & Cattle Co. (1949) 94 Cal. App. 2d 343, 347, 210 P.2d 754* (also citing former Corp. Code §§ 802, 803)].

If the leased premises constitutes all, or substantially all, of the corporation's assets, the principal terms of the lease must be as follows [*Corp. Code § 1001(a)*]:

- Approved by the board of directors; and
- Unless the transaction is in the usual and regular course of its business, approved by the outstanding shares, either before or after approval by the board and before or after the transaction.

As a general rule, the business affairs of every corporation are managed and all corporate powers are exercised by or under the direction of the board of directors [*see Corp. Code § 300(a)*]. For a corporate resolution authorizing a lease transaction, see *Ch. 34A, Prelease Forms, § 34A.200*.

[g] Partnerships

A partnership can acquire real property in the partnership name or in the name of one or more of the partners [*see Corp. Code § 16204*; *see also Corp. Code § 16111* (Uniform Partnership Act of 1994 provisions applicable to partnerships formed on or after January 1, 1997 and to all partnerships beginning January 1, 1999)]. When, as is usually the case, title to partnership real property is held in the partnership name, the property can be leased or otherwise conveyed only in that name [*Corp. Code § 16302(a)(l)*]. Subject to any limitation in a statement of partnership, any partner in a general

partnership, and a general partner in a limited partnership [*see* Corp. Code § 15643(a) (repealed January 1, 2010); Corp. Code §§ 15901.13, 15904.06(b)(2), 15912.06 (applicable to limited partnerships formed on and after January 1, 2008, limited partnerships formed before that date that elect to be subject to Limited Partnership Act of 2008 [Corp. Code § 15900 et seq.], and all limited partnerships after January 1, 2010)], can lease or otherwise convey property held in the partnership name by a lease executed in that name [*Corp. Code §§ 16302(a)(1), 16303(a)(1)(D)*].

However, in the case of a limited partnership, the affirmative vote of a majority of limited partners is required to lease property owned by the partnership when that property is all, or substantially all, of the partnership's assets, and the transaction is other than in the ordinary course of its business [Corp. Code § 15636(f)(1)(B) (repealed January 1, 2010)]. A unanimous vote is required for limited partnerships formed on and after January 1, 2008, limited partnerships formed before that date that elect to be subject to Limited Partnership Act of 2008 [Corp. Code § 15900 et seq.], and all limited partnerships after January 1, 2010 [Corp. Code §§ 15904.06(b)(2), 15912.06].

For further discussion, see Ch. 15, *General Partnerships* , Ch. 16, *Formation of Limited Partnerships*, and Ch. 27, *Deeds and Recording* .

[h] Limited Liability Companies

Generally, a limited liability company (LLC) may engage in any lawful business activity (subject to any limitations contained in its articles of organization and to compliance with any other applicable laws), whether or not for profit, except the banking business, the business of issuing policies of insurance and assuming insurance risks, or trust company business [*Corp. Code § 17002*]. In carrying out its business activities, an LLC has all of the powers of a natural person, subject to any limitations contained in its articles of organization and subject to compliance with applicable laws [*Corp. Code § 17003*]. These powers include the power to lease real and personal property [*see Corp. Code § 17003(f)*].

Unless the articles of organization provide that an LLC will be managed by one or more managers [*see Corp. Code § 17151(b)*], every member is an agent of the LLC for the purpose of its business and affairs [*Corp. Code § 17157(a)*]. The act of any member for the apparent purpose of carrying on in the usual way the LLC's business and affairs binds it, unless the member has no actual authority to act for it in the particular matter and the person with whom the member is dealing actually knows that the member does not have this authority [*Corp. Code § 17157(a)*]. A member acting in contravention of a restriction on authority cannot bind the LLC to persons actually knowing of the restriction [*Corp. Code § 17157(c)*]. If the LLC is managed by one or more managers, then no member, acting solely as a member, is an agent of the LLC or can bind or act for the LLC [*Corp. Code § 17157(b)(1)*].

For detailed coverage of limited liability companies, see Ch. 12C, *Limited Liability Companies* .

[i] Unincorporated Associations

An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real property [*Corp. Code § 18105*]. The law formerly required a lease of real property owned or held by an unincorporated fraternal or benevolent association or a labor organization to be authorized by a resolution of the association or organization and then executed by the presiding officer and recording secretary under the seal of the association or organization [*see* former *Corp. Code § 20002*]. In 2004, amendments to the Corporations Code deleted the requirement of a resolution and made the provisions governing unincorporated associations inapplicable to labor organizations, labor federations, labor councils, or labor committees governed by a constitution or bylaws [*Corp. Code § 18055(e)*]. In the case of other unincorporated associations, the conveyance must be executed by one of the following [*Corp. Code § 18115*]:

- The president or the secretary, or other comparable officer;

- Other persons specifically designated by a resolution adopted by the association; or
- A committee or other body or person authorized to act by the governing principles of the association.

An unincorporated association may record a statement that designates those officers or persons who are authorized to execute conveyances on its behalf [*Corp. Code § 18120*; *see* Ch. 27, *Deeds and Recording*].

[j] Agents and Attorneys-in-Fact

A lease need not be executed by the actual parties to the lease; it may instead be executed by the agent or attorney-in-fact for one or more of the parties [*see Civ. Code §§ 2304, 2305* (authority of agents); *Prob. Code §§ 4123(a), (b), 4261* (authority of attorney-in-fact); *County of Los Angeles v. Stuyvesant Ins. Co. (1964) 227 Cal. App. 2d 428, 431, 38 Cal. Rptr. 713* (authority of attorney-in-fact); *see also Civ. Code § 2295* ("agent" defined); *Prob. Code § 4014(a)* ("attorney-in-fact" defined); Ch. 98, *Powers of Attorney*].

An attorney-in-fact who executes an instrument transferring an estate in real property must sign both the principal's name and his or her own name as attorney-in-fact [*Civ. Code § 1095*]. An agent or attorney-in-fact may also be empowered by a landlord or a tenant to negotiate a lease or to collect or pay rent [*see Civ. Code §§ 2304, 2305*; *Prob. Code §§ 4123(a), (b), 4261*; *Holwick v. Walker (1935) 6 Cal. App. 2d 669, 672-673, 45 P.2d 374]* .

[3] Requirement That Lease Be in Writing

[a] Statutory Provisions

Three separate statutory provisions require that a lease of real property for a period longer than one year be in writing and signed by the landlord [*see Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*; *see also Dameshghi v. Texaco Refining & Marketing, Inc. (1992) 3 Cal. App. 4th 1262, 1283, 6 Cal. Rptr. 2d 515 , disapproved on other grounds, Trope v. Katz (1995) 11 Cal. 4th 274, 286, 45 Cal. Rptr. 2d 241, 902 P.2d 259]* .

Under the first provision, an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by a written instrument signed by (1) the transferor, or (2) the transferor's agent, provided the transferor first authorizes that act in writing [*Civ. Code § 1091*].

The second provision, which is part of the general statute of frauds, provides in part that an agreement for the leasing of an interest in real property for a term exceeding one year, or some note or memorandum of the agreement, must be in writing and subscribed by the party to be charged or by the party's agent. An agent cannot sign the agreement unless the principal first authorizes that act in writing [*Civ. Code § 1624(a)(3)*].

The third provision states that no estate or interest in real property may be created, granted, assigned, surrendered, or declared, other than by operation of law or by a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the estate or interest, or by the party's lawful agent pursuant to a written authorization. Leases with terms not exceeding one year are exempt from this requirement [*Code Civ. Proc. § 1971*].

To satisfy the above statutes and create an enforceable lease, the written instrument must contain all of the essential and material parts of a lease [*see* [1], *above*], and particularly must contain the following essential elements [*see Enlow v. Irwin (1926) 80 Cal. App. 98, 101, 251 P. 658]* :

- A description of the premises;

- A specified term; and
- An amount and time and manner of payment of the rent.

A writing that omits any of these three essential elements does not satisfy the statutes or create an enforceable lease [*Dusold v. Johnston (1950) 101 Cal. App. 2d Supp. 907, 909-910, 225 P.2d 536]* .

For the effect of part performance of an oral lease on the statutes of frauds, see [b], *below*. For additional coverage of the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[b] Part Performance Exception

Part performance of an oral agreement to execute a lease for a period longer than one year may take the case out of the operation of the statute of frauds [*Schubert v. Lowe (1924) 193 Cal. 291, 295, 223 P. 550* ; *Sutton v. Warner (1993) 12 Cal. App. 4th 415, 422, 15 Cal. Rptr. 2d 632]* . Thus, when a tenant obtains possession of premises under an oral lease agreement and performs the applicable provisions of the oral lease, equity may grant specific performance of the oral agreement to make a lease [*Schubert v. Lowe (1924) 193 Cal. 291, 296, 223 P. 550]* . However, to constitute part performance, the tenant's occupation of the premises must be in accordance with the oral agreement [*Sutton v. Warner (1993) 12 Cal. App. 4th 415, 422, 15 Cal. Rptr. 2d 632]* . Occupation under a prior lease is not part performance of the oral agreement or lease and does not avoid application of the statute of frauds [*Paul v. Layne & Bowler Corp. (1937) 9 Cal. 2d 561, 564-565, 71 P.2d 817]* .

The fact that an oral lease is not enforceable does not necessarily preclude the finding of a valid tenancy. When the tenant enters into possession of the premises with the landlord's consent, but with no provisions for rent or term, a tenancy at will is created [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 793, 284 P.2d 580* ; *see § 34B.14[3]* for discussion of tenancy at will]. When the landlord then accepts rent for specific, designated periods of time, for example, monthly, the tenancy becomes a periodic one [*see Civ. Code §§ 1944, 1945*; *see also § 34B.14[1]* for discussion of periodic tenancies].

For further discussion of part performance, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[4] Delivery and Acceptance

A lease must be delivered to and accepted by the tenant before it will bind him or her [*Civ. Code § 1054*; *Walker v. Dorn (1966) 240 Cal. App. 2d 118, 121, 49 Cal. Rptr. 362]* . As a contract, the lease takes effect only on its delivery to the party in whose favor it is made, or to his or her agent [*Civ. Code § 1626*; *see also Code Civ. Proc. § 1933* (execution of instrument does not occur until it is subscribed and delivered)].

As a grant or conveyance, a lease is presumed to be delivered as of the date of the lease [*Civ. Code § 1055*]. However, delivery of the lease must be unconditional to be effective [*Civ. Code § 1056*].

Whether or not an instrument has been delivered is a question of fact. Actual manual delivery is not necessary, and retention of the lease by the landlord is not conclusive evidence of its nondelivery. If the landlord's retention is with the tenant's consent and the parties understand that it has been executed and is in operation, the lease must be considered as delivered [*Handley v. Guasco (1958) 165 Cal. App. 2d 703, 710, 332 P.2d 354* ; *see Kreling v. Walsh (1947) 77 Cal. App. 2d 821, 833, 176 P.2d 965* ; *see also Civ. Code § 1059(1)*]. However, a lease is not delivered and is not effective if the landlord retains it and does not intend that it become effective until it is delivered [*Vizzone v. Selsor (1959) 174 Cal. App. 2d 509, 510, 344 P.2d 795]* , or if the landlord retains it and the tenant never sees it and never agrees to its

terms [*Vavuris v. Pinelli (1957) 147 Cal. App. 2d 390, 393, 305 P.2d 149]* .

The tenant's acceptance can be inferred from entry into possession and payment of rent [*Dodd v. Pasch (1907) 5 Cal. App. 686, 689, 91 P. 166]* or from other circumstances or actions indicating acceptance [*Canal Oil Co. v. National Oil Co. (1937) 19 Cal. App. 2d 524, 536, 66 P.2d 197* ; *Munford v. Humphreys (1924) 68 Cal. App. 530, 535, 229 P. 860]* . Although the landlord must sign a written lease [*Munford v. Humphreys (1924) 68 Cal. App. 530, 535, 229 P. 860]* , the tenant need not, as a general rule, sign the lease if the delivery and acceptance requirements are satisfied [*Walker v. Dorn (1966) 240 Cal. App. 2d 118, 121, 49 Cal. Rptr. 362* ; *see Watkins v. McCartney (1922) 57 Cal. App. 643, 644, 207 P. 909]* . The tenant's signature is required, however, if the statute of frauds is applicable [*see* [3], *above*], or if a special covenant in the lease is to bind the tenant [*see Walker v. Dorn (1966) 240 Cal. App. 2d 118, 121, 49 Cal. Rptr. 362]* .

For additional coverage of delivery and acceptance, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

[5] Recording a Residential Lease

Any instrument affecting the title to or possession of real property may be recorded [*Gov. Code § 27280*] with the county recorder of the county in which the affected property is located [*Civ. Code § 1169*]. A lease may be recorded, since it is both a contract and a conveyance of an estate or interest in real property [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 978, 269 Cal. Rptr. 807* ; *see § 34B.12[2]* for discussion of dual character of lease]. Every conveyance of real property or an estate for years in the property that is acknowledged (or proved and certified) and recorded gives constructive notice of its contents to subsequent purchasers and mortgagees of the affected property from the time it is filed with the recorder [*Civ. Code § 1213*].

Conversely, every conveyance of real property or an estate for years in the property (other than a lease for a term not exceeding one year) is void as against subsequent purchasers or mortgagees of the same property who act *in good faith* and for a valuable consideration unless it is recorded before their subsequent purchase or mortgage is recorded [*Civ. Code § 1214* (emphasis added)]. However, it should be noted that a subsequent purchaser (or mortgagee) who has actual notice of possession by the tenant will not be deemed to be acting as a bona fide purchaser. In this situation, the fact that a lease or rental agreement is not recorded does not make it any less enforceable against a subsequent purchaser, for the recording acts protect the subsequent purchaser who gives value before he or she has any notice, actual or constructive, of prior claims [*see First Fidelity Thrift & Loan Assn. v. Alliance Bank (1998) 60 Cal. App. 4th 1433, 1441-1443, 71 Cal. Rptr. 2d 295]* .

PRACTICE TIP:

Residential Leases Rarely Recorded. As a practical matter, it is rare for a residential lease to be recorded, unless it is for a long term. Nonresidential leases, however, are commonly recorded. Typically, a memorandum or short form of the lease is recorded to protect the confidentiality of many of the terms contained in the lease. For an illustrative memorandum of lease and additional discussion, see Ch. 34C, *Retail, Industrial, and Office Leases* . *By Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.16

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.16 Description of Premises

[1] Extent and Boundary of Property

A lease is required to contain a definite agreement as to the extent and boundary of the property to be leased [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* . Street addresses (and apartment numbers, if applicable) are usually sufficient for residential leases [*see Baranov v. Scudder (1918) 177 Cal. 458, 460, 170 P. 1122* ; *see also* California Real Estate Law and Practice, Ch. 155, *Drafting Residential Leases* (Matthew Bender)].

The extent of the leased premises, when ambiguous, may be established by the parties' conduct [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 41 n.32, 31 Cal. Rptr. 2d 378]* . For example, an ambiguous or uncertain description may be cured by the tenant's taking possession and paying the stipulated rent when the parties' actions relate to particular premises [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *see Cal-Am Corp. v. Department of Real Estate (1980) 104 Cal. App. 3d 453, 458, 163 Cal. Rptr. 729]* . Furthermore, parol evidence is admissible to determine the amount of land subject to the lease when a lease is silent about the quantity of land the tenant is entitled to occupy, as is often the case when the premises are described simply by their street address [*Guttman v. Berry (1948) 83 Cal. App. 2d 507, 510, 189 P.2d 41]* . However, if the lease fails entirely to describe the property, parol evidence may not be used to supply the necessary description, notwithstanding the fact that the tenant has taken possession [*Kingston v. Colburn (1956) 139 Cal. App. 2d 623, 624, 293 P.2d 805]* .

[2] Appurtenances and Easements

As a general rule, everything that belongs to or is used with, and appurtenant to, the leased premises and is "reasonably essential to their enjoyment" passes as incident to them, unless specifically reserved [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 717, 227 P.2d 263* ; *Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 96-98, 19 Cal. Rptr. 891* (phrase "reasonably essential to their enjoyment" is crucial part of general rule)]. The appurtenance need not be absolutely necessary to the tenant's enjoyment or a critical element in making the property tenantable [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 718, 227 P.2d 263]* . A lease of an entire house or building is a lease of the land on which the building

stands, at least as far as needed for its support. A lease of an entire house or building also includes the adjacent land belonging to the landlord that is used with the building as necessary to its proper occupation for the purpose for which it was intended [*Bachenheimer v. Palm Springs Etc., Corp. (1953) 116 Cal. App. 2d 580, 588, 254 P.2d 153]* . A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another [*Civ. Code § 662*].

Rights of ingress and egress pass to the tenant, even though they are not specifically mentioned in the lease and the word "appurtenances" is not included as part of the description of the leased premises [*Mayer v. Hazzard (1935) 10 Cal. App. 2d 1, 3, 51 P.2d 189]* . For example, a driveway on an adjoining lot was held to be a necessary appurtenance to the lease of a building and a shed behind it when the driveway was the most practical method of obtaining access to the shed for deliveries [*Ng v. Warren (1947) 79 Cal. App. 2d 54, 61-62, 179 P.2d 41]* . When a lease does not expressly create an easement, one may pass to the tenant by implication either from reasonable necessity or from the manifest intention of the parties [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580* (parties' actions evidenced intent to include adjacent parking spaces)].

PRACTICE TIP:

Lease Should Clearly Describe Appurtenances and Easements. To avoid disputes over which rights are included, by implication, in the lease as reasonably essential to the enjoyment of the premises, the lease should clearly set forth both the appurtenances and easements, if any, intended to pass, and the appurtenances and easements, if any, that are excepted or reserved. For example, the lease should describe any fixtures (such as operable air conditioning), furnishings, parking stalls or garages, storage areas, porches or patios, and use of swimming pools that are to be included in the lease. Conversely, the lease should specify any items that are located on or appurtenant to the leased premises but that are to be excluded from the lease. *By Publisher's Editorial Staff.*

For further discussion, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* , and Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.17

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.17 Term of Lease

[1] Required Element of Lease

A lease must set forth the term for which the property is leased [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* . The term is the period granted for the tenant to occupy and possess the leased premises [*see Taylor v. Terry (1886) 71 Cal. 46, 48, 11 P. 813]* . If the lease does not set forth a specific term, certain statutory presumptions may establish the term as a periodic tenancy [*see § 34B.14[1]* for discussion of periodic tenancy].

The lease should specify not only the term but also the commencement and, if applicable, termination dates. The term is adequately stated if it is to commence on the completion of construction (or other improvement) of the premises; any uncertainty about the beginning of the term is removed by the completion of the work [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* .

A residential lease usually creates either a tenancy for years or a periodic tenancy. The most important difference between the two types of tenancies is the method of termination; a tenancy for years terminates at the end of the stated term without any requirement of notice [*see § 34B.14[2]* for discussion of tenancy for years], whereas a month-to-month or other periodic tenancy is automatically renewed for each successive period unless either party gives written notice of termination in the manner prescribed by statute [*Civ. Code § 1946*; *see § 34B.14[1]*].

PRACTICE TIP:

Choosing Between Fixed Term and Periodic Tenancy. The choice between a fixed term and a periodic tenancy depends on several factors. Traditionally, periodic tenancies were considered to offer more flexibility in changing the terms of the lease, while fixed term leases were regarded as providing certainty and security because of the stated term. Rent control ordinances have altered the traditional analysis of this issue, however. For example, these ordinances frequently impose strict limitations on the landlord's right to evict a tenant who is not in default, thereby lessening the importance of the stability offered by a fixed term tenancy [*see § 34B.23* for discussion of rent control]. Further, if the ordinance

permits a landlord to terminate a periodic tenancy if the landlord wishes to personally occupy the premises, he or she may prefer a periodic tenancy [*see* California Real Estate Law and Practice, Ch. 155, *Drafting Residential Leases* (Matthew Bender)]. *By Publisher's Editorial Staff.*

PRACTICE TIP:

One Year Term Followed by Month-to-Month Tenancy Is Good Business Practice. If the rental market is already quite high, there is still an interest in maintaining the stability of tenancies. A good business practice would be to commence the tenancy with an initial one year lease which thereafter reverts to month-to-month, regardless of whether the unit is subject to rent control. Also, in most jurisdictions, "new construction" (that is, rental units located in a structure for which a certificate of occupancy was first issued after the effective date of the ordinance) are exempted from rent control. Therefore, one should not assume that all buildings or tenancies are subject to rent or eviction control. *By Benjamin Kaplan.*

The forms *set forth in §§ 34B.200[2]* (apartment lease) and 34B.201[2] (lease of single-family residence) provide for a fixed term. Language for a month-to-month or other form of periodic tenancy is provided in § 34B.220[2]. For discussion and a form for an automatic renewal or extension of the lease, see *§ 34B.222*. For an option to renew or extend the lease, see *§ 34B.224*. For discussion and form for a holdover provision, see *§ 34B.221*.

[2] Rule Against Perpetuities

Before January 1, 1992, when the Uniform Statutory Rule Against Perpetuities became operative in California [*see Prob. Code § 21200 et seq.*], a lease that was to commence in the future was subject to the common law rule against perpetuities. Under this rule, if the leasehold interest was "nonvested," it was invalid unless, at the time the lease was created, the leasehold was certain to either vest or terminate within 21 years after the death of some person alive at the time of creation, or alternatively within 60 years after the creation [*see* former *Civ. Code §§ 715.2, 715.6* (repealed Jan. 1, 1992); *see also Wong v. Di Grazia (1963) 60 Cal. 2d 525, 535-541, 35 Cal. Rptr. 241, 386 P.2d 817]* . For purposes of applying this rule, an interest was "nonvested" if it was subject to an unsatisfied condition precedent and "vested" if it was owned free of all conditions precedent [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2552-2553 (1990); Black's Law Dictionary 1563 (6th ed. 1990)].

Under the Uniform Statutory Rule Against Perpetuities, however, most leases are not subject to the rule against perpetuities. This is because the Uniform Statutory Rule excludes most "nondonative" transfers from its application [*see Prob. Code § 21225(a)*]. For this purpose, a "nondonative" transfer is a commercial-type transaction that is supported by consideration, for example, the typical commercial lease, an option to renew a lease, and a right of first refusal to purchase the property [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 571, 576, 31 Cal. Rptr. 2d 595]* . A "donative" transfer, in contrast, is generally a transfer that is not supported by consideration [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2594-2595 (1990)].

It should be noted that a lease may be a "nondonative" transfer for purposes of the Uniform Statutory Rule Against Perpetuities even though it is classified as a "noncommercial" lease for other purposes. Leases are commonly classified as either "commercial" or "residential" depending on whether the property is leased for commercial or residential purposes. For perpetuities purposes, however, the classification of a lease as "commercial" or "donative" is based on whether the lease is supported by consideration. "Nondonative" (that is, "commercial") transfers are generally transfers that are supported by consideration, while "donative" transfers are not supported by consideration [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990)]. Thus, a residential lease will be classified as a "nondonative" transfer for purposes of the statutory rule if it calls for the payment of rent or other consideration. Any lease that calls for the payment of rent is thus excluded from the operation of the statutory rule against perpetuities.

For a detailed discussion of the rule against perpetuities in California, see the Legal Background to Ch. 67, *Future Interests and Perpetuities*.

[3] Other Statutory Restrictions

Although leases supported by rent are not subject to the rule against perpetuities [*see* [2], *above*], many leases are subject to other time limitations. For example, under *Civ. Code § 718*, any lease of a town or city lot for which the term exceeds 99 years, including options to renew the lease, is invalid [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 576, 31 Cal. Rptr. 2d 595]* . If the property is owned or controlled by the municipality, generally the term will be limited to 55 years or less [*see Gov. Code § 37380*; *Civ. Code § 718*].

Every lease that is to commence at a time certain or on the happening of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution [*Civ. Code § 715*]. The effect of this section is to place a 30-year limit on leases that might have been voidable future interests under the old common law rule against perpetuities [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2552 (1990); *see also* former *Civ. Code § 715.2* (repealed Jan. 1, 1992)]. It should be noted, however, that the old rule against perpetuities required that an interest either vest or terminate within the applicable period. *Civ. Code § 715*, in contrast, requires that the lease actually commence in possession within 30 years. Thus, a lease may be invalid because it does not commence in possession within the statutory period even though the lease is fully vested within that period.

For further coverage of these restrictions, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTerm Tenancies



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.18

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§ 34B.18 Consideration

[1] Required Element of Lease

As a contract [*see § 34B.12[2][c]*], a valid lease must be based on consideration [*see Civ. Code § 1550(4)*; *see also § 34B.15[1][b]*]. In an ordinary lease, there is mutual consideration in that the landlord impliedly warrants quiet enjoyment by the tenant and the tenant promises to pay rent [*Blackman v. Dalton's Etc. Loans (1942) 51 Cal. App. 2d 14, 18, 124 P.2d 123]* . There are other acceptable forms of consideration. For example, a tenant's promise to repair the premises in lieu of paying rent is sufficient consideration to bind the landlord to his or her promise to lease the premises [*Riner v. Vernon (1933) 132 Cal. App. 178, 184, 22 P.2d 255]* .

For additional coverage of consideration, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

[2] Rent

Rent is the consideration paid by a tenant to the landlord for the tenant's use and possession of the property [*Silveira v. Ohm (1949) 33 Cal. 2d 272, 276, 201 P.2d 387* ; *Smith v. State Bd. of Equalization (1997) 53 Cal. App. 4th 331, 336, n.5, 61 Cal. Rptr. 2d 604]* . The obligation to pay rent may arise from the terms of the lease or from the tenant's mere occupancy of the premises in the absence of an express agreement [*Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638]* .

If a lease's term does not exceed one year and there is no usage or contractual requirement to the contrary, rent is payable at the end of the term. If the lease term is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due [*Civ. Code § 1947*]. Under most residential leases, rent is a fixed sum payable monthly. If the rent must be paid at the beginning of the period for which it is due, as is most often the case, the lease must so provide, since otherwise rent is not payable in advance, as discussed above. See *§ 34B.234* for discussion and a form for the landlord's right to demand a special form of rental payment if the tenant is late in making rent payments.

For additional coverage, see California Real Estate Law and Practice, Ch. 171, *Rent and Rent Control* (Matthew Bender).

[3] Other Payments

Payment of a security deposit by the tenant to a landlord for residential property is governed by *Civ. Code § 1950.5*. The specific statutory requirements and form language for security deposit provisions in leases are *covered in §§ 34B.230-34B.232*.

Late charges may be imposed by a landlord for the tenant's failure to make timely rental payments under a lease or rental agreement. The law applicable to late charges and a form for a late charge provision is included in § 34B.233.

A screening fee may also be charged to a tenant under certain circumstances [*see § 34B.19*].

For a lease provision requiring the tenant to make certain utility payments, see *§ 34B.263*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.19

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.19 Tenant/Application Screening Fees

[1] Application Screening Fee Defined

"Application screening fee" means any nonrefundable payment of money charged by a landlord or his or her agent to an applicant, the purpose of which is to purchase a consumer credit report and to validate, review, or otherwise process an application for the rental or lease of residential rental property [*Civ. Code § 1950.6(h)*]. The fee is not an "advance fee" as that term is used in *Bus. & Prof. Code § 10026* (advance fee rental agreements), nor is it a "security" as that term is used in *Civ. Code § 1950.5* (security deposits) [*Civ. Code § 1950.6(j)*]. See *§ 34B.280* for an Application to Rent and Receipt of Deposit form prepared by the California Association of Realtors.

[2] Landlord's Right to Charge Screening Fee

When a landlord (defined as an owner of residential property [*see Civ. Code § 1950.6(g)*]) or his or her agent receives a request to rent a residential property, the landlord or agent may charge the applicant (and his or her guarantor or cosigner, if any) an application screening fee to cover the costs of obtaining information about the applicant [*Civ. Code § 1950.6(a), (i)*]. The information requested and obtained by the landlord may include, but is not limited to, personal reference checks and consumer credit reports. The landlord may, but is not required to, accept and rely on a consumer credit report presented by an applicant [*Civ. Code § 1950.6(a)*]. In cases when the landlord or his or her agent knows or should have known that no rental unit is available or will be available in a reasonable period of time, the landlord may not charge an application screening fee unless the applicant agrees in writing [*Civ. Code § 1950.6(c)*].

The landlord must provide the applicant, either personally or by mail, a receipt for the fee paid. The receipt must itemize the out-of-pocket expenses and time spent by the landlord or his or her agent to obtain and process the information about the applicant [*Civ. Code § 1950.6(d)*]. If the landlord or his or her agent does not perform a personal reference check or does not obtain a consumer credit report, the landlord or his or her agent must return to the applicant any amount of the screening fee that is not used for the authorized purposes [*Civ. Code § 1950.6(e)*]. If an applicant who has paid an application screening fee requests a copy of his or her consumer credit report from the landlord, the landlord or his or her agent must provide a copy of the report to the applicant [*Civ. Code § 1950.6(f)*].

The statutory provisions for an application screening fee do not preempt any provisions or regulations that govern the collection of deposits and fees under federal or state housing assistance programs [*Civ. Code § 1950.6(k)*].

[3] Amount of Fee

The application screening fee may not exceed the actual out-of-pocket costs of gathering information concerning the applicant, including, but not limited to, the cost of using a tenant screening service or a consumer credit reporting service, and the reasonable value of time spent by the landlord or his or her agent in obtaining information on the applicant. In no case may the amount of the fee charged by the landlord or his or her agent be greater than $30.00 per applicant, except that the fee may be adjusted annually commensurate with an increase in the Consumer Price Index, beginning on January 1, 1998 [*Civ. Code § 1950.6(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.20

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.20 Covenants

[1] Nature of Covenants

A lease may contain either or both express or implied covenants. Either the landlord or the tenant may be the obligor or covenantor under a particular covenant [*see* California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy* (Matthew Bender)].

In California, only covenants specified by statute (and those incidental thereto) run with the land [*Civ. Code § 1461*; *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 353, 47 Cal. Rptr. 2d 898, 889 P.2d 536]* . In general, covenants made for the direct benefit of the property, or some part of it in existence when the covenant is made, run with the property [*see Civ. Code §§ 1460, 1462*]. For example, a covenant to pay rent runs with the land [*Civ. Code §§ 1462, 1463*; *Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 676, 104 P.2d 507]* . Likewise, a covenant to arbitrate, like a covenant to pay rent, touches and concerns and therefore runs with the land [*Melchor Investment Co. v. Rolm Systems (1994) 3 Cal. App. 4th 587, 592-593, 4 Cal. Rptr. 2d 343]* .

Covenants in a lease are construed to be dependent or independent based on the intentions of the parties [*Medico-Dental Etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-419, 132 P.2d 457]* . Traditionally, courts have held that covenants to pay rent are independent from covenants by the landlord to repair, and that the failure to repair does not justify a refusal by the tenant to pay rent [*Hosang v. Minor (1962) 205 Cal. App. 2d 269, 271-272, 22 Cal. Rptr. 794]* . However, in the case of a residential lease, the covenant to pay rent is mutually dependent on the landlord's fulfillment of his or her implied warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see § 34B.26[3]*].

For additional coverage, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender), and California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy* (Matthew Bender).

[2] Covenant of Quiet Enjoyment

A covenant of quiet enjoyment and possession is implied in every lease and is binding on the landlord during the continuation of the lease [*Civ. Code § 1927*; *Baranov v. Scudder (1918) 177 Cal. 458, 462, 170 P. 1122* ; *Lee v. Placer Title Co. (1994) 28 Cal. App. 4th 503, 512, 33 Cal. Rptr. 2d 572]* . This covenant insulates the tenant against any act or omission on the part of the landlord, or anyone claiming under the landlord, that interferes with the tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy [*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 846, 122 Cal. Rptr. 114]* . The covenant runs with the land [*Civ. Code § 1463*; *see Civ. Code § 1462*].

For further discussion of this covenant, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability



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17-34B California Legal Forms--Transaction Guide § 34B.21

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.21 Use of Premises

[1] Permitted Uses

A lease may limit the tenant's use of leased premises [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . If a lease does not restrict the tenant's use of the leased premises, the tenant can generally use the leased premises for any lawful purpose not materially different from the ordinary use of the premises or for which the premises are adapted or were constructed [*Davidson v. Goldstein (1943) 58 Cal. App. 2d Supp. 909, 910, 136 P.2d 665]* .

If the premises are leased for a particular purpose, the tenant cannot generally use the premises for any other purpose. If the tenant does so, the landlord may recover damages or rescind the lease [*Civ. Code § 1930*; *Keating v. Preston (1940) 42 Cal. App. 2d 110, 115, 108 P.2d 479]* . However, incidental activities necessary to complete enjoyment of the premises for the purposes for which they were leased are permitted [*DeLong v. Black's Package Co. (1927) 86 Cal. App. 80, 83, 260 P. 392]* . Furthermore, the fact that the lease states that the premises are leased for a particular use does not necessarily imply that the premises cannot be used for other purposes [*see Keating v. Preston (1940) 42 Cal. App. 2d 110, 115, 108 P.2d 479]* .

For a provision restricting the tenant's use of one or more parking spaces, see *§ 34B.241*. For discussion and a provision setting forth the tenant's rights to use a waterbed in the dwelling, see *§ 34B.240*. A general provision prohibiting the tenant's use in any manner that would increase the existing insurance rates or result in a termination of insurance is *set forth in § 34B.242*.

[2] Illegal Uses

Various uses of property are made illegal by statute, city or county ordinance, and zoning and building codes. For example, a person who knowingly permits gambling in premises owned or leased by him or her is guilty of a misdemeanor [*Penal Code § 331*]. Use by a tenant of leased premises for an unlawful purpose constitutes grounds for termination of the lease and for an unlawful detainer action by the landlord [*Code Civ. Proc. § 1161(4)*].

PRACTICE TIP:

Illegal Use Refers to Purpose, Not to the Dwelling. As noted above, illegal use means that the premises are being used to accomplish some unlawful purpose, not that the premises are themselves "unlawful" as being a non-conforming unit (illegal unit), or a unit in which there are code violations. *By Benjamin Kaplan.*

[3] Nuisance and Waste

A "nuisance" is anything that is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property. It is also anything that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway [*Civ. Code § 3479*].

"Waste" is an unlawful act or omission of duty by the tenant that results in permanent injury to the premises [*Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708]* . Waste occurs when the market value of property is substantially or permanently diminished or depreciated [*Dieterich Internat. Truck Sales, Inc. v. J. S. & J. Services, Inc. (1992) 3 Cal. App. 4th 1601, 1609, 5 Cal. Rptr. 2d 388]* .

The commission of waste or maintenance of a nuisance is grounds for termination of the lease termination and the basis of an action for unlawful detainer [*Code Civ. Proc. § 1161(4)*]. A person who commits an offense relating to controlled substances, unlawful weapons or ammunition, or uses the premises to further the purposes of that offense is deemed to have committed a nuisance on the premises [*Code Civ. Proc. § 1161(4)*; *see Civ. Code § 3485* (nuisance caused by illegal conduct involving an unlawful weapons or ammunition purpose on real property, repealed January 1, 2014); *Civ. Code § 3486* (until January 1, 2014, city prosecutor or city attorney in cities of Los Angeles, Long Beach, Palmdale, San Diego, Oakland and Sacramento may file action for unlawful detainer against any person in violation of nuisance or illegal purpose provisions of *Code Civ. Proc. § 1161(4)* with regard to a controlled substance; after that date, the authorization will apply only to the City of Los Angeles and only if the city has previously filed specified reports). In addition, if a person commits an act of domestic violence, sexual assault or stalking [*see Civ. Code § 1708.7*; *Fam. Code § 6211*; *Pen. Code §§ 261, 261.5, 262, 286, 288a, 289* (definitions)] against another tenant or subtenant on the premises, there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises. However, the presumption does not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises [*Code Civ. Proc. § 1161(4)* (in effect until January 1, 2012)]. For further discussion of waste and nuisance, see California Real Estate Law and Practice, Ch. 320, *The Law of Nuisance* , and Ch. 384, *Trespass and Waste* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawTitle QualityAdverse Claim ActionsUnlawful DetainerReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsWasteGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.22

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.22 Agreement to Execute Lease

If a landlord and tenant agree in writing on the essential terms of a lease, there is a binding lease, even though a formal instrument will be drafted and executed later [*Gavina v. Smith (1944) 25 Cal. 2d 501, 504, 154 P.2d 681* ; *Levin v. Saroff (1921) 54 Cal. App. 285, 289-291, 201 P. 961]* . However, an agreement to lease in the future will not be construed as a present lease if it can be shown that the parties did not intend the agreement to be a present lease [*Potter v. Mercer (1879) 53 Cal. 667, 672-674* , *overruled on other grounds*, *Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Regalia v. Mariani (1929) 100 Cal. App. 1, 5-6, 279 P. 455]* or if the agreement is too uncertain and incomplete (for example, if it lacks a date for commencement or a specified term) [*Martin v. Hall (1933) 219 Cal. 334, 338-339, 26 P.2d 288]* .

Whether an instrument is a present lease or an agreement to execute a lease in the future is largely a question of the intention of the parties [*Levin v. Saroff (1921) 54 Cal. App. 285, 289-290, 201 P. 961]* . Possession by the tenant and payment of rent by the tenant are indications that a present lease was intended [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 54, 2 Cal. Rptr. 727* (possession); *Pacific Improvement Co. v. Jones (1912) 164 Cal. 260, 264, 128 P. 404* (possession and payment of rent)].

For additional discussion, see California Real Estate Law and Practice, Ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationExecutionContracts LawFormationTender & DeliveryReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.23

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.23 Rent Control

A municipality has the power to enact a residential rent control ordinance [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 140, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679-684, 209 Cal. Rptr. 682, 693 P.2d 261]* . Rent control for residential tenancies is a proper exercise of a city's police power if the regulation is reasonably calculated to eliminate excessive rents and, at the same time, provide landlords with a just and reasonable return on their property [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 165, 130 Cal. Rptr. 465, 550 P.2d 1001]* . In contrast, the Legislature has enacted a strict prohibition against rent control for nonresidential leases [*see Civ. Code § 1954.27(a)*; *see also* Ch. 34C, *Retail, Industrial, and Office Leases*].

To the extent not superseded by applicable federal or state law [*see, e.g., Civ. Code §§ 1954.50-1954.535* (Costa-Hawkins Rental Housing Act)], a local rent control ordinance supersedes a residential lease with regard to rent increases, the permissible grounds for eviction, and any other aspects of the landlord-tenant relationship legitimately regulated by the ordinance [*see* California Real Estate Law and Practice, Ch. 155, *Drafting Residential Leases* (Matthew Bender)]. For comprehensive coverage of rent control, see California Real Estate Law and Practice, Ch. 171, *Rent and Rent Control* (Matthew Bender), and California Forms of Pleading and Practice, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantRent RegulationFederal PreemptionReal Property LawLandlord & TenantRent RegulationMethodsReal Property LawLandlord & TenantRent RegulationRent Control Statutes



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.24 Disclosure Requirements

[1] Address for Personal Service

[a] Disclosure in Lease or Rental Agreement

When one or more units in a dwelling structure are offered to the public for rent or for lease for residential purposes, certain disclosures must be made by any owner of the structure or by any party signing a rental agreement or lease on behalf of the owner [*Civ. Code §§ 1961, 1962(a)*]. Specifically, the owner or other party must disclose the name, telephone number, and usual street address for purposes of personal service of each person who is authorized to manage the premises, and each person who is (1) an owner of the premises or (2) authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting all notices and demands [*Civ. Code § 1962(a)(1)*]. The reference to "an owner of the premises" is to the record owner, not the beneficial owner [*People ex rel. Sepulveda v. Highland Fed. Savings & Loan (1993) 14 Cal. App. 4th 1692, 1719-1720, 19 Cal. Rptr. 2d 555* (lender was not subject to disclosure requirements)].

The lease or rental agreement must also disclose the name, telephone number, and address of the person or entity to whom rent payments must be made and, if payment may be made personally, the lease or rental agreement must disclose the usual days and hours that the person will be available to receive payment [*Civ. Code § 1962(a)(2)*]. Alternatively, the lease or rental agreement may disclose the name and street address and account number at a financial institution into which payment may be made, provided that the financial institution is located within five miles of the rental property, or furnish the information necessary to establish an electronic funds transfer procedure for paying the rent [*Civ. Code § 1962(a)(2)*]. In addition, the rental agreement must disclose the form or forms in which rental payments must be made [*Civ. Code § 1962(a)(3)*].

The owner of the premises or the owner's agent must provide a copy of the rental agreement or lease to the tenant within 15 days of its execution by the tenant and must provide a copy once each calendar year thereafter, on request by the tenant [*Civ. Code § 1962(a)(4)*]. If the owner or owner's agent does not possess the original or a copy of the rental agreement or lease, the owner or owner's agent must instead furnish the tenant with a written statement stating that fact

and containing the information required to be disclosed [*Civ. Code § 1962(a)(4)*]. In the case of an oral rental agreement, the owner or owner's agent must furnish the tenant, within 15 days of the agreement, with a written statement containing the information required to be disclosed and must provide an additional copy of the statement once each calendar year thereafter, within 15 days after request by the tenant [*Civ. Code § 1962(b)*].

If the address provided by the owner does not allow for personal delivery, it will be conclusively presumed that on the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed receivable by the owner on the date posted if the tenant can show proof of mailing to that name and address [*Civ. Code § 1962(f)*].

[b] Posting Alternative

In lieu of furnishing the required disclosures concerning personal service [*see Civ. Code § 1962(a)(1)*] in a written rental agreement or statement, the owner or owner's agent may post the information in at least two conspicuous places in the structure. If the structure is multiunit and contains an elevator, the elevator must be one of those two "conspicuous places" [*Civ. Code § 1962.5(a)*].

[c] Updating and Revising Information

The information provided in accordance with *Civ. Code § 1962* must be kept current. Any successor owner or manager must comply with these disclosure requirements within 15 days after succeeding the previous owner or manager [*Civ. Code § 1962(c)*].

[d] Violations

If an owner, successor owner, manager, or agent fails to comply with the disclosure requirements relating to service of process, discussed in [a]-[c], *above*, any service of process by a tenant relating to a dispute arising out of the tenancy may be made by registered or certified mail sent to the address at which rent is paid. In that case, the provisions of *Code Civ. Proc. § 1013* regarding the method of service and extensions of time limitations will apply [*Civ. Code § 1962.7*; *see* California Forms of Pleading and Practice, Ch. 518, *Service of Summons and Papers* (Matthew Bender)].

If a party who enters into a rental agreement on behalf of the owner fails to comply with these disclosure requirements, he or she is deemed an agent of the owner for the purposes of service of process, receiving and receipting notices and demands, and performing the obligations of the owner under the law and under the rental agreement [*Civ. Code § 1962(d)*]. That party is also deemed an agent of the owner for the purpose of receiving rental payments, which may be made in cash, by check, by money order, or in any form previously accepted by the owner or owner's agent, unless the form of payment has been specified in the oral or written agreement or the tenant has been notified by the owner in writing that a particular form of payment is unacceptable [*Civ. Code § 1962(d)(3)*].

[2] Foreign Language Translation

Special disclosure requirements apply to any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, either orally or in writing, in the course of entering into a lease, sublease, rental contract, rental agreement, or other term or tenancy contract or agreement, when the term of the agreement is longer than one month and the agreement covers a dwelling, an apartment, a mobilehome, or another dwelling unit normally occupied as a residence [*see Civ. Code § 1632*]. In that case, the person must furnish the other party (usually the tenant) with an unexecuted foreign-language translation of the lease or other agreement before the instrument is executed [*Civ. Code § 1632(b)*].

The above-mentioned statutory requirement does not apply if the other party negotiates the terms of the lease through his or her own interpreter [*Civ. Code § 1632(h)*].

In addition, at the time and place that the parties enter into the lease, the landlord must also provide the tenant with a "notice" in any of the required languages (Spanish, Chinese, Tagalog, Vietnamese, and Korean) [*Civ. Code § 1632(d)*]. *Civ. Code § 1632* does not describe the contents of the notice that must be given to a tenant. However, the statute does specify the contents of the notice that must be provided when the parties are negotiating certain agreements other than leases [*see Civ. Code § 1632(b)(1), (2), (f)*]. Basically, that notice must inform the recipient of the other party's obligation to provide the recipient with an unexecuted foreign-language translation of the agreement that is the subject of the negotiations [*see Civ. Code § 1632(f)*].

PRACTICE TIP:

Contents of Foreign-Language Notice. In light of the fairly ambiguous requirement regarding a foreign-language notice in the context of a lease agreement, it is recommended that counsel prepare a notice similar to that required for other types of agreements [*see Civ. Code § 1632(f)*] to demonstrate a good faith effort to comply with the notice requirements applicable to leases. *By Publisher's Editorial Staff.*

If a person subject to these statutory requirements fails to comply with them, the aggrieved person may rescind the lease [*Civ. Code § 1632(k)*].

[3] Real Estate Transfer Disclosure Statement

The transferor of any real property containing at least one but not more than four dwelling units must, under certain circumstances, deliver to the prospective transferee a written statutory disclosure statement setting forth detailed information concerning the property [*see Civ. Code §§ 1102, 1102.3, 1102.6*]. When the transfer is in the form of a lease, this disclosure requirement applies only in the following situations [*Civ. Code § 1102*]:

- The lease contains an option to purchase [*see* Ch. 34C, *Retail, Industrial, and Office Leases* for discussion and forms for an option to purchase]; or

- The lease is a ground lease that is coupled with improvements [*see* Ch. 34D, *Ground Leases*].

Further, a city or county may require that a second disclosure form be used in conjunction with the above statutory disclosure statement [*see Civ. Code § 1102.6a*]. For further discussion and the statutory disclosure forms, see Ch. 23, *Real Property Sales Agreements* .

[4] Former Ordnance Locations

[a] Disclosure Requirements

The landlord of a residential dwelling who has actual knowledge of any "former federal or state ordnance location" in the "neighborhood area" [*see* [b], *below*] of the residential premises must give written notice to a prospective tenant of that knowledge before execution of a rental agreement [*Civ. Code § 1940.7(b)*; *see § 34B.282* for form of notice]. In the case of a tenancy in existence on January 1, 1990, the landlord must give this written notice to the tenant or tenants as soon as practicable [*Civ. Code § 1940.7(b)*].

[b] Definitions

For these purposes, "former federal or state ordnance location" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes and that may contain potentially explosive munitions [*Civ. Code § 1940.7(c)(1)*]. "Neighborhood area" means the area within one mile of the residential dwelling [*Civ. Code § 1940.7(c)(2)*].

[c] Legislative Intent

In enacting this disclosure legislation, the Legislature declared that a 1983 explosion of munitions in a residential area that was formerly a military ordnance location, which resulted in a loss of life, demonstrated the following [*Civ. Code § 1940.7(a)*]:

- The unique and unknown risk that there are other live munitions in former ordnance locations in California;
- That there is a need for federal, state, or local authorities to identify those former ordnance locations; and
- That the people living in the neighborhood of those former ordnance locations should be notified of their existence.

The resulting legislation was "solely warranted and limited" by the following factors [*Civ. Code § 1940.7(a)*]:

- The fact that the former ordnance locations cannot be readily observed or discovered by landlord and tenants; and
- The ability of a landlord who has actual knowledge of a former ordnance location within the neighborhood of his or her rental property to disclose this information for the tenant's safety.

[5] Lead-Based Paint Disclosure

If premises were constructed before 1978, federal law requires that the landlord make certain disclosures, and provide certain information, to the tenant regarding lead-based paint [*see 42 U.S.C. § 4852d*; *24 C.F.R. § 35.80 et seq.*; *40 C.F.R. § 745.100 et seq.*]. In addition, a disclosure form containing certain information and signatures must be attached to the lease [*see 24 C.F.R. § 35.88*; *40 C.F.R. § 745.107*]. For further discussion of the law surrounding lead-based paint disclosures and a form for these purposes, see *§ 34B.284*.

In March 2008, EPA issued new rules for contractors who renovate or repair housing, child-care facilities or schools built before 1978 to further protect children from exposure to lead-based paint *[73 Fed. Reg. 21692 (April 22, 2008)* ; amending 40 C.F.R. Part 745]. The "Lead: Renovation, Repair and Painting Program" rule, which will take effect in April 2010, prohibits work practices creating lead hazards [for further discussion see *§ 34B.26[4]*].

[6] Natural Hazards Disclosure

The transferor of any real property containing at least one but not more than four dwelling units must, under certain circumstances, deliver to the prospective transferee a written statutory disclosure statement indicating whether the property is located in certain hazardous areas, including all of the following [*see Civ. Code §§ 1103(a), (c), 1103.1(a)*]:

- A special flood hazard area;
- An area of potential flooding;
- A very high fire hazard severity zone;
- A wildland area with substantial forest fire risk;

- An earthquake fault zone; and
- A seismic hazard zone.

When the transfer is in the form of a lease, this disclosure requirement applies only in the following situations [*Civ. Code § 1103(a)*]:

- When the lease contains an option to purchase [*see* Ch. 34C, *Retail, Industrial, and Office Leases* , for discussion and forms for an option to purchase]; and
- When the lease is a ground lease that is coupled with improvements [*see* Ch. 34D, *Ground Leases*].

For further discussion and the statutory disclosure form, see Ch. 23, *Real Property Sales Agreements* .

[7] Duty to Provide Notice of Pest Control Work

A registered structural pest control company must provide the property owner or owner's agent and the tenant of premises for which pest control work is to be done with clear written notice [*Bus. & Prof. Code § 8538(a)*; *see Bus. & Prof. Code § 8538(b)* (timing and method of notice)]. The notice must describe the pest to be controlled, as well as the pesticide or pesticides proposed to be used and the active ingredient or ingredients [*Bus. & Prof. Code § 8538(a)*]. The notice must also contain a specified warning regarding pesticides [*see Bus. & Prof. Code § 8538(a)(3)* (prescribed warning)]. Notice is only required to be provided at the time of the initial treatment if a contract for periodic service has been executed. However, if the pesticide to be used is changed, another notice is required [*Bus. & Prof. Code § 8538(b)*]. A violation of these requirements is a misdemeanor [*Bus. & Prof. Code § 8538(c)*].

The landlord has a duty to provide each new tenant of a residential dwelling unit with a copy of the notice if a contract for periodic pest control service has been executed [*Civ. Code § 1940.8*].

[8] Release of Illegal Controlled Substances

Before execution of a rental agreement, the owner of a residential dwelling unit must give prospective tenants written notice of the presence of a release of an illegal controlled substance which the owner knows about. The owner's knowledge of the condition is established by the receipt of a notice from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, the local environmental health officer, or a designee, advising the owner of the release on the property, or by actual knowledge of the condition from a source independent of the notice that a release has come to be located on or beneath the dwelling unit [*Civ. Code § 1940.7*.5(b)(1), (2)]. "Illegal controlled substance" means a drug, substance, or immediate precursor listed in any schedule contained in *Health & Safety Code §§ 11054*, *11055*, *11056*, *11057*, or *11058*, or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture an illegal controlled substance, but does not include marijuana [*Civ. Code § 1940.7*.5(a)(1)].

The written notice may be given by providing the tenant a copy of any notice received by the owner from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, the local environmental health officer, or a designee, advising the owner of the release on the property [*Civ. Code § 1940.7*.5(b)(1)]. Failure to provide written notice to a prospective tenant subjects the owner to actual damages and any other remedies provided by law. In addition, if the owner had actual knowledge of the presence of any release of an illegal controlled substance and knowingly and willfully failed to provide written notice to the renter, the owner will be liable for a civil penalty of up to $5,000 for each separate violation, in addition to any other damages provided by law [*Civ. Code § 1940.7*.5(b)(4)].

These provisions are repealed on January 1, 2006, unless a later-enacted statute deletes or extends that date [*Civ. Code § 1940.7*.5(c)].

[9] Toxic Mold Protection Act

[a] Development of Exposure Limits and Guidelines

The Toxic Mold Protection Act of 2001 [*Health & Safety Code § 26101.7*] requires the Department of Health Services to convene a task force to advise the Department on the development of permissible exposure limits to mold, standards for assessment of molds in indoor environments, and standards for identification and remediation of mold [*Health & Safety Code § 26101.7*]. If the Department determines that it is feasible, the Department must adopt permissible exposure limits to mold for indoor environments that avoid adverse health effects [*Health & Safety Code § 26103*]. The Department is required to report its progress on developing permissible exposure limits for molds by July 1, 2003 [*Health & Safety Code § 26103(d)*]. The Department is also required to develop guidelines for the identification of molds [*Health & Safety Code §§ 26120-26125*] and remediation guidelines [*Health & Safety Code §§ 26131-26134*].

[b] Written Disclosure Requirements

The Act imposes disclosure requirements on residential landlords, commencing on the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*Health & Safety Code § 26147*]. After that date, residential landlords must provide written disclosure to prospective and current tenants of affected units when the residential landlord knows, or has reasonable cause to believe, that mold, both visible and invisible or hidden, is present that affects the unit or the building and the mold either exceeds permissible exposure limits to molds or poses a health threat according to guidelines developed by the Department [*Health & Safety Code § 26147(a)*]. The written notice must be provided to prospective tenants before entering into the lease or rental agreement, and to current building occupants in affected units or buildings as soon as is reasonably practical [*Health & Safety Code § 26147(c)*]. However, residential landlords are exempt from providing written disclosure to prospective tenants if the presence of mold was remediated according to mold remediation guidelines developed by the Department [*Health & Safety Code § 26147(d)*].

Before entering into a lease or rental agreement, residential landlords must also provide prospective tenants written disclosure of the potential health risks and the health impact that may result from exposure to mold. Landlords may meet this requirement by distributing a consumer oriented booklet developed and disseminated by the Department [*Health & Safety Code § 26148*].

Disclosure requirements imposed under the Act are inapplicable to properties where the tenant is contractually responsible for maintenance, including any remedial action [*Health & Safety Code § 26144*].

[c] Enforcement

Public health officers, code enforcement officers, environmental health officers, city attorneys, and any other appropriate government entities may respond to complaints about mold [*Health & Safety Code § 26154*]. They may enforce both the standards and residential disclosure requirements adopted by the Department [*Health & Safety Code § 26154*]. Local authority to enforce disclosure requirements will not apply until the first January 1 or July 1 that occurs at least six months after the Department adopts disclosure enforcement guidelines for compliance with *Health & Safety Code §§ 26147* and *26148* [*Health & Safety Code § 26154*].

The disclosure enforcement guidelines established by the Department must include development of a form for disclosure and the penalties, if any, that may be imposed for failure to disclose. A penalty may not be assessed against an owner for failure to disclose under *Health & Safety Code § 26147* if the owner provides disclosure to the tenants in a form that substantially conforms to the disclosure form developed by the Department [*Health & Safety Code § 26154*].

[10] Duty to Disclose Application for Permit to Demolish Residential Unit

The owner of a residential dwelling unit or the owner's agent who applies to any public agency for a permit to demolish the unit must give written notice of that fact to a prospective tenant before the occurrence of any of the following actions by the owner or the owner's agent [*Civ. Code § 1940.6(a)(1)*]:

- Entering into a rental agreement with a prospective tenant.
- Requiring or accepting payment from the prospective tenant for an application screening fee.
- Requiring or accepting any other fees from a prospective tenant.
- Requiring or accepting any writings that would initiate a tenancy.

The owner or owner's agent must also give written notice to current tenants before applying to the public agency for the permit to demolish the residential dwelling unit. This requirement includes tenants who have entered into a rental agreement but not yet taken possession of the dwelling unit [*Civ. Code § 1940.6(a)(2)*]. The notice must include the earliest possible approximate date on which the owner expects the demolition to occur and the approximate date on which the owner will terminate the tenancy. The demolition may not occur before the earliest possible approximate date noticed [*Civ. Code § 1940.6(b)*].

PRACTICE TIP:

Disclosing Date of Demolition and Termination. This legislation, enacted in 2002, provides that the landlord's written notice disclosing the demolition of a building must include the "earliest possible approximate date on which the owner expects the demolition to occur and the approximate date on which the owner will terminate the tenancy" [*Civ. Code § 1940.6(b)*]. However, it is not clear from the legislation how the timing of this notice relates to the statutory requirement to provide 30 or 60 days' notice to terminate a tenancy [*see Civ. Code §§ 1946, 1946.1*]. *By Publisher's Editorial Staff.*

A tenant may bring an action if the landlord fails to comply with the notice requirements or demolition takes place before the earliest date in the notice [*Civ. Code § 1940.6(c)*]. The court may order remedies including the actual damages suffered, moving expenses, and a civil penalty of up to $2,500 to be paid by the landlord to the tenant [*Civ. Code § 1940.6(c)*]. The prevailing party is entitled to reasonable attorneys' fees [*Civ. Code § 1940.6(c)(3)*]. These remedies are cumulative to other remedies available under law [*Civ. Code § 1940.6(d)*].

For a form of notice, see *§ 34B.285*. For sample notices terminating a tenancy, see *Ch. 35B, Modification and Termination of Leases, §§ 35B.240* and *35B.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsEnvironmental LawHazardous Wastes & Toxic SubstancesPesticidesEnvironmental LawHazardous Wastes & Toxic SubstancesToxic MoldGovernmentsLegislationStatutory Remedies & RightsReal Property LawEnvironmental RegulationIndoor Air & Water QualityReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantRental Property ManagementReal Property LawPurchase & SaleRemediesDuty to Disclose



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.25

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.25 Landlord's Right of Access to Leased Premises

[1] Circumstances Under Which Landlord May Enter

A landlord may enter a dwelling unit leased to a tenant only under the following circumstances [*Civ. Code § 1954(a)(1)-(4)*]:

- In case of emergency;
- To make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors, or to make a preliminary inspection before termination of the lease or rental agreement [*see Civ. Code § 1950.5(f)*; § 34B.230[1][g][iii]];
- When the tenant has abandoned or surrendered the premises; or
- In accordance with a court order.

The landlord must not abuse the right of access or use it to harass the tenant. Except in cases of emergency or when the tenant has abandoned or surrendered the premises, the landlord may enter only during normal business hours unless the tenant consents at the time of entry [*Civ. Code § 1954(b), (c)*].

[2] Notice Requirement

The landlord must give the tenant reasonable written notice of his or her intent to enter. The notice must include the date, approximate time, and purpose of the entry. Notice may be personally delivered to the tenant, left with someone of a suitable age and discretion at the premises, or, left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover the notice [*Civ. Code § 1954(d)(1)*]. Twenty-four hours is presumed to be reasonable notice in the absence of evidence to the contrary. The notice may also be mailed to the tenant. Mailing of the

notice at least six days before an intended entry is presumed reasonable notice in the absence of evidence to the contrary [*Civ. Code § 1954(d)(1)*]. If the purpose of the entry is to exhibit the dwelling unit to prospective or actual purchasers, the notice may be given orally, in person, or by telephone, if the landlord or his or her agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale and that the landlord or agent may contact the tenant orally for the purpose of showing the property. Twenty-four hours is presumed reasonable notice in the absence of evidence to the contrary. At the time of entry, the landlord or agent must leave written evidence of the entry inside the unit [*Civ. Code § 1954(d)(2)*].

The tenant and the landlord may agree orally to an entry to make agreed repairs, in which case the landlord is not required to provide the tenant with written notice. Such an agreement must include the date and approximate time of the entry, which must be within one week of the agreement [*Civ. Code § 1954(d)(3)*].

The requirement of reasonable notice does not apply in the following circumstances [*Civ. Code § 1954(e)*]:

- In cases of emergency;
- When the tenant has abandoned or surrendered the premises; or
- When it is impracticable to give reasonable notice.

[3] Waiver of Right Is Void

Any provision of a lease or rental agreement of a dwelling under which the tenant agrees to modify or waive his or her rights under *Civ. Code § 1954* is void as against public policy [*Civ. Code § 1953(a)(1)*].

[4] Entry for Purpose of Providing Information Regarding Tenant's Rights

Any person who enters residential real property on the invitation of an occupant, during reasonable hours or because of emergency circumstances, for the purpose of providing information regarding tenants' rights or to participate in a tenants' association will not be liable in any criminal or civil action for trespass [*Civ. Code § 1942.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART II. LEGAL BACKGROUND

17-34B California Legal Forms--Transaction Guide § 34B.26

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§ 34B.26 Repairs and Maintenance

[1] Governing Law for Landlord's Obligations

The rights and responsibilities of a landlord regarding the repair and maintenance of residential real property are governed by three main sources. First, *Civ. Code § 1941* requires the landlord to put the premises into a condition fit for human occupancy, and to repair all subsequent dilapidations of the premises that render the premises untenantable [*see* [2], *below*]. Second, case law implies a warranty of habitability, under which the landlord covenants that the premises will be maintained in a habitable state for the lease's duration [*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see* [3], *below*]. Third, the lease may provide that the landlord promises or covenants to make repairs [*see, e.g., § 34B.200[2],* P 8(a)].

PRACTICE TIP:

Check Local Rent Control Ordinances. Local rent control ordinances might also come into play here. Many such ordinances permit the tenant to apply to a rent control board for permission to pay a reduced rent where the landlord fails to comply with certain habitability standards or reduces services which were provided at the outset of the tenancy. *By Myron Moskovitz.*

[2] Landlord's Statutory Duty to Repair and Maintain

[a] Tenantable Dwelling

A landlord of a building intended for human occupancy must, in the absence of an agreement to the contrary, put it into a condition fit for that occupation, and repair subsequent dilapidations of the building that render it untenantable. This duty to repair does not extend to deterioration or injuries to the premises caused by the tenant's want of ordinary care [*Civ. Code § 1941*; *see Civ. Code § 1929*].

A dwelling is deemed untenantable for these purposes if it meets the definition of "substandard building" set forth in *Health & Safety Code § 17920.3,* contains lead hazards as set forth in *Health & Safety Code § 17920.10,* or substantially

lacks any of the following affirmative standard characteristics [*Civ. Code § 1941.1*]:

- Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors;

- Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order;

- Either of the following: (1) a water supply that has been approved under applicable law, is under the tenant's control, and is capable of producing hot and cold running water; or (2) a system that is under the landlord's control, produces hot and cold running water, is furnished to appropriate fixtures, and is connected to a sewage disposal system approved under applicable law;

- Heating facilities that conformed with applicable law at the time of installation, maintained in good working order;

- Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order;

- Premises (specifically, the building, grounds, and appurtenances) that, at the time of the commencement of the lease or rental agreement, are in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin;

- Landlord-controlled areas that are kept clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin;

- An adequate number of appropriate receptacles for garbage and rubbish that are in clean condition and good repair at the time of the commencement of the lease or rental agreement [*see Civ. Code § 1941.1(g)* (this standard also requires the landlord to provide appropriate serviceable receptacles after the commencement of the lease or rental agreement, and to be responsible for the clean condition and good repairs of the receptacles under his or her control)];

- Floors, stairways, and railings maintained in good repair; or

- A locking mail receptacle provided for each residential unit in a residential hotel, as required by *Health & Safety Code § 17958.3* [*Civ. Code § 1941.1(i)*, effective July 1, 2008].

PRACTICE TIP:

Local Conditions May Expand Scope of Habitability Requirement. Although the Civil Code might not include such items as "swimming pools" or operable "air conditioning" as requirements for habitability, the reality of modern life in desert or arid regions is that they are necessities. *By Benjamin Kaplan.*

[b] Excuse for Violation of Tenant's Statutory Duties

The landlord has no statutory duty to repair conditions rendering the property untenantable [*see* [a], *above*] if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or other condition or interferes substantially with the landlord's statutory obligation to effect necessary repairs [*Civ. Code § 1941.2(a)*]:

- To keep that part of the premises that the tenant occupies and uses as clean and sanitary as the

condition of the premises permits;

- To dispose of all rubbish, garbage, and other waste from his or her dwelling unit in a clean and sanitary manner;

- To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits;

- To not willfully or wantonly destroy, deface, damage, impair, or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances of the structure or dwelling unit, and to not permit any person on the premises, with the tenant's permission, to do the same; or

- To occupy the premises as his or her abode, only using portions of the premises for living, sleeping, cooking, or dining purposes that were respectively designed or intended to be used for these purposes.

The tenant need not satisfy the first two bulleted items described above if the landlord has expressly agreed in writing to perform those acts [*Civ. Code § 1941.2(b)*].

For coverage of other responsibilities of the tenant relating to repairs and maintenance, see [4], *below*.

[c] Penalties for Collecting Rent on Untenantable Dwelling

[i] Conditions Justifying Penalties

Any landlord who demands or collects rent, issues a notice of a rent increase, or issues a three-day notice to pay rent or quit [*Code Civ. Proc. § 1161(2)*], is liable to the tenant for the actual damages sustained by the tenant and for special damages in an amount not less than $100 nor more than $5,000 [*Civ. Code § 1942.4(b)*]; *see McNairy v. C.K. Realty (2007) 150 Cal. App. 4th 1500, 1506, 59 Cal. Rptr. 3d 429* ("actual damages" as used in *Civ. Code § 1942.4(b)(1)* includes damages for emotional distress). However, all of the following conditions must exist [*Civ. Code § 1942.4(a)*]:

- The rental dwelling substantially lacks any of the affirmative standard characteristics listed in *Civ. Code § 1941.1*, violates *Health & Safety Code § 17920.10* (lead hazards), or is declared substandard as set forth in *Health & Safety Code § 17920.3* because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling [*see* [a], *above*];

- A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions;

- The conditions have existed and have not been abated 35 days beyond the date of service of the notice from the public officer or employee and the delay is without good cause; and

- The conditions were not caused by an act or omission of the tenant or lessee in violation of *Civ. Code § 1929* or *1941.2*.

Service of the notice from the public officer or employee is deemed complete at the time of deposit in the U.S. mail [*Civ. Code § 1942.4(a)(3)*].

[ii] Order to Abate Nuisance and to Make Repairs

Any court that awards damages under *Civ. Code § 1942.4(a)* may also order the landlord to abate any nuisance at the rental dwelling and to repair any substandard conditions of the rental dwelling, as defined in *Civ. Code § 1941.1* [*see* [a], *above*], which significantly or materially affect the health or safety of the occupants of the rental dwelling and are uncorrected. If the court orders repairs or corrections, or both, the court's jurisdiction continues over the matter for the purpose of ensuring compliance [*Civ. Code § 1942.4(c)*].

[iii] Other Matters Pertaining to Court Action

The tenant is under no obligation to undertake any other remedy before exercising his or her rights under *Civ. Code § 1942.4* [*Civ. Code § 1942.4(d)*]. Any action under this section may be maintained in small claims court if the claim does not exceed the jurisdictional limit of that court [*Civ. Code § 1942.4(e)*; *see Code Civ. Proc. §§ 116.220(a)* (jurisdiction of small claims court generally limited to claims of $5,000 or less), 116.221 (in addition to jurisdiction conferred by Code Civ. Proc. § 116.220, small claims court has jurisdiction in action brought by natural person if amount of demand does not exceed $7,500)].

In any action based on a violation of *Civ. Code § 1942.4*, the prevailing party is entitled to recover the allowable costs of suit and reasonable attorney's fees in an amount fixed by the court [*Civ. Code § 1942.4(b)*].

The remedy provided by *Civ. Code § 1942.4* may be utilized in addition to any other remedy provided by the rental agreement, lease, or other applicable statutory or common law [*Civ. Code § 1942.4(f)*].

[d] Locks and Keys

[i] Dead-Bolt Locks

A landlord of a residential lease must install and maintain an operable dead-bolt lock on each main swinging entry door of a dwelling unit. The dead-bolt lock must be installed in conformance with the manufacturer's specifications and must comply with applicable state and local codes including, but not limited to, those provisions relating to fire and life safety and accessibility for the disabled. When in the locked position, the bolt must extend a minimum of 13/16 of an inch in length beyond the strike edge of the door and protrude into the doorjamb [*Civ. Code § 1941.3(a)(1)*].

The dead-bolt requirement does not apply to horizontal sliding doors. Existing dead bolts of at least one-half inch in length must satisfy the dead-bolt requirement until the lock requires repair or replacement, at which time it must be replaced with a dead bolt at least 13/16 of an inch in length. Existing locks with a thumb-turn deadlock that have a strike plate attached to the doorjamb and a latch bolt that is held in a vertical position by a guard bolt, a plunger, or an auxiliary mechanism must also satisfy the dead-bolt requirement until the lock requires repair or replacement, at which time it must be replaced with a dead bolt at least 13/16 of an inch in length [*Civ. Code § 1941.3(a)(1)*].

Existing doors that cannot be equipped with dead-bolt locks must satisfy the dead-bolt requirement if the door is equipped with a metal strap affixed horizontally across the midsection of the door with a dead bolt which extends 13/16 of an inch in length beyond the strike edge of the door and protrudes into the doorjamb [*Civ. Code § 1941.3(a)(1)*].

Furthermore, locks and security devices, other than those described above, that are inspected and approved by an appropriate state or local government agency as providing adequate security must satisfy the requirements of *Civ. Code § 1941.3* [*Civ. Code § 1941.3(a)(1)*].

[ii] Window Security

A landlord of a residential lease must install and maintain operable window security or locking devices for windows that are designed to be opened. Excluded from this requirement are louvered windows, casement windows, and all

windows more than 12 feet vertically or 6 feet horizontally from the ground, a roof, or any other platform [*Civ. Code § 1941.3(a)(2)*].

[iii] Exterior Doors

A landlord of a residential lease must install locking mechanisms that comply with applicable fire and safety codes on the exterior doors that provide ingress or egress to common areas with access to dwelling units in multifamily developments. This requirement does not require the installation of a door or gate where none exists on January 1, 1998 [*Civ. Code § 1941.3(a)(3)*].

[iv] Tenant's Notice Obligations

A tenant is responsible for notifying the landlord (or his or her authorized agent) when the tenant becomes aware of an inoperable dead-bolt lock or window security or locking device in the dwelling unit. The landlord, or his or her authorized agent, will not be liable for a violation of the duties described in [i]-[iii], *above*, unless he or she fails to correct the violation within a reasonable time after he or she either has actual notice of a deficiency or receives notice of a deficiency [*Civ. Code § 1941.3(b)*].

[v] Tenant's Rights and Remedies

The rights and remedies of a tenant for a violation of *Civ. Code § 1941.3* by the landlord include all of the following [*Civ. Code § 1941.3(c)*]:

- The tenant's rights and remedies under *Civ. Code § 1942* (repair and deduct or vacate) [*see* [f], *below*];
- The tenant's rights and remedies under *Civ. Code § 1942.4* (penalties for collecting rent on untenantable dwelling) [*see* [c], *above*];
- The tenant's rights and remedies under *Civ. Code § 1942.5* (remedies for landlord retaliation) [*see California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions, § 333.28[5]* (Matthew Bender)];
- An action for breach of contract; and
- An action for injunctive relief under *Code Civ. Proc. § 526*.

Additionally, in an unlawful detainer action, after a default in the payment of rent, a tenant may raise the violation of *Civ. Code § 1941.3* as an affirmative defense and has a right to the remedies provided by *Code Civ. Proc. § 1174.2* [*Civ. Code § 1941.3(c)*].

[vi] Additional Security Requirements

Nothing in *Civ. Code § 1941.3* will be construed to affect any authority of any public entity that may otherwise exist to impose any additional security requirements on a landlord [*Civ. Code § 1941.3(e)*].

[vii] Buildings Exempted From Security Requirements

The provisions of *Civ. Code § 1941.3* do not apply to any building which has been designated as historically significant by an appropriate local, state, or federal governmental jurisdiction [*Civ. Code § 1941.3(f)*]. In addition, the requirements described in [i]-[iv], *above*, do not apply to any building intended for human habitation which is managed, directly or

indirectly, and controlled by the Department of Transportation [*see Civ. Code § 1941.3(g)*].

[e] Telephone Wiring

The landlord of a residential lease is responsible for the following repairs and improvements with regard to telephone wiring and jacks [*Civ. Code § 1941.4*]:

- Installing at least one usable telephone jack;
- Placing and maintaining the inside telephone wiring in good working order;
- Ensuring that the inside telephone wiring meets the applicable standards of the most recent National Electrical Code as adopted by the Electronic Industry Association; and
- Making any required repairs.

Further, the landlord is not permitted to restrict or interfere with access by the telephone utility to its telephone network facilities up to the demarcation point separating the inside wiring [*Civ. Code § 1941.4*]. "Inside telephone wiring" means that portion of the telephone wire that connects the telephone equipment at the leased premises to the telephone network at a demarcation point determined by the telephone corporation in accordance with orders of the Public Utilities Commission [*Civ. Code § 1941.4*].

[f] Tenant's Right to Repair and Deduct or Vacate

If the tenant notifies the landlord or the landlord's agent [*see Civ. Code § 1962(a)*] orally or in writing of dilapidations that render the premises untenantable and that the landlord "ought" to repair [*see Civ. Code § 1941.1*; *see also* [2][a], *above*], and the landlord fails to repair the conditions within a reasonable time, the tenant may make the necessary repairs or vacate the premises, subject to the limitations discussed below [*Civ. Code § 1942(a)*].

The tenant may make the repairs if the cost of the repairs does not exceed the equivalent of one month's rent. The tenant may then deduct the cost from the rent when due [*Civ. Code § 1942(a)*]. If the tenant repairs and deducts after the 30th day following the notice, the tenant is presumed to have acted after a reasonable time. The tenant may, however, repair and deduct after a shorter period if the circumstances require shorter notice [*Civ. Code § 1942(b)*].

If the tenant vacates the premises, he or she is discharged, as of the date of vacating, from further payment of rent or the performance of any other conditions [*Civ. Code § 1942(a)*].

The tenant's remedies to repair and deduct are not available more than twice in any 12-month period [*Civ. Code § 1942(a)*]. Further, they are not available if the condition was caused by either of the following [*Civ. Code § 1942(c)*]:

- The tenant's want of ordinary care [*see Civ. Code § 1929*]; or
- The tenant's violation of any of the affirmative obligations set forth in *Civ. Code § 1941.2* [*see* [2][b], *above*].

These remedies are in addition to any other remedy provided by the lease or other applicable statutory or common law [*Civ. Code § 1942(d)*].

[g] Arbitration of Disputes

The landlord and tenant may, in a written agreement, set forth the provisions of *Civ. Code §§ 1941-1942.1* and provide for the following [*Civ. Code § 1942.1*]:

- Any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, in accordance with the provisions of *Code Civ. Proc. §§ 1280-1294.2* (California Arbitration Act) [for coverage of the Act, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]; and

- The costs of the arbitration will be apportioned by the arbitrator between the parties.

For lease language that sets forth the above agreement, see *§ 34B.261[2]*.

One court of appeal has stated that to be enforceable, an agreement to arbitrate issues concerning the rights and obligations of a landlord and tenant, including tenantability issues, must be contained in a separate agreement and not in the lease itself [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . The court's reasoning was based on *Civ. Code § 1953(a)(4)*, which precludes a residential lease agreement from including any modification or waiver of a tenant's "procedural rights in litigation in any action involving his rights and obligations as a tenant" [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 403-404, 3 Cal. Rptr. 3d 525]* . However, the court did not decide the issue because it found that the agreement failed to meet other statutory requirements and was unconscionable [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . In light of *Jaramillo*, the form *set forth in § 34B.261[2]* contains an alternative clause that may be used as a separate agreement to arbitrate issues of tenantability.

[h] Waiver of Rights

Any agreement by a tenant waiving or modifying the tenant's rights under *Civ. Code § 1941* or *1942* is void as contrary to public policy with regard to any condition that renders the premises untenantable. Notwithstanding the above, the landlord and tenant may agree that the tenant will undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rental [*Civ. Code § 1942.1*].

[3] Implied Warranty of Habitability

There is an implied warranty of habitability in residential leases in California [*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168]* . Under the implied warranty, a residential landlord covenants that the premises he or she leases for living quarters will be maintained in a habitable state for the duration of the lease. This warranty does not require that a landlord ensure that the leased premises are in perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. In most cases, substantial compliance with applicable building and housing code standards that materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty [*Green v. Superior Court (1974) 10 Cal. 3d 616, 637, 111 Cal. Rptr. 704, 517 P.2d 1168]* . Further, the standards of tenantability set out in *Civ. Code § 1941.1* [*see* [2][a], *above*], although not strictly applicable in this context, may provide some guidance in determining whether a landlord has satisfied the common law warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 637 n.23, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

For detailed coverage of the implied warranty of habitability, see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender), and California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer* (Matthew Bender).

[4] Lead-Safe Renovation

In March 2008, EPA issued new rules for contractors who renovate or repair housing, child-care facilities or schools built before 1978 to further protect children from exposure to lead-based paint *[73 Fed. Reg. 21692 (April 22, 2008)* ; amending 40 C.F.R. Part 745]. The "Lead: Renovation, Repair and Painting Program" rule, which will take effect in April 2010, prohibits work practices creating lead hazards. Under the new rules, workers must follow lead-safe work practice standards to reduce potential exposure to dangerous levels of lead during renovation and repair activities.

Requirements under the rule include implementing lead-safe work practices and certification and training for paid contractors and maintenance professionals. To foster adoption of the new measures, EPA will conduct an extensive education and outreach campaign to promote awareness of these new requirements. The rule covers all rental housing and non-rental homes where children under six and pregnant mothers reside. The requirements apply to renovation, repair or painting activities where more than six square feet of lead-based paint is disturbed in a room or where 20 square feet of lead-based paint is disturbed on the exterior. The affected contractors include builders, painters, plumbers and electricians. Trained contractors must post warning signs, restrict occupants from work areas, contain work areas to prevent dust and debris from spreading, conduct a thorough cleanup, and verify that cleanup was effective. For further information *see* http://www.epa.gov/lead/pubs/renovation.htm.

[5] Tenant's Duties to Repair and Maintain Premises

The tenant has certain affirmative, statutory obligations regarding the maintenance and use of the premises; a tenant's violation of these statutory duties will excuse the landlord from his or her duty to maintain the premises in a tenantable condition [*see Civ. Code § 1941.2* and *[2][b], above*].

Other than these statutory obligations, and in the absence of contrary provisions in the lease, a tenant only has the duty to use ordinary care to keep the premises in safe and good condition [*see Civ. Code § 1928*] and to repair all deteriorations or injuries to the premises caused by the tenant's want of ordinary care [*see Civ. Code § 1929*]. Otherwise, a tenant has no general duty to repair the premises or correct defective conditions [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671-672, 75 Cal. Rptr. 889, 451 P.2d 721]* .

A tenant may covenant in a lease to repair the premises [*see Western Motors Corp. v. Land Dev. Etc. Co. (1957) 152 Cal. App. 2d 509, 513, 313 P.2d 927]* or to return the premises in as good a condition as they were when leased [*Dicker v. West (1958) 164 Cal. App. 2d 55, 61, 330 P.2d 106]* . A tenant's covenant to repair generally will be interpreted to avoid placing any unwarranted burden of improvement of the landlord's premises on the tenant [*see, e.g., ASP Properties Group, L.P. v. FARD, Inc. (2005) 133 Cal. App. 4th 1257, 1271-1272, 35 Cal. Rptr. 3d 343* (lease provision and amendment requiring tenant of commercial property to maintain and repair premises, including "make any improvement, correct any condition, or otherwise comply with any written notice" from city or landlord regarding defects, did not require tenant to replace roofs on premises)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent ApplicationReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent WithholdingReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.27

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.27 Alterations by Tenant

A tenant's right to make alterations to leased premises depends on the lease's specific terms [*see Spring Street Realty Co. v. Trask (1932) 126 Cal. App. 765, 768, 15 P.2d 195]* . Absent an express provision in the lease permitting or requiring alterations, the tenant may not make material alterations to the leased premises without the landlord's consent [*see Metzler v. Thye (1912) 163 Cal. 95, 98-99, 124 P. 721* ; *Briggs v. Sherman (1924) 65 Cal. App. 249, 251-252, 223 P. 581]* . It is not common for a tenant of a residential property to make material alterations to the premises. For lease language granting the tenant the right to make material alterations, see Ch. 34C, *Retail, Industrial, and Office Leases* .

On the other hand, a tenant may make minor changes to the leased premises without violating a lease specifically prohibiting alterations by the tenant [*see Briggs v. Sherman (1924) 65 Cal. App. 249, 251-252, 223 P. 581]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.28

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.28 Antidiscrimination and Fair Housing Laws

Federal and state laws prohibit discrimination against prospective and current tenants on the basis of specified characteristics, including sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. These laws apply to the initial selection of tenants and to leasing and rental practices in general. Applicable state laws include the Unruh Civil Rights Act [*Civ. Code § 51*; *see Civ. Code §§ 51.2-53*] and the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*]. The federal laws include the Fair Housing Act of 1983 [*42 U.S.C. § 3601 et seq.*] and the Civil Rights Act of 1866 [*42 U.S.C. § 1981 et seq.*]. For complete coverage of these antidiscrimination laws as they apply to leasing, see California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsProhibited ActsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.29

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.29 State Building Requirements

The State Housing Law [*Health & Safety Code § 17910 et seq.*] establishes minimum construction and occupancy requirements for buildings used for human habitation. Its implementing regulations [*see 25 Cal. Code Reg. § 1 et seq.*] apply to, among other things, the occupancy and use of apartment houses, hotels, motels, and dwellings [*25 Cal. Code Reg. § 1(a)*].

The California Building Standards Law [*Health & Safety Code § 18901 et seq.*] requires the California Building Standards Commission to codify and publish all state building standards in a single California Building Standards Code [*Health & Safety Code § 18931(b)*; *see Health & Safety Code § 18910* ("Code" defined); *see also Health & Safety Code § 18920* (California Building Standards Commission)]. The California Building Standards Code is set forth in Title 24 of the California Code of Regulations [*Health & Safety Code § 18902*].

For further discussion of state building requirements, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* , and California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityReal Property LawZoning & Land UseBuilding & Housing Codes



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17-34B California Legal Forms--Transaction Guide § 34B.30

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.30 Public Housing

The rights of low-income tenants in public housing owned and administered by local housing authorities are governed to a large extent by rules and regulations promulgated by the Department of Housing and Urban Development (HUD) [*see 42 U.S.C. § 1437 et seq.* (United States Housing Act of 1937)]. HUD assists local housing authorities in the production of housing, and establishes minimum requirements that the local housing authorities must satisfy. In many cases, the applicable requirements must be incorporated into the leases for the public housing units.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHousing & Public BuildingsGeneral OverviewPublic Health & Welfare LawHousing & Public BuildingsLow Income Housing



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide §§ 34B.31-34B.99

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34B.31[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.100

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.100 Basic Facts for All Parties

1. Basic information about landlord and tenant, such as:

a. Name.

b. Addresses (mailing, delivery, e-mail).

c. Telephone numbers (voice, fax, message, cellular).

d. Legal status, as any of the following:
(1) Individual.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Limited liability company.

(6) Joint venture.

(7) Unincorporated association.

(8) Estate.

(9) Public entity.

(10) Other.

e. If an individual:

(1) Age (if party is a minor).

NOTE:
A minor (that is, a person under 18 years of age) cannot make a contract relating to real property, unless he or she is an "emancipated minor" [***see*** *§ 34B.15[2][b][ii]*].

(2) Marital status.

(3) If married:

(a) Name and address of spouse.

(b) Date and place of marriage.

f. If an entity:

(1) Type of entity.

(2) Full legal name.

(3) Address of main office or principal place of business.

(4) Address of branch or office at which matters relating to this transaction will be handled.

(5) Name, address, and title of persons to whom communications should be directed.

(6) Name, address, and title of person authorized to bind entity.

2. Name, telephone number, and usual street address (for purposes of personal service) of owner of premises [*see Civ. Code § 1962(a)(1)*; *see also § 34B.24[1]*].

3. Name, telephone number, and address of person or entity to whom rent payments must be made [*Civ. Code § 1962(a)(2)*; *see § 34B.24[1]*]:

a. If payment may be made personally, usual days and hours that person will be available to receive payment;

b. Name and street address and account number at financial institution into which payment may be made, provided that financial institution is located within five miles of rental property; or

c. Information necessary to establish electronic funds transfer procedure for paying rent.

NOTE:

The form or forms in which rental payments must be made must also be provided [*Civ. Code § 1962(a)(3)*].

4. If applicable, name and usual street address of each person who is authorized to act for and on behalf of landlord for purposes of the following [*see Civ. Code § 1962(a)*; *see also § 34B.24[1]*]:

a. Service of process.

b. Receiving and receipting all notices and demands.

c. Receiving rental payments.

5. If corporation is party to transaction [*see § 34B.15[2][f]*]:

a. Date and state of its incorporation.

b. Date on which board of directors or shareholders approved or will approve transaction.

NOTE:

For a corporate resolution authorizing a lease transaction, and further discussion, see Ch. 34A, ***Prelease Forms*** .

6. If partnership is party to transaction [*see § 34B.15[2][g]*]:

a. And partnership holds title to property being leased in partnership name, names of partners authorized to sign lease.

b. And title is or will be held in name of one or more of partners, names of those partners.

7. If limited liability company (LLC) is party to transaction [*see § 34B.15[2][h]*]:

a. Name in which LLC holds title.

b. Name of members of LLC.

c. If manager has been appointed to manage business of LLC, name of manager.

8. If unincorporated association is party to transaction [*see § 34B.15[2][i]*]:

a. Type of entity, such as:

(1) Unincorporated fraternal or benevolent association.

(2) Labor organization.

(3) Other.

b. Date on which resolution authorizing transaction was or will be adopted (if applicable) [*see* Ch. 34A, *Prelease Forms*].

9. If an estate is party to transaction [*see § 34B.15[2][b][ii], [iii], [e]*]:

a. Name of guardian, conservator, executor, or administrator of estate.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name and location of court with jurisdiction over estate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.101

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.101 Additional Facts Relating to Landlord

1. Date landlord acquired property.

2. Name in which landlord took title to premises if different from name in which landlord presently holds title [*see § 34B.211*].

3. Manner in which landlord holds title.

a. As corporation in corporate name.

b. As partnership in partnership name.

c. As partnership in name of one or more partners.

d. As limited liability company in limited liability company name.

e. As individual.

f. As husband and wife in [*see § 34B.15[2][c]*]:
(1) Joint tenancy.

(2) Tenancy in common.

(3) Community property.

g. As co-owner in [*see § 34B.15[2][d]*]:

(1) Joint tenancy.

(2) Tenancy in common.

h. As executor or administrator of decedent's estate [*see § 34B.15[2][e]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.102

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.102 Additional Facts Relating to Tenant

1. Number of children, if any, to reside in leased premises.

2. Number and type of any pets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.103

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.103 Facts Relating to Premises

1. Address (including apartment number, if applicable).

2. Type, for example:

    a. Single-family residence.

    b. Unit in apartment building or complex.

3. Inventory or description of any fixtures and appliances, furnishings, and other personal property to be included in lease.

4. Appurtenances and easements to be included in lease [*see § 34B.16[2]*], for example:

    a. Rights of ingress and egress.

    b. Driveway.

    c. Parking space.

    d. Storage space.

    e. Porch.

f. Patio.

5. Any items or appurtenances located on or appurtenant to leased premises to be excluded from lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.104

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.104 Documents Pertaining to Landlord and Tenant

1. Deed or other document by which landlord derived title, for example, by court order.

PRACTICE TIP:

Copy of Deed Does Not Guarantee Vesting. Simply having a deed is no guarantee that it is the last deed in the chain of title. Unless some effort is made to do a chain of title search and confirm the vesting with the County Recorder's office, there can be no assurance that you are in fact dealing with the correct person or entity. Many clients will state that they own the property when in fact it is held by a limited partnership of which they are the general partner or when title is in the name of a family or revocable trust. The holding of title may have significant implications on what remedies or actions may be taken. *By Benjamin Kaplan.*

2. Any agreement creating easement burdening or benefiting property.

3. Landlord or tenant's power of attorney, if any.

4. Any agreement to enter into lease, or other correspondence between parties.

5. If party is corporation and resolution approving transaction has already been adopted, certified copy of that resolution [*see* Ch. 34A, *Prelease Forms*].

6. If landlord is partnership holding title in its name, certified copy of statement of partnership recorded in county where land is located (if any) [*see* Ch. 15, *General Partnerships*].

7. If party is limited liability company (LLC), copy of Articles of Organization filed with Secretary of State.

8. If party is unincorporated association and resolution authorizing transaction has already been adopted, certified copy of that resolution [*see* Ch. 34A, *Prelease Forms*].

9. If landlord is an estate or trust, copy of will or trust instrument naming executor or trustee.

10. If landlord is an estate, copy of Letters of Administration and certified copy of Register of Action of probate.

11. Copy of any rules or regulations for building.

12. Insurance policy and cover sheet (face sheet/Declarations Page) covering property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferGeneral OverviewReal Property LawTitle QualityGeneral Overview



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17-34B California Legal Forms--Transaction Guide §§ 34B.105-34B.109

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34B.105[Reserved]



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B. Preliminary Determinations

17-34B California Legal Forms--Transaction Guide § 34B.110

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.110 Capacity and Authority of Parties

1. If either party is corporation, determine the following:

a. Whether board of directors adopted resolution authorizing corporation to enter into lease [*see* Ch. 34A, *Prelease Forms*].

b. If property owned by corporation is being leased, ascertain the following:
(1) Whether property represent all or substantially all of corporation's assets.

(2) Whether transaction is in usual and regular course of business.

NOTE:
Statutory approval requirements apply to the leasing of all or substantially all of the assets of a corporation [***see*** *Corp. Code § 1001(a)*; ***see also*** *§ 34B.15[2][f]*].

2. If either party is unincorporated association, determine the following [*see* Ch. 34A, *Prelease Forms*]:

a. Whether articles of association or bylaws require resolution by authorizing board and/or approval by association's members.

b. If so, whether association has adopted resolution authorizing transaction.

3. If landlord is general partnership, ascertain whether statement of partnership authorizing specified partners to execute instruments on behalf of partnership has been signed by all partners and recorded [*see* Ch. 27, *Deeds and Recording*].

4. If landlord is limited partnership, determine the following:

a. Whether certified copy of certificate of limited partnership has been recorded in county where real property is located [*see* Ch. 27, *Deeds and Recording*].

b. Whether property to be leased is all, or substantially all, of partnership's assets, and if so, whether affirmative vote of majority of limited partners has been obtained for lease transaction [*see § 34B.15[2][g]*].

5. If landlord is limited liability company (LLC), determine the following [*see* Ch. 12C, *Limited Liability Companies*]:

a. Whether certified copy of LLC's articles of organization have been recorded in county in which real property is located [*Corp. Code § 17052(f)*; *see* Ch. 12C, *Limited Liability Companies*].

b. Whether member(s) or manager(s) of LLC have authority to bind LLC to lease, as indicated in articles of organization.

6. If executor or administrator of decedent's estate is leasing decedent's real property, ascertain whether transaction meets following criteria and therefore does not require court order [*Prob. Code § 9941*]:

a. Transaction is to advantage of estate; and

b. Either of following apply:

(1) Rental will not exceed $5,000 a month and term will not exceed one year; or

(2) Lease will be from month-to-month, regardless of amount of rental.

7. If either party is minor, determine the following [*see § 34B.15[2][b][ii]*]:

a. Whether minor is emancipated and capable of entering into binding lease.

b. If minor is not emancipated, whether guardian has been appointed.

c. Whether transaction meets following criteria, allowing court-appointed guardian to enter into lease without court order [*Prob. Code § 2555*]:

(1) Transaction is to advantage of estate; and

(2) Either of following apply:
(a) Rental will not exceed $5,000 a month and term will not exceed two years; or

(b) Lease will be from month-to-month, regardless of amount of rental.

8. If either party has been adjudicated incompetent, ascertain the following [*see § 34B.15[2][b][iii]*:

a. Whether conservator has been appointed to represent incompetent person.

b. If conservator of incompetent person is leasing property of ward, determine whether transaction meets following criteria, allowing conservator to enter into lease without court order [*Prob. Code § 2555*]:

(1) Transaction is to advantage of estate; and

(2) Either of following apply:
(a) Rental will not exceed $5,000 a month and term will not exceed two years; or

(b) Lease will be from month-to-month, regardless of amount of rental.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34B California Legal Forms--Transaction Guide § 34B.111

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.111 Terms of Lease

1. Determine type of tenancy, for example:

NOTE:
A residential lease usually creates a periodic tenancy or a tenancy for years.

a. Periodic tenancy [*see §§ 34B.14[1], 34B.220*].
(1) Month-to-month.

(2) Year-to-year.

(3) Week-to-week.

(4) Other.

b. Tenancy for years [*see §§ 34B.14[2], 34B.200[2], 34B.201[2]*].

c. Tenancy at will [*see § 34B.14[3]*].

d. Tenancy at sufferance [*see § 34B.14[4]*].

2. Ascertain basic facts concerning term, such as:

a. Commencement date.

b. If fixed term lease:

(1) Length of term.

(2) Termination date.

c. If periodic tenancy, length of successive periods.

3. Determine whether there will be automatic renewal or extension of lease [*see § 34B.222*] or whether tenant will have option to renew or extend lease [*see § 34B.224*]

4. Ascertain basic facts concerning rent [*see § 34B.18*]:

a. Amount.

b. Person to whom rent must be paid.

c. Form of payment (for example, cashiers check, money order or personal check).

d. Method of delivery.

e. Intervals at which rent is to be paid.

f. When rent is to be due.

g. Amount or method of determination of any penalties to be assessed for late payments.

h. Obligation of tenant to pay last month's rent at beginning of tenancy, if applicable.

i. Penalties, if any, to be assessed in event of late payment of rent or tendering check with insufficient funds.

5. Determine amount of security deposit to be paid by tenant, subject to following maximum amounts [*Civ. Code § 1950.5(c)*; *see § 34B.230*]:

a. Total amount equal to two months rent if premises are unfurnished.

b. Total amount equal to three months rent if premises are furnished.

6. Ascertain whether premises are subject to local rent control ordinance.

NOTE:
A municipality has the power to enact a rent control ordinance which may regulate permissible rent increases, grounds for eviction, and other aspects of the landlord-tenant relationship [***see** § 34B.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord &

TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies



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B. Preliminary Determinations

17-34B California Legal Forms--Transaction Guide § 34B.112

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.112 Condition of Dwelling

1. Determine whether premises are tenantable, that is, that premises do not come within definition of "substandard building" set forth in *Health & Safety Code § 17920.3*, do not contain lead hazards as set forth in *Health & Safety Code § 17920.10*, and possess or include following characteristics [*Civ. Code § 1941.1*; *see § 34B.26[2][a]*]:

NOTE:
A landlord of a building intended for human occupancy must, in the absence of an agreement to the contrary, put the building into a condition fit for that occupation, and repair subsequent dilapidations of the building that render it untenantable [*Civ. Code § 1941*; ***see*** *§ 34B.26[2][a]*].

a. Effective waterproofing and weather protection of roof and exterior walls (including unbroken windows and doors).

b. Plumbing or gas facilities that conformed to applicable law in effect at time of installation, maintained in good working order.

c. Approved and functioning water supply.

NOTE:
Specifically, the premises must contain either of the following: (1) a water supply that has been approved under applicable law, is under the tenant's control, and is capable of producing hot and cold running water; or (2) a system that is under the landlord's control,

produces hot and cold running water, is furnished to appropriate fixtures, and is connected to a sewage disposal system approved under applicable law [*Civ. Code § 1941.1(c)*].

d. Heating facilities that conformed with applicable law at time of installation, maintained in good working order.

e. Electrical lighting, with wiring and electrical equipment that conformed with applicable law at time of installation, maintained in good working order.

f. Grounds, appurtenances, and building that, at time of commencement of lease, are in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

g. Landlord-controlled areas that are clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

h. Appropriate receptacles for garbage and rubbish that are in clean condition and good repair at time of commencement of lease.

NOTE:

The landlord is also required to provide appropriate serviceable receptacles after the commencement of the lease, and to be responsible for the clean condition and good repair of the receptacles under his or her control [*Civ. Code § 1941.1(g)*].

i. Floors, stairways, and railings maintained in good repair.

j. A locking mail receptacle provided for each residential unit in a residential hotel, as required by *Health & Safety Code § 17958.3* [*Civ. Code § 1941.1(i)*, effective July 1, 2008].

2. Determine whether landlord will be making any repairs or improvements to premises either before commencement date or within a time certain after lease commences.

3. Determine whether premises conform to requirements of *Civ. Code § 1941.3* for dead-bolt locks, window security, and exterior doors [*see § 34B.26[2][d]*].

4. Determine whether premises conform to requirements of *Civ. Code § 1941.4* for telephone wiring [*see § 34B.26[2][e]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityReal Property LawZoning & Land UseBuilding & Housing Codes



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17-34B California Legal Forms--Transaction Guide §§ 34B.113-34B.119

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.113[Reserved]



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17-34B California Legal Forms--Transaction Guide § 34B.120

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.120 Representation of Both Parties to Lease

1. If requested to represent both parties to transaction:

a. Recommend that one party obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw their request and do not appear to have conflicting or potentially conflicting interests, take both of following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party.

b. Obtain written consent from both parties to arrangement before accepting employment.

PRACTICE TIP:
Be Sensitive to Potential Conflicts of Interest. One has to be sensitive to conflicts of interest even if it appears that one person is in control of the various entities. In one recent transaction a family limited partnership was the seller. The general partner of the limited partnership was a family trust. The trustee of the trust was Mr. Jones. Mr. Jones, as an individual, was also the lender. A conflict of interest waiver was required of both entities and one individual. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestReal Property LawLandlord & TenantGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.121

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.121 Tenant's Actions Before Lease Commencement

1. If desired, obtain standardized inspection checklist [*see § 34B.281*] and arrange for inspection of premises and completion of checklist by tenant.

2. If rental application is used [*see § 34B.280*]:

a. Have tenant complete and sign application.

b. Instruct tenant to pay deposit described on application form.

c. If landlord does not approve tenant's application within number of days specified on application form, confirm that landlord returns tenant's deposit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.122

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.122 Use of Standardized Lease Form

1. Assist client in completing standardized agreement and any related rental application [*see §§ 34B.202* (residential lease), 34B.280 (applicant to rent)].

2. Review drafting guide in Part D of this Transaction Guide to determine whether additional or alternative provisions should be included in standardized agreement.

3. If desired, modify provision(s) of standardized agreement by [*see § 34B.202[1][b]*]:

a. Preparing supplement describing all modifications;

b. Attaching supplement to lease; and

c. Incorporating attached supplement into lease [*see § 34B.202[2],* P 40].

PRACTICE TIP:
Tenant Changes Noted on Lease Form. A landlord will often find it advantageous to have numerous changes made by a tenant all noted on the form. This tends to dispel the idea that negotiations were "one-sided" or that the rental agreement was an "adhesion agreement." *By Benjamin Kaplan.*

4. If any marks or other modifications are made on form, have both parties initial each modification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsAdhesion ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.123

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.123 Use of Lease Drafted by Other Party

1. Assist client in negotiations with other party.

2. If client is presented with proposed lease prepared by another attorney, review lease to ensure that it is:

    a. Consistent with client's stated goals.

    b. Otherwise acceptable to client.

    c. Legally sufficient.

    NOTE:
    For a checklist of provisions that must or should be included in leases, see Part D of this Transaction Guide.

3. Negotiate any desired changes with other party's attorney.

4. For each requested change that is not acceptable to other party, determine whether client wishes:

    a. To drop request for change;

    b. To terminate negotiations and transaction if other party does not reconsider; or

    c. To compromise on stated terms and conditions.

5. For requested changes that are approved by other party, confer with other party's attorney for mechanics of implementing change.

NOTE:

The drafting attorney may agree to draft the proposed change or request the other attorney to submit a draft of the proposed change. Alternatively, the attorneys may jointly draft a proposed change, by phone or otherwise.

6. Obtain client's approval of final version of lease.

PRACTICE TIP:

Client Should Take Some Responsibility for Reviewing Leases Drafted by Other Party. There is a general consensus in the business community that an attorney cannot resist changing or modifying another attorney's product. Whether this is the case or the perception, it is important when confronted by a lease drafted by the other party or the other party's attorney to get some things understood with your client, regarding the purview of your activity.

- First, your client should read the lease. The attorney reading the lease is not a substitute for the client reading the lease.

- Second, if the client does not understand the lease or particular provisions of the lease, the attorney should explain them.

- Third, the client should articulate to the attorney which terms the client regards as the most critical terms, "make or break," and the lease should be examined from the viewpoint of whether such terms are set forth or adequately covered by the document.

- Fourth, the lease should be examined by the client for those terms that the client believes are incompatible with its interests. For example, it may be necessary for the attorney to call to the client's attention that certain clauses that do not appear as money clauses are in fact money clauses, and the open ended nature of any such clauses should be explained to the client. The client must clearly understand what dollars are being tabled, now and in the future, and what events may trigger significant or monumental expenditures, such as ADA compliance, code compliance, or reassessment on change of ownership.

- Lastly, the client should be informed of what each part and step of the review is likely to cost. The best idea is to deal with all the make or break points first and then decide if it is even worthwhile negotiating the other points. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.124

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.124 Drafting Custom Lease

1. If retained to draft lease, proceed with the following:

a. Review Part D of this Transaction Guide for checklist of items to be included in lease;

b. Complete agreement set forth in this chapter [*see §§ 34B.200* (apartment lease), 34B.201 (house lease)]; and

c. Incorporate additional or alternative provisions also included in this chapter, as appropriate [*see §§ 34B.210-34B.284*].

PRACTICE TIP:
Drafting Custom Lease Is Expensive. Despite the growing excellence of available forms, drafting is a laborious and thus expensive task. It is best to have a clear understanding from the client as to what clauses or provisions need intensive drafting, and what provisions can well afford to be left to "off-the-shelf utilization." *By Benjamin Kaplan.*

2. Conduct negotiations in manner described in § 34B.123.

3. If negotiations are successful, obtain client's approval of final version of lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal

Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.125

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.125 Execution of Lease

1. Instruct landlord and tenant (and their spouses, if applicable) to execute lease.

NOTE:

Under the Statute of Frauds, an agreement for the leasing of an interest in real property for a term exceeding one year, or some note or memorandum of the agreement, must be in writing and subscribed by the party to be charged or by the party's agent [*Civ. Code § 1624(a)(3)*; ***see*** *Civ. Code § 1091*; *Code Civ. Proc. § 1971*; ***see also*** *§ 34B.15[3]*]. Both spouses (either personally or by a duly authorized agent) must execute any instrument by which community real property is sold or otherwise conveyed [*Fam. Code § 1102*; ***see*** *§ 34B.15[2][c]*].

2. If agent has been authorized in writing to sign lease on behalf of landlord or tenant [*see § 34B.15[2][j]*]:

a. If agent is attorney-in-fact, have agent first subscribe principal's name, and then agent's own name as attorney-in-fact [*Civ. Code § 1095*].

b. Otherwise, have agent sign as landlord or tenant's agent.

3. If landlord is partnership, have lease executed by:

a. All partners; or

b. Partners expressly authorized to sign by statement of partnership of general

partnership.

4. If landlord is limited liability company (LLC), obtain signatures of:

a. Manager(s) appointed by members of LLC, if authorized in articles of organization; or

b. One or more members of LLC (refer to articles of organization to determine authority).

5. If landlord is corporation, obtain signatures of [*see Corp. Code § 313*]:

a. Chairman of the board, president, or any vice-president; and

b. Secretary, assistant secretary, chief financial officer, or assistant treasurer.

6. If landlord is unincorporated association, have lease executed by [*Corp. Code § 18115*; *see* Ch. 34A, *Prelease Forms*]:

a. President, secretary, or other comparable officer;

b. Person specifically designated by resolution adopted by association; or

c. Committee or other body or person authorized to act by association's governing principles.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of FraudsReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34B California Legal Forms--Transaction Guide § 34B.126

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.126 Optional Recordation of Memorandum of Lease

NOTE:

Residential leases are not recorded as a general rule. If the parties insist on recordation, however, counsel may prepare and record a memorandum of lease by following the procedural guide set forth in the Transaction Guide to Ch. 34C, ***Retail, Industrial, and Office Leases*** [***see*** *§ 34B.15[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawPriorities & RecordingRecording Acts



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17-34B California Legal Forms--Transaction Guide § 34B.127

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.127 Disclosures by Landlord

NOTE:
This section covers disclosures made by the landlord other than in the lease itself. For additional disclosures that must be or usually are set forth in the lease, see Part D of this Transaction Guide.

1. If any person, while engaging in trade or business, is negotiating (orally or in writing) primarily in Spanish (or, as of July 1, 2004, Chinese, Tagalog, Vietnamese, or Korean) in course of entering into lease, instruct that person to [*Civ. Code § 1632(b)*; *see § 34B.24[2]*]:

NOTE:
These requirements apply to leases for a period of longer than one month that cover dwellings, apartments, mobilehomes, or other dwelling units normally occupied as residences [*Civ. Code § 1632(b)*]. They do not apply if the other party negotiates the terms of the lease through his or her own interpreter [*Civ. Code § 1632(h)*].

a. Furnish other party with unexecuted translation of lease before lease is executed; and

b. Provide other party with foreign-language notice of disclosure requirement at time and place that parties enter into lease.

2. If landlord is leasing real property containing at least one but not more than four dwelling units and lease is to include option to purchase, instruct landlord to [*see Civ. Code § 1102*; *see also § 34B.24[3]*; Ch. 23, *Real Property Sales Agreements*]:

a. Complete real estate transfer disclosure statement [*see Civ. Code § 1102.6* (official form)].

b. Deliver form to prospective tenant as soon as practicable before execution of lease [*Civ. Code § 1102.3(b)*].

c. Indicate compliance with these requirements on lease, any addendum attached to lease, or separate document [*Civ. Code § 1102.3*].

d. If required by local ordinance [*Civ. Code § 1102.6a*]:
(1) Complete additional "local option" real estate transfer disclosure statement; and

(2) Deliver it to prospective tenant.

3. If landlord has actual knowledge of any former federal or state ordnance locations within one mile of premises, have landlord give written notice to prospective tenant of that knowledge before execution of lease [*Civ. Code § 1940.7(b), (c)*; *see §§ 34B.24[4], 34B.282*].

4. If landlord is leasing property constructed before 1978, provide lead-based paint disclosures to tenant before lease is signed [*see § 34B.284*], as follows:

a. Give tenant Environmental Protection Agency-approved lead hazard information pamphlet.

b. Complete and attach disclosure form to lease [*see § 34B.284[2]*].

5. If landlord is leasing residential property for which contract for periodic pest control has been executed, instruct landlord to [*Civ. Code § 1940.8*; *see § 34B.24[7]*]:

a. Ensure he or she has copy of notice provided by pest control service [*see Bus. & Prof. Code § 8538*].

b. Provide each new tenant of residential dwelling unit with copy of notice provided to landlord by pest control service.

6. If landlord is proposing to apply to any public agency for permit to demolish unit, give written notice of that fact to prospective tenant before [*Civ. Code § 1940.6(a)(1)*; *see §§ 34B.24[10], 34B.285*]:

a. Entering into rental agreement;

b. Requiring or accepting payment for application screening fee;

c. Requiring or accepting any other fees; or

d. Requiring or accepting any writings that would initiate tenancy.

NOTE:
Regarding current tenants, including tenants who have entered into a lease but have not yet taken possession, the landlord must give written notice of an intent to demolish before applying for the permit to demolish [*Civ. Code § 1940.6(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPurchase & SaleRemediesDuty to Disclose



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17-34B California Legal Forms--Transaction Guide §§ 34B.128-34B.129

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.128[Reserved]



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D. Drafting Guide

17-D California Legal Forms--Transaction Guide Scope

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

Scope

NOTE: This Part is a checklist of provisions that the attorney should or may include in a residential lease that memorializes the previous negotiations of the parties. If counsel is reviewing a standardized lease or a custom-drafted lease prepared by another attorney, he or she may use this list to evaluate the sufficiency and scope of the lease.



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17-34B California Legal Forms--Transaction Guide § 34B.130

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.130 Introductory Provisions and Description of Premises

1. Prepare introductory preamble setting forth [*see* preambles in *forms in §§ 34B.200[2], 34B.201[2]*]:

a. Date of execution of lease.

b. Information regarding parties as follows [*see § 34B.210* (alternative provisions setting forth names and status of parties)]:
(1) Full names.

NOTE:
If the landlord took title to the premises in one name, and then changed his or her name, the lease should set forth both names [***see*** *§ 34B.211*].

(2) Status and capacity, for example:

(a) California corporation.

(b) California general or limited partnership.

(c) Limited liability company.

(d) Husband and wife.

(e) Unmarried man or woman.

c. Agreement of parties to lease real property.

2. Describe premises to be leased, as follows [*see § 34B.16*]:

a. Set forth address (including apartment number, if applicable).

b. Describe any easements or appurtenances to be included with leased premises, such as:

(1) Parking spaces or garage.

(2) Driveways extending over adjacent property, if applicable.

(3) Storage units.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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17-34B California Legal Forms--Transaction Guide § 34B.131

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.131 Term of Lease

1. Indicate whether lease:

    a. Is for fixed term (tenancy for years) [*see § 34B.14[2]*]; or

    b. Will continue for successive periods of time of same specified length (periodic tenancy) [*see § 34B.14[1]*].

2. For fixed term lease, prepare provisions regarding [*see, e.g., § 34B.200[2],* P 1]:

    a. Commencement date.

    b. Length of term.

    c. Termination date.

    d. Whether or not tenant has right to extend term.

    e. Consequences if tenant holds over, that is, remains in possession of leased premises after expiration of term [*see § 34B.221*].

3. For periodic tenancy, specify [*see § 34B.220*]:

    a. Commencement date.

b. Length of recurring term as month, year, week, or other term.

c. When written notice of termination must be given [*Civ. Code §§ 1946, 1946.1*; *see § 34B.220[1][b]*]:
(1) For month-to-month tenancy:
(a) Thirty days in advance; or

(b) Any time not less than seven days before end of month.

(2) For month-to-month tenancies after tenant has lived in dwelling for one year or more [*Civ. Code § 1946.1*]:

(a) Sixty days in advance for notice given by the landlord; or

(b) Thirty days in advance if given by tenant.

(3) For other type of periodic tenancy [*see § 34B.220[1][c]*]:

(a) As long before expiration of one of its terms as term itself (not exceeding 30 days in any case); or

(b) Any time not less than seven days before expiration of recurring term.

d. Specify method of delivery of notice of termination [*Civ. Code §§ 1946, 1946.1*], for example:

(1) In manner prescribed by *Code Civ. Proc. § 1162* [*see* Ch. 35B, *Modification and Termination of Leases*];

(2) By sending copy by certified or registered mail addressed to other party; or

(3) If tenant is giving notice, by:

NOTE:
This option is in addition to the first two described above [***see*** *Civ. Code § 1946*].

(a) Sending copy by certified or registered mail addressed to landlord's agent to whom tenant has paid rent for month before date of notice; or

(b) Delivering copy to agent personally.

PRACTICE TIP:
Timing of Service of Notice May Be Critical. If a rental agreement provides for notice of termination to be served "not less than seven days" before expiration of a recurring term, the timing of the service is critical. Additionally, one must take into consideration the actual mode of service. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34B California Legal Forms--Transaction Guide § 34B.132

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.132 Rent, Security Deposit, and Other Charges

1. Include following information regarding rent:

    a. Amount.

    b. Person to whom rent must be paid.

    c. Form of payment (for example, cashiers check, money order, or personal check).

    d. Method of delivery.

    e. Intervals at which rent is to be paid.

    f. When rent is due.

    g. Whether rent is to be paid at beginning or end of period for which it is due.

    NOTE:
    If the lease (or local usage) does not require advance payments, the rent is payable at the end of the term [*Civ. Code § 1947*].

2. Include acknowledgment of landlord's receipt of first month's rent.

3. If desired, add clause providing for imposition of fee for late payment of rent [*see § 34B.233*].

4. Consider including provision giving landlord right to insist on payment by cash or other specified means if rent check is returned by tenant's bank [*see § 34B.234*].

NOTE:

A landlord or a landlord's agent may not demand or require cash as the exclusive form of payment of rent [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has previously attempted to pay the rent with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment for a period not exceeding three months [***see** § 34B.234*].

PRACTICE TIP:

Landlord May Not Require Tenant to Pay Rent by Specific Means Absent Lease Provision. In the absence of a provision requiring payment of rent by cashiers check or any specific other method, the fact that a tenant has previously provided checks with insufficient funds in the checking account to cover them does not permit the landlord to impose an additional contractual liability. *By Benjamin Kaplan.*

5. Set forth following information regarding security deposit [*see § 34B.230*]:

a. Amount of deposit.

b. Rights and obligations of landlord regarding use and handling of deposit.

c. Whether or not landlord will pay tenant interest on deposit.

d. Whether or not portion of deposit will serve as last month's rent [*see § 34B.231*].

e. If desired, obligation of tenant to restore any amount used by landlord during term of lease [*see § 34B.232*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.133

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.133 Utilities

1. Allocate responsibility for payment of utilities, for example:

a. Require tenant to pay all utilities, and to make payments directly to utility companies [*see § 34B.201[2]*, P 4].

b. Provide that [*see § 34B.200[2]*, P 4]:
(1) Landlord will pay for water and garbage disposal; and

(2) Tenant will pay for electricity, gas, and telephones, and will make payments directly to utility companies.

2. If meter for unit in multiunit building provides gas or electrical service for that unit and for area outside that unit, include clause that [*see § 34B.263*]:

a. Discloses that condition to tenant; and

b. Provides that:

(1) Tenant will pay cost of all gas or electrical services provided through tenant's meter; or

(2) Sets forth alternative arrangement, for example:
(a) Landlord will become customer of record for tenant's meter.

(b) Landlord will arrange for separate metering and will become customer of record for area outside tenant's unit.

(c) Tenant will pay specified portions of costs and landlord will pay balance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.134

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.134 Use and Occupancy of Leased Premises

1. State that tenant must use premises only as his or her living quarters [*see § 34B.200[2]*, P 6].

2. Describe any restrictions on use, such as prohibitions against:

a. Waste or nuisance [*see § 34B.200[2]*, P 6].

b. Insurance hazards [*see § 34B.242*].

c. Interfering with rights of:
(1) Other tenants or occupants of apartment building [*see § 34B.200[2]*, P 6]; or

(2) Occupants of neighboring buildings [*see § 34B.200[2]*, P 6].

d. Use of premises for any improper, unlawful, or objectionable purpose [*see § 34B.200[2]*, P 6].

e. Violations of applicable laws [*see § 34B.200[2]*, P 6].

f. Use of parking spaces for [*see § 34B.241*]:

(1) Parking of specified types of vehicles (for example, campers or mobilehomes); or

(2) Washing or disassembling of vehicles.

3. For multitenant building with rules and regulations, include clause that [*see § 34B.200[2]*, P 7]:

a. Requires tenant to comply with rules and regulations;

b. States that copy of rules and regulations is attached to lease; and

c. Incorporates rules and regulations by reference.

4. Add provision limiting permanent occupancy to tenant(s) [*see § 34B.200[2]*, P 5] and any children of tenant(s) [*see § 34B.201[2]*, P 5].

5. Impose restrictions on (or prohibit) occupancy of premises by guests [*see § 34B.200[2]*, P 5], for example:

a. Limit number of guests that tenant may have at any one time.

b. Define guest to mean person who occupies leased premises for specified numbers of consecutive and total days in year.

6. Prohibit pets [*see § 34B.200[2]*, P 6] or impose restrictions on tenant's right to keep them on premises [*see § 34B.201[2]*, P 6].

7. If desired, set forth statutory requirements governing tenant's use of waterbed [*see § 34B.240*].

8. If desired, add provision that insurance for tenant's personal property is to be provided by tenant [*see § 34B.265*].

9. If desired, describe circumstances under which landlord may enter premises [*see § 34B.200[2]*, P 10].

10. Require tenant to provide landlord with copy of new key if tenant changes or adds lock [*see § 34B.200[2]*, P 11].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.135

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.135 Condition of Premises, Repairs, and Alterations

1. If desired, include provision reflecting landlord's statutory duty to put premises into condition fit for human occupancy and to repair all subsequent dilapidations of premises that render them untenantable [*see § 34B.26[2][a]*; *see also § 34B.200[2]*, P 8(a)].

2. If desired, provide for arbitration in event of dispute over whether or not leased premises are tenantable [*see § 34B.261*].

3. State that tenant must repair, at tenant's own cost and expense, any deteriorations or injuries to premises caused by tenant's lack of ordinary care [*see § 34B.26[2][a]*; *see also § 34B.200[2]*, P 8(a)].

4. State that tenant has inspected leased premises and add the following:

a. Tenant agrees that premises are in satisfactory condition and working order, except as noted on inspection checklist that has been completed by tenant and is attached to lease and incorporated by reference [*see § 34B.200[2]*, P 8(b), first alternative];

b. Tenant will complete and deliver to landlord inspection checklist within certain time period after lease commencement date [*see § 34B.200[2]*, P 8(b), second alternative]; or

c. Tenant agrees that premises are in satisfactory condition and working order, except as set forth in lease itself [*see § 34B.264*].

5. If premises do not conform to statutory requirements for dead-bolt locks, window security, and

exterior doors [*see Civ. Code § 1941.3*; *see also § 34B.26[2][d]*], add provision requiring landlord to make required repairs and additions.

6. If premises do not conform to statutory requirements for telephone wiring [*see Civ. Code § 1941.4*; *see also § 34B.26[2][e]*], add provision requiring landlord to make required repairs and additions.

7. Regarding any repairs landlord has agreed to make to premises:

a. Describe repairs and specify dates by which they will be completed [*see §§ 34B.200[2]*, P 8(b), 34B.264].

b. If repairs are crucial to tenant's use of premises, grant tenant right to cancel lease or to continue it in effect with abatement of rent if they are not completed on time [*see § 34B.264*].

8. Indicate whether or not tenant may make alterations or improvements to leased premises [*see § 34B.200[2]*, P 9(a); *see also § 34B.201[2]*, P 8(a) (requiring tenant to obtain landlord's prior written consent before making alterations)].

9. Describe status of tenant's improvements or alterations (if any) on termination of lease [*see § 34B.200[2]*, P 9(a)], for example:

a. At landlord's option, will become landlord's property.

b. At landlord's option, must be removed by tenant at tenant's sole cost.

10. Consider including repair clause that [*see § 34B.200[2]*, P 9(b)]:

a. Requires tenant to notify landlord of any dilapidations or other defective conditions on premises.

b. Grants landlord right to repair defective condition within reasonable time (not exceeding 30 days) [*see Civ. Code § 1942(b)*].

c. States that tenant may make repairs and deduct cost from rent, provided it does not exceed equivalent of one month's rent.

NOTE:
A tenant has the right to repair dilapidations that render the premises untenantable and to deduct the cost (up to the equivalent of one month's rent) if (1) the tenant notifies the landlord or the landlord's agent of the condition, and (2) the landlord fails to perform the work within a reasonable time after notification [***see*** *Civ. Code § 1942*]. Although 30 days is presumed to be a reasonable time for these purposes, the tenant may repair and deduct after a shorter period if the circumstances require shorter notice [*Civ. Code § 1942(b)*]. Landlords commonly include in the lease a repair provision that grants them 30 days to perform nonemergency repair work so that they can control the quality and cost of that work. Of course, the provision does not alter the statutory rights and obligations regarding repair work and therefore would not preclude the tenant from acting sooner in accordance with his or her statutory rights.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent AbatementReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability



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17-34B California Legal Forms--Transaction Guide § 34B.136

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.136 Default and Termination

1. If applicable rent control ordinance permits evictions only for material breaches, recite that all (or specified) covenants and conditions of lease are material [*see § 34B.200[2]*, P 13].

2. Set forth landlord's remedies for tenant's breach, for example:

a. Terminate lease and recover damages [*see § 34B.251*].

b. Continue lease in effect [*see § 34B.252*].

NOTE:
If the landlord is to have the remedy of continuing the lease in effect (1) the lease must permit (or not prohibit) subletting or assignments, (2) the landlord must not terminate the tenant's right to possession, and (3) the lease must provide for this remedy [***see** § 34B.252*].

3. Describe actions landlord must take to terminate lease, for example, providing tenant with written notice [*see § 34B.200[2]*, P 13].

NOTE:
The landlord cannot continue a lease in effect following a breach if the landlord has terminated the tenant's right to possession [*Civ. Code § 1951.4*]. For this reason, among others, the lease should require the landlord to take an affirmative act to evidence his or her intention to terminate the lease to avoid claims of termination when one was not intended. Typically, a lease will require that the landlord provide three days' written notice because that is the notice requirement imposed by the unlawful detainer statute

for termination of a tenancy. Likewise, it is wise to specify which actions will not constitute a termination of the lease [***see** § 34B.252*].

4. If parties agree that additional events other than breaches by tenant will give either party right to terminate lease before its expiration [*see § 34B.253*]:

a. Describe events, for example:

(1) Sale of premises by landlord.

(2) Tenant's loss of main source of income.

b. State method required to terminate lease.

5. If desired, provide that landlord's acceptance of rent following breach, with or without knowledge of breach, will not constitute waiver of landlord's right to enforce any provision of lease [*see § 34B.200[2]*, P 16].

6. If desired, include liquidated damages provision [*see § 34B.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.137

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.137 Renewal or Extension

1. If parties want to include clause providing for automatic renewal or extension of lease [*see § 34B.222*]:

NOTE:
If an automatic renewal or extension clause appears in a printed lease, special notice and type requirements apply. Because this Drafting Guide focuses on the preparation of a custom-drafted lease, those requirements are not discussed here. For discussion of these requirements, see *§§ 34B.222, 34B.223*.

a. Specify whether clause provides for renewal or extension of lease.

b. Describe event(s) triggering automatic renewal or extension, for example:
(1) Failure of tenant to vacate and surrender leased premises before expiration of lease.

(2) Failure of tenant to give landlord notice of tenant's election not to exercise option granted by lease to renew or extend it.

2. If desired, add clause that grants tenant option to renew or extend lease and include the following [*see § 34B.224*]:

a. Specify whether clause permits renewal or extension.

b. Describe manner and time in which option is to be exercised.

c. If desired, require tenant to pay higher amount of rent during extended term.

d. If clause provides for rent increase, set forth specific amount of increased rent or formula or standard by which it will be determined.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.138

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.138 Miscellaneous Provisions

1. Insert assignment and subletting clause that provides for one of following provisions [*see § 34B.260*]:

a. Prohibits assignment and subletting outright.

NOTE:
If landlord is to have the option of continuing the lease in effect following tenant's breach of the lease and abandonment of the leased premises, the lease must not prohibit subletting or assignment [***see** § 34B.252*].

b. Permits subletting or assignment, subject to reasonable standards or conditions.

c. Permits subletting or assignment with landlord's consent, and:

(1) Provides that landlord's consent may not be unreasonably withheld [*see § 34B.200[2]*, P 12]; or

(2) Imposes one or more additional standards or conditions.

2. Disclose name and usual street address (for purposes of personal service) of [*see §§ 34B.24[1], 34B.200[2]*, P 14]:

a. Each person who is authorized to manage premises.

b. Each person who is:

(1) An owner of premises; or

(2) Authorized to act for and on behalf of owner for purposes of service of process and of receiving and receipting all notices and demands.

3. Draft arbitration provisions, if desired:

a. In event of dispute over whether or not leased premises are tenantable [*see § 34B.261*].

b. For other disputes arising under lease [*see § 34B.262*].

4. Set forth miscellaneous provisions regarding:

a. Delivery of notices [*see § 34B.200[2]*, P 15].

PRACTICE TIP:
Notice Provisions in Residential Leases. Although there is some latitude in altering statutory notice provisions respecting commercial leases, as contained in the Civil Code and the Code of Civil Procedure, the same latitude is not accorded residential leases. The drafter should conform notice requirements in the residential lease to standards not less than those provided by statutory law [*see § 34B.200[1][p]*]. *By Benjamin Kaplan.*

b. Waiver provision [*see § 34B.200[2]*, P 16].

c. Estoppel certificate [*see § 34B.200[2]*, P 17].

d. Attorneys' fees [*see § 34B.200[2]*, P 18].

e. Binding effect of agreement [*see § 34B.200[2]*, P 19].

f. Time for performance ("time is of the essence" provision) [*see § 34B.200[2]*, P 20].

g. Status of contract as entire agreement between parties [*see § 34B.200[2]*, P 21].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34B California Legal Forms--Transaction Guide §§ 34B.139-34B.199

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.139[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
A. Complete Residential Leases

17-34B California Legal Forms--Transaction Guide § 34B.200

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.200 Apartment Lease

[1] Comment

[a] Use of Form

This form is a lease for an apartment in a multiunit building or complex. It creates a tenancy for years, that is, a tenancy for a definitely described term beginning and ending on specified dates [*see § 34B.14[2]*]. It may be modified to provide for a month-to-month or other periodic tenancy by replacing Paragraph 1 with one of the alternative provisions in § 34B.220[2].

A standardized lease form prepared by the California Association of Realtors is *set forth in § 34B.202*. For a lease of a single-family residence, see *§ 34B.201*. Other residential lease provisions that may be inserted into any of the complete leases in this chapter are *set forth in § 34B.210 through § 34B.284*.

For a complete list of provisions that should be considered for inclusion in a residential lease, see the Transaction Guide. The Legal Background discusses the laws governing residential leases, including the formal requirements for a valid lease.

[b] Description of Premises

A lease must contain a definite description of the property to be leased [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *see § 34B.16*]. In the case of an apartment lease, the street address and apartment number are usually sufficient [*see Baranov v. Scudder (1918) 177 Cal. 458, 460, 170 P. 1122* ; *see also* preamble of form in [2], *below*].

A lease passes with it not only the described premises but also all appurtenances that are reasonably necessary to the tenant's enjoyment of the property, unless the lease provides otherwise [*see Owsley v. Hamner (1951) 36 Cal. 2d 710,*

717, 227 P.2d 263 ; *see also § 34B.16[2]*]. To avoid confusion, the lease should specify any additional items or spaces to be included in the leased premises, such as fixtures, furnishings, storage spaces, parking spaces, or porches [*see* preamble of form in [2], *below* (description of the premises includes a storage space and a parking place); *see also* preamble to *form in § 34B.201[2]* (description includes garage)]. If any of the these items are located on or appurtenant to the leased premises but are to be excluded from the lease, the instrument should state that fact [*see* preamble to *form in § 34B.201[2]* (description excludes tool and storage shed)].

[c] Term of Lease

Most residential leases create a tenancy for years or a periodic tenancy. As mentioned in [a], *above*, the form in [2], *below*, creates a tenancy for years, which is a tenancy for a definite and fixed duration that terminates at the end of the stated term without any requirement of notice [*see § 34B.14[2]*]. For a lease provision creating a periodic tenancy, see *§ 34B.220*. For discussion of the various types of tenancies, see *§ 34B.14*.

[d] Rent

This form specifies the amount of the monthly rent [*see § 34B.18[2]* for lease requirements for rent], and acknowledges the receipt by the landlord of the first month's rent. Further, it provides that the rent is payable in advance on or before the first day of the month [*see* P 2 of form in [2], *below*]. If the lease (or usage) does not require advance payments, the rent is payable at the end of the term [*Civ. Code § 1947*].

For a clause providing for the imposition of a fee for the late payment of rent, see *§ 34B.233*. For a provision giving the landlord the right to insist on payment by cash or other specified means if a rent check is returned by the tenant's bank, see *§ 34B.234*.

[e] Security Deposit

This form sets forth a security deposit clause [*see* P 3 of form in [2], *below*] that reflects the requirements of *Civ. Code § 1950.5*. That statute limits the amount of any security deposit that may be demanded by a landlord of residential property, and regulates the handling of the deposit. For complete coverage of the requirements of *Civ. Code § 1950.5*, see *§ 34B.230[1]*.

The security deposit clause in this form is favorable to the landlord in that it designates the entire amount of the deposit as a security deposit, rather than allocating a portion of the deposit as the last month's rent. This allows the landlord to use the entire amount of the deposit for any of the purposes set forth in *Civ. Code § 1950.5* [*see § 34B.230[1][c]*]. For additional coverage and a clause that requires the payment of last month's rent and a security deposit, see *§ 34B.231*.

A landlord or a landlord's agent may not demand or require cash as the exclusive form of a security deposit [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has attempted to pay with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment. The landlord must give the tenant a written notice stating that the payment instrument was dishonored and informing the tenant that the tenant must pay in cash. The landlord must attach a copy of the dishonored instrument to the notice [*Civ. Code § 1947.3(a)(2)*]. Waiver of these provisions is contrary to public policy, and void and unenforceable [*Civ. Code § 1947.3(c)*].

As used in *Civ. Code § 1950.5*, the definition of "security deposit" includes any amount used for the cleaning of the premises on termination of the tenancy [*Civ. Code § 1950.5(b)(3)*]. To avoid disputes regarding the meaning of this general statutory wording, this form includes an optional clause defining the term "cleaning."

Note that for tenancies as to which the tenant's right to occupy begins after January 1, 2003, the statute provides that the

security deposit may be used for cleaning of the premises "necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy" [*Civ. Code § 1950.5(b)(3)*].

PRACTICE TIP:

Be Specific About Tenant's Cleaning Obligations. There are probably more disputes over security deposits than any other feature of a residential lease. To minimize these disputes, spell out in the lease exactly what duties the tenant must fulfill to get back the security deposit. Instead of saying only that the tenant must "clean the premises," specify whether or not the tenant must shampoo the carpets, dry-clean the drapes, or clean the oven. *By Myron Moskovitz.*

California law does not require landlords to pay tenants interest on security deposits [*see § 34B.230[1][f]*], and the form in [2], *below*, provides that the landlord will not be required to pay interest. However, a local ordinance may require the landlord to do so. For a security deposit provision designed to include locally imposed interest requirements, see *§ 34B.231[2]*.

PRACTICE TIP:

Check Local Ordinances for Requirements to Pay Interest. A number of local jurisdictions have provided that landlords must pay tenants specified interest on security deposits. It is a common mistake to think that this only occurs in jurisdictions that have rent or eviction controls, or that it only applies to those units subject to rent or eviction controls. *By Benjamin Kaplan.*

[f] Utilities

Although a landlord of residential premises is responsible for furnishing the utilities necessary to render the premises tenantable [*see Civ. Code §§ 1941, 1941.1*; *see also § 34B.26[2][a]*], he or she is not obligated to pay for the utilities. Consequently, the responsibility for payment should be negotiated, and the lease should specify which party will pay for each utility.

If the tenant must pay for some or all of the utilities, the lease should indicate whether payment is to be made to the landlord or directly to the utility company. The form in [2], *below*, obligates the landlord to pay for water and garbage disposal services. Further, it requires the tenant to pay for electricity, gas, and telephone service, and to make the payments directly to the utility companies [*see* P 4 of form in [2], *below*]. This is a common arrangement. For a provision obligating the tenant of a detached single-family dwelling to pay all utilities, see *§ 34B.201[2]*, P 4.

If a multiunit building does not provide separate gas and electrical meters for each unit, and gas or electrical service provided through the tenant's meter serves an area outside the tenant's unit, certain statutory requirements apply [*see Civ. Code § 1940.9*]. For discussion and an illustrative lease provision reflecting those requirements, see *§ 34B.263*. For additional discussion of utilities, see California Real Estate Law and Practice, Ch. 155, *Drafting Residential Leases* (Matthew Bender).

[g] Occupancy by Tenant and Guests

This form limits occupancy to the named tenant [*see* P 5 of form in [2], *below*]. A landlord will typically insist on some control over the identity of the tenants, particularly when there are multiple tenants sharing the leased premises. For a clause permitting occupancy by more than one tenant and providing that the tenants will be jointly and severally liable for all obligations imposed by the lease, see *§ 34B.201[2]*, P 5.

This form also permits the tenant to have guests, but places limits on the number of guests and the length of their stays [*see* P 5 of form in [2], *below*]. These restrictions are designed to prevent tenants from abusing or circumventing the above restrictions on occupancy. They are not imposed by law and consequently may be the subject of negotiations.

[h] Use of Premises

The law applicable to the tenant's right to use the premises is discussed in *§ 34B.21*. This form provides that the tenant may use the leased premises only as his or her living quarters. It also prohibits the tenant from (1) keeping pets on the premises, (2) obstructing or interfering with the rights of other tenants or occupants, or (3) violating applicable laws [*see* P 6 of form in [2], *below*].

PRACTICE TIP:

Tenant's Use of Premises for Home Office. In recent years, there has been an increase in the number of people working out of their residences, either as a telecommuting employee, or in an entrepreneurial business such as consulting. If a tenant intends to work out of his or her apartment, counsel for the tenant may want to negotiate a broader use provision than what is provided in P 6 of the form in [2], *below*. A home office use may be acceptable to a landlord, especially if the tenant's business use will not include (1) meetings with clients at the residence and (2) frequent deliveries to the residence or (3) the storage or manufacture of products on the premises. *By Publisher's Editorial Staff.*

This form also prohibits the tenant from maintaining any nuisance or committing any waste [*see* P 6 of form in [2], *below*; *see also § 34B.21[3]* for discussion of the law applicable to nuisance and waste].

[i] Rules and Regulations

Owners of apartment buildings sometimes prepare rules and regulations governing the tenants' use of the leased premises, particularly the common areas. Any applicable rules and regulations should be attached to the lease. Further, the lease should (1) incorporate them by reference, and (2) require the tenant and his or her guests to comply with them. Two sets of illustrative rules and regulations (one for a complex in general, and one for a swimming pool) appear at the end of this form and are incorporated by reference into the lease [*see* P 7 of form in [2], *below*].

[j] Condition of Leased Premises

This form contains a general provision requiring the landlord to maintain the premises in a safe and sanitary condition and to comply with all applicable laws regarding the condition of the leased premises [*see* P 8(a) of form in [2], *below*]. It does not recite the landlord's statutory duties to put the premises in a tenantable condition because these duties are binding on the landlord whether or not they are set forth in the lease [*see Civ. Code § 1941*; *see also § 34B.26[2][a]*]. Likewise, it does not recite the landlord's statutory duties relating to locks and keys [*see § 34B.26[2][d]*] or telephone wiring [*see § 34B.26[2][e]*] because these duties are binding on the landlord whether or not they are set forth in the lease.

[k] Inspection and Agreement to Repair

The landlord of residential property often requires the tenant to inspect the condition of the premises before occupancy. Frequently, the landlord provides the tenant with a checklist that the tenant must use to note any damage or other defects. The checklist is then attached to and incorporated into the lease. This form provides for the use of a checklist [*see* P 8(b) of form in [2], *below*]. For an illustrative checklist, see *§ 34B.281*.

An alternative to using a checklist is a lease provision that indicates that the tenant has inspected the premises (including all furnishings, fixtures, and appliances) and found them to be in good condition and working order, with the exception of any defects that are listed in the provision [*see § 34B.264*].

If the landlord, before the lease's execution, agrees to make specified repairs to the premises, those repairs should be described in the lease. The parties may wish to state the date by which the landlord must complete the repairs [*see* P 8(b) of form in [2], *below*; *see also § 34B.264*].

[l] Alterations and Repairs by Tenant

Absent an express provision in the lease permitting or requiring alterations, the tenant may not make material alterations to the leased premises without the landlord's consent [*see Metzler v. Thye (1912) 163 Cal. 95, 98-99, 124 P. 721* ; *Briggs v. Sherman (1924) 65 Cal. App. 249, 251-252, 223 P. 581* ; *see also § 34B.27*]. This form requires the tenant to obtain the landlord's written consent before making any alterations [*see* P 9(a) of form in [2], *below*]. It also provides that any fixtures [*see Civ. Code §§ 658, 660* ("fixtures" defined)] installed as a part of approved alteration work will, at the landlord's option, become the landlord's property on the expiration or termination of the lease [*see Civ. Code § 1013* (when a person affixes his or her property to the land of another, the thing belongs to the landowner unless he or she agrees otherwise)]. For coverage of fixtures, see Ch. 34C, *Retail, Industrial, and Office Leases* .

A tenant has the right to perform certain maintenance or repair work (and to deduct the cost of the work, provided it does not exceed one month's rent) if the landlord fails to perform the work within a reasonable time after being notified of the condition [*see Civ. Code § 1942*; *see also § 34B.26[2][f]*]. If the tenant waits until 30 days have elapsed from the giving of the notice and then performs the necessary repair or maintenance work, the tenant is presumed to have acted after a reasonable time. However, the tenant may act sooner if all of the circumstances require shorter notice [*Civ. Code § 1942(b)*]. Of course, if the landlord makes the repairs, he or she will be able to control the cost and quality of the work. Consequently, a landlord will frequently insist on a lease provision that (1) gives him or her the right to perform nonemergency repairs and maintenance before the expiration of the 30-day statutory period, and (2) grants the tenant the right to repair and deduct if the landlord has not performed within the stated time period [*see* P 9(b) of form in [2], *below*]. This type of provision would not preclude a tenant from acting sooner in accordance with his or her statutory rights.

[m] Landlord's Right of Access

A landlord may enter a dwelling unit leased to a tenant only under the circumstances specified by statute [*see § 34B.25*]. Although those circumstances are a matter of law and need not be included in the lease, it is advisable to do so to inform both parties of their respective rights and obligations regarding entries by the landlord. Consequently, P 10 of the form in [2], *below*, sets forth the statutory circumstances justifying entry.

[n] Locks and Keys

A landlord may have difficulty exercising his or her right to enter a leased dwelling [*see* [m], *above*] if the tenant has changed or added a lock and failed to give the landlord a copy of the new key. Consequently, this form requires the tenant to (1) obtain the landlord's consent to change the locks and (2) give the landlord a key for any new or added lock [*see* P 11 of form in [2], *below*].

[o] Assignment and Subletting

Most residential leases include a provision governing subletting and assignment. This form contains a provision authorizing assignments and subletting with the prior written consent of the landlord. It also provides optional language that the landlord's consent will not be arbitrarily or unreasonably withheld [*see* P 12 of form in [2], *below*]. This restriction on the landlord's consent must be included if the landlord wants the option to continue the lease in effect after the tenant's breach [*see § 34B.252*].

For discussion of the law pertaining to the tenant's right to assign or sublet, and alternative provisions governing assignments and subletting, see *§ 34B.260* and Ch. 35A, *Assignment and Sublease of Leasehold Interest* .

[p] Tenant's Default

Many rent control ordinances [*see § 34B.23*] limit the landlord's right to evict a tenant to breaches that are considered

material or substantial. If a rent control ordinance applies to the lease transaction, the lease should recite that all (or certain identified) covenants and conditions are material provisions of the lease [*see* P 13 of form in [2], *below*]. Of course, the landlord cannot be certain that a court would find a particular covenant or condition to be material, even when the lease contains this recitation.

Leases frequently provide that termination will occur only on written notice by the landlord. Because unlawful detainer is the most commonly used method for evicting tenants who hold over after expiration of the lease or continue in possession after breaching the lease, this form sets forth the three-day notice requirement of the unlawful detainer statute for the termination of a tenancy [*see Code Civ. Proc. § 1161(3), (4)*; *see also* Ch. 35B, *Modification and Termination of Leases*].

A landlord of real property may continue the lease in effect following a breach and abandonment by the tenant if the following conditions apply [*Civ. Code § 1951.4(a), (b)*; *see § 34B.252* for discussion and illustrative clause]:

- The lease provides for this remedy;
- The landlord does not terminate the tenant's right of possession; and
- The lease permits subletting or assignment.

A landlord may recover certain statutory damages on the tenant's breach. For discussion of the statutory requirements and an illustrative clause, see *§ 34B.251*.

For discussion of a waiver of a breach, see [r], *below*.

[q] Disclosure Requirements

[i] Name and Address of Landlord

A residential lease must include a disclosure of the name and address of the landlord or the landlord's agent for the purpose of service of process and of receiving notices and demands under the lease [*see § 34B.24[1]*]. This form sets forth the required disclosure for this purpose [*see* P 14 of form in [2], *below*], and a standard notice provision [*see* P 15 of form in [2], *below*].

[ii] Lead-Based Paint Disclosure

If the leased premises were constructed before 1978, the landlord must make certain disclosures, and provide certain information, to the tenant [*see § 34B.284[1]*]. In addition, a disclosure form containing certain information and signatures must be attached to the lease [*see § 34B.284[2]* for illustrative disclosure form]. If the landlord is subject to these requirements, a paragraph should be added to the lease which refers to the attached disclosure form and incorporates the form by reference.

[r] Waiver

A waiver is the intentional relinquishment of a known right (for example, the right to declare a forfeiture) after knowledge of the facts giving rise to a breach [*see Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335]* . A waiver may be express or implied, and may be implied from conduct inferentially manifesting an intention to waive the breach [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 532-533, 64 Cal. Rptr. 246]* . For example, a landlord who accepts rent from the tenant, with full knowledge of a breach by the tenant of a condition of the lease, is generally deemed to have waived the breach, and is precluded from declaring a forfeiture of the lease by reason of the breach [*Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440,*

6 P.2d 71 ; *see Group Property Inc. v. Bruce (1952) 113 Cal. App. 2d 549, 555-556, 248 P.2d 761]* . However, HUD housing assistance payments do not constitute rent for this purpose, and a landlord's acceptance of HUD housing assistance payments on the tenant's behalf with knowledge of the tenant's breach does not constitute a waiver of the breach [*Savett v. Davis (1994) 29 Cal. App. 4th Supp. 13, 17, 34 Cal. Rptr. 2d 550]* .

PRACTICE TIP:

Consider No Waiver Provision in Lease. If there is a provision in the lease that permits the landlord to accept rent without waiving the breach, that provision is enforceable, and no waiver should be found [*see* P 16 of form in [2], *below*]. However, be cognizant that an anti-waiver provision may not prevent the tenant from asserting that the landlord is "estopped" from taking a certain position respecting the breach. *By Benjamin Kaplan.*

Furthermore, waiver of a breach is always a matter of intent [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 342, 53 Cal. Rptr. 335]* . Consequently, although an intent to waive may be inferred from the acceptance of rent, the inference may be rebutted. For example, the inference is rebutted when, by prior agreement of the parties, the rent was paid and accepted without prejudice [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 342, 53 Cal. Rptr. 335]* . The form in [2], *below*, includes a provision stating that the acceptance of rent by the landlord following a breach, with or without the landlord's knowledge of the breach, will not constitute a waiver of the landlord's right to enforce any provision of the lease [*see* P 16 of form in [2], *below*].

[s] Estoppel Certificate

In this form, the tenant agrees to execute and deliver an estoppel certificate, in a form provided by the landlord, if requested to do so by the landlord [*see* P 17 of form in [2], *below*]. An estoppel certificate is a statement of the tenant about the current status of its lease. Normally, the certificate recites the term of the lease, the amount of the rent, and the amount of any security deposit or prepaid rent. Further, the certificate usually requests the tenant to confirm the existence of the lease, to state whether any modifications or additions have been made to the original lease, and to describe any claims the tenant has against the landlord. For a form of estoppel certificate, see *Ch. 35A, Assignment and Sublease of Leasehold Interests, § 35A.222*.

PRACTICE TIP:

Tenant Has No Obligation to Execute Estoppel Certificate Absent Lease Provision. In the absence of a provision requiring a tenant to sign an estoppel certificate, a tenant cannot be compelled to do so. Sometimes landlords utilize such forms as a precursor to an eviction action to narrow the potential issues in a case. A tenant who is presented with an estoppel certificate when not required by the rental agreement should question the landlord about its purpose, and perhaps then seek legal advice. *By Benjamin Kaplan.*

PRACTICE TIP:

Landlord's Use of Estoppel Certificate to Bind Tenant in Future. There has been no definitive determination as to how far an estoppel certificate can actually bind a tenant in a landlord-tenant situation not involving the lender. There has been increasing use by residential landlords to use estoppel certificates as a method of binding or limiting the tenant from asserting certain rights in the future. It is unlikely that estoppel certificates can be used as a sword, particularly in rent and eviction control jurisdictions that have "anti-waiver" provisions in ordinances. *By Benjamin Kaplan.*

Estoppel certificates are commonly required by a prospective buyer before a sale of the leased premises by the landlord, or by a lender when the landlord is applying for a loan secured by the leased property. The purpose is to permit the buyer or lender to confirm that the leases encumbering the property are enforceable, and to estop each tenant from denying the truth of the statements contained in the certificate in any future litigation arising under the lease [*see Evid. Code § 623*].

For an alternative estoppel certificate clause, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.261*. That provision describes the contents of the estoppel certificate to be executed by the tenant. Further, unlike this form, it does not provide that a failure to execute and deliver a certificate will be deemed an acknowledgment by the tenant that the certificate as submitted by the landlord is true and correct.

[t] Miscellaneous Provisions

This form contains several miscellaneous provisions that are routinely included in leases, including the following provisions:

- Attorneys' fee provision [*see* P 18 of form in [2], *below*];

PRACTICE TIP:
Landlords May Prefer to Eliminate Attorneys' Fee Provision. Some sophisticated landlords are requesting that attorneys' fees clauses be omitted from certain leases. When there is a significant disparity between the landlord and tenant in regard to financial resources, some landlords believe that an attorneys' fees clause merely serves to encourage litigation, permitting tenants to engage counsel in ventures that seek to make the landlord a target defendant. *By Benjamin Kaplan.*

- Binding on successors provision [*see* P 19 of form in [2], *below*];
- "Time is of the essence" clause [*see* P 20 of form in [2], *below*]; and
- Sole and only agreement provision [*see* P 21 of form in [2], *below*].

[2] FORM

Apartment Lease

RESIDENTIAL LEASE

Preamble

This lease is entered into on _____[*date*], by and between _____[*name or names*], [*legal status, e.g.*, a California corporation] ("Landlord"), and _____[*name or names*], [*legal status, e.g.*, a single woman] ("Tenant").

Landlord hereby leases to Tenant those premises known as _____[*specify, e.g.*, Apartment A at 12345 Chestnut Street, San Francisco, California] (the "leased premises"). [The leased premises also include the following: _____ (*specify, e.g.*, Storage Space A in the basement of the building, and Parking Stall A in the parking garage adjacent to the west side of 12345 Chestnut Street, San Francisco, California)].

Term

1. This lease shall be for a term of [*specify, e.g.*, one year] commencing at 12:01 A.M. on _____[*date*] (the "Commencement Date"), and ending at 12:01 A.M. on _____[*date*] (the "Original Term"), unless terminated earlier under the provisions of this lease.

Rent

2. Tenant agrees to pay to Landlord as rent for the use and occupancy of the leased premises the sum of $_____ per month. The rent is payable in advance on or before the first day of each month, commencing on _____[*date*], at the address specified in this lease for the service of notices on Landlord or at any other place designated by Landlord in a written notice served on Tenant. Landlord acknowledges receipt of the sum of $_____ as the first month's rent.

Security Deposit

3. On execution of this lease, Tenant shall deposit with Landlord, in addition to the first month's rent of $_____, a security deposit of $_____[*specify amount, not to exceed a total of two months' rent for unfurnished premises, or three months' rent for furnished premises*]. Landlord will hold this security deposit for the faithful performance by Tenant of _____[his *or* her] obligations under this lease and for the cleaning and repairing of the leased premises after surrender by Tenant. Landlord agrees to hold the security deposit for Tenant, free from the claim of any creditor of Landlord. Before the end of the lease term, Landlord will notify Tenant of Tenant's right to request an initial inspection of the premises. On Tenant's request, and no earlier than two weeks before the end of the lease date, Landlord will make an initial inspection of the premises and provide Tenant with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security. Tenant will have the opportunity to remedy the identified deficiencies before the end of the lease date to avoid the deductions from the security. Landlord will return to Tenant the full amount of the deposit within 21 calendar days after Tenant has vacated the leased premises, less any amounts that are reasonably necessary to remedy any defaults in the payment of rent by Tenant, to repair damages to the leased premises caused by Tenant or Tenant's guests (other than ordinary wear and tear), and to clean the leased premises. [Cleaning of the leased premises shall include sweeping, vacuuming, oven cleaning, and rug shampooing.] At the time Landlord returns the deposit to Tenant, Landlord will furnish Tenant with an itemized written statement of the amount of the security deposit received, the charges made by Landlord against the security deposit, and the disposition made or to be made of the security deposit.

Utilities

4. Landlord agrees to pay all charges for water and garbage disposal furnished to the leased premises. Tenant agrees to pay for electricity, gas, and telephones used in or on the leased premises. Tenant shall make payments for these utilities directly to the utility companies.

Occupancy of Leased Premises

5. Except as otherwise provided in this paragraph, only Tenant will occupy the leased premises. Tenant may have up to [*specify, e.g.,* two] guests on the leased premises at any one time. A person shall be considered a "guest" for these purposes if he or she occupies the leased premises for [*specify period or periods, e.g.,* 20 or fewer consecutive days *or* for a total of fewer than 30 calendar days in a year]. No other person shall be permitted to occupy the leased premises except with the prior written approval of Landlord.

Use of Leased Premises

6. Tenant agrees that the leased premises are to be used exclusively as the living quarters of Tenant and shall not be used for any other purpose. Tenant shall not keep any pet, or permit any pet to be kept, on the leased premises. Tenant shall not do or permit anything to be done in or about the leased premises that will in any way obstruct or interfere with the rights of other tenants or occupants of the building or injure or annoy them or use or allow the leased premises to be used for any improper, unlawful, or objectionable purpose. Further, Tenant shall not cause, maintain, or permit any nuisance in, on, or about the leased premises, or commit any waste in or on the leased premises. Finally, Tenant shall not put the leased premises to any use that violates local zoning ordinances or any other law applicable to the leased premises.

Rules and Regulations

7. Tenant and Tenant's guests shall obey the rules and regulations governing the building, as they currently exist and as they may be amended in the future. A copy of the rules and regulations is attached to this lease and hereby incorporated by reference.

Condition of Leased Premises

8. The rights and responsibilities of Landlord and Tenant relating to the condition of the leased premises are as follows:

(a) Landlord will, at Landlord's own cost and expense, put and maintain the leased premises in a safe and sanitary condition and shall comply with all laws, ordinances, and regulations pertaining to the condition of the leased premises. Tenant shall remedy, at Tenant's own cost and expense, any deteriorations of or injuries to the leased premises occasioned by Tenant's lack of ordinary care.

[*Choose one of the following:*]
[*First alternative, if tenant has inspected the premises.*]

(b) Tenant acknowledges that _____ [he *or* she] has inspected the leased premises [, including all furnishings, fixtures, appliances, and other personal property subject to this lease, or specify other inspected fixtures, etc.] and agrees that they are in satisfactory condition and good working order, except as noted by Tenant on the "Inspection Sheet" attached to this lease and hereby incorporated by reference. [*describe any repairs landlord has agreed to make unless they are set forth on the inspection sheet, e.g.,* Landlord agrees that the _____ (*e.g.,* dishwasher) shall be repaired, at Landlord's sole expense, not later than two weeks after Tenant takes possession of the leased premises.]

[*Second alternative, if tenant will provide inspection sheet at a later date.*]

(b) Tenant acknowledges that _____ [he *or* she] has inspected the leased premises [, including all furnishings, fixtures, appliances, and other personal property subject to this lease, or specify other inspected fixtures, etc.]. Tenant agrees to complete and deliver to Landlord the "Inspection Sheet" form attached to this lease, setting forth any items which are damaged or not in operable condition within _____ [*specify, e.g.,* three] days after the Commencement Date as an acknowledgment of the condition of the premises. Landlord shall not be obligated to repair any items specified by Tenant on the Inspection Sheet unless otherwise required to do so under this Lease.

Alterations and Repairs by Tenant

9. The parties agree that the following provisions govern all alterations and repairs of the leased premises by Tenant:

(a) Tenant shall make no alterations to the leased premises[, including _____ (*e.g.*, painting or wallpapering)] without the prior written consent of Landlord. Any alteration made to the leased premises by Tenant after that consent has been given, and any fixtures installed as a part of that work, will at Landlord's option become the Landlord's property on the expiration or earlier termination of this lease, provided, however, that Landlord shall have the right to require Tenant to remove any fixtures at Tenant's cost on termination of this lease.

(b) Tenant shall notify Landlord of any dilapidations or other defective conditions on the leased premises that require repairs. If Landlord fails to repair or arrange for the repair of the condition within a reasonable time (not exceeding 30 days), Tenant may make the repairs or arrange for them to be made and deduct the cost of the repairs, provided Tenant does not deduct more than the equivalent of one month's rent.

Entry by Landlord

10. Landlord may enter the leased premises only under the following circumstances:

(a) In case of emergency.

(b) To make necessary or agreed repairs, decorations, alterations, or improvements; supply necessary or agreed services; or exhibit the leased premises to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.

(c) If Tenant abandons or surrenders the leased premises.

(d) Pursuant to court order.

Landlord will give Tenant at least 24 hours' notice of Landlord's intent to enter unless (1) an emergency exists, (2) Tenant has abandoned or surrendered the leased premises, or (3) it is impracticable to do so. Further, Landlord will enter only during the hours of [*specify, e.g.*, Monday through Friday from 9:00 a.m. to 5:00 p.m.] unless (1) an emergency exists, (2) Tenant has abandoned or surrendered the leased premises, or (3) Tenant consents, at the time of an entry that is not during normal business hours, to the entry.

Locks and Keys

11. Tenant may not change or add any lock to Tenant's apartment, storage space, or garage, without obtaining Landlord's prior written consent and without providing Landlord with a key to the changed or added lock.

Assignment and Subletting

12. Tenant may assign this lease or sublet all or any portion of the leased premises, provided Tenant first obtains the written consent of Landlord. [Landlord's consent to any assignment or subletting shall not be arbitrarily or unreasonably withheld]. The consent of Landlord to any one assignment or subletting shall not be deemed to be a consent by Landlord to any subsequent assignment or subletting. Any assignment or subletting without Landlord's prior written consent shall be void and shall, at Landlord's option, terminate this lease.

Default by Tenant

13. Landlord and Tenant agree that every condition, covenant, and provision of this lease is material and reasonable. Any breach by Tenant of a condition, covenant, or provision of this lease will constitute a material breach. For any material breach by Tenant, Landlord may provide Tenant with a written three-day notice that describes the breach and demands that Tenant cure the default (if a cure is possible). If Tenant does not cure the default within the three days, or if a cure is not possible, this lease will be terminated. Termination of this lease for a breach by Tenant will not occur unless the events described in this paragraph occur.

Name and Address of [Agent of] Owner [and Manager]

14. The owner of the leased premises [*or* The person authorized to act for and on behalf of the owner of the leased premises for the purpose of service of process and for the purpose of receiving and receipting all notices and demands] is _____[*name*]. _____[His *or* Her] usual street address is _____. [*Add if applicable:* The person who is authorized to manage the leased premises is _____ (*name*). _____ (His *or* Her) usual street address is _____].

Notices

15. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party shall be in writing and shall be deemed to be served when personally delivered to the party to whom the notice is directed or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____[*address of leased premises, e.g.,* 12345 Chestnut Street, Apartment A, San Francisco, California], or to Landlord at _____[*street address, city, state, zip*]. Either party to this lease may change _____[his *or* her *or* his or her] address for purposes of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Waiver

16. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or of another provision of this lease. Landlord's acceptance of rent following a breach by Tenant of any provision of this lease, with or without Landlord's knowledge of the breach, will not be deemed to be a waiver of Landlord's right to enforce any provision of this lease.

Estoppel Certificate

17. Tenant agrees to sign and deliver to Landlord an estoppel certificate, in a form provided by Landlord, within [*specify, e.g.,* three] days of receipt. The estoppel certificate acknowledges that (1) this Lease is in full force and effect and is unmodified (except as specifically set forth), and (2) Tenant has no claims against Landlord (except as specifically set forth). Failure to comply with this requirement shall be deemed to be an acknowledgment by Tenant that the facts set forth in the estoppel certificate are true, and may be relied on by a purchaser or lender.

Attorneys' Fees

18. If any legal action or proceeding arising out of or relating to this lease is brought by either party to this lease, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Binding on Heirs and Successors

19. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Landlord and Tenant; provided, however, that nothing in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest in it by Tenant.

Time of Essence

20. Time is expressly declared to be of the essence in this lease.

Sole and Only Agreement

21. This instrument is the full, complete, sole, final, and exclusive agreement of the parties concerning the matters covered by this agreement and the rights granted and duties undertaken as between the parties. There is no other agreement between the parties respecting the subject matter of this agreement or the rights, duties, promises, and undertakings of the parties. Any statement, representation, promise, or undertaking made prior to or contemporaneously with the execution of this agreement shall be void and of no effect, or to be held to have merged or been superseded by the terms and conditions of this agreement. Any statement, promise, or representation made to or by any party, or made to or by an employee, attorney, servant, agent or representative of any party, respecting the matters set forth in this agreement shall not be valid or binding as to these parties unless it is specifically contained in this agreement. Any oral representation, modification, or change concerning this agreement, or the terms or conditions of this agreement, shall be of no force and effect, except for a subsequent modification being reduced to a writing and signed by the parties to this agreement.

Executed on _____[*date*], at _____[*city*], [*county*], California.

LANDLORD
_____ [*name of landlord*]
By _____ [*signature*]
[*typed name and title*]
TENANT
_____ [*signature of tenant*]
[*typed name*]

RULES AND REGULATIONS

Noise and Other Disturbances

1. In consideration of others, no tenant or guest of a tenant may engage in any conduct in the building that may

reasonably be determined to constitute a substantial annoyance to other tenants. Further, no tenant shall permit or do anything that will otherwise interfere with the rights, comforts, or conveniences of other tenants.

Animals

2. Animals, whether owned by tenants or guests, are not permitted on or in the leased premises at any time without the express written consent of the landlord.

Antenna and Related Equipment

3. A master television antenna, with outlets in each apartment, is provided. Tenants shall not erect any equipment for television or radio reception without obtaining the landlord's prior written approval.

Balconies and Terraces

4. All outside balconies and terraces must be kept clear of all items other than outdoor furniture and outside plants. A balcony or terrace may not be used for drying laundry, beating rugs, shaking dust mops, or hanging any article. Cigarettes, trash, and other material must not be thrown from any balcony or terrace. Charcoal barbecues are permitted only on balconies and terraces.

Garbage

5. Garbage is to be placed inside the designated containers. Items too large to fit into a trash chute must be placed in the lower level trash rooms or containers. No volatile or highly inflammable materials shall be deposited in the chutes, trash rooms, or trash containers.

Plumbing Fixtures and Other Water Apparatus

6. The bathtubs, basins, sinks, garbage disposals, and other plumbing fixtures and water apparatus shall not be used for any purpose other than that for which they were constructed. Among other things, these fixtures and apparatus may not be used for the disposal of rubbish, rags, sweepings, matches, and similar improper articles. Any damage or expense resulting from the misuse of these fixtures and apparatus must be borne by the tenant causing the damage or on whose premises the damage was caused.

Nails, Fasteners, and Affixed Articles

7. No nails, screws, or other fasteners may be driven, screwed, or otherwise placed in the walls, woodwork, or any other part of any apartment without the prior written consent of the landlord. Any article affixed to the walls of an apartment by a tenant must be removed by the tenant when he or she vacates the unit.

Window Coverings

8. The landlord provides draperies for all apartments. A tenant must obtain the landlord's prior written consent before

removing and replacing those draperies.

Signs and Notices

9. No sign, advertisement, poster, foil, notice, doorplate, or similar device may be inscribed, painted, engraved, or affixed to any part of the inside or the outside of the premises, or placed in any window.

Common Areas

10. The halls, entranceways, paths, sidewalks, parks, parking areas, and other common areas must not be obstructed.

Appliances

11. Each tenant will receive a copy of the manufacturer's instructions for using each kitchen appliance covered by the tenant's lease. The appliances must be used according to these instructions. Installation of heavy electrical appliances other than those provided by the landlord will not be permitted.

Storage Compartments

12. Each tenant shall have the right to use the storage compartment assigned to that tenant in his or her lease. The landlord shall not be responsible or held liable for any loss or damage to the property stored in these compartments. Possessions that might create a fire hazard or other problems must not be placed in those compartments.

Parking Spaces

13. Each tenant shall park only in the parking space assigned to tenant by his or her lease or in the area designated for visitor parking. All vehicles, including motorcycles and other motor-propelled vehicles, are subject to this requirement. No vehicle may be left unattended on jacks or blocks. The tenant will be responsible for assuring that his or her guests park only in the area designated for visitor parking. The landlord will have a vehicle towed if it is parked in an unauthorized area, and the owner of the vehicle will be solely responsible for retrieving the vehicle and paying any related charges. No items may be stored in parking areas without the prior written consent of the landlord.

Goods and Packages

14. Any goods and packages of any kind left at entrances to apartments [*or* at the management office] will be the responsibility of the tenant to whom they belong, and the landlord will have no responsibility for their safekeeping.

Guests

15. Each tenant is responsible for the conduct of his or her guests, who must abide by all of these rules and regulations. Every guest who resides in an apartment for a period exceeding 72 hours must register with the landlord.

Locks and Keys

16. Each tenant will be given duplicate keys to the tenant's apartment and mailbox. A tenant may, at his or her own expense, install a special lock or deadbolt on the tenant's entry door, if the tenant obtains the prior consent of the landlord and gives the landlord a key for the new lock or deadbolt. A tenant may, at his or her own expense, install a door chain, but must leave the chain intact when he or she vacates the apartment. All keys to the tenant's apartment and mailbox must be returned to the landlord when the tenant vacates the apartment. A charge of $_____ will be made if this is not done.

The undersigned tenant received these Rules and Regulations (pages _____ through _____) on _____[*date*].

_____ [*signature of tenant*]
[*typed name*]
TENANT

RULES GOVERNING USE OF BUILDING SWIMMING POOL

Hours

1. The pool may be used between 10 A.M. and 9 P.M., every day of the week.

Use by Tenants, Guests, and Children

2. The pool is reserved for the exclusive use of tenants and their guests. A tenant shall have no more than two guests in the pool area at any given time. Children may use the pool. All children under 14 years of age must be accompanied and supervised by an adult.

Assumption of Risk

3. NO LIFEGUARD WILL BE ON DUTY. Accordingly, persons using pool facilities do so at their own risk and the landlord assumes no responsibility for accident or injury. No one is permitted to swim alone.

Prohibited and Restricted Activities

4. Running and loud noise in the pool area are prohibited. The volume of any radio or other electronic device must be kept at a level so as not to interfere with the quiet enjoyment of other tenants or guests using the pool or residing in units adjacent to the pool area. Intoxicated persons are not permitted in the pool area.

Beverages and Containers

5. No alcoholic beverages are permitted in the pool area. Nonalcoholic beverages may be served at poolside in plastic or metal containers. Positively no glass bottles or other glass containers are permitted.

Personal Effects

6. Tenants are responsible for removing all personal effects from the pool area, including towels and trash.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTerm Tenancies



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
A. Complete Residential Leases

17-34B California Legal Forms--Transaction Guide § 34B.201

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.201 Lease of Single-Family Residence

[1] Comment

[a] Use of Form

This form is a lease for a single-family residence. It specifies that the premises may be used only as a residence [*see* P 6 of form in [2], *below*] and creates a tenancy for years (that is, a tenancy for a fixed term) [*see § 34B.14[2]*]. This form may be modified to provide for a periodic tenancy by replacing Paragraph 1 with one of the alternative provisions in § 34B.220[2]].

An apartment lease is *set forth in § 34B.200[2]*. The laws governing residential leases are discussed at length in the Legal Background and in § 34B.200[1]. That discussion is, for the most part, applicable to this form as well. All provisions of this form that do not appear in § 34B.200[2] are discussed in [b], *below*.

For a comprehensive list of provisions that may be included in a residential lease, see the Transaction Guide. For a standardized lease published by the California Association of Realtors, see *§ 34B.202*. Finally, for additional and alternative clauses that may be inserted into this form, see *§ 34B.210 through § 34B.284*.

[b] Distinguished From Apartment Lease

This form differs from § 34B.200[2] in several ways. This form assumes that the tenants will be a husband and wife, and collectively refers to them as "the Tenant" [*see* preamble of form in [2], *below*]. Both tenants must sign the lease, and are jointly and severally responsible for the obligations imposed by the lease [*see* P 5 of form in [2], *below*; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for discussion of joint and several obligations]. This form permits the tenants' minor children to occupy the premises [*see* P 5 of form in [2], *below*].

The leased premises include the house and a garage [*see* [c], *below*]. An optional provision permits the parties to

exclude items (for example, a tool shed) from the leased premises [*see* preamble of form in [2], *below*; *see also § 34B.200[2]*]. The tenants must use the house as a single-family residence [*see* P 6 of form in [2], *below*]. They may own pets, provided they obtain the landlord's prior written consent [*see* P 6 of form in [2], *below*]. Further, they must pay for all utilities [*see* P 4 of form in [2], *below*].

[c] Description of Leased Premises

A lease of an entire house or building is a lease of (1) the land on which the building stands, at least as far as the land is needed for the support of the building, and (2) adjacent land belonging to the landlord that is used with the building and is necessary to its proper occupation for the intended purpose [*Bachenheimer v. Palm Springs Etc. Corp. (1953) 116 Cal. App. 2d 580, 588, 254 P.2d 153* ; *see § 34B.16[2]*]. Although the lease should mention any "adjacent land" covered by the lease [*see § 34B.200[1][b]*], there is no need to mention the land on which the structure stands.

[2] FORM

Lease of Single-Family Residence

RESIDENTIAL LEASE

Preamble

This lease is entered into on _____[*date*], by and between _____[*name or names*], [*legal status, e.g.*, a single woman] (hereafter referred to as "Landlord"), and _____[*name or names*], [*legal status, e.g.*, husband and wife] (hereafter collectively referred to as "Tenant"). Landlord hereby leases to Tenant the single-family house located at _____[*street address and city*], California, hereafter called the "leased premises." The "leased premises" shall also include [*specify, e.g.*, the garage attached to the house], but shall not include _____[*specify, e.g.*, the tool and storage shed located in the backyard, which Landlord shall retain for his or her own use during the term of this lease].

Term

1. This lease shall be for a term of [*specify, e.g.*, one year] commencing at 12:01 A.M. on _____[*date*] (the "Commencement Date"), and ending at 12:01 A.M. on _____[*date*] (the "Original Term"), unless sooner terminated under the provisions of this lease.

Rent

2. Tenant agrees to pay to Landlord as rent for the use and occupancy of the leased premises the sum of $_____ per month. The rent is payable in advance on or before the first day of each month, commencing on _____[*date*], at the address specified in this lease for the service of notices on Landlord or at any other place designated by Landlord in a written notice served on Tenant. Landlord acknowledges receipt of the sum of $_____ as the first month's rent.

Security Deposit

3. On execution of this lease, Tenant shall deposit with Landlord, in addition to the first month's rent of $_____, a security deposit of $_____[*specify amount, not to exceed a total of two*

months' rent for unfurnished premises, or three months' rent for furnished premises]. Landlord will hold this security deposit for the faithful performance by Tenant of _____[his *or* her] obligations under this lease and for the cleaning and repairing of the leased premises after surrender by Tenant. Landlord agrees to hold the security deposit for Tenant, free from the claim of any creditor of Landlord. Before the end of the lease term, Landlord will notify Tenant of Tenant's right to request an initial inspection of the premises. On Tenant's request, and no earlier than two weeks before the end of lease date, Landlord will make an initial inspection of the premises and provide Tenant with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security. Tenant will have the opportunity to remedy the identified deficiencies before the end of lease date to avoid the deductions from the security. Landlord will return to Tenant the full amount of the deposit within 21 calendar days after Tenant has vacated the leased premises, less any amounts that are reasonably necessary to remedy any defaults in the payment of rent by Tenant, to repair damages to the leased premises caused by Tenant or Tenant's guests other than ordinary wear and tear, and to clean the leased premises. At the time Landlord returns the deposit to Tenant, Landlord will furnish Tenant with an itemized written statement of the amount of the security deposit received, the charges made by Landlord against the security deposit, and the disposition made or to be made of the security deposit.

Utilities

4. Tenant agrees to pay all charges for all utilities, including electricity, gas, water, garbage disposal, and telephones, used in or on the leased premises during the term of this lease. Tenant shall make payments for these utilities directly to the utility companies.

Occupancy of Leased Premises

5. Except as otherwise provided in this paragraph, only those persons collectively referred to in this lease as "Tenant" (and their minor children) will occupy the leased premises. The persons collectively referred to as "Tenant" shall execute this lease. It is expressly understood that this lease is between Landlord and each Tenant signatory individually and severally. In the event of default by any one signatory, the remaining signatory shall be responsible for timely payment of rent and all other provisions of this lease. Tenant may have up to [*specify number, e.g.,* two] guests on the leased premises at any one time. A person shall be considered a "guest" for these purposes if he or she occupies the leased premises for [*specify period or periods, e.g.,* 20 or fewer consecutive days *or* for a total of fewer than 30 calendar days in a year]. No other person shall be permitted to occupy the leased premises except with the prior written approval of Landlord.

Use of Leased Premises

6. Tenant agrees that the leased premises are to be used exclusively as a single-family residence. Tenant must obtain Landlord's prior written consent before keeping pets (or permitting pets to be kept) on the leased premises. Tenant shall not do or permit anything to be done in or about the leased premises that will in any way obstruct or interfere with the rights of occupants of neighboring buildings or injure or annoy them or use or allow the leased premises to be used for any improper, unlawful, or objectionable purpose. Tenant shall not cause, maintain, or permit any nuisance in, on, or about the leased premises, or commit any waste in or on the leased premises. Further, Tenant shall not do or permit anything to be done in or about the leased premises or bring or keep anything in the leased premises that will in any way increase the existing rate of or affect any fire or other insurance on the house or any of its contents, or cause a cancellation of any insurance policy covering the house or any part of it or any of its contents. Finally, Tenant shall not put the leased premises to any use that violates local zoning ordinances or any other law applicable to the leased premises.

Condition of Leased Premises

7. The rights and responsibilities of Landlord and Tenant relating to the condition of the leased premises are as follows:

(a) Landlord will, at Landlord's own cost and expense, put and maintain the leased premises in a safe and sanitary condition and shall comply with all laws, ordinances, and regulations pertaining to the condition of the leased premises. Tenant shall remedy, at Tenant's own cost and expense, any deteriorations of or injuries to the leased premises occasioned by Tenant's lack of ordinary care.

[*Choose one of the following:*]

[*First alternative, if tenant has inspected the premises.*]

(b) Tenant acknowledges that _____ [he *or* she] has inspected the leased premises[, including all furnishings, fixtures, appliances, and other personal property subject to this lease, or specify other inspected fixtures, etc.] and agrees that they are in satisfactory condition and good working order, except as noted by Tenant on the "Inspection Sheet" attached to this lease and hereby incorporated by reference. [*Describe any repairs landlord has agreed to make unless they are set forth on the inspection sheet, e.g.,* Landlord agrees that the _____ (*e.g.,* dishwasher) shall be repaired, at Landlord's sole expense, not later than two weeks after Tenant takes possession of the leased premises.]

[*Second alternative, if tenant will provide inspection sheet at a later date.*]

(b) Tenant acknowledges that _____ [he *or* she] has inspected the leased premises [, including all furnishings, fixtures, appliances, and other personal property subject to this lease, or specify other inspected fixtures, etc.]. Tenant agrees to complete and deliver to Landlord the "Inspection Sheet" form attached to this lease, setting forth any items which are damaged or not in operable condition within _____ [*specify, e.g.,* three days] after the Commencement Date as an acknowledgment of the condition of the premises. Landlord shall not be obligated to repair any items specified by Tenant on the Inspection Sheet unless otherwise required to do so under this Lease.

Alterations and Repairs by Tenant

8. The parties agree that the following provisions govern all alterations and repairs of the leased premises by Tenant:

(a) Tenant shall make no alterations to the leased premises without the prior written consent of Landlord. Any alteration made to the leased premises by Tenant after that consent has been given, and any fixtures installed as a part of that work, will at Landlord's option become the Landlord's property on the expiration or earlier termination of this lease, provided, however, that Landlord shall have the right to require Tenant to remove any fixtures at Tenant's cost on termination of this lease.

(b) Tenant shall notify Landlord of any dilapidations or other defective conditions on the leased premises that require repairs. If Landlord fails to repair or arrange for the repair of the condition within a reasonable time (not exceeding 30 days), Tenant may make the repairs or arrange for them to be made and deduct the cost of the repairs, provided Tenant does not deduct more than the equivalent of one month's rent.

Entry by Landlord

9. Landlord may enter the leased premises only under the following circumstances:

(a) In case of emergency.

(b) To make necessary or agreed repairs, decorations, alterations, or improvements; supply necessary or agreed services; or exhibit the leased premises to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.

(c) If Tenant abandons or surrenders the leased premises.

(d) Pursuant to court order.

Landlord will give Tenant at least 24 hours' notice of Landlord's intent to enter unless (1) an emergency exists, (2) Tenant has abandoned or surrendered the leased premises, or (3) it is impracticable to do so. Further, Landlord will enter only during normal business hours unless (1) an emergency exists, (2) Tenant has abandoned or surrendered the leased premises, or (3) Tenant consents, at the time of an entry that is not during normal business hours, to the entry.

Locks and Keys

10. Tenant may not change or add any lock to the leased premises without obtaining Landlord's prior written consent and without providing Landlord with a key to the changed or added lock.

Assignment and Subletting

11. Tenant may assign this lease or sublet all or any portion of the leased premises, provided Tenant first obtains the written consent of Landlord. [Landlord's consent to any assignment or subletting shall not be arbitrarily or unreasonably withheld.] The consent of Landlord to any one assignment or subletting shall not be deemed to be a consent by Landlord to any subsequent assignment or subletting. Any assignment or subletting without Landlord's prior written consent shall be void and shall, at Landlord's option, terminate this lease.

Default by Tenant

12. [Landlord and Tenant agree that every condition, covenant, and provision of this lease is material and reasonable.] Any breach by Tenant of a condition, covenant, or provision of this lease will constitute a material breach. For any material breach by Tenant, Landlord may provide Tenant with a written three-day notice that describes the breach and demands that Tenant cure the default (if a cure is possible). If Tenant does not cure the default within the three days, or if a cure is not possible, this lease will be terminated. Termination of this lease for a breach by Tenant will not occur unless the events described in this paragraph occur.

Name and Address of [Agent of] Owner [and Manager]

13. The owner of the leased premises [*or* The person authorized to act for and on behalf of the owner of the leased premises for the purpose of service of process and for the purpose of receiving and receipting all notices and demands] is _____[*name*]. _____[His *or* Her] usual street address is _____. [

Add if applicable: The person who is authorized to manage the leased premises is _____ (*name*). _____ (His *or* Her) usual street address is _____.]

Notices

14. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party shall be in writing and shall be deemed to be served when personally delivered to the party to whom the notice is directed or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____[*address of leased premises*], or to Landlord at _____[*street address, city, state, zip*]. Either party to this lease may change _____[his *or* her] address for purposes of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Waiver

15. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or of another provision of this lease. Landlord's acceptance of rent following a breach by Tenant of any provision of this lease, with or without Landlord's knowledge of the breach, will not be deemed to be a waiver of Landlord's right to enforce any provision of this lease.

Estoppel Certificate

16. Tenant agrees to sign and deliver to Landlord an estoppel certificate, in a form provided by Landlord, within [*specify, e.g.,* three] days of receipt. The estoppel certificate acknowledges that (1) this Lease is in full force and effect and is unmodified (except as specifically set forth), and (2) Tenant has no claims against Landlord (except as specifically set forth). Failure to comply with this requirement shall be deemed to be an acknowledgment by Tenant that the facts set forth in the estoppel certificate are true, and may be relied on by a purchaser or lender.

Attorneys' Fees

17. If any legal action or proceeding arising out of or relating to this lease is brought by either party to this lease, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Binding on Heirs and Successors

18. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Landlord and Tenant; provided, however, that nothing in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest in it by Tenant.

Time of Essence

19. Time is expressly declared to be of the essence in this lease.

Sole and Only Agreement

20. This instrument is the full, complete, sole, final, and exclusive agreement of the parties concerning the matters covered by this agreement and the rights granted and duties undertaken as between the parties. There is no other agreement between the parties respecting the subject matter of this agreement or the rights, duties, promises, and undertakings of the parties. Any statement, representation, promise, or undertaking made prior to or contemporaneously with the execution of this agreement shall be void and of no effect, or to be held to have merged or been superseded by the terms and conditions of this agreement. Any statement, promise, or representation made to or by any party, or made to or by an employee, attorney, servant, agent or representative of any party, respecting the matters set forth in this agreement shall not be valid or binding as to these parties unless it is specifically contained in this agreement. Any oral representation, modification, or change concerning this agreement, or the terms or conditions of this agreement, shall be of no force and effect, except for a subsequent modification being reduced to a writing and signed by the parties to this agreement.

Executed on _____[*date*], at _____[*city*], [*county*], California.

LANDLORD
_____ [*name of landlord*]
By _____ [*signature*]
[*typed name and title*]
TENANT
_____ [*signature of tenant*]
[*typed name*]
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesTerm TenanciesReal Property LawOwnership & TransferNatural Persons



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
A. Complete Residential Leases

17-34B California Legal Forms--Transaction Guide § 34B.202

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.202 Residential Lease or Month-to-Month Rental Agreement (CAR)

[1] Comment

[a] Use of Form

This form is the California Association of Realtors (CAR) standard form for a Residential Lease or Month-to-Month Rental Agreement [CAR Form LR, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied]. This form may be used for either a tenancy for years, which is a tenancy for a fixed term or a month-to-month tenancy, which is a periodic tenancy [*see* P 2 of form in [2], *below*]. This form may be used to lease any type of residential unit or structure, including an apartment in a multiunit building or a single-family residence.

CAR also publishes an "Application to Rent Screening Fee," which may be used in conjunction with the residential lease [*see § 34B.280*]. For a CAR inspection sheet that may be used by a tenant to document the condition of the premises before and after occupancy, see *§ 34B.281*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

For complete, custom-drafted leases, see *§§ 34B.200* (apartment lease) and 34B.201 (lease for single-family residence). The discussion in the Legal Background and in § 34B.200[1] covers many significant laws governing residential leases, and should be used in conjunction with this comment and form. The discussion, *below*, focuses on those provisions which are unique to this form and were not previously discussed in the Legal Background or § 34B.200[1]. This chapter

also contains numerous additional and alternative lease provisions [*see §§ 34B.210-34B.286*].

PRACTICE TIP:

Benefits of Printed Forms. Printed lease forms are frequently used in residential transactions. They are particularly useful in smaller transactions because they provide an inexpensive method of setting forth lease provisions. Further, they are often used by landlords of multitenant buildings to eliminate the need to draft a new lease for each tenant and to minimize discrepancies among the various leases. *By Publisher's Editorial Staff.*

PRACTICE TIP:

: Attorney's Role in Printed Lease Transaction. The attorney's role in a transaction involving the use of a printed lease normally will be limited. Counsel may be asked to review the completed form before either or both parties have signed it, or to interpret or determine the sufficiency of the completed form. In any event, counsel should evaluate the legal sufficiency of the form, determine whether or not it accurately expresses the intent of the parties, and consider whether or not the form includes all necessary or advisable provisions. *By Publisher's Editorial Staff.*

PRACTICE TIP:

Consider Local Ordinances and Unique Attributes of Premises. As part of the attorney's role to determine whether the printed lease contains all provisions, particular consideration should be given to any unique attributes of the premises, and any local ordinances which may govern its use, occupancy, control, or termination of tenancy. *By Benjamin Kaplan.*

[b] Modifications to Form

Counsel may wish to consider making certain modifications to this form. The "Other Terms and Conditions; Supplements" provision in this form [*see* P 40 of form in [2], *below*] does not provide a sufficient amount of space for lengthy or numerous revisions. However, the form also provides for the option of attaching and incorporating a supplement to the lease [*see* P 40 of form in [2], *below*]. Each page of the supplement should be signed or initialed by both parties. Attached supplements are incorporated into the main lease agreement and can include CAR Form KLA (Keysafe/Lockbox Addendum) and CAR Form FLD (Lead-Based Paint and Lead-Based Paint Hazards Disclosure) [*see § 34B.284*]. For an illustrative addendum that may be easily modified for use as a supplement to the lease, see *Ch. 30D, Construction Contracts and Subcontracts, § 30D.230*. When an item on the attached supplement deletes or changes a particular provision of this form, the item should begin by identifying the affected provision, for example, "Paragraph _____ is modified as follows:".

Changes should not be made on the face of this form, except when an entire provision is being deleted or modified. In that case, the provision should be lined out and the change discussed on the attached document. Those marks and any other interlineations, deletions, or modifications appearing on the form itself should be initialed by both parties.

[c] Security Deposit

This form requires the tenant to pay a security deposit [*see* P 4 of form in [2], *below*]. It reflects the provisions of *Civ. Code § 1950.5*, which regulates the amount and handling of security deposits [*see § 34B.230*].

This form provides that the security deposit must not be used by the tenant in lieu of paying the last month's rent [*see* P 4B of form in [2], *below*]. This allows the landlord to use all of the funds for any of the purposes specified in *Civ. Code § 1950.5(b)* [*see § 34B.230[1][c]*]. For a provision that provides for the payment by the tenant of last month's rent and a security deposit, see *§ 34B.231*.

This form also requires the tenant to reinstate any portion of the security deposit that is used toward rent or damages

during the term of the tenancy [*see* P 4B of form in [2], *below*]. For discussion of this provision, see *§ 34B.232*.

For detailed coverage of *Civ. Code § 1950.5* and an alternative security deposit provision, see *§ 34B.230*. Unlike this form, § 34B.230[2] contains optional language that should be included if an applicable local ordinance requires the landlord to pay the tenant interest on the security deposit.

[d] Parking and Storage

This form sets forth alternative provisions for permitting or prohibiting parking and/or storage on the premises by the tenant [*see* PP 7, 8 of form in [2], *below*]. For discussion and an alternative provision for the tenant's parking rights, see *§ 34B.241*.

[e] Late Charges and "Non-Sufficient Fund" Checks

This form requires the tenant to pay an additional sum as a late charge if the landlord does not receive an installment of rent within a specified number of calendar days after its due date [*see* P 6 of form in [2], *below*]. It also provides that the tenant pay $25.00 as a "non-sufficient funds" (NSF) fee for the first returned check and $35.00 as a NSF fee for each additional returned check to the landlord [*see* P 6A of form in [2], *below*]. For discussion and an alternative provision for late charges, see *§ 34B.233*.

[f] Neighborhood Conditions

This form advises the tenant to satisfy himself or herself as to the neighborhood and area conditions [*see* P 12 of form in [2], *below*].

PRACTICE TIP:

Transfer Disclosure Not Required for Residential Lease. A transfer disclosure statement is not required for the transfer of a leasehold interest that does not include an option to purchase [*see Civ. Code § 1102 et seq.*; *see also* Ch. 23, *Real Property Sales Agreements*]. This provision reminds the tenant that he or she is responsible to inquire into the suitability of the neighborhood and not to rely on the landlord or the broker to review and disclose those issues to the tenant. *By Publisher's Editorial Staff.*

[g] Occupants

This form provides that the leased premises are to be used solely as a personal residence, and only by the persons named in the lease [*see* P 1B of the form in [2], *below*]. This is a common limitation. However, unlike this form, many leases also set forth restrictions regarding occupancy of the premises by guests of the tenant [*see, e.g., § 34B.200[2],* P 5].

[h] Lead-Based Paint Disclosure

This form includes an optional provision that attaches a disclosure form warning the tenant of the possible exposure to lead-based paint [*see* P 22 of form in [2], *below*]. For discussion of the law on this requirement and an illustrative disclosure form, see *§ 34B.284*.

[i] Temporary Relocation

This form provides for the tenant to temporarily vacate the premises, on the landlord's demand, for purposes of fumigation or other repairs to the premises [*see* P 29 of form in [2], *below*].

PRACTICE TIP:

Caution: Temporary Relocation Is Open-Ended. The above-mentioned provision is slanted in favor of

the landlord. There are no advance notice requirements for the tenant to vacate, nor are there any time limitations on the period the tenant is required to vacate the premises. The provision merely provides that the tenant agrees to temporarily vacate the premises for a "reasonable period." Since this provision includes not only fumigation but also repairs, the time period could be lengthy. For example, if the landlord wanted to undertake a major remodel on the premises, it could be argued that this provision would require the tenant to vacate the premises for a period of weeks or perhaps even months. If this is an issue for the tenant, counsel for the tenant may wish to modify this provision to provide some protection for the tenant. *By Publisher's Editorial Staff.*

PRACTICE TIP:

: Check Local Ordinances for Restrictions on Temporary Relocation. In several jurisdictions, temporary displacement is governed by local law if the premises are subject to rent or eviction controls. *By Benjamin Kaplan.*

[j] Damages to Premises

This form provides that if the premises are destroyed through no fault of the tenant, rendering the premises totally or partially uninhabitable, either party may terminate the lease by giving the other party written notice. If the lease is not terminated, the landlord is required to "promptly" repair the premises, and the rent is reduced based on the extent to which the damage interferes with the tenant's reasonable use of the premises [*see* P 30 of form in [2], *below*]. In the absence of this type of provision, the destruction of the premises would automatically terminate the lease [*see Civ. Code § 1933(4)*].

[2] FORM

Residential Lease or Month-to-Month Rental Agreement (CAR)

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide §§ 34B.203-34B.209

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.203[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
1. Introductory Provisions

17-34B California Legal Forms--Transaction Guide § 34B.210

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.210 Names and Status of Parties

[1] Comment

[a] Use of Form

This form sets forth alternative methods of stating the names and status of the parties to a lease. It includes provisions for individuals, multiple parties, entities, and political subdivisions. They may be inserted into either of the complete custom-drafted lease agreements in this chapter [*see §§ 34B.200* (apartment lease), 34B.201 (lease of single family residence)].

For alternative descriptions that may be used when the landlord's name has changed since he or she acquired title to the leased premises, see *§ 34B.211*. For coverage of the capacity of the types of persons and entities identified in this form to enter into contracts, see *§ 34B.15[2]*.

[b] Identifying Parties

Counsel should confirm that the lease contains the full names of the parties and that the names are spelled correctly. Additional identifying information should be included, if necessary, to distinguish one party from another (for example, when a father and son have the same name).

The name of an entity should be taken from one of the following sources, as appropriate:

- For a corporation, its articles of incorporation;
- For an unincorporated association, its articles of association or bylaws;

- For a partnership, its partnership agreement or fictitious name certificate; and
- For a limited liability company, its articles of organization.

If a party to the lease is an individual, his or her marital status (single, married, or widowed) should be stated. When a legal entity is a party, the type of entity (corporation, unincorporated association, partnership, limited partnership, limited liability company, municipal corporation, political subdivision of the state, or other) should be included, as well as the name of the state or county of organization, if appropriate.

[2] FORM

Names and Status of Parties

[*Spouses:*]

_____[*name of one spouse*] and _____[*name of other spouse*], husband and wife,

[*Joint Tenants or Tenants in Common:*]

_____[*name*] and _____[*name*], as [joint tenants *or* tenants in common],

[*Corporation:*]

_____[*name*], a California [*or other state*] corporation,

[*Partnership:*]

_____[*name*], a [limited] partnership [composed of _____ (*names of partners; if limited partnership, add:*, as general partners)],

[*Limited Liability Company:*]

_____[*name*], a limited liability company,

[*Joint venture:*]

_____[*name*], _____[*name*], and _____[*name*], doing business as _____[*name*], a joint venture,

[*Unincorporated association:*]

_____, an unincorporated association,

[*Minor:*]

_____[*name*], a minor,

[*Guardianship:*]

_____[*name*], guardian of the [person and] estate of _____[*name*], a minor,

[*Conservatorship:*]

_____[*name*], a [single *or* married] [man *or* woman] and a conservatee,

[*OR*]

_____[*name*], conservator of the [person and] estate of _____[*name*], a [single *or* married] [man *or* woman],

[*Probate:*]

the heirs and devisees of _____[*name of decedent*],

[*OR*]

_____[*name*] as [executor *or* administrator] of the estate of _____[*name of decedent*],

[*Trust:*]

_____[*name*], as trustee of _____ [*describe trust, e.g.,* the _____ (*name*) Trust of _____ (*date*)

[*OR*]

the _____ (*name*) Testamentary Trust No. _____, Superior Court No. _____, County of _____],

[*Municipal Corporation:*]

_____, a municipal corporation of the State of California,

[*Political Subdivision:*]

_____, a political subdivision of the State of California,

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
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17-34B California Legal Forms--Transaction Guide § 34B.211

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.211 Landlord's Title in Name Other Than Landlord's Current Name

[1] Comment--Use of Form

This form consists of alternative descriptions of a landlord that may be used in lieu of the description of the landlord in the preamble to the forms *set forth in §§ 34B.200* (apartment lease) and 34B.201 (lease of single-family residence) when the landlord wishes to lease property under a name other than the name in which he or she derived title. This form may also be modified to be used in the CAR standard lease *form in § 34B.202[2]*.

Any person who takes title to real property in one name, and then changes his or her name must, in any lease or other conveyance of the property, set forth the name under which he or she received title. If the lease does not comply with the requirement, it will be valid between the parties and those with notice, but the recordation of the instrument will not impart constructive notice of its contents to subsequent purchasers and encumbrancers [*Civ. Code § 1096*].

The alternatives in this form may be used when the landlord is an individual or a corporation. They may be easily modified for use with other types of landlords.

[2] FORM

Landlord's Title in Name Other Than Landlord's Current Name

This lease is entered into on _____[*date*], by and between _____[*name*], [*legal status, e.g.,* an unmarried man] ("Landlord"), and _____[*name or names*], [*legal status, e.g.,* a single woman] ("Tenant"). Landlord is the same person who acquired title to the leased premises described below under the name of _____[*name in which title held*], by deed dated _____[, and recorded on _____ (*date*), in the Office of the County Recorder of _____ County as Instrument No. _____ in Book _____, Page _____].

[*OR*]

This lease is entered into on _____[*date*], by and between _____[*name*], [*legal status, e.g.,* an unmarried man] ("Landlord"), also known as _____[*name in which title held*], and _____[*name or names*], [*legal status, e.g.,* a single woman] ("Tenant").

[*OR*]

This lease is entered into on _____[*date*], by and between _____[*present name of corporation*], a California corporation ("Landlord"), and _____[*name or names*], [*legal status, e.g.,* a single woman] ("Tenant"). Landlord is the successor by [*method of succession, e.g.,* merger] to _____[*name of original corporation*].

[*OR*]

This lease is entered into on _____[*date*], by and between _____[*present name of corporation*], a California corporation ("Landlord"), formerly _____[*former name*], and _____[*name or names*], [*legal status, e.g.,* a single woman] ("Tenant").

[*OR*]

This lease is entered into on _____[*date*], by and between _____[*present name of corporation*], a California corporation ("Landlord"), and _____[*name or names*], [*legal status, e.g.,* a single woman] ("Tenant"). Landlord derived title under the name of _____[*former name*] by deed dated _____[, and recorded on _____ (*date*), in the Office of the County Recorder of _____ County as Instrument No. _____ in Book _____, Page _____].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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17-34B California Legal Forms--Transaction Guide §§ 34B.212-34B.219

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.212[Reserved]



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2. Term

17-34B California Legal Forms--Transaction Guide § 34B.220

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.220 Periodic Tenancy

[1] Comment

[a] Use of Form

This form consists of alternative lease provisions creating a periodic tenancy. The first alternative creates a month-to-month periodic tenancy, and the second one creates a year-to-year or week-to-week periodic tenancy. Either provision may be substituted for § 34B.200[2], P 1 (apartment lease) or for § 34B.201[2], P 1 (lease of single-family residence). Unless modified in this manner, those forms will create tenancies for years.

For further discussion of the law applicable to a periodic tenancy, see *§ 34B.14[1]*. The most significant difference between a periodic tenancy and a tenancy for years [*see § 34B.14[2]* for discussion of tenancy for years] is that the former requires notice to terminate while the latter does not [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345* ; *see* [b], [c], *below*].

[b] Termination of Month-to-Month Tenancy

A tenancy from month-to-month may be terminated at any time by a 30-day written notice from one party, landlord or tenant, to the other [*Civ. Code § 1946*; *see* first alternative of form in [2], *below*]. When the tenancy is terminated by a 30-day notice given other than 30 days before the end of any month term, the tenancy terminates at the end of the 30 days specified in the notice, and rent is due and payable up to and including the date of termination [*Civ. Code § 1946*].

Notwithstanding the above, the parties to the tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before a recurring term of the tenancy expires [*Civ. Code § 1946*; *see* optional provision in first alternative in form in [2], *below*]. For discussion and forms for a notice to terminate a month-to-month tenancy, see Ch. 35B, *Modification and Termination of Leases* .

PRACTICE TIP:

Timing of Service of Notice May Be Critical. If a rental agreement provides for notice of termination to be served "not less than seven days" before expiration of a recurring term, the timing of the service is critical. Additionally, one must take into consideration the actual mode of service. *By Benjamin Kaplan.*

Notwithstanding *Civ. Code § 1946*, an owner must give notice at least 60 days (not 30 days) before the proposed date of termination of a periodic tenancy if the tenant has been living in the dwelling for at least one year [*Civ. Code § 1946.1(a)-(c)*]. In any case, a tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b), (e)*]. Notice must be sent by certified or registered mail or given in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 1946.1(f)*].

The 60-day notice requirement for longer term renters does not apply if (1) the dwelling or unit is alienable separate from the title to any other dwelling unit; (2) the owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; (3) the purchaser is a natural person or persons; (4) the notice is given no more than 120 days after escrow is established; (5) notice was not previously given to the tenant in accordance with *Civ. Code § 1946.1*; and (6) the purchaser in good faith intends to reside in the property for at least one full year after the tenancy's termination [*Civ. Code § 1946.1(d)*]. These provisions do not affect the authority of a public entity to regulate or monitor the basis for eviction [*Civ. Code § 1946.1(g)*].

[c] Termination of Other Periodic Tenancies

Any periodic tenancy other than a month-to-month tenancy, such as a year-to-year or a week-to-week tenancy, may be terminated unilaterally only at the end of one of its recurring terms [*Civ. Code § 1946*; *see* second alternative of form in [2], *below*]. In the absence of an agreement between the parties, the notice required to terminate a periodic tenancy, other than one from month-to-month, must be given either 30 days before one of the recurring terms expires or as long before expiration as one of the terms as the term itself [*Civ. Code § 1946*]. For example, in the absence of an agreement between the parties, a year-to-year tenancy may be terminated only by a written notice given at least 30 days before the end of one of its yearly terms and a week-to-week tenancy may be terminated only by a written notice given at least one week before the end of one of its weekly terms [*see Civ. Code § 1946*].

An owner must give notice at least 60 days before the proposed date of termination if the tenant has been living in the dwelling for at least one year. The tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b), (g)*; *see* [b], *above*].

Notwithstanding the above, the parties to any type of periodic tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before a recurring term of the tenancy expires [*Civ. Code § 1946*]. The second alternative of the form in [2], *below*, provides for this method of termination. For discussion and forms for a notice to terminate a periodic tenancy, see Ch. 35B, *Modification and Termination of Leases* .

[2] FORM

Periodic Tenancy

Term

[*First alternative; use to create a month-to-month tenancy.*]

1. The term of this lease will commence on _____[*date*], and will continue thereafter as a

month-to-month periodic tenancy until either party to this lease terminates the tenancy by giving the other party advance written notice of the intention to terminate the tenancy [*or* by giving the other party, at least _____ (*number not less than seven or more than 60*) days before the expiration of the then-current month term, written notice of the intention to terminate the tenancy]. The notice must be either delivered in person or sent by certified or registered mail to the other party. Rent will be due and payable up to and including the date of termination.

[*OR*]

[*Second alternative; use to create a periodic tenancy other than a tenancy from month-to-month.*]

1. The term of this lease will commence on _____[*date*], and will continue thereafter as a [year-to-year *or* week-to-week *or other period*] periodic tenancy until either party to this lease terminates the tenancy by giving the other party, at least _____ (*number not less than 7 or more than 60*) days before the expiration of the then-current [year *or* week *or other period*] term, written notice of the intention to terminate the tenancy. The notice must be either delivered in person or sent by certified or registered mail to the other party. Rent shall be due and payable up to and including the date of termination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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17-34B California Legal Forms--Transaction Guide § 34B.221

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.221 Holdover Provision

[1] Comment

[a] Use of Form

This form is a clause that provides that a tenant will, at the landlord's option, become a month-to-month tenant if he or she remains in possession of the leased premises after expiration of the original term of the lease. Optional language states that the tenant must also fail to exercise an option granted in the lease to renew or extend the lease to become a month-to-month tenant [for an option provision, *see § 34B.224*]. The clause essentially states the applicable statutory presumption that would apply in the absence of this provision [*see Civ. Code § 1945*; *see also § 34B.14[2]*], and is intended to notify the tenant of this method of creation of a month-to-month tenancy. Both this provision and the statutory presumption protect the tenant from an unnoticed unlawful detainer action [*see* [c], *below*].

For a clause providing for the automatic renewal or extension of a lease, see *§ 34B.222*.

[b] Effect of Clause

The creation of a month-to-month tenancy protects the tenant from an unnoticed action [*see* [c], *below*], since notice to quit is necessary to terminate a month-to-month tenancy [*Renner v. Huntington Etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895]* . The tenancy is deemed to be renewed each month until one of the parties gives a 30-day written notice to the other of his or her intention to terminate the tenancy [*Civ. Code § 1946*; *Renner v. Huntington Etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895* ; *see § 34B.220[1][b]*].

[c] Absence of Clause

Absent a holdover or other renewal or extension provision in a lease, if the tenant remains in possession after the

expiration of the lease, and the landlord accepts rent from the tenant, the parties are presumed to have renewed the lease on the same terms and for the same length of time (not exceeding one month if the rent is payable monthly, or one year in any case) set forth in the original lease [*Civ. Code § 1945*]. Thus, if a tenant holds over and the landlord accepts monthly rent payments in the amount that the tenant had been making under the lease, the tenant becomes a tenant from month to month [*Renner v. Huntington Etc. Oil & Gas. Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895]* . However, the presumption in *Civ. Code § 1945* is rebuttable [*Miller v. Stults (1956) 143 Cal. App. 2d 592, 598-599, 300 P.2d 312* (presumption rebutted when parties executed different agreement after expiration of original lease); *Black v. Black (1926) 77 Cal. App. 82, 85, 246 P. 90]* .

In the absence of a holdover provision, a tenant is guilty of unlawful detainer in the following circumstances [*see Civ. Code § 1945*]:

- If the tenant holds over after expiration of a fixed term lease [*Code Civ. Proc. § 1161(1)*]; and
- The landlord does not continue to accept rent from the tenant.

Unlike other cases of unlawful detainer, a tenant who holds over under these circumstances is not entitled to any form of notice to quit the premises [*see Code Civ. Proc. § 1161*]. Rather, the landlord may immediately file a complaint in unlawful detainer to regain possession of the premises and damages, without providing the tenant with any type of notice [*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356]* . For additional discussion, see California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer* (Matthew Bender).

[2] FORM

Holdover Provision

Holding Over

_____. If Tenant fails to vacate and surrender the leased premises on or before the expiration date of this lease, [*add if lease grants tenant an option to renew or extend:* and fails to exercise the option to _____ (renew *or* extend) this lease in the manner required by P _____ of this lease,] the tenancy shall, at Landlord's option, be deemed a tenancy from month to month, until the tenancy is terminated in a manner prescribed by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at Sufferance



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17-34B California Legal Forms--Transaction Guide § 34B.222

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.222 Automatic Renewal or Extension of Lease

[1] Comment

[a] Use of Form

This form consists of two alternative clauses providing for the renewal or extension of a lease. The first alternative provides for an automatic renewal or extension if the tenant does not vacate and surrender the leased premises before the expiration of the lease. The second alternative provides for automatic renewal or extension, but only if the tenant fails to give the landlord notice of the tenant's election not to renew or extend. If the clause will appear in a printed lease, special notice and type requirements apply [*Civ. Code § 1945.5*; *see* [c], *below*].

As an alternative to automatic renewal or extension, the parties may wish to provide that a holding over with the consent of the landlord will result in the creation of a month-to-month tenancy [*see § 34B.221*]. In the absence of a holdover or renewal or extension clause, a renewal will be presumed if the landlord continues to accept rent from the tenant [*Civ. Code § 1945*]. If the lease does not contain this clause and the landlord does not consent to the tenant's continuing possession, the tenant is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*].

For a clause granting the tenant the option to renew or extend the lease, see *§ 34B.224*.

[b] Distinction Between Renewal and Extension

A renewal of a lease creates a new and distinct tenancy and involves the execution of a new instrument, whereas an extension of a lease is a continuation of the term of an existing lease for an additional period [*Oryx Energy Co. v. County of Kern (1993) 17 Cal. App. 4th 48, 59, 21 Cal. Rptr. 2d 221* ; *Howell v. City of Hamburg Co. (1913) 165 Cal. 172, 177, 131 P. 130]* . However, the terms "renewal" and "extension" do not have a definite and fixed legal significance [*Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 273, 179 P.2d 611]* .

When difficulty occurs in determining whether a lease provides for an extension or a renewal, a court will, if possible, ascertain the intention of the parties by a consideration of the entire document or sets of documents, the surrounding circumstances, and the conduct of the parties [*Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140]* . In the absence of an express provision that a new lease was intended to be executed, the presumption is that no new lease was intended and that the tenant is to continue to hold under the original lease [*Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 275, 179 P.2d 611]* . The lease must clearly show that the making of a new lease was intended, and this must appear from the express language of the parties [*see Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 275, 179 P.2d 611]* . If a tenant exercises an option to renew that does not contain express language requiring the execution of a new lease, the action will be regarded as an extension of the original lease for an additional term [*Leonhardi-Smith, Inc. v. Cameron (1980) 108 Cal. App. 3d 42, 47, 166 Cal. Rptr. 135* ; *Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 645, 321 P.2d 473]* .

[c] Automatic Renewal in Printed Lease Forms

Statutory requirements apply to any printed residential lease that provides for the automatic renewal or extension of the lease if the tenant (1) remains in possession after the expiration of the lease [*see* first alternative of form in [2], *below*] or (2) fails to give notice of his or her intent not to renew or extend before expiration of the lease [*see* second alternative of form in [2], *below*]. A printed lease is voidable by the party who did not prepare it unless the renewal or extension clause appears in at least eight-point boldface type and a notice regarding the clause appears immediately above the tenant's signature block [*Civ. Code § 1945.5*; *see § 34B.223*].

As mentioned above, the statutory type and notice requirements apply to a clause in a printed lease that provides for an automatic renewal or extension if the tenant fails to give notice of his or her intent not to renew or extend [*Civ. Code § 1945.5*; *see* second alternative of form in [2], *below*]. Normally the tenant would be required to give this notice only if the lease also granted the tenant the option to renew or extend the lease. For an option provision, see *§ 34B.224*.

[2] FORM

Automatic Renewal or Extension of Lease

[*First alternative; use if lease is to be automatically renewed or extended for specified period if tenant remains in possession after lease expires (provision must be set out in at least eight-point boldface type if contract is printed).*]

Automatic _____ [Renewal *or* Extension]

_____. If Tenant fails to vacate and surrender the leased premises on or before the expiration date of this lease, this lease shall, at Landlord's option, be deemed[renewed ***or*** extended] **for an additional period of _____ [*specify, e.g.,*** one year] on the same terms, covenants, and conditions set forth in this lease.

[*OR*]

[*Second alternative; use if lease is to be automatically renewed or extended for specified period if tenant fails to notify landlord of tenant's intention not to renew or extend the lease (provision must be set out in at least eight-point boldface type if contract is printed).*]

Automatic _____ [Renewal *or* Extension]

_____. If Tenant fails to deliver to Landlord, at least[***e.g.,*** 30 days] **before the termination date of this lease, a written notice stating Tenant's intention not to _____ [renew *or*** extend] this lease under the option granted in P _____ of this lease, the lease shall, at Landlord's option, be deemed _____ [renewed ***or*** extended] for an additional period of _____ [***e.g.,*** one year] on the same terms, covenants, and conditions set forth in this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at Sufferance



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17-34B California Legal Forms--Transaction Guide § 34B.223

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.223 Notice Regarding Inclusion of Automatic Renewal or Extension Clause in Lease

[1] Comment--Use of Form

This form is an example of the type of recital that must appear in any printed residential lease that includes an automatic renewal or extension provision [*see § 34B.222*]. To trigger the recital requirement, the renewal or extension provision must provide for the automatic renewal or extension of the lease for all or part of the full term of the lease if the tenant remains in possession after the expiration of the lease, or fails to give notice of his or her intent not to renew or extend before the expiration of the lease.

The provision will be voidable by the party who did not prepare the lease unless the following conditions are met [*Civ. Code § 1945.5*]:

- The automatic renewal or extension provision appears in at least 8-point boldface type in the body of the lease agreement [*see § 34B.222[2]*]; and

- A recital of the fact that the provision is contained in the body of the agreement appears in at least 8-point boldface type immediately before the place where the tenant executes the lease [*see* form in [2], *below*].

As mentioned above, these statutory requirements apply only to printed leases [*Civ. Code § 1945.5*]. The Legislature apparently felt that automatic renewal clauses were easier to hide in a printed form and that unsophisticated residential tenants were more likely to be misled by printed forms than by typed, custom-drafted leases. Any waiver of the above statutory requirements is void as against public policy [*Civ. Code § 1945.5*].

If a printed form residential lease fails to satisfy the above requirements, then the presumption in *Civ. Code § 1945*

applies [*Civ. Code § 1945.5*]. Under *Civ. Code § 1945*, if a tenant of real property remains in possession after expiration of the lease and the landlord accepts rent from the tenant, the parties are presumed to have renewed the lease on the same terms and for the same length of time (not exceeding one month when the rent is payable monthly, or one year in any case) [*Civ. Code § 1945*].

[2] FORM

Notice Regarding Inclusion of Automatic Renewal or Extension Clause in Lease

[*Set out following recital in at least eight-point boldface type immediately above tenant's signature block.*]

NOTICE:
Paragraph _____ of this lease provides for the automatic _____ [renewal *or* extension] of this lease if Tenant _____ [remains in possession after expiration of this lease ***or*** fails to give notice of Tenant's intention not to renew or extend this lease before its expiration].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenanciesGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.224

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.224 Option to Renew or Extend Lease

[1] Comment

[a] Use of Form

This form is a clause granting a tenant the option to renew or extend the term of a fixed lease. For discussion and forms for automatic renewals and extensions, see *§ 34B.222*.

[b] Effect of Option to Renew Lease

A provision in a lease giving the tenant the option to extend or renew a lease creates only a contractual right [*Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463-464, 98 Cal. Rptr. 482* ; *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64, 338 P.2d 1005]* . An option is simply an offer by which a promisor binds himself or herself in advance to make a contract if the optionee accepts the offer on the terms and within the time designated in the option [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67, 338 P.2d 1005* ; *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229, 255 P.2d 473]* . It does not transfer any interest in the leased land until it is exercised [*Dougherty v. California Kettleman, Etc. (1937) 9 Cal. 2d 58, 78, 69 P.2d 155* ; *Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463-464, 98 Cal. Rptr. 482]* .

Once the option to extend or renew the lease is exercised, the promise to renew ceases to be a mere personal covenant and becomes a covenant running with the land [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64-65, 338 P.2d 1005]* . Because it is a covenant running with the land, the legal successors of the tenant as well as the legal successors of the landlord are entitled to the benefits and are burdened with the duties and obligations the covenant conferred and imposed on the original parties to the lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

Thus, when a tenant has exercised an option to renew or extend a lease, the tenant and his or her successors' rights to

possession of the premises for the renewed or extended term of the lease cannot be defeated by any actions of the landlord or a successor of the landlord [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* . The tenant or the tenant's successor in interest is entitled to specific performance of the covenant to renew or extend the lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

[c] Exercise of Option

Because the optionor, the landlord, is bound by the offer contained in the option, but the optionee, the tenant, is free to accept the offer or not as the tenant chooses [*see* [b], *above*], the courts are strict in holding an optionee to exact compliance with the terms of the option [*Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229, 255 P.2d 473]* .

The courts are equally strict in enforcing the notice requirements for an option to renew the lease. The specification of a time period or deadline by which notice of exercise by the tenant of an option to renew the lease must be given is universally considered to be a condition precedent to the exercise of the option [*Simons v. Young (1979) 93 Cal. App. 3d 170, 179, 155 Cal. Rptr. 460* ; *see Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 502, 113 Cal. Rptr. 705, 521 P.2d 1097]* .

When a lease containing an option for renewal or extension does not contain any provision as to the manner and time in which the option is to be exercised, the tenant may exercise the option before expiration of the original lease term by any act or course of conduct indicating to the landlord the tenant's intent to renew [*Alhandy v. Genchi (1962) 202 Cal. App. 2d 806, 810, 21 Cal. Rptr. 167* ; *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* . For further discussion of an option to renew, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.212*.

This form sets forth a specific notice procedure for the exercise of the option.

[d] Increased Rent

Whenever an option to renew or extend requires payment of an increased rent during the renewed or extended term, the specific amount or the formula or standard by which the amount of rent is to be determined must be included in the lease [*see Ablett v. Clauson (1954) 43 Cal. 2d 280, 284-286, 272 P.2d 753* ; *Etco Corp. v. Hauer (1984) 161 Cal. App. 3d 1154, 1161, 208 Cal. Rptr. 118]* . In residential leases, the rent increase is typically based on a stated fixed amount [*see* form in [2], *below*]. For alternative clauses providing for the use of a specified formula or standard to compute the increased rent, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.212*.

[2] FORM

Option to Renew or Extend Lease

Option to _____ [Renew ***or*** Extend] Lease Term

_____. Landlord grants to Tenant a one-time option to [renew *or* extend] this lease for a period of [*e.g.*, one year] (hereafter referred to as the "extended term") from the original expiration date of this lease. The extended term of this lease, if any, shall be subject to all of the terms and conditions contained in this lease, except that the rent to be paid by Tenant to Landlord for the extended term shall be increased to the sum of $_____ per month. To exercise this option, Tenant must not be in default of any of the provisions of this lease and must deliver written notice of its exercise of the option to Landlord _____[*specify, e.g.*, before expiration of the term of this lease *or* _____ (*number*) days before expiration of the term of this lease *or* on or before _____ (*date*), but not earlier than _____ (*date*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawRestrictive CovenantsCovenants Running With Land



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
2. Term

17-34B California Legal Forms--Transaction Guide §§ 34B.225-34B.229

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.225[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
3. Security Deposit and Other Charges

17-34B California Legal Forms--Transaction Guide § 34B.230

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.230 Security Deposit

[1] Comment

[a] Use of Form

This form is a lease provision that requires the tenant to post a security deposit for the faithful performance of the lease by the tenant and specifies how the landlord will handle the deposit. It reflects the requirements of *Civ. Code § 1950.5* (discussed throughout this comment), which places limits on the amount of security deposits collected by landlords of residential property and regulates the handling of the deposits. This form also contains optional language that may be used when a local ordinance requires the landlord to pay the tenant interest on the deposit [*see* [g], *below*].

For a lease provision requiring the tenant to pay the last month's rent and a security deposit, see *§ 34B.231*. For an alternative provision that obligates the tenant to replace the security deposit if it is used by the landlord during the tenancy, see *§ 34B.232*.

[b] Scope of Civ. Code § 1950.5

[i] Relationship to Local Laws

Although the Legislature has defined and regulated the use of security deposits in *Civ. Code § 1950.5*, nothing in this statute shows an legislative intent to fully and completely occupy the field of security deposits. Therefore, a local law governing the rate of increases in security deposits is not preempted by *Civ. Code § 1950.5* [*People v. Tannenbaum (1994) 23 Cal. App. 4th Supp. 6, 9-10, 29 Cal. Rptr. 2d 534* (Los Angeles City Rent Control Ordinance limiting increases in security deposits was not preempted by *Civ. Code § 1950.5*)].

PRACTICE TIP:

Counsel Should Review Rent Control Ordinances. As noted in the case of *People v. Tennenbaum, above*, local ordinances may provide for additional or greater protection for the tenant. Counsel should review any ordinances carefully when advising clients. For example, Chapter 49 of the San Francisco Administrative Code contains provisions regarding security deposits for residential rental property, the payment of interest on security deposits, and the remedies afforded to tenants if interest is not paid. *By Benjamin Kaplan.*

[ii] Persons Subject to Statutory Requirements

The landlord's obligations to hold and return a security deposit to the tenant also applies to the landlord's agent. *Civ. Code § 1950.5* does not focus on who collects the security and does not create any exception for entities who are not landlords. Rather, one court of appeal found that so long as a fee collected from a tenant constitutes a security, the statute would then apply to anyone who collects the security [*Kraus v. Trinity Management Services, Inc. (1997) 57 Cal. App. 4th 709, 723, 67 Cal. Rptr. 2d 210 , reversed on other grounds, Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 139-142, 96 Cal. Rptr. 2d 485, 999 P.2d 718]* .

[c] Definitions

Civ. Code § 1950.5 applies to security for a rental agreement for residential property. For these purposes, residential property is property used as the dwelling of a tenant [*Civ. Code § 1950.5(a)*].

Under *Civ. Code § 1950.5*, "security" means any payment, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge, except for an application screening fee [*see Civ. Code § 1950.6*] that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following purposes [*Civ. Code § 1950.5(b)*]:

- To compensate a landlord for a tenant's default in the payment of rent;
- To repair damages to the premises (exclusive of ordinary wear and tear) caused by the tenant or the tenant's guest or licensee;
- To clean the premises on termination of the tenancy (for tenancies as to which the tenant's right to occupy begins after January 1, 2003, the security deposit may be used for cleaning of the premises "necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy"); or
- To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the rental agreement authorizes the application of the security deposit in this manner.

This statutory definition of "security" is intended to be broadly defined; the examples of the purposes for which a security deposit may be required as set forth in *Civ. Code § 1950.5(b)* are not exclusive [*see Civ. Code § 1950.5(b); Kraus v. Trinity Management Services, Inc. (1997) 57 Cal. App. 4th 709, 720-721, 67 Cal. Rptr. 2d 210 , reversed on other grounds, Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 139-142, 96 Cal. Rptr. 2d 485, 999 P.2d 718]* .

PRACTICE TIP:

Check Definitions in Local Ordinances. In jurisdictions in which there are security deposit interest ordinances, the prepayment of a last month's rent or an amount specified as being on account of the last month's rent is most probably a security deposit [*see, e.g.*, San Francisco Administrative Code § 49.1,

referring to "any payment, fee, deposit, or charge"]. *By Benjamin Kaplan.*

[d] Form of Security Deposit

A landlord or a landlord's agent may not demand or require cash as the exclusive form of a deposit of security [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has attempted to pay with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment. The landlord must give the tenant a written notice stating that the payment instrument was dishonored and informing the tenant that the tenant must pay in cash. The landlord must attach a copy of the dishonored instrument to the notice [*Civ. Code § 1947.3(a)(2)*]. For purposes of these requirements, the issuance of a money order or a cashier's check is direct evidence only that the instrument was issued [*Civ. Code § 1947.3(b)*]. Waiver of these provisions is contrary to public policy, and void and unenforceable [*Civ. Code § 1947.3(c)*].

[e] Maximum Amount

Except as provided in *Civ. Code § 1940.5* (waterbeds) [*see § 34B.240[1][b][vi]*], a landlord of residential property may not demand or receive any security deposit, however denominated, that exceeds an amount equal to two months' rent in the case of unfurnished residential property, or three months' rent in the case of furnished residential property. However, the landlord may demand or receive, in addition to the security deposit, the rent for the first month of the tenancy before or at the time the tenant takes initial occupancy. Further, the landlord may insist on an advance payment of not less than six months' rent when the term of the lease is six months or longer [*Civ. Code § 1950.5(c)*].

The above-mentioned statutory limitations on the amount of the security deposit do not prohibit an agreement in which the landlord, at the request of the tenant and for a specified fee or charge, is to make structural, decorative, furnishing, or similar alterations, if the alterations do not involve cleaning or repairing for which the landlord may charge the previous tenant [*Civ. Code § 1950.5(c)*; *see Civ. Code § 1950.5(e)* (permissible cleaning and repairing charges against previous tenant)].

[f] Last Month's Rent

Because the definition of "security" extends to any advance payment of rent [*Civ. Code § 1950.5(b)*; *see* [c], *above*], the last month's rent falls within the scope of *Civ. Code § 1950.5*. For a provision that prohibits the tenant from using the security deposit for his or her last month's rent, see *§ 34B.202[2]*, P 4B. For a lease provision that requires the tenant to pay last month's rent and a security deposit, see *§ 34B.231*.

[g] Interest on Security Deposit

A landlord is not required by law to pay interest to tenants on security deposits [*Korens v. R. W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1058-1059, 261 Cal. Rptr. 137]* . However, the lease may provide that interest be paid on a security deposit [*see Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 635-636, 81 Cal. Rptr. 795]* . In addition, a local ordinance may require the payment of interest and may also specify a minimum return, establish the frequency of payments, or impose other related requirements [*see People v. Tannenbaum (1994) 23 Cal. App. 4th Supp. 6, 9-10, 29 Cal. Rptr. 2d 534]* . The form in [2], *below*, includes optional language providing for the inclusion of any interest requirements imposed by local ordinance.

For further discussion of interest on security deposits, see California Real Estate Law and Practice, Ch. 203, *Security Deposits* (Matthew Bender).

[h] Landlord's Handling of Deposit

[i] Deposit Held for Tenant's Benefit

Any security deposit made by a residential tenant must be held for the tenant by the landlord. The tenant's claim to the deposit is prior to the claim of any creditor of the landlord [*Civ. Code § 1950.5(d)*]. The fact that the lease calls the security deposit a "cleaning fee" or some other name does not excuse the landlord from holding it for the tenant who signed the lease [*see Bauman v. Islay Investments (1973) 30 Cal. App. 3d 752, 756-757, 106 Cal. Rptr. 889]* . However, there is no specific statutory requirement that security deposit funds be held by the landlord in a trust account [*Sternlieb v. State Bar (1990) 52 Cal. 3d 317, 330 n.6, 276 Cal. Rptr. 346, 801 P.2d 1097]* .

[ii] Permissible Deductions From Deposit

The landlord may claim (that is, deduct) only amounts from the security deposit that are reasonably necessary to accomplish the purposes specified in *Civ. Code § 1950.5(b)* [*see* [c], *above*]. The landlord may not assert a claim against the tenant or the security for [*Civ. Code § 1950.5(e)*]:

- Damages to the premises or any defective conditions that existed before the tenancy;
- Ordinary wear and tear or its effects (whether the wear and tear existed before the tenancy or occurred during the tenancy); or
- The cumulative effects of ordinary wear and tear occurring during any one or more tenancies.

For a provision obligating the tenant to replace deducted amounts during the term of the tenancy, see *§ 34B.232*.

[iii] Initial Inspection

Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord must notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection [*Civ. Code § 1950.5(f)(1)*]. The purpose of the initial inspection is to allow the tenant an opportunity to remedy identified deficiencies in order to avoid deductions from the security. If the tenant chooses not to request an initial inspection, the landlord's duties with regard to that inspection are discharged [*Civ. Code § 1950.5(f)(1)*]. The landlord must give at least 48 hours prior written notice of the date and time of the inspection if either a mutual time is agreed on or if a mutually agreed time cannot be scheduled but the tenant still wishes an inspection. The tenant and landlord may agree to forgo the 48-hour prior written notice by both signing a written waiver. The landlord may proceed with the inspection whether the tenant is present or not, unless the tenant previously withdrew his or her request for the inspection [*Civ. Code § 1950.5(f)(1)*]. For a form of notice, see *§ 34B.286*.

Based on the initial inspection, the landlord must give the tenant an itemized statement specifying repairs or cleaning that are proposed to be the basis of any deductions from the security. This statement must include the text of *Civ. Code § 1950.5(b)(1)-(4)* concerning the permissible uses of the security deposit [*Civ. Code § 1950.5(f)(2)*]. The tenant must be given the opportunity during the period following the initial inspection until termination of the tenancy to remedy the identified deficiencies in order to avoid deductions from the security [*Civ. Code § 1950.5(f)(3)*]. These provisions do not prohibit a landlord from using the security for any permissible purpose that occurs between completion of the initial inspection and termination of the tenancy or that was not identified during the initial inspection due to the presence of a tenant's possessions [*Civ. Code § 1950.5(f)(5)*].

The initial inspection requirements do not apply when the tenancy is terminated pursuant to *Code Civ. Proc. § 1161(2), (3)* or *(4)* (unlawful detainer) [*Civ. Code § 1950.5(f)(1)*; *see § 35B.44* for discussion of unlawful detainer proceedings].

[iv] Return of Deposit

No later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy under *Civ. Code §§ 1946* or *1946.1, Code Civ. Proc. § 1161*, or not earlier than 60 calendar days before the expiration of a fixed-term lease, the landlord must furnish the tenant with an itemized written statement indicating the basis for and amount of any security deposit received and of the disposition of the deposit. At the same time, the landlord must return any remaining portion of the security deposit to the tenant [*Civ. Code § 1950.5(g)(1)*]. Along with the itemized statement, the landlord must also include copies of documents showing charges incurred and deducted by the landlord to repair or clean the premises [*Civ. Code § 1950.5(g)(2)*]. If a repair to be done by the landlord cannot reasonably be completed within 21 calendar days after the tenant has vacated the premises, or if the documents from a person or entity providing services, materials, or supplies are not in the landlord's possession within that period, the landlord may deduct the amount of a good faith estimate of the charges that will be incurred and provide that estimate with the itemized statement. The landlord must provide the itemized statement and documents within 14 calendar days of completing the repair or receiving the documentation [*Civ. Code § 1950.5(g)(3)*]. The landlord is not required to provide documents showing itemized charges if the deductions for repairs and cleaning together do not exceed $125 or the tenant waived those rights [*see Civ. Code § 1950.5(g)(4)* (requirements for waiver)]. In any event, the landlord must provide the documentation if the tenant so requests within 14 calendar days after receiving the itemized statement. The landlord must provide the documentation within 14 calendar days of receiving the request [*Civ. Code § 1950.5(g)(5)*].

[v] Alternative Remedy of Damages

A landlord who has failed in good faith to take advantage of the summary nonjudicial deduct-and-retain procedure allowed under *Civ. Code § 1950.5(g)*, may nevertheless recover damages for unpaid rent, repairs, and cleaning (permitted under *Civ. Code § 1950.5(e)*) in a subsequent judicial proceeding. To recover these damages, the landlord must prove by a preponderance of the evidence that he or she has suffered the damages and that the amount claimed is reasonable, as provided in *Civ. Code § 1950.5*(*l*) [*Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 749-750, 38 Cal. Rptr. 2d 650, 889 P.2d 970]* .

[i] Transfer of Landlord's Interest

[i] Duties Before Transfer

Before voluntarily transferring his or her interest in the premises, a landlord must deliver to his or her successor in interest a written statement setting forth the following [*Civ. Code § 1950.5(i)*; *see Civ. Code § 1950.5(h)*]:

- The security remaining after any lawful deductions are made;
- An itemization of any lawful deductions from any security received; and
- The landlord's selection of one of the two statutory procedures for handling any portion of the security remaining after those lawful deductions [*see* [ii], *below*].

However, a violation of this requirement will not affect the validity of title to the real property transferred [*Civ. Code § 1950.5(i)*].

[ii] Transfer or Return of Deposit

If the landlord's interest in the leased premises terminates for any reason, the landlord will be relieved of further liability with regard to the security deposit if, within a reasonable time after the termination, the landlord or the landlord's agent follows either of the two procedures discussed below for the transfer or return of the security [*Civ. Code § 1950.5(h)*].

Under the first procedure, the landlord (or agent) must transfer the portion of the security deposit remaining after any

lawful deductions [*see Civ. Code § 1950.5(b), (e)*] to the landlord's successor in interest. Thereafter, the landlord or agent must notify the tenant by personal delivery or first-class mail (postage prepaid) of the transfer, of any claims made against the security, of the amount of the security deposited, and of the names, addresses, and telephone numbers of the successors in interest [*see Ch. 35A, Assignment and Sublease of Leasehold Interests, § 35A.223* for notice form]. If the notice is personally served, the tenant must acknowledge receipt of the notice and sign his or her name on the landlord's copy of the notice [*Civ. Code § 1950.5(h)(1)*]. When this procedure is followed, the successor in interest, on receiving the security, has all of the rights and obligations of a landlord holding the security with regard to the security [*Civ. Code § 1950.5(k)*].

Under the second procedure, the landlord or agent must return to the tenant the portion of the security remaining after any lawful deductions. The security must be accompanied by the required written accounting [*Civ. Code § 1950.5(h)(2)*; *see Civ. Code § 1950.5(b), (e)* (lawful deductions), (g) (written accounting); *see also* [h][iv], *above*].

[iii] Effect of Noncompliance

If, following the termination of the landlord's interest in the dwelling, the landlord (or landlord's agent) does not comply with the applicable transfer or refund requirements [*see Civ. Code § 1950.5(h)*; *see also* [ii], *above*], the landlord's successors in interest will be jointly and severally liable with the landlord for repayment of the security, or that portion of it to which the tenant is entitled, when and as provided in the laws governing the handling of security deposits following the termination of a tenancy [*Civ. Code § 1950.5(j)*; *see Civ. Code § 1950.5(e), (g)*; *see also* [h][iv], *above*].

[iv] Obligations of Landlord's Successor in Interest

A landlord's successor in interest may not require the tenant to post any security to replace the amount not transferred by the landlord to the tenant or successors in interest in the required manner [*see Civ. Code § 1950.5(h)*; *see also* [ii], *above*], unless and until the successor in interest does either of the following [*Civ. Code § 1950.5(j)*]:

- Returns the portion of the initial security to which the tenant is entitled as provided in *Civ. Code § 1950.5(h)(2)* [*see* [ii], *above*]; or

- Provides the tenant with a written accounting as provided in *Civ. Code § 1950.5(g)*; *see* [h][iv], *above*].

Notwithstanding the above, if on inquiry and reasonable investigation a landlord's successor in interest has a good faith belief that the lawfully remaining security has been properly transferred to him or her or returned to the tenant, the successor in interest will not be liable for the damages applicable to bad faith claims or retentions [*see Civ. Code § 1950.5*(*l*); *see also* [k], *below*], or for any security not transferred by the landlord in the required fashion [*Civ. Code § 1950.5(j)*].

Furthermore, a successor in interest may recover from the tenant compensatory damages that exceed the security received from the landlord for that tenant (that is, security previously paid by that tenant to the landlord and passed on, after lawful deductions, to the successor in interest) [*Civ. Code § 1950.5(j)*].

[j] Prohibition Against Nonrefundable Deposits

No residential lease or rental agreement may contain any provision characterizing any security as "nonrefundable" [*Civ. Code § 1950.5(m)*]. For example, in a case involving leases that provided for a nonrefundable $65 move-in fee and a nonrefundable $50 charge for changing apartments in the same complex, the court found as follows [*People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal. App. 3d 683, 690-691, 244 Cal. Rptr. 22]* :

- The fees were used to cover administrative and related costs and were not considered rent by the landlord or the tenants;

- The charges fell within the broad definition of "security" set forth in *Civ. Code § 1950.5(b)*; and

- Neither fee was used for any of the purposes permitted by *Civ. Code § 1950.5(b)* [*see* [c], *above*, for permitted purposes].

Accordingly, the court concluded that the charges had to be refunded to the tenants under *Civ. Code § 1950.5(e)* [*People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal. App. 3d 683, 690-691, 244 Cal. Rptr. 22* ; *see* [h][ii], *above*, for discussion of *Civ. Code § 1950.5(e)*].

[k] Damages for Bad Faith Claim or Retention of Deposit

The bad faith claim or retention by a landlord or the landlord's successors in interest of all or a portion of the security deposit, in violation of *Civ. Code § 1950.5*, or the bad faith demand of a replacement security deposit in violation of *Civ. Code § 1950.5(j)* [*see* [h][ii], [iv], [i][iv], *above*], may subject the landlord or the landlord's successors in interest to statutory damages of up to twice the amount of the security, in addition to actual damages. The court may award damages for bad faith whenever the facts warrant an award, regardless of whether the injured party has specifically requested relief [*Civ. Code § 1950.5*(*l*)]. In an action for bad faith damages, the landlord or the landlord's successors in interest will have the burden of proof as to the reasonableness of the amounts claimed or the authority to demand additional security deposits [*Civ. Code § 1950.5*(*l*)].

However, the landlord may still be entitled to set-offs. The California Supreme Court has held that even when a landlord has abjectly not complied at all with accounting procedures, the landlord was still entitled to full and complete set-offs should the tenant choose to sue the landlord. The Court specifically held that a landlord could be acting in good faith even when he or she had not at all provided the accounting [*Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 741-742, 749-750, 38 Cal. Rptr. 2d 650, 889 P.2d 970]* .

[l] Relevant Litigation Matters

[i] Jurisdiction

Any action under *Civ. Code § 1950.5* may be maintained in small claims court if the damages claimed, whether actual or statutory or both are within the jurisdictional amount allowed by Code Civ. Proc. § 116.220 or 116.221 [Civ. Code § 1950(n); *see* Code Civ. Proc. §§ 116.220(a)(1) (jurisdictional limit of small claims court is $5,000), 116.221 (in addition to jurisdiction conferred by Code Civ. Proc. § 116.220, small claims court has jurisdiction in action brought by natural person if amount of demand does not exceed $7,500)].

For an illustrative complaint for the return of money deposited as security under *Civ. Code § 1950.5*, see California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[ii] Proof of Existence and Amount of Security Deposit

Proof of the existence and amount of a security deposit may be established by any credible evidence. For these purposes, credible evidence includes a cancelled check, a receipt, a lease indicating the requirement and amount of a deposit, prior consistent statements or actions of the landlord or tenant, or a statement under penalty of perjury that satisfies the credibility requirements set forth in *Evid. Code § 780* [*Civ. Code § 1950.5(o)*].

[m] Waiver of Tenant's Rights

Any provision in a lease or rental agreement for a dwelling by which the tenant agrees to modify or waive his or her rights or remedies under *Civ. Code § 1950.5* is void as contrary to public policy [*Civ. Code § 1953(a)(1)*].

[2] FORM

Security Deposit

Security Deposit

_____. Tenant shall, on execution of this lease, deposit with Landlord the sum of $_____[*specify amount, not to exceed a total of two months' rent for unfurnished premises, or three months' rent for furnished premises*], receipt of which is hereby acknowledged by Landlord, to be held by Landlord as a security deposit for the faithful performance of this lease by Tenant. [Landlord shall not be required to pay Tenant interest on the deposit *or state any local requirements relating to interest earned on deposit, e.g.,* Landlord shall place the deposit in an interest-bearing account, separate and apart from Landlord's general funds.]_____ Before the end of the lease term, Landlord shall notify Tenant of Tenant's right to request an initial inspection of the premises. On Tenant's request, and no earlier than two weeks before the end of the lease date, Landlord shall make an initial inspection of the premises and provide Tenant with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security. Tenant shall have the opportunity to remedy the identified deficiencies before the end of the lease date in order to avoid the deductions from the security. The full amount of the deposit shall be returned to Tenant within 21 calendar days after Tenant has vacated the leased premises less only amounts that are reasonably necessary to (1) remedy any defaults in the payment of rent by Tenant; (2) repair damages to the leased premises (exclusive of ordinary wear and tear) caused by Tenant or by any guest or licensee of Tenant; [*or*] (3) clean the leased premises [*add if rental agreement obligates tenant to restore, replace, or return personal property or appurtenances:*; or (4) remedy any defaults in the restoration, replacement, or return of personal property or appurtenances by Tenant not attributable to ordinary wear and tear]. At the time specified in this paragraph for returning the deposit to Tenant, Landlord shall [*if applicable, provide for return of interest, e.g.,* pay to Tenant all interest earned on the deposit and shall] furnish Tenant with an itemized written statement indicating the basis for and the amount of the security deposit received, copies of documents showing charges incurred and deducted for the repair or cleaning of the premises, and the disposition made or to be made of the security deposit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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CHAPTER 34B RESIDENTIAL LEASES
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3. Security Deposit and Other Charges

17-34B California Legal Forms--Transaction Guide § 34B.231

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.231 Last Month's Rent and Security Deposit

[1] Comment

[a] Use of Form

This form is a lease provision that requires the tenant to pay the last month's rent and a security deposit on execution of the lease. It includes optional language that may be used when the landlord, in accordance with a local ordinance or the agreement of the parties, will pay the tenant interest on these amounts.

For a security deposit clause that does not require the payment of last month's rent, see *§ 34B.230*. For an alternative clause that requires the tenant to replace the security deposit if it is used by the landlord during the tenancy, see *§ 34B.232*.

[b] Applicability of Statutory Restrictions

This form incorporates the restrictions on security deposits imposed by *Civ. Code § 1950.5*. Because *Civ. Code § 1950.5* defines "security" to mean any payment, fee, deposit, or charge, including an advance payment of rent, used or to be used for any purpose [*Civ. Code § 1950.5(b)*], the last month's rent is subject to the requirements of that statute. Under *Civ. Code § 1950.5*, the landlord may not demand or receive any security deposit that exceeds an amount equal to two months' rent in the case of unfurnished property, or three months' rent in the case of furnished property [*Civ. Code § 1950.5(c)*]. Thus, the total of the last month's rent and any other security deposit demanded by the landlord must not exceed this statutory maximum. *Civ. Code § 1950.5* also regulates the handling of the deposit. For complete coverage of that statute, see *§ 34B.230*.

PRACTICE TIP:
Effect of Classification of Payment to Landlord and Tenant. It is preferable from the landlord's

perspective to label all amounts subject to *Civ. Code § 1950.5* as a security deposit because that will permit the funds to be used for any of the purposes specified in *Civ. Code § 1950.5(b)* [*see § 34B.230[1][c], [g]*]. Designating a portion of those funds as "last month's rent" would mean that the designated funds could be used by the landlord only for that purpose. However, a prospective tenant may object to a security deposit in an amount equal to two (or three) months' rent when no portion of it will be used as last month's rent. In that case, the landlord may agree to use this form. *By Publisher's Editorial Staff.*

PRACTICE TIP:

Be Careful of Using Term "Last Month's Rent." As a landlord, never specify an amount as being the "last month's" rent. If you do, it is a "contractual" obligation, and if the rent being paid by the tenant has otherwise increased--perhaps twice or several times from the original amount--the last month's rent will remain that which was originally contracted for. Thus, if there is any specification pertaining to the last month, it should be that a specified amount must be "applied to and on account of the last month's rent" [*see* form in [2], *below*]. It is wise only to specify a specific amount or the entire entire security deposit may have to be so applied leaving the landlord with little or no protection from damage to the premises after the tenant has moved. *By Benjamin Kaplan.*

[2] FORM

Last Month's Rent and Security Deposit

Security Deposit and Last Month's Rent

_____. Tenant shall, on execution of this lease, deposit with Landlord the following amounts: (1) the sum of $_____[*specify amount that, when combined with last month's rent, will not exceed statutory limitations on amount of security deposit, that is, a total of two months' rent for unfurnished premises, or three months' rent for furnished premises*], receipt of which is hereby acknowledged by Landlord, to be held by Landlord as a security deposit for the faithful performance of this lease by Tenant; and (2) the sum of $_____, which shall be applied to and on account of last month's rent. [Landlord shall not be required to pay Tenant interest on these amounts *or state any local requirements relating to interest earned on these amounts, e.g.,* Landlord shall place these amounts in an interest-bearing account, separate and apart from Landlord's general funds.] Before the end of the lease term, Landlord shall notify Tenant of Tenant's right to request an initial inspection of the premises. On Tenant's request, and no earlier than two weeks before the end of the lease date, Landlord shall make an initial inspection of the premises and provide Tenant with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security. Tenant will have the opportunity to remedy the identified deficiencies before the end of the lease date in order to avoid the deductions from the security. The full amount of the security deposit shall be returned to Tenant within 21 calendar days after Tenant has vacated the leased premises less only amounts that are reasonably necessary (1) to remedy any defaults in the payment of rent by Tenant; (2) to repair damages to the leased premises (exclusive of ordinary wear and tear) caused by Tenant or by any guest or licensee of Tenant; [*or*] (3) to clean the leased premises [*add if rental agreement obligates tenant to restore, replace, or return personal property or appurtenances:*; or (4) to remedy any defaults in the restoration, replacement, or return of personal property or appurtenances by Tenant not attributable to ordinary wear and tear]. At the time specified in this paragraph for returning the deposit to Tenant, Landlord shall [*if applicable, provide for return of interest, e.g.,* pay to Tenant all interest earned on the security deposit and on the last month's rent and shall] furnish Tenant with an itemized written statement indicating the basis for, and the amount of, the security deposit received, and the disposition made or to be made of the security deposit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord &

TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.232

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.232 Security Deposit: Tenant Obligated to Replace Amounts Deducted During Tenancy

[1] Comment--Use of Form

This form is a security deposit provision that reflects the requirements of *Civ. Code § 1950.5* and includes a provision under which the tenant is obligated to replace or replenish any amount of the security deposit that is used by the landlord during the term of the tenancy. As discussed in more detail in *§ 34B.230[1], Civ. Code § 1950.5* regulates the amount and handling of security deposits. In addition to incorporating the requirements of *Civ. Code § 1950.5*, this clause requires the tenant to reinstate or replace any amounts deducted by the landlord during the tenancy (1) to remedy a default by the tenant in the payment of rent or (2) to repair damages caused by the tenant or the tenant's guest or licensee.

Counsel should be aware, however, that *Civ. Code § 1950.5* is silent regarding any obligation on the part of the tenant to replace amounts deducted during the tenancy, and reported decisions have yet to comment on the validity of a requirement of this nature. Nevertheless, this type of provision is commonly included in residential leases [*see, e.g., § 34B.202[2]*, P 4B].

[2] FORM

Security Deposit: Tenant Obligated to Replace Amounts Deducted During Tenancy

Security Deposit

_____. The following provisions govern the security deposit that Tenant is to furnish under this lease:

(a) Tenant shall, on execution of this lease, deposit with Landlord the sum of $_____ [*specify*

amount, not to exceed a total of two months' rent for unfurnished premises, or three months' rent for furnished premises], receipt of which is hereby acknowledged by Landlord, to be held by Landlord as a security deposit for the faithful performance of this lease by Tenant. _____ [Landlord shall not be required to pay Tenant interest on the deposit *or state any local requirements relating to interest earned on deposit, e.g.,* Landlord shall place the deposit in an interest-bearing account, separate and apart from Landlord's general funds.]

(b) Landlord may deduct from the deposit only amounts that are reasonably necessary (1) to remedy any defaults in the payment of rent by Tenant; (2) to repair damages to the leased premises (exclusive of ordinary wear and tear) caused by Tenant or by any guest or licensee of Tenant; [*or*] (3) to clean the leased premises on termination of the tenancy governed by this lease [*add if rental agreement obligates tenant to restore, replace, or return personal property or appurtenances:*; or (4) to remedy any defaults in the restoration, replacement, or return of personal property or appurtenances by Tenant not attributable to ordinary wear and tear].

(c) If Landlord, under subparagraph (b), above, deducts all or any portion of the deposit to remedy a default by Tenant in the payment of rent or to repair the leased premises, Landlord may provide Tenant with a written notice notifying Tenant of the deduction and of the reason or reasons for it and demanding that Tenant replace the deducted amounts within _____ [*specify, e.g.,* 10 days] of the receipt of the notice. If Tenant fails to comply with the notice within that _____ [*specify same time period, e.g.,* 10-day] period, Landlord shall have the option of terminating this lease in the manner described in paragraph _____ of this lease.

(d) Before the end of the lease term, Landlord shall notify Tenant of Tenant's right to request an initial inspection of the premises. On Tenant's request, and no earlier than two weeks before the end of the lease date, Landlord shall make an initial inspection of the premises and provide Tenant with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security. Tenant shall have the opportunity to remedy the identified deficiencies before the end of the lease date in order to avoid the deductions from the security.

(e) The full amount of the deposit shall be returned to Tenant within 21 calendar days after Tenant has vacated the leased premises, less only amounts that are deducted under subparagraph (b), above. At the time specified in this subparagraph (e) for returning the deposit to Tenant, Landlord shall [*if applicable, provide for return of interest, e.g.,* pay to Tenant all interest earned on the deposit and shall] furnish Tenant with an itemized written statement indicating the basis for and the amount of the security deposit received, copies of documents showing charges incurred and deducted for the repair or cleaning of the premises, and the disposition made or to be made of the security deposit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34B California Legal Forms--Transaction Guide § 34B.233

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.233 Late Charge

[1] Comment

[a] Use of Form

This form is a lease clause that provides that the tenant will be charged a fee for the late payment of rent. A late charge clause in a home loan contract is considered to be a liquidated damages provision [*Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 740, 108 Cal. Rptr. 845, 511 P.2d 1197]* . Consequently, it must satisfy the statutory requirements governing liquidated damages [*see Civ. Code § 1671*]. Although there is no statutory or case law specifying that a late charge in a residential lease is a form of liquidated damages, presumably a similar conclusion would be reached [*see Civ. Code § 1671*].

There is also no statute or case law specifying the precise amount that would be considered reasonable for a late charge on rent under a lease. Under *Civ. Code § 1671(d)*, a late charge provision in a lease would be void unless it could be established that it would be impracticable or extremely difficult to fix the actual damage from the tenant's breach of failing to make a timely rental payment. The form in [2], *below*, includes a recital that the parties agree that it would be impracticable or extremely difficult to fix the actual damage in that event.

PRACTICE TIP:
Advise Landlord Not to Be Greedy About Late Charges. The landlord might want to include a high late charge to "encourage" tenants to pay rent on time. But, a late charge that is not a reasonable estimate of the actual cost caused by the late payment is an invalid penalty. If the landlord includes such charges in a three-day notice to pay or quit, he or she is inviting a defense to a subsequent unlawful detainer action. *By Myron Moskovitz.*

[b] Unlawful Detainer

A tenant is guilty of unlawful detainer when the tenant continues in possession after (1) defaulting in the payment of rent and (2) being served and failing to comply with a three-day written notice that requires payment of the rent or surrender of possession [*Code Civ. Proc. § 1161(2)*]. This form refers to that notice. For additional coverage of three-day notices, see Ch. 35B, *Modification and Termination of Leases* .

PRACTICE TIP:

Grace Period Does Not Extend Due Date. Tenants often believe that, if there is a so-called grace period to pay rent before a late payment penalty is due, that the rent is not due until the last day of that grace period. Such is not the case. Rent is due on the first day of each single month if the lease so provides regardless of any grace period. Although this may initially appear to be a somewhat minor consideration, in those rent or eviction control jurisdictions where "habitual late payment of rent" is a ground for eviction then it is a material consideration. *By Benjamin Kaplan.*

[2] FORM

Late Charge

Late Charge

_____. If Landlord has not received any rent payment within [*specify period, e.g.,* five days] after it is due under Paragraph _____ of this lease, Tenant shall pay a late charge of $_____ for every day that the rent is not paid following its due date. Landlord and Tenant agree that it is and will be impracticable and extremely difficult to fix the actual damages suffered by Landlord in the event Tenant makes a late payment of rent, and that the above charge represents a reasonable approximation of the damages Landlord is likely to suffer from a late payment. Landlord and Tenant further agree that this provision does not establish a grace period of the payment of rent, and that Landlord may give Tenant a three-day written notice to pay or quit the premises in accordance with *Code of Civil Procedure Section 1161(2)* at any time after the payment is due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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17-34B California Legal Forms--Transaction Guide § 34B.234

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.234 Right to Demand Special Form of Payment

[1] Comment

[a] Use of Form

This form is a lease provision that gives the landlord the right to require the payment of rent by a cashier's check or money order if a rent check has been returned by the tenant's bank for insufficient funds. It also provides that the landlord will give the tenant at least 30 days' notice of the landlord's election to exercise this right. The provision may be set forth as a separate provision, or may be added to the primary rent clause [*see §§ 34B.200[2]*, P 2, 34B.201[2], P 2]. For other provisions anticipating defaults in the payment of rent, see *§§ 34B.250* (liquidated damages clause) and 34B.233 (late charge provision). For a provision that charges the tenant a fee for tendering a check with insufficient funds, see *§ 34B.202[2]*, P 6.

[b] Payment in Cash

A landlord or a landlord's agent may not demand or require cash as the exclusive form of payment of rent [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has previously attempted to pay the rent with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment for a period not exceeding three months. The landlord must give the tenant a written notice stating that the payment instrument was dishonored and informing the tenant that the tenant must pay in cash for the period determined by the landlord. The landlord must attach a copy of the dishonored instrument to the notice [*Civ. Code § 1947.3(a)(2)*]. For purposes of these requirements, the issuance of a money order or a cashier's check is direct evidence only that the instrument was issued [*Civ. Code § 1947.3(b)*]. Waiver of these provisions is contrary to public policy, and void and unenforceable [*Civ. Code § 1947.3(c)*].

[2] FORM

Right to Demand Special Form of Payment

Payments Following Default

_____. If Tenant pays the rent required under this lease with a check that is returned by the bank for insufficient funds, Landlord may elect to require Tenant to pay rent for the next three months in cash and/or all subsequent rent with a cashier's check or a money order. Landlord shall notify Tenant of this election at least 30 days before the date Tenant is to make the first payment by cash, cashier's check, or money order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide §§ 34B.235-34B.239

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.235[Reserved]



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17-34B California Legal Forms--Transaction Guide § 34B.240

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.240 Waterbed

[1] Comment

[a] Use of Form

This form consists of long and short form versions of a lease provision that sets forth various statutory requirements governing a tenant's use of a waterbed [*see Civ. Code § 1940.5*]. Although these requirements apply whether or not they are incorporated into a lease or otherwise disclosed to a tenant, a landlord may wish to use this provision to notify the tenant of the existence of the restrictions.

The long version sets forth all the statutory requirements and requires an increased security deposit [*see* [b][vi], *below*]. It may be advisable to use this provision when the landlord is concerned about the ability of the structure to accommodate the added weight of a waterbed or the effect of leakage on the floor and floor covering. The short version merely requires compliance with the statute and describes the statutory insurance requirements in detail because of their importance. It does not require an additional security deposit.

[b] Statutory Requirements

[i] Landlord's Rights and Restrictions

An owner or agent may not refuse to rent a dwelling unit in a structure that received its certificate of occupancy after January 1, 1973, to an otherwise qualified prospective tenant, or refuse to continue renting to an existing tenant, solely because the tenant has a waterbed or other bedding with liquid filling material, as long as the tenant complies with the statutory requirements in *Civ. Code § 1940.5* [*Civ. Code § 1940.5*].

An owner's or agent's failure to exercise any of the statutory rights under *Civ. Code § 1940.5* will not constitute grounds

for denial of an insurance claim [*Civ. Code § 1940.5(h)*].

[ii] Insurance

The tenant or prospective tenant who wants to use a waterbed must obtain a waterbed insurance policy or certificate of insurance for property damage that provides at least $100,000 coverage. The policy must be (1) issued by an insurer that is licensed in California and that possesses a Bests Insurance Report rating of "B" or higher, and (2) maintained in full force until the bedding is permanently removed from the premises. It must cover, up to the policy limits, the replacement value of all property damage, including loss of use, incurred by the rental property owner or any other person, caused by or arising out of the ownership, maintenance, use, or removal of the waterbed on the rental premises, except for (1) any damage caused intentionally or at the direction of the insured, and (2) any damage caused by or resulting from fire [*Civ. Code § 1940.5(a)*].

The owner may require the tenant to produce evidence of insurance at any time. Every policy application must contain the information regarding the landlord (or landlord's agent) and manager required by *Civ. Code §§ 1962(a)-(c)* and *1962.5* [*see § 34B.24[1]*]. The carrier must give the owner 10 days' notice of cancellation or nonrenewal [*Civ. Code § 1940.5(a)*].

[iii] Floor Load Capacity

The filled bed must conform to the pounds-per-square-foot weight limitation and placement dictated by the floor load capacity of the residential structure. The weight must be distributed on a pedestal or frame that is substantially of the same dimensions as the mattress itself [*Civ. Code § 1940.5(b)*]. Similarly, any new waterbed installation must conform to the owner's or agent's reasonable structural specifications for placement within the residential property and must be consistent with the floor capacity of the rental unit [*Civ. Code § 1940.5(d)*].

[iv] Installation, Maintenance, and Removal

The tenant must install, maintain, and remove the bed according to all standard methods of installation, maintenance, and removal prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety [*Civ. Code § 1940.5(c)*]. In addition, the tenant must comply with the minimum component specification list prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety [*Civ. Code § 1940.5(e)*].

The tenant must deliver to the owner or agent 24 hours' advance written notice of intent to install, remove, or move the waterbed. Further, if the installation or move is performed by any person other than the tenant, the tenant must deliver to the owner or agent a written installation receipt stating the installer's name, address, and business affiliation when appropriate. The owner or agent has the right to be present at the time of installation, removal, or movement [*Civ. Code § 1940.5(c)*].

[v] Inspection and Violations

Subject to the notice of entry requirements of *Civ. Code § 1954* [*see § 34B.25*], the owner or agent has the right to inspect the waterbed installation on completion, and periodically thereafter, to ensure that it conforms to these requirements. If the installation or maintenance violates the requirements, the owner may serve the tenant with a written notice of breach of the rental agreement and give the tenant three days either to bring the installation into conformity with those standards or to remove the bed. However, if there is an immediate danger to the structure, the landlord may insist on immediate corrective action [*Civ. Code § 1940.5(f)*].

[vi] Security Deposit and Fees

Notwithstanding the standard limitations on security deposits set forth in *Civ. Code § 1950.5* [*see § 34B.230[1][d]*], an

owner or agent may increase the security deposit on a dwelling unit that contains or will contain a waterbed by an amount equal to one half of one month's rent. The owner or agent may also charge a tenant or subtenant a reasonable fee to cover related administrative costs [*Civ. Code § 1940.5(g)*].

[2] FORM

Waterbed

Waterbed

[*Short form:*]

_____. Tenant agrees to comply with all requirements and conditions of *Civil Code Section 1940.5* in connection with the use of a waterbed or other bed containing a liquid filling material on the leased premises. In addition to imposing installation, maintenance, inspection, and use requirements, *Civil Code Section 1940.5* permits Landlord to require, and Landlord hereby does require, that Tenant obtain, before installation of a waterbed or other bed with liquid filling material, a valid waterbed insurance policy or certificate of insurance for property damage. This policy shall be issued by a company licensed to do business in California and possessing a Bests Insurance Report rating of "B" or higher. The policy shall be written for no less than $100,000 of coverage, shall be maintained in full force and effect until the waterbed is permanently removed from the leased premises, and shall cover (up to the limits of the policy) the replacement value of all property damage, including loss of use, incurred by Landlord or any other person or entity and caused by or arising out of the ownership, maintenance, use, or removal of the waterbed, except for any damage caused intentionally or at the direction of Tenant or caused by or resulting from fire. Landlord may require Tenant to produce evidence of insurance at any time. The carrier must give Landlord 10 days' prior written notice of cancellation or nonrenewal of insurance, and Tenant must provide the carrier with the name and usual street address of Landlord [*or* the person authorized to act for and on behalf of Landlord for the purpose of service of process and for the purpose of receiving and receipting all notices and demands] [*add, if applicable:* and of the manager of the leased premises].

[*OR*]

[*Long form:*]

_____. Tenant agrees to comply with the following requirements in connection with the use of a waterbed or other bed with liquid filling material (hereafter referred to as a "waterbed") on the leased premises:

(a) Tenant shall furnish to Landlord, before installation of any waterbed, a valid waterbed insurance policy or certificate of insurance for property damage. This policy shall be issued by a company licensed to do business in California and possessing a Bests Insurance Report rating of "B" or higher. The policy shall be written for no less than $100,000 of coverage, shall be maintained in full force and effect until the waterbed is permanently removed from the leased premises, and shall cover (up to the limits of the policy) the replacement value of all property damage, including loss of use, incurred by Landlord or any other person or entity and caused by or arising out of the ownership, maintenance, use, or removal of the waterbed, except for any damage caused intentionally or at the direction of Tenant or caused by or resulting from fire. Landlord may require Tenant to produce evidence of insurance at any time. The carrier must give Landlord 10 days' prior notice of cancellation or nonrenewal, and Tenant must provide the carrier with the name and usual street address of Landlord [*or* the person authorized to act for and on behalf of Landlord for the purpose of service of process and for the purpose of receiving and receipting all notices and demands] [*add, if applicable:* and of the manager of the leased premises].

(b) The waterbed shall conform to the pounds-per-square-foot weight limitation and placement dictated by the floor load capacity of the leased premises, and its weight shall be distributed on a pedestal or frame that is substantially the dimensions of the mattress itself. Any new waterbed installation shall conform to reasonable structural specifications for placement within the leased premises specified by Landlord or Landlord's agent and shall be consistent with the floor capacity of the leased premises.

(c) Tenant shall install, maintain, and remove the waterbed according to all standard methods of installation, maintenance, and removal prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety. In addition, Tenant shall comply with the minimum component specification list prescribed by the manufacturer, retailer, or state law, whichever provides the highest degree of safety.

(d) Tenant shall give Landlord or Landlord's agent 24 hours' advance written notice of Tenant's intent to install, remove, or move a waterbed. If the installation or move is performed by any person other than Tenant, Tenant shall deliver to Landlord or Landlord's agent a written installation receipt stating the installer's name, address, and business affiliation when appropriate. Landlord or Landlord's agent has the option and right to be present at the time of installation, removal, or movement.

(e) Landlord or Landlord's agent shall have the right to inspect the waterbed installation on completion, and periodically thereafter, to ensure its conformity with applicable requirements. If the installation or maintenance violates these requirements, Landlord may serve Tenant with a written notice of breach of the rental agreement, and may give Tenant three days either to bring the installation into conformity with those standards or to remove the waterbed. If there is an immediate danger to the leased premises, Landlord may require immediate corrective action.

(f) If Tenant installs a waterbed or has a waterbed installed on the leased premises, Tenant agrees to pay a security deposit of $_____ [*specify sum that does not exceed one half of one month's rent*] in addition to any other deposit required under any other provision of this lease. In addition, Tenant agrees to pay a nonrefundable charge of $_____ [*specify reasonable amount*] to cover Landlord's related administrative costs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.241

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.241 Restrictions on Tenant's Parking Rights

[1] Comment--Use of Form

This form is a lease provision that may be used to restrict the use by the tenant of one or more parking spaces appurtenant to leased premises. The provision limits the size of vehicles that may be parked in a specific space or designated area and prohibits the tenant from washing or disassembling any motor vehicles on the premises without the landlord's consent. If the lease covers an apartment in a multiunit building, the landlord may wish to insert parking restrictions in the rules and regulations for the complex, and incorporate them by reference into the lease, in lieu of using this type of lease clause [*see § 34B.200[2],* Rules and Regulations, P 13].

PRACTICE TIP:

Consider Automobile Insurance Requirement. If the tenant's vehicle is being garaged with other tenants' vehicles, a requirement of liability insurance might reasonably be required. *By Benjamin Kaplan.*

If the parking space or area adjoins the leased premises (as is usually the case in a multitenant apartment building), and if the area is and has been used for the reasonable enjoyment of the premises, it probably passes to the tenant as an easement appurtenant to the leased premises [*see Owsley v. Hamner (1951) 36 Cal. 2d 710, 717, 227 P.2d 263* ; *see also § 34B.16[2]*]. To avoid confusion, the lease should describe any parking spaces and similar items or spaces to be included in the leased premises [*see, e.g.,* preamble of the *form in § 34B.201[2]*].

[2] FORM

Restrictions on Tenant's Parking Rights

Parking Privileges

_____. Tenant agrees to use the [parking space described in the preamble to this lease *or* areas designated as parking spaces, *or* areas reserved for vehicular parking on the leased premises] only for the parking of motor vehicles, including automobiles, motorcycles, and pickup trucks, but excluding, without the prior written consent of Landlord, trailers of any kind, mobilehomes, campers, buses, or trucks larger than three quarters of a ton, and excluding any motor vehicles not owned and registered or rented by tenant in the tenant's name. Further, Tenant agrees not to wash or disassemble any motor vehicles of any kind in, on, or near the leased premises without the prior written consent of Landlord.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.242

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.242 Insurance Hazards

[1] Comment--Use of Form

This form is a lease provision prohibiting the tenant from committing or permitting the commission of acts that will increase insurance rates or cause the cancellation of insurance policies covering the leased premises. It is designed for use when, as is usually the case with a residential lease, the landlord will be procuring and maintaining all casualty and liability insurance coverage on the property.

For an alternative provision placing similar restrictions on acts affecting insurance and imposing additional limitations on the use of a single-family residence, see *§ 34B.201[2]*, P 6. For detailed provisions for insurance coverage of leased premises for nonresidential leases, see Ch. 34C, *Retail, Industrial, and Office Leases* .

[2] FORM

Insurance Hazards

Insurance Hazards Prohibited

_____. Tenant shall not commit or permit the commission of any act or acts in or on the leased premises, or use or permit the leased premises to be used in any manner, that will increase the existing fire, liability, and other insurance rates on the leased premises or that will cause a cancellation of any insurance policy covering the leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceRental InsuranceReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide §§ 34B.243-34B.249

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.243[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.250

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.250 Liquidated Damages

[1] Comment

[a] Use of Form

This form is a lease clause that provides for liquidated damages if the landlord terminates the lease for cause or if the tenant breaches the lease and abandons the leased premises. It may be used when it would be impractical or extremely difficult to fix the actual damages resulting from a termination or abandonment [*see Civ. Code §§ 1671(d), 1951.5*].

For a late charge clause, which may also be considered to be a liquidated damages provision, see *§ 34B.233*.

[b] Statutory Requirements

Statutory requirements govern a liquidated damages clause in a lease of real property to be used as a dwelling by a party or those dependent on the party for support [*see Civ. Code §§ 1671(c)(2), (d), 1951.5*]. A liquidated damages provision is void unless the parties to the lease agree in the lease on an amount that will be presumed to be the amount of damage sustained by a breach of the lease, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages [*Civ. Code §§ 1671(d), 1951.5*].

These rules apply to all leases executed on or after July 1, 1978 [*see Civ. Code § 1671* (amended effective July 1, 1978; Stats. 1977, ch. 198, § 5); former *Civ. Code § 1670* (repealed effective July 1, 1978; Stats. 1977, ch. 198, § 2)]. For leases executed before July 1, 1978, liquidated damages provisions are generally invalid [*see* 9 Cal. Law Rev. Comm. 170, 419 (1969)]. For further discussion of those pre-1978 rules, see California Real Estate Law and Practice, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

[c] Reasonable Relationship to Actual Damages

In addition to the statutory requirements that a valid liquidated damages provision must be based on (1) an agreement by the parties fixing an amount to be considered as liquidated damages for a breach of the contract, and (2) the fact that it would be impracticable or extremely difficult to fix the amount of actual damages [*see* [b], *above*], the amount of liquidated damages should represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.

[2] FORM

Liquidated Damages

Liquidated Damages

_____. It is and will be impracticable and extremely difficult to fix the actual damages suffered by Landlord in the event Landlord terminates this lease for cause or Tenant breaches this lease and abandons the leased premises. Therefore, Landlord and Tenant fix the sum of $_____ as the amount of liquidated damages that Tenant agrees to pay to Landlord in the event of a termination or breach and abandonment. This sum represents a reasonable approximation of the damages Landlord is likely to suffer from a termination or breach and abandonment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.251

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.251 Landlord's Damages on Termination of Lease

[1] Comment

[a] Use of Form

This form sets forth a provision for a landlord's recovery if the lease is terminated due to the tenant's breach. That recovery is prescribed by *Civ. Code § 1951.2* which states that certain damages are recoverable only if the lease provides for them. A lease that provides for statutory damages in the event the lease is terminated [*see* form in [2], *below*] may also contain a provision that permits the landlord to continue a lease in effect after the tenant abandons the property and breaches the lease [*see § 34B.252*].

For full coverage of abandonment and termination, see Ch. 35B, *Modification and Termination of Leases* .

[b] Statutory Damages

Except when a lease provides that a landlord may continue the lease in effect after a breach and abandonment by the tenant [*see Civ. Code § 1951.4*; *see also § 34B.252*], if a tenant breaches the lease and abandons the property before the end of the lease term, or if the tenant's right to possession is terminated by the landlord because of a breach of the lease, the lease terminates [*Civ. Code § 1951.2*]. On termination, the landlord may recover from the tenant four basic types of damages [*see Civ. Code § 1951.2(a)*].

First, the landlord may recover the worth at the time of the award of the unpaid rent that had been earned at the time of the termination [*Civ. Code § 1951.2(a)(1)*]. This language means unpaid rent earned up to the time of termination of a lease pursuant to abandonment or an unlawful detainer action; the statutory language "at the time of award" refers to the time of an award for damages under the statute and not to the time of an unlawful detainer award [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* . The "worth at the time of

award" is computed by allowing interest at the rate specified in the lease or, if no rate is specified, at the legal rate [*Civ. Code § 1951.2(a)(1), (b)*].

Second, the landlord may recover the worth at the time of the award of the amount by which the unpaid rent that would have accrued between the time of termination and the time of the award exceeds the amount of rental loss that the tenant proves the landlord could have reasonably avoided [*Civ. Code § 1951.2(a)(2)*; *see* [d], *below*, for discussion of landlord's duty to mitigate]. This standard for damages covers unpaid rent accruing between the lease's termination and the time of a judgment for damages under *Civ. Code § 1951.2* [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* . The "worth at the time of award" is computed by allowing interest at the rate specified in the lease or, if no rate is specified, at the legal rate [*Civ. Code § 1951.2(a)(1), (b)*].

Third, the landlord may recover the worth at the time of the award of the amount by which the unpaid rent for the balance of the term after the time of the award exceeds the amount of rental loss that the tenant proves could be reasonably avoided [*Civ. Code § 1951.2(a)(3), (c)*; *see* [d], *below*, for discussion of landlord's duty to mitigate]. "Worth at the time of the award" of future damages is computed by discounting the amount of the award at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus 1 percent [*Civ. Code § 1951.2(b)*].

Finally, the landlord may recover any other amounts necessary to compensate him or her for all the damages proximately caused by the tenant's failure to perform his or her lease obligations or that, in the ordinary course of things, would be likely to result from the tenant's failure to perform [*Civ. Code § 1951.2(a)(4)*].

[c] Effect of Unlawful Detainer Action or Tenant Remaining in Possession

The landlord's right to recover damages for loss of the benefits of the lease under *Civ. Code § 1951.2* is independent of his or her right to bring an action for unlawful detainer to recover the possession of the property. The damages are recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action [*Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1672-1673, 1678, 11 Cal. Rptr. 2d 278* ; *Danner v. Jarrett (1983) 144 Cal. App. 3d 164, 166-167, 192 Cal. Rptr. 535]* .

Likewise, if the landlord allows the tenant to remain in possession after the lease's forfeiture, the landlord may still recover damages for loss of the benefits of the lease. The language of *Civ. Code § 1951.2* does not require a termination of actual possession for the landlord to recover damages. All that is required is the tenant's breach and a termination of the tenant's right of possession [*Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1678, 11 Cal. Rptr. 2d 278]* .

[d] Landlord's Duty to Mitigate

[i] Nature of Duty

A landlord has the duty to mitigate damages for unpaid rent accruing after the time a lease is terminated, that is, rent accruing from the time of termination until the time of a damages award [*see Civ. Code § 1951.2(a)(2)*] or from the time of termination through the lease term's balance [*see Civ. Code § 1951.2(a)(3), (c)*]. The tenant is entitled to offset against the damages otherwise recoverable by the landlord, amounts the landlord has received or will receive from a reletting and amounts the tenant proves could have been obtained by the landlord in a good faith and reasonable effort to relet the leased premises [*Green v. Smith (1968) 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796]* . Although a landlord has a duty to mitigate damages, the tenant has the burden of proving any claimed offset [*see Civ. Code § 1951.2(a)(2), (3)*]. Efforts by the landlord to mitigate the damages caused by the tenant's breach of the lease do not waive the landlord's right to recover damages provided for by statute [*Civ. Code § 1951.2(d)*; *see* [b], *above*].

[ii] Notice of Reletting the Premises

Under limited circumstances, a landlord is required to give a tenant notice that the landlord has relet the premises. The

notice is required by statute only if all the following occur [*see Civ. Code § 1951.7(b)*; *see also Ch. 35B, Modification and Termination of Leases, §§ 35B.243, 35B.244*]:

- The tenant has made an "advance payment," that is, a prepayment of rent or a deposit to secure faithful performance of the lease's terms, or another substantially equivalent payment, but excluding any payment that does not exceed the amount of one month's rent [*see Civ. Code § 1951.7(a)*];

- The lease is terminated in accordance with *Civ. Code § 1951.2* (termination on tenant's breach);

- The tenant has made a written request to the landlord that the tenant be given notice of reletting; and

- The amount of rent due and unpaid at the time of termination does not exceed the amount of the advance payment [*see Civ. Code § 1951.7(c)*].

The contents of the notice and its required method of delivery are prescribed by statute [*see Civ. Code § 1951.7(c)*].

[iii] Sale of Property

Following abandonment, the landlord's sale of the property does not constitute breach of the duty to mitigate, provided the trier of fact finds the sale to be a reasonable means to avoid further loss of rental revenue [*Millikan v. American Spectrum Real Estate Services California Inc. (2004) 117 Cal. App. 4th 1094, 1100, 12 Cal. Rptr. 3d 459]* . The landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable, together with consequential damages including the landlord's selling expenses [*Millikan v. American Spectrum Real Estate Services California Inc. (2004) 117 Cal. App. 4th 1094, 1104, 12 Cal. Rptr. 3d 459]* .

[e] Other Remedies

Civ. Code § 1951.2 does not affect the right of the landlord to equitable relief, when appropriate [*Civ. Code § 1951.8*], or to valid liquidated damages [*see Civ. Code §§ 1671, 1951.5*; *see also § 34B.250*]. Subject to certain limitations for double recovery, *Civ. Code § 1951.2* also does not affect actions for unlawful detainer, forcible entry, and forcible detainer [*Civ. Code § 1952*]. The subject of unlawful detainer is covered in California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[2] FORM

Landlord's Damages on Termination of Lease

Termination and Remedy in Damages

_____. If Tenant breaches this lease and abandons the property before the end of the term, or if Tenant otherwise breaches this lease, Landlord shall have the right to terminate this lease by giving written notice of termination to Tenant. On termination, Landlord may recover the following from Tenant:

(a) The worth at the time of award of the unpaid rent that had been earned at the time of termination;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of

award [*or designate shorter period*] exceeds the amount of rental loss for that period that Tenant proves could have been reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform the obligations under this lease, or that in the ordinary course of things would be likely to result therefrom.

Measure of Damages

_____. The "worth at the time of award" of the amounts referred to in subparagraphs (a) and (b) of Paragraph [*number of preceding paragraph*] of this lease shall be computed by allowing interest at the rate of _____ percent [*insert a lawful rate or state:* at the then-legal rate]. The "worth at the time of award" of the amount referred to in subparagraph (c) of Paragraph [*number of preceding paragraph*] is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigationReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34B California Legal Forms--Transaction Guide § 34B.252

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.252 Landlord's Right to Continue Lease in Effect

[1] Comment

[a] Use of Form

This form sets forth provisions granting a landlord the right to continue a lease in effect and collect rent as it becomes due after a tenant's breach and abandonment. This remedy is available to a landlord only if the lease provides for it [*Civ. Code § 1951.4(a)*; *see* [b], *below*]. Otherwise, the lease terminates after the abandonment and breach, and the landlord is entitled to recover statutory damages from the tenant [*Civ. Code § 1951.2*; *see § 34B.251*].

The availability of the remedy of continuing the lease in effect after breach and abandonment depends not only on its inclusion in the lease, but is also subject to the following two other conditions [*see Civ. Code § 1951.4*]:

- The landlord may not terminate the tenant's right to possession [*see* [d], *below*]; and
- The tenant must have the right to assign the lease or sublet the premises, subject only to reasonable limitations [*see* [c], *below*].

[b] Provision for Remedy

If a landlord is to have the statutory remedy of continuing a lease in effect and recovering rent as it becomes due after a breach and abandonment, the lease must contain a provision providing for this remedy [*Civ. Code § 1951.4(a)*]. The provision may be of any type that describes the remedy. In addition, a provision in the lease in substantially the following form satisfies the requirement [*Civ. Code § 1951.4(a)*]:

The lessor has the remedy described in *California Civil Code Section 1951.4* (lessor may continue

lease in effect after tenant's breach and abandonment and recover rent as it becomes due, if tenant has right to sublet or assign, subject only to reasonable limitations).

This statutory language has been incorporated, with minor stylistic modifications, into the form in [2], *below*.

[c] Tenant's Right to Assign or Sublet

The remedy of continuing a lease in effect after a tenant's breach and abandonment is not available unless at least one of the following conditions is satisfied:

- The lease permits (or does not prohibit or otherwise restrict) subletting, assignment, or both [*Civ. Code § 1951.4(b)(1)*];

- The lease permits subletting, assignment, or both, subject to express standards or conditions, provided the standards and conditions are reasonable at the time the lease is executed [*see Civ. Code § 1951.4(b)(2)* (an express standard or condition is presumed to be reasonable, and this presumption affects the burden of proof)] and the landlord does not require compliance with any standard or condition that has become unreasonable at the time the tenant seeks to sublet or assign [*Civ. Code § 1951.4(b)(2)*]; or

- The lease permits subletting, assignment, or both with the landlord's consent, and the lease either provides that the consent will not be unreasonably withheld or includes a standard implied by law that consent will not be unreasonably withheld [*Civ. Code § 1951.4(b)(3)*].

The provisions for assignment and subletting based on these statutory provisions are *set forth in § 34B.260[2]*.

[d] Continuation of Right of Possession

The remedy of continuing a lease in effect after a tenant's breach and abandonment is conditioned, among other requirements, on the landlord's not terminating the tenant's right to possession [*see Civ. Code § 1951.4(b)*]. Even though a tenant has breached the lease and abandoned the property, the lease continues in effect for as long as the landlord does not terminate the tenant's right to possession, and the landlord may enforce all the landlord's rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, provided the lease contains this remedy [*see* [b], *above*] and permits, subject only to reasonable limitations, the tenant to assign or sublet [*Civ. Code § 1951.4(b)*; *see* [c], *above*].

For this purpose, none of the following acts constitute a termination of the tenant's right to possession [*Civ. Code § 1951.4(c)*]:

- Acts of maintenance or preservation;

- Efforts to relet the property;

- The appointment of a receiver on initiative of the landlord to protect the landlord's interest under the lease; and

- Withholding consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate the tenant's rights to sublet or assign.

[e] Inconsistent Remedies as Not Incompatible

The remedy of terminating the lease for abandonment and breach [*see Civ. Code § 1951.2*; *see also § 34B.251[1]*] and the alternative remedy of the landlord's continuing the lease in effect [*see Civ. Code § 1951.4*] are inconsistent, but may be contained within the same lease [*see Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1671-1672, 11 Cal. Rptr. 2d 278]* . In that event, the landlord has a choice about how to handle the tenant's abandonment and breach. A statutory procedure for determining that the tenant has in fact abandoned the premises, and for terminating the lease, is set forth in *Civ. Code § 1951.3* [*see* Ch. 35B, *Modification and Termination of Leases*].

[f] Other Remedies

Neither of the remedies in *Civ. Code § 1951.2* (terminating lease and recovering damages) or 1951.4 (continuing the lease) prevents a landlord from obtaining equitable relief, if appropriate [*Civ. Code § 1951.8*]. The landlord may also bring actions for forcible entry or detainer, or unlawful detainer [*Civ. Code § 1952*]. However, if the landlord obtains possession of the property under a judgment for restitution of the premises [*see Code Civ. Proc. § 1174*], he or she is no longer entitled to continue the lease in effect [*see Civ. Code § 1951.4*] unless the tenant thereafter petitions for and obtains restoration to the premises [*see Civ. Code § 1952(c)*; *Code Civ. Proc. § 1179*].

[2] FORM

Landlord's Right to Continue Lease in Effect

Landlord's Right to Continue Lease in Effect

_____. If Tenant breaches this lease and abandons the leased premises, Landlord shall have the right to continue this lease in effect for as long as Landlord does not terminate Tenant's right to possession of the leased premises, and Landlord may enforce all of Landlord's rights and remedies under this lease, including the right to recover the rent as it becomes due.

Nonterminating Actions

_____. No action by Landlord, except a written notice of termination given to Tenant, shall be deemed a termination of this lease. Specifically, the following do not constitute a termination of Tenant's right to possession:

(a) Landlord's acts of maintenance or preservation of the property.

(b) Landlord's efforts to relet the property.

(c) The appointment of a receiver on Landlord's initiative to protect Landlord's interest under this lease.

(d) Landlord's withholding of consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate Tenant's rights to sublet or assign as specified in this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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17-34B California Legal Forms--Transaction Guide § 34B.253

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.253 Cancellation of Lease

[1] Comment--Use of Form

This form consists of two lease provisions authorizing the landlord and the tenant to cancel the lease before the expiration of its term on the occurrence of specified conditions. The landlord may cancel the lease if the landlord sells the leased premises. The provision for cancellation by the tenant permits cancellation for "good cause," and provides the parties with the opportunity to define that term.

A lease provision authorizing the landlord or tenant to cancel the lease on the occurrence of certain conditions does not negate the existence of a lease or create a mere tenancy at will [*Crocker-Anglo Nat. Bank v. Roberts (1960) 177 Cal. App. 2d 614, 616, 2 Cal. Rptr. 568]* . As a practical matter, most cancellation provisions are found in nonresidential leases. For further discussion and several alternative cancellation provisions relating primarily to nonresidential transactions, see Ch. 34C, *Retail, Industrial, and Office Leases* .

[2] FORM

Cancellation of Lease

Cancellation by Landlord

_____. Landlord hereby reserves the right to cancel or terminate this lease before the expiration of its original term [or any extended term] if Landlord sells the leased premises to a third party. To exercise this right, Landlord shall give Tenant written notice of Landlord's intention to sell the leased premises and terminate this lease. The notice shall prescribe the date by which Tenant is required to vacate and surrender the leased premises (the "termination date"). The termination date must be at least [*specify, e.g.,* 30 days] after the date of the notice. Tenant agrees to vacate and surrender the leased premises on or before the specified termination date. This lease shall be null

and void as of the termination date set forth in the notice.

Cancellation by Tenant

_____. Tenant hereby reserves the right to cancel or terminate this lease before the expiration of its original term [or any extended term] for good cause. For these purposes, "good cause" includes, but is not limited to, _____[*specify, e.g.*, the loss by Tenant of the main source of income Tenant uses to pay the rent under this lease.] To exercise this right, Tenant shall give Landlord written notice of Tenant's intention to cancel this lease. The notice shall specify the reason or reasons for cancellation and shall prescribe the date by which Tenant will vacate and surrender the leased premises (the "termination date"). The termination date must be at least [*specify, e.g.*, 30 days] after the date of the notice. Tenant agrees to vacate and surrender the leased premises on or before the specified termination date. This lease shall be null and void as of the termination date set forth in the notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34B California Legal Forms--Transaction Guide §§ 34B.254-34B.259

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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§§ 34B.254[Reserved]



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17-34B California Legal Forms--Transaction Guide § 34B.260

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.260 Assignment and Subletting

[1] Comment

[a] Use of Form

This form consists of a series of alternative provisions that forbid or permit (subject to various conditions) a tenant of residential property to sublease or assign his or her leasehold interest. Most residential leases include a provision governing subletting and assignment. However, unlike nonresidential leases, residential leases are not subject to statutory transfer restrictions [*see Civ. Code § 1995.010 et seq.* (nonresidential restrictions); *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.260[1][b]*]. Consequently, the parties to a residential lease are relatively free to negotiate the terms of a transfer provision [*see Civ. Code § 1044* (property of any kind may be transferred, except as otherwise provided by statute); *see also* [b], *below*]. However, if the landlord is to have the right to continue the lease in effect following a breach by the tenant, the lease must permit (or not prohibit) subletting or assignment and satisfy other statutory requirements [*see § 34B.252[1]*].

For comprehensive coverage of assignments and subleases, see Ch. 35A, *Assignment and Sublease of Leasehold Interests* , and California Real Estate Law and Practice, Ch. 172, *Assigning and Subletting of Leasehold Interests* (Matthew Bender). For assignment and subletting provisions that are tailored for use in ground leases, see Ch. 34D, *Ground Leases* . For transfer provisions that may be used in nonresidential leases, see Ch. 34C, *Retail, Industrial, and Office Leases* .

[b] Prohibition Against Assignment or Subletting

Although no statutes or reported decisions have expressly considered the transferability of interests in residential leases, a few statutes appear to implicitly recognize the right of a residential landlord to prohibit those transfers [*see, e.g., Civ. Code § 1951.4(b)(1)*; *Code Civ. Proc. § 1161(3)*]. Consequently, this form contains a provision prohibiting assignments

and subletting [*see* first alternative provision of form in [2], *below*]. If that prohibition is adopted, however, the landlord will not be able to continue the lease in effect following the tenant's breach of the lease and abandonment of the leased premises [*see Civ. Code § 1951.4(a)*; *see also § 34B.252[1]*].

[2] FORM

Assignment and Subletting

Assignment or Sublease

[*First alternative; transfers not permitted.*]

_____. Tenant shall not assign _____[his *or* her] interests under this lease or sublet the leased premises.

[*Second alternative; standards or conditions (other than landlord's consent) imposed.*]

_____. Tenant may assign _____[his *or* her] interests under this lease or sublet the leased premises, provided that _____[*specify standard or condition, e.g.,* Tenant shall pay to Landlord (1) one half of all rents received from the subtenant in excess of the rent payable by Tenant to Landlord under this lease; or (2) one half of any sums to be paid by any assignee of Tenant in consideration of the assignment of this lease]. Any assignment or subletting that does not comply with the provisions of this paragraph shall be void and shall, at Landlord's option, terminate this lease.

[*Third alternative; landlord's consent required and may not be unreasonably withheld.*]

_____. Tenant shall not assign _____[his *or* her] interests under this lease or sublet the leased premises without obtaining Landlord's prior written consent, provided that (1) Landlord shall not unreasonably withhold _____[his *or* her] consent to the assignment or subletting; and (2) a consent to one assignment or subletting by Landlord shall not be deemed a consent to any subsequent assignment or subletting. Any assignment or subletting without the prior written consent of Landlord shall be void and shall, at the option of Landlord, terminate this lease.

[*Fourth alternative; landlord's consent required and additional express standard or condition imposed.*]

_____. Tenant may sublet the leased premises or assign _____[his *or* her] interests under this lease, on the following terms and conditions:

(a) Tenant must first obtain the written consent of Landlord to the assignment or subletting, provided that (1) Landlord shall not unreasonably withhold _____ [his *or* her] consent to the assignment or subletting; and (2) a consent to one assignment or subletting by Landlord shall not be deemed a consent to any subsequent assignment or subletting. Any assignment or subletting without the prior written consent of Landlord shall be void and shall, at the option of Landlord, terminate this lease.

(b) _____ [*Specify one or more additional standards or conditions, e.g.,* Tenant shall pay to Landlord (1) one half of all rents received from the subtenant in excess of the rent payable by Tenant to Landlord under this lease; or (2) one half of any sums to be paid by any assignee of Tenant in consideration of the assignment of this lease].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34B California Legal Forms--Transaction Guide § 34B.261

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.261 Arbitration Regarding Tenantable Condition of Dwelling

[1] Comment

[a] Use of Form

This form contains a clause that may be included in a lease or other agreement between a residential landlord and tenant if the parties want to provide for arbitration in the event of a dispute over whether or not the leased premises are tenantable for purposes of *Civ. Code §§ 1941-1942.1*. For detailed coverage of the "tenantable condition" statutes, see *§ 34B.26[2]*.

One court of appeal has suggested that to be enforceable, an agreement to arbitrate issues concerning the rights and obligations of a residential landlord and tenant, including tenantability issues, must be contained in a separate agreement and not in the lease itself [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . The court's reasoning was based on *Civ. Code § 1953(a)(4)*, which precludes a residential lease agreement from including any modification or waiver of a tenant's "procedural rights in litigation in any action involving his rights and obligations as a tenant" [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 403-404, 3 Cal. Rptr. 3d 525]* . However, the court did not decide the issue because it found that the agreement failed to meet other statutory requirements and was unconscionable [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . In light of *Jaramillo*, this form contains an alternative clause that may be used as a separate agreement to arbitrate issues of tenantability.

For a binding arbitration provision that covers other types of disputes between a landlord and tenant, see *§ 34B.262*.

[b] Agreement to Arbitrate Disputes

The landlord and tenant may agree to arbitrate disputes over conditions that are claimed to make the premises

untenantable. Specifically, the parties may enter into a written agreement that provides for the following [*Civ. Code § 1942.1*]:

- That any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, in accordance with the provisions of *Code Civ. Proc. § 1280 et seq.* (California Arbitration Act) [for coverage of the Act, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*];

- That the costs of the arbitration will be apportioned by the arbitrator between the parties; and

- That the provisions of *Civ. Code §§ 1941-1942.1* are set forth in the agreement [*see discussion below*].

In this form, the basic agreement is set forth as a lease provision or separate agreement. However, it is not practical to include the provisions of *Civ. Code §§ 1941-1942.1* in the lease provision because they are lengthy. Consequently, this form (1) assumes that the provisions will be set forth in a separate document [*see § 34B.283*], (2) provides for the attachment of that document to the lease or to the separate arbitration agreement, and (3) incorporates by reference the provisions of that separate document.

[2] FORM

Arbitration Regarding Tenantable Condition of Dwelling

Tenantable Condition of Leased Premises and Related Arbitration Agreement

_____. Landlord shall put and maintain the leased premises in a tenantable condition in accordance with the provisions of *Civ. Code Sections 1941-1942.1*. A copy of those statutory provisions is attached to this lease and incorporated by reference. If any controversy relating to the tenantable condition of the leased premises arises between Landlord and Tenant, the controversy shall, on application of either Landlord or Tenant, be submitted to arbitration in accordance with the provisions of *Code of Civil Procedure Sections 1280-1294.2* (the California Arbitration Act). The costs of the arbitration will be apportioned by the arbitrator between Landlord and Tenant.

[*Or, if separate agreement:*]

This agreement is entered into on _____[*date*], by and between _____[*name/names*], [*legal status, e.g.*, a California corporation] ("Landlord"), and _____[*name/names*], [*legal status, e.g.*, a single woman] ("Tenant"). Landlord hereby agrees that _____[*he/she/it*] shall put and maintain the premises known as _____[*specify, e.g.*, Apartment A at 12345 Chestnut Street, San Francisco, California] (the "leased premises") in a tenantable condition in accordance with the provisions of *Civil Code Sections 1941-1942.1*. A copy of those statutory provisions is attached to this agreement and incorporated by reference. If any controversy relating to the tenantable condition of the leased premises arises between Landlord and Tenant, the controversy shall, on application of either Landlord or Tenant, be submitted to arbitration in accordance with the provisions of *Code of Civil Procedure Sections 1280-1294.2* (the California Arbitration Act). The costs of the arbitration will be apportioned by the arbitrator between Landlord and Tenant.

LANDLORD
_____ [*name of landlord*]
By _____ [*signature*]
[*typed name and title*]
TENANT

_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability



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17-34B California Legal Forms--Transaction Guide § 34B.262

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.262 Arbitration Provision

[1] Comment

[a] Use of Form

This form is a binding arbitration provision that may be included in a lease, and a statutory heading and notice that must accompany the provision under certain circumstances [*see* [e], *below*]. The arbitration provision incorporates by reference the rules of the American Arbitration Association. For further discussion of arbitration and an alternative arbitration clause that provides for the use of the rules set forth in the California Arbitration Act [*Code Civ. Proc. §§ 1280-1294.2*], see Ch. 23, *Real Property Sales Agreements* , and California Real Estate Law and Practice, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

[b] Content of Form

A lease may provide for the arbitration of disputes arising under it [*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816]* . A general arbitration agreement is independently enforceable, and has a life of its own outside the judicial system. The rules pertaining to the selection of arbitrators and the conduct of the hearings are matters almost entirely subject to the mutual desires of the parties [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 917-918, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *see Code Civ. Proc. § 1282.2* (conduct of arbitration hearings)]. If the agreement to arbitrate does not set forth the procedure for initiating and conducting the arbitration, then statutory provisions govern these matters [*see Code Civ. Proc. §§ 1282-1284.3*].

The arbitration provision in the form in [2], *below*, provides that the parties will submit all controversies relating to the lease to binding arbitration to be conducted in accordance with the rules of the American Arbitration Association. Alternatively, the parties may agree that only specific matters designated in the lease will be submitted to arbitration.

The form in [2], *below*, provides that each party is required to select an arbitrator and the two arbitrators are then required to select a third arbitrator. The decision of two of the three arbitrators is binding on the parties. The arbitrators are also granted the power to apportion the costs and expenses of the arbitration between the parties.

As discussed in [e], *below*, if a lease containing an option to purchase or a ground lease coupled with improvements contains an arbitration provision, that provision must conform to statutory requirements for the heading and type size of the provision. The lease must also contain a notice required by statute [*see Code Civ. Proc. § 1298(c)*; *see also* form in [2], *below*].

PRACTICE TIP:

Using a General Arbitration Provision. If the attorneys include a *general* arbitration provision--requiring arbitration of *all* disputes--this will delay any filing of an unlawful detainer action until all arbitration proceedings are completed. The landlord's attorney should thus be sure to advise his or her client of this, before the lease is executed. *By Myron Moskovitz.*

[c] Enforceability

Arbitration has traditionally been praised by courts as an expeditious and economical method of relieving overburdened civil calendars [*see Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-707, 131 Cal. Rptr. 882, 552 P.2d 1178]* . However, in cases not involving leases, contract clauses requiring mandatory arbitration have been held to be invalid adhesion contracts when one party's bargaining strength was clearly less than the other [*see Spence v. Omnibus Industries (1975) 44 Cal. App. 3d 970, 973-974, 119 Cal. Rptr. 171* (home remodeling contract); *Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 356-357, 133 Cal. Rptr. 775* (hospital admission contract)]. Arbitration provisions in commercial contracts that provide for an arbitrator closely connected with one party have also been criticized or held invalid as unconscionable [*see Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 821-824, 826-828, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Hope v. Superior Court (1981) 122 Cal. App. 3d 147, 154-155, 175 Cal. Rptr. 851 , cert. denied, 456 U.S. 910 (1982)]* .

An agreement providing for the settlement of disputes by arbitration is specifically enforceable by either party [*see Code Civ. Proc. § 1281.2*; *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810, 92 Cal. Rptr. 650]* . However, if a party to an arbitration agreement can establish that he or she was induced to sign the arbitration agreement through the misrepresentation or fraud of the other party, arbitration may be denied [*see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 974-981, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . If the agreement provides that the decision of the arbitrator will be final, a submission to and determination by the arbitrator is contractually binding on the parties [*Silva v. Mercier (1949) 33 Cal. 2d 704, 708, 204 P.2d 609]* .

PRACTICE TIP:

Enforcement of Arbitration Agreement. One court of appeal has suggested that to be enforceable, an agreement to arbitrate issues concerning the rights and obligations of a residential landlord and tenant must be contained in a separate agreement and not in the lease itself [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . The court's reasoning was based on *Civ. Code § 1953(a)(4)*, which precludes a residential lease agreement from including any modification or waiver of a tenant's "procedural rights in litigation in any action involving his rights and obligations as a tenant" [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 403-404, 3 Cal. Rptr. 3d 525]* . However, the court did not decide the issue because it found that the agreement failed to meet other statutory requirements and was unconscionable [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . In light of *Jaramillo* , practitioners drafting residential leases may wish to provide the arbitration agreement below in a separate document. *By Publisher's Editorial Staff.*

[d] Waiver

The right to arbitration granted under a contract may be waived when the party seeking to compel arbitration does any of the following:

- Takes steps inconsistent with an intent to invoke arbitration [*see, e.g., Case v. Kadota Fig Assn. (1950) 35 Cal. 2d 596, 604-606, 220 P.2d 912* ; Titan Enterprises, Inc. v. Armo Construction, Inc. (1973) 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456] ;

- Causes unreasonable delays undertaking the procedure [*see, e.g., Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816]* ; or

- Acts in bad faith or with willful misconduct [*Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 425-426, 158 Cal. Rptr. 828, 600 P.2d 1060]* .

The right may also be waived by a repudiation or denial of the lease in which the arbitration clause is contained [*Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 218, 30 Cal. Rptr. 719]* .

Whether there has been a waiver of a right to arbitrate is ordinarily a question of fact [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . To establish a waiver of the right to arbitration based on unreasonable delay, the delay must be substantial, unreasonable, and in spite of the claimant's own reasonable diligence. The burden is on the one opposing the arbitration agreement to prove that the other party's dilatory conduct rises to such a level of misfeasance as to constitute a waiver and a waiver is not to be lightly inferred [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

[e] Statutory Requirements for Certain Leases

The statutory requirements discussed below apply to a lease that grants the tenant an option to purchase [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.263*] or a ground lease that includes improvements [*see* Ch. 34D, *Ground Leases*] if the lease or ground lease contains a provision for binding arbitration of any dispute between the landlord and tenant [*Code Civ. Proc. § 1298(a)*; *see Code Civ. Proc. § 1298.8* (requirements are applicable only to contracts or agreements entered into on or after July 1, 1989); *see also* Ch. 23, *Real Property Sales Agreements*]. For those leases, the following requirements must be satisfied:

- The arbitration provision must be clearly titled "ARBITRATION OF DISPUTES" [*Code Civ. Proc. § 1298(a)*];

- The statutory arbitration notice [*see* form in [2], *below*] must appear immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision, and immediately following that arbitration provision [*Code Civ. Proc. § 1298(c)*]; and

- Both the statutory notice and the arbitration provision must be set out in capital letters if the contract is typed. If the contract is printed, the provision must be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and the notice must be set out in at least 10-point bold type or in contrasting red in at least 8-point bold type [*Code Civ. Proc. § 1298(a), (c)*].

These requirements also apply to a variety of other contracts that convey or are contemplated to convey real property [*see Code Civ. Proc. § 1298(a)*]. For further discussion of these requirements and other affected contracts, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Arbitration Provision

ARBITRATION OF DISPUTES

[*If contract is typed, set out following provision in capital letters. If contract is printed, set out following provision in either (1) at least 8-point bold type, or (2) contrasting red in at least 8-point type (Code Civ. Proc. § 1298(a)).*]

_____. IF ANY DISPUTE ARISES BETWEEN LANDLORD AND TENANT CONCERNING THE PREMISES, ANY PROVISION OF THIS LEASE, OR THE RIGHTS AND DUTIES OF EITHER IN REGARD THERETO, THE DISPUTE SHALL BE SETTLED BY ARBITRATION AS PROVIDED IN THIS SECTION. EACH PARTY SHALL APPOINT AN ARBITRATOR AND GIVE THE OTHER PARTY WRITTEN NOTICE OF THE NAME AND ADDRESS OF THE ARBITRATOR WITHIN[***specify, e.g.,*** FIVE DAYS] **AFTER A WRITTEN DEMAND TO DO SO HAS BEEN SERVED ON THE PARTY MAKING THE APPOINTMENT BY THE OTHER PARTY TO THIS LEASE. THE TWO APPOINTED ARBITRATORS SHALL, WITHIN _____ [*specify, e.g.,*** FIVE DAYS] AFTER THEIR APPOINTMENT, APPOINT A THIRD ARBITRATOR. THE WRITTEN DECISION OF ANY TWO OF THE THREE APPOINTED ARBITRATORS SHALL BE BINDING AND CONCLUSIVE ON BOTH PARTIES TO THIS LEASE. THE ARBITRATORS MAY APPORTION THE COSTS AND EXPENSES OF THE ARBITRATION PROCEEDING, INCLUDING ATTORNEYS' FEES AND ARBITRATORS' FEES, BETWEEN THE PARTIES TO THIS LEASE IN ANY MANNER DEEMED REASONABLE BY TWO OF THE THREE ARBITRATORS. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION.

[*If contract is typed, set out following statutory notice in capital letters. If contract is printed, set out following notice in (1) at least 10-point bold type, or (2) contrasting red in at least 8-point bold type (Code Civ. Proc. § 1298(c)).*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

INITIALED BY LANDLORD: _____

INITIALED BY TENANT: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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17-34B California Legal Forms--Transaction Guide § 34B.263

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.263 Payment of Utilities Under Joint Meters

[1] Comment

[a] Use of Form

This form is a lease provision that may be used in a lease for a dwelling unit in a multiunit building or complex when the landlord or landlord's agent is aware that gas or electrical service provided through a tenant's meter serves areas outside the tenant's unit. It is designed to meet the requirements of *Civ. Code § 1940.9* [*see* [b], *below*].

This form advises the tenant that the leased premises are not served by a separate meter (or meters) and that the meter(s) for the leased premises provide gas, electrical, or gas and electrical service to outside areas as well as to the tenant's unit. This form sets forth four alternative provisions for payment of the utility charges for the outside areas. The first alternative may be used if the tenant agrees to pay all charges for service provided through the meter(s) for the tenant's premises, including charges for areas outside the premises. The second alternative may be used if the landlord is to (1) become the customer of record for the tenant's meter, and (2) pay all charges for the meter. The third alternative may be used if the landlord is to arrange for the separate metering of the areas outside the tenant's unit and is to become the customer of record for the meter(s) serving those outside areas. The fourth alternative may be used if the tenant is to pay specified portions of the costs for service through the meter(s) and the landlord is to pay the balance. The form may be adapted appropriately to reflect any other arrangements for payment agreed to by the parties.

[b] Statutory Requirements

The requirements of *Civ. Code § 1940.9* apply when (1) the landlord does not provide separate gas and electrical meters for each tenant's dwelling unit that measure only the electrical or gas service to each individual unit, and (2) the landlord or the landlord's agent has knowledge that gas or electrical service provided through a tenant's meter serves an area outside the tenant's unit. In that case, the landlord must, before the inception of the tenancy or on discovery, explicitly

disclose the above condition to the tenant and do one of the following [*Civ. Code § 1940.9(a)*]:

- Execute a mutual written agreement with the tenant for payment by the tenant of the cost of the gas or electrical services provided through the tenant's meter to areas outside the tenant's dwelling unit [*see* first alternative provision of form in [2], *below*]; or

- Make a written agreement with the tenant for other arrangements for payment for the gas or electrical service provided through the tenant's meter to serve areas outside the tenant's dwelling unit. These arrangements may include the landlord's becoming the customer of record for the tenant's meter [*see* second alternative provision of form in [2], *below*], or the landlord separately metering and becoming the customer of record for the area outside the tenant's dwelling unit [*see* third alternative provision of form in [2], *below*].

As mentioned in [a], *above*, this form includes another arrangement under which the tenant pays for specified portions of the costs and the landlord pays the balance [*see* fourth alternative provision of form in [2], *below*].

[c] Remedies for Failure to Comply

If a landlord fails to comply with the statutory requirements [*see* [b], *above*], the aggrieved tenant may bring an action in a court of competent jurisdiction [*Civ. Code § 1940.9(b)*]. The remedies the court may order include, but are not limited to, the following [*Civ. Code § 1940.9(b)*]:

- Requiring the landlord to be made the customer of record with the utility for the tenant's meter; and

- Ordering the landlord to reimburse the tenant for payments made by the tenant to the utility for service to areas outside the tenant's dwelling unit.

When the court makes an order for reimbursement, it must order the landlord to reimburse the tenant for all payments made from the date the landlord's obligation to disclose that gas or electrical service was being provided to areas outside the tenant's dwelling unit arose [*Civ. Code § 1940.9(b)(2)*]. In the ordinary case, this will be from the inception of the tenancy.

Nothing in *Civ. Code § 1940.9* limits any remedies available to either a landlord or a tenant under other provisions of *Civ. Code §§ 1940-1954.1*, the rental agreement, or applicable statutory or common law [*Civ. Code § 1940.9(c)*].

[2] FORM

Payment of Utilities Under Joint Meters

Utility Charges

_____. In accordance with *Civil Code Section 1940.9*, Landlord hereby advises Tenant that the leased premises are not served by [a separate gas meter *or* a separate electrical meter *or* separate gas and electrical meters] that measure[s] only the service provided to the leased premises. Instead, the [gas meter *or* electrical meter *or* gas and electrical meters] for the leased premises provide[s] service to Tenant's unit and to certain areas outside the leased premises. Those outside areas include [*describe outside areas, e.g.,* common areas of the building in which the leased premises are situated, including hallways, stairwells, lobbies, and vestibules *or* the following dwelling premises adjoining the Tenant's leased premises: _____ (*description of adjoining premises*)].

[*Select one of following alternatives:*]

[*First alternative; tenant is to pay all costs for service through meter(s).*]

Tenant hereby agrees to pay all charges for [gas *or* electrical *or* gas and electrical] service provided through the meter[s] for the leased premises, including charges for service for areas outside the leased premises.

[*Second alternative: landlord is to become customer of record for tenant's meter and pay for all charges.*]

Landlord shall become customer of record for the [gas meter *or* electrical meter *or* gas and electrical meters] and shall pay all charges for [gas *or* electrical *or* gas and electrical] service charged to [that meter *or* those meters], regardless of whether the service is for the Tenant's leased premises or any other areas.

[*Third alternative: landlord is to arrange for separate metering of outside areas and is to become customer of record for those areas.*]

Landlord shall, within [*specify, e.g.,* one month] of the execution of this lease, arrange for the separate metering of [gas *or* electrical *or* gas and electrical] service currently provided through the meter[s] for the leased premises to areas outside the leased premises. Landlord shall become the customer of record for the meter[s] serving those outside areas and shall pay all charges for service charged to [it *or* them]. Until the separate metering commences, _____[*specify interim payment arrangement, e.g.,* Landlord shall pay all charges for _____ (gas *or* electrical *or* gas and electrical) service charged to the meter(s) for the leased premises].

[*Fourth alternative: tenant is to pay specified portion of costs for service through meter(s).*]

Landlord shall become customer of record for the [gas meter *or* electrical meter *or* gas and electrical meters]. Tenant hereby agrees to pay a sum equal to [*specify, e.g.,* 50 percent] of all charges for [gas *or* electrical *or* gas and electrical] service charged to [that meter *or* those meters]. Landlord shall provide Tenant with a statement showing the full amount of charges no later than [*specify date, e.g.,* the 15th day of each month during the lease term], and Tenant shall pay the agreed portion of those charges on the same date as the rental payments required in this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutory Remedies & RightsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34B California Legal Forms--Transaction Guide § 34B.264

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.264 Landlord's Repairs Before Tenant's Occupancy

[1] Comment--Use of Form

This form is a lease provision that may be used when the tenant, before the execution of the lease, has inspected the premises and discovered defects that the landlord has agreed to repair. It may be used in lieu of a separate inspection sheet to note defects [*see § 34B.281[2]* for the California Association of Realtors sample inspection sheet]. For a lease clause providing for the use of an inspection checklist (but not granting the tenant a right to cancel the lease), see *§ 34B.200[2]*, P 8(b).

The form in [2], *below*, describes each repair to be made by the landlord and states the date by which it must be completed. If any of the repairs are not completed on time, the tenant has the right to cancel the lease or to continue it in effect with an abatement of rent.

PRACTICE TIP:

Tenant's Right to Cancel Should Be Carefully Considered by Landlord. A provision granting the tenant the right to cancel the lease should the landlord fail to complete the repairs when promised is a subject for negotiation. Generally, a landlord will not agree to this type of provision because a delay in making repairs may be outside of the landlord's reasonable control. However, if (1) the repairs are crucial to the tenant's use of the property and (2) the landlord does not have many other tenants vying for the property, the landlord may decide to accept this provision. *By Publisher's Editorial Staff.*

[2] FORM

Landlord's Repairs Before Tenant's Occupancy

Inspection and Repairs

_____. Tenant acknowledges that _____[he *or* she] has inspected the leased premises [, including all fixtures and all furnishings, appliances, and other personal property subject to this lease *or specify other inspected items*], and agrees that they are in satisfactory condition and good working order, except as noted below. Landlord agrees to repair the following defects, at Landlord's sole expense, not later than the dates indicated below.

Repair	Date
_____	_____
_____	_____
_____	_____

In the event Landlord fails to complete the above-listed repairs by the date indicated, Tenant shall have the right either (1) to cancel this lease with [*specify, e.g.,* 10 days'] written notice to Landlord or (2) to continue this lease in effect, in which case tenant's rent shall be abated until the repairs are completed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent AbatementReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability



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17-34B California Legal Forms--Transaction Guide § 34B.265

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.265 Insurance for Tenant's Personal Property

[1] Comment--Use of Form

This form is a lease clause that notifies the tenant that the landlord's insurance for the leased premises does not cover the tenant's personal property, and that the tenant is responsible for insuring his or her own personal property. Unless the lease provides otherwise, the tenant has no obligation to procure insurance against any risk for the landlord's benefit, and neither party ordinarily has an interest in the insurance proceeds obtained by the other on his or her separate insurable interest [*Alexander v. Security-First Nat. Bank (1936) 7 Cal. 2d 718, 723, 62 P.2d 735* ; *see Russell v. Williams (1962) 58 Cal. 2d 487, 491, 24 Cal. Rptr. 859, 374 P.2d 827]* . Most landlords of residential property procure and maintain all casualty and liability insurance coverage, and it is up to the tenants to obtain renter's insurance for their personal property. When the parties agree to this type of arrangement, the lease need not even include an insurance provision. However, residential leases often contain a provision notifying the tenant that the landlord is not providing insurance for the tenant's personal property [*see* form in [2], *below*]. For a similar clause, see *§ 34B.202*, P 31.

Notwithstanding the above-mentioned provisions, the lease may state that either or both parties will provide certain types of insurance and that the insurance will protect the interests of either or both parties. For lease provisions setting forth a variety of alternative arrangements for insurance, see Ch. 34C, *Retail, Industrial, and Office Leases* .

[2] FORM

Insurance for Tenant's Personal Property

Insurance for Tenant's Personal Property

_____. Landlord's insurance coverage for the leased premises does not include coverage for Tenant's personal property. Tenant shall be responsible for insuring its own personal property and may elect, at Tenant's sole

cost, to obtain insurance for this purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoveragePersonal PropertyInsurance LawProperty InsuranceRental InsuranceReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
6. Miscellaneous Provisions

17-34B California Legal Forms--Transaction Guide §§ 34B.266-34B.279

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34B.266[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
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17-34B California Legal Forms--Transaction Guide § 34B.280

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.280 Application to Rent/Screening Fee (CAR)

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), includes a combination "Application to Rent" and "Screening Fee" [CAR Form LRA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

Part I of the form in [2], *below*, requests a great deal of information regarding the prospective tenant, including personal information, employment and income history, and credit and bank account information. By signing the application, the applicant authorizes the landlord (1) to verify the information given, and (2) to obtain a credit report on the prospective tenant.

Part II of the form in [2], *below*, to be completed by the landlord, manager, or agent, specifies that the applicant has paid a nonrefundable screening fee in the amount noted. The screening fee is applied to such items as obtaining credit reports and processing the application. It may not exceed $30.00, except that the fee may be adjusted annually commensurate with an increase in the Consumer Price Index, beginning on January 1, 1998 [*Civ. Code § 1950.6(b)*; *see § 34B.19*].

[2] FORM

Application to Rent/Screening Fee (CAR)

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Related Instruments

17-34B California Legal Forms--Transaction Guide § 34B.281

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.281 Move In/Move Out Inspection (CAR)

[1] Comment--Use of Form

This form, prepared by the California Association of Realtors (CAR), is an inspection sheet that is to indicate the condition of various items on the property, including the building's exterior, doors, walls, ceilings, floors, windows, light fixtures, and numerous other items [CAR Form MIMO, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

The form is designed to record the condition of the premises when the tenant moves in and again when he or she moves out. It may be used by a prospective tenant to note any damage or other defects in the leased premises discovered during an inspection by the tenant before occupancy. If the tenant has inspected the premises before the lease is signed, this form may be attached to the lease and incorporated by reference [*see § 34B.202[1][b]* for discussion of adding modifications to a lease].

An alternative to the use of a checklist is a lease provision indicating that the tenant has inspected the premises (including all furnishings, fixtures, appliances, and similar items) and found them to be in good condition and working order, with the exception of any defects that are listed in the provision [*see § 34B.264[2]*].

PRACTICE TIP:

Inspection by Tenant After Lease Is Signed. Sometimes a tenant will not inspect the premises until after

the lease is signed. This may happen, for example, if a tenant is moving from outside of the area and is not available to inspect the premises before signing the lease. In this event, after the lease is signed but before the tenant takes possession, the tenant and the landlord, or the landlord's agent, will do a walk-through of the property together and any defects will be noted on the inspection sheet which is then signed by both parties. For alternative language which incorporates this possibility, see *§§ 34B.200[2]*, P 8(b), 34B.201[2], P 7(b). *By Publisher's Editorial Staff.*

If the landlord agrees to make specified repairs to the premises before the execution of the lease, those repairs should be described in the lease. The parties also may wish to state the date by which the landlord must complete the repairs. For an illustrative repair provision, see *§ 34B.200[2]*, P 8(b).

The condition of the premises at the time the tenant moves out will establish the basis for the landlord's returning or withholding a part or all of the security deposit [*see § 34B.230[1]* for discussion of security deposits].

[2] FORM

Move In/Move Out Inspection (CAR)

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.282

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.282 Notice of Existence of Former Ordnance Location

[1] Comment--Use of Form

This form is a notice to a prospective tenant of the existence of a former ordnance location in the neighborhood of the rental premises. A landlord of a residential dwelling who has actual knowledge of any former federal or state ordnance location within one mile of the residential premises must give written notice to a prospective tenant of that knowledge before the execution of a rental agreement [*Civ. Code § 1940.7(b)*; *see § 34B.24[4]*].

[2] FORM

Notice of Existence of Former Ordnance Location

NOTICE OF EXISTENCE OF FORMER MILITARY ORDNANCE LOCATION

This notice relates to certain residential real property (hereafter referred to as the "Rental Property") described as follows: _____[*insert description, e.g.*, Apartment No. _____ of the building located at _____ (*address, city, state, zip*)]. This notice is to inform you, as a prospective tenant of the Rental Property, that the undersigned owner of the Rental Property has actual knowledge of the existence, within one mile of the Rental Property, of a former _____[federal *or* state] ordnance location. That former ordnance location is an area identified by [*identify governmental agency or instrumentality*] as an area once used for military training purposes that may contain potentially explosive munitions. It is located [*set forth any information owner has regarding location of ordnance area*].

_____ [*signature of owner*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.283

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.283 Statutory Provisions Relating to Tenantable Condition of Leased Premises

[1] Comment--Use of Form

This form sets forth the provisions of *Civ. Code §§ 1941-1942.1*, which impose requirements relating to the tenantable condition of real property. It is designed to be used in conjunction with the form *set forth in § 34B.261[2]*, which is a lease clause providing that any disputes regarding the tenantable condition of the leased premises may (by application of either party to the lease) be submitted to arbitration. This type of arbitration agreement must include the provisions of *Civ. Code §§ 1941-1942.1*. Because those provisions are quite lengthy, it would not be practical to include them in a lease. Consequently, the clause *set forth in § 34B.261[2]* provides for the attachment to the lease of a separate document setting forth the provisions of *Civ. Code §§ 1941-1942.1* (this form), and incorporates by reference the provisions of the separate document.

For further discussion of *Civ. Code §§ 1941-1942.1*, see *§ 34B.26[2]*.

[2] FORM

Statutory Provisions Relating to Tenantable Condition of Leased Premises

ATTACHMENT _____

STATUTORY PROVISIONS RELATING TO TENANTABLE CONDITION OF LEASED PREMISES

***Civil Code Section 1941*:**

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the

contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in *Civil Code Section 1929*.

***Civil Code Section 1941.1*:**

A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in *section 17920.3* or *17920.10 of the Health and Safety Code*:

(a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.

(c) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.

(h) Floors, stairways, and railings maintained in good repair.

(i) A locking mail receptacle provided for each residential unit in a residential hotel, as required by *Health & Safety Code § 17958.3*.

***Civil Code Section 1941.2*:**

(a) No duty on the part of the landlord to repair a dilapidation shall arise under *Civil Code Section 1941* or Section 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under *Civil Code Section 1941* to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

***Civil Code Section 1941.3*:**

(a) On and after July 1, 1998, the landlord, or his or her agent, of a building intended for human habitation shall do all of the following:

(1) Install and maintain an operable dead-bolt lock on each main swinging entry door of a dwelling unit. The dead-bolt lock shall be installed in conformance with the manufacturer's specifications and shall comply with applicable state and local codes including, but not limited to, those provisions relating to fire and life safety and accessibility for the disabled. When in the locked position, the bolt shall extend a minimum of 13/16 of an inch in length beyond the strike edge of the door and protrude into the doorjamb.

This section shall not apply to horizontal sliding doors. Existing dead bolts of at least one-half inch in length shall satisfy the requirements of this section. Existing locks with a thumb-turn deadlock that have a strike plate attached to the doorjamb and a latch bolt that is held in a vertical position by a guard bolt, a plunger, or an auxiliary mechanism shall also satisfy the requirements of this section. These locks, however, shall be replaced with a dead bolt at least 13/16 of an inch in length the first time after July 1, 1998, that the lock requires repair or replacement.

Existing doors which cannot be equipped with dead-bolt locks shall satisfy the requirements of this section if the door is equipped with a metal strap affixed horizontally across the midsection of the door with a dead bolt which extends 13/16 of an inch in length beyond the strike edge of the door and protrudes into the doorjamb. Locks and security devices other than those described herein which are inspected and approved by an appropriate state or local government agency as providing adequate security shall satisfy the requirements of this section.

(2) Install and maintain operable window security or locking devices for windows that are designed to be opened. Louvered windows, casement windows, and all windows more than 12 feet vertically or six feet horizontally from the ground, a roof, or any other platform are excluded from this subdivision.

(3) Install locking mechanisms that comply with applicable fire and safety codes on the exterior doors that provide ingress or egress to common areas with access to dwelling units in multifamily developments. This paragraph does not require the installation of a door or gate where none exists on January 1, 1998.

(b) The tenant shall be responsible for notifying the owner or his or her authorized agent when the tenant becomes aware of an inoperable dead-bolt lock or window security or locking device in the dwelling unit. The landlord, or his or her authorized agent, shall not be liable for a violation of subdivision (a) unless he or she fails to correct the violation within a reasonable time after he or she either has actual notice of a deficiency or receives notice of a deficiency.

(c) On and after July 1, 1998, the rights and remedies of tenant for a violation of this section by the landlord shall include those available pursuant to *Civil Code Sections 1942*, *1942.4*, and *1942.5*, an action for breach of contract, and an action for injunctive relief pursuant to *Code of Civil Procedure Section 526*. Additionally, in an unlawful detainer action, after a default in the payment of rent, a tenant may raise the violation of this section as an affirmative defense and shall have a right to the remedies provided by *Code of Civil Procedure Section 1174.2*.

(d) A violation of this section shall not broaden, limit, or otherwise affect the duty of care owed by a landlord pursuant to existing law, including any duty that may exist pursuant to *Civil Code Section 1714*. The delayed applicability of the requirements of subdivision (a) shall not affect a landlord's duty to maintain the premises in safe condition.

(e) Nothing in this section shall be construed to affect any authority of any public entity that may otherwise exist to impose any additional security requirements upon a landlord.

(f) This section shall not apply to any building which has been designated as historically significant by an appropriate local, state, or federal governmental jurisdiction.

(g) Subdivisions (a) and (b) shall not apply to any building intended for human habitation which is managed, directly or indirectly, and controlled by the Department of Transportation. This exemption shall not be construed to affect the duty of the Department of Transportation to maintain the premises of these buildings in a safe condition or abrogate any express or implied statement or promise of the Department of Transportation to provide secure premises. Additionally, this exemption shall not apply to residential dwellings acquired prior to July 1, 1997, by the Department of Transportation to complete construction of state highway routes 710 and 238 and related interchanges.

***Civil Code Section 1941.4*:**

The lessor of a building intended for the residential occupation of human beings shall be responsible for installing at least one usable telephone jack and for placing and maintaining the inside telephone wiring in good working order, shall ensure that the inside telephone wiring meets the applicable standards of the most recent National Electrical Code as adopted by the Electronic Industry Association, and shall make any required repairs. The lessor shall not restrict or interfere with access by the telephone utility to its telephone network facilities up to the demarcation point separating the inside wiring.

"Inside telephone wiring" for purposes of this section, means that portion of the telephone wire that connects the telephone equipment at the customer's premises to the telephone network at a demarcation point determined by the telephone corporation in accordance with orders of the Public Utilities Commission.

***Civil Code Section 1942*:**

(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of *Civil Code Section 1962*, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.

(b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is

presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and deducting after a shorter notice if all the circumstances require shorter notice.

(c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by the violation of *Civil Code Section 1929* or *1941.2*.

(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

***Civil Code Section 1942.1*:**

Any agreement by a lessee of a dwelling waiving or modifying his rights under *Civil Code Section 1941* or *1942* shall be void as contrary to public policy with respect to any condition which renders the premises untenantable, except that the lessor and the lessee may agree that the lessee shall undertake to improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental.

The lessor and lessee may, if an agreement is in writing, set forth the provisions of *Civil Code Sections 1941-1942.1*, inclusive, and provide that any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, pursuant to the provisions of Title 9 (commencing with *Section 1280), Part 3 of the Code of Civil Procedure*, and that the costs of such arbitration shall be apportioned by the arbitrator between the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
PART IV. FORMS
C. Related Instruments

17-34B California Legal Forms--Transaction Guide § 34B.284

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.284 Lead-Based Paint and Lead-Based Paint Hazards Disclosure (CAR)

[1] Comment

[a] Use of Form

This form is designed to satisfy federally required disclosure requirements regarding exposure to lead-based paints in the leased premises. It is prepared by the California Association of Realtors (CAR) [CAR Form FLD, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R) endorsement not implied].

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

If the premises were constructed before 1978, federal law requires the landlord to provide certain disclosures, records, and reports, and a federally approved lead information pamphlet to the tenant before the tenant obligates himself or herself under the lease [*see 42 U.S.C. § 4852d*; *24 C.F.R. § 35.80 et seq.* (HUD); *40 C.F.R. § 745.100 et seq.* (EPA)]. For a complete discussion of the federal laws pertaining to this disclosure requirement, see California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities* (Matthew Bender).

[b] Landlord's Obligations

Before a tenant signs a lease for a property constructed before 1978, the landlord must do all of the following [*24 C.F.R. § 35.88(a)*; *40 C.F.R. § 745.107*]:

- Provide the tenant with an Environmental Protection Agency approved lead hazard information pamphlet, such as "Protect Your Family From Lead in Your Home";

PRACTICE TIP:

Sources for Federally Required Pamphlet. Copies of the EPA-approved pamphlet "Protect Your Family From Lead in Your Home" (EPA 747-K-94-001) can be obtained from the Government Printing Office, (202) 512-1800, GPO Stock #055-000-00507-9 ($26 for 50 copies), or from the National Lead Information Center, (800) 424-5323. The pamphlet can also be obtained from the EPA web site on the Internet at http://www.epa.gov/opptintr/lead/leadpbed.htm. *By Publisher's Editorial Staff.*

- Disclose to the tenant the presence of any known lead-based paint or lead-based paint hazards in the housing being leased, along with any additional information available concerning that paint or hazard, such as the basis for determining that the lead-based paint or hazard exists, its location, and the condition of the painted surfaces;

- Disclose to each agent involved in the transaction the presence of any known lead-based paint or lead-based paint hazards in the housing being leased and the existence of any available records or reports pertaining to that paint or hazards. The landlord must also disclose any additional information available concerning the known lead-based paint or hazards, such as the basis for determining that lead-based paint or hazards exist, its location, and the condition of the painted surfaces; and

- Provide the tenant with any records or reports available to the landlord pertaining to lead-based paint or lead-based paint hazards in the housing being leased. This includes records and reports regarding common areas, and other residential dwellings in multifamily housing, provided that the information is part of an evaluation or reduction of lead-based paint or hazards in the housing as a whole.

If any of the above disclosure activities occurs after the tenant has made an offer to lease the housing, the landlord must (1) complete the required disclosure activities before accepting the tenant's offer and (2) allow the tenant an opportunity to review the information and possibly amend the offer [*24 C.F.R. § 35.88(b)*; *40 C.F.R. § 745.107(b)*].

[c] Lease Attachment

Each lease subject to the lead-based disclosure requirements must include an attachment [*see* [2], *below*] containing the following six elements [*see 24 C.F.R. § 35.92(b)*; *40 C.F.R. § 745.113(b)*]:

- A Lead Warning Statement in prescribed language;

- A statement by the landlord that either (1) discloses the presence of known lead-based paint or lead-based paint hazards in the target housing being leased, or (2) indicates no knowledge of the presence of any lead-based paint or hazards. The landlord must also disclose any additional information available concerning the known lead-based paint or hazards (for example, the basis for determining that the paint or hazards exist in the housing, the location of the paint or hazards, and the condition of the painted surfaces);

- A list of any records or reports available to the landlord and provided to the tenant pertaining to lead-based paint or paint hazards in the housing. If no records or reports are available, the landlord must so indicate;

- The tenant's statement affirming receipt of the information described above, as well as an

EPA-approved lead hazard information pamphlet [*see* [b], *above*];

- When the landlord is represented by an agent, a statement that (1) the agent has informed the landlord of the landlord's disclosure obligations under *42 U.S.C. § 4852d*, and *(2)* the agent is aware of his or her duty to ensure compliance with those requirements; and

- The signatures of all parties and agents certifying the accuracy of their statements to the best of their knowledge, along with the dates of signature.

Agents and landlords must retain copies of the completed attachment for no less than three years from the start of the leasing period [*24 C.F.R. § 35.92(c)*; *40 C.F.R. § 745.113(c)*].

[2] FORM

Lead-Based Paint and Lead-Based Paint Hazards Disclosure (CAR)

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34B California Legal Forms--Transaction Guide § 34B.285

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.285 Notice of Application for Permit to Demolish Residential Dwelling Unit

[1] Comment--Use of Form

This form is a notice to be provided by a landlord to a current or prospective tenant if the landlord intends to apply for a permit to demolish the residential dwelling unit. The owner of a residential dwelling unit or the owner's agent who applies to any public agency for a permit to demolish the unit must give written notice of that fact to a prospective tenant before entering into a rental agreement, requiring or accepting payment for an application screening fee, requiring or accepting any other fees, and requiring or accepting any writings that would initiate a tenancy [*Civ. Code § 1940.6(a)(1)*]. The owner or owner's agent must also give written notice to current tenants before applying to the public agency for the permit to demolish the residential dwelling unit. This requirement includes tenants who have entered into a rental agreement but not yet taken possession of the dwelling unit [*Civ. Code § 1940.6(a)(2)*]. The notice must include the earliest possible approximate date on which the owner expects the demolition to occur and the approximate date on which the owner will terminate the tenancy. The demolition may not occur before the earliest possible approximate date noticed [*Civ. Code § 1940.6(b)*].

For additional discussion, see *§ 34B.24[10]*.

[2] FORM

Notice of Application for Permit to Demolish Residential Dwelling Unit

NOTICE OF APPLICATION FOR PERMIT TO DEMOLISH PREMISES

TO: _____[*name of current or prospective lessee/tenant*]
_____[*street address*]
_____[*city, state, zip*]

This notice is given in compliance with *Civil Code Section 1940.6(a)(1)*. This notice relates to certain residential real property (hereafter referred to as the "Rental Property") described as follows: _____[*insert description, e.g.*, Apartment No. 1 of the building located at _____ (*insert address, city, state, and zip code*)]. This notice is to inform you, as a [prospective *or* current] tenant of the Rental Property, that the undersigned owner of the Rental Property will apply for a permit to demolish the Rental Property. The demolition is expected to take place on _____[*date*]. This notice is also to inform you that your tenancy of the Rental Property will be terminated on or about _____[*date*].

_____ [*signature of owner*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34B RESIDENTIAL LEASES
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17-34B California Legal Forms--Transaction Guide § 34B.286

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34B.286 Notice of Right to Request Inspection Before Termination of Tenancy

[1] Comment--Use of Form

This form is a notice of the right to request an inspection of a tenant's premises before the tenancy is terminated. Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord must notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection [*Civ. Code § 1950.5(f)(1)*]. The purpose of the initial inspection is to allow the tenant an opportunity to remedy identified deficiencies in order to avoid deductions from the security. If the tenant chooses not to request an initial inspection, the landlord's duties with regard to that inspection are discharged [*Civ. Code § 1950.5(f)(1)*]. The landlord must give at least 48 hours prior written notice of the date and time of the inspection if either a mutual time is agreed on or if a mutually agreed time cannot be scheduled but the tenant still wishes an inspection. The tenant and landlord may agree to forgo the 48-hour prior written notice by both signing a written waiver. The landlord may proceed with the inspection whether the tenant is present or not, unless the tenant previously withdrew his or her request for the inspection [*Civ. Code § 1950.5(f)(1)*].

Based on the initial inspection, the landlord must give the tenant an itemized statement specifying repairs or cleaning that are proposed to be the basis of any deductions from the security. This statement must include the texts of *Civ. Code § 1950.5(b)(1)-(4)* concerning the permissible uses of the security deposit [*Civ. Code § 1950.5(f)(2)*]. The tenant must be given the opportunity during the period following the initial inspection until termination of the tenancy to remedy the identified deficiencies in order to avoid deductions from the security [*Civ. Code § 1950.5(f)(3)*]. These provisions do not prohibit a landlord from using the security for any permissible purpose that occurs between completion of the initial inspection and termination of the tenancy or that was not identified during the initial inspection due to the presence of a tenant's possessions [*Civ. Code § 1950.5(f)(5)*].

These initial inspection requirements do not apply when the tenancy is terminated pursuant to *Code Civ. Proc. § 1161(2), (3)* or *(4)* (unlawful detainer) [*Civ. Code § 1950.5(f)(1)*; *see § 35B.44* for discussion of unlawful detainer

proceedings].

For further discussion and additional forms relating to security deposits, see *§§ 34B.230-34B.234*.

[2] FORM

Notice of Right to Request Inspection Before Termination of Tenancy

NOTICE OF RIGHT TO REQUEST INSPECTION BEFORE TERMINATION OF TENANCY

TO: _____[*name of lessee/tenant*]
_____[*street address*]
_____[*city, state, zip*]

This notice is given in compliance with *Civil Code Section 1950.5*. This notice relates to certain residential real property (hereafter referred to as the "Rental Property") described as follows: _____[*insert description, e.g.*, Apartment No. 1 of the building located at _____ (*insert address, city, state, and zip code*)]. This notice is to inform _____[*name of tenant*] ("you"), as a current tenant of the Rental Property, that you have the right to request an inspection of the premises before termination of the [rental agreement *or* lease]. On your request, and no earlier than two weeks before the end of the lease date, Landlord will make an initial inspection of the premises and provide you with an itemized statement specifying the repairs and cleaning proposed to be deducted from the security deposit you made on the Rental Property. You may remedy the identified deficiencies before the end of the lease date in order to avoid the itemized deductions from the security deposit. Landlord will give you at least 48 hours written notice of the inspection, unless you and landlord sign a written agreement to waive the 48-hour requirement.

Date: _____.

LANDLORD
_____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES

17-34C California Legal Forms--Transaction Guide 34C.syn

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.syn Synopsis to Chapter 34C: RETAIL, INDUSTRIAL, AND OFFICE LEASES

§ 34C.01 California Statutes

§ 34C.02 Federal Statutes

§§ 34C.03-34C.04 [Reserved]

§ 34C.05 Law Reviews and Periodicals

§ 34C.06 Annotations

§ 34C.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 34C.08-34C.09 [Reserved]

§ 34C.10 Attorney's Role in Lease Negotiations

§ 34C.11 Use of Standard Forms

[1] Industry-Wide Preprinted Forms

[2] Landlord's Standard Lease Forms

§ 34C.12 Lease as Both Conveyance and Contract

§ 34C.13 Agreement to Lease

[1] Enforcement

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§ 34C.14 Formal Requirements for Lease

§ 34C.15 Description of Leased Premises

[1] Extent and Boundary of Property

[2] Appurtenances and Easements

§ 34C.16 Term of Lease

[1] Primary and Option Terms

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§ 34C.17 Net Leases

[1] Definition

[2] Purpose

§ 34C.18 Commercial Rent Control

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§ 34C.19 Hazardous Substance Laws

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§ 34C.21 Toxic Mold Protection Act

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§ 34C.113 Rent and Other Payments to Landlord

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§ 34C.120 Repairs and Maintenance

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§ 34C.121 Destruction of Premises

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Arbitration of Disputes

by Linda Breen Piercen*
Myron Moskovitzn**
Benjamin Kaplann***
Practice Consultants

FOOTNOTES:

(n49)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California, at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

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Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and CASES AND PROBLEMS IN CRIMINAL PROCEDURE (Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.

(n51)Footnote ***. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES

17-34C California Legal Forms--Transaction Guide Scope

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

Scope

by Linda Breen Piercen*
Myron Moskovitzn**
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Practice Consultants Scope

This chapter covers retail, industrial, and office leases. Complete lease forms are provided for a percentage lease for retail purposes, a partially net industrial lease, and an office lease in a multitenant building. Discussion of the law applicable to these leases is included in the Legal Background and in the comments to the forms.

Also included in this chapter are discussion and forms for alternative and additional provisions to be used in commercial leases. Optional provisions are provided for frequently negotiated issues such as assignment and subletting, insurance matters, and use restrictions.

The terms "landlord" and "tenant," rather than their equivalents, "lessor" and "lessee," are used throughout this chapter. Retail, industrial, and office leases are referred to collectively as "nonresidential leases." Unless otherwise indicated, the requirements discussed throughout the chapter apply equally to retail, industrial, and office leases.

The former title of this chapter, *Commercial, Industrial, and Office Leases*, has been modified by changing "Commercial" to "Retail." The term "commercial" is a broad category that would include many forms of nonresidential leases including retail, industrial, and office leases. The new title describes the chapter's contents more specifically.

The income tax implications of leasing real property from both the landlord's and the tenant's point of view are beyond the scope of this chapter. For a thorough discussion of these issues, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 190, *Taxation of Landlords* , and Ch. 191, *Taxation of Tenants* (Matthew Bender).

Shopping center leases are covered in Ch. 34E, *Shopping Centers: Leasing and Operation* . Other types of leases are covered in Ch. 34B, *Residential Leases* , Ch. 34D, *Ground Leases* , Ch. 36, *Oil and Gas Rights and Leases* , and Ch. 37, *Farm Leases* . For discussion and forms related to leases, see Ch. 34A, *Prelease Forms* , Ch. 35A, *Assignment and Sublease of Leasehold Interests* , Ch. 35B, *Modification and Termination of Leases* , and Ch. 38, *Real Property*

Management .

FOOTNOTES:

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART I. RESEARCH GUIDE
A. Primary Sources

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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.01 California Statutes

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Creation, scope, and transfer of easements. *Civ. Code §§ 802-806, 1104*.

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Holdover tenancy. *Civ. Code § 1945*.

Security for commercial lease. *Civ. Code § 1950.7*.

Lessor's remedies. *Civ. Code §§ 1951.2-1951.8*.

Commercial rent control prohibitions. *Civ. Code §§ 1954.25-1954.31*.

Assignment and sublease under nonresidential leases. *Civ. Code §§ 1995.010-1995.340*.

Subordination of prior interest. *Civ. Code § 2934*.

Landlord's Notice of Non-Responsibility. *Civ. Code § 3094*.

"Nuisance" defined. *Civ. Code § 3479*.

Waste committed by tenant. *Code Civ. Proc. § 732*.

Unlawful detainer action. *Code Civ. Proc. § 1161 et seq.*

Eminent Domain Law. *Code Civ. Proc. § 1230.010 et seq.*

California Arbitration Act. *Code Civ. Proc. § 1280 et seq.*

Instruments affecting real estate title are recordable. *Gov. Code § 27280*.

California Building Standards Law. *Health & Safety Code § 18901 et seq.*

Release of hazardous substances. *Health & Safety Code §§ 25320, 25321*.

Disclosure of hazardous substances. *Health & Safety Code § 25359.7*.

Asbestos disclosures required. *Health & Safety Code §§ 25915-25919.7*.

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17-34C California Legal Forms--Transaction Guide § 34C.02

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.02 Federal Statutes

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17-34C California Legal Forms--Transaction Guide § 34C.05

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

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17-34C California Legal Forms--Transaction Guide § 34C.07

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.07 Text References

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Ch. 30A, *Construction Financing*.

Ch. 30B, *Zoning, Building, and Environmental Permits*.

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Ch. 33D, *Planned Developments*.

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Ch. 34A, *Prelease Forms*.

Ch. 34B, *Residential Leases*.

Ch. 34D, *Ground Leases*.

Ch. 34E, *Shopping Centers: Leasing and Operation*.

Ch. 35A, *Assignment and Sublease of Leasehold Interests*.

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Ch. 200, *Termination: Causes and Procedures*.

Ch. 201, *Surrender and Abandonment*.

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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.10 Attorney's Role in Lease Negotiations

The attorney's role in negotiations between a landlord and a tenant for a retail, industrial, or office lease may involve the following:

- Drafting or reviewing the lease;
- Negotiating the lease's terms; or
- Advising the client about specific terms of the lease.

These same functions may apply to other lease related documents, including, for example, a subordination, nondisturbance, and attornment agreement. The extent of the attorney's involvement depends on a number of factors, including the following:

- The state of lease negotiations;
- The lease's complexity; and
- The client's bargaining power, knowledge, and level of business sophistication.

The attorney may also become involved in lease negotiations if he or she represents related parties such as an assignee of either the landlord or tenant, a subtenant, or a lender to whom a security interest in the lease is being given.

PRACTICE TIP:

Make Sure Client Is Advised of Each Position Taken. Attorneys have traditionally been regarded in the business community as "beavers" who get into the flowing water and dam things up. If your client is heavily invested in obtaining a lease, the positions you take on that client's behalf, regardless of how well

advised, are not going to be satisfactory if the landlord leaves the negotiating table to you alone. Therefore, you should be quite sure, at every stage of negotiations, that the client is advised of each position you are taking on any particular issue. You should be clear as to whether your client regards adherence to your position as a "deal breaker" and that the client is prepared to support you if the deal falls apart. Thus, before commencing negotiations on behalf of a client the attorney should obtain the following two things:

- Explicit and as detailed as possible instructions, inclusive of financial terms; and
- Maximum knowledge of the property and premises involved.

By Benjamin Kaplan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsEffective RepresentationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.11 Use of Standard Forms

[1] Industry-Wide Preprinted Forms

Although printed lease forms are often used in residential transactions [*see Ch. 34B, Residential Leases, § 34B.202* (California Association of Realtors printed lease form)], they are used less frequently in nonresidential transactions. Typically, printed lease forms for nonresidential transactions are used only for tenants leasing a relatively small amount of space for a short term. Furthermore, even if a printed lease form is used, the parties and their attorneys should examine each provision carefully to determine whether it expresses each party's intent, and consider whether all necessary or advisable provisions have been included.

Preprinted lease forms for nonresidential leases are published by the California Association of Realtors and are often used by the larger commercial real estate brokerage firms.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

PRACTICE TIP: Using the "Preprinted Form." The "preprinted form" is often a negotiating technique designed to provide some impression of immutability. Such a form should be immediately document scanned into your computer. Often times at the commencement of serious interest, as expressed in a particular premise by viewing it, the prospective tenant should request a copy of the "standard form lease." In one instance involving our own offices, this was done and produced a 30 plus page form. The length of the form was not important, but the content certainly was. "Hidden" in what was an absolutely "standard" condemnation clause was a provision by which the landlord, a quasi-governmental corporation, had written a "thirty day" termination clause. Obviously, one would want that kicked from

the lease, before going through the hassle of lease negotiations and hiring space planners. If we had not seen the lease until we had invested much effort and money into the premises, which the landlord knew, it would have been harder for us to deal with it. Instead, our prospective landlord said, "You caught us, we will take it out. The "M" legal department in the building missed it, but you guys caught it." This did not raise our level of confidence in the integrity of the persons with whom we were dealing, who incidentally were part of a major real estate brokerage.

This leads to another tip, which is to say if your prospective landlord or tenant pulls something that stinks, then they probably do themselves. In our instance, we requested a lease with a five-year term and a five-year option, and were told "we can give you a 4-4." When we finally received the final lease it was a "4-1". At that point, having expended thousands of dollars on space planners, not to mention negotiations, I informed the brokers that I was not going to sue them because I did not even want to be in the same courtroom as them. However, it is one thing to have this happen to oneself, it is another thing to have it happen to a client. *By Benjamin Kaplan.*

[2] Landlord's Standard Lease Forms

Landlords of multitenant buildings often create their own standard lease forms to avoid drafting a new lease for each tenant, and to minimize discrepancies among the various leases. Obviously, since such standard forms will be landlord oriented, a tenant's attorney should examine each provision carefully.

If the form requires extensive changes, the tenant's attorney may elect to redraft the lease. Deciding which side will have the primary responsibility for drafting the lease is sometimes a major negotiating hurdle in a lease negotiation. If the proposed changes are minor, the attorney may follow common practice by drafting the modifications in a separate rider or addendum to the standard lease form. In this event, the attorney should exercise caution to avoid internal inconsistencies between the standard lease form and the rider or addendum.

PRACTICE TIP:

Use Introductory Clause in Addendums. Although it is best to avoid internal inconsistencies between the standard lease form and the addendum, know that for purposes of interpretation typewritten provisions control over printed ones and handwritten provisions control over typewritten ones. It is best to have an introductory clause in the addendum that is to the effect that "if there is any inconsistency between the provisions of the Lease and the provisions of the addendum, then the provisions of the addendum control" [*see Civ. Code § 1651*]. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.12 Lease as Both Conveyance and Contract

A lease is both a conveyance and a contract [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507]* . This dual character creates two distinct sets of rights and obligations. One set arises from the relationship of landlord and tenant created by the conveyance aspects of the lease and is based on "privity of estate." The other set arises from the express contractual stipulations of the lease and is based on "privity of contract" [*Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638* ; *Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457]* . For coverage of both types of rights and obligations, see the Legal Background of Ch. 34B, *Residential Leases*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.13 Agreement to Lease

[1] Enforcement

Potential parties to a nonresidential lease may enter into what is known as "an agreement to lease." An agreement to lease will be enforced as a lease if it contains all the essential terms of a lease, and if the parties intended to be bound without executing a formal lease [*Levin v. Saroff (1921) 54 Cal. App. 285, 289-291, 201 P. 961* ; *see Gavina v. Smith (1944) 25 Cal. 2d 501, 503-505, 154 P.2d 681]* . The essential terms of a lease are the following [*Levin v. Saroff (1921) 54 Cal. App. 285, 289, 201 P. 961]* :

- There must be a definite agreement as to the extent and boundary of the property leased;
- There must be a definite and agreed term; and
- There must be a definite and agreed price of rental, including the time and manner of payment.

An agreement to lease can be enforced as a lease even though the parties never executed a contemplated formal lease [*Pacific Improvement Co. v. Jones (1912) 164 Cal. 260, 263-264, 128 P. 404]* . However, the agreement to lease itself must be in writing and signed by the party to be charged if the intended term of the lease is longer than one year [*Wolfsen v. W. L. Hathaway (1948) 32 Cal. 2d 632, 639, 198 P.2d 1* ; *see Civ. Code § 1624(a)(3)* (statute of frauds)].

The fact that the location of the premises is not stated in the agreement is irrelevant if the tenant has entered into possession, and the description of the commencement of the lease's term is sufficient if it is to start when construction is finished on improvements on the property [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727* ; *see Pike v. Hayden (1950) 97 Cal. App. 2d 606, 612-613, 218 P.2d 578]* . Possession by the tenant [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 54, 2 Cal. Rptr. 727]* and payment of rent by the tenant [*Pacific Improvement Co. v. Jones (1912) 164 Cal. 260, 264-265, 128 P. 404]* are indications that a lease was intended. However, the wrongful entry on real property by potential tenants, after notice of the invalidity of their claim and of the

fact that the land had been leased to other persons, is not sufficient to render an otherwise invalid oral lease enforceable [*Wolfsen v. W. L. Hathaway (1948) 32 Cal. 2d 632, 647, 198 P.2d 1]* .

PRACTICE TIP:

Letters of Intent. Typically an agreement to lease, also known as a "Letter of Intent" (LOI) may well contain all the essential terms required for an enforceable lease [*see Ch. 34A, Prelease Forms, § 34A.225[2]* (complete LOI form)]. Therefore, appropriate language must be included therein to insure that no issue regarding the enforceability of a LOI will arise. Such suggested language includes the following:

Tenant and Landlord acknowledge that they do not intend this Letter of Intent to be construed as a Lease, or to be bound by its terms except for the period while negotiations are taking place to implement this Letter of Intent. A Lease will not exist unless and until the parties have executed a formal written agreement containing all terms approved by their respective representatives and containing all essential items of the agreed-upon transaction. The parties acknowledge that they have neither set forth herein, nor agreed upon all essential terms relating to the Lease of the Premises, including without limitation, covenants, conditions, warranties and representations, conditions precedent, conditions subsequent, indemnities, insurance provisions, assignment and subletting, and other anticipated terms, and that all such essential terms will be the subject of further negotiations. Tenant and Landlord further acknowledge that it would be imprudent and unreasonable to rely upon the expectation of entering a Lease regarding the Premises. Further, efforts by either party to complete due diligence, negotiate, and obtain the services of design and construction consultants, computer installation specialists, or other associated experts and specialists on office design and improvements, or to prepare the Lease shall not be considered as evidence of intent by either party to be bound by the terms of this Letter of Intent. Finally, the performance of either party, prior to execution of a formal written Lease, of any of the obligations which may be included in a Lease between the parties when negotiations are completed shall not be considered as evidence of intent by either party to be bound by the terms of this Letter of Intent.

By Benjamin Kaplan.

[2] Agreement to Lease in Future

An agreement to lease in the future will not be construed as a present lease if it can be shown that the parties did not intend the agreement to be a present lease [*Potter v. Mercer (1879) 53 Cal. 667, 672-674 , overruled on other grounds, Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20 ; Regalia v. Mariani (1929) 100 Cal. App. 1, 5-6, 279 P. 455]* , or if the agreement is too uncertain and incomplete because it lacks a date for commencement or a specified term [*Martin v. Hall (1933) 219 Cal. 334, 338-339, 26 P.2d 288]* . When a document recited, among other things, "the term of this lease shall be for a period of 10 years, commencing on the date of acquisition of title by Landlord," it was inferred by the court that the parties probably intended the document to be a binding lease without the execution of any other instrument and held to be a valid lease for a term to commence in the future [*Corson v. Brown Motel Investments, Inc. (1978) 87 Cal. App. 3d 422, 426, 151 Cal. Rptr. 385]* . However, the fact that the potential tenant has entered into possession does not necessarily mean that the agreement will be construed as a present lease [*Regalia v. Mariani (1929) 100 Cal. App. 1, 5, 279 P. 455]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of FraudsReal Property LawLandlord & TenantTenanciesGeneral Overview



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.14 Formal Requirements for Lease

Since a nonresidential lease is both a conveyance and a contract, it must generally comply with the requirements applicable to both [*see § 34C.12*]. As a conveyance (or "grant," as it is called in the Civil Code [*see Civ. Code § 1053*]), a lease must be in writing if it is for a term longer than one year [*Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*], and is not effective until it is delivered unconditionally [*Civ. Code §§ 1054, 1056*]. As a contract, a lease requires parties capable of contracting, the parties' consent, a lawful object, and a sufficient cause or consideration [*Civ. Code § 1550*].

For a general discussion of the essential terms needed to create an enforceable lease, including an adequate description of the property leased, the term of the lease, identification of the parties, and the amount of rent, see the Legal Background of Ch. 34B, *Residential Leases*. That chapter also contains further discussion of the requirement that a lease with a term longer than one year be in writing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds



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17-34C California Legal Forms--Transaction Guide § 34C.15

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.15 Description of Leased Premises

[1] Extent and Boundary of Property

A lease is required to contain a definite agreement as to the extent and boundary of the property to be leased [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727* ; *Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122]* . However, the extent of the leased premises, when ambiguous, may be established by the conduct of the parties [*Golden West Baseball Company v. City of Anaheim (1994) 25 Cal. App. 4th 11, 41, n.32, 31 Cal. Rptr. 2d 378]* . For example, an ambiguous or uncertain description may be cured by the tenant's taking possession and paying the stipulated rent when the parties' actions relate to particular premises [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *see Cal-Am Corp. v. Department of Real Estate (1980) 104 Cal. App. 3d 453, 458, 163 Cal. Rptr. 729]* . If the lease fails entirely to describe the property, parol evidence may not be used to supply the necessary description, notwithstanding the fact that the tenant has taken possession [*Kingston v. Colburn (1956) 139 Cal. App. 2d 623, 624, 293 P.2d 805]* .

For an option to lease additional space or a right of first refusal to lease additional space, see *§§ 34C.213* and *34C.214*, respectively.

[2] Appurtenances and Easements

As a general rule, everything that belongs to or is used with, and appurtenant to, the leased premises and is "reasonably essential to their enjoyment" passes as incident to them, unless specifically reserved [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 717, 227 P.2d 263* ; *Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 96-98, 19 Cal. Rptr. 891]* . For a lease of a part of a building, the lease passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part leased. When a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 716, 227 P.2d 263]* . A lease of an entire house or building is a lease of the land on which the building stands, at least as far as needed for its support. A lease of an entire house or building also includes the adjacent land belonging to the landlord that is used with the building as necessary to its proper occupation for the purpose for which it was intended [Bachenheimer v. Palm

Springs etc. *(1953) 116 Cal. App. 2d 580, 588, 254 P.2d 153]* . A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another [*Civ. Code § 662*].

Rights of ingress and egress pass to the tenant, even though they are not specifically mentioned in the lease and the word "appurtenances" is not included as part of the description of the leased premises [*Mayer v. Hazzard (1935) 10 Cal. App. 2d 1, 3, 51 P.2d 189]* . For example, a driveway on an adjoining lot was held to be a necessary appurtenance to the lease of a building and a shed behind it when the driveway was the most practical method of obtaining access to the shed for deliveries [*Ng v. Warren (1947) 79 Cal. App. 2d 54, 61-62, 179 P.2d 41]* . When a lease does not expressly create an easement, one may pass to the tenant by implication either from reasonable necessity or from the manifest intention of the parties [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580* (parties' actions evidenced intent to include adjacent parking spaces)].

The phrase, "reasonably essential to their enjoyment" is the crucial part of the general rule [*Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 98, 19 Cal. Rptr. 891]* .

PRACTICE TIP:

Lease Should Clearly Describe Appurtenances and Easements. To avoid disputes over which rights are included, by implication, in the lease as reasonably essential to the enjoyment of the premises, the lease should clearly set forth both the appurtenances and easements, if any, intended to pass, and the appurtenances and easements, if any, that are excepted or reserved. *By Publisher's Editorial Staff.*

For a nonexclusive parking easement on adjoining land owned by the landlord, see *§ 34C.233*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.16

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.16 Term of Lease

[1] Primary and Option Terms

The complete lease forms for retail [*see § 34C.200[2]*], industrial [*see § 34C.201[2]*], and office [*see § 34C.202[2]*] purposes each provide for a fixed term and therefore create a tenancy for years. A tenancy for years is one for a definite period, which may be less than a year. It terminates at the end of the stated term without any requirement of notice [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* . For a discussion of the different types of tenancies that may be created under a lease and applicable statutory presumptions that apply when a term is not explicitly stated in a lease, see the Legal Background in Ch. 34B, *Residential Leases*.

For discussion and forms relating to specific commencement dates of the term and for an option to extend the term of the lease, see *§§ 34C.210* (term to commence on occurrence of specified condition), 34C.211 (term to commence on completion of construction by landlord), and 34C.212 (option to extend term).

PRACTICE TIP:

Using Option Provisions. The exercise and enforcement of option provisions provide fertile grounds for disputes and potential litigation. A number of options as drafted are illusory as they fail to contain the same specifications required of an enforceable lease. Often the amount of rental payment is left to further agreement without any objective criteria in place to be used as a standard. *By Benjamin Kaplan.*

[2] Holdover Provision

The complete lease forms included in this chapter [*see §§ 34C.200[2], 34C.201[2], 34C.202[2]*] contain a holdover provision which provides that if the tenant remains in possession of the premises after expiration of the lease term, the tenancy under the lease is considered to be a month-to-month, or periodic, tenancy [*see also Ch. 34B, Residential Leases, § 34B.221* (sample holdover provision)]. Holdover provisions are based on the statutory provision that when a tenant remains in possession after expiration of the lease and the landlord accepts rent, the parties are presumed to have renewed the lease on the same terms and for the same time, which may not exceed one month when the rent is payable

monthly or one year in any other case [*see Civ. Code § 1945*].

PRACTICE TIP:

Landlords Should Use Care When Dealing With Holdovers. A tenant who remains in possession of the premises after the expiration of a lease for a term of years, but without the permission and consent of the landlord is not "a holdover tenant." A landlord who demands payment from such a person after the expiration of the term will establish a new tenancy, possibly not even under the same terms and conditions of the previous lease which has already expired. Therefore, because a landlord will usually have many protections under the preceding lease which would not exist under an oral tenancy agreement (e.g., no right of tenant to assign or sublet), a landlord should conduct himself or herself with great care and discretion in dealing with a holdover tenant. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34C California Legal Forms--Transaction Guide § 34C.17

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.17 Net Leases

[1] Definition

The term "net lease," although not a legal term, is commonly used in the real estate industry in the context of nonresidential leases. As one commentator on the characteristics of these leases has explained, "[a] net lease presumes the landlord will receive a fixed rent, without deduction for repairs, taxes, insurance, or any other charges, other than landlords' income taxes. Accordingly, the repair clause requires the tenant to make all repairs, inside and out, structural and otherwise, as well as all necessary replacements of the improvements on the premises (and to comply with all legal requirements affecting these improvements during the term). A lease is not 'net,' as this term is used in long-term leases, if the tenant's repair obligations are less than these" [1 Friedman on Leases (3d ed. 1990) Repairs, § 10.8, pp. 672-673]. The economic exchange supporting such "net" leases has been succinctly described as one under which "the landlord foregoes the speculative advantages of ownership in return for the agreed net rental. The tenant, in turn, gambles on the continued value of the location and the improvements ... and assumes all risks in connection therewith." (Van Doren, Some Suggestions for the Drafting of Long Term Net and Percentage Leases (1951) *51 Colum. L. Rev. 186) [Brown v. Green (1994) 8 Cal. 4th 812, 827, 35 Cal. Rptr. 2d 598, 884 P.2d 55]* .

PRACTICE TIP:

Be Aware of Different Terminology. When the tenant is required under the lease to pay all of the above items, the lease is commonly referred to as a "true net lease" or a "triple-net lease." When the tenant is responsible for payment of only one or two of the expense items, the lease may be referred to as "partially net."

The counterpart of a net lease is a "gross" lease. Under a gross lease, the rent to the landlord is gross, that is, the landlord must pay from the rent all taxes, operating expenses, and insurance for the property. *By Publisher's Editorial Staff.*

PRACTICE TIP: True Net Leases Are More Common in Leases of Freestanding Buildings. True net leases are common when a landlord leases a freestanding building to a single tenant for a retail,

industrial, or office purpose. They are probably less common in leases of space in multitenant buildings, although some landlords do require net leases in which each tenant agrees to pay, from the time the lease commences and throughout the lease term, a pro rata share of the landlord's total operating expenses (including taxes and insurance) for the property. *By Publisher's Editorial Staff.*

PRACTICE TIP: Leases of Multitenant Buildings Tend to be Hybrid of Net and Gross Leases. Most leases for space in a multitenant building fall between the two extremes of net and gross. Leases in this category require the tenant to pay a pro rata share of any increase in the landlord's operating expenses for the building. The increase may be measured against a base year agreed on by the parties, for example, the first year of the lease, or against a specific dollar amount agreed on by the parties, for example, the dollar amount of operating expenses for the first year of the lease term. Unlike a true net lease in which the tenant begins paying operating expenses at the beginning of the lease term, under these leases the tenant begins paying only at a subsequent time designated in the lease for determining the amount of any increase in the landlord's operating expenses, and then at regular intervals thereafter. *By Publisher's Editorial Staff.*

PRACTICE TIP: Gross Nonresidential Leases Are Rare. Few nonresidential leases, with the exception of some office leases, are gross leases. In contrast, most residential leases, with the exception of some with a substantially long term, are gross leases. *By Publisher's Editorial Staff.*

[2] Purpose

The triple-net or true net lease entitles the landlord to rent net of costs for maintenance, repair, replacement, insurance, and taxes [*see Brown v. Green (1994) 8 Cal. 4th 812, 827, 35 Cal. Rptr. 2d 598, 884 P.2d 55]* .

PRACTICE TIP:

Triple-net Lease Can Benefit Landlord. A triple-net lease protects the landlord against the rising costs of owning the property, since the tenant is responsible for paying all expenses of the property. For an owner seeking minimal management responsibilities, it can also provide a return on his or her investment without the active responsibilities of day-to-day management. *By Publisher's Editorial Staff.*

PRACTICE TIP: Advantages of Triple-Net Lease to Tenant. From the standpoint of the tenant, a long-term net lease can be viewed as a financing device that gives the tenant the advantages of ownership without the investment of capital or direct obligation under a deed of trust. For example, a net lease may provide an attractive arrangement for a manufacturing company that needs all of its available capital for the purchase of expensive heavy equipment and cannot afford an initial outlay of cash for the outright purchase of property for its manufacturing plant. The long-term net lease may be used for an existing building or in a transaction in which either the landlord or the tenant is to build improvements on the real property. *By Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.18 Commercial Rent Control

[1] Statutory Prohibition

A public entity cannot enforce or enact any measure constituting commercial rental control because the State of California has completely preempted the field [*Civ. Code § 1954.27(a)*; *see Civ. Code §§ 1954.25-1954.31*; *see also Civ. Code §§ 1954.27(b), 1954.28-1954.30* (clarifying application of prohibition to related laws)]. For these purposes, "commercial rental control" includes any action of a public entity taken by governmental enactment to establish, continue, implement, or enforce any control or system of controls on the price at which, or the term for which, commercial real property may be offered for rent, or that would designate a specific tenant, person, or entity with whom the owner must negotiate on the formation, extension, or renewal of a tenancy [*Civ. Code § 1954.26(f)*]. It should be noted that an appellate court upheld the constitutionality of a local commercial rent control ordinance before the enactment of the current statute prohibiting commercial rent control [*see Rue-Ell Enterprises, Inc. v. City of Berkeley (1983) 147 Cal. App. 3d 81, 83, 194 Cal. Rptr. 919]* .

For further discussion of rent control, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 171, *Rent and Rent Control* (Matthew Bender), and CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 335, *Landlord and Tenant: Rent Control* (Matthew Bender).

[2] Permitted Local Ordinances

Notwithstanding the statutory prohibition against commercial rent control [*see* [1], *above*], a public entity may, by the enactment of an ordinance or similar law, establish a procedure that requires the tenant and landlord to provide specified notices relating to the pending expiration of the term of a lease of commercial real property [*see Civ. Code § 1954.31*]. However, the local enactment may not do any of the following [*Civ. Code § 1954.31(c)*; *see Civ. Code § 1954.31(a)(3)*]:

- Provide for any extension of the term of a lease without the written consent of the owner and the tenant;

- Require either party to extend, renew, or negotiate an extension or renewal of the lease;
- Prohibit an action to recover possession by ejectment, unlawful detainer, or any other lawful means; or
- Provide for a remedy other than actual damages for a bad faith failure to comply with the enactment.

Furthermore, the local enactment will not apply to any lease or rental agreement that [*Civ. Code § 1954.31(d)(1)*]

- Is not in writing;
- Constitutes a tenancy at will;
- Is for a term of less than one year or for an unspecified term; or
- Is a month-to-month tenancy or a tenancy at sufferance.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34C California Legal Forms--Transaction Guide § 34C.19

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.19 Hazardous Substance Laws

[1] Lease Provisions

Various state and federal statutes impose requirements on the owner or possessor of property with respect to the presence, release, storage, and use or handling of certain hazardous substances and materials [*see, e.g., 42 U.S.C. § 9601 et seq.* (Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)); *Health & Safety Code § 25300 et seq.* (Hazardous Substances Account Act)]. Many of these requirements relate to disclosures and reporting [*see, e.g., Health & Safety Code §§ 25359.7, 25915-25919.7*]; others are prohibitions against release and requirements for cleanup and removal of the hazardous substances or materials [*see, e.g., Health & Safety Code §§ 25320, 25321*].

The parties to a nonresidential lease must be aware of these requirements not only for purposes of their own compliance, but also in case they decide to confirm or expand the respective responsibilities of either party in the lease itself. For example, a tenant may negotiate for an agreement by the landlord to indemnify the tenant against damage, loss, or liability arising from the presence of any hazardous or toxic substances not caused by the tenant [*see § 34C.201[2],* Section 4.01].

Alternatively, a landlord may prohibit the tenant from engaging in any use of the leased property that involves the use of toxic or hazardous substances [*see § 34C.201[2],* Section 4.01]. The parties also may want to include a lease provision that addresses the issue of who must perform and pay for any required cleanup or removal of a hazardous substance. For example, if a tenant will make its own improvements to the building, the tenant may negotiate for a lease provision that requires the landlord to pay for removing any asbestos that the tenant encounters in the building during the construction process.

For a discussion of responsibility as between tenant and landlord for complying with government mandated orders (for example, asbestos abatement) and of the judicial construction of typical "compliance with law" lease provisions, see *§ 34C.241[1]*.

For detailed coverage of hazardous substances laws, including disclosure requirements pertaining to asbestos, see CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, Chs. 50- 59 (Matthew Bender).

PRACTICE TIP:

Toxins. You have to obtain some knowledge of the operation of your client's business. Visiting your clients current operation is therefore always helpful. It may not initially dawn on you, until you smell the smells, and see the materials, that your client has a number of materials that are toxic or hazardous. This gives rise to a great many potential issues including the disposal thereof, and the cost of disposal. *By Benjamin Kaplan.*

[2] Compliance Issues

[a] Written Disclosure Requirements

Any owner of nonresidential real property who knows, or has reasonable cause to believe, that any "release" [*see* [c], *below*] of hazardous substances has come to be located on or beneath that real property must, before the sale, lease, or rental of the real property by that owner, give written notice of that condition to each buyer or tenant of the real property [*Health & Safety Code § 25359.7(a)*]. Failure to give that notice when required subjects the owner to actual damages and any other remedies provided by law. When the owner has actual knowledge of the presence of any release of a material amount of a hazardous substance, the knowing and willful failure to give the notice subjects the owner to a civil penalty [*Health & Safety Code § 25359.7(a)*].

Any tenant of real property who knows or has reasonable cause to believe that any release of a hazardous substance has come or will come to be located on or beneath that real property must, within a reasonable period of time either before the release or following the discovery by the tenant of the presence or believed presence of the hazardous substance release, give written notice of that condition to the owner of the real property or to the landlord under the tenant's lease or rental agreement [*Health & Safety Code § 25359.7(b)*]. A tenant who fails to provide written notice to the owner or landlord when required by the statute is subject to actual damages and any other remedy provided by law [*Health & Safety Code § 25359.7(b)(1)*]. If the tenant has knowledge of the presence of a release of a material amount of a hazardous substance, or of a hazardous substance release that is required to be reported to a state or local agency, on or under the real property leased or rented by the tenant and knowingly and willfully fails to provide written notice to the owner or landlord when required by the statute, the following apply [*Health & Safety Code § 25359.7(b)(2)*]:

- The failure is deemed to constitute a default, on the owner's or landlord's written notice to the tenant, under the tenant's lease or rental agreement (except that this provision does not apply to tenants of property used exclusively for residential purposes); and

- The tenant is liable for a civil penalty not to exceed $5,000 for each separate violation.

These state statutory requirements, as well as the ones discussed in [b] and [c], *below*, are patterned after and substantially parallel the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [*42 U.S.C. § 9601 et seq.*]. For detailed coverage of these provisions, see CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, chs. 50- 59 (Matthew Bender).

PRACTICE TIP:

Ensure That Appropriate Investigations Are Made. Do not think that because the hazardous substance situation may have "occurred" before the inception of the tenancy that the tenant will be free of legal responsibility. In any situation in which there is a possibility of a prior use of hazardous or toxic substances, appropriate investigation by trained technical personnel should be conducted. *By Benjamin Kaplan.*

[b] Curing a Default: Removal and Remedial Actions

A tenant may cure a default under the tenant's lease or rental agreement that resulted from a violation of the disclosure requirements [*see* [a], *above*] by promptly commencing and completing the removal of, or taking other appropriate remedial action with regard to, the hazardous substance release [*Health & Safety Code § 25359.7(b)(3)*]. The removal or remedial action must be conducted in accordance with all applicable laws and regulations and in a manner that is reasonably acceptable to, and is approved in writing by, the owner or landlord. The tenant's remedial action to cure a default under the lease or rental agreement does not relieve the tenant of any liability for actual damages or for any civil penalty under the statute [*Health & Safety Code § 25359.7(b)(3)*].

[c] "Release" Defined

"Release" is defined as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment [*Health & Safety Code § 25320*]. The following are excluded from the definition of "release" [*Health & Safety Code § 25321*]:

- Any release that results in exposure to persons solely within a workplace, with regard to a claim those exposed persons may assert against their employer;

- Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

- Release of source, byproduct, or special nuclear material from a nuclear incident [*see 42 U.S.C. § 2011 et seq.* (Atomic Energy Act of 1954)], if that release is subject to designated federal requirements or regulation; and

- The normal application of fertilizer, plant growth regulators, and pesticides.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.20 Bankruptcy of Tenant

[1] Lease Provisions

A tenant's insolvency or bankruptcy does not terminate a lease by operation of law [*Farnum v. Hefner (1889) 79 Cal. 575, 580, 21 P. 955]* . However, many commercial leases provide that the landlord may terminate a lease on the tenant's bankruptcy, insolvency, or other involuntary transfer, and those provisions have been upheld by the California courts [*see, e.g., Ilkhchooyi v. Best (1995) 37 Cal. App. 4th 395, 404, 45 Cal. Rptr. 2d 766* ; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1052, 241 Cal. Rptr. 487]* . A lease provision permitting termination of the lease on the bankruptcy, insolvency, or receivership of a tenant protects the landlord against being forced into a relationship with a tenant not of his or her own choosing. Accordingly, forfeiture of a lease on appointment of a receiver for a sublessor even when the subtenant had continued to pay the rent was held to be justified when the sublessor was liable on the lease and consideration for the approval of the sublease was rendered valueless by the appointment [*Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1052-1055, 241 Cal. Rptr. 487]* .

Notwithstanding the validity under California law of lease clauses permitting termination by the landlord for a tenant's bankruptcy, the superseding federal Bankruptcy Code [*see 11 U.S.C. § 101 et seq.*] generally disallows enforcement of such a clause [*see* § 30C.20[2]].

PRACTICE TIP:

Using Clauses Permitting Termination Based on Bankruptcy. Notwithstanding the unenforceability of a termination clause based on bankruptcy under federal law, some practitioners continue to include this type of clause in a lease because it is valid under California law. However, if it is included, a landlord should be advised that it is generally unenforceable in a federal bankruptcy proceeding. *By Publisher's Editorial Staff.*

[2] Federal Bankruptcy Code

The automatic stay provisions of the Federal Bankruptcy Code prevent a landlord from taking any legal action against a

creditor once a petition for bankruptcy has been filed [*11 U.S.C. § 362(a)(1), (3)*]. Therefore, unless the lease has been terminated by the expiration of its stated term before or during a bankruptcy case [*11 U.S.C. § 362(b)(10)*], the rights of the landlord and the tenant are governed by the provisions of the Bankruptcy Code relating to executory contracts and unexpired leases [*see 11 U.S.C. § 365*]. Under those provisions, an unexpired lease of a debtor involved in proceedings under the Bankruptcy Code may not be terminated or modified [*11 U.S.C. § 365(e)(1)*]. In addition, any right or obligation under the lease may not be terminated or modified at any time after the commencement of the case solely because of a provision in the lease conditioned on any of the following [*11 U.S.C. § 365(e)(1)*]:

- The insolvency or financial condition of the tenant at any time before the closing of the case;
- The commencement of a case under the Bankruptcy Code; or
- The appointment of or taking possession by a trustee in a case under the Bankruptcy Code or a custodian before such a commencement.

The conditions under which a trustee or debtor-in-possession may assume an unexpired lease are set forth in detail in the Bankruptcy Code [*see 11 U.S.C. § 365*]. The bankruptcy trustee has the right to assume or reject the bankrupt tenant's lease, subject to the court's approval [*11 U.S.C. § 365(a)*]. If there has been a default in the lease, the trustee must provide (1) a cure to the default or adequate assurance of the default's cure, (2) compensation for any loss to the landlord or any party other than the debtor resulting from the default, and (3) assurance of future performance under the lease [*11 U.S.C. § 365(b)(1)*; *see 11 U.S.C. § 365(b)(2), (3)*]. The trustee is not required to cure a default that is a breach of a non-monetary obligation, unless the default arises from a failure to operate in accordance with terms of the lease [*11 U.S.C. § 365(b)(1)(A)*].

When a lease of real property in a shopping center is involved, special assurances of future performance must be provided, including an assurance that any percentage rent due under the lease will not decline substantially [*see 11 U.S.C. § 365(b)(3)*; *see also* Ch. 34E, *Shopping Centers: Leasing and Operation*].

If the trustee does not assume an unexpired nonresidential lease by the earlier of the date that is (1) 120 days after the date of the order for relief or (2) the date of the entry of an order confirming a plan, the lease is considered to have been rejected [*11 U.S.C. § 365(d)(4)(A)*]. However, the court may grant a 90-day extension before the expiration of the 120-day period, on the motion of the trustee or landlord for cause. The court may grant subsequent extensions only with the prior written consent of the landlord in each instance [*11 U.S.C. § 365(d)(4)(B)*].

The Bankruptcy Code specifically provides that, subject to certain exceptions [*see 11 U.S.C. § 365(c)*], a bankruptcy trustee may assign an unexpired lease of the debtor despite any terms in the lease agreement prohibiting assignment [*11 U.S.C. § 365(f)(1)*]. The trustee may only assign a lease if it has assumed the lease and provided adequate assurance of future performance, whether or not there has been a default under the lease [*11 U.S.C. § 365(f)(2)*]. Lease provisions permitting a party to terminate or modify the lease on account of an assignment are declared to be ineffective in the case of an assignment by the trustee [*11 U.S.C. § 365(f)(3)*].

PRACTICE TIP:

Obtain Services of Bankruptcy Practitioner. If a notice terminating tenancy is served before the filing of the Petition for Bankruptcy, and if the notice period has expired as provided by state law before the Petition's filing, the automatic stay may not apply. In any situation involving bankruptcy, a bankruptcy practitioner should be obtained, at least for counseling. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesPowersBankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesProceduresBankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesTermination ClausesReal Property LawBankruptcyAutomatic StaysReal Property LawBankruptcyLeases



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17-34C California Legal Forms--Transaction Guide § 34C.21

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.21 Toxic Mold Protection Act

[1] Development and Adoption of Exposure Limits, Standards, and Guidelines

The Toxic Mold Protection Act of 2001 [*Health & Safety Code § 26101.7*] requires the Department of Health Services to convene a task force to advise the Department on the development of permissible exposure limits to mold, standards for assessment of molds in indoor environments, and standards for identification and remediation of mold [*Health & Safety Code § 26101.7*]. If the Department determines that it is feasible, the Department must adopt permissible exposure limits to mold for indoor environments that avoid adverse health effects [*Health & Safety Code § 26103*]. The Department is required to report its progress on developing permissible exposure limits for molds by July 1, 2003 [*Health & Safety Code § 26103(d)*]. The Department is also required to develop guidelines for the identification of molds [*Health & Safety Code §§ 26120-26125*] and remediation guidelines [*Health & Safety Code §§ 26131-26134*].

[2] Landlord's Disclosure Requirements; Remedial Action

The Act imposes disclosure requirements on landlords of commercial and industrial property, commencing on the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*Health & Safety Code § 26141(e)*]. After that date, landlords of commercial and industrial property must provide written disclosure to prospective and current tenants when the landlord knows that mold, both visible and invisible or hidden, is present that affects the unit or the building and the mold either exceeds permissible exposure limits to molds or poses a health threat according to guidelines developed by the Department [*Health & Safety Code § 26141(a)*]. The written notice must be provided to prospective tenants as soon as practicable and before entering into the rental agreement, and to current tenants in affected units as soon as is reasonably practical [*Health & Safety Code § 26141(b)*]. However, commercial and industrial landlords are exempt from providing written disclosure to prospective tenants if the presence of mold was remediated according to mold remediation guidelines developed by the Department [*Health & Safety Code § 26141(c)*].

Commercial and industrial landlords who know or have notice that mold is present in the building, heating system, ventilating or air-conditioning system, or appurtenant structures, or that there is a condition of chronic water intrusion or

flood, have an affirmative duty to assess within a reasonable period of time the presence of mold or condition likely to result in the presence of mold and conduct any necessary remedial action [*Health & Safety Code § 26143(a)*]. These requirements go into effect on the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*Health & Safety Code § 26143(b)*].

[3] Tenant Responsibilities

Any tenant of a commercial or industrial real property who knows that mold is present in the building, heating system, ventilating or air-conditioning system, or appurtenant structures, or that there is a condition of chronic water intrusion or flood, must inform the landlord of this knowledge in writing within a reasonable period of time. The tenant must make the property available to the landlord or his or her agents for appropriate assessment or remedial action as soon as is reasonably practicable if the landlord is responsible for maintenance of the property [*Health & Safety Code § 26142(a)*]. If the tenant is responsible for the property's maintenance, the tenant must inform the landlord in writing as soon as is reasonably practicable and correct the condition in compliance with the terms of the contract with the landlord [*Health & Safety Code § 26145(a)*]. These requirements go into effect on the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*Health & Safety Code §§ 26142(b), 26145(b)*].

[4] Enforcement

Public health officers, code enforcement officers, environmental health officers, city attorneys, and any other appropriate government entities may respond to complaints about mold and may enforce the standards adopted by the Department [*Health & Safety Code § 26154*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesToxic MoldReal Property LawEnvironmental RegulationIndoor Air & Water QualityReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.22

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.22 Application and Renewal Fees

A landlord may not require, demand, or cause to make payable the payment of "key money," however denominated, or the landlord's attorneys' fees incurred in preparing a lease or rental agreement, as a condition of initiating, continuing, or renewing a commercial lease or nonresidential rental agreement, unless the amount of payment is stated in the written lease or rental agreement [*Civ. Code § 1950.8(a), (b)*]. Any person who violates this prohibition is subject to a civil penalty of three times the amount of actual damages proximately suffered by the person seeking to obtain the lease or rental. In addition, that person is entitled to an award of costs, including reasonable attorneys' fees, reasonably incurred in connection with obtaining the civil penalty [*Civ. Code § 1950.8(c)*].

It is not unlawful under *Civ. Code § 1950.8* for a landlord merely to make a demand for "key money." Rather, for liability to attach under the statute, a plaintiff must allege that the landlord (1) made a demand for "key money" as a condition of initiating, continuing, or renewing a lease or rental agreement, and (2) failed to state the amount of the demanded payment in the resulting new written lease or rental agreement between the parties [*Edamerica, Inc. v. Superior Court (2003) 114 Cal. App. 4th 819, 828-829, 7 Cal. Rptr. 3d 921]* .

The prohibition against a verbal demand of "key money" does not prohibit the advance payment of rent, if the amount and character of the payment are clearly stated in a written lease or rental agreement [*Civ. Code § 1950.8(d)*]. It also does not prevent any person from charging a reasonable amount incurred in connection with business activities relating to the initiating, continuing, or renewing of a lease or rental agreement for nonresidential real property, such as costs relating to verification of the tenant's creditworthiness or other qualifications, or cleaning fees reasonably incurred in connection with the hiring of the real property [*Civ. Code § 1950.8(e)*]. In addition, the prohibition does not bar a person from increasing a tenant's rent for nonresidential real property to recover building operating costs incurred on behalf of the tenant, if the right to the rent, the method of calculating the increase, and the period of time covered by the increase is stated in the lease or rental agreement [*Civ. Code § 1950.8(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide §§ 34C.23-34C.99

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.23[Reserved]



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17-34C California Legal Forms--Transaction Guide § 34C.100

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.100 Basic Facts for All Parties

1. Basic information about landlord and tenant, such as:

a. Name.

b. Addresses (mailing, delivery, e-mail).

c. Telephone numbers (voice, fax message, cellular).

d. Legal status, as any of the following:
(1) Individual.
(a) Marital status.

(b) Name of spouse, if married.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Limited liability company (LLC).

(6) Joint venture.

(7) Unincorporated association.

(8) Fictitious Business Name filing.

PRACTICE TIP:

Obtain Appropriate Business Filings. If an individual or partnership does business under a fictitious business name, a copy of any fictitious business name filing should be obtained from the County Clerk. In addition, the attorney should obtain all filings of public record if the entity is a Corporation, LLC, or Limited Partnership. If there is a probate, the probate files should be examined, and certified copies of pertinent filings should be obtained. *By Benjamin Kaplan.*

(9) Estate.

(10) Revocable inter vivos trust.

(11) Public entity.

(12) Other.

2. Names, addresses, titles, and telephone numbers of any other parties, including:

NOTE:

The following is a list of potential participants in a nonresidential lease transaction. A client's proposed transaction may not require the services of all (or even most) of these parties. The list may be used to solicit from the client information for participants in the transactions and also may be used as a checklist of professionals whose services may be needed.

a. Attorney representing other party.

b. Real estate broker or salesperson representing each party.

c. Accountant representing each party.

d. For multitenant building, tenant's association.

e. If building or other improvements are to be constructed on leased premises:

(1) Contractor.

(2) Architect.

(3) Engineer.

(4) Surveyor.

(5) Lender(s) for construction and permanent financing.

(6) Governmental agency with approval power over project.

f. Lender for each party.

g. Title company that will insure tenant's leasehold interest.

h. Hazardous waste and toxic investigation specialists.

3. Additional information concerning any parties who are not individuals, such as:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

4. Steps already taken by client in connection with transaction, for example:

a. Whether option or agreement to lease has been executed.

b. Whether lease has been executed.

c. If transaction involves purchase or construction by landlord, whether landlord has obtained preliminary or binding commitment for financing.

5. Steps that client wants attorney to perform, for example:

a. Negotiating terms of proposed transaction.

b. Drafting lease and related documents.

c. Reviewing lease and related documents drafted by another.

d. Advising client on rights under executed lease.

e. Coordinating transaction that requires construction of building or other improvements on leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal

Property LawOwnership & TransferBusiness & Corporate Entities



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17-34C California Legal Forms--Transaction Guide § 34C.101

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.101 Additional Facts Pertaining to Landlord

1. Date that landlord acquired property.

2. Manner in which landlord holds title, such as:

a. Corporation in corporate name.

b. Partnership in partnership name.

c. Partnership in name of one or more partners.

d. Limited liability company in name of limited liability company.

e. Unincorporated association [*see Corp. Code § 18000 et seq.*].

f. Individual.

g. Husband and wife in [*see Fam. Code § 750*]:
(1) Joint tenancy.

PRACTICE TIP:
Affidavit of Death of Joint Tenant. In any situation in which the property has been held by a husband and wife as joint tenants, and one has passed, do not assume that an Affidavit of Death of Joint Tenant has been recorded. Often it is overlooked. Such a recordation is to vest clear title in the surviving joint tenant. *By Benjamin Kaplan.*

(2) Tenancy in common.

(3) Community property.

(4) Community property with right of survivorship.

h. Co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy.

(2) Tenancy in common.

i. Executor or administrator of decedent's estate [*see Prob. Code §§ 9940-9948*].

j. Revocable inter vivos trust [*see Prob. Code § 15200 et seq.*].

3. Name in which landlord acquired title, if different from name in which landlord currently holds title [*see Civ. Code § 1096*].

4. Adverse claims against landlord's title, if any.

PRACTICE TIP:
Conduct Chain of Title Search. A chain of title search should pick up any Notice of Pendency of Action, as well as any Abstracts of Judgment related to the subject property. *By Benjamin Kaplan.*

5. Pending litigation affecting property, if any.

6. Easements burdening or benefiting property, if any.

PRACTICE TIP:
Easements. Easements that are not of record may be *big* problems if they surface after the transaction has closed. There is no substitute for "walking the property" as it may disclose the potential for problems, both of encroachments and ingress and egress. Moreover, the "standard" title insurance policies do not protect from easements that are not of record, and special endorsements must be obtained to deal with particular situations. *By Benjamin Kaplan.*

7. Other encumbrances or liens against property, if any.

8. For any existing loan on property:

a. Name of original lender.

b. Name of current holder or beneficiary, if different.

c. Approximate unpaid principal balance.

d. Nature of any existing delinquencies or defaults.

9. If landlord is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

c. That corporation is "active" and in good standing.

NOTE:
For discussion of the authority of a corporation to lease real property and for verification of its current active status, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

10. If landlord is a partnership:

a. And partnership holds title in partnership name, names of partners authorized to sign lease.

b. And title is held in name of one or more of partners, names of these partners.

NOTE:
For discussion of the authority of a partnership to lease real property and for verification of its current active status, see Ch. 15, Part A, ***Formation of General Partnerships***.

11. If landlord is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name of manager(s) if other than members.

c. That limited liability company is "active" and in good standing.

NOTE:
For discussion of the authority of a limited liability company to lease real property and for verification of its current active status, see Ch. 12C, ***Limited Liability Companies*** .

12. If landlord is an unincorporated association [*see Corp. Code § 18000 et seq.*]:

a. Names of members if articles or bylaws require approval by members.

b. Name of any officers authorized to execute lease on behalf of association.

NOTE:
For discussion of the authority of an unincorporated association to lease real property, see Ch. 34A, ***Prelease Forms*** .

13. If landlord is an estate:

a. Name of estate's guardian, conservator, executor, or administrator.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name and location of court with jurisdiction over estate.

PRACTICE TIP:

Use Caution When Dealing With an Estate. Do not accept anyone's oral or written representation as to whom or what has authority to do anything, unless you have a document that is a court filing, a public record, that you have personally obtained. Moreover, authority in probate proceedings vary. Some probates require prior court approval, or even public bidding on the transaction. Others have executors who are empowered to transact business and only subsequently report to the court what has occurred. Do not rely on anyone to do the task properly. *By Benjamin Kaplan.*

14. If landlord is a public entity:

a. Governing body for entity.

b. Date on which governing body approved or will approve lease.

15. Zoning classification of leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawTitle QualityGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.102

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.102 Additional Facts Pertaining to Tenant

1. Type of business to be conducted by tenant on leased premises.

2. When tenant will be moving its existing business to premises to be leased under this transaction, including:

a. If tenant owns property on which existing business is located:
(1) Status of property's sale or lease.

(2) Date by which tenant must deliver possession to buyer or tenant.

b. If tenant leases its present business location:

(1) Whether any termination notice has been given to tenant, and if so, date of that lease's termination.

(2) Whether tenant has given landlord notice of intent to vacate, and if so, date of required vacation.

(3) Required notice period under lease for present business location for tenant to terminate lease.

(4) Whether tenant is currently in default under lease for current business location, and if so, nature of default.

c. Date by which tenant must have possession of premises to be leased under this transaction.

PRACTICE TIP:

Dispossessed Tenants. The entire issue of "timing" is critical. First, there is no guarantee that the tenant who is being dispossessed will in fact move. One must be careful in counseling your client to point this out. Moreover, various leases contain very heavy punitive clauses if the tenant does not move after termination of tenancy. Although one would think that this "cuts both ways" in terms of the tenant who is being dispossessed for your client, it rarely works that way. For example, it could be that the tenant being dispossessed does not have such a punitive lease clause in his/her lease and your client does. Serious thought should be given to the opportunity cost-benefit of retaining possession of your clients' premises until it appears that the other tenant is going to move. In any event, do not back your client up against a termination of a fixed-term tenancy. *By Benjamin Kaplan.*

3. If tenant is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

NOTE:

For discussion of the authority of a corporation to lease real property and for verification of its current active status, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

4. If the tenant is a partnership, names of partners authorized to sign lease.

NOTE:

For discussion of the authority of a partnership to lease real property and for verification of its current active status, see Ch. 15, Part A, ***Formation of General Partnerships*** .

5. If tenant is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name of manager(s) if other than members.

NOTE:

For discussion of the authority of a limited liability company to lease real property and for verification of its current active status, see Ch. 12C, ***Limited Liability Companies*** .

6. If tenant is an unincorporated association [*see Corp. Code § 18000 et seq.*], names of officers or members authorized to execute lease.

NOTE:

For discussion of the authority of an unincorporated association to lease real property, see Ch. 34A, ***Prelease Forms*** .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property

LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34C California Legal Forms--Transaction Guide § 34C.103

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.103 Documents Pertaining to Landlord

1. Copy of any correspondence between landlord and tenant.

2. Deed to property.

3. Property profile or preliminary title report issued for property.

PRACTICE TIP:

Do Not Rely on Preliminary Title Report. A preliminary title report is "an offer to enter into a contract of insurance," not insurance. Thus, it is not something that should be relied upon. It is "a snapshot of title" at one point in time, and may not reflect a myriad of events which are material, but no longer of record for the purposes of the report. Mention must be made as to each entity as to the necessity of obtaining its current "status." *By Benjamin Kaplan.*

4. Any agreement creating easements burdening or benefiting property.

5. Instruments or documents creating or asserting liens against property.

6. Any notes, deeds of trust, mortgages, or other documents relating to existing security interests in property.

7. For multitenant building, copy of any building rules and regulations.

8. Copy of any recorded declaration or Covenants, Conditions, and Restrictions affecting property.

9. Any documents evidencing zoning relief, for example:

a. Conditional use permits.

b. Variances.

10. If landlord is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*].

11. If landlord is a partnership holding title in its name, certified copy of statement of partnership authority filed in county where land is located [*see Ch. 15, Part A, Formation of General Partnerships, § 15.285*].

12. If landlord is a limited liability company:

a. Certified copy of articles of organization filed with Secretary of State.

b. Copy of operating agreement (if members have appointed manager for company).

13. If landlord is an unincorporated association:

a. Copy of articles of association.

b. Copy of bylaws.

c. Copy of recorded statement of unincorporated association.

14. If landlord is an estate or trust, copy of will or trust instrument naming executor or trustee and copies of Letters Testamentary and other filings that may be relevant.

15. If transaction involves new construction, copies of following, to extent available:

a. Contract between owner and design professional, for example, architect [*see* Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals*].

b. Construction contract documents, including: [*see* Ch. 30D, *Construction Contracts and Subcontracts*]:

(1) Owner-general contractor agreement.

(2) Drawings and specifications.

(3) Building permits.

(4) Use permits.

c. For project financing, the following:

(1) Binding loan commitments for construction and permanent financing.

(2) Deed(s) of trust executed to secure construction or permanent financing.

PRACTICE TIP:

Obtain Copies of All Filings. In any transaction involving real property it is relatively inexpensive, and productive, to obtain copies of all filings since the landlord's acquisition of title, at the County Recorder's office. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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17-34C California Legal Forms--Transaction Guide § 34C.104

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.104 Documents Pertaining to Tenant

1. Copy of any letters of intent or other correspondence between landlord and tenant.

2. Any option agreement for purchase of leased premises executed by landlord and tenant.

3. If tenant is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*].

4. If tenant is a partnership, certified copy of statement of partnership authority filed in county indicating authority of partner to bind partnership to lease [*see Ch. 15, Part A, Formation of General Partnerships, § 15.285*].

5. If tenant is a limited liability company:

a. Certified copy of articles of organization filed with Secretary of State.

b. Copy of operating agreement (if members have appointed manager for company).

6. If tenant is an unincorporated association:

a. Copy of articles of association.

b. Copy of bylaws.

PRACTICE TIP:

Obtain Copies of All Documents From Your Client. Do not think that the caveats on obtaining documents are addressed solely to concerns related to "the other side." Your client is a potential source of misinformation. You need to obtain copies of all organic documents from your client. For example, just because a trust document identifies the properties that are held by a trust does not mean that title to such properties was ever transferred into the trust's name. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34C California Legal Forms--Transaction Guide §§ 34C.105-34C.109

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§§ 34C.105[Reserved]



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B. Preliminary Determinations

17-34C California Legal Forms--Transaction Guide § 34C.110

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.110 Capacity and Authority of Parties

NOTE:
This Part is a list of issues to review and negotiate with the parties. The sections in this Part correspond with the sections in Part D, Drafting Guide, and the two Parts can be used together to determine what should be included in the lease agreement.

1. If either party is a corporation, determine whether board of directors has adopted resolution authorizing corporation to enter into lease [*see* Ch. 34A, *Prelease Forms*].

2. If either party is an unincorporated association, determine whether articles of association or bylaws require resolution by authorizing board and/or approval by association's members [*see* Ch. 34A, *Prelease Forms*].

NOTE:
For a detailed list of the determinations necessary to confirm required capacity and consent to enter into a lease, including those determinations that would apply to individuals, see the Transaction Guide to Ch. 34B, *Residential Leases*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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17-34C California Legal Forms--Transaction Guide § 34C.111

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.111 Conditions of Lease

1. Determine whether there any conditions to lease's effectiveness and commencement of its term, for example:

a. Delivery of possession of leased premises on or before specific date.

b. Ability to obtain zoning variance for tenant's intended business use.

c. Ability to obtain business or other license required for operation of tenant's business.

d. If landlord is required to construct new building, landlord's ability to obtain financing.

2. Ascertain deadline for satisfaction of conditions.

3. Determine what steps, if any, party must take to indicate satisfaction of condition (for example, written notice to other party).

4. Determine what effect failure of condition will have, such as:

a. Automatic cancellation of lease.

b. Cancellation on written notice.

c. Option or obligation of party intended to benefit from condition to do one of

following:

(1) Extend deadline for satisfaction of condition.

(2) Cancel lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.112

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.112 Term of Lease

1. Ascertain lease's primary term, including:

a. Length of term.

b. Whether term commences on:
(1) Specified date.

(2) Occurrence of specified event.

(3) Completion of construction and delivery of premises.

2. Ascertain options to extend (number and duration).

3. Determine whether occurrence of any event (other than tenant's default) will give either party right to terminate lease before its natural expiration, for example:

a. Landlord's inability to obtain financing.

b. Tenant's inability to obtain use permit.

c. Tenant's loss of legal right to operate its particular business.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34C California Legal Forms--Transaction Guide § 34C.113

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.113 Rent and Other Payments to Landlord

1. For fixed or minimum rent under lease, ascertain:

    a. Amount of minimum rent.

    b. When rent commences.

    c. At what intervals rent is payable.

2. For retail lease, determine whether tenant will be required to pay percentage rent, and if so:

    a. Amount of percentage rent.

    b. When rent commences.

    c. At what intervals it is payable.

    d. On what basis percentage rent will be calculated, for example, gross receipts of tenant.

    e. Whether percentage rent is in addition to, in lieu of, or an offset against, minimum rent.

3. Ascertain whether amount of basic or minimum rent will increase over lease's term, by any of the following:

a. Fixed dollar amounts at scheduled intervals.

b. Increased market value of premises.

c. Increases tied to:
(1) Property taxes.

(2) Operating expenses.

(3) Consumer price index or some other index for inflation.

4. Determine whether tenant will be required to post security deposit, and if so, in what amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.114

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.114 Use of Premises

1. Determine whether tenant's use of premises will be limited to specific business, and if so, what business.

2. Determine whether tenant will have right to change its use of premises during lease's term, and if so, subject to which of the following:

a. With landlord's prior approval.

b. Without landlord's prior approval.

c. Any other conditions.

3. Ascertain whether there will be any specific restrictions on tenant's use, such as prohibitions against:

a. Nuisance, waste, and unlawful purposes.

b. Use or storage of hazardous materials and substances.

c. Insurance hazards.

4. Determine whether tenant and/or landlord will be restricted from operating a similar business within certain radius of premises, and if so, how many miles is the radius.

5. Determine whether tenant will be required to continually operate business during certain hours, and if so, what hours.

6. Determine whether tenant's use will be restricted by any Covenants, Conditions, and Restrictions or building rules and regulations.

7. For other property owned by landlord:

a. Determine whether landlord will be restricted from leasing to other tenants operating similar businesses.

b. Ascertain whether landlord will be required to perform any affirmative acts on other property for tenant's benefit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawRestrictive CovenantsGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.115

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.115 Common and Parking Areas

1. Determine whether tenant will have right to use common and/or parking areas.

2. Ascertain who is obligated to maintain common areas.

3. If landlord maintains common areas, determine whether tenant is required to reimburse landlord for expenses.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.116

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.116 Signs and Trade Fixtures

1. Determine whether there are any restrictions for tenant in installing signs, and if so, subject to which of the following:

    a. Landlord's consent is required.

    b. Tenant must comply with rules and regulations for development or building.

2. Determine whether tenant is entitled to remove its trade fixtures at term's end, provided tenant repairs any damage caused by removal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsGeneral OverviewReal Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.117

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.117 Improvements and Alterations

NOTE:
See Ch. 34D, ***Ground Leases*** , for a lease in which a tenant is required to construct a new building.

1. If landlord will be constructing a new building, determine:

a. Preparation, timing, and cost of preliminary and final plans and specifications and cost estimates.

b. Deadline for completing construction and delivering possession to tenant.

c. Whether tenant will have right to terminate if construction is not completed within certain time period.

PRACTICE TIP:
Be Aware of Construction Issues. In any situation regarding construction of a new building by the landlord, if your client is the tenant, you must advise your client of the probability of construction delays. If the tenant is sharing in the costs of construction then you should be taking steps to ascertain the degree of control the tenant will have in the process. The entire area of construction is replete with problems, delays, cost overruns, and any number of potential difficulties. *By Benjamin Kaplan.*

2. If landlord will be making improvements to existing building, determine:

a. Nature and scope of improvements to be made.

b. Deadline for completing improvements and delivering possession to tenant.

c. Whether tenant will have right to terminate if improvements are not completed within certain time period.

3. Ascertain tenant's rights to make alterations or improvements, including:

a. Type of alterations or improvements permitted, for example:

(1) Interior, nonstructural.

(2) Interior, including structural.

(3) Exterior, nonstructural.

(4) Exterior, including structural.

b. Any conditions to tenant's right, for example:

(1) Advance notice to be given to landlord.

(2) Landlord's prior written approval for:
(a) Any improvement or alteration.

(b) Only improvements or alterations exceeding specified dollar amount.

(c) Only structural improvements or alterations.

(3) Whether landlord's approval is not to be unreasonably withheld.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.118 Taxes and Utilities

1. Ascertain which party will be obligated to pay the following:

a. Property taxes.

b. Utilities.

2. For multitenant building in which expenses for utilities and taxes are to be shared pro rata or on some other basis among tenants, determine formula to be used in determining each tenant's share.

3. Ascertain items that parties agree to include or exclude under each general category, for example:

a. For utilities:
(1) Air conditioning.

(2) Electricity.

(3) Gas.

(4) Water.

(5) Sewer.

(6) Garbage pickup and disposal.

(7) Other.

b. For real property taxes:

(1) Real property taxes.

(2) General assessments.

(3) Special assessments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.119 Insurance

1. Ascertain which party will be required to maintain and pay cost of insurance on:

    a. Leased premises.

    b. Any common areas.

2. For each party required to insure, ascertain:

    a. What types of insurance are required, for example:
    (1) Fire and extended coverage.

    (2) Public liability insurance.

    (3) Boiler and machinery insurance.

    (4) Products liability insurance.

    (5) Plate glass insurance.

    (6) Dramshop liability insurance.

    (7) Business interruption insurance.

(8) Earthquake insurance.

(9) Flood insurance.

(10) Personal property insurance.

b. What amounts of insurance are required.

PRACTICE TIP:

Insurance. The time for the tenant to ascertain the availability of coverage and the cost of coverage is before the tenant enters the lease. Obtaining the landlord's "standard" form lease, which contains the insurance clause in the beginning of the transaction is essential. Copies of *all* the insurance provisions (including by example only "waiver of subrogation" and "named additional insureds") should be immediately sent to tenant's insurance broker. It is amazing how leases demand primary coverage of types or in amounts which are not available, but may be accomplished by a less expensive umbrella policy not mentioned in the lease. Do not think about being able to rewrite the lease after you have entered it. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceBusiness Interruption InsurancePremises & OperationInsurance LawExcess InsuranceUmbrella PoliciesInsurance LawGeneral Liability InsuranceGeneral OverviewInsurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceFlood InsuranceReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.120

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.120 Repairs and Maintenance

1. Ascertain which party will be responsible for maintaining and repairing the following:

a. Leased premises, including:
(1) Structural portions, including roof, exterior walls, and foundation.

(2) Nonstructural portions.

(3) Plate glass.

(4) Janitorial services for leased space in multitenant building.

b. Common areas.

2. Ascertain which party will be responsible for making repairs and improvements required by governmental laws and regulations during lease's term, including:

a. Laws relating to tenant's specific use of premises.

b. Laws related to any business use of premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease

AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.121

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.121 Destruction of Premises

1. Determine whether either party is obligated to repair or rebuild premises in event of:

    a. Partial destruction.

    b. Total destruction.

2. Determine whether either party has right to terminate lease for:

    a. Partial destruction.

    b. Total destruction.

3. Ascertain what destruction will give rise to obligation to rebuild, including:

    a. Type of destruction, such as:
    (1) From any cause.

    (2) From any cause for which lease requires either party to carry insurance.

    b. Extent of destruction.

4. Ascertain party to whom insurance proceeds will be paid to, for example:

a. Party obligated to rebuild.

b. Insurance trustee.

5. For reconstruction period, determine:

a. Commencement and completion dates.

b. Effect on rent, for example:

(1) Total or partial abatement.

(2) Continuation of full amount rent.

6. Ascertain any events that will give party obligated to rebuild a right to terminate lease in lieu of rebuilding, for example:

a. Destruction occurring during last part of lease term.

b. Destruction from uninsured cause.

c. Whether time required to rebuild will exceed length of time period agreed on in lease.

d. Whether rebuilding cost will exceed maximum dollar amount agreed on in lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFrustration of Purpose



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17-34C California Legal Forms--Transaction Guide § 34C.122

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.122 Condemnation

1. For partial condemnation, determine:

    a. Whether lease will continue in effect as to any portion not condemned.

    b. Whether amount of rent payable will be reduced pro rata or on some other basis.

    c. Who will have obligation to do any necessary restoration.

2. Ascertain allocation of condemnation award, for example:

    a. Landlord and tenant will each recover award for its interests in lease.

    b. Landlord will receive entire award.

    c. Landlord will receive entire award, except that tenant will recover costs of removing fixtures and for amortized value of improvements made by tenant that are not removed.

PRACTICE TIP:
Condemnation Clauses. Be careful with condemnation clauses if the landlord is a governmental or quasi-governmental agency. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsGeneral OverviewReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawFixtures & ImprovementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.123

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.123 Assignment and Subletting

1. Determine whether any restrictions will be placed on tenant's right to sublet or assign leased premises, for example:

a. Blanket prohibition against assignment, sublease, or both.

b. Permissible only with landlord's prior approval, which may not be unreasonably withheld.

c. Permissible without landlord's prior approval.

2. If tenant may assign or sublet without landlord's approval, determine whether tenant's actions are subject to the following:

a. Landlord's right to terminate lease (recapture clause).

b. Landlord's right to share in any profits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.124 Miscellaneous Provisions

1. If tenant is to be granted option or right of first refusal to purchase premises, determine:

a. When and how it may be exercised.

b. Purchase price stated either:
(1) As specific dollar amount; or

(2) By reference to a standard or a formula, for example:
(a) For option, property's fair market value at time option is exercised.

(b) For right of first refusal, at same price set forth in third-party bona fide offer to purchase property.

c. Other terms and conditions of purchase.

NOTE:

When a right of first refusal is conditioned on receipt of a bona fide third party offer to purchase the property, the right is not triggered by the mere conveyance of that property to a third party. Generally speaking, it is the concurrence of both an arms' length transaction and change in control of the property that characterizes a bona fide sale. The absence of the first factor, as in the case of a gift, or the second factor, as in the case of a transfer between entities owned and controlled by the same individuals, usually means that there was no sale, or no bona fide offer for sale, within the meaning of the typical right of first refusal. The court must look through the formalities of the transaction to determine its true nature. Courts will not tolerate schemes designed to avoid a contractual right. However, legitimate business or

personal reasons, untainted by an intent to avoid a contractual preemptive right, weigh in favor of finding that the right was not triggered by the transaction [*Hartzheim v. Valley Land and Cattle Co. (2007) 153 Cal. App. 4th 383, 393, 62 Cal. Rptr. 3d 815* (right of first refusal to purchase property in commercial lease not triggered when family partnership transferred interest in property to grandchildren, because transfer was not made pursuant to a "bona fide offer from any third party for the purchase" of the property as required by parties' agreement)].

2. If tenant is to have option or right of first refusal to lease additional space, determine:

a. Size and location of additional space.

b. Rent for additional space.

c. Other terms and conditions.

3. If parties agree that some or all of disputes arising under lease will be settled by arbitration, determine which disputes must be submitted to arbitration, for example:

a. All disputes regarding lease.

b. Only specific disputes designated in lease.

4. Determine whether tenant will be required to subordinate lease to subsequent deeds of trust, and if so:

a. Whether landlord will be required to provide nondisturbance agreements.

b. Whether tenant will be required to attorn to lender or lender's successor.

5. Determine whether tenant will be required to execute estoppel certificates on landlord's request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPurchase & SaleOption ContractsRights of First Refusal



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§§ 34C.125[Reserved]



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17-34C California Legal Forms--Transaction Guide § 34C.130

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.130 Representation of Both Parties to Lease

1. If requested to represent both parties to transaction:

a. Recommend that one party obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw their request and do not appear to have conflicting or potentially conflicting interests, take both of the following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party.

b. Obtain written consent from both parties to arrangement before accepting employment.

PRACTICE TIP:

Representing Both Parties to a Lease Is Not Advised. It is impossible to see how there can be an effective waiver of a conflict of interest that would permit any attorney to represent both parties to a lease transaction even if that attorney's role was "limited" to drafting an already reached agreement. Any attorney who enters into such an arrangement is simply looking for major problems with either or both clients. It would be akin to representing both parties in a dissolution of marriage proceeding in which substantial interests were involved. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.131 Review of Lender Requirements

1. If representing landlord, review restrictions and requirements contained in existing or proposed security instruments or loan documents for leases entered into by landlord.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.132

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.132 Review of Lease Drafted by Other Party

1. If lease has not yet been drafted by other party, assist client in negotiations with other party.

2. On receipt of lease, review lease to ensure that it is:

    a. Consistent with negotiated terms.

    b. Legally sufficient.

    NOTE:
    For a checklist of provisions that should or may be included in a nonresidential lease, see Part D of this Transaction Guide.

3. Obtain client's approval of final lease form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.133

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.133 Drafting and Execution of Lease; Recording Memorandum of Lease

1. Draft lease.

NOTE:
For a drafting guide for a nonresidential lease, see Part D of this Transaction Guide.

2. Execute lease.

NOTE:
The execution requirements for a lease depend on whether the landlord or tenant is an individual or other type of legal entity. These requirements are discussed in the Transaction Guide to Ch. 34B, ***Residential Leases***.

3. Record Memorandum of Lease.

a. If representing tenant who desires to impart constructive notice of its leasehold interest, prepare Memorandum of Lease for recording purposes [*see § 34C.203* for discussion and sample Memorandum of Lease].

b. Execute Memorandum of Lease with acknowledgment and certification of signatures of executing parties by authorized offer [*see Gov. Code § 27287*].

NOTE:
The same execution requirements that apply to the lease apply to a Memorandum of Lease. For an outline of these requirements, see the Transaction Guide to Ch. 34B,

Residential Leases.

c. Record Memorandum of Lease in county where property is located [*Civ. Code §§ 1169, 1170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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§§ 34C.134[Reserved]



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AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

NOTE:

This Part is a checklist of provisions that the attorney should or may include in a lease agreement. If the attorney is reviewing a lease prepared by another party, this list may be used to evaluate the sufficiency and scope of that lease. The attorney will need the information included in Part A, Client Interview--Facts and Documents, and a resolution of the issues referred to in Part B, Preliminary Determinations, to complete the lease drafting or review.

PRACTICE TIP:

Drafting Services. When an attorney is presented with a long lease for review, that attorney should not assume that the client wants full redrafting of the lease. It is very important that the attorney discuss with the client and memorialize the various consideration, legal and financial, which enter into a decision of the scope of the attorneys services before the work is undertaken. Keep in mind that attorneys almost always underestimate the amount of time which will be taken in drafting and review. Care must be taken not to leave the impression with the client that the attorney is entering into a fixed fee arrangement unless that is in fact the case. Estimates must therefore be carefully explained and the client kept advised as to how the work is progressing. When there is a limited budget for fees, the client must be informed of the dangers of a less than complete review, but may be compelled to limit the review to various identifiable "crucial" clauses. *By Benjamin Kaplan.*



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17-34C California Legal Forms--Transaction Guide § 34C.140

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.140 Introductory Provisions and Description of Premises

1. Draft preamble, including [*see* introductory paragraphs of §§ 34C.200[2], 34C.201[2], 34C.202[2]]:

a. Date of lease.

b. Information concerning parties to lease, including [*see* Part A of this Transaction Guide]:
(1) Full names.

(2) Status and capacity.

c. Agreement of parties to enter into lease.

2. Describe premises to be leased, for example:

a. If leased premises is free-standing building or building within retail center or industrial park, set forth [*see* introductory paragraphs of §§ 34C.200[2], 34C.201[2]]:

(1) Street address.

(2) Legal description in body of lease or by attaching and incorporating by reference exhibit containing legal description.

b. If leased premises consists of space in multitenant building, set forth [*see* introductory paragraph of §

34C.202[2]]:

(1) Street address of building.

(2) Description of individual leased space in body of lease, or attach and incorporate by reference exhibit containing building's floor plan with leased space marked in red or otherwise delineated.

c. If tenant is to have option or right of first refusal to lease additional space, include provision that describes option or right of first refusal [*see §§ 34C.213[2]*, *34C.214[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.141

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.141 Term of Lease

1. Draft provision regarding lease's primary term [*see §§ 34C.200[2]*, Section 1.01, *34C.201[2]*,Section 1.01, *34C.202[2]*, P 1].

2. Draft provision regarding commencement date of term, such as:

a. Specified date.

b. On occurrence of some stated event [*see § 34C.210[2]*].

c. On completion of construction [*see § 34C.211[2]*].

3. If tenant has one or more options to extend lease's term, include provision providing for this right [*see, e.g., §§ 34C.200[2]*, Section 1.02, *34C.201[2]*, Section 1.02, *34C.202[2]*, P 1; *see also § 34C.212[2]* for alternative provisions].

4. Draft holdover provision [*see §§ 34C.200[2]*, Section 1.03, *34C.201[2]*, Section 1.04, *34C.202[2]*, P 1].

5. If landlord has right to cancel lease if tenant is unable to obtain financing, include provision providing for this right [*see § 34C.251[2]*].

6. Prepare provision regarding tenant's rights to cancel lease, for example:

a. On a stated event, for example, tenant's inability to obtain use permit [*see § 34C.272[2]*].

b. If landlord fails to deliver possession of premises within certain time period [*see § 34C.200[2]*, Section 1.05].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenanciesTenancies at Sufferance



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17-34C California Legal Forms--Transaction Guide § 34C.142

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.142 Rent and Other Payments to Landlord

1. Draft minimum rent provision [*see §§ 34C.200[2]*, Section 2.01(a), 34C.201[2], § 2.01(a), 34C.202[2], P 2].

2. Prepare provisions regarding any increases or additional minimum rent (escalation clause) based on:

a. Fixed increases of specified amount [*see § 34C.201[2]*, Section 2.01(a)].

b. Increase based on increase in market value of premises [*see § 34C.201[2]*, Section 2.01(b)].

c. Consumer price index [*see § 34C.200[2]*, Section 2.01(b)].

d. Increase in property taxes [*see § 34C.201[2]*, Section 2.02].

e. Increase in operating expenses [*see § 34C.202[2]*, P 3].

3. Draft security deposit provision [*see § 34C.220[2]*].

4. Draft percentage rent provisions [*see § 34C.200[2]*, Sections 2.02-2.06].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord &

TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.143

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.143 Use of Premises

1. Set forth tenant's permitted uses, for example:

a. Specific retail business [*see §§ 34C.200[2]*, Section 3.01, *34C.230[2]*].

b. Industrial use [*see §§ 34C.201[2]*, Section 4.01, *34C.230[2]*].

c. Office use [*see § 34C.202[2]*, P 4].

2. If tenant is to continually operate its business, include provision for this obligation [*see § 34C.200[2]*, Section 3.02].

3. Prepare provisions regarding restrictions on tenant's use, for example:

a. Prohibition against uses that will increase insurance premiums [*see §§ 34C.200[2]*, Section 3.03, *34C.202[2]*, P 5(a), 34C.230[2]].

b. Prohibition against waste, nuisance, or unlawful purposes [*see §§ 34C.200[2]*, Section 3.04, *34C.202[2]*, PP 5(b), 5(d), 34C.231[2]].

c. Prohibition against hazardous substances [*see § 34C.201[2]*, Section 4.01].

d. Prohibition against sales of specified items [*see § 34C.230[2]*].

4. For multitenant building, include provision obligating tenant to comply with building rules and regulations [*see § 34C.202[2]*, P 11(d)].

5. Draft provisions regarding any noncompetition and related covenants, for example:

a. Radius restriction for tenant [*see § 34C.200[2]*, Section 3.06].

b. Radius restriction for landlord [*see § 34C.200[2]*, Section 3.07].

c. Landlord's restriction of leasing to competitive business (exclusive use provision) [*see § 34C.232[2]*].

d. Landlord's obligation to perform affirmative acts on other property [*see § 34C.232[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.144

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.144 Common and Parking Areas

1. If tenant has right to use common areas, include provision providing for that right [*see § 34C.202[2]*, P 11].

2. If premises is a multitenant building, include provision providing for tenant's parking spaces [*see § 34C.202[2]*, P 12].

3. If there is a parking lot in retail or industrial development, include provisions providing for tenant's right to use parking lot [*see § 34C.233[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.145

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.145 Signs and Trade Fixtures

1. Draft provisions regarding tenant's right to install signs, for example:

   a. Tenant's unrestricted right to install signs in compliance with applicable laws [*see § 34C.200[2]*, Section 7.03].

   b. Requirement that signs be in compliance with laws and development's rules and regulations [*see § 34C.201[2]*, Section 4.03].

2. Draft provisions regarding tenant's trade fixtures, for example:

   a. Tenant may remove its trade fixtures on expiration of term subject to repairing any damage caused by removal [*see §§ 34C.242[2], 34C.200[2]*, Section 7.01, *34C.201[2]*, Section 3.05(b)].

   b. Any trade fixtures not removed become landlord's property [*see* §§ 34C. 242[2], 34C.200[2], § 7.02].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsGeneral OverviewReal Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.146

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.146 Improvements and Alterations

NOTE:
For a form in which the tenant is required to construct a new building, see Ch. 34D, ***Ground Leases*** .

1. Draft provisions regarding initial construction/improvements to premises, for example:

a. New building to be constructed by landlord [*see § 34C.243[2]*].

b. Improvements to existing building to be made by landlord [*see § 34C.202[2]*, P 8].

2. Prepare provisions regarding tenant's right to make alterations, such as:

a. Tenant can make alterations not impairing building's structure up to certain dollar amount without landlord's consent [*see § 34C.240[2]*].

b. Tenant can make nonstructural alterations with advance notice to landlord but structural alterations need landlord's consent [*see § 34C.240[2]*].

c. Tenant can make alterations with landlord's consent, not to be unreasonably withheld [*see § 34C.200[2]*, Section 5.05].

d. Tenant needs landlord's consent to any alterations; no requirement that landlord be reasonable [*see § 34C.202[2]*, P 6].

e. Tenant can make nonstructural alterations up to certain dollar amount without

landlord's approval provided advance notice is given; nonstructural alterations that exceed specified dollar amount and all structural alterations need landlord's approval, not to be unreasonably withheld [*see § 34C.201[2]*, Section 3.04].

3. Draft provisions regarding tenant's obligation to make repairs and/or capital improvements required by governmental laws and ordinances (compliance with laws), for example:

a. Tenant to make repairs and improvements triggered by tenant's specific use of premises [*see §§ 34C.200[2]*, Section 3.05, *34C.201[2]*, Section 4.02].

b. Tenant to make all repairs and improvements required by governmental laws and ordinances, whether related to tenant's specific use or not [*see § 34C.241[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.147

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.147 Taxes and Utilities

1. Draft utilities provision, for example:

   a. Tenant to pay for utilities [*see §§ 34C.200[2]*, Section 4.01, *34C.201[2]*, Section 10.02].

   b. Landlord to provide and pay for utilities [*see § 34C.202[2]*, P 13].

2. Draft provisions regarding real property taxes, such as:

   a. Tenant to pay all property taxes [*see § 34C.221[2]*].

   b. Tenant has right to contest amount of taxes [*see § 34C.221[2]*].

   c. Landlord to pay all property taxes; no reimbursement by tenant [*see § 34C.200[2]*, Section 4.03].

   d. Tenant to pay landlord for any increase in taxes over base year [*see § 34C.201[2]*, Section 2.02].

   e. Tenant to pay landlord prorata share of increase in operating expenses, which include taxes [*see § 34C.202[2]*, P 3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.148

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.148 Insurance and Indemnity

1. Prepare provisions regarding fire and extended coverage, for example:

a. Tenant to procure and pay for this insurance [*see §§ 34C.200[2]*, Section 6.04, *34C.201[2]*, Section 5.01].

b. Tenant to pay landlord prorata share of increase in operating expenses, which include insurance on building [*see § 34C.202[2]*, P 3].

c. Landlord to procure and pay for this insurance [*see § 34C.222[2]*].

2. Set forth provision requiring tenant to maintain public liability insurance for leased premises and name landlord as additional insured [*see §§ 34C.200[2]*, Section 6.02, *34C.201[2]*, Section 5.02, *34C.202[2]*, P 14].

3. Set forth provision requiring tenant to maintain personal property insurance on its fixtures and equipment [*see §§ 34C.200[2]*, Section 6.03, *34C.201[2]*, Section 5.04, *34C.202[2]*, P 15].

4. If tenant is required to maintain business interruption insurance, include provision for this obligation [*see § 34C.201[2]*, Section 5.03].

5. Set forth provision requiring tenant to maintain workers' compensation insurance [*see § 34C.201[2]*, Section 5.05].

NOTE:

Various standard provisions related to indemnity and subrogation are included in § 34C.222[2] and in each of the complete leases in this chapter [***see*** *§§ 34C.200[2]-34C.202[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceGeneral OverviewInsurance LawBusiness InsuranceBusiness Interruption InsurancePremises & OperationReal Property LawLandlord & TenantLease AgreementsLease ProvisionsTortsPremises Liability & PropertyLessees & LessorsGeneral OverviewWorkers' Compensation & SSDICoverageGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.149

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.149 Repairs and Maintenance

1. Draft provisions regarding repair and maintenance of leased premises, for example:

   a. Landlord to maintain structural portions; tenant to maintain nonstructural portions, including plate glass [*see §§ 34C.200[2],* Sections 5.02-5.04, *34C.201[2],* Sections 3.02, 3.03].

   b. Tenant to maintain both structural and nonstructural portions of building [*see § 34C.240[2]*].

   c. For multitenant building, landlord to provide cleaning services and repair and maintain leased space and building [*see § 34C.202[2],* P 9].

2. Draft provisions regarding maintenance of parking and other common areas, if any, for example:

   a. Landlord to maintain parking area used by more than one tenant [*see § 34C.233[2]*].

   b. Tenant to maintain parking area used by tenant only [*see §§ 34C.200[2],* Section 5.03, *34C.201[2],* Section 3.03(a), 34C.240[2]].

   c. For multitenant building, landlord to maintain all common and parking areas [*see § 34C.202[2],* P 11(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.150

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.150 Destruction of Premises

1. Draft provisions regarding restoration of leased premises in event of casualty, for example:

a. Landlord has obligation to rebuild, subject to right to terminate lease in certain events, for example [*see §§ 34C.200[2]*, Sections 8.01-8.03, *34C.202[2]*, P 17].:
(1) Uninsured casualty exceeding specified dollar amount.

(2) Casualty occurring near end of term.

(3) Repairs cannot reasonably be made within certain time period.

b. Tenant has obligation to rebuild for casualty covered by fire and extended coverage insurance; landlord has obligation to rebuild for other casualties; either party has right to terminate lease if casualty occurs near end of term [*see § 34C.201[2]*, Sections 6.01-6.05].

c. Tenant has obligation to rebuild for insured or uninsured casualties, subject to right to terminate lease in certain events, for example [*see § 34C.244[2]*]:

(1) Casualty occurs near end of term.

(2) Costs to rebuild will exceed stated percent of replacement value of premises.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsFrustration of Purpose



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34C California Legal Forms--Transaction Guide § 34C.151

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.151 Condemnation

1. Draft provisions regarding effect of condemnation of leased premises on lease, including:

a. For total condemnation, termination of lease.

PRACTICE TIP:
Termination Is Only Option for Total Condemnation. The termination of the lease on total condemnation is included in the complete lease forms in this chapter [*see §§ 34C.200[2]*, Sections 9.01-9.04, *34C.201[2]*, Sections 7.01-7.06, *34C.202[2]*, P 18]. Although the parties are free to make their own agreement in the lease regarding condemnation [*see Code Civ. Proc. § 1265.160*], a termination of the lease is the only realistic alternative if the whole property is taken. *By Publisher's Editorial Staff.*

b. For partial condemnation, for example:

(1) Tenant has right to terminate lease if more than certain percent of floor space or parking area is taken; if lease is not terminated, the following applies [*see* §§ 34C. 200[2], Sections 9.02, 9.03, 34C.262[2]]:
(a) Lease continues as to portion remaining.

(b) Landlord restores remaining premises.

(c) Rent is adjusted accordingly.

(2) Lease terminates as to portion of property that is taken, subject to the following [*see §§ 34C.201[2],*

Sections 7.02, 7.04, *34C.262[2]*]:

(a) Lease continues in effect for portion of property not taken.

(b) Rent is adjusted accordingly.

(3) Landlord or tenant may terminate lease if any part is taken, except that tenant may not terminate unless remaining portion is rendered useless for uses permitted under lease [*see § 34C.202[2]*, P 18].

2. Draft provisions regarding condemnation award, for example:

a. Landlord receives entire award and tenant waives its rights to any award [*see §§ 34C.200[2]*, Section 9.04, *34C.202[2]*, P 18], 34C.262[2]].

b. Landlord receives entire award except that tenant may recover compensation for the following [*see § 34C.201[2]*, Section 7.06]:

(1) Costs of removing tenant's trade fixtures.

(2) Value of improvements tenant has right to remove.

(3) Amortized value of improvements that cannot be removed.

c. Landlord and tenant are each entitled to award for their respective interests under Eminent Domain Law [*see § 34C.262[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.152

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.152 Assignment and Subletting

1. Draft provisions regarding tenant's right to assign or sublet premises, for example:

a. Tenant has right to assign or sublet with landlord's consent, not to be unreasonably withheld [*see §§ 34C.200[2],* Section 10.01, *34C.201[2],* Section 10.01, *34C.202[2],* P 19, 34C.260[2]].

b. Tenant has no right to assign or sublet lease [*see § 34C.260[2]*].

c. Tenant has unrestricted right to assign or sublet lease [*see § 34C.260[2]*].

d. Tenant may assign or sublet, but must share any profits with landlord [*see § 34C.260[2]*].

e. Tenant may assign or sublet, subject to landlord's right to terminate lease (recapture clause) [*see § 34C.260[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34C California Legal Forms--Transaction Guide § 34C.153

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.153 Default and Termination

1. Draft provisions regarding tenant's default and landlord's right to terminate lease based on tenant's default, including:

a. Tenant's default defined as failure to cure monetary and non-monetary defaults within certain time periods; abandonment for certain time period; bankruptcy and related proceedings [*see §§ 34C.200[2]*, Section 10.02, *34C.201[2]*, Section 9.03, *34C.202[2]*, P 20].

b. Landlord's right to terminate and recover damages [*see §§ 34C.200[2]*, Section 10.03, *34C.201[2]*, Section 9.01(b), 34C.202[2], P 21(b), 34C.270[2]].

c. Landlord's right to continue lease in effect after tenant's breach and collect rent as it becomes due [*see §§ 34C.200[2]*, Section 10.04, *34C.201[2]*, Section 9.01(a), 34C.202[2], P 21(a), 34C.271[2]].

NOTE:
If the landlord is to have this remedy, (1) the lease must provide for it, (2) the tenant's right to possession must not be terminated, and (3) the lease must permit the tenant the right to assign or sublet subject to reasonable conditions [***see*** *Civ. Code § 1951.4*; ***see also*** *§ 34C.271[1]* for discussion of this right].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.154

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.154 Miscellaneous Provisions

1. Draft subordination, nondisturbance, and attornment provisions [*see § 34C.250[2]*].

2. Draft provision requiring tenant to execute estoppel certificates [*see § 34C.261[2]*].

3. If tenant has option to purchase leased premises, include provision setting forth this right [*see § 34C.263[2]*].

4. If tenant has right of first refusal to purchase leased premises, include provision setting forth this right [*see §§ 34C.201[2]*, Section 1.03, *34C.264[2]*].

5. If parties have agreed to liquidated damages in event of breach, include provision providing for this remedy [*see § 34C.273[2]*].

6. If parties have agreed to arbitrate some or all of their disputes, include appropriate arbitration provisions [*see § 34C.280[2]*].

7. Draft attorneys' fees provisions [*see § 34C.274[2]*].

8. If parties have agreed to execute and record Memorandum of Lease [*see §§ 34C.133*, *34C.203*], include provision providing for this action.

NOTE:

The complete leases in this chapter also include standard clauses for force majeure (unavoidable delays), notice provisions, provisions for the binding effect of the lease on

successors and assigns, a partial invalidity provision, an entire agreement clause, and a time is of the essence clause [***see*** *§§ 34C.200[2]*, art. 11, 34C.201[2], art. 10, 34C.202[2], PP 24-28].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleOption ContractsRights of First Refusal



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

17-34C California Legal Forms--Transaction Guide §§ 34C.155-34C.199

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.155[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
A. Complete Leases

17-34C California Legal Forms--Transaction Guide § 34C.200

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.200 Retail Lease

[1] Comment

[a] Use of Form

This form is a retail lease providing for percentage rent. It is for a freestanding building to be used by a single tenant for retail purposes. As is common for a retail lease, the tenant is required to pay "percentage rent" [*see* [d] and [e], *below*, for discussion of minimum and percentage rent issues].

For a retail lease of space in a shopping center, see Ch. 34E, *Shopping Centers: Leasing and Operation* . For discussion of the description of the premises, including any appurtenances or easements, see *§ 34C.15*. For an example and discussion of an industrial lease, see *§ 34C.201*. For discussion and an example of an office lease, see *§ 34C.202*.

A tenant may want to record a short form or Memorandum of Lease to impart constructive notice of the lease's terms to all subsequent purchasers and mortgagees of the landlord [*see § 34C.203* for discussion and a sample Memorandum of Lease].

[b] Term of Lease

This form provides for a fixed term [*see* Section 1.01 of form; *see also § 34C.16* and Ch. 34B, *Residential Leases* , for discussion of the legal issues related to a lease's term]. For alternative provisions regarding the commencement of the lease term, see *§§ 34C.210* (term to commence on occurrence of specified conditions) and 34C.211 (term to commence on completion of construction by landlord).

This form also grants the tenant a one-time option to extend the lease's term for an additional designated term [*see* Section 1.02 of form]. The minimum rent payable during the extended term is *set forth in Section 2.01* of the form. The tenant's right to exercise the option is conditioned on the tenant's not being in default under the lease at the time the

option is exercised. For alternative provisions granting a tenant successive options to extend the term of a lease or providing for alternative rental increases during the option periods, see *§ 34C.212*.

PRACTICE TIP:

Provision for Extended Term. A provision to extend a lease term should expressly state when the tenant's notice of extension is effective; that is, whether the notice is effective when it is sent or when it is received [*see, e.g.*, Section 1.02 of form]. This will avoid later litigation over whether the tenant met the notice requirement. *By Myron Moskovitz.*

For discussion and lease provisions granting the landlord or the tenant the right to terminate the lease on the occurrence of a stated event, see *§ 34C.272*. For a specific provision granting the landlord the right to terminate the lease if financing cannot be obtained, see *§ 34C.251*.

[c] Landlord's Duty to Deliver Possession

A covenant of quiet enjoyment and possession during the lease term is implied in every lease [*Civ. Code § 1927*; *Baranov v. Scudder (1918) 177 Cal. 458, 462, 170 P. 1122]* . The landlord's failure to put a tenant in possession of the leased premises justifies the tenant's termination of the lease [*Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138]* . The proper measure of damages for a landlord's failure to deliver possession of the leased premises is the difference between the agreed rent and the rental value of the premises during the lease's term [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 884, 92 Cal. Rptr. 162, 479 P.2d 362]* .

PRACTICE TIP:

Landlord's Need for Flexibility in Delivering Possession. To avoid harsh consequences, landlords often insist on a lease provision that grants a landlord some flexibility in delivering possession when it may be needed, for example, when extra time is needed to evict a recalcitrant tenant or to complete tenant improvements the landlord is obligated to make. For example, the form in [2], *below*, specifies a commencement date, but specifies that if the landlord is unable to deliver possession by that date, the tenant may not terminate the lease and is not entitled to damages from the landlord [*see* Section 1.04 of form]. The tenant's only remedy is an abatement of rent until actual physical possession is delivered. However, if the landlord is unable to deliver possession within a stated grace period after the original commencement date, the tenant is granted the right to terminate the lease [*see* Section 1.05 of form]. If the projected date of delivery of possession is uncertain, as in the case of major construction to be completed by the landlord, the parties may want to provide for the alternative provision of a lease commencement date to coincide with delivery of possession [*see § 34C.211*]. The parties can also provide that the lease term would commence on the occurrence of some other event, such as obtaining a use permit or an alcoholic beverage license [*see § 34C.210*]. Another alternative provision that is more favorable to the tenant is to provide that the landlord must pay the tenant liquidated damages if there is a delay in delivery of possession [*see § 34C.273*]. For alternative provisions relating to the construction of the leased premises by the landlord, see *§ 34C.243*. *By Publisher's Editorial Staff.*

[d] Minimum Rent

[i] Amount of Minimum Rent

The amount of minimum rent, if any, required by a percentage lease is a matter of negotiation between the parties. This form provides for a basic fixed, or minimum rent [*see Section 2.01* of form] in addition to a percentage rent [*see* [e], *below*]. The minimum and percentage rental obligations are also in addition to the tenant's obligation to pay for such items as personal property taxes [*see Section 4.02* of form], insurance [*see Sections 6.02*-6.04 of form], and maintenance expenses [*see* Sections 5.03 and 5.04 of form].

The landlord (and the landlord's lender) may require the minimum rent to be an amount sufficient to cover the landlord's taxes, operating expenses, and loan payments. As an incentive, landlords may be willing to grant new tenants concessions in minimum rent during the early part of the lease term to permit the tenant to build up its business. The amount of minimum rent under a percentage lease is often lower than the fair market rental value of the leased premises.

For discussion and lease provisions relating to security deposits, see *§ 34C.220*.

[ii] Increase Based on Consumer Price Index

Many landlords of retail leases insist on a method of adjusting rent to keep pace with inflation. One method is to increase the rent according to proportionate increases in national or local consumer price indices. Probably the most common standard used is the Consumer Price Index published monthly by the Bureau of Labor Statistics of the U.S. Department of Labor. If the parties agree to employ the Consumer Price Index as the standard, they must determine which index they will use: the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W") or the Consumer Price Index for All Urban Consumers ("CPI-U") [*see Section 2.01*(b) of form]. The parties must also decide whether to use the national index or the local index. The Department of Labor publishes local indices for the principal metropolitan areas. Although a local index may be more accurate, it may be necessary to provide an alternative index in case the index is modified or provides for too volatile an increase [*see Section 2.01*(d) of form].

The lease should also specify the figures being used as the base index and how often rent will be adjusted [*see Section 2.01*(b) of form]. To protect the landlord from the minimum rent falling below a designated level through a cost of living adjustment provided for in a lease, the lease generally includes a provision stating that the minimum rent, notwithstanding any adjustment, may not fall below either the minimum rent originally set in the lease or the amount of minimum rent payable under the lease immediately before the most recent adjustment [*see Section 2.01*(c) of form].

For an alternative provision that requires the tenant to pay additional rent based on increases in the landlord's operating expenses, see *§ 34C.202[2]*, P 3. For a provision that requires the tenant to pay additional rent based on increases in property taxes, see *§ 34C.201[2]*, Section 2.02.

[e] Percentage Rent

[i] Calculating Amount

Most retail leases include a percentage rent provision in which the landlord collects as rent a specified percentage of the tenant's gross sales [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* . A percentage rent is advantageous to the landlord when a tenant operates a successful business because a higher generation of sales by a tenant results in the payment of increased rent to the landlord. Conversely, a percentage rent is advantageous to the tenant when a tenant experiences a downturn in business because the tenant pays lower rent under those circumstances.

A lease with percentage rent usually involves the payment of two separately computed amounts: (1) a fixed minimum rent [*see* [d], *above*] and (2) a percentage rent based on gross sales, gross receipts, gross revenues, or net profit [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 153, *Drafting Commercial Leases* (Matthew Bender)].

In this form, the tenant's percentage rent is the amount that a specified percent of the tenant's gross sales exceeds the minimum rent due [*see Section 2.02*(a) of form]. The term "gross sales" is defined [*see* Section 2.03 of form], as are items that may be excluded from gross sales [*see* Section 2.04 of form]. The form also provides that the tenant is required to maintain accurate books and records showing all gross sales made on the leased premises [*see Section 2.05* of form] and to submit quarterly and annual statements to the landlord [*see Section 2.06* of form]. The landlord has the right to have an audit performed of the tenant's books and records and, if an understatement of gross sales or rent in

excess of a stated percentage is disclosed. In addition, the form provides that the landlord has the right to require the tenant to pay the costs and expenses of the audit [*see Section 2.06* of form].

PRACTICE TIP:

Negotiate for Lease Provision That Keeps Records Confidential. The tenant's attorney might consider negotiating for a lease provision which provides that any information that the landlord obtains during an audit of the tenant's books and records must be kept confidential and used only to determine the proper percentage rent due, and must not be disclosed to any actual or potential competitor of the tenant. *By Myron Moskovitz.*

[ii] Amount and Time of Payment

When the parties to a lease have agreed to a percentage rent for the lease, they must determine whether the percentage rent will be based and paid on a monthly, quarterly, semi-annual, or annual basis.

PRACTICE TIP:

Annual vs. Monthly Sales as Basis for Percentage Lease. Tenants may prefer a basis of annual rather than monthly sales, so that heavy sales during peak seasons will be offset by lower sales during slow months. The landlord, however, may prefer a monthly basis, to obtain the percentage rent as it accrues rather than at the end of the year. In this form, percentage rent is payable monthly, but is subject to an annual adjustment if the tenant's monthly percentage rent payments exceed the total amount of percentage rent due on an annual basis [*see Section 2.02*(b) of form]. *By Publisher's Editorial Staff.*

PRACTICE TIP: Industry Standards to Determine Amount of Percentage Rent. The precise percentage of gross sales payable to a landlord under a percentage lease is also a matter of negotiation between the parties. However, as a starting point for negotiation, the parties should be aware of the particular percentages customarily used for the specific business to be conducted on the leased premises. The percentages currently applicable to specific businesses are published periodically in real estate trade directories and should be available from a commercial real estate broker. *By Publisher's Editorial Staff.*

[f] Use of Premises

A lease may limit the tenant's use of leased premises [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . If the lease includes a percentage rent clause, it is in the landlord's interest to maximize the tenant's revenue; thus, a commercial lease commonly will specify the business the tenant is to engage in, and will prohibit the tenant from engaging in any other business [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* .

PRACTICE TIP:

Broad "Use" Provision Is Beneficial to Tenant. The tenant's attorney should make sure that the "use" provision of the lease is *broad* enough to permit the sale of *all* products that the tenant plans to sell or *might* decide to sell during the lease's term--keeping in mind seasonal changes and possible changes in consumer tastes. *By Myron Moskovitz.*

In this form, the tenant's use is restricted to a particular type of retail business unless the tenant obtains the landlord's prior consent to another use [*see Section 3.01* of form]. For discussion of the legal issues related to the use of the premises, including the statutory rules applicable to nonresidential leases, and for alternative lease provisions for restricting or permitting certain tenant uses, see *§ 34C.230*.

Section 3.04 of the form is a provision prohibiting the tenant from committing waste or nuisance on the premises or using the premises for any unlawful purpose. For discussion of the law applicable to these issues, see *§ 34C.231[1]*.

PRACTICE TIP:

Tenant's Use of Premises. Unless there is good and substantial reason otherwise, the tenant should be permitted to make any lawful use of the premises, which does not conflict with the landlord's obligations to other tenants, and is suitable to the character of the building and the premises. *By Benjamin Kaplan.*

[g] Continuous Operation Provision

[i] Purpose

Because the amount of rent a landlord collects under a percentage lease is directly related to the success of a tenant's business, it is common for a landlord to require the tenant to continuously operate the business [*see Section 3.02*(a) of form]. Otherwise, as a general rule, there is no implied covenant on the tenant's part to continue to use the premises; the tenant may cease to use the premises for any purpose [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* .

However, as an exception to this general rule, even if a lease does not expressly include a covenant of continuous operation and/or a covenant restricting use of the premises to a particular purpose, the very fact that the lease provides for percentage rent may mean that such covenants may be implied [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* , especially in a lease in which there is no minimum rent or the minimum rent is not substantial [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142-143, 280 P.2d 775]* . "A substantial minimum" cannot be precisely defined [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 145, 280 P.2d 775]* ; therefore factual information on this issue must be examined before a covenant will be implied.

PRACTICE TIP:

Limit Operation of Business Clauses. Operation of Business Clauses should be limited solely to a retail context. Moreover, you do not want a situation where your client, as a tenant, is the only business in the complex. It is amazing to see how such clauses appear in office building leases in which instance the landlord usually disclaims any knowledge that they were included. *By Benjamin Kaplan.*

[ii] Measure of Damages for Breach

The measure of damages for breach of the covenant to remain in business ordinarily is the amount that the landlord would have received from the landlord's share of the proceeds of the business had the tenant operated it in its usual and customary manner [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146, 280 P.2d 775]* . The parties, however, may provide a different measure of damages in the lease. For example, in one case the court found that the parties made specific provision for the payment of damages in the event the tenant ceased to occupy the premises in a case in which (1) the lease contained an implied covenant, (2) the tenant failed after nine years of a 10-year lease to use the property for a retail sales business, and (3) the tenant's subsequent use was solely for storing merchandise [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146-147, 280 P.2d 775]* . According to the lease in *Lippman*, if the tenant sublet or assigned the premises, the tenant would be entitled to receive "the average monthly rental paid by Tenant to Landlord during the twelve months' period last preceding such" subletting or assignment [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146, 280 P.2d 775]* . In the event the tenant abandoned the premises, the tenant agreed to pay as damages the difference between the best rent obtainable by the landlord from a reletting of them and "the rent herein reserved" [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146, 280 P.2d 775]* . In effect, these provisions liquidated the damages to the landlord from a loss of a percentage of the income from the tenant's business if it ceased to occupy the premises. The court determined that it was a reasonable implication from these provisions that the parties agreed on the same measure of damages when that loss resulted from abandonment of the integral purpose for which the lease was made [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146-147, 280 P.2d 775]* .

In addition to the tenant's covenant of continued business operation, this form also contains a provision for damages in

the event of tenant's breach of this covenant [*see Section 3.02*(b) of form].

[h] Compliance With Laws

Section 3.05 of this form is a provision that obligates the tenant to comply with all laws and ordinances relating to the tenant's specific use of the premises, whether such laws are in existence at the time the lease is executed or subsequently enacted. For a discussion of the legal issues pertaining to this issue and an alternative provision allocating greater responsibility to the tenant, see *§ 34C.241*.

[i] Noncompetition Clauses

Sections 3.06 and 3.07 of this form are reciprocal "radius restriction" noncompetition clauses. The landlord and the tenant agree that they will not operate a business similar to the tenant's business within a designated geographical radius. When the landlord receives percentage rent from the tenant's business, the landlord has an interest in the tenant generating maximum sales at the landlord's location rather than distributing sales among several competing locations. The tenant who agrees to a radius clause restricting its own operation is likely to insist on the landlord's reciprocal restriction to eliminate competition from the landlord.

For alternative noncompetition provisions and further discussion of noncompetition covenants, see *§ 34C.232*.

PRACTICE TIP:

Noncompetition Clauses and Franchisees. A clause that landlord will not lease the premises to any competing business needs to be considered. If tenant is a franchisee, he or she may not have any control over the location of another franchise unless specified in its franchise agreement. Thus, any franchise agreement needs to be considered, including any clause drafted that takes such factors into account. *By Benjamin Kaplan.*

[j] Utilities and Taxes

Section 4.01 of this form requires the tenant to pay all utilities for the leased premises. This is common for the lease of a freestanding building. For a provision for a multitenant building that requires the tenant to pay a proportionate share of operating expenses that include utilities, see *§ 34C.202[2],* P 3.

In the absence of an express agreement with regard to paying taxes, the landlord generally has the obligation to pay all taxes assessed against the leased premises during the lease's term [*Lawrence v. F. W. Woolworth Co. (1965) 63 Cal. 2d 119, 121, 45 Cal. Rptr. 140, 403 P.2d 396]* . An exception exists, however, for taxes on improvements constructed on the leased premises by the tenant when the tenant, by the terms of the lease, is permitted to remove the improvements during or at the end of the lease term. Unless the lease provides otherwise, the tenant has this liability even though the tenant proves that it is unlikely he or she will remove the improvements [*Lawrence v. F. W. Woolworth Co. (1965) 63 Cal. 2d 119, 121-123, 45 Cal. Rptr. 140, 403 P.2d 396]* .

In this form, the landlord is required to pay all real property taxes on the property [*see Section 4.03* of form] and the tenant is required to pay all taxes or other charges imposed on personal property placed by the tenant on the premises [*see Section 4.02* of form].

For a provision that may be used in a net lease to require the tenant to pay all real property taxes on the leased premises, see *§ 34C.221*. For a provision that requires the landlord to pay all real estate taxes and the tenant to reimburse the landlord for any increase in taxes, see *§ 34C.201[2],* Section 2.02.

[k] Repairs and Maintenance

This form requires the landlord to maintain and repair structural elements of the leased building [*see Section 5.02* of form], and requires the tenant to maintain and repair nonstructural elements of the building and all other parts of the premises [*see* Section 5.03 of form], including plate window glass [*see* Section 5.04 of form].

PRACTICE TIP:

Pay Attention to Tenant's Obligations to Maintain Common Systems and Areas. When the tenant is obligating itself to maintain systems such as HVAC, then there has to be a great deal of care and attention to the history of those systems, as to whether they are to be exclusively used by tenant, under tenants control, or are even accessible to tenant without interference. The same concerns apply to "common areas," driveways, parking, and other paved surfaces. *By Benjamin Kaplan.*

For a lease provision that imposes all responsibility for repair and maintenance on a tenant, see *§ 34C.240*. For alternative provisions and discussion of the legal obligations of the parties to make repairs or alterations mandated by existing or new laws and regulations, such as laws pertaining to seismic retrofitting, asbestos abatement, and access for disabled persons, see *§ 34C.241*.

PRACTICE TIP:

Be Wary of Clause That Requires Acceptance of Premises in Their Present Condition. This form provides that the tenant must accept the premises, and improvements located on the premises, in their present condition [*see Section 5.01*]. However, this type of clause is a trap for the unwary. This is because other clauses in the lease interact with this clause which essentially says that there are no problems with the premises, which is unlikely at best, even in instances of new construction. *By Benjamin Kaplan.*

PRACTICE TIP: Compliance With Requirements Imposed by Government Agencies. Compliance with seismic upgrade or asbestos removal requirements imposed by a government agency might be extremely expensive. It is not clear whether a standard lease provision that requires the tenant to "comply with all applicable laws" imposes this expense on the tenant [*compare Brown v. Green (1994) 8 Cal. 4th 812, 829-834, 35 Cal. Rptr. 2d 598, 884 P.2d 55 , with Hadian v. Schwartz (1994) 8 Cal. 4th 836, 846-850, 35 Cal. Rptr. 2d 589, 884 P.2d 46* ; *see also Prudential Ins. Co. of America v. L.A. Mart (9th Cir. 1995) 68 F.3d 370, 373-374]* . To avoid expensive litigation, it is better if the parties expressly provide for these contingencies in the lease. *By Myron Moskovitz.*

PRACTICE TIP: Tenants Should Be Wary of Compliance With Laws Clause. Any compliance with law clause is a potential financial disaster for the tenant. There may be any number of events that may trigger the need for substantial expense, be it seismic retrofitting, new code compliance, or ADA compliance. Even in instances when ADA compliance, and local law compliance regarding the disabled has already occurred for specific premises, there is no guarantee that the authorities will not find non-compliance even when nothing has changed respecting the prior compliance. Although it may be disputed whether such things as ADA are covered by such a clause, when the triggering event is an act by the tenant, more likely than not the obligation will be imposed on the tenant. *By Benjamin Kaplan.*

In the absence of contrary provisions in a lease, a tenant only has the duty to use ordinary care for preserving the premises in safe and good condition [*see Civ. Code § 1928*] and to repair all deteriorations or injuries to the premises caused by the tenant's want of ordinary care [*Civ. Code § 1929*; *Lynn v. De Pue Warehouse Co. (1962) 198 Cal. App. 2d 742, 747, 17 Cal. Rptr. 841]* . Otherwise, a tenant has no general duty to repair the premises or to correct defective conditions [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671-672, 75 Cal. Rptr. 889, 451 P.2d 721]* . However, a tenant must, as the possessor of land, act as a reasonable person in managing the property in view of the probability of injury to others [*Civ. Code § 1714(a)*; *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

[l] Alterations by Tenant

This form requires the landlord's consent before any tenant alterations, and contains a covenant by the tenant to keep the premises free of mechanics' liens in the event alterations are made [*see Section 5.05* of form; *see also* discussion of mechanics' liens in § 34C.240[1][d]]. It also provides that any alterations become the landlord's property, but that the landlord may require the tenant to remove alterations and repair damage caused by the removal on the lease's termination [*see Section 5.05* of form]. For discussion of the law applicable to alterations made by a tenant to the leased premises, see *§ 34C.240[1]*. For alternative provisions for alterations by a tenant, see *§ 34C.240[2]*.

[m] Insurance and Indemnity

In the lease in [2], *below*, the tenant is required to procure and maintain (1) public liability and property damage insurance and (2) fire and extended coverage insurance for the leased premises [*see Sections 6.02* and 6.04 of form]. The tenant is also required to insure all of its own personal property [*see* Section 6.03 of form]. For a discussion of the rights and obligations of a tenant and landlord with regard to insurance, including the subjects of indemnity and insurance, and alternative insurance provisions for a lease, see *§ 34C.222*.

[n] Signs and Trade Fixtures

This form gives the tenant maximum flexibility in installing signs on the leased premises, subject only to compliance with any applicable governmental restrictions or requirements for signs [*see* Section 7.03 of form]. Sign restrictions are usually more stringent for a multitenant building.

This form also provides that the tenant is permitted to install any trade fixtures it deems advisable and to remove the trade fixtures, provided removal does not result in structural damage to the building and is accomplished within a designated time period [*see Sections 7.01* and *7.02* of form].

For a discussion of the law and alternative lease provisions relating to fixtures, including trade fixtures, see *§ 34C.242*.

[o] Destruction of Premises

If the lease does not require either party to restore leased premises that are destroyed, either party may terminate the lease in the event of such destruction [*Civ. Code §§ 1932(2), 1933(4)*; *Harvey v. Weisbaum (1911) 159 Cal. 265, 267, 113 P. 656]* . However, the parties to the lease may agree that one or the other party is obligated to rebuild the destroyed premises and the lease will continue in effect [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889, 451 P.2d 721]* . For further discussion of the law applicable to the destruction of the leased premises, see *§ 34C.244[1]*.

In this form, the landlord is required to rebuild the leased premises within a designated time if they are destroyed from any cause during the tenancy [*see* Section 8.01 of form]. However, the landlord is excused from this obligation and may elect instead to terminate the lease if any of the following occurs [*see* Section 8.02 of form]:

- The damage cannot be repaired within a designated time period agreed on by the parties;
- The cost to repair or rebuild from an uninsured cause exceeds a stated dollar amount; or
- The destruction occurs near the end of the lease term.

When the landlord is obligated to rebuild, a failure to complete construction within the time period agreed to by the parties gives the tenant the right to terminate the lease [*see* Section 8.01 of form]. During any period of construction in

which the tenant is unable to operate its business, the rent under the lease abates; if the tenant is able to continue operation of its business during the construction period, the tenant must continue to pay percentage rent but receives a reduction in minimum rent [*see* Section 8.03 of form].

For lease provisions that require the tenant to rebuild if the leased premises are destroyed, see *§ 34C.244[2]*.

[p] Condemnation

If the parties to a lease do not otherwise provide for the rights and obligations of the landlord and tenant in the event the leased premises are condemned [*see Code Civ. Proc. § 1265.160*], these matters are governed by applicable statutory law [*see Code Civ. Proc. §§ 1230.010-1273.050*] and case law. For a full discussion of the law applicable to the effect of condemnation on the lease and the parties' compensable interests, and for alternative lease provisions for condemnation, see *§ 34C.262*.

This lease provides that it terminates if the leased premises are totally condemned [*see Section 9.01* of form]. In the event of partial condemnation, the tenant has the right to terminate the lease if a minimum percentage of the building or premises is taken [*see Section 9.02* of form]. Otherwise, the lease continues in effect for the portion of the premises not condemned with a proportionate reduction in rent [*see* Section 9.03 of form]. The full amount of the condemnation award belongs to the landlord and the tenant waives any right to share in the award [*see* Section 9.04 of form].

[q] Assignment and Subletting

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210*, 1995.230; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*]. In this form, the tenant is required to obtain the landlord's consent before assigning the tenant's interest in the lease or subletting the leased premises. The lease expressly states that the landlord's consent must not be unreasonably withheld [*see Section 10.01* of form]. It should be noted that the lease must provide for a tenant's right to assign or sublet the premises, subject only to reasonable limitations, for a landlord to take advantage of the statutory remedy to continue a lease in effect on the tenant's default [*see § 34C.271*].

This form also prohibits assignments or transfers that are involuntary or that occur by operation of law [*see Section 10.01* of form].

PRACTICE TIP:

Termination Based on Tenant's Bankruptcy Unenforceable Under Federal Bankruptcy Code. Often a lease will include a provision prohibiting the assignment of a lease by operation of law, or whether assignment is voluntary or involuntary [*see Section 10.01* of form]. This is the case notwithstanding the fact that at this time a prohibition against a transfer pursuant to a bankruptcy proceeding is unenforceable under the Federal Bankruptcy Code [*see § 34C.20*]. The landlord should be advised that this language does not prevent an assumption and assignment of the lease in a tenant's federal bankruptcy proceeding. *By Publisher's Editorial Staff.*

PRACTICE TIP: Restrictions Against Subletting or Assignment. Is a landlord's refusal to consent to an assignment "unreasonable" [*see Section 10.01* of form, last sentence] when the landlord demands some sort of payment? And, does it matter whether the payment is to reimburse the landlord for some legitimate type of expense (such as checking the assignee's credit) or is simply an attempt to obtain a windfall for the landlord? Disputes and litigation surrounding these questions might be avoided by dealing with these issues in the lease. *By Myron Moskovitz.*

For a discussion of the law applicable to restrictions on subletting and assignment, see *§ 34C.260[1]*. For alternative

lease provisions that entirely prohibit subletting and assignment or permit them only conditionally, see *§ 34C.260[2]*.

[r] Tenant's Default

Section 10.02 of this form lists acts and omissions by the tenant that are considered a default under the lease. In this form, a default is not considered to have occurred with respect to payment of rent or performance of any other term or condition of the lease until the landlord has given the tenant written notice of the act or omission and the tenant fails to cure within a time period agreed on in the lease [*see Section 10.02*(a), (c) of form]. Because of the substantial financial commitment of both parties involved in a nonresidential lease, this type of provision is common. If the purpose of the provision is to extend the three-day time to cure under the unlawful detainer statutes [*see Code Civ. Proc. § 1161 et seq.*] and to require the landlord's notice as a condition to the tenant in being in default, those facts should be stated in the lease [*see, e.g., Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 201, 162 Cal. Rptr. 271* (landlord's failure to give 90-day notice of default provided in lease was not a bar to unlawful detainer action against subtenant when 90-day notice requirement was optional and was not intended to replace landlord's rights under unlawful detainer statute)].

This form also contains a provision describing the circumstances under which the tenant will be deemed to have abandoned the premises and breached the lease [*see Section 10.02*(b) of form]. The fact of abandonment may be determined by a statutory procedure [*see Civ. Code § 1951.3*], but that procedure is not exclusive [*see Civ. Code § 1951.3(f)*].

Section 10.02(d) of this form lists other circumstances relating to the financial condition of the tenant that are considered a default under the lease. One of these is the filing of a bankruptcy petition by or against the tenant (unless it is dismissed within a stated time period). A provision permitting the landlord to terminate a lease because of the tenant's bankruptcy is, with few exceptions, unenforceable under federal bankruptcy law [*see § 34C.20*].

[s] Damages on Termination of Lease

In the event of a lease termination, a landlord is entitled to recover damages provided by statute [*see Civ. Code § 1951.2*; Section 10.03 of form]. To recover certain damages, the lease must provide for their recovery [*see Civ. Code § 1951.2(c)*]. In addition, the landlord has a duty to mitigate certain damages [*see Civ. Code § 1951.2(a)(2), (3), (c)*]. The duty to mitigate and the remedy of damages on lease termination are discussed in *§ 34C.270[1]*.

Section 10.05 of this form provides for the landlord's right to relet the premises. Parties to a nonresidential lease may also provide for liquidated damages in the event of a breach or a failure of a condition [*see Civ. Code § 1671(b)*]. For discussion and a lease provision for liquidated damages, see *§ 34C.273*.

[t] Continuation of Lease After Breach

Section 10.04 of this form gives the landlord the right to continue the lease in effect (and collect rent as it becomes due) instead of terminating the lease on the tenant's default. This provision will be valid only if the tenant also has the right to assign or sublet the lease, subject only to reasonable limitations [*Civ. Code § 1951.4(b)*]. For a full discussion of the law applicable to the landlord's right to continue the lease in effect, see *§ 34C.271[1]*.

[u] Miscellaneous Provisions

An attorneys' fees provision is included in this lease [*see Section 11.02* of form]. For an alternative provision and a discussion of applicable law, see *§ 34C.274*.

Other miscellaneous provisions included in Article 11 of this form are the following:

- A force majeure clause [*see Section 11.01* of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.235*].

- A provision describing the methods by which either party may give the other any notice required or permitted by the lease [*see* Section 11.03 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.294*].

PRACTICE TIP:

Notices. Many problems arise respecting the notice; as to when given, when effective, and when and if received. Thus, to the extent that any provision should be as specific as possible, the notice provisions require the greatest specificity. Actual notice should be the goal. Thus, in lieu of personal service, the first class U.S. Mail should not be the sole source of notice as if the envelope is delivered, it may be overlooked with junk mail or the like, the possibility of which could have untoward consequences. Therefore, a provision should be inserted that if personal service is not obtained, then in addition to first class mailed notice, there should be Express Mail or its private equivalent, which would permit a tracing of the delivery. Any party who mails first class mail should do so at the post office and obtain and retain a proof of mailing as evidence. *By Benjamin Kaplan.*

- A provision making the lease binding on successors of the parties [*see* Section 11.04 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.282*].

- A partial-invalidity clause [*see Section 11.05* of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.271*].

- A sole-and-only-agreement clause [*see Section 11.06* of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.270*].

- A time-is-of-the-essence clause [*see Section 11.07* of form; *see also Ch. 23, Real Property Sales Agreements, § 23.200*].

The following additional miscellaneous provisions may be added to the lease:

- Subordination, nondisturbance, and attornment agreements [*see § 34C.250*].

- Tenant to execute an estoppel certificate on the landlord's request [*see § 34C.261*].

- Parties to arbitrate all or certain specified disputes [*see § 34C.280*].

[2] FORM

Retail Lease

RETAIL LEASE

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RETAIL LEASE

Preamble

This lease is made and entered into on _____[*date*], by and between _____[*name or names*], _____[*legal status, e.g.,* a California corporation] ("Landlord"), and _____[*name or names*], _____[*legal status, e.g.,* a California limited partnership] ("Tenant").

Landlord, for and in consideration of the rent to be paid by Tenant and of the covenants and provisions to be kept and performed by Tenant under this lease, hereby leases to Tenant, and Tenant agrees to lease from Landlord, the following: the real property commonly known as _____[*street address*], _____[*city*], California, and legally described on Exhibit "_____," attached hereto ("the Property"), together with _____[*describe included improvements, appurtenances, and easements, e.g.,* the freestanding single-story building and paved parking on the north side of the building] (collectively referred to as "the Improvements") located on the Property. The term "Premises" as used in this lease shall mean both the Property and the Improvements.

ARTICLE 1 TERM OF LEASE

Original Term

Section 1.01. This lease shall be for a term of _____[*number, e.g.,* 10] years, commencing at 12:01 A.M. on _____[*date*] ("Commencement Date"), and ending at 12:01 A.M. on _____[*date*] ("Original Term"), unless terminated earlier pursuant to the provisions of this lease.

Extended Term

Section 1.02. In the event Tenant is not then in default under this lease, Tenant shall have the option and right to extend the Original Term of this lease for one period of _____[*number, e.g.,* five years], commencing on expiration of the Original Term. If Tenant elects to extend the term of this lease, Tenant must give Landlord written notice of Tenant's election to extend at least _____[*time period, e.g.,* 30 days] before expiration of the Original Term. The written notice shall be deemed effective on personal delivery to Landlord or on the date it is deposited in the United States mail in accordance with the provisions of Section 11.03. During the Extended Term of this lease, if any, Landlord and Tenant shall be bound by all of the obligations, covenants, and agreements of this lease except that Tenant shall have no right to further extend the term of this lease beyond or after expiration of the one _____[*specify period stated above, e.g.,* five-year] period granted under this section. References

throughout this lease to "the term of this lease" shall include both the Original Term and the Extended Term, if any, unless otherwise indicated.

Holding Over

Section 1.03. In the event Tenant holds over and continues in possession of the Premises after expiration of the Original Term (when Tenant has not validly exercised its option to extend the term of the lease in accordance with Section 1.02) or after expiration of the Extended Term (when Tenant has validly exercised its option to extend the term of the lease in accordance with Section 1.02), Tenant's continued occupancy of the Premises shall be considered a month-to-month tenancy subject to all the terms and conditions of this lease.

Landlord's Inability to Deliver Possession

Section 1.04. If Landlord is for any reason unable to deliver possession of the Premises to Tenant on the Commencement Date set forth in Section 1.01 of this lease, this lease shall not be void or voidable nor shall Landlord be liable to Tenant for any loss or damage resulting from failure to deliver possession to Tenant so long as Landlord has exercised, and continues to exercise, reasonable diligence to deliver possession of the Premises to Tenant. No rent shall, however, accrue or become due from Tenant to Landlord under this lease until the actual physical possession of the Premises is delivered, or the right to actual unrestricted physical possession of the Premises under this lease is tendered by Landlord to Tenant. Furthermore, the term of this lease shall not be extended by Landlord's inability to deliver possession of the Premises to Tenant on the Commencement Date set forth in Section 1.01.

Termination for Failure of Possession

Section 1.05. Notwithstanding any provision of Section 1.04 of this lease, if Landlord for any reason fails to deliver actual physical possession of the Premises, or fails to tender actual unrestricted physical possession of the Premises under this lease, to Tenant _____[within _____ (*number*) days after _____ (the date specified in Section 1.01 of this lease for commencement of the term of this lease or before _____ (*date*)], Tenant may terminate this lease by giving Landlord written notice of its election to do so. In the event Tenant elects to so terminate this lease, this lease shall become null and void as of the date Tenant delivers its written notice of termination to Landlord, and thereafter neither party to this lease shall be under any further obligation or liability to the other because of this lease and Landlord shall return to Tenant any consideration received from Tenant pursuant to or for execution of this lease. If Tenant elects to terminate this lease in accordance with the provisions of this section, it shall give written notice of its election to terminate to Landlord _____[not later than _____ (*number, e.g.,* five) days after the date specified in Section 1.01 of this lease for commencement of the term of this lease or before _____ (*date*)].

ARTICLE 2 RENT

Minimum Rent

Section 2.01. (a) Tenant agrees to pay to Landlord, in addition to the Percentage Rent provided for in Section 2.02 of this lease, a fixed minimum rental for the use and occupancy of the Premises (the "Minimum Rent"). The amount of Minimum Rent payable for each month during the Original Term shall be $ _____, and the amount of Minimum Rent payable for each month during the Extended Term, if any, shall be $ _____. The Minimum Rent shall be payable on the _____[*specify, e.g.,* first] day of each and every month commencing _____[*date*] (the "Rent Commencement Date"), at the office of Landlord at

_____[*address*], _____[*city*], California, or at any other place or places as Landlord may from time to time designate by written notice delivered to Tenant. Minimum Rent for partial calendar months occurring at the commencement and termination of the term of this lease shall be prorated accordingly.

(b) Commencing on _____[*specify date for first increase to be effective, e.g.,* the first day of the sixth year of the lease term) and continuing each year thereafter ("the Rent Adjustment Date"), the minimum rent *set forth in Section 2.01*(a) shall be subject to adjustment as follows: The Consumer Price Index for _____ [*specify e.g.,* Urban Wage Earners and Clerical Workers *or* All Urban Consumers *or* a local index] published by the Bureau of Labor Statistics, United States Department of Labor for all items ("Index") in effect on _____[*specify base date, e.g.,* June 1, 1998] shall be the Base Index. For each Rent Adjustment Date, the Index in effect immediately before that Rent Adjustment Date ("the Adjustment Index") shall be used for purposes of calculating the amount of adjustment, if any. If the Adjustment Index has increased over the Base Index, the minimum rent payable for the following year and until the next Rent Adjustment Date shall be increased by the same percentage as the Adjustment Index bears to the Base Index.

(c) In no event shall the minimum monthly rent be decreased below the amount specified under Section 2.01(a).

(d) If the Consumer Price Index, as now constituted, compiled, and published shall cease to be compiled and published during the term of this lease, or is calculated on a significantly different basis following the date of this lease, the most comprehensive official Index published that most closely approximates the rate of inflation shall be used for purposes of computing adjustments under this lease.

Percentage Rent

Section 2.02. (a) In addition to the Minimum Rent provided for in Section 2.01 of this lease, Tenant shall pay annually as hereinafter provided, as additional rent, the amount, if any, by which _____[*specify percent, e.g.,* three] percent of Tenant's "gross sales" (as hereinafter defined) exceeds the Minimum Rent for the lease year. Such additional rent is hereafter referred to as "Percentage Rent." The Percentage Rent shall be paid by Tenant to Landlord at the same location described in Section 2.01(a) of this lease for the payment of Minimum Rent and shall be paid monthly, not later than _____[*number, e.g.,* 10] days after the end of each calendar month.

(b) Tenant agrees to deliver to Landlord, within 15 days after the close of each lease year during the term of this lease, an "annual statement of gross sales" (as hereinafter defined) showing the gross receipts of Tenant during such lease year. If the total amount of monthly Percentage Rent payments exceeds the annual Percentage Rent due, Landlord shall pay to Tenant the excess Percentage Rent within _____[*specify days, e.g.,* 15] days of receipt of Tenant's annual statement of gross sales. The "annual statement of gross sales" shall be a statement of Tenant's gross receipts for the lease year for which the same is required, prepared by Tenant's regularly employed accountant or bookkeeper and certified to be correct by an independent certified public accountant.

Gross Sales Defined

Section 2.03. For purposes of this Article, the term "gross sales" shall mean the total selling price of all merchandise or services sold or rendered in, on, or from the Premises by Tenant, its Subtenants, licensees, or concessionaires, whether for cash or on credit and if on credit whether or not paid, and shall include, without limitation:

(a) Proceeds from all automatic vending, weighing, and other machines owned and operated by Tenant in or on the Premises;

(b) Commissions received by Tenant from any automatic vending, weighing, and other machines not owned by

Tenant but operated in or on the Premises;

(c) Commissions received by Tenant from the operation of public telephones in or on the Premises; and

(d) Proceeds from sales based on orders solicited or taken from, in, or on the Premises for merchandise or services to be delivered or rendered off, or from sources outside, the Premises.

Gross Sales Exclusions

Section 2.04. Notwithstanding the provisions of Section 2.03 of this lease, the term "gross sales" shall not include the following items, and those items may be deducted from gross sales to the extent they have been included in a prior computation of gross sales on which a percentage rental has been paid under this lease to Landlord:

(a) Credits and refunds made to customers for merchandise returned or exchanged;

(b) Credits and amounts paid or allowed customers in settlement of claims for loss or damage to merchandise;

(c) Any sales or excise taxes otherwise includable in gross sales as defined in this Article because part of the total selling price of merchandise or services rendered in, from, or on the Premises when Tenant must account for and remit the taxes to the government entity or entities by which they are imposed;

(d) Any transfer of merchandise from the Premises to the manufacturer or supplier from whom it was obtained by Tenant; and

(e) Any sales to Tenant's employees at a discount off the retail price.

Books and Records

Section 2.05. Tenant shall at all times keep or cause to be kept on the Premises complete and accurate records and books of account showing the total amount of gross sales made in, on, or from the Premises. Tenant covenants that it shall cause to be installed accurate cash registers, which shall show and record each and every sale made on and within the Premises and which also shall show the total of all daily sales. Tenant agrees to maintain on the Premises for a period of three years following the close of each calendar month all records and books of account and all cash register tapes showing or in any way pertaining to the gross sales made in, on, or from the Premises during that calendar month.

Statement of Gross Sales and Audit

Section 2.06. (a) Tenant agrees to submit the following to Landlord: quarterly statements of gross sales received from the business operated on the Premises; a statement of yearly gross sales, within 30 days immediately following the end of the first and each succeeding full year of the term of this lease; and a statement of gross sales made since the last quarterly statement, within 30 days following the expiration or earlier termination of this lease. The first such yearly statement shall include gross sales for the first 12 whole months and any partial month immediately following the Rent Commencement Date of this lease. All such statements shall be signed by a responsible and authorized financial officer of Tenant certifying the amount of gross sales (as defined in this lease) defined for the period to be accounted for. If by any such yearly statement it appears that any percentage rent is due and payable to Landlord for the preceding yearly period, it shall be paid to Landlord within _____[*designated period, e.g.,* 30 days] immediately following the date the yearly statement is rendered. All minimum and percentage rent shall be paid to Landlord without deduction or offset.

(b) Landlord may at any time within one year after receiving a statement from Tenant, at Landlord's own cost and expense, cause all books, records, and cash register tapes described in Section 2.05 of this lease for the calendar month purportedly covered by the statement to be audited by a public or certified public accountant selected by Landlord. On receiving written notice of Landlord's election for such an audit, Tenant shall deliver and make available all such books, records, and cash register tapes to the public or certified public accountant selected by Landlord. Furthermore, Tenant shall promptly on demand reimburse Landlord for the full cost and expense of the audit if the audit discloses that the questioned statement understated gross sales or the rent payable because of gross sales by _____[*specify, e.g.,* five] percent or more.

Tenant's bookkeeper and/or accountant shall respond to all questions and inquiries of Landlord's certified public accountant with respect to the books and records being examined, and shall provide other further documentation as may be required by the Landlord's CPA.

(c) Landlord is entitled to take statements by deposition under oath of Tenant, Tenant's officers, or of any person who prepared the financial reports.

ARTICLE 3 USE OF PREMISES

Permitted Use

Section 3.01. During the term of this lease (including the Original Term and the Extended Term, if any), the Premises shall be used for the exclusive purpose of operating and conducting a _____[*specify type of business, e.g.,* a retail drug store], for uses normally incident to that purpose, and for no other purpose. Tenant shall not use or permit the Premises to be used for any other purpose, without the prior written consent of Landlord. In conducting the business specified in this Section in and on the Premises, Tenant shall sell any merchandise and render any services that are customarily sold and rendered by the operators of businesses of the same type in _____[*name of county in which premises are located*] county.

Operation of Business

Section 3.02. (a) During the lease's term, Tenant shall, unless prevented by casualty loss to the building, strikes, or other conditions beyond Tenant's control, conduct business of the type and nature specified in Section 3.01 of this lease on the Premises in a diligent and business like manner and keep the Premises open for business from at least _____ A.M. to at least _____ P.M. each day [except Sundays and legal holidays]. Tenant shall at all times keep the business adequately stocked with current merchandise competitive with similar businesses in the area and shall employ a sufficient number of personnel to conduct the business in a manner consistent with sound business and management practices. Tenant shall also install and maintain, at all times during the term of this lease, attractive displays of merchandise in the display windows of the Premises and keep all display windows and all signs on the Premises well lighted from sundown until _____ P.M. each night [except Sundays and legal holidays].

(b) A breach by Tenant of the covenant contained in this Section shall not excuse Tenant from its obligation to pay the Minimum Rent and Percentage Rent required under this lease for the full term of the lease. In the event Tenant ceases to operate its business on the leased premises, the Percentage Rent payable annually [*or* quarterly *or specify other period*] by Tenant for the balance of the lease term occurring after the cessation of Tenant's business shall be based on the gross receipts [*or other receipts specified in lease*] of Tenant's business earned for the 12-month period [*or* quarter *or other period for which percentage rent is calculated under lease*] immediately preceding the cessation of business.

Insurance Hazards

Section 3.03. Tenant shall not commit or permit the commission of any acts on the Premises nor use or permit the use of the Premises in any manner that will increase the existing rates for or cause the cancellation of any fire, liability, or other insurance policy insuring the Premises or the improvements on the Premises. Tenant shall, at its own cost and expense, comply with any and all requirements of Landlord's insurance carriers necessary for the continued maintenance at reasonable rates of fire and liability insurance policies on the Premises and the improvements on the Premises.

Waste or Nuisance

Section 3.04. Tenant shall not commit or permit the commission by others of any waste on the Premises. Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance as defined in *Civil Code Section 3479* on the Premises. Tenant shall not use or permit the use of the Premises for any unlawful purpose.

Compliance With Laws

Section 3.05. Tenant shall at Tenant's own cost and expense comply with all statutes, ordinances, regulations, and requirements of all governmental entities, both federal and state and county or municipal, relating to Tenant's specific use and occupancy of the Premises (and specifically excluding any such laws and requirements which would pertain to any lawful use and occupancy of the Premises in contrast to Tenant's specific use), whether those statutes, ordinances, regulations, and requirements are now in force or are subsequently enacted.

Noncompetition by Tenant

Section 3.06. Neither Tenant nor any entity that controls or is controlled by Tenant shall own, operate, control, or in any manner become financially involved in any business similar to that specified in Section 3.01 of this lease located within _____[*number, e.g.,* five] miles in any direction of the Premises.

Noncompetition by Landlord

Section 3.07. Neither Landlord nor any entity that controls or is controlled by Landlord shall own, operate, control, or in any manner become financially involved in any business similar to that specified in Section 3.01 of this lease located within _____[*number, e.g.,* five] miles in any direction of the Premises.

ARTICLE 4 TAXES AND UTILITIES

Utilities

Section 4.01. Tenant shall pay, and hold Landlord and the property of Landlord free and harmless from, all charges for the furnishing of gas, water, sewer, electricity, telephone service, garbage pickup and disposal, and other public utilities to the Premises during the term of this lease. All such charges shall be paid by Tenant directly to the provider of the service and shall be paid as they become due and payable but in any event before delinquency.

Personal Property Taxes

Section 4.02. Tenant shall pay before they become delinquent all taxes, assessments, and other charges levied or imposed by any governmental entity on the furniture, trade fixtures, appliances, and other personal property placed by Tenant in, on, or about the Premises including, without limiting the generality of the other terms used in this section, any shelves, counters, vaults, vault doors, wall safes, partitions, fixtures, machinery, plant equipment, office equipment, television or radio antennas, and communication equipment brought on the Premises by Tenant.

Real Property Taxes

Section 4.03. All real property taxes and assessments levied or assessed against the Premises by any governmental entity, including any special assessments imposed on or against the Premises for the construction or improvement of public works in, on, or about the Premises, shall be paid, before they become delinquent, by Landlord.

ARTICLE 5 ALTERATIONS AND REPAIRS

Condition of Premises

Section 5.01. Tenant accepts the Premises, as well as the Improvements located on the Premises, in their present condition and stipulates with Landlord that the Premises and Improvements are in good, clean, safe, and tenantable condition as of the date of this lease. Tenant further agrees with and represents to Landlord that the Premises have been inspected by Tenant, that it has received assurances acceptable to Tenant by means independent of Landlord or any agent of Landlord of the truth of all facts material to this lease, and that the Premises are being leased by Tenant as a result of its own inspection and investigation and not as a result of any representations made by Landlord or any agent of Landlord except those expressly set forth in this lease.

Maintenance by Landlord

Section 5.02. (a) Landlord shall, at its own cost and expense, maintain in good condition and repair the structural elements of the Building. For purposes of this section, "structural elements" shall mean the exterior roof, exterior walls (except show window glass), structural supports, and foundation of the Building. Landlord shall not be liable for any damages to Tenant or the property of Tenant resulting from Landlord's failure to make any repairs required by this section unless written notice of the need for those repairs has been given to Landlord by Tenant and Landlord has failed for a period of _____[*number, e.g.*, 30] days after receipt of the notice, unless prevented by causes not the fault of the Landlord, to make the needed repairs. Notwithstanding anything in this Section to the contrary, Tenant shall promptly reimburse Landlord for the full cost of any repairs made pursuant to this Section required because of the negligence or other fault, other than normal and proper use, of Tenant or its employees or agents or subtenants, if any.

(b) Landlord and its agents shall have the right to enter the Premises at all reasonable times (and at any time during an emergency) for the purpose of inspecting them or to make any repairs required to be made by Landlord under this lease.

Maintenance by Tenant

Section 5.03. Except as otherwise expressly provided in Section 5.02 of this lease, Tenant shall at its own cost and expense keep and maintain all portions of the Premises and all Improvements located on the Premises in good order and repair and in as safe and clean a condition as they were when received by Tenant from Landlord, reasonable wear and tear excepted. Tenant's obligation to repair shall specifically include necessary repairs to the heating, ventilation, and air

conditioning systems, interior walls, floor coverings, ceilings, painting and maintenance of exterior walls, the interior and exterior portions of all doors, paved driveways and parking areas, and landscaping for the Premises.

Maintenance of Plate Glass

Section 5.04. Tenant shall, at its own cost and expense, repair and replace any plate glass in any show window on the Premises that is broken regardless of any cause, except by fault of Landlord, or by fault of some employee or agent of Landlord. Furthermore, Tenant shall at Tenant's own cost and expense at all times during the term of this lease carry adequate plate glass insurance on the glass in all show windows on the Premises to perform the repair and replacement requirements of this section. Should Tenant fail to repair or replace any glass broken in a show window or fail to maintain adequate plate glass insurance on the glass in show windows on the Premises, Landlord may replace or repair the broken glass or secure that insurance and Tenant shall promptly reimburse Landlord for the cost of the repair, replacement, or insurance. In addition, Tenant shall pay Landlord interest on those costs at the rate of _____ percent per year from the date the costs were incurred by Landlord to the date they are reimbursed to Landlord by Tenant.

Alterations and Liens

Section 5.05. Tenant shall not make or permit any other person to make any alterations to the Premises or to any Improvements on the Premises without the prior written consent of Landlord. Landlord shall not unreasonably withhold this consent. Tenant shall keep the premises free and clear from any and all liens, claims, and demands for work performed, materials furnished, or operations conducted on the Premises at the instance or request of Tenant. Furthermore, any and all alterations, additions, improvements, and fixtures, except furniture and trade fixtures, made or placed in or on the Premises by Tenant or any other person shall on expiration or earlier termination of this lease, become the property of Landlord and remain on the Premises. Landlord shall have the option, however, on expiration or termination of this lease, of requiring Tenant, at Tenant's sole cost and expense, to remove any or all such alterations, additions, improvements, or fixtures from the Premises.

Inspection by Landlord

Section 5.06. Tenant shall permit Landlord or Landlord's agents, representatives, or employees to enter the Premises at all reasonable times for the purpose of inspecting the Premises to determine whether Tenant is complying with the terms of this lease, for the purpose of doing other lawful acts that may be necessary to protect Landlord's interest in the Premises, or for the purpose of performing Landlord's duties under this lease.

Surrender of Premises

Section 5.07. On expiration or earlier termination of this lease, Tenant shall promptly surrender and deliver the Premises to Landlord in as good condition as they are now at the date of this lease, excluding reasonable wear and tear, and repairs required to be made by Landlord under this lease.

ARTICLE 6 INDEMNITY AND INSURANCE

Hold-Harmless Clause

Section 6.01. Tenant agrees to protect, indemnify, and save Landlord harmless from and against any all liability to third

parties resulting from Tenant's occupation and use of the Premises, specifically including, without limitation, any claim, liability, loss, or damage arising by reason of:

(a) The death or injury of any person or persons, including Tenant or any person who is an employee or agent of Tenant, or by reason of the damage to or destruction of any property, including property owned by Tenant or any person who is an employee or agent of Tenant, and caused or allegedly caused by either the condition of the Premises, or some act or omission of Tenant or of some agent, contractor, employee, servant, subtenant, or concessionaire of Tenant on the Premises;

(b) Any work performed on the Premises or materials furnished to the Premises at the instance or request of Tenant or any agent or employee of Tenant; and

(c) Tenant's failure to perform any provision of this lease.

Public Liability and Property Damage Insurance

Section 6.02. Tenant shall, at its own cost and expense, procure and maintain during the entire term of this lease public liability insurance and property damage insurance issued by an insurance company reasonably acceptable to Landlord and insuring Landlord against loss or liability caused by or connected with Tenant's occupation and use of the Premises under this lease in amounts not less than:

(a) $ _____ for injury to or death of one person and, subject to that limitation for the injury or death of one person, of not less than $ _____ for injury to or death of two or more persons as a result of any one accident or incident; and

(b) $ _____ for damage to or destruction of any property of others.

The insurance required under this Section shall be issued by a responsible insurance company or companies authorized to do business in California and shall be in a form reasonably satisfactory to Landlord. Tenant shall within _____[*number, e.g.,* 10] days of the date of this lease, deposit with Landlord a certificate showing that insurance to be in full force and effect.

Tenant's Personal Property

Section 6.03. Tenant shall, during the full term of this lease and any renewals or extensions thereof, maintain at Tenant's own cost and expense an insurance policy issued by a reputable company authorized to conduct insurance business in California insuring for their full insurable value all fixtures and equipment and, to the extent possible, all merchandise that is, at any time during the term of this lease, in or on the Premises against damage or destruction by fire, theft, or the elements.

Fire and Extended Coverage Insurance

Section 6.04. Tenant shall, during the term of this lease, procure, carry, and pay for fire and extended coverage insurance, insuring the Building and other Improvements on the Premises for at least _____[*number, e.g.,* 90] percent of their full replacement value. The policy shall name Landlord as an additional insured and shall be issued by a responsible insurance company authorized to do business in California. Landlord hereby waives any and all right of recovery against Tenant for any loss occurring to the Premises, and the insurance policy required by this Section shall contain an endorsement recognizing this release by Landlord and waiving all rights of subrogation by the insurer.

The term "extended coverage" as used herein shall mean any casualties that are commonly included under the term "extended coverage" as that term is known and used in the casualty insurance business.

Cancellation Requirements

Section 6.05. Each of the insurance policies shall be in a form reasonably satisfactory to Landlord and shall carry an endorsement that, before changing or canceling any policy, the issuing insurance company shall give Landlord at least 30 days' prior written notice. Duplicate originals or certificates of all such insurance policies shall be delivered to Landlord.

ARTICLE 7 SIGNS AND TRADE FIXTURES

Installation and Removal of Trade Fixtures

Section 7.01. Tenant shall have the right at any time and from time to time during the term of this lease, at Tenant's sole cost and expense, to install and affix in, to, or on the Premises any items, herein called "trade fixtures," for use in Tenant's trade or business that Tenant may, in Tenant's sole discretion, deem advisable. Any and all trade fixtures that can be removed without structural damage to the Premises or any building or improvements on the Premises shall, subject to Section 7.02 of this lease, remain the property of the Tenant and may be removed by Tenant at any time before the expiration or earlier termination of this lease, provided Tenant repairs any damage caused by the removal.

Unremoved Trade Fixtures

Section 7.02. Any trade fixtures described in this Article that are not removed from the Premises by Tenant within _____[*specify, e.g.,* 30] days after the expiration or earlier termination regardless of cause, of this lease shall be deemed abandoned by Tenant and shall automatically become the property of Landlord as owner of the real property to which they are affixed.

Signs

Section 7.03. Tenant may erect, maintain, permit, and from time to time remove any signs in or about the Premises that Tenant may deem necessary or desirable, provided that any signs erected or maintained by Tenant shall comply with all requirements of any governmental authority with jurisdiction.

ARTICLE 8 DESTRUCTION OF PREMISES

Landlord's Obligation to Repair

Section 8.01. Except as otherwise provided in Section 8.02, below, if at any time during the Original Term of this lease or any Extended Term, the Building on the Premises is damaged or destroyed by any cause, Landlord shall promptly repair, rebuild, or restore the Building to substantially the same condition as the Building was delivered to Tenant at the commencement of this lease (i.e., exclusive of tenant fixtures and equipment) and shall be entitled for that purpose to any and all insurance proceeds. Landlord shall have the obligation to repair, rebuild, or restore described in this Section whether or not the insurance proceeds paid to Landlord are sufficient to cover the total cost of repair, restoration, or rebuilding. Landlord shall commence repair, restoration, or rebuilding, as appropriate, not later than [*number, e.g.,* 60] days after occurrence of the event causing damage or destruction and shall cause construction to be completed not later

than [*number, e.g.,* 180] days after the occurrence of the event causing damage or destruction. Landlord's obligation to commence and complete construction within the time periods described in this Section shall not be extended by the fact that Landlord may not yet have been paid the insurance proceeds. In the event Landlord does not commence or complete construction within the time periods described in this section, Tenant shall have the right to terminate this lease by giving Landlord written notice within [*number, e.g.,* 10] days after expiration of either time period.

Landlord's Right to Terminate Lease

Section 8.02. Notwithstanding Section 8.01, Landlord shall have the right to terminate this lease and shall have no obligation to repair, restore, or rebuild the Premises or the Building under any of the following circumstances:

(a) Damage or destruction from an insured casualty when the damage or destruction cannot reasonably be repaired, restored, or rebuilt within a period of _____[*same number of days set forth in Section 8.01 for construction period, e.g.,* 180] days;

(b) Damage or destruction from an uninsured casualty when the cost of repair, restoration, or rebuilding exceeds a total of _____[*specific dollar amount, e.g.,* $100,000 *or formula, e.g.,* 45 percent of the then replacement cost of the Building]; or

(c) Damage or destruction from an insured or uninsured casualty occurring during the last _____[*number, e.g.,* two] years of the Original Term of this lease, if Tenant has not before occurrence of the casualty elected to extend the Original Term of the lease, or occurring at any time during the Extended Term, if any, of this lease.

If Landlord elects to terminate this lease under any of the above circumstances, Landlord shall give written notice to Tenant not later than _____[*number, e.g.,* 30] days after occurrence of the casualty.

Abatement of Rent

Section 8.03. If damage or destruction to the Premises renders the operation of Tenant's business impossible and Tenant in fact ceases to operate its business, the rent required under this lease shall abate during the period in which Landlord is required to perform repairs or restoration, or to rebuild. Tenant shall also be excused from the payment of taxes and insurance attributable to that repair, restoration, or rebuilding period. In the event Tenant is able to continue partial operation of its business, Tenant shall continue to pay the Percentage Rent provided for under Section 2.02 of this lease, but the minimum monthly rent shall be reduced during the period of repair, restoration, or rebuilding by the same percentage as the Tenant's gross sales for the full month preceding the event causing the damage bears to the Tenant's gross sales for the full month following the event causing the damage.

ARTICLE 9 CONDEMNATION

Total Condemnation

Section 9.01. If at any time during the term of this lease, title and possession of all of the Premises is taken under the power of eminent domain by any public or quasi-public agency or entity, this lease shall terminate as of 12:01 A.M. of the date actual physical possession of the Premises is taken by the agency or entity exercising the power of eminent domain, and both Landlord and Tenant shall thereafter be released from all obligations under this lease, except those described in Section 9.04.

Termination Option for Partial Condemnation

Section 9.02. If at any time during the term of this lease, title and possession of only a portion of the Premises is taken under the power of eminent domain by any public or quasi-public agency or entity, Tenant may, at Tenant's option, terminate this lease if more than [*fraction or percentage, e.g.*, 35 percent] of the floor space of the Building or more than [*fraction or percentage, e.g.*, 20 percent] of the parking area of the Premises is taken under the power of eminent domain. If Tenant elects to exercise the option granted under this section, Tenant shall give Landlord at least [*number, e.g.*, 30] days prior written notice within [*number, e.g.*, 14] days after Tenant receives notice of the taking that designates the precise area of the Premises to be taken. This lease shall terminate as of the date specified for termination in Tenant's notice, or on the date actual physical possession of the Premises is taken by the public or quasi-public agency or entity, whichever date is earlier.

Partial Condemnation Without Termination

Section 9.03. If Tenant fails to exercise the option described in Section 9.02 of this lease or if the portion of the Premises taken under the power of eminent domain is insufficient to give rise to the option described in Section 9.02 of this lease:

(a) This lease shall terminate as to the portion of the Premises taken by eminent domain as of 12:01 A.M. of the day actual physical possession of that portion of the Premises is taken by the agency or entity exercising the power of eminent domain (the "date of taking");

(b) The Minimum Rent specified in Section 2.01 of this lease, but not the Percentage Rent specified in Section 2.02 of this lease, shall, after the date of taking, be reduced by an amount that bears the same ratio to the minimum rent specified in Section 2.01 of this lease as the square footage ground area of the portion of the Premises taken under the power of eminent domain bears to the total square footage ground area of the Premises as of the date of this lease; and

(c) Landlord, at Landlord's own cost and expense, shall remodel and reconstruct the Building remaining on the portion of the Premises not taken by eminent domain into a single efficient architectural unit as soon after the date of taking, or before, as can be reasonably done; provided, however, that neither the Minimum nor Percentage Rent specified in this lease shall be abated or reduced, except as provided in subsection (b) of this section, during remodeling and reconstruction.

Condemnation Award

Section 9.04. If at any time during the term of this lease, title and possession of all or any portion of the Premises is taken under the power of eminent domain by any public or quasi-public agency or entity, the compensation or damages for the taking shall be awarded to and be the sole property of Landlord. Tenant hereby waives any and all rights to share in any damages or award.

ARTICLE 10 DEFAULT, ASSIGNMENT, AND TERMINATION

Restriction Against Subletting or Assignment

Section 10.01. Tenant shall not encumber, assign, sublet, or otherwise transfer this lease, any right or interest in this lease, or any right or interest in the Premises or any of the Improvements that may now or hereafter be constructed or installed on the Premises without first obtaining the express written consent of Landlord. Tenant shall not sublet the

Premises or any part of the Premises or allow any other person, other than Tenant's agents, servants, and employees, to occupy the Premises or any part of the Premises without the prior written consent of Landlord. A consent by Landlord to one assignment, one subletting, or one occupation of the Premises by another person shall not be deemed to be a consent to any subsequent assignment, subletting, or occupation of the Premises by another person. Any encumbrance, assignment, transfer, or subletting without the prior written consent of Landlord, whether voluntary or involuntary, by operation of law or otherwise, is void and shall, at the option of Landlord, terminate this lease. The consent of Landlord to any assignment of Tenant's interest in this lease or the subletting by Tenant of the Premises or parts of the Premises shall not be unreasonably withheld.

Default Defined

Section 10.02. The occurrence of any of the following shall constitute a material default and breach of this lease by Tenant:

(a) Any failure by Tenant to pay the rent or to make any other payment required to be made by Tenant under this lease (when that failure continues for _____[*number, e.g.,* 10] days after written notice of the failure is given by Landlord to Tenant).

(b) The abandonment or vacation of the Premises by Tenant (the absence of Tenant from or the failure by Tenant to conduct business on the Premises for a period in excess of _____[*number, e.g.,* 14] consecutive days shall constitute an abandonment or vacation for purposes of this lease).

(c) A failure by Tenant to observe and perform any other provision of this lease to be observed or performed by Tenant, when that failure continues for _____[*number, e.g.,* 30] days after written notice of Tenant's failure is given by Landlord to Tenant; provided, however, that if the nature of that default is such that it cannot reasonably be cured within _____[*specify same time period for cure used above, e.g.,* a 30-day] period, Tenant shall not be deemed to be in default if Tenant commences that cure within the _____[*same time period for cure used above, e.g.,* 30-day] period and thereafter diligently prosecutes it to completion.

(d) The making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within 60 days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when possession is not restored to Tenant within 30 days; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when that seizure is not discharged within 30 days.

The notices provided for in subsections (a) through (c) of this Section 10.02 are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Termination of Lease and Recovery of Damages

Section 10.03. In the event of any default by Tenant under this lease, in addition to any other remedies available to Landlord at law or in equity, Landlord shall have the right to terminate this lease and all rights of Tenant hereunder by giving written notice of the termination. No act of Landlord shall be construed as terminating this lease except written notice given by Landlord to Tenant advising Tenant that Landlord elects to terminate the lease. In the event Landlord elects to terminate this lease, Landlord may recover from Tenant:

(a) The worth at the time of award of any unpaid rent that had been earned at the time of termination of the lease;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination of the lease until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this lease.

The term "rent" as used in this lease shall mean the Minimum Rent, the Percentage Rent, and all other sums required to be paid by Tenant pursuant to the terms of this lease. As used in subsections (a) and (b), above, the "worth at the time of award" is computed by allowing interest at the rate of 10 percent per year. As used in subsection (c), the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

Landlord's Right to Continue Lease in Effect After Breach

Section 10.04. (a) If Tenant breaches this lease and abandons the Premises before the natural expiration of the term of this lease, Landlord may continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all its rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease. For as long as Landlord does not terminate this lease, Tenant shall have the right to assign or sublease the Premises with the Landlord's prior written consent. Landlord shall not unreasonably withhold consent.

(b) No act of Landlord, including but not limited to Landlord's entry on the Premises, efforts to relet the Premises, or maintenance of the Premises, shall be construed as an election to terminate this lease unless a written notice of that intention is given to Tenant or unless the termination of this lease is decreed by a court of competent jurisdiction.

Landlord's Right to Relet

Section 10.05. In the event Tenant breaches this lease, Landlord may enter on and relet the Premises or any part of the Premises to a third party or third parties for any term, at any rental, and on any other terms and conditions that Landlord in its sole discretion may deem advisable, and shall have the right to make alterations and repairs to the Premises. Tenant shall be liable for all of Landlord's costs in reletting, including but not limited to remodeling costs required for the reletting. In the event Landlord relets the premises, Tenant shall pay all rent due under and at the times specified in this lease, less any amount or amounts actually received by Landlord from the reletting.

Landlord's Right to Cure Tenant Defaults

Section 10.06. If, after receipt of the required notice as provided for in Section 10.02, Tenant breaches or fails to perform any of the covenants or provisions of this lease, Landlord may, but shall not be required to, cure Tenant's breach. Any sum expended by Landlord, with the then maximum legal rate of interest, shall be reimbursed by Tenant to Landlord with the next due rent payment under this lease.

Cumulative Remedies

Section 10.07. The remedies granted to Landlord in this Article shall not be exclusive but shall be cumulative and in addition to all remedies now or hereafter allowed by law or provided in this lease.

Waiver of Breach

Section 10.08. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or another provision of this lease.

ARTICLE 11 MISCELLANEOUS

Force Majeure--Unavoidable Delays

Section 11.01. If the performance of any act required by this lease to be performed by either Landlord or Tenant is prevented or delayed by reason of an act of God, strike, lockout, labor troubles, inability to secure materials, restrictive governmental laws or regulations, or any other cause except financial inability that is not the fault of the party required to perform the act, the time for performance of the act will be extended for a period equivalent to the period of delay, and performance of the act during the period of delay will be excused. However, nothing contained in this section shall excuse the prompt payment of rent by Tenant as required by this lease or the performance of any act rendered difficult solely because of the financial condition of the party required to perform the act.

Attorneys' Fees

Section 11.02. If any litigation is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to the Premises or to this lease, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

Notices

Section 11.03. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party to this lease shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom they are directed, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____[*address*], _____[*city*], California _____[*zip code*] or to Landlord at _____[*address*], _____[*city*], California _____[*zip code*]. Either party, Tenant or Landlord, may change its address for the purpose of this section by giving written notice of that change to the other party in the manner provided in this section.

Binding on Heirs and Successors

Section 11.04. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Landlord and Tenant, but nothing in this section shall be construed as a consent by Landlord to any assignment of this lease or any interest therein by Tenant except as provided in Section 10.01 of this lease.

Partial Invalidity

Section 11.05. If any provision of this lease is held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this lease shall remain in full force and effect unimpaired by the holding.

Sole and Only Agreement

Section 11.06. This instrument constitutes the sole and only full, final, and complete agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. All prior negotiations between the parties are subsumed into this lease to the extent they have been agreed to, and if not agreed to by the parties such negotiations are not set forth in the terms and conditions of this lease. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

Time of Essence

Section 11.07. Time is expressly declared to be of the essence in this lease.

Executed on _____[*date*], at _____[*city*], California.

_____ [*signature of landlord*]
[*typed name*]
LANDLORD
_____ [*signature of tenant*]
[*typed name*]
TENANT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenanciesTerm Tenancies



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
A. Complete Leases

17-34C California Legal Forms--Transaction Guide § 34C.201

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.201 Industrial Lease

[1] Comment

[a] Use of Form

This form is a complete industrial lease for a freestanding building. Long-term industrial leases are often net or partially net leases [*see* [b], *below*] under which the tenant assumes responsibility for payment of most or all taxes and costs of maintenance, repairs, replacement, and insurance [*see § 34C.17* for discussion of net leases].

For an example and discussion of a retail lease, see *§ 34C.200*. For discussion and an example of an office lease, see *§ 34C.202*.

A tenant may want to record a short form or Memorandum of Lease to impart constructive notice of the terms of its lease to all subsequent purchasers and mortgagees of the landlord [*see § 34C.203* for discussion and a sample Memorandum of Lease].

[b] Partially Net Lease

The industrial lease in this form is only a partially net lease, in which the tenant pays for only a portion of the "net" items such as property taxes, insurance, and maintenance [*see § 34C.17*]. Under its terms, the landlord must make structural repairs to the leased premises [*see Section 3.02* of form] and repair the premises if they are destroyed by an uninsured cause [*see Section 6.01* of form]. The landlord must also pay real property taxes levied on the leased premises, but the tenant must pay as additional rent the amount of any increase in the real property taxes on the premises over the amount of taxes for a base year agreed on by the parties [*see Section 2.02* of form]. The tenant is also required to procure and maintain all insurance on the property [*see* Article 5 of form].

For alternative provisions that may be used to make this lease a fully net lease, see *§§ 34C.221* (tenant to pay all real

property taxes), 34C.240 (tenant required to perform all repairs and maintenance), and 34C.244 (tenant required to rebuild in event of destruction).

[c] Term of Lease

The lease in [2], *below*, is for a fixed term [*see* Section 1.01 of form; *see also § 34C.16* for discussion of legal issues related to the term], and also contains an option to extend the lease's term [*see* Section 1.02 of form].

PRACTICE TIP:

Term for Industrial Lease Is Generally Longer Than for Retail or Office Lease. Because an industrial building or space is often built to the specifications of the individual user, and because industrial equipment and machinery is often large and expensive to move, industrial leases tend to be for a longer term than either retail or office leases. A 20 or 30 year primary term is not unusual. *By Publisher's Editorial Staff.*

For alternative provisions regarding the commencement of the lease term, see *§§ 34C.210* (term to commence on occurrence of specified conditions) and 34C.211 (term to commence on completion of construction by landlord). For discussion and lease provisions relating to an option to renew or extend a lease, see *§ 34C.212*.

For discussion and lease provisions granting the landlord or the tenant the right to terminate the lease on the occurrence of a stated event, see *§ 34C.272*. For a specific provision granting the landlord the right to terminate the lease if financing cannot be obtained, see *§ 34C.251*.

[d] Right of First Refusal to Purchase Premises

Section 1.03 of this form grants the tenant a right of first refusal to purchase the leased premises [*see § 34C.264[1]* for discussion of this right]. In this form, the tenant may exercise this right either when the landlord gives the tenant notice of the landlord's election to sell, or when the landlord receives a bona fide offer from a third party acceptable to the landlord [*see* Section 1.03(a), (b) of form]. The terms and conditions of sale are to be as stated in the landlord's notice of election to sell or in the third-party offer.

PRACTICE TIP:

Landlords Should Avoid Rights of First Refusal. Landlords do not often appreciate how a first right of refusal severely inhibits the marketing of a property. Very few prospective purchasers go through all the steps to negotiate a lease, do due diligence and the like, only to have their offer given to the tenant in possession, who has a right of first refusal. To some extent this can be obviated by a procedure in which the tenant is offered a modified right of first refusal at the price which will be the initial listing price. The bottom line is that rights of first refusal should be avoided by the landlord as they provide tenants with the opportunity to tie up the property, causing mischief. A tenant with a right of first refusal can proceed to exercise that right in an attempt to create a situation in which the tenant can file a specific performance action with a notice of pendency of action, simply to prevent any sale to a third person and enhance their negotiating position. *By Benjamin Kaplan.*

For discussion of the law applicable to a tenant's right of first refusal to purchase the premises, see *§ 34C.264[1]*. For discussion and lease provisions granting the tenant an option to purchase the leased premises, see *§ 34C.263*.

[e] Rent

The rent payable by the tenant in this form is a fixed sum for a period of years that escalates to a higher fixed sum for later years during the lease term [*see Section 2.01* of form]. An alternative provision would be to increase the rent according to the Consumer Price Index [*see § 34C.200[2],* Section 2.01(b)-(d) for lease provision]. This form provides

that if the tenant elects to exercise the right to extend, rent for the extended term is an agreed-on percentage of the property's fair market value as determined at the time of extension [*see Section 2.01*(b) of form].

For discussion and lease provisions relating to security deposits, see *§ 34C.220*.

[f] Additional Rent for Increase in Taxes

[i] Rent Escalation Clauses

In this form, the tenant is required to pay as additional rent, throughout the lease's term and any extended term, the amount by which the real property taxes on the leased premises exceed the amount of taxes for a base year agreed on by the parties [*see Section 2.02* of form]. This type of provision is a form of rent escalation clause commonly used in nonresidential leases. When a lease provision already obligates a tenant to pay all real property taxes for the property and its improvements, including any increases [*see § 34C.221*], a provision such as this one is not necessary.

A rent escalation clause should clearly describe the specific taxes to which it applies. For example, if the clause applies to both real property taxes assessed against the land and the improvements, that fact should be stated. Also, the lease should specifically state if the tenant is obligated to pay any increase in general and special assessments, since a general clause obligating the tenant to pay the increase in property taxes does not extend to increases for general and special assessments [*see Wells v. Union Oil Co. (1938) 25 Cal. App. 2d 165, 166-167, 76 P.2d 696]* . If the tenant's responsibility for tax increases is to be based on both (1) an increase in assessed valuation and (2) an increase caused by a change in the tax rate, that fact should be specifically stated in the lease [*see Land & W. Co. v. Consumers R. & G. Co. (1935) 3 Cal. 2d 77, 79, 43 P.2d 281]* .

For a rent escalation clause based on an increase in a consumer price index, see *§ 34C.200[2]*, Section 2.01(b). For a rent escalation clause based on an increase in the landlord's operating expenses, see *§ 34C.202[2]*, P 3.

[ii] Base Year

An industrial lease should describe a base year, against which increases in taxes are to be measured [*see Section 2.02*(b) of form]. Often the base year is the first full tax year during a lease term, but the parties may agree on any other base year. For example, if the tax assessment in effect at the time the parties execute the lease is based on wholly unimproved land or on a partially constructed or occupied building, the parties may agree that the base year will be the first tax year reflecting a completed or fully occupied building.

[iii] Tenant's Share of Increase

Section 2.02(b) of this form allows the parties to specify whether the tenant will be responsible for 100 percent or less of the total amount of the increase in taxes. A sole tenant of a freestanding building is commonly required to pay the full amount of any increase. For tenants of a multitenant building, each tenant may be required to pay a proportionate share of the increase that is based on a formula, such as the percentage of floor area occupied by the tenant.

[iv] Tenant's Right to Contest Taxes

Section 2.02(e) of this form grants a tenant the right to contest the amount or payment of any tax increase. Whereas a landlord might consider granting that right to a sole tenant of a freestanding building, he or she probably would not grant the right to individual tenants of a multitenant building.

[g] Condition of Premises at Lease Inception

Section 3.01 of the form provides that, as of the date of the lease, the premises have been delivered in good condition to

the tenant. If there is the possibility of a delay in delivery of possession, the alternative provisions in § 34C.200[2], Sections 1.04 and 1.05 (delay entitles tenant to an abatement of rent and the right to terminate the lease after a certain grace period) or § 34C.211 (commencement of the lease term to correspond with delivery of possession) may be used.

Another alternative provision that is more favorable to the tenant is to provide that the landlord must pay the tenant liquidated damages if there is a delay in delivery of possession [*see § 34C.273*]. For alternative provisions relating to the construction of the leased premises by the landlord, see *§ 34C.243*.

[h] Repairs and Maintenance

The responsibilities for repair and maintenance of the leased premises are divided between the landlord and tenant in this lease, with each assuming specific duties described in the lease [*see Sections 3.02, 3.03* of form]. For a lease provision that imposes all responsibility for repair and maintenance on a tenant, see *§ 34C.240*. For discussion of the duty to make repairs and improvements required by governmental laws and regulations, see [j][ii], *below*.

[i] Alterations, Improvements, and Trade Fixtures

In this form, the tenant is permitted to make nonstructural interior improvements to the building without the landlord's consent but is required to notify the landlord in advance of any construction to allow the landlord to post a notice of nonresponsibility for the improvements [*see Section 3.04* of form]. Prior approval from the landlord is required for nonstructural interior improvements when the estimated cost exceeds a stated sum and for all other improvements. The tenant must comply with all applicable laws and ordinances in making the improvements [*see Section 3.04* of form] and covenants to keep the premises free of mechanics' liens in the event improvements are made [*see Section 3.06* of form; *see also* a discussion of mechanics' liens in § 34C.240[1][d]]. Any alterations become the landlord's property on termination of the lease, except that the tenant's trade fixtures may be removed [*see Section 3.05* of form].

For discussion and alternative provisions relating to alterations made by a tenant to the leased premises, see *§ 34C.240*. For discussion and alternative provisions relating to the tenant's trade fixtures, see *§ 34C.242*.

[j] Use of Premises

[i] Restrictions

A lease may limit the tenant's use of leased premises [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . In this form, the tenant's use is restricted to a specific type of industrial business use unless the landlord's prior consent to another use is obtained. Such consent may not be unreasonably withheld [*see Section 4.01* of form; *see also § 34C.230[1][b]* for a discussion of the law applicable to restrictions on the tenant's use of the premises].

Other provisions require the tenant to comply with recorded restrictions governing the industrial park in which the premises are located [*see Section 4.02* of form]. Provisions for signs that may be placed on the leased premises by the tenant are also included [*see Section 4.03* of form].

Also included is a covenant by the tenant that it will not use any hazardous or toxic substances in its business on the leased premises [*see Section 4.01* of form; *see also* discussion in *§ 34C.19*]. For discussion and lease provisions prohibiting the tenant from committing waste or nuisance on the premises or using the premises for any unlawful purpose, see *§ 34C.231*.

For discussion of the legal issues related to the use of the premises, including the statutory rules applicable to nonresidential leases, and for alternative lease provisions for restricting or permitting certain tenant uses, see *§ 34C.230*.

[ii] Compliance With Laws

Section 4.02 of this form is a provision that obligates the tenant to comply with all laws and ordinances related to the tenant's specific use of the premises, whether such laws are in existence at the time the lease is executed or subsequently enacted. For alternative provisions and discussion of the legal issues pertaining to repairs or alterations mandated by existing or new laws and regulations (such as laws pertaining to seismic retrofitting, asbestos abatement, and access for disabled persons), see *§ 34C.241*.

Section 4.02 also includes a provision that requires the tenant to comply with recorded restrictions of the industrial park in which the premises is located.

[k] Insurance and Indemnity

Article 5 of this form requires the tenant to procure and maintain the following types of insurance:

- Public liability;
- Property damage;
- Products liability;
- Fire and extended coverage for the leased premises;
- Personal property insurance;
- Workers' compensation; and
- Business interruption insurance.

PRACTICE TIP:

Need for Business Interruption Insurance. A landlord often requires a tenant to maintain business interruption insurance [*see* Section 5.03 of form] when the tenant is required to rebuild the premises in the event they are destroyed [*see Section 6.01* of form]. This is so that the landlord will not suffer an interruption in rent during the construction period. *By Publisher's Editorial Staff.*

For a discussion of matters relevant to insurance, including the subjects of subrogation and additional insureds, and for alternative insurance provisions for a lease, see *§ 34C.222*.

Article 8 of this form contains reciprocal indemnification provisions by the landlord and tenant. For a discussion of indemnification, see *§ 34C.222[1][j]*.

[l] Destruction of Premises

[i] Requirement to Rebuild

In this form, the tenant is required to rebuild if the destruction is from a cause for which the lease requires insurance to be carried and the landlord is required to rebuild for destruction from any other cause [*see Section 6.01* of form]. The tenant expressly waives the right granted by statute to terminate a lease because the leased premises are destroyed [*see Civ. Code §§ 1931-1933*].

The lease also describes certain exceptions to the landlord or tenant's obligation to rebuild [*see Section 6.02* of form]. For example, the landlord may terminate the lease if the cost to rebuild from an uninsured loss exceeds a maximum

dollar amount stated in the lease [*see Section 6.02*(a) of form]. The lease provides that either party may terminate the lease if the laws in existence at the time of destruction do not permit rebuilding or if the destruction occurs during the last part of the lease term [*see Section 6.02*(b) of form].

The rebuilding is required to be commenced and completed within a specified time period. Optional language is included that permits a tenant to terminate the lease if the landlord does not complete rebuilding within a designated time after the destruction [*see* Section 6.03 of form].

For further discussion of the effect on a lease when leased premises are destroyed and of agreements between landlord and tenant regarding destruction of the premises, see *§ 34C.244[1]*. For alternative provisions that require the tenant to rebuild the premises in all events, see *§ 34C.244[2]*. For lease provisions that require the landlord to restore the premises, see *§ 34C.200[2],* Article 8.

[ii] Rent Abatement

For destruction from an uninsured loss requiring the landlord to rebuild, this form provides that the tenant is excused from paying rent for the period the tenant is unable to occupy the premises [*see* Section 6.04(a) of form]. For destruction from an insured loss requiring the tenant to rebuild, the tenant is not excused from paying rent [*see* Section 6.04(b) of form] and is required to carry business interruption insurance for this purpose [*see* Section 5.03 of form].

[iii] Payment of Insurance Proceeds

This form provides that insurance proceeds payable from a loss are to be paid directly to the tenant for purposes of repair and rebuilding if their amount does not exceed a stated sum. Proceeds in excess of a stated sum are to be paid to an insurance trustee for disbursement throughout the rebuilding and construction period [*see Section 6.05* of form].

[m] Condemnation

If the parties to a lease do not otherwise provide for the rights and obligations of the landlord and tenant in the event the leased premises are condemned [*see Code Civ. Proc. § 1265.160*], these matters are governed by applicable statutory law [*see Code Civ. Proc. §§ 1230.010-1273.050*] and case law. For a discussion of the law applicable to the effect of condemnation on the lease and the parties' compensable interests, and for alternative lease provisions for condemnation, see *§ 34C.262*.

This lease defines "total condemnation" for purposes of the lease as a taking of a certain percentage of the ground area of the premises [*see Section 7.01* of form] and provides for the lease's automatic termination in the event of a total condemnation [*see* Section 7.03 of form]. "Partial condemnation" is defined in the lease as any condemnation that is less than a total condemnation as defined in the lease [*see Section 7.02* of form]. For a partial taking, the lease terminates as to the portion of property taken but continues in effect, with a proportional reduction in rent, for the portion of the property not taken. The landlord is required to do any restoration or rebuilding, at its cost, necessary to render the portion of the premises not taken usable for the tenant's business [*see* Section 7.04 of form].

Section 7.06 of the form provides that the landlord will receive the full amount of any condemnation award, less certain amounts attributable to tenant improvements and trade fixtures.

[n] Tenant's Default

Section 9.03 of this lease lists acts and omissions by the tenant that are considered a default under the lease. It is substantially the same as the default provision contained in the retail lease in § 34C.200[2], Section 10.02. For a discussion of its separate items, see *§ 34C.200[1][r]*.

PRACTICE TIP:

Special Considerations When Dealing With an Industrial Lease. California law provides that if a tenant fails to pay rent, the landlord may require him or her to quit in three days [*see Code Civ. Proc. §§ 1161(2)-(4), 1161.1*]. For certain serious breaches of a lease, the landlord might simply require the tenant to leave in three days. However, because industrial leases typically involve the tenant's use of heavy equipment, it is not practical to require a tenant in these circumstances to move in only three days. Thus, a tenant's attorney should consider including in an industrial lease provisions for longer notice periods and longer grace periods. *By Myron Moskovitz.*

[o] Damages on Termination of Lease

On termination of a lease, a landlord is entitled to recover damages provided by statute [*see Civ. Code § 1951.2*; *see also Section 9.01*(b) of form]. To recover certain damages, the damages must be provided for in the lease [*see Civ. Code § 1951.2(c)*]. Furthermore, the landlord has a duty to mitigate damages in some cases [*see Civ. Code § 1951.2(a)(2), (3), (c)*]. For coverage of the duty to mitigate and the remedy of damages on lease termination, see *§ 34C.270*.

Parties to a nonresidential lease may also provide for liquidated damages in the event of a breach or a failure of a condition [*see Civ. Code § 1671(b)*]. For discussion and a lease provision for liquidated damages, see *§ 34C.273*.

[p] Continuation of Lease After Breach

Section 9.01(a) of this form gives the landlord the right to continue the lease in effect (and collect rent as it becomes due) instead of terminating the lease on the tenant's default. This provision will be valid only if the tenant also has the right to assign or sublet the lease, subject only to reasonable limitations [*Civ. Code § 1951.4(b)*]. For a full discussion of the law applicable to the landlord's right to continue the lease in effect, see *§ 34C.271[1]*.

[q] Assignment and Subletting

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210, 1995.230*; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*]. In this form, the tenant is required to obtain the landlord's consent before assigning the tenant's interest in the lease or subletting the leased premises. The lease expressly states that the landlord's consent must not be unreasonably withheld [*see Section 10.01* of form]. The lease must provide for a tenant's right to assign or sublet the premises, subject only to reasonable limitations, for a landlord to take advantage of the statutory remedy to continue a lease in effect on the tenant's default [*see § 34C.271[1]* for discussion of legal requirements].

This lease form also prohibits assignments or transfers that are involuntary or that occur by operation of law. The landlord should be advised that this language does not prevent an assumption and assignment of the lease in a tenant's federal bankruptcy proceeding [*see* discussion of bankruptcy provisions in § 34C.20].

For a discussion of the law applicable to restrictions on subletting and assignment, see *§ 34C.260[1]*. For alternative lease provisions that entirely prohibit subletting and assignment or permit them only conditionally, see *§ 34C.260[2]*.

[r] Miscellaneous Provisions

This form includes an attorneys' fees provision [*see* Section 10.04 of form]. For an alternative provision and a discussion of applicable law, see *§ 34C.274*.

Other miscellaneous provisions included in Article 10 of this form are the following:

- A provision requiring the tenant to pay all utilities for the leased premises [*see Section 10.02* of form].

- A provision describing the methods by which either party may give the other any notice required or permitted by the lease [*see* Section 10.03 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.294*].

- A provision making the lease binding on successors of the parties [*see Section 10.05* of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.282*].

- A time-is-of-the-essence clause [*see Section 10.06* of form; *see also Ch. 23, Real Property Sales Agreements, § 23.200*].

- A sole-and-only-agreement clause [*see Section 10.07* of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.270*].

The following miscellaneous provisions may also be added to this lease:

- Subordination, nondisturbance, and attornment agreements [*see § 34C.250*];

- Tenant to execute an estoppel certificate on the landlord's request [*see § 34C.261*]; and

- Parties to arbitrate all or certain specified disputes [*see § 34C.280*].

[2] FORM

Industrial Lease

INDUSTRIAL LEASE

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LEASE

Preamble

THIS LEASE is entered into on _____[*date*], by and between _____[*name or names*], _____[*legal status, e.g.*, a California corporation *or* husband and wife *or* an unmarried man], (referred to in this lease as "Landlord") and _____[*name or names*], _____[*legal status, e.g.*, a California corporation *or* a California limited partnership *or* an unmarried woman] (referred to in this lease as "Tenant").

Landlord hereby leases to Tenant on the terms and conditions set forth in this lease the real property located in the County of _____, California, described as follows: _____[*insert legal description of leased premises*], together with the _____[*describe building, e.g.*, two-story] building and other improvements located on the real property, all of which are collectively referred to in this lease as "the Premises."

ARTICLE 1 TERM OF LEASE

Original Term

Section 1.01. The term of this lease shall be for a period of _____[*number, e.g.*, 30] years commencing at 12:01 A.M. on _____[*date*], and ending at 12:01 A.M. on _____[*date*], unless terminated sooner as provided in this lease.

Option to Extend Term

Section 1.02. Tenant shall have a one-time option to extend the term of this lease for an additional period of

_____[*number, e.g.,* 10] years commencing on expiration of the original term specified in Section 1.01 of this lease provided:

(a) Tenant is not then in default under this lease.

(b) Written notice of Tenant's election to renew the term of this lease is delivered by Tenant to Landlord at least _____[*number*] days before expiration of the original term specified in Section 1.01 of this lease. This written notice shall be deemed effective on personal delivery to Landlord or on the date it is deposited in the United States mail in accordance with the provisions of Section 10.03.

(c) The renewed term of this lease shall be subject to the same terms and conditions as are contained in this lease, except that the amount of rent payable under this lease for the renewed term shall be adjusted based on the then fair market value of the Premises, which shall be determined in accordance with Section 2.01(b) of this lease.

Right of First Refusal to Purchase Premises

Section 1.03. (a) Landlord agrees that Landlord shall not sell the Premises during the term of this lease, except subject to the lease. Landlord further agrees that it will not sell the Premises to any person until Landlord has given to Tenant notice in writing of its intent to sell, specifying the price and terms of the contemplated sale. Within _____[*number, e.g.,* 30] days after Landlord gives Tenant written notice of Landlord's intent to sell, Tenant shall have the right to purchase the Premises at the same price and on the same terms and conditions set forth in Landlord's written notice of intent to sell. To exercise its option, Tenant must, within the same _____[*same time period as above, e.g.,* 30-day] period, deposit in escrow with any escrow [*or* title] company in _____ County, California, all moneys and instruments required by the terms of Landlord's notice of intent to sell to be paid or delivered to Landlord on close of escrow and shall also give Landlord written notice of the deposit. If Tenant fails to exercise the right in accordance with the provisions of this section, Landlord may sell the Premises to any other person for the price and on the terms contained in the notice.

(b) If at any time during the term of this lease Landlord receives from any third party a bona fide offer to purchase the Premises at a price and on terms acceptable to Landlord, Landlord shall give written notice of the offer to Tenant. Within _____[*number, e.g.,* 30] days after Landlord gives Tenant written notice of the third-party offer, Tenant shall have the right to purchase the Premises at the same price and on the same terms and conditions set forth in the third-party offer. To exercise its right, Tenant must, within the same _____[*same time period as above, e.g.,* 30-day] period, deposit in escrow with any escrow [*or* title] company in _____ County, California, all moneys and instruments required by the terms of the offer to be paid or delivered to Landlord on close of escrow and shall also give Landlord written notice of the deposit. In the event Tenant fails to exercise the option to purchase in accordance with the provisions of the Section, Landlord may sell the Premises to the third party making the offer on the same terms and conditions set forth in that offer. If for any reason, the Premises are not sold to the party making the offer, Landlord shall give Tenant the same right to purchase the Premises on receiving any subsequent offer from any third party that is acceptable to Landlord.

[*Optional:*]

(c) The right of first refusal granted to Tenant shall exclude all of the following transfers: any transfer resulting from the Landlord's death; any transfer by Landlord to Landlord's spouse or any of Landlord's children; and any transfer by Landlord to any entity in which Landlord holds a 51 percent or greater ownership interest. The right of first refusal granted to Tenant also shall not apply in the event of foreclosure (or a deed in lieu of foreclosure) or to a sale of the leased premises by a lender who has foreclosed.

[*CONTINUE*]

(d) Tenant may not assign the rights granted under this section, and any purported assignment shall be null and void.

(e) If this property is sold to any third party during the term of this lease, then the provisions of this section shall thereafter be of no further force or effect. The transfer of landlord's title to the Premises by will or intestacy shall not be deemed to be a sale under the provisions of this section.

Holding Over

Section 1.04. If Tenant holds over and continues in possession of the Premises after termination of the term of this lease, including any extended term, Tenant's continued occupancy of the Premises shall be deemed merely a tenancy from month-to-month at a minimum rental of $ _____ per month subject to all the terms and conditions, including the provisions for additional rent, but excluding the right of first refusal, contained in this lease.

ARTICLE 2 RENT AND TAXES

Fixed Rent

Section 2.01. (a) Tenant agrees to pay to Landlord during the original term of this lease specified in Section 1.01, rent in the following amounts:

(1) $ _____ per month on the first day of each and every month, commencing on the first day of _____[*date*], during the first _____[*number*] years of the term of this lease; and

(2) $ _____ per month on the first day of each and every month during the last _____[*number*] years of the term of this lease.

Tenant shall pay all rent without deduction to Landlord at the address set forth in this lease for mailing notices to Landlord, or at any other place or places that Landlord may from time to time designate by written notice given to Tenant.

(b) The amount of rent to be paid by Tenant under this lease during the extended term described in Section 1.02 shall be determined as provided in this section. At least [*number, e.g.*, 90] days but not more than [*number, e.g.*, 120] days before expiration of the original term of this lease described in Section 1.01, Landlord and Tenant shall each designate an appraiser who is a member of the American Institute of Real Estate Appraisers. Within 10 days after selection of the last of the two appraisers, the two appraisers chosen shall select a third appraiser. If a third appraiser is not selected within the time allotted, a third appraiser shall be selected by the American Arbitration Association, the cost of which shall be shared equally by Landlord and Tenant. All appraisal costs shall be shared equally by Landlord and Tenant.

The Premises shall be appraised according to their use at the time of appraisal. The appraised value of the Premises for purposes of calculating the rent adjustment provided for under this section shall be the average of the three appraisals.

The annual rent for the renewed term shall be adjusted to _____[*percentage agreed to by parties, e.g.*, 1.5] percent of the appraised value of the Premises. The annual rent for the renewed term shall be payable in equal monthly installments and otherwise paid in the same manner as rent is required under Section 2.01 to be paid during the original term of this lease.

Additional Rent for Increase in Taxes

Section 2.02. (a) Landlord shall pay all real property taxes and assessments levied or assessed against the leased premises during the term of this lease.

(b) In addition to the rent specified in Section 2.01 of this lease, Tenant agrees to pay to Landlord as additional rent for the use and occupancy of the Premises the amount, referred to in this lease as "additional rent," that is required to reimburse Landlord for [*specify percentage of increase payable by tenant, e.g.*, the sole tenant of a freestanding building, 100] percent of the amount of all real property taxes (including general and special assessments) totaling more than $ _____ (which is acknowledged to be the amount of real property taxes and general and special assessments levied against the Premises (including land and improvements) for the base year agreed on by the parties on [*date*]) levied or assessed against the Premises each tax year during the term of this lease, including any renewed term of this lease. Tenant's responsibility for increases required under this section shall exist whether the increase is caused by an increase in assessed valuation of the land or the improvements of which the leased premises are a part, or by an increase in the tax rate.

(c) The additional rent shall be due and payable by Tenant to Landlord within [*number, e.g.*, 30] days after service on Tenant by Landlord of written notice of the amount due under this section as additional rent, the manner in which that amount was computed by Landlord, and a receipt or other evidence showing the bill has been paid in full.

(d) For purposes of this section, all taxes and assessments levied or assessed against the Premises during the first and last years of the term of this lease shall be prorated as of 12:01 A.M. Pacific time on the dates of commencement and expiration, respectively, of the term of this lease.

(e) Tenant shall have the right, at Tenant's sole cost and expense, to protest or contest any tax or assessment, or any increase in any tax or assessment, levied or assessed against the Premises, but Tenant shall have no right to direct Landlord, pending final determination of the protest or contest, not to pay any tax or assessment before it becomes delinquent unless Tenant deposits with Landlord the full amount of that tax or assessment plus the amount of any penalty that will be imposed on the Premises for failure to timely pay the tax or assessment, and one year's interest at the rate charged by the government entity imposing the tax or assessment on the amount of the tax or assessment.

ARTICLE 3 REPAIRS AND MAINTENANCE

Present Condition of Premises

Section 3.01. Tenant agrees and hereby stipulates with Landlord that the Premises are in good and tenantable condition on the date of this lease and that the improvements on the Premises have been constructed by Landlord and delivered to Tenant in good and tenantable condition and in accordance with plans and specifications approved by Tenant.

Repairs by Landlord

Section 3.02. During the term of this lease and any renewal or extension of the term of this lease, Landlord shall, at Landlord's own cost and expense, keep the exterior roof, sidewalls, structural supports, and foundation of the building on the Premises in good repair and make all necessary repairs to, or replacements of, the plumbing, heating, air conditioning, and electrical systems on the Premises; provided, however, Landlord shall not:

(a) Be required to make any repairs to the exterior roof, sidewalls, structural supports, and foundations of the building on the Premises that are rendered necessary by the negligence of or abuse of that property by Tenant or any employees, agents, subtenants, or permittees of Tenant; or

(b) Be liable for any damages resulting from Landlord's failure to make any repairs required by this section to be

made by Landlord, unless Tenant gives written notice to Landlord specifying the need for the repairs and Landlord fails to make the repairs or to commence making the repairs within [*number, e.g.,* 45] days after Tenant gives notice.

Repairs by Tenant

Section 3.03. Except as provided in Section 3.02 of this lease, Tenant shall, at Tenant's own cost and expense, during the term of this lease or any extension of the term of this lease:

(a) Keep and maintain the Premises in good order, repair, and tenantable condition, including maintaining yards, grounds, paving, building doors, and glazing in good order and repair;

(b) Regularly employ a heating and air conditioning maintenance firm to service and maintain, except for major repairs and replacements, the heating and air conditioning system on the Premises in good working order;

(c) Repair any defects in the exterior roof, sidewalls, structural supports, and foundations of the building on the Premises caused by the negligence of or abuse of the building by Tenant or any employees, agents, subtenants, or permittees of Tenant; and

(d) Assume, and save Landlord harmless from the obligation of Landlord under the deed from _____[*name*] to Landlord recorded as Instrument Number _____ of the Official Records in the Office of the County Recorder of _____ County, California, to maintain an easement roadway serving the Premises.

Tenant Alterations

Section 3.04. Subject to the provisions of Section 3.06 of this lease, Tenant may make nonstructural alterations or improvements to the interior of the building deemed necessary by Tenant for Tenant's business without Landlord's approval, provided that Tenant notifies Landlord in writing at least three days before the date construction for alterations or improvements is to commence so that Landlord may post and record a notice of nonresponsibility, and further provided that all construction complies with the requirements of all appropriate government agencies. Before making any nonstructural alterations or improvements to the interior of the building that are estimated to exceed in cost the sum of $ _____[*maximum dollar amount, e.g.,* 10,000] or any structural alterations or improvements to the interior of the building or any alterations or improvements to the exterior of the Building or before constructing any new improvements on the Premises, Tenant shall submit to and obtain Landlord's written approval on final construction plans and specifications for the alterations or improvements. Landlord shall not unreasonably withhold approval. All improvements or alterations made by Tenant on the Premises shall comply with the requirements of any federal, state, or municipal authority having jurisdiction.

Tenant Improvements and Trade Fixtures

Section 3.05. (a) Any alterations, improvements, or installations made by Tenant to the Premises shall at once become a part of the realty and belong to Landlord. On expiration or earlier termination of this lease, Tenant shall surrender the Premises and all improvements thereon to Landlord in good, sanitary, and neat order, condition, and repair, excluding ordinary wear and tear.

(b) Tenant shall have the right to remove its trade fixtures from the Premises at the expiration or earlier termination of this lease term provided Tenant is not then in default under this lease and provided that Tenant shall repair any damage to the Premises caused by that removal.

Liens

Section 3.06. (a) Tenant agrees to keep all of the Premises and every part thereof and the building and other improvements at any time located on the Premises free and clear of any and all mechanics', materialmen's, and other liens for or arising out of or in connection with work or labor done, services performed, or materials or appliances used or furnished for or in connection with any operations of Tenant, any alteration, improvement, or repairs or additions that Tenant may make or permit or cause to be made, or any work or construction by, for, or permitted by Tenant on or about the premises, or any obligations of any kind incurred by Tenant. Tenant further agrees to pay promptly and fully and discharge any and all claims on which any such lien may or could be based, and to save and hold Landlord and all of the Premises and the building and any other improvements on the Premises free and harmless from any and all such liens and claims of liens and suits or other proceedings pertaining thereto.

(b) If Tenant desires to contest any such lien, it shall notify Landlord of its intention so to do within _____[*number, e.g.,* 10] days after the filing of that lien. In such a case, and provided that Tenant on demand of Landlord protects Landlord by a good and sufficient surety bond against any such lien and any costs, liability, or damage arising out of that contest, Tenant shall not be in default hereunder until _____[*number, e.g.,* five] days after the final determination of the validity thereof, within which time Tenant shall satisfy and discharge that lien to the extent held valid. The satisfaction and discharge of any such lien shall not, in any case, be delayed until execution is had on any judgment rendered on the lien, and that delay shall be a default of Tenant under this lease. In the event of any such contest Tenant shall protect and indemnify Landlord against all loss, cost, expense, and damage resulting from the contest.

Landlord's Right of Inspection

Section 3.07. Landlord or Landlord's duly authorized agents may enter the Premises at any and all reasonable times during the term of this lease, including any extended term, to determine whether Tenant is complying with the terms and conditions of this lease or to perform any other acts authorized by this lease to be performed by Landlord or reasonably necessary to protect Landlord's rights under this lease.

Surrender of Premises

Section 3.08. On expiration or earlier termination of this lease, Tenant shall promptly surrender possession of the Premises to Landlord in as good condition as the Premises are on the date of this lease, reasonable wear and tear excepted.

ARTICLE 4 USE OF PREMISES

Permitted and Prohibited Use of Premises

Section 4.01. Tenant shall use the Premises for operating and conducting a _____[*description of business, e.g.,* business for the manufacture of children's wooden toys] and for no other purpose without the written consent of Landlord. Landlord shall not unreasonably withhold consent. Under no circumstances during the term of this lease shall Tenant use or cause to be used in the business operated on the Premises any hazardous or toxic substances or materials, or store or dispose of any such substances or materials on the Premises. [Landlord hereby agrees to and does indemnify and hold Tenant harmless against all damage, loss or liability arising from the presence of any hazardous or toxic substances not caused by Tenant].

Compliance With Laws

Section 4.02. The Premises shall not be used or permitted by Tenant to be used in violation of any law or ordinance. Tenant shall maintain the Premises in a clean and sanitary manner and shall comply with:

(a) All laws, ordinances, rules, and regulations related to Tenant's specific use of the Premises, now in effect or subsequently enacted or promulgated by any public or governmental authority or agency having jurisdiction over the Premises (and specifically excluding any such laws and requirements which would pertain to any lawful use and occupancy of the Premises in contrast to Tenant's specific use); and

(b) The recorded restrictions governing the industrial park, _____[*name of industrial park*], in which the Premises are located, as amended from time to time.

Signs

Section 4.03. Tenant may erect and maintain any signs on the Premises relating to Tenant's business on the Premises, provided the signs so erected:

(a) Comply with the rules and regulations of the architectural or other committee of the industrial park having jurisdiction over such matters in which the Premises are located;

(b) Are removed at the sole cost and expenses of Tenant without damage to any building on the Premises or to the Premises on expiration or sooner termination of this lease;

(c) Are erected by Tenant and not by some other person on space leased by Tenant without Landlord's written consent to some other person for advertising purposes; and

(d) Comply with any law or ordinance of any governmental agency having jurisdiction over the Premises.

ARTICLE 5 INSURANCE

Fire Insurance

Section 5.01. (a) Tenant shall, at Tenant's own cost and expense, at all times during the full term of this lease and any extended term of this lease, keep all buildings, improvements, and other structures on the Premises insured for at least [*number, e.g.,* 90 percent] of their full replacement cost against loss or destruction by fire and the perils, including vandalism and malicious mischief, commonly covered under the standard extended coverage endorsement in [*name of county where the Premises are located*] County, California. Any loss payable under any policy described in this section shall be paid by the insurance company to a trustee such as a joint control agency selected by the insurance company and used to fund the repair or replacement of the damaged building or improvement pursuant to Section 6.01 of this lease. Landlord shall be named as an additional insured on the policies and the policies shall also contain cross-liability endorsements.

(b) "Full replacement cost," as used in this section, shall mean the actual cost of replacement for the building and other improvements on the Premises, as determined from time to time. If at any time during the term of this lease, Landlord believes that the full replacement cost has increased, Landlord shall notify Tenant in writing. If Tenant agrees with the increased full replacement cost set forth in Landlord's notice, Tenant shall, within [*number, e.g.,* 30] days of the notice, increase the amount of insurance carried to the amount stated in the notice. If the parties are unable to agree

within the [*same time period as above, e.g.,* 30-day] period, the increased full replacement cost, if any, shall be determined by the insurance carrier that is then carrying the largest amount of fire and extended coverage on the Premises. That determination shall be final and Tenant shall immediately increase the amount of insurance to the amount determined by that carrier. Increases in coverage pursuant to this section may be made not more often than every [*number, e.g.,* three] years, unless otherwise agreed by Landlord and Tenant. Notwithstanding the preceding sentence, if Tenant makes improvements or alterations to the Premises during any given year of the term of this lease, Landlord may request an increase in coverage pursuant to the provisions of this section.

Liability Insurance

Section 5.02. Tenant shall, at Tenant's own cost and expense, secure and maintain during the entire term of this lease and any extended term of this lease, public liability, property damage, and products liability insurance, insuring Tenant and Tenant's employees against all bodily injury, property damage, personal injury, and other loss or liability caused by or connected with Tenant's occupation and use of the Premises under this lease in amounts not less than:

(a) $ _____ for injury to or death of one person and, subject to the limitation for the injury or death of one person, of not less than $ _____ for injury to or death of two or more persons as a result of any one accident or incident; and

(b) $ _____ for property damage.

Landlord shall be named as an additional insured and the policy or policies shall contain cross-liability endorsements.

In the event that Landlord determines, in Landlord's reasonable judgment, that the limits of the public liability, property damage, or products liability insurance then carried by Tenant are materially less than the amount or type of insurance typically carried by owners or tenants of properties located in the same county in which the Premises are located, which are similar to and operated for similar business purposes as the Premises, Landlord may elect to require Tenant to increase the amount of specific coverage, change the type of policy carried, or both. If Landlord so elects, Tenant shall be notified in writing of the specific change in policy amount or type required and shall have 30 days after the date of Landlord's notice to effect the change in amount or type of policy. Unless otherwise agreed by Landlord and Tenant, any adjustment under this section may be made not more often than every _____[*number, e.g.,* two] years.

Business Interruption Insurance

Section 5.03. Tenant shall procure and maintain, at Tenant's cost, business interruption insurance for and during the term of this lease, ensuring the rent provided for in Section 2.01 will be paid to Landlord for a period of up to _____[*time period, e.g.,* two years] in the event the Premises or the building is destroyed or damaged so as to render operation of Tenant's business impossible or impracticable by any casualty insured against by standard fire and extended coverage insurance.

Tenant's Personal Property

Section 5.04. Tenant shall at all times during the term of this lease and at Tenant's sole expense, keep all of Tenant's personal property, including trade fixtures and equipment and all merchandise of Tenant that may be in the Premises from time to time, insured against loss or damage by fire and by any peril included within fire and extended coverage insurance for an amount that will insure the ability of Tenant to fully replace the trade fixtures, equipment, and merchandise.

Workers' Compensation Insurance

Section 5.05. Tenant shall maintain in effect throughout the term of this lease, at Tenant's sole expense, Workers' Compensation insurance in accordance with the laws of California, and employers' liability insurance with a limit of not less than $ _____[*minimum dollar amount, e.g.,* 1 million] per employee and $ _____[*minimum dollar amount, e.g.,* 1 million] per occurrence.

Cancellation Clause

Section 5.06. Any policy of insurance required under this Article shall be written by insurance companies authorized to do business in California. Each policy of insurance procured by Tenant pursuant to this Article shall expressly provide that it cannot be canceled for any reason or altered in any manner unless at least _____[*minimum notice period, e.g.,* 10 days'] prior written notice has been given by the insurance company issuing the policy to Landlord in the manner specified in this lease for service of notices on Landlord by Tenant.

Deposit of Insurance Policies With Landlord

Section 5.07. Promptly on the issuance, reissuance, or renewal of any insurance policy required by this lease, including fire and liability insurance policies, Tenant shall cause a duplicate copy of the policy or a certificate evidencing the policy and executed by the insurance company issuing the policy or its authorized agent to be given to Landlord.

Blanket Insurance Policy

Section 5.08. To satisfy its obligations under this Article, Tenant may at any time during the term of this lease, have in full force and effect a "blanket" policy of insurance insuring the Premises as well as other property owned or occupied by Tenant, provided the blanket policy does not in any way diminish the amount or coverage of the insurance required under this Article, and further provided that the blanket policy otherwise meets all requirements of this Article.

Landlord's Right to Procure Insurance

Section 5.09. If at any time Tenant fails to procure or maintain the insurance required by this Article, Landlord may obtain that insurance and pay the premiums on it for the benefit of Tenant. Any amounts paid by Landlord to procure or maintain insurance pursuant to this section shall be immediately due and repayable to Landlord by Tenant with the next then due installment of rent under this lease; failure to repay at that time any amount expended by Landlord shall be considered the same as a failure to pay rent and a default by Tenant under this lease.

ARTICLE 6 DESTRUCTION OF PREMISES

Duty to Repair or Restore

Section 6.01. If any improvements, including buildings and other structures, located on the Premises are damaged or destroyed during the term of this lease or any renewal or extension thereof, the damage shall be repaired as follows:

(a) If the damage or destruction is caused by a peril against which fire and extended coverage insurance is required

to be carried by Section 5.01 of this lease, Tenant shall repair that damage as soon as reasonably possible and restore the Premises and improvements to substantially the same condition as existed before the damage or destruction, regardless of whether the insurance proceeds are sufficient to cover the actual cost of repair and restoration. If insurance required to be carried by Section 5.01 of this lease has lapsed or not been carried, Tenant shall be solely responsible for the full cost and expense of necessary repairs.

(b) If the damage or destruction is caused by a peril against which insurance is not required to be carried by this lease, Landlord, subject to its right to terminate this lease described in Section 6.02, shall repair that damage as soon as reasonably possible and restore the Premises to substantially the same condition as existed before the damage or destruction.

(c) If the damage or destruction is caused either by a peril against which fire and extended coverage insurance is required by this lease to be carried or by a peril against which insurance is not required to be carried by this lease, Tenant expressly waives any right under *Civil Code Sections 1931-1933* to terminate this lease for damage or destruction to the Premises.

Termination of Lease for Certain Losses

Section 6.02. (a) Notwithstanding any other provision of this lease, if any improvements located on the Premises are damaged or destroyed to such an extent it will cost more than $ _____[*maximum dollar amount, e.g.,* 100,000] to repair or replace them, and the damage or destruction is caused by a peril against which insurance is not required to be carried by this lease, Landlord may terminate this lease by giving Tenant written notice of the termination. The notice must be given within _____[*number*] days after occurrence of the damage or destruction.

(b) Tenant or Landlord shall have the right to terminate this lease under either of the following circumstances:

(1) If the Premises are damaged or destroyed from any cause whatsoever, insured or uninsured, and the laws then in existence do not permit the repair or restoration of the Premises provided for in this Article; or

(2) If the Premises are destroyed from any cause whatsoever, insured or uninsured, during the last _____ [*number, e.g.,* two] years of the term of this lease (provided that Tenant has not elected before the date of damage or destruction to extend the term of this lease in accordance with the provisions of Section 1.02) or during the last _____[*number, e.g.,* three] years of the extended term, if any, of this lease.

(c) Either party may terminate this lease by giving written notice of termination to the other not later than _____[*notice period, e.g.,* 14 days] after occurrence of the event giving rise to terminate under subsection (b), and termination shall be effective as of the date of the notice of termination. In the event of a termination under subsection (b), Tenant shall not be entitled to collect any insurance proceeds attributable to insurance policies covering the Premises or improvements, except those proceeds attributable to Tenant's personal property and trade fixtures.

(d) If this lease is terminated pursuant to either subsection (a) or (b) above, rent, taxes, assessments, and other sums payable by Tenant to Landlord under this lease shall be prorated as of the termination date. If any taxes, assessments, or rent has been paid in advance by Tenant, Landlord shall refund it to Tenant for the unexpired period for which the payment has been made.

Time for Construction of Repairs

Section 6.03. Any and all repairs and restoration of improvements required by this Article shall be commenced by Landlord or Tenant, as the case may be, within a reasonable time after occurrence of the damage or destruction requiring the repairs or restoration; shall be diligently pursued after being commenced; and shall be completed within a reasonable time after the loss. If Landlord is required under this lease to perform the repairs and restoration, Landlord shall cause the repairs and restoration to be completed not later than _____[*permitted time period for construction, e.g.,* 180 days] after occurrence of the event causing destruction [*or* Tenant shall have the right to terminate this lease].

Abatement of Rent

Section 6.04. (a) If the damage or destruction to the Premises is caused by a peril against which insurance is not required to be carried under this lease, rent shall be abated only for the time and to the extent Tenant is prevented from occupying the Premises for the uses authorized in this lease.

(b) If the damage or destruction is caused by a peril against which insurance is required to be carried by Section 5.01 of this lease, Tenant shall continue to pay the full amount of rent required under this lease notwithstanding the fact that damage or destruction renders the Premises either partially or completely uninhabitable for the uses authorized by this lease.

Payment of Insurance Proceeds

Section 6.05. For any damage to the Premises caused by a peril covered by insurance required under this lease to be carried and maintained by Tenant, the proceeds shall be paid directly to the Tenant for the purpose of making the necessary repairs to the Premises, provided that the total amount of the loss and proceeds payable for the loss do not exceed the amount of $ _____[*maximum permitted dollar amount, e.g.,* 10,000]. For any insured peril for which the amount of the loss and proceeds payable for the loss exceed the amount of $ _____[*same maximum permitted dollar amount, e.g.,* 10,000], the whole amount of the proceeds and the difference, if any, between the cost of the repairs or restoration and the amount of proceeds payable for the loss (for which Tenant is required to pay under Section 6.01(a)), shall be paid to an insurance trustee designated by the insurance carrier responsible for payment of the greatest amount of proceeds for the insured peril. The designated insurance trustee shall disburse the proceeds throughout the term of repair and reconstruction in accordance with its usual procedures. If the insurance proceeds payable for the insured loss are insufficient to cover the total cost of repair or restoration, Tenant, within 30 days of the occurrence of the event causing the damage or destruction, shall deposit a sum equal to the difference between the cost of restoration and the amount of insurance proceeds with the insurance trustee. Tenant shall pay all costs and fees of the insurance trustee. Both parties agree to execute documents requested by the insurance trustee as necessary to carry out the provisions of this section.

ARTICLE 7 CONDEMNATION

Total Condemnation Defined

Section 7.01. The term "total condemnation" as used in this Article shall mean the taking by eminent domain ("condemnation") by a public or quasi-public agency or entity having the power of eminent domain ("condemnor") of

(a) More than [*percentage agreed to by parties, e.g.,* 35] percent of the ground area of the Premises; or

(b) Less than [*percentage agreed to by parties, e.g.,* 35] percent of the ground area of the Premises at a time when the remaining buildings or improvements on the Premises cannot reasonably be restored to a condition suitable for

Tenant's occupancy for the uses permitted by this lease within [*number, e.g.,* 90] normal eight-hour working days under all laws and regulations then applicable; or

(c) Less than [*percentage agreed to by parties, e.g.,* 35] percent of the ground area of the Premises in such a manner that Tenant is substantially prevented from carrying on operations of a permitted use under this lease on the remaining portion of the Premises.

Partial Condemnation Defined

Section 7.02. The term "partial condemnation" as used in this Article shall mean any condemnation of a portion of the Premises that is not a total condemnation under Section 7.01 of this lease.

Termination for Total Condemnation

Section 7.03. In the event of a total condemnation of the Premises during the term of this lease, this lease shall terminate without further notice as of 12:01 A.M. on the date actual physical possession of the condemned property is taken by the condemnor. All rent payable under this lease shall be prorated as of 12:01 A.M. on that date and a prompt refund or payment of rent for the unexpired period of this lease shall be made by Landlord to Tenant. On the making of that rent adjustment, both Landlord and Tenant will be released and discharged from any and all further obligations under this lease.

Effect of Partial Condemnation

Section 7.04. In the event of a partial condemnation of the Premises, this lease shall terminate as to the portion of the Premises taken on the date actual physical possession of that portion is taken by the condemnor but shall remain in full force and effect as to the remainder of the Premises; provided, however, that promptly after the taking of actual physical possession by the condemnor of the portion taken by condemnation, Landlord shall restore, at Landlord's own cost and expense, the improvements on the remainder of the Premises to a condition making the Premises tenantable by Tenant for the uses permitted by this lease. Any rent payable under this lease after the date actual physical possession is taken by the condemnor of the portion of the Premises condemned shall be reduced by the percentage the ground area of the portion taken by eminent domain bears to the total ground area of the Premises on the date of this lease. In addition, the rent payable under this lease shall be further abated during the time and to the extent Tenant is prevented from occupying all of the remainder of the Premises by the work of restoration required by this section to be performed by Landlord.

Landlord's Power to Sell in Lieu of Condemnation

Section 7.05. Landlord may, without any obligation or liability to Tenant and without affecting the validity or continuation of this lease other than as expressly provided in this Article, agree to sell or convey to the condemnor, without first requiring that an action or proceeding for condemnation be instituted or tried, the portion of the Premises sought by the condemnor free from this lease and the rights of Tenant in the Premises other than as provided in this Article.

Condemnation Award

Section 7.06. All compensation and damages awarded or paid for the condemnation of the Premises or any portion of

the Premises, or for any sale in lieu of condemnation as authorized by Section 7.05 of this lease, shall, except as otherwise expressly provided in this section, belong to and be the sole property of Landlord. Tenant hereby assigns to Landlord any claim Tenant might have except for this provision against Landlord, the leased Premises, or condemnor for diminution in value of the leasehold estate created by this lease or the value of the unexpired term of this lease; provided, however, that Tenant is entitled to seek to recover from the condemnor, but not from Landlord:

(a) The cost of removing any trade fixtures, furniture, or equipment from the portion of the Premises taken by condemnation;

(b) The value of any improvements installed by Tenant on the portion of the Premises taken by condemnation that Tenant has a right to remove under this lease but that Tenant elects not to remove; and

(c) The then amortized value of all improvements made by Tenant on the portion of the Premises taken by condemnation that could not be removed by Tenant on expiration of this lease either because of provisions of this lease or because the improvements would have no economic value on removal from the Premises.

ARTICLE 8 INDEMNIFICATION

Tenant's Hold-Harmless Clause

Section 8.01. Except as otherwise provided in Section 8.02, Tenant shall indemnify and hold Landlord and the property of Landlord, including the Premises, free and harmless from any and all liability, claims, loss, damages, or expenses, including counsel fees and costs, arising by reason of the death or injury of any person, including Tenant or any person who is an employee or agent of Tenant, or by reason of damage to or destruction of any property, including property owned by Tenant or any person who is an employee or agent of Tenant, caused or allegedly caused by (1) any cause whatsoever while that person or property is in or on the Premises or in any way connected with the Premises or with any improvements or personal property on the Premises; (2) some condition of the Premises or some building or improvement on the Premises; (3) some act or omission on the Premises of Tenant or any person in, on, or about the Premises with the permission and consent of Tenant; or (4) any matter connected with Tenant's occupation and use of the Premises.

Landlord's Hold-Harmless Clause

Section 8.02. Notwithstanding the provisions of Section 8.01 of this lease, Tenant shall be under no duty to indemnify and hold Landlord harmless from any liability, claims, or damages arising because of Landlord's failure to make any repairs required by this lease to be made by Landlord or because of any negligence or willful acts of misconduct by Landlord or by any person who is an agent or employee of Landlord acting in the course and scope of its agency or employment. Landlord agrees to indemnify, defend, protect, and hold Tenant free and harmless from and against any liability, claims, or damages arising from or in connection with Landlord's failure to make any repairs required by this lease to be made by Landlord or because of any negligence or willful acts of misconduct by Landlord or by any person who is an agent or employee of Landlord acting in the course and scope of its agency or employment.

ARTICLE 9 DEFAULT AND REMEDIES

Remedies on Tenant's Default

Section 9.01. If Tenant breaches this lease, Landlord, in addition to any other remedy given Landlord by law or equity, may

(a) Continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which case Landlord shall be entitled to enforce all Landlord's rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease;

(b) Terminate this lease and recover from Tenant

(1) The worth, at the time of award, of the unpaid rent that had been earned at the time of termination of the lease;

(2) The worth, at the time of award, of the amount by which the unpaid rent that would have been earned after termination of the lease until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(3) The worth, at the time of award, of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(4) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform the obligations under this lease; or

(c) Terminate the lease and, in addition to any recoveries Tenant may seek under subsection (b) of this section, bring an action to reenter and regain possession of the Premises in the manner provided by the laws of unlawful detainer then in effect in California.

Termination by Landlord

Section 9.02. No act of Landlord, including but not limited to Landlord's entry on the Premises or efforts to relet the Premises, or the giving by Landlord to Tenant of a notice of default, shall be construed as an election to terminate this lease unless a written notice of the Landlord's election to terminate is given to Tenant or unless termination of this lease is decreed by a court of competent jurisdiction.

Default by Tenant

Section 9.03. All covenants and agreements contained in this lease are declared to be conditions to this lease and to the term hereby leased to Tenant. The following constitute a material default and breach of this lease by Tenant:

(a) Any failure to pay rent when due when the failure continues for _____[*number, e.g.*, five] days after written notice to pay that rent or surrender possession of the Premises is served on Tenant by Landlord.

(b) Any failure to perform any other covenant, condition, or agreement contained in this lease when the failure is not cured within _____[*number, e.g.*, 20] days after written notice of the specific failure is given by Landlord to Tenant.

(c) The bankruptcy or insolvency of Tenant, the making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under the Bankruptcy Act (unless, in the case of a petition filed against Tenant, it is dismissed within _____[*permitted time period, e.g.*, 60 days]); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, if possession is not restored to Tenant within _____[*permitted time period, e.g.*, 30 days]; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when that seizure is not discharged within _____[*permitted time period,*

e.g., 15 days].

(d) The abandonment or vacating of the Premises by Tenant (which, for purposes of this lease, shall mean Tenant's failure to occupy and operate the Premises for business for a period of at least _____[*permitted time period, e.g.*, 30 consecutive days]).

The notices provided for in subsections (a) and (b) of this Section 9.03 are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Cumulative Remedies

Section 9.04. The remedies granted to Landlord in this Article shall not be exclusive but shall be cumulative and in addition to all other remedies now or hereafter allowed by law or authorized in this lease.

Waiver of Breach

Section 9.05. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent default or breach by Tenant either of the same or a different provision of this lease.

ARTICLE 10 MISCELLANEOUS

Assignment and Subletting

Section 10.01. Tenant shall not encumber, assign, sublet, or otherwise transfer this lease, any right or interest in this lease, or any right or interest in the Premises or any of the improvements that may now or hereafter be constructed or installed on the Premises without first obtaining the written consent of Landlord. Tenant shall not sublet the Premises or any part of the Premises nor allow any other person, other than Tenant's agents, servants, and employees, to occupy the Premises or any part of the Premises without the prior written consent of Landlord. Any encumbrance, assignment, transfer, or subletting without the prior written consent of Landlord, whether voluntary or involuntary, by operation of law or otherwise, is void and shall, at the option of Landlord, terminate this lease. The consent of Landlord to any assignment of Tenant's interest in this lease or the subletting by Tenant of the Premises or parts of the Premises shall not be unreasonably withheld.

Utilities

Section 10.02. Tenant shall pay all charges incurred for the furnishing of gas, electricity, water, telephone service, garbage or refuse service, and other public utilities to the Premises during the term of this lease. All payments shall be made directly to the service provider before their delinquency.

Notices

Section 10.03. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom it is directed or to

any managing employee or officer of that party or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____[*address*], _____[*city*], California _____[*zip code*] or to Landlord at _____[*address*], _____[*city*], California _____[*zip code*]. Either party, Landlord or Tenant, may change its address for purposes of this Ssection by giving written notice of that change to the other party in the manner provided in this section.

Attorneys' Fees

Section 10.04. If any litigation, including arbitration proceedings, is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to this lease, the party prevailing in that litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to a reasonable sum as and for its attorneys' fees in the litigation, which shall be determined by the court in that litigation or in a separate action brought for that purpose.

Binding on Heirs and Successors

Section 10.05. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of each Landlord and Tenant, but nothing contained in this section shall be construed as a consent by Landlord to any assignment of this lease or any interest in this lease by Tenant.

Time of Essence

Section 10.06. Time is expressly declared to be of the essence in this lease.

Sole and Only Agreement

Section 10.07. This instrument constitutes the sole and only full, final, and complete agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, and the lease terms contained in this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. All prior negotiations between the parties are subsumed into this lease to the extent they have been agreed to, and if not agreed to by the parties such negotiations are not set forth in the terms and conditions of this lease. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

EXECUTED _____[*date*] at _____[*place*].

_____ [*signature of landlord*]
[*typed name*]
LANDLORD
_____ [*signature of tenant*]
[*typed name*]
TENANT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBankruptcyLeasesReal Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFrustration of PurposeReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
A. Complete Leases

17-34C California Legal Forms--Transaction Guide § 34C.202

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.202 Office Lease

[1] Comment

[a] Use of Form

This form is a lease for office space in a multitenant office building. The rent is a fixed monthly amount [*see* P 2 of form] plus the tenant's pro rata share of any increase (over a specified base year) in the landlord's operating expenses for the building [*see* P 3 of form; *see also* discussion of rent in [c], *below*]. Responsibilities for and rights in the common areas of the building are also described [*see* [i], *below*].

For an example and discussion of a retail lease, see *§ 34C.200*. For discussion and an example of an industrial lease, see *§ 34C.201*.

A tenant may want to record a short form or Memorandum of Lease to impart constructive notice of the terms of its lease to all subsequent purchasers and mortgagees of the landlord [*see § 34C.203* for discussion and a sample Memorandum of Lease].

[b] Term of Lease

This lease is for a fixed term [*see* P 1 of form; *see also § 34C.16* and Ch. 34B, *Residential Leases* , for discussion of the legal issues related to term]. For alternative provisions regarding the lease term's commencement, see *§ 34C.210* (term to commence on occurrence of specified conditions) and § 34C.211 (term to commence on completion of construction by landlord). For discussion and lease provisions relating to an option to renew or extend a lease, see *§ 34C.212*. For discussion and lease provisions granting the landlord or the tenant the right to terminate the lease on the occurrence of a stated event, see *§ 34C.272*. For a specific provision granting the landlord the right to terminate the lease if financing cannot be obtained, see *§ 34C.251[2]*.

[c] Rent

There is no uniform formula for rent under a lease for office space. What is available to a tenant is largely a matter of current market conditions, including the vacancy factor in the area where the tenant plans to lease space. Gross office leases, under which a tenant pays only a monthly or other periodic fixed rent and the landlord pays all operating expenses, taxes, and insurance are an increasing rarity.

This lease provides for a basic fixed rent [*see* P 2 of form] plus additional rent in the amount of increased operating expenses [*see* P 3 of form; *see also* [d], *below*]. Some office leases are fully "net" and require the tenant to pay a pro rata share of all operating expenses (including taxes and insurance) from the commencement of the lease [*see* discussion of net leases in § 34C.17].

For discussion and lease provisions relating to security deposits, see *§ 34C.220*.

[d] Additional Rent for Increase in Operating Expenses

A common provision in office leases is a rent formula that requires the tenant to pay, in addition to a fixed periodic rent, a pro rata share of any increase in the landlord's operating expenses for the property. The increase for which the tenant is responsible is usually measured against a base year or a specific dollar amount agreed on by the parties. When the increase is based on a base year or specific dollar amount, the tenant should confirm that the specific year or dollar amount is an accurate reflection of representative costs. For example, if a building is not fully occupied, its tax valuation and taxes are generally less than for a fully occupied building. Operating expenses for a largely vacant building are likewise much less than for a fully occupied building. Also of concern to the tenant is precisely which expenses of the landlord can and cannot be classified as "operating expenses."

In this form [*see* P 3 of form], the tenant is required to pay, during each year of the lease term, a pro rata share of the amount, if any, by which the landlord's operating expenses increase over a base year, for example, the first year of the lease term. Permitted and prohibited operating expenses are defined and a formula for determining the tenant's pro rata share of expenses is described.

For an alternative provision to adjust rent based on the increase in property taxes only, see *§ 34C.201[2]*, Section 2.02. For a provision to adjust rent based on the Consumer Price Index, see *§ 34C.200[2]*, Section 2.01(b)-(d).

[e] Use of Premises

A lease may limit the tenant's use of leased premises [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . In this form, the tenant's use is restricted to general office purposes unless the landlord's prior consent to another use is obtained [*see* P 4 of form].

This lease also contains provisions prohibiting the tenant from (1) engaging in any use that will increase the rates of insurance on any insurance carried for the building or that is unlawful and (2) committing waste or maintaining a nuisance [*see* P 5 of form]. For discussion and alternative provisions prohibiting the tenant from committing waste or nuisance on the premises or using the premises for any unlawful purpose, see *§ 34C.231*.

For discussion of the legal issues related to the use of the premises, including the statutory rules applicable to nonresidential leases, and for alternative lease provisions for restricting or permitting certain tenant uses, see *§ 34C.230*.

[f] Tenant Improvements

A tenant in an office building is often granted some amount of tenant improvement allowance from which the landlord

will "build-out" the tenant's space to accommodate the tenant's specific business needs. Paragraph 8 of the form requires the landlord to make certain improvements to the leased space agreed on by the parties before commencement of the lease term. If the construction is not completed by the time the term commences, the tenant is not obligated to pay rent, but also is not entitled to terminate the lease. If possession of the premises is not delivered by expiration of a designated grace period, the tenant does have the right to terminate the lease [*see* P 8 of form]. For more detailed provisions requiring the landlord to construct a building or other improvements, see *§ 34C.243*.

This form also provides that the tenant is not permitted to make any improvements or alterations to the leased space without the prior approval of the landlord [*see* P 6 of form]. For discussion of the law applicable to alterations made by a tenant to the leased premises, see *§ 34C.240[1]*. For alternative provisions for alterations by a tenant, see *§ 34C.240[2]*.

[g] Landlord Improvements

In this form, the landlord is required to make certain improvements to the premises before commencement of the lease term [*see* P 8 of form]. If the landlord fails to complete the construction before the commencement date, the tenant's rent is abated for the duration of the delay and the tenant has a right to terminate the lease if the delay continues for a certain period thereafter.

If the projected date of completion of the landlord's improvements is uncertain, the parties may want to provide that the commencement of the lease term would coincide with delivery of possession [*see § 34C.211*]. Another alternative provision that is more favorable to the tenant is to provide that the landlord must pay the tenant liquidated damages if there is a delay in delivery of possession [*see § 34C.273*].

[h] Repairs and Maintenance

In this form, the landlord must provide regular cleaning service for the tenant's leased space [*see* P 9(d) of form] and must also maintain and repair the tenant's space, in addition to the common area [*see* P 9(b) of form]. Except for emergency repairs, the landlord is required to make repairs specified in a tenant's notice within a designated period of time [*see* P 9(c) of form]. If the landlord fails to make the repair within the required time, the tenant may have the repair made and be reimbursed by the landlord, or failing timely reimbursement, deduct the repair's cost from the next due installment of rent [*see* P 9(c) of form].

For a lease provision that imposes all responsibility for repair and maintenance on a tenant, see *§ 34C.240*. For alternative provisions and discussion of the legal obligations of the parties to make repairs or alterations mandated by existing or new laws and regulations, such as laws pertaining to seismic retrofitting, asbestos abatement, and access for disabled persons, see *§ 34C.241*.

[i] Common Areas

Because a multitenant building usually includes common areas for shared use among tenants, for example, lobby, hallways, and elevators, a lease for space in the building, unlike that for a single-tenant, freestanding building, must address the issues of who will maintain the common areas and who will pay the related costs. In this form, the common areas are described [*see* P 11(b) of form] and the landlord has responsibility for maintenance and repair of these areas [*see* P 11(c) of form].

Rules and regulations for use of the common area are incorporated by reference in the lease and set forth in an exhibit to the lease. Also included in this lease is a covenant by the tenant to abide by and obey all building rules and regulations [*see* P 11(d) of form].

[j] Parking

An underground parking garage is described in this lease form as a part of the common area for which the landlord has maintenance responsibilities [*see* P 12 of form]. The tenant is granted an exclusive right to use a designated number of spaces, and subject to availability may lease more parking spaces for an additional cost. The landlord may reconfigure the parking spaces, provided the number made available to the tenant is not reduced.

[k] Utilities

The party responsible for providing and paying the cost of utilities is a matter to be negotiated between the parties. In the lease in [2], *below*, the landlord must provide water, electricity, heating, and air conditioning for both the leased space and common areas [*see* P 13 of form]. The precise hours when the services must be made available are specified, since many office tenants need access to their offices during nontraditional working hours, for example, weekends. The cost of utilities is an operating expense of the landlord that is passed to the tenant in the form of additional rent [*see* P 3 of form].

[l] Insurance and Indemnity

Responsibility for procuring and maintaining insurance on leased property may be allocated to either party in a lease. In this form, the tenant is required only to carry liability insurance on the leased premises and to insure its own personal property [*see* PP 14 and 15 of form]. The tenant also covenants to indemnify the landlord against liability occurring in the leased space or common areas, except for liability resulting from acts or omissions of the landlord or the landlord's agents [*see* P 16 of form]. In this form, neither party is obligated to carry fire and extended coverage insurance. For alternative lease provisions and further discussion of insurance and indemnity, see *§ 34C.222*. For additional alternative insurance provisions, see *§ 34C.200[2]*, Article 6, and § 34C.201[2], Article 5.

[m] Destruction of Premises

In this form, the landlord is required to rebuild in the event either the building or leased space is destroyed by any cause other than the fault of tenant and the tenant is entitled to an abatement of rent during any period the tenant is prevented from using its leased space [*see* P 17 of form]. However, if the necessary rebuilding cannot be accomplished within a stated time period, the landlord has the right to terminate the lease rather than rebuild. For discussion of the law applicable to the destruction of the leased premises, see *§ 34C.244[1]*. For an alternative provision requiring the tenant to restore the leased premises, see *§ 34C.244[2]*.

[n] Condemnation

If the parties to a lease do not otherwise provide for the rights and obligations of the landlord and tenant in the event the leased premises are condemned [*see Code Civ. Proc. § 1265.160*], those matters are governed by applicable statutory law [*see Code Civ. Proc. §§ 1230.010-1273.050*] and case law. For a discussion of the law applicable to the effect of condemnation on the lease and the parties' compensable interests, and for alternative lease provisions for condemnation, see *§ 34C.262*.

Paragraph 18 of this form provides that if a taking of the tenant's leased space results in the tenant's inability to use the space for the purposes stated in the lease, the tenant may terminate the lease by giving written notice to the landlord. For any other taking of the leased space, the lease continues in effect as to the portion not taken but the rent payable is reduced pro rata based on the floor space taken. If any portion of the building other than the leased space is taken, the landlord has the option to terminate the tenant's lease for the leased space. The form provides that any condemnation award is to belong solely to the landlord.

[o] Assignment and Subletting

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210, 1995.230*; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*]. In this form, the tenant is required to obtain the landlord's consent before assigning the tenant's interest in the lease or subletting the leased premises. The lease expressly states that the landlord's consent must not be unreasonably withheld [*see* P 19 of form]. It should be noted that the lease must provide for a tenant's right to assign or sublet the premises, subject only to reasonable limitations, for a landlord to take advantage of the statutory remedy to continue a lease in effect on the tenant's default [*see § 34C.271*].

This lease form also prohibits assignments or transfers that are involuntary or that occur by operation of law. The landlord should be advised that this language does not prevent an assumption and assignment of the lease in a tenant's federal bankruptcy proceeding [*see § 34C.20*].

For a discussion of the law applicable to restrictions on subletting and assignment, see *§ 34C.260[1]*. For alternative lease provisions that entirely prohibit subletting and assignment or permit them only conditionally, see *§ 34C.260[2]*.

[p] Tenant's Default

Paragraph 20 of this form lists acts and omissions by the tenant that are considered a default and breach under the lease. The provision is substantially the same as the default provision contained in a retail lease [*see § 34C.200[2]*, Section 10.02]. For a discussion of this provision's separate items, see *§ 34C.200[1][r]*.

[q] Damages on Termination of Lease

In the event of a lease termination, a landlord is entitled to recover damages provided by statute [*see Civ. Code § 1951.2*; *see also* P 21(b) of form]. Certain damages must be provided for in the lease if they are to be recovered [*see Civ. Code § 1951.2(c)*] and for the recovery of certain damages, the landlord has a duty to mitigate damages [*see Civ. Code § 1951.2(a)(2), (3), (c)*]. The duty to mitigate and the remedy of damages on lease termination are discussed further in § 34C.270[1].

Parties to a nonresidential lease may also provide for liquidated damages in the event of a breach or a failure of a condition [*see Civ. Code § 1671(b)*]. For discussion and a lease provision for liquidated damages, see *§ 34C.273*.

[r] Continuation of Lease After Breach

Paragraph 21(a) of this form gives the landlord the right to continue the lease in effect (and collect rent as it becomes due) instead of terminating the lease on the tenant's default. This provision will be valid only if the tenant also has the right to assign or sublet the lease, subject only to reasonable limitations [*see Civ. Code § 1951.4(b)*]. For a full discussion of the law applicable to the landlord's right to continue the lease in effect, see *§ 34C.271[1]*.

[s] Miscellaneous Provisions

An attorneys' fee provision is included in this form [*see* P 25 of form]. For an alternative provision and a discussion of the law applicable to an attorneys' fee provision, see *§ 34C.274*.

Other miscellaneous provisions included in this lease are the following:

- A provision describing the methods by which either party may give the other any notice required or permitted by the lease [*see* P 24 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.294*].

- A provision making the lease binding on successors of the parties [*see* P 26 of form; *see also Ch. 75,*

Formation of Contracts and Standard Contractual Provisions, § 75.282].

- A time-is-of-the-essence clause [*see* P 27 of form; *see also Ch. 23, Real Property Sales Agreements, § 23.200*].

- A sole-and-only-agreement clause [*see* P 28 of form].

The following miscellaneous provisions may also be added to this lease:

- Subordination, nondisturbance, and attornment agreements [*see § 34C.250*].

- Tenant to execute an estoppel certificate on the landlord's request [*see § 34C.261*].

- Parties to arbitrate all or certain specified disputes [*see § 34C.280*].

[2] FORM

Office Lease

OFFICE LEASE

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OFFICE LEASE

Preamble

This lease is entered into on _____[*date*], by and between _____[*name or names*], _____[*legal status, e.g.,* a corporation *or* husband and wife *or* an unmarried man], referred to in this

lease as "Landlord," and _____[*name or names*], _____[*legal status, e.g.,* a corporation *or* husband and wife *or* an unmarried woman], referred to in this lease as "Tenant."

Subject to the terms and conditions set forth in this lease, Landlord hereby leases to Tenant that certain space outlined in red on the plat map attached and marked Exhibit "A" on the _____[*specific floor of building, e.g.,* eleventh] floor of the building located at _____[*street address*], _____[*city*], California, which is currently known as _____[*name of building*] Building ("the Building"). The leased space outlined in red on the attached marked Exhibit "A" referred to in this lease as the "Leased Space," is presently designated Suite _____[*number*], but Landlord reserves the right to renumber and redesignate at any time during this lease the number of any space in the Building, including the Leased Space.

Term

1. The term of this lease shall be a period of _____[*number*] years commencing at 12:01 A.M. on _____[*date*], and ending at 12:01 A.M. on _____[*date*], unless terminated earlier as provided in this lease. If Tenant holds over and continues in possession of the Premises after termination of the term of this lease, Tenant's continued occupancy of the Premises shall be deemed merely a tenancy from month-to-month at a minimum rental of $ _____ per month subject to all the terms and conditions, including the provisions for the rent increase provided in Paragraph 3, contained in this lease.

Basic Rent

2. Tenant agrees to pay to Landlord as basic rent, to be adjusted as provided in Paragraph 3 of this lease, for the use and occupancy of the Leased Space, the sum of $ _____ per month payable on the _____[*specify, e.g.,* first] day of each and every month commencing _____[*date*], and continuing through the term of this lease. All rent shall be paid by Tenant at the office of Landlord in Room _____[*number*] of the Building or any other place or places that Landlord may from time to time designate by written notice given to Tenant.

Rent Increased by Operating Expense Increases

3. The basic rent specified in Paragraph 2 of this lease for each calendar year subsequent to the calendar year in which this lease is made shall be increased by Tenant's proportionate share of any increase in Operating Expenses incurred by Landlord for that year over the Operating Expenses incurred by Landlord for the calendar year in which this lease is made. The amount of the increase for the preceding calendar year shall be specified in a notice given to Tenant by Landlord on or before March 1 of the succeeding year and shall be payable by Tenant to Landlord at the place where the basic rent is then payable on or before March 31 of the year in which the notice is given. For the purposes of this paragraph,

(a) The term "Operating Expenses" shall mean all expenses incurred by Landlord each calendar year for the administration, operation, and maintenance of the Building, including, but not limited to,

(1) Personal property taxes and real property taxes and assessments (including general and special assessments) levied on the Building;

(2) The costs of all utilities required, by leases or otherwise, to be furnished by Landlord to the Building;

(3) Insurance premiums on insurance policies insuring the Building;

(4) The costs of janitorial services for the Building;

(5) Labor and costs incurred in managing the Building and maintaining its elevators, hallways, exterior walls, roof, and other parts, facilities, and appurtenances; and

(6) Capital improvements to the Building required by governmental authority.

The term "Operating Expenses" shall exclude _____[*describe any exclusions, e.g.,* Landlord's cost of leasing and advertising costs for the Building and penalties of any type whatsoever assessed against Landlord].

(b) Tenant's proportionate share of any increase in Operating Expenses incurred by Landlord for any calendar year shall be determined by dividing the amount of floor space in the Leased Space by the total amount of rentable floor space in the Building and multiplying the total increase in Operating Expenses for the year by the resulting percentage figure. The total amount of rentable floor space in the Building shall be determined by excluding from the total interior floor space of the Building the area occupied by common hallways, rest rooms, the building lobby, and other common areas; the area required for the Building's heating and air conditioning equipment; the area required for storage of maintenance and janitorial supplies; and the basement of the Building but including the area occupied by Landlord's offices in the Building.

Use of Premises

4. The Leased Space shall be used for general office purposes by Tenant and for no other use or uses without the prior express written consent of Landlord.

Prohibited Uses

5. Tenant shall not commit or permit the commission of any acts on the Leased Space nor use or permit the use of the Leased Space in any way that

(a) Increases the existing rates for or causes cancellation of any fire, casualty, liability, or other insurance policy insuring the Building or its contents;

(b) Violates or conflicts with any law, statute, ordinance, or governmental rule or regulation, whether now in force or hereinafter enacted, governing the Leased Space or the Building;

(c) Obstructs or interferes with the rights of other tenants or occupants of the Building or injures or annoys them; or

(d) Constitutes the commission of waste on the Leased Space or the commission or maintenance of a nuisance as defined by the laws of California.

Alterations by Tenant

6. No alteration, addition, or improvement to the Leased Space shall be made by Tenant without the written consent of Landlord. Concurrently with requesting Landlord's consent to the proposed alteration, addition, or improvement, Tenant shall submit to Landlord preliminary plans for the alteration, addition, or improvement. Landlord shall, in its sole discretion, approve or disapprove the proposed alteration, addition, or improvement, within _____[*time period, e.g.,* 30 days] after its receipt of Tenant's written request for approval. If Landlord fails to affirmatively approve or disapprove the proposed alteration, addition, or improvement within the same _____[*same time period as above, e.g.,* 30-day] period, the proposed alteration, addition, or improvement shall be deemed disapproved. If Landlord gives such written consent to any alteration, addition, or improvement to the leased premises, Landlord and Tenant shall agree in writing at that time to the date when that undertaking shall be completed. Tenant shall obtain all necessary governmental permits required for any alteration, addition, or improvement approved by Landlord and shall comply with all applicable governmental law, regulations,

ordinances, and codes. Any alteration, addition, or improvement made by Tenant after consent has been given, and any fixtures installed as part of the construction, shall at Landlord's option become the property of Landlord on the expiration or other earlier termination of this lease; provided, however, that Landlord shall have the right to require Tenant to remove the fixtures at Tenant's cost on termination of this lease. If Tenant is required by Landlord to remove the fixtures on termination of this lease, Tenant shall repair and restore any damages to the leased premises caused by such removal.

Mechanics' Liens

7. If Tenant causes any alterations, additions, or improvements to be made to the Leased Space, Tenant agrees to keep the Leased Space free of liens for both labor and materials. If a lien is placed on the Leased Space in connection with any construction, repair, or replacement work that Tenant may or must cause to be performed under this lease, which results in a final judgment, Landlord may pay the amount of that judgment. Tenant shall reimburse Landlord for the full amount paid within _____[*number, e.g.,* 30] days after that amount is paid by Landlord; otherwise tenant shall be in default under this lease.

Alterations by Landlord

8. Before commencement of the lease term provided for in this lease, Landlord shall, at Landlord's sole cost and expense, make the following improvements to the leased premises: _____[*describe improvements to be made by Landlord, e.g.,* replace the existing front door with a double-wide entrance door; replace the existing west window of the leased premises with a bay window; convert the existing southeast corner office to two offices of approximately equal size; and replace the existing carpet with new carpet previously selected by Tenant. Landlord shall cause all work to be performed in accordance with the final plans and specifications previously approved by Tenant and attached hereto as Exhibit "_____"]. If Landlord fails to complete construction required under this paragraph before commencement of the lease term, Tenant's obligation to pay rent shall not commence until that construction is completed, but Tenant shall have no right to cancel or otherwise terminate this lease. Notwithstanding the preceding sentence, if Landlord fails to complete construction and deliver possession of the premises on or before _____[*date*], Tenant shall have the right to terminate this lease by giving written notice to Landlord within _____ days after _____[*same date as deadline for construction*].

Maintenance and Repairs

9. (a) Subject to the duty of the Landlord under this lease to provide regular cleaning service for the Leased Space and to perform maintenance and repairs for the Leased Space as needed, Tenant shall during the term of this lease maintain the Leased Space, in a good, clean, and safe condition, and shall on expiration or earlier termination of this lease surrender the Leased Space to Landlord in as good condition and repair as existed on the date of this lease, reasonable wear and tear and damage by the elements excepted. Tenant, at Tenant's own expense, shall repair all deteriorations or injuries to the Leased Space or to the Building occasioned by Tenant's lack of ordinary care.

(b) Except as otherwise provided in this lease, Landlord shall perform, at Landlord's sole expense, all repairs and maintenance for the Leased Space and the Building. Any repairs by Landlord shall be made promptly with first-class materials, in a good and workmanlike manner, in compliance with all applicable laws of all governmental authorities, and in a style, character, and quality conforming to the existing construction. Except in the case of an emergency, Landlord shall not enter the Leased Space for the purpose of effecting the repairs, alterations, or improvements other than during normal business hours, and shall give Tenant 24-hours' notice of the intention to enter for those purposes.

(c) Except for cases of emergency, Landlord shall make all repairs required hereunder as soon as is practical. In the event Landlord has not made a repair referred to in a written notice from Tenant to Landlord within 30 days after the date of that notice, Tenant shall have the right to have the repair performed and be reimbursed by Landlord. If the full amount of reimbursement is not delivered by Landlord to Tenant within 10 days after Tenant's delivery to Landlord of a

written statement or bill evidencing the cost of the repair, Tenant shall have the right to deduct the cost of the repair from the next monthly rent payable to Landlord.

(d) Cleaning maintenance for the Leased Space shall be regularly performed by Landlord _____[*specify approximate times for cleaning, e.g.,* on a daily basis *or* on an as needed basis].

Inspection by Landlord

10. Tenant shall permit Landlord or Landlord's agents, representatives, or employees to enter the Leased Space at all reasonable times for the purpose of inspecting the Leased Space to determine whether Tenant is complying with the terms of this lease and for the purpose of doing other lawful acts that may be necessary to protect Landlord's interest in the Leased Space under this lease.

Common Areas of Building

11. (a) Landlord shall make available at all times during the term of this lease in any portion of the Building that Landlord from time to time designates or relocates, automobile parking and common areas (jointly referred to as "common areas," as that term is defined below) as Landlord shall from time to time deem appropriate. Tenant shall have the nonexclusive right during the term of this lease to use the common areas for itself, its employees, agents, customers, clients, invitees, and licensees.

(b) The term "common areas" means the portions of the Building that, at the time in question, have been designated and improved for common use by or for the benefit of more than one tenant of the Building, including the parking areas; access and perimeter roads; landscaped areas; exterior walks, roofs, stairways, elevators, escalators and/or ramps; interior corridors, elevators, stairs, and balconies; directory equipment; the main entry lobby; restrooms; and drinking fountains. Landlord reserves the right to redesignate a common area for a noncommon use or to designate as a common area a portion of the Building not previously designated a common area.

(c) All common areas shall be subject to the exclusive control and management of Landlord or any other persons or nominees that Landlord may have delegated or assigned to exercise management or control, in whole or in part, in Landlord's place and stead. Landlord shall have the right to close, if necessary, all or any portion of the common areas as is deemed necessary by Landlord to effect necessary repairs, maintenance, or construction, or to maintain the safety of tenants or the general public. Landlord will maintain the common areas in a clean, orderly, and sanitary manner. Landlord is responsible for all repairs of the common areas, except those required by the negligence of Tenant.

(d) Rules and Regulations. Landlord and Landlord's nominees and assignees shall have the right to establish, modify, amend, and enforce reasonable rules and regulations with respect to the common areas and the Building. Tenant shall fully and faithfully comply with and observe the rules and regulations for the common areas and the Building ("the Building Rules and Regulations"), of which the Leased Space is a part, including any additions or amendments to the Building Rules and Regulations that may be hereafter enacted by Landlord in Landlord's sole discretion. Tenant acknowledges receipt of a copy of the Building Rules and Regulations, which are attached to and made a part of this lease as Exhibit _____. Landlord shall not be liable in any way for failure of any other occupant of the Building of which the Leased Space is a part to comply with and observe these rules and regulations.

Parking Rights and Obligations

12. (a) Landlord agrees to maintain in good order, condition, and repair the underground parking garage for the Building. Landlord's obligation for maintenance shall include the following:

(1) Maintenance of the ground surfaces in a level, smooth, and evenly covered condition with the type of surfacing material originally installed or any substitute that in all respects is equal in quality, use, and durability.

(2) Removal of all papers, debris, filth, and refuse, and washing or sweeping the areas to the extent reasonably necessary to keep the parking garage in a neat, clean, and orderly condition.

(3) Placement, repair, and replacement of any necessary and appropriate directional signs, markers, and lines and any artificial lighting facilities that are reasonably required.

(4) Maintenance of, for the mutual benefit of Landlord and Tenant, general public liability and property damage insurance covering the common areas against claims for personal injuries, death, or property damage, in the amounts determined by Landlord in its sole discretion.

(5) Provision of adequate lighting.

(b) Included in the rent payable by Tenant under this lease for the Leased Space, Tenant shall have the exclusive right to _____[*number, e.g.*, eight] parking spaces in the parking garage, for use by it and its employees. Subject to availability, Tenant may lease additional spaces at an additional cost of $ _____ per space. The _____[*same number as above, e.g.*, eight] spaces to which Tenant is granted an exclusive right for parking are numbered spaces _____[*insert description*]. Landlord may in its sole discretion reconfigure the parking garage and renumber the parking spaces or reassign Tenant or other tenants different parking spaces, provided that Tenant at all times is entitled to _____[*same number as above, e.g.*, eight] parking spaces and _____[*describe any other restrictions, e.g.*, at least three of which shall be on the floor of the garage closest to the main entry lobby of the Building, presently numbered "P1"].

Utilities Furnished by Landlord

13. Landlord shall, at Landlord's own cost and expense, provide the following utilities to the Leased Space and the Building:

(a) Water and electricity for the Leased Space and the Building, available as follows: _____[*describe hours and days of service, e.g.*, seven days a week, 24 hours a day, excluding national holidays];

(b) Heating and air conditioning for the Leased Space and Building, available as follows: _____[*describe hours and days of service, e.g.*, seven days a week, 24 hours a day, excluding national holidays].

Tenant's Liability Insurance

14. For the mutual benefit of Landlord and Tenant, Tenant shall during the term of this lease cause to be issued and maintained public liability insurance in the sum of at least $ _____[*minimum dollar amount, e.g.*, 500,000] for injury to or death of one person, and $ _____[*minimum dollar amount, e.g.*, 1,000,000] for injury to or death of more than one person in any one accident, insuring the Tenant against liability for injury and/or death occurring in or on the Leased Space or the common areas. Landlord shall be named as an additional insured and the policy shall contain cross-liability endorsements. The Tenant shall maintain all such insurance in full force and effect during the entire term of this lease and shall pay all premiums for the insurance. Evidence of insurance and of the payment of premiums shall be delivered to Landlord.

Insurance for Tenant's Personal Property

15. Tenant agrees at all times during the term of this lease to keep, at Tenant's sole expense, all of Tenant's personal

property, including trade fixtures and equipment of Tenant that may be on or in the Leased Space from time to time, insured against loss or damage by fire and by any peril included within fire and extended coverage insurance for an amount that will insure the ability of Tenant to fully replace the personal property, trade fixtures, and equipment.

Indemnification

16. (a) Landlord shall not be liable to Tenant, and Tenant hereby waives all claims against Landlord, for any injury or damage to any person or property in or about the Leased Space or any part of the Leased Space by or from any cause whatsoever, except injury or damage to Tenant resulting from the acts or omissions of Landlord or Landlord's authorized agents.

(b) Tenant shall hold Landlord harmless from and defend Landlord against any and all claims or liability for any injury or damage to any person or property whatsoever occurring in, on, or about the Leased Space or any part of it, and occurring in, on, or about any common areas of the Building when that injury or damage was caused in part or in whole by the act, neglect, fault of, or omission of any duty by Tenant, its agents, servants, employees, or invitees.

Destruction of Leased Space or Building

17. If the Leased Space or the Building of which it is a part is damaged or destroyed by any cause not the fault of Tenant, Landlord shall at Landlord's sole cost and expense promptly repair it, and the rent payable under this lease shall be abated for the time and to the extent Tenant is prevented from occupying the Leased Space in its entirety. Notwithstanding the foregoing, if the Leased Space or the Building is damaged or destroyed and repair of the damage or destruction cannot be completed within _____[*maximum time permitted for construction, e.g.,* 180 days]:

(a) Landlord may, in lieu of making the repairs required by this paragraph, terminate this lease by giving Tenant _____[*number*] days' written notice of termination. A notice of termination must be given by Tenant not later than _____[*notice period, e.g.,* 30 days] after the event causing the destruction or damage; or

(b) Tenant may terminate this lease by giving Landlord _____[*number*] days' written notice of termination.

Condemnation

18. (a) If all or any part of the Leased Space is taken by any public or quasi-public agency or entity under the power of eminent domain during the term of this lease

(1) Either Landlord or Tenant may terminate this lease by giving the other _____ [*number*] days' written notice of termination; provided, however, that Tenant cannot terminate this lease unless the portion of the Leased Space taken by eminent domain is so extensive as to render the remainder of the Leased Space useless for the uses permitted by this lease.

(2) If only a portion of the Leased Space is taken by eminent domain and neither Landlord nor Tenant terminates this lease, the rent thereafter payable under this lease shall be reduced by the same percentage that the floor area of the portion taken by eminent domain bears to the floor area of the entire Leased Space.

(b) If any portion of the Building other than the Leased Space is taken by eminent domain, Landlord may, at its option, terminate this lease by written notice to Tenant.

(c) Any and all damages and compensation awarded or paid because of a taking of the Leased Space or the Building shall belong to Landlord, and Tenant shall have no claim against Landlord or the entity exercising eminent

domain power for the value of the unexpired term of this lease or any other right arising from this lease.

Assignment and Subletting

19. Tenant shall not encumber, assign, sublet, or otherwise transfer this lease, any right or interest in this lease, or any right or interest in the Leased Space without first obtaining the express written consent of Landlord. Furthermore, Tenant shall not sublet the Leased Space or any part of it or allow any other persons, other than Tenant's employees and agents, to occupy or use the Leased Space or any part of it without the prior written consent of Landlord. A consent by Landlord to one assignment, subletting, or occupation and use by another person shall not be deemed to be a consent to any subsequent assignment, subletting, or occupation and use by another person. Any encumbrance, assignment, transfer, or subletting without the prior written consent of Landlord, whether voluntary or involuntary, by operation of law or otherwise, is void and shall, at the option of Landlord, terminate this lease. The consent of Landlord to any assignment of Tenant's interest in this lease or the subletting by Tenant of the Leased Space shall not be unreasonably withheld.

Acts Constituting Breach by Tenant

20. The following shall constitute a default under and a breach of this lease by Tenant:

(a) The nonpayment of rent when due, when the nonpayment continues for _____[*number, e.g.,* 10] days after written notice to pay rent or surrender possession of the Leased Space has been given by Landlord to Tenant;

(b) A failure to perform any provision, covenant, or condition of this lease other than one for the payment of rent, when that failure is not cured within _____[*number, e.g.,* 30] days after written notice of the specific failure is given by Landlord to Tenant;

(c) The breach of this lease and abandonment of the Leased Space before expiration of the term of this lease;

(d) A receiver is appointed to take possession of all or substantially all of Tenant's property located at the Leased Space or of Tenant's interest in this lease, when possession is not restored to Tenant within _____[*maximum permitted time period, e.g.,* 30 days];

(e) Tenant makes a general assignment for the benefit of creditors;

(f) The execution, attachment, or other judicial seizure of substantially all of Tenant's assets located at the Leased Space or of Tenant's interest in this lease, when the seizure is not discharged within _____[*maximum permitted time period, e.g.,* 15 days]; or

(g) The filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under the federal bankruptcy law (unless, in the case of a petition filed against Tenant, it is dismissed within _____[*maximum permitted time period, e.g.,* 60 days]).

The notices provided for in subparagraphs (a) and (b) of this Paragraph 20 are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Landlord's Remedies

21. If Tenant breaches or is in default under this lease, Landlord, in addition to any other remedies given Landlord by law or equity, may:

(a) Continue this lease in effect by not terminating Tenant's right to possession of the Leased Space and thereby be entitled to enforce all Landlord's rights and remedies under this lease including the right to recover the rent specified in this lease as it becomes due under this lease; or

(b) Terminate this lease and all rights of Tenant under the lease and recover from Tenant

(1) The worth at the time of award of the unpaid rent that had been earned at the time of termination of the lease;

(2) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination of the lease until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(3) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(4) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform Tenant's obligations under this lease; or

(c) In lieu of, or in addition to, bringing an action for any or all of the recoveries described in subparagraph (b) of this paragraph, bring an action to recover and regain possession of the Leased Space in the manner provided by the California law of unlawful detainer then in effect.

Termination Notice

22. No act of Landlord, including but not limited to Landlord's entry on the Leased Space or efforts to relet the Leased Space, or the giving by Landlord to Tenant of a notice of default, shall be construed as an election to terminate this lease unless a written notice of the Landlord's election to terminate this lease is given to Tenant.

Waiver of Breach

23. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent default or breach by Tenant either of the same or a different provision of this lease.

Notices

24. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party shall be in writing, and shall be deemed duly served and given when personally delivered to the party to whom it is directed or any managing employee of that party or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Landlord at _____[*address*], _____[*city*], California, _____[*zip code*] or to Tenant at _____[*address*], _____[*city*], California _____[*zip code*]. Either party may change its address for purposes of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

25. If any litigation is commenced between the parties to this lease concerning the Leased Space, this lease, or the rights and duties of either in relation to the Leased Space or the lease, the party prevailing in that litigation shall be entitled, in addition to any other relief granted, to a reasonable sum as and for its attorneys' fees in the litigation, which shall be determined by the court in that litigation or in a separate action brought for that purpose.

Binding on Heirs and Successors

26. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties, but nothing in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest therein by Tenant except as provided in Paragraph 19 of this lease.

Time of Essence

27. Time is expressly declared to be of the essence in this lease.

Sole and Only Agreement

28. This instrument constitutes the sole and only full, final, and complete agreement between Landlord and Tenant respecting the Leased Space or the leasing of the Leased Space to Tenant, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Leased Space or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. All prior negotiations between the parties are subsumed into this lease to the extent they have been agreed to, and if not agreed to by the parties such negotiations are not set forth in the terms and conditions of this lease. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

EXECUTED on _____[*date*] at _____[*city*], _____ County, California.

_____ [*signature of landlord*]
[*typed name*]
LANDLORD
_____ [*signature of tenant*]
[*typed name*]
TENANT

EXHIBIT _____

BUILDING RULES AND REGULATIONS

Halls and Stairways

1. Tenants shall not loiter in the halls and entryways, nor permit their employees or patrons to loiter in the halls and entryways, and shall not obstruct in any way the entryways, passages, stairways, elevators, and halls of the building or use them for any other purpose than ingress and egress to and from their respective offices.

Signs

2. No sign, placard, picture, name, advertisement, or notice visible from outside a Tenant's premises shall be displayed in or on the Building without the express written consent of Landlord, and Landlord may remove, at the expense of the offending Tenant, any sign, placard, picture, name, advertisement, or notice so displayed.

Locks and Keys

3. No additional lock or locks shall be placed on any door in the Leased Space by any Tenant without the express written consent of Landlord. Each Tenant shall receive, without cost, two keys to each door having a lock in the Tenant's Leased Space. If any Tenant desires extra keys to any door, Tenant must obtain them from Landlord and Landlord may impose a charge for them.

Wiring and Electricity

4. Wiring of any kind shall be introduced in the Building and connected only as directed by Landlord, and no boring or cutting for wires will be allowed except with the prior consent of Landlord. The location of all telephones and call boxes affixed to the Building shall be prescribed by Landlord.

Connection of Machinery

5. Tenant shall not connect any apparatus, machinery, or device with the electric wires, water, or air pipes of the Building without the consent of Landlord.

Moving Furniture and Equipment

6. Landlord shall prescribe the permissible times for moving equipment and furniture into the Building and Tenant's Leased Space. Tenant shall give the Building Manager at least 24-hours' advance notice of the time Tenant intends to move furniture or equipment into Tenant's Leased Space. Landlord shall not be liable for any damage or loss caused by the moving of the furniture or equipment, and any damage to Building or Leased Space caused by the moving of the furniture or equipment shall be repaired at Tenant's expense.

Directory

7. The directory in the lobby of the Building shall display only the names and suite numbers of Tenants of the Building. Landlord reserves the right to exclude any names other than those of Tenants themselves from the directory and to make a charge of $ _____ for each additional name a Tenant wishes displayed on the directory.

Obstructing Light

8. The glass doors, windows, lights, and skylights admitting light into the halls and other common areas of the Building shall not at any time be covered or obstructed by Landlord or any Tenant.

Landlord's Office and Employees

9. Any request of a Tenant for service or any other matter connected with the Building must be made to and at the office of the Manager for the Building in Suite _____ of the Building. Employees of Landlord shall perform no work or do anything outside their regular daily duties except on order of the Manager for the Building. No employee of Landlord shall admit any person, Tenant or otherwise, to any office in the Building without specific instructions from the Manager of the Building.

Locking of Entrance Doors

10. All entrance and exit doors of the Building shall be open and unlocked by Landlord during the following hours: _____[*describe hours and days of week, e.g.,* Monday through Friday, from 6:00 A.M. to 7:00 P.M.; Saturday and Sunday, from 8:00 A.M. to 5:00 P.M.]. At all other times, including all national holidays, all entrance and exit doors shall be locked.

Entry After Building Closed

11. Any person entering or leaving the Building at any time when its entrance and exit doors are closed and locked may be questioned about his or her business in entering or leaving the Building, and may be required to sign the Building register by the security personnel. Any person not satisfying the security personnel that he or she has a right to enter the Building may be excluded from the Building.

Removal of Persons

12. Landlord reserves the right to exclude and expel from the Building any person who, in the judgment of Landlord, is intoxicated or under the influence of any intoxicating beverage or drug or who in any manner violates any of these rules and regulations or creates, in the judgment of Landlord, a disturbance in the Building.

No Canvassing or Soliciting

13. Canvassing, soliciting, and peddling in the Building are prohibited and each Tenant shall promptly report to the Building Manager any person found by him or her to be canvassing, soliciting, or peddling in the Building.

Further Rules and Regulations

14. Landlord reserves the right to amend these rules and regulations and to make any other and further rules and regulations for the Building that, from time to time in the judgment of Landlord, are required for the orderly and safe conduct of Building operations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigation



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
A. Complete Leases

17-34C California Legal Forms--Transaction Guide § 34C.203

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.203 Memorandum of Lease

[1] Comment

[a] Use of Form

This form is a Memorandum of Lease, sometimes called a "short form of lease." A Memorandum of Lease is prepared in addition to a complete leases and is often used for recording purposes when the parties do not want to record their complete lease [*see* Practice Tips, *below*; *see also §§ 34C.200, 34C.201*, and *34C.202* for sample complete leases]. Any instrument or judgment affecting the title to or possession of real property may be recorded [*Gov. Code § 27280*] with the county recorder of the county in which the property affected is situated [*Civ. Code § 1169*]. A lease may be recorded since it is both a contract and a conveyance of an estate or interest in real property [*Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352]* .

Every conveyance of real property or an estate for years in the property that is acknowledged, or proved and certified, and recorded as prescribed by law, gives constructive notice of its contents to subsequent purchasers and mortgages of the affected property from the time it is filed with the recorder [*Civ. Code § 1213*]. Conversely, every conveyance of real property or an estate for years in the property, other than a lease for a term not exceeding one year, is void as against subsequent purchasers or mortgagees of the same property who act in good faith and for valuable consideration, unless it is recorded before their subsequent purchase or mortgage is recorded [*Civ. Code § 1214*]. "Constructive notice" is the equivalent of actual knowledge; that is, knowledge of its contents is conclusively presumed [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

PRACTICE TIP:

Benefits of Using Memorandum of Lease. The parties to a lease may be reluctant to record an entire lease since, once recorded, it is a matter of public record and its specific terms (for example, the amount of rent) are no longer confidential. By preparing, acknowledging, and recording a Memorandum of Lease, the parties can avoid these problems while still giving constructive notice of the lease to

subsequent purchasers and mortgagees of the property. *By Publisher's Editorial Staff.*

PRACTICE TIP: Recording a Memorandum to Lease. In an office building or a shopping center context, it is often not critical that a memorandum to lease be recorded. Any inspection by a prospective purchaser should impart actual notice if the circumstances do not themselves impart inquiry notice. However, if the landlord has permitted other tenants to record memoranda, then the omission to record a memorandum may be of some significance. A search of the county recorders office should quickly disclose whether the landlord has permitted other memoranda of leases to be recorded. *By Benjamin Kaplan.*

[b] Required Contents

With certain exceptions not applicable to a Memorandum of Lease [*see Gov. Code §§ 27282, 27285*], to give constructive notice of its contents a recorded instrument must be a "conveyance" of real property or of an estate for years in the property [*see Civ. Code § 1213*]. The term "conveyance" means a written instrument by which an estate or interest in real property is created, alienated, mortgaged, or encumbered, or by which the title to real property may be affected, except wills [*Civ. Code § 1215*; *see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . Thus, a Memorandum of Lease is ineffective to give constructive notice to subsequent purchasers and mortgagees if it merely recites that the landlord "has leased" or "has demised" (or "will lease" or "will demise") certain real property to the tenant by some other instrument; it must be drafted as a present, active conveyance. To give constructive notice of its contents and of the lease, the Memorandum must actually convey or purport presently to convey the leasehold interest to the tenant [*see* Bowman, Ogden's Revised California Real Property Law, Ch. 12, *Leases*, § 12.5 (Cal. C.E.B. 1974); *see also* Dean, Nicholas, and Caplan, Commercial Real Property Lease Practice, Ch. 3, *Commercial Real Property Lease Form with Comments*, § 3.137 (Cal. C.E.B. 1976)].

As a present conveyance of a leasehold interest, the Memorandum must contain all the essential elements of a lease, including the following [*see O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 909-910, 159 Cal. Rptr. 125* ; *see also* Legal Background to Ch. 34B, *Residential Leases*]:

- The names of the parties;
- Operative words to create a lease;
- A description of the leased property; and
- The lease's term.

PRACTICE TIP:

Refer to Formal Unrecorded Lease. The Memorandum of Lease should also refer to the formal unrecorded lease between the parties, including the date of the lease, and a recitation of the fact that the Memorandum of Lease is subject to all terms and conditions of the unrecorded lease. This will put a subsequent purchaser or mortgagee of the leased property on inquiry as to the contents of the unrecorded lease. *By Publisher's Editorial Staff.*

When the Memorandum of Lease is properly drafted and recorded, the subsequent purchaser or mortgagee is charged with constructive notice of its contents [*see Civ. Code § 1213*], including the reference to the formal unrecorded lease between the parties, and with notice of all material facts that an inquiry suggested by the reference to the unrecorded lease would have produced [*see* Bowman, Ogden's Revised California Real Property Law, Ch. 12, *Leases*, § 12.4 (Cal. C.E.B. 1974); *see also Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 529, 131 Cal. Rptr. 394, 551 P.2d 1226]* .

Depending on the lease's contents, additional information should be included in a Memorandum of Lease to impart constructive notice to third parties. For example, if the unrecorded lease contains an option to extend the lease term [*see § 34C.212[2]*] or an option or right of refusal to purchase the leased premises [*see §§ 34C.263[2], 34C.264[2]*], either fact should be recited in the Memorandum of Lease [*see Gates Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 364, 262 Cal. Rptr. 630]* . If the lease contains subordination provisions [*see § 34C.250*], reference to that fact should also be included in the Memorandum of Lease.

[c] Acknowledgment

With certain exceptions not relevant to this discussion, before an "instrument" can be recorded, its execution must be acknowledged or proved and the acknowledgment or proof certified [*Gov. Code § 27287*; *see Gov. Code § 27288* (execution, acknowledgment, and proof of agreements affecting realty); *see also Civ. Code §§ 1198, 1199* (execution proved by handwriting)]. A Memorandum or short form of lease comes within the judicial and statutory definition of an "instrument," which the courts and Legislature have described as some written paper signed and delivered by one person to another, transferring the title to or creating a lien on property or giving a right to a debt or duty [*Hoag v. Howard (1880) 55 Cal. 564, 565* ; *see Gov. Code § 27279*].

An acknowledgment is a statement that an instrument was in fact signed by the person whose signature appears on the document [*see Civ. Code § 1189(a)*]. A certificate of acknowledgment is a formal declaration by an authorized officer [*see Civ. Code §§ 1180-1184*], usually a notary public, that the executing party made the acknowledgment in the officer's presence and that the officer had satisfactory evidence that the party was the individual who was described in and who executed the instrument [*Civ. Code § 1185(a)*; *see* [d], *below*].

[d] Certificate of Acknowledgment

[i] Form of Certificate

An officer taking an acknowledgment of an instrument must endorse on it or attach to it a certificate of acknowledgment substantially in the form prescribed by *Civ. Code § 1189* [*Civ. Code § 1188*]. If the certificate of acknowledgment is taken within this state, it must be in the form set forth in *Civ. Code § 1189(a)* [*Civ. Code § 1189(a)*]. If the certificate is taken in another place, it will be sufficient in California if it is taken in accordance with the laws of the place where the acknowledgment is made [*Civ. Code § 1189(b)*]. On documents to be filed in another state or jurisdiction of the United States, a California notary public may complete any acknowledgment form as may be required in that other state or jurisdiction on a document, provided the form does not require the notary to determine or certify that the signer holds a particular representative capacity or make other determinations and certifications not allowed by California law [*Civ. Code § 1189(c)*]. Finally, an acknowledgment provided before January 1, 1993, and conforming to applicable provisions of former *Civ. Code §§ 1189, 1190, 1190a, 1190.1, 1191,* and *1192,* as repealed by 1990 Stats., Ch. 335, will have the same force and effect as if those statutes had not been repealed [*Civ. Code § 1189(d)*]. Those repealed statutes set forth alternative certificate forms for use by individuals, corporations, partnerships, public agencies, and attorneys-in-fact. They have been replaced by the one form of certificate prescribed by the current version of *Civ. Code § 1189.*

For further discussion of certificates of acknowledgment, see *Ch. 27, Deeds and Recording, § 27.271*.

[ii] Certificate as Prima Facie Evidence

As a general rule, a certificate of acknowledgment is prima facie evidence of the facts recited in it and of the genuineness of the signatures contained on the document, if the certificate meets the requirements set forth in *Civ. Code §§ 1180-1207* [*Evid. Code § 1451*]. If the certificate appears on an instrument executed on behalf of an incorporated or unincorporated entity by a duly authorized person in the form specified in *Civ. Code § 1189,* it will be prima facie

evidence that the instrument is the duly authorized act of the entity named in the instrument, and conclusive evidence thereof in favor of any good faith purchaser, lessee, or encumbrancer. For these purposes, "duly authorized person," with respect to a domestic or foreign corporation, includes the president, vice president, secretary, and assistant secretary of the corporation [*Civ. Code § 1190*].

[e] Effect of Defective Certificate or Execution

When the acknowledgment or proof of the execution of an instrument is properly made but defectively certified, any interested party may bring an action in superior court to obtain a judgment correcting the certificate [*Civ. Code § 1202*]. However, one year after it has been copied into the proper book of record, any instrument affecting the title to real property that is kept in the office of any county recorder imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment, or the absence of any certificate of acknowledgment [*Civ. Code § 1207*].

[2] FORM

Memorandum of Lease

Recording requested by
_____[*name*]

When recorded mail to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____
Space above this line for recorder's use

MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE is made and entered into on _____[*date*] by and between _____[*name(s)*], _____[*legal status, e.g.,* a California corporation], "Landlord," and _____[*name(s)*], _____[*legal status, e.g.,* husband and wife], "Tenant."

Landlord hereby leases to Tenant for a term of _____[*number*] _____[months *or* years], commencing on _____[*date*] and ending on _____[*date*], on the terms and conditions set forth in the lease by and between the parties hereto dated _____[*date*], all the terms and conditions of which are made a part of this Memorandum of Lease as though fully set forth herein, the premises in the County of _____, State of California, described as follows:

_____[*Set forth legal description of leased premises*].

EXECUTED on _____[*date*], at _____[*city*], _____ County, California.

_____ [*signature of landlord*]
[*typed name*]
LANDLORD
_____ [*signature of tenant*]

[*typed name*]
TENANT

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*] before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ _____[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
A. Complete Leases

17-34C California Legal Forms--Transaction Guide §§ 34C.204-34C.209

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.204[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
1. Lease Term and Additional Space

17-34C California Legal Forms--Transaction Guide § 34C.210

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.210 Lease Term to Commence on Occurrence of Specified Conditions

[1] Comment

[a] Use of Form

This form is a lease provision stating that the lease's term commences on the occurrence of a specified future event. The event used as an example in the form is the issuance of an alcoholic beverage license. This provision further provides that if the event does not occur before a specified date, either party may terminate the lease.

For a lease provision that makes commencement of the lease's term dependent on the landlord's completion of a building on the leased premises, see *§ 34C.211*. For an alternative provision that does not postpone commencement of the lease term but merely abates the rent payable under the lease until the landlord is able to deliver possession of the premises to the tenant, see *§ 34C.200[2]*, Sections 1.04, 1.05.

PRACTICE TIP:

Include Provision as to Actual Date Lease Will Commence. When a lease is to commence on the happening of a particular event, consider including a provision in the executed lease whereby the parties are to complete the actual date the lease has commenced and initial the provision. This avoids disputes arising as to, for example, by which date an option for an additional term needed to be exercised. *By Benjamin Kaplan.*

[b] Conditions Precedent to Commencement of Lease Term

A condition precedent is one that is to be performed before either a right dependent thereon accrues or an act dependent thereon is performed [*Civ. Code § 1436*]. When commencement of a lease's term is subject to a condition precedent, the lease provides that its term does not commence until a particular event has occurred. Common examples of conditions

precedent to commencement of a lease term include the following:

- The landlord's execution of a lease with a "key" tenant (usually a large, chain tenant with substantial customer draw) in a shoppi ng center (when the lease is for space in the shopping center) [*see Cordonier v. Central Shopping Plaza Associates (1978) 82 Cal. App. 3d 991, 995-996, 147 Cal. Rptr. 558]* ;

- Procuring a zoning change for the property to be leased; and

- Obtaining a necessary license or permit for the tenant to operate its business on the property to be leased.

[c] Effect of Rule Against Perpetuities

Before January 1, 1992, when the Uniform Statutory Rule Against Perpetuities became operative in California [*see Prob. Code § 21200 et seq.*], a lease that was to commence in the future was subject to the common law rule against perpetuities. Under this rule, if the leasehold interest was "nonvested," it was invalid unless, at the time the lease was created, the leasehold was certain to either vest or terminate within 21 years after the death of some person alive at the time of creation, or alternatively within 60 years after the creation [*see* former *Civ. Code §§ 715.2, 715.6*, repealed Jan. 1, 1992; *see also Wong v. DiGrazia (1963) 60 Cal. 2d 525, 535-541, 35 Cal. Rptr. 241, 386 P.2d 817]* . For purposes of applying this rule, an interest was "nonvested" if it was subject to an unsatisfied condition precedent and "vested" if it was owned free of all conditions precedent [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2552-2553 (1990); Black's Law Dictionary 1331 (6th ed. 1990)].

Under the Uniform Statutory Rule Against Perpetuities, however, most leases are not subject to the rule against perpetuities. This is because the Uniform Statutory Rule excludes most "nondonative" transfers from its application [*see Prob. Code § 21225(a)*]. For this purpose, a "nondonative" transfer is a commercial-type transaction that is supported by consideration, such as the typical commercial lease, an option to renew a lease, and a right of first refusal to purchase the property [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 571, 576, 31 Cal. Rptr. 2d 595]* . A "donative" transfer, in contrast, is generally a transfer that is not supported by consideration [*see Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2594-2595 (1990)].

For a detailed discussion of the rule against perpetuities in California, see the Legal Background to Ch. 67, *Future Interests and Perpetuities*.

[d] Other Time Limitations

Although leases supported by rent are not subject to the rule against perpetuities [*see* [c], *above*] many leases are subject to other time limitations. For example, under *Civ. Code § 718*, any lease of a town or city lot for which the term exceeds 99 years, including options to renew the lease, is invalid [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 576, 31 Cal. Rptr. 2d 595]* .

Every lease that is to commence at a time certain or on the happening of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution [*Civ. Code § 715*].

[2] FORM

Lease Term

Term of Lease

Section _____. The term of this lease shall be for a period of _____[*number*] years, unless terminated earlier in accordance with the term of this lease. The term shall commence on the date that _____[*describe event, e.g.,* a general on-sale alcoholic beverage license is issued to Tenant for the leased premises] ("the Commencement Date"). Notwithstanding any other provision of this lease, if the Commencement Date of this lease does not occur on or before _____[*date agreed on by parties as appropriate deadline for stated event*], this lease shall, with no further action of the parties required, be void and of no effect and Landlord shall promptly return to Tenant any consideration paid by Tenant to Landlord for this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesFuture InterestsInvalid Restraints & Rule Against PerpetuitiesReal Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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1. Lease Term and Additional Space

17-34C California Legal Forms--Transaction Guide § 34C.211

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.211 Lease Term to Commence on Completion of Construction by Landlord

[1] Comment

[a] Use of Form

This form is a set of provisions requiring the term of a lease to commence on completion of a building to be constructed by the landlord on the leased premises. It includes alternative provisions for the ending date of the lease term, the standards for determining completion of the building, and the termination rights of the parties in the event the building is not completed within a specified time.

For a lease provision requiring commencement of the lease term on the occurrence of any other stated event, see *§ 34C.210*. For an alternative provision that does not postpone commencement of the lease term but merely abates the rent payable under the lease until the landlord is able to deliver possession of the premises to the tenant, see *§ 34C.200[2]*, Sections 1.04, 1.05.

PRACTICE TIP:

Defining "Completion of Construction." When a lease is to commence on the completion of construction depends on whether one is the landlord or the tenant in respect to which event defines completion. If the landlord is doing the construction, then the tenant is not interested when the landlord believes it has completed or "substantially" completed its construction. The tenant is interested as to when it can commence business which is usually defined when a Certificate of Completion or Certificate of Occupancy has issued from a governmental agency. The landlord, however, wants to rent immediately and thus will define completion as being on the earliest possible date. *By Benjamin Kaplan.*

[b] Lease Term

The term of a lease is adequately stated if it is to commence on the completion of the premises, and any uncertainty about the term is removed by the completion of the premises [*City of Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* . A lease that states that it is to begin when a building is constructed will begin when construction is complete, even if it is well after the date that the parties contemplated that construction would be complete [*Fanta v. Maddex (1926) 80 Cal. App. 513, 517-518, 252 P. 630* ; *Lang v. Pacific Brewing etc. Co. (1919) 44 Cal. App. 618, 623-625, 187 P. 81]* .

For a discussion of the inapplicability of the rule of perpetuities for a lease supported by consideration, see *§ 34C.210[1][c]*.

[2] FORM

Lease Term

ARTICLE _____
TERM

Term of Lease

Section _____.01. The term of this lease shall commence at 12:01 A.M. on the "Commencement Date" specified in Section _____.02 of this lease, and shall end at 12:01 A.M. on _____[*date*].

[*OR*]

Term of Lease

Section _____.01. The term of this lease shall be for a period of _____[*number*] years plus any fraction of a calendar month required by Section _____.04 of this lease. The term of this lease shall commence at 12:01 A.M. on the "Commencement Date" specified in Section _____.02 of this lease, and shall end at 12:01 A.M. on the date that is exactly _____[*number, e.g.,* 12] calendar years after the date specified in Section _____.04 of this lease.

[*CONTINUE*]

Commencement Date of Lease

Section _____.02. The commencement date of this lease ("Commencement Date") shall be the date the building to be constructed on the premises under Article _____ of this lease is completed in accordance with the plans and specifications for it described in Article _____ of this lease. The building shall be deemed substantially completed on the first of the following to occur:

(a) The Architect engaged by Landlord to supervise construction of the building certifies in writing to Landlord and Tenant that the building has been substantially completed in conformity with the plans and specifications for it described in Article _____ of this lease; or

(b) Tenant accepts, either in writing or by continued occupancy, the building as being completed; provided, however, mere entry of Tenant or Tenant's employees into the building for purposes of installing trade fixtures or stocking merchandise shall not be sufficient occupancy of the building by Tenant to constitute an acceptance by Tenant of the building as being completed within the meaning of this provision.

[*OR*]

Commencement Date of Lease

Section _____.02. The Commencement Date of the term of this lease ("Commencement Date") shall be whichever of the following first occurs:

(a) The date that Tenant commences actual operation of its business, _____[*describe business, e.g.,* a retail shoe store], on the premises; or

(b) _____[*number, e.g.,* 30] days after a Certificate of Occupancy for the building to be erected on the premises under Article _____ of this lease is duly issued by the _____[*specify agency or officer, e.g.,* Public Works Department *or* City Building Inspector *or* County Engineer] of the City [*or* County] of _____, California.

[*CONTINUE*]

Termination on Delay in Construction

Section _____.03. Notwithstanding any other provision of this lease, if the Commencement Date described in Section _____.02 of this lease does not occur [within _____ (*number*) months after the date of execution of this lease or before _____ (*date*)], then either party to this lease may, by giving written notice of termination to the other party to this lease, terminate this lease. Such termination, whether made by Tenant or Landlord, shall not, however, preclude or prevent Tenant from pursuing any rights or remedies, other than the right to specific performance of this lease, that Tenant may have against Landlord for unreasonable delay in completing the building to be erected on the premises in accordance with Article _____ of this lease.

[*OR*]

Termination on Delay in Construction

Section _____.03. Notwithstanding any other provision of this lease, if the Commencement Date described in Section _____.02 of this lease does not occur [within _____ (*number*) months from the date of execution of this lease by Tenant or before _____ (*date*)], then Tenant may, by giving written notice of termination to Landlord, terminate this lease and be relieved of all future obligations arising under this lease.

[*Add the following if the second alternative _____.01, above, is used:*]

Term Extension for Fractional Month

Section _____.04. If the Commencement Date described in Section _____.02 of this lease occurs on a day other than the first day of a calendar month, then the term of this lease shall include the unexpired fraction of the calendar month in which the Commencement Date occurs plus _____[*number, e.g.,* 12] full years from the first day of the calendar month immediately following the calendar month in which the Commencement Date occurs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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17-34C California Legal Forms--Transaction Guide § 34C.212

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.212 Option to Extend Term

[1] Comment

[a] Use of Form

This form is a lease provision granting the tenant the option to extend a fixed lease term, provided the tenant is not in default at the time the option is exercised. It contains alternative provisions for an increased amount of rent during the extended term.

[b] Increased Rent During Extended Term

A landlord who agrees to an option to renew or extend customarily will require that the tenant pay a higher amount of rent during the extended term. The parties may agree on a fixed amount, or agree to an adjustment based on a stated formula or standard. Common examples include rent increases that reflect the leased premises' increase in market value or that are based on changes in the consumer price index.

Whenever an option to renew or extend requires payment of an increased rent during the renewed or extended term, the specific amount or the formula or standard by which the amount of rent is to be determined must be included in the lease [*see Ablett v. Clauson (1954) 43 Cal. 2d 280, 284-286, 272 P.2d 753* ; *Etco Corp. v. Hauer (1984) 161 Cal. App. 3d 1154, 1161, 208 Cal. Rptr. 118]* . A lease provision authorizing the lease's renewal at a rent to be determined in the future is enforceable only if, absent agreement of the parties concerning the amount of that rent, the lease sets forth an ascertainable standard for the determination of the rent. This rule recognizes that fluctuating market conditions often preclude the determination, at the time an initial lease is made, of an appropriate rent for a renewal period, yet prevents a court from engaging in the drafting of contracts for parties in the absence of guidelines permitting an objective determination of the rent [*Etco Corp. v. Hauer (1984) 161 Cal. App. 3d 1154, 1161, 208 Cal. Rptr. 118]* .

This form includes several alternatives for increased rent during the extended term [*see* P (a) of form]. Under the first alternative, the rent is increased to a stated fixed amount. The second alternative provides that the tenant's periodic rent is increased by an amount equal to the increase in real property taxes for the property from the first year through the last year of the original term preceding the extended term.

The third alternative is a lengthy provision that bases the increase on the then market value of the property as agreed on by the parties, or if they are unable to agree, as determined by an appraisal process. The appraisers are to determine the "full cash market value" of the property, defined as the price a willing buyer would pay to a willing seller for the leased premises *for the uses specified in the lease, regardless of the highest and best potential use of the premises*. If the lease is silent on the issue of what uses are to be considered by the appraisers in determining a value for the property, a court may conclude that the parties intended the property to be valued at its highest and best use, which could be considerably higher than the value of the property as used by the tenant [*see Wu v. Interstate Consolidated Industries (1991) 226 Cal. App. 3d 1511, 1514-1517, 277 Cal. Rptr. 546]* .

For a provision to increase the rent based on a consumer price index, see *§ 34C.200[2]*, Section 2.01(b).

[c] Renewal and Extension Distinguished

Strictly speaking, the renewal of a lease involves the execution of a new instrument and creates a new estate, while an extension is a continuation in possession under the provisions of the old lease [*Estate of Fellows (1930) 106 Cal. App. 681, 684-685, 289 P. 887]* . This distinction, however, is not always observed, and it has been held that the words "renewal" and "to renew" have no definite and fixed legal meaning that is binding as a matter of law on the parties who use them in a lease [*Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 273, 179 P.2d 611]* . Rather, a lease, like any other contract, is to be enforced in accordance with the expressed intention of the contracting parties [*Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 273, 179 P.2d 611]* .

Consequently, when a lease gives the tenant a right of "renewal" or a right to "extend" the lease, the trend is to ascertain the true intention of the parties by considering the entire document or set of documents, the surrounding circumstances, and the conduct of the parties [*Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140]* . When the parties intend to execute a new lease on exercise of the tenant's option, the option, regardless of the language used in describing it, is an option to renew the lease [*Robertson v. Drew (1917) 34 Cal. App. 143, 144-145, 166 P. 838* ; *see Tay-Holbrook, Inc. v. Tutt (1933) 218 Cal. 600, 604-605, 24 P.2d 463]* . If the parties did not contemplate executing a new lease on exercise of the tenant's option, the option (even though stated as an option to renew) is in reality an option to extend the lease [*Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 401, 81 Cal. Rptr. 140* ; *Leonhardi-Smith, Inc. v. Cameron (1980) 108 Cal. App. 3d 42, 47, 166 Cal. Rptr. 135]* .

[d] Effect of Renewal or Extension Option

A provision in a lease giving the tenant the option to extend or renew a lease creates only a contractual right [*Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463-464, 98 Cal. Rptr. 482* ; *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64, 338 P.2d 1005]* . An option is simply an offer by which a promisor binds himself or herself in advance to make a contract if the optionee accepts the offer on the terms and within the time designated in the option [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67, 338 P.2d 1005* ; *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229*]. It does not transfer any interest in the leased land until it is exercised [*Dougherty v. California Kettleman, etc. (1937) 9 Cal. 2d 58* ; *Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463-464, 98 Cal. Rptr. 482]* .

Once the option to extend or renew the lease is exercised, the promise to renew ceases to be a mere personal covenant and becomes a covenant running with the land [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64-65, 338 P.2d 1005]* . Because it is a covenant running with the land, the legal successors of the tenant as well as the legal successors of the landlord are entitled to the benefits and are burdened with the duties and obligations the covenant conferred and

imposed on the original parties to the lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

Thus, when a tenant has exercised an option to renew or extend a lease, the tenant and his or her successors' rights to possession of the premises for the renewed or extended term of the lease cannot be defeated by any actions of the landlord or a successor of the landlord [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* . The tenant or the tenant's successor in interest is entitled to specific performance of the covenant to renew or extend the lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

A subtenant is a successor in interest of a tenant. When the subtenant and the tenant have exercised the options contained in their respective leases to renew or extend the terms of those leases, the subtenant becomes vested with the right to possession of his or her leased premises for the renewed or extended term of his or her lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* . There is nothing the subtenant's landlord, the master tenant, can do to defeat that vested right; therefore, the master tenant cannot withdraw his or her exercise of the option to renew or extend the master lease after the subtenant has exercised his or her option to renew or extend the subtenant's lease [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

[e] Manner of Exercising Renewal or Extension Option

Because the optionor, the landlord, is bound by the offer contained in the option, but the optionee, the tenant, is free to accept the offer or not as the tenant chooses [*see* [d], *above*], courts are strict in holding an optionee to exact compliance with the terms of the option [*Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229, 255 P.2d 473]* . For example, when a tenant attempts to vary the terms of the option in the tenant's notice purporting to exercise the option, the tenant in effect rejects the option, which is extinguished on expiration of the lease's original term [*Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229, 255 P.2d 473]* . The tenant's purported notice exercising the option in such a case is in reality a counter offer that may be rejected by the landlord [*Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 227, 255 P.2d 473]* .

The courts are equally strict in enforcing the notice requirements for an option to renew the lease. The specification of a time period or deadline by which notice of exercise by the tenant of an option to renew the lease must be given is universally considered to be a condition precedent to the exercise of the option [*Simons v. Young (1979) 93 Cal. App. 3d 170, 179, 155 Cal. Rptr. 460* ; *see Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 502, 113 Cal. Rptr. 705, 521 P.2d 1097]* .

When an option in a lease is not timely exercised in the manner specified in the lease, the fact that the tenant made substantial improvements in the premises just before the option date is not sufficient to constitute notice to the landlord that the option was exercised when there was no showing that the landlord waived the notice requirement [*Bekins Moving & Storage Co. v. Prudential Ins. Co. (1985) 176 Cal. App. 3d 245, 251, 221 Cal. Rptr. 738]* . Equitable relief is not available to extend the option period, and relief from forfeiture is not appropriate because there is no vested right in an option, which is merely an offer [*Bekins Moving & Storage Co. v. Prudential Ins. Co. (1985) 176 Cal. App. 3d 245, 253-254, 221 Cal. Rptr. 738* ; *see Simons v. Young (1979) 93 Cal. App. 3d 170, 178-185, 155 Cal. Rptr. 460]* .

When a lease containing an option for renewal or extension does not contain any provision as to the manner and time in which the option is to be exercised, the tenant may exercise the option before expiration of the original lease term by any act or course of conduct indicating to the landlord the tenant's intent to renew [*Alhandy v. Genchi (1962) 202 Cal. App. 2d 806, 810, 21 Cal. Rptr. 167* ; *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* . For example, when a lease contains an option to renew at a higher rent but does not specify how and when the option is to be exercised nor require execution of a new agreement, remaining in possession with tender of the higher rent is sufficient notice of exercise of the option [*ADV Corp. v. Wikman (1986) 178 Cal. App. 3d 61, 66, 223 Cal. Rptr. 262]* . Similarly, when a lease contains an option to renew but does not specify the manner in which the option is to be exercised and does not require the execution of a new lease or the payment of new consideration, the lease is extended

when the tenant remains in possession beyond expiration of the original lease term under the same terms and conditions as the original lease term [*In re Marriage of Joaquin (1987) 193 Cal. App. 3d 1529, 1534, 239 Cal. Rptr. 175]* .

PRACTICE TIP:

Be Creative to Ensure Against Tenant Missing Option Exercise Deadline. Apparently, the exercise of an option will be strictly construed. It is best if one is representing the tenant to develop creative approaches to insuring against the tenant inadvertently missing the option exercise deadline. One possible way is that when there is an option exercise deadline, to provide in the lease that the landlord must send to the tenant a notice of the right to exercise the option, no earlier than 60 days before the option exercise due date and no later than 30 days before that date, informing the tenant of his or her right to exercise the option. The failure on the landlord's part to send this notice will extend the time that the tenant has to exercise the option to 30 days from the date the notice is finally mailed (which could actually mean after the end of the fixed term tenancy or during the holdover period thereof). *By Benjamin Kaplan.*

[f] Holdover Clause

In addition to the option for extension or renewal of the lease, the provisions in this form contain a "holdover" clause stating that the tenant will become a month-to-month tenant if the tenant remains in possession of the leased premises after expiration of the original term of the lease without exercising the option to extend [*see* P (c) of form].

PRACTICE TIP:

Holdover Clause Will Counter Argument That Option Was Exercised. A holdover clause should be included to confirm that the option to extend the lease term may be exercised only by the tenant's giving the landlord the notice required under the lease and that merely holding over after expiration of the original lease term or any extension period and paying rent will not be considered an exercise of the option. *By Publisher's Editorial Staff.*

Even in the absence of a holdover clause, a tenant who holds over after expiration of the term becomes a tenant from month-to-month if the landlord accepts monthly rent payments in the amount specified in the expired lease [*Civ. Code § 1945*; *Renner v. Huntington etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895]* . Furthermore, the existence of a holdover clause has no effect on the terms of a month-to-month tenancy created by holding over. Whether or not the lease contains a holdover clause (even if the clause provides for a month-to-month tenancy "on the same terms and conditions" as stated in the lease), the month-to-month tenant is not entitled to the same rights the tenant enjoyed as tenant during the fixed term of the expired lease [*Spaulding v. Yovino-Young (1947) 30 Cal. 2d 138, 142, 180 P.2d 691]* . Consequently, an option to purchase the leased premises or to renew the lease contained in a fixed term lease does not carry over and inure to the benefit of a tenant who holds over and becomes a month-to-month tenant, whether by operation of a holdover clause or otherwise [*Spaulding v. Yovino-Young (1947) 30 Cal. 2d 138, 142, 180 P.2d 691]* .

[2] FORM

Option to Extend Lease

Option to Extend Lease Term

Section _____. (a) Tenant is hereby granted and shall, if not then in default under this lease, have an option to extend the term of this lease for an additional period of _____[*number*] years only from the original expiration date of this lease, [*or* in _____ (*specify number*) successive periods of _____ (*number*) years (*or* months) each as follows: _____ (*enumerate*)] but otherwise on the same terms, covenants, and conditions [and subject to the same exceptions and reservations] contained in this lease,

[*EITHER*]

except that the rent to be paid by Tenant to Landlord for the extended term shall be increased to the sum of $ _____ per _____[month *or* year].

[*OR*]

except that the rent to be paid by Tenant to Landlord as _____[monthly *or* yearly] rent shall be increased by the amount of increase in the real property taxes and general and special assessments levied on the leased premises during the last tax year preceding the extension period over those levied on the leased premises during the first full tax year of the term of this lease.

[*OR*]

except that the annual rent to be paid by Tenant to Landlord shall be increased to an amount that equals _____ percent of the then full cash market value of the leased premises as agreed on by Tenant and Landlord, or if the parties are unable to agree, fixed by appraisal in the following manner:

(1) On or before _____ [*number*] days before commencement of the extended term, Landlord and Tenant shall each appoint an appraiser and give written notice of the name and address of that appraiser to the other party to this lease. The two appointed appraisers shall, within _____ [*number*] days after appointment of the last of the two appraisers to be appointed, appoint a third appraiser and serve written notice of the name and address of that appraiser on Landlord and Tenant in the manner prescribed by this lease for service of notice on one party to this lease by the other.

(2) All appraisers appointed under this section shall be, at the time of their appointment, members in good standing of the American Institute of Real Estate Appraisers.

(3) Within _____ [*number*] days after the appointment of the third appraiser, the three appraisers shall confer and each shall submit in writing to Landlord and Tenant his or her appraisal of the full cash market value, as described in this section, of the leased premises. The term "full cash market value" as used in this section means the price a willing buyer would pay to a willing seller for the leased premises for the uses specified in this lease, regardless of the highest and best potential use of the premises, not necessarily in cash, but on the best terms then reasonably available for property in the county where the leased premises are located.

(4) The appraised value agreed on in writing by any two of the three appointed appraisers shall be conclusive and binding on the parties to this lease, and shall establish the full cash market value of the leased premises for purposes of this section. If no two of the three appraisers are able to agree on the full cash market value of the leased premises, both the highest appraisal and the lowest appraisal submitted by any of the three appraisers shall be disregarded and the remaining appraisal shall be binding and conclusive on the parties to this lease and shall establish the full cash market value of the leased premises for purposes of this section.

(5) If either Landlord or Tenant fails to appoint an appraiser as required by this section within _____ [*number*] days after service on that party of written demand to do so, the appraiser appointed by the other party shall act for both Landlord and Tenant. The decision in writing of that appraiser shall, in that event, be binding on both Landlord and Tenant and establish the full cash market value of the leased premises for purposes of this section.

(6) The rent payable by Tenant to Landlord each month during the extended term of this lease shall be an amount equal to _____ [*specify percentage*] percent of the full cash market value of leased premises as determined in accordance with either subsection (4) or subsection (5) of this Section.

(7) If the two appraisers appointed respectively by Landlord and Tenant fail, for any reason, to appoint a third appraiser within the time required by subsection (1) of this Section, either party may petition the Superior Court for the county in which leased premises are located to appoint the third appraiser.

(8) Landlord and Tenant shall each pay the fee and all expenses incurred by the appraiser appointed by each of them and one half of all expenses and the fee incurred by the third appraiser appointed in accordance with subsection (1) of this Section.

[*CONTINUE*]

(b) This option shall be exercised only by Tenant's delivering to Landlord [on or before _____ (*date*) *or* between the dates of _____ (*date*), and _____ (*date*), or before expiration of the term of this lease or _____ (*number*) days before expiration of the term of this lease], written notice of Tenant's election to renew the term of this lease as provided in this section. This written notice shall be deemed effective on personal delivery to Landlord or on the date it is deposited in the United States mail in accordance with the provisions of Section [*insert section number for notices provision of lease*].

(c) In the event that Tenant does not extend the term of this lease as herein provided, and holds over beyond the expiration of the term of this lease, that holding over shall be deemed a month-to-month tenancy only at the rental of $ _____ per month, payable on the [*specify, e.g.*, first] day of each and every month thereafter until the tenancy is terminated in a manner provided by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at Sufferance



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17-34C California Legal Forms--Transaction Guide § 34C.213

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.213 Option to Lease Additional Space

[1] Comment

[a] Use of Form

This form is an option to lease additional space in a multitenant building. Requirements for a valid option and its legal effect, which are discussed in *§ 34C.263[1]* in the context of an option to purchase, are equally applicable to an option to lease additional space. For a right of refusal to lease additional space, see *§ 34C.214*.

[b] Obtaining Option

Whether a tenant is able to obtain an option or right of first refusal to lease additional space from a landlord depends on several factors, including overall economic leasing conditions and the strength of the tenant. A tenant with a long-term lease who leases a large amount of space and wants the right or option to acquire a substantial amount of additional space will probably have a stronger bargaining position with the landlord than would a short-term, small user. A landlord also may be more willing to grant a right of first refusal that requires the tenant to match the rent offered by a third party at the time the right is exercised than an option that locks the landlord into an amount of rent agreed on at the time the option is granted.

[c] Contents of Form

This form describes the additional space covered by the option, as well as the method (with time limits) required to exercise the option. The tenant is not permitted to exercise the option if the tenant is then in default under the lease. The rent to be paid for the additional space is fixed at an amount agreed on by the parties. In all other respects, the same terms and conditions of the tenant's lease apply to the lease of the additional space. If there are any exceptions, they should be clearly set forth in the lease provision. The term of the lease for the additional space is defined by reference to

events, and this form provides that the parties agree to confirm the term in writing once the event that commences the lease term for the additional space has occurred. The form includes language that permits the tenant to terminate the lease for the additional space if the landlord fails to deliver possession by a certain date.

[2] FORM

Option to Lease Additional Space

Option to Lease Additional Space

Section _____. Landlord hereby grants to Tenant the option to lease approximately _____[*number*] square feet of rentable floor space ("the additional space") located in the Building of which the leased premises are a part. The additional space covered by this option shall be _____[*describe location agreed on by the parties, e.g.*, located immediately adjacent to the leased premises and is presently referred to as _____ (*identify suites or offices*) *or* any contiguous space of approximately _____ (*same number as above*) square feet located anywhere on the _____ [*number*] floor of the building that becomes available for lease on or before _____ (*date agreed on by the parties*)]. This option shall be subject to the following terms and conditions:

(a) Landlord shall give Tenant written notice of availability of the additional space at least 30 days before the date the additional space is expected to be vacated. Within _____[*number, e.g.,* 14] days after the date of landlord's notice, Tenant shall notify Landlord of its election to exercise the option to lease the additional space. Failure by the Tenant to notify Landlord within the required period shall constitute a conclusive election by Tenant not to exercise the option to lease the additional space. Tenant's written notice shall be deemed effective on personal delivery to Landlord or on the date it is deposited in the United States mail in accordance with the provisions of Section _____[*insert section number for notices provision of lease*].

(b) The term of the lease for the additional space and Tenant's obligation to pay rent for the additional space shall commence on the date Landlord actually delivers possession of the additional space to Tenant, whether or not Tenant actually begins to occupy the additional space on that date. If Landlord is unable to deliver possession of the additional space within _____[*specify time period that gives landlord a reasonable extension of time, e.g.,* 60 days after the expected date of availability] after Landlord's notice to Tenant described in subsection (a), Tenant shall have the right to terminate the lease for the additional space. After Landlord has delivered possession of the additional space to Tenant, Landlord and Tenant agree to confirm the commencement date for the lease of additional space in a written memorandum executed by the parties. The term of the lease for the additional space shall terminate and expire on the same date as the termination date for this lease.

(c) The rent to be paid by Tenant for the additional space shall be $ _____ per square feet. All other terms and conditions of this lease shall apply to the lease by Tenant of the additional space except _____[*describe any exceptions, e.g.,* Tenant shall have no further option to lease additional space in the Building once the option granted herein has been exercised].

(d) Tenant may exercise the option granted under this Section only if Tenant is not then in default under this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Alternative and Additional Lease Provisions
1. Lease Term and Additional Space

17-34C California Legal Forms--Transaction Guide § 34C.214

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.214 Right of First Refusal to Lease Additional Space

[1] Comment--Use of Form

This form is a provision granting a right of first refusal to lease additional space in a multitenant building. Requirements for and the legal effect of a right of first refusal to purchase leased property are discussed in *§ 34C.264[1]*. That section also discusses the difference between a right of first refusal and an option. For an option to lease additional space, see *§ 34C.213*.

A right of first refusal to lease additional space or property is the right of the tenant to meet any bona fide offer of a third party to lease it [*Vandenbergh v. Davis (1961) 190 Cal. App. 2d 694, 697, 12 Cal. Rptr. 222]* . The right of first refusal in this form describes the additional space covered by the right and the conditions under and method by which the right must be exercised. If the right is timely exercised by the tenant, the lease of the additional space will be on the same terms and conditions as a bona fide third-party offer, including the amount of rent and the term. The parties may agree that the right is either a one-time right, or that the tenant maintains the right during the term of the lease.

PRACTICE TIP:

Landlord Should Avoid Giving Tenant Right of First Refusal. A first right of refusal in a tenant is to be avoided by the landlord if possible. A first right of refusal creates definite problems for the marketability of the premises because few tenants are going to want to have their offer proffered to a tenant as part of the landlord's negotiating strategy. Even Letters of Intent are utilized by unethical landlords to get recalcitrant tenants to release their existing space at a higher rent, or to exercise their first right of refusal on adjoining space. You do not want your tenant client to be a shill for a landlord. *By Benjamin Kaplan.*

[2] FORM

Right of First Refusal to Lease Additional Space

Right of First Refusal to Lease Additional Space

Section _____. In further consideration of the rent, covenants, and conditions to be paid, performed, and observed by Tenant, Landlord hereby grants to Tenant a right of first refusal to lease _____[*specify, e.g.,* the entire third floor of the building in which the leased premises are located] (referred to in this lease as the "additional space"). In the event Landlord receives a bona fide offer from a third party to lease the additional space, which offer is acceptable to Landlord, Landlord shall promptly notify Tenant in writing of the offer, including the amount of rent offered and other terms and conditions of the offer. Tenant shall have _____[*number, e.g.,* five] business days within which to notify Landlord in writing whether Tenant agrees to lease the additional space at the amount of rent and on the same terms and conditions as the third-party offer. In the event Tenant elects to lease the additional space, the lease of the additional space shall be subject to the same terms and conditions as the third-party offer, including but not limited to amount of rent, term, and commencement date. In the event Tenant fails to give written notice of its election to lease the additional space within the time required under this Section, Landlord shall be free to accept the bona fide offer and lease the additional space to the third-party offeror. If the additional space subsequently becomes available again during the term of this lease, Tenant shall have the same right of first refusal granted herein with respect to a bona fide offer to lease the additional space by a subsequent third-party offeror [*or* The right of first refusal granted to Tenant herein is a one-time right and shall not apply after Tenant has once been offered the opportunity to exercise the right but declined].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationRights of First RefusalContracts LawTypes of ContractsOption ContractsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide §§ 34C.215-34C.219

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.215[Reserved]



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17-34C California Legal Forms--Transaction Guide § 34C.220

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.220 Security Deposit

[1] Comment

[a] Use of Form

This form is a provision for a nonresidential lease that requires the tenant to post a security deposit to secure performance of the lease. It incorporates the statutory requirements for the landlord's handling and disposition of the deposit [*see Civ. Code § 1950.7*; *see also* [b], *below*]. The last paragraph of this form requires the tenant to restore any amount of the security deposit that the landlord applied for a lawful purpose during the term of the tenancy.

[b] Statutory Requirements

[i] Type of Payments

Civ. Code § 1950.7 governs any payment or deposit of money the primary function of which is to secure the performance of a nonresidential rental agreement, other than a payment or deposit, including an advance payment of rent, made to secure the execution of a rental agreement [*see Civ. Code § 1950.7(a)*]. A different statute applies to security deposits for residential property [*see Civ. Code § 1950.5*].

[ii] Landlord's Right to Claim Deposit

The landlord may claim only amounts of the payment or deposit that are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises on termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes [*Civ. Code § 1950.7(c)*]. If the landlord's claim on the payment or deposit is only for defaults in the payment of rent, and the security deposit equals no more than one month's rent plus a deposit amount clearly described as the payment of the last month's rent, then any

remaining portion of the payment or deposit must be returned to the tenant no later than 30 days after the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(1)*]. If the landlord's claim on the payment or deposit is only for defaults in the payment of rent and the security deposit exceeds the amount of one month's rent plus a deposit amount clearly described as the payment of the last month's rent, then any remaining portion of the payment or deposit in excess of an amount equal to one month's rent must be returned to the tenant no later than two weeks after the date the landlord receives possession of the premises, with the remainder to be returned or accounted for within 30 days from the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(2)*].

If the landlord's claim on the payment or deposit includes amounts reasonably necessary to repair damages to the premises caused by the tenant or to clean the premises, then any remaining portion of the payment or deposit must be returned to the tenant at a time mutually agreed on by the landlord and tenant, but in no event later than 30 days from the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(3)*].

Parties to a commercial lease may waive *Civ. Code § 1950.7* to provide that a security deposit may be held and applied against future rent damages [*250 L.L.C. v. PhotoPoint Corp. (2005) 131 Cal. App. 4th 703, 712, 718-719, 32 Cal. Rptr. 3d 296]* . In an action concerning a tenant's breach of a lease for commercial property, the landlord violated *Civ. Code § 1950.7* by retaining the security deposit to cover its damages for future rent owed under the lease, because the lease contained no such waiver [*250 L.L.C. v. PhotoPoint Corp. (2005) 131 Cal. App. 4th 703, 720, 32 Cal. Rptr. 3d 296]* .

[iii] Termination of Landlord's Interest in Property

If the landlord's interest in the leased property terminates (whether by sale, assignment, death, appointment of receiver, or otherwise), the landlord or the landlord's agent must dispose of the security deposit within a reasonable time in accordance with one of the following methods [*see Civ. Code § 1950.7(d)*]:

- By transferring the portion of the payment or deposit after any lawful deductions [*see* [b][ii], *above*] to the landlord's successor in interest, and then notifying the tenant by personal delivery or certified mail of the transfer, of any claims made against the payment or deposit, and of the transferee's name and address [*see Ch. 35A, Assignment and Sublease of Leasehold Interests, § 35A.223*]. If the notice to the tenant is made by personal delivery, the tenant must acknowledge receipt of the notice and sign his or her name on the landlord's copy of the notice.

- By returning the portion of the payment or deposit remaining after any lawful deductions [*see* [b][ii], *above*] to the tenant.

On receipt of any portion of the payment or deposit, less lawful deductions, the landlord's successor in interest has all of the rights and obligations of a landlord with respect to the payment or deposit [*Civ. Code § 1950.7(e)*].

[iv] Damages for Bad Faith Retention of Funds

The bad faith retention by a landlord or transferee of a payment or deposit or any portion of a payment or deposit may subject the landlord or the transferee to statutory damages not to exceed $200, in addition to any actual damages [*Civ. Code § 1950.7(f)*].

[v] Tenant's Priority Over Landlord's Other Creditors

The landlord must hold any security payment or deposit of money for the tenant [*Civ. Code § 1950.7(b)*]. The claim of a tenant to that payment or deposit is prior to the claim of any creditor of the landlord, except a trustee in bankruptcy [*Civ. Code § 1950.7(b)*].

[2] FORM

Security Deposit

ARTICLE _____
SECURITY DEPOSIT

Receipt of Deposit

Section _____. Tenant has deposited with Landlord the sum of $ _____, receipt of which is hereby acknowledged by Landlord, as security for the full and faithful performance by Tenant of the terms, conditions, and covenants of this lease.

Deduction for Rent

Section _____. If at any time during the term of this lease Tenant defaults in the payment of rent, or any portion of rent, under this lease, Landlord shall [*or* may] appropriate and apply any portion of the security deposit reasonably necessary to remedy any such default in the payment of rent.

Deduction for Repairs

Section _____. If at any time during the term of this lease Tenant or Tenant's agents or employees damage the premises through want of ordinary care or any greater degree of culpability, then Landlord shall [*or* may] appropriate and apply any portion of the security deposit reasonably necessary to fund the necessary repair.

Deduction for Cleaning

Section _____. If on termination of this tenancy Tenant fails to leave the premises in a clean condition (i.e., comparable to the condition of the premises at the time Landlord delivered possession to Tenant at the commencement of this lease, excepting ordinary wear and tear), then Landlord shall [*or* may] appropriate and apply any portion of the security deposit reasonably necessary to put the premises in clean condition.

Custody of Deposit

Section _____. Landlord agrees to hold the security deposit for Tenant, free from the claim of any creditor of Landlord except a trustee in bankruptcy.

Transfer of Deposit

Section _____. If Landlord transfers Landlord's interest under this lease in any manner, Landlord or Landlord's agent shall do one of the following acts, either of which will relieve Landlord of further liability with respect to the deposit:

(a) Transfer the portion of the security deposit remaining after any deductions authorized by this article or

otherwise authorized by law, if any, to Landlord's successor in interest, and thereafter notify Tenant by personal delivery or certified mail of that transfer, and of the transferee's name and address. If the notice is personally delivered to Tenant, Tenant shall acknowledge receipt of the notice and sign Tenant's name on Landlord's copy of the notice. On receipt of the security deposit, or any portion of it, transferred to Landlord's successor in interest, the transferee shall have all of the rights and obligations of Landlord with respect to the security deposit.

(b) Return the portion of the security deposit remaining after any deductions authorized by this article or otherwise authorized by law, if any, to Tenant.

Return of Deposit

Section _____. Landlord shall return to Tenant the portion of the security deposit remaining after any deductions authorized by this article or otherwise authorized by law, if any, in the following manner. If a deduction has been made only for the nonpayment of rent, the remaining portion, if any, shall be returned not later than two weeks after the date Landlord receives possession of the premises. If a deduction has been made for any other reason authorized by this article or otherwise authorized by law, the remaining portion, if any, shall be returned not later than 30 days from the date Landlord receives possession of the premises. Tenant shall not be entitled to any interest on any portion of the security deposit [*or* Tenant shall be entitled to interest on the security deposit at the rate of _____ percent per year].

Restoration of Security Applied by Landlord

Section _____. If, during the term of this lease, Landlord applies all or any portion of the security deposit for a purpose authorized by this article or otherwise authorized by law, Tenant agrees to restore the amount of the security so applied by Landlord with the next due payment of rent under this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.221

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.221 Tenant to Pay Property Taxes and Assessments

[1] Comment

[a] Use of Form

This form is a lease provision requiring the tenant to pay the real property taxes and assessments on leased property. By inserting these provisions in a lease, the lease will be "net," at least as to taxes and assessments [*see § 34C.17*]. This type of provision is used most frequently in long-term industrial or retail leases for a freestanding building. For multitenant buildings, the landlord usually pays the real property taxes and assessments for the property and building directly, but each tenant may be required to pay a proportionate share of this expense. For a provision requiring the landlord to pay all property taxes and assessments, see *§ 34C.200[2]*, Section 4.03.

[b] Liability for Taxes

[i] Landlord's Obligation

The parties to a lease may provide that one of them will pay the taxes assessed against the leased premises, or they may agree to an apportionment of the taxes between them. In the absence of an express agreement with regard to the payment of taxes, the landlord generally has the obligation to pay all taxes assessed against the leased premises during the term of the lease [*Lawrence v. F. W. Woolworth Co. (1965) 63 Cal. 2d 119, 121, 45 Cal. Rptr. 140, 403 P.2d 396]* .

[ii] Reimbursement by Tenant

In some cases, the lease provides that the tenant is to pay a percentage or portion of the taxes for the landlord's property, based on a relationship between the leased premises and the assessed parcel [*see* form in [2], *below*]. If the lease

provides that the tenant is to *reimburse* the landlord for its portion of the taxes, the landlord must first make payment of the taxes before invoicing the tenant for the tenant's share, absent a lease provision authorizing advance billing [*WDT-Winchester v. Nilsson (1994) 27 Cal. App. 4th 516, 529-531, 32 Cal. Rptr. 2d 511]* .

PRACTICE TIP:

Sale of Property May Increase Tax Liability. The landlord's sale of a building, or an interest in a building, may trigger a Proposition 13 reassessment, and thus dramatically increase the amount to be paid in property taxes by the landlord. This will likely raise tenant's proportionate share of any increase in net operating expenses. *By Benjamin Kaplan.*

[iii] Increased Taxes Due to Tenant Improvements

Taxes on improvements constructed on the leased premises by the tenant, when the tenant by the lease's terms is permitted to remove the improvements during or at the end of the lease term, are excepted from the general rule requiring the landlord to pay taxes on the leased premises absent an agreement to the contrary [*see* [i], *above*]. In that case, absent an agreement to the contrary, the tenant has the obligation of paying the increase in taxes due to the improvements, and he or she cannot avoid liability by proving that it is unlikely that he or she will remove the improvements [*Lawrence v. F. W. Woolworth Co. (1965) 63 Cal. 2d 119, 121-123, 45 Cal. Rptr. 140, 403 P.2d 396]* .

[iv] Special Assessments

If a lease includes a covenant obligating the tenant to pay taxes and assessments, the extent of the tenant's liability depends on the words of the covenant, the context in which they occur, and the subject matter to which they are applied [*Terminal Inv. Co. v. Pope Estate Co. (1932) 122 Cal. App. 281, 283, 10 P.2d 139]* . The tenant's liability is limited to taxes legally assessed [*Third & Broadway Bldg. Co. v. Southern California Edison Co. (1933) 132 Cal. App. 186, 192, 22 P.2d 574]* . The obligation of a tenant under a lease to pay taxes on the leased premises, unless expressly provided in the lease, does not include special assessments imposed by an improvement district because a local improvement assessment is not a tax [*Wells v. Union Oil Co. (1938) 25 Cal. App. 2d 165, 166-167, 76 P.2d 696]* .

[v] Increases in Assessed Value and Tax Rate

If a lease contains a covenant that obligates the tenant to pay any increase in taxes due to an increase in the assessed value of the land, the tenant is not, unless expressly provided by the lease, required to pay increased taxes occasioned by an increase in the tax rate [*Land & W. Co. v. Consumers R. & G. Co. (1935) 3 Cal. 2d 77, 79, 43 P.2d 281]* . If the parties agree that the tenant will pay any increase in real property taxes during the lease term, the lease should specifically state that the obligation includes increases caused by either (1) an increase in the assessed value of the leased property or (2) an increase in the tax rate [*see* form in [2], *below*].

[c] Tenant's Right to Contest Taxes

Net leases requiring the tenant to pay all real property taxes and assessments for the leased property commonly permit the tenant to contest the validity or amount of any tax as long as the tenant protects the landlord and the property from any liability. This form contains such a provision and requires the tenant to post either cash or a surety bond with the landlord as protection against liability for unpaid taxes and penalties or other resulting liability.

PRACTICE TIP:

Potential Prop. 13 Consequences. The real danger is that the landlord will sell all or part of his or her interest in the property in which the premises are located. This will probably result in a significant Proposition 13 reassessment, if the landlord has held the property for a long term. *By Benjamin Kaplan.*

[d] Effect of Nonpayment by Tenant

This form contains a provision that permits the landlord to pay any taxes that the tenant is required to pay, if the tenant has failed to do so, and requires the tenant to reimburse the landlord for any amount paid, with the next due rent installment. The tenant's failure to make this reimbursement gives the landlord the right to terminate the lease. Under such a provision, the covenant to pay rent and the covenant to pay taxes are separate. Thus, if the landlord accepts the following month's rent but does not demand the delinquent tax, the landlord neither waives the default of the payment, nor is estopped from enforcing the lease's forfeiture for breach of the covenant to pay taxes [*Fraser's Etc. P. Co. v. Ocean Park P. Co. (1921) 185 Cal. 464, 473-474, 197 P. 328]* .

[2] FORM

Taxes to be Paid by Tenant

Taxes to Be Paid by Tenant

Section _____. (a) In addition to the rent specified in Section _____ of this lease, Tenant shall pay all real property taxes [and general and special assessments] levied or assessed against the Leased Premises during the term of this lease.

(b) Tenant's obligation to pay all real property taxes [and general and special assessments] on the Leased Premises shall also include the obligation to pay any increases in real property taxes [and general and special assessments], whether the increase results from an increase in the property tax rate and/or increase in the valuation of the Leased Premises.

(c) If the Leased Premises are assessed and taxed as part of a larger parcel of real property owned by Landlord (referred to in this lease as the "Tax Parcel"), the amount payable under this section by Tenant shall be the portion of the tax bill for the Tax Parcel that bears the same ratio to the total tax bill for the Tax Parcel as the value of the Leased Premises bears to the value of the entire Tax Parcel, determined from the worksheets of the county assessor for the county in which the Leased Premises are located or by appraisal by an independent real estate appraiser selected by the parties.

(d) The taxes and assessments levied against the Leased Premises during the first and last years of the term of this lease shall be prorated between Landlord and Tenant for purposes of this section as of 12:01 A.M. on date of commencement and termination respectively of this lease.

(e) If any tax, assessment, or charge may be paid in one sum or in installments, Tenant may elect either method of payment and its election shall be binding on Landlord. If tenant makes the election to pay any tax, assessment, or charge in installments and any installment is payable after termination of this lease, the unpaid installment shall be prorated as of the date of termination and the amount payable after the date of termination shall be paid by Landlord.

(f) Tenant shall not be required to pay any estate, gift, inheritance, succession, transfer, franchise, income, or other taxes of a similar nature that may be payable by Landlord or Landlord's legal representative, successors, or assigns. Tenant also shall not be required to pay any tax that might become due on account of Landlord's ownership of property other than the Leased Property, notwithstanding that tax may become a lien on the Leased Property or be collectible from it.

Right to Contest Taxes

Section _____. Tenant shall have the right, at Tenant's sole cost and expense, to protest or contest in good faith the amount of any tax or assessment or to defer payment of the tax or assessment until final determination of

the issue. On final determination, Tenant shall immediately pay the amount of the judgment rendered and all costs, charges, interest, and related penalties. The right granted to Tenant in this section is conditioned on the following:

[*EITHER*]

Before any contest, Tenant shall deposit with Landlord the full amount of the tax or assessment, plus the amount of penalty that will be imposed on the Leased Premises for failure to pay the tax or assessment before it became delinquent, and one year's interest at the rate charged by the government entity imposing the tax or assessment on the amount of the tax or assessment.

[*OR*]

Before any contest, Tenant shall furnish Landlord a surety bond issued by an insurance company qualified to do business in California. The bond shall be in an amount not less than _____ percent of the total amount of real property taxes in dispute, shall hold Landlord and the Leased Premises harmless from any damage arising out of the contest or proceeding, and shall insure the payment of any judgment rendered in the contest or proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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17-34C California Legal Forms--Transaction Guide § 34C.222

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.222 Insurance and Indemnity Provisions

[1] Comment

[a] Use of Form

This form is a set of provisions for insurance coverage of leased premises. The provisions in the form define the risks to be covered under the insurance, specify whether the landlord or tenant is required to procure and maintain the required insurance, and describe the disposition of any funds paid for a covered loss.

Alternative insurance provisions for a nonresidential lease can be found in the complete leases set forth in this chapter [*see §§ 34C.200[2]* (retail lease), 34C.201[2] (industrial lease), 34C.202[2] (office lease)].

[b] Obligation to Insure

In the absence of special provisions in the lease, the tenant has no obligation to procure insurance against fire or any other risk for the landlord's benefit, and neither the landlord nor the tenant has an interest in the proceeds of insurance obtained by the other on his or her own separate insurable interest [*Alexander v. Security-First Nat. Bank (1936) 7 Cal. 2d 718, 723, 62 P.2d 735* ; *see Russell v. Williams (1962) 58 Cal. 2d 487, 491, 24 Cal. Rptr. 859, 374 P.2d 827]* . The parties to the lease, however, may agree that either or both will provide certain types of insurance and that the insurance will protect the interests of either or both parties.

The failure to maintain insurance as agreed in a lease constitutes a breach, giving rise to liability measured by the damage suffered from failure to secure indemnity from the promised insurance [*Davidson v. Welch (1969) 270 Cal. App. 2d 220, 236-237, 75 Cal. Rptr. 676]* . If a party in violation of the lease procures insurance that only protects that party's interest, the other party for whose benefit the agreement was made has an equitable lien on the proceeds of that insurance [*Alexander v. Security-First Nat. Bank (1936) 7 Cal. 2d 718, 724, 62 P.2d 735]* . If a lease requires the

landlord and tenant to be named as additional insureds on a policy and the tenant's insurance company negligently fails to include the landlord as an insured, the landlord may sue the tenant's insurance company directly [*Jackson v. Aetna Life & Casualty Co. (1979) 93 Cal. App. 3d 838, 847, 155 Cal. Rptr. 905]* .

[c] Insured Risks

In drafting insurance provisions for a lease, the parties first need to agree on the types of risks to be covered by insurance. The possibilities include the following:

- Fire and extended coverage insurance;
- Earthquake insurance;
- Flood insurance;
- Boiler and machinery insurance;
- Sprinkler system leakage insurance;
- Plate glass insurance;
- Dramshop liability insurance;
- Business interruption insurance [*see § 34C.201[2]*, Section 5.03]; and
- Liability insurance against third-party claims.

Specific coverage will be determined by the type of property subject to the lease and the nature of the lease itself.

PRACTICE TIP:

Insurance Broker Should Be Consulted for Coverage Options. In determining the insured risks for specific leased property, the landlord and tenant, or their representatives, should consult with a broker or agent knowledgeable about insurance for the type of property being leased (for example, retail, industrial, or office). Such a consultation is necessary to confirm that the parties have considered all necessary coverage for the subject property, and to determine adequate policy limits for each type of insurance. *By Publisher's Editorial Staff.*

PRACTICE TIP: Brokers vs. Agents. Although most leases do not differentiate between primary and umbrella coverage, the distinction may have significant impact on the tenant. In some instances coverage in the amounts required by the lease may not be available except as excess coverage. Remember the essential distinction between a "broker" and an "agent." A broker is supposed to be working for you to obtain the best coverage at the lowest cost with any insurance carrier meeting the criteria rating of the lease. An "agent" usually works for a single carrier and tries to fit you into a specific cubby hole for that carriers benefit. *By Benjamin Kaplan.*

[d] Party Responsible for Premiums and Procuring Insurance

In a nonresidential lease, some or all of the obligation to insure is generally imposed on the tenant. For example, in a fully net lease [*see § 34C.17*], the tenant is required to carry all insurance on the property. Likewise, for a lease of a freestanding building, in contrast to a multitenant building, the tenant commonly has responsibility for most or all of the

insurance on the property.

[e] Lender Requirements

In the absence of special provisions in the loan documents, a borrower has no obligation to procure insurance for the benefit of the mortgagee against fire or other risk [*Alexander v. Security-First Nat. Bank (1936) 7 Cal. 2d 718, 723, 62 P.2d 735]* . However, it is common for a lender with a security interest in leased premises to require that it be named as an additional insured on the policy obtained by either a tenant or landlord. For a discussion of the term "additional insured," see the discussion in [f], *below*.

Furthermore, the lender may insist that the lease contain a provision permitting the lender to apply insurance proceeds against any default on its loan to the landlord. However, this requirement will apply only to proceeds for insurance risks that are required by the lender to be carried by the borrower. For example, when a lender does not require in its contract that the borrower obtain earthquake insurance on the property securing the loan, it has no right under the contract to receive or control the insurance proceeds paid as a result of earthquake damage to the property [*Ziello v. Superior Court (1995) 36 Cal. App. 4th 321, 326-330, 42 Cal. Rptr. 2d 251]* .

[f] Named Insured, Additional Insured, and Subrogation Waivers

In addition to determining the risks to be insured against and the party responsible for procuring specific insurance and paying the premiums [*see* [c] and [d], *above*], the parties to a lease must also determine, and set forth in the lease, which party or parties are to have the benefit of the insurance. If, for example, only the landlord is named as the insured on a fire insurance policy and the tenant's negligence causes a fire, the insurance company will be liable to the landlord but may assert subrogation rights against the tenant [*see, e.g., Parsons Manufacturing Corp. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1160-1162, 203 Cal. Rptr. 419* ; *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 864-866, 131 Cal. Rptr. 211]* .

The tenant can protect itself against such an assertion by either requiring that it be made an additional insured on the insurance policy, or requiring that the landlord obtain the insurer's waiver of subrogation rights against the tenant [*see* Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc., (2008) 169 Cal. App. 4th 415, 421, 86 Cal. Rptr. 3d 715 (subrogation waiver); *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 864-867, 131 Cal. Rptr. 211* ; *Gordon v. J. C. Penney Co. (1970) 7 Cal. App. 3d 280, 283-285, 86 Cal. Rptr. 604* ; *Sacramento-Yolo Port Dist. v. Cargill of California, Inc. (1970) 4 Cal. App. 3d 1004, 1010-1012, 84 Cal. Rptr. 822]* .

PRACTICE TIP:

Review Insurance Policies for Subrogation Waivers. The parties to a lease should review contemplated insurance policies to determine whether the policies contain subrogation waiver clauses allowing the insured to waive the subrogation rights of the insurer in favor of third parties in advance of loss. If the policy does have a clause permitting the insured to waive subrogation, then an appropriate subrogation waiver clause, conforming to the authorization to waive granted in the policy, can be drafted and inserted into the lease. *By Publisher's Editorial Staff.*

Another method of protecting the party to the lease who does not take out the policy is to have that party named as an additional insured under the policy, a device which usually does not involve increased premiums. This arrangement is as effective as a subrogation waiver; it prevents the insurance company from looking to the other party for a recovery, since the insurance company cannot sue its own insured [*Pacific Indemnity Company v. United States (9th Cir. 1972) 463 F.2d 1213, 1214]* . Inclusion of a cross-liability endorsement will allow one party, if damaged, to make a claim against the insurer, even though both parties are additional insureds under the same policy.

[g] Implied Waiver of Subrogation

Even when a lease does not contain a waiver of subrogation clause, there may be an implied waiver of subrogation protecting the tenant when the landlord is required to carry insurance that is either expressly or implicitly for the benefit of both the landlord and the tenant [*Parsons Manufacturing Corp. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1158-1162, 203 Cal. Rptr. 419* ; *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 866, 131 Cal. Rptr. 211* ; *Gordon v. J. C. Penney Co. (1970) 7 Cal. App. 3d 280, 283-285, 86 Cal. Rptr. 604]* .

PRACTICE TIP:

Include Express Waiver in Lease. Although the cited implied waiver cases involved leases under which the landlord was required to obtain the insurance, the same principles should apply when the tenant is required to obtain the insurance. Notwithstanding the possibility of a court ultimately finding an implied waiver of subrogation in a lease, good practice requires including an express waiver in the lease when that is the agreement of the parties. *By Publisher's Editorial Staff.*

[h] Proceeds of Insurance

PRACTICE TIP:

Landlord Should Consider Payment of Insurance Proceeds to Third Party Trustee. If each party to a lease agrees to insure only his or her own property and interest, and a loss occurs, that party should recover the insurance proceeds payable for the loss. When the situation is that simple, the lease may not even include provisions on the subject. However, other situations may call for different schemes of distribution, and the lease must set forth the agreement of the parties for these. For example, under a net lease [*see § 34C.17*], a tenant is generally required to carry at his or her expense all insurance on the leased premises, and also to rebuild or restore the leased premises in the event they are partially or totally destroyed. Under this type of arrangement, most landlords are reluctant to have a large lump sum of insurance proceeds payable to the tenant for the loss, even though the tenant needs those funds to rebuild. One common solution employed in business leases is to include a provision that designates a third party as an "insurance trustee" to receive the insurance proceeds when they exceed a given amount. The insurance trustee will then supervise repair or restoration of the property, disbursing the proceeds as they are needed. *By Publisher's Editorial Staff.*

For the special situations in which the parties agree that proceeds for an insured loss are to be paid to someone other than the named insured, the agreement for payment of the proceeds is usually not included in the general insurance provisions of the lease, such as those included in this form, but rather in the portion of the lease relating to the circumstances under which the proceeds would be paid, for example, on destruction of the premises [*see § 34C.244*]. This form follows that format by cross-referring to appropriate sections of the lease.

[i] Allocation of Risk

When the parties to a lease decide who is to be responsible for obtaining insurance coverage for a particular risk, and the party obligated to take out the insurance agrees to look to this insurance to satisfy all losses, even if caused by the negligence of the other party, the parties are not primarily contracting for a release from negligence but rather for an allocation of responsibility to obtain insurance for both parties [*Fred A. Chapin Lumber Co. v. Lumber Bargains, Inc. (1961) 189 Cal. App. 2d 613, 616, 11 Cal. Rptr. 634]* . Such an arrangement does not violate any public policy [*see* discussion of *Civ. Code § 1668* in [j], *below*] even if the negligence responsible for the loss involves a violation of law [*Tuchman v. Aetna Casualty & Surety Co. (1996) 44 Cal. App. 4th 1607, 1616, 52 Cal. Rptr. 2d 274* ; *Fred A. Chapin Lumber Co. v. Lumber Bargains, Inc. (1961) 189 Cal. App. 2d 613, 616, 11 Cal. Rptr. 634]* .

[j] Exculpation and Indemnity

All contracts that have as a direct or indirect object the exemption of anyone from responsibility for his or her own fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent, are against

public policy [*Civ. Code § 1668*]. General exculpatory clauses exonerating a landlord from damage to the tenant or tenant's property for any cause whatsoever have been held valid in commercial lease situations except when the landlord was guilty of willful misconduct or active negligence [*see Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1066-1067, 20 Cal. Rptr. 3d 562* ; *Mills v. Ruppert (1959) 167 Cal. App. 2d 58, 62, 333 P.2d 818* ; *Barkett v. Brucato (1953) 122 Cal. App. 2d 264, 278, 264 P.2d 978* ; *Butt v. Bertola (1952) 110 Cal. App. 2d 128, 138-140, 242 P.2d 32]* .

In this form, the tenant agrees to absolve the landlord for all injury or damage on the leased premises, except that resulting from any act or omission of the landlord or the landlord's authorized agent. The tenant further agrees to indemnify and hold harmless the landlord for any liability not caused by the landlord's acts or omissions [*see Inglis v. Garland (1936) 19 Cal. App. 2d Supp. 767, 770 , 64 P.2d 501]* .

PRACTICE TIP:

Strong Tenant May Be Able to Negotiate Reciprocal Indemnification Provisions. If the tenant has a strong bargaining position, it may be able to negotiate for mutual indemnity clauses, when, for example, the tenant agrees to indemnify and hold harmless the landlord for any liability not caused by the landlord's acts or omissions, and the landlord reciprocally agrees to indemnify and hold harmless the tenant for liability caused by the landlord's acts or omissions. This form can be modified to include the landlord's obligations. *By Publisher's Editorial Staff.*

[2] FORM

Insurance

ARTICLE _____
INSURANCE

Landlord's Obligations

Section _____. Landlord shall, within _____[*number*] days from the date of this lease, secure from a good and responsible company or companies authorized to do insurance business in California, and maintain during the entire term of this lease, the following insurance coverage: _____[*describe coverage, e.g.:*]

Fire Insurance

(a) Fire and extended coverage insurance in an amount not less than _____[*specify, e.g.*, 90 percent of the full replacement value of the building and other improvements on the leased premises], provided that insurance in that percentage can be obtained, and, if not, then the highest percentage that can be obtained less than the above-stated percentage.

Additional Insurance

(a) _____[*specify any additional insurance landlord is required to maintain, e.g., earthquake or flood insurance*]. Tenant's Obligations

Section _____. Tenant shall, within _____[*number*] days from the date of this lease, secure from a good and responsible company or companies authorized to do insurance business in California, and maintain during the entire term of this lease, the following insurance coverage:

[*Describe required insurance, e.g.:*]

Liability Insurance

(a) _____ [Public liability insurance in the minimum amount of $ _____ for loss from an accident resulting in bodily injury to or death of one person, and $ _____ for loss from an accident resulting in damage to or destruction of property, *or* Public liability, property damage (and products liability) insurance with a single combined liability limit in the minimum amount of $ _____, and property damage limits of not less than $ _____,] insuring against all Tenant liability arising out of Tenant's use or occupancy of the premises. At least every _____ *number, e.g.three]* years, but not more frequently, Tenant shall increase the amount of public liability (and property damage or, property damage, and products liability) insurance coverage, if at that time the existing coverage is not adequate in the reasonable opinion of Landlord's insurance broker or lender.

Fire Insurance for Tenant's Personal Property

(b) Fire and extended coverage insurance on Tenant's fixtures, goods, wares, and merchandise, in or on the leased premises, with coverage in an amount of not less than $ _____.

Plate Glass Insurance

(c) Plate glass insurance on all of the windows on the leased premises adequate to cover any repair and replacement requirements.

[*CONTINUE*]

Additional Insureds

Section _____. Landlord and Tenant agree that the other shall be named as an additional insured on the aforementioned policies of insurance and that the liability insurance policies described in this article shall contain cross-liability endorsements.

Subrogation Waiver

Section _____. Landlord and Tenant agree that in the event of loss due to any of the perils for which they have agreed to provide insurance, each party shall look solely to its insurance for recovery. Landlord and Tenant hereby grant to each other, on behalf of any insurer providing insurance to either of them with respect to the leased premises, a waiver of any right of subrogation that any such insurer of one party may acquire against the other by virtue of payment of any loss under that insurance.

Proof of Coverage

Section _____. On securing the above coverages, the parties shall each give the other written notice of the coverage, together with a certified copy of the appropriate policies [*or* The original policies may be retained by the insured, but the other party shall have the right to inspect any and all such policies, and the insured, on demand, agrees to furnish the other party proof of payment of the premium or premiums on any such policies].

Protection Against Cancellation

Section _____. Each party must give proof to the other, in accordance with the preceding Section of this lease, that each of the policies provided for in this section expressly provides that the policy shall not be canceled or altered without _____[*specify, e.g.,* 30] days' prior written notice to the other party.

Failure to Secure

Section _____. If either party at any time during the term of this lease fails to secure or maintain the foregoing insurance, the other party shall be permitted to obtain that insurance in the defaulting party's name or as the agent of the defaulting party, and shall be compensated by the defaulting party for the cost of the insurance premiums. The defaulting party shall reimburse the paying party the full amount paid not later than _____[*number*] days from the date written notice is received that the premiums have been paid. A failure by the defaulting party to make reimbursement within the time required under this section shall be considered a default under this lease.

Proceeds

Section _____. Proceeds from any policy or policies shall be payable to [*describe, e.g.,* the party responsible for the payment of insurance premiums *or* both Landlord and Tenant as their respective interests may appear *or* to the Insurance Trustee under Section _____ of this lease pertaining to destruction of the premises].

Waiver of Claims and Indemnification

Section _____. Landlord shall not be liable to Tenant, and Tenant hereby waives all claims against Landlord, for any injury or damage to any person or property on or about the leased premises by or from any cause whatsoever, excepting injury or damage to Tenant resulting from the acts or omissions of Landlord or Landlord's authorized agents. Tenant agrees to hold Landlord harmless from and defend Landlord against any and all claims or liability for any injury or damage to any person or property occurring in, on, or about the leased premises or any part of the leased premises, excepting any damage or injury caused in part or in whole by the act or omission of any duty by Landlord or Landlord's agents or employees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExculpatory ClausesInsurance LawBusiness InsuranceBusiness Interruption InsuranceGeneral OverviewInsurance LawBusiness InsuranceBusiness Interruption InsurancePremises & OperationInsurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawProperty InsuranceCoverageReal PropertyFire InsuranceInsurance LawProperty InsuranceFlood InsuranceInsurance LawProperty InsuranceInsurable InterestsInsurance LawProperty InsuranceRental InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
2. Monetary Obligations Other Than Rent

17-34C California Legal Forms--Transaction Guide §§ 34C.223-34C.229

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.223[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
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B. Alternative and Additional Lease Provisions
3. Use of Premises

17-34C California Legal Forms--Transaction Guide § 34C.230

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.230 Use Provisions

[1] Comment

[a] Use of Form

This form is a set of alternative provisions regarding permitted uses, and restrictions on use, by a tenant under a nonresidential lease. In addition to various retail uses, this form includes a provision restricting the placement of signs, a provision prohibiting auction or fire sales, and a provision prohibiting uses which would negatively impact insurance coverage for the premises. For a separate provision prohibiting the tenant from committing waste, maintaining a nuisance, or using the leased premises for any unlawful purpose, see *§ 34C.231*.

[b] Limitations on Use

[i] Types of Restrictions

A lease may restrict the tenant's use of the leased premises [*Civ. Code § 1997.210(a)* (applicable only to nonresidential leases); *Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . A restriction on the tenant's use of leased premises may be expressed in various ways. For example, the lease may do any of the following: [*Civ. Code § 1997.020(c)*]:

- Limit the use of the leased premises to a specified purpose;
- Mandate the use of the premises for a specified purpose;
- Prohibit the use of the premises for a specified purpose; or
- Limit or prohibit a change in the use of the premises.

If a lease does not restrict the tenant's use of the leased premises, the tenant can generally use the leased premises for any lawful purpose not materially different from the ordinary use of the premises or for which the premises are adapted or were constructed [*Davidson v. Goldstein (1943) 58 Cal. App. 2d Supp. 909, 910, 136 P. 665*].

If the premises are leased for a particular purpose, the tenant cannot generally use the premises for any other purpose. If the tenant does so, the landlord may recover damages or rescind the lease [*Civ. Code § 1930*; *Keating v. Preston (1940) 42 Cal. App. 2d 110, 115, 108 P.2d 479]* . However, incidental activities necessary to complete enjoyment of the premises for the purposes for which they were leased are permitted [*DeLong v. Black's Package Co. (1927) 86 Cal. App. 80, 83, 260 P. 392]* .

PRACTICE TIP:

Multitenant Buildings. The landlord is usually looking to protect itself from a tenant who will destroy the character of a muti-tenant building or who will "unreasonably" increase the burden on a multitenant building. Thus, government entities which might produce heavy traffic flows (for example, Passport Offices, Welfare oriented offices, and the like) are not likely to be good candidates for most Class AAA buildings. *By Benjamin Kaplan.*

PRACTICE TIP: Use Restrictions Beyond Control of the Parties. Some types of limitations on use may be necessitated by factors beyond the landlord or tenant's control, such as the type of property and applicable zoning or other ordinances, illegality of a contemplated use, or recorded restrictions against the property. Aside from these types of factors, the particular use of leased premises and any restrictions on that use are a matter of negotiation between the landlord and the tenant [*see* [ii], *below*]. *By Publisher's Editorial Staff.*

PRACTICE TIP: Bargaining Positions of Landlord and Tenant on Use Restrictions. The tenant under a lease for a freestanding building, particularly a net lease [*see § 34C.17*] or ground lease [*see* Ch. 34D, *Ground Leases*], is generally more likely than a tenant of a multitenant building to obtain the landlord's agreement to a lease provision permitting flexible use. Under a percentage lease [*see § 34C.200[2]*] in which the amount of rent paid to the landlord depends on the revenue generated from the tenant's business, a landlord is particularly interested in the type of business to be operated by the tenant and its likelihood for profitability. In that case, the landlord may prohibit the tenant from operating any type of business on the premises other than that stated in the lease, or at least require the landlord's prior consent to a different type of business. *By Publisher's Editorial Staff.*

PRACTICE TIP: Advantage of Flexible Use Provision to Tenant. From the tenant's standpoint, flexibility in use is always desirable. Flexibility enhances the tenant's ability to sublet the premises (assuming the lease permits subletting), and allows the tenant to change to a different business if its current business is financially unsuccessful. *By Publisher's Editorial Staff.*

[ii] Statutory Rules for Nonresidential Leases

Use restrictions contained in nonresidential leases are subject to special rules set forth in *Civ. Code §§ 1997.010-1997.270*. These rules generally make restrictions on use enforceable [*Civ. Code § 1997.210(a)*]. However, they also provide that, if a nonresidential lease does not include a restriction on use, the tenant's rights under the lease include any reasonable use of the leased property [*Civ. Code § 1997.210(b)*]; and, if there is an ambiguity in a use restriction, the ambiguity must be construed in favor of unrestricted use [*Civ. Code § 1997.220*].

Under *Civ. Code §§ 1997.010-1997.270*, a restriction on the use of leased property may absolutely prohibit a change in use [*Civ. Code § 1997.230*] or provide that a change in use is subject to an express standard or condition [*Civ. Code §*

1997.240]. A use restriction in a nonresidential lease may also require the landlord's consent for a change in use subject to an express standard for giving or withholding consent [*Civ. Code § 1997.250*]. The standard or condition may, for example, be that the landlord's consent may not be unreasonably withheld, or that the landlord's consent may be withheld subject to express standards or conditions [*Civ. Code § 1997.250*]. If the lease requires the landlord's consent for a change in use but provides no standard for giving or withholding consent, the restriction must be construed to include an implied standard that the landlord's consent cannot be unreasonably withheld [*Civ. Code § 1997.260*]. Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed within a reasonable time to state in writing a reasonable objection to the change in use [*Civ. Code § 1997.260*].

The rules set forth in *Civ. Code §§ 1997.010-1997.270* generally apply to all nonresidential leases, whether executed on, before, or after the effective date, January 1, 1992 [*Civ. Code §§ 1997.010, 1997.050*]. However, the rules relating to use restrictions that require the landlord's consent to a change in the use of the leased premises [*see Civ. Code § 1997.260* discussed above] apply only to a restriction on use in a nonresidential lease executed on or after January 1, 1992. If a use restriction in a lease executed before that date requires the landlord's consent for a change in the use of leased premises but provides no standard for giving or withholding consent, the landlord has sole and absolute discretion to give or withhold consent [*Civ. Code § 1997.270(a)*]. If the terms of a use restriction are fixed by an option or other agreement, the restriction on change in use is deemed to be executed on the date of execution of the option or other agreement [*Civ. Code § 1997.270(b)*].

[c] Continuous Operation Provision

As a general rule, the fact that a lease is made for a particular purpose does not imply a covenant on the part of the tenant to continue to use the premises for the particular purpose, and the tenant may cease to use the premises for any purpose [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* . For a lease provision requiring the tenant to operate a specific business on the premises, see *§ 34C.200[2],* Section 3.01.

[2] FORM

Use Provisions

ARTICLE _____
USE AND LIMITATIONS

Use of Premises

Section _____. The leased premises shall be used _____[exclusively] for the purpose of _____[*describe permitted use, or choose, for example, one of the following alternatives:*]

[*For use as a drugstore:*]

operating and conducting a retail drugstore for the sale of merchandise to the public, including the sale of drugs, prescriptions, surgical apparatus, physicians' and hospital supplies, druggists' sundries, chemicals, extracts, tinctures, pomades, ointments, liniments, toilet articles, perfumeries, tobacco and tobacco products, confectionery, ice cream and ice cream products, books, magazines, newspapers, and all other merchandise generally sold in retail drugstores in the city [*or* county] of _____, California.

[*OR, for use as a drive-in restaurant:*]

conducting and carrying on a drive-in restaurant and for the sale and consumption of food, drinks, and all other articles of merchandise usually sold in such an establishment and customarily sold in such establishments in the city [*or* county] of _____, California.

[*OR, for use as a flooring supply business:*]

conducting and carrying on a flooring and acoustical supply business.

[*OR, for use as a food warehouse:*]

conducting and carrying on a warehouse and storage operation, dealing primarily in the storage and warehousing and distribution of groceries, foodstuffs, delicatessen items, meats, liquor, fresh vegetables, and other items that are not considered foodstuffs but are ordinarily incident to and sold in supermarkets in the city [*or* county] of _____, California.

[*OR, for use as a grocery store:*]

conducting and carrying on a retail grocery store for the purpose of selling to the public groceries, vegetables, fruits, meats, dairy products, ice cream and ice cream products, candies, alcoholic beverages, tobacco and tobacco products, housewares, hardware, small household appliances, health and beauty supplies, paper products, and any and all other merchandise customarily sold in supermarkets in the city [*or* county] of _____, California.

[*CONTINUE*]

Limitations on Use

Section _____. Notwithstanding the provisions of Section [*number of section that describes permitted use or uses*] of this lease, Tenant shall not [without first obtaining the written consent of Landlord] do any of the following: [*describe any restrictions on tenant's use, or choose, for example, any one or more of the following:*]

[*To prohibit the sale of alcoholic beverages:*]

Display, stock, offer to sell, or sell, or permit the display, stocking, offering for sale, or sale of any alcoholic beverages, including beer and wine, in, on, or from the leased premises.

[*OR, for a percentage lease, to prohibit any nonselling use:*]

Use the leased premises or permit them to be used for office, warehouse, showroom, or any other nonselling purpose other than as reasonably necessary for the conduct of the [*specify, e.g.*, retail sales] business permitted by this lease.

[*OR, to prohibit the overloading of floors in the building:*]

Overload, or permit the overloading of, any floor in the leased building.

[*OR, to restrict placement of signs:*]

Place or maintain, or permit the placing or maintaining of, any sign or advertising device of any kind, nature, or description in, on, or about the leased premises [*or* on the exterior walls or roof of the leased building *or describe other prohibited locations*], except that Tenant may place [, subject to the prior approval of Landlord,] the following signs: _____[*describe any permitted signs and permitted locations*]. Tenant shall at all times comply with any law, ordinance, or regulation of any governmental authority restricting signs or advertising on the leased premises.

[*OR, to prohibit an auction and certain other sales on the leased premises:*]

Conduct or permit any auction or bankruptcy, fire, or going out of business sale on the leased premises.

[*OR, to prohibit insurance hazards:*]

Do or permit anything to be done in or about the leased premises or bring or keep anything on the leased premises that will in any way increase the existing fire, liability, and other insurance rates on the [leased premises *or* building in which the leased premises are situated], or that will cause a cancellation of any insurance policy covering the [leased premises *or* building in which the leased premises are situated].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.231

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.231 Prohibition Against Waste, Nuisance, and Unlawful Use

[1] Comment

[a] Use of Form

This form is a provision that is customarily included in a lease to prohibit a tenant from committing waste, maintaining a nuisance on the leased premises, or using the leased premises for any unlawful purpose. For other provisions pertaining to and restricting a tenant's use of leased premises, see *§ 34C.230*.

[b] "Waste" Defined

The term "waste" is not defined by statute but has been judicially defined as any unlawful act or omission on the part of a tenant that results in permanent injury to the premises [*see Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708]* . Waste occurs when the market value of property is substantially or permanently diminished or depreciated. The test to determine whether waste has occurred is applied flexibly and includes the quantity or quality of the estate, the nature and species of property, and the relation to it of the person charged to have committed the wrong [*Dieterich International Truck Sales, Inc. v. J. S. & J. Services, Inc. (1992) 3 Cal. App. 4th 1601, 1609, 5 Cal. Rptr. 2d 388]* .

Examples of waste include the severance and removal of oil and gas [*see Haskell v. Wood (1967) 256 Cal. App. 2d 799, 804, 64 Cal. Rptr. 459]* and the removal of timber [*see Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14, 70 Cal. Rptr. 92]* .

[c] "Nuisance" Defined

A "nuisance" is anything that is injurious to health, including, but not limited to, the illegal sale of controlled

substances, or is indecent or offensive to the senses, or is an obstruction to the free use of property, that interferes with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway [*Civ. Code § 3479*; *see Penal Code § 415* (disturbing the peace)].

[d] Illegal Uses

A lease, like any contract, must have a legal object [*see Civ. Code § 1550(3)*] and may be void for illegality [*Salazar v. Maradeaga (1992) 10 Cal. App. 4th Supp. 1, 4*]. The illegality may result from purposes unlawful in themselves, such as prostitution or gambling, or from lawful purposes carried on in an unlawful manner, such as leasing a hotel to be used for apartment purposes in violation of local and state laws [*Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 748-749, 6 Cal. Rptr. 433]* . If a lease limits use of the premises to a use prohibited by statute or local ordinance, the courts will not enforce it [*Becerra v. Hochberg (1961) 193 Cal. App. 2d 431, 433, 14 Cal. Rptr. 101]* .

A landlord who leases property with the knowledge that it is being used for an illegal purpose may be guilty of a criminal offense. For example, any person who knowingly permits gambling in premises owned or leased by him or her is guilty of a misdemeanor [*Penal Code § 331*]. The fact that a lease contemplates action by governmental authorities before the property may be used for the purpose specified in it does not render the lease illegal [*Stockburger v. Dolan (1939) 14 Cal. 2d 313, 316-317, 94 P.2d 33]* . For example, leases of property for purposes not allowed by existing zoning regulations have been upheld when the leases were entered into on the agreement that application should be made for a variance as provided by the zoning ordinance [*see Baldwin v. Kubetz (1957) 148 Cal. App. 2d 937, 943, 307 P.2d 1005* (oil and gas lease)].

[e] Landlord's Remedies

A landlord may recover treble damages from a tenant for life or years who commits certain types of waste on the leased premises [*Code Civ. Proc. § 732*]. Commission of waste or maintenance of a nuisance also establishes a basis for an unlawful detainer action [*Code Civ. Proc. § 1161(4)*]. A person who commits an offense relating to controlled substances, unlawful weapons or ammunition, or uses the premises to further the purposes of that offense is deemed to have committed a nuisance on the premises [*Code Civ. Proc. § 1161(4)*; *see Civ. Code § 3485* (nuisance caused by illegal conduct involving an unlawful weapons or ammunition purpose on real property, repealed on January 1, 2014; *Civ. Code § 3486* (until January 1, 2014, city prosecutor or city attorney in cities of Los Angeles, Long Beach, Palmdale, San Diego, Oakland and Sacramento may file action for unlawful detainer against any person in violation of nuisance or illegal purpose provisions of *Code Civ. Proc. § 1161(4)* with regard to a controlled substance; after that date, the authorization will apply only to the City of Los Angeles and only if the city has previously filed specified reports)]. In addition, if a person commits an act of domestic violence, sexual assault or stalking [*see Civ. Code § 1708.7*; *Fam. Code § 6211*; *Pen. Code §§ 261, 261.5, 262, 286, 288a, 289* (definitions)] against another tenant or subtenant on the premises, there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises. [*Code Civ. Proc. § 1161(4)* (in effect until January 1, 2012)]. However, acts that legally constitute waste only support an unlawful detainer action if the acts result in a breach of a condition or covenant of the lease. Whether these acts constitute a breach of the lease is a question of fact [*Freeze v. Brinson (1991) 3 Cal. App. 4th Supp. 1, 3 , 5 Cal. Rptr. 2d 227]* . Using leased premises for an unlawful purpose constitutes grounds for termination of the lease and for an unlawful detainer action by the landlord [*Code Civ. Proc. § 1161(4)*].

A landlord can also recover damages against a third party for injury to the property, notwithstanding the fact that the landlord does not have a possessory interest in the property at the time the action is filed [*see Civ. Code § 826*; *Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 775-777, 184 Cal. Rptr. 308]* .

[2] FORM

Prohibition Against Waste

Waste, Nuisance, and Unlawful Use Prohibited

Section _____. Tenant shall not commit, or permit to be committed, any waste on the leased premises. Furthermore, Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance on the leased premises, or use the leased premises for any unlawful purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsWasteGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
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3. Use of Premises

17-34C California Legal Forms--Transaction Guide § 34C.232

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.232 Noncompetition and Other Covenants Affecting Contiguous Property

[1] Comment

[a] Use of Form

This form sets forth a set of alternative provisions regarding a landlord's use of real property that is owned by him or her and is either contiguous to the leased premises or is property of which the leased premises are a part, as in the case of a shopping center or office building. The first alternative provision prohibits the landlord from leasing any portion of the property subject to the restriction to a third party who will conduct a business similar to the tenant's business [*see* [c], *below*; *see also* subsections (a)-(d) of form].

PRACTICE TIP:

Exclusive Use Provision. A tenant with substantial leverage may be able to negotiate for the right to operate a certain type of business exclusively within a certain development, building, or center. This type of provision has traditionally been used in percentage rental leases when it was believed that conduct of a competing business would cause a reduction of the gross receipts on the leased premises (and a corresponding reduction in the amount of percentage rent paid to the landlord). *By Publisher's Editorial Staff.*

The second alternative provision in this form expressly states that the landlord's use of premises adjacent to the leased premises is not to be restricted. It is appropriate for use when the parties wish to express their intent to negate any contrary implication that might otherwise be construed from the lease [*see Keating v. Preston (1940) 42 Cal. App. 2d 110, 122, 108 P.2d 479* (language of lease construed as indicating intention of parties to grant tenant an exclusive right to operate a restaurant business in a hotel)].

The third alternative provision imposes affirmative obligations on the landlord to perform specified acts on premises

adjacent to the leased premises. It may be appropriate when the landlord's failure to perform the specified acts would interfere with or detract from the tenant's intended use of the leased premises.

Also included in the form are fourth and fifth alternatives restricting the tenant and landlord from operating a similar business within a certain radius of the premises.

[b] Landlord's Covenants Binding on Successive Owners

Covenants by a landlord in a lease to do any act, or not to use or permit to be used any real property owned by the landlord that is contiguous to premises leased to a tenant, run with the land and are binding on successive owners of the land, provided statutory requirements are satisfied [*see Civ. Code §§ 1469, 1470*]. For either type of covenant, the lease must do all of the following [*Civ. Code §§ 1469, 1470*; *see* subsections (a) and (d) of form]:

- Describe the contiguous real property;
- Expressly state that successive owners and persons having an interest in the lease are bound by the covenant; and
- Be recorded in the county in which all or part of the contiguous real property is located.

These provisions may be included in a short form or Memorandum of Lease to satisfy the recording requirement [*see § 34C.203* for discussion and a sample Memorandum of Lease].

In addition, for covenants requiring the landlord to do any act or acts on contiguous property owned by the landlord, each act must relate to the use, repair, maintenance, or improvement of, or payment of taxes and assessments on, that contiguous real property or some part of it [*Civ. Code § 1469(c)*; *see* subsection (b) of form].

A covenant that runs with the land not only binds the covenantor and vests in the covenantee, but also binds the assignees of the covenantor and vests in the assignees of the covenantee in the same manner as if they had personally entered into the covenant [*Civ. Code § 1460*].

Even if a restrictive covenant in a lease is unenforceable because it does not comply with these statutory requirements, it may still be enforceable as an equitable servitude when the restriction is in writing in the lease and the person against whom it runs has actual notice of the covenant [*Civ. Code § 1217*; *Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493-496, 168 Cal. Rptr. 801]* .

[c] Noncompetition Covenants

[i] Express or Implied Covenant

If the tenant wants a restrictive covenant for property retained by the landlord, the lease must clearly express this intention [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680-681, 227 P.2d 1]* , although that covenant may be implied when language indicating the restrictive intent is used [*Keating v. Preston (1940) 42 Cal. App. 2d 110, 122, 108 P.2d 479]* . However, an implied covenant cannot rest solely on an inference from facts surrounding the lease's execution, but must have a basis in the contract itself [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680-681, 227 P.2d 1]* .

[ii] Enforceability

Contractual restraints on trade competition are generally invalid under the provisions of *Bus. & Prof. Code § 16600*. That section, however, does not invalidate express restrictive covenants regarding the use of retained premises

frequently incorporated in leases [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680, 227 P.2d 1* ; *see Keating v. Preston (1940) 42 Cal. App. 2d 110, 123, 108 P.2d 479]* . Express covenants by the landlord to refrain from engaging in a competing business or leasing other portions of the same premises or adjoining premises owned by him or her for a competing purpose are generally enforceable [*see Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24* ; *Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 419-420, 132 P.2d 457]* . Furthermore, a percentage rental lease may contain an implied covenant by both landlord and tenant not to compete in the same vicinity, if that competition is effected for the sole purpose of reducing the amount of gross sales below a specified sum that would justify cancellation of the lease by that party [*see Carter v. Adler (1955) 138 Cal. App. 2d 63, 72-73, 291 P.2d 111]* .

For discussion of the legal issues applicable to protective and restrictive covenants, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 153, *Drafting Commercial Leases* , and Ch. 474, *Shopping Centers* (Matthew Bender).

[iii] Limitation to Noncompetition Covenant

A breach of a covenant not to permit a similar sales business to be conducted occurs if even one of several classes or articles sold in that business is permitted to be sold by the competitor [*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 673, 155 P.2d 24]* . For this reason, a landlord who agrees with one tenant to a covenant prohibiting the landlord from leasing to another tenant with the same or similar business must consider whether the covenant is too broad and could possibly extend to businesses that merely carry overlapping products. For example, a landlord who covenants not to lease to any other operator of a retail liquor store should be careful to exclude from the covenant other business establishments such as grocery stores and major drug stores that generally carry liquor in addition to their other merchandise [*see* subsection (b) of form].

[iv] Tenant's Duty to Pay Rent in Event of Landlord's Breach

The landlord's breach of a restrictive noncompetition covenant does not entitle the tenant to escape his or her obligation to pay rent accrued to the date of the breach [*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24]* . However, when the exclusive right to conduct the tenant's business on the premises is the essence of the consideration for a tenant's payment of rent, breach of the restrictive covenant is so substantive that it goes to the whole of the consideration and supports a rescission of the contract, terminating the obligation to pay rent [*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24* ; *see Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 433-434, 132 P.2d 457]* . On the other hand, default by the tenant in the payment of rent does not waive the landlord's performance of the restrictive covenant unless the lease provides expressly or by necessary implication that performance depends on the payment of rent [*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24]* .

[2] FORM

Landlord's Use of Adjoining Property

ARTICLE _____
LANDLORD'S [***and/or*** TENANT'S] USE OF ADJOINING PROPERTY

[*First alternative: Restrictions on landlord's use of retained property.*]

Description of Adjoining Property

Section _____. (a) The following real property, which is referred to in this lease as "the adjoining

property," is contiguous (except for an intervening _____[public street *or* alley *or* sidewalk]) to the leased premises and is owned by Landlord: _____[*describe property*].

[*OR*]

Description of Adjoining Property

Section _____. (a) The leased premises are a part of other real property [*or* a building or shopping center] owned by Landlord and described as follows: _____[*describe property*], which is referred to in this lease as "the Adjoining Property."

[*CONTINUE*]

Covenants by Landlord

(b) Landlord covenants and agrees that during the entire term of this lease [and any extensions of the term], Landlord shall not rent or lease, or permit occupation by Landlord or others of, any portion of the Adjoining Property for the purpose of operating or conducting the primary business of _____[*describe prohibited use, e.g.,* a retail grocery store *or* a temporary office help business]. [This covenant shall not restrict _____ (*specify type of tenants, e.g.,* grocery store *or* drug store *or other*) tenants in the Adjoining Property from engaging in the incidental _____ (*specify type of sales or service, e.g.,* sales of alcoholic beverages *or* service of arranging for occasional placement of office help)].

(c) Landlord further agrees that all leases with all other tenants in the Adjoining Property shall include this restrictive covenant.

Covenants Binding on Landlord's Assigns

(d) The covenants set out above shall be binding on Landlord and on each successive owner, if any, during his or her ownership of the Adjacent Property, or any portion of the Adjoining Property, and on each person having or acquiring any interest in the Adjoining Property derived through any owner of the Adjoining Property, for the benefit of the leased premises.

[*Second alternative: No restrictions imposed on landlord's adjoining property.*]

No Limitation on Use of Retained Premises

Section _____. It is expressly understood and agreed by the parties to this lease that nothing contained in this lease is to be construed as in any way prohibiting or limiting Landlord's right to use, rent, or lease any portion, or all, of the property [*or* building] of which the leased premises are a part, or any other property owned by Landlord, for any lawful purpose, whether or not that use is in competition, direct or otherwise, with Tenant.

[*Third alternative: Requiring landlord to perform affirmative acts on adjoining property.*]

Landlord's Covenant to Perform Act on Contiguous Property

Section _____. The following described real property is contiguous [except for an intervening _____ (public street *or* alley *or* sidewalk)] to the leased premises and is owned by Landlord: [*describe property*] (the "Adjoining Property"). Landlord hereby covenants and agrees to [*describe affirmative acts landlord is to perform on adjoining property, e.g.,* clear all weeds, brush, and other unsightly vegetation and debris from the west 50 feet of the Adjoining Property bordering on U.S. Highway _____ so that motorists approaching from the south will have an unobstructed view of the leased premises (*or* building containing the leased premises) for a distance of 1,000 yards, and to keep that strip cleared of weeds, brush, and other unsightly vegetation and debris at all times during the term of this lease (and any extension of this lease)]. This covenant shall be binding on Landlord and on each successive owner, if any, during his or her ownership of the Adjoining Property or any portion of the Adjoining Property to which this covenant extends for the benefit of the leased premises.

[*Fourth Alternative: Restricting tenant from operating similar business within certain radius of premises.*]

Noncompetition by Tenant

Section _____. Neither Tenant nor any entity that controls or is controlled by Tenant shall own, operate, control, or in any manner become financially involved in any business similar to that specified in Section [*specify section setting forth use of premises by tenant*] of this lease located within [*number, e.g.,* five] miles in any direction of the Premises.

[*Fifth Alternative: Restricting landlord from operating similar business within certain radius of premises.*]

Noncompetition by Landlord

Section _____. Neither Landlord nor any entity that controls or is controlled by Landlord shall own, operate, control, or in any manner become financially involved in any business similar to that specified in Section [*specify section setting forth use of premises by tenant*] of this lease located within [*number, e.g.,* five] miles in any direction of the Premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



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17-34C California Legal Forms--Transaction Guide § 34C.233

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.233 Parking Easements

[1] Comment

[a] Use of Form

This form sets forth provisions granting the tenant a nonexclusive easement for parking on property owned by the landlord and located next to the building containing the tenant's leased space. The parking area described in the easement is to be used in common with other tenants of the same building and/or other buildings owned by the landlord. In this regard, the provisions in this form are similar to the parking and "common area" provisions usually found in shopping center leases [*see* Ch. 34E, *Shopping Centers: Leasing and Operation*].

The provisions of this form allow the tenant open use of the parking area for itself and its clients, subject only to the restriction that the tenant's employees park in areas designated for employees of the building. There are no restrictions on the specific number of parking spaces the tenant is entitled to use [*see* form in [2], *below*]. This type of arrangement is practical only when there is ample parking, such as in an office business park. In high-density areas where parking space is at a premium, an office tenant is likely to receive only a specific number of parking spaces based on availability [*see § 34C.202[2]*, P 12(b)].

This form also gives the landlord the right to reconfigure or redesignate the precise location of the parking area, provided such a change does not interfere with reasonable access to the tenant's leased premises and provided a minimum number of spaces of a minimum size is maintained [*see* form in [2], *below*]. Such a provision effectively prevents the landlord from building a new building in the parking area without providing adequate alternative parking. Finally, this form grants the tenant a nonexclusive "easement" for parking rather than a mere license to use the adjoining property for parking purposes. The distinction between an easement and a license is discussed in [c], *below*.

[b] Creation of Easements

An easement is an interest in the land of another that entitles the owner of the easement to a limited use or enjoyment of the other's land [*Goble v. Dotson (1962) 203 Cal. App. 2d 272, 277, 21 Cal. Rptr. 769]* . An easement may be created by express grant, by implication, by adverse use, or by necessity [*see* Legal Background to Ch. 28A, *Easements and Licenses*]. The transfer of a tenant's interest in a lease will include any easement rights appurtenant to the lease [*see Civ. Code § 1104*].

[c] Easements Distinguished From Licenses

As a general rule, a license is a personal, revocable, and nonassignable right to do one or more acts on the land of another without possessing an interest in that land [*Belmont County Water Dist. v. State of California (1976) 65 Cal. App. 3d 13, 17, 135 Cal. Rptr. 163]* . Licenses are often distinguished from easements on the ground that licenses are revocable and easements are irrevocable [*see, e.g., Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142* ; *but see Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 36, 31 Cal. Rptr. 2d 378* (license held to be irrevocable)]. For a detailed discussion of easements and licenses, see Ch. 28A, *Easements and Licenses* .

PRACTICE TIP:

Benefits of Easement for Parking Rights. The primary benefit of structuring the tenant's parking rights as an easement rather than a license is that the benefit and burden of an appurtenant easement such as a parking easement will automatically pass with both the landlord's and the tenant's interests in the lease [*see Civ. Code §§ 1104, 1107*]. This avoids the necessity of a separate document to transfer the personal rights of a license to a tenant's assignee or subtenant. *By Publisher's Editorial Staff.*

[d] Scope of Easements

The extent of an easement is determined by the terms of the grant creating it or the nature of the enjoyment by which it was acquired [*Civ. Code § 806*].

In most shopping center and retail store leases, the tenant's easement for use of a designated parking area in common with other tenants is created by an express grant in the lease itself. Thus, the extent or permitted extent of the easement's use is to be determined from the grant in the lease, and in construing an instrument conveying an easement, the rules applicable to deeds generally apply [*Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal. App. 4th 697, 702, 43 Cal. Rptr. 2d 810]* . When the language in the grant is clear and explicit, parol evidence is unnecessary to show the nature and extent of the rights acquired [*Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal. App. 4th 697, 702, 43 Cal. Rptr. 2d 810]* . However, when there is any ambiguity or uncertainty about the scope of an easement grant, the surrounding circumstances, including the physical conditions and character of the servient tenement and the requirements of the grantee, play a significant role in determining the controlling intent [*Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal. App. 4th 697, 705, 43 Cal. Rptr. 2d 810* ; *see Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 528, 131 Cal. Rptr. 394, 551 P.2d 1226]* .

An easement may be described in the grant in a lease by reference to an attached plat map [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272* ; *Douglas v. Lewin (1933) 131 Cal. App. 159, 162, 20 P.2d 959]* . Moreover, when the plat map contains markings indicating individual parking stalls, light stanchions, and areas of ingress and egress, the markings may serve to supply a specific and definitive description of the nature and quantity of the easement as well as its geographical boundaries [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272]* . In contrast, in a case in which the grant of an easement or irrevocable license provided merely for a minimum of 12,000 parking spaces, this did not entitle the holder of the easement or license the right to specify the location of the parking spaces or otherwise control the parking area [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 37-40, 31 Cal. Rptr. 2d 378]* .

When the extent of the easement is not specifically defined or is uncertain, the rules that govern the scope of an implied easement [*see* [e], *below*] should be applied [*Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 867, 274 Cal. Rptr. 678, 799 P.2d 758]* . However, this rule is further tempered by the fact that only interests expressed in the grant of the easement in the lease and those necessarily incident to the grant pass from the owner of the fee to the tenant [*Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 867, 274 Cal. Rptr. 678, 799 P.2d 758* ; *Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 579, 110 P.2d 983]* . Thus, when the burden imposed on the servient land is not specifically defined in the grant or lease, the tenant's use of the easement is limited by the requirement that the use be reasonably necessary and consistent with the purpose for which the easement was granted [*Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 582, 110 P.2d 983]* .

[e] Implied Easements

[i] Extent of Implied Easements

When an easement is not expressly created in a lease, an easement may nevertheless pass to the tenant by implication [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* . The extent of an easement created by implication is to be inferred from the circumstances that exist at the time of the conveyance and give rise to the implication. It includes such uses as the parties might reasonably have expected from the future uses of the dominant tenement. Accordingly, in determining the intent of the parties as to the extent of the grantee's rights, consideration must be given not only to the actual uses being made at the time of the grant, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance [*Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 866-867, 274 Cal. Rptr. 678, 799 P.2d 758]* . Prior use of the property is one of the circumstances to be considered in determining the intent of the parties, but easements may be implied in situations in which there was no prior use of the premises [*Fristoe v. Drapeau (1950) 35 Cal. 2d 5, 8-9, 215 P.2d 729]* .

Therefore, as a general rule, everything that belongs to the leased premises or is used with them and is reasonably necessary to their enjoyment passes as an incident of the lease unless specially reserved [*Bellon v. Silver Gate Theatres, Inc. (1935) 4 Cal. 2d 1, 11, 47 P.2d 462* ; *Owsley v. Hamner (1951) 36 Cal. 2d 710, 717, 227 P.2d 263]* .

[ii] Intent of Parties

The determination of what constitutes the leased premises or "belongs" to the leased premises is made from the intent of the parties, as ascertained from the circumstances existing at the time the lease is executed [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 773, 22 Cal. Rptr. 580]* . An easement may be implied as passing from the landlord to the tenant either because it is reasonably necessary to enjoyment of the leased premises or because of the manifest intention of the parties at the time the lease was made [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* . For example, an easement for parking behind a leased store is not implied in a lease that includes an express provision providing for parking at a different location [*Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 95-96, 19 Cal. Rptr. 891]* .

[iii] Enforcement of Implied Easements

An implied easement arising from a written lease is enforceable not only against the landlord, but also against a party who purchases the premises from the landlord [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 722, 217 P.2d 263]* .

[2] FORM

Parking Easement

Parking Easement

Section _____. Landlord hereby grants to Tenant for the term of this lease as a nonexclusive easement appurtenant to the leased premises, called "the parking easement," the right to use in common with other tenants of adjoining premises owned by Landlord the area marked "Common Area" on the plat map attached to this lease and marked as "Exhibit A." The parking easement, and the use of the parking easement by Tenant, shall be subject to the following terms and conditions:

(a) It shall be used only for vehicular parking and for vehicular and pedestrian ingress and egress to the leased premises by Tenant and Tenant's employees, suppliers, customers, and invitees.

(b) It shall be subject to all reasonable rules and regulations that Landlord may now or hereafter from time to time adopt.

(c) It shall be maintained by Landlord at Landlord's sole cost and expense.

(d) Vehicles owned or operated by Tenant or Tenant's employees shall be parked only in areas established and marked by Landlord for employee parking.

(e) Landlord shall have the right to make changes in the parking easement and the Common Area as shown on the attached plat, provided

(1) Ingress to and egress from the leased premises is not substantially impaired by those changes; and

(2) The Common Area as shown on that plat contains at all times not less than _____ [*number, e.g.,* 350] vehicular parking spaces capable of holding automobiles _____ [*describe dimensions, e.g.,* 12 feet by 15 feet in size].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsCreationEasement by Implication



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17-34C California Legal Forms--Transaction Guide §§ 34C.234-34C.239

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.234[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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4. Improvements, Repairs, and Maintenance

17-34C California Legal Forms--Transaction Guide § 34C.240

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.240 Maintenance, Repairs, and Alterations by Tenant

[1] Comment

[a] Use of Form

This form is a series of provisions requiring the tenant to make all necessary repairs to the leased premises during the lease's term. It also contains provisions for alterations and improvements to the premises by the tenant.

[b] Repairs and Maintenance

PRACTICE TIP:

Allocation of Responsibility. Long-term net retail or industrial leases commonly require a tenant to make all necessary repairs to the leased premises [*see § 34C.17*]. Such a provision is much less common in a lease of office space in a multitenant building [*see § 34C.202[2]*]. Rather than requiring either the landlord or tenant to make all repairs, the parties may agree to share the responsibility in some manner. For example, the landlord may be required to make all structural repairs and the tenant may be required to make all nonstructural repairs [*see § 34C.200[2]*, Sections 5.02, 5.03]. Alternatively, one party may be required to make repairs up to an agreed maximum cost, with the other party required to bear any excess cost. In a multitenant office building or retail shopping center, the lease might make the landlord responsible for all common areas and the tenant responsible for its individual leased space [*see § 34C.202[2]*, PP 9, 11(c); *see also* Ch. 34E, *Shopping Centers: Leasing and Operation* , for "common area" lease provisions]. *By Publisher's Editorial Staff.*

[i] Duties of Landlord

Absent specific laws or governmental orders, a property owner is under no general duty to repair and maintain the

premises or correct defective conditions, and the fact that he or she leases the premises to another does not alter this rule [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671, 75 Cal. Rptr. 889, 451 P.2d 721]* . However, state statutes, state regulations, and local ordinances directed at protecting public health and safety may impose certain duties of maintenance and repair on the landlord [*see, e.g.,* [ii], *below*; *see also Health & Safety Code §§ 18901-18949.6*; CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 214, *Government Regulation and Enforcement* (Matthew Bender)]. For an extended discussion of the respective duties of landlord and tenant under a commercial lease to comply with applicable governmental law and regulations (including those requiring repairs and improvements to leased property), see *§ 34C.241[1]*.

A landlord may also be liable to a tenant for injuries caused by the landlord's failure to use ordinary care or skill in the management of property to avoid exposing persons on it to any unreasonable risk of harm [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 472, 213 Cal. Rptr. 213, 698 P.2d 116]* . A landlord's potential tort liability for leased premises is beyond the scope of this chapter. For coverage of this issue, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 170, *The Premises: Duties and Liabilities* (Matthew Bender). For a sample complaint and additional allegations based on a landlord's negligence, see CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 334, *Landlord and Tenant: Claims for Damages* (Matthew Bender).

[ii] Statutory Duties

The landlord of a building intended for the occupation of human beings must put the premises into a condition fit for human occupancy, and repair all subsequent dilapidations that render the premises untenantable [*Civ. Code § 1941*]. The Legislature's use of the term "building intended for the occupation of human beings," in contrast to the narrower term "dwelling" used in related statutes, apparently indicates that the landlord's duty to maintain premises in a tenantable condition and a condition fit for human occupancy extends to commercial as well as residential property, since a commercial building as well as a residential dwelling is intended for the occupation of human beings. Thus, the applicable statutes [*see Civ. Code §§ 1940-1954.1*] are not to be construed as applying only to a tenancy in a dwelling unit unless the specific terms of a provision are expressly limited [*Civ. Code § 1940(d)*].

The remedy granted to the tenant by statute for a landlord's failure to maintain leased premises in a tenantable condition is to repair the condition and deduct the cost from the rent or to vacate [*see Civ. Code § 1942*].

[iii] Duties of Tenant

In the absence of contrary provisions in a lease, a tenant only has the duty to use ordinary care for the preservation of the premises in safe and good condition [*see Civ. Code § 1928*], and to repair all deteriorations or injuries to the premises caused by the tenant's want of ordinary care [*Lynn v. DePue Warehouse Co. (1962) 198 Cal. App. 2d 742, 747, 17 Cal. Rptr. 841]* . Otherwise, a tenant has no general duty to repair the premises or correct defective conditions [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671-672, 75 Cal. Rptr. 889, 451 P.2d 721]* or to repair portions of the premises over which he or she has no control or authority [*Rathbun Co. v. Simmons (1928) 90 Cal. App. 692, 696, 266 P. 369]* .

A tenant may covenant in a lease to keep the premises in repair [*Western Motors Corp. v. Land Dev. etc. Co. (1957) 152 Cal. App. 2d 509, 510-511, 313 P.2d 927]* or to return the premises in as good a condition as they were when leased [*Dicker v. West (1958) 164 Cal. App. 2d 55, 61, 330 P.2d 106]* . A tenant's covenant to repair generally will be interpreted to avoid placing any unwarranted burden of improvement of the landlord's premises on the tenant. Thus, a lease provision and amendment requiring a tenant of commercial property to maintain and repair the premises, including "make any improvement, correct any condition, or otherwise comply with any written notice" from the city or landlord regarding defects, did not require the tenant to replace the roofs on the premises [*ASP Properties Group, L.P. v. FARD, Inc. (2005) 133 Cal. App. 4th 1257, 1271-1272, 35 Cal. Rptr. 3d 343]* .

A general covenant by a tenant to repair will not be construed to require the tenant to replace and restore completely destroyed premises [*Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 574-578, 194 P. 1024* ; *see § 34C.244* (lease provision requiring tenant to rebuild destroyed premises)]. For an extended discussion of whether such a covenant will be construed to require the tenant to comply with statutes or ordinances governing the premises, see *§ 34C.241*.

When a lease imposes the duty of maintenance and repair on the tenant, the landlord may insist that the tenant indemnify and hold the landlord harmless against third-party claims. Such a lease provision is generally enforceable [*see Inglis v. Garland (1936) 19 Cal. App. 2d 767, 770*]. Indemnification and hold harmless clauses in the context of a lease are discussed in *§ 34C.222[1][j]*.

Additionally, the tenant, as the possessor of land, must act as a reasonable person in the management of the property in view of the probability of injury to others [*Civ. Code § 1714(a)*; *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 433 P.2d 561]* .

[c] Alterations by Tenant

A tenant's right to make alterations to leased premises depends on the lease's specific terms [*see Spring Street Realty Co. v. Trask (1932) 126 Cal. App. 765, 768, 15 P.2d 195]* . Absent an express provision in the lease permitting or requiring alterations, the tenant may not make material alterations to the leased premises without the landlord's consent [*see Metzler v. Thye (1912) 163 Cal. 95, 98-99, 124 P. 721* ; *Briggs v. Sherman (1924) 65 Cal. App. 249, 251-252, 223 P. 581]* . However, a tenant may make minor changes to the leased premises without violating a lease specifically prohibiting alterations by the tenant [*see Briggs v. Sherman (1924) 65 Cal. App. 249, 251-252, 223 P. 581]* .

The form in [2], *below*, contains two alternative provisions for alterations by the tenant. In the first, the tenant is permitted to make alterations that do not cost in excess of a maximum dollar amount; all other alterations require the prior written approval of the landlord. In the second alternative provision, the tenant is not permitted to make any alterations without the prior written approval of the landlord. An exception is permitted for nonstructural alterations if the tenant gives the landlord adequate prior notice to post a notice of nonresponsibility.

A tenant who makes alterations to the premises may become obligated to comply with governmental rules and regulations. For example, if a tenant voluntarily puts the leased premises to uses different from prior uses, he or she may cause the premises to fall within the scope of governmental rules and regulations that were previously inapplicable. The tenant then bears the burden of conforming the new use to the law, and of taking all actions necessary to rectify any subsequent instances of noncompliance [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* . For alternative provisions and an extended discussion of the respective duties of landlord and tenant under a commercial lease to comply with applicable governmental law and regulations (including those requiring repairs and improvements to leased property), see *§ 34C.241*. Compliance with governmental regulations is also discussed in CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 214, *Government Regulation and Enforcement* (Matthew Bender).

In the form in [2], *below*, both alternative provisions for alterations by the tenant require the tenant to comply with all applicable ordinances, rules, and regulations in making any alterations or improvements to the leased premises. A tenant will be liable to a landlord for its failure to comply with building codes in making alterations without setoff for the value of the improvements to the landlord [*Wolfen v. Clinical Data, Inc. (1993) 16 Cal. App. 4th 171, 180-181, 19 Cal. Rptr. 2d 684]* .

It is well settled that unless there is an express covenant in the lease to the contrary, any improvements constructed on the leased premises are the landlord's property at the end of the term of the lease [*Gett v. McManus (1873) 47 Cal. 56,*

57-58 ; *Wolfen v. Clinical Data, Inc. (1993) 16 Cal. App. 4th 171, 179-180, 19 Cal. Rptr. 2d 684]* . In the first alternative in this form, landlord and tenant agree that any alterations or improvements made by the tenant during the tenancy belong to the landlord.

On the other hand, if a tenant covenants to restore the premises to the landlord in the same condition as at the inception of the lease, the tenant is obligated to remove any alterations to the premises and to restore the premises to their original condition on the lease's termination [*see Worthington v. Kaiser Foundation Health Plan, Inc. (1970) 8 Cal. App. 3d 435, 440, 87 Cal. Rptr. 272* ; *Masonic T. Assn. v. Stockholders A. Corp. (1933) 130 Cal. App. 234, 237, 19 P.2d 865]* . In the second alternative in this form, the landlord may require the tenant to agree to remove the improvement and restore any resulting damage as a condition of receiving the landlord's consent to make the alteration or improvement.

[d] Mechanics' Liens

If a work of improvement is undertaken by a tenant, the landlord's interest in the property is subject to a lien unless the landlord posts a Notice of Nonresponsibility [*see Civ. Code §§ 3094, 3129*]. However, when a lease requires the tenant either to make substantial improvements for the landlord's benefit (that is, improvements that substantially enhance the value of the property) or be in breach of the lease, the landlord may be considered a participating owner. In such a case, the Notice of Nonresponsibility will not protect the landlord from liability [*Los Banos Gravel Co. v. Freeman (1976) 58 Cal. App. 3d 785, 797-798, 130 Cal. Rptr. 180* ; *Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 235, 161 Cal. Rptr. 551]* . The interest of the tenant who caused the work of improvement is, of course, subject to the lien [*Civ. Code § 3128*].

The first alternative provision in this form for alterations by the tenant contains a covenant by the tenant to keep the premises free from all mechanics' liens. The second alternative provision requires the tenant to give the landlord prior notice of any permitted alterations so that the landlord may post a Notice of Nonresponsibility, and also contains a covenant by the tenant to keep the leased premises free of all mechanics' liens.

[2] FORM

Maintenance, Repairs, and Alterations by Tenant

ARTICLE _____
REPAIRS, MAINTENANCE, AND ALTERATIONS

Present Condition of Premises

Section _____. Tenant hereby acknowledges that it has inspected the leased premises and all improvements on the leased premises, including any and all buildings on and appurtenances to the leased premises, and that the leased premises, improvements, buildings, and appurtenances are, on the date of this lease, in good order, repair, and condition.

Repairs and Maintenance by Tenant

Section _____. At all times during the term of this lease [and any renewals or extensions of the term of this lease], Tenant shall, at its own cost and expense and at no cost and expense to Landlord, maintain the leased premises and all portions of the leased premises in good order and repair, and make all repairs and replacements that may become necessary to the leased premises, any buildings or improvements on the leased premises, or any sidewalks, landscaping, driveways, or parking areas that are part of or appurtenant to the leased premises. Any and all repairs and replacements required by this section, both ordinary and extraordinary and both structural and nonstructural, shall be

made promptly by Tenant as required and shall be of first-class quality and workmanship and shall comply with all applicable laws, regulations, and ordinances of any governmental authority with jurisdiction.

[*Optional:*]

Tenant further agrees that it will, at its own cost and expense, and during the full term of this lease, make any and all changes, additions, or modifications to any such building or improvements that may be lawfully required by the building ordinances of the [City of _____ (*name of city in which leased premises are located*) or County of _____ (*name of county in which leased premises are located*)] and by any laws of the State of California or the United States of America, or by the requirements and regulations of any other governmental authority. Any such change, addition, modification, or improvement required under this section shall be subject to Section [*insert section number for provision relating to alterations by tenant to leased premises*] of this lease. Under no circumstances shall Landlord be required to make any expenditure for any such change, addition, modification, or improvement.

[*CONTINUE*]

Repairs by Landlord for Tenant's Account

Section _____. If at any time during the term of this lease [or any renewals or extensions of the term of this lease], Tenant fails to maintain the leased premises or make any repairs or replacements as required by Section _____ of this lease, Landlord may, at Landlord's option, enter the leased premises and perform maintenance or make repairs or replacements for the account of Tenant. Any sums expended by Landlord in so doing, together with interest thereon at the highest legal rate from the date expended by Landlord until the date repaid by Tenant, shall be due and payable by Tenant to Landlord with the next due payment of rent under this lease.

Waiver of Duty to Keep Premises Tenantable

Section _____. Tenant hereby expressly waives the provisions of *Civil Code Sections 1941* and *1942* and any other statute or law (1) requiring Landlord to put or maintain the leased premises in a condition fit for human occupancy and to repair all subsequent dilapidations of the premises that render them untenantable and (2) granting Tenant the right to offset against the rent due under this lease expenditures by Tenant for repairs.

[*EITHER*]

Alterations and Improvements

Section _____. Tenant shall have the right to make alterations and improvements to the leased premises, subject to the following terms and conditions:

(a) No alterations or improvements made by Tenant shall in any way impair the structural stability of any building or improvement on the leased premises or diminish the value of the leased premises.

(b) All alterations or improvements requiring an expenditure greater than $ _____[*specify, e.g.,* 10,000] shall be first approved in writing by Landlord.

(c) Tenant shall keep the leased premises and every part of the leased premises free and clear of any mechanics' lien or materialmen's lien arising out of the construction of any such alterations, improvements, or repairs.

(d) All alterations and improvements made to the leased premises shall become the property of Landlord and shall remain on and be surrendered with the leased premises at the expiration or earlier termination of this lease [or any renewal or extension of this lease].

(e) All alterations and improvements shall comply with all applicable laws, ordinances, and regulations of any governmental authority with jurisdiction over the leased premises.

[*OR*]

Alterations and Improvements

Section _____. (a) Tenant shall make no alterations, improvements, or additions to the leased premises, or enter into any contract for the making of any alterations or improvements to the leased premises, without the prior written consent of Landlord. To obtain that consent, Landlord may require Tenant's written agreement to remove any requested alterations, additions, or improvements on expiration or earlier termination of this lease and to repair any damage to the leased premises caused by their removal, at Tenant's sole cost and expense. To the extent Landlord does not require any such removal agreement, all alterations, additions, and improvements made to the leased premises shall, on expiration or earlier termination of this lease, become the property of Landlord and remain on the leased premises; provided, however, that Landlord hereby consents to the making of any nonstructural alterations to the leased premises that Tenant may desire so long as Tenant complies with subsection (b) of this Section in making those alterations and also complies with all applicable laws, ordinances, and regulations of any governmental authority with jurisdiction over the leased premises.

(b) At least 10 days before any work commences or any materials are delivered for any alterations, additions, improvements, or repairs Tenant is making to the leased premises, Tenant shall give notice to Landlord when the work is to commence or the materials are to be delivered. Landlord shall then have the right to post and maintain on the leased premises any notices that are required to protect Landlord and Landlord's interest in the leased premises from any liens for work and labor performed or materials furnished in making the alterations, additions, improvements, or repairs; provided, however, that it shall be the duty of Tenant, and nothing contained in this section shall excuse performance of that duty, to keep the leased premises free and clear of all liens, claims, and demands for work performed, materials furnished, or operations conducted on the leased premises at the instance or request of Tenant.

[*CONINUE*]

Surrender of Premises

Section _____. On expiration of the term of this lease [or any renewal or extension of the term of this lease], or on earlier termination of this lease, Tenant shall surrender the leased premises, all building or improvements on the leased premises, and all things appurtenant to the leased premises, to Landlord in good repair and in a good, safe, and clean condition, reasonable wear and tear excepted.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
4. Improvements, Repairs, and Maintenance

17-34C California Legal Forms--Transaction Guide § 34C.241

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.241 Compliance With Laws Provision

[1] Comment

[a] Use of Form

This form is a provision to place on the tenant the obligation of complying with all laws pertaining to the premises, whether in existence or enacted after the lease's execution, and whether relating to the tenant's particular use and occupancy or not. It is particularly applicable to a true net lease [*see § 34C.17*].

For lease provisions that limit the tenant's responsibility to compliance with only those laws pertaining to the tenant's specific use of the premises, see *§§ 34C.200[2]*, Section 3.05 and *34C.201[2]*, Section 4.02.

[b] Allocation of Responsibility

[i] Landlord's Obligation

As a general rule, since the property owner is initially under the duty to comply with all laws and orders, the owner, as landlord, remains subject to that duty unless it is assumed by the tenant [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* .

PRACTICE TIP:

Distinction Between Laws Triggered by Tenant's Specific Use and Laws Pertaining to Any Commercial Use of Premises. It is not uncommon during the term of a nonresidential lease for new laws or regulations or a new use of the premises to result in a legal duty to make repairs or alterations to the premises. The duty to make these repairs or alterations may or may not be triggered by the particular use of the tenant's property. For example, a new law requiring earthquake retrofitting for all commercial

buildings without regard to the specific use of the buildings is not triggered by the tenant's particular use, whereas a new law regulating the disposal of toxic chemicals used in a dry cleaning establishment is directly related or "triggered" by the tenant's specific use [*see* [iii], *below*]. Likewise, a change in the tenant's use may trigger a legal duty to comply with existing laws. *By Publisher's Editorial Staff.*

[ii] Change of Use by Tenant

A tenant who does not expressly assume the duty to comply with all laws may still be obligated to make certain repairs or alterations. For example, a tenant who voluntarily puts the premises to uses different from those to which they were put before the creation of his or her tenancy, and thereby causes the premises to fall within the scope of existing laws not previously applicable to the premises, must bear the burden of conforming his or her new use to the requirements of the law and of taking all action necessary to rectify any subsequent instances of noncompliance. This rule applies whether the tenant's obligation is viewed as arising from an implied assumption of the landlord's initial duty not to alter the use of the premises under his or her control without complying with all applicable laws or whether it is viewed as reflecting an independent duty to comply with the particular laws made applicable by the tenant's new use of the premises [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672-673, 75 Cal. Rptr. 889, 451 P.2d 721]* .

[iii] Tenant's Use as Triggering Factor

If the tenant agrees in the lease to comply with all governmental compliance orders and if it is the tenant's particular use of the premises that leads to the compliance order, it is reasonable to impose responsibility on the tenant for compliance under a compliance with laws provision, at least under a lease in which the landlord specifically disclaims any responsibility for maintaining or repairing the leased premises [*see Hadian v. Schwartz (1994) 8 Cal. 4th 836, 843-844, 35 Cal. Rptr. 2d 589, 884 P.2d 46* (discussing *Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 75 Cal. Rptr. 889, 451 P.2d 721* in which tenant's use as trailer park subjected premises to regulation of waste disposal system)].

[iv] Tenant's Use Not a Triggering Factor

Situations in which a tenant's use of the leased premises is not the triggering factor for the government's compliance order leads to uncertainty regarding the parties' responsibility for compliance. The general rule is that a tenant's unqualified covenant to comply with applicable laws, standing alone, does not constitute an assumption of the duty to comply with those laws that require curative actions of a *substantial* nature [*Brown v. Green (1994) 8 Cal. 4th 812, 822, 35 Cal. Rptr. 2d 598, 884 P.2d 55* , citing *Glenn R. Sewell Sheet Metal, Inc. v Loverde (1969) 70 Cal. 2d 666, 672-674, 75 Cal. Rptr. 889, 451 P.2d 721]* . If the literal language of the lease appears to place the duty of compliance on the tenant, the court will consider the lease's overall provisions, as well as certain judicially developed factors to determine the probable intent of the parties and a reasonable construction of the lease terms. These factors are as follows [*Brown v. Green (1994) 8 Cal. 4th 812, 830-834, 35 Cal. Rptr. 2d 598, 884 P.2d 55* ; *Hadian v. Schwartz (1994) 8 Cal. 4th 836, 847-849, 35 Cal. Rptr. 2d 589, 884 P.2d 46]* :

- The relationship of the curative action's cost to the rent reserved;
- The lease's term;
- The relationship of the benefit to the tenant to that of the landlord;
- Whether the curative action is structural or nonstructural in nature;
- The degree to which the tenant's enjoyment of the premises will be interfered with while the curative

action is being undertaken; and

- The likelihood that the parties contemplated the application of the particular law or order involved.

[c] Drafting Considerations

Care should be taken to draft lease provisions that clearly set out the parties intentions regarding compliance with laws. If either party to a contemplated commercial lease agreement is aware of the applicability of a specific governmental mandate that is likely to or may require improvements or repairs to leased property, provisions should be included in the lease that assign compliance and financial responsibility for the specific repairs or improvements. For example, if the parties agree that the tenant's obligation for compliance with all laws also will include the cost of any government-required capital expenditures, for example, comprehensive fire safety and sprinkler improvements [*see* Cox, Castle & Nicholson, *Allocating the Burden of Sprinkler Retrofit Costs Between Landlord and Tenant,* 12 Real Prop. L. Rep. 148 (Cal. C.E.B. 1989)], that fact should be stated in the lease.

PRACTICE TIP:

Review Potential for Expensive Governmental Compliance Orders. Before executing a lease, the parties should be diligent in their preliminary inquiries as to not only the likelihood, but the possibility, that certain governmental mandates will be applied to particular leased property. This is especially true for those mandates that have become relatively commonplace and expensive, such as asbestos abatement, earthquake retrofitting, sprinkler requirements, improvements for disabled persons, and removing underground storage tanks. *By Publisher's Editorial Staff.*

PRACTICE TIP: Tenant Considerations. As noted in the Practice Tip, *above*, the costs of seismic retrofitting, asbestos removal, and the like might be extremely high--high enough to eat up all profits to the side that must pay for them, and even make bankruptcy a serious possibility. Thus, before a tenant signs a lease that imposes liability for these potential costs on the tenant, the tenant should take the following steps:

- Obtain a complete history of the construction and all improvements to the property;
- Seek expert advice from seismic-safety, asbestos, or other appropriate persons; and
- Consult an insurance expert about whether the tenant might insure against such liability.

By Myron Moskovitz.

PRACTICE TIP: Potential Exposure for Tenant. Beware of events that trigger compliance statutes. These events can have a very substantial financial impact and are not readily ascertained by a simple reading of the proposed lease provisions. Changes in a single premise or unit in a multitenant building can trigger ADA compliance for the entire building. The landlord may shift such a burden to the tenant under general provisions of the lease. *By Benjamin Kaplan.*

This form may be used if the intent of parties is to assign the tenant all responsibility for any governmental mandates or compliance orders that may possibly affect the leased premises, irrespective of whether the mandate or order is "triggered" by the tenant's particular use of the premises. Additionally, care should be taken to ensure that other lease provisions (for example, provisions for repair and maintenance) are consistent with this intention and agreement of the parties.

[2] FORM

Compliance With Laws

Compliance with Laws

Section _____. Tenant shall at Tenant's own cost and expense comply with all statutes, ordinances, regulations, and requirements of all governmental entities, both federal and state and county or municipal, including but not limited to those requiring capital improvements to the Premises, [such as _____ (*specify any known required improvements or repairs required by governmental mandate, e.g.,* seismic retrofitting)] relating to any use and occupancy of the Premises (and specifically not limited to Tenant's particular use and occupancy) whether those statutes, ordinances, regulations, and requirements are now in force or are subsequently enacted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawZoning & Land UseGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34C California Legal Forms--Transaction Guide § 34C.242

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.242 Fixtures and Trade Fixtures

[1] Comment

[a] Use of Form

This form is a set of provisions concerning ownership and removal of fixtures. These provisions address the issue of which party to a lease owns and has the right to remove fixtures, including trade fixtures, installed by the tenant on the leased premises. For lease provisions governing a tenant's right to make alterations or improvements to the leased premises (including the right to install fixtures), see *§ 34C.240*.

[b] "Fixture" Defined

A fixture is tangible property that is affixed to and is deemed part of the real property to which it is affixed [*see Civ. Code § 658(2)*]. Property is deemed affixed to land in the following situations [*Civ. Code § 660*]:

- It is attached to it by roots, as in the case of trees, vines, or shrubs;
- It is imbedded in it, as in the case of walls;
- It is permanently resting on it, as in the case of buildings; or
- It is permanently attached to what is permanent, as by means of cement, plaster, nails, bolts, or screws.

Excepted from the above statutory definition, for the purposes of sale, are emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale [*Civ.*

Code § 660].

In determining whether or not an article is a fixture, the following three criteria are considered [*San Diego T. & S. Bank v. San Diego (1940) 16 Cal. 2d 142, 149, 105 P.2d 94* ; *Overhead Electric Co. v. State Bd. of Equalization (1991) 227 Cal. App. 3d 1230, 1232, 278 Cal. Rptr. 112]* :

- The manner of its annexation;
- Its adaptability to the use and purpose for which the realty is used; and
- The intent of the party making the annexation.

For an article to be a permanent accession to land, it need not be perpetually annexed. It is sufficient if it appears that the article is intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose [*San Diego T. & S. Bank v. San Diego (1940) 16 Cal. 2d 142, 151, 105 P.2d 94* ; *Seatrain Terminals of California, Inc. v. County of Alameda (1978) 83 Cal. App. 3d 69, 78, 147 Cal. Rptr. 578]* .

Moreover, portions of equipment that are not attached to the realty but that are used with and essential to other portions attached to the realty constitute a unit, and may be considered to be constructively annexed [*Southern Cal. Tel. Co. v. State Board (1938) 12 Cal. 2d 127, 138, 82 P.2d 422* ; *Seatrain Terminals of California, Inc. v. County of Alameda (1978) 83 Cal. App. 3d 69, 76, 147 Cal. Rptr. 578]* .

[c] Effect of Property as Fixture

Because a fixture is deemed part of the real property to which it is affixed [*Civ. Code § 658*], it is transferred with the sale or grant of the real property [*see Civ. Code §§ 1013, 1084*]. Also, whether property is determined to be a fixture may affect (1) whether it is subject to a mechanic's lien [*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 711, 20 P.2d 665]* , (2) whether it is taxable as real property [*Simms v. County of Los Angeles (1950) 35 Cal. 2d 303, 309, 217 P.2d 936]* , and (3) whether its value must be considered in determining the owner's compensation for land condemned for public use [*City of Los Angeles v. Klinker (1933) 219 Cal. 198, 206, 25 P.2d 826]* .

[d] "Improvements" Defined

Lease provisions often refer collectively to fixtures, improvements, and alterations. The word "improvement" is comprehensive enough to embrace all additions or alterations that a tenant may make for the convenience of the tenant's business on the premises. It is much more comprehensive than the word "fixture" and, while including these, also includes many things that may not be classified as fixtures [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 609, 328 P.2d 953* (holding that under lease provision that all improvements made to the premises were to inure to landlord, and any subsequent addition, alteration, or repair to the premises during the tenancy would be included in the term "improvement")]. For separate lease provisions that cover the rights of the tenant to make alterations and improvements, see *§ 34C.240[2]*.

[e] Ownership and Removal of Fixtures

The general rule is that when a person affixes his or her property to the land of another, without an agreement permitting him or her to remove it, the thing affixed belongs to the land's owner unless the owner requires the person to remove the property [*Civ. Code § 1013*]. There is an exception to this general rule for any person who affixes improvements to the land of another, acting in good faith and erroneously believing because of a mistake either of law or fact that he or she has a right to remove the improvements. In that event, a person may bring an action for removal of

the improvements, but must pay the owner (or owner's successor in interest) damages proximately caused by the affixing and removal of the improvements and the landlord's costs of suit and attorneys' fees, and in some cases must obtain the consent of certain lienholders [*Civ. Code § 1013.5*]. Another exception to the general rule also exists for trade fixtures [*see* [f], *below*].

Notwithstanding the above general rule and exceptions, the parties may provide by express agreement that the tenant may remove fixtures [*see Civ. Code § 1013*]. If the lease expressly permits the tenant to remove the fixtures, he or she may remove them at any time during or within a reasonable time after expiration of the lease term [*Weisberg v. Loughridge (1967) 253 Cal. App. 2d 416, 432, 61 Cal. Rptr. 563]* .

[f] Trade Fixtures

A trade fixture is a particular type of fixture specially permitted by law to be removed under certain circumstances by a tenant from the landlord's real property to which it has been annexed [*Trabue Pittman Corp. v. County of L.A. (1946) 29 Cal. 2d 385, 393, 175 P.2d 512* ; *County of Ventura v. Channel Islands State Bank (1967) 251 Cal. App. 2d 240, 249, 59 Cal. Rptr. 404]* . A tenant may at any time during the continuance of his or her lease term, remove from the leased premises anything affixed to the premises for the purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has become an integral part of the premises by the manner in which it is affixed [*Civ. Code § 1019*; *see City of Beverly Hills v. Albright (1960) 184 Cal. App. 2d 562, 568, 7 Cal. Rptr. 706]* .

A tenant's right to remove trade fixtures must be exercised within a reasonable time after the lease terminates or the right is lost [*United Pacific Ins. Co. v. Cann (1954) 129 Cal. App. 2d 272, 275, 276 P.2d 858]* . If the parties agree to a lease provision that fixtures, including trade fixtures, will belong to the landlord on the lease's termination due to the tenant's breach, the provision is valid and controlling [*Goldie v. Bauchet Properties (1975) 15 Cal. 3d 307, 313, 124 Cal. Rptr. 161, 540 P.2d 1]* .

PRACTICE TIP:

Trade Fixtures. What constitutes "trade fixtures" is often a matter of dispute. Therefore, a tenant who is going to install significant "trade fixtures" to the premises should attempt to specify by schedule, what "trade fixtures" there are and that the fixtures can be removed as is provided by the form in [2], *below*. The downside is that many trade fixtures once removed retain only a small fraction of their original value. It is probably better that the tenant obtain an agreement from the landlord to purchase the "trade fixtures" for a specified sum, such as a percentage of original acquisition cost. *By Benjamin Kaplan.*

[g] Improper Removal of Fixture or Improvement

The severance of fixtures and improvements from land changes the character of the property severed from real to personal, irrespective of the means by which it is accomplished. If the removal is tortious, the owner may treat the fixture as personalty and recover it by an action of replevin or recover its value by an action for conversion [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 606, 328 P.2d 953]* .

The proper measure of damages for the wrongful removal of a fixture by a tenant is the value of that fixture in its place as a part of the realty and not what it would sell for once removed from the building [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 135, 95 Cal. Rptr. 728]* . Also, an injunction can be obtained to prevent a tenant from removing fixtures that belong to the owner of the property [*see Gordon v. Cohn (1934) 220 Cal. 193, 30 P.2d 19]* . However, a person who affixes property to the land of another, acting in good faith and erroneously believing, because of a mistake either of fact or law, that he or she has a right to remove the property, may have a right to remove the fixtures or improvements [*see Civ. Code § 1013.5*].

[2] FORM

Ownership of Trade Fixtures

Ownership and Removal of Fixtures, Alterations, and Improvements

Section _____. Any alterations, additions, or improvements to the leased premises made by Tenant and any fixtures, except trade fixtures as described below, installed on the leased premises by Tenant, shall on expiration or earlier termination of this lease belong to Landlord without compensation to Tenant, provided, however, that Landlord shall have the right, to be exercised on expiration or sooner termination of this lease, to require Tenant, at Tenant's sole expense, to remove any or all such additions, improvements, or fixtures and to repair any damage to the leased premises caused by the removal. Tenant shall have the right to remove its trade fixtures ("Trade Fixtures") from the leased premises at any time during the term of this lease or within _____ days after expiration of the term of this lease, subject to repairing, at Tenant's expense, any damage caused to the leased premises by the removal. If Tenant's Trade Fixtures are not removed from the leased premises within _____ days after expiration of the term of this lease or after earlier termination of this lease, the Trade Fixtures remaining on the leased premises shall become the property of and belong to Landlord.

[*Add the following if parties want to designate particular items of property as trade fixtures:*]

For purposes of this lease, the parties agree that the following items of property and any replacement of that item during the term of this lease shall be considered Trade Fixtures: _____[*describe specific items*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsFixture CharacteristicsReal Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.243

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.243 Landlord's Construction Obligations

[1] Comment

[a] Use of Form

This form contains lease provisions requiring a landlord to construct a building on the leased premises. For related provisions, see *§§ 34C.211* (term of lease to commence on completion of building), 34C.250 (subordination of the lease to landlord financing for building), and 34C.251 (authorization of landlord to terminate lease if unable to secure construction financing). For a ground lease that requires the tenant to construct a building, see Ch. 34D, *Ground Leases* .

[b] Plans and Governmental Approvals

The first alternative in the form in [2], *below*, covers the preparation and cost of preliminary plans and cost estimates [*see* subsection (b) of form] and final plans for the construction [*see* subsection (c) of form], as well as governmental approval for the project [*see* subsection (d) of form]. Significant changes in the building or the building's cost required as a condition of governmental approval allow either the landlord or tenant the right to terminate the lease [*see* subsection (e) of form].

[c] Construction

The remaining sections of this form include the requirements for commencement and completion of the construction. Language is provided to describe the circumstances that permit delay in the construction, tenant changes in the plans, and the inspection by the tenant when the construction is substantially completed. Optional provisions are included for construction warranties and for liquidated damages if the building's construction is delayed beyond the required completion date [*see § 34C.273* for discussion of requirements for liquidated damages provisions]. Finally, the form

contains a provision that addresses the issue of which party will bear the excess cost if the actual cost of construction exceeds the estimated cost previously agreed on by the parties.

PRACTICE TIP:

Landlord's Construction Obligations. The complexities of the landlord constructing a building for a tenant are immense. Although a landlord may be prepared to absorb all the costs of construction this may not be entirely beneficial to the tenant. To the extent that the landlord's obligations to "build to plan" will be governed by the plans, it behooves the tenant to have its own architect involved from the inception. The more detailed the construction specifications are, the more likely there will not be "add ons" for the landlord to approve (or not approve). The long term tenant does not wish to end up with a building unsuitable for its intended use. Furthermore, no amount of documentation is going to prevent problems from arising. It is the nature of the beast. So if your tenant needs to be in premises by a particular date, building to suit may not be the way to go. *By Benjamin Kaplan.*

[2] FORM

Construction by Landlord

ARTICLE _____
CONSTRUCTION BY LANDLORD

Preliminary and Final Plans

Section _____. (a) Landlord shall construct [*or* make *or* have constructed *or* have made] on the leased real property [*or* premises *or specify other*] a building [*or describe other improvements*] in accordance with the Final Plans defined in this Section.

[*First alternative: For use when parties have agreed on preliminary plans and cost estimates before executing lease.*]

(b) Preliminary plans and specifications and preliminary cost estimates [*or specify other*] for the construction have been agreed on by the parties. Copies of these documents, signed by both Landlord and Tenant, are attached as Exhibit _____[*specify Exhibit for plans and specifications*] and made a part of this lease.

[*Second alternative: For use when parties have not agreed on preliminary plans and cost estimates before executing lease.*]

(b) Landlord [*or* Tenant] shall cause preliminary plans and specifications and preliminary cost estimates [*or specify other*] for the construction to be prepared, at Landlord's [*or* Tenant's] sole expense, within _____ days of the date of this lease [and shall promptly deliver them to Tenant. Tenant shall approve or disapprove the preliminary plans and specifications and preliminary cost estimates within _____ days after their delivery to Tenant by Landlord]. On approval of the preliminary plans and specifications [*or specify other*], each party to this lease shall sign them, and they shall, as of the date of signing, be deemed incorporated in and made a material part of this lease.

[*CONTINUE*]

(c) Within _____ days after the date _____[*if first alternative above was used:* of this lease *or, if second alternative above was used:* that both parties have approved and signed the preliminary plans and specifications and preliminary cost estimates], Landlord [*or* Tenant] shall cause final plans and specifications (including working drawings) and final cost estimates ("the Final Plans"), to be prepared, at Landlord's [*or* Tenant's]

sole expense, and delivered to Landlord. The Final Plans shall be based on the preliminary plans and specifications and preliminary cost estimates previously approved by the parties and shall be deemed to be a part of this lease and shall be attached to this lease as Exhibit _____[*specify exhibit for plans and specifications*].

(d) Landlord [*or* Tenant] shall be responsible for obtaining approval for the Final Plans from all necessary government agencies. The parties agree that they shall be bound by any change in the Final Plans ordered as a condition of government approval except for the following: _____ [*set forth changes that will give either party the right to terminate the lease, e.g.:*

(1) An increase in the cost to Landlord to construct the building (*or describe other improvement*) that is equal to or greater than _____ percent of the preliminary cost estimates agreed on by the parties shall give Landlord the right to terminate this lease.

(2) A change that will result in the building (*or describe other improvements*) being completed _____ (*specify time period, e.g.,* 60 days or more) after the Completion Date required under Section _____ of this lease shall give Tenant the right to terminate this lease.

(3) A change that will result in a reduction in the total square footage of the building (*or describe other improvements*) equal to or greater than _____ percent of the total square footage of the building (*or describe other improvements*) as set forth in the Final Plans shall give Tenant the right to terminate this lease.]

(e) Termination of this lease by either party for a required governmental change set forth above shall be by written notice to the other, given not later than _____ days after notice of the required governmental change is given to the terminating party either by the governmental authority or the other party to this lease, whichever is earlier. If this lease is not terminated in accordance with this section, the parties agree to confirm and memorialize in writing the date on which the last required governmental approval is obtained (the "Final Approval Date"). If Landlord [*or* Tenant] is unable to obtain all required government approvals for the construction within _____ days of the date the Final Plans are approved by both Landlord and Tenant (the "Approval Period"), either party shall have the right to terminate this lease by written notice to the other given within _____ days of expiration of the Approval Period.

Commencement and Completion of Construction

Section _____. Landlord shall cause construction of the building [*or* improvements] to be commenced by a general contractor licensed to do business in California and selected by Landlord ("the Contractor") within _____ days of the Approval Date set forth in Section _____of this lease. The Contractor shall be required by its contract with Landlord to construct the building [*or* improvements] in accordance with the Final Plans and to complete construction not later than [*number*] days [*or* months] after the Approval Date ("the Completion Date"), subject only to delays permitted by Section [*cross-refer to the following section of the lease that defines permitted delays*].

Permitted Delays

Section _____. The construction period provided for in Section _____ above shall be extended by a number of days equal to the number of days during which construction is delayed by any of the following:

(a) Material shortages, labor shortages, strikes, lockouts, boycotts, other labor disruptions, governmental actions,

war, riot, insurrection, rebellion, act of God, fire, flood, storm, earthquake, or any and all causes beyond the reasonable control of Landlord; or

(b) Any change in the Final Plans requested by Tenant.

Tenant Changes in Plans

Section _____. It is expressly understood and agreed by the parties that Landlord shall not be required to provide or pay for any construction in addition to that set forth in the Final Plans, and that Tenant shall not substantially delay or impede the construction by making changes or alterations in the Final Plans. Any changes requested by Tenant in the Final Plans must be approved by Landlord and any and all such changes or alterations shall be paid for solely by Tenant. Any additional time for construction required by Tenant's changes in the Final Plans shall be added to the time permitted for Landlord's completion of the building [*or* improvements].

Tenant Inspection and Punchlist

Section _____. When construction for the building [*or* improvements] is substantially complete, Landlord shall notify Tenant in writing. Within _____ days after the date of Landlord's written notice, Tenant shall inspect the building [*or* improvements] and shall prepare a "punchlist" of all items Tenant considers either defective or not completed. Within _____ days after Tenant delivers the punchlist to Landlord, Landlord shall cause all corrective work identified on the punchlist to be performed that, in the opinion of Landlord's architect, is necessary to bring the construction in substantial conformance with the Final Plans. If Tenant fails to deliver a punchlist to Landlord within the time period required by this section, Tenant shall be deemed to have inspected the building [*or* improvements] and accepted construction in the condition when inspected by Tenant.

Completion of Construction Defined

Section _____. The building [*or* improvements] shall be deemed completed and ready for occupancy by Tenant when a Certificate of Occupancy for the building [*or* improvements] has been issued by the [*specify agency, e.g.*, Public Works Department *or* Building Inspection Department or County Engineer] of the City [*or* County] of _____, California, and Landlord has given Tenant written notice of the issuance of such a certificate.

Actual Cost of Construction

Section _____. If Landlord's actual cost of construction for the building [*or* improvements] exceeds [*or* exceeds by more than _____ percent] the total cost of construction set forth in the preliminary cost estimates referred to in Section _____ of this lease (excepting any overage caused by a Tenant change in the Final Plans for which Tenant is solely responsible for payment), the excess construction cost shall be paid:

[*If Landlord is to pay additional construction cost:*]

solely by Landlord.

[*OR, if additional cost will be shared by Landlord and Tenant:*]

half by Landlord and half by Tenant [*or describe other arrangement*].

[*OR, if Tenant is to pay additional cost:*]

solely by Tenant.

[*If first or second alternative, above, is used, add:*]

Landlord shall bear the additional cost during the construction period, up to the Completion Date. Thereafter, Tenant shall pay [the *or* its share of the] excess construction cost by one of the following methods to be elected by Tenant within [*number, e.g.*, 30] days after the Completion Date.

(a) The excess construction cost shall be paid in cash in one lump sum on or before [*number, e.g.*, 90] days after the Completion Date.

(b) The total excess construction cost shall be divided by the number of months contained in the term of this lease and the dollar amount so computed shall be paid monthly by Tenant to Landlord, together with and in addition to the minimum monthly rent provided for in Section _____ of this lease.

For purposes of computing the Landlord's total construction cost and determining whether there has been any excess construction cost as defined in this Section, all construction costs of the Landlord shall be a permitted cost of construction, except that the following shall be excluded from the total cost of construction: [*describe in detail any Landlord costs that are not to be figured in total of construction costs, e.g.*, the cost to remove any hazardous substance from the construction site, and any penalties or late charges assessed against Landlord during the construction period by Landlord's interim or permanent lender].

[*Optional:*]

Construction Warranties

Section _____. Landlord hereby makes the following warranties with respect to construction of the building [*or* improvements]:

(a) The construction shall substantially comply with the Final Plans, subject to insubstantial deviations that do not interfere with Tenant's use of the leased premises, changes requested by Tenant and approved by Landlord, and changes requested by governmental authority and approved by the parties.

(b) The construction shall comply with all building codes and other applicable laws, regulations, and rules of governmental authorities having jurisdiction over the construction, all requirements of Landlord's lender[s], and all insurers of both Landlord and Tenant.

(c) As between Landlord and Tenant, Landlord shall be responsible for compliance with the Mechanic's Lien Law of California. If any claims are filed against the leased premises, Landlord shall promptly pay the claims except for any claims that the Landlord is contesting in good faith. In any event, Landlord shall indemnify the Tenant for any damages suffered by Tenant as a result of a mechanics' lien.

[*Optional:*]

Liquidated Damages for Delay

Section _____. If the building is [*or* the improvements are] not completed by the Completion Date set forth in this lease, Landlord shall pay to Tenant the sum of $ _____ per day for each day beyond the Completion Date (as extended by delays permitted under this lease) until construction is completed. That sum shall be paid to Tenant as liquidated damages for all damages and injuries sustained by Tenant because of the delay in completion of the building [*or* improvements] and shall relieve Landlord from all liability for any other or further damages sustained by Tenant because of that delay.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral Overview



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17-34C California Legal Forms--Transaction Guide § 34C.244

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.244 Tenant to Rebuild Destroyed Premises

[1] Comment

[a] Use of Form

This form contains provisions requiring a tenant to repair or rebuild any part of the leased premises that may be damaged or destroyed during the lease term. Under certain circumstances the tenant is excused from the obligation to repair and rebuild and may instead elect to terminate the lease.

These types of lease provisions are most often used in a net or partially net long-term lease that also requires the tenant to make all ordinary repairs to the premises [*see § 34C.240*]. For a discussion of the nature and purpose of net leases, see *§ 34C.17*. For provisions requiring the landlord to restore destroyed premises, see *§ 34C.200[2]*, Article 8. For provisions allocating the responsibility for restoration between the landlord and tenant, depending on the nature of the casualty, see *§ 34C.201[2]*, Article 6.

[b] Obligation of Parties Absent Lease Provision

Absent a lease provision requiring repair or restoration, either party may terminate the lease if the leased premises are destroyed [*Civ. Code §§ 1932(2), 1933(4)*; *Harvey v. Weisbaum (1911) 159 Cal. 265, 267, 113 P. 656]* . In the absence of a covenant in the lease to the contrary, the landlord is under no obligation to rebuild the premises in the event of destruction by hazards such as fire [*see Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647, 25 Cal. Rptr. 517]* . However, the parties to a lease may agree that either the landlord or the tenant must rebuild destroyed premises [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889, 461 P.2d 721]* .

A party cannot terminate a lease because the premises are destroyed when that party has assumed the risk of destruction by a covenant to repair [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889,*

451 P.2d 721] . However, a general covenant to repair is not in itself sufficient to obligate the landlord or the tenant to restore or rebuild a completely destroyed structure [*see Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 576, 194 P. 1024* ; *Friedman v. Isenbruck (1952) 111 Cal. App. 2d 326, 334, 244 P.2d 718]* .

[c] Duty to Repair or Rebuild

This form generally requires the tenant to repair any damage to the premises and to rebuild the premises if they are destroyed. Alternative language in the form permits the parties to limit the tenant's obligation to repair damage or destruction resulting from a cause for which the tenant is required by the lease to carry insurance, for example, fire. For a discussion of practical and legal considerations applicable to insurance provisions in a lease, see *§ 34C.222[1]*.

The form also provides exceptions to the tenant's general obligation to repair and restore. If the damage or destruction occurs during the last part of the lease term, for example, during the last year, the tenant has a right to terminate the lease if the cost of repair or rebuilding will exceed a maximum percentage of the building's replacement value (before the damage or destruction). Some commercial leases require a tenant to repair and rebuild only if the damaged portion of the building or premises does not exceed a maximum number of square feet or floor area; others require rebuilding only if it can be accomplished within a stated number of days and is permitted by then-existing law.

[d] Insurance Proceeds

This form states that insurance proceeds will be paid to tenant for purposes of repair or rebuilding, except that if the tenant elects to terminate the lease under the conditions permitted, the proceeds will be paid to the landlord. It further states that the tenant is responsible for the cost of repair or restoration, regardless of whether the insurance proceeds payable are sufficient to cover the entire cost.

PRACTICE TIP:

Insurance. There are particular endorsements to policies which are available to cover upgrades and the meeting of new code requirements. If the tenant is assuming the obligation to rebuild under certain circumstances, the question should be "rebuild to what and what standard?" *By Benjamin Kaplan.*

[e] Rent Abatement

In this form, the rent payable by the tenant during the period the tenant is required to repair or rebuild is not reduced or abated. Therefore, no specific time requirements for the rebuilding period are specified. The tenant is merely required to proceed promptly, and presumably would do so when faced with continuing rent payments during a period of interrupted business operations.

PRACTICE TIP:

Business Interruption Insurance for the Tenant Will Protect Landlord's Income. When the tenant receives no rent abatement or reduction during a period of major repair or rebuilding, the landlord should insist on a lease provision that requires the tenant to procure and maintain business interruption insurance during the term of the lease [*see § 34C.201[2]*, Section 5.03]. *By Publisher's Editorial Staff.*

[2] FORM

Tenant's Duty to Repair or Rebuild

ARTICLE _____
DESTRUCTION OF PREMISES

Tenant's Duty to Repair

Section _____. If the leased premises or any portion of the leased premises, or any building or improvement on the leased premises, is damaged or destroyed by any cause whatsoever [*or* by any cause for which Tenant is required under this lease to carry insurance], Tenant shall promptly, at Tenant's own cost and expense, repair the damage and restore the leased premises to at least the same condition that existed before that damage or destruction, regardless of whether any insurance proceeds paid for the damage or destruction are sufficient to cover the entire cost of repair or restoration. During repair and restoration this lease shall remain in full force and effect and the rent payable under this lease shall not be abated in any way or to any extent. The proceeds of any insurance covering the damage or destruction shall be made available to Tenant for the repair or restoration required under this Section.

Tenant's Option to Terminate Lease

Section _____. Notwithstanding any other provision of this lease, Tenant may terminate this lease if the building on the leased premises is damaged or destroyed by any cause [*or* by any cause for which Tenant is required to carry insurance under this lease] during the last year [*or other time period, e.g.,* the last two years] of the term of this lease to such an extent that it will cost more than [*specify, e.g.,* 25] percent of the replacement value of the building immediately before the damage or destruction to restore the building to the condition in existence immediately before the damage or destruction. Tenant may terminate this lease by giving written notice of termination to Landlord not later than [*number, e.g.,* 30] days after the event causing the damage or destruction. The termination shall be effective on the date specified in the Tenant's notice or on the date Tenant completes vacating the leased premises, whichever is later. Tenant shall pay rent through the termination date provided for in this Section with no deduction or abatement. If Tenant terminates this lease pursuant to this section, all insurance proceeds payable because of the damage or destruction shall be paid to and be the property of Landlord.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantRisk of LossReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent Abatement



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17-34C California Legal Forms--Transaction Guide §§ 34C.245-34C.249

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.245[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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5. Subordination and Financing

17-34C California Legal Forms--Transaction Guide § 34C.250

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.250 Subordination, Nondisturbance, and Attornment Provisions

[1] Comment

[a] Use of Form

This form is a subordination, nondistrubance, and attornment provision for inclusion in a nonresidential lease. It includes the following:

- A provision subordinating the lease to a deed of trust;
- A requirement that the landlord obtain an agreement from the lender not to disturb the tenant's tenancy in the event of foreclosure ("nondisturbance agreement"); and
- The tenant's agreement to accept a new owner as its landlord ("attornment agreement").

For a lease provision giving the landlord the right to terminate the lease if he or she is unable by a specified date to secure construction and permanent financing, see *§ 34C.251[2]*. Construction and permanent loans are discussed in Chs. 30A, *Construction Financing* , and 30D, *Construction Contracts and Subcontracts* .

For a discussion of the notices and captions required by statute for subordination clauses and agreements used in conjunction with loans of $25,000 or less [*see Civ. Code §§ 2953.2, 2953.3*], see *Ch. 25B, Subordination, Assumption, and Assignment, §§ 25B.203, 25B.204, 25B.207-25B.210*.

[b] Priority of Recorded Conveyances

Generally, every conveyance of real property or an estate for years in the property, other than a will or a lease for a term

not exceeding one year, takes effect and ranks in priority according to the date it is recorded [*Civ. Code §§ 1214, 1215*]. In California, it is common for a lender to record the deed of trust it receives from an owner [*see* Ch. 25A, *Security Instruments for Real Estate Financing*]. Tenants who want to protect their leasehold rights as against all subsequent liens and interests will record a Memorandum of Lease [*see § 34C.203*].

A foreclosure sale terminates all rights in the real property that were created after the recording of the instrument creating the lien that is foreclosed [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1326, 61 Cal. Rptr. 2d 280]* . Accordingly, a leasehold interest is extinguished by a foreclosure sale under a lien to which the lease is subordinate [*McDermott v. Burke (1860) 16 Cal. 580, 590]* .

PRACTICE TIP:

Termination of Lease Through Foreclosure of Landlord's Property Can Disadvantage Lender. The loss of a leasehold interest through foreclosure is not only an obvious concern for a tenant who wants to maintain its leasehold interest in the premises, it can also be a critical issue for the lender who may be relying on the rental income from the lease for payment of its loan. *By Publisher's Editorial Staff.*

A tenant can protect its interest through a nondisturbance agreement [*see* [e], *below*]. A lender can negotiate a number of alternatives to protect its interest in having a lease remain in place. One option is to provide for the subordination of its prior deed of trust to subsequent leases [*see* [h], *below*]. Even if the lease remains subordinate to the deed of trust, the lease may not be extinguished in the event of a foreclosure if the lease includes an attornment clause which requires the tenant to attorn to a new owner in a foreclosure action [*see* [g], *below*].

[c] Subordination of Lease to Financing Encumbrances

Parties to real estate transactions can contractually agree to alter the priorities otherwise fixed by law [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1326, 61 Cal. Rptr. 2d 280]* . A subordination agreement is an agreement by which one holding an otherwise senior lien or other real estate interest consents to a reduction in priority vis-a-vis another person holding an interest in the same real estate [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1327, 61 Cal. Rptr. 2d 280]* . For example, under the terms of a lease or a separate agreement, a tenant may agree to waive the priority of his or her leasehold interest to a subsequent lien on the fee [*Security-First Nat. Bank v. Marxen (1938) 28 Cal. App. 2d 446, 453, 82 P.2d 727]* . When the instrument by which a lease is subordinated to a subsequent lien is recorded, that instrument serves as constructive notice of subordination [*see Civ. Code § 2934*]. Subsection (d) of the form in [2], *below*, requires the Tenant to execute a separate form with the landlord or lender, if requested.

Typically, lenders require leases to be subordinated to their deeds of trust. Accordingly, a landlord often negotiates with the tenant for the lease to be subordinated to subsequent deeds of trust. subsection (a) of the form contains alternative provisions for the subordination of the lease to a deed of trust. The first alternative is an automatic subordination clause [*see* [d], *below*]. The second alternative provides that the lease is subordinate to the landlord's existing and subsequent encumbrances for financing of the property, without giving the lender the option to keep the lease in a superior position. Because mortgages and deeds of trust are functionally and legally the same, a lease will be extinguished by a trustee sale under a deed of trust even if the clause in the lease subordinates it to "mortgages which may now or hereafter affect" the property and does not mention deeds of trust [*Aviel v. Ng (2008) 161 Cal. App. 4th 809, 817, 74 Cal. Rptr. 3d 200]* .

[d] Automatic Subordination Clauses

The first alternative of subsection (a) of the form provides that the lease is subordinate to any deeds of trust unless the trust deed holder elects to have the lease be superior. This is commonly known as an automatic subordination [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1329, 61 Cal. Rptr. 2d 280]* . However, if the lender

fails to comply with the notice provisions in the lease for such election before the foreclosure sale, the lease will be automatically extinguished on foreclosure on the deed of trust. The lender, or its successor, cannot later decide to make the lease superior to the deed of trust [*see Dover Mobile Estates v. Fiber Form Products, Inc. (1990) 220 Cal. App. 3d 1494, 1498-1499, 270 Cal. Rptr. 183]* .

[e] Nondisturbance Agreements

A tenant may protect itself against loss of the leasehold interest caused by the landlord's default under a superior lien by requiring the landlord to obtain from its lender a nondisturbance agreement in the tenant's favor. Under a nondisturbance agreement, a lender covenants that, in the event of a foreclosure, the tenant will remain on the leased premises so long as the tenant continues to comply with the lease's terms and the lease is not in default [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1327, 61 Cal. Rptr. 2d 280]* .

PRACTICE TIP:

Requirement to Provide Tenant Nondisturbance Agreement Should Be Included in Lease. Requiring a landlord to obtain a nondisturbance agreement from its lender for subsequent loans should be negotiated at the inception of the lease if the lease requires the tenant to subordinate the lease to subsequent loans. Subsection (b) of the form includes a provision for this purpose. Otherwise, the tenant is left with no leverage when it requests the nondisturbance agreement from the lender in exchange for a subordination to a subsequent loan. *By Publisher's Editorial Staff.*

[f] Other Protections for Tenant

In addition to or in lieu of a nondisturbance agreement [*see* [e], *above*], a tenant may insist on a lease provision permitting the tenant to cure the landlord's default under a first deed of trust. A tenant may also negotiate with the landlord to limit the amount of future encumbrances to which the lease will be subordinate or to limit the real property of the landlord that may be given as security for a loan that is to have priority over the lease. Any of these restrictions limit a landlord's flexibility to obtain loans on the property but also gives the tenant some control over subordination that could impair its interest in the lease.

[g] Attornment Clause

Typically an attornment clause will accompany a nondisturbance agreement. Under an attornment clause, a tenant covenants with the lender that, in the event of foreclosure, the lease will not be extinguished but will continue as a lease between the lender (or any successor to it) and the tenant. The tenant, in other words, agrees to recognize that another party who would not otherwise have privity may enforce the lease agreement as though the third party were originally a beneficiary of the agreement [*Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1328, 61 Cal. Rptr. 2d 280]* .

In a situation in which a deed of trust is prior to a lease, an attornment clause may prevent a lease from being extinguished in a foreclosure action [*see Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1327-1332, 61 Cal. Rptr. 2d 280* (attornment clause obligating tenant to attorn to a new owner who "acquired and accepted the property subject to the lease" in a foreclosure action prevented a lease which was subsequent to the prior deed of trust from being extinguished)].

[h] Subordination of Deed of Trust to Lease

A prospective tenant and a lender may agree to subordinate an existing deed of trust on the subject property to the lease [*Bank of America v. Hirsch Merc. Co. (1944) 64 Cal. App. 2d 175, 182-183, 148 P.2d 110]* . This type of agreement is effective to establish the priority of the tenant's lease, even though the deed of trust is recorded before the recording of the lease [*Bank of America v. Hirsch Merc. Co. (1944) 64 Cal. App. 2d 175, 182-183, 148 P.2d 110]* .

The subordination agreement, when recorded, serves as constructive notice of the agreement's terms [*Civ. Code § 2934*]. The effect of subordinating the deed of trust to the lease is that, in the event of foreclosure, the leasehold interest remains intact, subject to any limitations set forth in the subordination agreement [*Bank of America v. Hirsch Merc. Co. (1944) 64 Cal. App. 2d 175, 182, 148 P.2d 110]* .

[2] FORM

Subordination, Nondisturbance, and Attornment Provisions

Subordination, Nondisturbance, and Attornment Provisions

[*First alternative: Use if lease is automatically subordinated to all deeds of trust unless elected otherwise by the lender.*]

Section _____. (a) This lease shall be subordinate and subject to all mortgages and deeds of trust on the leased premises, whether recorded before or after this lease; provided, that if any mortgagee or beneficiary elects to have this Lease superior to its mortgage or deed of trust and gives notice of its election to Tenant, then this Lease shall be superior to the lien of any such mortgage or deed of trust; and provided, further, that in the event this lease is subordinate to a mortgage or deed of trust, the conditions set forth in subsection (b), below, are satisfied.

[*Second alternative: Use if lease is to be subordinate without giving the lender an option to subordinate its deed of trust.*]

Section _____. (a) This lease shall be subordinate to the lien of all mortgages and deeds of trust, whether recorded before or after this lease; provided that the conditions set forth in subsection (b), below, are satisfied.

[*CONTINUE*]

(b) The subordination provided for under this Section is conditioned on and subject to the following requirement. For each mortgage or deed of trust, Landlord shall obtain from the mortgagee or beneficiary an agreement in writing that, in the event of foreclosure, or any sale under a foreclosure, this lease shall not be terminated and Tenant's right to possession under this lease shall not be disturbed, provided Tenant is not then in default under the lease.

(c) In consideration of the mortgagee or beneficiary's agreement described in subsection (b), Tenant hereby agrees to attorn to the purchaser at any foreclosure, sale, or other action or proceeding, provided that the purchaser accepts the Premises subject to this lease.

(d) The subordination described in this Section shall be effective without the necessity of having any further instruments executed by Tenant, but Tenant agrees to execute on demand any such further instruments evidencing subordination that Landlord or any mortgagee or beneficiary may reasonably request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property

LawNonmortgage LiensLien PrioritiesReal Property LawPriorities & RecordingGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34C California Legal Forms--Transaction Guide § 34C.251

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.251 Landlord's Right to Terminate Lease if Unable to Procure Financing

[1] Comment--Use of Form

This form is a lease provision that sets forth the landlord's right to terminate the lease if he or she cannot obtain financing for the building project by a specified date. It may be included in a lease that requires the landlord to construct a building or other substantial improvements on the leased property [*see § 34C.243*].

PRACTICE TIP:

Tenant Should Negotiate Reasonable Time Limit for Landlord's Finance Contingency. This type of provision is likely to be used only when the lease is executed at the very early stages of negotiation between a landlord and tenant. Because it allows the landlord to terminate the lease, a tenant should insist that the landlord's deadline for obtaining financing expire before the tenant is required to make any substantial expenditures with respect to the lease. *By Publisher's Editorial Staff.*

For provisions subordinating the lease to any encumbrances given by the landlord to secure construction funds, see *§ 34C.250*.

[2] FORM

Termination if Financing Unavailable

Termination if Financing Unavailable

Section _____. Notwithstanding any other provision of this lease, if Landlord is in good faith unable to secure adequate construction financing and a binding commitment for adequate permanent or take-out financing within [*number, e.g.,* 60] days after execution of this lease [*or* after approval by Tenant of final plans and specifications

for the building], Landlord may terminate this lease by giving Tenant written notice not later than [*number, e.g.,* five] days after expiration of the [*time period for obtaining financing, e.g.*, 60-day period granted to landlord for obtaining financing]. The terms "adequate construction financing" and "adequate permanent or take-out financing" as used in this Section mean sufficient financing to finance at least _____ percent of the construction cost, including [*or* exclusive of] architectural and engineering fees, of the building supplied by a bank, insurance company, savings and loan association, or similar institutional lender.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34C California Legal Forms--Transaction Guide §§ 34C.252-34C.259

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[Reserved]

§§ 34C.252[Reserved]



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6. Transfer of Interests Under Lease

17-34C California Legal Forms--Transaction Guide § 34C.260

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.260 Assignment and Subletting by Tenant

[1] Comment

[a] Use of Form

This form consists of alternative provisions relating to the assignment or subletting of nonresidential real property. The provisions include the options to prohibit, authorize without restriction, and restrict subletting and assignments by a tenant.

For assignment and subletting provisions that are tailored for use in ground leases, see Ch. 34D, *Ground Leases* . For transfer provisions that may be used in residential leases, see Ch. 34B, *Residential Lease* s. The subjects of assignment and subletting are fully covered in Ch. 35A, *Assignment and Sublease of Leasehold Interests* .

[b] Restrictions on Transfer of Interest

[i] Types of Restrictions

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210*, *1995.230*; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*]. The first and second alternative provisions in the form in [2], *below*, provide for an absolute prohibition and an unlimited right to transfer, respectively.

A transfer restriction may provide that the transfer is subject to any express standard or condition. For example, the lease may provide that the landlord is entitled to some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease [*Civ. Code § 1995.240*]. "Consideration," as used in *Civ. Code § 1995.240*, was intended by the Legislature to refer to appreciated rentals or to the bonus value of a leasehold and not to consideration

for the business operated on the leased premises [*Ilkhchooyi v. Best (1995) 37 Cal. App. 4th 395, 407, 411, 45 Cal. Rptr. 2d 766* (landlord's demand for 75 percent of amount tenant was to receive in sale of his business for covenant not to compete was not authorized by *Civ. Code § 1995.240* and was also unconscionable)]. A restriction may also require the landlord's consent to the transfer [*see* [ii], *below*, and the third alternative provision in the form], or provide the landlord with the right to terminate the lease following notice of a proposed transfer [*see* [iii], *below*, and the sixth alternative provision in the form]. Any ambiguity in a restriction on transfer must be construed in favor of transferability [*Civ. Code § 1995.220*; *see Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335]* .

[ii] Requirement of Landlord's Consent

A transfer restriction in a nonresidential lease may require the landlord's consent to the transfer [*Civ. Code § 1995.250*]. This consent may be made subject to an express standard or condition for giving or withholding consent. For example, the restriction may provide that the landlord's consent may not be unreasonably withheld, or that the consent may be withheld subject to express standards or conditions [*Civ. Code § 1995.250*]. The third alternative provision in the form provides for these options.

For all leases executed on or after September 23, 1983, if the landlord's consent to transfer is required and if the restriction provides no standard for giving or withholding consent, the transfer restriction must be construed to include an implied standard that the landlord's consent may not be unreasonably withheld [*Civ. Code §§ 1995.260, 1995.270(b)*]. If such a restriction was executed before September 23, 1983, however, the landlord's consent may be unreasonably withheld [*Civ. Code § 1995.270(b)*].

Whether the consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof [*Civ. Code § 1995.260*]. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer [*Civ. Code § 1995.260*]. If the landlord withholds consent unreasonably, the tenant has the remedies provided by law for breach of contract in addition to any remedies for breach of the lease [*Civ. Code § 1995.310*]. In these circumstances, the remedies for breach of contract include, but are not limited to, the right to recover contract damages caused by the landlord's breach and the right to terminate the lease [*Civ. Code § 1995.310*].

[iii] Recapture Clause

The statutes governing transfer restrictions permit the use of a recapture clause that gives the landlord the right to do the following [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 351-352, 371, 6 Cal. Rptr. 2d 467, 826 P.2d 710* ; *see Civ. Code §§ 1995.010-1995.340*]:

- Terminate the lease following the receipt of a notice of the tenant's intention to sublet the premises or to assign its interests under the lease;

- Enter into a new lease covering the premises with the tenant's intended assignee or sublessee (or with any other person); and

- Keep all profits, if any, resulting from the termination and reletting.

A recapture clause containing the above elements was one of the types of transfer restrictions contemplated by the Legislature when it enacted the assignment and subletting statutes [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 369-371, 6 Cal. Rptr. 2d 467, 826 P.2d 710]* . A landlord's exercise of the right of termination granted in such a clause is not a breach of the covenant of good faith and fair dealing [

Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 376, 6 Cal. Rptr. 2d 467, 826 P.2d 710] .

The sixth alternative provision in the form provides for a landlord's right to terminate the lease and enter into a new lease with the proposed assignee or subtenant. Profit sharing is also another option which allows a tenant to assign or sublease its interest and split any profits with the landlord [*see* fourth alternative provision in the form]. The fifth alternative provision in the form combines the profit sharing option with the requirement that the Landlord's written consent be obtained.

[iv] Breach and Remedies

If a tenant transfers his or her interest in a nonresidential lease in violation of the landlord's rights, or if the landlord prevents the tenant from transferring his or her interest in the lease in violation of the tenant's rights, the aggrieved party may be entitled to redress. Remedies provided by law for violation of the rights of a landlord or tenant concerning the transfer of the tenant's interest in a lease are generally subject to any express provision in the lease that may affect the remedies. They are also subject to any applicable defense, whether legal or equitable, including the defenses of waiver and estoppel [*Civ. Code § 1995.300*].

If a nonresidential lease permits the tenant to transfer his or her interest in the lease only if the landlord consents, and if there is an express or implied requirement that the landlord's consent cannot be unreasonably withheld, the tenant may have the right to judicial relief if the landlord withholds his or her consent unreasonably [*Civ. Code § 1995.310*]. Conversely, if the tenant transfers his or her interest in the lease in violation of a restriction on transfer set forth in the lease, the landlord may be entitled to judicial relief [*Civ. Code § 1995.320*]. In either case, the aggrieved party is entitled to the remedies provided by law for breach of contract as well as breach of a lease [*Civ. Code §§ 1995.310, 1995.320*]. In these circumstances, the remedies for breach of contract include, but are not limited to, the right to recover contract damages caused by the other party's breach and the right to terminate the lease [*Civ. Code §§ 1995.310(a), (b), 1995.320(a), (b)*].

An assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant's interest in a nonresidential lease is jointly and severally liable with the tenant for contract damages [*Civ. Code § 1995.330(a)*; *see Civ. Code § 1951.2*]. Among other things, an impermissible transfer (or attempted transfer) of the tenant's interest under a nonresidential lease gives the landlord the right to terminate the lease [*see Civ. Code § 1995.320(a), (b)*]. The landlord's right to terminate the lease includes the right to terminate a transfer without terminating the lease itself [*Civ. Code § 1995.330(b)*; *see Civ. Code § 1995.320*]. If the landlord terminates a transfer without terminating the lease, an assignee or subtenant who remains in possession will be guilty of unlawful detainer, and the landlord may obtain possession from the assignee or subtenant without terminating the right to possession of the tenant [*Civ. Code § 1995.330(b)*].

A restriction on transfer of a tenant's interest in a nonresidential lease generally applies to a subsequent transfer by a tenant, an assignee, or a subtenant, notwithstanding the landlord's consent to a prior transfer, or the landlord's waiver of a standard or condition for a prior transfer [*Civ. Code § 1995.340(a)*]. However, the restriction is not applicable to subsequent transfers if the lease expressly provides that the restriction is limited to the original tenant or if the landlord expressly states in writing that the consent or waiver applies to subsequent transfers [*Civ. Code § 1995.340(b)*].

[v] Insolvency and Bankruptcy

The United States Bankruptcy Code permits a trustee in bankruptcy, with certain conditions and exceptions, to assume or reject any executory contract or unexpired lease of a bankrupt debtor [*11 U.S.C. § 365(a)*]. It also provides that, notwithstanding a provision in an executory contract or unexpired lease prohibiting or restricting assignment of the contract or lease, a trustee in bankruptcy may assign the contract or lease in the manner provided in the Code [*11 U.S.C.*

§ 365(f)(1)]. For further discussion of the effect of the Bankruptcy Code, see *§ 34C.20*.

[2] FORM

Assignment or Sublease

Assignment or Sublease

[*First alternative: Prohibiting transfers.*]

Section _____. Tenant shall not assign Tenant's interests under this lease or sublet all or any portion of the leased premises.

[*Second alternative: Permitting transfers without restriction.*]

Section _____. Tenant may sublet all or any portion of the leased premises or assign its interest in this lease.

[*Third alternative: Requiring landlord's consent for transfer.*]

Section _____. Tenant may sublet all or any portion of the leased premises or assign its interest in this lease, provided that Tenant first obtains the written consent of Landlord to do so. [_____ (*If desired, set forth any express standard or condition governing the giving or withholding of consent, e.g.,* Landlord shall not unreasonably withhold consent to such an assignment or subletting).] Landlord's consent to one assignment or subletting shall not be deemed a consent to any subsequent assignment or subletting. Any assignment or subletting without the prior written consent of Landlord shall be void and shall, at the option of Landlord, terminate this lease.

[*Fourth alternative: Imposing standard or condition (other than landlord's consent).*]

Section _____. Tenant may sublet all or any portion of the leased premises or assign its interest in this lease, provided that [*specify standard or condition, e.g.,* Tenant shall pay to Landlord one half of all rents received from the subtenant in excess of the rent payable by Tenant to Landlord under the lease; or one half of any sums to be paid by any assignee of Tenant in consideration of the assignment of this lease]. Any assignment or subletting that does not comply with the above shall be void and shall, at Landlord's option, terminate this lease.

[*Fifth alternative: Requiring landlord's consent and additional standard or condition.*]

Section _____. Tenant may sublet all or any portion of the leased premises or assign its interest in this lease, on the following terms and conditions:

(a) Tenant must first obtain the written consent of Landlord to the assignment or subletting. [_____ (*If desired, set forth any express standard or condition governing the giving or withholding of consent, e.g.,* Landlord shall not unreasonably withhold consent to such an assignment or subletting).] A consent to one assignment or subletting by Landlord shall not be deemed a consent to any subsequent assignment or subletting. Any assignment or subletting without the prior written consent of Landlord shall be void and shall, at the option of Landlord, terminate this lease.

(b) [*Specify one or more additional standards or conditions, e.g.,* Tenant shall pay to Landlord one half of all rents received from the subtenant in excess of the rent payable by Tenant to Landlord under the lease; *or* one half of any sums to be paid by any assignee of Tenant in consideration of the assignment of this lease]. Any assignment or subletting that does not comply with the foregoing shall be void and shall, at Landlord's option, terminate this lease.

[*Sixth alternative: Requiring landlord's consent and giving landlord right to terminate lease.*]

Section _____. Tenant may sublet all or any portion of the leased premises, or assign its interest in this lease, on the following terms and conditions:

(a) Tenant must first give Landlord written notice ("Tenant's notice of intention") of the intention to sublet or assign. Tenant's notice of intention shall include the name and address of each proposed subtenant or assignee and shall specify the terms of the intended subletting or assignment. Landlord shall have the right to terminate this lease by giving Tenant a written termination notice not later than [*number, e.g.,* 30] days after Landlord receives Tenant's notice of intention. Landlord's notice shall state the date by which Tenant is required to vacate and surrender the premises ("the termination date"), which must be at least [*number, e.g.,* 30] days after the date of Landlord's notice. Tenant shall vacate and surrender the leased premises to Landlord on or before the termination date. If this lease is terminated in accordance with the provisions of this subsection, it shall be null and void as of the termination date or as of the date Tenant actually surrenders possession of the leased premises to Landlord, whichever is later. Before that time, the parties shall be bound by all terms, covenants, and conditions of this lease. Following the termination of this lease in accordance with this Subparagraph, Landlord shall have the right to enter into a new lease of the leased premises with any proposed subtenant or assignee identified in Tenant's notice of intention or with any other tenant. In that case, Tenant shall not be entitled to any portion of any profit Landlord may realize as a result of the termination and reletting.

(b) If Landlord does not terminate this lease in accordance with subsection (a) of this section, Tenant must still obtain the written consent of Landlord to the intended subletting or assignment. [_____ (*If desired, set forth any express standard or condition governing the giving or withholding of consent, e.g.,* Landlord shall not unreasonably withhold consent to such a subletting or assignment).] A consent to one subletting or assignment by Landlord shall not be deemed a consent to any subsequent subletting or assignment. Any subletting or assignment without the prior written consent of Landlord shall be void and shall, at the option of Landlord, terminate this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesTermination ClausesReal Property LawBankruptcyLeasesReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34C California Legal Forms--Transaction Guide § 34C.261

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.261 Tenant's Duty to Execute Estoppel Certificates

[1] Comment--Use of Form

This form is a provision that requires the tenant to execute an estoppel certificate, sometimes referred to as an offset statement, when requested to do so by the landlord. The certificate may take various forms but is generally a statement of the tenant about the current status of its lease with the landlord. Estoppel certificates are most often required by a prospective buyer before a sale of the leased premises by the landlord. However, the certificates may also be required in non-sale situations, for example, by the landlord's lender when the landlord is obtaining a loan secured by the leased property.

When a tenant has the right to encumber his or her leasehold interest, the tenant may insist on a lease provision that requires the landlord to execute an estoppel certificate when requested by the tenant. This form may be adapted for that purpose.

The lease should require the tenant to execute an estoppel certificate in a form requested by the landlord or the landlord's lender. For example, lenders generally require execution of their own form of estoppel statement. Basic facts regarding the lease, such as its term, the amount of rent, and the amount of any security deposit or prepaid rent, are generally required in the certificate. In addition, the executing party is generally requested to confirm the lease's existence, to state whether any modifications or additions have been made to the original lease, and to describe any claims against the other party to the lease. For a form of estoppel certificate, see *Ch. 35A, Assignment and Sublease of Leasehold Interests, § 35A.222*.

Whenever estoppel certificates are required, whether in a loan or a sale situation, time is an important factor. Therefore, the lease should require the obligated party to deliver the estoppel certificate within a stated time period after receipt of the request for it. Many leases provide that if the obligor party fails to deliver the certificate within the required time

period, the other party's representations about the status of the lease will be binding.

[2] FORM

Estoppel Certificate

Estoppel Certificate

Section _____. Tenant agrees to execute, in recordable form, and deliver to Landlord, when requested by Landlord, an estoppel certificate regarding the status of the lease between the parties. The certificate shall be in the form designated by Landlord and shall contain at a minimum the following: the term of the lease, including any right to extend or renew contained in the lease; any modifications to the original lease; the date to which rent has been paid; the amount of any security deposit posted; and the amount of any prepaid rent. The certificate shall be delivered to the requesting party not later than [*number, e.g.*, 10] business days after receipt of the written request for the certificate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34C California Legal Forms--Transaction Guide § 34C.262

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.262 Condemnation of Leased Premises

[1] Comment

[a] Use of Form

This form is a set of lease provisions that describe the rights and obligations of the parties to the lease if the leased premises are totally or partially condemned, that is, taken under the power of eminent domain. If a lease provides for the rights and obligations of the parties in the event that all or a portion of the property is acquired for public use, the lease provisions prevail [*Code Civ. Proc. § 1265.160*]. If the lease does not contain applicable provisions, the Eminent Domain Law [*see Code Civ. Proc. §§ 1230.010-1273.050*] and the case law discussed in the remainder of this section govern the rights and obligations of the parties to the lease [*see Code Civ. Proc. § 1265.160*].

In this form, the provisions for total condemnation provide for substantially the same result as applicable statutory law, that is, the lease terminates. The first alternative provision for division of any condemnation award is more favorable to the landlord than under statutory law; the second alternative incorporates the statutory scheme. The partial condemnation provisions provide that the lease terminates as to the portion of leased premises taken but continues as to the remainder of the premises. An optional clause permits the tenant to terminate the lease in the event of a partial taking if a stated minimum of the premises are taken.

For a full discussion of the subject of condemnation of leased premises, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, *Condemnation Practice Handbook*, Ch. 512, *Compensation* (Matthew Bender).

[b] Effect of Condemnation

[i] Total Taking

Property subject to a lease may be taken in whole or in part under the power of eminent domain [*see Code Civ. Proc. § 1240.110*]. If all the property subject to a lease is acquired for public use by condemnation, the lease terminates [*Code Civ. Proc. § 1265.110*]. However, the statutory provision for the lease's termination [*Code Civ. Proc. § 1265.110*] applies only to acquisitions by eminent domain and not to purchases by a public agency, unless the purchase is the substantial equivalent of condemnation [*Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency (1986) 178 Cal. App. 3d 435, 442-443, 223 Cal. Rptr. 728]* .

The form in [2], *below*, provides that the lease terminates if all of the leased property is taken by condemnation. For purposes of the lease, a "taking" expressly includes a voluntary conveyance by the landlord to a public entity after threat of a taking under the power of eminent domain. Rent is required to be paid up until the time the condemnor takes physical possession of the property or takes title to the property, whichever is earlier.

[ii] Partial Taking

Except as provided below, this form provides that acquisition for public use of part of the property subject to a lease terminates the lease as to the part taken, but the lease remains in force as to the remainder. The rent reserved in the lease that is allocated to the part taken is extinguished [*Code Civ. Proc. § 1265.120*]. Therefore, the amount of rent the tenant must pay is reduced pro rata according to the amount of the leasehold not taken. The provisions in this form follow the statutory result, that is, a partial taking terminates the lease as to the part of the property taken but the lease continues in effect for the remainder. Rent for the remaining leased property is reduced by a pro rata formula.

If only a part of the property subject to a lease is acquired for public use, either party to the lease may petition the court to terminate the entire lease. The court may do so if it determines that an essential part of the property subject to the lease is taken or that the remainder of the property subject to the lease is no longer suitable for the lease's purposes [*Code Civ. Proc. § 1265.130*].

If the landlord and tenant agree that a partial taking will not terminate the lease, that fact should be clearly stated in the lease. The provisions of *Code Civ. Proc. § 1265.130*, permitting either party to petition the superior court to terminate the lease in the event of a partial taking, should be expressly waived in the lease [*see* form in [2], *below*].

[c] Time for Termination

Termination or partial termination of the lease under the statutory rules occurs at the time title to the property is taken by the person who will put it to public use, or at the time the condemnor is authorized to take possession of the property as stated in an order for possession, whichever is earlier [*Code Civ. Proc. § 1265.140*].

[d] Compensation

[i] Respective Rights of Each Party

In the absence of an agreement to the contrary, the parties to the lease are each entitled to compensation for the taking of their respective rights [*see Code Civ. Proc. §§ 1260.220(a), 1265.150*]. A lease provision which provides that the lease will terminate in the event of a total taking does not deprive the tenant of any right it may have for compensation; such a provision is merely declarative of the statutory law for eminent domain [*City of Vista v. Fielder (1996) 13 Cal. 4th 612, 616-618, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* . However, the landlord and tenant may contract for their own rights and obligations in the event of a total or partial taking, and such lease provisions will prevail over the statutory law [*Code Civ. Proc. § 1265.160*; *City of Vista v. Fielder (1996) 13 Cal. 4th 612, 617-618, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* .

[ii] Tenant's Interest

The tenant's leasehold interest has what is called "bonus value" which may be defined as the present value of the difference between economic rent, that is, the value of market rental, and the contract rent through the remaining lease term [*Code Civ. Proc. § 1263.310*; *City of Vista v. Fielder (1996) 13 Cal. 4th 612, 616-617, n.1, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* . This bonus value is generally viewed as separate and distinct from the tenant's goodwill in its business [*see* [v], *below*, for discussion of tenant's goodwill interest]. However, some cases have determined that the value of cheap rental can be viewed as either bonus value or goodwill [*see* [v], *below*].

The bonus value usually assumes importance only in long-term commercial leases. Condemnation of the leased premises serves to terminate a lease, releasing the tenant from further obligation to pay rental; thus, the value of the lost possession must be offset by the value of the cancelled rental obligation. In short-term leases, the tenant will have at best a small claim against the condemning authority. In long-term leases, which typically involve commercial properties, the tenant may still have no claim if the lease rental equals or exceeds the market rental. But a landlord may sometimes forego increases in market rental over the lease term in exchange for a long-term commitment from the tenant. When this occurs in the negotiation of long-term leases, the lease bonus value may amount to a considerable sum [*New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1479, 30 Cal. Rptr. 2d 469]* .

Accordingly, options to renew a lease must be considered in determining the fair market value of the leasehold interest to the extent that they enhance the value of the leasehold interest [*People ex rel. Dept. of Water Resources v. Gianni (1972) 29 Cal. App. 3d 151, 158, 105 Cal. Rptr. 248* ; *S.F. Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal. App. 2d 263, 272, 71 Cal. Rptr. 204* ; *State of California v. Whitlow (1966) 243 Cal. App. 2d 490, 496, 52 Cal. Rptr. 336]* .

[iii] Landlord's Interest

The value of a landlord's interest in leased property (the reversion) is also measured by the fair market value [*Code Civ. Proc. § 1263.310*]. One approved formula for measuring this value is the sum of the following items [*New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1479, 30 Cal. Rptr. 2d 469]* :

- The present worth of the future net income that the landlord is to receive for the life of the lease or, in other words, the discounted value of the income stream;

- The present worth of the value of the improvements at the lease's expiration that are to inure to the landlord's benefit; and

- The present worth of the land at the lease's expiration.

The relationship between the value of the landlord's interest and the tenant's interest is discussed in [vii], *below*.

[iv] Fixtures

All improvements pertaining to realty must be taken into account in determining compensation, notwithstanding the right or obligation of a tenant, as against the owner of any other interest in real property, to remove that improvement at the expiration of the lease term [*Code Civ. Proc. § 1263.210*]. The term "improvements pertaining to realty" includes any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if that property is part of a larger parcel, that cannot be removed without substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation [*Code Civ. Proc. § 1263.205(a)*; *see Chhour v. Community Redevelopment Agency (1996) 46 Cal. App. 4th 273, 282-283, 53 Cal. Rptr. 2d 585]* .

In determining whether particular property can be removed "without a substantial economic loss," the value of the property in place considered as a part of the realty will be compared with its value if it were removed and sold [*Code*

Civ. Proc. § 1263.205(b)]. However, improvements that are removed or destroyed by a defendant in the proceeding (whether it be landlord or tenant) before the condemnor takes title to or possession of the property or before the occupant of the property moves under an order for possession, are not taken into account in determining the compensation award [*Code Civ. Proc. § 1263.230(b)*; *see New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1479, 30 Cal. Rptr. 2d 469]* . If the removal or destruction damages the remaining property, the damage must be taken into account in determining compensation to the extent it reduces the remaining property's value [*Code Civ. Proc. § 1263.230(b)*].

Improvements pertaining to the realty made after the date of service of summons in the eminent domain proceeding are likewise not taken into account in determining compensation except under limited circumstances, for example, the improvement is made with the condemnor's consent [*Code Civ. Proc. § 1263.240*].

Business inventory may be compensable under limited circumstances, that is, when the loss results from the condemnatory act itself (for example, the inventory cannot be relocated) rather than the personal circumstances of the condemnee (for example, the owner has decided that he or she will not relocate) [*Chhour v. Community Redevelopment Agency (1996) 46 Cal. App. 4th 273, 283, 53 Cal. Rptr. 2d 585]* .

The tenant's compensable interest is in his or her right of ownership to the fixtures, which is separate and apart from the tenant's compensable possessory rights in the premises [*Redevelopment Agency v. Diamond Properties (1969) 271 Cal. App. 2d 315, 318-319, 76 Cal. Rptr. 269]* . Thus, if any fixtures, structures, or other improvements exist as of the date a summons is served, the tenant has a compensable interest in the property condemned, notwithstanding the fact that the tenant's possessory interest in the property under the lease is not interfered with and subsequently expires [*see Code Civ. Proc. § 1263.210*; *State of California ex rel. Dept. of Water Resources v. Texaco, Inc. (1972) 25 Cal. App. 3d 514, 519, 101 Cal. Rptr. 923]* . Moreover, the condemnor cannot defeat the tenant's right and thus avoid paying for the fixtures, structures, or other improvements by negotiating a sale of the leased premises with the landlord free of improvements after it has unequivocally expressed its intention to take the property for public use. In such a case, the method used in obtaining the property constitutes condemnation or its substantial equivalent and *Code Civ. Proc. § 1263.205* applies [*City of Los Angeles v. Sabatasso (1970) 3 Cal. App. 3d 973, 979, 83 Cal. Rptr. 898* (analyzing former Code Civ. Proc. § 1248b, which is superseded by *Code Civ. Proc. § 1263.205*); *see Redevelopment Agency v. Diamond Properties (1969) 271 Cal. App. 2d 315, 321, 76 Cal. Rptr. 269]* .

[v] Tenant's Goodwill Interest

Absent lease provisions to the contrary, a tenant may be entitled to compensation for the loss of goodwill of operating his or her business on the leased premises [*see Code Civ. Proc. § 1263.510*; *see also People ex rel. Dept. of Transportation v. Muller (1984) 36 Cal. 3d 263, 270, 203 Cal. Rptr. 772, 681 P.2d 1340]* . For purposes of the Eminent Domain Law, as stated in *Code Civ. Proc. § 1263.510(b)*, goodwill "consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage" [*City of Vista v. Fielder (1996) 13 Cal. 4th 612, 616-617 n.1, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* .

Although goodwill as defined is conceptually distinct from leasehold bonus value [*see* [ii], *above*], the statutory definition has been construed to allow recovery of goodwill on a confusingly similar theory, that is, the benefits of location may include cheap rental [*New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1479, 30 Cal. Rptr. 2d 469* ; *see People ex rel. Dept. of Transportation v. Muller (1984) 36 Cal. 3d 263, 203 Cal. Rptr. 772, 681 P.2d 1340]* .

Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill [*People ex rel. Dept. of*

Transportation v. Muller (1984) 36 Cal. 3d 263, 271, 203 Cal. Rptr. 772, 681 P.2d 1340 ; *People ex rel. Dept. of Transportation v. Leslie (1997) 55 Cal. App. 4th 918, 922-923, 64 Cal. Rptr. 2d 252]* .

[vi] Other Interests of Tenant

If a lease contains an unexpired option to purchase, the tenant may be entitled to an amount equal to the difference between the total condemnation award and the option purchase price [*see County of San Diego v. Miller (1975) 13 Cal. 3d 684, 691, 119 Cal. Rptr. 491, 532 P.2d 139* ; *County of San Diego v. Miller (1980) 102 Cal. App. 3d 424, 162 Cal. Rptr. 480]* . Certain relocation costs incurred for moving the tenant's business and personal property are also recoverable by the tenant from the condemning authority [*see Gov. Code §§ 7260, 7262*].

[vii] Separate Assessment of Interests

As a general rule, when there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of that interest must be separately assessed and compensation awarded for it [*Code Civ. Proc. § 1260.220(a)*]. However, the condemning authority may require that the amount of compensation be first determined as between it and all defendants claiming an interest in the property. In that case, the trier of fact must in a separate proceeding determine the respective rights of the defendants in and to the amount of compensation awarded and must apportion the award accordingly [*Code Civ. Proc. § 1260.220(b)*].

The question arises as to whether the total amount of the separate interests to be awarded may exceed the value of the property if held by one owner in fee simple. Ordinarily the aggregate award to both landlord and tenant will equal market value of the property. When the lease rental falls below market value, the landlord will have a claim to less than the full market value of the property, since he or she is restricted to the present value of actual contract rental; but the tenant will have a right to recover the balance of the market value, above that recovered by the landlord, as lease bonus value [*New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1479, 30 Cal. Rptr. 2d 469]* .

There is authority for two theories of dividing the value of the property between the landlord and the tenant. The "undivided fee rule" requires that the property be valued as if owned by a single person, regardless of the separate interests in the property. This single value is then apportioned between the landlord and the tenant [*County of Los Angeles v. American Sav. & Loan Assn. (1972) 26 Cal. App. 3d 7, 11-12, 102 Cal. Rptr. 439]* .

The "aggregate of interests rule" requires that the separate interests of the landlord and the tenant be valued separately and paid to each respective party regardless of the fact that the total paid may be more or less than the value of the property if owned by a single person [*County of Los Angeles v. American Sav. & Loan Assn. (1972) 26 Cal. App. 3d 7, 11-12, 102 Cal. Rptr. 439]* .

The "aggregate of interests rule" has been applied in a number of cases [*see People ex rel. Dept. Pub. Wks. v. Lynbar, Inc. (1967) 253 Cal. App. 2d 870, 879-880, 62 Cal. Rptr. 320* ; *County of Los Angeles v. American Sav. & Loan Assn. (1972) 26 Cal. App. 3d 7, 11-12, 102 Cal. Rptr. 439]* . The use of the "undivided fee rule" has also been upheld [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11, 62 Cal. Rptr. 113* ; *see El Monte School Dist. v. Wilkins (1960) 177 Cal. App. 2d 47, 54-55, 1 Cal. Rptr. 715* ; *People v. S. & E. Homebuilders, Inc. (1956) 142 Cal. App. 2d 105, 107-108, 298 P.2d 53]* . The statutory scheme for the Eminent Domain Law does not specifically address this issue, and, to date, there has not been a definite case ruling holding that one rule prevails over the other.

[viii] Waiver of Rights

By a valid lease provision, either the landlord or the tenant can waive his or her right to compensation for the taking or

otherwise establish the rights of the parties on condemnation [*Code Civ. Proc. § 1265.160*; *City of Vista v. Fielder (1996) 13 Cal. 4th 612, 617-618, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* . Thus, a lease provision waiving the right to any bonus value [*see New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1482-1483, 30 Cal. Rptr. 2d 469]* and a provision setting the landlord's right to compensation at a certain amount and giving the tenant any amount of compensation above that amount [*see City of Industry v. Willey (1970) 11 Cal. App. 3d 658, 663-664, 89 Cal. Rptr. 922]* have been enforced.

[e] Lender's Security Interest

When there is a partial taking of property encumbered by a lien, the lender may share in the condemnation award only to the extent determined by the court to be necessary to prevent an impairment of the security, absent an agreement to the contrary between the landlord and the lender [*Code Civ. Proc. § 1265.225*; *People ex rel. Dept. of Transportation v. Redwood Baseline, Ltd (1978) 84 Cal. App. 3d 662, 670-671, 149 Cal. Rptr. 11]* . A lender's lien continues on the part of the property not taken as security for the unpaid portion of the indebtedness [*Code Civ. Proc. § 1265.225(a)*].

PRACTICE TIP:

Deed of Trust Should Be Reviewed for Potential Conflict With Landlord's Interest in Condemnation Award. If a lender has a security interest in the leased property, the attorney representing the landlord should review the deed of trust to determine that on condemnation, the lender's rights will not conflict with the condemnation provisions that the landlord and tenant intend to include in the lease. *By Publisher's Editorial Staff.*

[2] FORM

Eminent Domain

ARTICLE _____
EMINENT DOMAIN

Definitions

Section _____. (a) For purposes of this lease, "eminent domain" means the right of the people or government to take private property for public use. As used in this article, the words "condemned" and "condemnation" are coextensive with that right, and a voluntary conveyance by Landlord to the condemnor under threat of a taking under the power of eminent domain in lieu or after commencement of formal proceedings shall be deemed a taking within the meaning of this article.

(b) As used in this article, the terms "total condemnation" and "total taking" mean the taking of the entire leased premises under the power of eminent domain.

(c) As used in this article, the terms "partial condemnation" and "partial taking" mean any condemnation of the leased premises other than a total taking as defined in subsection (b) of this Section.

Total Condemnation

Section _____. (a) In the event that there is a total taking of the leased premises during the lease term [or any extension of the lease term] under the power of eminent domain, this lease shall terminate as of the date title or possession vests in the condemnor, or the purchaser, whichever is earlier (the "termination date").

(b) In the event of a total taking of the leased premises, [*choose one of the following provisions:*]

[*For a provision favoring landlord:*]

all compensation and damages awarded for a total taking of the leased premises shall belong to and be the sole property of Landlord, and Tenant shall have no claim to any amount or part of any award for its leasehold interest (bonus value), value of the goodwill for its business, leasehold improvements and fixtures, or any other interest [*optional:* except, however, that Tenant shall be entitled to receive the portion of any award attributable to the taking of those leasehold improvements and fixtures that Tenant has the right to remove under this lease but does not remove from the leased premises; or when the tenant does remove the fixtures or improvements, a reasonable amount for removal and relocation expenses, provided that amount does not exceed the market value of the improvements and fixtures]. Tenant hereby irrevocably assigns and transfers to Landlord any right Tenant may have to compensation or damages to which Tenant may become entitled [*add if optional phrase above is included:*, except as otherwise provided in this subsection (b)].

[*OR, for a provision favoring tenant:*]

Landlord and Tenant shall each be entitled to all compensation and damages awarded for each of their respective interests in the leased premises, as provided under the Eminent Domain Law (*Code Civ. Proc. §§ 1230.010-1273.050*).

[*CONTINUE*]

(c) On termination of this lease by a total taking of the leased premises under the power of eminent domain, all rent and other charges payable by Tenant to or on behalf of Landlord under the provisions of this lease shall be paid up to the termination date defined in subsection (a). If Tenant has prepaid any rent to Landlord for a period covering the period beyond the termination date, Landlord shall refund the prepaid rent, less any lawful deductions, to Tenant not later than two weeks after the termination date. Thereafter, the parties to this lease shall be released from all further liability in relation to this lease.

Partial Condemnation

Section _____. (a) If there is a partial taking of the leased premises during the lease term [or any extension of the lease term] under the power of eminent domain, this lease shall terminate as to the portion of the leased premises so taken on the date title or possession vests in the condemnor, or the purchaser, whichever is earlier (the "termination date"). For the remainder of the leased premises not taken under the power of eminent domain, this lease shall continue in full force and effect, except that the rent payable under this lease shall be reduced as follows: [*describe agreement for reduced rent, e.g.,* for a freestanding building, for each square foot, if any, taken from the building, the minimum monthly rent shall be reduced by $50.00; for each square foot, if any, taken from the leased premises exclusive of the building, the minimum monthly rent shall be reduced by $20.00]. Landlord [*or* Tenant] shall, with reasonable diligence, repair the portion of the leased premises so as to restore it to a condition reasonably suitable for Tenant's continued occupancy and business use. All restoration shall be at the expense of Landlord [*or* Tenant] and subject to all provisions of this lease, and Landlord [*or* Tenant] shall be entitled to the portion of any award of damages attributable to restoration of the Premises. During the restoration period, there shall be no abatement of rent [*or* the payment of rent by Tenant shall be abated].

[*Add, if tenant will have option to terminate lease in the event of certain partial taking:*]

(b) If more than [*describe partial taking that will give tenant right to terminate lease, e.g.,* for a freestanding building, 30 percent of the floor area of the building on the leased premises, or more than 50 percent of the land area of the leased premises not covered with the building,] is taken by condemnation, Tenant may terminate this lease by giving Landlord written notice of termination not later than 30 days after Tenant receives written notice of the taking from Landlord. The lease shall terminate on the earlier of the termination date defined in subsection (a) or the date specified in Tenant's termination notice. Any date for termination of this lease designated by Tenant in its termination notice must be at least [*minimum notice period, e.g.,* 30 days after but not more than 90 days after the date of Tenant's termination notice].

[*CONTINUE*]

(c) Landlord and Tenant agree that this Lease shall govern the rights and obligations of the parties in the event of a partial taking by eminent domain and that they each waive the provisions of *Code of Civil Procedure Section 1265.130,* permitting a party to a lease to petition the superior court for termination of a lease in the event of a partial taking of the leased premises.

(d) In the event of a partial taking of the leased premises, [*choose one of the following provisions:*]

[*For a provision favoring landlord:*]

all compensation and damages awarded for the partial taking shall belong to and be the sole property of Landlord, and Tenant shall have no claim to either and hereby irrevocably assigns and transfers to Landlord any right Tenant may have to compensation or damages for property condemned.

[*OR, for a provision favoring tenant:*]

Tenant shall be entitled to receive the following: the value of Tenant's lease term of the portion of the leased premises taken; any award that may be made for Tenant's trade fixtures and improvements made by Tenant to the leased premises that Tenant does not remove but has the right to remove under this lease; a reasonable amount for removal and relocation expenses if Tenant removes the fixtures or improvements (provided that amount shall not exceed the market value of the improvements and fixtures); [and] loss of goodwill for Tenant's business [*optional when lease grants tenant option to purchased the leased premises:,* and the value of the Tenant's unexpired option to purchase the leased premises]. [*Add when lease continues in effect for portion of leased premises not condemned and tenant is required under lease to make all necessary restorations:* If this lease is continued as to the portion of the premises not condemned, Tenant shall also be entitled to receive any award made for alterations, modifications, or repairs that may be reasonably required to place the remaining portion of the leased premises not taken in a suitable condition for the continuance of Tenant's tenancy.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawEminent Domain ProceedingsProcedureReal Property LawEminent Domain ProceedingsValuationReal Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
6. Transfer of Interests Under Lease

17-34C California Legal Forms--Transaction Guide § 34C.263

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.263 Option to Purchase Leased Premises

[1] Comment

[a] Use of Form

This form is a lease provision granting a tenant an option to purchase the leased premises. This type of option is more often included in a lease for a freestanding building than in a lease for space in a multitenant building. However, a tenant in a multitenant building might acquire an option to purchase the entire building or an option to purchase its individual space, such as an office condominium.

For a provision granting the tenant the first right of refusal to purchase the premises in the event the landlord decides to sell, see *§ 34C.264*. For detailed coverage of options to purchase, see Ch. 22, *Options to Purchase Real Property* , and CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 70, *Options* (Matthew Bender).

[b] Nature of Option to Purchase

An option to purchase real property, when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase specified real property for a stipulated price within a specified time [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . It is a right acquired by contract to accept or reject a present offer to sell real property within a limited time in the future [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . The right to purchase created by an option is a substantial one: it is irrevocable by the property owner and may be exercised against the owner's successors following the owner's death [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . Typically, the real property's owner is referred to as the "optionor" and the option's holder is referred to as the "optionee."

[c] Exercise of Option

Because the optionor is bound by the offer set forth in an option but the optionee is free to accept or reject the offer, courts are strict in holding an optionee to exact compliance with the terms of the option [*Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 229, 255 P.2d 473]* . Therefore, the optionee's acceptance, that is, the optionee's exercise of the option, must be in accordance with the option agreement's terms and must be free of conditions the optionor is not bound to perform [*Robbins v. Pacific Eastern Corp. (1937) 8 Cal. 2d 241, 276, 65 P.2d 42* ; *Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 660, 78 Cal. Rptr. 536* ; *Schomaker v. Osborne (1967) 250 Cal. App. 2d 887, 890, 58 Cal. Rptr. 827]* .

A well-drafted option prescribes the method by which the option must be exercised. Some option provisions permit exercise by mere notice, while others require payment or tender of all or part of the purchase price. Unless required by the option, however, acceptance need not be accompanied by a tender of performance; exercise of an option is merely the communicated election of the optionee to accept the option [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* . Except as otherwise required by statute, acceptance or exercise of an option may be either written or oral. An oral acceptance of a written option to convey real property is valid [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* .

Disputes about whether an option has been validly exercised are decided by reference to the rules of offer and acceptance--which means the terms of the exercise must ordinarily be identical to terms of the offer [*Arden Group, Inc. v. Burk (1996) 45 Cal. App. 4th 1409, 1414, 53 Cal. Rptr. 2d 492]* .

When an option agreement prescribes the particular manner in which the optionee is to exercise the option, the provisions must be strictly followed [*Palo Alto Town & Country Village, Inc. v. BBTC Company (1974) 11 Cal. 3d 494, 498, 113 Cal. Rptr. 705, 521 P.2d 1097* ; *see Wilson v. Gentile (1992) 8 Cal. App. 4th 759, 762-768, 10 Cal. Rptr. 2d 713* (provision for exercise "within 30 days prior to expiration" permits exercise during 30-day period immediately preceding expiration)]. However, when an option agreement does not prescribe any particular manner in which the option is to be exercised, any method of communicating an election to exercise the option to the landlord-optionor is proper [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* .

When the optionee exercises the option, an option agreement is converted from a unilateral contract to a bilateral contract of purchase and sale and the optionor is contractually bound to sell the property to the optionee [*Claremont Terrace Homeowners' Assn. v. United States (1983) 146 Cal. App. 3d 398, 406, 194 Cal. Rptr. 216* ; *Rollins v. Stokes (1981) 123 Cal. App. 3d 701, 711, 176 Cal. Rptr. 835]* .

PRACTICE TIP:

Avoiding Disputes as to When Option Has Been Exercised. In the instance of an option to purchase, to avoid disputes as to when the option has been exercised, one may provide the following:

Optionee shall simultaneously with the exercise of the option open an escrow in the County of _____ with a licensed title/escrow company and provide notice to the Optionor of that escrow company, including the identity and address of the escrow company, the escrow officer if any, and the escrow number.

By Benjamin Kaplan.

[d] Consideration for Option

It is universally accepted that an option included in a lease agreement is a contract distinct from the lease to which the option relates [*Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 771, 192 P.2d 949* ; *Ripani v. Liberty*

Loan Corp. (1979) 95 Cal. App. 3d 603, 609, 157 Cal. Rptr. 272] . The general consideration for a lease, such as the covenant to pay rent or do other acts, supports an option to purchase contained in the lease and no further consideration is needed [*Spaulding v. Yovino-Young (1947) 30 Cal. 2d 138, 141, 180 P.2d 691* ; *Re v. Wells Fargo Bank (1969) 269 Cal. App. 2d 783, 787, 75 Cal. Rptr. 367]* .

[e] Recording Option to Purchase

When including an option to purchase in a lease, the tenant should ensure that the option is recorded. By recording the option, the optionee's rights to purchase the property are protected against all subsequent purchasers or encumbrancers. Once an option is exercised, the optionee's right to acquire the property relates back to the time when the option was granted [*Claremont Terrace Homeowners' Assn. v. United States (1983) 146 Cal. App. 3d 398, 406, 194 Cal. Rptr. 216]* . Thus, when a purchaser or encumbrancer acquires an interest in the property after an option is granted but before it is exercised, and the option is recorded, on exercise, the optionee's title relates back to the date the option was granted and extinguishes the interest of the purchaser or encumbrancer because of constructive notice [*see Claremont Terrace Homeowners' Assn. v. United States (1983) 146 Cal. App. 3d 398, 406, 194 Cal. Rptr. 216]* .

When an option is recorded it becomes a cloud on the optionor's title, even if it is not exercised. However, a statute provides that a recorded option expires if no conveyance or other instrument that gives notice of the option's exercise, or that extends the option, is recorded within six months after the option expires by its terms; or, if the option provides no expiration date, six months after the date the option is recorded [*Civ. Code § 884.010*]. After the option expires of record, the recorded instrument that creates or gives constructive notice of the option ceases to be notice to any person. The recorded instrument ceases to put any person on inquiry notice with regard to the exercise or existence of the option or of any other writing or conveyance that may have been executed under the option [*Civ. Code § 884.020*].

If the parties choose to record the option agreement, they can either add the basic terms of the option agreement to the Memorandum of Lease (and entitle the document "Memorandum of Lease and Option Agreement") [*see § 34C.203[1]* for discussion of a Memorandum of Lease], or they can record an abstract of the option agreement [*see* Ch. 22, *Options to Purchase Real Property* , for abstract form].

[f] Covenant Running With Land

An option to purchase the leased premises is a covenant running with the land and thus is binding on successors of both the landlord and tenant [*Bewick v. Mecham (1945) 26 Cal. 2d 92, 96, 156 P.2d 757]* . In the absence of express restrictions to the contrary, an assignment of a lease also generally includes an assignment of the option to purchase the leased premises contained in the lease [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484, 66 Cal. Rptr. 70]* , at least when the option requires the purchase price to be paid in all cash [*see Chapman v. Great Western Gypsum Co. (1932) 216 Cal. 420, 424-425, 14 P.2d 758]* . However, a lease provision prohibiting assignments applies equally to the lease and to the option [*Gatley v. Shockley (1932) 215 Cal. 604, 611, 12 P.2d 436]* .

[g] Extension of Option to Purchase

It is unclear whether renewal or extension of a lease under an option to renew or extend contained in the lease also extends an option to purchase the leased premises contained in the lease, in the absence of words expressing a clear intent to do so [*see Spaulding v. Yovino-Young (1947) 30 Cal. 2d 138, 142, 180 P.2d 691]* . If the option to purchase is, according to its own terms, exercisable during the lease "or any option of renewal of said lease," the parties clearly intended the option to purchase to continue during any renewal term of the lease [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 663, 78 Cal. Rptr. 536]* . However, a lease holdover clause that provides for a month-to-month tenancy on the same terms and conditions as stated in the lease in the event the tenant holds over after expiration of the original lease term, does not extend an option to purchase beyond the expiration of the original lease term [*Spaulding v. Yovino-Young (1947) 30 Cal. 2d 138, 141-142, 180 P.2d 691]* .

[h] Purchase Price for Property

At the time the parties to a lease agree to include an option to purchase in the lease, they must agree either on a fixed purchase price for the property or on the method by which the purchase price can be determined with certainty at the time the option is exercised, for example, by appraisal, arbitration, or a third person [*see Peebler v. Seawell (1954) 122 Cal. App. 2d 503, 504, 265 P.2d 109* ; *see also Bewick v. Mecham (1945) 26 Cal. 2d 92, 97-98, 156 P.2d 757]* . An option that provides that the purchase price is to be "payable as mutually agreed by both parties" is too uncertain and cannot be specifically enforced by the tenant [*Bonk v. Boyajian (1954) 128 Cal. App. 2d 153, 155-157, 274 P.2d 948]* .

When a lease provision contains an option to purchase that can be exercised during the lease's term by payment of a purchase price equal to the then fair market value of the premises, and that further requires the fair market value to be determined by arbitration, the issue of whether the fair market value of the property should be reduced by the encumbrance of the remaining term of the existing lease arises. When the evidence is found to overcome the equitable presumption that a tenant did not intend a merger with the landlord's estate on exercising an option to purchase, the property should be valued as unencumbered by the lease [*Summit Industrial Equipment, Inc. v. Koll/Wells Bay Area (1986) 186 Cal. App. 3d 309, 316-320, 230 Cal. Rptr. 565]* .

[i] Other Terms of Purchase

In addition to setting forth the purchase price for the property, an option to purchase contained in a lease should contain the terms of the purchase and sale, just like any real property sales contract [*see Gatley v. Shockley (1932) 215 Cal. 604, 610-611, 12 P.2d 436* ; *see also* Ch. 23, *Real Property Sales Agreements*].

PRACTICE TIP:

Specific Terms to Include in Option to Purchase Provision. The method by which the purchase price must be paid (for example, all cash, or cash and notes) should be described in the lease. Provisions for escrow in the event the option is exercised, such as establishment of the escrow, payment of escrow fees, proration of rents and property taxes, and the time for closing escrow, should be included. In addition, the required state of title to the property at the time of closing should be described and a provision requiring title insurance for the property as agreed on by the parties should be included. *By Publisher's Editorial Staff.*

[j] Arbitration Clause Requirements

If a lease contains an option to purchase as well as provisions requiring binding arbitration of any dispute between the landlord and tenant [*see Code Civ. Proc. § 1298(a)*], the arbitration provision must comply with certain statutory format requirements and the lease must contain a notice required by statute regarding arbitration [*Code Civ. Proc. §§ 1298-1298.8*]. These format and notice requirements are discussed in *§ 34C.280[1][e]*.

[2] FORM

Option to Purchase Premises

Option to Purchase Premises

Section _____. Landlord hereby grants to Tenant an option to purchase the Premises on the following terms and conditions:

(a) Tenant may exercise this option on or before [*termination date of option exercise period*], but not earlier than [*commencement date of option exercise period*], provided Tenant is not then in default under this lease, by opening

escrow with and by depositing in escrow at the [*insert description or location*] office of the [*name*] Title Company a copy of this lease together with an initial deposit of $ _____ (to be applied toward the purchase price for the Premises), and by giving written notice to Landlord that those deposits have been made in escrow.

(b) The full purchase price for the Premises shall be the sum of $ _____, payable as follows:

(1) The sum of $ _____, less the amount of the initial deposit paid by Tenant into escrow at the time the option is exercised, shall be paid in cash on or before the close of escrow.

(2) The balance of the purchase price shall be evidenced by a promissory note executed by Tenant in the form attached and labeled "Exhibit _____." The note shall bear interest at the rate of _____ percent per annum and shall be payable to Landlord in equal monthly installments of principal and interest commencing _____ [*number, e.g.,* 30] days after close of escrow, and shall be due and payable _____ [*number, e.g.,* 15] years after the close of escrow. Tenant shall have the right at any time to prepay all or any portion of the balance on the note without penalty.

(c) The promissory note described in subsection (b) of this Section shall be secured by a deed of trust in the usual and customary form supplied by the [*name*] Title Company for use in _____ County, California, and shall be a first lien on the Premises.

(d) On close of the escrow opened by Tenant to exercise this option, Landlord shall convey to Tenant good and marketable title to the Premises, as evidenced by a standard form CLTA title insurance policy in the full amount of the purchase price issued by the [*name*] Title Company, subject only to current real estate taxes and assessments and [*set forth any other easements or restrictions of record agreed on by the parties as exceptions to title*].

(e) All real property taxes levied or assessed against the Premises as shown by the latest available tax bill shall be prorated between Tenant and Landlord on the basis of 30-day months as of 12:00 midnight on the date of the close of escrow. Any bonds or improvement assessments that constitute a lien on the Premises shall, on the close of escrow, be assumed by Tenant.

(f) On exercise of this option and close of the escrow for the sale of the Premises to Tenant:

(1) Landlord shall pay the full cost of the title insurance policy required by this section, the full cost of preparing as well as executing and acknowledging any deeds or other instruments required to convey title to the Premises to Tenant, and any tax imposed on the conveyance of title to Tenant under the Documentary Transfer Tax Act.

(2) Tenant shall pay the full cost of preparing as well as executing and acknowledging the promissory note and deed of trust required by this section and shall also pay the cost of recording the deed or other instrument conveying title to the premises to Tenant and the cost of recording the deed of trust required by this section.

(3) Any escrow fee charged by the escrow holder in addition to the cost of the title insurance policy required by this section shall be paid by Landlord and Tenant in equal proportions.

(g) Escrow for the sale of the Premises shall close on or before [*describe escrow period, e.g.,* 60 days after the date escrow is opened by Tenant in accordance with subsection (a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal

Property LawPurchase & SaleOption ContractsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
6. Transfer of Interests Under Lease

17-34C California Legal Forms--Transaction Guide § 34C.264

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.264 Right of First Refusal to Purchase Leased Premises

[1] Comment

[a] Use of Form

This form grants the tenant a right of first refusal to purchase the leased premises. The tenant may exercise this right either when the landlord gives the tenant notice of the landlord's election to sell the property, or when the landlord receives a bona fide offer from a third party acceptable to the landlord. The terms and conditions of sale are to be as stated in the landlord's notice of election to sell or in the third-party offer.

A right of refusal is generally only granted by a landlord to a tenant of a freestanding, rather than multitenant, building. Furthermore, tenants of a freestanding building who enter into long-term leases with the landlord may be most successful in bargaining for a right of first refusal.

For lease provisions granting the tenant an option to purchase the leased premises, see *§ 34C.263*.

[b] Distinguished From Option to Purchase

A grant of a right of first refusal to purchase (or to lease) property has been upheld as valid [*Nelson v. Reisner (1958) 51 Cal. 2d 161, 166-167, 331 P.2d 17]* . A right of first refusal is not the same as an option to purchase. An option to purchase the leased premises [*see § 34C.263*] is an agreement by which an owner vests another with the exclusive right to buy certain property at a stipulated price, within a limited time [*C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 66, 229 Cal. Rptr. 33* ; *see Arden Group, Inc. v. Burk (1996) 45 Cal. App. 4th 1409, 1414, 53 Cal. Rptr. 2d 492]* . A right of first refusal, however, usually does not give the tenant an unconditional option to purchase the property, but is worded so as to be conditioned on the owner's desire or election to sell [*Purdy v. Carlson (1953) 118 Cal. App. 2d 526, 528, 258 P.2d 94]* . Thus, when the owner decides to sell after granting a right of first

refusal to a tenant, he or she is required to offer the property to the tenant first [*Mercer v. Lemmens (1964) 230 Cal. App. 2d 167, 170, 40 Cal. Rptr. 803]* . The events which typically trigger the landlord's obligation to offer the property to a tenant include the owner's receipt of a bona fide offer of sale from a third party and/or the landlord's stated intention to sell the property on certain terms and conditions [*see* form in [2], *below*].

When a right of first refusal is conditioned on receipt of a bona fide third party offer to purchase the property, the right is not triggered by the mere conveyance of that property to a third party. Generally speaking, it is the concurrence of both an arms' length transaction and change in control of the property that characterizes a bona fide sale. The absence of the first factor, as in the case of a gift, or the second factor, as in the case of a transfer between entities owned and controlled by the same individuals, usually means that there was no sale, or no bona fide offer for sale, within the meaning of the typical right of first refusal. The court must look through the formalities of the transaction to determine its true nature. Courts will not tolerate schemes designed to avoid a contractual right. However, legitimate business or personal reasons, untainted by an intent to avoid a contractual preemptive right, weigh in favor of finding that the right was not triggered by the transaction [*Hartzheim v. Valley Land and Cattle Co. (2007) 153 Cal. App. 4th 383, 393, 62 Cal. Rptr. 3d 815* (right of first refusal to purchase property in commercial lease not triggered when family partnership transferred interest in property to grandchildren, because transfer was not made pursuant to a "bona fide offer from any third party for the purchase" of the property as required by parties' agreement)].

[c] Exercise of Right of First Refusal

The specific events that will enable a tenant to exercise a right of first refusal should be described. For example, a tenant may be granted the right to purchase the leased property if the landlord elects to sell the property [*see* subsection (a) of form] and/or if the landlord wants to sell the property and receives a bona fide offer to purchase from a third party [*see* subsection (b) of form].

In addition to describing the events that will or will not enable the tenant to exercise the right of first refusal, the lease should set forth the time limitations for the tenant's exercise.

[d] Price and Terms

Unlike an option to purchase, a provision granting a right of first refusal usually does not specify a purchase price and terms of purchase. Rather, the provision typically declares that the price and terms are to be determined by the event giving rise to the tenant's right to exercise the right, for example, the same as those offered by a third party purchaser. The price and terms become definite and ascertainable on the occurrence of the event or events specified in the lease [*see Moreno v. Blinn (1947) 81 Cal. App. 2d 852, 856, 185 P.2d 332]* . For example, the terms are sufficiently ascertainable when the purchase price is determinable by the tenant being given the right to purchase the premises on the terms and conditions of any bona fide offer to purchase the property by any third person [*Purdy v. Carlson (1953) 118 Cal. App. 2d 526, 527, 258 P.2d 94]* .

[e] Exclusions From Right

If the landlord wants to exclude certain transfers from the tenant's right of first refusal to purchase the leased premises, the lease should describe the exclusions. For example, a landlord might want to exclude transfers by the landlord to his or her specific relatives, to an entity owned by the landlord, or on the landlord's death. A lender with a security interest in the landlord's property may insist that the right of first refusal contained in a lease not apply to a foreclosure by the lender, a deed in lieu of foreclosure, or a sale of the leased premises by the lender who has foreclosed. subsection (c) of this form includes the above exclusions.

[f] Matching Terms of Third-Party Offer

In contrast to an option to purchase, under which the terms of the exercise must ordinarily be identical to terms of the

offer, no such matching is required for the exercise of a right of first refusal. Because the party exercising a right of first refusal is stepping into a contract made by a third party, the court must consider commercial realities and allow modifications consistent with the intent of the parties whose contract created the right of first refusal [*Arden Group, Inc. v. Burk (1996) 45 Cal. App. 4th 1409, 1414, 53 Cal. Rptr. 2d 492* (court upheld right of first refusal notwithstanding modifications to third party offer based on intended use of the property)].

Furthermore, the covenant of good faith and fair dealing implied in every contract requires the landlord to offer an existing tenant who has a right of first refusal the same terms included in a third party offer agreed to by the landlord [*Mitchell v. Exhibition Foods, Inc. (1986) 184 Cal. App. 3d 1033, 1043-1044, 229 Cal. Rptr. 535* (landlord's refusal to offer existing tenant the options to extend included in proposed lease with third party breached the covenant of good faith and fair dealing, *citing Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 768, 206 Cal. Rptr. 254, 686 P.2d 1158*)].

[g] Covenant Running With the Land and Assignability

Like an option to purchase, a right of first refusal is generally assignable by the tenant, subject to restrictions contained in the lease [*C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 69, 229 Cal. Rptr. 33]* and is a covenant running with the land [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484, 66 Cal. Rptr. 70]* . If the landlord wants to limit assignability, the lease must set forth specific limitations. In subsection (d) of this form, the tenant is restricted from assigning the right of first refusal. subsection (e) of this form also provides that the right terminates on a sale of the premises by the landlord.

[2] FORM

Right of First Refusal to Purchase Premises

Right of First Refusal to Purchase Premises

Section _____. (a) Landlord agrees that Landlord shall not sell the Premises during the term of this lease, except subject to the lease. Landlord further agrees that it will not sell the Premises to any person until Landlord has given to Tenant notice in writing of its intent to sell, specifying the price and terms of the contemplated sale. Within [*number, e.g.,* 30] days after Landlord gives Tenant written notice of Landlord's intent to sell, Tenant shall have the right to purchase the Premises at the same price and on the same terms and conditions set forth in Landlord's written notice of intent to sell. To exercise its option, Tenant must, within the same [*same time period as above, e.g.,* 30-day] period, deposit in escrow with any escrow [*or* title] company in _____ County, California, all moneys and instruments required by the terms of Landlord's notice of intent to sell to be paid or delivered to Landlord on close of escrow and shall also give Landlord written notice of the deposit. If Tenant fails to exercise the right in accordance with the provisions of this section, Landlord may sell the Premises to any other person for the price and on the terms contained in the notice.

(b) If at any time during the term of this lease Landlord receives from any third party a bona fide offer to purchase the Premises at a price and on terms acceptable to Landlord, Landlord shall give written notice of the offer to Tenant. Within [*number, e.g.,* 30] days after Landlord gives Tenant written notice of the third-party offer, Tenant shall have the right to purchase the Premises at the same price and on the same terms and conditions set forth in the third-party offer. To exercise its right, Tenant must, within the same [*same time period as above, e.g.,* 30-day] period, deposit in escrow with any escrow [*or* title] company in _____ County, California, all moneys and instruments required by the terms of the offer to be paid or delivered to Landlord on close of escrow and shall also give Landlord written notice of the deposit. In the event Tenant fails to exercise the option to purchase in accordance with the provisions of this section, Landlord may sell the Premises to the third party making the offer on the same terms and conditions set forth in that offer. If for any reason the Premises are not sold to the party making the offer, Landlord shall give Tenant the same right to purchase the Premises on receiving any subsequent offer from any third party that is acceptable to

Landlord.

[*Optional:*]

(c) The right of first refusal granted to Tenant shall exclude the following transfers: any transfer resulting from the Landlord's death; any transfer by Landlord to Landlord's spouse or any of Landlord's children; and any transfer by Landlord to any entity in which Landlord holds a 51 percent or greater ownership interest. The right of first refusal granted to Tenant also shall not apply in the event of foreclosure (or a deed in lieu of foreclosure) or to a sale of the leased premises by a lender who has foreclosed.

[*CONTINUE*]

(d) Tenant may not assign the rights granted under this Section either separately or together with a transfer of Tenant's leasehold interest, and any purported assignment shall be null and void.

(e) If this property is sold to any third party during the term of this lease, then the provisions of this section shall thereafter be of no further force or effect. The transfer of landlord's title to the Premises by will or intestacy shall not be deemed to be a sale under the provisions of this section.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of First RefusalReal Property LawPurchase & SaleOption ContractsRights of PreemptionReal Property LawRestrictive CovenantsCovenants Running With Land



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17-34C California Legal Forms--Transaction Guide §§ 34C.265-34C.269

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.265[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
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7. Termination and Other Remedies

17-34C California Legal Forms--Transaction Guide § 34C.270

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.270 Landlord's Damages on Termination of Lease

[1] Comment

[a] Use of Form

This form is a provision for a landlord's recovery if the lease is terminated due to the tenant's breach. That recovery is prescribed by *Civ. Code § 1951.2* which states that certain damages are recoverable only if the lease provides for them. A lease that provides for statutory damages in the event the lease is terminated [*see* form in [2], *below*] may also contain a provision that permits the landlord to continue a lease in effect after the tenant abandons the property and breaches the lease [*see § 34C.271*].

For full coverage of abandonment and termination, see Ch. 35B, *Modification and Termination of Leases* .

[b] Statutory Damages

Except when a lease provides that a landlord may continue the lease in effect after a breach and abandonment by the tenant [*see Civ. Code § 1951.4*; *see also § 34C.271*], if a tenant breaches the lease and abandons the property before the end of the lease term, or if the tenant's right to possession is terminated by the landlord because of a breach of the lease, the lease terminates [*Civ. Code § 1951.2*]. On termination, the landlord may recover from the tenant four basic types of damages [*see Civ. Code § 1951.2(a)*].

First, the landlord may recover the worth at the time of the award of the unpaid rent that had been earned at the time of the termination [*Civ. Code § 1951.2(a)(1)*]. This language means unpaid rent earned up to the time of termination of a lease pursuant to abandonment or an unlawful detainer action; the statutory language "at the time of award" refers to the time of an award for damages under the statute and not to the time of an unlawful detainer award [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* . The "worth at the time of

award" is computed by allowing interest at the rate specified in the lease or, if no such rate is specified, at the legal rate [*Civ. Code § 1951.2(a)(1), (b)*].

Second, the landlord may recover the worth at the time of the award of the amount by which the unpaid rent that would have accrued between the time of termination and the time of the award exceeds the amount of rental loss that the tenant proves the landlord could have reasonably avoided [*Civ. Code § 1951.2(a)(2)*; *see* [d], *below*, for discussion of landlord's duty to mitigate]. This standard for damages covers unpaid rent accruing between the lease's termination and the time of a judgment for damages under *Civ. Code § 1951.2* [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* . The "worth at the time of award" is computed by allowing interest at the rate specified in the lease or, if no such rate is specified, at the legal rate [*Civ. Code § 1951.2(a)(1), (b)*].

Third, the landlord may recover the worth at the time of the award of the amount by which the unpaid rent for the balance of the term after the time of the award exceeds the amount of rental loss that the tenant proves could be reasonably avoided [*Civ. Code § 1951.2(a)(3), (c)*; *see* [d], *below*, for discussion of landlord's duty to mitigate]. "Worth at the time of the award" of future damages is computed by discounting the amount of the award at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus 1 percent [*Civ. Code § 1951.2(b)*].

Finally, the landlord may recover any other amounts necessary to compensate him or her for all the damages proximately caused by the tenant's failure to perform his or her lease obligations or that, in the ordinary course of things, would be likely to result from the tenant's failure to perform [*Civ. Code § 1951.2(a)(4)*].

For purposes of the second and third items of damages discussed above, the amount of rental loss that could be, or could have been, reasonably avoided is computed by taking any reasonable use of the leased property into account [*Civ. Code § 1997.040(a)*]. However, if the lease contains a legally enforceable restriction on use, the computation must take into account the restricted use, except to the extent that the tenant proves that under all the circumstances enforcement of the restriction would be unreasonable. Restrictions related to any building or complex in which the leased property is located must be taken into consideration as well as restrictions related to the leased property itself [*Civ. Code § 1997.040(a)*]. For a general discussion of restrictions on use, see *§ 34C.230[1]*.

[c] Effect of Unlawful Detainer Action or Tenant Remaining in Possession

The landlord's right to recover damages for loss of the benefits of the lease under *Civ. Code § 1951.2* is independent of his or her right to bring an action for unlawful detainer to recover the possession of the property. The damages are recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action [*Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1672-1673, 1678, 11 Cal. Rptr. 2d 278* ; *Danner v. Jarrett (1983) 144 Cal. App. 3d 164, 166-167, 192 Cal. Rptr. 535]* .

Likewise, if the landlord allows the tenant to remain in possession after the lease's forfeiture, the landlord may still recover damages for loss of the benefits of the lease. The language of *Civ. Code § 1951.2* does not require a termination of actual possession for the landlord to recover damages. All that is required is the tenant's breach and a termination of the tenant's right of possession [*Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1678, 11 Cal. Rptr. 2d 278]* .

A judgment in unlawful detainer declaring the forfeiture of the lease or agreement does not relieve the tenant from liability under *Civ. Code § 1951.2* [*Code Civ. Proc. § 1174.5*].

[d] Landlord's Duty to Mitigate

[i] Nature of Duty

A landlord has the duty to mitigate damages for unpaid rent accruing after the time a lease is terminated, that is, rent

accruing from the time of termination until the time of a damages award [*see Civ. Code § 1951.2(a)(2)*] or from the time of termination through the lease term's balance [*see Civ. Code § 1951.2(a)(3), (c)*]. The tenant is entitled to offset against the damages otherwise recoverable by the landlord, amounts the landlord has received or will receive from a reletting and amounts the tenant proves could have been obtained by the landlord in a good faith and reasonable effort to relet the leased premises [*Green v. Smith (1968) 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796]* . Although a landlord has a duty to mitigate damages, the tenant has the burden of proving any claimed offset [*see Civ. Code § 1951.2(a)(2), (3)*]. Efforts by the landlord to mitigate the damages caused by the tenant's breach of the lease do not waive the landlord's right to recover damages provided for by statute [*Civ. Code § 1951.2(d)*; *see* [b], *above*].

[ii] Notice of Reletting the Premises

Under limited circumstances, a landlord is required to give a tenant notice that the landlord has relet the premises. The notice is required by statute only if the following occurs [*Civ. Code § 1951.7(b)*]:

- The tenant has made an "advance payment," that is, a prepayment of rent or a deposit to secure faithful performance of the lease's terms, or another substantially equivalent payment, but excluding any payment that does not exceed the amount of one month's rent [*see Civ. Code § 1951.7(a)*];

- The lease is terminated in accordance with *Civ. Code § 1951.2* (termination on tenant's breach);

- The tenant has made a written request to the landlord that the tenant be given notice of reletting; and

- The amount of rent due and unpaid at the time of termination does not exceed the amount of the advance payment [*see Civ. Code § 1951.7(c)*].

The contents of the notice and its required method of delivery are prescribed by statute [*see Civ. Code § 1951.7(c)*].

[e] Other Remedies

Civ. Code § 1951.2 does not affect the right of the landlord to equitable relief, when appropriate [*Civ. Code § 1951.8*], or to valid liquidated damages [*see Civ. Code §§ 1671, 1951.5*; *see also § 34C.273*]. Subject to certain limitations for double recovery, *Civ. Code § 1951.2* also does not affect actions for unlawful detainer, forcible entry, and forcible detainer [*Civ. Code § 1952(b)*]. The subject of unlawful detainer is covered in CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[2] FORM

Termination and Remedy in Damages

Termination and Remedy in Damages

Section _____. If Tenant breaches this lease and abandons the property before the end of the term, or if Tenant otherwise breaches this lease, Landlord shall have the right to terminate this lease by giving written notice of termination to Tenant. On termination, Landlord may recover from Tenant:

(a) The worth at the time of award of the unpaid rent that had been earned at the time of termination;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award [*or designate shorter period*] exceeds the amount of rental loss for that period that Tenant proves could have been reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform the obligations under this lease, or that in the ordinary course of things would be likely to result therefrom.

Measure of Damages

Section _____. The "worth at the time of award" of the amounts referred to in subsections (a) and (b) of Section [*number of preceding section*] of this lease shall be computed by allowing interest at the rate of _____ percent [*insert a lawful rate or state:* at the then-legal rate]. The "worth at the time of award" of the amount referred to in subsection (c) of Section [*number of preceding section*] is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesCompensatory DamagesReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsDamagesMitigationReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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17-34C California Legal Forms--Transaction Guide § 34C.271

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.271 Landlord's Right to Continue Lease in Effect

[1] Comment

[a] Use of Form

This form sets forth provisions granting a landlord the right to continue a lease in effect and collect rent as it becomes due after a tenant's breach and abandonment. This remedy is available to a landlord only if the lease provides for it [*Civ. Code § 1951.4(a)*; *see* [b], *below*]. Otherwise, the lease terminates after the abandonment and breach, and the landlord is entitled to recover statutory damages from the tenant [*Civ. Code § 1951.2*; *see § 34C.270*].

The availability of the remedy of continuing the lease in effect after breach and abandonment depends not only on its inclusion in the lease, but is also subject to two other conditions: (1) the landlord may not terminate the tenant's right to possession [*see* [d], *below*], and (2) the tenant must have the right to assign the lease or sublet the premises, subject only to reasonable limitations [*see Civ. Code § 1951.4*; *see also § 34C.260[1]* for discussion of the tenant's right to assign or sublet].

[b] Provision for Remedy

If a landlord is to have the statutory remedy of continuing a lease in effect and recovering rent as it becomes due after a breach and abandonment, the lease must contain a provision providing for this remedy [*Civ. Code § 1951.4(a)*]. The provision may be of any type that describes the remedy. In addition, a provision in the lease in substantially the following form satisfies the requirement [*Civ. Code § 1951.4(a)*]:

> The lessor has the remedy described in *California Civil Code Section 1951.4* (lessor may continue lease in effect after tenant's breach and abandonment and recover rent as it becomes due, if tenant has right to sublet or assign, subject only to reasonable limitations).

This statutory language has been incorporated, with minor stylistic modifications, into the form in [2], *below*.

[c] Tenant's Right to Assign or Sublet

The remedy of continuing a lease in effect after a tenant's breach and abandonment is not available unless at least one of the following conditions is satisfied:

- The lease permits (or does not prohibit or otherwise restrict) subletting, assignment, or both [*Civ. Code § 1951.4(b)(1)*];

- The lease permits subletting, assignment, or both, subject to express standards or conditions, provided the standards and conditions are reasonable at the time the lease is executed [*see Civ. Code § 1951.4(b)(2)* (an express standard or condition is presumed to be reasonable, and this presumption affects the burden of proof)] and the landlord does not require compliance with any standard or condition that has become unreasonable at the time the tenant seeks to sublet or assign [*Civ. Code § 1951.4(b)(2)*]; or

- The lease permits subletting, assignment, or both, with the landlord's consent, and the lease either provides that the consent will not be unreasonably withheld or includes a standard implied by law that consent will not be unreasonably withheld [*Civ. Code § 1951.4(b)(3)*].

The provisions for assignment and subletting based on these statutory provisions are included in § 34C.260[2].

[d] Continuation of Right of Possession

The remedy of continuing a lease in effect after a tenant's breach and abandonment is conditioned, among other requirements, on the landlord's not terminating the tenant's right to possession [*see Civ. Code § 1951.4(b)*]. Even though a tenant has breached the lease and abandoned the property, the lease continues in effect for as long as the landlord does not terminate the tenant's right to possession, and the landlord may enforce all the landlord's rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, provided the lease contains such a remedy [*see* [b], *above*] and permits, subject only to reasonable limitations, the tenant to assign or sublet [*Civ. Code § 1951.4(b)*; *see* [c], *above*].

For this purpose, the following do not constitute a termination of the tenant's right to possession [*Civ. Code § 1951.4(c)*]:

- Acts of maintenance or preservation;

- Efforts to relet the property;

- The appointment of a receiver on initiative of the landlord to protect the landlord's interest under the lease; and

- Withholding consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate the tenant's rights to sublet or assign.

[e] Inconsistent Remedies as Not Incompatible

The remedy of terminating the lease for abandonment and breach [*see Civ. Code § 1951.2*; *see also § 34C.270[1]*] and the alternative remedy of the landlord's continuing the lease in effect [*see Civ. Code § 1951.4*] are inconsistent, but may

be contained within the same lease [*see Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1671-1672, 11 Cal. Rptr. 2d 278]* . In that event, the landlord has a choice about how to handle the tenant's abandonment and breach. A statutory procedure for determining that the tenant has in fact abandoned the premises, and for terminating the lease, is set forth in *Civ. Code § 1951.3* [*see* Ch. 35B, *Modification and Termination of Leases*].

[f] Other Remedies

Neither of the remedies in *Civ. Code § 1951.4* (continuing the lease) or *Civ. Code § 1951.2* (terminating lease and recovering damages) prevents a landlord from obtaining equitable relief, if appropriate [*Civ. Code § 1951.8*]. The landlord may also bring actions for forcible entry or detainer, or unlawful detainer [*Civ. Code § 1952*]. However, if the landlord obtains possession of the property under a judgment for restitution of the premises [*see Code Civ. Proc. § 1174*], he or she is no longer entitled to continue the lease in effect [*see Civ. Code § 1951.4*] unless the tenant thereafter petitions for and obtains restoration to the premises [*see Civ. Code § 1952(c)*; *Code Civ. Proc. § 1179*].

[2] FORM

Landlord's Right to Continue Lease in Effect

Landlord's Right to Continue Lease in Effect

Section _____. If Tenant breaches this lease and abandons the leased premises, Landlord shall have the right to continue this lease in effect for as long as Landlord does not terminate Tenant's right to possession of the leased premises, and Landlord may enforce all of Landlord's rights and remedies under this lease, including the right to recover the rent as it becomes due.

Nonterminating Actions

Section _____. No action by Landlord, except a written notice of termination given to Tenant, shall be deemed a termination of this lease. Specifically, the following do not constitute a termination of Tenant's right to possession:

(a) Landlord's acts of maintenance or preservation of the property.

(b) Landlord's efforts to relet the property.

(c) The appointment of a receiver on Landlord's initiative to protect Landlord's interest under this lease.

(d) Landlord's withholding of consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate Tenant's rights to sublet or assign as specified in this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34C California Legal Forms--Transaction Guide § 34C.272

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.272 Right to Cancel Lease on Occurrence of Stated Event

[1] Comment

[a] Use of Form

This form is a set of alternative lease provisions that grant the landlord, the tenant, or both, the right to cancel the lease before expiration of its term on the occurrence of a stated event. The sale of the leased premises is an example of an event entitling the landlord to cancel the lease. For a specific provision giving the landlord the right to terminate the lease if the landlord is unable to obtain financing, see *§ 34C.251*.

Another provision of the form permits the landlord to terminate a percentage rent lease if the gross receipts from the tenant's business fall below a minimum stated amount for a specified period [*see Carter v. Adler (1955) 138 Cal. App. 2d 63, 67, 291 P.2d 111]* . For a discussion of percentage rent leases, see *§ 34C.200[1][e]*. For a percentage rent provision, see *§ 34C.200*, Section 2.02.

In the form in [2], *below*, loss of the tenant's business license or a governmental prohibition against operation of the tenant's business are examples of events giving rise to the tenant's right of cancellation.

PRACTICE TIP:

Tenant Should Evaluate Risk of Not Obtaining Business License. Although landlords are usually opposed to granting a tenant a right to cancel the lease if the tenant is unable to obtain a license for its intended use, a tenant operating a business such as an adult bookstore or theater that is at risk of losing a business license or encountering governmental prohibition may want to insist on inclusion of such a provision. *By Publisher's Editorial Staff.*

[b] Effect on Lease of Right to Cancel

A provision in a lease authorizing the landlord or tenant to cancel the lease on certain conditions does not negate the existence of a lease or create a mere tenancy at will [*Crocker-Anglo Nat. Bank v. Roberts (1960) 177 Cal. App. 2d 614, 616, 2 Cal. Rptr. 568]* . For example, the lease of store premises in one case provided that the landlord could terminate during a four-month period in each of three years of the lease on 60 days' notice, but only if the landlord sold the building containing the leased premises or leased a major portion of it for a term of years. The court stated that because the landlord could cancel only at limited periods and only on the sale or lease of the building, thus limiting the landlord's own freedom of action, the landlord clearly conferred on the tenant rights amounting to a leasehold interest. The right to cancel is a condition that does not negate the existence of a lease [*Crocker-Anglo Nat. Bank v. Roberts (1960) 177 Cal. App. 2d 614, 616, 2 Cal. Rptr. 568]* .

[2] FORM

Cancellation of Lease

ARTICLE _____
CANCELLATION OF LEASE

Cancellation by Landlord

Section _____. Landlord shall have the right to cancel or terminate this lease before expiration of its original term [or any extended term] as follows: [*choose one of following alternatives, or otherwise describe circumstances giving rise to right:*]

[*First alternative: If landlord has right to cancel the lease on sale of leased premises.*]

At any time on or after [*date*], Landlord may sell the leased premises to a third party and terminate this lease in accordance with the provisions of this Section. To exercise this right, Landlord shall give Tenant a written notice of the pending sale and termination of this lease. The notice shall state the date by which Tenant is required to vacate and surrender the premises ("the termination date"), which must be at least [*number, e.g.,* 30] days after the date of Landlord's written notice to Tenant. As a further condition to Landlord's right to terminate this lease under this Section, Landlord shall:

(a) Prorate as of the termination date and refund to tenant any advance rent paid by Tenant that is not yet due before the termination date, and the bonus paid by Tenant to Landlord on execution of this lease and described in Section [*section number of lease pertaining to bonus*];

(b) Refund the security deposit deposited by Tenant to Landlord, under the provisions of Section [*section number of lease pertaining to security deposit*]; and

(c) Pay to Tenant the sum of $ _____ as a bonus for the cancellation of this Lease.

Tenant agrees to vacate and surrender the leased premises on or before the termination date specified in Landlord's termination notice. Landlord shall make any payment to Tenant required by this Section on or before [*number, e.g.,* 10] days after Tenant surrenders possession of the premises to Landlord. The provisions of this section shall not apply to any forced sale of the leased premises, such as foreclosure or condemnation.

[*Second alternative: If lease is percentage lease, and landlord has the right to cancel if tenant's gross receipts fall below stated amount.*]

If the gross receipts of Tenant's business conducted on the leased premises fall below the sum of $ _____ per month for a period of [*define applicable time period, e.g.,* three consecutive months], Landlord shall have the right to terminate this lease. Landlord shall exercise this right by giving a notice to Tenant of the termination. The notice shall include the date by which Tenant is required to vacate and surrender the premises ("the termination date"), which shall be at least [*number, e.g.,* 30] days after the date of Landlord's termination notice to Tenant. Tenant shall vacate and surrender the leased premises to Landlord on or before the termination date.

Cancellation by Tenant

Section _____. Tenant shall have the right to cancel or terminate this lease at any time [on or after _____ (*date*)], on the happening of any one or more of the events set forth below, by giving to Landlord written notice of Tenant's election to terminate this lease. The notice shall specify a termination date that shall be at least [*number, e.g.,* 60] days after the date of Tenant's notice to Landlord. On or before the termination date, Tenant shall vacate and surrender the premises to Landlord [and shall pay to Landlord the sum of $ _____ as a bonus for each full _____ (year or month) or portion thereof of the unexpired term of this lease].

(a) On the loss by Tenant of Tenant's license or permit to conduct on the leased premises the business described in Section _____ of this lease [*or* to conduct the business of _____ (*specify*) on the leased premises], whether that loss is by forfeiture, suspension, or revocation, or by refusal of the appropriate governmental agency or bureau to renew that license or permit on its expiration.

(b) On the prohibition, by statute, ordinance, administrative rule or regulation, as now exists or hereafter may provide, of Tenant's conducting on the leased premises [the business described in Section _____ of this lease or the business of _____ (*specify*)].

(c) If the gross receipts of Tenant's business conducted on the leased premises fall below the sum of $ _____ per month for a period of [*define applicable time period, e.g.,* three consecutive months], notwithstanding Tenant's good faith efforts to maximize gross receipts.

(d) [*Describe any other events that will entitle tenant to prematurely terminate the lease*].

Effect of Termination

Section _____. If this lease is terminated in accordance with the provisions of this article, it shall be null and void as of the termination date set forth in Landlord's or Tenant's notice of termination or as of the date Tenant actually surrenders possession of the leased premises to Landlord, whichever is later. Before that time, the parties shall be bound by all terms, covenants, and conditions of this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34C California Legal Forms--Transaction Guide § 34C.273

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.273 Liquidated Damages Provision

[1] Comment

[a] Use of Form

This form is a liquidated damages provision for use in a nonresidential lease. It should be modified as appropriate to reflect the particular nature of the property, the circumstances of the contemplated lease, and the agreement of the parties. However, the customized provision must conform to certain rules discussed in [b][i], *below*, governing the validity of liquidated damages provisions in leases.

For further discussion of the law applicable to liquidated damages provisions in leases, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

For a lease provision that provides for liquidated damages in the event the landlord fails to construct a building within the time specified in the lease, see *§ 34C.243[2]*. A liquidated damages provision for a residential lease is included in Ch. 34B, *Residential Leases*.

[b] Liquidated Damages

[i] Statutory Rules: Residential vs. Nonresidential Property

The statutory rules for liquidated damages applicable to leases [*see Civ. Code §§ 1671, 1951.5*] depend on whether the lease is one for residential or for nonresidential property. A liquidated damages provision in a lease of real property for use as a dwelling by the party against whom damages are sought or those dependent on the party for support [*see Civ. Code § 1671(c)(2)*] is void except when the parties to the lease agree in the lease on an amount that will be presumed to be the amount of damage sustained by a breach of the lease, when, from the nature of the case, it would be

impracticable or extremely difficult to fix the actual damages [*Civ. Code §§ 1671(d), 1951.5*].

However, with respect to leases of nonresidential property, a provision liquidating damages for a breach of the lease is valid unless the party seeking to invalidate the provision establishes that the provision is unreasonable under the circumstances existing at the time the lease was made [*Civ. Code § 1671(b)*].

[ii] Burden of Proof

The party seeking to invalidate a liquidated damages provision has the burden of proving that the provision is unreasonable [*see Civ. Code § 1671(b)*]. All the circumstances existing at the time of the contract's making are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract [*Weber, Lipshie & Co. v. Christian (1997) 52 Cal. App. 4th 645, 654-655, 60 Cal. Rptr. 2d 677]* .

PRACTICE TIP:

Include Factual Basis for Liquidated Damages. Many practitioners find it prudent to memorialize in the liquidated damages clause the factual basis and circumstances for the parties' agreement to a specific amount of liquidated damages, and to recite the parties' agreement that the amount specified is reasonable under the circumstances stated in the lease. Their rationale is that the challenging party will have a much more difficult time proving the invalidity of the provision after having agreed in writing to its specific factual and circumstantial basis. *By Publisher's Editorial Staff.*

[iii] Pre-July 1, 1978 Leases

The rules on liquidated damages discussed in [b][i], *above*, apply to all leases executed on or after July 1, 1978 [*Civ. Code § 1951.5* (operative July 1, 1978)]. Liquidated damages provisions in leases executed on or after July 1, 1971, but before July 1, 1978, are governed by the same requirements applicable to residential leases executed on or after July 1, 1978 [former *Civ. Code § 1670* (repealed effective July 1, 1978, Stats. 1977, ch. 198, § 2); *now see Civ. Code § 1671* (amended effective July 1, 1978, Stats. 1977, ch. 198, § 5)]. For leases executed before July 1, 1971, liquidated damages provisions are generally invalid [*see* 9 Cal. Law Rev. Comm. 170, 419 (1969)].

[2] FORM

Liquidated Damages

Liquidated Damages

Section _____. If Landlord [*or* Tenant] fails to [*describe omission giving rise to payment of liquidated damages, e.g.,* deliver possession of the leased premises within 30 days of the Commencement Date set forth in this lease], Landlord [*or* Tenant] shall pay to Tenant [*or* Landlord] as liquidated damages, the sum of $ [*specify amount of damages, e.g.,* 5,000, plus the sum of $ _____ per day for each day beyond the 30-day period after the Commencement Date that the failure to deliver possession continues]. The parties agree that the sum designated herein as liquidated damages represents a reasonable approximation of the damages Tenant [*or* Landlord] is likely to suffer from [*describe omission giving rise to payment of liquidated damages, e.g.,* Landlord's failure to deliver possession of the leased premises on or before the time set forth in this section], given the following facts, which are hereby agreed to and acknowledged by the parties: [*state factual basis to support liquidated damages, e.g.,* Tenant has

given notice of its intention to vacate to its present Landlord, and requires possession of the leased premises not later than the date set forth in this section to continue its business with a minimum of interruption and of loss of income and to minimize its relocation expense].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofAllocationReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsResidential Leases



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17-34C California Legal Forms--Transaction Guide § 34C.274

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.274 Attorneys' Fees Provision

[1] Comment

[a] Use of Form

This form is a provision awarding attorneys' fees to the party prevailing on an action on a lease. Except as otherwise provided by statute, in the absence of a contractual attorneys' fees provision, the party employing an attorney must pay that attorney's fees [*Trope v. Katz (1995) 11 Cal. 4th 274, 278, 45 Cal. Rptr. 2d 241, 902 P.2d 259* ; *International Industries, Inc. v. Olen (1978) 21 Cal. 3d 218, 221-222, 145 Cal. Rptr. 691, 577 P.2d 1031* ; *see* Civ. Code § 1021]. For a general discussion of attorneys' fees provisions in leases, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

PRACTICE TIP:

Tip for Landlord's Attorneys' Fees. In drafting the form for attorneys' fees, the landlord's attorney should keep in mind the essential principle that "tort" causes of action are unlikely to be available against any tenant, but that a tenant may well wish to utilize such causes of action against the landlord. Thus, the landlord's attorney would wish, in view of the California Supreme Court decision in *Santisas v. Goodin* [*see Santisas v. Goodin (1998) 17 Cal. 4th 599, 614, 616-619, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* , to narrowly draft the attorneys' fees clause to limit causes of action sounding in contract, including actions for unlawful detainer. *By Benjamin Kaplan.*

[b] Attorneys' Fees

[i] Entitlement

If a contract provides that attorneys' fees and costs incurred to enforce the contract will be awarded either to one of the

parties or to the prevailing party, then in any action on the contract the party who is determined to be the party prevailing on the contract [*see* [ii], *below*] will be entitled to reasonable attorneys' fees and other costs, whether or not he or she is the party specified in the contract [*Civ. Code § 1717(a)*]. Such an attorneys' fees provision will be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract [*Civ. Code § 1717(a)*].

Contractual provisions for attorney fees will not be inflexibly enforced and the form of the judgment is not necessarily controlling, but must give way to equitable considerations [*Hsu v. Abbara (1995) 9 Cal. 4th 863, 873, 39 Cal. Rptr. 2d 824, 891 P.2d 804* ; *see Ecco-Phoenix Electric Corp. v. Howard J. White, Inc. (1969) 1 Cal. 3d 266, 272, 81 Cal. Rptr. 849, 461 P.2d 33* (notwithstanding attorney's fees provision in contract, fees could be recovered only to the extent necessary to protect the defendant's rights and that when the plaintiff is partially successful, the plaintiff's liability is limited to fees for the part of the defense which was successful)].

When a party sues for breach of a lease but the court rules that there is no enforceable lease, the other party may recover attorneys' fees if there was an attorneys' fee clause in the unenforceable lease. This result follows from the fact that the party attempting to enforce the lease would have been able to recover attorneys' fees had it prevailed [*Care Constr. Inc. v. Century Convalescent Centers, Inc. (1976) 54 Cal. App. 3d 701, 704-707, 126 Cal. Rptr. 761* ; *see Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 841, 217 Cal. Rptr. 856* ; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal. App. 3d 447, 459-460, 176 Cal. Rptr. 546]* .

[ii] Prevailing Party

The court, on notice and motion by a party, determines who is the party prevailing on the contract, whether or not the suit proceeds to final judgment. The party prevailing on the contract will be the party who recovered a greater relief in the action on the contract [*Civ. Code § 1717(b)*], with the following exceptions:

- The court may determine that there is no party prevailing on the contract [*Civ. Code § 1717(b)(1)*; *see Hsu v. Abbara (1995) 9 Cal. 4th 863, 876, 39 Cal. Rptr. 2d 824, 891 P.2d 804* (those parties whose litigation success is not fairly disputable may claim attorneys' fees as a matter of right under *Civ. Code § 1717*; trial court has the discretion to find no prevailing party only when the results of the litigation are mixed)].

- If the defendant's answer alleges that he or she tendered to the plaintiff the full amount to which the plaintiff was entitled, the defendant deposits the amount so tendered in court for the plaintiff, and the defendant's allegation is found to be true, then the defendant will be deemed to be the party prevailing on the contract. When a deposit has been made pursuant to this exception, the court must, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount will be allocated to the parties in the same proportion as the original funds are allocated [*Civ. Code § 1717(b)*].

In addition, a voluntary dismissal of a complaint that is based on contract causes of action will not result in the existence of any prevailing party [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 614, 619, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* . However, a voluntary dismissal of a complaint containing claims sounding in tort will not insulate a plaintiff from the award of contractually based fees related to tort causes of action [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 614, 616-619, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* .

PRACTICE TIP:

Effect of Settlement Agreement That Does Not Waive Recovery of Fees. A settlement agreement that does not contain a specific waiver of the recovery of attorneys fees and/or costs, or does not contain a provision to the effect that "each party is to bear their own attorneys fees and costs," may well expose a

party to the award of fees, particularly if some of the causes of action sound in "tort." *By Benjamin Kaplan.*

A litigant does not necessarily have to be a signatory to the contract sued on to be considered the "prevailing party" and entitled to recover attorneys' fees under *Civ. Code § 1717* [*see Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 128, 158 Cal. Rptr. 1, 599 P.2d 83* ; *Real Property Services Corp. v. City of Pasadena (1994) 25 Cal. App. 4th 375, 380-382, 30 Cal. Rptr. 2d 536* ; *Manier v. Anaheim Business Center Co. (1984) 161 Cal. App. 3d 503, 507, 207 Cal. Rptr. 508]* .

The purposes of *Civ. Code § 1717* require that it be interpreted to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he or she were a party to it, when a plaintiff would clearly be entitled to attorneys' fees should he or she prevail in enforcing the contractual obligation against the defendant [*see Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 128, 158 Cal. Rptr. 1, 599 P.2d 83]* . For example, attorneys' fees were properly awarded in a case where a tenant in a shopping center sued a cotenant and the landlord to enforce a restrictive covenant assumed by the cotenant for the tenant's benefit. In that case, the tenant was allowed the benefit of the attorneys' fee provision contained in the cotenant's lease with the landlord [*Lewis v. Alpha Beta Co. (1983) 141 Cal. App. 3d 29, 31-32, 189 Cal. Rptr. 840]* .

PRACTICE TIP:

Accounting for Expert Witness Fees in Addition to Attorneys' Fees. Counsel might also provide that *expert witness* fees may be recovered by the prevailing party. These fees are often incurred in commercial evictions, for example, accounting experts to prove what percentage rents were due and construction experts to prove that certain repairs were needed or properly made. *By Myron Moskovitz.*

[iii] Amount and Waiver

Reasonable attorneys' fees must be fixed by the court, and will be an element of the costs of suit [*Civ. Code § 1717(a)*]. The allowance for attorneys' fees extends to legal services rendered for an appeal as well as for trial [*Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 870, 73 Cal. Rptr. 808]* .

Attorneys' fees provided for by *Civ. Code § 1717* cannot be waived by the parties to any contract entered into after January 1, 1988, and any provision in such a contract that provides for a waiver of attorneys' fees is void [*Civ. Code § 1717(a)*].

[iv] Other Damages

In an action that seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not in the contract, the amounts awarded to the party prevailing on the contract under *Civ. Code § 1717* will be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *Civ. Code § 1717(c)* exceeds the amount of damages awarded the party not prevailing on the contract, the net amount will be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount [*Civ. Code § 1717(c)*].

PRACTICE TIP:

Countervailing Awards of Attorneys' Fees. It is thus possible under the ruling in *Santisas* [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* to have countervailing awards of attorneys fees. A plaintiff who prevails on contract causes of action may get an award based thereon, and a cross-complainant who prevails on tort causes of action may also get an attorneys' fees award based thereon. *By Benjamin Kaplan.*

[2] FORM

Attorney's Fees

Attorneys' Fees

Section _____. If any action or proceeding arising out of or relating to this lease, including an action for declaratory relief, is commenced by either party to this lease, then as between Landlord and Tenant the prevailing party shall be entitled to recover from the other party, in addition to any other costs and relief that may be granted, the reasonable attorneys' fees incurred in the action or proceeding by the prevailing party. That recovery shall include court costs and attorneys' fees on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
7. Termination and Other Remedies

17-34C California Legal Forms--Transaction Guide §§ 34C.275-34C.279

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

[Reserved]

§§ 34C.275[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34C RETAIL, INDUSTRIAL, AND OFFICE LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions
8. Arbitration

17-34C California Legal Forms--Transaction Guide § 34C.280

AUTHOR: by Linda Breen Pierce Myron Moskovitz Benjamin Kaplan Practice Consultants

§ 34C.280 Arbitration Provision

[1] Comment

[a] Use of Form

This form is a binding arbitration provision that may be included in a lease, and a statutory heading and notice that must accompany the provision under certain circumstances [*see* [e], *below*, for discussion of statutory requirements]. The arbitration provision incorporates by reference the rules of the American Arbitration Association. For further discussion of arbitration and an alternative arbitration clause that provides for the use of the rules set forth in the California Arbitration Act [*Code Civ. Proc. §§ 1280-1294.2*], see Ch. 23, *Real Property Sales Agreements* , and CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender).

[b] Content of Form

A lease may provide for the arbitration of disputes arising under it [*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816]* . A general arbitration agreement is independently enforceable, and has a life of its own outside the judicial system. The rules pertaining to the selection of arbitrators and the conduct of the hearings are matters almost entirely subject to the mutual desires of the parties [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 917-918, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *see Code Civ. Proc. § 1282.2*]. If the agreement to arbitrate does not set forth the procedure for initiating and conducting the arbitration, then statutory provisions govern these matters [*see Code Civ. Proc. §§ 1282-1284.2*].

The arbitration provision in the form in [2], *below*, provides that the parties will submit all controversies relating to the lease to binding arbitration to be conducted in accordance with the rules of the American Arbitration Association. Alternatively, the parties may agree that only specific matters designated in the lease will be submitted to arbitration.

The form in [2], *below*, provides that each party is required to select an arbitrator and the two arbitrators are then required to select a third arbitrator. The decision of two of the three arbitrators is binding on the parties. The arbitrators are also granted the power to apportion the costs and expenses of the arbitration between the parties.

As discussed in [e], *below*, when a lease containing an option to purchase or a ground lease coupled with improvements contains an arbitration provision, that provision must conform to statutory requirements for the heading and type size of the provision. The lease must also contain a notice required by statute [*see Code Civ. Proc. § 1298*; *see also* form in [2], *below*].

PRACTICE TIP:

Using a General Arbitration Provision. If the attorneys include a *general* arbitration provision--requiring arbitration of *all* disputes--this will delay any filing of an unlawful detainer action until all arbitration proceedings are completed. The landlord's attorney should thus be sure to advise his or her client of this, before the lease is executed. *By Myron Moskovitz.*

PRACTICE TIP: Exceptions to Arbitration. Even general arbitration clauses often contain exceptions to arbitration. Such exceptions have commonly included the following:

- A judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust or other security instrument, or real property sales contract;
- Unlawful detainer actions;
- Actions to foreclose a mechanic's lien; and
- Any matter within the jurisdiction of the probate court.

Moreover certain other exclusions may also be appropriate that are designed in instances in which arbitration offers no protection. Thus, exclusions are also made for declaratory relief actions, the filing of an action so that a lis pendens may be recorded, provisional remedies and attachment orders, and actions for injunctive relief actions. *By Benjamin Kaplan.*

PRACTICE TIP: Provide for Rules to Be Used. With regard to the form in [2], *below*, it is best to provide exactly which rules of the American Arbitration Association are to be utilized, for example, "Commercial Rules." *By Benjamin Kaplan.*

PRACTICE TIP: Arbitration Clauses and Discovery. Unless your arbitration clause specifies that there will be deposition discovery rights under *Code Civ. Proc. § 1283.05*, or rights to utilize interrogatories, requests for admissions, and requests for production of documents, your client will probably be deprived of any discovery rights. *By Benjamin Kaplan.*

[c] Enforceability

Arbitration has traditionally been praised by courts as an expeditious and economical method of relieving overburdened civil calendars [*see Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-707, 131 Cal. Rptr. 882, 552 P.2d 1178]* . However, in cases not involving leases, contract clauses requiring mandatory arbitration have been held to be invalid adhesion contracts when one party's bargaining strength was clearly less than the other [*see Spence v. Omnibus Industries (1975) 44 Cal. App. 3d 970, 973-974, 119 Cal. Rptr. 171* (home remodeling contract); *Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 356-357, 133 Cal. Rptr. 775* (hospital admission contract)]. Arbitration

provisions in commercial contracts that provide for an arbitrator closely connected with one party have also been criticized or held invalid as unconscionable [*see Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 821-824, 826-828, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Hope v. Superior Court (1981) 122 Cal. App. 3d 147, 154-155, 175 Cal. Rptr. 851 , cert. denied, 456 U.S. 910 (1982)]* .

An agreement providing for the settlement of disputes by arbitration is specifically enforceable by either party [*see Code Civ. Proc. § 1281.2*; *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810, 92 Cal. Rptr. 650]* . However, if a party to an arbitration agreement can establish that he or she was induced to sign the arbitration agreement through the misrepresentation or fraud of the other party, arbitration may be denied [*see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 974-981, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . If the agreement provides that the decision of the arbitrator will be final, a submission to and determination by the arbitrator is contractually binding on the parties [*Silva v. Mercier (1949) 33 Cal. 2d 704, 708, 204 P.2d 609]* .

[d] Waiver

The right to arbitration granted under a contract may be waived when the party seeking to compel arbitration does any of the following:

- Takes steps inconsistent with an intent to invoke arbitration [*see, e.g., Case v. Kadota Fig Assn. (1950) 35 Cal. 2d 596, 604-606, 220 P.2d 912* ; *Titan Enterprises, Inc. v. Armo Construction, Inc. (1973) 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456]* ;

- Causes unreasonable delays undertaking the procedure [*see, e.g., Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816]* ; or

- Acts in bad faith or with willful misconduct [*Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 425-426, 158 Cal. Rptr. 828, 600 P.2d 1060]* .

The right may also be waived by a repudiation or denial of the lease in which the arbitration clause is contained [*Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 218, 30 Cal. Rptr. 719]* .

Whether there has been a waiver of a right to arbitrate is ordinarily a question of fact [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . To establish a waiver of the right to arbitration based on unreasonable delay, the delay must be substantial, unreasonable, and in spite of the claimant's own reasonable diligence. The burden is on the one opposing the arbitration agreement to prove that the other party's dilatory conduct rises to such a level of misfeasance as to constitute a waiver and such waiver is not to be lightly inferred [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

[e] Statutory Requirements

The statutory requirements discussed below apply to a lease that grants the tenant an option to purchase [*see § 34C.263*] or a ground lease that includes improvements [*see* Ch. 34D, *Ground Leases*] if the lease or ground lease contains a provision for binding arbitration of any dispute between the landlord and tenant [*Code Civ. Proc. § 1298(a)*; *see Code Civ. Proc. § 1298.8* (requirements are applicable only to contracts or agreements entered into on or after July 1, 1989); *see also* Ch. 23, *Real Property Sales Agreements*]. For those leases:

- The arbitration provision must be clearly titled "ARBITRATION OF DISPUTES" [*Code Civ. Proc. § 1298(a)*];

- The statutory arbitration notice [*see* form in [2], *below*] must appear immediately before the line or

space provided for the parties to indicate their assent or nonassent to the arbitration provision, and immediately following that arbitration provision [*Code Civ. Proc. § 1298(c)*]; and

- Both the statutory notice and the arbitration provision must be set out in capital letters if the contract is typed. If the contract is printed, the provision must be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and the notice must be set out in at least 10-point bold type or in contrasting red in at least 8-point bold type [*Code Civ. Proc. § 1298(a), (c)*].

These requirements also apply to a variety of other contracts that convey or are contemplated to convey real property [*see Code Civ. Proc. § 1298(a)*]. For further discussion of these requirements and other affected contracts, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Arbitration of Disputes

ARBITRATION OF DISPUTES

[*If contract is typed, set out following provision in capital letters. If contract is printed, set out following provision in either (1) at least 8-point bold type, or (2) contrasting red in at least 8-point type (Code Civ. Proc. § 1298(a)):*]

Section _____. IF ANY DISPUTE ARISES BETWEEN LANDLORD AND TENANT CONCERNING THE PREMISES, ANY PROVISION OF THIS LEASE, OR THE RIGHTS AND DUTIES OF EITHER IN REGARD THERETO, THE DISPUTE SHALL BE SETTLED BY ARBITRATION AS PROVIDED IN THIS SECTION. EACH PARTY SHALL APPOINT AN ARBITRATOR AND GIVE THE OTHER PARTY WRITTEN NOTICE OF THE NAME AND ADDRESS OF THE ARBITRATOR WITHIN [***specify, e.g.,*** FIVE] **DAYS AFTER A WRITTEN DEMAND TO DO SO HAS BEEN SERVED ON THE PARTY MAKING THE APPOINTMENT BY THE OTHER PARTY TO THIS LEASE. THE TWO APPOINTED ARBITRATORS SHALL, WITHIN** [***specify, e.g.,*** FIVE] **DAYS AFTER THEIR APPOINTMENT, APPOINT A THIRD ARBITRATOR. THE WRITTEN DECISION OF ANY TWO OF THE THREE APPOINTED ARBITRATORS SHALL BE BINDING AND CONCLUSIVE ON BOTH PARTIES TO THIS LEASE. THE ARBITRATORS MAY APPORTION THE COSTS AND EXPENSES OF THE ARBITRATION PROCEEDING, INCLUDING ATTORNEYS' FEES AND ARBITRATORS' FEES, BETWEEN THE PARTIES TO THIS LEASE IN ANY MANNER DEEMED REASONABLE BY TWO OF THE THREE ARBITRATORS. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION.**

[*If contract is typed, set out following statutory notice in capital letters. If contract is printed, set out following notice in (1) at least 10-point bold type, or (2) contrasting red in at least 8-point bold type (Code Civ. Proc. § 1298(c)):*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR

AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

INITIALED BY LANDLORD: _____

INITIALED BY TENANT: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES

17-34D California Legal Forms--Transaction Guide 34D.syn

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.syn Synopsis to Chapter 34D: GROUND LEASES

§ 34D.01 California Statutes

§ 34D.02 Federal Statutes

§§ 34D.03-34D.04 [Reserved]

§ 34D.05 Law Reviews and Periodicals

§ 34D.06 Annotations

§ 34D.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 34D.08-34D.09 [Reserved]

§ 34D.10 Nature of Ground Lease

[1] Undeveloped Land

[2] Title to Improvements

[3] Similarity to Fee Ownership

[4] Residential Ground Lease

[5] Implied Duty of Good Faith

§ 34D.11 Tenant's Considerations

§ 34D.12 Landlord's Considerations

§ 34D.13 Tenant Financing

[1] Methods

[a] Mortgage of Leasehold Interest

[b] Fee Subordination

[2] Lender Requirements

[3] Leasehold Mortgage Document

§ 34D.14 Drafting Ground Lease

§ 34D.15 Lease Provisions

[1] Term of Lease

[2] Rent

[3] Use of Premises

[a] Any-Lawful-Purpose Requirement

[b] Continuous Use of Premises

[c] Use Restrictions

[4] Condemnation

[5] Assignment and Subletting

[a] Restrictions on Tenant's Rights

[b] Landlord Requirements

[c] Nondisturbance of Subtenants

[6] Arbitration Provisions

§ 34D.16 Escrow and Title Insurance

§ 34D.17 Tenant's Bankruptcy

§ 34D.18 Hazardous Substance Laws

§§ 34D.19-34D.99 [Reserved]

§ 34D.100 Basic Facts for All Parties

Scope

§ 34D.101 Additional Facts Pertaining to Landlord

Scope

§ 34D.102 Additional Facts Pertaining to Tenant

Scope

§ 34D.103 Documents Pertaining to Landlord

Scope

§ 34D.104 Documents Pertaining to Tenant

Scope

§§ 34D.105-34D.109 [Reserved]

Scope

§ 34D.110 Capacity and Authority of Parties

Scope

§ 34D.111 Tenant Financing

Scope

§ 34D.112 Escrow and Title Insurance

Scope

§ 34D.113 Purpose of Ground Lease

Scope

§ 34D.114 Conditions of Lease

Scope

§ 34D.115 Term of Lease

Scope

§ 34D.116 Rent and Other Payments to Landlord

Scope

§ 34D.117 Use of Premises

Scope

§ 34D.118 Ownership of Improvements

Scope

§ 34D.119 Condemnation

Scope

§ 34D.120 Assignment and Subletting

Scope

§ 34D.121 Right of First Refusal

Scope

§§ 34D.122-34D.129 [Reserved]

§ 34D.130 Representation of Both Parties to Lease

Scope

§ 34D.131 Reviewing Escrow Arrangements

Scope

§ 34D.132 Review of Lease Drafted by Other Party

Scope

§ 34D.133 Drafting and Execution of Lease; Recording Memorandum of Lease

Scope

§§ 34D.134-34D.139 [Reserved]

Scope

§ 34D.140 Introductory Provisions and Description of Premises

Scope

§ 34D.141 Term of Lease

Scope

§ 34D.142 Rent and Other Payments of Money

Scope

§ 34D.143 Use of Premises

Scope

§ 34D.144 Tenant's Rights and Duties Relating to Improvements

Scope

§ 34D.145 Tenant Financing

Scope

§ 34D.146 Condemnation

§ 34D.147 Assignment and Subleasing

Scope

§ 34D.148 Breach and Remedies for Breach

§ 34D.149 Miscellaneous Provisions

Scope

§ 34D.150 Signature and Execution

§§ 34D.151-34D.199 [Reserved]

§ 34D.200 Ground Lease

[1] Comment

[a] Use of Form

[b] Term of Lease

[c] Rent and Security Deposit

[d] Use of Premises

[e] Taxes and Utilities

[f] Construction of Improvements

[g] Financing

[h] Lender Protection

[i] Repairs and Maintenance

[i] Tenant's Repair Obligations

[ii] Renovation of Improvements

[j] Destruction of Improvements

[k] Insurance

[l] Condemnation

[m] Assignment and Subletting

[n] Default and Remedies

[o] Miscellaneous Provisions

[2] Form

Ground Lease

§§ 34D.201-34D.209 [Reserved]

§ 34D.210 Landlord's Right to Terminate Lease on Tenant's Failure to Obtain Financing

[1] Comment

[a] Use of Form

[b] Use of Escrow in Ground Lease Transaction

[c] Use of Memorandum of Lease in Ground Lease Transaction

[2] Form

Landlord's Right to Terminate Lease on Tenant's Failure to Obtain Financing

§ 34D.211 Landlord's Covenant Against Encumbrances

[1] Comment

[a] Use of Form

[b] Subsequent Encumbrances

[2] Form

Landlord's Covenant Against Encumbrances

§ 34D.212 Subordination of Fee Interest to Tenant Financing

[1] Comment

[a] Use of Form

[b] Agreement to Subordinate

[c] Required Loan Terms

[d] Required Mortgage Provisions

[e] Promise-to-Subordinate Clause

[f] Statutory Requirements

[2] Form

Subordination of Fee Interest to Tenant Financing

§ 34D.213 Subleasing and Nondisturbance of Subtenants

[1] Comment

[a] Use of Form

[b] Restrictions on Tenant's Right to Sublease

[c] Nondisturbance Provision

[2] Form

Subleasing and Nondisturbance of Subtenants

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FOOTNOTES:

(n58)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

(n59)Footnote **. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of

landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n60)Footnote ***. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and CASES AND PROBLEMS IN CRIMINAL PROCEDURE (Matthew Bender). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES

17-34D California Legal Forms--Transaction Guide Scope

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

Scope

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Practice Consultants Scope

This chapter covers ground leases, which are a unique type of nonresidential lease. The Legal Background discusses advantages and disadvantages of ground leases, financing considerations, and tax consequences of entering into a ground lease. The Transaction Guide includes procedural and drafting guides for ground leases. The Forms section contains a complete ground lease, as well as additional and alternative lease provisions.

Nonresidential leases other than ground leases are covered in Ch. 34C, *Retail, Industrial, and Office Leases* . Residential leases are discussed in Ch. 34B, *Residential Leases* . Shopping center leases are covered in Ch. 34E, *Shopping Centers: Leasing and Operation* . For additional chapters relating to leasing, see Ch. 34A, *Prelease Forms* , Ch. 35A, *Assignment and Sublease of Leasehold Interests* , and Ch. 35B, *Modification and Termination of Leases* .

The income tax implications of leasing real property from both the landlord's and the tenant's point of view are beyond the scope of this chapter. For a thorough discussion of these issues, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 190, *Taxation of Landlords* , and Ch. 191, *Taxation of Tenants* (Matthew Bender).

The terms "landlord" and "tenant," rather than their equivalents "lessor" and "lessee," are used throughout this chapter. Retail, industrial, and office leases (sometimes also referred to as "commercial leases") are referred to collectively in this chapter as "nonresidential leases."

FOOTNOTES:
(n61)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART I. RESEARCH GUIDE
A. Primary Sources

17-34D California Legal Forms--Transaction Guide § 34D.01

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.01 California Statutes

"Fixtures" defined. *Civ. Code § 658.*

Commencement and duration of lease term. *Civ. Code §§ 715-719.*

Creation, scope, and transfer of easements. *Civ. Code §§ 802-806, 1104.*

Expiration of unexercised option. *Civ. Code §§ 884.010-884.030.*

Ownership and removal of fixtures. *Civ. Code §§ 1013-1019.*

Transfer of property in general. *Civ. Code §§ 1039-1090.*

Statute of frauds. *Civ. Code §§ 1091, 1624*; *Code Civ. Proc. § 1971.*

Acknowledgments and proofs of execution of instruments. *Civ. Code §§ 1180-1207*; *Gov. Code §§ 27287, 27288.*

Constructive and actual notice of real property conveyance. *Civ. Code §§ 1213-1220.*

Covenants running with the land. *Civ. Code §§ 1460-1471.*

Lawful purpose as essential element of contract. *Civ. Code § 1550.*

Exculpatory provisions in contracts prohibited. *Civ. Code § 1668.*

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A. Primary Sources

17-34D California Legal Forms--Transaction Guide § 34D.02

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 34D.03[Reserved]



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17-34D California Legal Forms--Transaction Guide § 34D.05

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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17-34D California Legal Forms--Transaction Guide § 34D.06

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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17-34D California Legal Forms--Transaction Guide § 34D.07

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.07 Text References

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Ch. 22, *Options to Purchase Real Property*.

Ch. 23, *Real Property Sales Agreements*.

Ch. 25, *Real Estate Loans*.

Ch. 25A, *Security Instruments for Real Estate Financing*.

Ch. 25B, *Subordination, Assumption, and Assignment*.

Ch. 26, *Real Property Escrows*.

Ch. 26A, *Title Insurance*.

Ch. 27, *Deeds and Recording*.

Ch. 28A, *Easements and Licenses*.

Ch. 28C, *Covenants, Conditions, and Restrictions*.

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Ch. 30B, *Zoning, Building, and Environmental Permits*.

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Ch. 31, *Mechanics' Liens*.

Ch. 33, *Contamination Considerations in Real Property Transactions*.

Ch. 33A, *Time-Share Projects*.

Ch. 33B, *Membership Camping Contracts*.

Ch. 33C, *Stock Cooperatives*.

Ch. 33D, *Planned Developments*.

Ch. 34, *Condominiums*.

Ch. 34A, *Prelease Forms*.

Ch. 34B, *Residential Leases*.

Ch. 34C, *Retail, Industrial, and Office Leases*.

Ch. 34E, *Shopping Centers: Leasing and Operation*.

Ch. 35A, *Assignment and Sublease of Leasehold Interests*.

Ch. 35B, *Modification and Termination of Leases*.

Ch. 36, *Oil and Gas Rights and Leases*.

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Ch. 13, *Ground Leases*.

Ch. 13A, *Leasehold Financing*.

Ch. 14, *Office Leases*.

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17-34D California Legal Forms--Transaction Guide §§ 34D.08-34D.09

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.10 Nature of Ground Lease

[1] Undeveloped Land

A ground lease refers to the long-term lease of a parcel of land. Ground leases are most often used for undeveloped or underdeveloped land by a tenant-developer who will construct new improvements on the undeveloped land or who will demolish existing but virtually worthless improvements on underdeveloped land, and then construct new improvements. Under this scheme, the tenant-developer then ordinarily subleases space in the improvements to subtenants. Alternatively, a tenant may lease land under a ground lease and purchase existing improvements located on the land.

[2] Title to Improvements

One distinguishing feature of a ground lease, as compared to other nonresidential leases, is that during the term of a ground lease, title to the improvements is in or becomes vested in the tenant although the landlord retains title and ownership to the underlying land. On termination of the ground lease, title in the improvements usually reverts to the landlord, but the lease may require the tenant to remove the improvements from the land. Some ground leases give the ground tenant an option to purchase, or right of first refusal to purchase, the landlord's underlying fee interest during the term of the ground lease [*see* Ch. 34C, *Retail, Industrial, and Office Leases*, §§ 34C.64 (right of first refusal to purchase), 34C.263 (option to purchase)].

[3] Similarity to Fee Ownership

During a ground lease's term, the tenant has many of the rights normally associated with ownership. In addition, the tenant ordinarily is responsible for all expenses generally associated with ownership, including maintenance and repair of the property, property taxes, and insurance on the property and on the improvements. In this sense, ground leases are true net leases [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.17* (net leases)].

[4] Residential Ground Lease

A ground lease of a residential property is extremely rare. In the event a residential lease is contemplated, see Ch. 34B, *Residential Leases* , for discussion of disclosure and other requirements for residential leases.

[5] Implied Duty of Good Faith

The implied duty of good faith and fair dealing exists in virtually every commercial lease [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 372, 6 Cal. Rptr. 2d 467, 826 P.2d 710]* , including a ground lease. In a ground lease, this covenant imposes a reciprocal duty on the parties to do everything that the ground lease presupposed they would do to accomplish its purpose [*Ocean Services Corporation v. Ventura Port District (1993) 15 Cal. App. 4th 1762, 1781, 19 Cal. Rptr. 2d 750]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.11 Tenant's Considerations

The potential advantages to a tenant of entering into a ground lease rather than purchasing the land outright include reducing the tenant's initial cash investment in the transaction, thereby increasing the tenant's overall financial leverage. Financing under a ground lease usually requires little or no down payment, and payment for the use of the land is extended for a longer period of time than is possible with a conventional loan [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* (Matthew Bender); *see also § 34D.13[1]*]. Furthermore, a tenant under a ground lease may receive substantial tax advantages. For example, the entire rent paid under the lease is deductible for purposes of federal and state income tax, and the improvements constructed on the land are depreciable [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 191, *Taxation of Tenants* (Matthew Bender)].

PRACTICE TIP:

Lease vs. Purchase. Compare the income tax advantages of ground leases with outright purchase. Although land rent is deductible, land is not depreciable. *By Myron Moskowitz.*

One of the potential disadvantages to a ground lease tenant is that the tenant generally must concede to the landlord some degree of control over operation of the improvement project, and must follow the landlord's restrictions on use of the property. Also, if a tenant falls behind in rent payments under a ground lease, the lease may provide for termination in a far shorter time than foreclosure could be accomplished if the tenant were the fee owner and fell behind in its mortgage payments. Furthermore, lease payments made over the entire term of a ground lease may ultimately cost the tenant more than if the tenant had purchased the land outright.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property

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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.12 Landlord's Considerations

The potential advantages to a landlord under a ground lease include a guaranteed secure return with a minimum amount of management, and the ability to keep pace with inflation by rent increases, participation by the landlord in the project's profits through percentage rent, or both. A ground lease may also provide an attractive alternative to a landowner who would otherwise pay income taxes on selling the property outright to the tenant [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* (Matthew Bender)].

If a landlord subordinates its fee interest in the land to the tenant's financing on the improvements [*see § 34D.13[1][b]*], the landlord could lose the property through foreclosure because of a default by the tenant under its loan. Thus, the ground lease landlord should carefully evaluate the financial stability of the ground lease tenant (and any prospective subtenants) [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawPriorities & RecordingGeneral Overview



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.13 Tenant Financing

[1] Methods

[a] Mortgage of Leasehold Interest

Because a ground lease significantly reduces the substantial cash outlay otherwise needed to acquire and develop a parcel of real property, it is commonly characterized as a financing device rather than a conventional lease. A ground tenant may obtain financing either (1) by mortgaging its leasehold interest, or (2) by having the ground landlord join in and subordinate its fee interest to the mortgage [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* (Matthew Bender)].

Because any interest in real property that is capable of being transferred may be mortgaged [*see Civ. Code § 2947*], the leasehold interest itself, that is, an estate for years, may be the subject of a mortgage from an institutional lender [*see Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 741, 44 Cal. Rptr. 692* ; *Chapman v. Great Western Gypsum Co. (1932) 216 Cal. 420, 425, 14 P.2d 758* ; *see also Civ. Code §§ 2920* ("mortgage" defined), 2924f(a) ("property" defined)]. With leasehold financing, the lender generally requires that it may cure any defaults on the part of the ground tenant, or obtain a new ground lease on the same terms on termination due to the tenant's default [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* ; ch. 420, *Financing Construction and Development* (Matthew Bender); *see also* [2], *below*].

A suggested form for a leasehold mortgage can be found in *Civ. Code § 2948*. However, that section specifies a form that "may" be used. The word "may" in the statute shows that the form is not mandatory. For example, a leasehold mortgage may be created by a UCC-1 financing statement that specifically states that it covers the leasehold interest [*Lovelady v. Bryson Escrow, Inc. (1994) 27 Cal. App. 4th 25, 29-30, 32 Cal. Rptr. 2d 371]* . For further discussion of leasehold mortgages, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender).

PRACTICE TIP:

Financing Conditions Should Be Integral Part of Lease Negotiations. At the inception of negotiations respecting the lease it would be prudent to either make the coming into force of the lease contingent on obtaining financing, or have the financing in place at the time of the lease's execution. Any duties or obligations that the tenant would wish to impose on the landlord must be clearly provided for in the lease itself. This would include provisions to approve the financing, subordinate the landlord's interest to the financing, or other terms and conditions that the lender may impose on the tenant. Although it is always possible to have objective criteria for the landlord's approval of financing, such criteria are not a substitute for the tenant obtaining the landlord's approval before the lease comes into effect. Also, it is not uncommon to anticipate that there may be a refinancing of the lease over the lease's term. The refinancing may be made "automatic" without the approval of the landlord if the terms of that refinancing are materially the same as the terms of the prior loan (except as to amount), and some provision is made to establish how much the tenant may borrow against the security. *By Benjamin Kaplan.*

PRACTICE TIP: Consider Possibility of Interim Construction Loan. In all probability, the first loan obtained by the tenant will be a construction loan that will have a shorter repayment term and higher interest rate than an eventual permanent loan. The lease should anticipate this eventuality and provide for the landlord having already given consent to that change. *By Benjamin Kaplan.*

[b] Fee Subordination

With fee subordination financing, the ground lease obligates the landlord to subordinate its reversionary fee interest in the property to a construction or development loan [*see Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 741, 44 Cal. Rptr. 692* ; *see also Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 568-569, 71 Cal. Rptr. 2d 625]* . Although a ground landlord may be reluctant to subordinate its fee interest to the mortgage, many more loans are granted when the fee is subordinated than when it is not [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* (Matthew Bender)].

If the ground tenant defaults under the mortgage and the landlord has subordinated its reversionary interest to the tenant's leasehold mortgage, the foreclosure sale is of the entire fee and not merely the leasehold interest [*see Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 741-742, 44 Cal. Rptr. 692]* . The landlord, therefore, should evaluate the financial stability of the tenant before subordinating its fee interest, and should reserve the right to cure any defaults on the part of the tenant [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 154, *Complete Commercial Leases* ; ch. 420, *Financing Construction and Development* (Matthew Bender)].

[2] Lender Requirements

When a lender's only security is the tenant's leasehold interest, the lender may require that the ground lease contain certain provisions to protect its security. The lender wants to prevent a premature termination of the lease, since termination effectively terminates the lender's security. Even when the lender has the additional security of the landlord's fee title interest, it still may require inclusion of the same protective provisions in the ground lease. Otherwise, if the lease is terminated because of a default by the tenant, the lender loses any rights it had under the ground lease and is left only with the option of foreclosing on the landlord's fee title interest. A lease that does not include the provisions required by a lender will not be "financeable." For a list of some of the most common lender requirements, which are set forth in the complete ground lease form in this chapter, see *§ 34D.200[1][h]*.

PRACTICE TIP:

Lender's Right to Cure Default. A lender may well insist that the tenant's default not prejudice the lender's position if the lender chooses to cure. Thus, any lease must have appropriate provisions for the lender to cure a default of the tenant, particularly, but not limited to, a monetary default. The lender will

also usually insist that its position be restored to "status quo *ante*." For example, if a default triggers the imposition of a higher interest rate, then the lender upon cure would go back to the lower pre-default rate. *By Benjamin Kaplan.*

PRACTICE TIP: Lender's Approval of Lease Terms. It is not uncommon for the lender to place limitations on the collection of advanced rent by the tenant, the term for which premises or part thereof may be leased, and provisions respecting leasing at market value. Often long term tenant leases are made subject to approval of the lender. Thus, it is probably best that the landlord provides the lender with a "standard" form lease in advance of the financing agreement so that at least the form of that lease will be pre-approved. Major national anchor tenants will have their own lease forms; therefore, some provision should be included in the lease documentation and financial agreements to provide for same. *By Benjamin Kaplan.*

[3] Leasehold Mortgage Document

From the standpoint of the lender, the provisions of the actual deed of trust, mortgage, or other security instrument executed by the tenant in favor of the lender to secure the tenant's financing must be compatible with the provisions of the ground lease. A lender with a leasehold security interest will review a ground lease with particular attention to the rights of the tenant, since its security is the tenant's leasehold interest and the lender may be faced with the prospect of succeeding to the tenant's interest under the lease [*see* [2], *above*]. For example, the lender may require that the condemnation provision of a ground lease allocate a certain portion of the award to the tenant under specific circumstances, to insure compatibility with its deed of trust provision requiring the tenant to use any proceeds from a condemnation award to pay off or reduce the balance of the lender's loan [*see § 34D.200[1][l]*].

In some cases, the contents of the deed of trust or mortgage may be prescribed by the ground lease. For example, when a landlord agrees under a ground lease to subordinate its fee title interest to tenant financing [*see* [1][b], *above*], the subordination may be conditioned on the mortgage containing a provision that (1) exempts the landlord from personal liability on the mortgage and underlying note, and (2) confirms that the landlord's execution of the mortgage is for the sole purpose of encumbering its fee title interest [*see § 34D.212*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
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17-34D California Legal Forms--Transaction Guide § 34D.14

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.14 Drafting Ground Lease

Like any other lease, a ground lease is both a conveyance and a contract [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.12*]. Unlike other types of leases, however, it is also a financing device [*see § 34D.13*]. For this reason, an attorney drafting a ground lease must possess the necessary expertise to ensure that the interests of his or her client, whether landlord or tenant, are adequately protected, and must also work in close coordination with a lender, who will require certain provisions in the lease to protect its interest and security [*see § 34D.13[2], [3]*]. If a ground lease is not "financeable," its purpose is defeated.

As with any lease, the specific provisions of a ground lease depend on the particular transaction. However, the key features will always be the following [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 154, *Complete Commercial Leases* (Matthew Bender); *see also § 34D.15*]:

- Rent provisions;
- Provisions for construction if the land is unimproved;
- Assignment and sublease provisions;
- Provisions for repair and maintenance;
- Provisions regarding destruction of the premises and condemnation; and
- Provisions regarding ownership of the improvements.

For a comprehensive list of ground lease provisions, see Part D (Drafting Guide) of the Transaction Guide. For additional discussion of ground lease provisions and an example of a complete ground lease, see *§ 34D.200*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34D California Legal Forms--Transaction Guide § 34D.15

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.15 Lease Provisions

[1] Term of Lease

A ground lease is a long-term lease, generally for at least 50 years, that may contain renewal options [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 154, *Complete Commercial Leases* (Matthew Bender)]. When the security for the tenant's financing is the tenant's leasehold interest [*see § 34D.13[1][a]*], regulatory law for certain financial institutions requires that the term of the ground lease exceed the term of the loan by a stated period [*see, e.g., Fin. Code § 1227* (banks)].

Certain types of property are restricted by law as to the maximum length of a lease term [*see, e.g., Civ. Code §§ 718, 719* (leases of city property)]. For a summary of some of these restrictions and a discussion of the effect of the rule against perpetuities on the term of a lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.210[1][c], [d]*.

[2] Rent

Like other nonresidential leases, a ground lease generally provides for minimum rent and some additional rent [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.200[1][d], [e]*]. The minimum rent in a ground lease is often based on the appraised value of the land [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 153, *Drafting Commercial Leases* (Matthew Bender)].

Nonresidential leases, including ground leases, also typically contain an escalation or similar clause that provides for an increase in the minimum rent during the term of the lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.200[2]*]. An escalation clause may provide for a rent increase based on any of the following [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 153, *Drafting Commercial Leases* (Matthew Bender)]:

- A reappraisal of the property's value [*see, e.g., Ch. 34C, Retail, Industrial, and Office Leases, § 34C.221[2]*];

- Proportionate increases in national or local consumer price indices; or
- A schedule set forth in the lease.

To evaluate its risk in making a loan to the tenant, a lender may require the total amount of any rent increases to be ascertainable in advance. The complete ground lease form *set forth in § 34D.200[2]* provides for minimum rent to increase by stated amounts at stated intervals over the lease's term.

[3] Use of Premises

[a] Any-Lawful-Purpose Requirement

Ground leases often grant the ground tenant the right to use the premises for any lawful purpose [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 154, *Complete Commercial Leases* (Matthew Bender)]. If the lease does not specify the tenant's use, the tenant may use the property for any lawful purpose, including the following [*see Keating v. Preston (1940) 42 Cal. App. 2d 110, 115, 108 P. 2d 479]* :

- A purpose that is not materially different from the purposes for which the premises are usually employed;
- A purpose to which the premises are adapted; or
- A purpose for which the premises were constructed.

[b] Continuous Use of Premises

The fact that a lease is made for a particular purpose does not imply a covenant on the part of the tenant to continue to use the premises for that particular purpose, and the tenant may cease to use the premises for any purpose [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* .

However, if the rent under a nonresidential lease is a specified but insubstantial minimum plus a percentage, the tenant's covenant of continuous business operation may be implied [*Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1670, 42 Cal. Rptr. 2d 669]* , especially in a lease in which there is no minimum rent or the minimum rent is not substantial [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142-143, 280 P.2d 775]* . "A substantial minimum" cannot be precisely defined [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 145, 280 P.2d 775]* . Therefore factual information on this issue must be examined before a covenant will be implied.

[c] Use Restrictions

A ground lease may expressly restrict the use of the premises for specified purposes [*Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . Under a percentage rent lease, for example, a landlord is likely to limit the tenant's use to the particular business stated in the lease, and permit a change of use only with the landlord's written consent [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 153, *Drafting Commercial Leases* (Matthew Bender)]. Furthermore, use provisions may require compliance with applicable laws and ordinances, prohibit waste and nuisance, and prohibit use or storage of hazardous or toxic substances. For further discussion and examples of use provisions and restrictions, see *Ch. 34C, Retail, Industrial, and Office Leases, §§ 34C.230-34C.233*.

PRACTICE TIP:

Use Clauses for Multiuse Projects. "Use" in terms of subtenancies may be subject to non-competition clauses as well as appropriate "subtenant mixed uses." Careful attention should be paid for projects with potential multiuse, multipurpose development, such as shopping centers or other retail facilities. *By*

Benjamin Kaplan.

[4] Condemnation

If a ground lease provides for the rights and obligations of the parties in the event that all or a portion of the property is acquired for public use, the lease provisions prevail [*Code Civ. Proc. § 1265.160*]. Otherwise, the Eminent Domain Law [*Code Civ. Proc. § 1230.010 et seq.*] and applicable case law govern the rights and obligations of the parties to the lease [*see Code Civ. Proc. § 1265.160*; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.262*].

For a full discussion of the subject of condemnation of leased premises, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 509, *Evidence: Transactions* , and ch. 512, *Compensation* (Matthew Bender).

A lender under a ground lease, particularly one whose only security is the tenant's leasehold interest, will be concerned with the circumstances that may lead to a termination of the lease and thereby terminate the lender's security. Ordinarily, a lender wants its loan to be paid off to the greatest possible extent if the property is taken in whole or in part. If the property is taken in part and the lease continues in effect, the lender wants to ensure that its portion of the remaining security will be adequate. Therefore, the interests of the landlord on the one hand and the lender and tenant on the other must be satisfactorily resolved in the negotiating process.

A lender with a leasehold mortgage may require a provision in its mortgage instrument that, in the event of a total condemnation or of a partial condemnation that results in termination of the lease, any amount paid to the tenant for the improvements and the tenant's leasehold interest must be applied toward the lender's loan [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 152, *Drafting Basic Lease Provisions* (Matthew Bender)]. In the event of a partial taking that does not result in termination of the lease, a lender may agree to the tenant's use of the proceeds for necessary reconstruction or restoration. For further discussion of the division of a condemnation award between the various parties, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 512, *Compensation* (Matthew Bender).

[5] Assignment and Subletting

[a] Restrictions on Tenant's Rights

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210, 1995.230*; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*]. Ambiguities in a restriction on transfer must be construed in favor of transferability [*Civ. Code § 1995.220*]. For the types of restrictions that may be placed on transfer of a tenant's interest in a lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.260*.

If a ground lease contains restrictions on tenant's ability to assign its interest in the lease, a leasehold lender will be concerned that a prohibited assignment will cause the tenant to be in default and give the landlord the right to terminate the lease. From the tenant's standpoint, freedom to assign his or her interest is desired given the long-term nature of the ground lease. For these reasons, assignment provisions in a ground lease usually grant the tenant more flexibility in the area of assignment than do the provisions of an ordinary nonresidential lease.

[b] Landlord Requirements

If a tenant-developer enters into a ground lease for the purpose of developing and operating a commercial project such as a shopping center, the lease should contain a provision granting the ground tenant the right to sublease space in the improvements [*see § 34D.200[2]*, Section 10.03]. Although a tenant may bargain for an unrestricted right, the landlord may insist that each sublease meet certain requirements or that each sublease be subject to the landlord's prior approval, or both. For example, the landlord may require that the rent under any sublease be at least equal to fair market value rent

and may also limit the amount of prepaid rent the ground tenant may collect from its subtenants [*see § 34D.213*].

[c] Nondisturbance of Subtenants

In conjunction with the ground tenant's right to sublease, the lease should provide for nondisturbance of the subtenants by the landlord in the event the ground lease is terminated. It may require the landlord or the mortgagee or both to execute a nondisturbance agreement for each sublease. Correspondingly, each subtenant should agree to perform all of the ground tenant's obligations under the ground lease and attorn to the ground landlord on the ground tenant's default under the ground lease [*see* Dean, *Long Term Commercial Ground Leases-- An Alternate Method of Acquiring Real Property*, 2 Cal. Real Prop. J. No. 1, p. 4 (State Bar of California, Real Property Law Section) (Winter 1984); Undenberg, *Ground Leasing Makes Dollars and Sense for Developers*, 1 Real Est. Rev. No. 2, p. 53 (Summer 1971)]. In the context of a ground lease, "attornment" is an agreement by a subtenant to be bound directly to the ground landlord for the performance of all obligations under the sublease in the event of the ground tenant's default [*see* Rabkin & Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Ch. 23, *Real Estate Leases* (Matthew Bender)].

[6] Arbitration Provisions

If a ground lease also covers improvements and contains a provision for binding arbitration of any dispute between the principals in the transaction, the arbitration clause in the lease must comply with statutory requirements regarding content and type size [*Code Civ. Proc. § 1298*]. These requirements apply to covered agreements and contracts entered into on or after July 1, 1989 [*Code Civ. Proc. § 1298.8*], and are discussed in *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.280[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsPublic UseReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34D California Legal Forms--Transaction Guide § 34D.16

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.16 Escrow and Title Insurance

A ground lease transaction is usually handled through an escrow in the same manner as the sale of real property [*see* Ch. 23, *Real Property Sales Agreements*]. The escrow process provides a mechanism for effecting concurrent performance of the parties' respective obligations. For example, one of the tenant's obligations would be to obtain acceptable financing [*see § 34D.210*]. For discussion of real property escrows, see Ch. 26, *Real Property Escrows* .

Like a commercial lender financing a party's purchase of real property, a lender with a leasehold security interest under a ground lease will require title insurance insuring its fee title interest in the improvements and its leasehold interest in the land. Also, the tenant should obtain title insurance for its leasehold interest. Before issuing title insurance, the title company will require recordation of either the ground lease itself or a memorandum of the lease. For a discussion of the requirements for recording a lease and an illustrative memorandum of lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*. The subject of title insurance is covered in Ch. 26A, *Title Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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17-34D California Legal Forms--Transaction Guide § 34D.17

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.17 Tenant's Bankruptcy

Lease clauses that permit the landlord to terminate a lease because of the tenant's bankruptcy or insolvency are valid under California law [*see Ilkhchooyi v. Best (1995) 37 Cal. App. 4th 395, 404, 45 Cal. Rptr. 2d 766* ; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1052, 241 Cal. Rptr. 487]* , but are generally not enforceable under the superseding federal Bankruptcy Code [*see 11 U.S.C. § 365(e)(1)*]. That code also specifically provides that, subject to certain exceptions [*see 11 U.S.C. § 365(c)*], a bankruptcy trustee may assign an unexpired lease of the debtor despite any terms in the lease agreement prohibiting assignment [*11 U.S.C. § 365(f)(1)*].

A bankruptcy trustee also has the right to assume or reject the bankrupt tenant's lease, subject to the court's approval [*11 U.S.C. § 365(a)*]. If the trustee does not assume an unexpired nonresidential lease by the earlier of the date that is (1) 120 days after the date of the order for relief or (2) the date of the entry of an order confirming a plan, the lease is considered to have been rejected [*11 U.S.C. § 365(d)(4)(A)*]. However, the court may grant a 90-day extension before the expiration of the 120-day period, on the motion of the trustee or landlord for cause. The court may grant subsequent extensions only with the prior written consent of the landlord in each instance [*11 U.S.C. § 365(d)(4)(B)*]. At least one court has held that once the lease is rejected, the lease is terminated and the leasehold interest of the lender is extinguished [*see In re Bernard (Bankr. D. Haw. 1986) 69 B.R. 13]* . In an effort to avoid these consequences, a lender may require that the ground lease include a provision that the landlord must enter into a new ground lease with the lender (on the same terms as the original lease) if the landlord terminates the lease before the time the lender's loan is satisfied [*see § 34D.200[2]*, Section 6.08].

For further discussion of the effect of a tenant's bankruptcy on a nonresidential lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired

LeasesPowersBankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesTermination ClausesReal Property LawBankruptcyLeasesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & Terminate



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17-34D California Legal Forms--Transaction Guide § 34D.18

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.18 Hazardous Substance Laws

The owner and possessor of property are subject to state and federal statutory requirements regarding the presence, release, storage, and use or handling of certain hazardous substances and materials. Some of the statutes require disclosures and reporting [*see, e.g., Health & Safety Code §§ 25359.7, 25915-25919.7*]; others prohibit release of or impose requirements for the cleanup and removal of the hazardous substances or materials [*see, e.g., Health & Safety Code §§ 25320, 25321*]. For additional discussion of state regulation in this area, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.19*. For coverage of environmental investigation and cleanup liabilities and their effect on real estate transactions, see Ch. 33, *Contamination Considerations in Real Property Transactions* .

The parties to any nonresidential lease must be aware of these requirements not only for purposes of their own compliance, but also in case they confirm or expand the respective responsibilities of either party in the lease itself. Concern over hazardous substances is especially acute for parties to a ground lease, given the lengthy term of a ground lease and the fact that the tenant's lender lends on the security of the lease.

A tenant or lender may insist that the landlord warrant that no toxic substances or hazardous materials exist on the leased premises, and agree to indemnify the tenant against damage, loss, or liability arising from the presence of any hazardous or toxic substances not caused by the tenant. In turn, the landlord or lender may prohibit the tenant from engaging in any use of the leased property that involves the use of toxic or hazardous substances [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.201[2],* Section 4.01]. Also, the lease may include a provision addressing the issue of who must perform and pay for any required cleanup or removal of a hazardous substance. For a discussion of responsibility as between tenant and landlord for compliance with government mandated orders (for example, asbestos abatement) and of the judicial construction of typical "compliance with law" lease provisions, see *Ch. 34C, Retail, Office, and Industrial Leases, § 34C.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksContractual RelationshipsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide §§ 34D.19-34D.99

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[Reserved]

§§ 34D.19[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

17-34D California Legal Forms--Transaction Guide § 34D.100

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.100 Basic Facts for All Parties

1. Basic information about landlord and tenant, such as:

a. Name.

b. Addresses (mailing, delivery, e-mail).

c. Telephone numbers (voice, fax message, cellular).

d. Legal status, as any of the following:
(1) Individual, including:
(a) Marital status; and

(b) Name of spouse, if married.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Limited liability company.

(6) Joint venture.

(7) Unincorporated association.

(8) Estate.

(9) Public entity.

(10) Other.

2. Names, addresses, titles, and telephone numbers of any other parties, including:

NOTE:
The following is a list of potential participants in a nonresidential lease transaction. A client's proposed transaction may not require the services of all of these parties. The list may be used to solicit from the client information for participants in the transactions and also may be used as a checklist of professionals whose services may be needed.

a. Lender for tenant financing.

b. Attorney representing other party.

c. Real estate broker or salesperson representing each party.

d. Accountant representing each party.

e. For tenant's construction of improvements:

(1) Contractor.

(2) Architect.

(3) Engineer.

(4) Surveyor.

(5) Governmental agency with approval power over project.

f. Title company that will insure lender's interest and tenant's leasehold interest.

3. Additional information concerning any parties who are not individuals, such as:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

4. Steps that client wants attorney to perform, for example:

a. Negotiating terms of proposed transaction.

b. Negotiating terms of tenant's mortgage or fee subordination financing.

c. Drafting lease and financing documents.

d. Reviewing lease and financing documents drafted by others.

e. Advising client on rights under executed lease.

f. Coordinating transaction that requires construction of building or other improvements on leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.101

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.101 Additional Facts Pertaining to Landlord

1. Property to be leased, including:

    a. Location of property (street address and legal description).

    b. Acreage.

    c. If any buildings exist on property, type and size of buildings.

2. Date that landlord acquired property.

3. Manner in which landlord holds title, such as:

    a. Corporation in corporate name.

    b. Partnership in partnership name.

    c. Partnership in name of one or more partners.

    d. Limited liability company in name of limited liability company.

    e. Unincorporated association [*see Corp. Code § 18000 et seq.*].

    f. Individual.

g. Husband and wife in [*see Fam. Code § 750*]:
(1) Joint tenancy.

(2) Tenancy in common.

(3) Community property.

(4) Community property with right of survivorship.

h. Co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy.

(2) Tenancy in common.

i. Executor or administrator of decedent's estate [*see Prob. Code §§ 9940-9948*].

4. Name in which landlord acquired title, if different from name in which landlord currently holds title [*see Civ. Code § 1096*].

5. Adverse claims against landlord's title, if any.

6. Pending litigation affecting property, if any.

7. Easements burdening or benefiting property, if any.

8. Other encumbrances or liens against property, if any.

9. For any existing loan on property, the following information:

a. Name of original lender.

b. Name of current holder or beneficiary, if different.

c. Approximate unpaid principal balance.

d. Nature of any existing delinquencies or defaults.

10. If the landlord is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

NOTE:
For discussion of a corporation's authority to lease real property, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

11. If landlord is a partnership:

a. And partnership holds title in partnership name, names of partners authorized to sign lease.

b. And title is held in name of one or more of partners, names of these partners.

NOTE:
For discussion of a partnership's authority to lease real property, see Ch. 15, Part A, ***Formation of General Partnerships***.

12. If landlord is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name of manager(s) if other than members.

NOTE:
For discussion of a limited liability company's authority to lease real property, see Ch. 12C, ***Limited Liability Companies*** .

13. If landlord is an unincorporated association [*see Corp. Code § 18000 et seq.*]:

a. Names of members if articles or bylaws require approval by members.

b. Name of any officers authorized to execute lease on behalf of association.

NOTE:
For discussion of an unincorporated association's authority to lease real property, see Ch. 34A, ***Prelease Forms*** .

14. If landlord is an estate:

a. Name of estate's guardian, conservator, executor, or administrator.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name and location of court with jurisdiction over estate.

15. If landlord is a public entity:

a. Governing body for entity.

b. Date on which governing body approved or will approve lease.

16. Zoning classification of leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawZoning & Land UseGeneral

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A. Client Interview--Facts and Documents

17-34D California Legal Forms--Transaction Guide § 34D.102

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.102 Additional Facts Pertaining to Tenant

1. Type of development to be built by tenant on leased premises, for example, shopping center, industrial park, or office building.

2. Status of negotiations between tenant and lender.

3. Date by which tenant must have possession of premises to be leased under this transaction.

4. If tenant is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

NOTE:
For discussion of a corporation's authority to lease real property, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

5. If the tenant is a partnership, names of partners authorized to sign lease.

NOTE:
For discussion of a partnership's authority to lease real property, see Ch. 15, ***General Partnerships*** .

6. If tenant is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name of manager(s) if other than members.

NOTE:
For discussion of a limited liability company's authority to lease real property, see Ch. 12C, ***Limited Liability Companies*** .

7. If tenant is an unincorporated association [*see Corp. Code § 18000 et seq.*], names of officers or members authorized to execute lease.

NOTE:
For discussion of an unincorporated association's authority to lease real property, see Ch. 34A, ***Prelease Forms*** .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate Entities



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

17-34D California Legal Forms--Transaction Guide § 34D.103

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.103 Documents Pertaining to Landlord

1. Copy of any correspondence between landlord and tenant.

2. Deed to property.

3. Property profile or preliminary title report issued for property.

4. Any agreement creating easements burdening or benefiting property.

5. Instruments or documents creating or asserting liens against property.

6. Any notes, deeds of trust, mortgages, or other documents relating to existing security interests in property.

7. Copy of any recorded declaration or Covenants, Conditions, and Restrictions affecting property [*see* Ch. 28C, *Covenants, Conditions, and Restrictions*].

8. If landlord is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*; *see also Ch. 34A, Prelease Forms, § 34A.200*].

9. If landlord is a partnership holding title in its name, certified copy of statement of partnership authority filed in county where land is located [*see* Ch. 15, Part A, *Formation of General Partnerships*, § 15.285].

10. If landlord is a limited liability company:

    a. Certified copy of articles of organization filed with Secretary of State.

    b. Copy of operating agreement (if members have appointed manager for company).

11. If landlord is an unincorporated association:

    a. Copy of articles of association.

    b. Copy of bylaws.

    c. Copy of recorded statement of unincorporated association.

12. If landlord is an estate or trust, copy of will or trust instrument naming executor or trustee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawTitle QualityGeneral Overview



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17-34D California Legal Forms--Transaction Guide § 34D.104

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.104 Documents Pertaining to Tenant

1. Copy of any letters of intent or other correspondence between landlord and tenant [*see Ch. 34A, Prelease Forms, § 34A.225* (sample letter of intent to lease)].

2. Copy of any letters or other correspondence between tenant and tenant's lender.

3. If tenant is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*; *see also Ch. 34A, Prelease Forms, § 34A.200*].

4. If tenant is a partnership, certified copy of statement of partnership authority filed in county indicating authority of partner to bind partnership to lease [*see Ch. 15, Part A, Formation of General Partnerships, § 15.285*].

5. If tenant is a limited liability company:

    a. Certified copy of articles of organization filed with Secretary of State.

    b. Copy of operating agreement (if members have appointed manager for company).

6. If tenant is an unincorporated association:

    a. Copy of articles of association.

    b. Copy of bylaws.

7. If ground lease involves new construction by tenant, copies of the following, to the extent available:

a. Contract between tenant and design professional, for example, architect [*see* Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals*].

b. Construction contract documents, such as [*see* Ch. 30D, *Construction Contracts and Subcontracts*]:

(1) Agreement between owner and general contractor.

(2) Drawings and specifications.

(3) Building permit.

(4) Use permit.

c. For project financing:

(1) Binding loan commitments for construction and permanent financing.

(2) Deed(s) of trust or other security instrument(s) executed to secure construction or permanent financing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide §§ 34D.105-34D.109

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 34D.105[Reserved]



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17-34D California Legal Forms--Transaction Guide

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

NOTE:

This Part is a list of issues to review and negotiate with the parties. The sections in this Part correspond with the sections in Part D, Drafting Guide, and the two Parts can be used together to determine what should be included in the lease agreement.



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17-34D California Legal Forms--Transaction Guide § 34D.110

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.110 Capacity and Authority of Parties

1. If either party is a corporation, determine whether board of directors has adopted resolution authorizing corporation to enter into lease [*see* Ch. 34A, *Prelease Forms*].

2. If either party is an unincorporated association, determine whether articles of association or bylaws require resolution by authorizing board and/or approval by association's members [*see* Ch. 34A, *Prelease Forms*].

NOTE:
For a detailed list of the determinations necessary to confirm required capacity and consent to enter into a lease, including those determinations that would apply to individuals, see the Transaction Guide to Ch. 34B, ***Residential Leases***.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34D California Legal Forms--Transaction Guide § 34D.111

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.111 Tenant Financing

1. Determine whether landlord will agree to join in tenant financing and subordinate its fee interest in land to tenant's financing, and if so, whether there are any conditions to landlord's subordination, for example:

a. Tenant financing cannot exceed certain maximum amounts.

b. Rent under lease will be higher than if landlord did not subordinate.

c. Restrictions are imposed on tenant's management or operation of project.

2. Determine whether binding commitment for construction or permanent financing has been obtained from specific lender, and if so, what are specific protective provisions lender requires in ground lease.

3. If tenant has not yet obtained financing, ascertain whether effectiveness of ground lease is conditioned on tenant's ability to obtain financing [*see § 34D.210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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17-34D California Legal Forms--Transaction Guide § 34D.112

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.112 Escrow and Title Insurance

NOTE:

A ground lease transaction, like a real property sale and purchase, is usually handled through an escrow. The tenant's lender will require title insurance whether the financing is secured only by the tenant's leasehold interest or by both the landlord's fee title interest and the leasehold interest. Also, the tenant should obtain title insurance for its leasehold interest.

1. If escrow has been opened by either party, determine the following:

a. Name of escrow company.

b. Name of escrow officer.

c. Location of escrow office.

d. Date for closing.

2. Ascertain whether a preliminary title report insuring tenant's leasehold interest has been ordered or received.

3. Determine whether any exceptions to title exist for tenant's leasehold interest.

NOTE:

If the landlord's title is subject to an encumbrance that would have priority over the tenant financing for constructing the improvements, the tenant's lender will require, before funding the loan, either that the

encumbrance be paid off and removed or that it be subordinated to the tenant financing before funding the tenant's loan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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17-34D California Legal Forms--Transaction Guide § 34D.113

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.113 Purpose of Ground Lease

1. Determine purpose of ground lease, such as:

a. Sale and leaseback of land on which there is an existing building used by tenant for its own commercial or industrial business [*see Bullock's, Inc. v. Security-First Nat. Bk. (1958) 160 Cal. App. 2d 277, 279-281, 325 P.2d 185]* .

b. Sale and leaseback of land on which there is an existing office, apartment, or other multitenant building that tenant will rent out to subtenants.

NOTE:
For a discussion of construction and development financing involving ground leases and sale-leasebacks, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 420, ***Financing Construction and Development*** (Matthew Bender).

c. Lease of land on which tenant intends to build building for its own industrial or commercial operations.

d. Lease of land on which tenant intends to construct shopping center or other income-producing project [*see § 34D.200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal

Property LawLandlord & TenantLease AgreementsCommercial LeasesSale-Leaseback TransactionsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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17-34D California Legal Forms--Transaction Guide § 34D.114

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.114 Conditions of Lease

1. Determine whether there are any conditions to lease's effectiveness and commencement of its term, for example:

    a. Tenant's ability to obtain financing.

    b. Delivery of possession of leased premises on or before specific date.

    c. Ability to obtain zoning variance for tenant's intended business use.

    d. Ability to obtain business or other license required for operation of tenant's business.

2. Ascertain deadline for satisfaction of conditions.

3. Determine what steps, if any, party must take to indicate satisfaction of condition (for example, written notice to other party).

4. Determine what effect failure of condition will have, such as:

    a. Automatic cancellation of lease.

    b. Cancellation on written notice.

    c. Option or obligation of party intended to benefit from condition to do one of

following:

(1) Extend deadline for satisfaction of condition; or

(2) Cancel lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.115

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.115 Term of Lease

1. Ascertain lease's term, including:

    a. Length of term.

    b. Whether term commences on:
    (1) Specified date; or

    (2) Occurrence of specified event.

2. Ascertain options to extend (number and duration).

3. Determine whether occurrence of any event (other than tenant's default) will give either party right to terminate lease before its natural expiration, for example:

    a. Tenant's inability to obtain financing.

    b. Tenant's inability to obtain use permit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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17-34D California Legal Forms--Transaction Guide § 34D.116

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.116 Rent and Other Payments to Landlord

1. For fixed or minimum rent under lease, ascertain:

    a. Amount of minimum rent.

    b. When rent commences.

    c. At what intervals rent is payable.

2. For an income producing project, for example, a shopping center, determine whether tenant will be required to pay percentage rent, and if so:

    a. Amount of percentage rent.

    b. When rent commences.

    c. At what intervals it is payable.

    d. On what basis percentage rent will be calculated, for example, gross receipts of tenant.

    e. Whether percentage rent is in addition to, in lieu of, or an offset against, minimum rent.

3. Ascertain whether amount of basic or minimum rent will increase over lease's term, by any of the following:

a. Fixed dollar amounts at scheduled intervals.

b. Increased market value of premises.

c. Increases tied to Consumer Price Index or some other index for inflation.

4. Determine whether tenant will be required to post security deposit, and if so, in what amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.117

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.117 Use of Premises

1. Determine whether tenant's use of premises will be limited to specific development or business, and if so, what business.

2. Determine whether tenant will have right to change its use of premises during lease's term, and if so, subject to which of the following:

a. With landlord's prior approval.

b. Without landlord's prior approval.

c. Any other conditions.

3. Ascertain whether there will be any specific restrictions on tenant's use, such as prohibitions against:

a. Nuisance, waste, and unlawful purposes.

b. Use or storage of hazardous materials and substances.

c. Insurance hazards.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease

AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.118

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.118 Ownership of Improvements

NOTE:

One of the unique features of a ground lease is that the tenant owns the improvements during the lease's term, while the landlord continues to own the underlying land. When the lease terminates, most ground leases provide that title to the improvements reverts to the landlord [***see*** *§ 34D.10[2]*]. Responsibilities of the tenant toward the improvements during the lease term and at the expiration of the lease are matters to be agreed on by the parties. For example, some ground leases require the tenant to deliver the improvements intact at the end of the term, although others give the tenant the right to demolish economically obsolete improvements and the option to rebuild new improvements. A ground lease may also require the tenant to demolish and improve the improvements at the end of the lease term and to deliver the land to the landlord in its raw state.

1. During lease term, determine what tenant's responsibilities are if improvements are damaged or destroyed, such as:

a. Repair and rebuild.

b. Demolish and either rebuild or not rebuild.

c. Demolish and clear.

d. Do nothing.

2. At end of lease term (or earlier termination on tenant's default), determine whether:

a. Improvements must be delivered to landlord intact.

b. Tenant has right to remove improvements before that time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.119

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.119 Condemnation

1. For partial condemnation, determine:

    a. Whether lease will continue in effect as to any portion not condemned.

    b. Whether amount of rent payable will be reduced pro rata or on some other basis.

    c. Who will have obligation to do any necessary restoration.

2. Ascertain allocation of condemnation award, for example:

    a. Landlord and tenant will each recover award for its interests in lease.

    b. Landlord will receive entire award.

    c. Landlord will receive entire award, except that tenant will recover costs of removing fixtures and for amortized value of improvements made by tenant that are not removed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.120

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.120 Assignment and Subletting

1. Determine whether there will be any restrictions on tenant's right to assign lease, for example:

    a. Whether landlord's consent will be required.

    b. If landlord's consent is required, whether landlord must be reasonable in granting or withholding consent.

2. Determine whether there will be any restrictions on tenant's right to sublet premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsSubleases



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17-34D California Legal Forms--Transaction Guide § 34D.121

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.121 Right of First Refusal

1. If tenant is to be granted option or right of first refusal to purchase premises [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.264*], determine the following:

a. When and how option or right may be exercised.

b. Purchase price stated either:
(1) As specific dollar amount; or

(2) By reference to a standard or a formula, for example:
(a) For option, property's fair market value at time option is exercised.

(b) For right of first refusal, at same price set forth in third-party bona fide offer to purchase property.

c. Other terms and conditions of purchase.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPurchase & SaleOption ContractsRights of First Refusal



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 34D.122[Reserved]



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17-34D California Legal Forms--Transaction Guide § 34D.130

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.130 Representation of Both Parties to Lease

1. If requested to represent both parties to transaction:

a. Recommend that one party obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw their request and do not appear to have conflicting or potentially conflicting interests, take both of the following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party; and

b. Obtain written consent from both parties to arrangement before accepting employment.

PRACTICE TIP:
Representing Both Parties to a Lease Is Not Advised. It is impossible to see how there can be an effective waiver of a conflict of interest that would permit any attorney to represent both parties to a lease transaction even if that attorney's role was "limited" to drafting an already reached agreement. Any attorney who enters into such an arrangement is simply looking for major problems with either or both clients. It would be akin to representing both parties in a dissolution of marriage proceeding in which substantial interests were involved. *By Benjamin Kaplan.*

PRACTICE TIP: More on Conflicts of Interest. Lawsuits against attorneys based on

"conflicts of interest" are becoming more frequent. When a deal goes bad, some party is bound to impugn someone, with the attorney being the most likely target. Certain conflicts of interest may not be waivable. The fees involved in representing both parties to the transaction should more than justify the hiring of an independent ethics counsel to advise as to the propriety of the representation and, if appropriate, to draft the conflict of interest waivers. If it is the intention of the parties to "save" on attorneys' fees by employing the same counsel, then the parties should be willing to spring for the fees to have adequate disclosures made in respect to matters fundamental to the relationship. At the very least, the attorney should have an opinion by independent counsel of the propriety of proceeding where the interests of the parties are so fundamentally at variance. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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17-34D California Legal Forms--Transaction Guide § 34D.131

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.131 Reviewing Escrow Arrangements

NOTE:
For the requirements and procedure for opening and closing a real property escrow, see Ch. 26, ***Real Property Escrows*** .

1. Participate in drafting, or review, escrow instructions to confirm that following matters are covered:

    a. Proration of taxes and utilities, if any.

    b. Deposit of loan instruments and commitments.

    c. Deposit of any prepaid rent, security deposit, escrow fees, closing costs, or other money required by ground lease or tenant's loan.

    d. Any other matters required by ground lease.

2. Confirm that instructions recite any conditions to close of escrow, for example:

    a. Funding of tenant's loan(s).

    b. Title insurance for tenant's lender and tenant.

    c. Landlord's subordination of existing encumbrance on land.

3. If term of lease is not to commence until escrow closes, authorize escrow agent to insert operative date

in lease (and memorandum of lease) on close of escrow.

4. Instruct escrow agent to record memorandum of lease in recorder's office of county in which leased land is located [*see § 34D.133*].

5. Confirm that title insurance is issued at close of escrow.

NOTE:

The tenant's lender will require title insurance for its loan(s). The tenant should also obtain separate title insurance for its leasehold interest. The subject of title insurance is covered in Ch. 26A, ***Title Insurance*** .

PRACTICE TIP:

Escrow Practices. An escrow, whether it be a title company or escrow agent, is not there to protect your client. An attorney should not expect an escrow to do anything other than that which is provided in the usually prepared instructions, at least as to financial terms, on the escrow company's own forms. Therefore, the attorney should take very seriously his or her obligation to review proposed instructions before the client executes terms, and attempt to obtain the instructions in draft form as far in advance of the closing as is possible. For most major transactions, it is not unusual to pay a daily visit to the escrow officer handling the escrow if the office is not far away. Last minute panic reactions may be saved by ascertaining what is in the escrow file (to the extent it may be disclosed to you), with particular attention to the documents required for closing that the escrow has not received. Try to avoid closing dates that are in proximity to any dates that your funding is due to expire. It is good practice to send periodic confirming faxes to the escrow officer. Not only will this tend to move the escrow file to the top of the pile, but it will also instill in the escrow officer an impetus to close quickly and cleanly, if only not to have to address your faxes.

In addition, always instruct the escrow officer to provide you with certified copies of the documents that are recorded and/or "recorded as" conformed stamped copies. This simple expedient may save aggravation if the document is needed before it is returned to "the recording party." You may not, in any event, be representing "the recording party." *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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17-34D California Legal Forms--Transaction Guide § 34D.132

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.132 Review of Lease Drafted by Other Party

1. If lease has not yet been drafted by other party, assist client in negotiations with other party.

2. On receipt of lease, review lease to ensure that it is:

    a. Consistent with negotiated terms; and

    b. Legally sufficient.

    NOTE:
    For a checklist of provisions that should or may be included in a ground lease, see Part D of this Transaction Guide.

3. Obtain client's approval of final lease form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.133

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.133 Drafting and Execution of Lease; Recording Memorandum of Lease

1. Draft lease.

NOTE:
For a drafting guide for a ground lease, see Part D of this Transaction Guide.

2. Execute lease.

NOTE:
The execution requirements for a lease depend on whether the landlord or tenant is an individual or other type of legal entity. These requirements are discussed in the Transaction Guide to Ch. 34B, ***Residential Leases***.

PRACTICE TIP:
Execution of Lease. There is a trap for the unwary in respect to the authorization of certain types of entity/owners to execute leases. By example only, a corporation as a party to a lease may require at least two signatures by corporate officers [*see Corp. Code § 313*], and real property owned by a husband and wife may require both their signatures [*see Fam. Code § 1102(a)*]. *By Benjamin Kaplan.*

3. Prepare and record Memorandum of Lease as follows:

a. If representing tenant who desires to impart constructive notice of its leasehold interest, prepare Memorandum of Lease for recording purposes [*see Ch. 34C, Retail, Industrial, and Offices Leases, § 34C.203,* for discussion and sample Memorandum of Lease].

b. Execute Memorandum of Lease with acknowledgment and certification of signatures of executing parties by authorized offer [*see Gov. Code § 27287*].

NOTE:
The same execution requirements that apply to the lease apply to a Memorandum of Lease. For an outline of these requirements, see the Transaction Guide to Ch. 34B, ***Residential Leases***.

c. Record Memorandum of Lease in county where property is located [*Civ. Code §§ 1169, 1170*].

PRACTICE TIP:
Recording and Notorizing Lease. Although it is more common to record a Memorandum of Lease rather than the entire lease itself, if it is the tenant's intention to have the lease in recordable form, then it must be notarized. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPriorities & RecordingRecording Acts



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17-34D California Legal Forms--Transaction Guide §§ 34D.134-34D.139

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 34D.134[Reserved]



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

NOTE:

This Part is a checklist of provisions that an attorney may or should include in a ground lease for undeveloped land on which the tenant will construct improvements. For an example of a complete ground lease, see *§ 34D.200[2]*. If the attorney is reviewing a lease prepared by another party, this list may be used to evaluate the sufficiency and scope of that lease. This Part includes cross-references to forms in Ch. 34C, ***Retail, Industrial, and Office Leases*** , because many of the same provisions are typically included in both a ground lease and any other type of nonresidential lease. The focus of the guide below is on provisions unique to a ground lease.



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17-34D California Legal Forms--Transaction Guide § 34D.140

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.140 Introductory Provisions and Description of Premises

1. Begin lease with introductory paragraph or preamble setting forth all of the following [*see* Preamble and Recitals in § 34D.200[2]]:

a. Date of execution of lease.

b. Information concerning parties, including:
(1) Full names.

(2) Status and capacity, for example:
(a) California corporation.

(b) California limited partnership.

(c) Husband and wife.

(d) Unmarried man or woman.

c. Agreement of parties to lease.

2. Include legal description of land to be leased, either:

a. In body of lease; or

b. By attaching exhibit and incorporating it by reference [*see* Preamble and Recitals in § 34D.200[2]].

3. Recite fact that lease extends only to land and any described appurtenances, and not to improvements to be constructed by tenant on land [*see § 34D.200[2]*, Section 1.01].

4. If desired, include clause stating general purpose of lease [*see* Preamble and Recitals in § 34D.200[2] (lease of land for purpose of constructing shopping center)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.141

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.141 Term of Lease

1. State length of lease term [*see § 34D.200[2],* Section 1.03].

NOTE:

Ground leases have a longer term than other types of nonresidential leases and commonly range from a minimum of 35 years to a maximum of 99 years. Before agreeing on a specific term, the parties should consult with the tenant's lender. When institutional lenders lend on the security of a leasehold interest, the term of the lease may be required to extend a designated number of years beyond the maturity date of the tenant's loan, for example, 10 years [***see, e.g.,*** *Fin. Code § 1227* (banks)]. Also, the term of lease for certain types of property is limited [***see*** *§ 34D.15[1]*].

2. Describe when lease term is to commence, such as:

NOTE:

In most cases, the parties will elect not to have the term commence until the tenant's financing for construction of the improvements is obtained and escrow closes for the transaction. Since it is usually impossible to predict at the time the lease is drafted the particular date on which this will occur, a lease does not generally recite a specific date for its commencement. It is also unusual for a ground lease to postpone commencement of its term until completion of tenant improvements, although it is not uncommon for rent to be postponed until that time.

a. On specified date.

b. At close of escrow for ground lease transaction, after tenant's loan is approved [*see § 34D.200[2]*, Section 1.03].

c. On completion of construction of improvements on land.

3. Specify whether tenant has any right to extend term, and if so [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.212*]:

a. When right may be exercised.

b. How right must be exercised.

c. Length of extended term.

d. Terms and conditions, including amount of rent, for extended term.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesTerm Tenancies



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17-34D California Legal Forms--Transaction Guide § 34D.142

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.142 Rent and Other Payments of Money

1. Provide for periodic rent under lease, specifying [*see § 34D.200[2],* Section 2.01]:

a. Amount.

b. Date of commencement.

c. At what intervals it is payable.

2. If fixed rent will escalate during term of lease, include provision that:

a. Rent increases to be based on:
(1) Stated dollar amounts; or

NOTE:
Many lenders prefer increases based on specific dollar amounts to project at the time the loan is made the amount of total rent payable over the term of the lease.

(2) Consumer price index or other index for inflation.

b. States intervals at which increases are to be determined and paid.

3. If tenant is required to pay percentage rent under lease, include following information [*see § 34D.200[2],* Section 2.02]:

a. Basis for calculation, for example, tenant's gross receipts.

b. Intervals for calculation and payment.

c. Percentage of amount calculated that must be paid to landlord.

d. When payment commences.

4. If tenant is required to post security deposit [*see § 34D.200[2]*, Section 2.04; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.220*], state the following:

a. Amount of deposit.

b. Rights of landlord regarding use of deposit during lease term.

c. Obligation of tenant to restore any amount used by landlord during lease term.

d. Obligations of landlord for disposition of deposit on termination of lease.

5. Allocate responsibility for payment of the following:

NOTE:
A ground lease is usually a true net lease in which the tenant is required to pay all expenses normally associated with ownership, including those listed below [***see*** *Ch. 34C,* ***Retail, Industrial, and Office Leases****, § 34C.17*].

a. Property taxes [*see § 34D.200[2]*, art. 4; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.221*].

b. Repair and maintenance expenses [*see § 34D.200[2]*, art. 7; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.240*].

c. Insurance premiums for premises [*see § 34D.200[2]*, art. 8; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.222*].

d. Utilities [*see § 34D.200[2]*, Section 4.09].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.143

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.143 Use of Premises

NOTE:

Because of the long-term nature of a ground lease, such a lease usually permits greater flexibility in use than do comparable provisions of other types of nonresidential leases. The tenant's lender, in addition to the tenant, will customarily bargain for maximum flexibility in use, since the lender may succeed to the tenant's interest under the lease. Provisions for use are related to the tenant's right under a ground lease, if any, to make alterations to or to demolish the improvements, and to the tenant's duty, if any, to rebuild improvements in the event of destruction [***see*** *§ 34D.144*]. When a landlord is entitled to percentage rent under the ground lease from the tenant's business operations, he or she may be less flexible in agreeing to changes in use by the tenant.

1. Describe particular purpose and use for which tenant is constructing improvements, for example:

a. Shopping center [*see § 34D.200[2]*, Section 3.01].

b. Hotel.

c. Office building.

2. State whether tenant is permitted to change use during term of lease, and if so, describe any applicable conditions [*see § 34D.200[2]*, Section 3.01], for example:

a. Use must be permitted by law and zoning then in effect.

b. Use must provide amount of percentage rent comparable to that provided by initial use.

c. Use must be approved in advance by landlord.

d. Change will be permitted only if premises are destroyed during lease term.

e. Change will be permitted only during last part of lease term.

3. Describe any restrictions on use, such as prohibitions against:

a. Waste, nuisance, or unlawful purpose [*see § 34D.200[2]*, Section 3.03; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.231*].

b. Use or storage of hazardous materials and substances [*see § 34D.18*; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.201[2]*, Section 4.01].

4. Set forth any affirmative rights (with any corresponding limitations) of tenant to use premises or improvements, for example:

a. Right to demolish or reconstruct improvements.

b. Right to petition governmental authorities for:
(1) Change in zoning.

(2) Use permits.

(3) Change in assessments or reassessments.

c. Right to enter into agreements for the premises that:

(1) Grant easements.

(2) Restrict use.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawZoning & Land UseGeneral Overview

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17-34D California Legal Forms--Transaction Guide § 34D.144

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.144 Tenant's Rights and Duties Relating to Improvements

NOTE:

Ground lease provisions governing the rights or duties of a tenant with regard to maintenance and repair of the improvements, alterations to the improvements, and damage to or destruction of the premises, are related to the lease provisions governing the tenant's use of the premises [***see*** *§ 34D.143*] and must therefore be consistent.

1. State that during lease term tenant is to have title to improvements constructed by tenant on land [*see § 34D.200[2]*, Section 5.12].

NOTE:

To depreciate the improvements for tax purposes, the tenant must own the improvements [***see*** CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 191, ***Taxation of Tenants*** (Matthew Bender)].

2. Include provision that characterizes improvements as real property notwithstanding their separate ownership.

3. Set forth in detail tenant responsibilities for constructing new improvements on premises [*see § 34D.200[2]*, art. 5].

NOTE:

In most ground leases, the tenant is responsible for performing the construction and for paying all costs and expenses. For alternative provisions making the landlord responsible for construction, see *Ch. 34C, **Retail, Industrial, and Office Leases**, § 34C.243*.

4. Regarding maintenance of and repairs and alterations to improvements [*see § 34D.200[2]*, art. 7]:

a. Describe affirmative obligations of tenant, for example:
(1) Obligation to repair and maintain premises throughout term of lease.

(2) Duty to perform minor or major renovations as required or at stated intervals.

NOTE:
If major renovations are permitted or required, the same standards and requirements for the initial construction of improvements should apply to the subsequent renovation.

(3) Obligation to comply with all applicable laws.

(4) Duty to keep premises free of mechanics' liens.

(5) Duty to complete any construction in timely manner.

b. Describe any remedies of landlord for failure by tenant to perform required affirmative acts, for example:

(1) Performance of required acts and reimbursement for cost by tenant.

(2) Termination of lease.

c. List any rights of tenant regarding alteration of improvements, for example:

(1) Right to remodel.

(2) Right to demolish improvements and either rebuild or not rebuild new replacement improvements.

d. Set forth any limitations on tenant's rights to alter improvements, for example:

(1) Landlord's consent will be required for alterations exceeding stated cost or affecting certain percentage of improvements.

(2) Any special restrictions applicable to last portion of lease term.

5. Regarding damage to or destruction of premises [*see § 34D.200[2]*, art. 7], include the following:

a. Describe effect on lease of damage or destruction.

NOTE:
In the absence of lease provisions to the contrary, either party may terminate a lease if the leased premises are destroyed [*Civ. Code §§ 1932(2), 1933(4)*; *Harvey v. Weisbaum (1911) 159 Cal. 265, 267, 113 P. 656]* . Absent a lease provision requiring either party to rebuild, neither party has an obligation to rebuild destroyed premises [***see*** *Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647, 25 Cal. Rptr. 517]* . However, the parties to a lease may agree that either one of the parties has the obligation to rebuild [***see*** *Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr.*

889, 451 P.2d 721] . Under most ground leases, the tenant is required to rebuild if the premises are destroyed at any time during the lease's term, except possibly during the latter part of the term. The lease must clearly state this obligation; otherwise, the tenant has a right to terminate the lease if the premises are destroyed. The remainder of this section assumes that the tenant will have the obligation to rebuild.

b. Describe obligation of tenant to rebuild, including:

(1) Events giving rise to that obligation, for example:
(a) Damage or destruction from cause covered by insurance;

(b) Damage or destruction from cause not covered by insurance; or

(c) Either of above.

(2) Standards for rebuilding.

NOTE:
The lease provisions for the initial construction are usually made applicable to any rebuilding or repair.

(3) Commencement and completion dates.

(4) Effect on rent under lease.

c. Set forth any exceptions to tenant's obligation to rebuild.

NOTE:
For example, the tenant may be allowed to terminate the lease, rather than rebuild, after damage or destruction that occurs during the last part of the lease term [***see*** *§ 34D.200[2]*, Section 7.04].

d. Describe disposition of insurance proceeds payable from damage or destruction, for example:

(1) If tenant is required to rebuild, include provision requiring proceeds to be used for repair or reconstruction rather than payment of tenant's loan.

(2) If tenant is not required to rebuild, include provision reflecting parties' agreement that proceeds will be:

(a) Divided between landlord and tenant;

(b) Paid entirely to landlord;

(c) Paid to tenant's lender to satisfy loan; or

(d) Otherwise disposed of.

PRACTICE TIP:
Naming Lender as Named Insured or Named Additional Insured. The lender should be named as a named insured or a named additional insured with appropriate notice

provisions if there is a change in the terms of the policy or if a cancellation or termination notice should issue. *By Benjamin Kaplan.*

6. Specify rights and duties of parties on expiration or earlier termination of lease, for example:

a. Title to improvements remaining on land will automatically revert to landlord with no compensation to tenant [*see § 34D.200[2]*, Section 5.12].

b. Tenant is required, at landlord's election, to remove any improvements and restore land to its original state.

c. Tenant has right, but not duty, to remove improvements.

NOTE:

Disposition of the improvements on expiration or earlier termination of the lease is a matter to be negotiated by the parties. For any termination of the ground lease occurring before the natural expiration of the lease term, for example, as a result of condemnation or the tenant's default, the lease usually requires delivery of the improvements intact since they constitute all or part of the lender's security. Whether delivery of the improvements intact at expiration of the lease term will benefit the landlord's property value depends on, among other factors, the age and condition of the improvements. By that time, the tenant's loan(s) on the property will usually have been paid off.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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17-34D California Legal Forms--Transaction Guide § 34D.145

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.145 Tenant Financing

1. If security for tenant financing will be tenant's leasehold interest (to which landlord does not agree to subordinate its fee title interest), include the following:

a. Provision that expressly grants tenant the right to encumber its leasehold interest and improvements to be constructed by tenant [*see § 34D.200[2],* Section 6.01].

b. Any conditions applicable to tenant's right, for example:
(1) Tenant's mortgage must be subject to all provisions of ground lease, including all rights of landlord in lease.

(2) Notice of any mortgage or copies of mortgage and promissory note(s) secured by mortgage must be given to landlord.

(3) Any proceeds paid for damage or destruction to improvements must be used by tenant to repair or rebuild and not to pay tenant's mortgage.

2. If landlord agrees to join in tenant financing and subordinate its fee title interest [*see § 34D.212*], include the following provisions:

a. Landlord's agreement to subordinate its fee to specific loans of tenant, for example, construction and permanent loan for improvements to be constructed by tenant on premises.

b. Landlord's agreement to execute tenant's mortgage but not promissory note secured by mortgage for

sole purpose of pledging landlord's fee title interest as security.

c. Landlord's agreement to execute documents and instruments required by tenant's lender or by title company insuring interest of tenant or tenant's lender to carry out agreed-on subordination.

d. Conditions that are applicable to landlord's agreement, for example:

(1) Terms of construction and permanent loan must meet specific requirements set forth in ground lease [*see § 34D.212*].

(2) Landlord is not required to subordinate to construction loan until tenant has binding commitment for permanent loan.

(3) Landlord will have no personal liability on tenant's mortgage or underlying promissory note.

(4) Landlord's agreement to subordinate extends only to financing for original construction, and not to subsequent refinancings or other loans by tenant during term of lease.

e. Specific provisions landlord requires to be included in tenant's mortgage (and promissory note(s) as applicable), for example:

(1) Any terms of construction and permanent loan described in ground lease.

(2) That landlord will have no personal liability on tenant's mortgage or underlying promissory note.

(3) That none of following may occur without prior written consent of landlord:
(a) Extension of loan due date;

(b) Future advances or additions to balance of original loan(s);

(c) Refinancing by tenant of loan; and

(d) Modifications to loan documents.

(4) That any proceeds paid for damage or destruction to improvements must be used by tenant to repair or rebuild and not to pay tenant's mortgage.

(5) That landlord must receive notice of any default or notice of sale.

(6) That landlord must have right to cure any tenant default that is curable.

3. State any limitations on landlord's right to encumber fee title after recording of original tenant financing [*see § 34D.211*].

NOTE:
If the ground lease permits the tenant to obtain subsequent financing over the term of the lease on the

security of its leasehold interest, the landlord should be restricted from encumbering its fee title interest, since those encumbrances would then have priority over the tenant's subsequent financing. Some ground leases prohibit the landlord from encumbering its fee title during the ground lease's term, although others permit the encumbrances but require the landlord's agreement to subordinate the encumbrances to subsequent financing by the tenant. Problems of enforceability may exist for the latter method [***see § 34D.212[1][e]***].

4. If applicable, include landlord's agreement to consent to changes in ground lease required by tenant's lender, provided those changes do not substantially diminish rights or increase obligations of either party under lease.

NOTE:

Such a provision is useful when the parties draft or execute the lease before the time specific commitments for financing are obtained.

5. Include lender "protective" provisions required by specific lender involved [*see § 34D.200[2]*, Sections 6.02-6.12], for example:

a. Agreement by landlord and tenant that ground lease may not be modified or amended without consent of lender.

b. Prohibition against cancellation of lease by tenant (for reason permitted in the lease, such as destruction of premises) without prior written consent of lender.

c. Requirement that notice of any default by tenant under ground lease be given promptly to lender and that lender be given an opportunity to cure default.

d. Agreement by landlord to execute new lease (containing same terms as original ground lease) with lender as ground tenant, at lender's election, on termination of lease for default or on foreclosure of lender's deed of trust.

e. Right of lender to foreclose or make assignment in lieu of foreclosure and right after foreclosure to freely assign or sublease.

f. Provision limiting lender's obligation to perform terms of lease only during its period of possession, that is, from the time it acquires leasehold interest until it assigns to successor.

g. Provision protecting interest of lender in insurance proceeds.

NOTE:

For a casualty that damages or destroys the improvements at any time except during the latter part of the lease term, the lender will usually agree to permit the proceeds to be applied toward the rebuilding if that is the agreement between landlord and tenant. However, for damage or destruction occurring during the latter part of the lease term, the lender may insist that proceeds be used to pay its loan balance.

h. Provision protecting interest of lender in event of condemnation.

NOTE:

Although the chances of condemnation during the lease term may be remote, lenders usually insist on adequate protective lease provisions under these circumstances [***see §***

34D.200[1][l]].

i. Agreement that there will be no merger of leasehold estate and fee estate in leased land if both interests are at any time acquired by same party unless lender expressly consents to such a merger [*see 6424 Corp. v. Commercial Exchange Property, Ltd. (1985) 171 Cal. App. 3d 1221, 1223-1224, 217 Cal. Rptr. 803]* .

j. Provisions permitting flexibility in use of premises.

k. If landlord's fee title interest will be subordinated to tenant financing, specific terms of tenant loans to which subordination is to apply.

l. Any other provisions required by specific lender.

6. If applicable, add provision authorizing landlord to terminate lease if tenant does not obtain financing by specified date [*see § 34D.210*].

NOTE:

With this type of provision, the landlord can arrange for alternative disposition of the land if the tenant fails to obtain financing within the specified period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.146

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.146 Condemnation

NOTE:

If the lease does not specify the effect that a total or partial condemnation of the premises will have on the lease and does not state the respective rights and obligations of the parties (including division of any condemnation award), these matters are determined by applicable law [***see*** *Code Civ. Proc. § 1230.010 et seq.* (Eminent Domain Law); ***see also*** *Code Civ. Proc. § 1265.160*]. For discussion of that law, see *Ch. 34C,* ***Retail, Industrial, and Office Leases****, § 34C.262[1]*.

For a checklist of condemnation provisions that should be considered for inclusion in a ground lease, see *Ch. 34C,* ***Retail, Industrial, and Office Leases****, § 34C.151*. In addition to the items in that checklist, the parties to a ground lease must consider the interest of the lender in the event of condemnation, which may be controlling with regard to condemnation provisions ultimately included in the ground lease [***see*** *§ 34D.200[2]*, art. 9].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34D California Legal Forms--Transaction Guide § 34D.147

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.147 Assignment and Subleasing

NOTE:

Assignment and subleasing provisions in a ground lease are usually more permissive than those in other types of nonresidential leases. The tenant needs increased flexibility due to the extremely long term of most ground leases, and the tenant's lender usually insists on flexibility since it may succeed to the tenant's interest under the lease in the event of the tenant's default. For lease provisions that prohibit or only conditionally permit assignment or subleasing, see *Ch. 34C, **Retail, Industrial, and Office Leases**, § 34C.260*.

1. Set forth provision giving tenant right to assign interest in lease, subject to the following:

    a. Assignee being subject to all terms and conditions of ground lease.

    b. Any other conditions agreed on by parties [*see § 34D.200[2]*, Section 10.01].

2. Add provision granting tenant right to sublease premises, subject to the following:

    a. Subtenant's agreement to attorn to lender in event of tenant's default.

NOTE:

In the context of a ground lease, "attornment" is an agreement by a subtenant to be bound directly to the ground landlord for the performance of all obligations under the sublease in the event of the ground tenant's default [***see*** Rabkin & Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, ch. 23, ***Real Estate Leases*** (Matthew Bender)].

b. Any other conditions agreed on by parties [*see § 34D.200[2]*, Section 10.03; *see also § 34D.213*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsSubleases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

17-34D California Legal Forms--Transaction Guide § 34D.148

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.148 Breach and Remedies for Breach

NOTE:

Provisions in a ground lease for a tenant's breach and the landlord's remedies are substantially the same as in any other type of nonresidential lease. For a list of generally applicable provisions, see *Ch. 34C, **Retail, Industrial, and Office Leases**, §§ 34C.270, 34C.271*. In a ground lease, however, the lender is granted certain rights in the event of a default by the tenant, such as the right to cure the tenant's default. These lender rights are discussed in *§ 34D.200[1][n]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
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D. Drafting Guide

17-34D California Legal Forms--Transaction Guide § 34D.149

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.149 Miscellaneous Provisions

1. If parties agree that some or all disputes arising under lease will be settled by arbitration, include arbitration provision and confirm provision meets statutory requirements [*Code Civ. Proc. § 1298*; *see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.280*] for the following:

    a. Format.

    b. Headings.

    c. Notices.

2. If desired, set forth miscellaneous provisions regarding:

    a. Force majeure [*see § 34D.200[2]*, Section 12.01].

    b. Attorneys' fees [*see § 34D.200[2]*, Section 12.02].

    c. Delivery of notices [*see § 34D.200[2]*, Sections 12.03, 12.04].

    d. Governing law [*see § 34D.200[2]*, Section 12.05].

    e. Binding effect of agreement [*see § 34D.200[2]*, Section 12.06].

    f. Partial invalidity [*see § 34D.200[2]*, Section 12.07].

g. Status of contract and exhibits as entire agreement between the parties [*see § 34D.200[2]*, Section 12.08].

h. Time for performance (that is, "time of the essence" provision) [*see § 34D.200[2]*, Section 12.09].

3. Include provision that requires lease or memorandum of lease to be recorded [*see § 34D.200[2]*, Section 12.10; *see also § 34D.133* of this Transaction Guide].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

17-34D California Legal Forms--Transaction Guide § 34D.150

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.150 Signature and Execution

NOTE:

The execution requirements for a ground lease, which are the same as for a residential lease, are set forth in the Transaction Guide to Ch. 34B, ***Residential Leases***.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

17-34D California Legal Forms--Transaction Guide §§ 34D.151-34D.199

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 34D.151[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
A. Complete Lease

17-34D California Legal Forms--Transaction Guide § 34D.200

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.200 Ground Lease

[1] Comment

[a] Use of Form

The form in [2], *below*, is a complete ground lease that requires the tenant to construct improvements, in the form of a shopping center, on the land leased from the landlord. It authorizes the tenant to secure financing for construction of these improvements by its leasehold interest in the ground lease. This method of financing is commonly referred to as "leasehold financing." For an alternative method of financing in which the landlord agrees to join in the tenant financing and to subordinate its fee interest to the tenant's loans (commonly referred to as "fee subordination"), see *§ 34D.212*.

Alternative form provisions that may be used with this ground lease are *set forth in §§ 34D.210-34D.213*. For a discussion of the relative merits of using a ground lease, see *§§ 34D.10* (nature of ground lease), 34D.11 (tenant's considerations), and 34D.12 (landlord's considerations).

[b] Term of Lease

The form in [2], *below*, provides for a fixed term of years [*see* [2], Section 1.03, *below*], which, for ground leases, is generally quite lengthy compared to other nonresidential leases. For certain types of property, the maximum length of the lease term is restricted by statute. Furthermore, if the security for the tenant's financing is the tenant's leasehold interest, regulatory law for certain institutional lenders may require that the term of the ground lease exceed the term of the loan by a stated period [*see § 34D.15[1]*].

[c] Rent and Security Deposit

The form in [2], *below*, requires the tenant to pay (1) base rent during the term of the lease, which escalates by stated amounts and at stated intervals throughout the lease's term [*see* [2*], Section 2.01, below*], and (2) percentage rent based

on gross income from the tenant's operation of the shopping center [*see* [2*], Section 2.02, below*]. For discussion of other types of rent escalation clauses, see *§ 34D.15[2]*.

The form in [2], *below*, also requires the tenant to post a security deposit [*see* [2], Section 2.04, *below*]. For a discussion of the statutory requirements applicable to a security deposit for a nonresidential lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.220[1]*.

[d] Use of Premises

In the form in [2], *below*, the tenant's use of the premises is limited to a commercial shopping center [*see* [2*], Section 3.01, below*]. The tenant cannot make any change in use without the landlord's prior written consent. When a tenant is required to pay percentage rent [*see* [2*], Section 2.02, below*], the landlord has an interest in limiting use to that on which the landlord's expectation for a certain amount of percentage rent is based.

The tenant is required to comply with all laws and ordinances affecting the property and improvements during the lease term [*see* [2*], Section 3.02, below*]. For a discussion of the legal effect of this provision, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.241*. Furthermore, the lease prohibits the tenant from engaging in any illegal uses and from committing waste or maintaining a nuisance on the premises [*see* [2*], Section 3.03, below*]. For a provision that prohibits a tenant from using or storing any hazardous or toxic substances on leased premises, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.201[2],* Section 4.01.

For further discussion of issues relating to the use of the leased premises, see *§ 34D.15[3]*.

[e] Taxes and Utilities

Because most ground leases are "net" leases [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.17* (net leases)], the form in [2], *below*, requires the tenant to pay all real property taxes on the land and improvements for the duration of the lease term, in addition to all utilities for the leased premises [*see* Article 4, *below*]. It specifically provides that the tenant's obligation for taxes includes both general and special assessments and any increases in taxes, whether caused by an increase in assessed valuation or an increase in the tax rate [*see* [2*], Section 4.01, below* ; *see also Ch. 34C, Retail, Industrial, and Office Leases, § 34C.221*].

[f] Construction of Improvements

Under many ground leases the tenant is required to construct improvements on the premises. Article 5 of the lease in [2], *below*, describes the tenant's specific obligations with regard to preparation and approval of plans, changes in plans, construction requirements, compliance standards, and time for completion. These provisions are similar to those contained in the *form in Ch. 34C, Retail, Industrial, and Office Leases, § 34C.243[2]*. For discussion of construction issues that are equally applicable to nonresidential and ground leases, see *§ 34C.243[1]*.

[g] Financing

Article 6 of the ground lease in [2], *below*, authorizes what is commonly referred to as "leasehold financing" [*see § 34D.13[1][a]*]. The tenant is authorized to encumber its leasehold interest during the lease term to obtain loans to construct improvements on the premises or for other purposes [*see* [2*],Section 6.01, below*]. That authorization is subject only to the conditions that (1) the loans are subject to all terms of the ground lease, and (2) the tenant notify the landlord of any loan and deliver a copy of the corresponding security instrument to the landlord [*see* [2*], Section 6.01, below*]. For an alternative provision for use when the landlord agrees to subordinate its fee title interest in the premises to the tenant financing, see *§ 34D.212*.

For further discussion of financing under a ground lease, see *§ 34D.13*.

PRACTICE TIP:

Approval of Ground Lease by Lender. As a matter of practice, many ground leases are not approved by the leasehold lender before their execution by the landlord and tenant. For that reason, the tenant's attorney should consider including a provision in the ground lease that requires the landlord to agree to any changes in the lease required by the tenant's lender, provided the changes do not substantially diminish the rights or obligations of either tenant or landlord. *By Publisher's Editorial Staff.*

[h] Lender Protection

Because different lenders may require different provisions to protect their security for tenant financing, coordination with the tenant's lender is crucial in drafting a ground lease [*see § 34D.13[2], [3]*]. This lease contains the following provisions, which are commonly required by lenders [*see* [2], art. 6, *below*]:

- The landlord is required to mail a copy to the lender of any notice mailed to the tenant, including any notice of default [*see* [2*], Section 6.02, below*];

- The landlord may not modify or cancel the lease without the lender's prior written consent [*see* [2], Section 6.03, *below*];

- The lender has the right to foreclose on its security interest or to accept an assignment in lieu of foreclosure, and in connection with either, the right to assign the leasehold interest to a third party [*see* [2], Sections 6.04, *6.07, below*];

- The lender's duty to fulfill the tenant's duties under the lease is limited to the period the lender actually has possession or ownership [*see* [2], Section 6.04, *below*];

- The lender has the right to cure a default by the tenant [*see* [2*], Section 6.05, below*], but is not required to cure those defaults that are not curable (for example, a tenant's bankruptcy or insolvency);

PRACTICE TIP:

Lender's Role in Determining Tenant's Default. The tenant's attorney should be cognizant that any significant dispute between the landlord and tenant may turn into an incident of default with the lender. Tenant's attorneys should therefore be very careful in attempting to negotiate with the lender any limitations on what the lender may declare as a default. Otherwise, the tenant may find that the lender becomes the "handmaiden," if not enforcer, for the landlord in such a manner as to place the tenant at the will and whim of the landlord. *By Benjamin Kaplan.*

- The lender has the right to forestall a termination of the lease by the landlord by commencing foreclosure proceedings against the tenant (and paying all money due the landlord during pendency of the foreclosure proceeding) [*see* [2*], Section 6.06, below*];

- If the landlord terminates the lease with the tenant, the landlord must, if the lender makes a request within a stated period of time and cures the tenant default, enter into a new lease with the lender containing the same terms and conditions as the original ground lease [*see* [2], Section 6.08, *below* ; *see also § 34D.17*];

- The tenant's leasehold estate and the landlord's fee title will not merge, even though both are acquired by same person or entity, unless the lender consents [*see* [2], Section 6.09, *below* ; *see also 6424 Corp. v. Commercial Exchange Property, Ltd. (1985) 171 Cal. App. 3d 1221, 1223-1224, 217 Cal.*

Rptr. 803] ; and

- All rights of the lender described in the ground lease will accrue to any subsequent purchasers or assignees [*see* [2*], Section 6.11, below*].

This lease also provides that, if there is more than one lender and their rights under the lease conflict, the lender with the senior encumbrance will prevail [*see* [2*], Section 6.12, below*].

[i] Repairs and Maintenance

[i] Tenant's Repair Obligations

The lease in [2], *below*, requires the tenant to repair and maintain the premises throughout the term of the lease [*see* [2*], Section 7.01, below*], and to comply with all applicable laws affecting the premises, including those that require alterations, improvements, or additions [*see* [2*], Section 7.02, below*]. Both the landlord and the tenant's lender are likely to insist on this type of provision, since (1) the value of the landlord's property is enhanced by well-maintained improvements, (2) title to the improvements usually reverts to the landlord on the lease's termination, and (3) the lender's security interest consists of the improvements and the tenant's leasehold interest. For discussion of the respective duties of landlord and tenant under a nonresidential lease to comply with applicable governmental law and regulations (including those requiring repairs and improvements to leased property), see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.241[1]*.

[ii] Renovation of Improvements

Some ground leases require the tenant to renovate improvements at, for example, a shopping center or a hotel, at stated intervals throughout the lease's term. The purpose of this type of provision is so that the improvements on the premises can be maintained in a modern, first-class condition. When this provision is included, the requirements for the renovation are usually similar to those for the tenant's original construction. For illustrative provisions of this type, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 153, *Drafting Commercial Leases* (Matthew Bender).

[j] Destruction of Improvements

If the improvements are damaged or destroyed from any cause, the tenant is required to restore them to their condition as originally constructed by the tenant, subject to certain modifications permitted under the lease [*see* [2], Section 7.03, *below*]. However, if the damage or destruction is substantial (according to a formula in the lease) and occurs during a specified period at the end of the lease term, the tenant is excused from rebuilding and may instead terminate the lease [*see* [2], Section 7.04, *below*].

The application of insurance proceeds payable on destruction of the premises is likely to be a heavily negotiated point among the landlord, tenant, and lender. The landlord is likely to insist that the proceeds be used by the tenant for rebuilding, although the lender may prefer the proceeds be used to pay off its loan [*see* [k], *below*]. The provision set forth in this form is a compromise that may be acceptable to both parties. It provides that under circumstances described in the lease requiring the tenant to rebuild, the insurance proceeds are to be paid to the tenant for the express purpose of rebuilding [*see* [2*], Section 7.05, below*]. An alternative would be to require the proceeds be paid to an insurance trustee for distribution to the tenant during the rebuilding process. If circumstances permit the tenant to terminate the lease rather than rebuild, the proceeds must be used to pay off the lender's loan [*see* [2*], Section 7.05, below*].

[k] Insurance

The provisions for insurance in the lease form in [2], *below*, are typical of a "net" lease, that is, they require the tenant to maintain and pay the premiums for all required insurance on the premises [*see* [2], art. 8, *below*]. Unlike an ordinary

commercial lease [*see, e.g., Ch. 34C, Retail, Industrial, and Office Leases, § 34C.200[2]*], the ground lease in [2], *below*, does not require that the landlord be named as an additional insured under the fire and extended coverage insurance, and does not state that the insurance is for the benefit of both landlord and tenant, since the improvements are owned by the tenant. The fire and casualty policy carried by the tenant is required to contain a standard lender's endorsement and cannot be canceled without prior notice to both the landlord and the lender [*see* [2], Section 8.03, *below*].

PRACTICE TIP:

Insurance Broker Should Review Insurance Provisions Before Lease Execution. Before the execution of any lease, the tenant should have its insurance broker review all the insurance clauses of the proposed lease. The tenant should then have the broker obtain a commitment from an insurance carrier that it will insure against the risks as outlined in the lease, in the amounts of coverage as specified in the lease, and at a premium as stated in advance of entering into the lease. Tenants often enter long term leases without the slightest attempt to investigate whether the coverage required under the lease is available, or whether they are going to have to fly to Lloyd's of London to obtain it at some significant premium. *By Benjamin Kaplan.*

Payment of insurance proceeds following an insured casualty is of significant concern to a lender [*see Section 7.05* of form; *see also* [j], *above*]. Although a lender may prefer to have casualty proceeds used to reduce or pay off its loan balance, it may consent to a ground lease provision that requires the tenant to restore damaged improvements. However, the lender may insist that the tenant's obligation to restore be limited to the amount of insurance proceeds actually paid. If the landlord requires the tenant to restore the improvements under any and all circumstances, the lender may require that it be exempt from this provision and required to restore only to the extent of available insurance proceeds or a specific dollar amount. If there are excess insurance proceeds following a required restoration, the lender may require that the ground lease provide for their payment to the tenant and that the mortgage instrument securing the tenant's financing provide for their payment to reduce the lender's loan [*see* York, *The Ground Lease and the Leasehold Mortgagee, 99 Banking L.J. 713, 713*-714 (1982)].

For further discussion of general insurance considerations, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.222[1]*.

[l] Condemnation

Article 9 of the form in [2], *below*, sets forth the rights and obligations of the parties in the event the premises are totally or partially condemned. If a lease provides for the rights and obligations of the parties in the event that all or a portion of the property is acquired for public use, the lease provisions prevail [*Code Civ. Proc. § 1265.160*]. Otherwise, the Eminent Domain Law [*Code Civ. Proc. § 1230.010 et seq.*] and applicable case law govern the rights and obligations of the parties to the lease [*see Code Civ. Proc. § 1265.160*; *see also § 34D.15[4]*].

A "total taking," defined in the lease in [2], *below*, as a taking of fee title to all of the premises, all of the improvements, or all of the tenant's leasehold interest, results in termination of the lease [*see* [2*], Section 9.01, below*]. A partial taking is any taking less than a total taking. For certain partial takings, the tenant is required to restore any damage to remaining improvements and to replace taken improvements with new construction, to the extent permitted by then-applicable law [*see* [2*], Sections 9.02*, 9.03, *below*]. For more substantial takings, as defined in the lease, the tenant is permitted to terminate the lease [*see* [2], Section 9.04, *below*]. If the lease continues in effect after a partial taking, a provision is included that provides for a partial abatement of rent [*see* [2*], Section 9.06, below]. Section 9.05* of the form addresses the matter of how any condemnation award is to be divided between the landlord and the tenant.

PRACTICE TIP:

Consider Cost Allocation Provision as Part of Condemnation Award. Provision should be made when

providing for the division of cost recovery to take into account the fees and costs which may be expended in obtaining the award in a contested action. There should be some apportionment method for the fees and costs incurred paralleling the division of the award or the compensation to be received by the respective parties. *By Benjamin Kaplan.*

[m] Assignment and Subletting

Unless a nonresidential lease includes a restriction on the assignment, sublease, or other voluntary or involuntary transfer or encumbrance of all or a part of a tenant's interest in the lease [*see Civ. Code § 1995.020(e)* ("transfer" defined)], a tenant's rights under the lease include unrestricted transfer of the tenant's interest in the lease [*Civ. Code § 1995.210(b)*]. Ambiguities in a restriction on transfer must be construed in favor of transferability [*Civ. Code § 1995.220*].

The form in [2], *below*, provides that an assignment by the tenant is subject to the landlord's consent, which may not be unreasonably withheld. However, the landlord is required to consent to certain assignees, that is, those with operational experience and financial qualifications described in the lease [*see* [2*], Section 10.01, below*]. This form also provides that the tenant has the right to sublease without the landlord's consent [*see* [2], Section 10.03, *below*].

For an alternative transfer provision, and discussion of restrictions on transfer [*see Civ. Code §§ 1995.210-1995.270*], see *§ 34D.213*. For further discussion of transfer issues generally, see *§ 34D.15[5]*.

PRACTICE TIP:

Change of Ownership of Tenant Entity. It is not usual for a tenant to change the form of its business organization over the course of the lease, or to merge with or be purchased by another business entity. Provision should be made such that a change of business or merger would not trigger any clause limiting assignment of the lease. Often times this is expressed in terms of whether the "owners" still maintain a "controlling interest," which in some corporate contexts may be as little as 10 percent of the outstanding shares. *By Benjamin Kaplan.*

[n] Default and Remedies

The default and remedies provisions of the ground lease in [2], *below* [*see* [2], art. 11, *below*], are substantially the same as those for any nonresidential lease. For a discussion of those provisions, see *Ch. 34C, Retail, Industrial, and Office Leases, §§ 34C.200[1][r]-[t], 34C.270, 34C.271*. For discussion of the provisions used by lenders to protect their security interest on tenant default [*see* [2], art. 6, *below*], see [h], *above*. For detailed coverage and forms for use in unlawful detainer actions, see CALIFORNIA FORMS OF PLEADING AND PRACTICE, ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

Among the listed acts constituting default by the tenant is the voluntary or involuntary filing of bankruptcy [*see* [2], Section 11.03, *below*]. This provision is generally not enforceable under a federal bankruptcy proceeding [*see 11 U.S.C. § 365(e)(1)*]. However, to protect itself against a possible termination of the lease because of the tenant's bankruptcy, a lender usually requires a provision in the ground lease that requires the tenant to execute a new lease if the landlord terminates the lease with the tenant for the tenant's default [*see § 34D.17*].

[o] Miscellaneous Provisions

The form in [2], *below*, includes a provision for attorneys' fees [*see* [2*], Section 12.02, below*]. For an alternative provision and a discussion of the applicable law, see *Ch. 34C, Retail, Industrial, and Office Leases § 34C.274*.

Also included is a provision requiring the parties to execute and record a memorandum of the ground lease [*see* [2*], Section 12.10, below*]. Even without this specific provision, the lender would require that the memorandum or lease

itself be recorded. For a form of memorandum of lease and a discussion of its effect, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*.

Other miscellaneous provisions included in Article 12 of this form are the following:

- A force majeure clause [*see* [2*], Section 12.01, below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.235*];

- A provision describing the methods by which either party may give the other any notice required or permitted by the lease [*see* [2], Sections 12.03, 12.04, *below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.294*];

PRACTICE TIP:

Delivery Options Should Include Those With Tracking. To permit any party to serve a [critical] notice by the U.S. mail, first class, is to invite not only disaster, but possible wrongdoing. If one considers that the party mailing the notice need only swear that it has been done, and that many inadvertencies can occur which might result in the notice [innocently] never really being mailed, the potential consequences of permitting service by first class mail must be avoided. It is suggested that any notice, or particularly any notice which is a notice of default or an exercise of a right, be served either personally or by first class mail and express mail. This would then permit the tracking and verification of both deposit and delivery. *By Benjamin Kaplan.*

- A provision stating that California law will apply in interpreting the lease [*see* [2*], Section 12.05, below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.273*];

- A provision making the lease binding on successors of the parties [*see* [2*], Section 12.06, below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.282*];

- A partial invalidity clause [*see* [2*], Section 12.07, below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.271*];

- A sole and only agreement clause [*see* [2], Section 12.08, *below* ; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions , § 75.270*]; and

- A time is of the essence clause [*see* [2], Section 12.09, *below* ; *see also Ch. 23, Real Property Sales Agreements , § 23.200*].

[2] Form

Ground Lease

GROUND LEASE

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GROUND LEASE

Preamble and Recitals

This lease is entered into on _____[*date*] by and between _____[*name(s)*], _____[*legal status, e.g.,* a California general partnership], referred to in this lease as "Landlord," and _____[*name(s)*], _____[*legal status, e.g.,* a California corporation], referred to in this lease as "Tenant."

A. Landlord is the owner of certain real property in the County of _____, State of California,

described on Exhibit "_____," which is attached and made a part of this lease (referred to in this lease as "the Premises").

B. Tenant desires to lease the Premises (together with certain appurtenant rights and easements) for the purpose of constructing a commercial shopping center ("the Shopping Center"), appurtenant parking areas, and other related improvements (collectively referred to in this lease as "the Improvements") in accordance with the agreement of the parties as set forth in this lease.

ARTICLE 1 LEASE OF PREMISES AND TERM OF LEASE

Agreement to Lease

Section 1.01. For and in consideration of the rents to be paid and covenants to be performed by Tenant under this lease, Landlord agrees to lease the Premises to Tenant, and Tenant agrees to lease the Premises from Landlord, on the terms and conditions set forth in this lease. Except as expressly otherwise provided in this lease, "the Premises" includes the real property plus any appurtenances and easements described in Exhibit "_____" of this lease [*cross-refer to same exhibit referred to in Recital A, containing legal description of real property*], exclusive of any Improvements now or subsequently located on the Premises, notwithstanding that any Improvements may or shall be construed as affixed to and as constituting part of the described Premises, and without regard to whether ownership of the Improvements is in Landlord or in Tenant.

Status of Title

Section 1.02. Title to the leasehold estate created by this lease is subject to all exceptions, easements, rights, rights-of-way, and other matters of record set forth on the Preliminary Title Report issued by _____[*name of title company*], dated _____, a copy of which is attached as Exhibit "_____."

Term of Lease

Section 1.03. The term of this lease shall be for a period of _____[*number, e.g.*, 60 years] commencing on the date close of escrow for this transaction occurs (Escrow # _____[*number*], _____[*name of escrow company, address, city, and state*]) and continuing _____[*same number as above, e.g.*, 60 years] after escrow closes, unless terminated earlier as provided in this lease.

ARTICLE 2 RENT

Minimum Rent

Section 2.01. In addition to any percentage rent required under Section 2.02 of this lease, Tenant agrees to pay to Landlord minimum annual rent ("Minimum Rent") for each year during the term of this lease in the following amounts:

(a) $_____ per year for each of the first _____[*number, e.g.*, 10 years] of this lease;

(b) $_____ per year for the next _____[*specify, e.g.*, 10 years] of this lease; and

(c) $_____ per year for the _____[*specify, e.g.,* twenty-first] and each ensuing year of this lease.

[*If tenant will not be required to pay minimum rent before completion of construction or for any other agreed-on period at commencement of lease term, add:*]

Notwithstanding anything to the contrary in this section, Tenant shall not be required to pay Minimum Rent for the period from the date the term of this lease commences and continuing through _____[*specify date, or* the date Tenant completes construction of the Shopping Center *or* the date Tenant commences the operation of business at the Shopping Center].

[*CONTINUE*]

Percentage Rent

Section 2.02 (a). In addition to the Minimum Rent, Tenant shall pay to Landlord each Calendar Year (defined in subsection (f), below) or partial Calendar Year during the term of this lease, _____[*agreed-on percentage, e.g.,* 10] percent of Tenant's gross income [*or specify other, e.g.,* gross sales] from operation of the Shopping Center [*if percentage will apply only to amounts in excess of stated dollar amount, add:* in excess of the sum of $_____ (*agreed-on dollar amount, e.g.,* $2 million)].

(b) Gross income consists of the total, as determined under the cash method of accounting, of the following:

(1) All rents, participation in sales, deposits not refunded and not required to be refunded at a later date, and other amounts passing to Tenant chargeable or collected under any Sublease (defined in Section 10.03) of the Premises or of the Improvements; and

(2) An amount equal to the fair market rental value for any space occupied by Tenant.

(c) Percentage rent for one lease year is not subject to adjustment by reason of any transaction or adjustment occurring in any subsequent lease year. All amounts paid by Tenant for common area maintenance, insurance, taxes and similar charges (to the extent that Tenant is separately reimbursed for those amounts by its Subtenants [defined in Section 10.03] and that reimbursement is gross income) shall be excluded from gross income.

(d) On or before March 31 of each year during the term of this lease, beginning in the first year during which the Shopping Center has been open for business for at least _____[*number, e.g.,* 90 days] preceding the March 31 date, Tenant shall, without notice or demand from Landlord, deliver to Landlord in the manner prescribed in this lease for giving notices, a statement prepared in accordance with generally accepted accounting principles consistently applied and by a Certified Public Accountant acceptable to Landlord showing the gross income and deductions as provided in subsections (a) through (c) of this section for the preceding Calendar Year (defined in subsection (f), below) and shall simultaneously pay the percentage rent due Landlord under this lease for that calendar year. Payment shall be made in United States currency, or by check or other order as is then customary in business transactions and is otherwise acceptable to Landlord in its reasonable discretion. Delivery by mail or other means shall be deemed made in accordance with the definition of delivery set forth in this Lease.

(e) Tenant shall keep accurate records of the gross income and deductions as provided in subsections (a) through (c) of this section. All records relating to the management, operation, maintenance, repair, construction, or alteration of, or addition to the Premises and Improvements shall be kept at the principal business office of Tenant for not less than

_____[*number, e.g.,* three years] after delivery of the required annual report. Landlord shall have the right, at its own cost and at any reasonable time and from time to time after giving prior written notice to Tenant, to do or cause to be done any of the following: to audit the records or to cause an audit of the records to be made; to make abstracts from the records; to make copies of any or all of the records; and to examine and make copies of any or all Subleases. Tenant shall make all records specified in the notice available at the time specified in the notice, if reasonable, and at the place where the records are to be kept in accordance with this section. All information obtained by Landlord or otherwise obtained under the percentage rent provisions of this lease shall be treated as confidential except in any litigation or arbitration proceedings between Landlord and Tenant or Landlord and any Subtenant, concessionaire, or licensee. However, Landlord may divulge the information to a prospective buyer or encumbrancer of the Premises or of Landlord's interest in the lease or to a governmental agency demanding the information. If the audit discloses that the gross income was understated, Tenant shall immediately pay the additional Percentage Rent to Landlord, together with interest on the additional amount from the date it was due at the maximum interest rate then permitted by law, and in addition, if the error was in excess of _____[*agreed on percentage, e.g.,* 2 percent], Tenant shall pay Landlord's reasonable audit costs.

(f) For purposes of computing and paying Percentage Rent under this lease, a "Calendar Year" shall be considered to begin on the first day of January of the year in which the Shopping Center is open for business and each subsequent anniversary date of the beginning of the first Calendar Year. Partial years preceding the first Calendar Year and following the last full Calendar Year of the term of this lease, for purposes of computing and paying Percentage Rent, shall be included in and with the nearest whole Calendar Year.

Time and Place for Payment of Rent

Section 2.03. All Minimum Rent provided for in Section 2.01 of this lease shall be paid by Tenant on a monthly [*or* quarterly] basis on the first day of each calendar month [*or* quarter]. All Percentage Rent shall be paid at the times *set forth in Section 2.02*. All rent required under this lease (Minimum and Percentage) shall be paid to Landlord at _____[*street address and city*], California, or any other place or places that Landlord may designate by written notice to Tenant.

Security Deposit

Section 2.04. Tenant has, contemporaneously with the execution of this lease, deposited with Landlord a security deposit ("the Security Deposit") in the sum of $_____, receipt of which is acknowledged by Landlord, to be held and applied by Landlord in the following manner:

(a) If, at any time during the term of this lease, any of the rent payable by Tenant to Landlord under this lease should be overdue and unpaid, or if any other sums payable by Tenant to Landlord under the terms of this lease should be overdue and unpaid, Landlord may, at Landlord's option, appropriate and apply any portion of the Security Deposit, up to the whole amount of that deposit, to the payment of the overdue rent or sums. In the event of any such appropriation and application by Landlord, Tenant shall promptly, on receipt of written demand by Landlord, restore the amount so appropriated or applied to the Security Deposit. Tenant's failure to do so within _____[*number*] days after receipt of the written demand by Landlord, shall constitute a breach of this lease by Tenant.

(b) Should Tenant, at any time during the term of this lease, be in default in the performance of any of the terms, covenants, and conditions of this lease, Landlord may, after terminating this lease, appropriate and apply any portion of the Security Deposit, up to the whole amount of the Security Deposit, that may be required to compensate Landlord for damages caused by Tenant's breach to the payment of those damages to Landlord.

(c) Should Tenant fully and faithfully perform all the terms, covenants, and conditions of this lease, including the prompt payment of rent as required, Landlord shall, on expiration or earlier termination of this lease, return the full amount of the Security Deposit without interest to Tenant.

No Partnership or Joint Venture

Section 2.05. Nothing in this lease shall be construed to render Landlord in any way or for any purpose a partner, joint venturer, or associate in any relationship with Tenant other than that of Landlord and Tenant, nor shall this lease be construed to authorize either to act as agent for the other.

ARTICLE 3 USE OF PREMISES

Permitted Use

Section 3.01. Tenant shall use the Premises solely for the purpose of constructing, maintaining, and leasing for profit a first-class commercial Shopping Center. Tenant shall not change the use of the Premises without first obtaining the written consent of Landlord. Tenant shall use its best efforts to use and permit use of the Premises for purposes permitted by this Section 3.01, which in Tenant's reasonable opinion will maximize gross income (*defined in Section 2.02*(b)).

Compliance With Laws

Section 3.02. Tenant shall, at Tenant's own cost and expense, comply with all statutes, ordinances, regulations, and requirements of all governmental entities, both federal and state and county or municipal, including those requiring capital improvements to the Premises or Improvements, relating to any use and occupancy of the Premises (and specifically not limited to any particular use or occupancy by Tenant), whether those statutes, ordinances, regulations, and requirements are now in force or are subsequently enacted. If any license, permit, or other governmental authorization is required for the lawful use or occupancy of the Premises or any portion of the Premises, Tenant shall procure and maintain it throughout the term of this lease. The judgment of any court of competent jurisdiction, or the admission by Tenant in a proceeding brought against Tenant by any government entity, that Tenant has violated any such statute, ordinance, regulation, or requirement shall be conclusive as between Landlord and Tenant and shall constitute grounds for termination of this lease by Landlord.

Prohibited Uses

Section 3.03. Tenant shall not use or permit the Premises or any portion of the Premises to be improved, developed, used, or occupied in any manner or for any purpose that is in any way in violation of any valid law, ordinance, or regulation of any federal, state, county, or local governmental agency, body, or entity. Furthermore, Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance as now or hereafter defined by any statutory or decisional law applicable to the Premises or any part of the Premises.

ARTICLE 4 TAXES AND UTILITIES

Tenant to Pay Taxes

Section 4.01. Tenant shall pay during the term of this lease, without abatement, deduction, or offset, any and all real and

personal property taxes, general and special assessments, and other charges (including any increase caused by a change in the tax rate or by a change in assessed valuation) of any description levied or assessed during the term of this lease by any governmental agency or entity on or against the Premises, the Improvements located on the Premises, personal property located on or in the Premises or Improvements, and the leasehold estate created by this lease.

Proration of First and Last Year Taxes

Section 4.02. Notwithstanding the provisions of Section 4.01 of this lease, all taxes, assessments, or other charges levied or assessed during the tax years in which the term of this lease commences and ends shall be prorated between Landlord and Tenant as of 12:01 A.M. on the date the term commences and on the date the term ends, respectively, on the basis of tax years that commence on July 1 and end on June 30 of each year. Landlord shall pay the taxes, assessments, or other charges for the year in which the term of this lease commences and Tenant shall promptly, on service of written request by Landlord, reimburse Landlord for Tenant's share of those taxes, assessments, or other charges. Tenant shall pay the taxes, assessments, and other charges for the year in which this lease is to end; and Landlord shall promptly, on service of written request by Tenant, reimburse Tenant for Landlord's share of those taxes, assessments, and other charges.

Separate Assessment of Leased Premises

Section 4.03. Should the Premises be assessed and taxed with or as part of other property owned by Landlord before the commencement of the term of this lease, Landlord shall arrange with the taxing authorities to have the Premises taxed and assessed as a separate parcel distinct from any other real or personal property owned by Landlord. Should the Premises be assessed and taxed for the year in which this lease is to commence with or as part of other property owned by Landlord, the share of the taxes, assessments, or other charges for which Tenant is liable to pay under Section 4.02 shall be determined as follows: Tenant shall pay an amount equal to that portion of the taxes, assessments, and other charges that bears the same ratio to the total of the taxes, assessments, and other charges as the ground area of the Premises bears to the ground area of the total taxed property.

Payment Before Delinquency

Section 4.04. Any and all taxes and assessments and installments of taxes and assessments required to be paid by Tenant under this lease shall be paid by Tenant at least _____[*number, e.g.*, 10 days] before each such tax, assessment, or installment of tax or assessment becomes delinquent. [On the written request of Landlord,] Tenant shall deliver to Landlord the official and original receipt evidencing the payment of any taxes, assessments, and other charges required under this Article [*or* Tenant shall retain at its sole cost and expense for the term of this lease a tax service to notify Landlord whether the taxes, assessments, and other charges have been paid by Tenant as required under this Article].

Taxes Payable in Installments

Section 4.05. Should any special tax or assessment be levied on or assessed against the Premises that may be either paid in full before a delinquency date within the term of this lease or paid in installments over a period either within or extending beyond this lease, Tenant shall have the option of paying the special tax or assessment in installments. The fact that the exercise of the option to pay the tax or assessment in installments will cause the Premises to be encumbered with bonds or will cause interest to accrue on the tax or assessment is immaterial and shall not interfere with the free exercise of the option by Tenant. Should Tenant exercise the option to pay any such tax or assessment in installments, Tenant shall be liable to pay only those installments becoming due during the term of this lease. Landlord shall

cooperate with Tenant and on written request of Tenant execute or join with Tenant in executing any instruments required to permit any such special tax or assessment to be paid in installments.

Contest of Tax

Section 4.06. Tenant shall have the right to contest, oppose, or object to the amount or validity of any tax, assessment, or other charge levied on or assessed against the Premises or any part of the Premises; provided, however, that the contest, opposition, or objection must be filed before the tax, assessment, or other charge at which it is directed becomes delinquent and that written notice of the contest, opposition, or objection must be given to Landlord at least _____[*number, e.g.*, 10 days] before the date the tax, assessment, or other charge becomes delinquent. Landlord shall, on written request of Tenant, join in any such contest, opposition, or objection if Tenant determines that joinder is necessary or convenient for the proper prosecution of the proceedings. Tenant shall be responsible for and shall pay all costs and expenses in any contest or legal proceeding instituted by Tenant. In no event shall Landlord be subjected to any liability for costs or expenses connected to any contest by Tenant, and Tenant agrees to indemnify and hold Landlord harmless from any such costs and expenses. Furthermore, no such contest, opposition, or objection shall be continued or maintained after the date the tax, assessment, or other charge at which it is directed becomes delinquent unless Tenant has done one of the following:

(a) Paid the tax, assessment, or other charge under protest before its becoming delinquent;

(b) Obtained and maintained a stay of all proceedings for enforcement and collection of the tax, assessment, or other charge by posting a bond or other security required by law for such a stay; or

(c) Delivered to Landlord a good and sufficient surety bond in an amount specified by Landlord and issued by a bonding corporation licensed to do business in California, conditioned on the payment by Tenant of the tax, assessment, or charge together with any fines, interest, penalties, costs, and expenses that may have accrued or been imposed thereon within 30 days after final determination of Tenant's contest, opposition, or objection to the tax, assessment, or other charge.

Tax Returns and Statements

Section 4.07. Tenant shall, as between Landlord and Tenant, have the duty of attending to, preparing, making, and filing any statement, return, report, or other instrument required or permitted by law in connection with the determination, equalization, reduction, or payment of any taxes, assessments, or other charges that are or may be levied on or assessed against the Premises, the Improvements located on the Premises, personal property located on or in the Premises or Improvements, and the leasehold estate created by this lease.

Tax Hold-Harmless Clause

Section 4.08. Tenant shall indemnify and hold Landlord and Landlord's property, including the Premises and any Improvements now or subsequently located on the Premises, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Article to be paid by Tenant and from all interest, penalties, and other sums imposed thereon and from any sales or other proceedings to enforce collection of any such taxes, assessments, or other charges.

Utilities

Section 4.09. Tenant shall pay or cause to be paid, and hold Landlord and Landlord's property including the Premises free and harmless from, all charges for the furnishing of gas, water, electricity, telephone service, and other public utilities to the Premises during the lease's term and for the removal of garbage and rubbish from the Premises during the term of this lease.

Payment by Landlord

Section 4.10. Should Tenant fail to pay within the time specified in this Article any taxes, assessments, or other charges required by this Article to be paid by Tenant, Landlord may, without notice to or demand on Tenant, pay, discharge, or adjust that tax, assessment, or other charge for the benefit of Tenant. In that event, Tenant shall promptly on written demand of Landlord reimburse Landlord for the full amount paid by Landlord in paying, discharging, or adjusting that tax, assessment, or other charge together with interest thereon at the then-maximum legal rate from the date of payment by Landlord until the date of repayment by Tenant. If this Article does not specify the time within which Tenant must pay any charge required by this Article, Tenant shall pay that charge before it becomes delinquent.

ARTICLE 5 CONSTRUCTION BY TENANT

Duty to Construct

Section 5.01. Tenant shall, at Tenant's sole cost and expense, construct or cause to be constructed on the Premises, a first-class regional retail Shopping Center in the manner and according to the terms and conditions specified in this Article.

Requirement of Landlord's Written Approval

Section 5.02. No structure or other improvement of any kind shall be constructed on the Premises unless and until the plans, specifications, and proposed location of that structure or improvement have been approved in writing by Landlord. Furthermore, no structure or other improvement shall be constructed on the Premises that does not comply with plans, specifications, and locations approved in writing by Landlord.

Preparation and Submission of Plans

Section 5.03. Tenant shall, at Tenant's own cost and expense, engage a licensed architect or engineer to prepare plans and specifications for the Shopping Center and shall submit the following to Landlord for approval:

(a) Within _____[*number*] days after execution of this lease, two copies of the following:

(1) Drawings and materials in the form of plans, elevations, sections, and rendered perspectives sufficient to convey the architectural design of the Shopping Center to Landlord; and

(2) A statement of estimated construction costs for the Shopping Center prepared by the engaged architect or engineer.

(b) Within _____[*number*] days after approval by Landlord of the items specified in subsection (a) of this Section and the obtaining by Tenant of any variance permits, use permits, or rezoning required for the Shopping Center, two copies of the following:

(1) Detailed working drawings, plans, and specifications for the Shopping Center; and

(2) A revised statement of estimated construction costs for the Shopping Center prepared by the engaged architect or engineer.

Landlord's Approval or Rejection of Plans

Section 5.04. Within _____[*number*] days after receipt by Landlord of any of the documents submitted to Landlord for approval under Section 5.03 of this lease, Landlord shall either approve those documents by endorsing Landlord's approval on each such document and returning one set of the documents to Tenant, or Landlord shall give written notice to Tenant of any objections Landlord may have to those documents. Landlord's failure to give written notice to Tenant within that _____-day period of any objections Landlord may have to the documents shall constitute approval of the documents by Landlord. Within _____[*number*] days after service on Tenant of the written notice of Landlord's objections, Tenant may deliver corrective amendments to the documents to Landlord and Landlord shall, within _____[*number*] days after receiving the corrective amendments, serve written notice on Tenant of Landlord's approval or rejection of the documents as so amended. Failure of Landlord to serve written notice on Tenant within that _____-day period after receipt of the corrective amendments shall constitute approval by Landlord of the documents as so amended.

Changes in Plans

Section 5.05. After approval by Landlord of the documents pertaining to the Shopping Center described in Section 5.03(b) of this lease, any substantial change in the plans or specifications for the Shopping Center shall be approved by Landlord. For purposes of this Section, "substantial change" means one that materially changes the exterior appearance of the Shopping Center or one that results in a decrease in construction costs of $_____[*amount, e.g.*, 50,000] or more. Landlord's failure to give written notice to Tenant of any objections Landlord may have to any proposed changes within _____[*number*] days after a written statement of the proposed changes has been given to Landlord by Tenant shall constitute Landlord's approval of the changes. Minor changes in work or materials not constituting a substantial change need not be approved by Landlord but a copy of the altered plans and specifications reflecting those changes shall be given to Landlord.

All Work on Written Contract

Section 5.06. All work required in the construction of the Shopping Center, including any site preparation work, landscaping work, and utility installation work, as well as actual construction work on the Shopping Center, shall be performed only by competent contractors licensed under the laws of the State of California and shall be performed in accordance with written contracts with those contractors. Each such contract shall provide that the final payment under the contract due to the contractor shall be in an amount equaling at least _____[*specify percentage, e.g.*, 10 percent] of the full amount payable under the contract and shall not be paid to contractor until whichever of the following last occurs:

(a) The expiration of 35 days from the date of recording by Tenant as owner of a Notice of Completion of the Shopping Center, Tenant agreeing to record that Notice of Completion promptly within the time specified by law for the recording of that notice; or

(b) The settlement and discharge of all liens of record claimed by persons who supplied either labor or materials for the construction of the Shopping Center.

Performance and Lien Bonds

Section 5.07. Each contractor engaged by Tenant to perform any services for construction of the Shopping Center, including any construction, site preparation, utility installation, landscaping, or parking lot construction services, shall furnish to Tenant, who shall deliver copies of both of the following to Landlord, at the contractor's own expense at the time of entering a contract with Tenant for those services:

(a) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to _____[*specify percentage, e.g.,* 100 percent] of the contract price payable under the contract securing the faithful performance by the contractor of its contract with Tenant; and

(b) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to _____[*specify percentage, e.g.,* 50 percent] of the contract price payable under the contract securing the payment of all claims for the performance of labor or services on, or the furnishing of materials for, the performance of the contract.

Compliance With Law and Standards

Section 5.08. The Shopping Center shall be constructed, all work on the Premises shall be performed, and all buildings or other improvements on the Premises shall be erected in accordance with all valid laws, ordinances, regulations, and orders of all federal, state, county, or local governmental agencies or entities having jurisdiction over the Premises; provided, however, that any structure or other improvement erected on the Premises, including the Shopping Center, shall be deemed to have been constructed in full compliance with all such valid laws, ordinances, regulations, and orders when a valid final Certificate of Occupancy entitling Tenant and subtenants of Tenant to occupy and use the structure or other improvement has been duly issued by proper governmental agencies or entities. All work performed on the Premises under this lease, or authorized by this lease, shall be done in a good workmanlike manner and only with new materials of good quality and high standard.

Time for Completion

Section 5.09. Tenant shall cause construction of the Shopping Center to be commenced no later than _____[*number*] days after approval by Landlord of the documents described in Section 5.03(b) of this lease, shall then cause construction of the Shopping Center to be diligently pursued without unnecessary interruption, and shall cause the Shopping Center to be completed and ready for occupancy not later than _____[*number*] days after commencement of its construction. Tenant shall be excused for any delays in construction or commencement of construction caused by the act of Landlord, the act of any agent of Landlord, the act of any governmental authority, the act of any public enemy, acts of God, the elements, war, war defense conditions, litigation, strikes, walkouts, or other causes beyond Tenant's control. Tenant shall, however, use reasonable diligence to avoid any such delay and to resume construction as promptly as possible after the delay.

Mechanics' Liens

Section 5.10. At all times during the term of this lease, Tenant shall keep the Premises and all Improvements now or hereafter located on the Premises free and clear of all liens and claims of liens for labor, services, materials, supplies, or equipment performed on or furnished to the Premises. Should Tenant fail to pay and discharge or cause the Premises to be released from any such lien or claim of lien within _____[*specify, e.g.,* 20 days] after service on Tenant of written request from Landlord to do so, Landlord may pay, adjust, compromise, and discharge any such lien or claim of lien on any terms and in any manner that Landlord may deem appropriate. In that event, Tenant shall, on or before the first day of the next calendar month following any such payment by Landlord, reimburse Landlord for the

full amount paid by Landlord in paying, adjusting, compromising, and discharging that lien or claim of lien, including any attorneys' fees or other costs expended by Landlord, together with interest at the then-maximum legal rate from the date of payment by Landlord to the date of repayment by Tenant.

Zoning and Use Permits

Section 5.11. Should Tenant deem it necessary or appropriate to obtain any use permit, variance, or rezoning of the Premises to construct or operate the Shopping Center, Landlord agrees to execute any documents, petitions, applications, and authorizations that may be necessary or appropriate and hereby appoints Tenant as Landlord's attorney in fact to execute in the name and on behalf of Landlord any such documents, petitions, applications, or authorizations; provided, however, that any such permits, variances, or rezoning shall be obtained at the sole cost and expense of Tenant and Tenant agrees to protect and save Landlord and the property of Landlord, including the Premises, free and harmless from any such cost and expense.

Ownership of Improvements

Section 5.12. Title to all Improvements, including the Shopping Center, to be constructed on the Premises by Tenant shall be owned by Tenant until expiration of the term or earlier termination of this lease. All Improvements, including the Shopping Center, on the Premises at the expiration of the term or earlier termination of this lease shall, without compensation to Tenant, then automatically and without any act of Tenant or any third party become Landlord's property. Tenant shall surrender the Improvements to Landlord at the expiration of the term or earlier termination of this lease, free and clear of all liens and encumbrances, other than those, if any, permitted under this lease or otherwise created or consented to by Landlord. Tenant agrees to execute, acknowledge, and deliver to Landlord any instrument requested by Landlord as necessary in Landlord's opinion to perfect Landlord's right, title, and interest to the Improvements and the Premises.

ARTICLE 6 ENCUMBRANCE OF LEASEHOLD ESTATE

Tenant's Right to Encumber

Section 6.01. Tenant may, at any time and from time to time during the term of this lease, encumber to any institutional lender regulated by state or federal authority (referred to in this lease as "Lender"), by deed of trust or mortgage or other security instrument, all of Tenant's interest under this lease and the leasehold estate hereby created in Tenant (referred to in this lease as a "Leasehold Encumbrance") for any purpose or purposes without the consent of Landlord. However, no Leasehold Encumbrance incurred by Tenant in accordance with this section shall, and Tenant shall not have power to incur any encumbrance that shall, constitute in any way a lien or encumbrance on Landlord's fee interest in the Premises. Any Leasehold Encumbrance shall be subject to all covenants, conditions, and restrictions set forth in this lease and to all rights and interests of Landlord, except as is otherwise provided in this lease. Tenant shall give Landlord prior written notice of any Leasehold Encumbrance, together with a copy of the deed of trust, mortgage, or other security interest evidencing the Leasehold Encumbrance.

Notice to and Service on Lender

Section 6.02. Landlord shall mail to any Lender who has given Landlord written notice of its name and address, a duplicate copy of any and all notices Landlord may from time to time give to or serve on Tenant in accordance with or relating to this lease, including but not limited to any notice of default, notice of termination, or notice regarding any matter on which Landlord may predicate or claim a default. Any notices or other communications permitted by this or

any other section of this lease or by law to be served on or given to Lender by Landlord shall be deemed duly served on or given to Lender when deposited in the United States mail, first-class postage prepaid, addressed to Lender at the last mailing address for Lender furnished in writing by Lender to Landlord.

No Modification Without Lender's Consent

Section 6.03. For as long as there is any Leasehold Encumbrance in effect, Tenant and Landlord hereby expressly stipulate and agree that they will not modify this lease in any way nor cancel this lease by mutual agreement without the written consent of Lender having that Leasehold Encumbrance.

Right of Lender to Realize on Security

Section 6.04. A Lender with a Leasehold Encumbrance shall have the right at any time during the term of this lease and the existence of the encumbrance to do both of the following:

(a) Any act or thing required of Tenant under this lease, and any such act or thing done and performed by Lender shall be as effective to prevent a forfeiture of Tenant's rights under this lease as if done by Tenant; and

(b) Realize on the security afforded by the leasehold estate by foreclosure proceedings, accepting an assignment in lieu of foreclosure, or other remedy afforded in law or in equity or by the security instrument evidencing the Leasehold Encumbrance (referred to in this lease as "the Security Instrument"), and

(1) To transfer, convey, or assign the title of Tenant to the leasehold estate created by this lease to any purchaser at any foreclosure sale, whether the foreclosure sale is conducted under court order or a power of sale contained in the Security Instrument, or to an assignee under an assignment in lieu of foreclosure; and

(2) To acquire and succeed to the interest of Tenant under this lease by virtue of any foreclosure sale, whether the foreclosure sale is conducted under a court order or a power of sale contained in the Security Instrument, or by virtue of an assignment in lieu of foreclosure.

The Lender or any person or entity acquiring the leasehold estate shall be liable to perform Tenant's obligations under this lease only during the period, if any, in which that entity or person has ownership of the leasehold estate or possession of the Premises.

Right of Lender to Cure Defaults

Section 6.05. For as long as there is in effect any Leasehold Encumbrance, before Landlord may terminate this lease because of any default under or breach of this lease by Tenant, Landlord must give written notice of the default or breach to Lender and afford Lender the opportunity after service of the notice to do one of the following:

(a) Cure the breach or default within _____[*number*] days after expiration of the time period granted to Tenant under this lease for curing a default, when the default can be cured by the payment of money to Landlord or some other person;

(b) Cure the breach or default within _____[*number*] days after expiration of the time period granted to Tenant under this lease for curing a default, when the breach or default must be cured by something other than the payment of money and can be cured within that time; or

(c) Cure the breach or default in any reasonable time that may be required when something other than money is required to cure the breach or default and cannot be performed within _____[*specify same number recited in subparagraph (b), above*] days after expiration of the time period granted to the tenant under this lease for curing a default, provided that acts to cure the breach or default are commenced within that time period after service of notice of default on Lender by Landlord and are thereafter diligently continued by Lender.

Foreclosure in Lieu of Curing Default

Section 6.06. Notwithstanding any other provision of this lease, a Lender under a Leasehold Encumbrance may forestall termination of this lease by Landlord for a default under or breach of this lease by Tenant by commencing proceedings to foreclose the Leasehold Encumbrance. The proceedings so commenced may be for foreclosure of the Leasehold Encumbrance by order of court or for foreclosure of the Leasehold Encumbrance under a power of sale contained in the Security Instrument. The proceedings shall not, however, forestall termination of this lease by Landlord for the default or breach by Tenant unless all of the following conditions are met:

(a) The proceedings are commenced within _____[*number*] days after service on Lender of the notice described in Section 6.05 of this lease;

(b) The proceedings are, after having been commenced, diligently pursued in the manner required by law to completion; and

(c) Lender keeps and performs all of the terms, covenants, and conditions of this lease requiring the payment or expenditure of money by Tenant until the foreclosure proceedings are complete or are discharged by redemption, satisfaction, payment, or conveyance of the leasehold estate to Lender.

Assignment Without Consent on Foreclosure

Section 6.07. A transfer of Tenant's leasehold interest under this lease to any of the following shall not require the prior consent of Landlord:

(a) A purchaser at a foreclosure sale of the Leasehold Encumbrance, whether the foreclosure sale is conducted under court order or a power of sale in the instrument creating the encumbrance, provided Lender under the Leasehold Encumbrance gives Landlord written notice of the transfer, including the name and address of the purchaser and the effective date of the transfer;

(b) An assignee of the leasehold estate of Tenant under an assignment in lieu of foreclosure, provided Lender under the Leasehold Encumbrance gives Landlord written notice of the transfer, including the name and address of the assignee and the effective date of the assignment; or

(c) A purchaser or assignee of the purchaser at a foreclosure sale of the Leasehold Encumbrance or of the assignee of the leasehold estate of Tenant acquired under an assignment in lieu of foreclosure, provided the purchaser or assignee delivers to Landlord its written agreement to be bound by all of the provisions of this lease.

New Lease to Lender

Section 6.08. Notwithstanding any other provision of this lease, should this lease terminate because of any default under or breach of this lease by Tenant, Landlord agrees to enter into a new lease for the Premises with Lender under a Leasehold Encumbrance, as Tenant, provided all of the following conditions are satisfied:

(a) A written request for the new lease is served on Landlord by Lender within _____[*number*] days after service on Lender of the notice described in Section 6.05 of this lease;

(b) The new lease

(1) Is for a term ending on the same date the term of this lease would have ended had this lease not been terminated;

(2) Provides for the payment of rent at the same rate that would have been payable under this lease during the remaining term of this lease had this lease not been terminated; and

(3) Contains the same terms, covenants, conditions, and provisions as are contained in this lease (except those that have already been fulfilled or are no longer applicable);

(c) Lender, on execution of the new lease by Landlord, shall pay any and all sums that would at the time of the execution of the new lease be due under this lease but for its termination and shall otherwise fully remedy, or agree in writing to remedy, any other defaults under or breaches of this lease committed by Tenant that can be remedied;

(d) Lender, on execution of the new lease, shall pay all reasonable costs and expenses, including attorneys' fees and court costs, incurred in terminating this lease, recovering possession of the Premises from Tenant or the representative of Tenant, and preparing the new lease;

(e) The new lease shall be subject to all existing subleases between Tenant and subtenants, provided that for any sublease, the subtenant agrees in writing to attorn to Lender (or its assignee); and

(f) The new lease shall be assignable by Lender but not by any assignee of Lender without the prior written consent of Landlord.

No Merger of Leasehold and Fee Estates

Section 6.09. For as long as any Leasehold Encumbrance is in existence, there shall be no merger of the leasehold estate created by this lease and the fee estate of Landlord in the Premises merely because both estates have been acquired or become vested in the same person or entity, unless Lender otherwise consents in writing.

Lender as Assignee of Lease

Section 6.10. No Lender under any Leasehold Encumbrance shall be liable to Landlord as an assignee of this lease unless and until Lender acquires all rights of Tenant under this lease through foreclosure, an assignment in lieu of foreclosure, or as a result of some other action or remedy provided by law or by the instrument creating the Leasehold Encumbrance.

Lender as Including Subsequent Security Holders

Section 6.11. Except for purposes of Section 6.08, the term "Lender" as used in this lease shall mean not only the institutional lender that loaned money to Tenant and is named as beneficiary, mortgagee, secured party, or security holder in the Security Instrument creating any Leasehold Encumbrance, but also all subsequent purchasers or assignees of the leasehold interest secured by the Leasehold Encumbrance.

Two or More Lenders

Section 6.12. In the event two or more Lenders each exercise their rights under this lease and there is a conflict that renders it impossible to comply with all requests of Lenders, the Lender whose Leasehold Encumbrance would have senior priority in the event of a foreclosure shall prevail.

ARTICLE 7 REPAIRS AND RESTORATION

Maintenance by Tenant

Section 7.01. At all times during the term of this lease Tenant shall, at Tenant's own cost and expense, keep and maintain the Premises, all Improvements, and all appurtenances (including landscaped and parking areas) now or hereafter on the Premises in a first-class condition, in good order and repair, and in a safe and clean condition.

Requirements of Governmental Agencies

Section 7.02. At all times during the term of this lease, Tenant, at Tenant's own cost and expense, shall do all of the following:

(a) Make all alterations, additions, or repairs to the Premises or the Improvements on the Premises required by any valid law, ordinance, statute, order, or regulation now or hereafter made or issued by any federal, state, county, local, or other governmental agency or entity;

(b) Observe and comply with all valid laws, ordinances, statutes, orders, and regulations now or hereafter made or issued respecting the Premises or the Improvements on the Premises by any federal, state, county, local, or other governmental agency or entity;

(c) Contest if Tenant, in Tenant's sole discretion, desires by appropriate legal proceedings brought in good faith and diligently prosecuted in the name of Tenant, or in the names of Tenant and Landlord when appropriate or required, the validity or applicability to the Premises of any law, ordinance, statute, order, or regulation now or hereafter made or issued by any federal, state, county, local, or other governmental agency or entity; provided, however, that any such contest or proceeding, though maintained in the names of Tenant and Landlord, shall be without cost to Landlord, and Tenant shall protect the Premises and Landlord from Tenant's failure to observe or comply during the contest with the contested law, ordinance, statute, order, or regulation; and

(d) Indemnify and hold Landlord and the property of Landlord, including the Premises, free and harmless from any and all liability, loss, damages, fines, penalties, claims, and actions resulting from Tenant's failure to comply with and perform the requirements of this section.

Tenant's Duty to Restore Premises

Section 7.03. If at any time during this lease's term, any Improvements now or hereafter on the Premises are destroyed in whole or in part by fire, theft, the elements, or any other cause not the fault of Landlord, this lease shall continue in full force and effect and Tenant, at Tenant's own cost and expense, shall repair and restore the damaged Improvements. Any restoration by Tenant shall comply with original plans for the Improvements described in Article 5, except as may be modified by Tenant to comply with the terms of any sublease of the Improvements, or except as may be otherwise modified by Tenant and approved in writing by Landlord. The work of repair and restoration shall be commenced by Tenant within _____[*time period, e.g.,* 120 days] after the damage or destruction occurs and shall be completed with due diligence not later than _____[*time period, e.g.,* one year] after the work is

commenced. In all other respects, the work of repair and restoration shall be done in accordance with the requirements for original construction work on the Premises set forth in Article 5 of this lease. Tenant's obligation for restoration described in this section shall exist whether or not funds are available from insurance proceeds.

Option to Terminate Lease for Destruction

Section 7.04. Notwithstanding Section 7.03 of this lease, Tenant shall have the right to terminate this lease if, during the last _____[*time period, e.g.,* five years] of the lease's term, the Improvements are damaged or destroyed by a casualty for which Tenant is not required under this lease to carry insurance and the cost to repair or restore the damaged or destroyed Improvements exceeds _____[*agreed-on percentage, e.g.,* 50 percent] of the fair market value of the Improvements immediately before the damage or destruction.

Application of Insurance Proceeds

Section 7.05. Any and all fire or other insurance proceeds that become payable at any time during the term of this lease because of damage to or destruction of any Improvements on the Premises shall be paid to Tenant and applied by Tenant toward the cost of repairing and restoring the damaged or destroyed Improvements in the manner required by Section 7.03 of this lease, or, if this lease is terminated under Section 7.04, applied by Tenant toward payment of the Leasehold Encumbrance(s).

ARTICLE 8 INDEMNITY AND INSURANCE

Indemnity Agreement

Section 8.01. Tenant shall indemnify and hold Landlord and Landlord's property, including the Premises and Improvements now or hereafter on the Premises, free and harmless from any and all liability, claims, loss, damages, or expenses resulting from Tenant's occupation and use of the Premises, specifically including, without limitation, any liability, claim, loss, damage, or expense arising by reason of the following:

(a) The death or injury of any person, including Tenant or any person who is an employee or agent of Tenant, or by reason of the damage to or destruction of any property, including property owned by Tenant or by any person who is an employee or agent of Tenant, from any cause whatever while that person or property is in or on the Premises or in any way connected with the Premises or with any of the Improvements or personal property on the Premises;

(b) The death or injury of any person, including Tenant or any person who is an employee or agent of Tenant, or by reason of the damage to or destruction of any property, including property owned by Tenant or any person who is an employee or agent of Tenant, caused or allegedly caused by either (1) the condition of the Premises or some building or improvement on the Premises, or (2) some act or omission on the Premises of Tenant or any person in, on, or about the Premises with the permission and consent of Tenant;

(c) Any work performed on the Premises or materials furnished to the Premises at the instance or request of Tenant or any person or entity acting for or on behalf of Tenant; or

(d) Tenant's failure to perform any provision of this lease or to comply with any requirement of law or any requirement imposed on Tenant or the Premises by any duly authorized governmental agency or political subdivision.

Liability Insurance

Section 8.02. Tenant shall, at Tenant's own cost and expense, procure and maintain during the entire term of this lease a broad form comprehensive coverage policy of public liability insurance issued by an insurance company licensed by the State of California insuring Tenant and Landlord against loss or liability caused by or connected with Tenant's occupation and use of the Premises under this lease in amounts not less than the following:

(a) $_____ for injury to or death of one person and, subject to that limitation for the injury or death of one person, of not less than $_____ for injury to or death of two or more persons as a result of any one accident or incident; and

(b) $_____ for damage to or destruction of any property.

Fire and Casualty Insurance

Section 8.03. Tenant shall, at Tenant's own cost and expense, at all times during the term of this lease, keep all Improvements on the Premises insured for their full replacement value [*or* for _____ (*number*) percent of their full replacement value] by insurance companies authorized to do business in the State of California against loss or destruction by fire and the perils commonly covered under the standard extended coverage endorsement to fire insurance policies in the county where the Premises are located. For as long as there is any Leasehold Encumbrance in existence, that policy shall also contain a standard lender endorsement.

Specific Perils to Be Insured

Section 8.04. Notwithstanding anything to the contrary contained in Section 8.03 of this lease, the insurance required by Section 8.03 of this lease shall, whether or not included in the standard extended coverage endorsement referred to in Section 8.03, insure all Improvements on the Premises against loss or destruction by windstorm, cyclone, tornado, hail, explosion, riot, riot attending a strike, civil commotion, malicious mischief, vandalism, aircraft, fire, smoke damage, and sprinkler leakage. Furthermore, the insurance required by Section 8.03 of this lease during the construction of the Shopping Center described in Article 5 shall include coverage for course of construction, vandalism, and malicious mischief, insuring the Shopping Center during its construction and all materials delivered to the site of the Shopping Center for their full insurable value.

Deposit of Insurance With Landlord and Lender

Section 8.05. Tenant shall, within 10 days after the execution of this lease and promptly thereafter when any such policy is replaced, rewritten, or renewed, deliver to Landlord and Lender a true and correct copy of each insurance policy required by this Article of this lease or a certificate executed by the insurance company or companies or their authorized agent evidencing that policy or policies.

Notice of Cancellation of Insurance

Section 8.06. Each insurance policy required under this Article shall contain a provision that it cannot be cancelled for any reason unless at least _____[*minimum notice period, e.g.,* 10 days'] prior written notice of the cancellation is given to Landlord and to Lender in the manner required by this lease for service of notices on Landlord by Tenant.

ARTICLE 9 CONDEMNATION

Total Condemnation

Section 9.01. If, during the term of this lease, fee title to all of the Premises or to all of the Improvements, or the entire leasehold estate of Tenant is taken under the power of eminent domain by any public or quasi-public agency or entity (a "Total Taking"), this lease shall terminate as of 12:01 A.M. on whichever of the following occurs first: (1) the date legal title becomes vested in the agency or entity exercising the power of eminent domain, or (2) the date actual physical possession is taken by the agency or entity exercising the power of eminent domain. Thereafter, both Landlord and Tenant shall be released from all obligations under this lease, except those specified in Section 9.05.

Partial Taking--Parking Areas

Section 9.02. If, at any time during the term of this lease, a taking occurs that is less than a Total Taking and affects the parking areas for the Shopping Center, all compensation and damages payable for that taking shall be made available to and used, to the extent reasonably needed, by Tenant to repair any portion of the remaining parking areas damaged by the taking and to replace the parking areas taken with other new parking areas on the portion of the Premises not taken, provided that replacement is then permitted by existing law. Plans and specifications for the replacement parking areas must first be approved in writing by Landlord but may include, when practicable and when permitted by law, deck parking facilities to replace ground level parking facilities taken by eminent domain. Notwithstanding anything to the contrary in this section, if the portion of the parking areas taken by eminent domain results in a net loss of _____[*specify, e.g.,* 10 percent] or more of the area of the Premises that can, after considering any replacement parking areas that can be lawfully constructed on the remaining portion of the Premises by reasonable methods, be devoted to parking areas as compared with the area devoted to those parking areas immediately before the taking, Tenant may terminate this lease in the manner prescribed by Section 9.04 of this lease.

Partial Taking--Improvements

Section 9.03. If at any time during the term of this lease a taking occurs that is less than a Total Taking and affects the rentable portion of the Improvements on the Premises, all compensation and damages payable for that taking (excluding any portion payable for a taking of parking areas) shall be made available to and used, to the extent reasonably needed, by Tenant to repair any portion of the remaining rentable portion of the Improvements damaged by the taking and to replace the rentable portion of the Improvements taken with other new rentable space on the portion of the Premises not taken, provided that replacement is then permitted by existing law. Plans and specifications for the replacement rental space must be compatible, in terms of architecture and quality of construction, with the Improvements not taken and must be first approved in writing by Landlord. Notwithstanding anything to the contrary in this Section, if the rentable portion of the Improvements taken by eminent domain results in a net loss of _____[*specify, e.g.,* 10 percent] or more of the area of the Premises that can, after considering any replacement rentable space that can be lawfully constructed on the remaining portion of the Premises, be devoted to rentable space as compared with the area devoted to that rentable space immediately before the taking, Tenant may terminate this lease in the manner prescribed by Section 9.04 of this lease.

Termination for Partial Taking

Section 9.04. Tenant may terminate this lease for the reasons stated in either Section 9.02 or Section 9.03 of this lease, or both, by serving written notice of termination on Landlord within _____[*time period, e.g.,* 90 days] after Tenant has received from Landlord or from the condemning authority written notice of an intended taking that sets forth the extent and scope of the intended taking. If Tenant elects to terminate this lease, the effective date of termination shall be the earlier of (1) the date of termination specified in Tenant's notice to Landlord or (2) the date the

condemning authority takes physical possession of the portion of the Premises taken by eminent domain. On termination of this lease under this Section, all subleases and subtenancies in or on the Premises or any portion or portions of the Premises created by Tenant under this lease shall also terminate and the Premises shall be delivered to Landlord free and clear of all such subleases and subtenancies; provided, however, that Landlord may, at Landlord's option, by mailing written notice to any subtenant, allow the subtenant to attorn to Landlord and continue its occupancy on the Premises as a tenant of Landlord. On termination of this lease under this Section, both Landlord and Tenant shall be released from all obligations to the other under this lease except those specified in Section 9.05.

Condemnation Award

Section 9.05. Any compensation or damages awarded or payable because of the taking of all or any portion of the Premises by eminent domain shall be allocated between Landlord and Tenant as follows:

(a) All compensation or damages awarded or payable for the taking by eminent domain of any land that is part of the Premises shall be paid to and be the sole property of Landlord, free and clear of any claim of Tenant or any person claiming rights to the Premises through or under Tenant.

(b) All compensation or damages awarded or payable because of any Improvements constructed or located on the portion of the Premises taken by eminent domain when only a portion of the Premises is taken by eminent domain and Tenant is not entitled to or does not terminate this lease shall be applied in the manner specified in Section 9.02 or Section 9.03 toward the replacement of those Improvements with equivalent new Improvements on the remaining portions of the Premises.

(c) All compensation or damages awarded or payable because of any Improvements constructed or located on the portion of the Premises taken by eminent domain when this lease is terminated because of the taking by eminent domain, whether all or only a portion of the Premises is taken by eminent domain, shall be allocated between Tenant and Landlord as follows:

(1) That percentage of the compensation or damages awarded or payable because of the Improvements that equals the percentage of the full term of this lease that has, at the time of the taking, not expired shall belong to and be the sole property of Tenant.

(2) That percentage of the compensation or damages awarded or payable because of the Improvements that equals the percentage of the full term of this lease that has, at the time of the taking, expired shall belong to and be the sole property of Landlord.

(3) The term "time of taking" as used in this subparagraph shall mean 12:01 A.M. of whichever of the following shall first occur: the date that title, or the date that physical possession of the portion of the Premises on which the Improvements are located, is taken by the agency or entity exercising the eminent domain power.

(d) Any severance damages awarded or payable because only a portion of the Premises is taken by eminent domain shall be

(1) The sole and separate property of Tenant during the first _____ [*number*] years of the term of this lease;

(2) Equally divided, except to the extent needed to replace any Improvements taken by eminent domain with equivalent Improvements on the remaining portion of the Premises when Tenant cannot or does not terminate this lease, between Landlord and Tenant during the _____ [*number*] to _____ [*number*] years of the term of this lease; and

(3) The sole and separate property of Landlord during the last _____ [*number*] years of the term of this lease.

Rent Abatement for Partial Taking

Section 9.06. If title and possession of only a portion of the Premises is taken under the power of eminent domain by any public or quasi-public agency or entity during the term of this lease and Tenant does not or cannot under Section 9.02 or Section 9.03 terminate this lease, then this lease shall terminate as to the portion of the Premises taken under eminent domain as of 12:01 A.M. on whichever of the following first occurs: the date title is taken, or the date actual physical possession of the portion taken by eminent domain is taken, by the agency or entity exercising the eminent domain power. Furthermore, the rent payable under this lease shall, as of that time, be reduced in the same proportion that the value of the portion of the Premises taken by eminent domain bears to the full value of the Premises at that time; provided, however, that Tenant shall, subject to the provisions of Sections 9.02 and 9.03 of this lease, replace any Improvements or facilities with equivalent new facilities on the remaining portion of the Premises and do all other acts at Tenant's own cost and expense required by the eminent domain taking to make the remaining portion of the Premises fit for the uses specified in this lease.

Voluntary Conveyance in Lieu of Eminent Domain

Section 9.07. A voluntary conveyance by Landlord of title to all or a portion of the Premises to a public or quasi-public agency or entity in lieu of and under threat by that agency or entity to take it by eminent domain proceedings shall be considered a taking of title to all or any portion of the Premises under the power of eminent domain subject to the provisions of this Article.

ARTICLE 10 ASSIGNMENT AND SUBLEASING

No Assignment Without Landlord's Consent

Section 10.01. Tenant may assign this lease or any interest in this lease, subject to the prior written consent of Landlord. Landlord shall not unreasonably withhold or delay its consent, and shall grant consent if the proposed assignee is financially qualified and has sufficient experience in the operation and management of commercial shopping centers to perform all the agreements, undertakings, and covenants of this lease and all other agreements entered into by Tenant which relate to the management, operation, maintenance, construction, and restoration of the Improvements and the Premises. To assist Landlord in determining whether or not the proposed assignee is so qualified, Tenant shall furnish to Landlord at no expense to Landlord, before that assignment, detailed and complete financial statements of the proposed assignee, audited by a certified public accountant reasonably satisfactory to Landlord (if the proposed transferee causes its statements to be so audited in its normal course of business), together with detailed and complete information about the business of the proposed assignee, including its experience in operating commercial shopping centers, the use to be made of the Premises and Improvements by the proposed assignee, projections by the proposed assignee of the sources of funds to be used to repay any indebtedness of Tenant that the proposed assignee will assume or take subject to, or agree to pay to Tenant, and other claims on and requirements for those funds, together with any other information as Landlord may reasonably require to assist Landlord in determining whether or not the proposed assignee is so qualified. Landlord shall have _____[*time period for approval, e.g.*, 30 days] after receipt of the information described above to notify Tenant of whether it consents or does not consent to the proposed assignment. Absent any such notification by Landlord during the _____[*same time period set forth in preceding sentence, e.g.*, 30-day period], Landlord shall be conclusively deemed to have consented to the assignment. A consent by Landlord to one assignment shall not be deemed to be a consent to any subsequent assignment. Any assignment made contrary to

the terms of this section shall be null and void unless otherwise permitted by this Article.

Leasehold Encumbrances and Subsequent Transfers

Section 10.02. Notwithstanding the provisions of Section 10.01 of this lease, Tenant may without the prior written consent of Landlord transfer and assign all Tenant's interest under this lease and Tenant's leasehold estate created under this lease to a Lender under a Leasehold Encumbrance (as *defined in Section 6.01* of this lease). Any transfer, conveyance, or assignment resulting from a foreclosure or acceptance of a deed in lieu of foreclosure by any Lender (as *defined in Section 6.01* of this lease), or any transfer, conveyance, or assignment by any Lender following its acquisition of this lease and the leasehold estate of Tenant created by this lease as a result of foreclosure or acceptance of a deed in lieu of foreclosure shall not require the prior consent of Landlord.

Tenant's Right to Sublease

Section 10.03. Tenant shall have the right to sublease all or any portion of the Premises from time to time, and at all times during the term of this lease, without Landlord's consent; provided, however, that the following conditions are met:

(a) The term of any sublease shall not extend beyond the term of this lease;

(b) Any and all subleases shall be expressly made subject to all of the terms, covenants, and conditions of this lease; and

(c) Any subtenant shall be required to attorn to Landlord in the event of Tenant's default under this lease.

Transfers to or by Corporation

Section 10.04. Notwithstanding Section 10.01 of this lease, Tenant may, without the prior consent of Landlord, transfer and assign all of Tenant's interest under the lease and the leasehold estate created under this lease to a corporation now or hereafter organized in which Tenant owns at least _____[*agreed-on percentage, e.g.,* 80 percent] of all outstanding shares of stock. If Tenant is a corporation, or if Tenant's interest in this lease is assigned to a corporation under the sentence above, any transfer or assignment of any stock or interest in the corporation totaling in the aggregate more than _____[*specify, e.g.,* 25 percent] of all such stock or interest in the corporation shall be considered an assignment of this lease requiring the prior written consent of Landlord and subject to the standards *set forth in Section 10.01*; provided, however, that any transfer of shares to a shareholder's spouse, children, or grandchildren caused by the shareholder's death shall be excepted from this requirement.

ARTICLE 11 DEFAULT AND REMEDIES

Continuation of Lease in Effect

Section 11.01. Should Tenant breach this lease and abandon the Premises before the natural expiration of the lease's term, Landlord may continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all Landlord's rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease.

Termination and Unlawful Detainer

Section 11.02. In the event of a tenant default under this lease, Landlord may terminate this lease by written notice to Tenant and may also do the following:

(a) Bring an action to recover the following from Tenant:

(1) The worth at the time of award of the unpaid rent that had been earned at the time of termination of the lease;

(2) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination of the lease until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(3) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(4) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform Tenant's obligations under this lease; and

(b) Bring an action, in addition to or in lieu of the action described in subsection (a) of this section, to reenter and regain possession of the Premises in the manner provided by the laws of unlawful detainer of the State of California then in effect.

Breach and Default by Tenant

Section 11.03. All covenants and agreements contained in this lease are declared to be conditions to this lease and to the term hereby leased to Tenant. Should Tenant fail to perform any covenant, condition, or agreement contained in this lease and the default is not be cured within _____[*number*, *e.g.*, 30 days] after written notice of the default is served on Tenant by Landlord, then Tenant shall be in default under this lease. In addition to Tenant's failure to perform any covenant, condition, or agreement contained in this lease within the cure period permitted by this section, the following shall constitute a default by Tenant under this lease:

(a) The appointment of a receiver to take possession of the Premises or Improvements, or of Tenant's interest in, to, and under this lease, the leasehold estate or of Tenant's operations on the Premises for any reason, including, without limitation, assignment for benefit of creditors or voluntary or involuntary bankruptcy proceedings, when not released within _____[*number*, *e.g.*, 60 days];

(b) An assignment by Tenant for the benefit of creditors; or the voluntary filing by Tenant or the involuntary filing against Tenant of a petition, other court action, or suit under any law for the purpose of (1) adjudicating Tenant a bankrupt, (2) extending time for payment, (3) satisfaction of Tenant's liabilities, or (4) reorganization, dissolution, or arrangement on account of, or to prevent, bankruptcy or insolvency; provided, however, that in the case of an involuntary proceeding, if all consequent orders, adjudications, custodies, and supervisions are dismissed, vacated, or otherwise permanently stayed or terminated within _____[*number*, *e.g.*, 90 days] after the filing or other initial event, then Tenant shall not be in default under this Section; and

(c) The subjection of any right or interest of Tenant to or under this lease to attachment, execution, or other levy, or to seizure under legal process when the claim against Tenant is not released within _____[*number*, *e.g.*, 90 days].

Cumulative Remedies

Section 11.04. The remedies given to Landlord in this Article shall not be exclusive but shall be cumulative with and in addition to all remedies now or hereafter allowed by law and elsewhere provided in this lease.

Waiver of Breach

Section 11.05. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant of either the same or a different provision of this lease.

Surrender of Premises

11.06. On expiration or earlier termination of this lease, Tenant shall surrender the Premises and all Improvements in or on the Premises to Landlord in as good, safe, and clean condition as practicable, reasonable wear and tear excepted.

ARTICLE 12 OTHER PROVISIONS

Force Majeure

Section 12.01. Except as otherwise expressly provided in this lease, if the performance of any act required by this lease to be performed by either Landlord or Tenant is prevented or delayed by reason of any act of God, strike, lockout, labor trouble, inability to secure materials, restrictive governmental laws or regulations, or any other cause (except financial inability) not the fault of the party required to perform the act, the time for performance of the act will be extended for a period equivalent to the period of delay and performance of the act during the period of delay will be excused. However, nothing contained in this section shall excuse the prompt payment of rent by Tenant as required by this lease or the performance of any act rendered difficult or impossible solely because of the financial condition of the party required to perform the act.

Attorneys' Fees

Section 12.02. Should any litigation be commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation thereto, the party prevailing in that litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to a reasonable sum as and for that party's attorneys' fees in that litigation that shall be determined by the court in that litigation or in a separate action brought for that purpose.

Notices to Landlord

Section 12.03. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to Landlord by Tenant or any Lender described in Article 6 of this lease shall be in writing and shall be deemed duly served and given when personally delivered to Landlord, to any managing employee of Landlord, or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, and sent by express mail that allows for tracking, addressed to Landlord at _____[*address*]. Landlord may change Landlord's address for the purpose of this Section by giving written notice of that change to Tenant in the manner provided in Section 12.04; Tenant shall then transmit a copy of that notice to any Lender described in Article 6 of this lease.

Notices to Tenant

Section 12.04. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to Tenant by Landlord shall be in writing and shall be deemed duly served and given when personally delivered to Tenant, any managing employee of Tenant, or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, and sent by express mail that allows for tracking, addressed to Tenant at _____[*address*]. Tenant may change its address for the purpose of this section by giving written notice of that change to Landlord in the manner provided in Section 12.03 of this lease.

Governing Law

Section 12.05. This lease, and all matters relating to this lease, shall be governed by the laws of the State of California in force at the time any need for interpretation of this lease or any decision or holding concerning this lease arises.

Binding on Heirs and Successors

Section 12.06. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto, but nothing in this section shall be construed as a consent by Landlord to any assignment of this lease or any interest in the lease by Tenant except as provided in Article 10 of this lease.

Partial Invalidity

Section 12.07. If any provision of this lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this lease shall remain in full force and effect unimpaired by the holding.

Sole and Only Agreement

Section 12.08. This instrument constitutes the sole and only agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, the construction of the Shopping Center described in this lease on the Premises, and the lease terms set forth in this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises, their leasing to Tenant by Landlord, or any other matter discussed in this lease not expressly set forth in this instrument are null and void.

Time of Essence

Section 12.09. Time is expressly declared to be of the essence of this lease.

Memorandum of Lease for Recording

Section 12.10. Neither Landlord nor Tenant shall record this lease without the written consent of the other. However, Landlord and Tenant shall, at the request of either at any time during the term of this lease, execute a memorandum or "short form" of this lease for purposes of, and in a form suitable for, recordation. The memorandum or "short form" of this lease shall describe the parties, set forth a description of the leased premises, specify the term of this lease, incorporate this lease by reference, and include any other provisions required by Lender(s).

EXECUTED on _____[*date*], at _____[*city*], California.

_____ [*signature of landlord*]
[*typed name*]
LANDLORD
_____ [*signature of tenant*]
[*typed name*]
TENANT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesTerm TenanciesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
A. Complete Lease

17-34D California Legal Forms--Transaction Guide §§ 34D.201-34D.209

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 34D.201[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions

17-34D California Legal Forms--Transaction Guide § 34D.210

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.210 Landlord's Right to Terminate Lease on Tenant's Failure to Obtain Financing

[1] Comment

[a] Use of Form

The form in [2], *below*, is a ground lease provision that authorizes the landlord to terminate the lease if the tenant is unable to obtain financing for construction of improvements on the land by a specified date. It is a condition similar to that generally used in real property sales agreements [*see, e.g., Ch. 23, Real Property Sales Agreements , § 23.201*]. With this provision, the landlord can give the tenant a reasonable time to obtain financing, but also limit the time period during which the landlord is contractually bound to the tenant. After expiration of the specified period, the landlord is free to consider other offers or opportunities related to use or disposition of the land. Limitations on the time period for obtaining financing may motivate the tenant to expedite those financing matters under its control.

For a complete ground lease, see *§ 34D.200[2]*.

[b] Use of Escrow in Ground Lease Transaction

Most ground lease transactions are handled through an escrow in the same manner as the sale of real property [*see § 34D.16*]. If the lease is not executed until after the opening of escrow, both the lease and the escrow instructions should provide that the tenant's financing is a condition precedent to the effectiveness of the lease and to the closing of escrow. If the lease is executed before opening escrow or will be transacted without an escrow, the financing provision should be included in the lease for the landlord's protection.

[c] Use of Memorandum of Lease in Ground Lease Transaction

If the lease authorizes the recording of a memorandum of lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*; *see also § 34D.16*] immediately after execution of the ground lease, the landlord should require the tenant to

concurrently execute in recordable form a quitclaim deed to the landlord, which the landlord is authorized to record if the landlord cancels the lease due to the tenant's failure to obtain financing within the specified time period.

[2] Form

Landlord's Right to Terminate Lease on Tenant's Failure to Obtain Financing

Lease Termination for Inability to Finance

Section _____. Notwithstanding any other provision of this lease, the effectiveness of this lease is expressly conditioned on the ability of Tenant to obtain a written, binding commitment for financing described in Section _____[*state appropriate provision of lease*] on or before _____[*date*]. In the event Tenant fails to obtain financing by that date, Landlord shall have the absolute right to terminate this lease by giving written notice of termination to Tenant not later than _____[*number*] days after expiration of the period in which Tenant is required to obtain financing. In the event of that termination, this lease shall be null and void and neither party shall have any rights or obligations under this lease.

[*Add, if lease authorizes recordation of memorandum of lease immediately following execution of ground lease:*]

Concurrently with execution of this lease, Tenant shall execute and deliver to Landlord a quitclaim deed in favor of Landlord, in recordable form, which shall relinquish all of Tenant's right, title, and interest in, to, and under this lease and the premises. In the event Landlord terminates this lease under this section, Landlord shall have the right to immediately record the quitclaim deed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions

17-34D California Legal Forms--Transaction Guide § 34D.211

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.211 Landlord's Covenant Against Encumbrances

[1] Comment

[a] Use of Form

The form in [2], *below*, is the landlord's covenant against encumbrances. For a tenant to obtain financing at the commencement of a ground lease on the security of the tenant's leasehold interest, the landlord's fee title interest, or both, the tenant's lender generally will insist on a first encumbrance. Thus, the landlord's title must be free and clear, or any prior encumbrances must be subordinated to the tenant's new financing [*see § 34D.212*].

For a complete ground lease, see *§ 34D.200[2]*.

[b] Subsequent Encumbrances

A separate problem of priority may arise during the term of the lease if the lease permits the tenant to obtain further financing after the initial financing on the security of the leasehold interest or the landlord's fee title interest, for purposes such as remodeling of improvements or refinancing. If the landlord is also permitted to freely encumber the premises throughout the lease's term, any landlord encumbrances made before the tenant's subsequent financing will have priority over the subsequent financing. One method of protecting against this intervening priority is to prohibit the landlord from making any encumbrances on the premises after commencement of the lease term [*see* [2], *below*]. Another method is to permit the landlord to encumber the premises, but to provide that those encumbrances will be subject and subordinate to subsequent financing by the tenant permitted under the lease. If the latter method is used, a problem of enforcement may arise as with any agreement or promise to subordinate [*see § 34D.212[1][e]*].

[2] Form

Landlord's Covenant Against Encumbrances

Landlord's Covenant Against Encumbrances

Section _____ (a). Landlord covenants that the Premises shall be free and clear of all encumbrances or liens [except for those specifically permitted under this lease] on the commencement date of this lease.

(b) For as long as Tenant is permitted by the terms of this lease to encumber its leasehold interest, Landlord covenants and agrees that it shall not encumber Landlord's fee title to the Premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions

17-34D California Legal Forms--Transaction Guide § 34D.212

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.212 Subordination of Fee Interest to Tenant Financing

[1] Comment

[a] Use of Form

The form in [2], *below*, contains provisions for a ground lease that may be used when the tenant is required to construct new improvements on the leased land and the landlord agrees to subordinate its fee title interest in the leased premises to the tenant's financing. This method of financing is commonly referred to as "fee subordination." When the landlord will not agree to subordinate its fee title interest, a tenant may be able to obtain financing on the security of the tenant's leasehold interest under the lease [*see § 34D.200[2]*, Section 6.01]. That method of financing is commonly referred to as "leasehold financing" [*see § 34D.13[1][a]*].

For a complete ground lease, see *§ 34D.200[2]*.

PRACTICE TIP:

Landlord's Representative for Subordination Requests. It is not unusual over the term of 30 or more years for the ownership of the underlying fee to become fractionalized, by devise or other transfer. Oftentimes, there may not be a single party or entity that may be approached by the tenant to obtain a future consent to subordination. Thought should be given to providing some mechanism by which a special attorney is empowered to act in the absence of a single person or entity to execute such a subordination. *By Benjamin Kaplan.*

[b] Agreement to Subordinate

In the form in [2], *below*, the landlord's agreement to subordinate extends only to the construction and permanent financing for the improvements to be initially constructed by the tenant. It does not extend to any subsequent loans, future advances, or refinancing by the tenant [*see* [2], Section _____.01, *below*]. The landlord agrees to execute the

necessary instruments required to effect the subordination and, subject to specified conditions [*see* [c], [d], *below*], to execute the deed of trust or mortgage evidencing the tenant's loan.

[c] Required Loan Terms

The landlord's agreement to subordinate is conditioned on the tenant acquiring construction and permanent loans that conform to specified terms and conditions [*see* [2], Section _____.03, *below*; *see also* [e], *below*]. A construction loan is a short-term or interim loan that is repaid with the proceeds from permanent loans [*see* Ch. 30A, *Construction Financing*]. A permanent or take-out loan is a long-term loan, payable in installments over a period of years, that is used to pay off, or "take out," an interim construction loan [*see Jones v. Sacramento Sav. & Loan Assn. (1967) 248 Cal. App. 2d 522, 527, 56 Cal. Rptr. 741]* . Although the permanent loan is made when construction is completed, a lender may make a written commitment to make the loan before the construction lender proceeds with a construction loan. However, permanent commitments are quite difficult to obtain before the commencement of construction. The two loans may be made by the same lender, or, more commonly, by different lenders, with the construction lender receiving the security of the permanent loan commitment [*see* Ch. 30A, *Construction Financing*]. The need for certainty regarding the basic terms of the subordinating loan [*see* [e], *below*] applies to permanent loans as well as construction loans [*see* California Real Property Sales Transactions, ch. 5, *Seller Financing*, § 5.51 (Cal. C.E.B. 1981)].

For further discussion of permanent financing, see Ch. 30A, *Construction Financing* .

[d] Required Mortgage Provisions

As a further condition of the landlord's agreement to subordinate its fee title interest, the form in [2], *below*, requires that the instruments evidencing the tenant's loans contain several provisions. These include a provision that the landlord's execution of the tenant's mortgage is for the sole purpose of encumbering the landlord's fee title interest and that the landlord is to have no liability on the mortgage or underlying promissory note. Additionally, the lender may not make any future advances to the tenant, refinance the loan, extend the loan due date, or otherwise modify or amend the original mortgage instrument without the landlord's prior consent. Finally, the lender is required to give the landlord notice of any tenant default under the mortgage and the landlord is to have the right to cure the default. The mortgage must also contain a request by the landlord that any notice of default or notice of sale given by the lender under the mortgage also be given to the landlord in accordance with statutory requirements [*see Civ. Code § 2924b*; *see also* [2], Section _____.04, *below*].

[e] Promise-to-Subordinate Clause

The agreement of the landlord to subordinate its fee title interest in the premises to the tenant's financing in this form is similar to what is commonly referred to as an "executory subordination" or "promise to subordinate" clause. In that type of clause, a lender promises to execute a separate instrument subordinating its mortgage or deed of trust to a subsequent mortgage or deed of trust at the time the subsequent mortgage or deed of trust is to be recorded. To make an executory subordination or "promise to subordinate" clause specifically enforceable and not merely an agreement to agree in the future, the permissible terms, conditions, and purposes of the loan to which the mortgage or deed of trust containing the "promise to subordinate" clause is to be subordinated must be specified in the clause in some detail [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P. 2d 329* ; *see* Ch. 25B, *Subordination, Assumption, and Assignment*]. Furthermore, an enforceable subordination clause must contain terms that will define and minimize the risk that the subordinating liens will impair or destroy the seller's security. These terms may include limits on the use to which the proceeds may be put to insure that their use will improve the value of the land [*Swiss Property Management Co., Inc. v. Southern California Ibew-Neca Pension Plan (1997) 60 Cal. App. 4th 839, 842, 70 Cal. Rptr. 2d 587]* .

These terms, which include the maximum principal amount, maximum interest rate, maximum loan fees, repayment terms, and any restrictions on use of the loan proceeds are discussed more fully in Ch. 25B, *Subordination, Assumption,*

and Assignment.

[f] Statutory Requirements

Except for subordination clauses or agreements that expressly state that a subordinating loan will exceed $25,000 or that are executed in connection with a loan that exceeds $25,000 [*see Civ. Code § 2953.5*], every real property security instrument [*see Civ. Code § 2953.1(a)* (definition)] that contains or has attached to it a subordination clause [*see Civ. Code § 2953.1(b)* (definition)] and every subordination agreement [*see Civ. Code § 2953.1(c)* (definition)] must contain notices and captions prescribed by statute [*Civ. Code §§ 2953.2, 2953.3*]. For a full discussion of these requirements and for the forms of notice, see *Ch. 25B, Subordination, Assumption, and Assignment , §§ 25B.203, 25B.204* (trust deed subordination provisions), and 25B.207-25B.210 (subordination agreements and related notices).

[2] Form

Subordination of Fee Interest to Tenant Financing

ARTICLE _____
TENANT FINANCING AND LANDLORD'S SUBORDINATION

Landlord's Agreement to Subordinate

Section _____.01. Promptly after written request from Tenant, Landlord agrees that it shall subordinate Landlord's fee title interest in the Premises (as defined in Section _____[*specify applicable section, e.g.,* 1.01] of this lease) and the leasehold created by this lease (including rent and other benefits to Premises under this lease) to the lien of a first encumbrance represented by a construction loan and a permanent loan to be obtained by Tenant (collectively referred to in this lease as "Tenant's Mortgage"), provided that the construction loan and permanent loan satisfy and comply with all provisions of this Article. Landlord's agreement to subordinate is limited to the construction loan and permanent loan described in Section _____.03, below, for the initial construction and permanent financing of the _____[*specify, e.g.,* Shopping Center] to be constructed by Tenant under this lease, and does not extend to any subsequent loans obtained by Tenant or any additional advances or refinancing of the original construction and permanent loan described in Section _____.03, below.

Documentation for Subordination

Section _____.02. To effect the subordination described in Section _____.01, above, Landlord agrees to execute in recordable form and deliver to Tenant a deed of trust, mortgage, or other security instrument and any other agreement or instrument as required by a Lender (as defined in Section _____[*specify applicable section*] of this lease) or by the title company insuring Tenant's Mortgage, or both, to effect the subordination described in this Article, provided any such deed of trust, mortgage, or other security instrument and any other agreement or instrument is compatible with the provisions of and does not in any way abridge the rights of Landlord under this lease. Landlord shall execute Tenant's Mortgage (but not the promissory note secured by Tenant's Mortgage), provided Tenant's Mortgage meets all of the requirements and conditions set forth in Section _____.04, below.

Authorized Tenant Financing

Section _____.03. Tenant financing that is authorized by this lease and to which Landlord agrees to subordinate its fee title interest under Section _____.01, above, shall mean the following:

(a) A deed of trust, mortgage, or other security instrument to be executed by Tenant covering the premises and to be recorded in the Office of the County Recorder of _____[*name of county where premises are located*], to secure a loan ("Construction Loan") from a state or federal bank, life insurance company, federal or state savings and loan association, or other institutional lender regulated by federal or state authority ("Construction Lender"), for the purpose of constructing _____[*specify, e.g.,* a Shopping Center] as required under this lease, provided

[*EITHER*]

(1) The total amount of the Construction Loan shall not exceed $_____;

[*OR*]

(1) The Construction Loan shall not exceed _____ [*number*] percent of the anticipated value of the premises after completion of the Improvements for which the loan was obtained, as determined by the Permanent Lender referred to in subparagraph (b), below;

[*CONTINUE*]

(2) Any funds derived from the Construction Loan shall be used only for the construction on the premises of a Shopping Center described in Section _____ of this lease, having a value, as determined by the Permanent Lender referred to in subparagraph (b), below, of at least $_____, and to the extent permitted in this article, for the loan fees, interest, or other charges directly connected with the construction of the Shopping Center. "Construction of the Shopping Center" shall include the usual appurtenances for a commercial shopping center, including parking facilities, driveway, and fencing and the construction of all common area facilities; shall encompass all costs of labor and materials for the above, all aggregate costs of general improvements, including engineering fees, architectural fees, drafting fees, permit and inspection fees, and all costs of utility hookup and assessment charges (exclusive of monthly charges) in respect to the use of those facilities; and shall specifically exclude all off-site improvements [*or* shall specifically include off-site physical improvements required by the city (*or* county) of _____ (*name*), California, including, but not limited to, roads, storm drains, sidewalks, curbs and gutters, underground utilities, water systems, sewage systems, drainage and erosion control facilities, and fencing, provided that not more than $_____ (*specify maximum*) of the loan proceeds may be used for those off-site improvements];

(3) No portion of the Construction Loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of the Shopping Center on the portion of the property encumbered by the Construction Loan;

(4) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of the Construction Loan are as follows:

(a) Loan fees: _____ [*number*] percent of the principal amount of the Construction Loan;

(b) Interest: _____ [*number*] percent per annum; and

(c) Other loan charges: a sum not to exceed _____ [*number*] percent of the principal amount of the Construction Loan;

(5) No Construction Loan shall bear interest, exclusive of late charges, penalties, or fees payable in case of default,

greater than _____ [*number*] percent per annum;

(6) The Construction Loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ [*number*] months or more than _____ [*number*] years from the date of the Construction Loan, with the total unpaid balance all due and payable at the end of that period;

(7) Additional payments may be made, without penalty, on the principal and accrued interest of the Construction Loan at any time before maturity [*or specify maximum prepayment penalty or other prepayment terms*];

(8) The total payments of principal and interest due on the Construction Loan shall not exceed $_____ per month;

(9) The proceeds of any Construction Loan shall be disbursed by the Construction Lender either through its own offices or through a bonded disbursement control agency only after inspection of the work completed on the property and presentation of vouchers signed by Tenant or its successors in interest for the cost of work, labor, or materials actually performed or used in the construction of Improvements on the property;

(10) The remaining terms and provisions of any Construction Loan shall be as required by the Construction Lender; and

(11) Tenant has delivered to Landlord a binding written commitment from an institutional lender to make a permanent loan on the property, further described below, on completion of the Shopping Center.

(b) A deed of trust, mortgage, or other security instrument to be executed by Tenant on completion of the Shopping Center, covering the premises as improved, and to be recorded in the Office of the County Recorder of _____[*name of county where property is located*], to secure a permanent loan ("Permanent Loan") from a state or federal bank, life insurance company or correspondent thereof, federal or state savings and loan association, or other institutional lender regulated by federal or state authority ("Permanent Lender"), provided

(1) The proceeds of the Permanent Loan shall be used first to pay in full any Construction Loans on the premises, and any mechanics' liens or other charges levied or leviable against the premises because of any Improvements made on the premises by Tenant or its successors in interest and the premises shall be reconveyed from the Construction Loan deed of trust, mortgage, or other security instrument described in subparagraph (a), above, of this lease;

[*EITHER*]

(2) The total amount of the Permanent Loan shall not exceed $_____;

[*OR*]

(2) The total amount of the Permanent Loan shall not exceed _____ percent of the value, as determined by the Permanent Lender, of the property as improved by Tenant or his or her successor in interest;

[*CONTINUE*]

(3) The maximum loan fees, interest, or other loan charges that may be deducted from the principal amount of the Permanent Loan are as follows: (a) loan fees: _____ [*number*] percent of the principal amount of the

loan; (b) interest: _____ [*number*] percent per annum; (c) other loan charges: a sum not to exceed _____ [*number*] percent of the principal amount of the loan;

(4) The Permanent Loan shall not bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than _____ [*number*] percent per annum;

(5) The Permanent Loan shall be payable in equal monthly installments of principal and interest [*or specify other repayment schedule*] over a period of time of not less than _____ months or more than _____ years from the date of the Permanent Loan, with the total unpaid balance all due and payable at the end of that period;

(6) Additional payments of principal and accrued interest on the Permanent Loan may be made, without penalty, at any time before maturity [*or specify maximum prepayment penalty or other prepayment terms*];

(7) The total payments of principal and interest due on the Permanent Loan shall not exceed $_____ per month;

(8) The proceeds of the Permanent Loan shall be disbursed by the Permanent Lender either through its own offices or through a bonded disbursement control agency; and

(9) The remaining terms and provisions of the Permanent Loan shall be as required by the Permanent Lender.

Requirements for Tenant's Mortgage

Section _____.04. In addition to the ordinary and customary provisions regularly required by a Lender or the title company insuring Lender's interest under a mortgage similar to Tenant's Mortgage (defined in Section _____.01, above), Tenant's Mortgage (and the promissory note secured by Tenant's Mortgage when indicated) shall contain all of the following:

(a) A provision stating that Landlord shall have no personal liability on Tenant's Mortgage or the promissory note(s) secured by Tenant's Mortgage or for any provision contained in the note(s) or Tenant's Mortgage;

(b) A provision stating that Landlord has executed Tenant's Mortgage for the sole purpose of encumbering Landlord's fee title interest in the Premises;

(c) A provision stating that without Landlord's prior written consent, Tenant shall have no right to refinance any unpaid balance on Tenant's Mortgage or to obtain any amounts under Tenant's Mortgage except as permitted by Section _____.03;

(d) A provision stating that the due date of Tenant's Mortgage or the promissory note(s) secured by Tenant's Mortgage may not be extended and that the loan documents for Tenant's Mortgage may not be amended or modified in any way, except with the prior written consent of Landlord;

(e) Any and all notices of default under Tenant's Mortgage or under the promissory note(s) secured by Tenant's Mortgage must be given in writing to both Tenant and Landlord and Landlord shall have the right to cure any default not cured by Tenant within _____[*specify, e.g.,* 30 days] after expiration of the period granted to Tenant to cure a default; and

(f) A request that a copy of any notice of default and any notice of sale under Tenant's Mortgage be delivered by Lender to Landlord in accordance with the statutory requirements then in effect under the laws of the State of

California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34D GROUND LEASES
PART IV. FORMS
B. Alternative and Additional Lease Provisions

17-34D California Legal Forms--Transaction Guide § 34D.213

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34D.213 Subleasing and Nondisturbance of Subtenants

[1] Comment

[a] Use of Form

The form in [2], *below*, contains ground lease provisions that (1) permit the tenant to sublease improvements covered by the ground lease, subject to minimal restrictions, and (2) prohibit the landlord from disturbing the subtenant's possession (that is, terminating the sublease) if the landlord terminates the ground lease before its natural expiration.

For a complete ground lease, see *§ 34D.200[2]*. For an alternative provision for subleasing by the tenant, see *§ 34D.200[2]*, Section 10.03. For a series of alternative assignment and sublease provisions that may be used for any type of nonresidential lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.260*. A discussion of the tenant's rights to sublease and the permissible restrictions on that right is discussed in *§ 34D.15[5]*.

[b] Restrictions on Tenant's Right to Sublease

The right to sublease under a ground lease is important because the ground tenant is often a developer who leases unimproved property, constructs income-producing improvements, and then subleases space in the improvements to subtenants. Consequently, ground leases typically grant the ground tenant the right to sublease, and impose minimal, if any, restrictions on this right [*see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, ch. 153, *Drafting Commercial Leases* (Matthew Bender)].

The form in [2], *below*, contains the following restrictions on the ground tenant's right to sublease:

- Each sublease must contain the same attornment and nondisturbance requirements set forth in the "nondisturbance" provision of this form [*see* [c], *below*];

- The ground tenant must promptly notify the ground landlord of any subleasing; and

- The ground tenant may not accept more than one month's prepaid rent from any subtenant. By limiting the amount of prepaid rent that a ground tenant may collect from a subtenant, the landlord can ensure that it will not encounter any interruption in rent if the ground tenant defaults under the ground lease and the ground landlord becomes the landlord under the sublease.

[c] Nondisturbance Provision

A ground lease subtenant generally wants assurance that its sublease will remain in effect following a premature termination of the ground lease. To be able to provide this assurance to subtenants, the ground tenant should bargain for a nondisturbance provision in the ground lease at the time the lease is executed.

A lease nondisturbance provision typically provides that, if the master lease is terminated before its natural expiration, the master landlord will not disturb the subtenants' possession and the subtenants will attorn to the master landlord. In the context of a ground lease, "attornment" is an agreement by a subtenant to be bound directly to the ground landlord for the performance of all obligations under the sublease in the event of the ground tenant's default [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.250*].

The form in [2], *below*, provides a general guaranty by the landlord that, in the event the ground lease is terminated before its natural expiration, the landlord will not disturb the possession of any subtenant not then in default under its sublease. It further provides that the landlord succeeds to the rights of the ground tenant (the sublessor), that the subtenants will be deemed to have attorned to the landlord, and that the subtenants need not pay rent to the landlord until the landlord has notified the subtenants of the ground lease's termination. The nondisturbance provision must also be included in any sublease entered into by the ground tenant [*see Ch. 35A, Assignment and Sublease of Leasehold Interests, § 35A.210* (sublease with attornment and nondisturbance provisions)]. This form includes optional language requiring the landlord, on request of the ground tenant, to deliver a written instrument confirming the landlord's nondisturbance agreement to any subtenant or prospective subtenant.

[2] Form

Subleasing and Nondisturbance of Subtenants

Tenant's Right to Sublease

Section _____.01 During the term of this lease, Tenant shall have the right to sublease all or any portion of the premises without Landlord's consent, provided the following requirements are satisfied:

(a) Tenant shall not accept or require, directly or indirectly, more than one month's prepaid rent from any subtenant;

(b) After execution of each sublease, Tenant shall promptly notify Landlord of the subtenant's name and mailing address, and provide Landlord with a copy of the sublease; and

(c) Each sublease shall contain a provision stating that in the event of a default by Tenant under this lease, the subtenant shall attorn to Landlord, or in the event of any proceeding to foreclose a Leasehold Encumbrance (as defined in Section _____ of this lease), shall attorn to Lender (as defined in Section _____ of this lease) or any successor in interest of Lender designated in a written notice by Lender to a subtenant, effective on the date the subtenant receives notice from Landlord or a Lender that Tenant is in default under this lease and instructing Tenant to pay rent to Landlord, Lender, or Lender's designee.

Nondisturbance and Attornment

Section _____.02 If this lease is terminated for any reason before the natural expiration of its term, the termination shall not terminate nor affect the validity of any then-existing sublease of all or any portion of the premises made by Tenant as sublessor, provided the sublease meets the requirements set forth in Section _____[*specify applicable section*] of this lease. In that case, all of Tenant's interest as sublessor under any and all existing valid and enforceable subleases of all or any portion of the premises shall be deemed automatically assigned, transferred, and conveyed to Landlord. Landlord shall thereafter be bound on the subleases to the same extent Tenant (as sublessor) was bound on the subleases, and shall have all the rights that Tenant (as sublessor) had under each sublease, including the right to terminate any sublease then or thereafter in default. [Landlord shall, at Tenant's request, execute and deliver to any subtenant of all or any portion of the premises, a written instrument reciting in substance the contents of this section.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION

17-34E California Legal Forms--Transaction Guide 34E.syn

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.syn Synopsis to Chapter 34E: SHOPPING CENTERS: LEASING AND OPERATION

§ 34E.01 California Statutes

§ 34E.02 Federal Statutes

§§ 34E.03-34E.04 [Reserved]

§ 34E.05 Law Reviews and Periodicals

§ 34E.06 Annotations

§ 34E.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 34E.08-34E.09 [Reserved]

§ 34E.10 Types of Shopping Centers

§ 34E.11 Multiple Owners of Shopping Center

[1] Reciprocal Easement Agreements (REAs)

[2] Declarations

§ 34E.12 Enforceability of Covenants, Conditions, and Restrictions in REA or Declaration

§ 34E.13 Davis-Stirling Common Interest Development Act

[1] Applicability

[2] Definitions

[a] "Common Interest Development"

[b] "Planned Development"

[3] Requirements for Creation of Common Interest Development

[4] Inapplicability of Certain Provisions to Commercial Development

§ 34E.14 Inapplicability of Subdivided Lands Act

§ 34E.15 Shopping Center Leases

[1] Standard Leases

[2] Inapplicability of Subdivision Laws

§ 34E.16 Covenant of Continuous Business Operation

[1] Inclusion of Covenant Is Subject to Negotiation

[2] Implied Covenant

[3] Remedies for Breach

[a] Damages

[b] Specific Performance

§ 34E.17 Restrictive and Exclusive Use Provisions

§ 34E.18 Merchants' Association

[1] Purposes of Merchants' Association

[2] Mandatory Membership

[3] Governing Instruments

§ 34E.19 Public Access to Shopping Centers

[1] Right to Restrict Access Is Limited

[2] Protected Activities

[a] United States Supreme Court Decisions

[b] California Supreme Court Decisions

[c] Pruneyard Affirmed

[3] Arbitrary Discrimination Prohibited

§§ 34E.20-34E.99 [Reserved]

Scope

§ 34E.100 Lease or REA Transaction in General

[1] Facts

Scope

[2] Documents

Scope

§ 34E.101 Additional Facts and Documents to Be Obtained From Owner

[1] Facts

Scope

[2] Documents

Scope

§ 34E.102 Additional Facts and Documents to Be Obtained From Tenant

[1] Facts

Scope

[2] Documents

Scope

§§ 34E.103-34E.109 [Reserved]

§ 34E.110 Capacity and Consent of Parties

§ 34E.111 Lease

§ 34E.112 For REA

Scope

§§ 34E.113-34E.119 [Reserved]

§ 34E.120 Representation

Scope

§ 34E.121 Authority to Enter Into and Approve Lease or REA

§ 34E.122 Review of REA or Lease Drafted by Other Party

Scope

§ 34E.123 Drafting REA

§ 34E.124 Drafting Lease

§ 34E.125 Priority of REA and Title Insurance

Scope

§ 34E.126 Execution Requirements for REA or Lease

§ 34E.127 Recordation of REA

Scope

§ 34E.128 Optional Recordation of Memorandum of Lease

§ 34E.129 [Reserved]

§ 34E.130 Shopping Center REA

[1] Parties to Agreement

Scope

[2] Description of Land Covered by REA

Scope

[3] Common Plan

Scope

[4] Transfer Limitations, Rights, and Obligations

Scope

[5] Reciprocal Easements

Scope

[6] Covenants for Operation and Use

Scope

[7] Covenants for Buildings and Other Improvements

Scope

[8] Development and Initial Construction

Scope

[9] Leasing and Opening of Shopping Center

Scope

[10] Operation and Maintenance of Shopping Center Common Areas

Scope

[11] Taxes and Insurance

Scope

[12] Damage and Destruction

Scope

[13] Condemnation

Scope

[14] Default, Termination, and Remedies

Scope

[15] Effect of REA on Lenders and Rights of Lenders

Scope

[16] Merchants' Association

Scope

[17] Recordation and Miscellaneous Provisions

Scope

§ 34E.131 Drafting Guide for Shopping Center Lease

[1] Maintenance and Use of Common Areas

Scope

[2] Miscellaneous Provisions

Scope

§§ 34E.132-34E.199 [Reserved]

§ 34E.200 Reciprocal Easement Agreement and Declaration of Restrictions and Covenants (REA)

[1] Comment

[a] Use of Form

[b] Davis-Stirling Common Interest Development Act

[c] Covenants Running With Land

[d] Equitable Servitudes

[i] In General

[ii] Creation by Written Instrument

[iii] Notice to Grantee

[iv] Description of Dominant Estate

[v] Statement of Common Plan

[e] Reciprocal Easements

[f] Transfer Restrictions and Rights

[g] Covenant of Continuous Business Operation

[h] Other Covenants for Operation and Use

[i] Covenants for Buildings and Other Improvements

[j] Construction Obligations of Each Party

[k] Opening of Shopping Center and Leasing Obligations of Developer

[l] Operation and Maintenance of Common Areas

[m] Taxes and Insurance

[n] Damage and Destruction

[o] Condemnation

[p] Default, Termination, and Remedies

[q] Lender Protective Provisions

[r] Merchants' Association

[2] FORM

Reciprocal Easement Agreement and Declaration of Restrictions and Covenants (REA)

§ 34E.201 Shopping Center Lease

[1] Comment

[a] Use of Form

[b] Uniform Lease for All Tenants

[c] Description of Leased Premises

[d] Term of Lease

[e] Possession of Premises

[f] Rent and Other Charges

[i] In General

[ii] Fixed Rent

[iii] Percentage Rent

[iv] Tenant's Share of Common Area Maintenance Costs

[v] Real Property Taxes and Assessments

[vi] Utilities

[vii] Security Deposit

[g] Financing Considerations

[h] Tenant's Use of Premises

[i] Restriction as to Type of Business

[ii] Operating Covenant

[iii] Radius Restriction

[iv] Prohibited Activities

[v] Hazardous Substances

[vi] Compliance With Law and Other Affirmative Obligations

[vii] Signs and Form of Advertising

[i] Maintenance and Use of Common Areas

[j] Initial Construction Responsibilities for Leased Space

[k] Alterations and Improvements

[l] Repairs

[m] Destruction of Premises

[n] Indemnity and Insurance

[o] Merchants' Association

[p] Condemnation

[q] Subletting and Assignment

[r] Subordination

[s] Default by Tenant

[i] In General

[ii] Damages on Termination of Lease

[iii] Continuation of Lease in Effect After Breach

[t] Personal Liability of Landlord

[u] Lease Subject to Landlord's Operating Agreements

[v] Representations Regarding Major Occupants

[w] Recording of Lease

[x] Attorneys' Fees

[y] Miscellaneous Provisions

[2] FORM

Shopping Center Lease

§ 34E.202 Sign Requirements

[1] Comment--Use of Form

[2] FORM

Sign Requirements

§ 34E.203 Rules and Regulations for Use of Shopping Center

[1] Comment

[a] Use of Form

[b] Right of Public Access

[2] FORM

Rules and Regulations for Use of Shopping Center

Benjamin Kaplann*

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FOOTNOTES:

(n66)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n67)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966 through 1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION

17-34E California Legal Forms--Transaction Guide Scope

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

Scope

Benjamin Kaplann* Myron Moskovitzn** Practice Consultants Scope

This chapter discusses shopping centers. The focus is on shopping center leasing and operations. The chapter also considers, to a very limited extent, the development of shopping centers. The bulk of the chapter consists of forms, which include a shopping center lease and a reciprocal easement agreement and declaration of covenants, conditions, and restrictions for a shopping center (commonly referred to as an "REA"). The forms part also includes illustrative rules and regulations and sign criteria that may be appended to a shopping center lease or an REA. The comments to the forms and the Legal Background examine relevant law. The Transaction Guide contains drafting guides for a shopping center lease and an REA.

For shopping center lease transactions [*see § 34E.15*], this chapter should be used in conjunction with Ch. 34C, *Retail, Industrial, and Office Leases*, and Ch. 34D, *Ground Leases*.

This chapter does not cover practical development matters relevant to a shopping center, such as site selection and optimal tenant mixes, since the role of an attorney in a shopping center transaction does not usually extend to those matters. The only aspect of shopping center development covered in this chapter is the drafting of a shopping center REA that grants easements and imposes covenants, conditions, and restrictions relating to the use of the shopping center. The REA included in this chapter [*see § 34E.200[2]*] also includes provisions relating to the initial construction and development of a shopping center. These provisions are sometimes included in a separate development agreement rather than in the REA itself.

Other chapters in this publication cover development-related topics that are generally relevant to the development of a shopping center. These chapters and topics include the following:

- Acquisition of land [*see* Ch. 22, *Options to Purchase Real Property* ; Ch. 23, *Real Property Sales Agreements* ; Ch. 24, *Exchanges of Real Property*];

- Real estate loans and security instruments [*see* Ch. 25, *Real Estate Loans* ; Ch. 25A, *Security Instruments for Real Estate Financing* ; Ch. 25B, *Subordination, Assumption, and Assignment* ; Ch.

25C, *Release and Reconveyance* ; and Ch. 25D, *Foreclosure*];

- Title insurance [*see* Ch. 26A, *Title Insurance*];

- Deeds and recording [*see* Ch. 27, *Deeds and Recording*];

- Easements, covenants, and boundary agreements affecting land [*see* Ch. 28A, *Easements and Licenses* ; Ch. 28B, *Party Walls and Boundary Agreements* ; Ch. 28C, *Covenants, Conditions, and Restrictions*];

- Subdivisions [*see* Ch. 30, *Subdivision Regulation*];

- Construction agreements and financing and related requirements [*see* Ch. 30A, *Construction Financing* ; Ch. 30B, *Zoning, Building, and Environmental Permits* ; Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* ; Ch. 30D, *Construction Contracts and Subcontracts* ; Ch. 31, *Mechanics' Liens*];

- Environmental investigation and cleanup liabilities [*see* Ch. 33, *Contamination Considerations in Real Property Transactions*];

- Commercial lease transactions [*see* Ch. 34C, *Retail, Industrial, and Office Leases*]; and

- Property management [*see* Ch. 38, *Real Property Management*].

FOOTNOTES:

(n68)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

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A. Primary Sources

17-34E California Legal Forms--Transaction Guide § 34E.01

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.01 California Statutes

NOTE:
For a shopping center lease, the following list can be supplemented by the lengthy list of statutes in the Research Guide in Ch. 34C, ***Retail, Industrial, and Office Leases***, § 34C.01.

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Davis-Sterling Common Interest Development Act. *Civ. Code § 1350 et seq.*

Eminent Domain Law. *Code Civ. Proc. § 1230.010 et seq.*

Subdivision Map Act. *Gov. Code § 66410 et seq.*

California Environmental Quality Act (CEQA). *Pub. Res. Code § 21000 et seq.*



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17-34E California Legal Forms--Transaction Guide § 34E.02

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.02 Federal Statutes

Bankruptcy Reform Act of 1978. *11 U.S.C. § 101 et seq.*

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Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). *42 U.S.C. § 9601 et seq.*



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17-34E California Legal Forms--Transaction Guide § 34E.05

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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Shenkman, *Shopping Center Leasing: The Tax Impact,* 165 J. Acct. 155(1) (May 1988).

Pennell, *Mall Owner's Rents Were Not Passive S Corporation Income, 68 J. Tax'n 324 (May 1988).*

Roswick & McEvily, *Use Clauses in Shopping Center Leases: The Effect of the Tenant's Bankruptcy,* 14 Real Est. L.J. 3 (Summer 1985).

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17-34E California Legal Forms--Transaction Guide § 34E.06

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.06 Annotations

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Annot., Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity, 38 A.L.R.4th 1219 (1985) .

Annot., Shopping Center Lease Restrictions on Type of Business Conducted by Tenant, 1 A.L.R.4th 942 (1980) .

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17-34E California Legal Forms--Transaction Guide § 34E.07

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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Ch. 28A, *Easements and Licenses*.

Ch. 28B, *Party Walls and Boundary Agreements*.

Ch. 28C, *Covenants, Conditions, and Restrictions*.

Ch. 30, *Subdivision Regulation*.

Ch. 30A, *Construction Financing*.

Ch. 30B, *Zoning, Building, and Environmental Permits*.

Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*.

Ch. 30D, *Construction Contracts and Subcontracts*.

Ch. 31, *Mechanics' Liens*.

Ch. 33, *Contamination Considerations in Real Property Transactions*.

Ch. 34A, *Prelease Forms*.

Ch. 34C, *Retail, Industrial, and Office Leases*.

Ch. 34D, *Ground Leases*.

Ch. 35A, *Modification and Termination of Leases*.

Ch. 35B, *Assignment and Sublease of Leasehold Interests*.

Ch. 38, *Real Property Management*.

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Ch. 153, *Drafting Commercial Leases*.

Ch. 190, *Taxation of Landlords*.

Ch. 191, *Taxation of Tenants*.

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Ch. 474, *Shopping Centers*.

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Ch. 56, *Architects*.

Ch. 101, *Boundaries*.

Ch. 104, *Building Contracts*.

Ch. 184, *Deeds*.

Ch. 240, *Easements*.

Ch. 247, *Eminent Domain*.

Ch. 330, *Landlord and Tenant: General Introduction*.

Ch. 331, *Landlord and Tenant: Creating the Tenancy*.

Ch. 332, *Landlord and Tenant: The Tenancy*.

Ch. 333, *Landlord and Tenant: Eviction Actions*.

Ch. 334, *Landlord and Tenant: Claims for Damages*.

Ch. 335, *Landlord and Tenant: Rent Control*.

Ch. 361, *Mechanics' Liens*.

Ch. 421, *Premises Liability*.

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART II. LEGAL BACKGROUND

17-34E California Legal Forms--Transaction Guide § 34E.10

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.10 Types of Shopping Centers

Commercial shopping centers generally fall into one of two basic types: the regional center, or the "strip center." The regional center usually contains an enclosed mall and serves a relatively large, regional geographical area. One or more large chain or other retail users typically "anchor" the center and may participate in the center as owners in fee. The regional center also contains a variety of smaller commercial and service tenants.

A strip center is smaller than a regional center, usually serves a neighborhood or community, and is not enclosed. It may be anchored by one or more of the following: a grocery store; a drug store; or one of the larger retail chains.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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17-34E California Legal Forms--Transaction Guide § 34E.11

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.11 Multiple Owners of Shopping Center

[1] Reciprocal Easement Agreements (REAs)

Multiple owners are often involved in the development and operation of a shopping center. For example, it is not uncommon for a key department store or other large retailer to own the real property on which its store will be located, and to participate in the development of the shopping center with other owners of real property that will be included in the shopping center. Whenever multiple owners are or will be involved, it is necessary to provide by agreement for the integration of their multiple interests into a unified plan for the development, use, and operation of the shopping center. For a retail shopping center with one or more major owner-occupants, this is usually accomplished by negotiating and executing a mutual or reciprocal easement agreement (REA) at or around the time of acquisition of the interests in the property.

Generally, REAs are informal arrangements between adjoining landowners under which the landowners agree to share the use of stairways, driveways, waterways, or other appurtenances [*see Porto v. Vosti (1955) 136 Cal. App. 2d 395, 397, 288 P.2d 618* (agreement to share water from well); *Dierssen v. McCormack (1938) 28 Cal. App. 2d 164, 169-170, 82 P.2d 212* (agreement to share water flow in ditch); *O'Neil v. Edwards (1928) 95 Cal. App. 523, 524, 272 P. 1099* (agreement to share use of driveway)], or to allow for the passage of light or air between buildings [*Knoch v. Haizlip (1912) 163 Cal. 146, 151-152, 124 P. 998]* . Rights analogous to easements sometimes arise when landowners enter into oral agreements for revocable licenses which thereafter become irrevocable [*See Cooke v. Ramponi (1952) 38 Cal. 2d 282, 286, 239 P.2d 638]* . Under such circumstances, the licensee has rights in the land of the licensor that, for practical purposes, are identical to the rights that might be embraced in an easement.

[2] Declarations

For developments not involving a large owner-retailer, such as a mixed-use commercial development, the implementation of a scheme for the common use and development of the project by future multiple owners is more likely to be achieved by a declaration of covenants, conditions, and restrictions (CCandRs). The primary difference between a declaration and an REA is that an REA is a negotiated agreement among owners, while a declaration is not.

The declaration is drafted and recorded by the original owner (declarant) of all of the real property slated for development. Thereafter, subsequent purchasers of individual parcels in the shopping center take their parcels subject to the declaration, absent an agreement by the declarant to amend or modify the original declaration. This is the same type of arrangement commonly used for residential subdivisions [*see* Ch. 30, *Subdivision Regulation*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawRestrictive CovenantsCovenants Running With Land



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17-34E California Legal Forms--Transaction Guide § 34E.12

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.12 Enforceability of Covenants, Conditions, and Restrictions in REA or Declaration

To serve their intended purpose of binding all successive owners of a shopping center, the covenants, conditions, and restrictions in an REA or a declaration must be enforceable as covenants running with the land or as equitable servitudes, or both. The requirements for enforceability are discussed in *§ 34E.200[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcement



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.13 Davis-Stirling Common Interest Development Act

[1] Applicability

The Davis-Stirling Common Interest Development Act [*Civ. Code §§ 1350-1376*] (the "Act") regulates the creation and essential attributes of common interest developments [*see Civ. Code § 1352*]. For comprehensive coverage of the requirements of the Act, see Ch. 33D, *Planned Developments* , and Ch. 34, *Condominiums* .

[2] Definitions

[a] "Common Interest Development"

A "common interest development" is any of the following [*Civ. Code § 1351(c)*]:

- A planned development [*see* [b], *below*];
- A community apartment project [*see Civ. Code § 1351(d)*];
- A condominium project [*see Civ. Code § 1351(f)*]; or
- A stock cooperative [*see Civ. Code § 1351(m)*].

Of these types of common interest developments, the planned development is the only one that potentially includes certain types of shopping centers.

[b] "Planned Development"

Under the Act, a planned development is a development (other than a community apartment project, a condominium project, or a stock cooperative) that has either or both of the following features [*Civ. Code § 1351(k)*]:

(1) The common area [*see* definition, *below*] is owned either (a) by an association [*see Civ. Code § 1351(a)* (an association is a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development)], or (b) in common by the owners of the separate interests [*see* definition, *below*], who possess appurtenant rights to the beneficial use and enjoyment of the common area; and/or

(2) The association has the power to enforce any obligation of an owner of a separate interest relating to the beneficial use and enjoyment of the common area by means of an assessment on the owner's lot, parcel, area, or space [*see Civ. Code §§ 1367, 1367.1*].

For these purposes, a "separate interest" in a planned development is a separately owned lot, parcel, area, or space [*Civ. Code § 1351(l)*(3)]. The "common area" is the entire planned development other than the separately owned lots [*Civ. Code § 1351(b)*].

Alternatively, if the owners' association of the planned development has the power to levy an assessment against a separately owned lot to enforce an obligation of the lot's owner relating to the beneficial use and enjoyment of the common area [*see* item (2), *above*], the common area may consist of mutual or reciprocal easement rights appurtenant to the separately owned lots [*Civ. Code § 1351(b)*]. An estate in the common area may be a fee, a life estate, an estate for years, or any combination of these interests [*Civ. Code § 1351(b)*].

PRACTICE TIP:

Common Areas. In determining whether or not the above definitions apply to a particular shopping center, counsel should be aware that, even though most shopping center declarations refer to common areas, these areas are not necessarily common areas for purposes of the Act. It is also important to remember that under the Act, ownership of the common areas refers to an estate in fee, a life estate, an estate for years, or any combination of these estates [*see Civ. Code § 1351(b)*]. *By Publisher's Editorial Staff.*

[3] Requirements for Creation of Common Interest Development

A planned development or other common interest development is created on the occurrence of both of the following conditions [*Civ. Code § 1352*]:

- The conveyance of a separate interest (coupled with an interest in the common area or membership in the association); and

- The recordation of (1) a final or parcel map (if required under the Subdivision Map Act) [*Gov. Code § 66410 et seq.; see § 34E.15[2]*] and (2) a declaration.

The Davis-Stirling Act requires the declaration to contain certain information [*see Civ. Code § 1353*].

[4] Inapplicability of Certain Provisions to Commercial Development

Certain requirements of the Act do not apply to common interest developments that are (1) expressly zoned as commercial developments and (2) limited in use to commercial purposes [*see Civ. Code § 1373* (also applicable to industrial developments)]. The typical shopping center would clearly be considered such a commercial development. The Legislature created these exceptions after finding that the specified requirements protect purchasers in residential common interest developments, but that they are not necessary to protect purchasers in commercial (or industrial) developments and would result in unnecessary burdens and costs for those types of developments [*see Civ. Code § 1373*

].

The provisions inapplicable to a commercial development relate to all of the following:

- Amendment of a declaration [*see Civ. Code § 1356*];
- Association financial statements [*see Civ. Code § 1365*];
- Review of association operating and reserve accounts [*see Civ. Code § 1365.5*];
- Prohibitions against excessive fees and penalties [*see Civ. Code § 1366.1*];
- Delivery of certain documents to new purchasers [*see Civ. Code § 1368*];
- Association budgets [*see Civ. Code § 1363(b)*]; and
- Restrictions on raising assessments [*see Civ. Code § 1366(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UsePlanned Unit Developments



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.14 Inapplicability of Subdivided Lands Act

The Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*] regulates the sale of subdivided lands [*see Bus. & Prof. Code § 11004.5(c)*; *see also* Ch. 34, *Condominiums*]. However, the Act does not apply to the proposed sale or lease of lots or other interests in a subdivision in which the lots or other interests have been limited to commercial uses by zoning or by a recorded declaration of covenants, conditions, and restrictions [*Bus. & Prof. Code § 11010.3*]. This exception applies to shopping centers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UsePlanned Unit Developments



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17-34E California Legal Forms--Transaction Guide § 34E.15

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.15 Shopping Center Leases

[1] Standard Leases

Shopping center leases are usually standardized for use by all tenants except large "key" or "anchor" tenants. Anchor tenants, such as department stores, typically have the leverage to negotiate more favorable terms than those contained in standard leases.

For the most part, the coverage of leases in this chapter is limited to matters specifically relevant to a retail shopping center lease. Because a shopping center lease is a form of commercial lease, much of the coverage in Ch. 34C, *Retail, Industrial, and Office Leases*, is equally applicable to a shopping center lease and should be used in conjunction with this chapter. For example, Ch. 34C, *Retail, Industrial, and Office Leases*, covers the following topics, all relevant to a shopping center lease:

- The legal requirements for creating a lease and the legal effect of a lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.14*];
- Net leases [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.17*];
- Rent provisions, including percentage rent and commercial rent control [*see Ch. 34C, Retail, Industrial and Office Leases, §§ 34C.18, 34C.200[1][d], [e]*];
- The effect of hazardous substance laws on leases [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.19*];
- The effect of a tenant's bankruptcy on a lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.20*]; and

- Financing considerations [*see Ch. 34C, Retail, Industrial, and Office Leases, §§ 34C.250, 34C.251*].

Chapter 34C, *Retail, Industrial, and Office Leases*, also contains several alternative lease provisions that may be included in a shopping center lease.

[2] Inapplicability of Subdivision Laws

The leasing of stores or similar space in a commercial building is specifically exempt [*see Bus. & Prof. Code § 11000*] from the requirements of the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*]. Also, the Subdivision Map Act [*Gov. Code § 66410 et seq.*] does not apply to the financing or leasing of offices, stores, or similar space in a commercial building [*see Gov. Code § 66412(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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17-34E California Legal Forms--Transaction Guide § 34E.16

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.16 Covenant of Continuous Business Operation

[1] Inclusion of Covenant Is Subject to Negotiation

An REA or a lease for a shopping center may contain a covenant by an owner-occupant or a tenant of the shopping center to continuously operate its business for a stated period of time. In the case of a lease, this period would be the term of the lease. The inclusion of such a clause is likely to be the subject of negotiations. Most owner-occupants and tenants are reluctant to give the covenant. On the other hand, a developer-owner or landlord often seeks to extract such a covenant from major owner-occupants or large tenants, since continued operation in the shopping center by those occupants or tenants is a draw for other tenants and customers to the shopping center. The lender for a developer or landlord may also bargain for inclusion of covenants by major operators since their continued operation enhances the lender's security interest in the shopping center. For an operating covenant for a major occupant-owner of a shopping center, see *§ 34E.200[2]*.

PRACTICE TIP:

Another Reason for Wanting Covenant. It would appear that the owner wants the covenant for one more reason: to get the higher rent that sales will produce. The percentage of sales as rent is usually higher than the minimum. (This is certainly implied by the cases in [2], *below*.) *By Myron Moskovitz.*

PRACTICE TIP: "Continuous Operation" Should Be Defined. The lessor may also have a gross sales percentage clause which would be effected by the lessee limiting store hours to less cost effective days or times. "Continuous operation" therefore needs to be carefully defined in terms of not only which days and hours, but also which holidays. *By Benjamin Kaplan.*

[2] Implied Covenant

Most, if not all, reported cases in California involving an operating covenant have considered implied covenants in leases. As a general rule, the fact that a lease is made for a particular purpose does not imply a covenant on the part of the tenant to continue to use the premises for the particular purpose, and the tenant may cease to use the premises for

any purpose. However, when the rent under a commercial lease is a specified but unsubstantial minimum plus a percentage, the tenant's covenant of continued operation may be implied [*Lippman v. Sears. Roebuck & Co. (1955) 44 Cal. 2d 136, 142-143, 280 P.2d 775* ; *College Block v. Atlantic Richfield Co. (1988) 206 Cal. App. 3d 1376, 1380, 254 Cal. Rptr. 179]* . The rationale behind the finding of an implied covenant is that when a landlord agrees to a nominal minimum rent plus a percentage, the landlord's consideration for entering into the lease is based on receiving a fair rental return from its percentage of the tenant's sales, which requires that the tenant continue to operate in order to generate the sales [*see College Block v. Atlantic Richfield Co. (1988) 206 Cal. App. 3d 1376, 1380, 254 Cal. Rptr. 179]* .

An implied operating covenant has not yet been extended by the courts to a situation involving multiple-fee owner-occupants of a shopping center. However, when the developer, as an inducement to have large retailers locate in the center, grants major financial concessions (such as a below-market original purchase price for the land, a reduction in construction and development costs, and/or a reduction in or exclusion from required contributions to common area operating costs), the situation is arguably analogous to a landlord-tenant relationship in which the landlord charges nominal basic rent plus a percentage. As discussed in the preceding paragraph, a covenant of continued operation may be implied under those circumstances.

PRACTICE TIP:

Don't Rely on Implied Covenants. Unless one is seeking litigation, a drafter should never rely on any implied covenant, including, but not limited to, one for "continuous operation." *By Benjamin Kaplan.*

PRACTICE TIP: Agreement Should Specify Intent of Parties. If an operating covenant is not intended in any transaction between owners of the shopping center or in a shopping center lease, the applicable instrument should include an express provision to that effect. *By Publisher's Editorial Staff.*

[3] Remedies for Breach

[a] Damages

The measure of damages for breach of the covenant to remain in business ordinarily is the amount that the landlord would have received from the landlord's share of the proceeds of the business had the tenant operated it in its usual and customary manner [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146, 280 P.2d 775* ; *see College Block v. Atlantic Richfield Co. (1988) 206 Cal. App. 3d 1376, 1383 n.9, 254 Cal. Rptr. 179]* . The parties, however, may provide a different measure of damages in the lease. For example, in one case the California Supreme Court found that the parties made specific provision in the lease for the payment of damages in the event that the tenant ceased to occupy the premises. Under the lease, if the tenant sublet or assigned the premises, the landlord was entitled to receive the average monthly rental paid by the tenant to the landlord during the 12-month period immediately preceding the subletting or assignment. In the event the lessee abandoned the premises, it was obligated to pay as damages the difference between the best rent obtainable by the landlord from a reletting of them and the rent provided for under the lease. In the Court's view, these provisions in effect liquidated the damages to the landlord from a loss of a percentage of the income from the tenant's business if the business ceased to occupy the premises. The Court determined that it was reasonably implied by these provisions that the parties agreed on the same measure of damages when that loss resulted from abandonment of the integral purpose for which the lease was made [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 146-147, 280 P.2d 775]* .

Where a lease for premises in a shopping center included a liquidated damages clause and a covenant of "Continuous Operation," and the tenant ceased operations before the end of its lease term, a liquidated damages clause in the lease was enforceable as compensation for breach of the covenant of continuous operation. Although the tenant's evidence may have given rise to an inference that the clause was arbitrary, the evidence was not conclusive, and was countered by expert testimony introduced by the owner of the shopping center that the clause was intended to reimburse it for the

loss in synergy, goodwill, and patronage the shopping center and other tenants would lose if the tenant ceased operation [*El Centro Mall LLC v. Payless Shoesource Inc. (2009) 174 Cal. App. 4th 58, 65, 94 Cal. Rptr. 3d 43]* .

PRACTICE TIP:

Damages. If the lease includes provisions for formulaic damages after breach, such as pursuant to Civ. Code § 1954.2, it should clearly be stated that the damages are not in lieu of other damages which may be sought under other provisions of the lease. *By Benjamin Kaplan.*

[b] Specific Performance

California cases have not yet ordered specific performance or injunctive relief for breach of either an implied or express operating covenant. However, in other jurisdictions, specific performance has been both denied [*see Madison Plaza, Inc. v. Shapira Corp. (1979) 387 N.E.2d 483, 487]* and granted [*see Dover Shopping Center, Inc. v. Cushman's Sons, Inc. (1960) 164 A.2d 785, 791]* , at least for express operating covenants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsDamagesCompensatory DamagesReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawRestrictive CovenantsCovenants Running With Land



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17-34E California Legal Forms--Transaction Guide § 34E.17

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.17 Restrictive and Exclusive Use Provisions

Inclusion of a provision in a shopping center lease or an REA that restricts certain uses or grants exclusive rights of operation to a specific occupant requires consideration of whether the provision is likely to violate federal and state antitrust law. Because of the evolving nature of this area of the law, counsel must research current law for any particular transaction. As a general proposition under antitrust law, all circumstances of a case are considered in determining whether a restriction constitutes an unreasonable restraint of trade or unreasonably restricts competition.

An "exclusive" use clause that grants an occupant the exclusive right to operate a particular business in a shopping center or to sell a particular type of merchandise and excludes all others from operating the same or similar business or from selling the protected type of merchandise may or may not be enforceable under applicable antitrust laws. For example, in one case, two tenants in a shopping center entered into an agreement with the landlord. Under the agreement, a tenant operating a coffee shop agreed not to sell beer or wine in its shop, and a tenant operating a liquor store agreed not to sell Middle Eastern grocery items in its store. The landlord required the parties to enter into the agreement before it would execute a lease with the liquor store operator. The liquor store operator breached its agreement and began selling Middle Eastern products, and, in the ensuing case, asserted as its defense that the agreement constituted an illegal restraint of trade. The court rejected the defendant's argument, holding that the agreement did not involve the public welfare, did not unreasonably restrain either tenant, had a trivial non-competitive effect, was not directed at price, and did not per se constitute an illegal restraint of trade [*Martikian v. Hong (1985) 164 Cal. App. 3d 1130, 1133-1134, 211 Cal. Rptr. 66]* .

A lease granting the tenant the exclusive right to a market business in a shopping center, basing the rent on a percentage of receipts, and granting either party the right to cancel if sales fell below a certain level was interpreted to prohibit the landlord from expanding the shopping center and establishing a competing market in the newly acquired area [*Carter v. Adler (1955) 138 Cal. App. 2d 63, 70-74, 291 P.2d 111]* .

PRACTICE TIP:

Be Sure to Prohibit Use From Other Tenants. If you grant an exclusive use to one tenant, be sure to

include language in all other leases prohibiting those tenants from engaging in that use. *By Myron Moskovitz.*

PRACTICE TIP: Again, Be Sure to Prohibit Use From Other Tenants. When there are a number of retail tenants, the landlord may forget instances in which one or more have exclusive use provisions. Therefore, if an attorney is called on to draft a retail lease, one should obtain affirmative representations in writing from the landlord, that he/she has examined the other leases and that none contain any exclusive use clauses or contain only such provisions as are not in conflict with the prospective tenant's use. *By Benjamin Kaplan.*

PRACTICE TIP: Use Clauses for Multiuse Projects. "Use" in terms of subtenancies may be subject to non-competition clauses as well as appropriate "subtenant mixed uses." Careful attention should be paid for projects with potential multiuse, multipurpose development, such as shopping centers or other retail facilities. *By Benjamin Kaplan.*

For a sample use provision and discussion of the legal issues related to the use of the premises, including lease provisions for restricting or permitting certain tenant uses, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.230*. Noncompetition and other covenants affecting contiguous property, such as in a shopping center, are discussed in *§ 34C.232*. For a general discussion of the law applicable to restraints of trade, see California Forms of Pleading and Practice, ch. 565, *Unfair Competition* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34E California Legal Forms--Transaction Guide § 34E.18

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.18 Merchants' Association

[1] Purposes of Merchants' Association

A merchants' association may be formed for a shopping center to coordinate and foster the common promotional and advertising activities of the merchants. With the aid of an effective merchants' association, the owner-developer can (1) work at creating an image for the shopping center, (2) coordinate advertisements promoting the center as a whole rather than just the individual merchants, and (3) resolve any conflicting self-interests of the store owners that could injure the efficient operation of the center. It is usually organized either as an unincorporated association or as a nonprofit membership corporation [*see Corp. Code § 7111*] under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]. For articles and bylaws for a nonprofit mutual benefit corporation, see Ch. 13, *Nonprofit Corporations* . Chapter 13A, *Nonprofit Unincorporated Associations,* contains governing instruments for an unincorporated association.

[2] Mandatory Membership

Every tenant of a shopping center should be required by its lease to be and remain a member of the association [*see, e.g., § 34E.201 [2]*, P 10.01]. Some large "key" tenants of a center may resist mandatory membership in the association. In response to this problem, a landlord may include in the governing documents for the association, a provision that grants the "key" tenant the continuing right to designate or select a director of the board of the association. If the association is formed as a nonprofit mutual benefit corporation, up to one third of its directors may hold office by virtue of designation or selection (as provided by the corporate articles or bylaws) rather than by election by the membership at large [*Corp. Code § 7220(d)*].

[3] Governing Instruments

The governing instruments of a merchants' association typically grant it the power to set the amount of assessments payable by tenants on an annual or other basis by apportioning its expenses among its members on the basis of a stated formula. One commonly used formula prorates the total association expenses among the tenants on the basis of the

amount of square feet in the center occupied by each, after first deducting from the total expenses any amount the landlord is required to contribute to the association. Another formula bases the proration on a tenant's gross sales [*see* California Real Estate Law and Practice, ch. 474, *Shopping Centers* (Matthew Bender)]. Different formulas may apply to large "key" tenants.

The governing documents usually require the landlord to be a member of the association and to contribute on a regular basis to the association. The amount of the required contribution is usually a stated percentage of the association expenses for a given period or a stated percentage of total assessments assessed against all tenants for a given period, subject to a "cap" dollar amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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17-34E California Legal Forms--Transaction Guide § 34E.19

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.19 Public Access to Shopping Centers

[1] Right to Restrict Access Is Limited

Even though shopping centers are normally private property, the right of a shopping center to restrict public access is limited by both constitutional and other law. Owners of a shopping center must be aware of applicable limitations in promulgating and enforcing rules and regulations for the shopping center [*see § 34E.203[2]*].

[2] Protected Activities

[a] United States Supreme Court Decisions

When a privately owned shopping center prohibited the distribution inside the shopping center of handbills that were unrelated to the center's operation, the United States Supreme Court upheld the center's right to regulate handbill distribution, finding that property does not lose its private character merely because the public is generally invited to use it for designated purposes [*see Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 569, 92 S. Ct. 2219, 33 L. Ed. 2d 131]* . In *Lloyd*, the Court noted several factors relevant to its decision [*Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 564-570, 92 S. Ct. 2219, 33 L. Ed. 2d 131]* :

- First, the handbills, invitations to the public to attend a draft protest, had no relation to any purpose for which the center was being used.

- Second, there were other public places available for handbill distribution.

- Third, the Court noted that the shopping center was not dedicated generally to the public. Instead, the public was invited to the premises only to do business with the establishments there.

- Finally, the Court stated that even when public property is involved, the state has the power to preserve the property for its lawfully dedicated purpose, and thus to control its use to some extent.

Subsequently, the Supreme Court ruled that the constitutional guarantee of free expression did not give striking union members an absolute right to enter a shopping center and picket their employer's retail outlet in the center [*see Hudgens v. NLRB (1976) 424 U.S. 507, 513-521, 96 S. Ct. 1029, 47 L. Ed. 2d 196]* . In a later case, the Court held that a union may not, under the National Labor Relations Act (NLRA), distribute handbills advocating a total boycott of a shopping center because of a dispute between a union and a single tenant involving construction of the tenant's store [*see Edward J. De Bartolo Corp. v. NLRB (1983) 463 U.S. 147, 153-157, 103 S. Ct. 2926, 77 L. Ed. 2d 535]* . However, in that case, the Court ultimately held that the specific activities under consideration were permitted under the NLRA because they did not violate the NLRA (1) by inducing or encouraging employees of other tenants to strike, or (2) by threatening, coercing, or restraining customers from shopping at the mall [*see DeBartolo v. Fla. Gulf Coast Tr. Coun. (1988) 485 U.S. 568, 577-588, 108 S. Ct. 1392, 99 L. Ed. 2d 645]* .

[b] California Supreme Court Decisions

The California Supreme Court has limited the right of a shopping center to restrict public use of the premises. First, the Court has ruled that the California Constitution protects speech and petitioning reasonably exercised in shopping centers, even when the centers are privately owned [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)]* . Second, the Court has held that a shopping center may not eject any person on the basis of arbitrary discrimination [*In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* ; *see* [3], *below*].

The *Pruneyard* case in 1979 examined the issues resolved by the United States Supreme Court in *Lloyd* [*see* [a], *above*]. The California Supreme Court held that *Lloyd* did not define or recognize any property right of a shopping center, but merely defined the parameters of the free speech protection afforded by *U.S. Const., amend. I*. Therefore, there is no reason why California law cannot afford more protection to free speech than does the *First Amendment* and require shopping centers to permit free speech on the shopping center premises. The California Court then found that greater protection is provided by *Cal. Const., art. I, §§ 2* and *3*, and that those sections protect speech and petitioning that is reasonably exercised in shopping centers, even when the centers are privately owned [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)* ; *see* H-CHH Associates v. Citizens for Representative Government (1987) 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 , *cert. denied, 485 U.S. 971 (1988)* (shopping center land and parking facilities publicly owned)].

[c] *Pruneyard* Affirmed

The United States Supreme Court affirmed the California Supreme Court in *Pruneyard* [*see* [b], *above*]. It found that *Lloyd* does not limit a state's right to grant more expansive personal liberties than those conferred by the Federal Constitution. It also held that a state's expansion of these rights does not result in a taking of a center's property without just compensation [*Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74, 81, 84, 100 S. Ct. 2035, 64 L. Ed. 2d 741]* .

[3] Arbitrary Discrimination Prohibited

The California Supreme Court has ruled that, under the Unruh Civil Rights Act [*Civ. Code § 51*], a business generally open to the public may not arbitrarily exclude a prospective customer and subject him or her to criminal conviction under a local trespass ordinance for refusal to leave. However, a business establishment need not tolerate disruptive behavior and may promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided [*see In re Cox (1970) 3 Cal. 3d 205, 216-217, 90 Cal. Rptr. 24, 474 P.2d 992]* . A shopping center performs an important public function, and our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace [*In re Cox (1970) 3 Cal. 3d 205, 218, 90 Cal. Rptr. 24, 474 P.2d 992]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLimited Use RightsGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawTortsTrespass to Real Property



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART II. LEGAL BACKGROUND

17-34E California Legal Forms--Transaction Guide §§ 34E.20-34E.99

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 34E.20[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

17-34E California Legal Forms--Transaction Guide

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

NOTE:

This Transaction Guide covers only matters pertaining to the negotiation, drafting, or review of a shopping center lease or a reciprocal easement agreement and declaration of covenants, conditions, and restrictions (REA) for a shopping center. In the case of an REA, the Transaction Guide assumes that the separate parcels in the planned shopping center have already been purchased by their separate owners. For a list of topics relevant to the development of a shopping center that are covered elsewhere in this set, see the Scope note at the beginning of this chapter.



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A. Client Interview--Facts and Documents

17-34E California Legal Forms--Transaction Guide § 34E.100

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.100 Lease or REA Transaction in General

[1] Facts

1. Basic information regarding each party to transaction.

a. Name.

b. Address.

c. Telephone number.

d. Legal status:
(1) Individual.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Joint venture.

(6) Unincorporated association.

(7) Estate.

(8) Public entity.

(9) Other.

e. For any party that is an individual:

(1) Marital status.

(2) If married:
(a) Name and address of spouse.

(b) Date and place of marriage.

(3) Regarding any previous marriages:

(a) Date, place, and length of marriage.

(b) Name and address of former spouse.

(c) Circumstances of dissolution or other termination.

2. Names, addresses, titles, and telephone numbers of other participants in transaction.

NOTE:
The following is a list of potential participants in a shopping center lease or development transaction. Although a client's proposed transaction may not involve all (or even most) of these participants, the list may be used to solicit from the client information for participants in the transaction and also may be used as a checklist of professionals whose services may be needed or with whom consultation may be required or necessary.

a. Attorney representing other party or parties.

b. Real estate personnel:

(1) Finder.

(2) Broker.

(3) Appraiser.

(4) Consultant.

(5) Leasing agent.

(6) Title company.

c. Accountant or other tax professional representing client.

d. For existing shopping center, merchants' association.

e. If shopping center is to be constructed:

(1) Contractor.

(2) Architect.

(3) Engineer.

(4) Surveyor.

(5) Lender(s) for construction and permanent financing.

(6) Governmental agency with approval power over shopping center.

f. Lender for each party.

3. Additional information concerning any parties or participants who are not individuals:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

4. Information concerning existing or proposed shopping center:

a. Ownership:

(1) Single individual or entity.

(2) Multiple individuals or entities.

b. Location:

(1) Street address, city, and county.

(2) General area and vicinity.

c. Type, e.g.:

(1) Large regional shopping center, either:

(a) With enclosed mall; or

(b) Without enclosed mall.

(2) Smaller community or neighborhood strip center.

d. Space, if any, in shopping center to be occupied by owner or tenant:

(1) Type:

(a) Large single-occupant building.

(b) Space in multi-tenant building.

(2) Approximate square footage of building or space.

e. For proposed shopping center, scheduled or anticipated completion date.

f. For existing shopping center, percentage of shopping center presently leased.

5. Steps already taken by client in connection with transaction.

a. Whether any of following have been executed by client:

(1) Option to lease or purchase.

(2) Agreement to lease or purchase.

(3) Lease (including ground lease or lease under sale-leaseback arrangement).

(4) REA or similar instrument containing covenants, conditions, restrictions, easements, or other matters affecting use of shopping center land.

b. Whether owner-client has obtained preliminary or binding commitment for financing.

6. Steps client wants attorney to perform, e.g.:

a. Negotiating terms of proposed transaction.

b. Drafting REA or lease and related documents.

c. Reviewing REA or lease and related documents drafted by another party.

d. Advising client on rights under executed REA or lease.

7. Extent of client's previous experience with:

a. This type of transaction.

b. Shopping center development or lease transactions in general.

[2] Documents

1. Any of the following that have been executed by client in connection with lease transaction:

a. Option to lease or purchase.

b. Agreement to lease or purchase.

c. Lease (including ground lease or lease under sale-leaseback arrangement).

d. REA or similar instrument containing covenants, conditions, restrictions, easements, or other matters affecting use of shopping center land.

2. Any binding loan commitments for construction and permanent financing.

3. Any deed of trust executed to secure construction or permanent financing.

4. Copy of documents establishing existence of entity and capacity of individual (that is, lessee) to sign, e.g.:

a. For corporation:
(1) Certificate from Secretary of State that corporation is in good standing; and

(2) Recent Statement of Domestic Stock showing officers and directors.

b. For limited liability company, agreement and designation of managing member.

c. For limited partnership:

(1) Certification from Secretary of State; and

(2) Statement of who general partners are.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34E California Legal Forms--Transaction Guide § 34E.101

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.101 Additional Facts and Documents to Be Obtained From Owner

[1] Facts

1. Date owner acquired property.

2. Extent of shopping center owned:

    a. All.

    b. Specified portion.

3. Manner in which owner holds title:

    a. As corporation in corporate name.

    b. As partnership in partnership name.

    c. As partnership in name of one or more partners.

    d. As individual.

    e. As husband and wife in [*see Fam. Code § 750*]:
    (1) Joint tenancy.

    (2) Tenancy in common.

(3) Community property.

(4) Community property with right of survivorship.

f. As co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy.

(2) Tenancy in common.

(3) Partnership.

g. As executor or administrator of decedent's estate [*see Prob. Code §§ 9940-9948*].

4. Name in which owner acquired title, if different from name in which owner presently holds title [*see Civ. Code § 1096*].

5. Adverse claims against owner's title, if any.

6. Pending litigation affecting property, if any.

7. Easements burdening or benefiting property.

8. Existing loan or loans on property.

a. Name of original lender.

b. Name of present holder or beneficiary, if different.

c. Approximate unpaid principal balance.

d. Nature of any existing delinquencies or defaults.

9. Other encumbrances or liens against property.

10. Owner's obligations for construction and development of any of the following:

a. Building intended for use by single occupant, either owner or other user.

b. Multi-tenant building for leasing to individual tenants.

c. Common areas of shopping center.

d. Other.

11. Owner's participation in shopping center after it is opened:

a. Occupant of shopping center for purpose of operating owner's business.

b. Landlord of individual tenants in shopping center.

c. Manager of common areas in shopping center.

d. Other.

12. For owner-occupant, type of business to be operated in shopping center.

13. If owner is a corporation:

a. Date and state of its incorporation.

b. Date on which corporation approved or will approve REA.

c. Date on which corporation approved or will approve lease (if owner will be landlord).

NOTE:
For discussion of the authority of a corporation to lease real property, see the Legal Background to Ch. 34B, ***Residential Leases***.

14. If owner is a partnership:

a. And partnership holds title in partnership name, names of partners authorized to sign REA or lease.

b. And title is held in name of one or more partners, names of these partners.

NOTE:
For a discussion of the authority of a partnership to lease its real property, see the Legal Background to Ch. 34B, ***Residential Leases***.

15. If owner is an estate:

a. Name of guardian, conservator, executor, or administrator of estate.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name and location of court with jurisdiction over estate.

16. If owner is public entity:

a. Governing body for entity.

b. Date on which governing body approved or will approve REA or lease.

[2] Documents

1. Correspondence and any agreements between owner and:

a. Other owners.

b. Prospective tenants.

2. Deed to property.

3. Property profile or preliminary title report issued for property.

4. Any agreement creating easements burdening or benefiting property.

5. Instruments or documents creating or asserting liens against property.

6. Any notes, deeds of trust, mortgages, or other documents relating to existing security interests in property.

7. Copy of any REA or CCandRs of record affecting property.

8. Any documents evidencing zoning relief, e.g.:

a. Conditional use permit.

b. Variance.

9. Copy of parcel map or site plan for shopping center.

10. Copy of any leasing plan prepared for shopping center.

11. Copy of any proposed or finalized rules and regulations for shopping center.

12. If owner is a corporation, certified copy of resolution authorizing REA or lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.241*].

13. If owner is a partnership holding title in its name, certified copy of statement of partnership recorded in county where land is located [*see* Ch. 15, Part A, *Formation of General Partnerships* , § 15.285].

14. If owner is an estate or a trust, copy of will or trust instrument naming executor or trustee.

15. For transaction involving new construction, copies of following, to extent available:

a. Contract between owner and design professional (e.g., architect) [*see* Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals*].

b. Construction contract documents [*see* Ch. 30D, *Construction Contracts and Subcontracts*].

(1) Owner-general contractor agreement.

(2) Drawings and specifications.

(3) Building permit.

(4) Use permit.

c. For project financing:

(1) Binding loan commitments for construction and permanent financing.

(2) Deed(s) of trust executed to secure construction or permanent financing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34E California Legal Forms--Transaction Guide § 34E.102

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.102 Additional Facts and Documents to Be Obtained From Tenant

[1] Facts

1. Type of business to be conducted by tenant on leased premises.

2. Type of lease under which tenant will occupy premises:

    a. Ordinary retail lease.

    b. Ground lease.

    c. Lease resulting from sale-leaseback arrangement.

    NOTE:
    This refers to the situation in which an owner of a portion of the shopping center sells that portion to another party but agrees in connection with the sale to immediately lease back the portion sold. For discussion of sale-leasebacks in general, see California Real Estate Law and Practice, Ch. 76, ***Sale-Leasebacks*** (Matthew Bender).

[2] Documents

1. Copy of any correspondence between owner-landlord and tenant.

2. Copy of option agreement (if any) for purchase of leased premises executed by landlord and tenant.

3. Copy of any lease (including ground lease or lease under sale-leaseback arrangement) executed by tenant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34E California Legal Forms--Transaction Guide §§ 34E.103-34E.109

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 34E.103[Reserved]



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B. Preliminary Determinations

17-34E California Legal Forms--Transaction Guide § 34E.110

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.110 Capacity and Consent of Parties

NOTE:

To determine the capacity and consent of a party to enter into a lease (or other type of contract), see *Ch. 34B, **Residential Leases**, § 34B.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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17-34E California Legal Forms--Transaction Guide § 34E.111

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.111 Lease

NOTE:

For preliminary determinations that should be made for any nonresidential lease transaction, see the Transaction Guide to Ch. 34C, ***Retail, Industrial, and Office Leases***. Those same determinations also apply to a shopping center lease transaction and are not repeated here. For preliminary determinations applicable to a ground lease transaction, which may be applicable to a shopping center lease transaction, see the Transaction Guide to Ch. 34D, ***Ground Leases***.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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17-34E California Legal Forms--Transaction Guide § 34E.112

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.112 For REA

1. What is ownership structure for shopping center?

a. One contiguous tract of land:
(1) Owned by single individual or entity; or

(2) Jointly owned by more than one individual or entity?

b. Separate contiguous parcels, each owned by a different individual or entity?

2. What obligations will each owner have for development and operation of center?

a. During construction period and prior to opening of center:

(1) Construction of store for operation of its own business?

(2) Construction of multi-tenant building for leasing?

(3) Construction of improvements for shopping center common areas?

(4) Other?

b. After shopping center is constructed and opened:

(1) Operate its own store?

(2) Lease multi-tenant building?

(3) Maintain and operate shopping center common areas?

(4) Other?

3. Has owner entered into or does owner have any plans to enter into ground lease for its parcel?

4. If owner acquired its parcel as part of sale-leaseback arrangement:

a. What is term of lease under which owner has leased back parcel to seller?

b. What type of business is to be conducted in shopping center by seller-tenant?

5. Are there any existing encumbrances of record on shopping center or any parcel?

6. Have any covenants, conditions, or restrictions previously been recorded for shopping center or any parcel in it?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 34E.113[Reserved]



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C. Procedural Guide

17-34E California Legal Forms--Transaction Guide § 34E.120

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.120 Representation

1. If requested to represent more than one party to transaction:

a. Recommend that other party or parties obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw request and do not appear to have conflicting or potentially conflicting interests, take following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party or parties; and

b. Obtain written consent of parties to arrangement before accepting employment.

PRACTICE TIP:
Representing Both Parties to Shopping Center Lease Is Not Advised. It would seem hard to conjure up a situation in which the conflict of interest existing between two clients could be more fundamental than that involved in a commercial shopping center lease. Regardless of the nature and scope of the written waivers there is really no way that an attorney can ethically represent both parties other than where the already agreed terms are solely rent, duration, and signature and the attorney acts solely as a scrivener. The attorney can not participate in negotiation or mediation between two clients with conflicting interests. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases



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17-34E California Legal Forms--Transaction Guide § 34E.121

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.121 Authority to Enter Into and Approve Lease or REA

NOTE:

When a party to a lease or an REA is an entity rather than an individual, the entity must approve the transaction. Specific requirements for different types of entities are imposed by law and/or the governing instruments for the entity. For coverage of the statutory approval requirements pertaining to leases, which apply in many cases to REAs as well, see the Transaction Guide to Ch. 34B, ***Residential Leases***. The necessary approvals may be obtained prior to or concurrently with the execution of the REA or lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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17-34E California Legal Forms--Transaction Guide § 34E.122

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.122 Review of REA or Lease Drafted by Other Party

1. If REA or lease has not yet been drafted by other party, assist client in negotiations with other party.

2. On receipt of REA or lease drafted by other party's attorney, review it to ensure that it is:

   a. Consistent with client's previously stated requirements and objectives.

   b. Otherwise acceptable to client.

   c. Legally sufficient.

   NOTE:
   For a drafting guide that may be used as a checklist of provisions that must or should be included in a shopping center REA, see *§ 34E.130*. For a drafting guide for a nonresidential lease, see *§ 34E.131* and the Transaction Guide to Ch. 34C, ***Retail, Industrial, and Office Leases***.

3. Communicate and negotiate with other party's attorney regarding any changes in document requested by client to determine whether or not requested changes are acceptable to other party.

4. For requested changes that are not acceptable to other party, confer with client to determine client's position:

   a. Drop request for change.

   b. Insist on change and terminate negotiations if change remains unacceptable to other party.

c. Compromise on stated terms and conditions.

5. For requested changes that are acceptable to other party, confer with other party's attorney for mechanics of implementing change.

NOTE:

The drafting attorney may (1) agree to draft the proposed change for the attorney requesting the change, or (2) request that the other attorney submit a draft of the proposed change. Alternatively, the attorneys may jointly draft a proposed change, by phone or otherwise.

6. Obtain client's approval of final changes to document.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.123 Drafting REA

NOTE:
For a drafting guide for a shopping center REA, see *§ 34E.130*.



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17-34E California Legal Forms--Transaction Guide § 34E.124

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.124 Drafting Lease

NOTE:

For a drafting guide for a shopping center lease, see *§ 34E.131*. For a drafting guide for nonresidential leases generally, see *Ch. 34C, **Retail, Industrial, and Office Leases**, § 34D.140* et seq.



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17-34E California Legal Forms--Transaction Guide § 34E.125

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.125 Priority of REA and Title Insurance

1. If applicable, verify that following have been or will be subordinated to REA:

a. Any existing mortgage or deed of trust on shopping center land.

b. Any existing lease (e.g., ground lease) covering any parcel in shopping center.

NOTE:
It is essential that the REA have priority over any preexisting mortgage, trust deed, or lease of record on the shopping center property. A lender or lessee is usually willing to subordinate its interest to an REA since implementation of the REA provides for uniform development of the land as a shopping center and thereby enhances the value of the property. However, the lender will require that the REA contain certain protective provisions [***see*** *§ 34E.200[1][q]*].

2. Obtain, or verify that some other party has obtained, commitment from title company to issue title policy on shopping center land providing, for example, following types of protection:

NOTE:
For comprehensive coverage of title insurance, see Ch. 26A, ***Title Insurance*** .

a. Standard A.L.T.A. owner's coverage.

b. Dating and issuing of policy to cover all documents that must be recorded to complete overall

integration of shopping center.

c. Extension of protection not only to vested owner-occupant of center, but also to successors or assigns who may obtain controlling interest in owner's business other than through outright sale of assets.

d. Insurance of contiguity of all adjacent parcels of shopping center area.

e. Identity of parcels to those on particular survey maps.

f. Assurance that currently existing zoning ordinance covers all commercial uses of the parcels.

g. Assurance that easements and covenants contained in the REA [*see § 34E.200[2]*] are [*see Civ. Code § 1468*]:

(1) Valid.

(2) Valid interests in land covered by them.

(3) Mutually binding on servient and dominant tenements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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17-34E California Legal Forms--Transaction Guide § 34E.126

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.126 Execution Requirements for REA or Lease

NOTE:

The execution requirements are the same for an REA or a lease since both are a contract. Specific requirements vary depending on whether a signatory is an individual or other type of legal entity. For coverage of these requirements, see the Transaction Guide for Ch. 34B, ***Residential Leases***.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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17-34E California Legal Forms--Transaction Guide § 34E.127

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.127 Recordation of REA

NOTE:

For the covenants contained in an REA to run with the land, the REA must be recorded [***see*** *Civ. Code § 1468(d)*; ***see also*** *§ 34E.200[1][c]*]. For a covenant to be enforceable as an equitable servitude, the covenant must be contained in a recorded declaration or deed [***see*** *§ 34E.200[1][d]*].

1. Determine whether entire REA or only short form or memorandum of REA will be recorded.

NOTE:

The parties to an REA may be reluctant to record the entire REA since, once recorded, it is a matter of public record and its specific terms are no longer confidential. By preparing, acknowledging, and recording a short form or memorandum of REA, the parties can avoid making unwanted disclosures. However, if a short form of the REA is to be recorded, it must contain all of the covenants, conditions, and restrictions the parties want to be enforceable by and against their successors in interest to the property. The remainder of this Transaction Guide assumes that the entire REA will be recorded.

2. At time REA is executed, arrange for acknowledgment of REA by executing parties and for certification of acknowledgments by authorized officer [*see Gov. Code § 27287*].

NOTE:

Before an instrument can be recorded, its execution must be acknowledged (or proved) and the acknowledgment (or proof) certified [*Gov. Code § 27287*; ***see*** *Civ. Code § 1170*].

3. Have REA recorded in county in which property is located [*Civ. Code §§ 1169, 1170*].

NOTE:

The REA must be recorded by the county recorder of the county in which the subject real property is situated [***see*** *Civ. Code § 1169*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawPriorities & RecordingRecording ActsReal Property LawRestrictive CovenantsCovenants Running With Land



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17-34E California Legal Forms--Transaction Guide § 34E.128

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.128 Optional Recordation of Memorandum of Lease

NOTE:

If a shopping center lease is recorded, it is usually recorded only in its short form (memorandum of lease) rather than in its entirety. For the procedure for recording a memorandum of lease, see the Transaction Guide to Ch. 34C, ***Retail, Industrial, and Office Leases***. For a memorandum of lease form, see *Ch. 34C,* ***Retail, Industrial, and Office Leases****, § 34C.203*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawPriorities & RecordingRecording Acts



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17-34E California Legal Forms--Transaction Guide § 34E.129

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§ 34E.129[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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17-34E California Legal Forms--Transaction Guide § 34E.130

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.130 Shopping Center REA

NOTE:

This drafting guide is for a reciprocal easement agreement and declaration of covenants, conditions, and restrictions (REA) for a shopping center consisting of separate contiguous parcels, each of which is already separately owned. As discussed in *§ 34E.11*, this type of document is usually negotiated among the multiple owners of the parcels before the initial construction and development of the center.

Covenants, conditions, and restrictions may also be imposed and easements may be granted for a shopping center or mixed-use development as a whole by the owner of the land slated for development prior to the time any separate parcels are created or conveyed. In that case, the owner, as declarant, uses a declaration of covenants, conditions, and restrictions (CCandRs) to unilaterally impose the covenants, conditions, and restrictions and to grant easements that will be binding on any successor in interest to any parcel in the development. A separate declaration or CCandRs for a shopping center, as described in this paragraph, is not included in this chapter because of space limitations. That document would include many of the same provisions listed below and set forth in *§ 34E.200[2]*, but would be in the traditional format used for a subdivision declaration [***see, e.g.,*** Ch. 33D, ***Planned Developments*** , § 33D.200 (declaration of CC&Rs for planned development)].

[1] Parties to Agreement

1. Include following persons or entities as original parties to agreement:

a. Every fee owner of every parcel in shopping center.

b. Any ground or other lessee of any parcel in center.

c. Any other person with any legal ownership interest in any parcel in center (e.g., holder of life estate).

2. For each party, include [*see § 34E.200[2]*, first (unnumbered) P]:

a. Full name.

b. Legal status and capacity.

3. For any parcel involving split interests (e.g., interests of fee owner and ground tenant), clarify responsibility of each owner of interest for specific affirmative obligations under agreement [*see, e.g., § 34E.200[2]*, P 2.05].

NOTE:
For example, when a fee owner has leased its parcel to a ground tenant who will operate a business in the improvements to be constructed by the tenant, the REA should provide that the obligations it imposes relating to this construction and operation of the business are the ground tenant's obligations, at least for so long as the ground lease is in effect.

4. For parcels jointly owned (whether presently or in future), specify how responsibility for performance of terms of agreement is to be allocated among joint owners [*see § 34E.200[2]*, P 2.06].

5. If distinction is to be made between parties who will be large occupants ("majors") of shopping center and other parties:

a. Describe qualifications for being classified as a "major" [*see § 34E.200[2]*, P 1.03].

b. In connection with individual provisions of agreement, set forth special approval or other rights of majors.

[2] Description of Land Covered by REA

1. Identify each parcel in shopping center by [*see § 34E.200[2]*, Recitals A-C]:

a. Legal description, either included in body of instrument or referred to and incorporated by reference.

b. Reference to either:
(1) Site plan for shopping center; or

(2) Recorded parcel map.

2. For each parcel, describe specific ownership or other interest held by identified parties [*see § 34E.200[2]*, Recitals A-C].

[3] Common Plan

1. Include express statement that purpose of agreement is to establish common plan for joint development and operation of land as unified shopping center [*see § 34E.200[2]*, Recitals D, E].

2. Indicate how plan is to be implemented, e.g., through [*see § 34E.200[2]*, Recital E]:

a. Imposition of certain covenants, conditions, and restrictions (as further described in agreement) on all shopping center land, for benefit of each parcel and each party [*see § 34E.200[2]*, P 17.01].

b. Granting of certain reciprocal easements (as further defined in agreement) [*see § 34E.200[2]*, art. 3].

3. If declaration or similar document has previously been recorded for any portion of shopping center land, include provision stating that REA supersedes any previously recorded instrument, if that is intended effect of REA.

[4] Transfer Limitations, Rights, and Obligations

1. Include provision that prohibits transfer by party of any right, power, or obligation created by agreement without simultaneous transfer of that party's parcel or interest in parcel [*see § 34E.200[2]*, P 2.01].

2. Describe transfers that will:

a. Result in transferor remaining obligated to perform all terms and conditions of agreement [*see § 34E.200[2]*, P 2.05].

b. Result in transferee becoming obligated to perform all terms and conditions under agreement [*see § 34E.200[2]*, P 2.04].

3. Set forth general requirements for transfers, such as [*see § 34E.200[2]*, PP 2.01, 2.07]:

a. Delivery by transferor of notice of transfer to other parties.

b. Execution by transferee of written assumption agreement containing required information.

c. Execution of instrument of conveyance containing statement that property or interest is subject to REA, as recorded.

4. Describe any specific transfer restrictions, such as [*see § 34E.200[2]*, P 2.02]:

a. For any party obligated to perform construction work, prohibition against transfer until completion of construction.

b. Prohibition against further subdivision of shopping center by developer.

5. Consider adding provision that requires each party obligated to construct shopping center to assume personal liability for construction notwithstanding a transfer [*see § 34E.200[2],* P 2.03].

6. For benefit of lenders and subsequent purchasers, include provision that exempts a transferee from liability for default occurring prior to date transferee acquires title [*see § 34E.200[2]*, P 2.07(b)].

[5] Reciprocal Easements

1.For each easement to be granted, identify or describe [*see § 34E.200[2],* PP 3.01, 3.02]:

a. Its grantor.

b. Its grantee.

c. Parcel benefited by easement (dominant estate).

d. Parcel burdened by easement (servient estate).

e. Location.

f. Purpose, such as:
(1) Ingress and egress to shopping center.

(2) Parking.

(3) Utilities.

g. Duration.

h. Responsibility for maintenance [*see § 34E.200[2]*, P 3.03].

i. Right to relocate, if any [*see § 34E.200[2]*, P 3.03].

2. Characterize each easement as appurtenant to parcel that it benefits or in gross [*see § 34E.200[2],* P 3.02].

3. Identify persons to be benefited by easement [*see § 34E.200[2],* P 3.02]:

a. Grantee.

b. Grantee's:

(1) Successors in interest.

(2) Tenants.

(3) Customers.

4. If temporary encroachments are permitted, describe [*see § 34E.200[2],* P 3.05]:

a. Permitted encroachments; and

b. Their duration.

[6] Covenants for Operation and Use

NOTE:
For any covenant to be enforceable as a covenant running with the land or as an equitable servitude, certain statutory requirements (covenant running with the land) or judicial requirements (equitable servitude) must be satisfied. For a discussion of these requirements, see *§ 34E.200[1][c],[d]*.

1. Include provisions that cover, at a minimum, following matters relating to use and operation of shopping center:

a. Shopping center name [*see § 34E.200[2]*, P 4.01].

b. Sign restrictions [*see § 34E.200[2]*, P 4.02; *see also § 34E.202[2]*].

c. Access between parcels in shopping center [*see § 34E.200[2]*, P 4.04].

d. Permitted uses [*see § 34E.200[2]*, P 4.06].

e. Prohibited uses and activities [*see § 34E.200[2]*, P 4.07].

2. Include clause that grants owners authority to promulgate rules and regulations for shopping center, and that specifies [*see § 34E.200[2]*, P 4.05]:

a. Person or persons to whom foregoing authority is granted.

b. Persons or persons responsible for enforcement.

3. For any "major" occupant-owner that agrees to give a covenant of business operation, include provisions that:

a. Describe precisely what major covenants to do [*see § 34E.200[2]*, P 8.01(a)].

b. State period during which covenant is to be in effect [*see § 34E.200[2]*, P 8.01(b)].

c. Set forth circumstances under which major will be excused or released from covenant [*see § 34E.200[2]*, PP 8.02, 8.03].

d. Subordinate covenant to lien of any mortgage or deed of trust on that major's parcel [*see § 34E.200[2]*, P 8.04].

[7] Covenants for Buildings and Other Improvements

1.Impose requirement that no building or other improvements may be constructed unless they comply with uniform plan for shopping center, as established and implemented by REA [*see § 34E.200[2],* P 5.01].

2. Describe general building specifications and restrictions to which all improvements are subject, such as:

a. Location of specific "buildable" area for each parcel [*see § 34E.200[2],* P 5.02].

b. Building size limitations [*see § 34E.200[2],* P 5.03], described both by:
(1) Maximum gross floor area or similar measure; and

(2) Maximum permitted height in stories.

c. Other requirements, e.g.:

(1) Fire safety [*see § 34E.200[2],* P 5.06].

(2) Sidewalks [*see § 34E.200[2],* P 5.05].

3. For parking areas of shopping center [*see § 34E.200[2],* P 5.08]:

a. Designate location.

b. Define specific improvements that are to be considered part of parking areas.

c. Set forth minimum parking ratio.

d. Describe any rights or restrictions on reconfiguring parking areas.

e. Designate party responsible for its maintenance.

4. For each party, describe specific obligations for construction [*see § 34E.200[2],* P 6.02], including:

a. Type of commercial building, if any, to be constructed.

b. Common area improvements, if any.

c. Completion date [*see § 34E.200[2],* P 6.10].

5. Delegate responsibility for maintenance of:

a. Separate commercial buildings in shopping center [*see § 34E.200[2],* P 5.07].

b. Common areas of shopping center [*see § 34E.200[2],* art. 9].

[8] Development and Initial Construction

1. Allocate responsibility for:

a. Initial construction of [*see § 34E.200[2]*, P 6.02]:
(1) Each commercial building.

(2) Service facilities appurtenant to commercial buildings.

(3) Sidewalks and landscape areas adjacent to commercial buildings.

(4) Common areas.

(5) Required off-site improvements.

b. Installation and hook-up of utility systems and facilities.

c. Payment of construction costs.

d. Obtaining necessary governmental approvals and permits.

e. Preparation and cost of preliminary and final plans.

2. For construction plans [*see § 34E.200[2]*, PP 6.04, 6.05], describe:

a. Any required contents of plans.

b. Timing of preparation and submission.

c. Approval procedure.

3. For each party required to perform construction, require [*see § 34E.200[2]*, PP 6.06, 6.07]:

a. Compliance with final approved plans and all other terms of REA.

b. Compliance with all applicable laws, regulations, or ordinances of governmental entities with jurisdiction.

c. Diligent commencement and completion.

d. Completion by specified date [*see § 34E.200[2]*, P 6.10].

e. Standards for determining whether construction is completed.

f. Barricades around construction areas [*see § 34E.200[2]*, P 6.08].

g. Lien-free completion.

h. Insurance for improvements being constructed, e.g. [*see § 34E.200[2]*, P 6.12]:

(1) Fire and extended coverage.

(2) Public liability.

(3) Workers' compensation.

i. Indemnification of each other party by party performing construction [*see § 34E.200[2],* P 6.13].

4. When common area improvements will be constructed by developer for benefit of multiple owners in shopping center, consider including additional requirements for developer's construction, such as [*see § 34E.200[2],* P 6.07]:

a. Parties' right to approve developer's contract with general contractor.

b. Performance and lien bonds.

c. Periodic progress reports.

d. Parties' right to inspect and audit books and records.

[9] Leasing and Opening of Shopping Center

1. For multi-tenant building(s) located in shopping center [*see § 34E.200[2],* P 7.01]:

a. Identify party responsible for leasing.

b. Describe specific obligations for leasing that will apply:
(1) Prior to opening of shopping center.

(2) After opening of shopping center.

c. List any matters that must be included in tenant's lease.

2. For opening of shopping center and individual businesses, describe [*see § 34E.200[2],* P 7.02]:

a. When each party is required or permitted to open.

b. Any circumstances that will permit delay in opening.

[10] Operation and Maintenance of Shopping Center Common Areas

1. Define common areas [*see § 34E.200[2],* P 1.02].

2. Designate party responsible for maintenance and operation [*see § 34E.200[2],* P 9.01].

3. Describe specific management and maintenance responsibilities, including:

a. Responsibility for obtaining and maintaining insurance for common areas [*see § 34E.200[2],* P 9.03];

b. Duty to keep shopping center lien-free [*see § 34E.200[2],* P 9.07]; and

c. All other specific responsibilities [*see § 34E.200[2],* P 9.01].

4. Indicate whether party responsible for management and maintenance is permitted to delegate its responsibility in whole or in part to third parties, and, if so, describe any requirements or restrictions for third party contracts [*see § 34E.200[2],* P 9.02].

5. For common area operational costs [*see § 34E.200[2],* P 9.04]:

a. Define costs that may be included.

b. Set forth payment obligation of each party.

c. Describe accounting and billing requirements.

d. Consider including provision that grants parties right to audit books and records of party responsible for maintenance and operation.

6. Describe remedies for failure of manager-party to carry out duties [*see § 34E.200[2],* P 9.06].

7. Include method by which successor manager is to be designated [*see § 34E.200[2],* P 9.06].

[11] Taxes and Insurance

1. For real property taxes and assessments on shopping center [*see § 34E.200[2],* art. 10]:

a. Allocate responsibility for payment.

b. Require payment of taxes prior to delinquency.

c. Consider including a provision that permits nondefaulting parties to pay taxes not paid by defaulting party and that requires defaulting party to reimburse paying party for amount paid (plus interest).

d. If party responsible for payment of taxes is to have right to contest taxes, describe extent of right and any applicable conditions.

2. For each party, describe insurance to be procured and maintained [*see § 34E.200[2],* art. 11].

a. Type:
(1) Fire and extended coverage.

(2) Public liability.

(3) Other.

b. Portion of shopping center to be covered:

(1) Individual commercial buildings.

(2) Common area improvements.

c. Amount.

d. Other policy requirements:

(1) No cancellation without prior notice to other parties.

(2) Permissible insurers.

(3) Maximum deductible amounts.

(4) Designation of named or additional insureds.

(5) Subrogation rights (including waiver of these rights).

(6) Proof of insurance.

(7) Payment and use of policy proceeds.

3. Set forth indemnification agreement, if any, of each party [*see § 34E.200[2],* P 11.05].

[12] Damage and Destruction

1. Describe types and timing of damage or destruction that will give rise to obligation to rebuild [*see § 34E.200[2],* P 12.01].

2. For specific damage or destruction, designate party obligated to repair and rebuild [*see § 34E.200[2],* P 12.01].

3. For costs of rebuilding, include provisions for:

a. Payment of insurance proceeds to:
(1) Party obligated to rebuild.

(2) Insurance trustee.

b. Payment of any rebuilding costs not covered by insurance.

4. For rebuilding work, describe [*see § 34E.200[2],* P 12.02]:

a. Applicable construction standards.

b. Permitted time period for commencement and completion.

5. Describe circumstances under which rebuilding is not required [*see § 34E.200[2],* P 12.01].

6. Describe obligations, if any, of party that is not required or does not elect to rebuild [*see § 34E.200[2],* P 12.03].

7. For benefit of lenders, limit obligation to rebuild or restore following damage or destruction occurring after lender (or purchaser from lender) acquires title [*see § 34E.200[2],* P 12.04].

[13] Condemnation

1. Describe takings that will permit a party to terminate REA with respect to portion of property taken [*see § 34E.200[2],* P 13.01], such as taking of all or specified portion of:

a. Separate commercial buildings.

b. Common areas of shopping center.

2. When party is entitled to terminate REA with respect to portion of property taken [*see § 34E.200 [2],* P 13.01], set forth:

a. Method for termination.

b. Time period during which right must be exercised.

c. Date termination is to take effect.

3. Describe obligations of parties for any necessary reconstruction or rebuilding of portion of shopping center not taken [*see § 34E.200[2],* P 13.01], including:

a. Identity of party obligated to rebuild or restore.

b. Responsiblity for payment of cost.

c. Right, if any, of party obligated to rebuild or repair to receive portion of condemnation award.

d. Time period for commencement and completion of construction.

e. Standards for construction.

4. For each parcel in shopping center, set forth respective rights of parties in any condemnation award [*see § 34E.200[2],* P 13.02].

NOTE:

The owner of property acquired by eminent domain is entitled to compensation as provided under the Eminent Domain Law [*Code Civ. Proc. §§ 1230.010-1273.050*], but that Law does not affect any rights the owner may have under any other statute [*Code Civ. Proc. § 1263.010*]. If two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss [*Code Civ. Proc. § 1263.010(b)*].

[14] Default, Termination, and Remedies

1. Expressly state that default or breach does not give any person right to cancel or terminate agreement [*see § 34E.200[2]*, P 14.04].

2. State when agreement is to terminate [*see § 34E.200[2]*, P 14.05]:

a. After specified period of time.

b. On written agreement of all parties.

3. List persons required to join in any modification, amendment, or cancellation of agreement [*see § 34E.200[2]*, P 14.05]:

a. Parties.

b. Lenders.

c. Others.

4. For breach of agreement, describe:

a. Remedies [*see § 34E.200[2]*, P 14.01].

b. Any applicable cure period given to defaulting party [*see § 34E.200[2]*, P 14.02].

c. Any right of nondefaulting party to cure [*see § 34E.200[2]*, P 14.03].

5. Set forth agreement of parties relating to:

a. Unavoidable delays in performance [*see § 34E.200[2]*, P 14.06].

b. Attorneys' fees [*see § 34E.200[2]*, P 14.07].

[15] Effect of REA on Lenders and Rights of Lenders

NOTE:
A lender will insist that the REA include certain provisions intended to protect its security interest. Specific provisions depend on the particular lender involved, but those listed in Paragraphs 3-9, ***below***, are typical of some of the more common requirements.

1. State that REA is to have priority over any subsequent deed of trust or mortgage [*see § 34E.200[2]*, P 15.01].

2. If there are any existing deeds of trust or mortgages, include provision requiring their subordination to REA [*see § 34E.200[2]*, P 15.01].

3. Require that any notice of default be given to lender for defaulting party [*see § 34E.200[2],* P 15.02].

4. Grant lender right to cure any default and specify applicable cure period for different types of defaults (e.g., those that can be cured by payment of money and those that cannot) [*see § 34E.200[2],* P 15.04].

5. Limit lender's responsibility to perform obligations under REA to period during which it has title to encumbered property [*see § 34E.200[2],* P 15.01].

6. Describe rights of lender to foreclose or to make assignment in lieu of foreclosure [*see § 34E.200[2],* P 15.03].

7. Set forth rights of lender in event of damage or destruction to improvements on encumbered property [*see § 34E.200[2],* P 12.04].

8. If REA includes operating covenant of major, include provision that subordinates covenant to lender's security interest [*see § 34E.200[2],* P 8.04].

9. If required by lender, include provision that prohibits any amendment, modification, or cancellation of any provision of REA without lender's prior written consent [*see § 34E.200[2],* P 14.05].

[16] Merchants' Association

1. If merchants' association is to be formed for shopping center, delegate responsibility for formation and organization [*see § 34E.200[2],* P 16.01].

2. For association itself, set forth:

a. Type of legal entity [*see § 34E.200[2],* P 16.01].

b. Membership obligations of [*see § 34E.200[2],* P 16.02]:
(1) Parties to REA.

(2) Tenants in shopping center.

c. Formula for determining dues and assessments to be paid by [*see § 34E.200[2],* P 16.02]:

(1) Tenants.

(2) Parties to REA.

3. List any matters that must be included in tenant leases [*see § 34E.200[2],* P 16.02].

4. For governing instruments of association [*see § 34E.200[2],* P 16.03], describe:

a. Any limitations on power of association.

b. Any right of approval or other rights granted to parties to REA.

[17] Recordation and Miscellaneous Provisions

1. Include provision that requires REA (or memorandum) to be recorded and that specifies [*see § 34E.200[2]*, P 17.07]:

a. Party responsible for recording.

b. County in which it is to be recorded.

c. When it is to be recorded.

d. Method of allocation of recording costs.

2. Set forth agreement of parties regarding:

a. Method of giving required or permitted notices [*see § 34E.200[2]*, P 17.04].

b. Approval period for matters required by terms of REA to be approved [*see § 34E.200[2]*, P 17.05].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART III. TRANSACTION GUIDE
D. Drafting Guide

17-34E California Legal Forms--Transaction Guide § 34E.131

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.131 Drafting Guide for Shopping Center Lease

NOTE:

For a drafting guide for a commercial lease, which is equally applicable to the drafting of a shopping center lease, see Part IV of the Transaction Guide to Chapter 34C, ***Commercial, Industrial, and Office Leases***. To avoid unnecessary repetition, only matters not covered in that drafting guide are included below.

[1] Maintenance and Use of Common Areas

1. Grant tenant nonexclusive right to use common areas, subject to compliance with landlord's rules and regulations [*see § 34E.201[2],* P 5.03].

2. Describe common areas [*see § 34E.201[2],* P 5.02].

3. Set forth landlord's responsibilities for and rights in common areas [*see § 34E.201[2],* P 5.01].

4. Describe any restrictions on parking by tenant employees [*see § 34E.201[2],* P 5.04].

5. Require tenant to contribute to landlord's cost of maintaining common areas [*see § 34E.201[2],* P 4.06], specifying:

a. Formula by which tenant's pro rata share is to be determined.

b. When tenant's share is payable.

[2] Miscellaneous Provisions

1. For landlord, consider including provision that limits landlord's liability under lease to shopping center and excludes any other assets of landlord [*see § 34E.201[2]*, P 14.01].

2. When shopping center is subject to REA or similar instrument (e.g., declaration or operating agreement), state that fact and fact that lease is subordinate to foregoing instrument [*see § 34E.201[2]*, P 14.02].

3. For landlord, consider including disclaimer by landlord that any major occupant of center will [*see § 34E.201[2]*, P 14.03]:

a. Open (for new shopping center); or

b. Continue to operate (for existing shopping center).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART III. TRANSACTION GUIDE
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17-34E California Legal Forms--Transaction Guide §§ 34E.132-34E.199

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 34E.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART IV. FORMS

17-34E California Legal Forms--Transaction Guide § 34E.200

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.200 Reciprocal Easement Agreement and Declaration of Restrictions and Covenants (REA)

[1] Comment

[a] Use of Form

This form is an agreement between multiple owners of contiguous parcels of real property that the owners intend to develop as a shopping center. In this agreement, commonly referred to as a reciprocal easement agreement or an "REA," the parties grant reciprocal easements to each other and make specific covenants regarding their development and use of the land, all for the purpose of establishing a uniform plan for the development, maintenance, and operation of the shopping center. To that end, this form includes uniform design standards, common area management and maintenance provisions, use restrictions, and operating covenants [*see § 34E.11*].

This form also includes provisions relating to the initial construction and development of the shopping center [*see § 34E.200[2]*, art. 6]. Alternatively, these provisions are sometimes integrated into a separate development agreement executed between the developer and other owners of the shopping center.

For illustrative purposes only, this agreement assumes that three fee owners own three separate parcels that will make up the shopping center. One owner is the developer. The other two owners will be major occupants, such as department store operators, in the shopping center. This form refers to the two major occupants as "majors" [*see § 34E.200[2]*, P 1.03] and grants them special approval and other rights. It also requires each major to construct, on its respective parcel, a building for its store, and certain related improvements immediately adjacent to its building. The developer is obligated to construct (1) a multi-tenant building on its parcel for leasing to individual tenants, and (2) all common area improvements (such as parking areas) for the shopping center, including common area improvements located on the parcels owned by the majors. After the completion of the initial construction for the shopping center, the developer must maintain all common areas in the center [*see § 34E.200[2]*, art. 9].

As is true for any agreement, the specific provisions included in an REA must be based on the actual parties and circumstances involved. For example, an REA for a small neighborhood strip center is likely to be much shorter in

length and less comprehensive than the one set forth below. Abbreviated forms of an REA may contain basic provisions for easements for the common areas, and for building and design or architectural restrictions. Further, an abbreviated REA may require each owner to construct its building and common area improvements on its parcel, and to maintain all improvements on its parcel.

[b] Davis-Stirling Common Interest Development Act

This REA has not been drafted to comply with the requirements of the Davis-Stirling Common Interest Development Act (the "Act") [*Civ. Code §§ 1350-1373*] governing declarations and similar instruments. For discussion of the circumstances under which a shopping center might be considered a "common interest development," and therefore subject to the Act, see *Section 34E.13*.

[c] Covenants Running With Land

Paragraph 14.05 of this form provides that all of the provisions of the form (except certain easement clauses) are to remain effective for a stated period of years unless the parties terminate or modify the agreement prior to the expiration of that period. If the various covenants relating to land use set forth in this form are to achieve their intended purpose of binding all owners of the shopping center and all successors in interest to the land contained within the shopping center, they must run with the land [*see* discussion below] and/or constitute equitable servitudes [*see* [d], *below*].

In order for covenants made among owners of land to run with the land, certain requirements imposed by *Civil Code Section 1468* must be satisfied. Section 1468 allows two (or more) landowners to create burdens on land by covenants that bind subsequent grantees. More specifically, that statute applies to a covenant to do or refrain from doing some act on the covenantor's own land, when (1) the foregoing act is expressed to be for the benefit of the covenantee's land, (2) certain conditions (discussed below) are met, and (3) the covenant is made by the following: an owner of land with the owner of other land; a grantor of land with the grantee of the land conveyed; or the grantee of land conveyed with the grantor of the land [*Civ. Code § 1468*].

The following are the conditions that must be satisfied if the covenant is to run with the land [*Civ. Code § 1468*]:

> (1) The land of the covenantor that is to be affected by the covenants, and the land of the covenantee that is to be benefited, must be particularly described in the instrument containing the covenants [*see § 34E.200[2]*, Recitals A-C].
>
> (2) The instrument containing the covenants must state that successive owners of the land are to be bound by the covenants for the benefit of the land owned by, granted by, or granted to the covenantee [*see § 34E.200[2]*, P 17.01].
>
> (3) Each act must relate to (a) the use, repair, maintenance, or improvement of, or payment of taxes and assessments on, the land or some part of it; or (b), if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a period that is reasonable in relation to the purpose of the covenant.
>
> (4) The instrument containing the covenants must be recorded in the office of the recorder of each county in which the affected land or some part of it is located [*see § 34E.200[2]*, P 17.07].

If the foregoing conditions are satisfied, the covenant will run with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee. Further, the covenant will benefit or be binding on each successive owner, during his or her ownership, of any portion of the land affected by the covenant and on each person having any interest in the land derived through any owner of the land, except as provided by *Civil Code Section 1466* (regarding

nonliability for breaches before acquisition of the estate or after parting with it), or as specifically provided in the instrument creating the covenant, and notwithstanding the provisions of *Civil Code Section 1465* (regarding persons bound by a covenant running with the land) [*Civ. Code § 1468*].

For additional coverage of covenants running with the land, see California Real Estate Law & Practice, Chapter 470, *Subdivisions* (Matthew Bender).

[d] Equitable Servitudes

[i] In General

If covenants and restrictions affecting the land are not enforceable at law as covenants running with land [*see* [c], *above*], they may still be enforceable in equity as equitable servitudes [*Russell v. Palos Verdes Properties (1963) 218 Cal. App. 2d 754, 762-763, 32 Cal. Rptr. 488* ; *see Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 378, 101 P.2d 490]* . In practice, the judicially crafted requirements for enforcement of a covenant or restriction as an equitable servitude [*see* [ii]-[v], *below*] are very similar to those required for enforcement as a covenant running with the land [*see* [c], *above*].

[ii] Creation by Written Instrument

Equitable servitudes may be created only by a written agreement between property owners [*see McBride v. Freeman (1923) 191 Cal. 152, 158, 215 P. 678* ; *Russell v. Palos Verdes Properties (1963) 218 Cal. App. 2d 754, 762, 32 Cal. Rptr. 488]* or by a deed [*see Arrowhead Mut. Service Co. v. Faust (1968) 260 Cal. App. 2d 567, 581, 67 Cal. Rptr. 325]* . In addition, the agreement or deed must meet the requirements discussed in [iii]-[v], *below.*

Special requirements apply when a declaration is recorded by the owner of property and (1) the owner intends, but has yet to, subdivide the property, or (2) the owner has subdivided the property but has yet to convey a parcel created by the subdivision. In either case, the mere recording of a declaration of covenants, conditions, and restrictions (or similar instrument) does not impose its covenants, conditions, or restrictions on the property described in the declaration until the following occur: the first parcel or lot in the larger tract of land is conveyed; and the deed expressly recites that the property conveyed by it is subject to the declaration [*see Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 506-507, 131 Cal. Rptr. 381, 551 P.2d 1213* ; *see also Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1545-1547, 253 Cal. Rptr. 344]* . In the case of a recorded declaration that describes multiple lots or parcels in a subdivision, relevant case law is ambiguous as to whether (1) the restrictions are enforceable against each lot in the subdivision if the first deed to the first lot or parcel contains a reference to the recorded declaration ("first deed only" theory), or (2) the reference to the recorded declaration must be included in the first deed to each of the lots or parcels in the subdivision ("all first deeds" theory) [Miller & Starr, California Real Estate 2d, Ch. 22, *Covenants, Conditions, and Restrictions*]. In these situations, when the subdivider has control over the deeds to the individual lots or parcels, this uncertainty can be eliminated by referring to and incorporating by reference the recorded declaration in each deed to the individual lots or parcels [*see* [v], *below*].

[iii] Notice to Grantee

A covenant may not be enforced as an equitable servitude by the covenator against its grantee unless the grantee had notice of the covenant or restriction at the time the grantee acquired title to the property affected by the covenant or restriction [*see Martin v. Holm (1925) 197 Cal. 733, 746-748, 242 P. 718]* . If a recorded declaration exists for the property, a deed to the property should incorporate by reference or otherwise refer to the recorded declaration [*see Murry v. Lovell (1955) 132 Cal. App. 2d 30, 35, 281 P.2d 316]* .

Even when the grantee's deed does not refer to restrictions contained in a recorded declaration, the grantee may, under certain circumstances, be deemed to have notice of the restrictions. For example, a purchaser whose deed did not

contain any reference to recorded restrictions was held to have constructive notice of restrictions that were referred to in an earlier deed in the grantee's chain of title [*see Wayt v. Patee (1928) 205 Cal. 46, 49, 269 P. 660]* .

[iv] Description of Dominant Estate

The creation of an equitable servitude requires a designation or description of the dominant tenement [*Werner v. Graham (1919) 181 Cal. 174, 181-182, 183 P. 945]* . The deed to the benefited property must describe, or designate by map or some other means, the dominant tenement owned by the grantor [*see Wing v. Forest Lawn Cemetery Assn. (1940) 15 Cal. 2d 472, 483, 101 P.2d 1099]* . Without such a description or designation, the recital of a common plan by the grantor and the making of similar deeds is ineffective because the grantor has not bound himself or herself to continue to impose the restrictions on any specific property [*see Wing v. Forest Lawn Cemetery Assn. (1940) 15 Cal. 2d 472, 480-481, 101 P.2d 1099]* .

[v] Statement of Common Plan

To be enforceable as equitable servitudes, restrictions must also be part of some general common plan applicable to and for the common benefit of all owners of separate parcels in the designated larger tract [*Werner v. Graham (1919) 181 Cal. 174, 183-184, 183 P. 945* ; *see § 34E.200[2],* Recitals D, E and P 17.01]. An express statement of the common plan must be included in a recorded declaration or similar instrument and in any subsequent deeds [*see Werner v. Graham (1919) 181 Cal. 174, 183-184, 183 P. 945* ; *see also Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 505-507, 131 Cal. Rptr. 381, 551 P.2d 1213]* . A subsequent deed may itself contain the express statement of the common plan or it may incorporate by reference the statement contained in a recorded declaration or similar instrument [*see Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 505-507, 131 Cal. Rptr. 381, 551 P.2d 1213]* . The intent of a grantor alone to create a common plan is not sufficient; the grantees must also have the intent [*Werner v. Graham (1919) 181 Cal. 175, 184, 183 P. 945* ; *Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 506, 131 Cal. Rptr. 381, 551 P.2d 1213]* .

The courts strictly adhere to the joint intent requirement. For example, in one case, the court refused to enforce a view protection restriction contained in a recorded instrument against a purchaser of the affected land as either a covenant running with the land or as an equitable servitude because there was no written instrument showing a joint intent to be bound by the restriction (either between the owner seeking to enforce the restriction and its grantor or between the owner against whom enforcement was sought and its grantor) [*see Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1546-1547, 253 Cal. Rptr. 344]* . In that case, the grant deed to the owner seeking to enforce the restriction did not refer to the recorded restrictions on the property, but the owner was aware of them. The grant deed to the owner against whom enforcement was sought did not contain any reference to recorded restrictions [*see Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1541, 1546-1547, 253 Cal. Rptr. 344]* . Several other cases involving similar fact situations have reached the same conclusion [*see, e.g., Anderson v. Pacific Avenue Inv. Co. (1962) 201 Cal. App. 2d 260, 264, 19 Cal. Rptr. 829* ; *Murry v. Lovell (1955) 132 Cal. App. 2d 30, 32, 281 P.2d 316* ; *Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 771, 110 Cal. Rptr. 239]* .

In view of these decisions, prudent practice indicates that for a covenant, condition, or restriction affecting land to be enforceable as a covenant running with the land or an equitable servitude, one should (1) strictly adhere to the statutory requirements of *Civil Code Section 1468* [*see* [c], *above*] in drafting the instrument that imposes the covenant (whether an REA, declaration, or similar instrument), and (2) in any (or at least the first) deed or lease for the affected land to a subsequent purchaser or tenant, refer to and incorporate by reference the recorded covenant, condition, or restriction. This form requires that any instrument of transfer executed by a party refer to and incorporate by reference the recorded REA and state that the transfer is subject to the recorded REA [*see § 34E.200[2],* P 2.01].

[e] Reciprocal Easements

In this form, each owner grants to the other owners easements across the common areas of the grantor's parcel for the following activities relating to the use of the shopping center: parking, ingress, egress, and the installation, maintenance, removal, and replacement of utilities [*see § 34E.200 [2],* P 3.01]. Each easement is expressly stated to be appurtenant [*see Civ. Code § 801*] to the benefited parcels and for the benefit of successors and assigns of the owners of the benefited parcels. Each easement is to continue in effect until abandoned for a stated period of years [*see § 34E.200[2],* P 3.04]. The agreement also permits temporary encroachments on each parcel by each of the parties during the period the shopping center is being constructed [*see § 34E.200[2],* P 3.05].

For a discussion of the law relating to easements, see Volume 6, Chapter 28, *Easements, Covenants, and Adjoining Owners.*

[f] Transfer Restrictions and Rights

Article 2 of this form governs the sale, assignment, or other transfer by an owner of its parcel. No transfer of any right, power, or obligation created by the agreement may be made except in conjunction with the transfer of an owner's parcel or interest in the parcel [*see § 34E.200[2],* P 2.01]. Also, any transfer instrument must state that the parcel or interest in it is subject to the agreement, and refer to and incorporate by reference the agreement (as recorded) [*see § 34E.200[2],* P 2.01; *see also* [d][v], *above*].

This form contains a provision prohibiting the developer from subdividing its parcel on or after the effective date of the agreement [*see § 34E.200[2],* P 2.02]. An optional clause prohibits each owner from making any transfer of his or her parcel that will, pursuant to other provisions of the agreement discussed below, result in that party ceasing to be a party to the agreement. This prohibition applies until the owner has completed construction of its building and opened for business, or, in the case of the developer, until the developer has completed construction of its building and leased a specified percentage of it to tenants [*see § 34E.200[2],* P 2.02(b)]. A separate optional clause provides that for the same period, each party agrees to remain personally liable for the initial construction of its building, even if the party transfers its parcel or any interest in it [*see § 34E.200[2],* P 2.03].

If an owner assigns, sells, leases, or otherwise transfers its parcel without retaining any beneficial interest in it (other than under a mortgage or deed of trust) or without simultaneously acquiring a possessory interest, the transferee becomes a party to the agreement on its written assumption of the original party's obligations under the agreement [*see § 34E.200[2],* PP 2.04, 2.07]. If an owner encumbers his or her parcel or transfers the parcel while simultaneously acquiring a possessory interest (such as a leasehold interest under a sale-leaseback arrangement), the owner remains a party to the agreement [*see § 34E.200[2],* P 2.05].

This form also contains a provision that applies to jointly owned parcels and requires the appointment of an agent by the joint owners to act on their behalf in carrying out the provisions of the agreement [*see § 34E.200[2],* P 2.06]. Paragraph 2.07 of the form sets forth the conditions for release of an owner as a party to the agreement and requires a transferee to assume the obligations of the transferring party under the agreement.

[g] Covenant of Continuous Business Operation

This form contains an express covenant by each major occupant-owner to continue to operate its store in the shopping center under its same name and in the same physical size for a stated period of time, unless it is released from the covenant on the occurrence of certain specified events (discussed below). Notwithstanding this covenant, a major is not required to remain open during any period in which closure is required due to damage, destruction, or other cause beyond the major's control [*see § 34E.200[2],* P 8.01]. While many large retailers refuse or are reluctant to give this type of covenant, a lender for the developer or an occupant-owner may insist on such a covenant. Since a large shopping center occupant who gives an operating covenant is likely to be concerned about any restrictive effect the covenant may have on its ability to operate its business, this form grants the covenantor maximum flexibility and autonomy for the

specifics of its internal operation [*see § 34E.200[2]*, P 8.01(c)].

When an operating covenant is included in an REA, the document must describe any events that will result in the covenantor being released from the covenant. For example, these might include certain defaults by the developer, a continuing failure by the developer to maintain a certain occupancy level in its multi-tenant building, a failure by any other major to actually open for business in the shopping center or to operate for a stated period, or a release from, or default under, a covenant of continuous business operation made by another major [*see § 34E.200[2]*, P 8.02]. What seem to be liberal provisions in this regard may be necessary for a major to agree to inclusion of an operating covenant.

The operating covenants in this agreement are expressed to be both covenants running with the land and to be personal to the covenantors. Consequently, each covenant is binding on the covenantor even after a transfer of the covenantor's parcel in the shopping center [*see § 34E.200[2]*, P 8.03(a)]. However, an exception to continuing personal liability is often permitted for certain transfers to related, controlled, or controlling entities of the covenantor if the transferee assumes liability for performance of the covenant.

When an operating covenant is included in an agreement, the covenantor should make clear for whose benefit all or any part of the covenant is to run (for example, for all parties or only for the developer). This form includes alternative language that restricts the benefit of the covenant to the developer only, exclusive of the majors [*see § 34E.200[2]*, P 8.03(b)]. In an attempt to limit remedies for breach of the operating covenant to damages, optional language excludes specific performance as a remedy for breach [*see § 34E.200[2]*, P 8.03(c)].

Because a lender will not want to be burdened by an operating covenant in the event it succeeds to the interest of the covenator in the affected land, the agreement expressly provides for subordination of the covenant to the lender's security interest [*see § 34E.200[2]*, P 8.04].

If the parties to an REA or similar agreement do not intend to give or create an operating covenant, the agreement should state that fact. For a discussion of circumstances under which operating covenants have been implied by the courts, see *P 34E.16[2]*.

[h] Other Covenants for Operation and Use

Article 4 of this form contains various covenants regarding the operation and use of the shopping center. Some of these relate to permitted signs [*see § 34E.200[2]*, P 4.02; *see also § 34E.202[2]*], required access between parcels [*see § 34E.200[2]*, P 4.04], and prohibitions against sound and light projections from stores and buildings [*see § 34E.200[2]*, P 4.03].

This form includes alternative provisions that define the uses generally permitted in the shopping center [*see § 34E.200[2]*, P 4.06]. One alternative permits only retail sales and services. The other alternative is a mixed-use clause that allows retail uses and other uses often found in a neighborhood or community strip center, such as financial institutions, service businesses, and professional offices.

Activities and uses that are prohibited by this form include those that constitute a nuisance, involve the use or storage of hazardous substances, or violate any law or ordinance [*see § 34E.200[2]*, P 4.07(a)]. This form also prohibits other uses that are incompatible with a commercial center, such as manufacturing, industrial, residential, and warehouse uses.

Several clauses in this form exclude certain types of businesses from the shopping center or restrict them to specified geographical locations in the shopping centers [*see § 34E.200[2]*, P 4.07(b), (c)]. Certain types of businesses may be barred from the center because of the increased parking requirements associated with them and the fact that they do not normally draw customers to the center for the benefit of the retail merchants. These businesses may include certain types of entertainment businesses (for example, a bowling alley) or educational or training businesses (for example, a

beauty college). One method of remedying the parking problems associated with these uses is to require the user to provide the additional parking required by its business.

An optional "exclusive" clause in this form [*see § 34E.200[2]*, P 4.07(d)] may be used when one party to the agreement wishes to operate a specific type of business (for example, a grocery store) and to prohibit operation of the same or a similar type of business in the shopping center. The clause should be narrowly drafted to avoid violating federal or state antitrust laws [*see § 34E.17*]. The exclusive use clause in this form is to be effective only for so long as the operator continues to operate its specific business in the shopping center. If applicable, the clause should describe with particularity any permitted overlaps in merchandise carried by another business. For example, the operator of a drug store in the center may be permitted to carry some merchandise usually carried in a grocery store, such as alcoholic beverages and packaged food, provided the primary business of the drug store remains a drug store.

[i] Covenants for Buildings and Other Improvements

To achieve the goal of developing a shopping center under a uniform plan, an REA must contain covenants regulating the construction of any building or other improvements in the shopping center [*see § 34E.200[2]*, art. 5]. In this form, each party covenants that any building or other improvements constructed on its parcel will comply with all terms of the REA and will otherwise be architecturally and aesthetically compatible with all other buildings and improvements in the center [*see § 34E.200[2]*, P 5.01]. Buildings may be constructed only on designated portions of each parcel (referred to as "Commercial Areas") [*see § 34E.200[2]*, P 5.02], and must comply with height and floor area limitations [*see § 34E.200[2]*, PP 5.03, 5.04]. Parking areas may be located only on designated portions of the common areas for each parcel. Further, each parcel (and the shopping center as a whole) must maintain a minimum parking ratio at all times [*see § 34E.200[2]*, P 5.08].

In this form, each party also covenants to maintain and keep in good condition the building constructed by it on its parcel [*see § 34E.200[2]*, P 5.07]. Responsibility for maintaining the common areas of the shopping center is delegated to the developer [*see § 34E.200[2]*, art. 9; *see also* [l], *below*].

[j] Construction Obligations of Each Party

How multiple owners of a shopping center divide responsibility for development and construction of the shopping center is a matter for agreement between those parties. Initial development and construction of the shopping center may be covered in the REA itself [*see § 34E.200[2]*, art. 6] or in a separate development agreement between the parties.

As mentioned in [a], *above*, this form assumes that the shopping center consists of three parcels, each owned by a separate person or entity. The developer is one of the owners and is obligated to (1) construct a multi-tenant building on its parcel, (2) construct all common area improvements located on all three parcels [*see § 34E.200[2]*, art. 6], and (3) maintain the common areas [*see § 34E.200[2]*, art. 9; *see also* [l], *below*]. Each of the other two owners is required to construct a building for its own store on its respective parcel of land [*see § 34E.200[2]*, art. 6]. In some relatively small shopping centers, each owner of a parcel must construct its own building and any common area improvements on its respective parcel, and must covenant to maintain its entire parcel, including any common areas located on it.

When, as in this REA, a developer will develop and construct improvements for the common benefit of all owners, the owners must reach an agreement regarding their respective contributions to the costs and expenses of the common improvements. This agreement may be incorporated into the declaration, as is the case in this form [*see § 34E.200[2]*, P 6.07(c)], or into separate "side" agreements between the developer and individual owners. Often, as an inducement to attract desirable owner-occupants, the developer will agree to absorb more than its otherwise pro rata share (and sometimes, all) of the construction costs for the common areas. If confidentiality regarding any specific agreement between the developer and an owner-occupant is desired, the terms of their agreement should be included in a separate agreement rather than in the REA.

Article 6 of this form defines the construction obligations of each party and includes representative provisions for the selection of architects, plan preparation and approval, and standards and requirements for the actual construction. All construction must comply with applicable law [*see § 34E.200[2],* PP 6.06, 6.07(a)(3)] and with all provisions of the REA, including the site plan, exterior elevation specifications, construction specifications, and architectural style specifications referred to and incorporated by reference in the agreement [*see § 34E.200[2],* P 6.04]. Further, the construction must be completed free and clear of mechanic's liens [*see § 34E.200[2],* PP 6.02(e), 6.07(e)]. The form also specifies completion dates and standards for determining completion [*see § 34E.200[2],* P 6.10]. For its respective construction work, each party must maintain prescribed insurance [*see § 34E.200[2],* P 6.12] and indemnify the other parties from any liability [*see § 34E.200[2],* P 6.13].

For alternative construction provisions that are designed for inclusion in a lease but that are adaptable for use in a fee situation, see *Chapter 34C, Commercial, Industrial, and Office Leases , § 34C.243* (landlord to construct building), and Chapter 34D, *Ground Leases*, § 34D.220 (ground lease requiring tenant to construct improvements). For separate coverage of constructions contracts in general, see Chapter 31, *Construction Contracts* .

[k] Opening of Shopping Center and Leasing Obligations of Developer

A shopping center that opens at maximum occupancy benefits the owners and all occupants of the center. In this form, the developer agrees to lease out a specified percentage of its multi-tenant building within a designated number of days after its completion date, and to thereafter use its best efforts to maintain maximum occupancy of the building [*see § 34E.200[2],* P 7.01].

The parties to this REA agree to coordinate efforts for a grand opening for the shopping center [*see § 34E.200[2],* P 7.02(a)]. However, in the case of the owners who will operate their own stores in the shopping center, this obligation to open is conditioned on the developer fulfilling its initial leasing obligation and completing the common areas [*see § 34E.200 [2],* P 7.02(b)]. Conversely, the developer's obligation to open its building for business is conditioned on at least one of the majors being ready to open for business. This form also includes language that excuses the majors from opening during certain time periods.

This form ties the majors' operating covenants to the developer's continuing obligation to keep its building leased. The majors are released from their operating covenants if (1) the developer fails to achieve the initial occupancy level required under the declaration, or (2) the developer achieves that level but its building subsequently falls below a certain occupancy level and continues below that level for a specified period of time [*see § 34E.200[2],* P 8.02 (a),(b)].

[l] Operation and Maintenance of Common Areas

An REA or a declaration must provide for the continuing operation, maintenance, and management of the shopping center common areas. This form obligates the developer to perform these duties [*see § 34E.200[2],* art. 9]. Alternatively, in a relatively small shopping center, each owner may be responsible for maintaining any common areas located on its own land.

The agreement should also describe all duties of the developer (or other obligated party) relating to the operation and maintenance of the common areas, including insurance obligations and the duty to keep the common areas free of liens [*see § 34E.200[2],* PP 9.01, 9.03, 9.07]. The REA should also describe the developer's authority to delegate duties to third parties [*see § 34E.200[2],* P 9.02], and its responsibilities for accurate recordkeeping [*see § 34E.200[2],* P 9.05].

The REA must also cover the respective obligations of each of the owners to contribute to the costs of maintaining the common area. This form uses a formula based on a ratio of the maximum gross floor area permitted on a parcel compared to the maximum gross floor area permitted on all parcels in the shopping center [*see § 34E.200[2],* P 9.04].

In some shopping centers, major occupants pay only a nominal amount compared to what they would otherwise pay on a pro rata basis, and the developer agrees to absorb the additional cost.

The REA should provide for the payment of "common area operational costs" and describe the obligations of the other owners to share those costs with the developer [*see § 34E.200[2],* P 9.04(a)]. A capital expenditure exceeding a specified dollar amount is not considered a common area operational cost under this form unless it is first approved by all of the parties in writing. Optional language provides that a management fee for the developer is to be included in the costs and expenses shared by the other owners [*see § 34E.200[2],* P 9.04(b)].

Paragraph 9.06 of this form provides for the transfer of management responsibilities to a party other than the developer on agreement of the parties or in the event that the developer fails to perform its duties.

[m] Taxes and Insurance

This REA requires each party to pay all taxes and assessments on the land owned by it, permits each party to pay any taxes not paid by a defaulting party and to be reimbursed for such a payment, and grants each party the right to contest any taxes or assessments [*see § 34E.200[2],* art. 10].

The parties to an REA must agree on the insurance obligations of the owners, including responsibility for coverage, the specific types of insurance, and the amounts to be carried. Consultation with an insurance broker specializing in shopping centers is recommended. In Article 11 of this form, each owner is required to carry fire and extended coverage insurance for its entire parcel and public liability insurance for its building [*see § 34E.200[2],* PP 11.01, 11.03]. The developer must carry public liability insurance for the shopping center common areas [*see § 34E.200[2],* PP 9.03, 11.03(b)]. This form also states the maximum amount of a deductible under any required insurance [*see § 34E.200[2],* P 11.04]. The parties should insist that proof of insurance required of each of them be furnished to the other parties, and that no policy be cancelable without prior advance notice to the others [*see § 34E.200[2],* P 11.04].

The insurance article of this form also contains a waiver of subrogation clause [*see § 34E.200[2],* P 11.02] and an indemnification clause [*see § 34E.200[2],* P 11.05]. For coverage of these subjects, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.222[1]*.

[n] Damage and Destruction

The parties must provide for their respective obligations in the event that any part of the shopping center is damaged or destroyed during the term of the REA. Under Paragraph 12.01 of this form, a major must repair and rebuild if damage or destruction to its parcel occurs during the period in which the major's operating covenant [*see § 34E.200[2],* art. 8; *see also* [g], *above*] is still in effect. Further, the developer is required to repair or rebuild its parcel if it suffers damage or destruction during the period in which any major's operating covenant is still in effect. In either case, optional language exempts a major or a developer from the obligation to repair and rebuild if the damage or destruction occurs near the end of the term of the operating covenant (for example, during the last two or three years) [*see § 34E.200[2],* P 12.01].

For damage or destruction occurring at a time other than the periods described above, the affected party may repair and rebuild, but is not required to do so, with one important exception. The one exception applies to the developer. It must repair and rebuild the improvements on its parcel if (1) no major's parcel was affected by the damage, and the majors execute a written instrument reinstating their covenants of operation for a specific period of years, or (2) one or more majors' parcels was affected by the damage, and at least one major elects to and does in fact rebuild [*see § 34E.200[2],* P 12.01].

Any required rebuilding must conform to all provisions of the REA [*see § 34E.200[2],* P 12.02]. If a party is not

required to or elects not to rebuild, the damaged improvements must be razed and cleared and the parcel landscaped [*see § 34E.200[2],* P 12.03].

Specific provisions for damage and destruction must be tailored to the actual parties involved. For example, the provisions in this form, which are tied to the existence of majors' operating covenants, would be inappropriate in an REA that does not contain any operating covenants by the majors. Also, damage and destruction provisions are of particular importance to a lender for the shopping center. In Paragraph 12.04 of this form, a lender (or its purchaser) is not obligated to rebuild or repair unless the damage or destruction occurs after it (or its purchaser) acquires title to the affected parcel.

[o] Condemnation

Article 13 of this form sets forth the rights and duties of each party in the event that any portion of the shopping center is taken by eminent domain. A lender for a shopping center usually requires that an REA grant its borrower-party the right to terminate the REA for substantial takings of the property securing the lender's security interest. Under what circumstances a partial taking entitles the affected owner to terminate the REA (at least with respect to the portion of land taken) is a matter for agreement among the parties. Such an agreement is likely to be strongly influenced by the lenders involved.

In this form, a taking of more than a specified percentage of any building in the center obligates the owner to replace the floor area taken with unused remaining building area, if any, on the parcel. If it is not possible to restore the building to at least a specified percentage (for example, 90 percent) of the total floor area existing prior to the taking, the owner is permitted to terminate the REA with respect to its parcel [*see § 34E.200[2],* P 13.01(a)].

A taking of the parking areas of the shopping center will require the parties to agree on a plan for replacement, if possible, if the taking (1) causes the remaining parking areas to violate the parking ratios required by the REA or then-applicable zoning laws governing the size, number, layout, or other aspects of the parking areas, or (2) results in closure of ingress or egress to the shopping center. If the parties cannot reach an agreement within a specified time period, the owner of the affected parcel has the right to terminate the REA with respect to its parcel [*see § 34E.200[2],* P 13.01(b)].

The damages or compensation for a taking by eminent domain are to be awarded to each party as set forth in any applicable agreement, judgment, verdict, or order [*see § 34E.200[2],* P 13.02]. The Eminent Domain Law [*Code Civ. Proc. §§ 1230.010-1273.050*] contains specific provisions relating to compensation for a taking by eminent domain [*see Code Civ. Proc. §§ 1263.010-1263.770*]. Those provisions do not affect any rights the owner of property acquired by eminent domain may have under any other statute. However, when two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss [*see Code Civ. Proc. § 1263.010(b)*].

[p] Default, Termination, and Remedies

To assure continuity of the provisions of an REA necessary to achieve its intended purpose, the REA must provide that a breach by any party of its provisions does not terminate the agreement [*see § 34E.200[2],* P 14.04]. Otherwise, parties should be entitled to pursue any remedy at law or in equity against a breaching party [*see § 34E.200[2],* P 14.01]. This form grants a defaulting party a period within which to cure any default [*see § 34E.200[2],* P 14.02]. It also gives any party the right to (1) cure another party's default after the expiration of the defaulting party's cure period and any cure period granted a lender [*see § 34E.200[2],* P 15.04], and (2) record a claim of lien against the defaulting party's parcel for the amount expended by the curing party [*see § 34E.200[2],* P 14.03(b)].

The term of this REA is stated to be for a fixed number of years agreed on by the parties [*see § 34E.200[2],* P 14.05]. That number should be substantial. The REA may not be terminated or otherwise modified prior to the expiration of that

period without the consent of all of the parties. Optional language is included for use if a lender's consent will also be required for termination or modification. Finally, the REA should specifically provide that the consent of any tenant or other non-party occupant of the shopping center is not required for termination or modification [*see § 34E.200 [2]*, P 14.05].

[q] Lender Protective Provisions

This form contains several provisions intended to protect a lender's security interest in the shopping center [*see § 34E.200[2]*, art. 15]. For example, although this form provides that a lender's mortgage or deed of trust is subordinate to the REA, it also states that a breach of the REA does not defeat or render invalid any mortgage or trust deed [*see § 34E.200[2]*, P 15.01]. Lenders are usually willing to subordinate their security interest to an REA, provided it contains adequate protective provisions for the lender, since the value of the shopping center as a whole, and the property securing its interest, is enhanced by its operation as an integrated whole in accordance with the covenants, conditions, and restrictions imposed by the REA. If encumbrances exist on any portion of the shopping center prior to the date the REA is recorded, the borrower-party should be required to obtain its lender's subordination to the REA in a separate instrument [*see § 34E.200[2]*, P 15.01]. This form also includes a provision that grants the fee owner under a sale-leaseback arrangement the same rights as a lender during the period a lease is in effect [*see § 34E.200[2]*, P 15.06].

Under this form, a lender must be given notice of any default under the agreement by its borrower-party [*see § 34E.200[2]*, P 15.02], and must also be given a period of time within which to cure the default or to commence curative action [*see § 34E.200[2]*, P 15.04(a)]. This cure period must extend beyond the cure period granted to the defaulting party to cure its own default [*see § 34E.200[2]*, P 14.02]. In lieu of curing the default, the lender may commence foreclosure proceedings during the cure period, but only if it cures all monetary defaults and performs all monetary obligations of its borrower-party until title to the affected parcel is transferred through foreclosure [*see § 34E.200[2]*, P 15.04(b)].

Paragraph 14.03 of this form permits a nondefaulting party to cure a default of a party (but only after notice to the party and to the lender and expiration of the applicable cure periods for both), and to record a claim of lien on the defaulting party's parcel for costs and expenses incurred by the curing party. However, the form also provides that any claim of lien so recorded is subordinate to a first mortgage or deed of trust, whether recorded before or after the claim of lien [*see § 34E.200[2]*, P 15.05(a)]. The same priority over a claim of lien is granted to the fee owner under a sale-leaseback arrangement [*see § 34E.200[2]*, P 15.05(b)].

This form grants lenders other rights in addition to those set forth in Article 15. For example, it contains optional language that may be included if a lender's consent is to be required for any amendment, modification, or termination of the agreement [*see § 34E.200[2]*, P 14.05]. Since a lender will typically insist that it not be burdened by an operating covenant given by its borrower-party in the event that the lender obtains title to the borrower's parcel, the agreement also subordinates any covenant to the lender's mortgage or trust deed [*see § 34E.200[2]*, P 8.04]. Also, a lender (or fee owner under a sale-leaseback arrangement) is obligated to repair or restore damaged or destroyed improvements only if the damage or destruction occurs after the lender or fee owner (or purchaser from either) acquires title to the affected parcel [*see § 34E.200[2]*, P 12.04].

[r] Merchants' Association

This form contains an optional article requiring the developer to organize a merchants' association for the shopping center [*see § 34E.200[2]*, art. 16]. When this subject is covered in an REA, the REA should state whether the association will be unincorporated or incorporated. In California, most merchants' associations organized as corporations are incorporated under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code §§ 7110-8910*].

When an REA requires the organization of a merchant's association, the owners should agree on the purpose of the association. In this form, the association's purpose is limited to promoting the common business interests of the merchants through advertising and other forms of promotion. The REA should also define the respective obligations of each of the parties and tenants in the shopping center for membership and dues in the association. The tenants' leases should require them to be members of the association [*see, e.g., § 34E.201[2]*, P 10.01]. If exceptions for required membership or dues will exist for major occupants or tenants, the REA should clearly describe those exceptions.

For additional coverage of merchants' associations, see *§ 34E.18*.

[2] FORM

Reciprocal Easement Agreement and Declaration of Restrictions and Covenants (REA)

Grant of Reciprocal Easements and Declaration of Covenants and Restrictions for _____ [*name of shopping center*]

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This Agreement is made on _____[*date*] by _____[*name of developer/owner*], a [*legal status, e.g.,* California corporation] ("Developer"), _____[*name of second owner*], a [*legal status, e.g.,* California corporation] ("Owner #2"), and _____[*name of third owner*], a [*legal status, e.g.,* California corporation] ("Owner #3"), each of whom is a party ("Party") to this Agreement.

RECITALS

A. Developer is the owner of certain real property ("Developer's Parcel") located in the city of _____, County of _____, State of California, designated as Parcel[s] [*number(s)*] on [*select the appropriate provision below*]

[*EITHER*]

Parcel Map [*number*] filed for record on _____[*date*] as Instrument No. _____ in the Official Records of _____[*name of county where parcel is located*] County, State of California.

[*OR*]

the site plan set forth as Exhibit _____, which is attached to this Agreement and hereby incorporated

by reference.

[*Continue with the following:*]

The legal description for Developer's Parcel is set forth in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference.

B. Owner #2 is the owner of certain real property ("Owner #2's Parcel") located in the city of _____, County of _____, State of California, designated as Parcel[s] [*number(s)*] on [*select the appropriate provision below*]

[*EITHER*]

Parcel Map [*number*] filed for record on _____[*date*] as Instrument No. _____ in the Official Records of _____[*name of county where parcel is located*] County, State of California.

[*OR*]

the site plan set forth as Exhibit _____, which is attached to this Agreement and hereby incorporated by reference.

[*Continue with the following:*]

The legal description for Owner #2's Parcel is set forth in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference.

C. Owner #3 is the owner of certain real property ("Owner #3's Parcel") located in the city of _____, County of _____, State of California, designated as Parcel[s] [*number(s)*] on [*select the appropriate provision below*]

[*EITHER*]

Parcel Map [*number*] filed for record on _____[*date*] as Instrument No. _____ in the Official Records of _____[*name of county where parcel is located*] County, State of California.

[*OR*]

the site plan set forth as Exhibit _____, which is attached to this Agreement and hereby incorporated by reference.

[*Continue with the following:*]

The legal description for Owner #3's Parcel is set forth in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference.

D. The Parties intend to develop the real property owned by each of them and described in Recitals A through C of this Agreement ("the Parcels") into a unified commercial shopping center ("the Shopping Center"), as set forth on the site plan (the "Site Plan") contained in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference. The Shopping Center and each Parcel of real property contained in the Shopping Center will contain both Commercial Areas and Common Areas, as more particularly described in this Agreement.

E. By entering into this Agreement, the Parties desire to establish a common, general plan for the joint protection, development, maintenance, and improvement of the parcels in the Shopping Center as an integrated, retail shopping center. To this end, each Parcel shall be subject to certain protective provisions, covenants, conditions, and restrictions described in this Agreement, for the mutual benefit of the Parties and of each Parcel. Further, each Party shall grant to the others certain reciprocal easements in, to, over, under, and across the Common Areas located on each of the Parcels.

In consideration of the mutual covenants and agreements contained in this Agreement, the Parties agree as follows:

ARTICLE 1. DEFINITIONS

"Commercial Areas"

1.01. The term "Commercial Areas" means the portion of each Parcel and the portions of the Shopping Center designated as Commercial Areas on the Site Plan set forth in Exhibit _____. Commercial Areas are those portions of the Shopping Center designated for (1) the construction by the Parties of buildings (including loading docks and delivery areas appurtenant to those buildings), and (2) the use by the Parties or other Occupants for commercial purposes or other purposes related to the Shopping Center. The term "Commercial Areas" excludes Common Areas.

"Common Areas"

1.02. The term "Common Areas" means the portion of each Parcel and the portion of the Shopping Center designated as Common Areas on the Site Plan set forth in Exhibit _____. Common Areas are those portions of the Shopping Center designated for the nonexclusive use of the Parties, Occupants, and Users in common. Common Areas include all of the following: Parking Areas; roadways; sidewalks; walkways; malls; landscaped areas; public restrooms that are both directly accessible from pedestrian passageways and not located in the retail space of any Occupant; Shopping Center signs; and all other similar facilities provided for the convenience of Users. The term "Common Areas" does not include any Commercial Areas.

"Majors"

1.03. For purposes of this Agreement, Owner #2 and Owner #3 are each a "Major," and are hereafter collectively referred to as the "Majors." Each shall continue to be a Major for the period during which each operates on its respective Parcel a [*specific type of business, e.g.*, retail department store] devoted exclusively to that Major's business and containing at least the minimum gross floor area required under Paragraph 6.02 of this Agreement for that Parcel. Any Person who becomes a Party to this Agreement (determined pursuant to the provisions of Article 2) as a successor in interest to any original Major named in this Agreement shall be a Major for so long as the successor Party operates a [*specific type of business, e.g.*, retail department store] devoted exclusively to that Party's business and containing at least the minimum gross floor area required under Paragraph 6.02 of this Agreement for that Parcel. [*Add if applicable:* Any successor in interest described in Paragraph 8.03 of this Agreement to a Major originally named in this Agreement

shall also be a Major for purposes of this Agreement.]

"Maximum Gross Floor Area"

1.04. The term "maximum gross floor area" means the maximum number of square feet of floor area permitted under Paragraph 5.03 of this Agreement for a building constructed on the Commercial Area of a Parcel, whether (1) all of that floor area is used in initial construction of the building, or (2) part of that floor area is used in initial construction of the building and the balance is held for expansion.

"Minimum Gross Floor Area"

1.05. The term "minimum gross floor area" means the minimum number of square feet of floor area required for a building initially constructed on the Commercial Area of a Parcel, as set forth in Paragraph 6.02 of this Agreement.

"Occupant"

1.06. The term "Occupant" means each of the Parties to this Agreement and any Person entitled at any time to the use and occupancy of any portion of the Commercial Areas in the Shopping Center under this Agreement or under any lease, license, concession agreement, or other instrument or arrangement.

"Party"

1.07. The term "Party" means each Person executing this Agreement, or that Person's successor in interest to a Parcel, as shown by the Official Records of the County of _____, State of California, and determined as of the time in question by the provisions of Article 2 of this Agreement.

"Person"

1.08. The term "Person" means an individual or a partnership, firm, association, corporation, trust, or any other form of legal or business entity.

"Shopping Center"

1.09. The term "Shopping Center" means the Parcels described in Recitals A through C. The Shopping Center contains both Common Areas and Commercial Areas as set forth in the Site Plan contained in Exhibit _____.

"Users"

1.10. The term "Users" means all Persons who have been granted permission to use the Common Areas, including the Parties, Occupants, employees, service and other personnel, invitees, customers, agents, and contractors.

ARTICLE 2. TRANSFER LIMITATIONS,
RIGHTS, AND OBLIGATIONS

Limits on Transfer

2.01. No Party may transfer or assign any right, power, or obligation created under this Agreement without also transferring its own Parcel or its interest in that Parcel. Further, the transfer or assignment must comply with this Agreement. Any instrument of transfer or assignment shall state that the transfer or assignment is subject to this Agreement and shall refer to and incorporate by reference this Agreement. Any such reference shall recite the recording information for this Agreement, or for any memorandum of this Agreement, including the date and location of recordation and the instrument number.

Special Transfer Restrictions

2.02. Developer shall not subdivide or otherwise split or divide its Parcel at any time during the term of this Agreement, unless the Majors first approve the subdivision, split, or division. [*Add if applicable:* Notwithstanding any other provision of this Agreement, no Party shall make a transfer of its Parcel or an interest in its Parcel that, pursuant to the other provisions of this Article 2, results in the Party ceasing to be a Party to this Agreement, unless (1) in the case of the Developer, it has leased at least _____ (*same number used in P 7.01(b), e.g.,* 40) percent of the leaseable retail store space in its building, or (2) in the case of a Major, it has completed all construction required of it under Article 6 and has opened for business.]

[*Optional*]

Personal Liability

2.03. Notwithstanding any other provisions of this Article 2, each Party is and shall remain personally liable to construct all improvements required of it under Article 6. A transfer of any right, title, or interest in a Party's Parcel (whether or not the transfer results in the Party remaining a Party pursuant to the provisions of this Article 2) shall not relieve the Party of its personal liability under this Paragraph if the transfer occurs prior to the following: (1) in the case of the Developer, the leasing of at least [*same number used in P 7.01(b), e.g.,* 40] percent of the leaseable retail store space in its building, or (2) in the case of a Major, the completion of all construction required of it under Article 6 and its opening for business.

[*Continue with the following:*]

Transfer of Whole Interest

2.04. This Paragraph applies if a Party (1) conveys any leasehold interest in its Parcel, or (2) assigns, transfers, or conveys its whole interest in its Parcel without retaining any beneficial interest (other than under the terms of a deed of trust or mortgage), or without simultaneously acquiring a new interest by way of leasehold, life estate, or other possessory interest. In either case, the powers, rights, and interest conferred on that Party by this Agreement shall be assigned, transferred, or conveyed to the transferee, assignee, grantee, or lessee, and the obligations under this Agreement shall be assumed, pursuant to Paragraph 2.07 of this Agreement, by the transferee, assignee, grantee, or lessee.

Retention of Interest

2.05. This Paragraph applies if a Party (1) assigns, transfers, or conveys its whole interest in its Parcel but simultaneously acquires a new interest in the Parcel under a lease or similar possessory arrangement, or (2) conveys its interest in its Parcel or any part of it by deed of trust or other security instrument as security for indebtedness. In either case, none of the powers or obligations conferred on that Party pursuant to this Agreement shall be assigned, transferred, or conveyed with the interest assigned, transferred, or conveyed by the Party. All of the powers, rights, interests, and obligations provided for under this Agreement shall remain in the transferring Party for so long as that Party, (1) under the first set of circumstances described above, retains the new leasehold or other possessory interest in and to the Parcel; or, (2) under the second set of circumstances described above, remains the beneficial owner of its Parcel.

Multiple Owners of Parcel

2.06. (a) This Paragraph applies if at any time during the term of this Agreement a Party conveys or transfers its whole or any portion of its interest in its Parcel so as to vest ownership of the Parcel or any interest in the Parcel in more than one Person. In that case, those Persons, hereafter referred to as "Joint Owners of the Parcel," shall be considered a single Party under this Agreement and shall jointly appoint one of their number to act as Agent on behalf of all of them in carrying out the provisions of this Agreement. The appointment of an Agent pursuant to this Paragraph must be in a writing that is duly executed and acknowledged by each Joint Owner of the Parcel and is recorded in the Office of the Recorder of [*county in which shopping center is located*], California. Further, a copy of this writing must be given to every other Party to this Agreement in the manner required under Paragraph 17.04 of this Agreement. If an appointed Agent dies, is removed, becomes incapacitated, or is dissolved, the remaining Joint Owners of the Parcel shall promptly appoint a new Agent. If they fail to do so, an Agent shall be appointed pursuant to Subparagraph (d) of this Paragraph.

(b) The performance or exercise of rights under this Agreement by the Agent appointed to represent Joint Owners of the Parcel is binding on each Joint Owner of the Parcel and on each Person having an interest in a Joint Owner of the Parcel. So long as the appointment of an Agent remains in effect, each Joint Owner of the Parcel shall act only through its appointed Agent, and the other Parties to this Agreement shall have the right to deal exclusively with and to rely solely on the acts or omissions of the Agent in the performance of this Agreement. However, the appointment of an Agent pursuant to Subparagraph (a) of this Paragraph shall not relieve any Joint Owner of the Parcel from any of the obligations created under this Agreement.

(c) In the event an Agent is required to be appointed under the provisions of Subparagraph (a) of this Paragraph but none is appointed, the acts of any Party whose original exclusive interest in a Parcel is subsequently divided shall be binding on all Persons having an interest in the Parcel, whether or not the original Party retains any interest in the Parcel, until such time as written notice of the appointment of an Agent is given in the manner described in Subparagraph (a) of this Paragraph and is recorded in the Office of the Recorder of _____ County, California.

(d) If the Joint Owners of the Parcel do not appoint an Agent within [*number, e.g.,* 30] days after they become obligated to make such an appointment, the other Parties to this Agreement, or any one of them if they are unable to act jointly, may appoint an Agent in the manner required under Subparagraph (a) of this Paragraph. That Agent shall be a Party to this Agreement for so long as the appointment is in effect. The appointment shall be binding and remain in full force and effect until the Joint Owners of the affected Parcel appoint a new Agent pursuant to Subparagraph (a) of this Paragraph.

(e) The Joint Owners of the Parcel may at any time revoke the previous appointment of an Agent and appoint a new one in the manner prescribed in Subparagraph (a) of this Paragraph.

(f) An Agent appointed by the Joint Owners of the Parcel shall be the agent of each of its principals. Service of any process, writ, summons, order, or other mandate of any nature relating to any action, suit, or proceeding arising out of this Agreement, or any demand for arbitration relating to this Agreement, may be made on the Agent. Service on the Agent constitutes due and proper service of any matter on each of its principals, provided a copy of the matter is also mailed to each principal at its last address known to the sender.

Release on Transfer

2.07. (a) If a Party conveys, assigns, sells, or otherwise transfers its entire right, title, and interest in its Parcel, that Party shall be released from any obligations arising under this Agreement subsequent to the date of the transfer, provided the transferring Party delivers written notice of the transfer and a written assumption statement, in recordable form and executed by the transferee, to all other Parties to this Agreement. If the transferring Party is obligated to operate and maintain the Common Areas of the Shopping Center, that Party shall not be released from its obligations under this Agreement until it also delivers a final summary statement of all costs and expenses for the Common Areas as of the effective transfer date. The written notice of transfer, the assumption statement, and, if applicable, the final summary statement for the Common Areas, shall be delivered prior to or at the time the instrument effecting the transfer is filed for recording with the County of _____[*name of county where shopping center is located*], California. The written assumption statement referred to in this Subparagraph shall be executed by the transferee in recordable form, shall contain an express statement that the transferee expressly assumes and agrees to be bound by the covenants and restrictions contained in this Agreement, and shall be delivered to the transferring Party prior to or at the time the instrument effecting the transfer of title or interest is filed for recording. A transferee's failure to comply with these requirements relating to assumption statements constitutes a default under this Agreement by the transferee, but does not modify or negate that transferee's liability under this Agreement or affect the running of any covenants with the land provided for under this Agreement.

(b) Any transferee shall not be liable for any default of its transferring Party occurring prior to the time the transferee acquires its right, title, or interest in a Parcel, with the following exception: the acquired right, title, or interest shall be subject to any prior recorded claim of lien described in Paragraph 14.03 of this Agreement.

ARTICLE 3. EASEMENTS

Common Area Easements

3.01. Each Party, as grantor, grants to the other Parties, as grantees, the following nonexclusive easements over, across, in, under, and through the Common Areas of the grantor's Parcel:

(a) For parking motor vehicles in those portions of the Common Areas that are from time to time designated as Parking Areas.

(b) For ingress and egress over, across, in, and through the Common Areas by vehicular and pedestrian traffic.

(c) For the installation, maintenance, removal, and replacement of water mains, telephone lines, gas mains, sewers, electrical systems or conduits, water drainage systems or structures, and other public utilities and services (collectively referred to as "Utility System(s)"). Except when not feasible, all Utility Systems shall be located underground. The location of any Utility System that must be located above ground must be placed so as to not interfere with the use of the Common Areas.

Nature of Easements

3.02. For purposes of the easements granted in Paragraph 3.01 of this Agreement, the Parcels benefited by each easement constitute the dominant estate, and the Parcel burdened by each easement constitutes the servient estate. The grant of an easement to a Party for that Party's benefit shall also be a grant to and for the benefit of that Party's successors, heirs, assigns, Occupants, and Users. Each easement granted in Paragraph 3.01 of this Agreement is appurtenant to and for the benefit of each Parcel owned by each grantee of the easement. No easement may be transferred, assigned, or encumbered except as an appurtenance to the benefited Parcels.

Relocation and Maintenance of Utility Systems

3.03. The grantee of any easement for Utility Systems shall be responsible for all maintenance and repairs performed or made in connection with the easement. All maintenance and repairs shall be performed so as not to interfere or obstruct the business of or access to and from the Parcel burdened by the easement. Each Party may relocate utility drains, mains, lines, sewers, and related equipment located on its Parcel, provided the following conditions and requirements are satisfied: (1) the Party pays the sole cost and expense of the relocation; the relocation is performed only after [*number, e.g.,* 30] days' written notice has been given to the grantee of the easement in question; the relocation does not reduce or unreasonably impair the usefulness or function of the Utility facilities; the relocation does not interrupt the Utility services to the grantee; and the relocation will not interfere with the grantee's business operations or the business operations of any tenant of the grantee.

Duration of Easements

3.04. Each easement granted under this Article shall continue in effect both as to any Parcel benefited and as to any Parcel burdened by the easement until the use of the easement for the benefit of a particular Parcel is abandoned for a period of at least [*time period, e.g.,* two years].

Temporary Encroachments

3.05. Each Party agrees that during the construction of improvements on the Common Areas and the Commercial Areas as required under this Agreement, certain minor and temporary encroachments on the Common Areas may occur due to the use of equipment (such as ladders, scaffolds, and barricades) in connection with construction, and that these temporary encroachments shall be permitted on the Parcels for only a limited time and only to the extent necessary for the construction involved. For the same purpose and the same limited time and extent, the Parties further agree that the Common Areas located on each Parcel may be used for ingress and egress by construction-related vehicles and personnel and for the temporary storage of construction materials and equipment.

ARTICLE 4. OPERATIONS AND USE

Name of Shopping Center

4.01. The name of the Shopping Center is [*specify*]. This name may not be changed without the written consent of all of the Parties.

Signs

4.02. (a) Except as provided in Subparagraph (b) of this Paragraph, no sign, symbol, advertisement, or billboard may be

constructed, used, maintained, erected, posted, displayed, or permitted on or about any portion of the Shopping Center, with the following exception: one storefront sign may be used for each retail establishment in the Shopping Center, provided the sign (1) identifies the name, business, or symbol of the establishment, (2) does not advertise any particular item of merchandise (other than as may be contained in the store's trade name), (3) is harmonious with the general exterior architectural style of the buildings in the Shopping Center, (4) is of a type, size, and design commonly found in first-class regional [*or* neighborhood] shopping centers in [*geographical region*], and (5) otherwise complies with the sign criteria approved by the Parties [*if sign criteria has been approved and will be part of Agreement, add:* and set forth in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference].

(b) Notwithstanding Subparagraph (a) of this Paragraph, each Major shall have the right to affix to its building its usual and customary signs and/or logos, whether or not the signs or logos conform to the sign criteria otherwise approved by the Parties.

(c) Monument or pylon signs advertising the Shopping Center may be placed only in those locations so designated on the Site Plan. The size, content, and other physical characteristics of the signs shall be approved by the Parties.

Sound and Light Projections

4.03. No Occupant may operate or maintain any system or electronic device (such as loudspeakers or search lights) that projects sound or light beyond the confines of the Occupant's retail establishment. A sound system for the Shopping Center as a whole, as approved by the Parties, may be installed for general promotional purposes.

Access Between Parcels

4.04. Except as otherwise provided in this Agreement, no hedge, fence, wall, or similar barrier may be placed, installed, or constructed on a Parcel if the barrier would block or otherwise interfere with access between that Parcel and any other Parcel.

Rules for Common Areas

4.05. (a) The Parties [*or* The Majors] may from time to time adopt rules and regulations pertaining to the use of all Common Areas of the Shopping Center by Occupants and Users, provided that no rule or regulation shall abrogate, abridge, or otherwise modify the rights granted to any Party under this Agreement. [*If rules and regulations have already been adopted, add:* Unless and until modified by the Parties (*or* the Majors), the rules and regulations attached to this Agreement as Exhibit _____ and hereby incorporated by reference shall be in force and effect.] As part of its obligation to manage, operate, and maintain the Common Areas, Developer shall enforce all rules and regulations for the Common Areas.

(b) No portion of the Common Areas may be used for any commercial purpose by any Occupant or User except as may be permitted by this Agreement or by the rules and regulations adopted for use of the Common Areas pursuant to this Agreement.

[*Choose one of the following paragraphs:*]

[*If retail uses only will be permitted, use:*]

Permitted Uses

4.06. Subject to any limitations set forth in this Article, the Shopping Center may be used for retail purposes only, and is limited to the development, construction, leasing, operation, and maintenance of retail business establishments and related facilities (such as the Common Areas).

[*OR*]

[*If retail and limited office uses will be permitted, use:*]

Permitted Uses

4.06. Except as otherwise provided in this Agreement, the Shopping Center may be used only for the development, construction, leasing, operation, and maintenance of the following: retail stores; service businesses customarily located in a first-class regional [*or* neighborhood] shopping center; professional offices; and financial institutions.

[*Continue with the following:*]

Prohibited Operations and Nuisances

4.07. (a) No Party may conduct or permit any activity or use on its Parcel that constitutes a private or public nuisance, emits any noise or sound that is objectionable due to intermittence, beat, frequency, shrillness, or loudness; emits any obnoxious odor; involves the use of any noxious, toxic, caustic, hazardous, or corrosive fuel, gas, or other substance; produces dust or dirt; involves a risk of fire, explosion, or other dangerous hazard; involves the burning or incineration of garbage or refuse; or violates any law, ordinance, or regulation of any governmental entity with jurisdiction over the Shopping Center. No Parcel may be used for storage or warehouse purposes, except that a retail establishment may temporarily store goods and merchandise intended for sale at its establishment, subject to any limitations set forth in the Occupant's lease. Manufacturing, industrial, or residential uses shall all be prohibited on every Parcel. The Common Areas shall not be used for the display of merchandise by any Occupant or for any related commercial activity of any Occupant, except when either is conducted as part of a common promotional plan for the Shopping Center instituted by Developer [*or* the Merchants' Association for the Shopping Center] and approved by the Parties [*or* the Majors].

(b) Entertainment or recreational uses are not permitted on or in the Shopping Center [*if applicable, add:*, except on the Commercial Area of Parcel _____ (*number*)]. Uses subject to this prohibition include: bowling alleys; skating rinks; theaters; video or other game arcades; health spas, studios, or gyms; massage parlors; pool or billiard halls; and card rooms. Further, uses for general educational, training, or instructional purposes (such as beauty schools, barber colleges, or other facilities oriented primarily toward students or trainees rather than customers) are not permitted [*if applicable, add:*, except on the Commercial Area of Parcel _____ (*number*)].

(c) "Fast-food" establishments [*select the appropriate provision below*]

[*EITHER*]

are not permitted in the Shopping Center.

[*OR*]

are permitted in the Shopping Center, subject to the following limitation[s]: _____[*describe geographical or other limitations, e.g.,* these establishments shall be permitted only on the Commercial Area of Parcel(s) _____ *or* these establishments shall be permitted only in the portion of the Commercial Area designated "Food Court" in the Site Plan attached to this Agreement as Exhibit _____ *or* no fast-food establishment may be located within _____ (*distance, e.g.,* 200 feet) of any perimeter boundary of the Commercial Area(s) of Parcel(s) _____].

[*Continue with the following:*]

For purposes of this Agreement, a "fast-food" establishment is one that specializes in the preparation and sale of food primarily intended for off-premises consumption, and includes any establishment that has any walk-up, drive-up, or drive-through counter, window, or similar facility for serving or dispensing food. Any Occupant operating a fast-food establishment within the Shopping Center shall, at the Occupant's sole cost and expense, keep the Common Areas at all times free of trash and debris caused by the establishment. No portion of this cost may be included in the Common Area Maintenance Costs. Any lease to an Occupant operating a fast-food establishment shall contain provisions incorporating the preceding requirements.

(d) Restaurants are [*select the appropriate provision below*]

[*EITHER*]

not permitted in the Shopping Center.

[*OR*]

are permitted in the Shopping Center, subject to the following limitation[s]: [*describe geographical or other limitations, e.g.,* a restaurant may be located only on the Commercial Area of Parcel(s) _____ *or* a restaurant may be located only in the portion of the Commercial Area designated "Food Court" in the Site Plan attached to this Agreement as Exhibit _____ *or* no restaurant may be located within _____ (*distance, e.g.,* 200 feet) of any perimeter boundary of the Commercial Area of Parcel(s) _____].

[*Continue with the following:*]

For purposes of this Agreement, a "restaurant" is an establishment that prepares and serves food primarily for consumption on the premises and that is not included in the definition of a "fast-food" establishment set forth in Subparagraph (c) of this Paragraph. Any Occupant operating a restaurant within the Shopping Center shall, at the Occupant's sole cost and expense, keep the Common Areas at all times free of trash and debris caused by the restaurant. No portion of this cost may be included in the Common Area Maintenance Costs. Any lease to an Occupant operating a restaurant shall contain provisions incorporating the preceding requirements.

[*If desired, add following protective use covenant for specific type of business conducted by a party to agreement:*]

(e) The Parties covenant for themselves and their successors and assigns, for the benefit of [*name of benefited party,*

e.g., Owner #2] and its successors and assigns, that for so long as the business of a [*type of business, e.g.*, grocery supermarket] is operated on [*specify parcel, e.g.*, Owner #2's Parcel], no other portion of the Shopping Center may be used to operate [*describe prohibited businesses, e.g.*, any store or business that is or may reasonably be considered to be a grocery supermarket, grocery store, grocery market, supermarket, or similar establishment, however denominated; or any store primarily engaged in the sale of alcoholic beverages for consumption off-premises].

[*Describe any exceptions to foregoing prohibition, e.g.:*]

Notwithstanding the foregoing, nothing in this Subparagraph shall prohibit [*exception, e.g.*, the sale of packaged food items and alcoholic beverages by a drug store operated on _____ (*specify parcel, e.g.*, Owner #3's Parcel), provided the primary business of the _____ (*type of establishment, e.g.*, drug store) is not the sale of packaged food items and alcoholic beverages].

[*Continue optional Subparagraph (e) with the following:*]

The restriction described in this Subparagraph shall continue in effect unless and until the [*type of business protected by restriction, e.g.*, grocery supermarket] ceases to operate on [*specify parcel, e.g.*, Owner #2's Parcel] for a period of at least [*number, e.g.*, 365] consecutive days, except when operation ceases because of one of the following events: remodeling of the building containing the [*type of business, e.g.*, grocery supermarket] by its Occupant; major damage or destruction to the building containing the [*type of business, e.g.*, grocery supermarket], provided the Occupant commences repair and restoration within a reasonable time period; or acts that are beyond the reasonable control of the building's Occupant and are described in Paragraph 14.06 of this Agreement.

ARTICLE 5. BUILDING AND RELATED IMPROVEMENTS

Uniform Plan for Shopping Center

5.01. The Parties agree that a primary purpose of this Agreement is to create a uniform plan for development of the Shopping Center. To this end, any construction performed by a Party on its Parcel or on the Common Areas of any Parcel shall comply with all terms, covenants, and conditions of this Agreement, and shall otherwise at all times be architecturally and aesthetically compatible with all other buildings and improvements in the Shopping Center. Construction work subject to these requirements includes construction of a new building or other improvement, and construction involving the remodeling of or alterations or additions to an existing building or other improvement.

Limit Lines for Buildings

5.02. Any building or other structure may be constructed only on and above the surface of ground area designated as a Commercial Area on the Site Plan set forth in Exhibit _____. Notwithstanding the foregoing, minor encroachments beyond the boundary of any Commercial Area are permitted, provided all of the following apply:

(1) Any such encroachment is caused by a building overhang, canopy, eave, foundation, or footing;

(2) Any encroaching foundation or footing does not extend more than five feet beyond the boundary of the Commercial Area;

(3) The encroachment is designated in plans approved pursuant to the provisions of Article 6; and

(4) If the encroachment is on or over another Party's Parcel, the encroachment does not interfere with that Parcel and has been approved in writing by the Parcel's owner.

Building Size Limits

5.03. Any building constructed on the Commercial Area of a Parcel shall not contain more than the Maximum Gross Floor Area permitted for that Commercial Area, which is as follows:

COMMERCIAL AREA	MAXIMUM GROSS FLOOR AREA
Owner #2's Parcel	_____ square feet
Owner #3's Parcel	_____ square feet

Building Height Limits

5.04. Any building constructed on the Commercial Area of a Parcel shall not exceed the following height, in number of stories and/or in total height:

PARCEL	MAXIMUM STORIES	MAXIMUM HEIGHT
Developer's Parcel		
Owner #2's Parcel	_____	_____
Owner #3's Parcel	_____	_____

For purposes of this Paragraph, the height of any building shall be measured from the finish grade of the pad to the highest point of the building, including any sign or other structure or equipment affixed to the building.

Sidewalks

5.05. Concrete sidewalks constructed under this Agreement by any of the Parties shall be not less than [*number, e.g.*, 12] feet in width. Any sidewalk located on the Common Areas shall be part of the Common Areas, even if the sidewalk was constructed by a particular Party in connection with the construction by that Party of a building on its Parcel.

Fire Safety

5.06. Any building constructed on the Commercial Area of a Parcel shall be constructed in such a manner that its exterior walls are considered standard fire walls, so as to permit the Parties owning buildings immediately adjacent to the subject building, or Occupants of those adjacent buildings, to procure fire insurance for their buildings as separate structures without the payment of additional premiums required because of their location adjacent to the subject building. Automatic fire sprinklers shall be installed and maintained in each building constructed by a Party. These sprinklers shall satisfy any applicable local requirements and any requirements imposed by insurance companies.

Building Maintenance

5.07. Each Party shall, at that Party's sole cost and expense, maintain in a first-class manner the exterior of any building(s) located on the Commercial Area of that Party's Parcel. This obligation includes regular painting and all of the following, as necessary: reroofing, repair and replacement of stucco and wood surfaces, and removal of graffiti.

Parking Areas

5.08. (a) The Shopping Center as a whole and each Parcel in the Shopping Center shall at all times contain Parking Areas that contain at least [*number, e.g.,* five] parking spaces, adequate in size for full-size domestic automobiles, for each [*number, e.g.,* 1,000] square feet of maximum gross floor area permitted under this Agreement in the Commercial Areas of the Shopping Center and of each Parcel.

(b) The term "Parking Areas" means that portion of the Common Areas used for the parking of motor vehicles, including any roads, sidewalks, walkways, curbs, and landscaped areas contained within these Parking Areas. Parking Areas do not include truck ramps, loading docks, or delivery areas located in Common Areas and immediately adjacent to buildings in Commercial Areas.

(c) Subject to prior approval of the Parties [*or* Majors], any Party shall have the right to relocate or reconfigure Parking Areas located on its Parcel, provided the reconfigured Parking Areas comply at all times with Paragraphs 5.02, 5.03, and 5.04 of this Agreement and Subparagraph (a) of this Paragraph, and provided further that any relocation or reconfiguration (1) does not affect the traffic flow between Parcels; (2) does not block the view of any building on any other Parcel; and (3) is architecturally and aesthetically compatible with other improvements in the Shopping Center.

ARTICLE 6. INITIAL DEVELOPMENT AND CONSTRUCTION OF SHOPPING CENTER

Uniform Development Plan

6.01. In order to implement a uniform plan for the design, construction, and development of the Shopping Center, each Party shall comply with all requirements of this Agreement governing the design, construction, and development of any building or other improvement on the Commercial Area of its Parcel and on the Common Areas of its Parcel, to the extent applicable.

General Construction Obligations of Each Party

6.02. (a) Developer, at its sole cost and expense, shall construct or cause to be constructed in the Commercial Area of its Parcel, a [*number of floors, e.g.,* one-story] building containing a minimum gross floor area of at least [*number*] square feet of leasable retail store space. Developer shall also construct or cause to be constructed all improvements required under this Agreement for all Common Areas of the Shopping Center.

(b) Owner #2, at its sole cost and expense, shall construct or cause to be constructed in the Commercial Area of its Parcel, a retail store containing a minimum gross floor area of at least [*number*] square feet.

(c) Owner #3, at its sole cost and expense, shall construct or cause to be constructed in the Commercial Area of its Parcel, a retail store containing a minimum gross floor area of at least [*number*] square feet.

(d) The obligation of each Party to construct a building on its Parcel (and corresponding obligation to pay all expenses and costs) includes all necessary pad work and the installation of all Utility Systems located on the Commercial Area of

each Party's Parcel. The hook-up or connection of Utility Systems to Utility Systems located on the Common Areas (and the corresponding cost and expense) shall be the Developer's responsibility. Each Party shall, at that Party's sole cost and expense, develop and construct any perimeter sidewalks (excluding the street curb) and landscape areas immediately adjacent to and contiguous with the exterior of its building, and any loading docks, delivery areas, or other service facilities for the exclusive use of its building.

(e) Each Party shall at all times keep its Parcel and all improvements erected on the Parcel free and clear of all liens and claims of liens for labor, services, materials, supplies, or equipment furnished to the Parcel in connection with the construction performed by each Party on its Parcel.

(f) Any exterior remodeling or repair and any rebuilding of a building in the Shopping Center permitted or required under this Agreement is subject to and shall conform to all requirements of this Agreement to the extent not rendered inapplicable under any then-applicable laws, regulations, and ordinances of a governmental entity having jurisdiction over the Shopping Center.

Designation of Architects

6.03. Each Party shall designate an architect to prepare the plans and specifications for the building to be constructed on the Commercial Area of its Parcel (the "Commercial Area Plans"). Each Party shall pay all costs, expenses, and fees for the Commercial Area Plans for its Parcel. Developer shall designate an architect to prepare the plans and specifications for the Common Areas ("Project Architect"). This architect may or may not be the same architect any Party has designated to prepare Commercial Area Plans for its Parcel. Designation of a Project Architect must be approved by the Parties, and the contract for architectural services entered into between the Developer and the Project Architect must be approved by the Parties. Any Party except Developer may at any time change its previous designation of an architect, provided the Party gives written notice of the change to each of the other Parties. Developer may not change its designation of a Project Architect previously approved by the Parties without the approval of the Parties.

Preparation and Approval of Plans

6.04. (a) Not later than [*number, e.g.,* 90] days after the effective date of this Agreement (as defined in Paragraph 17.07 of this Agreement), each Party shall cause final Commercial Area Plans for its Parcel to be prepared and submitted to each of the other Parties for review. Commercial Area Plans for each Parcel are deemed approved by each of the other Parties, provided they meet all requirements of the following: the Site Plan attached to this Agreement as Exhibit _____; the exterior elevation specifications contained in Exhibit _____; the construction specifications contained in Exhibit _____; the architectural style specifications for the Shopping Center set forth in Exhibit _____; and all other requirements of this Agreement.

(b) Not later than [*number, e.g.,* 60] days after the effective date of this Agreement (as defined in Paragraph 17.07 of this Agreement), Developer shall cause preliminary plans for the Common Areas to be prepared and submitted to the Parties for their approval. The preliminary plans shall conform to the requirements of the following: the Site Plan attached to this Agreement as Exhibit _____; the exterior elevation specifications contained in Exhibit _____; the construction specifications contained in Exhibit _____; the architectural style specifications for the Shopping Center set forth in Exhibit _____; and all other requirements of this Agreement. Further, the preliminary plans shall include the following:

> (1) All access roadways, exterior boundary walls or fences, signs, walkways, malls, curbs, curb cuts, entrance driveways, interior roadways, Parking Areas, Utility System lines located on the Common Areas that will serve Common Area improvements (and, when designated by a Party in its Commercial

Area Plans, any building located on the Commercial Area of a Parcel), fire hydrants, lighting facilities, and other similar facilities for common use located on the Common Areas.

(2) The location of all facilities for common use in the Common Areas, if the fixing of the location is reasonably possible, or, when the precise location cannot be shown, specifications for the location.

(3) A comprehensive rough and final grading plan for the Common Areas and any required soil compaction or other preparation (including soil tests).

(4) A composite parking layout for the entire Shopping Center, including paving, striping, bumpers, curbs, the location of lighting systems, and the designation of any areas that may be separately illuminated from time to time at the request and sole cost and expense of any Party.

(5) A composite landscaping plan prepared by a landscape architect and specifying overall plant materials and planting, but excluding planting areas immediately adjacent and contiguous to the building to be constructed by the Parties under this Agreement.

(6) The conditions, standards, and architectural treatment that shall govern the location, construction, or installation of improvements on the Common Areas and that shall conform with the requirements of this Agreement and with all minimum requirements of the County of

_____ or other governmental entity having jurisdiction over the performance of the foregoing work in the Shopping Center.

(7) Any off-site improvements required by the local entity with jurisdiction over the Shopping Center, and any extensions of off-site facilities, such as sewer or utility lines or drainage systems, serving the Common Areas.

Approval of Plans for Common Areas

6.05. (a) Each Party shall have [*number, e.g.,* 30] days after its receipt of the preliminary plans for the Common Areas (the "Approval Period") to advise the Project Architect in writing either that it approves the preliminary plans as submitted or that it recommends changes to the preliminary plans. In the latter case, the Party must describe in detail the recommended change. In the absence of any written communication from the Parties during the Approval Period, the preliminary plans shall be deemed approved as submitted. If the Project Architect receives in writing a recommended change to the preliminary plans from any Party prior to the expiration of the Approval Period, the Project Architect shall promptly call a meeting of all Parties for the purpose of considering and either incorporating or not incorporating the recommended change in the final plans for the Common Areas. The Parties shall not unreasonably object to a recommended change, provided the change as implemented conforms to all requirements of this Agreement.

(b) Within [*number, e.g.,* 60] days from the date the preliminary plans are approved by the Parties, the Project Architect shall prepare and deliver to the Parties final plans for the Common Areas (the "Final Plans"). The Final Plans shall incorporate the approved preliminary plans. The requirements set forth in Subparagraph (a) of this Paragraph governing the approval of the preliminary plans shall also apply to the approval of the Final Plans [*when shorter approval period will apply, add:*, except that the applicable approval period shall be _____ (*number less than one used for preliminary plans, e.g.,* 15) days]. Once Final Plans for the Common Areas have been approved by the Parties, no change may be made to the Final Plans without the written consent of the Parties.

Construction for Commercial Areas

6.06. At its sole cost and expense, each Party shall construct or cause to be constructed the building described in the applicable Subparagraph of Paragraph 6.02 of this Agreement on the Commercial Area of its Parcel in accordance with the final Commercial Area Plans for the building prepared and approved pursuant to Paragraph 6.04 of this Agreement. Each Party shall diligently commence and expeditiously pursue construction to enable it to complete construction on or before the Completion Dates set forth in Paragraph 6.10 of this Agreement. Further, each Party shall comply with all requirements of any building codes, zoning laws, and any other laws, regulations, ordinances, or rules of any authority with jurisdiction, and shall apply for and obtain all necessary permits and licenses required for construction.

Construction for Common Areas

6.07. (a) Developer shall construct or cause to be constructed all improvements on the Common Areas required under this Agreement in accordance with the Final Plans for the Common Areas prepared and approved pursuant to Paragraphs 6.04 and 6.05 of this Agreement. Developer shall solicit bids for the construction work in the Common Areas from at least [*number, e.g.,* three] general contractors duly licensed under the laws of the State of California. The Parties (including Developer) shall select a general contractor ("Contractor") for the work and shall approve a construction contract for performance of construction work in the Common Areas. Thereafter, Developer shall enter into the contract with the Contractor. The contract between the Developer and the Contractor shall provide for the construction of all improvements on the Common Areas in accordance with the Final Plans for the Common Areas and all other provisions of this Agreement. The contract shall also contain provisions for the following:

(1) The final payment under the contract due to the Contractor shall be in an amount equal to at least

_____ [*number expressed as percent, e.g.,* 10] percent of the full amount payable under the contract and shall not be paid to the Contractor until the construction work for the Common Areas has been completed, free of liens and claims of liens.

(2) Prior to commencing construction for the Common Areas, the Contractor shall furnish to the Parties (excluding Developer) [*or* to the Majors], at its own cost and expense, the following bonds:

(i) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to

_____ [*specify percentage, e.g.,* 100] percent of the contract price payable under the contract securing the faithful performance by the Contractor of its contract with Developer; and

(ii) A bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to

_____ [*specify percentage, e.g.,* 50] percent of the contract price payable under the contract securing the payment of all claims for the performance of labor or services on, or the furnishing of materials for, the performance of the contract. For any claim, right, or cause of action under either bond described above, the Parties (excluding Developer) [*or* the Majors] shall have the right, in either their name or the name of the Developer, to enforce, settle, receive payments of money, or make payments toward the debt on the contract, as the case may be, in any matter under the bond. Any such action

shall be binding on and without liability to Developer.

(3) All work performed on the Common Areas and all improvements constructed on the Common Areas shall comply with all valid laws, ordinances, regulations, and orders of all federal, state, county, or local governmental agencies or entities having jurisdiction over the Shopping Center.

(4) There shall be no change made to the Final Plans for the Common Areas without the prior written approval of the Parties [*or* the Majors].

(5) All construction work for the Common Areas shall be completed on or before the Completion Dates set forth in Paragraph 6.l0 of this Agreement.

(b) Developer shall furnish the Parties with written [*periodic frequency, e.g.,* weekly *or* monthly] reports on the progress of the construction for the Common Areas. The periodic reports shall contain a summary of work performed during the covered period by the Contractor and Developer and shall also contain a status report on the progress of required governmental approvals for the work and any problems known to Developer that are likely to cause a delay in the progress of the construction.

(c) Developer shall pay all costs and expenses of construction to be performed for the Common Areas, subject to Developer's right to be reimbursed by the other Parties as provided in this Subparagraph. Each Party shall pay a percentage share of the total costs and expenses as follows:

Party	% of Total
Party #2	_____%
Party #3	_____%

At the end of each [*period agreed on by parties, e.g.,* calendar month], Developer shall furnish each Party with a written statement of its total costs and expenses for the preceding [*same period as above, e.g.,* month] and of each Party's share of the total costs and expenses. Developer's statement shall be accompanied by copies of all bills and invoices paid by Developer for the covered [*same period as above, e.g.,* month]. Each Party shall pay its share due to Developer not later than [*number, e.g.,* 30] days after the date of Developer's written statement. "Costs and expenses of construction for the Common Areas" means all amounts reasonably expended by Developer for construction and development of the Common Areas, including payments to the Contractor, the Project Architect, engineers, and governmental and utility entities.

(d) Developer shall at all times during construction of the Common Areas and for at least [*number, e.g.,* three] years after construction is completed, maintain detailed books and records of account that itemize all of its costs and expenses of construction for the Common Areas. Any Party or its authorized agent shall have the right during normal business hours to inspect and make copies of these books and records. Each Party may also cause an audit to be performed of these books and records. If an audit discloses that a Party has been overcharged for any given payment period, either because Developer has overstated the actual amount of costs and expenses for the Common Areas or has overstated the share due from a Party, Developer shall immediately refund the amount of overpayment to the Party. If an audit discloses that Developer has for any given payment period overstated by [*number, e.g.,* 3] percent or more either the actual amount of costs and expenses of construction for the Common Areas or the amount of the share of costs and expenses owed by the Party causing the audit to be performed, Developer shall pay the cost of the audit.

(e) Developer shall at all times keep each Parcel free and clear of liens and claims of liens for labor, services, materials,

supplies, or equipment performed on or furnished to any Parcel in connection with the construction performed by Developer for the Common Areas. Developer may contest a claim of lien on any Parcel only if it first records a bond issued by a responsible corporate surety in an amount required to release the lien. Developer agrees to defend, indemnify, and hold the other Parties harmless from any liability, damage, loss, and other costs and expenses relating to claims of lien arising out of any labor, services, materials, supplies, or equipment furnished to any Parcel in connection with the construction performed by Developer for the Common Areas.

(f) When construction of improvements for the Common Areas is substantially complete, Developer shall notify each of the Parties in writing. Within _____ days after the date of Developer's written notice, the Parties shall inspect the improvements and shall prepare a "punchlist" of all items the Parties consider either defective or not completed. The Project architect shall review the punchlist and indicate on it the corrective work that, in the architect's opinion, is necessary to bring the construction into substantial conformance with the Final Plans for construction in the Common Areas. Within _____ days after the Parties deliver the punchlist to Developer, Developer shall cause the corrective work identified by the architect to be performed. On performance of the corrective work, the Parties shall accept as complete the construction of improvements for the Common Areas. This acceptance shall be in writing. If the Parties, or any of them, fail to deliver a punchlist to Developer within the time period required by this Subparagraph, that Party shall be deemed to have inspected the improvements for the Common Areas and accepted the improvements as complete.

Erection of Barricades

6.08. During the construction of a building on a Parcel, the Party responsible for the work shall erect and maintain a solid barrier around the perimeter of the work site to protect the safety of all Users of the Shopping Center and to protect existing improvements in the Shopping Center from dust and other debris. The barrier shall satisfy all minimum requirements of any applicable local ordinance. If there are no such local requirements, the barrier shall be at least [*number, e.g.,* eight] feet in height and constructed of wood or other solid material that is at least as durable as wood. In any event, the barricade shall be painted a color that is aesthetically compatible with the other buildings and improvements in the Shopping Center.

Separate Works of Improvement

6.09. For purposes of the mechanics' lien law of the State of California, construction of improvements on the Common Areas by Developer and construction of improvements on the Commercial Area of a Parcel by a Party shall each be deemed to be a separate and distinct "work of improvement" as defined in *Civil Code Section 3106* or its successor statute.

Completion Dates

6.10. All construction work for the Common Areas shall be completed on or before _____[*date*]. All buildings required to be constructed on the Commercial Area of a Parcel shall be completed on or before _____[*date*]. In the case of any building to be constructed on the Commercial Area of a Parcel, construction work shall be deemed completed by the appropriate Party on the date the controlling governmental agency issues a certificate of occupancy [*or comparable final approval*] for the building. Construction work for the Common Areas shall be deemed complete when all on-site and off-site improvements for the Common Areas have been completed and are ready for use and the Parties indicate, in writing, that they accept as complete the construction of the improvements for the Common Areas.

Cooperation Among Parties

6.11. Each Party agrees that it shall perform construction required of it under this Agreement in a manner that will not interrupt or interfere with any other Party's performance of construction required under this Agreement. Each Party agrees to allow access across its Parcel by each of the other Parties so that each of the other parties may perform any construction required by this Agreement. The Parties agree to coordinate construction schedules and to otherwise cooperate in the overall construction of the Shopping Center for the common goal of completing all construction work on or before the Completion Dates set forth in Paragraph 6.10 of this Agreement.

Insurance

6.12. From the time any Party commences construction on its Parcel and continuing until completion of the construction, each Party shall procure and maintain, at its sole cost and expense, public liability insurance and fire and extended coverage insurance applicable to the construction work to be performed by it under this Agreement. This coverage shall meet all requirements for insurance set forth in Article 11 of this Agreement. Each Party shall also procure and maintain workers' compensation insurance in the minimum amounts established by law.

Indemnification

6.13. Each Party agrees to defend, indemnify, and hold each other Party harmless from any liability, damage, injury, or other costs and expenses arising from or alleged to have arisen from any act or omission of the indemnifying Party in connection with the construction work to be performed by it on its Parcel.

ARTICLE 7. OPENING AND LEASING OF SHOPPING CENTER

Leasing by Developer

7.01. (a) Developer shall procure binding leases with tenants for occupancy in the building(s) located on the Commercial Area of Developer's Parcel. The tenants shall be appropriate in mix and experience for a first-class regional [*or* neighborhood] shopping center in [Southern California *or* Northern California *or* California]. During the period in which any Major's operating covenant described in Paragraph 8.01 of this Agreement is in effect and for so long afterwards as any Major continues to operate for business in the Shopping Center, Developer shall use its best efforts to procure and maintain maximum tenant occupancy of the gross floor area of the Commercial Area on Developer's Parcel. [*If desired, add:* Developer, as Landlord, shall require in its leases with tenants that each tenant maintain the same business hours (both with respect to number and days) as those maintained from time to time by the Majors.]

(b) Prior to the opening of the Shopping Center, Developer shall procure binding leases with tenants for occupancy of at least [*number, e.g.,* 40] percent of the leasable retail store space in Developer's building. The leases shall require the tenants to open for business not later than _____[*time period, e.g.,* 30 days after the Completion Date for the building to be constructed by Developer on Developer's Parcel], unless Developer, as Landlord, requests a postponement in openings by tenants so that their openings coincide with a grand opening for the Shopping Center arranged pursuant to Paragraph 7.02(a) of this Agreement. All tenants and all leases referred to in this Subparagraph shall also comply with any requirements for tenants and leases set forth in Subparagraph (a) of this Paragraph.

Opening for Business

7.02. (a) Each Party agrees that a unified grand opening for the Shopping Center would be beneficial to all Parties and further agrees that it will cooperate in all scheduling and other matters necessary to participate in a grand opening, provided the grand opening date is not later than [*specify deadline, expressed either as specific date or as date determined by reference to particular event, e.g.,* 30 days after the latest Completion Date set forth in Paragraph 6.10 of this Agreement]. Otherwise, a Party may open for business at any time after completion of the construction of (1) the building located on its Commercial Area; and (2) the improvements on the Common Areas.

(b) No Party shall be obligated to open for business until _____[*describe any circumstances under which a party is permitted to delay opening, e.g.,*, in the case of Owner #2 or Owner #3, Developer has completed construction for the Common Areas and has leased at least 40 percent of the gross floor area of its building to Occupants who are ready to immediately open for business; and in the case of Developer, Owner #2 or Owner #3 is ready to immediately open for business. Neither Owner #2 nor Owner #3 shall be required to open during the following time periods: _____ (*specify dates*)].

ARTICLE 8. COVENANTS BY MAJORS FOR CONTINUOUS BUSINESS OPERATION

Majors' Covenant of Continuous Operation

8.01. (a) Owner #1, as a Major, covenants and agrees that for a period of [*number, e.g.,* 10] years, commencing on the date it opens its retail department store in the Shopping Center for business, it will operate or cause to be operated on its Parcel a retail department store containing not less than the minimum gross floor area required under Paragraph 6.02 of this Agreement, under the trade name used by it for all [*or* substantially all] of its other department stores located in [*designated geographical area, e.g.,* California], unless it is earlier released from performing the covenant pursuant to Paragraph 8.02 of this Agreement.

(b) Owner #2, as a Major, covenants and agrees that for a period of [*number, e.g.,* 10] years, commencing on the date it opens its retail department store in the Shopping Center for business, it will operate or cause to be operated on its Parcel a retail department store containing not less than the minimum gross floor area required under Paragraph 6.02 of this Agreement, under the trade name used by it for all [*or* substantially all] of its other department stores located in [*designated geographical area, e.g.,* California], unless it is earlier released from performing the covenant pursuant to Paragraph 8.02 of this Agreement.

(c) Notwithstanding the covenant given by any Major in this Paragraph, each Major shall have the right to operate its retail department store in the manner deemed appropriate by it in its sole and absolute discretion. This right shall extend to all operational matters, including business hours to be maintained, types of merchandise to be stocked and sold, and the types of departments contained within the store.

(d) Notwithstanding the covenant given by any Major in this Paragraph, no Major shall be required to remain open for business during any period in which it is repairing, restoring, or rebuilding its store because of damage or destruction, or during any period when closure of its store is required by any cause that is beyond its reasonable control and is described in Paragraph 14.06 of this Agreement.

Early Release From Covenant Obligations

8.02. A Major shall be released from its covenant obligations under Paragraph 8.01 of this Agreement prior to the time the covenant would otherwise expire as provided in Paragraph 8.01, on the occurrence of any of the following:

[*List all circumstances or events that will permit release, e.g.:*]

(a) Developer fails to perform any of its obligations under Paragraph 2.02, Paragraph 7.01(b), Article 9, or Article 12 of this Agreement, and either of the following applies:

(1) The failure to perform is capable of being cured within a period of

_____ [*number that may be same as or greater than number of days parties have to cure defaults pursuant to Paragraph 14.02*] days after any Party gives written notice of the failure to Developer and gives copies of the notice to each of the other Parties, and Developer fails to cure the default during that period; or

(2) The failure is not capable of being cured within the foregoing

_____ [*same number as above*]-day time period, and the Developer fails (i) to begin to cure the default within that time period; and (ii) to complete the cure within a reasonable time not to exceed

_____ days after the date of the written notice describing Developer's failure to perform.

(b) At any time after a Major opens its store for business, less than [*number, e.g.,* 60] percent of leasable store space in Developer's building is leased, occupied, and open for business; provided, however, that Developer shall have [*time period, e.g.,* nine months] after written notice from any Party regarding Developer's failure to maintain the foregoing occupancy level within which to raise the occupancy level to the minimum required under this Subparagraph. Any tenant lease procured by Developer during the period granted to Developer to raise the occupancy level that requires the tenant to open for business during that same period shall be counted toward the requirement that Developer raise the occupancy level to the minimum required under this Subparagraph.

(c) Any other Major fails for any reason to actually open for business as required under this Agreement, notwithstanding any exceptions to performance otherwise provided for in this Agreement.

(d) Any other Major ceases for any reason to operate its store for a continuous period of at least [*time period, e.g.,* six months], except when all of the following apply or are satisfied: the closure is caused by damage or destruction to the Major's store; the Major is required or elects to repair, restore, and rebuild the store; and the Major actually commences the repair, restoration, or rebuilding within the foregoing [*same time period used above, e.g.,* six-month] time period and thereafter completes it with due diligence.

(e) Any other Major is released from its covenant of operation described in Paragraph 8.01 of this Agreement pursuant to the terms of this Agreement.

Nature of Covenants

8.03. (a) Each covenant of a Major set forth in Paragraph 8.01 of this Agreement shall constitute a covenant running with the land and shall also be personally binding on the Major, even if the Major transfers all or any portion of its Parcel. However, a Major shall be relieved of its personal obligations under the covenant in the event _____[*describe any transfer circumstances that will release major, e.g.,* any Person acquires the

Major's statewide (*or* national) business and assumes the obligations of the Major's covenant].

(b) Each covenant of a Major set forth in Paragraph 8.01 of this Agreement shall be for the benefit of each of the other Parties to this Agreement and their respective Parcels [*or* for the benefit of only the Developer and Developer's Parcel].

(c) In the event of a default or breach by a Major of a covenant set forth in Paragraph 8.01 of this Agreement, each Party agrees that specific performance of the covenant shall not be available as a remedy and that no party may or shall seek to enforce that remedy against the Major.

Subordination of Covenants

8.04. Each covenant of a Major set forth in Paragraph 8.01 of this Agreement shall be subordinate to the lien of any deed of trust or mortgage recorded on the Major's Parcel. A Lender (as defined in Paragraph 15.01 of this Agreement) [*or* Any person (including a Lender as defined in Paragraph 15.01 of this Agreement)] who acquires title to the Parcel through foreclosure proceedings, a power of sale, or a deed in lieu of foreclosure shall take title free and clear of the covenant of the Major.

ARTICLE 9. OPERATION AND MAINTENANCE OF COMMON AREAS

Management and Maintenance Duties

9.01. Developer shall manage, maintain, and operate all Common Areas located within the Shopping Center, and will keep the Common Areas in good condition and repair and clean and free of rubbish and other hazards to Users. Developer's obligation to maintain and operate the Common Areas includes the following:

(a) Maintenance of the surfaces of all paved portions of the Common Areas, including sidewalks and curbs, so that the surfaces are level, smooth, and evenly covered with the type of surfacing material originally installed or a substitute material that is equal in quality, appearance, and durability.

(b) Removal of all papers, debris, filth, and refuse from the Common Areas, and washing or thorough sweeping of paved areas, as required to maintain the Common Areas in a first-class and clean condition.

(c) Placement, repair, replacement, and repainting as necessary of entrances, exits, directional signs, striping, markers, and lights in the Parking Areas and other Common Areas.

(d) Maintenance and cleaning of all landscaped areas in the Common Areas, including: the regular pruning, weeding, fertilizing, and watering of trees and shrubbery; repair and replacement of the irrigation system; and maintenance and replacement of seasonal bedding plants in designated "color spot" areas of the landscaped areas to maintain blooms in these areas throughout the year.

(e) Maintenance and repair of the monument sign that bears the name of the Shopping Center and is located at the entrance to the Shopping Center, and any other sign subsequently erected on the Common Areas that bears only the name of the Shopping Center.

(f) Maintenance of all Common Areas free from any obstructions not required or permitted under this Agreement, including any obstructions relating to the sale or display of merchandise outside the exterior limits of retail establishments in the Shopping Center; provided, however, that the Parties may waive the prohibition against obstructions in the Common Areas for promotional activities in the Shopping Center.

(g) Payment of all electrical, water, and other utility charges or fees for services furnished to the Common Areas.

(h) Maintenance, cleaning, and repairing of all common utility lines, storm drains, sewers, and other Utility Systems located in the Common Areas.

(i) Performance of any other specific duties described under this Agreement that require the Developer to manage, operate, and maintain the Common Areas.

[*Include the following Subparagraphs if shopping center has enclosed mall:*]

(j) Heating, cooling, ventilating, and illuminating the enclosed mall, maintaining its air-conditioning system, and maintaining the temperature and humidity throughout the enclosed mall at a reasonably comfortable level, consistent with the minimum standards of the American Society of Heating, Refrigeration, and Air Conditioning Engineers in effect at the time construction of the Shopping Center is completed for the area in which the Shopping Center is located.

(k) Maintaining the glass, floors, and walls of the enclosed mall (excluding any portion of the walls and windows that also constitute a part of a retail establishment), and the stairways, elevators, escalators, and roof of the enclosed mall, in clean and good condition and repair.

Developer's Contracts With Third Parties

9.02. Developer may contract with a third party to perform some or all of its obligations listed in Paragraph 9.01 of this Agreement, provided the contract is in writing and includes clauses that provide for the following: the right of either the Developer or any other Party to terminate the contract on [*number, e.g.*, 30] days' written notice; the right of all Parties to this Agreement [*or* the Majors] to approve the third party contract; and an acknowledgment and agreement by the third party that Developer is not an agent of the Parties and that only the Developer (and not any other Parties to this Agreement) is obligated to perform the provisions of the contract (including all payments of money). If Developer enters into such a contract with a third party, Developer shall be and remain, as between itself and the other Parties to this Agreement, liable and responsible for performance of all of Developer's obligations under this Agreement and for performance by any third party with whom it contracts. Developer agrees to indemnify, defend, and hold harmless all other Parties to this Agreement from any and all claims, damages, liabilities, costs, or expenses (including amounts for reasonable attorneys' fees) arising from or in connection with Developer's contract with a third party.

Insurance for Common Areas

9.03. Developer shall maintain public liability insurance for all of the Common Areas insuring against the risks of bodily injury, property damage, and personal injury liability occurring or arising during the policy period. The insurance required under this Paragraph shall have a minimum combined single limit of liability of at least $ [*dollar amount*] and a general aggregate limit of at least $ [*dollar amount*], and shall include [*describe any required additional coverage, e.g.*, blanket contractual coverage and broad form property damage coverage]. The premiums for the public liability policy or policies are a Common Areas Operational Cost (as defined in Paragraph 9.04 of this Agreement). Each Party shall be listed as an additional insured on the policy or policies. Each public liability policy or policies shall contain a provision prohibiting cancellation of the policy or policies except on [*number, e.g.*, 30] days' prior written notice to each Person listed as an additional insured. Developer shall furnish each Party with a copy of any policy or policies of public liability insurance described in this Paragraph or a certificate of insurance from the insurer. As required by law, Developer shall maintain workers' compensation insurance covering all employees hired or used by Developer to fulfill

its obligations for maintenance and operation of the Common Areas.

Common Areas Operational Costs

9.04. (a) Developer shall pay, prior to delinquency, all costs, charges, and expenses incurred in managing, operating, and maintaining the Common Areas as required under this Agreement. Each Party other than Developer shall reimburse Developer an amount equal to that Party's pro rata share of the total costs, charges, and expenses incurred by Developer to operate and maintain the Common Areas. Each Party's pro rata share of Common Areas Operational Costs shall be calculated on the basis of a ratio of the Maximum Gross Floor Area on that Party's Parcel to the Maximum Gross Floor Area on all Parcels contained in the Shopping Center.

(b) For these purposes, "Common Areas Operational Costs" means the total of all items of direct cost and expense necessarily and reasonably expended by Developer for the supervision, operation, maintenance, and repair of the Common Areas required under this Agreement, excluding any real property taxes or assessments described in Article 10. The term includes costs and expenses for the following: maintenance, replacement, and reconstruction work as required to preserve the condition and status of the Common Areas and its equipment; all rental charges for equipment; the cost of small tools and supplies; all costs for police security protection, traffic direction and control, and parking regulations; costs of cleaning and removal of rubbish, dirt, and debris from the Common Areas; the cost of landscaping, and supplies required for landscaping; all charges for utility services used in connection with the Common Areas; and all premiums for public liability insurance covering the Common Areas. Any repair or replacement of the Common Areas estimated to cost in excess of $ [*maximum dollar amount, e.g.,* $10,000] shall be considered an extraordinary expense and shall not be made by Developer unless and until approved in writing by the other Parties to this Agreement. Extraordinary expenses approved by the Parties shall be considered a Common Areas Operational Cost. Any cost incurred by Developer for the operation of its own office, accounting service, or any other service or cost not directly related to operation and maintenance of the Common Areas shall not be considered a Common Areas Operational Cost.

[*Add following provision if other parties are to pay pro rata shares of management fee for developer-manager:*]

Notwithstanding the preceding provision, for each Accounting Period (defined below) Developer shall be paid for its managerial services for the Common Areas an amount equal to [*e.g.,* 3] percent of the total of Common Areas Operational Costs for that Accounting Period ("Management Fee"), except that any costs for [*describe cost items that are to be excluded, e.g.,* depreciation, public liability insurance premiums, and any Extraordinary Expense defined above] shall first be excluded from the total of Common Areas Operational Costs before the amount of the Management Fee is calculated. The Management Fee shall be added to and paid by the Parties in the same manner as the Common Areas Operational Costs.

Accounting and Recordkeeping

9.05. (a) At the end of each quarter [*or* month] of each Accounting Period, Developer shall submit a statement to each Party showing the amount due to Developer for that Party's pro rata share of Common Areas Operational Costs. The quarterly [*or* monthly] statement shall summarize by category the amounts expended by Developer for the operation and maintenance of the Common Areas during that quarter [*or* month]. Not later than [*number, e.g.,* 30] days after the date of the statement, each Party shall pay to Developer the amount set forth on the Party's statement. For these purposes, "Accounting Period" means each calendar year occurring during the term of this Agreement, except that: the first Accounting Period shall begin on the date any Party first opens its business in the Shopping Center to the public and shall end on December 31 of the same year; and if this Agreement terminates on any date other than December 31, the last Accounting Period shall end on the date this Agreement terminates.

(b) Not later than [*number, e.g.,* 60] days after the end of each Accounting Period, Developer shall prepare and submit to each of the Parties an itemized statement of actual Common Areas Operational Costs for that entire Accounting Period ("the Annual Statement"). This statement shall also include actual totals for each quarter [*or* month] in that Accounting Period. Developer shall attach to the Annual Statement necessary documentation that will enable the Parties to verify the accuracy of the Statement. The Annual Statement shall set forth the amounts actually paid by each Party as its pro rata share of Common Areas Operational Costs for that Accounting Period, and the amounts actually due from each Party as its pro rata share of Common Areas Operational Costs for that Accounting Period. If there is any difference between the two amounts for any Party, the following rules will apply: the amount of an underpayment by the Party shall be paid by that Party to Developer within [*number, e.g.*, 30] days after the date of the Annual Statement; an overpayment by the Party will be credited to the amount otherwise payable by that Party for the next quarterly [*or* monthly] statement, unless the overpayment is noted in the last Annual Statement prepared pursuant to this Agreement; and, in the case of an overpayment noted in the last Annual Statement prepared pursuant to this Agreement, the Developer shall promptly refund the overpayment to the Party.

(c) Developer shall maintain complete and accurate books of account and supporting documentation for each and every amount expended for maintaining and operating the Common Areas as required under this Agreement. For each Accounting Period, all books and records shall be kept by Developer for at least [*time period, e.g,* two years] following the end of that Accounting Period.

(d) Each Party, at that Party's sole cost and expense, shall have the right to inspect or audit the books and records of Developer. Any inspection or audit shall be performed only during reasonable business hours. [*If desired, add:* Further, at least _____ (*minimum notice period, e.g.,* 48 hours before the time the Party wishes to perform the inspection or audit), the Party must provide Developer with notice of the election to perform the inspection or audit.]

Transfer of Responsibility for Common Areas

9.06. If one or more of the Parties are dissatisfied with Developer's performance of its duties and obligations for the Common Areas set forth in this Article, the dissatisfied Party or Parties may give Developer written notice containing the following: an itemization of all matters giving rise to the dissatisfaction; the time period within which Developer must correct the matters giving rise to the dissatisfaction [*optional:*, which shall not in any event be shorter in duration than the Cure Period provided for in Paragraph 14.02 of this Agreement]; and the name of the Person who will assume the Developer's responsibilities under this Agreement for the Common Areas ("the Assuming Party") in the event of the Developer's failure to correct the situation. When only one Party gives the notice of dissatisfaction to Developer, that Party shall be the Assuming Party; when more than one Party joins in giving the notice of dissatisfaction, the Assuming Party shall be the Party jointly designated by those Parties. Developer must correct the matters giving rise to the dissatisfaction within the time period set forth in the notice or, if a matter cannot be corrected within that time period, must commence appropriate corrective action within that period. If Developer, within that time period, fails to correct the foregoing matters or fails, in the reasonable estimation of the complaining Party or Parties, to commence appropriate corrective action, the following shall apply: the Assuming Party shall assume responsibility for the maintenance, management, and operation of the Common Areas; Developer shall be liable to the Parties for all costs, expenses, and damages resulting to the Parties from Developer's failure to fulfill its obligations under this Agreement; and Developer shall promptly transfer to the Assuming Party all books and records pertaining to the Common Areas and all equipment and supplies used by Developer in connection with the operation and maintenance of the Common Areas. Assumption of responsibility for the Common Areas by an Assuming Party shall not relieve Developer of its obligation, as a Party to this Agreement, to pay its pro rata share of Common Areas Operational Costs or to perform all other terms of this Agreement (except those relating to maintenance and management of the Common Areas). An Assuming Party shall have all of the rights, duties, and obligations with respect to the Common Areas that are set forth for the Developer in this Article. At any time after Developer has been replaced by an Assuming Party pursuant to this Paragraph, responsibility for maintenance, operation, and management of the Common Areas may be transferred for any reason to

another Party (including Developer) pursuant to the method and for the reasons outlined in this Paragraph, or on the unanimous consent of all Parties.

Liens

9.07. In carrying out its responsibilities under this Agreement for the maintenance, management, and operation of the Common Areas, Developer shall keep the Parcels free and clear from any liens arising out of any work performed, materials furnished, or other obligations incurred by Developer. If any lien is imposed, Developer shall pay the lien within [*number not more than 30, e.g.*, 10] days after its imposition unless Developer elects to contest the lien. Developer shall have the right to contest a lien imposed on any Parcel only if Developer first records a bond of a responsible corporate surety in an amount sufficient to release the lien from the affected Parcel or Parcels within [*same number used in preceding sentence*] days after the date the lien is imposed.

ARTICLE 10. PROPERTY TAXES AND ASSESSMENTS

Obligation for Payment

10.01. Each party will pay, prior to delinquency, all real property taxes, assessments, and other charges that may be levied, assessed, or charged against the Parcel owned by it in the Shopping Center, including any taxes, assessments, or other charges levied, assessed, or charged against any portion of the Common Areas located on that Party's respective Parcel. If a Party fails to pay taxes or assessments owed by it prior to its delinquency, any other Party may pay the taxes or assessments. In that case, the nonpaying Party shall reimburse the paying party for the full amount paid, plus interest at the maximum legal rate then prevailing, within _____ days after the paying Party gives the nonpaying Party written demand for the amount paid.

Right to Contest

10.02. Each Party shall have the right, at that Party's sole cost and expense, to protest or contest in good faith the amount of any tax or assessment levied on that Party's Parcel and to defer payment of the tax or assessment until final determination of the contest. On final determination of the contest, the contesting Party shall immediately pay the amount of the judgment rendered and all costs, charges, interest, and penalties related to the contest. The contesting Party shall also defend, indemnify, and hold each of the other Parties harmless from any damage, cost, or expense arising out of the contest.

ARTICLE 11. INSURANCE

Fire Insurance

11.01. (a) Each Party shall procure and maintain fire and extended coverage insurance with an endorsement for [*type of required endorsement(s), e.g.*, vandalism] on all buildings and other improvements located on the Commercial Area and Common Areas of that Party's Parcel. The amount of coverage shall be equal to at least [*number, e.g.*, 90] percent of the full replacement cost of all included buildings and other improvements.

(b) In the event a Party is required by this Agreement to rebuild, repair, or restore a damaged or destroyed building or other improvement on the Commercial Area or Common Areas of that Party's Parcel, the insurance proceeds paid for an insured loss shall be used for the purpose of the rebuilding, repair, or restoration. The proceeds shall be paid to the insured Party, with the following exception: if the amount of insurance proceeds payable for an insured loss exceeds $ [

dollar amount, e.g., $50,000], the proceeds shall be paid to an insurance trustee designated by the insured Party's Lender for disbursement throughout the period of rebuilding, repair, or restoration.

Waiver of Subrogation

11.02. Each Party agrees that in the event of loss due to any of the perils for which they each have agreed to provide insurance, each Party shall look solely to its insurance for recovery. Each Party grants to each other Party, on behalf of its insurer, a waiver of any right of subrogation that any insurer of one Party may acquire against any other Party by virtue of payment of any loss under the insurance. Each insurance policy shall contain this express waiver endorsement.

Public Liability Insurance

11.03. (a) Each Party shall procure and maintain at all times during the term of this Agreement comprehensive general public liability insurance covering the Commercial Areas located on the Party's Parcel and insuring against the risks of bodily injury, property damage, and personal injury liability occurring or arising during the policy period. The insurance required under this Paragraph shall have a minimum combined single limit of liability of $ _____ and a general aggregate limit of at least $ _____. Further, the insurance shall include [*describe any required additional coverage, e.g.,* broad form contractual liability coverage insuring against the Party's indemnity obligations under this Agreement]. Each policy shall designate each of the other Parties as an additional insured, shall provide that the insurance is primary and noncontributory, shall provide for severability of interests, and shall provide that an act or omission by the insured party or any additional insured does not void or reduce coverage afforded the insured party or any additional insured.

(b) Developer shall procure and maintain public liability insurance for the Common Areas of each Parcel in accordance with the provisions of Paragraph 9.03 of this Agreement.

Policy Requirements

11.04. Any insurance a Party is required under this Agreement to procure and maintain shall be issued by a responsible insurance company or companies licensed to do business in the State of California [*optional:* and rated A+XII or better in Best's Insurance Guide], and shall provide that it may not be cancelled, terminated, or changed except after [*number, e.g.,* 30] days' prior written notice to each of the other Parties. The amount of a deductible under any insurance required under this Article shall not exceed [*maximum amount expressed as dollar amount or percentage of coverage*]. Any Party may maintain all or part of the insurance required under this Article by means of a blanket insurance policy so long as all provisions of this Article are satisfied. For any insurance required of a Party under this Agreement, the Party shall deliver to each of the other Parties a certificate of insurance that recites in summary form compliance with all requirements set forth in this Article relating to specific insurance coverage.

Indemnity

11.05. (a) Developer shall defend, indemnify, protect, and hold each other Party harmless from any and all damages, claims, causes of action, costs, expenses, and any other liability arising from, related to, or incurred in connection with the death of any person or the injury or damage to any person or property occurring in or on the Common Areas located on each other Party's Parcel, unless the liability is caused by the negligence or willful act or omission of the indemnified Party, the agents or employees of the indemnified Party, or any Occupant of the indemnified Party.

(b) Each Party other than Developer shall defend, indemnify, protect, and hold each other Party harmless from any and

all damages, claims, causes of action, costs, expenses, and any other liability arising from, related to, or incurred in connection with the death of any person or the injury or damage to any person or property occurring in or on the Commercial Areas of the indemnifying Party's Parcel, unless the liability is caused by the negligence or willful act or omission of the indemnified Party, the agents or employees of the indemnified Party, or any Occupant of the indemnified Party.

ARTICLE 12. DAMAGE AND DESTRUCTION

Obligation to Rebuild and Repair

12.01. (a) A Major shall, at its sole cost and expense, repair, restore, or rebuild any building or other improvements on the Commercial Area or Common Areas of its Parcel that are damaged or destroyed by any cause, whether or not any casualty causing the damage or destruction is covered by insurance, provided the damage or destruction occurs while that Major's operating covenant (as described in Paragraph 8.01 of this Agreement) is in effect [*if desired, add:*, and provided further that the covenant has a remaining term of at least _____ (*number, e.g.,* three) years from the date of damage or destruction]. Similarly, the Developer shall, at its sole cost and expense, repair, restore, or rebuild any building or other improvements on the Commercial Area or Common Areas of its Parcel that are damaged or destroyed by any cause, whether or not any casualty causing the damage or destruction is covered by insurance, provided the damage or destruction occurs while any Major's operating covenant (as described in Paragraph 8.01 of this Agreement) is in effect [*if desired, add:*, and provided further that any such covenant has a remaining term of at least _____ (*number, e.g.,* three) years from the date of damage or destruction].

(b) If damage or destruction to any building or other improvement on the Commercial Area or Common Areas of any Major's Parcel occurs at a time when that Major's Operating Covenant is no longer in effect [*if optional language in (a), above is used, add:* or at a time when less than _____ (*number, e.g.,* three) years remain in the term of the operating covenant], that Major shall have no obligation, but may elect, to repair, restore, or rebuild the damaged portion of the building or other improvement on its Parcel. If damage or destruction to any building or other improvement on the Commercial Area or Common Areas of the Developer's Parcel occurs at a time when any Major's Operating Covenant is no longer in effect [*if optional language in (a), above is used, add:* or at a time when less than _____ (*number, e.g.,* three) years remain in the term of any Major's Operating Covenant still in effect], the Developer may elect, but shall have no obligation, to repair, restore, or rebuild the damaged portion of the building or other improvement on its Parcel. Notwithstanding the foregoing, Developer shall be required to repair, restore, or rebuild the damaged portion of any building or other improvement on its Parcel under the following circumstances:

(1) No building or other improvement on the Parcel of any Major is damaged or destroyed and each [*or* at least one] Major[s] executes a written instrument, in recordable form, agreeing to reinstate its Operating Covenant for a minimum period of

_____ [*number, e.g.,* 10] years from the date of the instrument.

(2) A building or other improvement on the Parcel of at least one Major is damaged or destroyed and at least one of the Majors affected by the damage or destruction (i) elects to rebuild, repair, or restore the destroyed or damaged building or improvement, and (ii) gives written notice to Developer of its election to repair or rebuild within

_____ [*number, e.g.,* 90] days after occurrence of the event causing the damage or destruction. If a Major who has given notice to Developer of its intention to repair, rebuild, or restore any damaged or destroyed building or other improvement located on the Major's Parcel does not actually

commence the repair, rebuilding, or restoration within

_____ [*time period, e.g.,* 180 days after occurrence of the event causing the damage or destruction], Developer shall be relieved of its obligation to rebuild, restore, and repair any damage or destruction of a building or other improvement located on the Commercial Area or Common Areas of Developer's Parcel.

Standards for Rebuilding, Repair, or Replacement

12.02. Any rebuilding, repair, or replacement of a building or other improvement on a Party's Parcel required or permitted under this Agreement shall be commenced as soon as possible after occurrence of the event causing the damage or destruction and completed as expeditiously as possible thereafter. Any restoration, repair, or rebuilding for a Parcel shall comply with all applicable requirements of this Agreement, including those relating to plan approval set forth in Paragraph 6.04 of this Agreement.

Obligations When Rebuilding Not Required or Elected

12.03. If any Party is not required to or elects not to rebuild, repair, or restore all or any portion of any damaged or destroyed building or other improvement located on the Commercial Area or Common Areas of that Party's Parcel, the Party shall raze and demolish the damaged or destroyed building or other improvement and clear all debris from the affected area of that Party's Parcel. The affected area shall then either be landscaped with ground cover or fenced off from the remaining portion of the Shopping Center, as determined by a majority of the other Parties to this Agreement.

Obligations of Lender and Fee Owner-Lessor

12.04. (a) Any Lender or Fee Owner-Lessor under a sale-leaseback arrangement described in Paragraph 15.06 of this Agreement, or a purchaser from either, who acquires title to a Parcel by foreclosure, deed in lieu of foreclosure, or as a result of a lease termination under the sale-leaseback arrangement, shall be obligated to perform any repair, restoration, or rebuilding required under this Agreement, provided the damage or destruction necessitating the repair, restoration, or rebuilding occurs after the date the foregoing Lender, Fee Owner-Lessor, or purchaser acquired title to the Parcel.

(b) Any Lender or Fee Owner-Lessor under a sale-leaseback arrangement described in Paragraph 15.06 of this Agreement, or a purchaser from such a Lender or Fee Owner-Lessor, who acquires title in the manner described in Subparagraph (a) of this Paragraph and who is not required or elects not to rebuild under this Agreement, shall comply with Paragraph 12.03 of this Agreement. However, imposition of this obligation on the Person acquiring title in the manner described in this Paragraph shall in no way relieve the Party from whom the Parcel was acquired from compliance with Paragraph 12.03 of this Agreement.

ARTICLE 13. CONDEMNATION

Restoration or Termination

13.01. (a) If a taking by eminent domain (or purchase in lieu of a taking by eminent domain) occurs with respect to [*specify percentage, e.g.,* 10] percent or more of the gross floor area of any building on the Commercial Area of any Parcel [*or* any Major's Parcel], the affected Party [*or* Major] shall, at that Party's [*or* Major's] sole cost and expense, be required to utilize remaining Commercial Area, if any, on its Parcel to restore the gross floor area of the building to at

least [*number, e.g.,* 90] percent of what existed in the building prior to the taking. If the Party [*or* Major] is unable to make the restoration to the extent required under this Paragraph, the Party [*or* Major] may terminate this Agreement with respect to its Parcel by giving written notice of its election to terminate to each of the other Parties.

(b) This Subparagraph applies when a taking by eminent domain (or purchase in lieu of a taking by eminent domain) occurs with respect to either of the following: (1) Parking Areas located on the Common Areas of any Parcel, if the Parking Areas remaining on any Parcel or for the Shopping Center as a whole after the taking violate either the then-applicable zoning law as to size, location, layout, or otherwise, or the required parking ratio set forth in Paragraph 5.08(a) of this Agreement; or (2) any portion of the Common Areas, if the taking results in a closure of ingress and egress from adjacent public streets to the Shopping Center. Following such a taking, the Parties shall in good faith endeavor to agree, as the case may be, on a plan (1) to bring the remaining Parking Areas into compliance with the then-applicable zoning law (either through obtaining a variance or exception to the zoning law or by providing additional substitute Parking Areas) or with the required parking ratio set forth in Paragraph 5.08(a) of this Agreement; or (2) to provide new ingress and egress routes to and from the Shopping Center and the adjacent public streets in a way that complies with the then-applicable zoning law [*describe any other requirements for plan, e.g.,* and that does not substantially decrease public ingress and egress to and from any building located on the Commercial Area of any Major's Parcel]. The portion of any award for a taking by eminent domain received by a Party attributable to a taking of the Common Areas on that Party's Parcel shall be used for any corrective work to the Common Areas described above and agreed on by the Parties, regardless of whether the corrective work will or will not be performed on that Party's Parcel. Any excess cost of corrective work shall be shared equally by the Parties. A decision regarding a specific plan for the corrective work adopted by a majority of the Parties shall be binding on all of the other Parties. If a majority of the Parties are unable to agree on a plan for corrective work within [*number, e.g.,* 120] days after definitive written notice of the intended taking is given by the condemning authority, any Party whose Parcel is affected by the taking shall have the right to terminate this Agreement with respect to its Parcel by giving written notice of its election to terminate within [*number, e.g.,* 30] days after expiration of the above [*same number used above for corrective work approval period, e.g.,* 120]-day period.

(c) If any Party elects to terminate this Agreement with respect to its Parcel pursuant to the provisions of this Paragraph, the effective termination date shall be as determined by the terminating Party, except that it may be no earlier than [*number, e.g.,* 180] days after the Party's written notice of its election to terminate. At the request of any Party who elects to terminate this Agreement with respect to its Parcel pursuant to this Paragraph, each of the Parties shall execute in recordable form a written instrument prepared by the terminating Party reciting the fact that this Agreement is terminated with respect to the terminating Party's Parcel.

(d) Except as otherwise expressly permitted in this Paragraph, no taking by eminent domain of any Parcel or any portion of a Parcel shall entitle any Party to terminate this Agreement with respect to its Parcel.

Distribution of Award

13.02. This Paragraph applies to any award of damages or compensation made for a taking by eminent domain of any Parcel, whether the award is obtained by agreement prior to, or during the time of, any court action, or by judgment, verdict, or order resulting from or entered after any such court action resulting from the taking by eminent domain of a Parcel (or any portion of a Parcel). Any such award shall be distributed among the Parties and any other Person having an interest in the award, in accordance with the terms and conditions of the agreement, judgment, verdict, or order. For purposes of this Agreement, in the event any Parcel (or portion of a Parcel) is sold in lieu of a taking by eminent domain, the sale shall be considered a taking by eminent domain and the sales price for the Parcel, less selling expenses, shall be considered the award of damages or compensation made for a taking by eminent domain.

ARTICLE 14. DEFAULT, TERMINATION, & REMEDIES

Legal and Equitable Remedies

14.01. In the event of any actual or threatened violation, default, or breach (hereafter collectively referred to as a "default") of or under any of the terms, restrictions, covenants, or conditions of this Agreement by any Party or by the Occupants of any Party's Parcel, any other Party shall have the right, in addition to specific remedies described in this Agreement, to pursue any available legal or equitable remedy, including damages, injunctions, and restraining orders. All remedies shall be cumulative, and the pursuit of any available remedy shall not constitute a waiver or election of remedies with respect to all other available remedies. A Party shall be responsible for any default by an Occupant of the Party's parcel.

Notice as Prerequisite to Breach

14.02. Except as otherwise provided in this Agreement, a Party shall not be deemed to be in default under this Agreement until that Party has been given a written notice, prepared by any other Party or Parties, that describes the act or omission constituting the default, and (1) the Party fails to cure the default within [*number*] days after the date of the notice of default (the "Cure Period"), or (2) in the case of a default that is not capable of being cured within the Cure Period, the Party fails to commence the cure within the Cure Period and to diligently pursue it to completion within a reasonable time thereafter.

Right of Nondefaulting Party to Cure

14.03. (a) Except as provided below, any Party shall have the right, but not the obligation, to cure a default of any other Party on behalf of and at the sole expense of the defaulting Party. In that case, the defaulting Party shall pay to the curing Party (1) all costs and expenses reasonably incurred in effecting the cure, plus interest at the then-maximum legal rate, and (2) all court costs and expenses, including reasonable attorneys' fees, incurred by the curing Party. The right to cure described in this Paragraph may not be exercised by a Party until (1) the Cure Period described in Paragraph 14.02 of this Agreement has elapsed and the defaulting Party has neither cured nor commenced a cure of the default as provided in that Paragraph; and, (2) to the extent applicable, the Additional Cure Period described in Paragraph 15.04 of this Agreement has elapsed and the Lender has neither cured nor commenced a cure of the default or commenced foreclosure proceedings within the Additional Cure Period or the extended period provided for in that same Paragraph.

(b) All costs and expenses described in Subparagraph (a) of this Paragraph incurred by a curing Party shall constitute a lien on the Parcel of the defaulting Party or on the interest of the defaulting Person in the Parcel, effective on the date the curing Party records a claim of lien in _____ County, California. The claim of lien shall set forth, at a minimum, a legal description of the Parcel of the defaulting Party, a reference to this Agreement (as recorded), a statement that the lien is authorized by this Agreement, the amount of the lien, and descriptions of the default and the curative action taken. The curing Party shall (1) give a copy of the claim of lien to the defaulting Party in the manner and at the address specified in Paragraph 17.04 of this Agreement, and (2) mail a copy to the address of record in the County of _____ for the mailing of tax statements for the Parcel or interest against which the lien is filed. Any lien created under this Paragraph shall be subordinate to any right, title, or interest in a Parcel created or acquired of record prior to the date the claim of lien is recorded, even if the claim of lien relates to matters that occurred prior to the time any right, title, or interest in the Parcel was created or acquired of record.

Termination Not Permitted for Breach

14.04. It is expressly agreed that any breach of this Agreement shall not entitle any Party or Person to cancel, rescind, or

otherwise terminate this Agreement or any of its provisions. However, this limitation shall not in any way affect any other rights or remedies that a Party or Person may have for a breach of this Agreement.

Termination and Amendment

14.05. Notwithstanding any other provision of this Agreement to the contrary, all provisions of this Agreement (except those relating to certain easements described in Article 3 that shall terminate as provided in that Article) shall terminate [*number, e.g.,* 60] years after the date this Agreement [*or* a memorandum of this Agreement] is recorded pursuant to Paragraph 17.07 of this Agreement. Except as otherwise provided in this Agreement, this Agreement and its Exhibits may be cancelled, modified, or amended only by a writing that is executed by all of the Parties [*if approval of lender and fee owner-lessor under sale-leaseback is required, add:* and, for so long as any first lien of a Lender or any lease of a Fee Owner-Lessor described in Paragraph 15.06 of this Agreement is in effect for a Parcel in the Shopping Center, by the Lender or Fee Owner-Lessor of the affected Parcel]; and recorded in the County of _____[*name of county where shopping center is located*], California. No cancellation, modification, or amendment shall require the prior approval or consent of any Occupant or User.

Force Majeure

14.06. Except as otherwise provided in this Agreement, any Party shall be excused from a delay in any performance required of the Party under this Agreement caused by any of the following: the act of any public enemy; war; war defense condition; act of God; the elements; strike; walkout; or other causes beyond the Party's reasonable control. However, each Party shall use reasonable diligence to avoid any such delay and to resume its performance required under this Agreement as promptly as possible after the delay.

Attorneys' Fees

14.07. If any action is commenced between any Parties to this Agreement concerning this Agreement or for the enforcement of rights and duties of any Party, the Party prevailing in the action shall be entitled to, in addition to any other relief that may be granted, a reasonable sum as and for its attorneys' fees. The sum shall be determined by the court in the action or in a separate action brought for that purpose.

ARTICLE 15. RIGHTS OF LENDERS AND OTHERS

Breach Not to Defeat Mortgage

15.01. This Agreement and all of its provisions shall be superior and senior to any lien (including a mortgage or deed of trust) placed on any Parcel or a portion of any Parcel. [*If mortgage or trust deed has been recorded on any parcel, add:* Any Party who has encumbered its Parcel with a mortgage or deed of trust prior to the effective date of this Agreement (as defined in Paragraph 17.07 of this Agreement) shall cause its Lender(s) to execute, in recordable form, and record in the Official Records of the County of _____ (*county where shopping center is located*), State of California, a written instrument subordinating its encumbrance to this Agreement]. The mortgagee under a mortgage or the beneficiary under a deed of trust (referred to in this Agreement as a "Lender") shall not be obligated to perform any of the terms, covenants, or conditions of its borrower-Party under this Agreement unless and until the Lender acquires title to the borrower-Party's Parcel, and then, only for the period during which the Lender retains title to the Parcel. Any Person (including a Lender) who acquires title to a Parcel as a result of a default under a mortgage or deed of trust shall be obligated to perform all terms, covenants, and conditions of the defaulting borrower-Party under this Agreement, commencing when the Person acquires title to the Parcel and continuing for so long as the Person owns the Parcel. A

breach of any of the terms, conditions, covenants, or restrictions of this Agreement shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value, but the violated term, condition, covenant, or restriction shall be binding on and effective against any Person (including any Lender) who acquires title to a Parcel or portion of a Parcel by foreclosure, trustee's sale, deed in lieu of foreclosure, or otherwise. Notwithstanding anything to the contrary in this Paragraph, neither the making of a mortgage or deed of trust by a borrower-Party on its Parcel nor the subsequent foreclosure of any mortgage or deed of trust shall relieve the borrower-Party of its liability under this Agreement.

Notice to and Service on Lender

15.02. A duplicate copy of any and all notices a Party may from time to time give to or serve on any other Party pursuant to or relating to this Agreement, including any notice of default or notice regarding any matter on which the Party may predicate or claim a default, shall be mailed to any Lender (as that term is defined in Paragraph 15.01 of this Agreement) for the affected Parcel, provided the Lender has first given the noticing Party a written notice containing the Lender's name, address, and a description of the Lender's security interest in the Parcel (the "Request for Notices"). Any notices or other communications permitted or required by this or any other Paragraph of this Agreement or by law to be served on or given to a Lender by a Party shall be deemed given to the Lender when delivered or mailed in accordance with Paragraph 17.04 of this Agreement to the Lender at the last mailing address for the Lender furnished in writing by the Lender to the Party.

Right of Lender to Realize on Security

15.03. A Lender for an affected Parcel shall have the right at any time during which its lien is in effect to take any of the following actions:

(a) Perform any act required of its borrower-Party under this Agreement, in which case the act performed by the Lender shall be as effective to prevent a breach of this Agreement by its borrower-Party under this Agreement as if done by the borrower-Party;

(b) Realize on its security interest by commencing foreclosure proceedings, agreeing to an assignment in lieu of foreclosure, or pursing any other remedy afforded in law or in equity or by the security instrument evidencing the lien, and to take the following related actions:

> (1) Transfer, convey, or assign title to the Parcel or its interest in the Parcel secured by the security instrument evidencing its lien to any purchaser at any foreclosure sale, whether the foreclosure sale is conducted pursuant to court order or pursuant to a power of sale contained in the security instrument, or to an assignee pursuant to an assignment in lieu of foreclosure; and
>
> (2) Acquire and succeed to the interest of any borrower-Party under this Agreement by virtue of any foreclosure sale, whether the foreclosure sale is conducted pursuant to a court order or pursuant to a power of sale contained in the security instrument, or by virtue of an assignment in lieu of foreclosure.

Right of Lender to Cure Defaults

15.04. (a) This Subparagraph applies if (1) any Party has given any other Party a notice of default described in Paragraph 14.02 of this Agreement, (2) the defaulting Party fails to cure or to commence to cure the default within the Cure Period provided for in that Paragraph, and (3) a Lender with a lien on the defaulting Party's Parcel has given the

noticing Party a Request for Notices described in Paragraph 15.02 of this Agreement. In that case, the noticing Party shall give to the Lender an additional notice stating that the defaulting Party has failed to cure or commence cure of the default within the Cure Period. On receipt of the additional notice, the Lender shall have the right to do any of the following:

(1) Cure the breach or default within

_____ [*number*] days after the date of the additional notice ("the Additional Cure Period"), if the default can be cured by the payment of money;

(2) Cure the breach or default within the Additional Cure Period, when the breach or default must be cured by something other than the payment of money and can be cured within that time; or

(3) Cure the breach or default in a reasonable time when something other than money is required to cure the breach or default and the cure cannot be performed within the Additional Cure Period, provided that acts to cure the breach or default are commenced within the Additional Cure Period and are thereafter diligently continued by the Lender.

(b) Notwithstanding Subparagraph (a) of this Paragraph, a Lender may, in lieu of curing a default of its borrower-Party, commence proceedings to foreclose its lien (either through foreclosure by order of court or under a power of sale contained in the security instrument evidencing its lien). In that case, the commencement of foreclosure proceedings shall be deemed a cure of its borrower-Party's default, provided the following requirements are met:

(1) The proceedings are commenced within the Additional Cure Period (except that commencement may be extended by a period equal to any delay caused by bankruptcy or insolvency proceedings or any other judicial process);

(2) After having been commenced, the proceedings are diligently pursued in the manner required by law to completion (except that completion may be extended by a period equal to any delay caused by bankruptcy or insolvency proceedings or any other judicial process); and

(3) The Lender keeps and performs all of the terms, covenants, and conditions of this Agreement requiring the payment or expenditure of money by its borrower-Party until the foreclosure proceedings are complete or are discharged by redemption, satisfaction, payment, or conveyance of title to the Lender or other Person.

Subordination of Lien Claims to First Encumbrances

15.05. (a) Any lien created pursuant to Paragraph 14.03 of this Agreement on a Parcel shall be subordinate to the interest of any Lender under a first mortgage or first deed of trust recorded on that Parcel (or a portion of that Parcel) in good faith and for fair value, whether the claim of lien described in Paragraph 14.03 of this Agreement is recorded before or after the first mortgage or first deed of trust.

(b) The interest of a Fee Owner under a sale-leaseback arrangement with a Party (as described in Paragraph 15.06 of this Agreement) shall have the same priority described in Subparagraph (a) of this Paragraph over a claim of lien created in a Parcel pursuant to Paragraph 14.03 of this Agreement, provided the Party-lessee's transfer of title to its Parcel (or a portion of the Parcel) is not subject to any secured obligation for the payment of money other than real

estate taxes.

Rights of Fee Owner in Sale-Leaseback

15.06. This Paragraph applies if (1) any Party transfers title to all or part of its Parcel for the purpose of financing the improvements to be constructed on the Parcel, (2) the Party, as lessee, simultaneously leases back the entire Parcel (or portion of it) from the then-fee owner ("Fee Owner"), and (3) the Party agrees, as part of the sale-leaseback arrangement, to assume all obligations under this Agreement. In that case, the Fee Owner of the Parcel (or portion of it) shall, for purposes of this Agreement, have all of the rights and privileges under this Agreement of a Lender (as defined in Paragraph 15.01 of this Agreement) for so long as the lease remains in existence. If the leasehold interest is terminated, and notwithstanding any provision in the lease purporting to prohibit a merger of title in the Fee Owner, the Fee Owner shall be obligated to perform all terms, covenants, and conditions of the Party-lessee under this Agreement; provided, however, that imposition of this liability on the Fee Owner shall in no way relieve the Party-lessee of its liability under this Agreement.

[*Optional*]

ARTICLE 16. MERCHANTS' ASSOCIATION

Organization

16.01. Developer shall organize a merchants' association (the "Association") for the Shopping Center for the purpose of advancing and coordinating the common promotional interests of merchants in the Shopping Center. The Association shall be [an unincorporated association *or* a nonprofit mutual benefit corporation], organized [*if corporation, add:* and incorporated] under the laws of the State of California.

Membership

16.02. (a) Developer, as Landlord, shall require in all leases entered into between Developer and tenants that all tenants be members of the Association and maintain membership in good standing during the term of the lease. Tenants shall be required to pay monthly dues and assessments to the Association, based on the number of square feet of gross floor area leased by the tenants. The annual amount of these dues and assessments shall not be less than $ _____ per square foot. Each lease with a tenant shall also require the tenant to (1) make an initial contribution to the Association, in a dollar amount determined by Developer, at the commencement of the lease term, and (2) expend at least [*number*] percent of its annual gross sales (as that term is defined in the lease) on advertising its business.

(b) Developer shall be a member of and actively participate in the Association. Further, Developer shall contribute to the Association annually an amount equal to _____ [*set forth formula for determining amount, e.g.,* 25 percent of the total dues and assessments collected by the Association from Majors and from members other than Landlord]; provided, however, that Landlord shall not be required to contribute more than $ _____ for any calendar year.

(c) Subject to the provisions of Paragraph 16.03 of this Agreement, each Major shall be a member of the Association for so long as the Association exists and the Major continues to operate its retail department store on its Parcel. The amount of total annual dues and assessments paid to the Association by any Major shall not exceed $ _____ per square foot of the maximum gross floor area of the Commercial Area of each Major's Parcel.

Governing Instruments

16.03. Developer shall draft governing instruments for the Association. The governing instruments shall not contain any provision that grants the Association power to abrogate, modify, or otherwise affect any right granted to a Major or Developer under this Agreement. The governing instruments shall provide that the board of directors for the Association shall consist of not more than [*number, e.g.*, five] directors, and shall grant each Party to this Agreement the right to appoint one director to the Association's board of directors.

[*Continue with the following:*]

ARTICLE 17. MISCELLANEOUS

Covenants Run With Land

17.01. The covenants, restrictions, conditions, and provisions contained in this Agreement (whether affirmative or negative in nature) (1) are made for the direct, mutual, and reciprocal benefit of each Parcel in the Shopping Center; (2) shall constitute and be enforceable as mutual equitable servitudes on each Parcel in the Shopping Center in favor of every other Parcel; (3) shall constitute covenants running with the land; (4) shall bind every person having any fee, leasehold, or other interest in a Parcel, to the extent that the covenants, restrictions, conditions, or provisions apply to the Parcel; and (e) shall inure to the benefit of the Parties and their respective successors and assigns.

No Public Dedication

17.02. Nothing contained in this Agreement shall be deemed to be a gift or dedication of any portion of the Shopping Center to the general public, for the general public or for any public purpose whatsoever, it being the intention of the Parties that this Agreement shall be strictly limited to and for the purposes expressed in the Agreement.

No Partnership or Joint Venture

17.03. This Agreement shall not be construed or deemed to create a relationship of partnership or joint venture among the Parties or between any of them.

Notices

17.04. All notices, statements, demands, requests, approvals, or other communications (collectively referred to in this Agreement as "notices") to be given under or pursuant to this Agreement shall be in writing, addressed to the Parties at their respective addresses set forth below. Further, the notices shall be delivered in person, or by certified or registered mail, return receipt requested and postage prepaid. Notices shall be deemed given on the date personal delivery is made or, in the case of mailed notices, the date of delivery indicated on the requested return receipt.

Notices to Parties shall be sent to the following addresses unless and until a Party changes its address by written notice given to all other Parties:

DEVELOPER
_____[*name*]
_____[*address*]

OWNER #2
_____[*name*]
_____[*address*]

OWNER #3
_____[*name*]
_____[*address*]

Any Person who becomes a Party to this Agreement by virtue of the provisions of Article 2 shall give written notice of his, her, or its address to each of the other Parties.

Approvals

17.05. Whenever the approval or consent of any Party (hereafter referred to as an "approval") is required under this Agreement, the approval shall not be unreasonably withheld except as otherwise provided in this Agreement. Unless this Agreement requires a particular approval to be made within a specific time period, the approval must be given within [*number, e.g.,* 30] days after the date of a written request for the approval. Except as otherwise provided in this Agreement, if a Party fails to indicate, within the foregoing _____ -day period, whether or not it approves of a particular matter, the party will be deemed to have given its approval. If a Party disapproves a particular matter, the reasons for the disapproval must be stated in writing.

Severability

17.06. If any provision of this Agreement is held to be invalid by any court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

Recordation and Effective Date

17.07. [*If memorandum will be recorded, include the following:* A memorandum of this Agreement, in recordable form, shall be executed by each of the Parties concurrently with the execution of this Agreement.] _____[*Name of party*] shall (1) cause this Agreement [*or* the memorandum] to be recorded, as soon as possible after the execution of this Agreement, in the Official Records of the County of _____, California, and (2) thereafter deliver copies of the Agreement [*or* memorandum], showing recordation, to each of the other Parties. The effective date of this Agreement shall be the date on which it [*or* the memorandum] is recorded. The cost of recording shall be shared equally by the Parties.

Executed at _____, California, on _____[*date*].

DEVELOPER
_____ [*name of developer*]
By _____ [*signature*]
[*typed name and title*]

OWNER #2
_____ [*name of owner #1*]
By _____ [*signature*]

[*typed name and title*]

OWNER #3
_____ [*name of owner #2*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART IV. FORMS

17-34E California Legal Forms--Transaction Guide § 34E.201

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§ 34E.201 Shopping Center Lease

[1] Comment

[a] Use of Form

This form is a retail lease for a shopping center. Because a shopping center lease is a type of commercial lease, much of the coverage in Chapter 34C, *Commercial, Industrial, and Office Leases,* including its alternative lease provisions, is applicable to the use of this form. This comment makes appropriate cross-references to that chapter when necessary.

As a practical matter, most tenant leases for a shopping center contain, on the whole, provisions more favorable to the landlord than to the tenant. This lease reflects that reality. The remainder of this comment identifies provisions in this form that favor the landlord (or, less frequently, the tenant).

[b] Uniform Lease for All Tenants

Most shopping centers use a standardized, uniform lease for all tenants. As a general rule, only large "anchor" tenants are able to successfully negotiate their own individual terms for a lease. However, depending on market conditions and the financial strength or reputation of a tenant, even a small tenant may be able to bargain for and obtain modifications to an otherwise standardized lease.

From a practical standpoint, uniformity in the tenant leases for a shopping center makes it easier to manage the center and to market it to prospective purchasers. Also, prospective tenants may be more likely to accept a lease containing provisions that are binding on other tenants as well.

[c] Description of Leased Premises

To avoid potential title problems, a shopping center lease should simply lease space in a building, and not lease the building itself or the underlying land. Further, a shopping center lease usually does not contain a legal description of the

land on which the shopping center is located. Instead, a site plan for the shopping center is typically attached to the lease and incorporated by reference [*see § 34E.201[2],* P 1.02].

In addition to its retail space, the tenant should be granted a nonexclusive right in common with others to use the common areas of the shopping center [*see § 34E.201[2],* P 1.03], subject to the tenant's compliance with rules and regulations governing the use of these areas [*see § 34E.201[2],* P 5.03].

[d] Term of Lease

This lease provides for a fixed term of years, beginning on the commencement date of the lease. This date is the earlier of the date the tenant is required under the lease to open for business, or the date the tenant actually opens for business [*see § 34E.201[2],* P 3.01]. If the shopping center is new, the landlord may want to secure the tenant's agreement to participate in a grand opening for the shopping center [*see* optional language in § 34E.201 [2], P 3.01]. When a conditional commencement date (see discussion above) makes it impossible to specify the exact termination date of a fixed lease term until the commencement date has been established, the lease should contain a provision requiring the parties to memorialize in writing the exact commencement and termination dates of the lease once they have been determined [*see § 34E.201[2],* P 3.03]. For a lease clause granting a tenant the right to extend the term of a lease and a discussion of applicable laws, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.212*

This form refers to the interim period between the date of the lease and the commencement date as the preliminary term of the lease [*see § 34E.201[2],* P 3.02]. During that term, the tenant is not required to pay rent and other charges, but is obligated to construct its own improvements and to install fixtures suitable for its business.

[e] Possession of Premises

The failure by a landlord to put a tenant in possession of leased premises justifies the termination of the lease by the tenant [*see Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138]* . The proper measure of damages for a landlord's failure to deliver possession of the leased premises is the difference between the agreed rent and the rental value of the premises during the term of the lease [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 884, 92 Cal. Rptr. 162, 479 P.2d 362]* . In light of these consequences, a landlord should insist on some flexibility under the lease in delivering possession to the tenant. For example, this form specifies a definite possession date, but provides that the tenant is not entitled to terminate the lease or to any other remedy if the landlord fails to deliver by that date. Only if the landlord fails to deliver possession before expiration of a specified grace period is the tenant entitled to cancel the lease [*see § 34E.201[2],* P 3.04].

[f] Rent and Other Charges

[i] In General

In addition to a basic fixed rent [*see* [ii], *below*] and a percentage rent [*see* [iii], *below*], a tenant in a shopping center usually must also pay a pro rata share of the landlord's common area operating expenses and real property taxes for the shopping center [*see* [iv]-[vi], *below*]. Further, the landlord may require a security deposit at the commencement of the lease term [*see* [vii], *below*]. For any rent or other required charge, the lease must clearly set forth the amount of the rent or charge (or formula for determining the amount), when and to whom the amount is payable, and the circumstances, if any, that excuse or postpone the payment of any amount.

[ii] Fixed Rent

This form requires the tenant to pay an annual minimum fixed rent. This rent is payable in equal monthly installments on the first day of each month [*see § 34E.201[2],* P 4.01].

[iii] Percentage Rent

The percentage rent provision in this form requires the tenant to pay the landlord a percentage of the portion of its gross sales that exceeds a specified base dollar amount [*see* P 4.02]. For a percentage rent provision that requires the payment of a stated percent of the amount, if any, by which the tenant's annual gross sales exceed an agreed-on amount or formula (for example, four times the minimum rent), see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.200[2],* P 2.02. For discussion of the purpose of percentage rent and the different ways in which it may be calculated, see the Legal Background to Chapter 34C, *Commercial, Industrial, and Office Leases.*

The lease must clearly define the term "gross sales" (or alternative term) for purposes of the percentage rent provision. Further, it should describe all transactions or amounts that are to be included or are excludable [*see § 34E.201[2],* P 4.03]. The lease should also require the tenant to maintain accurate books and records of its gross sales on the premises [*see § 34E.201 [2],* P 4.05], and to provide the landlord with statements of its gross sales on a periodic basis [*see § 34E.201[2],* P 4.04].

The lease should also grant the landlord reasonable access to the tenant's books and records and the right to conduct an audit of the tenant's gross sales [*see § 34E.201[2],* P 4.05]. It should describe remedies for any discrepancies (disclosed by an audit) in the amount of a tenant's gross sales or in the amount of percentage rent paid by the tenant [*see § 34E.201[2],* P 4.05(b)]. Common provisions require the tenant to pay for the audit if a discrepancy equal to or greater than a specified percentage is disclosed. For even higher or repeated discrepancies, the landlord may insist on a provision giving it the right to terminate the tenant's lease.

[iv] Tenant's Share of Common Area Maintenance Costs

A shopping center lease usually requires the tenant to contribute to the landlord's cost of operating and maintaining common areas of the center. Typically, a tenant's pro rata share of total common area maintenance costs is determined on the basis of floor area occupied by the tenant in relationship to the total leasable floor area in the shopping center. For purposes of the calculation, the lease may exclude the floor area of major occupants or tenants, such as department stores, from the total leasable floor area in the shopping center before the tenant's share is calculated [*see* optional language in § 34E.201[2], P 4.06]. The reason for this exclusion is that a "key" tenant or owner-occupant usually negotiates its own agreement with the owner of the shopping center regarding a contribution to common area maintenance costs. In order to induce a large tenant or occupant to locate in the shopping center, a developer or landlord may agree to significantly reduce the amount that the tenant or occupant would otherwise be required to pay on the basis of leasable floor area occupied in the shopping center.

The lease should describe the costs and expenses for which the tenant is required to contribute a pro rata share [*see § 34E.201[2],* P 4.06(c)]. The landlord will normally want to include as many items as possible, while the tenant may bargain for the exclusion of certain items that do not contribute to the tenant's beneficial use of the shopping center. For example, a tenant may bargain to exclude (1) attorneys' fees incurred by the landlord to enforce other individual tenant leases, or (2) costs incurred to perform any required cleanup of hazardous substances in the shopping center not caused by the tenant. On the other hand, a landlord may insist on the inclusion of all costs and expenses of complying with any environmental law or regulation, including the removal of any hazardous substances from the shopping center [*see § 34E.201[2],* P 4.06(c)].

A limited liability company that was the owner of a shopping center was not entitled under the lease to charge its tenants the cost of its LLC taxes and fees as shares of "common area operating expenses." The LLC fees and taxes did not qualify as costs "relating to the ownership and operation" of a shopping center within the meaning of the lease term "Common Area Operating Expenses"; LLC taxes and fees are not the costs of owning property but the costs of operating a business in a form that limits the personal liability of its principal [*Tin Tin Corp. v. Pacific Rim Park LLC, (2009) 170 Cal. App. 4th 1220, 1231, 88 Cal. Rptr. 3d 816]* .

[v] Real Property Taxes and Assessments

In the absence of an express agreement between a landlord and tenant regarding responsibility for the payment of property taxes, the general rule is that the landlord has the obligation to pay all taxes assessed against the leased premises during the term of the lease [*Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 121, 45 Cal. Rptr. 140, 403 P.2d 396]* . A limited exception exists for tax increases caused by certain improvements made by a tenant [*see Ch. 34C, Commercial, Industrial, and Office Leases, § 34C.221*].

In a shopping center, each owner of the property in the center (including the landlord) commonly pays the property tax assessed against its land [*see, e.g., § 34E.200[2],* P 10.01]. The landlord then requires in its leases with tenants that tenants each pay a pro rata share of the property taxes [*see § 34E.201[2],* P 4.08(b)]. It is important that the lease specify all taxes that are to be included in or excluded from the computation in determining the tenant's share [*see § 34E.201[2],* P 4.08(a)]. For example, the obligation of a tenant under a lease to pay "taxes" on the leased premises does not, unless expressly provided in the lease, include special assessments imposed by an improvement district since a local improvement assessment is not a tax [*Wells v. Union Oil Co. (1938) 25 Cal. App. 2d 165, 166-167, 76 P.2d 696]* .

[vi] Utilities

A landlord may furnish some utilities to a shopping center tenant. In that case, the lease should require the tenant to contribute to the cost [*see § 34E.201[2],* P 4.07(b)]. For other utilities, the tenant should be required to contract with local utility providers and to pay the cost of service [*see § 34E.201[2],* P 4.07(a)].

[vii] Security Deposit

The security deposit provision in this form reflects statutory requirements governing the handling and disposition of a security deposit for a nonresidential lease [*see Civ. Code § 1950.7*; § 34E.201[2], P 4.10]. For coverage of these requirements, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.200[1]*.

This form also requires the tenant to restore any amount of the deposit used by the landlord during the term of the lease. While this type of provision is neither authorized nor prohibited by statute, it is commonly included in a nonresidential lease. Finally, the lease should indicate whether or not the landlord will pay the tenant interest on the deposit. The payment of interest is not required under current law or under this form.

[g] Financing Considerations

If, as is often the case, a lender will finance the shopping center for the landlord, the lender will generally condition financing on its review and approval of existing and future leases. This review will permit the lender to confirm that the leases are compatible with its loan documents, and to assess its security risk in the event the landlord defaults and the lender assumes the position of landlord under the leases. The lender will want to hold the property with a minimum of ownership concerns if it eventually acquires title through foreclosure. For this reason, lenders usually view with disfavor (1) restrictions on the landlord resulting from an "exclusive" use clause granted to a tenant, and (2) obligations of a landlord to perform certain affirmative acts in favor of a particular tenant. Further, since most lenders are not in the business of operating shopping centers, they require lease provisions that will protect and enhance the value of the shopping center and thereby increase its marketability.

For further discussion of financing as it affects the provisions of a lease, see the Legal Background to Chapter 34C, *Commercial, Industrial, and Office Leases.* For coverage of financing considerations applicable to a ground lease, see the Legal Background to Chapter 34D, *Ground Leases.*

[h] Tenant's Use of Premises

[i] Restriction as to Type of Business

It is to the tenant's advantage to have maximum flexibility in its use of the leased premises. On the other hand, a landlord may insist on a provision that restricts the tenant's use to a particular type of business, especially when the specific percentage requirements used in a percentage lease are based on a particular type of business to be conducted by the tenant. Although this lease restricts the tenant's use of the premises to a particular type of business, it permits the sale of collateral merchandise, provided gross sales from the collateral merchandise do not exceed an agreed-on percentage of total gross sales from the tenant's business [*see § 34E.201[2]*, P 2.01].

If a lease does not limit the uses that the tenant may make of the leased premises, the tenant may use the premises for any lawful purpose not materially different from the ordinary use of the premises or uses for which the premises are adapted or for which they were constructed [*Davidson v. Goldstein (1943) 58 Cal. App. 2d Supp. 909]* .

[ii] Operating Covenant

Because the amount of rent a landlord collects under a percentage lease is directly related to the success of the tenant's business, the landlord may bargain for a provision requiring the tenant to continuously operate the business during the term of the lease [*see § 34E.201[2]*, P 8.10; *see also Ch. 34C, Commercial, Industrial, and Office Leases, § 34C.200[1][g]*]. Absent such a provision, there is, as a general rule, no implied covenant on the part of the tenant to continue to use the premises, and the tenant may cease to use the premises for any purpose. However, under an important exception to the general rule, a tenant's covenant of continued operation may be implied when the rent under a commercial lease is a specified but unsubstantial minimum plus a percentage [*Lippman v. Sears Roebuck & Co. (1955) 44 Cal. 2d 136, 142-143, 280 P.2d 775* ; *College Block v. Atlantic Richfield Co. (1988) 206 Cal. App. 3d 1376, 1380, 254 Cal. Rptr. 179* ; *see § 34E.16*].

[iii] Radius Restriction

A radius restriction lease clause restricts the tenant (or landlord) from operating a business similar to the tenant's business within a designated geographical radius [*see, e.g., Ch. 34C, Commercial, Industrial, and Office Leases, § 34C.200[2]*, PP 3.06, 307]. The intent behind this provision is to cause the tenant to generate maximum sales at the landlord's location, and to restrict the tenant's ability to distribute sales among several competing locations. Alternatively, a lease may provide that if the tenant opens a similar business within a designated geographical radius, the gross sales from that business will be counted together with the gross sales from the business conducted on the leased premises for purposes of computing percentage rent [*see § 34E.201[2]*, P 8.09].

[iv] Prohibited Activities

The lease should prohibit certain activities that constitute a nuisance or violation of law and that otherwise interfere with the business and operation of the shopping center. For such a provision, see [2], P 8.04, *below* .

[v] Hazardous Substances

Most retail leases contain a standard provision prohibiting the tenant from using or storing hazardous materials on the leased premises [*see, e.g., § 34E.201[2]*, P 8.04(h)]. The hazardous substances provision should designate the party responsible for performing any necessary cleanup of hazardous materials and for paying the cost of the cleanup [*see § 34E.201[2]*, P 14.04]. A tenant may bargain for (1) a warranty by the landlord that no hazardous materials are located on the premises, and (2) the landlord's agreement to indemnify the tenant against any damage or loss caused by the presence of hazardous materials found on the leased premises and not caused by the tenant.

For a discussion of hazardous substance laws and their effect on a landlord and tenant under a lease, see the Legal Background to Chapter 34C, *Commercial, Industrial, and Office Leases.*

[vi] Compliance With Law and Other Affirmative Obligations

An owner of real property has a duty to comply with laws and orders regarding the condition of the premises unless the tenant expressly assumes this obligation [*Glenn R. Sewell Sheet Metal Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* . If a tenant covenants in a lease to comply with all laws and ordinances pertaining to the leased premises, that covenant, standing alone, does not constitute an assumption of the duty to comply with laws that require actions of a "substantial" nature [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 674, 75 Cal. Rptr. 889, 451 P.2d 721]* . Therefore, if it is the intent of the parties that the tenant's obligation to comply with all laws is to include the responsibility to make and pay for any or certain government-required capital expenditures (for example, comprehensive fire safety and sprinkler improvements), the lease should state that fact [*see § 34E.201[2],* P 8.05]. For an extended discussion of the California Supreme Court's interpretation of a compliance with laws clause similar to the one in Paragraph 8.05 of this form (which may or may not reflect particular parties' intended use of the clause) and the allocation of responsibility as between tenant and landlord for compliance with government mandated orders, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.241*. If a tenant agrees to assume the burden of complying with applicable laws and regulations pertaining to the leased premises but fails to do so, the landlord can recover from the tenant the expenses of putting the premises in a condition that meets the regulatory standard [*Strecker v. Barnard (1952) 109 Cal. App. 2d 149, 240 P.2d 345]* .

The lease should impose affirmative obligations governing the tenant's operation of its business and use of the premises, such as obligations relating to merchandising, the condition of the premises, and hours of operation [*see § 34E.201[2],* PP 8.01-8.03]. Further, it should require the tenant to comply with any rules and regulations adopted by the landlord [*see § 34E.201[2],* P 8.07]. For an illustrative set of rules and regulations, see *§ 34E.203[2]*.

[vii] Signs and Form of Advertising

To maintain uniformity in tenant signs in a shopping center and to enhance the overall appearance of the center, a lease must obligate the tenant to comply with established sign criteria regarding size, placement, and content [*see § 34E.201[2],* P 8.06]. For illustrative sign criteria that may be included with a lease as an exhibit, see *§ 34E.202[2]*.

[i] Maintenance and Use of Common Areas

The lease should provide that the landlord has exclusive control of the common areas (as defined) [*see § 34E.201[2],* PP 5.01, 5.02]. It should list the actions the landlord must or may take in connection with the use of the common areas, and should clearly describe any limitations on the landlord's control and use of these areas. The landlord should also retain the right to make changes to the common areas. For example, it should be permitted to reduce the size of the common areas, to demolish or construct buildings, and to designate additional portions of the center as common areas. Further, the lease should also authorize the closure by the landlord of all or a portion of the common areas under specific circumstances (for example, during repair and construction work), and should provide that any such closure does not give the tenant the right to terminate the lease or to an abatement of rent [*see § 34E.201[2],* P 5.01].

A lease provision should grant tenants a nonexclusive right to use these areas in common with other tenants and users of the shopping center [*see § 34E.201[2],* P 5.03]. The lease should require the tenant to abide by any rules and regulations adopted by the landlord for the shopping center [*see § 34E.201[2],* P 5.03; *see also § 34E.203[2]* (rules and regulations)]. It should also set forth requirements governing the use of parking spaces by tenants and their employees [*see § 34E.201[2],* P 5.04].

[j] Initial Construction Responsibilities for Leased Space

A shopping center lease typically requires the landlord or tenant to complete, within a specified period of time, construction of improvements necessary for the conduct of the tenant's business on the leased premises. The lease may

require one or both parties to pay construction costs.

This form requires the tenant, at the tenant's sole cost and expense, to perform the necessary construction work in accordance with plans and specifications approved by the landlord [*see § 34E.201[2],* P 6.02(a), (b)]. It also sets forth related requirements governing the tenant's insurance, lien-free completion of construction, standards for construction, liability for design or construction defects, and personal liability for construction work [*see § 34E.201[2],* P 6.02(c)-(f)]. For alternative lease provisions that require the landlord to construct improvements on the leased premises, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.243*

[k] Alterations and Improvements

Absent an express provision in the lease permitting or requiring alterations or improvements, a tenant may not make material alterations to the leased premises without the landlord's consent [*see Metzler v. Thye (1912) 163 Cal. 95, 98-99, 124 P. 721]* . This form requires the tenant to obtain the landlord's prior consent to any tenant alteration, and also provides that the tenant, in making any approved alteration or improvement, must comply with all requirements of the lease governing the tenant's initial construction work [*see § 34E.201[2],* P 6.04; *see also § 34E.201[2],* P 6.02 (initial construction work)]. Any alterations or improvements made by the tenant become the property of the landlord [*see § 34E.201[2],* P 6.06]. A landlord may also want to insert a provision that grants the landlord the option of requiring the tenant to remove alterations and repair damage caused by the removal on termination of the lease [*see Ch. 34C, Commercial, Industrial, and Office Leases, § 34C.200[2],* P 5.05]. For coverage of the laws governing the ownership of improvements made by a tenant and the ownership of a tenant's trade fixtures, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.242*. For alternative alteration provisions, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.240*.

To obtain maximum flexibility for the landlord with respect to future improvements to the shopping center, the landlord should insist that the lease grant it the right to make alterations and improvements to the shopping center as it deems appropriate [*see § 34E.201[2],* P 6.03].

[l] Repairs

Paragraph 6.05 of this form covers the respective responsibilities of landlord and tenant for repairs to the premises. In the absence of lease provisions to the contrary, a tenant only has the duty (1) to use ordinary care to preserve the premises in safe and good condition [*see Civ. Code § 1928*] and (2) to repair all deteriorations or injuries to the premises caused by the tenant's want of ordinary care [*Lynn v. DePue Warehouse Co. (1962) 198 Cal. App. 2d 742, 747, 17 Cal. Rptr. 841]* . Otherwise, a tenant has no general duty to repair the premises or to correct defective conditions [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671-672, 75 Cal. Rptr. 889, 451 P.2d 721]* . However, as the possessor of land, the tenant must act as a reasonable person in the management of the property in view of the probability of injury to others [*Civ. Code § 1714*; *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 433 P.2d 561]* . For further discussion of the respective duties of the landlord and tenant for repair and maintenance, absent contrary lease provisions, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.240[1]*.

[m] Destruction of Premises

If the lease does not require either party to restore leased premises that are destroyed, either party may terminate the lease in the event the premises are destroyed [*Civ. Code §§ 1932(2), 1933(4)*; *Harvey v. Weisbaum (1911) 159 Cal. 265, 267, 113 P. 656]* . However, the parties to the lease may agree that either party is obligated to rebuild the destroyed premises [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889, 451 P.2d 721]* .

Except as otherwise discussed below, this lease requires the landlord to rebuild the leased premises within a designated time if they are destroyed from any casualty covered by the landlord's fire and extended coverage insurance, at least to the extent the cost of rebuilding does not exceed the landlord's net insurance proceeds. The failure by the landlord to commence or complete construction within the specified time period gives the tenant the right to terminate the lease [*see § 34E.201 [2]*, P 7.02].

Notwithstanding the above, the landlord may elect to terminate this lease (instead of repairing and rebuilding the premises) under certain circumstances [*see § 34E.201[2]*, P 7.03]. These circumstances include the following: damage or destruction to the leased premises resulting from an uninsured casualty; damage or destruction to the leased premises or to the building containing the premises, if the cost of repair exceeds a certain percent of the building's replacement cost; or damage or destruction to a specified percentage of the leasable floor space contained in the shopping center. In addition, either party has the right to terminate the lease if the premises are damaged or destroyed from any cause during the last part of the lease term. Paragraph 7.03 of this form describes the procedure for terminating the lease due to damage or destruction.

Another clause in this lease provides for the continuation or abatement of rent if the lease continues in effect after damage or destruction [*see § 34E.201[2]*, P 7.04]. A landlord (and a landlord's lender) may be amenable to an abatement of rent during a period of rebuilding. If a tenant is required to pay rent during such a period, the landlord should include a provision requiring the tenant to obtain business interruption insurance. As a practical matter, the tenant should consider obtaining this coverage even if it is not required under the lease.

When either party is required to rebuild following damage or destruction to the leased premises, the lease should set forth standards and a time frame for the rebuilding [*see § 34E.201[2]*, P 7.05]. For example, rebuilding required by the landlord under this lease only extends to the original "shell" for the premises delivered to the tenant at the commencement of the lease [*see § 34E.201[2]*, P 7.05].

Of particular concern to a landlord's lender is how insurance proceeds will be disbursed following a casualty causing damage to or destruction of the leased premises. The lease provisions should not conflict with those contained in the lender's security instrument [*see § 34E.201[2]*, P 7.06]. A lender may or may not require that the proceeds be applied to the outstanding balance of its loan. In some cases, the lender may require that the proceeds be paid to an insurance trustee for distribution during the construction period, rather than directly to the insured.

For alternative lease provisions that require the tenant to rebuild in the event that the leased premises are destroyed, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.244*

[n] Indemnity and Insurance

Article 9 of this form contains provisions for insurance and indemnity that are similar to those *set forth in Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.222*. The comment to that form is equally applicable to the use of Article 9 of this form, and includes a full discussion of the rights and obligations of a tenant and landlord with respect to insurance, including the issues of subrogation, indemnity, and additional and named insureds.

[o] Merchants' Association

If a merchants' association exists for the shopping center [*see § 34E.18*], the tenant's lease should require the tenant to be and remain a member of the association. The lease should also describe all amounts that the tenant must pay to the association, such as regular dues and an initial contribution [*see § 34E.201[2]*, P 10.01(a)]. The parties may wish to add additional provisions governing tenant voting and other rights of a tenant in the association. If large major tenants-members of the shopping center are subject to different obligations or have different rights in the association, that fact should probably be stated in the standard lease used for the other tenants, although the details should not be

disclosed.

In most merchants' associations, the landlord is also required to be a member of the association and to contribute a designated amount to the association on a regular basis. In this form, the required contribution is a designated percentage of the total amount contributed by all tenants (which must not exceed a stated maximum amount) [*see § 34E.201[2]*, P 10.01(b)]. When a shopping center has owners other than the landlord who are also occupants of the shopping center, the lease must also specify their respective contributions to the merchant's association [*see, e.g., § 34E.200[2]*, art. 16].

[p] Condemnation

Unless the lease provides otherwise [*see Code Civ. Proc. § 1265.160*], statutory requirements and case law govern the rights and obligations of the landlord and tenant in the event the leased premises are condemned [*see Code Civ. Proc. §§ 1230.010-1273.050*]. For coverage of the applicable laws, including a consideration of the practical factors the parties should consider in negotiating a condemnation provision, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.262[1]*. That form also contains alternative lease provisions for condemnation.

This form provides that the lease terminates if the leased premises are totally condemned or if the condemnation of a designated percentage substantially prevents the tenant from conducting its business [*see § 34E.201[2]*, P 12.02]. Certain takings of the shopping center's leasable area or of the common areas or parking areas of the shopping center also justify termination of the lease [*see § 34E.201[2]*, P 12.03].

Under Paragraph 12.02 of this lease, if a taking of less than a specified percentage of the gross floor area of the premises occurs and does not render the premises unsuitable for the conduct of the tenant's business, the lease will terminate as to the portion taken but will continue in effect for the remainder of the premises. When a lease contains such a provision, it should also include a waiver by the tenant of its statutory right [*see Code Civ. Proc. § 1265.130*] to petition the court for termination of the lease following the partial taking [*see § 34E.201[2]*, P 12.05]. For discussion of that statutory right, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.262[1]*.

This form provides that the full amount of any condemnation award belongs to the landlord, except for certain amounts attributable to a tenant's improvements to the premises [*see § 34E.201 [2]*, P 12.04]. For coverage of the laws governing the division of a compensation award in the absence of a contrary lease provision, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.262[1]*

[q] Subletting and Assignment

A tenant under a nonresidential lease has an unrestricted right of transfer unless the lease restricts or absolutely prohibits transfers [*Civ. Code § 1995.210(b)*]. This lease requires the tenant to obtain the landlord's consent prior to (1) assigning the tenant's interest in the lease or (2) subletting the leased premises [*see § 34E.201[2]*, P 8.08(a)]. Alternative language states that the landlord will not unreasonably withhold its consent, or that the landlord may withhold consent in its sole discretion. If a transfer restriction in a lease requires the landlord's consent but provides no standard for giving or withholding the consent, the consent must not be unreasonably withheld if the lease was executed on or after September 23, 1983 [*Civ. Code § 1995.270(b)*; *see Cohen v. Ratinoff (1983) 147 Cal. App. 3d 321, 329, 195 Cal. Rptr. 84]* . If the lease was executed before that date, the consent may be unreasonably withheld [*Civ. Code § 1995.270(b)*].

For alternative lease provisions governing subletting and assignments and a discussion of the laws governing transfer restrictions, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.260*. That form and comment also discuss the effectiveness of a lease provision that prohibits assignment in the event of a tenant's insolvency, bankruptcy, or death [*see 11 U.S.C. § 365*].

This form includes optional language that requires the tenant to pay to the landlord any profit from a sublease or assignment. For these purposes, "profit" means any amount the tenant receives from a subtenant or assignee over the amount of rent the tenant is obligated to pay to landlord [*see § 34E.201[2],* P 8.08(b)]. This arrangement appears to be consistent with the principle, affirmed by the California Supreme Court, that nothing bars the parties to a commercial lease transaction from making their own arrangements respecting the allocation of appreciated rentals if there is a transfer of the leasehold [*see Kendall v. Ernest Pestana, Inc. (1985) 40 Cal. 3d 488, 505, n.17, 220 Cal. Rptr. 818, 709 P.2d 837]* .

[r] Subordination

This form contains a clause stating that the tenant's lease is subordinate to any mortgage or deed of trust that has been or may be placed by the landlord on all or any portion of the shopping center. It requires the tenant to execute any documents deemed necessary by the landlord or the landlord's lender to effect the subordination, provided the lender agrees to a nondisturbance agreement for the tenant [*see § 34E.201[2],* P 11.01(a)]. A typical nondisturbance agreement provides that although the lease is subordinate to a superior lien, the holder of the lien will not, by foreclosure or otherwise, disturb the tenant's possession, as long as the tenant is not then in default under the lease.

This form also grants the lender the right to subordinate its lien to the lease [*see § 34E.201[2],* P 11.01(b)]. For a discussion of the reasons why a lender might make this election, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.250[1]*.

[s] Default by Tenant

[i] In General

This form lists acts and omissions by the tenant that are considered a default under the lease [*see § 34E.201[2],* P 13.01]. As a general rule, a failure to pay rent or perform any other term or condition of the lease does not constitute a default unless (1) the landlord has given the tenant written notice of the act or omission, and (2) the tenant fails to cure within a specified time period. Because of the substantial financial commitment of both parties involved in a retail lease, this type of provision is not uncommon in a nonresidential lease.

This lease also contains a provision describing the circumstances under which the tenant will be deemed to have abandoned the premises and breached the lease [*see § 34E.201[2],* P 13.01(b)]. The fact of abandonment may be determined by a statutory procedure [*see Civ. Code § 1951.3*], but that procedure is not exclusive [*see Civ. Code § 1951.3(f)*]. For full coverage of abandonment and termination, see Chapter 35B, *Modification and Termination of Leases* , Part B.

Paragraph 13.01(d) of this form lists other circumstances relating to the financial condition of the tenant that are considered a default under the lease. One of these is the filing of a bankruptcy petition by or against the tenant (unless the petition is dismissed within a stated time period). A provision permitting the landlord to terminate a lease because of the tenant's bankruptcy is, with few exceptions, unenforceable under federal bankruptcy law [*see 11 U.S.C. § 365*; *see also* the Legal Background to Ch. 34C, *Commercial, Industrial, and Office Leases*].

[ii] Damages on Termination of Lease

If a lease is terminated due to the tenant's breach, the landlord is entitled under certain circumstances to recover statutory damages from the tenant [*see Civ. Code § 1951.2*; § 34E.201[2], P 13.02]. To recover certain damages, the lease must provide for their recovery [*see Civ. Code § 1951.2(c)*]; for others, the landlord has a duty to mitigate damages [*see Civ. Code § 1951.2(a)(2), (3), (c)*]. For comprehensive coverage of those damages, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.270[1]*.

[iii] Continuation of Lease in Effect After Breach

Rather than terminate the lease if the tenant breaches it and abandons the premises, the landlord may wish to continue the lease in effect and collect rent as it becomes due. However, this statutory remedy is available only if all of the following apply [*Civ. Code § 1951.4*]:

(1) The lease provides for it;

(2) The landlord does not terminate the tenant's right to possession; and

(3) The lease permits the tenant the right to sublet or assign, subject to reasonable limitations.

For complete coverage of this remedy, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.271[1]*.

[t] Personal Liability of Landlord

This lease provides that in the event of the landlord's default, a tenant will look solely to the landlord's interest in the shopping center and not to other assets of the landlord for satisfaction of any judgment or other tenant remedy [*see § 34E.201[2]*, P 14.01]. It is not uncommon in a shopping center or other commercial lease for a landlord to bargain for inclusion of such a provision limiting its liability exposure.

[u] Lease Subject to Landlord's Operating Agreements

When an REA [*see § 34E.200[2]*] or comparable instrument (such as a declaration or an operating agreement) has been or will be recorded for the shopping center by the landlord or by the landlord and other owners of the center, the lease should specifically state that it is subject to the REA or other instrument [*see § 34E.201[2]*, P 14.02]. Language included in this form recites that a tenant is not a third party beneficiary to any REA or similar instrument entered into by the landlord, and that the landlord has no obligation to enforce a declaration or similar instrument for the benefit of the tenant [*see § 34E.201[2]*, P 14.02].

[v] Representations Regarding Major Occupants

The presence of chain department stores or other large national or regional occupants in a shopping center has a beneficial effect on the center's ability to draw other tenants. When negotiating with prospective tenants prior to the opening of the shopping center and prior to the time any major occupants have actually located there, the landlord and its agents should be very wary of making representations to potential tenants regarding the occupancy of space in the center by major stores. Further, even when certain majors are already located in the center, the landlord should avoid making any representations or guarantees that the majors will continue to operate in the center. This lease contains a provision in which the tenant acknowledges that no such representations have been made [*see § 34E.201[2]*, P 14.03].

The lease should constitute the entire agreement between the landlord and tenant and should state all the material terms and conditions on which the lease is based. Otherwise, there is a danger the tenant can allege and prove fraud in the inducement to sign the lease on the basis of representations made concerning the shopping center [*see Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 323 P.2d 843]* .

[w] Recording of Lease

A lease should indicate whether it (or a memorandum of lease) must or may be recorded. This form provides that either party may record a memorandum of the lease and that each party will, on the request of the other party, execute such a memorandum [*see § 34E.201[2]*, P 14.08].

For a discussion of the reasons why a tenant should consider recording a lease and an illustrative memorandum of lease, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.203*.

[x] Attorneys' Fees

This form includes an attorneys' fee provision [*see § 34E.201[2]*, P 13.10]. For an alternative version and a discussion of applicable laws, see *Chapter 34C, Commercial, Industrial, and Office Leases, § 34C.274*.

[y] Miscellaneous Provisions

The following miscellaneous provisions appear in Article 14 of this form:

(1) A provision for brokerage commissions [*see § 34E.201[2]*, P 14.07];

(2) A clause providing for the payment of interest on any monetary obligation that is not paid when due [*see § 34E.201 [2]*, P 14.09];

(3) A provision describing the methods by which either party may give the other any notice required or permitted by the lease [*see § 34E.201[2]*, P 14.10; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*];

(4) A provision making the lease binding on successors of the parties [*see § 34E.201[2]*, P 14.11; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.282*];

(5) A partial invalidity clause [*see § 34E.201[2]*, P 14.15];

(6) A sole and only agreement clause [*see § 34E.20[2]*, P 14.13; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.270*]; and

(7) A time is of essence clause [*see § 34E.201[2]*, P 14.12; *see also Ch. 23, Real Property Sales Agreements, § 23.200[2]*].

[2] FORM

Shopping Center Lease

SHOPPING CENTER LEASE

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SHOPPING CENTER LEASE

THIS Lease is entered into on _____[*date*], by and between _____[*name*], [*legal status, e.g.*, a California corporation] ("Landlord"), and _____[*name*], [*legal status, e.g.*, a California corporation] ("Tenant").

ARTICLE 1. LEASED PREMISES

Agreement to Lease

1.01. In consideration of the agreements and covenants contained in this Lease to be kept and performed by both Landlord and Tenant, Landlord leases to Tenant and Tenant leases from Landlord the Premises described in Paragraph 1.02 of this Lease.

"Premises" Defined

1.02. "Premises" means the retail store space that is designated as Store Number _____ on the site plan (described below) of the shopping center known as _____[*name of shopping center*] ("Shopping Center"), located in _____[*city*], _____ County, California. [*Add if applicable:* Store Number _____ (*repeat number set forth above*) is in Building _____ on Level _____ of the Shopping Center.] The site plan mentioned above is attached to this Lease as Exhibit _____ and is hereby incorporated by reference. The Premises contain approximately _____ square feet of gross floor area, measured as follows: the frontage dimensions of the Premises are measured from the center [*or* outside] of the side walls of the Premises, and the depth dimensions of the Premises are measured from the outside of the rear perimeter wall to the outside of the front perimeter wall [*or, when the premises contain a storefront instead of a front perimeter wall,* to the point where the front of the Premises joins the Common Areas (defined below) of the Shopping Center, as designated on Exhibit _____ (*same designation for site plan indicated above*) to this Lease]. "Premises" does not include, and Tenant has no right in, the land or improvements below the floor slab of the Premises or above the interior ceiling of the Premises.

Right to Use Common Areas

1.03. Tenant has the nonexclusive right to use, in common with others, the Common Areas of the Shopping Center. The term "Common Areas" is defined in Paragraph 5.02 of this Lease.

ARTICLE 2. TENANT'S BUSINESS USE AND NAME

Permitted Business Use

2.01. Tenant is leasing the Premises to operate and conduct the following business: [*describe permitted business, e.g.,* a drugstore, the operation of which will involve any or all of the following: (1) servicing, filling, and refilling of pharmaceutical prescriptions by licensed pharmacists only, (2) retailing of other over-the-counter medicines and any or all other commercial products relating primarily to personal health care and hygiene, and (3) collateral merchandising of publications, electronic equipment, sundries, photographic equipment and accessories, take-out food, dessert items, jewelry, cosmetics, hardware, toys, groceries, and candies, so long as this collateral merchandising does not at any time account for more than _____ percent of the inventory on display for sale (*or* for more than _____ percent of the gross sales of any month)]. Tenant may not use the Premises or permit the Premises to be used for any other purpose. Landlord does not represent or warrant that Tenant's permitted business use is presently permitted or will be permitted in the future by applicable laws and regulations.

Tenant's Business Name

2.02. The name of Tenant's business is _____[*trade name*]. Tenant may not change its business name during the term of this Lease without the written consent of Landlord. If Landlord consents to a change in the name, Tenant shall be solely responsible for all costs of changing the name, including costs of changing the name as it appears in any signs of the Shopping Center or in any business, advertising, or similar materials generated by the Merchants' Association for the Shopping Center.

ARTICLE 3. TERM OF LEASE

Commencement Date and Term

3.01. The Original Term of this Lease shall be for a period of [*number, e.g.,* five] years, beginning on the Commencement Date. The Commencement Date is the earlier of the following: (1) the day following the Completion Date for Tenant's Work as specified in Paragraph 6.02(a) of this Lease, or (2) the day on which Tenant actually opens for business on the Premises. If the Commencement Date falls on a day other than the first day of the month, the period between the Commencement Date and the first day of the first calendar month in the term shall be added to the [*repeat number, e.g.,* five]-year period described above.

[*If shopping center is new and there is to be a grand opening, add the following:*]

Notwithstanding the above, if Landlord requests in writing that Tenant delay opening for business until a later date that coincides with a grand opening for the Shopping Center, Tenant agrees to delay its opening of business until the date specified in Landlord's notice [, provided the date for the grand opening is on or before _____ (*date*)]. If Tenant delays opening its business until the date requested in Landlord's notice, the Commencement Date of this Lease shall be the date on which Tenant opens for business.

[*Continue with the following:*]

Preliminary and Original Term

3.02. The period beginning on the date of this Lease first written above and ending on the date immediately prior to the Commencement Date shall be the "Preliminary Term" of this lease. The period beginning on the Commencement Date and continuing until the stated expiration date or the earlier termination of this Lease shall be the "Original Term" of this Lease. Unless otherwise specified, references in this Lease to "the term of this Lease" include both the Preliminary Term and the Original Term. Tenant's obligation to pay rent and other monetary amounts required under this Lease shall be abated during the Preliminary Term (except that Tenant shall pay Landlord the cost of any utilities furnished by Landlord to Tenant for Tenant's Work during the Preliminary Term); otherwise, all provisions, covenants, and conditions of this Lease shall apply to Tenant during the Preliminary Term.

Confirmation of Term

3.03. Following determination of the Commencement Date and termination date for the Original Term of this Lease, Landlord and Tenant shall each execute, at the option of Landlord, a written statement prepared by Landlord and in recordable form, confirming those dates.

Delivery of Possession

3.04. Landlord shall deliver possession of the Premises to Tenant no later than _____[*date*] (the "Possession Date"). If Landlord fails to deliver possession on or before the Possession Date, this Lease shall not be void or voidable nor shall Landlord be liable to Tenant for any loss or damage resulting from failure to deliver possession to Tenant. Instead, the Possession Date shall be extended to the actual date Landlord delivers possession. In the case of such an extension, the Parties shall each confirm in writing the extended Possession Date. Notwithstanding the foregoing, if Landlord does not deliver possession of the Premises to Tenant on or before _____[*date*], Tenant may cancel this Lease on written notice to Landlord given within [*number, e.g.,* five] days after that date.

ARTICLE 4. RENT AND OTHER CHARGES

Fixed Rent

4.01. Beginning on the Commencement Date and continuing throughout the term of this Lease, Tenant shall pay an annual minimum fixed rent to Landlord of $ [*annual dollar amount*] ("Fixed Rent"). Tenant shall pay the Fixed Rent in equal monthly installments on the first day of each month. Each monthly installment of Fixed Rent shall be paid in advance, without prior demand by Landlord, and without any deduction or setoff. If the Commencement Date falls on a day other than the first day of the month, the first monthly installment of Fixed Rent shall be adjusted for that month only on a per diem basis calculated on a 30-day month. If the Fixed Rent payable under this Lease is abated for any portion of any month pursuant to the terms of this Lease, the amount of the monthly installment of Fixed Rent for that month shall also be adjusted on a per diem basis calculated on a 30-day month. All rent payable under this Lease shall be paid (1) to Landlord at the address set forth in this Lease for giving notices to Landlord (as may be changed by written notice from time to time), or (2) to Landlord's agent at the address designated in writing by Landlord.

Percentage Rent

4.02. In addition to the Fixed Rent and all other charges and amounts payable under this Lease, Tenant shall pay a percentage rent to Landlord for each lease year in the Original Term of this Lease. The percentage rent for a year shall be equal to _____ percent of the amount, if any, by which Tenant's annual Gross Sales (defined in Paragraph 4.03 of this Lease) for that lease year exceed $ [*specify base amount*] (the "Gross Sales Base Amount"). Except as noted below, the term "lease year" means the twelve full calendar months commencing on the first day of January immediately following the Commencement Date and ending on the thirty-first day of December of that calendar year; and each successive twelve-month period. Notwithstanding the foregoing, the first lease year shall begin on the Commencement Date and end on the immediately following thirty-first day of December, and the last lease year shall end on the termination date of this Lease. If a lease year contains less than 12 full calendar months, the Gross Sales Base Amount for that lease year shall be determined by multiplying the Gross Sales Base Amount by a fraction, the numerator of which is the number of days in the partial lease year and the denominator of which is 365. The Percentage Rent shall be paid by Tenant to Landlord monthly, as provided in Paragraph 4.04(a) of this Lease.

"Gross Sales" Defined

4.03. (a) "Gross Sales" means the gross dollar amount generated by the sale, rental, or leasing of all goods and merchandise and the charges for all services performed by Tenant, from all business conducted by Tenant on, in, at, or from the Premises, whether the consideration for the goods, merchandise, or services is paid by cash or check or on credit. "Gross sales" includes all amounts from the following: (1) any order that originates and is accepted by Tenant on or from the Premises, including an order that is delivered to or filled from a location other than the Premises or is solicited by an employee of Tenant or otherwise on behalf of Tenant at a location outside the Premises; (2) any order that is received at or billed from the Premises by mail, telephone, or other similar device; and (3) unless excluded under

Subparagraph (b) of this Paragraph, any other transaction that Tenant would in the ordinary course of its business attribute to its business on the Premises, including a transaction involving a finance charge or a customer deposit that is not refunded to the customer. Any installment sale or credit sale by Tenant shall be deemed a sale for the full sale price in the month during which the sale occurs, regardless of when Tenant actually receives payment for the sale.

(b) The following matters may be excluded or deducted, as the case may be, from Gross Sales:

(1) Discounts on sales to employees.

(2) Cash or credit refunds to customers on transactions previously included in Gross Sales.

(3) City, state, county, or federal sales tax actually paid by Tenant, provided the tax is added to the selling price and separately stated to the customer.

(4) Receipts from vending machines, pay telephones, or other equipment (to the extent permitted under this Lease) located on the Premises for the exclusive use of Tenant's employees.

(5) Sales of used fixtures and similar items of business operations not held as stock-in-trade and not sold in the ordinary course of Tenant's business.

(6) Returns to shippers or manufacturers.

[*When tenant has multiple stores, add:*]

(7) Any exchange of merchandise between Tenant's other stores made to facilitate the operation of Tenant's business, provided the exchange is not for the purpose of a sale on or from the Premises.

[*Continue with the following:*]

If Tenant has previously included any item listed above in Gross Sales on a statement for an accounting period, Tenant may deduct the previously included amount from the statement for the month in which Tenant becomes aware of the excludable item. No franchise or capital stock tax and no other tax based on income, profits, or gross sales of Tenant may be excluded or deducted from Gross Sales.

(c) For purposes of this Paragraph, "Tenant" means Tenant and any subtenant, concessionaire, or licensee of Tenant.

Statements and Payment of Gross Sales

4.04. (a) No later than [*number, e.g.,* 10] days after the end of each calendar month in the Original Term of this Lease, Tenant shall submit to Landlord an itemized written statement for the preceding calendar month showing the Gross Sales from Tenant's business and all permissible deductions or exclusions (the "Monthly Statement"). If the Commencement Date of this Lease falls on a date other than the first day of a month, the Gross Sales from the partial month shall be added to, and the partial month shall be included in, the Monthly Statement for the first full calendar month in the Original Term. The Monthly Statement shall be certified by Tenant or Tenant's duly authorized officer or agent to be true and accurate. Concurrently with the delivery of the Monthly Statement to Landlord, Tenant shall pay Landlord the amount of Percentage Rent calculated for the month represented by the Monthly Statement.

(b) No later than [*month and day*] of each lease year in the Original Term of this Lease, Tenant shall submit to Landlord an itemized written statement for the preceding lease year showing the Gross Sales from Tenant's business and all permissible deductions or exclusions for the lease year, broken down by month (the "Annual Statement"). The Annual Statement shall be certified by Tenant or Tenant's duly authorized officer or agent to be true and accurate and shall be certified by an independent certified public accountant. If the amount of Percentage Rent paid by Tenant for a lease year is less than that stated as due on the Annual Statement covering that lease year, Tenant shall, concurrently with delivery of the Annual Statement to Landlord, pay the amount of the underpayment to Landlord. If the amount of Percentage Rent paid by Tenant for a lease year is more than that stated as due on the Annual Statement covering that lease year, Landlord shall, within [*number, e.g.*, 10] days after its receipt of the Annual Statement, refund the amount of the overpayment to Tenant; provided, however, that if Tenant is then in default or otherwise indebted to Landlord under this Lease, Landlord may deduct the amount owed to it from the overpayment.

Tenant's Books and Records

4.05. (a) Tenant shall keep and maintain accurate books and records of account in accordance with generally accepted accounting principles for all business conducted on the Premises. Tenant shall also keep all supporting documentation for Gross Sales and exclusions or deductions from Gross Sales, including daily receipts, sealed cash register rolls, and serialized sales slips. Tenant shall keep and maintain the foregoing books, records, and supporting documentation pertaining to each lease year for at least [*number, e.g.,* three] years after expiration of that lease year. Notwithstanding the foregoing, if any books, records, or supporting documentation kept and maintained by Tenant are the subject of an audit requested by Landlord or an unresolved controversy involving Landlord, Tenant shall keep and maintain them until the audit or controversy is terminated.

(b) Landlord's accountants or representatives may examine the books and records of Tenant for the purpose of conducting an audit of Gross Sales, provided that (1) at least [*number, e.g.*, 10] days' advance written notice is given to Tenant, and (2) an audit is not performed more frequently than [*frequency and time period, e.g.*, once each year]. If an audit discloses that the actual Gross Sales generated by Tenant for the period in question are greater than Gross Sales previously reported by Tenant to Landlord, Tenant shall pay the excess amount to Landlord. If the excess amount is greater than [*number, e.g.*, three percent], Tenant shall pay the full cost of the audit; otherwise, Landlord shall pay the full cost of the audit. If the excess amount is greater than [*higher number, e.g.*, five percent], then Landlord shall have the right to terminate this Lease. Any information obtained by Landlord in conducting an audit of Tenant's books and records shall be treated as confidential except in any litigation or proceeding between Landlord and Tenant. Landlord may also disclose information from an audit performed by it to prospective purchasers of the Shopping Center, to existing or prospective lenders, or pursuant to any judicial proceeding or subpoena.

(c) Landlord may examine under oath the Chief Financial Officer, the Accountant and/or the bookkeeper who was involved in the particular record keeping, and any other persons who may have been involved in the preparation of the Gross Sales reports and calculations related thereto under the Lease.

Common Area Maintenance Costs

4.06. (a) Tenant shall pay to Landlord, as additional rent, a proportionate share of Common Area Maintenance Costs (defined below). For each lease year, Tenant's proportionate share of these costs shall be a sum equal to the product obtained by multiplying (1) the total Common Area Maintenance Costs for the lease year [*when contributions made by major department stores in the center are to be deducted from costs, add:* (less any contributions to Common Area Maintenance Costs by the owners or operators of the department stores in the Shopping Center)] by (2) a fraction, the numerator of which is the number of square feet of gross floor area of the Premises, and the denominator of which is the

number of total square feet of gross floor area of all areas in the Shopping Center that are available for the exclusive use and occupancy of Tenants of the Shopping Center [*when floor area of department stores in center is to be excluded from computation, add:* (excluding the gross floor area of the department stores in the Shopping Center)] and that are open for business and occupied as of the last day of the lease year.

(b) Concurrently with its monthly payment of Fixed Rent to Landlord, Tenant shall pay its proportionate share of Common Area Maintenance Costs in the amount determined and billed by Landlord. The amount billed monthly shall be based on Landlord's estimate of Common Area Maintenance Costs for the current calendar year. That estimate shall not exceed by more than [*number, e.g.,* 10] percent the total Common Area Maintenance Costs for the immediately preceding calendar year. Within [*number, e.g.,* 90 days] after the end of each calendar year, Landlord shall deliver to Tenant an itemized statement of the total Common Area Maintenance Costs for the preceding calendar year. If the statement discloses an underpayment by Tenant for the calendar year covered by the statement, Tenant shall pay Landlord the amount of the underpayment within [*number, e.g.,* 30 days] from the date of the statement. If the statement discloses an overpayment by Tenant, Landlord shall pay to Tenant the amount of the overpayment within [*number, e.g.,* 30 days] from the date of the statement; provided, however, that if Tenant is then in default or otherwise indebted to Landlord under this Lease, Landlord may deduct the amount owed it from the overpayment.

(c) "Common Area Maintenance Costs"means the cost and expense of managing, operating, and maintaining the Common Areas (defined in Paragraph 5.02) in a manner deemed reasonable and appropriate by Landlord, including all costs and expenses of or relating to the following: [*specify, e.g.,* operating, heating, cooling, ventilating, repairing, cleaning, replacing, lighting, painting, and maintaining the Common Areas; security services for the Shopping Center; garbage and trash removal for the Shopping Center; the insurance described in Paragraph 9.01 of this Lease; regulation of traffic; repairing and replacing paved surfaces, roofs, landscaping, drainage, escalators, elevators, electrical lines, and heating and air-conditioning systems; all on-site personnel used for the management, operation, and maintenance of the Shopping Center; trucks and other equipment used for the management, operation, and maintenance of the Shopping Center; depreciation of machinery, equipment, and other non-real estate assets used in the maintenance and operation of the Shopping Center; and measures undertaken by Landlord to comply with any environmental or similar law, ordinance, or regulation, including the removal of any hazardous substance from the Shopping Center. Further, "Common Area Maintenance Costs" shall include a management fee paid to Landlord or to a management company employed by Landlord and equal to _____ (*number, e.g.,* 20) percent of the total Common Area Maintenance Costs].

Utility Services and Charges

4.07. (a) Except for utility services provided by Landlord pursuant to Subparagraph (b) of this Paragraph, Tenant shall apply to the appropriate local utility companies to begin service on the Premises on or before the Commencement Date, and shall pay the cost of any required deposit, hook-up fee, metering charge, or other charge by the utility provider. Throughout the term of this Lease, Tenant shall pay, prior to delinquency, the cost of all utilities used on the Premises, whether supplied by a local utility company or by Landlord. When any service is separately metered and supplied by a local utility company, Tenant shall arrange for the utility company to bill Tenant directly. In the case of any utility services provided by Landlord directly to Tenant, Landlord shall bill Tenant for those services monthly at the same time Landlord bills Tenant for its proportionate share of Common Area Maintenance Costs, and Tenant shall pay the bill for those services at the same time Tenant pays its share of Common Area Maintenance Costs. For utility services provided by Landlord that are not separately metered and that are used by Tenant in common with other Tenants, Tenant shall pay Landlord a proportionate share based on total square footage of gross floor area of all Tenants using the common utility services.

(b) Landlord shall furnish, at Tenant's expense, the following utilities to the Premises: _____[*describe, e.g.,* electricity, heating, and air conditioning]. Further, Landlord may elect at any time during the term of this Lease to

furnish, or to select an agent or independent contractor to furnish, other utilities to the Premises. In that case, Tenant agrees to accept the furnished utility services to the exclusion of any other provider, provided the charge to Tenant for the furnished service is competitive with other providers or has been approved by the appropriate regulatory agency. On at least [*number, e.g.,* 30] days' prior written notice to Tenant, Landlord may discontinue furnishing any utility service previously provided to Tenant. In that event, Landlord shall be responsible for connecting the Premises to a new provider, but shall have no other responsibility toward Tenant. Landlord has no responsibility for the curtailment or suspension of any utility services to the Premises provided by a local utility company, or in the case of services furnished by Landlord, for any curtailment or suspension necessitated by repairs, action of public authority, strikes, acts of God or public enemy, other similar causes, or a default by Tenant under this Lease. Curtailment or suspension of utility services does not constitute a constructive eviction under this Lease.

Taxes

4.08. (a) Landlord shall pay all Taxes (defined below) that may be levied or assessed against the land, buildings, or other improvements in the Shopping Center; provided, however, that Tenant shall pay a proportionate share of Taxes as provided in this Paragraph. "Taxes" means any real property taxes, assessments, and other levies or charges imposed by a governmental entity that are or may be levied, assessed, imposed, become a lien on, or arise in connection with the use, occupancy, or possession of all or any portion of the Shopping Center or the land, buildings, or other improvements in the Shopping Center. [*If major tenant is obligated to pay all taxes on its parcel to taxing authority or to Landlord, and those taxes are to be excluded from definition of taxes, add:* Notwithstanding the foregoing, "Taxes" do not include any taxes attributable (1) to a parcel in the Shopping Center not owned by Landlord or (2) to space in the Shopping Center containing a gross floor area of at least _____ (*number that is minimum number of square feet for a major tenant, e.g.,* 15,000) square feet occupied exclusively by a single Tenant who is required to pay all taxes attributable to that space either to Landlord or directly to the taxing authority]. Further, "Taxes" do not include any inheritance, estate, succession, transfer, gift, franchise, corporation, income, or profit tax that is or may be levied or imposed on Landlord; provided, however, that the term "Taxes" does include any tax, assessment, or charge (1) that is imposed or levied on Landlord (directly or indirectly) by a taxing authority with jurisdiction over the Shopping Center, and (2) that is measured, computed, or determined in whole or in part based on rents paid by Tenants in the Shopping Center.

(b) Tenant's annual share of Taxes for each Tax Year (defined below) in the Original Term of the lease shall be a sum equal to the product obtained by multiplying the total amount of all Taxes payable during a Tax Year by a fraction, the numerator of which is a number equal to the total square feet of gross floor area in the Premises, and the denominator of which is a number equal to the total square feet of gross floor area in the Shopping Center designed exclusively for the use and occupancy of Tenants that is open for business on the first day of the Tax Year. [*When optional language in Subparagraph (a), above, excludes taxes paid by major tenant from computation of taxes, add:* For purposes of this computation, the total square feet of gross floor area in the Shopping Center shall not include any gross floor area of a building in the Shopping Center containing a gross floor area of at least _____ (*repeat number set forth in Subparagraph (a), e.g.,* 15,000) square feet occupied exclusively by a single Tenant who is required to pay all taxes attributable to that building either to Landlord or directly to the taxing authority.] Tenant's annual share of Taxes shall be paid in advance on a monthly basis in equal installments in the amount billed by Landlord, concurrently with Tenant's payment of Fixed Rent under this Lease. At Landlord's option, Landlord may estimate the amount of Tenant's monthly share of Taxes, provided the estimate does not exceed by more than [*number, e.g.,* 10] percent the actual amount of Taxes for the same calendar month in the immediately preceding Tax Year. An official tax bill or copy of the tax bill shall be conclusive evidence of any amount taxed or levied. No later than _____[*date and month*] of each Tax Year, Landlord shall present Tenant with a written statement for the preceding Tax Year, showing the total Taxes, the amount of Taxes actually paid by Tenant for that Tax Year, and the amount of any underpayment or overpayment for that Tax Year ("Annual Tax Statement"). Tenant shall pay the amount of any underpayment to Landlord within [*number, e.g.,* 30] days after the date of the Annual Tax Statement. In the case of an overpayment,

Landlord shall refund the amount of the overpayment to Tenant within the same _____ -day period governing underpayments; provided, however, that if Tenant is then in default under this Lease or otherwise indebted to Landlord, Landlord may deduct the amount owed to it from the overpayment.

(c) "Tax Year" means the twelve full calendar months of the term beginning on January first immediately following the Commencement Date and ending on December thirty-first of that same calendar year, and each successive twelve-month period in the Original Term of this Lease; provided, however, that the first Tax Year under this Lease shall begin on the Commencement Date and shall end on December thirty first of the same calendar year. When the Commencement Date is a date other than January first or when this Lease terminates on a date other than December thirty first, Tenant's proportionate share of Taxes for either year, as the case may be, shall be equitably prorated.

(d) Tenant shall not and shall have no right to contest the amount of any Tax assessed or levied or the underlying valuation giving rise to the Tax for purposes of obtaining a Tax reduction or for any other purpose. If Landlord obtains a refund of Taxes previously paid for a Tax Year and for which Tenant has fully paid its proportionate share, Landlord shall refund to Tenant its net proportionate share after first deducting all costs and expenses incurred by Landlord in obtaining the refund, including attorneys' and appraisers' fees. Landlord shall have no duty to contest the amount of any Taxes imposed or levied on the Shopping Center.

Additional Rent

4.09. In addition to the Fixed Rent and Percentage Rent payable by Tenant under this Lease, any other monetary sum required under this Lease to be paid by Tenant to Landlord or to others is deemed under this Lease to be additional rent payable by Tenant under this Lease (''Additional Rent''), whether or not the monetary sum is so designated as Additional Rent. Unless otherwise provided, all Additional Rent is due and payable at the same time as Fixed Rent, and Landlord has the same remedies for Tenant's failure to pay Additional Rent as it has for Tenant's failure to pay Fixed Rent.

Security Deposit

4.10. Landlord acknowledges receipt from Tenant of $ _____ to be held by Landlord as security for the full and faithful performance by Tenant of the terms, conditions, and covenants of this Lease. If at any time during the term of this Lease Tenant defaults in the payment of rent, or Tenant or Tenant's agents or employees damage the Premises, Landlord may appropriate and apply all or so much of the deposit as is necessary to remedy the default or to repair the damage. After Tenant delivers possession of the Premises to Landlord, Landlord shall return the Security Deposit, less any amounts lawfully deducted, to Tenant within the time period then required by law. If during the term of this Lease Landlord applies all or any portion of the Security Deposit for a purpose authorized by this Paragraph or otherwise by law, Tenant agrees to restore the amount of the security so applied by Landlord at the same time Tenant is required to make the next payment of rent under this Lease. Landlord shall hold the security deposit, without interest, for Tenant, free from the claim of any creditor of Landlord (except a trustee in bankruptcy). If Landlord transfers its interest in the Premises, Landlord shall be relieved of liability with respect to the Security Deposit if it (1) transfers the Security Deposit, less any deductions authorized by this Paragraph or otherwise authorized by law, to its transferee with notice required by law to Tenant of the transferee's name and address; or (2) returns the Security Deposit, less any deductions authorized by this Paragraph or otherwise by law, to Tenant.

ARTICLE 5. MAINTENANCE AND USE OF COMMON AREAS

Maintenance and Control

5.01. All Common Areas (defined in Paragraph 5.02 of this Lease) of the Shopping Center are subject to the exclusive control of Landlord. Landlord shall construct, maintain, operate, illuminate, and manage the Common Areas in a manner determined appropriate by Landlord in its sole discretion. Landlord reserves the right from time to time during the term of this Lease to (1) reduce or change the number, type, size, location, and use of any facilities in the Common Areas; (2) construct new improvements, buildings, or facilities; or (3) remove existing improvements, buildings, or facilities in the Common Areas, provided the change, construction, or removal does not permanently and unreasonably interfere with Tenant's ingress and egress to the Premises. Landlord may employ and discharge all personnel hired in connection with the Common Areas; police, and maintain security services for, the Common Areas; use and allow others to use the Common Areas for any purpose; regulate parking by Tenants and other occupants (including their respective employees) and by customers of the Shopping Center; establish, modify, and enforce rules and regulations for the Common Areas; and close the Common Areas when necessary to make repairs, changes, or alterations to the Common Areas or to prevent the acquisition of public rights in the Common Areas. In the event of a temporary closure of the Common Areas or the alteration, rearrangement, or other change in the facilities of the Common Areas (1) Landlord shall not be liable to Tenant for any resulting loss or damage; (2) Tenant shall not be entitled to any abatement of rent or other compensation; and (3) the closure, alteration, rearrangement, or other change shall not constitute an actual or constructive eviction of Tenant or other grounds for Tenant to terminate this Lease.

"Common Areas" Defined

5.02. "Common Areas" means all areas, facilities, space, equipment, and signs made available by Landlord at any time for the common and joint use and benefit of Landlord, Tenant, and other tenants and occupants of the Shopping Center, including their respective employees, agents, customers, and invitees. "Common Areas" includes the following, to the extent provided by Landlord: parking areas, driveways, access roads, landscaped areas, truck serviceways, loading facilities, pedestrian malls, stairs, ramps, sidewalks, public restrooms, elevators, escalators, and [*other facilities, e.g.*, enclosed corridors and malls].

Tenant's Right to Use

5.03. For the term of this Lease, Landlord grants Tenant and its employees, agents, customers and invitees, the nonexclusive right, in common with Landlord and all others to whom Landlord has or may grant the right, to use the Common Areas, subject to Tenant's compliance with any rules and regulations enacted or modified by Landlord that govern the use of the Common Areas. Tenant agrees to abide by and to use its best efforts to cause its employees, agents, customers, and invitees to abide by Landlord's rules and regulations for the Common Areas.

Tenant and Employee Parking

5.04. Tenant and its employees shall park only in those areas that are designated by Landlord as employee parking areas. Tenant shall at all times during the term of this Lease keep Landlord furnished with a current list of license plate numbers for the cars of Tenant and its employees. Landlord may charge Tenant $ [*dollar amount, e.g.,* 10] per day per car for each violation of this Paragraph after giving Tenant written notice of the violation.

ARTICLE 6. CONSTRUCTION AND REPAIRS

Condition of Premises

6.01. Tenant has inspected the Premises and accepts it in its "as is" condition. Landlord makes no representations or warranties regarding the condition of the Premises, and Tenant acknowledges that neither Landlord nor Landlord's agent

has made any representations to Tenant regarding the present or future condition of the Premises.

Tenant's Construction

6.02. (a) At its sole cost and expense, Tenant shall commence and complete construction of all improvements to the Premises that are necessary for the conduct of Tenant's business on the Premises ("Tenant's Work"). Tenant's Work includes [*describe specific improvements, e.g.*, new flooring, new paint on interior walls, and a new storefront identification sign]. All Tenant's Work must be performed in strict accordance with the following: plans and specifications prepared by Tenant and approved in writing by Landlord; the construction specifications attached to this Lease as Exhibit _____; and all other provisions of this Lease. Tenant's Work shall be completed no later than [*number*] days after the Possession Date (the "Completion Date"). Tenant shall open for business no later than the day immediately following the Completion Date [*when landlord may request a delay in opening pursuant to Paragraph 3.01, add:*, except when Tenant is requested by Landlord to delay opening for purposes of a grand opening as provided in Paragraph 3.01].

(b) Within [*specify, e.g.*, thirty days] after the date of this Lease first written above, Tenant shall submit [*number, e.g.*, two] set(s) of plans and specifications for Tenant's Work ("the Plans") to Landlord for Landlord's approval. Landlord's approval shall not be unreasonably withheld. Within [*number, e.g.*, 10] days after Landlord's receipt of the Plans, Landlord shall return the Plans to Tenant and advise Tenant in writing that the Plans are approved as submitted or are approved subject to specific changes required to be made by Tenant. In the latter event, Tenant shall submit to Landlord revised Plans incorporating the changes required by Landlord within [*number, e.g.*, 10] days of its receipt of the conditionally approved Plans. Landlord shall approve the revised Plans, provided they contain all required changes, no later than [*number, e.g.*, 10] days after its receipt of them. Thereafter, Landlord shall promptly return the Plans to Tenant and advise Tenant in writing that the Plans are approved. No later than [*number, e.g.*, 10] days after Tenant receives the approved Plans from Landlord, Tenant shall apply for required permits and otherwise commence construction to enable it to complete Tenant's Work no later than the Completion Date. At the time Tenant submits the Plans to Landlord for its approval, Tenant shall pay Landlord the sum of $ _____ as reimbursement for Landlord's expenses for review of the Plans.

(c) During the period beginning on the date Tenant commences construction and ending on the date Tenant completes construction (the "Construction Period"), Tenant shall procure and maintain, in addition to the insurance described in Paragraph 9.02 of this Lease, builder's risk insurance for the Premises. This insurance shall cover the full replacement value of all work performed and all fixtures and equipment installed on the Premises. Tenant or Tenant's subcontractors shall also maintain in effect workers' compensation insurance as required by the laws of the State of California.

(d) Tenant shall promptly pay all contractors involved in Tenant's Work and shall notify each contractor and subcontractor in writing that (1) Tenant is solely responsible for payment of all Tenant's Work, and (2) Landlord has no liability for that work. If a mechanic's lien or other encumbrance relating to Tenant's work is filed against Landlord, the Premises, or any other portion of the Shopping Center, Tenant shall, at Tenant's sole cost and expense, cause the lien or other encumbrance to be discharged of record or bonded within [*number, e.g.*, 10] days after Landlord's written notice to Tenant. If Tenant fails to discharge or bond a lien or other encumbrance within the required time period, Landlord has the right (but not the obligation) to pay the amount of the lien or encumbrance or to otherwise discharge it by deposit or bonding. If Landlord pays or otherwise causes discharge of the lien or encumbrance, Tenant shall reimburse Landlord, on Landlord's written demand, for the amount expended by Landlord (including all attorneys' fees and expenses), plus interest, at the then-maximum legal rate of interest, accruing from the date of Landlord's expenditure until paid by Tenant. Landlord's right to pay or otherwise discharge such a lien or encumbrance does not preclude Landlord from exercising any other rights or remedies under this Lease, at law, or in equity.

(e) In performing or causing Tenant's Work to be performed, Tenant, at Tenant's sole cost and expense, shall comply

with the construction specifications attached to this Lease as Exhibit _____; and all applicable laws, regulations, orders, and requirements of any governmental entity having jurisdiction. Further, Tenant shall obtain all necessary permits required by governmental entities or utility companies. Tenant shall use or cause to be used only new materials in Tenant's Work. At all times during the Construction Period, Tenant shall insure that its construction does not in any way interfere with the normal business operation of the Shopping Center. Any materials, equipment, or other items used in the construction shall be kept at all times in the interior of the Premises. The Premises shall be barricaded at the storefront line by full-height barricades so as to prevent access by the public or other non-construction personnel. All debris and rubbish shall be confined to the interior of the Premises and shall be removed at regular intervals by Tenant. If any portion of Tenant's Work is damaged or destroyed by any cause during the Construction Period, Tenant shall immediately, at its sole cost and expense, repair or rebuild the damaged portion. Tenant's Work shall be deemed complete when a certificate of occupancy [*or comparable final local approval*] for the Premises is filed for record.

(f) Landlord's approval of Tenant's Plans or of Tenant's Work shall in no way be deemed to mean that Tenant's Plans are adequate, Tenant's construction is structurally sound, or that the Plans or construction comply with applicable governmental requirements for building, safety, or otherwise. Tenant shall be solely responsible for any defect in construction or design of Tenant's Work. [*If desired, add:* Each contractor or subcontractor for Tenant's Work shall guarantee in its written contract with Tenant or the contractor, as the case may be, that its work will be free from any defects in quality or materials for a period of at least one year.]

(g) Tenant assumes all liability for personal injury or property damage in any way arising out of the performance of Tenant's Work. Further, Tenant agrees to defend, indemnify, and hold harmless Landlord against all damages, liabilities, or other costs or expenses (including legal fees and costs) that Landlord may pay or incur as a result of any claim or lawsuit arising from Tenant's Work.

Alterations and Improvements by Landlord

6.03. Landlord may at any time make additions or alterations to any building in the Shopping Center, including the building containing the Premises. Landlord may also construct additional improvements or buildings in the Shopping Center, expand or reduce the size of the Shopping Center, construct multi-level above-ground and/or below-ground parking facilities or garages, and enclose any open areas of the Shopping Center. Further, Landlord may at any time use any part of the exterior walls, roof, or air space above the finished ceiling of the Premises to carry out any construction described in this Paragraph or any repairs described in Paragraph 6.05 or Article 7.

Alterations and Improvements by Tenant

6.04. Except for Tenant's Work described in Paragraph 6.02 of this Lease, Tenant may not make any alterations or improvements to the Premises during the term of this Lease without first obtaining the written consent of Landlord. Landlord's consent to any such alterations or improvements shall not be unreasonably withheld. Any alterations or improvements approved by Landlord shall be performed pursuant to plans and specifications previously approved by Landlord for the specific alterations or improvements, shall not in any way interfere with the normal business operation of Tenant or the Shopping Center, and in all respects shall comply with the requirements for Tenant's Work described in Paragraph 6.02 of this Lease.

Repairs to Premises

6.05. (a) Landlord shall maintain and keep in good order, condition, and repair the foundations [and *or*,] exterior walls (excluding the storefront wall, windows, doors, and plate glass) [*when premises are located on top story of multi-story*

building, add:, and the roof] of the Premises [*describe any other portion of premises, e.g.,*, as well as the air conditioning system installed in the Premises by Landlord]. Landlord's obligation for repairs under this Paragraph extends only to damage not caused by Tenant or Tenant's employees, customers, contractors, agents, or invitees. Landlord is not obligated to make any repair, except in the case of emergency, until it receives written notice from Tenant of the necessity for the repair. In making any repairs, Landlord shall use its best efforts to perform the work with a minimum of disruption to Tenant's business.

(b) At its sole cost and expense, Tenant shall maintain the Premises in good order and repair. This obligation to maintain and repair extends, but is not limited, to the following portions of the Premises: [*specify, e.g.,* the interior of all walls, floors, and ceilings; the interior and exterior of all doors and windows and the storefront; all plumbing and sewage facilities that exclusively serve the Premises; and air conditioning and heating systems]. Tenant's obligation to maintain and repair does not extend to any areas or portions of the Premises that Landlord is required under this Lease to maintain and repair. If Tenant fails to make any necessary repairs within [*number, e.g.,* 10] days after written notice from Landlord, or after reasonable notice to Tenant in the event of an emergency, Landlord may make the repairs and Tenant shall pay the cost of the repair to Landlord as Additional Rent. This payment shall accompany the next due monthly payment of Fixed Rent and shall include interest at the then-maximum legal rate.

Ownership of Improvements

6.06. All alterations, additions, and improvements, except for Tenant's stock in trade, trade fixtures, furniture, and furnishings, made or placed in or on the Premises by Tenant or any other person shall on expiration or earlier termination of this Lease, become the property of Landlord and remain on the Premises. Landlord shall have the option, however, on expiration or termination of this Lease, of requiring Tenant, at Tenant's sole cost and expense, to remove any or all such alterations, additions, and improvements from the Premises.

ARTICLE 7. DESTRUCTION OF PREMISES
OR SHOPPING CENTER

Notice of Damage

7.01. Within [*number, e.g.,* 24] hours of its occurrence, Tenant shall notify Landlord of any damage or accident occurring on the Premises.

**Damage or Destruction From
Insured Casualty**

7.02. Subject to the limitations set forth in this Paragraph, if at any time during the term of this Lease, the Premises are damaged or destroyed by fire or any other casualty covered by Landlord's fire and extended coverage insurance, Landlord shall promptly repair, rebuild, or restore the Premises to substantially the same condition as was originally delivered to Tenant under this Lease. Notwithstanding the foregoing, Landlord shall not be obligated to expend for repairs or rebuilding an amount in excess of the net insurance proceeds for damage to the Premises recovered by it. "Net insurance proceeds" means the total amount of proceeds recovered and attributable to the Premises, less any expenses incurred by Landlord in recovering the proceeds; and less any amounts required to be paid to Landlord's Lender (defined in Paragraph 11.01 of this Lease). Landlord shall commence repair, restoration, or rebuilding work, as appropriate, not later than [*number, e.g.,* 60] days after the occurrence of the event causing damage or destruction, and shall cause construction to be completed not later than [*number, e.g.,* 180] days after the occurrence of the event causing damage or destruction. If Landlord does not commence or complete construction within the time periods described in this Paragraph, Tenant shall have the right to terminate this Lease by giving Landlord written notice within [*number,*

e.g., 10] days after expiration of the applicable time period.

Right to Terminate Lease

7.03. Notwithstanding Paragraph 7.02 of this Lease, Landlord shall have the right to terminate this Lease and shall have no obligation to repair, restore, or rebuild the Premises or the Shopping Center, as the case may be, under any of the following circumstances:

(a) The Premises are damaged or destroyed by a casualty not covered by Landlord's insurance.

(b) Either the Premises or the building in the Shopping Center containing the Premises is damaged or destroyed by any cause (whether or not the damage or destruction actually includes the Premises), and the cost of repair, restoration, or rebuilding exceeds a total of [*formula, e.g.*, 45 percent of the then-replacement cost of the building].

(c) At least [*number, e.g.*, 50] percent of the gross leasable floor area of the Shopping Center is destroyed or damaged by any cause, whether or not the damage or destruction actually includes the Premises.

(d) The Premises are damaged in whole or in part by any cause during the last [*number, e.g.*, two] years of the Original Term of this Lease.

If Landlord elects to terminate this Lease under any of the above circumstances, Landlord shall give written notice to Tenant not later than [*number, e.g.*, 30] days after occurrence of the casualty. This notice shall set forth the date on which the termination is to be effective. That date shall be not less than [*number, e.g.*, 30] days nor more than [*number, e.g.*, 60] days after the date of the termination notice. If the type of partial or total destruction described in Subparagraph (d) of this Paragraph occurs, Tenant shall have the same right as Landlord to terminate this Lease, subject to the same notice requirements, provided that Tenant gives its notice of termination prior to the time Landlord commences repairs to or restoration of the Premises.

Abatement of Rent

7.04. If damage or destruction to the Premises renders the operation of Tenant's business wholly impossible and Tenant in fact ceases to operate its business, the Fixed Rent payable under this Lease shall abate either during the period beginning on the date of the casualty and ending on the date Landlord completes repairs, restoration, or rebuilding; or, if the damage or destruction results in the termination of this Lease, on the date of termination. If Tenant is able to continue partial operation of its business, the Fixed Rent shall be abated proportionately based on the percentage of floor area of the Premises Tenant is able to occupy. Notwithstanding any abatement or partial abatement of Fixed Rent provided for under this Paragraph, Tenant shall not be excused from continuing to pay Percentage Rent, its proportionate share of Taxes or Common Areas Maintenance Costs, or other Additional Rent required under this Lease.

Obligations for Repair or Rebuilding

7.05. If this Lease is not terminated pursuant to the provisions of this Article, Landlord's obligation to repair and rebuild is limited to construction of the perimeter walls, floor, [and ceiling *or* ceiling, and roof] of the Premises, and excludes any interior finishing and the storefront for the Premises. The Premises as completed by Landlord shall contain approximately the same amount of gross floor area as existed prior to the damage or destruction. Tenant must, at its own cost and expense, repair and rebuild the Premises to the extent not repaired or rebuilt by Landlord, in accordance with plans and specifications approved by Landlord and in all other respects in accordance with Paragraph 6.02 of this

Agreement relating to Tenant's Work. Tenant shall commence its repair and rebuilding and diligently pursue the work to completion promptly after receiving written notice from Landlord that Landlord has completed its repair and rebuilding obligations.

Payment of Insurance Proceeds

7.06. All insurance proceeds payable with respect to the Premises shall belong to and be payable to Landlord. If Landlord does not elect to terminate this Lease, the insurance proceeds, subject to any prior rights of Landlord's Lender (defined in Paragraph 11.01), shall be disbursed in the following order: first, to Landlord's cost of rebuilding or restoration; second, to Tenant's cost of rebuilding or restoration, excluding costs covered by Tenant's insurance and also excluding the cost of any Tenant trade fixtures or stock in trade; and third, to Landlord, as Landlord's sole property. No amount shall be paid to Tenant until after the completion of Tenant's work and the expiration of the period during which a mechanic's lien arising from Tenant's Work could be filed.

ARTICLE 8. USE OF PREMISES

Merchandising

8.01. (a) Tenant shall maintain at all times throughout the term of this Lease a full stock of current and seasonal merchandise on the Premises and a staff of employees that is appropriate for Tenant's business and sufficient to maximize Gross Sales from Tenant's business.

(b) Tenant shall maximize space in the Premises for retail use. Tenant shall reserve space for administrative, warehousing, and other nonpublic needs only to the extent actually required by Tenant's business operation. Tenant may store on the Premises only goods and merchandise intended for retail sale by Tenant from and on the Premises [*add when Tenant has other stores and is permitted to temporarily store merchandise for those stores on leased premises:*; provided, however, that Tenant may temporarily store goods and merchandise intended for transfer to other stores of Tenant not located in the Shopping Center].

Condition of Premises

8.02. Tenant shall at all times keep the Premises (including the interior and exterior storefront surfaces) in a clean, safe, sanitary, and orderly condition. At its sole expense, Tenant shall replace any cracked or broken storefront glass on the Premises with glass equal in quality and similar in kind to that originally installed on the Premises.

Business Hours

8.03. Tenant shall be open for business during the same hours that the Shopping Center is open for business, which are as follows:

Monday through Friday: _____ A.M. through _____ P.M.

Saturday: _____ A.M. through _____ P.M.

Sunday: _____ A.M. through _____ P.M.

Landlord reserves the right to change at any time the hours during which the Shopping Center is open for business.

Tenant agrees to keep its business open during any new hours selected by Landlord, whether the new hours are less or more than the hours listed in this Paragraph. Landlord specifically reserves the right to decrease or increase the hours listed in this Paragraph in the case of legally recognized holidays. Tenant shall illuminate all storefront windows located on the Premises during the hours Tenant is required to be open for business.

Prohibited Actions

8.04. Tenant may not do any of the following on the Premises:

(a) Permit or commit any waste.

(b) Operate, cause, or permit to be operated any catalogue, mail, or telephone order sales in or from the Premises, except for the incidental sale of merchandise that Tenant is permitted to sell on the Premises to customers.

(c) Permit or conduct any public or private auction on the Premises or any sale that would or would tend to indicate that Tenant is going out of business, is bankrupt, or has lost its lease.

(d) Place or permit the placement of any pay telephones, vending machines [*when machines are permitted for employee use, add:* (except those intended for the exclusive use of Tenant's employees)], or amusement or video games on the Premises, without the prior written consent of Landlord.

(e) Use or permit the Common Areas adjacent to the Premises to be used for the display or sale of merchandise or for any other business purpose.

(f) Permit the making of any noise or sounds that carry beyond the boundaries of the Premises, whether through loudspeakers, other types of electronic devices, or otherwise.

(g) Conduct or permit any type of unlawful conduct on the Premises.

(h) Store or use any hazardous substances or materials on the Premises.

Compliance With Laws

8.05. At its sole expense, Tenant shall comply with all governmental laws, rules, regulations, orders, and ordinances relating to the Premises and to the use and occupancy of the Premises, including [*or* excluding] any requiring a capital expenditure for or capital improvement to the Premises. Tenant shall also maintain and keep in force all licenses and permits required by governmental authorities and shall comply with all requirements, recommendations, and regulations of Landlord's and Tenant's insurance companies.

Signs and Advertising

8.06. (a) Tenant shall include the name of the Shopping Center in any advertising of its business, except that permitted signs located on the Premises need not contain the name of the Shopping Center. Prior to the Commencement Date, Tenant shall install on the Premises a storefront identification sign that complies with the _____[size and design requirements adopted by Landlord (*or* the Merchants' Association) *or* sign criteria attached to this Lease as Exhibit _____]. Other than the one storefront identification sign, Tenant shall not place, install, or maintain any other sign, awning, canopy, advertising, or other matter on the exterior of the Premises (including the

storefront window and door), or in any place inside the Premises that is visible from the exterior storefront, unless it obtains the prior approval of Landlord [*or* the Merchants' Association]. Tenant shall maintain all signs and other items described in this Paragraph in good condition and repair.

(b) Tenant shall at all times during the term of this Lease maintain seasonal merchandise in the display window of the Premises, exhibited in an attractive and professional manner. Notwithstanding any other provision of this Lease, Tenant may place professionally printed signs on the floor of its display window, provided they are of a reasonable size and contain prices and descriptions of merchandise offered for sale and exhibited in the display window.

Rules and Regulations

8.07. Landlord shall have the right from time to time to adopt, amend, or supplement rules and regulations relating to the Premises, the Common Areas, and the Shopping Center. Rules and regulations in effect as of the date of this Lease are attached to this Lease as Exhibit _____ and are hereby incorporated by reference. Landlord shall notify Tenant in writing of any amendment or modification made to the rules and regulations. Rules and regulations shall apply uniformly to all tenants in the Shopping Center [*describe any exceptions, e.g.*,, except that different rules may apply to major department stores located in the Shopping Center]. Tenant agrees to comply with all rules and regulations; a failure by Tenant to so comply shall constitute a breach under this Lease.

Assignment and Sublease

8.08. (a) Tenant shall not do any of the following without first obtaining the written consent of Landlord: assign, sell, mortgage, or in any other manner transfer this Lease or any interest of Tenant in the lease; sublet the whole or any part of the Premises; or permit all or any part of the Premises to be used or occupied by others (whether through the grant of a concession, license, or otherwise). Any consent requested from Landlord shall not be unreasonably withheld [*or* may be given or withheld by Landlord as Landlord in its sole discretion determines]. Any consent given by Landlord under this Paragraph applies only to the specific transfer transaction for which it is given, and Landlord's consent to a specific transfer transaction does not relieve or excuse Tenant from the requirement that Tenant obtain the prior written consent of Landlord for any subsequent transaction. Any transfer described in this Paragraph, whether made with or without Landlord's prior written consent, does not relieve Tenant of personal liability for the performance as a Tenant of applicable terms and covenants under this Lease (including the payment of rent), unless Landlord executes a written agreement for a specific transfer that provides otherwise. The prohibitions against transfer described in this Paragraph include any transfer transaction described above that occurs by operation of law, legal process, receivership, bankruptcy, or otherwise, whether voluntary or involuntary.

(b) Without in any way waiving its right to approve or disapprove any transfer transaction described in this Paragraph, Landlord may (1) collect rent from an assignee, subtenant, user, or occupant of the Premises following any transfer described in this Paragraph, whether or not Landlord gave its prior written consent for the transfer, and (2) apply the collected amount to the rent due from Tenant under this Lease. [*If tenant is prohibited from profiting from sublease, add:* In addition, if the rent or other consideration payable to Tenant by a subtenant, assignee, licensee, or other transferee exceeds the rent payable under this Lease, Tenant shall pay to Landlord an amount equal to the excess of the amount of rent or other consideration payable to Tenant over the amount of rent payable under this Lease by Tenant to Landlord.]

(c) Any sublease, assignment, or other transfer agreement described in this Paragraph must recite the following: that it is subject and subordinate to this Lease; and that the termination by Landlord of this Lease will, at Landlord's sole option, terminate the sublease, assignment, or other transfer agreement.

[*If tenant is a corporation, add:*]

(d) The transfer of corporate shares of Tenant by assignment, sale, bequest, inheritance, operation of law, or other disposition shall not be considered a prohibited transfer transaction under this Lease if it results in Tenant holding at least 51 percent of the voting power of the corporation. [*If tenant is a subsidiary of another corporation, add:* Further, the assignment of this Lease to or Tenant's merger with _____[*name of parent corporation*], which is Tenant's parent corporation, shall not constitute a prohibited transfer transaction under this Lease.]

[*If tenant must pay a fee for any transfer transaction approved by landlord, add:*]

(e) Tenant shall pay Landlord a fee of $ [*specify, e.g.*, 500] to cover Landlord's administrative costs, overhead, and attorneys' fees in connection with an assignment, sublease, or other transfer transaction approved by Landlord. Tenant shall pay this fee before Landlord executes the document evidencing Landlord's consent to the transfer.

[*Optional*]

Competitive Business

8.09. Tenant acknowledges that Landlord's expectation of receiving fair and equitable rent for the Premises is dependent on Tenant generating maximum Gross Sales from the business Tenant will conduct on the Premises. Tenant further acknowledges that if Tenant were to conduct a similar business in close proximity to the Shopping Center, the Gross Sales generated on the Premises would be adversely affected. Therefore, if Tenant or any entity that controls or is controlled by Tenant owns, operates, manages, controls, or engages in any business that is similar to or competes with the business conducted by Tenant on the premises and that is located within a radius of [*distance, e.g.*, 10 miles] from the outer perimeters of this Shopping Center, then, at Landlord's option, (1) Tenant's Gross Sales (as defined in Paragraph 4.03 of this Lease) in, on, or from the similar or competing business shall be added to, included in, and deemed to be a part of Tenant's Gross Sales under this Lease, and (2) the foregoing sales shall be computed and accounted for to Landlord in the same manner as is provided in this Lease for the computation and accounting of Tenant's Gross Sales from its business conducted on the Premises. Any such handling of Gross Sales from a similar or competing business shall be in addition to and cumulative with all other rights and remedies of Landlord.

[*Optional*]

Covenant of Continuous Business Operation

8.10. (a) Tenant shall conduct its business in a businesslike and efficient manner. Further, because the adequacy of the rent payable by Tenant under this Lease is dependent on the amount of Gross Sales generated by Tenant on the Premises, Tenant shall, except as otherwise provided in this Lease, continuously, actively, and diligently operate its business on the Premises in a manner intended to maximize Tenant's Gross Sales on the Premises.

(b) Landlord and Tenant acknowledge that (1) Landlord does not consider the Fixed Rent provided for under this Lease in itself to be fair and adequate compensation for the leasing of the Premises to Tenant, and (2) Landlord's consideration for entering into this Lease is based on the expectation that the Percentage Rent to be paid by Tenant will supplement the Fixed Rent so as to provide Landlord with a fair and adequate rental return on the Premises. Therefore, if Tenant either fails to open for business on the date required under this Lease or, after opening, fails to continuously operate its

business on the Premises as required under this Lease, then, at Landlord's option, (1) Tenant shall be in default under this Lease, and (2) Landlord shall have the right to collect, in addition to all other sums due from Tenant under this Lease, liquidated damages from Tenant equal to _____[*measure of damages agreed on by parties, e.g.,* one thirtieth of the monthly amount of Fixed Rent payable by Tenant under this Lease] for each day Tenant fails to open after the required opening date or for each day Tenant fails to operate its business after it has opened.

[*Continue with the following:*]

ARTICLE 9. INSURANCE

Insurance by Landlord

9.01. Landlord shall procure and maintain during the entire term of this Lease, the following insurance coverage: [*specify, e.g.,* fire and extended coverage insurance in an amount equal to not less than _____ (*minimum coverage, e.g.,* 90 percent of the full replacement value of all improvements constructed or installed by Landlord in the Shopping Center and by Tenant in the Premises (excluding Tenant's trade fixtures)]. In addition to the foregoing insurance, Landlord in its sole discretion may procure and maintain other insurance covering the Shopping Center, including the following: [*specify, e.g.,* liability insurance for personal injury, death, and property damage; workers' compensation insurance covering personnel; fidelity bonds for personnel; insurance against liability for defamation and claims of false arrest occurring in and about the Common Areas; and plate glass insurance for glass located in or on the Common Areas]. The cost of any insurance procured by Landlord for the Shopping Center, whether mandatory or optional under this Paragraph, is a Common Areas Maintenance Cost for which Tenant is obligated to contribute its proportionate share as described in Paragraph 4.06 of this Lease.

Insurance by Tenant

9.02. (a) Tenant shall, at its own cost and expense, procure and maintain during the entire term of this Lease the following insurance coverage: _____ [*specify, e.g.,*

(1) Comprehensive general public liability insurance insuring against the risks of bodily injury, property damage, and personal injury liability occurring on the Premises or arising out of Tenant's use or occupancy of the premises, with a combined single limit of liability of at least $

_____ and a general aggregate limit of at least $

_____ , and including

_____ [*describe any additional coverage, e.g.,* an endorsement for libel, slander, and false imprisonment]. At least every

_____ [*number, e.g.,* three] years, but not more frequently, Tenant shall increase the amount of public liability coverage, if at that time the existing coverage is not adequate in the opinion of Landlord's insurance broker or Lender.

(2) Fire and extended coverage insurance, and vandalism and malicious mischief insurance, insuring Tenant's fixtures, goods, wares, and merchandise in or on the Premises for 100 percent of their full insurable and replacement cost, without deduction for depreciation.

(3) Plate glass insurance covering all plate glass on the Premises.

(4) Business interruption insurance, payable in the event of a loss covered by the fire and extended coverage or vandalism and malicious mischief insurance Tenant is required to maintain, in an amount not less than the amount of Tenant's Fixed Rent and proportionate share of Taxes and Common Area Maintenance Costs for a 12-month period following any damage or destruction.

(5) Workers' compensation insurance as required by the laws of the State of California].

[*Continue with the following:*]

Tenant's policy of liability insurance shall list Landlord as an additional [*or* a named] insured and shall also contain an endorsement that although Landlord is listed as an additional [*or* a named] insured, Landlord shall be entitled to recover under the policy for any loss or damage occasioned to it or its agents or employees by reason of Tenant's negligence.

(b) Any insurance policy Tenant is required to procure and maintain under this Lease shall be issued by a responsible insurance company or companies licensed to do business in the State of California. Further, each such policy shall provide that it may not be canceled, terminated, or changed except after [*number, e.g.,* 10] days' prior written notice to Landlord. Tenant may maintain all or part of the insurance required under this Lease by means of a blanket insurance policy so long as the provisions of this Article are satisfied. Tenant must deliver to Landlord duplicate originals or certificates of all insurance policies procured by Tenant.

(c) Tenant may not do, omit to do, permit to be done, or keep anything in or on the Premises that will violate the provisions of Landlord's fire and extended coverage insurance policy or otherwise adversely affect the premiums paid by Landlord or Landlord's ability to maintain the insurance in effect. If any such act or omission by Tenant results in an increase in Landlord's premiums for any policies on the Premises or the Shopping Center, Tenant shall pay the amount of the increase. Landlord may also, at Landlord's option, rectify the condition causing the increase if Tenant fails to do so. In that case, on demand of Landlord, the amount expended by Landlord shall be immediately due and payable by Tenant as Additional Rent.

(d) If during the term of this Lease Tenant fails to secure or maintain the insurance required under this Lease, Landlord may obtain the insurance for the Premises in Tenant's name or as the agent of Tenant, and Tenant shall compensate Landlord for the cost of the insurance premiums. Tenant shall reimburse Landlord the full amount paid no later than [*number*] days from the date written notice is received that the premiums have been paid. A failure by Tenant to make reimbursement within the time required under this Subparagraph shall be considered a default under this Lease.

Subrogation Waiver

9.03. Landlord and Tenant agree that in the event of loss due to any of the perils for which they have agreed to provide insurance, each party shall look solely to its insurance for recovery. Landlord and Tenant hereby grant to each other, on behalf of any insurer providing insurance to either of them with respect to the Premises, a waiver of any right of subrogation that any such insurer of one party may acquire against the other by virtue of payment of any loss under that insurance.

Proceeds

9.04. Except as otherwise provided in this Lease, proceeds from any policy or policies shall be payable to the party

responsible for the payment of insurance premiums [*or* either or both Landlord and Tenant as their respective interests may appear].

Indemnification

9.05. Landlord shall not be liable to Tenant, and Tenant hereby waives all claims against Landlord, for any injury or damage to any person or property on or about the Premises by or from any cause whatsoever, excepting injury or damage to Tenant resulting from the acts or omissions of Landlord or Landlord's authorized agents. Tenant agrees to hold Landlord harmless from and defend Landlord against any and all claims or liability for any injury or damage to any person or property occurring in, on, or about the Premises or any part of the Premises, excepting any damage or injury caused in part or in whole by the act or omission of any duty by Landlord or Landlord's agents or employees.

ARTICLE 10. MERCHANTS' ASSOCIATION

Membership

10.01. (a) During the term of this Lease, Tenant shall be a member of the _____[*name of merchants' association*] ("Association"), a nonprofit association of merchants in the Shopping Center organized for the purpose of promoting their common business interests in the Shopping Center, to the extent consistent with rights of Landlord and other owners of the Shopping Center. Tenant shall pay monthly dues and assessments required by the Association, which shall not be less than an annual amount of $ _____ per square foot of the gross floor area of the Premises. In addition to regular dues and assessments, Tenant shall pay, on Landlord's written demand, an initial contribution of $ _____ to the Association to defray expenses of the Association in advertising or otherwise promoting the opening of Tenant's business on the Premises.

(b) Landlord shall be a member of the Association in accordance with the provisions of the Association's governing instruments, and shall pay to the Association annually an amount equal to [*set forth specific amount or formula for determining amount, e.g.,* 25 percent of the total dues and assessments collected by the Association from members other than Landlord and department stores located in the Shopping Center]; provided, however, that for any given year Landlord shall not be required to contribute more than the sum of $ _____.

Advertising Expenditures

10.02. In addition to dues and assessments paid to the Association by Tenant, Tenant shall expend at least _____ percent of its annual gross sales on advertising the business conducted by Tenant on the Premises.

ARTICLE 11. SUBORDINATION, ATTORNMENT,
AND ESTOPPEL CERTIFICATES

Subordination

11.01. (a) Except as provided in Subparagraph (b) of this Paragraph, this Lease and all of Tenant's rights in the lease shall be subject and subordinate to any mortgage, deed of trust, ground lease, or other instrument of encumbrance (collectively referred to in this Paragraph as a "security instrument") that is now or hereafter placed against any part of the real property on which the Shopping Center is located, the Premises, or any or all of the buildings currently or in the future located in the Shopping Center. On written request of the holder of any security instrument ("Lender") or

Landlord, Tenant shall execute, acknowledge, and deliver any documents evidencing subordination that the Lender or Landlord may reasonably request. For each security instrument, the Lender shall agree in writing that, in the event of a default under the security instrument, Lender shall not terminate this Lease and shall not disturb Tenant's right to possession under this Lease, provided Tenant is not then in default under this Lease and continues thereafter to fully perform all of its obligations under this Lease.

(b) Notwithstanding the provisions of Subparagraph (a) of this Paragraph, any Lender may subordinate its security instrument to this Lease by executing and recording a written document subordinating its security instrument to this Lease as provided in the document. In that case, this Lease shall be deemed prior to the security instrument as provided in the document, without regard to the execution, delivery, or recording dates of the subordination document or the security instrument. Subordination of a security instrument described in this Subparagraph shall not require the consent of Tenant, but Tenant agrees to execute and deliver, in recordable form, any instrument requested by Lender or Landlord to confirm or acknowledge the subordination.

Attornment

11.02. If Landlord transfers its interest in the Premises or if any proceeding is brought to foreclose any mortgage, deed of trust, or instrument to secure debt affecting the Premises or any ground lease made by Landlord, Tenant shall attorn to the purchaser or transferee of Landlord's interest.

Estoppel Certificates

11.03. Tenant agrees to execute, in recordable form, and deliver to Landlord or a Lender (as defined in Paragraph 11.01 of this Lease), when requested by Landlord or a Lender, an estoppel certificate regarding the status of this Lease. The certificate shall be in the form designated by Landlord or the Lender and shall contain at a minimum the following: (1) a statement that the lease is in full force and effect with no modifications, or a statement that the lease is in full force and effect as modified, together with a description of the modifications; (2) the Commencement Date and expiration date of this Lease; (3) the amount of advance rent, if any, paid by Tenant, and the date to which the rent has been paid; (4) the amount of any security deposit deposited with Landlord; (5) a statement indicating whether or not Landlord is, in Tenant's good faith opinion, in default under any of the terms of this Lease, and if so, a description of the alleged default and of any defense or offset claimed by Tenant; and (6) any other information reasonably required by Landlord or Lender. Tenant shall deliver the certificate to the requesting party not later than [*number, e.g.,* 15] days after the date of the written request for the statement. Tenant's failure to deliver the certificate within the foregoing time period shall constitute an acknowledgment by Tenant that this Lease has not been assigned or modified; that the lease is in full force and effect; and that all rent payable under this Lease has been fully paid up to but not beyond the due date immediately preceding the date of Landlord or Lender's written request for the statement. Such an acknowledgment may be relied on by any person holding or intending to acquire any interest in the Premises or the Shopping Center. Tenant's failure to timely deliver the required certificate shall also constitute, as between Tenant and the persons entitled to rely on the statement and as between Tenant and Landlord, a waiver of any defaults by Landlord or of Tenant defenses or offsets against the enforcement of this Lease that may exist prior to the date of the written request for the statement. Landlord may also treat Tenant's failure to deliver the certificate as a default under this Lease.

ARTICLE 12. CONDEMNATION

Termination of Lease

12.01. If at any time during the term of this Lease, title and possession of all of the Premises or of _____ percent or more of the gross floor area of the Premises is taken under the power of eminent

domain by any public or quasi-public agency or entity, this Lease shall terminate as of 12.01 A.M. of the date actual physical possession of the Premises is taken by the agency or entity exercising the power of eminent domain. Thereafter, both Landlord and Tenant shall be released from all obligations under this Lease, subject to the provisions of Paragraph 12.04 of this Lease.

Continuation of Lease

12.02. If the portion of the Premises taken under the power of eminent domain is less than [*same percentage used above*] percent of the gross floor area of the Premises, the following will occur:

(a) This lease shall terminate as to the portion taken as of 12:01 A.M. of the day actual physical possession of that portion of the Premises is taken by the agency or entity exercising the power of eminent domain (the "date of taking").

(b) This lease shall continue in effect for the remainder of the Premises not taken. Beginning on the day and at the time described in Subparagraph (a) of this Paragraph, the Fixed Rent payable by Tenant under this Lease shall be reduced by the same proportion that the gross floor area taken bears to the gross floor area of the Premises prior to the taking. Promptly after the taking described above, Landlord shall, at Landlord's expense, restore the Premises not taken by eminent domain to a condition making the Premises tenantable by Tenant for the uses permitted by this Lease; and Tenant shall, at Tenant's expense, make all necessary repairs to Tenant's fixtures, equipment, and furnishings.

Option to Terminate Lease

12.03. Landlord [*or* Landlord or Tenant] shall have the right to terminate this Lease if title and possession of the following is taken under the power of eminent domain, whether or not the taking includes any portion of the Premises:

(a) More than [*number, e.g.,* 33 *or* 50] percent of the gross floor area of the building containing the Premises;

(b) More than [*number, e.g.,* 33 *or* 50] percent of the Common Areas of the Shopping Center;

(c) More than [*number, e.g.,* 33 *or* 50] percent of the leasable floor area of the Shopping Center; or

(d) All or a portion of the parking area of the Shopping Center, provided the taking causes the Shopping Center to violate the requirements of the then-applicable zoning law governing the size, location, layout, or other features of the parking area. Notwithstanding the foregoing, this Lease shall continue in full force and effect if Landlord, immediately after the agency or entity exercising the power of eminent domain takes actual physical possession of the parking area, commences to correct the circumstances giving rise to the right to terminate this Lease, either through obtaining a variance or an exception to the then-applicable zoning law or by providing additional substitute parking areas. This action must be at Landlord's sole cost and expense.

Landlord [*or* Landlord or Tenant] may exercise the foregoing right to terminate this Lease by giving written notice to Tenant [*or* to the other party] at least [*number, e.g.,* 30] days prior to the termination date, which shall be the date actual physical possession of the Premises is taken by the agency or entity exercising the power of eminent domain.

Condemnation Award

12.04. If at any time during the term of this Lease, title and possession of all or any portion of the Premises or the Shopping Center is taken under the power of eminent domain, the compensation or damages for the taking shall[, except

as provided below,] be awarded to and be the sole property of Landlord, and Tenant shall have no right or claim to that compensation or damages. [*Add if desired:* Notwithstanding the foregoing, Tenant shall have a right or claim to any amount attributable to the reasonable value of Tenant improvements or alterations installed at Tenant expense that Tenant has a right to remove but elects not to remove; or, if Tenant elects to remove any such Tenant improvements or alterations, to an amount equal to the reasonable removal and relocation costs, not to exceed market value.]

Waiver on Condemnation

12.05. Landlord and Tenant each agree that this Lease shall govern the respective rights and obligations of each party in the event of a taking by eminent domain. Landlord and Tenant each hereby waives any right either may have at law to petition the court for termination of this Lease in the event of a partial taking of the Premises.

ARTICLE 13. DEFAULT AND TERMINATION

"Default" Defined

13.01. The occurrence of any of the following constitutes a default and breach of this Lease by Tenant:

(a) Any failure by Tenant to pay the rent or to make any other payment required to be made by Tenant under this Lease, when the failure continues for [*number, e.g.,* 10 or more days] after written notice from Landlord to Tenant.

(b) The abandonment of the Premises by Tenant. For these purposes, the absence of Tenant from or the failure by Tenant to conduct business on the Premises for a period in excess of [*number, e.g.,* 14 consecutive days] shall constitute an abandonment.

(c) A failure by Tenant to observe or perform any other provision of this Lease to be observed or performed by Tenant, when the failure continues for [*number, e.g.,* 30 days] or more after written notice of Tenant's failure is given by Landlord to Tenant; provided, however, that if the default cannot reasonably be cured within the [*same time period for cure used above, e.g.,* 30-day] cure period, Tenant shall not be deemed to be in default if Tenant commences the cure within the [*same time period for cure used above, e.g.,* 30-day] cure period and thereafter completes the curative action within a reasonable time.

(d) The making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within [*number, e.g.,* 60 days]); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, when possession is not restored to Tenant within [*number, e.g.,* 30 days]; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, when that seizure is not discharged within [*number, e.g.,* 30 days].

Termination of Lease and Recovery of Damages

13.02. In the event of any default by Tenant under this Lease, in addition to any other remedies available to Landlord at law or in equity, Landlord shall have the right to terminate this Lease and all rights of Tenant under this Lease by giving written notice of the termination. No act of Landlord shall be construed as terminating this Lease except written notice given by Landlord to Tenant advising Tenant that Landlord elects to terminate the lease. In the event Landlord elects to terminate this Lease, Landlord may recover the following from Tenant:

(a) The worth at the time of award of any unpaid rent that had been earned at the time of termination of the lease;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after termination of the lease until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term of this Lease after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this Lease.

The term "rent" as used in this Paragraph shall mean the Fixed Rent, the Percentage Rent, and all other sums required to be paid by Tenant pursuant to the terms of this Lease. As used in Subparagraphs (a) and (b) of this Paragraph, the "worth at the time of award" is computed by allowing interest at the rate of 10 percent per year. As used in Subparagraph (c) of this Paragraph, the "worth at the time of award" is computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

Landlord's Right to Continue Lease in Effect

13.03. If Tenant breaches this Lease and abandons the Premises before the natural expiration of the term of this Lease, Landlord may continue this Lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all its rights and remedies under this Lease, including the right to recover the rent specified in this Lease as it becomes due under this Lease. For as long as Landlord does not terminate this Lease, Tenant shall have the right to assign or sublease the Premises, subject to the requirements of Paragraph 8.08 of this Lease. No act of Landlord (including an entry on the Premises, efforts to relet the Premises, or maintenance of the Premises) shall be construed as an election to terminate this Lease unless a written notice of termination is given to Tenant or the termination of this Lease is decreed by a court of competent jurisdiction.

Landlord's Right to Relet

13.04. In the event Tenant breaches this Lease, Landlord may enter on and relet the Premises or any part of the Premises to a third party for any term, at any rental, and on any other terms and conditions that Landlord in its sole discretion may deem advisable, and shall have the right to make alterations and repairs to the Premises. Tenant shall be liable for all of Landlord's costs in reletting, including remodeling costs required for the reletting. In the event Landlord relets the premises, Tenant shall pay all rent due under and at the times specified in this Lease, less any amount or amounts actually received by Landlord from the reletting.

Landlord's Right to Cure Tenant Defaults

13.05. If Tenant breaches or fails to perform any of the covenants or provisions of this Lease, Landlord may, but shall not be required to, cure Tenant's breach. Any sum expended by Landlord, with the then-maximum legal rate of interest, shall be reimbursed by Tenant to Landlord with the next due rent payment under this Lease.

Cumulative Remedies

13.06. The remedies granted to Landlord in this Article shall not be exclusive but shall be cumulative and in addition to

all remedies now or hereafter allowed by law or provided in this Lease.

Waiver of Breach and Estoppel

13.07. (a) No waiver of any provision of this Lease shall be implied by any failure of Landlord to enforce any remedy for the violation of that provision, even if that violation continues or is repeated. Any waiver by Landlord of any provision of this Lease must be in writing. Such written waiver shall affect only the provision specified and only for the time and in the manner stated in writing. The acceptance of rent hereunder by Landlord shall not be a waiver of any preceding breach of Tenant of any provision hereof other than the failure of Tenant to pay the particular rent so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such rent.

(b) The Landlord's neglect or omission to provide notice to the Tenant as to why the Landlord is not enforcing any provision of this Lease, or the Landlord's neglect or failure to enforce any provision of this Lease, whether known to Landlord or not, and any statement made by the Landlord or conduct by the Landlord herein that the Landlord is not enforcing any provision of this Lease, shall not act as an estoppel on the Landlord to enforce any provision of this Lease.

Surrender on Termination

13.08. On expiration of the term of this Lease or the earlier termination of this Lease, Tenant agrees to surrender the Premises in good order and condition (reasonable wear and tear excepted). Further, Tenant shall, at Tenant's expense, remove all of its merchandise, inventory, and trade fixtures, and repair any damage caused by the removal. Landlord shall also have the right to require Tenant, at Tenant's expense, to remove any improvements made to the Premises by Tenant and to repair any damage caused by the removal.

Holdover Tenancy

13.09. If Tenant remains in possession of the Premises after expiration of the term of this Lease without renewing or extending this Lease or entering into a new lease with Landlord, Tenant's continued occupancy of the Premises, at Landlord's option, shall be considered a month-to-month tenancy that may be terminated by either party on 30 days' prior notice to the other. All terms of this Lease shall be fully applicable to the month-to-month tenancy insofar as consistent with a month-to-month tenancy [*when tenant must pay an increase in rent and/or other charges, describe the increase, e.g.,,* except that Tenant must pay 150 percent of the Fixed Rent, Percentage Rent, proportionate share of Common Areas Maintenance Costs and Taxes, and any Additional Rent provided for under this Lease].

Attorneys' Fees

13.10. If any litigation is commenced between the parties to this Lease concerning the Premises, this Lease, or the rights and duties of either in relation to the Premises or the lease, the party prevailing in that litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to a reasonable sum as and for its attorneys' fees in the litigation, which shall be determined by the court in that litigation or in a separate action brought for that purpose.

ARTICLE 14. MISCELLANEOUS

[*Optional*]

No Personal Liability of Landlord

14.01. Tenant agrees that Landlord shall have no personal liability with respect to any provision of this Lease, and that in the event Landlord fails to perform any obligation under this Lease or otherwise breaches this Lease, Tenant shall look solely to Landlord's ownership interest in the real property and improvements constituting the Shopping Center for satisfaction of any judgment or any other remedy of Tenant, subject to any prior rights of any holder of a mortgage or deed of trust covering the Shopping Center. No other assets of Landlord shall be subject to levy, execution, or other judicial process for the satisfaction of Tenant's claim.

[*Optional*]

Landlord's Operating Agreements With Others

14.02. Landlord has entered into various agreements with the owners of or occupants of other premises located in the Shopping Center relating to the operation and use of the Shopping Center (hereafter collectively referred to in this Paragraph as "Operating Agreements"). These Operating Agreements include reciprocal easement agreements, development agreements, and leases. This lease shall be subject at all times to these Operating Agreements. Landlord shall not be liable to Tenant for the breach of any Operating Agreement by any owner or occupant of other premises located in the Shopping Center, and shall not be required for Tenant's benefit to institute efforts to enforce any party's obligations under an Operating Agreement or to terminate any Operating Agreement because of a party's default.

[*Optional*]

Other Covenants of Continuous Operation

14.03. This lease shall not be deemed or interpreted to contain, implicitly or otherwise, any representation or agreement by Landlord that any other tenant (including any department store or national or regional chain retail store) shall open for business or occupy or continue to occupy any portion of the Shopping Center at any time during the term of this Lease. Tenant agrees and affirms that it is not relying on any such representation or agreement in entering into this Lease, and waives any claim with respect to any such agreement or representation.

[*Optional*]

Removal of Hazardous Materials

14.04. If any hazardous materials or substances prohibited by law are found to exist on the Premises and the presence of the materials or substances has not been caused by Tenant or by Tenant's use of the Premises, Landlord shall, at Landlord's sole cost and expense, perform necessary removal and cleanup as required by law. If any hazardous materials or substances prohibited by law are found to exist on the Premises and the presence of the materials or substances has been caused by Tenant or by Tenant's use of the Premises, Tenant shall be responsible for any required cleanup or removal and for the cost of the foregoing.

[*Continue with the following:*]

Landlord-Tenant Relationship

14.05. This lease establishes a Landlord-Tenant relationship between the parties. It shall not be construed or deemed to create any other type of relationship between them, including one of agency, partnership, or joint venture.

Landlord's Right of Entry

14.06. At any time Tenant is open for business or is required by this Lease to be open for business, Landlord shall have the right to enter the Premises to inspect the Premises; show the Premises to a third party; or perform any repairs Landlord is permitted or required to make under this Lease, whether to the Premises, adjoining premises, or the building containing the Premises. For any entry made while Tenant is open for business, Landlord shall use its best efforts to minimize interference with the conduct of Tenant's business. Repairs required or permitted to be made by Landlord may, at Landlord's option, be scheduled for times when Tenant's business is not open, provided prior written notice is given to Tenant. In the case of an emergency, Landlord may enter the Premises at any time without prior notice to Tenant, but shall notify Tenant promptly afterwards of its emergency entry.

Brokerage Commissions

14.07. Neither Tenant nor Landlord has had any dealings or negotiations with any broker or finder with respect to the Premises [*if any exceptions exist, add:*, except with _____ (*name of finder or broker*), to whom Tenant (*or* Landlord) shall be solely responsible for any payment or other compensation]. In the event of any claim for payment or compensation by any agent or broker with respect to Tenant's lease of the Premises [*when broker or finder is named above, add:* other than _____ (*repeat name of finder or broker*)], each party agrees to defend, indemnify, and hold the other harmless from and against all costs, fees, liabilities, and other claims incurred by the indemnified party as a result of the claim.

Recording of Lease

14.08. On the request of either Landlord or Tenant, the parties agree to execute a short form or memorandum of this Lease, in recordable form, which may be recorded by either party at that party's expense.

Interest on Obligations

14.09. The payment of any sum due to Landlord under this Lease, however designated, shall be due promptly as provided for in this Lease. Any payment that is not paid promptly shall bear interest from its due date until paid at the then-maximum legal rate of interest.

Notices

14.10. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Lease or by law to be served on or given to either party to this Lease by the other party to this Lease shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom they are directed or any managing employee of that party, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Landlord at _____[*mailing address*] or to Tenant at

_____[*mailing address*]. Either party may change its address for purposes of this Paragraph by giving written notice of that change to the other party in the manner provided in this Paragraph.

Binding on Heirs and Successors

14.11. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of Landlord and Tenant, but nothing in this Paragraph shall be construed as a consent by Landlord to any assignment of this Lease or any interest in this Lease by Tenant except as provided in Paragraph 8.08 of this Lease.

Time of Essence

14.12. Time is expressly declared to be of the essence in this Lease.

Sole and Only Agreement

14.13. This lease, together with the Exhibits described in Paragraph 14.14 of this Lease, constitutes the sole and only agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this Lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. This lease may be modified or amended only by an instrument in writing signed by both Landlord and Tenant.

Exhibits

14.14. The following exhibits are incorporated by reference in and constitute a part of this Lease: [*list exhibits, e.g:*
EXHIBIT A: Site Plan for Shopping Center
EXHIBIT B: Construction Specifications
EXHIBIT C: Sign Criteria
EXHIBIT D: Rules and Regulations]

Invalidity or Unenforceability

14.15. If any provision of this Lease is held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this Lease shall remain in full force and effect.

Waivers

14.16. No waiver of any term, condition, or covenant of this Lease shall be presumed or implied. Any such waiver must be expressly made in writing by the party waiving the term, condition, or covenant. The acceptance by Landlord from Tenant of any amount paid for any reason under this Lease in a sum less than what is actually owing shall not be deemed a compromise, settlement, accord and satisfaction, or other final disposition of the amount owing unless Landlord agrees otherwise in writing.

Captions

14.17. The captions and numbers of the Articles and Paragraphs of this Lease are for convenience only and are not intended to reflect in any way on the substance or interpretation of the provisions of this Lease.

Executed on _____[*date*], at _____[*city*], California.

LANDLORD
_____ [*signature of landlord*]
[*typed name*]

TENANT
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART IV. FORMS

17-34E California Legal Forms--Transaction Guide § 34E.202

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.202 Sign Requirements

[1] Comment--Use of Form

This form contains illustrative sign requirements for a retail shopping center. It it presented here as a separate document that may be attached as an exhibit to either an REA [*see § 34E.200 [2]*] or a shopping center lease [*see § 34E.201 [2]*]. If included with either, the primary document should specifically refer to it and incorporate it by reference.

Uniformity in signs in a shopping center enhances the overall appearance of the center and should be strictly enforced. From both a management and compliance standpoint, it is useful to standardize the applicable requirements prior to entering into tenant leases for the shopping center.

[2] FORM

Sign Requirements

SIGN REQUIREMENTS FOR
_____ [*name of shopping center*]

No sign may be placed, installed, or erected in the Shopping Center by any tenant or other occupant ("Occupant") unless it meets the criteria set forth below.

ARTICLE 1. GENERAL REQUIREMENTS FOR ALL STORES

1.01. No signs, advertising placards, banners, pennants, names, insignia, trademarks, or other descriptive material may be affixed to or maintained on the glass panes and supports of the storefront windows or on the exterior walls of buildings without the prior written permission of [*person or entity authorized to grant approval, e.g.*, Landlord].

1.02. Prior to the fabrication of any sign, Occupant shall provide [*person or entity authorized to grant approval, e.g.,* Landlord] with at least two copies of detailed drawings indicating, to the extent applicable, the location, size, layout, design, color, lettering, and graphics of the proposed sign.

1.03. Occupant shall obtain any necessary permits for signs and/or their installation.

1.04. Any sign placed, installed, or erected in violation of these criteria shall be removed at the sole cost and expense of the Occupant, and any damage caused by the removal shall be repaired by Occupant at its sole cost and expense. Failure to remove a sign within [*number, e.g.,* 10] days after written notice from [*authorized person or entity, e.g.,* Landlord] shall constitute a default under the Occupant's lease or other occupancy agreement.

ARTICLE 2. GENERAL SPECIFICATIONS FOR ALL STORES

2.01. The following shall not be permitted:

(a) Flashing, moving, or audible signs.

(b) Pylon or pole signs.

(c) Exposed tubing or raceways.

2.02. All electrical signs shall bear the UL label, and their installation shall comply with all local building and electrical codes.

2.03. All cabinets, conduits, conductors, transformers, and other equipment shall be concealed.

2.04. Electrical service to all signs shall be on the Occupant's separate meter.

ARTICLE 3. CONSTRUCTION REQUIREMENTS FOR ALL STORES

3.01. All signs, bolts, fastenings, and clips shall be of hot dipped galvanized iron, stainless steel, aluminum, brass, or bronze, and no black iron materials of any type shall be permitted.

3.02. All exterior letters or signs exposed to the elements shall be mounted at least [*distance in inches, e.g.,* three fourths of an inch] but not more than [*distance in inches, e.g.,* one and one-half inches] from the building wall to permit water drainage.

3.03. The location of all openings or conduit and sleeves in sign panels of building walls shall be indicated by the sign contractor on submitted drawings. The sign contractor shall install them in accordance with the approved drawings.

3.04. Labels shall be permitted on the exposed surface of signs only if they are required by local ordinance and are placed in an inconspicuous location.

3.05. All penetrations of the building structure required for sign installation shall be neatly sealed in a watertight condition.

3.06. The sign contractor shall repair any damage to any other work or improvement caused by the contractor's own work.

3.07. Occupant shall be responsible for the operations of Occupant's sign contractors.

ARTICLE 4. ENTRYWAY REQUIREMENTS FOR ALL STORES

4.01. Any door to an Occupant's premises that is provided for customer ingress and egress may contain a sign that (1) is not larger than [*maximum size in square inches, e.g.,* 144 square inches], and (2) indicates, in gold leaf or decal application lettering not exceeding [*number, e.g.,* two] inches in height, the Occupant's hours of business and emergency telephone numbers.

4.02. Each Occupant who has a noncustomer door for receiving merchandise shall have stenciled on the door, in [*number in inches, e.g.,* two-inch] high block letters, the Occupant's business name and address. For any door used by more than one Occupant, the business name and address of each shall be applied. All lettering shall be in the color [*specify, e.g.,* black] and shall be located in a position on the door as illustrated in the architectural drawings for receiving doors attached to these sign criteria.

ARTICLE 5. DESIGN REQUIREMENTS FOR ALL STORES

5.01. Each sign shall be placed only in the location designated by Occupant in its detailed drawings submitted to and approved by [*person or entity authorized to approve signs, e.g.,* Landlord].

5.02. The maximum total horizontal dimension of any storefront sign shall not exceed [*maximum width, e.g.,* one half of the width] of the store frontage, and shall be located at least [*number, e.g.,* 36] inches from each side boundary of the Occupant's premises.

5.03. The background of any storefront sign shall be in a solid color only, as indicated in Occupant's detailed drawings submitted to and approved by [*person or entity authorized to approve signs, e.g.,* Landlord].

5.04. No signs perpendicular to the face of the building shall be permitted. Only one horizontal storefront sign is permitted for each Occupant. The precise dimensions of each storefront sign, its elevation above floor level, and its location and style of lettering shall be uniform in the Shopping Center and shall comply with the requirements set forth in the attached architectural drawings for storefront sign criteria.

5.05. Script lettering shall be permitted on any storefront sign only when it is a part of an Occupant's established trade script signature.

5.06. No sign of any type shall be permitted on canopy roofs or building roofs.

5.07. No storefront sign shall include the product sold by Occupant (for example, shoes or dresses), except when the product sold is part of Occupant's business or trade name.

5.08. No sign or any portion of any sign shall project above the parapet or top of the wall on which it is mounted.

ARTICLE 6. SPECIAL DESIGN REQUIREMENTS--
DEPARTMENT STORES AND FINANCIAL INSTITUTIONS

6.01. Department stores and financial institutions located in the Shopping Center shall have the right to affix to the building or space occupied by them their usual signs or logos customarily used for their other stores or bank locations in [*geographical region, e.g.,* Southern California *or* Northern California *or* California], as the case may be, whether or not the signs or logos otherwise conform to these criteria. However, the location and size of each sign shall be subject to the prior written approval of [*authorized person or entity, e.g.,* Landlord].

EXHIBIT

[*Attach architectural drawings of sign specifications*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 34E SHOPPING CENTERS: LEASING AND OPERATION
PART IV. FORMS

17-34E California Legal Forms--Transaction Guide § 34E.203

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 34E.203 Rules and Regulations for Use of Shopping Center

[1] Comment

[a] Use of Form

This form is a set of rules and regulations for a shopping center. It is presented here in a self-contained format so that it may be attached as an exhibit to, and incorporated by reference in, an REA [*see § 34E.200 [2]*] or a shopping center lease [*see § 34E.201 [2]*]. An REA should contain a provision authorizing its parties to adopt rules and regulations governing the use of the shopping center by the parties and other occupants of the shopping center [*see § 34E.200 [2]*, P 4.05]. Similarly, a shopping center lease should require tenants to abide by rules and regulations adopted by the landlord [*see § 34E.201 [2]*, P 8.07]. When the rules and regulations are appended as an exhibit to an REA or a shopping center lease, rather than included in the body of the primary instrument, its provisions should supplement the specific provisions relating to use contained in the REA or lease.

The rules and regulations in this form are fairly representative of a typical shopping center. For the most part, they are intended to minimize automobile and pedestrian traffic flow problems, to promote safety, to prevent nuisances, to maintain an overall desirable appearance and ambience for the shopping center, and to facilitate the transaction of shopping center-related business. Although most of the rules and regulations relate to the use of the common areas in the shopping center, some relate to the individual premises leased by tenants.

Responsibility for enforcement of rules and regulations for a shopping center is usually delegated to the developer in an REA [*see § 34E.200[2]*, P 4.05] and to the landlord in a lease [*see § 34E.201 [2]*, P 8.07]. This responsibility may in turn be delegated to a property management company, and in some instances may be implemented by a private security agency.

[b] Right of Public Access

Even though shopping centers are usually private property, constitutional and other legal restraints place limitations on

the right of a shopping center owner to restrict public access to the center [*see § 34E.19*]. Paragraph 17(b) of this form is intended to provide necessary flexibility with respect to protected activities.

[2] FORM

Rules and Regulations for Use of Shopping Center

RULES AND REGULATIONS
FOR _____
[*name of shopping center*]

Thoroughfares

1. No person shall use any roadway or walkway located in the Shopping Center except as a means of egress from or ingress to the Commercial Areas and Parking Areas within the Shopping Center or adjacent public streets. Roadways and walkways shall be used in an orderly manner and in accordance with directional or other signs or guides. The speed limit for automobiles on the roadways shall not exceed [*number, e.g.,* 15] miles per hour. Parking or stopping on roadways is prohibited except for the immediate loading or unloading of passengers. Walkways are limited to pedestrian use.

Parking Areas

2. Parking in the Parking Areas of the Shopping Center is limited to those persons using the Shopping Center, and shall be permitted only for the period during which the person is patronizing, conducting business related to, or otherwise using the Shopping Center. All automobiles shall be parked in an orderly manner within the painted lines defining the individual parking spaces. Parking may be limited by length of time in designated portions of the Parking Areas. Only automobiles, vans, and trucks not exceeding three quarters of a ton may park in the Parking Areas.

Employee Parking

3. Every tenant or other occupant of the Shopping Center ("Occupant") or the employee of any Occupant shall park his or her automobile only in the portions of the Common Areas designated as "Employee Parking" on the attached Exhibit _____. The location of employee parking may be changed from time to time by written notice given [by the management company for the Shopping Center *or, for a lease,* by Landlord].

Delivery Areas

4. Delivery areas, loading docks, and service roads shall be used only for making deliveries or providing other services (including management and security services) to the retail establishments in the Shopping Center. Except for deliveries made when the Shopping Center is not open for business, all deliveries made to retail establishments in the Shopping Center shall be made through the delivery areas located at the rear of the buildings in the Commercial Areas of the Shopping Center and designated for Occupants' use.

Business Hours

5. Except for the Major Occupants, all retail establishments shall be open on the days and during the hours from time to time established by [the management company for the Shopping Center *or, for a lease,* Landlord]. All Occupants shall illuminate their window displays, exterior signs, and exterior advertising displays during all hours in which the Shopping Center is open for business. "Major Occupant" means any single Occupant of retail space consisting of at least [*number, e.g.,* 50,000] square feet of gross floor area.

Exterior of Buildings [*or* Premises]

6. The exterior of [any building in the Shopping Center *or, for a lease,* the Premises], including all entrances, doors, storefront windows, plate glass, and fixtures, shall at all times be maintained in a safe, neat, and clean condition.

Plumbing

7. Plumbing facilities shall not be used for any purpose other than that for which they are constructed.

Removal of Trash and Litter

8. All trash, refuse, and waste materials shall be regularly removed from [each building in the Shopping Center *or, for a lease,* the Premises] by its Occupant. Until removed, the foregoing materials shall be stored in adequate containers and placed where they cannot be seen by customers of the Shopping Center, in a manner that will not constitute a health or fire hazard or nuisance to any Occupant or user of the Shopping Center. Burning of trash, refuse, or waste materials is strictly prohibited.

Residential Uses

9. No portion of the Shopping Center shall be used for any residential or lodging purposes.

Industrial and Manufacturing Uses

10. No portion of the Shopping Center shall be used for any industrial or manufacturing purpose. Warehousing uses shall not be permitted except as otherwise provided in [a written agreement between an Occupant or Occupants and the Owners of the Shopping Center *or* an Occupant's lease].

Displays on Common Areas

11. The Common Areas (including the sidewalks and walkways of the Common Areas) may not be used by any Occupant to display, sell, store, or place any merchandise, equipment, or other items. No merchandise or other items may be placed outside the exterior walls of [any building in the Shopping Center *or, for a lease,* the Premises] for purposes of sale, display, or otherwise.

Promotional Events

12. Notwithstanding any provision in Paragraph 11 to the contrary, portions of the Common Areas may be used for

special promotional events, but only if the specific event is first approved in writing by [the Shopping Center management company *or, for a lease,* Landlord]. If approved, any promotional event shall be conducted only (1) in those portions of the Common Areas, and during those hours, specifically approved for the promotion, and (2) in accordance with any other conditions set forth in [the management company's *or, for a lease,* Landlord's] approval of the event. Except as provided below, nothing in this Paragraph shall be interpreted to require [the management company *or, for a lease,* Landlord] to approve any requested promotional event. Any Major Occupant (as defined in Paragraph 5) shall have the right to conduct a special promotional event in the Common Areas located immediately in front of its main [*or* mall] entrance, provided the following requirements are met: _____[*set forth applicable conditions, e.g.,* the Major Occupant first gives at least _____ (*number, e.g.,* three) months' advance written notice to _____ (the management company *or, for a lease,* Landlord); the promotional event does not last more than three consecutive days; the promotional event does not unreasonably interfere with pedestrial or vehicular ingress and egress to and from the Shopping Center; and the Major Occupant does not conduct more than two promotional events in any one calendar year].

Advertising

13. No form of advertising medium (including flashing light, searchlight, loudspeaker, phonograph, radio, or television) shall be maintained on the Common Areas. No sound or light may be transmitted beyond the boundaries of [any building in the Shopping Center *or, for a lease,* the Premises].

Close-Out Promotions

14. No auction, fire, bankruptcy, or going-out-of-business sale shall be conducted in, at, on, or about the Shopping Center or [any building in the Shopping Center *or, for a lease,* the Premises].

Unlawful Uses

15. Neither the Shopping Center nor [any building in the Shopping Center *or, for a lease,* the Premises] shall be used for any purpose that violates any law, ordinance, or regulation or that constitutes a nuisance.

Hazardous Substances

16. Hazardous substances shall not be used or stored [in any building in the Shopping Center *or, for a lease,* on the Premises] or any other portion of the Shopping Center.

Other Unauthorized Activities

17. (a) Subject to Subparagraph (b) below, no person shall do any of the following in or on any part of the Common Areas:

(1) Sell, distribute, or solicit orders for sale or distribution of any merchandise, device, service, periodical, book, pamphlet, or other matter.

(2) Exhibit any sign placard, banner, notice, or other written material.

(3) Distribute any circular, booklet, handbill, placard, or other material.

(4) Solicit membership in any organization, group, or association or a contribution for any purpose.

(5) Parade, patrol, picket, demonstrate, rally, or engage in any conduct that might tend to (i) interfere with or impede the use of any of the Common Areas by any user of the Shopping Center, (ii) create a disturbance, (iii) attract attention, or (iv) harass, annoy, disparage, or be detrimental to the interest of any of the retail establishments within the Shopping Center.

(6) Use any Common Area for any purpose at a time when no retail establishment in the Shopping Center is open for business or employment.

(7) Throw, discard, or deposit any paper, glass, or extraneous matter of any kind, except in designated receptacles, or create litter or hazards of any kind.

(8) Use any sound-making device of any kind or create or produce in any manner noise or sound that is annoying, unpleasant, or distasteful to Occupants or users of the Shopping Center.

(9) Deface, damage, or demolish any sign, light standard, fixture, landscaping material, or other improvement within the Center or the property of any Occupant or user located in the Shopping Center.

(b) Subparagraphs(a)(1) through (5) of this Paragraph 17 shall not apply (and shall not be interpreted or construed) to (1) prevent any access to the Common Areas by any person when the access is required or permitted by law, or (2) prohibit the conduct of any activity that is permitted by law. However, _____ [*responsible party, e.g.,* the management company for the Shopping Center *or* Landlord) shall have the right to take reasonable measures permitted by law to minimize any disruption or interference with the business of the Shopping Center caused by the access or conduct.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
Chapter 35 [Reserved]

17-35 California Legal Forms--Transaction Guide Chapter 35

[Reserved]

Chapter 35[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS

18-35A California Legal Forms--Transaction Guide 35A.syn

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.syn Synopsis to Chapter 35A: ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS

§ 35A.01 California Statutes

§§ 35A.02-35A.04 [Reserved]

§ 35A.05 Law Reviews and Periodicals

§ 35A.06 Annotations

§ 35A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§§ 35A.08-35A.09 [Reserved]

§ 35A.10 Transferability of Leasehold

§ 35A.11 Assignment by Lessee and Sublease Distinguished

[1] Terms of Conveyance Determine Type of Transfer

[2] Consequences of Classification

§ 35A.12 Formal Requirements

[1] Assignment

[a] Statute of Frauds

[b] Assignment by Operation of Law

[c] Delivery

[2] Sublease

§ 35A.13 Recording of Assignment or Sublease

§ 35A.14 Restrictions on Transfer of Interest in Nonresidential Lease

[1] Validity of Transfer in Absence of Restriction

[2] Transfer Restrictions Subject to Standard or Condition

[3] Effect of Prohibition of Transfer

[4] Remedies for Tenant's Breach

§ 35A.15 Requirement of Landlord's Consent to Transfer in Nonresidential Lease

[1] Giving or Withholding Consent Subject to Standard or Condition

[2] Implied Standard That Consent Will Not Be Unreasonably Withheld; Tenant's Remedies

§ 35A.16 Recapture Clause in Nonresidential Lease

§ 35A.17 Transfer of Interest in Residential Lease

§ 35A.18 Continuation of Transferable Lease Following Tenant's Breach

§§ 35A.19-35A.29 [Reserved]

§ 35A.30 Assignment by Lessee

[1] Contractual Obligations of Assignor and Assignee

[a] Privity of Estate

[b] Privity of Contract

[i] Liability of Assignor

[ii] Liability of Assignee

[2] Landlord's Remedies Against Lessee's Assignees

[3] Assignee's Remedies Against Landlord

§ 35A.31 Assignment by Lessor

[1] Assignment of Rents and Other Rights

[2] Lessor's Assignment of Rents in Connection With Loan Secured by Property

[a] Written Assignment Is Effective to Create Present Security Interest

[b] Consequences of Recording Assignment

[c] Enforcement of Assignment

[3] Remedies of Lessor's Transferee

[4] Lessee's Remedies Against Lessor's Transferee

§§ 35A.32-35A.39 [Reserved]

§ 35A.40 Introduction to Subleases

[1] Definition of Sublease

[2] Nature of Relationship Under Sublease

§ 35A.41 Relationship Between Original Lessor and Parties to Sublease

[1] Nature of Relationship

[2] Potential Liability of Lessor and Subtenant

§ 35A.42 Relationship Between Sublessor and Sublessee

[1] Sublessor's Rights

[2] Sublessee's Rights

§ 35A.43 Applicability of Master Lease Provisions

§ 35A.44 Termination of Sublessee's Rights

[1] Expiration of Master Lease's Term

[2] Forfeiture

[3] Surrender of Sublease

§§ 35A.45-35A.49 [Reserved]

§ 35A.50 Transfer or Return of Security for Residential Lease

[1] Statutory Procedure, Generally

[2] Transfer of Deposit

[3] Return of Deposit

§ 35A.51 Transfer of Payment or Deposit Securing Performance of Nonresidential Lease

§ 35A.52 Amounts Deductible From Security

[1] Residential Leases

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§ 35A.53 Rights of Successor in Interest to Security

§ 35A.54 Liability of Successor in Interest--Effect of Noncompliance

§§ 35A.55-35A.99 [Reserved]

§ 35A.100 Client Interview

[1] Facts

Scope

[2] Documents

Scope

§§ 35A.101-35A.109 [Reserved]

§ 35A.110 Review of Original Lease Before Assignment by Lessee

Scope

§ 35A.111 Additional Determinations Before Assignment by Lessee

Scope

§ 35A.112 Assignment of Lessor's Interest in Lease to Lender

Scope

§ 35A.113 Assignment by Lessor of Rent or of Interest in Lease as Condition of Sale

Scope

§ 35A.114 Sublease

Scope

§§ 35A.115-35A.119 [Reserved]

§ 35A.120 Assignment by Lessee

Scope

§ 35A.121 Assignment of Lessor's Interest in Lease or Rent

Scope

§ 35A.122 Sublease

Scope

§§ 35A.123-35A.129 [Reserved]

§ 35A.130 Assignment of Lessor's Interest in Lease to Lender

Scope

§ 35A.131 Assignment by Lessor of Rent or of Interest in Lease as Condition of Sale

Scope

§§ 35A.132-35A.199 [Reserved]

§ 35A.200 Assignment of Lease by Lessee

[1] Comment--Use of Form

[2] FORM

Assignment of Lease by Lessee

§ 35A.201 Assignment of Lessor's Interest in Lease--As Condition of Sale of Leased Property

[1] Comment

[a] Use of Form

[b] Provision Cancelling Lease on Sale of Property

[2] FORM

Assignment of Lessor's Interest in Lease--As Condition of Sale of Leased Property

§ 35A.202 Assignment of Rents

[1] Comment

[a] Use of Form

[b] Notice to Lessees

[2] FORM

Assignment of Rents

§ 35A.203 Assignment to Lender of Lessor's Interest in Lease as Security for Loan Obligation

[1] Comment

[a] Use of Form

[b] Effect of Assignment of Interest in Leases, Rents, Issues, or Profits

[c] Recording

[2] FORM

Assignment to Lender of Lessor's Interest in Lease as Security for Loan Obligation

§§ 35A.204-35A.209 [Reserved]

§ 35A.210 Sublease

[1] Comment

[a] Use of Form

[b] Nondisturbance Agreement

[c] Protection of Sublessee's Possession

[d] Attorneys' Fees

[2] FORM

Sublease

§ 35A.211 Nondisturbance Agreement

[1] Comment--Use of Form

[2] FORM

Nondisturbance Agreement

§§ 35A.212-35A.219 [Reserved]

§ 35A.220 Notice to Lessee of Assignment of Rent

[1] Comment--Use of Form

[2] FORM

Notice to Lessee of Assignment of Rent

§ 35A.221 Notice to Lessee of Assignment of Lease as Security for Loan

[1] Comment--Use of Form

[2] FORM

Notice to Lessee of Assignment of Lease as Security for Loan

§ 35A.222 Estoppel Certificate Executed by Lessee

[1] Comment

[a] Use of Form

[b] Practical Considerations

[2] FORM

Estoppel Certificate Executed by Lessee

§ 35A.223 Lessor's Notice to Tenant of Transfer of Security Payment or Deposit [Civ. Code §§ 1950.5, 1950.7]

[1] Comment--Use of Form

[2] FORM

Lessor's Notice to Tenant of Transfer of Security Payment or Deposit [Civ. Code §§ 1950.5, 1950.7]

§ 35A.224 Request for Statement of Reasons for Refusal to Consent to Transfer of Interest in Nonresidential Lease

[1] Comment--Use of Form

[2] FORM

Request for Statement of Reasons for Refusal to Consent to Transfer of Interest in Nonresidential Lease

Benjamin Kaplann*

Myron Moskovitzn** Practice Consultants

FOOTNOTES:

(n72)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of

landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n73)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966 through 1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS

18-35A California Legal Forms--Transaction Guide Scope

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

Scope

Benjamin Kaplann* Myron Moskovitzn** Practice Consultants Scope

This chapter covers assignments and subleases of leasehold interests. It discusses general rules governing the transferability of leasehold interests, distinctions between assignments and subleases, and rules relating to the transfer of the lessor's and the lessee's interests in a lease. This chapter discusses in detail the rules applicable to the transfer of a residential leasehold, lease provisions requiring the lessor (or landlord) to consent to a particular assignment or sublease by the lessee (or tenant), and rules governing the enforceability of such a requirement. This chapter includes forms for assigning a lease, assigning rents to be received under a lease, assigning a lessor's interest in a lease as security for a loan obligation, and subleases.

For coverage of real property leases and lease provisions, including forms, see Ch. 34B, *Residential Leases* , and Ch. 34C, *Retail, Industrial, and Office Leases* . For coverage of the modification and termination of leases, see Ch. 35B, *Modification and Termination of Leases* .

FOOTNOTES:
(n74)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n75)Footnote **. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters

of the California Supreme Court. From 1966 through 1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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A. Primary Sources

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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.01 California Statutes

Types of estates in real property. *Civ. Code § 761*.

Estates for years as chattels real. *Civ. Code § 765*.

Remedies of lessor's grantee. *Civ. Code § 821*.

Lessor's remedies against assignee. *Civ. Code § 822*.

Lessee's and assignee's remedies against lessor's assignee. *Civ. Code § 823*.

Transfer of property in general. *Civ. Code §§ 1039-1090*.

Property of any kind as transferable. *Civ. Code § 1044*.

Method of transfer of real property. *Civ. Code § 1091*.

Effect when owner of estate for years purports transfer of greater interest. *Civ. Code § 1108*.

Grants of rents or reversions as against tenant's rights. *Civ. Code § 1111*.

Acknowledgments. *Civ. Code §§ 1180-1207*; *Gov. Code §§ 27287, 27288*.

Constructive notice of real property conveyance. *Civ. Code §§ 1213-1215*.

Transferability of burden of obligation. *Civ. Code § 1457*.

Covenants running with the land. *Civ. Code §§ 1460-1471*.

Novation. *Civ. Code §§ 1530-1533*.

Enforcement by third-party beneficiary. *Civ. Code § 1559*.

Statute of frauds. *Civ. Code § 1624*; *Code Civ. Proc. § 1971*.

Leasing rights and responsibilities in general. *Civ. Code §§ 1925-1935*.

Security for residential lease. *Civ. Code § 1950.5*.

Security for commercial lease. *Civ. Code § 1950.7*.

Lessor's remedies. *Civ. Code §§ 1951.2, 1951.4*.

Assignment and sublease under nonresidential leases. *Civ. Code §§ 1995.010-1995.340*.

Assignments and subletting as grounds for unlawful detainer. *Code Civ. Proc. § 1161(2)-(4)*.

Provisions for special recording indexes of assignments. *Gov. Code §§ 27243, 27244*.

Instruments affecting real estate title are recordable. *Gov. Code § 27280*.



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§§ 35A.02[Reserved]



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B. Secondary Sources

18-35A California Legal Forms--Transaction Guide § 35A.05

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.05 Law Reviews and Periodicals

Davies, *FNMA v. Bugna: California Assignment of Rents Provision and the Impact of the Bankruptcy Reform Act of 1994, 31 Loy. L.A. L. Rev. 1453 (1998).*

Myster, *Protecting Landlord Control of Transfers: The Status of "Sole Discretion" Clauses in California Commercial Leases, 35 Santa Clara L. Rev. 845 (1995).*

Stipanov, *Assignment and Subletting of Commercial Leases Under the New Statutory Scheme*, 8(4) Cal. Real Prop. J. 18 (Fall 1990).

Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers, 22 Loy. L.A. L. Rev. 405 (1989).*

Curtis, *Assignments and Subleases: An Archaic Distinction, 17 Pac. L.J. 1247 (1986).*

Kehr, *The Assignability of Commercial Leases*, 9 Real Estate L.J. 197 (1981).

Kehr, *The Changing Law of Lease Assignments*, 11 Real Estate Rev. 54 (1981).



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.06 Annotations

Annot., Merger or Consolidation of Corporate Lessee as Breach of Clause in Lease Prohibiting, Conditioning, or Restricting Assignment or Sublease, 39 A.L.R.4th 879 (1985).

Annot., Sublessee's Rights With Respect to Primary Lessee's Option to Renew Lease, 39 A.L.R.4th 824 (1985).

Annot., When Lessor May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Leases Premises Without Lessor's Consent, 21 A.L.R.4th 188 (1983).

Annot., Agency: Anti-Assignment Clause in Contract as Precluding Enforcement by Undisclosed Principal, 75 A.L.R.3d 1184 (1977).

Annot., Construction and Effect of Provision in Lease that Consent to Subletting or Assignment Will Not Be Arbitrarily or Unreasonably Withheld, 54 A.L.R.3d 679 (1973).



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18-35A California Legal Forms--Transaction Guide § 35A.07

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender)

Ch. 25B, *Subordination, Assumption, and Assignment* .

Ch. 34A, *Prelease Forms* .

Ch. 34B, *Residential Leases* .

Ch. 34C, *Retail, Industrial, and Office Leases* .

Ch. 34D, *Ground Leases* .

Ch. 34E, *Shopping Centers: Leasing and Operation* .

Ch. 35B, *Modification and Termination of Leases* .

Ch. 38, *Real Property Management* .

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Ch. 60, *Assignments* .

Ch. 330, *Landlord and Tenant: General Introduction* .

Ch. 331, *Landlord and Tenant: Creating the Tenancy* .

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Ch. 333, *Landlord and Tenant: Eviction Actions* .

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Ch. 141, *Landlord and Tenant* .

Ch. 236, *Unlawful Detainer* .

California Real Estate Law and Practice (Matthew Bender)

Ch. 152, *Drafting Basic Lease Provisions* .

Ch. 172, *Assigning and Subletting Leasehold Interests* .

Current Leasing, ch. 23, *Real Estate Leases* (Matthew Bender).

Powell On Real Property, ch. 17, *Landlord's Rights and Remedies* (Matthew Bender).

[2] Additional Text References

Miller & Starr, California Real Estate, ch. 18, *Landlord and Tenant* (2d ed. 1989).

[3] Legal Encyclopedias

49 Am. Jur. 2d Landlord and Tenant §§ 391-512.

42 Cal. Jur. 3d Landlord and Tenant §§ 184-232.

51C C.J.S. Landlord and Tenant §§ 30-53.



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A. Transfer of Leasehold Interests

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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.10 Transferability of Leasehold

A lease has a dual character: it is both a contract between the lessor and the lessee for the possession and use of the subject property and a conveyance of an estate in the land [*Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352]* . In the absence of a condition or covenant forbidding the transfer of an interest in a lease, a leasehold interest is generally transferable in the same manner as any other interest in property [*Chandler v. Hart (1911) 161 Cal. 405, 415, 119 P. 516* ; *Morris v. Iden (1913) 23 Cal. App. 388, 395, 138 P. 120* ; *see Civ. Code § 1044*]. Although a leasehold is an estate in real property [*Civ. Code § 761*; *Callahan v. Martin (1935) 3 Cal. 2d 110, 118, 43 P.2d 788]* , it is not "real property" in the strict sense of that term. Rather, it is classified by statute as a "chattel real" [*see Civ. Code § 765*] and, as such, is a form of personal property [*Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162-163, 2 Cal. Rptr. 2d 536* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 118, 43 P.2d 788]* . Thus, a transfer of an interest in a lease is not subject to the general rules governing the sale of real property but is governed by the rules relating to the transfer of personal property [*Potts Drug Co. v. Benedict (1909) 156 Cal. 322, 328, 104 P. 432* ; *Weaver v. Superior Court (1949) 93 Cal. App. 2d 729, 734, 209 P.2d 830, 210 P.2d 246]* .

PRACTICE TIP:

Importance of Including Express Assignability Language. When drafting a lease for a landlord, if you want to restrict assignability in any way, you must include express language in the lease that does so. Failure to include this language will make the lease freely assignable by the tenant. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.11 Assignment by Lessee and Sublease Distinguished

[1] Terms of Conveyance Determine Type of Transfer

The terms of a conveyance, rather than its designation as an assignment or a sublease, determine whether a transfer is an assignment or a sublease [*Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 206, 219 P. 435* ; *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710-711, 40 Cal. Rptr. 575]* . It is the interest transferred by the lessee that distinguishes an assignment from a sublease [*see Williams v. Hinckley (1930) 109 Cal. App. 574, 576, 293 P. 644]* . An assignment transfers the whole of a lessee's interest in a lease for the entire unexpired duration of the lease [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 242, 73 P.2d 1163* ; *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* ; when an assignment is made, the lessee retains no reversionary interest or right of reentry [*Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* . A sublease transfers only a portion of the lessee's interest, even if the transfer is for the whole of the unexpired duration of the lease [*see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 243, 73 P.2d 1163* ; *see also Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 206, 219 P. 435]* ; if the lessee reserves the right of reentry for breach of conditions, a sublease arises [*see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 243, 73 P.2d 1163* ; *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* .

[2] Consequences of Classification

The classification of a transfer as an assignment or a sublease is important because different legal consequences flow from the classification. When the lessee's interest in a lease is assigned, the assignee comes into privity of estate with the prime lessor and the lessee-assignor does not become the assignee's landlord [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* . When a sublease is made, however, the transferor-sublessor becomes the landlord, the transferee-sublessee becomes the subtenant, and there is no privity between the transferee-sublessee and the prime lessor [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* . Thus, a sublease may also transfer all of the leased premises (a portion of the lessee's interest) for a part of the unexpired term.

For discussion of "privity" issues, including the distinction between "privity of estate" and "privity of contract" and when a landlord-assignee relationship is in privity, see California Real Estate Law and Practice, ch. 172, *Assigning and Subletting Leasehold Interests* (Matthew Bender).

PRACTICE TIP:

Assignment Does Not Relieve Tenant of Obligations. An assignment does *not* relieve the tenant of his or her obligations to the landlord under the lease--unless the tenant obtains a release from the landlord. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.12 Formal Requirements

[1] Assignment

[a] Statute of Frauds

A lease for a term in excess of one year may be assigned only by operation of law [*see* [b], *below*] or by an instrument in writing subscribed by the party to be charged or by the party's agent [*see Civ. Code §§ 1091, 1624(a)(3)*]. An agent may not sign the document unless the principal first authorizes that act in writing [*Civ. Code § 1624(a)(3)*; *Code Civ. Proc. § 1971*].

[b] Assignment by Operation of Law

An assignment by operation of law may arise from the landlord's acceptance of a new tenant with the original tenant's consent, even when there has been no express assignment by the original tenant [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484, 66 Cal. Rptr. 70]* . An assignment by operation of law may also result from the lessee's insolvency [*see 11 U.S.C. § 365(f)(1), (3)*]. For discussion of the effect of bankruptcy, see Ch. 34C, *Retail, Industrial, and Office Leases* .

PRACTICE TIP:

Effect of Bankruptcy on Assignment. Most provisions of a lease that attempt to effectuate either lease termination or assignment by operation of law as a result of the filing of the Petition in Bankruptcy will not be effective. *By Benjamin Kaplan.*

[c] Delivery

To be effective, an assignment of a lease must be delivered to the assignee [*Green v. Shulman (1924) 66 Cal. App. 284, 286, 225 P. 891]* and accepted by the assignee [*see Canale v. Copello (1902) 137 Cal. 22, 23-24, 69 P. 698]* .

Delivery of the lease is not required [*Hess v. Sausser (1928) 206 Cal. 15, 17, 272 P. 1059]* .

[2] Sublease

Because a sublease is actually a lease between a present tenant and a third party, it must comply with the requirements governing leases. Thus, if its term exceeds one year, the sublease must conform to the statute of frauds; that is, it must be in writing and signed by the sublessor [*Civ. Code §§ 1091*, *1624(a)(3)*; *Code Civ. Proc. § 1971*; *see Fam. Code § 1102* (both spouses must execute instrument leasing community property for longer than one year)]. Further, the sublease must, as a general rule, comply with the requirements governing contracts and conveyances [*see Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 636, 96 P.2d 122]* . For further discussion of the statute of frauds and formal requirements for leases, see Ch. 34B, *Residential Leases* .

PRACTICE TIP:

Community Property Interests. When a married landlord maintains that the property in which the leased premises are situated is separate property, and even in instances where record title may confirm this, the fact is that there may still be a community property interest held by the other spouse. Therefore, the lessee/assignee should either obtain the recordation of a quitclaim deed from the other spouse, or a waiver of any community property interest, to insure that the lease or assignment is effective. In the absence of a written agreement authorizing recordation, the lessor is under no obligation to consent thereto or present or sign any instrument in recordable form. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of FraudsReal Property LawLandlord & TenantLease AgreementsSubleases



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§ 35A.13 Recording of Assignment or Sublease

Any instrument affecting the title to or possession of real property may be recorded [*Gov. Code § 27280*] with the county recorder of the county in which the affected property is situated [*Civ. Code § 1169*]. An assignment of lease is a recordable instrument, as is a sublease [*see Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352]* . Recordation gives constructive notice of the instrument's contents to subsequent purchasers, mortgagees, and assignees [*Civ. Code §§ 1213, 1214*; *see Central Construction Co. v. Hartman (1935) 7 Cal. App. 2d 703, 708, 47 P.2d 484]* .

Before an instrument may be recorded, its execution must be properly acknowledged or proved and the acknowledgment or proof must be certified as prescribed by law [*see Gov. Code §§ 27287, 27288*]. When the instrument to be recorded is a sublease, a "short form" of lease is generally recorded in place of the longer formal instrument. For a complete discussion of recordation, see Ch. 34C, *Retail, Industrial, and Office Leases* .

PRACTICE TIP:

Recording the Assignment. If the lease has already been recorded before the assignment, the assignment itself should be recorded. Be sure to have the assignment executed in recordable form. If the lease has not been previously recorded then the "short form," or what is usually referred to as a "Memorandum of Lease," should be recorded [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203* (sample Memorandum of Lease)]. The assignment should ideally contain thereon the landlord's consent to assignment as part of the same document, which consent is also subject to the requirements of it being in recordable form. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawPriorities & RecordingRecording Acts



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.14 Restrictions on Transfer of Interest in Nonresidential Lease

[1] Validity of Transfer in Absence of Restriction

A tenant under a nonresidential lease has an unrestricted right to sublease, assign, or otherwise transfer that leasehold interest unless the lease restricts or absolutely prohibits transfers [*Civ. Code §§ 1995.210, 1995.230*; *see Civ. Code §§ 1995.010-1995.340*; *see also Civ. Code § 1044*].

[2] Transfer Restrictions Subject to Standard or Condition

A transfer restriction may provide that the transfer is subject to any express standard or condition. For example, the lease may provide that the landlord is entitled to some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease [*Civ. Code § 1995.240*]. "Consideration," as used in *Civ. Code § 1995.240*, was intended by the Legislature to refer to appreciated rentals or to the bonus value of a leasehold and *not* to consideration for the *business* operated on the leased premises [*Ilkhchooyi v. Best (1995) 37 Cal. App. 4th 395, 407, 411, 45 Cal. Rptr. 2d 766* (landlord's demand for 75 percent of amount tenant was to receive in sale of his business for covenant not to compete was not authorized by *Civ. Code § 1995.240* and was also unconscionable)]. A restriction may also require the landlord's consent to the transfer [*see § 35A.15*], or provide the landlord with the right to terminate the lease following notice of a proposed transfer [*see § 35A.16*]. Any ambiguity in a restriction on transfer must be construed in favor of transferability [*Civ. Code § 1995.220*; *see also Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335]* .

PRACTICE TIP:

Recaputure of Consideration. If the market in commercial leased premises is rapidly increasing, the landlord will have more of an incentive to "recapture" any consideration the tenant receives from a transferee. *By Benjamin Kaplan.*

[3] Effect of Prohibition of Transfer

A restriction on transfer in a lease applies to all subsequent transfers notwithstanding the lessor's consent to a prior transfer or any waiver for a prior transfer, unless the lease expressly limits the restriction to the original lessee or the lessor expressly states in writing that the consent or waiver applies to a subtenant [*Civ. Code § 1995.340*]. If the lease absolutely prohibits transfers, the lessor will not be able to continue the lease in effect following the lessee's breach of the lease and abandonment of the leased premises [*see Civ. Code §§ 1951.4(a), (b)(1), 1995.230*; *see also § 35A.18*]. However, if an assignment of a lease is made in breach of a covenant against assignment without the lessor's consent, the lessor has the option to declare a forfeiture of the lease [*People v. Klopstock (1944) 24 Cal. 2d 897, 901, 151 P.2d 641]* . The prohibited assignment, however, is merely voidable, not void, and is valid and binding unless the landlord elects to declare a forfeiture [*People v. Klopstock (1944) 24 Cal. 2d 897, 901, 151 P.2d 641]* .

PRACTICE TIP:

Issues of Waiver and Estoppel. In a case of breach, the lessor must be very careful not to waive the breach or do anything that would or could leave the lessee or assignee to claim that an estoppel exists that would prevent the lessor from exercising any right to evict or claim a forfeiture. However, because "the law abhors a forfeiture," the lessor's conduct in regard to a breach will be carefully scrutinized by the court. A great deal depends on the existence of provisions in the lease that govern "waiver" or "estoppel." Most commercial leases fail to even include "estoppel" provisions (one is not here discussing "estoppel statements" which are obtained for the benefit of lenders and which are totally unrelated) in this context. Thus, the lessor's conduct should not be such as to admit a claim that the lessee or assignee detrimentally relied on the lessor's conduct or statements.

"Acceptance of rent" in the absence of a "waiver" provision that permits the acceptance of rant without waiving the breach is one of the more common situations in which "waiver" may occur. *By Benjamin Kaplan.*

[4] Remedies for Tenant's Breach

If a tenant transfers the tenant's interest in a nonresidential lease in violation of a restriction on transfer set forth in the lease, the landlord may be entitled to judicial relief in the form of the remedies provided by law for breach of contract as well as breach of a lease [*Civ. Code § 1995.320*]. In these circumstances, the remedies for breach of contract include, but are not limited to, the right to recover contract damages caused by the tenant's breach and the right to terminate the lease [*Civ. Code § 1995.320(a), (b)*; *see Civ. Code § 1951.2*]. Furthermore, an assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant's interest in a nonresidential lease may be jointly and severally liable with the tenant for contract damages [*Civ. Code § 1995.330(a)*]. For further discussion of breach and available remedies, see Ch. 34C, *Retail, Industrial, and Office Leases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.15

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.15 Requirement of Landlord's Consent to Transfer in Nonresidential Lease

[1] Giving or Withholding Consent Subject to Standard or Condition

A transfer restriction in a nonresidential lease may require the landlord's consent to the transfer [*Civ. Code § 1995.250*]. This consent may be made subject to an express standard or condition for giving or withholding consent. For example, the restriction may provide that the landlord's consent may not be unreasonably withheld, or that the consent may be withheld subject to express standards or conditions [*Civ. Code § 1995.250*].

[2] Implied Standard That Consent Will Not Be Unreasonably Withheld; Tenant's Remedies

For all leases executed on or after September 23, 1983, if the landlord's consent to transfer is required and if the restriction provides no standard for giving or withholding consent, the transfer restriction must be construed to include an implied standard that the landlord's consent may not be unreasonably withheld [*Civ. Code §§ 1995.260, 1995.270(b)*]. If such a restriction was executed before September 23, 1983, however, the landlord's consent may be unreasonably withheld [*Civ. Code § 1995.270(b)*]. Whether the consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof [*Civ. Code § 1995.260*]. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent [*see § 35A.224*], the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer [*Civ. Code § 1995.260*]. If the landlord withholds consent unreasonably, the tenant has the remedies provided by law for breach of contract in addition to any remedies for breach of the lease [*Civ. Code § 1995.310*]. In these circumstances, the remedies for breach of contract include, but are not limited to, the right to recover contract damages caused by the lessor's breach and the right to terminate the lease [*Civ. Code § 1995.310*].

PRACTICE TIP:

Landlord Should Obtain Qualifications of Assignee. Because the entire area of assignment/subletting is fraught with the possibility of litigation, if such transfer is refused, it is better for the landlord to have very specific indicia of the assignee's qualifications. This is particularly so if the lease provides that the

lessee is not, on assignment, released from the lessee's financial responsibilities under the lease. If specific indicia regarding the "credit worthiness," "net worth," or "experience," were not included as specific indicia under the lease, under these circumstances, questions will arise as to the lessor's reasonableness should an assignment be refused. The lessee is in a credible position to argue that since he or she is not "off the hook," the ostensible credit worthiness of the assignee should not be in issue when the standard of consent of "reasonableness" is applied. Although there are valid arguments against that position (e.g., the landlord will still have to deal with a defaulting assignee by eviction or notices, or otherwise attend to the matter with all the disruption and cost and expense), it is better to preclude such issues from even arising. The loss of an advantageous sale may create significant exposure to a lessor who withholds its consent. *By Benjamin Kaplan.*

PRACTICE TIP: Issues Surrounding Lessor's Consent. When the lease itself provides for time periods for the lessor to exercise his or her right to consent, those time periods should be strictly complied with. Performance by the lessor in advance of the deadline dates is preferred. When the lease does not provide for deadline dates for the lessor to exercise his or her right of consent, the lessor should act speedily and expeditiously to inform the lessee of its position.

It is appropriate to include in the requirement to obtain the lessor's consent that the lessor must be presented with a fully executed "Purchase and Sale Agreement" of the business executed by the prospective assignee subject to the obtaining of the lessor's consent. Therefore, the lessor's consent will be predicated on the executed agreement and not some "pig in the poke" in which the terms of the assignment may not be fully disclosed to lessor, who may have rights to any bonus being paid by the assignee. In drafting the provisions of the lease one must be careful to include specific language which would prohibit the lessee from characterizing as "goodwill" or some other category, what is in fact the bonus value of the lease itself. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.16

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.16 Recapture Clause in Nonresidential Lease

The statutes governing transfer restrictions permit the use of a recapture clause that gives the landlord the right to do all of the following [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 351-352, 371, 6 Cal. Rptr. 2d 467, 826 P.2d 710* ; *see Civ. Code §§ 1995.010-1995.340*]:

- Terminate the lease following the receipt of a notice of the tenant's intention to sublet the premises or to assign its interests under the lease;

- Enter into a new lease covering the premises with the tenant's intended assignee or sublessee (or with any other person); and

- Keep all profits, if any, resulting from the termination and reletting.

A recapture clause containing the above elements was one of the types of transfer restrictions contemplated by the Legislature when it enacted the assignment and subletting statutes [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 369-371, 826 P.2d 710]* . A landlord's exercise of the right of termination granted in such a clause is not a breach of the covenant of good faith and fair dealing [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 376, 826 P.2d 710]* .

For further discussion of recapture clauses and an illustrative recapture provision, see Ch. 34C, *Retail, Industrial, and Office Leases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property

LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.17

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.17 Transfer of Interest in Residential Lease

Unlike nonresidential leases, residential leases are not subject to specific statutory provisions governing subletting and assignment [*see § 35A.14*]. However, the statutes appear to implicitly recognize the right of a residential landlord to prohibit subletting and assignment. For example, *Civ. Code § 1951.4* permits a lessor of real property to continue to recover rent after the lessee has breached or abandoned the premises if the lease permits (or does not prohibit) assignment or subletting and certain other conditions are satisfied [*see Civ. Code § 1951.4(b)(1)*; *see also § 35A.18*]. Similarly, *Code Civ. Proc. § 1161(4)* provides that a tenant is guilty of unlawful detainer if the tenant continues in possession after subleasing, assigning, or committing waste contrary to covenants of the lease and after being served with a three-day notice demanding surrender of possession.

Until reported decisions or statutes address the issue of the transferability of residential leases, counsel may wish to refer to commercial lease cases for guidance in this area. For discussion of commercial cases, see Ch. 34C, *Retail, Industrial, and Office Leases* . For additional coverage of the transferability of interests in residential leases, see Ch. 34B, *Residential Leases* .

PRACTICE TIP:

Make Sure Provision Against Assignment or Subletting Is in Writing. In the absence of an agreement not to assign or sublet, the lessee may do so without restriction. This agreement need not be in writing unless otherwise subject to the Statute of Frauds. However, because of difficulties of *proof* in the absence of any writing (it may be contained in a document other than a lease or rental agreement so long as signed "by the party to be charged"), establishing such an oral term would be difficult to prove. Certain local eviction control jurisdictions have "required" that provisions against assignment or subleasing be in *writing* although they have not defined what constitutes a writing. It is highly questionable whether a local jurisdiction can require a writing if such is not required by state law as that entire area of law would appear to be preempted. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantLease AgreementsSubleases



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.18 Continuation of Transferable Lease Following Tenant's Breach

A lessor of real property has the right to continue to collect rent and otherwise continue the lease in effect following the tenant's breach of the lease and abandonment of the leased premises if the lease permitting subletting or assignment provides for this remedy and the landlord does not terminate the lessee's right of possession [*Civ. Code § 1951.4(a), (b)*]. For further discussion of this remedy, see Ch. 34B, *Residential Leases* . If the statutory prerequisites to this remedy are not satisfied, the lease terminates after the lessee's abandonment and breach, and the lessor may recover statutory damages from the lessee [*see Civ. Code § 1951.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide §§ 35A.19-35A.29

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.19[Reserved]



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18-35A California Legal Forms--Transaction Guide § 35A.30

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.30 Assignment by Lessee

[1] Contractual Obligations of Assignor and Assignee

[a] Privity of Estate

The assignment of a lessee's interest in a lease terminates the privity of estate between the prime lessor and the lessee-assignor and all obligations arising out of that privity [*see Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 86, 21 Cal. Rptr. 317* ; *but see* [b], *below* (assignor may still have liability because of privity of contract)]. After an assignment has been made, the assignee and the lessor are in privity of estate, and the assignee is liable for all covenants running with the land [*Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138* ; *see Civ. Code §§ 1460-1471* (covenants running with land)]. Although these covenants include the covenant to pay rent [*Civ. Code § 1463*; *see Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 676, 104 P.2d 507]* , the assignee is liable for rent only so long as the assignee remains in possession of the property; no one merely by reason of having acquired an estate subject to a covenant running with the land is liable for a breach of the covenant before that person acquired the estate, or after that person has parted with or ceased to enjoy its benefits [*Civ. Code § 1466*; *see Tyler v. Wilson (1943) 58 Cal. App. 2d 583, 586, 137 P.2d 33]* . Consequently, the assignee who does not assume the lease's contractual obligations remains liable on covenants running with the land only during the period of the assignee's occupancy [*Civ. Code § 1466*], and may terminate that liability by assignment to someone else [*Johnson v. Sherman (1860) 15 Cal. 287, 290]* or by reassignment to the lessee [*Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138]* . For further discussion of covenants running with the land, see California Real Estate Law and Practice, ch. 172, *Assignment and Subletting Leasehold Interests* (Matthew Bender).

[b] Privity of Contract

[i] Liability of Assignor

The assignment of the lessee's interest in the lease does not in itself terminate the lessee's contractual obligations under

the lease. In the absence of some special agreement on the lessor's part, the lessee-assignor remains liable for rent during the full term of the lease [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 602, 328 P.2d 953* ; *Munzinger v. Caffrey (1942) 49 Cal. App. 2d 180, 185-186, 121 P.2d 13]* . Neither the lessor's consent to the assignment nor the assignee's express assumption of the contractual obligations of the lease relieve the lessor-assignor from that liability [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 602, 328 P.2d 953]* . Consequently, the lessee becomes a surety for the assignee's obligation to pay the rent [*Samuels v. Ottinger (1915) 169 Cal. 209, 212, 146 P. 638]* and remains a primary obligor under the lessee's own express contract to pay rent [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 602, 328 P.2d 953]* . However, the lessee can be released from all further liability on the lease if the lease so provides [*see Beckjord v. Slusher (1937) 22 Cal. App. 2d 559, 566-567, 71 P.2d 820* ; *see also O'Donnell v. Weintraub (1968) 260 Cal. App. 2d 352, 355-357, 67 Cal. Rptr. 274]* , or the parties effect a novation [*see Civ. Code §§ 1530-1533*]. The mere assignment of a lease does not operate as a novation absent some evidence of an agreement or contract on the lessor's part to relieve the lessee from further liability on the lease [*see Wellman v. Conroy (1920) 50 Cal. App. 141, 143, 194 P. 728* (involving lease of personal property)].

PRACTICE TIP:

Effect of Modification. Although the assignor remains liable as a surety if the assignee fails to pay the rent, the assignor is probably relieved from liability if the landlord and assignee agree to any significant *modification* of the lease. The landlord should take this into account before agreeing to any modification. *By Myron Moskovitz.*

[ii] Liability of Assignee

If the assignee does not assume the obligations of the lease, there is no privity of contract between the assignee and the lessor [*Farber v. Greenberg (1929) 98 Cal. App. 675, 685, 277 P. 534]* , and the assignee is not ordinarily bound by the lease's contractual obligations [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 676, 104 P.2d 507]* .

If the assignee expressly assumes the obligations of the lease, the assignment is a contract for the lessor's benefit, or the lessor's subsequent grantee. In that case, the lessor (or subsequent grantee) may enforce the lease's covenants against the assignee [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 244-245, 73 P.2d 1163* ; *Rosenkranz v. Pellin (1950) 99 Cal. App. 2d 650, 653, 222 P.2d 249]* . An assuming assignee will not be relieved of liability merely by assigning the lease to another [*Lopizich v. Salter (1920) 45 Cal. App. 446, 449, 187 P. 1075]* .

PRACTICE TIP:

Responsibilities of Lessee. A lessor may not create obligations in the lessee/assignor larger than those imposed by the existing lease. Thus, if the lessor extends the lease's initial term, or the lease term that is then in effect, or provides an additional option term, such will not be, in the absence of the lessor's written consent, the contractual responsibility of the lessee. The execution of other agreements, even contemporaneously made with the assignment and consent of these agreements, may effect a *novation* when the parties to the agreement are the lessor and the assignee. *By Benjamin Kaplan.*

[2] Landlord's Remedies Against Lessee's Assignees

Any remedy that a lessor may have against the lessee for the breach of any agreement in the lease, or to recover possession of the property, may be pursued against the lessee's assignee for any cause of action occurring while the assignment is in effect, except when the assignment is made as security for a loan and is not accompanied by possession of the premises [*Civ. Code § 822*]. Notwithstanding this rule, however, an assignee who has not assumed a contractual obligation under a lease is liable only for the obligations that arise out of privity of estate and not those that arise out of privity of contract. Such an assignee is thus bound to perform only those covenants running with the land [*see Lutton v. Rau (1918) 37 Cal. App. 429, 430, 173 P. 1111* ; *see also Civ. Code §§ 1460-1471* (covenants running with land)].

PRACTICE TIP:

Make Sure Communications and Notices Are Sent to Lessee/Assignor. Careful consideration should be given to insuring that appropriate communications and notices to the assignee are also conveyed or served on the lessee/assignor. Failure to so notify the assignor or serve the assignor with notices may be fatal if and when the lessor acts against the lessee/assignor. *By Benjamin Kaplan.*

[3] Assignee's Remedies Against Landlord

Any remedy a lessee may have against a lessor for breach of any agreement in the lease may also be pursued by any assignee of the lessee, except for breach of covenants against encumbrances or relating to the title or possession of the premises [*Civ. Code § 823*]. Similarly, any remedy that the lessee may have against the assignees of the lessor may also be pursued by the assignees of the lessee, with the exceptions noted [*Civ. Code § 823*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesDelegation of PerformanceContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.31 Assignment by Lessor

[1] Assignment of Rents and Other Rights

A lessor may assign rents due or to become due under existing leases [*Silverstein v. Oakland Title Ins. Etc. Co. (1932) 122 Cal. App. 73, 78, 9 P.2d 846]* . Accrued rents are a chose in action, which may be assigned orally [*Hibernia Sav. & Loan Soc. v. Belcher (1935) 4 Cal. 2d 268, 275, 48 P.2d 681]* . A right of reentry, or of repossession for breach of condition subsequent, may also be transferred [*Civ. Code § 1046*].

A grant of rents, of a reversion, or of a remainder is good and effectual without attornments of the tenants [*Civ. Code § 1111*]. An "attornment" is an act by which a lessee agrees to become the tenant of (that is, acknowledges obligations to) a stranger who has acquired the fee in the leased land, the right to the rents from that land, or similar rights [*see* Black's Law Dictionary (6th ed. 1990), p. 130]. However, *Civ. Code § 1111* also provides that "no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage" from the grant.

[2] Lessor's Assignment of Rents in Connection With Loan Secured by Property

[a] Written Assignment Is Effective to Create Present Security Interest

A written assignment of interest in leases, rents, issues, or profits of real property made in connection with a loan secured by real property is, on execution and delivery by the assignor, effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. This is true irrespective of whether the assignment is denoted as absolute, absolute conditioned on default, additional security for an obligation, or otherwise [*Civ. Code § 2938(a)*; *see Civ. Code § 2938(i)* (*Civ. Code § 2938* applies to contracts entered into on or after January 1, 1997, and former *Civ. Code §§ 2938* and *2938.1*, as they were in effect before January 1, 1997, govern contracts entered into before January 1, 1997, and govern actions and proceedings initiated on the basis of these contracts)].

[b] Consequences of Recording Assignment

The assignment may be recorded [*Civ. Code § 2938(b)*]. This recording has two statutory consequences [*Civ. Code § 2938(b)*]:

- First, the assignment will be deemed to give constructive notice of the assignment's content and effect; and

- Second, the interest granted by the assignment will be deemed perfected as of the date of recordation (and this remains true notwithstanding a provision of the assignment or a provision of law that would otherwise preclude or defer enforcement of the rights granted the assignee under the assignment until the occurrence of a subsequent event, including the assignor's subsequent default, or the assignee's obtaining possession of the real property or the appointment of a receiver).

[c] Enforcement of Assignment

If the assignor under the obligation secured by the assignment defaults, the assignee is entitled to enforce the assignment by a number of alternative methods prescribed by statute, such as the appointment of a receiver [*see Civ. Code § 2938(c)*].

[3] Remedies of Lessor's Transferee

A person to whom real property is transferred on which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as the grantor might have had [*Civ. Code § 821*].

The lessor's sale of real property during the unexpired term of a lease does not of itself abrogate the lease; usually, all the original lessor's rights are granted to the reversion's grantee, with the grantee becoming the landlord by operation of law and the tenant becoming a tenant of the reversion's grantee [*see Rosenkranz v. Pellin (1950) 99 Cal. App. 2d 650, 652, 222 P.2d 249]* . However, if in the purchase and sale agreement there is an express reservation by the lessor of the landlord's rights under the lease, the grantee does not become the landlord by operation of law [*Commonwealth Memorial, Inc. v. Telophase Society of America (1976) 63 Cal. App. 3d 867, 871, 134 Cal. Rptr. 58]* .

[4] Lessee's Remedies Against Lessor's Transferee

Whatever remedies a lessee of any real property may have against the immediate lessor for the breach of any agreement in the lease, the lessee may have against the assigns of the lessor, except on covenants against encumbrances or relating to the title or possession of the premises [*Civ. Code 823*]. The assigns of the lessee also have those remedies against the lessor and the lessor's assigns [*Civ. Code § 823*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsAssignments



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.32[Reserved]



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C. Sublease

18-35A California Legal Forms--Transaction Guide § 35A.40

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.40 Introduction to Subleases

[1] Definition of Sublease

A sublease is a transfer of a portion of a lessee's interest in a lease [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* . For example, the sublessor may do any of the following [*see Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 206, 219 P. 435]* :

- Transfer only a portion of the premises covered by the master lease;
- Provide for a shorter term than the one applicable to the master lease;
- Create new conditions or new causes of forfeiture; or
- Reserve a reversionary interest such as a right of reentry for a breach of conditions.

[2] Nature of Relationship Under Sublease

Under a sublease, the original lessee becomes a sublessor and the transferee becomes a sublessee [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* . A landlord-tenant relationship exists between these parties [*see Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.41

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.41 Relationship Between Original Lessor and Parties to Sublease

[1] Nature of Relationship

A lease is both a conveyance of an estate for years and a contract between the landlord and the tenant. Consequently, the original lease creates dual obligations: contractual obligations from the terms of the lease (privity of contract) and legal obligations from the creation of the tenancy (privity of estate) [*see Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507]* . A sublease terminates the privity of estate between the original lessor and the sublessor, but not the privity of contract [*see Munzinger v. Caffrey (1942) 49 Cal. App. 2d 180, 185-186, 121 P.2d 13]* . Consequently, the sublessor remains obligated to the original lessor under the terms of the master lease [*Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 207, 219 P. 435]* , and is responsible for any violations by the sublessee of the covenants contained in the master lease [*Smith v. United Crude Oil Co. (1919) 179 Cal. 570, 573, 178 P. 141]* . A sublessee's breach of the covenants of the master lease could result in a forfeiture of the master lease [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 262, 73 P.2d 1163* ; *see McNeece v. Wood (1928) 204 Cal. 280, 283-285, 267 P. 877* (no forfeiture when sublessor was not a participant in sublessee's nonconforming use and had taken steps to abate it)].

[2] Potential Liability of Lessor and Subtenant

As a general rule, there is no privity of contract or estate between the original lessor and the sublessee [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575* ; *but see Melchor Investment Co. v. Rolm Systems (1992) 3 Cal. App. 4th 587, 592-593, 4 Cal. Rptr. 2d 343* (sublessee who remains occupant of property is bound to arbitrate with lessor by privity of estate)], and the sublessee is not liable to the original lessor for breach of the covenants in the master lease or the sublease [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 242, 73 P.2d 1163* ; *Webb v. Jones (1927) 88 Cal. App. 20, 28, 263 P. 538]* . However, if the sublessee expressly assumes the contractual obligations of the master lease, a privity of contract exists between the original lessor and the sublessee [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 244-245, 73 P.2d 1163* ; *see Johnson v. Couch (1961) 189 Cal. App. 2d 687, 691-692, 11 Cal. Rptr. 645* (merely stating that sublease is subject to all terms and

conditions of master lease does not effect assumption)]. In that case, the original lessor, as a third-party beneficiary of the assumption agreement, has a direct right of action against the sublessee [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 244-246, 73 P.2d 1163* ; *see Bennett v. Leatherby (1992) 3 Cal. App. 4th 449, 452, 4 Cal. Rptr. 2d 340]* .

Furthermore, if the original lessor has expressly agreed to a sublease, the sublessee is a third-party beneficiary to the implied covenant of quiet enjoyment in the master lease and has the right to sue the landlord directly for breach of that covenant [*Marchese v. Standard Realty & Dev. Co. (1977) 74 Cal. App. 3d 142, 147, 141 Cal. Rptr. 370]* . The covenant of quiet enjoyment requires the landlord to provide the tenant with the quiet possession of the premises during the lease's term [*see Civ. Code § 1927*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesPresent EstatesChattel Real & Leasehold EstatesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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C. Sublease

18-35A California Legal Forms--Transaction Guide § 35A.42

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.42 Relationship Between Sublessor and Sublessee

[1] Sublessor's Rights

A landlord-tenant relationship exists between a sublessor and a sublessee [*see Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* . Therefore, all covenants in the sublease that inure to the benefit of the original tenant as sublessor (for example, a covenant to pay rent) are enforceable against the sublessee [*Cox v. Hollywood Film Enterprises, Inc. (1952) 109 Cal. App. 2d 320, 323, 240 P.2d 713]* . If the sublessee breaches the sublease, the sublessor may use unlawful detainer proceedings to obtain possession of the premises [*Code Civ. Proc. § 1161*; *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 711, 40 Cal. Rptr. 575]* , or rely on the other remedies available to any landlord. For further discussion of these remedies, see California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* , and ch. 211, *Contractual Remedies* (Matthew Bender).

[2] Sublessee's Rights

The sublessor is liable (1) in damages for any breach of a covenant in the sublease inuring to the sublessee's benefit [*Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 90-92, 21 Cal. Rptr. 317]* and (2) for any damages resulting from any act or omission of the sublessor that results in the termination by the original lessor of the master lease [*Dimas v. Irvine (1959) 167 Cal. App. 2d 78, 80, 334 P.2d 82]* .

PRACTICE TIP:

Liability of Sublessor on Breach by Landlord. Suppose the original landlord breaches a provision of the lease, damaging the sublessee. Is the sublessor liable to the sublessee? One case found that a tenant can be held liable to his or her subtenant for damages caused by the original landlord's interference with the subtenant's possession, if the sublessor requested the interference [*Riechhold v. Sommarstrom Invest. Co. (1927) 83 Cal. App. 173, 177-178, 256 P. 592]* . *By Myron Moskovitz and Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.43

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.43 Applicability of Master Lease Provisions

The provisions of a sublease are subordinate to the provisions of the master lease [*Julian v. Schwartz (1936) 16 Cal. App. 2d 310, 331, 60 P.2d 887* ; *Johnson v. Couch (1961) 189 Cal. App. 2d 687, 691, 11 Cal. Rptr. 645* ; *see § 35A.210 [2],* P 7]. Although there is no privity of contract between an original lessor and a sublessee, the sublessee is charged with notice of the master lease's existence, and is bound by its terms and conditions [*Pedro v. Potter (1926) 197 Cal. 751, 760, 242 P. 926* ; *Scott v. Mullins (1962) 211 Cal. App. 2d 51, 56, 27 Cal. Rptr. 269]* . A sublease that expressly provides that it is subject to the master lease's terms and conditions merely states the rule set forth above, and does not create a contractual relation between the original lessor and sublessee [*Johnson v. Couch (1961) 189 Cal. App. 2d 687, 691, 11 Cal. Rptr. 645]* . Consequently, any provisions in the master lease that are found to have been included for the personal benefit of the original tenant-sublessor will not be implied in the sublease [*Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926* ; *see, e.g., Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 712-713, 40 Cal. Rptr. 575* (master lease provision for 30-day grace period for correcting breaches did not carry over to sublessee despite "subject to" clause in sublease)]. Instead, these types of provisions must be specifically set out in the sublease if they are to apply to the sublease transaction [*Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.44

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.44 Termination of Sublessee's Rights

[1] Expiration of Master Lease's Term

A sublease may not extend beyond the master lease's term [*Hart v. Fuller (1920) 45 Cal. App. 618, 620, 188 P. 611]* , even if the sublease provides for a longer term [*see Georgeous v. Lewis (1912) 20 Cal. App. 255, 259, 128 P. 768]* . The expiration of the master lease's term terminates the sublessee's right to possession [*Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 466, 250 P.2d 270* ; *see Civ. Code § 1108*].

[2] Forfeiture

If the original lessor declares a forfeiture of the master lease based on the sublessor's nonperformance of contractual obligations, the original lessor may also terminate the sublease because the sublessee holds the premises subject to performing the original lease's terms and conditions [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . Consequently, following such a forfeiture, the landlord is entitled to possession as against the sublessee [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . Of course, the original lessor may enter into a nondisturbance agreement or otherwise agree not to terminate subleases following a default by the sublessor [*see § 35A.210[1][b]*].

PRACTICE TIP:
Sublessee's Right to Cure. Note, however, that a landlord must give a sublessee the opportunity to *cure* a sublessor's breach, for example, to pay the rent. The unlawful detainer statutes and cases require this as a precondition to evicting a sublessee. *By Myron Moskovitz.*

[3] Surrender of Sublease

A sublease, like a lease, may be surrendered voluntarily or by operation of law. A surrender is a yielding up of an estate for life or years to the reversioner or remainderman [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr.*

269] . A surrender yields the estate as distinguished from the possession, and can be accomplished either by express written consent of the parties or by operation of law when the parties' actions imply their consent [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . For example, acceptance of a new sublease by the sublessee is an effective surrender by operation of law of the premises demised in the original sublease [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269* ; *see* Ch. 35B, *Modification and Termination of Leases*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesTerm Tenancies



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18-35A California Legal Forms--Transaction Guide §§ 35A.45-35A.49

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.45[Reserved]



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18-35A California Legal Forms--Transaction Guide § 35A.50

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.50 Transfer or Return of Security for Residential Lease

[1] Statutory Procedure, Generally

When a landlord's interest in leased residential premises terminates for any reason, the landlord will be relieved of further liability with respect to the security if, within a reasonable time after the termination, the landlord or the landlord's agent follows either of the procedures described in [2] or [3], *below* [*see Civ. Code § 1950.5(h)*].

[2] Transfer of Deposit

The landlord may be relieved of further liability with respect to the security deposit if the portion of the security deposit remaining after any lawful deductions [*see Civ. Code § 1950.5(b), (e)*; *see also § 35A.52[1]*] is transferred to the landlord's successor in interest, and thereafter the tenant is notified by personal delivery or first-class mail (postage prepaid) of the transfer, of any claims made against the security, of the amount of the security deposited, and of the names, addresses, and telephone numbers of the successors in interest. If the notice is personally served, the tenant must acknowledge receiving the notice and sign the landlord's copy of the notice [*Civ. Code § 1950.5(h)(1)*].

For a sample notice of the transfer of a security deposit, see *§ 35A.223[2]*.

PRACTICE TIP:

Use of Escrows When Transferring Security Deposits. It is a fairly common occurrence for an unsophisticated lessor/seller to believe that the transfer of security deposits in escrow is enough to comply with the provisions of *Civ. Code § 1950.5(h)*, absent other requirements contained therein. In fact, an escrow only does what it is told to do, and you should be careful to advise your lessor/seller to comply with the appropriate provisions to escape future liability. *By Benjamin Kaplan.*

[3] Return of Deposit

The landlord may be relieved of further liability with respect to the security deposit if the portion of the security remaining after any lawful deductions is returned to the tenant, together with the required written accounting [*Civ. Code § 1950.5(h)(2)*; *see Civ. Code § 1950.5(b), (e)* (lawful deductions), (g) (written accounting)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.51

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.51 Transfer of Payment or Deposit Securing Performance of Nonresidential Lease

On termination of the landlord's interest in nonresidential property, the landlord or the landlord's agent must transfer or return the money, as described below, within a reasonable time to be relieved of further liability with regard to the payment or deposit [*see Civ. Code § 1950.7*]. The landlord will be relieved of further liability with regard to the payment or deposit if the money, less lawful deductions [*see Civ. Code § 1950.7(c)*], is transferred to the landlord's successor in interest, and thereafter the tenant is notified by personal delivery or certified mail of the transfer, of any claims made against the payment or deposit, and of the transferee's name and address [*Civ. Code § 1950.7(d)(1)*]. If the notice is personally delivered, the tenant must acknowledge receiving the notice and sign the landlord's copy of the notice [*Civ. Code § 1950.7(d)(1)*]. Alternatively, the landlord will be relieved of further liability if the portion of the payment or deposit remaining after making any lawful deductions is returned to the tenant [*Civ. Code § 1950.7(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.52

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.52 Amounts Deductible From Security

[1] Residential Leases

A residential real property landlord may deduct from the security deposit only those amounts that are reasonably necessary to do any of the following [*Civ. Code § 1950.5(b), (e)*]:

- Compensate the landlord for the tenant's default in the payment of rent;
- Repair damages to the premises (exclusive of ordinary wear and tear) caused by the tenant or the tenant's guest or licensee;
- Clean the premises on termination of the tenancy (for tenancies as to which the tenant's right to occupy begins after January 1, 2003, the security deposit may be used for cleaning of the premises "necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy"); or
- Remedy future defaults by the tenant in any obligation under the lease to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the lease authorizes the security deposit's application in this manner.

The landlord may not assert a claim against the tenant or the security for damages to the premises or any defective conditions that existed before the tenancy, for ordinary wear and tear or its effects (whether the wear and tear existed before the tenancy or occurred during the tenancy), or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies [*Civ. Code § 1950.5(e)*].

PRACTICE TIP:

"Cleaning Deposits" vs. "Security Deposits." Often one sees a lease or rental agreement that refers to one payment made for a "Cleaning Deposit" and another payment made for a "Security Deposit." Both

are "security deposits" under the law; however, that portion of the "security deposits" which is a "Cleaning Deposit" may limit the lessor to its use only for that limited purpose, i.e. "cleaning" and not "to remedy a default in rent." The best practice is to denominate everything as a "security deposit" and simply state the statutory and contractual agreement to apply the security deposit. *By Benjamin Kaplan.*

PRACTICE TIP: Pay Attention to Local Ordinances. Warning: Many jurisdictions have local ordinances regarding the segregation of security deposits and the payment of interest thereon, even in respect to non-rent controlled premises. *By Benjamin Kaplan.*

[2] Nonresidential Lease

A nonresidential real property landlord may claim only those amounts from the security payment or deposit that are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises on termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes [*Civ. Code § 1950.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential Leases



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18-35A California Legal Forms--Transaction Guide § 35A.53

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.53 Rights of Successor in Interest to Security

On receiving any portion of the security payments or deposits, the landlord's successor in interest has all of the rights and obligations of a landlord holding the security with regard to the security [*Civ. Code §§ 1950.5(k)* (residential security), *1950.7(e)* (nonresidential security)]. Before voluntarily transferring any interest in the premises, a landlord must deliver to the successor in interest a written statement regarding the status of the security deposits [*see Civ. Code § 1950.5(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity Deposits



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18-35A California Legal Forms--Transaction Guide § 35A.54

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.54 Liability of Successor in Interest--Effect of Noncompliance

If the requirements of *Civ. Code § 1950.5(h)* are not complied with [*see § 35A.50*], the landlord's successors in interest are jointly and severally liable with the landlord for repayment of the security or that portion of the security to which the tenant is entitled. A landlord's successor in interest may not require the tenant to post any security to replace that amount not transferred to the tenant or his or her successors in interest unless and until the landlord's successor in interest first makes restitution of the initial security or provides the tenant with an accounting [*Civ. Code § 1950.5(j)*].

The provision set forth above, however, does not preclude a successor in interest from recovering from the tenant compensatory damages that are in excess of the security received from the landlord previously paid by the tenant to the landlord. Nonetheless, if, on inquiry and reasonable investigation, a landlord's successor in interest has a good faith belief that the lawfully remaining security deposit is transferred to him or her or returned to the tenant, the successor in interest is not liable for damages or for any security not transferred [*Civ. Code § 1950.5(j)*; *see Civ. Code § 1950.5(h)*].

PRACTICE TIP:

Liability of Buyers. *Civ. Code § 1950.5(j)* and (k) implies that a *buyer* has no obligation to a tenant for the return of a security deposit given earlier to a *seller* unless the buyer actually receives the deposit. Thus, a buyer should check what security deposits are held by the seller and make sure these are transferred to the buyer. Even though buyers might not be liable to tenants if they do not get the security deposits from the sellers, these buyers will face some very unhappy tenants if they seek new security deposits and/or fail to return deposits to tenants who already paid them to a prior landlord. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide §§ 35A.55-35A.99

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.55[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-35A California Legal Forms--Transaction Guide § 35A.100

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.100 Client Interview

NOTE:
The following facts and documents supplement those listed in Ch. 34B, ***Residential Leases,*** Ch. 34C, ***Retail, Industrial, and Office Leases,*** Ch. 34D, ***Ground Leases,*** and Ch. 34E, ***Shopping Centers: Leasing and Operation.***

[1] Facts

1. Name, address, and telephone number of:

    a. Lessor.

    b. Lessee.

    c. Assignee or sublessee.

2. Legal status of parties:

    a. Individual.

    b. Corporation.

    c. Unincorporated association.

    d. Trust.

e. Partnership.

f. Fiduciary.

g. Other.

3. Lease's execution date.

4. Lease's expiration date.

5. If lease was recorded, recording information.

6. Proposed use of property to be subleased or assigned.

7. Whether lease has been modified by written agreement or executed oral agreement.

8. Whether lessor or lessee has defaulted in any of lease's terms, covenants, or conditions, and if so:

a. Nature of default(s).

b. Whether effective waiver of default has been made.

c. Whether there is proposed remedy for any unremedied default, and by whom, when, and how.

9. If required by lease, whether lessor consents to proposed sublease or assignment by lessee.

10. Whether assignee or sublessee will assume some or all obligations of lease.

11. Whether lessor or lessee has encumbered leased property or leasehold interest since lease's execution.

12. Whether lease has been subordinated to another encumbrance on leased property by reason of:

a. Provision in lease.

b. Subsequently executed subordination agreement.

c. Failure to record lease or memorandum of it.

13. Whether lessee has previously assigned or subleased leased property, and, if so:

a. Name, address, and telephone number of each transferee.

b. Whether any unremedied defaults exist under sublease or assignment.

14. If lessor is assignor and assignment is for security purposes:

a. Loan application numbers.

b. Date of mortgage or deed of trust execution.

c. Names and addresses of persons to whom notices should be sent under assignment of lessor's interest in lease, including:
(1) Assignor-lessor.

(2) Assignee-lender.

(3) Other.

15. If lessee is assignor, amount, if any, of consideration required of assignee.

16. If lessee is sublessor:

a. Term of sublease, including commencement and termination dates.

b. Amount of total or monthly rent to be paid.

c. Address to which rent will be paid by sublessee.

d. Portion, if not all, of leased premises to be subleased.

PRACTICE TIP:

Independent Confirmation of Facts Is Good Practice. "Facts" do not mean what your client tells you they mean. Facts are only "facts" if they are independently determined to exist separate and apart from any representations made to you. Thus, if a client states that a particular corporation (wholly owned by the client) is "in good standing" that statement is not a fact until you have confirmed it by access to the Secretary of States' website and thereafter obtained a certified Statement of Good Standing from the Secretary of State. The same type of ascertaining of "facts" pertains to any filing requirement, recordation requirement (for example, "Fictitious Business Name Statement"), licensing requirement, issuing requirement, reporting requirement, and the like. In all instances you as the attorney must come from Missouri, "The Show Me State."

In addition, access to public records, such as the Grantor/Grantee index, should occur in all instances involving real property interests. The number of situations in which an individual lessor represents that he/she is the owner, when in fact the property had been transferred to a trust of which that person is the Trustee (and other similar situations), is quite amazing. As an attorney for the prospective lessee or assignee you would want to make sure that the lessor is in fact of record title to the property. Do not rely on any oral statement or representation of your client as it is not worth the paper it is written on. Moreover, having the client sign a document that you are relying on the client's representation may provide you with an argument in the future that you did not do the work because you were informed to rely on the representations, but it may not cause you to escape your liability for any act or omission. *By Benjamin Kaplan.*

[2] Documents

1. Authorization documents, if party to assignment or sublease is corporation, unincorporated association, fiduciary, or agent [*see* Ch. 34A, *Prelease Forms*].

2. Copy of lease.

3. Written modifications of lease, if any.

4. Written notices of default, and waivers of default, if any.

5. Written exercise of any option contained in lease.

6. Copy of any documents creating or giving notice of encumbrances on or liens against leased premises.

7. Copy of any subleases of leased premises or any portion of leased premises, if any.

8. Copy of any assignment of leasehold interests.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleases



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-35A California Legal Forms--Transaction Guide §§ 35A.101-35A.109

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.101[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

18-35A California Legal Forms--Transaction Guide § 35A.110

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.110 Review of Original Lease Before Assignment by Lessee

1. Ascertain existence of and review any assignment provisions.

NOTE:
For discussion of a tenant's right to assign, sublease, or otherwise transfer the tenant's interest in a nonresidential lease, see *§§ 35A.14-35A.16* [***see*** *Civ. Code §§ 1995.010-1995.340*]. For discussion of the transferability of interests in residential leases, see *§ 35A.17* and Ch. 34B, ***Residential Leases*** **.**

a. If lessor's consent to assignment of lease is required, ascertain limitation, if any, on lessor's right to refuse.

b. Determine other conditions, if any, imposed on right to assign.

2. Review lease's purpose to ascertain that proposed use of premises is not restricted or prohibited by lease's terms, provisions in other recorded leases or grants of lessor, statutes, administrative regulations, or ordinances.

3. Ascertain existence of restrictions on use of property, and restrictions, if any, on use of property retained by lessor.

4. Review duties of parties to lease, including duty to repair, restore, and comply with laws.

5. Ascertain whether lease's terms, covenants, and conditions bind heirs, administrators, executors,

successors, and assigns of parties.

6. Ascertain existence of and review any provisions concerning security deposit.

7. Ascertain existence of and review any provisions concerning subordination.

8. Review property description.

9. Review lease's term, including:

a. Balance remaining.

b. Effect of holding over.

c. Existence of options to renew or extend.

10. Determine total amount of rent reserved, remaining, and required to be paid by assignor-lessee to or on behalf of lessor.

PRACTICE TIP:

Be Sure to Obtain Only Fully Executed Documents. A document which does not clearly bear all the signatures of the parties is not to be relied on. It does not matter that the client swears on a stack of bibles that the particular lease was the one that he/she executed. If you do not have a fully executed document then one should be obtained. At times the obtaining of such a document from the other party or its agent may present "sticky" problems, including whether or not you wish those persons to know that you do not have a fully executed copy. How that is handled is a matter of judgment, but the bottom line is that you cannot rely on any unexecuted document. Also, if the signatures appear by the same persons under different names and are not made in the form for Attorneys in Fact, then other issues are raised as well. In any instance when someone has signed as an Attorney in Fact, you need to obtain the executed and/or recorded Attorney in Fact. The instances are legion in which I have found that Attorneys at Law have permitted clients to sign as "Attorneys in Fact" when no such written authority for same ever existed. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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B. Preliminary Determinations

18-35A California Legal Forms--Transaction Guide § 35A.111

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.111 Additional Determinations Before Assignment by Lessee

1. Determine effect of any modifications to lease on proposed transfer.

2. Verify that lease has not been terminated due to:

    a. Expiration of lease term.

    b. Unremedied default by lessor or lessee.

    c. Surrender of premises.

    d. Abandonment of lease.

    e. Operation of law.

    f. Other.

3. Determine effect of any liens, encumbrances, easements, or other rights against leased premises, including subordination of lease to another encumbrance on leased property; if all or some of these rights can or should be removed, determine by whom, how, and when.

4. If any subleases bind or inure to benefit of assignee, determine whether:

    a. Any sublessee has assumed to discharge any of lessee's obligation under lease; if so,

which sublessee and which obligations.

b. Any sublessee is in default under terms of sublease; if so, what effect default will have on assignment.

5. Determine effect of assumption of lease obligations by assignee:

a. If, by assignment's terms, assignee does not expressly consent to assume all contractual obligations of lessee under lease, following obligations will nevertheless be binding on assignee:
(1) Covenants running with land.

(2) Covenants implied by law.

(3) Obligations imposed by reason of lease providing that its terms, covenants, and conditions must be binding on heirs, administrators, executors, successors, and assigns of parties.

b. If, by assignment's terms, assignee assumes all contractual obligations of lessee under lease, lessee's liability may be altered as follows:

(1) Lease may provide that assignment with lessor's consent releases lessee from all obligations under lease.

(2) Lessor's express consent to releasing lessee from liability on assignment may result in novation [*see Civ. Code §§ 1530-1533*].

6. Determine whether assignment will be recorded [*see § 35A.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide § 35A.112

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.112 Assignment of Lessor's Interest in Lease to Lender

NOTE:
This section applies when the interest of an owner-lessor of rental property in leases on the property is assigned to a lender as additional security for a loan obligation. Although this type of assignment is generally used in connection with the long-term financing of a commercial building, it may also be used in connection with loans on other types of rental properties. As a practical matter, an assignment of rents made in connection with a real estate loan is almost always a conditional pledge of additional security rather than an absolute assignment [***see*** Ch. 25A, ***Security Instruments for Real Estate Financing***], and this Part reflects that practice [***see*** P 3, ***below***]. For discussion of the effect of an assignment of rents [***see*** *Civ. Code § 2938*], see *§ 35A.31[2]*.

1. Review each lease and any modifications to it, paying attention to provisions affecting or relating to assignment by lessor, including:

a. Restrictions, if any, on use of property retained by lessor.

b. Duties of parties, including duty to repair, restore, and comply with laws.

c. Whether lease's terms, covenants, and conditions bind heirs, administrators, executors, successors, and assigns of parties.

d. Subordination provision, if any.

e. Term of lease remaining:
(1) Effect of holding over.

(2) Existence of options to renew or extend.

f. Total amount of rent reserved, remaining, and required to be paid by lessee to or on behalf of lessor.

g. Security deposit provision, if any.

2. Ascertain that lessor and lessee are in compliance with lease's terms and conditions.

3. Determine whether assignment of lease interest is sufficient additional security for loan, considering:

a. Term remaining under each lease.

b. Total amount of remaining rent payable under each lease, taking into account any known charges or offsetting claims against lessor.

4. Determine rights, duties, and other terms and conditions to be included in assignment agreement [*see § 35A.203*].

5. Determine whether assignment of lease interest will be recorded [*see § 35A.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35A California Legal Forms--Transaction Guide § 35A.113

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.113 Assignment by Lessor of Rent or of Interest in Lease as Condition of Sale

NOTE:

For further discussion of assigning a lessor's interest in a lease made as a condition of sale of the leased premises, see Ch. 23, ***Real Property Sales Agreements*** **,** and Ch. 26, ***Real Property Escrows*** **.**

1. Review lease for provisions affecting assignment of rents or interest in lease, including provisions regarding:

a. Lease's term.

b. Total amount of rent reserved, remaining, and required to be paid by lessee.

c. Rent reduction provision, if any.

d. Subordination.

e. Lease's cancellation on sale of premises.

f. Duties of lessor and lessee.

g. Security deposit.

h. Whether terms, covenants, and lease's conditions bind heirs, administrators, executors, successors, and assigns of parties.

2. Ascertain whether anyone other than lessor has claim to rent:

a. Determine existence of any:
(1) Liens or encumbrances.

(2) Prior assignments by lessor.

(3) Set-offs or other charges.

b. If any claim exists, determine whether claim should or can be removed or eliminated before assignment, and manner in which this should be done.

3. Determine whether lessor and lessee are in compliance with lease's terms and conditions:

a. Confer with lessor and lessee.

b. When assignment of lessor's interest in lease is condition of sale of leased premises, deliver to existing tenants and have them execute estoppel certificate [*see* Ch. 23, *Real Property Sales Agreements*].

PRACTICE TIP:
Estoppel Certificates. Remember, unless the lease provides for the lessee to execute an estoppel certificate, there is no way to compel a lessee to do so. This is something to keep in mind when dealing with a prospective purchaser or prospective lender. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.114

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.114 Sublease

1. Review lease, with special attention to:

NOTE:
For discussion of a tenant's right to sublease, assign, or otherwise transfer an interest in a nonresidential lease, see *§§ 35A.14-35A.16*. For discussion of the transferability of interests in residential leases, see *§ 35A.17* and Ch. 34B, ***Residential Leases*** **.**

a. Sublease provisions, if any, to determine if:
(1) Lessor's consent to sublease is required, and if it is, ascertain limitation, if any, on lessor's right to refuse.

(2) Any other conditions are imposed on right to sublease.

b. Lease's purpose to determine if proposed use of premises is restricted or prohibited by lease terms, statutes, administrative regulations, or ordinances.

c. Restrictions on use of property.

d. Duties of parties to lease, including duties to repair, restore, and comply with laws.

e. Term of lease remaining.

f. Property description.

2. Determine effect of any modifications to lease on proposed sublease.

3. Verify that lease has not been terminated by:

a. Expiration of lease term.

b. Unremedied default of either party.

c. Surrender of premises.

d. Abandonment of lease.

e. Operation of law.

f. Other.

4. Determine effect of any liens, encumbrances, easements, or other rights against leased premises:

a. Determine effect of any subordination of lease to another encumbrance on leased property.

b. If all or some of these rights can or should be removed, determine by whom, how, and when.

5. Ascertain obligations to be assumed by sublessor and sublessee under lease, including whether sublessee will assume all or some of sublessor's obligations and covenants under master lease.

6. If sublessee will assume only some of sublessor's obligations and covenants, describe specific obligations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35A California Legal Forms--Transaction Guide §§ 35A.115-35A.119

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35A.115[Reserved]



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18-35A California Legal Forms--Transaction Guide § 35A.120

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.120 Assignment by Lessee

1. If lease requires lessor's consent to any assignment, procure lessor's written consent.

NOTE:
Provision for a lessor's written consent may be included in the assignment agreement [***see*** *§ 35A.200*] rather than as a separate document. In that case, the lessor should sign the assignment agreement to indicate consent to assignment after the assignment agreement has been drafted and includes its final terms but before the assignor/lessee and assignee have executed it. For discussion of the lessor's consent to assignment or other transfer of the lessee's interest in a nonresidential lease, see *§ 35A.15* [***see*** *Civ. Code §§ 1995.250, 1995.260*]. For discussion of the transferability of interests in residential leases, see *§ 35A.17* and Ch. 34B, ***Residential Leases*** **.**

2. Have assignor and assignee execute assignment.

3. Consider recording assignment agreement [*see § 35A.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentConsentReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35A California Legal Forms--Transaction Guide § 35A.121

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.121 Assignment of Lessor's Interest in Lease or Rent

1. Send estoppel certificates to lessees [*see § 35A.222*].

NOTE:
Estoppel certificates should be sent to lessees before the assignment agreement's execution. The lender or purchaser will then be alerted to any lessee's refusal to sign the certificate on the basis that a statement contained therein is not true, and will be able to insist that the dispute be resolved before accepting an assignment of a lease interest as additional security for a loan or as a condition of sale.

2. Have parties execute assignment agreement [*see §§ 35A.201-35A.203*].

3. Send to each lessee notice of assignment [*see §§ 35A.220, 35A.221*] and notice of transfer of any security payment or deposit [*see § 35A.223*].

4. Consider recording assignment.

NOTE:
If the original lease was recorded, any assignment of it should probably also be recorded [***see*** *§ 35A.13*].

5. Send lessee notice of transfer of security deposit [*see § 35A.223*] or notice of assignment of rent [*see § 35A.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawPriorities & RecordingRecording Acts



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18-35A California Legal Forms--Transaction Guide § 35A.122

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.122 Sublease

1. If lessor's consent to sublease is required by lease, obtain lessor's written consent to sublease [*see § 35A.210*].

NOTE:
For discussion of the lessor's consent to subletting or other transfer of the lessee's interest in nonresidential lease, see *§ 35A.15* [***see*** *Civ. Code §§ 1995.250, 1995.260*]. For discussion of the transferability of interests in residential leases, see *§ 35A.17* and Ch. 34B, ***Residential Leases*** **.**

2. Have parties execute sublease agreement.

3. Consider recording sublease [*see § 35A.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawPriorities & RecordingRecording Acts



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18-35A California Legal Forms--Transaction Guide §§ 35A.123-35A.129

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.123[Reserved]



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18-35A California Legal Forms--Transaction Guide § 35A.130

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.130 Assignment of Lessor's Interest in Lease to Lender

1. Draft assignment of lease interest [*see § 35A.203*].

2. Draft notice to lessee of assignment [*see § 35A.221*].

3. Draft estoppel certificate [*see § 35A.222*].

4. Draft notice of transfer of security deposit [*see § 35A.223*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignments



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D. Drafting Guide

18-35A California Legal Forms--Transaction Guide § 35A.131

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.131 Assignment by Lessor of Rent or of Interest in Lease as Condition of Sale

1. When assignment of lessor's interest in lease is condition of sale of leased premises, draft:

    a. Assignment of lessor's interest in lease [*see § 35A.201*].

    b. Notice of transfer of security deposit [*see § 35A.223*].

2. When assignment is only for rents, draft:

    a. Assignment of rent [*see § 35A.202*].

    b. Notice to lessee of assignment of rent [*see § 35A.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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18-35A California Legal Forms--Transaction Guide §§ 35A.132-35A.199

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35A.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Assignments

18-35A California Legal Forms--Transaction Guide § 35A.200

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.200 Assignment of Lease by Lessee

[1] Comment--Use of Form

This form is an assignment by a lessee of the lessee's interest in a lease. It provides that the assignment is to be under the same terms and conditions as the parent or master lease and that the assignee expressly assumes all the obligations under the lease. It also contains a provision for the lessor's consent to the assignment since that consent is generally required by a master lease [*see § 35A.15*]. For assignments of other interests, see *§§ 35A.201-35A.203*. For discussion of the distinction between an assignment and a sublease, see *§ 35A.11*.

[2] FORM

Assignment of Lease by Lessee

_____

	)
Recording requested by:	)
_____ [*name*]	)
When recorded mail to:	)
_____ [*name*]	)
_____ [*street address*]	)
_____ [*city, state, zip*]	)
	)

_____

_____

Space above this line for recorder's use

This Agreement is made _____[*date*], by and between [*name of assignor*], [*legal status, e.g.,* an individual *or* a corporation *or* a partnership], (the "Assignor,") and [*name of assignee*], [*legal status*], (the "Assignee").

Recitals

_____[*Name of lessor*], as Lessor, and Assignor as Lessee, executed a lease on _____[*date*], and subsequently recorded the lease in Book _____, Page _____, of the County Recorder of _____ County, California;

By the terms of the lease, a copy of which is attached to this assignment as Exhibit A, the following described property was leased to Assignor as Lessee for a term of [*term of lease*], commencing on _____[*date*], and ending on _____[*date*], subject to earlier termination as provided in the lease as follows: [*conditions of early termination*]; and,

Assignor now desires to assign the lease to Assignee, and Assignee desires to accept the lease's assignment;

THEREFORE, Assignor and Assignee agree as follows:

Assignment

For [value received *or* and in consideration of the sum of $_____, receipt of which is acknowledged, and the agreement of Assignee, set forth below], Assignor assigns and transfers to Assignee all of Assignor's right, title, and interest in and to the lease attached to this assignment as Exhibit A, and Assignee agrees to and does accept the assignment. Assignee expressly assumes and agrees to keep, perform, and fulfill all the terms, covenants, conditions, and obligations, required to be kept, performed, and fulfilled by Assignor as Lessee under the lease, including the making of all payments due to or payable on behalf of Lessor under the lease when due and payable.

Executed at _____, California, on the day and year first above written.

ASSIGNOR
_____ [*signature*]
[*typed name*]

ASSIGNEE
_____ [*signature*]
[*typed name*]
_____ [*address*]

Consent of Lessor

[*EITHER, if lessee is not relieved of liability:*]

The undersigned is the Lessor in the lease described in the above assignment and consents to the lease's assignment to [*name of assignee*] waiving none of the Lessor's rights under the lease as to the Lessee or the Assignee.

[*OR, if lessee is relieved of liability:*]

The undersigned is the Lessor in the lease described in the above assignment and consents to the lease's assignment to [*name of assignee*] waiving none of the Lessor's rights under the lease as to the Assignee and hereby expressly releasing the Lessee from any further liability or obligation under the terms of the lease.

[*Continue with the following:*]

Date: _____.

LESSOR
_____ [*signature*]
[*typed name*]
_____ [*address*]

[*Attach copy of master lease as Exhibit A.*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California

County of _____

On _____[*date*] before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentConsentReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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A. Assignments

18-35A California Legal Forms--Transaction Guide § 35A.201

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.201 Assignment of Lessor's Interest in Lease--As Condition of Sale of Leased Property

[1] Comment

[a] Use of Form

This form is an assignment that may be used by a seller when a contract for the sale of commercial or residential rental property requires the seller to execute and deliver a written assignment of existing leases to the buyer [*see* Ch. 23, *Real Property Sales Agreements*]. However, even without that requirement in the contract of sale, a real property grant carries with it, unless otherwise expressly reserved in the deed, the grantor's rights and remedies as landlord under leases encumbering the property, without the necessity of the tenants' attornments to the purchaser [*see Civ. Code §§ 821, 1111*; *Plummer v. Agoure (1912) 20 Cal. App. 319, 321, 128 P. 1014]* . Before the assignment is executed, a signed estoppel certificate should be obtained from each tenant [*see* Ch. 23, *Real Property Sales Agreements*]. During escrow, the buyer will also ordinarily instruct escrow to notify the tenants of the change in ownership [*see* Ch. 26, *Real Property Escrows*].

PRACTICE TIP:

Deeds of Trust Include Assignment of Rents Provisions. When the purchase/sale agreement of the property contemplates the inclusion of an assignment of rents provision, and the transaction involves a preexisting Deed of Trust on the subject property, it should be kept in mind that such Deeds of Trust themselves contain an assignment of rents provision in the case of default [*see § 35A.203*]. *By Benjamin Kaplan.*

[b] Provision Cancelling Lease on Sale of Property

Although a sale by a lessor of real property during an unexpired term does not of itself usually abrogate the lease [*Rosenkranz v. Pellin (1950) 99 Cal. App. 2d 650, 652, 222 P.2d 249]* , some leases contain a provision reserving the right of the lessor, the lessee, or both, to cancel the lease if the premises are sold. The lease should be reviewed to

determine whether a sale of the leased premises will prematurely terminate the lease.

[2] FORM

Assignment of Lessor's Interest in Lease--As Condition of Sale of Leased Property

ASSIGNMENT OF LESSOR'S INTEREST IN LEASES

This assignment is made on _____[*date*], from [*name of assignor*], [*legal status*], (the "Assignor"), to [*name of assignee*], [*legal status*], (the "Assignee").

Recitals

[*name of assignor*], as Lessor, has executed leases, referred to below as "the leases," of various units in that certain building, known as _____[*e.g.*, The _____ (*name*) Building] and referred to below as "the premises," consisting of _____[*description of building, e.g.*, _____ (*number*) stories and a total of _____ (*number*) rental units], described as follows: _____[*specify legal description of real property or location, e.g.*, located at _____ (*street address, city, state, zip*)];

The existing leases were executed by and between Assignor, as Lessor, and the following Lessees on the following dates:

Name of Lessee	Lease Execution Date
_____ Exhibit A	_____
_____ Exhibit B	_____

A copy of each existing lease, with any written modifications to it, is attached to this assignment as Exhibits A through _____ as described above and made a part of this assignment; and,

Assignor, as a condition of the Contract of Sale for the premises entered into on _____[*date*], between Assignor and Assignee, has agreed to assign the leases to Assignee in fulfillment of this condition;

THEREFORE, Assignor agrees as follows:

Assignment of Leases

1. For value received, Assignor assigns and transfers to Assignee all of Assignor's right, title, and interest in and to the leases; provided, however, that if Assignor and Assignee fail to complete their purchase and sale of the premises by

_____ [*last date for closing of escrow or other date*], this assignment shall be void and of no further effect, and Assignor shall remain liable and responsible for all of Assignor's right, title, and interest in and to the leases.

2. Assignor states that no other assignment by Assignor exists in connection with the leases.

Executed at _____, California, on the day and year first above written.

ASSIGNOR
_____ [*signature of assignor*]
[*typed name*]

[*For acknowledgment, see § 35A.200[2].*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
PART IV. FORMS
A. Assignments

18-35A California Legal Forms--Transaction Guide § 35A.202

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.202 Assignment of Rents

[1] Comment

[a] Use of Form

This form of assignment may be used by a lessor to assign the lessor's right to receive rents from leased property to a third party. Rents due or to become due under existing leaseholds are assignable by the lessor [*Silverstein v. Oakland Title Ins. etc. Co. (1932) 122 Cal. App. 73, 78, 9 P.2d 846]* , and an assignee is entitled to the same remedies for recovering rent as the assignor may have had [*Civ. Code § 821*; *Reios v. Mardis (1912) 18 Cal. App. 276, 281, 122 P. 1091]* . An assignment of rents is not required to be in any particular form [*Silverstein v. Oakland Title Ins. etc. Co. (1932) 122 Cal. App. 73, 78, 9 P.2d 846]* . Moreover, an assignment of rents that does not name the assignee, but that is signed by the assignor and delivered to the assignee, is prima facie evidence of the assignee's right of ownership [*Walmsley v. Holcomb (1943) 61 Cal. App. 2d 578, 584, 143 P.2d 398]* .

[b] Notice to Lessees

Grants of rents are good and effectual without the tenants agreeing to the grants; however, no tenant who, before notice of the grant, has paid rent to the grantor, may suffer any damage thereby [*Civ. Code § 1111*]. Therefore, all lessees of property, the rents on which have been assigned by the lessor, should be notified of the assignment immediately after its execution. Commonly, an assignment of rents agreement provides that the lessor-assignor notify the lessees that the rents on the leased property have been assigned. However, the assignee of rents may give the notice to the lessees, and should certainly do so if the assignor fails or delays in giving the notice. For a notice to lessee of assignment of rents, see *§ 35A.220*.

[2] FORM

Assignment of Rents

ASSIGNMENT OF RENT

Assignment

1. For value received, Assignor, [*name of assignor*], assigns and transfers to Assignee, [*name of assignee*], all rents and sums due and to become due under the terms of that certain lease, referred to below as "the lease," a copy of which is attached to this assignment as Exhibit A, by and between [*name of assignor*], as Lessor, and _____[*name of lessee*], as Lessee, executed on _____[*date*], and subsequently recorded in Book _____, Page _____, of the County Recorder of _____ County, California, for the lease of the following described property: [*describe*].

Rental Payments Made and Due

2. Assignor states that Lessee has made all rental payments due to and including _____[*date to which rent has been paid*] and that, as of the date of this assignment, the total unpaid balance of rental payments due and to become due under the lease is $_____, payable in [monthly *or other*] installments of $_____.

[*EITHER*]

No Liens, Encumbrances, Claims, or Set-offs

3. Assignor states that no other assignment by Assignor exists in connection with the lease, that the rental property and rental payments and sums due and to become due under the lease are free from liens, encumbrances, claims, and set-offs, and that Assignor shall not sell or encumber the rental property or subject it to liens without first [notifying *or* obtaining the consent of] Assignee.

[*OR*]

Liens, Encumbrances, Claims, or Set-offs

3. Assignor states that no other assignment by Assignor exists in connection with the lease, that the rental property and rental payments and sums due and to become due under the lease are free from liens, encumbrances, claims, and set-offs, except as follows: [*describe*]. In addition, Assignor shall not sell or encumber the rental property or subject it to liens without first [notifying *or* obtaining the consent of] Assignee.

[*Continue with the following:*]

No Modification Without Consent

4. Assignor shall not modify or alter the lease's terms, nor terminate or accept the lease's surrender without first obtaining Assignee's consent.

No Assignment of Assignor's Obligations

5. Assignor does not assign to Assignee any of Assignor's obligations under the lease, and shall fulfill or perform each and every condition and covenant of the lease by Assignor, as Lessor, to be fulfilled or performed.

Remedy of Assignee

6. Assignee may proceed against Assignor directly or independently of Lessee if the Lessee's liability ceases for any reason other than full payment of the rent and sums due and to become due under the terms of the lease.

Assignor to Notify Lessee

7. Assignor shall give Lessee written notice of this assignment on or before _____[*date*], and shall include in the notice the following address at which rental payments to Assignee shall be directed: _____[*street address, city, state, zip*].

Executed at _____, California, on _____[*date*].

ASSIGNOR
_____ [*signature*]
[*typed name*]

[*Attach a copy of the lease as Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
PART IV. FORMS
A. Assignments

18-35A California Legal Forms--Transaction Guide § 35A.203

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.203 Assignment to Lender of Lessor's Interest in Lease as Security for Loan Obligation

[1] Comment

[a] Use of Form

This form is an assignment to a lender by an owner of rental property of the leases on the property as additional security for a loan obligation. This type of assignment is frequently used in connection with long-term financing of a commercial building, but may also be used in connection with loans on other types of rental properties. Although the lease assignment is similar to the assignment of rents provision contained in most deeds of trust, the separate lease assignment is preferred by lenders because it gives the lender more than just the right to collect rents, and therefore, provides the lender with greater security if there is a default by the property owner. For example, the lender who has a separate lease assignment as security may take over the owner's position and take control of the property, making any necessary modifications or terminations of leases to preserve the value of the security if foreclosure proceedings will be necessary. The lender normally gives the lessee or lessees notice of the lease assignment [*see § 35A.221*]. Before making the loan, the lender should also obtain from the lessee or lessees an estoppel certificate containing appropriate representations concerning the lease [*see § 35A.222*].

[b] Effect of Assignment of Interest in Leases, Rents, Issues, or Profits

This form reflects the usual practice in that the assignment of rents is a conditional pledge of additional security rather than an absolute assignment [*see* Ch. 25A, *Security Instruments for Real Estate Financing*]. However, regardless of whether a written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property is denoted as absolute, absolute conditioned on default, additional security for an obligation, or otherwise, the assignment is, on its execution and delivery by the assignor, effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property [*Civ. Code § 2938(a)*; *see* former *Civ. Code §§ 2938, 2938.1* in effect before January 1, 1997, for contracts entered into before January 1, 1997, and actions and proceedings initiated on the basis of those contracts (*Civ. Code § 2938(i)*)]. If the assignor under the

obligation secured by the assignment defaults, the assignee is entitled to enforce the assignment by a number of alternative methods prescribed by statute [*see Civ. Code § 2938(c)*]. For additional discussion of the assignment of rents, see California Forms of Pleading and Practice, ch. 555, *Trust Deeds and Real Property Mortgages* , pt. III (Matthew Bender).

[c] Recording

To protect its interest against subsequent purchasers or encumbrancers, the lender normally records the lease assignment. An assignment of an interest in leases, rents, issues, or profits of real property may be recorded in the records of the county recorder in which the underlying real property is located in the same manner as any other conveyance of an interest in real property [*Civ. Code § 2938(b)*]. The assignment must be properly acknowledged or proved, and the acknowledgment or proof certified as prescribed by law, before it may be recorded [*see Civ. Code §§ 1180-1207*; *Gov. Code §§ 27287, 27288*]. Once recorded, the assignment gives constructive notice of its contents, and the interest granted by the assignment is deemed fully perfected as of the time of recordation [*Civ. Code § 2938(b)*].

[2] FORM

Assignment to Lender of Lessor's Interest in Lease as Security for Loan Obligation

ASSIGNMENT OF LESSOR'S INTEREST IN LEASE

This Assignment is made on _____[*date*], by and between [*name of assignor*], called "Assignor," and [*name of assignee*], called "Assignee."

The parties agree as follows:

Assignment of Lease Interest

1. For value received, the Assignor grants, transfers, and assigns to the Assignee, its successors, and assigns all of the right, title, and interest of the Assignor in and to [that certain Lease *or* those certain Leases], with modifications, if any, described in Schedule A, covering premises (called "the premises") briefly described as _____[*description of leased premises such as name of building, street address, city, and state*], together with any extensions and any guaranties of the [Lessee's *or* Lessees'] obligations [*add if more than one lease:* , each of the Leases, together with all the guaranties, modifications, and extensions, referred to below as "the Lease"].

Purpose of Assignment

2. This Assignment is made for both of the following purposes:

(a) To secure payment of all the sums now or at any time hereafter due the Assignee and secured by a certain mortgage or deed of trust made by the Assignor to, or to a trustee for, the Assignee dated

_____ , this Assignment, or by any other mortgage or deed of trust hereafter affecting the premises (each of these mortgages or deeds of trust being referred to below as "the Mortgage"); and

(b) To secure performance and discharge of each obligation, covenant, and agreement of the Assignor contained in this Assignment or in the Mortgage or any note or bond secured thereby.

Collection of Rents

3. So long as there shall exist no default by the Assignor in the payment of any indebtedness secured hereby or in the performance of any obligation of the Assignor herein or in the Mortgage or any other instrument securing the indebtedness, the Assignor shall have the right to collect, but not more than 30 days before accrual, all rents, issues, and profits from the premises and to retain, use, and enjoy the same.

Payment in Full

4. On the payment in full of all indebtedness secured hereby, as evidenced by the recording or filing of an instrument of satisfaction or full release of the Mortgage without the recording of another Mortgage in favor of the Assignee affecting the premises, this Assignment shall become and be void and of no effect.

Performance by Assignor

5. The Assignor shall do all of the following:

(a) Fulfill or perform each and every condition and covenant of the Lease by Lessor to be fulfilled or performed;

(b) Give prompt notice to the Assignee of any notice of default by the Assignor under the Lease received by the Assignor together with a complete copy of any such notice;

(c) At the sole cost and expense of the Assignor, enforce, short of the Lease's termination, the performance or observance of each and every covenant and condition of the Lease by the Lessee to be performed or observed;

(d) Not modify nor in any way alter the Lease's terms;

(e) Not terminate the Lease's terms nor accept a surrender of the Lease unless required to do so by the Lease's terms;

(f) Not anticipate the rents under the Lease for more than 30 days before accrual; and

(g) Not waive nor release the Lessee from any obligations or conditions by the Lessee to be performed.

Rights Assigned

6. The rights assigned in this Assignment include all the Assignor's right and power to modify the Lease or to terminate the term or to accept the Lease's surrender or to waive or release the Lessee from the performance or observance by the Lessee of any obligation or condition of the Lease or to anticipate rents under the Lease for more than 30 days before accrual.

Defense of Actions

7. At the Assignor's sole cost and expense, the Assignor shall appear in and defend any action growing out of or in any

manner connected with the Lease or the obligations or liabilities of the Lessor, Lessee, or any guarantor under the lease.

Rights of Assignee

8. Should the Assignor fail to make any payment or to do any act as provided in this Assignment, then the Assignee, but without obligation to do so and without notice to or demand on the Assignor and without releasing the Assignor from any obligation in this Assignment, may make or do the same, including specifically, without limiting its general powers, appearing in and defending any action purporting to affect the security hereof or the rights or powers of the Assignee and performing any obligation of the Lessor in the Lease contained, and in exercising any such powers paying necessary costs and expenses, employing counsel and incurring and paying reasonable attorneys' fees. The Assignor shall pay immediately on demand all sums expended by the Assignee under the authority of this paragraph, together with interest thereon at _____ percent per annum, and the same shall be added to the indebtedness and shall be secured hereby and by the Mortgage.

Acceleration

9. The whole of the indebtedness shall become due at either of the following times:

(a) On the election by the Assignee to accelerate the maturity of the indebtedness in accordance with the provisions of the note or bond secured by the Mortgage, or of the Mortgage, or any other instrument that may be held by the Assignee as security for the indebtedness; or

(b) At the Assignee's option, after any attempt by the Assignor to exercise any of the rights described in Paragraph 6 or after any default by the Assignor hereunder and the continuance of such default for 10 days after notice and demand.

Remedies of Assignee

10. (a) After any attempt by the Assignor to exercise any of the rights described in Paragraph 6 or after any default by the Assignor in paying the indebtedness or in performing any obligation of the Assignor herein or in the Mortgage or any other instrument securing said indebtedness, the Assignee may exercise any legal rights or remedies available to Assignee under then existing law. Without limiting the above, the Assignee, at its option, without notice, irrespective of whether Declaration of Default under any deed of trust has been delivered to the trustee thereunder, and without regard to the adequacy of security for the indebtedness hereby secured, either in person or by agent with or without bringing any action or proceeding, or by a receiver to be appointed by a court, may do all of the following:

(1) Enter on, take possession of, and operate the premises;

(2) Make, enforce, modify, and accept the surrender of leases;

(3) Obtain and evict tenants;

(4) Fix or modify rents; and

(5) Do any acts that the Assignee deems proper to protect the security hereof.

(b) The Assignor has the right to act in accordance with (a), above, until all indebtedness secured hereby is paid in full,

and may further either with or without taking possession of the premises, in its own name, sue for or otherwise collect and receive all rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorneys' fees, on any indebtedness secured hereby in the order as the Assignee may determine.

(c) Any income received from the premises by the Assignee in excess of the amount necessary to meet all obligations of the Assignor secured hereby, including any accelerated indebtedness, and of the amount estimated by the Assignee to be necessary to meet these obligations for the subsequent six months' period shall be paid over by the Assignee to the Assignor promptly after the expiration of each six months' period following the date of the entry. The entering on and taking possession of the property, the collection of the rents, issues, and profits and the application thereof as stated above, shall not cure or waive any default or waive, modify, or affect any notice of default under the Mortgage or invalidate any act done under the notice.

Merger

11. The Assignor, without the prior written consent of the Assignee, shall not cause or permit the leasehold estate under the Lease to merge with the Assignor's reversionary interest.

Warranties

12. The Assignor warrants:

(a) The Assignor has not executed any prior assignment of any of its rights under the Lease;

(b) The Assignor has not done anything that might prevent the Assignee from or limit the Assignee in operating under any of the provisions of this Assignment;

(c) The Assignor has not accepted rent under the Lease more than 30 days in advance of its due date;

(d) So far as the Assignor knows, there is no present default by the Lessee under the Lease; and

(e) The Lease is in full force and effect, unmodified except as set forth in Schedule A.

Indemnification

13. The Assignee shall not be obligated to perform or discharge any obligation under the Lease, or under or by reason of this Assignment, and the Assignor agrees to indemnify the Assignee against and hold it harmless from any and all liability, loss, or damage that it may or might incur under the Lease or under or by reason of this Assignment and of and from any and all claims and demands whatsoever that may be asserted against it by reason of any alleged obligation or undertaking on its part to perform or discharge any of the terms of the Lease. If the Assignee incurs any such liability, loss, or damage under the Lease or under or by reason of this Assignment, or in defense against any such claims or demands, the amount thereof, including costs, expenses, and reasonable attorneys' fees, together with interest thereon at _____ percent per annum, shall be secured hereby and by the Mortgage, and the Assignor shall reimburse the Assignee therefor immediately on demand.

Successors and Assigns

14. This Assignment shall inure to the benefit of the Assignee's successors and assigns and shall bind the Assignor's legal representatives, successors, and assigns.

Notices

15. The parties agree that all notices, demands, or documents that are required or permitted to be given or served under this Assignment shall be in writing and shall be deemed given when sent by registered mail addressed to the Assignor at _____[*address*], and to the Assignee at _____[*address*] with a copy to _____[*name*] at _____[*address*]. These addresses may be changed from time to time by either party by serving notice as provided in this paragraph.

IN WITNESS WHEREOF, the parties have duly executed this Assignment at _____, California on the day and year first above written.

ASSIGNOR
_____ [*signature*]
[*typed name*]

ASSIGNEE
_____ [*signature*]
[*typed name*]

[*For acknowledgment, see § 35A.200[2]*.]

SCHEDULE A

[*Set forth the following information for each lease and, to the extent appropriate, each modification of each lease: lessor's name; lessee's name; date, book, and page of recording; remaining length of current term; and, address or other identification of leased premises.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesLong Term Commercial Leases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
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A. Assignments

18-35A California Legal Forms--Transaction Guide §§ 35A.204-35A.209

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35A.204[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
PART IV. FORMS
B. Sublease

18-35A California Legal Forms--Transaction Guide § 35A.210

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.210 Sublease

[1] Comment

[a] Use of Form

This form is a short form of sublease that may be used when the sublease transaction is to be subject to most of the terms and conditions governing the master lease. It includes provisions for the lessor's consent to the sublease [*see § 35A.15*], the sublessee's assumption of specified obligations under the master lease [*see § 35A.41*], and authorization for the sublessee to take any action necessary to prevent a default by the sublessor under the terms of the master lease [*see § 35A.42[2]*].

For additional discussion of approval clauses and other restrictions or prohibitions on subleases or assignments, see Ch. 34C, *Retail, Industrial, and Office Leases* , and California Real Estate Law and Practice, ch. 172, *Assignment and Subletting Leasehold Interests* (Matthew Bender).

[b] Nondisturbance Agreement

Some leases that permit subletting contain or authorize the issuance of a nondisturbance agreement. A nondisturbance agreement provides that the master lease's lessor will not disturb sublessees (that is, will not terminate their subleases) if the lessor terminates the master lease before its expiration, and that the sublessees will attorn to the lessor. An attornment is an agreement by a sublessee to be bound directly to the lessor under the master lease for the performance of all obligations under the sublease if the sublessor defaults [*see* Rabkin & Johnson, Current Legal Forms with Tax Analysis, ch. 23, *Real Estate Leases* (Matthew Bender)]. Nondisturbance agreements are commonly used in connection with ground leases [*see* Ch. 34D, *Ground Leases*].

If the lessor under the master lease does not wish to enter into any type of nondisturbance agreement, the sublease should contain a provision providing for its termination on the termination of the master lease; this provision is

contained in the first alternative Paragraph 11 of this form. There are two basic types of nondisturbance clauses. The first consists of a general guaranty, set forth in the master lease and repeated in each sublease, that no sublessee will be disturbed if the sublessor defaults on the master lease; the second alternative Paragraph 11 of this form is an example of this type of provision.

The second type of nondisturbance clause provides for the use of a separate nondisturbance agreement. In that case, the lease and every sublease should provide that the lessor will not disturb any sublessee who has entered into a nondisturbance agreement with the lessor; the third alternative Paragraph 11 of this form is an example of this type of provision. Under this type of provision, the lease and every sublease typically require the sublessee to submit a written request for a nondisturbance agreement, and provide the lessor with some discretion in deciding whether or not to enter into the agreement. For example, this form states that the lessor will issue a nondisturbance agreement if the lessor is satisfied with the sublessee's integrity and financial stability. For an illustrative nondisturbance agreement, see *§ 35A.211*.

[c] Protection of Sublessee's Possession

A sublessee's continued possession of the subleased premises depends not only on the status of the sublease but also on the master lease's continuation. Therefore, the sublease should afford the sublessee some protection against a default by the sublessor under the master lease. The nature of the protective provisions will depend on the bargaining positions of the parties. This form protects the sublessee in several ways. Specifically, Paragraph 9 provides that the sublessee has the right to take action, at the sublessor's expense, to prevent a default by the sublessor, and any right of the sublessor to terminate the master lease (for example, in the case of destruction of the premises) is transferred to the sublessee. Paragraph 10 provides that the sublessor agrees to maintain the master lease, and to obtain the sublessee's consent before modifying or surrendering the master lease.

[d] Attorneys' Fees

Code Civ. Proc. § 1021 provides that the award of attorney's fees is a matter of agreement between the parties. In the landlord-tenant context, the recovery of attorney's fees is generally dependent on the specific provisions in the lease [*Bank of America etc. Ass'n v. Moore (1937) 18 Cal. App. 2d 522, 529-530, 64 P.2d 460]* . If the lease fails to include provisions for the recovery of attorneys' fees, the general rule is that fees will be awarded to the prevailing party [*see, e.g., Civ. Code § 1942.4(b)* ("prevailing party" entitled to reasonable attorney's fees in action based on untenantable dwelling); *Code Civ. Proc. §§ 1021.5* ("successful party" entitled to attorney's fees in action affecting public interest), *1174.2* (concerning "prevailing party" when tenant raises habitability as affirmative defense)]. Paragraph 12 of the form in [2], *below*, provides that the prevailing party in any litigation relating to the sublease will be entitled to attorney's fees.

Chapter 34, *Retail, Industrial, and Office Leases* , § 34C.274, includes discussion and a form for awarding attorneys' fees to the party prevailing in an action on a lease. For detailed coverage of attorney's fees generally, see California Forms of Pleading and Practice, ch. 174, *Costs and Attorney's Fees* (Matthew Bender).

PRACTICE TIP:

Expert Witness Fees. The fees provision in this form [*see* [2], P 12, *below*] might also include a provision for recovery of *expert witness fees*, which are often incurred in commercial landlord-tenant disputes. This is true especially if there is an issue regarding valuation or damages. *By Myron Moskovitz.*

[2] FORM

Sublease

SUBLEASE

This sublease is executed on _____[*date*], by and between _____[*name of sublessor*], [*legal status*] (the "Sublessor"), whose address is _____[*street address, city, state, zip*], and _____[*name of sublessee*], [*legal status*] (the "Sublessee"), whose address is _____[*street address, city, state, zip*].

Recitals

_____[*Name of original lessor*], as Lessor, and _____[*name of sublessor*], as Lessee, executed a lease on _____[*date*] (the "Master Lease"), which was recorded on _____[*date*] as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California, and is attached to this sublease as Exhibit A and incorporated into this Sublease by this reference;

By the terms of the Master Lease, the real property described in Paragraph 1 of this Sublease [*if sublease covers only portion of property subject to master lease, add:* and in Paragraph _____ of the Master Lease] was leased to _____[*name of sublessor*] for a term of [*specify*], commencing on _____[*date*], and ending on _____[*date*], subject to earlier termination as provided in the Master Lease;

Sublessor desires to sublease to Sublessee [all *or* a portion] of the property currently occupied by Sublessor under the terms of the Master Lease, and Sublessee desires to lease that property from Sublessor; and

The Lessor under the Master Lease shall consent to this sublease by executing the "Consent of Lessor" provision at the end of this sublease.

THEREFORE, Sublessor and Sublessee agree as follows:

Leasing and Description of Property

1. Subject to the terms, conditions, and covenants set forth in this sublease, Sublessor hereby leases to Sublessee, and Sublessee hereby leases from Sublessor, the property located in _____ County, California, described as follows: [*description*] (the "subleased premises").

Term

2. This sublease shall commence on _____[*date*], and shall end on the date on which the Master Lease terminates or on _____[*date*], whichever is earlier.

Rent

3. Sublessee shall pay to Sublessor as rent for the subleased premises a rental of $_____ per month payable in advance on the [*e.g.*, first] day of each calendar month during the term, commencing on _____[*date*]. Rent shall be paid to Sublessor at _____[*address where payment should be made*], or at any other place designated in writing by Sublessor. The installment rent payable for any portion of a calendar month shall be a pro rata portion of the installment payable for a full calendar month.

Use of Premises

4. Sublessee shall use the subleased premises [*state purpose, e.g.,* as a single-family residence *or* for business office purposes] and for no other purpose.

Quiet Enjoyment

5. Sublessor covenants that Sublessee shall be entitled to quiet enjoyment of the premises, provided that Sublessee complies with the terms of this sublease.

Condition of Premises

6. Sublessee agrees that Sublessee's act of taking possession will be an acknowledgment that the subleased premises are in a tenantable and good condition. Sublessee will, at Sublesse e's own expense, maintain the subleased premises in a thorough state of repair and in good and safe condition.

Applicability of Master Lease

7. This Sublease is subject and subordinate to the terms and conditions of the Master Lease. Further, the following paragraphs of the Master Lease are hereby incorporated by reference: [*specify*].

Assumption

8. Sublessee expressly assumes and agrees to perform and comply with all the obligations required to be kept or performed by the Lessee under the provisions of the Master Lease identified in Paragraph 7 of this sublease, to the extent that they are applicable to the subleased premises [*if some obligations are not assumed, add:* , with the following exceptions: _____ (*specify, e.g.,* (1) the obligation and covenant to pay rent to the Lessor required by Paragraph _____ of the Master Lease shall be considered performed by Sublessee to the extent and in the amount rent is paid to Sublessor in accordance with Paragraph 3 of this sublease, and (2) Sublessee shall not be responsible for the payment of rentals or taxes provided for in the Master Lease)].

Sublessee's Rights Regarding Continuing Possession

9. Sublessee shall have the right at any time, at Sublessor's expense, to take any action required to be taken, but not timely taken, by Sublessor, that may be necessary to prevent a default under the terms of the Master Lease. If Sublessor is provided with the right, under the terms of the Master Lease, to terminate the Master Lease before the expiration of its term, Sublessee rather than Sublessor shall have the right to make that decision. Nothing contained in this sublease shall be construed so as to deprive Sublessee of Sublessee's right to surrender or otherwise terminate this Sublease as provided by law.

Obligations of Sublessor

10. Sublessor agrees to maintain the Master Lease during the entire term of this Sublease, subject, however, to any earlier termination of the Master Lease without the fault of Sublessor. Sublessor also agrees [*state specific obligations, e.g.,* to pay all rentals and taxes] as provided for in the Master Lease in accordance with its terms, and to comply with or perform all obligations of the Lessor under the Master Lease that Sublessee has not assumed under this sublease. Further, Sublessor agrees not to modify or surrender the Master Lease without the prior consent of Sublessee. Any modification or surrender made without that consent shall be null and void and shall have no effect on the rights of Sublessee under this sublease.

[*EITHER, if sublessor will assume lessor's obligations under master lease:*]

Sublessor further agrees to assume and to perform all of those obligations required to be kept or performed by the Lessor under the Master Lease to the extent that they apply to the subleased premises under the terms of this Sublease.

[*OR, if sublessor will not assume lessor's obligations under master lease:*]

Sublessor does not assume the obligations required to be kept or performed by the Lessor under the Master Lease.

[*EITHER*]

Termination of Master Lease

11. If the Master Lease is terminated, this Sublease shall terminate simultaneously and the Sublessor and Sublessee shall thereafter be released from all obligations under this Sublease, and Sublessor shall refund to Sublessee any unearned rent paid in advance.

[*OR*]

Nondisturbance and Attornment

11. If the Master Lease is terminated for any reason before the natural expiration of its term, and Sublessee is not then in default under the terms of this Sublease, the termination shall not terminate or affect the continuing validity of this Sublease. In that case, all Sublessor's interest as sublessor under this Sublease shall be deemed automatically assigned, transferred, and conveyed to the Lessor under the Master Lease. Lessor shall thereafter be bound on this Sublease to the same extent Sublessor was bound on this Sublease, and shall have all the rights that Sublessor had under this Sublease. Further, Sublessee shall be deemed to have attorned to Lessor, provided that Sublessee shall be under no obligation to pay rent to Lessor until Sublessee receives written notice from Lessor that it has succeeded to the Sublessor's rights under this Sublease.

[*OR*]

Issuance of Nondisturbance Agreement and Attornment

11. If the Master Lease is terminated for any reason before the natural expiration of its term, the termination shall not terminate or affect the continuing validity of this Sublease, if the Lessor under the Master Lease has entered into a nondisturbance agreement with Sublessee. If Sublessee desires to enter into such an agreement, Sublessee shall submit to Lessor a written request for a nondisturbance agreement, stating the reason or reasons it is desired and including a copy of this Sublease. The request must be submitted to Lessor at the following address: _____. Within [*number*] days after Lessor receives the request, Lessor shall, if Lessor is satisfied with Sublessee's integrity and financial stability, notify Sublessee of this decision and arrange to enter into a nondisturbance agreement with Sublessee. The agreement shall be in the form set forth as Exhibit B to this Sublease. Among other things, that agreement provides that the following shall apply on termination of the Master Lease:

(1) All Sublessor's interests under this Sublease shall be deemed automatically assigned, transferred, and conveyed to Lessor;

(2) Lessor shall be bound on this Sublease to the same extent Sublessor was bound on it; provided, however, that any amendments to this Sublease made after Lessor and Sublessee enter into the nondisturbance agreement shall not be binding on Lessor; and

(3) Sublessee shall attorn to Lessor, provided that Sublessee shall be under no obligation to pay rent to Lessor until Sublessee receives written notice from Lessor that Lessor has succeeded to the interests of Sublessor under this Sublease.

If Lessor does not enter into a nondisturbance agreement with Sublessee and the Master Lease is terminated for any reason before the natural expiration of its term, the following shall occur: this Sublease shall immediately terminate; after termination, Sublessor and Sublessee shall be released from all obligations under this Sublease; and, Sublessor shall refund to Sublessee any unearned rent paid in advance.

[*Continue with the following:*]

Attorney's Fees

12. If any action or other proceeding arising out of this Sublease is commenced by either party to this Sublease concerning the subleased premises, then as between Sublessor and Sublessee, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorney's fees, costs, and expenses incurred in the action or other proceeding by the prevailing party.

Executed at _____, California, on the date specified in the first paragraph of this Sublease.

SUBLESSOR
_____ [*signature of sublessor*]
[*typed name*]

SUBLESSEE
_____ [*signature of sublessee*]
[*typed name*]

Consent of Lessor

The undersigned is the Lessor under the Master Lease described in the foregoing sublease and hereby consents to the sublease of the premises described in this sublease to _____[*name of sublessee*]. In granting this consent, the undersigned does not waive any of the Lessor's rights under the Master Lease as to the Lessee or under the sublease as to the Sublessee.

LESSOR
_____ [*signature of lessor*]
[*typed name*]

[*For acknowledgment, see § 35A.200[2].*]

[*Attach a copy of the Master Lease as Exhibit A.*]

[*If appropriate, attach a copy of the nondisturbance agreement as Exhibit B.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
PART IV. FORMS
B. Sublease

18-35A California Legal Forms--Transaction Guide § 35A.211

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.211 Nondisturbance Agreement

[1] Comment--Use of Form

This form is a nondisturbance agreement. A nondisturbance agreement is an agreement by a lessor under a master lease (often a ground lease) to refrain from terminating a sublease if the lessor terminates the master lease before its expiration. This form is designed to be used in conjunction with the sublease form [*see § 35A.210*]. The sublease form contains a provision that the lessor will enter into a nondisturbance agreement with any qualified sublessee who requests such an arrangement, and states that on early termination of the master lease because of the lessee's default, the lessor will not disturb any sublessee who has entered into such an agreement with the lessor [*see § 35A.210[2]*, P 11 (third alternative)]. Although this form assumes that the master lease is a ground lease, it may be easily modified for use in conjunction with another type of master lease. For further discussion of nondisturbance agreements, see *§ 35A.210[1][b]*.

[2] FORM

Nondisturbance Agreement

NONDISTURBANCE AGREEMENT

Preamble

This agreement is made on _____[*date*], between _____[*name of ground lessor*] (the "Ground Lessor"), whose address is _____[*street address, city, state, zip*], and _____[*name of sublessee*] (the "Sublessee"), whose address is _____[*street address, city, state, zip*].

Recitals

Ground Lessor, as lessor, and _____[*name of ground lessee/sublessor*], as lessee (the "Ground Lessee"), executed a ground lease on _____[*date*] (the "Ground Lease"), a copy of which is attached to this agreement as Exhibit A and is incorporated into it by this reference. [A memorandum of the *or* The] Ground Lease was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

By the terms of the Ground Lease, the real property described in Paragraph _____ of the Ground Lease was leased to Ground Lessee for a term of [*specify*], commencing on _____[*date*], and ending on _____[*date*], subject to earlier termination as provided in the Ground Lease.

Sublessee, as sublessee, and Ground Lessee, as sublessor, entered into a sublease on _____[*date*] (the "Sublease"), a copy of which is attached to this agreement as Exhibit B and is incorporated into it by this reference. [A memorandum of the *or* The] Sublease was recorded on _____[*date*], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California.

By the terms of the Sublease, Sublessee subleased the real property described in Paragraph _____ of the Sublease (the "subleased premises").

Paragraph _____ of the Ground Lease and Paragraph _____ of the Sublease provide that Ground Lessor will, on request, enter into a nondisturbance agreement with any sublessee of Ground Lessee who requests that Ground Lessor enter into such an agreement, provided Ground Lessor is satisfied with the Sublessee's integrity and financial stability.

Sublessee is not in default under the Sublease, desires to enter into a nondisturbance agreement with Ground Lessor, and has submitted an appropriate request to Ground Lessor.

Ground Lessor is satisfied with Sublessee's integrity and financial stability and desires to enter into a nondisturbance agreement with Sublessee.

THEREFORE, Ground Lessor and Sublessee agree as follows:

Nondisturbance

1. So long as Sublessee is not in default in the performance of any of the terms, covenants, or conditions of the Sublease, Ground Lessor will not join Sublessee as a party defendant in any action or proceeding for the purpose of terminating Sublessee's interest and estate under the Sublease because of any default by Lessee under the Ground Lease.

Attornment

2. If the Ground Lease is terminated for any reason, all Ground Lessee's interests as sublessor under the Sublease shall be deemed automatically assigned, transferred, and conveyed to Lessor. Lessor shall thereafter be bound on the Sublease to the same extent Lessee (as sublessor) was bound on the Sublease, and shall have all the rights under the Sublease that Lessee (as sublessor) had under the Sublease; provided, however, that any amendments to the Sublease

made after this agreement's issuance shall not be binding on Ground Lessor. Further, on such a termination, Sublessee shall be bound to Ground Lessor under all the conditions of the Sublease for the balance of the Sublease's term with the same force and effect as if Ground Lessor were the landlord under the Sublease. As a part of this process, Sublessee attorns to Ground Lessor as Sublessee's landlord. This attornment will become effective immediately when Ground Lessor succeeds to the Lessee's interest under the Sublease, and shall not require the execution of any additional instruments by the parties to this agreement. However, Sublessee shall be under no obligation to pay rent to Ground Lessor until Sublessee receives written notice from Ground Lessor that it has succeeded to Lessee's interest under the Sublease. The respective rights and obligations of Sublessee and Ground Lessor on attornment shall for the balance of the term of the Sublease be the same as they are currently set forth in the Sublease.

Obligations

3. If the Ground Lease is terminated for any reason and Ground Lessor succeeds to the Lessee's interest under the Sublease, Ground Lessor shall be bound to Sublessee under all of the Sublease's terms, and Sublessee shall, from and after that event, have the same remedies against Ground Lessor for the breach of any agreement contained in the Sublease that Sublessee might have had under the Sublease against the Lessee. However, Ground Lessor shall not be liable for any act or omission of Lessee, shall not be subject to any offsets or defenses that Sublessee might have against Lessee, and shall not be bound by any rent or additional rent that Sublessee might have paid to Lessee for more than the current month.

Executed at _____, California, on the date specified in the first paragraph of this agreement.

GROUND LESSOR
_____ [*signature of ground lessor*]
[*typed name*]

SUBLESSEE
_____ [*signature of sublessee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
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18-35A California Legal Forms--Transaction Guide §§ 35A.212-35A.219

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35A.212[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35A ASSIGNMENT AND SUBLEASE OF LEASEHOLD INTERESTS
PART IV. FORMS
C. Notices and Other Documents Related to Transfer

18-35A California Legal Forms--Transaction Guide § 35A.220

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.220 Notice to Lessee of Assignment of Rent

[1] Comment--Use of Form

This form is a notice to a lessee that the lessor has assigned the rents under their lease to a third party and that the tenant should therefore make future payments of rent to the assignee. Grants of rents are good and effectual without tenants agreeing to the grants; however, no tenant who, before notice of the grant, has paid rent to the grantor, may suffer any damage thereby [*Civ. Code § 1111*]. This form may be used by the assignor or by the assignee.

[2] FORM

Notice to Lessee of Assignment of Rent

NOTICE OF ASSIGNMENT OF RENT

Date: _____

To: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

[*EITHER, if notice is given by assignor:*]

You are hereby notified that on [*date of assignment*], I assigned my right to receive rent from our lease dated _____, for the premises located at _____[*street address*], to [*name of assignee*], and I direct you to make all further rental payments in discharge of your obligation for rent under our lease to [*name and address of assignee*]. [*If appropriate, add:* A copy of the assignment is enclosed.]

LESSOR
_____ [*signature*]
[*typed name*]

[*OR, if notice is given by assignee:*]

You are hereby notified that on [*date of assignment*], your landlord, _____[*name of lessor*], assigned to me the right to receive rents due and to become due under your lease dated _____, for the premises located at _____[*street address*]. I hereby request that you make all further rental payments to me at [*address of assignee*]. [*If appropriate, add:* A copy of the assignment is enclosed.]

ASSIGNEE
_____ [*signature of assignee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.221

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.221 Notice to Lessee of Assignment of Lease as Security for Loan

[1] Comment--Use of Form

This form is a notice to a lessee of the lessor's assignment of interest in their lease to a lender. It is appropriate for use by a lender, who will normally notify all lessees of an assignment at the time that the loan is made and the lease assignments are received from the lessor. For further discussion of the use of a lease assignment as security for a loan obligation, see *§ 35A.203[1]*.

[2] FORM

Notice to Lessee of Assignment of Lease as Security for Loan

NOTICE OF LEASE ASSIGNMENT

Date: _____

To: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

Re: Loan Application No. _____

Premises: _____[*insert description and address*]

Lease dated _____, between _____[*name of lessor*], Lessor, and _____[*name of lessee*], Lessee.

You are hereby notified that in accordance with the terms and provisions of that "Assignment of Lessor's Interest in Lease," referred to below as "Assignment," a copy of which is attached to this notice and delivered to you with it so that you may be fully advised of its terms, there was duly assigned and transferred to the undersigned, _____[*name of lender*], referred to below as "the Lender," the entire interest of Lessor in and to the above-mentioned Lease, more particularly referred to and described in the attached copy of Assignment, and referred to below as the "Lease."

You are further notified that all rental payments under the Lease shall be paid as heretofore in accordance with the terms thereof unless and until you are otherwise notified in writing by the Lender.

Your attention is also called particularly to the following points:

(1) That by the Assignment there has been assigned to the Lender all the Lessor's right and power to modify the Lease, or to terminate the Lease's term, or accept the Lease's surrender, or to waive the performance or observance by the Lessee of any obligation or condition of the Lease, or to anticipate rents under the Lease.

(2) That the Lessor's interest in the Lease has been assigned to the Lender solely as security for the purposes specified in the Assignment and the Lender assumes no duty, liability, or obligation whatever under the Lease either by virtue of the Assignment or by any subsequent receipt or collection of rents under the Lease.

Please date and sign the attached acknowledgment of receipt and return it in the enclosed envelope.

Very truly yours, _____ [*signature of lender*]
[*typed name*]

ACKNOWLEDGMENT OF RECEIPT

Receipt of a copy of the
above-described Assignment
is hereby acknowledged.
Dated: _____.

_____ [*signature of lessee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35A California Legal Forms--Transaction Guide § 35A.222

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.222 Estoppel Certificate Executed by Lessee

[1] Comment

[a] Use of Form

This form is an estoppel certificate to be executed by a tenant whose landlord intends to assign to a lender the landlord's interest in the lease. This type of certificate is frequently required by a lender who takes an assignment of a lease interest as additional security for a loan on rental property [*see § 35A.203*]. It is a statement by the tenant setting forth the tenant's current rights and liabilities with regard to the lease. It states all of the following [*see generally* California Real Estate Law and Practice, ch. 90, *Representing Clients in Sales Transactions* (Matthew Bender)]:

- That neither the tenant nor the landlord is in breach of the lease;
- That the tenant has no claims against the landlord;
- That the lease is in full force and effect and has not been modified except as specified in the certificate;
- That the lessee is in possession of the leased premises;
- That the lessee has not paid rent more than 30 days in advance; and
- That the lessee has no offsetting claims or charges against the rent due to the lessor under the lease.

[b] Practical Considerations

A properly executed certificate estops the tenant from later making any assertions contrary to those stated in the

certificate [*Evid. Code § 623*], provided that the estoppel applies only to existing facts and not to promises or future events [*Berverdor, Inc. v. Salyer Farms (1950) 97 Cal. App. 2d 459, 464, 218 P.2d 138]* . Furthermore, if any tenant refuses to sign an estoppel certificate on the basis that the statements contained in it are not true, the lender will be alerted to potential problems and may insist that the matter in dispute be resolved before accepting the assignment of the lessor's interest in the lease as security for the loan. Therefore, to maximize the benefit of using an estoppel certificate, a lender should require delivery of the certificates *before* making the loan.

[2] FORM

Estoppel Certificate Executed by Lessee

ESTOPPEL CERTIFICATE BY LESSEE

Re: Loan Application No. _____

Premises: _____[*description and address*]

Lease dated _____, between _____[*name of lessor*], Lessor, and _____[*name of lessee*], Lessee.

The undersigned, the Lessee under the above-dated lease, certifies to _____[*name of lender*], the holder or proposed holder of a note or other obligation secured or to be secured by a mortgage or deed of trust on the above-described premises, all of the following:

(1) That the Lease is presently in full force and effect and unmodified except as indicated at the end of this certificate;

(2) That the undersigned has accepted possession of the premises and that any improvements required by the terms of the Lease to be made by the Lessor have been completed to the undersigned's satisfaction;

(3) That no rent under the Lease has been paid more than 30 days in advance of its due date; and

(4) That the undersigned, as of this date, has no charge, lien, or claim of offset under the Lease or otherwise, against rents or other charges due or to become due under the Lease.

Dated: _____

LESSEE _____ [*signature of lessee*]
[*typed name*]

MODIFICATIONS

The above-described Lease has been modified as follows: [None *or specify modifications*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-35A California Legal Forms--Transaction Guide § 35A.223

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.223 Lessor's Notice to Tenant of Transfer of Security Payment or Deposit [Civ. Code §§ 1950.5, 1950.7]

[1] Comment--Use of Form

This form is a notice to be used by a landlord or the landlord's agent to notify a tenant that a security payment or deposit paid by the tenant (less any lawful deductions) has been transferred to the landlord's successor in interest. Statutes regulate the disposition by a landlord of security for a rental agreement of residential property [*see Civ. Code § 1950.5*], and the disposition by a landlord of a security payment or deposit for a nonresidential rental agreement [*see Civ. Code § 1950.7*]. For further discussions of the statutory requirements governing transfer of security deposits, see *§§ 35A.50-35A.54* and California Real Estate Law and Practice, ch. 203, *Security Deposits* (Matthew Bender).

[2] FORM

Lessor's Notice to Tenant of Transfer of Security Payment or Deposit [Civ. Code §§ 1950.5, 1950.7]

NOTICE OF TRANSFER OF SECURITY PAYMENT OR DEPOSIT

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

You are hereby notified that the [payment *or* deposit] you made on _____[*date*], of $_____ as security for faithful performance of particular requirements under our lease dated _____, under which you leased the premises at [*address or other description of unit*] has been transferred [*if appropriate, add:,* after certain lawful deductions]. My successor in interest under that lease, and the person to whom the security has been transferred, is: _____[*name*], at _____[*address*]. [*If residential lease, add:* (His/Her) telephone number is _____.]

[*If deductions have been made, add:*]

Before making that transfer I deducted the following amount(s) for the following purpose(s) according to the terms of the above-described lease:

(a) Payment of rent in arrears for ____ ____ ____ ____ ____ ____ _ *dat*[*e*]: $_____.

(b) Repair of _____ [*description of damage*] on _____ [*date*], for damage occasioned by you [*if residential lease, add:* or any guest or licensee of yours and not by ordinary wear and tear]: $_____ _____.

(c) Cleaning of the premises on termination of your tenancy on _____ [*date*]: $_____ _____.

[*Add if authorized by residential rental agreement:*]

(d) _____ [Restoration *or* Replacement *or* Return] of _____ [*describe personal property or appurtenance*], following your failure to take that action under the terms of the above lease: $_____ _____.

[*Continue with the following*:]

Total deposit deducted: $_____ _____

TOTAL AMOUNT OF DEPOSIT TRANSFERRED: $_____ _____

Dated: _____.

LESSOR

_____ [*signature of lessor*]

[*typed name*]

[*If notice will be personally delivered to tenant, add:*]

I hereby acknowledge receipt of the notice of transfer of security deposit or payment.
Dated: _____.

TENANT
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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C. Notices and Other Documents Related to Transfer

18-35A California Legal Forms--Transaction Guide § 35A.224

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35A.224 Request for Statement of Reasons for Refusal to Consent to Transfer of Interest in Nonresidential Lease

[1] Comment--Use of Form

This form is a request by a tenant under a nonresidential lease for a statement of reasons for the landlord's refusal to consent to a transfer of the tenant's interest in the lease. The purpose of the request is to determine whether or not the landlord has a reasonable objection to the transfer [*see Civ. Code § 1995.260*]. A tenant may make this request when (1) the lease requires the landlord's consent to a subletting, assignment, or other transfer of the tenant's interest in the lease, and (2) the restriction either provides that the consent may not be unreasonably withheld or does not provide a standard for giving or withholding consent [*Civ. Code § 1995.260*]. Whether or not the consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent (this form), the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer [*Civ. Code § 1995.260*; *see § 35A.15*].

[2] FORM

Request for Statement of Reasons for Refusal to Consent to Transfer of Interest in Nonresidential Lease

REQUEST BY TENANT FOR STATEMENT OF LANDLORD'S REASONS FOR REFUSAL TO CONSENT TO TRANSFER OF TENANT'S INTEREST IN LEASE

TO: _____[*name of landlord*]
_____[*address*]
_____[*city, state, zip*]

This request is made in accordance with *Civil Code Section 1995.260* and relates to the nonresidential premises at [

address of premises or other description]. The undersigned leases those premises from you under a lease dated _____. The undersigned has attempted unsuccessfully to obtain your consent to a transfer, as follows: [*facts describing attempt to obtain landlord's consent, e.g.,* On _____ (*date*), the undersigned attempted to exercise the undersigned's right under the lease to _____ (sublet *or* assign *or describe other type of transfer*) the undersigned's interest in the lease by mailing to you a written request for your consent to that transfer of the undersigned's interest. On _____ (*date*), you notified the undersigned, in a telephone conversation, that you would not consent to the proposed transfer].

Consequently, the undersigned requests that you provide, within a reasonable time, a written statement of reasons for the withholding of your consent.
Dated: _____.

_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentConsentReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleases



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES

18-35B California Legal Forms--Transaction Guide 35B.syn

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.syn Synopsis to Chapter 35B: MODIFICATION AND TERMINATION OF LEASES

§ 35B.01 California Statutes

§§ 35B.02-35B.04 [Reserved]

§ 35B.05 Law Reviews and Periodicals

§ 35B.06 Annotations

§ 35B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§§ 35B.08-35B.09 [Reserved]

§ 35B.10 Modification--Definition

§ 35B.11 Governing Law

§ 35B.12 Modification Distinguished From Other Actions and Agreements

[1] Modification Requires New Consideration

[2] Modification vs. Independent and Supplemental Agreements

[3] Modification vs. Termination

§ 35B.13 Modification of Written Lease

[1] By Written Contract

[2] By Executed Oral Agreement

[3] Oral Agreement Supported by New Consideration

§§ 35B.14-35B.19 [Reserved]

§ 35B.20 Surrender--Definition

§ 35B.21 Effect of Surrender

§ 35B.22 Surrender by Express Written Consent

§ 35B.23 Surrender by Operation of Law

§ 35B.24 Abandonment--Definition

§ 35B.25 Abandonment--Governing Law

[1] Governing Law Depends on Date of Execution of Lease

[2] Traditional Law

[3] Statutory Law

[a] Introduction to Lessor's Remedies

[b] Notice by Landlord of Belief of Abandonment

[c] Response Required From Tenant

[d] Standards for Determining Abandonment

[e] Damages Recoverable by Landlord

[i] Statutory Standard

[ii] Worth at Time of Award

[iii] Damages Accrued From Time of Termination to Time of Award

[iv] Damages for Rent Due From Time of Award to End of Lease Term

[v] Other Amounts

[vi] Landlord May Also Be Entitled to Liquidated Damages, Equitable Relief, and Other Remedies Available in Unlawful Detainer Proceedings

[f] Continuation of Lease as Alternative to Termination

§ 35B.26 Termination by Notice

[1] Statutory Requirements Govern

[2] Tenancy at Will

[a] Definition

[b] Notice Requirement

[3] Periodic Tenancy

[a] Definition

[b] Notice Requirements--Month-to-Month Tenancy

[c] Notice Requirements--Other Periodic Tenancies

[d] Service of Notice

[i] Manner of Giving Notice

[ii] Service of Notice on Cotenants and Subtenants

[4] Tenancy for Years

[5] Tenancy at Sufferance

[6] Property in Foreclosure

§ 35B.27 Special Rules Relating to Termination of a Hiring

[1] Hiring--Definition

[2] Presumptions Related to Term of Hiring

[3] Implied Renewal of Term

[4] Termination

[a] Statutory Grounds Generally

[b] Premature Termination

§ 35B.28 Termination by Destruction of Premises

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[2] FORM

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[1] Comment

[a] Use of Form

[b] Contents of Notice

[i] Date

[ii] Notice to Reclaim Abandoned Personal Property

[c] Service of Notice

[2] FORM

Notice to Tenant of Landlord's Belief of Abandonment of Leased Premises

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[1] Comment

[a] Use of Form

[b] Contents of Notice

[2] FORM

Notice by Tenant of Nonabandonment of Leased Premises

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[1] Comment

[a] Use of Form

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[c] Service of Notice

[2] FORM

Scope

§ 35B.215 Combined Notice to Tenant of Landlord's Belief of Abandonment of Leased Premises and Tenant's Right to Reclaim Abandoned Personal Property

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Scope

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[1] Comment

[a] Use of Form

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[1] Comment

[a] Use of Form

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Tenant's Request for Return of Personal Property

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[1] Comment

[a] Use of Form

[b] Contents of Notice

[i] Rent Owed

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[c] Service of Notice

[d] Subtenants

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[iii] Amount of Rent Claimed as "Reasonably Estimated"

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[2] FORM

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§ 35B.231 Three-Day Notice to Perform Covenant or Quit

[1] Comment

[a] Use of Form

[b] Distinguished From Other Three-Day Notices

[c] Contents of Notice

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[ii] Forfeiture of Lease

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[f] Statute of Limitations

[g] Landlord's Right of Reentry

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[1] Comment

[a] Use of Form

[b] Reasonable Grounds Required for Basis of Belief That Violation of Lease Occurred

[c] Distinguished From Other Three-Day Notices

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[e] Service of Notice

[f] Landlord's Right of Reentry

[2] FORM

Three-Day Notice to Quit

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§ 35B.240 Notice to Tenant Terminating Tenancy at Will or Periodic Tenancy

[1] Comment

[a] Use of Form

[b] Notice Requirement--Tenancy at Will

[c] Notice Requirements--Periodic Tenancies

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[d] Service of Notice

[e] Foreclosed Property

[2] FORM

Notice to Tenant Terminating Tenancy at Will or Periodic Tenancy

§ 35B.241 Notice to Landlord Terminating Periodic Tenancy

[1] Comment

[a] Use of Form

[b] Cotenancy

[c] Service of Notice

[d] Effect of Failure to Surrender Premises After Notice

[2] FORM

Notice to Landlord Terminating Periodic Tenancy

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[1] Comment--Use of Form

[2] FORM

Notice for Terminating Lease Prematurely in Accordance With Lease Provision

§ 35B.243 Lessee's Request for Notice of Reletting When Advance Payment Made Before Lease Termination

[1] Comment

[a] Use of Form

[b] Advance Payment Defined

[c] Contents of Notice and Time and Manner of Delivery Unspecified

[2] FORM

Lessee's Request for Notice of Reletting When Advance Payment Made Before Lease Termination

§ 35B.244 Lessor's Notice of Reletting After Termination of Lease When Advance Payment Was Received

[1] Comment

[a] Use of Form

[b] Content of Notice

[c] Time and Manner of Delivery

[2] FORM

Lessor's Notice of Reletting After Termination of Lease When Advance Payment Was Received

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FOOTNOTES:

(n78)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

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Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure(Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES

18-35B California Legal Forms--Transaction Guide Scope

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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This chapter covers the modification, surrender, termination, and abandonment of real property leases. It discusses general rules governing a lease's modification, distinctions between modifications and other actions and agreements, and rules regarding the surrender and termination of a lease and abandonment of leased premises by a tenant that may or may not result in the lease's termination. Also covered are the rules regarding the disposition of personal property abandoned on the leased premises. Detailed coverage of the procedures to recover possession of leased premises is beyond the scope of this chapter. However, this chapter includes a brief review of actions to recover possession of the premises, including unlawful detainer notices to quit.

This chapter includes forms for modification of a lease agreement, surrender of a leasehold, notices of abandonment of leased premises and personal property, nonabandonment of leased premises and personal property, the public sale of a tenant's personal property, unlawful detainer notices to quit, and termination and reletting notices.

For general coverage of real property leases and lease provisions, including forms, see Ch. 34B, *Residential Leases* , and Ch. 34C, *Retail, Industrial, and Office Leases* . Assignments and subleases are covered in Ch. 35A, *Assignment and Subleases of Leasehold Interests* .

FOOTNOTES:
(n80)Footnote *. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real

Property Law Section.

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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.01 California Statutes

Termination of estate at will. *Civ. Code § 789.*

Accrual of right of reentry. *Civ. Code § 790.*

Three-day notice to quit as prerequisite to right of reentry. *Civ. Code § 791.*

Change of terms of month-to-month or other periodic tenancy of lesser term. *Civ. Code § 827.*

Forfeitures strictly construed. *Civ. Code § 1442.*

Extinction of contract by performance. *Civ. Code § 1473.*

Extinction of contract by offer of performance. *Civ. Code § 1485.*

Extinction of contract by accord and satisfaction. *Civ. Code §§ 1521-1526.*

Novation. *Civ. Code §§ 1530-1533.*

Extinction of contract by novation. *Civ. Code § 1530.*

Extinction of contract by release. *Civ. Code § 1541.*

Enforcement by third-party beneficiary. *Civ. Code § 1559.*

"Executed" agreement defined. *Civ. Code § 1661*.

Extinction of contract by rescission. *Civ. Code § 1688*.

Modification of verbal lease. *Civ. Code § 1697*.

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Sixty-day notice required to terminate periodic tenancy when tenant has been living in dwelling for at least one year. *Civ. Code § 1946.1*.
Termination of lease on abandonment of premises by tenant. *Civ. Code §§ 1951-1952.2*.
Lessor's remedies. *Civ. Code §§ 1951.2, 1951.4*.

Statute of frauds. *Civ. Code § 1624*.

Disposition of tenant's personal property on tenant's request. *Civ. Code § 1965*.

Disposition by landlord of abandoned personal property. *Civ. Code §§ 1980-1991*.

Assignment and sublease under nonresidential leases. *Civ. Code §§ 1995.010-1995.340*.

Unlawful detainer procedure. *Code Civ. Proc. §§ 1161-1179a*.

Tenants guilty of unlawful detainer. *Code Civ. Proc. § 1161*.

Assignments and subletting as grounds for unlawful detainer. *Code Civ. Proc. § 1161(2)-(4)*.

Application of three-day notice requirement to commercial real property. *Code Civ. Proc. § 1161.1*.

Avoidance of forfeiture following service of notice to quit. *Code Civ. Proc. § 1161.5*.

Service of notice to quit. *Code Civ. Proc. § 1162*.

Judgment restoring premises and forfeiting lease. *Code Civ. Proc. § 1174*.

Instrument in writing required for lease's surrender. *Code Civ. Proc. § 1971*.



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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Ch. 34D, *Ground Leases* .

Ch. 34E, *Shopping Centers: Leasing and Operation* .

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PART II. LEGAL BACKGROUND
A. Modification of Leases

18-35B California Legal Forms--Transaction Guide § 35B.10

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.10 Modification--Definition

"Modification" is an alteration or change in one or more regards that introduces new elements into the details of a contract, or cancels some of them, but leaves the general purpose and effect of the contract undisturbed [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawTypes of ContractsLease AgreementsReal Property LawLandlord & TenantLease AgreementsResidential Leases



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.11 Governing Law

A lease has a dual character: it is both a contract between the lessor and the lessee for the possession and use of the subject property and a conveyance of an estate in the land [*Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 163, 2 Cal. Rptr. 2d 536, 820 P.2d 1046* ; *Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352]* . Thus, a lease's modification is subject to the principles of contract law [*see Civ. Code §§ 1697* (bilateral modification of oral contracts), 1698 (bilateral modification of written contracts); *see also Civ. Code § 827* (unilateral modification by landlord of certain short-term leases)].

Contracts entered into before January 1, 1977 are governed by the Civil Code provisions in effect before that date [*see* Stats. 1976, ch. 109, § 5; *Civ. Code §§ 1697, 1698*]. For discussion of the applicable Civil Code sections in effect from January 1, 1977, see *§ 35B.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.12 Modification Distinguished From Other Actions and Agreements

[1] Modification Requires New Consideration

Modification must be distinguished from changes contemplated by the original contract. A modification generally requires new consideration, while a change in accordance with the terms of a contractual provision that authorizes and sets forth a method for revising the contract is simply a change in the contract's terms that was bargained for by the parties at the time they entered the agreement and is supported by the same consideration that supported the contract [*Busch v. Globe Indus. (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441]* .

[2] Modification vs. Independent and Supplemental Agreements

A modification should be distinguished from an independent, collateral agreement that is entered into after the original contract but that does not vary the contract's terms [*see Lacy Mfg. Co. v. Gold Crown Mining Co. (1942) 52 Cal. App. 2d 568, 577, 126 P.2d 644]* . A modification should also be distinguished from a supplemental written agreement that merely explains a prior written contract, because the same consideration that supports the original contract also supports the supplemental agreement [*Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 311, 34 Cal. Rptr. 317]* .

PRACTICE TIP:

Effect of Parol Evidence Rule. Note that the "parol evidence rule" does not exclude evidence of a modification of a lease after the lease is made. The parol evidence rule bars evidence of *prior* agreements that are inconsistent with a contract, but has no effect on *subsequent* agreements. *By Myron Moskovitz.*

[3] Modification vs. Termination

Modification differs from a contract's termination. To terminate a contract means to abrogate so much of it as remains unperformed, thereby doing away with the existing agreement on the terms and with the consequences agreed on [

Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 75, 204 P.2d 683] . Modification also differs from a novation, which involves extinguishing the entire contract and substituting new obligations for the previously existing ones [*see Civ. Code § 1530*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART II. LEGAL BACKGROUND
A. Modification of Leases

18-35B California Legal Forms--Transaction Guide § 35B.13

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.13 Modification of Written Lease

[1] By Written Contract

A written lease may be modified by a contract in writing [*Civ. Code § 1698(a)*]. To be a contract, a written modification must be supported by consideration [*Civ. Code § 1550*; *Main St. & Agricultural Park R.R. Co. v. Los Angeles Traction Co. (1900) 129 Cal. 301, 305, 61 P. 937]* . If the modification adds to or varies the original contract's terms so that new and onerous terms are imposed on one of the parties, the consideration may consist either of a new consideration or some favorable modification of the original contract [*Main St. & Agricultural Park R.R. Co. v. Los Angeles Traction Co. (1900) 129 Cal. 301, 305, 61 P. 937]* . The surrendering of prior rights of the parties also may be sufficient consideration [*Gardner v. Shreve (1949) 89 Cal. App. 2d 804, 808, 202 P.2d 322]* .

[2] By Executed Oral Agreement

A written lease may also be modified by an oral agreement to the extent that the oral agreement is executed by the parties [*Civ. Code § 1698(b)*]. In contrast to modification by a written contract, an executed oral agreement modifies the original written lease without regard to the presence or absence of consideration [*Julian v. Gold (1931) 214 Cal. 74, 76-79, 3 P.2d 1009]* . To be "executed," the agreement must be fully performed by both sides [*Klein Norton Co. v. Cohen (1930) 107 Cal. App. 325, 330, 290 P. 613* (construing former *Civ. Code § 1698*, substantially reenacted as *Civ. Code § 1698(a), (b)*)].

In the case of an oral agreement to reduce the amount of rent payable under a written lease, the oral agreement is considered executed only as to the reduced rent for past months that has actually been paid by the tenant and accepted by the landlord under the oral agreement [*Julian v. Gold (1931) 214 Cal. 74, 76-79, 3 P.2d 1009]* , and is not considered executed for rents to become due in the future [*Stoltenberg v. Harveston (1934) 1 Cal. 2d 264, 266-267, 34 P.2d 472]* .

An executed oral agreement may modify the original lease even though the lease provides that all changes must be

approved in writing [*see Miller v. Brown (1955) 136 Cal. App. 2d 763, 775, 289 P.2d 572]* .

[3] Oral Agreement Supported by New Consideration

Unless the lease expressly provides otherwise, a written lease may be modified by an oral agreement supported by new consideration [*Civ. Code § 1698(c)*]. However, under these circumstances, the statute of frauds must be satisfied if the lease as modified is within its provisions [*Civ. Code § 1698(c)*; *see Civ. Code § 1624* (statute of frauds)]. Thus, for example, if the lease as modified is for more than one year, it must be in writing [*see Civ. Code § 1624(a)(3)*]. Conversely, if the lease as modified is for one year or less, modification may be in the form of an oral agreement supported by new consideration, unless the lease is subject to the statute of frauds for some other reason [*Civ. Code § 1698(c)*; *see Civ. Code § 1624*].

PRACTICE TIP:

Satisfying Statute of Frauds Without New Consideration. Note the general rule that the statute of frauds may be satisfied by *detrimental reliance* on an oral promise by the promisee--even without a new consideration. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawContract ModificationsOral ModificationsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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18-35B California Legal Forms--Transaction Guide §§ 35B.14-35B.19

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35B.14[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-35B California Legal Forms--Transaction Guide § 35B.20

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.20 Surrender--Definition

"Surrender" is a yielding up of an estate for life or for years to the reversioner (lessor) or remainderman [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . A lease's surrender is a consensual termination of the lease before the termination date set forth in the lease [*see Welcome v. Hess (1891) 90 Cal. 507, 513, 27 P. 369* ; *Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670-671, 155 P.2d 24]* . Surrender relieves the parties of any further contractual obligations under the lease after the surrender date [*see Welcome v. Hess (1891) 90 Cal. 507, 513, 27 P. 369* ; *Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670-671, 155 P.2d 24* ; *see also § 35B.21*]. It can be accomplished by express consent of the parties in writing, or by operation of law when the parties do something that implies they have consented [*Code Civ. Proc. § 1971*; *Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269* ; *see § 35B.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.21

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.21 Effect of Surrender

Surrender relieves the tenant of any further liability under the lease, including any rent that may otherwise be due after the date of surrender [*Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10* ; *Welcome v. Hess (1891) 90 Cal. 507, 514, 27 P. 369]* . It also relieves the landlord of his or her obligations under the lease [*see Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24]* . When there is an executed surrender of a leasehold agreement, the tenant is obligated to leave the premises within the time set for the lease's surrender. If the tenant retains possession beyond the surrender date, the tenant is guilty of unlawful detainer and the landlord may use unlawful detainer proceedings to obtain possession of the premises [*Code Civ. Proc. § 1161(5)*]. For forms of notices that must precede the filing of an unlawful detainer action, see *§§ 35B.230-35B.232*.

For detailed coverage of the remedy of unlawful detainer, including several forms of complaint, see California Forms of Pleading and Practice, ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender). Unlawful detainer is also discussed in detail in California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide § 35B.22

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.22 Surrender by Express Written Consent

Surrender by express written consent of the parties occurs when a lessor and a lessee agree, in writing, to terminate their lease in advance of the termination date set forth in the lease [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . A lease for a term exceeding one year may be surrendered only by a writing subscribed by the lessor and lessee or their properly authorized lawful agents, or by operation of law [*Code Civ. Proc. § 1971*; *Bonetti v. Treat (1891) 91 Cal. 223, 230, 27 P. 612]* . For discussion of surrender by operation of law, see *§ 35B.23*. For a sample form setting forth the surrender of a leasehold agreement, see *§ 35B.210[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.23 Surrender by Operation of Law

Surrender by operation of law occurs when the parties do something that implies they have consented to a surrender and that would not be valid unless the lease term were ended [*Welcome v. Hess (1891) 90 Cal. 507, 512, 27 P. 369]* . Surrender by operation of law is inferred from acts that would not be valid unless the lease were terminated [*Welcome v. Hess (1891) 90 Cal. 507, 512, 27 P. 369]* . For example, there is a surrender when the lessor gives a new lease of the property to a third party with the tenant's consent [*Security-First Nat'l Bank of Los Angeles v. Marxen (1938) 28 Cal. App. 2d 446, 453, 82 P.2d 727]* . Abandonment of the premises by the lessee can, under certain circumstances, result in a surrender by operation of law [*see Welcome v. Hess (1891) 90 Cal. 507, 512, 27 P. 369 ; see also § 35B.25[2]*].

For detailed coverage of the law relating to a lease's surrender, see California Real Estate Law and Practice, ch. 201, *Surrender and Abandonment* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-35B California Legal Forms--Transaction Guide § 35B.24

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.24 Abandonment--Definition

"Abandonment" is the voluntary giving up of a thing by the owner because the owner no longer wants to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or as to who may thereafter possess it [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 110, 307 P.2d 981]* . Abandonment occurs when the lessee leaves the premises vacant with the avowed intention not to be bound by his or her lease [*Kassan v. Stout (1973) 9 Cal. 3d 39, 43, 106 Cal. Rptr. 783, 507 P.2d 87]* . Abandonment differs from surrender in that surrender requires an acceptance by the landlord, either by express agreement or by an unequivocal act that is so inconsistent with the lease as to imply an agreement to surrender [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 111, 307 P.2d 981]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsPerformanceGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.25

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.25 Abandonment--Governing Law

[1] Governing Law Depends on Date of Execution of Lease

The options open to a lessor when a lessee abandons leased property depend, generally, on whether the lease involved was executed before, or on or after, July 1, 1971. Leases executed before that date and leases executed on or after that date but the terms of which were fixed by a lease, option, or other agreement executed before that date are subject to the traditional law on abandonment [*see Civ. Code § 1952.2*; *see also* [2], *below*]. All other leases are subject to the statutory law on abandonment [*see Civ. Code §§ 1951-1952.2*; *see also* [3], *below*].

[2] Traditional Law

Whether the elements of an abandonment existed in a given case has traditionally been a question of fact [*Boral v. Caldwell (1963) 223 Cal. App. 2d 157, 162, 35 Cal. Rptr. 689* ; *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 311, 25 Cal. Rptr. 138]* .

When the tenant expressed or was found to have expressed an intention to abandon the premises, the abandonment was viewed as being merely an offer to surrender [*Welcome v. Hess (1891) 90 Cal. 507, 513, 27 P. 369]* . Under these circumstances, the landlord had one of the following three possible remedies [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 671, 155 P.2d 24* ; *see Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* :

- To consider the lease as still in existence and sue for the unpaid rent as it came due;
- To treat the lease as terminated and retake possession for the landlord's own account (resulting in a surrender by operation of law); or
- To retake possession for the tenant's account and relet the premises, holding the tenant responsible

for the difference between the lease rentals and what the landlord was able in good faith to procure by reletting.

Thus, under the traditional concept of abandonment, the landlord's actions after a tenant's abandonment determine whether or not the abandonment results in a surrender of the lease by operation of law.

[3] Statutory Law

[a] Introduction to Lessor's Remedies

Legislation enacted since 1970 has substantially revised the lessor's remedies when a lessee has breached the lease and abandoned the premises, and has provided a statutory procedure for determining whether abandonment has in fact occurred [*see Civ. Code §§ 1951-1952.3*]. Legislation now provides that, if a lessee breaches the lease and abandons the premises, the lease terminates and the lessor is entitled to recover prescribed damages [*see Civ. Code § 1951.2(a)*; *see also* [e], *below*]. When the rent on leased real property has been due and unpaid for at least 14 consecutive days, and the landlord reasonably believes that the tenant has abandoned the property, the landlord may give a notice of belief of abandonment to the tenant [*Civ. Code § 1951.3(b)*].

[b] Notice by Landlord of Belief of Abandonment

The notice must be in substantially the form prescribed by statute [*Civ. Code § 1951.3(d)*; *see § 35B.212*]. It must specify the date on which the lease will terminate and this date must not be less than 15 days after the notice's personal service, or not less than 18 days after deposit in the mail, as appropriate [*Civ. Code § 1951.3(b)*].

The notice must be personally delivered to the lessee or sent by first-class mail, postage prepaid, to the lessee at his or her last known address and, if there is reason to believe that the notice sent to that address will not be received by the lessee, it must also be sent to any other address known to the landlord where the lessee may reasonably be expected to receive the notice [*Civ. Code § 1951.3(c)*].

PRACTICE TIP:

Landlord Should Give Statutory Notice. The landlord is not required to give the statutory notice of abandonment to take possession of abandoned premises [*see Civ. Code § 1951.3(b)*]. However, lessors gain a substantial advantage by doing so. If the landlord fails to give the notice, he/she takes a risk: if the landlord takes possession and turns out to be wrong--i.e., the tenant has not in fact abandoned the property--the landlord might be liable for damages for trespass, forcible entry, and/or forcible detainer. These are strict liability claims, and the landlord's good faith belief is no defense. Proper compliance with the statutory notice requirements protects the landlord from such claims even if it turns out that the premises were not in fact abandoned [*see* [d], *below* (standards for determining abandonment)]. *By Myron Moskovitz.*

[c] Response Required From Tenant

After giving notice of belief of abandonment, the property will be deemed abandoned unless the lessee, by the termination date, (1) replies with written notice of his or her intention not to abandon the premises [*see § 35B.213*], (2) pays all or a portion of the unpaid rent, or (3) proves either that no rent was 14 days overdue or that the lessor's belief in abandonment was not reasonable [*Civ. Code § 1951.3(a), (e)*; *but see* [f], *below* (lease's continuation as alternative to termination)].

[d] Standards for Determining Abandonment

Real property will not be deemed abandoned if the tenant proves any of the following [*Civ. Code § 1951.3(e)*]:

- At the time the notice of belief of abandonment was given, the rent was not due and unpaid for 14 consecutive days;

- At the time the notice of belief of abandonment was given, it was not reasonable for the landlord to believe that the tenant had abandoned the real property. That the landlord knew the tenant left personal property on the real property does not, of itself, justify a finding that the landlord did not reasonably believe that the tenant had abandoned the real property;

- Before the date specified in the landlord's notice, the tenant gave written notice to the landlord stating an intent not to abandon the real property and stating an address at which he or she may be served by certified mail in any action for unlawful detainer of the real property; or

- During the period commencing 14 days before the time the notice of belief of abandonment was given, and ending on the date the lease would have terminated under the notice, the tenant paid to the landlord all or a portion of the rent due and unpaid on the real property.

None of the statutory standards listed above for determining whether an abandonment has occurred preclude the landlord from otherwise proving that the lessee abandoned the property for purposes of recovering statutory damages [*Civ. Code § 1951.3(f)*; *see Civ. Code § 1951.2* (damages)].

[e] Damages Recoverable by Landlord

[i] Statutory Standard

On a lease's termination that results from the tenant's breach and abandonment, the landlord may ordinarily recover from the tenant any of four types of damages specified by statute [*see Civ. Code § 1951.2(a)(1)-(4)*; *see also Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1671-1673, 11 Cal. Rptr. 2d. 278* (purpose of statutory damages)]. These are enumerated in [ii]-[v], *below*.

The landlord has a burden of mitigating damages, but the tenant has the burden of proof concerning the landlord's reasonable mitigation [*see Civ. Code § 1951.2*].

For sample forms and additional discussion of a landlord's damages on the termination of a lease under *Civ. Code § 1951.2*, see Ch. 34B, *Residential Leases* , and Ch. 34C, *Retail, Industrial, and Office Leases* .

[ii] Worth at Time of Award

First, the landlord may recover the worth at the time of the award of the unpaid rent that had been earned at the time of termination [*Civ. Code § 1951.2(a)(1)*]. This figure is computed by adding the amount of the rent owed at the date of termination to interest on that amount computed at the rate specified in the lease or, if no such rate is specified, at the legal rate [*Civ. Code § 1951.2(a)(1), (b)*; *see Cal. Const. art. XV, § 1* (legal rate of interest)]. The phrase "at the time of award" refers to the time of the award under *Civ. Code § 1951.2* and not to the time of the unlawful detainer award [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* . Thus, damages recoverable under these circumstances apply to unpaid rent earned up to the time of a lease's termination in accordance with abandonment or an unlawful detainer action [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* .

[iii] Damages Accrued From Time of Termination to Time of Award

Second, the landlord may recover damages accrued from the time of termination to the time of the award [*Civ. Code §*

1951.2(a)(2)]. These damages are the worth at the time of the award of the amount of the rent that would have accrued between the time of termination and the time of the award, minus the amount of lost rental that the tenant proves the landlord could have reasonably avoided [*Civ. Code § 1951.2(a)(2)*]. The worth at the time of the award is based on the actual amount owed plus interest at the rate specified in the lease or, if no amount is specified, at the legal rate [*Civ. Code § 1951.2(b)*; *see Cal. Const. art. XV, § 1* (legal rate of interest)]. Under these circumstances, "the time of award" applies to unpaid rent accruing between the lease's termination and the time of a judgment in accordance with *Civ. Code § 1951.2* [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39* ; *see Civ. Code § 1951.2(a)(2)*].

[iv] Damages for Rent Due From Time of Award to End of Lease Term

Third, the landlord may recover damages for rent due from the time of the award to the end of the lease term if (1) the lease specifically allows the landlord to collect the damages, or (2) the landlord relets in a good faith attempt to mitigate the damages, subject to any limitations in the lease [*Civ. Code § 1951.2(a)(3), (c)*]. If one of these conditions is met, the landlord may recover the worth at the time of the award of the difference between the unpaid rent for the balance of the term, or a shorter period if so provided in the lease, and the amount of the rental loss that the tenant proves could have been avoided [*Civ. Code § 1951.2(a)(3)*; *see Civ. Code § 1951.2(b)* (computation of worth at time of award)]. Under these circumstances, "the time of award" applies to unpaid rent that accrues after the *Civ. Code § 1951.2* judgment until the lease term's expiration [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 998-999, 211 Cal. Rptr. 39]* .

[v] Other Amounts

Fourth, the landlord may also recover any other amount necessary to compensate him or her for all the detriment proximately caused by the tenant's failure to perform lease obligations or which were reasonably foreseeable [*Civ. Code § 1951.2(a)(4)*].

[vi] Landlord May Also Be Entitled to Liquidated Damages, Equitable Relief, and Other Remedies Available in Unlawful Detainer Proceedings

Neither the statutory remedy [*Civ. Code § 1951.2*] nor the remedy of continuing the lease as an alternative to termination [*Civ. Code § 1951.4*; *see* [f], *below*] precludes a lessor from recovering damages under a valid liquidated damages clause in a lease [*see Civ. Code § 1951.5*], or from obtaining equitable relief when it is appropriate [*Civ. Code § 1951.8*]. In addition, these statutory remedies do not affect, with limited exceptions, actions for unlawful detainer, forcible entry, and forcible detainer [*see Civ. Code §§ 1952-1953*].

[f] Continuation of Lease as Alternative to Termination

As an alternative to terminating the lease and recovering statutory damages as a result of the tenant's breach and abandonment, a landlord may elect to continue the lease, collecting the rent on abandoned property as it becomes due under the lease [*Civ. Code § 1951.4*]. This remedy is available if (1) the lease specifically provides for it [*Civ. Code § 1951.4(a)*], (2) the lessor does not terminate the lessee's right to possession [*Civ. Code § 1951.4(b)*], and (3) any of three additional conditions regarding the lessee's rights to sublet the property or assign the lessee's lease interest is satisfied [*see Civ. Code § 1951.4(b)*].

In general, for the lessor to continue the lease in effect, the tenant must be permitted by the lease to sublet or assign the tenant's lease interest, either at will, or with the landlord's consent, which may not be unreasonably withheld [*see Civ. Code § 1951.4(b)*]. Under this option, the lease will continue in effect in spite of the tenant's breach, as long as the landlord does not terminate the lessee's right to possession [*Civ. Code § 1951.4(b)*; *see Civ. Code § 1951.4(c)* (acts not constituting termination of lessee's right of possession)]. However, the option to continue the lease in effect terminates when the lessor evicts the tenant, in which case it appears that the lessor is entitled to recover statutory damages [*see*

Civ. Code § 1951.2(b); *see also* 9 Cal. Law Rev. Comm. 168 (1969)].

For further discussion of continuing the lease as an alternative to termination, see Ch. 34B, *Residential Leases* .

PRACTICE TIP:

Be Sure Lease Preserves This Remedy. When drafting a lease for a landlord of commercial space, be sure to include the language indicated in *Civ. Code § 1951.4*, in order to preserve this optional remedy for the landlord. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsGovernmentsLegislationStatutory Remedies & RightsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsDamagesCompensatory DamagesReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated DamagesReal Property LawLandlord & TenantLease AgreementsDamagesMitigation



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18-35B California Legal Forms--Transaction Guide § 35B.26

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.26 Termination by Notice

[1] Statutory Requirements Govern

Termination of certain types of tenancies is governed by statute and requires that notice first be given to the tenant [*see Civ. Code § 789*; *Code Civ. Proc. § 1161(1)* (tenancy at will); *see also Civ. Code §§ 1946, 1946.1* (periodic tenancy)]. Other types of tenancies do not require this notice [*see Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345* (tenancy for fixed term); *McLeran v. Benton (1887) 73 Cal. 329, 340, 14 P. 879* (tenancy at sufferance)].

Termination requirements of the various tenancies are enumerated in [2]-[5], *below*. For further discussion of the different types of tenancies, see Ch. 34B, *Residential Leases* , and California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

[2] Tenancy at Will

[a] Definition

A tenancy at will is an estate that confers, with the lessor's consent, the right to possess the premises leased for an indefinite period of time, with no express reservation of rent [*Covina Manor, Inc. v. Hatch (1955) 284 P.2d 580* ; *Blum v. Robertson (1864) 24 Cal. 128, 144-145]* . Because the lessee holds at the lessor's will, the tenancy must be created by either express grant or agreement [*Blum v. Robertson (1864) 24 Cal. 128, 144-145]* . Termination of a tenancy at will is governed by statute [*Civ. Code § 789*] and may only be effected by a proper notice of termination [*see* [b], *below*; *see also § 35B.240*].

[b] Notice Requirement

A tenancy at will, however created, may be terminated by the landlord's giving written notice to the tenant, in the manner prescribed by statute, to remove from the premises within a period of not less than 30 days, to be specified in

the notice [*Civ. Code § 789*; *see Code Civ. Proc. § 1162* (methods of service); *see also § 35B.240[1][d]*].

[3] Periodic Tenancy

[a] Definition

A periodic tenancy is an estate that lasts for a certain term, and unless seasonably terminated before the term's end, repeats for another like term. The term may be for any length of time, for example, a year, a month, or a week [*see* Black's Law Dictionary (6th ed. 1990) p. 1139].

A periodic tenancy may be established by written agreement, by oral agreement, or by statutory presumption when the tenant holds over at the end of the lease term and continues to pay rent with the landlord's consent [*Civ. Code §§ 1945, 1945.5*; *Miller v. Stults (1956) 143 Cal. App. 2d 592, 598-599, 300 P.2d 312]* . Termination of this type of tenancy is governed by statute [*Civ. Code § 1946*], which permits either lessor or tenant to terminate the tenancy by giving proper notice of termination to the other party [*see* [b]-[d], *below*; *see also § 35B.240*].

[b] Notice Requirements--Month-to-Month Tenancy

A tenancy from month-to-month may be terminated at any time by a 30-day written notice from either party, landlord or tenant, to the other [*Civ. Code § 1946*]. When the tenancy is terminated by a 30-day notice given other than 30 days before the end of any month term, the tenancy terminates at the end of the 30 days specified in the notice, and rent is due and payable up to and including the date of termination [*Civ. Code § 1946*].

Notwithstanding the above, the parties to the tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before a recurring term of the tenancy expires [*Civ. Code § 1946*].

Notwithstanding *Civ. Code § 1946* an owner must give notice at least 60 days (not 30 days) before the proposed date of termination of a periodic tenancy if the tenant has been living in the dwelling for at least one year [*Civ. Code § 1946.1(a)-(c)*]. In any case, a tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b)*, (e)]. Notice must be sent by certified or registered mail or given in the manner prescribed by *Code Civ. Proc. § 1162* [Civ. Code § 1946.1(f)].

The 60-day notice requirement for longer term renters does not apply if (1) the dwelling or unit is alienable separate from the title to any other dwelling unit; (2) the owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; (3) the purchaser is a natural person or persons; (4) the notice is given no more than 120 days after escrow is established; (5) notice was not previously given to the tenant in accordance with *Civ. Code § 1946.1*; and (6) the purchaser in good faith intends to reside in the property for at least one full year after the tenancy's termination [*Civ. Code § 1946.1(d)*]. These provisions do not affect the authority of a public entity to regulate or monitor the basis for eviction [Civ. Code § 1946.1(g)].

PRACTICE TIP:

Service of Notice Terminating Month-to-Month Tenancy. Clients often have what is a common misconception, which is that the notice terminating a month-to-month tenancy must be served prior to the first day of the month if rent is due on the first day of the month. If the client insists on the notice being served in that manner the client should be warned not to accept rent for the full monthly term or else the notice will be vitiated. *By Benjamin Kaplan.*

PRACTICE TIP:

Thirty-Day Notice May Be Given at Any Time. Note that the 30-day notice may be given at any time.

Thus, even though a month-to-month tenancy might run from the 1st of each month, either party may give the notice on some day other than the 1st, in which case it will terminate the tenancy 30 days later. The rent for the portion of the subsequent month before termination will be apportioned. *By Myron Moskovitz.*

PRACTICE TIP:

Notice Requirements for Commercial vs. Residential Tenancies. Although there is some latitude in altering statutory notice provisions respecting commercial leases, as contained in the Civil Code and Code of Civil Procedure, the same latitude is not accorded residential leases. Therefore, if the residential lease has provisions contrary to that provided by statute, those provisions should probably be disregarded unless demonstrably more favorable to the tenant. *By Benjamin Kaplan.*

[c] Notice Requirements--Other Periodic Tenancies

Any periodic tenancy other than a month-to-month tenancy, such as a year-to-year or a week-to-week tenancy, may be terminated unilaterally only at the end of one of its recurring terms [*Civ. Code § 1946*]. In the absence of an agreement between the parties, the notice required to terminate a periodic tenancy, other than one from month-to-month, must be given either 30 days before one of the recurring terms expires or as long before expiration as one of the terms as the term itself [*Civ. Code § 1946*]. For example, in the absence of an agreement between the parties, a year-to-year tenancy may be terminated only by a written notice given at least 30 days before the end of one of its yearly terms and a week-to-week tenancy may be terminated only by a written notice given at least one week before the end of one of its weekly terms [*see Civ. Code § 1946*].

An owner must give notice at least 60 days before the proposed date of termination if the tenant has been living in the dwelling for at least one year. The tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b)*, (e); *see § 35B.26[3][b]*].

Notwithstanding the above, the parties to any type of periodic tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before a recurring term of the tenancy expires [*Civ. Code § 1946*].

[d] Service of Notice

[i] Manner of Giving Notice

The notice to terminate a periodic tenancy must be given in either of the following ways [*Civ. Code §§ 1946, 1946.1*]:

- In the manner prescribed by *Code Civ. Proc. § 1162* [*see below*]; or
- By sending a copy by certified or registered mail addressed to the other party.

Service of the notice, by either the landlord or the tenant, in accordance with *Code Civ. Proc. § 1162*, must be given as follows:

- By delivering a copy to the party personally [*Code Civ. Proc. § 1162(1)*];
- If the party is absent from his or her residence and usual place of business, by (1) leaving a copy with some person of suitable age and discretion at either place and (2) sending a copy through the mail addressed to the tenant at his or her place of residence [*Code Civ. Proc. § 1162(2)*]; or
- If the party's places of residence and business cannot be ascertained, or a person of suitable age or

discretion cannot be found at either place, by affixing a copy in a conspicuous place on the property, delivering a copy to a person residing on the property (if one can be found), and mailing a copy to the tenant at the leased premises [*Code Civ. Proc. § 1162(3)*].

If the tenant is the party giving the notice, he or she is permitted to give notice by sending a copy by certified or registered mail addressed to the lessor's agent to whom the lessee has paid rent for the month before the date of the notice or by delivering a copy to the agent personally [*Civ. Code § 1946*]. However, a tenant giving notice pursuant to *Civ. Code § 1946.1* (regarding termination of tenancies when tenant has been living in dwelling for at least one year), must give notice in the manner specified by *Code Civ. Proc. § 1162* or by certified or registered mail [Civ. Code § 1946.1(f); *see § 35B.26[3][b]*].

PRACTICE TIP:

Notice to Terminate vs. Three-Day Notice to Quit or Pay Rent. Do not confuse service of a 30-day notice under *Civ. Code § 1946* or a 60-day notice under *Civ. Code § 1946.1* with service of a three-day notice to quit or pay rent under the unlawful detainer statute. A three-day notice may be served at any time within one year after the rent becomes due [*Code Civ. Proc. § 1161(2)*]. *By Myron Moskovitz and Publisher's Editorial Staff.*

PRACTICE TIP: Actual Notice Should Be Goal. Many problems arise regarding the notice in terms of factual determinations. These include (1) when it was given, (2) when it was effective, and (3) when and if it was actually received. Actual notice should be the goal. Since many actions fail due to improper service, service must be effectuated in all the possible available manners pursuant to *Code Civ. Proc. § 1162*. Any party who mails first class mail should do so at the post office and obtain and retain a post office issued Certificate of Mailing as evidence. Often times after obtaining service in accordance with *Code Civ. Proc. § 1162(2)* or *(3)*, the tenants guard will be down as the tenant will think that they have already been served. At that point, personal service should be effected. Thus, ideally, one would have service by posting and mailing, also service on a competent person and mailing, also service by certified or registered mail, and "service" (not really "service") by First Class Mail, Certificate of Mailing. The First Class Mailing is a "fall-back" in an instance in which the tenant denies receipt by other means, and is designed to have more of a "psychological" rather than legal effect on the court as a tenant (or landlord) denying receipt of such mail will usually appear to be a liar. *By Benjamin Kaplan.*

[ii] Service of Notice on Cotenants and Subtenants

Service of notice by the landlord on one cotenant is notice to the other cotenant(s) [*University of So. Cal. v. Weiss (1962) 208 Cal. App. 2d 759, 769-770, 25 Cal. Rptr. 475]* . Notice by one cotenant to the landlord, however, does not function as notice by the other cotenant who continues as a tenant until the landlord terminates the tenancy as to him or her [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 647, 321 P.2d 473]* .

PRACTICE TIP:

Serve as Many Cotentants as You Can. Although only one cotenant need be served, it is a good idea to serve as many cotenants as you can. If one cotenant shows that service was improper for some reason, you might be able to rely on service on another cotenant. *By Myron Moskovitz.*

PRACTICE TIP:

Again, Serve All Tenants. Although service on one "co-tenant" may well be service on the other co-tenants your practice should be to insure that all tenants are served regardless of their tenancy status or character of their tenancy. Also, keep in mind that under certain local eviction control ordinances claims may arise that all tenants need to be served with notices. *By Benjamin Kaplan.*

If a subtenant is involved, the 30-day notice of termination is not required to be served on the subtenant [*Four Seas*

Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 611-612, 146 Cal. Rptr. 531] .

[4] Tenancy for Years

A tenancy for years, also known as a tenancy for a fixed term, is one created for a definite term. To be effectively created, the duration must be capable of exact computation when it becomes possessory [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* . This type of tenancy terminates automatically at the lease term's end, and no notice of termination is necessary, unless either party seeks to prematurely terminate the lease for cause [*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356]* .

PRACTICE TIP:

Termination of Tenancy for Years. If, at the expiration of the tenancy for years the lessor accepts rent, then the tenancy can only thereafter be terminated by notice as there would be a new tenancy created by the acceptance of rent. In all likelihood that new tenancy would be a tenancy from month-to-month, pursuant to the terms of the then existing lease or presumptively under the Civil Code. However, the determination of what type of tenancy is created by the lessor's acceptance of rent after the termination of a fixed term tenancy must always be independently determined. *By Benjamin Kaplan.*

[5] Tenancy at Sufferance

A tenancy at sufferance arises when one comes lawfully into possession of land but keeps it afterward without any title and without the lessor's consent [*Hull v. Laugharn (1934) 3 Cal. App. 2d 310, 314, 39 P.2d 478* ; *Gartlan v. C.A. Hooper & Co. (1918) 177 Cal. 414, 426, 170 P. 1115]* . There is no notice requirement for terminating this type of tenancy; the lessor may therefore terminate it at any time [*Vandenbergh v. Davis (1961) 190 Cal. App. 2d 694, 699, 12 Cal. Rptr. 222]* .

PRACTICE TIP:

Tenancy at Sufferance May Be Protected by Eviction Control Law. There exist many traps for the unwary. In regard to a tenancy at sufferance, such tenancy may be "protected" by eviction control laws. See San Francisco Rent Stabilization and Arbitration Ordinance § 37.2(t), which defines "Tenant" as "[a] person entitled by written or oral agreement, subtenancy approved by the landlord, *or by sufferance* [emphasis supplied], to occupy a residential dwelling unit to the exclusion of others." Such a tenant by sufferance is thus entitled not only to notice under the Ordinance, but that notice must be premised on one of the denominated "just cause" grounds thereof. *By Benjamin Kaplan.*

[6] Property in Foreclosure

Notwithstanding the unlawful detainer provisions of Civ. Code § *Code Civ. Proc. § 1161* [*see § 35B.44*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit in the manner set forth in *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section1161b was enacted in 2008 in a statute intended to ameliorate the deleterious effects on the state economy and local economies and the California housing market resulting from the foreclosures of residential properties in unprecedented numbers resulting from subprime lending practices [2008 Stats., Ch. 69, sec. 1(d)]. It is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Code Civ. Proc. § 1161b(c)*]. For discussion of SB 1137, *see § 25D.31*.

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, sec.

703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. In addition, the Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. A lease or tenancy is considered bona fide if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [P.L. 111-22, sec. 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [P.L. 111-22, sec. 704, 123 Stats. 1662]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies



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18-35B California Legal Forms--Transaction Guide § 35B.27

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.27 Special Rules Relating to Termination of a Hiring

[1] Hiring--Definition

A hiring is a contract by which one gives to another the temporary possession and use of property, and the latter agrees to return the property to the former at a future time [*Civ. Code § 1925*]. Leases come within this definition of a hiring [*see Santa Monica Rent Control Board v. Bluvshtein (1991) 230 Cal. App. 3d 308, 316, 281 Cal. Rptr. 298* ; *Cooperative Bldg. Materials v. Robbins & Larkey (1947) 80 Cal. App. 2d 832, 839, 183 P.2d 81]* .

[2] Presumptions Related to Term of Hiring

When there is no custom or usage on the subject, a hiring of real property, other than lodgings and dwelling houses, is presumed to be a month-to-month tenancy unless otherwise designated in writing, with one exception. In the case of real property used for agricultural or grazing purposes, a hiring is presumed to be for one year from its commencement, unless otherwise expressed in the hiring [*Civ. Code § 1943*].

A hiring of lodgings or a dwelling house for an unspecified term is presumed to have been for the length of time as the parties adopt for the rent's estimation. Thus, a hiring at a monthly rate of rent is presumed to be for one month. Absent an agreement regarding the length of time or the rent, the hiring is presumed to be monthly [*Civ. Code § 1944*].

PRACTICE TIP:

Recovery of Attorneys' Fees If the client tells you that the tenancy is an oral month-to-month agreement, do not assume that there is no possibility of recovering *attorneys' fees*. Ask if the tenant is holding over after a prior lease ended. If so, and if the prior lease contained an attorney's fee provision, then *Civ. Code § 1945* (regarding implied renewal of leases) [*see* [3], *below*] will permit recovery of these fees in any present litigation. *By Myron Moskovitz.*

[3] Implied Renewal of Term

If a lessee remains in possession after the hiring expires and the lessor accepts rent from him or her, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly nor in any case one year [*Civ. Code § 1945*; *see Code Civ. Proc. § 1161(2)* (holding of agricultural lands)].

A hiring for a term not specified by the parties is deemed renewed as stated above at the end of the term implied by law, unless one of the parties gives written notice of intention to terminate [*Civ. Code § 1946*; *see § 35B.26*].

[4] Termination

[a] Statutory Grounds Generally

As a hiring, a lease terminates on the occurrence of any of the following [*Civ. Code § 1933*]:

(1) At the end of the term agreed on;

(2) By the mutual consent of the parties;

(3) By the hirer (tenant) acquiring a title to the thing hired superior to that of the letter (lessor); or

(4) By the destruction of the thing hired.

For example, a lease terminates when there is a merger of the tenant's interest as tenant, with his or her interest as lessor, after he or she acquires the lessor's interest [*Vucinich v. Gordon (1942) 51 Cal. App. 2d 434, 437, 124 P.2d 868]* . Additionally, if the property is let for a particular purpose, the lessee must not use it for any other purpose, and if the lessee does, he or she is liable to the letter (lessor) for all damages resulting from such use, or the lessor may treat the contract as rescinded [*Civ. Code § 1930*; *Isom v. Rex Crude Oil Co. (1905) 147 Cal. 659, 661, 82 P. 317* ; *but see Keating v. Preston (1940) 42 Cal. App. 2d 110, 117, 108 P.2d 479* (requirement that *Civ. Code § 1930* be read in connection with *Civ. Code § 1689*, stating grounds on which contract may be rescinded)].

[b] Premature Termination

A letter (lessor) may prematurely terminate a hiring when the hirer (tenant) uses or permits a use of the thing hired in a manner contrary to the parties' agreement, or when the hirer does not, within a reasonable time after request, make such repairs as he or she is bound to make [*Civ. Code § 1931*]. A hirer may terminate the hiring before the term's end when either of the following conditions are met [*Civ. Code § 1932*]:

- The lessor does not, within a reasonable time after request fulfill his or her obligations, if any, as to placing and securing the lessee in the quiet possession of the thing hired, or putting it into good condition, or repairing; or

- The greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of the hirer's ordinary care.

For discussion of the lessor's duties to put a building intended for human occupation in a condition fit for occupation and to keep the premises tenable, see Ch. 34B, *Residential Leases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.28 Termination by Destruction of Premises

Although destruction of the premises is cause for a lease's termination [*Civ. Code §§ 1932(2), 1933(4)*; *see § 35B.27[4]*], lease provisions may alter the governing effect of these statutes. For example, if the lease expressly requires the lessor to rebuild the demised premises if they are totally destroyed by fire, then the lease does not terminate [*Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647-650, 25 Cal. Rptr. 517]* . Alternatively, if the lessee assumes, by his or her covenants to repair, the risk of the destruction of the premises, he or she may not terminate the lease [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 674-678, 75 Cal. Rptr. 889, 451 P.2d 721]* . However, a general covenant to repair is insufficient to prevent the lease's termination on destruction [*Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 574-578, 194 P. 1024]* .

If the premises are only partially destroyed, the destruction must be to the part of the property that is being leased. For example, if the tenant has a ground lease, the building's destruction does not terminate the lease, unless the lease provides the contrary [*Hamer v. Ellis (1919) 40 Cal. App. 57, 60, 180 P. 30]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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§ 35B.29 Termination by Death or Incapacity

If a lease is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his or her death or incapacity to contract [*Civ. Code § 1934*]. Thus, a tenancy at will or at sufferance may be terminated because of death or incapacity to contract. However, absent a contrary lease provision, the death or incapacity to contract of either party does not terminate a tenancy for a fixed term [*Joost v. Castel (1939) 33 Cal. App. 2d 138, 141, 91 P.2d 172]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawOwnership & TransferNatural Persons



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§ 35B.30 Termination by Commercial Frustration

The doctrine of frustration arises from a commercial necessity of excusing performance in cases of extreme hardship. Unlike the doctrine of impossibility, which involves physical impossibility and extreme impracticability, performance excused by commercial frustration remains possible, but the expected value of the performance to the party seeking to be excused has been destroyed by a chance event, which supervenes to cause an actual but not literal failure of consideration [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53, 153 P.2d 47]* . The doctrine of frustration is usually limited to cases of extreme hardship so that business people, who must make their arrangements in advance, can rely with certainty on their contracts [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 54, 153 P.2d 47]* . However, if the parties contract in reference to the frustrating event, even if the event is beyond their imagination, the doctrine of frustration may not be used [*see Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 675-678, 75 Cal. Rptr. 889, 451 P.2d 721]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsFrustration of Purpose



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§ 35B.31 Termination by Bankruptcy

The Bankruptcy Code of 1978 [*11 U.S.C. § 101 et seq.*] provides, with limited exceptions, that an executory contract or unexpired lease of a bankrupt debtor may not be terminated solely because of (1) a provision in the contract or lease that is conditioned on the insolvency or financial condition of the debtor, (2) the filing of bankruptcy by or against the debtor, or (3) the appointment of or taking possession of the debtor's property by a trustee in bankruptcy or a custodian before bankruptcy [*11 U.S.C. § 365(e)(1)*; *see 11 U.S.C. § 365(e)(2)* (exceptions)]. For more detailed coverage of termination through bankruptcy, see Ch. 34C, *Retail, Industrial, and Office Leases* , and Ch. 34D, *Ground Leases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesTermination ClausesReal Property LawBankruptcyLeases



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.32 Termination by Condemnation

Property subject to a lease may be taken in whole or in part under the power of eminent domain. Absent a valid lease provision to the contrary [*Code Civ. Proc. § 1265.160*], when all the property subject to a lease is acquired for public use, the lease terminates [*Code Civ. Proc. § 1265.110*]. Unless the parties to a lease provide otherwise in their lease [*see Code Civ. Proc. § 1265.160*], when part of the property subject to a lease is taken for public use, the lease terminates as to the part taken and remains in force as to the remainder, and the rent reserved in the lease that is allocable to the part taken is extinguished [*Code Civ. Proc. § 1265.120*]. However, the court may, on petition of any party to the lease, terminate the lease if the court determines that an essential part of the property subject to the lease is taken, or that the remainder of the property subject to the lease is no longer suitable for the lease's purposes [*Code Civ. Proc. § 1265.130*]. For comprehensive treatment of the subject of condemnation, see California Real Estate Law and Practice, chs. 500- 513, *Condemnation Practice Handbook* (Matthew Bender).

PRACTICE TIP:

"Standard" Termination Clauses in Cases of Condemnation. I have actually seen leases that contain what are "standard" termination clauses if condemnation should occur. When the character of the lessor was examined it was determined that the lessor was either a governmental or quasi-governmental agency who had written a 30-day termination clause into a lease ostensibly for years, where the plan was for that agency to gradually reoccupy other floors of the building it owned and controlled. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.33 Termination by Actual or Constructive Eviction

[1] When Actual or Constructive Eviction Occurs

Actual eviction occurs when the lessor or someone with paramount title ousts the tenant from possession [*McAlester v. Landers (1886) 70 Cal. 79, 82-83, 11 P. 505]* . Partial eviction, when the tenant is forcibly evicted from a substantial portion of the leased premises, but continues to occupy the remainder under the lease, is also possible [*see Giraud v. Milovich (1938) 29 Cal. App. 2d 543, 547-548, 85 P.2d 182]* .

Constructive eviction occurs if, as a result of any disturbance of the tenant's possession by the lessor, or at the lessor's procurement, which renders the premises unfit for the purposes for which they were demised, or which has the effect of depriving the tenant of the beneficial enjoyment of the premises, the tenant vacates the premises within a reasonable time [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-613, 272 P.2d 938 ; see Civ. Code § 1927* (covenant of quiet enjoyment implied); *McDowell v. Hyman (1897) 117 Cal. 67, 70, 48 P. 984* (covenant means tenant will not be wrongly evicted or disturbed in his or her possession by lessor or persons deriving title from lessor)]. Constructive eviction may also result if the tenant vacates the premises in response to an improper notice to quit threatening an unlawful detainer action, even if the lessor does not physically substantially interfere with the tenant's possession and quiet enjoyment [*see Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 823, 108 Cal. Rptr. 566]* .

PRACTICE TIP:

Tenant Must Vacate. Remember that there is no "constructive eviction" in the absence of an actual vacating by the tenant [*see, e.g., Dussin Investment Co. v. Bloxham (1979) 96 Cal. App. 3d 308, 315-316, 157 Cal. Rptr. 646]* . *By Benjamin Kaplan.*

PRACTICE TIP: Effect of Breach of Covenant of "Quiet Enjoyment" on Eviction Action. The breach of the covenant of "quiet enjoyment" is not an independent grounds for asserting constructive eviction, nor does it provide a defense to an eviction action. In one case, the court barred the use of such a claim as an affirmative defense, ruling that there was no breach unless and until the tenant vacated within a

reasonable time (that is, actual constructive eviction) [*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 846-848, 122 Cal. Rptr. 114]* . The *Petroleum* decision is in keeping with the general policy in unlawful detainer actions that strictly limits the scope of "defenses" that will be entertained in summary proceedings [*see, e.g., Knowles v. Robinson (1963) 60 Cal. 2d 620, 625-627, 36 Cal. Rptr. 33* (affirmative defenses restricted to preserve summary nature of unlawful detainer action); *D'Amico v. Riedel (1949) 95 Cal. App. 2d 6, 9, 212 P.2d 52* (fraud defense not allowed)]. *By Benjamin Kaplan.*

[2] Effect of Actual or Constructive Eviction

Actual or constructive eviction may, but does not necessarily, result in a lease's termination [*see, e.g., Lindenberg v. MacDonald (1950) 34 Cal. 2d 678, 678-683, 214 P.2d 5* (no termination when landlord served notice to quit in bad faith)]. If there is a constructive eviction, the tenant is relieved of any further liability for the payment of rent after abandonment of the premises [*Veysey v. Moriyama (1921) 184 Cal. 802, 805-807, 195 P. 662]* . The tenant also has the option of standing on the lease and claiming damages for breach of the covenant of quiet enjoyment, rather than vacating the premises [*Guntert v. City of Stockton (1976) 55 Cal. App. 3d 131, 138-141, 126 Cal. Rptr. 690* ; *Slater v. Conti (1959) 171 Cal. App. 2d 582, 585, 341 P.2d 395* ; *Riechhold v. Sommarstrom Invest. Co. (1927) 83 Cal. App. 173, 177, 256 P. 592]* .

PRACTICE TIP:

Tenant Has Options. Before claiming constructive eviction and terminating the lease, the tenant should examine the economic value of the lease by comparing the required rent to the present market rent for similar premises. If the lease is valuable, the tenant might be better off staying in place and suing the landlord for damages. *By Myron Moskovitz.*

For further discussion of actual and constructive eviction, including its effect on termination and the tenant's obligation to pay rent, see California Real Estate Law and Practice, ch. 200, *Termination: Causes and Procedures* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsConstructive EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsPartial EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises



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18-35B California Legal Forms--Transaction Guide § 35B.34

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.34 Termination by Breach of Lease Covenant

[1] Termination by Landlord

A tenant's continued neglect or failure to perform the covenants or conditions of a lease, including one to pay rent, provides a landlord with a basis for terminating a lease. The lease is terminated on expiration of the three-day notice to perform or quit [*see §§ 35B.230, 35B.231* (sample three-day notices)]. On expiration of the three-day notice, the landlord may bring an action for unlawful detainer, which will give him or her the right to possession [*see Code Civ. Proc. § 1161(2), (3)*; *see also § 35B.44*].

[2] Termination by Tenant

A tenant may have cause to terminate the lease because of the lessor's breach of a covenant of the lease [*see Fong v. Rossi (1948) 87 Cal. App. 2d 20, 23, 195 P.2d 854* (lessor's failure to fulfill material condition of lease as material failure of consideration); *Garetson v. Hester (1943) 57 Cal. App. 2d 39, 43-46, 133 P.2d 863* (violation of provision offering tenant first option to purchase as grounds for terminating lease)]. For a tenant to terminate a lease, the lessor's breach must be of a dependent, and not an independent, covenant [*see Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse (1942) 21 Cal. 2d 411, 418-424, 132 P.2d 457]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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§§ 35B.35[Reserved]



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18-35B California Legal Forms--Transaction Guide § 35B.40

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.40 Four Types of Actions

A lessor who wants to evict a tenant to regain possession of the premises may pursue any one of four methods:

- The nonjudicial remedy of self-help [*see § 35B.41*];
- The judicial method of suit in ejectment [*see § 35B.42*];
- The judicial method of an action to quiet title [*see § 35B.43*]; and
- The judicial method of an unlawful detainer action [*see § 35B.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide § 35B.41

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.41 Self-Help

The remedy of self-help consists of physically evicting or ousting the tenant. Its use is discouraged in California because (1) the law takes a dim view of breaches of the peace and (2) enactment of the statutory unlawful detainer procedure [*see § 35B.44*] obviates the need for any resort to self-help [*Kassan v. Stout (1973) 9 Cal. 3d 39, 44, 106 Cal. Rptr. 783, 507 P.2d 87]* . Although leases may contain a provision permitting a lessor to reenter the premises and remove the tenant and his or her possessions for a breach of a covenant or condition of the lease [*see Civ. Code §§ 790, 791*], orderly procedure and preservation of the peace require that actual possession not be disturbed except by legal process [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 605, 12 Cal. Rptr. 488, 361 P.2d 20]* . Thus, even when a right of reentry provision is contained in the lease, self-help through reentry may be resorted to by lessors only when the tenant has voluntarily surrendered the premises [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604, 12 Cal. Rptr. 488, 361 P.2d 20]* .

PRACTICE TIP:

Self-Help on Landlord's Use of Abandonment Procedure. There is one more situation when the landlord may use self-help: when the landlord has properly used the statutory notice of abandonment procedure (even if the tenant has not in fact abandoned) [*see Civ. Code §§ 1951-1952.3*; *see also § 35B.25[3]*]. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide § 35B.42

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.42 Suit in Ejectment

A suit in ejectment is an action designed to restore possession to the person entitled to it [*see* Black's Law Dictionary (6th ed. 1990) pp. 516-517]. The plaintiff must not only establish the right of possession in himself or herself, but must also establish that the defendant is in (wrongful) possession, thereby disposing the plaintiff [*see* Black's Law Dictionary (6th ed. 1990) pp. 516-517]. A suit in ejectment may be maintained at any time after the right of reentry accrues and without serving notice [*Civ. Code §§ 791, 793*]. Such a suit is infrequently used as a method of obtaining possession because, as a traditional civil action, it is time consuming and often cumbersome.

For further discussion of ejectment actions, see California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* (Matthew Bender), and California Forms of Pleading and Practice, ch. 241 *Ejectment* (Matthew Bender).

PRACTICE TIP:

Suit in Ejectment vs. Unlawful Detainer Action. A suit in ejectment may be maintained without prior compliance with the statutory notice procedures required for an unlawful detainer lawsuit [*see Code Civ. Proc. § 1161*]. Nevertheless, ejectment is rarely used, because it is not accorded any priority for trial, as unlawful detainer is. *By Myron Moskovitz.*

PRACTICE TIP:

Suit in Ejectment vs. Unlawful Detainer Action. There may be certain instances in which a suit in ejectment may be one of the only remedies available for the plaintiff owner to obtain possession. The action for unlawful detainer is wholly statutory and there are many instances in which it will not be available. One example, is where the owner acquires title to the premises by means of bidding at a tax sale conducted by the County Tax Collector's office after the previous owner defaulted in the payment of taxes. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide § 35B.43

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.43 Action to Quiet Title

An action to quiet title is a proceeding to establish the plaintiff's title to land by bringing into court and compelling an adverse claimant to set forth his or her claim so that it may be determined by decree. It embraces every sort of claim whereby the plaintiff might be deprived of his or her property, the property's title clouded, or its value depreciated, or whereby the plaintiff might be disturbed by assertion of an outstanding title already held or grown out of adverse possession [*Bank of America Nat. Trust & Savings Assn. v. Town of Atherton (1943) 60 Cal. App. 2d 268, 271-272, 140 P.2d 678]* . Thus, an action to quiet title may be maintained by a lessor if the lessee has forfeited his or her rights under the lease by not complying with its covenants or conditions [*Andrews v. Russell (1927) 85 Cal. App. 149, 154, 259 P. 113]* . In the lessor's action to quiet title, the lessor establishes a prima facie case by proof of his or her title; if denied, the lessee must then prove his or her interest by introducing the lease, and then the lessor may prove matters in the lease's avoidance [*Riedman v. Barkwill (1934) 139 Cal. App. 564, 567, 34 P.2d 744]* .

PRACTICE TIP:

Remedy Is Not Exclusive. Quiet title actions are statutory [*see Code Civ. Proc. § 760.010 et seq.*] and have a detailed schema. However, the remedy so provided is cumulative, not exclusive, and any form or right of action or proceeding provided by law for quieting title or establishing title to property is also permitted [*Code Civ. Proc. § 760.030(a)*]. *By Benjamin Kaplan.*

PRACTICE TIP:

Action to Quiet Title Is Infrequently Used. Like a suit in ejectment [*see § 35B.42*], an action to quiet title is infrequently used as a method of obtaining possession of the premises because, as a traditional civil action, it is time consuming and often cumbersome. *By Publisher's Editorial Staff.*

For further discussion of title actions, see California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions



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18-35B California Legal Forms--Transaction Guide § 35B.44

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.44 Unlawful Detainer

[1] Purpose of Proceeding; Strict Compliance With Statutory Provisions Is Required

The summary proceeding of unlawful detainer [*Code Civ. Proc. §§ 1161-1179a*] is an optional procedure for evicting a tenant who holds the premises after the expiration or in violation of a lease's terms. Its primary purpose is to recover possession of the premises [*Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 853, 105 Cal. Rptr. 864]* . Any landlord pursuing this remedy must comply strictly with the statutory provisions since the proceeding provides for the forfeiture, in certain cases, of valuable rights [*Woods-Drury, Inc. v. Superior Court (1936) 18 Cal. App. 2d 340, 344, 63 P.2d 1184]* . As a summary proceeding, an unlawful detainer action has "precedence" over most other civil actions on a court's calendar [*Code Civ. Proc. § 1179a*]. Thus, the unlawful detainer action is used more frequently as an eviction proceeding than either the suit in ejectment [*see § 35B.42*] or the action to quiet title [*see § 35B.43*].

PRACTICE TIP:

Speedy Nature of Unlawful Detainer Actions. Note that the unlawful detainer suit gets *more* than priority. *Code Civ. Proc. § 1170.5* requires the court clerk to set the case for trial within 20 days after an "at-issue" memorandum is filed. Thus, the action is far speedier than either ejectment or quiet title. *By Myron Moskovitz.*

[2] Conduct by Tenant Resulting in Unlawful Detainer

Conduct that may render a tenant (and a subtenant, if the subtenant is in actual possession of the premises) guilty of unlawful detainer includes any of the following:

- Continuing in possession after defaulting in the payment of rent and after being served with a three-day written notice that requires payment of rent or surrender of possession, if he or she fails to comply with the three-day notice [*Code Civ. Proc. § 1161(2)*; *see § 35B.230*];

- Continuing in possession after failing to perform a covenant of the lease (other than the covenant to pay rent), if covenant can still be performed, and after being served with a three-day written notice that requires the covenant's performance or surrender of possession [*Code Civ. Proc. § 1161(3)*; *see § 35B.231*];

- Continuing in possession after a noncurable breach of a condition or covenant of the lease or agreement under which the property is held and after being served with a three-day notice to surrender possession [*Code Civ. Proc. § 1161(3)*; *see § 35B.232*];

- Continuing in possession after subleasing, assigning, or committing waste contrary to covenants of the lease under which the property is held, or maintaining, committing, or permitting the maintenance or commission of a nuisance on the premises or using the premises for an unlawful purpose, and after being served with a three-day notice demanding surrender of possession [*Code Civ. Proc. § 1161(4)*; *see § 35B.232*]; or

- Continuing in possession after giving written notice to the landlord, pursuant to statute, of the tenant's intent to terminate the lease or making a written offer to surrender that is accepted in writing by the landlord [*Code Civ. Proc. § 1161(5)*; *see Civ. Code § 1946* (methods of notice)].

The lessor must generally serve a notice on the tenant (or possessor, in certain circumstances) before the tenant will be guilty of unlawful detainer [*see Code Civ. Proc. § 1161*; *see also §§ 35B.230-35B.232*]. However, this does not apply to an eviction which takes place on the tenant failing to vacate after the expiration of a fixed term commercial lease.

For discussion of the litigation aspects of an unlawful detainer proceeding and of forcible detainer and forcible entry, see California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* , and ch. 212, *Forcible Entry, Forcible Detainer, and Other Torts* (Matthew Bender); and California Forms of Pleading and Practice, ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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DIVISION II: REAL ESTATE TRANSACTIONS
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18-35B California Legal Forms--Transaction Guide § 35B.50

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.50 Statutory Procedures Governing Disposition of Abandoned Personal Property

[1] Disposition of Property by Landlord: Notice to Tenant Is Required

If the tenant who is believed by the landlord to have abandoned the leased premises has left personal property on the premises, the landlord may elect to dispose of the property remaining on the premises in accordance with an optional statutory procedure requiring the lessor to give the tenant a notice of the tenant's right to reclaim the abandoned personal property [*Civ. Code §§ 1983, 1993.03*; *see Civ. Code §§ 1980 et seq.* (applicable to residential property), 1993 et seq. (applicable to commercial property); *see also §§ 35B.51, 35B.214, 35B.215*]. However, this procedure is not available in situations specifically governed by other statutes [*Civ. Code §§ 1981, 1993.02*]. For example, it may not be used for unclaimed property in a hospital [*see Civ. Code § 1862.5*], for any manufactured home, mobilehome, or any commercial modular [*see Health & Safety Code §§ 18007* (manufactured home defined), 18008 (mobilehome defined), 18001.8 (commercial modular defined)], or for the lost property, which must be disposed of in accordance with the lost property statutes [*see Civ. Code §§ 1982, 1993.01, 2080-2080.9*].

[2] Disposition of Property by Former Tenants

An alternative statutory procedure for disposing of a former tenant's personal property must be initiated by the former tenant [*see Civ. Code § 1965*; *see also §§ 35B.52, 35B.217*]. This procedure is not available if the disposition of the personal property has been initiated or completed by the landlord, in accordance with the optional procedure described in [1], above [*Civ. Code § 1965(c)*], or if the tenancy was in a hotel, motel, or residency club where the innkeeper retained a right of access to the dwelling unit or provided certain services [*see Civ. Code § 1940(b)*]. Further, this remedy is not exclusive and will not preclude either the landlord or the tenant from pursuing any other remedy provided by law [*Civ. Code § 1965(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLegislationStatutory Remedies & RightsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.51

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.51 Landlord's Optional Statutory Procedure to Dispose of Abandoned Personal Property

[1] Required Notice of Tenant's Right to Reclaim Abandoned Property

Notice of right to reclaim the property may be either a separate notice or it may be combined with the landlord's notice of belief of abandonment [*Civ. Code §§ 1991, 1993.09*; *see §§ 35B.214* (separate notice), 35B.215 (combined notice)]. For further discussion of the required contents of the notice and its service, see *§ 35B.214*.

[2] Procedure After Giving Notice to Tenant

[a] Options of Landlord

After the notice is given [*see* [1], *above*], the landlord may do any of the following [*see Civ. Code §§ 1986-1988, 1993.01, 1993.07*]:

- Leave the property on the vacated premises [*Civ. Code §§ 1986, 1993.06*];
- Store the property until it is claimed by the former tenant or person reasonably believed by the landlord to be its owner [*Civ. Code §§ 1986, 1993.06*]; or
- Sell the property at public sale [*Civ. Code §§ 1988(a), 1993.07*; *see* [b], *below*].

If the property is not claimed by the former tenant or the person believed to be its owner and is reasonably believed by the landlord to have total resale value of less than $300 (for residential property) or the lesser of $750 or $1 per square foot of the premises (for commercial property), the landlord may retain the property for the landlord's own use or dispose of it in any manner [*Civ. Code §§ 1988(a), 1993.07(a)(2)*].

[b] Public Sale of Property

[i] Notice of Public Sale

If the abandoned personal property is to be sold at public sale, notice of the sale must be given [*Civ. Code §§ 1988(b), 1993.07(b)*]. Notice of the time and place of the public sale must be given by publication in a newspaper of general circulation published in the county where the sale is to be held, with the last publication occurring not less than five days before the sale is to be held [*Civ. Code §§ 1988(b), 1993.07(b)*]. The notice of sale may not be published before the last of the dates specified in the lessor's notice for taking possession of the property [*Civ. Code § 1988(b), 1993.07(b)*]. It must describe the property to be sold in a manner reasonably adequate to permit the property owner to identify it [*Civ. Code § 1988(b), 1993.07(b)*].

[ii] Payment of Proceeds After Sale

After the abandoned property's public sale in the manner prescribed by statute, any balance of the sale's proceeds, after deducting the costs of storage, advertising, and sale, must be paid into the treasury of the county in which the sale took place not later than 30 days after the date of sale, if not claimed by the former tenant or the property owner [*Civ. Code §§ 1988(c), 1993.07(c)*]. The former tenant or other owner of the property has one year from the date the landlord pays the proceeds of the sale into the county treasury to claim the proceeds from the county. If the county pays the proceeds in whole or in part to a claimant, neither the county nor any county officer or employee will be liable to any other claimant as to the amount paid [*Civ. Code §§ 1988(c), 1993.07(c)*].

Nothing in the sale requirements applicable to property left on commercial premises precludes a landlord or tenant from bidding on the property at the public sale [*Civ. Code § 1993.07(d)*].

[3] Liability of Landlord

A landlord who follows the procedures regarding the giving of notice of the right to reclaim abandoned personal property will not be liable for property properly released or disposed of [*Civ. Code §§ 1989, 1993.08*]. The landlord may be liable, however, to a person to whom a notice of right to reclaim was not given if that person can prove that, before releasing or disposing of the property, the landlord believed or reasonably should have believed that this person had an interest in the property and that the landlord knew or should have known on reasonable investigation the person's address [*Civ. Code §§ 1989(b)(2), (c)(2), 1993.08(b)(2), (c)(2)*].

If only a portion of the property is described in the notice, the limited liability discussed above [*see Civ. Code §§ 1989, 1993.08*] does not protect the landlord from any liability for disposing of property not described in the notice, unless the undescribed property is contained in certain specified containers that deter immediate access to the contents [*Civ. Code §§ 1983(b), 1993.03(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutory Remedies & RightsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.52

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.52 Tenant's Optional Statutory Procedure to Reclaim Personal Property

[1] Procedure for Return of Personal Property

If a tenant vacates residential premises and leaves personal property not owned by the landlord on the premises, the landlord must surrender the personal property to the tenant, or to the tenant's duly authorized representative, if all of the following occur [*Civ. Code § 1965(a)*]:

(1) Within 18 days after vacating the premises, the tenant requests, in writing, the surrender of the personal property;

(2) The request includes a description of the personal property held by the landlord and specifies the tenant's mailing address;

(3) The landlord or the landlord's agent has control or possession of the tenant's personal property at the time the request is received;

(4) The tenant, before the surrender of the personal property by the landlord and on proper written demand by the landlord, tenders payment of all reasonable costs associated with the landlord's removal and storage of the personal property [*see* [3], *below*]; and

(5) The tenant agrees to claim and remove the personal property at a reasonable time mutually agreed by the landlord and tenant, but not later than 72 hours after the tender described in item (4), *above*.

[2] Limitations on Use of Procedure

The tenant's optional statutory procedure to reclaim personal property may not be used when either of the following exist [*Civ. Code § 1965(c)*]:

- The personal property's disposition has been initiated or completed in accordance with the alternative optional statutory procedure initiated by the landlord [*see Civ. Code §§ 1980-1991*; *see also § 35B.51*]; or

- The relevant tenancy was in a hotel, motel, or residence club where the innkeeper retained a right of access to the dwelling unit or provided certain services [*see Civ. Code § 1940(b)*].

[3] Costs of Removal and Storage

Under the tenant's optional statutory procedure to reclaim personal property, the tenant must comply with a proper demand by the landlord to tender payment of all reasonable costs associated with the landlord's removal and storage of the personal property [*Civ. Code § 1965(a)(3)*; *see* [1], *above*]. The landlord's demand for payment must be in writing and must itemize all charges, specifying the nature and amount of each item of cost. Further, the landlord must transmit the demand to the tenant within five days after actually receiving the tenant's request for the return of the personal property, unless the landlord elects to return the property before that five-day deadline. The landlord must (1) mail the demand to the tenant at the address provided by the tenant in his or her request or (2) personally present the demand to the tenant or the tenant's authorized representative [*Civ. Code § 1965(a)(3)*].

For these purposes, "reasonable costs associated with the landlord's removal and storage of the personal property" include, but are not limited to, the following [*Civ. Code § 1965(b)*]:

(1) Reasonable costs actually incurred, or the reasonable value of labor actually provided, or both, in removing the personal property from its original location to the place of storage, including disassembly and transportation; and

(2) Reasonable storage costs actually incurred, which must not exceed the fair rental value of the space reasonably required for the storage of the personal property.

[4] Compliance by Landlord

A landlord who complies with the statutory procedure governing the return of a tenant's personal property will not be liable to any person with regard to any personal property belonging to that person that is given to another [*Civ. Code § 1965(d)*]. In the event of conflicting demands, the first timely request for surrender of personal property received by the landlord will prevail [*Civ. Code § 1965(d)*].

[5] Damages for Violations by Landlord

A landlord who retains personal property in violation of the statutory procedure governing the return of a tenant's personal property will be liable to the tenant in a civil action for both of the following [*Civ. Code § 1965(e)*]:

- Actual damages, up to the value of the personal property, if the personal property is not surrendered by the later of either (1) the passage of a reasonable period of time [*see Civ. Code § 1965(e)(1)* (three days is presumed to be reasonable time in absence of contrary evidence)] after the tenant's request for surrender of the personal property, or (2) if applicable, the later of the tenant's tender of the payment of the landlord's reasonable costs of removal and storage [*see* [3], *above*] and the tenant's timely removal of the personal property [*see* [1], *above*]; and

- An amount not exceeding $250 for each bad faith violation of the statute. In determining the amount of the award, the court must consider proof of matters as justice may require.

In addition, the court may award reasonable attorneys' fees and costs to the prevailing party [*Civ. Code § 1965(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutory Remedies & RightsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART II. LEGAL BACKGROUND
D. Disposition of Abandoned Personal Property

18-35B California Legal Forms--Transaction Guide §§ 35B.53-35B.99

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.53[Reserved]



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1. Client Interview--Facts and Documents

18-35B California Legal Forms--Transaction Guide § 35B.100

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.100 Client Interview

NOTE:

The following facts and documents supplement those listed in Ch. 34B, ***Residential Leases,*** Ch. 34C, ***Retail, Industrial, and Office Leases,*** Ch. 34D, ***Ground Leases,*** and Ch. 34E, ***Shopping Centers: Leasing and Operation.***

[1] Facts

1. Name, address, and telephone number of:

    a. Landlord.

    b. Tenant.

    c. Assignee or sublessee.

2. Legal status of parties:

    a. Individual.

    b. Corporation.

    c. Unincorporated association.

d. Trust.

e. Partnership.

f. Fiduciary.

g. Other.

3. Lease's execution date.

4. Lease's expiration date.

5. Description of leased property.

6. If lease was recorded, recording information.

7. Whether lease is oral or written.

8. Whether lease has been modified by either written agreement or executed oral agreement.

9. If lease has been modified, effective date of modification.

10. Type and term of tenancy.

NOTE:

Certain short-term leases may be modified by the landlord's unilateral action [***see*** *Civ. Code § 827*; ***see also*** *§ 35B.201*].

11. Terms of provision(s) to be changed.

12. Proposed change.

13. Effective date of proposed modification.

14. Consideration payable, if any.

[2] Documents

1. Authorization documents, if party to modification is corporation, unincorporated association, fiduciary, or agent [*see* Ch. 34A, *Prelease Forms*].

2. Copy of lease.

3. Written modifications of lease, if any.

4. Written exercise of any option contained in lease.

5. Copy of any documents creating or giving notice of encumbrances on or liens against leased premises.

6. Copy of any subleases of leased premises or any portion of leased premises.

7. Copy of any assignment of leasehold interests.

8. Copy of any prior lease entered into between parties.

9. Copy of documents establishing existence of entity and capacity of individual (i.e. lessee) to sign, e.g.:

a. For corporation:
(1) Certificate from Secretary of State that corporation is in good standing; and

(2) Recent Statement of Domestic Stock showing officers and directors.

b. For limited liability company, agreement and designation of managing member.

c. For limited partnership:

(1) Certification from Secretary of State; and

(2) Statement of who general partners are.

PRACTICE TIP:
Business Entities. It has been this commentator's experience that in one out of every five cases the client's business entity has some infirmity to it. These range from revocation to suspension, or in some simple instances the failure to file a fictitious business name statement in order to have capacity to sue or defend. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide §§ 35B.101-35B.109

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.101[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-35B California Legal Forms--Transaction Guide § 35B.110

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.110 Review of Original Lease Before Modification

1. Determine whether original lease is oral or written.

2. Review lease's term, including:

    a. Balance remaining.

    b. Effect of holding over.

    c. Existence of options to renew or extend.

3. Determine total amount of rent reserved, remaining, or required to be paid to or on behalf of lessor.

4. Review property description.

5. Review existing modifications, if any.

6. Determine permissible methods of modifying lease:

    a. If lease is oral, lease may be modified by written consent of parties, without new consideration [*Civ. Code § 1697*].

    b. If lease is written, lease may be modified by [*Civ. Code § 1698*]:

(1) Written contract.

(2) Oral agreement executed by parties.

(3) Oral agreement supported by new consideration, unless lease expressly provides otherwise.

NOTE:
For modification of a written contract by oral agreement executed by the parties, the statute of frauds must be satisfied if the lease as modified is within its provisions [*Civ. Code § 1698(c)*; ***see*** *Civ. Code § 1624* (statute of frauds)].

c. If lease is for month-to-month term or less, landlord may change lease's terms by giving tenant proper written notice [*see Civ. Code § 827*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide § 35B.111

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.111 Additional Determinations Before Modification

1. Ascertain nature of proposed modification.

2. Review lease to determine:

a. Provisions to be modified.

b. Other provisions affected by proposed modification; if any, determine:
(1) How provisions are affected.

(2) Whether affected provisions should be modified in this agreement.

3. If new consideration is required, determine what consideration will be.

NOTE:
Unless the contract expressly provides otherwise, a contract in writing may be modified by an oral agreement supported by new consideration [***see*** *Civ. Code § 1698(c)*].

4. Determine whether following parties other than landlord and tenant have an interest in lease:

a. Subtenant.

b. Assignee of landlord or tenant, including party with security interest in lease.

c. Other.

5. Determine whether modification will be recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide §§ 35B.112-35B.119

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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18-35B California Legal Forms--Transaction Guide § 35B.120

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.120 Modification

1. If modification requires consent of party other than lessor or lessee, procure that party's written consent.

2. Have lessor and lessee execute modification agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide §§ 35B.121-35B.129

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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4. Drafting Guide

18-35B California Legal Forms--Transaction Guide § 35B.130

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.130 Modification

1. Draft modification agreement, if appropriate [*see § 35B.200*].

2. Draft modification notice, if appropriate [*see § 35B.201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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4. Drafting Guide

18-35B California Legal Forms--Transaction Guide §§ 35B.131-35B.139

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.131[Reserved]



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18-35B California Legal Forms--Transaction Guide § 35B.140

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.140 Client Interview

[1] Facts

1. General information.

NOTE:
See *§ 35B.100[1]* for general facts to obtain in the client interview.

2. For surrender of leasehold by written agreement:

a. Effective date of surrender.

b. Consideration payable, if any.

c. Identity of any possessor other than tenant.

3. For abandonment of premises by tenant:

a. Last known address of tenant, or if unknown, other address where tenant may reasonably be expected to receive notice, if any.

b. For any abandoned personal property:
(1) Description of property.

(2) Address where property may be claimed.

(3) Name and address of presumed owner, if other than tenant.

c. Basis for landlord's belief that premises have been abandoned [*see § 35B.25[3][d]*].

d. Period for which unpaid rent is due, if any.

e. If premises have been or will be relet for tenant's account:

(1) Date and amount of advance payment made by tenant, if any.

(2) Address where tenant may be notified of reletting.

(3) Date of reletting.

(4) Name and address of new lessee.

(5) Rental payment of new lessee.

4. For lease's termination (when surrender or abandonment is not involved):

a. Whether tenant has failed to pay rent that is due; if so:

(1) Amount of rent in default.

(2) Rental periods represented by amount of rent in default.

(3) Last day for which rent was due and paid.

(4) Name of person to whom rent is to be paid, if other than lessor.

b. Whether tenant has defaulted in covenant or condition other than to pay rent; if so:

(1) Nature of default(s).

(2) Whether effective waiver of default has been made.

(3) Whether default can be cured.

(4) If there is proposed remedy for default, determine by whom, how, and when.

c. If periodic tenancy or tenancy at will, amount of notice required to terminate.

d. If lease is for fixed term, whether it contains provision authorizing premature termination.

5. Whether landlord has defaulted in lease's covenants or conditions; if so:

a. Nature of default(s).

b. Whether effective waiver of default has been made.

c. Whether default can be cured.

d. If there is proposed remedy for default, determine by whom, how, and when.

[2] Documents

1. General documents.

NOTE:
See *§ 35B.100[2]* for a list of documents of a general nature regarding the lease to be obtained in the client interview.

2. Copy of any and all notices lessor or tenant received, including:

a. Notice of belief of abandonment.

b. Notice or right to reclaim abandoned personal property.

c. Request for notice of reletting.

d. Notice to quit.

e. Notice to pay rent or quit.

f. Notice to perform covenant or quit.

g. Notice of termination of periodic tenancy or tenancy at will.

PRACTICE TIP:
Get Any and All Notices. Note that the wording in P 2, *above*, is to obtain "any and all" notices. There are different statutory rules applying to different modes of service. Although a single notice produced by a client may indicate one thing in relationship to a deadline, another identical notice served in a different manner may well indicate another thing in relationship to a deadline.

Note, too, that a request for any and all notices should also be accompanied by a request to see the envelopments or other documents with which they were delivered. *By Benjamin Kaplan.*

3. Copy of any prior lease entered into between parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease

ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35B California Legal Forms--Transaction Guide §§ 35B.141-35B.149

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.141[Reserved]



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18-35B California Legal Forms--Transaction Guide § 35B.150

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.150 Surrender of Leasehold by Mutual Agreement

1. Review lease and its modifications, if any, to verify that:

a. Proposed date of surrender is before termination date specified in lease.

b. Parties are not in default on any obligations.

2. Determine whether any sublease or assignment of lease is in effect; if so:

NOTE:
A lease's surrender does not impair or destroy a sublessee's rights, who may retain possession of the premises and sometimes may not be liable for rent [***see*** *Buttner v. Kasser (1912) 19 Cal. App. 755, 759-761, 127 P. 811* ; *City Inv. Co. v. Pringle (1925) 73 Cal. App. 782, 788, 239 P. 302]* .

a. Determine whether party other than lessor and lessee should be notified or should join in execution of surrender agreement.

b. Advise lessor of alternative means of gaining possession or protecting rents, such as [*Buttner v. Kasser (1912) 19 Cal. App. 755, 760, 127 P.811]* :
(1) Refusing to consent to lease's surrender.

(2) Demanding that surrender of actual possession of premises accompany or precede surrender.

(3) Taking assignment of rental under sublease.

3. Determine whether possession of premises will be surrendered simultaneously with execution of surrender agreement.

NOTE:

Surrender of the leasehold differs from surrender of possession of the premises [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* . If the tenant retains possession of the premises beyond the date of surrender, the tenant is guilty of unlawful detainer [*Code Civ. Proc. § 1161(5)*; ***see*** *§ 35B.44*].

4. Determine whether surrender agreement will be recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35B California Legal Forms--Transaction Guide § 35B.151

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.151 Abandonment

1. Determine whether lease is subject to current statutory law or to traditional law on abandonment.

NOTE:

Leases executed (except for those the terms of which were fixed by an agreement executed before such date) on or after July 1, 1971, are subject to a special statutory procedure for abandonment and breach [*Civ. Code § 1952.2*]. Leases executed, or leases the terms of which were fixed by an agreement executed, before that date, however, are still subject to the traditional law on the subject. For further discussion of the governing law, see *§ 35B.25*.

2. If lease is subject to traditional law, determine whether elements of abandonment exist [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 110, 307 P.2d 981]* :

a. Ascertain whether tenant has vacated premises; and

b. Ascertain whether tenant had express intent to abandon property.

NOTE:

Express intent to abandon property may be inferred by a complete indifference as to what may become of the property or who may thereafter possess it [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 110, 307 P.2d 981]* .

3. If lease is subject to current statutory law on abandonment [*see § 35B.25[3]*], determine whether abandonment has

occurred [*see Civ. Code §§ 1951-1952.3*]:

a. Ascertain whether rent has been due and unpaid for at least 14 consecutive days; and

b. Ascertain whether landlord reasonably believes tenant has abandoned premises.

NOTE:
The fact that the lessor knew that the lessee left personal property on the real property does not, of itself, justify a finding that the lessor did not reasonably believe that the lessee had abandoned the real property [*Civ. Code § 1951.3(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help Remedies



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18-35B California Legal Forms--Transaction Guide § 35B.152

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.152 Termination and Unlawful Detainer Notices

1. Determine type of tenancy involved.

a. Tenancy for years (fixed term).
(1) Unexpired.

NOTE:
To maintain an unlawful detainer action under a lease with an unexpired fixed term, the landlord must first serve the tenant with one of the required three-day notices to quit [***see*** *Code Civ. Proc. § 1161(2)-(5)*; ***see also*** *§§ 35B.230-35B.232*].

(2) Expired.

NOTE:
When the tenant holds over after the expiration of a fixed term for years, with the permission and consent of the landlord, one of the tenancies described below will result. None of these tenancies requires a special notice to quit if the notice of termination required for each is given to the tenant [***see*** *Code Civ. Proc. § 1161(1)*].

b. Month-to-month or other periodic tenancy.

NOTE:
A notice of termination of tenancy [***see*** *§ 35B.240*] is sufficient to maintain an unlawful detainer action in the case of a periodic tenancy; no three-day notice to quit is required by statute [*Hennessy v.*

Gleason (1947) 81 Cal. App. 2d 616, 619, 184 P.2d 913 ; ***see*** *Code Civ. Proc. § 1161(1), (5)*].

c. Tenancy of sufferance.

NOTE:

Under a tenancy at sufferance, the landlord may commence an unlawful detainer action at once without serving any notice on the tenant [*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356]* .

d. Tenancy at will.

NOTE:

A 30-day notice of termination of tenancy [***see*** *§ 35B.240*] is required to terminate the lease, and must be served before a tenant is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*]. No further notice to quit is required [***see*** *Code Civ. Proc. § 1161(1)*].

2. Determine if lease has provision authorizing lessor to reenter premises.

NOTE:

The landlord must, notwithstanding such a provision, give the tenant an appropriate three-day notice to quit [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604-605, 12 Cal. Rptr. 488, 361 P.2d 20]* .

3. Determine if subtenant is in possession of premises.

NOTE:

The appropriate notice to quit must be served on a subtenant as well as on a tenant [***see*** *Code Civ. Proc. § 1161(2)-(4)*].

4. Determine whether a forfeiture of lease clause is to be included in notice [*see § 35B.230[1][b][ii]*].

5. Determine whether property is to be sold in foreclosure [*see* 35B.240[1][e]].

NOTE:

A tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a), (c)* (in effect until January 1, 2013)]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)* (in effect until January 1, 2013)].

NOTE:

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, sec. 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett]. The federal provisions are repealed on December 31, 2012 [P.L. 111-22, sec. 704, 123 Stats. 1662].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm TenanciesReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide §§ 35B.153-35B.159

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.153[Reserved]



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18-35B California Legal Forms--Transaction Guide § 35B.160

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.160 Surrender

1. Have parties execute surrender agreement.

2. Record agreement, if appropriate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceDischarges & TerminationsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide § 35B.161

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.161 Abandonment

1. If tenant has abandoned premises, advise lessor of alternative actions available under traditional law [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 671, 155 P.2d 24]* :

NOTE:
If the tenant is found not to have abandoned the premises and actions enumerated in Paragraph (a) or (b), ***below,*** are taken, the landlord is guilty of forcible entry and may be guilty of forcible detainer [***see*** *Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 108-110, 307 P.2d 981]* , even if the lease contains a provision granting the landlord a right of reentry [***see*** *Jordan v. Talbot (1961) 55 Cal. 2d 597, 605-608, 361 P.2d 20]* .

a. Treating lease as in existence, sue for unpaid rent for unexpired portion of lease term as it becomes due.

b. Treating lease as terminated, retake possession for lessor's own account.

c. Holding tenant for difference between lease rentals and what landlord is able in good faith to procure by reletting, retake possession for lessee's account and relet premises.

NOTE:
The lease is considered as continuing in existence if the landlord notifies the tenant that the landlord intends to continue to hold the tenant as a tenant and is reletting the premises in the tenant's account [*Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 684, 230*

P.2d 10] . If the landlord fails to give the tenant notice, the landlord's actions will result in a surrender by operation of law, terminating the lease [*Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 684, 230 P.2d 10]* .

2. If tenant has abandoned premises, advise lessor of alternative actions available under current statutory law:

a. Continue lease in effect.

NOTE:

The landlord may continue to recover rent after the tenant has breached or abandoned the premises if (1) the lease provides for that remedy [*Civ. Code § 1951.4(a)*], (2) the landlord does not terminate the tenant's right to possession [*Civ. Code § 1951.4(b)*], and (3) any of three additional conditions is satisfied [***see*** *Civ. Code § 1951.4(b)(1)-(3)*]. For further discussion, see Ch. 34B, ***Residential Leases*** **.**

b. Terminate lease and recover statutory damages [*see Civ. Code § 1951.2*].

NOTE:

The lessor may terminate the lease and recover statutory damages if (1) the rent on the property has been due and unpaid for at least 14 consecutive days [*Civ. Code § 1951.3(b), (e)(1)*]; (2) the lessor reasonably believes that the lessee has abandoned the property [*Civ. Code § 1951.3(b), (e)(2)*]; and (3) the lessor sends a statutory notice of belief of abandonment to the tenant, and the tenant fails to respond within the required time [*Civ. Code § 1951.3(a), (b)*; ***see*** *§ 35B.212*]. Further, the statutory procedure for terminating a lease because of the tenant's abandonment does not preclude the lessor from serving a notice requiring the lessee to pay rent or quit [***see*** *Code Civ. Proc. §§ 1161, 1162*] nor affect the time and manner of giving any other notice required or permitted by law [*Civ. Code § 1951.3(g)*]. A notice of belief of abandonment does not, however, satisfy the requirements of an unlawful detainer notice to pay rent or quit [*Civ. Code § 1951.3(g)*].

c. If terminating lease:

(1) Send notice of belief of abandonment [*see § 35B.212*].

NOTE:

If the tenant has left personal property on the premises, the landlord may combine a notice of right to reclaim personal property with a notice of belief of abandonment [***see*** *§ 35B.215*], or send a separate notice of right to reclaim personal property [***see*** *§ 35B.214*] simultaneously with the notice of belief of abandonment [*Civ. Code § 1991*]. For discussion of the landlord's optional procedure for disposing of personal property left on abandoned or vacated premises, see *§ 35B.51*. For discussion of the tenant's optional procedure to reclaim personal property, see *§ 35B.52*. If the tenant does not within the required time either respond with a notice of his or her intention not to abandon [***see*** *§ 35B.213*] or pay all or a portion of unpaid rent, then the lease terminates [*Civ. Code § 1951.3(a), (e)(3), (4)*].

d. If lease is terminated, send notice to tenant of landlord's initial reletting of premises when [*Civ. Code § 1951.7(a), (b); see § 35B.244*]:

(1) Tenant has made an advance payment;

NOTE:

The term "advance payment" means moneys paid to the landlord as prepayment of rent, or as a deposit to secure faithful performance of the lease's terms, or another payment that is the substantial equivalent of either of these. However, payment that is not in excess of one month's rent is not an advance payment [*Civ. Code § 1951.7(a)*].

(2) Lease is terminated in accordance with statute providing for termination of lease if tenant abandons property and breaches lease [*see Civ. Code § 1951.2*];

(3) Lessee has made written request to lessor that he or she be given notice of reletting [*see § 35B.243*]; and

(4) Amount of rent due and unpaid at time of termination is less than or equal to amount of advance payment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsRent Recovery



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18-35B California Legal Forms--Transaction Guide § 35B.162

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.162 Termination and Unlawful Detainer Notice

1. Serve appropriate notice to quit on tenant (or subtenant actually occupying the premises) [*see Code Civ. Proc. § 1161*]:

a. Three-day notice to pay rent or quit [*see § 35B.230*].

b. Three-day notice to perform covenant or quit [*see § 35B.231*].

c. Three-day notice to quit [*see § 35B.232*].

2. Serve three-day notice to pay rent or quit any time within one year after rent becomes due [*Code Civ. Proc. § 1161(2)*].

3. Use any one of following means to serve appropriate three-day notice [*Code Civ. Proc. § 1162*]:

a. Deliver copy to tenant personally.

b. If tenant is absent from both residence and usual place of business:
(1) Leave copy with some person of suitable age and discretion at either place; and

(2) Send copy through mail addressed to tenant at place of residence.

c. If tenant's places of residence and business cannot be ascertained, or a person of suitable age or

discretion cannot be found at either place:

(1) Affix copy in conspicuous place on property;

(2) Deliver copy to any person residing on property; and

(3) Mail copy to tenant at leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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18-35B California Legal Forms--Transaction Guide §§ 35B.163-35B.169

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.163[Reserved]



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4. Drafting Guide

18-35B California Legal Forms--Transaction Guide § 35B.170

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.170 Surrender

1. Draft surrender agreement [*see § 35B.210*].



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18-35B California Legal Forms--Transaction Guide § 35B.171

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.171 Abandonment

1. If landlord reasonably believes tenant has abandoned premises, draft notice of belief of abandonment [*see § 35B.212*].

2. If tenant has abandoned premises, draft:

a. Notice of reletting, if lessor chooses to relet premises for lessee's account [*see § 35B.211*].

b. Notice of right to reclaim personal property, if applicable [*see § 35B.214*].

c. Notice of termination of tenancy [*see § 35B.240*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsDamagesMitigation



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18-35B California Legal Forms--Transaction Guide § 35B.172

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.172 Termination

1. If tenant has violated lease covenant, draft, as appropriate:

    a. Three-day notice to pay rent or quit [*see § 35B.230*].

    b. Three-day notice to perform covenant or quit [*see § 35B.231*].

    c. Three-day notice to quit [*see § 35B.232*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsBreachGeneral Overview



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18-35B California Legal Forms--Transaction Guide §§ 35B.173-35B.199

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35B.173[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Modification of Leases

18-35B California Legal Forms--Transaction Guide § 35B.200

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.200 Modification of Lease Agreement

[1] Comment--Use of Form

The form in [2], *below*, is an agreement to modify an existing lease. As a contract as well as a conveyance, a lease must be modified in the manner prescribed for contracts [*Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352* ; *Wright v. Coberly (1967) 250 Cal. App. 2d 31, 35, 58 Cal. Rptr. 213]* . An oral contract entered into on or after July 1, 1977, may be modified by the written consent of the parties, without new consideration [*Civ. Code § 1697*]. A written contract entered into on or after July 1, 1977, may be modified by a written contract by the parties [*Civ. Code § 1698(a)*; *see Civ. Code § 1698(b), (c)* (modification by oral agreement)]. Thus, this form may be used as the written consent or contract required to modify either an existing oral or written lease entered into on or after July 1, 1977.

This form is not appropriate for modifying a lease entered into before January 1, 1977. For these contracts, the provisions of *Civ. Code §§ 1697* and *1698* in effect before that date continue to govern [*see* Stats. 1976, ch. 109, § 5].

Certain short-term leases of a period less than a month may be unilaterally modified by a landlord on written notice to the tenant [*see Civ. Code § 827*]. For the form of notice to be used to modify these short-term leases, see *§ 35B.201*.

[2] FORM

Modification of Lease Agreement
[*If agreement is to be recorded, use:*]

_____

)
Recording Requested by:)
_____ [*name*])
After Recordation, Mail to:)

_____ [*street address*])
_____ [*city, state, zip*])
)
_____

_____

Space above this line for recorder's use

[*Continue with the following:*]

MODIFICATION OF LEASE

Preamble

This supplemental Agreement is made _____[*date*], at _____[*city*], California, by _____[*name*], referred to in this Agreement as "Lessor," and _____[*name*], referred to in this Agreement as "Lessee."

Recitals

A. Lessor is the owner of certain real property situated in _____ County, referred to in this Agreement as "the property," _____[commonly known as _____ (*street address*), *or, if property has no street address,* located in] _____[*city*], California; and,

B. Lessor and Lessee executed a lease on _____[*date*].

C. By the terms of the lease, the property was leased to Lessee for a term of [*term of lease*], beginning on _____[*date*], and ending on _____[*date*].

[*If the lease was recorded*:]

D. The lease was recorded on _____[*date*] [*insert* Book _____, Page _____, *if so designated by recorder of county of recording*] by the County Recorder of [*county*], California.

[*Continue with the following:*]

E. Lessor and Lessee now desire to modify the lease.

THEREFORE, Lessor and Lessee agree as follows:

Terms of Modification

[*EITHER, if the lease to be modified is written, for each paragraph or section to be modified:*]

[Paragraph *or* Section] _____ of the lease is modified to read as follows: [*set forth modified lease provision*].

[*OR, if the lease to be modified is oral, for each provision to be modified:*]

The lease provided as follows: [*set forth original provision desired to be modified*]. The lease is modified as follows: [*set forth modified lease provision*].

[*Continue with the following:*]

In all other regards, the lease shall continue in full force and effect.

This supplemental Agreement shall become effective on _____[*date*].

Executed on _____[*date*], at _____[*city*], [*county*], California.

LESSOR
_____ [*signature*]
[*typed name and title*]
LESSEE
_____ [*signature*]
[*typed name and title*]

[*If agreement is to be recorded*:]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*] before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[*Seal*]

[*Continue with the following:*]

EXHIBIT A

[*Attach lease.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide § 35B.201

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.201 Notice to Tenant Changing Terms of Month-to-Month or Lesser Period Tenancy

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to a tenant changing the terms of a month-to- month or lesser period tenancy. For these types of leases, the landlord may, by giving the tenant proper written notice, change the terms of the lease [*Civ. Code § 827*].

When properly served on a tenant, the notice itself establishes the terms specified in the notice as a part of the lease, if the tenant continues to hold the premises after the notice takes effect [*Civ. Code § 827*].

PRACTICE TIP:

Effect of Rent Control Ordinances. Be careful before using this form to change terms of a *residential* tenancy in a jurisdiction that has a rent control ordinance. Most such ordinances bar any change in terms that works to the disadvantage of the tenant (called a "reduction in services") without a corresponding reduction in rent. *By Myron Moskovitz.*

[b] When Change Takes Effect

Unless the parties have previously agreed otherwise in writing, the change in the lease terms effected by this written notice takes effect as follows [*Civ. Code § 827(a)*]: (1) for tenancies for less than one month, on the expiration of a period at least as long as the term of the hiring itself; (2) for tenancies from month-to-month, on the expiration of not less than 30 days. However, if the change takes effect within a rental term, the rent accruing from the first day of that term to the date of the change must be computed at the rental rate immediately before the change [*Civ. Code § 827(a)*], with one exception. If the parties provide by written agreement that a notice changing the agreement's terms may be given at any time not less than seven days before the term expires, the change is effective on the term's expiration [*Civ.*

Code § 827(a)].

Commencing on January 1, 2001, the amount of the rent increase determines the notice period required with regard to residential leases. If the proposed rent increase for a tenant is 10 percent or less of the rental amount charged to that tenant at any time during the 12 months before the effective date of the increase, either in and of itself or when combined with any other rent increases for the 12 months before the effective date of the increase, the notice must be delivered at least 30 days before the effective date of the increase, and subject to *Code Civ. Proc. § 1013* (extension of time to respond) if served by mail [*Civ. Code § 827(b)*]. If the increase in rent is greater than 10 percent, the minimum notice period is increased by an additional 30 days, and subject to *Code Civ. Proc. § 1013* (extension of time to respond) if served by mail [*Civ. Code § 827(b)*]. However, this additional 30-day period does not apply to an increase in rent caused by a change in a tenant's income or family composition as determined by a recertification required by statute or regulation [*Civ. Code § 827(b)(2)*].

If a state or federal statute, state or federal regulation, recorded regulatory agreement, or contract provides for a longer period of notice regarding a rent increase than that provided above, the personal service or mailing of the notice must be in accordance with the longer period [*Civ. Code § 827(c)*].

[c] Service of Notice

For nonresidential leases, the landlord may serve the notice in one of the following ways [*Code Civ. Proc. § 1162*]:

(1) By delivering a copy to the tenant personally;

(2) If the tenant is absent from his or her residence and usual place of business, by (a) leaving a copy with some person of suitable age and discretion at either place, and (b) sending a copy through the mail addressed to the tenant at his or her place of residence; or

(3) If the tenant's places of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found at either place, by (a) affixing a copy in a conspicuous place on the property, (b) delivering a copy to a person residing on the property (if one can be found), and (c) mailing a copy to the tenant at the leased premises.

Commencing on January 1, 2001, for residential leases the landlord may serve the notice in either one of the following ways [*Civ. Code § 827(b)*]:

(1) By delivering a copy of the notice to the tenant personally; or

(2) By serving a copy by mail under the procedures set forth in *Code Civ. Proc. § 1013*.

[2] FORM

Notice to Tenant Changing Terms of Month-to-Month or Lesser Period Tenancy

NOTICE OF CHANGE OF TERMS OF LEASE

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

Notice is hereby given that the terms of the lease dated _____[*date*], for the premises located at [*address or other description of property*], between the undersigned, as Lessor, and you, as Lessee, are changed as

follows:

[*EITHER, for each paragraph or section to be modified*:]

[Paragraph *or* Section] _____ of the lease is modified to read as follows: [*set forth modified lease provision*].

[*OR, for each unnumbered provision to be modified*:]

The lease provided as follows: [*set forth original provision to be modified*]. The lease is modified as follows: [*set forth modified lease provision*].

[*Continue with the following:*]

In all other regards, the lease shall continue in full force and effect.

This change in the terms of the lease shall become effective on _____[*date*].

Executed on _____[*date*], at _____[*city*], [*county*], California.

LESSOR
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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18-35B California Legal Forms--Transaction Guide §§ 35B.202-35B.209

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 35B.202[Reserved]



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B. Termination of Leases
1. Surrender and Abandonment

18-35B California Legal Forms--Transaction Guide § 35B.210

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.210 Surrender of Leasehold

[1] Comment

[a] Use of Form

The form in [2], *below*, is a surrender of leasehold agreement. By this surrender agreement, a landlord and a tenant agree to terminate their lease in advance of the termination date set forth in the lease, relieving the parties of all further obligations under the lease after the surrender date [*see Code Civ. Proc. § 1971* (surrender defined); *Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* .

For further discussion of the law regarding a lease's surrender, see *§§ 35B.20-35B.23*, and California Real Estate Law and Practice, ch. 201, *Surrender and Abandonment* (Matthew Bender).

[b] Practice Tips

[i] Effect of Surrender on Sublease

Before entering into a surrender of leasehold agreement, the landlord should ascertain whether the tenant has subleased the premises. The lease's surrender does not impair or destroy the sublessee's rights, who may retain possession of the premises on compliance with the conditions of his or her lease and may in some cases not be liable for rent [*see Buttner v. Kasser (1912) 19 Cal. App. 755, 759-761, 127 P. 811* ; *see also City Inv. Co. v. Pringle (1925) 73 Cal. App. 782, 788, 239 P. 302]* . Thus, if before signing this agreement the landlord knows that there is a sublessee, the landlord may either refuse to consent to the lease's cancellation unless it is accompanied by a surrender of actual possession of the premises, or he or she may take an assignment of the rentals under the sublease [*Buttner v. Kasser (1912) 19 Cal. App. 755, 760, 127 P. 811]* .

[ii] Recording Surrender Agreement

If the original lease was recorded, this agreement should also be recorded [*see* Ch. 34C, *Retail, Industrial, and Office Leases*].

[2] FORM

Surrender of Leasehold

[*If agreement is to be recorded, use:*]

	)
Recording Requested by:	)
_____ [*name*]	)
After Recordation, Mail to:	)
_____ [*street address*]	)
_____ [*city, state, zip*]	)
	)

_____

Space above this line for recorder's use

[*Continue with the following:*]

SURRENDER OF LEASEHOLD

Preamble

This Agreement is made _____[*date*], at _____[*city*], California, by _____[*name*], referred to in this Agreement as "Lessor," and _____[*name*], referred to in this Agreement as "Lessee."

Recitals

A. Lessor is the owner of certain real property situated in _____ County, referred to in this Agreement as "the property," _____[commonly known as _____ (*street address*), *or, if property has no street address,* located in] _____[*city*], California.

B. Lessor and Lessee executed a lease on _____[*date*].

[*If the lease was recorded*:]

C. The lease was recorded on _____[*date*] [*insert* Book _____, Page _____, *if so designated by recorder of county of recording*], by the County Recorder of [*county*], California.

[*Continue with the following:*]

D. By the terms of the lease, the property was leased to Lessee for a term of [*term of lease*], beginning on _____[*date*], and ending on _____[*date*].

E. Lessee desires to surrender this lease and all rights to the possession of the property and to release Lessor from its obligations under the lease.

F. Lessor desires to accept Lessee's surrender and to release Lessee from its obligations under the lease.

THEREFORE, Lessor and Lessee agree as follows:

Terms of Surrender

[*EITHER, if the terms of surrender do not include the payment of any monies by the lessee*:]

1. In consideration of the mutual promises contained in this Agreement, Lessee agrees to surrender the lease and vacate the property as of _____[*date*]; and Lessor agrees to accept Lessees's surrender of the lease and of the property; and Lessor and Lessee agree to discharge each other from all obligations under the lease, effective as of _____[*date*].

[*OR, if the terms of surrender include the payment of monies by the lessee*:]

1. In consideration of the mutual promises contained in this Agreement, and in consideration of Lessee's paying Lessor the sum of $_____[*e.g., this sum may represent amount lessee agrees to pay for right to be released from obligations under lease; or it may represent rent that lessee owes until date of surrender*], Lessee agrees to surrender the lease and vacate the property as of _____[*date*]; and Lessor agrees to accept Lessees's surrender of the lease and of the property; and Lessor and Lessee agree to discharge each other from all obligations under the lease, effective as of _____[*date*].

[*Continue with the following:*]

Notices

2. (a) Unless otherwise provided in this Agreement, any notice, tender, or delivery to be given under this Agreement by either party to the other may be effected by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed communicated as of _____[mailing *or* actual receipt *or* _____ (*number*) hours from mailing]. Mailed notices shall be addressed as set forth below,

but each party may change its address by written notice in accordance with this paragraph.

(b) Notice to Lessor shall be addressed as follows: _____.

(c) Notice to Lessee shall be addressed as follows: _____.

Entire Agreement

3. This instrument [*add, if lease is attached:* and Exhibit A] constitute the entire agreement between the parties regarding the leasehold's surrender. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing and signed by the Lessor and Lessee.

Attorney's Fees

4. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Binding Effect

5. This Agreement shall be binding on and inure to the benefit of the parties to this Agreement and their heirs, personal representatives, successors, and assigns.

Executed on _____[*date*], at _____[*city*], [*county*], California.

LESSOR
_____ [*signature*]
[*typed name and title*]

LESSEE
_____ [*signature*]
[*typed name and title*]

[*If agreement is to be recorded, see § 35B.200[2] for acknowledgment.*]

EXHIBIT A

[*Attach lease.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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18-35B California Legal Forms--Transaction Guide § 35B.211

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.211 Notice to Lessee of Lessor's Intention to Relet Premises for Lessee's Account

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to a lessee that the lessor intends to relet the leased premises for the lessee's account following the lessee's abandonment of the property. The lessor must give this type of notice if the lease was executed before July 1, 1971 [*Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683-684, 230 P.2d 10*], and may, but is not required to, give this notice, as appropriate, if the lease was executed on or after that date [*see Civ. Code § 1951.4(a), (b)*].

[b] Pre-July 1, 1971 Leases

If a lessee under a lease executed before July 1, 1971, abandons the premises, the lessor may retake possession on the lessee's behalf and relet the premises for the lessee's account. In that case, the lessee is responsible for the difference between the rent specified in the lessee's lease and the amount the lessor is able in good faith to procure by reletting [*Kulawitz v. Pacific etc. Paper Co. (1944) 25 Cal. 2d 664, 671, 155 P.2d 24* ; *see Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* . The lessor must notify the lessee that the retaking is on the lessee's behalf, and that the landlord intends to relet the premises on behalf of the lessee to mitigate damages [*Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683-684, 230 P.2d 10]* .

For further discussion of abandonment pertaining to leases executed before July 1, 1971, see *§ 35B.25[2]*.

[c] Post-July 1, 1971 Leases

Under statutory law enacted since 1970, a lessor of real property may not continue the lease in effect following the

lessee's breach of the lease and abandonment of the leased premises unless all of the following factors are met [*Civ. Code § 1951.4(a), (b)*]:

- The lease provides for this remedy [*see* Ch. 34B, *Residential Leases*];
- The lease permits subletting or assignment; and
- The lessor does not terminate the lessee's right of possession.

For these purposes, the following do not constitute a termination of the lessee's right to possession [*Civ. Code § 1951.4(c)*]:

- Acts of maintenance or preservation of the property;
- Efforts to relet the property;
- The appointment of a receiver on the lessor's initiative to protect the lessor's interest under the lease; and
- Withholding consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate the lessee's rights.

The landlord is not required to give the tenant notice of the landlord's election to continue the lease in effect and to relet the property [*see Civ. Code § 1951.4(a), (b)*]. However, the landlord may want to send this type of notice as a reminder to the tenant that a lease clause provides for this remedy and as notification of the landlord's election to continue the lease.

[2] FORM

Notice to Lessee of Lessor's Intention to Relet Premises for Lessee's Account

NOTICE OF INTENTION TO RELET

TO: _____[*name of lessee/tenant*]
_____[*street address*]
_____[*city, state, zip*]

[*EITHER, if the lease was executed before July 1, 1971*:]

Notice is given that the undersigned Lessor, in accordance with the lease executed by Lessor and Lessee on _____[*date*], intends to continue the lease in effect until the termination date of _____, as specified in the lease. Consequently, the Lessor is proceeding to relet the premises described in the lease, as your agent and for your account.

[*OR, if the lease was executed on or after July 1, 1971, and contains the appropriate provision to continue the lease in effect*:]

Notice is given that the undersigned Lessor, in accordance with Section _____ of the lease executed by Lessor and Lessee on _____[*date*], intends to continue the lease in effect until the termination date

of _____[*date*], as specified in the lease. Consequently, the Lessor is proceeding to relet the premises described in the lease, as your agent and for your account.

[*Continue with the following:*]

Date: _____

LESSOR _____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigation



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
1. Surrender and Abandonment

18-35B California Legal Forms--Transaction Guide § 35B.212

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.212 Notice to Tenant of Landlord's Belief of Abandonment of Leased Premises

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of (1) the lessor's belief that a lessee has abandoned leased property, and (2) the lessor's intention to terminate the lease. The notice must be in substantially the form prescribed by statute [*Civ. Code § 1951.3(d)*].

When the rent on leased real property has been due and unpaid for at least 14 consecutive days, and the landlord reasonably believes that the tenant has abandoned the property, the landlord may give a notice of belief of abandonment (this form) to the tenant [*Civ. Code § 1951.3(b)*; *see Civ. Code § 1951.3(e)* (standards for determining abandonment); *see also § 35B.25[3][d]*].

Use of this form and its implementing procedure neither precludes the lessor from serving a notice requiring the lessee to pay rent or quit nor affects the time and manner of giving any other notice required or permitted by law [*Civ. Code § 1951.3(g)*; *see Code Civ. Proc. §§ 1161, 1162* (notice to pay rent or quit); *see also § 35B.230*].

PRACTICE TIP:

Landlord Should Give Statutory Notice. The landlord is not required to give the statutory notice of abandonment to take possession of abandoned premises [*see Civ. Code § 1951.3(b)*]. However, lessors gain a substantial advantage by doing so. If the landlord fails to give the notice, he/she takes a risk: if the landlord takes possession and turns out to be wrong--that is, the tenant has not in fact abandoned the property--the landlord might be liable for damages for trespass, forcible entry, and/or forcible detainer. These are strict liability claims, and the landlord's good faith belief is no defense. Proper compliance with the statutory notice requirements protects the landlord from such claims even if it turns out that the

premises were not in fact abandoned. *By Myron Moskovitz.*

This form is not appropriate for use when the lease was executed before July 1, 1971, or when the lease was executed after that date, but its terms were fixed by an agreement executed before July 1, 1971. For discussion of the law on abandonment as it pertains to those leases, see *§ 35B.25[2]*, and California Real Estate Law and Practice, ch. 201, *Surrender and Abandonment* (Matthew Bender). For further discussion of the law of abandonment as it pertains to leases executed on or after July 1, 1971, see *§ 35B.25[3]*.

For a notice stating the tenant's intent not to abandon the real property and stating an address at which he or she may be served by certified mail in any action for unlawful detainer of the real property, see *§ 35B.213*.

[b] Contents of Notice

[i] Date

The notice must specify the date on which the lease will terminate. This date must not be less than 15 days after personal service of the notice, or not less than 18 days after deposit in the mail, as appropriate [*Civ. Code § 1951.3(b)*].

[ii] Notice to Reclaim Abandoned Personal Property

When a tenant has left personal property on the premises and the lessor elects to dispose of the property in accordance with an optional statutory procedure [*see Civ. Code §§ 1980 et seq.* (residential property), 1993 et seq. (parallel procedure applicable to commercial property); *see also § 35B.51*], the lessor may combine the notice in this form with a notice to the tenant of his or her right to reclaim the abandoned personal property [*Civ. Code §§ 1991, 1993.09*; *see § 35B.215*], or may concurrently send this notice and a separate notice of the tenant's right to reclaim the property [*see Civ. Code § 1951.3* (belief of abandonment of leased premises); *Civ. Code §§ 1983, 1984* (notice to former residential tenant of right to reclaim abandoned personal property), 1993.03, 1993.04 (notice to former commercial tenant of right to reclaim abandoned personal property); *see also § 35B.214*].

For further discussion of the law governing the procedure for notifying a tenant and disposing of abandoned property, see *§§ 35B.51* and *35B.214*. For discussion of an alternative statutory procedure for disposing of a former tenant's personal property, which must be initiated by the former tenant [*see Civ. Code § 1965*], see *§§ 35B.52* and *35B.217*.

[c] Service of Notice

A landlord's notice of belief of abandonment must be personally delivered to the tenant or sent by first-class mail, postage prepaid, to the tenant at his or her last known address and, if there is reason to believe that the notice sent to that address will not be received by the tenant, it must also be sent to any other address known to the landlord where the tenant may reasonably be expected to receive the notice [*Civ. Code § 1951.3(c)*].

[2] FORM

Notice to Tenant of Landlord's Belief of Abandonment of Leased Premises

NOTICE OF BELIEF OF ABANDONMENT OF LEASED PREMISES

TO: _____[*name of lessee/tenant*]
_____[*street address*]
_____[*city, state, zip*]

This notice is given in accordance with *California Civil Code Sections 1951.3* and *1983* concerning the real property

leased by you at _____ [*address or other sufficient description*].

The rent on this property has been due and unpaid for 14 consecutive days and the landlord believes that you have abandoned the property.

The real property will be deemed abandoned within the meaning of *California Civil Code Section 1951.2* and your lease will terminate on _____[*date not less than 15 days after this notice is served personally or, if mailed, not less than 18 days after this notice is deposited in the mail*], unless, before that date, the undersigned receives at the address indicated below a written notice from you stating both of the following:

(1) Your intent not to abandon the real property; and

(2) An address at which you may be served by certified mail in any action for unlawful detainer of the real property.

You are required to pay the rent due and unpaid on this real property as required by the lease, and your failure to do so can lead to a court proceeding against you.

Date: _____.

LANDLORD
_____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.213

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.213 Notice by Tenant of Nonabandonment of Leased Premises

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice by a tenant of the tenant's intention not to abandon leased property. It is a reply to a landlord's notice of belief of abandonment of premises [*see § 35B.212*]. By providing written notice of the intention not to abandon the premises, the tenant may prevent the lease's termination on the date specified in the landlord's notice.

This form is not appropriate for use when the lease was executed before July 1, 1971, or when the lease was executed after that date, but its terms were fixed by an agreement executed before July 1, 1971. For discussion of the law on abandonment pertaining to those leases, see *§ 35B.25[2]*, and California Real Estate Law and Practice, ch. 201, *Surrender and Abandonment* (Matthew Bender). For discussion of the statutory law on abandonment, see *§ 35B.25[3]*, and California Real Estate Law and Practice, ch. 201, *Surrender and Abandonment* (Matthew Bender).

[b] Contents of Notice

The notice must include an address at which the tenant may be served by certified mail in any action for unlawful detainer [*Civ. Code § 1951.3(a)*; *see Code Civ. Proc. § 415.47(a), (b)* (service of unlawful detainer summons)].

[2] FORM

Notice by Tenant of Nonabandonment of Leased Premises

NOTICE OF INTENT NOT TO ABANDON REAL PROPERTY

TO: _____[*name of lessor/landlord*]
_____[*street address*]
_____[*city, state, zip*]

You are hereby notified that the undersigned, who is the lessee/tenant of the real property [located at _____ (*street address*), *or, if property has no street address,* located in] _____[*city*], California, does not intend to abandon this property.

The address at which the undersigned may be served by certified mail in any action for unlawful detainer of the property is _____[*address*].

Date: _____.

LESSEE
_____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.214

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.214 Notice to Tenant or Personal Property Owner of Right to Reclaim Abandoned Personal Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice informing a tenant (or person believed to be the owner of abandoned property) who has vacated leased premises that he or she left behind personal property that may be reclaimed. Under the optional statutory procedure for disposing of abandoned personal property [*see Civ. Code §§ 1980* (applicable to personal property left at residential property), 1993 et seq. (parallel procedures applicable to commercial property)], the landlord must give written notice to the tenant and to any other person whom the landlord reasonably believes to be the property's owner [*Civ. Code §§ 1983(a), 1993.03(a)*]. If the property remaining on the premises consists of records as defined in *Civ. Code §§ 1980(e)* and *1993(f)* ("records" means any material, regardless of the physical form, on which information is recorded or preserved by any means, including in written or spoken words, graphically depicted, printed, or electromagnetically transmitted; it does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number) the tenant is presumed to be the owner of the records [*Civ. Code §§ 1983(a), 1993.03(a)*].

Although the notice of right to reclaim abandoned personal property is ordinarily given only after the tenancy has terminated and the tenant has vacated the premises, it may be given at the same time as a notice of belief of abandonment, even though the tenancy does not terminate until the end of the period specified in the notice of belief of abandonment [*Civ. Code §§ 1991, 1993.09*]. For a notice of belief of abandonment, see *§ 35B.212*. For a combined notice of the landlord's belief of abandonment and of the tenant's right to reclaim abandoned property, see *§ 35B.215*.

The landlord need not give this notice if the alternate statutory procedure for the surrender of a former tenant's personal property, which must be initiated by the former tenant, has been initiated or completed [*Code Civ. Proc. § 1174(f)*; *see Civ. Code § 1965* (tenant's optional statutory procedure to reclaim personal property)]. For a discussion of that

procedure, see *§§ 35B.52* and *35B.217*.

Further, this optional statutory procedure for the disposition of personal property remaining on the premises after a tenancy has terminated and the premises have been vacated by a tenant is not available in situations specifically governed by other statutes [*Civ. Code § 1981*]. For example, it may not be used for unclaimed property in a hospital [*see Civ. Code § 1862.5*], for any manufactured home, mobilehome, or any commercial modular [*see Health & Safety Code §§ 18007* (manufactured home defined), 18008 (mobilehome defined), 18001.8 (commercial modular defined)], or for the lost property, which must be disposed of in accordance with the lost property statutes [*see Civ. Code §§ 1982, 1993.01, 2080-2080.9*].

[b] Contents of Notice

The contents of the notice are substantially prescribed by statute [*see Civ. Code §§ 1983, 1984, 1993.03, 1993.04*]. The notice must do both of the following [*Civ. Code §§ 1983(b), 1993.03(b)*]:

- Describe the property in a manner reasonably adequate to permit the property's owner to identify it and may describe all or a portion of the property; and

- Advise the person to be notified (1) that reasonable costs of storage may be charged before the property is returned, (2) where the property may be claimed, and (3) the date before which the claim must be made.

The date specified in the notice must be not less than 15 days after the notice is personally delivered or not less than 18 days after the notice is deposited in the mail [*Civ. Code §§ 1983(b), 1993.03(b)*].

[c] Service of Notice

The notice of right to reclaim abandoned property must be personally delivered to the person to be notified or sent by first-class mail, postage prepaid, to the person to be notified at his or her last known address [*Civ. Code §§ 1983(c), 1993.03(c)*]. If there is reason to believe that the notice sent to that address will not be received, the notice also must be sent to any other address, if any is known to the landlord, where the person may reasonably be expected to receive the notice [*Civ. Code §§ 1983(c), 1993.03(c)*]. If the notice is sent by mail to the former tenant, one copy must be sent to the premises vacated by the tenant [*Civ. Code §§ 1983(c), 1993.03(c)*].

[2] FORM

NOTICE OF RIGHT TO RECLAIM ABANDONED PROPERTY

TO: _____[*name of former tenant or owner of personal property*]
_____[*street address*]
_____[*city, state, zip*]

[*EITHER, if the former tenant is the property owner*:]

When you vacated the premises at _____[*address, including unit number, if any*], the following personal property remained: _____

[*OR, if the former tenant is not the property owner*:]

When _____[*name of former tenant*] vacated the premises at _____[*address, including unit number, if any*], the following personal property remained: _____

[*Continue with the following*:]

[*adequate description of the personal property*].

You may claim this property at _____[*address*].

This property may be disposed of in accordance with *California Civil Code Section [1988 or 1993.07*] unless you do both of the following:

(1) Pay the reasonable cost of storage for all the above-described property; and

(2) Take possession of the property that you claim, no later than

_____ [*date not less than 15 days after notice is personally delivered or, if mailed, no less than 18 days after notice is deposited in the mail*].

California Civil Code Section [1988 or 1993.07] provides that this property may be sold at public sale.

[*EITHER*:]

If you fail to reclaim the property, it will be sold at a public sale after notice of the sale has been given by publication. You have the right to bid on the property at this sale. After the property is sold and the cost of storage, advertising, and sale is deducted, the remaining money will be paid over to the county. You may claim the remaining money at any time within one year after the county receives the money.

[*OR, if the personal property has an estimated value of less than $300 (for residential property) or the lesser of $750 or $1 per square foot of the premises (for commercial property)*:]

Because this property is believed to be worth less than [$300 *or* _____ (*amount calculated for personal property left at commercial premises*)], it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated above.

[*Continue with the following*:]

Date: _____.

LANDLORD
_____ [*signature*]
[*typed name*]

_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
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1. Surrender and Abandonment

18-35B California Legal Forms--Transaction Guide § 35B.215

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.215 Combined Notice to Tenant of Landlord's Belief of Abandonment of Leased Premises and Tenant's Right to Reclaim Abandoned Personal Property

[1] Comment--Use of Form

The form in [2], *below*, is a combined notice of a landlord's belief that a tenant has abandoned leased premises and of the tenant's right to reclaim personal property left behind on the premises.

The landlord may give to the tenant a single notice of belief of abandonment and of right to reclaim the abandoned property [*Civ. Code §§ 1991* (property left on residential premises), 1993.09 (property left on commercial premises)]; or he or she may give separate notices of each [*see Civ. Code § 1951.3* (belief of abandonment of leased premises); *Civ. Code §§ 1983, 1984* (tenant's right to reclaim personal property left at residential premises), 1983.03, 1983.04 (tenant's right to reclaim personal property left at commercial premises)]. Although the notice of right to reclaim abandoned personal property is ordinarily given only after the tenancy has terminated and the tenant has vacated the premises, it may be given at the same time as a notice of belief of abandonment, even though the tenancy does not terminate until the end of the period specified in the notice of belief of abandonment [*Civ. Code §§ 1991, 1993.09*; *see Civ. Code § 1983(a), 1993.03(a)* (notice given after abandonment)].

This form is not appropriate for use when the lease was executed before July 1, 1971, or when the lease was executed after that date, but its terms were fixed by an agreement executed before July 1, 1971. For a discussion of the law on abandonment as it pertains to those leases, see *§ 35B.25[2]*, and California Real Estate Law and Practice, Ch. 201, *Surrender and Abandonment* (Matthew Bender).

For a discussion of the statutory procedure for terminating a lease, see *§§ 35B.25[3]* and *35B.212*. For a discussion of the optional procedure for disposing of abandoned personal property by the landlord, see *§§ 35B.51* and *35B.214*.

[2] FORM

NOTICE OF BELIEF OF ABANDONMENT OF LEASED PREMISES AND OF RIGHT TO RECLAIM ABANDONED PROPERTY

TO: _____[*name of lessee/tenant*]
_____[*street address*]
_____[*city, state, zip*]

This notice is given in accordance with *California Civil Code Sections 1951.3* and [1983 *or* 1993.03] concerning the real property leased by you at [*address or other sufficient description*].

The rent on this property has been due and unpaid for 14 consecutive days, and the [lessor *or* landlord] believes that you have abandoned the property.

The real property will be deemed abandoned within the meaning of *California Civil Code Section 1951.2*, and your lease will terminate on _____[*date not less than 15 days after this notice is served personally or, if mailed, not less than 18 days after this notice is deposited in the mail*], unless, before that date, the undersigned receives at the address indicated below a written notice from you stating both of the following:

(1) _____Your intent not to abandon the real property; and

(2) _____An address at which you may be served by certified mail in any action for unlawful detainer of the real property.

You are required to pay the rent due and unpaid on this real property as required by the lease, and your failure to do so can lead to a court proceeding against you.

The following personal property remains on the premises described above: [*adequate description of the personal property*].

You may claim this property at _____[*address*].

This property may be disposed of in accordance with *California Civil Code Section [1988 or 1993.07*] unless you do both of the following:

(1) _____Pay the reasonable cost of storage for all the above-described property; and

(2) _____Take possession of the property that you claim, no later than

_____ [*date not less than 15 days after notice is personally delivered or, if mailed, no less than 18 days after notice is deposited in the mail*].

California Civil Code Section [1988 or 1993.07] provides that this property may be sold at public sale.

[*EITHER*:]

If you fail to reclaim the property, it will be sold at a public sale after notice of the sale has been given by publication.

You have the right to bid on the property at this sale. After the property is sold and the cost of storage, advertising, and sale is deducted, the remaining money will be paid over to the county. You may claim the remaining money at any time within one year after the county receives the money.

[*OR, if the personal property has an estimated value of less than $300 (for residential property) or the lesser of $750 or $1 per square foot of the premises (for commercial property)*:]

Because this property is believed to be worth less than [$300 *or* _____ (*amount calculated for personal property left at commercial premises*)], it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated above.

[*Continue with the following*:]

Date: _____.

LANDLORD
_____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.216

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.216 Notice of Public Sale of Tenant's Personal Property

[1] Comment

[a] Use of Form

The form in [2], *below*, a notice to be published in a newspaper, announces a landlord's public sale of personal property left behind by a tenant at the termination of a tenancy. It may be used by a landlord who has elected to dispose of property left behind by a tenant under the optional statutory procedure for disposing of a former tenant's personal property [*see Civ. Code §§ 1980 et seq.* (property left at residential premises), 1983 et seq. (property left at commercial premises); *see also § 35B.214*]. It may also be used by a keeper with whom personal property has been left [*Civ. Code §§ 1980(a)*, (f), *1981(a), 1993(b)*, (g), *1993.02*; *see* Ch. 102, *Bailments*].

This form contains the following three alternative versions of the required notice:

- The first alternative is to be used to advertise the sale of property left behind by a single tenant or the tenants of a single unit.

- The second alternative covers the sale of property left by various tenants in a single building or complex.

- The third alternative covers the sale of property left by various tenants at various locations.

[b] Publication Requirements

Before selling property left behind by former tenants, a landlord must give notice of the sale by publication in a newspaper of general circulation published in the county where the sale is to be held [*Civ. Code §§ 1988(b), 1993.07(b)*

]. The notice must be published once weekly for two consecutive weeks [*Gov. Code § 6066*]. Two publications in a paper published at least once weekly, with at least five days intervening between the two publication dates, is sufficient [*Civ. Code §§ 1988(b), 1993.07(b)*; *Gov. Code § 6066*]. The first publication may not be made before the last of the dates on which the tenant or owner is permitted to reclaim the property in accordance with the written notice required to be sent to the tenant or owner [*Civ. Code §§ 1983(a), 1988(b), 1993.03(a), 1993.07(b)*; *see §§ 35B.214, 35B.215*]. The last publication may not be less than five days before the sale is to be held [*Civ. Code § 1988(b), 1993.07(b)*].

[c] Contents of Notice

The notice of sale must give the time and place of the sale, and must describe the property to be sold in a manner reasonably adequate to permit the owner to identify it [*Civ. Code §§ 1988(b), 1993.03(b)*]. The notice may describe all or a portion of the property [*Civ. Code §§ 1988(b), 1993.03(b)*]. The landlord will not be protected from liability with regard to any property not described in the notice, except that the contents of a container that is locked, fastened, or tied in a manner that deters immediate access to its contents need not be described [*Civ. Code §§ 1988(b), 1993.03(b)*]. However, the container itself must be described, and the fact that the contents cannot be ascertained must be stated [*Civ. Code §§ 1988(b), 1993.03(b)*].

[2] FORM

SALE OF UNCLAIMED PERSONAL PROPERTY

[EITHER, if property has been left behind by a single tenant or the tenants of a single unit:]

In accordance with *California Civil Code Section [1988(b) or 1993.03(b)]* [miscellaneous household goods and furniture *or* describe actual items] left by _____[*name of tenant*] in the possession of _____[*name of landlord*] at _____[*street address and city*], California, will be sold at public auction on _____[*date*], at _____[*street address, city, and county*], California, to the highest bidder for cash.

[*OR*, if property has been left by various tenants in a single building or complex:]

In accordance with *California Civil Code Section [1988(b) or 1993.03(b)]*, the items of personal property described below, left by the named tenants, in the possession of _____[*name of landlord*] at _____[*street address and city*], California, will be sold at public auction on _____[*date*], at _____[*street address, city, and county*], California, to the highest bidder for cash.

_____[*tenants' names*]

[*description of each item to be sold*]

[*OR*, if property has been left by various tenants at various locations:]

In accordance with *California Civil Code Section [1988(b) or 1993.03(b)*], the items of personal property described below, left by the named tenants, in the possession of _____[*name of landlord*] at the addresses listed, will be sold at public auction on _____[*date*], at _____[*street address, city, and county*], California, to the highest bidder for cash.

_____[*tenants' names*]
_____[*tenants' addresses*]

[*description of each item to be sold*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-35B California Legal Forms--Transaction Guide § 35B.217

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.217 Tenant's Request for Return of Personal Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a request by a tenant for the return of personal property left on the residential premises formerly occupied by the tenant. This method of reclaiming personal property is an alternative to the optional statutory procedure for use by the landlord to dispose of personal property remaining on the premises after a tenancy has been terminated and the premises vacated [*Civ. Code § 1965(c)*; *see Civ. Code §§ 1980-1991* (landlord's optional statutory procedure); *see also §§ 35B.51, 35B.214*].

This remedy is not exclusive and will not preclude either the landlord or the tenant from pursuing any other remedy provided by law [*Civ. Code § 1965(f)*].

[b] Limitations on Use of Form

This form and its implementing procedure may not be used when either of the following circumstances exist [*Civ. Code § 1965(c)*]:

(1) The personal property's disposition has been initiated or completed in accordance with the alternative optional statutory procedure initiated by the landlord [*see Civ. Code §§ 1980-1991*; *see also §§ 35B.52, 35B.214*]; or

(2) The relevant tenancy was in a hotel, motel, or residence club where the innkeeper retained a right of access to the dwelling unit or provided certain services [*see Civ. Code § 1940(b)*].

[2] FORM

Tenant's Request for Return of Personal Property

REQUEST BY TENANT FOR RETURN OF TENANT'S PERSONAL PROPERTY

TO: _____[*name of lessor/landlord*]
_____[*street address*]
_____[*city, state, zip*]

This request is made in accordance with *California Civil Code Section 1965* concerning the real property leased from you at [address *or other sufficient description*].

The undersigned was the tenant at those premises until _____[*date*]. On that date, the undersigned vacated the premises but left the following personal property on the premises: [*description of the personal property*].

The undersigned hereby requests that you surrender that property to the undersigned. The undersigned agrees to claim and remove the property at a reasonable time mutually agreed on by you and the undersigned.

Date: [*must be within 18 days of tenant's departure from premises*].

FORMER TENANT
_____ [*signature*]
[*typed name*]
_____ [*street address*]
_____ [*city, state, zip*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
1. Surrender and Abandonment

18-35B California Legal Forms--Transaction Guide §§ 35B.218-35B.229

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35B.218[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
2. Unlawful Detainer Notices to Quit

18-35B California Legal Forms--Transaction Guide § 35B.230

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.230 Three-Day Notice to Pay Rent or Quit

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to pay rent or quit the premises. It is to be delivered by a lessor to a tenant who, before the lease's termination period, continues in possession of leased property after defaulting in the rental payments. The notice is part of the unlawful detainer proceeding [*Code Civ. Proc. §§ 1161-1179a*] and is a condition precedent to the filing of a complaint for unlawful detainer [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 905, 126 Cal. Rptr. 34]* .

The purpose of the notice is to give the tenant the opportunity to pay rent and retain possession of the premises; and if payment is made within the three-day notice period, the right to possession remains with the tenant as if there had been no default [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 905, 126 Cal. Rptr. 34]* . This notice to pay rent or quit is appropriate for use even if the landlord has previously given the tenant a notice of belief of abandonment [*see §§ 35B.212, 35B.215*], since that notice does not satisfy the notice requirements of an unlawful detainer proceeding [*Civ. Code § 1951.3(g)*].

For further discussion of the unlawful detainer procedure, see California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer* (Matthew Bender). For coverage of unlawful detainer actions, including numerous forms of complaint for unlawful detainer, see California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender).

[b] Contents of Notice

[i] Rent Owed

Since one of the purposes of this three-day written notice is to point out specifically to the tenant the amount of rent due, and to give the tenant the opportunity to pay the rent within the time allowed by law [*see Haydell v. Silva (1962) 201 Cal. App. 2d 20, 23, 19 Cal. Rptr. 705]* , it is essential that the notice (1) state no more than the amount of rent due, and (2) be phrased in the alternative, that is, demanding that the tenant either pay the rent due or quit the premises [*see Werner v. Sargeant (1953) 121 Cal. App. 2d 833, 837, 264 P.2d 217]* . "Rent," for these purposes, refers only to the periodic payment for occupancy labeled in a lease as rent and not to other duties owed to the landlord, including obligations to pay real estate taxes, a proportionate share of the cost of maintaining common areas, or other monies [*Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 586, 207 Cal. Rptr. 532]* .

A three-day notice that demands payment of more than one year's rent is insufficient to support an unlawful detainer action because it does not correctly state "the amount which is due" and because it is not served within "one year after the rent becomes due" [*see* [c], *below*], both of which are required under *Code Civ. Proc. § 1161(2)* [*Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 697-698, 32 Cal. Rptr. 2d 635]* .

In regard to commercial real property, *Code Civ. Proc. § 1161.1* provides that a landlord may estimate the rent in a *Code Civ. Proc. § 1161(2)* notice under certain defined circumstances [*see* [e], *below*].

In addition to the amount due, the three-day notice must set forth the name, telephone number, and address of the person to whom the rent payment is to be made [*Code Civ. Proc. § 1161(2)*]. If the payment may be made personally, the notice must state the usual days and hours that person will be available to receive the payment or the number of an account and the name and street address of a financial institution into which the rental payment may be made, provided that the institution is located within five miles of the rental property [*Code Civ. Proc. § 1161(2)*]. If the address for payment does not allow for personal delivery, it will be conclusively presumed that on the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner [*Code Civ. Proc. § 1161(2)*]. If an electronic funds transfer procedure has been previously established, the notice must state that payment may be made pursuant to that procedure [*Code Civ. Proc. § 1161(2)*].

[ii] Forfeiture of Lease

The tenant's failure to pay rent does not automatically result in the leasehold's forfeiture, but merely gives the lessor the right to terminate the lease in accordance with set statutory provisions [*Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 714, 78 Cal. Rptr. 344* ; *see Civ. Code § 791* (landlord's right of reentry); *see also* [g], *below*].

For a forfeiture to occur, the notice must contain wording that warns the tenant that nonpayment during the three-day period will cost the tenant his or her tenancy rights [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 905, 126 Cal. Rptr. 34]* . If the notice contains the appropriate forfeiture language, a landlord may refuse to accept the payment of rent after the three-day period expires and proceed to terminate the tenant's possession. However, if there is no forfeiture provision, a tenant is not foreclosed from paying the rent after the expiration of the three-day period and retaining possession [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 905, 126 Cal. Rptr. 34]* . An unlawful detainer judgment declaring the lease's forfeiture will not relieve the tenant from liability for damages for the lease's termination in accordance with *Civ. Code § 1951.2* [*Code Civ. Proc. § 1174.5*].

[c] Service of Notice

Except in the case of tenants of agricultural lands [*see* [h], *below*] the notice to pay rent or quit may be served at any time within one year after the rent becomes due [*Code Civ. Proc. § 1161(2)*]. The landlord may serve the notice by one of the following methods [*Code Civ. Proc. § 1162*]:

- By delivering a copy to the tenant personally;

- If the tenant is absent from his or her residence and usual place of business, by (1) leaving a copy with some person of suitable age and discretion at either place and (2) sending a copy through the mail addressed to the tenant at his or her place of residence; or

- If the tenant's places of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found at either place, by affixing a copy in a conspicuous place on the property, delivering a copy to a person residing on the property (if one can be found), and mailing a copy to the tenant at the leased premises.

PRACTICE TIP:

Obtain Personal Service of Notice. The law "abhors a forfeiture." In addition, since judges are loathed to terminate a tenancy in which the tenant has moneys invested in an established business, they will strictly construe service statutes. Therefore, it is always best to obtain personal service of any "cure" notice. This does not mean that other modes of service should not be simultaneously utilized as well. Often a tenant who is dodging personal service will let his or her guard down upon being served in another manner, thus leaving the tenant open to personal service. *By Benjamin Kaplan.*

[d] Subtenants

The three-day notice normally must be served, in the manner specified by statute [*see Code Civ. Proc. § 1162*; *see also* [c], *above*], on any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(2)*]. However, the landlord may maintain an unlawful detainer proceeding against the tenant without serving the subtenant if both the tenant and the subtenant occupy the premises [*Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795]* . However, if the landlord wants to evict both the tenant and the subtenant, the subtenant must be served with a separate notice that complies with the statutory requirements, rather than with a copy of the notice that is directed to and served on the tenant [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 904-905, 126 Cal. Rptr. 34]* .

PRACTICE TIP:

Service of Notice on Subtenants. Note, however, that the notice must be served on the subtenant only if the breach is curable. *By Myron Moskovitz.*

PRACTICE TIP:

Serve Everyone! Serve everyone in occupation of the premises or who might have a colorable claim to the possession or control of the premises, and serve them in all ways and often. *By Benjamin Kaplan.*

[e] Requirements Affecting Commercial Property

[i] "Commercial Real Property" Defined

Special requirements govern the application of *Code Civ. Proc. § 1161* to commercial real property [*see Code Civ. Proc. § 1161.1*]. For these purposes, "commercial real property" means all real property in California except the following:

- Dwelling units [*see Code Civ. Proc. § 1161.1(d)*; *see also Civ. Code § 1940(c)* ("dwelling unit" defined)];

- Mobilehomes [*see Code Civ. Proc. § 1161.1(d)*; *see also Civ. Code § 798.3* ("mobilehome" defined)]; and

- Recreational vehicles [*see Civ. Code §§ 799.24(a), 799.29* ("recreational vehicle" defined); *Health & Safety Code § 18862.39* ("recreational vehicle park" defined)].

[ii] Rights and Liabilities of Tenant

Under the special requirements of *Code Civ. Proc. § 1161.1*, if the amount stated in the three-day notice provided to the tenant pursuant to statute [*see Code Civ. Proc. § 1161(2)*] is clearly identified by the notice as an estimate, and the amount claimed is not, in fact, correct, the tenant will be subject to judgment for possession. The tenant will also be subject to the actual amount of rent and other sums found to be due if the court in the unlawful detainer action determines that (1) rent is owing and (2) the amount claimed in the notice was "reasonably estimated" [*Code Civ. Proc. § 1161.1(a)*; *see* [iii], *below*]. However, the tenant will be deemed the prevailing party in the action if both of the following conditions are met [*Code Civ. Proc. § 1161.1(a)*]:

- On receiving a three-day notice claiming an amount identified by the notice as an estimate, the tenant tenders to the landlord, within the three-day period required by the notice, the amount that the tenant has reasonably estimated to be due; and

- At trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount.

If the court determines that the amount tendered by the tenant was less than the amount due, but was reasonably estimated [*see* [iii], *below*], the tenant will retain the right to possession if the tenant pays to the landlord within five days of the judgment's effective date all of the following [*Code Civ. Proc. § 1161.1(a)*]:

- The amount previously tendered if it had not been previously accepted;

- The difference between the amount tendered and the amount determined by the court to be due; and

- Any other sums ordered by the court.

[iii] Amount of Rent Claimed as "Reasonably Estimated"

The amount of rent claimed or tendered is presumed reasonably estimated if it is no more than 20 percent more or less than the amount judicially determined to be due [*Code Civ. Proc. § 1161.1(e)*]. However, if the rent due is contingent on information primarily within the knowledge of one party to the lease and that information has not been furnished to, or has not been accurately furnished to, the other party, the court will consider that fact in determining the reasonableness of the amount of rent claimed or tendered [*Code Civ. Proc. § 1161.1(e)*].

PRACTICE TIP:

The Estimate Procedure. If a commercial lease provides for a rent in a *fixed* amount, there is no need to use the estimate procedure allowed by *Code Civ. Proc. § 1161.1*. That section is designed for leases providing that rent shall be determined by a percentage of sales. Here, the landlord cannot be sure of the correct rent, because knowledge of the amount of sales is in the hands of the tenant. The estimate should usually be based on the landlord's knowledge of past sales during a similar time period. *By Myron Moskovitz.*

[f] Acceptance of Partial Payments of Rent

If the landlord accepts a partial payment of rent, including any payment of estimated payment of rent tendered for commercial real property [*see Code Civ. Proc. § 1161.1(a)*; *see also* [e], *above*], without any further notice to the tenant,

the landlord may commence and pursue an unlawful detainer action to recover the difference between the amount demanded in that notice and the payment actually received [*Code Civ. Proc. § 1161.1(b)*]. In that case, the complaint must describe the partial payments accepted by the landlord [*Code Civ. Proc. § 1161.1(b)*].

If the landlord accepts a partial payment of rent after filing a complaint for unlawful detainer, and the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights (including the right the landlord may have to recover the property's possession), the landlord's acceptance of the partial payment is evidence only of that payment, and does not constitute a waiver of any rights or defenses of any of the parties [*Code Civ. Proc. § 1161.1(c)*; *see Code Civ. Proc. § 1166* (requirements governing complaint)]. The landlord will be entitled to amend the complaint to reflect the partial payment without necessitating the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of the court [*Code Civ. Proc. § 1161.1(c)*]. Further, the amendment will not delay the matter from proceeding [*Code Civ. Proc. § 1161.1(c)*].

[g] Landlord's Rights of Reentry

The landlord's summary reentry on the premises for the nonpayment of rent or other breach is not warranted, even though a lease clause expressly authorizes reentry, unless the statutory three-day written notice is properly served on the tenant [*Civ. Code § 791*; *Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 714, 78 Cal. Rptr. 344]* . A landlord who does not properly serve the required three-day notice is guilty of forcible entry and detainer [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 605-608, 12 Cal. Rptr. 488, 361 P.2d 20* ; *see Code Civ. Proc. §§ 1159* (forcible entry defined), 1160 (forcible detainer defined)].

PRACTICE TIP:

Right of Reentry and Use of Self-Help. It should be noted, however, that service of the three-day notice does *not* permit a landlord to use self-help. Only the sheriff may retake possession, after judgment and writ of possession are issued. *By Myron Moskovitz.*

[h] Holdover of Agricultural Land Tenancy

A tenant of agricultural lands who holds over and retains possession for more than 60 days after expiration of the term without any demand of possession or notice to quit by the landlord or the landlord's successor in estate, is deemed to be holding by permission of the landlord or successor in estate and is entitled to hold under the terms of the lease for another full year [*Code Civ. Proc. § 1161(2)*]. Under these circumstances, the tenant will not be guilty of an unlawful detainer during that year, and the holding over is construed as a consent on the tenant's part to hold for another year [*Code Civ. Proc. § 1161(2)*].

[2] FORM

Three-Day Notice to Pay Rent or Quit

NOTICE TO PAY RENT OR QUIT

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

You are hereby notified that in accordance with the agreement under which you hold possession of the premises located at _____[*street address, unit number (if any), city, state, zip*], there is now due and unpaid rent in the following amounts for the following specified periods: [*For each period, use:*] $_____ balance due for [month *or months*] and [*year*].

TOTAL DUE: $_____

[*If the lease covers commercial property, add, if appropriate:*]

The above amount of rent has been estimated by the undersigned.

[*Continue with the following:*]

You are further notified that, within three days after service of this notice on you, you must pay the amount of rent stated above, or surrender possession of the premises to [the undersigned *or* _____ (*name*), the authorized agent of the undersigned *or other person*].

You are further notified that the payment must be made to _____[*name of person to whom payment must be made*]

[*OPTIONAL*]

at _____[*street address, city and state, and telephone number*] and may be made in person on [*days and hours that person will be available to receive payment*]

[*OR*]

deposited into account number _____ at _____[*name and address of financial institution located within five miles of the rental property*]

[*OR*]

by electronic fund transfer.

[*Continue with the following:*]

If you fail to pay the rent or to surrender possession of the premises within three days, the undersigned will commence legal proceedings against you to recover possession of the premises [*add, if appropriate,* to declare the lease forfeited,] and to recover a judgment for the amount of the rent and damages for your unlawful detention of the premises.

[*If lessee is to forfeit the lease*:]

You are further notified that the undersigned has elected to, and hereby does, declare the lease under which you hold the premises to be forfeited if you fail to pay the above rent within three days.

[*Continue with the following:*]

Date: _____

LESSOR
_____ [*signature*]
[*typed name*]
_____ [*address*]

[*Attach copy of lease as Exhibit A.*]

[*Continue with the following, if applicable:*]

ADVICE REGARDING THIS NOTICE IS AVAILABLE FROM [*name and telephone number of agency, e.g.,* the Rent Board of San Francisco, (415) 252-4600.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
2. Unlawful Detainer Notices to Quit

18-35B California Legal Forms--Transaction Guide § 35B.231

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.231 Three-Day Notice to Perform Covenant or Quit

[1] Comment

[a] Use of Form

The form in [2], *below*, a notice to perform a covenant or quit the premises, is to be delivered by the landlord to a tenant who, during the lease's term, continues in possession of the leased premises after failing to perform a condition or covenant of the lease (other than the covenant to pay rent) that can still be performed. The notice requires the tenant to perform the condition or covenant or to surrender the premises. The landlord may not maintain an unlawful detainer action based on such a breach, unless the landlord serves this notice on the tenant and on any subtenant in possession of the premises and the recipient (or certain other persons) fails to perform the condition or covenant within that three-day period [*see Code Civ. Proc. § 1161(3)*].

PRACTICE TIP:
Service of Notice on Subtenants. A landlord may maintain an unlawful detainer action against a tenant even if the landlord failed to serve a subtenant. However, a resulting judgment will not give the landlord possession from the subtenant. Thus, the landlord had better serve the subtenant [*see* [e], *below*]. *By Myron Moskovitz.*

For detailed coverage of unlawful detainer actions, see California Forms of Pleading and Practice, ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender), and California Real Estate Law and Practice, ch. 210, *Unlawful Detainer* (Matthew Bender).

[b] Distinguished From Other Three-Day Notices

The landlord must use a different three-day notice if the unlawful detainer action is based on any of the following:

- A default in the payment of rent [*see Code Civ. Proc. § 1161(2)*; *see also § 35B.230*];

- An incurable violation of a lease covenant, that is, a violation of a lease covenant that cannot afterward be performed [*see Code Civ. Proc. § 1161(3)*; *see also § 35B.232*]; or

- Any of the following acts [*see Code Civ. Proc. § 1161(4)*; *see also § 35B.232*]:

  (1) Violating a lease covenant or condition by assigning the lease, subletting the leased premises, or committing waste on the premises;

  (2) Maintaining, committing, or permitting the maintenance or commission of a nuisance on the premises; or

  (3) Using the premises for an unlawful purpose.

[c] Contents of Notice

[i] Performance of Covenant

The notice must be phrased in the alternative, demanding that the tenant either perform the defaulted covenant or surrender possession of the premises [*Feder v. Wreden Packing & Provision Co., Inc. (1928) 89 Cal. App. 665, 671, 265 P. 386]* . It must also specifically describe the covenant that has not been performed [*Feder v. Wreden Packing & Provision Co., Inc. (1928) 89 Cal. App. 665, 671, 265 P. 386]* .

[ii] Forfeiture of Lease

For a forfeiture to occur, the notice must state that nonperformance of the covenant within three days will cause the tenant to forfeit the lease [*Code Civ. Proc. § 1174(a)*].

Since the failure or neglect to perform a condition or covenant may result in the lease's forfeiture, any covenant or condition involving a forfeiture by the lessee must be strictly construed against the lessor [*Civ. Code § 1442*]. Consequently, trivial breaches will not support a forfeiture [*McNeece v. Wood (1928) 204 Cal. 280, 285, 267 P. 877]* , nor will forfeiture result when the tenant has in good faith substantially complied with the covenant's command [*Knight v. Black (1912) 19 Cal. App. 518, 526, 126 P. 512]* .

An unlawful detainer judgment declaring the lease's forfeiture will not relieve the lessee from liability for damages for the lease's termination under *Civ. Code § 1951.2* [*Code Civ. Proc. § 1174.5*].

[d] Service of Notice

The notice must be given in the manner prescribed by statute [*see Code Civ. Proc. § 1162*; *see also § 35B.230[1][c]*].

[e] Subtenants

The three-day notice normally must be served in the manner specified by *Code Civ. Proc. § 1162* on any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(3)*]. However, the landlord may maintain an unlawful detainer proceeding against the tenant without serving the subtenant if both the tenant and the subtenant occupy the premises [*Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795]* . If the landlord wants to evict both the tenant and the subtenant, however, the subtenant must be served with a separate notice that complies with the statutory requirements, rather than with a copy of the notice that is directed to and served on the

tenant [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 904-905, 126 Cal. Rptr. 34]* .

PRACTICE TIP:

Obtain Personal Service of Notice. The law "abhors a forfeiture." In addition, since judges are loathed to terminate a tenancy in which the tenant has moneys invested in an established business, they will strictly construe service statutes. Therefore, it is always best to obtain personal service of any "cure" notice. This does not mean that other modes of service should not be simultaneously utilized as well. Often a tenant who is dodging personal service will let his or her guard down upon being served in another manner, thus leaving the tenant open to personal service. *By Benjamin Kaplan.*

[f] Statute of Limitations

The notice to perform a covenant or quit may be served more than one year after the breach [*see Code Civ. Proc. § 1161(3)*]. Further, an unlawful detainer action based on the breach of a covenant to pay money other than rent [*see Code Civ. Proc. § 1161(3)*] is not subject to the one-year time limitation governing unlawful detainer actions based on failure to pay rent, leaving the ordinary statute of limitations to apply [*Cal- American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585-586, 207 Cal. Rptr. 532* ; *see Code Civ. Proc. § 1161(2)* (one year statute of limitations for unlawful detainer action based on failure to pay rent)].

PRACTICE TIP:

Waiver and Estoppel. Although a notice may be served more than one year after the breach, if the landlord has *accepted rent* during this period with knowledge of the breach, he/she will have *waived* the right to recover possession because of this breach--unless a lease provision says that acceptance of rent with knowledge of the breach is not a waiver. Even in this situation, the landlord might be *estopped* from claiming possession based on this breach if the tenant reasonably relied on the landlord's actions. *By Myron Moskovitz.*

[g] Landlord's Right of Reentry

When the lease contains a provision granting the landlord the right of reentry for breach of a condition or covenant of the lease, the landlord may reenter after the right has accrued, but only after giving the tenant three days' written notice, as provided by statute [*Civ. Code § 791*; *Code Civ. Proc. §§ 1161, 1162* (three-day notice requirements); *Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 714, 78 Cal. Rptr. 344* ; *see Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20* (regarding breach of covenant to pay rent)].

PRACTICE TIP:

Right of Reentry and Use of Self-Help. Note, however, that service of the three-day notice does *not* permit a landlord to use self-help. Only the sheriff may retake possession, after judgment and writ of possession are issued. *By Myron Moskovitz.*

[2] FORM

Three-Day Notice to Perform Covenant or Quit

NOTICE TO PERFORM COVENANT OR QUIT

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

You are hereby notified that in accordance with the lease dated _____, under which you hold

possession of the premises located at _____[*street address, unit number (if any), city, state, zip*], you are required to perform the following [provision *or* provisions]:

[*For each provision, use:*]

Paragraph _____ of the lease states: [*state lease obligation, e.g.,* that you pay all taxes and assessments levied against the property].

[*Continue with the following:*]

You have failed to [perform (that *or* those obligations) *or e.g.,* pay the taxes].

You are further notified that, within three days after service of this notice on you, you must [perform (the obligation *or* obligations stated above) *or specify obligation, e.g.,* pay the taxes], or surrender possession of the premises to [the undersigned *or* (*name*), the authorized agent of the undersigned *or other person*].

If you fail to [perform (the obligation *or* obligations stated above) *or specify obligation, e.g.,* pay the taxes] or to surrender possession of the premises within three days, the undersigned will commence legal proceedings against you to recover possession of the premises [*add, if appropriate,* to declare the lease forfeited,] and to recover a judgment for the amount of the rent and damages for your unlawful detention of the premises.

[*If lessee is to forfeit the lease*:]

You are further notified that the undersigned has elected to, and hereby does, declare the lease under which you hold the premises to be forfeited if you fail to [perform (the obligation *or* obligations stated above) *or specify obligation, e.g.,* pay the taxes].

[*Continue with the following:*]

Date: _____.

LESSOR
_____ [*signature*]
[*typed name*]
_____ [*address*]

[*Attach copy of lease as Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer



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2. Unlawful Detainer Notices to Quit

18-35B California Legal Forms--Transaction Guide § 35B.232

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.232 Three-Day Notice to Quit

[1] Comment

[a] Use of Form

The form in [2], *below*, a notice to quit the premises, is designed for use by a landlord whose tenant subleases, assigns, or commits waste contrary to covenants of the lease under which the property is held; maintains, commits, or permits the maintenance or commission of a nuisance on the premises or uses the premises for an unlawful purpose; or or violates a lease covenant that cannot afterward be performed [*see Code Civ. Proc. § 1161(3), (4)*].

The notice includes alternative statements depending on whether the breach can or cannot be cured. For non-curable breaches, the notice makes no demand that the violation be cured and simply requires the tenant to quit the premises within three days. In these situations, the landlord may not maintain an unlawful detainer action based on the breach unless he or she serves the three-day notice to quit on the tenant and on any subtenant in possession of the premises [*Code Civ. Proc. § 1161(3)*; *see Schnittger v. Rose (1903) 139 Cal. 656, 660-661, 73 P. 449]* and the recipient (or certain other persons) fails to quit the premises within that three-day period [*Code Civ. Proc. § 1161(3)*]. For curable breaches, however, the notice should include a statement requiring that the tenant cure the stated breach or vacate and deliver possession to the landlord.

PRACTICE TIP:

Notices for Curable Breaches Must Be Stated in the Alternative. Any notice related to a curable breach must be stated in the alternative--"cure or vacate." A simple demand for possession after the expiration of three days without a statement of alternatives renders the notice defective. *By Benjamin Kaplan.*

For further discussion of unlawful detainer actions, see California Forms of Pleading and Practice, ch. 333, *Landlord and Tenant: Eviction Actions* (Matthew Bender), and California Real Estate Law and Practice, ch. 210, *Unlawful*

Detainer (Matthew Bender).

[b] Reasonable Grounds Required for Basis of Belief That Violation of Lease Occurred

In certain cases, a dispute will arise between a landlord and tenant over the question of whether the tenant has breached the lease. In such a case, the landlord may validly serve the tenant with a notice to quit and obtain possession of the premises if the landlord has reasonable grounds to believe that the tenant has breached the lease (whether or not the tenant has in fact breached the lease), or if the landlord acts in good faith without malice [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 824-825, 108 Cal. Rptr. 566]* . The tenant will have an action for damages for wrongful eviction only if the landlord acts maliciously and without probable cause [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 825, 108 Cal. Rptr. 566]* .

[c] Distinguished From Other Three-Day Notices

The form in [2], *below*, is not appropriate for use when a tenant who holds the premises under an unexpired lease has defaulted in his or her covenant to pay rent or has failed to perform some other covenant capable of being performed. In these instances, the appropriate notices to quit must contain alternate clauses for the payment of rent due [*see § 35B.230*] or performance of the violated covenant or condition [*see § 35B.231*].

[d] Contents of Notice--Forfeiture of Lease

For a forfeiture to occur, the notice to quit must so state [*Code Civ. Proc. § 1174(a)*]. However, an unlawful detainer judgment declaring a lease's forfeiture will not relieve the lessee from liability for damages for the lease's termination under *Civ. Code § 1951.2* [*Code Civ. Proc. § 1174.5*].

[e] Service of Notice

The notice must be given in the manner prescribed by statute [*see Code Civ. Proc. § 1162*; *see also § 35B.230[1][c]*].

[f] Landlord's Right of Reentry

If the lease contains a provision authorizing reentry by the landlord, the landlord may reenter at any time after the right has accrued, but only on three days notice, as provided by statute [*Civ. Code § 791*; *Code Civ. Proc. §§ 1161*, *1162* (three-day notices); *Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 714, 78 Cal. Rptr. 344]* . The landlord, thus, has no immediate right to possession under a right of reentry until a proper three-day notice has been served on the lessee [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20* (regarding breach of covenant to pay rent)].

PRACTICE TIP:

Right of Reentry and Use of Self-Help. Note, however, that service of the three-day notice does *not* permit a landlord to use self-help. Only the sheriff may retake possession, after judgment and writ of possession are issued. *By Myron Moskovitz.*

[2] FORM

Three-Day Notice to Quit

NOTICE TO QUIT

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

You are hereby notified that in accordance with the lease dated _____, under which you hold possession of the premises located at _____[*street address, unit number (if any), city, state, zip*], you [breached the following (provision *or* provisions) *or* failed to perform the following (provision *or* provisions)]:

[*For each provision, use:*]

Paragraph _____ of the lease states: [*state lease obligation, e.g.,* tenant is not permitted to sublet any portion of the premises].

[*Continue with the following:*]

You [breached that (provision *or* provisions), *or e.g.,* sublet a portion of the premises *or* failed to perform (that obligation *or* those obligations) *or e.g.,* failed to pay the taxes].

[*If covenant can no longer be performed, i.e., breach cannot be cured:*]

[That obligation is *or* Those obligations are] no longer capable of being performed.

You are further notified that, within three days after service of this notice on you, you must surrender possession of the premises to [the undersigned *or* to _____ (*name*), the authorized agent of the undersigned *or other person*].

If you fail to surrender possession of the premises within three days, the undersigned will commence legal proceedings against you to recover possession of the premises [*add, if appropriate,* to declare the lease forfeited,] and to recover a judgment for the amount of the rent and damages for your unlawful detention of the premises.

You are further notified that the undersigned has elected to, and hereby does, declare the lease under which you hold the premises to be forfeited.

[*If covenant can still be cured, i.e., breach is curable:*]

Within three days of the service on you of this notice you must cure your above stated breach, or in the alternative, you must vacate, quit, and deliver possession of the premises to your landlord at the expiration of the three-day period.

If you do not cure the breach as set forth herein within the three-day period after service upon you of this notice, your landlord elects to declare the lease under which you hold the premises to be forfeited at the expiration of the three-day period.

[*Continue with the following:*]

Date: _____.

LESSOR
_____ [*signature*]
[*typed name*]

_____ [*address*]

[*Attach copy of lease as Exhibit A.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help RemediesReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination Notice



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
2. Unlawful Detainer Notices to Quit

18-35B California Legal Forms--Transaction Guide §§ 35B.233-35B.239

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 35B.233[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
3. Termination and Reletting Notices

18-35B California Legal Forms--Transaction Guide § 35B.240

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.240 Notice to Tenant Terminating Tenancy at Will or Periodic Tenancy

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice from a landlord to a tenant terminating a periodic tenancy or a tenancy at will. To terminate either type of tenancy, the landlord must serve sufficient notice of termination on the tenant [*Civ. Code §§ 789*, *1946*, *1946.1*; *Code Civ. Proc. § 1161(1)*].

For definitions of tenancies at will and periodic tenancies and for further discussion of termination by notice, see *§ 35B.26*. For the form of notice to be used by a tenant to terminate a periodic tenancy, see *§ 35B.241*.

[b] Notice Requirement--Tenancy at Will

A tenancy at will may be terminated by the landlord giving written notice to the tenant to remove from the premises within a period of not less than 30 days, to be specified in the notice [*Civ. Code § 789*].

[c] Notice Requirements--Periodic Tenancies

[i] Month-to-Month Tenancy

A tenancy from month-to-month may be terminated at any time by a 30-day written notice from one party, landlord or tenant, to the other [*Civ. Code § 1946*]. When the tenancy is terminated by a 30-day notice given other than 30 days before the end of any month term, the tenancy terminates at the end of the 30 days specified in the notice, and rent is due and payable up to and including the date of termination [*Civ. Code § 1946*].

Nothwithstanding the above, the parties to the tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before expiration of a recurring term of the tenancy [*Civ. Code § 1946*].

Notwithstanding *Civ. Code § 1946*, an owner must give notice at least 60 days (not 30 days) before the proposed date of termination of a periodic tenancy if the tenant has been living in the dwelling for at least one year [*Civ. Code § 1946.1(a)-(c)*]. In any case, a tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b)*, (e)]. Notice must be sent by certified or registered mail or given in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 1946.1(f)*].

The 60-day notice requirement for longer term renters does not apply if (1) the dwelling or unit is alienable separate from the title to any other dwelling unit; (2) the owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; (3) the purchaser is a natural person or persons; (4) the notice is given no more than 120 days after escrow is established; (5) notice was not previously given to the tenant in accordance with *Civ. Code § 1946.1*; and (6) the purchaser in good faith intends to reside in the property for at least one full year after the tenancy's termination [*Civ. Code § 1946.1(d)*]. These provisions do not affect the authority of a public entity to regulate or monitor the basis for eviction [*Civ. Code § 1946.1(g)*].

PRACTICE TIP:

Effect of Rent Control Ordinances. Some California cities have rent control ordinances that prevent termination of any residential tenancy (even month-to-month tenancies) without "good cause"--as defined by the ordinance. *By Myron Moskovitz.*

[ii] Other Periodic Tenancies

Any periodic tenancy other than a month-to- month tenancy, such as a year-to-year or a week-to-week tenancy, may be terminated unilaterally only at the end of one of its recurring terms [*Civ. Code § 1946*]. In the absence of an agreement between the parties, the notice required to terminate a periodic tenancy, other than one from month-to-month, must be given either 30 days before expiration of one of the recurring terms or as long before expiration as one of the terms as the term itself [*Civ. Code § 1946*]. For example, in the absence of an agreement between the parties, a year-to- year tenancy may be terminated only by a written notice given at least 30 days before the end of one of its yearly terms. A week-to-week tenancy may be terminated only by a written notice given at least one week before the end of one of its weekly terms [*Civ. Code § 1946*].

Until January 1, 2010, an owner must give notice at least 60 days before the proposed date of termination if the tenant has been living in the dwelling for at least one year. The tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b)*, (e); *see § 35B.240[1][c][i]*].

Notwithstanding the above, the parties to any type of periodic tenancy may agree at the time the tenancy is created that it may be terminated by a notice given at any time not less than seven days before expiration of a recurring term of the tenancy [*Civ. Code § 1946*].

[d] Service of Notice

Service of the notice must be given in one of the following ways:

- By delivering a copy to the party personally [*Code Civ. Proc. § 1162*];
- If the party is absent from his or her residence and usual place of business, by (1) leaving a copy with

some person of suitable age and discretion at either place and (2) sending a copy through the mail addressed to the tenant at his or her place of residence [*Code Civ. Proc. § 1162*];

- If the party's places of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found at either place, by affixing a copy in a conspicuous place on the property, delivering a copy to a person residing on the property (if one can be found), and mailing a copy to the tenant at the leased premises [*Code Civ. Proc. § 1162*]; or

- By sending a copy by certified or registered mail addressed to the other party [*Civ. Code §§ 1946, 1946.1*].

If the tenant is the party giving the notice, he or she is permitted to give notice by sending a copy by certified or registered mail addressed to the lessor's agent to whom the lessee has paid rent for the month before the date of the notice or by delivering a copy to the agent personally [*Civ. Code § 1946*]. However, a tenant giving notice pursuant to *Civ. Code § 1946.1* (regarding termination of tenancies when tenant has been living in dwelling for at least one year), must give notice in the manner specified by *Code Civ. Proc. § 1162* or by certified or registered mail [*Civ. Code § 1946.1(f)*; *see § 35B.240[1][c][i]*].

Service of notice by the landlord on one cotenant is notice to the other cotenant(s) [*University of So. Cal. v. Weiss (1962) 208 Cal. App. 2d 759, 769-770, 25 Cal. Rptr. 475]* . Notice by one cotenant to the landlord, however, does not function as notice by the other cotenant who continues as a tenant until the landlord terminates the tenancy as to him or her [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 647, 321 P.2d 473]* .

If a subtenant is involved, the 30-day notice of termination is not required to be served on the subtenant [*Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 611-612, 146 Cal. Rptr. 531]* .

[e] Foreclosed Property

Notwithstanding the unlawful detainer provisions of Civ. Code § *Code Civ. Proc. § 1161* [*see* Ch. 35B, *Modification and Termination of Leases*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit in the manner set forth in *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section1161b is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, sec. 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. In addition, the Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [P.L. 111-22, sec. 702(a)(2), 123 Stats. 1661]. A lease or tenancy is considered bona fide if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not

substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [P.L. 111-22, sec. 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [P.L. 111-22, sec. 704, 123 Stats. 1662]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett].

PRACTICE TIP:

Calculating Rent Due. Although it is appropriate to include in the notice language to the effect, "The rent for the premises shall be due and payable to and including the date of termination," I would defer stating the amount due [*see* second alternative in second to last paragraph in [2], *below*]. Once the notice is served I would send a letter to the tenant informing him or her of the amount due, and carefully instruct the client that if a check with a larger amount is tendered by the tenant then it must be immediately returned through his or her attorney's office. For practical as well as legal purposes I always calculate rent owing by applying every interpretation in favor of the tenant. Thus, I always calculate rent on a 31-day month, never 30 days nor 29 days (nor 29 days even if such months do apply). If notices have been served in different manners, I also calculate rent owing based on the most favorable interpretation to the tenant. Keep in mind that I am always going to wait such additional days before filing the complaint as to make all modes of service of the notice effective, not just the service which was personal or "shorter" in time effect. This conservative approach should act as a safety net to any mistakes that have been made in one service of notice procedure, although your assurance level of appropriate service before filing the complaint should be 100 percent. *By Benjamin Kaplan.*

[2] FORM

Notice to Tenant Terminating Tenancy at Will or Periodic Tenancy

NOTICE OF TERMINATION OF TENANCY

TO: _____[*name of tenant*]
_____[*street address*]
_____[*city, state, zip*]

Notice is hereby given that [*insert, if appropriate:* in accordance with the provisions of Paragraph _____ of the lease dated _____ between us] your tenancy [at will *or* from month-to-month *or other*] of the premises located at [*street address or other description of property*], is terminated as of 30 [*or other appropriate number*] days from the date of this notice [*or* 30 (*or other appropriate number*) days after service on you of this notice in accordance with the provisions of *California Code of Civil Procedure Section 1162*].

You are required to remove from the premises and to deliver up possession of the premises to the undersigned [*or* to _____ (*name),* your lessor (*or* the authorized agent of the undersigned *or other*)] on or before expiration of the above-mentioned 30-day [*or other appropriate number*] period.

[*EITHER, if exact amount of rent due is known:*]

The rental for the premises shall be due and payable up to and including the date of termination of the tenancy. This sum of $_____[*state exact amount of rent due*] is payable to _____[*name*], your lessor [*or* the authorized agent of the undersigned *or other*] on or before the date of termination.

[*OR, if exact amount of rent due is not known:*]

The rental for the premises shall be due and payable up to and including the date of termination of the tenancy. This sum is payable to _____[*name*], your lessor [*or* the authorized agent of the undersigned *or other*] on or before the date of termination.

[*Continue with the following:*]

This notice is given in accordance with _____[California Civil Code Section _____ (789 *or* 1946 *or* 1946.1)] for the purpose of terminating your tenancy of the premises as of _____[*date or* 30 days (*or other appropriate number*) after service on you of this notice].

Date: _____.

LESSOR
_____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
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18-35B California Legal Forms--Transaction Guide § 35B.241

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.241 Notice to Landlord Terminating Periodic Tenancy

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice to be used by a tenant to terminate a periodic tenancy. Either party may terminate a periodic tenancy by giving an appropriate written notice to the other party [*see Civ. Code §§ 1946, 1946.1*].

For the definition of a periodic tenancy and further discussion of termination by notice, see *§ 35B.26*. For the form of notice to be used by a landlord to terminate a periodic tenancy, see *§ 35B.240*.

[b] Cotenancy

When one cotenant gives notice of termination to the landlord, that cotenant is not liable for the other cotenant's remaining in possession, nor may that cotenant bring a proceeding to force the other cotenant to surrender the premises to the landlord [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 648, 321 P.2d 473]* . On receiving the notice, the landlord must choose either to accept the cotenant as the tenant alone or to terminate the tenancy [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 648, 321 P.2d 473]* .

[c] Service of Notice

See *§ 35B.240[1][d]* for discussion of service of the notice.

[d] Effect of Failure to Surrender Premises After Notice

A tenant who fails, without the landlord's permission, to deliver up possession of the premises at the time specified in

the tenant's written notice terminating the tenancy is guilty of unlawful detainer [*Code Civ. Proc. § 1161(5)*].

[2] FORM

Notice to Landlord Terminating Periodic Tenancy

NOTICE OF TERMINATION OF TENANCY

TO: _____[*name of landlord*]
_____[*street address*]
_____[*city, state, zip*]

Notice is hereby given that [*if appropriate, insert:* in accordance with the provisions of Paragraph _____ of the lease dated _____, between you and the undersigned] I will terminate the [month-to-month] tenancy by which I hold possession of the premises located at [*address or other description of the property*], as of 30 [*or other appropriate number*] days from the date of this notice [*or* 30 (*or other appropriate number*) after service on you of this notice] and that I will vacate the premises and deliver up its possession to you on or before expiration of this 30 [*or other appropriate number*] day period.

This notice is given in accordance with California Civil Code Section _____ [1946 *or* 1946.1] for the purpose of terminating my tenancy of the premises as of _____[*date or* 30 (*or other appropriate number)* days after service on you of this notice].

Date: _____.

LESSEE
_____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesPeriodic Tenancies



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18-35B California Legal Forms--Transaction Guide § 35B.242

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.242 Notice for Terminating Lease Prematurely in Accordance With Lease Provision

[1] Comment--Use of Form

The form in [2], *below*, is to be used by a lessor or lessee to terminate a lease prematurely on notice in accordance with a lease provision reserving this right to the lessor or granting this right to the lessee.

[2] FORM

Notice for Terminating Lease Prematurely in Accordance With Lease Provision

NOTICE OF TERMINATION OF TENANCY

TO: _____[*name of lessor or lessee*]
_____[*street address*]
_____[*city, state, zip*]

Notice is hereby given that, in accordance with the right reserved [*or* granted] to me by [*if appropriate, insert:* Paragraph _____ of] the lease dated _____[*date*], under which you [*or* I] hold possession of the premises located at [*address or other description of property*], I have elected to terminate that lease as of [*number*] days from the date of this notice.

[*EITHER, if lessor is terminating tenancy*:]

You are required to deliver up possession of the premises to me [*or* to _____ (*name)*, my authorized agent *or other*] on or before expiration of the _____-day [*number*] period specified above.

[*OR, if lessee is terminating tenancy*:]

I will deliver up possession of the premises to you on or before expiration of the _____-day [*number*] period specified above.

[*Continue with the following:*]

Date: _____.

[LESSOR *OR* LESSEE]
_____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-35B California Legal Forms--Transaction Guide § 35B.243

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.243 Lessee's Request for Notice of Reletting When Advance Payment Made Before Lease Termination

[1] Comment

[a] Use of Form

The form in [2], *below*, a request by a lessee to a former landlord for written notice of the initial reletting of the leased premises, may be used when the lease has been terminated before the end of the term by the lessor because of a breach of the lease or as a result of the lessee's breach and abandonment of the property [*see Civ. Code § 1951.2*].

A lessee may request, in writing, that the landlord notify the lessee of the initial reletting of the leased premises, and the landlord must send the lessee the requested notice if all of the following circumstances exist [*Civ. Code § 1951.7(b), (c)*]:

- The lessee has made an advance payment, as defined by statute [*see* [b], *below*];
- The lease is terminated in accordance with *Civ. Code § 1951.2*;
- The lessee has requested, in writing, that the lessor send such a notice to the lessee; and
- The amount of the rent due and unpaid at the time of termination is less than or equal to the amount of the advance payment.

For a form of written notice that the landlord may use to send the prescribed information to the lessee, see *§ 35B.244*.

[b] Advance Payment Defined

For these purposes, an "advance payment" is moneys paid to the lessor as prepayment of rent, or as a deposit to secure faithful performance of the lease's terms, or another payment that is the substantial equivalent of either of these [*Civ. Code § 1951.7(a)*]. A payment that is not in excess of the amount of one month's rent is not an advance payment [*Civ. Code § 1951.7(a)*].

[c] Contents of Notice and Time and Manner of Delivery Unspecified

The contents of the request are not specified by law, and a mere reference to the controlling code section is probably sufficient [*see Civ. Code § 1951.7(b)(3)*]. However, the form below considers several expanded statements and includes a reference to the dollar amount of the advance payment.

Further, the statute does not specify in what manner the request must be delivered, nor the time for delivery [*see Civ. Code § 1951.7*]. Theoretically, a tenant may give his or her landlord such a request at any time during the lease term, or a lease provision requiring notice by the landlord may itself be made an automatic request, or the breaching lessee may make the request during the period of the lessee's default.

[2] FORM

Lessee's Request for Notice of Reletting When Advance Payment Made Before Lease Termination

REQUEST FOR NOTICE OF RELETTING

TO: _____[*name of lessor*]
_____[*street address*]
_____[*city, state, zip*]

As your lessee under the lease dated _____, I made an advance payment to you in the amount of $_____, on _____[*date*].

If our lease is terminated under *Civil Code Section 1951.2* [*or* Our lease has been terminated under *Civil Code Section 1951.2*, therefore,] I request that you send written notice under *Civil Code Section 1951.7(c)* [*or* of reletting of the property at _____ (*address)* which was rented to me under the above-mentioned lease, stating the name and address of the new lessee, the length of the new lease, and the amount of rent], by delivery to me personally [*or* by regular mail to me at _____ (*address*)] not later than 30 days after the new lessee takes possession of the property.

Date: _____.

[LESSOR]
_____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsDamagesMitigationReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 35B MODIFICATION AND TERMINATION OF LEASES
PART IV. FORMS
B. Termination of Leases
3. Termination and Reletting Notices

18-35B California Legal Forms--Transaction Guide § 35B.244

AUTHOR: Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 35B.244 Lessor's Notice of Reletting After Termination of Lease When Advance Payment Was Received

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice from a landlord informing a former tenant who made an advance payment and whose lease was terminated before the end of the term by the lessor because of a breach of the lease, or as a result of the lessee's breach and abandonment of the property, of certain details concerning the initial reletting of the leased premises.

See *§ 35B.243* for discussion of the circumstances under which a landlord must send this type of notice to a lessee. For a request by a lessee to a former landlord for written notice of the initial reletting of the leased premises, see also *§ 35B.243*.

[b] Content of Notice

The written notice must state that the property has been relet, the name and address of the new lessee, the length of the new lease, and the amount of the rent [*Civ. Code § 1951.7(c)*].

[c] Time and Manner of Delivery

The written notice is required only on the initial reletting of the property [*Civ. Code § 1951.7(c)*]. On the initial reletting, it must be delivered to the lessee personally, or be sent by regular mail to the lessee at the address shown on the request, not later than 30 days after the new lessee takes possession of the premises [*Civ. Code § 1951.7(c)*].

[2] FORM

Lessor's Notice of Reletting After Termination of Lease When Advance Payment Was Received

NOTICE OF RELETTING

TO: _____[*name of lessee*]
_____[*street address*]
_____[*city, state, zip*]

Notice is hereby given that the property at _____[*address*] rented to you under a lease dated _____[*date*], was relet on _____[*date*], to _____[*name of new lessee*] of _____[*address of new lessee*], under a lease that is to expire on _____[*date*], at a rental of $_____.

Date: _____.

[LESSOR]
_____ [*signature*]
[*typed name*]
_____ [*address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesMitigationReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES

18-36 California Legal Forms--Transaction Guide 36.syn

AUTHOR: Linda Breen Pierce

§ 36.syn Synopsis to Chapter 36: OIL AND GAS RIGHTS AND LEASES

§ 36.01 California Sources

[1] Statutes

[2] Regulations

§§ 36.02-36.04 [Reserved]

§ 36.05 Law Reviews and Periodicals

§ 36.06 Annotations

§ 36.07 Text References

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[2] Additional Text References

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[b] "Reservoir Traps"

[2] Ownership of Subsurface Minerals

[a] Ownership in Place Doctrine Inapplicable in California

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[c] Transferability of Fee Owner's Rights

[d] Ownership of Recovered Oil and Gas

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[1] Conveyance and Contract

[2] Profit 'a Prendre Interest in Tenant

[a] Nature of Interest

[b] Duration of Profit 'a Prendre Interest

[c] Abandonment of Profit 'a Prendre

[d] Servitude in Gross

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[2] "Or" Type Development Clause

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[4] History of Development Clauses

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[2] Implied Drainage Covenant

[a] Drainage by Third Parties

[b] Meaning of "In Paying Quantities"

[c] Drainage by Tenant

[d] Effect of Other Covenants in Lease

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[1] Surrender by Tenant

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Scope

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Scope

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Scope

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§ 36.200 Oil and Gas Lease With "Drill or Pay" Development Clause

[1] Comment

[a] Use of Form

[b] Habendum Clause

[c] "Or" and "Unless" Development Clauses

[d] Royalties Reserved Under Lease

[i] Gas Royalties

[ii] Casinghead Gasoline Royalties

[iii] Oil Royalties

[e] Suspension Clause

[f] Surrender Clause

[i] Unilateral Right of Tenant

[ii] Purpose of Surrender Clause

[iii] Under "Drill or Pay" Type Lease

[iv] Under "Unless" Type Lease

[v] Effect of Surrender

[2] FORM

Oil and Gas Lease With "Drill or Pay" Development Clause

§ 36.201 Habendum Clause Extending Lease for as Long as Oil or Gas Is Produced in Paying Quantities

[1] Comment

[a] Use of Form

[b] Exploratory and Production Periods

[c] Meaning of "In Paying Quantities"

[i] Implied Term in Habendum Clause

[ii] Excess Over "Operating Costs"

[iii] Definition of "Operating Costs"

[iv] Different Meaning Than in Development Clause

[d] Time Periods for Paying Quantities Analysis

[e] Condition Precedent in Habendum Clause

[f] Term Extended by Other Clauses in Lease

[2] FORM

Habendum Clause Extending Lease for So Long As Oil or Gas Is Produced in Paying Quantities

§ 36.202 "Unless" Type Development Clause Terminating Lease When Drilling Not Commenced Within Stated Period Unless Rental Paid to Landlord

[1] Comment

[a] Use of Form

[b] Purpose of Development or Delay Rental Clause

[c] Acts Constituting Commencement of Drilling

[2] FORM

"Unless" Type Development Clause Terminating Lease When Drilling Not Commenced Within Stated Period Unless Rental Paid to Landlord

§ 36.203 Dry-Hole Clause Requiring Tenant to Drill Another Well or to Pay Delay Rental When Well Drilled on Leased Premises Does Not Produce Oil or Gas

[1] Comment

[a] Use of Form

[b] Purpose of Dry-Hole Clause

[2] FORM

Dry-Hole Clause Requiring Tenant to Drill Another Well or to Pay Delay Rental When Well Drilled on Leased Premises Does Not Produce Oil or Gas

§ 36.204 Shut-In Royalty Clause for Payment of Specified Amount When Operations of Gas Well Are Suspended

[1] Comment

[a] Use of Form

[b] Application of "Shut-In Royalty Clause"

[2] FORM

Shut-In Royalty Clause for Payment of Specified Amount When Operations of Gas Well Are Suspended

§ 36.205 Clause Authorizing Leased Land to Be Combined or Pooled With Other Land for Drilling and Production Purposes

[1] Comment

[a] Use of Form

[b] Methods of Protecting Oil and Gas Rights

[2] FORM

Clause Authorizing Leased Land to Be Combined or Pooled With Other Land for Drilling and Production Purposes

§§ 36.206-36.209 [Reserved]

§ 36.210 Instrument of Surrender Executed by Tenant Releasing Part of Leased Land From Oil and Gas Lease

[1] Comment--Use of Form

[2] FORM

Instrument of Surrender Executed by Tenant Releasing Part of Leased Land From Oil and Gas Lease

§ 36.211 Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Long Form

[1] Comment

[a] Use of Form

[b] Distinctions Between Assignment and Sublease

[c] Landlord's Rights Against Subtenant or Assignee

[d] Nature of Overriding Royalty

[2] FORM

Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Long Form

§ 36.212 Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Short Form

[1] Comment--Use of Form

[2] FORM

Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Short Form

§ 36.213 Conveyance of Mineral Interest in Oil and Gas by Landowner

[1] Comment

[a] Use of Form

[b] Distinctions Between Royalty and Mineral Interests

[i] Royalty Interest

[ii] Mineral Interest

[iii] Practical Implications

[c] Construction of Deed Granting Mineral or Royalty Interest

[2] FORM

Conveyance of Mineral Interest in Oil and Gas by Landowner

§ 36.214 Conveyance of Royalty Interest in Oil and Gas by Landowner

[1] Comment--Use of Form

[2] FORM

Conveyance of Royalty Interest in Oil and Gas by Landowner

§ 36.215 Assignment by Landlord of Royalty Interest Under Existing Oil and Gas Lease

[1] Comment--Use of Form

[2] FORM

Assignment by Landlord of Royalty Interest Under Existing Oil and Gas Lease

§ 36.216 Grant Deed Excepting and Reserving Mineral Interest in Oil and Gas With Complete Rights for Grantor

[1] Comment

[a] Use of Form

[b] Reservation and Exception of Oil Rights

[2] FORM

Grant Deed Excepting and Reserving Mineral Interest in Oil and Gas With Complete Rights for Grantor

§ 36.217 Grant Deed Provision Reserving Mineral Interest in Oil and Gas to Grantor Without Right to Enter Land Surface

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Mineral Interest in Oil and Gas to Grantor Without Right to Enter Land Surface

§ 36.218 Grant Deed Provision Reserving Royalty Interest in Oil and Gas to Grantor

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Royalty Interest in Oil and Gas to Grantor

§§ 36.219-36.229 [Reserved]

§ 36.230 Agreement and Grant of Easement for Slant Wells Through Land Adjoining Property Leased for Oil and Gas Purposes

[1] Comment

[a] Use of Form

[b] Meaning of "Slant Well"

[c] Interest Created: Easement vs. Profit 'a Prendre

[d] Recording and Transfer Tax Requirements

[e] Unauthorized Slant Well as Trespass; Accrual of Cause of Action

[2] FORM

Agreement and Grant of Easement for Slant Wells Through Land Adjoining Property Leased for Oil and Gas Purposes

§ 36.231 Dry-Hole Contribution Letter--Contribution Not Due Unless Test Well Is a Dry Hole

[1] Comment--Use of Form

[2] FORM

Dry-Hole Contribution Letter--Contribution Not Due Unless Test Well Is a Dry Hole

§ 36.232 Bottom-Hole Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[1] Comment--Use of Form

[2] FORM

Bottom-Hole Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

§ 36.233 Acreage Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[1] Comment--Use of Form

[2] FORM

Acreage Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

§ 36.234 Farm-Out Letter Agreement for Drilling of Test Well on Leased Premises by One Company in Exchange for Assignment of Portion of Tenant's Rights Under Oil and Gas Lease

[1] Comment--Use of Form

[2] FORM

Farm-Out Letter Agreement for Drilling of Test Well on Leased Premises by One Company in Exchange for Assignment of Portion of Tenant's Rights Under Oil and Gas Lease

§ 36.235 Division Order Specifying Royalty Interests of Landlords and Tenants in Oil Produced From Specified Oil Farm--Given by Owners to Oil Purchaser

[1] Comment--Use of Form

[2] FORM

Division Order Specifying Royalty Interests of Landlords and Tenants in Oil Produced From Specified Oil Farm--Given by Owners to Oil Purchaser

Linda Breen Piercen*

FOOTNOTES:

(n83)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES

18-36 California Legal Forms--Transaction Guide Scope

AUTHOR: Linda Breen Pierce

Scope

Linda Breen Piercen* Scope

This chapter covers the transfer, assignment, and development of oil and gas interests in California. The Transaction Guide covers the basic steps necessary to lease oil and gas interests in California. The forms illustrate basic lease documents and alternative provisions that can be inserted in the basic lease forms. In addition to basic leases, the forms include provisions that may be used to transfer oil and gas interests by assignment, grant deed, and agreements.

This chapter does not cover the category of solid minerals known as "locatable" minerals, for example, gold and other minerals that are the subject of mining claims. Mining claims are covered in Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* . This chapter also does not cover the Subdivided Lands Act [*see Bus. & Prof. Code § 11000 et seq.*], which generally applies to the lease of any subdivided oil and gas lands and requires that a notice of intention to sell or lease be filed with the California Department of Real Estate [*Bus. & Prof. Code § 11010*]. For general coverage of the Subdivided Lands Act, see Ch. 30, *Subdivision Regulation* . For further coverage of subdivision regulation in California, see California Real Estate Law and Practice, ch. 424, *Regulation of Subdivided Land Sales* (Matthew Bender). For coverage of environmental contamination issues in real property transactions, see Ch. 33, *Contamination Considerations in Real Property Transactions* .

FOOTNOTES:
(n84)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.



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A. Primary Sources

18-36 California Legal Forms--Transaction Guide § 36.01

AUTHOR: Linda Breen Pierce

§ 36.01 California Sources

[1] Statutes

Retail marketing regulations of oil and gas. *Bus. & Prof. Code §§ 13400-13620, 20999-21203.*

Limitation on length of lease of land for purposes of producing oil or gas from other land. *Civ. Code § 718f.*

Fictitious oil and gas lease may be recorded and its provisions set forth in other oil and gas leases. *Civ. Code § 1219.*

Agreement for exploration or removal of natural resources is not a lease. *Civ. Code § 1952.4.*

Statute of limitations for trespass action based on unauthorized slant well. *Code Civ. Proc. § 349.4.*

Injunction against secondary oil recovery prohibited if security posted. *Code Civ. Proc. § 731c.*

Authority for action to terminate oil or gas lease. *Code Civ. Proc. §§ 772.030, 772.040.*

Regarding partition of real property, no requirement to join persons who are merely tenants or landlords under oil and gas lease. *Code Civ. Proc. § 872.540.*

Giving of lien to persons who furnish labor or materials in drilling or operating oil or gas wells under Oil and Gas Lien Act. *Code Civ. Proc. §§ 1203.50-1203.66.*

Interest or participation in oil or gas titles, issuer of certificates as "issuer" subject to Corporate Securities Law. *Corp. Code § 25010.*

"Security" under Corporate Securities Law includes certificate of interest or participation in oil or gas titles or leases. *Corp. Code § 25019.*

Sale of certain certificates of interest or participation in oil or gas titles or leases are exempt from qualification under Corporate Securities Law. *Corp. Code § 25102(j).*

Oil well, oilfield, tank farm, and refinery are properties that may be posted to prohibit trespassing. *Penal Code § 554(a).*

Manner of posting property to prohibit trespassing. *Penal Code § 554.1.*

Entry of posted property without permission or destruction of signs is a misdemeanor. *Penal Code §§ 555-555.3.*

Guardian's or conservator's power to lease for oil and gas purposes. *Prob. Code §§ 2554, 2590, 2591.*

Power to lease property for oil and gas development purposes; procedure in probate. *Prob. Code §§ 9946, 9947(c).*

Manner of selling oil and gas leaseholds in probate. *Prob. Code § 10203(b)(3).*

Uniform Statutory Rule Against Perpetuities. *Prob. Code § 21200 et seq.*

Department of Conservation. *Pub. Res. Code § 601.*

Division of Oil, Gas, and Geothermal Resources. *Pub. Res. Code § 607.*

State Oil and Gas Supervisor is the Chief of Division of Oil, Gas, and Geothermal Resources. *Pub. Res. Code § 690.*

Earthmoving activities in oil or gas field that are integral to, and necessary for, ongoing operations for the extraction of oil or gas, are exempt from Surface Mining and Reclamation Act of 1975. *Pub. Res. Code § 2714(k).*

Definitions and administrative provisions applicable to oil and gas conservation. *Pub. Res. Code §§ 3000-3167.*

"Oil" defined. *Pub. Res. Code § 3006.*

"Gas" defined. *Pub. Res. Code § 3007.*

"Well" defined. *Pub. Res. Code § 3008.*

"Production facility" defined. *Pub. Res. Code § 3010.*

State as divided into six oil and gas districts. *Pub. Res. Code § 3100.*

Appointment of district deputies of Supervisor. *Pub. Res. Code § 3101.*

State Oil and Gas Supervisor to supervise drilling, operation, maintenance, and abandonment of wells to prevent damage or waste. *Pub. Res. Code § 3106.*

Oil and gas conservation. *Pub. Res. Code §§ 3000-3473.*

Regulation of oil well and production facility operations. *Pub. Res. Code §§ 3200-3237.*

Requirement to designate agency by well owner or operator. *Pub. Res. Code § 3200*.

Notice of disposal of well or production facility. *Pub. Res. Code § 3201*.

Notice of acquisition of well or production facility. *Pub. Res. Code § 3202*.

Required contents, filing time, and required approval of State Oil and Gas Supervisor for Notice of Intent to commence drilling. *Pub. Res. Code § 3203*.

Requirement for filing bond for drilling and deepening well. *Pub. Res. Code § 3204*.

Blanket bond, instead of individual bonds for each well, for drilling or deepening of more than one well. *Pub. Res. Code § 3205*.

Requirements for keeping and filing records of well drilling and operations. *Pub. Res. Code §§ 3210-3217*.

Contents and filing requirements of monthly well statements and annual statements of oil production by mining or other unconventional techniques. *Pub. Res. Code § 3227*.

Requirements for Notice of Intent to abandon well. *Pub. Res. Code §§ 3229, 3230*.

Requirements for supervisor's approval or disapproval to abandon well. *Pub. Res. Code § 3232*.

Inspection of well reports and records filed with State Oil and Gas Supervisor or District Deputy. *Pub. Res. Code § 3234*.

Abatement of hazardous wells. *Pub. Res. Code §§ 3250-3259*.

Interstate cooperation in oil and gas conservation. *Pub. Res. Code §§ 3275-3277*.

Unreasonable waste of gas by oil well operator is unlawful and may be enjoined. *Pub. Res. Code §§ 3300-3314*.

Regulation of subsidence of oil and gas lands. *Pub. Res. Code §§ 3315-3347*.

Wasting of natural gas by escape into air from well is a misdemeanor. *Pub. Res. Code §§ 3500-3503*.

Spacing of wells and community leases. *Pub. Res. Code §§ 3600-3609*.

Spacing of wells 100 feet from borders of property or 150 feet apart is a public nuisance. *Pub. Res. Code § 3600*.

Spacing of wells on property less than 250 feet in width but containing one acre or more. *Pub. Res. Code § 3602*.

When slant drilling is permitted and manner of such drilling. *Pub. Res. Code § 3606*.

Compulsory pooling of land less than one acre in size surrounded by other oil and gas leased land. *Pub. Res. Code § 3608*.

Mandatory pooling under well-spacing pattern found necessary for particular field by State Oil and Gas Supervisor. *Pub. Res. Code § 3609*.

Unit operation of oil and gas fields. *Pub. Res. Code §§ 3630-3690*.

Unit agreements without approval of State Supervisor of Oil and Gas are valid but are not binding on nonconsenting owners or operators in field. *Pub. Res. Code § 3641*.

Application for approval of unit agreement by State Oil and Gas Supervisor; consent of three fourths of owners and operators is required. *Pub. Res. Code § 3642*.

Grounds for and findings required for approval of unit agreement by State Oil and Gas Supervisors. *Pub. Res. Code § 3643*.

Rules and regulations applicable to oil sumps. *Pub. Res. Code §§ 3780-3787*.

Documentary Transfer Tax Act authorizing county and city tax on instruments conveying real property interests. *Rev. & Tax. Code §§ 11901-11934*.

[2] Regulations

Onshore well regulations. *14 Cal. Code Reg. §§ 1712-1724.10*.

Well-spacing patterns for new pools. *14 Cal. Code Reg. §§ 1721-1721.9*.

Regulations for wells. *14 Cal. Code Reg. §§ 1722-1724.10*.

Offshore well regulations. *14 Cal. Code Reg. §§ 1740-1749*.

Environmental protection from oilfield sumps. *14 Cal. Code Reg. §§ 1750-1780*.

Unit operations, gaining approval of unit agreement by State Oil and Gas Supervisor. *14 Cal. Code Reg. §§ 1810-1882*.

Records of Oil and Gas Division; disclosure and inspection. *14 Cal. Code Reg. §§ 1995-1998.2*.

Map of oil and gas districts in California. *14 Cal. Code Reg. § 1998.2*, Appendix.



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18-36 California Legal Forms--Transaction Guide §§ 36.02-36.04

AUTHOR: Linda Breen Pierce

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18-36 California Legal Forms--Transaction Guide § 36.05

AUTHOR: Linda Breen Pierce

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18-36 California Legal Forms--Transaction Guide § 36.06

AUTHOR: Linda Breen Pierce

§ 36.06 Annotations

Annot., *Rights of Royalty Owner to Take-or-Pay Settlements, 57 A.L.R.5th 753 (1998).*

Annot., Duty of Oil and Gas Lessee to Restore Surface of Leased Premises Upon Termination of Operations, 62 A.L.R.4th 1153 (1988).

Annot., Production on One Tract as Extending Term on Other Tract Where One Mineral Lease Conveys Oil or Gas Rights in Separate Tracts For as Long as Oil or Gas Is Produced, 35 A.L.R.4th 1167 (1985).

Annot., Implied Duty of Oil and Gas Lessee to Protect Against Drainage, 18 A.L.R.4th 14 (1982).

Annot., Grant, Lease, Exception, or Reservation of Oil and/or Gas Rights as Including Oil Shale, 61 A.L.R.3d 1109 (1975).

Annot., Assertion of Statutory Mechanic's or Materialman's Lien Against Oil and Gas Produced or Against Proceeds Attributable to Oil and Gas Sold, 59 A.L.R.3d 278 (1974).

Annot., Right to Partition of Overriding Royalty Interest in Oil and Gas Leasehold, 58 A.L.R.3d 1052 (1974).



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18-36 California Legal Forms--Transaction Guide § 36.07

AUTHOR: Linda Breen Pierce

§ 36.07 Text References

[1] Matthew Bender Sources

California Legal Forms(Matthew Bender)

Ch. 28A, *Easements and Licenses* .

Ch. 28C, *Covenants, Conditions, and Restrictions* .

Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

Ch. 30A, *Construction Financing* .

Ch. 30B, *Zoning, Building, and Environmental Permits* .

Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .

Ch. 30D, *Construction Contracts and Subcontracts* .

Ch. 33, *Contamination Considerations in Real Property Transactions* .

Ch. 34A, *Prelease Forms* .

Ch. 34C, *Retail, Industrial, and Office Leases* .

Ch. 34D, *Ground Leases* .

Ch. 35A, *Assignment and Sublease of Leasehold Interests* .

Ch. 35B, *Modification and Termination of Leases* .

Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* .

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California Forms of Pleading and Practice(Matthew Bender)

Chs. 330-335, *Landlord and Tenant* .

Ch. 363, *Mining* .

Ch. 393, *Oil and Gas* .

Ch. 418, *Pollution and Other Environmental Matters* .

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American Gas Association, Regulation of the Gas Industry (Matthew Bender).

Muchow and Mogel, Energy Law and Transactions (Matthew Bender).

Kramer and Martin, the Law of Pooling and Unitization (Matthew Bender).

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Southwestern Legal Foundation, Annual Institute On Oil and Gas Law and Taxation (Matthew Bender).

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[2] Additional Text References

Witkin, Summary of California Law, vol. 12, *Real Property* (10th ed. 2005).

Bowman, Ogden's Revised California Real Property Law, Ch. 12, *Leases* (Cal. C.E.B. 1974).



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18-36 California Legal Forms--Transaction Guide §§ 36.08-36.09

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.08[Reserved]



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AUTHOR: Linda Breen Pierce

§ 36.10 Governing Statutes

Although the fundamental rights and remedies of persons engaged in the development of oil and gas have been decided by the courts [*see Callahan v. Martin (1935) 3 Cal. 2d 110, 43 P.2d 788]* , the Legislature has the power to regulate these resources [*see People v. Associated Oil Co. (1930) 211 Cal. 93, 105, 294 P. 717]* , and it has taken steps to prevent the waste of these rapidly disappearing minerals.

The principal California statutes regulating the development of oil and gas are set forth in the Public Resources Code. Division 3 of that Code [*see Pub. Res. Code §§ 3000-3865*] deals exclusively with oil and gas. The statutes in that division are subject to the administrative supervision of the Division of Oil, Gas, and Geothermal Resources in the Department of Conservation [*Pub. Res. Code § 3002*; *see Pub. Res. Code § 607(b)*]. The Division of Oil, Gas, and Geothermal Resources is headed by the State Oil and Gas Supervisor [*Pub. Res. Code § 690*], who appoints district deputies for each of the six oil and gas districts in California [*Pub. Res. Code § 3101*; *see Pub. Res. Code § 3100*]. Division 3 and the regulations adopted under it [*see 14 Cal. Code Reg. §§ 1710-1998.2*] comprise the bulk of the statutes and regulations affecting the development of oil and gas. However, other statutory provisions are scattered throughout other codes and many of these provisions are identified in the Research Guide in *§ 36.01[1]*, and have been mentioned when relevant to the transaction under consideration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGas IndustryGeneral OverviewEnergy & Utilities LawOil IndustryGeneral OverviewEnergy & Utilities LawWaste Prevention



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18-36 California Legal Forms--Transaction Guide § 36.11

AUTHOR: Linda Breen Pierce

§ 36.11 Securities Aspects of Oil and Gas Leases

[1] Sales of Interest in Oil and Gas Leases Generally Exempt From Securities Law

A certificate of interest or participation in an oil or gas title or lease is a "security" and is therefore subject to the qualifications provisions of the Corporations Code [*see Corp. Code § 25110*]. Notwithstanding this, many sales of (or offers to sell) interests or participations in oil or gas leases are exempt from those provisions. For example, a sale or offer to sell is exempt if all the purchasers have been engaged primarily in the business of drilling for, producing, or refining oil or gas for the preceding two years [*Corp. Code § 25102(j)(1)(A)*]. Another exemption is available for sales to banks, savings and loan associations, trust companies, insurance companies, and certain investment companies [*Corp. Code § 25102(j)(1)(B)*; *see Corp. Code § 25102(i)(1)*]. Still another exemption is available for persons who have been found by the Commissioner of Corporations on written application to be substantially engaged in the business of drilling for, producing, or refining oil or gas so as not to require the protection of the securities qualification law [*Corp. Code § 25102(j)(1)(C)*].

This chapter does not cover the securities law aspects of the transfer or assignment of oil and gas interests. For coverage of securities laws generally, see Ch. 6, *Securities Regulation Issues* , and Ch. 11, *Merger and Acquisition Issues* .

[2] Limited Partnerships and the Development of Oil and Gas Interests

The Commissioner of Corporations has promulgated comprehensive regulations governing the formation of limited partnerships for the purpose of developing oil and gas interests. The qualification of these partnerships will normally precede or coincide with the negotiation and execution of oil or gas leases [*see 10 Cal. Code Reg. §§ 260.140.120-260.140.131.9*]. For general coverage of limited partnerships, their formation, dissolution, and merger, see Ch. 15A, *Limited Partnerships* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawLimited PartnershipsGeneral OverviewEnergy & Utilities LawFinancingRaising CapitalSecurities LawBlue Sky LawsExcluded Transactions



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AUTHOR: Linda Breen Pierce

§ 36.12 Nature of Oil and Gas Ownership

[1] Petroleum as a Mineral

[a] Commonly Used Terms

Petroleum has long been popularly regarded and has been held by the courts to be a "mineral" [*Burke v. Southern P. R. Co. (1914) 234 U.S. 669, 676, 34 S. Ct. 907, 58 L. Ed. 1527* ; *see Chino Land & Water Co. v. Hamaker (1918) 39 Cal. App. 274, 276, 178 P. 738]* . Originally, the word "petroleum" meant "rock oil" and was used to describe an oily substance found naturally oozing from crevices in rocks [*Burke v. Southern P. R. Co. (1914) 234 U.S. 669, 676, 34 S. Ct. 907, 58 L. Ed. 1527]* .

Today, the term "petroleum" is commonly used as a generic term to describe all combustible hydrocarbon compounds found in the earth [Williams & Meyers, Oil and Gas Law, Ch. 1, *A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law*, § 101 (Matthew Bender)]. Although petroleum sometimes occurs in nature in a solid state, it most often is discovered in nature in either a gaseous or liquid state [Williams & Meyers, Oil and Gas Law, Ch. 1, *A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law*, § 101 (Matthew Bender)]. When it appears in nature in a gaseous state it is called "natural gas" [*see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "N" (Matthew Bender)]. When it appears in nature in a liquid state, it is called "crude oil" [*see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "C" (Matthew Bender)]. Whenever liquid petroleum, or oil, is found in nature, some gaseous petroleum, or natural gas, is almost always found to be present too [Williams & Meyers, Oil and Gas Law, Ch. 1, *A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law*, § 101 (Matthew Bender)].

[b] "Reservoir Traps"

When a geologist starts looking for land that might produce oil or gas, he or she looks for what are known as "reservoir traps," which may, when a well is drilled, be found to contain either singly or in combination, three different fluids: gas, oil, and water [*Williams & Meyers, Oil and Gas Law, Ch. 1, A Brief Introduction to Scientific and Engineering*

Background of Oil and Gas Law, § 104 (Matthew Bender)]. When the gas-tight dome on the reservoir trap is broken or pierced with an oil-well shaft, the pressure on the fluids in the reservoir is reduced. This causes the gas in the reservoir to expand forcing the oil in the reservoir up the oil-well shaft to freedom [*People v. Associated Oil Co. (1930) 211 Cal. 93, 106, 294 P. 717]* . In like manner, when there is little gas but a great deal of water in the reservoir trap, the reduction in pressure will cause the water to expand pushing the oil in the reservoir toward the oil-well shaft when it can be pumped to the surface by mechanical means [*Williams & Meyers, Oil and Gas Law, Ch. 1, A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law, § 104* (Matthew Bender); *see Lynch v. State Board of Equalization (1985) 164 Cal. App. 3d 94, 99-101, 210 Cal. Rptr. 335* for a detailed overview of the oil and gas production process].

When a reservoir lies beneath several parcels of land owned by different persons, an oil well drilled on one of the parcels will cause the oil under each parcel to be directed toward the well where it can be either forced or pumped to the surface. The oil from each of the adjoining parcels becomes the property of the person on whose land the well was drilled when it enters the well [*Brown v. Spilman (1895) 155 U.S. 665, 670, 15 S. Ct. 245, 39 L. Ed. 304]* .

[2] Ownership of Subsurface Minerals

[a] Ownership in Place Doctrine Inapplicable in California

Ordinarily, the ownership of land includes the ownership of all "minerals" lying below the surface of the land [Bowman, Ogden's Revised California Real Property Law, vol. 1, § 1.9 (Cal. C.E.B. 1974)]. However, the ordinary "ownership in place" doctrine that makes the surface owner of land the owner of all minerals under the land cannot be applied to petroleum [*Callahan v. Martin (1935) 3 Cal. 2d 110, 116-117, 43 P.2d 788]* . Some states try to apply the "ownership in place" doctrine to oil and gas by saying the surface owner has a defeasible fee in all oil and gas lying below the owner's land which the owner may lose should the oil and gas escape or be drained from the owner's land by an oil well on adjoining land [*see Callahan v. Martin (1935) 3 Cal. 2d 110, 115-116, 43 P.2d 788* ; *see also* Williams & Meyers, Oil and Gas Law, Ch. 2, *Nature of Interests in Oil and Gas*, §§ 203.2, 203.3 (Matthew Bender)]. California rejects this ownership-in-place or defeasible fee theory [*Callahan v. Martin (1935) 3 Cal. 2d 110, 117-118, 43 P.2d 788]* .

[b] Rule-of-Capture Doctrine

In California, the fee owner of land does not own the oil and gas in place under the owner's land. Instead, the owner has merely the exclusive incorporeal right to drill for oil and gas and to claim as the owner's property all the oil and gas brought to the land's surface by means of wells drilled on the owner's land [*Callahan v. Martin (1935) 3 Cal. 2d 110, 117, 43 P.2d 788* ; *Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1526, 266 Cal. Rptr. 611]* . Known as the "rule of capture," the owner of a tract of land acquires title to the oil and gas which the owner produces from wells drilled thereon, though it may be proved that part of the oil or gas migrated from adjoining lands [*Pacific Gas & Electric Company v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1137-1138, 234 Cal. Rptr. 630* ; *see* Kramer & Martin, The Law of Pooling and Unitization, Ch. 2, *The Rule of Capture*, § 2.01 (Matthew Bender)].

[c] Transferability of Fee Owner's Rights

In the instance in which one entity has fee simple ownership of the property to all depths, that owner has the exclusive right to drill for and produce oil and gas on that property [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237* ; *Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1526, 266 Cal. Rptr. 611]* . This incorporeal right, like the owner's right to exclusive occupancy and use of the land's surface, is one of the bundle of rights that make up the land owner's fee simple title to the land [*Callahan v. Martin (1935) 3 Cal. 2d 110, 120, 43 P.2d 788]* . It is a valuable right and, like most of the other rights that make up the owner's fee title to the land, may be transferred by the owner independent of the land or the owner's other rights in and to the land [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237* ; *Contra Costa Water District v. Vaquero Farms, Inc. (1997) 58 Cal. App. 4th*

883, 894, 68 Cal. Rptr. 2d 272] . In like manner, this incorporeal right can also be excepted or reserved by the land owner in a transfer of all the owner's other rights in and to the land [*Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438]* . If this right is separated from the land by either an independent transfer or reservation of the right to drill for and remove oil and gas from the land, the right becomes an incorporeal profit 'a prendre much like an easement [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237* ; *Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438]* .

[d] Ownership of Recovered Oil and Gas

Depleted gas reservoirs are often used for storage purposes. An oil and gas producer can inject gas or oil recovered or purchased from another source into an underground storage reservoir. Once gas or oil is reduced to the personal possession the owner of the gas or oil is not to be considered to have been divested of ownership simply because it stores the gas in an underground storage reservoir. Furthermore, the owner of the recovered gas and oil does not lose its ownership of the minerals if they migrate to another parcel [*Pacific Gas & Electric Company v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1137-1139, 234 Cal. Rptr. 630]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesMineral InterestsTransmigratory MineralsEnergy & Utilities LawExploration, Discovery & RecoveryRule of CaptureEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsAbsolute & Qualified OwnershipReal Property LawAdjoining LandownersMines & MiningReal Property LawMiningSurface RightsReal Property LawOil & Gas



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AUTHOR: Linda Breen Pierce

§ 36.13 Interests Created by Oil and Gas Lease

[1] Conveyance and Contract

An oil and gas lease is both a conveyance and a contract. The conveyancing elements are the granting and habendum clauses, and the contractual elements include the provisions that pertain to the tenant's obligations with regard to exploring, drilling, and producing operations [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 409, 76 Cal. Rptr. 2d 287]* .

[2] Profit 'a Prendre Interest in Tenant

[a] Nature of Interest

Under the usual oil and gas lease, the owner-landlord of the premises transfers to the tenant the owner-landlord's right to drill for and produce oil and other substances on the described premises [*Callahan v. Martin (1935) 3 Cal. 2d 110, 122, 43 P.2d 788]* . This right in the oil and gas tenant presents a clear case of a profit 'a prendre in gross, a right to remove a part of the substance of the land [*Callahan v. Martin (1935) 3 Cal. 2d 110, 122, 43 P.2d 788]* . A profit 'a prendre is a right to take something from the land of another [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 878 n.7, 69 Cal. Rptr. 612, 442 P.2d 692]* . It is an incorporeal hereditament much like an easement [*Callahan v. Martin (1935) 3 Cal. 2d 110, 121, 43 P.2d 788* ; *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 880, 69 Cal. Rptr. 612, 442 P.2d 692* ; *Wells Fargo Bank v. Goldzband (1997) 53 Cal. App. 4th 596, 622, 61 Cal. Rptr. 2d 826]* .

An "incorporeal hereditament," for example, a profit 'a prendre, is a limited interest or estate in land [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 878 n.7, 69 Cal. Rptr. 612, 442 P.2d 692]* . There is a significant difference between a permanent right to extract oil and gas and the interest of a tenant under an oil and gas lease [*Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1526, 266 Cal. Rptr. 611]* . When the incorporeal hereditament or limited interest is to endure for perpetuity or for life, it is a freehold interest just as a fee simple or life estate in the land itself is a freehold interest [*Callahan v. Martin (1935) 3 Cal. 2d 110, 120, 43 P.2d 788]* . When the incorporeal hereditament is to endure only for a term of years, it is simply a leasehold interest in the land or a "chattel real" [*Dabney v. Edwards (1935) 5*

Cal. 2d 1, 6-7, 53 P.2d 962] .

[b] Duration of Profit 'a Prendre Interest

The typical oil and gas lease grants the profit 'a prendre to take oil and gas from the leased premises for a stated term and so long thereafter as oil and gas are produced in paying quantities or simply produced from the leased premises [*Dabney v. Edwards (1935) 5 Cal. 2d 1, 11, 53 P.2d 962]* . In other words, the typical oil and gas lease provides, in its habendum clause, for a fixed term called the "exploratory period" and an indefinite term thereafter called the "production period" [*Dabney v. Edwards (1935) 5 Cal. 2d 1, 14, 53 P.2d 962]* . Both periods vest in the tenant immediately on execution of the lease [*Dabney v. Edwards (1935) 5 Cal. 2d 1, 14, 53 P.2d 962]* . Thus, the tenant is vested with the profit 'a prendre for an indefinite and uncertain term; a term the common law classified as a freehold interest in the nature of a qualified or determinable fee [*Dabney v. Edwards (1935) 5 Cal. 2d 1, 11, 53 P.2d 962* ; *Renner v. Huntington-Hawthorne Oil & Gas Co. (1952) 39 Cal. 2d 93, 98, 244 P.2d 895]* .

[c] Abandonment of Profit 'a Prendre

Because the profit 'a prendre is an incorporeal hereditament, it, like a perpetual easement, can be abandoned [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 882, 69 Cal. Rptr. 612, 442 P.2d 692]* . Being in the nature of an easement, it is simply a burden on the leased or servient property. Full fee title to the property, subject to the burden of the profit 'a prendre, is still retained by the landlord. When the profit 'a prendre ends or is abandoned, its burden is simply removed from the leased premises. However, to conclude that the tenant has abandoned its rights under the oil and gas lease, the court must find a concurrence of the tenant's nonuser of the rights and the tenant's intent to abandon the rights [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 889, 69 Cal. Rptr. 612, 442 P.2d 692]* . But the tenant's nonuser of his or her rights may in itself create conflicting inferences as to an oil and gas tenant's intent to abandon his or her profit 'a prendre. In this case, to find an abandonment by the tenant, the court must find either that the tenant's future use of the profit could result only from a palpably unsound business judgment or that the tenant has given some further indication of its intent to abandon [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 894-895, 69 Cal. Rptr. 612, 442 P.2d 692]* .

[d] Servitude in Gross

Because the tenant's right to drill for and take oil or gas from the leased premises is not for the benefit of any other land owned by the tenant or dependent on the tenant's ownership of any other land, it is called a profit 'a prendre in gross rather than a profit 'a prendre appurtenant [*see Balestra v. Button (1942) 54 Cal. App. 2d 192, 197, 128 P.2d 816]* . Incorporeal hereditaments or servitudes in gross are expressly recognized by statute in California [*Civ. Code § 802*]. Although there was some question as to the transferability or assignability of a servitude in gross other than a profit 'a prendre at common law, a profit 'a prendre if granted in gross was capable of being transferred in gross [*Callahan v. Martin (1935) 3 Cal. 2d 110, 121, 43 P.2d 788]* . By statute in California, property of any kind, including a servitude in gross, may be transferred unless expressly made nontransferable by statute [*Civ. Code § 1044*; *Callahan v. Martin (1935) 3 Cal. 2d 110, 121, 43 P.2d 788]* .

[3] Royalty Interest in Landlord

After the owner of the land executes an oil and gas lease on the owner's land, the landlord under the lease has the following three distinct interests [*Brown v. Copp (1951) 105 Cal. App. 2d 1, 5, 232 P.2d 868]* :

- The fee simple title to the surface estate of the land;
- A reserved royalty interest in the land; and
- A possibility of reverter of the minerals described in the lease.

The landlord's right to receive royalty payments is itself an interest in land in the nature of an incorporeal hereditament [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 594, 72 Cal. Rptr. 886, 446 P.2d 1006]* . The royalty an oil and gas tenant pays to an oil and gas landlord is rent or so closely analogous to rent as to partake of the incidents of rent [*Callahan v. Martin (1935) 3 Cal. 2d 110, 123, 43 P.2d 788]* .

Because rents and royalties are an interest in the land in the nature of an incorporeal hereditament, they are transferable; and a transfer of a rental or royalty interest must be recorded, to be effective against purchasers without actual notice, as a conveyance of an interest in land [*Callahan v. Martin (1935) 3 Cal. 2d 110, 124, 43 P.2d 788]* .

[4] Landlord's Rights and Duties as Surface Owner

Surface owners typically own nearly all rights in the land except for the exclusive right to drill for and produce oil, gas, and other hydrocarbons. The owners of the mineral estate, and their tenants, typically hold only the very limited right, analogous to an easement, to drill and capture subsurface oil and gas, and the incidental rights necessary to accomplish this [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1782-1783, 18 Cal. Rptr. 2d 574]* . The right of the surface owner is subordinate to an oil and gas tenant, and the surface owner may not affect the tenant's rights so as to prevent the tenant's enjoyment or unreasonably interfere with the tenant's rights [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1780, 18 Cal. Rptr. 2d 574]* .

In a typical oil and gas lease, the landlord grants the tenant a right to drill for the production of minerals. However, any use by the owner, or others operating under the owner, which does not affect the search for and production of the minerals, is lawful, and the tenant has no right to interfere with this use, except when in the actual exercise of the tenant's rights under the lease [*Brookshire Oil Co. v. Casmalia Etc. Co. (1909) 156 Cal. 211, 217, 103 P. 927* (oil and gas tenant had no right to destroy pipelines installed by licensee of owner when pipelines did not interfere with tenant's rights)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsCorporeal & Incorporeal InterestsReal Property LawLimited Use RightsProfits a PrendreReal Property LawOil & Gas



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AUTHOR: Linda Breen Pierce

§ 36.14 Development Clauses in Oil and Gas Leases

[1] Types of Development Clauses

Oil and gas leases are classified as either "or" or "unless" leases depending on the wording of their "development" clauses [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 402 (1940)*]. Every oil and gas lease has a development clause, either express or implied [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684, 74 P. 296]* . The implied covenant for development requires the oil and gas tenant to use diligence in drilling for oil on the leased property [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684-685, 74 P. 296* ; *see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 239-241, 73 P.2d 1163]* . The express development clause typically will be in the form of an "or" type clause [*see* [2], *below*] or an "unless" type clause [*see* [3], *below*].

[2] "Or" Type Development Clause

The earliest type of "drill or pay" provision was a version of what is known today as an "or" type development clause. The "or" type clause provides that the tenant must commence drilling operations within a specified period, shorter than the exploratory period specified in the lease's habendum clause, "or" begin paying delay rental, usually of a specified amount per acre [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 401 (1940)*]. The lease is not forfeited or terminated by failure of the tenant to comply with the terms of the "drill or pay" clause. However, the tenant's failure to drill within the time required does make the obligation to pay delay rental absolute and the landlord may sue to collect it [*Butler v. Nepple (1960) 54 Cal. 2d 589, 593-594, 6 Cal. Rptr. 767, 354 P.2d 239]* . In addition, the default clause of a lease almost always provides that on the tenant's failure to pay any money due under the lease or perform any other condition of the lease the landlord may, at the landlord's election, declare the lease terminated and the tenant's rights under it forfeited. Thus, absent any provision which would permit the tenant to reduce or eliminate the obligation to pay rental, the tenant's failure to drill within the time required or pay the delay rental would give the landlord the following choice of remedies [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239* ; Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 401 (1940)*]:

- The landlord may declare the lease terminated for breach under the default clause and sue to quiet

title to the landlord's land; or

- The landlord may allow the lease to continue in its unproductive state and from time to time sue for the delay rental as it accrues, all the way to the end of the exploratory term specified in the lease's habendum clause.

To avoid having to pay delay rental on land valueless for oil producing purposes, the oil producers and operators have developed two lease clauses: (1) the "surrender" clause [*see § 36.200[1][f]*] and (2) the "unless" development clause [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 401-402 (1940)*; *see* [3], *below*].

[3] "Unless" Type Development Clause

The "unless" type development clause provides that if drilling is not commenced on the leased premises within a specified time the lease is terminated unless the tenant pays delay rental of a specified amount per acre. The lease is automatically forfeited or terminated by the tenant's failure to either drill within the specified time or pay rent [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239]* . No notice of default need be given by the landlord [*Norris Oil Co. v. Von Glahn (1951) 104 Cal. App. 2d 159, 161, 230 P.2d 885* ; *Alexander v. Oates (1950) 100 Cal. App. 2d 266, 267-268, 223 P.2d 264]* . Therefore, the landlord cannot maintain a suit against the tenant for the delay rental as it accrues in the event that the tenant fails to either drill or pay, because the lease is automatically terminated [*Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 591, 229 P.2d 838]* . Thus, the tenant, under an "unless" type development clause, is allowed to escape from the lease when the tenant comes to believe the leased land is not worthy of exploration [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 404 (1940)*].

[4] History of Development Clauses

Before 1940, the California courts seemed confused as to the exact nature of an "or" or "unless" development or delayed rental clause in an oil and gas lease [*see Carlisle v. Lady (1930) 109 Cal. App. 567, 572-573, 293 P. 686]* . Although the courts apparently recognized that oil and gas do not wander aimlessly about underneath the land's surface, the misconception which originally caused the courts to assume that drilling had to be commenced within the period specified in the development clause to capture the oil and gas before it escaped, they still adhered to the early strict view requiring immediate drilling under an oil and gas lease [*see Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684-685, 74 P. 296* ; *Hall v. Augur (1927) 82 Cal. App. 594, 600, 256 P. 232]* . They allowed forfeiture to be declared by a landlord for a tenant's failure to drill within the period specified in the lease's development clause though the lease contained no forfeiture provisions [*Hall v. Augur (1927) 82 Cal. App. 594, 600-601, 256 P. 232]* . The California courts also held that when an oil and gas lease did not contain an express development clause requiring drilling to be commenced within a reasonable time, one would be implied by law [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684, 74 P. 296]* . This still appears to be the law in California [*see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 239-241, 73 P.2d 1163]* .

In 1940, a comprehensive law review article was published tracing the history of the development or delay rental clauses in oil and gas leases which has led to the use of the "or" and the "unless" type oil and gas leases [*see* Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 304, 393, 400-408 (1940)*]. One year later a California court of appeal expressly recognized the difference between "or" and "unless" type leases [*Wilcox v. West (1941) 45 Cal. App. 2d 267, 270-271, 114 P.2d 39]* . There followed a series of court of appeal decisions recognizing this distinction [*see Alexander v. Oates (1950) 100 Cal. App. 2d 266, 268, 223 P.2d 264* ; *Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590, 229 P.2d 838* ; *Norris Oil Co. v. Von Glahn (1951) 104 Cal. App. 2d 159, 161, 230 P.2d 885* ; *Walston v. Flintridge Oil Co. (1955) 133 Cal. App. 2d 660, 662, 284 P.2d 895* ; *Fritsch v. Fisher (1957) 151 Cal. App. 2d 732, 734, 312 P.2d 21]* . Finally, in 1960, the issue reached the California Supreme Court and it too recognized the distinction between "or" and "unless" type development or delay rental clauses [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesAbandonment & TerminationEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty ClausesEnergy & Utilities LawLeases & LicensesShut-In Royalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART II. LEGAL BACKGROUND

18-36 California Legal Forms--Transaction Guide § 36.15

AUTHOR: Linda Breen Pierce

§ 36.15 Tenant's Covenants to Protect Leased Premises

[1] Drainage Protection Covenants

In every oil and gas lease there is either an express or implied covenant requiring the tenant to protect the leased premises from having the oil drained from under it by wells on adjoining lands [*see* Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 426-427 (1940)*]. The usual and ordinary way to accomplish this protection from drainage is to drill so-called "offset" wells on the leased premises [*see Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 252, 158 P.2d 754* ; *see also* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "O" (Matthew Bender)]. Ordinarily, in the absence of state regulations, an offset well is drilled the same distance from the common boundary of the two parcels of land as is the well it is "offsetting" on the adjoining land [*see* Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289 (1960)*]. An express "offset clause" provides, in effect, that if a well producing oil or gas in paying quantities is drilled on adjacent land within a specified distance of the leased land, the oil and gas tenant must drill an offset well on the leased land [Hightower, *The Oil and Gas Lease in California, 3 UCLA L. Rev. 424 (1956)*]. If the covenant requiring the tenant to protect the leased land from drainage is implied, a distinction is made between drainage by others and drainage by the tenant's operations on adjoining land [*see Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 252, 158 P.2d 754* ; *see also* [2][a], [c], *below*].

[2] Implied Drainage Covenant

[a] Drainage by Third Parties

If the leased land is being drained of oil or gas by a well drilled and operated on adjacent premises by third parties, the tenant is only required to afford reasonable protection against the drainage [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 426-427 (1940)*]. This means the tenant must drill an offset well only if a prudent oil person, under similar circumstances, would drill an offset well [*see Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 252, 158 P.2d 754]* . The prudent operator would drill the offset well only if the operator could do so without incurring a loss [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 427 (1940)*]. In other words, the prudent oil person would drill the offset well only if it were probable that it would produce oil or gas "in paying quantities" and the operator

would make a profit from its operation [*see Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 250, 158 P.2d 754]* .

[b] Meaning of "In Paying Quantities"

For purposes of the implied covenant, the term "in paying quantities" has a different meaning than it has when used in the habendum clause of an oil and gas lease [*see § 36.202[1][c]*]. For purposes of the implied covenant against drainage, the term means the quantities as will result in a profit to the tenant after deducting the costs of drilling, equipping, and operating the offset well, and marketing its products [Blake, *The Oil and Gas Lease, 13 S. Cal. L. Rev. 393, 427 (1940)*].

[c] Drainage by Tenant

If the leased land is being drained of oil or gas by a well drilled or operated on adjacent land by the tenant directly, the tenant has an absolute duty to protect it against the drainage [*see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 243, 73 P.2d 1163* ; *Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 250-252, 158 P.2d 754]* . There is an implied duty imposed on every oil and gas tenant to refrain from taking any affirmative action that will result in the draining of a substantial quantity of oil or gas from the leased premises through wells drilled or operated by the tenant on adjacent property owned by another landlord [*Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 251-252, 158 P.2d 754]* . In fact, at least one writer has argued that this obligation to protect the premises by not draining it is a separate and distinct implied covenant from the implied covenant requiring the tenant to reasonably protect the leased premises from drainage by others [*see* Seed, *The Implied Covenant in Oil and Gas Leases to Refrain From Depletory Acts, 3 UCLA L. Rev. 508 (1956)*].

[d] Effect of Other Covenants in Lease

The implied obligation to protect the leased premises from drainage is probably not affected by an express provision specifying the maximum number of wells to be drilled [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 241, 73 P.2d 1163]* . This provision will definitely not relieve the tenant from the duty to drill offset wells to protect the leased premises from drainage by the tenant directly [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 241-242, 73 P.2d 1163]* . Similarly, an express provision excusing the tenant from drilling offset wells does not relieve the tenant of the implied obligation to refrain from taking affirmative action to drain the leased premises by wells on adjoining property drilled or operated by the tenant [*Bush Oil Co. v. Beverly-Lincoln Land Co. (1945) 69 Cal. App. 2d 246, 253, 158 P.2d 754]* .

[3] Remedy for Breach of Drainage Covenant

The remedy for breach of the express or implied covenants of protection against drainage is damages. The landlord from whose land oil or gas has been drained may recover from the tenant the royalties the landlord should have been paid on the oil or gas drained from the landlord's land by the well or wells on adjoining property [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 254, 73 P.2d 1163* ; *Mitchell v. Union Drilling & Petroleum Co. (1934) 1 Cal. 2d 56, 60, 32 P.2d 1069]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawImplied CovenantsDefensesEnergy & Utilities LawImplied CovenantsDrillingReal Property LawAdjoining LandownersOil & GasTortsPremises Liability & PropertyLessees & LessorsGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART II. LEGAL BACKGROUND

18-36 California Legal Forms--Transaction Guide § 36.16

AUTHOR: Linda Breen Pierce

§ 36.16 Liability for Trespass on Mineral Estate

Causing subsurface migration of fluids into a mineral estate without consent constitutes a trespass [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1778, 18 Cal. Rptr. 2d 574]* . Similarly, slant drilling that drains a pool of oil owned by another on an adjacent parcel constitutes subsurface trespass [*Hancock Oil Co. v. Meeker-Garner Oil Co. (1953) 118 Cal. App. 2d 379, 257 P.2d 988]* . For a discussion of the relationship between the surface owner and the mineral owner, see *§ 36.13[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesMineral InterestsTransmigratory MineralsEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewReal Property LawAdjoining LandownersMines & MiningReal Property LawTortsTrespass to Real Property



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36 California Legal Forms--Transaction Guide § 36.17

AUTHOR: Linda Breen Pierce

§ 36.17 Pooling and Unitization

[1] Physical and Economic Waste

Under the law of capture, captured oil belongs to the person in whose well it is captured [*see* Kramer & Martin, the Law of Pooling and Unitization, ch. 2, *The Rule of Capture* , § 2.01 (Matthew Bender)]. At common law, an owner could drill as many wells as the owner liked on the owner's land. Thus, when an oil and gas reservoir lay under several adjoining parcels of land owned by different persons, each land owner would try to drill more wells on the owner's land and capture more of the oil and gas in the reservoir than the owner's neighbor [Comment, *Compulsory Unitization--The Answer to Oil and Gas Conservation? 7 UCLA L. Rev. 312, 313 (1960)*].

The result of this race to capture the oil was great physical and economic waste [Kramer & Martin, The Law of Pooling and Unitization, Ch. 2, *The Rule of Capture*, § 2.02 (Matthew Bender)]. There was physical waste because the maximum amount of oil was not brought to the surface because the overdrilling of wells reduced the gas and water pressures in the reservoir causing less oil to be moved to the well and up its shaft [Williams & Meyers, Oil and Gas Law, Ch. 1, *A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law*, § 104 (Matthew Bender)]. More important, however, was the economic waste that resulted from drilling duplicate and unnecessary wells and producing gas and oil in quantities that bore no relation to the market demand for those products [Comment, *Compulsory Unitization--The Answer to Oil and Gas Conservation? 7 UCLA L. Rev. 312, 313 (1960)*]. This waste led to voluntary pooling and unitization by oil and gas operators. It also led to well-spacing statutes requiring unitization or pooling in certain instances [*see* Kramer & Martin, the Law of Pooling and Unitization, ch. 2, *The Rule of Capture* , § 2.02 (Matthew Bender)].

[2] Meaning of Pooling and Unitization; Advantages

The terms "pooling" and "unitization" are often used interchangeably [*see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "P" and "U" (Matthew Bender)]. However, in oil and gas parlance each has come to have a commonly understood different meaning. The term "pooling" is commonly understood in the industry to refer to the consolidation of the oil and gas rights of the parcels of land that can be efficiently drained by one oil or gas well. By

contrast, the term "unitization" is commonly understood to mean the consolidation of the oil and gas rights of all parcels of land overlying an entire oil and gas reservoir [Hoffman, *Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mtn. Min. L. Inst. 103 (1955)*].

When the oil and gas rights to various parcels of land are "pooled" or "unitized," individual property lines are ignored, and all the land in the "pool" or "unit" is treated for drilling and petroleum production purposes as if it were one parcel covered by one oil and gas lease. All the owners of parcels of land in the "pool" or "unit" receive a share of the royalties payable for oil or gas produced on any part of the pooled or unitized land [Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289, 289-290 (1960)*].

Thus, pooling, though involving several landlords, will most often involve only one tenant. A unitization will, because it covers a much larger area than a pooling, often involve many landlord and several oil and gas tenants [Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289, 290 (1960)*; *see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "P" and "U" (Matthew Bender)]. The principal advantage of pooling is that it prevents the drilling of unnecessary and uneconomic wells when one well will do the job [Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "P" (Matthew Bender)]. The principal advantage of unitization is that it allows maximum recovery of oil from a reservoir by making it economically feasible to engage in "cycling" and other methods of maintaining gas and water pressure in the reservoir [Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "U" (Matthew Bender); *see* Kramer & Martin, the Law of Pooling and Unitization, ch. 2, *The Rule of Capture* , § 2.03 (Matthew Bender)]. The best results in conservation can be achieved only through unitization [Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "U" (Matthew Bender)].

[3] Methods of Pooling or Unitizing

[a] Statutory Requirements

There are several ways in which the pooling or unitization of oil and gas rights can be accomplished. In some cases it may be required as a conservation measure by statute and be practically decreed by administrative fiat [*see Hunter v. Justice's Court (1950) 36 Cal. 2d 315, 317, 223 P.2d 465]* . For example, when land aggregating less than one acre is surrounded by other lands that are subject to an oil and gas lease aggregating one acre or more, and if the drilling or producing of a well on the first parcel would be a public nuisance under *Pub. Res. Code §§ 3600-3607* (required spacing of wells), the first parcel is deemed included in the oil and gas lease on the adjoining lands when the State Oil and Gas Supervisor records a declaration to that effect with the county recorder of the county in which the first parcel is located [*Pub. Res. Code § 3608*]. This right to receive royalties under the oil and gas lease on adjoining lands is appurtenant to the land and passes to the grantee on sale of the property [*LeBard v. Richfield Oil Corp. (1961) 56 Cal. 2d 532, 536-538, 15 Cal. Rptr. 617, 364 P.2d 449]* .

[b] Voluntary Agreements

Pooling or unitization can be accomplished voluntarily by means of either (1) a community lease, the insertion of so-called "pooling clauses" in separate leases [*see* [c], *below*], or (2) a separate pooling or unitization agreement among various tenants and landlord [*see* [e], *below*; *see also* Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289 (1960)*; *see LeBard v. Richfield Oil Corp. (1961) 56 Cal. 2d 532, 537, 15 Cal. Rptr. 617, 364 P.2d 449]* .

[c] Pooling Clauses in Oil and Gas Leases

A pooling clause is simply a lease provision giving the tenant the right to pool the leased land with other properties in the vicinity for gas and oil development, production, and operational purposes [Hoffman, *Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mtn. Min. L. Inst. 103, 104 (1955)*]. A properly drawn pooling clause usually does all of the following [*see* Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289, 308-310 (1960)*]:

- It restricts the property with which the leased land may be pooled to that in the immediate vicinity of the leased land;

- It limits the number of acres that may be pooled with the leased land; and

- It specifies that the landlord must receive a portion of the royalties from any oil or gas produced anywhere on the pooled property.

[d] Community Leases

[i] Features of Community Lease

A community lease is a single oil and gas lease signed by several owners of distinct parcels of land who are leasing their parcels as a combined tract of land for oil and gas purposes [Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289, 290 (1960)*]. The features of a community lease are the following [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 818, 129 P.2d 383]* :

- That several owners of distinct parcels lease their respective parcels as one tract of land;

- That the tenant is given sole and exclusive right to drill for and produce oil on any part of the tract; and

- That each owner shares proportionately in the royalties from any oil or gas produced from the tract regardless of the portion of the tract on which it is discovered or produced.

Community leases are only one method for achieving common oil development, however, and agreements for the pooling of individual leases [*see* [e], *below*] and other forms of unit operation are not uncommon [*LeBard v. Richfield Oil Corp. (1961) 56 Cal. 2d 532, 536-537, 15 Cal. Rptr. 617, 364 P.2d 449]* .

[ii] Cross-Conveyancing

In a community oil and gas lease, each landowner conveys to each of the other landowners signing the lease a percentage interest in all oil produced on his or her land by the tenant during the term of the lease. The consideration each landowner receives for conveying a percentage interest in all oil produced on his or her land to each of the other landowners is a like conveyance by each of them of a portion of the oil produced on his or her land [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 820, 129 P.2d 383]* .

[iii] Two Distinct Royalty Interests

Each landowner signing a community oil and gas lease has the following two royalty interests [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 820, 129 P.2d 383* ; *see LeBard v. Richfield Oil Corp. (1961) 56 Cal. 2d 532, 536-537, 15 Cal. Rptr. 617, 364 P.2d 449]* :

- The landowner has a percentage royalty interest in the oil and gas produced from the landowner's land, which is an incorporeal hereditament appurtenant to that land; and

- The landowner also has a percentage royalty interest in the oil and gas produced from the land of each of the other landowners who signed the lease which, in his or her hands, is an incorporeal hereditament in gross.

An incorporeal hereditament that is appurtenant passes with the land to which it is appurtenant. An incorporeal

hereditament in gross, not being appurtenant to any land, does not pass with the conveyance of the landowner's land [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 820, 129 P.2d 383]* .

[iv] Withdrawal of Land From Community Lease

Under the "cross-conveyancing" theory [*see* [ii], *above*], when a landowner who is a party to a community lease withdraws his or her land from the lease and releases the tenant from all obligations under the lease with regard to the landowner's land, the landowner is still entitled to a portion of the royalty earned by oil produced from other land subject to the lease. The withdrawal and release does not affect the landowner's rights under the incorporeal hereditament in gross conveyed to the landowner on execution of the lease by each of the other landowners [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 823, 129 P.2d 383]* . Furthermore, when the withdrawal and release of one parcel is joined in by all the other landowners, a well may be drilled on the withdrawn land and its owner need not share the royalties from oil produced by that well with anyone else [*Tanner v. Olds (1946) 29 Cal. 2d 110, 116, 173 P.2d 6]* .

[v] Conveyance of Land Subject to Community Lease

A conveyance of land subject to a community lease, although it conveys to the grantee oil royalty rights appurtenant to the land, does not convey to the grantee the right to royalties from oil produced from other lands subject to the community lease [*Vantress Farms, Inc. v. Sydenstricker (1970) 11 Cal. App. 3d 943, 949, 90 Cal. Rptr. 251* ; *Agajanian v. Cuccio (1956) 141 Cal. App. 2d 828, 831-832, 297 P.2d 755* ; *Friedrich v. Roland (1950) 95 Cal. App. 2d 543, 549, 213 P.2d 423]* . However, it would not be unreasonable for the parties to provide that all of the royalties payable to an individual landlord under unit operation should be appurtenant to the landlord's land to avoid the problem of apportionment that arises under the *Tanner* rules in the event of a sale without a reservation of the mineral rights or an assignment of the royalties held in gross [*Lebard v. Richfield Oil Corporation (1961) 56 Cal. 2d 532, 537, 15 Cal. Rptr. 617]* . Whether, in any given agreement for unit development, the *Tanner* rules will be applicable between the parties will depend on the terms of the agreement [*Lebard v. Richfield Oil Corporation (1961) 56 Cal. 2d 532, 537, 15 Cal. Rptr. 617* ; *see* [i]-[iv], *above*, for discussion of the *Tanner* rules].

[vi] Foreclosure of Land Subject to Community Lease

If land included in a community lease was foreclosed on under a lien that predated the lease, the owner of that land lost the right to part of the royalties for oil produced from other lands subject to the community lease. On foreclosure, the tenant lost the right to drill for and produce oil from the foreclosed land. That, in turn, meant that the consideration agreed to be given by the owner of the foreclosed parcel for the cross-conveyance of a royalty interest in each of the other lands subject to the community lease failed, and the owner of the foreclosed parcel lost the right to royalties under the community lease [*Gillis v. Royalty Serv. Corp. (1949) 91 Cal. App. 2d 365, 368-369, 204 P.2d 968]* .

[e] Separate Pooling Agreement

A separate pooling or unitization agreement is, as the name implies, a separate agreement providing for pooling or unitization of specified parcels and is usually solicited from a landlord after the landlord has already executed an oil and gas lease. A separate pooling or unitization agreement usually specifically describes the area to be pooled or unitized and may even specify the manner in which the pool or unit is to be operated [Hoffman, *Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mtn. Min. L. Inst. 103, 105 (1955)*].

Pooling clauses in oil and gas leases are most often used to authorize the formation of a "pooled" unit that can be drained or produced through one well [Hoffman, *Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mtn. Min. L. Inst. 103, 105 (1955)*]. In contrast, separate unitization agreements are almost always used to unitize an entire oil and gas reservoir. The majority of unitization production units in the United States are said to be based on separate unitization agreements substantially following the Model Form Unit Agreement and Model Form Unit Operating

Agreement prepared by the American Petroleum Institute.

PRACTICE TIP:

Getting in Touch With the American Petroleum Institute. The model forms are available from the American Petroleum Institute, 1220 L Street, Northwest, Washington, D.C. 20005, (202) 682-8000, http://www.api.org. *By Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryRule of CaptureEnergy & Utilities LawLeases & LicensesPooling ClausesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36 California Legal Forms--Transaction Guide § 36.18

AUTHOR: Linda Breen Pierce

§ 36.18 Rule Against Perpetuities

[1] Pre-1992 Rules

Before January 1, 1992, when the Uniform Statutory Rule Against Perpetuities became operative in California [*see Prob. Code § 21200 et seq.*], a lease that was to commence in the future was subject to the common law rule against perpetuities. Under this rule, if the leasehold interest was "nonvested," it was invalid unless, at the time the lease was created, the leasehold was certain to either vest or terminate within 21 years after the death of some person alive at the time of creation, or alternatively within 60 years after the creation [*see* former *Civ. Code §§ 715.2, 715.6*, repealed January 1, 1992; *see also Wong v. Di Grazia (1963) 60 Cal. 2d 525, 535-541, 35 Cal. Rptr. 241, 386 P.2d 817]* . For purposes of applying this rule, an interest was "nonvested" if it was subject to an unsatisfied condition precedent. An interest was "vested" if it was owned free of all conditions precedent [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2552-2553 (1990); Black's Law Dictionary 1563 (6th ed. 1990)].

[2] Uniform Statutory Rule Against Perpetuities

Under the Uniform Statutory Rule Against Perpetuities, most leases are not subject to the rule against perpetuities. This is because the Uniform Statutory Rule excludes most "nondonative" transfers from its application [*see Prob. Code § 21225(a)*]. For this purpose, a "nondonative" transfer is a commercial-type transaction that is supported by consideration, for example, a typical commercial lease, an option to renew a lease, and a right of first refusal to purchase the property [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 571, 576, 31 Cal. Rptr. 2d 595]* . A "donative" transfer, in contrast, is generally a transfer that is not supported by consideration [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2594-2595 (1990)]. Under the exclusion for "nondonative transfers," it would appear that property interests arising in oil and gas leases are not subject to the rule against perpetuities.

For a detailed discussion of the rule against perpetuities in California, see the Legal Background to Ch. 67, *Future Interests and Perpetuities* .

[3] Related Time Restrictions

Although leases supported by rent are not subject to the rule against perpetuities, many leases are subject to other time limitations. For example, under *Civ. Code § 718*, any lease of a town or city lot for which the term exceeds 99 years, including options to renew the lease, is invalid [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 576, 31 Cal. Rptr. 2d 595]* . If the property is owned or controlled by the municipality, generally the term will be limited to 55 years or less [*see Gov. Code § 37380*; *see also Civ. Code § 718*].

Every lease that is to commence at a time certain or on the happening of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution [*Civ. Code § 715*]. The effect of this section is to place a 30-year limit on leases that might have been voidable future interests under the old common law rule against perpetuities [*see* Recommendation Relating to Uniform Statutory Rule Against Perpetuities, 20 Cal. L. Revision Comm'n Reports 2501, 2595 (1990); *see* former *Civ. Code § 715.2*, repealed January 1, 1992; *see also* [1], *above*]. It should be noted, however, that the old rule against perpetuities required that an interest either vest or terminate within the applicable period. *Civ. Code § 715*, in contrast, requires that the lease actually commence in possession within 30 years. Thus, a lease may be invalid because it does not commence in possession within the statutory period even though the lease is fully vested within that period.

For further coverage of these restrictions, see California Real Estate Law and Practice, ch. 151, *Predrafting Legal Considerations* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesRule Against PerpetuitiesEnergy & Utilities LawOil, Gas & Mineral InterestsPersonalty & Realty InterestsReal Property LawOil & Gas



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART II. LEGAL BACKGROUND

18-36 California Legal Forms--Transaction Guide § 36.19

AUTHOR: Linda Breen Pierce

§ 36.19 Termination of Oil and Gas Lease

[1] Surrender by Tenant

A typical oil and gas lease may be terminated before its natural expiration in a number of ways. Most leases have a surrender clause [*see § 36.200[1][f]*] that permits the tenant to unilaterally terminate the lease. Since the tenant's interest in an oil and gas lease is a profit 'a prendre, it can be abandoned [*see § 36.13[2]*].

The rules governing surrender and abandonment of possessory leaseholds are expressly inapplicable to a profit 'a prendre. *Civ. Code § 1952.4* (which governs the rights and obligations of landlords and tenants with regard to termination, surrender, and abandonment) provides as follows [*see also Kennecott Corp. v. Union Oil Co. of California (1987) 196 Cal. App. 3d 1179, 1186, 242 Cal. Rptr. 403]* :

> An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of [*Civ. Code] Sections 1951 to 1952.2*, inclusive.

[2] Termination of Tenant's Surface Rights

Without terminating the lease, a landlord may file an action to terminate the tenant's surface rights to all or part of the land subject to the lease under limited circumstances [*Code Civ. Proc. §§ 772.030, 772.040*; *Donlan v. Weaver (1981) 118 Cal. App. 3d 675, 680-684, 173 Cal. Rptr. 566]* .

[3] Tenant's Obligation to Quitclaim Interest

When the term of any oil, gas, or other mineral right lease has expired, or a lease has been abandoned, the landlord, his or her successor in interest, heirs, or grantees may demand a deed quitclaiming the tenant's interest in the land and minerals covered by the lease [*see* California Forms of Pleading and Practice, Ch. 393, *Oil and Gas* (Matthew Bender)]. Within 30 days after this demand, the tenant, his or her assignee, or other successor in interest must execute, acknowledge, and deliver, or cause to be recorded, a quitclaim deed. When the expiration or abandonment of a lease

covers less than the tenant's entire interest, the tenant must execute, acknowledge, and deliver a notice of surrender or termination or other appropriate instrument covering the interest that has expired or been abandoned [*Civ. Code § 883.140(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAbandonment & TerminationEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesGeneral OverviewReal Property LawLimited Use RightsProfits a PrendreReal Property LawOil & Gas



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18-36 California Legal Forms--Transaction Guide § 36.20

AUTHOR: Linda Breen Pierce

§ 36.20 Tenant's Breach of Oil and Gas Lease

If the landlord of oil or mineral producing property sues for damages when the tenant breaches a contract to drill or mine, the appropriate contract measure of damages is the amount of royalties the landlord can prove that he or she lost by reason of the tenant's breach [*Gold Min. & Water Co. v. Swinerton (1943) 23 Cal. 2d 19, 32, 38-42, 142 P.2d 22* ; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 747, 118 Cal. Rptr. 811]* . In California, in contrast to some other jurisdictions, a landlord may not recover the cost of drilling the well that the tenant failed to drill [*Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 750-751, 118 Cal. Rptr. 811]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesCompensatory Damages



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18-36 California Legal Forms--Transaction Guide §§ 36.21-36.99

AUTHOR: Linda Breen Pierce

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§§ 36.21[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-36 California Legal Forms--Transaction Guide § 36.100

AUTHOR: Linda Breen Pierce

§ 36.100 Basic Facts for All Parties

1. Basic information about landlord and tenant, including the following:

a. Name.

b. Addresses (mailing, delivery, e-mail).

c. Telephone numbers (voice, fax, message, cellular).

d. Legal status, as any of the following:
(1) Individual.
(a) Marital status.

(b) Name of spouse, if married.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Limited liability company.

(6) Joint venture.

(7) Unincorporated association.

(8) Estate.

(9) Public entity.

(10) Other.

2. Names, addresses, titles, and telephone numbers of any other parties, including the following:

NOTE:

The following is a list of potential participants in an oil and gas lease transaction. A client's proposed transaction may not require the services of all these parties. The list may be used to solicit from the client information for participants in the transactions and also may be used as a checklist of professionals whose services may be needed.

a. Attorney representing other party.

b. Accountant representing each party.

c. "Landman" or other person negotiating lease on behalf of corporation.

NOTE:

The term "landman" in the oil and gas industry means a corporate employee whose primary duty is management of the corporation's relations with its oil and gas landowner landlords. Included in those duties are the securing of oil and gas leases, securing any required lease amendments or landlord approvals to unitization or pooling arrangements [***see*** *§ 36.17*], and securing instruments required to cure any title defects [***see*** Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "L" (Matthew Bender)].

d. Title company, if any, from which tenant will order title insurance policy insuring its rights under lease.

3. Additional information concerning any parties who are not individuals, such as:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

4. If landlord or tenant is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

NOTE:
For discussion of the authority of a corporation to lease real property, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

5. If landlord or tenant is a partnership:

a. And partnership holds title in partnership name, names of partners authorized to sign lease.

b. And title is held in name of one or more of partners, names of these partners.

NOTE:
For discussion of the authority of a partnership to lease real property, see Ch. 15, Part A, ***Formation of General Partnerships***, § 15.201.

6. If landlord or tenant is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name of manager(s) if other than members.

NOTE:
For discussion of the authority of a limited liability company to lease real property, see Ch. 12C, ***Limited Liability Companies*** .

7. If landlord or tenant is an unincorporated association [*see Corp. Code § 18000 et seq.*]:

a. Names of members if articles or bylaws require approval by members.

b. Name of any officers authorized to execute lease on behalf of association.

NOTE:
For discussion of the authority of a unincorporated association to lease real property, see Ch. 34A, ***Prelease Forms*** .

8. If landlord or tenant is an estate:

a. Name of estate's guardian, conservator, executor, or administrator.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name of location of court with jurisdiction over estate.

9. If landlord or tenant is a public entity:

a. Governing body for entity.

b. Date on which governing body approved or will approve lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.101

AUTHOR: Linda Breen Pierce

§ 36.101 Basic Facts About Property Subject to Lease

1. Landlord's title to property subject to lease, including:

a. Date landlord acquired title.

b. Manner in which landlord holds title, such as:
(1) Corporation in corporate name.

(2) Partnership in partnership name.

(3) Partnership in name of one or more partners.

(4) Limited liability company in name of limited liability company.

(5) Unincorporated association [*see Corp. Code § 18000 et seq.*].

(6) Individual.

(7) Husband and wife in [*see Fam. Code § 750*]:
(a) Joint tenancy.

(b) Tenancy in common.

(c) Community property.

(d) Community property with right of survivorship.

(8) Co-owner in [*see Civ. Code § 682*]:

(a) Joint tenancy.

(b) Tenancy in common.

(9) Executor or administrator of decedent's estate [*see Prob. Code §§ 9940-9948*].

2. Description of real property subject to lease, including:

a. City and county in which property is located.

b. Exact legal description of property.

c. Proximity of property to producing oil and gas wells or fields, including:

(1) Whether property is part of established oil and gas field; and

(2) Whether property is located in "wildcat territory."

NOTE:
"Wildcat territory" is defined as territory that is not known to contain oil and is not near enough to known oil territory to make the existence of oil under it reasonably probable. However, it includes territory that has a relation to other oil lands and geological characteristics suggesting the possibility that it contains oil [*United States v. Stockton Midway Oil Co. (S.D. Cal. 1917) 240 F. 1006, 1007]* .

d. Number or approximate number of acres of property.

NOTE:
The acreage aids in determining whether a well may be drilled on the property under the well-spacing statutes [*Pub. Res. Code §§ 3600-3609*] and the number of wells that may be drilled on the property. It will also determine, to some extent at least, the number of wells that will most efficiently drain the oil from under the property and whether the land should be pooled with other land [***see** § 36.17* (pooling and unitization)].

3. Nature of tenant's operations and purpose for which tenant desires lease, such as:

a. Operating oil and gas producer intending to drill wells and produce oil or gas from leased premises.

b. Operating oil and gas producer intending to pool leased premises with other land in vicinity which it has under oil and gas leases.

c. Independent "lease hound" intending to speculate on rights under lease.

NOTE:

A "lease hound" is a person whose business is securing oil and gas leases from landowners. Some lease hounds are employed by oil corporations and are called "landmen" [***see*** *§ 36.100*, P 2c, NOTE]. Others, however, are self-employed and secure oil and gas leases in their own names so they may sell them at a profit to another person who will actually drill on and develop the leased property [***see*** Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "L" (Matthew Bender)].

4. Name and address of each person or entity, other than landlord, who owns any interest in property that is to be subject to lease, including:

NOTE:

Part of this information can readily be obtained from the landlord but much of it may have to be learned by means of a title report ordered from a title company. The prospective oil and gas tenant may, in fact, have already obtained a title report on the property it seeks to lease for oil and gas purposes.

a. Former grantors of land who have reserved any oil or rights.

b. Persons to whom present owners or any former owners granted any interest in oil and gas rights.

c. Former grantors of land who reserved any mineral rights to land.

d. Persons to whom present owners or any former owners have granted any interest in any kind in mineral rights.

e. Trustees and beneficiaries of any deeds of trusts encumbering property.

f. Holders of any liens encumbering the property.

g. Any tenants of surface rights.

h. Persons holding easements or licenses over or to use any portion of land.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawLeases & LicensesGeneral OverviewReal Property LawOil & Gas



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18-36 California Legal Forms--Transaction Guide § 36.102

AUTHOR: Linda Breen Pierce

§ 36.102 Documents to Be Obtained

1. Deed or other instrument showing legal description of property to be leased, such as:

    a. Deed by which property was conveyed to landlord.

    b. Decree of distribution by which property, if inherited, was distributed to landlord.

    c. Other instruments showing legal description.

2. Copies of all leases given by landlord for use of property to be leased, including:

    a. Leases for occupancy of all or any part of surface of land, including:
    (1) Agricultural leases.

    (2) Business leases.

    (3) Residential leases.

    b. Prior oil and gas or mineral leases.

3. Copies of all deeds of trust or other instruments evidencing obligations encumbering or possibly encumbering land to be leased.

4. Preliminary title report showing status of:

a. Title to land sought to be leased.

b. Title to oil and gas rights of land sought to be leased.

5. Copies of any and all instruments described in preliminary report of title company that might cloud title to oil and gas rights.

6. When landlord is a corporation, certified copy of the resolution of its board of directors authorizing execution of lease [*see Ch. 34A, Prelease Forms, § 34A.200*].

7. When landlord is a partnership holding land in partnership name, statement of partnership recorded in county where land is located [*see* Ch. 15, Part A, *Formation of General Partnerships* ; Ch. 15A, *Formation of Limited Partnerships*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewReal Property LawOil & GasReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate Entities



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18-36 California Legal Forms--Transaction Guide §§ 36.103-36.109

AUTHOR: Linda Breen Pierce

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§§ 36.103[Reserved]



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B. Preliminary Determinations

18-36 California Legal Forms--Transaction Guide § 36.110

AUTHOR: Linda Breen Pierce

§ 36.110 Feasibility of Oil Well Drilling

1. Determine whether tenant desires a short term lease-option of real property for purpose of making further surveys of its potential oil and gas reserves.

2. Determine whether size of land or peculiarities of terrain will require drilling of slant well through adjoining land, and if so:

a. Whether drilling may require acquisition by lease of surface drilling rights on neighboring land subject to well-spacing rules [*see Pub. Res. Code § 3606*].

b. When land on which well to be located is not contiguous with land to be leased for oil and gas production, whether an easement through intervening parcel(s) will be necessary [*see § 36.230*].

3. Determine whether well may be drilled on leased land without pooling or unitization owing to limitations imposed by well-spacing requirements [*see Pub. Res. Code §§ 3600-3608.1*].

NOTE:

In addition to any voluntary unit or pooling plan authorized by statute [***see*** *Pub. Res. Code §§ 3630-3690*], the State Supervisor of Oil and Gas may require a particular well-spacing plan, or inclusion of certain parcels under a unit or pooling program, if the Supervisor determines, after a hearing, that a well-spacing plan or program is necessary to prevent waste and increase recovery from a designated reservoir of oil and gas [*Pub. Res. Code § 3609*].

4. Determine whether voluntary pooling of leased land with neighboring property is advisable to avoid drilling of offset

wells [*see § 36.17[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesPooling ClausesEnergy & Utilities LawPooling & UnitizationCompulsory UnitizationEnergy & Utilities LawPooling & UnitizationVoluntary PoolingEnergy & Utilities LawPooling & UnitizationVoluntary UnitizationReal Property LawAdjoining LandownersOil & Gas



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B. Preliminary Determinations

18-36 California Legal Forms--Transaction Guide § 36.111

AUTHOR: Linda Breen Pierce

§ 36.111 Basic Terms of Lease

1. Ascertain rental to be paid at time oil and gas lease is executed.

2. Ascertain amount of deferred rentals tenant will pay to defer drilling on leased land [*see § 36.14*] by considering factors such as:

a. Whether amount is paid annually at rate per acre or per unit or per lot in case of subdivided land.

b. Whether amount is determined by [*see* Mee, Cal. Div. of Oil and Gas Pub. No. PRO 9, Leasing Land for Oil and Gas Development in California, "Questions and Answers" (1976)]:
(1) Proximity of leased land to other producing wells.

(2) Value of land for other uses.

(3) Economic analyses of prospect, including costs.

(4) Negotiations between oil and gas landlord and oil and gas tenant.

3. Ascertain royalties payable under lease, including:

a. Oil royalties [*see § 36.200[1][d][iii]*].

b. Gas royalties [*see § 36.200[1][d][i]*].

c. Casinghead gasoline royalties [*see § 36.200[1][d][ii]*].

d. Other royalties.

4. Determine whether following royalties will be payable in cash or in kind, or only in cash:

a. Oil royalties.

b. Gas and casinghead gasoline royalties.

5. Determine length of exploratory term during which either oil or gas must be discovered or property must be pooled or unitized with other property.

NOTE:
An oil and gas lease is usually granted for a definite number of years "and so long thereafter as oil or gas is produced" in paying quantities from the leased land. The specified number of years is the exploratory period and the "thereafter" period is known as the production period [***see*** *§ 36.201[1][b]*].

6. Determine period within which drilling must be commenced on leased land or deferred rental paid [*see § 36.14*], considering factors such as:

a. Whether period will be considerably shorter than exploratory term of lease.

b. Whether deferred rentals usually cannot defer drilling beyond exploratory term of lease.

7. Determine any conditions that would prevent drilling from surface of leased land, for example:

a. Land in urban area having high value for surface use.

b. Leases already granted for surface use.

c. Buildings or other structures of considerable value occupying surface of land.

8. Determine whether either party wishes to include any special provisions or conditions in lease, for example:

a. Clause giving easement to leased land as drilling site over adjoining land owned by landlord.

b. Clause restricting drilling on specified portions of leased land, for example, portion near landlord's home.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesForce Majeure ClausesEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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B. Preliminary Determinations

18-36 California Legal Forms--Transaction Guide §§ 36.112-36.119

AUTHOR: Linda Breen Pierce

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§§ 36.112[Reserved]



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C. Procedural Guide

18-36 California Legal Forms--Transaction Guide § 36.120

AUTHOR: Linda Breen Pierce

§ 36.120 Steps Required Before Executing Lease

1. Take whatever actions are necessary to remove defects in title affecting tenant's rights as revealed by preliminary title report, including:

a. Quitclaim or corrective deeds.

b. Releases of liens or other evidences of debt.

c. Quiet title action.

2. If slant well will be required [*see § 36.110*], obtain easement from adjoining landowner to drill well.

3. Make inquiries to find out whether local authorities or other regulatory bodies have imposed zoning or other regulations affecting land to be leased.

4. Check with local administrative office for appropriate district of Division of Oil, Gas, and Geothermal Resources to determine whether there is any existing well-spacing plan [*see 14 Cal. Code Reg. §§ 1721-1721.9*] or unit agreement [*see 14 Cal. Code Reg. §§ 1810-1883*] affecting land to be leased [*see § 36.110*].

NOTE:
The headquarters for the Division of Oil, Gas, and Geothermal Resources is at 801 K Street, MS 20-20, Sacramento, CA 95814, telephone (916) 323-0424. There are six districts within the Division. Locations and telephone numbers of the six districts may be found on the web site for the Department of Conservation at http://www.consrv.ca.gov/prog/docdirect.htm.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawLeases & LicensesGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.121

AUTHOR: Linda Breen Pierce

§ 36.121 Representation of Both Parties to Lease

1. If requested to represent both parties to transaction:

a. Recommend that one party obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw their request and do not appear to have conflicting or potentially conflicting interests, take both of the following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party.

b. Obtain written consent from both parties to arrangement before accepting employment.

PRACTICE TIP:
Representing Both Parties to a Lease Is Not Advised. It is impossible to see how there can be an effective waiver of a conflict of interest that would permit any attorney to represent both parties to a lease transaction even if that attorney's role was "limited" to drafting an already reached agreement. Any attorney who enters into such an arrangement is simply looking for major problems with either or both clients. It would be akin to representing both parties in a dissolution of marriage proceeding in which substantial interests were involved. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of Interest



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18-36 California Legal Forms--Transaction Guide § 36.122

AUTHOR: Linda Breen Pierce

§ 36.122 Review of Lease Drafted by Other Party

1. If lease has not yet been drafted by other party, assist client in negotiations with other party.

2. On receipt of lease, review lease to ensure that it is:

    a. Consistent with negotiated terms.

    b. Legally sufficient.

    NOTE:
    For a checklist of provisions that should or may be included in an oil and gas lease, see Part D of this Transaction Guide.

3. Obtain client's approval of final lease form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.123

AUTHOR: Linda Breen Pierce

§ 36.123 Drafting, Execution, and Recording Lease

1. Draft lease.

NOTE:
For a drafting guide for an oil and gas lease, see Part D of this Transaction Guide.

2. Execute lease.

NOTE:
The execution requirements for a lease depend on whether the landlord or tenant is an individual or other type of legal entity. These requirements are discussed in the Transaction Guide to Ch. 34B, ***Residential Leases***.

3. Record lease, or a Memorandum of Lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203[1]* for discussion of advantages and purpose of recording memorandum of lease].

NOTE:
If the county of recordation imposes a documentary transfer tax, the consideration for, or the value of, the interest conveyed will need to be determined [***see*** *Rev. & Tax. Code § 11911*]. Since a right to drill for oil and gas is a profit 'a prendre which continues for an indefinite period (for as long as oil and gas are produced), it is a freehold interest and its conveyance is a sale subject to the provisions of the Documentary Transfer Tax Act [***see*** *Rev. & Tax. Code §§ 11901-11934*]. However, it is not at all clear how a nonproducing profit 'a prendre could be valued, and it is likely that the tax can be simply calculated on the initial payment of deferred rental.

4. Forward original lease (or memorandum of lease) to county recorder, together with:

a. Cover letter requesting recordation.

b. Check for recording fees [*see Gov. Code § 27361*].

c. Check for amount of documentary transfer tax, calculated at $0.55 per $500 of consideration for or value of lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOil & GasReal Property LawPriorities & RecordingRecording Acts



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18-36 California Legal Forms--Transaction Guide §§ 36.124-36.129

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.124[Reserved]



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D. Drafting Guide

18-36 California Legal Forms--Transaction Guide

AUTHOR: Linda Breen Pierce

NOTE:

This Part is a checklist of provisions that the attorney should or may include in an oil and gas lease and related documents. If the attorney is reviewing a lease prepared by another party, this list may be used to evaluate the sufficiency and scope of that lease. The attorney will need the information included in Part A of this Transaction Guide and a resolution of the issues referred to in Part B to complete the lease drafting or review.



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D. Drafting Guide

18-36 California Legal Forms--Transaction Guide § 36.130

AUTHOR: Linda Breen Pierce

§ 36.130 Oil and Gas Lease

1. If original lease is to be drafted, select appropriate:

a. Granting clause describing leased land and purposes for lease [*see § 36.200[2]*, P 1].

b. Habendum clause specifying term and length of lease as [*see § 36.200[1][b]*]:
(1) For stated period and so long thereafter as production or drilling is continuously prosecuted on the leased land [*see § 36.200[2]*, P 2]; or

(2) For stated period and so long thereafter as oil and gas are produced in paying quantities, defining "paying quantities" [*see § 36.201*].

c. Clauses specifying activity that tenant may engage in on leased land [*see § 36.200[2]*, PP 1, 3].

d. Royalty clauses, including:

(1) Oil royalty clause [*see § 36.200[2]*, P 4].

(2) Gas royalty clause [*see § 36.200[2]*, P 5].

(3) Casinghead gasoline royalty clause [*see § 36.200[2]*, P 6].

(4) No royalty on oil or gas used by tenant itself [*see § 36.200[2]*, P 7].

(5) Manner of payment of royalty [*see § 36.200[2]*, P 8].

e. Development and deferred rental clause, including:

(1) "Drill or pay" type development clause [*see § 36.200[2]*, P 9].

(2) "Unless" type development clause [*see § 36.202*].

(3) Dry-hole clause requiring tenant to drill another well or pay deferred rentals where well drilled is nonproductive [*see § 36.203*].

(4) Shut-in royalty clause requiring payment of specified amount where operations of gas well suspended [*see § 36.204*].

f. Development clause requiring further wells to be drilled, including:

(1) Oil development clause requiring further drilling after oil in paying quantities is discovered [*see § 36.200[2]*, P 12].

(2) Gas development clause requiring further drilling after gas but not oil is discovered in paying quantities [*see § 36.200[2]*, P 13].

g. Offset-well clause requiring offset wells to be drilled to offset production and drainage by wells on neighboring lands [*see § 36.200[2]*, P 14].

h. Operations clauses, including:

(1) Operations to be conducted at tenant's expense and according to law [*see § 36.200[2]*, P 15].

(2) Surface use of land not interfering with tenant [*see § 36.200[2]*, P 18].

(3) When suspension of operations is allowed without terminating lease [*see § 36.200[2]*, P 16].

i. Tax, proration, and payment clauses [*see § 36.200[2]*, P 17].

j. Surrender clause [*see § 36.200[2]*, P 20; *see also § 36.200[1][f]*].

k. Default and termination clauses [*see § 36.200[2]*, PP 19, 21].

l. Pooling and unitization clause authorizing tenant to pool or combine leased land's oil and gas rights with those of other property in vicinity [*see § 36.205*; *see also § 36.17*].

m. Clauses dealing with assignments and notices, binding heirs, attorneys' fees, and defining terms [*see § 36.200[2]*, PP 22-27].

2. Prepare at least four copies of lease for distribution as follows:

a. Original to be recorded in county where land is located [*see § 36.123*].

b. One copy signed by landlord and tenant to be given to each party.

c. One copy for attorney's office files.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAbandonment & TerminationEnergy & Utilities LawLeases & LicensesCancellationEnergy & Utilities LawLeases & LicensesForfeiture ClausesEnergy & Utilities LawLeases & LicensesGranting ClausesEnergy & Utilities LawLeases & LicensesHabendum ClausesEnergy & Utilities LawLeases & LicensesPooling ClausesEnergy & Utilities LawLeases & LicensesRoyalty ClausesEnergy & Utilities LawLeases & LicensesSavings ClausesEnergy & Utilities LawOil, Gas & Mineral InterestsSurface Use Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

18-36 California Legal Forms--Transaction Guide §§ 36.131-36.139

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.131[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

18-36 California Legal Forms--Transaction Guide § 36.140

AUTHOR: Linda Breen Pierce

§ 36.140 Drilling Operations

1. Obtain following forms from District Office of Division of Oil and Gas ("Division") before commencement of drilling:

a. Notice of intention to commence drilling [*see Pub. Res. Code § 3203*].

NOTE:
The Supervisor of Oil and Gas ("Supervisor") may approve the use of forms other than printed forms supplied by the Division of Oil and Gas, and may require other pertinent information to supplement the notice of intention [*Pub. Res. Code § 3203*].

b. Either of the following:

(1) Blanket indemnity bond [*see Pub. Res. Code § 3205*]; or

NOTE:
Any operator who engages in the drilling of one or more wells (or related work) in California may file with the Supervisor one blanket indemnity bond for $250,000 ($100,000 for operators with 50 or fewer wells) to cover all of that person's drilling operations in any of his or her wells in the state in lieu of an individual indemnity bond for each drilling operation [*Pub. Res. Code § 3205*]. A blanket surety bond provided before January 1, 1999, must be increased to $250,000 by January 1, 2001. A blanket cash bond provided before January 1, 1999, must be increased by a minimum of $30,000 per year, commencing January 1, 2000, and yearly on January 1 thereafter [*Pub. Res. Code § 3205(a)*]. Instead of filing a $250,000 bond, which does not include the bonds or fees for

idle wells required by *Pub. Res. Code § 3206*, operators may provide a $1 million bond and be relieved of the requirements of *Pub. Res. Code § 3206* [*Pub. Res. Code § 3205(c)*].

(2) Individual indemnity bond [*see Pub. Res. Code § 3204*].

NOTE:

Every operator who drills a well (or performs related tasks) in California and who has not filed a blanket indemnity bond must file with the Supervisor an individual indemnity bond in the following sum for each well that is to be drilled: $15,000 for each well less than 5,000 feet; $20,000 for each well more than 5,000 but less than 10,000 feet, and $30,000 for each well 10,000 or more feet [*Pub. Res. Code § 3204*].

Either type of bond may be terminated and canceled when the well or wells covered by them have been properly completed or abandoned, or another valid bond has been substituted [*Pub. Res. Code § 3207*]. A well is properly completed when it has been shown to the satisfaction of the Supervisor of Oil and Gas that the manner of producing oil or gas or injecting fluids into the well is satisfactory and that the well has maintained production or injection for a continuous six-month period [*Pub. Res. Code § 3208*].

2. File notice of intention and bond with Supervisor or district deputy of Division [*see Pub. Res. Code §§ 3203-3205*].

3. Unless Supervisor or district deputy informs client in writing of rejection of notice of intention within 10 working days of Supervisor's (or deputy's) receipt of that notice, instruct client to commence drilling on the later of the following time [*Pub. Res. Code § 3203*]:

a. On approval of notice.

b. After 10 working days have elapsed since Supervisor's (or deputy's) receipt of notice.

NOTE:

If the Supervisor or district deputy does not give the operator a written response to the notice of intention within 10 working days from the date of the notice's receipt, that failure will be considered an approval of the notice and the notice will be deemed a written report of the Supervisor [*Pub. Res. Code § 3203*].

4. Keep accurate log, core record, and history of drilling of well [*see Pub. Res. Code § 3210*].

NOTE:

The log must be kept together with tour reports in the well owner's local office and be open to inspection by the Supervisor of Oil and Gas or his or her deputies [*Pub. Res. Code § 3214*]. The supervisor or district deputy may require the owner or operator of any well to file a copy of the entire log or a portion of the log at any time after drilling is commenced [*Pub. Res. Code § 3216*].

5. File following documents with Supervisor [*Pub. Res. Code § 3227*]:

a. Monthly well statement, on prescribed form.

b. If client produces oil by application of mining or other unconventional techniques, an annual report, on or before March 1 of each year, showing amount of oil produced by those techniques in preceding calendar year.

6. Before abandoning well, take both of the following steps [*Pub. Res. Code § 3229*]:

a. Complete and file prescribed notice of intent to abandon well [*see Pub. Res. Code § 3230* (required contents of form)]; and

b. Obtain approval of Supervisor or district deputy.

NOTE:
The abandonment may not proceed until the Supervisor or a district deputy approves the proposed abandonment. If the Supervisor or a district deputy fails to give the owner or operator a written response to the notice of intention within 10 working days, the proposed abandonment will be deemed to have been approved and the notice of intention will be deemed a written report of the Supervisor [*Pub. Res. Code § 3229*].

7. Within 60 days after date of cessation of drilling or abandonment operations, or date of suspension of operations, file the following with district deputy [*Pub. Res. Code § 3215*]:

NOTE:
On a showing of hardship, the Supervisor may extend this 60-day period by up to 60 additional days [*Pub. Res. Code § 3215*].

a. True copies of:

(1) Log.

(2) Core record.

(3) History of work performed.

b. If made, true and reproducible copies of all electrical, physical, or chemical logs, tests, or surveys on forms provided by Division.

NOTE:
Within 10 days after the receipt of a written report of abandonment, the Supervisor or a district deputy will furnish the owner or operator with a written final approval of abandonment, or with a written disapproval of abandonment that sets forth the conditions on which the disapproval is based [*Pub. Res. Code § 3232*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawGas IndustryGeneral OverviewEnergy & Utilities LawOil IndustryGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.141

AUTHOR: Linda Breen Pierce

§ 36.141 Assignment of Lease

1. If tenant is to assign or sublet interest in oil and gas lease, draft form of assignment or sublease to be executed by tenant and delivered to subtenant [*see §§ 36.211, 36.212*].

2. If landlord is to assign all or part of interest, prepare for execution and delivery to grantee or assignee one of the following:

a. Assignment of royalty interest under existing lease [*see § 36.215*].

b. Deed conveying mineral interest in oil and gas rights in perpetuity or for shorter time [*see § 36.213*].

c. Deed conveying grantee royalty interest in oil and gas rights in perpetuity or for shorter time [*see § 36.214*].

NOTE:
For a discussion of the distinction between mineral interests and royalty interests, see *§ 36.213[1][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesGeneral OverviewEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignmentsEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesLease ObligationsEnergy & Utilities LawLeases &

LicensesAssignment, Release & Surrender ClausesSubleases



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18-36 California Legal Forms--Transaction Guide § 36.142

AUTHOR: Linda Breen Pierce

§ 36.142 Surrender by Tenant

1. Draft instrument of surrender describing portion of lease to be surrendered [*see § 36.210*].

2. Have instrument executed, acknowledged, recorded, and delivered to landlord.

NOTE:

Surrender of part of leased land does not reduce the royalties payable to the landlord, but does reduce the tenant's obligation to drill on the portion surrendered and will normally reduce any deferred rental payable by the tenant [***see*** *§ 36.200[1][f][v]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.143

AUTHOR: Linda Breen Pierce

§ 36.143 Pooling or Unitization of Leased Land

1. If one well will economically drain oil and gas pool under two or more parcels, consider pooling leased land with other leased land in manner specified in pooling clause [*see §§ 36.17, 36.205*].

2. Create pool by having tenant execute declaration of pooling.

3. Have declaration of pooling acknowledged, recorded, and delivered to landlords.

4. If several oil and gas landlords and tenants are engaged in drilling over large area, consider separate unitization agreement.

NOTE:
California's Oil and Gas Supervisor, by approving the agreement, may make it binding on all persons owning oil and gas rights to lands over the reservoir regardless of their consent [*Pub. Res. Code § 3641*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesPooling ClausesEnergy & Utilities LawPooling & UnitizationGeneral Overview



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18-36 California Legal Forms--Transaction Guide §§ 36.144-36.199

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.144[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.200

AUTHOR: Linda Breen Pierce

§ 36.200 Oil and Gas Lease With "Drill or Pay" Development Clause

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth an oil and gas lease illustrating use of a "drill or pay" type development clause. This form should be regarded as a master form, the key provisions of which may be substituted for by other provisions as set forth in the forms in §§ 36.201-36.205.

[b] Habendum Clause

Paragraph 2 of the form in [2], *below*, sets forth the habendum clause, the provision in an oil and gas lease that sets the duration of the tenant's interest in the lease [*see San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 405, 76 Cal. Rptr. 2d 287]* . For an alternative habendum clause and additional discussion, see *§ 36.201*.

[c] "Or" and "Unless" Development Clauses

Oil and gas leases have traditionally been classified as either "or" or "unless" leases depending on the wording of their development clause. The development clause requires the tenant to commence drilling on the leased premises within a specified period or thereafter pay delay rental. An "unless" type lease provides that the lease will terminate unless the tenant commences drilling or paying rent before the end of a specified period. An "or" type lease simply provides that the tenant must either commence drilling or start paying rent before the end of a specified period. Paragraph 9 of the form in [2], *below*, is of the latter type and provides that on or before the last day of a specified period the tenant must either commence drilling operations on the leased land or pay rental of a stated sum per acre per year.

An alternative "unless" development clause is set forth in *§ 36.202[2]*. The differences between "or" and "unless" type

leases are more fully discussed in *§ 36.14*.

[d] Royalties Reserved Under Lease

[i] Gas Royalties

The oil and gas lease in [2], *below*, provides for the following three different types of royalties:

- Gas royalties [*see* discussion, *below*];
- Casinghead gasoline royalties [*see* [ii], *below*]; and
- Oil royalties [*see* [iii], *below*].

Natural gas found with oil has a double value. It is valuable in and of itself as a product that may be marketed for heating or power generating purposes. It is also valuable as an energy force lifting the oil in the oil-well reserve to the surface of the well [*People v. Associated Oil Co. (1930) 211 Cal. 93, 107, 294 P. 717* ; *see § 36.12[1]*]. Recognition of the double value of gas found in oil wells, particularly its value as an energy source independent of its capacity to raise oil to the surface, has led to the insertion of gas royalty provisions in most oil leases.

The gas royalty provision in [2], *below*, requires a stated percentage or a stated fraction of all gas produced on the premises and sold to be paid as a royalty to the landowner [*see* Brown & Brown, The Law of Oil and Gas Leases, ch. VI, *The Royalty Clauses*, § 6.05 (Matthew Bender)]. In this form, the costs of transporting the gas to an extraction plant is deducted from the proceeds received by the tenant to determine the net amount subject to royalty payments. A lease may provide that the gas royalty is to be based on the value of all gas produced on the premises and not used in oil or gas well operations on the leased premises [Williams & Meyers, Oil and Gas Law, Ch. 6, *The Oil and Gas Lease--Express Provisions* , § 643.2 (Matthew Bender); *see* [2], P 5, *below*].

[ii] Casinghead Gasoline Royalties

Gas produced by an oil or gas well is of two types: dry gas and wet gas. Wet gas contains liquid hydrocarbons in solution with it. The hydrocarbons can be removed by a relatively simple extraction process leaving dry gas and natural gasoline [*Axis Petroleum Co. v. Taylor (1941) 42 Cal. App. 2d 389, 394, 108 P.2d 978]* . The latter is called "casinghead gasoline" because it is retrieved from openings in the side of the casinghead that tops the casing that seals the side of an oil-well shaft.

Technically speaking, casinghead gasoline and casinghead gas can only be produced from an oil well and not a gas well [Brown & Brown, the Law of Oil and Gas Leases, ch. VI, *The Royalty Clauses*, § 6.06 (Matthew Bender)]. Wet gas produced by a gas well is called "distillate" or "condensate" [Brown & Brown, the Law of Oil and Gas Leases, ch. VI, *The Royalty Clauses*, § 6.07 (Matthew Bender)]. The gasoline extracted from wet gas produced by a gas well is known simply as "natural gasoline" [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 406 n.2, 76 Cal. Rptr. 2d 287* ; *see Saulsbury Oil Co. v. Phillips Petroleum Co. (10th Cir. 1944) 142 F.2d 27, 31]* . However, casinghead gasoline produced by an oil well is also a form of "natural gasoline" [*see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "N" (Matthew Bender)]. Therefore, the casinghead gasoline royalty provision in this form expressly includes, in the term "casinghead gasoline," natural gasoline produced by a gas well. The gas royalty clause in the lease in this form would cover all dry gas produced and sold whether produced as dry gas directly from the well or resulting from the extraction of casinghead or natural gasoline from wet gas produced by the well.

[iii] Oil Royalties

The oil royalty clause in [2], *below*, requires the tenant to pay the landlord an amount equal to a stated fraction or percentage of the value of all oil produced on the leased premises. The oil is to be valued at the posted market price for oil of like gravity.

Oil is marketed according to its gravity [*Alamitos Land Co. v. Shell Oil Co. (1935) 3 Cal. 2d 396, 402, 44 P.2d 573]* . In the oil and gas industry the specific gravity of oil is expressed in "A.P.I. degrees" standardized by the American Petroleum Institute (A.P.I), which can be reached at 1220 L Street, Northwest, Washington, D.C. 20005, (202) 682-8000, http://www.api.org. The A.P.I. degree scale is inverted so that the oil with the lightest or least specific gravity has the highest number of A.P.I. degrees. All things being equal, the oil with the highest number of A.P.I. degrees commands the highest price [*see* Williams & Meyers, Oil and Gas Law, ch. 1, *A Brief Introduction to Scientific and Engineering Background of Oil and Gas Law* , § 101 (Matthew Bender)].

[e] Suspension Clause

Paragraph 16 of the form in [2], *below*, provides that the tenants' obligations under the lease are suspended in the event that rates for oil production fall below a certain level or the tenant is prevented from performing under the lease due to conditions beyond the tenant's control (force majeure clause). This suspension clause will not excuse the conditions precedent in an habendum clause to extend the lease unless the force majeure clause specifically applies to these conditions or unless the habendum clause incorporates the force majeure clause by reference [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 411-413, 76 Cal. Rptr. 2d 287]* . In this form, the force majeure clause applies only to the tenant's obligations, not to any conditions contained in the lease.

[f] Surrender Clause

[i] Unilateral Right of Tenant

A surrender provision is set forth in Paragraph 20 of the form in [2], *below*. Almost every oil and gas lease, especially a "drill or pay" lease, contains a provision allowing the tenant to surrender all or any part of the leased premises back to the landlord [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 140, 114 P.2d 351* ; *Beverly Hills Oil Co. v. Beverly Hills Unified SCh. Dist. (1968) 264 Cal. App. 2d 603, 610, 70 Cal. Rptr. 640]* . This is a unilateral right of the tenant, and the landlord's acceptance of the surrender is not required [*Kennecott Corp. v. Union Oil Co. of California (1987) 196 Cal. App. 3d 1179, 1186-1188, 242 Cal. Rptr. 403]* .

[ii] Purpose of Surrender Clause

The purpose of a surrender clause is to protect an oil and gas tenant from the failure to develop once promising land that becomes apparently valueless for oil or gas producing purposes [Hightower, *The Oil and Gas Lease in California, 3 UCLA L. Rev. 424 (1956)*]. Since the tenant remains obligated to pay royalties for as long as it holds an interest in the property (which typically is for an indefinite term), most oil and gas leases include a surrender clause that enables the tenant unilaterally to quitclaim its interest and avoid paying any further royalties on land that proves to be unproductive [*Kennecott Corp. v. Union Oil Co. of California (1987) 196 Cal. App. 3d 1179, 1187, 242 Cal. Rptr. 403]* .

[iii] Under "Drill or Pay" Type Lease

Under a "drill or pay" delay rental clause, the tenant has an absolute obligation to either drill on the leased land within a specified time or pay a delay rental of so much per acre for each acre subject to the oil and gas lease. The delay rental is normally payable periodically, for example, monthly or annually, until drilling is commenced on the lease premises [*see* Brown & Brown, the Law of Oil and Gas Leases, ch. VII, *The Drilling and Rental Clause*, § 7.01 (Matthew Bender)]. Thus, when it appears, perhaps from explorations made on adjoining property, that there is no oil or gas under the leased premises, the oil and gas tenant would either have to drill a useless well on the leased land or pay delay rental until expiration of the 10 or 20-year "exploration" term of the lease [*Wooton v. McAdoo (1930) 110 Cal. App. 48, 53,*

293 P. 694] . The surrender clause avoids this result by permitting the tenant to surrender the lease at any time and be discharged from all further obligations under it [Blake, *The Oil and Gas Lease*, Part Two, *13 S. Cal. L. Rev. 393, 402 (1940)*]. The surrender clause usually authorizes the tenant to surrender all or any part of the leased land. Thus, the tenant may retain the portion of the leased premises that appears most promising and reduce the delay rental under the lease by surrendering the rest of the leased acreage [Williams & Meyers, Oil and Gas Law, Ch. 6, *The Oil and Gas Lease--Express Provisions* , § 680 (Matthew Bender)].

[iv] Under "Unless" Type Lease

Under an "unless" type lease, the oil and gas lease is automatically terminated unless the tenant drills on the leased premises within a specified time or starts paying delay rental [*see § 36.14[3]*]. Thus, a surrender clause is not as important in an "unless" type oil and gas lease as it is in a "drill or pay" type oil and gas lease [Williams & Meyers, Oil and Gas Law, Ch. 6, *The Oil and Gas Lease--Express Provisions* , § 680 (Matthew Bender)]. Surrender clauses, particularly those allowing the tenant to surrender all or any part of the leased premises, are, however, commonly included in "unless" type leases for two purposes [Williams & Meyers, Oil and Gas Law, Ch. 6, *The Oil and Gas Lease--Express Provisions* , § 680 (Matthew Bender)]. First, a tenant who does not wish to drill immediately may, even under an "unless" type lease, reduce the delay rentals the tenant must pay to keep the lease active by retaining only the most promising part of the leased premises and surrendering the rest. Second, a tenant may reduce its obligation to drill further wells after drilling has commenced on the leased premises. Many leases provide that additional wells are to be drilled on the leased land until they equal a specified number per acre, once oil or gas in paying quantities is discovered.

In addition, many leases contain a so-called "dry-hole clause" requiring the tenant to continue drilling wells until the tenant discovers oil or gas in paying quantities on the leased land [*see § 36.203*]. Furthermore, the law will imply, if the lease does not expressly include it, an obligation on the part of the tenant to drill offset wells to protect the leased premises from being drained by wells drilled on adjoining properties [*see § 36.15[2]*]. The tenant may reduce its duty under each of these drilling obligations by surrendering that portion of the leased premises that appears to be the least promising [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 680 (Matthew Bender)].

[v] Effect of Surrender

On the unilateral exercise of a surrender right under an oil and gas lease, the geothermal interest automatically extinguishes and merges into the estate out of which it was carved [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 140, 114 P.2d 351* ; *Kennecott Corp. v. Union Oil Co. of California (1987) 196 Cal. App. 3d 1179, 1187, 1188, 242 Cal. Rptr. 403]* . However, a surrender of only a portion of the leased premises under the surrender clause in no way affects or reduces the royalties payable under the lease [*Beverly Hills Oil Co. v. Beverly Hills Unified School Dist. (1968) 264 Cal. App. 2d 603, 608-611, 70 Cal. Rptr. 640]* . Otherwise, a tenant could reduce the royalties provided for in the lease by surrendering the major portion of the leased premises and then drain the oil and gas reservoir lying under both the surrendered and unsurrendered portions of the premises through a well drilled on the unsurrendered portion [*Beverly Hills Oil Co. v. Beverly Hills Unified School Dist. (1968) 264 Cal. App. 2d 603, 609, 70 Cal. Rptr. 640]* .

California courts consistently have recognized that the right to surrender a profit interest is a unilateral right vested in the tenant. Because the right to surrender may be exercised unilaterally by the tenant regardless of the landlord's consent, a lease containing a surrender clause lacks mutuality of obligations and cannot be specifically enforced by the tenant [*Kennecott Corp. v. Union Oil Co. of California (1987) 196 Cal. App. 3d 1179, 1187 n.7, 242 Cal. Rptr. 403]* .

It was argued originally that a surrender clause in a lease was abortive and without consideration [Blake, *The Oil and Gas Lease*, Part Two, *13 S. Cal. L. Rev. 393, 402 (1940)*]. However, the real consideration for an oil and gas lease is the tenant's promise to drill wells and pay royalties. That promise is sufficient consideration to support the demising of

the leased premises by the landlord and all the promises and provisions of the lease favoring the tenant [*Hill v. General Petroleum Corp. (1932) 128 Cal. App. 284, 293, 16 P.2d 1035]* . It is also sufficient to support a restriction in the surrender clause preventing the landlord from drilling on a surrendered portion of the leased land within a specified distance of a producing well on the unsurrendered portion of the land [*Hill v. General Petroleum Corp. (1932) 128 Cal. App. 284, 293, 16 P.2d 1035]* .

It has also been held that a surrender clause does not render the lease so unfair and inequitable that it cannot be enforced in equity by the tenant [*Guffey v. Smith (1915) 237 U.S. 101, 115-116, 35 S. Ct. 526, 59 L. Ed. 856]* . Neither does the apparent lack of mutuality of obligation prevent a tenant from bringing an equitable action to protect the leasehold interest. Equity requires mutuality of obligation only to grant specific performance of an executory contract. An action to protect a presently existing vested leasehold interest under an already executed lease is not an action for specific performance of an executory contract [*Guffey v. Smith (1915) 237 U.S. 101, 115, 35 S. Ct. 526, 59 L. Ed. 856]* .

On the surrender of land by a tenant, in the absence of any other restrictive covenants, the landowner may drill or permit others to drill wells on the surrendered land. The owner is under no duty to share royalties from oil produced by the newly drilled wells on the surrendered land with the original tenant who surrendered the land [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 823-824, 129 P.2d 383]* .

[2] FORM

Oil and Gas Lease With "Drill or Pay" Development Clause

OIL AND GAS LEASE

_____[*Name(s)*], [*status, e.g.,* husband and wife *or* a single man *or* a married woman dealing with her sole and separate property] ("Landlord"), and _____[*name*], [*status, e.g.,* a California corporation] ("Tenant"), agree as follows:

Granting Clause

1. Landlord, in consideration of the rent payment of $[*specify amount of rental for primary term*], receipt of which is acknowledged by Landlord, and the covenants and conditions contained in this lease, does lease and demise to Tenant exclusively that certain tract of land in the County of _____, State of California, described as follows: [*legal description of land*] and containing [*number*] acres, more or less ("the premises"), for the purpose of exploring, mining, drilling, and operating for, and extracting, storing, and removing of oil, gas, hydrocarbons, and all associated substances.

Lease Term

2. Landlord leases to Tenant the premises for a term of _____ years from and after the date of this lease and so long thereafter as (a) any oil, gas, or other hydrocarbon substances are produced from the premises; (b) drilling operations are being continuously prosecuted on the premises; or (c) the term is extended by agreement of the parties.

Tenant's Rights

3. During the term of this lease, Tenant shall have the exclusive right to explore, drill, and mine for, and extract, store,

and remove oil, gas, hydrocarbons, and other associated substances on and from the premises and for the following purposes:

(a) To enter and occupy the premises;

(b) To erect, construct, maintain, operate, use, repair, and replace on the premises structures, buildings, plants, machinery, casing, instruments, equipment, tanks, houses for employees, pipe lines, pole lines, power lines, telephone lines, telegraph lines, roads, and other structures and facilities as may be necessary or convenient;

(c) To inject in the premises gas, water, and other fluids;

(d) To drill on the premises for water and use, without charge, any water obtained by its operations on the premises; and

(e) To construct, erect, maintain, use, operate, repair, and replace on the premises a plant, with all necessary appurtenances, for the extraction of gasoline and other products from gas produced from the premises or other land in the vicinity of the premises.

Oil Royalty

4. Tenant shall pay to Landlord as royalty for all oil produced and removed from the premises an amount equal to [*fraction or percentage, e.g.,* one sixth *or* one eighth *or* 162/3 percent *or* 121/2 percent] of the value of all oil produced and removed from the premises after the customary adjustments are made for temperature, water, and basic sediment. The value of the oil shall be the posted available market price in the district in which the premises is located for oil of like gravity on the day the oil is removed from the premises. Landlord, by giving 90 days' notice in writing to Tenant, may elect to receive the royalty provided for in this paragraph in kind, in which event Tenant shall, at no cost to Landlord, deliver to Landlord's tanks on the premises or to a pipe line designated by Landlord at the mouth of each well on the premises the percentage or fraction of all oil produced and removed from the premises as specified in this paragraph; provided, however, that a change from payment in kind to payment in value, or vice versa, may be made no more often than once each calendar year. No royalty shall be due Landlord for or on account of oil lost through evaporation, leakage, fire, or other casualty before marketing, or, when royalty oil is being taken in kind by Landlord, before delivery.

Gas Royalty

5. Tenant shall pay to Landlord as a royalty for all gas, including residual dry gas, produced, removed, saved, and sold from the premises an amount equal to [*fraction or percentage, e.g.,* one sixth *or* 162/3 percent] of the net proceeds received by Tenant from the sale of the gas; provided, however, that nothing contained in this paragraph shall obligate Tenant to produce, save, or sell gas from the premises. Should Tenant, for purposes of having gasoline extracted from the gas, transport the gas, or cause it to be transported, to a gasoline extraction plant located on the premises or on other land, the cost of so transporting the gas shall be deducted from the amount received for it by Tenant before determining the net proceeds received by Tenant from the sale of the gas. Further, no royalty shall be payable to Landlord for any gas that is

(a) Lost, used, or consumed in the operation of the gasoline extraction plan; or

(b) Used by Tenant to repressure any oil bearing formation from which oil is being produced by a well or wells on the premises though the repressuring is accomplished by injecting the gas into wells not situated on the premises.

Casinghead Gasoline Royalty

6. Any casinghead gasoline extracted from gas produced from the premises may, at the option of Tenant, either be returned to the oil or gas formation from which it was produced or sold by Tenant at the best price and on the best terms reasonably obtainable. When the gasoline is returned to the oil or gas formation from which it was produced, no royalty shall be payable to Landlord for this gasoline. When the gasoline is sold, a royalty shall be paid by Tenant to Landlord equal to [*fraction or percentage, e.g.,* one sixth *or* 162/3 percent] of the net proceeds received by Tenant for the sold casinghead gasoline. The term "casinghead gasoline" shall include natural gasoline produced by a gas well. When sold, casinghead gasoline shall be sold for not less than the public or open market price for this gasoline, when it exists, at its place of extraction.

No Royalty for Own Use

7. Tenant is not required to account for or pay royalties to Landlord for any oil, gas, or water produced from the premises and used by Tenant in its operations under this lease.

Payment of Royalties

8. On or before the _____ day of each month, Tenant shall pay to Landlord in the manner specified in this lease all royalties due to Landlord under this lease for any oil, gas, or other substances produced and removed or sold from the premises during the preceding month; provided, however, that should the amount of royalties due for any month be less than $[*specify amount, e.g.,* $50], payment of this amount may be withheld until it equals $[*specify amount, e.g.,* $50], or the end of the calendar year in which the royalty became due. All royalties, regardless of amount, shall be fully paid, if not otherwise already paid, at the end of the calendar year in which they accrue.

Development Clause

9. Tenant has paid to Landlord the rental in full for the first [*number*] months of the term of this lease. Unless Tenant terminates this lease sooner, as provided in this lease, Tenant, on or before the last day of that period, shall either commence drilling operations on the premises or pay to Landlord as rental the sum of $_____ per acre for each acre of the premises remaining subject to this lease and make a like payment of rental to Landlord on or before the _____ day of [*month, e.g.,* January] each year thereafter, until drilling operations are actually commenced on the premises or this lease is terminated.

Manner of Payment of Rent

10. All rent and royalties payable under this lease shall be deemed duly paid when a check for the same, payable to the order of Landlord jointly, is deposited in the United States mail, first-class postage prepaid, addressed to Landlord at _____[*mailing address*]. Landlord may at any time, and from time to time, change its address for the purpose of this paragraph by giving written notice to Tenant in the manner prescribed in Paragraph 23 of this lease.

Payment for Lesser Interest

11. The rentals and royalties specified in this lease are based on the assumption that all the oil and gas rights in the

premises are owned by Landlord and leased to Tenant under this lease. Should it hereafter appear that Landlord, at the time of making this lease, owns less than a fee simple in the premises and therefore less than all oil and gas rights in the premises, the rentals and royalties accruing under this lease to Landlord shall be reduced proportionately.

Oil Development

12. Should oil or gas be produced in paying quantities by any well drilled by Tenant on the premises, tenant shall continue to drill additional wells on the premises as rapidly as can be done with one drilling rig working with reasonable diligence until as many wells have been drilled on the premises as equal the number of acres held under this lease divided by [*number, e.g.*, six]. Thereafter, all drilling obligations of Tenant on the premises shall be deemed fully performed.

Gas Development

13. Should Tenant complete a well or wells on the premises that fail or fails to produce oil in paying quantities but produces gas in paying quantities, tenant shall either sell so much of the gas as it may be able to find a market for and pay Landlord the gas royalties specified in this lease or suspend operations of the gas well or wells and pay Landlord a yearly rental in advance of $_____ per acre for each acre held under this lease at the commencement of the suspension until producing operations on the premises are again resumed by Tenant. Should Tenant complete a well on the premises that fails to produce oil in paying quantities but produces gas in paying quantities, Tenant shall not be obligated to conduct any further drilling operations on the premises, except to drill offset wells as described in Paragraph 14 of this lease, until in its judgment the drilling of additional wells under the provisions of this lease is warranted by existing or anticipated market conditions.

Offset Wells

14. Should oil or gas be discovered in paying quantities by means of any well drilled on property adjoining the premises and within _____ feet of the exterior boundary of the premises, Tenant shall offset this well by commencing the drilling of an offset well on the premises provided both of the following conditions are met:

(a) Oil or gas in paying quantities is produced by the adjoining well for longer than a 30-day production test period; and

(b) The drilling obligations of Tenant expressed in Paragraph 12 of this lease have not been fully performed.

Conduct of Operations

15. All operations to be performed by Tenant on the premises in accordance with this lease shall be performed by Tenant at Tenant's own cost and expense and not at the expense of Landlord or any of them. Further, Tenant shall conduct all operations in a careful workmanlike manner, in accordance with all laws, statutes, and regulations relating to the operations of oil and gas production, and shall allow no liens to attach to the premises as a result the oil and gas operations.

Suspension Clause

16. Drilling and production operations under this lease may be suspended by Tenant during any period the price offered

generally in the vicinity of the premises to producers for oil of the quality produced from the premises is [*number, e.g.,* 80] cents or less per barrel at the well. Furthermore, the obligations of Tenant under this lease shall be suspended during any period tenant is prevented from performing these obligations, in whole or in part, by strikes, lockouts, actions of the elements, other matters or conditions beyond the control of Tenant, or the statutes, rules, or regulations of any governmental agency, be it federal, state, municipal, or otherwise.

Taxes

17. Tenant shall pay all taxes on any improvements placed or oil stored by it on the premises and [*fraction or percentage, e.g.,* five sixths *or* 831/3 percent] of the taxes levied and assessed on the petroleum mineral rights in the premises. Landlord shall pay all taxes levied or assessed against the premises and [*fraction or percentage, e.g.,* one sixth *or* 162/3 percent] of the taxes levied and assessed against the petroleum mineral rights in the premises. Should any state, federal, or local government levy a license or tax on the oil produced under this lease or on Tenant's right to conduct operations under this lease, Tenant shall pay [*fraction or percentage, e.g.,* five sixths *or* 831/3 percent] and Landlord shall pay [*fraction or percentage, e.g.,* one sixth *or* 162/3 percent] of this license or tax.

Surface Use

18. Landlord shall have the right to use the surface of the premises, and all of it, for agriculture and any purposes that do not interfere with Tenant's rights under this lease.

Default Clause

19. Should Tenant default in the payment of any rent or royalty due under this lease or in the performance of any other obligation imposed on it by this lease, and this default is not corrected within [*number*] days after written notice of the default has been served on Tenant by Landlord, then Landlord may terminate this lease and all rights of Tenant in and to the premises or under this lease shall cease. However, if any oil well has been drilled or is being drilled on the premises by Tenant and Tenant is not in default in connection with this well, Tenant's right to this well and to one acre surrounding the well, together with Tenant's right to any rights-of-way necessary for egress and ingress to the well, shall not be affected by the default or terminated by Landlord.

Surrender of Land

20. Tenant, either before or after discovery of oil or gas on the premises, at any time, and from time to time, may surrender all or any part of the premises to Landlord or its successors in interest by executing and delivering to Landlord or its successors in interest an instrument of surrender particularly describing the portion surrendered and recording an acknowledged copy of the surrender instrument in the office of the County Recorder of the county in which the premises are located. On surrender by Tenant of all or any part of the premises, Tenant's obligations under this lease as to the land so surrendered shall cease, and full title to the surrendered land shall vest, free and clear of this lease, in landlord or its successors in interest; provided, however, that Landlord shall not drill any oil or gas wells on any land surrendered in accordance with this Paragraph within [*number*] feet of any well drilled by Tenant on any other portion of the premises.

Termination of Lease

21. On termination of this lease, or on surrender by Tenant of any of the premises under Paragraph 20 of this lease, Tenant shall peaceably surrender possession of the premises, or the portion surrendered to Landlord or its successors in interest in as good condition, reasonable wear and tear excepted, as it was on the date of this lease. Tenant shall have the right, on termination of this lease or surrender of any part of the premises, to all improvements placed on the premises or the surrendered part of the premises by Tenant under this lease including all structures, buildings, plants, machinery, casing, instruments, equipment, or tanks erected or installed by Tenant.

Assignments

22. Landlord and Tenant shall each have the right to assign its interests in this lease, in the premises, and in the oil and gas rights to the premises; provided, however, that no assignment by Landlord shall increase Tenant's obligations under this lease and no assignment by Landlord shall be binding on Tenant until Tenant has been given written notice, signed by Landlord, of the assignment.

Notices

23. Any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party to this lease by the other party shall be in writing and shall be deemed to be served when personally delivered to any Landlord by Tenant or to any executive officer of Tenant by Landlord. In lieu of this personal service, the notice or other communication shall be deemed served when deposited in the United States mail, first-class postage prepaid, addressed to Landlord at _____[*mailing address*], or to Tenant at _____[*mailing address*]. Either party to this lease may change the party's address for purposes of this section by giving written notice of the change to the other party in the manner provided in this section.

Binding on Heirs

24. This lease shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties to this lease.

Attorneys' Fees

25. If any litigation is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to the Premises or to this lease, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

Sole Agreement

26. This instrument constitutes the sole agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

Definition of Terms

27. All words, phrases, and terms used in this lease shall, as used in this lease, have the meaning ascribed to them in the _____ edition of Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms (Matthew Bender). Any words, phrases, or terms not included in that publication shall, as used in this lease, have the meaning ascribed to them by common usage and the general law of the State of California on the date of this lease.

EXECUTED on _____[*date*], at _____[*city*], California.

LANDLORD
_____ [*signature*]
[*typed name*]
TENANT
_____ [*name of tenant*]
By _____ [*signature*]
[*typed name and title*]

Acknowledgment

[*Acknowledgments taken in California must be in substantially the following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____[*date*] before me, _____[*name and title of officer taking acknowledgment*], personally appeared _____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesAbandonment & TerminationEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesGeneral OverviewEnergy & Utilities LawLeases & LicensesHabendum ClausesEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty ClausesEnergy & Utilities LawRoyaltiesGeneral Overview



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.201

AUTHOR: Linda Breen Pierce

§ 36.201 Habendum Clause Extending Lease for as Long as Oil or Gas Is Produced in Paying Quantities

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth an alternative provision that may be substituted for the habendum clause of the oil and gas lease set forth in *§ 36.200[2]*, P 2. The purpose of an habendum clause is to limit and define the estate granted or conveyed [*Estate of Blake (1910) 157 Cal. 448, 462, 108 P. 287]* . The form in [2], *below*, is referred to as a "thereafter clause," that is, a clause that provides for the continued validity of the tenant's interest after the expiration of the primary term, so long as a specified state of affairs continues [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 405-406, 76 Cal. Rptr. 2d 287]* .

This form provides three different variations of the standard definition of "in paying quantities," which term, as explained in [c], *below*, will determine how long the lease will continue. Generally, the more the term "in paying quantities" is qualified by limitations, the easier it will be for the tenant or the landlord to escape from an uneconomical lease.

[b] Exploratory and Production Periods

The habendum clause of an oil and gas lease typically grants a determinable fee estate in a profit 'a prendre on the leased land to the tenant by specifying two different time periods for which the lease is to run. The first period is an "exploratory period" of a specified number of years. The second period is an indefinite "production period" continuing after the expiration of the exploratory period for "so long thereafter" as production of drilling continues on the leased premises [*Dabney v. Edwards (1935) 5 Cal. 2d 1, 9-10, 53 P.2d 962]* .

[c] Meaning of "In Paying Quantities"

[i] Implied Term in Habendum Clause

The difference between the habendum clause of the lease in *§ 36.200[2],* P 2, and this form is that the phrase "in paying quantities," as defined, is used to extend the term of the production period. That is, the lease will continue "so long thereafter" as oil or gas is produced "in paying quantities." Although the habendum clause of the lease in *§ 36.200[2],* P 2, does not mention "in paying quantities," this phrase is an impli ed term of the habendum clause as a matter of law [*see* Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 604.5 (Matthew Bender)]. When an oil or gas lease is for a specified period and "so long thereafter" as oil or gas is "produced" from the leased land, the word produced means "produced in paying quantities" [*Barnard v. Gibson (1950) 100 Cal. App. 2d 527, 533-534, 224 P.2d 90* ; *Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1528 n.1, 266 Cal. Rptr. 611]* . In this case, the law supplies its own definition of the phrase "in paying quantities" [*Renner v. Huntington-Hawthorne Oil & Gas Co. (1952) 39 Cal. 2d 93, 99, 244 P.2d 895* ; *see* [ii], *below*].

[ii] Excess Over "Operating Costs"

In California, and in the great majority of states, the phrase "in paying quantities" when used in the habendum clause of an oil or gas lease means the production of oil or gas in quantities sufficient to yield a return in excess of the operating costs of producing it [*Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1528, 266 Cal. Rptr. 611* ; *Transport Oil Co. v. Exeter Oil Co. (1948) 84 Cal. App. 2d 616, 622, 191 P.2d 129* ; *West v. Russell (1970) 12 Cal. App. 3d 638, 643, 90 Cal. Rptr. 772* ; *see Renner v. Huntington-Hawthorne Oil & Gas Co. (1952) 39 Cal. 2d 93, 99, 244 P.2d 895* ; *see also* [2], Second Alternative, *below*]. The fact that the royalties payable under the lease are insufficient to enable the landlord to pay the real property taxes on the land covered by the lease is immaterial [*West v. Russell (1970) 12 Cal. App. 3d 638, 643, 90 Cal. Rptr. 772]* , unless provided for in the lease [*see* [2], Third Alternative, *below*].

[iii] Definition of "Operating Costs"

As discussed in [ii], *above*, the definition of "in paying quantities" refers to an excess over "operating costs." Expenses related to oil and gas production will be classified as either operating or capital expenditures. Operations which merely serve to improve the productivity of a well and which do not involve new drilling or major equipment, are in the nature of repairs or maintenance and have long been held to be items which are considered current expenses in determining whether or not a well is producing in paying quantities. The initial drilling and equipping costs ("sunk" costs) are excluded from this calculation. Current operating expenses have been held to include all of the following [*Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1530-1532, 266 Cal. Rptr. 611]* :

- The cleaning out and servicing of wells [*West v. Russell (1970) 12 Cal. App. 3d 638, 644, 90 Cal. Rptr. 772* ; *Barnard v. Gibson (1950) 100 Cal. App. 2d 527, 534-535, 224 P.2d 90]* ;

- Labor costs, including the costs of hiring a pumper [*Kerr v. Hillenberg (Okla. 1962) 373 P.2d 66* ; *Sunburst Oil & Refining Co. v. Callender (1929) 84 Mont. 178, 274 P. 834]* ;

- Taxes, including taxes on "mining rights" [*West v. Russell (1970) 12 Cal. App. 3d 638, 638, 90 Cal. Rptr. 772]* ;

- Electricity [*Edwards v. Hardwick (Okla. 1960) 350 P.2d 495* ; *Fick v. Wilson (Tex. Civ. App. 1961) 349 S.W.2d 622]* ;

- Landlord's royalties [*Welport Oil Co. v. Fairfield (1942) 51 Cal. App. 2d 533, 541, 125 P.2d 97* ; *Transport Oil Co. v. Exeter Oil Co. (1948) 84 Cal. App. 2d 616, 622-623, 191 P.2d 129]* ; and

- The reperforating and testing of an oil and gas well [*Lough v. Coal Oil, Inc. (1990) 217 Cal. App.*

3d 1518, 1531-1532, 266 Cal. Rptr. 611] .

[iv] Different Meaning Than in Development Clause

In construing the meaning of the phrase "in paying quantities" in an habendum clause, the court is dealing with a tenant who has already expended the amount necessary to drill and equip a well [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 604.6(b) (Matthew Bender)]. Because the tenant has already invested all the drilling costs required to produce oil from the leased premises, the tenant should be entitled to recoup as much of that cost as possible from operation of the well the tenant has placed on the leased premises [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 604.6(b) (Matthew Bender); *see* [2], First Alternative, *below*, for provision building in the drilling and equipment costs as part of definition of "in paying quantities"]. Consequently, so long as sufficient oil and gas is being produced from the leased premises to return a profit to the tenant over and above the current operating costs for producing the oil or gas, oil or gas is deemed being produced "in paying quantities" for purposes of the lease's habendum clause and the lease term continues [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 604.6(b) (Matthew Bender)].

In contrast, when the phrase "in paying quantities" is used in the development provisions of the lease [*see § 36.200[2]*, P 12], it limits the tenant's obligation to continue drilling on the leased premises [*Transport Oil Co. v. Exeter Oil Co. (1948) 84 Cal. App. 2d 616, 621, 191 P.2d 129]* . In that context, the use of the phrase has the effect of excusing the tenant from expending more money drilling on the leased land unless oil or gas has been discovered "in paying quantities" [*Transport Oil Co. v. Exeter Oil Co. (1948) 84 Cal. App. 2d 616, 621, 191 P.2d 129]* . The tenant should not be required, under the development provisions of a lease, to expend more money drilling on the leased land unless the tenant can reasonably expect to be reimbursed for that money from the oil or gas that will be discovered by the drilling. Thus, the phrase "in paying quantities," as used in the development provisions, means oil and gas in sufficient quantities to cause a prudent person experienced in the oil and gas industry to reasonably expect to receive a reasonable profit over and above the cost of drilling, equipping, and operating the enterprise [*Renner v. Huntington-Hawthorne Oil & Gas Co. (1952) 39 Cal. 2d 93, 99, 244 P.2d 895* ; *see Humphrey v. Placid Oil Co. (E.D. Tex. 1956) 142 F. Supp. 246, 255]* .

[d] Time Periods for Paying Quantities Analysis

There is no hard-and-fast rule for determining over what period the paying quantities analysis must be made. Obviously, the period cannot be unreasonably short (for example, a few days or even weeks) or else a landlord could claim that a lease had terminated when in fact it was merely shut-in for repairs or maintenance. On the other hand, using an excessively long period of many years could keep a lease "alive" long after it had become uneconomic and was no longer producing in "paying quantities" by using high initial and very short-lived production rates to claim an artificial "profit" years later through averaging [*Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1528-1529, 266 Cal. Rptr. 611]* . Although a month was "inadequate to provide a reasonably accurate financial picture as to the profitability of production," an entire year was an adequately lengthy period [*Transport Oil Co. v. Exeter Oil Co. (1948) 84 Cal. App. 2d 616, 624, 191 P.2d 129]* .

[e] Condition Precedent in Habendum Clause

Lease provisions are either covenants or conditions. A covenant is a promise to do or refrain from doing a specific act. A condition is a qualification to the parties' obligations; if it occurs, the interest is terminated or enlarged [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 411, 76 Cal. Rptr. 2d 287]* . The form in [2], *below*, is a condition precedent to the extension of the term of the lease. It should be noted that the force majeure clause commonly found in oil and gas leases [*see § 36.200[2]*, P 16] will not excuse the conditions precedent in an habendum clause to extend the lease unless the force majeure clause specifically applies to these conditions or unless the habendum clause incorporates the force majeure clause by reference [*see San Mateo*

Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 410-413, 76 Cal. Rptr. 2d 287 ; *see also* [f], *below*].

[f] Term Extended by Other Clauses in Lease

It is not uncommon for the habendum clause to be modified by other clauses in the lease, which may have the effect of extending the duration of the lease beyond the primary term in the absence of commercial production. Clauses that deal with rights and obligations of the tenant following the drilling of a dry hole, for example, are frequently designed to have this effect [*Southern Pacific Land Company v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 821-822, 233 Cal. Rptr. 794]* . Some dry hole clauses are designed to give the tenant a stated period of time after to the completion of a dry hole to commence new operations, even if the stated period of time extends into the secondary term [*Southern Pacific Land Company v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 821-822, 233 Cal. Rptr. 794]* . However, for this provision to extend the term of the lease, the habendum clause should refer to these other provisions in the lease that are intended to have that effect [*see* [2], *below*].

[2] FORM

Habendum Clause Extending Lease for So Long As Oil or Gas Is Produced in Paying Quantities

Lease Term

_____. [Except as otherwise provided in paragraph _____ of this lease], the term of this lease shall be for a period of [*number*] years from and after the date of this lease and so long thereafter as oil, gas, or other hydrocarbon substances are produced from the premises in paying quantities; provided, however, the term "in paying quantities" as used in this provision shall mean

[*Choose one of following alternatives:*]

in sufficient quantities each year as will be sufficient to (a) pay the royalties reserved under this lease, (b) reimburse Tenant for Tenant's normal annual operating costs on the premises for the year, and (c) reimburse Tenant for drilling and equipping costs expended on wells drilled on the premises over a period not exceeding [*number*] years after each well is completed.

[*OR*]

in sufficient quantities each year as will return a profit to Tenant over and above Tenant's operating but not Tenant's drilling or equipping costs in producing the oil or gas.

[*OR*]

in sufficient quantities each year as will produce both a net profit to Tenant over and above Tenant's operating costs on the premises for the year and royalties to Landlord in excess of the real property taxes levied or assessed on the premises for the year.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesHabendum

ClausesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
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A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.202

AUTHOR: Linda Breen Pierce

§ 36.202 "Unless" Type Development Clause Terminating Lease When Drilling Not Commenced Within Stated Period Unless Rental Paid to Landlord

[1] Comment

[a] Use of Form

Oil and gas leases are known in the industry as either "unless" or "or" type leases depending on the wording of their development or delay rental clause [*Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590, 229 P.2d 838* ; *see § 36.14*]. The development or delay rental clause set forth in *§ 36.200[2]*, P 9, makes that lease an "or" type lease. The form in [2], *below*, sets forth an alternative development or delay rental clause that may be used to transform the oil and gas lease in *§ 36.200[2]* into an "unless" type lease. If used, it should replace *§ 36.200[2]*, P 9.

[b] Purpose of Development or Delay Rental Clause

The principal purpose of an oil and gas lease is to procure the exploration of the leased land followed by proper development if warranted [*Hall v. Augur (1927) 82 Cal. App. 594, 600, 256 P. 232]* . The tenant cannot hold the lease for purely speculative purposes at the expense of the landlord [*Hall v. Augur (1927) 82 Cal. App. 594, 600, 256 P. 232]* . Otherwise, the landlord's land would be burdened by a lease that could and should be profitable but in fact is profitless through neglect, and the landlord is prevented from making other arrangements for the property's development [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 686, 74 P. 296]* .

For these reasons, most oil leases that provide for a royalty on the oil produced from the land to be paid to the landlord contain provisions requiring the almost immediate sinking of wells [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 685, 74 P. 296]* . In fact, when an oil and gas lease does not contain an express provision for the immediate sinking of wells, and the only consideration for the lease is the promise of royalties, the law will imply a covenant requiring the tenant to use diligence to discover and produce oil or gas [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684-685, 74 P. 296* ; *Hall v. Augur (1927) 82 Cal. App. 594, 601, 256 P. 232]* .

There are two types of development or deferred rental clauses in common use today [Blake, *The Oil and Gas Lease*, Part Two, *13 S. Cal. L. Rev. 393, 401-408 (1948)*]:

- The first, the "unless" type, automatically terminates the oil and gas lease if its terms are not met; and
- The other, the "or" type, gives the oil and gas landlord the alternative of either suing for the delay rental or terminating the lease.

For a discussion of the distinctions between the two types, see *§ 36.14*. Both the "unless" type development clause in this form and the "or" type development clause in *§ 36.200[2]* are worded so there should be no confusion as to their meaning.

[c] Acts Constituting Commencement of Drilling

When an oil and gas lease provides that the tenant must commence drilling operations within a specified time or pay delay rental, a question might arise as to what constitutes the commencement of drilling operations on the leased premises [*see Butler v. Nepple (1960) 54 Cal. 2d 589, 593, 6 Cal. Rptr. 767, 354 P.2d 239* ; *Wilcox v. West (1941) 45 Cal. App. 2d 267, 271-272, 114 P.2d 39]* .

The general rule is that actual drilling is unnecessary. Work preparatory to drilling is sufficient to constitute the commencement of drilling if performed with a bona fide intention to proceed with actual drilling operations prosecuted with reasonable diligence [*Butler v. Nepple (1960) 54 Cal. 2d 589, 595, 6 Cal. Rptr. 767, 354 P.2d 239* ; *Wilcox v. West (1941) 45 Cal. App. 2d 267, 272, 114 P.2d 39]* . Thus, the following activities may be sufficient to constitute the commencement of drilling [*Wilcox v. West (1941) 45 Cal. App. 2d 267, 272, 114 P.2d 39]* :

- Work or activities at the location of well sites;
- Hauling of lumber onto the premises;
- Erection of derricks;
- Providing a water supply; or
- Moving machinery on the premises preliminary to commencing drilling.

As a corollary to the general rule that preliminary work if done in good faith may constitute the commencement of drilling operations on the leased premises, failure to continue the work may be evidence of bad faith [*Butler v. Nepple (1960) 54 Cal. 2d 589, 596-598, 6 Cal. Rptr. 767, 354 P.2d 239]* . Thus, after the preliminary work is completed and the deadline for commencing drilling operations on the leased premises has past, failure to prosecute actual drilling with due diligence is evidence the tenant did the preliminary activities without any real intent to commence drilling [*Butler v. Nepple (1960) 54 Cal. 2d 589, 595, 6 Cal. Rptr. 767, 354 P.2d 239]* .

[2] FORM

"Unless" Type Development Clause Terminating Lease When Drilling Not Commenced Within Stated Period Unless Rental Paid to Landlord

Development Clause

_____. Should operations for the drilling of a well for oil or gas not be commenced on the premises

on or before _____[*time period, e.g.*, one year from the date of this lease or _____ (*date*)], this lease shall terminate as to both parties unless tenant shall, on or before the last day of that period, pay or tender to Landlord the sum of $_____ per acre for each acre of the premises remaining subject to this lease as delay rental deferring the commencement of drilling operations on the premises for an additional _____-month period. In like manner, the commencement of drilling operations on the premises may be further deferred for additional _____-month periods by Tenant making or tendering a like payment to Landlord on or before the last day of each successive _____-month period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.203

AUTHOR: Linda Breen Pierce

§ 36.203 Dry-Hole Clause Requiring Tenant to Drill Another Well or to Pay Delay Rental When Well Drilled on Leased Premises Does Not Produce Oil or Gas

[1] Comment

[a] Use of Form

This form sets forth an alternative lease provision known in the petroleum industry as a "dry-hole clause" [*see* Brown & Brown, The Law of Oil and Gas Leases, ch. IX, *The Dry Hole and Lease Extension Clause*, § 9.01 (Matthew Bender)]. A "dry-hole" is a completed well that does not produce oil or gas, or at least does not produce oil or gas in paying quantities [*see* Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "D" (Matthew Bender)]. A "dry-hole clause" provides that the lease must terminate unless the tenant continues drilling wells on the leased premises during the lease's exploratory term, as stated in the habendum clause of the lease, though the preceding well drilled by the tenant is a dry hole [*see* Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 613]. In some situations, a "dry hole" provision may also be the means by which a tenant may keep a lease alive after drilling a non-producing well [*San Mateo Community College District v. Half Moon Bay Limited Partnership (1998) 65 Cal. App. 4th 401, 413 n.5, 76 Cal. Rptr. 2d 287]* , at least in those instances when the habendum clause provides that the lease may be extended by other provisions in the lease such as a "dry hole" clause [*see Southern Pacific Land Company v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 821-822, 233 Cal. Rptr. 794]* .

[b] Purpose of Dry-Hole Clause

The primary purpose of a dry-hole clause is similar to that of a development or delay rental clause [*see § 36.202[1][b]*]. The principal purpose of an oil and gas lease is to procure the exploration of the leased land [*Hall v. Augur (1927) 82 Cal. App. 594, 600, 256 P. 232]* . Since an oil and gas lease is valuable to the landlord, whose principal consideration for the lease is its promise of royalties only on the discovery of oil or gas, it is not only important to see that drilling is commenced at an early date, but that the drilling be continued until the oil and gas possibilities of the land have been fully explored and developed [*Acme Oil & Mining Co. v. Williams (1903) 140 Cal. 681, 684-685, 74 P. 296]* .

Dry-hole clauses have been recognized in California and applied, when appropriately worded, to a well that produced oil but not in paying quantities. This result follows from the fact that it is commonly known that some oil wells never produce in paying quantities [*Siemon v. Lyon (1942) 51 Cal. App. 2d 350, 353, 124 P.2d 893]* . The operator must be given a reasonable time, however, to determine whether the well will produce in paying quantities [*Welport Oil Co. v. Fairfield (1942) 51 Cal. App. 2d 533, 537, 125 P.2d 97* ; *see § 36.201[1][d]* (time period for paying quantity analysis)].

[2] FORM

Dry-Hole Clause Requiring Tenant to Drill Another Well or to Pay Delay Rental When Well Drilled on Leased Premises Does Not Produce Oil or Gas

Dry-Hole Clause

_____. Should Tenant, before the discovery of oil or gas or other hydrocarbons in paying quantities on the premises, drill a well on the premises to a depth of at least _____ feet and the well be a dry hole, as that term is commonly understood in the petroleum industry, this lease shall terminate unless before the date the next payment of rent by Tenant to Landlord becomes due under Paragraph _____ of this lease [*or* within _____ days], Tenant either commences the drilling of another well on the premises or resumes the payment of rent to Landlord in the manner specified in Paragraph _____ of this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.204

AUTHOR: Linda Breen Pierce

§ 36.204 Shut-In Royalty Clause for Payment of Specified Amount When Operations of Gas Well Are Suspended

[1] Comment

[a] Use of Form

Although a tenant drills a well during the exploratory term of the lease capable of producing gas in paying quantities, the tenant may be unable to market the gas [Brown & Brown, The Law of Oil and Gas Leases, Ch. VI, *The Royalty Clauses*, § 6.08 (Matthew Bender)]. In this case the tenant would normally be forced to suspend operation of the well to avoid losing money on operating expenses. As a result, the oil and gas lease would terminate at the end of the exploratory term specified in its habendum clause because neither gas nor oil is being produced from the leased land in paying quantities [*see § 36.201[1][b]*].

The form in [2], *below*, sets forth a lease provision designed to prevent termination of the lease in this situation. It is known in the industry as a "shut-in royalty clause" and provides that the tenant may continue the lease in full force and effect when the tenant has suspended operations of a gas well on the leased premises by paying a specified rent to the landlord [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 631 (Matthew Bender)].

[b] Application of "Shut-In Royalty Clause"

The "shut-in royalty clause" in this form is typical in that it applies only when gas but not oil has been discovered by the oil and gas tenant on the leased premises [*see* Brown & Brown, The Law of Oil and Gas Leases, Ch. VI, *The Royalty Clauses*, § 6.08 (Matthew Bender)]. This is because the operation of an oil well capable of producing oil in paying quantities seldom has to be suspended because there is no market for the oil. Sometimes, however, the operation of a gas well capable of producing gas in paying quantities must be suspended because there is no pipeline available to carry the gas from the well to market and the gas is therefore, in effect, not marketable [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 631 (Matthew Bender)]. Unlike oil, gas cannot be produced,

saved, and marketed from a well unless and until a pipeline connection with the well is secured [Williams & Meyers, Oil and Gas Law, ch. 6, *The Oil and Gas Lease--Express Provisions* , § 631 (Matthew Bender)].

The shut-in royalty clause in this form is not limited, however, to the situation in which operations must be suspended because of the lack of a pipeline connection with the well. It would also be applicable when operations of the gas well must be suspended for conservation purposes or other reasons [*see* Brown & Brown, The Law of Oil and Gas Leases, Ch. VI, *The Royalty Clauses*, § 6.08 (Matthew Bender)].

[2] FORM

Shut-In Royalty Clause for Payment of Specified Amount When Operations of Gas Well Are Suspended

Shut-In Royalty

_____. Should Tenant complete only a well, or wells, on the premises that produces gas but not oil in paying quantities, Tenant may suspend operations of the well, or wells, and continue this lease in full force as if gas in paying quantities were being produced from the premises by paying to Landlord on the first day of the month following the suspension of operations and on the anniversary of that day each year during the period of suspension the sum of $_____ per year in lieu of any and all other rentals or royalties that may be produced by the well or wells. The provisions of this paragraph shall apply to any suspension of operations of a well, or wells, described in it either during the primary term of this lease or at any time thereafter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesShut-In Royalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide § 36.205

AUTHOR: Linda Breen Pierce

§ 36.205 Clause Authorizing Leased Land to Be Combined or Pooled With Other Land for Drilling and Production Purposes

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth a model "pooling clause" that may be inserted in an oil and gas lease. The clause authorizes the tenant to combine the leased land with other land in the vicinity to form one or more production units or pools at any time during the continuance of the lease. However, it limits the tenant's power to pool the leased land with other land after oil or gas has been discovered in paying quantities on it or any other land in the proposed pool. It also limits the number of acres that may be included in the pool. When this limitation or any other set forth in this form is not desired, it may be omitted and the remaining subdivisions of the clause renumbered.

[b] Methods of Protecting Oil and Gas Rights

If an oil and gas reservoir underlies several parcels of land owned by different persons, a well drilled on any of the parcels will drain the oil from under all the parcels [*see § 36.12[1]*]. In this event, there are only two ways the owners of the various parcels can protect their oil and gas rights [Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289 (1960)*]:

- Drill offset wells on each of their own parcels; or
- Enter into an agreement to combine or pool their respective rights to the oil and gas in the reservoir.

As a result it has become common practice for oil tenants to insert a "pooling clause" in the lease giving them authority to pool the oil rights to the leased land with the oil rights to other lands in the vicinity [Gregg, *Community Leases and Pooling Clauses, 7 UCLA L. Rev. 289, 302 (1960)*].

Generally, pooling clauses in oil and gas leases are designed to provide for pooling, not unitization. For a discussion of "pooling" and "unitization," see *§ 36.17*.

[2] FORM

Clause Authorizing Leased Land to Be Combined or Pooled With Other Land for Drilling and Production Purposes

Pooling

_____. Tenant may at any time during the continuance of this lease, in Tenant's sole discretion, combine or pool all or any part of the premises with other land in the immediate vicinity of the premises [*or* within _____ miles of an exterior boundary of the premises *or* in the same section of the U.S. Geological Survey as the premises] to form one or more drilling or production units ("pools"), provided

(a) No pool or pools created by combining and pooling of the premises, or any part of the premises, shall be effective until a Declaration of Pooling describing the land included in the pool and the owners of the land is executed by Tenant, recorded in the office of the County Recorder of the county or counties in which the premises is located, and served on Landlord.

(b) No pool or pools shall be created later than _____ days after the discovery in paying quantities of oil or gas on any of the land, including the premises, to be included in the pool.

(c) No pool created in accordance with this paragraph shall exceed [*number*] acres for oil development or [*number*] acres for gas development.

(d) Should oil or gas in paying quantities be produced from any land, including the premises, included in a pool created in accordance with this paragraph, for the purpose of computing the royalties payable under this lease to Landlord the proportion of the oil or gas so produced as the surface area of the premises included in the pool bears to the total surface area of all land included in the pool shall be allocated to and regarded as having been produced from the premises and not from any other tract of land. The royalty payments to be made under this lease to Landlord shall be based solely on the oil and gas allocated to and considered, under this subparagraph, produced from the premises.

(e) For drilling and developmental purposes, all land included in a pool created in accordance with this paragraph shall be considered as subject to this lease and the drilling of any well on any part of the land included in a pool created in accordance with this paragraph shall satisfy Tenant's drilling obligations under this lease to the same extent as if the well were drilled on the premises expressly described in this lease.

(f) Tenant need not offset any well drilled on any land included in a pool created in accordance with this paragraph by drilling an offset well on this property.

(g) Tenant may surrender, in the manner described in Paragraph _____ of this lease, any land, including all or any portion of the premises, included in a pool created in accordance with this paragraph and be immediately relieved of all obligations regarding the land so surrendered. Any owner of land in the pool who does not own, other than by reason of the pool, any interest in the land surrendered shall have no further interest in the land surrendered, in any gas or oil thereafter produced from the surrendered land, or any right to royalties for oil or gas produced from the surrendered land. The owner of the surrendered land shall, however, continue to be entitled to receive royalties for any oil or gas produced by any land included in the pool in the proportion specified in subparagraph (d) of this paragraph until the owner again leases the surrendered land for oil and gas exploration and

development purposes.

(h) Should only part of the premises be included in a pool created in accordance with this paragraph, the remainder of the premises not included in the pool shall be considered as held by Tenant under a separate lease of the same date as this lease and containing all the provisions contained in this lease. A default by Tenant as to the portion of the premises not included in the pool shall not be a default as to the part of the premises included in the pool, and vice versa.

(i) Any pool or pools created in accordance with this paragraph may be terminated by Tenant, in Tenant's sole discretion, at any time before oil or gas is produced from any of the lands included in the pool by a declaration stating that the pool, identifying it by reference to the recorded Declaration of Pooling that created it, has been terminated. The declaration stating the pool has been terminated shall be executed by Tenant, recorded in the office of the County Recorder of the county or counties in which the Declaration of Pooling creating the pool was recorded, and served on Landlord.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawLeases & LicensesPooling ClausesEnergy & Utilities LawPooling & UnitizationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Oil and Gas Lease and Alternative Provisions

18-36 California Legal Forms--Transaction Guide §§ 36.206-36.209

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.206[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
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B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.210

AUTHOR: Linda Breen Pierce

§ 36.210 Instrument of Surrender Executed by Tenant Releasing Part of Leased Land From Oil and Gas Lease

[1] Comment--Use of Form

The form in [2], *below*, sets forth the instrument that should be used by a tenant or its assignee in exercising its right under the lease surrender provision [*see § 36.200[1][f]* (surrender clauses)]. The instrument of surrender should be executed and acknowledged before a notary public and recorded in the office of the county recorder of the county in which the oil and gas lease is recorded. The recording fees are set by statute [*see Gov. Code § 27361* for amounts]. Under the surrender clause set forth in *§ 36.200[2]*, P 20, an executed copy of the surrender instrument must also be delivered to the landlord or his or her successors in interest.

When the surrender is being made by an assignee of the original tenant, the bracketed recital appearing under "Recital Identifying Assignment" should be included in the surrender instrument. When the surrender is by a more remote assignee of the original tenant, for example, by an assignee of the assignee of the original tenant, successive "Recital Identifying Assignment" paragraphs should be included in the surrender instrument reciting the various assignments of the lease.

[2] FORM

Instrument of Surrender Executed by Tenant Releasing Part of Leased Land From Oil and Gas Lease

SURRENDER OF LEASED LAND

_____. The undersigned, _____[*name*], [*status, e.g.,* a California corporation], declares:

Recital Identifying Lease

WHEREAS, the undersigned [*or* _____ (*name*)] is Tenant under that certain Oil and Gas Lease, executed on _____[*date*], by _____[*name(s)*] as Landlord and the undersigned [*or* _____ (*name*)] as Tenant[, which lease is duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California]; and

Recital Identifying Assignment

[*Add if the corporation executing the surrender is the assignee of the original tenant named in the oil and gas lease:*]

WHEREAS, _____[*name of original tenant named in lease*] assigned all its right, title, and interest as Tenant under the lease to the undersigned on _____[*date*], by an instrument duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California; and

Recital Identifying Surrender Clause

WHEREAS, Paragraph _____ of this lease provides that Tenant may at any time and from time to time surrender all or any part of the leased premises to Landlord or its successors in interest by executing, recording, and delivering to Landlord or its successor in interest an instrument of surrender particularly describing the portion surrendered; and

WHEREAS, Paragraph _____ of the lease further provides that on a surrender being made, Tenant's obligations under the lease as to the land surrendered shall cease.

Surrender of Land

NOW, THEREFORE, the undersigned surrenders, in accordance with Paragraph _____ of the lease, to Landlord named in the lease or to their successors in interest that portion of the land leased by the lease that is situated in the County of _____, State of California, and more particularly described as follows: [*insert legal description of portion of leased land being surrendered*].

EXECUTED _____[*date*], at _____[*city*], California.

_____ [*name of tenant or assignee*]
By _____ [*signature*]
[*typed name and title*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesGeneral OverviewEnergy & Utilities LawLeases & LicensesGeneral

OverviewEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesGeneral OverviewEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignments



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.211

AUTHOR: Linda Breen Pierce

§ 36.211 Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Long Form

[1] Comment

[a] Use of Form

The form in [2], *below*, and the form in *§ 36.212[2]*, both set forth forms for the assignment of a tenant's interest in an oil and gas lease, reserving to the original tenant an overriding royalty in oil or gas produced from the leased premises. The form in *§ 36.212[2]*, however, is a one-paragraph assignment signed by the assignor and a separate one-paragraph acceptance of assignment signed by the assignee. The form in [2], *below*, sets forth an agreement between the assignor and assignee in which the assignor assigns its interest in the lease and the assignee agrees to do certain things favoring the assignor. The assignor also warrants that it has not encumbered the leased premises and that the lease the assignor purports to assign is still in good standing and effect. In addition, this form assumes the assignor is the original tenant under the oil and gas lease being assigned. Thus, its identity of lease recitals identify only the lease being assigned and the book and page where that lease is recorded [*see § 36.212[2]* for recitals for prior assignments].

[b] Distinctions Between Assignment and Sublease

The difference between an assignment and a sublease is that an assignment transfers the tenant's entire interest in the property whereas a sublease transfers only a portion of that interest, with the original tenant retaining a right of reentry at some point during the unexpired term of the lease [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 242-243, 73 P.2d 1163* ; *Kendall v. Ernest Pestana, Inc. (1985) 40 Cal. 3d 488, 492 n.2, 220 Cal. Rptr. 818, 709 P.2d 837]* . A lease is both a contract and a conveyance of an estate in real property. Therefore the original tenant is bound to the landlord by both privity of contract and privity of estate [*see § 36.13[1]*]. When the original tenant assigns its leasehold estate in the leased premises, the assignee, though not bound to the original landlord by privity of contract, is bound to the original tenant by privity of estate [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 243, 73 P.2d 1163]* .

When a tenant, however, executes a sublease, the tenant carves a lesser leasehold estate out of the original leasehold estate and conveys it to the subtenant. Thus, the subtenant is not bound to the original landlord by either privity of contract or privity of estate [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* .

An instrument designated by the parties as an "assignment" may be held to be a "sublease" [*see Garner v. Knudsen (1954) 129 Cal. App. 2d 747, 754-756, 277 P.2d 890]* . If a tenant reserves both an overriding royalty and a right of reentry for breach of any condition in the assignment, the assignment is held to be a sublease. In this case, the right of reentry amounts to a "contingent reversionary interest" in the purported assignor and therefore, the assignor has not assigned the whole of the unexpired term of the lease [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 243, 73 P.2d 1163* ; *Garner v. Knudsen (1954) 129 Cal. App. 2d 747, 755-756, 277 P.2d 890]* .

[c] Landlord's Rights Against Subtenant or Assignee

An important distinction exists, so far as a landlord is concerned, between the subleasing of property subject to an oil and gas lease and the assignment of the oil and gas lease. A subtenant is not liable to an original landlord in damages for breach of covenants in the original lease [*Hartman Ranch Co. v. Associated Oil Co (1937) 10 Cal. 2d 232, 242, 73 P.2d 1163* ; *Recorded Picture Company v. Nelson Entertainment, Inc. (1997) 53 Cal. App. 4th 350, 364, 61 Cal. Rptr. 2d 742]* , unless the subtenant specifically assumes the tenant's obligations under the original lease [*Bennett v. Leatherby (1992) 3 Cal. App. 4th 449, 452, 4 Cal. Rptr. 2d 340]* . In contrast, whatever remedies the landlord of any real property has against the immediate tenant for the breach of any agreement in the lease, or for recovery of possession, the landlord has against the assignees of the tenant for any cause of action accruing while they are assignees [*Civ. Code § 822*].

However, when in a sublease of oil and gas property the subtenant expressly agrees to assume and perform the master oil and gas lease on the property, the promise can be enforced by the original landlord. In this case, the original landlord is a third-party beneficiary of the express assumption promise contained in the sublease and may bring an action for damages against the subtenant for breach of the master lease's covenants [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 244-245, 73 P.2d 1163]* . Thus, the original landlord may maintain an action for damages against the subtenant for breach of the implied covenant, implied in every oil and gas lease, to protect the leased premises from drainage [*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 244, 73 P.2d 1163* ; *see § 36.15[2]*].

[d] Nature of Overriding Royalty

The term "royalty" is generally applied to the fractional interest in all oil and gas produced from a particular piece of land and is created either by reservation when an oil and gas lease is entered into or by grant to a third person [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351]* .

The term "overriding royalty" is applied generally to a fractional interest in the tenant's share of all oil and gas produced under an oil and gas lease [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351]* . It is in addition to the share of oil and gas produced from the land that is reserved for the land owner [*Meeker v. Ambassador Oil Co. (10th Cir. 1962) 308 F.2d 875, 882]* and must be created by the oil tenant from its share, after payment of the landowner's oil royalty [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351]* . It may be created by a sublease when the tenant transfers all its interest under the lease except an overriding royalty to a subtenant, or it may be created by a grant by a tenant of a fractional part of its share of the oil and gas to some third person [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351]* .

If, without subleasing, the tenant grants the overriding royalty to a third party, the grant constitutes an interest in real property and must be in writing. The interest, however, is not unlimited but is a determinable interest limited to the duration of the existing oil and gas lease. Termination of the lease terminates the overriding royalty interest granted the third party [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 139-140, 114 P.2d 351]* . Whether the grant of the

overriding royalty makes the grantee a tenant in common with the tenant and able to enter the leased premises and share in the operation of the oil development and drilling functions depends on the intent of the parties. In the absence of a clear indication of a contrary intent, the grant, when not coupled with a sublease, will be held to retain in the grantor-tenant the operating rights contained in the profit 'a prendre granted by the oil and gas lease, and grant to the third party simply a share in the oil and gas produced under the lease [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351]* .

[2] FORM

Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Long Form

ASSIGNMENT OF OIL AND GAS LEASE BY TENANT

_____. _____[*Name(s)*], [*status, e.g.,* husband and wife *or* a single man *or* a California corporation] ("Assignor"), and _____[*name(s)*], [*status, e.g.,* husband and wife *or* a single man *or* a California corporation] ("Assignee") agree:

Identity of Lease

WHEREAS, Assignor is tenant under that certain Oil and Gas Lease executed on _____[*date*], by Assignor as Tenant and _____[*name(s)*] as Landlord covering the real property in the County of _____, State of California, described as follows: [*legal description of real property*]; and

WHEREAS, this lease is duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California.

Assignment

NOW, THEREFORE, in consideration of the sum of $_____ and other good and valuable consideration, receipt of which is acknowledged, Assignor does sell, assign, transfer, and convey to Assignee all of Assignor's right, title, and interest in and to the lease and the real property covered by the lease on the following terms and conditions.

Override Royalty

There is excepted from the above assignment and conveyance and reserved and retained in Assignor an overriding royalty equal to [*fraction or percentage*] of the value of all oil produced and removed under the lease and the net proceeds received by Assignee from the sale of all gas and casinghead gasoline produced and sold under the lease.

The overriding royalty reserved and retained by Assignor shall be payable to Assignor at the same time, and shall be computed in the same manner, as is provided in the lease for the payment, and computation, of royalties payable under it to Landlord.

Assignee to Perform Lease

Assignee accepts, on the terms and conditions specified in this agreement, this assignment of lease and agrees to truly

and fully perform all the terms and conditions of the lease to be performed under the lease by Tenant.

Indemnity Agreement

Assignee shall indemnify and hold Assignor and the property of Assignor, including Assignor's interest under this agreement, free and harmless from any and all claims, liability, loss, damage, or expense resulting from Assignee's performance of the lease, Assignee's occupation of any part of the real property covered by the lease, or the exploration for or extraction by Assignee under the lease of any oil, gas, or other hydrocarbon substances.

Modification and Extension of Lease

Assignee shall have the right to obtain from Landlord under the lease, or Landlord's successor in interest as Landlord under the lease, any modifications or extensions of the lease Assignee may desire so long as the modifications or extensions do not reduce in any way the overriding royalty reserved and retained by Assignor under this agreement or otherwise infringe on any rights of Assignor under this agreement.

Development Clause

Unless Assignee, on or before _____[*date*], has either commenced drilling operations on the land covered by the lease or reassigned its rights under the lease to Assignor, Assignee shall pay or tender to Assignor in advance on the first day of each and every month a monthly rental of $_____ until drilling operations are commenced by Assignee on the land covered by the lease or Assignee's rights in and to the lease are reassigned by Assignee to Assignor. No payments made under this paragraph shall in any way extend the period within which Assignee must commence drilling operations on the land covered by the lease beyond one year from the date of this agreement. Any amounts payable under the lease to landlord under the lease as deferred rentals until drilling operations are actually commenced on the land covered by the lease shall be paid, for a period not exceeding one year from the date of this agreement, by Assignor from the rental payable to the Assignor by Assignee in accordance with this paragraph.

Default Clause

Should Assignee fail to commence drilling operations on the land covered by the lease within one year from and after the date of this agreement, or should Assignee fail or default in the performance of the lease or this agreement, then Assignor, at Assignor's option, may either (a) declare Assignee's rights under the lease and this agreement forfeited and resume Assignor's status as Tenant under the lease or (b) bring an appropriate action in law or equity to either enforce this agreement or recover appropriate damages.

Access to Wells

Assignor shall have access to any well drilled by Assignee on the land covered by the lease and shall have the privilege of witnessing all tests and operations conducted on or in connection with any of these wells. On written request of Assignor, Assignee agrees to furnish Assignor with copies of logs and reports obtained or prepared in connection with any well drilled on the land covered by the lease.

Assignor's Warranties

Assignor makes no warranty of title with regard to the land covered by the lease but Assignor does warrant and represent to Assignee that

(a) The rights and interest conveyed to Assignee by this agreement are free and clear of all liens, charges, and encumbrances created by Assignor;

(b) Assignor has the right to make the transfer and conveyance effectuated by this agreement;

(c) No default or defaults now exist or have been declared under the lease; and

(d) The lease is now in good standing and in full force and effect.

Manner of Payments to Assignor

All moneys payable under this agreement by Assignee to Assignor shall be deemed duly paid when a check therefor payable to the order of Assignor is deposited in the United States mail, first-class postage prepaid, addressed to Assignor at _____[*mailing address*]. Assignor may from time to time change the address for the purpose of this paragraph by giving written notice of the change of address in the manner prescribed by Paragraph _____ of this agreement.

Notices

Any and all notices or other communications required or permitted by this agreement, the lease, or by law to be served on or given to either party to this agreement, Assignor or Assignee, by the other party shall be in writing and shall be deemed duly served when personally delivered to the party to whom it is directed or when deposited in the United States mail, first-class postage prepaid, addressed to Assignor at _____[*mailing address*], or to Assignee at _____[*mailing address*]. Either party, Assignor or Assignee, may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

Should any litigation be commenced between the parties to this agreement concerning the assignment and transfer made by it, the lease, or the rights or duties of either party in relation to the lease or this agreement, the party, Assignor or Assignee, prevailing in the litigation shall be entitled, in addition to any other relief as may be granted, to a reasonable sum as and for its attorneys' fees in the litigation, which shall be determined by the court in the litigation or in a separate action brought for that purpose.

Binding on Heirs

All the terms and provisions of this agreement shall inure to the benefit of and shall be binding on the heirs, executors, administrators, representatives, successors, and assigns of each of the parties to this agreement.

Sole Agreement

This agreement constitutes the sole agreement between Assignor and Assignee respecting the lease or the assignment of the lease by Assignor to Assignee and correctly sets forth the obligations of Assignor and Assignee to each other as of its date. Any agreements or representations respecting the lease or its assignment to Assignee not expressly set forth in this agreement are null and void.

EXECUTED on _____[*date*], at _____[*city*] , California

ASSIGNOR
_____ [*signature*]
[*typed name*]
ASSIGNEE
_____ [*signature*]
[*typed name*]

[*Add if appropriate:*]

CONSENT OF ASSIGNOR'S SPOUSE

The undersigned, being the [wife *or* husband] of the above-named Assignor [*name of assignor*], consents to and joins in the Assignment of Lease set out above.
DATED: _____.

_____ [*signature of assignor's spouse*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignmentsEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesLease ObligationsEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesSubleasesEnergy & Utilities LawLeases & LicensesImplied DutiesEnergy & Utilities LawLeases & LicensesRoyalty Clauses



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.212

AUTHOR: Linda Breen Pierce

§ 36.212 Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Short Form

[1] Comment--Use of Form

The form in [2], *below*, sets forth a short form assignment of an oil and gas lease by an assignee of the original tenant. This form reserves to the assignor an overriding royalty in any gas or oil produced under the assignment. This form differs from the assignment in *§ 36.211[2]* in that it is intended for use by an assignee of the original oil and gas tenant instead of the original oil and gas tenant. It should be noted that in both forms, the assignee agrees to perform all the terms of the lease being assigned to him or her. This should allow the original landlord to bring an action directly against the assignee for damages caused by any breach of a covenant, express or implied, of the lease [*see § 36.211[1][c]*].

The form in [2], *below*, assumes that there have been three prior assignments of the lease. The recitals identify not only the lease being assigned and its recordation but each of the three previous assignments of that lease and their recordation. However, by either adding to or omitting the recitals of former assignments the form can be made to reflect the actual number of assignments at the time of the particular transaction for which it is used. In some areas there has been a great deal of speculative buying and selling of oil and gas leases and some leases have been assigned as many as five or six times before drilling is commenced on the leased premises [*see* Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 401 (Matthew Bender)].

[2] FORM

Assignment of Tenant's Interest in Oil and Gas Lease Reserving Overriding Royalty--Short Form

ASSIGNMENT OF OIL AND GAS LEASE

_____. _____[*Name(s)*], [*status, e.g.*, husband and wife *or* a single man *or* a California corporation] ("Assignor") declare[s]:

Identity of Lease

WHEREAS, that certain Oil and Gas Lease duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California was executed on _____[*date*], by _____[*name or names of original landlords*] as Landlord and _____[*name or names of original tenants*], [*status of original tenant, e.g.*, husband and wife *or* a single man *or* a California corporation], as Tenant covering the real property in the County of _____, State of California, described as follows: [*legal description of real property*]; and

First Prior Assignment

WHEREAS, on or about _____[*date*], by an instrument duly recorded on _____[*date*], as Document No. _____ in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, _____[*name(s) of original tenant(s)*] did transfer and assign to [*name(s) of first assignee(s)*], [*status of first assignees, e.g.*, husband and wife *or* a single man *or* a California corporation], all their right, title, and interest as Tenant under the lease, RESERVING, HOWEVER, unto _____[*name(s) of original tenant(s)*] an overriding royalty interest equal to [*fraction or percentage*] of the value of all oil produced and removed under the lease and the net proceeds from the sale of all gas and casinghead gasoline produced and sold under the lease; and

Second Prior Assignment

WHEREAS, on or about _____[*date*], by an instrument duly recorded on _____[*date*], as Document No. _____ in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, [*name(s) of first assignee(s) of tenant's interest*] did transfer and assign to [*name(s) of second assignee(s)*], [*status of second assignees, e.g.*, husband and wife *or* a single man *or* a California corporation], all their right, title, and interest as Assignee of Tenant under the lease, RESERVING, HOWEVER, unto [*name(s) of first assignee(s) of tenant's interest*] an overriding royalty interest of [*fraction or percentage*] of the value of all oil produced and removed under the lease and the net proceeds from the sale of all gas and casinghead gasoline produced and sold under the lease; and

Third Prior Assignment

WHEREAS, on _____[*date*], by an instrument duly recorded on _____[*date*], as Document No. _____ in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, [*name(s) of second assignee(s) of tenant's interest*] did transfer and assign to Assignor all their right, title, and interest as Assignee(s) of Tenant under the lease.

Assignment With Overriding Royalty

NOW, THEREFORE, in consideration of the sum of $_____ and other good and valuable

consideration, receipt of which is acknowledged, Assignor does sell, assign, transfer, and convey to [*name(s) of present assignee(s)*], [*status of present assignee, e.g.*, husband and wife *or* a single man *or* a California corporation] all Assignor's right, title, and interest in and to the lease and the real property covered by the lease, RESERVING, HOWEVER, to Assignor an overriding royalty interest equal to [*fraction or percentage*] of the value of all oil produced and removed under the lease and [*fraction or percentage*] of the net proceeds received by Assignee from the sale of all gas and casinghead gasoline produced and sold under the lease.

EXECUTED on _____[*date*], at _____[*city*] , California.

_____ [*signature of assignor*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

ACCEPTANCE OF ASSIGNMENT

I [*or* We] accept the above Assignment of Oil and Gas Lease and agree to perform the terms of this assignment as well as to perform fully and faithfully the terms of the lease described in this assignment to be performed by the tenant.
DATED: _____.

_____ [*signature of assignee*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignmentsEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesLease ObligationsEnergy & Utilities LawLeases & LicensesRoyalty Clauses



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.213

AUTHOR: Linda Breen Pierce

§ 36.213 Conveyance of Mineral Interest in Oil and Gas by Landowner

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth a deed of mineral interest or grant deed conveying a fractional mineral interest in all oil and gas produced from a specified piece of real property. It differs from the deed in *§ 36.214[2]*, which conveys an expense-free royalty interest in all oil and gas produced from a specified piece of real property. It differs from the assignment in *§ 36.215[2]*, which assigns only a percentage of the royalties to be received by a landowner under a particular oil and gas lease.

This form conveys to the grantee an undivided fractional interest in the landowner's exclusive right to drill for and produce oil and gas from the land described in the deed [*see Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234-235, 217 P.2d 416]* . Thus, it would convey the right, equal with that of the grantor, to enter on the property described in it and to drill on and produce oil and gas from that land [*Callahan v. Martin (1935) 3 Cal. 2d 110, 125-126, 43 P.2d 788]* . Apparently, if no valid oil and gas lease on the property already exists, either the grantor or grantee, or both jointly, may lease the property described in the deed to an oil and gas tenant. Thus, this form should not be used unless the grantor wishes to convey to the grantee a permanent interest in the real property described in the deed and to make the grantee a tenant in common of the grantor's right to explore for and produce oil and gas from the land described in the deed.

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the mineral rights being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax in accordance with that Act [*see Rev. & Tax. Code §§ 11901-11934*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[b] Distinctions Between Royalty and Mineral Interests

[i] Royalty Interest

A landowner's exclusive right to drill for and produce oil from its land may be assigned or transferred separately from the other rights that go to make up land ownership [*Callahan v. Martin (1935) 3 Cal. 2d 110, 118-121, 43 P.2d 788]* . Furthermore, this exclusive right may be split up and assigned in different parts to different persons [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237]* . The landowner usually develops its exclusive right to drill for and produce oil from its land by executing a lease with an oil and gas producer. It conveys to the tenant the exclusive right to drill for oil or gas on the leased land and to retain the major portion of the oil or gas brought to the surface [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237]* . The interest conveyed to the oil and gas tenant, in the hands of a person who owns no other interest in the land, is called a profit 'a prendre [*Callahan v. Martin (1935) 3 Cal. 2d 110, 118, 43 P.2d 788]* .

Under the normal oil and gas lease the tenant agrees, as consideration for the lease, to deliver to the landowner, at no cost or expense to the landowner, a certain percentage or fraction of the oil and gas recovered by the tenant [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237]* . This percentage or fraction of oil or gas is called a "royalty" and represents the landowner's "royalty interest" under the lease. It is referred to as a 1/6, 1/8, or 15 percent royalty interest depending on the fraction or percentage of produced oil and gas agreed to be delivered to the landowner [*Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825]* .

The royalty interest retained by the landowner under an oil and gas lease is itself an interest in real property in the nature of a profit 'a prendre and may be assigned, in whole or in part [*Callahan v. Martin (1935) 3 Cal. 2d 110, 123-124, 43 P.2d 788]* . In fact, it may be assigned, in whole or in part, before any oil and gas lease has been executed by the landowner and it may be assigned in perpetuity [*see Beam v. Dugan (1933) 132 Cal. App. 546, 549, 23 P.2d 58]* . An assignment in perpetuity not only assigns all or a part of the royalty interest under an existing lease, but also assigns all or a part of the royalty interest under any future leases [*Beam v. Dugan (1933) 132 Cal. App. 546, 549, 23 P.2d 58]* .

Thus, when a landowner conveys to a third person 1/8 royalty interest, the third person is entitled to 1/8 of all oil or gas produced from the land and the landowner has no right to execute an oil and gas lease calling for a lesser royalty [*see* Maxwell, *A Primer of Mineral and Royalty Conveyancing, 3 UCLA L. Rev. 449, 454 (1956)*]. If, after the conveyance, the landowner executes an oil and gas lease on the land under which tenant agrees to pay a 1/6 royalty, the landowner is entitled to 1/24 of all oil and gas produced under the lease and the landowner's assignee is entitled to 1/8 or 3/24 of all oil and gas produced under the lease [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 657-658, 52 P.2d 237]* .

[ii] Mineral Interest

In addition to being able to assign or convey fractional interests in its royalty interest under any oil and gas lease the landowner may place on a designated parcel of land, a landowner may also assign or convey fractional interests in its exclusive right to explore for and produce oil and gas from that land [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 235, 217 P.2d 416]* . When the landowner conveys an interest to explore and produce minerals, the landowner is said to have conveyed a "mineral interest" and not merely a "royalty interest" to the grantee, and the landowner and the grantee become tenants in common of the exclusive right to explore and produce oil and gas [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* . Because both the landowner and the fractional grantee are tenants in common of the right, either may enter the land and drill for and produce oil or gas from the land [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 52 P.2d 237]* . Furthermore, either tenant in common may make an oil and gas lease conferring on a tenant the right to enter the land and drill for and produce oil or gas from the land [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006]* .

When one cotenant of the mineral interest in oil and gas discovers and produces oil and gas from the land, the cotenant must account to its other cotenants for their respective shares of the oil and gas produced because the producing cotenant is exhausting the very thing that the cotenants own in common--the minerals [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 656, 52 P.2d 237]* .

However, when one cotenant of the mineral interest produces oil and gas, the cotenant is entitled to charge the interests of the nonproducing cotenants in that oil and gas with their proportionate share of the drilling and operating expenses incurred by the producing cotenant [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* . The general rule that nonproducing cotenants are generally subject to a charge or deduction for their proportion of drilling and operating expenses is controlled by agreement of the parties, express or necessarily implied [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 657, 52 P.2d 237* ; *Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1779, 18 Cal. Rptr. 2d 574]* . When one cotenant produces oil from the land by leasing it to a developer, and the lease provides for payment of a 1/6 royalty to the landowner, the cost to the cotenant of producing the oil is 5/6 of the oil retained by tenant [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* . When the nonproducing cotenants accept benefits under the oil and gas lease, they ratify the lease [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006]* and so agree that the 5/6 of the oil retained by the tenant is a fair charge for the expense of drilling and producing oil under the lease [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* .

[iii] Practical Implications

The discussion in [i] and [ii], *above*, highlight two important practical distinctions between a fractional "mineral interest" and a fractional "royalty interest" in oil and gas rights. First, the owner of a fractional mineral interest is a tenant in common with the landowner of the oil rights and may either (1) enter the land and drill for oil or (2) place an oil and gas lease on the land. However, the owner of a fractional royalty interest can do neither of these things. The owner of this interest has a right only to share in the royalty payable under an oil and gas lease if a lease is ever placed on the property involved [Maxwell, *A Primer of Mineral and Royalty Conveyancing, 3 UCLA L. Rev. 449, 454 (1956)*].

Second, the owner of a fractional mineral interest must bear a proportionate part of the expenses involved in producing oil or gas from the land [*Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* . The owner of a fractional royalty interest does not have to bear any of the expenses of production [*Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825]* . Thus, courts sometimes refer to the interests created by a conveyance as an "expense-free royalty interest" or an "expense-bearing mineral interest" [*see Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825]* .

Since the owner of a 1/6 royalty interest is entitled to receive 1/6 of all oil and gas produced from that land free and clear of any expenses [Maxwell, *A Primer of Mineral and Royalty Conveyancing, 3 UCLA L. Rev. 449, 454 (1956)*], when there is an oil and gas lease providing for a royalty of 1/6 to be paid to the landlord, the owner of a 1/6 royalty interest would be entitled to the entire royalty payable under the lease [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 657-658, 52 P.2d 237]* .

In contrast, the owner of a 1/6 mineral interest is entitled to receive the 1/6 that remains after enough oil and gas has been sold to pay the expenses of production. Thus, when an oil and gas lease provides for a royalty of 1/6 of all oil and gas to be paid to the landlord, the owner of a 1/6 mineral interest in the oil and gas rights to the land is entitled to 1/6 of the oil and gas remaining after payment of 5/6 of the oil and gas to the tenant for producing it or, in other words, 1/36 of the oil and gas produced from the land [*see Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234, 217 P.2d 416]* .

[c] Construction of Deed Granting Mineral or Royalty Interest

There has been confusion over whether a royalty interest or mineral interest was being conveyed by deeds or assignments that purported to convey "one eighth of all oil, gas, and other hydrocarbon substances in, under, or which may be produced and saved from" certain real property [*see Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 233, 217 P.2d 416]* . Deeds dealing in the transfer of oil interests must be construed as a whole in the light of both of the following [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 651, 52 P.2d 237* ; *Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1779, 18 Cal. Rptr. 2d 574]* :

- The circumstances under which they were executed; and
- The expressed intent of the parties at that time

The deed in this form expressly states it is conveying a fractional interest in oil and gas rights "as a mineral interest and not as a royalty interest." Conversely, the deed in *§ 36.214[2]* expressly states it is conveying a fractional interest in oil and gas rights "as an expense-free royalty interest and not as a mineral interest." In like manner, the provisions in *§ 36.216[2]* and *§ 36.217[2]* reserve to the grantor of real property a mineral interest in the oil and gas rights to the property. The form in *§ 36.218* reserves to the grantor of real property a royalty interest in the oil and gas rights to the property.

[2] FORM

Conveyance of Mineral Interest in Oil and Gas by Landowner

Recording requested by _____[*name*]

When recorded mail to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

Documentary Transfer Tax $_____
_____[*firm name if any*]
By [*signature*]
Agent for Grantor [*or* Grantee]

DEED OF MINERAL INTEREST

I, _____[*name of grantor*], _____[*status of grantor, e.g.,* a married man dealing with his sole and separate property *or* a single woman] grant to _____[*name of grantee*], [*status of grantee, e.g.,* a single man *or* a California corporation] as a mineral interest and not as a royalty interest [*fraction or percentage, e.g.,* one half] of all oil, gas, and other hydrocarbon substances in, under, or produced and saved from the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

EXECUTED on _____[*date*].

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesFractional InterestsEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsRoyalty InterestsEnergy & Utilities LawOil, Gas & Mineral InterestsSurface Use InterestsReal Property LawOil & Gas



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.214

AUTHOR: Linda Breen Pierce

§ 36.214 Conveyance of Royalty Interest in Oil and Gas by Landowner

[1] Comment--Use of Form

The form in [2], *below*, sets forth a deed of royalty interest or grant deed conveying to the grantee a fractional royalty interest in perpetuity in all oil and gas produced from a specified piece of real property. It differs from the form in *§ 36.213[2]*, which conveys a mineral interest, and from the form in *§ 36.215[2]*, which assigns only a percentage of the royalties to be received by a landowner under a particular oil and gas lease. For discussion of the nature of a royalty interest as conveyed by the deed in this form, see *§ 36.213[1][b][i]*. The discussion in that comment should be reviewed before a decision is made as to whether the deed in this form, the deed in *§ 36.213[2]*, or the assignment in *§ 36.215[2]* should be used in a particular situation.

The deed in [2], *below*, conveys an interest in real property. Thus, it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title to real property [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the royalty rights being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code §§ 11901-11934*]. For discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[2] FORM

Conveyance of Royalty Interest in Oil and Gas by Landowner

Recording Requested by _____[*name*]

When Recorded Mail to
_____[*name*]
_____[*address*]

_____[*city, state, zip*]

Documentary Transfer Tax $_____
_____[*firm name if any*]
By [*signature*]
Agent for Grantor [*or* Grantor]

DEED OF ROYALTY INTEREST

I, _____[*name of grantor*], [*status of grantor, e.g.,* a married woman dealing with her sole and separate property *or* a single man] grant to _____[*name of grantee*] [*status of grantee, e.g.,* a corporation *or* a single woman] as an expense-free royalty interest and not as a mineral interest [*fraction or percentage, e.g.,* 20 percent] of all oil, gas, and other hydrocarbon substances produced and saved from the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

EXECUTED on _____[*date*].

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesFractional InterestsEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsConcurrent & Successive InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsRoyalty Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.215

AUTHOR: Linda Breen Pierce

§ 36.215 Assignment by Landlord of Royalty Interest Under Existing Oil and Gas Lease

[1] Comment--Use of Form

The form in [2], *below*, sets forth an assignment of lease by which an oil and gas lease landlord assigns a portion of the royalties payable under an existing oil and gas lease. This form differs from the deeds in *§ 36.213[2]* and *§ 36.214[2]*, which convey fractional "mineral" or "royalty" interest in oil and gas rights. The assignment in this form conveys neither a "mineral" nor a "royalty" interest as those terms are generally understood and described in *§ 36.213[1][b]*. It simply assigns a fractional part of the royalty agreed to be paid under a specific oil and gas lease. When the specific oil and gas lease described in the assignment ends, the rights of the assignee also end. Under either the deed contained in *§ 36.213[2]* or the deed in *§ 36.214[2]*, the rights of the grantee continue in perpetuity.

The right of an oil and gas landlord to receive a royalty under an oil and gas lease has been declared a form of interest in real property [*Callahan v. Martin (1935) 3 Cal. 2d 110, 123, 43 P.2d 788]* . Thus, the assignment in this form conveys an interest in real property and should be executed, acknowledged, and recorded in the same manner as a grant deed conveying real property [*see* Ch. 27, *Deeds and Recording*].

[2] FORM

Assignment by Landlord of Royalty Interest Under Existing Oil and Gas Lease

ASSIGNMENT OF LEASE BY LANDLORD

_____[*Name(s)*], [*status, e.g.,* husband and wife *or* a single man] ("Assignor") declares:

Recitals

WHEREAS, Assignor is landlord under that certain Oil and Gas Lease ("the lease"), executed on _____[*date*], by Assignor as Landlord and _____[*name*] as Tenant, whereby the premises were leased for the purpose of exploring for and extracting oil, gas, hydrocarbons, and all associated substances for the certain tract of land in the County of _____, State of California, described as follows: [*legal description of land*]; and

WHEREAS, Assignor is entitled under the lease to all of the following:

(1) A royalty equal to [*fraction or percentage*] of the value of all oil produced and removed from the land demised by the lease;

(2) [*fraction or percentage*] of the net proceeds received by Tenant from the sale of gas produced and sold from the land demised by the lease; and

(3) [*fraction or percentage*] of the net proceeds received by Tenant for sold casinghead gasoline produced and removed from the land demised by the lease.

Assignment

NOW, THEREFORE, in consideration of the sum of $_____ and other good and valuable consideration, receipt of which is acknowledged, Assignor assigns to _____[*name(s)*], [*status, e.g.,* husband and wife *or* a single man *or* as joint tenants] ("Assignee") a [*fraction or percentage*] interest in all royalties now or hereafter payable to Assignor as Landlord under the lease; and

Warranty

Warrants to Assignee that Assignor is the full owner in fee of the land demised by the lease, that the lease is now in full force and effect, that Assignor is not in default in performance of the terms of the lease, and that no person or persons other than Assignor and Assignee have any right to any part of the royalties payable under the lease.

Agrees to promptly give notice of this assignment to Tenant under the lease and to request in writing that Tenant pay all royalties now or hereafter becoming due under the lease to Assignor and Assignee in the proportions provided for by this assignment.

EXECUTED on _____[*date*], at _____[*city*] , California.

_____ [*signature of assignor*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesFractional InterestsEnergy & Utilities LawGrants & ReservationsAssignments & SubleasesEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignmentsEnergy & Utilities LawLeases & LicensesRoyalty ClausesEnergy & Utilities LawRoyaltiesGeneral Overview



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18-36 California Legal Forms--Transaction Guide § 36.216

AUTHOR: Linda Breen Pierce

§ 36.216 Grant Deed Excepting and Reserving Mineral Interest in Oil and Gas With Complete Rights for Grantor

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth a grant deed conveying real property from a grantor or grantors to a grantee but reserving to the grantor or grantors a mineral interest in oil and gas rights to the conveyed land. The important part of this form is the "EXCEPTING AND RESERVING" clause of the deed. It illustrates the proper way to reserve to the grantor or grantors a mineral interest, as distinguished from a royalty interest, in the oil and gas rights of the real property being conveyed.

The reserving clause of this deed may either be used as part of a deed drawn by counsel, or it may be added to the printed form Grant Deed distributed in California by most title companies. It is included in this form as part of a complete grant deed to show its proper location as part of the legal description of the property being conveyed and as a separate single-spaced paragraph of that description.

The reserving clause in this form should be compared with the similar provision in *§ 36.217[2]*, which reserves a mineral interest to a grantor without the right to enter on the land surface of the conveyed real property. It should also be compared with the form in *§ 36.218[2]*, which reserves a royalty interest to the grantor. The distinctions between a "mineral interest" and a "royalty interest" in oil and gas rights are discussed in *§ 36.213[1][b]*. That discussion should be read before a decision is made as to which grant deed reservation clause should be used in a particular case--the one in this form, the one in *§ 36.217[2]*, or the one in *§ 36.218[2]*.

[b] Reservation and Exception of Oil Rights

A mineral or royalty interest may be retained by a land grantor either in perpetuity or for a limited time [*Rousselot v.*

Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438 ; *see § 36.12[2][c]*]. This exception or reservation does not violate the rule against perpetuities [*see § 36.18[2]*]. A reservation in a grant is to be interpreted in favor of the grantor [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1778, 18 Cal. Rptr. 2d 574]*

[2] FORM

Grant Deed Excepting and Reserving Mineral Interest in Oil and Gas With Complete Rights for Grantor

Recording Requested by _____[*name*]

When Recorded Mail to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

Mail Tax Statements to _____[*name*]
_____[*address*]
_____[*city, state, zip*]

Documentary Transfer Tax $_____
Computed on full value of property conveyed _____[*or* computed on full value less liens and encumbrances remaining _____]
[*signature*]

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is acknowledged, _____[*name and status of grantor or grantors*] GRANTS(S) to _____[*name and status of grantee or grantees*] the following described real property in the County of _____, State of California: [*legal description of real property*].

EXCEPTING AND RESERVING unto the Grantor, as a mineral interest and not as a royalty interest, [*amount, e.g.,* all *or* one half of all] oil, gas, hydrocarbons, and associated substances in, under, or produced and saved from this real property.
DATED: _____.

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGrants & ReservationsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawOil & Gas



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B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.217

AUTHOR: Linda Breen Pierce

§ 36.217 Grant Deed Provision Reserving Mineral Interest in Oil and Gas to Grantor Without Right to Enter Land Surface

[1] Comment--Use of Form

The form in [2], *below*, sets forth a provision reserving a mineral interest that may be inserted into a grant deed conveying real property. This form differs from the form in *§ 36.216[2]* because, although it reserves a mineral interest in the grantor, it prohibits the grantor's entry on the surface of the land. Normally, the owner of a mineral interest in the oil and gas rights to a parcel of land has the right to enter the land and drill for oil on it [*see § 36.213[1][b][ii]*]. Here, however, it is assumed that the grantor will either slant drill to reach the reservoir under the property conveyed or that the reservoir can be drained efficiently by a vertical well on adjoining land under the grantor's control.

The provision in this form should be inserted in a grant deed in the same manner as the reservation provision in *§ 36.216[2]*.

[2] FORM

Grant Deed Provision Reserving Mineral Interest in Oil and Gas to Grantor Without Right to Enter Land Surface

EXCEPTING AND RESERVING unto the Grantor, as a mineral interest and not as a royalty interest, all oil, gas, hydrocarbons, and associated substances in, under, or produced and saved from this real property but without the right of entry to the surface of this real property or the top [*number, e.g.*, 500 feet] of the subsurfaces of this real property for the purpose of exploring for, developing, and removing oil, gas, hydrocarbons, and associated substances.

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawGrants & ReservationsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawOil & Gas



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Transfers of Oil and Gas Interests

18-36 California Legal Forms--Transaction Guide § 36.218

AUTHOR: Linda Breen Pierce

§ 36.218 Grant Deed Provision Reserving Royalty Interest in Oil and Gas to Grantor

[1] Comment--Use of Form

The form in [2], *below*, is a provision in a grant deed retaining in the grantor a royalty interest in oil and gas rights to property being conveyed by the grantor. Unlike the reservation clauses in *§ 36.216[2]* and *§ 36.217[2]*, which reserve a mineral interest to the grantor, this form reserves an expense-free royalty interest to the grantor. The nature of mineral interests and royalty interests in oil and gas rights, as well as the distinctions between the two types of interests, is discussed in *§ 36.213[1][b]*.

When used, the provision in this form should be inserted in a grant deed in the same manner the "EXCEPTING AND RESERVING" clause in *§ 36.216[2]* is inserted in the grant deed set forth in that form.

[2] FORM

Grant Deed Provision Reserving Royalty Interest in Oil and Gas to Grantor

EXCEPTING AND RESERVING unto the Grantor, as an expense-free royalty interest and not as a mineral interest, [*amount, e.g.,* all *or* one half of all] oil, gas, hydrocarbons, and associated substances produced and saved from the real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGrants & ReservationsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsRoyalty InterestsReal Property LawDeedsTypesMineral Deeds



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18-36 California Legal Forms--Transaction Guide §§ 36.219-36.229

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36.219[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
C. Agreements for Easements and Contributions

18-36 California Legal Forms--Transaction Guide § 36.230

AUTHOR: Linda Breen Pierce

§ 36.230 Agreement and Grant of Easement for Slant Wells Through Land Adjoining Property Leased for Oil and Gas Purposes

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth the type of instrument a well driller will require from owners of the land through which a slant drilled well is to pass on its way to an oil and gas reservoir. It was adapted from the fact situation and "Stocker Strip Agreement" described in *Dawson v. Standard Oil Co. (1963) 216 Cal. App. 2d 85, 87, 30 Cal. Rptr. 600* . It grants to the well driller or grantee an easement through the grantor's land at a depth of at least 100 feet below land surface for a slant well to an oil and gas reservoir under neighboring land. In return for the easement the well driller or grantee agrees to pay the grantor a royalty on all oil and gas produced through the easement and slant well. The grantee or oil well driller is given no right, however, to locate any structures or pipelines on the surface or in the top 100 feet of the grantor's land.

Sometimes it is impossible or undesirable to drill a well on the surface of the land directly above a known oil and gas reservoir [*see, e.g., Beverly Hills Oil Co. v. Beverly Hills Unified School Dist. (1968) 264 Cal. App. 2d 603, 605, 70 Cal. Rptr. 640]* . In this case, a tenant of the land containing the oil and gas reservoir will drill a so-called "slant" or "whipstock" well at an angle from the surface of some other parcel of land to the reservoir under the leased land [*see Sehle v. Producing Properties, Inc. (1964) 230 Cal. App. 2d 430, 432, 41 Cal. Rptr. 136]* . To do so the oil and gas tenant will, of course, have to obtain drilling rights from the owner of the land from which the well is to be drilled and an easement for the tenant's slant well from the owners of all land lying between that parcel and the parcel under which the reservoir lies.

[b] Meaning of "Slant Well"

A "slant well" is also known as "whipstock well" and a "directional well." A "directional well" is a well that departs

materially from the vertical [Williams & Meyers, Oil and Gas Law, vol. 8, Manual of Oil and Gas Terms, "D" (Matthew Bender)]. In other words, a "slant or directional well," instead of being drilled perpendicular to the surface of the earth, is drilled at an angle toward a specific direction or reservoir of oil and gas [*see Stafford v. Union Oil Co. (1959) 173 Cal. App. 2d 307, 309, 343 P.2d 380]* .

Thus, a slant well will have its surface location or "well head" at one location and its "producing interval" or bottom at another location several feet or hundreds of feet to the east, west, north, or south of its surface location [*see Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 733, 249 P.2d 600]* . The "producing interval" of a well is that portion of an oil well through which oil is taken into the well to be raised by mechanical means to the mouth of the well [*Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal. App. 2d 222, 225, 270 P.2d 604]* .

[c] Interest Created: Easement vs. Profit 'a Prendre

The right to drill a slant or traverse well through land to capture oil or gas on adjoining land is an easement as distinguished from a profit 'a prendre created by an oil and gas lease on adjoining lands [*Sehle v. Producing Properties, Inc. (1964) 230 Cal. App. 2d 430, 432, 41 Cal. Rptr. 136]* . An easement is typically and primarily the privilege of doing a certain act on another's property [*Sehle v. Producing Properties, Inc. (1964) 230 Cal. App. 2d 430, 432-433, 41 Cal. Rptr. 136]* . A profit 'a prendre is the right to take something from another's property [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 878 n.7, 69 Cal. Rptr. 612, 442 P.2d 692]* . The easement to drill a slant well is appurtenant to the oil and gas lease on the land from which the oil or gas is being taken and, when no other limitation is expressed in the instrument creating it, lasts for the duration of that lease [*Sehle v. Producing Properties, Inc. (1964) 41 Cal. Rptr. 136*].

[d] Recording and Transfer Tax Requirements

As noted in [a], *above*, the agreement for slant wells creates and conveys an interest in real property. Thus, the grantee or oil well driller should have the instrument (1) executed and acknowledged before a notary public and (2) recorded in the office of the county recorder of the county where the grantor's property is located [*see Gov. Code § 27361* for current fee schedule].

It also appears that the agreement in this form creates an easement or interest in real property of sufficient length and quantity to be subject to the California Documentary Transfer Tax Act [*Rev. & Tax. Code §§ 11901-11934*]. A local documentary transfer tax may be imposed, by ordinance, on each deed, instrument, or writing by which real property sold within the county is granted, assigned, transferred, or otherwise conveyed to, or vested in, another person when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining on the property at the time of sale, exceeds $100 [*Rev. & Tax. Code § 11911(a), (b)*]. An easement is subject to the Documentary Transfer Tax Act if it potentially may endure for a substantial period of time, for example, as in the following *[62 Ops. Cal. Atty. Gen. 87 (1979)]* :

- A perpetual easement;
- An easement for life; or
- An easement for a fixed period of years that (1) can be renewed by the easement holder, or (2) is of sufficient length so as to approximate a perpetual easement or an easement for life.

Thus, if the county in which the grantor's land is located has adopted a documentary transfer tax, payment of the tax would appear to be a prerequisite to the recordation of the instrument. For further discussion of the California Documentary Transfer Tax Act, see Ch. 27, *Deeds and Recording* .

[e] Unauthorized Slant Well as Trespass; Accrual of Cause of Action

A slant well drilled from one parcel of land into an oil and gas reservoir under another parcel of land without permission of the owner of the land under which the reservoir is located is a trespass [*Stafford v. Union Oil Co. (1959) 173 Cal. App. 2d 307, 313, 343 P.2d 380]* . An action to enjoin or abate for damages on account of an underground trespass by means of a well drilled for oil or gas from a surface location on land other than the real property in which the plaintiff has some right, title, or interest must be commenced within 180 days after the cause of action accrues [*Code Civ. Proc. § 349.4(a)*]. When the slant well has been drilled unintentionally, the cause of action accrues 10 days after the well is first placed in production [*Code Civ. Proc. § 349.4(b)*]. When the slant well is drilled intentionally, the cause of action does not accrue until the aggrieved party discovers the trespass [*Code Civ. Proc. § 349.4(b)*]. Though the slant well would ordinarily be a continuing trespass, it gives rise to only one cause of action accruing either 10 days after start of production or on plaintiff's discovery of the intentionally drilled well [*Code Civ. Proc. § 349.4(b)*].

[2] FORM

Agreement and Grant of Easement for Slant Wells Through Land Adjoining Property Leased for Oil and Gas Purposes

AGREEMENT FOR SLANT WELLS

_____[*Name(s)*], [*status, e.g.*, husband and wife *or* a single man] ("Grantor") and _____[*name(s)*], [*status, e.g.*, husband and wife *or* a single man *or* a California corporation] ("Grantee") agree:

Recital of Grantee's Leased Land

WHEREAS, Grantee is tenant under that certain lease, recorded in Book _____ at page _____ of the Official Records in the Office of the County Recorder of _____ County, California, executed on _____[*date*], by _____[*name(s)*] as Landlord and covering that certain land in the County of _____, State of California, described as follows: [*insert legal description of leased land*];

Recital of Grantor's Land

WHEREAS, Grantor is the owner in fee of that certain parcel of land ("Grantor's Land") in the County of _____, State of California, more particularly described as follows: [*insert legal description of grantor's land*]; and

Recital of Agreement's Purpose

WHEREAS, Grantee is desirous of obtaining a right-of-way and easement to drill slant wells, as defined below, through Grantor's Land to obtain and produce oil, gas, and other hydrocarbon substances from the leased land.

Grant of Easement

NOW, THEREFORE, in consideration of the sum of $_____ and other good and valuable

consideration, receipt of which is acknowledged, Grantor grants to Grantee the exclusive right-of-way and easement to drill and operate, at any time and from time to time, slant wells into and through Grantor's Land on the following terms and conditions.

Purpose of Slant Wells

1. The only purpose for which slant wells may be drilled and operated under this grant is the production of water, oil, gas, and hydrocarbon substances from the leased land.

Included Rights

2. The right to drill and operate slant wells under this grant shall include the right of Grantee to repair, redrill, deepen, maintain, and abandon these wells.

Definition of Slant Wells

3. The slant wells authorized by this grant to be drilled and operated into and through Grantor's Land shall be wells

(a) The surface or wellhead locations of which are on the other lands;

(b) The bore-holes and subsurface course of which transverse Grantor's Land at a depth of not less than 100 feet below the present surface of Grantor's Land; and

(c) The producing intervals of which shall be located in the leased land.

Royalty Payments

4. As full consideration and compensation for the rights granted under this agreement, Grantee shall account and pay to Grantor on or before the last day of April, July, October, and January each year

(a) A sum equal to the "sale value" of [*fraction or percentage*] of all oil produced and run to pipeline from the leased land during the three calendar months preceding the month of payment by means of slant wells drilled through Grantor's land;

(b) A sum equal to the "sale value" of [*percentage or fraction*] of all gas produced, saved, and sold from the leased land during the three calendar months preceding the month of payment by means of slant wells drilled through Grantor's Land; and

(c) A sum equal to the "sale value" of [*percentage or fraction*] of all gasoline extracted and saved from gas produced from the leased land during the three calendar months preceding the month of payment by means of slant wells drilled through Grantor's Land.

"Sale Value" Defined

5. As used in Paragraph 4 of this agreement,

(a) "Sale value" of all oil produced and run to pipeline from the leased land shall be the value of the oil at the current price posted by Grantee for oil of like gravity and quality in the same vicinity as the leased land;

(b) "Sale value" of all gas produced, saved, and sold from the leased land shall mean the net proceeds received by Grantee for the gas. However, should any gas produced and saved from the leased land by means of slant wells drilled through Grantor's Land not be sold but used by Grantee for purposes not connected with or incident to its operations on the leased land, Grantee shall pay Grantor for [*fraction or percentage*] of the price being received by Grantee for similar surplus gas from _____[*name of utility or other consumer of gas*] in the same geographical area. The value of the gas used by Grantee and not sold shall be measured in cubic feet at [*specify pounds, e.g.,* 14.73] pounds per square inch absolute pressure and at a temperature of [*specify degrees, e.g.,* 60] degrees Fahrenheit in accordance with procedure outlined in [*name of publication, e.g.,* California Natural Gasoline Association Bulletin No. TS-353]; and

(c) "Sale value" of all gasoline extracted and saved from gas produced from the leased land shall mean the value of the gasoline at the current price being offered or paid by Grantee for gasoline of like specification and quality in the vicinity of the leased land.

Oil and Gas Used on Leased Land

6. Grantee shall not be obligated to account for or pay Grantor for oil, gas, or gasoline produced from the leased land and used by Grantee in connection with its operations on the leased land.

Payment for Lesser Interest

7. The payments specified in this instrument are based on the assumption that Grantor owns a full fee simple estate in Grantor's Land. Should it hereafter appear that Grantor owns less than a fee simple estate in Grantor's Land, the payments accruing under this instrument to Grantor shall be reduced proportionately.

Manner of Payments

8. All payments to be made to Grantor under this instrument shall be deemed duly paid when paid by check payable to the order of Grantor and the check is deposited in the United States mail, first-class postage prepaid, addressed to _____[*mailing address*]. Grantor may from time to time change the address specified in this paragraph by giving written notice of the change in the manner specified in Paragraph 12 of this agreement.

Continuance of Agreement

9. This agreement shall remain in full force and effect as long as the lease covering the leased land and recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California remains in full force and effect.

Surface of Grantor's Land

10. Grantee shall have no right to enter or to locate any structure or facility on or within 100 feet below the surface of

Grantor's Land.

Rights in Leased Land

11. Nothing contained in this agreement shall be construed to convey, grant, or give to Grantor any right, title, claim, or interest in or to the leased land or any slant wells drilled in accordance with this instrument. Further, nothing contained in this agreement shall obligate Grantee to drill any slant wells or to produce, save, sell, or otherwise dispose of any oil, gas, or gasoline from the leased land. Grantee reserves the right to modify, surrender, assign, or terminate all or any part of its interest in the leased land, at any time and without Grantor's participation or consent.

Notices

12. Any and all notices or other communications required or permitted by this instrument or by law to be served on or given to either party to this agreement, Grantor or Grantee, by the other party shall be in writing and shall be deemed duly served when personally delivered to the party to whom it is directed, or any officer of the party to whom it is directed. In lieu of personal service, any notice or other communication shall be deemed duly served and given when deposited in the United States mail, first-class postage prepaid, addressed to Grantor at _____[*mailing address*], or to Grantee at _____[*mailing address*]. Either party, Grantor or Grantee, may change their address for purposes of this paragraph by giving written notice of this change to the other party in the manner specified in this paragraph.

Binding on Heirs

13. This agreement shall be binding on and inure to the benefit of the heirs, administrators, executors, successors, and assigns of each of the parties to this agreement.

Sole Agreement

14. This agreement constitutes the sole agreement between Grantor and Grantee concerning Grantor's Land, the leased land, or the drilling of slant wells through Grantor's Land. Any prior or other agreement or representation not expressly set forth in this agreement is of no further force or effect.

Attorneys' Fees

15. If any litigation is commenced between the parties to this agreement concerning the Grantor's Land, the leased land, or the drilling of slant wells through Grantor's Land, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

EXECUTED on _____[*date*], at _____[*city*], California.

GRANTOR
_____ [*signature of grantor*]
[*typed name*]
GRANTEE

_____ [*name of grantee*]
By _____ [*signature*]
[*typed name and title*]

[*Acknowledgment; see § 36.200[2]*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersOil & GasReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawPriorities & RecordingRecording ActsReal Property LawTortsTrespass to Real Property



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
C. Agreements for Easements and Contributions

18-36 California Legal Forms--Transaction Guide § 36.231

AUTHOR: Linda Breen Pierce

§ 36.231 Dry-Hole Contribution Letter--Contribution Not Due Unless Test Well Is a Dry Hole

[1] Comment--Use of Form

The form in [2], *below*, sets forth a typical so-called "dry-hole letter" [*see* Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 431.1]. The purpose of a dry-hole letter agreement is to finance the drilling of test wells in promising but unproven oil fields. A promising but unproven oil field is known as "wildcat" territory and a test well drilled in it is called a "wildcat" well [*United States v. Stockton Midway Oil Co. (S.D. Cal. 1917) 240 F. 1006, 1007]* . The writer of the dry-hole letter will receive geological information from the results of the test well.

A dry-hole letter (or a bottom-hole letter [*see § 36.232*]) typically is used when two oil and gas developers or operators have oil and gas leaseholds in the same wildcat or oil field adjacent or near to each other. The essence of a dry-hole letter is that one of the two neighboring oil and gas leaseholders offers to pay a part of the cost incurred by the other in drilling a well on the other's leasehold if certain conditions are met [*see* Seaman, *Financial Aspects of Oil Transactions, 3 UCLA L. Rev. 550, 560 (1956)*]:

- The leaseholder drilling the test well must furnish the other leaseholder all the geological information he or she uncovers in drilling the well;

- The well must be drilled to a specified depth or to a depth sufficient to test a specified rock or sand strata; and

- The well must be a dry hole incapable, without further drilling, of producing oil or gas in paying quantities.

The writer of the dry-hole letter is under no duty to make a financial contribution toward the cost of drilling the test

well, under a dry-hole letter, if the well, after or before it is drilled to the depth designated in the letter, produces oil and gas in paying quantities [Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 431.1 (Matthew Bender)].

Whether, for purposes of a dry-hole letter, a test well is capable of producing oil or gas in paying quantities depends on the definition of the term "in paying quantities" used by the parties [*see* discussion of this term in *§ 36.201[1][c]*]. In this form, the term is specifically defined to avoid disputes.

[2] FORM

Dry-Hole Contribution Letter--Contribution Not Due Unless Test Well Is a Dry Hole

[*Letterhead*]

_____[*date*]

_____[*name of drilling tenant*]
_____[*street address*]
_____[*city*], CA [*zip*]

Re: Test Well in _____ County, California; Dry-Hole Contribution

Dear _____:

When accepted by you this letter shall constitute a binding agreement by us to make, on the terms and conditions set forth in this letter agreement, a dry-hole contribution to the cost of a test well to be drilled by you in _____ County, California:

1. The well shall be located _____ feet from the [*e.g.*, west] line and _____ feet from the [*e.g.*, south] line of the real property in _____ County, California described as follows: [*set forth legal description of property*].

2. Drilling operations for the well shall be commenced within [*number, e.g.*, 30 days] from and after the date of this letter and shall be prosecuted with due diligence until the well has reached either of the following:

- A depth that in the opinion of our geologist is sufficient to test the

_____ [*type of formation, e.g.*, Oil Creek Sand of the Ordivician Age]; or

- 10,000 feet.

3. Should the well be abandoned as a dry hole after reaching one of the depths described in Paragraph 2 of this letter and you have complied with all the terms and conditions of this letter, then, in that event and only in that event, we shall pay to you a dry-hole contribution toward the cost of drilling the well of $_____. The well cannot be abandoned as a dry hole when it is capable, without further drilling, of producing oil or gas "in paying quantities," as that term is defined in this letter.

4. At all times during the drilling, testing, and completing of the well, our representatives shall have free access to the derrick floor and shall be entitled to receive all the information concerning the well that they would be entitled to receive were we drilling the well ourselves under their supervision.

5. At all times during the drilling and testing of the well you must furnish us with all of the following:

(a) Daily written drilling reports;

(b) Samples, unless we elect not to require them, of all cuttings and cores obtained in the drilling operations;

(c) A certified copy of the driller's log for the well;

(d) A true copy of an electrical well log from the base of the surface casing to the total depth of the well;

(e) Sufficient notice of the taking of any cores or of the making of any other tests of the well for us to have, and if we so desire, a representative present to witness the operation; and

(f) Should the well result in a dry hole, a completion and plugging report evidencing the plugging of the well in accordance with applicable federal, state, and local laws.

6. After location of the well has been staked but before spudding in of the well, you must furnish us with a plat showing the exact location of the well.

7. You must test, in the manner an ordinarily prudent person experienced in oil and gas exploration would test, all horizons and formations in the well that show reasonable probability of producing oil or gas "in paying quantities," as the term "in paying quantities" is defined in this letter, as evidenced by one of the following:

(a) The electrical well log required to be made by subparagraph (d) of Paragraph 5 of this letter;

(b) Any electrical well log made of the well either before or after the well has reached the depths required by this letter; or

(c) Any electrical well log when considered in conjunction with evidence from any cuttings, cores, or other tests made of the well.

8. Neither this letter nor the agreement resulting from your acceptance of this letter shall be construed as creating a partnership or joint venture between us. The well described in this letter shall be drilled at your sole cost, risk, and expense. You agree to indemnify us and hold us and our property free and harmless from any and all claims, damages, costs, or expenses arising because of or incurred by you in your drilling the well.

9. Neither the agreement embraced in this letter, the rights arising under it, or the duties required by it, may be assigned or delegated by you to any person or entity without our express written consent.

10. All notices, communications, and other information required under this letter to be furnished to us by you shall be delivered by you to our office at _____ Street, _____, California in the form as the person in charge of that office may from time to time require.

11. All notices, communications, and other matters required or permitted to be given by us to you under this letter shall be deemed properly delivered to you when deposited in the United States mail, first-class postage pre-paid, addressed to you at the address to which this letter is being sent.

12. The well will produce oil or gas "in paying quantities" as the term "in paying quantities" is used in this letter when an ordinarily prudent person experienced in oil or gas production and exploration would, taking into consideration the existing conditions and circumstances, expect operation of the well to result in a reasonable profit over and above [the cost of operating the well excluding the cost of drilling and equipping it *or* the cost of drilling, equipping, and operating the well].

Should the terms of this letter meet with your approval, we request you sign the original of this letter and return it within _____ days from the date of this letter to our above office. When signed by you and returned to our office, this letter will constitute a contract between you and us and will supersede any and all other and former agreements between you or us, or any understandings, by either you or us, as to the matters contained in it.

Sincerely, _____ [*name of contributor*]
By _____ [*signature*]
[*typed name and title*]

Accepted on _____[*date*]
_____[*name of drilling tenant*]
By [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawGrants & ReservationsDrilling ContractsEnergy & Utilities LawGrants & ReservationsJoint Ventures & PartnershipsEnergy & Utilities LawGrants & ReservationsLetter Agreements



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
PART IV. FORMS
C. Agreements for Easements and Contributions

18-36 California Legal Forms--Transaction Guide § 36.232

AUTHOR: Linda Breen Pierce

§ 36.232 Bottom-Hole Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[1] Comment--Use of Form

The form in [2], *below*, sets forth a form of a "bottom-hole letter" [*see* Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 431.1 (Matthew Bender)]. A bottom-hole letter has much the same purpose as a dry-hole letter [*see § 36.231*]. The only difference between the two is that the writer of the dry-hole letter agrees to make a contribution toward the cost of drilling the operator's test well only if the test well, after reaching at least a specified depth, fails to produce oil or gas in paying quantities or, in other words, is a dry hole. The writer of a bottom-hole letter agrees to contribute toward the cost of the test well provided it is drilled to at least a specified depth, regardless of whether it produces oil or gas in paying quantities or is a dry hole [Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 431.1 (Matthew Bender)].

[2] FORM

Bottom-Hole Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[*Letterhead*]

_____[*date*]

_____[*name of drilling tenant*]
_____[*address*]
_____[*city*], CA [*zip code*]

Re: Test Well in _____ County, California; Bottom-Hole Contribution

Dear _____:

We understand you contemplate drilling a test well on the land covered by that certain Oil and Gas Lease between you as Tenant [*or* as Assignee of tenant] and _____[*name*] as Landlord executed on _____[*date*], and recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California.

We agree to pay you a bottom-hole contribution of $_____ toward the cost of drilling the well on the following terms and conditions.

1. The well must be drilled _____[*specify location, e.g.,* not more than _____ feet nor less than _____ feet from the southwest corner of the land described in the Oil and Gas Lease described in this letter].

2. You must commence the drilling of the well on or before _____[*date*], and complete it within a reasonable time not exceeding _____ days from the date you commence drilling.

3. The well must be drilled to a depth of at least [*number, e.g.,* 10,025] feet unless oil or gas in "paying quantities," as that term is defined in this letter, is discovered at a shallower depth.

4. We shall be under no obligation to pay any portion of the bottom-hole contribution specified in this letter until drilling of the well has been completed to the depth specified in Paragraph 3 of this letter, unless oil or gas is discovered in paying quantities at a shallower depth, and a certified copy of the driller's log together with a true certified copy of an electrical well log run from the surface to the bottom of the well is delivered to our above office.

5. At all times during the drilling of the well our representative shall have free access to the derrick floor.

6. At our request you must core and make other tests, by drill stem or other specified method, of any formation or formations encountered in the drilling as we may specify.

7. You must furnish us, through _____[*name*] at _____ Street, _____ California, with weekly written drilling reports on the well.

8. Before the well is plugged or abandoned by you, you shall notify us at our above office so that we may have it inspected by our representative.

9. The term "paying quantities" as used in this letter means oil or gas discovered in quantities that an ordinarily prudent person experienced in oil or gas production and exploration would, taking into consideration the existing conditions and circumstances, expect operation of the well to result in a reasonable profit over and above the cost of drilling, equipping, and operating it.

Should the terms of this letter meet with your approval, we request you sign the original of this letter and return it within _____ days of this letter's date to our above office. When signed by you and returned to our above office, this letter will constitute a binding contract between you and us and will supersede any and all other and former agreements between you and us concerning the well or the drilling of the well. The agreement so formed shall be personal in character and you shall not, without our written consent, be able to assign the rights accruing to you under the agreement or delegate the duties imposed on you by the agreement.

Sincerely, _____ [*name of contributor*]
By _____ [*signature*]
[*typed name and title*]

Accepted in full on _____[*date*].
_____[*name of drilling tenant*]
By [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawGrants & ReservationsDrilling ContractsEnergy & Utilities LawGrants & ReservationsLetter Agreements



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36 California Legal Forms--Transaction Guide § 36.233

AUTHOR: Linda Breen Pierce

§ 36.233 Acreage Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[1] Comment--Use of Form

When two or more oil and gas operators have taken oil and gas leases on property near to each other in the same promising but perhaps unproven oil field, the operators may decide to drill just one test well instead of each drilling a test well on their respective leaseholds. In this case, the operator on whose oil and gas leasehold the test well is to be drilled may receive "contribution letters" from other operators having oil and gas leases on nearby property [*see §§ 36.231, 36.232*]. In the contribution letters the other operators agree to contribute toward the cost of drilling the test well provided they are furnished with the geological information gathered from the drilling of the test well.

If, in exchange for the test well information, the operators agree to contribute money toward the cost of the test well, their contribution letter is known as either a "bottom-hole letter" or a "dry-hole letter." When, instead of money, the operator writing the contribution letter agrees to contribute oil and gas rights to other property in exchange for the test well information, the letter is known as an "acreage-contribution letter" [Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 431.1 (Matthew Bender)]. A bottom-hole letter is set forth in *§ 36.232[2]*, and a dry-hole letter is set forth in *§ 36.231[2]*. The form in [2], *below*, is an acreage-contribution letter.

The acreage-contribution letter illustrated by this form is merely a type of bottom-hole letter. It provides, like a bottom-hole letter, that if the test well is drilled to a specified depth and the writer of the letter is furnished with geological information from the well, the writer will contribute to the addressee a portion of the writer's interest as tenant under a designated oil and gas lease. Thus, the discussion in *§ 36.232[1]* as to the use and purpose of a bottom-hole letter is equally applicable to the acreage-contribution letter in this form. Furthermore, because a dry-hole letter is just another form of a bottom-hole letter, the discussion in *§ 36.231[1]* is also applicable to the acreage-contribution letter in this form.

[2] FORM

Acreage Contribution Letter--Contribution Not Due Unless Test Well Drilled to Specified Depth

[*Letterhead*]

_____[*date*]

_____[*name of drilling tenant*]
_____[*address*]
_____[*city*], CA [*zip code*]

Re: Test Well in _____ County, California; Lease No. _____; Bottom-Hole Acreage Contribution

Dear _____:

We understand that you contemplate drilling a test well on the land covered by that certain Oil and Gas Lease between you as Tenant [*or* as Assignee of tenant] and _____[*name*], Landlord, executed on _____[*date*], and recorded in Book _____ at Page _____ of the Official Records in the Office of the County Record of _____ County, California.

We agree to assign to you as a bottom-hole contribution all [*or* one half *or* one quarter *or other stated portion*] of our interest as Tenant under that certain Oil and Gas Lease, between us as Tenant [*or* as Assignee of Tenant] and _____[*name(s)*] as Landlord executed on _____[*date*], and recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California ("the lease"), a copy of which is attached to this letter and marked "Exhibit A," on the following terms and conditions.

1. You must do all of the following:

(a) Locate the well _____[*specify, e.g.*, not more than _____ feet from the west and not more than _____ feet from the south boundary] of the land described in the Oil and Gas Lease between you as Tenant and _____[*name*] as Landlord described above;

(b) Commence the drilling of the well on or before _____[*date*], and complete it within a reasonable time, not exceeding [*number*] days, thereafter;

(c) Drill the well to a depth, unless oil or gas in paying quantities is sooner discovered in the well, to allow thorough testing to our satisfaction of the [*name of formation to be tested, e.g.*, Loma Novia sand horizon] lying at an estimated depth of [*number*] feet below the surface of the land on which you propose to drill the well;

(d) Allow our representatives, at all times during the drilling and testing of the well, free and unhindered access to the derrick floor;

(e) Comply with all the requirements, furnish us all the information, and perform all the tests specified on our "Requirements for Test Wells" attached to this letter and marked "Exhibit B"; and

(f) Deliver the daily drilling report and other information required by "Requirements for Test Wells" attached to this

letter and marked "Exhibit B" at the times specified to us at _____ Street, _____, California, marked "Attention: _____[*name*]."

2. We agree with and warrant to you that

(a) The rights and interests in the lease agreed to be assigned to you by this letter are free and clear of all liens, charges, and encumbrances created by us;

(b) We have the right to make the transfer, conveyance, and assignment of the lease described in this letter;

(c) No default or defaults on our part exist or have been declared under the lease;

(d) The lease is now in good standing and full force and effect; and

(e) We shall not release or assign our interests as Tenant under the lease, or any of the property covered by the lease, during the time required for your performance of this agreement, including any extensions of time granted to you by us for performance of this agreement.

3. Should you fail to drill and complete the well at the location, to the depth, or within the time specified in this letter, or should you fail in any other way to fully comply with any of the terms of this letter, we may cancel this agreement by mailing written notice to you by United States mail, certified postage prepaid, at the address to which this letter is directed. On the mailing of this notice by us, this agreement shall be cancelled and all your rights under it and to assignment of any portion of the lease shall terminate.

4. The agreements contained in this letter are of a personal character and you therefore may not, without our special written consent, assign your rights under these agreements or delegate your duties under these agreements.

5. Should the terms of this letter meet with your approval, we request that you sign the original and return it within _____ days of this letter's date to our office at the address set forth above. When signed by you and returned to our above office, this letter will constitute a binding contract between you and us and will supersede and replace any and all other and former agreements between you and us, or any understanding you or we may have had, concerning the drilling of the well, the assignment of an interest in the lease, or the duties of either you or us in relation to the lease and the assignment.

Sincerely, _____ [*name of contributor*]
By _____ [*signature*]
[*typed name and title*]

Accepted in full on _____[*date*]
_____[*name of drilling tenant*]
By [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryExploration Obligations & RightsEnergy & Utilities LawGrants & ReservationsDrilling ContractsEnergy & Utilities LawGrants & ReservationsLetter Agreements



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18-36 California Legal Forms--Transaction Guide § 36.234

AUTHOR: Linda Breen Pierce

§ 36.234 Farm-Out Letter Agreement for Drilling of Test Well on Leased Premises by One Company in Exchange for Assignment of Portion of Tenant's Rights Under Oil and Gas Lease

[1] Comment--Use of Form

The form in [2], *below*, is a "farm-out letter agreement" by which an oil and gas tenant "farms out" its lease obligations, particularly the obligation to drill, in exchange for a portion of the tenant's interest under the lease [*see* Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 432 (Matthew Bender)]. A farm-out agreement is usually evidenced by a letter agreement written by the oil and gas tenant to the person or organization it is offering the "farm out" [Brown & Brown, The Law of Oil and Gas Leases, ch. XVIII, *Forms of Leases, Assignments, Escrow Agreements, and Other Contracts Affecting Oil and Gas Leases*, § 18.09 (Matthew Bender)].

Under a typical farm-out agreement, the person accepting the farm out must drill a well on the leased premises at a designated location within a specified period of time. The tenant agrees that, if the will is drilled to a designated depth, the tenant will assign to the driller a portion of its rights under the lease. Farm-out letters are often used when a tenant is either unable or unwilling to commence drilling within the time required by the lease and that time is nearing expiration [Brown & Brown, The Law of Oil and Gas Leases, ch. XVIII, *Forms of Leases, Assignments, Escrow Agreements, and Other Contracts Affecting Oil and Gas Leases*, § 18.09 (Matthew Bender)]. Performance of the drilling by the farm out saves the lease for the tenant and, in most cases, also furnishes the tenant with geological information useful in further drilling on the leased premises [Williams & Meyers, Oil and Gas Law, ch. 4, *Grants and Reservations Affecting Working Interest* , § 432 (Matthew Bender)].

[2] FORM

Farm-Out Letter Agreement for Drilling of Test Well on Leased Premises by One Company in Exchange for Assignment of Portion of Tenant's Rights Under Oil and Gas Lease

[*Letterhead*]

_____[*date*]

_____[*name of driller*]
_____[*address*]
_____[*city*], CA [*zip code*]

Re: _____ County Oil Field Farm-Out Agreement

Dear _____:

We, _____[*name*], a California corporation, are the owners [by assignment] of tenant's interest in that certain Oil and Gas Lease executed on _____[*date*], by _____[*name*] as Landlord and _____[by us *or name*] as Tenant covering land ("the premises") in the County of _____, State of California, described as follows: [*legal description of land*].

Enclosed is a copy of the lease duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, [and a copy of the assignment to us of tenant's interest in the lease duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of the same county]. We refer you to the recorded copies of the lease [*or* those documents] for further details as to its [*or* their] contents.

We agree that if on or before _____[*date*], you commence the drilling of a well on [*specify location, e.g.*, the east five acres] of the premises and prosecute the drilling of the well with due diligence to a depth sufficient to test the [*type of formation*] formation lying at an estimated depth of [*number*] feet to our satisfaction, unless oil or gas is found in paying quantities at a lesser depth, and you complete the well within a reasonable time not exceeding [*number, e.g.*, 90 days] after commencement of drilling, we will assign to you the tenant's interest under the lease for the _____[*description, e.g.*, east five acres or portion described in Schedule A attached to this letter] of the premises on the following terms and conditions:

1. We shall retain and reserve to ourselves under the lease both of the following:

(a) The right under the lease to all oil, gas, and other minerals in, under, or that may be produced from any portion of the premises not expressly agreed in this letter to be assigned to you; and

(b) An overriding royalty equal to [*fraction or percentage*] of the value of all oil, gas, and other hydrocarbons produced and removed from the premises under the lease, excluding fuel oil and gas used for operational purposes on the premises, to be computed and paid in the same manner as the royalties reserved to landlord under the lease.

2. Should you fail to commence drilling a well in the manner and time specified in this letter, or having commenced the well should you fail to complete it with due diligence within the time limit specified in this letter, we may, at our option, terminate the contract created by this letter and your acceptance of its terms.

3. We are not to deliver to you an assignment of tenant's interest in the lease as to the acreage specified in this letter until you have completed the drilling of a well in the manner and time specified in this letter.

4. You agree to indemnify us and hold us and our property, including our interest in the lease, free and harmless from

any and all claims, demands, liabilities, or losses arising from your operations under this letter or on the premises.

5. We shall retain the option to purchase all oil and gas produced under this letter or from the premises during the term of the lease, or any extensions or renewals of the lease, at the market price for the oil and gas prevailing at the time of its production at the mouth of the well from which it is produced.

6. No portion of that part of the premises agreed to be assigned to you shall be surrendered to landlord under the lease, nor shall any gas well drilled on that part of the premises be shut in without the express written consent of both parties, you and us, to this letter agreement. Should you, with the consent of both of us, shut in any gas well on the part of the premises agreed to be assigned to you, you shall pay at your own expense to landlord under the lease any shut-in royalties due under the lease for this well.

7. We shall at all times have the freedom of the derrick floor, and you shall on request by us

(a) Core or test, by drill stem or other specified method, any formation or formations encountered by you on the premises; and

(b) Furnish us with all information, including cores and cuttings, pertaining to any well or wells drilled by you on the premises.

8. You shall furnish us with all of the following in relation to the well to be drilled, as required by this letter:

(a) Weekly written reports of your progress in drilling the well;

(b) Prompt notice, before plugging and abandonment, of the fact the well is a dry hole, if it should be a dry hole, so that our representative may inspect and measure the well; and

(c) On completion of the well, as either a producing well or a dry hole, a complete log of the well together with an electrical log of the well from surface to the bottom of the hole.

9. This agreement is personal and cannot be assigned, nor can the duties under this agreement be delegated by you, without our express consent in writing.

10. Any and all notices and other communications or requests, including request for authority to plug or abandon a well, authorized or required to be given to us by you must be in writing and shall not be deemed received by us until they are received by _____[*name of officer or employee to whom communications are to be sent*] at _____ Street, _____, California, or his [*or* her] designated representative at the well site.

11. Any and all notices or other communications required or permitted to be given to you by us shall be deemed duly delivered to you when deposited in the United States mail, first-class postage prepaid, addressed to you at the address to which this letter is addressed.

12. The letter will not constitute a binding agreement until you accept its terms by signing two copies of it and returning them to our above office within 10 days of this letter's date. On receipt of the two signed copies of this letter, executed by you, in our office on or before 10 days of its date, this letter shall constitute a valid and binding contract between us and shall supersede and make void any and all other agreements between us relating to the premises or the drilling of any wells thereon.

Sincerely, _____ [*name of tenant*]

By _____ [*signature*]
[*typed name and title*]

Accepted in full on _____[*date*]
_____[*name of drilling tenant*]
By [*signature*]
[*typed named and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGrants & ReservationsAssignments & SubleasesEnergy & Utilities LawGrants & ReservationsDrilling ContractsEnergy & Utilities LawGrants & ReservationsFarmout AgreementsEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesAssignmentsReal Property LawOil & Gas



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36 OIL AND GAS RIGHTS AND LEASES
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18-36 California Legal Forms--Transaction Guide § 36.235

AUTHOR: Linda Breen Pierce

§ 36.235 Division Order Specifying Royalty Interests of Landlords and Tenants in Oil Produced From Specified Oil Farm--Given by Owners to Oil Purchaser

[1] Comment--Use of Form

The form in [2], *below*, sets forth a division order specifying the royalty interests of various persons who are parties to an oil and gas lease. The purpose of a division order is to protect the person who must distribute the proceeds received from the sale of oil or gas produced under the lease [Williams & Meyers, Oil and Gas Law, ch. 7, *Division Orders, Transfer Orders, and Gas Purchase Contracts* , § 701 (Matthew Bender)]. In the typical situation, the tenant is a driller or oil-field operator but not a marketer of oil and gas. Therefore, the tenant attempts to sell the oil or gas to a refinery or marketer of oil and gas. Before the refinery or marketer purchases the oil and gas from the tenant, it will want to know the following information [Williams & Meyers, Oil and Gas Law, ch. 7, *Division Orders, Transfer Orders, and Gas Purchase Contracts* , § 701 (Matthew Bender)]:

- How much belongs to the tenant;
- How much belongs, as a royalty, to the landlord;
- Whether the tenant has authority to sell the landlord's share or if, instead, it must be delivered in kind to the landlord; and
- Whether any persons other than the landlord or the tenant have any mineral interests or royalty interests [*see § 36.213[1][b]*] entitling them to any of the oil or gas.

There are several ways in which the intended purchaser of the oil and gas can ascertain these matters. The purchaser can have an attorney examine the lease and other relevant instruments and render an opinion and report [*see* Williams & Meyers, Oil and Gas Law, ch. 7, *Division Orders, Transfer Orders, and Gas Purchase Contracts* , § 701 (Matthew

Bender)]. The purchaser may even receive a report and perhaps some form of title insurance from a title company [*see* Audrain, *Title Insurance of Oil and Gas Leases, 3 UCLA L. Rev. 523 (1956)*]. None of these methods is foolproof. The intended purchaser's attorney may be mistaken on the law or facts, though he or she uses reasonable care in researching both. The title company, if it issues a report or insurance, cannot take responsibility for instruments not recorded or for ambiguously worded instruments that may create either a mineral or a royalty interest in oil and gas rights. For these reasons, the oil and gas purchaser ordinarily will demand that a "division order," listing the rights of every party claiming an interest in or under the oil and gas lease, be signed by each of the parties claiming any interest under the lease.

[2] FORM

Division Order Specifying Royalty Interests of Landlords and Tenants in Oil Produced From Specified Oil Farm--Given by Owners to Oil Purchaser

DIVISION ORDER

_____[*date*]

TO: _____[*name of oil company*]

We, the undersigned, and each of us, do agree, warrant, and guarantee that we are the legal owners, in the proportion set out below opposite our respective names, of the oil produced from _____[*name*] Farm, described as [*legal description of leased or pooled land*] in the County of _____, State of California.

You are authorized commencing as of [*time, e.g.*, 7:00 A.M.], on _____[*date*], and continuing until further written notice either from you or us, to receive oil from the farm, purchase it, and pay for it as follows:

Credit to	Division of Interest	Post Office Address
_____ _ [*name*]	_____%	_____ [*street*], _____, CA
_____ _ [*street*], _____ _, CA	_____ [*name*]	_____%
_____ _ [*street*], _____ _, CA	_____ [*name*]	_____%
_____ _ [*street*], _____	_____ [*name*]	_____%

_, CA

The following covenants are also a part of this Division Order and shall be binding on the undersigned, their successors, legal representatives, and assigns, to wit:

1. The oil run under this Division Order shall become your property on actual delivery to you or on actual delivery into any gathering or trunk line of any pipeline company designated by you.

2. The oil received and purchased by you under this Division Order shall be delivered F.O.B. to you or to any gathering system or pipeline company designated by you. You shall pay for the oil to the owners above listed in the percentages set forth opposite their names the market price posted by you for oil of the same kind and quality from the field in which the above-described land is located on the date it is received by you. However, should it be necessary to transport the oil by truck for delivery to you, you may deduct from the amount due the owners the trucking costs incurred by you. Provided further, should the oil be sold by you to a purchaser who accepts delivery at the well tanks, your payment to the owners may be based on the price received by you from the purchaser.

3. The amount due each owner shall be paid to the owner monthly by your check mailed to the owner at the address set forth above opposite the owner's name.

4. The quantity of oil delivered to and received by you under this Division Order shall be computed from regularly compiled tank tables, corrections for impurities and temperatures being made as may be required, in your judgment, to make the oil merchantable. The oil may also be steamed if necessary, in your judgment, to render it merchantable.

5. Those undersigned owners who own working or producing interests in the wells covered by this Division Order warrant that oil purchased by you under this Division Order has been and will in the future be produced in accordance with all applicable federal, state, county, and municipal laws, statutes, ordinances, rules, and regulations.

6. The undersigned will furnish satisfactory evidence of title on demand by you. On failure to furnish satisfactory evidence of title, or on any adverse claim, question, or controversy arising as to the title to the oil purchased by you under this Division Order, or any part of the oil, you may hold the proceeds due under this Division Order for the oil, to the extent of the adverse claim or controversy, without interest until either satisfactory indemnity is furnished to you or the adverse claim or controversy has been resolved. Should any litigation be commenced because of any adverse claim or controversy, the undersigned shall promptly notify you of the litigation.

7. Each of the undersigned agree to indemnify and hold you and any carrier engaged by you to transport oil for your account free and harmless from any claims or judgments rendered against you or them because of any oil received, purchased, or transported in accordance with this Division Order. Further, each of the undersigned agrees to promptly notify you of any change of ownership of any interests set forth in this Division Order and further agree any change of ownership shall not be binding on you until you are notified of the change of ownership in writing by one of the undersigned.

8. This Division Order is valid and binding on each of the owners named in this Division Order who has or will sign it regardless of whether any other owner listed in it has or will sign it.

WITNESSES	SIGNATURE OF OWNERS
_____	_____ [*signature*]
[*signature*]	[*typed name*]

[*typed name*]

_____ [*signature*]
[*typed name*]

_____
[*signature*]
[*typed name*]

_____ [*signature*]
[*typed name*]

_____
[*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil, Gas & Mineral InterestsRoyalty InterestsEnergy & Utilities LawRoyaltiesApportionmentEnergy & Utilities LawRoyaltiesLeasehold Royalty Clauses



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS

18-36A California Legal Forms--Transaction Guide 36A.syn

AUTHOR: Linda Breen Pierce

§ 36A.syn Synopsis to Chapter 36A: MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS

§ 36A.01 California Sources

[1] Constitution

[2] Statutes

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[b] Timber Interests

[c] Water Rights

[3] Regulations

[a] Timber Interests

[b] Water Rights

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[2] Regulations

[a] Mining Claims

[b] Timber Interests

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§ 36A.05 Law Reviews and Periodicals

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§ 36A.10 Governing Statutes

[1] Overview

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§ 36A.11 Patented Mining Claims

§ 36A.12 Mining Partnerships

§ 36A.13 Surface Mining and Reclamation Act

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§§ 36A.15-36A.19 [Reserved]

§ 36A.20 Authority Over Forest Lands

§ 36A.21 The Forest Practice Act

[1] Applicability

[2] Relationship to California Environmental Quality Act (CEQA)

[3] Timber Harvesting Plan

[a] When Plan Is Required

[b] Requirements of Plan

[c] Review and Approval of Plan

[d] Timber Operations Exempted From Plan Requirement

[e] Amendments to Timber Harvesting Plan

[f] Plan to Conform to Subsequently Enacted Standards and Rules

[4] Emergency Timber Operations

[5] Modified Timber Harvesting Plan

[6] Nonindustrial Timber Management Plan

[7] Stocking Standards

[8] Preemption of Local Laws

§ 36A.22 Transfer of Timber Interests on Private Land

§§ 36A.23-36A.29 [Reserved]

§ 36A.30 Constitutional Mandates

§ 36A.31 Governing Statutes

§ 36A.32 Types of Water Rights

§ 36A.33 Public Water Systems

§§ 36A.34-36A.99 [Reserved]

§ 36A.100 Mining Claims--Facts

Scope

§ 36A.101 Mining Claims--Documents

Scope

§ 36A.102 Timber Operations--Facts

Scope

§ 36A.103 Timber Operations--Documents

Scope

§ 36A.104 Water Supply Contract--Facts

Scope

§ 36A.105 Water Supply Contract--Documents

Scope

§§ 36A.106-36A.109 [Reserved]

§ 36A.110 Mining Claims

Scope

§ 36A.111 Timber Operations in Forests Other Than National Forests

Scope

§ 36A.112 Timber Operations in National Forests

Scope

§ 36A.113 Water Supply Contract

Scope

§§ 36A.114-36A.119 [Reserved]

§ 36A.120 Locating Mining Claims

Scope

§ 36A.121 Timber Operations

Scope

§ 36A.122 Water Supply Contract for Subdivision

Scope

§§ 36A.123-36A.129 [Reserved]

§ 36A.130 Notice of Location of Mining Claim

Scope

§ 36A.131 Timber Operations

Scope

§ 36A.132 Water Supply Contract for Subdivision

Scope

§§ 36A.133-36A.139 [Reserved]

§ 36A.140 Mining Claims--Annual Assessment Work

Scope

§ 36A.141 Mining Claims--Deferment of Annual Assessment Work

Scope

§§ 36A.142-36A.199 [Reserved]

§ 36A.200 Notice of Location of Lode Mining Claim [30 U.S.C. § 28; Pub. Res. Code §§ 3900, 3911]

[1] Comment

[a] Use of Form

[b] "Lode" vs. "Placer" Claims

[c] Size and Extent of Lode Claim

[d] Locating and Claiming Lode Claim

[i] Essential Requirements

[ii] Discovery of Minerals

[iii] Boundaries

[iv] Contents of Notice

[v] Posting Notice

[vi] Recording Notice

[vii] Filing Notice With Bureau of Land Management

[e] Annual Development Work

[f] Exclusive Right to Possession

[2] FORM

Notice of Location of Lode Mining Claim [30 U.S.C. § 28; Pub. Res. Code §§ 3900, 3911]

§ 36A.201 Notice of Location of Placer Mining Claim on Land Covered by United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(b), 3911]

[1] Comment

[a] Use of Form

[b] Size, Shape, and Purpose of Placer Claims

[i] Maximum Acreage

[ii] Public Land Survey System

[iii] Building Stones Subject to Placer Claims

[c] Locating and Claiming Placer Claim

[i] Essential Requirements

[ii] Discovery of Minerals

[iii] Boundaries

[iv] Contents of Notice

[v] Posting Notice of Location

[vi] Other Requirements

[2] FORM

Notice of Location of Placer Mining Claim on Land Covered by United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(b), 3911]

§ 36A.202 Notice of Location of Placer Mining Claim Not Described as Subdivision of United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(a), 3911]

[1] Comment

[a] Use of Form

[b] Boundaries

[2] FORM

Notice of Location of Placer Mining Claim Not Described as Subdivision of United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(a), 3911]

§ 36A.203 Notice of Location of Tunnel Right [30 U.S.C. § 27; Pub. Res. Code § 3906]

[1] Comment

[a] Use of Form

[b] Locating and Claiming Tunnel Right

[i] Posting Notice on Monument

[ii] Boundaries

[iii] Contents of Notice

[iv] Recording and Filing Requirements

[c] Ongoing Work on Tunnel

[2] FORM

Notice of Location of Tunnel Right [30 U.S.C. § 27; Pub. Res. Code § 3906]

§ 36A.204 Amended Notice of Location of Mining Claim [Pub. Res. Code § 3908]

[1] Comment

[a] Use of Form

[b] Posting and Filing Amended Notice

[2] FORM

Amended Notice of Location of Mining Claim [Pub. Res. Code § 3908]

§ 36A.205 Declaration of Annual Labor Performed on Claim [43 U.S.C. § 1744; Pub. Res. Code § 3913]

[1] Comment

[a] Use of Form

[b] Required Contents of Affidavit or Declaration

[c] Recording and Filing Declaration

[d] Effects of Recordation and Failure to File

[e] Certificate of Payment of Property Taxes

[f] Federal Alternatives to Declaration

[2] FORM

Declaration of Annual Labor Performed on Claim [43 U.S.C. § 1744; Pub. Res. Code § 3913]

§ 36A.206 Agreement Between Mining Claim Owner and Contractor for Construction of Tunnel on Unpatented Mining Claim

[1] Comment--Use of Form

[2] FORM

Agreement Between Mining Claim Owner and Contractor for Construction of Tunnel on Unpatented Mining Claim

§ 36A.207 Agreement for Mining Partnership Among Co-Owners of Mining Claim [Pub. Res. Code §§ 3940-3950]

[1] Comment

[a] Use of Form

[b] Formation of Mining Partnership

[c] Characteristics of Mining Partnership

[i] Partner's Share of Profits and Losses

[ii] Assignment of Partnership Interest

[iii] Partnership Property

[d] Fiduciary Relationship of Partners

[2] FORM

Agreement for Mining Partnership Among Co-Owners of Mining Claim [Pub. Res. Code §§ 3940-3950]

§ 36A.208 Grant Deed Conveying Unpatented but Located Mining Claim

[1] Comment--Use of Form

[2] FORM

Grant Deed Conveying Unpatented but Located Mining Claim

§ 36A.209 Grant Deed Conveying Mineral Interest in Minerals

[1] Comment--Use of Form

[2] FORM

Grant Deed Conveying Mineral Interest in Minerals

§ 36A.210 Grant Deed Provision Reserving Mineral Interest in Land

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Mineral Interest in Land

§ 36A.211 Notice of Intent to Preserve Mineral Right

[1] Comment

[a] Use of Form

[b] Exempt Interests

[c] Termination of Dormant Mineral Rights

[d] Preserving Mineral Rights

[e] Contents of Notice

[2] FORM

Notice of Intent to Preserve Mineral Right

§ 36A.212 Mineral Right Quitclaim Deed

[1] Comment

[a] Use of Form

[b] Partial Expiration or Abandonment

[c] Actions to Clear Title

[2] FORM

Mineral Right Quitclaim Deed

§§ 36A.213-36A.219 [Reserved]

§ 36A.220 Contract Between Landowner and Purchaser for Sale of Standing Timber on Real Property

[1] Comment

[a] Use of Form

[b] Contract as Grant of Real Property

[c] Contract as Sale of Goods

[d] When Title Passes to Buyer

[i] As Trees Are Cut

[ii] Present Sale Passing Immediate Title

[e] Scaling of Timber

[2] FORM

Contract Between Landowner and Purchaser for Sale of Standing Timber on Real Property

§ 36A.221 Grant Deed Conveying Standing Timber

[1] Comment

[a] Use of Form

[b] Standing Timber vs. Timber Rights

[c] Time for Removal of Standing Timber

[2] FORM

Grant Deed Conveying Standing Timber

§ 36A.222 Grant Deed Conveying Timber Rights in Perpetuity

[1] Comment--Use of Form

[2] FORM

Grant Deed Conveying Timber Rights in Perpetuity

§ 36A.223 Grant Deed Provision Reserving Standing Timber

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Standing Timber

§ 36A.224 Grant Deed Provision Reserving Timber Rights in Perpetuity

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Timber Rights in Perpetuity

§ 36A.225 Logging Contract Between Timber Landowner and Logging Contractor

[1] Comment

[a] Use of Form

[b] Timber Operator's License

[i] When Required; Exceptions

[ii] Basis for Denial of License

[c] Contractor's Lien

[d] Effect of Recorded Logging Contract

[e] Contractor's Bond

[2] FORM

Logging Contract Between Timber Landowner and Logging Contractor

§§ 36A.226-36A.229 [Reserved]

§ 36A.230 Agreement by Landowner to Supply Water From Well to Grantee of Adjoining Land

[1] Comment

[a] Use of Form

[b] Nature of Right to Receive Water

[c] Recording Agreement

[2] FORM

Agreement by Landowner to Supply Water From Well to Grantee of Adjoining Land

§ 36A.231 Contract to Construct Water System for and Supply Water to Subdivision--Between Subdivider and Private Water Corporation

[1] Comment

[a] Use of Form

[b] Conditions in Contract

[2] FORM

Contract to Construct Water System for and Supply Water to Subdivision--Between Subdivider and Private Water Corporation

§ 36A.232 Grand Deed Conveying Riparian Water Rights Appurtenant to Land

[1] Comment

[a] Use of Form

[b] Statute of Frauds

[c] Other Requirements

[2] FORM

Grand Deed Conveying Riparian Water Rights Appurtenant to Land

§ 36A.233 Grant Deed Provision Reserving Riparian Water Rights Appurtenant to Land

[1] Comment--Use of Form

[2] FORM

Grant Deed Provision Reserving Riparian Water Rights Appurtenant to Land

Linda Breen Piercen*

FOOTNOTES:
(n86)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS

18-36A California Legal Forms--Transaction Guide Scope

AUTHOR: Linda Breen Pierce

Scope

Linda Breen Piercen* Scope

This chapter covers three major types of natural resources: minerals (except for oil and gas), timber, and water. The focus is on the basic procedures that must be followed under state and federal law when establishing a timber operation, negotiating and executing a water supply contract, or staking a claim to a mine.

The coverage of minerals in this chapter is limited to the category of solid minerals known as "locatable" minerals, which includes all recognized minerals except those categorized as "leasable" minerals (such as oil and gas) and those categorized as "salable" minerals (such as sand, stone, gravel, and clay). Oil and gas interests are covered in Ch. 36, *Oil and Gas Rights and Leases* .

This chapter does not discuss the large body of statutory and case law dealing with the acquisition, development, and misappropriation of water rights in California. For forms and other coverage relating to that subject, see California Forms of Pleading and Practice, Ch. 575, *Waters* (Matthew Bender).

FOOTNOTES:
(n87)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley and a J.D. from Hastings College of Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full time free lance writer.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART I. RESEARCH GUIDE
A. Primary Sources

18-36A California Legal Forms--Transaction Guide § 36A.01

AUTHOR: Linda Breen Pierce

§ 36A.01 California Sources

[1] Constitution

Basic water policy. *Cal. Const., art. X, §§ 1-7.*

[2] Statutes

[a] Mining Claims

Lease of municipal property for mining. *Civ. Code § 717.*

Right of taking water, wood, or minerals as easement appurtenant. *Civ. Code § 801(5).*

Right of taking water, wood, or minerals as easement not appurtenant. *Civ. Code § 802.*

Owner of land surface has right to everything permanently below surface. *Civ. Code § 829.*

Mineral rights, including termination of these rights. *Civ. Code § 883.110 et seq.*

Requirement of bill of sale for sale of mining machinery. *Civ. Code § 1631.*

Liens for labor or supplies furnished mining claim or mine. *Civ. Code § 3060.*

Trespass or action to quiet title to mining claim, postponement of trial. *Code Civ. Proc. § 595.3.*

Admissibility of mining customs and rules in actions involving mining claims. *Code Civ. Proc. § 748*.

Contract for sale of minerals to be severed by seller; contract for sale of goods subject to Commercial Code. *Com. Code § 2107(1)*.

State Mining and Geology Board is part of State Department of Conservation; Board's authority to regulate mining on state land. *Pub. Res. Code § 660 et seq.*

Creation and function of California Geological Survey (formerly Division of Mines and Geology) in making studies and exhibiting minerals. *Pub. Res. Code § 2200 et seq.*

Surface Mining and Reclamation Act requires reclamation of surface mined. *Pub. Res. Code § 2710 et seq.*

Location of mining claims. *Pub. Res. Code § 3900 et seq.*

Claiming tunnel right. *Pub. Res. Code § 3906*.

Annual assessment work on a mining claim. *Pub. Res. Code § 3913*.

Mining partnerships. *Pub. Res. Code § 3940 et seq.*

Uniform Partnership Act applies to mining partnership except when application of Act is inconsistent with special statutes relating to mining partnership. *Pub. Res. Code § 3940*.

Miscellaneous provisions relating to mining. *Pub. Res. Code § 3980 et seq.*

[b] Timber Interests

Scaling measurements of National Bureau of Standards. *Bus. & Prof. Code § 12313*.

Sale of timber as sale of goods. *Civ. Code § 660*.

Right to take wood in accordance with an easement appurtenant. *Civ. Code § 801*.

Right to take wood in accordance with an easement in gross. *Civ. Code § 802*.

Contracts for sale of standing timber.

Recordation of documents affecting standing timber. *Civ. Code § 1220*.

Contract for sale of goods subject to Commercial Code. *Com. Code § 2107(2)*.

Logger and lumber-millman's liens. *Civ. Code §§ 3065-3065c*.

Damages recoverable for wrongful injury to timber trees. *Civ. Code § 3346(a)*; *Code Civ. Proc. § 734*.

"Goods" includes fixtures and standing timber that is to be cut and removed under a conveyance or contract for sale. *Com. Code § 9102(a)(44)*.

Debtor must authenticate (*i.e.*, sign; *see Com. Code § 9102(a)(7)*) security agreement; agreement must provide description of collateral and, if security interest covers timber to be cut, description of land concerned. *Com. Code § 9203(b)(3)(A)*.

Local law of jurisdiction governs perfection of security interest in goods by filing a fixture filing, and perfection of security interest in timber to be cut. *Com. Code § 9301(3)(b)*.

Office designated for filing or recording of mortgage on related real property is proper place to file financing statement to perfect security interest in collateral that is as-extracted collateral or timber to be cut. *Com. Code § 9105(a)(1)(A)*.

Office designated for filing or recording of mortgage on related real property is proper place to file financing statement as fixture filing when collateral is goods that are or are to become fixtures. *Com. Code § 9105(a)(1)(A)*.

Office of Secretary of State is proper place to file financing statement to perfect security interest in timber that has been cut. *Com. Code § 9501(a)(2)*.

Requirements applicable to financing statement covering timber to be cut. *Com. Code § 9502(b), (c), (d)*.

No fee for filing and indexing record is charged with respect to record of mortgage which is effective as financing statement filed as a fixture filing or as financing statement covering as-extracted collateral or timber to be cut under *Com. Code § 9502(c)*, but recording and satisfaction fees that otherwise would be applicable to record of the mortgage apply. *Com. Code § 9525(d)*.

Use of a steam powered logging locomotive or threshing engine near any forest is a misdemeanor unless person uses every reasonable precaution to prevent fire. *Health & Safety Code § 13003*.

Wages of loggers and sawmill employees employer must have on hand before work commences. *Lab. Code § 270.5*.

Cutting or altering brands on logs or lumber is a misdemeanor. *Penal Code § 356*.

Certain acts against various specified property, including brush-covered land and cut-over land, are punishable as arson. *Penal Code §§ 450, 451*.

Maliciously driving nails or iron in sawlogs is a felony. *Penal Code § 593a*.

Department of Forestry and Fire Protection. *Pub. Res. Code § 700 et seq.*

Organization and general powers of Department of Forestry and Fire Protection are a part of the State Resources Agency. *Pub. Res. Code § 712*.

State Board of Forestry and Fire Protection consists of nine members; duties. *Pub. Res. Code §§ 730-745*.

Professional Foresters Law requiring registration and licensing by State Board of Forestry and Fire Protection of professional foresters. *Pub. Res. Code §§ 750-783*.

State control and protection of forests, forestry, range and forage lands; definitions and general provisions. Pub. Res. Code § 4000 et seq.

Prevention and control of forest fires. Pub. Res. Code § 4100 et seq.

Hazardous fire areas. *Pub. Res. Code §§ 4251-4290*.

Fire breaks, mountains, forest, brush, and grass covered lands. *Pub. Res. Code §§ 4291-4299*.

Restricted areas. *Pub. Res. Code §§ 4331-4333*.

Rubbish dumps. *Pub. Res. Code §§ 4371-4376*.

Prohibited activities in forest land. *Pub. Res. Code §§ 4411-4446*.

Burning of forest and brush covered lands. *Pub. Res. Code §§ 4475-4494*.

Z'berg-Nejedly Forest Practice Act of 1973. *Pub. Res. Code § 4511 et seq.*

"Timber operations" defined. *Pub. Res. Code § 4527*.

Timber harvesting plan. *Pub. Res. Code §§ 4581-4584*.

Emergency timber operations. *Pub. Res. Code § 4592*.

Nonindustrial timber management plan. *Pub. Res. Code § 4593*.

State forests. *Pub. Res. Code § 4631 et seq.*

Sale of forest products from state forest. *Pub. Res. Code §§ 4650, 4650.1*.

Removal and sale of floating lumber. *Pub. Res. Code §§ 4851-4855*.

Marking logs and timber; recorded mark required on all logs floated in navigable waters. *Pub. Res. Code §§ 4875-4879*.

California Environmental Quality Act (CEQA). *Pub. Res. Code § 21000 et seq.*

Valuation of timberland for tax purposes. *Rev. & Tax. Code § 423.5*.

With certain exceptions, federal tax laws relating to natural resources apply to the California taxation of natural resources. *Rev. & Tax. Code §§ 17681, 24831*; *see, e.g., I.R.C. § 611 et seq.*

Limitations on length of pole or pipe dollies. *Veh. Code § 35414*.

Limitations on weight of vehicles transporting logs. *Veh. Code § 35552*.

[c] Water Rights

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Right to take water as possible easement appurtenant or in gross. *Civ. Code §§ 801, 802*.

Requirements of notice regarding appropriation of water rights. *Civ. Code § 1410a et seq.*

Injunction to prevent diversion of water; notice requirements. *Code Civ. Proc. § 530*.

Dissolving or modifying injunction preventing diversion of water. *Code Civ. Proc. §§ 532-534*.

Cortese-Knox Local Government Reorganization Act of 1985 governs organization and reorganization of public districts including water and irrigation districts. *Gov. Code § 56000 et seq.*

Regulation and licensing of operators of bottled water. *Health & Safety Code § 111070 et seq.*

Regulation of operators of water treatment facilities. *Health & Safety Code § 111690 et seq.*

Contracts by water irrigation districts. *Pub. Contract Code § 20560 et seq.*

Contracts by municipal water districts. *Pub. Contract Code § 20640 et seq.*

Public utilities, water system defined. *Pub. Util. Code § 240*.

Water corporation includes any corporation or person owning, controlling, or operating commercial water system. *Pub. Util. Code § 240*.

Manner of regulation of public utilities by Public Utilities Commission. *Pub. Util. Code § 701 et seq.*

Rights and obligations of public utilities. *Pub. Util. Code § 451 et seq.*

Certificate of public convenience and necessity is required for the construction or extension of facilities by public utilities. *Pub. Util. Code § 1001 et seq.*

Eminent domain purchase of private water company by public agency; just compensation to be determined by Public Utilities Commission. *Pub. Util. Code § 1401 et seq.*

Water system operator is a water corporation and public utility is subject to regulation by Public Utility Commission. *Pub. Util. Code § 2701 et seq.*

Mutual water company is a public utility when it delivers water to a non-stockholder. *Pub. Util. Code § 2703*.

Water Commission Act requiring permit from State Water Resources Control Board to appropriate water. *Water Code § 1000 et seq.*

Application for permit to appropriate water. *Water Code §§ 1260-1266, 1270, 1271*.

Supplemental information requested by Water Resources Board for application to appropriate water. *Water Code §§ 1275-1276*.

Irrigation districts. *Water Code § 20500 et seq.*

County water districts. *Water Code § 30000 et seq.*

California water districts. *Water Code § 34000 et seq.*

Municipal water districts. *Water Code § 71000 et seq.*

[3] Regulations

[a] Timber Interests

Forest District Boundaries. *14 Cal. Code Reg. §§ 906-909.2*.

Coast Forest District Rules. *14 Cal. Code Reg. §§ 911-929.7*.

Northern Forest District Rules. *14 Cal. Code Reg. §§ 931-949.7*.

Southern Forest District Rules. *14 Cal. Code Reg. §§ 951-969.7*.

Timber operator licenses--issuance, renewal, and denial procedures. *14 Cal. Code Reg. §§ 1020-1030*.

Timber harvesting plans. *14 Cal. Code Reg. §§ 1031-1052.3*.

Timber harvesting plan appeal procedures. *14 Cal. Code Reg. §§ 1053-1056.6*.

Administrative penalty hearing procedures. *14 Cal. Code Reg. §§ 1057-1059*.

Timber site classification. *14 Cal. Code Reg. § 1060*.

Standardized stocking sampling procedures. *14 Cal. Code Reg. §§ 1070-1075*.

Stocking standards. *14 Cal. Code Reg. §§ 1080-1085.6*.

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Organization and operation of State Board of Forestry and Fire Protection. *14 Cal. Code Reg. §§ 1120-1154*.

Hazardous fire areas and conditions. *14 Cal. Code Reg. §§ 1200-1207*.

Forest fire protection. *14 Cal. Code Reg. §§ 1220-1262*.

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[b] Water Rights

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AUTHOR: Linda Breen Pierce

§ 36A.02 Federal Sources

[1] Statutes

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Material Sales Act of 1947. *30 U.S.C. §§ 601-604*.

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Authority and conditions for withdrawing lands from mining location and patent. *43 U.S.C. § 1714*.

Establishment of and directors for the Bureau of Land Management. *43 U.S.C. § 1731*.

Authority of Bureau of Land Management to establish fees, charges, and commissions. *43 U.S.C. § 1734*.

Recording mining claims. *43 U.S.C. § 1744*.

[2] Regulations

[a] Mining Claims

Minerals management of public lands generally. *43 C.F.R. § 3000.0-5 et seq.*

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Types of mining claims. 43 C.F.R. §§ 3840.1-3844.1.

Assessment work. 43 C.F.R. §§ 3851.1-3852.5.

Mineral patent applications. 43 C.F.R. §§ 3861.1-3864.1-4.

Requirements for filing adverse claims to patent applications. *43 C.F.R. §§ 3871.1-3871.6*.

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[b] Timber Interests

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Field organization of forest service and national forests. *36 C.F.R. § 200.2*.

Headquarter office locations for national forests. *36 C.F.R. § 200.2(e)*.

Timber uses in national forest. 36 C.F.R. § 221.1.

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AUTHOR: Linda Breen Pierce

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AUTHOR: Linda Breen Pierce

§ 36A.06 Text References

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Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

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AUTHOR: Linda Breen Pierce

§ 36A.10 Governing Statutes

[1] Overview

Mining claims in California are governed by both federal and state statutes. The applicable federal statutes primarily authorize the location and patenting of mining claims on United States government-owned land and describe in general the procedure for patenting a mining claim. The California statutes supplement the federal statutes on locating and patenting a mining claim and detail the manner in which the claim must be posted, marked, and recorded. The California statutes also define "mining partnerships" and their peculiar characteristics. These laws are discussed in more detail in [2] and [3], *below*.

For these purposes, "location" essentially means the act or acts leading to the acquisition of private ownership rights in deposits of locatable minerals on federal lands.

[2] Federal Provisions

The federal requirements governing the manner in which mining claims may be located, claimed, and patented are set forth in Title 30 of the United States Code [*see 30 U.S.C. §§ 21-54*]. Basically, these provisions state that, "except as otherwise provided," all vacant lands belonging to the United States, both surveyed and unsurveyed, containing valuable mineral deposits are open to exploration, occupation, and purchase or patenting by citizens of the United States and those who have declared their intention to become United States citizens [*30 U.S.C. § 22*]. However, Congress has the power to withdraw public lands from prospecting or patenting by statute or certain other methods [*see* U.S. Const., art. IV, § 3, cl. 2; *Union Oil Co. v. Smith (1919) 249 U.S. 337, 344, 39 S. Ct. 308, 63 L. Ed. 635* ; *see also* American Law of Mining, Ch. 14, *Reservations and Withdrawals* (Matthew Bender)].

Under the federal statutes, a claim may be located and claimed on federal land "according to local customs" so far as they are not inconsistent with United States laws [*30 U.S.C. § 22*]. This means that claims must be located and claimed in accordance with state laws on the subject [43 C.F.R. § 3831.1].

[3] California Provisions

The relevant California laws [*Pub. Res. Code §§ 3900-3924*] establish mandatory procedures for locating either a "lode" or a "placer" mining claim, posting the claim, marking the boundaries of the claim, and recording a notice of its location [*Pub. Res. Code §§ 3900-3902, 3911*]. They also specify the procedure for claiming (1) a "tunnel right" instead of a mining claim and (2) a "millsite" as part of a mining claim [*see Pub. Res. Code §§ 3906, 3907, 3910*]. Further, these statutes provide for the use of an affidavit to prove performance of required annual assessment work on a mining claim [*Pub. Res. Code § 3913*]. General federal requirements also apply to these matters [*see* 43 C.F.R. §§ 3840.1-3844.1].



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§ 36A.11 Patented Mining Claims

Although the claimant is not required to purchase fee simple title to the lands, he or she may do so by obtaining a patent from the United States government [*see* American Law of Mining, Ch. 30, *Introduction to Federal Mining Law* (Matthew Bender)]. The procedure that must be followed in applying for a patent from the United States government conveying title to the claimant, after a claim has been duly located and claimed, is specified by federal statutes and regulations [*see 30 U.S.C. § 29*; *43 C.F.R. §§ 3861.1-1-3864.1-4*]. For a more detailed discussion of patents, which is beyond the scope of this chapter, see American Law of Mining, Ch. 54, *Mineral Patents* (Matthew Bender).



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§ 36A.12 Mining Partnerships

Mining partnerships, although otherwise governed by the Uniform Partnership Act [*Pub. Res. Code § 3940*; *see Corp. Code § 16100 et seq.*], are specifically defined and regulated by the Public Resources Code [*see Pub. Res. Code § 3940 et seq.*]. The provisions of the Public Resources Code prevail over the provisions of the Uniform Partnership Act when the two are inconsistent [*Pub. Res. Code § 3940*]. For a discussion of the formation and characteristics of mining partnerships, and a sample agreement, see *§ 36A.207*.



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AUTHOR: Linda Breen Pierce

§ 36A.13 Surface Mining and Reclamation Act

Surface mining operations in California are subject to the Surface Mining and Reclamation Act of 1975 [*Pub. Res. Code § 2710 et seq.*]. Surface mining operations include all of the following [*Pub. Res. Code § 2735*]:

- Open-pit mining;
- Mining by the auger method;
- Dredging and quarrying;
- In-place distillation, retorting, or leaching;
- Prospecting and exploratory activities; and
- Surface work incident to an underground mine.

The Act is designed to promote the reclamation of mined lands so as to prevent or minimize adverse effects on the environment and to protect the public health and safety [*Pub. Res. Code § 2711(a)*]. For a further discussion of the Surface Mining and Reclamation Act of 1975 and its requirements, see Manaster & Selmi, California Environmental Law and Land Use Practice, Ch. 82, *Mineral Development* (Matthew Bender).



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§ 36A.14 Termination of Mineral Right

The owner of real property that is subject to a mineral right may bring an action to terminate the right if there has been no mineral production, exploration, drilling, mining, development, or other mineral operations for a period of 20 years [*Civ. Code § 883.220*; *see § 36A.211[1][c]*; *see also* California Forms of Pleading and Practice, Ch. 393, *Oil and Gas* (Matthew Bender)]. An action may not be maintained, however, if the owner of the mineral right records a notice of intent to preserve the right [*Civ. Code § 883.230*]. For further discussion and a sample form for a notice of intent, see *§ 36A.211*. For actions to quiet title to property subject to a mineral right, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender).



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AUTHOR: Linda Breen Pierce

§ 36A.20 Authority Over Forest Lands

The following are the three basic types of forest lands in California:

- National forests owned by the United States government;
- State forests owned by the State of California; and
- Privately owned lands.

The law that governs the cutting and logging of timber in California is determined in large part by the ownership of the land on which the timber grows.

The Secretary of Agriculture has statutory authority to sell trees, portions of trees, or forest products located on National Forest System lands [*16 U.S.C. § 472a*]. The Secretary has delegated authority over the National Forest System lands to the United States Forest Service [*36 C.F.R. § 200.3(b)(2)*]. Regulations governing timber management planning for the National Forest System lands are set forth in the Code of Federal Regulations [*see 36 C.F.R. § 221.3*].

The California Director of Forestry and Fire Protection, with the approval of the State Director of General Services, has authority to make sales of forest products from state forests, if the value of the forest products does not exceed $10,000 or if the forest products are from dead, dying, downed, diseased, or defective trees and the sales do not exceed 100,000 board feet [*Pub. Res. Code § 4650(a)*]. All other sales must be on competitive bids [*Pub. Res. Code § 4650(b)*].



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AUTHOR: Linda Breen Pierce

§ 36A.21 The Forest Practice Act

[1] Applicability

Timber harvesting on private land in California is subject to the Z'berg-Nejedly Forest Practice Act of 1973 (the Forest Practice Act) [*Pub. Res. Code § 4511 et seq.*] and the Forest Practice Rules [*14 Cal. Code Reg. § 895 et seq.*; for complete coverage of the Forest Practice Act and the Forest Practice Rules, *see* Manaster & Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender)]. The Forest Practice Act applies to all non-federal land that is available for and capable of growing trees of any commercial species used to produce lumber or other forest products [*Pub. Res. Code § 4526*]. The state is divided into the following three forest districts:

- The Coast Forest District, which generally includes the redwood and pure Douglas-fir forest types of the north and central coast of California [*14 Cal. Code Reg. § 907*; *see 14 Cal. Code Reg. §§ 911-929.7* for rules applying to Coast Forest District];

- The Northern Forest District, which includes the inner coast range, the Siskiyou Mountains, and the Northern Sierra Nevada [*14 Cal. Code Reg. § 908*; *see 14 Cal. Code Reg. §§ 931-949.7* for rules applying to Northern Forest District]; and

- The Southern Forest District, which covers the remainder of the state southward from El Dorado County in the Sierra and Monterey County on the coast [*14 Cal. Code Reg. § 909*; *see 14 Cal. Code Reg. §§ 951-969.7* for rules applying to Southern Forest District].

Commercial species of timber are determined by the State Board of Forestry for each forest district [*see Pub. Res. Code § 4526*; *14 Cal. Code Reg. § 895.1*].

[2] Relationship to California Environmental Quality Act (CEQA)

With certain exceptions, timber harvesting operations are subject to the provisions of the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1228-1231, 32 Cal. Rptr. 2d 19, 876 P.2d 505]* . Under CEQA, certain regulatory programs are exempt from the requirement of preparing an environmental impact report (EIR) [*see Pub. Res. Code § 21080.5*]. Under the provisions of this exemption statute, the Secretary of the Resources Agency certified that timber harvest plans filed under the Forest Practice Act qualify for the exemption of *Pub. Res. Code § 21080.5*. However, timber harvesting plans are subject to all other provisions of CEQA [*Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1231, 32 Cal. Rptr. 2d 19, 876 P.2d 505]* .

For detailed coverage of CEQA, see Manaster & Selmi, California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender), and California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender).

[3] Timber Harvesting Plan

[a] When Plan Is Required

The Forest Practice Act requires every person who conducts timber operations to submit a timber harvesting plan prepared by a registered professional forester [*Pub. Res. Code § 4581*]. "Timber operations" mean the cutting or removal or both of timber or other solid wood forest products, including Christmas trees, from timberlands for commercial purposes [*Pub. Res. Code § 4527*]. The term "commercial purposes" includes both of the following [*Pub. Res. Code § 4527*]:

- The cutting or removal of trees which are processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade; and

- The cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the growing of timber which are subject to the provisions of *Pub. Res. Code 4621*, including, but not limited to, residential or commercial developments, production of other agricultural crops, recreational developments, ski developments, water development projects, and transportation projects.

If a person intends to sell timber when it is cut, and the timber is cut for commercial purposes, it is immaterial whether the sale is ever realized [*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 523, 63 Cal. Rptr. 2d 118]* .

[b] Requirements of Plan

Some requirements for timber harvesting plans are set forth in the Forest Practice Act, whereas others are set forth in regulations. In general, timber harvesting plans are required to provide information as to how timber harvesting practices will be selected to prevent or minimize impacts on natural resources [*see Pub. Res. Code § 4582*; *14 Cal. Code Reg. § 1034*; *see also §§ 36A.121, 36A.131* (procedures and contents of timber harvesting plan)]. Regulations set forth responsibilities for the contractor (that is, the plan submitter) [*see 14 Cal. Code Reg. § 1035*], the registered professional forester [*see 14 Cal. Code Reg. § 1035.1*; *see also 14 Cal. Code Reg. § 1035.2*], and the licensed timber operator [*see 14 Cal. Code Reg. § 1035.3*; *see also 14 Cal. Code Reg. § 1035.2*] relating to timber harvesting plans.

For a detailed description of the requirements of the Forest Practice Act and rules for submitting timber harvesting plans, see Manaster & Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender).

[c] Review and Approval of Plan

The Department of Forestry and Fire Protection (Department of Forestry) is required to review the plan, take public comments, and either return or approve the plan [*Pub. Res. Code § 4582.7(a), (b)*]. The statutory framework of the Forest Practice Act, Forest Practice Rules, and California Environmental Quality Act (CEQA) [*see Pub. Res. Code § 21000 et seq.*] confer on the Department of Forestry the obligation to see that cumulative impacts and alternatives to projects, as well as other specified environmental information, be taken into consideration in evaluating a timber harvesting plan [*Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal. App. 4th 556, 567, 68 Cal. Rptr. 2d 343]* . No harvesting can occur before the director has approved the plan [*Pub. Res. Code § 4582*; *Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1226, 32 Cal. Rptr. 2d 19, 876 P.2d 505]* .

The Forest Practice Act does not expressly grant the Department of Forestry the authority to request information not expressly specified by the rules, nor do the rules themselves. However, by vesting the Department of Forestry with the authority to determine whether timber harvesting plans incorporate the measures specified by the State Board of Forestry to reduce significant adverse environmental impacts, the State Board impliedly vests the Department of Forestry with the authority to secure the information that it needs to make that determination. Furthermore, the Department of Forestry has the express authority to request any information needed to identify the significant adverse impacts of a timber harvesting plan under CEQA provisions [*Pub. Res. Code § 21160*; *Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1227-1228, 32 Cal. Rptr. 2d 19, 876 P.2d 505]* .

[d] Timber Operations Exempted From Plan Requirement

The Forest Practice Act authorizes the State Board of Forestry to exempt certain types of timber operations from the requirement of filing a timber harvesting plan [*see Pub. Res. Code § 4584*]. Under this authority, the State Board has enacted the following regulations exempting certain timber operations from the requirement of a timber harvesting plan:

- Harvesting Christmas trees [*14 Cal. Code Reg. § 1038(a)*];

- Harvesting dead, dying, or diseased trees of any size, fuelwood, or split products in amounts less than 10 percent of the average volume per acre, under specified conditions [*see 14 Cal. Code Reg. § 1038(b), (d)*];

- The cutting or removal of trees in compliance with *Pub. Res. Code §§ 4290* and *4291* which eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuelbreak to reduce fire spread, duration, and intensity [*14 Cal. Code Reg. § 1038(c)*];

- Timber operations in the Lake Tahoe Region for the purposes of (1) cutting Christmas trees, for other ornamental purposes, or for minor forest products such as fuel wood; (2) cutting or removing dead, dying diseased trees of any size; or (3) cutting or removing trees that eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuel break, provided specified conditions are met [*see* 14 Cal. Code Reg. § 1038(f)].

- The removal of woody debris and slash that is (1) located outside the standard width watercourse and lake protection zone; (2) within the reach of loading equipment operating on existing logging roads and landings; (3) developed during timber operations; and (4) delivered as combustion fuel for the production of energy [*14 Cal. Code Reg. § 1038(g)*]; and

- The harvesting of trees in compliance with *Pub. Res. Code § 4584(k)* (Forest Fire Prevention Exemption) [*14 Cal. Code Reg. § 1038(i)*].

However, no tree that existed before 1800 A.D and is greater than 60 inches in diameter at stump height for Sierra or Coastal Redwoods, and 48 inches in diameter at stump height for all other tree species, may be harvested unless done so under the conditions or criteria set forth in *14 Cal. Code Reg. § 1038(h)*. Under § 1038(h), harvesting of large old trees may only occur when the tree is not critical for the maintenance of a Late Successional Stand and a registered professional forester (RPF) attaches to the exemption an explanation and justification for the removal based on the RPF's finding that specified criteria or conditions are met. However, these requirements need not be met if an approved management document such as a habitat conservation plan or sustained yield plan addresses large old tree retention for the area in which the large old trees are proposed for removal and the removal is in compliance with the retention standards of that document. All large old trees to be harvested must be marked by an RPF before removal [*14 Cal. Code Reg. § 1038(h)(1), (2)*]. A large old tree may also be removed when [*14 Cal. Code Reg. § 1038(h)(2)(A)-(C)*]:

- It is a hazard to safety or property;

- The removal of the tree is necessary for the construction of a building as approved by the appropriate county/city permitting process and as shown on the county/city approved site plan, which must be attached to the Notice of Exemption; or

- The tree is dead or is likely to die within one year of the date of proposed removal, as determined by an RPF or professionally certified arborist.

[e] Amendments to Timber Harvesting Plan

Once approved, amendments to the original timber harvesting plan may be submitted detailing proposed changes from the original plan [*Pub. Res. Code § 4591*]. Substantial deviations from the original plan may not be undertaken until the amendment has been filed with, and acted on, by the Department of Forestry [*Pub. Res. Code § 4591*; *14 Cal. Code Reg. § 1039*; *Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal. App. 4th 556, 566, 68 Cal. Rptr. 2d 343]* . However, minor deviations may be undertaken by the person who submitted the plan without submission of an amendment to the plan. However, these deviations must be reported immediately in writing to the Director [*14 Cal. Code Reg. § 1040*; *Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal. App. 4th 556, 568, 68 Cal. Rptr. 2d 343]* . "Minor deviations" mean any change, minor in scope, in a plan which can reasonably be presumed not to make a significant change in the conduct of timber operations and which can reasonably be expected not to significantly adversely affect timberland productivity or values relating to soil, water quality, watershed, wildlife, fisheries, range and forage, recreation, and aesthetic enjoyment. All other changes are presumed to be "substantial," and are subject to public review [*Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal. App. 4th 556, 568, 68 Cal. Rptr. 2d 343]* .

[f] Plan to Conform to Subsequently Enacted Standards and Rules

All timber operations must conform to any changes or modifications of standards and rules made after plan approval unless before the adoption of such changes or modifications, both of the following occur [*Pub. Res. Code § 4583*; *Public Resources Protection Assn. v. Department of Forestry & Fire Protection (1994) 7 Cal. 4th 111, 119, 27 Cal. Rptr. 2d 11, 865 P.2d 728]* :

- Substantial liabilities for timber operations have been incurred in good faith and in reliance on the standards in effect at the time the plan became effective; and

- Adherence to such new rules or modifications would cause unreasonable additional expense to the owner or operator.

If new rules or rule revisions are adopted after a timber harvest plan becomes effective, the Department of Forestry has

discretion to require amendments to the plan to ensure that no substantial deviation occurs between the plan and timber operations [*Louisiana-Pacific Corp. v. Department of Forestry & Fire Protection (1993) 21 Cal. Rptr. 2d 468]* .

[4] Emergency Timber Operations

A registered professional forester may, in an emergency, on behalf of a timber owner or operator, file an "emergency notice" with the Department of Forestry that will allow immediate commencement of timber operations [*Pub. Res. Code § 4592*; *14 Cal. Code Reg. § 1052*; *County of Santa Cruz v. California State Board of Forestry (1998) 64 Cal. App. 4th 826, 831-832, 75 Cal. Rptr. 2d 393]* . A bona fide emergency may include, but is not limited to, the necessity to harvest to remove fire-killed or damaged timber or insect or disease-infested timber, or to undertake emergency repairs to roads [*Pub. Res. Code § 4592*]. Under emergency circumstances, timber operations may be conducted if there is potential financial loss of timber that was previously inoperable or unmerchantable due to access, location, condition, or timber volume and that has unexpectedly become feasible to harvest, provided that the harvest opportunity will not be economically feasible for more than 120 days and operations meet specified stocking requirements [*14 Cal. Code Reg. § 1052.1*].

[5] Modified Timber Harvesting Plan

A modified timber harvesting plan may be submitted by an owner of 100 acres or less if the plan submitter meets specified conditions designed to avoid and mitigate significant adverse environmental effects [*see 14 Cal. Code Reg. § 1051(a)(1)-(16)*]. Although mitigation measures are automatically incorporated as a prerequisite for approval of a modified timber harvesting plan, the Department of Forestry must still require a cumulative impacts assessment when substantial evidence in the record supports a fair argument that significant individual or cumulative impacts will result. In addition, a modified timber harvesting plan must include discussion of feasible alternatives even if the project's significant impacts will be avoided through mitigation measures [*Friends of the Old Trees v. California Dept. of Forestry and Fire Protection (1997) 52 Cal. App. 4th 1383, 1397, 1404, 61 Cal. Rptr. 2d 297]* .

[6] Nonindustrial Timber Management Plan

A nonindustrial timber management plan may be submitted by an owner of less than 2,500 acres of timberland who is not primarily engaged in the manufacture of forest products [*Pub. Res. Code § 4593.3*; *see Pub. Res. Code § 4593.2(b)* ("nonindustrial tree farmer" defined)]. A nonindustrial timber management plan is a management plan with the objective of a managed, uneven-aged timber stand and sustained yield for a parcel or group of contiguous parcels [*Pub. Res. Code § 4593.2(e)*]. Any person who proposes to harvest trees under a nonindustrial timber management plan must file a notice of intent to harvest in the year during which the harvesting will occur [*Pub. Res. Code § 4594*; *14 Cal. Code Reg. §§ 1090.7, 1090.21*]. The notice must include (1) statements regarding the present condition of the harvest site and (2) the use of best management practices [*see Pub. Res. Code § 4594*; *14 Cal. Code Reg. § 1090.7*].

[7] Stocking Standards

The Forest Practice Act sets forth resource conservation (stocking) standards designed to ensure that an adequate cover of trees of commercial species remains or is established after the conclusion of timber operations. The stocking standards set forth in the Act must generally be attained within five years after completion of timber operations [*Pub. Res. Code § 4561*]. For a discussion of the stocking standards of the Act, see Manaster & Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender).

[8] Preemption of Local Laws

The Forest Practice Act generally preempts local laws and regulations relating to timber harvesting operations [*see Pub. Res. Code § 4516.5(d)*], except for timber operations on any land area of less than three acres and which is not zoned for timberland production [*Pub. Res. Code § 4516.5(f)*]. Thus, a county ordinance creating a local permit requirement for

timber operations is preempted by the Forest Practice Act when the timber operations are to occur on a land area of three or more acres [*Westhaven Community Development Council v. County of Humboldt (1998) 61 Cal. App. 4th 365, 368-369, 71 Cal. Rptr. 2d 536]* . However, although the Forest Practice Act preempts city and county ordinances regulating the *conduct* of timber harvesting operations, it does not preempt a county ordinance designating the *location* in which timber harvesting may take place [*Big Creek Lumber Company, Inc. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 426, 37 Cal. Rptr. 2d 159]* . To the contrary, in enacting the California Timberland Productivity Act of 1982 (TPA) [*Gov. Code § 51100 et seq.*], the Legislature specifically mandated local zoning authorities to designate areas as "timberland production zones." The purpose of the TPA is to protect properly conducted timber operations from being prohibited or restricted due to conflict or apparent conflict with surrounding land uses [*Big Creek Lumber Company, Inc. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 425-426, 37 Cal. Rptr. 2d 159]* .



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18-36A California Legal Forms--Transaction Guide § 36A.22

AUTHOR: Linda Breen Pierce

§ 36A.22 Transfer of Timber Interests on Private Land

The owner of forested land may transfer or reserve the rights to the timber on his or her land in one of several ways, including the following:

- The owner may contract to sell all timber standing on the property as of the date of sale. The buyer has a right to remove the trees within a limited, specified time period [*see § 36A.220* for discussion of relevant law and a sample contract of sale];

- The owner may convey an interest in the timber standing on his or her land as of the date of transfer. The grantee may remove the trees at any time in the future, but may remove only those trees that were standing at the date of the transfer [*see § 36A.221* for discussion of relevant law and a sample grant deed];

- The owner may convey all timber rights (both standing timber and future growths) forever to its grantee [*see § 36A.222*];

- The owner may reserve the standing timber only when conveying title to his or her land [*see § 36A.223*]; and

- The owner may reserve all timber, both standing and future growths, when conveying title to his or her land [*see § 36A.224*].

For discussion and forms relating to the termination of claimed timber rights in land, see California Forms of Pleading and Practice, Ch. 482, *Quieting Title* (Matthew Bender).



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18-36A California Legal Forms--Transaction Guide §§ 36A.23-36A.29

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.23[Reserved]



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18-36A California Legal Forms--Transaction Guide § 36A.30

AUTHOR: Linda Breen Pierce

§ 36A.30 Constitutional Mandates

The California Constitution recognizes the importance of water in the state by setting forth general policy statements relating to the use and conservation of water. It recognizes all of the following [*Cal. Const., art. X, § 2*]:

- That the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent possible;

- That waste and unreasonable use of water must be prevented; and

- That water conservation must be encouraged by promoting the reasonable and beneficial use of water.

The California Constitution also declares that the use of all water now appropriated, or that may be appropriated in the future, for rental or distribution, is a public use and subject to regulation by the state [*Cal. Const., art. X, § 5*].



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18-36A California Legal Forms--Transaction Guide § 36A.31

AUTHOR: Linda Breen Pierce

§ 36A.31 Governing Statutes

The basic statutory scheme for water regulation in California was first enacted by the Legislature as the Water Commission Act in 1913. The Water Commission Act is now codified as *Water Code § 1000 et seq.* The Act applies only to water flowing in surface streams or subterranean streams flowing through known and definite channels [*Water Code § 1200*]. The Act does not affect riparian water rights or overlying water rights [*see § 36A.32*]. It does, however, preclude the acquisition of appropriative water rights without a license from the State Water Resources Control Board [*Water Code § 1225*; *see Water Code §§ 1226-1226.4*].

Other statutes regulating water are also found in other codes [*see, e.g., Health & Safety Code § 116270 et seq.* (drinking water and water systems); *Pub. Util. Code § 2701 et seq.* (water companies)]. The rules governing the regulation of water are covered in detail in California Forms of Pleading and Practice, Ch. 575, *Waters* (Matthew Bender).



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18-36A California Legal Forms--Transaction Guide § 36A.32

AUTHOR: Linda Breen Pierce

§ 36A.32 Types of Water Rights

The following four basic types of water rights are recognized in California:

- Riparian rights;
- Appropriative rights;
- Prescriptive rights; and
- Overlying rights.

Riparian rights accrue to the owner of land bordering a stream or other natural watercourse and allow him or her to use so much of the water from the stream as may be put to beneficial use reasonably on his or her land [*Cal. Const., art. X, § 2*; *Pleasant Valley Canal Company v. Borror (1998) 61 Cal. App. 4th 742, 781, 72 Cal. Rptr. 2d 1]* .

An appropriative right to water is acquired simply by appropriating the water from a stream or other surface watercourse and putting it to a beneficial purpose. The appropriation gives the water user a right to water from the stream or watercourse as against all subsequent appropriators [*City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 926, 207 P.2d 17 , cert. denied, 339 U.S. 937 (1950)]* .

Prescriptive rights accrue by the wrongful appropriation of water if it is used for the period required in California to establish title by adverse possession [*City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 926, 207 P.2d 17 , cert. denied, 339 U.S. 937 (1950)]* .

An overlying right to water is the right of the owner of land to take water from a water table or basin underlying his or her land [*City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 925, 207 P.2d 17 , cert. denied, 339 U.S. 937*

(1950) ; *City of Barstow v. Mojave Water Agency (1998) 64 Cal. App. 4th 737, 750, 75 Cal. Rptr. 2d 477]* .

However, all four types of water rights are limited to only so much of the water from the source to which they appertain as the taker may reasonably use for beneficial purposes [*Cal. Const., art. X, § 2*; *Peabody v. City of Vallejo (1935) 2 Cal. 2d 351, 383, 40 P.2d 486]* . In addition, all unappropriated water flowing in any natural channel belongs to the state and can be appropriated only by permission of the State Water Commission or State Water Resources Control Board [*Water Code §§ 1003.5, 1201, 1225*].

The judicial determination of water right disputes, including actions for declaratory relief, injunctive relief, and quieting title, are covered in California Forms of Pleading and Practice, Ch. 575, *Waters* (Matthew Bender).



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18-36A California Legal Forms--Transaction Guide § 36A.33

AUTHOR: Linda Breen Pierce

§ 36A.33 Public Water Systems

Any person, firm, or corporation that sells, leases, rents, or delivers water to any other person, firm, corporation, municipality, or other political subdivision in California is a public utility and, as such, subject to the provisions of the Public Utilities Act [*Pub. Util. Code § 2701*; *see Pub. Util. Code § 2100 et seq*]. Certain transactions between adjoining landowners are exempted from the regulations of the Public Utilities Code [*see Pub. Util. Code § 2704*].

The rights and obligations of public utilities in California are generally described in the Public Utilities Code [*see Pub. Util. Code § 451 et seq.*], which also sets forth the rules under which public utilities are regulated [*see Pub. Util. Code § 701 et seq.*].

Any person who wishes to operate a public water system in California must first submit an application to the California Department of Public Health and receive a permit as provided in the Health and Safety Code [*Health & Safety Code § 116525*]. Requirements for water system permits are set forth in the Health and Safety Code [*see Health & Safety Code § 116325 et seq.*].



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18-36A California Legal Forms--Transaction Guide §§ 36A.34-36A.99

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.34[Reserved]



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18-36A California Legal Forms--Transaction Guide § 36A.100

AUTHOR: Linda Breen Pierce

§ 36A.100 Mining Claims--Facts

1. Contact information for the locator(s), including:

    a. Name in full as locator wishes it to appear on claim patent.

    b. Addresses of locator (mailing, delivery, e-mail).

    c. Telephone numbers (voice, fax, message).

2. Legal status and relationship of locator(s), including:

    a. United States citizenship.

    b. For a married person:
    (1) Name of spouse.

    (2) Whether name of spouse should be listed as colocator.

    c. For a corporation:

    (1) Date and state of incorporation.

    (2) Corporate officer, employee, or geologist handling claim.

d. If more than one locator, determine:

(1) Whether they intend to form a "mining partnership" by working claim together.

NOTE:
Colocators and owners of a mining claim are not members of a "mining partnership" but merely coowners of the claim unless they actually engage in working the claim together [***see*** *§ 36A.207[1]*].

(2) Whether they are or intend to become partners in an ordinary commercial partnership, as distinguished from a mining partnership, for operation of claim [*see § 36A.207[1]*].

(3) Whether they intend to be merely coowners as tenants in common of claim.

3. Type or nature of mining claim, such as:

a. Lode claim.

NOTE:
This type of claim contains a "lode" or "vein," which is a belt of mineral or mineral-bearing rock held in place under the ground by layers of other, clearly distinguishable, rock [***see*** *§ 36A.200[1][b]*].

b. Placer claim.

NOTE:
This is a claim of any plot of ground containing minerals in its earth, sand, or gravel other than in "lodes" or "veins" and may be a subterranean channel of an ancient river containing mineral-bearing gravel [***see*** *§ 36A.200[1][b]*].

c. Location of tunnel right.

NOTE:
This location merely gives locator(s) first right to claim as a lode claim any veins or lodes discovered in the tunnel on a line within 3,000 feet of its face [***see*** *§ 36A.203[1]*].

4. Location of claim, including:

a. County and state.

b. Township, range, section or sections, and meridian of United States public land survey.

c. Approximate distance and direction from some well-known natural object or permanent monument in vicinity of the claim to point on claim where minerals were discovered by locator(s) [*see Pub. Res. Code §§ 3900(f), 3902(a)(5)*].

5. Size and description of claim, for example:

a. For lode claim:

(1) May be no more than 1,500 feet along length of lode or vein [*30 U.S.C. § 23*; *Pub. Res. Code § 3901*; 43 C.F.R. § 3841.4-1].

NOTE:
Entire length may be on one side, or partly on one side and partly on the other side of the point of discovery [43 C.F.R. § 3841.4-5].

(2) Cannot exceed 300 feet on each side of centerline of vein at ground surface [*30 U.S.C. § 23*; *Pub. Res. Code § 3901*; 43 C.F.R. §§ 3841.4-2, 3841.4-3].

NOTE:
When the locator has not located the centerline of the vein at ground surface of the vein by exploration, the locator's discovery shaft must be assumed to mark that point [43 C.F.R. § 3841.4-3].

b. For placer claim:

(1) Must conform as nearly as practicable with United States system of public land surveys and rectangular subdivisions of those surveys [*30 U.S.C. § 35*; 43 C.F.R. § 3842.1-5(a)].

(2) Must be rectangular or square even when located on land not covered by United States public land survey [*see § 36A.202[1]*].

(3) Cannot exceed 20 acres for each individual claimant and 160 acres for all claimants [*30 U.S.C. §§ 35, 36*].

(4) When claim can be described in notice of location as legal subdivision of public land survey, its boundaries need not be marked and it need not be further described by reference to some known natural object or permanent monument [*30 U.S.C. § 35*; *Pub. Res. Code § 3902(b)*].

NOTE:
The smallest placer claim that may be described as a legal subdivision of a public land survey is a 10-acre tract [*30 U.S.C. § 36*; 43 C.F.R. § 3842.1-3]. This tract might be described, for example, as the Northeast 1/4 of the Northeast 1/4 of the Northeast 1/4 of Section 10, Township 3 South, Range 3 East, M.D.B. & M. [43 C.F.R. § 3842.1-4; ***see*** *§ 36A.201[1][b][ii]*].

6. Amount, type, and manner of discovery of mineral on propsective claim, for example:

a. For lode claim:

NOTE:
No lode claim may be located until after the discovery of a vein or lode within its limits [*30 U.S.C. § 23*; 43 C.F.R. § 3841.3-1].

(1) Must be vein or lode of rock bearing minerals in sufficient quantities and value to cause person of ordinary business prudence, not necessarily a miner, to expend time and money developing property as mine [*see § 36A.200[1][d][ii]*].

(2) Need not be original discovery; claimant may take advantage of discovery by prior

claimant who has forfeited his or her claim [*see § 36A.200[1][f]*].

(3) Unless vein is traceable on surface of land claimant, before locating claim, should sink shaft or run tunnel or drift to sufficient depth to discover and develop:
(a) Mineral-bearing vein.

(b) General course of vein [*see* 43 C.F.R. § 3841.3-2].

(c) "Apex" or highest point of vein or lode.

NOTE:
The locator may lose all rights to his or her mining claim and the vein, even after the locator has received a patent for the claim, when the "apex" of the vein is on land that is later located and claimed by someone else as a lode mining claim. The owner of a lode mining claim has the exclusive right to follow, from the vein's apex or high point, the "dip" or downward slope of the vein across the claim's boundaries all the way to the vein's end [*30 U.S.C. § 26*; ***see*** *§ 36A.200[1][c]*]. Consequently, the owner of a mining claim located on the apex of a vein could, for all practical purposes, invalidate an earlier claim based on the same vein but located below the apex on the vein's dip [***see*** American Law of Mining, Ch. 6, ***Locatable Public Domain*** (Matthew Bender)].

b. For placer claim:

NOTE:
A placer claim may not be located until after discovery of a valuable placer mineral deposit within its limits [***see*** American Law of Mining, Ch. 4, ***Historical Background of Federal Lands and Minerals*** , § 4.17 (Matthew Bender)].

(1) Evidence of placer mineral deposit constituting "discovery" must be of such character that person of ordinary prudence would be justified in further expenditure of labor and means with reasonable prospect of success in developing valuable mine [*see § 36A.201[1][c][ii]*].

(2) Discovery of a lode or vein of rock bearing valuable minerals, required for locating lode mining claim, will not support placer mining claim [*Duffield v. San Francisco Chem. Co. (9th Cir. 1913) 205 F. 480, 486]* .

c. Tunnel right.

NOTE:
A discovery of minerals is not required for a "tunnel right" claim or location. The locator must simply commence the tunnel and post monuments and a notice of location in the manner prescribed by law [***see*** *§ 36A.203[1]*]. A tunnel right is lost by a failure to prosecute work on the tunnel for a period of six months [*30 U.S.C. § 27*; 43 C.F.R. § 3843.1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningClaims



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18-36A California Legal Forms--Transaction Guide § 36A.101

AUTHOR: Linda Breen Pierce

§ 36A.101 Mining Claims--Documents

1. Paper copy of master title plat for individual township, range, and section of United States public land survey in which claim is located.

NOTE:

The master title plat will show land open to claims and show unpatented mining claims after October 22, 1976 [***see*** 43 C.F.R. § 3833.1-2(a)]. It is obtainable from United States Department of Interior, Bureau of Land Management, California State Office, 2135 Butano Drive, Sacramento, CA 95825-0451, telephone (916) 978-4400. The master title plats are also available for inspection in the public room of the Bureau of Land Management office in Sacramento.

2. Lot book report from title company in county where claim is located showing any notices of location recorded on the property.

NOTE:

Explicit instructions will probably have to be given to the title company as to the information and type of title search desired. Cost of the search will vary but will probably range from $15 to $125 depending on whether title insurance on the search, known as a "lot book guarantee" insurance, is desired [***see*** Ch. 26, ***Real Property Escrows***]. This same information--notice of location recorded on the same claim--should be available at the office of the United States Bureau of Land Management having jurisdiction over the property [***see*** 43 C.F.R. § 3833.1-2].

3. Assay report of minerals discovered on claim, if made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsLode ClaimsReal Property LawMiningClaims



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AUTHOR: Linda Breen Pierce

§ 36A.102 Timber Operations--Facts

1. Names, addresses (mailing, delivery, e-mail), and telephone numbers (voice, fax, message) of parties, including:

a. Timberland owner.

b. Timber buyer.

c. Logging contractor.

2. Names, addresses (mailing, delivery, e-mail), and telephone numbers (voice, fax, message) of related persons or firms who may be involved in transaction, such as:

a. Registered professional forester who is to prepare timber harvesting plan for removal of timber.

b. Title company that will issue title report on property, if desired.

c. Insurance agent or insurance company providing general liability and workers' compensation insurance for timber buyer or logging contractor.

3. Ownership of forest or timberland involved in transaction, such as:

a. National forest.

b. State forest.

c. Privately owned

4. If privately owned, manner in which title is held, such as:

a. Single individual.

b. Husband and wife as joint tenants or community property or tenants in common.

c. Partnership with title in the name of one of the following:
(1) One partner.

(2) All partners.

(3) Partnership name and statement of partnership recorded in county where property located [*see* Ch. 15, *General Partnerships*].

d. Corporation, including:

(1) Date and place of incorporation.

(2) Officers.

(3) Time and place of board of directors' approval of contract.

5. Legal status of timber buyer or logging contractor, such as:

a. Single individual.

b. Married individual.

NOTE:
The timber buyer and timberland owner may wish the timber buyer's spouse's name to appear on the contract, but the timberland owner and logging contractor will probably not require or desire the logging contractor's spouse's name to appear on the contract.

c. Corporation, including:

(1) Date and place of incorporation.

(2) Officer or employee handling transaction.

(3) Time and place of board of directors' approval of contract.

d. Partnership or other unincorporated association, including:

(1) Names of partners or other owners.

(2) Partner or other member handling transaction.

6. Location of timberland, including:

a. County.

b. Exact legal description of land.

7. Type of transaction, such as:

a. Contract for sale of standing timber.

b. Logging contract to fell and remove timber.

c. Other.

8. Specie or species of timber to be harvested under contract, including:

a. Specific species.

b. Size.

c. Other.

9. Price to be paid by buyer or to logging contractor for timber removed under contract, including:

a. Time and place of payment.

b. Amount per board foot or other measure of specified types of timber [*see §§ 36A.220[2]* (timber buyer), *36A.225[2]* (logging contractor)].

10. Time, place, and manner in which timber subject to contract is to be scaled [*see § 36A.220[1][e]*], including:

NOTE:
Scaling, done by an expert "scaler," determines the number of board feet and the percentage of unsound timber in logs.

a. Place where scaling is to be done, for example:

(1) On timberland property.

(2) At mill of timberland owner.

(3) On property of timber buyer or logging contractor.

(4) At independent site owned by independent lumber mill or scaler.

b. Person who is to do scaling, such as:

(1) Employee of timber buyer or logging contractor.

(2) Employee of timberland owner.

(3) Specified independent scaler or scaling association.

c. Scale to be used in scaling.

NOTE:

The scale to be used in scaling may be declared in the logging contract to be that established by the United States Bureau of Standards, but even in the absence of a specific provision, that scale will govern since the Bureau's published measuring standards apply to all measuring transactions in California [*Bus. & Prof. Code § 12313*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public Lands



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18-36A California Legal Forms--Transaction Guide § 36A.103

AUTHOR: Linda Breen Pierce

§ 36A.103 Timber Operations--Documents

1. Deed or other instrument showing exact legal description of timberland involved and exact names in which timberland owners hold title, such as:

a. Deed by which owners received title to land.

b. Title report or preliminary title report.

c. Tax bill.

2. Timber operator's license issued by California State Forester to logger or other entity that is to remove timber under contract.

3. Preliminary "lot book guarantee" report of title by title insurance company showing any liens or encumbrances against timberland and any financing statements filed under Commercial Code as to standing timber on land.

NOTE:
This report will usually be desired by the timber buyer or logging contractor and should be paid for by that person. The ordinary charge for this report will approximate $125 to $150 depending on the number of documents requested and recorded on the property [***see*** Ch. 26, ***Real Property Escrows***].

4. When either party is a corporation, certified copy of its board of directors' resolution authorizing it to enter contemplated contract or transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public Lands



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-36A California Legal Forms--Transaction Guide § 36A.104

AUTHOR: Linda Breen Pierce

§ 36A.104 Water Supply Contract--Facts

1. Names, addresses (mailing, delivery, e-mail), and telephone numbers (voice, fax, message) of parties, including:

a. Person who is to supply water.

b. Person(s) to whom water is to be supplied.

2. Names, addresses (mailing, delivery, e-mail), and telephone numbers (voice, fax, message) of persons related to transaction to supply water for subdivision, such as:

a. Civil engineer who is to prepare subdivision maps and plats for subdivision.

b. Attorney or other person who is to arrange for and obtain final approval by local and state governmental agencies of subdivision [*see* Ch. 30, *Subdivision Regulation*].

3. Purpose of contract, such as:

a. To supply individual owning or purchasing land adjoining supplier [*see § 36A.230*].

b. To install, operate, and furnish water supply to proposed subdivision [*see § 36A.231*].

4. Legal status of parties, including:

a. Supplier, such as:
(1) Husband and wife.

(2) Single person.

(3) Commercial water supplier classified by Public Utilities Code as a public utility [*see Pub. Util. Code §§ 241, 2701*].

(4) Mutual water company [*see Pub. Util. Code §§ 2702, 2703, 2705*].

(5) Irrigation district [*see Water Code § 20500 et seq.*].

(6) County water district [*see Water Code § 30000 et seq.*].

(7) California water district [*see Water Code § 34000 et seq.*].

(8) Municipal water district [*see Water Code § 71000 et seq.*].

b. Consumer, such as:

(1) Individual or family for residential use.

(2) Farmer for irrigation or farm use.

(3) Business user for commercial or industrial use.

(4) Subdivider for proposed subdivision.

5. Source of water, for example:

a. River or natural stream adjoining supplier's land.

b. Well on supplier's property.

c. River or other stream not adjoining supplier's land.

d. License from State Water Resources Control Board allowing supplier to appropriate water from stream, lake, or other channel.

6. Amount of water to be supplied, for example:

a. Specified maximum.

b. Requirements for irrigation of specified number of acres.

c. Requirements for domestic use of single-family dwelling.

d. Requirements for subdivision containing specified number of dwelling and commercial units or subdivision consisting of specified number of acres.

7. Manner of supplying water to person or subdivision, for example:

a. Pipeline already in place.

b. Pipeline to be installed by consumer.

c. Pipeline to be installed by supplier.

d. Water main and water system to be constructed by supplier at cost and expense of subdivider.

e. Water mains and water system constructed by supplier where supplier is a public district to serve the proposed subdivision and financed by creation of special assessment district of subdivision [*see* Ch. 30A, *Construction Financing*].

8. Location of real property involved, including:

a. Legal description of real property to be supplied with water.

b. For real property from which water is to be supplied:

(1) Legal description if supplier is private individual.

(2) Location of present end of supplier's water system if supplier is a private water company or a public water district.

c. Relationship in terms of distance and direction between real property to be supplied with water and either of the following, as appropriate:

(1) Real property from which water is to be supplied; or

(2) Present end nearest real property to be supplied with water of supplier's water main or system.

9. Consideration to be paid to water supplier, including:

a. When supplier is not public utility or public district, amount to be paid for water.

NOTE:
When the supplier is a public utility, the amount to be paid for water will be controlled by the rates filed by the supplier with and approved by the California Public Utilities Commission.

b. Amount and manner of payment for construction of water system serving subdivision [*see § 36A.231*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater Rights



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
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A. Client Interview--Facts and Documents

18-36A California Legal Forms--Transaction Guide § 36A.105

AUTHOR: Linda Breen Pierce

§ 36A.105 Water Supply Contract--Documents

1. Deed or other instrument showing exact legal description of real property to be supplied with water and any real property over which an easement must be obtained to supply water.

2. If supplier is a corporation or public district, certified copy of resolution of its board of directors or trustees authorizing it to enter contract.

3. If entity to be supplied with water is a corporation, certified copy of resolution of its board of directors authorizing it to enter water supply contract or commence development of subdivision to be served by water supply contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater Rights



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36A California Legal Forms--Transaction Guide §§ 36A.106-36A.109

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.106[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
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B. Preliminary Determinations

18-36A California Legal Forms--Transaction Guide § 36A.110

AUTHOR: Linda Breen Pierce

§ 36A.110 Mining Claims

1. Determine which Bureau of Land Management (BLM) district land office has jurisdiction over proposed claim.

NOTE:

To answer this question, the attorney should contact the BLM's administrative office in California, which is located in the federal building at 2800 Cottage Way, Sacramento, CA 95825, telephone (916) 978-4400.

2. Ascertain whether proposed mining claim is on United States public land that is open to mining, by reviewing the following:

NOTE:

Public land is basically any unreserved and unappropriated national resources land administered by the BLM or any unreserved and unappropriated public domain land in a national forest administered by the United States Department of Agriculture's Forest Service [***see*** *43 C.F.R. §§ 3811.1, 3811.2-1*]. Land in national parks and national monuments, with the exception of Death Valley, are not open to private mining unless specifically authorized by law [*43 C.F.R. § 3811.2-2*].

a. Records in the public room of applicable BLM office having jurisdiction over proposed claim.

b. Paper copy of master title plat obtained from local BLM office for township, range,

and section of public land survey in which proposed claim is located.

3. Determine from records in public room of proper BLM Land Office whether previous notice of location was recorded on proposed mining claim, and if so:

a. Determine whether previously recorded notice of location was defective in content or in complying with recording and filing requirements [*see §§ 36A.200-36A.203*].

NOTE:
Defects or impropriety in recording a notice will normally appear on the face of the recorded notice. For a guide to the required contents of the notice of location, and the posting and recordation requirements, see *§ 36A.120*.

b. Determine whether previously recorded notice of location is still valid [*see § 36A.200[1][e]* for discussion of requirement for annual development work].

NOTE:
Failure to perform required assessment work on a claim makes the claim relocatable by someone else at any time before the failure is corrected and assessment work is performed [*30 U.S.C. § 28*; 43 C.F.R. § 3851.3]. However, the Secretary of the Interior may grant temporary deferment of annual assessment work under certain conditions [*30 U.S.C. §§ 28b-28d*; 43 C.F.R. §§ 3852.0-3852.2]. For a guide to the assessment work requirements, see *§ 36A.140*.

c. Whether the prior claim, if valid, bars mining claim on same land.

NOTE:
Valid claims may coexist. For example, a patented placer mining claim does not include known lodes or veins located in the claim unless, in the application for patent, the owner of the placer mining claim stated that he or she wished to claim the lode and paid the lode claim purchase price for the vein and 25 feet of surface on each side of it [*30 U.S.C. § 37*].

4. Determine whether type of mineral discovered on proposed claim is type for which mining claim is available.

NOTE:
Mining claims may be made only for "locatable" minerals. Minerals are "locatable" if they are subject to the General Mining Law, are not leasable under the mineral leasing laws, and are not salable under the Mineral Materials Act of 1947 and Surface Resources Act of 1955 (*30 U.S.C. § 601 et seq.*, 43 C.F.R. pts. 3600-3620) [*43 C.F.R. § 3830.11*; ***but see*** *43 C.F.R. § 3830.12(b)* (certain varieties of mineral materials are locatable under Surface Resources Act if they are uncommon because they possess distinct and special value)]. In addition, to be locatable, a mineral must be recognized as a mineral by the scientific community and found on federal lands open to mineral entry [*43 C.F.R. § 3830.12(a)*]. Deposits of oil, gas, coal, potassium, sodium, phosphate, oil shale, native asphalt, solid and semi-solid bitumen, and bituminous rock, including oil-impregnated rock or sands from which oil is recoverable only by special treatment, can be acquired under the mineral leasing laws [***see*** *43 C.F.R. § 3100.0-3(a)(1)*] and are not subject to location and purchase under the United States mining laws. The so-called "common variety" mineral materials and petrified wood on the public lands may be acquired under the Materials Act [***see*** 43 C.F.R. §§ 3600.0-1-3604.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGovernmentsState & Territorial GovernmentsPropertyReal Property LawMiningClaims



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36A California Legal Forms--Transaction Guide § 36A.111

AUTHOR: Linda Breen Pierce

§ 36A.111 Timber Operations in Forests Other Than National Forests

1. Ascertain ability of timber buyer or logging contractor to post bond for payment of possible logging liens in amount equal to at least 50 percent of contract price for timber covered by contract.

NOTE:
The bond, when duly recorded, limits the amount of any logger's lien on the lumber removed from the premises to the contract price as against the timberland owner [*Civ. Code § 3065*]. Further, since the logger's lien lasts only for 30 days or until the lumber is removed from the county in which the services that are the basis for the lien were performed [*Civ. Code § 3065a*], logger's liens are probably ineffective in most cases [***see*** *Morehouse v. Shipman Lbr. Servaes Co. (1959) 168 Cal. App. 2d 135, 138, 335 P.2d 496]* .

2. Ascertain type of contract or other instruments required, for example:

a. Contract between private individuals or corporations for sale of standing timber on privately owned land.

b. Contract between federal government and private operator for sale of standing timber in national forest, including length of term, such as:
(1) Contract to be performed in less than one year.

(2) Contract requiring more than one year to perform.

c. Contract between state and private operator for sale of standing timber in state forest.

d. Logging contract between logging contractor and owner of private timberland.

3. Determine time within which timber is to be removed from land, including:

a. Starting date.

b. Date for completion of harvesting.

4. If transaction involves sale of standing timber or logging of timber on land other than national forest land, ascertain state forest district established under Z'berg-Nejedly Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*] in which timberland is located, for example:

a. Coast Forest District, which generally includes coastal area north of Monterey County extending to Oregon border [*14 Cal. Code Reg. § 907*].

b. Northern Forest District, which generally includes inner Coast Range, Siskiyou Mountains, and Northern Sierra Nevada [*14 Cal. Code Reg. § 908*].

c. Southern Forest District, which generally covers rest of state southward from El Dorado County in the Sierra and Monterey County on the coast [*14 Cal. Code Reg. § 909*].

5. Advise client where to find rules of forest practice for state forest district in which timberland is located [*see 14 Cal. Code Reg. §§ 911-929.7* (Coast Forest District Rules); *14 Cal. Code Reg. §§ 931-949.7* (Northern Forest District Rules); *14 Cal. Code Reg. §§ 951-969.7* (Southern Forest District Rules)].

6. Determine whether person or firm that plans to conduct cutting and logging operations has valid timber operator's license from State Board of Forestry [*see Pub. Res. Code §§ 4571-4578*].

NOTE:

A license is not required for operations on land owned by the federal government [***see*** *Pub. Res. Code § 4526* ("timberland" defined)].

7. Determine whether planned operations are subject to requirement of preparing and submitting timber harvesting plan.

NOTE:

Timber harvesting plans prepared by registered professional foresters must be prepared for all timber operations subject to the Z'berg-Nejedly Forest Practice Act of 1973 (the Forest Practice Act) [***see*** *Pub. Res. Code § 4511 et seq.*; ***see also*** *§ 36A.21*]. Timber harvesting plans are not required for operations on land owned by the federal government [***see*** *Pub. Res. Code § 4526* ("timberland" defined)].

8. Determine whether planned operations are exempt from requirement of preparing and submitting timber harvesting plan on grounds that operations are for one of the following purposes [*Pub. Res. Code § 4584*; *14 Cal. Code Reg. § 1038*; *see § 36A.21[3][d]*]:

a. Harvesting Christmas trees.

b. Harvesting dead, dying, or diseased trees, or fuelwood or split products in amounts less than 10 percent of the average volume per acre when following conditions are met [*see 14 Cal. Code Reg. § 1038(b),* (d)]:

(1) No tractors or other heavy equipment will be used on slopes greater than 50 percent.

(2) No new tractor roads will be constructed on slopes greater than 40 percent.

(3) Timber operations within any Special Treatment Area [*see 14 Cal. Code Reg. § 895.1*] must comply with the rules associated with that Special Treatment Area.

(4) No tractors or other heavy equipment will be used on known slides or unstable areas.

(5) There will be no new road construction or reconstruction [*see 14 Cal. Code Reg. § 895.1*].

(6) No heavy equipment will be used within a watercourse or lake protection zone, except for maintaining roads and drainage facilities or structures or the removal of dead or dying trees when consistent with *14 Cal. Code Reg. §§ 916.4(b), 936.4(b),* and *956.4(b)*.

(7) No known sites of rare, threatened, or endangered plants or animals will be disturbed, threatened, or damaged.

(8) No timber operations will be conducted within the buffer zone of a sensitive species [*see 14 Cal. Code Reg. § 895.1*].

(9) No timber harvest will be conducted in a watercourse or lake protection zone except sanitation-salvage harvesting.

(10) No timber operations will be conducted on any site that satisfies the criteria listed in *14 Cal. Code Reg. § 895.1* for a significant archaeological or historical site.

NOTE:
Specific requirements apply to timber operations in the Lake Tahoe Region for the purposes of (1) cutting Christmas trees, for other ornamental purposes, or for minor forest products such as fuel wood; (2) cutting or removing dead, dying diseased trees of any size; or (3) cutting or removing trees that eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuel break [***see** 14 Cal. Code Reg. § 1038(f)*].

c. Cutting or removing trees to reduce flammable materials and maintain a fuelbreak as specified in *Pub. Res. Code § 4584(j)*.

d. Removal of woody debris and slash that is [*14 Cal. Code Reg. § 1038(g)*]:

(1) Located outside standard width watercourse and lake protection zone;

(2) Within reach of loading equipment operating on existing logging roads and landings;

(3) Developed during timber operations; and

(4) Delivered as combustion fuel for production of energy.

e. Harvesting of trees that eliminate vertical continuity of vegetative fuels and horizontal continuity of tree crowns, for purpose of reducing rate of fire spread, duration and intensity, fuel ignitability, or ignition of tree crowns, as provided in *Pub. Res. Code § 4584(k)* (effective until January 1, 2013).

NOTE:

However, no tree that existed before 1800 A.D and is greater than 60 inches in diameter at stump height for Sierra or Coastal Redwoods, and 48 inches in diameter at stump height for all other tree species, may be harvested unless done so under the conditions or criteria set forth in *14 Cal. Code Reg. § 1038(h)* [***see*** discussion in *§ 36A.21[3][d]*].

9. Determine whether land on which timber operations are planned is exempt from requirement of preparing and submitting timber harvesting plan because land is managed by California Department of Parks and Recreation.

NOTE:

Timber operations on land managed by the California Department of Parks and Recreation are exempt from the requirement of preparing and submitting a timber harvest plan provided the operations have undergone all evaluations required by the California Environmental Quality Act (CEQA) [*14 Cal. Code Reg. § 1038.3(a)*; ***see*** *Pub. Res. Code § 21000 et seq.* (CEQA)]. For the requirements of CEQA, see Manaster & Selmi, California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender).

10. Determine whether emergency exists that requires immediate commencement of timber operations for any of the following reasons [*14 Cal. Code Reg. § 1052.1*]:

NOTE:

A registered professional forester may file an emergency notice with the Department of Forestry and Fire Protection that will allow immediate commencement of timber operations. The notice must contain a declaration under penalty of perjury that a bona fide emergency exists that requires immediate harvest activities [*Pub. Res. Code § 4592*]. The notice must describe the nature of the emergency and the need for immediate cutting in sufficient detail so that the reason for the emergency is clear. An emergency is presumed to exist when tree killing insects have killed and are likely to kill trees within one year on timberland. Trees will be considered likely to die when they are determined to be high-risk under specified classification or rating systems or when evidence of a current beetle attack exists (that is, existence of boring dust, woodpecker feeding, or recent top kill) and those trees are within 100 feet of multiple tree kills [*14 Cal. Code Reg. § 1052.2*].

a. Trees are dead or dying as a result of insects, disease, parasites, or animal damage.

b. Trees are fallen, damaged, dead, or dying as a result of wind, snow, freezing weather, fire, flood, landslide, or earthquake.

c. Trees are dead or dying as a result of air or water pollution.

d. Cutting or removing of trees is required for emergency construction or repair of roads.

e. In high, very high or extreme fuel hazard conditions, combustible fuel quantity, type, condition, configuration and terrain positioning poses a significant fire threat on private timberlands.

f. Trees obscure the sight-line from the observation area of a fire detection lookout maintained by a

government agency.

g. It has unexpectedly become feasible to harvest timber that was previously inoperable or unmerchantable due to access, location, condition, or timber volume, provided the following conditions are met:

(1) Harvest opportunity will not be economically feasible for more than 120 days;

(2) Harvest will meet conditions specified in *14 Cal. Code Reg. § 1038(b)(1)-(10)* for exempting the harvest of dead, dying, or diseased timber from timber harvesting plan and stocking requirements; and

(3) Harvest will meet minimum stocking requirements at end of timber operations.

11. If timber harvesting plan is required, determine which office of Department of Forestry and Fire Protection plan should be filed in [*14 Cal. Code Reg. § 1032*], for example:

NOTE:

The Timber Harvesting Plan must be submitted in writing on a form that meets regulatory requirements at the appropriate CAL FIRE Review Team Office:

a. For Alameda, Colusa, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, western Trinity, and Yolo counties: Forest Practice Program Manager For Timber Operations, California Department of Forestry and Fire Protection, 135 Ridgway Ave., Santa Rosa, California 95401-4318, 707-576-2959; email: SantaRosaPublicComment@fire.ca.gov.

b. For Butte, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Sutter, Tehama, eastern Trinity, and Yuba counties: Forest Practice Program Manager, California Department of Forestry and Fire Protection, 6105 Airport Road, Redding, California 96002, 530-224-2445; e-mail: ReddingPublicComment@fire.ca.gov.

c. For Alpine, Amador, Calaveras, El Dorado, Fresno, Imperial, Inyo, Kern, Los Angeles, Madera, Mariposa, Merced, Mono, Monterey, Orange, Riverside, San Benito, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Stanislaus, Tuolumne, Tulare, and Ventura Counties: California Department of Forestry and Fire Protection, Forest Practice Program Manager, 1234 E. Shaw Avenue, Fresno, California 93710, 559-243-4100; e-mail: FresnoPublicComment@fire.ca.gov.

d. All Counties for Timberland Conversion Applications, Timberland Conversion Permit Application Fees, and Conversion Plans: Environmental Coordinator, California Department of Forestry and Fire Protection, P.O. Box 944246, 1416 Ninth Street, Room 1516 25, Sacramento, California 94244-2460, 916-657-0300: e-mail: SacramentoPublicComment@fire.ca.gov.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsGovernmentsPublic LandsForest Lands



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18-36A California Legal Forms--Transaction Guide § 36A.112

AUTHOR: Linda Breen Pierce

§ 36A.112 Timber Operations in National Forests

1. If transaction involves sale of standing timber in national forest, ascertain location of its headquarters office.

NOTE:
the address for the headquarters office of any National Forest in California can be found on the website of the United States Forest Service at http://www.fs.fed.us/r5/.

2. Contact headquarters office of particular national forest in which timber is to be cut to ascertain price to be paid for timber, that is, timber's "stumpage value," using one of the following methods:

a. Transaction evidence appraisal method.

NOTE:
This method determines the fair market value based on prices received for comparable sales of standing timber. It is the preferred method of determining fair market value for all Forest Service Regions, except Alaska (Region 10) *[61 Fed. Reg. 5685 (Feb. 14, 1996)]* . Other valid methods include (1) analytical appraisals, (2) comparison appraisals, and (3) independent estimates based on average investments. Pertinent factors affecting market value include (1) prices paid and valuations established for comparable timber, (2) selling value of products produced, (3) estimated operating costs, (4) operating difficulties, and (5) quality of timber [*36 C.F.R. § 223.60*].

b. Lump-sum "stumpage value" method or at rate per unit of measure [*36 C.F.R. § 223.64*].

NOTE:

When timber is sold at a rate per unit of measure, the rate may be adjusted during the contract period if it is specified in the contract according to formulas or other equivalent specifications because of changes in timber values or product values [*36 C.F.R. § 223.64*]. All contracts exceeding seven years in duration must provide for a redetermination of rates for stumpage and for the required deposits at intervals of not more than five years [*36 C.F.R. § 223.33*].

3. Determine whether headquarters office of national forest will require the following:

a. Satisfactory evidence of client's financial ability to perform timber purchase contract [*36 C.F.R. § 223.101*].

b. Satisfactory evidence of client's ability to obtain equipment and supplies suitable for logging timber being sold, manufacturing timber, and for meeting fire precautionary terms required by forest service to be included in contract [*36 C.F.R. § 223.101*].

c. Performance bond for satisfactory compliance with terms of timber sale contract [*36 C.F.R. § 223.35*].

4. Determine when timber is to be paid for by client.

NOTE:

Ordinarily, timber and forest products sold by a national forest must be paid for in advance of cutting [*36 C.F.R. § 223.34*]. However, the contract may provide that payment may be made after timber is cut and scaled [***see** § 36A.200[1][e]*], provided that the purchaser, before cutting, furnishes a bond with a corporate surety, satisfactory to the United States Forest Service, for the value of the timber to be cut before payment is made [*36 C.F.R. § 223.35*].

5. Draft contract for sale of timber or review and approve contract prepared for sale of timber by United States Forest Service.

6. If client is not successful bidder for timber advertised for sale by United States Forest Service:

a. Determine if bid was highest bid submitted [*36 C.F.R. § 223.100*].

b. Determine, if bid was highest, if client failed to show ability to meet financial and other requirements for contract [36 C.F.R. § 221.10(a)].

c. Determine whether any other reason specified in regulations authorizes denial of sale to client when client is high bidder, such as:

(1) If two or more equally qualified bidders submit identical bids, sale may be awarded by lot [*36 C.F.R. § 223.100(b)*].

(2) Emergency situation may require division of sale between highest bidder and another purchaser [36 C.F.R. § 221.10(a)(3)].

(3) Contract may be denied highest bidder if he or she is notoriously or habitually careless with fire, or has failed to comply satisfactorily with requirements of previous national forest contracts [*36 C.F.R. § 223.100(c)*].

(4) Contract may be denied highest bidder if monopoly, injurious to public welfare, would result from control of large amounts of public or public and private timber by bidder [*36 C.F.R. § 223.100(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsGovernmentsPublic LandsForest Lands



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36A California Legal Forms--Transaction Guide § 36A.113

AUTHOR: Linda Breen Pierce

§ 36A.113 Water Supply Contract

1. Determine nature of water supplier's right to water as one of the following [*see § 36A.32*]:

a. Riparian right.

b. Appropriative right.

c. Prescriptive right.

d. Overlying right.

2. Determine extent of supplier's right to water.

NOTE:
In general, the supplier's right is limited to only so much as may be reasonably used for beneficial purposes [*Cal. Const., art. X, § 2*], and when the supplier's right is appropriative or prescriptive, he or she may have to apply to the State Water Resources Control Board for more water [*Water Code §§ 1003.5, 1201, 1225*].

3. When contract is for supplying water system for proposed subdivision, ascertain proposed subdivider's ability to successfully complete proposed subdivision without liens or other financial disasters, considering the following:

a. Previous experience in subdivision development.

b. Commitments for financing of subdivision, including:

(1) Financing of off-site improvements.

(2) Construction loans for on-site improvements.

(3) Take out loans.

c. Net worth.

d. Purchase money mortgage or deed of trust and other encumbrances presently encumbering proposed subdivision land.

4. Determine nature and type of easements, if any, over lands of persons other than contracting parties that may be necessary to supplier to perform contract, considering the following:

a. Nature of required easements.

b. Land over which required easements must pass.

c. Best location and exact legal description of easements.

d. Names and addresses of owners of land over which easements must pass.

5. Determine method of acquiring easements across lands owned by others necessary for performance of contract, including:

a. Purchase of easement by private company or public district.

b. Acquisition by eminent domain.

c. Exchange for other easement or property.

6. Determine how improvements required for performance of water supply contract are to be financed, for example.

a. Private financing.

b. Formation of special assessment district and issuance of bonds [*see* Ch. 30A, *Construction Financing*].

c. Construction loans.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater Rights



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18-36A California Legal Forms--Transaction Guide §§ 36A.114-36A.119

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.114[Reserved]

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C. Procedural Guide

18-36A California Legal Forms--Transaction Guide § 36A.120

AUTHOR: Linda Breen Pierce

§ 36A.120 Locating Mining Claims

1. Prepare notice of location [*see §§ 36A.200-36A.203* for appropriate form].

2. Have locator(s) post notice of location and mark claim boundaries, including the following:

NOTE:
The space on the notice of location should be left blank, to be filled in on all copies on the date the notice is actually posted on the claim [***see*** *Pub. Res. Code § 3900(d)*].

a. For lode claim:
(1) On date of location, have locator(s) erect monument at point of discovery and post notice of location in or on monument [*Pub. Res. Code § 3900*].

NOTE:
The monument must be one of the following: (1) a wooden post not less than one and a half inches in diameter projecting at least two feet above the ground; (2) a mound of stone projecting at least two feet above the ground; or (3) a nonperforated, capped metal post or solid metal rod, not less than one inch in diameter and projecting at least two feet above the ground [*Pub. Res. Code § 3915(a)*].

(2) Within 60 days after date of location, have locator(s) erect monument at each corner of claim [*Pub. Res. Code § 3901*].

(3) Confirm that each corner monument bears or contains markings sufficient to appropriately designate

[*Pub. Res. Code § 3901*]:

(a) Corner of mining claim to which it pertains.

(b) Name of claim.

b. For placer claim:

(1) When claim being located is described in notice of location as part of United States public land survey:

(a) Have locator(s) erect conspicuous and substantial monument at point of discovery of valuable minerals and post notice of location in or on monument [*Pub. Res. Code § 3902(a)*].

(b) Do not mark boundaries of claim [*Pub. Res. Code § 3902(b)*].

(2) When claim being located is not described as part of United States public land survey, have locator(s) do the following:

(a) Erect conspicuous and substantial monument at point of discovery of valuable minerals [*Pub. Res. Code § 3902(a)*].

(b) Post notice of location in or on monument [*Pub. Res. Code § 3902(a)*].

(c) Erect conspicuous and substantial monument at each corner of claim, or nearest accessible point to each corner, bearing or containing [*Pub. Res. Code § 3902(b)*]:
(i) Markings sufficient to appropriately designate corner of mining claim to which it pertains; and

(ii) Name of claim.

c. For tunnel right:

(1) Have locator(s) erect conspicuous and substantial monument at face or point of commencement of tunnel (point where it enters ground) and post notice of location in or on monument [*Pub. Res. Code § 3906*].

(2) Have conspicuous and substantial monuments erected along lines of tunnel on surface of ground at 600-feet intervals for distance of 3,000 feet from face or point of commencement of tunnel [*Pub. Res. Code § 3907*].

d. If it is impractical or dangerous to place or maintain monument in its true position because of precipitous ground or because the claim is being worked, use a "witness monument" as follows [*see Pub. Res. Code § 3915(b), (c)*]:

NOTE:
A "witness monument" is a monument that is not placed at the true point where it should have been placed but contains a notice or other marking specifying where that true point is located [***see*** the American Law of Mining, Ch. 33, ***Location Procedures*** (Matthew Bender)].

(1) Erect it as near true position as nature of ground will permit; and

(2) Mark it to identify true position.

3. As soon as notice of location is posted, forward the following documents to county recorder of county in which mining claim or tunnel right is located:

NOTE:

The notice of location must be recorded within 90 days after it is posted on the claim [*Pub. Res. Code § 3911*]. It is not advisable to delay recording because a certified copy of the recorded notice must also be filed within 90 days of the "date of location" with the BLM [*43 U.S.C. § 1744(b)*; 43 C.F.R. §§ 3833.0-5, 3833.1-2(a)]. In California, the "date of location" is the date the notice is posted on the claim [*Pub. Res. Code §§ 3900(d), 3902(a), 3906(b)*].

a. One executed and two conformed copies of notice of location.

NOTE:

A notice of location of a mining claim is expressly exempted from the requirement that a "document" must be acknowledged before it can be recorded [***see*** *Gov. Code § 27282(a)(3)*].

b. Cover letter asking county recorder to do the following:

(1) Record an executed copy of notice of location enclosed with letter.

(2) Certify one of conformed copies of notice of location with recorder's certificate showing date of recording of executed copy, book and page at which it was recorded, and document number assigned to it.

(3) Stamp other conformed copy of notice of location as "Endorsed: Filed" on date executed copy was recorded.

c. Counsel's check payable to county recorder for recording and certification fees consisting of:

(1) Fee for recording executed copy of notice of location [*see Gov. Code § 27361* for current amount of fee].

(2) Fee for certifying conformed copy of notice of location [*see Gov. Code § 27364* for current amount of certification fees].

NOTE:

Gov. Code § 27364 no longer establishes a set fee. Rather, it has been amended to provide for the setting of certification fees by the board of supervisors in amounts necessary to recover the costs of providing products or services or the costs of enforcing any regulation for which fees or charges are levied.

4. Within 90 days after date of location, forward the following to BLM office in Sacramento:

a. Copy of official record of notice of location that was or will be filed under California law, including description of location of mining claim or tunnel right sufficient to locate claimed lands on ground [*43 U.S.C. § 1744(b)*; 43 C.F.R. § 3833.1-2(a)].

NOTE:

This official record of notice of location must be accompanied by a topographic map published by the U.S. Geological Survey or by a narrative description or sketch depicting or describing the location of the claim [43 C.F.R. § 3833.1-2(b)].

b. Copy of notice of location stamped "Endorsed: Filed" by county recorder of county where it was recorded.

c. Counsel's check payable to BLM in amount of required service fee [*see* 43 C.F.R. § 3833.1-3(b) for service fees].

d. Cover letter requesting BLM to do the following:

(1) File copy of notice of location that has been certified by county recorder of county where it was recorded.

(2) On copy of notice of location stamped "Endorsed: Filed" by county recorder, mark serial number assigned by Bureau to claim and date of Bureau's filing of certified copy of notice of location and return "Endorsed: Filed" copy to counsel for counsel's office files.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsReal Property LawMiningClaims



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
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18-36A California Legal Forms--Transaction Guide § 36A.121

AUTHOR: Linda Breen Pierce

§ 36A.121 Timber Operations

1. Prepare and have parties execute contract for sale of standing timber [*see § 36A.220[2]*] or logging contract [*see § 36A.225*], as applicable.

2. Prepare timber harvesting plan as follows:

NOTE:
Timber harvesting plans are customarily prepared by the landowner, landlord, or other person who controls or operates on the land [***see*** *Pub. Res. Code §§ 4581, 4582*; *14 Cal. Code Reg. § 1032.7*]. If someone other than the owner plans to harvest the timber, that person must file the timber harvesting plan and must also notify the owner by certified mail that the plan has been submitted [*Pub. Res. Code § 4582*; ***see*** P 4, ***below***].

a. Employ registered professional forester to prepare plan.

NOTE:
The plan must be prepared by a registered professional forester [*Pub. Res. Code § 4581*; ***see*** *Pub. Res. Code § 752* ("professional forester" defined); *14 Cal. Code Reg. § 895.1* ("registered professional forester" defined)]. The names and addresses of registered professional foresters may be obtained from the State Board of Forestry at its office in the Resources Building, 1416 Ninth Street, Sacramento. The mailing address is P.O. Box 944246, Sacramento, CA 94244-2460 [*14 Cal. Code Reg. § 1601*].

b. Confirm that plan is prepared on official form and includes required information [*see § 36A.131*, P 1

(guide to drafting timber harvesting plan)].

3. File plan with State Department of Forestry and Fire Protection at appropriate address [*14 Cal. Code Reg. § 1032*].

NOTE:
The plan must be filed by a person who owns, leases, or otherwise controls or operates on the timberland and plans to harvest the timber on the land [*Pub. Res. Code § 4582*]. For the appropriate addresses for filing, see *§ 36A.111*, P 11.

4. If client does not own land on which timber is to be harvested, notify owner by certified mail that plan has been submitted and certify to Department of Forestry and Fire Protection that owner has been notified [*Pub. Res. Code § 4582*].

5. Prepare Notice of Intent to Harvest Timber if any of the following situations exist [*14 Cal. Code Reg. § 1032.7(c)*; *see § 36A.131*, P 2 (guide to drafting Notice of Intent)]:

a. Any proposed plan boundary lies within 300 feet of any property owned by another person.

b. Any plan amendment [*see Pub. Res. Code § 4591*] changes a plan boundary so that new boundary lies within 300 feet of any property owned by another person.

c. Any plan amendment changes silvicultural method, and Notice of Intent was required for the plan under a. or b., *above*.

NOTE:
"Silviculture" is the theory and practice of controlling the establishment, composition, and growth of forests. "Silvicultural system" is the planned program of forest stand treatments during the life of a stand. It consists of a number of integrated steps conducted in logical sequence leading to maintaining a forest stand of distinctive form for the level of management intensity desired [*14 Cal. Code Reg. § 895.1*].

6. Before plan is submitted, have client post copy of Notice of Intent and map at conspicuous location on public road nearest plan site.

NOTE:
The Notice of Intent must be on colored paper or identified with colored flagging so as to be easily visible to the public [*14 Cal. Code Reg. § 1032.7(g)*].

7. Submit all of following to Director of Forestry and Fire Protection at appropriate regional office [*see § 36A.111*, P 11 (addresses)]:

a. Timber harvest plan [*14 Cal. Code Reg. § 1032*].

b. Notice of Intent, if required [*see* P 5, *above*].

c. Names and mailing addresses of all property owners within 300 feet of plan boundary.

NOTE:
These names and addresses must be furnished by the registered professional forester when the plan is submitted. The names and addresses can be compiled from the latest equalized assessment roll or a list provided by a title company doing business in

California compiled within 60 days of the plan's submission [*14 Cal. Code Reg. § 1032.7(e)*]. The Department will mail copies of the Notice of Intent to the person on this list within two working days after the plan is received [*14 Cal. Code Reg. § 1032.7(f)*].

d. Copies of notice by letter (as well as proof of service and publication of notice and any response to notice [*see* NOTE, *below*]) to all other landowners within 1,000 feet downstream of the plan boundary whose ownership adjoins or includes a Class I, II, or IV watercourse(s) that receives surface drainage from the proposed timber operations [*14 Cal. Code Reg. § 1032.10*].

NOTE:

The notice must request that the plan submitter be advised of surface domestic water use from the watercourse. In addition, notice by publication must be given one time by the plan submitter in a newspaper of general circulation in the area affected by the proposed project [*14 Cal. Code Reg. § 1032.10*]. The letter and publication must notify the party of the proposed timber operation and describe its legal location and identify the name, if any, of the watercourse it may effect. The letter and publication must also request a response by the property owner within 10 days of the postmarked date on the letter or the date of publication. Copies of the notice, proof of service and publication, and any responses must be attached to the plan when submitted. However, the registered professional forester may propose, with justification and explanation, an exemption to these notice requirements [*14 Cal. Code Reg. § 1032.10*].

8. Inform client of following procedure for processing of plan, which may require client's participation:

a. Director of Forestry and Fire Protection must review plan and take public comments within one of following time periods [*Pub. Res. Code § 4582.7(a)*]:

(1) 30 days from completion of any initial inspection (with 10 of those days following the date of final interagency review);

NOTE:

Within 10 days of the receipt of a plan, or within 20 days of the receipt of a plan to which a Road Management Plan [*see 14 Cal. Code. Reg. § 895.1* (definition)] is appended, the Director must determine if an initial inspection is necessary [*Pub. Res. Code § 4604(a)*; *14 Cal. Code Reg. § 1037*]. If an inspection is necessary, the Department of Forestry and Fire Protection will conduct the inspection within that same period, or any longer period mutually agreed on by the Department and the person submitting the plan [*Pub. Res. Code § 4604*].

(2) 15 days from date plan was filed, if no inspection is necessary; or

(3) Any longer period mutually agreed on by Director and client.

b. After initial review and public comment period has ended, Director must determine if plan complies with applicable requirements, within one of following time limits [*Pub. Res. Code § 4582.7(a)*]:

NOTE:

As a part of this process, the Director must (1) review the public input, (2) consider recommendations and mitigation measures of other agencies, and (3) respond in writing to the issues raised [*Pub. Res. Code § 4582.7(a)*].

(1) 15 working days; or

(2) Any longer period mutually agreed on by Director and client.

c. Department of Forestry and Fire Protection may hold public hearing on plan, within time limits set forth in *Pub. Res. Code § 4582.7* [*see* P b, *above*], if the following occur [*Pub. Res. Code § 4582.6(d)*]:

NOTE:

The Department must hold the requested hearing before taking any action on the plan. The hearing must be held (1) at a time and place convenient to the public, (2) in the county in which the proposed harvest is located, and (3) at county offices if they are made available by the county for that purpose. Oral and written testimony will be accepted at the hearing. This hearing will not extend the time limits established by *Pub. Res. Code § 4582.7* [*Pub. Res. Code § 4582.6(d)*].

(1) State Board of Forestry has adopted local rules and regulations applicable to county in which lands covered by plan are located [*see Pub. Res. Code § 4516.5*].

(2) Board of supervisors or planning commission of that county request the hearing.

9. If Director approves plan in timely fashion [*see* P 8b, *above*], instruct client to commence operations, unless Director of Fish and Game or State Water Resources Control Board appeals approval to State Board of Forestry within 10 days of approval [*Pub. Res. Code § 4582.9(a)*; *14 Cal. Code Reg. § 1037.7*].

NOTE:

If the approval is appealed, no further timber operations may occur under the plan until a final determination of the appeal by the Board [*Pub. Res. Code § 4582.9(a)*]. The Board must hold a public hearing on the appeal and then approve or deny the plan [*Pub. Res. Code § 4582.9(d)*].

10. If Director does not act on plan within 25 days, or a longer period as mutually agreed on by Board and person filing plan, inform client that operations may commence [*see Pub. Res. Code § 4582.7(d)*].

11. If Director notifies client in writing that plan does not comply with applicable requirements, instruct client to take one of following actions:

NOTE:

The written notification must (1) set forth the Director's reasons for the denial, (2) inform the applicant of his or her right to a public hearing before the Board, and (3) state that timber operations under the plan must not commence [*Pub. Res. Code § 4582.7(b)*; *14 Cal. Code Reg. §§ 1037.6, 1054*; ***see*** P c, ***below***]. Further, the Director must specify any changes and reasonable conditions that in the Director's professional judgment are needed to bring the plan into conformance with the Board's rules, and must offer to confer with the registered professional forester to reach agreement on the conditions necessary to bring the plan into conformance [*14 Cal. Code Reg. § 1037.6*].

a. Comply with any changes and conditions identified in Director's statement that are necessary to bring plan into conformance with Board's rules [*14 Cal. Code Reg. § 1037.6*];

b. Accept Director's offer (contained in statement) to confer with registered professional forester to reach agreement on conditions necessary to bring plan into conformance [*14 Cal. Code Reg. § 1037.6*]; or

c. Within 10 days of return of plan, appeal rejection by requesting public hearing before Board as follows [*Pub. Res. Code § 4582.7(c)*; *14 Cal. Code Reg. § 1054.1*]:

NOTE:
After an appeal is made, the Board must schedule a public hearing to review the plan to determine if it conforms to the Board's rules and regulations and the Z'Berg-Nejedly Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*]. Timber operations must await Board approval of the plan. Board action must occur within 30 days from the filing of the appeal, or any longer period mutually agreed on by the Board and the appellant [*Pub. Res. Code § 4582.7(c)*].

(1) Prepare written request containing [*14 Cal. Code Reg. § 1054.2*]:
(a) Statement requesting hearing before Board.

(b) Identification of timber harvesting plan.

(c) Name and address of person making request.

(2) Mail request to State Board of Forestry, 1416 Ninth Street, Room 1506-14, Sacramento, CA 95814 [*14 Cal. Code Reg. § 1054.3*].

NOTE:
The request will be considered filed on the date it is mailed or the date it is otherwise received at the Board's Sacramento headquarters, whichever is earlier [*14 Cal. Code Reg. § 1054.3*].

d. Abandon rejected plan and consider preparing new one.

12. If hearing on rejected plan is held, advise client to take one of following steps (as appropriate) after hearing [*see Pub. Res. Code § 4582.7(d)*; *14 Cal. Code Reg. § 1054.8*]:

a. If Board approves plan, commence operations.

b. If Board rejects plan but Director overrides Board and approves plan within 10 days of Board's action:

(1) Bring plan into full compliance with all applicable rules and regulations.

(2) Commence operations.

c. If Board rejects plan and Director does not override rejection, refrain from conducting timber operations under plan.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsEnvironmental LawNatural Resources & Public LandsGovernmentsPublic LandsForest Lands



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18-36A California Legal Forms--Transaction Guide § 36A.122

AUTHOR: Linda Breen Pierce

§ 36A.122 Water Supply Contract for Subdivision

1. Draft and have parties execute water supply contract as follows [*see § 36A.231[2]* for form]:

a. Prepare enough copies so each party, counsel for each party, and all governmental agencies which must approve contract or any matter connected with contract may be supplied with copy.

b. Condition contract on approval by any governmental agency, such as Public Utilities Commission, required to approve performance.

2. Determine which public agencies and governmental entities must approve water supply contract or matters necessary for its performance and obtain approvals, as follows:

a. When private individual is to supply water to single neighbor, obtain any necessary approval or permit from city or county agencies required to issue building permit for pipelines or facilities.

b. When contract is for privately owned water system to supply proposed subdivision, obtain the following:
(1) Certificate of public necessity and convenience from California Public Utilities Commission authorizing water system to be expanded to serve subdivision [*Pub. Util. Code §§ 1001-1011*].

(2) Permit from California Department of Public Health to operate water system for

subdivision [*see Health & Safety Code § 116525*].

c. If mutual water company is to supply water to proposed subdivision, secure same permits and certificates as are required of nonmutual companies [*see Pub. Util. Code § 2703*].

d. If public district, such as irrigation or county water district, is to supply water to subdivision not already in district, annexation of subdivision land to district will have to be approved by local agency formation commission (LAFCO) of county in which land and district are located under Cortese-Knox Local Government Reorganization Act of 1985 [*see Gov. Code § 56000 et seq.*].

3. Negotiate for and secure all easements across land owned by parties other than contracting parties, as follows:

a. May be acquired by private supplier or public district by negotiation and purchase [*see* Ch. 28A, *Easements and Licenses*].

b. May be acquired by public district by means of eminent domain [*see* California Forms of Pleading and Practice, Ch. 247, *Eminent Domain* (Matthew Bender)].

4. When water and water system is to be supplied by public district such as irrigation district, county water district, or municipal water district, proceed with the following:

a. Petition LAFCO of county or counties in which district and land proposed to be subdivided are located for annexation of land to district [*see Gov. Code § 56000 et seq.*].

b. After approval of annexation petition and annexation to district of land proposed to be subdivided, proceed to form a special assessment district of land proposed to be subdivided to finance construction of water system for subdivision [*see* Ch. 30A, *Construction Financing*].

5. When water system is to be built and water supplied by privately owned commercial water system, proceed with the following:

a. Apply to California Public Utilities Commission for certificate of public convenience and necessity allowing water system to extend its mains and build system for subdivision [*Pub. Util. Code § 1001*; *see § 36A.132* for guide to drafting petition].

b. File petition with State Department of Health for permit to operate water system for subdivision [*see Health & Safety Code § 116525*].

6. On receipt of all required permits and authorizations, proceed to assist in planning and developing subdivision and water supply system for subdivision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReal Property LawWater RightsDomestic Use



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18-36A California Legal Forms--Transaction Guide §§ 36A.123-36A.129

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.123[Reserved]



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18-36A California Legal Forms--Transaction Guide § 36A.130

AUTHOR: Linda Breen Pierce

§ 36A.130 Notice of Location of Mining Claim

1. For lode claim, draft the following [*see § 36A.200[2]* for form]:

a. Name of lode or claim.

b. Name (or names) and current mailing or residence address of locator (or locator(s)) of claim.

c. Number of linear feet claimed in length along course of vein, each way from point of discovery.

d. Description, to extent possible, of general course of vein or lode on which claim is based.

e. Width of claim on each side of center.

f. Date of location (which must be the same as date of posting notice).

g. Description of type of monuments used for the discovery and corner monuments.

h. Statement that lode claim is being located.

i. Description of claim by reference to some natural object or permanent monument that will identify claim [*Pub. Res. Code § 3900(f)*].

2. For placer claim, draft the following [*see §§ 36A.201[2], 36A.202[2]* for sample forms]:

a. Name of claim.

b. Name (or names) and current mailing address or current residence address of locator (or locator(s)).

c. Number of feet or acreage claimed.

d. Description of claim that refers to some natural object or permanent monument to identify its location.

e. Date of location of claim, which must be date notice of location is posted on claim.

f. Statement that placer claim is being located.

3. For tunnel right, draft the following [*see § 36A.203[2]* for form]:

a. Name and current mailing or residence address of each locator.

b. Actual or proposed course or direction of tunnel.

c. Height and width of tunnel.

d. Description of tunnel by reference to some natural object or permanent monument.

e. Date of location of tunnel right, which must be date notice of location is posted.

f. Statement that tunnel right is being located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningClaimsReal Property LawMiningLocation



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18-36A California Legal Forms--Transaction Guide § 36A.131

AUTHOR: Linda Breen Pierce

§ 36A.131 Timber Operations

1. Draft Timber Harvesting Plan, which must include all of the following information [*see Pub. Res. Code § 4582*]:

NOTE:
An official form that meets the applicable requirements has been prepared by the Department of Forestry and Fire Protection and should be used in submitting the plan [***see*** *14 Cal. Code Reg. § 1032*].

a. Name and address of timber owner.

b. Name and address of timber operator, if known at time of filing.

NOTE:
If the timber operator is not known at the time of filing, the person submitting the plan must notify the Department as soon as the timber operator is known, but in any case before timber operations begin [*Pub. Res. Code § 4582(b)*].

c. Description of land on which work is proposed to be done, including the following:

(1) United States Geological Survey quadrangle map or equivalent indicating location of all streams;

(2) Location of all proposed and existing logging truck roads;

(3) Known locations of any stands of species Taxus brevifolia three inches and larger in diameter at breast height; and

(4) Boundaries of all site I classification timberlands to be stocked in accordance with *Pub. Res. Code § 4561(b)* or any other minimum stocking standards established by State Board of Forestry.

d. Description of silvicultural methods to be applied, including type of logging equipment to be used.

e. Outline of methods to be used to avoid excessive accelerated erosion from timber operations to be conducted within proximity of stream.

f. Special provisions, if any, to protect any unique area within area of timber operations.

g. Expected dates of commencement and completion of timber operations.

h. Certification by registered professional forester preparing plan that he or she (or a designee) has personally inspected plan area.

i. Any other information State Board of Forestry provides by regulation.

2. If Notice of Intent to Harvest Timber is required [*see § 36A.121*, P 5], draft notice to include all of the following information [*14 Cal. Code Reg. § 1032.7(d)*]:

a. Name of timberland owner.

b. Name of registered professional forester who prepared plan.

c. Name of plan submitter.

d. Location of plan area by county, section, township, and range, and approximate direction and distance to plan area from nearest community or well-known landmark.

e. Name of and distance from nearest perennial stream and major watercourse flowing through or downstream from plan area.

f. Acres proposed to be harvested.

g. Regeneration methods and intermediate treatments to be used.

h. Estimated earliest date that Director of Forestry and Fire Protection may approve plan.

NOTE:

This will be 15 days from the Department's receipt of the plan, except in counties for which rules and regulations have been adopted specifying that the earliest date is 45 days after receiving the plan by the Department [*14 Cal. Code Reg. § 1032.7(d)(6)*; ***see*** *Pub. Res. Code §§ 4516.5, 4516.8*].

i. Statement that public may review plan at appropriate regional office of Department of Forestry and

Fire Protection and that copy may be obtained from Department on payment of applicable charge.

j. Map providing approximate boundary of plan area, map legend, and scale.

k. Statement that questions or concerns regarding plan should be directed to applicable regional office for incorporation into an Official Response Document.

l. Statement of whether there is a known overhead electric power line on proposed plan area except lines from transformers to service panels.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsForest Management



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18-36A California Legal Forms--Transaction Guide § 36A.132

AUTHOR: Linda Breen Pierce

§ 36A.132 Water Supply Contract for Subdivision

1. When water system is to be built by privately owned commercial water company, draft and file petition with California Public Utilities Commission as follows [Pub. Res. Code § 1001; *see* California Forms of Pleading and Practice, Ch. 480, *Public Utilities* (Matthew Bender)]:

NOTE:

There is no official printed form of an application for a certificate of public convenience and necessity. However, the application must be submitted in the form and contain the information prescribed by the Commission's rules [***see** 20 Cal. Code Reg. § 88*]. The required information is outlined below. For a skeletal form of application, see *California Forms of Pleading and Practice, Ch. 480, **Public Utilities**, § 480.191* (Matthew Bender).

The following will apply when the system is to be built or water is to be supplied by a mutual water company for a subdivision whose owners do not own stock in the mutual water company [*Pub. Util. Code § 2703*].

a. Petition must be on letter-size paper bearing all of the following [*20 Cal. Code Reg. §§ 2, 2.1*]:

(1) Caption of proceeding;

(2) Docket number; and

(3) Title of document.

b. Original and seven exact copies of petition must be filed with Commission [*20 Cal. Code Reg. § 2.5*].

c. Original must be signed by applicant, or by officer of applicant if applicant is corporation, or by attorney representing applicant [*20 Cal. Code Reg. § 2.2*].

d. Application must be verified in same manner as complaint is verified [*20 Cal. Code Reg. § 2.4*].

e. Petition must state both of the following:

(1) Exact legal name of applicant, location of its principal place of business, and state under laws of which it was organized if it is a corporation, trust, association, or other organized group [*20 Cal. Code Reg. § 15(a)*]; and

(2) Name, title, address, telephone number, facsimile transmission number, and, if applicant consents to e-mail service [*see 20 Cal. Code Reg. § 2.3.1*], e-mail address of person to whom correspondence or communications in regard to petition are to be addressed [*20 Cal. Code Reg. § 15(b)*].

f. Petition must also furnish following information:

(1) Full description of proposed construction and extension and manner in which it will be constructed [*20 Cal. Code Reg. § 18(a)*].

(2) Names and addresses of all utilities and entities, including public districts, with which proposed construction is likely to compete, and cities or counties within which service will be rendered by it [*20 Cal. Code Reg. § 18(b)*].

(3) Map of suitable scale showing location or route of proposed construction or extension and its relation to other public utilities or entities with which it is likely to compete [*20 Cal. Code Reg. § 18(c)*].

(4) Statement identifying franchises and such health and safety permits as appropriate public authorities have required or may require for proposed construction or extension [*20 Cal. Code Reg. § 18(d)*].

(5) Facts showing that public convenience and necessity require or will require proposed construction or extension and its operation [*20 Cal. Code Reg. § 18(e)*].

(6) Statement detailing estimated cost of proposed construction or extension and estimated annual costs, both fixed and operating, associated with it [*20 Cal. Code Reg. § 18(f)*].

(7) Statements or exhibits showing financial ability of applicant to render proposed service and information as to manner in which applicant proposed to finance proposed construction or extension [*20 Cal. Code Reg. § 18(g)*].

(8) Statement of proposed rates to be charged for service to be rendered by means of such construction or extension [*20 Cal. Code Reg. § 18(h)*].

(9) Statement of all known matters, or that there are none, that both:

(a) Are required by Commission's General Order 104-A to be included in annual report of applicant but occurred or were proposed after period covered by last previous annual report filed by applicant; and

(b) Are, or will be connected with construction or extension proposed [*20 Cal. Code Reg. § 18(i)*].

(10) Estimate of number of customers and requirements for water for first and fifth years in future, and ultimate future development anticipated by applicant, together with description of normal, and emergency standby, water facilities for production, storage, and pressure in areas to be served [*20 Cal. Code Reg. § 18(m)(1)*].

(11) Statement of estimated operating revenues and estimated expenses, by major classes, including taxes and depreciation, for first and fifth years in future attributable to operations in proposed area [*20 Cal. Code Reg. § 18(m)(2)*].

(12) When applicant has operated as water utility elsewhere in California for one year or longer, general statement of operating plans for proposed area including whether new area will be served by existing personnel or will constitute separate district to be served by new personnel [*20 Cal. Code Reg. § 18(m)(3)*].

(13) Additional information and data as may be necessary to full understanding of situation [*20 Cal. Code Reg. § 18(p)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReal Property LawWater RightsDomestic Use



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART III. TRANSACTION GUIDE
D. Drafting Guide

18-36A California Legal Forms--Transaction Guide §§ 36A.133-36A.139

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.133[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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E. Related and Subsequent Procedures

18-36A California Legal Forms--Transaction Guide § 36A.140

AUTHOR: Linda Breen Pierce

§ 36A.140 Mining Claims--Annual Assessment Work

1. Inform owner of placer or lode mining claim about need to perform not less than $100 worth of labor or improvements annually [*30 U.S.C. § 28*; 43 C.F.R. § 3851.1; *Pub. Res. Code § 3912*; *see § 36A.200[1][e]*].

NOTE:

The period within which work must be done commences at 12:01 p.m. on the first day of September succeeding the date of location of the claim [*30 U.S.C. § 28*; 43 C.F.R. § 3851.1]. Failure to make annual assessment work during any assessment year subjects the claim to relocation by others unless the owner of the claim resumes work after the failure and before relocation of the claim by others [*30 U.S.C. § 28*; 43 C.F.R. § 3851.3].

2. Notify owner that above requirement may be satisfied by conduct of geological, geochemical, or geophysical surveys on claim [*30 U.S.C. § 28-1*; 43 C.F.R. § 3851.2(a)].

NOTE:

The surveys must be verified by a detailed report filed in the county office where the claim was recorded. Surveys cannot be applied as the assessment labor due on the claim for more than two consecutive years or for a total of more than five years in all, and cannot be repetitive of any previous survey of the same claim [*30 U.S.C. § 28-1*; 43 C.F.R. § 3851.2(a)].

3. Warn owner that assessment work substantially affecting surface environment may require filing of notice of intent and plan of operation with BLM or under California Surface Mining and Reclamation Act of 1975 [*Pub. Res. Code § 2710 et seq.*].

NOTE:

Federal surface management rules for mining claims are set forth in 43 C.F.R. pt. 3809.

The California Surface Mining and Reclamation Act of 1976 is not applicable to surface mining operations that are required by federal law to protect a mining claim conducted solely for that purpose [*Pub. Res. Code § 2714(e)*].

4. Within 30 days after September 1 of each year, have person for whose benefit annual assessment work for year was performed (or someone on that person's behalf) make affidavit of annual labor performed on claim [*see § 36A.205*] and have it recorded in office of county recorder of county in which claim is located [*Pub. Res. Code § 3913(a)*].

NOTE:

Failure to file the affidavit within 30 days after September 1 of any year creates a prima facie presumption of the act and intent of the owner to abandon the mining claim and places the burden of proof on the owner to show that the assessment work was performed and the claim was not abandoned [*Pub. Res. Code § 3913(c)*]. Failure to record the affidavit before December 31 of any year conclusively constitutes an abandonment of the mining claim [*43 U.S.C. § 1744(c)*]. However, the owner may avoid this presumption by filing for record, before December 31, a notice of intention to hold mining claim [*43 U.S.C. § 1744(a)(1)*].

5. Before December 31 of each year, have owner of lode or placer mining claim file with proper BLM office either evidence of annual assessment work having been performed or notice of intention to hold mining claim [*43 U.S.C. § 1744(a)(1)*; 43 C.F.R. §§ 3833.2-1, 3833.2-2], as follows:

NOTE:

The general mining laws allow the required annual assessment work to be initiated in the assessment year following the assessment year in which the claim was located [***see** 30 U.S.C. § 28*]. Accordingly, a claimant of a mining claim located between September 1 and December 31 of a given calendar year must submit an annual filing on or before December 31 of the following calendar year [43 C.F.R. § 3833.2-3(a)].

a. Evidence of annual assessment work having been performed must be in form of either:

(1) Exact legible reproduction or duplicate, except microfilm, of evidence of assessment work that was performed under state law and that was or will be filed for record in local jurisdiction where claim or group of claims is located and recorded, setting forth [43 C.F.R. § 3833.2-4(a)]:

(a) BLM serial number assigned to claim on filing of notice or certificate of location in proper BLM office; and

(b) Any change in mailing address, if known, of owner or owners of claim; or

(2) Exact legible reproduction or duplicate, except microfilm, of detailed report concerning geological, geochemical, and geophysical surveys which has been or will be recorded in California jurisdiction where claim or group of claims is located and recorded [43 C.F.R. § 3833.2-4(b)].

b. Notice of intention to hold claim must include [43 C.F.R. § 3833.2-5(b)]:

NOTE:

A notice of intention may be filed at the owner's election, regardless of whether the assessment has been suspended, deferred, or not yet accrued. However, the claimant must file with the BLM the same documents that have been or will be recorded with the county or local recorder's office. The notice will be effective only to satisfy the filing requirement for the year [***see*** 43 C.F.R. § 3833.0-5(o) (filing year means time period during which documents and fees are required to be provided to the proper BLM office; the time periods are set forth in the regulation)] in which the notice is filed [***but see*** NOTE immediately following P 5, ***above***]. The filing of a notice with the BLM will not relieve the owner of complying with federal and state laws pertaining to the performance of annual assessment work [43 C.F.R. § 3833.2-5(a)].

(1) Exact legible reproduction or duplicate (except microfilm) of an instrument signed by owner of claim or owner's agent and setting forth the following:

(a) BLM serial number; and

(b) Any known change in mailing address of owner of claim.

(2) Reference by date and serial number to decision (on file in proper BLM office) that granted deferment of annual assessment work.

(3) Reference to pending petition for deferment of annual assessment work by date of filing and serial number.

6. Before December 31 of each year, an owner of a tunnel mill or tunnel site must file with proper BLM office a notice of intention to hold claim in a form of letter or other notice signed by owner of site or owner's agent, setting forth the following information [43 C.F.R. § 3833.2-5(c)]:

a. BLM serial number.

b. Any known change in mailing address of owner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsLode ClaimsReal Property LawMiningClaims



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18-36A California Legal Forms--Transaction Guide § 36A.141

AUTHOR: Linda Breen Pierce

§ 36A.141 Mining Claims--Deferment of Annual Assessment Work

1. Conditions required for grant of deferment are either of the following [*30 U.S.C. § 28b*; 43 C.F.R. § 3852.1]:

a. Mining claim in United States is surrounded by lands over which right-of-way for performance of assessment work has been denied or is in litigation or is in process of acquisition under state law; or

b. Other legal impediments exist that affect right of claimant to enter on surface of claim or to gain access to boundaries of claim.

2. Procedure for gaining deferment is as follows:

a. Prepare and record in office of county recorder where claim is located notice to public of claimant's petition to Secretary of Interior for deferment of assessment work.

b. Have conformed copy of notice certified by recorder to show it has been filed or recorded in his or her office.

c. Pay applicable recording fees [*see Gov. Code § 27361* for current amounts].

d. Prepare and file with manager of United States Bureau of Land Management office having jurisdiction over claim petition in duplicate requesting deferment, as follows [43 C.F.R. § 3852.2]:

(1) One copy of petition must have attached to it copy of notice to public of claimant's petition for deferment showing it has been recorded in office of county recorder where claim is located [43 C.F.R. § 3852.2(a)].

(2) Both duplicate copies of petition should:
(a) Be signed by at least one of owners of claim; and

(b) Give name of claim, date of location, and date of beginning of one-year assessment work period for which deferment is requested [43 C.F.R. § 3852.2(a)].

(3) When petition is based on denial of right-of-way it must state all of the following:

(a) Nature and ownership of land, or claim to ownership of land, over which it is necessary to obtain right-of-way to reach claim;

(b) Description of such land by legal subdivision of United States public land survey if land is surveyed;

(c) Full details as to why present use of right-of-way is denied or prevented and steps that have been taken to acquire right to use it; and

(d) Whether any other right-of-way is available and, if so, reasons it is not feasible or desirable to use other right-of-way [43 C.F.R. § 3852.2(b)].

(4) When petition is based on legal impediments other than denial of right-of-way, set out those impediments in detail and describe their effect in detail [43 C.F.R. § 3852.2(c)].

(5) Each petition must be accompanied by nonrefundable service charge [*see* 43 C.F.R. § 3852.2(a) for service fees].

(6) Record copy of work or decision of Bureau of Land Management disposing of petition for deferment in office of county recorder of county where claim is located [*30 U.S.C. § 28e*; 43 C.F.R. 3852.3].

NOTE:
When the conditions justifying the deferment are removed, the deferred assessment work must be performed no later than the end of the assessment year following the removal of the conditions and in addition to the annual assessment work required in the assessment year in which it is performed [*30 U.S.C. §§ 28c, 28d*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsLode ClaimsReal Property LawMiningClaims



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18-36A California Legal Forms--Transaction Guide §§ 36A.142-36A.199

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.142[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.200

AUTHOR: Linda Breen Pierce

§ 36A.200 Notice of Location of Lode Mining Claim [30 U.S.C. § 28; Pub. Res. Code §§ 3900, 3911]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of location of a lode mining claim. The posting of a notice of location, and the recordation of an exact copy of the posted notice, are two of the required steps in the claiming of any type of mining claim [*see* [d][i], *below*]. For the notices applicable to a placer mining claim, see *§ 36A.201* and *§ 36A.202*. A notice of location of a tunnel right is set forth in *§ 36A.203*.

For a guide to the procedures applicable to staking a mining claim, see *§ 36A.120*.

[b] "Lode" vs. "Placer" Claims

There are two types of mining claims: "lode" claims and "placer" claims. The distinction between "lode" claims and "placer" claims is delineated in both federal and California statutes [*see 30 U.S.C. §§ 23-27, 35-37; Pub. Res. Code §§ 3900-3902*].

Lode claims embrace one or more continuous veins, lodes, or ledges of mineral lying within well-defined seams or fissures in the surrounding rock, within boundaries clearly separating it from the neighboring rock, often deep within the bowels of the earth [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113]* . The terms "lode," "vein," and "ledge" mean the same things when used in the federal and California statutes dealing with mining claims [*Wm. H. Hoegee Inv. Co. v. Burton Bros. (1955) 132 Cal. App. 2d 863, 867, 283 P.2d 314]* .

In contrast, a "placer" is a gravelly place where a mineral is found, especially by the side of a river, or in the bed of a mountain torrent. [*Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County (1996) 12 Cal. 4th 533, 567 n.25, 48 Cal. Rptr. 2d 778, 907 P.2d 1324* ; *Gregory v. Pershbaker (1887) 73 Cal. 109, 114, 14 P. 401]* . The

term "placer" includes all forms of mineral deposits except veins of quartz or other rock in place [*30 U.S.C. § 35*]. It also includes subterranean beds of gravel that contain minerals [*Gregory v. Pershbaker (1887) 73 Cal. 109, 114-115, 14 P. 401]* .

A lode claim is limited by reference to its course, while a placer claim may not exceed 20 acres for each individual claimant [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113* ; *see § 36A.201[1][b][i]*].

[c] Size and Extent of Lode Claim

Both federal and California statutes provide that a lode mining claim may not (1) extend more than 1,500 feet along the course of the lode or vein that is the basis for the claim and (2) include more than 300 feet of ground on either side of the center of the vein or lode [*30 U.S.C. § 23*; *Pub. Res. Code § 3901*]. Neither the sidelines nor the end lines of a lode mining claim need be straight. However, the end lines of the claim must be parallel to each other [*30 U.S.C. § 23*]. End lines of a lode mining claim are those that cut across the lode or vein that is the basis for the claim and mark the end of the 1,500 feet or lesser distance the claim runs along the course of the vein [*see* U.S. Department of the Interior, Bureau of Land Management, Discovery, Location, Recordation, and Assessment Work for Mining Claims and Sites in California 10 (1987 ed.)].

The "dip" of a vein is broadly defined as its downward course or direction toward depth [*Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 487, 145 P.2d 49]* . The "strike" of a vein is at right angles to its dip and is used to designate the longitudinal or horizontal course of the vein [*Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 487, 145 P.2d 49]* . The "apex" of a vein is the highest point of the vein, or the place where the vein is nearest the surface, and the top of the vein's dip [*Brugger v. Lee Yim (1936) 12 Cal. App. 2d 38, 49-50, 55 P.2d 564]* . The apex must, however, be the top of the vein itself and not merely the top of some spur or feeder of the vein [*Brugger v. Lee Yim (1936) 12 Cal. App. 2d 38, 50, 55 P.2d 564]* . Whether, in fact, a mine owner was following the dip of a vein that has its apex on the owner's claim when he or she goes beyond the sidelines of the claim is a question of fact to be determined by the trier of fact [*Wm. H. Hoegee Inv. Co. v. Burton Bros. (1955) 132 Cal. App. 2d 863, 868, 283 P.2d 314]* .

The owner of a lode mining claim may follow the dip of any lode or vein having its apex on the owner's claim indefinitely outside the sidelines of the owner's claim [*Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U.S. 463, 467, 25 L. Ed. 253]* . The owner may not, however, follow either the dip or the strike of the vein or lode beyond the end lines of his or her claim [*Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U.S. 463, 467, 25 L. Ed. 253]* . This was the general rule of "miners' law" [*Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U.S. 463, 467, 25 L. Ed. 253]* , and has been expressly incorporated into the federal mining claim statutes [*see 30 U.S.C. § 26*]. The right to follow the dip of a vein beyond the sidelines of a claim is known as the claimant's "extralateral rights" [*see* American Law of Mining, Ch. 30, *Introduction to Federal Mining Law* (Matthew Bender)]. If the claim is in a shape other than a parallelogram (for example, in the shape of a horseshoe or an isosceles triangle) and its side and end lines are indistinguishable, the claim owner loses these extralateral rights [*Doe v. Sanger (1890) 83 Cal. 203, 209-214, 23 P. 365]* .

[d] Locating and Claiming Lode Claim

[i] Essential Requirements

The federal statutes set forth the general requirements for locating and claiming either a lode or a placer claim [*see 30 U.S.C. §§ 21-36*]. They are supplemented by California statutes specifying in greater detail the requirements for locating and claiming a placer, lode, tunnel right, or millsite claim [*see Pub. Res. Code §§ 3900-3924*].

In mining terms, "location" refers to the acts required to stake a claim to mineral bearing property. In addition to discovering the minerals [*see* [ii], *below*], the locator must do all of the following [*Creede & C. C. M. & M. Co. v.*

Uinta T. M. & T. Co. (1904) 196 U.S. 337, 346, 25 S. Ct. 266, 49 L. Ed. 501 ; *Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113]* :

- Mark the boundaries of the claim [*see* [iii], *below*];
- Post a notice of location on the claim [*see* [iv], [v], *below*];
- Record and file the notice of location [*see* [vi], [vii], *below*];
- Take possession and work the claim [*see* [e], *below*]; and
- Perform whatever else is mandated by the acts of Congress and by local laws and regulations.

[ii] Discovery of Minerals

Discovery of valuable minerals on the claim is necessary to perfect the claim, but discovery need not precede the other acts of location [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113]* .

There are two tests used to determine whether a lode claim has been properly discovered:

- The "prudent person test," in which the locator must find evidence of mineralization that would justify the expenditure of addition labor and means by an ordinarily prudent person to develop the property as a mine [*see Kramer v. Gladding, McBean & Co. (1938) 30 Cal. App. 2d 98, 104, 85 P.2d 552]* ; and
- The "marketability test," which complements the prudent person test, and requires that the locator find a mineral deposit that can be mined and sold at a profit, given the accessibility of the deposit, its proximity to a market, the demand for the mineral, and the costs of development [Acting Solicitor Op., "Taking of Sand and Gravel From Public Lands for Federal Aid Highways," *54 I.D. 294, 296 (1933)* , GFS Mining Supp. Decision No. 6 (1973)].

For further discussion of these tests, see American Law of Mining, Ch. 35, *Discovery* (Matthew Bender).

[iii] Boundaries

The boundaries of a lode mining claim must be defined by the locator so that they may be readily traced, but in no case may the claim extend more than 1,500 feet along the course of the vein or lode, or more than 300 feet on either side of it, as measured from the centerline of the vein at the surface [*Pub. Res. Code § 3901*]. Within 60 days after the claim is located, the locator must erect a monument at each corner of the claim [*Pub. Res. Code § 3901*; *see Pub. Res. Code § 3915*]. The monument must be of one of the following forms [*Pub. Res. Code § 3915(a)*]:

- A wooden post not less than one and one-half inches in diameter projecting at least two feet above the ground.
- A mound of stone projecting at least two feet above the ground.
- A nonperforated, capped metal post or solid metal rod, not less than one inch in diameter and projecting at least two feet above the ground.

Each corner monument must bear or contain markings sufficient to appropriately designate the corner of the mining

claim and the name of the claim to which it pertains [*Pub. Res. Code § 3901*].

[iv] Contents of Notice

The notice of location of a lode mining claim must contain all of the following information [*Pub. Res. Code § 3900*; 43 C.F.R. § 3833.1-2(b)]:

- The name of the lode or claim.
- The type of claim or site.
- The name and current mailing or residence address of the locator.
- The number of linear feet claimed in length along the course of the vein or lode, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be.
- The date of the location, which must be the same as the date of posting the notice.
- A description of the type of monuments used for the discovery and corner monuments.
- A description of the claim by reference to some natural object or permanent monument by which the claim can be identified.

[v] Posting Notice

The locator must post the notice of location in or on a monument erected by the locator at the point of discovery of the vein or lode [*Pub. Res. Code § 3900*; *see* [iii], *above* (monument requirements)].

[vi] Recording Notice

Within 90 days after the notice of location is posted on the claim, a true copy of the posted notice together with a statement of the boundary markings and their character must be recorded in the office of the county recorder of the county in which the claim is situated [*Pub. Res. Code § 3911*]. The notice need not be acknowledged to be recorded [*Gov. Code § 27282(a)(3)*]. The recording fees are set by statute [*see Gov. Code § 27361* for current amounts]. Recordation of the notice serves as constructive notice to other prospectors, but a failure to record with the county recorder does not work a forfeiture and persons with actual knowledge of the claim may not take advantage of the failure to record [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 902, 62 Cal. Rptr. 2d 113]* .

[vii] Filing Notice With Bureau of Land Management

In 1976, Congress enacted the Federal Land Policy and Management Act [*43 U.S.C. § 1701 et seq.*]. Under that Act, the owner of an unpatented mining claim is required to file with the Bureau of Land Management (BLM), within 90 days of locating the claim, a copy of the official notice of the location or certificate of location [*43 U.S.C. § 1744(b)*; 43 C.F.R. § 3833.1-2(a)]. In California, the notice should be filed at the following address:

Bureau of Land Management
California State Office
2800 Cottage Way, Suite W-1834
Sacramento, CA 95825-1886
Telephone: (916) 978-4400

Internet: <<www.ca.blm.gov/caso/minerals.html>>

The copy must be accompanied by a topographic map published by the U.S. Geological Survey or by a narrative description or sketch depicting or describing the location of the claim [*see* 43 C.F.R. § 3833.1-2(b)(5)(ii)]. A legal description that describes the location by legal subdivision, section, township, range, meridian, and state is sufficient for this purpose [43 C.F.R. § 3833.1-2(b)(6)].

[e] Annual Development Work

After a claim is perfected, a miner must perform at least $100 worth of labor or improvements tending to develop the property each year or the claim will be open to other prospectors until such time as work is resumed [*30 U.S.C. § 28*; *Pub. Res. Code § 3912*]. California law also requires the recordation of an affidavit of the performance of labor and improvements within 30 days of the time limited by law for the performance of such work [*Pub. Res. Code § 3913(a)*]. Timely recordation of the affidavit serves as prima facie proof of the performance of the work stated in the affidavit [*Pub. Res. Code § 3913(b)*]. A failure to record the affidavit timely creates a prima facie presumption of the act and intent of the owner to abandon the claim at the end of the assessment year in which the work should have been done and imposes on the owner the burden of proof of showing that the work was performed in any contest, suit, or proceeding touching the title to the claim [*Pub. Res. Code § 3913(c)*]. However, the failure to record the affidavit does not work a forfeiture of the claim if the owner proves that he or she in fact performed the requisite annual work [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 902, 62 Cal. Rptr. 2d 113]* . For a form of affidavit or declaration, see *§ 36A.205[2]*.

Under the Federal Land Policy and Management Act [*43 U.S.C. § 1701 et seq.*], the owner of a claim is required to file with state officials and with the Bureau of Land Management [*see* [d][vii], *above*, for address, telephone number, and web site], before December 31, one of the following [*43 U.S.C. § 1744(a)*]:

- A notice of intention to hold the claim;
- An affidavit of assessment work performed on the claim; or
- A detailed reporting form.

The failure to file the required instruments will be deemed conclusively to constitute an abandonment of the mining claim by the owner [*43 U.S.C. § 1744(c)*]. Full and timely compliance with these provisions is required for preservation of a mining claim and failure to comply works a forfeiture of the claim [*United States v. Locke (1985) 471 U.S. 84, 97-102, 105 S. Ct. 1785, 85 L. Ed. 2d 64]* . Thus, intent to abandon is irrelevant and the claim is lost [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 903, 62 Cal. Rptr. 2d 113* (claimant lost his rights to mining claim by failing to file annual affidavit, thereby allowing subsequent claimant to quiet title to claim)].

[f] Exclusive Right to Possession

If a miner has perfected a location of a mining claim and while he or she continues to perform the required annual development work on the claim, the miner is entitled to the exclusive right of possession and enjoyment of all the surface included within the borders of the location for so long as he or she complies with all of the laws of the United States and with the state, territorial, or local regulations not in conflict with the laws of the United States [*30 U.S.C. § 26*; *Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901-902, 62 Cal. Rptr. 2d 113]* . An attempted location on lands that are already covered by a valid and existing location of another is void [*Denman v. Smith (1939) 14 Cal. 2d 752, 761, 97 P.2d 451]* . If, however, the location is abandoned by the locator or is forfeited for the failure to comply with legal prerequisites for locating and maintaining a claim, any other person may relocate the claim in the same manner as is required of an original locator [*Pub. Res. Code § 3903*].

[2] FORM

Notice of Location of Lode Mining Claim [30 U.S.C. § 28; Pub. Res. Code §§ 3900, 3911]

NOTICE OF LOCATION OF LODE MINING CLAIM

NOTICE IS HEREBY GIVEN that the undersigned hereby locates and claims as a lode mining claim 1,500 linear feet of the vein or lode running through this site together with surface ground extending 300 feet in width on each side of the middle of that vein or lode.

NOTICE IS FURTHER GIVEN that

1. The name of the above lode mining claim (hereafter referred to as "the mining claim") is [*specify*], and it is located in the_____[*name*] Mining District, in the County of _____, State of California.

2. The name of the Locator of the mining claim is _____, and_____[his *or* her] current [mailing *or* residence] address is _____.

3. The point of discovery of the mining claim (hereafter referred to as the "point of discovery") is marked by a monument on which this notice is posted and is located approximately [*number*] feet [*direction, e.g.,* northwesterly *or* North 45 degrees 15' West] from_____[*name some natural well-known object or permanent well-known monument*].

4. The undersigned claims for the mining claim [*number, e.g.,* 600] linear feet extending in a [*direction, e.g.,* southwesterly] direction from the point of discovery along the course of the vein or lode on which the mining claim is based and [*number, e.g.,* 900] linear feet extending in a [*direction, e.g.,* northeasterly] direction from the point of discovery along the course of the vein or lode.

5. The general course of the vein or lode on which the mining claim is based runs, as near as can be determined from present developments, in a [*e.g.,* northeasterly] and [*e.g.,* southwesterly] direction through the point of discovery.

6. There has been erected at the point of discovery where this notice is posted, at each corner of the mining claim, and at the center of each end line of the claim, a monument consisting of [*select appropriate provision below*]

[*If mound of stones is used:*]

a mound of stones at least two feet in height above the ground.

[*If a wooden post is used:*]

a wooden post at least one and one-half inches in diameter projecting at least two feet above the ground.

[*If a metal post is used:*]

a metal post at least one inch in diameter projecting at least two feet above the ground.

[*CONTINUE*]

7. The mining claim is situated in Section _____, of Township _____ North [*or* South], Range _____ East [*or* West], M.D.B. & M. [*or* S.B.B. & M. *or* H.B. & M.].
DATED: _____.

_____ [*signature of locator*]
[*typed name*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
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A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.201

AUTHOR: Linda Breen Pierce

§ 36A.201 Notice of Location of Placer Mining Claim on Land Covered by United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(b), 3911]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of location that may be used in locating and claiming a placer mining claim on land covered by a United States public land survey [for discussion of public land surveys, *see* [b][ii], *below*]. If the claim is on land not covered by a public land survey, counsel should use the form in *§ 36A.202[2]*.

For the definition of "placer" and a discussion of the differences between placer claims and lode claims, see *§ 36A.200[1][b]*.

[b] Size, Shape, and Purpose of Placer Claims

[i] Maximum Acreage

The federal statutes that authorize placer claims appear to disagree about the permissible size of a placer claim. One statute provides that no placer claim may exceed 160 acres for any one person or association of persons [*30 U.S.C. § 36*; *see* 43 C.F.R. § 3842.1-2(a)]. Another federal statute, however, provides that any claim must not include more than 20 acres for each individual claimant [*30 U.S.C. § 35*; *see* 43 C.F.R. § 3842.1-2(b)]. The two statutes have been construed together by the United States Bureau of Land Management to mean that no placer claim may exceed 20 acres per claimant and a total of 160 acres for all claimants when the claim is being located by more than one person [43 C.F.R. § 3842.1-2(c)]. Thus, according to the Bureau, one person may locate and claim 20 acres as a placer mining claim, two persons may jointly locate and claim 40 acres as a placer mining claim, and eight persons may jointly locate and claim 160 acres as a placer mining claim [43 C.F.R. § 3842.1-2(c)]. Nine persons may not, however, jointly locate and claim 180 acres as a placer mining claim. The maximum amount of land eight or more persons may jointly locate and claim as

a placer mining claim is 160 acres [*30 U.S.C. § 36*; 43 C.F.R. § 3842.1-2(c)].

[ii] Public Land Survey System

All placer mining claims, even those on unsurveyed land, must conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions created by those surveys [*30 U.S.C. § 36*; 43 C.F.R. § 3842.1-5(a)]. The United States system of public land surveys is also sometimes called the "U.S. Rectangular System" because it divides the land into a rectangular grid pattern measured from a particular geographical reference point [*see* California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions* (Matthew Bender)]. The "legal subdivisions" created by the surveys are one mile square "sections" containing 640 acres. The sections are numbered 1 through 36 and are described as being located in a specified "Township" north or south of a particular geographical reference point and in a specified "Range" east or west of that same geographic reference point [*see* California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions* (Matthew Bender)]. The following are three geographical reference points used by the United States Rectangular System in California [*see* California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions*]:

- The Humboldt Base Line and Meridian in Northern California.
- The Mt. Diablo Base Line and Meridian in Central California.
- The San Bernardino Base Line and Meridian in Southern California.

Whether a placer location conforms reasonably with the legal subdivisions of the public survey is a question of fact to be determined in each case [43 C.F.R. § 3842.1-5(d)]. Conformity to the public land surveys and the rectangular subdivisions created by them is not required when conformity would result in a claim's overlapping a previously located claim [43 C.F.R. § 3842.1-5(b)].

For a placer mining claim to be described as a "legal subdivision" of a United States public land survey, it must be described as a fraction of a section created by the survey, for example, "the Northeast 1/4 of the Northeast 1/4 of Section 10 of Township 3 South, Range 3 East, M.D.B. & M." The smallest placer mining claim that may be described as a "legal subdivision" of a public land survey is a 10-acre tract, for example, "the Northwest 1/4 of the Northeast 1/4 of the Northeast 1/4" of a specified section [43 C.F.R. § 3842.1-3]. Any smaller mining claim must be described by metes and bounds and have its boundaries properly marked [43 C.F.R. § 3842.1-3].

[iii] Building Stones Subject to Placer Claims

Originally, most placer mining claims were located and claimed for gold or other valuable minerals discovered on them. However, placer mining claims may also be located because of uncommon varieties of building stone found on them [43 C.F.R. § 3842.2(b)]. A placer mining claim may not be located and claimed, however, merely for common varieties of building stones located on it [43 C.F.R. § 3842.2(a)].

[c] Locating and Claiming Placer Claim

[i] Essential Requirements

The federal statutes set forth the general requirements for locating and claiming either a lode or a placer claim [*30 U.S.C. §§ 21-36*]. They are supplemented by California statutes specifying in greater detail the requirements for locating and claiming a placer, lode, tunnel right, or millsite claim [*Pub. Res. Code §§ 3900-3924*].

In mining terms, "location" refers to the acts required to stake a claim to mineral bearing property. In addition to discovering the minerals [*see* [ii], *below*], the locator must do all of the following [*Creede & C. C. M. & M. Co. v.*

Uinta T. M. & T. Co. (1904) 196 U.S. 337, 346, 25 S. Ct. 266, 49 L. Ed. 501 ; *Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113]* :

- Mark the boundaries of the claim [*see* [iii], *below*];
- Post a notice of location on the claim [*see* [iv], [v], *below*];
- Record the notice of location [*see* [vi], *below*]; and
- Take possession and work the claim and perform whatever else is mandated by the acts of Congress and by local laws and regulations [*see* [vi], *below*].

[ii] Discovery of Minerals

Discovery of valuable minerals on the claim is necessary to perfect the claim, but discovery need not precede the other acts of location [*Crummett v. Miller (1997) 53 Cal. App. 4th 897, 901, 62 Cal. Rptr. 2d 113]* .

To discover a placer claim, a person must acquire acknowledge that the claim is reasonably valuable for mining purposes [*Parsons v. Kazange (1958) 158 Cal. App. 2d 779, 783-784, 323 P.2d 577]* . Thus, if the purported locator of a placer claim, before locating the claim, had found evidence of gold on it and indications of prior mining operations on it, the locator's "discovery" of valuable minerals on the claim was held sufficient to substantiate the purported location and claim [*Parsons v. Kazange (1958) 158 Cal. App. 2d 779, 783-784, 323 P.2d 577]* . The discovery of minerals on a second claim was also held sufficient when the locator had "panned" on the claim, found "colors" indicating gold might be present on the claim, and observed evidence of previous mining activities on the claim [*Parsons v. Kazange (1958) 158 Cal. App. 2d 779, 784, 323 P.2d 577]* .

[iii] Boundaries

The boundaries of a placer mining claim need be marked only if the claim is not covered by the United States system of public land surveys or is not claimed as a legal subdivision of a survey [*Pub. Res. Code § 3902(b)*]. Although the surveys do not cover all the land in California [*see* California Real Estate Law and Practice, Ch. 81, *Boundaries and Descriptions*], undoubtedly most public land owned by the United States government in the state is covered by a public land survey. All placer mining claims must conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of those surveys [*30 U.S.C. § 35*; 43 C.F.R. § 3842.1-5].

[iv] Contents of Notice

The notice of location of a placer mining claim must contain all of the following information [*Pub. Res. Code § 3902(a)*; 43 C.F.R. § 3833.1-2(b)]:

- The name of the claim.
- The type of claim or site.
- The name and current mailing address or current residence address of the locator.
- The number of feet or acreage claimed.
- A description of the claim that, among other things, refers to some natural object or permanent monument to identify its location.

- The date of location of the claim, which must be the date of posting of the notice of location.

[v] Posting Notice of Location

The notice of location of a placer mining claim must be posted in or on a conspicuous and substantial monument erected at the point of discovery of minerals on the claim [*Pub. Res. Code § 3902(a)*]. For discussion of discovery of minerals, see [ii], *above*.

[vi] Other Requirements

For a discussion of the requirements to record a notice of location of a placer or lode claim, see *§ 36A.200[1][d][vi]*. Additional filing requirements are mandated by the Federal Land Policy and Management Act [*see § 36A.200[1][d][vii]*]. Annual development work on the claim and corresponding filing requirements are required to prevent a forfeiture of the claim [*see § 36A.200[1][e]*].

[2] FORM

Notice of Location of Placer Mining Claim on Land Covered by United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(b), 3911]

NOTICE OF LOCATION OF PLACER MINING CLAIM

NOTICE IS HEREBY GIVEN that the undersigned hereby locates and claims as a placer mining claim the [*number not less than 20 or more than 160*] acres in the County of _____, State of California described as follows:_____[*legal description of legal subdivision of United States land survey, e.g.,* The East one half of the Northwest one quarter of the Southeast one quarter of Section _____ of Township _____ North, Range _____ East, M.D.B. & M.].

NOTICE IS FURTHER GIVEN that

1. The name of the placer mining claim hereby claimed is [*specify*] and it is located in the _____ Mining District of said county and state.

2. The name of the Locator of the claim is _____ and_____[his *or* her] current [mailing *or* residence] address is _____.
DATED: _____.

_____ [*signature of locator*]
[*typed name*]



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18-36A California Legal Forms--Transaction Guide § 36A.202

AUTHOR: Linda Breen Pierce

§ 36A.202 Notice of Location of Placer Mining Claim Not Described as Subdivision of United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(a), 3911]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of location of a placer mining claim that may be used when the claim is located on land that is either not covered by the United States system of public land surveys or is not described in the notice of location as part of that system. Although the land claimed as a placer mining claim need not be described in the notice of location as part of a public land survey or be covered by the United States system of surveys, it must conform as nearly as practicable with the shape of the rectangular subdivisions created by the system of surveys [43 C.F.R. § 3842.1-5(a)]. For a notice of location for a placer mining claim on land covered by a United States public land survey and described as a "legal subdivision" of that survey, see *§ 36A.201[2]*. For a discussion of placer mining claims and the system of public land surveys, see *§ 36A.201[1]*.

[b] Boundaries

If the land being claimed as a placer mining claim is not covered by the United States system of public land surveys or cannot be conformed with and claimed as a legal rectangular subdivision of a public land survey, its boundaries must be marked so they may be readily traced [*Pub. Res. Code § 3902(b)*]. In addition, at each corner of the claim or at the nearest accessible point to a corner, a "conspicuous and substantial monument" must be erected [*Pub. Res. Code § 3902(b)*]. To qualify as "conspicuous and substantial," a monument must be one of the following [*Pub. Res. Code § 3915(a)*]:

- A wooden post not less than one and one-half inches in diameter projecting at least two feet above the ground;

- A mound of stone projecting at least two feet above the ground; or

- A nonperforated, capped metal post or solid metal rod, not less than one inch in diameter and projecting at least two feet above the ground.

Each monument must bear or contain markings sufficient to designate the corner it marks and the name of the claim [*Pub. Res. Code § 3902(b)*].

[2] FORM

Notice of Location of Placer Mining Claim Not Described as Subdivision of United States Survey [30 U.S.C. § 35; Pub. Res. Code §§ 3902(a), 3911]

NOTICE OF LOCATION OF PLACER MINING CLAIM

NOTICE IS HEREBY GIVEN that the undersigned hereby locates and claims as a placer mining claim the [*number, e.g.*, 20] acres in the County of _____, State of California, described as follows:_____[*describe the claim by reference to some natural object or permanent monument that will enable it to be readily located, e.g.*, beginning at a point 660 feet Southwest of the conspicuous and substantial monument on which this notice is posted, which conspicuous and substantial monument is located approximately 1,925 feet North 45 degrees 15' West of the Southeast corner of Claypool Circle Wildlife Refuge; thence running North 660 feet to a monument marked _____; thence running East 1,320 feet to a monument marked _____; thence running South 660 feet to a monument marked _____; and thence running West 1,320 feet to the place of beginning].

NOTICE IS FURTHER GIVEN that

1. The name of the placer mining claim hereby claimed is_____[*specify name*].

2. The name of the Locator of the claim is _____ and_____[his *or* her] current [mailing *or* residence] address is _____.

3. There has been erected at the point of discovery where this notice is posted, and at each corner of the mining claim hereby claimed, a conspicuous and substantial monument consisting of [*select appropriate provision below*]

[*If mound of stones is used:*]

a mound of stones at least two feet in height above the ground.

[*If a wooden post is used:*]

a wooden post at least one and one-half inches in diameter projecting at least two feet above the ground.

[*If a metal post is used:*]

a metal post at least one inch in diameter projecting at least two feet above the ground.

[*CONTINUE*]

4. The mining claim hereby claimed is situated in Section _____ of Township _____ North [*or* South], Range _____ East [*or* West], M.D.B. & M. [*or* S.B.B. & M. *or* H.B. & M.] in the _____ Mining District of _____ County, California.
DATED: _____.

_____ [*signature of locator*]
[*typed name*]



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18-36A California Legal Forms--Transaction Guide § 36A.203

AUTHOR: Linda Breen Pierce

§ 36A.203 Notice of Location of Tunnel Right [30 U.S.C. § 27; Pub. Res. Code § 3906]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of location of a tunnel right. When a tunnel is run for the development of a vein or lode or for the discovery of mines, the owners of the tunnel have the right of possession of all veins or lodes not previously known to exist that are discovered in the tunnel, on the line of the tunnel, and within 3,000 feet of its face [*30 U.S.C. § 27*]. To avail themselves of this statutory right, the owners of the tunnel must, however, post and record a notice of their tunnel right (this form) and mark the boundaries of the tunnel [43 C.F.R. § 3843.2]. The manner in which they must post the notice and mark the boundaries, as well as the matters that must be contained in the notice, are stated both in regulations adopted by the United States Department of Interior Bureau of Land Management [*see* 43 C.F.R. § 3843.2] and in California statutes [*Pub. Res. Code §§ 3906, 3907*]. This form complies with both the Department of Interior regulations and the California statutes.

[b] Locating and Claiming Tunnel Right

[i] Posting Notice on Monument

The claimant of a tunnel right may locate his or her claim by erecting a "conspicuous and substantial" monument at the "face" or point of commencement of the tunnel and then posting a notice of location of the tunnel right in or on the monument [43 C.F.R. § 3843.2; *Pub. Res. Code § 3906*]. For the types of monuments that will qualify as "conspicuous and substantial," see *§ 36A.200[1][d][iii]*.

[ii] Boundaries

The locators of the tunnel right must also erect conspicuous and substantial monuments along the boundary lines of the

tunnel, on the surface of the land, at intervals of not more than 600 feet from the face of the tunnel to the terminus of 3,000 feet from the face [43 C.F.R. § 3843.2; *Pub. Res. Code § 3907*]. The "face" of the tunnel means the place where work on the tunnel first began and the point at which the tunnel actually enters "cover" [43 C.F.R. § 3843.1].

[iii] Contents of Notice

The notice of location of a tunnel right must contain all of the following information [*Pub. Res. Code § 3906*; 43 C.F.R. § 3833.1-2(b)]:

- The name and current mailing address or current residence address of the locator.
- The actual or proposed course or direction of the tunnel.
- The height and width of the tunnel.
- A description of the tunnel that includes, among other things, a reference to some natural object or permanent monument.
- The date of location of the tunnel right, which must be the date the notice is posted at the face or point of commencement of the tunnel.

[iv] Recording and Filing Requirements

For a discussion of the requirements to record a notice of location of a tunnel right, see *§ 36A.200[1][d][vi]*. Additional filing requirements are mandated by the Federal Land Policy and Management Act [*see § 36A.200[1][d][vii]*].

[c] Ongoing Work on Tunnel

Failure to prosecute work on the tunnel for six months will be considered an abandonment of the right to all undiscovered veins on the line of the tunnel [*30 U.S.C. § 27*; 43 C.F.R. § 3843.1].

[2] FORM

Notice of Location of Tunnel Right [30 U.S.C. § 27; Pub. Res. Code § 3906]

NOTICE OF LOCATION OF TUNNEL RIGHT

NOTICE IS HEREBY GIVEN that the undersigned hereby locates and claims a tunnel right or location (1) commencing at a conspicuous and substantial monument, on which this notice is posted, erected at the point of commencement (hereafter referred to as the "point of commencement") of the tunnel described in this notice, and (2) extending for a proposed course of 3,000 feet in a [*direction, e.g.*, northeasterly] direction.

NOTICE IS FURTHER GIVEN that

1. The name of the Locator of this tunnel right is _____ and_____[his *or* her] current [mailing *or* residence] address is _____.

2. The point of commencement described in this notice is located in the County of _____, State of California, approximately _____ feet [*direction, e.g.*, northwesterly *or* North 45 degrees 15' West] from_____[*name some well-known natural object or permanent monument*].

3. There has been erected at the point of commencement described in this notice and at 600-foot intervals along the 3,000-foot proposed course of the tunnel conspicuous and substantial monuments consisting of [*select appropriate provision below*]

[*If mound of stones is used:*]

a mound of stones at least two feet in height above the ground.

[*If a wooden post is used:*]

a wooden post at least one and one-half inches in diameter projecting at least two feet above the ground.

[*If a metal post is used:*]

a metal post at least one inch in diameter projecting at least two feet above the ground.

[*CONTINUE*]

4. The tunnel on which this tunnel right is based is and shall be _____ feet in height and _____ feet in width.

5. The tunnel right or location hereby claimed is situated in Section _____ of Township _____ North [*or* South], Range _____ East [*or* West], M.D.B. & M. [*or* S.B.B. & M. *or* H.B. & M.] in the_____[*name*] Mining District and the County of _____, State of California.
DATED: _____.

_____ [*signature of locator*]
[*typed name*]



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18-36A California Legal Forms--Transaction Guide § 36A.204

AUTHOR: Linda Breen Pierce

§ 36A.204 Amended Notice of Location of Mining Claim [Pub. Res. Code § 3908]

[1] Comment

[a] Use of Form

The form in [2], *below*, is an amended notice of location of a mining claim that corrects defects in an original notice of location of a mining claim. If the locator of a lode or placer mining claim or a tunnel right finds that the original notice of location was defective or erroneous or did not comply with the law, the locator may post and file an amended notice of location remedying the defect. However, the amended location notice will not cure a defect if this would interfere with the existing rights of others as of the time of the posting and filing of the amended notice [*Pub. Res. Code § 3908*].

For original notices of location, see *§§ 36A.200[2]* (lode mining claim), *36A.201[2]* (placer mining claim on land covered by United States survey), *36A.202[2]* (placer mining claim on land not covered by United States survey), and *36A.203[2]* (tunnel right).

[b] Posting and Filing Amended Notice

The locator must comply with the following requirements for posting and filing an amended notice [*Pub. Res. Code § 3908*]:

- The amended location notice on the claim to which it relates must be posted in the same manner that the original notice of location was posted on the claim [*see § 36A.200[1][d][v]*];

- The amended notice must be recorded in the office of the appropriate county recorder [*see § 36A.200[1][d][vi]*]; and

- A copy of the recorded notice must be filed with the California State Office of the Bureau of Land

Management [*see § 36A.200[1][d][vii]*].

[2] FORM

Amended Notice of Location of Mining Claim [Pub. Res. Code § 3908]

AMENDED NOTICE OF LOCATION OF MINING CLAIM

NOTICE IS HEREBY GIVEN that the undersigned, by this amended notice of location made in accordance with *California Public Resources Code Section 3908*, amends that certain Notice of Location of [Lode *or* Placer *or* Tunnel Right] Mining Claim dated _____, and recorded on_____[*date*], in Book _____ at page _____ of the Official Records in the Office of the County Recorder of _____ County, California.

[*Insert contents of Notice of Location form for appropriate mining claim: see §§ 36A.200[2] (lode claim), 36A.201[2] (placer claim based on survey), 36A.202[2] (placer claim not based on survey), or 36A.203[2] (tunnel right).*]

NOTICE IS FURTHER GIVEN that this Amended Notice of Location is made solely for the purpose of correcting any errors, defects, or omissions in the original Notice of Location and that the undersigned does not hereby, or in any other manner, waive any rights_____[he *or* she] has or may have acquired under the Notice of Location of Lode Mining Claim dated _____, and recorded on_____[*date*], in Book _____ at page _____ of the Official Records in the Office of the County Recorder of _____ County, California.
DATED: _____.

_____ [*signature of locator*]
[*typed name*]



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18-36A California Legal Forms--Transaction Guide § 36A.205

AUTHOR: Linda Breen Pierce

§ 36A.205 Declaration of Annual Labor Performed on Claim [43 U.S.C. § 1744; Pub. Res. Code § 3913]

[1] Comment

[a] Use of Form

The form in [2], *below*, is a declaration of assessment work performed on a mining claim. To hold possession of an unpatented mining claim [for discussion of patents, see *§ 36A.11*], the owner of the claim must perform at least $100 worth of labor or make at least $100 worth of improvements on the claim between 12:01 p.m. of the first day of September, commencing with the first day of September following location of the claim, and 12:01 p.m. of the first day of September of the following year [*30 U.S.C. § 28*]. Under the federal statutes, this type of work is referred to as "assessment work" [*see 43 U.S.C. § 1744(a)(1)*]. Both state and federal law require the owner of the claim to record and file annually [*see* [c], *below*] an affidavit or declaration of the assessment work performed on the claim during the year (this form) [*43 U.S.C. § 1744(a)*; *Pub. Res. Code § 3913(a)*; *see Code Civ. Proc. § 2015.5* (use of declaration in lieu of affidavit)]. The federal statutes, however, provide the owner with two alternatives to the filing of a declaration [*see* [f], *below*].

For additional discussion of the requirement of annual assessment work on a claim, see *§ 36A.200[1][e]*.

[b] Required Contents of Affidavit or Declaration

The affidavit or declaration must contain all of the following information [*Pub. Res. Code § 3913(a)*]:

- The name of the claim and the serial number, if any, assigned to the claim by the Bureau of Land Management in the United States Department of Interior.

- A reference by book and page or document number to the public record of the notice of location of the claim and, if amended, of the last recorded amendment.

- The section or sections, township, range, and meridian of the United States survey within which all or any part of the claim is located.

- A description of the labor performed or improvements made on or for the benefit of the claim for which the proof is made, the value of each item, and the dates on which, or the period of time within which, the labor was performed or the improvement was made, or a statement that a maintenance fee in the amount prescribed by the laws of the United States has been or will be paid, the amount of the maintenance fee, and the date of payment or anticipated payment.

- The name, current mailing address, and current residence address of the person making the proof (the declarant) and of the owner of the claim, as known to the declarant.

- A statement that the claim is held and claimed by the owner, or the declarant if he or she is entitled to possession of the claim, for the valuable mineral contained in the claim.

- The name and address of the person who performed the work or made the improvements described in the declaration, as known to the declarant, if applicable.

- A statement that all monuments required by law to have been erected on the claim and all notices required by law to have been posted on the claim were in place at a date within the assessment year for which the declaration is made, and a statement of that date.

- A statement that on the above date, each corner monument bore or contained a marking sufficient to appropriately designate the corner of the mining claim to which it pertains and the name of the claim.

[c] Recording and Filing Declaration

The declaration must be recorded in the office of the county recorder of the county where the claim is located within 30 days after the time required by law for performing the labor, making improvements, or paying the maintenance fee [*Pub. Res. Code § 3913(a)*; *see* [a], *above* (assessment year)]. The owner must then file an exact legible reproduction or duplicate (other than microfilm) of the recorded declaration with the Bureau of Land Management (BLM) before December 31 of the year in which it is recorded [*43 U.S.C. § 1744(a)*; 43 C.F.R. § 3833.2-4(a)]. The copy must be filed with the BLM at the following address:

Bureau of Land Management
California State Office
2135 Butano Drive
Sacramento, CA 95825-0451
Telephone: (916) 978-4400
Internet: http://www.blm.gov/nhp/efoia/ca/Phone/PhDir.htm

[d] Effects of Recordation and Failure to File

Under California law, a properly recorded and certified copy of the declaration issued by the county recorder is prima facie evidence of the performance of the labor, the making of the improvements, or the payment of the maintenance fee [*Pub. Res. Code § 3913(b)*]. The neglect or failure to make the declaration and cause it to be properly recorded creates a prima facie presumption under California law of the act and intent of the owner to abandon the claim, and imposes the burden of proof on the owner to show, in any contest, suit, or proceeding involving title to the claim, that the labor has been performed, that the improvements have been made, or that the maintenance fee has been paid [*Pub. Res. Code §*

3913(c)].

However, if the declaration is executed and recorded by anyone other than the owner within the 30-day period, and the owner discovers that there are deficiencies in the recorded declaration, the owner may record a supplemental declaration to correct the problems [*see Pub. Res. Code § 3913(c)*].

Under federal law, the failure to file a copy of the recorded declaration with the BLM is deemed conclusively to constitute an abandonment of the claim by its owner [*43 U.S.C. § 1744(c)*; *see Crummett v. Miller (1997) 53 Cal. App. 4th 897, 906-907, 62 Cal. Rptr. 2d 113* (*43 U.S.C. § 1744(c)* is self-executing and may be enforced in a civil action brought by a private party in state court)]. However, the owner may avoid this result by filing with the BLM a "Notice of Intention to Hold Claim" [*43 U.S.C. § 1744(a)*; *see* [f], *below*].

[e] Certificate of Payment of Property Taxes

A county board of supervisors may pass a resolution requiring any person filing a declaration (or affidavit) [*see Code Civ. Proc. § 2015.5*] in accordance with *Pub. Res. Code § 3913*, or any person filing a notice of intention to hold a claim [*see 43 U.S.C. § 1744(a)*; *see also* [f], *below*], to demonstrate, before the recordation of the declaration or notice of intention, proof of payment of any unsecured tax levied against the mining claim on which the declaration or notice of intention to hold is filed; and proof of payment of any delinquent unsecured taxes levied against the person filing the affidavit or notice of intention [*Pub. Res. Code § 3914*]. If this resolution is adopted, it may also prohibit the county recorder from accepting the declaration or notice of intent to hold for recordation without the tax collector's certification that the taxes have been paid [*Pub. Res. Code § 3914(a)*]. Further, the resolution may require all of the following [*Pub. Res. Code § 3914(b)*]:

- That, when taxes are paid, the tax collector issue a receipt or certificate of payment for use in certification of the affidavit or notice of intent to hold.

- That the county recorder forward the affidavit or notice of intent to hold to the tax collector if the county recorder receives an affidavit for recording by mail and the affidavit or notice of intent to hold does not contain the tax collector's certification that the taxes have been paid.

- That, if applicable, the tax collector then certify that the taxes have been paid on the face of the affidavit or notice of intent to hold and return the document to the county recorder for recording.

- That, if the taxes have not been paid, the tax collector return the affidavit unrecorded to the filer.

The form in [2], *below*, contains a tax collector's certification.

[f] Federal Alternatives to Declaration

Under federal law, there are two alternatives to the filing of the declaration. Compliance with either of these alternatives will not, however, relieve the owner of the obligation to comply with California's declaration requirements [43 C.F.R. § 3833.2-5(a); *see* 43 C.F.R. § 3833.2-4(b); *see also* American Law of Mining, Ch. 45, *Assessment Work Requirement* (Matthew Bender)].

Under the first alternative, the annual assessment work required to be performed on a mining claim may be, instead of labor or improvements, a geological, geochemical, or geophysical survey conducted by a qualified expert and verified by a detailed report recorded in the office of the county recorder where the claim is located [*30 U.S.C. §§ 28-1, 28-2*]. An exact legible reproduction or duplication (other than microfilm) of the recorded report must then be filed with the BLM at the address set forth in [c], *above* [43 C.F.R. § 3833.2-4(b)]. That copy must include the BLM serial number

assigned to the claim and any change in the mailing address of the owner of the claim [43 C.F.R. § 3833.2-4(b)].

The second alternative permits the owner to file a notice of intention to hold a claim [*43 U.S.C. § 1744(a)*]. The notice must be in the form required by regulation [*see* 43 C.F.R. § 3833.2-5].

For a detailed discussion of the federal requirements for annual assessment work, see American Law of Mining, Ch. 45, *Assessment Work Requirement* (Matthew Bender).

[2] FORM

Declaration of Annual Labor Performed on Claim [43 U.S.C. § 1744; Pub. Res. Code § 3913]

DECLARATION OF ANNUAL LABOR

_____[*Name*] declares:

That_____[he *or* she] is the person in whose behalf [*or* _____ (he *or* she) makes this Declaration on behalf of _____ (*name*), the person in whose behalf] the labor and improvements described in this Declaration have been performed and made on the claim described in this Declaration, and that

1. The name of the claim is_____[*name of claim*] Mining Claim.

2. The Notice of Location for this claim is duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, and this claim was assigned serial number [*number*] by the authorized officer of the_____[California State Office *or* Riverside District and Land Office] of the United States Bureau of Land Management.

3. The claim referred to in this Declaration is located in the County of _____, State of California, and in Section _____ of Township [North *or* South], Range [East *or* West], [M.D.B. & M. *or* H.B. & M. *or* S.B.B. & M].

[*EITHER*]

4. Between 12:00 noon on the first day of September [*year*], and 12:00 noon on the first day of September _____, the following [labor was performed *or* improvements were made] on or for the benefit of the claim described in this Declaration:_____[*set forth a description of each item of labor performed or improvements made on, including the value of each item and the date on which, or period of time within which, the labor was performed or improvement was made*].

[*OR*]

4. A maintenance fee in the amount prescribed by the laws of the United States [has been *or* will be] paid. The amount of the maintenance fee is $[*specify*]. The maintenance fee [has been *or* will be] paid on_____[*specify date*].

[*CONTINUE*]

[*EITHER, if the declarant is the same person as the owner of the claim:*]

5. The name, current mailing address, and current residence address of the person who owns the claim and makes this proof is _____ [*name*] ,_____[*current mailing address*],_____[*current residence address*].

[*OR, if the declarant is not the same person as the owner of the claim:*]

5. (a) The name, current mailing address, and current address of the Declarant is_____[*name*],_____[*current mailing address*],_____[*current residence address*].

(b) The owner of the claim described in this Declaration is_____[*name*],_____[*current mailing address*],_____[*current residence address*].

[*CONTINUE*]

6. The claim described in this Declaration is held and claimed by the [owner *or* Declarant who is entitled to possession of the claim as grantee of the original locator] for the following valuable minerals contained in it: [*describe briefly, e.g.,* the gold contained in the vein or lode that is the basis for the claim].

7. The name and address of the person or persons who performed or made work and improvements described in this Declaration, as known to Declarant, is_____[*set forth names and addresses*].

8. All monuments required by law to have been erected on the claim described in this Declaration, as described in the Notice of Location recorded as described in Paragraph 2 of this Declaration, and all notices required by law to have been posted on the claim were in place on_____[*date within the assessment year for which the declaration is made*], a date within the assessment year for which this Declaration is made.

9. On the date set forth in Paragraph 8 of this Declaration, each corner monument erected at a corner of the claim bore or contained marking sufficient to appropriately designate the corner of the mining claim to which it pertains and the name of the claim, in that they bore respectively the marking [*specify markings of corner monuments*].

[*Add if appropriate:*]

10. The mailing address of the owner or owners of the claim described in this Declaration has been changed from that stated in the_____[Notice of Location *or* Declaration of Annual Labor recorded _____ (*date*), in Book _____ at Page _____ of the Official Records of this County] to that stated in Paragraph 5 of this Declaration.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on_____[*date*], at_____[*city*], _____ County, California.

_____ [*signature of declarant*]
[*typed name*]

[*Add if required by local ordinance:*]

TAX COLLECTOR'S CERTIFICATE

I,_____[*name of tax collector*], Tax Collector of _____ County, State of California, hereby certify that I have received the property tax due and payable on the above mining claim.
DATED: _____.

_____ [*signature of tax collector*]
[*typed name and title*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.206

AUTHOR: Linda Breen Pierce

§ 36A.206 Agreement Between Mining Claim Owner and Contractor for Construction of Tunnel on Unpatented Mining Claim

[1] Comment--Use of Form

The form in [2], *below*, is an agreement for the construction of a mining tunnel by an independent contractor on an unpatented mining claim. The owner of an unpatented mining claim must perform at least $100 worth of assessment work on the claim each year to hold the claim [*see § 36A.205*] and must perform at least $500 of assessment work on the claim before he or she may apply for a patent for the claim [*30 U.S.C. §§ 28, 29*]. The running of a tunnel for the purpose of developing a lode or lodes owned by the owner of the mining claim is considered the performance of the required assessment work on the claim [*30 U.S.C. § 28*].

[2] FORM

Agreement Between Mining Claim Owner and Contractor for Construction of Tunnel on Unpatented Mining Claim

AGREEMENT FOR DEVELOPMENT WORK

_____[*name*] ("Owner") and_____[*name*] ("Contractor") agree:

Recitals

WHEREAS, Owner is the owner of that certain mining claim known as the_____[*name of claim*] Mining Claim and described in a Notice of Location duly recorded in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California;

NOW THEREFORE:

Excavation of Tunnel

1. Contractor shall excavate and construct a mining tunnel on the claim approximately [*number*] lineal feet in length, commencing at a point [*specify e.g.,* approximately 100 feet east of the point of discovery as described in the Notice of Location], and ending at a point [*specify, e.g.,* approximately 50 feet east of the west boundary of the claim].

Size of Tunnel

2. The tunnel agreed to be constructed by Contractor under Paragraph 1 of this Agreement shall be located at a depth of not more than _____ feet below the surface of the claim, shall be _____ feet in width and _____ feet in height in the clear and shall be timbered where necessary.

Payment for Tunnel

3. Owner shall pay the sum of $_____ per lineal foot to Contractor for each foot of the tunnel completed by Contractor_____[*specify manner of payment, e.g.,* in equal installments on the completion of each _____ feet of the tunnel *or* within _____ days after full and final completion of the tunnel].

Time for Performance

4. Contractor shall commence work on the tunnel within _____ days after the date of this Agreement and shall complete the same in a good and minerlike manner on or before_____[*date*].

Charges and Liens

5. Contractor shall pay all charges incurred in the construction of the tunnel for labor and materials used in this construction as they become due. Should Contractor fail to pay any such charge, Owner may pay the same on behalf of Contractor and deduct it from the amount due Contractor under this Agreement. Should the amount so paid by Owner exceed the amount due under this Agreement from Owner to Contractor on full completion of the tunnel, the same shall immediately become, on payment by Owner, due and payable by Contractor to Owner with interest thereon at the highest rate allowed by law from the time of payment by Owner to its repayment to Owner by Contractor.

Examination by Contractor

6. Contractor has by careful examination ascertained (a) the nature and location of the tunnel; (b) the conformation of the ground and soil in which the tunnel is to be constructed; (c) the character, quantity, and quality of materials, equipment, and facilities required to complete the tunnel under this Agreement; and (d) all other matters in any way affecting the performance of this Agreement by Contractor. Further, Contractor represents and agrees that Contractor is entering this Agreement solely as a result of those examinations by Contractor and not because of any representations made to Contractor by Owner or any agent of Owner and not contained in this Agreement.

Indemnity Agreement

7. Contractor shall indemnify and hold Owner and the property of Owner, including the claim, free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons, from damage or destruction of any property or properties, or from any charges for labor or materials, caused by or connected with the performance of this Agreement by Contractor, its agents, subcontractors, or employees.

Workers' Compensation Insurance

8. Contractor, at Contractor's own cost and expense, shall procure and maintain in full force and effect during the continuance of this Agreement, a policy of workers' compensation insurance for the protection of Contractor's employees, including executive, managerial, and supervisorial employees, engaged in work on the tunnel. Further, Contractor shall require all subcontractors, if any, employed by Contractor in the performance of this Agreement to procure and maintain workers' compensation insurance for the protection of their employees and certificates evidencing policies obtained by Contractor and Contractor's subcontractors shall, on demand, be deposited with Owner.

Notices

9. Any and all notices or other matters required or permitted by this Agreement or by law to be served on, given to, or delivered to either party by the other party to this Agreement, shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is addressed [*or* to a supervisorial employee of that party], or in lieu of such personal service when deposited in the United States mail, first-class postage prepaid, addressed to Owner at_____[*mailing address*], or to Contractor at_____[*mailing address*].

Attorneys' Fees

10. Should any litigation be commenced between the parties to this Agreement concerning the tunnel, any provision of this Agreement, or the rights and obligations of either party in relation to this Agreement, the party prevailing in that litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for attorneys' fees in such litigation which may be recovered as part of the costs of that litigation or in a separate action brought for that purpose.

Sole and Only Agreement

11. This instrument constitutes the sole and only agreement of the parties relating to the tunnel and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect.

Assignment by Contractor

12. This Agreement is for the personal services of Contractor in constructing the tunnel. Contractor may not assign this Agreement, Contractor's right to any moneys becoming due under this Agreement, or Contractor's duties under this

Agreement, to any other person or entity without the written consent of Owner.

EXECUTED ON_____[*date*], at_____[*city*], California.

OWNER
_____ [*signature of owner*]
[*typed name*]
CONTRACTOR
_____ [*signature of contractor*]
[*typed name*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.207

AUTHOR: Linda Breen Pierce

§ 36A.207 Agreement for Mining Partnership Among Co-Owners of Mining Claim [Pub. Res. Code §§ 3940-3950]

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement between two or more co-owners of a mine or mining claim to work the mine or mining claim jointly and to form a mining partnership. Because a mining partnership differs in some respects from an ordinary business partnership [*see* [b], [c], *below*], care should be taken to distinguish an agreement to form a mining partnership from an agreement to form a partnership to engage in mining or in the operation of a mining claim [*see* American Law of Mining, Ch. 121, *Comparative Analysis of Organizational Structures* (Matthew Bender)]. If the parties desire simply to form a partnership to engage in mining or in the operation of a mine, counsel should use the partnership forms in Ch. 15, *General Partnerships* . When the parties desire to form a mining partnership [*see Pub. Res. Code §§ 3940-3950*], counsel should use the form in [2], *below*.

Mining partnerships cannot be formed in California for the extraction of oil, gas, or other hydrocarbons [*Pub. Res. Code § 3950*].

[b] Formation of Mining Partnership

A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral from it actually engage in working the claim [*Pub. Res. Code § 3940*]. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of the mining partnership [*Pub. Res. Code § 3941*]. The following two elements are essential to the formation of a mining partnership [*Pub. Res. Code §§ 3940, 3941*; *Treat v. Murdock (1937) 8 Cal. 2d 316, 320-321, 65 P.2d 881]* :

- Ownership of shares or interests in a mine.

- Joint participation by the partners in the actual working of the mine.

This joint participation requirement does not mean that each of the co-owners must perform actual physical labor in the mine. It does mean, however, that each of the partners must have some part in carrying on the mining operations. A mining partnership arises only when the co-owners unite and cooperate in working the mine [*Treat v. Murdock (1937) 8 Cal. 2d 316, 321, 65 P.2d 881* ; *Peterson v. Beggs (1915) 26 Cal. App. 760, 762, 148 P. 541]* .

[c] Characteristics of Mining Partnership

[i] Partner's Share of Profits and Losses

The mining partners share in the profits and losses of the mine in the proportion the interest each owns in the mine bears to the whole partnership capital or whole number of partnership shares [*Pub. Res. Code § 3942*]. The decision of the members owning a majority of the shares or interests in the partnership binds the partnership in the conduct of its business [*Pub. Res. Code § 3949*].

[ii] Assignment of Partnership Interest

The interests of each partner in a mining partnership may be sold and assigned without the consent of the other partners [*Pub. Res. Code § 3945*]. The purchaser of a selling partner's interest in the partnership becomes, from the date of purchase, a member of the mining partnership [*Pub. Res. Code § 3945*]. Although the consent of the other partners is not required, it would obviously be unjust to subject those partners to personal liability for debts created and torts committed by a person who became a member of the partnership without their consent and against their wishes [*Skillman v. Lachman (1863) 23 Cal. 198, 23 Cal. 199, 206]* . Consequently, no member, agent, or manager of a mining partnership can, by a written contract, bind the partnership except by express authority derived from the members of the partnership [*Pub. Res. Code § 3948*].

[iii] Partnership Property

The mining ground owned and worked by the partners in mining, whether or not purchased with partnership funds, is partnership property [*Pub. Res. Code § 3944*]. Each member of a mining partnership has a lien on the partnership property for the debts due the partnership's creditors and for money advanced by the member for partnership use [*Pub. Res. Code § 3943*]. The lien exists notwithstanding an agreement among the partners that it must not exist [*Pub. Res. Code § 3943*]. A purchaser of an interest in a mine owned by a mining partnership takes it subject to all such existing liens unless he or she purchased the interest in good faith for a valuable consideration without notice of any such lien [*Pub. Res. Code § 3946*]. However, a purchaser of the interest of a partner in a mine that the partnership is engaged in working takes with notice of all liens resulting from the relation of the partners to each other and to partnership creditors [*Pub. Res. Code § 3947*].

[d] Fiduciary Relationship of Partners

There is nothing in the law of mining partnerships which relieves a mining partner of the same degree of fiduciary responsibility as that of any other partner; indeed, considering the nature of mining operations, it is essential that the partners in such ventures should show the highest good faith and regard for the rights of their fellow venturers [*Bufalini v. De Michelis (1955) 136 Cal. App. 2d 452, 457, 288 P.2d 934]* .

[2] FORM

Agreement for Mining Partnership Among Co-Owners of Mining Claim [Pub. Res. Code §§ 3940-3950]

MINING PARTNERSHIP AGREEMENT

_____[*Name*] and_____[*name*], both of _____ County, California, agree:

Recital of Ownership of Mining Claim

WHEREAS, they are co-owners entitled to possession of that certain mining claim in the _____ Mining District, County of _____, State of California, known as the_____[*name of claim*] Mining Claim and described in that certain Notice of Location (referred to below as the "Notice of Location") duly recorded on_____[*date*], in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California, and

Recital of Purpose of Claim

WHEREAS, the purpose of the parties in owning the claim is to work it and extract the mineral from the claim.

Association as Partners

NOW, THEREFORE, they do hereby associate themselves together actually to engage in working the claim as a Mining Partnership, as that term is defined in *Public Resources Code Section 3940*, on the following terms and conditions.

Term of Partnership

1. This mining partnership shall commence on execution of this Agreement and continue until dissolved by mutual agreement of the parties.

Initial Capital

2. The initial capital of this mining partnership shall be, in addition to the claim and its rights to the claim, the sum of $_____, of which each partner shall contribute, by depositing in a checking account in the name of the partnership at _____ Branch of _____ Bank in _____, California, the following amounts:

_____ [*name*] the amount of $_____

_____ [*name*] the amount of $_____

Name of Partnership

3. The name of the partnership shall be the_____[*name of claim*] Mining Company.

Ownership and Profits

4. The interest owned by each of the parties in the claim, and therefore the share of mining partnership profits and losses that shall be received and borne by each of the parties, is as follows:

_____ [*name*] owns a _____ [*e.g.*, one-half] interest.

_____ [*name*] owns a _____ [*e.g.*, one-half] interest.

Books of Account

5. At all times during the continuance of this mining partnership the parties shall keep accurate books of account in which all matters relating to the mining partnership and the claim, including all income, expenditures, assets, and liabilities of the mining partnership, shall be entered. The books shall be kept on an accrual [*or* cash] basis and shall be open to examination by either [*or* any] partner at any time.

Fiscal Year

6. The fiscal year of the mining partnership shall end on the _____ day of [*month*] each year.

Accountings

7. A complete accounting of the partnership affairs as of the close of business on the last day of March, June, September, and December of each year shall be rendered to each partner within [*number*] days after the close of each such month. On each accounting being made, the profits and losses of the partnership shall be distributed to the partners as provided in this agreement. Except as to manifest errors brought to the attention of the other partner [*or* all other partners] within [*number*] days after its rendition, each accounting shall be final and conclusive as to the partners.

Time Devoted to Partnership

8. Each of the partners shall devote his or her undivided time and attention to the working of the claim and the affairs of this mining partnership.

Dissolution

9. On dissolution of this mining partnership, the claim shall be sold, the affairs of the partnership shall be wound up, the other assets of the partnership liquidated, the debts paid, and the surplus divided among the partners according to their interests in the claim as described in Paragraph 4 of this Agreement.

Notices

10. Any and all notices between the parties provided for or permitted under this Agreement or by law shall be in writing and shall be deemed duly served when personally delivered to the partner to whom directed, or, in lieu of such personal service, when deposited in the United States mail, first class postage prepaid, addressed to the_____[

name of partner] at_____[*mailing address*], or to_____[*name of partner*] at_____[*mailing address*]. Either [*or* Any] partner may, at any time, change his or her address for the purpose of this Paragraph by giving written notice of the change to the other partner[s] in the manner prescribed in this Paragraph.

Consents and Agreements

11. Any and all consents and agreements provided for or permitted by this Agreement shall be in writing, and a signed copy of each such consent or agreement shall be filed and kept with the books of the mining partnership.

Sole and Only Agreement

12. This instrument contains the sole and only agreement of the parties relating to the claim or the mining partnership and correctly sets forth the rights, duties, and obligations of each to the other in connection therewith as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

EXECUTED on_____[*date*], at_____[*city*], California.

_____ [*signature of partner*]
[*typed name*]
_____ [*signature of partner*]
[*typed name*]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.208

AUTHOR: Linda Breen Pierce

§ 36A.208 Grant Deed Conveying Unpatented but Located Mining Claim

[1] Comment--Use of Form

The form in [2], *below*, is a grant deed that may be used to convey the locator's right in an unpatented but properly located mining claim to another person.

The locator of a mining claim has the right to the exclusive possession and enjoyment of the land embraced in that claim [*Mery v. Brodt (1898) 121 Cal. 332, 335, 53 P. 818]* . Although the ultimate fee title to the land remains in the United States government, the interest of the locator of a validly located mining claim on public land of the United States has always, except as against the United States government, been treated as virtually a title in fee [*Buchner v. Malloy (1909) 155 Cal. 253, 255, 100 P. 687]* . The locators of a properly located mining claim are treated, as between themselves and all persons but the United States, as the owners of the land and the mines comprising the claim [*Buchner v. Malloy (1909) 155 Cal. 253, 256, 100 P. 687]* . They may sell the claim, give it to another, or transfer it in any other mode authorized by law [*Richardson v. McNulty (1864) 24 Cal. 339, 345]* .

However, because a mining claim is real property [*Del Giorgio v. Powers (1938) 27 Cal. App. 2d 668, 678, 81 P.2d 1006]* it can be conveyed or transferred only in the manner in which real property may be conveyed or transferred. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the interest or by his or her agent authorized in writing [*Civ. Code § 1091*]. Thus, a mining claim, although unpatented, can be transferred or conveyed only by an instrument in writing signed by the owner of the claim or by his or her agent duly authorized to sign the instrument by a written instrument [*Mery v. Brodt (1898) 121 Cal. 332, 335, 53 P. 818]* . This form sets forth the usual form of the instrument in writing used to transfer estates in real property in California [*see Civ. Code § 1092*].

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of

the mining claim being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code § 11901 et seq.*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[2] FORM

Grant Deed Conveying Unpatented but Located Mining Claim

Recording requested by_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

Mail tax statements to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent for Grantor]

DEED OF MINERAL CLAIM

I,_____[*name of grantor*], [*legal status of grantor, e.g.,* a single man] grant to_____[*name of grantee*], [*legal status of grantee, e.g.,* a California corporation] all that real property in the County of _____, State of California, described as follows:

That certain mining claim known as the_____[*name of claim*] Mining Claim and more fully described in that certain Notice of Location recorded on_____[*date*], in Book _____ at Page _____ of the Official Records in the Office of the County Recorder of _____ County, California.

EXECUTED on_____[*date*], at_____[*city*], California.

_____ [*signature of grantor*]
[*typed name*]

Acknowledgment

[*Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On_____[*date*] before me,_____[*name and title of officer taking acknowledgment*], personally appeared_____[*names(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[*Seal*]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.209

AUTHOR: Linda Breen Pierce

§ 36A.209 Grant Deed Conveying Mineral Interest in Minerals

[1] Comment--Use of Form

The form in [2], *below*, is a deed of mineral interests granting all, or a fraction of all, of the minerals under the land owned by the grantor. Title to the surface of the land need not be held by the same person or persons who hold the title to subsurface minerals in the land [*Ames v. Empire Star Mines Co., Ltd. (1941) 17 Cal. 2d 213, 222, 110 P.2d 13]* .

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the mining interest being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code § 11901 et seq.*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

For comprehensive coverage of deeds in general, see Ch. 27, *Deeds and Recording* .

[2] FORM

Grant Deed Conveying Mineral Interest in Minerals

Recording requested by_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent for Grantor]

DEED OF MINERAL INTEREST

I,_____[*name of grantor*],_____[*status of grantor, e.g.,* a married man dealing with his sole and separate property] grant to_____[*name of grantee*], [*status of grantee, e.g.,* a California corporation] as a mineral interest and not as a royalty interest [*fraction, e.g.,* one half *or* all] of the minerals of every kind [except gas, oil, and other hydrocarbon substances] in, under, or that may be produced from the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

EXECUTED on_____[*date*].

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.210

AUTHOR: Linda Breen Pierce

§ 36A.210 Grant Deed Provision Reserving Mineral Interest in Land

[1] Comment--Use of Form

The form in [2], *below*, is a provision that may be inserted in a grant deed if the grantor wishes, in conveying the fee title to the land to the grantee, to retain the minerals under the land. It should be inserted immediately following the land description in the deed. For a complete grant deed conveying mineral interest in minerals, see *§ 36A.209*.

[2] FORM

Grant Deed Provision Reserving Mineral Interest in Land

EXCEPTING AND RESERVING unto Grantor,_____ [*amount, e.g.,* all *or* one half] of the minerals of every kind [except oil, gas, and other hydrocarbon substances,] in, under, or that may be extracted from that real property.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.211

AUTHOR: Linda Breen Pierce

§ 36A.211 Notice of Intent to Preserve Mineral Right

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of intent to preserve a mineral right and should be recorded by an owner of a mineral right who has not been using the right but wishes to prevent that right from becoming dormant and thereafter being terminated by the owner of the subject real property. For the purposes of this procedure, "mineral right" means an interest in virtually any mineral that is created by any grant or reservation, whether a fee or lesser interest, mineral, royalty, or leasehold, absolute or fractional, corporeal or incorporeal, and includes express or implied appurtenant surface rights [*Civ. Code § 883.110*].

The statutory provisions governing the termination and preservation of mineral rights are part of the marketable record title provisions of the Civil Code [*see Civ. Code § 880.020 et seq.*], which fix expiration periods for certain interests in real property. For a discussion of the general provisions applicable to all of these terminable interests, see Ch. 26, *Real Property Escrows* .

The statutory provisions discussed in this section apply to all mineral rights, regardless of when they were executed or recorded [*Civ. Code § 883.270*].

[b] Exempt Interests

The following interests are not subject to the termination and preservation provisions discussed throughout this section [*Civ. Code § 883.120*]:

- Mineral rights reserved to the United States, whether in a patent, in accordance with federal law, or otherwise.

- An oil or gas lease, mining claim, or other mineral right of a person, to the extent provided in *Civ. Code § 880.240*.

- Mineral rights of the state or a local public entity, or of any other person, to the extent provided in *Civ. Code § 880.240*.

In addition, the following interests are not subject to expiration under the marketable record title provisions of the Civil Code [*Civ. Code § 880.240*]:

- The interest of a person in possession (including use or occupancy) of real property, and the interest of a person under whom a person in possession claims, if possession would have been revealed by reasonable inspection or inquiry.

- An interest of the United States or an interest in real property which, under federal law, is not subject to state recording requirements and has not terminated under federal law.

- An interest of the state or a local public entity in real property.

- A conservation easement.

Finally, the termination and preservation provisions discussed in this section do not limit or affect the common law governing abandonment of a mineral right or any other statutory procedure for clearing an abandoned mineral right from title to real property [*Civ. Code § 883.130*].

[c] Termination of Dormant Mineral Rights

The owner of real property subject to a mineral right may bring an action to terminate the right if it is dormant [*Civ. Code § 883.210*]. A mineral right is dormant if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the termination action [*Civ. Code § 883.220*]:

- There is no production of the minerals and no exploration, drilling, mining, development, or other operations that affect the minerals, whether on or below the surface of the real property or on other property, whether or not unitized or pooled with the real property;

- No separate property tax assessment is made of the mineral right or, if made, no taxes are paid on the assessment; and

- No instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded.

An action to terminate a mineral right must be brought in the superior court of the county in which the subject real property is located [*Civ. Code § 883.240(a)*], in the same manner and subject to the same procedure as an action to quiet title [*Civ. Code § 883.240(b)*; *see* discussion of *Code Civ. Proc. § 760.010 et seq.* (quiet title provisions) in California Real Estate Law and Practice, Ch. 370, *Quieting Title and Determining Adverse Claims* (Matthew Bender)].

A terminated mineral right is unenforceable and is deemed to have expired. A court order terminating a mineral right is equivalent for all purposes to a conveyance of the mineral right to the owner of the real property [*Civ. Code § 883.260*].

[d] Preserving Mineral Rights

An owner of a mineral right may record, at any time, a notice of intent to preserve the mineral right [*Civ. Code § 883.230(a)*]. Recordation will prevent an unused mineral right from becoming dormant [*see* [c], *above*], and therefore prevent the owner of the subject real property from terminating the right, if it occurs within 20 years immediately preceding commencement of an action to terminate the right [*Civ. Code § 883.230(c)(1)*].

Dormancy and termination can also be avoided after the commencement of an action to terminate the mineral right if the owner of the right (1) records a late notice of intent to preserve the right and (2) pays into court for the benefit of the owner of the real property the litigation expenses attributable to the mineral right covered by the notice. For purposes of this procedure, "litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including reasonable attorneys' fees [*Civ. Code §§ 883.230(c)(2), 883.250*].

[e] Contents of Notice

In most respects, a notice of intent to preserve a mineral right must comply with the requirements of the marketable record title provisions of the Civil Code applicable to notices to preserve any interest in real property [*see* Ch. 26, *Real Property Escrows*]. The one exception concerns the description of the right; a mineral rights notice may refer generally and without specificity to any or all mineral rights claimed by the claimant in any real property situated in the county [*see* bracketed instruction under "Interest" in the form in [2], *below*]. This description may be used in lieu of the more detailed descriptive statements required for all other notices of intent to preserve interests in real property by *Civ. Code § 880.330(b)(2), (3),* and is sufficient notwithstanding any other statutory provisions governing marketable record title [*Civ. Code § 883.230(b)*].

[2] FORM

Notice of Intent to Preserve Mineral Right

Recording requested by
_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Indexing Instructions:

This Notice Must be Indexed as Follows:
Grantor and Grantee Index--Each Claimant is a Grantor

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from being extinguished under Title 5 (commencing with *Section 880.020) of Part 2 of Division 2 of the Civil Code* (Marketable Record Title).

Claimant Name: _____

Mailing address: [*must be given for each claimant*]

Interest: [*Describe; description may refer generally to any or all mineral rights claimed by claimant in any real property in county, e.g.,* All my rights in the minerals of every kind in, under, or that may be produced from the real property in the County of _____, State of California, described as follows: _____ (*legal description of real property*)].

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true. If this notice is made on behalf of a claimant, I assert under penalty of perjury that I am authorized to act on behalf of the claimant.

Date: _____.

_____ [*signature of claimant or of person signing on claimant's behalf*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide § 36A.212

AUTHOR: Linda Breen Pierce

§ 36A.212 Mineral Right Quitclaim Deed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a quitclaim deed quitclaiming all interest in and to mineral rights covered by a mineral rights lease. If the term of a mineral rights lease has expired or a mineral rights lease has been abandoned by the tenant, the tenant, within 30 days after demand by the landlord, must execute, acknowledge, and deliver, or have recorded, a deed quitclaiming all interest in and to the mineral rights covered by the lease [*Civ. Code § 883.140(b)*]. For the purposes of this requirement, the term "tenant" or "lessee" includes an assignee or other successor in interest of the tenant [*Civ. Code § 883.140(a)(1)*], and "landlord" or "lessor" includes a successor in interest, heir, or grantee of the landlord [*Civ. Code § 883.140(a)(2)*].

For a general discussion of quitclaim deeds, see Ch. 27, *Deeds and Recording* .

[b] Partial Expiration or Abandonment

If the expiration or abandonment covers less than the tenant's entire interest, the tenant must execute, acknowledge, and deliver an appropriate instrument or notice of surrender or termination that covers the interest that has expired or been abandoned [*Civ. Code § 883.140(b)*]. For an instrument of surrender executed by a tenant and releasing a part of leased land from an oil and gas lease, see *Ch. 36, Oil and Gas Rights and Leases, § 36.210[2]*.

[c] Actions to Clear Title

If a tenant fails to comply with the applicable requirements, the tenant is liable for all damages sustained by the landlord as a result of the failure, including court costs and reasonable attorneys' fees in an action to clear title to the landlord's interest. The tenant must also pay landlord the sum of $150 [*Civ. Code § 883.130(c)*]. These requirements do not,

however, make a quitclaim deed or other instrument or notice of surrender or termination, or a demand for the same, a condition precedent to an action to clear title to the landlord's interest [*Civ. Code § 883.140(d)*].

[2] FORM

Mineral Right Quitclaim Deed

Recording requested by
_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent for Grantor]

MINERAL RIGHT QUITCLAIM DEED

I,_____[*name of tenant*], hereby quitclaim to_____[*name of landlord*] all my right in the minerals of every kind in, under, or that may be produced from the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

This Quitclaim Deed is given specifically to release the mineral rights granted by that certain mineral right lease dated_____[*date*], between_____[*name of tenant*] and_____[*name of landlord*].

Executed on_____[*date*], at_____[*city*], California.

_____ [*signature*]
[*typed name and address*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
A. Mining Claims

18-36A California Legal Forms--Transaction Guide §§ 36A.213-36A.219

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.213[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
B. Timber Interests

18-36A California Legal Forms--Transaction Guide § 36A.220

AUTHOR: Linda Breen Pierce

§ 36A.220 Contract Between Landowner and Purchaser for Sale of Standing Timber on Real Property

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract for the sale of standing timber growing on certain designated real property and for its severance and removal by a specified date. The contract also provides that any disputes arising between the parties to it concerning it or their duties under it must be settled by arbitration.

[b] Contract as Grant of Real Property

When this form is used, the buyer should insist that the signatures on the contract be acknowledged before a notary public and the contract be recorded in the office of the county recorder of the county where the real property on which the timber is growing is located. Contracts for the purchase and sale of standing timber or trees, for severance or otherwise, may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants of real property [*Civ. Code § 1220*]. All statutory provisions relating to the recordation or nonrecordation of conveyances of real property and the effect of recordation or nonrecordation apply to recorded and nonrecorded contracts for the purchase and sale of standing timber [*Civ. Code § 1220*]. It appears that when the real property on which the timber being sold is growing is in a county that has adopted a documentary transfer tax under the California Documentary Transfer Tax Act [*Rev. & Tax. Code § 11901 et seq.*], a transfer tax may have to be paid on the contract at the time it is submitted for recording. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* . The recording fees are set by statute [*see Gov. Code § 27361* (current amounts)].

[c] Contract as Sale of Goods

In California, real property is defined as consisting, among other things, of land and that which is affixed to land [*Civ.*

Code § 658]. A thing is attached to land when it is attached to it by roots as in the case of trees, vines, or shrubs [*Civ. Code § 660*]. However, for purposes of sale, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale, are treated as goods and their sale is governed by the statutes regulating the sale of goods [*Civ. Code § 660*].

Even before enactment of the Uniform Commercial Code in California, it was held that a contract for the sale of standing timber, purchased separately from the land on which it is growing for the purpose of severance from the land, is a contract of sale of "goods" or personal property [*Palmer v. Wahler (1955) 133 Cal. App. 2d 705, 711, 285 P.2d 8* ; *Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 282-283, 299 P.2d 367]* . This rule has been codified in California's Commercial Code [*see Com. Code § 2107(2)*]. It makes no difference whether the timber is to be severed from the land by the buyer or by the seller or that it forms a part of the realty at the time of contracting [*Com. Code § 2107(2)*].

[d] When Title Passes to Buyer

[i] As Trees Are Cut

The fact that growing timber to be cut is treated as goods or personal property for sales contract purposes does not mean that title to the timber passes to the buyer on execution of the sales contract [*Drewry v. Welch (1965) 236 Cal. App. 2d 159, 166, 46 Cal. Rptr. 65]* . The rule was well established in California before adoption of the Uniform Commercial Code that when there was a contract for the sale of standing trees to be removed from the land within a specified time, title passed to the buyer only for those trees which the buyer cut and removed within the designated period. Title to the remaining, uncut trees remained in the seller [*Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7]* .

It is doubtful that any change in this rule was intended by adoption of the Uniform Commercial Code. The applicable statute provides that the parties can, by identification, effect a present sale before severance [*Com. Code § 2107(2)*]. Thus, when the parties do not effect a present sale before severance by identification, presumably the contract for the sale of timber to be cut is merely a contract for a future sale. Should a contract for the sale of timber to be severed from the land within a specified time continue to be construed as merely a sale of only so many trees as the buyer might cut and remove within the designated time [*Mallett v. Doherty (1919) 180 Cal. 225, 229, 180 P. 531]* , it would seem "identification," as defined in the Commercial Code [*see Com. Code § 2501(1)*], could not occur until the designated time for removal has elapsed [*see Mallett v. Doherty (1919) 180 Cal. 225, 230, 180 P. 531]* .

If the contract of sale does not constitute an absolute present sale but only a sale of so much timber as the buyer may remove from the land within the time designated in the contract, the seller cannot prevent the buyer from removing trees within the contract time. Should the buyer be interrupted by the seller from removing trees during that period, the period of interruption would be taken into account and the period designated in the contract would be extended by operation of law for that period [*Mallett v. Doherty (1919) 180 Cal. 225, 230, 180 P. 531]* .

[ii] Present Sale Passing Immediate Title

Even before the adoption of the Uniform Commercial Code the parties could contract for the sale of timber to be severed within a designated time and agree that it was a present sale passing immediate title to the severed timber to the buyer [*Gibbs v. Peterson (1912) 163 Cal. 758, 763, 127 P. 62* ; *Miller v. Taber (1957) 149 Cal. App. 2d 792, 795, 309 P.2d 110]* . In one case, an absolute present sale of timber was held to exist when the contract of sale provided the following [*Peterson v. Gibbs (1905) 147 Cal. 1, 6, 81 P. 121* ; *see Gibbs v. Peterson (1912) 163 Cal. 758, 763, 127 P. 62* (as explained in *Mallett v. Doherty (1919) 180 Cal. 225, 228, 180 P. 531*)]:

- The buyer was to remove the timber within 10 years;

- If the timber was not removed within 10 years, the buyer should pay seller a yearly rental thereafter of $200 for the privilege of removing it; and

- All the privileges granted in the agreement were to continue until the timber was removed.

If an absolute present sale, passing title to the timber to the buyer at the time the contract is executed, is held to have occurred, the time designated in the contract for removal of the timber and other agreements in the contract are held to be mere "covenants" [*Gibbs v. Peterson (1912) 163 Cal. 758, 764, 127 P. 62* ; *Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 283, 299 P.2d 367]* . Damages may be recovered by the seller for breach of the covenants but a forfeiture of the buyer's title to the standing timber cannot be declared because of the buyer's breach [*Gibbs v. Peterson (1912) 163 Cal. 758, 765, 127 P. 62* ; *Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 285-286, 299 P.2d 367]* .

[e] Scaling of Timber

Unless modified or controlled by other expressions in an agreement, "timber" means such trees as are fit to be used for lumber in building or similar construction [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852* ; *Crain v. Hoefling (1942) 56 Cal. App. 2d 396, 405, 132 P.2d 882]* .

Most contracts for the sale of timber, and most logging contracts [*see § 36A.225*], provide that the timber subject to the contract will be "scaled" by a specified "scaler." A "scaler" is an expert person employed to determine the number of board feet and the percentage of unsound timber in logs [*see Lumsden v. Roth (1955) 138 Cal. App. 2d 172, 176, 291 P.2d 88* ; *Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 108, 146 P.2d 8]* . Scaling is essential to fix the rights of the parties in most logging and timber sales contracts and is a continuous operation [*Connecticut Valley Lbr. Co. v. Stone (2d Cir. 1914) 212 F. 713, 715]* .

If the parties agree on a specified scaler as the person who is to determine the board feet and unsound timber in lots subject to their contract, the scaler's report is binding on the parties and can be set aside only for fraud or mistake [*Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 108, 146 P.2d 8]* . The scaler is like an arbitrator, and the mistake that will justify a rejection of an arbitrator's decision must be more than a mere error in judgment--it must amount to actual or constructive fraud [*Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 108, 146 P.2d 8]* .

One way to check on the accuracy of scalings made by a scaler is to have a qualified "timber cruiser" make a "stump cruise" of the land from which the timber has been removed. In making a "stump cruise" the cruiser marks the point where the butt of a felled tree struck the ground and then determines the length between that mark and the point where the top cut was made on the felled tree trunk, as determined from sawdust left on the ground. The cruiser then measures the circumference inside the bark of the tree stump left in the ground and by a fixed formula finds the number of board feet in the felled portion of the tree that was "bucked" or sold for timber purposes [*see Lumsden v. Roth (1955) 138 Cal. App. 2d 172, 176, 291 P.2d 88]* .

The scale for the measurement of logs that will apply to all timber transactions in California is that published by the National Bureau of Standards [*see Bus. & Prof. Code § 12313*].

[2] FORM

Contract Between Landowner and Purchaser for Sale of Standing Timber on Real Property

CONTRACT FOR SALE OF STANDING TIMBER

_____[*Name(s)*] of _____ County, California ("Seller") agrees to sell to Buyer, and_____[*name(s)*] of _____ County, California ("Buyer") agrees to purchase from

Seller all the standing timber now growing on and forming a part of the real property described in Paragraph 1 of this Contract on the following terms and conditions.

Description of Real Property

1. The real property from which Buyer may remove standing timber under this Contract and on which the standing timber agreed to be sold by this Contract is now growing, and of which it now forms a part, is that certain real property in the County of _____, State of California, described as follows: [*legal description of real property*].

Standing Timber Being Sold

2. The timber agreed to be sold by Seller and purchased by Buyer consists of the following:

(a) All logs on the real property defined as merchantable by the official rules of a recognized log scaling and grading bureau including short logs;

(b) All trees of the following species now growing, standing, or lying on the real property: [*list species*]; and

(c) [*specify any other lumber or forest products the buyer may remove from the described real property*].

Price

3. The Buyer shall pay to Seller, in the manner prescribed in this Contract, as the full price for any and all timber purchased by Buyer or removed from the real property by Buyer under this Contract, the following sums and amounts:

Species	Grade	Price	Measurement
_____	_____	$_____	per _____
_____	_____	_____	
_____	_____	$_____	per _____
_____	_____	_____	
_____	_____	$_____	per _____
_____	_____	_____	

Manner of Payment

4. Buyer shall pay to Seller the purchase price, as determined under Paragraph 3 of this Contract, for all timber removed from the real property in any calendar week on or before the Friday of the following calendar week. All such payments shall be accompanied by a scaler's report by the scaler named in this Contract and shall be delivered to Seller at the address specified in Paragraph 13 of this Contract for the mailing of notices to Seller.

Scaling of Timber

5. All timber purchased by Buyer under this Contract or removed from the real property by Buyer under this Contract shall be scaled by_____[*name of scaler or scaling bureau*] at the sole cost and expense of Buyer but at

a location convenient to the real property that is agreeable to Seller.

Operations by Buyer

6. Buyer shall fell and remove the timber sold under this Contract from the real property in a good and workmanlike manner on or before_____[*date*], and shall use Buyer's reasonable best efforts to prevent unnecessary damage, including damage by forest fire or like calamity, to the real property.

No Liens

7. Buyer shall fell, cut, and remove the timber sold under this Contract from the real property at Buyer's own cost and expense and shall allow no lien to attach to the real property for any materials furnished or labor rendered by any person or entity in performance of Buyer's duties or rights under this Contract.

Examination by Buyer

8. Buyer hereby agrees with and represents to Seller that Buyer has carefully examined the real property and all timber on the real property and that Buyer is entering this Contract and agreeing to purchase the timber on the real property as a result of this examination and not as a result of any representations made to Buyer by Seller, or any agent of Seller, not contained in this Contract.

Indemnity Agreement

9. Buyer shall indemnify and hold Seller free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons, or from the damage or destruction of any property or properties caused by or connected with the performance of this Contract by Buyer, his or her agents, servants, subcontractors, or employees.

Workers' Compensation Insurance

10. Buyer, at its own cost and expense, shall procure and maintain in full force and effect during Buyer's felling or removal of timber from the real property, a policy of workers' compensation and liability insurance for the protection of Buyer's employees, including executive, managerial, and supervisorial employees, engaged in work on the real property. Further, should Buyer employ any subcontractors Buyer shall require them to procure and maintain a policy of workers' compensation and liability insurance for the protection of their employees engaged in work on the real property. Buyer further agrees that the certificates for the insurance policies required by this Paragraph shall be displayed to Seller or Seller's representative at any time on request.

Default

11. Should Buyer default in the performance of any conditions of this Contract, Seller may suspend all future operations by Buyer under this Contract or on the real property until the default is corrected by Buyer on giving Buyer [*number*] days' notice in writing of the default and Seller's election to suspend operations under this Paragraph.

Arbitration

12. Should any dispute arise between Buyer and Seller concerning any provision of this Contract, the rights or duties of either party, or any other matter relating to the purchase and sale agreed to be made in this Contract, the same shall be settled by arbitration in the following manner:

(a) Buyer and Seller shall each appoint an arbitrator within [*number*] days after receiving written notice from the other of the name of the other's arbitrator and a request to appoint an arbitrator.

(b) The two arbitrators appointed by the parties shall name a third arbitrator within [*number*] days after their appointment by the parties.

(c) The decision in writing of any two of the three arbitrators so appointed shall be binding and conclusive on the parties to this Contract.

(d) Should either party fail to appoint an arbitrator within [*number*] days after receipt of a notice to so do from the other, the arbitrator appointed by the other party shall act for both and that arbitrator's decision in writing shall be final and binding on both Buyer and Seller.

(e) The costs and expense, including reasonable compensation for the arbitrators, shall be borne in such a manner and in such proportions by Buyer and Seller as the arbitrators in their majority report shall specify.

Notices

13. Any and all notices or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either party by the other party to this Contract, shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is directed [or to a supervisorial employee of such party], or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Buyer at_____[*mailing address*], or to Seller at_____[*mailing address*]. Either party may change its address for the purpose of this Paragraph by giving the other party written notice of such change in the manner prescribed by this Paragraph.

Sole and Only Agreement

14. This Contract constitutes the sole and only agreement of the parties relating to the timber and said real property and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force and effect.

Assignment by Buyer

15. This Contract shall be binding on the heirs, assigns, and successors of the parties to this Contract, but no rights or duties under this Contract may be assigned, sold, or transferred in any manner by Buyer to any other person or entity whatsoever without the express written consent of Seller.

EXECUTED on_____[*date*], at_____[*city*], California.

SELLER

_____ [*signature of seller*]

[*typed name*]

BUYER

_____ [*signature of buyer*]

[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
B. Timber Interests

18-36A California Legal Forms--Transaction Guide § 36A.221

AUTHOR: Linda Breen Pierce

§ 36A.221 Grant Deed Conveying Standing Timber

[1] Comment

[a] Use of Form

The form in [2], *below*, is a deed that conveys only the timber "now standing, lying, and contained" on the land to its grantee. In contrast, the deed in *§ 36A.222[2]* conveys timber rights forever to the land described in it to its grantee. Similarly, the provision in *§ 36A.223[2]* reserves only standing timber to the grantor of the grant deed in which it is inserted and the provision in *§ 36A.224[2]* reserves timber rights to the grantor.

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the timber rights being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code § 11901 et seq.*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[b] Standing Timber vs. Timber Rights

A fee interest in timber standing on real property may be conveyed apart from title to the real property on which the timber stands [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 734, 50 Cal. Rptr. 852]* . A distinction must be drawn, however, between a conveyance of "standing timber" and a conveyance of "timber rights" on real property. Standing timber means the present growth of timber on the land; timber rights includes all successive growths of timber on the land as well as existing timber [*see Crain v. Hoefling (1942) 56 Cal. App. 2d 396, 405-406, 132 P.2d 882]* .

If a grant or reservation is limited to "timber," the grant or reservation is only of the standing timber on the land. Under this grant, the grantee's rights are exhausted when the timber growing on the land at the time of the grant is exhausted [

Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852] . Under a grant of "timber rights," however, the grantee is not so limited. The grantee may, in this case, harvest successive crops of timber that grow on the land as they mature [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852]* . Exceptions and reservations in grants are to be interpreted in favor of the grantor [*Sears v. Ackerman (1903) 138 Cal. 583, 586, 72 P. 171]* .

[c] Time for Removal of Standing Timber

If the conveyance or reservation specifies the time within which the timber must be removed, the timber must be removed during the specified time. If no time limit is specified, a reasonable time will be implied [*Cochran v. Union Lbr. Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632]* .

If, however, a deed clearly and unequivocally states that the grantee of standing timber is given "the right to remove same at any time hereafter," the grantee's right to remove the timber is perpetual [*Cochran v. Union Lbr. Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632]* . The grantee has only the right to remove standing timber growing on the land at the time the deed is given, not successive crops of timber grown on the land, but it may remove that standing timber at any time in the future it chooses [*Cochran v. Union Lbr. Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632]* .

If a deed conveying the timber "now standing" on described real property is executed in accordance with an earlier contract containing similar language, the grantee is entitled to all timber standing on the property at the date of the deed, rather than on the date of the preceding contract. In the absence of mistake, fraud, or other matter affecting the validity of the instrument, a deed executed in consummation of an agreement between the parties merges all prior negotiations and agreements relating to its subject matter. Thus, the deed becomes the measure of the rights of the parties and prevails over the contract under which it was executed [*Cochran v. Union Lbr. Co. (1972) 26 Cal. App. 3d 423, 429, 102 Cal. Rptr. 632]* .

[2] FORM

Grant Deed Conveying Standing Timber

Recording requested by
_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent for Grantor]

DEED TO STANDING TIMBER

I,_____[*name of grantor*],_____[*status of grantor, e.g.,* a married man dealing with his sole and separate property] grant to_____[*name of grantee*], [*status of grantee, e.g.,* a single man] all of the timber now standing, lying, and contained on the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

TOGETHER WITH a right-of-way over the premises to get and remove the timber herein granted.
DATED: _____.

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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18-36A California Legal Forms--Transaction Guide § 36A.222

AUTHOR: Linda Breen Pierce

§ 36A.222 Grant Deed Conveying Timber Rights in Perpetuity

[1] Comment--Use of Form

The form in [2], *below*, is a grant deed conveying the timber rights in perpetuity to certain real property. For a discussion of the distinction between a conveyance of timber rights and a conveyance of standing timber, see *§ 36A.221[1][b]*.

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the timber rights being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code § 11901 et seq.*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[2] FORM

Grant Deed Conveying Timber Rights in Perpetuity

Recording requested by
_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent of Grantor]

DEED OF TIMBER INTERESTS

I,_____[*name of grantor*] _____[*status of grantor, e.g.*, a married man with his sole and separate property *or* a single woman] grant to_____[*name of grantee*], [*status of grantee, e.g.*, a single man *or* a California corporation] the timber rights forever, and not merely the standing timber, to the real property in the County of _____, State of California, described as follows: [*legal description of real property*];

TOGETHER with a right-of-way over the land to get and remove timber therefrom.
DATED: _____.

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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18-36A California Legal Forms--Transaction Guide § 36A.223

AUTHOR: Linda Breen Pierce

§ 36A.223 Grant Deed Provision Reserving Standing Timber

[1] Comment--Use of Form

The form in [2], *below*, is a provision that may be inserted in a grant deed conveying title to real property when the grantor of the deed wishes to retain the standing timber on the property. The provision in this form reserves to the grantor only the standing timber now on the land being conveyed; it does not reserve the right to future growths of timber that will grow on the land. The distinction between a grant or reservation of "standing timber" and "timber rights," and the rules governing time for removal of the timber are discussed in *§ 36A.221[1][b]* and *[c]*.

The provision in the form in [2], *below*, should be inserted in the grant deed immediately following the legal description of the land. For a provision that may be inserted in a grant deed reserving to the grantor timber rights to the conveyed property, see *§ 36A.224[2]*.

[2] FORM

Grant Deed Provision Reserving Standing Timber

EXCEPTING AND RESERVING unto Grantor all of the timber now standing, lying, and contained on said real property TOGETHER WITH a right of way until_____[*date*], over the real property to get and remove such timber.



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18-36A California Legal Forms--Transaction Guide § 36A.224

AUTHOR: Linda Breen Pierce

§ 36A.224 Grant Deed Provision Reserving Timber Rights in Perpetuity

[1] Comment--Use of Form

The form in [2], *below*, is a provision that may be inserted in a grant deed conveying title to real property when the grantor wants to reserve the timber rights in perpetuity to the property. The distinction between "standing timber" and "timber rights," and the language required to convey or reserve either, is discussed in *§ 36A.221[1][b]*. The provision in this form should be inserted in the grant deed immediately following the legal description of such property. For a provision that may be inserted in a grant deed reserving to the grantor rights to standing timber only, see *§ 36A.223[2]*.

[2] FORM

Grant Deed Provision Reserving Timber Rights in Perpetuity

EXCEPTING AND RESERVING unto Grantor all timber rights to, and not merely the timber now standing on, the real property TOGETHER WITH the right to enter the real property and remove timber therefrom.



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18-36A California Legal Forms--Transaction Guide § 36A.225

AUTHOR: Linda Breen Pierce

§ 36A.225 Logging Contract Between Timber Landowner and Logging Contractor

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract for the logging of real property by a licensed logging contractor or timber operator. A logging contract to log a specific piece of land requires the contractor to fell the timber trees on that land, cut them into saw logs, and transport the logs to mill or market [*see Fray v. Rogers (1969) 272 Cal. App. 2d 858, 862, 77 Cal. Rptr. 776]* . In most instances, a timber harvesting plan must be submitted and approved by the Department of Forestry and Fire Protection (Department of Forestry) before the commencement of timber operations [*see § 36A.21[3]*].

In this contract the landowner is also the operator of a lumber mill that transforms saw logs into lumber suitable for use in the construction industry. The owner agrees to pay the logging contractor a specified amount per measure for different species of timber delivered by the contractor to the owner's mill yard at a designated place. Normally the price is calculated as a designated sum per board foot of lumber contained in the saw logs delivered to the yard. The number of board feet in a given log is determined by a "scaler" who "scales" the log according to a scaling or log measurement table published by the National Bureau of Standards [*see Bus. & Prof. Code § 12313*; *see also § 36A.220[1][e]* (scaling)]. Enough copies of this contract should be prepared so that both the owner and contractor may have an executed copy; an executed copy may be recorded in the county where the real property is located, and a copy may be filed with the California Department of Forestry.

[b] Timber Operator's License

[i] When Required; Exceptions

Before executing the contract in [2], *below*, the contractor must be licensed by the State Board of Forestry. The Forest Practice Act requires every timber operator in California to obtain a timber operator's license [*Pub. Res. Code § 4571(a)*

]. A "timber operator" is anyone who cuts or removes (or contracts with others to cut or remove) timber or other solid wood forest products from non-federal lands for commercial purposes [*Pub. Res. Code §§ 4526.5, 4527*]. Additionally, a timber operator's license is required for mechanical site preparation activities undertaken before the stocking standards of the Forest Practice Act and related rules have been met in a logging area [*14 Cal. Code Reg. § 1022.2*]. However, a timber operator's license is not required for either of the following:

- Site preparation activities involving broadcast burning [*14 Cal. Code Reg. § 1022.2*].

- The maintenance of erosion control structures following the completion of timber operations described in an approved work completion report for a timber harvesting plan [*14 Cal. Code Reg. § 1022.3*].

No other licenses are required for timber operations in California [*Pub. Res. Code § 4578*].

[ii] Basis for Denial of License

A timber operator's license may be denied for any of the following reasons:

- The applicant is not the real person in interest [*Pub. Res. Code §§ 4570, 4573(a)*].

- Material misrepresentation or false statements in the application [*Pub. Res. Code § 4573(b)*].

- Conviction within one year of the application of unlawfully operating without a license [*Pub. Res. Code § 4573(c)*].

- Failure by the applicant to comply with the Forest Practice Act within the three years before the filing of the application [*Pub. Res. Code § 4573(d)*].

- The applicant's failure or refusal to pay a judgment resulting from violation of the Forest Practice Act or of rules and regulations adopted under the Act [*Pub. Res. Code § 4573(e)*].

- The applicant's failure or refusal to keep current insurance [*Pub. Res. Code §§ 4572(c), 4573(f)*].

- The applicant's failure or refusal to reimburse the Department of Forestry for costs incurred as the result of an action brought to correct a violation of the Act [*Pub. Res. Code §§ 4573(g), 4601-4612*].

[c] Contractor's Lien

Every person who renders labor or uses livestock, machinery, or appliances to perform work or service in connection with the felling, preparing, or transporting of any logs has a lien on any and all of the logs and on any and all of the lumber or other timber products manufactured from the logs for the value of that person's work and services [*Civ. Code § 3065*]. The lien has priority over all other encumbrances on the logs except the landowner's claim for a reasonable stumpage when the lien claimant was not employed directly by the landowner [*Civ. Code § 3065*]. The amount of the lien is not, however, limited by any contract between the landowner and the logging contractor or between the logging contractor and the person who makes the logs into lumber [*Civ. Code § 3065*]. However, the lien cannot extend to any work or labor performed by the claimant for the logging contractor not embraced within, contemplated by, covered by, or reasonably necessary to the execution of the original contract between the contractor and log owner when the lien claimant had actual notice of the contract before performance of the contractor's services [*Civ. Code § 3065*].

[d] Effect of Recorded Logging Contract

When the original contract between the logging contractor and timber owner is recorded in the county where the timberland is located before commencement of work under the contract, the recordation is equivalent to the giving of actual notice of the contract by the owner to all persons who may be entitled to a lien for services rendered under the contract [*Civ. Code § 3065*]. The contract must be acknowledged to be recorded [*Gov. Code § 27287*]. Recording fees are set by statute [*see Gov. Code § 27361* for current recording fees].

[e] Contractor's Bond

The contract in [2], *below*, requires the contractor to furnish a bond for the payment of labor and material claims incurred by the contractor in the performance of the contract. When the contract is recorded together with a bond of the contractor for payment of liens claims, the amount that may be recovered from the timber owner on such claims is limited to the price specified in the contract [*Civ. Code § 3065*]. The balance of the liens must be paid by the contractor and the sureties on the contractor's payment bond [*Civ. Code § 3065*]. The bond must be in an amount not less than 50 percent of the contract price specified in the contract and must be conditioned for the payment in full of the claims of all persons performing labor or services under the contract [*Civ. Code § 3065*]. It must also, by its terms, be made to inure to the benefit of such persons so as to give them a right of action on the bond either in a suit to enforce their liens on the logs and lumber or in a separate suit on the bond itself [*Civ. Code § 3065*].

[2] FORM

Logging Contract Between Timber Landowner and Logging Contractor

LOGGING CONTRACT

_____[*name*], a California corporation ("Owner"), and_____[*name*] of _____ County, California ("Contractor"), agree:

Contract to Log Land

1. Contractor, at Contractor's own cost and expense, shall log and remove the timber described in Paragraph 6 of this Contract from the real property owned by Owner in the County of _____, State of California, and described as follows: [*set forth legal description of real property*].

Delivery Site

2. Contractor, at Contractor's own cost and expense, shall transport and deliver all timber so logged and removed by Contractor from the real property to Owner at Owner's yards at _____, California [*or* on _____ Street in _____, California].

Term of Contract

3. Contractor shall commence performance under this Contract no later than_____[*date*].

Payment

4. On the first and 15th day of each and every month commencing [*date, which must be the first or 15th day of the*

month following the date contractor must commence performance of the contract as specified in Paragraph 3], Owner shall pay to Contractor, as payment in full for Contractor's services under this Contract, for each measure of timber delivered by Contractor in accordance with Paragraph 2 of this Contract during the preceding 15 calendar days the following sums and amounts:

For _____ [*species*] timber $_____ per _____ [*measure*];

For _____ [*species*] timber $_____ per _____ [*measure*];

For _____ [*species*] timber $_____ per _____ [*measure*];

Scaling

5. All timber logged and delivered by Contractor under this Contract shall be scaled at the location specified in Paragraph 2 of this Contract at the sole cost and expense of [Owner *or* Contractor] by_____[*name of scaling firm or association*] and a copy of the scaling reports shall be delivered to Owner and Contractor.

Timber to Be Logged

6. The timber that is to be logged, felled, and removed from the real property by Contractor under this Contract is estimated by Owner to be of the total volume of [*specify*] and consists of [*describe logs and trees to be removed as to species, size, etc.*].

Temporary Roads and Buildings

7. Contractor may install and erect, at Contractor's own cost and expense, on the real property all such temporary roads, bridges, transportation facilities, buildings, and other improvements as may be reasonably necessary or convenient for the performance of this Contract by Contractor; provided, however, all such roads, bridges, transportation facilities, buildings, and improvements shall be removed by Contractor at Contractor's own cost and expense within 30 days after full completion of performance of this Contract by Contractor.

Operations Under Contract

8. Contractor shall conduct operations required for performance by Contractor of this Contract on said real property and otherwise in a good and workmanlike manner, and shall allow no liens or other encumbrances for labor performed or materials furnished as a result of such operations, or for any other cause connected with Contractor or Contractor's operations under this Contract, to attach to the real property. Should any such lien attach to the real property, or should any charge incurred by Contractor in performance of this Contract which might or could become or be perfected into a lien on the real property remain unpaid for more than 15 days after it becomes due, the same may be paid by Owner and deducted from any amounts due or to become due to Contractor under this Contract.

Payment Bonds

9. Within _____ days after execution of this Contract and before any work or operations are commenced on the property by Contractor, Contractor shall deliver to Owner a bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to [*50 percent or more*] of the anticipated revenue to be received by Contractor from Owner under this Contract securing payment by Contractor of all claims for labor performed or materials furnished in the performance of this Contract by Contractor. The bond shall inure to the benefit of any and all persons who perform labor or use livestock, machinery or appliances in the execution of the work to be done under this Contract so as to give those persons, and their assigns or successors in interest, a right of action to recover on the bond in any suit brought to enforce the liens provided under *Civil Code Section 3065*, or in a separate suit brought on the bond.

Examination by Contractor

10. Contractor agrees with and represents to Owner that Contractor has carefully examined the timber and real property subject to this Contract, and that Contractor is entering into this Contract as a result of Contractor's examination of this timber and real property and not as a result of any representation made to Contractor by Owner or any agent of Owner that is not contained in this Contract.

Workers' Compensation Insurance

11. Contractor, at Contractor's own cost and expense, shall procure and maintain in full force and effect during the term of this Contract a policy of workers' compensation insurance for the protection of Contractor's employees, including executive, managerial, and supervisorial employees, engaged in work on the real property. Further, should Contractor employ any subcontractors or other independent contractors to perform work under this Contract on the real property, Contractor shall require those subcontractors or other independent contractors to procure and maintain a policy of workers' compensation insurance for the protection of their employees engaged in work on the real property. Certificates evidencing that insurance shall, on request at any times during reasonable business hours, be exhibited to Owner or Owner's representative.

Indemnity Agreement

12. Contractor shall indemnify and hold Owner free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons including Contractor, or from damage or destruction of any property or properties caused by or connected with the performance of this Contract by Contractor, its agents, servants, subcontractors, or employees.

Attorneys' Fees

13. If any action at law or in equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of this Contract, the prevailing party shall be entitled to reasonable attorneys' fees, which may be set by the court in the same action or in a separate action brought for that purpose, in addition to any other relief to which the prevailing party may be entitled.

Notices

14. Any and all notices or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either party by the other party shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is directed [or to a supervisorial employee of such party], or, in lieu of such personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Owner at_____[*mailing address*], or to Contractor at_____[*mailing address*]. Either party may change its address for the purposes of this Paragraph by giving written notice of such change to the other party in the manner prescribed in this Paragraph.

Assignment by Contractor

15. This Contract is for the personal services of Contractor in rendering the services prescribed by it and Contractor may not, either voluntarily or involuntarily, assign this Contract, or Contractor's right to moneys becoming due under this Contract, or delegate Contractor's duties under this Contract to any other person or entity without the express written consent of Owner.

Sole and Only Agreement

16. This instrument constitutes the sole and only agreement of the parties, Owner and Contractor, relating to the timber and real property subject to this Contract and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force and effect.

Binding on Heirs and Assigns

17. This Contract shall inure to the benefit of and be binding on the heirs, successors, and assigns of each of the parties to this Contract but nothing contained in this Contract shall authorize the assignment of this Contract by Contractor other than in the manner prescribed in Paragraph 15, above.

Time Is of Essence

18. Time is hereby expressly declared to be of the essence in the performance of this Contract.

Timber Operator's License

19. Contractor represents and warrants to Owner that Contractor has a current and valid timber operator license (# _____) issued by the California State Board of Forestry required for the services to be performed by Contractor under this Contract.

Timber Harvesting Plan

20. The preparation of a Timber Harvesting Plan for operations contemplated by this Contract, the securing of its approval by the California Department of Forestry and Fire Protection, and the securing of any other licenses or permits

required by Contractor for performance by Contractor of this Contract, shall be done by Contractor at Contractor's own cost and expense and without any cost to Owner.

EXECUTED on_____[*date*], at_____[*city*], _____ County, California.

OWNER
_____ [*signature of owner*]
[*typed name and title*]
CONTRACTOR
_____ [*signature of contractor*]
[*typed name and title*]

[*Acknowledgment; see § 36A.208[2]*]



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18-36A California Legal Forms--Transaction Guide §§ 36A.226-36A.229

AUTHOR: Linda Breen Pierce

[Reserved]

§§ 36A.226[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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C. Water Rights

18-36A California Legal Forms--Transaction Guide § 36A.230

AUTHOR: Linda Breen Pierce

§ 36A.230 Agreement by Landowner to Supply Water From Well to Grantee of Adjoining Land

[1] Comment

[a] Use of Form

The form in [2], *below*, is a water use agreement in which the owner of a parcel of land containing a well agrees to supply water for domestic use to a person purchasing an adjoining parcel of land. It was modeled after the water use agreement involved in *Acadia California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 332-333, 5 Cal. Rptr. 686, 353 P.2d 294* , furnished through the courtesy of Fain and Lavine, Attorneys at Law, Beverly Hills, California.

The transaction contemplated by the agreement in [2], *below*, is exempt from the requirements imposed on water companies under the Public Utilities Code [*see Pub. Util. Code § 2704*].

[b] Nature of Right to Receive Water

A contract to furnish water confers a right to receive water on the terms specified in the agreement, and that right is a right in real property. The agreement does not, however, constitute a present grant or transfer of an interest in real property [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 723, 93 P. 858]* . It conveys no interest in the water itself but merely a right to demand and be furnished with water according to the terms of the contract for the purposes specified in the contract [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 723, 93 P. 858]* . Water itself, whether in lakes, streams, or from percolation through the soil, is, in its natural state, part of the land and real property. Like any other part of the realty, it becomes personal property only on being severed from the realty [*Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 154, 131 P. 119]* . When it is sold for domestic use, as in the contract in [2], *below*, and delivered to the premises where it is to be used through pipes, the pipes themselves are fixtures and part of the real property. Therefore, the water is severed from the land and becomes personal property only when taken from the pipes by the consumer [*Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 154, 131 P. 119]* .

[c] Recording Agreement

Since the agreement set forth in [2], *below*, is an instrument affecting an interest or right in real property, it should be recorded in the county where the land is located on which the water is to be used. Because use of the water to be supplied under this agreement is limited to specifically described premises, it in effect constitutes an easement appurtenant to those premises. Since it is therefore an incident of that land, the right to water under this contract will pass as such by a conveyance of that land without express mention or reference being made to it in the instrument of conveyance [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 724, 93 P. 858]* .

[2] FORM

Agreement by Landowner to Supply Water From Well to Grantee of Adjoining Land

WATER USE AGREEMENT

_____[*Name(s)*] of _____ County, California ("Grantor"),
and_____[*name(s)*] of _____ County, California ("Grantee"), agree:

Recital of Original Ownership of Land

WHEREAS, Grantor was, before Grantor's conveyance of a certain portion to Grantee, the owner of a tract of land consisting of approximately [*number*] acres in the County of _____, State of California, described as follows: [*legal description of land owned by Grantor before conveyance to Grantee*]; and

Recital of Conveyance

WHEREAS, Grantor has before this date or will contemporaneously with execution of this Agreement convey to Grantee by separate deed that portion of the above-described land ("Grantee's land"), in the County of _____, State of California, that is described as follows: [*legal description of portion of land conveyed or being conveyed to grantee*]; and

Well Recital

WHEREAS, Grantor before this date drilled and developed a certain water well on that portion of the above-described land ("the retained land"), not being conveyed to Grantee; and

Recital of Desire for Water

WHEREAS, Grantee desires to obtain water from the water well so drilled and developed by Grantor on the retained land for use by Grantee solely for domestic purposes on the land so conveyed to Grantee by Grantor;

Agreement to Furnish Water

NOW, THEREFORE, Grantor agrees to furnish to Grantee from this well such water as may be necessary for the "domestic use," as that term is defined in Pargraph 1, of Grantee in the occupancy and development of Grantee's Land

as a residence on the following terms and conditions.

Domestic Use Defined

1. The "domestic use" for which water is to be furnished Grantee under this Agreement consists in general of the usual household uses and the adequate watering of ornamental plants and shrubbery and household garden plots connected with the occupancy and development of Grantee's land as a residence but not its development for any industrial or commercial or general agricultural purposes.

Limit on Water Amount

2. In no event shall the water furnished Grantee under this contract exceed [*specify amount, e.g.,* one fiftieth] of the maximum amount of water that may be made available from the well or any replacement well drilled in place of this well.

No Guaranty as to Quantity

3. Grantor cannot and does not make any guaranty concerning the quantity of water agreed to be furnished under this Agreement or concerning the continuing availability of water except as provided in this Agreement. Grantee understands and acknowledges that Grantor is not a public utility, is not guaranteeing any specific quantity of water, is the sole owner of the well and all waters underlying or in any way connected with the retained land, and has agreed to furnish water to Grantee only in accordance with the terms of this Agreement. Grantee stipulates that Grantor has no right, title, or interest in or to any water from the well or water underlying the retained land except as specifically set forth in this Agreement.

Maintenance by Grantor

4. Grantor shall at Grantor's sole cost and expense

(a) Maintain the well in proper and sanitary order without representation as to the quantity or quality of water that may be produced by it;

(b) Install such pipeline, tanks, and other facilities for the delivery of water to Grantee's land as Grantor may deem reasonably necessary;

(c) Maintain and operate the facilities described in this Paragraph for so long as it is reasonably possible to procure and distribute water from the waters underlying the retained land; and

(d) Drill a replacement well and place it in operation if the original well should sand up or become inoperative and it is reasonably possible, in the opinion of water experts, to drill another producing well in lieu of the original well on the retained land.

Payment for Water

5. Grantee shall pay to Grantor for water furnished under this Agreement the sum of $_____ per

month during the first year of this Agreement and shall pay during each subsequent year an amount per month that will reflect any increase in the expenses of Grantor over Grantor's expenses for the prior year in furnishing water to Grantee under this Agreement; provided, however, should more than one residence be maintained on Grantee's land, the monthly rate specified in this Paragraph shall apply to each residence; the term residence meaning family dwelling unit.

Receipt on Grantee's Land

6. Grantee shall receive the water furnished Grantee at gravity and without pressure at the property line separating Grantee's land from the retained land and shall, at Grantee's own cost and expense, make such provision for its distribution and use on Grantee's land as Grantee may desire and which is in accord with the permitted uses specified in Paragraph 1 of this Agreement.

Term of Agreement

7. This Agreement is made for the period of one year commencing_____[*date*], and will be automatically renewed thereafter from year to year so long as Grantee complies strictly with the terms of this Agreement concerning the permitted use of the water furnished under it and the payment for that water.

Default Clause

8. Should Grantee fail to pay the monthly charge for water specified in this contract for a period of [*number*] days after receiving written notice of this failure from Grantor, Grantor may terminate this Agreement and discontinue furnishing water to Grantee's Land under it.

Sale of Retained Land and Well

9. Grantor expressly reserves the right to sell, lease, trade, mortgage, encumber, or otherwise deal with the retained land as Grantor may see fit. This Agreement is binding on Grantor only so long as Grantor is, and is binding on Grantor's successors in interest only to the extent they are, the owner of that portion of the retained land, not exceeding 4,000 square feet in area immediately surrounding the well, on which the well is located and which is necessary to the operation and replacement of this well.

Subject to Valid Laws

10. This Agreement is subject at all times to any and all valid laws, ordinances, and governmental regulations whether federal, state, county, or city, and any modification made to this Agreement by any such law or ordinance or regulation or to the conduct of the parties under this Agreement shall not impose liability on either party for breach of their duties under this Agreement.

Assignment and Binding on Heirs

11. This Agreement shall be binding on the parties to this Agreement and on their successors in interest; provided, however, Grantor and Grantor's successors in interest shall have no obligations under this Agreement at any time except to the present or future owners or tenants of Grantee's lands and then only as expressly set forth in this Agreement.

Notices

12. Any and all notices or other matters required or permitted by this Agreement or by law to be served on, given to, or delivered to either party by the other party to this Agreement shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is directed, or, in lieu of such service, when deposited in the United States mail, first-class postage prepaid, addressed to Grantee at the address of Grantee's land or to Grantor at the address of the retained land.

EXECUTED on_____[*date*], at_____[*city*], California.

GRANTOR
_____ [*signature of grantor*]
[*typed name*]
GRANTEE
_____ [*signature of grantee*]
[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
C. Water Rights

18-36A California Legal Forms--Transaction Guide § 36A.231

AUTHOR: Linda Breen Pierce

§ 36A.231 Contract to Construct Water System for and Supply Water to Subdivision--Between Subdivider and Private Water Corporation

[1] Comment

[a] Use of Form

The form in [2], *below*, is a contract by a privately owned water supply company to supply water to a subdivision proposed to be developed by a subdivider on what is now raw land. It is assumed that at the time this contract is drafted neither the preliminary nor final map of the proposed subdivision has been drafted, much less approved, by any of the proper officials of the county where the proposed subdivision is to be located [*see* Ch. 30, *Subdivision Regulation* , for discussion of preliminary and final maps and their approval; *see also* Manaster & Selmi, California Environmental Law and Land Use Practice, Ch. 61, *Subdivision Regulation* (Matthew Bender)].

This contract provides for the water company's construction of the water system according to its specifications with money furnished in advance by the subdivider. The contract in this form is adapted, in part at least, from the fact situation and contract described in *Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App.2d 528, 532-533, 13 Cal. Rptr. 573* .

[b] Conditions in Contract

Because the contract in [2], *below*, will be executed at a preliminary stage of development, many things specified in this contract must be provided for on a conditional basis. For example, because the subdivision has not been definitely planned and plotted yet, the exact cost of the water system to be installed by the water company cannot be determined. Further, performance of the contract is expressly conditioned to commence only after approval of the final subdivision map of the subdivision by proper local county authorities of the county in which the property is located [*see* [2], P 6, *below*].

Two other important conditions to performance of the contract by the water company are included in the form in [2], *below*. First, the contract is conditioned on the issuance of authority by the California Public Utilities Commission to the water company to expand its lines and system to serve the subdivision [*see* [2], P 1, *below*]. Any person, firm, or corporation in California operating, owning, controlling, or managing a public water system is a public utility subject to control and regulation by the state Public Utilities Commission [*Pub. Util. Code § 2701*]. Most public utilities, including water corporations, are prohibited from beginning the construction of a line, plant, or system, or any extension of the same, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction [*Pub. Util. Code § 1001*]. The contents of an application for this certificate for construction or expansion of a public utility line or system is specified in regulations issued by the Commission [*see 20 Cal. Code Reg. § 18*; *see also § 36A.132*].

Second, performance of the contract by the water company is conditioned on the issuance by the California Department of Public Health of a permit for the proposed water system [*see* [2], P 2, *below*]. No person may operate a public water system unless he or she first files a petition for and receives a permit to do so from the Department of Public Health [*Health & Safety Code § 116525*]. A complete set of plans and specifications for the proposed system must be filed with the petition for a permit [*Health & Safety Code § 116530*].

[2] FORM

Contract to Construct Water System for and Supply Water to Subdivision--Between Subdivider and Private Water Corporation

CONTRACT TO SUPPLY WATER TO SUBDIVISION

_____[*Name*], a California corporation ("Supplier"), and_____[*name*], a California corporation ("Subdivider"), agree:

Recitals

WHEREAS, Subdivider proposes to develop a subdivision and construct approximately, [*number*] homes on that certain real property in the County of _____, State of California, described as follows: [*legal description of real property*]; and

WHEREAS, Supplier operates a water system supplying water to residents and other occupants of land in the County of _____, adjoining the real property;

Agreement to Supply Water

NOW, THEREFORE, Supplier agrees to install and operate a complete and adequate water distribution system in the proposed subdivision to be created by Subdivider on the real property and to supply water to the residents and occupants of the Subdivision on the following terms and conditions.

Approval by Public Utilities Commission

1. Rendition of a decision by the California Public Utilities Commission authorizing Supplier to expand its [*or* to construct and operate a] water system to serve this Subdivision is an express condition precedent to the rendition of any performance under this Contract by Supplier.

Permit From Health Department

2. Issuance of a permit by the California Department of Public Health to Supplier for a water system serving this Subdivision and the proposed occupants of this Subdivision is also an express condition precedent to the rendition of any performance under this Contract by Supplier.

Plat of Subdivision

3. Notwithstanding the provisions of Paragraphs 1 and 2 of this Contract and before the occurrence of the events described in these Paragraphs, Supplier shall cooperate with the civil engineer or civil engineering firm selected by Subdivider in preparing the preliminary subdivision map of the Subdivision and determining and showing on the map the location, type, size, and other details of water mains to be installed to serve the Subdivision.

Water Supply Facilities

4. All water mains and water supply facilities installed in or to serve the Subdivision shall be of the type and meet standards determined by Supplier and its engineering staff.

Costs of Water System

5. Notwithstanding the provisions of Paragraphs 1 and 2 of this Contract and before the occurrence of the events described in these Paragraphs, Supplier shall cooperate with Subdivider and the civil engineer or civil engineering firm retained by Subdivider to plot the Subdivision in determining the anticipated cost of the water supply system to be constructed and installed in and to serve the subdivision.

Commitment to Construct Water System

6. After rendition and issuance of the decisions and permits described in Paragraphs 1 and 2 of this Contract and after, or at the time of, approval of the final subdivision map for the Subdivision by the proper authorities of the County of [*specify county in which property is located*], Supplier shall enter into a binding contract to construct and install for Subdivider in the Subdivision and to serve the Subdivision the water supply system shown on the final subdivision map for this Subdivision at the price and cost determined in accordance with Paragraph 5 of this Contract. The binding contract described in this paragraph may be evidenced simply by a letter from Supplier, signed by its president or other authorized executive officer, to the proper authorities of the County of _____, indicating Supplier's commitment to build the described water supply system for a price specified in that letter.

Construction in Units

7. Should Subdivider determine that the Subdivision should be built in units over a period of time instead of entirely in one year, it shall so notify Supplier and the contract or letter executed by Supplier under Paragraph 6 of this Contract shall specify both (1) the price at which Supplier will construct and install the water system for each unit of the Subdivision and (2) the total price at which Supplier will construct and install the water system for the entire Subdivision.

Deposit of Construction Price

8. Within [*number*] days after execution by Supplier of the contract or letter described in Paragraph 6 of this Contract, Subdivider shall deliver to_____[*name of joint control or disbursing agency*] the full price specified in that contract or letter at which Supplier will construct and install the water system for all units of the Subdivision in which Subdivider proposes to complete off-site improvements, as that term is understood in the construction industry, within 12 calendar months from that date. Subdivider shall also deliver to_____[*name of joint control or disbursing agency*] written instructions to disburse to Supplier the amount so deposited with it by Subdivider in [*number*] equal installments:_____[*specify when payments are to be made, e.g.*, On commencement of excavation for water mains in each unit, on completion of all excavation for water mains in each unit, on completion of the water system installation for each unit, and finally on expiration of the mechanic's lien period for labor or material furnished Supplier in constructing and installing the water system for any unit]. Subdivider shall also notify Supplier promptly of the making of the deposits by Subdivider described in this Paragraph.

Commencement of Water System

9. Within [*number*] days after receiving notice of the deposits made by Subdivider under Paragraph 8 of this Contract, Supplier shall commence construction of the water systems for units of the Subdivision in which Subdivider proposes to complete off-site improvements within the 12-month period described in Paragraph 8. Supplier shall coordinate its activities in constructing such water systems with activities of Subdivider and Subdivider's subcontractors in installing off-site improvements in the Subdivision.

Later Units

10. For each unit of the Subdivision in which Subdivider does not propose to construct off-site improvements within the 12-month period specified in Paragraph 8 of this Contract, Subdivider shall deposit with_____[*name of joint control or disbursing agency*] on or before [*number*] months before Subdivider does propose to commence construction of off-site improvements in the unit, the full price for which Supplier has agreed to construct and install a water system in and serving such unit. At the same time Subdivider will deposit with_____[*name of joint control or disbursing agency*] instructions to distribute the same to Supplier in the manner described in Paragraph 8 of this Contract and shall notify Supplier of the deposit and the date Subdivider proposes to commence construction of off-site improvements in the unit. Supplier shall commence construction and installation of the water system for the unit on or before the date so specified by Subdivider as the date it proposes to commence construction of off-site improvements for the unit.

Water for Construction

11. Supplier, after receiving the authorization and permits described in Paragraphs 1 and 2 of this Contract, shall construct and install on request from Subdivider such temporary or other facilities as may be required to supply water to Subdivider or contractors and subcontractors employed by Subdivider during construction of any off-site or on-site improvements in any unit or portion of the Subdivision. Subdivider shall promptly on installation of any such facilities reimburse Supplier for its actual cost, including _____ percent overhead expenses, incurred in installing such facilities. These facilities shall be capable of supplying the water and volume of water reasonably required for construction of off-site or on-site improvements, as the case may be, in the Subdivision. Subdivider and contractors or subcontractors of Subdivider shall pay Supplier for water furnished through these facilities or used in the

construction of improvements in the Subdivision Supplier's normal rates for water supplied to its patrons.

Extension of Main

12. In addition to the amounts otherwise specified in this Contract, Subdivider shall pay to Supplier within [*number*] days after approval of the final subdivision map of the Subdivision and receipt by Supplier of the matters described in Paragraphs 1 and 2 of this Contract the costs, as determined by Supplier, to Supplier of extending its _____-inch [*size*] trunk water main from its present termination point at_____[*specify location, e.g.,* Main and Turncott Streets] to the nearest exterior boundary of the first unit of the Subdivision proposed to be developed by Subdivider.

Bond for Liens

13. Before commencement of the construction of the water system for any unit of the Subdivision, Supplier shall deliver to Subdivider a good and sufficient bond issued by a corporate surety authorized to issue surety insurance in California in an amount equal to _____ percent of the price for which Supplier is to install the water system for the unit securing payment by Supplier of all claims for labor performed or materials furnished in the construction and installation of the water system.

Indemnity

14. Supplier shall indemnify and hold Subdivider and the property of Subdivider, including the real property included in the Subdivision, free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person, including employees of Supplier, or from damage or destruction of any property or properties caused by or connected with the performance of this Contract by Supplier or Supplier's agents, servants, subcontractors, or employees.

Attorneys' Fees

15. Should any litigation be commenced between the parties concerning this Contract, the water systems agreed to be constructed for the Subdivision, or the rights and duties of either party under this Contract, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for attorneys' fees in such litigation, which shall be determined by the court in such litigation or in a separate action brought for that purpose.

Notices

16. Any and all notices or other matters required or permitted by this Contract or by law to be served on, given to, or delivered to either party by the other party to this Contract shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is directed or to a supervisorial employee of that party, or, in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Supplier at_____[*mailing address*], or to Subdivider at_____[*mailing address*]. Either party may change its address for purposes of this Paragraph by giving written notice of this change to the other party in the manner prescribed by this Paragraph.

Sole and Only Agreement

17. This instrument constitutes the sole and only agreement of the parties, Supplier and Subdivider, relating to the Subdivision or the water systems to be constructed for the Subdivision and correctly sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Contract are of no force and effect.

Binding on Heirs and Successors

18. This Contract shall inure to the benefit of and be binding on the heirs, executors, administrators, successors, and assigns of each party to this Contract.

Time of Essence

19. Time is hereby expressly declared to be of the essence in the performance of this Contract.

EXECUTED on_____[*date*], at_____[*city*], California.

SUPPLIER
_____ [*name of supplier*]
By _____ [*signature*]
[*typed name and title*]
SUBDIVIDER
_____ [*name of subdivider*]
By _____ [*signature*]
[*typed name and title*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 36A MINING CLAIMS, TIMBER INTERESTS, AND WATER RIGHTS
PART IV. FORMS
C. Water Rights

18-36A California Legal Forms--Transaction Guide § 36A.232

AUTHOR: Linda Breen Pierce

§ 36A.232 Grand Deed Conveying Riparian Water Rights Appurtenant to Land

[1] Comment

[a] Use of Form

The form in [2], *below*, is a grant deed that may be used to convey water rights separate and apart from the land to which the water is appurtenant. Water rights are appurtenant to real property and part of the real property [*Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 154, 131 P. 119]* . Therefore, they pass as an incident to real property by a conveyance of the real property to which they are appurtenant without being mentioned in the deed or other instrument of conveyance of that real property [*Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 724, 93 P. 858]* . Water rights may also be conveyed separate and apart from the rest of the rights and incidents going to make up the real property to which they are appurtenant [*Mount Carmel Fruit Co. v. Webster (1903) 140 Cal. 183, 186-187, 73 P. 826]* .

[b] Statute of Frauds

Because water rights are an interest in real property, a conveyance of them in perpetuity or for a term longer than one year is required by the statute of frauds to be in writing signed by the grantor [*Civ. Code § 1624(c)*].

[c] Other Requirements

Because the deed in this form conveys an interest in real property it should be executed, acknowledged, and recorded in the same manner as a grant deed conveying full fee title [*see* Ch. 27, *Deeds and Recording*]. Further, when the value of the water rights being conveyed exceeds $100, the deed in this form may be subject to taxation under the California Documentary Transfer Tax Act in counties that have adopted ordinances imposing a tax under that Act [*see Rev. & Tax. Code § 11901 et seq.*]. For a discussion of the Documentary Transfer Tax Act and the taxes that may be imposed under it, see Ch. 27, *Deeds and Recording* .

[2] FORM

Grand Deed Conveying Riparian Water Rights Appurtenant to Land

Recording requested by
_____[*name*]

When recorded return to
_____[*name*]
_____[*address*]
_____[*city, state, zip*]

_____

Documentary Transfer Tax $_____
_____[*firm name, if any*]
By [*signature*]
[*typed name and title*]
Grantor [*or* Agent of Grantor]

DEED OF WATER RIGHTS

I,_____[*name of grantor*],_____[*status of grantor, e.g.*, a married man dealing with his sole and separate property] declare that I am the owner in fee of the real property described in this deed and do hereby grant to_____[*name of grantee*], [*status of grantee, e.g.*, a mutual water company duly organized under the laws of California] the right to take and appropriate water [*or* _____ acre feet (*or* gallons) of water per year] from _____ River [*or* Creek *or* Stream], such right being [part of] the riparian right appurtenant to the real property in the County of _____, State of California, described as follows: [*legal description of real property*].

EXECUTED on_____[*date*].

_____ [*signature of grantor*]
[*typed name*]

[*Acknowledgment; see § 36A.208[2]*]



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-36A California Legal Forms--Transaction Guide § 36A.233

AUTHOR: Linda Breen Pierce

§ 36A.233 Grant Deed Provision Reserving Riparian Water Rights Appurtenant to Land

[1] Comment--Use of Form

The form in [2], *below*, is a provision that should be inserted in a deed conveying fee title to a parcel of real property when the grantor wishes to retain riparian water rights that are appurtenant to the property. It also reserves to the grantor an easement for a pipeline across a portion of the property being conveyed to carry water to the grantor's adjoining land.

This provision should be inserted in the deed conveying title to the property in question immediately after the legal description of that property [*see § 36A.232[2]*]. The reservation may be modified to reserve to a grantor a water right other than a riparian right that is appurtenant to the land being conveyed.

[2] FORM

Grant Deed Provision Reserving Riparian Water Rights Appurtenant to Land

EXCEPTING AND RESERVING unto Grantor the riparian right appurtenant to the premises to take and appropriate water [*or* to take and appropriate _____ (gallons *or* acre feet) of water per year] from_____[*name*] River [*or* Creek *or* Stream] TOGETHER WITH an easement across the [*describe section of land for pipeline, e.g.*, north five feet of the south 20 feet] of the premises for a five-inch pipeline to carry water from the river to adjoining land owned by Grantor.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES

18-37 California Legal Forms--Transaction Guide 37.syn

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.syn Synopsis to Chapter 37: FARM LEASES

§ 37.01 California Statutes

§ 37.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 37.03-37.04 [Reserved]

§ 37.05 Law Reviews and Periodicals

§ 37.06 Annotations

§ 37.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 37.08-37.09 [Reserved]

§ 37.10 Nature of Farm Lease

[1] Agriculture as Subject Matter

[2] Farm Lease Distinguished From Other Farm Agreements

[a] Sharecropping Agreement

[b] License Agreement

[c] Partnership Agreement

§ 37.11 Types of Farm Leases

[1] Cash Farm Lease

[2] Crop or Livestock Share Lease

[3] Livestock Lease for Annual Grasslands

§ 37.12 Formal Lease Requirements

[1] Intent to Lease

[2] Writing Required

[3] Other Requirements

§ 37.13 Taxes, Assessments, and Entitlements

[1] Property Taxes and Assessments

[2] Crop Share Rents as Taxable Income to Landlord

[3] Social Security Benefits

[a] Eligibility Requirements

[b] "Material Participation" Defined

[4] Special Use Valuation for Estate Tax Purposes

[a] Making an Election

[b] Recapture of Tax Savings

§ 37.14 California Land Conservation Act of 1965 (Williamson Act)

[1] Williamson Act Contracts Creating Agricultural Preserves

[2] Assessment and Taxation of Agricultural Preserves

[3] Practical Considerations

§§ 37.15-37.99 [Reserved]

§ 37.100 Basic Facts for All Parties

Scope

§ 37.101 Additional Facts Pertaining to Landlord

Scope

§ 37.102 Documents Pertaining to Landlord

Scope

§ 37.103 Documents Pertaining to Tenant

Scope

§§ 37.104-37.109 [Reserved]

§ 37.110 Capacity and Authority of Parties

Scope

§ 37.111 Uses of Property

Scope

§ 37.112 Terms of Proposed Lease

Scope

§ 37.113 Leasing Custom in Farm Locale

Scope

§ 37.114 Material Participation of Landlord

Scope

§ 37.115 Appropriate Type of Farm Lease

Scope

§ 37.116 Calculating Equitable Rent

Scope

§ 37.117 Effect of Williamson Act Contract on Proposed Farming Operations

Scope

§§ 37.118-37.129 [Reserved]

§ 37.130 Representation of Both Parties to Lease

Scope

§ 37.131 Review of Lease Drafted by Other Party

Scope

§ 37.132 Drafting and Execution of Lease; Recording Memorandum of Lease

Scope

§§ 37.133-37.139 [Reserved]

§ 37.140 Parties, Description of Premises, and Term of Lease

Scope

§ 37.141 Rental Payments

Scope

§ 37.142 Purpose of Lease and Operations of Farm

Scope

§ 37.143 Expenses and Operating Costs

Scope

§ 37.144 Assignment and Subleasing

Scope

§ 37.145 Remedial Clauses

Scope

§ 37.146 Consultation and Inspection by Landlord

Scope

§ 37.147 Reservation of Rights by Landlord

Scope

§ 37.148 Condemnation

Scope

§ 37.149 General Lease Provisions

Scope

§§ 37.150-37.199 [Reserved]

§ 37.200 Cash Farm Lease

[1] Comment

[a] Use of Form

[b] Advantages of Cash Farm Lease

[c] Holdover by Tenant

[d] Recording Lease

[2] FORM

Cash Farm Lease

§ 37.201 Crop Share Farm Lease

[1] Comment

[a] Use of Form

[b] Terms in Crop Share Lease

[c] Advantages of Crop Share Farm Lease

[d] Automatic Renewal of Lease Term

[i] Agricultural Leases Limited to 51 Years

[ii] Holdover Tenants Subject to Action for Unlawful Detainer

[e] Ownership of Crops

[f] Material Participation by Landlord

[g] Arbitration Provision

[2] FORM

Crop Share Farm Lease

§ 37.202 Livestock Lease for Annual Grasslands

[1] Comment

[a] Use of Form

[b] Method of Calculating Rent

[i] Customary Practices

[ii] Per-Acre Charges

[iii] Per-Head Charges

[iv] Share-of-Gain Method

[c] Lease Agreement Conditions

[2] FORM

Livestock Lease for Annual Grasslands

§§ 37.203-37.209 [Reserved]

§ 37.210 Livestock Share Farm Lease Provisions

[1] Comment--Use of Form

[2] FORM

Livestock Share Farm Lease Provisions

§ 37.211 Variable Rent for Cash Farm Lease

[1] Comment

[a] Use of Form

[b] Purpose and Effect of Variable Rent

[2] FORM

Variable Rent for Cash Farm Lease

§§ 37.212-37.219 [Reserved]

§ 37.220 Farm Lease Worksheet

[1] Comment--Use of Form

[2] FORM

Farm Lease Worksheet

Linda Breen Piercen*

Benjamin Kaplann**
Myron Moskovitzn***
Practice Consultants

FOOTNOTES:

(n91)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full-time free-lance writer.

(n92)Footnote **. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n93)Footnote ***. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure (Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES

18-37 California Legal Forms--Transaction Guide Scope

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

Scope

Linda Breen Piercen* Benjamin Kaplann**
Myron Moskovitzn***
Practice Consultants Scope

This chapter covers the preparation and drafting of leases of agricultural lands. The Legal Background includes a brief discussion of the general requirements for farm leases and relevant tax considerations. The Transaction Guide lists the various factors in determining what type of lease is appropriate and what provisions should be included. The Forms section includes leases that typify the arrangements encountered in farm leasing and alternative rental provisions.

This chapter does not present all the issues relevant to the drafting of real property leases generally. For a general discussion of real property leases and lease provisions, including forms, see Ch. 34B, *Residential Leases* , Ch. 34C, *Retail, Industrial, and Office Leases* , and Ch. 34D, *Ground Leases* . For a complete discussion of the tax consequences of leasing real property and agricultural transactions, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 23, *Real Estate Leases* , and Ch. 24, *Agricultural Transactions and Natural Resources* (Matthew Bender).

FOOTNOTES:
(n94)Footnote *. Linda Breen Pierce obtained a B.A. degree from the University of California at Berkeley, followed by a J.D. at Hastings College of the Law in 1977. Admitted to the California State Bar in 1977, Ms. Pierce practiced law for 10 years, specializing in real estate law. Her experience includes supervising the legal staff of a real estate law department for a major, multistate retailer. She has also worked as a residential real estate broker and is now a full-time free-lance writer.

(n95)Footnote **. Benjamin Kaplan received his law degree from Hastings College of Law in 1968. He has been in private practice since that time with an office in San Francisco. He has served as the tenant's attorney for the Berkeley Tenants Union and as the lead attorney for the Haight-Ashbury Legal Project and the Tenant's Action Group. He was the first instructor in landlord-tenant law at the People's Law School in San Francisco.

Mr. Kaplan's practice has been primarily devoted to real estate and business litigation with a pronounced

concentration in landlord-tenant and lease litigation. Since 1971, he has primarily represented the legal interests of landowners and lessors. He is a lecturer for the Continuing Education of the Bar and The Rutter Group in landlord-tenant law. He was also the first landlord's Chairperson of the State Bar Landlord-Tenant Committee of the Real Property Law Section of the State Bar and was subsequently a member of the Executive Committee of the Real Property Law Section.

(n96)Footnote ***. Myron Moskovitz is a Professor of Law at Golden Gate University School of Law in San Francisco. He received his law degree from Boalt Hall in 1964. In 1965, he served as a law clerk to Justice Ray Peters of the California Supreme Court. From 1966-1967, he was the directing attorney of the Marysville Office of California Rural Legal Assistance and between 1968 and 1972 served as the Chief Attorney for the National Housing Law Project.

Professor Moskovitz is the author of several publications including Winning an Appeal (Michie 1985), California Eviction Defense Manual (Cal. C.E.B. 1992), and Cases and Problems in Criminal Procedure (Matthew Bender 1995). He has litigated cases at both the trial and appellate level, including the California and United States Supreme Court.



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18-37 California Legal Forms--Transaction Guide § 37.01

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.01 California Statutes

Crops as fixtures. *Civ. Code § 660.*

Agricultural lease may not exceed 51 years. *Civ. Code § 717.*

Statute of frauds. *Civ. Code §§ 1091, 1624*; *Code Civ. Proc. § 1971.*

Acknowledgments. *Civ. Code §§ 1180-1207*; *Gov. Code §§ 27287, 27288.*

Constructive and actual notice of real property conveyance. *Civ. Code §§ 1213-1218.*

Covenants running with the land. *Civ. Code §§ 1460-1471.*

Attorneys' fees. *Civ. Code § 1717*; *Code Civ. Proc. § 1021.*

Bailments and leases. *Civ. Code § 1925 et seq.*

"Hiring" defined. *Civ. Code § 1925.*

Warranty of quiet enjoyment. *Civ. Code § 1927.*

Termination of lease. *Civ. Code §§ 1931-1935.*

Agricultural leases presumed to be for one year unless expressly stated otherwise. *Civ. Code § 1943.*

Implied renewal of lease. *Civ. Code § 1945*.

Tenant's duty to inform landlord of possessory notices. *Civ. Code § 1949*.

Landlord's remedies. *Civ. Code §§ 1951.2-1951.8*.

Assignment and sublease of nonresidential leases. *Civ. Code §§ 1995.010-1995.340*.

Use restrictions under nonresidential leases. *Civ. Code §§ 1997.010-1997.270*.

Waste committed by tenant. *Code Civ. Proc. § 732*.

Unlawful detainer action. *Code Civ. Proc. § 1161 et seq.*

Agricultural lease renewed for one year when tenant holds over for more than 60 days and landlord makes no demand for possession. *Code Civ. Proc. § 1161(2).*

Eminent Domain Law. *Code Civ. Proc. § 1230.010 et seq.*

California Arbitration Act. *Code Civ. Proc. § 1280 et seq.*

Buyer of unborn livestock or future crops obtains insurable interest and special rights when young are conceived or crops planted. *Com. Code §§ 2501(1)(c), 2502*.

Recording instruments affecting title. *Gov. Code § 27280*.

California Land Conservation Act of 1965 (Williamson Act). *Gov. Code § 51200 et seq.*

Uniform Statutory Rule Against Perpetuities. *Prob. Code § 21200 et seq.*



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.02 Federal Sources

[1] Statutes

Income derived from farm lease arrangement generating Social Security benefits; material participation by landlord or tenant. *42 U.S.C. § 411(a)(1)*; *I.R.C. § 1402(a)*.

Rents as income. *I.R.C. § 61(a)(5)*.

Deduction for business expenses. *I.R.C. § 162(a)*.

Deduction for charitable contributions. *I.R.C. § 170*.

Special use valuation election for estate tax purposes. *I.R.C. § 2032A*.

[2] Regulations

Crop share rents included as income. *Treas. Reg. § 1.61-4*.

"Actual participation" defined. *Treas. Reg. § 1.1402(a)-4*.



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18-37 California Legal Forms--Transaction Guide §§ 37.03-37.04

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§§ 37.03[Reserved]



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18-37 California Legal Forms--Transaction Guide § 37.05

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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18-37 California Legal Forms--Transaction Guide § 37.06

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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18-37 California Legal Forms--Transaction Guide § 37.07

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.07 Text References

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Ch. 22, *Options to Purchase Real Property* .

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Ch. 25, *Real Estate Loans* .

Ch. 27B, *Homesteads* .

Ch. 28A, *Easements and Licenses* .

Ch. 28C, *Covenants, Conditions, and Restrictions* .

Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* .

Ch. 30B, *Zoning, Building, and Environmental Permits* .

Ch. 33, *Contamination Considerations in Real Property Transactions* .

Ch. 34A, *Prelease Forms* .

Ch. 34B, *Residential Leases* .

Ch. 34C, *Retail, Industrial, and Office Leases* .

Ch. 34D, *Ground Leases* .

Ch. 35A, *Assignment and Sublease of Leasehold Interests* .

Ch. 35B, *Modification and Termination of Leases* .

Ch. 36, *Oil and Gas Rights and Leases* .

Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* .

Ch. 38, *Real Property Management* .

Ch. 53, *Personal Property Leasing* .

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Ch. 76, *Sale-Leasebacks* .

Ch. 150, *Types of Tenancies* .

Ch. 151, *Predrafting Legal Considerations* .

Ch. 152, *Drafting Basic Lease Provisions* .

Ch. 153, *Drafting Commercial Leases* .

Ch. 154, *Complete Commercial Leases* .

Ch. 155, *Drafting Residential Leases* .

Ch. 170, *The Premises: Duties and Liabilities* .

Ch. 171, *Rent and Rent Control* .

Ch. 172, *Assigning and Subletting Leasehold Interests* .

Ch. 173, *Modifying, Extending, and Renewing Leasehold Interests* .

Ch. 190, *Taxation of Landlords* .

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Ch. 200, *Termination: Causes and Procedures* .

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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 37.08[Reserved]



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.10 Nature of Farm Lease

[1] Agriculture as Subject Matter

The terms "farming," "husbandry," and "tillage" are said to be synonymous with or equivalent to the term "agriculture" [*Fraenkel v. Bank of America (1953) 40 Cal. 2d 845, 850, 256 P.2d 569]* . Agriculture has been defined as the art or science of cultivating the ground, raising and harvesting crops, and raising livestock [*Fraenkel v. Bank of America (1953) 40 Cal. 2d 845, 850, 256 P.2d 569]* . A lease of real property is an instrument by which one is granted, on stated terms and conditions, the right to occupy a parcel of land to the grantor's exclusion [*Bachenheimer v. Palm Springs Management Corp. (1953) 116 Cal. App. 2d 580, 591, 254 P.2d 153]* . Thus, a farm lease may be defined as a contract by which a landlord grants to a tenant the exclusive right to occupy certain real property for the purpose of cultivating and raising crops and raising livestock [*see Harrelson v. Miller & Lux Inc. (1920) 182 Cal. 408, 410-412, 188 P. 800]* .

Except for the subject matter and the manner by which rent is calculated, farm leases do not differ significantly from other leases of real property. For a discussion of the distinguishing aspects of farm leases from other types of arrangements, see [2], *below*.

PRACTICE TIP:
Practical Factors Affecting Type of Farm Lease. In counseling the client and preparing a farm lease, an attorney must be familiar with all of the following:

- The acreage to be leased;
- The economic outlook for the contemplated crops;
- Zoning laws applicable to the affected parcel;

- Potential sources of water; and
- The experience and abilities of the prospective tenant/farmer.

The leasing custom in the locale where the acreage is situated is also of major significance. These factors are all relevant to the determination of what type of lease to employ. This information may be obtained from the client or from secondary sources, such as county agricultural commissioners and instructors at local agriculture education institutions. *By Publisher's Editorial Staff and Benjamin Kaplan.*

[2] Farm Lease Distinguished From Other Farm Agreements

[a] Sharecropping Agreement

A lease is distinguishable from other types of arrangements found in farm usage such as sharecropping, licenses, or partnerships. The distinction between a sharecropping agreement and a farm lease is that a lease grants the tenant an estate in land for a given time, a right of property in crops, and in the case of a crop share lease, the power to divide the crops between the tenant and the landlord. The sharecropper, however, has no estate in land, nor ownership in crops, but is a servant and receives a share of the crops from the landowner, who has title to them [*In re Okahara (1923) 191 Cal. 353, 361, 216 P. 614]* .

[b] License Agreement

An agreement for the use and occupancy of land or other premises may be either a lease or a license. A lease gives exclusive possession of the premises against all other persons, including the owner, to the tenant [*Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879* ; *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc. (1995) 31 Cal. App. 4th 1323, 1330, 37 Cal. Rptr. 2d 552]* . Thus, the test in determining whether an agreement for the use of land is a lease or a license is the following: if the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease; if it merely confers a privilege to occupy under the owner it is a license [*Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879* ; *O'Shea v. Claude C. Wood Company (1979) 97 Cal. App. 3d 903, 909, 159 Cal. Rptr. 125* (contract giving person the right to stockpile dirt on the property of another for the first person's benefit created a license)].

A license is revocable at the will of the licensor [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 36, 31 Cal. Rptr. 2d 378* ; *see Von Goerlitz v. Turner (1944) 65 Cal. App. 2d 425, 430, 150 P.2d 278]* . Tenants of agricultural lands often grant licenses permitting other persons to graze livestock on crop remains after harvest. Because these licenses are not equivalent to lease arrangements, they do not violate covenants against assignment or subletting [*see Harrelson v. Miller & Lux Inc. (1920) 182 Cal. 408, 413, 188 P. 800]* .

The question of whether an instrument is a lease or merely conveys a license is a question of law that must be determined from the instrument itself [*Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879]* . For further discussion of the distinctions between leases and licenses, see California Real Estate Law and Practice, Ch. 150, *Types of Tenancies* (Matthew Bender).

[c] Partnership Agreement

A lease of farm property, particularly a crop share lease, may appear to establish a partnership [*see Smith v. Schultz (1891) 89 Cal. 526, 533-534, 26 P. 1087* (use of terms indicating partnership in share lease agreement)]. If a lease is deemed to create a partnership, certain potentially undesirable consequences may ensue, including (1) joint liability for partnership losses [*see Corp. Code § 16401(b)*], (2) joint and several liability to third parties [*see Corp. Code §§ 16301-16308*], and (3) the ability of one partner to bind the partnership [*see Corp. Code § 16301*; *Smith v. Schultz (1891) 89 Cal. 526, 534, 26 P. 1087]* . For that reason, a farm lease often includes a denial of a partnership [*see §*

37.201[2], P 40].

Under the Uniform Partnership Act of 1994 [*Corp. Code § 16100 et seq.*], a partnership is defined as an association of two or more persons carrying on as co-owners a business for profit and includes a registered limited liability partnership, but excludes a limited partnership formed under *Corp. Code § 15501 et seq.* (ULPA, repealed January 1, 2010), *Corp. Code § 15611 et seq.* (CRLPA, repealed January 1, 2010), or Corp. Code § 15900 et seq. (ULPA '08) [*Corp. Code § 16101(9)*]. However, the sharing of gross returns (as in a crop share lease) does not by itself establish a partnership, whether or not the persons sharing them have a joint or common interest in any property from which the returns are derived [*Corp. Code § 16202(c)(2)*]. Furthermore, the receipt by a person of a share of the profits of a business is not prima facie evidence of a partnership if the profits were received as rent to a landlord [*Corp. Code § 16202(c)(3)(C)*]. For a complete discussion of partnerships, see Ch. 15, *General Partnerships* , and Ch. 16, *Formation of Limited Partnerships*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsPartnership AgreementsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLimited Use RightsLicenses



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.11 Types of Farm Leases

[1] Cash Farm Lease

The most common types of farm leases encountered are the following:

- Cash farm leases [*see § 37.200*];
- Crop share leases [*see § 37.11[2]*; *see also § 37.201*];
- Livestock share leases [*see § 37.11[2]*; *see also § 37.210*]; and
- Livestock leases for annual grasslands [*see § 37.11[3]*; *see also § 37.202*].

Each of these leases is an example of the various methods by which rent is charged. These various farm lease methods have evolved to take into consideration various types of farm operations, the relative agricultural skills and knowledge of the parties, and the viability of the land to support the proposed operations.

A cash farm lease [*see § 37.200*] is a typical leasing arrangement in which the tenant makes a fixed periodic cash payment. It provides the landlord with a fixed income and allows both parties to fix their costs and expenses for the future. When the landlord is unsure of the likelihood for success of the tenant or, conversely, when the tenant has skills and expertise greater than those believed by the landlord, this arrangement may be desirable [*see § 37.200[1][b]*].

[2] Crop or Livestock Share Lease

In a crop or livestock share lease arrangement [*see §§ 37.201, 37.210*], the tenant agrees to pay a fixed share of the crop or livestock production, either in the product itself or in cash proceeds. In a share lease, the landlord assumes a risk of a partial or total crop failure or insufficient weight gain in the livestock. However, when the chances for a successful yield are high, either due to a history of crop or livestock success on the premises or the skill and expertise of the tenant, the

share lease method may be favored. Share basis leases also provide for the "material participation" of the landlord, allowing for the eligibility for Social Security benefits and the special use valuation [*see 42 U.S.C. §§ 401-433*; *I.R.C. § 2032A*; *see also § 37.13[3], [4]*].

[3] Livestock Lease for Annual Grasslands

A lease of annual grasslands for livestock grazing [*see § 37.202*] should be employed when livestock grazing will be the sole operation on the leased premises. Under this type of lease the method of calculating rent may be based either on the acreage leased or other factors relating to the specific livestock to be placed on the property [*see § 37.202[1][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.12 Formal Lease Requirements

[1] Intent to Lease

Farm leases are largely similar to other leases of real property and therefore must comply with the basic requirements of a lease [*see generally, Ch. 34B, Residential Leases, §§ 34B.15-34B.18*; *Ch. 34C, Retail, Industrial, and Office Leases, §§ 34C.14-34C.16*]. Although no particular legal terminology is required in making a lease, it is essential that the instrument show an intention to establish the relationship of landlord and tenant [*O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 909, 159 Cal. Rptr. 125]* .

[2] Writing Required

A lease entered into for a period exceeding one year must be evidenced by a written instrument [*Civ. Code § 1624(a)(3)*; *see Civ. Code § 1091*; *Code Civ. Proc. § 1971*]. For further discussion of the statutes requiring a lease to be in writing, see *Ch. 34B, Residential Leases, § 34B.15[3]*.

[3] Other Requirements

Any lease must include all of the following [*O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 909-910, 159 Cal. Rptr. 125* ; *see Ch. 34B, Residential Leases, §§ 34B.15-34B.18*; *Ch. 34C, Retail, Industrial, and Office Leases, §§ 34C.14-34C.16*]:

- A definite description of the property leased;
- An agreement as to the amount of rent to be paid;
- The time and manner of payment of rent; and
- A specified term of duration.

In addition, agricultural or horticultural leases may not be entered into for a term exceeding 51 years [*Civ. Code § 717*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds



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AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.13 Taxes, Assessments, and Entitlements

[1] Property Taxes and Assessments

When the lease makes no express provision regarding the liability for taxes and assessments, the general rule holds the landlord liable for all taxes and assessments levied on the demised premises during the lease term [*Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 121, 45 Cal. Rptr. 140, 403 P.2d 396]* . However, if the lease is silent with regard to tax liability, the tenant is liable for any additional assessments if the tenant makes improvements and retains possession of the improvements on termination of the lease, and the landlord derives no substantial benefit from those improvements [*see Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 121-123, 45 Cal. Rptr. 140, 403 P.2d 396]* . Conversely, when the landlord will gain possession of the improvements on the lease's termination and will derive a substantial benefit from them, the landlord will be liable for the additional assessments [*see City of Oakland v. Albers Bros. Milling Co. (1919) 43 Cal. App. 191, 193, 184 P. 868]* .

[2] Crop Share Rents as Taxable Income to Landlord

When the lease agreement specifies that rent is to be paid on a crop share method [*see § 37.201*], the crops paid will be treated as taxable income to the landlord [*see I.R.C. § 61(a)(5)* (rents included in gross income); *Treas. Reg. § 1.61-4*]. However, the income is not required to be reported until the time that the crops are reduced to cash or its equivalent, whether the taxpayer is on a cash or accrual method of accounting [*Treas. Reg. § 1.61-4(a), (b)*].

Crop shares received by the landlord and subsequently fed to the landlord's livestock are taxed at their fair market value at the time of feeding [*Rev. Rul. 75-11, 1975-1 C.B. 27*]. An equivalent expense deduction can be taken to offset the income, if applicable [*see I.R.C. § 162(a)(3)*]. If crop shares are donated to a charitable organization, their fair market value as of the date donated (rather than the date converted by the donee) must be reported as taxable income [*Rev. Rul. 75-11, 1975-1 C.B. 27*], although a deduction for charitable contributions is normally allowed to offset the reported income [*see I.R.C. § 170*; *see also* Ch. 69, *Charitable Dispositions*].

[3] Social Security Benefits

[a] Eligibility Requirements

A landlord of agricultural lands may become eligible for Social Security benefits [*see 42 U.S.C. §§ 401-433*] if he or she has generated qualifying self-employment income [*see 42 U.S.C. § 411(a)*; *I.R.C. § 1402(a)* ("net earnings from self-employment" defined)] through the receipt of rental payments under a crop share lease [*see 42 U.S.C. § 402* (entitlement to Social Security benefits); *20 C.F.R. §§ 404.110, 404.143, 404.1082* (farm rental income qualifying for inclusion in calculating eligibility for Social Security benefits)]. A person having net earnings from self-employment income is also liable for a tax on those earnings [*see I.R.C. § 1401*]. To qualify for social security benefits, both of the following requirements must be met [*42 U.S.C. § 411(a)(1)*]:

- The lease must provide for the landlord's "material participation" [*see* [b], *below*] in the production or management of the production of agricultural or horticultural commodities; and

- The landlord must actually participate.

Crop share leases provide the opportunity for this type of "material participation" [*see § 37.201[2]*, P 11]. Conversely, a landlord already receiving Social Security payments may have those payments reduced or eliminated if his or her "material participation" in the farm operations creates net earnings from self-employment income [*see 42 U.S.C. § 403(b), (f)*; *20 C.F.R. §§ 404.410-404.416*].

[b] "Material Participation" Defined

"Material participation" generally will be found if the landlord does any of the following [*see Rev. Rul. 57-58, 1957-1 C.B. 270*]:

- Periodically advises or consults with the tenant regarding production of the crop;

- Periodically inspects the production activities on the land and furnishes a substantial portion of the machinery or implements used in production;

- Advances funds; or

- Assumes financial responsibility for a substantial portion of the production expenses.

The making of management decisions by the landlord has been held to constitute "material participation" in the management of the production of agricultural products [*Conley v. Ribicoff (9th Cir. (1961) 294 F.2d 190, 193, 195* ; *see* Treas. Reg. § 1.1402(a)(4) ("actual participation to a material degree" defined)]. Caution should be exercised in drafting leases when the landlord is "materially participating" to avoid having the relationship deemed a partnership [*see § 37.10[2][c]*].

[4] Special Use Valuation for Estate Tax Purposes

[a] Making an Election

Under *I.R.C. § 2032A*, the executor of an estate may elect to have certain qualified real property specially valued for estate tax purposes. The reduction in valuation of the decedent's estate may be as high as $750,000 by valuing the real property at its current use rather than its highest and best use [*I.R.C. § 2032A(a)*]. This amount is subject to inflation adjustments [*I.R.C. § 2032A(a)(3)*]. For decedents dying in 2002, the maximum reduction is $820,000 [*Rev. Proc. 2001-59* , § 3.18, *2001-52 I.R.B. 623*]. Real property used as a farm for farming purposes by the decedent or a member of the decedent's family qualifies if (1) its adjusted value [*see I.R.C. § 2032A(b)(3)(B)*] equals 50 percent or more of the

adjusted value of the gross estate [*see I.R.C. §§ 2032A(b)(1)(A), 2053(a)*] and (2) certain other restrictions are met, including the "material participation" of the decedent or a member of the decedent's family in the operation of the farm during five of the last eight years that the decedent was alive [*I.R.C. § 2032A(b)(1)(C)*; *see 42 U.S.C. § 411(a)(1)* and *[3], above*].

For a complete discussion of the rules relating to the special use valuation election, see *Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 24, Agricultural Transactions and Natural Resources, § 24.27* (Matthew Bender).

[b] Recapture of Tax Savings

The tax savings achieved under the election in [a], *above*, are subject to recapture if the qualified heir [*see I.R.C. § 2032A(e)(1)*] to the estate subjects the farmland to a use other than one permitted under the Code during the recapture period [*see I.R.C. § 2032A(c)*]. Lease arrangements before the decedent's death that fail to provide for "material participation" by the decedent or a member of the decedent's family may prevent the election of the special use evaluation [*see I.R.C. § 2032A(b)(1)(C)*]. Leases failing to provide for the continued "material participation" by the qualified heir or a member of the qualified heir's family [*see I.R.C. § 2032A(e)* ("qualified heir" and "member of family" defined)] after the decedent's death may trigger the recapture of the tax savings [*see I.R.C. § 2032A(c)(6)*]. For this reason, crop share leases often provide for the "material participation" of the landlord in a manner consistent with the requirements for the special use valuation election [*see § 37.201[2]*, PP 9, 11].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsTax LawFederal Income Tax ComputationGross Income (IRC sec. 61)Tax LawFederal Income Tax ComputationTax AccountingCash Basis Method (IRC secs. 446, 448, 451, 461)Taxable Year of InclusionTax LawFederal Income Tax ComputationUnearned IncomeRental IncomeTax LawFederal Taxpayer GroupsIndividualsSelf-Employment (IRC secs. 164, 1401-1403, 6017)Tax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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CHAPTER 37 FARM LEASES
PART II. LEGAL BACKGROUND

18-37 California Legal Forms--Transaction Guide § 37.14

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.14 California Land Conservation Act of 1965 (Williamson Act)

[1] Williamson Act Contracts Creating Agricultural Preserves

The California Land Conservation Act of 1965 [*Gov. Code § 51200 et seq.*], widely referred to as the Williamson Act, provides tax relief to property owners who contract with a city or county to create an agricultural preserve [*see Gov. Code § 51201(d)* ("agricultural preserve" defined)]. The contract must be for an initial term of not less than 10 years [*Gov. Code § 51244*]. Agricultural preserve contracts must (1) contain provisions excluding uses other than agriculture and (2) be binding on the owner's successors in interest (including tenants) [*Gov. Code § 51243*; *see Olympic Federal Sav. & Loan Ass'n v. Regan (9th Cir. 1981) 648 F.2d 1218, 1221-1222* (successor in interest is party who has equitable title in land)]. The land is further subject to any additional restrictions on development set forth in the contract [*Gov. Code § 51240*]. Williamson Act contracts must be recorded with the county recorder within 20 days of the date the contract is entered into [*Gov. Code § 51248*].

For a complete discussion and forms for Williamson Act contracts, see Ch. 28D, *Conservation Restrictions on Use of Agricultural and Open-Space Land* , and California Real Estate Law and Practice, Ch. 322, *Preservation of Agricultural and Open-Space Land* (Matthew Bender). In addition, California Environmental Law and Land Use Practice, Ch. 70, *Agricultural Preservation* (Matthew Bender), includes detailed coverage of the Williamson Act and other environmental laws, such as the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*].

[2] Assessment and Taxation of Agricultural Preserves

Land placed in an agricultural preserve under the Williamson Act is assessed and taxed at its restricted value rather than the full cash value [*see Cal. Const., arts. XIII, § 8, XIIIA, § 1*]. Although the tax benefits to the landowner have diminished since the passage of Proposition 13 in 1978 [*see* Cal. Const., art. XIIIA], Williamson Act contracts still remain in use as viable land use planning devices [*see* Note, *Proposition 13: A Mandate to Reevaluate the Williamson Act, 54 S. Cal. L. Rev. 93 (1980)*].

[3] Practical Considerations

Attorneys drafting farm leases should be aware of the presence of a Williamson Act contract enforceable against the property to be leased. Restrictions on use that appear in the contract [*see Gov. Code § 51240*; *see also* [1], *above*] and the subsequent tax benefits that arise [*see* [2], *above*] are both possible factors in reducing the rental rate in the lease agreement. Further, the owner's successors in interest [*see Olympic Federal Sav. & Loan Ass'n v. Regan (9th Cir. 1981) 648 F.2d 1218, 1221-1222* (successor in interest is party who has equitable title in land)] are bound and benefited by the contract restricting use [*Gov. Code § 51243(b)*]. Therefore, tenants should take into account the presence of the contract in contemplating future uses of the leased land.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-37 California Legal Forms--Transaction Guide §§ 37.15-37.99

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 37.15[Reserved]



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CHAPTER 37 FARM LEASES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-37 California Legal Forms--Transaction Guide § 37.100

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.100 Basic Facts for All Parties

1. Basic information about landlord and tenant, such as:

a. Name.

b. Addresses (mailing, delivery, email).

c. Telephone numbers (voice, fax message, cellular).

d. Legal status, as any of the following:
(1) Individual.
(a) Marital status.

(b) Name of spouse, if married.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Limited liability company.

(6) Joint venture.

(7) Unincorporated association.

(8) Estate.

(9) Public entity.

(10) Other.

2. Names, addresses, titles, and telephone numbers of any other parties, including:

NOTE:
The following is a list of potential participants in a nonresidential lease transaction. A client's proposed transaction may not require the services of all (or even most) of these parties. The list may be used to solicit from the client information for participants in the transactions and also may be used as a checklist of professionals whose services may be needed.

a. Attorney representing other party.

b. Real estate broker or salesperson representing each party.

c. Accountant representing each party.

d. Lender for tenant.

e. Title company, if any, that will insure tenant's leasehold interest.

3. Additional information concerning any parties who are not individuals, such as:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to this transaction will be handled.

e. Name, address, and title of persons to whom communications should be directed.

f. Name, address, and title of person authorized to bind entity.

4. Steps already taken by client in connection with transaction, for example:

a. Whether option or agreement to lease has been executed.

b. Whether lease has been executed.

5. Steps that client wants attorney to perform, for example:

a. Negotiating terms of proposed transaction.

b. Drafting lease and related documents.

c. Reviewing lease and related documents drafted by another.

d. Advising client on rights under executed lease.

e. Contacting state or county agencies, including any county agricultural agents or commissions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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18-37 California Legal Forms--Transaction Guide § 37.101

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.101 Additional Facts Pertaining to Landlord

1. Date that landlord acquired property.

2. Manner in which landlord holds title, such as:

    a. Corporation in corporate name.

    b. Partnership in partnership name.

    c. Partnership in name of one or more partners.

    d. Limited liability company in name of limited liability company.

    e. Unincorporated association [*see Corp. Code § 18000 et seq.*].

    f. Individual.

    g. Husband and wife in [*see Fam. Code § 750*]:
      (1) Joint tenancy.

      (2) Tenancy in common.

      (3) Community property.

(4) Community property with right of survivorship.

h. Co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy.

(2) Tenancy in common.

i. Executor or administrator of decedent's estate [*see Prob. Code §§ 9940-9948*].

3. Name in which landlord acquired title, if different from name in which landlord currently holds title [*see Civ. Code § 1096*].

4. Adverse claims against landlord's title, if any.

5. Pending litigation affecting property, if any.

6. Easements burdening or benefiting property, if any.

7. Other encumbrances or liens against property, if any.

8. If the landlord is a corporation:

a. Date and state of incorporation.

b. Date on which corporation approved or will approve lease.

NOTE:
For discussion of the authority of a corporation to lease real property, see Ch. 5, ***Directors' Meetings, Actions, and Resolutions*** .

9. If landlord is a partnership:

a. And partnership holds title in partnership name, names of partners authorized to sign lease.

b. And title is held in name of one or more of partners, names of these partners.

NOTE:
For discussion of the authority of a partnership to lease real property, see Ch. 15, ***General Partnerships*** .

10. If landlord is a limited liability company [*see Corp. Code § 17000 et seq.*]:

a. Names of members.

b. Name(s) of manager(s) if other than members.

NOTE:
For discussion of the authority of a limited liability company to lease real property, see Ch. 12C, ***Limited Liability Companies*** .

11. If landlord is an unincorporated association [*see Corp. Code § 18000 et seq.*]:

a. Names of members if articles or bylaws require approval by members.

b. Name of any officers authorized to execute lease on behalf of association.

NOTE:
For discussion of the authority of a unincorporated association to lease real property, see Ch. 34A, ***Prelease Forms*** .

12. If landlord is an estate:

a. Name of estate's guardian, conservator, executor, or administrator.

b. Name of attorney for guardianship, conservatorship, or probate.

c. Name and location of court with jurisdiction over estate.

13. If landlord is a public entity:

a. Governing body for entity.

b. Date on which governing body approved or will approve lease.

14. Zoning classification of leased premises.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural PersonsReal Property LawZoning & Land UseGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.102

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.102 Documents Pertaining to Landlord

1. Copy of any correspondence between landlord and tenant.

2. Deed to property.

3. Property profile or preliminary title report issued for property.

4. Any agreement creating easements burdening or benefiting property.

5. Instruments or documents creating or asserting liens against property.

6. Copy of contract executed under California Land Conservation Act of 1965 (Williamson Act) [*Gov. Code § 51200 et seq.*; *see § 37.14*], if any.

7. Reports applicable to crop sprayings or other applications of chemicals and fertilizers.

8. If landlord is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*].

9. If landlord is a partnership holding title in its name, certified copy of statement of partnership authority filed in county where land is located [*see Ch. 15, Part A, Formation of General Partnerships, § 15.285*].

10. If landlord is a limited liability company:

a. Certified copy of articles of organization filed with Secretary of State.

b. Copy of operating agreement (if members have appointed manager for company).

11. If landlord is an unincorporated association:

a. Copy of articles of association.

b. Copy of bylaws.

c. Copy of recorded statement of unincorporated association.

12. If landlord is an estate or trust, copy of will or trust instrument naming executor or trustee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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18-37 California Legal Forms--Transaction Guide § 37.103

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.103 Documents Pertaining to Tenant

1. Copy of any letters of intent [*see Ch. 34A, Prelease Forms, § 34A.225* (sample letter of intent to lease)] or other correspondence between landlord and tenant.

2. Any option agreement for purchase of leased premises executed by landlord and tenant.

3. If tenant is a corporation, certified copy of resolution authorizing lease [*see Ch. 5, Directors' Meetings, Actions, and Resolutions, § 5.249*].

4. If tenant is a partnership, certified copy of statement of partnership authority filed in county indicating authority of partner to bind partnership to lease [*see Ch. 15, General Partnerships, § 15.285*].

5. If tenant is a limited liability company:

    a. Certified copy of articles of organization filed with Secretary of State.

    b. Copy of operating agreement (if members have appointed manager for company).

6. If tenant is an unincorporated association:

    a. Copy of articles of association.

    b. Copy of bylaws.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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18-37 California Legal Forms--Transaction Guide §§ 37.104-37.109

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 37.104[Reserved]



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18-37 California Legal Forms--Transaction Guide § 37.110

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.110 Capacity and Authority of Parties

1. If either party is a corporation, determine whether board of directors has adopted resolution authorizing corporation to enter into lease [*see Ch. 34A, Prelease Forms, § 34A.200*].

2. If either party is an unincorporated association, determine whether articles of association or bylaws require resolution by authorizing board and/or approval by association's members [*see* Ch. 34A, *Prelease Forms*, 34A.201].

NOTE:
For a detailed list of the determinations necessary to confirm required capacity and consent to enter into a lease, including those determinations that would apply to individuals, see the Transaction Guide to Ch. 34B, ***Residential Leases***.

3. Ascertain past experience of landlord and tenant in proposed type of farming operation.

4. If representing landlord, determine whether landlord requires steady rental income to meet fixed obligations.

5. If agent is acting for landlord or tenant in execution of lease for longer than one year, determine whether agent has written authority to act in that capacity [*see Civ. Code § 2309*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawOwnership &

TransferBusiness & Corporate EntitiesReal Property LawOwnership & TransferNatural Persons



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18-37 California Legal Forms--Transaction Guide § 37.111

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.111 Uses of Property

1. Ascertain past and present use(s) of premises to be leased.

2. Ascertain condition of parcel to be leased, including:

a. Source and adequacy of water supplies; and

b. Tests and inspections conducted regarding potential toxic substances on parcel, such as:
(1) Prior sprayings or other applications of chemicals and fertilizers; and

(2) Inspections of underground storage tanks.

3. Ascertain improvements on premises to be leased, including:

a. Dwellings.

b. Barns, storage sheds, and other structures.

4. Ascertain suitability of premises for proposed type of farming operation(s).

5. Determine whether premises to be leased are covered by Williamson Act contract [*Gov. Code § 51200 et seq.*; *see § 37.14*], and if so, the following:

a. Date contract was entered into.

b. Term of contract.

c. Restrictions imposed by contract.

6. Ascertain purpose for which premises are being leased, such as:

a. Raising vegetable crop.

b. Raising grain crop.

c. Orchard.

d. Raising livestock and supplemental grains.

e. Livestock grazing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationUnderground Storage TanksReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.112

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.112 Terms of Proposed Lease

1. Determine term of lease, including:

NOTE:
Agricultural leases for a period greater than 51 years are void [*Civ. Code § 717*; ***see*** *§ 37.201[1][d][i]*].

a. Duration, including:
(1) Fixed, such as:
(a) Year.

(b) Term of years.

(c) Harvest season.

(2) Renewable.

b. Dates of commencement and termination.

2. Determine rental payments, including:

a. Method, such as:

(1) Fixed periodic cash payment.

(2) Crop or livestock share.

(3) Variable rate.

(4) Share of weight gain.

b. Place for delivery of rental payment.

c. If share rent, manner of preparation of share.

3. Ascertain expenses to be borne by tenant, such as:

a. Seed, fertilizer, and other supplies.

b. If applicable, supplemental feed.

c. Maintenance.

d. Insurance.

e. Taxes.

f. Utilities.

4. Ascertain expenses to be borne by landlord, such as:

a. Seed, fertilizer, and other supplies.

b. If applicable, supplemental feed.

c. Maintenance.

d. Insurance.

e. Taxes.

f. Utilities.

g. If applicable, weighing facilities.

5. If representing landlord, determine whether landlord will reserve either of following rights in premises to be leased:

a. Oil, gas, and mineral exploration; or

b. Hunting.

6. If representing landlord, determine whether landlord is or will become eligible for Social Security benefits during proposed lease term.

NOTE:

If the landlord is currently eligible for Social Security benefits, payments may be reduced or eliminated if he or she has net earnings from self-employment resulting from material participation in the lease operations [***see*** *42 U.S.C. § 403(b)*; ***see also*** *§ 37.13[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions

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18-37 California Legal Forms--Transaction Guide § 37.113

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.113 Leasing Custom in Farm Locale

NOTE:
The determinations listed in this section may be helpful in selecting the type of lease arrangement. The information may be gathered from the client, independent farm advisors, county agricultural commissioners, and instructors at local agriculture education institutions.

1. Determine whether raising of proposed crops and livestock has been done successfully on premises or in farm locale.

2. Determine what items are normally contributed by landlord in addition to real estate costs, such as:

a. Water.

b. Fertilizer.

c. Maintenance of roads, buildings, and other improvements on premises.

3. Determine what type of lease arrangement is commonly employed within farm locale for proposed farming operation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.114

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.114 Material Participation of Landlord

NOTE:
The landlord's material participation will affect net earnings from self-employment [***see*** *42 U.S.C. § 411(a)*; *I.R.C. § 1402(a)(1)*] and the election for special use valuation of estate real property [***see*** *I.R.C. § 2032A*]. For further discussion of these issues, see *§ 37.13[3], [4]*.

1. Determine whether landlord is currently receiving or will become eligible for Social Security benefits during proposed lease term.

2. Determine whether landlord's estate planning goals contemplate use of special use valuation election [*see I.R.C. § 2032A*].

NOTE:
For discussion of the special use valuation election, see *Ch. 63, **Will Provisions**, § 63.310*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawSocial SecurityRetirement & Survivor BenefitsEligibilityReal Property LawLandlord & TenantLease AgreementsGeneral OverviewTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)Valuation of Certain Farm & Real Property



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18-37 California Legal Forms--Transaction Guide § 37.115

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.115 Appropriate Type of Farm Lease

NOTE:

Although the parties may have already agreed on a particular type of lease arrangement before consulting an attorney, the attorney should acquire sufficient familiarity with the situation to advise his or her client on the legal consequences of that decision, and to suggest alternatives if it appears that the proposed arrangement is not in the client's best interest.

1. Determine likelihood of success in carrying out operation(s) proposed for leased premises, including:

a. Whether either party has successfully participated in management and operation of farm.

b. Whether proposed operation has been successfully performed on premises under consideration.

2. Determine financial needs of client, including:

a. Whether landlord has monthly expenses that require fixed income from leased premises.

b. Whether tenant has sufficient capital to provide expenses of farm operation(s) and make periodic cash rental payments.

3. Determine projected market conditions and economic outlook.

NOTE:

This information is critical in determining the most appropriate type of lease. If the economic and market forecast is weak, the landlord may prefer a cash farm lease [***see*** *§§ 37.11[1], 37.200*]. However, when the indications are for a strong market and economy, the landlord may wish to employ a share basis lease [***see*** *§§ 37.11[2], 37.201, 37.210*]. Conversely, a tenant may prefer a cash farm lease when he or she believes that his or her skill and expertise will provide a greater yield than that expected by the landlord, or a share basis lease when the risk of low prices or yields is high.

4. After discussing client's preference with client in light of factors discussed above, make final determination regarding specific type of lease arrangement desired, such as:

a. Cash farm lease [*see § 37.200[2]* (form)].

b. Crop share farm lease [*see § 37.201[2]* (form)].

c. Livestock lease for annual grasslands [*see § 37.202[2]* (form)].

d. Livestock share farm lease [*see § 37.210[2]* (form)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral Overview



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B. Preliminary Determinations

18-37 California Legal Forms--Transaction Guide § 37.116

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.116 Calculating Equitable Rent

NOTE:

If the parties have not already determined the amount of rent payable under the lease, the attorney may employ any of the methods outlined in this section in assisting the calculation and negotiation of an equitable rent. As indicated, these methods may be used singly or in combination.

1. To calculate equitable rent, determine the following:

a. Specific nature of operation(s) to be conducted on leased premises.

b. Market rate rents charged for similar operations in farming locale.

NOTE:

Information relating to current rental rates and other local rental customs may be obtained from the client or the independent farm consultants or county farm commissioners.

A Williamson Act contract restricting the use of the proposed premises to be leased may affect the market rental [***see*** *§ 37.14*]. Since the contract terms are binding on the tenant [***see*** *Gov. Code § 51243(b)*], the tax savings may be a consideration in negotiating the rental amount.

c. For crop or livestock share lease [*see §§ 37.201*, *37.210*], compute rent as share of crops or livestock equal to percentage of total production costs contributed by landlord, or based on customary local farm practice.

d. For cash farm lease, compute rent as follows [*see § 37.200*]:

(1) Determine probable yield (in bushels, tons, or other standard unit of measurement) of crop(s) to be grown on leased premises.

(2) Determine probable market price (in bushels, tons, or other standard unit of measurement) of crops to be grown on leased premises.

(3) Multiply projected total yield by projected market price and apply percentage of total costs of production contributed by landlord to determine rent.

2. Determine whether variable rent provision should be used [*see § 37.211*].

NOTE:

Variable rent provisions are most often found in cash farm leases when the parties agree to have the rent payment fluctuate with crop prices or yields. Because crop or livestock share leases already account for fluctuations in either price or yield, variable rents are normally used only when the chance of crop failure is extremely high.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.117

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.117 Effect of Williamson Act Contract on Proposed Farming Operations

NOTE:

A contract entered into under the Williamson Act [*Gov. Code § 51200 et seq.*] restricts the development of the property covered by the contract for a minimum of 10 years [*Gov. Code § 51244*]. In addition to the statutory requirements of the contract, the property may be subject to any further restrictions agreed on by the original parties [*Gov. Code § 51240*; ***see*** *§ 37.14[1]*].

1. Determine restrictions on use of premises.

2. Determine amount of time remaining in contract.

3. Determine tax savings realized under contract.

NOTE:

In determining the amount of rent payable under a farm lease, the expenses and investments of both parties are considered. Therefore, a lower tax rate on the premises may contribute to a lower rental rate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLimited Use RightsEasementsConservation Easements



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18-37 California Legal Forms--Transaction Guide §§ 37.118-37.129

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 37.118[Reserved]



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18-37 California Legal Forms--Transaction Guide § 37.130

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.130 Representation of Both Parties to Lease

1. If requested to represent both parties to transaction:

a. Recommend that one party obtain separate counsel.

b. Determine whether or not potential for conflict exists.

2. If potential clients do not withdraw their request and do not appear to have conflicting or potentially conflicting interests, take both of the following steps [*see Cal. Rules Prof. Conduct, Rule 3-310*; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* :

a. Make full disclosure to each party of nature of representation of other party.

b. Obtain written consent and waiver from both parties to arrangement before accepting employment.

PRACTICE TIP:

Representing Both Parties to a Lease Is Not Advised. It is impossible to see how there can be an effective waiver of a conflict of interest that would permit any attorney to represent both parties to a lease transaction even if that attorney's role was "limited" to drafting an already reached agreement. Any attorney who enters into such an arrangement is simply looking for major problems with either or both clients. It would be akin to representing both parties in a dissolution of marriage proceeding in which substantial interests were involved. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.131

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.131 Review of Lease Drafted by Other Party

1. If lease has not yet been drafted by other party, assist client in negotiations with other party.

2. On receipt of lease, review lease to ensure that it is:

    a. Consistent with negotiated terms.

    b. Legally sufficient.

    NOTE:
    For a checklist of provisions that should or may be included in a farm lease, see Part D of this Transaction Guide.

3. Obtain client's approval of final lease form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.132

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.132 Drafting and Execution of Lease; Recording Memorandum of Lease

1. Draft lease.

NOTE:
For a drafting guide for a farm lease, see Part D of this Transaction Guide.

2. Execute lease.

NOTE:
The execution requirements for a lease depend on whether the landlord or tenant is an individual or other type of legal entity. These requirements are discussed in the Transaction Guide to Ch. 34B, ***Residential Leases*** .

3. Record Memorandum of Lease.

a. If representing tenant who desires to impart constructive notice of its leasehold interest, prepare Memorandum of Lease for recording purposes [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203,* for discussion and sample Memorandum of Lease].

b. Execute Memorandum of Lease with acknowledgment and certification of signatures of executing parties by authorized offer [*see Gov. Code § 27287*].

NOTE:
The same execution requirements that apply to the lease apply to a Memorandum of Lease. For an outline of these requirements, see the Transaction Guide to Ch. 34B,

Residential Leases .

c. Record Memorandum of Lease in county where property is located [*Civ. Code §§ 1169, 1170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPriorities & RecordingRecording Acts



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18-37 California Legal Forms--Transaction Guide §§ 37.133-37.139

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

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§§ 37.133[Reserved]



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18-37 California Legal Forms--Transaction Guide § 37.140

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.140 Parties, Description of Premises, and Term of Lease

1. Draft introductory provision, including [*see* introductory paragraphs in *§§ 37.200[2], 37.201[2], 37.202[2]*]:

a. Names of parties.

b. Legal and/or marital status.

c. Addresses.

2. Insert legal description of property as given in instrument showing title [*see* introductory paragraphs in *§§ 37.200[2], 37.201[2], 37.202[2]*].

NOTE:
To avoid later conflicts over the extent of the property leased, the legal description should appear exactly as it does in the document proving title.

3. Include appropriate provision stating term of lease, such as:

a. Fixed nonrenewable term.

NOTE:
A tenant of agricultural lands that holds over for more than 60 days without a demand for possession or notice to quit from the landlord is entitled to retain possession for another full year [***see*** *Code Civ. Proc. § 1161(2)*]. For a discussion of the statutory renewal of farm leases, see *§ 37.200[1][c]*.

b. Fixed term with provision for automatic renewal [*see § 37.201[2]*, P 2].

NOTE:

For a discussion of a provision governing automatic renewal, see *§ 37.201[1][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTerm Tenancies



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18-37 California Legal Forms--Transaction Guide § 37.141

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.141 Rental Payments

1. Select and draft appropriate provision for payment of fixed rent, such as:

a. Fixed periodic cash payment [*see § 37.200[2]*, P 2].

b. Fixed percentage or fractional share of crops and/or livestock [*see §§ 37.201*, P 4, *37.210*, P 4], including:
(1) Provision establishing ownership of crops and/or livestock grown and raised on leased premises [*see §§ 37.201[2]*, P 5, *37.210[2]*, P 5].

(2) Appropriate provision governing preparation of landlord's share, such as:
(a) Share of crop or livestock itself [*see §§ 37.201[2]*, P 6 (first alternative), *37.210[2]*, P 6 (first alternative)].

(b) Share of proceeds from sale of crops and/or livestock [*see §§ 37.201[2]*, P 6 (second alternative), *37.210[2]*, P 6 (second alternative)].

(3) Appropriate provision governing delivery of landlord's share, such as:

(a) Share of crop or livestock itself [*see §§ 37.201[2]*, P 7 (first alternative), *37.210[2]*, P 7 (first alternative)].

(b) Share of proceeds from sale of crops and/or livestock [*see §§ 37.201[2]*, P 7 (second alternative), *37.210[2]*, P 7 (second alternative)].

c. If lease is livestock lease for annual grasslands, include appropriate rent provision, such as:

(1) Rent based on "per acre" method [*see § 37.202[2]*, P 2 (first alternative)].

(2) Rent based on "per head" method [*see § 37.202[2]*, P 2 (second alternative)].

(3) Rent based on "share of gain" method [*see § 37.202[2]*, P 2 (third alternative)].

d. If cash farm lease will provide for variable rent, include appropriate variable rent provision [*see § 37.211[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.142

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.142 Purpose of Lease and Operations of Farm

1. Select and draft provisions for tenant's use of leased premises, such as:

a. Premises to be used for [*see § 37.200[2]*, P 3]:
(1) Growing and raising of crops;

(2) Specific numbers of livestock; and

(3) Residence of tenant, its family, and employees engaged in farm operations.

b. Premises to be used for [*see § 37.201[2]*, P 3]:

(1) Growing and raising of crops;

(2) Livestock as needed for personal consumption by tenant and family; and

(3) Residence of tenant, its family, and employees.

c. Premises to be used for [*see § 37.210[2]*, P 3]:

(1) Growing and raising specific numbers of livestock, specific crops as supplemental feed, grain, and vegetable crops for personal consumption by tenant; and

(2) Residence of tenant, tenant's family, and employees engaged in farm operations.

d. Premises to be used solely for feeding, maintenance, grazing, and production of livestock [*see § 37.202[2]*, P 3].

2. Draft provision governing tenant's operation of farm, including [*see §§ 37.200[2]*, P 4, *37.201[2]*, P 10, *37.202[2]*, P 4]:

a. Landlord's right to enter premises and take reasonable action to protect its interest in lease and premises.

b. Language requiring tenant's compliance with public laws, ordinances, and regulations.

c. Language limiting use of chemical herbicides, fungicides, pesticides, and insecticides.

3. Include provision governing maintenance of leased premises and improvements [*see §§ 37.200[2]*, P 8, *37.201[2]*, P 18, *37.202[2]*, P 9].

4. Draft provision governing improvements on leased premises, including [*see §§ 37.200[2]*, P 10, *37.201[2]*, P 19, *37.202[2]*, P 12]:

a. Language permitting placement of improvements on premises with landlord's consent.

b. Language establishing ownership of improvements and trade fixtures on expiration of lease.

c. Language requiring tenant to keep premises free of mechanics' liens.

5. Include provision requiring tenant to keep premises free from weeds and pests [*see § 37.201[2]*, P 13].

6. Include appropriate provision governing control of disease and blight on premises, such as:

a. Provision relating to disease or blight of crops [*see § 37.201[2]*, P 14].

b. Provision requiring tenant to furnish certificate of good health for livestock placed on premises [*see § 37.202[2]*, P 10].

7. Include provision relating to waste and nuisances on leased premises [*see §§ 37.200[2]*, P 9, *37.201[2]*, P 15, *37.202[2]*, P 5].

NOTE:
For a definition of acts constituting a nuisance, see *Civ. Code § 3479*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.143

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.143 Expenses and Operating Costs

PRACTICE TIP:

Ascertain Leasing Customs in Client's Locale. The division of costs and expenses is often decided by the customary practice in the farm locale. Counsel should consult with the client, independent farm advisors, or county farm commissioners to determine the customary practices. *By Publisher's Editorial Staff.*

1. Include appropriate provision regarding furnishing of labor and equipment, such as:

a. Tenant responsible for all expenses relating to its operation on premises [*see §§ 37.200[2],* P 5, *37.202[2],* P 6].

b. Tenant responsible for costs of labor and equipment necessary in operation of premises [*see §§ 37.201[2],* P 8, *37.210[2],* P 8].

2. Include appropriate provision for payment of fertilizer, seed, and other supply costs, such as:

a. Provision requiring tenant to pay percentage share [*see §§ 37.201[2],* P 8(b), *37.210[2],* P 8(b)].

b. Provision requiring landlord to pay percentage share [*see §§ 37.201[2],* P 9(a), *37.210[2],* P 9(a)].

3. Include provision for payment of utility costs, such as:

a. Tenant responsible for all expenses relating to its operation on premises [*see §§*

37.200[2], P 5, *37.202[2]*, P 6].

b. Tenant responsible for payment of gas, electricity, and other utilities except water [*see §§ 37.201[2]*, P 8(e), *37.210[2]*, P 8(e)].

c. Landlord responsible for payment of irrigation water [*see §§ 37.201[2]*, P 9(c), *37.210[2]*, P 9(c)].

4. Include provision for payment of insurance premiums, such as:

a. Provision requiring landlord to provide adequate insurance protection, and instructing tenant to refrain from acts causing increase in landlord's premiums or subjecting policies to cancellation and to comply with landlord's insurance company [*see §§ 37.200[2]*, P 7 (first alternative), *37.201[2]*, P 16 (first alternative), *37.202[2]*, P 8 (first alternative)].

b. Provision requiring tenant to acquire adequate insurance protection, including workers' compensation and furnish proof of coverage [*see §§ 37.200[2]*, P 7 (second alternative), *37.201[2]*, P 16 (second alternative), *37.202*, P 8 (second alternative)].

NOTE:
Every individual or business entity served by employees must obtain workers' compensation insurance or a state certificate of consent to self-insure [*Lab. Code § 3700*].

c. Provision requiring tenant to procure insurance against destruction of crops [*see § 37.201[2]*, P 17].

5. Include provision for payment of taxes and assessments on leased premises [*see §§ 37.200[2]*, P 6, *37.201[2]*, P 9(b), *37.202[2]*, P 7, *37.210[2]*, P 9(b)].

6. Include provision for payment of cost of improvements and alterations on leased premises, such as:

NOTE:
Crop share leases are considered advantageous for the incentive they provide the landlord to make improvements on the leased premises. Improvements made by the landlord will increase crop and livestock yields, thereby increasing income for both parties.

a. Tenant to make alterations and improvements with landlord's permission [*see §§ 37.200[2]*, P 10(a), *37.201[2]*, P 19(a), *37.202[2]*, P 12(a)].

b. Landlord to repair or replace damaged or destroyed structures on premises when not fault of tenant [*see § 37.201[2]*, P 9(d)].

7. If using "share of gain" rental method [*see § 37.202[2]*, P 2 (third alternative)] in livestock lease of annual grasslands, include provision for livestock weighing facilities [*see § 37.202[2]*, P 11].

NOTE:
For a discussion of the "share of gain" rental method, see *§ 37.202[1][b][iv]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.144

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.144 Assignment and Subleasing

NOTE:
For an expanded discussion of the assignment and sublease of real property leases, see Ch. 35A, ***Assignment and Sublease of Leasehold Interests*** .

1. Include provision governing tenant's right to assign or sublet interest in premises [*see §§ 37.200[2]*, P 14, *37.201[2]*, P 23, *37.202[2]*, P 16].

NOTE:
Covenants in leases against assignment or subleasing do not bar tenants from granting a license to a party to perform an act on the premises [***see*** *§ 37.10[2][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleases



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18-37 California Legal Forms--Transaction Guide § 37.145

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.145 Remedial Clauses

1. Include provision describing conditions and remedies for default by tenant [*see §§ 37.200[2]*, P 15, *37.201[2]*, P 25, *37.202[2]*, P 17].

2. Include provision for remedies of landlord on tenant's default [*see §§ 37.200[2]*, PP 16, 17, *37.201[2]*, PP 26, 27, *37.202[2]*, PP 18, 19].

3. Include provision for remedies of either party for recovery of costs, including reasonable allowance for attorneys' fees, incurred in enforcing lease [*see §§ 37.200[2]*, P 21, *37.201[2]*, P 32, *37.202[2]*, P 23].

4. Include provision for indemnification of landlord [*see §§ 37.200[2]*, P 13, *37.201[2]*, P 22, *37.202*, P 15].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.146

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.146 Consultation and Inspection by Landlord

NOTE:

Provisions for the landlord's consultation and inspection should be included if the lease will provide for the "material participation" of the landlord in the farm operations. Material participation may be desirable for generating Social Security benefits or receiving favorable estate tax treatment [***see*** *§ 37.13[3], [4]*]. However, material participation by a landlord currently receiving Social Security benefits may reduce or eliminate those benefits [***see*** *42 U.S.C. § 403(b)*].

1. Include provision authorizing inspection of leased premises by landlord [*see §§ 37.200[2],* P 11, *37.201[2],* P 11, *37.202[2],* P 13].

NOTE:

A landlord may include a provision for inspection for purposes other than "material participation." Assurance that the tenant is complying with the terms of the lease and visual observation of the leased premises are reasons for requiring this provision.

2. Include provision requiring tenant to consult landlord in matters relating to farm operations, if material participation is desired [*see § 37.201[2],* P 11; *see also § 37.13[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawSocial SecurityRetirement & Survivor BenefitsEligibilityReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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18-37 California Legal Forms--Transaction Guide § 37.147

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.147 Reservation of Rights by Landlord

1. Include provision reserving right of landlord to enter premises to explore for and extract oil, gas, or other minerals [*see §§ 37.200[2]*, P 19, *37.201[2]*, P 30, *37.202[2]*, P 21].

NOTE:
For a discussion of the leasing and development of subsurface natural resources, see Ch. 36, ***Oil and Gas Rights and Leases*** .

2. Include provision reserving landlord's right to enter premises and hunt for wildlife [*see §§ 37.200[2]*, P 20, *37.201[2]*, P 31, *37.202[2]*, P 22].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMiningGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.148

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.148 Condemnation

1. Include provision granting landlord rights to award in eminent domain proceedings [*see §§ 37.200[2]*, P 18, *37.201[2]*, P 29, *37.202[2]*, P 20].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview



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18-37 California Legal Forms--Transaction Guide § 37.149

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.149 General Lease Provisions

1. Include provision governing service of notice [*see §§ 37.200[2]*, P 22, *37.201[2]*, P 33, *37.202[2]*, P 24].

2. Include provision binding heirs and successors of parties to lease [*see §§ 37.200[2]*, P 23, *37.201[2]*, P 34, *37.202[2]*, P 25].

3. Include provision making time of the essence [*see §§ 37.200[2]*, P 24, *37.201[2]*, P 35, *37.202[2]*, P 26].

4. Include provision governing subsequent amendments to lease [*see §§ 37.200[2]*, P 25, *37.201[2]*, P 36, *37.202[2]*, P 27].

5. Include provision governing effect of invalidity of portions of lease [*see §§ 37.200[2]*, P 26, *37.201[2]*, P 37, *37.202[2]*, P 28].

6. Include provision governing waiver of breach [*see §§ 37.200[2]*, P 28, *37.201[2]*, P 39, *37.202[2]*, P 30].

7. Include provision expressly denying existence of partnership [*see § 37.201[2]*, P 40; *see also § 37.10[2][c]*].

NOTE:

A lease of farm property, particularly a crop share lease, may appear to establish a partnership [***see*** *Smith v. Schultz (1891) 89 Cal. 526, 533-534, 26 P. 1087]* . If a lease is

deemed to create a partnership, certain potentially undesirable consequences may ensue, including (1) joint liability for partnership losses [***see*** *Corp. Code § 16401(b)*], (2) joint and several liability to third parties [***see*** *Corp. Code §§ 16301-16308*], and (3) the ability of one partner to bind the partnership [***see*** *Corp. Code § 16301*; ***see also*** *Corp. Code § 16100 et seq.* (Uniform Partnership Act of 1994)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART III. TRANSACTION GUIDE
D. Drafting Guide

18-37 California Legal Forms--Transaction Guide §§ 37.150-37.199

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 37.150[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
A. Complete Farm Lease Forms

18-37 California Legal Forms--Transaction Guide § 37.200

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.200 Cash Farm Lease

[1] Comment

[a] Use of Form

The form in [2], *below*, is a cash farm lease. It should be used when the parties agree to have the payment of rent established at a specific periodic cash rate. For a farm lease based on a crop share rental, see *§ 37.201*.

For a listing of the provisions that should be included in a cash farm lease, see *§§ 37.140-37.149*.

[b] Advantages of Cash Farm Lease

Although rent may be paid in the form of cash or crops [*see Silveira v. Ohm (1949) 33 Cal. 2d 272, 275-276, 201 P.2d 387]* , there may be instances when either or both parties to a farm lease may prefer to have the rent payment made on a periodic cash basis. If the landlord requires a fixed income sufficient to cover fixed expenses (for example, loan payments, taxes, and insurance), a cash farm lease providing for the periodic payment of a stipulated cash rental is often employed.

Cash farm leases may be desirable when the price stability of the crops to be grown on the leased premises is uncertain. Further, when the tenant's farming expertise is questionable and the landlord is unable to ensure that the tenant will comply with the best farming practices in the locale, a cash farm lease secures the landlord with a consistent income. The tenant may desire a cash farm lease when he or she believes that the yields and prices of the crops grown on the leased premises may be greater than the landlord anticipates, thereby increasing the percentage of the gross income that will go to the tenant.

[c] Holdover by Tenant

Under *Code Civ. Proc. § 1161(2),* in all cases of tenancy on agricultural lands, when the tenant has held over and retained possession for more than 60 days after expiration of the lease term, and the landlord has not made any demand for possession or given a notice to quit, the tenant is deemed to be holding by permission of the landlord for another full year under the terms of the lease, and is not subject to an unlawful detainer action during that time.

Agricultural leases sometimes contain a "holdover" provision specifying that a month-to-month tenancy will be created if the tenant remains in possession of the premises after expiration of the lease term. This form does not contain a holdover provision because it may conflict with the statutory rule of *Code Civ. Proc. § 1161(2)* stated above. Although case law authorizes modification of other notice requirements of that section [*see Folberg v. Clara G.R. Kinney Co. (1980) 104 Cal. App. 3d 136, 140, 163 Cal. Rptr. 426]* , there is no authority permitting modification of the special requirement for agricultural leases, which by the langauge of the statute itself applies "[i]n all cases of tenancy upon agricultural lands" [*Code Civ. Proc. § 1161(2)*].

For a discussion of a form provision for the automatic renewal of a farm lease that may be included in this form, see *§ 37.201[1][d]*.

[d] Recording Lease

The tenant of a farm lease may want to record the lease or a memorandum of lease to impart constructive notice of its interest in the leased premises to all subsequent purchases and mortgagees of the property [*see Civ. Code §§ 1213, 1214*]. For a form and discussion of the requirements for recording a memorandum of lease, see *Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*.

[2] FORM

Cash Farm Lease

FARM LEASE

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FARM LEASE

Preamble

_____[*Name(s)*] (Landlord), [*status, e.g.*, a California corporation *or* husband and wife *or* a single woman], _____[*address or principal place of business in California*], California, hereby leases to _____[*name(s)*] (Tenant), [*status, e.g.*, a California corporation, *or* husband and wife, *or* a single woman], _____[*address or principal place of business in California*], California, the real property, "leased premises," in the County of _____, State of California, described as follows: [*legal description*

].

This lease is subject to the following terms and conditions.

Term of Lease

1. The term of this lease shall be for a period of _____ years, commencing on _____[*date*], and ending on _____[*date*].

Rent

2. As rental for the leased premises, Tenant agrees to pay to Landlord a total rent of $_____ per month [*or other period*], payable in cash or by certified check, money order, or any other form of payment acceptable to Landlord, without deduction or offset. Payment shall be made on the [*e.g.*, first] day of each month [*or other period*], commencing _____[*date*], at _____ Street, _____, California, or any other place or places that may be designated by Landlord in a written notice to Tenant given in the manner prescribed in Paragraph 22 of this lease.

Use of Leased Premises

3. The leased premises are demised to Tenant for the following purposes and for no other purpose except with the prior written consent of Landlord:

(a) The planting, growing, and harvesting of agricultural crops, specifically crops of [*specify, e.g.*, oats, wheat, barley, and other grain cereals];

(b) The feeding, pasturing, maintenance, and production of agricultural livestock, specifically [*specify, e.g.*, beef cattle], not to exceed [*number*] head in total count; and

(c) The residence of Tenant and Tenant's family and any employees of Tenant engaged in farming activities on the leased premises.

Operations on Leased Premises

4. (a) Tenant shall carry on all of the activities specified under Paragraph 3 in accordance with good husbandry and the best practices of the farming community in which the leased premises are situated. If Tenant fails to take any required action or conduct any operation in accordance with the best course of husbandry practiced in the farming community surrounding the leased premises, Landlord may, after giving Tenant [*number*] days' written notice of the failure in the manner prescribed in Paragraph 22 of this lease, enter the leased premises and take any reasonable action Landlord may deem necessary to protect Landlord's interest in this lease and the leased premises. Tenant agrees to reimburse Landlord on demand for the cost of any reasonable actions taken by Landlord in accordance with the provisions of this paragraph.

(b) Tenant shall, at Tenant's cost and expense, comply with any and all laws, ordinances, rules, regulations, requirements, and orders present or future, of any federal, state, county, or municipal governments which may in any way apply to the use, maintenance, operations, or production of crops on the leased premises, or the sale or disposition of those crops.

(c) Tenant agrees not to apply pesticides, insecticides, fungicides, herbicides, or other chemical treatments that will have a residual effect beyond the term of this lease except with the prior written consent of Landlord.

Operating Costs

5. Tenant shall pay all costs in connection with Tenant's operations on the leased premises, including but not limited to costs of preparing the leased premises for planting of crops, production costs, costs of tools and labor, electricity and other utilities, and any tax or assessment imposed on the leased premises by the _____ Irrigation District for the provision of water required by Tenant.

Taxes and Assessments

6. Tenant shall pay, before delinquency, all personal property taxes or assessments levied on Tenant's personal property situated in or about the leased premises during the term of this lease. On demand, Tenant shall provide to Landlord satisfactory evidence of payment of taxes. Landlord shall be responsible for the payment of real property taxes or assessments levied on the leased premises.

Insurance

[*If landlord is to maintain insurance on the property:*]

7. Before the commencement of this lease, Landlord shall procure, and thereafter maintain, sufficient property and liability insurance coverage to protect Landlord and Tenant from public liability and property damage on the leased premises. Tenant shall not commit or permit the commission of any acts on the leased premises nor use or permit the use of the leased premises in any manner that will increase the existing rates for or cause the cancellation of any fire, liability, or other insurance policy insuring the leased premises, improvements, and crops on the leased premises. Tenant shall, at Tenant's own cost and expense, comply with any and all requirements of Landlord's insurance carriers necessary for the continued maintenance, at reasonable rates, of reasonable fire and liability insurance on the leased premises and crops thereon.

[*Or, if tenant will provide insurance:*]

7. Tenant shall, at all times during the term of this lease, maintain and keep in force insurance coverage with insurers approved by Landlord which will adequately protect both Tenant and Landlord against public liability and property damage on the leased premises. The minimum coverage required by this paragraph shall be $_____ bodily injury per individual, $_____ per occurrence, and $_____ property damage. Proof of the insurance coverage obtained by Tenant shall be given to Landlord within _____ days after execution of this lease. Any contract entered into by Tenant for insurance coverage on the leased premises shall include a provision requiring timely notice to Landlord in the event of cancellation of coverage by the insurer. Tenant is also responsible for any workers' compensation insurance required under state law.

[*Continue with the following:*]

Maintenance

8. Tenant shall, at Tenant's own expense, keep and maintain the leased premises, all improvements on the premises, and all facilities appurtenant to the leased premises, in good order and repair and in as safe and clean a condition as they were when received from Landlord, reasonable wear and tear excepted.

Waste or Nuisance

9. Tenant shall not commit, or permit others to commit, any waste on the leased premises. Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance as defined by *California Civil Code Section 3479* on the leased premises. Tenant shall not use or permit the use of the leased premises for any unlawful purpose.

Alterations and Mechanics' Liens

10. (a) Tenant shall not make or permit any alterations or improvements to the leased premises without the prior written consent of Landlord. On termination or expiration of this lease, all improvements and alterations other than trade fixtures shall be the property of Landlord, and no reimbursement to Tenant shall be required. Tenant shall remove all trade fixtures placed by Tenant on the leased premises within _____ days after the expiration of this lease.

(b) Tenant shall keep the premises free and clear of any and all liens arising out of any work performed or materials furnished at the request of Tenant, or obligations incurred by Tenant.

Inspection by Landlord

11. Tenant shall permit Landlord or Landlord's agents, representatives, or employees to enter the leased premises at all reasonable times to determine whether Tenant is complying with the terms of this lease and for the purpose of doing other lawful acts that may be necessary to protect the Landlord's interest in the leased premises.

Acceptance by Tenant

12. Tenant accepts the leased premises, as well as the improvements on the premises and facilities appurtenant to the premises, in their present condition. Tenant agrees with, and represents to Landlord, that the leased premises have been inspected by him/her and that Tenant has been assured by means independent of Landlord or Landlord's agents of the truth of all facts material to this lease and that the leased premises are being leased by Tenant as a result of its inspection and investigation and not as a result of any representations made by Landlord or Landlord's agents.

Indemnification of Landlord

13. Throughout the term of this lease, Tenant shall indemnify and hold Landlord harmless from all damages, injuries, or claims arising in or about the leased premises or arising from Tenant's operations on the leased premises.

Assignment and Subleasing

14. Tenant shall not assign, transfer, or encumber this lease or any interest in this lease without the prior written consent of Landlord. Tenant shall not sublease all or any part of the leased premises or allow any persons other than Tenant's agents, family, or employees to occupy or use all or any part of the leased premises without the prior written consent of Landlord. Landlord's consent to one assignment, sublease, occupation, or use by another person shall not be deemed to be a consent to any subsequent assignment, sublease, occupation, or use by any other person. Any assignment or subleasing without the prior written consent of Landlord shall be void. The consent of Landlord to the assignment or subleasing of any interest in this lease by Tenant shall not be unreasonably withheld.

Default by Tenant

15. The occurrence of any of the following shall constitute a material default and breach of this lease by Tenant:

(a) Any failure by Tenant to pay the rent or to make any other payment required to be made by Tenant under this lease (when that failure continues for [*number, e.g.,* 10 days] after written notice of the failure is given by Landlord to Tenant);

(b) The abandonment or vacation of the Premises by Tenant;

(c) A failure by Tenant to observe and perform any other provision of this lease to be observed or performed by Tenant, when that failure continues for [*number, e.g.,* 30 days] after written notice of Tenant's failure is given by Landlord to Tenant; provided, however, that if the nature of that default is such that it cannot reasonably be cured within a [*specify same time period for cure used above, e.g.,* 30-day] period, Tenant shall not be deemed to be in default if Tenant commences that cure within the [*same time period for cure used above, e.g.,* 30-day] period and thereafter diligently prosecutes it to completion; or

(d) The making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within 60 days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when possession is not restored to Tenant within 30 days; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when that seizure is not discharged within 30 days.

The notices provided for in subsections (a) through (c) of this paragraph are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Recovery of Damages on Tenant's Default

16. In the event of any default by Tenant under this lease, in addition to any other remedies available to Landlord at law or in equity, Landlord shall have the right to terminate this lease and all rights of Tenant under this lease by giving written notice of the termination. No act of Landlord shall be construed as terminating this lease except written notice given by Landlord to Tenant advising Tenant that Landlord elects to terminate the lease. In the event Landlord elects to terminate this lease, Landlord may recover from Tenant all of the following:

(a) The worth at the time of award of any unpaid rent that had been earned at the time of the lease's termination;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after the lease's

termination until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this lease.

Landlord's Right to Continue Lease in Effect After Breach

17. If Tenant breaches this lease and abandons the Premises before the natural expiration of this lease's term, Landlord may continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all its rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease. For as long as Landlord does not terminate this lease, Tenant shall have the right to assign or sublease the Premises with the Landlord's prior written consent. Landlord shall not unreasonably withhold consent.

Condemnation

18. (a) If all or any part of the leased premises is taken by any public or quasi-public agency or entity under the power of eminent domain during the term of this lease,

(1) Either Landlord or Tenant may terminate this lease by giving the other _____ [*number*] days' written notice of termination; provided, however, that Tenant cannot terminate this lease unless the portion of the leased premises taken by eminent domain is so extensive as to render the remainder of the premises useless for the uses permitted by this lease; and

(2) If only a portion of the leased premises is taken by eminent domain and neither Landlord nor Tenant terminates this lease, the rent thereafter payable under this lease shall be reduced by the same percentage that the total acres of the portion taken by eminent domain bears to the total acreage of the leased premises.

(b) Any and all damages and compensation awarded or paid because of a taking of the leased premises shall belong to Landlord, and Tenant shall have no claim against Landlord or the entity exercising eminent domain power for the value of the unexpired term of this lease or any other right arising from this lease.

Oil, Gas, and Mineral Rights

19. All rights in any and all minerals, oil, gas, and other hydrocarbons located on or under the leased premises are reserved to Landlord and are particularly excepted from the property covered by the terms of this lease. Tenant hereby grants to Landlord, Landlord's agents and licensees, and tenants of these rights, a right of entry and right of way for access to the leased premises for the exploration, drilling, and mining of minerals, gas, oil, and other hydrocarbons on or under the leased premises. Landlord, however, shall reimburse Tenant for any interference with the quiet enjoyment or agricultural operations on the leased premises arising from exploration, drilling, or mining operations performed by Landlord, Landlord's agents and licensees, and tenants of these rights.

Hunting Rights

20. All of the hunting rights and privileges on the leased premises are reserved to Landlord. Tenant agrees that he/she will not permit any hunting on the leased premises without the prior written consent of Landlord.

Attorneys' Fees

21. If any litigation is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to the Premises or to this lease, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

Notices

22. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to [any member of *or* the designated agent of] the party to whom they are directed, or in lieu of personal service when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____ Street, _____, CA [*zip code*], or to Landlord at _____ Street, _____, CA [*zip code*]. Either party may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Binding on Heirs and Successors

23. This lease and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this lease. Nothing contained in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest in this lease by Tenant except as provided in Paragraph 14 of this lease.

Time of Essence

24. Time is of the essence of this lease and of each provision contained within, and each provision is made and declared to be a material, necessary, and essential part of this lease.

Sole and Only Agreement

25. This instrument constitutes the sole and only agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

Effect of Partial Invalidity

26. If any term or provision of this lease or any application of this lease shall be held invalid or unenforceable, the remainder of this lease and any application of the terms and provisions shall remain valid and enforceable under this lease or California law.

Governing Law

27. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Waiver

28. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or of another provision of this lease.

Executed on _____[*date*], at _____[*city*], _____ County, California.

LANDLORD
_____ [*signature of landlord*]
[*typed name*]
TENANT
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTerm TenanciesReal Property LawPriorities & RecordingRecording Acts



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
A. Complete Farm Lease Forms

18-37 California Legal Forms--Transaction Guide § 37.201

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.201 Crop Share Farm Lease

[1] Comment

[a] Use of Form

The form in [2], *below*, is a complete crop share farm lease. It should be used when the rental rate will be based on a division of the gross income of the farming operation, whether the division is in crops or their cash proceeds. For a farm lease based on a fixed cash rental, see *§ 37.200*.

[b] Terms in Crop Share Lease

The crop share lease form in [2], *below*, includes several provisions that should be given careful consideration by the drafting attorney. It includes provisions for all of the following:

- The automatic renewal of the lease term for succeeding and consecutive one-year terms until either party gives notice of termination [*see* [2], P 2, *below*; *see also* [d], *below*];

- That the landlord and tenant will own the crops grown on the demised premises as co-tenants [*see* [2], P 5, *below*; *see also* [e], *below*]; and

- The division of expenses incurred in the production of crops [*see* [2], PP 8, 9, *below*].

Also included is a provision making the landlord a material participant in the operations of the farm [*see* [2], P 11, *below*; *see also* [f], *below*].

For a detailed listing of the provisions that should be included in a crop share farm lease, see *§§ 37.140-37.149*.

[c] Advantages of Crop Share Farm Lease

Rent is defined as the compensation paid for the use of land. Cash payment is not required; chattels or products of the soil will suffice [*Clarke and Cain v. Cobb (1898) 121 Cal. 595, 597, 54 P. 74]* . Crop share rental leases are unique to the field of agriculture, but are similar to the more commonly encountered commercial percentage lease [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.200[1][e]*, for discussion of percentage rent in commercial leases]. Crop share leases, like commercial percentage leases, protect the tenant from declining prices, demand, and production, while allowing the landlord to participate in the success of the tenant's operations.

The crop share lease allows the parties to share the risk of a total crop failure due to unforeseen circumstances. It also serves as an incentive to the landlord to make capital improvements on the demised premises that may result in increased crop production benefiting both tenant and landlord.

[d] Automatic Renewal of Lease Term

[i] Agricultural Leases Limited to 51 Years

The lease form in [2], *below*, includes a provision for the automatic renewal of the lease for consecutive one-year periods after the expiration of the initial lease term unless notification of termination is provided by either party [*see* [2], P 2, *below*].

Under *Civ. Code § 717*, a lease of agricultural lands is not valid if drafted for a term exceeding 51 years. California courts are divided on whether lease provisions for automatic renewal violate the 51-year limit. One case, relying on out-of-state decisions, held that options for renewal are in the nature of a present demise, including the renewal periods, and that although the current term is enforceable, a renewal provision for a term or terms in excess of the statutory limitation is invalid [*see Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 272-274, 179 P.2d 611]* . A later case, however, held that until the option to renew is exercised, the tenant has only a contractual right to extend the lease, and not an estate beyond the original lease term. The lease and its renewal option provision were upheld as a valid agreement [*Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463-465, 98 Cal. Rptr. 482]* . The court in the latter case refused to follow the reasoning of the earlier decision, citing a lack of California authority for it and concluding that the earlier court had adopted the "present demise" theory only because it enabled the court to reach an equitable result under the facts of that particular case [*see Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 465, 98 Cal. Rptr. 482]* . In any event, a lease in excess of a statutory period is not void except as to the excess [*Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 576 n.9, 31 Cal. Rptr. 2d 595]* .

To preclude any possibility that the lease might be voided under *Civ. Code § 717*, a provision for automatic renewal should limit the maximum term, including renewals, to 51 years.

[ii] Holdover Tenants Subject to Action for Unlawful Detainer

Absent a provision for automatic renewal, a tenant holding over past the expiration of the lease term would be subject to an action for unlawful detainer [*see Code Civ. Proc. § 1161(2)*]. However, even without an automatic renewal provision, a tenant of agricultural lands who holds over for more than 60 days without any demand of possession or notice to quit by the landlord is entitled to remain in possession for another full year [*see Code Civ. Proc. § 1161(2)*]. For further discussion of the statutory renewal on holdover by a tenant on agricultural lands, see *§ 37.200[1][c]*.

[e] Ownership of Crops

When a relationship of landlord and tenant exists, the title to the crops grown on the leased premises is held by the tenant, and not by both parties as tenants in common. The fact that the rent payable is on a crop share basis does not alter tenant's title [*Cox v. Miller (1936) 15 Cal. App. 2d 494, 498, 59 P.2d 628]* . However, by the terms of a lease

agreement, the parties may be made cotenants in the crops grown [*see Woodsend v. Chatom (1923) 191 Cal. 72, 76, 214 P. 965]* . The landlord-tenant relationship of the parties does not preclude creation of a cotenancy in the crops, as long as the intention to create the cotenancy is evidenced by the lease agreement [*see Clarke and Cain v. Cobb (1898) 121 Cal. 595, 597, 54 P. 74]* .

The form in [2], *below*, contains a provision making the landlord and tenant tenants in common in the crops grown on the premises [*see* [2], P 5, *below*]. The provision states that the landlord's title to the crops vests at the time of planting and that it is equal to the share of rent payable under the lease. By this provision, the landlord reserves title to its rental share of the crop and binds the parties to the lease and all others having notice of the reservation of title in the crops [*Cox v. Miller (1936) 15 Cal. App. 2d 494, 498-499, 59 P.2d 628]* . To protect the landlord's interest in the crops to be planted and grown on the leased premises from possible claims of the tenant's creditors, the lease or a memorandum of lease should be recorded [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.203*].

[f] Material Participation by Landlord

Crop share leases may provide for the "material participation" of the landlord [*see* [2], PP 9, 11, *below*]. If the landlord is materially participating in the farm operations on the leased premises, issues of Social Security benefits, self-employment income, and estate taxation become important. For a discussion of these areas, see *§ 37.13[3], [4]*.

"Material participation" generally will be found if the landlord periodically advises or consults with the tenant regarding production of the crop, periodically inspects the production activities on the land [*see* [2], P 11, *below*], and furnishes a substantial portion of the machinery or implements used in production, advances funds, or assumes financial responsibility for a substantial portion of the production expenses [*see Rev. Rul. 57-58, 1957-1 C.B. 270* ; *see also* [2], P 9, *below*]. The making of management decisions by the landlord has been held to constitute "material participation" in the management of the production of agricultural products [*Conley v. Ribicoff (9th Cir. 1961) 294 F.2d 190, 193, 195* ; *see also* Treas. Reg. § 1.1402(a)(4) ("actual participation to a material degree" defined)].

[g] Arbitration Provision

This form sets forth a provision for the arbitration of any disputes relating to the lease's provisions [*see* [2], P 41, *below*]. A written agreement to submit a controversy to arbitration is a binding and enforceable contract [*Code Civ. Proc. § 1281*]. The provision in this lease form calls for any arbitration entered into under this lease to be conducted in compliance with the statutory scheme for arbitration contained in the California Arbitration Act [*Code Civ. Proc. §§ 1280-1294.2*]. If the lease includes an option to purchase, certain additional requirements will generally be required for the arbitration provision [*see Ch. 34C, Retail, Industrial, and Office Leases, § 34C.280* for discussion of these requirements].

A crop share lease contains many elements that may lead to subjective disagreements between the parties. Examples of these issues include the following:

- What constitutes the best farming practices and good husbandry [*see* [2], P 10, *below*];
- What constitutes proper preparation and delivery of crop shares [*see* [2], PP 6, 7, *below*]; and
- What additional crops, if any, may be grown [*see* [2], P 8(a), *below*].

Disputes relating to these issues can be settled quickly and with minimal expense by a panel of arbitrators familiar with agricultural practices [*see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

[2] FORM

Crop Share Farm Lease

CROP SHARE FARM LEASE

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CROP SHARE FARM LEASE

Preamble

_____[*Name(s)*] (Landlord), [*status, e.g.,* a California corporation *or* husband and wife *or* a single woman], _____[*address or principal place of business in California*], California, hereby leases to _____[*name(s)*] (Tenant), [*status, e.g.,* a California corporation, *or* husband and wife, *or* a single

woman], _____[*address or principal place of business in California*], California, the real property in the County of _____, State of California, described as follows ("leased premises"): [*legal description*].

This lease is subject to the following terms and conditions.

Term of Lease

1. The term of this lease shall be for a period of _____ years, commencing on _____[*date*], and ending on _____[*date*].

Automatic Renewal

2. At the expiration of the term specified in Paragraph 1, this lease, including all the terms and conditions within, shall be automatically renewed for an additional period of one year, and thereafter shall be automatically renewed for succeeding and consecutive one-year periods until either Landlord or Tenant gives written notice to the other, at least _____ days before the expiration of the term, of the termination of the lease at the end of the current one-year period. Under no circumstances, however, shall the initial term and any subsequent renewal periods extend beyond a total lease term of 51 years. The notice required by this paragraph shall be made in the manner prescribed in Paragraph 33 of this lease.

Use of Leased Premises

3. The leased premises are demised to Tenant for the following purposes and for no other purpose except with the prior written consent of Landlord:

(a) The planting, growing, and harvesting of [*specify, e.g.*, cotton and cottonseed] crops;

(b) The planting, growing, and harvesting of [*specify, e.g.*, hay and alfalfa] crops;

(c) The feeding, pasturing, and maintenance of dairy cattle and poultry, to the extent reasonably necessary to provide dairy and poultry products to Tenant and Tenant's family; and

(d) The residence of Tenant and Tenant's family and any employees of Tenant engaged in farming activities on the leased premises.

Rent

4. As rental for the leased premises, Tenant hereby agrees to pay to Landlord the following percentages of the total annual yield:

(a) [*fraction or percentage, e.g.*, One fourth] of all [*type of crop, e.g.*, cotton and cottonseed] grown and produced on the leased premises, both quality and quantity considered, during the term of this lease and any and all renewals or extensions of this lease; and

(b) [*fraction or percentage, e.g.*, Sixteen percent] of all [*type of crop, e.g.*, hay and alfalfa] grown and produced on the leased premises, both quality and quantity considered, during the term of this lease and any and all renewals or

extensions of this lease.

Ownership of Crops

5. Crops planted, cultivated, and grown in accordance with Paragraph 3 of this lease on the leased premises during the term of this lease or any renewals or extensions of this lease shall be owned by Landlord and Tenant as tenants in common, before the actual physical division and removal from the leased premises. Landlord shall own an undivided interest in the crops equal to the share payable to it as rent for the leased premises under Paragraph 4 of this lease and the interest shall vest in Landlord at the time the crop is planted on the leased premises.

Preparation of Landlord's Share

[*If crop is usually marketed in containers:*]

6. The share of any crop payable to Landlord as rent under Paragraph 4 of this lease shall, before delivery to Landlord, be harvested and prepared for market by Tenant, at Tenant's own cost and expense, in accordance with the best practices known to the farming industry in the locale where the leased premises are located. If marketing of the crop in containers is customary in the locale where the leased premises are located, Tenant shall, at Tenant's own cost and expense, place and deliver the share of the crop payable to Landlord under Paragraph 4 of this lease in good new merchantable containers of the best type reasonably obtainable in the locale where the leased premises are located.

[*Or, if crop is usually sacked or baled (as in the case of grain and feed crops):*]

6. Before delivery to Landlord,

(a) The share of any grain crop payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall be harvested, threshed, cleaned, and sacked in good new merchantable sacks by Tenant at Tenant's own cost and expense and shall, in all respects, be in good marketable condition at the time of delivery to Landlord; and

(b) The share of any alfalfa or hay crop payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall be harvested, cured, and baled in [*size of bales*] by Tenant at Tenant's own cost and expense.

[*Or, if crops will be sold and cash proceeds paid to Landlord:*]

6. The share of any crop payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall be payable in lawful currency of the United States of America in an amount equal to the market value of the share of the crop as of the date of harvest. Tenant shall have _____ days after harvest to prepare the crop share for commercial sale and convert the crop share to cash.

[*Continue with the following:*]

Delivery to Landlord

[*If landlord's share is payable in crops:*]

7. The share of any crop payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall immediately after harvest be prepared in the manner specified in Paragraph 6 of this lease and delivered by Tenant, at its own cost and expense, to Landlord at the place or places not more than _____ miles from the leased premises as may from time to time be designated by Landlord in a written notice served on Tenant.

[*Or, if landlord's share is payable in cash proceeds:*]

7. The share of any crop payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall be prepared immediately after harvest, in the time and manner specified in Paragraph 6 of this lease, and personally delivered or mailed first-class by Tenant, at Tenant's own cost and expense, to Landlord at _____ Street, _____, CA [*zip code*].

[*Continue with the following:*]

Expenses of Tenant

8. During the term of this lease and any extensions of this lease, Tenant shall, at Tenant's own cost and expense, do all of the following:

(a) Furnish all labor and equipment necessary to properly cultivate, grow, and harvest on the leased premises, in a manner consistent with good farming practices and husbandry, the crops specified in Paragraph 3 of this lease and any other crops that Landlord and Tenant mutually agree should be grown on the leased premises during the term of this lease or any renewal or extension of this lease;

(b) Furnish _____ percent of all seeds, _____ percent of all fertilizers, and _____ percent of all other supplies necessary to properly plant, cultivate, grow, and harvest on the leased premises in a manner consistent with good farming practices and husbandry the crops that are to be planted, grown, cultivated, and harvested on the leased premises under this lease;

(c) Keep and maintain all reclamation, irrigation, and drainage ditches located on the leased premises open and in good condition and repair so that drainage and irrigation waters may flow freely in the ditches to and from lands adjoining the leased premises;

(d) Maintain in as good condition as they are on the date of the making of this lease, reasonable wear and tear excepted, the well, pump, and pressure system used to supply the dwelling houses on the leased premises with domestic water;

(e) Pay all charges, promptly as they become due, for the furnishing of gas, electricity, and other public utilities [except irrigation water] to the leased premises; and

(f) Pay, before delinquency, all personal property taxes or assessments levied on Tenant's personal property situated in or about the leased premises during the term of this lease. On demand, Tenant shall provide to Landlord satisfactory evidence of payment of taxes.

Expenses of Landlord

9. During the term of this lease and any renewals or extensions of this lease, Landlord shall, at Landlord's own cost and expense, do all of the following:

(a) Furnish _____ percent of all seeds, _____ percent of all fertilizers, and _____ percent of all other supplies necessary to properly plant, cultivate, grow, and harvest on the leased premises in a manner consistent with good farming practices and husbandry the crops that are to be planted, grown, cultivated, and harvested on the leased premises under this lease;

(b) Pay, promptly as they become due, all taxes and assessments levied or assessed against the leased premises, excepting those taxes levied or assessed against Tenant's personal property and trade fixtures on or about the leased premises;

(c) Provide adequate water for the proper irrigation of any and all crops that may be planted, cultivated, grown, and harvested on the leased premises under this lease; and

(d) Replace or repair any dwelling or permanent improvement now located on the leased premises that may be damaged or destroyed by fire, flood, tornado, or any other cause not the fault and beyond the control of Tenant.

Operations on Leased Premises

10. (a) Tenant shall carry on all of Tenant's activities specified under Paragraph 3 in accordance with good husbandry and the best practices of the farming community in which the leased premises are situated. Should Tenant fail to take any action required by the best course of husbandry practiced in the farming community surrounding the leased premises, or should Tenant fail to conduct any operation undertaken by Tenant on the leased premises in accordance with the best course of husbandry practiced in the farming community surrounding the leased premises, Landlord may, after serving _____ days' written notice of the failure on Tenant in the manner prescribed in Paragraph 33 of this lease, enter the leased premises and take any reasonable action Landlord may deem necessary to protect Landlord's interest in this lease and the leased premises. Tenant agrees to reimburse Landlord on demand for the cost of any reasonable actions taken by Landlord in accordance with the provisions of this paragraph;

(b) Tenant shall, at Tenant's cost and expense, comply with any and all present or future laws, ordinances, rules, regulations, requirements, and orders of federal, state, county, or municipal governments that may in any way apply to the use, maintenance, operations, or production of crops on the leased premises, or the sale or disposition of those crops; and

(c) Tenant agrees not to apply pesticides, insecticides, fungicides, herbicides, or other chemical treatments that will have a residual effect beyond the term of this lease, or any renewals or extensions of this lease, except with the prior written consent of Landlord.

[*If material participation of landlord is desired:*]

Consultation and Inspection by Landlord

11. In addition to any other duties imposed on Landlord under the provisions of this lease, Landlord or Landlord's designated agent or employee shall consult with Tenant on a [*specify periodic basis, e.g.,* weekly *or* bimonthly] basis regarding the maintenance and operation of the leased premises. Landlord or Landlord's designated agent or employee shall inspect the operations of Tenant on the leased premises on a [*specify periodic basis, e.g.,* weekly *or* bimonthly]

basis to assure that Tenant is operating the farm in accordance with the provisions of this lease and the best course of husbandry practiced in the farming community surrounding the leased premises.

[*Continue with the following:*]

Crop on Levee

12. Tenant shall not plant, cultivate, or grow any crop or crops on any levee or levees located on or adjacent to the leased premises without the prior written consent of Landlord. Should Landlord consent to the planting, growing, or cultivation of any crop on any levee, Tenant will do nothing in planting, cultivating, or growing the crop that might weaken or impair the strength of the levee. Any consent given by Landlord for the growing of any crop by Tenant on a levee may be withdrawn at any time by Landlord without liability to Landlord if Landlord has reasonably determined the strength of the levee is endangered thereby.

Weeds and Pests

13. Tenant shall prevent noxious weeds from going to seed on the leased premises, destroy them, and keep the weeds and grass cut. Tenant shall make and keep all levees on or abutting the leased premises free and clear of all growth of any kind, except as may be allowed under Paragraph 12 of this lease. Tenant shall make and keep the leased premises free and clear of all rats, gophers, squirrels, and other pests.

Disease or Blight

14. Should any disease or blight of any character appear on the leased premises or in or on any crop growing or grown on the leased premises, Tenant, at Tenant's own cost and expense, shall do both of the following:

(a) Employ the best known methods for eradicating the disease or blight; and

(b) Consult with and follow the advice of any and all experts on the subject recommended by Landlord [who have offices or reside within _____ miles of the leased premises].

Waste or Nuisance

15. Tenant shall not commit, or permit others to commit, any waste on the leased premises. Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance as defined by *California Civil Code Section 3479* on the leased premises. Tenant shall not use or permit the use of the leased premises for any unlawful purpose.

Insurance

[*If landlord is to maintain insurance on the property:*]

16. Before the commencement of this lease, Landlord shall procure, and thereafter maintain, sufficient property and liability insurance coverage to protect Landlord and Tenant from public liability and property damage on the leased

premises. Tenant shall not commit or permit the commission of any acts on the leased premises, nor use or permit the use of the leased premises in any manner that will increase the existing rates for or cause the cancellation of any fire, liability, or other insurance policy insuring the leased premises, improvements, and crops on the leased premises. Tenant shall, at Tenant's own cost and expense, comply with any and all requirements of Landlord's insurance carriers necessary for the continued maintenance, at reasonable rates, of reasonable fire and liability insurance on the leased premises and crops thereon.

[*Or, if tenant will provide insurance:*]

16. Tenant shall, at all times during the term of this lease, maintain and keep in force insurance coverage with insurers approved by Landlord that will adequately protect both Tenant and Landlord against public liability and property damage on the leased premises. The minimum coverage required by this paragraph shall be $_____ bodily injury per individual, $_____ per occurrence, and $_____ property damage. Proof of the insurance coverage obtained by Tenant must be given to Landlord within _____ days after execution of this lease. Any contract entered into by Tenant for insurance coverage on the leased premises shall include a provision for timely notice to Landlord in the event of cancellation of coverage by the insurer. Tenant is also responsible for any workers' compensation insurance required under state law.

[*Continue with the following:*]

Crop Insurance

17. Tenant, at Tenant's own cost and expense, shall insure for their full insurable value, through insurance policies issued by companies approved by Landlord, any crops specified in Paragraph 3 of this lease grown on the leased premises, against damage or destruction by [*specify calamity or calamities, e.g.,* fire, hail, windstorms, tornadoes, and explosions]. The losses recoverable under any policy issued in accordance with this paragraph shall be payable to Landlord and Tenant according to their respective interests in the crop as specified in Paragraph 4 of this lease.

Maintenance

18. Tenant, at Tenant's own expense, shall keep and maintain the leased premises, all improvements, and all facilities appurtenant to the leased premises, in good order and repair and in as safe and clean a condition as they were when received from Landlord, reasonable wear and tear excepted.

Alterations and Mechanics' Liens

19. (a) Tenant shall not make or permit any alterations or improvements to the leased premises without the prior written consent of Landlord. On termination or expiration of this lease, all improvements and alterations other than trade fixtures shall be the property of Landlord, and no reimbursement to Tenant shall be required. Tenant shall remove all trade fixtures placed by Tenant on the leased premises within _____ days after the expiration of this lease.

(b) Tenant shall keep the premises free and clear of any and all liens arising out of any work performed or materials furnished at the request of Tenant, or obligations incurred by Tenant.

Inspection by Landlord

20. Tenant shall permit Landlord or Landlord's agents, representatives, or employees to enter the leased premises at all reasonable times to determine whether Tenant is complying with the terms of this lease and for the purpose of doing other lawful acts that may be necessary to protect the Landlord's interest in the leased premises.

Acceptance by Tenant

21. Tenant accepts the leased premises, as well as the improvements on the premises and facilities appurtenant to the premises, in their present condition. Tenant agrees with, and represents to Landlord, that the leased premises have been inspected by it and that Tenant has been assured by means independent of Landlord or Landlord's agents of the truth of all facts material to this lease and that the leased premises are being leased by Tenant as a result of its inspection and investigation and not as a result of any representations made by Landlord or Landlord's agents.

Indemnification of Landlord

22. Tenant, throughout the term of this lease, shall indemnify and hold Landlord harmless from all damages, injuries, or claims arising in or about the leased premises or arising from Tenant's operations on the leased premises.

Assignment and Subleasing

23. Tenant shall not assign, transfer, or encumber this lease or any interest in this lease without the prior written consent of Landlord. Tenant shall not sublease all or any part of the leased premises or allow any persons other than Tenant's agents, family, or employees, to occupy or use all or any part of the leased premises without the prior written consent of Landlord. Landlord's consent to one assignment, sublease, occupation, or use by another person shall not be deemed to be a consent to any subsequent assignment, sublease, occupation, or use by any other person. Any assignment or subleasing without the prior written consent of Landlord shall be void. The consent of Landlord to the assignment or subleasing of any interest in this lease by Tenant shall not be unreasonably withheld.

Death or Incapacity of Tenant

24. Should Tenant die or become permanently incapacitated for any reason from performing Tenant's duties under this lease before the time any crop planted by Tenant on the leased premises has been fully harvested, Landlord, at Landlord's option, may (1) re-enter and take possession of the leased premises; (2) cause the crop to be properly cultivated, grown, and harvested in a manner consistent with good farming practice and husbandry; (3) sell the crop for the best price reasonably obtainable at the time of the harvest; and (4) divide the proceeds from the sale of the crop, after reimbursing Landlord for any costs or expenses incurred by it in performing the provisions of this paragraph, between Landlord and the estate of Tenant according to the respective interests of both parties in the crop provided under Paragraph 4 of this lease. Tenant shall become permanently incapacitated within the meaning of this paragraph if Tenant is adjudged incompetent in a proceeding to have a guardian or conservator appointed for Tenant or if, in the opinion of three qualified physicians who have examined Tenant, it is impossible or dangerous to continue to perform Tenant's duties under this lease.

Default by Tenant

25. The occurrence of any of the following shall constitute a material default and breach of this lease by Tenant:

(a) Any failure by Tenant to pay the rent or to make any other payment required to be made by Tenant under this lease (when that failure continues for [*number, e.g.,* 10 days] after written notice of the failure is given by Landlord to Tenant);

(b) The abandonment or vacation of the Premises by Tenant;

(c) A failure by Tenant to observe and perform any other provision of this lease to be observed or performed by Tenant, when that failure continues for [*number, e.g.,* 30 days] after written notice of Tenant's failure is given by Landlord to Tenant; provided, however, that if the nature of that default is such that it cannot reasonably be cured within a [*specify same time period for cure used above, e.g.,* 30-day] period, Tenant shall not be deemed to be in default if Tenant commences that cure within the [*same time period for cure used above, e.g.,* 30-day] period and thereafter diligently prosecutes it to completion; or

(d) The making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within 60 days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when possession is not restored to Tenant within 30 days; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when that seizure is not discharged within 30 days.

The notices provided for in subsections (a) through (c) of this paragraph are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Recovery of Damages on Tenant's Default

26. In the event of any default by Tenant under this lease, in addition to any other remedies available to Landlord at law or in equity, Landlord shall have the right to terminate this lease and all rights of Tenant under this lease by giving written notice of the termination. No act of Landlord shall be construed as terminating this lease except written notice given by Landlord to Tenant advising Tenant that Landlord elects to terminate the lease. In the event Landlord elects to terminate this lease, Landlord may recover from Tenant all of the following:

(a) The worth at the time of award of any unpaid rent that had been earned at the time of the lease's termination;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after the lease's termination until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this lease.

Landlord's Right to Continue Lease in Effect After Breach

27. If Tenant breaches this lease and abandons the Premises before the natural expiration of this lease's term, Landlord may continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all its rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease. For as long as Landlord does not terminate this lease, Tenant shall have the right to assign or sublease the Premises with the Landlord's prior written consent. Landlord shall not unreasonably withhold consent.

Force Majeure Clause

28. Should the performance of the obligations of either party under this lease be prevented or delayed by an act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, or by any law, regulation, or order of any federal, state, county, or municipal authority, or by any other cause beyond the control of the party to be excused, that party's performance under this lease, to the extent it is prevented or delayed, shall be excused.

Condemnation

29. (a) If all or any part of the leased premises is taken by any public or quasi-public agency or entity under the power of eminent domain during the term of this lease,

(1) Either Landlord or Tenant may terminate this lease by giving the other _____ [*number*] days' written notice of termination; provided, however, that Tenant may not terminate this lease unless the portion of the leased premises taken by eminent domain is so extensive as to render the remainder of the premises useless for the uses permitted by this lease; and

(2) If only a portion of the leased premises is taken by eminent domain and neither Landlord nor Tenant terminates this lease, the rent thereafter payable under this lease shall be reduced by the same percentage that the total acres of the portion taken by eminent domain bears to the total acreage of the leased premises.

(b) Any and all damages and compensation awarded or paid because of a taking of the leased premises shall belong to Landlord, and Tenant shall have no claim against Landlord or the entity exercising eminent domain power for the value of the unexpired term of this lease or any other right arising from this lease.

Oil, Gas, and Mineral Rights

30. All rights in any and all minerals, oil, gas, and other hydrocarbons located on or under the leased premises are reserved to Landlord and are particularly excepted from the property covered by the terms of this lease. Tenant hereby grants to Landlord, Landlord's agents and licensees, and tenants of these rights, a right of entry and right of way for access to the leased premises for the exploration, drilling, and mining of minerals, gas, oil, and other hydrocarbons on or under the leased premises. Landlord, however, shall reimburse Tenant for any interference with the quiet enjoyment or agricultural operations on the leased premises arising from exploration, drilling, or mining operations performed by Landlord, Landlord's agents and licensees, and tenants of these rights.

Hunting Rights

31. All of the hunting rights and privileges on the leased premises are reserved to Landlord. Tenant agrees that Tenant will not permit any hunting on the leased premises without the prior written consent of Landlord.

Attorneys' Fees

32. If any litigation is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to the Premises or to this lease, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

Notices

33. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to [any member of *or* the designated agent of] the party to whom they are directed, or in lieu of personal service when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____ Street, _____, CA [*zip code*] or to Landlord at _____ Street, _____, CA [*zip code*]. Either party may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Binding on Heirs and Successors

34. This lease and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors and assigns of the parties to this lease. Nothing contained in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest in this lease by Tenant except as provided in Paragraph 23 of this lease.

Time of Essence

35. Time is of the essence of this lease and of each provision contained within, and each provision is made and declared to be a material, necessary, and essential part of this lease.

Sole and Only Agreement

36. This instrument constitutes the sole and only agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

Effect of Partial Invalidity

37. If any term or provision of this lease or any application of this lease shall be held invalid or unenforceable, the

remainder of this lease and any application of the terms and provisions shall remain valid and enforceable under this lease or California law.

Governing Law

38. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Waiver

39. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or of another provision of this lease.

No Partnership

40. Nothing contained in this lease shall create a partnership, joint venture, or employment relationship between Landlord and Tenant. Neither Landlord nor Tenant shall be liable, except as otherwise expressly provided for in this lease, for any obligations or liabilities incurred by the other.

Arbitration

41. Any dispute that arises between Landlord and Tenant relating to the provisions of this lease shall be submitted to arbitration on application by either party. The arbitration panel shall consist of three persons, one each appointed by Landlord and Tenant, and the third shall be jointly appointed by the appointees of Landlord and Tenant. The arbitration shall be conducted in compliance with *Code of Civil Procedure Sections 1280-1294.2* relating to arbitration. The cost of the arbitration shall be divided evenly between Landlord and Tenant.

Executed on _____[*date*], at _____[*city*], _____ County, California.

LANDLORD
_____ [*signature of landlord*]
[*typed name*]
TENANT
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawSocial SecurityRetirement & Survivor BenefitsEligibilityReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenanciesTenancies at Sufferance



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
A. Complete Farm Lease Forms

18-37 California Legal Forms--Transaction Guide § 37.202

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.202 Livestock Lease for Annual Grasslands

[1] Comment

[a] Use of Form

The form in [2], *below*, is a lease that may be used by parties entering into an agreement for the grazing of livestock on annual grasslands. It includes several alternative provisions illustrating different methods for payment of rent [*see* [b], *below*]. When the parties contemplate an agreement under which the tenant will plant, grow, and harvest crops as supplemental feed, and reside on the leased premises, use the provisions in *§ 37.210[2]*.

[b] Method of Calculating Rent

[i] Customary Practices

The parties must determine the method of rental by which the leased premises will be demised. A number of methods are in use and local practices should be considered when the determination is made. For assistance in determining the prevailing local rental rates or in selecting the proper method for determining the rent payable, county farm commissioners and independent farm advisors may be consulted. Possible methods of calculating rent include the following:

- Per-acre charges [*see* [ii], *below*];
- Per-head charges [*see* [iii], *below*]; and
- The "share of gain" method [*see* [iv], *below*].

[ii] Per-Acre Charges

Per-acre charges [*see* [2], P 2 (first alternative), *below*] vary with the productivity of the leased premises and the conditions of the lease. The parties must agree on the number and type of animals to be stocked, and the time of use (for example, month, season, year) to avoid overgrazing. Under this method, the landlord receives the same return per year based on an average range forage production, and the tenant assumes the risk of a diminished range forage production due to drought or other detrimental condition.

[iii] Per-Head Charges

Per-head charges [*see* [2], P 2 (second alternative), *below*] for a month or season vary with the type of livestock grazed--cows and calves, stocker cattle, replacement heifers, sheep, or horses. Under this method, the landlord assumes a portion of the risk of diminished range forage production but has greater control of the number of livestock grazed on the leased premises.

[iv] Share-of-Gain Method

The "share of gain" method [*see* [2], P 2 (third alternative), *below*] applies to seasonally grazed, weight-gaining animals such as stocker cattle, replacement heifers, and lambs. Rent charges under this method may consist of a pre-established charge per pound of weight gain (for example, $0.25) or a share of the total weight gain (40-60 percent) for the predetermined grazing period. Animals are weighed before and after the grazing period, with the difference being the weight gain.

[c] Lease Agreement Conditions

This lease is similar to that of the other common farm leases illustrated in this chapter [*see §§ 37.200, 37.201*] and should include those provisions that are required in all real property leases [*see § 37.12*]. In addition, there are a number of special provisions that may be appropriate, depending on the circumstances. These include provisions governing acceptable grazing levels [*see* [2], P 3, *below*], health of the livestock [*see* [2], P 10, *below*], and the manner of weighing the stock when weight is a factor in determining the rent [*see* [2], P 11, *below*].

For a discussion of a provision governing the automatic renewal of a farm lease for a period not to exceed the statutory limitation that may be included here, see *§ 37.201[1][d]*. For a discussion of holdover tenants on agricultural lands, see *§ 37.200[1][c]*.

[2] FORM

Livestock Lease for Annual Grasslands

LEASE FOR ANNUAL GRASSLANDS

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LEASE FOR ANNUAL GRASSLANDS

Preamble

_____[*Name(s)*] (Landlord), [*status, e.g.,* a California corporation *or* husband and wife *or* a single woman], _____[*address or principal place of business in California*], California, hereby leases to _____[*name(s)*] (Tenant), [*status, e.g.,* a California corporation *or* husband and wife *or* a single woman], _____[*address or principal place of business in California*], California, the real property in the County of _____, State of California, described as follows ("leased premises"): [*insert legal description*].

This lease is subject to the following terms and conditions.

Term of Lease

1. The term of this lease shall be for a period of _____ years [*or other period*], commencing on _____[*date*], and ending on _____[*date*].

Rent

[*If rent is to be computed on a "per-acre" basis:*]

2. As rental for the leased premises, Tenant hereby agrees to pay to Landlord a total rent of $_____ per month [*or otherwise*] payable in lawful currency of the United States of America, without deduction or offset. Payment shall be made on the [*e.g.,* first] day of each month commencing _____[*date*], at _____ Street, _____, California, or any other place or places that may be designated by Landlord in a written notice to Tenant given in the manner prescribed in Paragraph 24 of this lease.

[*Or, if rent is to be computed on a "per-head" basis:*]

2. As rental for the leased premises, Tenant hereby agrees to pay to Landlord the total rent of $_____ per head of [*type of animal, e.g.,* steers] and $_____ per head of _____[*type of animal, e.g.,* sheep] grazed on the leased premises. Payment shall be made on the [*e.g.,* first] day of each month commencing _____[*date*], at _____ Street, _____, California, or other any other place or places that may be designated by Landlord in a written notice to Tenant given in the manner prescribed in Paragraph 24 of this lease.

[*Or, if rent is to be computed on a "share of gain" basis:*]

2. As rental for the leased premises, Tenant hereby agrees to pay to Landlord

_____[_____ percent of the current market value of *or* $_____ per pound for] the total weight gain in each animal grazed under this agreement, based on the weight per animal immediately preceding the commencement of this lease and at the termination of this lease. Landlord shall provide weighing facilities as specified in Paragraph 11 of this lease. Payment shall be made within _____ days of the natural termination of this lease at _____ Street, _____, California, or any other place or places that may be designated by Landlord in a written notice to Tenant given in the manner prescribed in Paragraph 24 of this lease.

[*Continue with the following:*]

Use of Leased Premises

3. The leased premises are demised to Tenant for the purpose of feeding, maintenance, grazing, and production of agricultural livestock consistent with the terms of this lease and with good farming practices and animal husbandry. The total number of [*type of animal, e.g.,* steers] shall not exceed _____, and the total number of _____[*type of animal, e.g.,* sheep] shall not exceed _____. Tenant shall maintain the leased premises productive by assuring residual dry matter (RDM) at a minimum average of two inches of unused plant material. No other use shall be permitted without the prior written consent of Landlord.

Operations on Leased Premises

4. (a) Tenant shall carry on all of Tenant's activities specified under Paragraph 3 in accordance with good husbandry and the best practices of the farming community in which the leased premises are situated. Should Tenant fail to take any action required by the best course of husbandry practiced in the farming community surrounding the leased premises, or should Tenant fail to conduct any operation undertaken by Tenant on the leased premises in accordance with the best course of husbandry practiced in the farming community surrounding the leased premises, Landlord may, after serving _____ days' written notice of the failure on Tenant in the manner prescribed in Paragraph 24 of this lease, enter the leased premises and take any reasonable action Landlord may deem necessary to protect Landlord's interest in this lease and the leased premises. Tenant agrees to reimburse Landlord on demand for the cost of any reasonable actions taken by Landlord in accordance with the provisions of this paragraph;

(b) Tenant shall, at Tenant's cost and expense, comply with any and all present or future laws, ordinances, rules, regulations, requirements, and orders of federal, state, county, or municipal governments that may apply in any way to the use, maintenance, operations, or production of livestock on the leased premises, or the sale or disposition of that livestock; and

(c) Tenant agrees not to apply pesticides, insecticides, fungicides, herbicides, or other chemical treatments on the leased premises that will have a residual effect beyond the term of this lease, except with the prior written consent of Landlord.

Waste or Nuisance

5. Tenant shall not commit, or permit others to commit, any waste on the leased premises. Tenant shall not maintain, commit, or permit the maintenance or commission of any nuisance as defined by *California Civil Code Section 3479* on the leased premises. Tenant shall not use or permit the use of the leased premises for any unlawful purpose.

Operating Costs

6. Tenant shall pay all costs in connection with Tenant's operations on the leased premises, including but not limited to production costs, costs of tools and labor, electricity and other utilities, and any tax or assessment imposed on the leased premises by the _____ Irrigation District for the provision of water to the leased premises.

Taxes and Assessments

7. Before delinquency, Tenant shall pay all personal property taxes or assessments levied on Tenant's personal property situated in or about the leased premises during the term of this lease. On demand, Tenant shall provide to Landlord satisfactory evidence of payment of taxes. Landlord shall be responsible for the payment of real property taxes or assessments levied on the leased premises.

Insurance

[*If landlord is to maintain insurance on the property:*]

8. Before the commencement of this lease, Landlord shall procure, and thereafter maintain, sufficient property and liability insurance coverage to protect Landlord and Tenant from public liability and property damage on the leased premises. Tenant shall not commit or permit the commission of any acts on the leased premises, nor use or permit the use of the leased premises, in any manner that will increase the existing rates for or cause the cancellation of any fire, liability, or other insurance policy insuring the leased premises and improvements on the leased premises. Tenant shall, at Tenant's own cost and expense, comply with any and all requirements of Landlord's insurance carriers necessary for the continued maintenance at reasonable rates of reasonable fire and liability insurance on the leased premises.

[*Or, if tenant will provide insurance:*]

8. Tenant shall, at all times during the term of this lease, maintain and keep in force insurance coverage with insurers approved by Landlord which will adequately protect both Tenant and Landlord against public liability and property damage on the leased premises. The minimum coverage required by this paragraph shall be $_____ bodily injury per individual, $_____ per occurrence, and $_____ property damage. Proof of the insurance coverage obtained by Tenant must be given to Landlord within _____ days after execution of this lease. Any contract entered into by Tenant for insurance coverage on the leased premises shall include a provision requiring timely notice to Landlord in the event of cancellation of coverage by the insurer. Tenant is also responsible for any workers' compensation insurance required under state law.

[*Continue with the following:*]

Maintenance

9. Tenant, at Tenant's own expense, shall keep and maintain the leased premises, all improvements on the leased premises, and all facilities appurtenant to the leased premises, in good order and repair and in as safe and clean a condition as they were when received from Landlord, reasonable wear and tear excepted.

Livestock Health

10. Tenant shall provide Landlord, within _____ days from the date of this lease's commencement, with a certification executed by a licensed veterinarian attesting to the good health of the livestock to be placed on the leased premises and proof of brucellosis vaccination of same. Tenant [*or* Landlord] shall assume all losses due to predation except when Landlord's [*or* Tenant's] negligence is a contributing factor.

[*Add, if "share of gain rental" method is used:*]

Weighing Facilities

11. Landlord shall provide adequate weighing, working, and loading facilities sufficient to accurately measure the weight gain of each animal for purposes of calculating the rental rate specified in Paragraph 2 of this lease.

[*Continue with the following:*]

Alterations and Mechanics' Liens

12. (a) Tenant shall not make or permit any alterations or improvements to the leased premises without the prior written consent of Landlord. On termination or expiration of this lease, all improvements and alterations other than trade fixtures shall be the property of Landlord, and no reimbursement to Tenant shall be required. Tenant shall remove all trade fixtures placed by Tenant on the leased premises within _____ days after the expiration of this lease.

(b) Tenant shall keep the premises free and clear of any and all liens arising out of any work performed or materials furnished at the request of Tenant, or obligations incurred by Tenant.

Inspection by Landlord

13. Tenant shall permit Landlord or Landlord's agents, representatives, or employees to enter the leased premises at all reasonable times to determine whether Tenant is complying with the terms of this lease and for the purpose of doing other lawful acts that may be necessary to protect Landlord's interest in the leased premises.

Acceptance by Tenant

14. Tenant accepts the leased premises, as well as the improvements on the leased premises, and facilities appurtenant to the leased premises, in their present condition. Tenant agrees with, and represents to Landlord, that the leased premises have been inspected by it and that Tenant has been assured by means independent of Landlord or any agent of Landlord of the truth of all facts material to this lease and that the leased premises are being leased by Tenant as a result of its inspection and investigation and not as a result of any representations made by Landlord or any agent of Landlord.

Indemnification of Landlord

15. Tenant, throughout this lease's term, shall indemnify and hold Landlord harmless from all damages, injuries, or claims arising in or about the leased premises or in connection with the conduct by Tenant of any operations thereon, except as otherwise provided in this lease.

Assignment and Subleasing

16. Tenant shall not assign, transfer, or encumber this lease or any interest in this lease without the prior written consent of Landlord. Tenant shall not sublease all or any part of the leased premises, or allow any persons other than Tenant's agents, family, or employees, to occupy or use all or any part of the leased premises, without the prior written consent of Landlord. Landlord's consent to one assignment, sublease, occupation, or use by another person shall not be deemed to be a consent to any subsequent assignment, sublease, occupation, or use by any other person. Any assignment or subleasing without the prior written consent of Landlord shall be void. The consent of Landlord to the assignment or subleasing of any interest in this lease by Tenant shall not be unreasonably withheld.

Landlord shall have the right to assign or transfer this lease or any part of this lease, or any rights to it, at any time and without Tenant's consent.

Default by Tenant

17. The occurrence of any of the following shall constitute a material default and breach of this lease by Tenant:

(a) Any failure by Tenant to pay the rent or to make any other payment required to be made by Tenant under this lease (when that failure continues for [*number, e.g.,* 10 days] after written notice of the failure is given by Landlord to Tenant);

(b) The abandonment or vacation of the Premises by Tenant;

(c) A failure by Tenant to observe and perform any other provision of this lease to be observed or performed by Tenant, when that failure continues for [*number, e.g.,* 30 days] after written notice of Tenant's failure is given by Landlord to Tenant; provided, however, that if the nature of that default is such that it cannot reasonably be cured within a [*specify same time period for cure used above, e.g.,* 30-day] period, Tenant shall not be deemed to be in default if Tenant commences that cure within the [*same time period for cure used above, e.g.,* 30-day] period and thereafter diligently prosecutes it to completion; or

(d) The making by Tenant of any general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within 60 days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when possession is not restored to Tenant within 30 days; or the attachment, execution, or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this lease, when that seizure is not discharged within 30 days.

The notices provided for in subsections (a) through (c) of this paragraph are not intended to replace, but rather are in addition to, any required statutory notices for unlawful detainer proceedings under *Code of Civil Procedure Section 1161 et seq.*

Recovery of Damages on Tenant's Default

18. In the event of any default by Tenant under this lease, in addition to any other remedies available to Landlord at law or in equity, Landlord shall have the right to terminate this lease and all rights of Tenant under this lease by giving written notice of the termination. No act of Landlord shall be construed as terminating this lease except written notice given by Landlord to Tenant advising Tenant that Landlord elects to terminate the lease. In the event Landlord elects to terminate this lease, Landlord may recover from Tenant all of the following:

(a) The worth at the time of award of any unpaid rent that had been earned at the time of the lease's termination;

(b) The worth at the time of award of the amount by which the unpaid rent that would have been earned after the lease's termination until the time of award exceeds the amount of rental loss that Tenant proves could have been reasonably avoided;

(c) The worth at the time of award of the amount by which the unpaid rent for the balance of the term of this lease after the time of award exceeds the amount of rental loss that Tenant proves could be reasonably avoided; and

(d) Any other amount necessary to compensate Landlord for all detriment proximately caused by Tenant's failure to perform its obligations under this lease.

Landlord's Right to Continue Lease in Effect After Breach

19. If Tenant breaches this lease and abandons the Premises before the natural expiration of this lease's term, Landlord may continue this lease in effect by not terminating Tenant's right to possession of the Premises, in which event Landlord shall be entitled to enforce all its rights and remedies under this lease, including the right to recover the rent specified in this lease as it becomes due under this lease. For as long as Landlord does not terminate this lease, Tenant shall have the right to assign or sublease the Premises with the Landlord's prior written consent. Landlord shall not unreasonably withhold consent.

Condemnation

20. (a) If all or any part of the leased premises is taken by any public or quasi-public agency or entity under the power of eminent domain during the term of this lease,

(1) Either Landlord or Tenant may terminate this lease by giving the other _____ [*number*] days' written notice of termination; provided, however, that Tenant cannot terminate this lease unless the portion of the leased premises taken by eminent domain is so extensive as to render the remainder of the premises useless for the uses permitted by this lease; and

(2) If only a portion of the leased premises is taken by eminent domain and neither Landlord nor Tenant terminates this lease, the rent thereafter payable under this lease shall be reduced by the same percentage that the total acres of the portion taken by eminent domain bears to the total acreage of the leased premises.

(b) Any and all damages and compensation awarded or paid because of a taking of the leased premises shall belong to Landlord, and Tenant shall have no claim against Landlord or the entity exercising eminent domain power for the value of the unexpired term of this lease or any other right arising from this lease.

Oil, Gas, and Mineral Rights

21. All rights in any and all minerals, oil, gas, and other hydrocarbons located on or under the leased premises are reserved to Landlord and are particularly excepted from the property covered by the terms of this lease. Tenant hereby grants to Landlord, Landlord's agents and licensees, and tenants of these rights, a right of entry and right of way for access to the leased premises for the exploration, drilling, and mining of minerals, gas, oil, and other hydrocarbons on or under the leased premises. Landlord, however, shall reimburse Tenant for any interference with the quiet enjoyment or agricultural operations on the leased premises arising from exploration, drilling, or mining operations performed by Landlord, Landlord's agents and licensees, and tenants of these rights.

Hunting Rights

22. All of the hunting rights and privileges on the leased premises are reserved to Landlord. Tenant agrees that Tenant will not permit any hunting on the leased premises without the prior written consent of Landlord.

Attorneys' Fees

23. If any litigation is commenced between the parties to this lease concerning the Premises, this lease, or the rights and duties of either in relation to the Premises or to this lease, the party prevailing in that litigation shall be entitled to, in addition to any other relief that may be granted in the litigation, a reasonable sum as and for its attorneys' fees in that litigation that are determined by the court in that litigation or in a separate action brought for that purpose.

Notices

24. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this lease or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to [any member of *or* the designated agent of] the party to whom they are directed, or in lieu of personal service when deposited in the United States mail, first-class postage prepaid, addressed to Tenant at _____ Street, _____, CA [*zip code*] or to Landlord at _____ Street, _____, CA [*zip code*]. Either party may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Binding on Heirs and Successors

25. This lease and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this lease. Nothing contained in this paragraph shall be construed as a consent by Landlord to any assignment of this lease or any interest in this lease by Tenant except as provided in Paragraph 16 of this lease.

Time of Essence

26. Time is of the essence of this lease and of each provision contained within, and each provision is made and declared to be a material, necessary, and essential part of this lease.

Sole and Only Agreement

27. This instrument constitutes the sole and only agreement between Landlord and Tenant respecting the Premises, the leasing of the Premises to Tenant, or the lease term created under this lease, and correctly sets forth the obligations of Landlord and Tenant to each other as of its date. Any agreements or representations respecting the Premises or their leasing by Landlord to Tenant not expressly set forth in this instrument are null and void. This lease may not be extended, amended, modified, altered, or changed, except in a writing signed by Landlord and Tenant.

Effect of Partial Invalidity

28. If any term or provision of this lease or any application of this lease shall be held invalid or unenforceable, the remainder of this lease and any application of the terms and provisions shall remain valid and enforceable under this lease or California law.

Governing Law

29. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Waiver

30. The waiver by Landlord of any breach by Tenant of any of the provisions of this lease shall not constitute a continuing waiver or a waiver of any subsequent breach by Tenant either of the same or of another provision of this lease.

Executed on _____[*date*], at _____[*city*], _____ County, California.

LANDLORD
_____ [*signature of landlord*]
[*typed name*]
TENANT
_____ [*signature of tenant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
A. Complete Farm Lease Forms

18-37 California Legal Forms--Transaction Guide §§ 37.203-37.209

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 37.203[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
B. Alternative Farm Lease Provisions

18-37 California Legal Forms--Transaction Guide § 37.210

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.210 Livestock Share Farm Lease Provisions

[1] Comment--Use of Form

The form in [2], *below*, consists of lease provisions to be used when the primary operation on the leased premises will be the production of livestock and rental payment is to be made based on a percentage of the gross income of the operation. This form is designed to be substituted for Paragraphs 3-9 of *§ 37.201[2]* (crop share farm lease).

These provisions limit the number of livestock that may be raised, and describe the crops that may be grown on the premises. Unlike the crop share lease arrangement [*see § 37.201[2]*, P 3], crops are limited to those necessary for supplemental feeding of livestock and grains and vegetables raised for the personal consumption of the tenant and the tenant's family.

This form contains two alternative methods for payment of rent. One provides for payment of a share of the actual livestock raised on the leased premises, while the other provides for cash payment of a share from the proceeds of the sale [*see* [2], PP 4, 6, *below*].

When the parties contemplate an agreement in which the tenant will only be grazing livestock on annual grasslands, *§ 37.202[2]* (livestock lease for annual grasslands) should be used.

[2] FORM

Livestock Share Farm Lease Provisions

Use of Leased Premises

3. The leased premises are demised to Tenant for the following purposes and for no other purpose except with the prior written consent of Landlord:

(a) The planting, growing, and harvesting of [*specify, e.g.,* corn *or* oats *or* hay and alfalfa] as supplemental feed crops;

(b) The raising, feeding, and pasturing of livestock in total number as good farming practices and husbandry may allow on the leased premises. Tenant and Landlord agree that the leased premises can generally sustain _____ head of [*type of livestock, e.g.,* poultry *or* horses *or* beef cattle]. Any deviation from this total greater or less than _____ percent shall be immediately reported to Landlord;

(c) The planting, growing, and harvesting of grain and vegetable crops as may be reasonably necessary to provide grain and vegetable products to Tenant and Tenant's family; and

(d) The residence of Tenant, Tenant's family, and any employees of Tenant engaged in farming activities on the leased premises.

Rent

4. As rental for the leased premises, Tenant hereby agrees to pay to Landlord the following:

(a) [*fraction or percentage, e.g.,* One fourth] of the [sale price *or* head count] of all [*type of livestock, e.g.,* beef cattle] raised, fed, and pastured on the leased premises, both quality and quantity considered, during the term of this lease and any and all renewals or extensions of this lease; and

(b) [*fraction or percentage, e.g.,* Sixteen percent] of the [sale price *or* head count] of all [*type of livestock, e.g.,* feeder pigs] raised, fed, and pastured on the leased premises, both quality and quantity considered, during the term of this lease and any and all renewals or extensions of this lease.

Ownership of Livestock

5. Livestock raised, fed, and pastured in accordance with Paragraph 3 of this lease on the leased premises shall be owned by Landlord and Tenant as tenants in common before removal from the leased premises. Landlord shall own an undivided interest in the livestock equal to the share payable to it as rent for the leased premises under Paragraph 4 of this lease and the interest shall vest in Landlord at the time the livestock is born or placed on the leased premises.

Preparation of Landlord's Share

[*If rent share will be paid in livestock:*]

6. The share of any livestock payable to Landlord as rent under Paragraph 4 of this lease shall be prepared and delivered to Landlord at Tenant's own cost and expense, in accordance with the best practices of the farming industry in the locale where the leased premises are located. The delivery of Landlord's livestock share shall be [*specify circumstances of delivery date, e.g.,* on market maturity, determined by farming industry practice in the locale where the leased premises are located and current market requirements].

[*Or, if rent share will be paid in cash proceeds:*]

6. The share of any livestock payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall be payable in lawful currency of the United States of America in an amount equal to the market value of the share of the livestock as of the date of sale.

[*Continue with the following:*]

Delivery to Landlord

[*If Landlord's share is payable in livestock:*]

7. The share of any livestock payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall at the time of sale be prepared in the manner specified in Paragraph 6 of this lease and delivered by Tenant, at Tenant's own cost and expense, to Landlord at the place or places not more than _____ miles from the leased premises as may from time to time be designated by Landlord in a written notice served on Tenant in accordance with Paragraph _____ of this lease.

[*Or, if Landlord's share is payable in cash proceeds:*]

7. The share of any livestock payable to Landlord as rent for the leased premises under Paragraph 4 of this lease shall immediately after sale be prepared in the time and manner specified in Paragraph 6 of this lease and personally delivered or mailed first-class by Tenant, at Tenant's own cost and expense, to Landlord at _____ Street, _____, CA [*zip code*].

[*Continue with the following:*]

Expenses of Tenant

8. During the term of this lease and any renewals or extensions of this lease, Tenant shall, at Tenant's own cost and expense, do all of the following:

(a) Furnish all labor and equipment necessary to properly raise, feed, and pasture on the leased premises, in a manner consistent with good farming practices and husbandry the livestock specified in Paragraph 3 of this lease and any other livestock that the parties to this lease decide shall be raised on the leased premises during the term of this lease or any renewal or extension of this lease;

(b) Furnish _____ percent of all seeds, _____ percent of all fertilizers, and _____ percent of all other supplies necessary to properly plant, cultivate, grow, and harvest on the leased premises, in a manner consistent with good farming practices and husbandry, the crops that are to be planted, grown, cultivated and harvested as supplemental feed for the livestock raised, fed, and pastured on the leased premises under this lease. Tenant shall advance all these costs, and Landlord's share of these costs shall be deducted from the percentage of rent payable to Landlord under Paragraph 4 of this lease;

(c) Keep and maintain all reclamation, irrigation, and drainage ditches located on the leased premises open and in good condition and repair, so that drainage and irrigation waters may flow freely in the ditches to and from lands adjoining the leased premises;

(d) Maintain in as good condition as they are on the date of the making of this lease, reasonable wear and tear excepted, the well, pump, and pressure system used to supply the dwelling houses on the leased premises with domestic water;

(e) Pay all charges, promptly as they become due, for the furnishing of gas, electricity, and other public utilities, [except irrigation water,] to the leased premises; and

(f) Pay _____ percent of all costs incurred for the off-premises acquisition of additional feed for livestock raised in accordance with this lease, beyond those costs contemplated in Paragraph 8(b) of this lease, necessary to maintain livestock in a manner consistent with good farming practices and husbandry. Tenant shall advance all feed costs, and Landlord's share of these costs shall be deducted from the percentage of rent payable to Landlord under Paragraph 4 of this lease.

Expenses of Landlord

9. During the term of this lease and any renewals or extensions of this lease, Landlord shall, at Landlord's own cost and expense, do all of the following:

(a) Furnish _____ percent of all seeds, _____ percent of all fertilizers, and _____ percent of all other supplies necessary to properly plant, cultivate, grow, and harvest on the leased premises, in a manner consistent with good farming practices and husbandry, the crops that are to be planted, grown, cultivated, and harvested on the leased premises in accordance with this lease as supplemental feed for the livestock raised, fed, and pastured on the leased premises. Tenant shall advance all these costs, and Landlord's share of these costs shall be deducted from the percentage of rent payable to Landlord under Paragraph 4 of this lease;

(b) Pay, promptly as they become due, all taxes and assessments levied or assessed against the leased premises, excepting those taxes levied or assessed against Tenant's personal property and trade fixtures on or about the leased premises;

(c) Provide adequate water for the proper irrigation of any and all crops that may be planted, cultivated, grown, and harvested, and livestock raised, fed, and pastured on the leased premises in accordance with this lease;

(d) Replace or repair any dwelling or permanent improvement now located on the leased premises that may be damaged or destroyed by fire, flood, tornado, or any other cause not the fault, and beyond the control of, Tenant; and

(e) Pay _____ percent of all costs incurred for the off-premises acquisition of additional feed for livestock raised in accordance with this lease, beyond those costs contemplated in Paragraph 9(a) of this lease, necessary to maintain livestock in a manner consistent with good farming practices and husbandry. Tenant shall advance all feed costs, and Landlord's share of these costs shall be deducted from the percentage of rent payable to Landlord under Paragraph 4 of this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
B. Alternative Farm Lease Provisions

18-37 California Legal Forms--Transaction Guide § 37.211

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.211 Variable Rent for Cash Farm Lease

[1] Comment

[a] Use of Form

The form in [2], *below*, is a variable rent provision for use in a cash farm lease [*see § 37.200[2]*]. It should be used when the parties agree to have the rent calculated according to the current market price for the crops grown on the leased premises, rather than at a fixed rental rate. When used, this provision should be substituted for Paragraph 2 of *§ 37.200[2]* (Cash Farm Lease).

[b] Purpose and Effect of Variable Rent

Under a variable rent arrangement, the rent payable for the leased premises is made to vary according to either the price received for the crops grown, yield per acre of the crops grown, or income derived from the leased premises. The effect of this type of arrangement is that the parties to the lease share the risk of an increase or decrease in the price of the crops grown on the leased premises in proportion to the rise or fall in the income received from those crops. Variable rent provisions allow the rental rate to go up or down as the prices of the crops grown on the leased premises fluctuate, and reflect crop income more realistically.

[2] FORM

Variable Rent for Cash Farm Lease

Rent

2. As rental for the leased premises, Tenant hereby agrees to pay to Landlord the base rate of $_____ per year, adjusted by multiplying the annual base rate by a fraction the numerator of which shall be the market price for

[*crop, e.g.,* barley] on [*day, e.g.,* the Thursday preceding the day rent is due], as determined by [*local pricing index or standard for crops in question*] and the denominator of which shall be the 10-year price average for [*crop, e.g.,* barley] for the month of [*e.g.,* September *or* the month in which rent is due], determined from [*local pricing index or standard for crops in question*]. Payment shall be made on the [*e.g.,* first] day of each month and shall consist of one twelfth of the adjusted annual amount, commencing _____[*date*], at _____ Street, _____, California, or other place or places as may be designated by Landlord in a written notice given to Tenant in the manner prescribed in Paragraph _____ of this lease.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART IV. FORMS
B. Alternative Farm Lease Provisions

18-37 California Legal Forms--Transaction Guide §§ 37.212-37.219

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

[Reserved]

§§ 37.212[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 37 FARM LEASES
PART IV. FORMS
C. Farm Lease Worksheet

18-37 California Legal Forms--Transaction Guide § 37.220

AUTHOR: Linda Breen Pierce Benjamin Kaplan Myron Moskovitz Practice Consultants

§ 37.220 Farm Lease Worksheet

[1] Comment--Use of Form

The form in [2], *below*, is a worksheet for use in computing an equitable rent payable under a farm lease. The worksheet was originally published in a pamphlet written by Professors Reed and Snyder, What You Should Know About Farm Leases, Leaflet No. 2361 (University of California Coop. Extension 1973). The publication, however, has been discontinued and no replacements, updates, or substitutes are available.

PRACTICE TIP:

Getting in Touch With the University of California Cooperative Extension. Cooperative Extension publications are distributed by the University of California's Department of Agriculture and Natural Resources. The address, telephone number, and e-mail address of the Cooperative Extension are as follows:

University of California
ANR Communication Services
6701 San Pablo Ave.
Oakland, CA 94608-1239

Telephone: (800) 994-8849
E-mail: www.danrcs.ucdavis.edu

The ultimate objective of a farm lease is the production of income. The land alone, however, does not produce income. The lessee/farmer bears the expenses of planting, harvesting, and sacking the crop, and is entitled to reasonable wages for its skill, industry, and management in operating the farm [*see Edgar v. Bank of America (1942) 50 Cal. App. 2d 827, 836, 123 P.2d 885]* . Cash payment is not required; chattels or products of the soil will suffice [*Clarke and Cain v. Cobb (1898) 121 Cal. 595, 597, 54 P. 74]* .

The method for determining rent under this farm lease worksheet is based on the assumption that an equitable rent is one under which the landlord and the tenant share gross income in the same proportion as they contribute to the cost of production. This worksheet is one method by which the costs of production contributed by both lessor and lessee can be calculated. By determining the proportionate contributions of the lessor and lessee toward the production of farm income, the worksheet determines the percentage of farm income that should be paid to the lessor in rent.

PRACTICE TIP:

Be Aware of Customary Rental Rates in Your Locale. Attorneys engaged in rent negotiations should be aware of customary rental rates in the farm locale that may serve as a basis for establishing current rental rates. However, customary rates should be reappraised by the use of this form, or another method, to reflect economic and technological changes. Assistance in determining the customary rate can be obtained through the county farm advisor at the Cooperative Extension.

[2] FORM

Farm Lease Worksheet

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease Provisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT

18-38 California Legal Forms--Transaction Guide 38.syn

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.syn Synopsis to Chapter 38: REAL PROPERTY MANAGEMENT

§ 38.01 California Sources

[1] Statutes

[2] Regulations

§ 38.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 38.03-38.04 [Reserved]

§ 38.05 Law Reviews and Periodicals

§ 38.06 Annotations

§ 38.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§ 38.08 Pamphlets

§ 38.09 [Reserved]

§ 38.10 Types of Property Warranting Professional Management

§ 38.11 Goals and Duties of Property Manager

§ 38.12 Types of Property Managers

§ 38.13 Selecting Type of Manager

§ 38.14 Professional Associations and Designations for Managers

[1] Institute of Real Estate Management (IREM)

[a] Overview

[b] Certified Property Manager (CPM)

[c] Accredited Management Organization (AMO)

[2] Building Owners and Managers Association International (BOMA)

[3] International Council of Shopping Centers

[4] Community Associations Institute (CAI)

[5] National, State, and Local Apartment Associations

[6] International Property Management Organizations

[7] National and Local Realtor Associations

§ 38.15 Manager's Compensation

[1] Basic Fee

[2] Extra Compensation

[3] Deduction of Management Expenses by Owner

§ 38.16 Applicability of Statute of Frauds

§ 38.17 Manager as Owner's Agent

[1] In General

[2] Disclosures for Residential Transactions

§ 38.18 Status of Manager as Employee or Independent Contractor

§ 38.19 Applicability of Real Estate Licensing Requirements

[1] Activities Requiring License

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§ 38.20 Applicability of Other Requirements Under Real Estate Law

[1] In General

[2] Trust Fund Account

[a] Deposit of Funds

[b] Interest-Bearing Accounts

[c] Financial Records

[3] Retention of Documents and Inspection and Audit

[4] Delivery of Copy of Agreement

[5] Specific Requirements for Agreement

§ 38.21 Special Requirements for Management of Common Interest Developments

[1] Limitations on Association Board

[2] Davis-Stirling Common Interest Development Act

[a] Definition of Managing Agent

[b] Disclosures to Board of Directors

[c] Requirements for Handling Funds

§ 38.22 Special Requirements for Residential Property

[1] Disclosure of Identity and Address of Owner and Manager

[2] Live-In Caretaker

[3] Compensation Paid to Resident Manager

§ 38.23 Wage and Hour Laws

[1] State Industrial Welfare Commission

[2] Fair Labor Standards Act

§§ 38.24-38.99 [Reserved]

§ 38.100 Basic Information for Parties and Property

[1] Facts

Scope

[2] Documents

Scope

§ 38.101 Additional Information to Be Obtained From Owner

[1] Facts

Scope

[2] Documents

Scope

§ 38.102 Additional Information to Be Obtained From Manager

[1] Facts

Scope

[2] Documents

Scope

§§ 38.103-38.109 [Reserved]

§ 38.110 Duties to Be Performed by Manager

Scope

§ 38.111 Status of Manager as Employee or Independent Contractor

Scope

§ 38.112 Applicability of Real Estate Law to Manager

Scope

§ 38.113 Manager's Compensation

Scope

§§ 38.114-38.119 [Reserved]

§ 38.120 Negotiation and Execution of Management Agreement

[1] Reviewing Agreement Drafted or Submitted by Other Party

Scope

[2] Drafting Agreement

[3] Executing Agreement

§§ 38.121-38.129 [Reserved]

§ 38.130 Property Management Agreement

[1] Introductory Provisions

Scope

[2] Term of Agreement

Scope

[3] Leasing Property

Scope

[4] Operation and Maintenance of Property

Scope

[5] Collection and Disbursement of Revenues

Scope

[6] Financial Records and Reports

Scope

[7] Compensation to Manager

Scope

[8] Miscellaneous Provisions

Scope

§§ 38.131-38.199 [Reserved]

§ 38.200 Property Management Agreement--Long Form

[1] Comment

[a] Use of Form

[b] Agency and Status

[c] Preliminary Professional Services

[d] Leasing

[e] Operation and Maintenance

[f] Collection and Disbursement of Revenues

[g] Financial Records and Reports

[h] Monthly Payments to Owner

[i] Compensation

[j] Termination

[2] FORM

Property Management Agreement--Long Form

§ 38.201 Property Management Agreement [CAR Form]

[1] Comment

[a] Use of Form

[b] Summary of Form Provisions

[c] Status of Manager as Independent Contractor or Employee

[2] FORM

Property Management Agreement [CAR Form]

§§ 38.202-38.219 [Reserved]

§ 38.220 Resident Manager Employment Agreement--Custom-Drafted Form

[1] Comment

[a] Use of Form

[b] Resident Manager or Live-in Caretaker Required for Certain Properties

[c] Duties of Resident Manager

[d] Overview of Wage and Hour Laws

[e] Manager's Compensation

[f] Manager's Right to Occupy Apartment

[g] Termination of Agreement

[2] FORM

Resident Manager Employment Agreement--Custom -Drafted Form

§ 38.221 Resident Apartment Manager-Employer Agreement [CAA Form]

[1] Comment

[a] Use of Form

[b] Related CAA Exhibits

[i] List of Duties

[ii] Record of Hours Worked

[c] Apartment Occupied by Resident Manager

[2] FORM

Resident Apartment Manager-Employer Agreement [CAA Form]

§ 38.222 Exhibit A--Job Description [CAA Form]

[1] Comment--Use of Form

[2] FORM

Exhibit A--Job Description [CAA Form]

§ 38.223 Exhibit B--Report of Hours Worked [CAA Form]

[1] Comment--Use of Form

[2] FORM

Exhibit B--Report of Hours Worked [CAA Form]

§ 38.224 Motel Management Agreement

[1] Comment

[a] Use of Form

[b] Requirement of Live-In Caretaker or Manager

[c] Status of Manager

[2] FORM

Motel Management Agreement

§ 38.225 Agricultural Property Management Agreement

[1] Comment

[a] Use of Form

[b] Payment of Property Expenses

[c] Compensation to Manager

[d] Termination of Agreement

[2] FORM

Agricultural Property Management Agreement

by Jeannie C. Newell, J.D.n*

FOOTNOTES:
(n98)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT

18-38 California Legal Forms--Transaction Guide Scope

AUTHOR: by Jeannie C. Newell, J.D.

Scope

by Jeannie C. Newell, J.D.n* Scope

This chapter covers real property management. It emphasizes the drafting of property management agreements, and also discusses (1) the licensing and other requirements a manager must satisfy, and (2) the legal relationship between a property owner and a manager. The chapter also contains several complete forms of agreement, including general purpose management agreements [*see §§ 38.200* and *38.201*] and special purpose agreements [*see §§ 38.220* and *38.221* (resident manager agreement); *§ 38.224* (motel management agreement); *§ 38.225* (agricultural property management agreement)].

For a management agreement between a homeowners' association for a condominium project and a professional manager or management firm, see Ch. 34, *Condominiums* . Management of mobilehome parks is covered in Ch. 39, *Mobilehome Parks* , and Ch. 40, *Mobilehomes* , and the management and operation of shopping centers is discussed in Ch. 34E, *Shopping Centers: Leasing and Operation* .

FOOTNOTES:
(n99)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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PART I. RESEARCH GUIDE
A. Primary Sources

18-38 California Legal Forms--Transaction Guide § 38.01

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.01 California Sources

[1] Statutes

License requirement for real estate brokers and salesmen. *Bus. & Prof. Code § 10130.*

Real estate broker defined. *Bus. & Prof. Code § 10131.*

Exclusion of certain resident and other property managers and their employees from definition of real estate broker. *Bus. & Prof. Code § 10131.01.*

Real estate salesman defined. *Bus. & Prof. Code § 10132.*

Persons exempt from licensing requirements. *Bus. & Prof. Code § 10133.*

No right to compensation for unlicensed persons. *Bus. & Prof. Code § 10136.*

Requirement that licensee deliver copy of agreement authorizing licensee to perform services requiring license to authorizing person. *Bus. & Prof. Code § 10142.*

Trust fund account requirements. *Bus. & Prof. Code § 10145.*

Retention of documents by licensee. *Bus. & Prof. Code § 10148.*

Grounds for suspension or revocation of real estate license. *Bus. & Prof. Code §§ 10176, 10177.*

Requirement that exclusive agreement with licensee contain definite date of termination. *Bus. & Prof. Code § 10176(f).*

Management of common interest development by association. *Civ. Code § 1363*.

Required disclosures by managing agent of common interest development. *Civ. Code § 1363.1*.

Requirements for handling and disposition of funds by managing agent of common interest development. *Civ. Code § 1363.2*.

Application of statute of frauds to agents and brokers. *Civ. Code § 1624(c), (d)*.

Information required to be disclosed to tenants of residential buildings. *Civ. Code § 1961 et seq.*

Agency relationships in residential real property transactions. *Civ. Code §§ 2079.12-2079.24*.

Agency law in general. *Civ. Code § 2295 et seq.*

Requirement that nonexempt employees be paid semimonthly. *Lab. Code § 204*.

[2] Regulations

Industrial Welfare Commission Order No. 5-89, regulating wages, hours, and working conditions in the public housekeeping industry. *8 Cal. Code Reg. § 11050*.

Requirement of live-in caretaker for certain apartment buildings and hotels. *25 Cal. Code Reg. § 42*.



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§ 38.02 Federal Sources

[1] Statutes

Federal Insurance Contributions Act (FICA). *I.R.C. § 3101 et seq.*

Federal Unemployment Tax Act. *I.R.C. § 3301 et seq.*

Fair Labor Standards Act of 1938. *29 U.S.C. § 201 et seq.*

[2] Regulations

Wage Payments Under Fair Labor Standards Act of 1938. 29 C.F.R. pt. 531.

Interpretive Bulletin on the General Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938. 29 C.F.R. pt. 776.



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[Reserved]

§§ 38.03[Reserved]



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B. Secondary Sources

18-38 California Legal Forms--Transaction Guide § 38.05

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.05 Law Reviews and Periodicals

Fiore, *Live-in Apartment Manager Was Employee, 21 Tax Adviser 129 (Feb. 1990).*

Goldstein, *How to Draft an Exclusive Listing,* 6 Prac. Real Estate Lawyer 69 (Sept. 1990).

Flank & Connelly, *Wage-hour Blues for Real Estate Management Agents,* 16 Real Estate L.J. 313 (Spring 1988).

Comment, *California Real Estate--A Practitioner's Guide Through the Broker's Legal Duties, 7 Whittier L.Rev. 613 (1985).*



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18-38 California Legal Forms--Transaction Guide § 38.06

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.06 Annotations

Annot., From Minimum Wage and Maximum Hours, Who Is Employed in "Professional Capacity," Within Exemption, Under 29 U.S.C. § 213(a)(1), Minimum Wage and Maximum Hours Provisions of Fair Labor Standards Act, 77 A.L.R. Fed. 681 (1986) .



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.07 Text References

[1] Matthew Bender Sources

California Legal Forms

Ch. 21, *Agreements With Brokers and Agents.*

Ch. 23, *Real Property Sales Agreements.*

Ch. 34E, *Shopping Centers: Leasing and Operations.*

Ch. 39, *Mobilehome Parks.*

Ch. 40, *Mobilehomes.*

Ch. 84, *Independent Contractors.*

Ch. 85, *Employment Agreements.*

California Real Estate Law and Practice(Matthew Bender)

Ch. 60, *The Brokerage Industry and Its Regulation.*

Ch. 63, *Duties and Liabilities of Brokers.*

Ch. 64, *Licensing and Discipline of Brokers.*

Ch. 380, *Property Insurance.*

Ch. 381, *Tort Liability of Property Owners.*

Ch. 382, *Property Management.*

[2] Additional Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005).

Downs, Principles of Real Estate Management (Institute of Real Estate Management).

Walter, Jr., The Practice of Real Estate Management (Institute of Real Estate Management).



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B. Secondary Sources

18-38 California Legal Forms--Transaction Guide § 38.08

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.08 Pamphlets

Is an Accredited Firm Managing Your Real Estate Investment? (Institute of Real Estate Management, March 1990).

Achieve: Become a CPM (Institute of Real Estate Management, November 1989).



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[Reserved]

§ 38.09[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART II. LEGAL BACKGROUND

18-38 California Legal Forms--Transaction Guide § 38.10

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.10 Types of Property Warranting Professional Management

Any type of income-producing property may be the subject of real property management. The bulk of professionally managed property consists of residential, commercial, and industrial properties. Residential properties include all types of dwellings--single-family, apartment complexes, duplexes, condominiums, and public housing. Commercial properties include office buildings and complexes and retail establishments, ranging from large regional shopping centers to small neighborhood or strip shopping centers. Factories, warehouses, and industrial parks are all types of industrial property.

Properties that do not necessarily fall into one of the above property classifications, but that are often professionally managed, encompass a wide variety of special-use properties. These include hotels, motels, mobilehome parks, self-storage facilities, and resort properties. Agricultural property is another type of property that may be the subject of professional management. For example, the owner of agricultural property may hire a property manager to operate a particular agricultural enterprise, such as a farm, ranch, orchard, or vineyard [*see § 38.225* (agricultural property management agreement)].

While a property manager's specific duties vary depending on the type of property managed, the principles applicable to property management, property managers, and agreements between owners and managers discussed in this chapter are common to all income-producing property.



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.11 Goals and Duties of Property Manager

A property manager must control and supervise the day-to-day operation and maintenance of real property. Further, the manager must strive to maximize the owner's net income from the property. Maximization of income necessarily requires a diligent monitoring of expenses. The manager must also preserve and maintain the physical condition of the property and provide present and prospective tenants with the level of service needed to assure maximum occupancy.

A property manager may contract to perform any of a wide range of duties. These duties range from simply accepting rental applications and collecting periodic rent payments to performing a more comprehensive management role. This role may include, for example, the performance of the following tasks: screening and selecting tenants to fill vacancies, keeping business records on the operation of the property, and preparing financial reports for the owner. For a checklist of various preliminary, general, and specialized management duties, see *Section 38.110*.



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.12 Types of Property Managers

In its broadest sense, the term "property manager" includes a wide range of individuals and organizations. For example, the term may refer to an individual who performs limited management services, such as a resident manager of an apartment complex or a superintendent of an office building. Alternatively, it may refer to an individual or to a property management firm that performs, for a fee, all or most of the management responsibilities for income-producing property. This chapter uses the term "full-service property manager" to refer to such a manager or management firm.

An individual property manager may be employed by a management firm or may contract directly with a property owner, as an employee or an independent contractor [*see § 38.18*], to manage the owner's property. He or she may, or may not, work exclusively for the owner, or specialize in the management of particular types of property.

A variety of entities are active in the field of property management. The professional property management firm usually specializes in the management of particular types of property. Large institutional real estate investors, such as pension funds and life insurance companies, may utilize their own "in-house" management division to manage their real estate portfolio. Local real estate offices may also provide property management services to clients. However, these services are often limited to properties on which the office has a listing or on which the office has an exclusive option to list in the event the owner decides to sell [*see* Ch. 21, *Agreements with Brokers and Agents*].



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18-38 California Legal Forms--Transaction Guide § 38.13

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.13 Selecting Type of Manager

There are no precise guidelines for determining whether a property owner's management needs will be better served by either an individual manager or a management firm. The type and size of the owner's property, the income it produces, and any specialized services needed to properly manage it are some of the factors to be considered in determining the type and extent of management services needed. One advantage of a management firm, in the case of large income-producing properties that require extensive management services, is that a firm may draw on the management skills of several individuals. These individuals in the aggregate may possess more expertise in the field of property management than would one individual.

On the other hand, an owner simply may not need or desire the extensive management services provided by a large management firm. For example, in a small-to-medium-sized apartment building, an individual resident manager or husband-wife team who performs limited management duties such as collecting rent, showing vacant apartments, and performing light maintenance tasks, may be all that a property owner needs or wants to manage the building. In the case of larger apartment buildings, the property owner may need both a resident manager and a full-service property manager [*see § 38.12* (full-service property manager)].

For further discussion of the advantages and disadvantages of both an individual manager and a management firm, see California Real Estate Law and Practice, Ch. 382, *Property Management* (Matthew Bender).

Before selecting a property manager, counsel and the property owner should be familiar with the professional property management associations and the designations bestowed by them. For coverage of these associations and designations, see *Section 38.14*.



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18-38 California Legal Forms--Transaction Guide § 38.14

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.14 Professional Associations and Designations for Managers

[1] Institute of Real Estate Management (IREM)

[a] Overview

The Institute of Real Estate Management (IREM) is a branch of the National Association of Realtors [*see* [7], *below*] and is headquartered in Chicago, with local chapters throughout the country. IREM members must adhere to a code of ethics and other professional standards applicable specifically to property managers. IREM publishes the Journal of Property Management, textbooks, bulletins, and standardized forms of property management agreements. IREM bestows the following professional designations on individuals: Certified Property Manager (CPM) [*see* [b], *below*], and Accredited Resident Manager (ARM). Qualified property management firms receive the designation of Accredited Management Organization (AMO) [*see* [c], *below*]. A list of these professionals in a specific geographical area may be obtained from IREM headquarters or local chapters.

[b] Certified Property Manager (CPM)

To qualify as a CPM, the candidate must satisfy educational, exam, experience, and ethical requirements [*see* Achieve: Become a CPM (IREM, November 1989)]. The candidate must also complete a management plan prior to receiving the certification. At the time of certification, the candidate must be a member in, or be affiliated with a member board of, the National Association of Realtors. Further, the appropriate local chapter of IRM must endorse the candidate's integrity and ethics.

[c] Accredited Management Organization (AMO)

In order to be designated an Accredited Management Organization (AMO), a property management firm must satisfy specified requirements. One of these is that the firm must employ at least one CPM in an executive and supervisory position. To protect the owner's investment, AMOs are required to carry (1) a fidelity bond in a prescribed minimum amount covering all management employees and officers or owners of the firm and (2) depositor's forgery and

alterations insurance. AMOs must undergo independent financial review by IREM and be endorsed by local members in the firm's geographical area. Once accredited, an AMO must be reaccredited on a regular periodic basis [*see* Is an Accredited Firm Managing Your Real Estate Investment? (IREM, March 1990)].

[2] Building Owners and Managers Association International (BOMA)

The Building Owners and Managers Association International (BOMA), headquartered in Washington, D.C., bestows the designation of Real Property Administrator (RPA) on individuals who successfully complete an educational course. RPAs, and individuals with comparable qualifications, may obtain a Systems Maintenance Administrator (SMA) designation from BOMA if they complete courses on the technical systems and other aspects of office buildings, such as electrical and control systems and building design.

[3] International Council of Shopping Centers

The International Council of Shopping Centers is a professional member association based in New York City that provides educational courses, standardized forms, and other materials in the field of shopping center management. To obtain the Certified Shopping Center Manager (CSM) designation offered by the Council, the candidate must pass a required exam.

[4] Community Associations Institute (CAI)

The Community Associations Institute (CAI), based in Arlington, Virginia, publishes numerous reports geared to specific problems and tasks involved in operating a community association. CAI also offers educational courses and programs. A qualified manager may be designated a Professional Community Association Manager (PCAM) through CAI.

[5] National, State, and Local Apartment Associations

The National Apartment Association (NAA) and California Apartment Association (CAA) provide educational courses, publications, and standardized forms to their members. Local chapters of the Apartment Association exist throughout California and may offer a professional designation. For example, a manager may be certified as a Certified Apartment Manager (CAM) by the Orange County Apartment Association after meeting required educational, exam, and experience requirements.

[6] International Property Management Organizations

A qualified candidate may become a Certified International Property Specialist (CIPS) through the Federation Internationale des Administrateurs de Biens Conseils Immobiliers (FIABCI) by satisfying education, experience, and other requirements. The FIABCI operates in several countries and maintains its United States headquarters in Washington, D.C.

The International Real Estate Institute, based in Scottsdale, Arizona, is another organization oriented toward international property management. It publishes the International Real Estate Journal, and offers a Registered Property Manager (RPM) designation for managers.

[7] National and Local Realtor Associations

As a real estate licensee [*see § 38.19*], a property manager may be a member of the National Association of Realtors (NAR) on the national level and of the California Association of Realtors (CAR) on the state level. A manager may also be a member of a local board of realtors [*see* California Real Estate Law & Practice, ch. 60, *The Brokerage Industry and Its Regulation* (Matthew Bender)].



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.15 Manager's Compensation

[1] Basic Fee

The amount of compensation paid to a property manager depends on a number of factors, including the type and size of the property, the scope of responsibilities assumed by the manager, the degree of difficulty involved in managing the property, and the amount of time required to effectively manage the property. For example, because industrial space is usually considered easier to manage than other types of property, its management fees are typically lower. In order to determine what is competitive compensation at the time a management agreement is executed, local sources (such as a board of realtors or a chapter of a professional association) [*see § 38.14*] should always be checked to determine current rates and compensation arrangements for a particular type of property in a given area.

A full-service property manager [*see § 38.12*] typically receives, as its fee for basic management services, a percentage of the property's income. The exact percentage paid will depend not only on the factors listed above, but also on the average amount of rental income, the location of the property, and the prevailing economy. The compensation is usually a percentage of gross collected income, but may also be a percentage of gross possible income or effective gross income. Some compensation arrangements provide for the payment of a flat fee or a stated percentage of gross income, whichever is greater.

As an alternative to the percentage method of payment, the owner may pay a flat fee to the property manager. A flat fee is more often paid to a manager performing limited management services, such as a resident manager, rather than to a full-service manager. The flat fee may be determined by multiplying the number of units managed by an agreed-on dollar amount.

A common method of compensating a resident manager is to provide the manager with a rent-free apartment or a reduction in rent, usually in addition to a fixed salary. The amount of value of an apartment that may be credited against the employer's minimum wage obligation to a resident manager employee is limited by law [*see 8 Cal. Code Reg.§ 11050(10)(B)*; *see also § 38.220[1][e]*]. The wages, hours, and working conditions of a resident manager who is an

employee rather than an independent contractor [*see § 38.18*] are also regulated [*see 8 Cal. Code Reg. § 11050*; *see also § 38.220[1]*].

For most types of property, rent (and other income) on the property is collected monthly and basic management fees are paid monthly. For agricultural property that usually produces one or two crops a year, a percentage management fee may instead be paid on an annual basis [*see § 38.225*].

[2] Extra Compensation

In addition to the basic management fee, a property manager is usually paid extra compensation, in the form of a commission or a fixed fee, for performing additional services. Examples of these services include procuring new leases or renewing existing leases, supervising any major alterations or repairs to the property, placing insurance on the property, and preparing a comprehensive management plan or market analysis for the property. A property manager, as a licensed real estate broker [*see Bus. & Prof. Code § 10131*; *see also § 38.19*], may also be granted an exclusive option to list the property in the event the owner decides to sell. This could result in the payment of a real estate commission to the broker [*see* Ch. 21, *Agreements With Brokers and Agents*].

[3] Deduction of Management Expenses by Owner

Compensation paid to a property manager by the property owner is deductible for income tax purposes, when paid or incurred, either as an ordinary and necessary expense of business [*I.R.C. § 162(a)*] or as an expense for the management, conservation, or maintenance of property held for the production of income [*I.R.C. § 212*]. However, fees and expenses incurred by a property owner to procure tenants and leases, or to obtain renewals of leases, must ordinarily be attributed to the entire leasehold term. Thus, commissions paid and incurred by an owner for these services are deductible for federal tax purposes ratably over the period or life of the lease for which the fees are paid [*Andrew J. Pembroke (1931) 23 B.T.A. 1176 , aff'd, Pembroke v. Helvering (D.C. Cir. 1934) 70 F.2d 850, 851* ; *Clara Hellman Heller Trust No. 7610 (1946) 7 T.C. 556 , rev'd on other grounds sub nom. Wells Fargo Bank & Union Trust Co. v. Commissioner of Int. Rev. (9th Cir. [T.C.] 1947) 163 F.2d 521* ; *Rev. Rul. 70-408, 1970-2 C.B. 68*]. For further discussion of the tax consequences of real property management to both the owner and property manager, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Development and Subdivision* , Part E, "Real Estate Management" (Matthew Bender).



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.16 Applicability of Statute of Frauds

An agreement must be in writing if it authorizes or employs an agent, broker, or any other person to do any of the following for compensation or a commission: purchase or sell real estate; lease real estate for a term exceeding one year; or procure, introduce, or find (1) a purchaser or seller of real estate or (2) a lessee or lessor of real estate, if the lease term is to exceed one year [*Civ. Code § 1624(d)*]. An agreement for the leasing of real property for a term exceeding one year made by an agent of the party sought to be charged is invalid unless the authority of the agent is in writing, subscribed by the party sought to be charged [*Civ. Code § 1624(c)*].



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.17 Manager as Owner's Agent

[1] In General

A written management agreement between a property owner and manager typically establishes a principal-agent relationship that is subject to pertinent California statutes [*see Civ. Code §§ 2295-2357*] and principles of general agency law [*see* Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005)]. As an agent of the owner, a manager has certain fiduciary duties to the owner created by the trust relationship between them [*see Civ. Code § 2322(c)*; *see also Prob. Code §§ 15000-19403* (Trust Law), *Prob. Code §§ 16000-16105* (trustee's duties and standard of care)]. For example, the manager must act in good faith and with loyalty toward the owner, disclose material facts [*see Prob. Code § 16002*], avoid conflicts of interest with the owner [*see Prob. Code §§ 16004, 16005*], and avoid commingling the owner's funds with the manager's funds [*Prob. Code § 16009*]. As a real estate licensee [*see § 38.19*], the manager is also bound by the fiduciary duties imposed under the Real Estate Law [*see Bus. & Prof. Code §§ 10000-10580*; *see also* California Real Estate Law & Practice, Ch. 63, *Duties and Liabilities of Brokers* (Matthew Bender)].

[2] Disclosures for Residential Transactions

A real estate broker must provide the seller and buyer in a real property transaction with two disclosures regarding the broker's agency relationship with the seller or buyer [*Civ. Code § 2079.13*; *see Civ. Code §§ 2079.12-2079.24*]. The first disclosure consists of a statutory form that contains general disclosures regarding real estate agency relationships [*see Civ. Code § 2079.16*]. In addition to providing that form, the broker must disclose whether the broker is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent representing both buyer and seller [*Civ. Code § 2079.17*]. This disclosure may be made either orally or in writing, but must be followed by a written confirmation of the relationship [*Civ. Code § 2079.17(a), (b)*]. Although these requirements relate primarily to sales of real property, the term "sale" includes transactions for the creation of a leasehold exceeding one year's duration [*see Civ. Code § 2079.13(l)*] and the term "real property" includes any leasehold in residential property containing one to four units [*see Civ. Code 2079.13(j)*]. For a full discussion of these disclosure requirements, see Ch. 21, *Agreements with Real Estate Brokers and Agents* .



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.18 Status of Manager as Employee or Independent Contractor

In any property management arrangement, it is important to determine whether the manager is an employee of the owner or an independent contractor [*see Lab. Code §§ 3352, 3353* (definitions)]. This determination is important since if the manager is deemed an employee of the owner, rather than an independent contractor, the owner is obligated to comply with pertinent wage and hour laws, pay and deduct social security taxes, withhold income taxes and disability insurance payments, pay federal and California unemployment insurance taxes, and carry workers' compensation insurance [*see* Ch. 85, *Employment Agreements*]. Liability of an owner for the manager's torts also differs depending on whether the manager is an employee of the owner or an independent contractor [*see Civ. Code § 2338*; *see also* Ch. 84, *Independent Contractors* and Ch. 85, *Employment Agreements;* California Real Estate Law & Practice, Ch. 381, *Tort Liability of Property Owners* (Matthew Bender); Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005)].

Although the written agreement between the property owner and manager is relevant in determining the relationship between them, the terminology used in such an agreement is not conclusive, even in the absence of fraud or mistake [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 952, 88 Cal. Rptr. 175, 471 P.2d 975* ; *see also § 38.111*]. Instead, a variety of factors must be considered in making this determination [*see* Restatement of Agency 2d, § 220 and Comment h; *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949-950, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686]* . The single most important factor is the right to control the manner and means by which the work is accomplished. If the employer has the right to exercise complete control, an employer-employee relationship exists [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

Most large full-service property management firms retained by an owner are probably independent contractors. In the case of a resident manager [*see § 38.220*], it is more likely that the control exercised by the owner over the manager's performance creates an employer-employee relationship. For additional discussion, see Ch. 84, *Independent Contractors* , and California Real Estate Law & Practice, Ch. 382, *Property Management* (Matthew Bender).



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.19 Applicability of Real Estate Licensing Requirements

[1] Activities Requiring License

Many activities routinely engaged in by persons who manage the real property of another require a real estate broker's or salesperson's license under the Real Estate Law [*Bus. & Prof. Code §§ 10000-10580*]. These activities include leasing or offering to lease real property, placing real property for lease, soliciting listings of places for lease, soliciting leases for prospective tenants, negotiating the sale, purchase, or exchange of leases on real property, or collecting rent from real property or improvements on real property [*see Bus. & Prof. Code §§ 10131(b), 10130, 10132*]. These specific activities, described in *Bus. & Prof. Code § 10131(b)*, are referred to in the discussion under [2], *below*, as "management activities" solely for the purpose of explaining certain exceptions to the licensing law requirements. As a licensee under the Real Estate Law, a property manager must conform to the ethical standards [*see, e.g., Bus. & Prof. Code §§ 10176, 10177*] and other requirements of the Real Estate Law and its implementing regulations [*see* California Real Estate Law & Practice, Ch. 60, *Regulation of Real Estate Brokers;* Ch. 64, *Licensing and Discipline of Brokers* (Matthew Bender)]. A person performing activities for which a license is required may not bring an action to collect a commission or any compensation if he or she was not duly licensed at the time the right to receive the compensation is alleged to have arisen [*Bus. & Prof. Code § 10136*].

[2] Exception for Certain Management Activities

The manager of a hotel, motel, auto park, or trailer park, or the employee of such a manager, may engage in the management activities described in [1], *above*, without possessing a real estate license [*Bus. & Prof. Code § 10131.01(a)(1)*]. The resident manager of an apartment building, apartment complex, or court, or the employee of such a manager, may also engage in those activities without a real estate license [*Bus. & Prof. Code § 10131.01(a)(1)*].

Exemptions from the requirement of possessing a real estate license are also available for persons who solicit, arrange, or accept reservations or money for transient occupancies in common interest developments [*Bus. & Prof. Code § 10131.01(a)(2)*; *see Civ. Code § 1351* (common interest developments); *see also Civ. Code § 1940(b)* (transient occupancies)] and for certain employees of property management firms [*Bus. & Prof. Code § 10131.01(a)(3)*]. The

employee of a property management firm retained to manage a residential apartment building, complex, or court, and who works under the supervision and control of a broker who is an employee of the firm, or a salesperson licensed to the broker, may perform any of the following services without a license [*Bus. & Prof. Code § 10131.01(a)(3)*]:

(1) Show rental units and common areas to prospective tenants.

(2) Provide or accept preprinted rental applications, or respond to inquiries from prospective tenants concerning the completion of such an application.

(3) Accept deposits or fees for credit checks or administrative costs, and accept security deposits and rents.

(4) Provide information about rental rates and other terms and provisions of a lease or rental agreement as set out in a schedule provided by an employer.

(5) Accept signed leases and rental agreements from prospective tenants.

A broker employing these nonlicensed persons must also obtain a license [*see Bus. & Prof. Code § 10163*] for each apartment building, complex, or court where the nonlicensed persons are employed [*Bus. & Prof. Code § 10131.01(c)*].

[3] Exemptions

Certain persons may perform not only the management activities referred in [1], *above*, but also any other activity that ordinarily requires a real estate broker's license [*see Bus. & Prof. Code § 10131*], without a license [*see Bus. & Prof. Code § 10133*]. The persons exempt from these licensing requirements are [*Bus. & Prof. Code § 10133(a)*]:

(1) A regular officer of a corporation or a general partner of a partnership with respect to real property owned or leased by the corporation or partnership, respectively, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, respectively, if the acts are not performed by the officer or partner in expectation of special compensation;

(2) A person holding a duly executed power of attorney from the property owner with respect to which the acts are performed;

(3) An attorney rendering legal services to a client;

(4) A receiver, trustee in a bankruptcy, or other person acting under order of a court of competent jurisdiction; and

(5) A trustee for the beneficiary of a deed of trust when selling under authority of that deed of trust.

The above exemptions are not applicable to a person who uses or attempts to use them for the purpose of evading the provisions of the Real Estate Law [*Bus. Prof. Code 10133(b)*]. For example, the power of attorney exemption listed above applies only when a property owner is compelled by personal necessity to empower another to consummate a particular or isolated transaction [*Sheetz v. Edmonds (1988) 201 Cal. App. 3d 1432, 1435, 247 Cal. Rptr. 776]* . A power of attorney executed by owners to allow a personal friend to manage their property did not exempt the friend from the real estate licensing requirements. Even though the friend did not manage any other properties, she performed tasks that the owners had previously hired real estate brokers to perform and received compensation for performing tasks that required a license [*Sheetz v. Edmonds (1988) 201 Cal. App. 3d 1432, 1436, 247 Cal. Rptr. 776]* .



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.20 Applicability of Other Requirements Under Real Estate Law

[1] In General

A property manager who is required to be licensed under the Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*; *see § 38.19*] must satisfy not only the licensing requirements but also all other requirements of the Real Estate Law. Some of the requirements that are particularly relevant to a property manager are summarized below. For further discussion of the duties and responsibilities of licensees under the Real Estate Law, see California Real and Estate Law & Practice, Ch. 63, *Duties and Liabilities of Brokers* (Matthew Bender).

[2] Trust Fund Account

[a] Deposit of Funds

A real estate broker who accepts funds belonging to others in connection with any transaction subject to the Real Estate Law must deposit all funds that are not immediately placed into a neutral escrow depository [*see Bus. & Prof. Code § 10145(i)* (definition of"neutral escrow")]. Compliance with *Bus. & Prof. Code § 10145* requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds or into a neutral escrow depository or a trust fund account in the name of the broker as trustee at a bank or other financial institution, not later than three business days following receipt of the funds by the broker or by the broker's salesperson [*10 Cal. Code Reg. § 2832(a)*]. The funds must be kept in the account until disbursed by the broker in accordance with instructions from the person entitled to the funds [*Bus. & Prof. Code § 10145(a)*; *see 10 Cal. Code Reg. § 2834*]. The Real Estate Law prohibits a broker from commingling his or her own money or property with any money or property that belongs to others and that is being held by the broker [*Bus. & Prof. Code § 10176(e)*; *see 10 Cal. Code Reg. § 2835* (definition of "commingling")].

For general discussion of broker trust funds accounts, see California Real Estate Law and Practice, Ch. 60, *Regulation of Real Estate Brokers* (Matthew Bender).

[b] Interest-Bearing Accounts

If requested by the owner of trust funds or by principals of the subject transaction, and if not otherwise specifically prohibited under the Real Estate Law, a broker may deposit the trust funds into an interest-bearing account with a bank or other designated financial institution whose accounts are federally insured, provided certain statutory requirements are satisfied [*see Bus. & Prof. Code § 10145(d)*; *see also Bus. & Prof. Code § 10145(f)* (Real Estate Commissioner's authority to promulgate related regulations); *10 Cal. Code Reg. § 2830.1*; California Real Estate Law and Practice, Ch. 60, *The Brokerage Industry and Its Regulation* (Matthew Bender)]. A broker need not place trust funds into an interest-bearing account unless requested to do so and unless all of the relevant statutory requirements governing deposits in interest-bearing accounts are satisfied [*Bus. & Prof. Code § 10145(e)*; *see Bus. & Prof. Code § 10145(d)*]. Further, no deposit is required in any event if the broker advises the party making the request that the funds will not be placed in an interest-bearing account [*Bus. & Prof. Code § 10145(e)*].

[c] Financial Records

A broker must maintain a separate record of the receipt and disposition of all trust funds, including any interest earned on the funds [*Bus. & Prof. Code § 10145(g)*; *see 10 Cal. Code Reg. §§ 2831-2831.2*]. On request of the Real Estate Commissioner, a broker must furnish to the Commissioner an authorization for examination of financial records of any such trust fund accounts maintained in a financial institution [*Bus. & Prof. Code § 10145(h)*; *see Gov. Code § 7473* (procedures for examination)].

[3] Retention of Documents and Inspection and Audit

A licensed real estate broker must retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate license is required. After notice, the books, accounts, and records must be made available for examination, inspection, and copying by the Real Estate Commissioner or his or her designated representative during regular business hours. On the appearance of sufficient cause, the books, accounts, and records are subject to audit without further notice, except that the audit must not be harassing in nature [*Bus. & Prof. Code § 10148(a)*].

[4] Delivery of Copy of Agreement

When a licensee prepares or has prepared an agreement authorizing or employing the licensee to perform any of the acts for which he or she is required to hold a license [*see § 38.19 [1]*], or when the licensee secures the signature of any person to any contract pertaining to these acts, he or she must deliver a copy of the agreement to the person signing it at the time the signature is obtained [*Bus. & Prof. Code § 10142*].

[5] Specific Requirements for Agreement

A broker must have the written authorization of a property owner prior to offering business property for sale, lease, or exchange [*see Bus. & Prof. Code § 10176(j)*]. An exclusive agreement authorizing the broker to perform any acts for which a license is required must contain a specified date of final and complete termination [*see Bus. & Prof. Code § 10176(f)*; *see also § 38.19 [1]* (activities requiring license)].



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.21 Special Requirements for Management of Common Interest Developments

[1] Limitations on Association Board

The homeowners' association for a condominium project or other common interest development often contracts with a professional property manager for the day-to-day management of the project. Subject to specified exceptions, the governing association for a homeowners' association cannot enter into a management contract for a term longer than one year [*see 10 Cal. Code Reg. § 2792.21(b)(1)*]. If the homeowners' association is incorporated under the Nonprofit Mutual Benefit Corporation Law [*Corp. Code §§ 7110-8910*], as most are, and a member of the board of directors wishes to enter into a management agreement with the association, or has a material financial interest in the proposed management entity, the material facts of the transaction must be disclosed to and approved by the board [*see Corp. Code § 7233(a)*]. For further discussion of these requirements and other limitations on the authority of a homeowners' association, and for a form of management agreement between a condominium owners' association and a property manager, see Ch. 34, *Condominiums* .

[2] Davis-Stirling Common Interest Development Act

[a] Definition of Managing Agent

Under the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], a "managing agent" is a person or entity who, for compensation or in expectation of compensation, exercises control over the assets of a common interest development [*Civ. Code §§ 1363.1(b), 1363.2(f)*; *see Civ. Code § 1351(c)* (definition of "common interest development")]. A full-time employee of the homeowners' association and any regulated financial institution operating within the normal course of its regulated business practice are excluded from the definition [*Civ. Code §§ 1363.1(b), 1363.2(f)*]. For purposes of the statutory requirements relating to the handling of funds and the maintenance of records [*see* [c], *below*], an attorney acting within the scope of his or her license is also excluded from the definition of managing agent [*Civ. Code § 1363.2(f)*].

[b] Disclosures to Board of Directors

A prospective managing agent, as defined in [a], *above*, must provide a written statement disclosing certain information to the board of directors prior to entering into a management agreement [*Civ. Code § 1363.1(a)*]. The required information includes the names and business addresses of the following: in the case of an agent that is a noncorporate entity, its owners or general partners; or, if the agent is a corporation, its directors, officers, and any shareholders holding more than 10 percent of the shares of the corporation. Further, the statement must describe the licenses and professional certifications held by the foregoing persons or entities. For further discussion of the required disclosures, see Ch. 34, *Condominiums* .

[c] Requirements for Handling Funds

Special statutory provisions apply to a managing agent's handling of association funds [*see Civ. Code § 1363.2*]. For example, funds must be maintained in a trust account and must be separately accounted for [*Civ. Code § 1363.2(a), (c)*]. These requirements and others are discussed in Ch. 34, *Condominiums* .



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AUTHOR: by Jeannie C. Newell, J.D.

§ 38.22 Special Requirements for Residential Property

[1] Disclosure of Identity and Address of Owner and Manager

Certain information required by statute must be disclosed to tenants of a dwelling structure containing one or more units that are offered to the public for lease for residential purposes [*Civ. Code § 1961*]. The required information includes the name, telephone number, and usual street address for purposes of effecting personal service of (1) any person authorized to manage the premises, and (2) an owner of the premises or the person who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting all notices and demands [*Civ. Code § 1962(a)(1)*].

The owner of the dwelling structure, or a party signing a lease on behalf of the owner, must make the required disclosures by one of the following methods:

- In the lease itself [*Civ. Code § 1962(a)*];
- If the lease agreement is oral, by a separate written statement [*Civ. Code § 1962(b)*]; or
- By posting a notice containing the required information in at least two conspicuous places in the structure, one of which must be in the elevator if the structure contains one [*Civ. Code § 1962.5*].

In addition, the lease or rental agreement must disclose the name, telephone number, and address of the person or entity to whom rent payments must be made and, if payment may be made personally, the lease or rental agreement must disclose the usual days and hours that the person will be available to receive payment [*Civ. Code § 1962(a)(2)*]. Alternatively, the lease or rental agreement may disclose the name and street address and account number at a financial institution into which payment may be made, provided that the financial institution is located within five miles of the rental property, or furnish the information necessary to establish an electronic funds transfer procedure for paying the rent [*Civ. Code § 1962(a)(2)*]. The lease or rental agreement must also disclose the form or forms in which rental

payments must be made [*Civ. Code § 1962(a)(3)*].

The owner of the premises or the owner's agent must provide a copy of the rental agreement or lease to the tenant within 15 days of its execution by the tenant and must provide a copy once each calendar year thereafter, on request by the tenant [*Civ. Code § 1962(a)(4)*]. If the owner or owner's agent does not possess the original or a copy of the rental agreement or lease, the owner or owner's agent must instead furnish the tenant with a written statement stating that fact and containing the information required to be disclosed [*Civ. Code § 1962(a)(4)*]. In the case of an oral rental agreement, the owner or owner's agent must furnish the tenant, within 15 days of the agreement, with a written statement containing the information required to be disclosed and must provide an additional copy of the statement once each calendar year thereafter, within 15 days after request by the tenant [*Civ. Code § 1962(b)*].

The information required to be disclosed to tenants must be kept current, and any successor owner or manager must comply with the statutory requirements within 15 days of succeeding the previous owner or manager [*Civ. Code § 1962(c)*]. A party who enters into a lease on behalf of the owner but fails to comply with the statutory disclosure requirements is deemed an agent of each person who is an owner for the purposes of service of process, receiving and receipting notices and demands, performing the obligations of the owner under the law and under the lease, and receiving rental payments [*Civ. Code § 1962(d)*]. Nothing in the applicable statutory provisions limits or excludes the liability of any undisclosed owner [*Civ. Code § 1962(e)*]. In the event an owner fails to comply with the disclosure requirements, service of process by a tenant with respect to a dispute arising out of the tenancy may be made by registered or certified mail sent to the address at which rent is paid [*Civ. Code § 1962.7*; *see Code Civ. Proc. § 1013* (methods of service applicable)].

[2] Live-In Caretaker

A manager, janitor, housekeeper, or other responsible person must reside on the premises and must have charge of every apartment house in which there are 16 or more apartments, and of every hotel in which there are 12 or more guest rooms, if the owner of the apartment house or hotel does not reside on the premises. Only one caretaker is required for all structures under one ownership and on one contiguous parcel of land. For apartment houses in which there are more than four but less than 16 apartments and in which the owner does not reside, a notice stating the owner's name and address or the name and address of the owner's agent in charge of the apartment house must be posted in a conspicuous place on the premises [*25 Cal. Code Reg. § 42*].

[3] Compensation Paid to Resident Manager

If, as is usually the case, a resident manager is an employee of the property owner or a management firm rather than an independent contractor [*see §§ 38.18, 38.220*], the manager's minimum wages and maximum hours are regulated under the Industrial Welfare Commission's regulations for the public housekeeping industry [*see 8 Cal. Code Reg. § 11050(4)*; *see also § 38.220[1]*]. If lodging is used by the employer to meet part of the employee's minimum wage obligation, the amount that may be credited for the lodging is limited by regulation [*see 8 Cal. Code Reg. § 11050(10)(B), (C)*]. For a full discussion of these and other related requirements for a resident manager, see *§ 38.220[1]*.



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18-38 California Legal Forms--Transaction Guide § 38.23

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.23 Wage and Hour Laws

[1] State Industrial Welfare Commission

The Industrial Welfare Commission regulates wages, hours, and working conditions in the public housekeeping industry [*see 8 Cal. Code Reg. § 11050* (Industrial Welfare Commission Order No. 5-89)]. This industry includes hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering living, business, or commercial quarters for lease [*8 Cal. Code Reg. § 11050(2)(P)(3)*]. The regulations cover all nonexempt employees [*8 Cal. Code Reg. § 11050(1)*]. Exempt employees are student nurses [*8 Cal. Code Reg. § 11050(1)(A)*] and those persons employed in administrative, executive, or professional capacities [*8 Cal. Code Reg. § 11050(1)(B)*]. To qualify under the second exemption, the employee must be engaged in work that is primarily intellectual, managerial, or creative and that requires the exercise of discretion and independent judgment. Further, the remuneration for the work must be at least the monthly minimum dollar amount set forth in the regulations [*8 Cal. Code Reg. § 11050(1)(B)(1)-(3)*].

[2] Fair Labor Standards Act

The Fair Labor Standards Act of 1938 [*29 U.S.C. § 201 et seq.*] contains minimum wage, overtime, and recordkeeping requirements for employees employed in an enterprise engaged in commerce or in the production of goods for commerce [*see 29 U.S.C. § 203(s)(1)*; *see also 29 U.S.C. § 203(r)(1)* (definition of "enterprise")]. One of the requirements an employer must meet to be considered an enterprise engaged in commerce or in the production of goods for commerce is to have annual gross sales in excess of $500,000 [*see 29 U.S.C. § 203(s)(1)(A)(ii)*].

A real estate management company that provides extensive management services to owners of apartments or commercial buildings must comply with the provisions of the Act if the scope and dollar volume of its activities are sufficient to bring it within the Act. For purposes of making this determination, the correct measure of the "gross sales" (*see* preceding paragraph) is the gross commissions the management company receives for the sale of its professional management services. The gross rentals collected by the company as agent for the owners are not used for this determination because they do not represent sales attributable to the company's enterprise [*Falk v. Brennan (1973)*

414 U.S. 190, 201, 94 S. Ct. 427, 38 L. Ed. 2d 406 ; *see Brennan v. Arnheim & Neely, Inc. (1973) 410 U.S. 512, 93 S. Ct. 1138, 35 L. Ed. 2d 463* (management company directing operations at several separately owned buildings held to be single enterprise for purposes of Act)].



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18-38 California Legal Forms--Transaction Guide §§ 38.24-38.99

AUTHOR: by Jeannie C. Newell, J.D.

[Reserved]

§§ 38.24[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

18-38 California Legal Forms--Transaction Guide § 38.100

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.100 Basic Information for Parties and Property

[1] Facts

1. Basic facts for owner and manager:

a. Name

b. Address.

c. Telephone number.

d. Legal status.
(1) Individual.

(2) Corporation.

(3) Limited partnership.

(4) General partnership.

(5) Joint venture.

(6) Unincorporated association.

(7) Estate.

(8) Public entity.

(9) Other.

2. Additional information concerning party who is not an individual:

a. Type of entity.

b. Full legal name.

c. Address of main office or principal place of business.

d. Address of branch or office at which matters relating to transaction will be handled.

e. Name, address, and title of person(s) to whom communications should be directed.

f. Name, address, and title of person(s) authorized to bind entity.

3. Name, address, and telephone number of attorney representing other party, if any.

4. For subject property to be managed:

a. Type.

(1) Residential.
(a) Single-family home.

(b) Duplex.

(c) Apartment complex.

(d) Condominium complex or other common interest development.

(e) Other.

(2) Office.

(a) High-rise building.

(b) Complex.

(c) Free-standing building.

(3) Retail.

(a) Single-use building.

(b) Shopping center.

(4) Industrial.

(a) Plant or building.

(b) Park or complex.

(5) Special purpose property.

(a) Parking facility.

(b) Storage facility.

(c) Motel or hotel.

(d) Mobilehome park.

(e) Other.

(6) Agricultural.

(a) Orchard.

(b) Farm.

(c) Ranch.

(d) Other.

b. Amenities.

(1) Parking garage.

(2) Common areas and facilities.

(3) Pool.

(4) Elevators.

(5) Other.

c. Approximate size.

(1) If residential, number of units.

(2) If nonresidential:

(a) Total gross floor area, in square feet.

(b) Net leasable floor area, in square feet.

(3) If agricultural, acreage.

d. Location.

(1) Street address.

(2) City and county.

e. Zoning classification of subject property.

5. Steps already taken by client in connection with transaction.

a. Whether management agreement has been executed.

b. Whether manager has submitted bid for management services to owner.

6. Steps client wants attorney to perform, e.g.:

a. Negotiate terms of proposed management agreement.

b. Draft management agreement and related documents.

c. Review management agreement and related documents drafted by another.

d. Advise client of rights under executed management agreement.

[2] Documents

1. Copy of any correspondence between owner and manager.

2. Copy of any written agreements between owner and manager.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide § 38.101

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.101 Additional Information to Be Obtained From Owner

[1] Facts

1. Manner in which owner holds title to property:

a. As corporation in corporate name.

b. As partnership in partnership name.

c. As partnership in name of one or more partners.

d. As individual.

e. As husband and wife in [*see Fam. Code § 750*]:
(1) Joint tenancy.

(2) Tenancy in common.

(3) Community property.

(4) Community property with right of survivorship.

f. As co-owner in [*see Civ. Code § 682*]:

(1) Joint tenancy.

(2) Tenancy in common.

(3) Partnership.

g. As executor or administrator of decedent's estate [*see Prob. Code § 9940 et seq.*].

2. Type of manager desired by owner [*see § 38.12*]:

a. Manager that performs full range of management services.

b. Manager that performs limited management services, e.g.:

(1) Resident manager.

(2) Building superintendent.

3. If manager will reside or occupy office on premises, description of apartment or office.

[2] Documents

1. Copy of any existing rules and regulations for property.

2. Copy of any recorded declaration or CCandRs affecting property.

3. List of tenant security deposits held by or on behalf of owner that shows:

a. Name of tenant.

b. Date collected.

c. Amount of deposit.

d. Any deductions that have been made since beginning of tenancy.

4. Copy of all insurance policies covering property or properties to be managed.

5. List of existing tenants, including names, addresses, and telephone numbers.

6. Copy of all leases pertaining to subject property.

7. List of units or space presently vacant, if any.

8. Copy of any maintenance or other contracts pertaining to subject property between owner and third persons.

9. Guaranties on equipment and appliances.

10. Any unpaid repair bills.

11. Account books and financial records or reports.

12. Any prior management contracts for property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide § 38.102

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.102 Additional Information to Be Obtained From Manager

[1] Facts

1. Professional management certification, accreditation, or designation, if any, held by manager.

a. Certified property manager (CPM) issued by Institute of Real Estate Management (IREM).

b. Accredited Resident Manager (ARM) issued by IREM.

c. Accredited Management Organization (AMO) issued by IREM.

d. Real Property Administrator (RPA) issued by Building Owners and Managers Association International (BOMA).

e. Certified Shopping Center Manager (CSM) issued by International Council of Shopping Centers.

f. Registered Property Manager (RPM) issued by International Real Institute.

g. Certified International Property Specialist (CIPS) issued by Federation Internationale des Administrateurs de Biens Conseils Immobiliers (FIABCI).

h. Other.

2. Any license, registration, certification, or degree obtained by manager in related field, e.g.:

    a. Real estate.

    b. Accounting.

    c. Architectural design.

    d. Construction.

    e. Engineering.

3. Manager's areas of specialty, if any.

4. Length of time manager has been in business of property management.

5. Whether manager is bonded or bondable.

[2] Documents

1. List of properties currently and previously managed by manager.

2. List of current and/or prior clients that may be contacted for references.

3. Credit report or check.

4. Proof of license or accreditation.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide §§ 38.103-38.109

AUTHOR: by Jeannie C. Newell, J.D.

[Reserved]

§§ 38.103[Reserved]



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18-38 California Legal Forms--Transaction Guide § 38.110

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.110 Duties to Be Performed by Manager

1. Will manager provide any services preliminary to commencement of management, such as:

    a. Property management plan?

    b. Market rent analysis for property?

    c. Other?

2. For leasing of property, will manager:

    a. Advertise for tenants?

    b. Be exclusive agent for leasing?

    c. Cooperate with other real estate brokers or rental agencies to obtain tenants?

    d. Screen and select tenants, verify their financial ability to pay rent, and check their references?

    e. Prepare and periodically revise rental schedule?

    f. Negotiate leases?

g. Complete standard form leases for execution by tenant?

h. Execute leases on behalf of owner?

i. Renew leases?

j. Clean or refurbish rental units for occupation by new tenant?

k. Receive and respond to tenant complaints and maintain tenant satisfaction?

l. Collect and deposit rents?

m. Initiate and pursue action for delinquent rents?

3. For maintenance and repair of property, will manager:

a. Perform or supervise performance of day-to-day maintenance of building or grounds?

b. Develop and/or execute schedule for improvements, refurbishment, and alterations?

c. Hire and supervise personnel to maintain property?

d. Obtain bids and estimates and execute contracts with outside maintenance persons and independent contractors?

e. Perform or oversee performance of regular preventative maintenance?

f. Perform emergency repairs?

g. Be required to deal with specific service and material suppliers designated by owner?

4. What, if any, other operational duties will manager be expected to perform?

a. Purchase necessary supplies for maintenance and operation of property?

b. Procure or maintain insurance on property required by owner?

c. Comply with applicable federal, state, and local laws and regulations?

5. What will be specific financial/accounting duties of manager?

a. Prepare annual or other periodic budget?

b. Prepare annual or other periodic budget reconciliation statement?

c. Maintain accurate records and books of account?

d. Pay:
(1) Recurring operating expenses?

(2) Property taxes?

(3) Mortgage payments?

(4) Other?

e. Collect:

(1) Rents?

(2) Other revenue from property?

f. Appeal tax assessments?

g. Prepare periodic financial statements as required by owner?

h. Disburse net income to owner from property?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsReal Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide § 38.111

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.111 Status of Manager as Employee or Independent Contractor

NOTE:

The actual relationship between the owner and manager must be considered to determine whether the manager is an employee of the owner or is an independent contractor. The terminology used in the agreement between the owner and manager may be relevant but is not conclusive on the subject [***see*** *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 952, 88 Cal. Rptr. 175, 471 P.2d 975]* . It is important to accurately characterize the relationship since if the manager is an employee of the owner, the owner must comply with applicable wage and hour laws, pay and deduct social security taxes, withhold income taxes and disability insurance payments, pay federal and California unemployment insurance taxes, and carry workers' compensation insurance. This section sets forth some relevant criteria for making the foregoing determination in the context of an owner/property manager relationship. For more detailed coverage of the distinction between an employee and an independent contractor, see Ch. 84, ***Independent Contractors*** , and Ch. 85, ***Employment Agreements*** .

1. In relationship between owner and manager:

a. Does owner have right to control manner and means of accomplishing result desired by owner; or

b. Does manager have discretion as to method and means used to obtain owner's desired results, with owner's control limited only to results?

NOTE:

Whether a person is an independent contractor or an employee is generally a question of fact [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 672, 39 Cal. Rptr. 849]* . In

determining whether a person is an independent contractor or an employee, the most important question is which party has the right to control the manner and means by which the work is accomplished [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . For additional discussion, see Ch. 84, ***Independent Contractors*** .

2. In delegation of duties to manager, has owner:

a. Retained responsibility for many of the duties and delegated only narrowly defined specific duties to manager; or

b. Delegated most or all property management duties to manager?

NOTE:

As a general rule, the more responsibilities the owner retains and the more control the owner retains over a manager, the more likely the relationship is to be one of owner/employee [***see, e.g.,*** *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 88 Cal. Rptr. 175, 471 P.2d 975]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide § 38.112

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.112 Applicability of Real Estate Law to Manager

1. Will proposed manager perform any duties for owner that require a license under Real Estate Law [*Bus. & Prof. Code § 10000 et seq.*], e.g. [*see Bus. & Prof. Code §§ 10131(b), 10130, 10132*]:

a. Leasing?

b. Offering or negotiating to lease?

c. Soliciting prospective tenants?

d. Collecting rents from real property or improvements located on real property?

2. Is manager one of following that may perform duties described in (1), *above*, without real estate license [*see Bus. & Prof. Code § 10131.01(a)*]:

a. Resident manager of apartment building, complex, or court, or employee of such a manager?

b. Manager of hotel, motel, or auto and trailer park?

NOTE:
Certain employees of a management firm are also exempt from the licensing requirements when performing various leasing-related activities, subject to requirements set forth in the statute [***see*** *Bus. & Prof. Code § 10131.01*; ***see also*** *§ 38.19[2]*].

3. Does manager fall within scope of any of the following exemptions from licensing requirements [*see Bus. & Prof. Code §§ 10133(a), 10131*]?

a. Regular officer of corporation or general partner of partnership acting with respect to real property owned or leased by corporation or partnership, respectively, or in connection with proposed purchase or leasing of real property by corporation or partnership, respectively, if acts are not performed by officer or partner in expectation of special compensation?

b. Person acting pursuant to executed power of attorney from owner of property?

c. Attorney at law rendering legal services to client?

d. Receiver, trustee in bankruptcy, or other person acting under order of court of competent jurisdiction?

e. Trustee selling under deed of trust?

NOTE:

The above exemptions from the licensing requirements of Real Estate Law are not applicable to a person who uses or attempts to use them for the purpose of evading provisions of the Law [*Bus. & Prof. Code § 10133(b)*; ***see*** *§ 38.19[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide § 38.113

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.113 Manager's Compensation

1. Considering type of property to be managed, what form of compensation will manager receive for basic management services?

NOTE:
The method of basic compensation paid to a manager will depend on the type and size of property managed and the type of services provided by manager. For example, a resident manager is often paid a fixed salary plus the use of an apartment. A full service property manager is commonly paid some percentage of income on the property.

a. Flat fee arrangement?
(1) Straight flat fee?

NOTE:
A flat fee arrangement may be stated as a specific dollar amount per unit to be managed.

(2) Flat fee plus one of following:

(a) Apartment?

(b) Apartment and utilities?

(c) Percentage of collections from property [*see* P 1b, *below*]?

b. Percentage of one of following:

(1) Gross collected rents?

(2) Gross possible income?

(3) Effective gross income?

(4) Other?

c. Combination, e.g., greater of specific percentage of gross rents or stated dollar amount?

d. Other?

2. Will manager be paid additional compensation based on special services, i.e.:

a. Procuring new leases?

b. Renewing leases?

c. Supervising major repairs or rehabilitation of property?

d. Other?

3. For resident manager:

a. What are number of hours to be worked each day and each week?

b. What day(s) will manager have off each week?

c. If use of apartment is to be credited against employee's minimum wage, what is maximum amount that can be credited?

NOTE:

Only two-thirds of the ordinary rental value of the apartment or a dollar amount set by law, whichever is less, may be credited against the resident manager's minimum wage [*8 Cal. Code Reg. § 11050(10)*]. If no credit for the apartment is used to meet the employer's minimum wage obligation to the manager, the employer may charge, pursuant to a voluntary written agreement with the manager, up to two-thirds of the fair market rental value of the apartment supplied to the manager [*Lab. Code § 1182.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawLandlord & TenantRental Property Management



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AUTHOR: by Jeannie C. Newell, J.D.

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§§ 38.114[Reserved]



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C. Procedural Guide

18-38 California Legal Forms--Transaction Guide § 38.120

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.120 Negotiation and Execution of Management Agreement

[1] Reviewing Agreement Drafted or Submitted by Other Party

1. If agreement has not yet been drafted or submitted by other party, assist client in negotiations with other party.

2. On receipt of agreement drafted or submitted by other party's attorney, review agreement to ensure that it is:

a. Consistent with client's previously stated requirements and objectives for agreement.

b. Otherwise acceptable to client;

c. Legally sufficient.

NOTE:
The Drafting Guide [***see*** *§ 38.130*] may be used as a checklist of provisions that must or should be included in a property management agreement.

3. Communicate and negotiate with other party's attorney regarding changes in agreement requested by client to determine whether or not requested changes are acceptable to other party.

4. For requested changes that are not acceptable to other party, confer with client to determine client's position:

a. Drop request for change.

b. Insist on request for change and, if not agreed to by other party, stop negotiations on agreement.

c. Compromise on stated terms and conditions.

5. For requested changes acceptable to other party, confer with other party's attorney for mechanics of implementing change.

NOTE:
The drafting attorney may (1) agree to draft the proposed change for the attorney requesting the change on behalf of his or her client, or (2) request the other attorney to submit a draft of the proposed change. Alternatively, the attorneys may jointly draft a proposed change, by phone or otherwise.

6. Obtain client's approval of final changes to original agreement.

[2] Drafting Agreement

NOTE:
For a drafting guide for a management agreement, see *§ 38.130*.

[3] Executing Agreement

NOTE:
As with any contract, if the manager or property owner is any legal entity other than an individual, the property management agreement must be executed by the person or persons authorized to legally bind the entity [***see, e.g.,*** *Corp. Code § 313* (corporations)]. If the property to be managed is community property and the agreement authorizes the manager to enter into leases for a period longer than one year on behalf of the owners, both owner spouses should execute the agreement [***see*** *Fam. Code § 1102*]. Also, if the property is owned by a legal entity other than an individual and the agreement authorizes the manager to lease the property, appropriate approval of the entity should be obtained [***see*** Ch. 34B, ***Residential Leases***].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationReal Property LawLandlord & TenantRental Property Management



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18-38 California Legal Forms--Transaction Guide §§ 38.121-38.129

AUTHOR: by Jeannie C. Newell, J.D.

[Reserved]

§§ 38.121[Reserved]



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D. Drafting Guide

18-38 California Legal Forms--Transaction Guide § 38.130

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.130 Property Management Agreement

NOTE:
This drafting guide includes provisions for a management agreement with a full service professional property manager. Many of these provisions are not appropriate for an agreement providing for more limited management services, such as a resident manager [***see*** *§§ 38.220* and *38.221*]. This guide may also be used as a checklist of provisions when reviewing a management agreement.

[1] Introductory Provisions

1. Identify parties to agreement by:

    a. Full name.

    b. Legal status.

2. Set forth date of agreement.

3. Briefly describe specific capacity in which manager is to be employed, hired, or retained.

    a. Exclusive agent to lease, operate, and manage property [*see § 38.201[2],* PP 1, 6].

    b. Exclusive agent to operate and manage property and nonexclusive agent to lease property [*see § 38.200 [2],* PP 1.01, 2.04].

    c. Employee to perform specific management duties [*see § 38.220[2],* P 4].

d. Independent contractor to provide management services [*see § 38.225[2],* P 1].

e. Other.

4. Describe property or properties to be managed:

a. Street address.

b. City and state.

c. Building name, if any.

5. State any preliminary services manager is to perform or provide prior to commencement of management [*see § 38.200 [2],* P 1.03], e.g.:

a. Prepare analysis of property and surrounding neighborhood;

b. Prepare plan for utilization and economic development of property;

c. Formulate budget showing projected property expenses and income; or

d. Take inventory of all personal property and readily removable fixtures attached to property.

[2] Term of Agreement

1. State length of term, specifying the following [*see § 38.200[2],* P 7.01]:

a. Commencement date.

b. Termination date.

2. If agreement can be renewed, provide for [*see § 38.200[2],* P 7.02]:

a. Method of renewal.

b. Length of renewed term.

c. Terms and conditions of agreement applicable to renewed term.

3. Describe right, if any, to terminate agreement prior to its natural expiration date, e.g.:

a. Either party may terminate on written notice to other party:
(1) At any time during term [*see § 38.200 [2],* P 7.03];

(2) Only near end of term [*see § 38.225 [2],* P 9]; or

(3) Only after certain amount of time in term has first elapsed.

b. Either party may terminate for cause on written notice to other party [*see § 38.225 [2],* P 10].

c. Either party may terminate in the event of other party's bankruptcy [*see § 38.200 [2],* P 7.05].

d. Owner may terminate on sale of property [*see § 38.200[2],* P 7.04].

4. For any termination notice either party may give to other, set forth requirements governing [*see § 38.200[2],* P 7.03]:

a. Method of giving notice.

b. When notice must be given.

c. When termination is effective.

5. If owner will pay a termination fee to manager for early termination of agreement by owner, describe [*see § 38.200 [2],* P 7.07]:

a. Amount of fee.

b. Precise circumstances under which fee is payable.

6. Describe any affirmative actions either party must take on termination, for example [*see § 38.200 [2],* P 7.06; *§ 38.220[2],* P 6]:

a. Manager must return to owner all records and other property belonging to owner.

b. Manager must vacate office or apartment on premises.

7. State effect of termination on relationship of parties, for example [*see § 38.200 [2],* P 7.06]:

a. Manager's right to compensation immediately ceases.

b. Manager ceases to be owner's agent.

[3] Leasing Property

1. Set forth specific leasing duties of manager [*see § 38.200 [2],* art. 2; *see also § 38.110*].

2. Describe any limitations and restrictions on manager's authority relating to:

a. Specific terms and conditions on which property may be leased without prior owner approval.

b. Authority of manager to execute new leases on behalf of owner.

c. Authority of manager to renew or extend existing leases without owner approval.

d. Authority of manager to evict tenants or to take other legal action on delinquent accounts or other tenant-related problems.

e. Other.

3. Set forth all acts of manager that require prior written approval by owner.

4. Describe responsibilities for advertising and publicity:

a. Methods to be used:
(1) Newspapers.

(2) Signs on property.

(3) Other.

b. Person responsible for payment:

(1) Manager.

(2) Owner.

[4] Operation and Maintenance of Property

1. Describe authority and duties of manager relating to operation and maintenance of property, e.g. [*see § 38.200 [2]*, art. 3; *§ 38.224[2]*, P 3]:

a. Authority to hire, supervise, and discharge employees, including:
(1) Limitations on types of employees manager is authorized to hire, e.g., only janitor and resident manager.

(2) Indication whether persons hired by manager are employees of manager or owner.

b. Types of routine maintenance for which manager is responsible, including the following:

(1) Cleaning.

(2) Painting.

(3) Plumbing.

(4) Gardening.

c. Authority to make necessary repairs to property, including:

(1) Any dollar limitation on discretionary repairs.

(2) Authority to make emergency repairs.

(3) Any requirement that manager obtain owner approval prior to making repairs.

d. Authority to purchase supplies, equipment, and services necessary for maintenance and repairs, including:

(1) Any dollar or other limitation on authority.

(2) Any requirement that manager deal with specified list of materialmen.

2. If manager is granted authority to refurbish or make structural alterations to property, describe:

a. Extent of authority.

b. Specific limitations on authority.

3. For services and utilities, describe:

a. Types of services and utilities for which manager is to contract, e.g., water, electricity, gas, telephone, or garbage collection.

b. Whether manager is to contract for foregoing services and utilities in own name or in owner's name.

c. Maximum period (e.g., one year), if any, for which manager may contract, without prior written approval of owner.

4. Consider including provision that requires manager to [*see § 38.200[2]*, P 3.04; *§ 38.224[2]*, P 3(i)]:

a. Comply with all government regulations affecting property; and

b. Notify owner of any order or notice issued by government authority.

5. If manager is to have responsibility for procuring and maintaining insurance on property [*see § 38.200[2]*, P 3.05; *§ 38.224[2]*, P 8]:

a. Identify party responsible for selecting types and amount of coverage:

(1) Owner.

(2) Manager.

(3) Manager, subject to owner's prior approval.

b. State specific policies, if any, on which manager is to be named as co-insured or as additional insured.

c. Set forth specific duties of manager:

(1) Procure policies and maintain them in full force and effect.

(2) Furnish owner with proof of insurance.

(3) Investigate all insurance claims and make reports of these to owner.

(4) Other.

d. If manager is also insurance broker, state whether manager is entitled to separate compensation for procuring insurance policies.

6. Describe procedure manager is to follow when manager considers legal or professional services to be necessary:

a. Notify owner immediately.

b. Refer matter to appropriate professionals designated by:

(1) Owner; or

(2) Manager.

c. Notify owner after referral to appropriate professional.

[5] Collection and Disbursement of Revenues

1. Set forth authority of manager to collect:

a. Rent [*see § 38.200[2],* P 2.08; *§ 38.220 [2],* P 4].

b. Other revenue from property [*see § 38.224 [2],* P 3(e)].

2. Describe duties of manager for handling and depositing owner's funds, including [*see § 38.200[2],* P 4.02; *§ 38.224[2],* P 3(e)]:

a. Name of specific or type of permissible financial institution where owner's funds are to be deposited.

b. Requirement, if any, that manager establish earmarked trust fund account for owner's funds.

c. Any requirement that manager and manager's employees who handle owner's funds be bonded.

3. Describe property expenses manager is authorized to pay from owner's funds [*see § 38.200[2],* P 4.03]:

a. Regular, recurring operating expenses.

b. Mortgage on property.

c. Property taxes.

d. Insurance premiums.

e. Manager's compensation.

f. Other.

4. If manager is authorized to retain funds to build reserve for anticipated expenses:

a. State that fact.

b. Set forth amount to be retained as reserve and schedule for establishing reserve.

5. Describe manager's responsibility to remit income to owner, including:

a. Amount (e.g., net income).

b. Frequency (e.g., monthly).

[6] Financial Records and Reports

1.Describe manager's obligation to prepare and maintain financial records for property, e.g. [*see § 38.200[2]*, art. 5]:

a. Maintain accurate and separate records of all receipts and disbursements relating to property.

b. Prepare and provide owner with regular financial statements [*see § 38.224[2]*, P 5], specifying:
(1) Type of statements.

(2) When each statement is required, e.g., monthly, quarterly, or annually.

2. Consider granting owner right to audit books and records maintained by manager and indicating:

a. When right may be exercised.

b. Party responsible for payment of audit.

3. List all forms and reports manager is required to prepare and file [*see § 38.200[2]*, P 5.06]:

a. Payroll forms and reports concerning employees.

b. Workers' compensation forms.

c. Any other forms and reports necessary for operation of property.

4. Identify reports and forms, if any, owner will file, e.g., owner's tax return.

[7] Compensation to Manager

1. For manager's compensation for management services, describe:

a. Agreed-on compensation:
(1) Fixed dollar amount.

(2) Fixed dollar amount plus use of apartment located on property [*see § 38.220[2],* P 2].

(3) Specified percentage of gross income, net income, net profit, or other amount [*see § 38.200 [2],* P 6.01; *§ 38.225 [2],* P 7].

(4) Fixed dollar amount plus percentage [*see § 38.224 [2],* P 7].

(5) Other.

b. Period to which amount or formula used in (a), *above,* applies:

(1) Month.

(2) Year.

c. When it is payable:

(1) Biweekly.

(2) Monthly.

(3) Quarterly.

(4) Annually.

2. If manager has received advance on management fees, set forth:

a. Fact of payment.

b. Amount received.

3. State whether or not manager will receive additional compensation, and if so, amount of compensation, for any of following:

a. Procuring new leases [*see § 38.200 [2],* P 6.02].

b. Renewing or extending existing leases.

c. Procuring insurance for owner.

d. Supervising major alterations or repairs to property.

e. Performing special real estate services for owner, such as selling property, making appraisals, or securing financing [*see § 38.200[2],* P 6.03].

f. Other services.

4. Consider prohibiting manager from realizing or collecting other forms of compensation, e.g. [*see § 38.200[2],* P 6.04]:

a. Prohibit manager from including office overhead expenses in operating expenses chargeable to owner.

b. Prohibit manager from collecting or charging any undisclosed fee, rebate, or discount in connection with management of property.

[8] Miscellaneous Provisions

1. Describe any restrictions on or prohibition against manager assigning its duties under agreement [*see § 38.200 [2],* P 8.02; *§ 38.224[2],* P 12; *§ 38.225[2],* P 11].

2. If desired, set forth miscellaneous provisions regarding:

a. Delivery of notices [*see § 38.200 [2],* P 8.03; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

b. Status of contract and exhibits as entire agreement between parties [*see § 38.200 [2],* P 8.06; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

c. Attorneys' fees [*see Civ. Code § 1717*; *see also § 38.200 [2],* P 8.01].

d. Binding effect of agreement [*see § 38.200 [2],* P 8.04; *see also* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReal Property LawLandlord & TenantRental Property Management



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART III. TRANSACTION GUIDE
D. Drafting Guide

18-38 California Legal Forms--Transaction Guide §§ 38.131-38.199

AUTHOR: by Jeannie C. Newell, J.D.

[Reserved]

§§ 38.131[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
A. General Purpose Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.200

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.200 Property Management Agreement--Long Form

[1] Comment

[a] Use of Form

This form is a property management agreement suitable for use when a property owner wishes to contract with a property manager or management firm for a full range of management services, rather than for the more limited services usually provided by a resident manager or on-site building superintendent or manager [*see § 38.220[2]*]. This form is a referred to as a "long form" property management agreement because it describes the duties of the manager in more detail and provides the property owner with more control than do shorter, standardized forms of management agreement used by many professional property management firms. For a general purpose standardized form of agreement, see *Section 38.201*.

This form may be used for most types of income-producing property, but should be modified to include any special management duties unique to the particular type of property involved and any special management services desired by the property owner. For special purpose management agreements, see *Sections 38.220* and *38.221* (resident manager), *38.224* (motel manager), and *38.225* (agricultural property manager).

[b] Agency and Status

A property owner may elect to designate a property manager as the owner's agent for (1) the management and operation of the property [*see* [2], P 1.01] and (2) the leasing of the property [*see* [2], P 2.04]. The two are separate functions and an owner may not wish to retain the same manager for both purposes. This form includes alternative provisions for making the manager either an exclusive or a nonexclusive agent for leasing [*see* [2], P 2.04].

This form also contains alternative provisions specifying that the manager is either an employee of the owner or an independent contractor [*see* [2], P 1.01]. Whether a person is an independent contractor or an employee is generally a

question of fact [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 672, 39 Cal. Rptr. 849]* . Although the language of an agreement is a factor in determining whether the manager is an employee or an independent contractor, it is not determinative [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 952, 88 Cal. Rptr. 175, 471 P.2d 975]* . Instead, a variety of factors must be considered in making this determination [*see* Restatement of Agency 2d, § 220 and Comment h; *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949-950, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686]* . The single most important factor is the right to control the manner and means by which the work is accomplished. If the employer has the right to exercise complete control, an employer-employee relationship exists [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . For further discussion, see Ch. 84, *Independent Contractors* .

If a manager is an employee of the property owner, the owner/employer must comply with applicable minimum wage and maximum hour laws, as well as other laws relating to employees. For further discussion, see *Section 38.220[1][d], [e]*.

[c] Preliminary Professional Services

Large professional management companies offer various professional services in addition to the day-to-day maintenance and operation of the property, such as the preparation of a comprehensive management plan for the property. The agreement must describe these services, if applicable, and any separate compensation payable for the services [*see* [2], P 1.03].

[d] Leasing

Article 2 of this form sets forth the duties of the manager with respect to leasing and defines the scope of the manager's authority. Duties in this area might include qualifying and screening tenants, negotiating and entering into leases, advertising, enforcing leases, evicting tenants, collecting rents and security deposits, and handling tenant problems [*see § 38.110*].

The agreement should clearly describe any limitations the owner wishes to place on the manager's authority to lease. For example, a manager may be authorized only to enter into leases that are for at least a minimum term set by the owner and not longer than a maximum term specified by the owner [*see* [2], P 2.01]. The owner may also elect to retain control over the lease forms used by the manager [*see* [2], P 2.02].

[e] Operation and Maintenance

Article 3 of this agreement authorizes the property manager to perform several duties ordinarily required for the operation and maintenance of most types of income-producing property. These duties include hiring and supervising employees to work on the property, maintaining and repairing the property, contracting for services and utilities for the property, and complying with government regulations. As is true for the manager's authority to lease, any restrictions or limitations on the manager's authority to operate and maintain the property, such as prior owner approval for expenditures in excess of a stated dollar amount [*see* [2], P 3.02(b)], must be clearly described in the agreement.

A property owner may delegate responsibility to the manager for procuring and maintaining adequate insurance coverage for the property. This form includes alternative insurance provisions [*see* [2], P 3.05]. The first alternative requires the manager to obtain bids but reserves to the owner the right to select the specific carrier and coverage. The second alternative grants the manager discretion to procure and maintain adequate insurance for the property.

This form includes an optional provision that may be used if the manager is to maintain an office on the premises [*see* [2], P 3.06].

[f] Collection and Disbursement of Revenues

Article 4 of this form requires the manager to collect all rents and other revenue from the property, to deposit collected funds in a trust account [*see § 38.20 [2]* (trust account requirements)], and to pay from the trust account recurring property expenses authorized under the agreement. This form includes alternative language that may be used to designate the party that is to be responsible for direct payment of the mortgage and property taxes on the property [*see* [2], P 4.03].

Paragraph 4.04 of this form requires the manager to furnish the owner a fidelity bond for protection against misapplication of the owner's funds by the manager or its employees. An Accredited Management Organization (AMO), accredited by the Institute of Real Estate Management (IREM) [*see § 38.14 [1]*] is required to have a fidelity bond, broad form money and securities insurance, and depositor's forgery and alternations insurance [Solving the Property Management Puzzle: Selecting the Right Firm for Your Investments (IREM), No. 313-901].

[g] Financial Records and Reports

Article 5 describes the financial records the manager is required to maintain and the financial statements the manager must periodically prepare and deliver to the owner, such as a monthly income and expense report [*see* [2], P 5.02] and an annual financial statement [*see* [2], P 5.05]. In addition, the owner may require special reports, such as delinquency and vacancy reports for the property [*see* [2], P 5.04]. Paragraph 5.07 of this form requires the manager to prepare an annual budget for the owner's approval. After the budget is approved, the manager must inform the owner of any anticipated deviations from the budget both with respect to income and expenses. The manager is also required to prepare and file all payroll and employee-related forms and statements [*see* [2], P 5.06].

[h] Monthly Payments to Owner

This form requires the manager to remit to the owner, each month, the monthly net profit from the property as shown on the preceding month's income and expense report [*see* [2], PP 5.02, 5.03]. It includes optional language for use if the owner authorizes the manager to make any deductions from the amount otherwise payable as net profit, for the manager's monthly compensation or to establish a reserve fund for expenses not yet due [*see* [2], P 5.03].

[i] Compensation

The basic management fee paid to a professional property manager is usually based in some manner on income collected from the property, but instead may be a flat fee [*see § 38.15*]. Both alternatives are included in Paragraph 6.01 of this form.

In addition to a basic management fee, a property manager who is authorized to lease the property on either an exclusive or nonexclusive basis usually receives extra compensation for leasing services in the form of a commission. The agreement should set forth the total commission, if any, payable by the owner for both the procuring of new leases and the renewal or extension of existing leases [*see* [2], P 6.02].

Unlike some other management agreements, this form does not grant a property manager the exclusive right to list the managed property in the event the owner decides to sell it. For coverage of listing agreements, see Ch. 21, *Agreements with Brokers and Agents* .

[j] Termination

The term of the agreement, including both its commencement and final termination date, should be clearly set forth in the agreement [*see Bus. & Prof. Code § 10176(f)*; *see* [2], P 7.01]. This form includes alternative renewal provisions [*see* [2], P 7.02]. The first provides for automatic renewal unless a notice of termination is given by either party prior to the original expiration date of the agreement; the second requires the parties to execute a renewal agreement prior to the

agreement's original expiration date.

This form permits either party to terminate the agreement by written notice to the other. Optional language is included that may be used if the parties agree that neither shall have this right until a minimum period has elapsed [*see* [2], P 7.03].

An optional provision in this form requires the owner to pay the manager a cancellation fee, under certain circumstances, if the owner terminates the agreement during a specified period of time (for example, the first 12 months of the term) [*see* [2], P 7.07]. If the property is sold, any cancellation fee otherwise payable must be offset against the real estate commission paid to the manager, if any, for the sale. No cancellation fee is payable if the purchaser of the property retains the services of the manager [*see* [2], P 7.05]. In the event of the owner's or the manager's bankruptcy, either party may terminate the agreement, but no cancellation fee will be payable [*see* [2], P 7.05].

For alternative termination provisions for a management agreement, see *Sections 38.224[2]* and *38.225[2]*.

[2] FORM

Property Management Agreement--Long Form

MANAGEMENT AGREEMENT

This Agreement is entered into on _____[*date*] between _____[*name(s) of owner(s)*], [*legal status*] ("Owner") and _____[*name of manager*], [*legal status*] ("Manager").

Recitals

A. Owner is the owner of [*general description of property, e.g.*, a 180-unit apartment complex] commonly known as [*name of property, e.g.*, the Greenwood Apartments], located at _____[*street address and city*], California (the "Premises").

B. Manager is engaged in the business of property management and has extensive experience in the operation of [*specific type of property, e.g.*, apartment complexes].

C. Owner desires to retain the services of Manager to manage and operate the Premises for the benefit of Owner on the terms and conditions set forth in this Agreement.

THE PARTIES AGREE AS FOLLOWS:

ARTICLE 1. MANAGEMENT SERVICES AND STANDARDS

[*Choose one of the following:*]

[*EITHER*]

Creation of Employment Relationship

1.01. Owner hereby employs Manager and Manager hereby accepts employment as manager of the Premises, with the authority to direct, supervise, and manage the operation of the Premises on the terms and conditions set forth in this Agreement.

[*OR*]

Appointment and Independent Contractor Status

1.01. Owner hereby appoints Manager and Manager hereby accepts appointment as manager of the Premises, with the authority to direct, supervise, and manage the operation of the Premises on the terms and conditions set forth in this Agreement. Owner and Manager acknowledge and agree that this Agreement establishes and constitutes only a Management Agreement between the parties, that the parties are not joint venturers or partners, and that Manager shall not be deemed to be an employee of Owner. Manager shall at all times be an independent contractor.

[*Continue with the following:*]

Professional Management Standards

1.02.(a) Manager agrees to exert its best efforts, to furnish the services of its organization, and to exercise the highest degree of professional competence in managing the Premises so as to provide Owner with the maximum economic return consistent with proper management.

(b) Manager shall operate and maintain the Premises consistent with the Premises' reputation as a first-class _____ [*type of property, e.g.,* multi-unit apartment complex] on a standard equal to other first-class _____ [*type of property, e.g.,* apartment complexes] in the surrounding vicinity with comparable facilities and amenities.

(c) Notwithstanding the authority granted in this Agreement, Manager agrees to abide by those standards and instructions that Owner may issue from time to time regarding the Plan (as defined in Paragraph 1.03(c) of this Agreement) or other standards governing the management and operation of the Premises.

Preliminary Analysis and Management Plan

1.03. On or before _____[*date*], Manager shall do the following:

(a) Become familiar with the neighborhood, layout, construction, location, character, plan, and operation of the Premises and any mechanical or physical systems located on the Premises.

(b) Prepare inventories of all personal property and readily removable fixtures attached to the Premises, and deliver these inventories to Owner.

(c) On the basis of the information gathered pursuant to Subparagraphs (a) and (b) of this Paragraph, prepare a comprehensive management plan for the maintenance, utilization, and economic development of the Premises (the "Plan"). The Plan, together with Manager's recommendations for achieving maximum economic return on the Premises, shall be submitted to Owner. Any policies or actions recommended in the Plan are subject to the prior approval of Owner. At a minimum, the Plan shall include (1) an analysis of the neighborhood and the Premises; (2) an estimate of

the value of the Premises and a statement of its current financial situation; (3) recommendations for rental schedule and for the best use to which the Premises may be put; (4) a budget of operations; (5) a plan for securing tenants; and (6) a plan for maintaining [*add if relevant:* rehabilitating, and modernizing] the Premises.

ARTICLE 2. LEASING OF PREMISES

Leasing to Tenants

2.01. Manager shall use all reasonable efforts to keep the Premises leased by procuring tenants for the Premises and negotiating and executing on behalf of Owner all leases for units [*or* space] in the Premises. Manager is authorized to enter into [*specify permissible lease terms, e.g.,* month-to-month lease agreements with tenants *or* leases with tenants for a minimum term of _____ (*specify, e.g.,* six months) and a maximum term of _____ (*specify, e.g.,* one year)] without the prior approval of Owner. Any lease for a shorter or longer term shall require the prior written consent of Owner.

Limitations on Authority to Lease

2.02. Manager shall lease all units [*or* space] in accordance with the terms and conditions of this Agreement [*or* on terms and conditions specified in writing by Owner from time to time *or* on the terms and conditions set forth in lease forms to be provided by Owner from time to time *or* on the terms and conditions set forth in _____ (a schedule approved by Owner *or* the schedule that is attached to this Agreement as Exhibit _____) *or other*].

Qualification of Tenants

2.03. Manager shall not decline to lease any unit [*or* space] on the Premises to a prospective tenant on the basis of the tenant's race, color, creed, national origin, sex, or any other classification then protected by law. Prior to executing any lease with a tenant, Manager shall investigate the financial ability and history of the tenant to pay rent, perform necessary credit checks, and obtain references from employers and prior landlords, to the extent deemed necessary by Manager to protect Owner against financial loss and to protect the physical condition of the Premises. All expenditures incurred by Manager for duties described in this Paragraph shall be considered operating expenses of the Premises.

[*Choose one of the following paragraphs:*]

Manager as Exclusive Leasing Agent

2.04. Manager shall be and shall act as Owner's exclusive agent in leasing the Premises.

[*OR*]

Manager as Nonexclusive Leasing Agent

2.04. Manager shall be and shall act as Owner's agent in leasing the Premises. This agency shall not be exclusive, and Owner shall have the right to directly engage the services of other brokers or agents for the purpose of leasing the

Premises. Manager shall cooperate with outside brokers and agents in the securing of tenants for vacant units [*or* space] on the Premises.

[*Continue with the following:*]

Advertising

2.05. Manager agrees to promote leasing by full use of available advertising media, such as newspapers, the display of signs on the Premises, and [*describe other appropriate means of advertising for particular type of property, e.g.,* for industrial or business property, the use of floor plans, solicitation aids, and economic surveys as are appropriate to market available space]. Manager shall charge all expenses of advertising [*describe method of treating and allocating advertising expenses, e.g., when the manager's compensation includes commissions for leasing space:* to its own account as a managerial expense and not as an operating expense to be reimbursed by Owner *or, when the manager's compensation is based solely on a percentage of gross revenue,* to Owner's account as an operating expense *or other appropriate provision*].

Authority and Duty to Enforce Leases

2.06. Manager is authorized to serve notices to vacate on tenants and to institute any action or proceeding it deems necessary to: recover possession of leased premises; or to recover rent, charges, or other sums payable to Owner. Manager may compromise and settle or otherwise discontinue any such action or proceeding [*if desired, add:*, provided Manager first obtains Owner's approval]. In exercising the authority granted by this Paragraph, Manager may incur collection fees, costs, and legal fees, _____[*describe any restrictions on the incurring of expenses, e.g.,* in accordance with the schedule of collection fees, costs, and legal fees attached to this Agreement as Exhibit _____ or as otherwise agreed in writing by Manager and Owner]. Any such fees or costs shall be considered operating expenses of the Premises.

Security Deposits

2.07.(a) Manager shall collect a security deposit from each tenant in an amount equal to the maximum then authorized by law. If no maximum is established by law, the deposit shall be equal to [*amount, e.g.,* one month's rent].

(b) Manager shall collect and disburse each security deposit in accordance with the requirements of the governing lease and then-applicable law. Manager shall deposit each security deposit in a trust account, separate from all other accounts and funds, in a bank or other financial institution whose deposits are insured by an agency of the United States government. The account shall _____ [*set forth additional requirements for account, e.g.,* be designated as the Tenant Security Deposit Account].

Collection of Rents and Other Receipts

2.08. Manager shall collect all rents, charges, and other amounts receivable on Owner's account in connection with the management and operation of the Premises. Manager shall establish and maintain, in a bank whose deposits are insured by the Federal Deposit Insurance Corporation, a trust account for the deposit of all amounts collected from the Premises except security deposits. Security deposits shall be separately deposited and maintained as required under Paragraph 2.07(b) of this Agreement.

Tenant Problems

2.09. Manager shall receive, consider, and respond to all tenant complaints or problems in a professional and businesslike manner consistent with Manager's authority and duties as described in this Agreement.

ARTICLE 3. OPERATION AND MAINTENANCE

Employees and Other Personnel

3.01. On behalf of Owner, Manager shall hire, discharge, supervise, and pay all employees, contractors, and other personnel necessary for the management and operation of the Premises [*add if appropriate:*, including a resident manager *or* including an on-site manager *or* including an on-site building superintendent]. Manager shall not discriminate against any employee or prospective employee because of race, creed, color, national origin, or sex or any other classification then protected by law.

Maintenance

3.02.(a) Manager shall cause the Premises to be maintained in a good, clean, and sanitary condition acceptable to Owner at all times, and to be repaired as necessary to maintain this condition. To this end, Manager shall:

(1) Supervise the performance of the following, subject to any limitations imposed by Owner: all interior and exterior cleaning, painting, decorating, and carpentry; the maintenance and repair of plumbing, heating, and ventilation systems, and elevators; the maintenance of outdoor grounds and facilities; and any other normal maintenance and repair work that becomes necessary.

(2) Systematically and promptly receive and investigate all service requests from tenants, take any necessary action, and keep records of the action taken. Emergency requests shall be received and serviced on a 24-hour basis. Complaints of a serious nature shall be reported to Owner after investigation by Manager.

(3) Purchase materials, supplies, equipment, tools, appliances, and services that are necessary for the operation and maintenance of the Premises.

(4) Supervise the continuing performance of preventative maintenance for the Premises as deemed necessary by Manager.

(5) Contract with independent contractors, as deemed necessary by Manager, for the maintenance and repair of air conditioning and heating systems, elevators, and other items requiring special maintenance and repair skills not usually possessed by regular maintenance employees.

(b) Notwithstanding any of the provisions of Subparagraph (a) of this Paragraph, a maintenance or repair outlay costing in excess of $ _____ shall require the prior approval of Owner. This limitation shall not apply to recurring expenses within the limits of the operating budget, to emergency repairs involving imminent danger to persons or property, or to expenditures required to avoid suspension of any necessary service to the Premises. In any of these events, however, Manager shall notify Owner of all relevant facts as soon as possible after the occurrence of the event giving rise to the expenditure.

Services and Utilities

3.03. Manager shall contract on Owner's behalf for all services and utilities necessary for the efficient operation and maintenance of the Premises, including _____[*describe services and utilities required for particular property, e.g.*, water, electricity, gas, telephone, pest extermination, rubbish hauling, laundry facilities, pool cleaning, and window cleaning]. Manager shall not enter into any contract on behalf of Owner that _____[*set forth any limits on manager's authority, e.g.*, has a term in excess of one year or requires an annual expenditure in excess of $ _____] without first obtaining the prior written consent of Owner.

Compliance With Governmental Regulations

3.04. Manager shall comply with all building codes, zoning and licensing requirements, and other requirements of federal, state, and local authorities having jurisdiction over the Premises; provided, however, that _____[*describe any specific requirements or exceptions relating to this duty, e.g.,* Manager shall first promptly notify Owner of all written orders and notices received by Manager from any government authority requiring a capital expenditure in excess of $ _____, and shall obtain Owner's written approval prior to making the expenditure *or* compliance is not required when Manager is instructed by Owner not to comply on the grounds that the requirement is invalid or on any other grounds *or other requirement or exception*].

[*Optional*]

Manager may, with the prior written consent of Owner, appeal from any requirement imposed by government authority when Manager considers that requirement unwarranted or unreasonable and may, with or without an appeal, compromise or settle any dispute regarding any requirement imposed by the government authority.

[*Continue with the following:*]

Insurance Coverage

[*Choose either of the following:*]

[*First Alternative (owner must accept all bids for insurance coverage)*]

3.05. On or before _____[*date*], and annually thereafter during the term of this Agreement, Manager shall obtain recommendations and premium costs from at least three different insurance companies on all forms of insurance needed to protect Owner and the Premises. This coverage shall include [*specific types of insurance, e.g.,* workers' compensation insurance, public liability insurance, boiler insurance, fire and extended coverage insurance, burglary and theft insurance,] and any other insurance required by law. Owner shall designate the insurance company or companies whose bids are accepted by Owner, and Manager shall secure insurance in the amounts and with the beneficial interests that are acceptable to Owner. The following requirements shall apply to insurance covering the Premises, to the extent applicable:

(a) Manager shall be named as a co-insured in any policy of _____ [*policy type, e.g.*, public liability insurance].

(b) Proof of all insurance shall be delivered to Owner in a form acceptable to Owner.

(c) Manager shall promptly investigate and make a full written report of all damage or destruction to the Premises and all accidents or claims for damages relating to the ownership, operation, or maintenance of the Premises. The report shall include the estimated cost of repair, if applicable. Manager shall also cooperate with and make any reports or satisfy any other requirements of the insurance policy or policies covering a loss or claim.

[*Optional: for use if manager is insurance broker*]

(d) Manager may [*or* may not] receive from others and retain the customary compensation for services as an insurance agent or broker in placing insurance provided for under this Agreement.]

[*OR*]

[*Second Alternative (manager has discretion in selecting insurance coverage)*]

3.05. Manager is authorized to and shall purchase any insurance deemed necessary by Manager to protect the Premises and Owner's interest in the Premises, including [*specify types of insurance, e.g.*, fire insurance with extended coverage, elevator, public liability, and workers' compensation insurance]. Owner must be named as insured on all insurance policies, and the policies or certificates of insurance must be delivered to Owner. Manager shall be named as an additional insured [*or* as a co-insured] on any policy of [*policy type, e.g.*, public liability insurance]. [*If manager is insurance agent or broker, add:* Manager may (*or* may not) receive from others and retain the customary compensation for services as an insurance agent or broker in placing insurance under this Paragraph].

[*Continue with the following:*]

[*Optional: Manager to maintain on-site office*]

Manager's On-Site Office

3.06. Manager shall maintain an office on the Premises for the purpose of managing and operating the Premises. The office shall be on the [*specify, e.g.*, ground] floor of the Premises, in the location cross-hatched in red on the floor plan that is attached to this Agreement as Exhibit _____ and hereby incorporated by reference. All staff and personnel for the on-site office [, including (*or* excluding) a building superintendent or manager,] shall be employees of Manager and shall be paid by Manager from Manager's own funds. Manager shall also pay from its own funds the following: [*describe specific items, e.g.*, all costs for supplies, equipment, and telephone service] related to operating the office. Rent for the office [*describe agreement for office rent, e.g.*, shall be $ _____ per month and shall be deducted monthly from the amount of monthly compensation payable by Owner to Manager under Paragraph 6.01 of this Agreement *or* shall be $ _____ per month and shall be paid on or before the _____ (*number, e.g.*, fifth) day of each month directly by Manager to Owner *or* shall not be charged by Owner to Manager for Manager's occupancy of the on-site office]. All utilities for the office, excluding phone service, shall be paid by Manager from Owner's funds and shall be included as an operating expense of operating and maintaining the Premises.

Legal and Accounting Services

3.07. Manager shall refer any matter requiring legal or accounting expertise to the appropriate professional designated by Owner. Fees and costs for services rendered by these professionals shall be an operating expense of the Premises.

ARTICLE 4. COLLECTION AND DISBURSEMENT OF REVENUES

Collection of Rent

4.01. Manager shall use its best efforts to collect all rents and revenues from the Premises.

Deposit of Revenues

4.02. Manager shall establish and maintain, in a bank designated by Owner [*or* in a bank whose deposits are insured by the Federal Deposit Insurance Corporation], a trust account for the deposit of all rent and other revenue collected from the Premises. This trust account shall be designated the Operating Account for the Premises. Collected funds shall be deposited into the Trust Account not later than the first banking day following their receipt.

Disbursement of Revenues

4.03.(a) From the funds collected and deposited in the trust account described in Paragraph 4.02 of this Agreement, Manager shall cause to be disbursed regularly and punctually all recurring operating expenses of the Premises as authorized by this Agreement, including [*or* excluding] the payment of Manager's compensation. [*Add if applicable:* The single aggregate payment required to be made monthly by Owner on its Mortgage(s) for the Premises, which payment includes amortized principal, interest, and _____ (*other items included in mortgage payment, e.g.,* mortgage insurance, fire insurance, and impounds for taxes and assessments,) shall be paid directly to the Mortgagee by _____ (Manager *or* Owner).] Owner shall [also] retain responsibility for direct payment of [*any items required to be paid by Owner, e.g.,* all property taxes and assessments for the Premises].

(b) Except for the disbursements described in Subparagraph (a) of this Agreement, funds shall be disbursed or transferred from the Operating Account only as directed by Owner.

(c) If the balance in the Operating Account is at any time insufficient to pay disbursements due and payable, Manager shall immediately inform Owner of that fact and Owner shall then remit to Manager sufficient funds to cover the deficiency. In no event shall Manager be required to use its own funds to pay these disbursements.

(d) Manager shall organize and maintain a system of controls designed to insure the authenticity of bills, invoices, and statements charged and paid. In carrying out this responsibility, Manager shall _____ [*set forth specific control requirements, e.g.,* authorize all purchasing and the hiring of services for the Premises only by supervisory personnel at Manager's office, with the exception that employees on-site at the Premises may make purchases or hire services to be paid from a petty cash fund in an amount not to exceed $ _____]. Manager shall order goods and services from any of the suppliers _____ [listed in Exhibit _____ *or* included in a list of suppliers to be submitted by Owner to Manager]. [If Owner fails to provide Manager with a list of suppliers, Manager shall have the authority to select any appropriate supplier.]

Bonding

4.04. Manager shall furnish, at Manager's expense, a fidelity bond in the principal sum of $ _____, to

protect Owner against misapplication of funds by Manager and Manager's employees. All terms and conditions of the bond, and surety on the bond, are subject to the approval of Owner.

ARTICLE 5. ACCOUNTING RECORDS AND REPORTS

Books and Records

5.01. Manager agrees to keep accurate, complete, and separate books and records of account in accordance with accepted accounting standards and procedures on the basis of a calendar year [*or* a fiscal year that begins on _____ (*date, e.g.*, July 1) and ends on _____ (*date, e.g.*, June 30)]. These books and records shall show all income and expenditures, accounts payable, accounts receivable, available cash, and other assets and liabilities pertaining to the Premises. Owner may, at any time during Manager's normal business hours and either in person or through a representative, inspect all records and supporting and related documentation kept by Manager relating to the management and operation of the Premises, including checks, bills, vouchers, statements, cash receipts, and correspondence. Owner may, at Owner's expense, have an audit made of all account books and records connected with the management of the Premises.

Income and Expense Reports

5.02. Each month Manager shall prepare and submit to Owner an income and expense report that shows a summary of all rents and other income collected and all operating expenses for the Premises. The monthly income and expense report shall separately set forth data for both the current month and the year to date (including the current month). Manager shall retain [*or* deliver to owner] all bills paid by Manager for the preceding month. Simultaneously with delivery of the monthly income and expense report, Manager shall also deliver to owner a rent roll and check register.

Remittance to Owner

5.03. On or before the [*number, e.g.*, 10th] day of each month, Manager shall remit to Owner the net profit, if any, shown on the preceding month's income and expense report [*if less than total of monthly net profit is to be remitted to Owner, describe authorized deductions, e.g.*, less Manager's monthly compensation under this Agreement *or* less $ _____, which shall be retained by Manager as a reserve to pay expenses that are anticipated but not yet due *or* less _____ percent of the monthly net profit, which shall be retained by Manager as a reserve to pay expenses that are anticipated but not yet due].

Delinquency and Vacancy Reports

5.04. On or before the [*number, e.g.*, fifth] day of each Month, Manager shall prepare and submit to Owner a tenant delinquency report for the Premises. A vacancy report shall be prepared by Manager and submitted to Owner on a [weekly *or other*] basis.

Annual Financial Report

5.05. For each fiscal [*or* calendar] year ending during the term of this Agreement, Manager shall cause an annual financial report to be prepared by a certified public accountant designated by Manager [*or* Owner], based on the preparer's examination of the books and records of Manager and Owner. The report shall be certified by the preparer and Manager, and must be submitted to Owner within [*time period, e.g.,* 90 days] after the end of the fiscal year.

Compensation for the preparer's services shall be paid by Manager out of the Operating Account as an expense of the Premises.

Filing of Tax and Other Returns and Reports

5.06.(a) Manager shall prepare and file all returns and other documents required under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act, or any similar federal or state legislation, and all withholding tax returns required for employees of the Premises. Manager will pay from Owner's funds all amounts required to be paid under the Federal Unemployment Tax Act, or any similar federal or state legislation, and all withholding taxes. Manager shall also prepare and file the following on behalf of Owner:

(1) All payroll forms and reports concerning employees for the Premises;

(2) Workers' compensation forms;

(3) Business tax forms;

(4) Personal property declarations;

(5) Health and welfare forms connected with labor union employees;

(6) _____ [*Specify any other required forms relating to operation of the premises*].

(b) Owner shall be responsible for preparing its own income tax return. Notwithstanding the foregoing, Manager agrees that the records and reports on the Premises furnished to Owner by Manager under this Agreement shall set forth all required data as to operating expenses and income and shall be otherwise sufficient for the preparation of Owner's income tax return.

Annual Operating Budget

5.07. Manager shall prepare and submit to Owner for Owner's approval, an Operating Budget (the "Budget") for the calendar [*or* fiscal] year beginning _____[*date*] and for each calendar [*or* fiscal] year thereafter during the term of this Agreement. Manager shall submit the Budget to Owner at least [*time period, e.g.,* 90 days] prior to the beginning of the calendar [*or* fiscal] year covered by the Budget. Owner shall promptly inform Manager of any changes to be incorporated in the Budget, and Manager shall keep Owner informed of any anticipated deviation from the receipts or disbursements set forth in the approved Budget. Except as permitted under Paragraph 3.02(b) or Paragraph 3.03 of this Agreement, annual disbursements for each type of operating expense itemized in the Budget may not exceed the amount authorized by the approved Budget.

ARTICLE 6. MANAGER'S COMPENSATION

Basic Compensation

6.01. In consideration of the services to be rendered to Owner by Manager under this Agreement, Owner shall pay Manager [*set forth agreement regarding basic compensation, e.g.,* $ _____ per month *or* _____ percent of the gross revenues from the Premises actually collected, to be computed and payable monthly *or* _____ percent of collected gross revenues above the amount of $ _____, to be computed and payable monthly *or* the greater of $ _____ or

_____ percent of collected gross revenues from the Premises, to be computed and payable monthly].

Commissions From Leasing

6.02. For any new lease for the Premises procured by Manager [*if manager is authorized to enter into month-to-month lease agreements, add:*, except a month-to-month lease agreement], Owner shall pay Manager a commission equal to _____ percent of the annual rent under the new lease. [*If manager is authorized to enter into month-to-month lease agreements, add:* For any new month-to-month lease agreement procured by Manager, Owner shall pay Manager a commission equal to _____ (*amount, e.g.*, 50 percent of the first month's rent under the lease agreement)]. [Manager shall not be entitled to a commission on the renewal of a lease *or* For each renewal of a lease procured by Manager, Owner shall pay Manager a commission equal to _____ *(percentage, which is usually one-half (or less) of the percentage paid for new leases)* percent of the annual rent under the renewed lease]. Manager shall be entitled to share in any real estate commission paid by Owner to another broker for leasing of the Premises on any terms agreed to by that broker and Manager.

Compensation for Special Services

6.03. The compensation payable by Owner to Manager under this Agreement covers only those management services specifically described in it and does not cover any special real estate services Owner may from time to time request Manager to perform, including the sale of the Premises, appraisals, and financing. If Owner requests Manager to perform any of these special services, the agreement between Owner and Manager for the special services shall be set forth in a separate written instrument executed by the parties.

Other Forms of Compensation Prohibited

6.04. Except as otherwise provided in Paragraph 6.03 of this Agreement, Manager's compensation (as described in Paragraphs 6.01 and 6.02 of this Agreement) is to be paid in consideration of all services to be rendered pursuant to the terms of this Agreement by Manager and all of Manager's employees, except on-premises employees and workers. Manager's managerial expenses shall not be reimbursed by Owner and shall not be an operating expense of the Premises. Manager's office overhead expenses, whether or not allocable to services rendered in the management of Premises, are to be treated as services and expenses incurred in consideration of the managerial compensation provided for in Paragraph 6.01 of this Agreement. All rebates, discounts, or commissions collected by Manager, or credited to Manager's use, that relate to the purchasing of supplies or the rendering of services for the Premises, must be fully disclosed to Owner. Any part of any rebate, discount, or commission that is allocable to the purchasing of supplies, or to the rendering of services for the Premises, shall be credited to Owner's account. For the purposes of this Paragraph, all rebates, discounts, or commissions relating solely to managerial overhead expenses need not be disclosed to Owner and need not be allocated in part to Owner's account.

ARTICLE 7. TERMINATION

Term

7.01. This Agreement shall be effective as of the date first set forth in this Agreement [*or specify other date*] and shall continue until _____[*date*] ("original expiration date"), unless the Agreement is: terminated prior to the original expiration date pursuant to the terms of this Agreement; or (2) renewed pursuant to Paragraph 7.02 of this Agreement.

Renewals

[*Choose either of the following paragraphs:*]

[*First Alternative (automatic renewal):*]

7.02. This Agreement shall be automatically renewed, on the same terms and conditions set forth in this Agreement, for a period of [*time period, e.g.,* one year] beyond the original expiration date, unless at least [*time period, e.g.,* 30 days] prior to the original expiration date, either party gives the other written notice that it elects to terminate the Agreement as of the original expiration date. If this Agreement is renewed beyond the original expiration date, the provisions for renewal, notice, and termination contained in this Paragraph shall [*or* shall not] apply to each subsequent renewal period. A notice given by one party to the other at least [*time period, e.g.,* 30 days] before the original expiration date (or subsequent expiration date) offering to renew this Agreement subject to the amendment of certain terms and conditions shall be treated as a notice of termination unless the other party accepts in writing the amended terms and conditions at least [*time period, e.g.,* 15 days] before the original expiration date (or subsequent expiration date).

[*OR*]

[*Second Alternative (new agreement required for renewal):*]

7.02. This Agreement terminates on the original expiration date set forth in Paragraph 7.01 of this Agreement unless the parties enter into and execute a renewal agreement prior to the original expiration date.

[*Continue with the following:*]

Termination by Notice

7.03. Either party to this Agreement [*add if desired:*, after it has been in effect for at least _____ (*specify minimum period, e.g.,* 60 days),] may elect to cancel and terminate this Agreement with or without cause as of _____[*describe effective date of termination and method required to terminate, e.g.,* the close of business on the last day of any calendar month by giving written notice to the other party at least _____ (*time period, e.g.,* 60 days) prior to the termination date].

Termination on Sale

7.04. Owner shall notify Manager at least [*specify number*] days before an anticipated transfer of title to the Premises. On transfer of title to the Premises, this Agreement shall automatically terminate.

Right to Terminate on Bankruptcy

7.05. If either Owner or Manager is adjudicated a bankrupt, voluntarily files for bankruptcy, or makes any assignment for the benefit of creditors, either party may terminate this Agreement by giving the other written notice of termination. The Agreement shall terminate on the date specified in the notice of termination. [*If termination fee is otherwise*

payable, add: In the event of termination under this Paragraph, Manager shall not be entitled to the termination fee provided for in Paragraph _____ (*number, e.g.,* 7.07) of this Agreement].

Effect of Termination

7.06. On termination of this Agreement, Owner and Manager agree as follows:

(a) All of the records in Manager's possession pertaining to the operation of the Premises, together with all supplies, equipment, or other items of property owned by Owner and in Manager's possession, shall be immediately delivered to Owner.

(b) Manager's right to compensation [*if termination fee is payable, add:*, other than any termination fee payable under this Agreement,] shall immediately cease, except that Manager is entitled to compensation for services rendered before the termination date.

(c) The agency relationship created under this Agreement shall immediately cease, and Manager shall have no further right or authority to act for or on behalf of Owner.

[*If manager occupies office on the premises, add:*]

(d) Manager shall immediately: vacate the office occupied by it on the Premises, remove only personal property owned by Manager, and leave the office in good condition and repair.

[*Optional*]

Termination Fee

7.07. Except as otherwise provided in this Paragraph, if this Agreement is terminated by Owner during [*describe period to which termination fee applies, e.g.,* the first 12 months of the term of this Agreement], Owner shall pay Manager a termination fee equal to $ _____, less $ _____ for each month that this Agreement was in effect prior to the termination. No termination fee shall be paid or payable in the event of a termination by either Owner or Manager under Paragraph 7.05 of this Agreement. In the event this Agreement terminates because title to the Premises is transferred by Owner, the amount paid or payable to Manager as a termination fee shall be offset by any real estate broker's commission paid or payable to Manager from the sale of the Premises. Also, no termination fee shall be paid or payable to Manager in the event the new owner of the Premises hires Manager to operate and manage the Premises.

ARTICLE 8. MISCELLANEOUS

Attorneys' Fees

8.01. If any litigation is commenced between the parties to this Agreement concerning the Premises, this Agreement, or the rights and duties of either party with respect to this Agreement, the party prevailing in the litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to a reasonable sum as and for its attorneys' fees in the litigation that shall be determined by the court in the litigation or in a separate action brought for that purpose.

Prohibition Against Assignment

8.02. Manager shall not assign this Agreement without Owner's prior written consent.

Notices

8.03. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party to this Agreement by the other party shall be in writing. All such notices or other communications shall be deemed duly served and given when personally delivered to the party to whom they are directed, or in lieu of personal service when deposited in the United States mail, first-class postage prepaid, addressed to Owner at _____[*street address, city, state, and zip code*] or to Manager at _____[*street address, city, state, and zip code*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Binding on Heirs and Successors

8.04. The provisions of this Agreement shall be binding on and shall inure to the benefit of both of the parties and to their respective heirs, executors, administrators, successors, and assigns, but nothing in this Paragraph shall be construed as a consent by Owner to any assignment of this Agreement or any interest in it by Manager except as provided in Paragraph 8.02 of this Agreement.

Partial Invalidity

8.05. In the event any provision of this Agreement is held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of the Agreement shall remain in full force and effect.

Sole Agreement

8.06. This Agreement constitutes the sole agreement between the parties regarding the matters contained in it.

Owner's Consent

8.07. Any consent of Owner required under this Agreement shall not be effective unless it is in writing and signed by Owner or one of Owner's duly authorized officers or agents.

Modifications

8.08. This Agreement may not be changed or modified except by a writing executed by both of the parties.

Governing Law

8.09. The provisions of this Agreement shall be construed in accordance with and governed by the laws of the State of California.

Executed on _____[*date*], at _____[*city*], California.

OWNER
[*name of owner*]
By _____ [*signature*]
[*typed name and title*]

MANAGER
[*name of manager*]
By _____ [*signature*]
[*typed name and title*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
A. General Purpose Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.201

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.201 Property Management Agreement [CAR Form]

[1] Comment

[a] Use of Form

This form is the California Association of Realtors (CAR) standard form of Property Management Agreement [CAR Form PMA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. It may be used when the manager is a licensed real estate broker [*see § 38.19*]. Although this form may be used for many different types of property management situations, the particular desires and needs of most property owners require at least some modification or alteration of this basic model. For a more detailed, custom-drafted property management agreement, see *§ 38.200*.

[b] Summary of Form Provisions

Under this form, the owner grants the broker/manager (hereafter referred to as the "manager") the exclusive right to rent, lease, operate, and manage the property or properties described in the agreement [*see* [2], P 1; *see also* [c], *below*]. The agreement may be terminated by either party on 30 days' written notice to the other. However, the right to terminate may not be exercised until a minimum period agreed on by the parties has elapsed [*see* [2], P 1]. If neither party exercises that right, the agreement will terminate on a specified date [*see* [2], P 1].

Paragraph 3 of this form sets forth the duties and responsibilities of the manager for the operation and maintenance of the property. They include the following: advertising the availability of rental units; executing, renewing, modifying, and cancelling leases; collecting rents, security deposits, and other charges; terminating tenancies; making repairs and providing maintenance services; entering into contracts involving the operation and maintenance of the property; and paying various expenses and costs for the property [*see* [2], P 3].

This form requires the parties to specify the compensation the manager is to receive for the performance of various

services [*see* [2], P 6; *see also § 38.15*]. It also permits the manager to be compensated by tenants who retain the services of the manager to obtain the owner's consent to an assignment of their leases [*see* [2], P 6(D)(1)].

[c] Status of Manager as Independent Contractor or Employee

An important issue in any property management transaction is whether the manager will be an employee or an independent contractor [*see § 38.18*]. A previous version of this form provided that the owner "hereby employs" the manager. This form no longer contains any language relating to an employment relationship between the owner and the manager. Instead, it states that the owner "hereby appoints" and grants the manager certain rights [*see* [2], P 1]. It also provides that the manager agrees to act as the dual agent for the owner and tenant(s) in any resulting lease transaction involving the property covered by the agreement [*see* [2], P 7]. Although this language suggests that the manager is an independent contractor instead of an employee, there is no express provision establishing an independent contractor status. However, as discussed *below*, factors other than the terminology used in the agreement must be taken into account in determining the manager's status.

Whether a person is an independent contractor or an employee is generally a question of fact [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 672, 39 Cal. Rptr. 849]* . Although the language of an agreement is a factor in determining whether the manager is an employee or an independent contractor, it is not determinative [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 952, 88 Cal. Rptr. 175, 471 P.2d 975]* . Instead, a variety of factors must be considered in making this determination [*see* Restatement of Agency 2d, § 220 and Comment h; *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949-950, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686]* . The single most important factor is the right to control the manner and means by which the work is accomplished. If the employer has the right to exercise complete control, an employer-employee relationship exists [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

If a manager is an employee, the employer must comply with applicable minimum wage and maximum hour laws, as well as other laws relating to employees. For discussion of those laws, see *§ 38.220[1][d], [e]*.

For extensive coverage of the laws governing independent contractors and employees, see Ch. 84, *Independent Contractors* , and Ch. 85, *Employment Agreements* . For alternative provisions characterizing a property manager as an employee or independent contractor, see *§ 38.200[2]*.

[2] FORM

Property Management Agreement [CAR Form]

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
A. General Purpose Property Management Agreements

18-38 California Legal Forms--Transaction Guide §§ 38.202-38.219

AUTHOR: by Jeannie C. Newell, J.D.

[Reserved]

§§ 38.202[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.220

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.220 Resident Manager Employment Agreement--Custom-Drafted Form

[1] Comment

[a] Use of Form

This form is a management agreement for a resident manager who is an employee rather than an independent contractor [*see* [d], *below*]. It is drafted for use by a property owner to directly employ the resident manager, but may be easily modified for use by a property management firm to employ a resident manager for residential property managed by the firm. For a shorter, standardized resident management agreement, see *§ 38.221*. For a full-service property management agreement, see *§ 38.200*.

For discussion of the factors that must be considered in determining whether a manager is an independent contractor or an employee, see *§ 38.200[1][b]*.

[b] Resident Manager or Live-in Caretaker Required for Certain Properties

As a matter of practice, a resident manager is often hired for apartment complexes to monitor on-site tenant problems and to perform recurring management tasks. An on-site manager or other responsible person is required for certain residential properties. Specifically, if an owner of an apartment house containing 16 or more apartments does not reside in the apartment house, some responsible caretaker, such as a manger, janitor, housekeeper, or other responsible person, must reside on and have charge of the premises. The same requirement applies to every hotel in which there are 12 or more guest rooms. Only one caretaker is required for structures under one ownership and on one contiguous parcel of land. For an apartment house with more than four but fewer than 16 apartments and in which the owner does not reside, a notice stating the owner's name and address, or the name and address of an agent in charge of the apartment house, must be posted in a conspicuous place on the premises [*25 Cal. Code Reg. § 42*].

[c] Duties of Resident Manager

The employer of a resident manager should clearly set forth in the agreement all duties the manager is expected to perform. Paragraph 4 of this form lists several duties commonly performed by a resident manager. These include showing vacant apartments, collecting rents from tenants, and performing light maintenance tasks.

[d] Overview of Wage and Hour Laws

If a resident manager is an employee of either the property owner or a management firm, in contrast to an independent contractor [*see § 38.18*], the employer must comply with all applicable minimum wage and maximum hour laws, as well as other laws relating to employees [*see* Ch. 85, *Employment Agreements*]. In California, the wages, hours, and working conditions of a resident manager employed in an apartment building are regulated by the Industrial Welfare Commission [*see 8 Cal. Code Reg. § 11050*]. The Commission's Order regulating wages, hours, and working conditions in the public housekeeping industry [*see* Industrial Welfare Order No. 5-89 (effective 7/1/89)] extends to all nonexempt employees [*see 8 Cal. Code Reg. § 11050(1)*; *see also § 38.23[1]*] employed in the public housekeeping industry, which includes apartment houses, hotels, motels, rooming houses, office or loft buildings, camps, clubs, trailer parks, and similar establishments offering the rental of living, business, or commercial quarters [*see 8 Cal. Code Reg. § 11050(2)(P)(3)*]. Some of the specific wage and hour requirements are discussed in [e], *below*.

If the employer is subject to the Fair Labor Standards Act of 1938 [*29 U.S.C. § 201 et seq.*; *see § 38.23[2]*], wages and hours of the manager are also regulated under the Act and its implementing regulations [*see, e.g.*, 29 C.F.R. pts. 531 (wage payments under Act), 776 (interpretive bulletin on general wage and hours provisions of Act)].

[e] Manager's Compensation

This agreement provides that the manager is entitled to a monthly salary, payable semimonthly [*see Lab. Code § 204* (requirements governing semimonthly payments)], plus the use of a designated apartment for services rendered under the agreement [*see* [2], P 2, *below*]. The wages paid to the manager must at least equal the hourly minimum wage for all hours worked [*8 Cal. Code Reg. § 11050(4)(A)*]. When an employee is required to reside on the premises, "hours worked" means the time spent carrying out assigned duties [*see 8 Cal. Code Reg. § 11050(2)(K)*].

Hourly overtime rates must be paid if the employee works hours in excess of eight per day or 40 per week, or if the employee works more than six days in any one workweek [*see 8 Cal. Code Reg. § 11050(3)(A)*]. An employee may, however, be employed on seven workdays in one workweek with no overtime pay required when the total hours of employment during the workweek do not exceed 30 and the total hours of employment in any one workday of the workweek do not exceed six [*8 Cal. Code Reg. § 11050(3)(G)*]. The exact amount of overtime pay required for excess hours worked by an employee ranges from one-and-one-half to two times the regular rate of pay for an employee [*see 8 Cal. Code Reg. § 11050(3)(A)*].

This form [*see* [2], P 5, *below*] requires the employer to specify the maximum hours in a day and in a week and the maximum days in a week the manager is authorized to work. The manager must obtain the employer's permission to work hours in excess of those specified unless the extra hours are required because of an emergency situation. As a practical matter, the hours required for a resident manager to perform his or her duties usually vary from day to day. For this reason, this agreement allows the manager to establish his or her own work schedule and to work hours that may vary from day to day, as long as the maximum number of hours and days specified in the agreement are not exceeded. The manager must furnish the employer, on a semimonthly basis, a record of all hours worked. An employer in the public housekeeping industry is required to keep and maintain various types of employee records, including records of all hours worked by each employee [*see 8 Cal. Code Reg. § 11050(7)*].

Under the terms of this agreement, the value of the apartment to be occupied by the resident manager is to be credited toward the manager's total monthly salary, and thus toward the employer's minimum wage obligation [*see* [2], P 2,

below]. Lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the resident manager [*8 Cal. Code Reg. § 11050(10)(C)*]. When credit for lodging is used to meet part of the minimum wage obligation of the employer, the lodging, if an apartment, may not be valued in excess of two-thirds of the ordinary rental value of the apartment, or a maximum dollar amount prescribed in the regulations, whichever is less. The maximum dollar amount permitted depends on whether only the manager is employed or whether a couple is employed [*8 Cal. Code Reg. § 11050(10)(C)*]. Also, if as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent for an apartment in excess of the described maximum amounts [*8 Cal. Code Reg. § 11050(10)(E)*].

Rather than credit the value of a resident manager's apartment against the employer's minimum wage obligation, the employer and manager may agree on a different compensation arrangement. For example, they might agree that the employer will pay the manager a salary that meets minimum wage requirements and that no deduction will be made for the manager's use of the apartment. Instead, the manager will separately pay the employer a specific amount each month (or other period) for the use of the apartment. If this arrangement is reached through the voluntary written agreement of the parties, the employer may charge the employee up to two-thirds of the fair market rental value of the apartment for its use [*Lab. Code § 1182.8*]. As discussed in the paragraph above, if the use of the apartment is credited against the employer's minimum wage obligation to the employee, the maximum value that can be credited is the *lesser* of two-thirds of the ordinary rental value of the apartment or the maximum dollar amount permitted under the regulations [*see 8 Cal. Code Reg. § 11050(10)*].

[f] Manager's Right to Occupy Apartment

This agreement states that the manager's right to occupy an apartment on the managed premises arises from the employee-employer relationship between the parties and does not create a landlord-tenant relationship [*see* [2], P 3, *below*]. The tenant's right to occupy the apartment ends when the employment relationship terminates [*see* [g], *below*]. The purpose of these provisions is to clarify that the manager is not a tenant and is not entitled to any legal rights of a tenant [*see* Ch. 34B, *Residential Leases*] before or after the agreement is terminated. For this reason, the property owner or manager should not enter into any lease with the resident manager that would create a tenancy unless a tenancy is intended.

A person who becomes the occupant of premises as an employee and who remains in possession after termination of the employer-employee relationship or after the time fixed in the employment agreement for occupancy has expired is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*]. A resident manager who occupies premises furnished by the employer as compensation to the manager under an employment agreement does not have a right to retain possession of the premises after the employment relationship is terminated. If the former manager continues to occupy the premises following the termination, he or she is a tenant at sufferance [*Karz v. Mecham (1981) 120 Cal. App. 3d Supp. 1, 4, 174 Cal. Rptr. 310]* . However, if the employee remains in possession and the employer demands rent in a stated monthly amount for the employee's continued occupancy, the tenancy at sufferance may be converted into a month-to-month tenancy [*see Karz v. Mecham (1981) 120 Cal. App. 3d Supp. 1, 4, 174 Cal. Rptr. 310]* .

[g] Termination of Agreement

The termination provision in this agreement allows either party to terminate the employment relationship at any time by giving written notice to the other [*see* [2], P 6, *below*]. The parties should specify the exact time period within which the resident manager must vacate his or her apartment once the agreement has been terminated [*see* [f], *above*].

[2] FORM

Resident Manager Employment Agreement--Custom -Drafted Form

RESIDENT MANAGER EMPLOYMENT AGREEMENT

This agreement is entered into on _____[*date*] by and between _____[*name of resident manager*] ("Employee") and [*name of employer, e.g., property owner or management firm*] ("Employer").

THE PARTIES AGREE AS FOLLOWS:

Creation of Employment Relationship

1. Employer hereby employs Employee and Employee hereby accepts employment as resident manager of the apartment complex known as _____[*name*], located at _____[*street address, city, and state*] (the "Premises"). Employee's employment shall commence on _____[*date*] and shall continue until terminated by either party pursuant to Paragraph 6 of this Agreement.

Compensation

2. For the performance of duties described in this Agreement, Employee shall receive total compensation of $_____ per month, payable semimonthly. This total monthly compensation shall consist of: (a) $_____ in cash; and (b) credit for the use of the employee's apartment on the Premises in an amount equal to $[*dollar amount that does not exceed two-thirds of ordinary rental value or maximum dollar limit set by regulation, whichever is less (see 8 Cal. Code Reg. § 11050(10)(C))*].

Employee's Occupancy of Apartment

3. As a condition of employment, Employee shall occupy an apartment on the Premises provided by Employer. The apartment shall be a _____[*describe apartment to be provided, e.g.*, two-bedroom unfurnished apartment located on the ground floor], designated apartment number _____. Employee's right to occupy this apartment is expressly conditioned on Employee's continued employment with Employer. If this agreement is terminated for any cause whatsoever, Employee shall have no right to occupy the apartment and shall promptly vacate as provided in Paragraph 6 of this Agreement. Nothing in this Agreement shall create a landlord/tenant relationship between Employer and Employee.

Duties of Employee

4. In consideration of the compensation to be paid to Employee under this Agreement, Employee shall perform the following duties:

(a) Show vacant apartments to prospective tenants.

(b) Have prospective tenants complete Employer's standard rental application and lease and promptly deliver these to Employer.

(c) Clean or supervise the cleaning and preparation of apartments for lease.

(d) Collect all rents when due and promptly deposit them in Employer's account [*or* deliver them to Employer].

(e) Maintain the general premises in a clean, orderly, and safe condition.

(f) Enforce any rules governing the premises and report any unusual tenant problems or behavior to Employer.

(g) Report to Employer all necessary repairs, present and projected vacancies, accidents, and changes of tenancy, immediately on discovery.

(h) Obtain Employer's written authorization before making any expenditure exceeding $ _____ or employing any person in connection with the performance of duties described in this Agreement.

(i) Furnish Employer, semimonthly, with a complete and accurate record of all hours worked by Employee.

(j) Perform any other managerial duties that from time to time may be requested by Employer.

(k) _____ [*Describe any other duties*].

Hours and Days of Work

5. Except as otherwise provided in this Paragraph, Employee is not authorized and agrees not to work in excess of [*number, e.g.,* 8] hours per day nor in excess of [*number, e.g.,* 40] hours per week, and not more than [*number, e.g.,* 6] days per week in performing the duties described in this Agreement. Employee shall have [*day(s) of week, e.g.,* Monday] off each week, and shall not be called on to perform any managerial duties on [that day *or* those days]. Employee shall not accumulate days off from week to week.

Due to the nature of apartment building management, the parties agree and understand that the hours worked by Employee may vary from day to day; notwithstanding this, Employee shall regulate any and all hours of work so that the total number of hours worked does not exceed the daily and weekly limitations described above. Employee shall post, on the door of Employee's apartment [*or specify other location*], a schedule of the hours for which Employee is regularly available for work.

Employee shall not work any hours in excess of the daily and weekly maximums described in this Paragraph without first obtaining the written permission of Employer, unless the excess hours are required in connection with an emergency situation that threatens life or property. In the event of an emergency, Employee shall notify Employer, in writing, of the number of hours worked in connection with the emergency. Employee shall provide this notification within [*time period, e.g.,* 48 hours] after completing the work. Excess hours worked by Employee as authorized in this Paragraph shall be compensated by Employer at the rate specified by California law.

Termination

6. This Agreement and the employment relationship created by it may be terminated with or without cause at any time by either party on written notice to the other. The notice shall be personally delivered or mailed by first-class mail, postage prepaid, to the address for the party indicated below. Notwithstanding the foregoing, either party may change the party's address for this purpose by giving written notice of the change to the other party in the manner provided in this Paragraph. Termination shall be effective as of the date the written notice of termination is delivered. In the event this agreement is terminated by either party, Employee shall be entitled only to compensation earned up to the date of termination, notwithstanding that Employee's compensation is paid under this Agreement on a monthly basis. Within [*time period, e.g.,* 24 hours] after the termination date of this Agreement, Employee shall: vacate the apartment _____[he *or* she] occupies on the Premises; leave the apartment in good condition and repair; and deliver to Employer all keys, books of account, or records of any kind pertaining to the Premises.

Executed at _____[*city*], California.

EMPLOYER
_____ [*signature of employer*]
[*typed name*]
[*address*]
[*city, state, zip*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]
[*address*]
[*city, state, zip*]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.221

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.221 Resident Apartment Manager-Employer Agreement [CAA Form]

[1] Comment

[a] Use of Form

This form is the California Apartment Association (CAA) standard Resident Apartment Manager-Employee Agreement [reprinted with permission, California Apartment Association]. A property owner may use this form to employ a resident manager on an hourly basis [*see § 38.200[1][b]* (status of manager as employee or independent contractor)].

Instruction sheets for completing this form are available from CAA [*see* CAA Instruction Sheets 1.0-I and 1.2-I]. The instructions are not reproduced here because they refer to specific wages and other amounts required by applicable state and federal wage and hour laws, and those requirements are subject to continuing change. Counsel should contact the CAA to obtain the latest revision of both the management agreement form and its accompanying instruction sheets.

PRACTICE TIP:

California Apartment Association Forms. The CAA publishes a "Rental Housing Forms Sample Packet." The booklet includes instruction sheets for completing the forms as well as the forms. A listing of all CAA local Chapters and Divisions, including address, phone numbers, and fax numbers, is also included. The address, telephone number, fax number, and e-mail address of CAA's main office is as follows:

California Apartment Association
980 Ninth Street, Suite 2150
Sacramento, CA 95814

Telephone: (800) 967-4222
Fax: (916) 447-7903

E-mail: www.ca-apartment.org

This form must be used in conjunction with two other CAA forms. For discussion of those forms, see [b], *below*.

For a custom-drafted resident manager agreement, see *§ 38.220[2]*. For coverage of the laws governing resident managers, see *§ 38.220[1]*.

[b] Related CAA Exhibits

[i] List of Duties

This form does not describe the manager's duties. Instead, it (1) provides that the duties assigned to the manager are indicated on "Exhibit A--Job Description" [*see § 38.222[2]* (Exhibit A)], and (2) incorporates the provisions of Exhibit A by reference [*see* [2], P 2]. For further discussion of that exhibit, see § 28.222[1].

[ii] Record of Hours Worked

Paragraph 1 of the form in [2], *below*, provides that the "employee" (that is, the manager) will be compensated on an hourly basis. Further, it requires the manager to obtain the consent of the "employer" (that is, the owner) before working more than a specified number of hours per week. "Exhibit B" of the Resident Apartment Manager-Employer Agreement is the "Report of Hours Worked" form [*see § 38.223*].

[c] Apartment Occupied by Resident Manager

If a resident manager is an employee, the employer must comply with all applicable minimum wage and maximum hour laws, as well as other laws relating to employees. The California laws governing a manager's wages provide, in part, that a portion of the value of an apartment provided to a resident manager may be credited against the resident manager's minimum wage compensation [*see 8 Cal. Code Reg. § 11050*; *see also § 38.220[1][d], [e]*]. However, if the employer is subject to the Fair Labor Standards Act of 1938 [*see § 38.23*], value for use of the apartment may not be deducted from the employee's salary. Rather, the employee must separately pay the agreed-on amount for his or her use of the apartment directly to the employer [*see 29 U.S.C. § 203(m)*; *see also* 29 C.F.R. pt. 531]. This form provides for both alternatives [*see* [2], P 3].

For additional coverage of wage and hour laws, see *§ 38.220[1][d], [e]*.

[2] FORM

Resident Apartment Manager-Employer Agreement [CAA Form]

[Please see Original Source or contact Editorial Support for assistance.]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.222

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.222 Exhibit A--Job Description [CAA Form]

[1] Comment--Use of Form

This form is the California Apartment Association (CAA) Exhibit A--Job Description [reprinted with permission, California Apartment Association]. It is an exhibit to the CAA standard form for a Resident Apartment Manager-Employer Agreement [*see § 38.221*]. For an additional exhibit intended for use with the CAA standard resident management agreement, see *§ 38.223* (Exhibit B--Report of Hours Worked).

This form contains an extensive list of property management duties. By checking the appropriate box following each listed duty, the parties to the underlying manager-employer agreement indicate whether the primary responsibility for the performance of the duty rests with the manager, the employer (that is, the owner), or an outside contractor. Any duties assigned in this manner to the manager are subject to the manager-employer agreement. That agreement incorporates this form by reference [*see § 38.221[2],* P 2].

[2] FORM

Exhibit A--Job Description [CAA Form]

[Please see Original Source or contact Editorial Support for assistance.]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.223

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.223 Exhibit B--Report of Hours Worked [CAA Form]

[1] Comment--Use of Form

This form is the California Apartment Association (CAA) Exhibit B--Report of Hours Worked [reprinted with permission, California Apartment Association]. It is an exhibit to the CAA standard form for a Resident Apartment Manager-Employer Agreement [*see § 38.221[2]*]. For an additional exhibit intended for use with the CAA standard resident management agreement, see *§ 38.222[2]* (Exhibit A--Job Description).

The manager uses this form to record hours worked pursuant to the underlying CAA manager-employer agreement. Under that agreement, the manager is paid by the hour. The manager must obtain the employer's consent before devoting more than a specified number of hours per week to the performance of the duties assigned to the manager in Exhibit A [*see § 38.221[2]*, P 1; *see also § 38.222[2]* (Exhibit A)]. By establishing these maximum hours, the owner may prevent the manager from qualifying for the hourly overtime rates required by California law [for coverage of those rates, see *§ 38.220[1][e]*]. Notwithstanding the foregoing, the CAA manager-employer agreement provides that the manager may exceed the specified maximum hours without obtaining the employer's prior consent in the case of an emergency, provided the manager notifies the employer of the additional hours worked within 48 hours [*see § 38.221[2]*, P 1].

This form reflects the above provisions of the underlying manager-employer agreement by requiring the manager to report all hours worked. As a practical matter, the manager-employer agreement does not require the manager to work a specified number of hours. Instead, it specifies the duties the manager must perform, and, as discussed above, requires the manager to obtain the owner's consent before working more than the specified maximum hours. Further, the manager must indicate whether or not excess hours were authorized or were the result of an emergency. Finally, the manager must also use this form to report any failure to perform the assigned duties.

[2] FORM

Exhibit B--Report of Hours Worked [CAA Form]

[Please see Original Source or contact Editorial Support for assistance.]



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.224

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.224 Motel Management Agreement

[1] Comment

[a] Use of Form

This form is an agreement between an owner of a motel and a property manager for the management of the motel. Motel management combines the duties and responsibilities of both commercial and residential property management since the manager must not only operate a business but also attract and handle guests. Large motel and hotel chains often have their own management divisions. For an alternative hotel management agreement, see Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 22, *Real Estate Development and Subdivision* , Part E, "Real Estate Management" (Matthew Bender).

In addition to the usual management duties of handling guests, collecting room revenues and other charges, and arranging for building maintenance, a motel manager is normally required to arrange for continuous advertising, to hire and manage a large staff, to operate restaurants and other facilities or deal with business tenants who will operate these facilities, and to maintain a system of services responsive to the needs of the guests. Paragraph 3 of this form describes in detail typical duties of a motel manager and includes language limiting the authority of the manager in carrying out certain duties. The manager is paid a base salary plus a percentage of net profits generated by the motel [*see* [2], P 7, *below*]. The circumstances under which the agreement may be terminated prior to its natural expiration date are described in Paragraph 11 of the form.

[b] Requirement of Live-In Caretaker or Manager

A manager, janitor, housekeeper, or other responsible person must reside on the premises and must have charge of every hotel in which there are 12 or more guest rooms if the owner of the hotel does not reside on the premises [*25 Cal. Code Reg. § 42*]. It is not clear whether or not this regulation is also applicable to motels [*see 25 Cal. Code Reg. § 1* (applicability of housing law regulations)]. For forms of agreement that may be used by a management firm or property

owner to employ a resident manager, see *§§ 38.220[2]* and *38.221[2]*.

[c] Status of Manager

Paragraph 1 of this form provides that the manager will be the owner's employee. For discussion of the factors that must be considered in determining whether a manager is an independent contractor or an employee, see *§ 38.200[1][b]*.

An employer must comply with all applicable minimum wage and hour laws, as well as other laws relating to employees. Those laws include regulations governing non-exempt employees in the public housekeeping industry, such as motel employees [*see 8 Cal. Code Reg. § 11050(2)(P)(3)*]. For additional discussion, see *§ 38.220[1][d], [e]*.

[2] FORM

Motel Management Agreement

MOTEL MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT is entered into on _____[*date*] by and between _____[*name of motel owner*], [*legal status, e.g.,* an individual] ("Owner") and _____[*name of property manager*], [*legal status, e.g.,* a California corporation] ("Manager").

Recitals

A. Owner is the owner of property commonly known as _____[*name of motel*] ("Motel"), located at _____[*street address and city*], California.

B. Manager is engaged in the business of motel management and has extensive experience in the operation of motels.

C. Owner desires to retain the services of Manager to manage and operate the Motel for the benefit of Owner on the terms and conditions set forth in this Agreement.

OWNER AND MANAGER MUTUALLY AGREE AS FOLLOWS:

Creation of Employment Relationship

1. Owner hereby employs Manager and Manager hereby accepts employment as exclusive manager of the Motel, with the authority to direct, supervise, and manage the operation of the Motel on the terms and conditions set forth in this Agreement.

Term of Agreement

2. The term of this Agreement shall commence on _____[*date*], and terminate on _____[*date*], unless terminated prior to that date pursuant to the provisions of this Agreement.

Manager's Duties

3.(a) At all times during the term of this Agreement, Manager shall use its best efforts to manage and operate the Motel

in a manner that: maximizes profits generated by the Motel; maintains the reputation of the Motel as a first-class motel; and continues the standard and quality of management and operation at a level not lower than that maintained on the date of execution of this Agreement.

(b) Manager shall use its best efforts to rent rooms to guests and to achieve and maintain the highest possible occupancy rate. Manager shall advertise the Motel at intervals and in the manner it deems necessary, within the cost limitations set forth in the Annual Budget and Plan described in Paragraph 4 of this Agreement.

(c) Manager shall operate the following facilities of the Motel: _____ [*specify, e.g.*, cocktail lounge, pool, dining room, and recreation and game room] ("Facilities"). Manager shall, on Owner's behalf, enter into leases providing for the operation by outside business entities of the following facilities on the Motel premises: _____ [*specify, e.g.*, the coffee shop and the gift shop] ("Tenant Facilities"). Manager may enter into a lease for a term of _____ [*specify, e.g.*, one year] or less on Owner's behalf without the prior approval of Owner. Any lease for a term of more than _____ [*same duration of term used above, e.g.*, one year] shall require Owner's prior written approval.

(d) Manager shall hire, promote, discharge, and supervise the performance of all employees, clerks, and other personnel as necessary for the efficient operation of the Motel and its Facilities. [*Describe any limitations on manager's authority or rights of owner with respect to personnel management, e.g.*, Manager may not enter into any employment or other written agreement with any employee or other person that exceeds a term of _____ (*duration of term, e.g.*, one year) or that requires the payment of annual compensation in excess of $ _____ without the prior written consent of Owner.] All staff (with the exception of employees of any Tenant Facility) shall be on Owner's payroll, and Manager shall not be liable to the staff for salaries or other compensation. Owner shall have the right to discharge, or require Manager to discharge, any employee of the Motel. Manager shall obtain workers' compensation insurance for the staff at Owner's expense and shall observe all state and federal laws regarding the hiring, compensation, and working conditions of employees. Manager shall have the duty and authority to negotiate, on the behalf of Owner, with any labor union entitled by law to represent any employees of the Motel, but no collective bargaining agreement or other labor contract resulting from the negotiations shall be valid and binding on Owner unless executed by Owner.

[*Continue with the following:*]

(e) Manager shall establish, maintain, and supervise an accounting department for the Motel that shall do the following:

(1) Collect, for the benefit of Owner, all revenues, income, rent, charges, and taxes from the leasing of rooms in the Motel and the operation of the Motel's Facilities and Tenant Facilities.

(2) Maintain bank accounts for the deposit and disbursement of Motel funds.

(3) For the benefit of Owner, deposit all funds furnished by Owner for the operation of the Motel and all funds received by Manager from the operation of the Motel in an account or accounts with banking institutions designated from time to time by Owner in writing. The accounts shall be in the name of Owner or in the name of Manager as trustee for Owner, as designated in writing by Owner.

(4) On behalf of Owner, disburse funds for salaries, maintenance, supplies, services, and other Motel expenses, charges, and assessments authorized by this Agreement and any other charge or item of expense from time to time authorized in writing by Owner. Interest or penalties assessed on any amount due but not timely paid by Manager shall be reimbursed by Manager to Owner unless the delay in payment was expressly authorized in writing by Owner.

(5) Prepare and file as required under state and federal law all necessary reports and forms with respect to withholding taxes, social security taxes, unemployment insurance, disability insurance, labor standards, or any other matter relating to the employment of personnel by the Motel.

(f) Manager shall be responsible for all maintenance and repairs for the Motel and shall:

(1) Conduct regular inspections of the Motel building(s) and all Motel Facilities and Tenant Facilities for compliance with applicable health and safety standards and building codes, for cleanliness, and for good order, condition and repair (except in the case of Tenant Facilities, when this duty is assumed by a Tenant in a written agreement or lease).

(2) Purchase, clean, and repair all Motel furnishings.

(3) Contract for the periodic painting, redecorating, and refurbishing of the Motel, subject to cost limitations for the subject year set forth in the Annual Budget described in Paragraph 4 of this Agreement.

(4) Hire and maintain a staff to clean Motel rooms, lobbies, hallways, stairways, and _____ [*list other facilities to be cleaned daily*] on a daily basis.

(5) Contract for the repair of all Motel equipment and fixtures, including _____ [*specify, e.g.,* elevators, furnace, air conditioner, pool equipment, lights, wiring, fire alarms, smoke detectors, radios, televisions, and kitchen equipment].

(6) Contract for maintenance and other services, including _____ [*specify, e.g.,* pool cleaning and towel and linen supply].

(7) Purchase supplies for the Motel, such as _____ [*specify, e.g.,* kitchen supplies, office supplies, stationery and other promotional materials for guest rooms,] and other supplies necessary for efficient operation of the Motel.

(g) Manager shall contract, in the name of Owner, for all water, gas and electricity, garbage, telephone, and other utilities necessary for the operation of the Motel.

[*Optional*]

(h) Manager shall perform or arrange for the performance of the following tasks to conserve water in the Motel:

(1) Clean all sidewalk and other concrete areas by sweeping them with a broom, unless cleaning with water is necessary for health and safety reasons.

(2) Water all grass and shrubbery prior to dawn or after sunset.

(3) Serve water to guests and patrons of the restaurant only on request.

(4) On or before _____ (*date*), equip all showers with flow-restrictor shower heads, and install water displacement bags or bottles in all toilet tanks, pursuant to a schedule that does not interrupt the occupation of rooms by guests.

(5) Strictly follow any other conservation measures made mandatory by any governmental authority with jurisdiction.

[*Continue with the following:*]

(i) Manager shall comply with all statutes, ordinances, laws, rules, regulations, orders, and determinations of any government authority with jurisdiction over the Motel. Any repair or capital improvement costing in excess of $ _____ required by any government authority shall not be made by Manager without the prior written consent of Owner, unless the repair or capital improvement and its cost have previously been provided for and approved in the Annual Budget described in Paragraph 4 of this Agreement. If any required repair or capital improvement is not made because Owner fails or refuses to give its consent after Manager's written request for consent, Owner shall indemnify and hold Manager harmless from any and all liability, including attorneys' fees, that may arise from the failure to make the repair or capital improvement.

(j) On behalf of and at the expense of Owner, Manager shall institute in Manager's name all necessary legal actions or proceedings to collect charges, rent, or other income from the Motel, to evict or oust guests, tenants, or other persons on the premises of the Motel, or to terminate any Tenant Facility lease for default by the tenant _____ [*set forth any restrictions or limitations on authority, e.g.,*; provided, however, that Manager shall not terminate any Tenant Facility lease with a term in excess of one year without the prior written consent of Owner]. Owner shall designate counsel [*or* shall have the right to approve counsel designated by Manager] for any legal action described under this Subparagraph.

(k) Manager shall receive, consider, respond to, and resolve all guest, customer, and tenant complaints and problems.

(l) Manager shall perform all other duties specifically set forth in this Agreement.

Annual Budget and Plan

4. The Motel shall be operated and books and records maintained for the Motel on the basis of a calendar year [*or* a fiscal year that begins on _____ (*date*) and ends on _____ (*date*)]. At least [*time period, e.g.,* 60 days] prior to the beginning of each calendar [*or* fiscal year] in the term of this Agreement, Manager shall prepare and submit to Owner for Owner's approval a detailed Annual Budget and Plan that sets forth an estimate of all projected income from the Motel (including all of its Facilities and Tenant Facilities) and an estimate of all expenses for the Motel (including all costs for repairs, maintenance, replacements, and capital expenditures for the ensuing calendar [*or* fiscal] year). Within [*time period, e.g.,* 30 days] after its receipt of the Annual Budget and Plan, Owner shall either approve it or specify the particular items of expense or income that are to be amended. Owner may not increase or decrease the amount of any of Manager's estimates by more than [*number, e.g.,* 10] percent without Manager's approval. Manager shall comply with the Annual Budget and Plan as approved or amended by Owner and shall not incur any substantial expense not set forth in the Annual Budget and Plan, except: in the case of an emergency; or when the failure to incur the expense would subject Owner to imminent criminal liability other than the payment of fines.

Income and Expense Statements

5.(a) On or before the [*day of month, e.g.,* 15th] day of each month, Manager shall deliver to Owner (or any person or entity designated in writing by Owner) a detailed Income and Expense Statement of the Motel's operations that separately sets forth all capital expenditures and all net profit for both the preceding month and for the period beginning on the first day of the calendar [*or* fiscal] year and ending on the last day of the preceding month. The statements shall be prepared by the accounting department for the Motel and shall be certified by one of Manager's authorized financial officers.

(b) Not later than _____ [*time period, e.g.,* 60 days] after the end of each calendar [*or* fiscal] year in the term of this Agreement, Manager shall deliver to Owner a detailed Annual Income and Expense Statement of the Motel's operations that sets forth all capital expenditures and the net profit for the preceding calendar [*or* fiscal] year. The statement shall be prepared and certified by the public accounting firm of _____ [*name of firm*] or any other firm designed in writing by Owner from time to time. Manager shall provide the firm with the data necessary for the preparation of the statement.

Payments to Owner

6. Simultaneously with the delivery each month of the Income and Expense Statement described in Subparagraph 5(a) of this Agreement, Manager shall remit to Owner all amounts collected on Owner's behalf from Motel operations during the preceding month, less: disbursements and advances made on behalf of and for Owner's account; and a reasonable amount for reserves determined by Manager to be necessary for the payment of obligations that will or may become due, taking into account estimated future income. Nothing in this Paragraph shall limit or preclude Owner's right to use or withdraw funds from Motel operations that are deposited in bank accounts for Owner's account pursuant to Subparagraph 3(e) of this Agreement.

Manager's Compensation

7. As compensation for Manager's services under this Agreement, Owner shall pay Manager a base annual salary of $ [*dollar amount*] ("Salary"), plus [*number*] percent of the Motel's net profit [*or some other measure capable of objective determination, e.g.,* net sales *or* adjusted net sales] ("Incentive") for each calendar [*or* fiscal] year as shown on the final Annual Income and Expense Statement described in Subparagraph 5(b) of this Agreement. The Salary portion of Manager's compensation shall be payable in monthly installments, on the [*day of month, e.g.,* first] day of each month. The Incentive Portion of Manager's compensation shall be paid not later than [*time period that is after the date by which the annual income and expense statement must be prepared, e.g.,* 90 days] after the end of each calender [*or* fiscal year] in the term of this Agreement.

Insurance for Motel

8.(a) Manager shall procure and maintain in full force and effect throughout the term of this Agreement, the following types of insurance for the Motel: public liability insurance; fire insurance; any insurance required under Owner's deed(s) of trust on the Motel, any tenant lease, or any other applicable written agreement; and any insurance otherwise required by Owner in a written notice provided to Manager.

(b) Simultaneously with submission of the Annual Budget and Plan for the Motel each year, Manager shall submit to owner a schedule that sets forth the insurance presently maintained and in force for the Motel (including the type, amount, and name of the insurer) and any additional insurance Manager recommends be procured and maintained for the protection of the Motel, Owner, and Manager (including the type, amount, and name of the insurer). Within _____ [*time period, e.g.,* 30 days] after its receipt of the schedule, Owner shall advise Manager in writing of the specific insurance to be maintained (and procured, if necessary) for the following year, specifying, for every type of insurance, the amount and the name of the insurer. The insurer need not be the same one (if any) specified in the Manager's schedule for the particular type of insurance. Manager shall maintain in full force and effect and procure as necessary all insurance for the Motel set forth in Owner's written directive.

(c) All insurance required under this Agreement shall be maintained at Owner's expense. The original and one duplicate

of all policies shall be delivered to Owner or to persons or entities designated by Owner.

(d) For each policy of insurance required to be maintained under this Agreement, Owner shall indicate in writing whether the policy shall name Owner, Manager, or a mortgagee as insured. Any policy of hazard insurance shall contain a loss payment clause that meets the requirements of any mortgage covering the Motel.

(e) Provided Manager procures and maintains in full force and effect all insurance required under this Agreement, Owner and Manager agree that neither shall assert against the other any claims for losses, damages, liability, or expenses (including attorneys' fees) incurred or sustained by them, to the extent the losses, damages, liability, or expenses are covered by insurance, on the account of damage or injury to person or property arising out of the ownership, operation, or maintenance of the Motel. If Manager fails to procure and maintain in full force and effect any or all insurance required under this Agreement, Manager shall be solely liable for any and all losses, damages, liability, and expenses (including attorneys' fees) incurred or sustained by Manager or Owner and not fully reimbursed by insurance proceeds.

(f) Owner shall indemnify and hold harmless Manager from all damages for injuries to persons or property on or about the Motel premises and shall defend any action against Manager arising from those injuries, subject to the limitations described in Subparagraph (e) of this Paragraph, and provided that the damages were not the result of the gross negligence or willful misconduct of Manager.

(g) Manager and Owner shall each give the other notice of any claims made against either of them or against the Motel, and each shall cooperate with the other and any insurance carrier in the investigation and defense of any claim. Manager shall not hire or retain legal counsel for the defense of Owner or the Motel without the prior written consent of Owner.

(h) Manager shall comply with any written directive prepared from time to time by Owner that instructs Manager to maintain a fidelity or other bond for the protection of Owner, Manager, or any mortgagee. The bonds shall be in the amounts and obtained from the surety companies designated by Owner in Owner's written directive to Manager.

Casualty Losses

9. In the event the Motel is damaged by fire or other casualty, Manager shall immediately notify Owner. As Owner's agent, Manager shall file the insurance claim(s) with the appropriate insurer and shall negotiate with the insurer as necessary for the payment of proceeds. If Owner determines that the assistance of legal counsel is necessary to obtain the insurance proceeds, Owner shall designate the counsel to be used. Manager shall obtain Owner's written consent prior to entering into any settlement [*or* any settlement in excess of $ _____ (*maximum dollar amount, e.g.*, $5,000)] on behalf of Owner. With the insurance proceeds obtained, Manager shall cause the damaged premises to be promptly repaired and restored as nearly as practicable to the condition existing immediately prior to the damage or destruction. For any repairs or restoration costing in excess of the total insurance proceeds collected for the casualty, Manager shall obtain Owner's written consent for the cost of repairs prior to the time Manager authorizes the repairs to be made. The provisions of any Mortgage on the Motel governing the payment of insurance proceeds in the event of a casualty loss shall have priority and supersede, to the extent applicable, the provisions of this Paragraph.

Subordination of Agreement to Mortgage(s)

10. This Agreement is not, and shall not be deemed to be, an interest in or a lien against either the Motel or the real property on which the Motel is located. This Agreement and the rights of Manager set forth in the Agreement shall be and remain at all times subordinate to any mortgage on the Motel or its underlying real property (including any renewal, modification, consolidation, replacement, or extension of any mortgage). If requested by Owner or any Mortgagee,

Manager shall execute a separate written instrument confirming the subordination described in this Paragraph.

Termination of Agreement

11. Owner may terminate this Agreement by written notice to Manager if any of the following occur:

(a) Pursuant to any federal or state statute:

(1) Manager files in any court a petition in bankruptcy or insolvency, or for a reorganization, or for the appointment of a receiver or trustee of all or a substantial portion of Manager's property.

(2) Manager makes an assignment for, petitions for, or enters into an arrangement for the benefit of creditors.

(3) A petition in bankruptcy is filed against Manager and is not discharged within 90 days after the filing date.

(b) Owner sells the Motel.

(c) The Motel or a substantial portion of it is taken by eminent domain.

(d) Owner loses title to the Motel, the right to possession of the Motel, or the right to collect income from the Motel, regardless of the cause of the loss.

(e) Following substantial damage to the Motel by fire or other casualty, Owner elects not to rebuild the Motel.

(f) Manager defaults in the performance of this Agreement, and within _____ [*time period, e.g.,* 30 days] following Owner's written notice to Manager of the alleged default: Manager fails to cure the default; or, if the default is not capable of being cured within the above cure period, Manager fails to commence to cure the default within that period and to diligently proceed to cure the default.

[*Add the following if manager is to have the right to demand arbitration of disputes involving manager's alleged default:*]

Notwithstanding the foregoing, Manager shall have the right to dispute Owner's assertion that Manager is in default and to demand arbitration by so notifying Owner in writing within [*time period, e.g.,* 15 days] after the date of Owner's notice of Manager's default. The dispute shall be promptly submitted to arbitration for determination in accordance with the rules of the American Arbitration Association, and the decision of the arbitrator shall be final and binding on both parties. If the decision of the arbitrator is that Manager is in default under this Agreement, Manager shall pay all costs and expenses of the arbitration. If the arbitrator finds that Manager is not in default under this Agreement, Owner shall pay all costs and expenses of the arbitration.

[*Continue with the following:*]

(g) Any notice of termination given by Owner to Manager pursuant to this Paragraph shall set forth the effective date of termination. Except in the case of a termination subject to Subparagraph (f) of this Paragraph, the termination date shall be no earlier than _____ [*time period, e.g.,* two weeks] after the date of Owner's notice of termination. In the case of a termination subject to Subparagraph (f), the termination date shall reflect the time periods set forth in that subparagraph.

Assignment

12. Manager may not assign this Agreement without the prior written consent of Owner [*describe any exceptions to consent requirement, e.g.,*, except that Manager's merger or consolidation with a corporation that has substantially the same operating personnel as Manager on the date of the consolidation or merger and that is primarily engaged in the management and operation of motels shall not require the prior written consent of Owner].

Mortgage and Mortgagee Defined

13. As used in this Agreement, the term "mortgage" means any mortgage, deed of trust, or similar security instrument executed by Owner in connection with the Motel or the real property on which the Motel is located. "Mortgagee" means the holder of any mortgage, deed of trust, or similar security instrument.

Attorneys' Fees

14. If any litigation is commenced between the parties to this Agreement concerning the Premises, this Agreement, or the rights and duties of either party with respect to this Agreement, the party prevailing in the litigation shall be entitled, in addition to any other relief that may be granted in the litigation, to a reasonable sum as and for its attorneys' fees in the litigation that shall be determined by the court in the litigation or in a separate action brought for that purpose.

Notices

15. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom they are directed, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Owner at _____[*street address, city, state, and zip code*] or to Manager at _____[*street address, city, state, and zip code*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Binding on Heirs and Successors

16. The provisions of this Agreement shall be binding on and shall inure to the benefit of both of the parties and to their respective heirs, executors, administrators, successors, and assigns, except that nothing in this Paragraph shall be construed as a consent by Owner to any assignment of this Agreement or any interest in it by Manager except as provided in Paragraph 12 of this Agreement.

Partial Invalidity

17. In the event any provision of this Agreement is held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of the Agreement shall remain in full force and effect.

Sole Agreement

18. This Agreement constitutes the sole agreement between the parties regarding the matters contained in it.

Owner's Consent

19. Any consent of Owner required under this Agreement shall not be effective unless it is in writing and signed by Owner or one of Owner's duly authorized officers or agents.

Modifications

20. This Agreement may not be changed or modified except by a writing executed by both of the parties.

Governing Law

21. The provisions of this Agreement shall be construed in accordance with and governed by the laws of the State of California.

Executed on _____[*date*], at _____[*city*], California.

OWNER
[*name of owner*]
By _____ [*signature*]
[*typed name and title*]

MANAGER
[*name of manager*]
By _____ [*signature*]
[*typed name and title*]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 38 REAL PROPERTY MANAGEMENT
PART IV. FORMS
B. Specialized Property Management Agreements

18-38 California Legal Forms--Transaction Guide § 38.225

AUTHOR: by Jeannie C. Newell, J.D.

§ 38.225 Agricultural Property Management Agreement

[1] Comment

[a] Use of Form

This form is a management agreement for agricultural property. It may be used by an owner of agricultural property to turn over to a manager or management firm complete responsibility for operating a particular type of agricultural operation on the owner's property. It is appropriate for use if the manager is an independent contractor rather than an employee of the owner [*see* [2], P 1; *see also § 38.200[1][b]* (discussion of manager's status as independent contractor or employee)].

For illustrative purposes only, this agreement uses the example of a walnut orchard. However, with few modifications, the form can be used for other types of agricultural property, such as a farm, ranch, or vineyard. The specific duties of the manager and expenses involved in management will depend on the particular type of agricultural activity conducted on the property.

[b] Payment of Property Expenses

Under the terms of this agreement, the property manager is required to pay all property expenses from revenues produced by the property. To the extent revenues are insufficient, the property owner must provide funds for the payment of the expenses [*see* [2], P 6]. Because agricultural property generally produces income only annually, rather than monthly as do most nonagricultural types of property, some or all of the property expenses may become due prior to the time that the property produces its annual income. For example, expenses for planting and maintaining a crop may become due and payable prior to the time when the crop is harvested and sold. Under the terms of this agreement, the property owner must supply the manager with the funds necessary to pay these expenses and is assumed to have made his or her own financing arrangements in this regard.

[c] Compensation to Manager

The compensation paid to a manager of agricultural property, like that paid to a manager of nonagricultural property, is usually in the form of a fixed fee or a specified percentage of income from the property [*see § 38.15 [1]*]. However, unlike managers of nonagricultural property who generally receive a monthly fee for managing property that generates a monthly income, managers of agricultural property may receive an annual management fee that corresponds with the property's yearly production of income. The compensation provision in this form [*see* [2], P 7] permits the parties to specify the compensation to be paid to the manager for each year covered by the term of the agreement. That compensation may be the same for each year, or may vary from year to year.

[d] Termination of Agreement

The first termination provision in this form [*see* [2], P 9] permits either the property owner or the property manager to terminate the agreement without cause and prior to the original termination date set by the parties, but only at the end of any year for which the agreement is to be in effect. Under this type of provision, both the owner and manager are assured that, absent a default by either party, the management agreement will be in effect for at least one full year. Because most agricultural activities are of a seasonal nature, the years in the term of the agreement should coincide with the growing season involved. This type of provision is intended to protect the manager from a mid-season termination of the agreement, that is, a termination prior to the time the crop is harvested. Also, from the standpoint of the property manager, it may not be economically feasible for the manager to enter into the management agreement unless the agreement prohibits the owner from terminating the agreement without cause for at least one full year.

The second termination clause in this form [*see* [2], P 10] is intended to cover the situation in which either party defaults under the terms of the agreement. It describes a procedure for submitting disputes to an arbitrator who has the power to terminate the agreement.

[2] FORM

Agricultural Property Management Agreement

AGRICULTURAL MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT is entered into on _____[*date*] by and between _____[*name of property owner*], [*legal status, e.g.,* an individual] ("Owner") and _____[*name of property manager*], [*legal status, e.g.,* a California corporation] ("Manager").

Recitals

A. Owner is the owner of a certain parcel of real property located in _____ County, California ("the Property"), and more particularly described [as follows: _____ (*insert legal description*) *or* in Exhibit _____, which is attached to this Agreement and hereby incorporated by reference].

B. The Property has been [*or* is intended to be] operated as a [*describe existing or contemplated use of the Property, e.g.,* walnut orchard].

C. Manager is experienced in the husbandry and care of the type of agricultural operations conducted on [*or* intended to be initiated on] the Property.

D. Owner wishes to continue [*or* commence] operation of the Property as a [*repeat description, e.g.,* walnut orchard] and wishes to employ Manager for this purpose.

E. Manager is willing to operate the Property as a [*repeat description, e.g.*, walnut orchard].

OWNER AND MANAGER MUTUALLY AGREE AS FOLLOWS:

Appointment and Independent Contractor Status

1. Owner hereby appoints Manager and Manager hereby accepts appointment as exclusive manager for the development and care of the Property as a [*repeat description, e.g.*, walnut orchard]. The term of this Agreement shall be for a period of [*specify, e.g.*, three years], commencing on _____[*date*], and ending on _____[*date*], subject to earlier termination as provided in this Agreement. Owner and Manager acknowledge and agree that this Agreement establishes and constitutes only a Management Agreement between the parties, that the parties are not joint venturers or partners, and that Manager shall not be deemed to be an employee of Owner. Manager shall at all times be an independent contractor.

Description of Required Services

2. Manager shall perform the following duties:

[*Describe duties; the following examples of duties performed in connection with the management of a walnut orchard are provided for illustrative purposes, and may be used for, or easily modified to apply to, other types of agricultural properties:*]

(a) The selection of the varieties of trees to be planted at each location and the area to be planted.

(b) The purchase of all necessary trees and plant materials; provided, however, that Manager shall not be requested or required to replace any trees except trees that have died.

(c) The positioning of the trees so as to obtain the maximum percentage stand.

(d) The maintenance and replacement of the irrigation system for the Property as is necessary to maintain the system in good working order.

(e) The solicitation of bids for design and construction of the irrigation systems or other improvements that may from time to time be desirable or necessary for maximum efficiency.

(f) The care and maintenance of the Property, including insect control work, plant nutrition measures, pruning and training, proper irrigation, and the frequent weeding of the plots to keep the areas free of noxious and unsightly weeds.

(g) The harvesting and marketing of all crops and produce.

(h) The maintenance of accurate written records of all activities relating to the care and maintenance of the property.

(i) The securing of adequate insurance naming both Owner and Manager as insureds. The cost of this insurance shall be deemed an indirect expense within the meaning of Subparagraph 5(b)(2) of this Agreement.

(j) The collection of all revenues from the Property and the deposit of them in a separately maintained account.

(k) The payment of all direct and indirect expenses of agricultural operations on the Property from revenues.

[*Continue with the following:*]

Standard of Care

3. Manager agrees to operate the Property in a manner consistent with good husbandry practices as applied to similar agricultural property located in the surrounding geographical location.

Budget and Financial Records

4.(a) Manager shall prepare an annual budget (the "Budget"), based on a calendar [*or* fiscal] year, which shall contain the Manager's good faith estimates of all direct and indirect expenses (as defined in Paragraph 5 of this Agreement) and all revenues. Manager shall submit the Budget to Owner at least [*number, e.g.,* 30] days prior to the commencement of the year covered by the Budget. The Parties agree that the Budget is only an estimate and that Manager shall not be responsible for variances from the Budget. Notwithstanding the foregoing, Manager shall administer the Budget in good faith.

(b) Manager shall keep and maintain separate, accurate records of revenues and expenses for the Property. Manager shall prepare an annual report and statement for each calendar [*or* fiscal] year that summarizes the expenses incurred during that year and compares the expenditures with the Budget previously submitted for that year. Manager shall submit the annual report and statement to Owner no later than _____ [*number, e.g.,* 30] days after the end of the calendar [*or* fiscal] year.

Expenses and Revenues

5.(a) As used in this Agreement, "expenses" means both direct and indirect expenses. "Direct expenses" means those expenses that are directly attributable to the operation and maintenance of the Property and includes the following:

[*The following list may be used as is or modified to reflect the expenses incurred in connection with the operation of the owner's property.*]

(1) Direct labor costs;

(2) Labor override costs to cover payroll taxes and benefits;

(3) Cost of materials;

(4) Outside services relating to the Property;

(5) Miscellaneous rentals and utilities relating to the Property;

(6) Equipment costs, at standard rates, including maintenance, depreciation, fuel, travel time, and related expenses; and

(7) The then-prevailing custom rate charge in the area for harvesting and drying the crop, whether or not that charge is Manager's actual cost.

[*Continue with the following:*]

(b) Indirect expenses are those expenses that are indirectly attributable to the operation and maintenance of the Property and include the following:

(1) Supervisory labor;

(2) Lost time from any cause;

(3) Vacation time;

(4) Bonus expenses;

(5) Cost of insurance; and

(6) Base maintenance expenses.

(c) Expenses shall not include any management and office costs of Manager attributable to the establishment or maintenance of an office by Manager located either on or off the Property.

(d) As used in this Agreement, "revenues" means all amounts received as a result of Manager's operations and activities on the Property.

Payment of Expenses

6. All expenses shall first be paid from revenues and then, to the extent that revenues are not sufficient, from funds provided by Owner.

Compensation

7. For Manager's services described in Paragraph 2 of this Agreement, Owner shall pay Manager the following sums per year:

Fiscal [*or* Calendar] Year	Amount of Compensation
_____	_____
_____	_____
_____	_____

The annual compensation provided for above shall be paid within _____ days after the end of the applicable fiscal [*or* calendar] year.

[*If owner has paid advance to manager for first year of term, add:*]

Manager acknowledges receipt of the sum of $ _____ from Owner as full [*or* partial] payment of Manager's compensation for the fiscal [*or* calendar] year _____.

[*Continue with the following:*]

Distribution of Revenues

8. Manager shall apply the revenues from the Property in the following order:

(a) Payment of all of Manager's compensation for the current fiscal [*or* calendar] year.

(b) Payment of all direct and indirect expenses described in Paragraph 5 of this Agreement.

(c) Payment of the balance to the Owner [*optional:*, except for $ _____ (*dollar amount*), which is to be retained by Manager as a reserve for the payment of expenses of the Property for the following fiscal (*or* calendar) year].

Termination at End of Year

9. Either party may terminate this Agreement at the end of any fiscal [*or* calendar] year described in Paragraph 7 of this Agreement, without cause and notwithstanding the provisions of Paragraph 1 of this Agreement, by giving the other party at least [*notice period, e.g.*, 60 days'] written notice prior to the end of the fiscal [*or* calendar] year.

Termination for Default

10.(a) In the event either party violates any of the terms or conditions of this Agreement or fails, in the opinion of the other party, to satisfactorily perform its duties under this Agreement, the aggrieved party shall deliver an Allegation of Default to the violating party. The Allegation of Default shall be delivered in the manner described in Paragraph 12 of this Agreement. After delivery of the Allegation of Default, the violating party shall have [*number, e.g.*, 30] days within which to cure the alleged default or to otherwise respond to the Allegation of Default. If the violating party does cure the alleged default within the required time period, this Agreement shall continue in effect as though no default had occurred. In the event that (i) the violating party fails to cure the alleged default within the required time period and fails to otherwise respond to the Allegation of Default within the required time period, or (ii) the violating party, within the required time period, alleges in writing that it has not in fact committed an act of default, then the aggrieved party may deliver a Demand for Arbitration to the violating party. Within [*time period, e.g.*, 10 days] after delivery of a Demand for Arbitration, the parties shall endeavor in good faith to agree on a qualified agricultural expert to whom the dispute shall be submitted for decision. If the parties are unable within that time period to agree on a qualified expert to arbitrate the dispute, either party may request _____[*name or title of person agreed on by parties, e.g.*, the head of the County Agricultural Department of _____ (*name of county in which property is located*) County] to designate a qualified expert to act as arbitrator. Arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The decision of the arbitrator shall be binding on the parties and shall be set forth in writing within [*time period agreed on by parties, e.g.*, 14 days] after the dispute is presented to the arbitrator. The arbitrator shall have the power to resolve the specific dispute at issue, but shall have no power to modify any of the terms or conditions of this Agreement. On the request of either party to the dispute, the arbitrator shall also have the

power to decide which party was at fault in the dispute and which party was not at fault. [*Add if desired:* On written demand by the party who is determined not to be at fault in the dispute, the arbitrator may terminate this Agreement.] In the discretion of the arbitrator, the party who is determined to be at fault in the dispute may be required to pay [*list costs and fees, e.g.,* all costs of arbitration, and attorneys' fees for the other party].

(b) In the event this Agreement is terminated under the provisions of Subparagraph (a) of this Paragraph, Manager shall be entitled to the compensation described in Paragraph 7 of this Agreement, prorated through the date of termination.

Assignment

11. Manager may not assign this Agreement without the prior written consent and approval of Owner [*describe any exceptions to consent requirement, e.g.,,* except that Manager may, without Owner's consent, assign rights and obligations to an affiliate or related entity of Manager when the services described in this Agreement will be performed by substantially the same persons.] Any unauthorized assignment shall be void.

Notices

12. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom they are directed, or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to Owner at _____[*street address, city, state, and zip code*] or to Manager at _____[*street address, city, state, and zip code*]. Either party may change its address for the purpose of this Paragraph by giving written notice of the change to the other party in the manner provided in this Paragraph.

Merger and Construction

13. This Agreement sets forth the entire understanding and agreement of the parties and may be modified only by an agreement in writing executed by the parties. All negotiations between the parties are merged into this Agreement. This Agreement shall not be construed against the drafting party, but shall be construed as if drafted by both parties. The paragraph headings used are for convenience only and do not form a part of this Agreement.

Executed on _____[*date*], at _____[*city*], California.

OWNER
[*name of owner*]
By _____ [*signature*]
[*typed name and title*]

MANAGER
[*name of manager*]
By _____ [*signature*]
[*typed name and title*]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS

18-39 California Legal Forms--Transaction Guide 39.syn

AUTHOR: by Jeannie Christy Newell, J.D.

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§ 39.02 Federal Regulations

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§ 39.06 Annotations

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[1] Matthew Bender Sources

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Information for Prospective Homeowners

by Jeannie Christy Newell, J.D.n*

FOOTNOTES:

(n101)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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18-39 California Legal Forms--Transaction Guide Scope

AUTHOR: by Jeannie Christy Newell, J.D.

Scope

by Jeannie Christy Newell, J.D.n* Scope

This chapter covers the statutory and regulatory requirements governing mobilehome parks. It provides an overview of the development and construction requirements for a new mobilehome rental park, and reproduces applications for a construction permit and a permit to operate a park. The chapter also covers the conversion of a mobilehome rental park to a resident-owned park. Finally, the chapter examines in detail the operation of a mobilehome park and the relationship between park management and the tenants of the park (referred to as "homeowners" under the applicable laws). Illustrative forms relating to park tenancies include a lease agreement, park rules and regulations, and notices that must or may be given by either park management or a homeowner.

Unless otherwise indicated, all regulatory requirements discussed in this chapter apply to manufactured homes as well as to mobilehomes [*see § 39.11*]. Except for a brief summary of applicable tenancy laws [*see §§ 39.15, 39.16*], the chapter does not cover recreational vehicles and floating homes. Finally, this chapter does not discuss factory-built housing.

For extensive coverage of the sale of mobilehomes (and manufactured homes), registration and titling requirements, and security interests in mobilehomes, see Ch. 40, *Mobilehomes* . Chapter 40 also covers the taxation and installation of mobilehomes.

FOOTNOTES:
(n102)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.01 California Sources

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Mobilehome Residency Law (MRL). *Civ. Code § 798 et seq.*

Terms defined under MRL. *Civ. Code §§ 798.2-798.12*.

Rental agreement contents. *Civ. Code §§ 798.15-798.22*.

Exemptions from local rent control ordinances. *Civ. Code §§ 798.17, 798.45*.

Park rules and regulations. *Civ. Code §§ 798.23, 798.25, 798.25.5, 798.26*.

Notice of zoning and lease of park. *Civ. Code § 798.27*.

Disclosure of park ownership. *Civ. Code § 798.28*.

Removal of unauthorized vehicles. *Civ. Code § 798.28.5*.

Fees and charges. *Civ. Code §§ 798.30-798.44*.

Limit on charges for liquified petroleum gas. *Civ. Code § 798.44*.

Homeowner meetings and communications. *Civ. Code §§ 798.50-798.52*.

Termination of tenancy. *Civ. Code §§ 798.55-798.61*.

Sale of abandoned mobilehome by management. *Civ. Code § 798.61*.

Transfer of mobilehome. *Civ. Code §§ 798.70-798.83*.

Actions, proceedings, and penalties. *Civ. Code §§ 798.84-798.88*.

Manufactured Housing Act of 1980. *Health & Safety Code § 18000 et seq.*

NOTE:
For a detailed listing of provisions under this Act, see Ch. 40, ***Mobilehomes*** .

Mobilehome Ombudsman. *Health & Safety Code §§ 18150-18153*.

Mobilehome Parks Act. *Health & Safety Code § 18200 et seq.*
"Mobilehome" defined. *Health & Safety Code § 18211*.
"Mobilehome park" defined. *Health & Safety Code § 18214*.
Citations for violation of Act. *Health & Safety Code §§ 18420-18424* (repealed as of January 1, 2012, unless that date is deleted or extended by statute).
Construction permits and fees. *Health & Safety Code §§ 18500-18518*.
Requirements for installing or removing mobilehome on foundation system. *Health & Safety Code § 18551*.
Mobilehome park building, construction, and lot standards. *Health & Safety Code §§ 18550-18700*.

Manufactured housing communities. *Health & Safety Code § 18210.7*

Special Occupancy Park Act. *Health & Safety Code § 18860 et seq.*

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§ 39.02 Federal Regulations

Manufactured home exemption under Federal Interstate Land Sales Full Disclosure Act. *24 C.F.R. § 1710.11*.



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§§ 39.03[Reserved]



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AUTHOR: by Jeannie Christy Newell, J.D.

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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.06 Annotations

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18-39 California Legal Forms--Transaction Guide § 39.07

AUTHOR: by Jeannie Christy Newell, J.D.

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Ch. 30A, *Construction Financing* .
Ch. 30D, *Construction Contracts and Subcontracts* .
Ch. 34B, *Residential Leases* .
Ch. 38, *Real Property Management* .
Ch. 40, *Mobilehomes* .

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§§ 39.08[Reserved]



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18-39 California Legal Forms--Transaction Guide § 39.10

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.10 Rental Park and Resident-Owned Park Distinguished

There are two basic types of mobilehome parks. The first, commonly referred to as a rental park, is one in which the individual lots or spaces in the park are rented or leased to individual owners of mobilehomes by the park's owner, usually through the owner's manager or management company. The second type of park is one in which the individual owners of mobilehomes located in the park have some type of ownership interest in the park and in the lots or spaces occupied by their mobilehomes. Examples of this type of park include those organized as regular subdivisions, condominiums, or cooperatives [*see § 39.28*].

The distinction between the two types of parks is important for determining the applicability of specific statutory requirements. For example, the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and its requirements for development, construction, and operation of a park [*see § 39.13* (summary of Act)] apply only to rental parks and resident-owned parks that were converted from a rental park [*see Health & Safety Code § 18214(a)* ("mobilehome park" defined)]. Parks that are developed and constructed from the outset as resident-owned parks are therefore not subject to the Act but to other regulatory schemes [*see § 39.28*].

The Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*], for the most part, only applies to rental parks [*see Civ. Code § 798.4* ("mobilehome park" defined)]. However, limited provisions do apply to resident-owned parks [*see Civ. Code §§ 798.26(b), 799-799.10* (rights and duties regarding sale of mobilehome located in park)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.11 Definition of "Mobilehome" Includes "Manufactured Home"

For purposes of the statutory and other requirements discussed in this chapter, the term "mobilehome" includes a "manufactured home." Although each of these terms is separately defined under the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*; *see § 39.13[3]* (definitions)], the implementing regulations for the Act [*25 Cal. Code Reg. § 1000 et seq.*] make it clear that the term "mobilehome" includes and is interchangeable with the term "manufactured home" [*25 Cal. Code Reg. § 1002* ("MH-unit" as used in regulations means mobilehome, manufactured home, or multi-unit manufactured housing)]. Also, a "manufactured home" [*see Health & Safety Code § 18007*; *§ 39.13[3][b]*] is included in the definition of a mobilehome under the Mobilehome Residency Law [*Civ. Code § 798.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.12 Mobilehome Ombudsman

The Mobilehome Ombudsman assists the public in resolving problems and complaints relating to mobilehomes [*see Health & Safety Code § 18150*; *see also Health & Safety Code §§ 18151-18153*]. The Ombudsman is appointed by the governor, and the position exists within the Department of Housing and Community Development (HCD) [*see Health & Safety Code § 18150*]. Among other things, the Ombudsman helps with problems concerning titling, registration, installation, warranties, certain financing, sales, inspection of homes and parks, mobilehome accessories and improvements, and the Mobilehome Residency Law [*Health & Safety Code § 18151(b)*; *see Civ. Code § 798 et seq.* (Mobilehome Residency Law)]. Further, the Ombudsman must establish procedures to deal with complaints and publish complaint forms and materials that inform the public of its functions [*Health & Safety Code § 18153*]. The Ombudsman is not authorized to arbitrate, mediate, negotiate, or provide legal advice on mobilehome park rent disputes, lease or rental agreements, or disputes arising from lease or rental agreements. However, the Ombudsman may provide information on these issues [*Health & Safety Code § 18151(c)*]. Finally, the Ombudsman must refer any alleged violations of law or regulations within the jurisdiction of HCD to their Division of Codes and Standards [*Health & Safety Code § 18151(d)*].

The management of a mobilehome park must post a mobilehome ombudsman sign provided by HCD [*Civ. Code § 798.29*]. The sign must be posted in the mobilehome park clubhouse or in another conspicuous public place within the park [*Health & Safety Code § 18253.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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A. Overview

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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.13 Mobilehome Parks Act (MPA)

[1] Legislative Purpose

The purpose of the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*] is to assure protection of the health, safety, and general welfare of all mobilehome park residents [*Health & Safety Code § 18254(a)*] in mobilehome parks and manufactured housing communities [*see Health & Safety Code § 18214.1* (definition of "park" includes these types of developments); *see also § 39.13[3][c]* (definition of "mobilehome park"); *§ 39.17* (coverage of manufactured housing communities)]. The Act is predicated on the legislative finding and declaration that the standards and requirements established for the construction, maintenance, occupancy, use, and design of mobilehome parks (1) should guarantee park residents maximum protection of their investment and a decent living environment, and (2) should be flexible enough to accommodate new technologies and to allow designs that reduce costs and enhance the living environment of park residents [*Health & Safety Code § 18251*; *see Health & Safety Code § 18250* (further legislative findings and declarations)].

[2] Scope of Regulation

The MPA and its implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*] govern the construction, maintenance, occupancy, use, and design of mobilehome parks and manufactured housing communities [*Health & Safety Code §§ 18254, 18251*; *see Health & Safety Code § 18214.1* (definition of "park" for purposes of MPA includes these types of developments)]. The MPA (and its regulations) apply on a statewide basis and supersede any local ordinance applicable to a matter covered by it [*Health & Safety Code § 18300(a)*; *see Health & Safety Code §§ 18253* (authority of HCD to develop specific requirements for MPA), *18930* (limitations on state agencies to enact conflicting, overlapping, or duplicate regulations)].

Any park owned, operated, and maintained by the federal government, the state, any agency or political subdivision of the state, or any city, county, or city and county, is exempt from regulation under the MPA [*Health & Safety Code § 18303*]. The MPA also does not apply to electric, gas, or water facilities owned, operated, and maintained by public

utilities [*Health & Safety Code § 18304(b)*].

[3] Definitions

[a] "Mobilehome"

Under the MPA, a "mobilehome" is a structure that meets the requirements for a "manufactured home," *defined in § 39.13[3][b]* [*Health & Safety Code § 18008*; *see Health & Safety Code § 18211* (MPA incorporation of definition)].

The term "mobilehome" does not include a recreational vehicle, a commercial coach, or factory-built housing [*Health & Safety Code §§ 18008, 18211*; *see Health & Safety Code §§ 18010, 18215.5* (definition of recreational vehicle), *18001.8, 18218* (definition of commercial coach), *19971* (definition of factory-built housing)].

[b] "Manufactured Home"

A "manufactured home" means a structure, transportable in one or more sections, that (1) in the traveling mode, is eight body feet or more in width, or 40 body feet or more in length, or (2) when erected on site, is 320 or more square feet. It must be built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities. "Manufactured home" includes a mobilehome subject to the National Manufactured Housing Construction and Safety Act of 1974 [*Health & Safety Code § 18007*; *see Health & Safety Code § 18210.5* (MPA incorporation of § 18007 definition); *see also 42 U.S.C. § 5401 et seq.* (federal Act)].

[c] "Mobilehome Park"

A "mobilehome park" is any area or tract of land where, to accommodate manufactured homes, mobilehomes, or recreational vehicles used for human habitation, two or more lots (1) are rented or leased, (2) are held out for rent or lease, or (3) were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership [*Health & Safety Code § 18214(a)*]. Notwithstanding the above, for purposes of the requirement to obtain an initial or annual permit to operate or to pay related fees, employee housing that has obtained a permit to operate pursuant to the Employee Housing Act [Health & Safety Code § 17000 et seq.] will not be deemed a mobilehome park if both of the following requirements are met [Health & Safety Code § 18214(b)]:

- The housing meets the criteria for employee housing set forth in Health & Safety Code § 17021.6; and

- The housing is comprised of two or more lots or units held out for lease or rent or provided as a term or condition of employment.

In addition, notwithstanding the definition of "mobilehome park" in *Health & Safety Code § 18214(a)*, an area or tract of land will not be deemed a mobilehome park if the structures on it consist of residential structures that are rented or leased, or held out for rent or lease, if the residential structures (1) consist of manufactured homes constructed under the National Manufactured Housing Construction and Safety Act of 1974 [*42 U.S.C. § 5401 et seq.*] or mobilehomes containing two or more dwelling units for human habitation and (2) those manufactured homes or mobilehomes have been approved by a city, county, or city and county as an alternate use that is at least the equivalent to the requirements prescribed in the California Building Standards Code or the State Housing Law [*Health & Safety Code § 17910 et seq.*] in performance, safety, and for the protection of life and health [*Health & Safety Code § 18214(c)*; *see Health & Safety Code § 17951(e)* (obtaining approval as alternate use)].

[d] Other Terms

Several other terms pertinent to mobilehomes and mobilehome parks are defined under the MPA. These include, among

others, "lot" [*see Health & Safety Code § 18210*], "mobilehome accessory building or structure" [*see Health & Safety Code § 18213*], and "permanent building" [*Health & Safety Code § 18214.5*; *see Health & Safety Code § 18620* (applicability of State Building Standards Code and Department regulations to permanent buildings)].

[4] Administration and Enforcement

For mobilehomes located in mobilehome parks, the "enforcement agency" for purposes of the MPA and its implementing regulations is the Department of Housing and Community Development (HCD), or any city, county, or city and county that has properly assumed responsibility for the enforcement of the MPA in the appropriate local jurisdiction [*Health & Safety Code § 18207* ("enforcement agency" defined); *see Health & Safety Code § 18300(b)-(f)* (assumption of responsibility for enforcement); *see also 25 Cal. Code Reg. §§ 1004-1006*]. For mobilehomes located outside of a mobilehome park, the local government with jurisdiction must enforce the MPA and its regulations [*Health & Safety Code § 18300(f)(2)* (no formal assumption of responsibility required)].

[5] Special Occupancy Parks

Standards and requirements for the construction and maintenance of special occupancy parks are set forth in the Special Occupancy Park Act [*Health & Safety Code § 18860 et seq.*; *see 25 Cal. Code Reg. § 2000 et seq.* (implementing regulations)]. "Special occupancy park" means a recreational vehicle park, temporary recreational vehicle park, incidental camping area, or tent camp [*Health & Safety Code § 18862.43*]. The Legislature has found that because owners of recreational vehicles are highly mobile and use various facilities throughout the state, there is a need for consistent and uniform statewide regulations for special occupancy parks [*Health & Safety Code § 18863*]. Accordingly, in legislation enacted in 2001 [2001 Stats., ch. 434, SB 325], the Legislature removed provisions addressing special occupancy parks from the MPA and placed them in the Special Occupancy Parks Act. The Special Occupancy Parks Act imposes substantially similar requirements as the Mobilehome Parks Act [*see Health & Safety Code § 18861(a)* (to extent provisions of Special Occupancy Parks Act are substantially the same as existing statutory provisions relating to same subject matter, they must be construed as restatements and continuations and not as new enactments)].

The Mobilehome Parks Act continues to govern the construction, installation, maintenance, use, and occupancy of a mobilehome, manufactured home, mobilehome accessory building or structure, commercial coach, factory-built home, or permanent building in a special occupancy park [*Health & Safety Code § 18861(b)*]. The Mobilehome Parks Act applies to any portion of a special occupancy park that is also a mobilehome park, but if a portion of a park is permanently dedicated to recreational vehicles, the Special Occupancy Parks Act applies in that portion of the park [*Health & Safety Code §§ 18300.25(a), 18865.05*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-39 California Legal Forms--Transaction Guide § 39.14

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.14 Mobilehome Residency Law

[1] Scope of Regulation

The Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*] governs the landlord-tenant relationship between a mobilehome park owner or management and a mobilehome owner who leases or rents a lot, space, or site in the park. With a few exceptions, the MRL applies only to mobilehome parks in which the individual sites are rented or leased, and not to resident-owned parks [*see Civ. Code § 798.4* (definition of "mobilehome park"); § 39.10 (rental parks and resident-owned parks distinguished)]. Tenants in a mobilehome rental park are referred to under the MRL as "homeowners" [*see Civ. Code §§ 798.9, 798.12*], and that same terminology is used throughout this chapter.

Among other things, the MRL regulates rental and lease agreements, permitted fees and charges, rent and exemptions from local rent control, park rules and regulations, tenant rights, management obligations, termination of tenancies, and the sale of mobilehomes located in a park. This Legal Background briefly discusses the foregoing subjects [*see §§ 39.50-39.64*], and includes cross-references (where necessary) to other parts of the chapter for more detailed coverage.

[2] Definitions

For purposes of the MRL, a "mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit [*Civ. Code § 798.3(a)*; *see Veh. Code § 35790* (permit required before mobilehome wider than eight-and-a-half feet can be moved on highway)]. The term includes "manufactured homes" and "mobilehomes" as defined under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see Health & Safety Code §§ 18007, 18008* (definition of respective terms)]. It does not include commercial modulars [*see Health & Safety Code § 18001.8* (definition of "commercial modular")] or certain recreational vehicles [*Civ. Code § 798.3(a)*; *but see Civ. Code § 798.3(b)* (Act applies to certain recreational vehicles that are used for human habitation and that satisfy specified occupancy criteria)].

The MRL defines several other terms, and these definitions govern construction of the MRL's provisions unless

otherwise provided [*Civ. Code § 798.1*]. A "mobilehome park" is an area of land where two or more mobilehome sites are rented, or held out for rent, to accommodate mobilehomes used for human habitation [*Civ. Code § 798.4*]. A "rental agreement" is an agreement (including a lease) between the management and a homeowner establishing the terms and conditions of a park tenancy [*Civ. Code § 798.8*]. "Management" means the owner of a mobilehome park or an agent or representative authorized to act on his or her behalf in connection with matters relating to a tenancy in the park [*Civ. Code § 798.2*]. "Tenancy" is the right of a homeowner to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome, site improvements, and accessory structures for human habitation, including the use of the services and facilities of the park [*Civ. Code § 798.12*].

A "homeowner" is a person who has a tenancy in a mobilehome park under a rental agreement [*Civ. Code § 798.9*]. A "resident" is a homeowner or other person who lawfully occupies a mobilehome [*Civ. Code § 798.11*]. Under these definitions, a "homeowner" is always a resident, but a resident is not necessarily a "homeowner." For example, since a homeowner is one whose tenancy is established by rental agreement with park management [*see Civ. Code §§ 798.8, 798.9*], a person who rents or leases a mobilehome from the homeowner directly is not a homeowner but a resident for purposes of the MRL. The distinction is important since some provisions of the MRL apply only to homeowners [*see, e.g., Civ. Code §§ 798.25, 798.27* (required notices to homeowners)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.15

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.15 Floating Home Residency Law

The Floating Home Residency Law (Law) [*Civ. Code § 800 et seq.*] is a series of landlord-tenant provisions similar to those in the Mobilehome Residency Law [*Civ. Code § 798 et seq.*; *see § 39.14*], but that apply to floating homes in floating home marinas. For purposes of the law, a "floating home"is a floating structure that satisfies all of the following criteria [*Civ. Code § 800.3* (incorporation of definition contained in *Health & Safety Code § 18075.55(d)*)]:

- It is designed and built to be used, or it is modified to be used, as a stationary waterborne residential dwelling;
- It has no mode of power of its own;
- It is dependent for utilities on a continuous utility linkage to a source originating on shore; and
- It has a permanent continuous hookup to a shoreside sewage system.

A "floating home marina" is an area where five or more floating home berths are rented (or held out for rent) to accommodate floating homes [*Civ. Code § 800.4*]. The following are not considered a "floating home marina" for purposes of the Floating Home Residency Law: (1) a marina where 10 percent or fewer of the berths are leased or held out to lease to floating homes; and (2) a marina or harbor that is managed by a nonprofit organization, has rules and regulations that are set by a majority of th e berthholders, and contains berths for fewer than 25 floating homes [*Civ. Code § 800.4*].

The Law regulates the landlord-tenant relationship between the management [*see Civ. Code § 800.2* ("management" defined)] of a floating home marina and the "homeowners" [*Civ. Code § 800.306*], that is, the people who own or reside in the floating homes in the marina pursuant to a rental agreement with management [*Civ. Code § 800.6*]. For example, the Law regulates the contents of rental agreements and the manner in which they are offered to prospective

homeowners [*see Civ. Code §§ 800.20-800.26*]. It also requires management to make specified disclosures to homeowners [*see Civ. Code §§ 800.33, 800.34*], and limits management's right to enter floating homes [*see Civ. Code §§ 800.32, 800.35*]. Further, the Law contains requirements governing rules and regulations [*see Civ. Code § 800.31; see also Civ. Code § 800.30*]; abandoned floating homes [*see Civ. Code §§ 800.36, 800.37*]; fees and charges [*see Civ. Code §§ 800.40-800.50*]; homeowner meetings [*see Civ. Code §§ 800.60, 800.61*]; terminations of tenancies [*see Civ. Code §§ 800.70-800.75*]; transfers of floating homes and floating home marinas [*see Civ. Code §§ 800.80-800.91* (floating homes), 800.100 (marinas)]; actions, proceedings, and penalties [*see Civ. Code §§ 800.200, 800.201*]; and floating home cooperatives an condominiums [*see Civ. Code §§ 800.300-800.306*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMarinasObligations & RightsAdmiralty LawMarinasRegulationReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.16

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.16 Recreational Vehicle Park Occupancy Law

The Recreational Vehicle Park Occupancy Law (Law) [*Civ. Code § 799.20 et seq.*] regulates limited aspects of the relationship between the management of a recreational vehicle park on the one hand, and occupants, tenants, and residents of the park on the other. For these purposes, "management" means the owner of a recreational vehicle park or an authorized agent or representative of the owner [*Civ. Code § 799.26*]. "Occupant" means the owner or operator of a recreational vehicle who has occupied a lot in a recreational vehicle park for 30 days or less [*Civ. Code § 799.28*]. A "tenant" is the owner or operator of a recreational vehicle who has occupied a lot in a park for more than 30 consecutive days [*Civ. Code § 799.32*]. A "resident" is a tenant who has occupied a lot in a park for nine months or more [*Civ. Code § 799.31*].

The Law deals primarily with the procedures park management must follow to terminate the occupancy or tenancy rights of an occupant, tenant, or resident. The rights created under this Law are cumulative and in addition to any other legal rights the management of a park may have against a defaulting occupant, tenant, or resident, or that an occupant, tenant, or resident may have against park management [*Civ. Code § 799.40*].

Because the Law expressly does not apply to a mobilehome [*Civ. Code § 799.41*; *see Health & Safety Code § 18008* (applicable definition of "mobilehome")], additional coverage of the Law is beyond the scope of this chapter. For further discussion of the Law, see California Real Estate Law & Practice, Ch. 174, *The Mobilehome Residency Law* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingTransportation LawPrivate VehiclesGeneral Overview



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18-39 California Legal Forms--Transaction Guide § 39.17

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.17 Manufactured Housing Communities

Special requirements apply to manufactured housing communities. A manufactured housing community is any area or tract of land where two or more manufactured home lots are rented or leased, held out for rent or lease, or were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership, only to accommodate the use of (1) manufactured homes constructed pursuant to the National Manufactured Housing Construction and Safety Act of 1974 [*42 U.S.C. § 5401 et seq.*; *see Ch. 40, Mobilehomes, § 40.14*; *see also Health and Safety Code § 18801(c)* (exclusion for area or tract of land structures on which consist of certain specified manufactured homes or mobilehomes approved under State Housing Law (*Health & Safety Code § 17910 et seq.*) as alternate use)] or (2) mobilehomes containing two or more dwelling units [*Health & Safety Code § 18210.7(a)*; *but see Health & Safety Code § 18210.7(b)* (exclusion for housing for agricultural employees)]. These communities are subject to the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*; *see Health & Safety Code § 18214.1* (MPA definition of "park" includes manufactured housing communities); *see also § 39.13*]. Furthermore, an area or tract of land will not be deemed a mobilehome park if the structures on it consist of residential structures that are rented or leased, or held out for rent or lease, if those residential structures meet both of the following requirements: (1) The residential structures are manufactured homes constructed pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*] or mobilehomes containing two or more dwelling units for human habitation; and (2) those manufactured homes or mobilehomes have been approved by a city or county pursuant to *Health & Safety Code § 17951(d)* as an alternate for which the requirements are at least equivalent to the requirements prescribed in the California Building Standards Code or *Health & Safety Code § 17910 et seq.* for performance, safety, and the protection of life and health [*Health & Safety Code § 18210.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksPurchase &

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18-39 California Legal Forms--Transaction Guide §§ 39.18-39.19

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.18[Reserved]



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18-39 California Legal Forms--Transaction Guide § 39.20

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.20 General Zoning Considerations

The general police power of a local jurisdiction to subject mobilehomes and mobilehome parks to local land use restrictions and requirements is restricted by statute. For example, a city or county cannot prohibit mobilehomes in areas zoned for conventional single-family dwellings [*Gov. Code § 65852.3*], or require the average density in a new mobilehome park to be less than that permitted by the applicable zoning ordinance, plus any density bonus, for other types of affordable housing [*Health & Safety Code § 18300(h)(1)*; *see Gov. Code § 65915* (density bonus)].

A mobilehome park must be deemed a permitted land use on all land zoned for residential uses as designated by the applicable general plan [*Gov. Code § 65852.7*]. Notwithstanding the above, a local jurisdiction may require a use permit for a mobilehome park [*Gov. Code § 65852.7*; *see § 39.21*], and may establish certain zones for mobilehomes and mobilehome parks [*see Gov. Code § 65852.3*; *Health & Safety Code § 18300(g)(1)*]. A local jurisdiction may also impose certain architectural requirements and development standards on mobilehomes [*see Gov. Code § 65852.3(a)*; *Health & Safety Code § 18300(g)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawZoning & Land UseBuilding & Housing Codes



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18-39 California Legal Forms--Transaction Guide § 39.21

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.21 Conditional Use Permit

Any person may file an application for a conditional use permit for a mobilehome park with the appropriate local governing body. A public hearing, preceded by advance notice, must be held to consider the application. A staff report with recommendations and the basis for the recommendations must be included in the record of the hearing. The decision of the governing body is final. The reasons for its decision must be included in the record for the hearing [*Health & Safety Code § 18300.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseSpecial Permits & Variances



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18-39 California Legal Forms--Transaction Guide § 39.22

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.22 Foundation Systems

[1] Limitation on Local Requirements

A local government cannot require that any mobilehome located either on private property or in a mobilehome park be placed on a foundation system [*Health & Safety Code § 18551(d), (e)*; *see* Ch. 40, *Mobilehomes* (coverage of requirements for installation on foundation system)]. Also, a local government may not require, as a condition for the approval of the conversion of a rental park to a resident-owned park, that mobilehomes located there be placed on foundation systems. This limitation does not apply if the rental park to be converted has been operating as a rental park for a period of fewer than five years [*Health & Safety Code § 18551(f)*].

[2] Construction of Park to Accommodate

Any mobilehome park constructed after January 1, 1982, may be constructed in a manner that will enable mobilehomes sited in the park to be placed on a foundation system. Mobilehomes in such a park may be placed on the foundation systems subject to the installation requirements of *Health & Safety Code § 18551(b)* and to the approval of park management [*Health & Safety Code § 18551.1(a), (d)*]. Also, any mobilehome originally sited on or after January 1, 1985, in a mobilehome park constructed prior to January 1, 1982, may be placed on a foundation system, subject to compliance with applicable requirements for installation and to approval by park ownership [*Health & Safety Code § 18551.1(b), (d)*; *see Health & Safety Code § 18551(b)*; Ch. 40, *Mobilehomes* (coverage of requirements for installation on foundation system)]. Finally, notwithstanding the above, any mobilehome sited in a mobilehome park that is converted, or is in the process of being converted, to resident ownership [*see § 39.29*] on or after January 1, 1992, may be placed on a foundation system, subject to applicable statutory requirements [*see Health & Safety Code § 18551(b)*], and with the approval of the park ownership [*Health & Safety Code § 18551.1(c)*; *see Health & Safety Code § 18555*; *§ 39.29[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-39 California Legal Forms--Transaction Guide § 39.23

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.23 Restriction on Local Government's Right to Require Recreational Facilities

A city, county, or city and county may not require a new mobilehome park to include a clubhouse. Recreational facilities, recreational areas, accessory structures, or improvements may be required only to the extent that the facilities or improvements are required in other types of residential developments containing a like number of residential dwelling units [*Health & Safety Code § 18300(h)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & Transportation



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18-39 California Legal Forms--Transaction Guide § 39.23A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.23A Restriction on Local Government's Right to Require Set-Back and Separation Requirements

The Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] does not prevent local authorities from prescribing and enforcing set-back and separation requirements governing the installation of a manufactured home, mobilehome, or mobilehome accessory structure or building installed outside of a mobilehome park [*Health & Safety Code § 18300(g)*]. However, a city, county, or city and county may not require the set-back and separation requirements to be greater than those permitted by applicable ordinances for other housing forms [*Health & Safety Code § 18300(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & Transportation



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18-39 California Legal Forms--Transaction Guide § 39.24

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.24 Private Land Restrictions

Covenants, conditions, and restrictions or other management documents adopted on and after January 1, 1988, and restricting the use of real property, must not prohibit the sale, lease, or use of real property on the basis that the structure intended for occupancy on the real property is constructed in an offsite facility or factory, and subsequently moved or transported in sections or modules to the real property [*Civ. Code § 714.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsSubdivisions



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18-39 California Legal Forms--Transaction Guide § 39.25

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.25 Environmental Regulations

Compliance with the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], including the preparation of an environmental impact report (or negative declaration), is required before developing and constructing a mobilehome park [*25 Cal. Code Reg. §§ 1030, 1032(b)*; *see also § 39.29[4]* (exemption available for "converted" parks)]. The potential applicability of other environmental laws and regulations must also be considered, including the following: the California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*], federal legislation pertaining to air pollution prevention and control [*42 U.S.C. § 7403 et seq.*], and the state Water Quality Control Act [*Water Code § 13000 et seq.*]. For detailed coverage of environmental laws and regulations, see Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* , California Real Estate Law Practice, Chs. 300-304 (Matthew Bender), and California Environmental Law & Land Use Practice(Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development



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18-39 California Legal Forms--Transaction Guide § 39.26

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.26 Access Requirements for Mobilehome Park Fronting on Body of Water

An enforcement agency may not approve a park that fronts on a coastline, shoreline, river, or waterway, or on any lake or reservoir owned in whole or in part by a public agency, including the State, unless the city, county, or city and county with jurisdiction over the property has determined that reasonable public access by fee or easement from public highways exists to the body of water. Any public access route required to be provided by the park owner must be expressly designated on a map filed with the local county recorder. The map must specify the name of the park owner, particularly describe the property involved, and designate the governmental entity to which the route or routes are dedicated. The dedication must be accepted by the appropriate governmental entity within three years after the map is recorded or it is deemed abandoned [*Health & Safety Code § 18406*].

Public access through or across a park need not be provided if the city, county, or city and county with jurisdiction makes a finding that reasonable public access is otherwise available within a reasonable distance from the park. If this finding is made, it must be set forth on the recorded map required for the park [*Health & Safety Code § 18406*].

The statutory requirement for public access discussed above may not be construed to require a park owner to improve any access route or routes that are primarily for the benefit of nonresidents of the park [*Health & Safety Code § 18406*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral Overview



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18-39 California Legal Forms--Transaction Guide § 39.27

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.27 Development and Construction of New Rental Park

For any mobilehome rental park or resident-owned park that was formerly a rental park [*see Health & Safety Code § 18214(a)* ("mobilehome park" defined); *see also § 39.10* (distinction between rental and resident-owned parks)], it is unlawful under the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to do any of the following without a valid construction permit issued by the enforcement agency [*Health & Safety Code § 18500*; *see § 39.13[4]* (discussion of enforcement agency)]:

- Construct a park;
- Construct additional buildings or lots, or alter buildings, lots, or other installations, in an existing park; or
- Operate, occupy, rent, lease, sublease, let out, or hire out for occupancy any lot in a park that has been constructed, reconstructed, or altered without a required permit.

A labor camp with a valid annual permit to operate is exempt from the construction permit requirement [*Health & Safety Code § 18500*].

For any construction activity regulated under the MPA, an application for a construction permit must be completed on a form provided by the enforcement agency [*25 Cal. Code Reg. § 1032(a)*] and filed with the enforcement agency [*25 Cal. Code Reg. § 1018(a)*]. An application for new park construction must be accompanied by, among other things (1) complete plans and specifications; (2) evidence that the plans have been previously approved by the local planning commission, health and fire departments, the local department responsible for flood control and public works, and serving utilities [*Health & Safety Code § 18501(e)*; *25 Cal. Code Reg. § 1032(b)*]; and (3) the appropriate filing fees [*Health & Safety Code §§ 18502, 18503*; *25 Cal. Code Reg. § 1020.7*]. Written evidence of compliance with the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*] must also be submitted with the

application for a construction permit [*25 Cal. Code Reg. §§ 1030, 1032(b)*; *see § 39.200*]. For the form of application for obtaining a construction permit and a full discussion of the procedure for obtaining a construction permit, see *§ 39.200*. For an overview of the regulatory requirements for construction and development of a new rental park, see *§ 39.120*.

Once construction of a new mobilehome park is completed, it is unlawful to operate the mobilehome park or any part of it without a valid operating permit [*Health & Safety Code § 18500*; *see § 39.201* (form of application and requirements for operating permit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksExemptionsReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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18-39 California Legal Forms--Transaction Guide § 39.28

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.28 Development and Construction of New Mobilehome Subdivision (Resident-Owned Park)

A developer may elect to develop a mobilehome park in which the lots will be sold rather than rented or leased. This type of project is commonly referred to as a "mobilehome subdivision" or a resident-owned park. If the development is to contain commonly owned areas, it should be formed as a common interest subdivision, such as a condominium project, planned development, or stock cooperative. A development without commonly owned areas would be formed as an ordinary subdivision. In either case, the development must comply with the laws regulating subdivisions in general. These laws include the Subdivision Map Act [*Gov. Code § 66410 et seq.*; *see § 39.212* (official petition); *but see Gov. Code § 66428.1* (exemption from map requirements when at least two thirds of tenants in mobilehome park sign petition indicating intent to purchase park and convert it to resident ownership)], the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*], and the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *but see Bus. & Prof. Code § 11010.8* (exemption for purchase of mobilehome park by certain tenant-controlled nonprofit corporations)]. Those laws are discussed in detail in Ch. 30, *Subdivision Regulation* , and in Ch. 33A, *Time-Share Profits* , Ch. 33B, *Membership Camping Contracts* , Ch. 33C, *Stock Cooperatives* , Ch. 33D, *Planned Developments* , and Ch. 34, *Condominiums* . For further discussion of mobilehome subdivisions, see California Real Estate Law & Practice, Ch. 472, *Mobilehome Parks* , Part B (Matthew Bender). For detailed coverage of the Subdivision Map Act and of subdivision regulation in general, see California Environmental Law and Land Use Practice, Ch. 61, *Subdivision Regulation* (Matthew Bender).

Although the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] governs the development and construction of new mobilehome rental parks [*see § 39.27*], it does not regulate the initial construction and development of a new mobilehome park subdivision [*see Health & Safety Code § 18214* (definition of "mobilehome park" under MPA only includes rental parks and resident-owned parks that were formerly a rental park)]. Rather, these subdivisions are subject to the general subdivision laws identified above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation



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18-39 California Legal Forms--Transaction Guide § 39.29

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.29 Conversion of Rental Park to Resident-Owned Park

[1] In General

A rental park may be converted to resident ownership, that is, to a mobilehome subdivision [*see § 39.28* (types of subdivision ownership)]. Once the park has been converted, each resident (1) has a marketable equity interest in the lot in which his or her mobilehome is located, (2) usually has an ownership interest in any common areas in the park, and (3) shares in the park's control and management. The process of converting a park is regulated by the general subdivision laws described in *§ 39.28*. For conversions initiated and joined in by at least two thirds of park residents, certain waivers and exemptions from otherwise applicable laws may be available [*see, e.g., Gov. Code § 66428.1*; *see also § 39.212[1][b], [c]* (exemption from parcel map and tentative and final map requirements under Subdivision Map Act)].

[2] Subdivision Map Act Requirements and Waivers

[a] Report on Impact of Conversion on Displaced Park Residents

At the time of filing a tentative or parcel map for a subdivision to be created from the conversion of a rental mobilehome park to resident ownership, a subdivider must file a report on the impact of the conversion on the residents of the mobilehome park to be converted. The subdivider must make a copy of the report available to each resident of the mobilehome park at least 15 days before the hearing on the map [*Gov. Code § 66427.5(b), (c)*]. The subdivider must also obtain a survey of the support of residents in the mobilehome park for the proposed conversion [*Gov. Code § 66427.5(d)*], although this requirement does not apply to any application for parcel map approval for conversion of a rental mobilehome park to resident ownership approved by the local agency before January 1, 2003 [*see* 2002 Stats., ch. 1143, § 3]. The survey must be conducted in accordance with an agreement between the subdivider and the resident homeowners' association, if there is one, that is independent of the subdivider or mobilehome park owner [*Gov. Code § 66427.5(d)(2)*]. The survey must be conducted pursuant to written ballot, and each occupied mobilehome space must have one vote [*Gov. Code § 66427.5(d)(3), (4)*]. The results of the survey must be submitted to the local agency with

the filing of the tentative or parcel map, to be considered as part of the hearing on the map [*Gov. Code § 66427.5(d)(5)*].

The hearing will be conducted by the legislative body or advisory agency that is authorized by local ordinance to approve, conditionally approve, or disapprove the map [*Gov. Code § 66427.5(e)*]. The subdivider must offer each existing tenant an option to either purchase his or her condominium or subdivided unit, which is to be created by the conversion of the park to resident ownership, or to continue residency as a tenant [*Gov. Code § 66427.5(a)*]. The subdivider is required to avoid the economic displacement of all nonpurchasing residents in accordance with statutory requirements [*Gov. Code § 66427.5(f)*].

[b] Waiver for Certain Tenant-Initiated Conversions

A waiver from the requirements for a parcel map or tentative and final map under the Subdivision Map Act [*Gov. Code § 66410 et seq.*] may be sought if at least two thirds of the owners of mobilehomes who are tenants in the park sign a petition indicating their intent to purchase the park for purposes of converting it to resident ownership [*Gov. Code § 66428.1(a)*; *see § 39.212* (form of petition)]. The waiver must be granted unless certain circumstances described by statute exist. For example, the requirements will not be waived if the conversion will result in additional parcels, or if significant design or improvement requirements will be necessary because of health and safety concerns [*see Gov. Code § 66428.1(a)*; *§ 39.212* (complete list of permitted grounds for denying waiver)]. If the waiver is not granted, the appropriate map (parcel or tentative and final) must be filed, but the local governing body is limited as to the onsite and offsite improvements it may require [*see Gov. Code § 66428.1(d)-(f)*]. For further discussion of the procedure for obtaining this waiver and additional requirements imposed if the waiver is or is not granted, see *§ 39.212*.

[3] Subdivided Lands Act Exemption

As discussed in *§ 39.28*, the sale of individual units in a mobilehome subdivision is ordinarily subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*]. The subdivider of a mobilehome park that is proposed to be converted to resident ownership must, before filing a notice of intention [*see Bus. & Prof. Code § 11010*], disclose to homeowners and residents of the park, by written notice and in accordance with statutory requirements, the tentative price of the subdivided interest proposed to be sold or leased [*Bus. & Prof. Code § 11010.9*].

An exemption from the notice of intention requirement of the Subdivided Lands Act exists for the sale of a mobilehome park to certain nonprofit corporations. To qualify for this exemption, all of the following must apply [*Bus. & Prof. Code § 11010.8*]:

- A majority of the shareholders or members of the nonprofit corporation constitute a majority of the homeowners of the mobilehome park, and a majority of the members of the board of directors of the corporation are homeowners of the mobilehome park.

- All members of the corporation are residents of the mobilehome park, and members of the corporation may enter into leases with the corporation that are greater than five years in length [*see Bus. & Prof. Code § 11010.8(a)(2)* ("homeowners" and "residents" defined)].

- A permit to issues securities is obtained from the Department of Corporations [*see Corp. Code § 25113*], unless the transaction is exempt from the permit requirement [*see Bus. & Prof. Code § 11010.8(a)(3)*].

- All tenant funds for the purchase of the mobilehome park are deposited in escrow until the document transferring title of the mobilehome park to the corporation is recorded [*see Bus. & Prof. Code § 11010.8(a)(4)* (authorizing use of escrow funds to pay conversions costs under specified circumstances)].

[4] Exemption from EIR Requirements

The conversion of an existing rental mobilehome park to a resident-initiated subdivision, cooperative, or condominium project for mobilehomes is exempt from the environmental impact report and other requirements of the California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*] if the conversion will not result in an expansion of or change in the existing use of the property [*Pub. Res. Code § 21080.8*].

[5] Applicability of Mobilehome Parks Act

The Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] regulates both rental mobilehome parks and resident-owned parks that were formerly rental parks [*Health & Safety Code § 18214* (definition of "mobilehome park" expressly includes a park where two or more mobilehome lots were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership, to accommodate manufactured homes or mobilehomes used for human habitation)]. The legislative intent behind this inclusive definition is that enforcement agencies regulate converted parks in the same manner as all other mobilehome parks are regulated under the MPA [*see* Stats. 1989, ch. 721, § 2].

Under the Act, the registered owner of a mobilehome in a mobilehome park that has been converted or proposed to be converted to a resident-owned park may, if the registered owner is also a participant in the resident ownership, apply for voluntary conversion of the mobilehome to a fixture and improvement to the underlying real property without complying with the statutory requirements otherwise applicable to installing a mobilehome as a fixture or improvement to real property [*Health & Safety Code § 18555(a)*; *see Health & Safety Code §§ 18551(a), 18555(b)-(l)*; *see also Health & Safety Code § 18551.1(c)*; *§ 39.22[2]*]. For further discussion, see Ch. 40, *Mobilehomes* .

[6] State Loans for Conversions and for Residents of Converted Parks

[a] Mobilehome Park Purchase Fund

The Department of Housing and Community Development (HCD) is authorized to make loans from the Mobilehome Park Purchase Fund to resident organizations to assist residents of a rental mobilehome park to convert the park to resident ownership [*Health & Safety Code § 50783(a)*; *see Health & Safety Code §§ 50780-50786.5*; *see also Health & Safety Code § 50781(l)* ("resident organization" defined); *Health & Safety Code § 50781(m)* ("resident ownership" defined)]. There are two types of authorized loans, discussed in [b] and [c], *below*.

[b] Loans to Finance Conversions

The first type of loan may be made to resident organizations [*see Health & Safety Code § 50781(l)* ("resident organization" defined)] for the purpose of financing conversion costs [*Health & Safety Code § 50783(a)*; *see Health & Safety Code § 50781(b)* ("conversion costs" defined)]. These loans are for a short term (not more than three years), bear interest at a rate well below market, and are ordinarily (but not always) limited to an amount that does not exceed 50 percent of the approved conversion costs [*Health & Safety Code §§ 50783(b), (c), 50785, 50786(d)*].

[c] Loans to Reduce Monthly Costs to Affordable Level

[i] Purpose and Intended Recipients of Loans

The second type of loan under the Mobilehome Park Purchase Fund program may be made to the following [*Health & Safety Code § 50784(a)*]:

- Individual low-income residents of mobilehome parks that have converted to resident ownership;

- Resident organizations that have converted or plan to convert a mobilehome park to resident ownership; or

- "Qualified nonprofit housing sponsors" [*see Health & Safety Code § 50783(k)* for definition] or local public entities that plan to acquire a mobilehome park, provided that no less than 30 percent of the spaces in the park are for occupancy by manufactured homes owned by low-income residents.

The purpose of this type of loan is to reduce the monthly housing costs for low-income residents to an affordable level [*Health & Safety Code § 50784(a)*].

[ii] Loans to Finance Individual Interests

Loans provided to individual low-income residents must be for the minimum amount necessary to reduce the borrower's monthly housing costs to an affordable level. Furthermore, loans to finance individual interests in the mobilehome park are subject to the following provisions [*Health & Safety Code § 50784(e)*]:

- To the extent possible, loan amounts must not exceed 50 percent of the acquisition costs of the individual interests. However, the loan amounts may be for up to 100 percent of the acquisition costs of the individual interests when approved by HCD;

- HCD may grant approval to exceed 50 percent of the acquisition costs of the individual interests only when (1) the low-income resident has made an effort to secure additional funding from other sources and these funds are not available, and (2) it is determined that the low-income resident would be unable to purchase an individual interest without a waiver of the 50 percent financing limitation; and

- The total indebtedness of the loan plus any senior debt on individual interests may not exceed 100 percent of the value of the collateral securing the loan, plus the amount of costs incidentally, but directly, related to the acquisition.

These loans are long term (up to 30 years) and low-interest [*see Health & Safety Code § 50784(c)*]. The HCD may establish flexible repayment terms for loans of this type if the terms are necessary to reduce the monthly housing costs for low-income residents to an affordable level, and do not represent an unacceptable risk to the security of the Fund. Flexible repayment terms may include, but are not limited to, graduated payment schedules with negative amortization [*Health & Safety Code § 50784(d)*].

[iii] Loans to Entities

Loans provided to resident organizations, qualified nonprofit housing sponsors, or local public entities must be for the minimum amount necessary to reduce the monthly housing costs of low-income residents to an affordable level. These loans are also subject to all of the following provisions [*Health & Safety Code § 50784(f)*]:

- To the extent possible, loan amounts must not exceed 50 percent of the conversion costs attributable to low-income spaces. However, the loan amounts may be for up to 95 percent of the conversion costs attributable to low-income spaces when approved by HCD;

- The HCD may grant approval to exceed 50 percent of the conversion costs attributable to low-income spaces only when it is demonstrated that (1) the applicant has made an effort to secure additional funds from other sources and these funds are not available, and (2) the project would not be feasible as determined by HCD without a waiver of the 50 percent financing limitation; and

- The total secured debt in a superior position to HCD's loan plus the HCD's loan must not exceed the value of the collateral securing the loan plus the amount of costs incidentally, but directly, related to the acquisition and, if applicable, rehabilitation of the park.

[iv] Restrictions on Loans to Individuals and Entities

Funds from loans to individuals [*see* [ii], *above*] or entities [*see* [iii], *above*] may not be used for any of the following purposes [*Health & Safety Code § 50784(g)*]:

- To assist residents who are not of low income;

- To reduce monthly housing costs for low-income residents to less than 30 percent of their monthly income; or

- To facilitate the purchase of a park by a qualified nonprofit corporation or local public entity from a public entity that had acquired the park before the commitment of the loan.

[v] Purchase of Mobilehome Park by Local Public Entity

Any mobilehome park purchased by a local public entity with this type of loan must be transferred to a nonprofit housing sponsor or resident organization that has converted, or plans to convert, the park to resident ownership no later than three years from the date of loan closing, with all obligations under the loan assumed by the nonprofit organization or resident organization [*Health & Safety Code § 50784(b)(1)*].

If a local public entity has made a good faith effort, but has not been able, to transfer the park by the end of the three-year period, the entity may apply to HCD for an additional three-year extension. On a determination by HCD that the local public entity has made a good faith effort to transfer the park within the three-year period, it will have an additional three years from the expiration date of the first three-year period to consummate the transfer. The three-year extension may only be granted once by HCD for each loan to a local public entity [*Health & Safety Code § 50784(b)(2)*]. When a local public entity fails to make a good faith effort to transfer the park within the first three-year period, as determined by HCD, or fails to transfer the park by the expiration date of the extended three-year period, it must repay the loan in full to HCD [*Health & Safety Code § 50784(b)(3)*].

[vi] Relocation of Mobilehome Park

Funds provided under this program may be used to finance the costs of relocating a mobilehome park to a more suitable site within the same jurisdiction if HCD determines that the cost of the relocation, including any and all relocation costs to the affected households, is a more prudent expenditure of funds than the costs of needed or repetitive repairs to the existing park. However, these funds may not be used to relieve a park owner of any responsibility for covering the costs of mitigating the impacts of a park closure as may be provided for by local ordinance or under *Gov. Code §§ 65863.7* and *66427.4* [*Health & Safety Code § 50784(h)*].

[d] Eligibility Criteria for Loans

In determining the eligibility for and amount of loans under [b] and [c], *above*, HCD must take into consideration, among other factors, all of the following [*Health & Safety Code § 50785(a)*]:

- The reasonableness of the conversion costs relating to repairs, rehabilitation, construction, or other costs;

- Any administrative and security factors affecting HCD's program operation and administration;

- Whether or not the project complements the implementation of a local housing program to preserve or increase the supply of housing for persons and families of low or moderate income;

- Whether or not state funds are utilized in the most efficient and effective manner; and

- In the case of a loan to a qualified nonprofit housing sponsor or to a local public entity, evidence of resident participation in the conversion and management of the park, in the form of either resident participation on the board of directors of the entity that acquires ownership of the park or through a permanent resident advisory board.

To the extent consistent with requests for assistance, HCD must allocate funds available under this program throughout California in accordance with identified housing needs, including seeking to allocate not less than 20 percent to rural areas [*Health & Safety Code § 50785(b)*].

When a city, county, or other local governmental entity has acquired a mobilehome park for the purpose of converting the park to resident ownership, and HCD has entered into a binding agreement for the commitment of funds to the project, HCD may not require that more than a simple majority of households residing in the park actually purchase, or have opened escrow to purchase, interests or spaces in the park as a condition of disbursement of funds for loans made to qualified individual households under [c], *above* [*Health & Safety Code § 50786.5*].

[e] Administration of Loan Programs

A loan of either type described under [b] or [c], *above*, must be secured by the best available security [*Health & Safety Code § 50786(b)*]. Also, no financing will be provided unless, among other things, at least two thirds of the households residing in the mobilehome park support the plans for acquisition and conversion of the park [*Health & Safety Code § 50786(d)*]. HCD is required by statute to promulgate rules and regulations for the administration and implementation of these statutory loan provisions [*Health & Safety Code § 50786(a)*].

[7] Exemptions From Property Tax Reassessment

A transfer of a mobilehome park to a nonprofit corporation, stock cooperative corporation, limited equity stock cooperative, or other entity formed by the tenants of the park for the purpose of purchasing it, is not considered a change in ownership for property tax reassessment purposes if the individual tenants who were renting at least 51 percent of the spaces in the park before the transfer participate in the transaction through the ownership of an aggregate of at least 51 percent of the voting stock of, or other ownership or membership interests in, the acquiring entity [*Rev. & Tax. Code § 62.1(a)(1), (c)* (generally applicable, but not necessarily limited, to transfers occurring on and after Jan. 1, 1985)]. Similarly, a transfer of rental spaces in a mobilehome park to the individual tenants of the rental spaces is not considered a change of ownership if (1) at least 51 percent of the rental spaces are purchased by individual tenants who rented their spaces before the purchase and (2) the individual tenants of these spaces form, within one year after the first purchase of a rental space by a tenant, a resident organization [*see Health & Safety Code § 50781(l)*] to operate and maintain the park [*Rev. & Tax. Code § 62.1(a)(2)* (applicable to transfers occurring on and after Jan. 1, 1985)]. Finally, a related exception to the change in ownership laws applies to a transfer of a mobilehome park to a nonprofit corporation, stock cooperative corporation, tenant-in-common ownership group, or other entity (including a governmental entity) if, within 18 months after the transfer, a second transfer is made that satisfies either of the exceptions discussed above [*see Rev. & Tax. Code § 62.2*]. For further discussion of these exceptions, see *§ 39.201[1][f][ii]*.

[8] Right of Qualified Homeowners' Organization to Receive Prior Notice of Park Owner's Intention to Sell Park

If a homeowners' organization is formed for the purpose of purchasing a rental park from the owner and converting it to resident ownership, that organization is entitled, under certain circumstances, to receive notice from the park owner of the owner's intention to sell the park. The owner must provide the notice before he or she lists the park for sale or offers to sell it to a third party. The organization is only entitled to this prior notice from the park owner [*see § 39.211* (form of notice by park owner)] if, among other requirements, it notifies the owner of its existence and of its interest in purchasing the park before the time the owner lists it for sale or offers it for sale to a third party [*see § 39.210* (form of notice to park owner and other requirements)]. Also, the resident organization is not entitled to notice for certain exempt sales or transfers by the park owner [*see Civ. Code § 798.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksExemptionsReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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18-39 California Legal Forms--Transaction Guide §§ 39.30-39.39

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.30[Reserved]



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C. Mobilehome Park Operation

18-39 California Legal Forms--Transaction Guide § 39.40

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.40 Operating Permit for Park

[1] Required Permits and Posting Requirement

It is unlawful to operate a mobilehome park [*see Health & Safety Code § 18214* ("mobilehome park" defined)] without possessing a valid operating permit issued by the enforcement agency [*Health & Safety Code § 18500(d)*; *25 Cal. Code Reg. § 1006.5*; *see § 39.13[4]* (discussion of enforcement agency)]. The permit must be posted in a conspicuous place in the park [*Health & Safety Code § 18508*]. It is also unlawful to operate, occupy, rent, lease, sublease, let out, or hire out for occupancy any lot in a park that has been constructed, reconstructed, or altered without having obtained a construction permit [*Health & Safety Code § 18500(c)*; *see § 39.200*].

[2] Issuance of Permit

Permits to operate must be issued by the enforcement agency. A copy of each operating permit must be forwarded to the Department of Housing and Community Development (HCD) [*Health & Safety Code § 18505*].

For new construction, a permit to operate is issued by HCD following notification by the local enforcement agency that the construction has been completed for a new park or for additional lots in an existing park. By approving the application for a permit to operate [*see § 39.201*], the enforcement agency authorizes occupancy of the newly constructed facilities [*Health & Safety Code § 18505*]. After approval by the local enforcement agency, one copy of the permit application must be provided to the applicant and one copy must be forwarded to HCD [*Health & Safety Code § 18505*].

For existing parks, permits to operate are issued by the enforcement agency on an annual basis [*Health & Safety Code § 18506*]. A completed permit application and an operating fee must be submitted each year to renew the permit [*Health & Safety Code § 18506*; *see Health & Safety Code §§ 18502-18504* (fees)]. A permit to operate will not be issued to a park that has had its previous operating permit suspended until the violations which were the basis for the suspension have been corrected [*Health & Safety Code § 18506*].

If there has been a change in the name, ownership, or possession of the park, the enforcement agency will issue an amended permit to operate after it receives notice of the change and the appropriate fee [*Health & Safety Code § 18507(a)*; *see §§ 39.41, 39.201[1][f]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawZoning & Land UseGeneral Overview



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18-39 California Legal Forms--Transaction Guide § 39.41

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.41 Change of Park's Name, Ownership, or Possession

The enforcement agency must be notified in writing of any change in a park's name or in its ownership or possession. The new owner or operator of the park must give the notice within 30 days of the event causing the change and must also submit a fee [*Health & Safety Code § 18507(a)*; *25 Cal. Code Reg. § 1014(a)*; *see also Health & Safety Code § 18502* (fees); *25 Cal. Code Reg. § 1014(b)* (fees)]. Changes in information must include [*25 Cal. Code Reg. § 1014(a)*]:

- Change of name, mailing address, or ownership; or
- Change in the number of lots resulting from the sale, lease, removal, construction, or alteration of existing lots or facilities; or
- Change of conditional uses specified on the annual permit to operate; or
- When a snow load roof maintenance program status is changed pursuant to *25 Cal. Code Reg. § 1338*.

The enforcement agency will then record the change of ownership or possession and issue an amended operating permit [*Health & Safety Code § 18507(a)*; *see § 39.201* (application for operating permit)]. If the change occurs while the park is being built and construction will deviate from previously approved plans, a new application for a construction permit must be submitted, together with revised plans and required fees [*Health & Safety Code § 18507(b)*; *see § 39.200* (application for construction permit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawZoning & Land UseGeneral

Overview



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18-39 California Legal Forms--Transaction Guide § 39.42

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.42 General Operating and Management Duties

Duties for operating a mobilehome park are imposed both by the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*; *see § 39.13*] and the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*; *see § 39.14*]. For example, the MPA requires that mobilehome parks be lighted from sunset to sunrise [*Health & Safety Code § 18602*], and that a person be available in the park who is responsible for its operation and maintenance [*see Health & Safety Code § 18603*]. In every park with 50 or more units, this responsible person must reside in the park and must have knowledge of emergency procedures relative to utility systems and common facilities under the ownership and control of the owner of the park [*Health & Safety Code § 18603*].

Management responsibilities under the MRL are summarized in §§ 39.50-39.62. A procedural guide for operating a mobilehome park, which includes coverage of management's responsibilities toward park tenants, is set forth in *§ 39.121*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseGeneral Overview



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18-39 California Legal Forms--Transaction Guide § 39.43

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.43 Unlawful Mobilehome Occupancy Uses

It is unlawful for any person to occupy (or to cause or permit to be used for occupancy) any of the following [*Health & Safety Code § 18550*]:

- Any manufactured home, mobilehome, or recreational vehicle supplied with fuel, gas, water, electricity, or sewage connections, unless the connections and installations conform to regulations of the Department of Housing and Community Development (HCD).

- Any manufactured home, mobilehome, or recreational vehicle that is permanently attached with underpinning or foundation to the ground, except for a manufactured home or mobilehome that (i) bears an HCD insignia or federal label [*see* Ch. 40, *Mobilehomes*], and (ii) is installed on a foundation system in accordance with statutory requirements [*see, e.g., Health & Safety Code § 18551*].

- Any manufactured home or mobilehome that does not conform to HCD registration requirements [*see* Ch. 40, *Mobilehomes*].

- Any manufactured home, mobilehome, or recreational vehicle in an unsafe or unsanitary condition.

- Any manufactured home, mobilehome, or recreational vehicle that is structurally unsound and does not protect its occupants against the elements.

The provisions listed above apply to any manufactured home or mobilehome, wherever located, not only to those located in parks. The provisions also apply to recreational vehicles located in mobilehome parks [*Health & Safety Code § 18550*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseBuilding & Housing Codes



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18-39 California Legal Forms--Transaction Guide § 39.44

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.44 Governmental Inspection of Parks

[1] Authorized and Required Inspections

The enforcement agency for the jurisdiction in which a park is located [*see § 39.13[4]* ("enforcement agency" defined)] is empowered to enter private property to determine whether a "park" subject to the Mobilehome Parks Act (MPA) [*see Health & Safety Code § 18214.1*; *see also § 39.13[3][c]* ("mobilehome park" defined)] exists on the property [*Health & Safety Code § 18400(b)*]. When a park does exist, the enforcement agency may enter the park and inspect it and all of its accommodations, equipment, or paraphernalia in order to enforce the MPA and its implementing regulations [*Health & Safety Code § 18400(b)*; *see § 39.13[2]* (regulatory scope of MPA)]. The enforcement agency must enter and inspect mobilehome parks to ensure compliance with the MPA and its implementing regulations [*Health & Safety Code § 18400.1(a)*, (g) (repealed as of Jan. 1, 2012, unless that date is deleted or extended by statute)].

[2] Violations

[a] Issuance of Notice of Violation

If the enforcement agency determines, as a result of its inspection, that a mobilehome park, mobilehome, accessory building or structure, or lot is in violation of the MPA or rules or regulations adopted under the MPA, the enforcement agency must issue a notice of violation [*Health & Safety Code § 18400.1(a)*, (g) (repealed as of Jan. 1, 2012, unless that date is deleted or extended by statute); *see Health & Safety Code §§ 18420-18424* (required procedure for notices of violation; repealed as of January 1, 2012, unless that date is deleted or extended by statute)].

As a general rule, the notice must be issued within 10 days after the agency completes the inspection and makes the determination that a violation exists [*Health & Safety Code § 18420(a)(1), (b)(1)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. However, if the violation constitutes an imminent threat to health and safety, it must be issued immediately [*Health & Safety Code § 18420(a)(2), (b)(2)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. The violation must be corrected by (1) the owner or operator of the

park, in the case of a violation by the park [*Health & Safety Code § 18420(a)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)], or (2) the registered owner of the mobilehome, if the mobilehome, an accessory building or structure, or the lot is in violation of applicable laws [*Health & Safety Code § 18420(b)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)].

[b] Request for Informal Conference

If the holder of the permit to operate the park or the registered owner of the mobilehome disputes the agency's determination or certain related matters, he or she may request an informal conference with the agency. The conference, any subsequent hearings, and any appeals of the agency's decision must be conducted in accordance with procedures prescribed by HCD [*Health & Safety Code § 18421*; *see Health & Safety Code § 18423* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)].

[c] Fines and Penalties

The enforcement agent may order that nuisances in a park be abated [*see Health & Safety Code §§ 18402*, *18403*], and that violations of the MPA be corrected [*see Health & Safety Code §§ 18401*, *18404*]. Willful violation of the MPA or its regulations is a misdemeanor, punishable by fine or imprisonment, or both. Civil penalties for each violation or for each day of a continuing violation may also be imposed for willful violations. Finally, the park's permit to operate [*see § 39.201*] may be suspended or revoked if the holder of the permit willfully violates any provision of the MPA [*Health & Safety Code § 18700*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseBuilding & Housing Codes



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18-39 California Legal Forms--Transaction Guide §§ 39.45-39.49

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.45[Reserved]



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18-39 California Legal Forms--Transaction Guide § 39.50

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.50 Notice of Zoning and Lease Terms

Prior to commencement of a tenancy in a mobilehome park, management must give the prospective tenant (referred to as a "homeowner" under the Mobilehome Residency Law (MLR)) written notice of certain matters relating to the park's right to operate [*see § 39.230* (form of notice)]. Specifically, the notice must describe the nature of the zoning or use permit under which the mobilehome park operates, and include any renewal or expiration dates applicable to the permit. Also, if management leases rather than owns all or any portion of the park from a third party, the notice must indicate the duration of the lease [*Civ. Code § 798.27(a)*].

After a homeowner becomes a resident of the park, he or she must be given written notice of any change that occurs concerning (1) the zoning or use permit under which the park operates or (2) a lease under which the management is a lessee. The notice must be given within 30 days of the change [*Civ. Code § 798.27(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.51

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.51 Disclosure of Identity of Park Owner and Mobilehome Ombudsman

On the request of a homeowner, the management of a mobilehome park must disclose, in writing, the name, business address, and business telephone number of the park owner [*Civ. Code § 798.28*]. Management must also post a sign containing the name, address, and phone number of the state Mobilehome Ombudsman [*Civ. Code § 798.29*; *see Health & Safety Code §§ 18150-18153*, *18253.5(a)*; *see also § 39.12*]. The sign used must be one provided by the Department of Housing and Community Development (HCD), and it must be posted in the mobilehome park clubhouse or in another conspicuous public place within the park [*Civ. Code § 798.29*; *Health & Safety Code § 18253.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development



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18-39 California Legal Forms--Transaction Guide § 39.52

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.52 Rental Agreements

[1] Definitions; Required Contents of Agreement

Under the Mobilehome Residency Law (MRL), a "rental agreement" is an agreement between park management and the homeowner establishing the terms and conditions of a mobilehome park tenancy. A lease is a rental agreement for these purposes [*Civ. Code § 798.8*]. A rental agreement must contain certain provisions required by statute [*see Civ. Code § 798.15*]. For a discussion of these mandatory provisions and a form of lease agreement, see *§ 39.220*.

A copy of the text of the MRL must be attached as an exhibit to, and incorporated by reference into, the rental agreement. Each year thereafter during a homeowner's tenancy, park management must provide the homeowner with an updated version of the MRL that reflects significant legislative changes made during the previous year [*Civ. Code § 798.15(c)*].

A rental agreement for a mobilehome may not contain any provision under which the homeowner waives his or her rights under the MRL. Any waiver of this type is deemed contrary to public policy and void [*Civ. Code §§ 798.19, 798.77*]. In addition, rental agreements entered into or renewed on and after January 1, 2006, may not include a clause, rule, regulation, or any other provision that grants to management the right of first refusal to purchase a homeowner's mobilehome that is in the park and offered for sale to a third party pursuant to *Civ. Code § 798.70 et seq.* [*Civ. Code § 798.19.5*]. However, this does not preclude a separate agreement for separate consideration granting the park owner or management a right of first refusal to purchase the homeowner's mobilehome [*Civ. Code § 798.19.5*].

[2] Rent Control

As a general rule, a mobilehome park rental agreement is exempt from any local rent control measure if the agreement and the manner in which it is offered to the homeowner satisfy certain criteria [*see Civ. Code § 798.17*]. For example, an "exempt agreement" must have a term exceeding 12 months and must contain a provision regarding its exempt status. Further, it must be entered into between management and a homeowner who will use the mobilehome as his or

her personal and actual residence. The prospective homeowner must be given the opportunity to accept or reject the proffered agreement for at least 30 days from the time it is first presented, and must have the right to void the agreement within 72 hours of executing it [*Civ. Code § 798.17(b)*]. For further discussion of the requirements for an exempt rental agreement, see *§§ 39.220* (rental agreement) and *39.231* (required notice of homeowner rights).

Another exemption from rent control exists for mobilehomes that are not the principal residence of the homeowner and that are not rented to another party [*see Civ. Code § 798.21*]. An additional exemption from local rent control measures applies to new construction in a mobilehome park [*Civ. Code § 798.45*]. For these purposes, "new construction" means any newly constructed spaces initially held out for rent after January 1, 1990 [*Civ. Code § 798.7*].

When a local rent control measure applies to a mobilehome park, the local agency that administers the measure must permit the park management to separately charge a homeowner for certain fees, assessments, or other charges imposed on the homeowner's space in the park (1) by the local jurisdiction or (2) pursuant to any state-mandated or locally mandated housing program authorized by the Health and Safety Code [*see Civ. Code § 798.49(a)*; *see also Civ. Code § 798.49(b)* (decreased or eliminated fees), (d) (exceptions)]. The amount of any such fee, assessment, or other charge must be separately stated on any billing to the homeowner [*see Civ. Code § 798.49(c), (e)*]. Any change in the amount of the fee, assessment, or other charge must be considered when any rental adjustment is made under the local measure [*Civ. Code § 798.49(c)*].

Local rental ordinances applicable to mobilehome parks have been challenged on constitutional grounds. In *Cashman v. City of Cotati* [*Cashman v. City of Cotati (9th Cir. 2004) 374 F.3d 887, 898-899]* , the Ninth Circuit originally held that a mobilehome rent control ordinance violated the *takings clause of the Fifth Amendment* because it did not provide for a mechanism to prevent the capture of a premium by the owner on the sale of a mobilehome, and therefore did not substantially advance the city's interest in maintaining affordable housing. However, the United States Supreme Court subsequently held that the test set forth in *Agins v. City of Tiburon (1980) 447 U.S. 255, 259-263, 100 S. Ct. 2138, 65 L. Ed. 2d 106* (government regulation of private property effects a taking if it does not "substantially advance legitimate state interests") is inapplicable in takings cases [*Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2083, 161 L. Ed. 2d 876*]. Consequently, the Ninth Circuit in *Cashman* granted rehearing, withdrew its opinion, and issued a new opinion affirming the district court's judgment in favor of the city [*Cashman v. City of Cotati (9th Cir. 2005) 415 F.3d 1027]* . For a general discussion of the validity of rent control ordinances applicable to mobilehome parks, including questions of constitutional validity, see California Real Estate Law and Practice, Ch. 174, *The Mobilehome Residency Law* (Matthew Bender).

[3] Security Deposits

A security deposit may be required by management only on or before a homeowner's initial occupancy in the park [*see § 39.220[2],* P 4 (security deposit provision for rental agreement)]. The amount charged at that time may not exceed an amount equal to two months' rent, in addition to any rent for the first month [*Civ. Code § 798.39(a)*]. With regard to security deposits collected on or after January 1, 1989, management must, in response to a written request from the homeowner, refund the deposit (within the time specified by statute) following the earlier of (1) the resale of the mobilehome or (2) the prompt payment by the homeowner, for any 12 consecutive months after the payment of the deposit and within five days of applicable due dates, of all rent, utilities, and reasonable service charges [*Civ. Code § 798.39(b)*].

With regard to security deposits collected before January 1, 1989, they must be refunded to the homeowner on the extension or renewal of the rental agreement or lease between the homeowner and the management, and on receipt of a written request from the homeowner. To be eligible for the refund, the homeowner must have paid, within five days of the due date, all of the rent, utilities, and reasonable service charges for the 12-consecutive-month period preceding the receipt of the written request. The management must refund the security deposit within 60 days [*Civ. Code § 798.39(c)*]. With regard to any security deposits collected before January 1, 1989, and not otherwise disbursed, in the event the

mobilehome park is sold or transferred to any other party or entity, the selling park owner must deposit in escrow an amount equal to all security deposits held by the park owner. The seller's escrow instructions must direct that on the close of escrow the security deposits deposited in escrow that were held by the selling park owner (including the escrow period) for 12 months or more must be disbursed to the persons who paid the deposits and who promptly paid (within five days of their due date) all rent, utilities, and reasonable service charges for the 12-month period preceding the close of escrow [*Civ. Code § 798.39(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.53

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.53 Housing Discrimination

[1] General Prohibitions

The general laws prohibiting discrimination in housing apply to the sale and rental of mobilehomes [*see Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 376-378, 256 Cal. Rptr. 750, 769 P.2d 932* ; *see also 42 U.S.C. § 3601 et seq.* (Fair Housing Act); *Civ. Code § 51 et seq.* (Unruh Civil Rights Act)]. For complete coverage of these laws, see California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination* (Matthew Bender). A limited exception under these laws exists for classifications based on age or familial status [*see § 39.53[2]*].

[2] Age or Familial Status Classifications

[a] General Rule for Senior Parks

Management of a mobilehome park may require that a prospective purchaser comply with any rule or regulation limiting residency based on age requirements for housing for older persons, provided that the rule or regulation complies with specified provisions of the Fair Housing Act [*42 U.S.C. § 3601 et seq.*] that prohibit discrimination based on "familial status" (among other classifications) [*Civ. Code § 798.76*; *see 42 U.S.C. § 3605(a)*]. "Familial status" essentially means families that include one or more children under the age of 18 [*see 42 U.S.C. § 3602(k)*]. The general effect of this federal prohibition is that mobilehome parks may not adopt rules that exclude families with children [*see Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 375, 256 Cal. Rptr. 750, 769 P.2d 932* (decided under former version of *Civ. Code § 798.76*)]. However, the Fair Housing Act exempts "housing for older persons" from the prohibition against discrimination based on familial status [*42 U.S.C. § 3607(b)(1)*]. "Housing for older persons" means, among other things, either of the following: (1) housing intended for, and solely occupied by, persons 62 years of age or older; or (2) housing intended and operated for occupancy by persons 55 years of age or older and which has at least 80 percent of its occupied units occupied by at least one person who is 55 years of age or older, provided the housing meets certain criteria [*42 U.S.C. § 3607(b)(2), (3)*; *see 42 U.S.C. § 3607(b)(2)(C)*]. The effect of this federal exemption on state law is that mobilehome parks may not prohibit children under 18 who live with their parents from living in the

park unless the federal "housing for older persons" requirements are satisfied [*see Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 375, 391, 256 Cal. Rptr. 750, 769 P.2d 932* ; *Colony Cove Associates v. Brown (1989) 220 Cal. App. 3d 195, 201, 269 Cal. Rptr. 234* (restriction against residents under age 55 held enforceable under state and federal law when mobilehome park was adapted for older persons)].

[b] Homeowner's Relatives Requiring Live-In Care

A senior homeowner (one who is 55 years of age or older) who lives in a mobilehome park that has implemented rules or regulations limiting residency based on age requirements for housing for older persons may share his or her mobilehome with any person over 18 years of age if that person is a parent, sibling, child, or grandchild of the senior homeowner and requires live-in health care, live-in supportive care, or supervision pursuant to a written treatment plan prepared by a physician and surgeon. Management may not charge a fee for the person. Any agreement between the senior homeowner and the person will not change the terms and conditions of the rental agreement between management and the senior homeowner. Unless otherwise agreed upon, park management is not required to manage, supervise, or provide for the person's care during his or her stay in the mobilehome park. The person has no rights of tenancy in the park, and must comply with the rules and regulations of the mobilehome park. A violation of the mobilehome park rules and regulations by the person will be deemed a violation of the rules and regulations by the homeowner pursuant to subdivision *Civ. Code § 798.56(d)* [*Civ. Code § 798.34(d)*; *see Civ. Code § 799.9(b)* (similar requirements for resident-owned mobilehome parks)].

[3] Private Club Membership

Membership in a private club or organization may be a condition for tenancy in a mobilehome park. However, when it is a condition, the membership may not be denied on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or source of income [Civ. Code § 798.20(a); *see* Civ. Code § 798.20(b) (senior housing exceptions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.54 Park Rules and Regulations

[1] Contents; Rules and Regulations Apply to Owners and Employees

A rental agreement for space in a mobilehome park must contain, in addition to other required matters [*see § 39.220*], the rules and regulations for the park [*Civ. Code § 798.15(b)*]. These rules and regulations typically address tenant conduct in and use of the common facilities for the park. They also usually contain provisions relating to the tenant's use of his or her particular rented space in the park, at least to the extent these matters are not included in the tenant's rental agreement. For an illustrative set of rules and regulations for a mobilehome park and a discussion of relevant provisions of the MRL, see *§ 39.221*.

The park's owner and any park employee are subject to and must comply with all park rules and regulations to the same extent as residents and guests [*Civ. Code § 798.23(a)*]. However, this requirement does not apply to any rule or regulation that governs the age of any resident or guest or to acts of an owner or employee that are undertaken to fulfill a park owner's maintenance, management, and business operation responsibilities [*Civ. Code § 798.23(b)*].

Any rule or regulation of a mobilehome park that (1) is unilaterally adopted by the management, (2) is implemented without the consent of the homeowners, and (3) by its terms purports to deny homeowners their right to a trial by jury or which would mandate binding arbitration of any dispute between management and homeowners is void and unenforceable [*Civ. Code § 798.25*.5].

[2] Restrictions on Fees for Enforcement

As a general rule, park management may not charge a homeowner a fee for the enforcement of any of the rules and regulations of the park [*Civ. Code § 798.36*]. An exception exists for a situation in which a homeowner fails, after notice from management [*see § 39.237* (form of notice)], to maintain his or her rented space as required under a rental or lease agreement and park management is required to perform the necessary maintenance [*Civ. Code § 798.15(g)*]. Management may also charge a reasonable fee if, in good faith, it (1) has removed and stored a homeowner's or

resident's personal property in order to bring the premises into compliance with park rules and regulations or with the Mobilehome Parks Act or its implementing regulations, and (2) has complied with notice requirements [*Civ. Code § 798.36(a), (b)*; *see § 39.237A* (form of notice)].

[3] Amendments

When management proposes an amendment to the park's rules and regulations, the management must meet and consult with the homeowners in the park, their representatives, or both. Written notice setting forth the proposed amendment and the date, time, and location of the meeting must be given to all the homeowners in the park 10 days or more before the meeting [*Civ. Code § 798.25(a)*; *see § 39.234A* (management's notice of meeting to amend rules and regulations)]. Following the meeting and consultation with the homeowners, the noticed amendment to the park rules and regulations may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent on written notice of not less than six months. Any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*]. However, regulations applicable to recreational facilities may be amended without homeowner consent on written notice of not less than 60 days [*Civ. Code § 798.25(b)*; *see § 39.235* (management's notice of amendment to rules and regulations)]. Written notice to a homeowner whose tenancy commences within the required period of notice of a proposed amendment to the park's rules and regulations constitutes compliance when the notice is given before the inception of the tenancy [*Civ. Code § 798.25(c)*].

When management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation, it may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

[4] Remedies for Homeowner Violations

Three remedies are available to management under the MRL for homeowner violations of the park rules and regulations. Under the first, management may terminate a homeowner's lease or rental agreement [*Civ. Code § 798.56(d)*]. Prior notice of the alleged violation and a short time to cure must be given to the offending homeowner before terminating the tenancy [*Civ. Code § 798.56(d)*; *see § 39.238* (form of and requirements for termination notice)].

Alternatively, or in addition to the right to terminate, management may obtain an injunction against continuing or recurring violations of mobilehome park rules [*see Civ. Code § 798.88*]. The procedure for obtaining the injunction is prescribed by statute [*Civ. Code § 798.88*; *see § 39.121[6]* (required procedure)].

Substantial violation of a mobilehome park rule is also a public nuisance [*Civ. Code § 798.87(b)*; *see Civ. Code §§ 3490-3496* (public nuisances and remedies)]. The nuisance may be remedied only by a civil action or abatement, and not by criminal prosecution (which is ordinarily available as a remedy for a public nuisance) [*Civ. Code § 798.87(b)*; *see Civ. Code § 3491* (available relief for public nuisance includes criminal prosecution)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.55 Homeowner Communication and Meetings

The right of homeowners and residents of mobilehome parks to peacefully assemble and freely communicate with one another and with others with regard to mobilehome living or for social or educational purposes is protected by statute [*see Civ. Code §§ 798.50-798.52*; *see § 39.121[7]*]. Homeowners are also entitled to meet with park management on certain matters that affect the park, such as amendments to park rules and regulations and standards for maintaining physical improvements in the park [*see Civ. Code §§ 798.25, 798.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART II. LEGAL BACKGROUND
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18-39 California Legal Forms--Transaction Guide § 39.56

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.56 Restrictions on Fees Charged to Homeowners

Homeowners may be charged fees only for rent, utilities, and services actually rendered [*Civ. Code § 798.31*]. However, there is a split of authority on the question of whether an assessment or rent "pass-through" for capital improvements is a prohibited fee under *Civ. Code § 798.31* or is a permitted form of "rent." Interpretation of local rent control ordinances has been determinative in some of these cases [*see Robinson v. City of Yucaipa (1994) 28 Cal. App. 4th 1506, 1513-1515, 34 Cal. Rptr. 2d 291* (permitted form of rent); *Karrin v. Ocean-Aire Mobile Home Estates (1991) 1 Cal. App. 4th 1066, 1070-1073, 2 Cal. Rptr. 2d 581* (prohibited fee)]. In other areas with no applicable rent control ordinances, the language of the lease itself has been determinative [*see Vance v. Villa Park Mobilehome Estates (1995) 36 Cal. App. 4th 698, 705-706, 42 Cal. Rptr. 2d 723* (permitted form of rent); *Dills v. Redwoods Associates, Ltd. (1994) 28 Cal. App. 4th 888, 893, 33 Cal. Rptr. 2d 838* (permitted form of rent)].

In addition to the general rule under *Civ. Code § 798.31*, the MRL contains restrictions on specific types of fees, for example, fees for guests and pets. The specific fee restrictions of the MRL are discussed in *§ 39.121[5]*. Ninety days' prior notice is required before management may increase rent under a rental agreement [*Civ. Code § 798.30*; *see § 39.232* (form of notice for rent increase)] or impose fees for services not contained in a homeowner's rental agreement [*Civ. Code § 798.32*; *see § 39.233* (form of notice for imposing fees for new services)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
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18-39 California Legal Forms--Transaction Guide § 39.57

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.57 Management's Duty to Maintain Park's Common Facilities and to Provide Promised Services

Park management must provide and maintain physical improvements in the park's common facilities in good working order and condition [*Civ. Code § 798.15(d)(1)*]. With regard to a sudden or unforeseeable breakdown or deterioration of these conditions, management has a "reasonable period of time" to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have known of the breakdown or deterioration. A reasonable period of time means as soon as possible in situations affecting a health or safety condition, and must not exceed 30 days in any other case except when exigent circumstances justify a delay [*Civ. Code § 798.15(d)(2)*].

Management must also list in a homeowner's rental agreement, the specific services that will be provided to the homeowner during his or her tenancy, and the fee, if any, to be charged to the homeowner [*Civ. Code § 798.15(f)*].

Except for personal injury or wrongful death actions, a homeowner may not commence an action based on the management's failure to maintain the physical improvements in the common facilities or on an alleged reduction of service unless management is given at least 30 days' prior written notice of the intention to commence the action [*Civ. Code § 798.84(a), (f)*]. The notice must contain certain information and be served in the manner required by statute [*see Civ. Code § 798.84(b), (c)*]. A homeowner is not required to give the notice before filing suit if the management has been notified of the alleged failure to maintain or the alleged reduction of services by a state or local agency [*Civ. Code § 798.84(d)*].

The substantial failure of park management to provide and maintain physical improvements in the common facilities in good working order and condition is deemed a public nuisance [*Civ. Code § 798.87(a)*; *see Civ. Code §§ 3490-3496* (public nuisances and remedies)]. The nuisance may be remedied by a civil action or abatement, but not by criminal prosecution (which is ordinarily available as a remedy for a public nuisance) [*Civ. Code § 798.87(a)*; *see Civ. Code § 3491* (available relief for public nuisance includes criminal prosecution)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.57A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.57A Management's Duty to Maintain Trees and Driveways

[1] Duty with Regard to Trees

Park management is solely responsible for the trimming, pruning, or removal of any tree in the common areas of a mobilehome park [*Civ. Code § 798.37.5(b)*]. With regard to trees in rental spaces in a mobilehome park, park management is responsible for trimming, pruning, or removal of a tree on written notice by a homeowner or a determination by park management that the tree poses a specific hazard or health and safety violation [*Civ. Code § 798.37.5(a)*]. In the case of a dispute over that assertion, the park management or a homeowner may request an inspection by the Department of Housing and Community Development or a local agency responsible for the enforcement of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to determine whether there is a violation of that Act [*Civ. Code § 798.37.5(a)*].

In addition, no homeowner may plant a tree within a mobilehome park without first obtaining written permission from the management [*Civ. Code § 798.37.5(d)*].

[2] Duty with Regard to Driveways

Park management is solely responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of all driveways installed by park management, including repair of root damage to driveways and foundation systems [*Civ. Code § 798.37.5(c)*]. Homeowners are responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of a homeowner-installed driveway [*Civ. Code § 798.37.5(c)*]. A homeowner may be charged for the cost of any damage to the driveway caused by an act of the homeowner or a breach of the homeowner's responsibilities under the mobilehome park rules and regulations, so long as those rules and regulations are not inconsistent with the statutory requirements [*Civ. Code § 798.37.5(c)*].

[3] Duties Apply to Agreements on or After January 1, 2001

The provisions in [1] and [2], *above*, regarding trees and driveways apply only to rental agreements entered into, renewed, or extended on or after January 1, 2001 [*Civ. Code § 798.37.5(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-39 California Legal Forms--Transaction Guide § 39.58

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.58 Management's Restricted Right of Entry

Park management may not enter a homeowner's mobilehome or enclosed accessory structure without the prior written consent of the homeowner [*Civ. Code § 798.26(a)*]. This consent requirement does not apply, however, in the case of an emergency or when the resident has abandoned the mobilehome or accessory structure [*Civ. Code § 798.26(b)*]. Management may enter upon the land on which a mobilehome is situated for specified purposes, such as the maintenance of utilities, provided the entry is performed in a manner and at a time that does not interfere with the resident's quiet enjoyment [*Civ. Code § 798.26(a)*]. The same restrictions apply to management of a mobilehome subdivision park [*see Civ. Code § 799.2.5*; *see also § 39.29* (mobilehome subdivisions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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18-39 California Legal Forms--Transaction Guide § 39.59

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.59 Termination of Tenancies

The management of a mobilehome park may not terminate or refuse to renew a mobilehome park site tenancy except for a reason permitted under the MRL [*Civ. Code § 798.55(b)*; *see Civ. Code § 798.56* (permissible reasons for termination)]. A notice to sell or remove, at the homeowner's election, a mobilehome from a park must be given at least 60 days prior to the required removal [*see Civ. Code § 798.55(b)(1)*; *see also Code Civ. Proc. § 1162*] and served in the manner required by statute [*see Civ. Code § 798.55(b)(1)*]. The notice of termination must also state specific facts relied on by management for the termination; mere reference to the statute authorizing terminations is insufficient [*Civ. Code § 798.57*; *see § 39.238* (notice of termination)]. The permissible reasons for terminating a mobilehome park rental or lease agreement and the procedure management must follow in terminating the tenancy are discussed in *§ 39.238*. Homeowners who desire to terminate their tenancies must give management written notice at least 60 days prior to vacating the park [*Civ. Code § 798.59*].

The MRL does not apply to any area owned, operated, or maintained by the state for the purpose of providing employee housing or space for a mobilehome owned or occupied by a state employee [*Civ. Code § 798.13(a)*]. However, a state employer must provide the occupant of a privately owned mobilehome that is situated in an employee housing area owned, operated, or maintained by the state, and that is occupied by a state employee by agreement with his or her state employer and subject to the terms and conditions of that state employment, with a minimum of 60-days' notice before terminating the tenancy for any reason [*Civ. Code § 798.13(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksExemptionsReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.60

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.60 Notice of Owner's Intention to Sell Mobilehome Park

Subject to limited exceptions, the owner of a mobilehome park who enters into a listing agreement for sale of the park or who offers to sell the park to any party, must give notice of this intention to sell to any resident organization that has been formed by mobilehome owners in the park for purposes of purchasing the park and converting it to condominium or stock cooperative ownership interests [*Civ. Code § 798.80(a)*; *see Civ. Code § 798.80(e)* (transfers exempt from notice requirement); *see also § 39.29* (mobilehome park conversions)]. To be entitled to this notice, the resident organization must, among other things, have previously notified management in writing that it is interested in purchasing the park [*Civ. Code § 798.80(b)(2)*]. Failure by a park owner to give notice to a qualified resident organization of his or her intention to sell does not affect the validity of a purchaser's title in the event the owner sells the park, but does expose the owner to a lawsuit by the homeowners or the resident organization [*Civ. Code § 798.80(c)*; *see Civ. Code § 798.86* (civil damages for willful violations of MRL)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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18-39 California Legal Forms--Transaction Guide § 39.61

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.61 Notice of Change in Park Use

If the owner of a mobilehome park wants to change the use of the park to one that will result in the termination of homeowner tenancies [*see Civ. Code § 798.10* ("change of use" defined)], he or she must give prior notice of the change or proposed change to homeowners before terminating any tenancy [*see Civ. Code § 798.56(g)*]. Specific notice requirements depend on whether or not the change in use requires governmental permits [*see § 39.240* (form and requirements for notice)]. "Change of use" for these purposes includes a change of the park or any portion of it to a condominium, stock cooperative, planned unit development, or any form of ownership involving the sale of spaces in the park [*Civ. Code § 798.10*; *see § 39.29* (mobilehome park conversions)]. At the same time the notice of change in use is given, the owner must also give the homeowners a report on the impact of the conversion, closure, or cessation of use on displaced mobilehome park residents. The report must address the availability of adequate replacement housing in mobilehome parks and relocation costs [*Civ. Code § 798.56(h)*; *Gov. Code § 65863.7* (required report)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.62

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.62 Homeowner's Sale of Mobilehome During Term of Rental Agreement

If a person sells a mobilehome to a purchaser who wishes to remain in the same mobilehome park, park management has the right to approve the purchaser [*see Civ. Code § 798.74*]. For the procedure management must follow in approving or disapproving a prospective purchaser and the permitted grounds for disapproval, see Ch. 40, *Mobilehomes* . Management may not require the selling homeowner to list the mobilehome for sale with management or any other specified broker, dealer, or person as a condition to management granting its approval of a prospective purchaser [*Civ. Code § 798.71(c)*].

If a mobilehome is sold to a third party during the term of the rental agreement between park management and the selling homeowner, management may not require removal of the mobilehome from the park except under narrowly defined circumstances [*Civ. Code § 798.73*; *see* Ch. 40, *Mobilehomes*]. If a mobilehome will remain in the park after its sale, management may not require repairs or improvements to the park space or property owned by management, except for damage caused by the actions or negligence of the homeowner or his or her agent [*Civ. Code § 798.83*]. However, park management may require repairs or improvements to the mobilehome, its appurtenances, or its accessory structures not owned and installed by the management, if (1) the repair or improvement is based on or is required by a local ordinance or state statute or regulation relating to mobilehomes, or a rule or regulation of the mobilehome park that implements or enforces a local ordinance, state statute, or regulation relating to mobilehomes; and (2) the repair or improvement relates to the exterior of the mobilehome, its appurtenances, or the accessory structure [*Civ. Code § 798.73.5(a)*].

Park management may not require a homeowner who is replacing a mobilehome or manufactured home on a space in the park in which he or she resides to use a specific broker, dealer, or other person as an agent in the purchase of or installation of the replacement home [*Civ. Code § 798.71(d)*].

For further discussion of the requirements applicable to the sale of a mobilehome located in a mobilehome park, including the rights and duties of both park management and the selling homeowner, see Ch. 40, *Mobilehomes* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-39 California Legal Forms--Transaction Guide § 39.63

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.63 Renting or Subletting Mobilehome or Space

Park management must permit a homeowner to rent his or her mobilehome, if it is the homeowner's primary residence, or to sublet his or her space, if a medical emergency or medical treatment requires the homeowner to be absent from home and this is confirmed in writing by an attending physician [*Civ. Code § 798.23.5(a), (b)*]. The minimum term of the rental or sublease must be six months and the maximum term may not exceed 12 months, unless management approves a shorter or longer term [*Civ. Code § 798.23.5(b)(1)*]. A homeowner may not charge a renter or sublessee more than the amount necessary to cover the cost of space rent, utilities, and scheduled loan payments on the mobilehome, if any [*Civ. Code § 798.23.5(c)*]. The homeowner will remain liable for the mobilehome park rent and other park charges [*Civ. Code § 798.23.5(b)(4)*].

The management may require approval of a prospective renter or sublessee, subject to the process and restrictions applicable to prospective purchasers of mobilehomes [*Civ. Code § 798.23.5(b)(2)*; *see Civ. Code § 798.74(a)* (approval of purchaser)]. A prospective sublessee must comply with any rule or regulation limiting residency based on age requirements [*Civ. Code § 798.23.5(b)(2)*; *see Civ. Code § 798.76*; *§ 39.53[2]*]. In addition, the management may charge a prospective sublessee a credit screening fee for the actual cost of any personal reference check or consumer credit report [*Civ. Code § 798.23.5(b)(2)*].

The renter or sublessee must comply with all park rules and regulations. Failure to comply with the rules and regulations may result in the termination of the homeowner's tenancy in the mobilehome park [*Civ. Code § 798.23.5(b)(3)*; *see Civ. Code § 798.56*; *§ 39.59* (termination of tenancies)]. A homeowner's tenancy may not be terminated if the homeowner completes an action for unlawful detainer or executes a judgement for possession within 60 days of the homeowner's receipt of notice of the tenancy's termination [*Civ. Code § 798.23.5(b)(3)*].

Park management may require the homeowner to reside in the mobilehome park for a term of one year before allowing the homeowner to rent or sublet the mobilehome or mobilehome space [*Civ. Code § 798.23.5(b)(5)*]. If a security deposit has been refunded to the homeowner pursuant to *Civ. Code § 798.39(b)* or *(c)*, management may require the

homeowner to resubmit a security deposit in an amount or value not to exceed two months' rent in addition to the first month's rent. Management may retain this security deposit for the duration of the term of the rental or sublease [*Civ. Code § 798.23.5(b)(6)*]. The homeowner must keep his or her current address and telephone number, or the name, address, and telephone number of his or her legal representative, on file with the management during the term of rental or sublease [*Civ. Code § 798.23.5(b)(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-39 California Legal Forms--Transaction Guide § 39.64

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.64 Information for Prospective Homeowners

Effective October 1, 2004, within two business days of receiving a request from a prospective homeowner for an application for residency for a specific space within a mobilehome park, if the management has been advised that the mobilehome occupying that space is for sale, the management must give the prospective homeowner a separate document in at least 12-point type entitled "INFORMATION FOR PROSPECTIVE HOMEOWNERS" that includes specified statements concerning home ownership in a mobilehome park [*Civ. Code § 798.74.5(a)*]. On request of the prospective homeowner, management must also provide a copy of park rules and regulations and a copy of the Mobilehome Residency Law [*Civ. Code § 798.74.5(b)*]. For a copy of the form, see *§ 39.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-39 California Legal Forms--Transaction Guide §§ 39.65-39.99

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.65[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-39 California Legal Forms--Transaction Guide § 39.100

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.100 Basic Information

[1] Facts

1. Identifying information for client and other involved parties:

a. Name.

b. Address.

c. Phone number.

d. If not individual, legal status.

2. General type of mobilehome park [*see § 39.10*]:

a. Rental park, i.e., park with individual lots or spaces that are or will be rented to owners of mobilehomes.

b. Resident-owned park, i.e., park in which each owner of a mobilehome located in park has some type of ownership interest in lot or space occupied by his or her mobilehome.

3. Relationship of client to mobilehome park or proposed park.

a. Owner of park or proposed park.

b. Developer of proposed park.

c. Manager of existing park.

d. Tenant (or prospective tenant) in rental park.

e. Owner of mobilehome in resident-owned park.

f. Lender for existing or proposed park.

g. Other.

4. General nature of client's transaction:

a. New park construction.

b. Conversion of rental park to resident-owned park.

c. Park violation of law or regulation.

d. Tenant violation of rental agreement or park rule or regulation.

e. Execution of rental or lease agreement.

f. Other.

5. Basic information for existing or proposed park:

a. Name of park.

b. Name(s) of park owner.

c. Name of manager or management company.

d. Location.
(1) Street address.

(2) City or unincorporated area.

(3) County.

e. Whether park is or will be limited to seniors.

[2] Documents

NOTE:
For particular documents necessary for a specific transaction, see *Sections 39.101 [2]* (new park construction) and *39.102 [2]* (mobilehome park tenancy).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

18-39 California Legal Forms--Transaction Guide § 39.101

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.101 Additional Information for New Park Construction

[1] Facts

1. Approximate size in acres.

2. Whether located on any body of water or waterway.

3. Number and size of lots or spaces.

4. Types of common areas and facilities:

    a. Streets and sidewalks.

    b. Office.

    c. Laundry.

    d. Pet facilities (e.g., dog run).

    e. Restrooms/showers.

    f. Storage facilities.

    g. Parking areas.

h. Recreational facilities:
(1) Swimming pools (indoor or outdoor).

(2) Jacuzzi or spa.

(3) Playground.

(4) Meeting or recreation room.

i. Special facilities for seniors.

j. Other.

5. Utilities, if any, that will be separately metered for individual lots or spaces.

6. Whether park will be constructed to enable placement of mobilehomes on foundation system [*see § 39.22*].

7. Whether any mobilehome accessory structures [*see Health & Safety Code § 18213*] will be included in initial construction.

8. Whether separate area will be provided to accommodate recreational vehicles.

9. Whether park owner owns or leases underlying land.

[2] Documents

1. Preliminary title report showing either:

a. Park owner's ownership of real property; or

b. Park owner's right to occupy real property as lessee under lease with owner of real property.

2. If park owner occupies real property as lessee, copy of lease.

3. Copies of required governmental approvals that have been obtained, if any [*see § 39.110*].

4. Plans and specifications, to extent available, for:

a. Mobilehome park.

b. Special offsite improvements and utility installations.

c. Permanent buildings.

d. Mobilehome accessory structures.

5. Copy of agreements with contractors and subcontractors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & Transportation



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

18-39 California Legal Forms--Transaction Guide § 39.102

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.102 Additional Information for Mobilehome Tenancy

[1] Facts

1. Name of persons who executed or who are considering executing rental or lease agreement.

2. Name of persons who reside or will reside in mobilehome, if different than persons described in P 1, *above*.

3. For alleged violations of agreement or park rules and regulations by management or homeowner, nature of violation.

[2] Documents

1. Copy of existing (or proposed) rental or lease agreement.

2. Copy of park rules and regulations.

3. Copy of notices or other correspondence sent to or received by homeowner or park management.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease

AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Client Interview--Facts and Documents

18-39 California Legal Forms--Transaction Guide §§ 39.103-39.109

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.103[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

18-39 California Legal Forms--Transaction Guide § 39.110

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.110 Determinations for Construction and Development of New Park

1. Will park be rental park or resident-owned park?

NOTE:
The requirements of the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*] discussed in this Section apply to construction of a new "rental" mobilehome park, that is, one in which the spaces or lots will be rented to owners of mobilehomes [***see*** *Health & Safety Code § 18214(a)* ("mobilehome park" defined)]. Construction and development of a new mobilehome park that is to be resident-owned is not regulated under the MPA, but rather under the Subdivision Map Act and the Subdivided Lands Act [***see*** *§ 39.29[2], [3]*].

2. Is Department of Housing and Community Development (HCD) or a local governing body the enforcement agency (for purposes of MPA) in jurisdiction in which park will be constructed?

NOTE:
HCD is the enforcement agency unless enforcement responsibility has been assumed by a local governing body [***see*** *Health & Safety Code § 18300(b)*; ***see also*** *§ 39.13[4]*].

3. Has project been approved by local planning agency [*Health & Safety Code § 18501(e)*; *see Health & Safety Code § 18300.1*; *§ 39.21* (conditional use permits for mobilehome parks); *see also* California Real Estate Law & Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender)]?

4. If park fronts on coastline, shoreline, river, or waterway, or on any lake or reservoir owned in whole or

in part by a public agency, has local government with jurisdiction over park determined that reasonable public access by fee or easement from public highways exists to body of water, either through park or within reasonable distance from it [*Health & Safety Code § 18406*; *see § 39.27*]?

5. Have requirements of California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], including preparation of environmental impact report (or negative declaration), been met [*25 Cal. Code Reg. §§ 1030, 1032(b)*; *see* Ch. 30, *Subdivision Regulation* , Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* ; *see also* California Real Estate Law & Practice, Ch. 303, *Environmental Impact Reports* (Matthew Bender)]?

6. If park is within area of coastal zone requiring a development permit, has permit been obtained from Regional Coastal Zone Conservation Commission [*see Health & Safety Code § 18501(e)*; *see also* California Real Estate Law & Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender)]?

7. Has appropriate local approval been obtained for the following [*Health & Safety Code § 18501*; *25 Cal. Code Reg. § 1032(b)*]:

a. Water supply and method of sewage disposal?

b. Plans for fire protection provided in park?

c. Plans for park surface or subsurface drainage system?

8. Have local sewer and water agencies and public utilities agreed that planned services for park will be provided [*Health & Safety Code § 18501*; *25 Cal. Code Reg. § 1032(b)*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

18-39 California Legal Forms--Transaction Guide § 39.111

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.111 Determinations for Mobilehome Park Tenancies

1. Is park (or if not yet constructed, will it be) limited to seniors [*see § 39.53[2]*]?

2. Is membership in any club or organization required as a condition of tenancy?

NOTE:
Membership in a private club or organization may be made a condition of tenancy, but membership may not be denied on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or source of income [Civ. Code § 798.20(a); *see* Civ. Code § 798.20(b) (senior housing exceptions)].

3. Is park located in rent control jurisdiction?

4. If park is located in rent control jurisdiction, have tenants been offered (or for new park, will prospective tenants be offered) lease agreements that are exempt from local rent control ordinances?

NOTE:
Under these circumstances, the agreements must comply with specific statutory requirements [***see*** *Civ. Code § 798.17*; ***see also*** *§ 39.220[1][f]* (discussion of requirements)].

5. Will tenants be offered any gifts by management for entering into "exempt" rental agreement?

NOTE:
Management may offer gifts of value, other than rental rate reductions, to homeowners

who execute an exempt rental agreement [*Civ. Code § 798.17(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

18-39 California Legal Forms--Transaction Guide §§ 39.112-39.119

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
C. Procedural Guide

18-39 California Legal Forms--Transaction Guide § 39.120

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.120 Procedural Guide to Construction of New Rental Park

NOTE:

The construction permit procedure under the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*] for a new "rental" mobilehome park is outlined below. Initial construction and development of a new mobilehome park subdivision (that is, one that will be resident-owned) is not subject to the MPA, but rather to the Subdivision Map Act and the Subdivided Lands Act [***see** § 39.29[2], [3]*]. However, construction in a "converted" park (that is, one that was originally a rental park but was subsequently converted to a resident-owned park) is subject to the requirements of the MPA [***see** Health & Safety Code § 18214(a)* (definition of "mobilehome park" includes rental and "converted" parks)].

1. To obtain construction permit for park, submit following to enforcement agency [*Health & Safety Code §§ 18500(a), 18501*; *25 Cal. Code Reg. § 1032*; *see § 39.13[4]* (determination of enforcement agency)]:

a. Official application form [*see § 39.200* (form of application)].

b. Evidence of all required governmental approvals for project [*see § 39.110* (list of required approvals)].

c. Description of grounds.

d. Plans and specifications of proposed construction [*25 Cal. Code Reg. § 1034*; *see § 39.200[1][e]*].

NOTE:
Standard plan approval may be available for some aspects of the project [***see*** *§ 39.200[1][e][iii]*].

e. Required fees [*see § 39.200[1][f]*].

2. When permit is issued, instruct developer to:

a. Post construction permit in conspicuous location on jobsite [*Health & Safety Code § 18508*; *see 25 Cal. Code Reg. § 1034(j)*]; and

NOTE:
The approved application for the construction permit [***see*** *§ 39.200* (form of application)] will serve as the official permit.

b. Keep permit and approved set of plans and specifications on job site until enforcement agency has made final inspection [*25 Cal. Code Reg. § 1034(j)*].

3. Authorize commencement of construction.

NOTE:
If construction work is commenced before issuance of a valid permit, the work must be discontinued until a permit is obtained, and all fees prescribed for the permit will be doubled [*25 Cal. Code Reg. § 1050*].

a. Confirm that contractor complies with all regulatory standards for buildings, equipment, facilities, and installations in park [*see 25 Cal. Code Reg. §§ 1130-1520*].

b. Advise contractor to not use any materials, appliances, installations, devices, arrangements, or methods of construction that are not specifically prescribed by law (i.e., "alternates" or "equivalents") without first requesting and obtaining approval from enforcement agency [*Health & Safety Code § 18305*; *25 Cal. Code Reg. § 1016*]:

NOTE:
The enforcement agency will forward the request to the Department of Housing and Community Development (HCD) [***see*** *25 Cal. Code Reg. § 1016*]. HCD may approve the request if it finds that the proposed design is satisfactory and that the proposed alternate or equivalent is at least the equivalent to that prescribed by law. Proof of compliance, at the owner's expense, may be required [*Health & Safety Code § 18305(b), (c)*].

c. Confirm that construction complies with all regulatory requirements for:

(1) Grading and sloping [*see 25 Cal. Code Reg. § 1116*].

(2) Lot identification [*see 25 Cal. Code Reg. § 1104*].

(3) Roadways and driveways [*see 25 Cal. Code Reg. § 1106*].

4. Have developer or contractor request inspection of work during stages of construction, as required by HCD

regulations [*see 25 Cal. Code Reg. § 1048*].

5. If developer receives written order from enforcement agency demanding cessation of work:

NOTE:
The enforcement agency may issue such a notice whenever the construction work violates the relevant statutory and regulatory requirements. The notice will identify the requirements that have been violated [*Health & Safety Code § 18511*; *25 Cal. Code Reg. § 1046* (stop order)].

a. Instruct developer to immediately cease work.

NOTE:
The work cannot be recommenced until the agency gives its authorization to proceed [*25 Cal. Code Reg. § 1046*].

b. If developer wishes to contest suspension of work:

(1) File petition with enforcement agency requesting hearing [*see Health & Safety Code § 18513*].

NOTE:
The enforcement agency will notify the petitioner in writing of the time and place for the hearing [*Health & Safety Code § 18514*].

(2) Attend hearing on request and show why notice should be modified or withdrawn [*Health & Safety Code § 18514*; *see Health & Safety Code § 18516*].

c. Unless notice is modified or withdrawn following hearing:

(1) Advise developer to correct violation(s) within 30 days after date of mailing and posting of notice [*see Health & Safety Code §§ 18511, 18517*]; and

NOTE:
If the violation is not corrected within that 30-day period, the enforcement agency may suspend the permit [*Health & Safety Code §§ 18511, 18517*].

(2) Submit proof of compliance to agency, so that agency will [*Health & Safety Code § 18518*]:

(a) Reinstate permit; or

(b) Issue new permit.

6. Inform client that construction permit automatically expires within six months from date of issuance unless extension is granted [*Health & Safety Code § 18509*; *see* P 7, *below*].

NOTE:
If the permit expires, the work must cease until the enforcement agency issues a new construction permit [*25 Cal. Code Reg. § 1038(b)*]. Fees paid for a construction permit [***see** § 39.200[1][f]*] are forfeited if construction has not started within six months of the date the permit was issued [*25 Cal. Code Reg. §*

1038(c)].

7. To obtain six-month extension of permit [*25 Cal. Code Reg. § 1038(a), (b)*; *see Health & Safety Code § 18509*]:

NOTE:
Although more than one six-month extension may be obtained, all permits will expire two years from the date on which the original permit was issued [***see*** *Health & Safety Code § 18509*; *25 Cal. Code Reg. § 1038(a)*].

a. Have work commenced prior to application for extension.

NOTE:
An extension will not be granted unless the construction work has commenced [*25 Cal. Code Reg. § 1038(a)*].

b. Submit application for extension (available from HCD) prior to expiration of permit.

NOTE:
Applications for extensions need not be accompanied by plans and specifications if the original ones still control, are made available to the enforcement agency during the construction, and were approved less than two years before the request for the extension [*25 Cal. Code Reg. § 1038(b)*].

8. If, during construction, there is a change in name of park or a transfer of ownership or possession of park:

a. Have owner (new owner in case of transfer of ownership or possession) send written notice to enforcement agency within 30 days after name change or transfer of ownership [*Health & Safety Code § 18507(a)*]; and

NOTE:
No additional fee will be required if the new owner completes construction in accordance with the approved plans and specifications. However, if there is any substantial deviation from the approved plans and specifications, a new application for a permit to construct must be submitted [*Health & Safety Code § 18507(b)*].

b. In the case of a transfer of ownership of park, have transferee report transfer to county [*see Rev. & Tax. Code §§ 480, 480.3*; *see also § 39.201[1][f]*].

9. On completion of construction, arrange for final inspection by enforcement agency [*25 Cal. Code Reg. § 1048*].

10. Once construction is certified as complete by enforcement agency, obtain permit to operate before commencing park operation [*Health & Safety Code § 18505*; *see § 39.201* (application and procedure for obtaining permit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksExemptionsReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
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C. Procedural Guide

18-39 California Legal Forms--Transaction Guide § 39.121

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.121 Procedural Guide to Operating Mobilehome Park

NOTE: The requirements outlined in this Procedural Guide assume that a mobilehome park is subject to both the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*; ***see*** *§ 39.13[2]* (scope of Act)] and the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*; ***see*** *§ 39.14* (scope of MRL)]. Tenants are referred to as "homeowners" in order to be consistent with the terminology used in the MRL [***see*** *Civ. Code § 798.9* ("homeowner" defined)].

Unless otherwise indicated, the steps below are phrased in terms of directives to park management. However, this Procedural Guide should be equally useful to the attorney representing a homeowner since it outlines homeowner rights and duties in a mobilehome park as well as management's duties and responsibilities.

[1] Permit to Operate

NOTE:
It is unlawful to do any of the following without first obtaining a permit to operate from the enforcement agency for the mobilehome park: operate a mobilehome park or any portion of it; or operate, occupy, rent, lease, sublease, let out, or hire out for occupancy any lot in a mobilehome park that has been constructed, reconstructed, or altered [*Health & Safety Code § 18500*]. However, a person who owns a mobilehome located on leased land and who is not a park operator, may rent the mobilehome (and the land on which it is located) to a third party without a permit, subject to the lease or rental agreement governing the underlying ground [*Health & Safety Code § 18500.6*].

1. To obtain original permit to operate mobilehome park:

a. Submit following to enforcement agency:
(1) Completed application for permit on HCD-approved form [*Health & Safety Code § 18500(d)*; *see § 39.201* (application form)].

(2) Annual operating permit fee [*Health & Safety Code § 18502(c)(1)* (repealed as of January 1, 2007, unless that date is deleted or extended by statute)].

(3) Separate and additional annual fee based on number of lots in park [*Health & Safety Code § 18502(c)(2)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)].

NOTE:
This fee must be used exclusively for the governmental inspection of mobilehome parks required under the Mobilehome Parks Act [*Health & Safety Code §§ 18502(c)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute), *18400.1* (required inspections); ***see*** *§§ 39.13[4], 39.44* (inspections and notice of violations)]. The permit holder may charge each homeowner one-half of the per lot separate annual fee at the next billing for the rent (and other charges) immediately following the payment of the separate annual fee to HCD or the local enforcement agency [*Health & Safety Code § 18502(c)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. Statutory authority for the ***additional*** annual fee is repealed as of January 1, 2012, unless a statute enacted before that time deletes or extends the repeal date [***see*** *Health & Safety Code § 18502(f)*].

b. Verify local enforcement agency has [*Health & Safety Code § 18505*]:

(1) Notified HCD that construction of new park or additional lots to existing park has been completed.

(2) Issued certificate of occupancy for new construction.

2. Renew operating permit each year after it is originally issued [*Health & Safety Code § 18506*].

NOTE:
Annual operating permits are issued by the enforcement agency for a 12-month period [*Health & Safety Code § 18506*].

a. Submit renewal application and annual fees [*Health & Safety Code § 18506*; for required annual fees, see *Health & Safety Code § 18502(c)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute); *see also* P 1a, *above*].

b. If renewal application and fees are not timely submitted, pay required penalty fee [*Health & Safety Code § 18506*].

3. Caution park owner that violation of terms and conditions of operating permit or any provision of MPA may result in suspension of permit by enforcement agency [*Health & Safety Code § 18510*].

4. Before applying for reissuance of permit that has been suspended, cause all violations that were basis for suspension to be corrected [*Health & Safety Code § 18506*; *see Health & Safety Code § 18518*].

NOTE:
If a previous operating permit for a mobilehome park has been suspended by the enforcement agency, a permit to operate will not be issued until the violations that were the basis for the suspension have been

corrected [*Health & Safety Code § 18506*; ***see*** *Health & Safety Code § 18518*].

5. If there is any change in name, ownership, or possession of park:

a. Submit written notice of change in name, ownership, and/or possession, and appropriate fee [*see Health & Safety Code § 18502(d)*], to enforcement agency within 30 days after change [*Health & Safety Code § 18507(a)*].

NOTE:
For a discussion of the special rules that apply when the change in name, ownership, or possession takes place prior to the completion of construction [***see*** *Health & Safety Code § 18507(b)*], see *§ 39.200[1]*.

b. Report change in ownership to county officials [*see Rev. & Tax. Code §§ 480, 480.3*].

NOTE:
Following any change in ownership of taxable real property, the transferee must file a preliminary change of ownership report or change in ownership statement with the county in which the real property is located [*Rev. & Tax. Code §§ 480, 480.3*; ***see*** *Rev. & Tax. Code § 60* ("change in ownership" defined)]. However, certain transfers are exempt from this reporting requirement. For further discussion of the reporting requirement and applicable exemptions, see *§§ 39.29[7]* and *39.201[1][f]*.

[2] Maintenance of Park and Its Facilities

1. Have park owner designate person to be responsible for operation and maintenance of park, and confirm that foregoing person meets or will meet following criteria [*Health & Safety Code § 18603*]:

a. Will be available by telephone or other means, or in person, to respond in a timely manner to emergencies concerning operation and maintenance of park; and

b. If park has 50 or more units:

NOTE:
The following requirements may be satisfied by a designee of the person who is responsible for the operation and maintenance of the park [*Health & Safety Code § 18603*].

(1) Will reside in park; and

(2) Has knowledge of emergency procedures applicable to utility systems and common facilities under ownership and control of park owner.

2. Maintain physical improvements in common facilities in good working order and condition at all times [*Civ. Code § 798.15(d)(1)*].

NOTE:
With regard to a sudden or unforeseeable breakdown or deterioration of these improvements,

management has a reasonable period of time to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have know of the breakdown or deterioration. A reasonable period of time to repair a sudden or unforeseeable breakdown or deterioration is as soon as possible in situations affecting a health or safety condition, and must not exceed 30 days in any other case except when exigent circumstances justify a delay [*Civ. Code § 798.15(d)(2)*]. If management fails to properly maintain the park's common facilities, it is subject to civil liability [***see*** *Civ. Code §§ 798.84, 798.86*]. Also, the substantial failure of management to provide and maintain physical improvements in the common facilities in good working order and condition is deemed a public nuisance that may be remedied by a civil action or abatement [***see*** *Civ. Code § 798.87(a)*; ***see also*** California Forms of Pleading and Practice, Ch. 369, ***Mobilehomes and Mobilehome Parks*** (Matthew Bender) (form of complaint)].

3. Keep each common area facility open or available to residents at all reasonable hours, and post hours at facility [*Civ. Code § 798.24*].

4. Maintain in safe operating condition all common areas, park-owned electrical, gas, and plumbing equipment and installations, and park-owned permanent building and structures [*25 Cal. Code Reg. § 1102(a)*].

NOTE:

Any violation must be corrected within five days or any longer period permitted by the enforcement agency [*25 Cal. Code Reg. § 1611(a)(2)*]. At least 72 hours before an interruption of more than two hours in utility service for the maintenance, repair, or replacement of facilities of utility systems over which park management has control within the park, management must post notice of the interruption on the mobilehomes of all affected homeowners and residents. This requirement does not apply to an interruption that is due to an emergency. For these purposes, "emergency" means the interruption of utility service resulting from an accident or act of nature, or cessation of service caused by other than the management's regular or planned maintenance, repair, or replacement of utility facilities. If management violates this posting requirement, it will be liable only for any actual damages sustained by a homeowner or resident [*Civ. Code § 798.29*.5].

5. Prevent wastewater, sewage, or waste material from any plumbing fixtures in the park, from the park sewage or waste disposal system, or from any plumbing fixtures in a manufactured home, mobilehome, recreational vehicle, accessory structure, or permanent building in the park, from being discharged onto or deposited on the surface of the ground [*Health & Safety Code § 18554(a)*].

NOTE:

The enforcement agency may order the removal, sanitation, or both, of any wastewater, sewage, or waste material discharged onto or deposited on the surface of the ground, or may require the removal, sanitation, or both, of the wastewater, sewage, or waste material, in a manner consistent with the requirements of, and in consultation with, the local health department or agency [*Health & Safety Code § 18554(b)*]. However, the registered owner of a mobilehome, manufactured home, or recreational vehicle is be responsible for complying with an order, or the correction of a citation, issued by the enforcement agency, and the costs of that order, whenever wastewater, sewage, or waste material is discharged onto or deposited upon the surface of the ground as a result of leaks from plumbing fixtures in a manufactured home, mobilehome, or recreational vehicle, or accessory structure, or whenever those leaks come from plumbing on the space or lot that connects the home or recreational vehicle or accessory structure to the park's sewer, septic, or drain system on the home or vehicle registered owner's side of the connection, if the discharge or deposit is determined by the enforcement agency to be the fault of the registered owner of the home or recreational vehicle [*Health & Safety Code § 18554(c)*].

6. Keep park area clean and free from accumulation of refuse, garbage, and similar material [*25 Cal. Code Reg. § 1120*].

NOTE:
The park must provide rubbish containers with tight-fitting covers and a collection system for those containers [*25 Cal. Code Reg. § 1120(d)*].

7. Install artificial light and keep it burning from sunset to sunrise for adequate illumination of [*Health & Safety Code § 18602*]:

a. Every park building containing toilets and showers.

b. Park roadways and walkways.

NOTE:
The average level of light required for each of these facilities is prescribed by regulation [***see*** *25 Cal. Code Reg. § 1108*].

8. For individual lots or spaces in park:

a. Keep lots identifiable and distinguishable as follows [*25 Cal. Code Reg. § 1104*]:

(1) Number or designate lots by street number or other suitable means, with designation:
(a) In conspicuous location facing driveway; or

(b) On wall surface nearest driveway.

(2) Use corner markers as permanent lot lines.

NOTE:
Park lot lines may not be created, moved, shifted, or altered without a permit issued to the park owner or operator by the enforcement agency and the written authorization of the registered owner or owners of the mobilehome or manufactured home located on the lot or lots on which the lot line will be created, moved, shifted, or altered [*Health & Safety Code § 18610.5(a)*]. The park owner or operator must submit a written application for the lot line alteration permit to the enforcement agency [*Health & Safety Code § 18610.5(c)*; *25 Cal. Code Reg. § 2105(b)*]. The application must include a list of the names and addresses of the registered owners of mobilehomes or manufactured homes located on the lot or lots that would be altered by the proposed lot line change and the written authorization of the registered owners. The enforcement agency may also require that the mobilehome park owner or operator submit documents demonstrating compliance with the statutory requirements, including a detailed plot plan showing the dimensions of each lot altered by the creation, movement, shifting, or alteration of the lot lines [*Health & Safety Code § 18610.5(c)*; *25 Cal. Code Reg. § 2105(b)(1)*]. If submission of a plot plan is required, the mobilehome park owner or operator must provide a copy of the plot plan to the registered owners of mobilehomes or manufactured homes located on each lot that would be altered by the proposed lot line change and must provide the enforcement agency with proof of delivery by first-class postage prepaid of the copy of the plot plan to the affected registered owners [*Health & Safety Code § 18610.5(c)*; *25 Cal. Code Reg. § 2105(b)(1)(E)*]. If the park is a common interest development as defined in *Civ. Code § 1351*, and the lot line change involves encroaching into a common area, the plot plan must demonstrate compliance with the approval provisions of *Civ. Code § 1363.07* [*25 Cal. Code Reg. § 2105(b)(1)(G)*]. If the Department of Housing and Community Development is the enforcement agency and the application proposes to reduce or increase the total number of lots available for occupation, the applicant must

submit a copy of the application and any other required information to the local planning agency of the jurisdiction where the park is located [*Health & Safety Code § 18610.5(e)*; *25 Cal. Code Reg. § 2105(c)*].

b. If management proposes to create, move, shift, or alter lot lines before July 1, 2005:

(1) Refrain from taking that action if it would place an occupant of a lot in violation of any statutory or regulatory separation or space requirements [*Health & Safety Code § 18610.5(b)*].

(2) In all other cases [*Health & Safety Code § 18610.5(a)*]:

(a) Obtain a permit from local planning agency; and

(b) Obtain written authorization or consent of any occupants of mobilehome lots affected by proposed action.

c. If management proposes to create, move, shift, or alter lot lines on and after July 1, 2005:

(1) Refrain from taking that action if it would place the mobilehome owner [*see Health & Safety Code § 18400.4* (mobilehome owner defined)] of a mobilehome or manufactured home located on a lot in violation of any statutory or regulatory separation or space requirements [*Health & Safety Code § 18610.5(b)*].

(2) In all other cases:

(a) Obtain a permit from enforcement agency; and

(b) Obtain written authorization of registered owner or owners of mobilehome or manufactured home, if any, located on lot or lots affected by proposed action.

9. Take following steps in supervising park's fire fighting program:

a. In areas where fire department services are not available, instruct staff in use of park fire protection equipment and specific duties [*25 Cal. Code Reg. § 1305*].

b. Print and post in conspicuous place on premises list showing [*25 Cal. Code Reg. § 1122*]:

(1) Telephone numbers of fire department, police department or sheriff's office, park office, person responsible for operation and maintenance, and enforcement agency.

(2) Location of park (by street or highway numbers), nearest fire alarm box (when available), and nearest public telephone.

c. Protect fire protection or suppression equipment against freezing in any susceptible areas [*25 Cal. Code Reg. § 1314*].

d. Instruct homeowners and management staff to keep area under and around vehicles free from accumulation of paper, leaves, brush, or other combustible material [*25 Cal. Code Reg. § 1120(a)*].

10. Before constructing additional buildings or lots, or altering buildings, lots, or other installations in park:

a. Obtain permit from enforcement agency [*Health & Safety Code § 18500*; *25 Cal. Code Reg. § 1018*; *see § 39.200*]; and

b. Instruct park owner to keep permit posted in conspicuous place [*Health & Safety Code § 18508*].

11. If homeowner is to be responsible for his or her own lot maintenance and landscaping:

a. Confirm that obligations imposed on homeowner are reasonable [*see Civ. Code § 798.37*] and are recited in rental agreement or in park rules and regulations contained in agreement [*see Civ. Code §§ 798.15(g), 798.36*].

b. Do not require homeowner or prospective homeowner to purchase, rent, or lease goods or services for landscaping, remodeling, or maintenance from any person, company, or corporation [*Civ. Code § 798.37*].

12. Do not enter any resident's mobilehome or enclosed accessory structure without his or her prior written consent except [*Civ. Code § 798.26*]:

NOTE:
Written consent may be revoked in writing by a resident at any time [*Civ. Code § 798.26(a)*].

a. In case of emergency; or

b. If resident has abandoned mobilehome or accessory structure.

13. Enter on land (lot or space) on which mobilehome is located only [*Civ. Code § 798.26(a)*]:

NOTE:
Entry may not be made in a manner or at a time which interferes with the resident's quiet enjoyment [*Civ. Code § 798.26(a)*].

a. At a reasonable time; and

b. For any of the following:

(1) Maintenance of utilities, trees, and driveways.

(2) Maintenance of premises in accordance with rules and regulations of park when homeowner or resident fails to maintain the premises.

(3) Protection of park.

14. Trim, prune, or remove any tree on the rental space on either written notice from the homeowner or a determination by park management that the tree poses a specific hazard or health and safety violation [*Civ. Code § 798.37.5(a)*].

NOTE:
This requirement applies only to rental agreements entered into, renewed, or extended on or after January

1, 2001 [*Civ. Code § 798.37.5(f)*]. If there is a dispute as to whether a tree poses a specific hazard or a health and safety violation, the park management or a homeowner may request an inspection by the Department of Housing and Community Development or a local agency responsible for the enforcement of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to determine whether there is a violation of that Act [*Civ. Code § 798.37.5(a)*].

[3] Renting and Leasing

1. For any rental or lease agreement [*see § 39.220* (form of agreement)] to be offered to prospective homeowners, confirm that agreement:

a. Contains all mandatory provisions required by Mobilehome Residency Law [*see Civ. Code § 798.15*; *§ 39.220[1][d]*].

b. Is for one of the following terms (unless agreement is to be exempt from local rent control) [*Civ. Code § 798.18(a)*; *see* P 2, *below* (different term requirement for agreements exempt from local rent control)]:

NOTE:
A rental agreement must not contain any terms or conditions with respect to charges for rent, utilities, or incidental reasonable service charges that would be different during the first 12 months of the rental agreement from the corresponding terms or conditions that would be offered to the homeowners on a month-to-month basis [*Civ. Code § 798.18(b)*].

(1) Twelve months [*see* P (2), NOTE, *below*].

(2) Period less than 12 months, if requested by homeowner.

NOTE:
A rental agreement for a term of 12 months or less must not include any provision that authorizes automatic extension or renewal of, or automatically extends or renews, the rental agreement beyond the initial term for a term longer than 12 months at the sole option of either park management or the homeowner [*Civ. Code § 798.18(c)*].

(3) Period longer than 12 months, if mutually agreed to by park management and homeowner.

c. Complies with any local rent control ordinance, unless agreement is exempt [*see* P 2, *below*].

d. Does not impose any fee or charge prohibited by MRL [*see Civ. Code §§ 798.30-798.44*; *see also § 39.121[5]* (prohibited fees and charges)].

e. Does not contain any provision in which homeowner waives his or rights under MRL [*Civ. Code § 798.19*].

f. For rental agreements entered into or renewed on and after January 1, 2006, does not include a clause, rule, regulation, or any other provision that grants to management the right of first refusal to purchase the homeowner's mobilehome that is in the park and offered for sale to a third party pursuant to *Civ. Code § 798.70 et seq.* [*Civ. Code § 798.19.5*].

NOTE:

Management is not precluded from entering into a separate agreement for separate consideration granting the park owner or management a right of first refusal to purchase a homeowner's mobilehome that is in the park and offered for sale [*Civ. Code § 798.19.5*].

g. Includes park rules and regulations [*Civ. Code § 798.15(b)*; *see § 39.221* (illustrative set of rules and regulations)].

h. Incorporates by reference an attached copy of Mobilehome Residency Law [*Civ. Code § 798.15(c)*].

NOTE:

Each year before February 1, management must provide homeowners with a new copy of the MRL that contains substantive legislative amendments made during the prior year [*Civ. Code § 798.15(c)*].

i. Contains all other provisions governing tenancy [*see Civ. Code § 798.15(h)*].

NOTE:

The agreement must contain, in addition to the items required by *Civ. Code § 798.15* (discussed above), any other provisions otherwise required by law to be included in such an agreement [*Civ. Code § 798.15*]. Further, the agreement may include any other provisions permitted by law, but need not include specific language contained in state or local laws that are not a part of the MRL [*Civ. Code § 798.16(a)*].

2. For rental or lease agreement that is to be exempt from local rent control ordinance:

NOTE:

If a rental agreement and the manner in which it is offered to the homeowner satisfy the criteria set forth in this Paragraph and in Paragraph 3, ***below,*** the agreement will be exempt from any ordinance, rule, regulation, or initiative measure adopted by the local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent (hereafter referred to as a "local rent control measure" [***see*** *Civ. Code § 798.17*]. For additional coverage of these requirements, see *§ 39.220[1][f]*.

"New construction" in a mobilehome park is automatically exempt from local rent control measures [*Civ. Code § 798.45*]. Consequently, a rental agreement covering such construction need not comply with the requirements of *Civ. Code § 798.17*. For these purposes, "new construction" means any newly constructed spaces initially held out for rent after January 1, 1990 [*Civ. Code § 798.7*].

a. Before entering into agreement, confirm that:

(1) Prospective homeowner will use mobilehome as his or her personal and actual residence [*Civ. Code § 798.17(b)(2)*].

(2) Prospective homeowner will accept term exceeding 12 months [*Civ. Code § 798.17(b)(1)*].

b. Confirm that rental or lease agreement satisfies following requirements:

(1) Contains, in first sentence of first paragraph of agreement, notice advising prospective homeowner that agreement will be exempt from any local rent control measure [*Civ. Code § 798.17(a)(2)*; *see § 39.220[2]*, first unnumbered paragraph (required notice)].

NOTE:
The notice must be in at least 12-point boldface type if the agreement is printed, or in capital letters if it is typed [*Civ. Code § 798.17(a)(2)*].

(2) Is for term longer than 12 months [*Civ. Code § 798.17(b)(1)*].

(3) Provides that homeowner will use mobilehome as his or her personal and actual residence [*see Civ. Code § 798.17(b)(2)*].

(4) Contains specific provisions required under MRL [*Civ. Code § 798.15*; *see* P 1, *above*].

(5) Does not include provision that authorizes automatic extension or renewal of, or automatically extends or renews, agreement for period beyond initial stated term at sole option of either management or homeowner [*Civ. Code § 798.17(g)*].

c. At time agreement is first offered to homeowner, provide homeowner with written notice of homeowner's right [*Civ. Code § 798.17(f)*]:

NOTE:
The failure of management to provide this notice will make the agreement voidable at the homeowner's option on the homeowner's discovery of the failure [*Civ. Code § 798.17(f)*].

(1) To have at least 30 days to inspect agreement; and

NOTE:
The homeowner must have at least 30 days from the date the rental agreement is first offered to the homeowner to accept or reject the agreement [*Civ. Code § 798.17(b)(3)*].

(2) To void agreement within 72 hours of acceptance of agreement [*see* P e, *below*].

d. Obtain homeowner's written acknowledgment of receipt of notice described in P c, *above* [*Civ. Code § 798.17(f)*].

e. If homeowner executes offered agreement, allow homeowner opportunity to void it by notifying management in writing within 72 hours of homeowner's execution of agreement [*Civ. Code § 798.17(b)(4)*].

f. If homeowner executes and then rescinds agreement within 72 hours [*see* P e, *above*], or rejects agreement within 30 days [*see* P c(1) NOTE, *above*], give homeowner option to accept alternative rental agreement for term of 12 months or less from date offered agreement was to have begun [*Civ. Code § 798.17(c)*; *see* P 1b, *above*].

NOTE:
If the homeowner selects this alternative, the agreement must contain the same rental charges, terms, and conditions as the offered agreement during the first 12 months, with one exception: the alternative agreement need not include any options to extend or renew that were contained in the offered agreement [*Civ. Code § 798.17(c)*; ***see*** *Civ. Code § 798.18(c)* (limitations on provisions governing extensions or renewals of agreements with a term of 12 months or less)].

g. Return executed copy of rental agreement to homeowner within 15 business days after receipt of rental agreement signed by homeowner [*Civ. Code § 798.16(b)*].

3. If park is to be limited to "adults only," confirm rental practices and physical facilities conform to federal requirements for "housing for older persons" [*see Civ. Code § 798.76*; *42 U.S.C. § 3607(b)*; *see also § 39.53[2][a]*].

4. If membership in any private club or organization is to be a condition for tenancy in park, do not deny membership to anyone on basis of any of the following [*Civ. Code § 798.20(a)*]:

a. Race;

b. Color;

c. Religion;

d. Sex;

e. Sexual orientation;

f. Marital status;

g. National origin;

h. Ancestry;

i. Familial status;

j. Disability; or

k. Source of income.

NOTE:
With regard to familial status, Civ. Code § 798.20(a) may not be construed to apply to housing for older persons, as defined in Gov. Code § 12955. Also with regard to familial status, nothing in § 798.20(a) may be construed to affect Civ. Code §§ 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5, relating to housing for senior citizens. However, Civ. Code §§ 51(d) and 1360 (concerning requirements for building construction and alterations) and Gov. Code § 12955(n), (o), and (p) (concerning financial status) do apply to Civ. Code § 798.20(a) [Civ. Code § 798.20(b)].

5. Do not refuse to renew homeowner's tenancy for any reason except one permitted by statute for termination of a tenancy [*see Civ. Code § 798.55*; *§ 39.238[1][h]*].

6. Confirm that any mobilehome rented out by park to occupant bears either of the following [*Health & Safety Code § 18604*; *see Health & Safety Code § 18026*]:

a. Insignia of approval issued by HCD; or

b. Federal label issued pursuant to National Manufactured Housing Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*].

NOTE:
For coverage of these requirements, see Ch. 40, ***Mobilehomes*** .

7. Collect and maintain duplicate registration cards for mobilehomes located in park [*see Health & Safety Code § 18080.6(a)*].

NOTE:

When a mobilehome is registered, the HCD, among other things, issues a registration card to the registered owner [*Health & Safety Code § 18090.5*; ***see*** *Health & Safety Code §§ 18091, 18091.5*]. The registration card is in two parts. One part must be retained in the mobilehome, and, if the mobilehome is located in a mobilehome park, the other part must be submitted to the operator of the park [*Health & Safety Code § 18080.6(a)*]. For further discussion of the registration process, see Ch. 40, ***Mobilehomes*** .

8. Do not include any provision in governing documents for park that prohibit use of any mobilehome that satisfies following criteria [*see Civ. Code § 714.5*]:

a. Is constructed in offsite facility or factory; and

b. Is subsequently moved or transported in sections or modules to park.

9. If park was developed after January 1, 1982, do not rent lots or spaces in park for use by recreational vehicles unless [*Civ. Code § 798.22(a)*; *see Civ. Code § 799.29*]:

a. Park has specifically designated area for recreational vehicles;

b. Designated area is separate and apart from area designated for mobilehomes; and

c. Recreational vehicles are located only in specifically designated area.

10. For each lot, limit occupancy to one mobilehome (or, if permitted in park, one recreational vehicle or commercial coach) [*25 Cal. Code Reg. § 1118*].

NOTE:

A self-propelled recreational vehicle or truck-mounted camper may be parked on a lot beside an occupied mobilehome or recreational vehicle if it is used as a means of transportation, is not occupied or connected to the lot utility facilities, and is not interconnected with the occupied mobilehome or recreational vehicle [*25 Cal. Code Reg. § 1118*].

[4] Park Rules and Regulations

1. Before implementing or enforcing any rule or regulation relating to pets in the park, notify management that:

a. It cannot charge pet-related fees, except for any special facilities or services for pets provided by it [*Civ. Code § 798.33(b)*; *see § 39.121[5]*];

b. No lease agreement entered into, modified, or renewed on or after January 1, 2001, may prohibit a homeowner from keeping at least one pet within park, subject to park's reasonable rules and regulations [*Civ. Code § 798.33(a)*].

NOTE:

For these purposes, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the management and the homeowner [*Civ. Code § 798.33(c)*]. These provisions do not affect any other rights provided by law to a homeowner to keep a pet within the park [*Civ. Code § 798.33(a)*].

c. It must not permit any dogs or other domestic animals to run at large in park [*25 Cal. Code Reg. § 1114(a)*].

2. Before amending a park rule or regulation:

NOTE:
The following steps apply when management proposes an amendment to the park's rules and regulations [***see*** *Civ. Code § 798.25*].

a. Provide 10 days' advance written notice to all homeowners in park setting forth proposed amendment and date, time, and location of meeting to discuss amendment [*Civ. Code § 798.25(a)*].

b. Meet and consult with homeowners in park, their representatives, or both [*Civ. Code § 798.25(a)*].

c. After meeting and consultation, do either of following to implement noticed amendment, as to any homeowner [*Civ. Code § 798.25(b)*]:

(1) Obtain that homeowner's consent; or

(2) Give homeowner at least six months written notice of amendment.

NOTE:
Regulations applicable to recreational facilities may be amended without homeowner consent on written notice of at least 60 days [*Civ. Code § 798.25(b)*]. Written notice to a homeowner whose tenancy commences within the required period of notice of a proposed amendment constitutes compliance with the rules for amending park rules and regulations if the written notice is given before the inception of the tenancy [*Civ. Code § 798.25(c)*]. However, any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*]. When management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation, it may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

3. If homeowner violates any park rule or regulation included in rental agreement [*Civ. Code § 798.56(d)*]:

a. Give homeowner written notice of alleged rule or regulation violation.

b. Give homeowner seven days from date of notice to adhere to rule or regulation.

NOTE:

Failure of a homeowner or resident to comply with a reasonable rule or regulation that is part of a rental agreement is a permissible ground for terminating the homeowner's tenancy. However, any homeowner or resident act or omission does not constitute a failure to comply unless and until management complies with the requirements described above. Also, management has the obligation to demonstrate that a rule or regulation has in fact been violated [*Civ. Code § 798.56(d)*].

4. If homeowner is required by rules and regulations in rental agreement to maintain lot on which mobilehome is located, but fails to do so, consider giving notice to homeowner that [*Civ. Code §§ 798.15(g), 798.36*]:

a. States specific condition to be corrected.

b. Advises homeowner that if he or she does not correct condition within 14 days, management may correct condition and charge homeowner a reasonable fee for services.

c. Includes estimate of charges to be imposed by management if services required for correction are performed by management (or management's agent).

NOTE:

A provision that provides for the remedy described above must be included in the rental agreement [*Civ. Code § 798.15*].

5. If violation of rule or regulation is not corrected after written notice and within required time period [*see* P 3, *above*], consider feasibility of following remedies, as appropriate for specific violation:

a. Proceed to terminate tenancy [*Civ. Code § 798.56(d)*; *see § 39.238* (procedure for termination)].

b. For failure by homeowner to maintain lot as required under rental agreement, perform necessary maintenance on lot and charge homeowner for reasonable services rendered [*Civ. Code §§ 798.15(g), 798.36*; *see* P 4, *above*].

c. For substantial violation, treat it as a public nuisance and file civil action or abatement proceeding.

NOTE:

The substantial violation of a park rule is deemed a public nuisance that may be remedied by a civil action or abatement, but not by a criminal proceeding [*Civ. Code § 798.87(b)*; ***see*** *Civ. Code § 3491* (remedies for public nuisance usually include criminal information or indictment)]. Also, a "substandard" mobilehome (that is, one that is unfit for human occupancy) is considered a nuisance. The local enforcement agency may order the abatement or removal of such a mobilehome [***see*** *25 Cal. Code Reg. §§ 1606-1618* (abatement procedure); ***see also*** California Forms of Pleading and Practice, Ch. 369, ***Mobilehomes and Mobilehome Parks*** (Matthew Bender)].

d. For continuing or recurring violation, obtain injunction prohibiting the violation [*Civ. Code § 798.88*; *see* P 6, *below* (procedure for obtaining injunction)].

6. If management wishes to enjoin continuing or recurring violation of reasonable rule or regulation, take following steps [*Civ. Code § 798.88*]:

NOTE:

The injunction remedy provided by *Civ. Code § 798.88* is nonexclusive, and nothing in that statute may be construed to preclude or limit any rights the management of a mobilehome park may have to terminate a tenancy [*Civ. Code § 798.88(g)*; ***see*** *Civ. Code § 798.88(a)*; ***see also*** *Civ. Code §§ 798.55-798.61* (termination of tenancy); *§ 39.238*].

A party to an action under *Civ. Code § 798.88* may appear through legal counsel or in propria persona [*Civ. Code § 798.88(f)*].

a. File petition for order enjoining nuisance with superior court for county in which park is located [*Civ. Code § 798.88(b)*; *see California Forms of Pleading and Practice, Ch. 369, Mobilehomes and Mobilehome Parks, § 369.132* (Matthew Bender) (illustrative petition)].

b. If desired, at time of filing of petition, request temporary restraining order (TRO) and submit supporting affidavit [*Civ. Code § 798.88(b)*].

NOTE:

To obtain the TRO, the petitioner must comply with the requirements of *Code Civ. Proc. § 527(c)* [*Civ. Code § 798.88(b)*]. For discussion of those requirements and an illustrative affidavit, see *California Forms of Pleading and Practice, Ch. 369,* ***Mobilehomes and Mobilehome Parks****, § 369.132* (Matthew Bender).

A TRO restraining the violation may be granted, with notice, if the petitioner's affidavit shows, to the satisfaction of the court, reasonable proof of a continuing or recurring violation of a rule or regulation of the park by the named homeowner or resident, and that great or irreparable harm would result to the management or other homeowners or residents of the park from continuance or recurrence of the violation [*Civ. Code § 798.88(b)*].

c. If TRO is granted, have following documents personally served on respondent homeowner or resident [*Civ. Code § 798.88(c)*]:

(1) TRO;

(2) Petition for injunction; and

(3) Notice of hearing on petition [*see* P d, *below*].

NOTE:

The TRO will remain in effect for a period of up to 15 days, except as modified or sooner terminated by the court [*Civ. Code § 798.88(c)*].

d. Attend hearing on petition [*see Civ. Code § 798.88(d)*].

NOTE:

The court will hold the hearing within 15 days of the filing of the petition. If the court, by clear and convincing evidence, finds the existence of a continuing or recurring violation of a reasonable rule or regulation of the park, the court will issue an injunction prohibiting the violation. The duration of the injunction may not exceed three years [*Civ. Code § 798.88(d)*].

e. No more than three months before expiration of injunction, consider petitioning for new injunction if [*Civ. Code § 798.88(e)*]:

(1) There has been a recurring or continuous violation of injunction; or

(2) There is a threat of a future violation of park rules on termination of injunction.

7. If management determines, in good faith, that removal of a homeowner's or resident's personal property from land and premises on which mobilehome is situated is necessary to bring premises into compliance with park rules and regulations or with Mobilehome Parks Act or its implementing regulations [*Civ. Code § 798.36(a), (b)*]:

NOTE:

If management elects to proceed under *Civ. Code § 798.36*, it may not also terminate the tenancy pursuant to *Civ. Code § 798.56(d)* (violation of park rules or regulations; ***see*** P 3, ***above***) based on the same specific violations [*Civ. Code§ 798.36(b)(4)*].

a. Give homeowner or resident written notice that [*Civ. Code § 798.36(b)(1)*; *see § 39.237A* (form of notice)]:

(1) Gives 14 days from date of notice to correct violation.

(2) Describes property to be removed.

(3) Specifies rule, regulation, or code justifying removal.

(4) Provides estimate of charges to be imposed by management.

NOTE:

The homeowner or resident is responsible for reimbursing management the actual, reasonable costs of removing and storing the property [*Civ. Code § 798.36(b)(2)*]. Costs incurred by management in correcting the violation associated with the property's removal and storage are deemed to be reasonable incidental service charges and may be collected pursuant to *Civ. Code § 798.56(e)* if a notice of nonpayment of the removal and storage fees is personally served on the homeowner [*Civ. Code§ 798.36(b)(2), (3)*; ***see*** *§ 39.238* (form)].

b. If violation is not corrected after written notice and within required time period, management may remove property to reasonably secure storage facility [*Civ. Code § 798.36(b)(1)*].

c. Within seven days of removal of property to storage area, provide homeowner or resident written notice that includes [*Civ. Code § 798.36(b)(3)*; *see § 39.237B* (notice)]:

(1) Inventory of property removed.

(2) Location where property may be claimed.

(3) Notice that cost of removal and storage must be paid by resident or homeowner.

NOTE:

If, within 60 days, the homeowner or resident does not claim the property, the property is deemed abandoned, and management may dispose of the property in any manner. If a resident or homeowner communicates in writing his or her intent to abandon the property before 60 days has expired, management may dispose of the property immediately and no further storage charges may accrue. If the homeowner or resident claims the property but has not reimbursed management for storage costs, management may bill those costs in a monthly statement that will constitute notice of nonpayment, and the costs will become the obligation of the homeowner or resident. The homeowner's or resident's liability for storage charges may not exceed 60 days [*Civ. Code § 798.36(b)(3)*].

d. If management elects to dispose of property by sale or auction and funds received by management exceed amount owed by homeowner or resident [*Civ. Code § 798.36(b)(4)*]:

(1) Refund difference to homeowner or resident within 15 days from date of receipt, by first class mail, postage prepaid, to homeowner's or resident's address in park, or by personal delivery.

(2) Include accounting specifying costs of removal and storage of property incurred by management in correcting rules violation and amount of proceeds realized from sale or auction.

NOTE:

If a sale or auction of the property yields less than the costs incurred by management, the homeowner or resident is responsible for the difference. This amount will be deemed a reasonable incidental service charge and may be collected pursuant to *Civ. Code § 798.56(e)* if a notice of nonpayment of the removal and storage fees is personally served on the homeowner [*Civ. Code§ 798.36(b)(4)*; ***see*** *§ 39.238* (form)].

[5] Rent and Other Charges and Fees

1. Limit fees and charges to some or all of the following:

a. Rent and utilities [*Civ. Code § 798.31*].

NOTE:

For a discussion of the limited circumstances under which mobilehome park rental agreements and "new construction" in mobilehome parks are exempt from local rent control ordinances [***see*** *Civ. Code §§ 798.17, 798.45*], see *§ 39.220[1][f]*. For purposes of *Civ. Code § 798.31*, cable television charges are not considered a "utility," at least when those charges are imposed retroactively and on residents who do not want cable services [*Greening v. Johnson (1997) 53 Cal. App. 4th 1223, 1230, 62 Cal. Rptr. 2d 214]* .

b. Incidental reasonable charges for services actually rendered, provided management gives homeowner written notice of charge at least 60 days before its imposition if service is not listed in rental agreement [*Civ. Code §§ 798.31, 798.32*].

NOTE:

Any charges that are the subject of such a 60-day notice must be separately stated on any monthly or other periodic billing to the homeowner. If the charge has a limited duration or is amortized for a specific period, the expiration date must be stated on the initial notice and on each subsequent billing to the

homeowner while the charge is being billed [*Civ. Code § 798.32(b)*].

c. Fee for keeping any pet in park, but only if [*Civ. Code § 798.33(b)*]:

(1) Management actually provides special facilities or services for pets; and

(2) Fee charged is reasonably related to:
(a) Cost of maintaining facilities or services; and

(b) Number of pets kept in park.

d. Fee for any guest who stays with homeowner for more than 20 consecutive days or total of 30 days in calendar year (except as provided in P 2, *below*) [*Civ. Code § 798.34*].

NOTE:
Guests who do not stay that long cannot be required to register with the management [*Civ. Code § 798.34*].

e. Fee for obtaining lease on mobilehome lot, but only if [*Civ. Code § 798.31*]:

(1) Lease is for more than one year; and

(2) Fee is mutually agreed on by homeowner and management.

f. Security deposit, but only if [*see Civ. Code § 798.39*]:

(1) Charge does not exceed equivalent of two months' rent (in addition to rent for first month); and

NOTE:
Management need not place the security deposit in an interest-bearing account or provide a homeowner with any interest on the deposit [*Civ. Code § 798.39(e)*].

(2) Deposit is required before time homeowner first begins occupancy in park.

NOTE:
Management may not demand an additional security deposit of a homeowner following the initial occupancy [*Civ. Code § 798.39(a)*].

g. If management does not permit mobilehome owners or residents to purchase liquified petroleum gas for use in mobilehome park from someone other than management, charges to homeowners and residents for liquified petroleum gas must not exceed 110 percent of actual price paid by management [*Civ. Code § 798.44(a)*].

NOTE:
If the management sells liquified petroleum gas to homeowners and residents under these circumstances, it must post in a visible location the actual price paid by the management for the liquified petroleum gas [*Civ. Code § 798.44(b)*]. The price limitation applies when federal, state, or local laws or regulations, including requirements for setbacks between mobilehomes, prohibit homeowners or residents from installing their own liquefied petroleum gas supply tanks, even though the management of the mobilehome park permits mobilehome owners and park residents to buy their own liquefied petroleum gas [*Civ. Code § 798.44(e)*].

2. Do not impose any charge or fee that is:

a. Based on number of members in homeowner's "immediate family," consisting of homeowner, homeowner's spouse, and their parents, children, and grandchildren under 18 years of age [*Civ. Code § 798.35*].

b. For one "guest" who shares mobilehome with a homeowner who is living alone [*Civ. Code § 798.34(b)*].

NOTE:
Any agreement between the homeowner and such a "guest" will not change the terms and conditions of the rental agreement between management and the homeowner. The guest must comply with the park's rules and regulations [*Civ. Code § 798.34(b)*].

c. For any caretaker of a homeowner who lives in park.

NOTE:
To be a qualified caretaker, the person must be over 18 years of age and provide live-in health care or live-in supportive care to the homeowner pursuant to a written treatment plan prepared by the homeowner's physician [*Civ. Code § 798.34(c)*].

d. For any senior homeowner's parent, sibling, child, or grandchild who requires live-in health care, live-in supportive care, or supervision under a written treatment plan prepared by a physician and surgeon [*Civ. Code § 798.34(d)*].

NOTE:
The homeowner's relative must be over 18 years of age [*Civ. Code § 798.34(d)*].

e. To enforce any of park's rules and regulations, except lot maintenance requirements [*Civ. Code § 798.36(a)*; *see Civ. Code § 798.15(g)*; *§ 39.237*] or charges incurred in cleaning up land and premises [*Civ. Code § 798.36(a), (b)*; *see also § 39.121[4]*].

f. For entry, installation, hookup, or landscaping as condition of tenancy, unless fee is [*Civ. Code § 798.37*]:

NOTE:
The park rules and regulations may include reasonable landscaping and maintenance requirements [***see*** *Civ. Code §§ 798.15(g), 798.36*; *§ 39.237*]. However, management must not require a homeowner or prospective homeowner to purchase, rent, or lease goods or services for landscaping, remodeling, or maintenance from any person, company, or corporation [*Civ. Code § 798.37*].

(1) Imposed by local governmental ordinance or requirement;

(2) Directly related to occupancy of specific site on which mobilehome is located; and

(3) Not incurred as portion of development of park as a whole.

g. Reflective of cost to management of any fine, forfeiture, penalty, money damages, or fee assessed by

a court against management for a violation of Mobilehome Residency Law [*Civ. Code 798.39.5(a)*].

NOTE:

Management may not charge or impose any fee or rent increase that reflects the above cost to management (including attorneys' fees and related costs incurred by management) [*Civ. Code § 798.39.5(a)*]. In determining whether a homeowner has met the burden of proof that a fee or rent increase violates this prohibition, the court must consider the timing of any fine, forfeiture, penalty, or fee assessed against management [*Civ. Code § 798.39.5(b)*].

3. If management provides both master meter and submeter utilities service [*Civ. Code § 798.40*]:

a. Post in conspicuous place prevailing residential utilities rate schedule as published by serving utility;

b. Give written notice to homeowners and residents in their utility billing statements by February 1 of each year about assistance to low-income persons for utility costs under California Alternate Rates for Energy (CARE) program [*Civ. Code § 798.43.1(a)*];

c. For each billing period, separately state charges for period and opening and closing readings for homeowner's meter including CARE discount, if any [*Civ. Code § 798.43.1(c)*]; and

d. If third-party billing agent or company prepares utility billing for park, disclose name, address, and telephone number of billing agent or company on each resident's billing [*Civ. Code § 798.40(b)*].

4. Unless rental agreement provides otherwise, consider billing homeowner separately for utility service fees and charges assessed by utility for following services provided to or for spaces in park [*see Civ. Code § 798.41(a), (c)*]:

a. Natural gas or liquid propane gas.

b. Electricity.

c. Water.

d. Cable television.

e. Garbage or refuse service.

f. Sewer service.

NOTE:

Fees and charges may not be separately billed by management to homeowners who entered into a rental agreement prior to January 1, 1991, unless the agreement is or was extended or renewed on or after that date [*Civ. Code § 798.41*]. Any separately billed utility fees and charges will not be considered as rent payable under the rental agreement or for purposes of rent increases under any local rent control provision, but only if, at the time of the initial separate billing, the rent chargeable under the rental agreement or the base rent chargeable under the terms of the local provision is simultaneously reduced by an amount equal to the separate fees and charges for utilities [*Civ. Code § 798.41(a)*].

Specifically, the amount of this reduction must be equal to the average amount charged to

management for the utility services for the homeowner's space during the 12 months immediately preceding notice of the commencement of the separate billing for the utility services [*Civ. Code § 798.41(a)*].

These separately billed utility fees and charges must be separately stated on any monthly or other periodic billing to the homeowner. If any such fee or charge has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice of the billing and on each subsequent billing that is given to the homeowner while the fee or charge is being billed [*Civ. Code § 798.41(d)*].

5. If homeowner is responsible for paying gas, water, or electric utility service:

a. Notify homeowner, before inception of tenancy or on discovery, of any condition known to management by which gas, water, or electric meter on homeowner's site measures gas, water, or electric service for common area facilities or equipment, including lighting [*Civ. Code § 798.43(a)*]; and

NOTE:
This requirement, and the requirement discussed in P 5b, ***below***, applies if the electric meter on the homeowner's site measures electricity for lighting mandated by statute for certain common facilities [***see*** *Health & Safety Code § 18602*] and this lighting serves the homeowner's site [*Civ. Code § 798.43(b)*].

b. Do either of following [*Civ. Code § 798.43(a)*]:

(1) Enter into mutual written agreement with homeowner for compensation by management for cost of portion of service measured by homeowner's meter for common area facilities or equipment; or

NOTE:
This agreement must cover the above costs to the extent that they accrue on or after January 1, 1991 [*Civ. Code § 798.43(a)(1)*].

(2) Discontinue using meter on homeowner's site for utility service to common area facilities and equipment.

6. If a homeowner plans to sell or sells his or her mobilehome located in park, do not charge [*Civ. Code § 798.72*; *see Civ. Code § 798.74(b)*]:

a. Homeowner or homeowner's agent a transfer or selling fee as a condition of sale of mobilehome, except for any actual service management has performed in sale or transfer in accordance with written request of homeowner or homeowner's agent.

NOTE:
Civ. Code § 798.72 also prohibits imposing this fee on any heir, joint tenant, or personal representative of a homeowner's estate who gains ownership of a mobilehome in a mobilehome park through the death of the owner of the mobilehome, provided the owner was a homeowner in the park at the time of his or her death [*Civ. Code § 798.72(a)*].

b. Prospective homeowner or his or her agent, on purchase of mobilehome, a fee as condition of approval for residency in park, unless management performs specific service in sale.

c. Prospective homeowner an interview fee.

NOTE:
Management may charge a prospective homeowner for a credit check [*Civ. Code § 798.72(b)*; ***see*** *Civ. Code § 798.74(b)* (requirements governing credit checks)].

7. Give at least 90 days' advance written notice before increasing amount of rent payable by homeowner [*Civ. Code § 798.30*; *see § 39.232*].

8. Give at least 60 days' advance written notice before imposing any fee or charge for services rendered by management that are not described in rental agreement [*Civ. Code § 798.32*; *see § 39.233*].

9. If requested in writing by a homeowner, refund homeowner's security deposit within 30 days of earlier of the following [*Civ. Code § 798.39(b)*]:

NOTE:
The requirements outlined in this paragraph apply to any security deposit collected on or after January 1, 1989 [*Civ. Code § 798.39(b)*]. Deposits collected before that date must be refunded to the homeowner (1) on the extension or renewal of the rental agreement or lease between the homeowner and the management, and (2) on receipt of a written request from the homeowner [*Civ. Code § 798.39(c)*]. Security deposits not otherwise required to be disbursed must be transferred to the successor in interest of a selling or transferring park owner; the new owner then has the same statutorily-imposed obligations with regard to the security deposits [*Civ. Code § 798.39(d)*].

For discussion of the statutory limitations on the amount and timing of the deposit [*Civ. Code § 798.39(a)*], see P 1(f), ***above***.

a. Resale of mobilehome; or

b. End of any 12-month period, following collection of deposit, during which homeowner promptly paid all rent, utilities, and reasonable service charges (as applicable) within five days of relevant due dates.

10. Do not acquire any lien or security interest in homeowner's mobilehome located in park unless [*see Civ. Code § 798.38*]:

a. Homeowner's consent is obtained; or

b. Judgment lien has been obtained.

NOTE:
If management obtains this lien or interest, any billing and payment on the secured obligation must be kept separate from current rent [*Civ. Code § 798.38*]. For the procedure for perfecting a security interest in a mobilehome, see Ch. 40, ***Mobilehomes*** .

11. If local rent control measure applies to mobilehome park, consider separately charging each homeowner for certain fees, assessments, or other charges imposed on homeowner's space in park [*see Civ. Code § 798.49*]:

NOTE:
The local agency that administers the local measure must permit the park management to separately

charge the homeowners for these fees [*Civ. Code § 798.49(a)*]. *Civ. Code § 798.49* does not apply, however, to certain fees and other charges imposed (1) pursuant to the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*], (2) on management by a court for a violation of the Mobilehome Residency Law [*Civ. Code § 798 et seq.*; ***see*** *Civ. Code § 798.39.5*], or (3) on management for the purpose of defraying the cost of administration of any local rent control measure. Further, it does not apply to any tax imposed on the property by a local jurisdiction [*Civ. Code § 798.49(d)*].

a. By local jurisdiction; or

b. Pursuant to any state or locally mandated housing program authorized by Health and Safety Code [*see Civ. Code § 798.49(a)*].

NOTE:

The amount of any such fee, assessment, or other charge must be separately stated on any billing to the homeowner [***see*** *Civ. Code § 798.49(c), (e)*; ***see also*** *Civ. Code § 798.59(b)* (adjustments for decreased or eliminated fees)]. Any change in the amount of the fee, assessment, or other charge must be separately stated on any billing to the homeowner [***see*** *Civ. Code § 798.49(c), (e)*; ***see also*** *Civ. Code § 798.59(b)* (adjustments for decreased or eliminated fees)]. Any change in the amount of the fee, assessment, or other charge must be considered when any rental adjustment is made under the local measure [*Civ. Code § 798.49(c)*].

[6] Required Notices and Disclosures to Homeowners and Prospective Homeowners

NOTE:

Unless otherwise provided, all notices required by the Mobilehome Residency Law [*Civ. Code § 798 et seq.*] must be either (1) delivered personally to the homeowner; or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

1. Furnish any prospective homeowner with following information, in writing, before beginning of homeowner's tenancy:

a. Notice of park's right to operate [*Civ. Code § 798.27(a)*; *see* P 4, *below*].

b. Notice of any change in park's right to operate [*see* P 4, *below*] that occurs before time homeowner begins occupancy in park [*Civ. Code § 798.27*].

c. For any prospective homeowner who is offered a rental or lease agreement that is to be exempt from rent control [*see § 39.220[1][f]*], notice of homeowner's right to [*Civ. Code § 798.17(f)*; *see § 39.231* (form of notice)]:

(1) Have at least 30 days to inspect agreement; and

(2) Void rental agreement by notifying management in writing within 72 hours of accepting rental agreement.

d. Notice of any pending amendment to park's rules and regulations [*see Civ. Code § 798.25*].

e. Existence of any gas, water, or electric meter on homeowner's site that measures both homeowner's usage and usage for park's common facilities or equipment [*see Civ. Code § 798.43*; *§ 39.220[1][i][ix]*].

f. If management is requesting a change of use in park before local governmental bodies or if a change of use request has been granted by a local government body, notice of that fact [*Civ. Code § 798.56(g)(3)*; *see § 39.240* (form of notice)].

g. Notice that mobilehome may be subject to school facilities fee [*Civ. Code § 798.82*; *see § 39.230A* (form of notice)].

NOTE:
The notice must be furnished at the time of application for residency [*Civ. Code § 798.82*].

h. Effective October 1, 2004, within two business days of receiving request from prospective homeowner for application for residency for specific space within mobilehome park, if management has been advised that mobilehome occupying that space is for sale, give prospective homeowner document in at least 12-point type entitled "INFORMATION FOR PROSPECTIVE HOMEOWNERS" that includes specified statements concerning home ownership in mobilehome park [*Civ. Code § 798.74.5(a)*; *see § 39.241[2]* (form)].

2. Notify homeowners of existence and identity of Mobilehome Ombudsman by taking following steps [*Civ. Code § 798.29*]:

NOTE:
The Mobilehome Ombudsman assists the public in resolving problems relating to mobilehomes [***see*** *Health & Safety Code §§ 18150-18153*; ***see also*** *§ 39.12*].

a. Obtain sign from Department of Housing and Community Development that contains name, address, and phone number for Mobilehome Ombudsman; and

b. Post sign in park clubhouse or in another conspicuous public place within park [*see Health & Safety Code § 18253.5(a)*].

3. Before February 1 of each year, provide homeowners with copy of Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*] if Legislature enacted significant change or changes to MRL in prior year [*Civ. Code § 798.15(c)*].

NOTE:
A copy of the text of the MRL must also be attached as an exhibit to, and incorporated by reference into, a mobilehome park rental agreement [***see*** *Civ. Code § 798.15(c)*; ***see also*** *§ 39.220*].

4. Provide all homeowners and prospective homeowners [*see* P 1a, *above*] with written notice of park's right to operate park, which describes [*Civ. Code § 798.27(a)*]:

a. Nature of zoning or use permit under which park operates.

NOTE:
If the park is operating under a permit subject to a renewal or expiration date, the relevant information and dates must be included in the notice [*Civ. Code § 798.27(a)*].

b. Duration of any lease on all or any portion of park that management leases from another party.

5. If after giving notice described in P 4, *above*, a change occurs concerning zoning or use permit under which park operates or a lease under which management is a lessee, provide homeowners and prospective homeowners with written notice that describes change [*Civ. Code § 798.27*].

NOTE:
If this change occurs before the time a homeowner begins his or her tenancy, the notice must be given before the tenancy commences. Otherwise, the notice must be given within 30 days of the change [*Civ. Code § 798.27*].

6. Disclose, in writing, name, business address, and business telephone number of park owner to any homeowner who requests this information [*Civ. Code § 798.28*].

7. Before increasing any homeowner's rent, give him or her at least 90 days' advance notice [*Civ. Code § 798.30*].

8. Before charging homeowner any fee for services that will be rendered by park but that are not described in homeowner's rental agreement, give homeowner at least 60 days' prior notice [*Civ. Code § 798.32*].

9. In conspicuous place in park, post following information [*25 Cal. Code Reg. § 1686*]:

a. Telephone numbers of the following:

(1) Fire department.

(2) Police department or sheriff's office.

(3) Park office.

(4) Person responsible for operation and maintenance.

(5) Enforcement agency.

b. Locations of the following:

(1) Nearest fire alarm box, when available.

(2) Park (giving street or highway numbers).

(3) Nearest public telephone.

10. Post hours of common area facilities at each facility [*Civ. Code § 798.24*].

11. Before amending any park rule or regulation give notice as follows:

a. At least 10 days' advance written notice of meeting to discuss proposed amendment [*Civ. Code § 798.25(a)*].

NOTE:
Management must meet and consult with the homeowners in the park, their representatives, or both, when proposing an amendment to the park's rules and regulations. Notice of the meeting must set forth the proposed amendment to the park rule

and regulation and the date, time, and location of the meeting [*Civ. Code § 798.25(a)*]. A meeting is not required when management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation. In such cases, management may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

b. After meeting and consultation [*Civ. Code § 798.25(b)*]:

(1) At least 60 days written notice for any amendment that relates to recreational facilities in the park.

(2) At least six months written notice for amendment of any other park rule or regulation.

NOTE:
The six month notice requirement is not required to adopt the noticed amendment, as to any homeowner, if that homeowner's consent is obtained [*Civ. Code § 798.25(b)*].

12. For violation of park rule or regulation, give homeowner written notice of alleged violation.

NOTE:
A homeowner is not considered to be in violation unless this notice is given and he or she fails to adhere to the rule or regulation within seven days [*Civ. Code § 798.56(d)*]. This notice must also be given before terminating a tenancy for a homeowner's violation of a park rule or regulation [***see*** *§ 39.236*]. Notice of the alleged violation need not be given if notice has been previously given for the same rule or regulation on three or more occasions within a 12-month period [***see*** *Civ. Code § 798.56*].

13. If homeowner is required by rental agreement to maintain lot on which mobilehome is located but fails to do so, consider giving homeowner notice that if he or she fails to perform maintenance, management may perform the maintenance and charge homeowner a fee for performance of these services [*Civ. Code §§ 798.15(g), 798.36*; *see § 39.237* (requirements for notice)].

14. If homeowner does not pay rent, utilities, or other permitted park charges within five days of their due date (not including day payment is due), give homeowner three-day notice to pay or vacate [*Civ. Code § 798.56(e)(1)*; *Code Civ. Proc. § 1162* (required method of service); *see 39.238* (requirements for notice)].

NOTE:
This notice may (and should) be given at the same time as the 60-day notice of termination [*Civ. Code § 798.56(e)(1)*; ***see*** P 15, ***below; see also*** *§ 39.121[9]*, P 3].

If management has previously given a homeowner a three-day notice to pay rent or other charges on three or more occasions in the preceding 12-month period, and each three-day notice contained a warning statement specified in the statute [***see*** [9], ***below***], it need not give a further three-day notice for subsequent nonpayment. Rather, management may give the homeowner a notice to vacate [*Civ. Code § 798.56(e)(5)*; ***see*** P 15, ***below***].

15. If grounds for terminating a tenancy exist [*Civ. Code § 798.56*; *see § 39.238*] and any required preliminary notices

have been given [*see, e.g.,* P 14, *above*], give written notice of termination to [*Civ. Code § 798.55(b)(1)*]:

NOTE:

For more detailed coverage of the procedure governing the termination of tenancies, see *§§ 39.121[9]* (procedural guide to terminations) and *39.238* (coverage of applicable procedure and illustrative termination notice).

a. Homeowner, at least 60 days before date homeowner is required to sell or remove mobilehome from park; and

b. Legal owner of mobilehome, each junior lienholder, and registered owner (if different than homeowner), within 10 days after notice of termination is given to homeowner.

NOTE:

Notice to the legal owner, each junior lienholder, and the registered owner may be sent by regular mail or by certified or registered mail with return receipt requested, at management's option [*Civ. Code § 798.55(b)(1)*]. However, for termination for nonpayment of rent or other valid charges, the notice must be sent by certified or registered mail, return receipt requested, within 10 days after notice is sent to the homeowner [*Civ. Code §§ 798.55(b)* (applicable when three-day notice is also required), *798.56(e)(5)* (applicable when three-day notice is not required)].

16. If park management seeks a change in park's use:

a. Give homeowners at least 15 days' written notice that management will be appearing before local governing body to request permits for change of use of mobilehome park [*Civ. Code § 798.56(g)(1)*].

b. At same time that notice described in P 15, *above*, is given, give homeowners report on impact of change in use on displaced park residents [*Civ. Code § 798.56(h)*; *Gov. Code § 65863.7(b), (i)*].

c. After receiving final approval for change in use, give homeowners six months' or more written notice of termination of tenancy [*Civ. Code § 798.56(g)(2)*].

NOTE:

If the change of use requires no local governmental permits, then notice must be given 12 months or more before the management's determination that a change of use will occur. Also, management must disclose and describe in detail the nature of the change of use [*Civ. Code § 798.56(g)(2)*].

17. If qualified homeowner organization has previously notified park owner of its interest in purchasing park in order to convert it to resident ownership [*see § 39.210* (form of notice and requirements for qualified organization)], give organization prior notice if park owner intends to do either of following [*see Civ. Code § 798.80*; *see also § 39.211* (form of owner's notice, including requirements for service, and discussion of exempt transfers and sales)]:

a. Enter into written listing agreement with licensed real estate broker for sale of park; or

b. Offer to sell park to any nonexempt party.

18. At least 72 hours before an interruption of more than two hours in utility service for maintenance, repair, or

replacement of facilities or utility systems over which management has control within park, post notice of interruption on mobilehomes of all affected homeowners and residents [*Civ. Code § 798.42*].

NOTE:

This requirement does not apply to an interruption that is due to an emergency. For these purposes, "emergency" means the interruption of utility service resulting from an accident or act of nature, or cessation of service caused by other than the management's regular or planned maintenance, repair, or replacement of utility facilities [*Civ. Code § 798.42*].

If management violates this posting requirement, it will be liable only for actual damages sustained by a homeowner or resident [*Civ. Code § 798.42*].

[7] Homeowner Meetings and Right of Assembly

NOTE:

Unless otherwise indicated below, any notice required by the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*; ***see*** *§ 39.14* (scope of MRL)] must be either delivered personally to the homeowner or deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

1. Meet with homeowner or homeowners who submit a written request for a meeting on any of following matters [*Civ. Code § 798.53*]:

NOTE:

Management may meet with homeowners on the following matters either individually, collectively, or with representatives of a group of homeowners who have signed a request to be represented. The meeting must be held within 30 days of receiving the written request for a meeting, and management must give notice to all requesting homeowners at least 10 days before any collective meeting [*Civ. Code § 798.53*].

a. Resident concerns regarding existing park rules that are not subject to statutory provisions applicable to amendments of park rules and regulations [*see Civ. Code § 798.25*].

b. Standards for maintenance of physical improvements in park.

c. Addition, alteration, or deletion of service, equipment, or physical improvements.

d. Rental agreements with terms exceeding one year offered pursuant to *Civ. Code § 798.17* [*see § 39.52[2]*].

2. Do not enact any park rule or regulation or take any other action that prohibits or restricts right of homeowners to do the following:

NOTE:

Any homeowner or resident who is prevented by management from exercising the following rights may bring an action to enjoin enforcement of any rule, regulation, or

other policy that unreasonably deprives the homeowner or resident of those rights [*Civ. Code § 798.52*].

a. Peacefully assemble or meet in park, at reasonable hours and in a reasonable manner, for any lawful purpose [*Civ. Code § 798.51(a)(1)*].

NOTE:
Meetings may be held in the park community hall, recreation hall, or clubhouse when the facility is not otherwise in use. They may also be held in any mobilehome in the park, with the consent of the homeowner of the mobilehome [*Civ. Code § 798.51(a)(1)*].

b. Invite public officials, candidates for public office, or representatives of mobilehome owner organizations to meet with homeowners and residents and speak on matters of public interest [*Civ. Code § 798.51(a)(2)*].

NOTE:
This right must be exercised in accordance with *Civ. Code § 798.50* [*Civ. Code § 798.51(a)(2)*]. Section 798.50 provides that the legislative intent behind the statutory requirements governing homeowner communications and meetings is to ensure that homeowners and residents of mobilehome parks have the right to peacefully assemble and freely communicate with one another and with others with respect to mobilehome living or for social or educational purposes [*Civ. Code § 798.50*].

c. Canvass and petition homeowners and residents for noncommercial purposes relating to mobilehome living, election to public office, or the initiative, referendum, or recall processes [*Civ. Code § 798.51(a)(3)*].

NOTE:
The canvassing and petitioning may include the distribution or circulation of information, and must be performed at reasonable hours and in a reasonable manner [*Civ. Code § 798.50(c)*].

d. Display in window or on side of manufactured home or mobilehome, or within site on which home is located or installed, political campaign sign relating to candidate for election to public office or to initiative, referendum, or recall process [*Civ. Code §§ 798.51(e), 799.10*].

NOTE:
The size of the face of the sign may not exceed six square feet, and the sign may not be displayed in excess of a period of time from 90 days before an election to 15 days following the election, unless a local ordinance within the jurisdiction where the mobilehome park is located imposes a more restrictive time period [*Civ. Code §§ 798.51(e), 799.10*].

3. Permit the use of any mobilehome in park as a polling place if county clerk [*Elec. Code § 1638.7*]:

NOTE:
A rental agreement must not prohibit this use of a mobilehome [*Elec. Code § 1638.7*].

a. Determines that no other facilities are available for convenient exercise of voting rights by park

residents; and

b. Designates mobilehome as a polling place [*see Elec. Code § 1638*].

[8] Homeowner's Sale of Mobilehome Located in Park

NOTE:
For a discussion of the rights and duties of park management and a homeowner who desires to sell his or her mobilehome located in that park, see Ch. 40, ***Mobilehome Parks*** .

[9] Termination of Tenancies

NOTE:
The requirements discussed below for terminating a tenancy in a mobilehome park apply to any tenancy subject to the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*; ***see*** *§ 39.14* (scope of MRL)]. The requirements do not affect any rights or proceedings set forth in the unlawful detainer statutes [***see*** *Code Civ. Proc. § 1159 et seq.*], except as otherwise provided in the MRL [*Civ. Code § 798.60*]. Unless otherwise indicated below, any notice required by the MRL must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

1. Do not terminate a tenancy except for one or more of the following permitted reasons [*Civ. Code § 798.56*]:

a. Failure of homeowner or resident to comply, within reasonable time after receiving notice of noncompliance from appropriate governmental agency, with local ordinance or state law or regulation relating to mobilehomes.

b. Conduct by homeowner or resident on park premises constituting substantial annoyance to other homeowners or residents.

c. Conviction of homeowner or resident for prostitution, assault with a firearm on another person or on a peace officer or firefighter engaged in performance of his or her duties [*Pen. Code §§ 243(d), 245(a)(2), (b)*], lewd or lascivious acts involving children [*Pen. Code § 288*], arson [*Pen. Code § 451*], or a felony controlled substance offense, if:
(1) Act resulting in conviction was committed within homeowner's mobilehome or elsewhere on park premises; and

(2) Person convicted of offense has not permanently vacated mobilehome.

d. Homeowner's or resident's continuing noncompliance with reasonable rule or regulation of park that is part of rental agreement, or any amendment to such a rule or regulation, for seven days following receipt of written notice from management of alleged violation [*see § 39.236* (form of notice)].

NOTE:
If a homeowner receives three or more written notices of an alleged violation of the same rule or

regulation within a 12-month period, no further written notice of the alleged violation is required for a subsequent violation of the same rule or regulation by the same homeowner [*Civ. Code § 798.56(d)*].

e. Nonpayment of rent, utility charges, or reasonable incidental service charges, if:

NOTE:
If rent has not been paid on an unoccupied mobilehome for 60 days and certain other criteria are satisfied, the mobilehome and its contents will be considered abandoned and may be sold by management [***see*** *Civ. Code § 798.61*]. For a discussion of these requirements, see *§ 39.121[10]*.

(1) Amount due has been unpaid for at least five days from due date (not including due date);

(2) After that five-day period, management gives homeowner three-day written notice to pay or to vacate tenancy; and

NOTE:
The three-day notice must be given to the homeowner in the same manner as is required for three-day notices under the unlawful detainer statutes [*Civ. Code § 798.56(e)(1)*; ***see*** *Code Civ. Proc. § 1162*]. However, the three-day notice must also contain the following statement printed in at least 12-point boldface type at the top of the notice, with the appropriate number written in the blank: "Warning: This notice is the (insert number) three-day notice for nonpayment of rent, utility charges, or other reasonable incidental services that has been served upon you in the last 12 months. Pursuant to *Civil Code Section 798.56(e)(5)*, if you have been given a three-day notice to either pay rent, utility charges, or other reasonable incidental services or to vacate your tenancy on three or more occasions within a 12-month period, management is not required to give you a further three-day period to pay rent or vacate the tenancy before your tenancy can be terminated" [*Civ. Code § 798.56(e)(5)*]. It may (and should) be given at the same time as the 60-day notice required for termination of tenancy [*Civ. Code § 798.56(e)(1)*; ***see*** P 3, ***below***]. A copy of the three-day notice must be sent to the legal owner [***see*** *Health & Safety Code § 18005.8*], each junior lienholder [***see*** *Health & Safety Code § 18005.3*], and the registered owner of the mobilehome, if other than the homeowner, within 10 days after the three-day notice is delivered to the homeowner. The three-day notice need not be sent if the homeowner cures the default [*Civ. Code § 798.56(e)(1)*].

If the homeowner has been given a three-day notice to pay or vacate on three or more occasions within the preceding 12-month period, management need not give a written three-day notice for a subsequent nonpayment [*Civ. Code § 798.56(e)(5)*]. Instead, management must give written notice to the homeowner to remove the mobilehome from the park within a period (specified in the notice) of not less than 60 days. The notice must be served in the manner required for three-day notices [***see*** *Code Civ. Proc. § 1162*]. A copy of this notice must be sent to the legal owner, each junior lienholder, and the registered owner of the mobilehome, if other than the homeowner [***see*** *Civ. Code § 798.55(b)*], by certified or registered mail, return receipt requested, within 10 days after notice is sent to the homeowner [*Civ. Code § 798.56(e)(5)*].

(3) Default is not cured by either of following methods:

(a) Homeowner pays before expiration of three-day notice period [*Civ. Code § 798.56(e)(2)*]; or

NOTE:
If the homeowner does not pay before the expiration of the three-day notice period, he or she will remain

liable for all payments due up until the time the tenancy is vacated [*Civ. Code § 798.56(e)(2)*]. An owner of a mobilehome park who obtains a final money judgment for unpaid rent against the registered owner of a mobilehome may perfect a lien against the mobilehome pursuant to statutory requirements [***see*** *Health & Safety Code § 18080.9*].

(b) Legal owner, registered owner of mobilehome (if other than homeowner), or junior lienholder [*see Health & Safety Code §§ 18005.8, 18009.5, 18005.3* (respective definitions of these terms)] cures homeowner's default by paying amount due within 30 calendar days after three-day notice or notice of termination was mailed [*see Civ. Code § 798.56(e)(3), (6)*].

NOTE:

A cure by either the legal owner, registered owner, or a junior lienholder is not permitted more often than twice during a 12-month period [*Civ. Code § 798.56(e)(4)*; ***see*** *Civ. Code § 798.56(e)* (additional restrictions on right to cure)].

f. Condemnation of park.

g. Change of use of all or any part of park, provided [*Civ. Code § 798.56(g)*]:

(1) Management gives homeowners:

(a) At least 15 days' written notice that management will be appearing before local governmental entity to request permits for change [*see § 39.240*]; and

(b) After all required permits are approved, six months or more advance written notice of termination of tenancy.

NOTE:

If the change of use requires no local governmental permits, then notice must be given at least 12 months before the management's determination that a change of use will occur. The notice must disclose the nature of the change and describe it in detail [*Civ. Code § 798.56(g)(2)*].

(2) Management gives proposed homeowners, before inception of tenancy, written notice that management is requesting change or that change has been granted.

(3) Notice requirements for termination of tenancy set forth in *Civ. Code §§ 798.56* and *798.57* are followed if proposed change actually occurs [*see § 39.238*].

2. Do not terminate tenancy for purpose of making homeowner's site available for person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from owner of park or owner's agent [*Civ. Code § 798.58*].

3. If valid reason for termination exists [*see* P 1, *above*], give written notice of termination [*see § 39.238* (illustrative termination notice)] to:

NOTE:

The notice must require sale or removal, at the homeowner's election, of the mobilehome from the park on a date that is at least 60 days after the date of the notice of termination [***see*** *Civ. Code §§ 798.55(b)(1), 798.73*]. Management may not require a mobilehome to be removed from the park pursuant to *Civ. Code § 798.73* unless it has provided notice to the homeowner particularly specifying

the condition that permits the removal of the mobilehome [*Civ. Code § 798.73(e)*]. The notice must set forth the reason for the termination, and provide specific facts to permit a determination of the date, place, witnesses, and circumstances concerning that reason. This requirement will not be satisfied by a mere recital of the language of the applicable termination statutes or by reference to a section number or subdivision of those statutes [*Civ. Code § 798.57*].

a. Homeowner, at least 60 days before date homeowner is required to sell or remove mobilehome from park; and

NOTE:

If the notice is being given for nonpayment of rent [***see*** *Civ. Code § 798.56(e)(1)*], it may (and should) be given at the same time as the three-day notice to pay or vacate [***see*** *Civ. Code § 798.56(e)(1)*; P 1e, ***above***].

b. Legal owner of mobilehome, each junior lienholder, and registered owner (if different than homeowner), within 10 days after notice of termination is given to homeowner.

NOTE:

The notice must be sent to these persons by United States mail, addressed to the recipients at the addresses set forth in the registration card [*Civ. Code § 798.55(b)*; ***see*** *Health & Safety Code § 18091.5* (registration card)]. It may be sent by regular mail or by certified or registered mail with return receipt requested, at the management's option [*Civ. Code § 798.55(b)(1)*]. However, for terminations for nonpayment of rent, the notice must be sent by certified or registered mail with return receipt requested [***see*** *Civ. Code §§ 798.55(c), 798.56(e)(5)*].

4. If notice of termination has been given [*see* P 3, *above*], permit legal owner of mobilehome or any junior lienholder to maintain mobilehome in park until its sale to a third party only if legal owner or junior lienholder does all of following [*Civ. Code § 798.56a(b)*]:

NOTE:

As an alternative to selling the mobilehome to a third party, the legal owner or junior lienholder may agree with management to sell it to park management [***see*** *Civ. Code § 798.56a(a)(1)*].

a. Within 60 days following receipt of, or no later than 65 days after mailing of, notice of termination, notifies management of either [*Civ. Code § 798.56a(a)(2), (3), (b)(1)*]:

NOTE:

For the form of notice that must be given, the time requirements for giving it, and related requirements, see Ch. 40, ***Mobilehomes*** .

(1) Its intention to foreclose on its security interest in mobilehome; or

(2) Its request that management pursue termination of tenancy against homeowner.

NOTE:

The legal owner and junior lienholder must reimburse management for reasonable attorney's fees and court costs incurred by management in the termination action, in an

amount agreed on by the parties [*Civ. Code § 798.56a(a)(3)*].

b. Satisfies, within 60 days following receipt of notice of termination (but no later than 65 days after its mailing), all of homeowner's responsibilities and liabilities owing to management for 90 days preceding mailing of notice of termination and then continues to satisfy responsibilities and liabilities as they accrue from date notice was mailed until mobilehome is resold [*Civ. Code § 798.56a(b)(1)*].

NOTE:
For these purposes, "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations [*Civ. Code § 798.56a(c)*]. Performance by the legal owner or junior lienholder of the homeowner's responsibilities and liabilities will not cure the homeowner's default [*Civ. Code § 798.56a(g)*].

c. Within 60 days following receipt of notice of termination (but no later than 65 days after mailing of that notice), commences all repairs and necessary corrective actions so that mobilehome complies with [*Civ. Code § 798.56a(b)(2)*]:

(1) Park rules and regulations in existence at time notice of termination was given; and

(2) Health and safety standards specified in *Health & Safety Code §§ 18550*, *18552*, and *18605*.

NOTE:
These standards govern (1) the condition, installation, and registration of mobilehomes [***see*** *Health & Safety Code § 18550*]; (2) the construction, location, and use of mobilehome accessory buildings [***see*** *Health & Safety Code § 18552*]; and (3) the use and occupancy of mobilehomes [***see*** *Health & Safety Code § 18605*].

d. Completes repairs and corrective actions described in P 4c, *above*, within 90 calendar days of notice of termination, or before date mobilehome is sold, whichever is earlier [*Civ. Code § 798.56a(b)(2)*].

e. Complies with requirements of Mobilehome Residency Law [*Civ. Code § 798 et seq.*] governing transfers of mobilehomes [*see Civ. Code §§ 798.70-798.83*; *see also* Ch. 40, *Mobilehomes*] as they relate to transfers of mobilehomes to third parties [*Civ. Code § 798.56a(b)(3)*].

5. If legal owner or junior lienholder fails to satisfy requirements described in P 4, *above*, consider exercising following rights [*Civ. Code § 798.56a(e)*]:

NOTE:
These rights exist notwithstanding any other provision of law, including the one that specifically prohibits a mobilehome from being moved from the site indicated on its registration card until the written consent of the legal owner and each junior lienholder has been obtained [*Civ. Code § 798.56a(e)*; ***see*** *Health & Safety Code § 18099.5* (prohibition against removal without consent)]. These rights also apply if a registered owner of a mobilehome that is not encumbered by a lien held by a legal owner or a junior lienholder, fails to comply with a notice of termination and is either legally evicted or vacates the premises [*Civ. Code § 798.56a(e)*].

a. Remove mobilehome from premises and place it in storage or store it on its site.

b. Enforce warehouseman's lien against mobilehome for costs of dismantling and moving, if appropriate,

and storage [*see Com. Code §§ 7209, 7210* (enforcement procedure); *see also* Ch. 99, *Moving and Storage of Household Goods* , Pt. C].

NOTE:

This lien will be superior to all other liens, except any lien the state may have for unpaid registration fees and penalties [***see*** *Health & Safety Code § 18116.1*].

[10] Disposition of Abandoned Mobilehome

NOTE:

For purposes of the requirements and procedures discussed below, a mobilehome is considered to be "abandoned" if all of the following are true: (1) it is located in a mobilehome park on a site for which no rent has been paid to the management for the preceding 60 days, (2) it is unoccupied, and (3) a reasonable person would believe it to be abandoned [*Civ. Code § 798.61(a)(1)*]. The term "abandoned mobilehome" includes a mobilehome that (1) is uninhabitable because of its total or partial destruction, (2) cannot be rehabilitated, and (3) satisfies the requirements described in the preceding sentence [*Civ. Code § 798.61(a)(2)(B)*]. That term also includes certain trailer coaches and recreational vehicles [***see*** *Civ. Code § 798.61(a)(2)(A)*].

For the procedure a creditor must follow to foreclose on an abandoned mobilehome [*Health & Safety Code § 18037.5(a)*], see Ch. 40, ***Mobilehomes*** .

Unlike the remainder of *§ 39.121*, this subsection phrases its steps in terms of directives to the attorney (rather than to park management) because an attorney will normally be retained to perform the acts described below.

1. Prepare notice of belief of abandonment and take following steps [*Civ. Code § 798.61(b)*]:

a. Post notice on mobilehome for not fewer than 30 days; and

b. Mail copies of notice to:

NOTE:

The copies must be mailed by registered or certified United States mail, postage prepaid, with a return receipt requested [*Civ. Code § 798.61(b)*].

(1) Homeowner of mobilehome, at last known address.

(2) Any known registered owner, if different from homeowner.

(3) Any known holder of security interest in mobilehome.

2. Thirty or more days following posting of notice, take following steps [*Civ. Code § 798.61(c)*]:

a. File petition in superior court in county in which park is located, for judicial declaration of abandonment.

b. Post copy of petition on mobilehome.

c. Have copies of petition served on:

NOTE:
This service must be accomplished by mailing copies of the petition by registered United States mail, postage prepaid, with a return receipt requested. The copies must be addressed to the following persons at their last known address [*Civ. Code § 798.61(c)*].

(1) Homeowner.

(2) Any known registered owner.

(3) Any known person having lien or security interest of record in mobilehome.

3. Attend hearing on petition and show, by preponderance of evidence, that criteria for abandoned mobilehome have been satisfied [*Civ. Code § 798.61(d)(2)*; *see* NOTE preceding P 1, *above*].

NOTE:
The hearing on the petition must be given precedence over other matters on the court's calendar [*Civ. Code § 798.61(d)*].

If, at the hearing, the petitioner makes the required showing and no party establishes an interest in the mobilehome, the court will enter a judgment of abandonment, determine the amount of charges to which the petitioner is entitled, and award attorneys' fees and costs to the petitioner [*Civ. Code § 798.61(d)(2)*]. "An interest in the mobilehome" is established by evidence of a right to possession of the mobilehome or a security or ownership interest in the mobilehome [*Civ. Code § 798.61(d)(2)*].

4. If court enters judgment of abandonment, request that default be entered by court clerk [*Civ. Code § 798.61(d)(3)*].

NOTE:
A default judgment will be entered following the request if no responsive pleading is filed within 15 days after service of the petition by mail [*Civ. Code § 798.61(d)(3)*].

5. Assist management in performance of following duties within 10 days following judgment of abandonment [*Civ. Code § 798.61(e)*]:

a. Enter abandoned mobilehome, complete inventory of its contents, and submit inventory to court.

b. Prepare notice of intent to sell mobilehome and its contents.

NOTE:
This notice must announce the date of sale [*Civ. Code § 798.61(e)(2)*].

c. Post and mail notice of intent to sell, following same procedures used for notice of belief of abandonment [*see* P 1, *above*].

6. If any person having right to possession of mobilehome pays, at any time prior to sale, all rent or other charges due (including reasonable costs of storage and other costs awarded by court), instruct management to take following steps [*Civ. Code § 798.61(e)(3)*]:

a. Permit that person to recover mobilehome and remove it from premises.

b. Upon receipt of payment and removal of mobilehome, file acknowledgment of satisfaction of judgment [*see Code Civ. Proc. § 724.030*].

NOTE:

When a money judgment is satisfied, the judgment creditor immediately must file with the court an acknowledgment of satisfaction of judgment (unless the judgment is satisfied in full pursuant to a writ) [*Code Civ. Proc. § 724.030*]. For further discussion and a form of acknowledgment, see *California Forms of Pleading and Practice, Ch. 318,* ***Judgments****, § 318.120 et seq.* (Matthew Bender).

7. Following entry of judgment of abandonment, but not less than 10 days following mailing of notice of intent to sell [*see* P 5c, *above*], have management conduct public sale of mobilehome and its contents [*Civ. Code § 798.61(f)*].

NOTE:

Management may bid at the sale, and has the right to offset its bids to the extent of the total amount owed to management (as determined under the statutory provisions discussed here governing the sale of abandoned mobilehomes) [*Civ. Code § 798.61(f)*].

8. Provide purchaser at sale with the following [*Civ. Code § 798.61(h)*]:

a. Copy of judgment of abandonment; and

b. Evidence of the sale, as specified by Department of Housing and Community Development (HCD) or Department of Motor Vehicles (DMV).

NOTE:

HCD or DMV will register title in the abandoned mobilehome to the purchaser upon presentation of the above judgment of abandonment and evidence of title [*Civ. Code § 798.61(h)*; ***see*** *Veh. Code § 5903*]. The sale will pass title to the purchaser free of any prior interest in the mobilehome, including any security interest or lien, except the state's lien for unpaid fees and penalties [*Civ. Code § 798.61(h)*; ***see*** *Health & Safety Code § 18116.1* (state's lien for unpaid fees and penalties on mobilehomes)].

9. Following sale, instruct management to do the following:

a. Retain sales proceeds, up to amount owed [*Civ. Code § 798.61(f)*]; and

b. Within 30 days of sale:

(1) Pay into county treasury any unclaimed amount obtained by management over and above amount to which it is entitled [*Civ. Code § 798.61(f)*]; and

NOTE:

This unclaimed amount is deemed abandoned property. The former homeowner or any other owner may claim any or all of that unclaimed amount within one year from the date of payment to the county by applying to the county treasurer or other official designated by the county. If the county pays any or all of that unclaimed amount to a claimant, neither the county nor any officer or employee of the county is liable to any other

claimant for the amount paid [*Civ. Code § 798.61(f)*].

(2) Submit to court an accounting of moneys received from sale and disposition of money and items contained in inventory [*Civ. Code § 798.61(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART III. TRANSACTION GUIDE
C. Procedural Guide

18-39 California Legal Forms--Transaction Guide §§ 39.122-39.199

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.122[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
A. Required Permits

18-39 California Legal Forms--Transaction Guide § 39.200

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.200 Application for Permit to Construct Mobilehome Park

[1] Comment

[a] Use of Form

This form is the official Department of Housing and Community Development (HCD) application for a construction permit. Under the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*] and its implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*], a construction permit must be obtained before beginning construction of a new mobilehome rental park [*see Health & Safety Code § 18500*; *25 Cal. Code Reg. § 1018(a)*; *see also § 39.10* (rental and resident-owned parks distinguished)]. For a step-by-step guide to the construction of a mobilehome park, see *§ 39.120*.

Use of this form is mandatory if the enforcement agency for the proposed mobilehome park is HCD [*see § 39.13[4]*]. If a local governing body has become the enforcement agency by assuming responsibility for enforcement of the MPA in the jurisdiction in which the proposed park is located [*see § 39.13[4]*], a different form of application may be required. In any event, the application for a construction permit must be submitted to the appropriate enforcement agency, whether it is HCD or a local governing body [*25 Cal. Code Reg. § 1018(a)*]. The remainder of this comment assumes that the HCD is the enforcement agency for the proposed park; if it is not, the procedure for obtaining a required construction permit may vary slightly from the requirements discussed *below*.

This application form should not be submitted for construction of a new mobilehome subdivision park (that is, a resident-owned park), since the development and construction of those parks is regulated by the Subdivision Map Act and the Subdivided Lands Act, not the Mobilehome Parks Act [*see § 39.29*]. However, any construction occurring in a resident-owned park that was formerly a "rental park" is subject to the permit and other requirements of the MPA and its implementing regulations [*see Health & Safety Code § 18214(a)* (definition of "mobilehome park" includes converted parks)].

This HCD application form is a multi-purpose form that is used not only to obtain a construction permit for a new "rental" park, but also to obtain a permit for other construction and installation activities regulated under the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*; *see* [2], *below*, "Instructions"]. These other regulated activities are briefly described in [c], *below*.

[b] Available State Assistance in Permit Process

The Department of Housing and Community Development (HCD) provides information relating to the permit process. It publishes informational booklets that summarize specific requirements under the Mobilehome Parks Act. These cover, among other things, the construction permit process and specifications for installing mobilehomes. HCD can be reached in Sacramento at (916) 445-4782.

Until 2004, a number of state and local agencies staffed Permit Assistance Centers, also known as "One-Stop Permitting" Centers, at various locations across the state. The Centers served as a single point where businesses could obtain information, receive permit consultation, and file applications for local, regional, and state permits. Those centers have been replaced by the online "CalGOLD" permit assistance website at http://www.calgold.ca.gov. However, it does not appear that the CalGold website relates to permit assistance for mobilehome parks.

[c] Construction and Other Activities That Require Permit

[i] Overview

It is unlawful to construct a mobilehome park, or to construct or alter buildings, lots, or other installations in an existing mobilehome park, without first obtaining a valid permit issued by the enforcement agency with jurisdiction over the park [*Health & Safety Code § 18500(a), (b)*; *see Health & Safety Code § 18207* ("enforcement agency" defined); *§ 39.13[4]*]. Subject to limited exceptions for minor construction [*see 25 Cal. Code Reg. § 1018(d)*], the following activities require a construction permit: erecting, constructing, reconstructing, installing, replacing, relocating, or altering any building, structure, accessory building or structure, or building component [*see* [ii], *below*], any electrical, mechanical, or plumbing equipment, any fuel gas equipment and installations, or any fire protection equipment or installations of, or within, a mobilehome park, or a mobilehome lot, or perform any non-load bearing grading or area fill with a depth of one foot or greater, unless exempted from obtaining a grading permit pursuant to Appendix 33 of the California Building Code [*25 Cal. Code Reg. § 1018(a)*; *see* [iii], *below* (installations)].

[ii] Accessory Structures and Buildings

Examples of accessory buildings and structures include any awning, cabana, ramada, storage cabinet, storage building, private garage, carport, fence, windbreak, or porch, or any residential building or structure established for the use of the occupant of a mobilehome [*Health & Safety Code § 18213*]. A single permit may be issued for all mobilehome accessory buildings or structures to be erected at the same time on the same mobilehome lot [*25 Cal. Code Reg. § 1020.3(f)*]. Standard plan approval is available for these buildings and structures [*25 Cal. Code Reg. § 1518(a)*; *see* [e][ii], *below* (standard plan approval)].

[iii] Mobilehome Installations and Foundation Systems

A person required to obtain a permit to install a mobilehome must submit an application for the permit to the enforcement agency on forms provided by the enforcement agency (this form) [*25 Cal. Code Reg. § 1020(a)*]. A complete set of plans and specifications must also be submitted with the application [*25 Cal. Code Reg. § 1020(a)(4)*]. Further, the application must be accompanied by three copies of a dimensioned plot plan of the lot on which the mobilehome will be installed. The park owner or his or her designated representative must sign at least one copy of the plot plan to certify that the dimensions of the lot are correct [*25 Cal. Code Reg. § 1020(a)(4)*]. The applicant must provide a copy of the plot plan to the mobilehome owner, if the applicant is a contractor, and to the park owner or

operator [*Health & Safety Code § 18613.3*].

When a foundation is to be installed for a mobilehome, a separate permit to construct the foundation system must be obtained from the enforcement agency [*25 Cal. Code Reg. § 1020(b)*]. An application and three complete copies of the plan and specifications must be submitted for the permit [*25 Cal. Code Reg. § 1020(b)(2)*].

For a procedural guide to the requirements for installing a mobilehome, either on or not on a foundation system, see Ch. 40, *Mobilehomes* .

[d] Documentation Required With Application

The following is a list of items that must be submitted with an application for a permit to construct a mobilehome park before a permit will be granted [*see Health & Safety Code § 18501*; *25 Cal. Code Reg. §§ 1030, 1032*; Mobilehome Park Plan Review (HCD); Building Plan Review (HCD)]:

- A description of the grounds.

- Complete set of plans and specifications of the proposed construction, drawn to scale on substantial paper, that show the location of the project, the name and address of the owner, and the name and address of the person preparing plans, and that demonstrate that the proposed construction complies with MPA and implementing regulations [*see* [e], *below*].

- Evidence that project has been approved by the local planning agency [*see Health & Safety Code § 18406*; *§ 39.27* (special approval considerations for waterfront locations); *Health & Safety Code § 18300.1*; *§ 39.21* (conditional use permits for mobilehome parks); *see also* California Real Estate Law and Practice, Ch. 265, *Zoning Relief: Amendments, Variances, and Conditional Use Permits* (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 60, *Zoning* , and Ch. 62, *Planning* (Matthew Bender)].

- Written evidence of compliance with the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see* California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender), and California Environmental Law and Land Use Practice, Chs. 20- 23 (Matthew Bender)].

- For developments within permit area of coastal zone, permit from Regional Coastal Zone Conservation Commission [*see* California Real Estate Law and Practice, Ch. 300, *Regulation in the Coastal Zone* (Matthew Bender), and California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender)].

- Written approval or stamp of approval on all the plans from the local health department for water supply and method of sewage disposal.

- Written approval or stamp of approval on all the plans for fire protection provided in the park from the local fire department.

- Written approval or stamp of approval on all plans for the park surface or subsurface drainage system from the local public works department, engineering department, flood control agency, or water quality board.

- Letter(s) from local sewer and water agencies and public utilities that planned services for park will

be provided.

- If park fronts on coastline, shoreline, river, or waterway, or on any lake or reservoir owned in whole or in part by a public agency, confirmation that the local government with jurisdiction over the park has determined that reasonable public access by fee or easement from public highways exists to the body of water, either through the park or within a reasonable distance from the park [*Health & Safety Code § 18406*; *see § 39.26*].

- Payment of appropriate fees [*see* [f], *below*].

Three complete sets of plans and specifications must be submitted if required by the enforcement agency [*25 Cal. Code Reg. § 1034(a)*]. Two copies of each of the approvals, conditions of approval, and permits described above must be submitted with the application [*see* Mobilehome Park Plan Review (HCD)].

[e] Plans and Specifications

[i] General Requirements

As discussed in *§ 39.200[1][d]*, plans and specifications for a mobilehome construction project must be submitted with an application for a construction permit. The plans and specifications submitted for proposed work must be of sufficient clarity to indicate the nature and extent of all proposed work, and must show in detail that the work will conform to the Mobilehome Parks Act and its implementing regulations [*25 Cal. Code Reg. § 1034(b)*]. The enforcement agency may waive the requirement for plans when the proposed work is minor [*25 Cal. Code Reg. § 1034(e)*].

Detailed specification requirements for mobilehome park construction are contained in the implementing regulations for the Mobilehome Parks Act. These cover, among other things, requirements for electrical, fuel and gas, and plumbing systems [*see 25 Cal. Code Reg. §§ 1130-1520*]. Also, the most current version of a Plan Review List, prepared by HCD, should be obtained from HCD and reviewed before preparing plans for submission. This list contains all the detailed and technical requirements for various aspects of the plans and specifications, such as the park plot plan, sewage disposal systems, and water distribution systems.

If the plans and specifications do not comply with the applicable regulations, the enforcement agency will notify the applicant of the violations. The applicant must then correct these matters and resubmit the plans and specifications to the enforcement agency along with a plan resubmission fee [*25 Cal. Code Reg. § 1020.7(e)*; *see § 39.200[1][f][ii]*].

Once the plans and specifications have been approved, any deviations from them must be approved by the designer, engineer, or architect, and the revised plans and specifications must be submitted to the enforcement agency for approval [*25 Cal. Code Reg. § 1034(d)*].

[ii] Standard Plan Approval

Standard plan approval from HCD may be available when a contractor will construct or install more than one of the same type of certain buildings and structures [*see 25 Cal. Code Reg. § 1020.9*]. Under this process, separate original plans need not be submitted each time the same type of building or structure covered under an approved standard plan is constructed or installed. This procedure is available for mobilehome accessory buildings or structures, foundation systems installed pursuant to *Health & Safety Code § 18551* and *25 Cal. Code Reg. 1333(d)*, and engineered tiedown systems designed in accordance with *25 Cal. Code Reg. § 1336.3* [*25 Cal. Code Reg. § 1020.9(a)*].

[f] Required Fees

[i] Construction Permit Fees and Plan Checking Fees

Payment of required fees for a construction permit must be submitted at the same time as the application for the permit [*Health & Safety Code §§ 18502(a), 18503*]. Two basic types of fees are required.

The first is a construction permit fee that, for buildings or structures that do not have a standard plan approval from HCD [*see § 39.200[1][e][iii]*], is based on the estimated value of the building or other structure covered under the permit [*see 25 Cal. Code Reg. § 1020.7(a)*]. Construction or alteration permit fees for mobilehome accessory buildings, structures, and building components that have a standard plan approval from HCD are a fixed dollar amount [*see 25 Cal. Code Reg. § 1020.4*]. The permit fee for electrical, plumbing, or gas piping permits is also a fixed dollar amount, which varies depending on whether the permit holder has a standard plan approval from HCD [*see 25 Cal. Code Reg. § 1020.7*].

The second type of fee required to be submitted with an application for a construction permit is a plan checking fee. Plan checking fees are equal to one half of the combined total of construction, plumbing, mechanical, and electrical permit fees, with a minimum fee of $10 [*Health & Safety Code § 18502(b)*; *25 Cal. Code Reg. § 1020.7(a)(2)*]. Plan checking fees are not required for mobilehome accessory buildings or structures for which a standard plan approval has been obtained from HCD [*25 Cal. Code Reg. § 1020.4(d)*; *see 25 Cal. Code Reg. § 1020.9* (standard plan approval)]. If an applicant simultaneously files applications to construct two or more buildings, or two or more mobilehome accessory buildings or structures, and the buildings or structures are identical and within the same mobilehome park, only one plan checking fee is required [*25 Cal. Code Reg. § 1020.7(c)*].

[ii] Fees on Resubmission of Plans and Specifications

If a permit applicant receives notification from the enforcement agency that plans and specifications do not comply with applicable regulations, the applicant must then correct and resubmit the plans and specifications to the enforcement agency along with a plan resubmission fee and a plan checking fee [*25 Cal. Code Reg. § 1020.7(e)*; *see § 39.200[1][f][i]*]. The plan checking fee is a minimum dollar amount, plus an additional amount based on the time it takes to perform the check [*25 Cal. Code Reg. § 1020.7(e)(1)*].

[g] Use of Alternate Construction Materials or Methods

HCD must approve the use of any materials, appliances, installations, devices, arrangements, or methods of construction that are not specifically prescribed by the MPA or its implementing regulations, unless the alternate is permitted under local regulations authorized under the MPA [*see Health & Safety Code § 18305(a)*; *25 Cal. Code Reg. § 1016*]. HCD may approve an alternate if it finds that the proposed design is satisfactory and that the alternate is, for the purpose intended, the equivalent of that prescribed by law in quality, strength, effectiveness, fire resistance, durability, safety, and for the protection of life and health [*Health & Safety Code § 18305(b)*]. The developer, at his or her own expense, may be required to offer proof of the alternate's compliance [*Health & Safety Code § 18305(c)*].

[h] Posting and Use of Permit

Once a construction permit is issued, the developer must post it in a conspicuous place on the premises [*Health & Safety Code § 18508*]. An approved set of plans and specifications must also be kept on site until the enforcement agency has made its final inspection [*25 Cal. Code Reg. § 1034(j)*].

[i] Inspections

Construction under a construction permit must be inspected by the enforcement agency during several stages of the construction and when the construction is completed. The developer must request the inspections at specified stages of construction [*see 25 Cal. Code Reg. § 1048*].

[j] Expiration and Extension of Permit

A construction permit normally expires six months from the date of its issuance. Six-month extensions may be granted, if work approved under the original permit is commenced before the expiration date of the original permit. In all cases, all permits expire two years after the date on which the original permit was issued [*Health & Safety Code § 18509*; *25 Cal. Code Reg. § 1038(a)*; *see California Forms of Pleading and Practice, Ch. 369, Mobilehomes and Mobilehome Parks, § 369.131* (Matthew Bender) (form of petition for writ of mandate to require extension of construction permit)].

Once a permit has expired, all work must cease until another valid construction permit has been issued by the enforcement agency. Plans and specifications need not accompany any further applications if (1) construction is to be completed in accordance with the plans filed with the initial permit, (2) the approved plans are made available to the enforcement agency during construction, and (3) the plans were approved less than two years before the request for the extension [*25 Cal. Code Reg. § 1038(b)*]. Fees paid for a construction permit will be forfeited to the enforcement agency if the applicant does not start construction within six months of the date the permit is issued, or if work has commenced, on expiration of the permit [*25 Cal. Code Reg. § 1038(c)*].

[k] Violations of Permit Requirement

The enforcement agency may institute any appropriate action or proceeding to prevent, restrain, correct, or abate a violation of the permit requirement [*Health & Safety Code § 18404(a)*]. For example, the agency may serve a written stop order on any person who orders or performs unauthorized work. The person must then stop the work until authorized by the enforcement agency to proceed [*25 Cal. Code Reg. § 1046*], and must pay double the normal fees [*Health & Safety Code § 18504*; *25 Cal. Code Reg. § 1050*; *see* [f], *above*].

[l] Change of Park Ownership During Construction

If there is a change in ownership or possession of the park before completion of construction, the new owner must complete construction in accordance with the approved plans and specifications. No additional fee will be required. However, if there is any substantial deviation from the approved plans and specifications as submitted by the original applicant, a new permit application must be submitted, accompanied by revised plans and specifications and the appropriate fees [*Health & Safety Code § 18507(b)*].

[2] FORM

Application for Permit to Construct Mobilehome Park

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawZoning & Land UseBuilding & Housing Codes



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
A. Required Permits

18-39 California Legal Forms--Transaction Guide § 39.201

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.201 Application for Permit to Operate Mobilehome Park

[1] Comment

[a] Use of Form

This is the Housing and Community Development (HCD) application form that must be submitted to obtain a permit to operate a mobilehome park. It is unlawful to operate a mobilehome park [*see Health & Safety Code § 18214* ("mobilehome park" defined)], or any portion of it, or to operate, occupy, rent, lease, sublease, let out, or hire out for occupancy any lot in a mobilehome park that has been constructed, reconstructed, or altered, without first obtaining a permit to operate from the enforcement agency for the mobilehome park [*Health & Safety Code § 18500*; *see § 39.13[4]* (discussion of enforcement agencies)].

[b] Issuance of Permit

A permit to operate will be issued by HCD following notification from the local enforcement agency that the construction of a new park or of additional lots in an existing park has been completed. By approving the application for a permit to operate, the local enforcement agency authorizes occupancy of the newly-constructed facilities. On approval by the local enforcement agency, one copy of the permit application must be provided to the applicant and one copy must be forwarded to HCD [*Health & Safety Code § 18505*].

Annual operating permits are issued by the enforcement agency for a 12-month period [*Health & Safety Code § 18506*]. A permit to operate may not be issued for a park when the previous operating permit has been suspended by the enforcement agency until the violations that were the basis for the suspension have been corrected [*Health & Safety Code § 18506*].

If the park was in existence on September 15, 1961, a permit to operate may not be denied if the park complied with the law that was superseded by the MPA [*Health & Safety Code § 18506*].

[c] Required Fees

[i] Annual Operating Permit Fee

An operating permit fee must be paid annually [*Health & Safety Code § 18502(c)*]. If a renewal application is submitted after the due date, a penalty fee will be assessed [*see Health & Safety Code § 18506*]. The operating permit will not be issued until the annual fee and any penalties have been paid [*see Health & Safety Code § 18506*].

[ii] Separate Inspection Fee

When a permit holder pays the annual operating permit fee [*see § 39.201[1][c][i]*], he or she must also pay to HCD or the local enforcement agency, as appropriate, a separate annual fee that is based on the number of lots in the park. This separate fee must be used exclusively for the inspection of mobilehome parks and mobilehomes as required under the Mobilehome Parks Act [*Health & Safety Code § 18502(c)(2)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute); *see § 39.201[1][d]* (required inspections)]. Following payment of the fee to HCD or the local enforcement agency, the permit holder may then charge each homeowner one half of the per lot additional annual fee at the next billing for the rent and other charges [*Health & Safety Code § 18502(c)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. Statutory authority for the separate, additional annual fee is repealed as of January 1, 2012, unless a statute enacted before that time deletes or extends the repeal date [*see Health & Safety Code § 18502(f)*].

[d] Notice of Violations

The enforcement agency must enter and inspect all mobilehome parks at least once every seven years, to ensure compliance with the Mobilehome Parks Act and its implementing regulations [*Health & Safety Code § 18400.1(a),* (g) (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. If the enforcement agency determines, as a result of an inspection, that a mobilehome park is in violation of the Act or rules or regulations adopted pursuant to the Act, the enforcement agency must issue a notice to correct the violation to the owner or operator of the park and to the person who is responsible for the operation and maintenance of the park [*Health & Safety Code § 18420(a)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute); *see Health & Safety Code § 18420(c)* (notice and service requirements; repealed as of January 1, 2012, unless that date is deleted or extended by statute); *see also Health & Safety Code § 18603* (person in park responsible for operation and maintenance)]. The owner or operator of the park is responsible for the correction of the violation covered by the citation [*Health & Safety Code § 18420(a)(3)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. For further discussion, see *§§ 39.13[4]* and *39.44*.

[e] Suspension of Permit

If the holder of a permit to operate violates any provision of the permit or of the Mobilehome Parks Act, the enforcement agency may suspend the permit [*Health & Safety Code § 18510*]. When a previous operating permit for a mobilehome park has been suspended by the enforcement agency, a permit to operate will not be issued until the violations that were the basis for suspension have been corrected [*Health & Safety Code § 18506*].

[f] Change of Name or Ownership of Park

[i] Amended Operating Permit

If there is a change in the name, ownership, or possession of an existing mobilehome park, the park operator or owner (new owner in the case of a transfer of ownership or possession) must notify the enforcement agency of the change. The notice must be in writing and must be furnished within 30 days from the time of the change in name or transfer. After the agency receives the notice and required fee, it will record the change and issue an amended permit to operate [

Health & Safety Code § 18507; *see Health & Safety Code § 18502(d)* (required fee)].

[ii] Reevaluation for Property Tax Purposes

Following any change in ownership of taxable real property or of a mobilehome subject to local property taxation, the transferee must report the transfer to the county assessor of the county in which the property is located [*see Rev. & Tax. Code §§ 480, 480.3*] so that the taxable value of the property may be increased to fair market value [*Cal. Const., art. XIIIA, § 2*; *see* Cal. Const., art. XIII; *see also Rev. & Tax. Code §§ 50-100.9*]. A "change in ownership" is a transfer of a present interest in real property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest [*Rev. & Tax. Code § 60*; *see Rev. & Tax. Code §§ 61-68*; *18 Cal. Code Reg. § 462.001(b)*].

There are several exceptions to the basic change in ownership reporting requirement [*see* Ch. 23, *Real Property Sales Agreements*]. One of them provides that a transfer of a mobilehome park will not constitute a change in ownership for property taxation purposes if it satisfies the following requirements [*Rev. & Tax. Code § 62.1(a)*]:

- The transfer occurs on or after January 1, 1985 [*but see Rev. & Tax. Code § 62.1(c)* (bona fide transfers before that date are also eligible)].

- The transfer is made to a nonprofit corporation, stock cooperative corporation, limited equity stock cooperative, or other entity formed by the tenants of the park for the purpose of purchasing the park.

- In the case of a transfer occurring on or after January 1, 1989, the individual tenants who were renting at least 51 percent of the spaces in the park before the transfer participate in the transaction through the ownership of an aggregate of at least 51 percent of the voting stock of, or other ownership or membership interests in, the acquiring entity. For park acquisitions on or after January 1, 1998, an additional year after transfer is permitted to attain the required tenant participation level [*see Rev. & Tax. Code § 62.1(a)(1)*].

If an acquiring entity relies on the above exemption but does not convert the park to condominium ownership, stock cooperative ownership, or limited equity cooperative ownership, then any transfer on or after January 1, 1989, of shares of the voting stock of, or other ownership or membership interests in, the acquiring entity will be a change in ownership of a pro rata portion of the real property of the park unless the transfer is for the purpose of converting the park to one of the above forms of ownership or is otherwise excluded from the change in ownership reporting requirement [*Rev. & Tax. Code § 62.1(b)(1)*; *see Rev. & Tax. Code §§ 62.1(b)(2), (3), 2188.10*].

A second exception from the change in ownership laws applies to a transfer of rental spaces in a mobilehome park to the individual tenants of the rental spaces, provided the following conditions are satisfied [*Rev. & Tax. Code § 62.1(a)(2)*]:

- The transfer occurs on or after January 1, 1985.

- At least 51 percent of the rental spaces are purchased by individual tenants who rented their spaces before the purchase.

- The individual tenants of these spaces form, within one year after the first purchase of a rental space by a tenant, a resident organization to operate and maintain the park. For this purpose, "resident organization" means a group of mobilehome park residents who have formed a nonprofit corporation, cooperative corporation, or other entity or organization for the purpose of acquiring the mobilehome park in which they reside and converting the park to resident ownership [*Health & Safety Code § 50781(l)*].

If, on or after January 1, 1985, an individual tenant or tenants notify the county assessor of the intention to comply with

the exemption described above [*Rev. & Tax. Code § 62.1(a)(2)*], any mobilehome park rental space that is purchased by an individual tenant in that park during that period will not be reappraised by the assessor. However, if all of those conditions are not satisfied, the county assessor will thereafter levy escape assessments for the transferred spaces. This escape assessment requirement applies only to rental mobilehome parks that have been in operation for at least five years [*Rev. & Tax. Code § 62.1(a)(2)*].

When the Legislature amended the method for determining changes in ownership of resident-owned mobilehome parks in 1988, it failed to specify a notice process for those changes in ownership. The situation therefore arose in which the failure to timely assess changes in ownership in resident-owned mobilehome parks resulted in the issuance of escape and supplemental assessments in an unfair and inequitable manner. Accordingly, the Legislature amended *Rev. & Tax. Code § 62.1* to avoid the unfair and unreasonable burden on the park residents of escape and supplemental assessments, and to permit the changes in ownership to be applied prospectively only, commencing with the lien date in 2002 [*see* 2001 Stats., ch. 772, § 1]. Thus, after an exclusion under *Rev. & Tax. Code § 62.1(a)*, the assessor may not levy any escape or supplemental assessment with regard to any change in ownership of a pro rata portion of the real property of the mobilehome park that occurred between January 1, 1989, and January 1, 2002, and for which the assessor did not, before January 1, 2000, levy any assessments. Commencing with the January 1, 2002, lien date, the assessor must correct the base year value of the pro rata portion of the real property of the park to properly reflect the changes in ownership [*Rev. & Tax. Code § 62.1(b)(4)(A)*]. An assessor who corrects the base year value of the real property of a park must notify the park that residents may be eligible for property tax assistance programs offered by either the controller or the Franchise Tax Board for senior citizens, or blind or disabled persons [*Rev. & Tax. Code § 62.1(b)(4)(B)*].

Any outstanding taxes that were levied between January 1, 2000, and January 1, 2002, as a result of a pro rata change in ownership as described in *Rev. & Tax. Code § 62.1(a)* must be canceled. However, no such taxes that were paid before January 1, 2002, will be refunded [*Rev. & Tax. Code § 62.1(b)(4)(C)*].

A third, related exception from the change in ownership requirements applies to a transfer on or after January 1, 1989, of a mobilehome park to a nonprofit corporation, stock cooperative corporation, tenant-in-common ownership group, or other entity (including a governmental entity) if, among other things, either of the following occurs within 18 months after the transfer [*Rev. & Tax. Code § 62.2(a)*]:

- The park is transferred by that corporation or other entity to a nonprofit corporation, stock cooperative corporation, or other entity formed by the tenants of the park in a transaction that qualifies for the exception first discussed *above* [*see Rev. & Tax. Code § 62.1(a)*]; or

- At least 51 percent of the rental spaces in the park are transferred to the individual tenants of those spaces in a transaction that falls within the scope of the second exception discussed *above* [*see Rev. & Tax. Code § 62.1(b)*].

For purposes of the third exception described *above*, the second qualifying transfer may be made within 36 months, rather than 18 months, of the first qualifying transfer if the first transfer was made on or after January 1, 1993. For transfers on or after January 1, 1995, the 36-month limit requirement for a subsequent transfer to an individual tenant can be met by executing a purchase contract and opening an escrow with a licensed escrow agent, provided that the escrow is opened before the expiration of the 36-month time period and that escrow closes no later than six months after the end of the 36-month time period [*Rev. & Tax. Code § 62.2(a)(2)*]. Also, the limit is 76 months (between the first and second qualifying transfer) for a mobilehome park located within a disaster area that was initially transferred to a qualified entity on or after October 1, 1991, and before October 31, 1991 [*Rev. & Tax. Code § 62.2(a)(2)*].

[iii] Notice Requirements

A mobilehome park that does not use recorded deeds to transfer ownership interest in the spaces or lots must file a report with the county assessor's office by February 1 of each year. The report must contain all of the following information [*Rev. & Tax. Code § 62.1(b)(5)*]:

- The full name and mailing address of each owner, stockholder, or holder of an ownership interest in the mobilehome park;
- The address, including space number, of each unit;
- The date that the ownership interest was acquired; and
- If the unit is a manufactured home, the Department of Housing and Community Development decal number or serial number, or both, and whether the manufactured home is subject to the vehicle license fee or the local property tax.

A park that fails to comply with this reporting requirement is subject to a penalty in accordance with *Rev. & Tax. Code § 482* [*Rev. & Tax. Code § 62.1(b)(7)*].

Within 30 days of a change in ownership, the new resident owner or other purchaser or transferee of a mobilehome within a mobilehome park that does not use recorded deeds to transfer ownership interest in the spaces or lots must file a change in ownership statement described in either *Rev. & Tax. Code § 480* or *480.2* [*Rev. & Tax. Code § 62.1(b)(6)*].

For further discussion of the change in ownership laws, see Ch. 23, *Real Property Sales Agreements* .

[2] FORM

Application for Permit to Operate Mobilehome Park

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
A. Required Permits

18-39 California Legal Forms--Transaction Guide §§ 39.202-39.209

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.202[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
B. Conversion of Rental Park to Resident-Owned Park

18-39 California Legal Forms--Transaction Guide § 39.210

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.210 Notice of Formation of Resident Organization to Purchase and Convert Park, and Request for Notice of Any Intended Sale by Owner

[1] Comment

[a] Use of Form

This is a notice that may be given by residents in a rental park to notify the owner of the park that an organization of residents has been formed for the purpose of purchasing the park and converting it to resident ownership [*see Civ. Code § 798.80(b)(2)*]. If all requirements for giving the notice are satisfied [*see* [b], [c], *below*], the park owner must give the organization prior notice if the owner subsequently lists the park for sale or offers to sell it to a third party, unless the sale or other transfer by the owner is exempt from the prior notice requirement [*Civ. Code § 798.80*; *see § 39.211* (form of notice by park owner and discussion of exempt sales and transfers)].

[b] Requirements for Entitlement to Notice of Intended Sale

To be entitled to prior notice of a park owner's intention to sell the park (provided the sale or transfer is not exempt from this notice requirement) [*see § 39.211*], a resident organization formed by homeowners in the mobilehome park must satisfy certain requirements. Specifically, the organization must be formed as a nonprofit corporation in accordance with *Revenue and Taxation Code Section 23701v*, stock cooperative corporation, or other entity for purposes of (1) converting the mobilehome park to condominium or stock cooperative ownership interests, and (2) purchasing the mobilehome park [*Civ. Code § 798.80(a)*]. Also, before the time the park owner lists the park for sale or offers it for sale to a third party, the resident organization must furnish the park owner or park management with a notice (this form) that contains the following [*Civ. Code § 798.80(b)(1), (b)(2)*]:

(1) The name and address of the president, secretary, and treasurer of the resident organization to whom the notice of sale is to be given; and

(2) A statement that the residents are interested in purchasing the park.

[c] Subsequent Notices and Requirements

After the initial notice is given by the resident organization to the park owner or park management [*see* [b], *above*], the organization must perform additional acts to maintain its right to receive a notice of sale from the park owner. First, once each year following the year initial notice is given, the organization must give the owner a subsequent notice that indicates that the organization is still interested in purchasing the park [*Civ. Code § 798.80(b)(2)*]. Second, the organization must give the park owner or park management written notice, within five days, of any change in the name or address of the officers of the resident organization to whom the notice of sale is to be given [*Civ. Code § 798.80(b)(3)*].

[d] Effect of Park Owner's Failure to Comply

Although nothing in *Civil Code Section 798.80* will affect the validity of title to real property transferred in violation of that statute, the violation will subject the seller to a civil action [*see Civ. Code §§ 798.84-798.88*] by homeowner residents of the park or the resident organization [*Civ. Code § 798.80(c)*]. Further, nothing in Section 798.80 affects the right of a real estate broker to collect a commission under an executed contract between the broker and the mobilehome park owner [*Civ. Code § 798.80(d)*].

[2] FORM

Notice of Formation of Resident Organization to Purchase and Convert Park, and Request for Notice of Any Intended Sale by Owner

Notice of Formation of Resident
Organization and Request for Notice of
Any Intended Sale of Park

TO: Management [*or* Owner] of _____[*name of mobilehome park*]

Please be advised that a group of homeowners in the above mobilehome park have organized a resident organization for the purpose of purchasing the park and converting it to [condominium *or* stock cooperative] ownership interests. The organization is a [*type of entity, e.g.,* nonprofit corporation formed in accordance with *Revenue and Taxation Code Section 23701v*]. Its name is _____, and the names and addresses of its officers are as follows:

President: _____[*name and address*]
Secretary: _____[*name and address*]
Treasurer: _____[*name and address*]

_____[*Name of organized entity*] is interested in purchasing the mobilehome park and requests, in accordance with *Civil Code Section 798.80,* that the owner [*or* you] provide the officers listed above with written notice, when applicable, of the owner's [*or* your] intention to sell the park. Such a notice must be provided at least 30 days but not more than one year before the time the owner does [*or* you do] either of the following: (1) enters [*or* enter] into a written listing agreement with a licensed real estate broker for the sale of the park, or (2) offers [*or* offer] to sell the park to any party.
Dated: _____

_____ [*Name of resident organization*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
B. Conversion of Rental Park to Resident-Owned Park

18-39 California Legal Forms--Transaction Guide § 39.211

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.211 Notice to Resident Organization That Park Owner Intends to Sell Mobilehome Park

[1] Comment

[a] Use of Form

This is a notice by the owner of a mobilehome park that may be used to notify park residents that the owner intends either to list the park for sale with a licensed real estate broker or to otherwise offer it for sale to any party. Except for exempt sales or transfers [*see* [b], *below*], a park owner must give this notice to any resident organization in the park that has been formed for the purposes of purchasing the park and converting it to condominium or stock cooperative ownership interests, provided the organization has previously furnished the park owner or park management with notice that it is interested in purchasing the park and satisfied certain other statutory notice requirements [*Civ. Code § 798.80; see § 39.210* (notice and other requirements for resident organization)].

The park owner must give this notice to the resident organization at least 30 days but not more than one year before the date the owner (1) enters into a written listing agreement with a licensed real estate broker to sell the park, or (2) otherwise offers to sell the park to any party. The notice must be either personally delivered or mailed by first-class mail to the president, secretary, and treasurer of the resident organization [*Civ. Code § 798.80(a)*]. A park owner who fails to give this notice when required to do so is subject to civil action by homeowner residents of the park or the resident organization [*Civ. Code § 798.80(c)*; *see § 39.210[1][d]*].

[b] Sales or Transfers Exempt From Notice Requirement

This notice requirement does not apply to any of the following [*Civ. Code § 798.80(e)*]:

(1) Any sale or other transfer by a park owner who is a natural person to any relation specified in *Probate Code Section 6401* or *6402*.

(2) Any transfer by gift, devise, or operation of law.

(3) Any transfer by a corporation to an affiliate [*see Civ. Code § 798.80(e)(3)* ("affiliate" defined)].

(4) Any transfer by a partnership to any of its partners.

(5) Any conveyance resulting from the judicial or nonjudicial foreclosure of a mortgage or deed of trust encumbering a mobilehome park or any deed given in lieu of such a foreclosure.

(6) Any sale or transfer between or among joint tenants or tenants in common owning a mobilehome park.

(7) Any purchase of a mobilehome park by a governmental entity under its powers of eminent domain.

[2] FORM

Notice to Resident Organization That Park Owner Intends to Sell Mobilehome Park

Notice of Owner's Intention
to Sell Mobilehome Park

TO: _____[*name of president, secretary, or treasurer*]
_____[*address*]
_____[*city, state, zip*]

This notice relates to _____[*name of mobilehome park*] (hereafter referred to as "the Park"), and is provided pursuant to *Civil Code Section 798.80*. You are hereby notified, as the [president *or* secretary *or* treasurer] of _____[*name of resident organization*], that (1) the undersigned is the owner of the Park, and (2) intend(s), on or about _____[*date that is least 30 days but not more than one year after date of this notice*], to _____[list the Park for sale with a licensed real estate broker *or* offer the Park for sale]. The undersigned is providing this notice pursuant to a written request for such a notice dated _____ and submitted by _____[*name of resident organization*] to the undersigned [*or* the management of the Park].

Date: _____

_____ [*signature of park owner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
B. Conversion of Rental Park to Resident-Owned Park

18-39 California Legal Forms--Transaction Guide § 39.212

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.212 Conversion Petition and Disclosure Statement [Gov. Code § 66428.1]

[1] Comment

[a] Use of Form

This form is a statutory petition and disclosure statement that must be used when the tenants in a mobilehome rental park (1) are attempting to purchase the park and to convert it to resident ownership and (2) wish to qualify for an exemption from the tentative and parcel map requirements of the Subdivision Map Act [*see Gov. Code § 66428.1*; *see also* [b], *below*]. Parks that are resident-owned are commonly refered to as mobilehome subdivisions [*§ 39.29*; *see § 39.10* (rental and resident-owned parks distinguished)]. For a brief summary of the regulatory requirements applicable to a mobilehome subdivision, see *§ 39.29*. For comprehensive coverage of the requirements of the Subdivision Map Act, see Ch. 33C, *Stock Cooperatives* , Ch. 33D, *Planned Developments* , Ch. 34, *Condominiums* , and Ch. 30, *Subdivision Regulation* .

For purposes of this petition and disclosure statement, "resident ownership" means, depending on the context, either or both of the following [*Gov. Code § 66428.1(g)*; *see Health & Safety Code § 50781(m)*]:

- The ownership of individual interests in a mobilehome park.

- The ownership by a resident organization [*see* definition, *below*] of an interest in a mobilehome park that entitles the resident organization to control the operations of the mobilehome park for a term of no less than 15 years. "Resident organization" means a group of mobilehome park residents who have formed a nonprofit corporation, cooperative corporation, or other entity or organization for the purpose of acquiring the mobilehome park in which they reside and converting the park to resident ownership [*Health & Safety Code § 50781(l)*].

[b] Waiver of Map Requirements Under Subdivision Map Act

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] and local ordinances enacted by every city and county in California pursuant to authority granted by the Act require the approval of a parcel map, or a tentative map and final map, prior to the (1) sale, lease, or financing of subdivided property, or (2) the commencement of construction, for sale, lease, or financing, of any building (except model units) in a subdivision [*Gov. Code § 66499.30(a), (b)*; *see Gov. Code §§ 66426, 66428*]. However, if at least two thirds of the owners of mobilehomes who are tenants in a mobilehome rental park have signed a petition (this form) [*see Gov. Code § 66428.1(b)* (required form for petition)] indicating their intent to purchase the park for purposes of converting it to resident ownership, and a field survey is performed, an application (on a form provided by the appropriate local agency) may be submitted to the local agency for a waiver of the parcel map or tentative and final map requirements of the Subdivision Map Act. The map requirements must be waived unless any of the following conditions exist [*Gov. Code § 66428.1(a)*; *see Gov. Code § 66428.1(c)*; *see also* [c], *below*]:

- There are design or improvement requirements necessitated by significant health or safety concerns.

- The local agency determines that there is an exterior boundary discrepancy that requires recordation of a new parcel or tentative and final map.

- The parcels in existence before the proposed conversion were not created by a recorded parcel or final map.

- The conversion would result in the creation of more condominium units or interests than the number of tenant lots or spaces in existence before the conversion.

After the waiver application is deemed complete, the local agency must approve or deny the application within 50 days. The applicant has the right to appeal a denial of the application to the governing body of the local agency [*Gov. Code § 66428.1(c)*; *see Gov. Code § 65943* (standards used to determine completeness of application); *see also* Ch. 30, *Subdivision Regulation*].

[c] Procedure If Waiver Is Denied

If the waiver application is denied, the applicant may proceed to convert the mobilehome park to a "tenant-owned, condominium ownership interest" (that is, a tenant-owned condominium project), but must file a parcel map or a tentative and final map. The local agency may not require the applicant to file and record a tentative and final map unless the conversion creates five or more parcels shown on the map. The number of condominium units or interests created by the conversion must not determine whether the filing of a parcel or a tentative and final map will be required [*Gov. Code § 66428.1(f)*].

If a tentative map or parcel map is required, the local agency may not impose any offsite design or improvement requirements unless the requirements are necessary to mitigate an existing health or safety condition. No other dedications, improvements, or in-lieu fees can be required. In no case can the mitigation have the effect of reducing the number, or changing the location, of existing mobilehome spaces [*Gov. Code § 66428.1(d)*].

If the local agency imposes requirements to mitigate a health or safety condition, the applicant and the local agency must enter into an unsecured improvement agreement. The local agency may not require bonds or other security devices for the performance of that agreement. The applicant has a period of one year from the date the agreement was executed to complete the improvements [*Gov. Code § 66428.1(e)*].

[d] State Financial Assistance for Conversion

The Department of Housing and Community Development (HCD) is authorized to make loans from the Mobilehome

Park Purchase Fund to assist in the conversion of rental parks to resident-owned parks [*Health & Safety Code §§ 50780-50786.5*; *see § 39.29[6]* (authorized types of loans)]. Certain requirements must be satisfied before financing will be provided [*see Health & Safety Code § 50786(d)*]. For example, HCD must receive verification that at least two-thirds of the households residing in the mobilehome park support the plans for acquisition and conversion of the park [*Health & Safety Code § 50786(d)(1)*]. HCD must also have verification that either no park residents will be involuntarily displaced as a result of the park conversion or that the impact of the displacement will be mitigated as required under state and local law. For purposes of this requirement, compliance with *Gov. Code § 66427.5* (required methods for avoiding economic displacement of nonpurchasing residents) is conclusively presumed to have mitigated economic displacement [*Health & Safety Code § 50786(d)(2)*].

[e] Impact Report Required When Filing of Tentative or Parcel Map Is Required

If the filing of a tentative or parcel map is required for a subdivision to be created from the conversion of a rental mobilehome park to resident ownership, the subdivider must take prescribed steps to avoid the economic displacement of all nonpurchasing residents [*see Gov. Code § 66427.5*]. These steps include, among others, offering existing tenants the option to purchase their units or to continue residency as tenants and filing a report on the impact of the conversion on residents of the mobilehome park to be converted [*Gov. Code § 66427.5(a), (b)*].

[2] FORM

Conversion Petition and Disclosure Statement [Gov. Code § 66428.1]

MOBILEHOME PARK PETITION AND
DISCLOSURE STATEMENT

SIGNING THIS PETITION INDICATES YOUR SUPPORT FOR CONVERSION OF THIS MOBILEHOME PARK TO RESIDENT OWNERSHIP. THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____. THE TOTAL COST FOR CONVERSION AND PURCHASE OF THE PARK IS $ _____ TO $ _____, EXCLUDING FINANCING COSTS. THE TOTAL COST TO YOU FOR CONVERSION AND PURCHASE OF YOUR OWNERSHIP INTEREST IS $ _____ TO $ _____, EXCLUDING FINANCING COSTS. IF TWO THIRDS OF THE RESIDENTS IN THIS PARK SIGN THIS PETITION INDICATING THEIR INTENT TO PURCHASE THE MOBILEHOME PARK FOR PURPOSES OF CONVERTING IT TO RESIDENT OWNERSHIP, THEN THE REQUIREMENTS FOR A NEW PARCEL, OR TENTATIVE AND FINAL SUBDIVISION MAP IN COMPLIANCE WITH THE SUBDIVISION MAP ACT MUST BE WAIVED, WITH CERTAIN VERY LIMITED EXCEPTIONS. WAIVING THESE PROVISIONS OF LAW ELIMINATES NUMEROUS PROTECTIONS WHICH ARE AVAILABLE TO YOU.

_____ _____
Buyer, unit #, date Petitioner, date

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCooperativesConversionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksSubdivisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
B. Conversion of Rental Park to Resident-Owned Park

18-39 California Legal Forms--Transaction Guide §§ 39.213-39.219

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.213[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
1. Agreements Between Mangement and Homeowners

18-39 California Legal Forms--Transaction Guide § 39.220

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.220 Mobilehome Park Lease Agreement

[1] Comment

[a] Use of Form

This form is a lease for space in a mobilehome park. It satisfies the requirements for a "rental agreement" imposed by the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*]. For purposes of the MRL, a lease is considered a rental agreement, and "rental agreement" means an agreement between the management and the homeowner establishing the terms and conditions of a park tenancy [*Civ. Code § 798.8*; *see* [c], *below*, for definitions of other terms contained in this definition].

The lease in [2], *below*, also contains the provisions that must be included in a rental agreement if it is to be exempt from local rent control ordinances [*see Civ. Code § 798.17*]. These required provisions, as well as the manner in which an "exempt" rental agreement must be offered to a prospective tenant, are discussed in [f], *below*.

The MRL contains several provisions that govern the specific content of a rental agreement and the landlord/tenant relationship between park management and tenants. These provisions are discussed below. To the extent a particular subject matter is regulated under the MRL, the MRL supersedes provisions of ordinary landlord-tenant law that cover the same subject matter. However, for matters not covered by the MRL, the principles of ordinary landlord-tenant law presumably apply [*see Civ. Code §§ 798.15, 798.16*]. For coverage of leases of residential property in general, see Ch. 34B, *Residential Leases* .

[b] Mobilehomes Subject to MRL

For purposes of the MRL, a "mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit pursuant to *Veh. Code § 35790* [*Civ. Code § 798.3*]. Under *Veh. Code § 35790*, a mobilehome

that exceeds a prescribed size or weight may not be moved on any street or highway without a permit from the Department of Transportation or the city or county having jurisidiction over the street or highway [*see Veh. Code § 35790(a)*]. Specifically, a permit is required for moving a mobilehome wider than eight and a half feet, longer than 40 feet, taller than 14 feet [*see Veh. Code §§ 35100, 35250, 35400*], or heavier than the maximum allowable weight [*see Veh. Code §§ 35550, 35551*].

The term "mobilehome" includes a manufactured home (as defined under *Health & Safety Code § 18007*) and a mobilehome (as defined under *Health & Safety Code § 18008*) [*Civ. Code § 798.3*]. The term does not include commercial modulars [*see Health & Safety Code § 18001.8* (definition of "commercial modular")] or certain recreational vehicles [*Civ. Code § 798.3(a)*; *but see Civ. Code § 798.3(b)* (term includes certain recreational vehicles that are used for human habitation and that satisfy specified occupancy criteria)].

[c] Definitions of Other Terms

The MRL distinguishes between "homeowners" and "residents." The distinction is important since different rights are accorded each under the MRL. A "homeowner" is a person who has a tenancy in a mobilehome park under a rental agreement [*Civ. Code § 798.9*]. A "resident" is a homeowner or other person who lawfully occupies a mobilehome [*Civ. Code § 798.11*].

Additional definitions under the MRL clarify the difference between a homeowner and a resident. For example, a "tenancy" is the right of a homeowner to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome, site improvements, and accessory structures for human habitation, including the use of the services and facilities of the park [*Civ. Code § 798.12*]. A "rental agreement" is an agreement (including a lease) between the management [*see Civ. Code § 798.2* (definition of "management")] and the homeowner establishing the terms and conditions of a park tenancy [*Civ. Code § 798.8*].

From the above definitions, it is clear that the principal difference between a homeowner and a resident is that a homeowner has a contractual relationship with park management through a rental agreement or lease. A resident of a mobilehome may or may not have this contractual relationship. For example, a person who subleases a mobilehome directly from a homeowner is a resident but is not a homeowner for purposes of the MRL.

[d] Required Contents of Rental Agreement

Management of a mobilehome park must offer each homeowner a written rental agreement (this form) [*Civ. Code §§ 798.15, 798.18(a)*]. The agreement must contain certain information required by statute and discussed below [*see Civ. Code § 798.15*]. Further, it may contain any other provisions permitted by law that will govern the tenancy [*Civ. Code §§ 798.15(h), 798.16(a)*]. For a rental agreement that is to be exempt from local rent control measures, additional provisions must be included [*Civ. Code § 798.17*; *see* [f], *below*].

The lease must contain the term of the tenancy and the amount of the rent [*Civ. Code § 798.15(a)*; *see § 39.220[2]*, PP 1, 3]. A homeowner must be given a lease for a term of 12 months, a lesser period if requested by the homeowner, or any longer period mutually agreed on by the homeowner and management [*Civ. Code § 798.18(a)*]. If the lease is to be exempt from local rent control it must be for a term longer than 12 months [*Civ. Code § 798.17(b)(1)*; *see* [f], *below*]. The lease may not contain any terms or conditions with respect to charges for rent, utilities, or incidental reasonable service charges that would be different during the first 12 months of the agreement from the corresponding terms or conditions that would be offered to the homeowner or homeowners on a month-to-month basis [*Civ. Code § 798.18(b)*]. A lease for a term of 12 months or less must not include a provision that authorizes automatic extension or renewal of, or automatically extends or renews, the lease beyond the initial term for a term longer than 12 months at the sole option of either management or the homeowner [*Civ. Code § 798.18(c)*; *see § 39.220[2]*, P 20 (providing for negotiation of extension)].

The rental agreement must include the rules and regulations of the park [*Civ. Code § 798.15(b)*; *see § 39.221* (illustrative set of rules and regulations)]. These are commonly attached as an exhibit to the lease or rental agreement, as contemplated by this form [*see § 39.220[2]*, P 10], rather than included in the body of the agreement. In addition, a copy of the text of the MRL must be attached as an exhibit and incorporated by reference into the rental agreement [*Civ. Code § 798.15(c)*; *see § 39.220[2]*, P 11]. Management must return an executed copy of the rental agreement to the homeowner within 15 business days after receipt of the rental agreement signed by the homeowner [*Civ. Code § 798.16(b)*]. Management must also provide all homeowners with a copy of the MRL before February 1 of each year, if a significant legislative change in its provisions was enacted in the prior year [*Civ. Code § 798.15(c)*].

A rental agreement must also contain provisions that do the following:

- State that it is the responsibility of management to provide and maintain physical improvements in the common facilities in good working order and condition [*Civ. Code § 798.15(d)(1)*] and that with regard to a sudden or unforeseeable breakdown or deterioration of these improvements, management has a reasonable period of time to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have known of the breakdown or deterioration [*Civ. Code § 798.15(d)(2)*; *see § 39.220[2]*, P 12]. For purposes of the above, a reasonable period of time to repair a sudden or unforeseeable breakdown or deterioration means as soon as possible in situations affecting a health or safety condition, and does not exceed 30 days in any other case except when exigent circumstances justify a delay [*Civ. Code § 798.15(d)(2)*].

- Describe the physical improvements that will be provided the homeowner during the tenancy [*Civ. Code § 798.15(e)*; *see § 39.220[2]*, P 12].

- List the services that will be provided at the time the lease is executed and that will continue to be offered for the tenancy period, and the fees, if any, to be charged for those services [*Civ. Code § 798.15(f)*; *see, e.g., § 39.220[2]*, P 5; *see* also *§ 39.221[2]*, P 9].

- State that management may charge a reasonable fee for services relating to the maintenance of the land and premises on which the mobilehome is situated if (1) the homeowner fails to maintain the land or premises in accordance with the park rules and regulations, (2) the homeowner is given a notice stating the specific condition to be corrected and an estimate of the charges to be imposed by management if management (or its agent) performs the services, and (3) the homeowner fails to comply with the notice within 14 days [*Civ. Code § 798.15(g)*; *see § 39.220[2]*, P 9].

[e] Waiver of Rights Under MRL Prohibited

A rental or sale agreement may not contain any provision by which the purchaser waives his or her rights under the MRL. Any such waiver is contrary to public policy and is void and unenforceable [*Civ. Code § 798.77*].

[f] Special Requirements for Rental Agreement That Is to Be Exempt From Local Rent Control

[i] Basis of Exemption

Special rules apply to any rental agreement with a term in excess of 12 months entered into between management and a homeowner, if the agreement and the manner in which it is offered to the homeowner satisfy certain criteria. Such a rental agreement (hereafter referred to as an "exempt agreement") is exempt from any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may

charge a homeowner for rent (referred to in this discussion as a "local rent control measure") [*Civ. Code § 798.17(a)(1), (b)(1), (2)*]. Further, with regard to any space in the park that is subject to an exempt agreement, and nothwithstanding any local rent control measure, a mobilehome park may not be assessed any fee or other exaction for a park space that is exempt under *Civ. Code § 798.17(a)* imposed pursuant to any rent control measure. Moreover, no other fee or other exaction may be imposed for a park space that is exempt underCiv. Code § 798.17(a) for the purpose of defraying administrative costs of an exemption [*Civ. Code § 798.17(e)*].

The statutory provisions set forth in *Civ. Code § 798.17* occupy the field with regard to rules for the execution of the rent control-exempt leases, that is, leases for a period of more than 12 months. Provisions of a local ordinance that contradict, duplicate, or otherwise modify these state legislative provisions are invalid [*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 46-47, 41 Cal. Rptr. 2d 393* (provisions governing renewal of rent-control exempt leases)].

[ii] Requirements for Agreement

An exempt agreement must, as a general rule, meet the following criteria:

- The first sentence of the first paragraph of the agreement must notify the homeowner that the agreement will be exempt from any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent [*Civ. Code § 798.17(a)(2)*; *see § 39.220[2]*, first unnumbered paragraph]. This notice must be in capital letters if the agreement is typed, or in at least 12-point boldface type if the agreement is printed [*Civ. Code § 798.17(a)(2)*].

- The agreement must not include a provision that authorizes automatic extension or renewal of, or automatically extends or renews, the rental agreement for a period beyond the initial stated term at the sole option of either management or the homeowner [*Civ. Code § 798.17(g)*; *see § 39.220[2]*, P 20 (providing for negotiation of extension)].

- The agreement must be entered into between management and a homeowner who will use the mobilehome as his or her personal and actual residence [*Civ. Code § 798.17(b)(2)*; *see § 39.220[2]*, P 6].

- The homeowner must have at least 30 days from the date the rental agreement is first offered to the homeowner to accept or reject the agreement [*Civ. Code § 798.17(b)(3)*; *see* [iii], *below*; *see also § 39.231*].

- A homeowner who executes such a rental agreement must be given the right to rescind the agreement by notifying management in writing within 72 hours of the homeowner's execution of the rental agreement [*Civ. Code § 798.17(b)(4)*; *see § 39.231*]. Although the statute refers to this as a right to "void" the agreement, the term "rescind" more accurately describes the right of a homeowner to terminate the rental agreement [*see Civ. Code § 1688* (contract is extinguished by its rescission); *Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571* ("rescission" means restoration of parties to their former position); *see also* Ch. 77, *Discharge of Obligations*].

[iii] Rejection or Rescission of Offered Agreement and Acceptance of Nonexempt Agreement

If the homeowner rejects the offered rental agreement or rescinds a signed rental agreement [*see* [ii], *above*] the homeowner will be entitled to instead accept a rental agreement for a term of 12 months or less from the date the offered rental agreement was to have begun (including a month-to-month tenancy). If the homeowner selects this alternative, the agreement must contain the same rental charges, terms, and conditions as the offered rental agreement

during the first 12 months, with the following exception: the alternative agreement need not include any options to extend or renew that were contained in the offered agreement [*Civ. Code § 798.17(c)*; *see Civ. Code § 798.18(c)* (limitations on provisions governing extensions or renewals of agreements with term of 12 months or less); *see also* [d], *above*].

[iv] Related Written Disclosure

At the time the rental agreement is first offered to the homeowner, management must provide written notice to the homeowner of the homeowner's right (1) to have at least 30 days to inspect the agreement [*see* [ii], *above*], and (2) to rescind the agreement by notifying management in writing within 72 hours of the homeowner's acceptance of the agreement [*see* [ii], *above*]. The homeowner must acknowledge in writing his or her receipt of this notice. The failure of management to provide this notice will make the rental agreement voidable at the homeowner's option on the homeowner's discovery of the failure [*Civ. Code § 798.17(f)*].

This form contains these disclosures [*see § 39.220[2]*, second and third (unnumbered) PP]. However, even if the disclosures are contained in an offered lease or rental agreement, they should also be made by separate notice to the prospective homeowner. For a separate notice of disclosure, see *§ 39.231*. That form includes an acknowledgment of receipt that may be executed by the homeowner/recipient.

[v] Prevailing Rent at Expiration of Lease Term

If the rental agreement is not extended and no new rental agreement in excess of 12 months' duration is entered into, then the last rental rate charged for the space under the previous rental agreement will be the base rent for purposes of any applicable provisions of law concerning rent regulation [*Civ. Code § 798.17(a)(1)*].

[vi] Gifts of Value

Nothing in the MRL prohibits management from offering gifts of value, other than rental rate reductions, to homeowners who execute exempt agreements [*Civ. Code § 798.17(d)*].

[vii] Separate Exemption for New Construction

Notwithstanding *Civ. Code § 798.17*, new construction in a mobilehome park is exempt from any ordinance, rule, regulation, or initiative measure adopted by any city, county, or city and county, that establishes a maximum amount that a landlord may charge a tenant for rent [*Civ. Code § 798.45*]. For these purposes, "new construction" means any newly-constructed spaces initially held out for rent after January 1, 1990 [*Civ. Code § 798.7*].

[viii] Separate Exemption for Non-Principal Residence

Notwithstanding *Civ. Code § 798.17*, if a mobilehome space within a mobilehome park is not the principal residence of the homeowner and the homeowner has not rented the mobilehome to another party, it is exempt from any local rent control measure [*Civ. Code § 798.21(a)*]. The exemption does not apply under certain circumstances, including those when the mobilehome is being actively held available for sale by the homeowner or pursuant to a listing agreement with a real estate broker or a mobilehome dealer [*see Civ. Code § 798.21(f)*].

[g] Rent

[i] Increases

For illustrative purposes only, this form has a term of five years [*see § 39.220[2]*, P 1], with the rent set at a yearly fixed amount that increases each year over the term of the lease [*see § 39.220[2]*, P 3]. A tenant may prefer this type of rent

arrangement since he or she knows at the beginning of the lease term the precise amount of rent that he or she must pay over the entire term of the lease. Management, on the other hand, may be reluctant to agree to an escalating rent that increases by fixed dollar amounts. This is especially true for lengthy leases since management's increase in operating expenses over the term of the lease may exceed those projected by management at the beginning of a lease term and reflected in fixed amount annual increases. Management may prefer rent increases that are tied to a consumer price or cost-of-living index or to actual increases in the property's operating expenses. For coverage of these types of rent increases, see Ch. 34C, *Retail, Industrial, and Office Leases* .

As discussed in [f], *above*, this lease, when used in conjunction with the notice in *§ 39.231*, meets the requirements for a lease or rental agreement that is exempt from local rent control ordinances. If the lease did not qualify for this exemption, it would not be possible to use an escalating rent in fixed dollar amounts. Rather, increases would have to be tied to the formula for rent increases provided for in the rent control ordinance.

The MRL requires park management to give a homeowner written notice of any increase in his or her rent at least 90 days before the date of the increase [*Civ. Code § 798.30*]. It is not clear whether this requirement applies only to month-to-month rental agreements or also to a lease with an escalating rent clause (such as this one). A cautious attorney would give the notice in the latter case, even though the amount of the increase is spelled out in the lease. For a form of notice for increasing rent due under a rental agreement, see *§ 39.232*.

[ii] Prohibition Against Retaliatory Increases

Management may not charge or impose on a homeowner any fee or rent increase that reflects the cost to management of any fine, forfeiture, penalty, money damages, or fee assessed or awarded by a court against management for a violation of the MRL, including any related attorneys' fees and costs incurred by management [*Civ. Code § 798.39.5(a)*]. A homeowner has the burden of proving that any fee or rent increase violates this prohibition. In determining whether the homeowner has met this burden, a court must consider the remoteness in time of the assessment or award against management of the fine, forfeiture, penalty, money damages, or fee [*Civ. Code § 798.39.5(b)*]. Any provision in a rental agreement entered into, renewed, or modified on or after January 1, 1995, that permits a fee or increase in rent that reflects the cost to the management of any money damages awarded against the management for a violation of the MRL is void [*Civ. Code § 798.39.5(c)*].

[h] Security Deposit

Management may demand that a homeowner pay a security deposit [*see § 39.220[2]*, P 4], in addition to any rent for the first month, provided that (1) the demand is made on or before initial occupancy and (2) the amount or value of the deposit does not exceed the equivalent of two months' rent [*Civ. Code § 798.39(a)*]. Management need not place the deposit in an interest-bearing account or provide the homeowner with any interest on the deposit [*Civ. Code § 798.39(e)*].

With regard to security deposits collected on or after January 1, 1989, management must refund the deposit on written request by the homeowner following the earlier of (1) the resale of the mobilehome or (2) the prompt payment by the homeowner, for any 12 consecutive months after the payment of the deposit and within five days of applicable due dates, of all rent, utilities, and reasonable service charges. The refund must be made within 30 days following the date of the resale or the end of the foregoing 12-month period [*Civ. Code § 798.39(b)*]. Security deposits collected before January 1, 1989, must be refunded to the homeowner (1) on the extension or renewal of the rental agreement or lease between the homeowner and the management, and (2) on receipt of a written request from the homeowner. To be eligible for the refund, the homeowner must have paid, within five days of the due date, all of the rent, utilities, and reasonable service charges for the 12-consecutive-month period preceding the receipt of the written request. The management must refund the security deposit within 60 days [*Civ. Code § 798.39(c)*]. With regard to any security deposits collected before January 1, 1989, and not otherwise disbursed, in the event the mobilehome park is sold or

transferred to any other party or entity, the selling park owner must deposit in escrow an amount equal to all security deposits held by the park owner. The seller's escrow instructions must direct that on the close of escrow the security deposits deposited in escrow that were held by the selling park owner (including the escrow period) for 12 months or more must be disbursed to the persons who paid the deposits and who promptly paid (within five days of their due date) all rent, utilities, and reasonable service charges for the 12-month period preceding the close of escrow [*Civ. Code § 798.39(d)*].

[i] Restrictions on Other Charges to Homeowners

[i] Services Rendered

Management may not charge a homeowner any fees except for rent, utilities, and incidental reasonable charges for services actually rendered [*Civ. Code § 798.31*]. All services to be provided to the homeowner by management, and corresponding charges, should be clearly described in the rental agreement. Management may not charge a fee for services that are actually rendered but that are not listed in a homeowner's rental agreement unless management gives the homeowner 60 days' advance written notice of the charge [*Civ. Code § 798.32(a)*]. Any fees that are the subject of such a 60-day notice must be separately stated on any monthly or other periodic billing to the homeowner. If the fee has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice and on each subsequent billing to the homeowner while the fee is being billed [*Civ. Code § 798.32(b)*].

[ii] Fee for Lease

Charging a homeowner a fee for obtaining a lease on a mobilehome lot is prohibited unless the lease is for more than one year and the fee is mutually agreed on by the homeowner and management [*Civ. Code § 798.31*].

[iii] Pets

Charges may not be made for pets unless special facilities or services for pets are actually provided. If special pet facilities are maintained, the fee charged must be reasonably related to the cost and maintenance of the facilities or services and the number of pets kept in the park [*Civ. Code § 798.33*].

[iv] Guests and Family Members

A homeowner may not be charged a fee for a guest who does not stay with him or her for more than a total of 20 consecutive days or a total of 30 days in a calendar year. A guest whose stay does not exceed these totals may not be required to register with management [*Civ. Code § 798.34(a)*]. Further, if a homeowner who is living alone wants to share his or her mobilehome with one person, a fee may not be imposed for that person. That person will be considered a guest, and must comply with the park rules and regulations [*Civ. Code § 798.34(b)*]. A homeowner may also not be charged a fee based on the number of members in his or her immediate family [*Civ. Code § 798.35* ("immediate family" includes the homeowner, the homeowner's spouse, and their children, grandchildren under 18 years of age, and parents)].

This agreement does not contain any provision for charging a homeowner a fee for guests [*but see § 39.221[2]*, P 2 (park rules and regulations)].

[v] Senior Caretakers and Homeowner's Relatives Requiring Live-in Care

Park management must not charge a fee for any person over 18 years of age who shares a mobilehome with a homeowner who is 55 years of age or older, if the person provides live-in health care or live-in supportive care to the homeowner pursuant to a written treatment plan prepared by the homeowner's physician. However, that person must comply with the park rules and regulations, and does not have any rights of tenancy in the park [*Civ. Code § 798.34(c)*].

A similar rule prevents management from charging a fee for a senior homeowner's parent, sibling, child, or grandchild who resides with the homeowner and who requires live-in health care, live-in supportive care, or supervision pursuant to a written treatment plan prepared by a physician and surgeon [*Civ. Code § 798.34(d)*].

[vi] Enforcement of Park Rules and Regulations

As a general rule, park management may not charge a fee for enforcement of any of the park rules and regulations [*Civ. Code § 798.36*]. However, management may charge a reasonable fee for services relating to the maintenance or cleanup of the land and premises on which the mobilehome is situated if (1) the homeowner fails to maintain the land or premises in accordance with the park rules and regulations, (2) the homeowner is given a notice stating the specific condition to be corrected and an estimate of the charges to be imposed by management if management (or its agent) performs the services [*see* § 29.237 (illustrative notice)], and (3) the homeowner fails to comply with the notice within 14 days [*Civ. Code §§ 798.15(g), 798.36*; *see § 39.220[2]*, P 9].

[vii] Entry, Installation, and Hookup

A homeowner cannot be charged a fee for entry, installation, or hookup as a condition of tenancy in a mobilehome park. This prohibition does not apply, however, to an actual fee or cost imposed by a local governmental ordinance or requirement directly related to the occupancy of the specific site on which the mobilehome is located and not incurred as a portion of the development of the mobilehome park as a whole [*Civ. Code § 798.37*].

[viii] Landscaping and Maintenance

Management may impose reasonable landscaping and maintenance requirements on a homeowner [*see § 39.220[2]*, P 9], but cannot charge a fee for landscaping as a condition of tenancy [*Civ. Code § 798.37*]. Also, a homeowner or prospective homeowner cannot be required to purchase, rent, or lease goods or services for landscaping, remodeling, or maintenance from any person, company, or corporation [*Civ. Code § 798.37*].

[ix] Utility Service Fees and Charges

If a rental agreement does not specifically provide otherwise, park management may elect to bill a homeowner separately for utility service fees and charges assessed by the utility for services provided to or for spaces in the park. Utility services that may be separately billed are natural gas or liquid propane gas, electricity, water, cable television, garbage or refuse service, and sewer service. Any separately-billed utility fees and charges are not deemed to be included in the rent charged for those spaces under the rental agreement, and may not be considered to be rent or a rent increase for purposes of any local rent control ordinance, provided that at the time of the initial separate billing of any utility fees and charges the rent chargeable under the rental agreement or the base rent chargeable under the terms of a local rent control provision is simultaneously reduced by an amount equal to the fees and charges separately billed. Specifically, the amount of this reduction must be equal to the average amount charged to management for the utility services for the homeowner's space during the 12 months immediately preceding notice of the commencement of the separate billing for the utility services [*Civ. Code § 798.41(a)*].

Separately-billed utility fees and charges must be separately stated on any monthly or other periodic billing to the homeowner. If any such fee or charge has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice of the billing and on each subsequent billing that is given to the homeowner while the fee or charge is being billed [*Civ. Code § 798.41(d)*].

This form does not provide for separate billing by management for utility service fees and charges. Instead, it includes certain utilities in the homeowner's rent. For all other utility services, the homeowner must pay their cost directly to the utility provider [*see § 39.220[2]*, P 5].

If a homeowner is responsible for the payment of gas, water, or electric utility service, management must notify the homeowner if there is any gas, water, or electric meter on the homeowner's site that measures gas, water, or electric service for common area facilities or equipment, including lighting. The disclosure must be made prior to the beginning of a homeowner's tenancy or at the time management discovers the condition. Thereafter, management must either discontinue service to the common areas from the meter or mutually agree on compensation to be paid by management for service attributable to the common areas [*Civ. Code § 798.43(a)*]. Management is not excused from taking either course of action if the meter on the homeowner's site measures electricity for lighting required on park roadways, walkways, or shower and restroom facilities [*see Health & Safety Code § 18602*], and this lighting provides lighting for the homeowner's site [*Civ. Code § 798.43(b)*]. This form assumes that the foregoing requirements are not applicable.

[j] Attorneys' Fees

In any action arising out of the MRL, the prevailing party is entitled to reasonable attorneys' fees and costs [*Civ. Code § 798.85*; *see § 39.220[2]*, P 22]. A party is deemed to be a prevailing party when the judgment is rendered in that person's favor, or when the litigation is dismissed in that person's favor before or during the trial, unless the parties have otherwise agreed on a compromise or settlement [*Civ. Code § 798.85*].

[k] Prohibitions Against Limiting Right of Homeowners to Assemble and Communicate

A rental agreement (or park rule or regulation) may not contain any provision that denies the right of any homeowner or resident to do any of the following [*Civ. Code § 798.51*]:

- Peacefully assemble or meet in the park, at reasonable hours and in a reasonable manner, for any lawful purpose.

- Invite public officials, candidates for public office, or representatives of mobilehome owner organizations to meet with homeowners and residents and speak on matters of public interest [*see Civ. Code § 798.50*].

- Canvass and petition homeowners and residents for noncommercial purposes relating to mobilehome living, election to public office, or the initiative, referendum, or recall processes, at reasonable hours and in a reasonable manner. This right specifically includes the distribution and circulation of information.

- Display in the window or on the side of a manufactured home or mobilehome, or within the site on which the home is located or installed, a political campaign sign relating to a candidate for election to public office or to the initiative, referendum, or recall process [*Civ. Code §§ 798.51(e)*, *799.10*].

[l] Use of Mobilehome as Polling Place

A mobilehome may be used as a polling place if the county clerk (1) determines that no other facilities are available for the convenient exercise of voting rights by mobilehome park residents and (2) designates the mobilehome as a polling place. A rental agreement may not prohibit the use of a mobilehome as a polling place [*Elec. Code § 1638.7*; *see Elec. Code § 1638* (designation of polling place)].

[m] Membership in Private Club as Condition of Tenancy

Membership in a private club or organization may be made a condition for tenancy in a mobilehome park. However, membership may not be denied to anyone on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or source of income [Civ. Code § 798.20(a); *see* Civ. Code § 798.20(b) (senior housing exceptions)]. This form does not make membership in such an entity a condition for tenancy.

[n] Parks Limited to Senior Citizens

This agreement does not limit tenancy in the park to senior citizens [*but see § 39.221[2],* P 1 (park rules and regulations)]. For a discussion of the enforceability of an "adults only" rule in a mobilehome park [*see Civ. Code § 798.76*], as limited by federal law, see *§ 39.53[2][a]*.

[o] Restrictions on Management's Right to Enter Mobilehome

Management may not enter a homeowner's mobilehome without the homeowner's prior written consent, except in the case of an emergency or if the homeowner has abandoned the mobilehome. The homeowner may at any time revoke in writing a consent previously given [*Civ. Code § 798.26*; *see § 39.220[2],* P 21].

Management may enter on a lot or space leased or rented by a homeowner for any of the following purposes: (1) to maintain utilities, trees, and driveways; (2) to maintain the premises after a homeowner is required but fails to do so; or (3) to protect the park. The entry must occur at a reasonable time, and must not interfere with the resident's quiet enjoyment [*Civ. Code § 798.26(a)*; *see § 39.220[2],* P 21].

[p] Restrictions on Pets

No lease agreement entered into, modified, or renewed on or after January 1, 2001, may prohibit a homeowner from keeping at least one pet within the mobilehome park, subject to reasonable park rules and regulations [*Civ. Code § 798.33(a)*]. For these purposes, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the management and the homeowner [*Civ. Code § 798.33(c)*]. These provisions do not affect any other rights provided by law to a homeowner to keep a pet within the park [*Civ. Code § 798.33(a)*].

[q] Sale of Mobilehome During Term of Rental Agreement

As authorized under the MRL, this agreement requires the homeowner to obtain management's prior approval of a person who intends to purchase the homeowner's mobilehome and to keep the mobilehome in the park [*Civ. Code § 798.74(a)*; *see § 39.220[2],* P 15]. It also requires the homeowner to give management written notice of the sale before the close of escrow. Management must approve or disapprove the prospective purchaser within 15 days of receiving all required information from the prospective purchaser [*Civ. Code § 798.74(a)*; *see § 39.220[2],* P 15]. Management is limited by statute as to the reasons it may use to disapprove a prospective purchaser [*Civ. Code § 798.74*; *see* Ch. 40, *Mobilehomes*]. Management may require that a prospective purchaser of a mobilehome comply with any rule or regulation limiting residency based on age requirements for housing for older persons, provided that the rule or regulation complies with specified provisions of the Fair Housing Act [*42 U.S.C. § 3601 et seq.*] that prohibit discrimination based on "familial status" (among other classifications) [*Civ. Code § 798.76*; *see 42 U.S.C. § 3605(a)*; *see also § 39.53[2][a]*].

Ordinarily, if a mobilehome is sold to a third party during the term of a homeowner's rental agreement, management cannot require that the mobilehome be removed from the park. However, removal may be required under certain circumstances [*Civ. Code § 798.73*; *see* Ch. 40, *Mobilehomes*].

For a discussion of other restrictions and requirements applicable to the sale of a mobilehome located in a park, see Ch. 40, *Mobilehomes* .

[r] Termination of Mobilehome Tenancy

Because of the high cost of moving mobilehomes, complicated installation requirements, and the cost of landscaping or lot preparation, the Legislature has afforded tenants of mobilehome parks unique protection against actual or constructive eviction [*see Civ. Code § 798.55(a)*]. Thus, a tenancy may be terminated only for a specific reason

permitted by statute [*see § 39.220[2]*, P 17], the particular reason cited for termination must be clearly stated (with supporting facts) in a written notice, and proper service of the notice must be made on the homeowner [*Civ. Code §§ 798.55(b)*, *798.56*, *798.57*]. The homeowner must also be given written notice to sell or remove the mobilehome. This notice must specify the period (not less than 60 days) within which the mobilehome must be sold or removed [*Civ. Code § 798.55(b)(1)*; *see § 39.220[2]*, P 18]. For complete coverage of these requirements, see *§ 39.238*.

[2] FORM

Mobilehome Park Lease Agreement

MOBILEHOME PARK LEASE

[*If lease is to be exempt from local rent control measures under Civ. Code § 798.17, include the following notice in capital letters if lease is typed, or in at least 12-point boldface type if lease is printed (Civ. Code § 798.17(a)(2)):*]

THIS LEASE IS EXEMPT, UNDER *CIVIL CODE SECTION 798.17*, FROM ANY ORDINANCE, RULE, REGULATION, OR INITIATIVE MEASURE ADOPTED BY ANY LOCAL GOVERNMENTAL ENTITY THAT ESTABLISHES A MAXIMUM AMOUNT THAT A LANDLORD MAY CHARGE A TENANT FOR RENT.

[*Include the following if lease is to be exempt from local rent control measures under Civ. Code § 798.17 and these disclosures will not be made by separate notice (see § 39.231):*]

UNDER CALIFORNIA LAW, YOU HAVE AT LEAST 30 DAYS FROM THE DATE THIS LEASE IS FIRST OFFERED TO YOU TO REVIEW AND INSPECT THE LEASE AND TO EITHER ACCEPT OR REJECT IT.

IF YOU ACCEPT THIS LEASE BUT THEN CHANGE YOUR MIND AND WANT TO REJECT AND VOID THE LEASE, YOU MAY DO SO PROVIDED YOU GIVE PARK MANAGEMENT WRITTEN NOTICE OF THAT DECISION WITHIN 72 HOURS FROM THE TIME YOU ACCEPTED THE LEASE.

[*Continue with the following:*]

This lease agreement is made and entered into on _____[*date*], by and between _____[*name of homeowner*] ("Homeowner,") and the Management of _____[*name of mobilehome park*] ("Management").

Term

1. This lease is for a term of[*specify term, which must be in excess of 12 months in order for lease to be exempt from local rent control measures under Civ. Code § 798.17, e.g,* five consecutive years], beginning on _____[date].

Lease of Homesite

2. Management leases to Homeowner and Homeowner leases from Management the mobilehome space [*or* lot], designated number _____, in_____[*name of mobilehome park*] ("the Park"), located at _____[*street address and city*], California. The space [*or* lot] in the Park being leased by

Homeowner is referred to in this lease as the "Homesite."

Rent

3. For each year during the term of this lease, Homeowner agrees to pay Management as rent for the use and occupancy of the Homesite, the following annual rent:

Year 1: $_____

Year 2: $_____

Year 3: $_____

Year 4: $_____

Year 5: $_____

Rent shall be paid monthly, in advance, in twelve equal monthly installments for each year of the lease term. Rent for each month shall be paid on or before the[*e.g.,* fifth] day of the month. Homeowner shall pay a late charge of $ _____ for each monthly rent payment not paid on or before its due date. All rent shall be paid to Management at its office in the Park.

Security Deposit

4. At the time Homeowner executes this lease and prior to beginning occupancy in the Park, Homeowner shall deposit with Owner the sum of $[*specify amount that does not exceed the equivalent of two months' rent*], to be held by Management as security for the faithful performance of this lease by Homeowner. Management shall not pay Homeowner any interest on the deposit during the time it is held by Management. Homeowner may submit a written request to Management for a refund of this deposit after either: (1) a period of 12 consecutive months has elapsed from the commencement of this lease, during which time Homeowner has paid, within five days of applicable due dates, all rent, utilities, and service charges due under this lease; or (2) Homeowner has sold _____[his *or* her] Mobilehome. Following its receipt of the written request under the first circumstance described above, Management shall refund to Homeowner the full amount of the security deposit. On receipt of a written request following the sale of Homeowner's Mobilehome, Management shall refund to Homeowner the full amount of the security deposit, less any amounts owing to Management by Homeowner for rent, utilities, or other charges due under this lease but unpaid by Homeowner at the time Homeowner vacates the Park.

Utilities and Related Services

5. Management shall provide the following utilities and related services for Homeowner: [*specify, e.g.,* sewer service and trash and garbage removal service]. Homeowner shall contract directly with the provider, and pay the provider for, the following utilities and related services: _____[*specify, e.g.,* telephone, cable television, gas, electricity, and water].

Use of Homesite

6. The Homesite shall be used exclusively by Homeowner for the maintenance [and installation] of the Mobilehome described in Paragraph 7 of this Lease. The Mobilehome shall be used for residential purposes only [*if lease is to be exempt from rent control under Civ. Code § 798.17, add:*, and shall be Homeowner's personal and actual residence].

Identification of Mobilehome

7. The Mobilehome to be occupied by Homeowner and located [*or* to be located] on the Homesite ("Homeowner's Mobilehome") is described as follows:

Name of Manufacturer: _____
Date of Manufacture: _____
Manufacturer I.D. Number: _____
Manufacturer Trade Name: _____
Manufacturer Model Name or Number: _____
Manufacturer Serial Number: _____
HUD Label or HCD Insignia No.(s): _____
Length (in inches): _____
Width (in inches): _____
Weight: (in pounds): _____
Registered Owner(s): _____
Legal Owner (if different than Registered Owner): _____
Junior Lienholder(s): _____

Prior to beginning occupancy in the Park, Homeowner shall deliver to Management a duplicate valid registration card for Homeowner's Mobilehome, which shall be maintained on file by Management.

[*If mobilehome is not presently located in park, add:*]

Installation

8. Homeowner shall give Management at least [*time period, e.g.,* 72 hours'] advance written notice of the date Homeowner's Mobilehome will be installed on the Homesite. Homeowner, at Homeowner's sole expense, shall obtain the required installation permit and shall otherwise cause the installation to comply with all applicable laws and regulations then in effect for mobilehome installation. Appurtenances to Homeowner's Mobilehome, including awnings, porches, decks, and storage sheds, shall be installed or erected only after obtaining any required permits, and then only with the prior written consent of Management and in compliance with the Park Rules and Regulations.

[*Continue with the following:*]

Maintenance by Homeowner

9. Homeowner shall at all times maintain Homeowner's Mobilehome and the Homesite in a clean and sanitary

condition, and shall cause all rubbish and other debris to be removed from Homeowner's Mobilehome and the Homesite on a regular basis. Landscaping on the Homesite shall be watered and maintained by Homeowner, at Homeowner's expense. In addition, Homeowner shall comply with all Park Rules and Regulations (described in Paragraph 10 of this Lease) pertaining to the maintenance of the Homesite by Homeowner.

If Homeowner fails to maintain the Homesite in accordance with this Paragraph and with applicable Park Rules and Regulations, Management shall have the right to perform or cause the performance of the necessary maintenance and to charge Homeowner a reasonable fee for services performed. Prior to exercising this right, Management first shall give Homeowner written notice that states the specific condition to be corrected and an estimate of the charges that will be imposed if Management corrects or causes the correction of the condition. If Homeowner fails to correct the condition within 14 days (or any other period required by then-prevailing law), Management shall have the right to cause the condition to be corrected and to impose a reasonable fee on Homeowner for the services performed.

Compliance With Park Rules and Regulations

10. Homeowner shall at all times comply with and abide by the Park Rules and Regulations, as they may from time to time be amended. Management shall give Homeowner written notice of anyproposed amendment to the Park Rules and Regulations that is made after Homeowner begins _____[his *or* her] tenancy under this Lease. The Park Rules and Regulations are attached to this Lease as Exhibit _____ and are hereby incorporated by reference. [*Add if applicable:* Proposed amendments to those Rules and Regulations are attached to this Lease as Exhibit _____.]

Compliance With Law

11. Homeowner shall at all times during the term of this lease maintain and occupy Homeowner's Mobilehome in compliance with all applicable federal, state, and local laws, including the Mobilehome Residency Law. A copy of the Mobilehome Residency Law in effect as of the date of this Lease is attached to the Lease as Exhibit _____.

Common Area Facilities

12. The Park contains the following common area facilities: _____[*describe facilities, e.g.,* two laundry rooms, one swimming pool, one recreation room, paved streets throughout the Park, and Park Management's office]. During the term of this Lease, Homeowner shall have the right to use these facilities in common with other homeowners and Management, with the exception of Park Management's office, which is reserved exclusively for use by Management]. Management, at the Park's expense, shall provide and maintain all physical improvements in the common facilities in good working order and condition. With regard to a sudden or unforeseeable breakdown or deterioration of these improvements, management shall have a reasonable period of time to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have known of the breakdown or deterioration. For purposes of the above, a reasonable period of time to repair a sudden or unforeseeable breakdown or deterioration shall be as soon as possible in situations affecting a health or safety condition, and shall not exceed 30 days in any other case except when exigent circumstances justify a delay.

Subletting of Mobilehome

13. Homeowner shall not sublet Homeowner's Mobilehome without Management's prior written consent.

Assignment of Lease

14. Homeowner shall have no right to assign this Lease or any interest in it, except to a third-party purchaser of Homeowner's Mobilehome who has been previously approved by Management for tenancy in the Park pursuant to Paragraph 15 of this Lease. In the event of a valid assignment, the assignee shall have the same rights and duties as Homeowner under this Lease.

Homeowner's Sale of Mobilehome During Term of Lease

15. If Homeowner intends to sell _____[his *or* her] Mobilehome, Homeowner shall notify Management in writing of the proposed sale as soon as possible, but in no event later than the close of escrow for the sale. The notice shall contain the name and address of the proposed purchaser, the name of the escrow company handling the sale, and the date escrow is scheduled to close. If the proposed purchaser intends to keep Homeowner's Mobilehome in the Park after purchasing it, Management shall have the right to approve the prospective purchaser. On request of the prospective purchaser, Management shall inform the purchaser of all information that must be submitted to Management to enable it to approve or disapprove the purchaser. Management may require the prospective purchaser to pay a fee for the procurement of a financial report or credit rating and to submit to a personal interview with Management. Within 15 business days of receiving all required information from the prospective purchaser, Management shall notify Homeowner and the prospective purchaser in writing of Management's acceptance or rejection of the proposed purchaser. If the proposed purchaser is rejected, Management shall set forth in writing the reason or reasons for rejection.

If Homeowner sells_____[his *or* her] Mobilehome to a third party during the term of this lease, Management may, under circumstances permitted by law, be able to require that Homeowner's Mobilehome be removed from the Park in order to upgrade the quality of the Park.

Homeowner's Notice of Intent to Vacate

16. Homeowner shall give the Park at least 60 days' advance written notice of_____[his *or* her] intent to vacate the Park and to terminate _____[his *or* her] tenancy under this Lease. If Homeowner vacates the Park for any reason (other than following the sale of Homeowner's Mobilehome to a third party who is approved by Management for tenancy in the Park pursuant to Paragraph 15 of this Lease), Homeowner shall cause Homeowner's Mobilehome to be removed from the Park on or before the date Homeowner vacates the Park in compliance with Paragraph 19 of this Lease.

Grounds for Termination by Management

17. Homeowner's tenancy in the Park may be terminated by Management for any of the following reasons:

(a) Failure of Homeowner or other resident of Homeowner's Mobilehome to comply with a local ordinance or a state law or regulation relating to mobilehomes within a reasonable time after Homeowner's receipt of notice of noncompliance from the appropriate governmental agency.

(b) Conduct of Homeowner or other resident of Homeowner's Mobilehome that constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of Homeowner or other resident of Homeowner's Mobilehome for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed within Homeowner's Mobilehome or anywhere else on the premises of the Park; provided, however, that Homeowner's tenancy will not be terminated if the person convicted of the offense was a resident (other than Homeowner) of Homeowner's Mobilehome, and permanently vacates and does not subsequently reoccupy Homeowner's Mobilehome.

(d) Failure of Homeowner to comply with the Park Rules and Regulations, as they may be amended from time to time. Any act or omission of Homeowner or a resident of Homeowner's Mobilehome shall not constitute a failure to comply with Park rules and regulations until Management has first given Homeowner written notice of the alleged rule or regulation violation and Homeowner or resident has failed to adhere to the rule or regulation within seven days. Notwithstanding the above, if Homeowner has been given written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the first alleged violation, Management need not give a written notice for a subsequent violation of the same rule or regulation.

(e) Nonpayment of rent, utility charges, or reasonable incidental service charges, if (i) the amount due has been unpaid for a period of at least five days from its due date (excluding the date the payment is due), and (ii) the amount remains unpaid for an additional period of three days, beginning on the date Management gives Homeowner a written three-day notice to pay the amount due or to vacate the tenancy. In the event Homeowner does not pay the amount due prior to the expiration of the foregoing three-day notice period, Homeowner shall be liable for all payments due up until the time the tenancy is vacated. The legal owner, registered owner (if different than Homeowner), or any junior lienholder of Homeowner's Mobilehome shall have any right granted by then-prevailing law to cure a monetary default by Homeowner under this lease. If a Homeowner has been given a three-day notice to pay or vacate on three or more occasions within the preceding 12-month period, Management shall not be required to give Homeowner a three-day notice for any subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

(f) The Park is condemned by governmental authority or sold in lieu of condemnation by governmental authority.

(g) There is a change in use of the Park, or any portion of it, provided Management gives Homeowner all written notices, if any, required under then prevailing law prior to and after the change in the Park's use.

Notice of Termination

18. Management may terminate Homeowner's tenancy in the Park only by giving Homeowner written notice of the termination at least 60 days (or any other period required under then-applicable law) prior to the date Homeowner is required to vacate the Park. Any notice of termination shall state the specific facts and the reason or reasons for termination, and shall be served on Homeowner as required by the law then in effect.

Surrender and Removal of Mobilehome

19. On the expiration or sooner termination of this lease, Homeowner shall, at Homeowner's sole expense, surrender the Lot and cause Homeowner's Mobilehome to be moved from the Lot and the Park, unless Homeowner has validly assigned this Lease to a purchasing third party as provided in Paragraphs 14 and 15 of this Lease. All personal property or appurtenances owned by Homeowner and located on the Homesite shall also be promptly removed. The Homesite shall be cleared of all debris and left in a clean condition.

Extension of Lease Agreement

20. Not later than[*time period, e.g.*, six months] prior to the expiration of the term of this Lease, Management shall notify Homeowner in writing if Management is willing to negotiate with Homeowner regarding Homeowner's continued tenancy in the Park after the term of this Lease expires. If Management is so willing, it shall, in the same written notice, notify Homeowner of the lease terms, including the amount of rent and the duration of the lease, proposed by Management.

Management's Right of Entry

21. Management shall not enter Homeowner's Mobilehome without Homeowner's prior written consent, except in the case of an emergency or if Homeowner has abandoned Homeowner's Mobilehome. Management may enter on the Homesite for any of the following purposes: to perform any act necessary to protect the Park; to maintain any utilities located on the Homesite; or to perform any maintenance Homeowner is required under this Lease or the Park Rules and Regulations to perform but has failed to perform. Except in the case of an emergency, Management's entry on the Homesite shall be conducted in a manner and at a time that do not substantially interfere with Homeowner's quiet enjoyment of the Homesite.

Attorneys' Fees

22. If any legal action or proceeding arising out of or relating to this Lease is brought by either party to this Lease, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.

Entire Agreement

23. This Lease constitutes the entire and only agreement between Homeowner and Management regarding Homeowner's tenancy in the Park. It fully and correctly sets forth the respective obligations of Homeowner and Management as of its date.

Amendment of Agreement

24. Any amendment or modification of this Lease shall be valid and binding only if made in writing and executed by both parties to this Lease.
Dated:_____

PARK MANAGEMENT
_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]

HOMEOWNER
_____ [*signature of homeowner*]
[*typed name*]

EXHIBIT A

[Mobilehome Residency Law]

EXHIBIT B
[Park rules & regulations]

EXHIBIT C
[Any proposed amendments to park rules & regulations]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
1. Agreements Between Mangement and Homeowners

18-39 California Legal Forms--Transaction Guide § 39.221

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.221 Mobilehome Park Rules and Regulations

[1] Comment

[a] Use of Form

This form is a set of rules and regulations for a mobilehome rental park. The precise content of park rules and regulations is in large part discretionary with park management. The Mobilehome Residency Law (MRL) [*Civ. Code §§ 798-799.8*] does not require that specific provisions be included in the park rules and regulations, as it does for a rental or lease agreement [*see § 39.220*]. However, many of its provisions limit management's right to do certain things. For example, management may not charge a fee for keeping a pet in the park unless management actually provides special facilities or services for pets [*see Civ. Code § 798.33*; *see § 39.221 [2]*, P 4]. Familiarity with the requirements (and prohibitions) of the MRL is essential, since without it, management might promulgate nonconforming rules and regulations [*see, e.g., Civ. Code § 798.25.5* (any rule or regulation unilaterally adopted by management, implemented without homeowner consent, and that purports to deny homeowners their right to a jury trial or mandates binding arbitration of disputes is void and unenforceable)]. Most of these requirements applicable to a rental or lease agreement and park rules and regulations are discussed in *Section 39.220*. This form should be used in conjunction with that discussion.

[b] Inclusion of Rules and Regulations in Rental Agreement

Mobilehome park rules and regulations must be included in a mobilehome park rental agreement [*Civ. Code § 798.15*; *see § 39.220* (rental agreement)]. Because these rules and regulations are usually lengthy, they are often not included in the body of the rental agreement. Instead, they are incorporated by reference in, and attached as an exhibit to, the rental agreement [*see, e.g., § 39.220[2]*, P 10].

[c] Applicability of Rules and Regulations to Park's Owner and Employees

The park's owner and any park employee are subject to and must comply with all park rules and regulations to the same extent as residents and guests [*Civ. Code § 798.23(a)*]. However, this requirement does not apply to any rule or regulation that governs the age of any resident or guest or to acts of an owner or employee that are undertaken to fulfill a park owner's maintenance, management, and business operation responsibilities [*Civ. Code § 798.23(b)*].

[d] Amendment of Park Rules and Regulations

[i] Meetings With Homeowners

When park management proposes an amendment to the park's rules and regulation, the management must meet and consult with the homeowners in the park, their representatives, or both after written notice of the meeting has been given to all the homeowners in the park [*Civ. Code § 798.25(a)*; *see* [ii], *below* (prior notice requirements)].

In addition, management must, on written request, meet and consult with the homeowners on certain specified matters [*see § 39.121[7]*], including resident concerns regarding existing park rules that are not subject to the statutory provisions governing amendments to park rules and regulations. With regard to those matters, management may meet with the homeowners individually or collectively, or with representatives of a group of homeowners who have signed a request to be so represented. The meeting must be held within 30 days of receiving the request, and management must give notice to all requesting homeowners at least 10 days before any collective meeting [*Civ. Code § 798.53*].

[ii] Prior Notice Requirements

Written notice of a meeting and consultation to discuss a proposed amendment to the park's rules and regulations must be given to all the homeowners in the park 10 days or more before the meeting. The notice must set forth the proposed amendment to the park rules and regulations and the date, time, and location of the meeting [*Civ. Code § 798.25(a)*; *see § 39.234A* (notice of meeting to amend park rules and regulations)].

Following the meeting and consultation, the noticed amendment to the park rules and regulations may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent on written notice of not less than six months (except that only 60 days' advance written notice is required to amend a regulation pertaining to recreational facilities) [*Civ. Code § 798.25(b)*; *see § 39.235* (notice of amendment to park rules and regulations)]. Paragraph 12 of this form sets forth these requirements. Written notice to a homeowner whose tenancy commences within the required period of notice of a proposed amendment to the park's rules and regulations constitutes compliance when the notice is given before the inception of the tenancy [*Civ. Code § 798.25(c)*]. However, any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*].

A meeting is not required when management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation. In such cases, management may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

[e] Violation of Rules and Regulations

[i] Prohibition Against Fees for Enforcement

Subject to two exceptions, a homeowner may not be charged a fee for the enforcement of any of the park rules or

regulations. Under one exception, a reasonable fee may be charged by management for the maintenance of the land and premises on which the mobilehome is located if the rules and regulations (or rental agreement) [*see § 39.220[2]*, P 9] require the homeowner to perform the maintenance and the homeowner fails to do so. The charge may not be imposed unless (1) management gives the homeowner written notice of the specific condition to be corrected and an estimate of the charges to be imposed if management performs the services, and (2) the homeowner fails to correct the condition within 14 days [*Civ. Code § 798.36(a)*]. Management may also charge a reasonable fee if, in good faith, it (1) has removed and stored a homeowner's or resident's personal property in order to bring the premises into compliance with park rules and regulations or with the Mobilehome Parks Act or its implementing regulations, and (2) has complied with notice requirements [*Civ. Code § 798.36(a), (b)*; *see § 39.237A* (form of notice)].

[ii] Grounds for Termination of Tenancy

Permissible reasons to terminate a tenancy in a mobilehome park are limited by statute [*Civ. Code § 798.56*]. One permissible reason is the failure of a homeowner or resident to comply with a reasonable rule or regulation of the park that is part of the rental agreement, or with any amendment to such a rule or regulation [*Civ. Code § 798.56(a), (d)*; *see § 39.121[9]* (other permissible reasons)]. These rules and regulations expressly provide that they (and their amendments) are a part of the rental agreement between management and the homeowner [*see § 39.221[2]*, first unnumbered paragraph].

The act or omission of a homeowner or resident does not constitute a failure to comply with a reasonable rule or regulation unless and until (1) park management gives the homeowner written notice of the alleged rule or regulation violation [*see § 39.236*], and (2) the homeowner or resident fails to comply with the rule or regulation within seven days after receiving the notice. However, if a homeowner has been given written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice will be required for a subsequent violation of the same rule or regulation [*Civ. Code § 798.56(d)*]. For further discussion of the requirements for terminating tenancies in a mobilehome park and an illustrative notice of termination, see *§§ 39.121[9]* and *39.238*.

[iii] Injunction for Continuing or Recurring Violation

Any person who violates a reasonable rule or regulation of a mobilehome park may be enjoined from the violation [*Civ. Code § 798.88(a)*]. The procedure for obtaining the injunction is prescribed by statute [*see Civ. Code § 798.88*; *§ 39.121[4]*], and the injunction will be granted if the court finds that the violation is continuing and recurring [*Civ. Code § 798.88(d)*]. This remedy is in addition to the right of management to terminate a lease or rental agreement for a violation of park rules and regulations [*Civ. Code § 798.88(a), (g)*].

[f] Limiting Park Residents to "Older Persons"

This form contains an optional provision that may be used if residency in the park is to be limited to certain "older persons" [*see § 39.221[2]*, P 1]. State law permits the enforcement of a rule or regulation limiting residency in a mobilehome park based on age requirements for housing for older persons, provided that the rule or regulation complies with specified provisions of the Fair Housing Act [*42 U.S.C. § 3601 et seq.*] that prohibit discrimination based on "familial status" (among other classifications) [*Civ. Code § 798.76*; *see 42 U.S.C. § 3605(a)*; *see also 42 U.S.C. § 3602(k)* ("familial status" essentially means families that include one or more children under the age of 18)]. Federal law exempts "housing for older persons" from the anti-discrimination requirements of the Fair Housing Act if, among other things, the housing (1) is intended for, and solely occupied by, persons 62 years of age or older, or (2) is intended and operated for occupancy by persons age 55 years of age or older and has at least 80 percent of its occupied units occupied by at least one person who is 55 years of age or older [*42 U.S.C. § 3607(b)(2), (3)*]. The optional "older persons" provision in this form reflects the above federal requirements. For further discussion of the applicable state and federal laws, see *§ 39.53[2][a]*.

[g] Restrictions on Charges

A homeowner in a mobilehome park may not be charged a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered [*Civ. Code § 798.31*]. No charge may be imposed for services that are actually rendered but that are not listed in the rental agreement unless the homeowner is given written notice of the charge at least 60 days before its imposition [*Civ. Code § 798.32(a)*; *see Civ. Code § 798.32(b)* (requirements governing billing and notice of expiration date of charge)]. It is important, therefore, to itemize all charges in the rental agreement or the rules and regulations included in the agreement. For example, this form lists charges for recreational vehicle (RV) parking and for storage spaces in the park [*see § 39.221[2]*, PP 9, 10].

The MRL contains many provisions that restrict or prohibit several specific types of charges that may be imposed on a homeowner by management. For a discussion of these restrictions and prohibitions and an itemization of the specific types of charges regulated, see *§ 39.121[5]*.

[h] Common Facilities

A rental or lease agreement must contain a provision specifying that (1) it is the responsibility of park management to provide and maintain physical improvements in the common facilities in good working order and condition and (2) with regard to a sudden or unforeseeable breakdown or deterioration of these improvements, management has a reasonable period of time to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have known of the breakdown or deterioration [*Civ. Code § 798.15(d)*; *see § 39.220[2]*, P 12]. It must also contain a description of the physical improvements to be provided to the homeowner during his or her tenancy, and a provision listing those services that will be provided during the tenancy, and the fees, if any, that will be charged for those services [*Civ. Code § 798.15(e), (f)*]. This form provides for the imposition of fees for the following: use of the recreation room for private functions [*see § 39.221[2]*, P 5]; parking of recreational vehicles or boats in the park [*see § 39.221[2]*, P 9]; and the storage of personal property [*see § 39.221[2]*, P 10].

Each common area facility in a mobilehome park must be open or available to residents at all reasonable hours, and the hours of the common area facility must be posted at the facility [*Civ. Code § 798.24*]. A homeowner may not be required to obtain liability insurance to use common area facilities for meeting and assembly purposes granted by statute [*Civ. Code § 798.51(c)*; *see Civ. Code §§ 798.50, 798.51* (homeowners' meeting)]. However, if alcoholic beverages are to be served at any meeting or private function, a liability insurance binder may be required by the park ownership or management [*Civ. Code § 798.51(c)*]. The ownership or management of a mobilehome park may prohibit the consumption of alcoholic beverages in the park common area facilities if the terms of the rental agreement or the rules and regulations of the park prohibit it [*Civ. Code § 798.51(c)*].

A homeowner or resident may not be charged a cleaning deposit to use the park recreation hall or clubhouse for meetings of resident organizations whether or not guests or visitors from outside the park are invited to attend the meeting, if a homeowner or resident of the park is hosting the meeting and all homeowners or residents of the park are allowed to attend [*Civ. Code § 798.51(b)*]. A homeowner, organization, or group of homeowners using a recreation hall or clubhouse must adhere to any vehicle parking or maximum occupancy limitations or restrictions [*Civ. Code § 798.51(d)*].

Provisions in this form relating to the swimming pool, laundry room, and recreation room require that the hours of each facility be posted at the entrance of the facility [*see* PP 5-7].

[i] Guests

The MRL restricts the ability of park management to charge fees for a homeowner's guests [*Civ. Code § 798.34*]. For

discussion of those restrictions, which have been incorporated into this form [*see § 39.221[2]*, P 2], see *§ 39.220[1][i][iv]*.

[j] Pets

No lease agreement entered into, modified, or renewed on or after January 1, 2001, may prohibit a homeowner from keeping at least one pet within the mobilehome park, subject to reasonable park rules and regulations [*Civ. Code § 798.33(a)*]. For these purposes, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the management and the homeowner [*Civ. Code § 798.33(c)*]. These provisions do not affect any other rights provided by law to a homeowner to keep a pet within the park [*Civ. Code § 798.33(a)*].

A homeowner may not be charged a fee for keeping a pet in the park unless the management actually provides special facilities or services for pets. If special pet facilities are maintained by the management, the fee charged must reasonably relate to the cost or maintenance of the facilities or services and the number of pets kept in the park [*Civ. Code § 798.33(b)*].

This form contains a provision for pets in the park. Paragraph 4 permits pets subject to specific limitations as to type and number.

[k] Annoying Conduct

Conduct by a homeowner or resident on park premises that constitutes a substantial annoyance to other homeowners or residents is grounds for the termination of a rental agreement or lease in a mobilehome park [*Civ. Code § 798.56(b)*; *see § 39.221[2]*, P 3]. For a discussion of the other permissible reasons to terminate a tenancy, see *§ 39.121[9]*.

[l] Rental of RV Spaces in Mobilehome Park

Any mobilehome park first developed after January 1, 1982, must not rent spaces for recreational vehicles (RV's) [*see Civ. Code § 799.29* ("recreational vehicle" defined)] unless the mobilehome park has a specifically designated area within the park for the RV's. Such an area must be separate and apart from the area designated for mobilehomes. RV's may be located only in the specifically designated areas [*Civ. Code § 798.22*; *see § 39.221[2]*, P 9].

[m] Advertising Sale of Mobilehome

The MRL grants both park management and homeowners specific rights with respect to a homeowner's sale of a mobilehome located in a park [*see Civ. Code §§ 798.70-798.83*]. These rights and related requirements are discussed in Ch. 40, *Mobilehomes* .

One right granted to a homeowner who wants to sell his or her mobilehome is the right to place a sign on or near the mobilehome that advertises the mobilehome for sale/exchange (or for rent, if permitted by his or her rental or lease agreement) [*Civ. Code § 798.70*; *see § 39.221[2]*, P 11]. The sign must state the name, address, and telephone number of the owner of the mobilehome or his or her agent, and the sign face must not exceed 24 inches in width and 36 inches in height [*Civ. Code § 798.70*]. Signs posted in front of a mobilehome may be of an H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Homeowners may attach to the sign or their mobilehome tubes or holders for leaflets which provide information on the mobilehome for sale, exchange, or rent [*Civ. Code § 798.70*].

[2] FORM

Mobilehome Park Rules and Regulations

EXHIBIT _____
to
Mobilehome Lease [*or* Rental Agreement]

RULES AND REGULATIONS
for
_____ [*Name of mobilehome park*]

These are the Rules and Regulations for _____[*name of mobilehome park*] (the "Park"). The Rules and Regulations, including any amendments made pursuant to Paragraph 12 below, are a part of any rental agreement or lease entered into between a Homeowner and Park Management. All Homeowners, Residents, and Guests of the Park must comply with the Rules and Regulations. For purposes of these Rules and Regulations:

A. A Homeowner is the person(s) who has (have) signed a rental or lease agreement with Park Management to rent or lease space in the Park to locate, maintain, and occupy a mobilehome.

B. A Homesite is a lot or space in the Park rented or leased by a Homeowner under a rental or lease agreement with Management for the purpose of locating and maintaining a mobilehome.

C. Park Management is the owner of the Park or an agent or representative authorized to act on the owner's behalf in connection with matters relating to tenancies in the Park.

D. A Resident is a Homeowner or any other person who lawfully occupies a mobilehome located in the park.

E. A Guest (or Visitor) is a person who visits the Park on a temporary basis at the invitation of a Homeowner, Resident, or Park Management.

Homeowners and Residents

1. A prospective Homeowner or Resident shall not be denied residency or tenancy in the Park on the basis of race, color, creed, religion, sex, [*if park is not to be limited to seniors, add:* age], or marital status. [*If park tenancies are to be limited to seniors, add:* Residency in the Park is restricted to Homeowners and Residents who are _____ (62 *or* 55) years of age or older. [*If park tenancies are to be limited to persons who are at least 55 years old, add:* If more than one Homeowner or Resident resides in a mobilehome, this requirement shall be satisfied if at least one Homeowner who resides in the mobilehome is 55 years of age or older.]

Guests

2. Subject to the exceptions described in this Paragraph, a Guest who has stayed with a Homeowner more than a total of 20 consecutive days or a total of 30 days in a calendar year and who intends to stay on for any continued period beyond that must register with Park Management. For each registered Guest, Homeowner shall pay a fee to Management of $_____ per week or partial week that the Guest remains in the mobilehome after the time he or she is required to be registered. The fee shall be paid weekly, in advance.

A Homeowner who lives alone in the Park may share his or her mobilehome with one person. Management shall not impose a "guest" fee or any other fee for that person. The person shall comply with all provisions of these rules and regulations.

Management may not charge any Homeowner a guest fee for any person over the age of 18 years who resides with a Homeowner in order to provide live-in health care or live-in supportive care to the Homeowner pursuant to a written treatment plan prepared by the Homeowner's physician. However, the caretaker shall register with Management and shall comply with these Park Rules and Regulations.

[*If mobilehome park is one that has implemented rules or regulations limiting residency based on age requirements for housing for older persons under Civ. Code § 798.76, add:*]

A Homeowner 55 years of age or older may share his or her mobilehome with any person over 18 years of age if that person is a parent, sibling, child, or grandchild of the Homeowner and requires live-in health care, live-in supportive care, or supervision pursuant to a written treatment plan prepared by a physician and surgeon. Management may not charge Homeowner a fee for this person. Unless expressly agreed otherwise in writing between Management and the Homeowner, Management shall have no responsibility to manage, supervise, or provide for the person's care during his or her stay in the mobilehome park. The person described in this paragraph who resides with Homeowner shall comply with all rules and regulations of the Park.

Noise and Other Disturbances

3. No Homeowner, Resident, or Guest may engage in any conduct in a mobilehome, on a Homesite, or in the Park that may reasonably be determined to constitute a substantial annoyance or nuisance to other Homeowners and Residents.

Pets

4. A Homeowner may keep [*specify the number of permissible pets, which must be at least one*] pet[s] per mobilehome within the Park, subject to Park rules and regulations. Permitted pets include domesticated birds, cats, dogs, aquatic animals kept within an aquarium, or other animals as agreed to between Management and Homeowner.

Any dog permitted to be in the Park pursuant to this Paragraph shall be restrained on a leash at all times while outside the Homeowner's or Resident's mobilehome. A Homeowner or Resident shall promptly clean up after his or her own dog as necessary, on the Homesite or elsewhere in the Park. The owner of a pet shall at all times monitor and control it so as to prevent behavior that is dangerous or disruptive to other Homeowners and Residents.

Recreation Room

5. The recreation room located in the Park is provided for the common use of all Homeowners, Residents, and Guests, and is open for common use during the hours posted on the outside entrance to the room, except as otherwise provided in this Paragraph. Any Homeowner may reserve the recreation room for a private party or other function by submitting a written request to Management at least two weeks prior to the scheduled event. The request shall contain the following: the name of the Homeowner, the date of the request, a description of the event to be held, the date of the event, and the hours during which the event will be held. If Management approves the request, the Homeowner shall pay a nonrefundable room charge of $25 and a refundable cleaning deposit of $25 within [*time period, e.g.,* 48 hours] after the approval. If Homeowner fails to pay these charges before expiration of the foregoing time period, Management shall have the right to cancel Homeowner's reservation for the room. All requests for reserving the recreation room shall be considered on a first-come, first-served basis. All Homeowners and Residents shall be responsible for removing their own trash and personal belongings from the recreation room after using it. A Homeowner who has held a private party

or other function in the room must, immediately following the function, clean the room and restore it to the condition it was in prior to the function in order to receive a full refund of the cleaning deposit posted by him or her.

Smoking is not permitted [*or* is permitted only in designated areas] in the recreation room. Wet bathing suits or other wet clothing may not be worn in the recreation room.

Swimming Pool

6. The swimming pool [and spa] in the Park is [are] for the exclusive use of Homeowners, Residents, and Guests. A Guest must be accompanied by a Homeowner or Park Resident when using the pool. Children under the age of[*age, e.g.,* 12] must be accompanied by an adult [*or, for a senior mobilehome park*: Children are not permitted in the pool at any time]. All persons using the pool are responsible for their own safety as there is no lifeguard on duty. No alcoholic beverages are permitted in or around the pool. Food and other beverages are permitted only at the tables adjacent to the pool. No glass containers are permitted in the pool areas. Homeowners and Residents must remove their own trash from the pool area before leaving. The pool may be used only during the hours posted at the pool entrance.

Laundry Facilities

7. The Laundry Facilities (consisting of a minimum of four washing machines and four dryers, all coin-operated) located in the Park shall be maintained in good working order and condition by Management. These facilities shall be open for use by Homeowners and Residents daily from 7:00 a.m. through 11:00 p.m. All users of the facilities shall promptly transfer washed clothing from the washing machines to the dryer and shall remove clothing from the dryer when it is dry. Clothing left in a washing machine or dryer after completion of the respective washing or drying cycles may be removed from the machines by subsequent users and placed on the folding table. No smoking is permitted in the Laundry Facilities.

Mobilehome Accessory Structures

8. For any mobilehome not already located in the Park, Homeowner shall, at Homeowner's sole expense, install and locate his or her mobilehome in the park. Homeowner shall be responsible for obtaining any necessary permit required by governmental authority and for complying with all applicable laws and regulations. Homeowner must obtain Management's approval before installing or affixing any mobilehome accessory structure or other improvement to the mobilehome or on the Homesite. [*Add if desired:* Homeowner is required to skirt the mobilehome pursuant to Management's standard specifications not later than _____ (*time period, e.g.,* 60 days) after Homeowner begins his or her tenancy in the Park.]

Moving Vehicles and Parking

9. The speed limit for all vehicles moving through streets in the Park is [*e.g.,* 15] miles per hour. No vehicles of any type shall be parked in or on the street at any time. A Homeowner or Residents shall park his or her vehicle only in the [appropriate _____ (carport *or* driveway) located on the Homesite *or* parking space(s) assigned to Homeowner]. Guests shall park only in designated guest spaces, on a first-come, first-served basis. If all guest spaces are full, a Guest shall park outside the park on public streets. Only automobiles and pick-up trucks may be parked in the Park. Any automobile or pick-up truck that is nonoperational shall promptly be removed by its owner from the Park. No trucks (except pick-up trucks) are permitted in the Park except with the prior consent of Management. Recreational vehicles, campers, trailers, and boats may not be parked or located in the Park except in the areas designated for them

by Management, and then only on payment to Management of a fee based on the length of the vehicle, as follows:

Length (in feet)	Monthly Charge	Daily Charge
Up to 10 feet	$_____	$_____
Up to 20 feet	_____	_____
Up to 30 feet	$_____	$_____
Up to 40 feet	_____	_____
Over 40 feet	$_____	$_____
	_____	_____
	$_____	$_____
	_____	_____
	$_____	$_____
	_____	_____

Storage

10. A Homeowner or Resident shall not use the exterior of the mobilehome or the Homesite for the storage of personal property of any type whatsoever. [*Add if appropriate:* A carport located on a Homesite shall be used exclusively to park a vehicle and not for storage or for any other purpose]. Limited covered storage space for personal belongings is available for use by Homeowners and Residents in the area designated by Management. The charge to be paid by a Homeowner or Resident for this space is as follows:

Size of Storage Area (in feet)	Monthly Charge
_____	$_____
_____	$_____

Advertisements of Mobilehome Sales

11. A Homeowner may advertise his or her mobilehome for [sale or exchange *or, if lease permits homeowner to sublet,* sale, exchange, or rent] by placing a sign in the window of the mobilehome, by posting a sign on the side of the mobilehome facing the street, or by a sign in front of the mobilehome facing the street. The sign face shall state the name, address, and telephone number of the owner of the mobilehome or his or her agent. The sign shall not exceed 24 inches in width and 36 inches in height. Signs posted in front of a mobilehome may be of an H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Homeowners may attach to the sign or their mobilehome tubes or holders for leaflets which provide information on the mobilehome for sale, exchange, or rent.

Amendments

12. Management may amend these park rules and regulations by meeting and consulting with the Homeowners in the park, their representatives, or both, after written notice has been given to all the Homeowners in the park 10 days or more before the meeting. Following the meeting and consultation, the noticed amendment to the park rules and regulations may be implemented, as to any Homeowner, with the consent of that Homeowner. Otherwise, Management must give written notice to Homeowners of the proposed amendment at least six months before the proposed

amendment will take effect, except that if the amendment relates to recreational facilities in the Park, Management need only give at least 60 days' prior notice of the amendment.
Dated: _____

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksSubdivisions



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
1. Agreements Between Mangement and Homeowners

18-39 California Legal Forms--Transaction Guide §§ 39.222-39.229

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 39.222[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.230

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.230 Notice of Park's Right to Operate

[1] Comment

[a] Use of Form

This is a notice that informs homeowners and prospective homeowners of a mobilehome park of (1) the nature of the zoning or use permit under which the park operates, and (2) the duration of any lease under which park management leases all or part of the park from a third party. Management must give written notice of these matters to homeowners and prospective homeowners. If the park is operating under a permit subject to a renewal or expiration date, the relevant information and dates must also be included in the notice [*Civ. Code § 798.27(a)*].

[b] Subsequent Changes

If a change occurs concerning the zoning or use permit under which the park operates or a lease in which the management is a lessee, all homeowners in the park must be given written notice within 30 days of that change. A prospective homeowner must be notified before the inception of the tenancy [*Civ. Code § 798.27(b)*]. For the notice that must be given to homeowners if the park's owner petitions for a change in the park's use [*see Civ. Code § 798.56(g)*], see *Section 39.240*.

The notice of the park's right to operate (this form) need not describe the above subsequent notification requirements [*see Civ. Code § 798.27(b)*]. However, the final paragraph of this form includes this description because of the relevance of these notification requirements to the required information set forth in this form. If desired, counsel may delete that paragraph.

[2] FORM

Notice of Park's Right to Operate

NOTICE OF RIGHT TO OPERATE PARK

TO: ALL HOMEOWNERS AND PROSPECTIVE HOMEOWNERS OF _____[*name of mobilehome park*]

FROM: PARK MANAGEMENT

_____[*Name of mobilehome park*] operates as a mobilehome park under authority of a [zoning *or* use *or* conditional use] permit issued on _____[*date*] by the _____[city *or* county *or* city and county] of _____, California. This permit [expires on *or* must be renewed on or before] _____[*date*].

[*If park management's possession of park arises from lease rather than through ownership, add:*]

Park Management leases [a portion of] the real property on which the Park is located from a third party owner. The lease grants Management the right to operate the park and lease space in it to homeowners until _____[*expiration date*], the expiration date of the lease.

[*If desired, add the following:*]

If a change occurs concerning the [zoning *or* use *or* conditional use] permit [or the lease] mentioned above, you will be given written notice by Management within 30 days of the change. Prospective homeowners will be given notice, before the commencement of their tenancy in the Park, of any changes occurring after the date of this notice.

Dated: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.230A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.230A Notice to Prospective Resident That Mobilehome May be Subject to School Facilities Fee

[1] Comment--Use of Form

This form is a notice to a prospective park resident that his or her mobilehome may be subject to a school facilities fee [*see Educ. Code §§ 17620, 17625* (authorization for fee)]. Park management must make this disclosure in writing at the time of an application for residency. The disclosure must be made to any person who proposes to purchase or install a manufactured home or mobilehome on a space, on which the construction of the pad or foundation system commenced after September 1, 1986, and no other manufactured home or mobilehome was previously located, installed, or occupied [*Civ. Code § 798.82*]. The disclosure requirement applies not only to tenancies governed by the MRL, but also to subdivisions, cooperatives, and condominiums for mobilehomes [*see Civ. Code § 799.8*].

No specific form of notice is required by statute. The form below requires the prospective resident to acknowledge receipt of the notice; this acknowledgment is not specifically required by statute.

[2] FORM

Notice to Prospective Resident That Mobilehome May be Subject to School Facilities Fee

NOTICE REGARDING POSSIBLE SCHOOL FACILITIES FEE

Date: _____

As a prospective resident in _____[*name of mobilehome park*], you should be aware that a manufactured home or mobilehome purchased or installed in _____[*name of mobilehome park*] may be [*or* is] subject to a school facilites fee authorized under California law [*see Educ. Code §§ 17620, 17625*]. Management is providing you with this notice as required by *Civil Code Section 798.82*.

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]

ACKNOWLEDGEMENT BY PROSPECTIVE TENANT

The undersigned acknowledges receiving the above notice from Park Management on the date set forth at the top of the notice. The notice was given to me before or at the time I applied for residency in _____[*name of mobilehome park*].

Signature: _____
[*signature of prospective tenant*]
Print Name: _____
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 39 MOBILEHOME PARKS
PART IV. FORMS
C. Mobilehome Park Tenancies
2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.231

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.231 Notice to Prospective Homeowner Regarding Lease Agreement That Is Exempt From Rent Control

[1] Comment

[a] Use of Form

This form is a notice that must be given by park management to a prospective mobilehome park homeowner (that is, a prospective tenant) who is offered a rental agreement or lease that is exempt from local rent control measures [*see Civ. Code § 798.17*; *see also Civ. Code § 798.8* ("rental agreement" includes a lease)]. The offered mobilehome park rental agreement must itself meet certain requirements of the MRL [*Civ. Code §§ 798-799.8*]. These requirements are discussed in *Section 39.220*.

[b] Requirements for Notice

At the time an "exempt" rental agreement (that is, one exempt from local rent control) is first offered to a prospective homeowner, park management must provide the prospective homeowner with written notice (this form) of his or her right to do the following [*Civ. Code § 798.17(f)*]:

> (1) To have at least 30 days to inspect the rental agreement [*see Civ. Code § 798.17(b)(3)* (homeowner must have at least 30 days from date exempt agreement is first offered to homeowner to accept or reject it); *see also § 39.231[2]*]; and
>
> (2) To void the rental agreement by notifying management in writing within 72 hours of the acceptance of a rental agreement [*Civ. Code § 798.17(b)(4)*; *see § 39.231[2]*].

If park management fails to provide this written notice, the rental agreement is voidable at the homeowner's option on his or her discovery of the failure [*Civ. Code § 798.17(f)*].

[c] Tenant's Acknowledgment of Receipt

The receipt of any written notice described in [b], *above*, must be acknowledged in writing by the homeowner [*Civ. Code 798.17(f)*]. This form contains the required acknowledgment (immediately following the notice).

[d] Tenant's Option to Accept Rental Agreement for Lesser Term

In order to be exempt from local rent control measures, a mobilehome park rental agreement (or lease) must, among other things [*see § 39.220[1][f]*], be for a term in excess of 12 months [*Civ. Code § 798.17(b)(1)*]. If the prospective homeowner rejects the offered agreement or rescinds a signed rental agreement pursuant to *Civil Code Section 798.17(b)* [*see* [b], *above*], the prospective homeowner will be entitled to instead accept a rental agreement for a term of 12 months or less from the date the offered rental was to have begun (including a month-to-month rental agreement). If the homeowner elects to have a rental agreement for a term of 12 months or less, the agreement must contain the same rental charges, terms, and conditions as the offered rental agreement during the first 12 months, with the following exception: the alternative agreement need not include any options to extend or renew that were contained in the offered agreement [*Civ. Code § 798.17(c)*; *see Civ. Code § 798.18(c)* (limitations on provisions governing extensions or renewals of agreements with a term of 12 months or less)]. This right of a prospective tenant is described in this form [*see § 39.231[2]*] even though the MRL does not require that it be contained in the required written notice [*see* [b], *above*].

[2] FORM

Notice to Prospective Homeowner Regarding Lease Agreement That Is Exempt From Rent Control

NOTICE TO PROSPECTIVE TENANT REGARDING OFFERED MOBILEHOME PARK LEASE AGREEMENT

_____ [*date*]

This notice is being provided to you on the date set forth above. On this date, you are also being offered a lease agreement ("the Lease") by the Management of_____[*name of mobilehome park*] ("the Park") for the Lease of space number _____ in the Park. This Lease is to begin on _____[*commencement date of lease*] and continue for a term of [*specify term, which must be in excess of 12 months in order to be exempt from local rent control measures (see Civ. Code § 798.17)*]. Under California Law, you have at least 30 days from the date the Lease was first offered to you (that is, the date set forth at the beginning of this notice) to review the Lease and either to accept or reject it. Consequently, you have until_____[*date that is at least 30 days after date lease is offered*] either to accept or reject this Lease. Further, if you accept and execute the Lease but then change your mind and want to void the Lease, you may do so provided you give Park Management written notice of that decision within 72 hours from the time you executed the Lease.

If you reject or void the Lease in the manner described above, you will be entitled to instead accept a rental agreement for a term of 12 months or less from the date the offered Lease was to have begun, such as a month-to-month rental agreement. If you choose to have a rental agreement for a term of 12 months or less, that rental agreement will contain the same rental charges, terms, and conditions as the offered Lease during the first 12 months [*if offered lease agreement contains option to extend or renew and management wants to exclude this from alternative agreement, add:*, except for the option contained in the offered Lease to _____ (extend *or* renew) the Lease].

_____ [*name of mobilehome park*]
By_____ [*signature*]

[*typed name and title*]

PARK MANAGEMENT

ACKNOWLEDGEMENT BY PROSPECTIVE TENANT

The undersigned hereby acknowledges receiving the above notice from Park Management on the date set forth at the top of the notice.

Signature: _____ [*signature of prospective tenant*]
Print Name:_____
Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationExemptionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.232

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.232 Notice of Mobilehome Park Rent Increase

[1] Comment--Use of Form

This form is a notice to a homeowner that his or her rent will be increased to a specific amount as of a certain date. Management must give a homeowner written notice of any increase in his or her rent at least 90 days before the date of the increase [*Civ. Code § 798.30*]. The notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

In order for a mobilehome park rental agreement to be exempt from any local rental control ordinance, the agreement and the manner in which it is offered to the homeowner must satisfy certain criteria [*see Civ. Code § 798.17*; *§ 39.220[1][f]*]. New construction is also exempt from local rent control measures [*Civ. Code § 798.45*; *see Civ. Code § 798.7* ("new construction" defined)].

[2] FORM

Notice of Mobilehome Park Rent Increase

NOTICE OF RENT INCREASE

TO: _____[*name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

As the homeowner of the mobilehome located at _____[*lot or site designation, e.g.,* Lot No. 72 *or* 183 Pine Street] ("the Premises") in _____[*name of mobilehome park*], you are hereby notified that your

rent for the Premises is about to be increased. Specifically, beginning on _____[*date that is at least 90 days after date of this notice*], your rent will be $ _____ per [*period of time, e.g.*, month *or* year], [*indicate when rent is payable, e.g.,*, to be paid on or before the first day of each month].

[*Optional provision*]

This increase is necessitated by increases in costs of overhead for management and maintenance of basic park services. It does not include, and has no effect on, other special services that are individually maintained and subject to separate charges, such as utilities or other incidental services.

Date:_____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationExemptionsReal Property LawMobilehomes & Mobilehome ParksGeneral Overview



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18-39 California Legal Forms--Transaction Guide § 39.233

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.233 Notice to Homeowner of New Park Services and Corresponding Charges

[1] Comment--Use of Form

This form may be used by park management to notify existing homeowners in the park that (1) some type of new service will be provided by management for the park and (2) a specific charge will be made to homeowners for the service. This form uses, as an example only, a 24-hour security service.

A homeowner may be charged a fee for only the following: rent, utilities, and incidental reasonable charges for services actually rendered [*Civ. Code § 798.31*]. For services that are actually rendered but that are not listed in the homeowner's rental agreement, management cannot charge a fee until it first gives the homeowner at least 60 days' written notice of the charge (this form) [*Civ. Code § 798.32(a)*]. A fee that is the subject of such a 60-day notice must be separately stated on any monthly or other periodic billing to the homeowner [*Civ. Code § 798.32(b)*]. This form assumes that the homeowners are not given monthly or other periodic bills, and provides that the payments of the new fee must accompany the monthly rent payments. If the new fee has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice and on each subsequent billing that is provided to the homeowner while the fee is being billed [*Civ. Code § 798.32(b)*]. Because the 24-hour security service described in this form is to be provided for an indefinite period and the fee is not to be amortized, this form is not subject to the foregoing requirement.

This notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

[2] FORM

Notice to Homeowner of New Park Services and Corresponding Charges

NOTICE OF NEW SERVICES AND CHARGES

TO: _____[*name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

As a homeowner in_____[*name of mobilehome park*], you are hereby notified that Park Management has retained a security service to provide security services for the Park on a 24-hour basis, effective_____[*date that is at least 60 days after date of this notice*]. To offset the cost of this service, each Homeowner will be required to pay $ _____ per month, in addition to rent and other charges currently payable under each Homeowner's rental or lease agreement with Park Management. For each Homeowner, this charge shall be due and shall be paid to Management at the same time as the Homeowner's monthly rent payment. Your first monthly payment of this charge shall accompany your first monthly rent payment due after_____[*same date as above*].

DATE:_____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.234

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.234 Notice to Homeowners of Meeting With Management

[1] Comment

[a] Use of Form

This form is a notice from park management to homeowners that a meeting has been scheduled between management and the homeowners pursuant to a written request for such a meeting. Management must meet and consult with the homeowners, either individually, collectively, or with representatives of a group of homeowners who have signed a request to be so represented, within 30 days of the receipt of a written request from one or more homeowners for a meeting regarding one or more of four topics specified by statute [*Civ. Code § 798.53*; *see* [b], *below*]. For a collective meeting between homeowners and management, management must give at least 10 days' advance notice of the meeting (this form) to all the homeowners that requested the meeting [*Civ. Code § 798.53*]. The notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

This form should not be confused with the notice set forth in *Section 39.234A*. The notice in [2], *below*, is based on *Civil Code Section 798.53*, which provides for meetings between management and homeowners on the written request of a homeowner or homeowners. However, the notice set forth in *Section 39.234A* is required by *Civil Code Section 798.25(a)*, which states that a noticed meeting must be held when management proposes an amendment to the park's rules and regulations.

[b] Homeowners' Right to Meeting on Certain Subject Matters

Homeowners have the right to meet with management [*see* [a], *above*] regarding the following matters [*Civ. Code § 798.53*]:

(1) Resident concerns regarding existing park rules (other than proposed amendments separately governed by *Civ. Code § 798.25*).

(2) Standards for maintaining physical improvements in the park.

(3) Adding, altering, or deleting service, equipment, or physical improvements.

(4) Rental agreements offered by management that are exempt from rent control ordinances under *Civil Code Section 798.17* [*see § 39.220[1][f]*].

[2] FORM

Notice to Homeowners of Meeting With Management

NOTICE OF HOMEOWNER/PARK MANAGEMENT MEETING

TO: _____[*name of requesting homeowner*]
_____[*address*]
_____[*city, state, zip*]

YOU ARE HEREBY NOTIFIED that on _____[*specify date that is at least 10 days after date of this notice*], at [*time*] at [*location, e.g.*, the park recreation room], the owner of _____[*name of mobilehome park*] ("the Park") [, through its authorized agent (*or* representative), _____ (*name*),] will meet and consult with the homeowners of the Park on the following matter[s]:

[*Select one or more of the following, as appropriate:*]

(1) Resident concerns regarding the existing Park rule pertaining to [(*specify, e.g.*, the prohibition against parking vehicles in front of the recreation room).]

(2) Standards for maintaining physical improvements in the Park. [Specifically, the meeting will consider _____ (*specify, e.g.*, ways to keep the Park's sidewalks and cul-de-sacs clear of parked vehicles).]

(3) Adding, altering, or deleting services, equipment, or physical improvements. [The specific proposal to be considered at the meeting is the _____ (*describe, e.g.*, construction of a spa in the pool area).]

(4) Rental agreements offered in accordance with *Civil Code Section 798.17*.

[*Continue with the following:*]

This meeting has been called in response to a written request for such a meeting dated _____.

Date: _____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.234A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.234A Notice to Homeowners of Meeting to Amend Park Rules and Regulations

[1] Comment

[a] Use of Form

This form is a notice to homeowners of a meeting to amend the park's rules and regulations. Management must give notice of a meeting to homeowners when it proposes an amendment to the park's rules and regulations [*see Civ. Code § 798.25(a)*]. The notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

Because a proposed amendment may be implemented only after management has met with the homeowners [*see Civ. Code § 798.25(b)*], this form should be used in conjunction with a notice that the park's rules and regulations are being amended [*see § 39.235*]. However, this form should not be confused with the notice set forth in *§ 39.234*. The notice in [2], *below*, is required by *Civ. Code § 798.25(a)*, which states that a noticed meeting must be held when management proposes an amendment to the park rules and regulations [*see* [b], *below*]. The notice in *§ 39.234*, however, is based on *Civ. Code § 798.53*, which provides for meetings between management and homeowners on the written request of a homeowner or homeowners.

[b] Meeting and Notice Requirements

When park management proposes an amendment to the park's rules and regulation, the management must meet and consult with the homeowners in the park, their representatives, or both. Ten days' advance written notice of the meeting must be given to each homeowner. The notice must set forth the proposed amendment to the park rules and regulations and the date, time, and location of the meeting [*Civ. Code § 798.25(a)*].

Following the meeting and consultation, the amendment may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent on written notice of not less than six months, except that only 60 days' advance written notice is sufficient for amendments that pertain to recreational facilities [*Civ. Code § 798.25(b)*; *see § 39.235* (notice of amendment to park rules and regulations)]. Any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*].

A meeting is not required when management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation. In such cases, management may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

[2] FORM

Notice to Homeowners of Meeting to Amend Park Rules and Regulations

NOTICE OF MEETING TO AMEND PARK RULES AND REGULATIONS

TO: _____[*Name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

Please take notice that a meeting will be held on _____[*date that is at least 10 days after date of notice*], at [*time*] at [*location of meeting, e.g.,* the park recreation room] to discuss a proposed amendment to the park's rules and regulations.

The formal text of the proposed amendment reads as follows: [*specify*].

[The text of the present regulation that will be superseded by the proposed amendment reads as follows: _____ (*specify*)].

Date: _____

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.235

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.235 Notice of Amendment to Park Rules and Regulations

[1] Comment

[a] Use of Form

This form is a notice to mobilehome park homeowners of an amendment to the park rules and regulations [*see* [b], *below*]. The notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

Because an amendment may be implemented only after management has met and consulted with the homeowners [*see Civ. Code § 798.25(a), (b)*], this form should be used in conjunction with a notice to the homeowners that a meeting will be held to discuss a proposed amendment to the park's rules and regulations [*see § 39.234A*].

[b] Notice Required for Amendment

Once management has satisfied the meeting requirements applicable to amending a park rule or regulation [*see Civ. Code § 798.25(a)*; *see also* [c], *below*], the amendment may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent on written notice of not less than six months, except that only 60 days' advance written notice is sufficient for amendments that pertain to recreational facilities [*Civ. Code § 798.25(b)*]. For a homeowner whose tenancy will commence within the required period of notice, written notice of the proposed amendment must be given before the beginning of the tenancy [*Civ. Code § 798.25(c)*]. The notice below may be used to give notice of an amendment to new, as well as existing, homeowners.

[c] Meeting Between Management and Homeowners

When park management proposes an amendment to the park's rules and regulations, the management must meet and

consult with the homeowners in the park, their representatives, or both, after written notice has been given to all the homeowners in the park 10 days or more before the meeting [*Civ. Code § 798.25(a)*; *see § 39.234A*]. Any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*].

A meeting is not required when management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation. In such cases, management may implement the amendment, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment [*Civ. Code § 798.25(d)*].

[2] FORM

Notice of Amendment to Park Rules and Regulations

NOTICE OF AMENDMENT OF MOBILEHOME PARK
RULES AND REGULATIONS

TO: _____[*Name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

PLEASE TAKE NOTICE that the rules and regulations of _____[*name of mobilehome park*] are being amended, as indicated below. This amendment will become effective on _____[*date that is at least six months after date of notice (or at least 60 days after date of notice, if amendment relates to recreational facilities or is mandated by a change in law*)].

The effect of the amendment will be to [*describe effect, e.g.*, reserve the Park's recreation room on Monday evenings for meetings of the Park Homeowners' Association. The recreation room will be available on Monday evenings for other purposes only if the Homeowners' Association, for any reason, elects to not have a meeting].

The formal text of the amendment reads as follows: [*specify*].

[The text of the present regulation that will be superseded by the amendment reads as follows: _____ (*specify*)].

Date: _____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.236

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.236 Notice of Violation of Park Rules and Regulations

[1] Comment

[a] Use of Form

This form is a notice of violation of a mobilehome park's rules and regulations. Management should give this notice to a homeowner [*Civ. Code §§ 798.9, 798.8* ("homeowner" is a person who has a tenancy in a mobilehome park under a rental agreement with park management)] when the homeowner's tenancy is in danger of being terminated [*see* [b], *below*] because the homeowner or a resident of the homeowner's mobilehome has violated a park rule or regulation [*Civ. Code § 798.56(d)*; *see Civ. Code § 798.11* ("resident" means a homeowner or other person who lawfully occupies a mobilehome)].

The notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*]. Thereafter, management may terminate the tenancy if the homeowner or resident fails to adhere to the rule or regulation within seven days [*see* [b], *below*]. For a notice to terminate a tenancy in a mobilehome park, see *§ 39.238*.

[b] Grounds for Terminating Tenancy

Among other grounds permitted by statute, management may terminate a tenancy if a homeowner or resident fails to comply with (1) a reasonable rule or regulation of the park that is part of the rental agreement, or (2) any amendment to such a rule or regulation [*Civ. Code § 798.56(d)*; *see Civ. Code §§ 798.15* (rental agreement must include park rules and regulations), 798.25 (notice required for amendment of park rules or regulations)]. However, any act or omission of the homeowner or resident does not constitute a failure to comply with a reasonable rule or regulation unless and until management gives the homeowner written notice of the alleged rule or regulation violation (this form) and the homeowner or resident fails to adhere to the rule or regulation within seven days [*Civ. Code § 798.56(d)*]. If a

homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no further written notice is required for a subsequent violation of the same rule or regulation. Management has the obligation to demonstrate that a rule or regulation has in fact been violated [*Civ. Code § 798.56(d)*].

[c] Injunction Against Recurring Violations

In addition to management's right to terminate a tenancy for a homeowner's violation of park rules and regulations [*see* [b], *above*], management may obtain an injunction for a continuing or recurring violation [*Civ. Code § 798.88*]. The required procedure for obtaining the injunction is outlined in *Section 39.121[4]*.

[2] FORM

Notice of Violation of Park Rules and Regulations

NOTICE OF VIOLATION OF PARK
RULES AND REGULATIONS

TO: _____[*name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

As the homeowner of the mobilehome located at [*lot or site designation*] in _____[*name of mobilehome park*] ("the Park"), you are hereby informed that [you have *or* a resident of your mobilehome has] violated one [*or specify other number*] of the rules and regulations of the Park, which are a part of your rental agreement. Specifically, [you have *or* the resident has] failed to comply with [*identify rule or regulation, e.g.,* Section 11] of those rules and regulations, [*add if applicable:* as amended on _____ (*date*)], which provides [in part] that[*specify, e.g.,* recreational vehicles shall not be parked at any location inside the Park]. [You have *or* The resident has] failed to comply with the above rule or regulation in that [*specify, e.g.,* you have parked or permitted a recreational vehicle to be parked on your homesite in the Park].

The date on which the violation was first noted by Park Management was _____. The violation has continued through the date of this Notice.

You have seven days from the date of this Notice in which to [comply *or* cause the resident of your mobilehome to comply] with the above rule or regulation. If you do not comply within that time period, Park Management has the right to terminate your tenancy in the Park.

DATE: _____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.237

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.237 Notice of Violation of Lot Maintenance Requirements

[1] Comment

[a] Use of Form

This form is a notice to a homeowner that he or she is in violation of a mobilehome park's lot maintenance requirements. Management may charge a reasonable fee for service relating to the maintenance of the land and premises on which a mobilehome is situated if the homeowner fails to maintain the land or premises in accordance with the park's rules and regulations [*see Civ. Code §§ 798.15(g), 798.36*]. However, management cannot take this action unless (1) it provides the homeowner with a written notice (this form) stating the specific condition to be corrected and containing an estimate of the charges to be imposed if the services are performed by management or its agent, and (2) the homeowner fails to comply with the notice within 14 days [*Civ. Code §§ 798.15(g), 798.36*].

The homeowner's rental agreement must contain a provision describing the foregoing lot maintenance requirements [*Civ. Code § 798.15(g)*]. For such a provision, see Paragraph 9 of *§ 39.220[2]*.

This notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

[b] Termination of Tenancy

Failure by a homeowner to comply with a reasonable rule or regulation of the park that is contained in the homeowner's rental agreement constitutes a ground for termination of the rental agreement by management [*see Civ. Code § 798.56(d)*]. For a discussion of the procedure required to terminate a tenancy in a mobilehome park, see *§ 39.121[9]*.

[2] FORM

Notice of Violation of Lot Maintenance Requirements

NOTICE OF VIOLATION OF LOT MAINTENANCE REQUIREMENTS

TO: _____[*name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

As the homeowner of the mobilehome located at [*lot or site designation*] in _____[*name of mobilehome park*] ("the Park"), you have failed to comply with the rules and regulations of the Park. Specifically, you have violated [*cite appropriate section number(s)*] of the rules and regulations, which read(s) [in part] as follows: [*quote relevant portion, e.g.,* "Homeowner will maintain lawn, flowers, and shrubs; keep the lot clean; keep the grass cut and watered; and keep all trash, debris, boxes, barrels, brooms, ladders, and other equipment and paraphernalia out of sight"].

You have failed to comply with the above rule or regulation in that [*describe, e.g.,* you have permitted all of the vegetation on your lot to die and have allowed garbage to accumulate on the lot].

You must act within 14 days from the date you receive this notice to comply with the Park's lot maintenance requirements by correcting the above condition(s). If you fail to do so, management or its agent may correct the violation(s) and charge you a reasonable fee for these maintenance services. This fee is currently estimated to be $ [*specify*].

DATE: _____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.237A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.237A Notice for Removal of Personal Property

[1] Comment

[a] Use of Form

This form is a notice to a homeowner or resident that park management has determined that personal property must be removed from the land and premises on which the mobilehome is situated in order to bring the premises into compliance with park rules and regulations or with the Mobilehome Parks Act or its implementing regulations [*see § 39.121[4]*, P 7]. Management may remove the property to a reasonably secure storage area if the homeowner fails to bring the land or premises into compliance with the park's rules and regulations or the applicable code sections [*see Civ. Code § 798.36(a), (b)*]. However, management cannot take this action unless (1) it provides the homeowner with a written notice (this form) stating the rule, regulation, or code provision that has been violated, providing a description of the property to be removed, and containing an estimate of the charges to be imposed if the services are performed by management; and (2) the homeowner fails to comply with the notice within 14 days [*Civ. Code § 798.36(b)(1)*]. The homeowner or resident is responsible for reimbursing management the actual, reasonable costs of removing and storing the property [*Civ. Code § 798.36(b)(2)*].

This notice must be either (1) delivered personally to the homeowner, or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

[b] Termination of Tenancy

Failure by a homeowner to comply with a reasonable rule or regulation of the park that is contained in the homeowner's rental agreement constitutes a ground for termination of the rental agreement by management [*see Civ. Code § 798.56(d)*. For a discussion of the procedure required to terminate a tenancy in a mobilehome park, see *§ 39.121[9]*]. However, if management elects to proceed under *Civ. Code § 798.36*, it may not also terminate the tenancy pursuant to

Civ. Code § 798.56(d) based on the same specific violations [*Civ. Code § 798.36(b)(4)*]. Nevertheless, costs incurred by management in correcting the violation associated with the removal and storage of the property are deemed to be reasonable incidental service charges and may be collected pursuant to *Civ. Code § 798.56(e)* (termination of tenancy for failure to pay rent, utilities, or other permitted park charges within five days of their due date) if a notice of nonpayment of the removal and storage fees is personally served on the homeowner [*Civ. Code § 798.36(b)(2), (3)*; *see § 39.238* (form for termination of tenancy)].

[2] FORM

Notice for Removal of Personal Property

NOTICE FOR REMOVAL OF PERSONAL PROPERTY

TO: _____[*name of homeowner/resident*]
_____[*address*]
_____[*city, state, zip*]

As the [homeowner *or* resident] of the mobilehome located at [*lot or site designation*] in _____[*name of mobilehome park*] ("the Park"), you have failed to comply with [the rules and regulations of the Park *or* the requirements of the Mobilehome Parks Act]. Specifically, you have violated [*cite appropriate section number(s)*] [of the rules and regulations *and/or* code provisions], which read(s) [in part] as follows: [*quote relevant portion, e.g.*, "Homeowner will keep lot free of trash and debris and will store all personal property out of sight"].

You have failed to comply with the above rule or regulation in that you have allowed [*describe specific property to be removed, e.g.*, automotive parts] to accumulate on the premises.

You must act within 14 days from the date you receive this notice to comply with Park requirements by correcting the above condition(s). If you fail to do so, management or its agent may correct the violation(s) and charge you the actual, reasonable costs of removing and storing the property. This charge is currently estimated to be $[*specify*].

DATE: _____

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.237B

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.237B Inventory and Location of Stored Property

[1] Comment--Use of Form

This form may be used to meet the requirement that park management provide the homeowner or resident (1) an inventory of property that was removed and stored; (2) the location of the storage facility; and (3) a notice that the cost of removal and storage must be paid by the resident or homeowner [*see Civ. Code § 798.36(b)(3)*]. Park management may charge a reasonable fee if, in good faith, it has removed and stored a homeowner's or resident's personal property in order to bring the premises into compliance with park rules and regulations or with the Mobilehome Parks Act or its implementing regulations [*Civ. Code § 798.36(a), (b)*; *see § 39.237A* (notice for removal of property)].

This notice must be either (1) delivered personally to the homeowner, or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

[2] FORM

Inventory and Location of Stored Property

INVENTORY AND LOCATION OF STORED PROPERTY

TO: _____[*name of homeowner or resident*]
_____[*address*]
_____[*city, state, zip*]

1. As a [homeowner *or* resident] in _____[*name of mobilehome park*], you are hereby notified that Park Management has removed the following item(s) of personal property from the land and premises on which your mobilehome is situated in order to bring the premises into compliance with [the rules and regulations of the Park *and/or*

the provisions of the Mobilehome Parks Act]: [*list items of personal property*].

2. The items listed in Paragraph 1 are being held in storage at:_____[*name, address, and telephone number of storage facility*].

3. You are responsible for reimbursing Park Management the actual, reasonable costs of removing and storing the property.

DATE: _____

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-39 California Legal Forms--Transaction Guide § 39.238

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.238 Notice of Termination of Tenancy

[1] Comment

[a] Use of Form

This form is a notice to a homeowner of a mobilehome park that his or her tenancy is being terminated. The management of a mobilehome park may terminate or refuse to renew a tenancy only for one or more reasons specified by statute [*see* [b], *below*]. To exercise this right, management must give the homeowner written notice to sell or remove the mobilehome (this form). The notice must specify the period (not less than 60 days) within which the mobilehome must be removed [*Civ. Code § 798.55(b)(1)*]. Management must give the notice to the homeowner, and distribute copies to specified persons, in the manner prescribed by statute [*see Civ. Code § 798.55(b)(1)*; *see also Code Civ. Proc. § 1162*; [d], [e], *below*].

The resident of a mobilehome who remains in the mobilehome park after this notice to sell or remove the mobilehome has been served continues to be subject to the Mobilehome Residency Law (MRL) and to the rules and regulations of the park, including those pertaining to maintenance of the space [*Civ. Code § 798.55(e)*]. Any lawful act by the management to enforce the MRL or the rules and regulations of the park may not be deemed or construed to waive or otherwise affect the notice to remove the mobilehome [*Civ. Code § 798.55(f)*].

[b] Permissible Grounds for Termination

A tenancy may be terminated by management only for one or more of the following reasons [*Civ. Code § 798.56*]:

- Failure of the homeowner or resident [*see Civ. Code §§ 798.9* ("homeowner" defined), *798.11* ("resident" defined); *see also § 39.14[2]* (definitions)] to comply with a local ordinance, state law, or regulation relating to mobilehomes within a reasonable time after receipt of a notice of noncompliance

from the appropriate governmental agency.

- Conduct by the homeowner or resident, on the park premises, that constitutes a substantial annoyance to other homeowners or residents.

- Conviction of the homeowner or resident for prostitution, an assault with a firearm on another person or on a peace officer or firefighter engaged in the performance of his or her duties [*Pen. Code 243(d), 245(a)(2), (b)*], lewd or lascivious acts involving children [*Pen. Code § 288*], arson [*Pen. Code § 451*], or a felony controlled substance offense if the act resulting in the conviction was committed within the homeowner's mobilehome or anywhere else on the park premises. The tenancy may not be terminated for this reason, however, if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

- Failure of the homeowner or resident to comply with a reasonable park rule or regulation as set forth in the original or amended rental agreement [*see Civ. Code § 798.25* (amendment procedure)], if management has complied with, or is exempt from, the statutory notice requirements [*see § 39.236*].

- Nonpayment of rent, utility charges, or reasonable incidental service charges, provided management waits at least five days following the nonpayment (not including the due date) before issuing a three-day notice to pay or vacate [*Civ. Code § 798.56(e)(1)*; *but see Civ. Code § 798.56(e)(5)* (three-day notice requirement does not apply if homeowner has already received three of these notices within preceding 12-month period); *see also § 39.121[9]*].

- Condemnation of the park.

- Change of use of all or any portion of the park, provided proper notice is given [*see Civ. Code § 798.56(g)* (notice requirements); *see also § 39.240*].

Any grounds other than those listed above do not constitute the basis for a valid termination of a mobilehome park tenancy. Further, a tenancy may not be terminated for the purpose of making a homeowner's site available for a person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from the owner of the park or the owner's agent [*Civ. Code § 798.58*].

[c] Required Statement of Specific Grounds for Termination

Management must specify in the termination notice the reason for the termination of the tenancy. The reason must be set forth with specific facts so that the date, place, witnesses, and circumstances can be determined. For these purposes, it is not sufficient to simply do either or both of the following: refer to the controlling statute; or recite the language of the governing law [*Civ. Code § 798.57*].

[d] Service of Notice

The notice of termination must be served on the homeowner in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 798.55(b)(1)*]. Under § 1162, a copy must be delivered to the homeowner personally. If the homeowner is absent from his or her residence and from his or her usual place of business, a copy must be left with someone of suitable age and discretion at either place. In that case, another copy must be mailed to the homeowner at his or her place of residence. If the place of residence and the usual place of business cannot be ascertained or if a person of suitable age or discretion cannot be found at either place, then (1) a copy must be affixed in a conspicuous place on the property, (2) a copy must be delivered to a person residing on the property, if one can be found, and (3) a copy must be mailed to the homeowner at the place where the property is situated. Service on a subtenant may be made in the same

manner [*Code Civ. Proc. § 1162*]. For termination because of a homeowner's nonpayment of rent or other valid charges, the notice of termination may be given at the same time as the required three-day notice to the homeowner [*Civ. Code § 798.56(e)(1)*; *see Civ. Code § 798.56(e)(5)* (three-day notice not required for nonpayment if homeowner has been sent three-day notice to pay three or more times within preceding 12-month period)].

[e] Distribution of Copies

A copy of the notice must be sent to the legal owner [*see Health & Safety Code § 18005.8* ("legal owner" defined)], each junior lienholder [*see Health & Safety Code § 18005.3* ("junior lienholder"defined)], and the registered owner, if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested, at the management's option [*Civ. Code § 798.55(b)(1)*]. However, if termination is for nonpayment of rent or other valid charges, this notice must be sent by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner [*Civ. Code §§ 798.55(b), 798.56(e)(5)*]. The copies of the notice of termination described above must be addressed to the recipients at the addresses set forth in the registration card [*Civ. Code § 798.55(c)*; *see Health & Safety Code § 18091.5* (registration card)].

[f] Effect on Forcible Entry and Unlawful Detainer Statutes

Except as may be otherwise provided in the Mobilehome Residency Law (MRL), the provisions of that law do not affect any rights or proceedings authorized by the statutes dealing with forcible entry and unlawful detainer proceedings [*Civ. Code § 798.60*; *see Code Civ. Proc. § 1159 et seq.* (forcible entry and unlawful detainer statutes)].

As discussed in [a] and [b], *above*, the MRL permits management of a mobilehome park to terminate a mobilehome tenancy only for one or more specified reasons and only by giving a 60-day written notice to the homeowner to sell or remove his or her mobilehome from the park [*Civ. Code § 798.55*]. This has been interpreted as placing a restriction on the termination rights of mobilehome landlords. Not only is termination of a mobilehome tenancy contingent on the giving of a 60-day written notice to the homeowner, but the landlord must also rely on one or more of the reasons specified in the MRL [*Palmer v. Agee (1978) 87 Cal. App. 3d 377, 384, 150 Cal. Rptr. 841]* . Thus, it would appear that the unlawful detainer proceedings for obtaining possession of real property by giving the homeowner a three-day notice for nonpayment of rent, breach of covenant, or unauthorized subletting, are not applicable to mobilehome tenancies, except to the extent made so by the MRL [*see Palmer v. Agee (1978) 87 Cal. App. 3d 377, 386, 150 Cal. Rptr. 841]* .

[g] Grounds for Termination Cannot Be Waived

A rental or lease agreement for space in a mobilehome park may not contain any provision by which the homeowner waives his or her rights under the MRL. A waiver of this type is deemed to be contrary to public policy and void [*Civ. Code § 798.19*].

[h] Permitted Grounds for Refusal to Renew Tenancy

Park management may refuse to renew a tenancy only for one or more of the same reasons permitted by statute to terminate a tenancy [*see* [b], [c], *above*]. Further, management must comply with the same notice of termination requirements [*see* [a], *above*] if management determines that it will not renew a homeowner's lease [*Civ. Code § 798.55*].

[2] FORM

Notice of Termination of Tenancy

NOTICE OF TERMINATION

TO: _____[*name of homeowner*]
_____[*address*]
_____[*city, state, zip*]

This notice relates to the tenancy established by the lease agreement entered into on _____[*date*] by you and _____[*name of owner of park*]. That agreement covers the mobilehome situated on the mobilehome lot described as [*insert description of lot or site*], and located in _____[*name of mobilehome park*] ("the Park").

YOU ARE HEREBY NOTIFIED that the above tenancy is being terminated, effective _____[*date that is at least 60 days after date of notice*]. On or before that date, you must do the following: surrender possession of the premises covered by the above lease to Park Management; and either sell or remove the mobilehome currently on those premises.

This termination is being ordered for the reason(s) that _____[*specify reason(s), including specific facts so that date, place, witnesses, and circumstances can be determined, e.g.*, on August 13, 2003, at approximately _____ (*time*), the undersigned personally delivered to you a "Notice of Violation of Park Rules and Regulations," dated _____, which notified you that you had violated one of the rules and regulations of this Park. Specifically, the notice indicated that you had failed to comply with Paragraph 3 of those rules and regulations, which provide in part that "Guests who have stayed with Homeowner more than a total of 20 consecutive days or a total of 30 days in a calendar year and who intend to stay on for any continued period beyond that must register with the Park Management." Paragraph 3 also provides for the imposition of a fee for registered guests. The notice of violation stated that two guests had been in continuous residence in your mobilehome for a minimum of three months without registering with Park Management or paying the required fee, and instructed you to comply with the foregoing requirements within seven days of the issuance of the notice. However, you and your guests have failed to do so].

As a result of your failure to comply with the above notice of violation, you are hereby given this 60-DAY NOTICE OF TERMINATION. If you do not surrender possession of the premises described above and either sell or remove the mobilehome currently on those premises on or before _____[*same date specified in first paragraph above*], Park Management will initiate legal proceedings against you to obtain possession of the premises.

Date: _____

_____ [*name of mobilehome park*]
By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-39 California Legal Forms--Transaction Guide § 39.239

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.239 Notice to Park Management That Homeowner Will Vacate Park

[1] Comment--Use of Form

This form is a notice by a homeowner of a mobilehome park that he or she intends to vacate the park as of the date set forth in the notice. Such a notice must be in writing and must be given to park management at least 60 days prior to the date the homeowner vacates [*Civ. Code § 798.59*]. The notice should be given in the manner prescribed by the homeowner's lease or rental agreement. If there is no prescribed method, the notice should be either delivered personally to management or deposited in the mail, postage prepaid, addressed to management located in the park [*see Civ. Code § 798.14* (required method for giving of notices by park management)].

[2] FORM

Notice to Park Management That Homeowner Will Vacate Park

NOTICE OF INTENT TO VACATE PARK

TO: Management of _____[*name of mobilehome park*]
_____[*address*]
_____[*city, state, zip*]

The undersigned is presently a homeowner of your park. _____[He *or* She] is using [*lot or site designation*] in your park pursuant to a rental agreement [*or* lease] dated _____ and executed by the undersigned and _____[*name*].

Please take notice that the undersigned will vacate the Park not later than _____[*date that is at least 60 days after notice*]. The undersigned is providing you with the advance notice pursuant to *Civil Code Section 798.59* and

Paragraph _____ of the above rental agreement [*or* lease].

DATE: _____

_____ [*signature of homeowner*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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2. Required and Permitted Notices

18-39 California Legal Forms--Transaction Guide § 39.240

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.240 Notice to Homeowners That Management Will Request Change of Use for Park

[1] Comment

[a] Use of Form

This form is a notice to mobilehome park homeowners that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park. If the change requires one or more local governmental permits, and the change will result in the termination of one or more tenancies in the park, management must give this type of written notice to homeowners in the park at least 15 days before the appearance before the governmental body [*Civ. Code § 798.56(g)(1)*; *see Civ. Code § 798.56(g)* (tenancy in park may be terminated because of change in use for park)].

This notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*].

Park management must also give each prospective homeowner, prior to the inception of his or her tenancy, written notice that management is making a change of use request to a local governmental body or that a change of use request has been granted [*Civ. Code §§ 798.27(b), 798.56(g)(3)*]. With minor modifications, this form may be used to satisfy that requirement.

For coverage of related notices that must be given when there is a change in use of the park, see [d], *below*.

[b] Required Verification That Park Residents Have Received Notice of Proposed Change in Use

A local agency that receives an application for conversion of a mobilehome park to another use must send the applicant a written notice at least 30 days prior to a hearing or any other action on the application. That notice must inform the

applicant of the provisions of *Civ. Code § 798.56* (permitted reasons and required procedures for terminating mobilehome park tenancy) and all applicable local requirements that require the applicant to notify residents and mobilehome owners in the park of the proposed change in use. The notice must also indicate the manner in which the applicant must verify that those persons have been notified. Until the applicant has satisfactorily verified that those persons have been notified in the required manner, the local agency cannot conduct a hearing or take any other action on the application [*Gov. Code § 65863.8*].

[c] Report on Impact of Conversion or Closure of Park

[i] Preparation and Service on Residents

Unless an exception applies [*see* [iii], *below*], prior to the conversion of a mobilehome park to another use, or prior to closure of a mobilehome park or cessation of use of the land as a mobilehome park, the proponent of the change in use must file a report with the local legislative body or its delegated advisory agency on the impact of the proposed conversion, closure, or cessation of use on the displaced residents of the park. In determining this impact, the report must address the availability of adequate replacement housing in mobilehome parks and relocation costs [*Gov. Code § 65863.7(a)*].

If the proposal is for a conversion, the proponent must provide a copy of the report to a resident of each mobilehome in the park at the same time that the 15-day notice of a proposed change in use (this form) is given [*see Gov. Code § 65863.7(b)*; *Civ. Code § 798.56(g)(1), (h)*]. If the proposal is for a closure or cessation of use, the proponent must provide a copy of the report to a resident of each mobilehome in the park at the same time that the notice of the change is provided to the residents under *Civ. Code § 798.56(g)(2)* [*Gov. Code § 65863.7(c)*; *see* [d][i], *below*].

[ii] Review of Report and Mitigation

The local governmental entity must review the impact report prior to any change of use, and may require the proponent, as a condition of the change, to take steps to mitigate any adverse impact of the conversion, closure, or cessation of use on the ability of displaced mobilehome park residents to find adequate housing in a mobilehome park. The cost of these steps must not exceed the reasonable costs of relocation [*Gov. Code § 65863.7(e)*].

If the impact report is filed in connection with a proposed closure or cessation of use, the person or entity filing the report or any park resident may request, and has a right to, a hearing before the legislative body on the sufficiency of the report [*Gov. Code § 65863.7(d)*].

[iii] Exceptions

The requirements of *Gov. Code § 65863.7* do not apply to a closure or cessation of use of a mobilehome park that results from the entry of an order for relief in bankruptcy [*Gov. Code § 65863.7(f)*]. Further, they do not apply to the conversion of a mobilehome park to another use regulated under the Subdivision Map Act [*Gov. Code § 66410 et seq.* (Act)], such as a conversion to a mobilehome park subdivision [*Gov. Code § 65863.7(a)*; *see § 39.29*]. In the latter case, an impact report is still required, but the report is subject to different statutory authority [*see Gov. Code § 66427.5*; *see also § 39.29[2][a]*; *see also* Ch. 30, *Subdivision Regulation*].

The standard requirements of *Gov. Code § 65863.7* do not apply to a closure, cessation of use, or change of use of a mobilehome park that is the result of (1) a decision by a local governmental entity or planning agency not to renew a conditional use permit or zoning variance under which the mobilehome park has operated, or (2) any other zoning or planning decision, action, or inaction. In this case, the local governmental agency must prepare and distribute the impact report and, if necessary, mitigate the adverse impact of the change [*Gov. Code § 65863.7(i)*]. The impact report must be given to the homeowners or residents at the same time that the notice of the change in use (this form) is provided to the residents pursuant to *Civ. Code § 798.56(g)(2)* [*Civ. Code § 798.56(h)*].

The standard requirements of *Gov. Code § 65863.7* apply when the closure, cessation, or change of use is the result of a decision by an enforcement agency [*see Health & Safety Code § 18207* ("enforcement agency" defined)] to suspend the permit to operate the mobilehome park [*Gov. Code § 65863.7(j)*].

[d] Other Required Notices

[i] Termination of Tenancy

After all required permits requesting a change of use have been approved by the local governmental entity [*see* [a]-[c], *above*], management must give the homeowners at least six months' written notice that their tenancies are being terminated [*Civ. Code § 798.56(g)(2)*]. If the change of use requires no local governmental permits, then management must give the homeowners, at least 12 months prior to management's determination that a change of use will occur, a notice of termination of tenancy that discloses and describes in detail the nature of the change of use [*Civ. Code § 798.56(g)(2)*]. In either case, the notice must be either (1) delivered personally to the homeowner or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*see Civ. Code § 798.14*]. Further, all statutory notice requirements for terminating a tenancy must be followed if a proposed change in use actually occurs [*Civ. Code § 798.56(g)(4)*; *see Civ. Code §§ 798.56, 798.57* (notice requirements); *see also §§ 39.121[9], 39.238*].

[ii] Change Affecting Zoning or Permit

If a change occurs affecting the zoning or use permit under which the park operates or a lease under which the management is a tenant, all homeowners must be given written notice within 30 days of the change [*Civ. Code § 798.27(b)*]. When the change affects the use of all or any portion of the park, the notice must comply with the requirements of *Civ. Code § 798.56(g)* (discussed throughout this Section) [*Civ. Code § 798.27(b)*]. A prospective homeowner must be notified of the change before the beginning of his or her tenancy [*Civ. Code § 798.27(b)*].

[2] FORM

Notice to Homeowners That Management Will Request Change of Use for Park

NOTICE THAT MANAGEMENT WILL REQUEST
PERMITS FOR CHANGE OF USE

TO: _____[*name of homeowner(s*)]
_____[*street address*]
_____[*city, state, zip*]

PLEASE TAKE NOTICE that on _____[*date that is at least 15 days after date of this notice*], at [*time*], the management of _____[*name of mobilehome park*] ("the Park") will be appearing before _____[*name of local governmental board, commission, or body*] at _____[*name of building and room number, street address, city, state, zip*] to request the issuance of all necessary governmental permits for the change of use of [a portion of] the Park, as described below. The owners of the Park propose to change the use of [a certain portion of] the real property on which the Park is presently situated. [The portion of the Park that would be affected by the change of use is described as follows: _____ (*specify*).] The proposed change of use is from residential use to [*description of proposed use, e.g.,* amusement park operation].

DATE: _____

_____ [*name of mobilehome park*]

By_____ [*signature*]
[*typed name and title*]
PARK MANAGEMENT

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-39 California Legal Forms--Transaction Guide § 39.241

AUTHOR: by Jeannie Christy Newell, J.D.

§ 39.241 Information for Prospective Homeowners

[1] Comment--Use of Form

The form in [2], *below*, is the statutory "Information for Prospective Homeowners" form. Within two business days of receiving a request from a prospective homeowner for an application for residency for a specific space within a mobilehome park, if the management has been advised that the mobilehome occupying that space is for sale, the management must give the prospective homeowner the form set forth below [*Civ. Code § 798.74.5(a)*]. The form must be in at least 12-point type [*Civ. Code § 798.74.5(a)*]. On request of the prospective homeowner, management must also provide a copy of park rules and regulations and a copy of the Mobilehome Residency Law [*Civ. Code § 798.74.5(b)*].

[2] FORM

Information for Prospective Homeowners

INFORMATION FOR PROSPECTIVE HOMEOWNERS

As a prospective homeowner you are being provided with certain information you should know prior to applying for tenancy in a mobilehome park. This is not meant to be a complete list of information.

Owning a home in a mobilehome park incorporates the dual role of "homeowner" (the owner of the home) and park resident or tenant (also called a "homeowner" in the Mobilehome Residency Law). As a homeowner under the Mobilehome Residency Law, you will be responsible for paying the amount necessary to rent the space for your home, in addition to other fees and charges described below. You must also follow certain rules and regulations to reside in the park.

If you are approved for tenancy, and your tenancy commences within the next 30 days, your beginning monthly rent

will be $_____ (must be completed by the management) for space number _____ (must be completed by the management). Additional information regarding future rent or fee increases may also be provided.

In addition to the monthly rent, you will be obligated to pay to the park the following additional fees and charges listed below. Other fees or charges may apply depending upon your specific requests. Metered utility charges are based on use.

_____

_____

(Management shall describe the fee or charge and a good faith estimate of each fee or charge.)

Some spaces are governed by an ordinance, rule, regulation, or initiative measure that limits or restricts rents in mobilehome parks. Long-term leases specify rent increases during the term of the lease. By signing a rental agreement or lease for a term of more than one year, you may be removing your rental space from a local rent control ordinance during the term, or any extension, of the lease if a local rent control ordinance is in effect for the area in which the space is located.

A fully executed lease or rental agreement, or a statement signed by the park's management and by you stating that you and the management have agreed to the terms and conditions of a rental agreement, is required to complete the sale or escrow process of the home. You have no rights to tenancy without a properly executed lease or agreement or that statement. (*Civ. Code § 798.75*)

If the management collects a fee or charge from you in order to obtain a financial report or credit rating, the full amount of the fee or charge will be either credited toward your first month's rent or, if you are rejected for any reason, refunded to you. However, if you are approved by management, but, for whatever reason, you elect not to purchase the mobilehome, the management may retain the fee to defray its administrative costs. (*Civ. Code § 798.74*)

We encourage you to request from management a copy of the lease or rental agreement, the park's rules and regulations, and a copy of the Mobilehome Residency Law. Upon request, park management will provide you a copy of each document. We urge you to read these documents before making the decision that you want to become a mobilehome park resident.

Dated: _____

Signature of Park Manager: _____

Acknowledge Receipt by Prospective Homeowner: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES

18-40 California Legal Forms--Transaction Guide 40.syn

AUTHOR: by Jeannie Christy Newell, J.D.

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§ 40.05 Law Reviews and Periodicals

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Notice of Belief of Abandonment

by Jeannie Christy Newell, J.D.n*

FOOTNOTES:
(n104)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES

18-40 California Legal Forms--Transaction Guide Scope

AUTHOR: by Jeannie Christy Newell, J.D.

Scope

by Jeannie Christy Newell, J.D.n* Scope

This chapter covers the purchase, sale, registration, titling, and taxation of mobilehomes. The coverage of mobilehome sales includes a consideration of the statutory requirements governing sales by mobilehome dealers and by real estate brokers. Special considerations and requirements for the sale of a mobilehome located in a mobilehome park, including the respective rights and duties of both park management and the selling homeowner, are also covered. Further, the chapter discusses security interests in mobilehomes and foreclosure proceedings.

In addition to the above, this chapter outlines the regulatory requirements for the installation of a mobilehome on a site or foundation system. Applicable law pertaining to the use, maintenance, and occupancy of a mobilehome is also briefly discussed.

Unless otherwise indicated, all requirements for a mobilehome discussed in this chapter also apply to a manufactured home [*see § 40.10*].

For extensive coverage of mobilehome parks, see Chapter 39, *Mobilehome Parks* . That chapter examines the regulatory requirements governing the development and construction of a new park, the overall operating requirements for a park, and mobilehome park tenancies.

FOOTNOTES:
(n105)Footnote *. Ms. Newell is a graduate of Hastings College of the Law, University of California, and is a member of the State Bar of California. The chapter is updated by the Publisher's Editorial Staff.



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18-40 California Legal Forms--Transaction Guide § 40.01

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.01 California Sources

[1] Statutes

Mobilehome Residency Law. *Civ. Code § 798 et seq.*
"Mobilehome" defined. *Civ. Code § 798.3*.
Sale or transfer of mobilehome located in park. *Civ. Code §§ 798.70-798.83* (rental park), 799-799.10 (mobilehome subdivision park).
Mobilehome Park Disclosure Form. *Civ. Code § 798.75.5*.

Transfer Disclosure Statements. *Civ. Code §§ 798.74.4*, *1102(b)*, *1102.6d*.

Former Ordnance Locations Disclosure. *Civ. Code § 1102.15*.

Disclosure Relating to Industrial Use. *Civ. Code § 1102.17*.

Natural Hazards Disclosures. *Civ. Code § 1103 et seq.*

Mobilehome warranties. *Civ. Code §§ 1797-1797.7*.

Prohibition against deficiency judgment following failure to complete conditional sale contract for sale of mobilehome. *Civ. Code § 2983.8*.

Prohibition against civil action to enforce conditional sale contract on mobilehome subject to local property taxation unless contract is recorded or change in ownership statement is filed. *Code Civ. Proc. § 1062.10*.

Use of mobilehome as polling place. *Elec. Code § 1638.7*.

Manufactured Housing Act of 1980. *Health & Safety Code § 18000 et seq.*
Definitions. *Health & Safety Code §§ 18001-18014*.
Standards for construction of mobilehomes. *Health & Safety Code §§ 18025-18032*.
Sale by dealer of used mobilehome to be installed on foundation. Health & Safety Code § 18035.26.
Sales, escrows, and defaults. *Health & Safety Code §§ 18035-18039.5*.
Multiple listings between dealers. *Health & Safety Code §§ 18040, 18040.5*.
Dealer licensing and practices. *Health & Safety Code §§ 18045-18066.5*.
Manufactured Home Recovery Fund. *Health & Safety Code §§ 18070-18070.5*.
Registration and titling. *Health & Safety Code §§ 18075-18124.5*.
Mobilehome Ombudsman. *Health & Safety Code §§ 18150-18153*.

Mobilehome Parks Act. *Health & Safety Code § 18200 et seq.*
"Mobilehome" defined. *Health & Safety Code § 18211*; *see Health & Safety Code § 18008*.
"Mobilehome park" defined. *Health & Safety Code § 18214*.
Notices for violation of Act. *Health & Safety Code §§ 18420-18424* (repealed as of January 1, 2012, unless that date is deleted or extended by statute).
Construction permits and fees. *Health & Safety Code §§ 18500-18518*.
Requirements for installing mobilehome on or removing it from foundation system. *Health & Safety Code § 18551*.
Requirements for mobilehome installation. *Health & Safety Code § 18613*.
Permit requirement for earthquake resistant bracing system. *Health & Safety Code § 18613.7*.

Manufactured Housing Communities Act. *Health & Safety Code § 18210.7 et seq.*

The Manufactured Home Property Tax Law. *Rev. & Tax. Code § 5800 et seq.*

Sales tax. *Rev. & Tax. Code §§ 6012.8, 6012.9, 6379*.

Use tax. *Rev. & Tax. Code § 6201*.

Vehicle license fee in lieu of ad valorem taxes. *Rev. & Tax. Code §§ 10751-10760*.

Permits for movement of mobilehome. *Veh. Code § 35790*.

[2] Regulations

Implementing regulations for Mobilehome Parks Act. *25 Cal. Code Reg. § 1000 et seq.*

Special occupancy parks. *25 Cal. Code Reg. § 2000 et seq.*

Standards for mobilehome construction, health, and safety. *25 Cal. Code Reg. § 4000 et seq.*

Manufactured housing sales, and occupational licensing and education for dealers. *25 Cal. Code Reg. § 5000 et seq.*

Manufactured home, mobilehome, and commercial coach registration and *titling. 25 Cal. Code Reg. § 5510 et seq.*



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.02 Federal Sources

[1] Statutes

Manufactured home loans by federal savings and loan associations. *12 U.S.C. § 1464(c)(1)(J).*

HUD insurance of manufactured home financing. *12 U.S.C. § 1703.*

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

VA mobilehome loan financing for veterans. *38 U.S.C. § 3711.*

National Manufactured Housing Construction and Safety Standards Act of 1974. *42 U.S.C. § 5401 et seq.*

[2] Regulations

Manufactured home exemption under Federal Interstate Land Sales Full Disclosure Act. *24 C.F.R. § 1710.11.*

Manufactured home construction and safety standards. 24 C.F.R. pt. 3280.

Manufactured home procedural and enforcement regulations. 24 C.F.R. pt. 3282.

Manufactured Home Consumer Manual requirements. 24 C.F.R. pt. 3283.



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[Reserved]

§§ 40.03[Reserved]



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18-40 California Legal Forms--Transaction Guide § 40.05

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.05 Law Reviews and Periodicals

Buchanan, *Mobile Home Sales Under the UCC*, 18 UCC L.J. 216 (1986).



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18-40 California Legal Forms--Transaction Guide § 40.06

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.06 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice, Ch. 369, *Mobilehomes and Mobilehome Parks* (Matthew Bender).

California Legal Forms, Ch. 39, *Mobilehome Parks* (Matthew Bender).

California Real Estate Law and Practice (Matthew Bender)
Ch. 77, *Mobilehome Dealer Sales and Security Requirements.*
Ch. 174, *The Mobilehome Residency Law.*
Ch. 472, *Mobilehome Parks.*

Powell on Real Property, Ch. 18B, *Mobile Homes* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Sales* (10th ed. 2005).

Miller & Starr, California Real Estate 3d, Ch. 31, *Mobilehomes*.

[3] Legal Encyclopedias

54 Am. Jur. 2d Mobile Homes, Trailer Parks, and Tourist Camps.

44 Cal. Jur. 3d Mobile Homes.



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A. Overview

18-40 California Legal Forms--Transaction Guide § 40.10

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.10 "Mobilehome" Includes "Manufactured Home"

The terms "mobilehome" and "manufactured home" are separately but similarly defined under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see § 40.11[2]*], the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*; *see § 40.12[1]*], and the Mobilehome Residency Law [*Civ. Code § 798 et seq.*; *see § 40.13*]. In 2007 the Legislature amended the Manufactured Housing Act to clarify the distinctions between mobilehomes and manufactured housing [*see Health & Safety Code § 18000(b)(4)* (changes to Act clarifying meaning of terms "mobilehomes" and "manufactured homes" not intended to effect any substantive change with respect to the treatment of those housing products or to the consumer protections provided for those housing products)]. The Legislature found that confusion exists among consumers, enforcement agencies, lenders, and others in the housing industry regarding the difference between "manufactured housing" and "mobilehomes." It therefore declared that all single-family factory-constructed housing built on or after June 15, 1976, that is in compliance with the standards of the United States Department of Housing and Urban Development promulgated under the Federal National Manufactured Housing Construction and Safety Standards Act of 1974 [*42 U.S.C.§ 5401 et seq.*] is manufactured housing or manufactured homes, not "mobilehomes" and, as such, may be subject to additional benefits [*Health & Safety Code § 18000(b)*]. However, if any codified provision of state law, by its context, requires that the term "mobilehome" applies to mobilehomes or manufactured homes without regard to the date of construction, the codified provision will apply to both mobilehomes, as defined under *Health & Safety Code § 18008(a)*, and manufactured homes, as defined under *Health & Safety Code § 18007* [*Health & Safety Code § 18008(b)*].

Unless otherwise indicated, all statutory and other requirements for a mobilehome discussed in this chapter also apply to a manufactured home. This chapter uses the term "mobilehome" because that is the term commonly used by the industry and the public.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling



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18-40 California Legal Forms--Transaction Guide § 40.11

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.11 Manufactured Housing Act of 1980

[1] Scope of Regulation

The Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] (the "Act") is administered by the Department of Housing and Community Development (HCD) and supersedes conflicting local ordinances [*Health & Safety Code §§ 18015, 18030.5*]. The Act governs the registration and titling of mobilehomes, manufactured homes, commercial coaches, truck campers, and floating homes [*Health & Safety Code § 18075(a)*; *see Health & Safety Code §§ 18075-18124.5*].

The Act also regulates sales, escrows, and multiple listings of mobilehomes and manufactured homes by dealers [*see Health & Safety Code §§ 18035-18040.5*; *see also §§ 40.43, 40.120[1]*]. Licensing requirements and standards of professional conduct for dealers are also set forth in the Act but are not covered in this chapter. For coverage of dealer licensing, see California Real Estate Law and Practice, Ch. 77, *Mobilehome Dealer Sales and Security Requirements* (Matthew Bender).

HCD has adopted regulations that prescribe standards for materials and methods used in manufacturing mobilehomes [*see 25 Cal. Code Reg. § 4000 et seq.*; *see also Health & Safety Code §§ 18025, 18028, 18029.5*]. For the most part, the regulations require compliance with the manufacturing standards contained in the National Manufactured Housing Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*] and the federal Act's implementing regulations [*see Health & Safety Code § 18025.5*; *25 Cal. Code Reg. § 4050*]. Additional coverage of these standards is beyond the scope of this chapter.

[2] Definitions

[a] "Mobilehome"

For purposes of the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*], a "mobilehome" is a

structure that was constructed prior to June 15, 1976, meets the requirements for a "manufactured home," defined in [b], *below* [*Health & Safety Code § 18008*].

The term "mobilehome" does not include a recreational vehicle, a commercial modular, a manufactured home, a multifamily manufactured home, or factory-built housing [*Health & Safety Code § 18008*; *see Health & Safety Code §§ 18007* (manufactured home defined), 18008.7 (multifamily manufactured home defined),18010 (recreational vehicle defined), 18001.8 (commercial modular defined), 19971 (factory-built housing defined)].

[b] "Manufactured Home"

A "manufactured home" is a structure constructed on and after June 15, 1976, transportable in one or more sections, that (1) in the traveling mode is eight body feet or more in width, or 40 body feet or more in length, in the traveling mode, or (2) when erected on site, is 320 or more square feet. Further, it must be built on a permanent chassis and designed to be used as a single-family dwelling with or without a foundation when connected to the required utilities [*Health & Safety Code § 18007*]. "Manufactured home" includes a any structure that meets all the requirements of this definition except the size requirements and with respect to which the manufacturer voluntarily files a certification and complies with the standards established under the National Manufactured Housing Construction and Safety Act of 1974 [*Health & Safety Code § 18007*; *see 42 U.S.C. § 5401* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.12 Mobilehome Parks Act

[1] Scope of Regulation

The Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*] regulates virtually all operational aspects of a mobilehome park, including its development and construction. The primary coverage in this publication of the MPA is set forth in Ch. 39, *Mobilehome Parks* . However, this chapter discusses the provisions of the MPA that govern the use, maintenance, and occupancy of a mobilehome by its individual owner. These consist mainly of health, safety, and construction standards for the mobilehome and mobilehome accessory structures [*see §§ 40.20-40.25*], and requirements for the installation of a mobilehome [*see § 40.31*]. For purposes of the MPA, "mobilehome" and "manufactured home" have the same meaning as under the Manufactured Housing Act of 1980 [*Health & Safety Code §§ 18211, 18210.5*; *see § 40.11[2]*]. For further discussion of the regulatory scope of the Mobilehome Parks Act, see Ch. 39, *Mobilehome Parks* .

[2] Administration and Enforcement

For mobilehomes located in mobilehome parks, the "enforcement agency" for purposes of the MPA and its implementing regulations is the Department ofHousing and Community Development (HCD), or any city, county, or city and county that has properly assumed responsibility for the enforcement of the MPA in the appropriate local jurisdiction [*Health & Safety Code § 18207* ("enforcement agency" defined); *see Health & Safety Code § 18300(b)-(f)* (assumption of responsibility for enforcement)]. For mobilehomes located outside of a mobilehome park, the local government with jurisdiction must enforce the MPA and its regulations [*Health & Safety Code § 18300(f)(2)* (no formal assumption of responsibility required)].

The enforcement agency may issue a notice to correct any violation of the MPA disclosed by the agency's inspection of a mobilehome, the lot on which it is located, or any accessory building or structure. The registered owner of the mobilehome must correct the violation before the deadline specified in the notice [*see Health & Safety Code § 18420(b)* (repealed as of January 1, 2012, unless that date is deleted or extended by statute)]. Uncorrected, willful violations result

in civil and criminal penalties [*see Health & Safety Code § 18700*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsPolice PowerReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
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A. Overview

18-40 California Legal Forms--Transaction Guide § 40.13

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.13 Mobilehome Residency Law

The Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*] governs the overall relationship between management of a mobilehome rental park and the tenants in the park (referred to as "homeowners" under the MRL and in this chapter). It also includes provisions that address the respective rights and duties of park management and a park tenant who desires, during the term of his or her tenancy in the park, to sell his or her mobilehome to a third party [*see Civ. Code §§ 798.70-798.83*]. This chapter covers only those sale-related provisions of the MRL [*see §§ 40.44, 40.120[2]*]. For full coverage of the MRL, see Ch. 39, *Mobilehome Parks* .

For purposes of the MRL, a "mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit pursuant to *Veh. Code § 35790* [*Civ. Code § 798.3(a)*; *see § 40.30* (permit requirements)]. The term includes a "manufactured home" (as defined in the Manufactured Housing Act of 1980) [*see Health & Safety Code § 18007*; *see also § 40.11[2][b]*], but does not include a commercial modular[*see Health & Safety Code § 18001.8* ("commercial modular" defined)] or certain recreational vehicles [*Civ. Code § 798.3(a)*; *see Civ. Code § 799.29*, *Health & Safety Code § 18010* ("recreational vehicle" defined); *but see Civ. Code § 798.3(b)* (term includes recreational vehicles that are used for human habitation and that meet specified occupancy criteria)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.14

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.14 Federal Regulation

Manufacturers of mobilehomes, as defined in the National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*], are governed by the Act and its implementing regulations [*see* 24 C.F.R. pts. 3280, 3282]. California manufacturers of mobilehomes, as defined in the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see Health & Safety Code § 18008*; *see also § 40.11[2][a]*], excluding mobilehomes covered under the federal definition, are governed by the state Act and implementing regulations [*see 25 Cal. Code Reg. §§ 4000-4070*]. However, the effect of this state regulation is minimal since the applicable state regulations provide that federal standards apply [*see 25 Cal. Code Reg. §§ 4050-4070*]. Specific requirements of the federal Act are beyond the scope of this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.15

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.15 Mobilehome Ombudsman

The Mobilehome Ombudsman assists the public in resolving problems and complaints relating to mobilehomes [*see Health & Safety Code § 18150*; *see also Health & Safety Code §§ 18151-18153*]. The Ombudsman is appointed by the governor, and the position exists within the Department of Housing and Community Development (HCD) [*see Health & Safety Code § 18150*]. Among other things, the Ombudsman helps with problems concerning titling, registration, installation, warranties, certain financing, sales, inspection of homes and parks, mobilehome accessories and improvements, and the Mobilehome Residency Law (MRL) [*Health & Safety Code § 18151(b)*; *see Civ. Code § 798 et seq.* (MRL)]. Further, the Ombudsman must establish procedures to deal with complaints and publish complaint forms and materials that inform the public of his or her functions [*Health & Safety Code § 18153*]. The Ombudsman is not authorized to arbitrate, mediate, negotiate, or provide legal advice on mobilehome park rent disputes, lease or rental agreements, or disputes arising from lease or rental agreements. However, he or she may provide information on these issues [*Health & Safety Code § 18151(c)*]. Finally, the Ombudsman must refer any alleged violations of law or regulations within the jurisdiction of HCD to the Division of Codes and Standards [*Health & Safety Code § 18151(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide §§ 40.16-40.19

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.16[Reserved]



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18-40 California Legal Forms--Transaction Guide § 40.20

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.20 Unlawful Occupancy Uses

It is unlawful for any person to occupy or to cause or permit to be used for occupancy, the following [*Health & Safety Code § 18550*]:

- Any mobilehome supplied with fuel, gas, water, electricity, or sewage connections, unless the connections and installations conform to regulations enacted under the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] by the Department of Housing and Community Development (HCD).

- Any mobilehome that is permanently attached with underpinning or foundation to the ground, except for mobilehomes that bear an HCD insignia or federal label [*see § 40.40*], and that are installed in accordance with statutory requirements [*see Health & Safety Code § 18551*; *§ 40.31[2]*].

- Any mobilehome that does not conform to HCD registration requirements [*see § 40.50*].

- Any mobilehome in an unsafe or unsanitary condition.

- Any mobilehome that is structurally unsound and does not protect its occupants against the elements.

These provisions apply to any mobilehome, whether or not it is located in a mobilehome park [*Health & Safety Code § 18550*; *see 25 Cal. Code Reg. § 1600*].

In a mobilehome park, each lot may accommodate only one mobilehome, recreational vehicle, or commercial coach. A self-propelled recreational vehicle or truck mounted camper may be parked beside an occupied mobilehome or recreational vehicle when used as a means of transportation. However, either of these types of transportation vehicles may not be occupied or connected to the lot utility facilities or interconnected with the occupied mobilehome or recreational vehicle [*25 Cal. Code Reg. § 1118*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-40 California Legal Forms--Transaction Guide § 40.21

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.21 Prohibition Against Waste Discharge

It is unlawful to permit wastewater, sewage, or waste material from any plumbing fixtures in the park, from the park sewage or waste disposal system, or from any plumbing fixtures in a manufactured home, mobilehome, recreational vehicle, accessory structure or permanent building in the park, from being discharged onto or deposited on the surface of the ground [*Health & Safety Code § 18554(a)*]. The enforcement agency may order the removal, sanitation, or both, of any wastewater, sewage, or waste material discharged onto or deposited on the surface of the ground, or may require the removal, sanitation, or both, of the wastewater, sewage, or waste material, in a manner consistent with the requirements of, and in consultation with, the local health department or agency [*Health & Safety Code § 18554(b)*]. However, the registered owner of a mobilehome, manufactured home, or recreational vehicle is be responsible for complying with an order, or the correction of a citation, issued by the enforcement agency. The registered owner must also pay the costs of that order whenever wastewater, sewage, or waste material is discharged onto or deposited upon the surface of the ground as a result of leaks from plumbing fixtures in a manufactured home, mobilehome, or recreational vehicle, or accessory structure, or whenever those leaks come from plumbing on the space or lot that connects the home or recreational vehicle or accessory structure to the park's sewer, septic, or drain system on the home or vehicle of the registered owner's side of the connection, if the discharge or deposit is determined by the enforcement agency to be the fault of the registered owner of the home or recreational vehicle [*Health & Safety Code § 18554(c)*]. The implementing regulations of the Mobilehome Parks Act [*25 Cal. Code Reg. § 1000 et seq.*] contain specific plumbing requirements [*see 25 Cal. Code Reg. §§ 1240-1284*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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18-40 California Legal Forms--Transaction Guide § 40.22

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.22 Abatement of "Substandard" Mobilehomes

A "substandard" mobilehome may, after notice and hearing, be abated as a nuisance and ordered removed from its location [*see 25 Cal. Code Reg. §§ 1606-1618*; *Health & Safety Code § 18605*]. A mobilehome that has been ordered to be abated as a nuisance must be removed in a manner consistent with law [*25 Cal. Code Reg. § 1619(a)*]. The implementing regulations of the Mobilehome Parks Act [*25 Cal. Code Reg. § 1000 et seq.*] outline numerous conditions that, to the extent they endanger life, limb, health, property, safety, or welfare of the public or the mobilehome occupants, will result in the mobilehome being considered "substandard" [*see 25 Cal. Code Reg. § 1606*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawTortsNuisanceTypesPublic Nuisance



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18-40 California Legal Forms--Transaction Guide § 40.23

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.23 Accessory Buildings and Structures

Mobilehome accessory buildings and structures are subject to building standards adopted by the Department of Housing and Community Development (HCD) [*see 25 Cal. Code Reg. §§ 1420-1520*]. These standards regulate the construction, location, and use of buildings and structures in order to protect the health and safety of the occupants and the public. The appropriate enforcement agency must enforce the standards [*Health & Safety Code § 18552*; *25 Cal. Code Reg. § 1004*].

Mobilehome accessory buildings and structures include items often affixed to or located near a mobilehome, such as skirting, awnings, carports, and cabanas [*see Health & Safety Code § 18008.5* ("manufactured home or mobilehome accessory building or structure" defined)]. Subject to limited exceptions for minor construction [*see 25 Cal. Code Reg. § 1018(d)*], a permit must be obtained from the enforcement agency before erecting, constructing, reconstructing, installing, replacing, relocating, or altering a mobilehome accessory building or structure [*25 Cal. Code Reg. § 1018(a)*]. Standard plan approval is available from HCD for many types of buildings and structures [*see 25 Cal. Code Reg. § 1518*; *see also* Ch. 39, *Mobilehome Parks* (coverage of standard plan approvals)]. If the mobilehome is located in a mobilehome park, an application for a permit will not be granted unless the application contains the approval of the park owner or management [*25 Cal. Code Reg. § 1032(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseBuilding & Housing Codes



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18-40 California Legal Forms--Transaction Guide § 40.24

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.24 Satisfaction of Compliance Requirements Prior to Sale or Lease of Mobilehome

If a mobilehome was manufactured after September 1, 1958, and contains structural, fire safety, plumbing, heat-producing, or electrical systems and equipment, it is unlawful for any person to sell, offer for sale, or lease the mobilehome unless the systems and equipment meet HCD requirements for those systems and equipment and for their installation [*Health & Safety Code § 18025(a)*]. An exception to this rule exists for mobilehomes manufactured on or after June 15, 1976. Those mobilehomes must comply with the requirements of the National Manufactured Housing Construction and Safety Standards Act of 1974 [*Health & Safety Code § 18025(b)*; *see 42 U.S.C. § 5401 et seq.* (federal Act)]. Also, the sale of a used mobilehome by an agent (licensed dealer or salesperson, or a real estate licensee) is subject to separate statutory requirements [*Health & Safety Code § 18025(c)*; *see Health & Safety Code § 18046(d)* (dealers and salespersons); *§ 40.41[7]*; *see also Civ. Code § 2079* (real estate licensees); *§ 40.45[1]*].

A mobilehome manufactured on or after September 1, 1958, that is sold, offered for sale, or leased must bear a federal label or state insignia to signify compliance with applicable manufacturing standards in effect as of the date the mobilehome was manufactured [*Health & Safety Code § 18026(a)*; *see Health & Safety Code § 18604* (same requirement applies under Mobilehome Parks Act to rental of mobilehome located in mobilehome park); *see § 40.40*]. For further discussion of this requirement, see *§ 40.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.25

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.25 Alterations or Conversions

It is unlawful for any person to alter or convert, or to cause to be altered or converted, the structural, fire safety, plumbing, heat-producing, or electrical systems and installations or equipment of a mobilehome that bears an HCD insignia of approval or federal label [*see § 40.40*] when the mobilehome is used, occupied, sold, or offered for sale in California, unless the alteration or conversion complies with applicable HCD regulations [*Health & Safety Code § 18029*]. A permit authorizing any alteration or conversion must be obtained from HCD prior to commencing the work [*25 Cal. Code Reg. § 4040*]. Further, HCD must perform an inspection of the mobilehome to determine whether or not the relevant regulatory requirements have been satisfied [*see 25 Cal. Code Reg. §§ 4010, 4011*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.26

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.26 Accommodation of the Disabled

Management may not prohibit a homeowner or resident from installing accommodations for the disabled on the home or the site, lot, or space on which the mobilehome is located, including ramps or handrails on the outside of the home, as long as the installation of those facilities complies with code and any applicable permits have been obtained. However, management may require that such accommodations be removed by the current homeowner at the time the mobilehome is removed from the park or pursuant to a written agreement between the current homeowner and management prior to the completion of the resale of the mobilehome in place in the park. These provisions are not exclusive and may not be construed to condition, affect, or supersede any other provision of law or regulation relating to accessibility or accommodation for the disabled [*Civ. Code § 798.29*.6; *see also Civ. Code § 799.11* (same requirements applicable to subdivision, cooperative, or condominium for mobilehomes and to resident-owned mobilehome park)].



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18-40 California Legal Forms--Transaction Guide §§ 40.27-40.29

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.27[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide § 40.30

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.30 Permit to Move or Transport Mobilehome

A mobilehome that exceeds a prescribed size or weight may not be moved on any street or highway without a permit from the Department of Transportation or the city or county having jurisdiction over the street or highway [*see Veh. Code § 35780*]. Specifically, a permit is required for moving a mobilehome wider than eight feet, longer than 40 feet, taller than 14 feet [*see Veh. Code §§ 35100, 35250, 35400*], or heavier than the maximum allowable weight [*see Veh. Code § 35550*]. Under certain circumstances, overwidth mobilehomes may be moved under permit by licensed manufacturers, dealers, and transporters [*Veh. Code § 35790*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling



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18-40 California Legal Forms--Transaction Guide § 40.31

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.31 Installation of Mobilehomes

[1] Installation on Foundation Systems Generally

Under the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*], foundation systems for mobilehomes are subject to regulations established by the Department of Housing and Community Development (HCD). These regulations apply throughout the state and supersede any ordinance enacted by any local government [*Health & Safety Code § 18551*; *see 25 Cal. Code Reg. § 1333*]. HCD may approve alternate foundation systems to those provided by regulation when it is satisfied of equivalent performance [*Health & Safety Code § 18551*].

A mobilehome may be installed on a foundation system as either a fixture or improvement to real property [*see* [3], *below*] or as a chattel (personal property) [*Health & Safety Code § 18551*; *see* [2], *below*]. Installation by either method must comply with statutory requirements [*see Health & Safety Code §§ 18551(a)* (real property), *18551(b), 18613* (personal property)]. The registered owner of a mobilehome in a mobilehome park converted or proposed to be converted to a resident-owned subdivision, cooperative, condominium, or nonprofit corporation [*see Bus. & Prof. Code § 11010.8*] may, if he or she is also a participant in the resident ownership, apply for voluntary conversion of the mobilehome to a fixture and improvement to the underlying real property without complying with the statutory requirements otherwise applicable to installation on a foundation system [*see Health & Safety Code § 18555(a)*]. To be considered a fixture or improvement to real property, a mobilehome must either be installed as such in accordance with statutory requirements [*see Health & Safety Code § 18551(a)*] or be legally converted to that status by compliance with the statutory conversion requirements outlined in *Health & Safety Code § 18555* [*Health & Safety Code § 18555(i)*].

[2] Installation on Foundation System as Personal Property

The installation of a mobilehome on a foundation system as personal property (a chattel) must be in accordance with *Health & Safety Code § 18613* and is deemed to meet or exceed the requirements of *Health & Safety Code § 18613.4* [*Health & Safety Code § 18551(b)*]. A permit must be obtained from the enforcement agency [*see § 40.12[2]*] each time a mobilehome subject to the MPA is to be located, installed, or reinstalled on any site for human habitation or

occupancy as a dwelling [*Health & Safety Code § 18613(a)*; *25 Cal. Code Reg. § 1324(a)*; *see Health & Safety Code § 18613(a)(2)*; *see also 25 Cal. Code Reg. § 1010*].

The licensed contractor [*see* [5], *below*] engaged to install the mobilehome must obtain a permit, except when the owner of the mobilehome proposes to perform the installation [*Health & Safety Code § 18613(b)*; *see Ch. 39, Mobilehome Parks, § 39.201* (HCD form of application for permit)]. Installation must be completed in accordance with applicable regulations [*see 25 Cal. Code Reg. §§ 1320-1368*]. The enforcement agency will issue a statement of installation acceptance once the installation has been approved [*Health & Safety Code § 18613(e)*; *25 Cal. Code Reg. § 1366*].

When a foundation is required to be installed for a mobilehome, a separate permit to construct the foundation system must be obtained from the enforcement agency. Plans and specifications, required fees, and other supporting documentation must be submitted with the application for the construction permit [*25 Cal. Code Reg. § 1020(b)*; *see 25 Cal. Code Reg. §§ 1320-1368* (requirements for installation and facilities)]. For the HCD application that must be used to obtain a construction permit, see *Ch. 39, Mobilehome Parks, § 39.200*.

For further discussion of the required procedure for installing a mobilehome, see *§ 40.122*.

[3] Installation on Foundation System as Fixture or Improvement to Real Property

[a] Applicable Law

To be considered a fixture or improvement to real property, a mobilehome must either be installed in accordance with the statutory requirements outlined in *Health & Safety Code § 18551(a)* or be legally converted to that status by compliance with the statutory conversion requirements outlined in *Health & Safety Code § 18555* [*Health & Safety Code § 18555(i)*]. For a discussion of the requirements for conversion of rental parks to resident-owned parks, see Ch. 39, *Mobilehome Parks* .

[b] Basic Requirements

A mobilehome may not be installed on a foundation system until its owner or a licensed contractor has obtained a building permit from the appropriate enforcement agency [*Health & Safety Code § 18551(a)(1)*]. The permit will not be granted unless the owner of the mobilehome presents evidence that he or she either owns the real property on which the mobilehome is to be installed or is a lessee under a qualified lease [*see Health & Safety Code § 18551(a)(1)(A)*]. Additionally, the permit will not be granted unless the owner of the mobilehome presents satisfactory evidence that the mobilehome is or will be owned free and clear of liens or any encumbrances [*see Health & Safety Code § 18551(b)(2)(B)*]. These and other requirements for installation on a foundation system as a fixture or improvement to real property are outlined in *§ 40.122[2]*.

[c] Effect of Installation

Once the mobilehome is installed on a foundation system in compliance with applicable regulations and the enforcement agency issues a certificate of occupancy, the enforcement agency must then record a document stating that the mobilehome has been affixed to real property [*see Health & Safety Code § 18551(a)(2)(A)*]. As of that date, registration of the mobilehome is cancelled, subject to HCD's receipt of a copy of the certificate of occupancy and the return of the certificate of title and other indicia of registration for the mobilehome [*Health & Safety Code § 18551(a)(3)*]. A mobilehome properly installed on a foundation system then is deemed a fixture and a real property improvement to the real property to which it is affixed [*Health & Safety Code § 18551(a)(4)*; *but see Health & Safety Code § 18555(i)* (installation not in compliance with regulations is not deemed fixture or improvement to real property)]. Thereafter, its physical removal from the foundation system, except temporarily for repairs or improvements, is prohibited without the consent of all persons or entities who, at the time of removal, have title to any estate or interest in the real property to which the mobilehome is affixed [*Health & Safety Code § 18551(a)(4), (5)*]. For

the procedure for removing a mobilehome from its foundation system and the real property on which it is located, see *§ 40.122[2]*, P 8.

Once a mobilehome has become a fixture or improvement to real property by being installed in accordance with statutory requirements [*see Health & Safety Code § 18551(a)*] or by being converted to that status [*see Health & Safety Code § 18555*], it is taxed as all other real property is taxed [*Rev. & Tax. Code § 5801(b)*; *see § 40.70*]. Also, once installed as or converted to a fixture or improvement to real property, a mobilehome is subject to applicable state-enforced health and safety standards enforced under *Health & Safety Code § 18020* [*Health & Safety Code §§ 18551(c), 18555(j)*; *see Health & Safety Code § 18025* (standards)].

[4] Restrictions on Local Government's Right to Require Installation on Foundations

A local government cannot require that any mobilehome located either on private property or in a mobilehome park be placed on a foundation system so as to be permanently affixed to real property [*Health & Safety Code § 18551(d), (e)*; *see § 40.122[2]* (requirements for installation on foundation system)]. Also, a local government may not require, as a condition for the approval of the conversion of a rental park to a resident-owned park, that mobilehomes located there be placed on foundation systems. This limitation does not apply if the rental park to be converted has been operating as a rental park for a period of less than five years [*Health & Safety Code § 18551(f)*].

[5] "Contractor" Defined

California law imposes licensing requirements on contractors who engage in construction work for $500 or more in compensation [*see Bus. & Prof. Code § 7048*; *see also Bus. & Prof. Code § 7000 et seq.*; Ch. 88, *Licensing of Contractors*].

For these purposes, "contractor" includes any person engaged in the business of the construction, installation, alteration, repair, or preparation for moving of mobilehomes or mobilehome accessory buildings and structures on a site for the purpose of occupancy as a dwelling [*Bus. & Prof. Code § 7026.2(a)*]. However, "contractor" does not include a seller of a mobilehome who holds a retail mobilehome dealer's license [*see Health & Safety Code §§ 18045-18055*; *see also § 40.41*] if the installation of the mobilehome will be performed by a licensed contractor and the seller certifies that fact in writing to the buyer prior to the performance of the installation. The certification must include the name, business address, and contractor's license number of the licensed contractor by whom the installation will be performed [*Bus. & Prof. Code § 7026.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART II. LEGAL BACKGROUND
C. Transportation and Installation

18-40 California Legal Forms--Transaction Guide §§ 40.32-40.39

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.32[Reserved]



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18-40 California Legal Forms--Transaction Guide § 40.40

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.40 Federal Label or HCD Insignia of Approval

It is unlawful for any person to sell, offer for sale, or lease in California any mobilehome manufactured after September 1, 1958, unless its plumbing, heating, and electrical equipment and installations comply with certain standards. In the case of a mobilehome manufactured on or after June 15, 1976, the relevant standards are those contained in the National Manufactured Housing Construction and Safety Standards Act of 1974 [*Health & Safety Code § 18025*; *see 42 U.S.C. § 5401 et seq.* (federal Act)]. For other mobilehomes, the applicable standards are contained in Department of Housing and Community Development (HCD) regulations [*Health & Safety Code § 18025*].

No mobilehome manufactured on or after September 1, 1958, may be sold, offered for sale, or leased unless it bears either a federal label or HCD insignia of approval, whichever is appropriate [*see § 40.110*, P 1], to indicate compliance with applicable standards [*Health & Safety Code § 18026*; *see Health & Safety Code § 18604* (same requirement imposed by Mobilehome Parks Act for rental or lease of mobilehome located in park)]. A person who violates this requirement is subject to civil and criminal penalties [*Health & Safety Code §§ 18020.5*, *18700*]. It is also unlawful to remove or to cause the removal of an insignia of approval without prior HCD authorization [*Health & Safety Code § 18026*].

If a mobilehome does not have the required federal label or state insignia of approval, its owner must apply for one from HCD. HCD will then inspect the mobilehome and notify its owner of any violations. HCD may also post a Prohibited Sales Notice on the mobilehome. Violations must generally be corrected within 20 days. Until all noted violations are corrected, the mobilehome cannot be removed from the location where it was inspected unless HCD is first notified of its intended destination. If HCD has posted a Prohibited Sales Notice on the mobilehome, the notice may not be removed until removal is authorized by HCD [*25 Cal. Code Reg. § 4013*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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D. Purchase and Sale of Mobilehomes

18-40 California Legal Forms--Transaction Guide § 40.41

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.41 Sales of Mobilehomes by Dealers

[1] Governing Law

The sale of new and used mobilehomes by dealers is governed by the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see § 40.11* (summary of Act)]. In general terms, a "mobilehome dealer" is a person who is engaged in the business of buying and selling mobilehomes for a commission [*see Health & Safety Code § 18002.6(a)*]. Dealers must be licensed by the Department of Housing and Community Development (HCD) [*Health & Safety Code § 18045*; *see Health & Safety Code §§ 18045-18066.5* (licensing requirements)]. These licensing requirements are not discussed in this chapter but are covered in California Real Estate Law and Practice, Ch. 77, *Mobilehome Dealer Sales and Security Requirements* (Matthew Bender).

[2] Required Documents and Escrow for Purchase and Sale

In every transaction by or through a dealer to sell (or lease with the option to buy) a new or used mobilehome, the dealer and purchaser must sign a receipt for deposit. The deposit receipt must contain specific information required by statute [*see § 40.131*]. The dealer must give the purchaser a copy of the deposit receipt, and must retain a copy for at least three years [*Health & Safety Code § 18035.1*].

Every purchase order, conditional sale contract, or other document evidencing the sale by a dealer of a new or used mobilehome must contain information and notices required by statute [*see Health & Safety Code § 18035.3*; *see also § 40.130*]. Further, the dealer must establish an escrow account with an escrow agent [*see Health & Safety Code §§ 18035*, *18035.2*]. The specific requirements governing the escrow and the escrow instructions vary depending on whether the sale involves a mobilehome that is subject to registration or one that is exempt from registration because it will be installed on a foundation system [*see Health & Safety Code §§ 18035* (escrow requirements for mobilehome subject to registration), *18035.2* (escrow requirements for mobilehome installed on foundation system); *see also § 40.50* (registration requirements and exemption for mobilehome installed on foundation)]. For additional coverage of the above requirements, see *§§ 40.120[1]* and *40.130*.

The sale by a dealer of a used mobilehome to be installed by the buyer on a foundation system is deemed complete at the close of escrow [Health & Safety Code § 18035.26(a), (b)]. Escrow will be deemed closed when [Health & Safety Code § 18035.26(b)]:

- A declaration of delivery sale form is executed [Health & Safety Code § 18035.26(b)(1); *see § 40.207* (form of declaration)];

- All funds in the escrow account, other than escrow fees, amounts for accessories not yet delivered, and any other amounts mutually agreed to by the dealer and buyer, are disbursed; and

- The buyer takes delivery of the mobilehome.

All sales subject to these requirements must meet (1) the escrow requirements in Health & Safety Code § 18035.2, and (2) the reporting requirements set forth in Health & Safety Code § 18080.5 [Health & Safety Code § 18035.26(d)]. An escrow agent may not create an escrow instruction in which a purchaser accepts responsibility for the installation of a manufactured home unless and until the escrow agent receives the declaration of delivery form executed by the purchaser. An escrow instruction created before the declaration is received is null and void and unenforceable [Health & Safety Code § 18035.26(d)].

[3] Rescission for Inability to Obtain Financing

If a buyer obligates himself or herself to purchase a mobilehome, the seller knows that the buyer intends to obtain financing from a third party without the assistance of the seller, and the buyer is unable to obtain financing within 30 days of the date the contract is executed, the contract is deemed rescinded. All consideration, other than escrow fees, must be returned by the respective parties without demand [*Health & Safety Code § 18036*].

[4] Truth in Lending Disclosures

A conditional sale contract relating to a new or used mobilehome subject to registration [*see § 40.50*] must contain all disclosures required by Regulation Z of the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] if Regulation Z [12 C.F.R. pt. 226] otherwise applies to the transaction [*Health & Safety Code § 18036.5*]. For a discussion of required truth in lending disclosures, see Ch. 45, *Consumer Installment Loans and Credit Sales* , and California Real Estate Law and Practice, Ch. 105, *Truth In Lending* (Matthew Bender).

[5] Manufactured Home Recovery Fund

[a] Reimbursement for Losses

The Manufactured Home Recovery Fund [*see Health & Safety Code §§ 18070-18070.7*] exists to reimburse a person for certain losses resulting from his or her purchase or sale of a manufactured home (or mobilehome) [*see § 40.11[2][a]*] for a personal or family residential or investment purpose. Specifically, the Fund will reimburse such a person if he or she obtains a final judgment against a licensed dealer (or against a manufacturer, salesperson, or other seller or purchaser), and the judgment is based on the grounds of failure to honor warranties or guarantees, fraud, willful misrepresentation, willful violation of any provision of the Manufactured Housing Act [*Health & Safety Code § 18000 et seq.*] or regulations adopted pursuant to the Act, willful violation of the provisions governing mobilehome warranties set forth in *Civ. Code § 1797 et seq.*, or conversion [*Health & Safety Code § 18070.3(a)*]. Reimbursement is also possible when a person purchases a manufactured home from or sells it to a person or entity who is or has been the subject of a bankruptcy proceeding, and the person incurs actual and direct losses as a result of thedealer's fraud, willful misrepresentation, conversion, failure to honor warranties or guarantees, willful violation of any provision of the Manufactured Housing Act [*Health & Safety Code § 18000 et seq.*] or regulations adopted pursuant to the Act, or

violation of the provisions governing mobilehome warranties set forth in *Civ. Code § 1797 et seq.* [*Health & Safety Code § 18070.3(b)*].

Amendments to *Health & Safety Code § 18070.3* enacted in 2004 added additional grounds (fraud or misrepresentation related to financial provisions; willful violation of any provision of the Manufactured Housing Act or regulations adopted pursuant to the Act; and willful violation of the provisions governing mobilehome warranties set forth in *Civ. Code § 1797 et seq.*) and procedures for recovery from the Fund. Those amendments apply to any transaction for which the statute of limitation established by *Health & Safety Code § 18070.3(e)* had not expired on January 1, 2004 [*Health & Safety Code § 18070.7*; *see* [c], *below*].

[b] Amount of Claim

The total amount of a claim against the Fund may not exceed the amount of actual and direct loss that remains unreimbursed from any source, and the maximum amount that may be recovered under the Fund for any one transaction is $75,000 [*see Health & Safety Code § 18070.3(c)*; *see also Health & Safety Code § 18070(b)(1)* ("actual and direct loss" defined)]. If the manufactured home was purchased or sold for an investment purpose, the person may receive payment from the Fund for that purpose only once [*see Health & Safety Code § 18070.3(c)(3)*].

[c] Payment From Fund and Filing of Claim

To make a claim against the Fund, the claimant must have (1) diligently pursued collection efforts against all assets of the judgment debtor, (2) established that he or she is judgment proof, or (3) provided evidence that the costs of collection are likely to be in excess of the amounts that could be collected. This evidence may include (1) a description of the searches and inquiries conducted by or on behalf of the claimant with regard to the judgment debtor's assets liable to be sold or applied to the judgment's satisfaction, (2) an itemized valuation of the assets discovered, and (3) the results of actions by the claimant to have assets applied to satisfy the judgment [*Health & Safety Code § 18070.3(d)(1)*]. If the claim is not based on a final judgment, the claimant must present evidence that either [*Health & Safety Code § 18070.3(d)(2)*]:

- The person or entity is or has been the subject of bankruptcy proceedings and has assigned to the Department of Housing and Community Development any interest in the actual and direct loss in the amount that the claimant recovers from the fund; or

- The claimant's claim is consistent with the Act, and the claimant had presented evidence that the debtor was judgment proof or that the costs of collection were likely to be in excess of the amounts that could be collected.

If the claim is based on a violation of a provision within a warranty [*see Civ. Code § 1797 et seq.*], the claimant must have provided evidence that he or she has been denied full compensation or correction under the warranty [*Health & Safety Code § 18070.3(d)(3)*].

A claim based on a final judgment must be filed with the Department of Housing and Community Development within two years of the date of the judgment [*Health & Safety Code § 18070.3(e)(1)*]. If the claim is not based on a final judgment, the claim must be filed within two years from the termination of bankruptcy proceedings or two years from the date of sale [*see Health & Safety Code § 18070.2(a)* (determining sale date)] or within two years of discovery of the violations causing actual and direct losses pursuant to the Act, but no longer than five years after the date of sale, whichever event occurs later [*Health & Safety Code § 18070.3(e)(2)*].

In dispersing moneys from the Fund, the Department may give priority to claimants who have attempted to purchase or sell a manufactured home for a personal or family residential purpose [*Health & Safety Code § 18070.3(h)*; *see Health*

& Safety Code § 18070(a)(2)].

[6] Removal of Towbar, Wheels, or Axles

A mobilehome dealer may not remove the towbar, wheels, wheel hubs, or axles from a mobilehome unless the purchase document provides for the removal and states whether the purchase price includes or excludes these items [*Health & Safety Code §§ 18550.5(b), 18035.3(a)(1)*]. If they are not included in the purchase price, the price of each of these items must be listed in the purchase document [*Health & Safety Code § 18035.3(a)(1)*]. A manufacturer may deliver a mobilehome to a dealer without these items or may remove or cause those items to be removed only under certain circumstances [*Health & Safety Code § 18550.5(c)*; *see Health & Safety Code § 18032*].

[7] Inspection and Disclosure Requirements for Resales

If a dealer or salesperson has a written contract with the seller to find or obtain a buyer, or is a dealer or salesperson who acts in cooperation with others to find and obtain a buyer, the dealer or salesperson has a duty to a prospective buyer of a used mobilehome to conduct a reasonably competent and diligent visual inspection of the home offered for sale and to disclose to that prospective buyer all facts materially affecting the value or desirability of the home that an investigation would reveal [*Health & Safety Code § 18046(d)*]. When a transfer disclosure statement is required under *Civ. Code § 1102(b)*, a dealer or salesperson must discharge this duty by completing the agent's portion of the transfer disclosure statement that a seller prepares and delivers to a buyer for residential property under *Civ. Code § 1102* [*Health & Safety Code § 18046(d)*; *see Civ. Code § 1102(b)* (resale on or after January 1, 2000, of mobilehomes classified as personal property intended for use as a residence, subject to all transfer disclosure statements and related requirements applicable to residential real property); *see also Health & Safety Code § 18160*].

If no transfer disclosure statement is required, but the transaction is not exempt under *Civ. Code § 1102.2* (relating to nonapplication of disclosure requirements), a dealer or salesperson must discharge his or her duty by completing and delivering to the prospective buyer an exact reproduction of Sections III, IV, and V of the transfer disclosure statement required under *Civ. Code § 1102(b)* [*Health & Safety Code § 18046(d)*]. The standard of care owed by a dealer to a buyer is the degree of care that a reasonably prudent dealer would exercise and is measured by the degree of knowledge through education, experience, and examination required to obtain a license under the dealer licensing statutes [*Health & Safety Code § 18046.1*].

For further coverage of applicable disclosure requirements, see *§ 40.45*. The statutory disclosure statement is set forth in *§ 40.205*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.41A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.41A Sale of Mobilehomes by Contractors

The Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] authorizes licensed general building contractors to buy manufactured homes from the manufacturer for purposes of resale [*see Health & Safety Code § 18062.9*; *see also Bus. & Prof. Code § 7057* ("general building contractor" defined); *Health & Safety Code § 18007* ("manufactured home" defined)]. This is an exception to the rule that manufactures are prohibited from selling mobilehomes for resale to unlicensed persons since general building contractors are not licensed under the Mobilehomes-Manufactured Housing Act of 1980 for resale [*see Health & Safety Code § 18062.8(p)*]. However, a manufactured home manufacturer may sell a mobilehome directly to a licensed California general building contractor only if (1) the sale is for five or more mobilehomes in a calendar year; (2) the mobilehomes are delivered directly to a building site and installed on a foundation system in accordance with *Health & Safety Code § 18551(a)* [*see § 40.31*]; and (3) the mobilehomes are installed within a single subdivision, as defined in *Gov. Code § 66424*, consisting of five or more parcels, and therefore require a tentative and final map in accordance with *Gov. Code § 66426* [*Health & Safety Code § 18062.9*].

Building contractors who resell mobilehomes are subject to the same warranty provisions as manufacturers and dealers who sell directly to buyers [*see Civ. Code §§ 1797-1797.7*; *see also § 40.42[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.42

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.42 Consumer Protection

[1] Statutory Mobilehome Warranty

When a new mobilehome is sold to a buyer, the manufacturer of the mobilehome and the dealer [*see Civ. Code § 1797.1(b)*; *Health & Safety Code § 18002.6* ("dealer" defined)] or contractor [*see Civ. Code § 1797.1(a)*; *Bus. & Prof. Code § 7057* ("contractor" defined)] who sells it warrant the electrical, plumbing, heating, cooling, fire safety, and structural systems, and all appliances of the mobilehome as installed or manufactured by the contractor, dealer, or manufacturer [*Civ. Code §§ 1797, 1797.2(a)*]. Further, at the time the sales agreement is signed, the contractor or dealer must deliver to the buyer a separate written warranty document that sets forth the warranty and reprints the provisions of the statutory mobilehome warranty [*Civ. Code § 1797.3*; *see Civ. Code §§ 1797-1797.7* (warranty provisions)]. The warranty document must also contain specific terms required by statute [*see Civ. Code § 1797.3*]. Among other things, those terms require the buyer or his or her transferee to give the contractor, manufacturer, or dealer written notice of any substantial defects in materials or workmanship that become evident within one year and 10 days from the date of delivery of the mobilehome to the buyer [*Civ. Code § 1797.3(b)*].

Every contractor or dealer must post a copy of the statutory mobilehome warranty provisions in each area where purchase orders and conditional sales contracts are written [*Civ. Code § 1797.5*]. Manufacturers, contractors, and dealers must keep records of all actions taken pursuant to the statutory warranty requirements, including all correspondence to or from the buyer, for a period of three years from the date of delivery [*Civ. Code § 1797.6*].

The contractor, dealer, or manufacturer must complete warranty service to correct all substantial defects within 90 days of receiving the buyer's written notice of the defects (*see above*), unless there are circumstances that are beyond the control of the contractor, dealer, or manufacturer [*Civ. Code § 1797.7*].

The statutory mobilehome warranty is in addition to all other rights and privileges that a buyer of a mobilehome has under any other law or instrument [*see, e.g.*, [2], *below*]. A contractor, manufacturer, or dealer must not require a buyer

to waive his or her rights under the mobilehome warranty statutes. Any waiver of this type is deemed contrary to public policy and is unenforceable and void [*Civ. Code § 1797.4*].

[2] Other Warranties

Under the Song-Beverly Consumer Warranty Act [*see Civ. Code § 1790 et seq.*], retail sales of consumer goods are, under specified circumstances, accompanied by the following: (1) the manufacturer's and the seller's implied warranty that the goods are merchantable [*see Civ. Code § 1792*]; (2) the manufacturer's implied warranty of fitness [*see Civ. Code § 1792.1*]; and (3) the retailer's (or distributor's) implied warranty of fitness [*see Civ. Code § 1792.2*]. For these purposes, "consumer goods" means any new product or part of a new product that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables [*Civ. Code § 1791(a)*]. Consequently, retail sales of mobilehomes by dealers are subject to the Act. For further discussion of this Act and the warranties under it, see Ch. 92, *Service Contracts* , and California Forms of Pleading and Practice, Ch. 369, *Mobilehomes and Mobilehome Parks* (Matthew Bender).

Alternative implied warranties of merchantability [*see Com. Code § 2314(1), (2)*] and fitness for purpose [*see Com. Code § 2315*] apply when the mobilehome sales transaction is not a retail sale handled by a licensed dealer. For discussion of those warranties, see California Forms of Pleading and Practice, Ch. 369, *Mobilehomes and Mobilehome Parks* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsWarrantiesExpress WarrantiesContracts LawSales of GoodsWarrantiesMerchantabilityReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.43

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.43 Sales of Mobilehomes by Real Estate Brokers

A person licensed as a real estate broker may sell or offer to sell, buy or offer to buy, solicit prospective purchasers of, solicit or obtain listings of, or negotiate the purchase, sale, or exchange of, any mobilehome only if the following apply [*Bus. & Prof. Code §§ 10131.6(a), 10131.7(a)*]: (1) the mobilehome has been registered under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see § 40.50* (general registration requirements)], or has become a fixture of real property by being permanently installed on a foundation system in accordance with applicable statutory requirements [*see Health & Safety Code § 18551*; *§ 40.122* (requirements for installation on foundation system)]; and (2) the mobilehome is either located in an established mobilehome park [*see Health & Safety Code § 18214* ("mobilehome park" defined)] or in another location permitted by local zoning ordinance or permit, provided its presence there has been authorized or its continued presence and that use would be authorized for a total and uninterrupted period of at least one year. For these purposes, a "mobilehome" is a structure transportable in one or more sections, designed and equipped to contain not more than two dwelling units to be used with or without a foundation system [*Bus. & Prof. Code § 10131.6(c)*]. This definition includes a manufactured home [*see Health & Safety Code § 18007* ("manufactured home" defined)], but does not include a recreational vehicle, a commercial modular, or factory built housing [*Bus. & Prof. Code § 10131.6(c)*; *see Health & Safety Code §§ 18010, 18001.8, 19971* (respective terms defined)].

For a discussion of the special duties of a real estate licensee who participates in the purchase or sale of a mobilehome, see *§ 40.204*. For an illustrative mobilehome purchase contract and receipt for deposit that may be used when the purchase and sale of a mobilehome involves real estate brokers, see *§ 40.204*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property

LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.44

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.44 Sale of Mobilehome Located in Mobilehome Park

The Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*; *see § 40.13*; *see also* Ch. 39, *Mobilehome Parks*] contains several requirements governing the sale of a mobilehome that is located in a mobilehome park. Most provisions of the MRL apply only to "rental" parks and not to resident-owned parks [*see Civ. Code § 798.4* ("mobilehome park" means a rental park); *see also* Ch. 39, *Mobilehome Parks*].

For a subdivision, cooperative, or condominium for mobilehomes or other resident-owned park, the applicable provisions governing sale of the mobilehome and other matters depend on whether the mobilehome resident has or does not have an ownership interest in the space, subdivision, cooperative, or condominium in which their mobilehome is located or installed. For those residents who do not have an ownership interest, general provisions of the MRL apply [*Civ. Code § 799.1*; *see Civ. Code §§ 798-798.88* (general provisions)]. If the resident does have an ownership interest, different separate statutory provisions apply to the mobilehome's sale and other matters [*Civ. Code § 799.1*; *see Civ. Code §§ 799-799.10*].

Applicable sales requirements impose restrictions on and grant specific rights to both park management and the selling homeowner. For example, park management may reserve the right to approve the purchaser of the mobilehome, but is limited as to the grounds it may use to reject a prospective purchaser [*see Civ. Code §§ 798.74, 799.4*]. The right of a homeowner to sell his or her mobilehome and to list or advertise it for sale is also covered [*see, e.g., Civ. Code §§ 798.70, 798.71*].

An escrow, sale, or transfer agreement involving a mobilehome located in a rental park at the time of the sale, when the mobilehome is to remain in the park, must contain a copy of either a fully executed rental agreement or a statement signed by the park's management and the prospective homeowner indicating that the parties have agreed to the terms and conditions of a rental agreement [*Civ. Code § 798.75(a)*]. If the purchaser fails to execute the rental agreement, the purchaser does not have any rights of tenancy in the park [*Civ. Code § 798.75(b)*].

For further discussion of these requirements and others relating to the sale of a mobilehome located in a mobilehome park, see *§ 40.120[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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18-40 California Legal Forms--Transaction Guide § 40.45

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.45 Disclosure Requirements

[1] Transfer Disclosure Statement

[a] Requirement to Complete and Deliver Statement

The transfer or sale of a manufactured home or mobilehome in a mobilehome park is subject to the real estate transfer disclosure requirements and provisions set forth in *Civ. Code § 1102 et seq.* Those requirements include, but are not limited to, the use of the Manufactured Home and Mobilehome Transfer Disclosure Statement [*Civ. Code § 1102.6d*], discussed below [*Civ. Code § 798.74*.4].

The seller of a mobilehome classified as personal property and intended for use as a residence must complete and deliver a transfer disclosure statement form to prospective purchasers on all resale transactions on or after January 1, 2000 [*Civ. Code § 1102(b)*; *see Civ. Code § 1102.6d*; *see also § 40.205* (statutory form)]. The only exceptions to this requirement are (1) when a statutory exception applies [*see Civ. Code § 1102.2*] and (2) when the mobilehome is located in a common interest development [*Civ. Code § 1102.6d*; *see Civ. Code § 1351 et seq.* (common interest development)]. Any waiver of the requirement to complete and deliver a disclosure statement, or of any of the other disclosure requirements, is void as against public policy [*Civ. Code § 1102(c)*].

Any dealer, salesperson, real estate broker, or salesperson representing the seller or obtaining the offer must complete a portion of the statutory transfer disclosure statement [*Civ. Code §§ 1102.1(c), 1102.6d*; *see Health & Safety Code § 18046(d)*; *§ 40.41[7]* (dealers and salespersons); *see also Civ. Code § 2079* (real estate brokers and salespersons)].

[b] Required Contents of Statement

There is a statutory form for use to satisfy the disclosure requirement [*see Civ. Code §§ 1102(b), 1102.6d*; *see also § 40.205[2]* (statutory form)]. The statutory form must indicate all of the following [*see Civ. Code § 1102.6d*]:

- Whether the property has certain items;
- Whether any of those items are not in operating condition;
- Whether the seller is aware of any significant defects or malfunctions in certain structural components of the property; and
- Whether the seller is aware of various other restrictions or problems with the property.

[2] Mobilehome Park Disclosure Form

The management of a mobilehome park must provide a prospective homeowner with a completed written disclosure form concerning the park at least three days before execution of a rental agreement or statement signed by the park management and the prospective homeowner that the parties have agreed to the terms and conditions of the rental agreement. The management must update the information on the disclosure form annually, or, in the event of a material change in the condition of the mobilehome park, at the time of the material change in that condition [*Civ. Code § 798.75.5*; *see § 40.206* (statutory form)].

[3] Natural Hazards Disclosures

On resale transactions on or after January 1, 2000, a transferor of a mobilehome that is classified as personal property intended for use as a residence must make certain natural hazards disclosures to the prospective transferee [*see Civ. Code § 1103(b), (c)*; *see also Civ. Code § 1103.2(a)* (statutory form)]. The disclosures must be made if the property is located in specified areas that have been designated as hazardous, including all of the following [*see Civ. Code § 1103(b), (c)*]:

- A special flood hazard area;
- An area of potential flooding;
- A very high fire hazard severity zone;
- A wildland area with substantial forest fire risk;
- An earthquake fault zone; and
- A seismic hazard zone.

For detailed coverage of the natural hazards disclosures, including the statutory form, see Ch. 23, *Real Property Sales Agreements* .

[4] Zoning for Industrial Use

A seller of a mobilehome who has actual knowledge that the property is adjacent to, or zoned to allow, an industrial use (as described in *Code Civ. Proc. § 731a*), or affected by a nuisance created by such a use, must give written notice of this knowledge as soon as practicable before close of escrow [*Civ. Code § 1102.17*].

[5] Former Ordnance Locations

A seller of a mobilehome who has actual knowledge of any former federal or state ordnance locations within the neighborhood area must give written notice of that knowledge as soon as practicable before transfer of title [*Civ. Code §*

1102.15]. "Former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes which may contain potentially explosive munitions. "Neighborhood area" means within one mile of the residential real property [*Civ. Code § 1102.15*].

The disclosure requirement for former ordnance locations does not limit or abridge any obligation for disclosure created by any other law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Civ. Code § 1102.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART II. LEGAL BACKGROUND
D. Purchase and Sale of Mobilehomes

18-40 California Legal Forms--Transaction Guide §§ 40.46-40.49

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.46[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART II. LEGAL BACKGROUND
E. Registration and Titling

18-40 California Legal Forms--Transaction Guide § 40.50

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.50 Basic Registration Requirements

Mobilehomes must, as a general rule, be registered annually with the Department of Housing and Community Development (HCD) [*Health & Safety Code § 18075.5*; *see § 40.121* (procedural guide for registration and titling of mobilehomes); *see also § 40.210* (HCD application for original registration)]. However, there are a number of exceptions to this annual registration requirement [*see Health & Safety Code §§ 18075.5*, *18075.6*; *see also § 40.111*, P 2 (list of exceptions)]. For example, after the original registration of a mobilehome subject to local property taxation [*see § 40.70*], that mobilehome need not be registered again except on its subsequent sale, resale, or transfer of title [*Health & Safety Code § 18075.5(a)*]. For these purposes, a "transfer of title" includes any change, addition, or deletion of one or more registered owners, legal owners, or junior liennholders [*Health & Safety Code § 18075.5(a)*].

Mobilehomes installed or to be installed on a foundation system as a fixture or improvement to real property in conformance with statutory requirements [*see Health & Safety Code § 18551(a)*] are exempt from registration so long as they remain affixed to the foundation system. If the mobilehome is removed from the foundation system for any purpose other than dismantling or reinstalling a foundation system, it is immediately subject to registration [*Health & Safety Code § 18075.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide § 40.51

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.51 Issuance of Title and Subsequent Changes in Interest

When a mobilehome is registered for the first time, HCD establishes a permanent title record for it and issues a certificate of title to the legal owner, a registration card to the registered owner [*Health & Safety Code § 18090.5(a)*; *see Health & Safety Code §§ 18091, 18091.5*], and a registration decal that must be affixed to the outside of the mobilehome in a designated location [*see Health & Safety Code § 18092*]. Thereafter, HCD must be notified in writing whenever any registered or legal owner or junior lienholder does any of the following: (1) changes his or her permanent address [*Health & Safety Code § 18098*]; (2) moves the mobilehome [*see Health & Safety Code § 18100*]; or (3) transfers his or her title or interest in the mobilehome [*Health & Safety Code § 18100.5*]. HCD is authorized to set up a system for the electronic transmission and receipt of certificates of title [*see Health & Safety Code § 18090.6*]. For additional coverage of these requirements, see *§ 40.121[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide § 40.52

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.52 Manufacturer's Certificate of Origin

An application for the original registration of a mobilehome must include the original manufacturer's certificate of origin [*Health & Safety Code § 18085(a)*; *see Health & Safety Code §§ 18093, 18093.5* (required form of certificate)]. If the original is not in existence, a duplicate must be obtained from the manufacturer and submitted with the application for original registration [*Health & Safety Code § 18085(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling



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18-40 California Legal Forms--Transaction Guide §§ 40.53-40.59

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.53[Reserved]



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18-40 California Legal Forms--Transaction Guide § 40.60

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.60 Governing Law

Except as otherwise provided in the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*], a security interest in a mobilehome subject to registration [*see § 40.50*] is governed by Division 9 [*Com. Code § 9101 et seq.*] of the Commercial Code [*Health & Safety Code § 18080.7(h)*]. Only the requirements of the Manufactured Housing Act of 1980 are covered in this chapter. For coverage of Division 9 requirements, see Ch. 42, *Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.61

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.61 Perfection and Priority of Security Interests

As between holders of perfected security interests, the Department of Housing and Community Development (HCD) designates the holder as either the legal owner or a junior lienholder [*Health & Safety Code § 18080.7(f)*; *see Health & Safety Code §§ 18005.3* ("junior lienholder" defined), 18005.8 ("legal owner" defined)]. These designations are indicated on the permanent title record for the mobilehome, as well as on the certificate of title and registration card issued for the mobilehome [*see Health & Safety Code § 18090.5*]. For coverage of the procedure for perfecting a security interest held by a legal owner or junior lienholder, see *§ 40.222[1][b]*.

Rules of priority for conflicts between perfected and unperfected security interests and for conflicts involving lien creditors [*see Health & Safety Code § 18106(a)* ("lien creditor" defined)] are specified by statute [*see Health & Safety Code §§ 18105, 18106*]. For a description of these rules, see California Real Estate Law and Practice, Ch. 77, *Mobilehome Dealer Sales and Security Requirements* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.62

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.62 Protection of Security Interests

[1] Consent Required Before Moving Mobilehome

No person may move, permit to be moved, or cause to be moved, any mobilehome from the location indicated on the registration card without first obtaining the written consent of the legal owner and each junior lienholder, if any [*Health & Safety Code § 18099.5(a)*]. If the secured party neither gives nor withholds its consent within 30 days of a properly mailed request, the person proposing the move may move the mobilehome, provided he or she notifies HCD [*Health & Safety Code § 18099.5(b)*]. For further discussion of these requirements, see *§ 40.121[2]*.

[2] Termination of Homeowner's Tenancy

If management gives a homeowner in the park a notice of termination of tenancy, management must also give a copy of the notice to the following people (if other than the homeowner): the legal owner of the mobilehome, each junior lienholder, and the registered owner [*Civ. Code § 798.55(b)*; for an illustrative notice of termination and additional coverage of these terminations, see Ch. 39, *Mobilehome Parks*]. Thereafter, the legal owner and each junior lienholder must send management, within the time permitted by statute, a responsive written notice that does one of the following: (1) offers to sell the obligation secured by the mobilehome to park management; (2) notifies park management of the lienholder's intention to foreclose on its security interest in the mobilehome; or (3) requests that management pursue the termination of tenancy and offers management reasonable reimbursement of attorneys' fees and costs in that action [*see Civ. Code § 798.56a(a)*; *see also § 40.220* (illustrative notice)]. If the legal owner or junior lienholder offers to sell the secured obligation to management but park management rejects the offer, the secured creditor must indicate its choice of one of the other options described above [*Civ. Code § 798.56a(a)*].

If a legal owner or junior lienholder properly elects to foreclose on its security interest or requests that management terminate the homeowner's tenancy, and the legal owner or junior lienholder has the right to sell the mobilehome within the park to a third party in accordance with provisions of the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*], that person or entity has the right to keep the mobilehome on the site within the mobilehome park until it is resold,

provided the person or entity satisfies the defaulting homeowner's monetary responsibilities to the park, performs necessary maintenance and repairs for the mobilehome until the time the mobilehome is resold, and performs certain acts, which include the satisfaction of the defaulting homeowner's monetary responsibilities to the park and the performance of necessary maintenance and repairs for the mobilehome until it is resold [*Civ. Code §§ 798.56a(b), 798.79(b)*]. If the legal owner or junior lienholder does not give the required responsive notice to park management, or gives the notice but fails to perform the acts discussed above, that person or entity has no right to sell the mobilehome within the park to a third party [*Civ. Code § 798.56a(b)*]. For further discussion of these requirements and the park management's remedies for a lienholder's noncompliance, see *§ 40.220*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.63

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.63 Release of Liens

If a legal owner or junior lienholder no longer holds an outstanding obligation or a commitment to make advances, incur obligations, or otherwise give value to be secured by a mobilehome, that person or entity must release the lien. For a legal owner, this is done by appropriately signing the certificate of title for the mobilehome and forwarding the certificate to HCD with the required fees [*Health & Safety Code § 18100.5(a)(4)*]. A junior lienholder must properly execute its junior lienholder registration card and forward the card to HCD with the appropriate fees [*Health & Safety Code § 18100.5(a)(5)*].

If a secured party fails to release the lien as described above and subsequently receives a written demand for release from the registered owner, the lien must be released within 20 days of the written demand (except when there is reasonable cause for noncompliance). Otherwise, the secured party is liable to the registered owner for all actual damages suffered by the registered owner by reason of the secured party's failure to release the lien [*Health & Safety Code § 18100.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.64

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.64 Foreclosure of Security Interests

[1] Notice of Default Required Before Sale

Unless the registered owner of a mobilehome has abandoned the mobilehome or has voluntarily surrendered its possession to a foreclosing creditor, the creditor must give a notice of default, in substantially the form prescribed by statute, to the registered owner prior to foreclosing [*Health & Safety Code § 18037.5(a)*]. For a form of notice and a discussion of the requirements for its content and manner of service, see *§ 40.223*. That section also discusses the registered owner's right to cure the default, the creditor's right of sale, and the required distribution of proceeds resulting from a sale.

[2] Sale of Abandoned Mobilehomes

A secured party may not foreclose on an abandoned mobilehome until it first gives the registered owner a notice of belief of abandonment, in the form and manner required by statute [*see Health & Safety Code § 18037.5(a)(6)*]. A mobilehome is deemed abandoned only if the registered owner fails to respond to the secured party's notice of belief of abandonment within the deadline prescribed by statute. A foreclosing creditor may give a notice of belief of abandonment only when it reasonably believes that the registered owner has abandoned the mobilehome [*Health & Safety Code § 18037.5(a)(6)*]. For further discussion of these requirements and an illustrative notice of belief of abandonment, see *§ 40.224*.

[3] Special Requirements for Foreclosure if Mobilehome Is Located in Mobilehome Park

Any legal owner or junior lienholder who forecloses on his or her security interest in a mobilehome [*see Civ. Code § 798.3* ("mobilehome" defined)] located in a mobilehome park [*see Civ. Code § 798.4* ("mobilehome park" defined)] has the right to sell the mobilehome within the park to a third party in accordance with the provisions of the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*], but only if the foreclosing creditor satisfies all of the homeowner's responsibilities and liabilities to the management regarding rent, utilities, and reasonable maintenance of a mobilehome

and its premises as they accrue through the date the mobilehome is resold [*Civ. Code § 798.79(a)*]. The secured creditor must take additional steps to preserve this right if the mobilehome is the subject of a notice of termination served on its tenant by park management [*Civ. Code §§ 798.79(b), 798.56a*; *see § 40.220*].

[4] Prohibition Against Deficiency Judgment

A deficiency judgment is not permitted following the sale of a mobilehome for failure of the purchaser to complete the sales contract given to the seller by the purchaser to secure payment of the balance of the purchase price of the mobilehome. This rule does not apply if there is substantial damage to the mobilehome (other than wear and tear from normal usage) [*Health & Safety Code § 18038.7*; *see Civ. Code § 2983.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksSecurity Interests



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide §§ 40.65-40.69

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.65[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide § 40.70

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.70 Manufactured Home Property Tax Law

A mobilehome becomes subject to local property taxation [*see Rev. & Tax. Code § 5800 et seq.* (The Manufactured Home Property Tax Law)] upon its original registration with the Department of Housing and Community Development (HCD) and the issuance of a certificate of title by HCD in the name of a consumer, a dealership, or some other party [*Health & Safety Code § 18084.7*; *see § 40.50*]. If the mobilehome has become real property by being affixed to land on a permanent foundation system [*see Health & Safety Code § 18551*; *see also § 40.122[2]*], it is taxed as all other real property is taxed [*Rev. & Tax. Code § 5801(b)(1)*]. A movable mobilehome will be taxed as personal property if it was first sold new on or after July 1, 1980, or if the owner requests that it be taxed as personal property rather than as a vehicle [*Rev. & Tax. Code §§ 5801(a), 5810*]. Mobilehomes sold before that date and not taxed as real or personal property under the foregoing provisions are taxed as vehicles [*see Rev. & Tax. Code §§ 10701-11005.7*; *see also § 40.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewTax LawState & Local TaxesPersonal Property TaxTangible PropertyGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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18-40 California Legal Forms--Transaction Guide § 40.71

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.71 Annual Vehicle License Taxes

Mobilehomes not subject to local real or personal property taxation [*see § 40.70*] are subject to annual vehicle licensing and an annual vehicle license fee after they have been registered for the first time in the name of a consumer [*Health & Safety Code §§ 18115*, *18116*; *see Rev. & Tax. Code §§ 10701-11005.7* (Vehicle License Fee Law), *10751*]. The Department of Housing and Community Development (HCD) administers the annual vehicle licensing and taxation functions [*Health & Safety Code § 18076.5*]. The amount of the annual license fee is 2 percent of the market value of the mobilehome, as determined by HCD pursuant to statute [*see Health & Safety Code §§ 18115-18116*]. Penalties are imposed for delinquent payments, and these become a lien in favor of the State [*see Health & Safety Code §§ 18116*, *18116.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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18-40 California Legal Forms--Transaction Guide § 40.72

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.72 Sales and Use Taxes

Generally, a sales or use tax applies to the sale or use of tangible personal property [*see Rev. & Tax. Code §§ 6051, 6201*]. However, the gross receipts from the sale or use of used mobilehomes that are subject to real or personal property taxation [*see § 40.70*] are exempt from sales or use taxes [*see Rev. & Tax. Code § 6379*; *Health & Safety Code § 18116.5* (use taxes)]. Sales or use taxes are imposed on the sale of used mobilehomes that are not subject to local personal or real property taxes [*see Rev. & Tax. Code §§ 6051, 6201, 6379*].

The sale or use of a new mobilehome is subject to sales or use taxes whether the mobilehome is sold by a retailer to a purchaser for installation on a foundation system [*see Health & Safety Code § 18551*] for occupancy as a residence (and thereafter subject to real property taxation) [*Rev. & Tax. Code § 6012.8(a)*], or for installation on a mobilehome park lot [*Health & Safety Code § 18613*] for occupancy as a residence [*Rev. & Tax. Code § 6012.9(a)*]. For both of these categories of new mobilehomes, the tax is imposed on a percentage of the sales price [*see Rev. & Tax. Code §§ 6012.8(a), 6012.9(a)*].

The gross receipts from the subsequent sale or use of any used mobilehome, the initial retail sale of which qualified for the imposition of sales or use taxes, are exempt from further sales or use taxation [*Rev. & Tax. Code §§ 6012.8(d), 6012.9(d)*]. The sale of a mobilehome that is subject to registration is exempt from sales or use taxation if (1) the seller is the parent, grandparent, child, grandchild, spouse, or sibling of the buyer or (2) the sale is to a revocable trust and certain specified conditions are met [*see Rev. & Tax. Code § 6285*].

For purposes of the application of sales and use taxes to mobilehomes, "gross receipts" from the sale of a used mobilehome [*see Health & Safety Code § 18014*] and the "sales price" of a used mobilehome, sold, stored, used, or otherwise consumed in California must be based on the current value of the used mobilehome, as specified by a recognized value guide, whenever (1) a registered or legal owner sells a used mobilehome through a licensed dealer and not on the dealer's own account or through a licensed real estate broker [*see Bus. & Prof. Code § 10131.6*], or (2) a purchaser of a used mobilehome is required to pay the use tax to the Department of Housing and Community

Development (HCD) [*Rev. & Tax. Code § 6012.2(a)*]. If the value guide does not specify the model or manufacturer of a used mobilehome, the value of the used mobilehome must be established by reference to the highest value in the value guide according to age and size or the actual sales price, whichever is less. If the actual sales price of any used mobilehome is less than the current applicable value specified in the value guide, the "sales price" and "gross receipts" must be based on the actual sales price of the mobilehome as evidenced by the purchase documents. The State Board of Equalization must promulgate regulations approving value guides for use within California [*Rev. & Tax. Code § 6012.2(a)*].

"Gross receipts" from the sale of a new or used mobilehome must exclude the amount of separately stated escrow fees on the sale of the mobilehome [*Rev. & Tax. Code § 6012.2(b)*]. "Actual sales price" means the total contract price, including the value of the mobilehome, in-place location, awning, skirting, carport, patio, landscaping, shrubs, unattached furnishings, or other items not part of the mobilehome, and documentation fees [*Rev. & Tax. Code § 6012.2(c)*].

The term "mobilehome," for purposes of sales and use taxation, means a mobilehome as defined under the Mobilehomes-Manufactured Housing Act of 1980 and the Mobilehome Parks Act [*Rev. & Tax. Code §§ 6012.8(b), 6012.9(b)*; *see Health & Safety Code §§ 18008, 18211*; *see also § 40.11[2][a]* (applicable definition of "mobilehome")]. A "used mobilehome" is a mobilehome that was previously sold and registered or titled with HCD, or with an appropriate agency or authority, any other state, the District of Columbia, a territory or possession of the United States, or a foreign state, province, or country [*Rev. & Tax. Code § 6379*; *see Health & Safety Code § 18014*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleTax LawState & Local TaxesSales TaxExemptionsTax LawState & Local TaxesSales TaxImposition of Tax



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide §§ 40.73-40.99

AUTHOR: by Jeannie Christy Newell, J.D.

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§§ 40.73[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

18-40 California Legal Forms--Transaction Guide § 40.100

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.100 Basic Information

[1] Facts

1. Identifying information for client and other involved parties:

    a. Name.

    b. Address.

    c. Phone number.

    d. If not an individual, legal status.

2. General nature of client's transaction:

    a. Installation of mobilehome.

    b. Purchase or sale of mobilehome.

    c. Registration or transfer of registration for mobilehome.

    d. Transaction involving security interest in mobilehome.

    e. Other.

3. Person or entity presently in possession of mobilehome:

a. Registered owner.

b. Mobilehome dealer.

c. Lienholder.

d. Other.

4. Mobilehome's present location:

a. Dealer's place of business.
(1) Dealer's name.

(2) Street address and city.

b. Mobilehome park.

(1) Name of park.

(2) Name(s) of park owner.

(3) Name of manager or management company.

(4) Address.

(5) Status as rental park or resident-owned park.

c. Private property other than mobilehome park.

(1) Location.
(a) Street address, city, and county, if applicable.

(b) Otherwise, general description of area.

(2) Owner of property (owner of mobilehome or other person).

5. Description of mobilehome:

a. New or used.

b. Name of manufacturer and identification number.

c. Year of manufacture.

d. Serial number or numbers

e. Model and model number.

f. Size (length, width, and height).

g. Number of components (if more than one).

h. Number(s) on federal label or HCD insignia of approval affixed to mobilehome.

6. Name and address of person or entity who is or will be:

a. Registered owner.

b. Legal owner.

c. Junior lienholder(s), if any.

[2] Documents

1. Registration card for mobilehome, if any, in client's possession.

2. Copy of any security agreement or other contract that created security interest in mobilehome.

3. If mobilehome is located in park, copy of rental or lease agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.101

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.101 Additional Information for Purchase and Sale of Mobilehome

[1] Facts

1. Name(s) in which purchaser will take title.

2. Name of dealer, if any, involved in sale.

3. Names of real estate brokers, if any, involved in sale.

4. If escrow has been established:

    a. Name of escrow agent or company.

    b. Escrow number for transaction.

5. Lien(s) on mobilehome (existing or to be created):

    a. Name and address of lienholder.

    b. Face amount of obligation.

    c. Present amount of obligation.

    d. Account number or other identifying information for underlying debt.

6. Sales price.

a. Down payment.

b. How balance is to be paid:
(1) All cash.

(2) New loan.

(3) Assume existing loan.

(4) Combination of above.

(5) Other.

7. If sale involves mobilehome located in park, whether written approval of purchaser by park management has been obtained.

[2] Documents

1. Copy of proposed or executed contract of sale.

2. For used mobilehome, current registration card and certificate of title from seller.

3. Copies of any loan documents.

4. If mobilehome is located in rental park:

a. Copy of executed rental agreement between park management and prospective purchaser; or

b. Copy of statement executed by park management and prospective purchaser indicating that they have agreed to terms and conditions of a rental agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersRight to CommissionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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A. Client Interview--Facts and Documents

18-40 California Legal Forms--Transaction Guide §§ 40.102-40.109

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.102[Reserved]



California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

18-40 California Legal Forms--Transaction Guide § 40.110

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.110 Determinations for Purchase and Sale

1. If mobilehome was manufactured on or after September 1, 1958, does it have affixed to it, either [*Health & Safety Code § 18026*]:

a. A federal HUD label; or

NOTE:
Mobilehomes manufactured on or after June 15, 1976, are required to have a label that signifies compliance with federally prescribed standards under the National Manufactured Home Construction and Safety Standards Act of 1974 [*24 C.F.R. §§ 3282.205, 3282.362*; *42 U.S.C. §§ 5401-5426 (Act)*; ***see*** *25 Cal. Code Reg. §§ 4009(b), 4031(e), 4032(f), 4034.3*]. The labels are commonly referred to as a HUD label because the Department of Housing and Urban Development (HUD) administers the federal act. A dealer may not lawfully sell a mobilehome that is required to bear, but does not bear, a HUD label [***see*** *24 C.F.R. § 3282.252*].

b. Insignia of approval issued by Department of Housing and Community Development (HCD)?

NOTE:
All mobilehomes manufactured on or after September 1, 1958, which are sold, offered for sale, rented, or leased in California must bear a federal label [***see*** P 1a, ***above***] or an insignia of approval issued by HCD, whichever is appropriate, to indicate compliance with HCD regulations which were in effect on the the date of manufacture [*Health & Safety Code § 18026*]. Since the federal label is required for all mobilehomes manufactured on or after June 15, 1976, the HUD approval insignia must be obtained and affixed for all mobilehomes manufactured between September 1, 1958, and June 14, 1976 [***see*** *25 Cal.*

Code Reg. §§ 4034.5(a), 4033(a)(4)]. Violators of this requirement are subject to criminal and civil penalties [***see*** *Health & Safety Code §§ 18020.5, 18021*].

2. Are any of following involved in sale:

a. Licensed mobilehome dealer;

b. Real estate broker; or

c. General building contractor.

NOTE:

For the requirements that apply to dealer sales of a mobilehome, see *§§ 40.120* and *40.130*. Special requirements for the sale of a mobilehome by a real estate broker are discussed in *§ 40.204*. For a discussion of the special requirements applicable to the sale of a mobilehome by a general building contractor, see *§ 40.41A*.

3. If mobilehome is located in mobilehome park:

a. Does lease or rental agreement require park management's prior approval of prospective purchaser?

b. If so, has management given this approval?

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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B. Preliminary Determinations

18-40 California Legal Forms--Transaction Guide § 40.111

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.111 Determinations for Registration

1. Does mobilehome fall within definition of "mobilehome" set forth in Manufactured Housing Act of 1980 [*see Health & Safety Code § 18008*; *see also Health & Safety Code § 18000 et seq.* (Act); *§ 40.11[2][a]*]?

NOTE:
Under the Act, a mobilehome is a structure that meets the requirements of a "manufactured home" [*Health & Safety Code § 18008*]. For the Act's definition of "manufactured home" [***see*** *Health & Safety Code § 18007*], see *§ 40.11[2][b]*.

2. If mobilehome is subject to Act, is it exempt from requirements governing original and/or annual registration because it meets any of following criteria?

NOTE:
The Manufactured Housing Act of 1980 (Act) [*Health & Safety Code § 18000 et seq.*] requires the "original" registration of most mobilehomes subject to the Act [***see*** *Health & Safety Code §§ 18075(a), 18085*; ***see also*** *Health & Safety Code § 18008* ("mobilehome" defined); *§ 40.11[2][a]*]. Further, these mobilehomes must, as a general rule, be registered annually [***see*** *Health & Safety Code § 18075(a)*]. However, there are a number of exceptions (listed ***below***) to these registration requirements. For additional coverage of registration and the exceptions, see *§ 40.210*.

a. It is subject to local property taxation [*see § 40.70*] but is not permanently installed on foundation system as fixture or improvement to real property [*Health & Safety Code §*

18075.5(a); *see Health & Safety Code § 18551(a)*; *see also § 40.122* (requirements for installation on foundation system)].

NOTE:
These mobilehomes must be originally registered, and then registered again, at the time of any subsequent sale, resale, or transfer of title [*Health & Safety Code § 18075.5(a)*; ***see** § 40.121[2]* (transfer of registration and title)].

b. It has been or will be installed on foundation system as fixture or improvement to real property [*Health & Safety Code § 18075.5(b)*; *see Health & Safety Code § 18551(a)*; *see also § 40.122* (requirements for installation on foundation system)].

NOTE:
The mobilehome will be exempt from registration as long as it remains affixed to the foundation system. If it is removed from the foundation system for any purpose other than dismantling or reinstallation on another system, it must be immediately registered [*Health & Safety Code § 18075.5(b)*].

c. It is new, previously unregistered, unoccupied, and part of inventory held for sale by manufacturer or dealer in course of business [*Health & Safety Code § 18075.5(f)*].

NOTE:
This type of mobilehome is exempt from registration [*Health & Safety Code § 18075.5(f)*].

d. It is installed on a foundation system [*see Health & Safety Code § 18551(a)*] and is being used as office at manufacturer's, distributor's, or dealer's established place of business [*Health & Safety Code § 18075.6*].

NOTE:
This type of mobilehome is exempt from registration [*Health & Safety Code § 18075.6*].

e. It is owned by member of armed forces and displays valid registration issued by [*Health & Safety Code § 18075.5(d)*]:

NOTE:
This type of mobilehome is exempt from registration. The exemption applies whether or not the owner is a resident of California [*Health & Safety Code § 18075.5(d)*].

(1) Owner's home state of residence; or

(2) Foreign jurisdiction where owner was regularly assigned and stationed for duty by competent military orders at time registration was issued.

NOTE:
"Competent military orders" do not include military orders for leave, for temporary duty, or for any other assignment of any nature requiring the owner's presence outside the foreign jurisdiction where the owner was regularly assigned and stationed for duty [*Health & Safety Code § 18075.5(d)*].

f. It is owned by person who enters California to establish or reestablish residence or accept employment following discharge from United States armed forces [*Health & Safety Code § 18075.5(e)*].

NOTE:

The following conditions and limitations apply to this exception from registration: (1) the person must have owned the mobilehome at the time of his or her discharge; (2) the owner must have registered the mobilehome in a foreign jurisdiction where his or her presence was required by military orders; and (3) the exemption lasts until the expiration of the registration period current at the time of discharge and entrance into California [*Health & Safety Code § 18075.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
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B. Preliminary Determinations

18-40 California Legal Forms--Transaction Guide §§ 40.112-40.119

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.112[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART III. TRANSACTION GUIDE
C. Procedural Guide

18-40 California Legal Forms--Transaction Guide § 40.120

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.120 Procedural Guide to Sale of Mobilehomes

NOTE:

This Guide outlines the special statutory requirements that apply (1) if a mobilehome is sold by a licensed dealer [***see*** [1], ***below***], or (2) if a mobilehome is sold while located in a mobilehome park [***see*** [2], ***below***]. For a discussion of the special requirements that apply to the sale of a mobilehome by a licensed real estate broker, see *§ 40.204*. For a discussion of the special requirements applicable to the sale of a mobilehome by a general building contractor under *Health & Safety Code § 18062.9*, see *§ 40.41A*.

[1] Sale by Mobilehome Dealer

NOTE:

In general terms, a "mobilehome dealer" is a person in the business of buying and selling mobilehomes for a commission [***see*** *Health & Safety Code § 18002.6(a)*]. Such a person must obtain a dealer's license from the Department of Housing and Community Development (HCD) [***see*** *Health & Safety Code §§ 18045-18066.5* (license requirements)].

For these purposes, "dealer" does not include licensed real estate brokers who buy, sell, list, or negotiate the purchase, sale, or exchange of mobilehomes under *Bus. & Prof. Code § 10131.6* [*Health & Safety Code § 18002.6(b)(7)*]. For a discussion of the special requirements that apply to the sale of mobilehomes by brokers, see *§ 40.204*.

Most of the requirements discussed below apply not only to a sales transaction but also to a transaction involving a lease with an option to buy [***see, e.g.,*** *Health & Safety Code §§ 18035, 18035.1*; PP 9-12, ***below***]. Most of them do not apply to dealer sales of mobilehomes to the federal government, the State of California, any agency or political subdivision of California, or any city, county, or city and county [*Health & Safety Code § 18035.4*; ***see, e.g.,*** *Health & Safety Code §§ 18035, 18035.1, 18035.2*].

1. Inform client that contract or purchase order will be deemed rescinded, and all consideration (other than escrow fees) must be returned by respective parties, if all of the following occur [*Health & Safety Code § 18036*]:

a. Buyer becomes obligated to buy mobilehome;

b. Seller knows that buyer intends to obtain financing from third party without seller's assistance; and

c. Buyer cannot obtain that financing within 30 days of executing contract or purchase order.

2. Review or draft conditional sale agreement [*see § 40.130* (statutory requirements)].

3. Review or draft deposit receipt [*see Health & Safety Code § 18035.1*; *see also § 40.131* (statutory requirements)].

4. Contemporaneous with or prior to receipt of any cash or cash equivalent from buyer, have dealer and buyer execute the following [*Health & Safety Code §§ 18035(a), 18035.1*]:

NOTE:

For purposes of the above requirement, "cash equivalent" means property other than cash. If an item of cash equivalent is, due to its size, incapable of physical delivery to the escrow holder, the property may be held by the dealer for the purchaser until close of escrow and, if the property has been registered with the HCD or the Department of Motor Vehicles, its registration certificate and (if available) its certificate of title must be delivered to the escrow holder [*Health & Safety Code § 18035(a)(3)*].

a. Purchase order, conditional sale contract, or other document evidencing purchase.

b. Deposit receipt.

NOTE:

The dealer must retain a copy of the deposit receipt for at least three years [*Health & Safety Code § 18035.1*; ***see*** *§ 40.131*]. A copy of the purchase contract and deposit receipt must be given to the buyer [***see*** *Health & Safety Code § 18035.1*].

4A. If sale involves used mobilehome that is to be installed by buyer on a foundation, have buyer review and sign Declaration of Delivery Sale [Health & Safety Code § 18035.26(b); *see § 40.207* (form)].

NOTE:

An escrow agent may not create an escrow instruction in which a purchaser accepts responsibility for the installation of a manufactured home unless and until the escrow agent receives the declaration of delivery sale form executed by the purchaser. An escrow instruction created before the declaration is received is null and void and unenforceable [Health & Safety Code § 18035.26(d)].

5. If mobilehome installation is included in sale, have dealer furnish buyer with certificate stating that installation will be performed by licensed contractor and containing following information regarding contractor [*Bus. & Prof. Code §*

7026.2(c)]:

a. Name.

b. Business address.

c. Contractor's license number.

NOTE:
Any person engaged in the business of installing mobilehomes is a "contractor" who must have a contractor's license [***see*** *Bus. & Prof. Code § 7026.2(a)*]. A licensed mobilehome dealer is not considered a contractor for these purposes if installation of a mobilehome sold by the dealer is performed by a licensed contractor and the dealer certifies that fact in writing to the buyer [*Bus. & Prof. Code § 7026.2(c)*].

6. Have parties determine or select the following:

a. Opening and closing dates for escrow.

b. For used mobilehome, items that will be prorated, e.g.:

(1) Property taxes.

(2) Interest on any existing assumable loan.

(3) Rental of lot on which mobilehome is located.

(4) Fire and peril insurance.

c. Escrow agent.

NOTE:
A dealer must establish an escrow account with an escrow agent [*Health & Safety Code §§ 18035(a)(1), 18035.2*; ***see*** *Health & Safety Code § 18035(g)*; ***see also*** *Health & Safety Code § 18003.5* ("escrow agent" means person, firm, or corporation authorized by law to conduct escrows required by *Health & Safety Code § 18035*)]. A dealer or seller may not establish an escrow account in an escrow company in which the dealer or seller has more than a 5 percent ownership interest [*Health & Safety Code § 18035(h)*]. This restriction does not apply to a dealer who is selling a new or used mobilehome that is to be installed on a foundation system [***see*** *Health & Safety Code § 18035.2*; ***see also*** P 8, ***below***].

NOTE:
At the opening of escrow, the escrow agent must give notice of the right to request that funds be held in escrow in the event of a dispute [*Health & Safety Code § 18035(f)*]. On receiving written notice of a dispute from a party to the escrow, the escrow agent must inform the party of his or her right to hold funds in escrow by submitting a written request. On receipt by the escrow agent of a party's written request to hold funds in escrow, all funds denoted as deposit must be held in escrow until a release is signed by the disputing party, or pursuant to new written escrow instructions signed by the parties involved, or pursuant to a final order for payment or division by the court. Any other funds, other than escrow fees, must be returned to the buyer or any person, other than the dealer or seller, as appropriate [*Health & Safety Code § 18035(f)*].

7. Confirm that escrow instructions prepared by escrow agent or escrow company satisfy following requirements:

NOTE:
The escrow agent must prepare the instructions, provide the dealer and the purchaser with copies of the signed instructions and any amendments to them, and retain the originals or executed copies of them [*25 Cal. Code Reg. § 5061*].

a. Contain information required by law [*see Health & Safety Code §§ 18035(a)-(c), (e), (i), (j), 18035.2(b), (c)*; *25 Cal. Code Reg. § 5061*]; and

NOTE:
25 Cal. Code Reg. § 5061 sets forth detailed requirements governing the contents of the escrow instructions. It essentially requires the inclusion in the instructions of the following: (1) identifying information regarding the mobilehome and the terms of the transaction; and (2) statements describing procedural steps or affirmative acts that must be performed by the parties during the sales transaction.

b. Are signed by dealer and buyer [*25 Cal. Code Reg. § 5061*].

8. If dealer is selling new or used mobilehome that is to be installed on foundation system as fixture or improvement to real property [*see Health & Safety Code § 18551(a)*; *see also § 40.122*], comply with following escrow requirements [*Health & Safety Code § 18035.2*]:

NOTE:
The following requirements apply in lieu of the escrow provisions of *Health & Safety Code § 18035*, which are discussed in Paragraphs 9-11, ***below*** [*Health & Safety Code § 18035.2(a)*; ***see*** P 9, NOTE, ***below***]. Further, these requirements must be incorporated into the escrow instructions [*Health & Safety Code § 18035.2(b)*].

A mobilehome installed or to be installed on a foundation system as a fixture or improvement to real property [***see*** *Health & Safety Code § 18551(a)*] is exempt from registration under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] so long as it remains affixed to the foundation system [*Health & Safety Code § 18075.5(b)*; ***see*** *§ 40.111* P 2].

a. Have original manufacturer's certificate of origin placed in escrow; and

NOTE:
The escrow agent must obtain from the manufacturer a true and correct facsimile of the copy of the certificate of origin retained by the manufacturer [*Health & Safety Code § 18035.2(b)(3)*; ***see*** *Health & Safety Code § 18093*].

b. Confirm that either of following occurs with respect to each inventory creditor:

NOTE:
For these purposes, "inventory creditor" includes any person who is identified as a creditor on the manufacturer's certificate of origin or any person who places the original certificate of origin in escrow and claims in writing to the escrow agent to have a purchase money security interest in the mobilehome [*Health & Safety Code § 18035.2(b)*; ***see*** *Com.*

Code § 9103 (purchase money security interest)].

(1) Creditor's lien on mobilehome is satisfied by payment from escrow account; or

(2) Creditor consents in writing to other than full payment.

c. If sale involves used mobilehome that is to be installed by buyer on a foundation, provide Declaration of Delivery Sale form signed by purchaser [Health & Safety Code § 18035.26(b); *see § 40.207* (form)].

NOTE:

On close of escrow, the escrow agency must submit a copy of the original document to the Department of Housing and Community Development along with documents required to report the sale; the original document must be retained by the escrow agent. In addition, a copy of the original document must be sent to the manufacturer [Health & Safety Code § 18035.26(e)].

9. For any sale not subject to P 8, *above* (i.e., sale of new or used mobilehome that is subject to registration and that is not and will not be installed on foundation system), take following steps:

NOTE:

The escrow requirements imposed by *Health & Safety Code § 18035* and discussed in this P 9 and in PP 10 and 11, ***below***, apply to the sale by or through a dealer of a mobilehome subject to registration under the Manufactured Housing Act of 1980 [***see*** *Health & Safety Code § 18035(a)*; ***see also*** *Health & Safety Code § 18000 et seq.* (Act)]. Consequently, they do not apply to the sale by a dealer of a new or used mobilehome installed or to be installed on a foundation system as an improvement orfixture to real property [***see*** *Health & Safety Code § 18035.2(a)*; ***see also*** P 8, ***above***].

The rights established by *Health & Safety Code § 18035* may not be waived [*Health & Safety Code § 18035(k)*].

a. Instruct dealer to deposit into escrow account, within five working days of receipt (including day of receipt), any cash or cash equivalent received before close of escrow as a deposit, down payment, or whole or partial payment for mobilehome or mobilehome accessory [*Health & Safety Code § 18035(a)(1), (2)*].

NOTE:

Checks, money orders, or similar payments made toward the purchase of the mobilehome or a mobilehome accessory must be made payable only to the escrow agent [*Health & Safety Code § 18035(a)(1)*]. A down payment or whole or partial payment must include an amount designated as a deposit, which may be less than or equal to the total amount placed in escrow [*Health & Safety Code § 18035(a)(2)*].

For the definition of "cash equivalent" [***see*** *Health & Safety Code § 18035(a)(3)*], see P 4, NOTE, ***above***.

b. Comply with additional requirements described in P 10 or 11, *below*, as appropriate.

10. If sale involves new mobilehome that is not to be installed on foundation system as fixture or improvement to real

property, confirm that [*Health & Safety Code § 18035(b)*]:

NOTE:
The escrow instructions must provide for the performance of the following acts [*Health & Safety Code § 18035(b)*; ***see*** P 7, ***above***].

a. Original manufacturer's certificate of origin is placed in escrow; and

NOTE:
The escrow agent must obtain from the manufacturer a true and correct facsimile of the copy of the certificate of origin retained by the manufacturer [*Health & Safety Code § 18035(b)(3)*; ***see*** *Health & Safety Code § 18093*].

b. Either of following occurs with respect to each inventory creditor:

NOTE:
For the definition of "inventory creditor" [***see*** *Health & Safety Code § 18035(b)(2)(B)*; ***see*** *Com. Code § 9103* (purchase money security interest)], **see** P 8b, NOTE, ***above.***

(1) Creditor's lien on mobilehome is satisfied by payment from escrow account; or

(2) Creditor consents in writing to other than full payment.

11. If sale involves used mobilehome that is not to be installed on foundation system as fixture or improvement to real property, take following steps:

a. Confirm that escrow agent completes official notice of escrow opening and forwards it to Department with appropriate fees within three days of receipt of [*Health & Safety Code § 18035(d)(2)*]:

(1) Notification from dealer that seller has accepted buyer's offer to purchase [*see Health & Safety Code § 18035(d)(1)*]; and

(2) Mutually endorsed escrow instructions.

b. Confirm that following documents are placed in escrow [*Health & Safety Code § 18035(c)(1)*]:

NOTE:
This requirement must be incorporated into the escrow instructions [*Health & Safety Code § 18035(c)*].

(1) Current registration card;

(2) All copies of registration cards held by junior lienholders; and

(3) Certificate of title.

c. Unless procedure in Paragraph 11d, *below*, is selected, have registered owner [*Health & Safety Code § 18035(c)(2)(A)*]:

NOTE:
The performance of the alternative procedures set forth in this paragraph and in P 11d, ***below***, must be required by the escrow instructions [***see*** *Health & Safety Code § 18035(c)*].

(1) Acknowledge in writing amount of dealer's sales commission; and

(2) Release all ownership interests in mobilehome, either:
(a) Contemporaneously upon payment of specified amount from escrow account; or

(b) At close of escrow, if buyer has executed security agreement approved by registered owner covering unpaid balance of purchase price.

d. As alternative to requirement in Paragraph 11c, *above*, confirm that [*Health & Safety Code § 18035(c)(2)(B)*]:

(1) Dealer declares in writing that mobilehome is dealer's inventory.

(2) Registered owner acknowledges in writing that dealer has paid purchase price in full.

NOTE:
This price is the price paid by the dealer to acquire the mobilehome before its resale by the dealer [*Health & Safety Code § 18035(c)(2)(B)*].

(3) Registered owner executes current certificate of title to reflect release of all of his or her ownership interests.

(4) Dealer releases all of its ownership interests in mobilehome, either:

(a) Contemporaneously upon payment of specified amount from escrow account; or

(b) At close of escrow, if buyer has executed security agreement approved by dealer covering unpaid balance of purchase price.

e. Instruct legal owner and each junior lienholder to either [*Health & Safety Code § 18035(c)(3)*]:

(1) Release or transfer his or her security interest to designated third party contemporaneously upon payment of specified amount from escrow account; or

(2) Advise escrow agent in writing that new buyer, or buyer's stated designee, will be approved as new registered owner when buyer executes formal assumption of indebtedness secured by his or her lien and approved by creditor at or before close of escrow.

f. Have escrow agent provide legal owner and each junior lienholder with [*Health & Safety Code § 18035(d)(3)*]:

NOTE:
The following documents must be mailed to the legal owner and junior lienholders at their addresses shown on the current registration card [*Health & Safety Code § 18035(d)(3)(A)*].

(1) Written demand for lien status report [*see Health & Safety Code § 18035.5*; *§ 40.221*].

(2) Written demand for either:

NOTE:
The escrow agent must also provide each legal owner and junior lienholder with a blank copy of either of the following documents [*Health & Safety Code § 18035(d)(3)(A)*].

(a) Executed statement of conditional lien release; or

NOTE:
The statement of conditional lien release must include both (1) a statement of the dollar amount or other conditions required by the creditor in order to release or transfer its lien; and (2) the creditor's release or transfer of the lien in the mobilehome contingent upon the satisfaction of those conditions [*Health & Safety Code § 18035(d)(3)(A)(i), (ii)*].

An official statement of condition lien release is available from HUD.

(b) Executed statement of anticipated formal assumption.

NOTE:
This document must include both (1) a statement of the creditor's belief that the buyer will formally assume the indebtedness secured by its lien pursuant to terms and conditions that are acceptable to the creditor at or before the close of escrow; and (2) the creditor's approval of the buyer or the buyer's designee as the registered owner upon execution of the formal assumption [*Health & Safety Code § 18035(d)(3)(B)(i), (ii)*].

An official statement of anticipated formal assumption is available from HUD.

g. Within five days of receipt of demand described in P 11f, *above*, have legal owner or junior lienholder do following [*Health & Safety Code § 18035(d)(4)*]:

NOTE:
Any statement of conditional lien release or statement of anticipated formal assumption executed by the creditor will become inoperative and be returned to the creditor along with the certificate of title or the copy of the current registration card if (1) the escrow conditions are not satisfied before the end of the escrow period, or (2) the registered owner advises the creditor not to accept any satisfaction of his or her lien or not to permit any formal assumption of the indebtedness, and the creditor or registered owner advises the escrow agent in writing accordingly [*Health & Safety Code § 18035(d)(5)*].

If a creditor willfully fails to comply with the above requirements within 21 days of the receipt of the written demand and related documents, the creditor must forfeit $300 to the escrow agent, unless the creditor has reasonable cause for noncompliance. This money will be credited to the seller, unless otherwise provided in the escrow instructions. If this penalty is paid, it will preclude any civil liability for noncompliance with *Health & Safety Code § 18035.5* relating to the same act or omission [*Health & Safety Code § 18035(d)(6)*].

(1) Complete and execute statement.

(2) Prepare lien status report [*see § 40.221*].

(3) Forward to escrow agent, by first-class mail, the above documents plus either of the following [*Health & Safety Code § 18035(d)(4)*]:

(a) If creditor is the legal owner, certificate of title in unexecuted form.

(b) If creditor is junior lienholder, creditor's copy of current registration card in unexecuted form.

h. At time escrow is opened, confirm that escrow officer forwards either of the following to tax collector of county in which mobilehome is located, if mobilehome is subject to local property taxation [*Health & Safety Code § 18035(m)*; *see Health & Safety Code § 18035(m)(1)-(3)*]:

(1) Written demand for tax clearance certificate, if no tax liability exists; or

(2) Written demand for conditional tax clearance certificate if tax liability exists.

12. If sale involves used mobilehome:

a. Confirm that mobilehome will have operable smoke detector in each room designed for sleeping on date of transfer of title [*Health & Safety Code § 18029.6(a)*].

NOTE:
This requirement will be satisfied if, within 45 days before the date of transfer of title, the transferor signs a declaration stating that each smoke detector in the manufactured home or mobilehome is operable on the date that the declaration is signed [*Health & Safety Code § 18029.6(b)*].

b. Confirm that all fuel-gas-burning water heater appliance or appliances are seismically braced, anchored, or strapped consistent with the requirements of *Health & Safety Code § 18031(d)(3)*.

NOTE:
This requirement will be satisfied if, within 45 days prior to the transfer of title, the transferor signs a declaration stating that each water heater appliance in the used mobilehome is secured pursuant to *Health & Safety Code § 18031(d)(3)* on the date the declaration is signed.

13. Confirm that escrow funds are not disbursed until one of the following occurs, as appropriate [*Health & Safety Code § 18035(e)*]:

NOTE:
The buyer and dealer may mutually agree, and the escrow instructions may so specify, that funds be disbursed to a government agency for the payment of fees and permits required as a precondition for an installation acceptance or certificate of occupancy [*Health & Safety Code § 18035(e)(1)*].

a. If buyer is to perform installation, mobilehome is delivered to location specified in escrow instructions.

NOTE:
All funds in the escrow account, other than escrow fees and amounts for undelivered accessories, must be disbursed at that time [*Health & Safety Code § 18035(e)(1)*].

b. If dealer is responsible for installation:

(1) And installation is subject to inspection requirements of *Health & Safety Code § 18613* [*see § 40.122[1]*]:
(a) Mobilehome is delivered to buyer and installed on its site; and

(b) Mobilehome passes required inspection.

NOTE:
All funds in the escrow account, other than escrow fees and amounts for undelivered accessories, must be disbursed at that time [*Health & Safety Code § 18035(e)(1)*].

(2) And mobilehome is not subject to *Health & Safety Code § 18613*, mobilehome is delivered to buyer pursuant to delivery requirements contained in sales documents.

NOTE:
All funds, other than escrow fees, must be disbursed at that time [*Health & Safety Code § 18035(e)(2)*].

14. Advise purchaser to obtain report of sale from dealer and display it in window of mobilehome [*see Health & Safety Code § 18080.5(b)(1), (c)*].

NOTE:
A mobilehome displaying a copy of the dealer's report of sale may be occupied without registration decals or registration card until the purchaser receives the registration decals and registration card [*Health & Safety Code § 18080.5(c)*].

15. Notify buyer of responsibility to report change in ownership to county officials [*see Rev. & Tax. Code §§ 480, 480.3*].

NOTE:
Following any change in ownership of a mobilehome subject to local property taxation, the transferee must file a preliminary change of ownership report or change in ownership statement with the county in which the mobilehome is located [*Rev. & Tax. Code §§ 480, 480.3*]. For further discussion and illustrative reporting forms, see Ch. 23, ***Real Property Sales Agreements*** .

The purchaser need not file a change in ownership statement if the dealer gives written notice of the transfer to the county assessor for the county where the mobilehome is installed. Dealers must give this notice within 10 days after the sale or other transfer [***see*** *Health & Safety Code § 18080.5(d)*].

[2] Special Requirements for Sale or Transfer of Mobilehome Located in Mobilehome Park

NOTE:
The requirements discussed below are imposed by the Mobilehome Residency Law (MRL) [*Civ. Code § 798 et seq.*] and apply to mobilehomes located in a mobilehome rental park [***see*** Ch. 39, ***Mobilehome Parks***]. The MRL also contains similar but separate requirements for the sale of a mobilehome located in a mobilehome subdivision [***see*** *Civ. Code §§ 799-799.9*; ***see also*** Ch. 39, ***Mobilehome Parks***]. Those

provisions are not separately detailed below.

The MRL refers to tenants in a park as "homeowners" [***see*** *Civ. Code § 798.9*], and that terminology is used below.

1. Concerning showing or listing of mobilehome:

a. Notify client that park management must permit listing or sale of mobilehome by any of the following [*Civ. Code §§ 798.71(b), 798.81*]:

NOTE:
Management cannot require any of the following persons to authorize management or any other specified broker, dealer, or person to act as the agent in the sale of the mobilehome as a condition of management's approval of the buyer or prospective homeowner for residency in the park [*Civ. Code §§ 798.71(c), 798.81*].

(1) Homeowner;

(2) Heir, joint tenant, or personal representative of estate who gains ownership of mobilehome through death of its owner, provided that owner was a homeowner at time of his or her death; or

(3) Agent (other than management) of any such person.

b. If management is to show or list mobilehome, confirm that management obtains owner's written authorization specifying terms and conditions of showing or listing [*Civ. Code § 798.71(a)*; *see § 40.200*].

2. Inform client that homeowner and other authorized sellers [*see* P 1a, *above*] have right to display sign in window of mobilehome, on side of mobilehome facing street, or in front of mobilehome facing street that [*Civ. Code § 798.70*]:

NOTE:
Signs posted in front of the mobilehome may be of an H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Homeowners may attach to the sign or their mobilehome tubes or holders for leaflets which provide information on the mobilehome for sale, exchange, or rent [*Civ. Code § 798.70*].

a. Advertises sale, exchange, or, if not prohibited by any agreement with management, rental of mobilehome by owner or owner's agent.

b. States name, address, and telephone number of owner or owner's agent.

c. Face of which does not exceed 24 inches in width and 36 inches in height.

3. If heir, joint tenant, or personal representative is selling mobilehome [*see* P 1a(2), *above*], inform client that seller has right to do following prior to sale [*Civ. Code § 798.78(c)*]:

NOTE:

The heir, joint tenant, or personal representative has the right to sell the mobilehome to a third party in accordance with the provisions applicable to the original homeowner [***see*** *Civ. Code §§ 798.70-798.83*], provided all the homeowner's responsibilities and liabilities to the management regarding rent, utilities, and reasonable maintenance of the mobilehome and its premises that arise at any time from the death of the homeowner until the date the mobilehome is resold are satisfied as they accrue pursuant to the rental agreement in effect at the time of the death of the homeowner [*Civ. Code § 798.78(a)*]. If the homeowner's responsibilities and liabilities to management have not been so satisfied, management has the right to require the removal of the mobilehome from the park [*Civ. Code § 798.78(b)*].

a. Replace existing mobilehome with another new or used mobilehome; or

NOTE:

If the mobilehome is to be replaced, the replacement mobilehome must meet current standards of the park as contained in the park's most recent written requirements issued to prospective homeowners [*Civ. Code § 798.78(c)*].

NOTE:

Management may not require a homeowner who is replacing a mobilehome or manufactured home on a space in the park in which he or she resides, to use a specific broker, dealer, or other person as an agent in the purchase of or installation of the replacement home [*Civ. Code § 798.71(d)*].

b. Repair existing mobilehome so that it complies with health and safety standards provided in *Health & Safety Code §§ 18550, 18552,* and *18605* and their implementing regulations [*see §§ 40.20* (use and occupancy of mobilehome), *40.23* (accessory buildings or structures)].

4. Explain to client that park management may not charge:

a. Homeowner (or other authorized seller) [*see* P 1a, *above*] a transfer or selling fee as condition of sale of mobilehome within park unless management performs a service in sale [*Civ. Code § 798.72(a)*].

NOTE:

Management may not render a sales-related service unless the homeowner (or other authorized person) has submitted a written request for the service [*Civ. Code § 798.72(a)*; ***see*** *§ 40.200*].

b. Prospective purchaser or homeowner (or his or her agent) a fee as condition of approval for residency in park [*Civ. Code § 798.72(b)*].

c. Prospective homeowner a fee for interview [*Civ. Code § 798.72(b)*].

NOTE:

Management may impose a fee for a credit check of the prospective homeowner [*Civ. Code § 798.72(b)*; ***see*** *Civ. Code § 798.74(b)*; ***see also*** P 6c, ***below***].

5. Inform client that in event of sale of mobilehome in park to third party, management may not require removal of mobilehome during term of homeowner's rental agreement unless mobilehome falls within one of the following categories [*Civ. Code § 798.73*; *see § 40.202* (notice requiring removal)]:

a. Is not considered a "mobilehome" under Mobilehome Residency Law [*see Civ. Code § 798.3* (definition); *see also § 40.13*].

b. Meets all of the following criteria:

(1) Is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971;

(2) Is 20 feet wide or more; and

(3) Does not comply with applicable health and safety statutes [*see Health & Safety Code §§ 18550, 18552, 18605*] and their implementing regulations [*see § 40.20* (use and occupancy of mobilehome); *see also § 40.23* (accessory structures)], as determined following inspection by appropriate enforcement agency [*see Health & Safety Code § 18207* ("enforcement agency" defined); *see also § 40.12[2]*].

c. Meets all of following criteria:

(1) Is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971;

(2) Is less than 20 feet wide; and

(3) Does not comply with applicable health and safety statutes [*see Health & Safety Code §§ 18550, 18552, 18605*] and their implementing regulations [*see §§ 40.20, 40.23*], as determined following inspection by appropriate enforcement agency [*see Health & Safety Code § 18207* ("enforcement agency" defined); *see also § 40.12[2]*].

d. Is in significantly run-down condition or in disrepair, as determined by its general condition and its acceptability to health and safety of occupants and public, exclusive of its age.

NOTE:

Management bears the burden of demonstrating that the mobilehome is in a significantly run-down condition or in disrepair, and must use reasonable discretion in determining the general condition of the mobilehome and its accessory structures [*Civ. Code § 798.73(d)*]. Management may not require repairs and improvements to the park space or property owned by the management, except for damage caused by the homeowner [*Civ. Code § 798.73(d)*].

6. If mobilehome is to remain in park:

a. Inform client that management may only require repairs or improvements to mobilehome, its appurtenances, or accessory structures not owned and installed by management, if [*Civ. Code § 798.73.5(a)*]:

(1) Repair or improvement is based on or is required by local ordinance or state statute or regulation relating to mobilehomes, or rule or regulation of mobilehome park that implements or enforces local ordinance, state statute, or regulation relating to mobilehomes; and

(2) Repair or improvement relates to exterior of mobilehome, its appurtenances, or

accessory structure.

b. Explain to client that management must provide homeowner with written summary of required repairs and improvements no later than 10 business days following receipt of request for this information made by homeowner as part of homeowner's 60-day notice of termination of tenancy under *Civ. Code § 798.59* [*Civ. Code § 798.73.5(b)*].

NOTE:

The summary must include specific references to the park rules and regulations, local ordinances, or state statutes and regulations relating to mobilehomes on which the request for repair or improvement is based [*Civ. Code § 798.73.5(b)*].

7. If mobilehome is to remain in park:

NOTE:

The following requirements apply not only to prospective homeowners in general but also to heirs, joint tenants, or personal representatives [***see*** P 1a(2), ***above***] who desire to establish a tenancy in the park [*Civ. Code § 798.78(d)*].

a. Inform client that management may require a selling homeowner to obtain management's prior approval of a prospective purchaser and to give management notice of the sale [*Civ. Code § 798.74(a)*; *see § 40.201* (form for notice of sale and request for approval)].

b. Explain to client that management must notify prospective homeowner, upon his or her request, of information management will require in order to determine whether or not he or she will be acceptable as homeowner in park [*Civ. Code § 798.74(a)*].

c. Inform client that management may collect fee or charge from prospective purchaser to obtain financial report or credit rating [*Civ. Code § 798.74(b)*].

NOTE:

If management rejects the prospective purchaser, management must refund the full amount of that fee or charge within 30 days from the date of rejection. If the purchaser is approved, management must credit the full amount of the fee or charge toward payment of the first month's rent, unless the prospective purchaser elects not to buy the mobilehome, in which case management may retain all or a portion of the fee to defray its related administrative costs [*Civ. Code § 798.74(b)*].

d. Explain to client that management may reject prospective purchaser only if [*Civ. Code § 798.74(a)*]:

NOTE:

If management withholds approval for any reason other than those described in *Civ. Code § 798.74* [***see*** P (1), (2), ***below***] or in the other statutory provisions governing the transfer of mobilehomes [***see*** *Civ. Code §§ 798.70-798.83*, discussed throughout this *§ 40.120[2]*], management or the owner of the mobilehome may be held liable for all damages proximately resulting from the disapproval [*Civ. Code § 798.74(a)*].

(1) Purchaser lacks financial ability to pay rent and charges of park; or

NOTE:
In determining whether the purchaser has the financial ability to pay the rent and charges of the park, management may not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support [*Civ. Code § 798.74(a)*].

(2) Management determines, based on purchaser's prior tenancies, that he or she will not comply with park rules and regulations.

e. Inform client that, within 15 business days after management receives all information requested from prospective homeowner [*Civ. Code § 798.74(a)*]:

(1) Prospective homeowner must comply with any request by management for a personal interview.

(2) Management must notify seller and prospective homeowner, in writing, of:

(a) Acceptance or rejection of application; and

(b) If management rejects application, reasons for rejection.

8. If mobilehome is to remain in park, confirm that escrow, sale, or transfer agreement contains [*Civ. Code § 798.75(a)*]:

a. Statement, signed by management and prospective homeowner, indicating that parties have agreed to terms and conditions of a rental agreement; or

b. Clause incorporating by reference the provisions of a rental agreement that has been executed by purchaser and management.

NOTE:
Civ. Code § 798.75(a) provides that the escrow, sale, or transfer agreement must "contain" either the statement described in P a, ***above***, or a fully executed rental agreement. Although the statute does not define the term "contain," the incorporation by reference of a rental agreement in the manner described in this P b should satisfy the requirements of *§ 798.75(a)*.

If the purchaser does not execute a rental agreement, he or she will not have any rights of tenancy [*Civ. Code § 798.75(b)*].

9. If escrow, sale, or transfer agreement contains clause incorporating by reference provisions of executed rental agreement [*see* P 8b, *above*], attach copy of that rental agreement to escrow, sale, or transfer agreement [*Civ. Code § 798.75(a)*].

10. If occupant of mobilehome has no rights of tenancy [*see* P 8b, NOTE, *above*] and is not otherwise entitled to occupy mobilehome, instruct client that management may [*Civ. Code § 798.75(c)*]:

a. Demand that occupant surrender mobilehome park site; and

b. Commence unlawful detainer proceedings if occupant becomes "unlawful occupant" by failing to comply with above demand within five days [*see Code Civ. Proc. §§ 1159-1179a*].

NOTE:

The occupant will not be considered an unlawful occupant and will not be subject to the procedures discussed in this Paragraph if (1) management failed or refused to offer the occupant a rental agreement [***see*** P 8, ***above***]; (2) the occupant is the registered owner of the mobilehome; and (3) management has determined that the occupant has the financial ability to pay the rent and charges of the park, will comply with the park rules and regulations (based on the occupant's prior tenancies), and will comply with the provisions of the MRL regulating the transfer of mobilehomes [*Civ. Code § 798.75(d)*; ***see*** *Civ. Code §§ 798.70-798.83*].

11. Verify that sales agreement does not contain any provision by which purchaser or homeowner waives his or her rights [*see* PP 1-10, *above*] under MRL provisions governing mobilehome transfers [*Civ. Code § 798.77*; *see Civ. Code §§ 798.70-798.83*; *see also* PP 1-10, *above*].

12. Advise any legal owner or junior lienholder who wishes to foreclose his or her security interest in mobilehome in park of following rights and responsibilities:

a. Mobilehome may be resold by legal owner or junior lienholder following foreclosure, subject to MRL provisions discussed in PP 1-10, *above,* but only if legal owner or junior lienholder satisfies all of homeowner's monetary and other responsibilities until date mobilehome is resold [*Civ. Code § 798.79*].

b. If park management gives legal owner or junior lienholder a copy of a notice of termination of park tenancy sent to homeowner [*see Civ. Code § 798.56*; *see also* Ch. 39, *Mobilehome Parks*], legal owner or junior lienholder must respond with written notice to management and perform other acts to preserve its right to maintain mobilehome in park until its resale [*Civ. Code § 798.56a*; *see § 40.220*].

13. If seller posted security deposit with management at beginning of his or her tenancy in park, advise seller to submit request for refund [*see Civ. Code § 798.39(b)*].

NOTE:

Management must refund the deposit within 30 days following the date of the resale [*Civ. Code § 798.39(b)*]. For further discussion, see Ch. 39, ***Mobilehome Parks*** **.**

[3] Required Disclosures

1. Advise seller to prepare Transfer Disclosure Statement in form specified by *Civ. Code § 1102.6d* [*see § 40.205[2]* for form].

NOTE:

The seller of a mobilehome classified as personal property and intended for use as a residence must complete and deliver a transfer disclosure statement form to prospective purchasers on all resale transactions on or after January 1, 2000 [*Civ. Code § 1102(b)*; ***see*** *Civ. Code § 1102.6d*; ***see also*** *§ 40.205* (statutory form)], except when the mobilehome is located in a common interest development [*Civ. Code § 1102.6d*].

2. Advise agents, dealers, and salespersons involved in resale transaction of mobilehome to conduct

reasonably competent and diligent inspection of accessible areas of mobilehome and to complete Sections III, IV, and V of Transfer Disclosure Statement [*see § 40.205[2]* for form].

3. Deliver Transfer Disclosure Statement (or confirm that delivery has been made by seller or agent) as soon as practicable before transfer of title.

4. Advise seller to indicate compliance with delivery requirement by making notation of date of delivery on receipt for deposit or in separate document.

5. Request park management to provide Mobilehome Park Disclosure Form required by statute to prospective homeowner at least three days before execution of rental agreement (or statement signed by park management and prospective homeowner indicating that parties have agreed to rental terms) [*see Civ. Code § 798.75*.5; *see also § 40.206[2]* (form)].

6. Advise seller who has actual knowledge that property is affected by or zoned to allow industrial use [*see Code Civ. Proc. § 731a*] to give written notice of this knowledge as soon as practicable before close of escrow [*Civ. Code § 1102.17*].

7. Advise seller of mobilehome to disclose certain natural hazards if property is located in specified areas that have been designated as hazardous, including following areas [*see Civ. Code § 1103(b), (c)*; *see also* Ch. 23, *Real Property Sales Agreements* , for form]:

a. Special flood hazard area;

b. Area of potential flooding;

c. Very high fire hazard severity zone;

d. Wildland area with substantial forest fire risk;

e. Earthquake fault zone; and

f. Seismic hazard zone.

8. Advise seller of mobilehome who has actual knowledge of any former federal or state ordnance locations within neighborhood area to give written notice of that knowledge as soon as practicable before close of escrow [*Civ. Code § 1102.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity InterestsReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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California Legal Forms--Transaction Guide

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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART III. TRANSACTION GUIDE
C. Procedural Guide

18-40 California Legal Forms--Transaction Guide § 40.121

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.121 Procedural Guide to Registration and Titling of Mobilehome

NOTE:

Subject to limited exceptions [***see** § 40.111*], all mobilehomes are subject to the Manufactured Housing Act of 1980 ("Act") [*Health & Safety Code § 18000 et seq.*] for purposes of titling and registration [*Health & Safety Code § 18075(a)*]. Registration and titling for mobilehomes is administered by the Department of Housing and Community Development (HCD).

[1] Original and Annual (Renewal) Registration

1. To originally register mobilehome, complete HCD official registration application [*see § 40.210*].

NOTE:

Even though certain mobilehomes are exempt from annual registration [***see** § 40.111*, P 2], they must still be originally registered unless they are also exempt from original registration [***see** Health & Safety Code § 18075.5(b), (f)*; ***see also** § 40.111*, P 1]. The HCD application form contains a questionnaire that must be completed to establish the basis for an annual exemption from registration [***see** § 40.210[2]*].

2. On application form [*see § 40.210*] or other documentation required by HCD, designate name(s) and manner in which registration title is to be held:

a. If registration is to be held by two or more individuals, register mobilehome in names of [*Health & Safety Code § 18080*]:

(1) Two or more persons as joint tenants.

NOTE:

Each joint tenant will have the right of survivorship. The signature of each joint tenant or survivor(s), as the case may be, will be required to transfer or encumber the title to the mobilehome [*Health & Safety Code § 18080(a)*].

(2) Two or more persons as tenants in common.

NOTE:

If the names of the tenants in common are separated by the word "and," each tenant in common may transfer his or her individual interest in the mobilehome without the signature(s) of the other tenant(s) in common. However, the signature of each tenant in common is required to transfer full interest in the title to a new registered owner. If the names of the tenants in common are separated by the word "or," any one of them may transfer full interest in the title to the mobilehome to a new registered owner without the signature of any other tenant in common. The signature of each tenant in common is required in all cases to encumber the title to the mobilehome [*Health & Safety Code § 18080(b)*].

For these purposes, all mobilehomes registered on or before January 1, 1985, in the names of two or more persons as tenants in common, will be considered the same as mobilehomes registered in the names of tenants in common whose names are separated by the word "or," as provided in the preceding paragraph [*Health & Safety Code § 18080(d)*].

(3) Husband and wife, with mobilehome registered as community property.

NOTE:

The signature of each spouse will be required to transfer or encumber the title to the mobilehome [*Health & Safety Code § 18080(c)*].

b. For individual owner, register in true name of individual owner only [*Health & Safety Code § 18080.1(a)*].

NOTE:

Complimentary or professional titles may be added to the true name only if the individual is commonly addressed by that title [*Health & Safety Code § 18080.1(a)*].

c. For conservatorship or guardianship, register in name(s) of person(s) designated as conservator(s) or guardian(s), with each name followed by one of the following, as appropriate [*Health & Safety Code § 18080.1(b)*]:

(1) Guardian.

(2) Conservator.

NOTE:

The status of any conservators or guardians must be evidenced by documentation deemed adequate by HCD. Subsequent transfer of ownership or encumbrance of a mobilehome registered in the above manner will require the signatures of all designated conservators or guardians [*Health & Safety Code § 18080.1(b)*].

d. For trust, register in name of trust [*Health & Safety Code § 18080.1(c)*].

NOTE:

The status of the trust must be evidenced by documentation deemed adequate by HCD. Transfer of ownership or encumbrance of a mobilehome registered in this manner requires the signature(s) of the authorized trustee(s) designated in the trust [*Health & Safety Code § 18080.1(c)*].

e. For estate, register in name of estate [*see Health & Safety Code § 18080.1(e)* (application must be signed by appointed executor or administrator of estate)].

NOTE:

The status of the appointed executor or administrator must be evidenced by documentation deemed adequate by HCD. A subsequent transfer of ownership or encumbrancing of the mobilehome registered will require the signature of the appointed executor or administrator [*Health & Safety Code § 18080.1(e)*].

f. For company, register in name of company [*see Health & Safety Code § 18080.1(d)*].

NOTE:

The subsequent transfer of ownership or encumbrancing of a mobilehome registered in a company name will require the signature of an officer or authorized agent of the company [*Health & Safety Code § 18080.1(d)*].

3. Have designated registered owners execute application form.

NOTE:

If the mobilehome is registered in the name of a company, the registration application must be countersigned by an officer or authorized agent of the company [*Health & Safety Code § 18080.1(d)*]. For an estate, the application must be signed by the appointed executor or administrator of the estate [*Health & Safety Code § 18080.1(e)*].

4. Submit completed application for original registration [*see § 40.210* (form of application)] to HCD, along with:

a. Required registration and license fee(s) [*see Health & Safety Code §§ 18085(a), 18114, 18116*].

b. Manufacturer's certificate of origin [*Health & Safety Code § 18085(a)*; *see Health & Safety Code §§ 18093, 18093.5* (requirements for certificate of origin)].

NOTE:

The original manufacturer's certificate of origin must be submitted. If it is not in existence, a duplicate must be obtained from the manufacturer and submitted. Any duplicate copy must be conspicuously marked by the manufacturer as a duplicate copy [*Health & Safety Code § 18085(a)*]. In the absence of satisfactory evidence of ownership of a mobilehome or other structure or vehicle subject to registration, HCD may require an undertaking or a bond [***see*** *Health & Safety Code §§ 18086.5, 18089*].

c. If mobilehome was previously registered out of state [*Health & Safety Code § 18087.5*]:

NOTE:

The registration of a mobilehome that has been previously registered in another state is due 20 days after the date of entry into California, and is delinquent if a registration application is not made and any applicable fees are not paid within 40 days after that date of entry [*Health & Safety Code § 18075.5(c)*]. A limited exception exists for

mobilehomes owned by members of the armed forces or by persons recently discharged from the armed forces who enter California to establish or reestablish residence or to accept gainful employment [*Health & Safety Code § 18075.5(d), (e)*].

(1) All unexpired plates, seals, or other evidence of foreign registration in applicant's possession or control.

(2) Fee charged for cost of returning unexpired plates to issuing state.

NOTE:
HCD must give current valid foreign certificates of title full faith and credit [***see*** *Health & Safety Code § 18088*]. If the foreign certificate indicates an unpaid lien or encumbrance, the certificate of title issued by HCD must include the name of the legal owner and lienholders [***see*** *Health & Safety Code § 18088.5*].

d. Use tax payable, if any [*Health & Safety Code §§ 18123* (authority of HCD to withhold registration until payment), *18117* (use tax required for mobilehomes previously registered out-of-state)].

NOTE:
The circumstances under which a use tax is payable are discussed in *Section 40.72*. HCD may withhold the registration or the transfer of registration of any mobilehome sold at retail to any applicant by any person, other than a licensed mobilehome dealer or manufacturer, until the applicant pays to it any required use tax, unless the State Board of Equalization finds that no use tax is due. An applicant may elect to pay the use tax to HCD in order to obtain immediate action on his or application for registration or transfer of registration, and thereafter apply through HCD to the State Board of Equalization for a refund of the amount paid [*Health & Safety Code § 18123(a)*].

5. After registered owner receives registration card from HCD [*Health & Safety Code § 18080.4*]:

NOTE:
HCD, on the original registration of a mobilehome, will establish a permanent title record for the mobilehome and will issue a certificate of title to the legal owner and a registration card to the registered owner [*Health & Safety Code § 18090.5*; ***see*** *Health & Safety Code §§ 18091, 18091.5*]. The registration card will be in two parts. The two parts will contain identical registration information, except that the part to be filed with the mobilehome park operator will bear a special notation [*Health & Safety Code § 18080.6(a)*; ***see*** P 5a NOTE, ***below***].

a. If mobilehome is located in mobilehome park, instruct owner to submit appropriate part of registration card to park operator [*Health & Safety Code § 18080.6(a)*].

NOTE:
The part that should be submitted to the operator will bear the following notation: "Duplicate copy to be filed with the mobilehome park operator as required by law" [*Health & Safety Code § 18080.6(a)*].

b. Advise owner to keep other part or copy of it in mobilehome [*Health & Safety Code § 18080.4(a)*].

NOTE:

This requirement does not apply when the card is necessarily removed from the mobilehome for the purpose of applying for the renewal, amendment, or transfer of registration [*Health & Safety Code § 18080.4(b)*].

6. Instruct owner of mobilehome to apply registration decal to outside of mobilehome in clearly visible location within 15 inches of lower front right-hand side [*Health & Safety Code § 18092(a), (b)*].

NOTE:

HCD issues a registration decal for every mobilehome subject to registration [*Health & Safety Code § 18092(a)*]. The decal indicates, by color or otherwise, whether or not the mobilehome is subject to annual registration or is subject to local property taxation and the current status of any registration fee [*Health & Safety Code § 18092(c)*].

7. Advise registered owner, legal owner, and junior lienholder to notify HCD of any new permanent address [*Health & Safety Code § 18098(a)*].

NOTE:

This notification is required within 10 days of the move or other change of permanent address, but no penalty arises from a person's failure to notify HCD [*Health & Safety Code § 18098(a), (b)*]. However, it is important to notify HCD of an address change since HCD and all other persons are entitled to rely on a party's last known address listed with HCD [*Health & Safety Code § 18098(c)*]. A registered owner who changes his or her address should mark out the old address on the registration card, write or type the new address on the face of the card, and initial the change [*Health & Safety Code § 18098(d)*].

8. If mobilehome is to be moved at any time after its original registration:

a. Prior to move [*Health & Safety Code § 18099.5*]:

(1) Have party proposing the move obtain official HCD consent form and deliver or mail it (by certified mail, return receipt requested) to following persons:
(a) Legal owner; and

(b) Each junior lienholder, if any.

NOTE:

If there is no legal owner and no junior lienholder, the registered owner must complete the written consent form [*Health & Safety Code § 18099.5(a)*]. The original copy of each written consent form must accompany the mobilehome to its new situs in lieu of a registration card [*Health & Safety Code § 18099.5(a)*].

(2) If legal owner or any junior lienholder does not give or withhold its consent within 30 days after request for consent is delivered or mailed [*see* P 8a(1), *above*], have person proposing to move mobilehome submit written notification of this fact (on official HCD form) to HCD.

NOTE:

In this case, a copy of the notification form must accompany the mobilehome to its new situs [*Health & Safety Code § 18099.5(b)*].

b. Within 10 days after move, have person responsible for move submit following to HCD [*Health & Safety Code § 18100*]:

(1) Application for amended registration card;

(2) Copy of written consent form described in P 8a(1), *above.*

(3) Any information HCD may require relating to new situs location.

(4) Current registration card.

(5) Required fee.

9. Unless exempt from annual (renewal) registration [*see § 40.111*, P 2], advise registered owner to renew registration annually prior to its expiration date by submitting following to HCD [*Health & Safety Code § 18109*]:

a. Existing registration card.

b. Renewal fee [*see Health & Safety Code §§ 18114-18119*].

[2] Transfer of Title and Registration

NOTE:

As a general rule, no transfer of the title of a mobilehome registered under the Manufactured Housing Act of 1980 ("Act") [*Health & Safety Code §§ 18000-18000 et. seq.*] is effective until the transferor has endorsed and delivered the certificate of title, and delivered the registration card, as provided under the Act [*Health & Safety Code § 18101*]. Specific requirements for various types of transfers are set forth below.

1.If title or interest of registered owner or legal owner in registered mobilehome is transferred, submit following to Department of Housing and Community Development (HCD) within 20 days from date of transfer [*Health & Safety Code § 18100.5(a)(1)*]:

NOTE:

On its receipt of the items listed ***below,*** HCD will amend the permanent title record, forward a new certificate of title to the legal owner, and forward an amended registration card to the registered owner with copies to all secured parties shown on the permanent title record. If there is no legal owner, the new certificate of title and amended registration card will be forwarded to the registered owner [*Health & Safety Code § 18100.5(a)(1)*].

a. Notice of transfer [*see § 40.211*].

b. Required fee [*see Health & Safety Code § 18114*].

c. Certificate of title, executed by transferor and transferee in accordance with HCD requirements set forth on the certificate [*see Health & Safety Code § 18091*].

NOTE:

If the transfer is made by a registered owner and the transferee is to assume an underlying

indebtedness secured by the mobilehome and owed to the legal owner, the legal owner must state on the certificate of title that legal title and interest are to be retained [*Health & Safety Code § 18100.5(a)(1)*].

d. For transfer of used mobilehome subject to local property taxation [*see § 40.70*], either of the following [*Health & Safety Code § 18092.7*]:

(1) Tax clearance certificate issued by tax collector of county where mobilehome is located [*see Rev. & Tax. Code § 5832*].

(2) Conditional tax clearance certificate that [*see Rev. & Tax. Code §§ 2189.8, 5832*]:

NOTE:
A conditional tax clearance certificate sets forth the amount of an outstanding tax liability and the final date that the amount may be paid before a further tax liability is incurred [***see*** *Rev. & Tax. Code § 5832*].

(a) Was issued by foregoing tax collector; and

(b) Indicates that tax liability has been satisfied pursuant to *Health and Safety Code Section 18035(m)(3)*.

NOTE:
Health and Safety Code Section 18035(m) applies when an escrow is opened on a used mobilehome that is subject to local property taxation and to registration. Under *Health and Safety Code Section 18035(m)(3)*, an escrow officer may satisfy the terms of the conditional tax clearance certificate by (1) paying the amount of the tax liability shown on the certificate out of the escrow proceeds on or before the date indicated on the certificate, and (2) certifying in the space provided on the certificate that all of its terms and conditions have been complied with.

(3) Certification signed by escrow officer under penalty of perjury that tax collector has failed to respond to written demand for tax clearance certification or conditional tax clearance certificate [*see Health & Safety Code § 18035(m)(2)*].

NOTE:
Under *Health and Safety Code Section 18035(m)* [***see*** NOTE to P 1d(2), ***above***], an escrow officer may forward to the tax collector of the county in which a used mobilehome is located a written demand for a tax clearance certificate (if no tax liability exists) or a conditional tax clearance certificate. As a general rule, the collector must forward the certificate within five working days of receipt of the demand [*Health & Safety Code § 18035(m)(1)*; *Rev. & Tax. Code § 5832(b)*]. If the collector does not comply with the demand within 30 days from the date the demand was mailed, the escrow officer may close the escrow and submit a statement of facts certifying that the written demand was made and that the collector failed to comply within 30 days [*Health & Safety Code § 18035(m)(2)*; *Rev. & Tax. Code § 5832(c)*; ***but see*** *Rev. & Tax. Code § 5832(d)* (if mobilehome has not been enrolled in county, collector is not subject to foregoing 5- and 30-day deadlines)]. HCD will accept this statement in lieu of a tax certificate [*Health & Safety Code § 18035(m)(2)*; *Rev. & Tax. Code § 5832(c)*].

e. Use tax payable, if any [*see § 40.72*], or statement of facts evidencing exemption from use tax (on official HCD

form) [*see Health & Safety Code § 18123*].

NOTE:

HCD may withhold a transfer of registration until the applicant pays any use tax due for the transaction [*Health & Safety Code § 18123(a)*]. For a discussion of use taxes and applicable exemptions, see *Section 40.72*.

2. If interest of junior lienholder is being transferred [*Health & Safety Code § 18100.5(a)(2)*]:

a. Have transferor and transferee execute registration card.

b. Within 20 days of transfer, submit card to HCD with appropriate fees [*see Health & Safety Code §§ 18114-18119*].

NOTE:

After these steps are taken, HCD will amend the permanent title record and forward an amended registration card to the registered owner with copies to all secured parties shown on the permanent title record [*Health & Safety Code § 18100.5(a)(2)*].

3. If creditor acquires security interest in mobilehome after permanent title record has been established, notify HCD within 20 days [*Health & Safety Code § 18100.5(a)(3)*; *see § 40.222* (official HCD notice)].

NOTE:

HCD will amend the permanent title record to reflect the interest as that of a legal owner or as that of a junior lienholder, as appropriate. If the record already reflects the interest of one or more junior lienholders, the creditor then perfecting its interest will be designated as the most junior lienholder [*Health & Safety Code § 18100.5(a)(3)*]. For the procedure for perfecting a security interest obtained after the original registration of a mobilehome, see *Section 40.222*.

4. If secured obligation to legal owner has been fully satisfied, have legal owner take following steps [*Health & Safety Code § 18100.5(a)(4)*]:

a. Indicate release of lien by signing certificate of title.

b. Within 20 days from date obligation is satisfied, forward certificate to HCD with appropriate fees [*see Health & Safety Code §§ 18114-18119*].

NOTE:

HCD will amend the permanent title record, deliver a new certificate of title to the new legal owner, if any, and forward an amended registration card to the registered owner with copies to all secured parties shown on the registration card [*Health & Safety Code § 18100.5(a)(4)*]. For these purposes, the new legal owner will be either of the following, as appropriate: (1) the junior lienholder, if any; or (2) if there is more than one junior lienholder, the junior lienholder whose statement of lien was designated, on the permanent title record, as the most senior of the junior liens [*Health & Safety Code § 18100.5(a)(4)*].

If the secured party fails to release the lien as described above, the registered owner should send a written demand for release to the secured owner. Then, if the secured party fails to release the lien within 20 days after receipt of the demand (without reasonable cause for noncompliance), the secured party is liable to the registered owner for all actual

damages suffered by the registered owner by reason of the failure to release the lien [*Health & Safety Code § 18100.5(c)*].

5. If secured obligation of junior lienholder is fully paid and satisfied, have junior lienholder [*Health & Safety Code § 18100.5(a)(5)*]:

a. Submit to HCD, within 20 days, a statement of lien release on official HCD form.

b. Pay required fee [*see Health & Safety Code §§ 18114-18119*].

NOTE:
HCD will amend the permanent title record and forward an amended registration card to the registered owner with copies to all secured parties shown on the permanent title record [*Health & Safety Code § 18100.5(a)(5)*]. If the junior lienholder fails to release the lien, the registered owner should give the lienholder a written demand for release [*Health & Safety Code § 18100.5(c)*; ***see*** NOTE to P 4, ***above***].

6. If registered or legal owner dies without leaving other property necessitating probate and did not otherwise bequeath mobilehome, and at least 40 days have elapsed since owner's death, advise surviving heir or beneficiary to obtain transfer of registration of decedent's title or interest by submitting following to HCD [*Health & Safety Code § 18102(b)*; *see § 40.212*]:

a. Certificate of title and registration card, if available.

b. Certified statement of heir or beneficiary setting forth his or her interest in decedent's estate, fact of decedent's death, and status of creditors' claims [*see § 40.212* (official HCD form for statement)].

c. Names and addresses of any other heirs or beneficiaries, if required by HCD.

d. Certificate of death, if required by HCD.

7. If title held by or interest of registered owner or legal owner in registered mobilehome passes to another person other than by voluntary transfer (except under circumstances described in P 6, *above*), instruct new registered owner or legal owner to apply for transfer of registration by submitting following to HCD [*Health & Safety Code § 18100.5(d)*]:

a. Last certificate of title, if available.

b. Current registration card, if available.

c. Required transfer fee.

d. Any original or certified copies of instruments or documents of authority that may be required by HCD, or by law, to evidence or effect the transfer.

e. For transfer of used mobilehome subject to local property taxation [*see § 40.70*], proof of tax clearance described in P 1d, *above* [*see Health & Safety Code §§ 18100.5(e), 18092.7*].

NOTE:
HCD, when satisfied of the genuineness and regularity of the transfer, will amend the permanent title record, issue a new current registration card and certificate of title, and

forward copies of the current registration card to all junior lienholders [*Health & Safety Code § 18100.5(d)*].

8. For any transaction by or through a dealer to sell (or lease with the option to buy) a used mobilehome, advise client that HCD may impose moratorium on transferring any ownership interest or transferring or creating any security interest during required escrow period [*Health & Safety Code § 18100.5(b)*; *see Health & Safety Code § 18035(d)(2)* (required notice of escrow opening)].

9. Concerning required transfer fees, advise client that:

a. If application for transfer is filed during 60-day period before expiration of existing registration, applicant must submit full renewal fees (if any) for following registration year in addition to any other fees then due and payable [*Health & Safety Code § 18118*].

b. To avoid delinquency penalty, required transfer fee must be paid not later than 20 days after transferee receives properly executed certificate of title [*Health & Safety Code § 18117.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity InterestsTax LawState & Local TaxesUse TaxGeneral Overview



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART III. TRANSACTION GUIDE
C. Procedural Guide

18-40 California Legal Forms--Transaction Guide § 40.122

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.122 Procedural Guide to Installation of Mobilehomes

[1] Installation on Foundation System as Personal Property

NOTE:

The installation of a mobilehome on a foundation system as personal property (a chattel) must be in accordance with *Health & Safety Code § 18613* and is deemed to meet or exceed the requirements of *Health & Safety Code § 18613.4* [*Health & Safety Code § 18551(b)*]. Under the Mobilehome Parks Act (MPA) [*Health & Safety Code § 18200 et seq.*], a permit must be obtained from the enforcement agency [***see*** *§ 40.12[2]*] each time a mobilehome subject to the MPA is to be located, installed, or reinstalled, on any site for human habitation or occupancy as a dwelling [*Health & Safety Code § 18613(a)*; *25 Cal. Code Reg. § 1324(a)*; ***see*** *Health & Safety Code § 18613(a)(2)*; ***see also*** *25 Cal. Code Reg. § 1020*].

1. If mobilehome is being purchased from licensed dealer [*see § 40.120[1]*] and purchase is to include installation by licensed contractor:

a. Confirm that dealer provides buyer, before installation, with written certification that [*Health & Safety Code § 18035.3(a)(5)*; *Bus. & Prof. Code § 7026.2(c)* (formerly § 7027(c))]:

(1) States that installation is to be performed by licensed contractor; and

(2) Includes the contractor's:

(a) Name;

(b) Business address; and

(c) License number.

b. Notify client of dealer's responsibility to correct any defects in installation by licensed contractor [*Health & Safety Code § 18035.25*].

NOTE:
Any allegation against a dealer for a failure to correct must be filed within three years after the occurrence of the alleged act or omission [*Health & Safety Code § 18035.25*].

2. If mobilehome will be installed in mobilehome park:

a. Obtain park operator's approval for installation [*see 25 Cal. Code Reg. § 1032(d)*].

b. Confirm that initial installation (or subsequent reinstallation on a different lot pursuant to *Health & Safety Code § 18613*) will resist, in conjunction with vertical loads, either forces from horizontal wind pressures of 15 pounds per square foot or the home's design wind load, whichever is greater [*Health & Safety Code § 18613.4(a)*].

NOTE:
This requirement applies whether the mobilehome will be installed in a mobilehome park or elsewhere [*Health & Safety Code § 18613.4(a)*]. In addition, for purposes of complying with this requirement, all mobilehomes with manufacturer's installation instructions that include requirements for tiedowns must be installed in accordance with specific statutory requirements [***see** Health & Safety Code § 18613.4(b)*]. If no manufacture's installation instructions are available that include requirements for tiedowns, the mobilehome must be installed in accordance with certain other requirements [***see** Health & Safety Code § 18613.4(c)*]. However, all mobilehomes may be installed or reinstalled in accordance with plans and specifications signed by a licensed architect or engineer that meet the requirements of *Health & Safety Code § 18613.4*.

3. Obtain installation permit by submitting following to enforcement agency [*Health & Safety Code §§ 18613, 18613.3, 18613.5*; *25 Cal. Code Reg. §§ 1020, 1324*]:

NOTE:
The application must be submitted by the licensed contractor who will perform the installation, unless the installation will be performed by the owner of the mobilehome [*Health & Safety Code § 18613(b)*].

a. Official application form [*see Ch. 39, Mobilehome Parks, § 39.200*].

b. Complete set of plans and specifications [*see 25 Cal. Code Reg. § 1020(a)(4)*].

c. Required fees [*see 25 Cal. Code Reg. §§ 1020(a)(1), 1020.1*].

NOTE:
When the enforcement agency issues an installation permit for a new mobilehome, a copy of the permit must be delivered to the county or city assessor having jurisdiction where the mobilehome is located [*Health & Safety Code § 18613.2*].

d. Dimensioned plot plan of lot on which mobilehome will be installed [*see Health & Safety Code §*

18613.3].

NOTE:
This requirement applies to an application for a permit for initial installation of a mobilehome. The park owner or operator must sign the plot plan to certify that the dimensions of the lot are correct. The applicant must provide a copy of the plot plan to the mobilehome owner, if the applicant is a contractor, and to the park owner or operator [*Health & Safety Code § 18613.3*].

4. Obtain separate permit for any of following activities that will be performed in conjunction with installation:

NOTE:
For the official HCD application form that must be submitted to obtain the following permits, see Ch. 39, ***Mobilehome Parks*** **.**

a. If mobilehome will be installed on foundation, construction permit for foundation system [*see 25 Cal. Code Reg. § 1020(b)*; *see also 25 Cal. Code Reg. §§ 1320-1368*].

b. If earthquake resistant bracing system will be installed, permit for installation of bracing system [*Health & Safety Code § 18613.7*; *see 25 Cal. Code Reg. §§ 1370-1377*].

c. If any mobilehome accessory building or structure (e.g., an awning) will be constructed or installed, permit for construction or installation [*25 Cal. Code Reg. §§ 1018(a), 1020.3*; *see 25 Cal. Code Reg. §§ 1420-1520*; *see also Health & Safety Code § 18213* ("mobilehome accessory building or structure" defined)].

5. Confirm that contractor (or owner/installer) requests inspection of installation by enforcement agency at least 24 hours before expected completion [*25 Cal. Code Reg. § 1326(a)*; *see Health & Safety Code § 18613(c), (d)*].

6. If agency notifies installer that installation is inadequate, instruct installer to [*25 Cal. Code Reg. § 1326(c)*; *see Health & Safety Code § 18613(c), (d)*]:

a. Perform necessary corrective work indicated by enforcement agency and request reinspection within 10 days.

b. Pay required reinspection fee.

NOTE:
If the installer is a licensed contractor who fails to timely perform corrective work, the contractor may be subject to disciplinary action [***see*** *Health & Safety Code § 18614*].

7. If enforcement agency will not approve mobilehome for occupancy because of defects in mobilehome, advise owner of mobilehome that [*Health & Safety Code § 18613(d)*]:

a. He or she may not occupy mobilehome if it failed inspection because of immediate hazards to health or safety of occupant.

b. He or she may occupy mobilehome if it failed inspection because of conditions that do not endanger occupant's health or safety.

NOTE:

The enforcement agency must immediately notify HCD whenever any mobilehome cannot be approved for occupancy because of defects. The report must indicate health and safety defects and, in the case of new mobilehomes, substantial defects of materials and workmanship. "Substantial defects of materials and workmanship" means defects objectively manifested by broken, ripped, cracked, stained, or missing parts or components. Alleged defects concerning color combinations or grade of materials used are not considered such defects [*Health & Safety Code § 18613(d)*].

8. If mobilehome passes inspection, obtain "Installation Acceptance" certificate from enforcement agency [*see Health & Safety Code § 18613(e)*; *25 Cal. Code Reg. § 1366(a)*].

NOTE:

If the mobilehome is moved or relocated, the statement of installation acceptance becomes invalid [*25 Cal. Code Reg. § 1366(b)*].

[2] Installation on Foundation System as Real Property

NOTE:

To be considered a fixture or improvement to real property, a mobilehome must either be installed in accordance with the statutory requirements outlined in *Health & Safety Code § 18551(a)* or be legally converted to that status by compliance with the statutory conversion requirements outlined in *Health & Safety Code § 18555* [*Health & Safety Code § 18555(i)*]. Installation requirements of *Health & Safety Code § 18551(a)* are outlined below. For a discussion of the requirements for conversion of rental parks to resident-owned parks, see Ch. 39, ***Mobilehome Parks*** **.**

1. Confirm that following eligibility requirements for installation of mobilehome on foundation system as fixture or improvement to real property have been satisfied:

NOTE:

The building permit required to install a mobilehome on a foundation system will not be issued unless satisfactory evidence of the following is submitted to the enforcement agency [*Health & Safety Code § 18551(a)(1)*].

a. For real property on which mobilehome is to be installed, owner of mobilehome must either [*Health & Safety Code § 18551(a)(1)(A)*]:

(1) Own, hold title to, or be purchasing the property; or

(2) Hold a transferable lease for the exclusive use of the property, provided:

(a) Term of lease is 35 years or more, or is less than 35 years and mutually agreed on by lessor and lessee; and

(b) Term is not revocable at discretion of lessor except for cause as described in *Code Civ. Proc. § 1161(2)-(5)*.

b. For title to mobilehome, registered owner must either [*Health & Safety Code § 18551(a)(1)(B)*]:

(1) Own mobilehome free of any liens or encumbrances; or

(2) Obtain from legal owner and any lienors or encumbrancers, consent to attachment of mobilehome upon discharge of any personal lien, which may be conditioned on satisfaction by registered owner of obligation secured by lien.

2. Have owner or licensed contractor obtain building permit by submitting following to enforcement agency [*Health & Safety Code § 18551(a)(1)*; *see § 40.12[2]* (enforcement agency)]:

a. Application for permit [*see* Ch. 39, *Mobilehome Parks*].

b. Written evidence to substantiate requirements for real property on which mobilehome is to be located [*see* P 1a, *above*].

c. Written evidence to substantiate title requirements for mobilehome [*see* P 1b, *above*].

d. Plans and specifications required by HCD regulations or HCD-approved alternative for mobilehome foundation system.

NOTE:
Standard plan approval is available for foundation systems [*25 Cal. Code Reg. § 1333(h)*; ***see*** Ch. 39, ***Mobilehome Parks***].

e. Either of the following, as appropriate:

(1) Manufacturer's installation instructions; or

(2) In absence of such instructions, plans and specifications signed by California licensed architect or engineer covering installation of mobilehome.

f. Required fees [*see Health & Safety Code § 18551(a)(1)(E), (F)*].

3. When installation is nearly complete, request final inspection by enforcement agency [*see 25 Cal. Code Reg. § 1366(a)*].

4. Request enforcement agency to issue certificate of occupancy for mobilehome on determination that mobilehome passes inspection [*see 25 Cal. Code Reg. § 1366(a)*].

5. Advise owner of mobilehome that enforcement agency, on same day it issues certificate of occupancy, must also record with county recorder of county in which mobilehome is located, a document that contains the following [*Health & Safety Code § 18551(a)(2)(A)*]:

a. Name of owner of real property on which mobilehome is installed.

b. Description of real property.

c. Statement that mobilehome has been affixed to that real property by installation on foundation system pursuant to *Health & Safety Code § 18551(a).*

NOTE:

When recorded, this document must be indexed by the county recorder to the named owner, and is deemed to give constructive notice as to its contents to all persons thereafter dealing with the real property [*Health & Safety Code § 18551(a)(2)(B)*].

6. Cancel registration for mobilehome by submitting the following to HCD [*Health & Safety Code § 18551(a)(3)*]:

a. Copy of certificate of occupancy.

b. Certificate of title.

c. Registration card and decals.

d. Any other information and fees required by HCD.

NOTE:
Cancellation of registration is effective as of the date the mobilehome is permanently affixed to a foundation system, that is, the date a certificate of occupancy and the statement described in P 5, ***above,*** is recorded. However, HCD will not enter the cancellation on its records until it receives a copy of the certificate of occupancy [*Health & Safety Code § 18551(a)(3)*].

7. Advise owner that once mobilehome is installed on foundation system (in compliance with statutory requirements discussed *above*):

a. Mobilehome is deemed to be a fixture and a real property improvement to real property to which it is affixed [*Health & Safety Code § 18551(a)(4)*].

NOTE:
This is not true for any mobilehome that is installed without complying with the statutory requirements of *Health & Safety Code § 18551(a)* (discussed ***above***) [*Health & Safety Code § 18555(i)*].

b. Mobilehome is subject to state-enforced health and safety standards for mobilehomes [*Health & Safety Code § 18551(c)*; *see Health & Safety Code § 18020* (enforcement authority)].

8. Inform owner that mobilehome may not be removed from foundation system unless owner takes following steps [*Health & Safety Code § 18551(a)(4)-(6)*]:

a. Notifies HCD and county assessor of intended removal at least 30 days prior to removal of mobilehome from foundation system and transportation away from the real property.

b. Obtains consent for removal from all persons or entities who, at time of removal, have title to any estate or interest in real property to which mobilehome is affixed.

NOTE:
Consent to removal is not required from the owners of rights-of-way or easements or the owners of subsurface rights or interests in or to minerals, including oil, gas, or other hydrocarbon substances [*Health & Safety Code § 18551(a)(5)(B)*].

c. Upon removal, registers mobilehome with HCD [*see Health & Safety Code § 18551(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide §§ 40.123-40.129

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.123[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
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D. Drafting Guide

18-40 California Legal Forms--Transaction Guide § 40.130

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.130 Purchase Contract

NOTE:
This Guide contains checklists of provisions that the attorney should include in purchase/sale documents. If counsel is reviewing documents prepared by another person, he or she may use these lists to evaluate the sufficiency and scope of the forms.

NOTE:
For a form that combines a contract for the purchase of a mobilehome (non-dealer sale) with a receipt for deposit [***see*** *§ 40.131*], see *§ 40.204*.

1. For sale by licensed mobilehome dealer of new or used mobilehome [*see § 40.120[1]* (escrow and other requirements for sale by dealer)], prepare or obtain purchase document that [*Health & Safety Code § 18035.3(a)*]:

NOTE:
The following disclosures must be included in either the purchase order, conditional sale contract, any other document evidencing the purchase, or an attachment to a purchase document. These disclosures need not be contained in the same document [*Health & Safety Code § 18035.3(a)*]. Rescission of a conditional sale contract may not be based on a dealer's failure to make these disclosures [*Health & Safety Code § 18035.3(b)*]. If the dealer is also licensed as a real estate broker, the sale of a mobilehome being installed on a foundation system as a fixture or improvement to real property [***see*** *Health & Safety Code § 18551(a); § 40.122[2]*] may be included in the purchase document for the underlying real property, provided that the statutory requirements for the installation are satisfied [*Health & Safety Code § 18035.3(d)*].

a. Is signed and dated by purchaser [*Health & Safety Code § 18035.3(a)*].

b. Contains the following [*Health & Safety Code § 18035.3(a)(1)*]:
(1) Description of mobilehome.

(2) Description and cash price of each accessory, structure, or service included with purchase.

(3) Total cash price for purchase.

(4) Statement indicating whether purchase price includes or excludes towbar, wheels, wheel hubs, tires, and axles and, if not included, the purchase price of each item.

c. States amount, if any, charged by dealer for documentary preparation and, if this charge is imposed, contains a notice advising purchaser that it is not a governmental fee [*Health & Safety Code § 18035.3(a)(2)*].

d. Contains notice in at least 8-point type that satisfies following requirements [*Health & Safety Code § 18035.3(a)(3)*]:

(1) States that complaints concerning purchase must be referred to dealer;

(2) Indicates that, if complaint is not resolved, it may be referred to Department of Housing and Community Development, Division of Codes and Standards, Occupational Licensing; and

(3) Sets forth current address and telephone number of Department.

e. Includes following notice, in at least 10-point bold type [*Health & Safety Code § 18035.3(a)(4)*]: "(A) Do NOT sign the purchase agreement before you read it or if it contains any blank spaces to be filled in. (B) You are entitled to a completely filled-in copy of that agreement and, if purchasing a manufactured home or mobilehome covered by a warranty, a copy of the warranty."

f. Sets forth following information concerning licensed contractor whom dealer, as required by law [*see Bus. & Prof. Code § 7026.2(c)*], certifies will perform installation [*Health & Safety Code § 18035.3(a)(5)*; *see § 40.122* (installation requirements)]:

NOTE:
Failure to provide the information listed below is a ground for disciplinary action but not a criminal offense [*Health & Safety Code § 18035.3(c)*].

(1) Name;

(2) Business address; and

(3) Contractor's license number.

2. Include all federally-required truth in lending (Regulation Z) disclosures [*see Health & Safety Code § 18036.5*; *see also § 40.204[1][i]*].

3. Include provision for automatic rescission within 30 days after execution if buyer is unable to obtain financing from third party without seller's assistance [*see Health & Safety Code § 18036*].

NOTE:

If a buyer becomes obligated to buy a mobilehome pursuant to a purchase order or contract, the seller knows that the buyer intends to obtain third party financing without the seller's assistance, and the buyer is unable to obtain the financing within 30 days after execution of the agreement, the agreement is deemed rescinded and all consideration, other than escrow fees, must be returned without demand [*Health & Safety Code § 18036*].

4. Do not include any provision by which buyer waives his or her rights with respect to following [*see Health & Safety Code § 18039*]:

a. Establishment and operation of escrow account [*Health & Safety Code §§ 18035(k), 18035.2(b)*; *see § 40.120[1]*].

b. Execution and receipt of deposit receipt [*see Health & Safety Code § 18035.1*; *see also § 40.131*].

c. Right to receive written sales document meeting statutory requirements [*see* discussion of *Health & Safety Code §§ 18035.2(a), 18035.3* in *§ 40.120[1]*].

d. Right to have contract rescinded for buyer's inability to obtain independent third party financing [*see Health & Safety Code § 18036*].

e. Rights relating to federal truth in lending disclosures or correction of disclosure violations [*see Health & Safety Code § 18036.5*; *see also § 40.41[4]*].

f. Right to assert claims and defenses against seller's assignees [*see Health & Safety Code § 18037*].

g. Rights relating to disposal of repossessed or surrendered mobilehome [*see Health & Safety Code § 18037.5*].

h. Right to avoid deficiency judgment [*see Health & Safety Code § 18038.7*].

i. Right to notice of default and sale with respect to mobilehome that has become real property [*see Health & Safety Code § 18039.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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D. Drafting Guide

18-40 California Legal Forms--Transaction Guide § 40.131

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.131 Deposit Receipt for Sale by Mobilehome Dealer

NOTE:

A deposit receipt containing the following information must be utilized in any transaction by or through a dealer to sell (or lease with the option to buy) a new or used mobilehome [*Health & Safety Code § 18035.1(a)*; ***see*** *§ 40.120[1]*], unless the purchaser is a governmental entity [***see*** *Health & Safety Code § 18035.4*]. It must be set forth in at least 6-point type [*Health & Safety Code § 18035.1(a)*].

For the sale of a mobilehome that is not subject to registration because it is or will be permanently installed on a foundation system as a fixture or improvement to real property [***see*** *Health & Safety Code § 18551(a)*; ***see also*** *§ 40.122*], the dealer must provide a statement of fact containing the information described in Paragraphs 6-10, ***below,*** as part of the purchase documents [*Health & Safety Code § 18035.1(b)*]. If the sale of a new or used mobilehome subject to registration does not involve a dealer, the Department of Housing and Community Development (HCD) may, by regulation, require the seller and buyer to execute a receipt for deposit containing whatever information, of the nature described below, that it deems appropriate [*Health & Safety Code § 18035.1(c)*].

1. Include provisions that state that:

a. Purchaser will receive copy of [*Health & Safety Code § 18035.1(a)(1)*]:
(1) Purchase contract; and

(2) Deposit receipt.

b. All portions of purchase documents and receipt for deposit must be completed before purchaser's execution of these documents [*Health & Safety Code § 18035.1(a)(2)*].

2. Set forth specific amounts to be placed in escrow for [*Health & Safety Code § 18035.1(a)(3)*]:

a. Deposit.

b. Downpayment.

c. Any other category of funds.

3. Include warning that deposit may be withheld in escrow in case of dispute between purchaser and dealer [*Health & Safety Code § 18035.1(a)(3)*].

4. State that amounts of deposit and downpayment must be [*Health & Safety Code § 18035.1(a)(4)*]:

a. Agreed on by purchaser and dealer; and

b. Entered on purchase documents and deposit receipt before purchaser signs them.

5. Include reprints of complete provisions of [*Health & Safety Code § 18035.1(a)(5)*]:

a. *Health & Safety Code § 18035* (establishment of escrow account);

b. *Health & Safety Code § 18035.1* (deposit receipt);

c. *Health & Safety Code § 18035.3* (disclosure requirements applicable to purchase documents); and

d. *Civ. Code § 1797.3* (mobilehome warranty document) [*see* P 7, *below*].

6. State that any oral promises or commitments that have been made are not binding unless they appear in writing in purchase documents [*Health & Safety Code § 18035.1(a)(6)*].

7. If sale is of new mobilehome, include warning that a warranty document complying with *Civ. Code § 1797.3* [*see § 40.42[1]*] must be provided to purchaser immediately after signing purchase documents [*Health & Safety Code § 18035.1(a)(7)*].

8. State that terms and duration of any other warranty not required by law and offered by dealer must be in writing [*Health & Safety Code § 18035.1(a)(8)*].

9. Include statement that if purchaser has any complaints with respect to any of the following, purchaser may seek administrative relief from the HCD or judicial relief [*Health & Safety Code § 18035.1(a)(9)*]:

a. Sales practices.

b. Delivery.

c. Warranty.

d. Other matters related to mobilehome.

10. State that sale will not be complete until escrow for sale closes [*Health & Safety Code § 18035.1(a)(10)*].

11. Obtain signatures of both dealer and purchaser [*Health & Safety Code § 18035.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART III. TRANSACTION GUIDE
D. Drafting Guide

18-40 California Legal Forms--Transaction Guide §§ 40.132-40.199

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.132[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.200

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.200 Homeowner's Request and Authorization for Performance of Sales-Related Services by Park Management

[1] Comment

[a] Use of Form

This form is (1) a request by a homeowner (or authorized representative) that mobilehome park management perform certain services in connection with the sale of the homeowner's mobilehome in the park, and (2) an authorization for management to perform the requested services [*see Civ. Code § 798.72(a)*; *see also Civ. Code § 798.9* ("homeowner" means person who has tenancy in mobilehome park under rental agreement)]. Management may not perform a service in connection with the sale of a mobilehome in the park unless a written request for the service (this form) is made by one of the following: the homeowner; an heir, a joint tenant, or a personal representative of the estate who gains ownership of the mobilehome through the death of a person who, at the time of his or her death, owned the mobilehome and was a homeowner in the park; or the agent of any such person [*Civ. Code § 798.72(a)*].

This form is not a listing agreement for the sale of a mobilehome, nor does it require management to show the mobilehome [*see Civ. Code § 798.71* (listings or showings by management); [b], *below*]. Rather, the services management is authorized to perform are limited to providing notice of the mobilehome's availability to prospective purchasers and introducing these prospective purchasers to the owner of the mobilehome or his or her agent. For these services, management will be paid a flat fee. Optional language included in the form should be used if the owner of the mobilehome also agrees to pay management a commission based on the sales price at the close of escrow. For discussion of restrictions on transfer-related fees that may be charged by management, see [c], *below.*

[b] Restrictions on Showing or Listing Services by Management

The management of a mobilehome park may not show or list for sale a mobilehome in the park without first obtaining the owner's written authorization. Any authorization must specify the terms and conditions regarding the showing or

listing [*Civ. Code § 798.71(a)*]. Depending on the activities performed by management, it may be subject to the statutes governing the licensing of mobilehome salespersons or dealers [*see Health & Safety Code §§ 18045-18066.5*; *see also Civ. Code § 798.71*]. This form does not authorize management to list or show a mobilehome, but rather to assist in finding buyers and introducing them to the selling homeowner or to his or her agent [*see* [a], *above*].

Management of a mobilehome park cannot prohibit the homeowner or his or her designated representative [*see* [a], *above*] from listing or selling his or her mobilehome. Further, management may not require the selling homeowner (or his or her representative) to authorize the management or any other specified broker, dealer, or person to act as the agent in the sale of a mobilehome as a condition of management's approval of the buyer or prospective homeowner for residency in the park [*Civ. Code § 798.71(c)*; *see Civ. Code § 798.74* (management's right to prior approval of mobilehome purchaser)].

Management may not require a homeowner who is replacing a mobilehome or manufactured home on a space in the park in which he or she resides, to use a specific broker, dealer, or other person as an agent in the purchase of or installation of the replacement home [*Civ. Code § 798.71(d)*].

[c] Restrictions on Transfer-Related Fees

Unless management actually performs a sales-related service that has been requested in writing by the homeowner or the homeowner's representative, management may not charge the homeowner or his or her representative a transfer or selling fee as a condition of the sale [*Civ. Code § 798.72(a)*]. This form provides for the payment of a flat fee to park management for its sales-related services. It also includes optional language for additional compensation to be paid at the close of escrow in an amount equal to a specified percentage of the mobilehome's sale price.

Management may not charge a prospective homeowner (or his or her agent) a fee, on the purchase of the mobilehome, as a condition of management's approval of that purchaser or homeowner for residency in the park unless management performs a specific service in the sale [*Civ. Code § 798.72(b)*; *see Civ. Code §§ 798.72(a)* (performance of service must be requested in writing by seller), *798.74* (management's right of approval of mobilehome purchaser)]. Further, management may not charge a fee for interviewing a prospective homeowner. However, a fee may be charged for a credit check [*Civ. Code § 798.72(b)*; *see Civ. Code § 798.74(b)*; *§ 40.201[1][d*] (requirements governing this fee)].

A rent increase imposed on new tenants at the time of the sale or transfer of a mobilehome (excluding any transfer to a transferor's spouse, children, or parents) is *not* a prohibited fee within the meaning of *Civ. Code § 798.72* [*Vance v. Villa Park Mobilehome Estates (1995) 36 Cal. App. 4th 698, 707, 42 Cal. Rptr. 2d 723]* . A local rent control ordinance may, however, prohibit rent increases at the termination of a tenancy [*see Carson Harbor Village Ltd. v. City of Carson (9th Cir. 1994) 37 F.3d 468, 472-473]* .

[2] FORM

Homeowner's Request and Authorization for Performance of Sales-Related Services by Park Management

REQUEST AND AUTHORIZATION FOR PERFORMANCE OF SALES-RELATED SERVICES BY PARK MANAGEMENT

TO: Management of _____[*name of mobilehome park*]
_____[*address*]
_____[*city, state, zip*]

This request is made pursuant to *Civil Code Section 798.72* and relates to the mobilehome situated on the mobilehome lot described as [*description, including lot number*], and located in _____[*name of mobilehome park*] ("the Park"). The undersigned ("Homeowner") is the owner of the above mobilehome and a homeowner in the Park [*or*

The undersigned ("Owner"), pursuant to _____ (his *or* her) status as _____ (an heir *or* a joint tenant *or* a personal representative), gained ownership of the above mobilehome through the death of _____ (*name*), who was the owner of the mobilehome and a homeowner in the Park at the time of _____ (his *or* her) death]. The lease agreement between _____[Homeowner *or name of original homeowner*] and _____[*name*], the owner of the Park, was entered into on _____[*date*].

Homeowner [*or* Owner] wishes to sell the mobilehome described above, and requests and authorizes the management of the Park to perform the following services in connection with the sale: [*specify, e.g.,* To inform all prospective homeowners of the availability for sale of Homeowner's (*or* Owner's) mobilehome, whether for purposes of retaining it at the present lot, removing it to another lot in the Park, or removing it from the Park; and to lead prospective homeowners to the mobilehome for the purpose of inspecting it or making direct inquiry concerning its availability for transfer. As part of this service, management will maintain information concerning the availability of the mobilehome in one or more directories of park information, and will make the directory or directories available to prospective homeowners at the management office where inquiries by prospective homeowners are likely to be made. It is understood by Homeowner (*or* Owner) and the Park management that the Park management is not acting as a dealer or a salesperson in the sale of Homeowner's (*or* Owner's) mobilehome, and will in no manner take part in negotiations or arrangements to make a contract for a sale of the mobilehome. The Park management's services will consist solely of finding and introducing prospective homeowners of the mobilehome to Homeowner (*or* Owner) or Homeowner's (*or* Owner's) agents.]

For any and all services incidental to the contemplated sale of Homeowner's [*or* Owner's] mobilehome, Homeowner [*or* Owner] will pay in advance a flat charge of $ [per _____ (*period of time, e.g.,* week) or fraction thereof], whether or not any prospective homeowners are found and introduced to Homeowner [*or* Owner] or Homeowner's [*or* Owner's] agents [and a further fee of _____ percent of the sales price, if a sale of Homeowner's (*or* Owner's) mobilehome is consummated between Homeowner (*or* Owner) and a purchaser introduced to Homeowner (*or* Owner) by Park management. The latter fee is to be paid at the time of closing of the sales transaction. Any purchaser who has signed the Park's register of prospective applicants maintained at the management office will be conclusively considered to have been introduced by the Park management to Homeowner (*or* Owner)].

DATE: _____

_____ [*signature of homeowner or owner*]
[*typed name*]
_____ [*address*]

ACCEPTED: _____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]
Park Management

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.201

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.201 Seller's Notice of Intended Sale of Mobilehome and Request for Park Management's Approval of Purchaser

[1] Comment

[a] Use of Form

This form is a notice to the management of a mobilehome rental park of the proposed sale of a mobilehome within the park to a particular purchaser. The notice requests management's prior approval of the purchaser for purposes of allowing the latter to keep the mobilehome in the park, and includes a place for management to indicate its decision.

[b] Management's Limited Right of Prior Approval

Management of a mobilehome park may insist on the right of prior approval of a purchaser of a mobilehome that will remain in the park, and may require the selling homeowner or his or her agent to give notice of the sale to management before the closing of the sale (this form). Management cannot withhold approval unless (1) management reasonably determines, on the basis of the purchaser's prior tenancies, that he or she will not comply with the rules and regulations of the park; or (2) the purchaser does not have the financial ability to pay the rent and charges of the park [*Civ. Code § 798.74(a)*].

In determining whether the purchaser has the financial ability to pay the rent and park charges, management may not require the purchaser to submit copies of any personal income tax returns to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support [*Civ. Code § 798.74(a)*]. Management may also obtain a financial report or credit rating on the prospective purchaser [*see Civ. Code § 798.74(b)*; [d], *below*].

On request, management must notify a prospective homeowner of the information that it will require to determine whether or not the person will be acceptable as a homeowner in the park [*Civ. Code § 798.74(a)*]. During the 15-day

period in which management is required to conduct its evaluation and make its determination [*see* [c], *below*], the prospective homeowner must submit to a personal interview with management if management so requests [*Civ. Code § 798.74(a)*].

Management may not condition its approval of a prospective buyer on a requirement that the selling homeowner list the mobilehome for sale with management or any other specified broker, dealer, or person [*Civ. Code §§ 798.71(c), 798.81*]. Also, management may not charge a prospective homeowner who purchases a mobilehome in the park (or his or her agent) a fee as a condition of approval for residency in the park unless management performs a specific service in the sale [*Civ. Code § 798.72(b)*; *see Civ. Code § 798.72(a)* (performance of service must be requested in writing by seller)]. For further discussion of sales-related restrictions applicable to park management, see *§ 40.200*.

[c] Procedure for Accepting or Rejecting Applicant

Within 15 business days of management's receipt of all of the information requested from the prospective homeowner, management must notify the seller and the prospective homeowner, in writing, of management's acceptance or rejection of the application. During the same 15-day period, a prospective homeowner must comply with management's request (if any) for a personal interview. Any notice of rejection given by management must set forth the reason or reasons for the rejection [*Civ. Code § 798.74(a)*]. This form contains a place for management to indicate its approval or disapproval of the proposed purchaser and, if applicable, its reasons for a rejection. If a prospective homeowner is disapproved for any reason other than those permitted under the Mobilehome Residency Law [*see Civ. Code §§ 798.70-798.83*], management is subject to civil damages resulting from the disapproval [*Civ. Code § 798.74(a)*].

[d] Handling Requirements for Credit Report Fees and Charges

If park management collects a fee or charge from the prospective purchaser to obtain a financial report or credit rating, the collected funds must be handled in the following manner. If the purchaser is approved, management must credit the full amount of the fee or charge toward payment of the first month's rent for that purchaser, unless the purchaser elects (for whatever reason) not to purchase the mobilehome, in which case management may retain all or a portion of the fee to defray its related administrative costs. If management rejects the prospective purchaser, management must refund the full amount of the fee or charge within 30 days from the date of rejection [*Civ. Code § 798.74(b)*].

[e] Purchaser's Acknowledgment of Rental Agreement

If a mobilehome in a park is to be sold and remain in the park, the escrow, sale, or transfer agreement must contain a copy of either of the following: (1) a fully executed rental agreement; or (2) a statement, signed by park management and the prospective homeowner, indicating that the parties have agreed to the terms and conditions of a rental agreement [*Civ. Code § 798.75(a)*; *see § 40.120 [2]*, P 7]. A purchaser who fails to execute a rental agreement does not have any rights of tenancy [*Civ. Code § 798.75(b)*].

An occupant of a mobilehome who has no tenancy rights and who is not otherwise entitled to occupy the mobilehome is subject to an unlawful detainer action if the occupant refuses to surrender the mobilehome park site within five days after park management's demand for surrender [*Civ. Code § 798.75(c)*]. An occupant of a mobilehome is not considered an unlawful occupant and is not subject to this surrender requirement if all of the following conditions are present [*Civ. Code § 798.75(d)*]:

(1) The management failed or refused to offer the occupant a rental agreement;

(2) The occupant is the registered owner of the mobilehome; and

(3) The management has determined that the occupant (i) has the financial ability to pay the rent and charges of the park, (ii) will comply with the rules and regulations of the park [*see Civ. Code §*

798.75(d)(2) (this determination must be based on the occupant's prior tenancies)], and (iii) will comply with the statutory provisions governing the transfer of mobilehomes [*see Civ. Code §§ 798.70-798.81*].

[2] FORM

Seller's Notice of Intended Sale of Mobilehome and Request for Park Management's Approval of Purchaser

NOTICE TO PARK MANAGEMENT
OF SALE OF MOBILEHOME AND REQUEST FOR APPROVAL
OF PURCHASER TO REMAIN IN PARK

TO: _____[*name of mobilehome park*]
_____[*street address*]
_____[*city, state, zip*]

I am the owner of the mobilehome located at [*specify address or other location of mobilehome, e.g.,* 238 Lane "G"] in your mobilehome park. This mobilehome is under contract to be sold to _____[*name of prospective purchaser*], presently of _____[*current address*]. The sale is scheduled to close on _____[*date*]. Escrow for the sale is being handled by _____[*name of escrow company*], located in _____[*city*], California. The Escrow Number is _____.

Your approval of the above purchaser is hereby requested for the purpose of allowing the mobilehome to remain in this mobilehome park. You may use this form to satisfy your statutory obligation to notify me and the prospective purchaser, within 15 business days of your receipt of all of the information you may request from the prospective homeowner, of (1) your approval or disapproval of the purchaser, and (2) if applicable, the reason or reasons for your disapproval. After completing this form, please return the original or a copy to me, and send a copy to the above purchaser at _____[his *or* her] address indicated above.

DATE: _____.

_____ [*signature of homeowner*]
[*typed name*]
_____ [*address*]

APPROVED BY PARK MANAGEMENT ON _____[*date*].

DISAPPROVED BY PARK MANAGEMENT ON _____[*date*], for the following [reason *or* reasons]: [*specify, e.g.,* The above purchaser has refused to comply with park management's demand that the purchaser document the amount and source of _____ (his *or* her) _____ (gross monthly income *or* means of financial support) *or other reason (see Civ. Code § 798.74)*].

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]
Park Management

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes &

Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
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A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.202

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.202 Notice to Remove Sold Mobilehome From Park

[1] Comment

[a] Use of Form

This form is a notice to the seller and purchaser of a mobilehome located in a mobilehome rental park that park management will not allow the mobilehome to remain in the park. As a general rule, management may not require the removal of a mobilehome if it is sold to a third party during the term of the homeowner's rental agreement [*Civ. Code § 798.73*]. However, management may require removal following a sale under narrow circumstances relating to the condition of the mobilehome [*Civ. Code § 798.73*; *see* [b], *below*]. Management's limited right to require removal applies only if the mobilehome is located in a rental park; the right does not exist if the mobilehome is located in a subdivision, cooperative, or condominium for mobilehomes, or in a resident-owned mobilehome park [*see Civ. Code § 799.3*].

The statute governing when management may require removal of a mobilehome from its park [*see Civ. Code § 798.73*] does not require that any specific form of notice be given, nor does it address the issues of when and to whom the notice must be given. In the interest of fairness to both the seller and purchaser, management should probably give the notice to both parties as soon as management is aware of a pending sale (for example, at the time the selling homeowner notifies management of the pending sale and seeks management's approval of the purchaser to remain in the park as a tenant) [*see Civ. Code § 798.74; see also § 40.201*]. The notice should be either (1) delivered personally, or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park and to the purchaser at his or her current address [*see Civ. Code § 798.14*].

[b] Grounds for Required Removal

If a mobilehome in a park is sold to a third party during the term of the homeowner's rental agreement, management may, to upgrade the quality of the park, require that the mobilehome be removed from the park, but only for a reason

permitted by statute [*see Civ. Code § 798.73*]. One permissible reason for removal is that the mobilehome is not a "mobilehome" as defined under the Mobilehome Residency Law [*see Civ. Code § 798.3*; *§ 40.13*]. Another permissible reason is that the mobilehome does not comply with certain health and safety or construction standards [*see Civ. Code § 798.73*]. For a complete list of circumstances under which removal may be required, see *§ 40.120[2]*.

The notice must particularly specify the condition that permits the removal of the mobilehome [*Civ. Code § 798.73(e)*].

Management must use reasonable discretion in determining the general condition of the mobilehome and bears the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. Also, management may not require repairs or improvement to the park space or property, except for damage caused by the actions or negligence of the homeowner or the homeowner's agent [*Civ. Code § 798.73(d)*].

[2] FORM

Notice to Remove Sold Mobilehome From Park

NOTICE TO REMOVE MOBILEHOME FROM PARK

TO: _____[*name of selling homeowner*]
_____[*address*]
_____[*city, state, zip*]
AND
_____[*name of purchasing homeowner*]
_____[*address*]
_____[*city, state, zip*]

PLEASE TAKE NOTICE that the management of _____[*name of mobilehome park*] has been advised of the sale [*or* pending sale] of the mobilehome located at [*designation of site, e.g.,* Lot 26] in the above mobilehome park. This mobilehome occupies space in the park under an unexpired rental agreement between _____[*name of selling homeowner*] and _____[*name of mobilehome park*]. Because of this sale [*or* pending sale], management has inspected the mobilehome and discovered the following: [*specify grounds for removal, e.g.,* the mobilehome has several broken windows, and its sidings have been severely scorched by fire. Management has considered the results of that inspection in evaluating the general condition of the mobilehome and its acceptability to the health and safety of the occupants and to the public. The age of the mobilehome was not considered in the inspection or evaluation. Based on the evaluation and in the exercise of reasonable discretion, management has determined that the mobilehome is in a significantly run-down condition and in disrepair.] Therefore, pursuant to *Civil Code Section 798.73*, you are hereby informed that you must remove the mobilehome from the park _____[immediately *or* by _____ (*date*)].

DATE: _____

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.202A

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.202A Notice to Repair Mobilehome

[1] Comment--Use of Form

This form is a notice to the seller of a mobilehome located in a mobilehome park that park management has inspected the mobilehome and requires certain repairs to be made. Park management may only require repairs or improvements to the mobilehome, its appurtenances, or its accessory structures not owned and installed by the management, if (1) the repair or improvement is based on or is required by a local ordinance or state statute or regulation relating to mobilehomes, or a rule or regulation of the mobilehome park that implements or enforces a local ordinance, state statute, or regulation relating to mobilehomes, and (2) the repair or improvement relates to the exterior of the mobilehome, its appurtenances, or the accessory structure [*Civ. Code § 798.73.5(a)*].

The statute permitting park management to require repairs on the sale or transfer of a mobilehome does not require any specific form of notice. It requires management to provide a homeowner with a written summary of required repairs and improvements no later than 10 business days following receipt of a request for this information made by the homeowner as part of the homeowner's 60-day notice of termination of tenancy under *Civ. Code § 798.59* [*Civ. Code § 798.73.5(b)*]. The summary must include specific references to the park rules and regulations, local ordinances, or state statutes and regulations relating to mobilehomes on which the request for repair or improvement is based [*Civ. Code § 798.73.5(b)*]. The notice should either be (1) delivered personally, or (2) deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park.

[2] FORM

NOTICE TO REPAIR MOBILEHOME

TO: _____[*name of selling homeowner*]
_____[*address*]
_____[*city, state, zip*]

PLEASE TAKE NOTICE that the management of _____[*name of mobilehome park*] has been advised of the sale [*or* pending sale] of the mobilehome located at [*designation of site, e.g.,* Lot 26] in the above mobilehome park. This mobilehome occupies space in the park under an unexpired rental agreement between _____[*name of selling homeowner*] and _____[*name of mobilehome park*]. Because of this sale [*or* pending sale], management has inspected the mobilehome, its appurtenances and accessory structures and has discovered the following:

[*specify items requiring repair*]. Repair of these conditions is required under _____[*specify grounds for requiring repair, which must be a local ordinance or state statute or regulation relating to mobilehomes, or a rule or regulation of the mobilehome park that implements or enforces a local ordinance, state statute, or regulation relating to mobilehomes*]. Therefore, in accordance with *Civil Code Section 798.73.5*, you are hereby informed that you must repair the mobilehome _____[immediately *or* by _____ (*date*)].

Date: _____.

_____ [*name of mobilehome park*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawZoning & Land UseBuilding & Housing Codes



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.203

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.203 Request for Registration Information and Title Search

[1] Comment

[a] Use of Form

This is the official Department of Housing and Community Development (HCD) form that must be completed and submitted to HCD to request information regarding the current registration and title status of a mobilehome [*see Health & Safety Code § 18081(a)*]. To complete the form, the requester must supply identifying information for the unit in question and indicate whether an informal or formal search is being requested. If a request for informal information is made, HCD issues its information statement based only on the current status of its records as of the date it processes the request. For a formal search, which should be requested in any sales transaction, HCD supplies information based on the date the original request is processed and, in addition, provides follow-up notices of any changes to the record within 120 days of the initial request.

On its receipt of a properly executed request for information and the payment of prescribed fees (specified in the form), HCD must provide the information within five working days by first-class mail to the address indicated on the request [*Health & Safety Code § 18081(b)*]. Alternatively, if so requested, HCD may supply the information by electronic facsimile, provided the requester pays an additional fee and has established a prepaid requester account [*see* [2], *below*, instructions; *see also Health & Safety Code § 18081(b)* (authority of HCD to adopt procedures for providing information by electronic facsimile)].

The Department of Housing and Community Development maintains an informative website at www.hcd.ca.gov. HCD forms, including the form in [2], *below*, can be found and printed out at the website.

[b] Confidentiality of Registered Owner's Home Address

If a registered owner of a mobilehome has requested confidentiality of his or her home address, HCD will not disclose

that address to any requester except a court, law enforcement agency, the State Board of Equalization, or any other governmental entity entitled by law to that information [*Health & Safety Code § 18081(c)*]. A registered owner who requests confidentiality of his or her home address must supply HCD with a valid and accurate mailing address, which HCD will supply to requesters [*Health & Safety Code § 18081(d)*].

[2] FORM

Request for Registration Information and Title Search

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.204

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.204 Manufactured Home Purchase Agreement and Joint Escrow Instructions [CAR Form MHPA]

[1] Comment

[a] Use of Form

This form is the California Association of Realtors (CAR) Manufactured Home Purchase Agreement and Joint Escrow Instructions [CAR Form MHPA, displayed/reprinted with permission, CALIFORNIA ASSOCIATION OF REALTORS(R); endorsement not implied]. It is intended for use in transactions in which real estate brokers participate in the sale of a mobilehome [*see* [b], *below*].

The form is titled "Manufactured Home Purchase Agreement." Note that a "mobilehome" is defined as a structure that meets the requirements of a "manufactured home" [*see Health & Safety Code §§ 18007, 18008*].

This form and other standardized purchase agreements prepared by real estate boards and associations and commercial publishers assume that the buyer and his or her broker will complete the form. Everything preceding the seller's acceptance clause constitutes the buyer's offer to purchase the mobilehome. After the buyer completes the offer, the buyer's broker formally presents the offer to the seller and the seller's broker. To accept the offer and create a binding contract, the seller must execute the form and return the signed copy to the buyer [*see* P 36 of form in [2], *below*]. Several of the provisions of this form are identical to those contained in the CAR "Residential Purchase Agreement and Joint Escrow Instructions." For detailed coverage of the provisions of that form, see *Ch. 23, Real Property Sales Agreements, § 23.203*.

For a summary of requirements for mobilehome purchase/sale documents, see *§ 40.130*. Special considerations and requirements that apply to the sale of a mobilehome located in a mobilehome park are outlined in *§ 40.120[2]*. Finally, for discussion of the requirements that apply when a mobilehome is sold by a licensed dealer, see *§ 40.131*.

PRACTICE TIP:

Getting in Touch With the California Association of Realtors. The California Association of Realtors has offices throughout California. Their headquarters are located at 525 South Virgil Ave., Los Angeles, CA. 90020, (213) 739-8200, www.car.org. Generally, the Association will sell their forms in packages to both members and non-members. Some local Associations, however, will not sell to non-members. *By Publisher's Editorial Staff.*

[b] Broker's Sale of Mobilehome

[i] Authority to Sell

As a general rule, a licensed real estate broker may sell or offer to sell, buy or offer to buy, solicit prospective purchasers of, solicit or obtain listings of, or negotiate the purchase, sale, or exchange of a mobilehome if the mobilehome has been registered under the Manufactured Housing Act of 1980 as personal property [*Bus. & Prof. Code § 10131.6(a)*; *see Health & Safety Code § 18000 et seq.* (Act); *see also § 40.50* (basic registration requirements)]. A broker who performs any of these activities described above in connection with mobilehomes may not maintain any place of business where two or more mobilehomes are displayed and offered for sale unless the broker is also licensed as a mobilehome dealer [*Bus. & Prof. Code § 10131.6*; *see Health & Safety Code § 18045 et seq.* (dealer licensing requirements)].

For these purposes, a "mobilehome" is a structure transportable in one or more sections designed and equipped to contain not more than two dwelling units used with or without a foundation system [*Bus. & Prof. Code § 10131.6(c)*]. Recreational vehicles, commercial coaches, and factory-built housing are not included in this definition [*Bus. & Prof. Code § 10131.6(c)*; *see Health & Safety Code §§ 18010*, *18001.8*, *19971* (definitions of these respective terms)].

In addition to the above requirements, a real estate broker, like any other seller of a mobilehome, may not sell, offer for sale, rent, or lease any mobilehome unless its plumbing, heating, and electrical equipment and installations comply with standards contained in Department of Housing and Community Development (HCD) regulations or, for a mobilehome manufactured on or after June 15, 1976, standards contained in the National Manufactured Housing Construction and Safety Standards Act of 1974 [*Health & Safety Code § 18025*; *see 42 U.S.C. § 5401 et seq.* (federal Act)]. The mobilehome must have affixed to it either a federal label or HCD insignia to indicate compliance with these standards [*Health & Safety Code § 18026*; *see § 40.40*].

[ii] Duty of Inspection and Disclosure

If a broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer, the broker has a duty to a prospective purchaser of a mobilehome to inspect the property offered for sale and to disclose to the prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal [*Civ. Code § 2079(a)*; *see Health & Safety Code § 18046(c)*]. Also, the disclosure statement and other requirements applicable to the sale of residential property apply to the sale of a mobilehome classified as real property, and also apply to the resale, on or after January 1, 2000, of a mobilehome classified as personal property intended for use as a residence [*Civ. Code § 1102*; *see Health & Safety Code § 18160*].

[c] Prohibited Broker Practices

It is unlawful for a real estate broker to do any of the following in connection with the sale of a mobilehome [*Bus. & Prof. Code § 10131.7*]:

- Advertise or offer for sale any mobilehome unless either of the following applies: (1) the mobilehome is in place on a lot rented or leased for human habitation within an established mobilehome park [*see Health & Safety Code § 18214* (applicable definition of "mobilehome park")] and the

advertising or offering for sale is not contrary to any terms of a contract between the seller of the mobilehome and the owner of the mobilehome park; or (2) the mobilehome is otherwise located, in accordance with a local zoning ordinance or permit, on a lot where its presence has been authorized, or its continued presence and that use would be authorized for an uninterrupted period of at least one year.

- Fail to withdraw any advertisement of a mobilehome for sale, lease, or exchange within 48 hours after receiving notice that the mobilehome is no longer available for sale, lease, or exchange.

- Advertise or represent a mobilehome as a new mobilehome.

- Add licensing or title transfer fees [*see Rev. & Tax. Code § 10751*] to the selling price of the mobilehome when they are not yet due unless either (1) the broker has paid these fees to avoid a late payment penalty, or (2) the seller has paid the fees and the buyer and seller agree to a proration of the fees [*Bus. & Prof. Code § 10131.7(d)*].

- Make any representation that a mobilehome is capable of being transported on California highways if the mobilehome does not meet all equipment standards applicable to mobilehomes [*see Veh. Code § 24000 et seq.*], or fail to disclose any material fact regarding these equipment requirements.

- Advertise or otherwise represent, or knowingly allow to be advertised or represented on the broker's behalf or at his or her place of business, that no downpayment is required in connection with the sale of a mobilehome when a downpayment is in fact required and the buyer is advised or induced to finance the downpayment by a loan in addition to any other loan financing the balance of the purchase price.

- Fail or neglect to cause the endorsement, dating, and delivery of (or fail to endorse, date, and deliver) the certificate of ownership or title to the mobilehome, and, when having possession, to fail to deliver the registration card to a transferee who is lawfully entitled to a transfer of registration.

[d] Broker's Disclosure of Agency Relationship

A licensed real estate broker under whose license a listing is executed or an offer to purchase is obtained must disclose whether he or she is acting exclusively as the seller's agent, exclusively as the buyer's agent, or as a dual agent representing both the buyer and the seller. Further, the broker must confirm this disclosure in writing [*Civ. Code § 2079.17*; *see Civ. Code §§ 2079.14, 2079.16* (obligation to provide sellers and buyers with related statutory disclosure form)]. The written confirmation must appear either in the purchase agreement or in a separate writing [*Civ. Code § 2079.17*]. Paragraph 30 of this form contains the required confirmation. For further discussion, see *Ch. 21, Agreements With Real Estate Brokers and Agents, §§ 21.20, 21.21*.

[e] Mobilehome Park's Approval of Purchaser

Management of a mobilehome park may insist on the right to approve any potential purchaser of a mobilehome in the park if the mobilehome is to remain in the park [*see Civ. Code §§ 798.74* (tenant park), *799.4* (resident-owned park)]. This form provides that if the property is located on leased or rented land, obtaining residency approval is a contingency of the agreement. After acceptance, the buyer is required to submit a residency application [*see* P 14 of form in [2], *below*]. For the limited factors that may be used by management to disapprove a purchaser and the procedure that must be followed to communicate approval or disapproval, see *§ 40.201*.

[f] Installation of Smoke Detector

Any used mobilehome that is sold must have an operable smoke detector in each room designed for sleeping on the date

of transfer of title [*Health & Safety Code § 18029.6(a)*]. This requirement will be satisfied if, within 45 days before the date of transfer of title, the transferor signs a declaration stating that each smoke detector in the manufactured home or mobilehome is operable on the date that the declaration is signed [*Health & Safety Code § 18029.6(b)*]. Paragraph 4(C)(1) provides that the buyer or seller, depending on which box is checked, must pay for smoke detector installation. Before the close of escrow, the seller must then provide the buyer with a written statement of compliance in accordance with state and local law, unless exempt.

[g] Arbitration

A binding arbitration provision in a deposit receipt or other contract providing for the conveyance of real property must be clearly titled "ARBITRATION OF DISPUTES," must satisfy certain format requirements, and must contain a statutory notice [*see Code Civ. Proc. § 1298(a)-(c)*]. Paragraph 19(B) of this form satisfies those requirements. For further discussion, see Chapter 23, *Real Property Sales Agreements* .

[h] Liquidated Damages

A liquidated damages clause in a contract to purchase and sell real property is valid if:

- It is separately signed or initialed by each party to the contract [*Civ. Code §§ 1676, 1677(a)*];
- In the case of a printed contract, the provision is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type [*Civ. Code §§ 1676, 1677(b)*]; and
- The buyer, or other person seeking to invalidate the provision, does not establish that it was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code §§ 1671(b), 1676*].

The liquidated damages provision in this form [*see* P 18 of form in [2], *below*] satisfies the requirement for type size described in the second bulleted item, *above*. In addition, both parties must initial the provision before it will be incorporated into the agreement. For further discussion of liquidated damages clauses in contracts providing for the sale of real property, see *Chapter 23, Real Property Sales Agreements, § 23.18.*

[i] Regulation Z Disclosures

A conditional sale contract for the purchase of a new or used mobilehome that is subject to registration under the Mobilehomes-Manufactured Housing Act of 1980 [*see § 40.50* (general registration requirements)] must contain all of the disclosures required under the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] by Regulation Z [*12 C.F.R. § 226.1 et seq.*], if Regulation Z applies to the transaction [*Health Safety Code § 18036.5(b)*; *see Health & Safety Code § 18036.5(c)-(m)* (violations of disclosure requirement)]. To determine whether or not Regulation Z applies to a particular mobilehome sales transaction, see Chapter 45, *Consumer Installment Loans and Credit Sales* . Chapter 45 also fully discusses the Regulation Z disclosure requirements.

[j] Broker's Commission

The CAR form provides that the seller agrees to pay compensation to the broker as specified in a separate written agreement between the seller and the broker [*see* P 35(A) of form in [2], *below*]. Real estate brokers are not parties to the agreement. The form also includes provisions that may be used if the commission is to be split between the seller's broker ("listing broker") and another broker ("cooperating broker") [*see Ch. 23, Real Property Sales Agreements, § 23.200[1][c][v]* for coverage of splitting commissions].

If this form will be the first document to establish the broker's right to compensation for the sale of the mobilehome, or

will alter the terms of any previous agreement providing for that compensation, the form must include a statutory statement regarding the negotiable nature of real estate commissions [*see Bus. & Prof. Code § 10147.5(a)*]. As a practical matter, the first form to establish this right typically is a listing agreement executed at the time the property is placed on the market for sale. For further discussion of this requirement, as well as several sample listing agreements, see Chapter 21, *Agreements with Real Estate Brokers and Agents* .

[k] Reporting Change in Ownership

If the mobilehome is or will be subject to local property taxation [*see § 40.70*], the buyer must, following the change in ownership, file a preliminary change of ownership report or change in ownership statement with the county in which the mobilehome is located [*Rev. & Tax. Code §§ 480, 480.3*]. An action to enforce the terms of a conditional sale contract providing for the change in ownership of a mobilehome that is subject to local property taxation and to the Mobilehomes-Manufactured Housing Act of 1980 may not be maintained until a change in ownership statement is filed or the contract is recorded [*Code Civ. Proc. § 1062.10*]. For further discussion and illustrative reporting forms, see Chapter 23, *Real Property Sales Agreements* .

[2] FORM

Manufactured Home Purchase Agreement and Joint Escrow Instructions [CAR Form MHPA]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingDisclosureReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.205

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.205 Transfer Disclosure Statement

[1] Comment

[a] Use of Form

The form in [2], *below*, is a Transfer Disclosure Statement to be used by the seller of a mobilehome on a resale transaction on or after January 1, 2000 [*see Civ. Code §§ 1102(b), 1102.6d*]. Unless a statutory exception applies [*see* [b], *below*], the seller of a mobilehome classified as personal property and intended for use as a residence must complete and deliver a statutory disclosure form to prospective purchasers [*Civ. Code § 1102(b)*; *see Civ. Code § 1102.6d*], except when the mobilehome is located in a common interest development [*Civ. Code § 1102.6d*; *see Civ. Code § 1351 et seq.* (common interest development)]. Any waiver of this requirement, or of any of the other disclosure requirements, is void as against public policy [*Civ. Code § 1102(c)*].

The statutory form must indicate whether the property has certain items, whether any of those items are not in operating condition, whether the seller is aware of any significant defects or malfunctions in certain structural components of the property, and whether the seller is aware of various other restrictions or problems with the property [*see Civ. Code § 1102.6d*]. The disclosure of the existence of any window security bars and any safety release mechanism on those window security bars must also be included [*Civ. Code § 1102.16*].

Each disclosure and each act which may be performed in making the disclosure, must be made in good faith. "Good faith" means honesty in fact in the conduct of the transaction [*Civ. Code § 1102.7*].

[b] Exempted Transactions

The requirement to furnish a Transfer Disclosure Statement to a prospective purchaser [*see* [a], *above*] does not apply in any of the following situations [*Civ. Code § 1102.2*]:

- Transfers that are required to be preceded by the furnishing to a prospective transferee of a copy of a public report in accordance with *Bus. & Prof. Code § 11018.1* (relating to subdivisions) and transfers that can be made without a public report in accordance with *Bus. & Prof. Code § 11010.4* (relating to subdivisions);

- Transfers ordered by the court, including, but not limited to, transfers ordered by a probate court in the administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance;

- Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure, transfers to the legal owner or lienholder of a manufactured home or mobilehome by a registered owner or successor in interest who is in default, or transfers by reason of any foreclosure of a security interest in a manufactured home or mobilehome;

- Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;

- Transfers from one co-owner to one or more other co-owners;

- Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors;

- Transfers between spouses resulting from a judgment of dissolution of marriage or of legal separation or from a property settlement agreement incidental to that judgment;

- Transfers by the Controller under the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*];

- Transfers under the statutory provisions providing for the sale of tax-defaulted property [*see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*]; and

- Transfers or exchanges to or from any governmental entity.

[c] Duties of Dealers, Salespersons, Real Estate Agents, and Escrow Agents

Any dealer, salesperson, real estate broker, or salesperson representing the seller or obtaining the offer must complete a portion of the Transfer Disclosure Statement [*see Civ. Code §§ 1102.1(c), 1102.6d, 2079*; *see also* [2], *below*, PP III, IV, and V].

If more than one licensed real estate broker is acting as an agent in the transfer of a mobilehome, the broker who has obtained the offer made by the transferee must deliver the Transfer Disclosure Statement to the transferee, unless the transferor has given other written instructions for delivery [*Civ. Code § 1102.12(a)*].

If a licensed real estate broker responsible for delivering the Transfer Disclosure Statement cannot obtain the required disclosure document and does not have written assurance from the transferee that the disclosure has been received, the broker must advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering the disclosure statement must maintain a record of the action taken to effect compliance in accordance with *Bus. & Prof. Code § 10148* [*Civ. Code § 1102.12(b)*].

A person or entity acting in the capacity of an escrow agent for the transfer of a mobilehome (other than a real estate agent) will not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements, unless the person or entity is empowered to so act by an express written agreement to that effect. The extent of such an agency must be governed by the written agreement [*Civ. Code § 1102.11*].

[d] Delivery and Receipt of Transfer Disclosure Statement

The transferor of a mobilehome must deliver to the prospective transferee the Transfer Disclosure Statement as follows [*Civ. Code § 1102.3a(a)*]:

- In the case of a sale, or a lease with an option to purchase, of a mobilehome involving an agent (as defined in *Health & Safety Code § 18046*) as soon as practicable, but no later than the close of escrow for the purchase of the mobilehome; and

- In the case of a sale, or lease with an option to purchase, of a mobilehome not involving an agent (as defined in *Health & Safety Code § 18046*) at the time of execution of any document by the prospective transferee with the transferor for the purchase of the mobilehome.

Delivery of disclosures must be by personal delivery or mail to the prospective transferee. For the purposes of this requirement, delivery to the spouse of a transferee is deemed delivery to the transferee, unless provided otherwise by contract [*Civ. Code § 1102.10*].

The transferor must indicate compliance with these requirements either on the Transfer Disclosure Statement, any addendum attached to the statement, or on a separate document [*Civ. Code § 1102.3a(b)*].

[e] Amendment to Transfer Disclosure Statement

Any disclosure made in accordance with *Civ. Code § 1102 et seq.* may be amended in writing by the transferor or his or her agent. The amendment is subject to the same provisions for delivery and confirmation of receipt as the original statement [*Civ. Code § 1102.9*; *see* [d], *above*].

Furthermore, if a Transfer Disclosure Statement, or any material amendment of any disclosure, is delivered after the execution of an offer to purchase, the transferee has three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivering a written notice of termination to the transferor [*Civ. Code § 1102.3a(c)*].

[f] Information From Third Parties

The delivery of any information required to be disclosed under *Civ. Code § 1102 et seq.* to a prospective transferee by a public agency or other person providing this information is deemed to comply with the disclosure requirements and relieves the transferor or any listing or selling agent of any further disclosure duty with regard to that item of information [*Civ. Code § 1102.4(b)*].

Likewise, the delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest

control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, is sufficient compliance for application of the exemption discussed in [b], *above*, if the information is provided to the prospective transferee in response to a written or oral request for that information. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of *Civ. Code § 1102.6* and, if so, must indicate the required disclosures to which the information being furnished is applicable. When the expert's statement is furnished, the expert is not responsible for any items of information other than those expressly set forth in the statement [*Civ. Code § 1102.4(c)*].

[g] Errors and Omissions

Neither the transferor nor any listing or selling agent will be liable for any error, inaccuracy, or omission of any information in the Transfer Disclosure Statement if the error, inaccuracy, or omission meets all of the following criteria [*Civ. Code § 1102.4(a)*]:

- It was not within the personal knowledge of the transferor or that listing or selling agent;
- It was based on information timely provided by public agencies or by certain other persons [*see* [f], *above*]; and
- Ordinary care was exercised in obtaining and transmitting it.

[h] Subsequent Inaccuracies

If information disclosed is subsequently rendered inaccurate as a result of any act, occurrence, or agreement after the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation of the disclosure requirements. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the best information available to the transferor or his or her agent, and is not used for the purpose of circumventing or evading the transfer disclosure requirements [*Civ. Code § 1102.5*].

[i] Effect of Noncompliance

The transfer of a mobilehome will not be invalidated solely because of the failure of any person to comply with the requirements to furnish a Transfer Disclosure Statement to a prospective transferee. However, any person who willfully or negligently violates or fails to perform any duty under *Civ. Code § 1102 et seq.* will be liable in the amount of actual damages suffered by a transferee [*Civ. Code § 1102.13*].

[2] FORM

Transfer Disclosure Statement

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSubdivisions



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide § 40.206

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.206 Mobilehome Park Disclosure Form

[1] Comment--Use of Form

The form in [2], *below*, is the statutory Mobilehome Park Rental Agreement Disclosure Form [*see Civ. Code § 798.75.5*]. The management of a mobilehome park must provide a prospective homeowner with a completed written disclosure form concerning the park at least three days before execution of a rental agreement or statement signed by the park management and the prospective homeowner that the parties have agreed to the terms and conditions of the rental agreement [*Civ. Code § 798.75.5*]. The form sets forth information describing the condition of the park and the common areas, such as parking and laundry areas [*see* [2], *below*].

The management must update the information on the disclosure form annually, or, in the event of a material change in the condition of the mobilehome park, at the time of the material change in that condition [*Civ. Code § 798.75.5*.5].

[2] FORM

Mobilehome Park Disclosure Form

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use



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DIVISION II: REAL ESTATE TRANSACTIONS
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A. Purchase and Sale

18-40 California Legal Forms--Transaction Guide § 40.207

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.207 Declaration of Delivery Sale Form

[1] Comment--Use of Form

This form is the statutory Declaration of Delivery Sale form [*see* Health & Safety Code § 18035.26(b)(1)]. A dealer who is selling a used mobilehome that is to be installed on a foundation by the purchaser must obtain the purchaser's signature on this form and provide the form to the escrow agent before preparation of the escrow instructions [Health & Safety Code § 18035.26(a), (b)]. An escrow agent may not create an escrow instruction in which a purchaser accepts responsibility for the installation of a manufactured home unless and until the escrow agent is in receipt of the executed form. An escrow instruction created before the receipt of the declaration is null and void and unenforceable [Health & Safety Code § 18035.26(d)].

[2] FORM

Declaration of Delivery Sale

Declaration of Delivery Sale

The undersigned purchaser hereby declares that he/she is agreeing to a delivery sale wherein he/she intends to actually and physically install the subject home described below, or accept responsibility for engaging the services of a licensed contractor to perform that installation. Additionally, the purchaser hereby declares that he/she understands that most manufacturers' warranties do not cover defects caused by improper site preparation or installation. The purchaser takes full responsibility for the proper storage, including blocking of the home and protection from the elements, prior to the completion of the installation.

It is strongly recommended that, before entering into this agreement, the purchaser has ensured that the home described below will be installed pursuant to *subdivision (a) of Section 18551 of the Health and Safety Code* (see reverse side) and

the manufacturer's installation instructions. Additionally, the purchaser should make certain that he/she can meet all permit and fee requirements, including school development fees, most of which may be financed, for the installation of the subject home.

Warranty Expiration

Notwithstanding *Section 1797 of the Civil Code*, in order to provide reasonable time for the installation of your home, the manufacturer's warranty, when applicable, will expire one year after either the issuance of a certificate of occupancy or 120 days from the close of escrow, whichever occurs first.

Name of Escrow Company: _____; Escrow Number: _____

Manufacturer's Name: _____; Serial Number: _____

Dealer's Name: _____; Address where purchaser intends to install home: _____

Address where purchaser will accept delivery: _____;

Address where purchaser intends to install home: _____

(NOTE: An original copy of this document must be deposited with the above named escrow agent as a condition precedent to the preparation of escrow instructions. Upon close of escrow, the escrow agency shall submit a copy of the original document to the department along with documents required to report the sale; the original document shall be retained by the escrow agent. Additionally, a copy of the original document shall be sent to the manufacturer.)

WARNING: This is an important document. Do not sign unless you have read and understood the above declaration.

Purchaser's Printed Name: _____
Purchaser's Signature _____
Date: _____
Purchaser's Printed Name: _____
Purchaser's Signature _____
Date: _____

(*Section 18551 of the Health and Safety Code* shall be reprinted on the reverse side of this document.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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DIVISION II: REAL ESTATE TRANSACTIONS
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18-40 California Legal Forms--Transaction Guide §§ 40.208-40.209

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.208[Reserved]



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DIVISION II: REAL ESTATE TRANSACTIONS
CHAPTER 40 MOBILEHOMES
PART IV. FORMS
B. Registration and Titling

18-40 California Legal Forms--Transaction Guide § 40.210

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.210 Application for Original Registration

[1] Comment

[a] Use of Form

This form is the official Department of Housing and Community Development (HCD) application form [Form HCD 480.5] for the original registration of any mobilehome that is subject to registration under the Manufactured Housing Act of 1980 [*Health & Safety Code §§ 18075*, *18085*; *see Health & Safety Code § 18000 et seq.* (Act); *see also § 40.50*]. Except as otherwise explained below, this form must be filed to originally register a mobilehome, even if the mobilehome is exempt from annual registration requirements [*see Health & Safety Code §§ 18085*, *18075*; *see also § 40.111*, P 2 (exemption from annual registration requirements)]. The reverse side of the official form contains a questionnaire that includes a request for information necessary to establish the basis for an exemption from the annual registration requirements.

Mobilehomes installed or to be installed on foundation systems as a fixture or improvement to real property [*see Health & Safety Code § 18551(a)*; *see also § 40.122*] are exempt from registration so long as they remain affixed to a foundation system. Therefore, for the purchase of a new mobilehome that will be immediately installed on a foundation system, this application for original registration need not be filed. However, if the mobilehome is subsequently removed from the foundation system, this form must be filed to obtain the original registration for the mobilehome [*see Health & Safety Code § 18075.5(b)*]. This application for original registration also does not have to be filed for any new and previously unregistered, unoccupied mobilehome that is part of an inventory held for sale by a manufacturer or dealer in the course of business until the mobilehome is sold [*see Health & Safety Code §§ 18075.5(f)*, *18084.7*].

For an outline of mobilehome registration and titling requirements, see *§ 40.121*. That outline covers original and renewal registration, transfers of title and interests after initial registration, and miscellaneous required notices.

The Department of Housing and Community Development maintains an informative website at www.hcd.ca.gov. HCD

forms, including the form in [2], *below*, can be found and printed out at the website.

[b] Filing Requirements

A completed application for original registration (this form) must be submitted to HCD, along with the appropriate filing fee [*see Health & Safety Code § 18114*]. For mobilehomes manufactured on or after January 1, 1986, theoriginal manufacturer's certificate of origin for the mobilehome must also be submitted [*Health & Safety Code § 18085(a)*; *see Health & Safety Code §§ 18093, 18093.5* (certificate of origin)]. If the original certificate of origin does not exist, a duplicate copy must be obtained from the manufacturer and submitted with the application. Any duplicate copy must be conspicuously marked by the manufacturer as a duplicate copy [*Health & Safety Code § 18085(a)*].

[c] Required Information

The following information must be furnished in the application for original registration [*Health & Safety Code § 18085(b)*]:

- The true name and mailing address of the registered owner, the legal owner (if any), and any junior lienholders.

- The name of the county in which the registered owner resides.

- The situs address of the mobilehome.

- A description of the mobilehome, including all of the following: (1) the manufacturer's name and identification number; (2) the date of manufacture; (3) the serial number or numbers; (4) the federal label or HCD insignia number or numbers affixed to the mobilehome [*see § 40.40*]; (5) the date first sold or leased to a purchaser or lessee for purposes other than resale; and (6) any other information reasonably required by HCD to enable it to determine whether the mobilehome is entitled to registration.

[d] Establishment of Permanent Title Record

When a mobilehome is originally registered, HCD will establish a permanent title record for the mobilehome and issue (1) a certificate of title [*see Health & Safety Code § 18091* (contents)] to the legal owner, and (2) a registration card [*see Health & Safety Code § 18091.5* (contents)] to the registered owner [*Health & Safety Code § 18090.5(a)*]. The holder (if any) of the perfected security interest in the mobilehome, will be designated as the legal owner on the permanent title record. If there is more than one perfected security interest, the holder of the security interest designated in the application for original registration (this form) as the legal owner will be the legal owner [*Health & Safety Code § 18090.5(b)*].

The record will also designate as junior lienholders those holders (if any) of perfected security interests in the mobilehome other than the legal owner. If there is more than one junior lienholder, they will be listed on the permanent title record in the same order as designated in the application for original registration [*Health & Safety Code § 18090.5(c)*].

If the application specifies more than one secured creditor and HCD is unable to determine from the application which creditor is to be the legal owner, or the seniority order in which junior lienholders are to be designated, HCD must (1) so notify the applicant and all secured creditors, and (2) withhold registration until it receives the designation [*Health & Safety Code § 18090.5(d)*].

[e] HCD Refusal to Register

HCD may refuse to register a mobilehome in the following instances [*Health & Safety Code § 18092.5*]:

- If HCD is not satisfied that the applicant is entitled to have the mobilehome registered under the Mobilehomes-Manufactured Housing Act of 1980.

- If the applicant has failed to furnish information required in the application or reasonable additional information required by HCD.

[f] Registration When Ownership or Foreign Liens in Doubt

If HCD is not satisfied as to the ownership or the existence of foreign liens on the mobilehome, it may register the mobilehome and issue a registration card with distinctive markings. It will not, however, issue a certificate of title unless the applicant presents documents sufficient to reasonably satisfy HCD of the applicant's ownership of the mobilehome and the absence of any liens, or posts a bond pursuant to *Health & Safety Code § 18086.5* [*Health & Safety Code § 18089*]. A *Health & Safety Code § 18086.5* bond may be accepted by HCD in the absence of regularly required supporting evidence of ownership. The bond must be conditioned to protect HCD, all of its officers and employees, any subsequent purchaser of the mobilehome, any person acquiring a lien or security interest on the mobilehome, or the successor in interest of that purchaser or that person against any loss or damage arising from any defect in or undisclosed claim on the right, title, and interest of the applicant or other person to or in the mobilehome [*Health & Safety Code § 18086.5(a)*].

[g] Renewal of Registration

The registration card for all mobilehomes subject to annual registration [*see § 40.111*, P 2 (list of exemptions)] expires at midnight on the expiration date indicated on the registration card, and must be renewed before that expiration. Renewal is accomplished by submitting the registration card and required renewal fees to HCD [*Health & Safety Code § 18109*].

[h] Filing of Application to Perfect Security Interest

To perfect a security interest acquired or retained at or before the original registration of a mobilehome, the holder of the security interest must forward or cause to be forwarded to HCD an application for original registration of the mobilehome (this form), executed by the registered owner. The security interested is perfected (provided it has attached as provided in *Com. Code § 9302(a)*) [*see* Ch. 47, *Automotive Financing and Vehicle Leasing*], except as otherwise provided by *Com. Code § 9313*, on HCD's receipt of the completed application designating the holder of the security interest as "legal owner" [*Health & Safety Code §§ 18080.7(a), (b), 18090.5(b)*].

[2] FORM

Application for Original Registration

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksExemptionsReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.211

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.211 Notice of Sale or Transfer of Mobilehome

[1] Comment--Use of Form

This form is the official Department of Housing and Community Development (HCD) notice of sale or transfer of a mobilehome [Form HCD 476.8]. This form must be completed and submitted to HCD within 20 days of any of the following events [*Health & Safety Code § 18100.5(a)*]:

- The title or interest of a registered owner, legal owner, or junior lienholder in a registered mobilehome is transferred to another person.

- All outstanding secured obligations previously held by a legal owner registered on the original or subsequent registration or by a junior lienholder are satisfied and the person no longer has any obligation to extend credit, incur obligations, or otherwise give value to be secured by the mobilehome.

- A security interest is taken in a mobilehome after the permanent title record has been established.

For further discussion of the requirements governing a transfer of title, see *§ 40.121[2]*.

The Department of Housing and Community Development maintains an informative website at www.hcd.ca.gov. HCD forms, including the form in [2], *below*, can be found and printed out at the website.

[2] FORM

Notice of Sale or Transfer of Mobilehome

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale



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18-40 California Legal Forms--Transaction Guide § 40.212

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.212 Certificate for Transfer Without Probate

[1] Comment

[a] Use of Form

This form is the official Department of Housing and Community Development (HCD) form that must be submitted to HCD by a surviving heir or beneficiary of a deceased registered or legal owner of a mobilehome, if the registration of the decedent's title or interest in the mobilehome is to be transferred without probate [Form HCD 475.2; *see Health & Safety Code § 18102*]. For discussion of the requirements that must be satisfied to secure a transfer under these circumstances, see [b], *below*.

The Department of Housing and Community Development maintains an informative website at www.hcd.ca.gov. HCD forms, including the form in [2], *below*, can be found and printed out at the website.

[b] Transfer of Registration in Absence of Probate

If 40 days have elapsed since the death of the registered or legal owner of a registered mobilehome and the decedent has not left other property necessitating probate, then, irrespective of the value of the mobilehome, the following person or persons may secure a transfer of registration of the decedent's title or interest [*Health & Safety Code § 18102(a)*]:

- The sole person or all of the persons who succeeded to the decedent's property by intestate succession [*see Prob. Code §§ 6401, 6402*], unless the mobilehome is otherwise bequeathed by will.

- The sole beneficiary or all of the beneficiaries who succeeded to the mobilehome under the decedent's will.

To secure the transfer, the above person(s) must present all of the following to HCD [*Health & Safety Code § 18102(b)*

]:

- The appropriate certificate of title and registration card, if available.
- If required by HCD, a certificate of the decedent's death.
- If required by HCD, the names and addresses of any other heirs or beneficiaries.
- A certificate of the heir or beneficiary under penalty of perjury (this form) containing the following information and statements:

(1) the date and place of the decedent's death;

(2) a statement that the decedent left no other property necessitating probate and that no probate proceeding is now being or has been conducted in California for the decedent's estate;

(3) a statement that the declarant is entitled to the mobilehome either as the sole person (or all of the persons) who succeeded to the decedent's property by intestate succession [*see Prob. Code §§ 6401, 6402*], if the decedent left no will, or as the beneficiary (or beneficiaries) under the decedent's last will, and that no one has a right to the decedent's mobilehome that is superior to that of the declarant; and

(4) a statement that there are no unsecured creditors of the decedent or, if there are, that the decedent's unsecured creditors have been paid in full or their claims have been otherwise discharged.

The person who secures the transfer of the mobilehome under the procedure described above is subject to the Probate Code provisions governing liability resulting from transfer of a decedent's property [*see Prob. Code §§ 13109-13113*] to the same extent as a person to whom transfer of property is made under Probate Code provisions that permit the collection of all or a portion of a small estate without administration [*Health & Safety Code § 18102(c)*; *see Prob. Code § 13100 et seq.* (collection of small estate without administration); California Forms of Pleading and Practice, Ch. 440, *Probate: Is Probate Necessary ?* (Matthew Bender)].

[2] FORM

Certificate for Transfer Without Probate

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling



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18-40 California Legal Forms--Transaction Guide §§ 40.213-40.219

AUTHOR: by Jeannie Christy Newell, J.D.

[Reserved]

§§ 40.213[Reserved]



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18-40 California Legal Forms--Transaction Guide § 40.220

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.220 Responsive Notice by Secured Party Regarding Homeowner's Default

[1] Comment

[a] Use of Form

This form is a notice to park management from the legal owner of a mobilehome in the park or a junior lienholder with a security interest in such a mobilehome, responding to a notice of termination of tenancy. If park management gives a homeowner written notice that his or her tenancy in the park is being terminated [*see* Ch. 39, *Mobilehome Parks*], it must also send notice of the termination to the legal owner of the mobilehome and any junior lienholder [*Civ. Code § 798.55(b)*; *see* [c], *below* (definitions of "legal owner" and "junior lienholder")]. The legal owner and each junior lienholder must then send management, within the time permitted by statute, a responsive written notice (this form) that does one of the following [*see Civ. Code § 798.56a(a)*]:

- Offers to sell the obligation secured by the mobilehome to park management.
- Notifies park management of the lienholder's intention to foreclose on its security interest in the mobilehome.
- Requests that management pursue the termination of tenancy and offers management reasonable reimbursement of attorneys' fees and costs in that action.

The notice must be sent by certified or registered mail with return receipt requested [*Civ. Code § 798.56a(f)*]. If a legal owner or junior lienholder fails to give the required notice, that person or entity has no right to sell the mobilehome within the park to a third party [*Civ. Code § 798.56a(b)*; *see* [f], [g], *below*].

[b] Secured Party's Right of Sale

As a general rule, any legal owner or junior lienholder who forecloses on his or her security interest in a mobilehome located in a mobilehome park has the right to sell the mobilehome within the park to a third party in accordance with applicable provisions of the Mobilehome Residency Law (MRL) [*see Civ. Code § 798 et seq.* (MRL); *Civ. Code §§ 798.70-798.83* (MRL transfer and sale requirements); *see also §§ 40.44, 40.120[2]*]. However, this right may be exercised only if all of the homeowner's responsibilities and liabilities to the park management regarding rent, utilities, and reasonable maintenance of a mobilehome and its premises are satisfied by the foreclosing creditor as they accrue through the date the mobilehome is resold [*Civ. Code § 798.79(a)*]. Also, if a legal owner or junior lienholder has received from park management a copy of a notice of termination of tenancy, the foreclosing creditor's right to sell the mobilehome within the park to a third party is subject to the creditor's compliance with all of the requirements discussed in this *§ 40.220* [*see Civ. Code § 798.56a*].

[c] "Legal Owner" and "Junior Lienholder" Defined

For purposes of the statutory provisions discussed in this *§ 40.220*, "legal owner" means a person holding a security interest in a mobilehome, provided (1) the security interest has been perfected by the filing of the appropriate documents with the Department of Housing and Community Development (HCD) [*see Health & Safety Code § 18080.7* (procedure for perfecting security interest)] and (2) the person is entitled to the designation under the provisions of the Mobilehomes-Manufactured Housing Act of 1980 governing applications for original registration and title or transactions affecting the registration of, or interests in, mobilehomes [*Health & Safety Code § 18005.8*; *Civ. Code §§ 798.55(b), 798.56(e)(1)*; *see Health & Safety Code § 18080.7*]. A lien arising from a final money judgment for unpaid rent in a mobilehome park [*see Health & Safety Code § 18080.9*] is not a "security interest" for purposes of this definition [*Health & Safety Code § 18005.8*].

"Junior lienholder" means a person, other than a legal owner, holding a security interest in a mobilehome that has been perfected by the filing of the appropriate documents with HCD [*Health & Safety Code § 18005.3*; *Civ. Code §§ 798.55(b), 798.56(e)(1)*; *see Health & Safety Code § 18080.7*].

[d] Termination of Tenancy

Management may terminate a tenancy in a mobilehome park only for one or more reasons permitted by statute [*see Civ. Code § 798.56*]. To exercise this right, management must give the homeowner written notice to remove the mobilehome from the park. The notice must specify the period (not less than 60 days) within which the mobilehome must be sold or removed. Management must also send a copy of this notice to the legal owner, each junior lienholder, and the registered owner, if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested, at the management's option [*Civ. Code § 798.55(b)(1)*]. Further, if the homeowner has not paid the rent due (if any) within three days "after notice to the homeowner," and if the first notice was not sent by certified or registered mail with return receipt requested, an additional copy of the notice of termination must be sent to the legal owner, each junior lienholder, and the registered owner, if other than the homeowner, by certified or registered mail with return receipt requested within 10 days after notice to the homeowner [*Civ. Code § 798.55(c)*]. As used above, "after notice to the homeowner" apparently refers to the notice of termination received by the homeowner. However, because a termination cannot be based on a nonpayment of rent unless the homeowner is also given a three-day notice to pay or vacate [*see Civ. Code § 798.56(e)(1)*; Ch. 39, *Mobilehome Parks*], a notice of termination provided to the homeowner under these circumstances should be accompanied by such a three-day notice, as permitted by statute [*see Civ. Code § 798.56(e)(1)*]. The copies of the notice of termination described above must be addressed to the recipients at the addresses set forth in the registration card [*Civ. Code § 798.55(c)*; *see Health & Safety Code § 18091.5* (registration card)].

[e] Requirements for Responsive Notice

Within 60 days following the receipt of the notice of termination (but no later than 65 days after it was mailed), the legal owner and each junior lienholder must notify management in writing (this form) of at least one of the following [*Civ. Code § 798.56a(a)*]:

- Its offer to sell the obligation secured by the mobilehome to management for the amount specified in its written offer. In that case, management has 15 days following the receipt of the offer to accept or reject it in writing. If management rejects the offer, the offeror has 10 days in which to exercise one of the other options described in (2) and (3), *below*, and to notify management in writing of its choice.

- Its intention to foreclose on its security interest in the mobilehome.

- Its request that management pursue the termination of tenancy against the homeowner and its offer to reimburse management for the reasonable attorneys' fees and court costs incurred by management in that action.

The notice must be sent to management by certified or registered mail with return receipt requested [*Civ. Code § 798.56a(f)*].

[f] Conditional Right to Keep Mobilehome in Park Pending Resale

If the legal owner or junior lienholder elects to foreclose on its security interest or requests that management terminate the homeowner's tenancy [*see* [e], *above*], and the legal owner or junior lienholder has the right to sell the mobilehome to a third party in accordance with the provisions of the MRL governing transfers of mobilehomes in mobilehome parks [*Civ. Code § 798.56a(c)*; *see Civ. Code §§ 798.70-798.82*; *see also §§ 40.44*, *40.120[2]*], that person or entity has the right to keep the mobilehome on the site within the park until it is resold, provided the person or entity performs all of the following acts [*Civ. Code § 798.56a(b)*]:

- Satisfies, within 60 days following receipt of the notice of termination (but no later than 65 days after mailing of that notice), all of the homeowner's responsibilities and liabilities owing to management for the 90 days preceding the mailing of the notice of termination. For these purposes, "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations [*Civ. Code § 798.56a(c)*]. Performance by the legal owner or junior lienholder of the homeowner's responsibilities and liabilities does not cure the homeowner's default [*Civ. Code § 798.56a(g)*].

- Continues to satisfy the above responsibilities and liabilities as they accrue from the date of mailing of the notice of termination until the date the mobilehome is resold.

- Within 60 days following receipt of the notice of termination (but no later than 65 days after mailing of that notice), commences all repairs and necessary corrective actions so that mobilehome complies with (a) the park rules and regulations that were in existence at the time the notice of termination was given and (b) certain health and safety standards [*see Health & Safety Code §§ 18550*, *18552*, *18605*; *see also §§ 40.20*, *40.23*].

- Completes the repairs and corrective actions described *above*, within 90 calendar days

of the notice of termination, or before the date the mobilehome is sold, whichever is earlier.

- Complies with the requirements of the MRL governing transfers of mobilehomes [*see Civ. Code §§ 798.70-798.82*; *§ 40.44*] as they relate to transfers of mobilehomes to third parties.

- Reimburses management the amount of reasonable attorneys' fees and court costs, as agreed on by management and the legal owner or junior lienholder, incurred by management in an action to terminate the homeowner's tenancy, provided the legal owner or junior lienholder requested that management pursue such an action [*see* [a], *above*]. The reimbursement must be paid to management on or before the earlier of (a) the sixtieth calendar day following receipt of written notice from management of the aggregate amount of those reasonable attorneys' fees and costs or (b) the date the mobilehome is resold [*Civ. Code § 798.56a(a)(3)*].

[g] Consequences of Noncompliance by Secured Party With Notice and Other Requirements

If the legal owner or junior lienholder fails to provide management with this notice, or, after giving the notice, fails to comply with all conditions required by statute to maintain the mobilehome in the park until its resale [*see Civ. Code § 798.56a(b)*; [f], *above*], that person or entity does not have any right to sell the mobilehome within the park to a third party [*Civ. Code § 798.56a(b)*]. Further, notwithstanding any other provision of law, if neither the legal owner nor the junior lienholder (if any) gives this notice or performs as agreed in that notice within 30 days, management may either remove the mobilehome from the premises and place it in storage or store it on its site. In that case, management will have a warehouseman's lien [*see Com. Code § 7209*; *see also* Ch. 99, *Moving and Storage of Household Goods,* pt. C] against the mobilehome for costs of dismantling and moving, if appropriate, and storage. The warehouseman's lien is superior to all other liens, except the state's lien for unpaid license and registration fees and penalties [*see Health & Safety Code § 18116.1*]. The lien may be enforced under the Commercial Code [*see Com. Code § 7210* (procedure for lien enforcement); *see also* Ch. 99, *Moving and Storage of Household Goods* , Part C] either after the date of judgment in an unlawful detainer action or after the date the mobilehome is physically vacated by the resident, whichever occurs earlier [*Civ. Code § 798.56a(e)*]. After any lawful sale to enforce the warehouseman's lien, management must provide the purchaser at the sale with evidence of the sale as may be specified by HCD, which then must, upon proper request by the purchaser, register title to the mobilehome to that purchaser, whether or not there existed a legal owner or junior lienholder on title to the mobilehome [*Civ. Code § 798.56a(e)*].

[h] Effect of Homeowner's Bankruptcy

If the defaulting homeowner files for bankruptcy, all time periods described in subsections [a] through [g], *above,* are tolled until the mobilehome is released from bankruptcy [*Civ. Code § 798.56a(d)*].

[2] FORM

Responsive Notice by Secured Party Regarding Homeowner's Default

LIENHOLDER'S NOTICE TO MANAGEMENT
REGARDING NOTICE OF TERMINATION

TO: Management of _____[*name of mobilehome park*]
_____[*street address*]
_____[*city, state, zip*]

The undersigned is [the legal owner of *or* a junior lienholder with a security interest in] the mobilehome situated on the mobilehome lot described as [*insert description, including lot or site number*], and located in _____[*name of mobilehome park*]. The mobilehome occupies that site pursuant to the lease [*or* rental agreement] entered into on _____[*date*] by _____[*name of homeowner*] and _____[*name of owner of park*]. On _____[*date*], the undersigned received from you a notice of termination dated _____. In that notice, you indicated that you were terminating the tenancy established by the lease [*or* rental agreement] referenced above because [*set forth reason(s) specified in notice*]. Pursuant to *Civil Code Section 798.56a*, the undersigned hereby [*select at least one of the following alternatives:*]

[*First alternative:*]

offers to sell you the obligation owed to the undersigned and secured by the above mobilehome. The obligation is evidenced by [*describe instrument that created security interest*]. The undersigned is willing to sell you that obligation for $ [*specify amount*]. Please notify [him *or* her *or* it] in writing of your acceptance or rejection of this offer within 15 days after you receive this notice.

[*Second alternative:*]

notifies you of _____[his *or* her *or* its] intention to foreclose on its security interest in the above mobilehome.

[*Third alternative:*]

requests that you pursue the termination of tenancy against _____[*name of homeowner*] and agrees to reimburse you for the reasonable attorneys' fees and court costs incurred by you in that action, in an amount not to exceed $ [*specify maximum dollar amount*].

[*Continue with the following:*]

Date: _____

_____ [*signature of legal owner or junior lienholder*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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C. Security Interests and Foreclosure

18-40 California Legal Forms--Transaction Guide § 40.221

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.221 Secured Party's Lien Status Report

[1] Comment

[a] Use of Form

This form is the type of lien status report that a secured party (that is, a legal owner or junior lienholder) [*see Health & Safety Code § 18035.5(a)(1)*] must provide to an entitled party upon written request. An "entitled party" is any of the following: (1) a registered owner or any person holding a security interest or other lien or encumbrance that is subordinate to the security interest of the secured party; or (2) an escrow agent for an escrow involving the sale or transfer of an interest in a mobilehome subject to registration under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18035.5(a)(2)*; *see Health & Safety Code § 18000 et seq.*].

In addition to this statement, an entitled person or his or her authorized agent may demand a true, correct, and complete copy of the conditional sale contract or the promissory note and security agreement and any subsequent modifications. All of the requested documents must be mailed to the person whose name and address is set forth in the demand [*Health & Safety Code § 18035.5(b), (d)*].

The secured party may charge up to $50 for furnishing the required report, whether or not the security agreement covering the mobilehome provides for a charge [*Health & Safety Code § 18035.5(g)*].

If the secured party has more than one branch, office, or other place of business, the demand must be made to the branch or office where the payments of the obligation are made. The report, unless it specifies otherwise, will be deemed to apply only to the unpaid balance owing to or payable at that branch office or place of business [*Health & Safety Code § 18035.5(f)*].

[b] Required Contents of Report

The written report must indicate all of the following [*Health & Safety Code § 18035.5(b)*]:

- The amount of the unpaid balance of the obligation owing to the secured party and the interest rate, together with the total amounts (if any) of all overdue installments of either principal or interest, or both.

- The amounts of periodic payments, if any.

- The date on which the obligation is due in whole or in part.

- The date to which taxes and special assessments have been paid, to the extent that information is known to the secured party.

- The amount of hazard insurance in effect and the term and premium of that insurance, to the extent that information is known to the secured party.

- The amount in an account, if any, maintained for the accumulation of funds with which to pay taxes and insurance premiums.

- The nature and, if known, the amount of any additional charges, costs, or expenses paid or incurred by the secured party that have become a lien on the mobilehome.

- If applicable, a statement indicating (a) that subsequently incurred obligations will be secured by the mobilehome and (b) if applicable, the maximum amount that may thereafter become secured.

[c] Proof of Entitlement

Before delivering the report, the secured party may require reasonable proof that the person making the demand is in fact an "entitled person" [*see* [a], *above*]. If this demand is made, the secured party will not be subject to penalties for failure to prepare and deliver the report [*see* [d], *below*] until 21 days after receipt of the proof demanded [*Health & Safety Code § 18035.5(c)*].

A written statement appointing an authorized agent, signed by the entitled person, will constitute reasonable proof as to the identity of an agent when delivered to the secured party either personally or by registered mail (return receipt requested). Similar delivery of any of the following documents will constitute reasonable proof as to the identity of a successor in interest, provided the person demanding the report is named as successor in interest in the document: a title insurance policy; a preliminary report issued by a title company; an original or photographic copy of a sales agreement covering the mobilehome; or a certified copy of letters testamentary, guardianship, or conservatorship [*Health & Safety Code § 18035.5(c)*].

[d] Failure to Provide Report

If, for a period of 21 days after receipt of the written demand, a secured party willfully fails to prepare and deliver the report, he or she is liable to the entitled person for all actual damages. Further, whether or not actual damages are sustained, the secured party must forfeit $300 to the entitled person. Each failure to prepare and deliver a lien status report when required to do so creates a separate cause of action. However, a judgment awarding an entitled person the $300 forfeiture (with or without damages) bars recovery of damages and forfeiture for any other failure to prepare and deliver a report in response to a demand for such a report that (1) is made within six months before or after the demand that lead to the award and (2) relates to the same obligation [*Health & Safety Code § 18035.5(e)*].

[2] FORM

Secured Party's Lien Status Report

MOBILEHOME LIEN STATUS REPORT

This report is provided by the undersigned, as a "secured party," in response to a written request made on _____[*date*] by _____[*name of entitled party*], [the authorized agent of] an "entitled person" as that term is defined in *Health and Safety Code Section 18035.5(a)(2)*. The financial information provided below pursuant to that request pertains to the mobilehome described in the [conditional sale contract *or* promissory note and security agreement] [and amendment(s) thereto] that [is *or* are] attached to this statement and marked as "Exhibit[s] [*specify*]." The undersigned is [the legal owner of *or* a junior lienholder with a security interest in] the above mobilehome.

Unpaid balance of obligation owing to secured party: $ _____.
Interest rate applicable to unpaid balance amount: _____.
Overdue installments:
Principal: $ _____.
Interest: $ _____.
Amounts of periodic payments: $ _____.
Date(s) on which obligation is due in whole or in part: _____.
Date to which taxes and special assessments have been paid: [*describe to extent known*].
Hazard Insurance:
Amount in effect: $ _____.
Term: _____.
Premium: _____.
Amount in account, if any, maintained for accumulation of funds with which to pay taxes and insurance premiums: $ _____.
Additional charges, costs, or expenses paid or incurred by secured party that have become a lien on above mobilehome: [*describe nature and, if known, the amount*].

[*Add if applicable:*]

Subsequently incurred obligations will be secured by the above mobilehome [up to the following amount: $ _____].

[*Continue with the following:*]

DATE: _____.

_____ [*signature of legal owner or junior lienholder*]
[*typed name*]

[*Attach the following exhibit(s): (1) original conditional sale contract and any amendments to it, or (2) original promissory note and security agreement and any amendments to them.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.222

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.222 Statement of Lien by Junior Lienholder

[1] Comment

[a] Use of Form

This is the official Department of Housing and Community Development (HCD) form [Form HCD 480.7] that, in conjunction with other items [*see* [b], *below*] must be filed to perfect a security interest that is acquired or to be retained after the original registration of a mobilehome (that is, a junior lien) [*see Health & Safety Code § 18080.7*]. Except as otherwise provided in the Manufactured Housing Act of 1980 (Act) [*Health & Safety Code § 18000 et seq.*], a security interest in a mobilehome subject to registration under the Act [*see § 40.50*] is governed by Division 9 [*see Com. Code § 9101 et seq.*] of the Commercial Code [*Health & Safety Code § 18080.7(h)*; *see Com. Code § 9201(b)*]. The requirements discussed below are only those imposed by the Act. For detailed coverage of Division 9 requirements, see Ch. 42, *Secured Transactions* .

[b] Filings Required to Perfect Security Interest

To perfect a security interest in a mobilehome that is acquired or retained after the original registration of the mobilehome, the following must be filed with HCD [*Health & Safety Code § 18080.7*]:

- Appropriate filing fee [*see Health & Safety Code §§ 18114-18119*].
- Certificate of title or current registration card with appropriate insertions and signatures [*see Health & Safety Code § 18100.5*].
- Debtor's signed statement of lien (this form) that contains description of collateral [*see Com. Code § 9203* (value must have been given and debtor must have rights in collateral for security interest to attach)].

The completed statement of lien may be faxed to HCD. In that case, the interest will be perfected as of its date of receipt by HCD (provided the interest has attached) [*see Com. Code § 9203(a)*; *see also Com. Code § 9313*; *but see* [c], *below*], subject to HCD receiving the following within 10 days of the facsimile transmission: the required fee, the certificate of title or current registration card, and the original of the statement of lien (this form) [*see Health & Safety Code 18080.7(b)*].

To perfect a security interest acquired or retained at or before the original registration of a mobilehome, an application for original registration [*see § 40.210[2]* (form for application)] and appropriate fees [*see Health & Safety Code §§ 18114-18119*] must be forwarded to HCD [*Health & Safety Code § 18080.7(a), (b)*].

The failure of a secured party to perfect a security interest for which there has been attachment does not impair or affect in any way its enforceability against the registered owner or debtor with respect to the mobilehome [*Health & Safety Code § 18080.7(g)*].

[c] Establishment or Amendment of Permanent Title Record

On receipt of the items required to perfect a security interest [*see* [b], *above*], HCD will ordinarily take the following steps: establish or amend the permanent title record of the mobilehome to reflect the interest of the secured party; issue the registered owner a current registration card indicating the interest of the secured party; and forward a copy of the registration card to all persons holding a record security interest in the mobilehome [*Health & Safety Code § 18080.7(c), (d)*]. The registration card will designate the holder of a perfected security interest as either the legal owner or a junior lienholder [*Health & Safety Code § 18080.7(f)*]. HCD may not refuse to establish or amend the permanent title record to indicate a security interest that is authorized by law to be recorded and that would otherwise satisfy statutory requirements for departmental documentation and recordation on the basis of lack of knowledge as to the attachment of the security interest prior to its receipt of the statement of lien or of the electronic facsimile of the statement [*Health & Safety Code § 18080.7(e)*].

Notwithstanding the provisions discussed above regarding amendments to permanent title, HCD may impose a moratorium on any amendments to the permanent title if it has previously received notice that escrow has been opened for the sale of the subject mobilehome in which the security interest is to be acquired [*Health & Safety Code § 18100.5(b)(1)*; *see Health & Safety Code § 18035(d)* (escrow and other requirements for dealer sale or lease with option to buy a used mobilehome)]. This moratorium period begins on the date HCD receives notice that escrow has been opened, and continues for 120 days or until the escrow is cancelled or closes. It extends, among other things, to any amendments to the permanent title record of the mobilehome for the purpose of transferring any ownership interest or transferring or creating any security interest in the mobilehome [*Health & Safety Code § 18100.5(b)(1)*].

[2] FORM

Statement of Lien by Junior Lienholder

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Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.223

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.223 Notice of Default

[1] Comment

[a] Use of Form

This form is a statutory notice of default that must be given by a creditor to the registered owner of a mobilehome before the creditor may foreclose its security interest under any security agreement relating to a loan or conditional sale contract that grants the secured creditor the right to foreclose its security interest in (or repossess) the property [*see Health & Safety Code § 18037.5(a)*]. Unless the registered owner of the collateral has voluntarily surrendered possession of the property to the secured creditor or has abandoned the property, this notice must be given prior to foreclosure, notwithstanding any contrary provisions in the security agreement or conditional sale contract or in any other agreement entered into prior to default [*Health & Safety Code § 18037.5(a)*]. For a form for the notice that must be given in cases of abandonment, see *§ 40.224*.

Use of this notice and the foreclosure procedure discussed below is limited to situations in which the collateral is a mobilehome that (1) is subject to registration under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*], and (2) does not constitute part of a dealer's inventory [*Health & Safety Code § 18037.5(a)*].

If the collateral is subject to registration but is part of a dealer's inventory, the secured party may repossess and dispose of the collateral in accordance with the provisions of the security agreement or conditional sale contract and applicable law, including applicable provisions of Division 9 of the Commercial Code [*Health & Safety Code § 18037.5(b)*; *see Com. Code § 9101 et seq.*; *see also* Ch. 42, *Secured Transactions*]. After repossession, the secured creditor must then prepare and forward to the Department of Housing and Community Development (HCD) a notice of repossession on the form prescribed by it [*Health & Safety Code § 18037.5(b)*].

This form and the foreclosure procedure discussed below also should not be used if (1) the mobilehome pledged as collateral is permanently affixed to a foundation system [*see Health & Safety Code § 18551; § 40.122 [2]*], or (2)

security for the loan involved includes the real property on which the mobilehome is affixed or installed. In those cases, procedures for foreclosure (including notice of default and sale) are the same as those required for real property [*Health & Safety Code § 18039.1*; *see Civ. Code §§ 2920-2967*; Ch. 25D, *Foreclosure*].

[b] Form of Notice and Mailing Requirements

The notice of default must be in substantially the form required by statute (this form), must be in at least 10-point type, and must be signed by the foreclosing creditor [*Health & Safety Code § 18037.5(a)(1)*].

The foreclosing creditor must mail (via registered or certified mail with postage prepaid) this notice to each registered owner listed on the current registration of the mobilehome [*Health & Safety Code § 18037.5(a)(1)*]. Within five days following that mailing, the creditor must then forward a copy of the notice to HCD and to the legal owner and each junior lienholder (as shown on the current registration card), provided they are different than the foreclosing creditor. These copies of the notice must also be mailed via registered or certified mail with postage prepaid [*Health & Safety Code § 18037.5(a)(2)*].

[c] Right to Cure Default

Each registered owner and each junior lienholder having a security interest that is subordinate to the security interest of the foreclosing creditor has the right to cure the default. This right must be exercised in the methods and manner prescribed in the notice of default (this form) within 45 days after the notice of default is mailed to the registered owner [*Health & Safety Code § 18037.5(a)(3)*].

[d] Sale of Mobilehome

If the default is not cured within the time indicated in the notice of default, or if the property has been abandoned by the registered owner or voluntarily surrendered by the registered owner to the foreclosing creditor, the creditor may sell the mobilehome at a private or public sale [*Health & Safety Code § 18037.5(a)(4)*; *see § 40.224* (notice required prior to sale of abandoned mobilehome)]. The sale must be conducted pursuant to the provisions of *Com. Code § 9610* [*see* Ch. 42, *Secured Transactions* (required sale procedure)], except that certain of those provisions relating to the notice of sale and the distribution of sale proceeds are superseded by the requirements discussed below [*Health & Safety Code § 18037.5(a)(4), (5), (c)*; *see* [e], *below* (required distribution of sale proceeds)]. Specifically, in the case of the notice of sale required by *Com. Code §§ 9610*, *9611*, *9617*, *9618*, *9624*, the notice must not be mailed or delivered before expiration of the period for the right to cure the default (as stated in the notice of default), unless the registered owner abandons the property or voluntarily surrenders it to the foreclosing creditor [*Health & Safety Code § 18037.5(a)(4)*]. Notwithstanding any contrary provisions of *Com. Code 9610*, *9611*, *9615*, *9617*, *9618*, and *9624*, the foreclosing creditor also must send, by registered or certified mail, a notice of sale addressed to each party to whom a copy of the notice of default was mailed [*see* [b], *above*]. The notice of sale must be given at least 10 days before the date fixed for a public sale or the date on or after which any private sale is to be made [*Health & Safety Code § 18037.5(a)(5)*].

[e] Distribution of Sale Proceeds

The proceeds of the sale of the mobilehome must be applied to the following, in the order indicated below [*Health & Safety Code § 18037.5(c)*]:

> (1) The reasonable and necessary expenses incurred in preparing for and conducting the sale; if the foreclosing creditor has obtained possession of the collateral (mobilehome) prior to the disposition, the reasonable and necessary expenses for the retaking and holding of the collateral; and, to the extent provided for in the agreement and not prohibited by law, reasonable attorneys' fees and legal expenses incurred by the foreclosing creditor in retaking the property from any person not a party to the credit contract.

(2) The satisfaction of the indebtedness secured by the security interest of the foreclosing creditor under which the disposition is made.

(3) The satisfaction of indebtedness secured by any subordinate liens or encumbrances on the property in the order of their priority as provided in *Health & Safety Code § 18105* if, with respect to a junior creditor, written demand is received before distribution of the proceeds is completed, and to the satisfaction of any subordinate attachment lien or execution lien pursuant to *Code Civ. Proc. § 701.040(b)*, if notice of the levy of attachment or execution is received before distribution of the proceeds is completed. If requested by the foreclosing creditor, the holder of a subordinate lien or encumbrance must furnish reasonable proof of his or her interest. If he or she does not furnish this proof, the foreclosing creditor need not comply with the demand.

(4) The satisfaction of indebtedness secured by all senior liens or encumbrances in the order of their priority as provided in *Health & Safety Code § 18105* if, with respect to a senior creditor, written demand is received by the foreclosing creditor before distribution of the proceeds is completed. If requested by the foreclosing creditor, the holder of a senior lien or encumbrance must furnish reasonable proof of his or her interest. If he or she does not furnish this proof, the foreclosing creditor need not comply with his or her demand.

(5) The registered owner, within 45 days after the sale is conducted, if a surplus remains.

[f] Written Accounting to Registered Owner

If the registered owner makes a request for an accounting within one year after the sale of the mobilehome and an accounting was not automatically provided within 45 days after the sale, the foreclosing creditor must provide a written accounting containing the gross sales proceeds and its allocation. If any surplus is paid to the registered owner [*see* [e], *above*], the foreclosing creditor must furnish an accounting whether or not one is requested by the registered owner [*Health & Safety Code § 18037.5(d)*].

[2] FORM

Notice of Default

NOTICE OF DEFAULT

TO: _____[*names of all registered owners*]

You [*or, if the registered owner is not the person who is in default, substitute name(s) of defaulting person(s*)] are in default under the terms of the _____[*identify security agreement by title or caption and date*] in that [*describe default*]. This default gives the creditor named below the right to sell your [manufactured home *or* mobilehome *or* truck camper *or* floating home], which is registered with the Department of Housing and Community Development under registration number(s) [*give registration number(s)*], located at [*give location of property as shown on current registration*] unless the default is promptly cured.

You may cure the default by _____[*describe conditions precedent to reinstatement required to cure default*] or by entirely repaying the outstanding secured indebtedness on or before _____[*state final date available for cure, which date shall be no earlier than 45 days after mailing of the notice*]. To cure the default you may also be required to reimburse the creditor for its reasonable attorneys' fees and legal expenses and for any other sums to which the creditor may have become entitled under the terms of your credit agreement after the date of this notice. You may entirely repay the outstanding obligation by paying the creditor _____[*state dollar*

amount required to obtain release of security interest, and if the amount may increase due to passage of time, state that fact] plus any amount necessary to reimburse the creditor for its reasonable attorneys' fees and legal expenses and any other sums to which the creditor may have become entitled after the date of this notice under the terms of your agreement.

_____
[*name of creditor*]

_____
[*signature of creditor*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of CollateralReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity Interests



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18-40 California Legal Forms--Transaction Guide § 40.224

AUTHOR: by Jeannie Christy Newell, J.D.

§ 40.224 Notice of Belief of Abandonment

[1] Comment

[a] Use of Form

This statutory notice of belief of abandonment must be given by a secured creditor with the right of foreclosure who reasonably believes that the registered owner of collateral for the creditor's secured obligation has abandoned the collateral. Under these circumstances, this notice, in lieu of a notice of default [*see § 40.223[2]*], is required before the secured creditor may foreclose on its security interest [*Health & Safety Code § 18037.5(a), (a)(1), (6)*]. This notice must be used when the collateral believed to be abandoned is a mobilehome subject to registration under the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] and is not a part of dealer inventory [*Health & Safety Code § 18037.5(a), (a)(6)*].

This form may not be used, and different foreclosure proceedings apply [*see § 40.223[1][a]*], if any of the following apply to the collateral for the secured obligation:

- The collateral is a part of dealer inventory [*see Health & Safety Code § 18037.5(a), (b)*].

- The collateral is a mobilehome that is permanently affixed to a foundation system [*Health & Safety Code § 18039.1*; *see Health & Safety Code § 18551* (requirements for installation on foundation system)].

- The collateral includes real property on which a mobilehome is affixed or installed [*Health & Safety Code § 18039.1*].

[b] Form of Notice and Service Requirements

The notice must be in 10-point type and in substantially the form set forth below. It must be personally delivered to the registered owner or sent by registered or certified mail, with postage prepaid, to the registered owner at his or her last known address. If there is reason to believe that the registered owner will not receive the notice sent to that address, then it must also be sent to any other known address where the registered owner may reasonably be expected to receive it [*Health & Safety Code § 18037.5(a)(6)*].

[c] Responsive Notice by Registered Owner

After this notice is delivered, the mobilehome will be deemed abandoned unless the registered owner responds by written notice before the date indicated in the notice. The date indicated in the notice must be not less than 15 days after the notice is served personally or, if the notice is mailed, not less than 18 days after the notice is deposited in the mail. The registered owner's written notice to the foreclosing creditor must state the following [*Health & Safety Code § 18037.5(a)(6)*]:

- That the registered owner has not abandoned and does not intend to abandon the mobilehome; and
- An address at which the registered owner may be served by certified mail with a summons in connection with any legal action that the foreclosing creditor may appropriately initiate.

[d] Sale and Distribution of Proceeds

If the registered owner does not respond in writing within the required time period after receiving the notice of belief of abandonment [*see* [c], *above*], the mobilehome is deemed abandoned and the foreclosing creditor may proceed to sell it [*see Health & Safety Code § 18037.5(a)(4), (6)*]. For a discussion of the sale procedure and the required distribution of proceeds, see *§ 40.223*.

[2] FORM

Notice of Belief of Abandonment

NOTICE OF BELIEF OF ABANDONMENT

TO: _____[*names of all registered owners*]

This notice is given pursuant to *Section 18037.5 of the Health and Safety Code* concerning your [manufactured home *or* mobilehome *or* truck camper *or* floating home] located at _____[*address of manufactured home, mobilehome, truck camper, or floating home as shown on current registration*]. You [*or, if the registered owner is not the person who is in default, substitute name of defaulting person(s)*] are in default under the terms of the _____[*identify security agreement or conditional sale contract by title or caption and date*] in that [*describe default*]. This default gives the foreclosing creditor named below the right to sell your [manufactured home *or* mobilehome *or* truck camper *or* floating home], which is registered with the Department of Housing and Community Development under number(s) [*give registration number(s)*], unless the default is promptly cured. Unless the foreclosing creditor receives a written notice from you to the contrary by _____[*specify date not less than 15 days after this notice is served personally or, if mailed, not less than 18 days after this notice is deposited in the mail*] your [manufactured home *or* mobilehome *or* truck camper *or* floating home] will be deemed abandoned, which means that the foreclosing creditor may sell your [manufactured home *or* mobilehome *or* truck camper *or* floating home] sooner than would otherwise be permitted by law. The written notice you must send to the foreclosing creditor shall be sent to _____[*address of foreclosing creditor*] and shall state both of the following:

1. Your intent not to abandon the _____ [manufactured home *or* mobilehome *or* truck camper *or* floating home].

2. An address at which you may be served by certified mail with a summons in connection with any legal action that the foreclosing creditor may appropriately initiate.

_____
[*name of foreclosing creditor*]

_____
[*signature of foreclosing creditor*]

_____
[*name of foreclosing creditor*]

_____
[*signature of foreclosing creditor*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of CollateralCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of SaleReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity Interests